

No relief on forced stay in India for Financial year 2020-2021 – Individuals and foreign companies may have to pay taxes in India on global income.

A) Issue:

- Likely change in residential status due to forced stay owing to COVID 19 travel restrictions, thereby giving India taxing right on their Global Income.
 - In case of Individuals - from Non-resident to resident in India
 - In case of foreign companies - shifting of place of effective management (POEM) to India resulting in shifting of residency to India.

B) Impact

Possibility of higher tax outgo and noncompliance of obligations under Indian tax laws.

Residential status and its impact on Indian Taxation: -

Individuals need to assess their residential status in India for every financial year. Residential status determines which income (distinction based on source i.e.-: Indian sourced OR foreign sourced and distinction based on place of receipt i.e.: - received in India or outside India) of the individual is taxable in India. India's taxing right is wider in case of residents income and narrower in case of nonresidents income. Individual resident's global income (Indian sourced as well as foreign sourced, received in India as well as outside) is taxable in India while individual is a non-resident's income received in India and deemed to be received in India is Taxable in India. If the residential status changes from Resident to Nonresident, then the income taxable in India is restricted to income received in India or deemed to be received in India. If the residential status changes from Non-resident to Resident, then a wider income of the individual is taxable in India.

Why has the issue arisen?

Residential status for individuals is determined based on stay in India. Due to COVID 19 travel restrictions individuals were stranded in India in Financial year 2019-20 as well as in 2020-21. They were unable to leave the country and hence their stay in India in this period was forced on them. With an intention to avoid genuine hardship to such individuals who were unable to leave India CBDT issued [Circular No. 11/2020 dated 08.05.2020](#) in which relief was granted by stating that the stay in India shall not be taken into account for calculation of residential status for financial year 2019-20. However, no such relief is granted in circular no 2 of 2021 dated 20/03/2021 [residency-circular-02-of-2021.pdf \(incometaxindia.gov.in\)](#) for financial year 2020-21.

Why is no relief granted in financial year 2020-21?

If relief such as the one given for financial year 2019-20 (of not counting the days of forced stay in India) is given, then there can be cases of dual non residency i.e., the individual will not be a resident of either of the countries. Following example can be useful in understanding. (All the numbers for days of stay are assumed)

Residency based on stay in India	Situation of Dual non residency if days of forced stay are excluded
Without excluding forced stay (without excluding forced stay)	Resident of India and Non resident of other country , as stay is more than 182 days in India (stay 184 days) and less than 182 days in other (181 days) country
Excluding forced stay Residency based on stay in India (excluding forced stay)	Non resident of India , as stay is less than 182 days (stay 184 days- 3 days forced)

Residency based on stay in India	Situation of Dual non residency if days of forced stay are excluded
	stay= 181 days) and nonresident of other country (stay 181 days)
Days in a year FY 2020-21	365
Days of stay in other country	181
Days of stay in India	184
forced stay in India	3
voluntary stay in India	181

In case of double non residency, the Individual is likely to escape from tax net in both the countries (which situation the Government wants to avoid). As opposed to this, if no relief in terms of exclusion of stay in India is granted then there is a possibility of shifting the residency of the Individual from the other state to India. In which case, his global income will be taxable in India even though not received or accrued in India. It may so happen that same income of such individual may get taxed in the other state which is the source state (income which is accrued in other state and or received in other state) as per the taxation laws of that state (i.e., the other state where he was previously residing/exercising his employment).

The Government feels that in such cases, already relief has been granted. The Individual can access DTAA between India and the source country and claim relief under DTAA for doubly taxed income if any.

If DTAA relief is available what is the issue?

Impact on Individuals

Individuals who are usually in employment in other state and have not been able to travel to the country from where they had come to India are not aware of these provisions. More so taxing rights as per DTAA are to the country where the employment is exercised. In the situation where the individual could not leave India but was working from India, the employment is exercised in India and India gets the taxing right in the DTAA.

Impact on foreign companies

Income of Foreign companies gets taxed in a place where key management and commercial decisions to conduct the business are taken. If an individual who could not leave India and who is at a senior position in a company registered outside India and was working from India and taking key decisions from India, then Income of such foreign company will be taxed in India as the Place of Effective management (POEM) is in India. The foreign company may not be aware of such provisions. In some cases, the key management decisions could have been taken in multiple places as the key decision makers were at different places and meeting on virtual platform for discussing and taking decisions.

What needs to be done?

All persons who are in the situation should approach professionals who can guide them so that there is no noncompliance with the laws of the land to avoid possible penal action.
