

Residency under DTAA and Employment Income

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- Residency under Income Tax Act, 1961 (Act) and Double Tax Avoidance Agreement (DTAA)
- Taxability of employment income under DTAA

Residency under:

Income Tax Act, 1961 (Act)

Double Tax Avoidance Agreement (DTAA)

Categories of Residential Status



Conditions under the Act

Basic conditions to be Resident:

1. The individual is in India for a period of **182 days or more** in a financial year, **OR**
2. The individual is in India for **60* days or more** during a financial year and has been in India for **365 days or more** during 4 previous financial years immediately preceding the financial year.

* The period of 60 days stands extended to 182 days in case of a citizen of India who leaves India for the purposes of taking employment outside India.

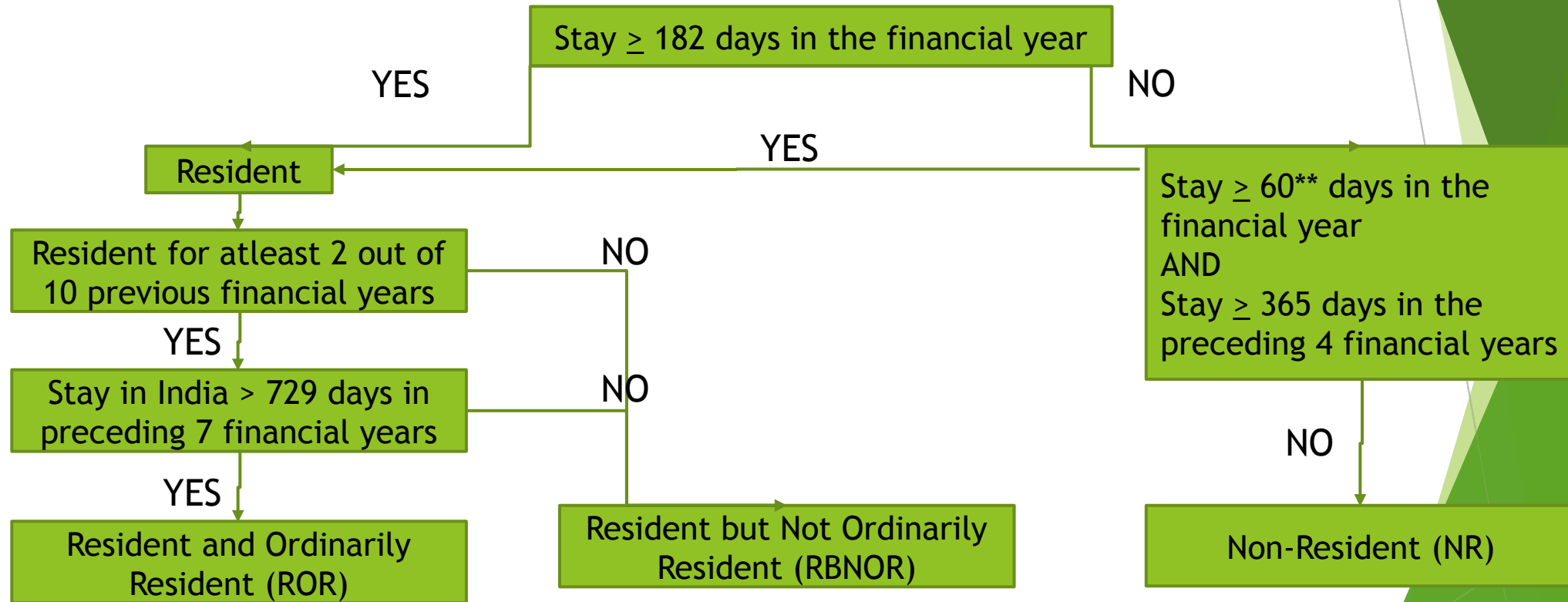
* The period of 60 days stands extended to 182 days in case of a citizen of India or a person of Indian origin who being outside India comes to India for visit (for personal or business purpose) during the financial year.

