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**AMENDMENT TO RESIDENCY
PROVISIONS UNDER
INCOME TAX ACT, 1961**

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AMENDMENT TO RESIDENCY PROVISIONS UNDER INCOME TAX ACT, 1961

Amendment in Residential Status

BACKGROUND

Off late, the Government has noticed that the residency provisions stipulated under the Income Tax Act, 1961 ("**Act**") is being misused by many individuals, who are actually carrying out substantial economic activities from India but manage their period of stay in India in such a way, so as to ensure that they remain a non-residents in perpetuity and are therefore not required to offer their global income to tax in India. To prevent such tax abuse, the Government has carried out certain amendments to the Act with regard to the residency provisions, which are discussed hereinafter and these amendments will take effect from 1st April, 2021 and will, accordingly, apply in relation to A. Y. 2021-22 and subsequent assessment years. The reference to the relevant section in this Article, unless otherwise stated, is to the section of the Act.

A. Scope of Total Income [Section 5]

Section 5 provides Scope of Total Income (a) in case of a person who is a resident in India; (b) in case of a person not ordinarily resident in India; and (c) in case of a person who is a non-resident, which includes Income from any source which (i) is received or is deemed to be received in India in such year by or on behalf of such person; or (ii) accrues or arises or is deemed to accrue or arise to him in India during such year; or (iii) accrues or arises to him outside India during such year.

The following table explains the Scope of Total Income under Section 5 for the persons referred to hereinabove in a nutshell:

Sr. No	Particulars	Resident and Ordinary Resident (ROR)	Resident But Not Ordinary Resident (RNOR)	Non Resident (NR)
1	Income received in India	Taxable	Taxable	Taxable
2	Income deemed to be received in India	Taxable	Taxable	Taxable
3	Income accrues or arises in India	Taxable	Taxable	Taxable
4	Income deemed to accrue or arise in India	Taxable	Taxable	Taxable
5	Income accrues or arises outside India	Taxable	Non Taxable	Non Taxable
6	Income accrues or arises outside India from business/ profession controlled/ set up in India	Taxable	Taxable	Non Taxable

B. Amendment to the Residency Provisions for Individuals [Section 6(1)]

- (a) The existing provisions of Section 6(1) provide for situations in which an individual shall be resident in India in a previous year. An individual is resident in India in a previous year if (i) he is in India for a period or periods amounting to 182 days or more in that year; or (ii) he is in India for 365 days or more in the 4 years preceding that year **and** he is in India for a **period of 60 days** or more in that year.
- (b) Explanation 1 to Section 6(1) provides that, in case of the following individual, the threshold of 60 days (referred to in sub para (ii) of para (a) above) **is relaxed to 182 days**, thereby enabling such individual to stay in India for longer duration of time, without becoming a resident in India and consequently not becoming liable to pay taxes in India on his foreign income.
- (i) Individual, being a citizen of India, who leaves India in any previous year as a member of the crew of an Indian ship or for the purposes of employment outside India; and
- (ii) Individual being a citizen of India or a person of Indian origin, who is outside India and comes on a visit to India in a previous year.
- (c) To plug the misuse of the extended period of 182 days, the Finance Act has made the following amendment :
- (i) The existing limit of 182 days under Explanation 1(a) of Section 6(1) has been reduced to 120 days in case of a citizen of India or a person of Indian origin who is outside India and comes on a visit to India in a previous year and whose total income, other than income from foreign sources, **exceeds** Rs.15 Lakhs during the previous year. For this purposes, income from foreign sources means income which accrues or arises outside India (except income derived from a business controlled in or a profession set up in India).
- (ii) Accordingly, post the aforesaid amendment, an Indian citizen or a person of Indian origin who is outside India and comes on a visit to India in a previous year and whose total income, other than income from foreign sources, exceeds Rs. 15 Lakhs during the previous year will have to stay outside India for 245 days or more as compared to 183 days earlier for enabling him to qualify as a non-resident for tax purposes in India, thereby not becoming liable to pay taxes in India on his foreign income.