Additional conditions to be ROR:

1. The individual has been a **Resident in atleast 2 out of 10 years** immediately preceding the financial year. **AND**
2. The individual has been in India for a period of more than **729 days in 7 financial years** immediately preceding the relevant financial year.

Basic condition	Additional condition	Residential status
Not Satisfied	Not Applicable	NR
Any One Satisfied	Any One Satisfied	RNOR
Any One Satisfied	Both Satisfied	ROR

Conditions Simplified



* financial year is from 1st April to 31st March

** The period of 60 days stands extends to 182 days in case of a:

- Citizen of India who leaves for the purposes of taking employment outside India; and
- For person of Indian origin and citizen of India who comes on Visit to India.

Case study 1

- Mr. D is present in India for:
 - 100 days during financial year 2016-17.
 - 400 days from financial year 2012-2013 to financial year 2015-2016 (4 years).
 - 960 days from financial year 2009-2010 to financial year 2015-2016 (7 years).
- Mr. D qualified to be Non-resident for financial year 2007-2008 and 2008-2009
- Is he ROR, NOR or NR?

Since the basic as well as both the additional conditions are satisfied Mr. D qualifies to be Resident and Ordinarily Resident for financial year 2016-2017.

Case study 2

- Mr. D is present in India for:
 - 100 days during financial year 2016-17.
 - 400 days from financial year 2012-2013 to financial year 2015-2016 (4 years).
 - 960 days from financial year 2009-2010 to financial year 2015-2016 (7 years).
- Mr. D qualified to be Non-resident for financial year 2007-2008 and 2008-2009
- Mr. D is leaving India for the purpose of employment.
- Is he ROR, NOR or NR?

Though he satisfies both the additional conditions since Mr. D is leaving India for purpose of employment and is not present in India for more than 182 days, Mr. D qualifies to be Non-Resident for financial year 2016-2017.

ROR v/s RBNOR

Scenario 1

- D is Resident in financial year 2016-17.
- Stay during financial year 2009-10 to financial year 2015-16 is 736 days.
- Resident for 1 year from financial year 2006-07 to financial year 2015-16.
- Is he ROR or NOR?

Only One Additional condition satisfied

Resident But Not Ordinarily Resident

Scenario 2

- D is Resident in financial year 2016-17.
- Stay during financial year 2009-10 to financial year 2015-16 is 555 days.
- Resident for 3 years from financial year 2006-07 to financial year 2015-16.
- Is he ROR or NOR?

Only One Additional condition satisfied

Resident But Not Ordinarily Resident

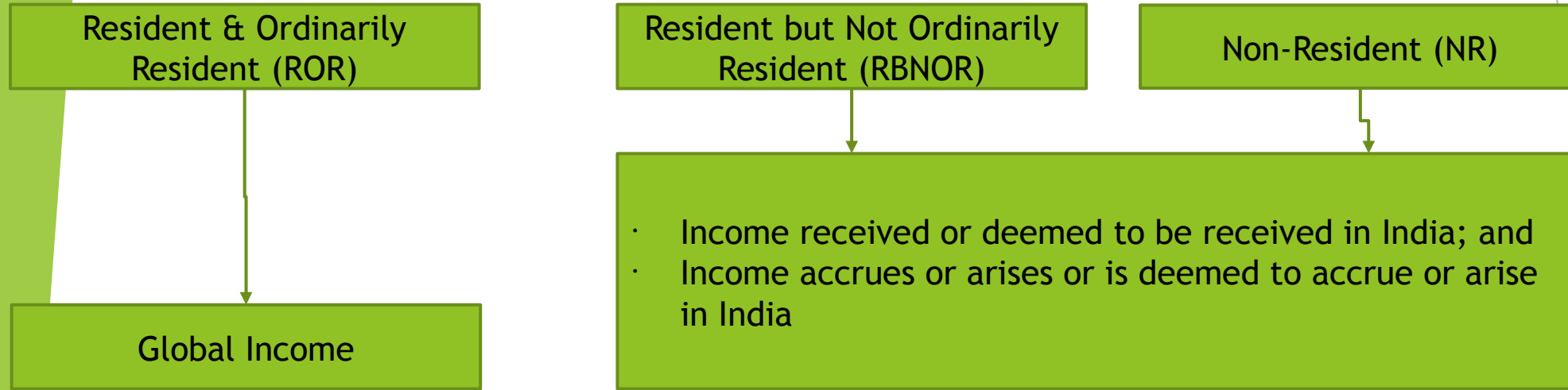
Scenario 3

- D is Resident in financial year 2016-17.
- Stay during financial year 2009-10 to financial year 2015-16 is 960 days.
- Resident for 3 years from financial year 2006-07 to financial year 2015-16.
- Is he ROR or NOR?

Both Additional conditions satisfied

Resident And Ordinarily Resident

Scope of Income



Taxability of employment income

Remuneration is taxable in India if services are rendered in India irrespective of the residential status.

Practical Issues

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Case Study 3

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- ABC, an Indian citizen is out of India during FY 1982-83 for a total period of 218 days .i.e. 147 Days - Present in India.
- He filed his tax return as “non-resident” for the FY 1982-83.
- He had undertaken 12 trips abroad during the relevant FY and his stay overseas during these trips ranged from 4 to 56 days.
- He continued to be an employee of the Indian company and received salary in India.
- Whether assessee’s claim for non-resident status for assessment year in question could be accepted?

ABC’s claim for the non - resident status was rejected.
K.Y.Patel - Second ITO v. K.Y.Patel

Case Study 4

Fa

- M, an Indian citizen is deputed to UK for a period of two years.
 - For the FY 2005-06 his stay in India is 88 days.
 - M continues to receive salary from Indian company during the period of his deputation.
- I
- Whether a careful reading of Explanation (a) would show that requirement of Explanation is not leaving India for employment but it is leaving India for purposes of employment outside India.

It was held that M was non - resident in India.
Manish Gupta - British Gas India (P.) Ltd.

Case Study 5

Fa

- MK, an Indian national and an employee of IBM India is deputed to work in IBS US.
 - He remains the employee of the Indian company during deputation.
 - Stay details in India for the financial years, 2000-01 to 2006-07 was 365 days each year except for the financial years 2003-04 - 306 days and 2004-05 - 78 days.
- I
- Whether the day of arrival to India needs to be excluded while determining the period of stay in India?
 - Whether the number of days the assignee visited India has to be included for calculating the period of stay u/s. 6(1)(c) i.e. 60 days?

High Court held that he was to be treated as non-resident.

Manoj Kumar - Director of Income-tax, International Taxation, Bangalore v Manoj Kumar Reddy Nare

Case Study 6

Fa

- Assessee left India for the purpose of employment in China and her stay in India in a particular year never exceeded 182 days.
- The applicant returned to India after resigning from her employment in China with effect from January 31, 2011. During financial year 2010-11, her total stay in India was 119 days.
- She approached AAR to determine whether she is taxable in India on ESOP's & RSU's exercise granted by employer in China and vested /exercised by her during the tenure of her employment.
- The applicant submitted her status to be non-resident as total stay in India being less than 181 days
- Whether consequently, amount of proceeds received in India on conversion of ESOPs and RSUs awarded to her by her employer in China will be taxable in India

AAR held that since she was Resident in India, ESOPs & RSUs received from employer will be taxable in India.

Smita Anand - AAR New Delhi.

Case Study 7

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- AR leaves India for the first time to the overseas on September 1, 2012.
- His intention was to set up his consultancy service business overseas.
- He was successful in his venture and earned 10 million rupees overseas.

I

- His auditor advised that he would be subject to audit U/S 44AB for the income earned overseas during FY 2012-13.
- AR is devastated that he has missed the September 30th deadline and has asked for your advise.