- (iii) The **CBDT vide its Circular No. 11 of 2020 dated 8th May, 2020** has issued clarification in respect of an individuals who had come on a visit to India during the previous year 2019-20 for a particular duration and intended to leave India before the end of the previous year for maintaining their status as non--resident or not ordinary resident in India. However, due to declaration of the lockdown and suspension of international flights owing to outbreak of Novel Corona Virus (COVID-19), they are required to prolong their stay in India. Similar clarification needs to be issued by the CBDT for the stay of such individuals continuing during the current financial year 2020-21 due to Covid pandemic.

The CBDT has accordingly clarified for the purpose of determining the residential status under Section 6 during the previous year 2019-20 in respect of an individual who has come to India on a visit before 22nd March, 2020 and:

- (a) has been unable to leave India on or before 31st March, 2020, his period of stay in India from 22nd March, 2020 to 31st March, 2020 shall not be taken into account; or
- (b) has been quarantined in India on account of Novel Corona Virus (Covid-19) on or after March, 2020 and has departed on an evacuation flight on or before 31st March, 2020 or has been unable to leave India on or before 31st March, 2020, his period of stay from the beginning of his quarantine to his date of departure or 31st March, 2020, as the case may be, shall not be taken into account; or
- (c) has departed on an evacuation flight on or before 31st March, 2020, his period of stay in India from 22nd March, 2020 to his date of departure shall not be taken into account.

C. Insertion of new Sub-Section (1A) to Section 6 – New concept of Deemed Resident

- (a) **A new Sub-Section (1A) to Section 6(1) is inserted to provide that Indian citizen whose total income, other than income from foreign sources, exceeds Rs.15 Lakhs during the previous year, shall be deemed to be resident in India in that previous year, if he is not liable to tax in any other country or territory by reason of their domicile or residence or any other criteria of similar nature. Literal interpretation of the aforesaid provision would mean that the global income including foreign income of such**

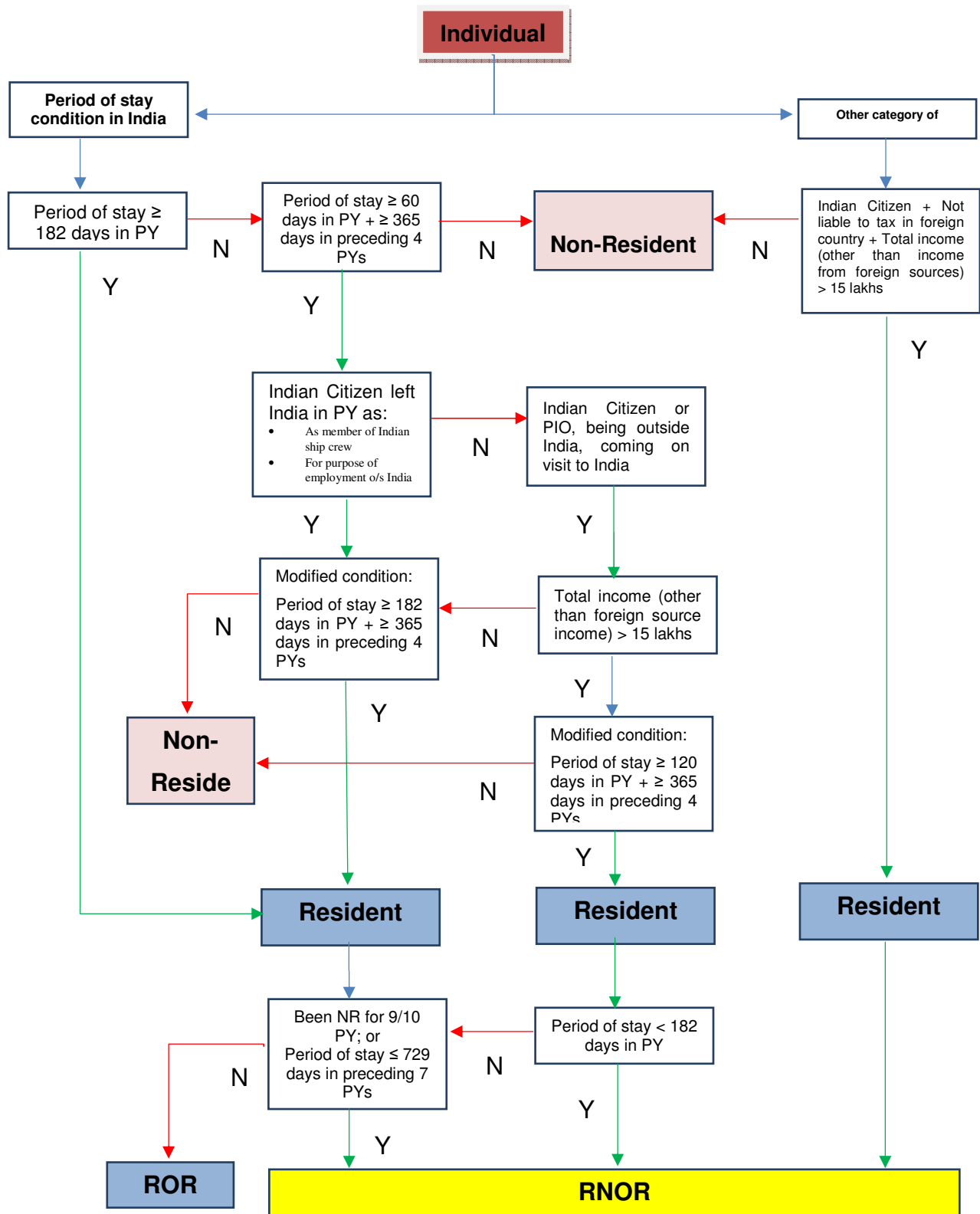
individual can potentially become taxable in India after he becomes ordinarily resident of India.