Kerala High Court has held that going abroad for the purposes of employment would include self employment (CIT VS Abdul Razak 198 Taxman 1)

Residency under DTAA

- **Significance of DTAA**

- DTAA applies to individual who qualifies to be resident of one or both the countries. In case individual is Non Resident in both the countries then DTAA cannot be invoked.
- Resolves conflict between two residencies.

- **General Definition for Residency under Article 4 of DTAA**

“For the purpose of this Agreement, the term “resident of a contracting State” means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of similar nature.”

Tie Breaker Provisions as per Article

4(2) of DTA

Person resident under domestic laws of both countries - Dual resident

Country of permanent home*

Any one - Yes; country of residence determined

Country of personal and economic interest

Any one - Yes; country of residence determined

Habitual abode

Any one - Yes; country of residence determined

National of which country

Any one - Yes; country of residence determined

Competent authorities to decide

*In case where the individual has a permanent home in neither of the contracting states, then center of vital interest need not be examined.

Permanent Home

- Place where the individual owns or possesses a home
- Home may be owned or rented or leased.
- Individual has arranged to have the dwelling available to him at all times continuously, and not occasionally for the purpose of stay for short duration.
- An occasional stay i.e. travel for pleasure, business travel, educational travel does not make it as a permanent home.
- Dwelling commensurate with his standard of living.

Example

- Cathy - MD of RT co. has let out her house in the US while she is on an assignment to India. She is in India since 2009. She takes a view that a small room in her house at US is at her disposal. Accordingly, she has a house available to her in the US. Is she right?
- Sarah owns 2 house properties in the UK. Both are vacant. She is staying in a leased accommodation in India since 2010. She is due to repatriate from India on April 1, 2014. Where is a permanent home available to Sarah - whether in India or UK?
- Ranvir goes to US on a transfer along with his family during November 2013. He stayed in a rented accommodation in Bangalore
 - Is a home available to Ranvir in India after his relocation to the US?
 - Does it make a difference if he owns a house property in India and his parents continue to stay there?
 - Does your answer differ in both the above scenarios if Ranvir purchases a house in the US?

Center of Vital Interest

- This presupposes that person has a permanent home in both the states.
- Place where his personal and economic relations are closer.
- Regard would be had to family and social relations, his occupation, political, cultural or other activities.
- If personal relations are closer to one contracting state and economic relations are closer to another contracting state, it has to be determined by the individual which state is of greater significance to the individual.
- Personal factor may replace economic factors in case of conflict between economic and personal relations.
- The courts give preference to family relations and considered as the decisive factor if the tax payer has economic business in both states
- Example: Tom is a US citizen. He is on an assignment to India; receives the salary in the US. His wife and daughters continue to stay in US. He has significant investments in properties in the US.

Habitual abode

- The criteria has to be applied where the individual has home in both contracting states and it is not possible to determine the place of center of vital interest.
- Habitual abode means reportedly or persistently; there should be a thread of continuity.
- The place where he frequents and stays very often.
- Observation of the AAR in Dr. Rajnikant R. Bhatt:
 - Permanent home was available in both UAE and India
 - Personal ties were closer in India, however as regards economic ties, he had property and income in both states. Hence it was difficult to determine on the basis of center of vital interest.
 - He was employed in UAE for an indefinite period where he resided continuously, making his home there.
- **Conclusion: The AAR hence took a view that on account of habitual abode, the applicant should be treated as resident of UAE.**

Taxability of Employment income under DTAA

Dependent Personal Service - Article 15 / 16

- Typically Article 15(1) / 16(1) of DTAA's provides -

“Subject to the provisions of Article 16, 18 and 19, salary , wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that state unless the employment is exercised in the other contacting state. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other state.”

- Exclusive right given to the state of Residence of the employee to tax the income from employment.
- Exception: where employment is exercised in the other state, then the source state also has the right to tax the employment income

Dependent Personal Service - Article 15 (1) / 16(1)

- Employment is considered to be exercised where employee is physically present when performing the activities for which the income is paid.
- Salary, wages and other remuneration would include benefits in kind received in respect of employment e.g. stock options, use of residence etc.

Case Study 8

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- Mr. D is deputed to USA in financial year 2016-2017.
 - Mr. D is leaving India for the purpose of employment and is present in India for 50 days during financial year 2016-2017.
 - Mr. D is on India payroll and receives salary in India for services rendered in USA.
 - Mr. D is resident of USA under Article 4 of DTAA between India and USA for the year 2016 and 2017
- Q
- Whether exemption can be claimed in India for salary received in India for services rendered in USA?

Yes exemption can be claimed as all the conditions under Article 15(1) are satisfied.

Tax residency certificate to prove the residency in USA will have to be obtained.

Case Study 9

Fa

- Mr. D is deputed to Hong Kong in financial year 2016-2017.
 - Mr. D is leaving India for the purpose of employment and is present in India for 50 days during financial year 2016-2017.
 - Mr. D is on India payroll and receives salary in India for services rendered in Hong Kong.
 - Mr. D is resident of Hong Kong under the domestic law of Hong Kong.
- Q
- Whether salary received in India for services rendered in Hong Kong will be taxable in India?

Since there is no DTAA between India and Hong Kong, salary received in India for services rendered in Hong Kong will be taxable in India.

Case Study 10

Fa

- Salary was earned by the assessee outside India.
 - His stay outside India was 225 days for working on board of a ship which was outside the shores of India.
 - Assessing office held that the income was deemed to be received in India as per Section 5(2)(b), therefore the same was taxable in India.
 - Commissioner held that the income or salary earned by the assessee was outside India & hence it was exempt.
- 1
- Whether salary credited to a bank account in India for services rendered there by a non-resident was taxable in India?

The case was ruled in favor of the assessee & he was exempt from paying taxes in India.
Director of Income Tax VS Prahlad Vijendra Rao.

Short Stay Exemption under the Act

Section 10 (6) (vi)

Remuneration received by an employee* of a foreign enterprise for services rendered by him during his stay in India can be claimed as exempt from tax, provided the following conditions are fulfilled:

- the foreign enterprise is not engaged in any trade or business in India;
- his stay in India does not exceed in the aggregate a period of ninety days in such financial year ; and
- such remuneration is not liable to be deducted from the income of the employer chargeable under the Act.

Short Stay Exemption under DTAA

Article 15 (2) / 16(2)

Remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State, if:

- The foreign the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in the relevant taxable year;
- the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State ; and
- the remuneration is not borne by a permanent establishment or a fixed base or a trade or business which the employer has in the other State.

Case Study 11

Fa

- Peter working for XYZ Inc. (company in USA), came to India for assignment on 20th February 2016.
 - His stay in India for financial year 2016-2017 was less than 183 days
 - He was a tax resident of USA for the year 2016.
 - Remuneration was paid by XYZ Inc. in USA for his services rendered in India.
 - Remuneration was not borne by any permanent establishment/fixed base/trade/business which XYZ Inc. has in India.
-
- Can Short stay exemption be availed?

As per Article 16(2) of the DTAA between India and USA, since Peter satisfies all the conditions, he would be eligible to claim a short stay exemption in India in respect of remuneration earned by him for services rendered in India.

Case Study 12

Fa

- Peter working for XYZ Inc. (company in USA), came to India for assignment on 20th February 2016.
 - His stay in India for financial year 2016-2017 was less than 183 days
 - He was a tax resident of USA for the year 2016.
 - Remuneration was paid by XYZ Inc. in USA for his services rendered in India.
 - Remuneration was cross charged to the Indian entity which is a permanent establishment of XYZ Inc. in India.
-
- Can Short stay exemption be availed?

Since the remuneration cost of Peter is borne by the permanent establishment of XYZ nc. In India, Peter does not satisfy the 3rd condition and hence he would not be eligible to claim a short stay exemption in India.

Key Takeaways

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THANK YOU!!