- (b) To avoid any misinterpretation and to give benefit to bona fide persons working abroad, the CBDT has issued a Press Release dated 2 February, 2020 to clarify that the aforesaid amendments are not intended to include within its tax net those Indian citizens who are bona fide workers in other countries, including Middle East, who are not liable to tax in those countries on income earned there. **The Press Release further clarifies that in case of an Indian citizen who becomes a deemed resident of India, the income earned outside India shall not be taxed in India, unless it is derived from an Indian business or profession.**
- (c) Thus, from F. Y. 2020-21, an Indian citizen who is non-resident in India and having total income in excess of Rs.15 Lakhs (other than from foreign sources) shall be deemed to be resident in India, if he is not liable to pay tax in any country. The residential status of such person shall be 'Not Ordinarily Resident' due to new insertion of Sub-Section (d) to Section 6(6). Accordingly, he would not be liable to pay tax in India on his foreign income, unless such income is derived from a business controlled in or a profession set up in India.

D. Amendment to the Residency Provisions for Resident but not Ordinarily Resident (RNOR) in India [Section 6(6)]

- (a) As per Section 6(6)(a), an individual is a resident but not ordinarily resident in India, if he (i) has been a non-resident in India in 9 out of 10 years preceding that year; or (ii) has during the seven previous years preceding that year been in India for an overall period of 729 days or less. Similar provisions exist under Section 6(6)(b) for a manager of an HUF for determining the not ordinarily residential status of such an HUF.
- (b) The Finance Act has inserted the following two more situations wherein a resident person is deemed to be "Not Ordinarily Resident" in India:
- (i) An Indian citizen or a person of Indian origin whose total income (other than income from foreign sources) exceeds Rs.15 Lakhs during the previous year and who has been in India for a period of 120 days or more but less than 182 days;
- (ii) An Indian citizen who is deemed to be a resident in India under the newly inserted Section 6(1A) – Deemed resident.

E. Flow chart depicting the above amendments



CONCLUSION

Pursuant to the above changes introduced in the Act with regard to the residency provisions, it is important for an Indian citizens and PIOs to carefully evaluate their residential status and assess their tax liability in India accordingly, so to ensure that the likely litigation on the direct tax front can be avoided at a later stage.

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DISCLAIMER

This article highlights the key amendments as introduced by the Finance Act, 2020 in relation to the residential status of an individual under the provisions of Section 6 of the Act. This article is intended to be a succinct overview of the amendments put forth in Section 6 of the Act and is neither to be construed as comprehensive nor as to render taxation, legal, economic or financial advice. This article should not be relied upon for taking any actions / decisions on the contents of the note without taking proper professional or legal advice.

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