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INDIAN GOVERNMENT RELAXES TAX RESIDENCY CRITERIA FOR STRANDED INDIVIDUALS

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Introduction

Under Indian income tax law, an individual's tax residency is determined by his physical stay in India during a Financial Year (FY) (i.e. 1 April to 31 March) as well as his stay in the preceding years. The residential status then determines whether his global income would be taxable in India or not.

There have been cases of Indians (primarily based outside India) who came into the country prior to the novel Corona Virus (Covid-19) outbreak to fulfil their social and financial obligations, and now because of the Covid-19 countrywide lockdown (imposed since 24 March 2020) have had to stay in India beyond the prescribed threshold number of days for FY 2019 - 20 (182 days or more).

Acknowledging this as a genuine hardship, the Central Board of Direct Taxes (CBDT) via Circular No. 11 of 2020 dated 8 May 2020 (Circular), has decided to provide certain relaxations while counting the number of days' stay by such persons in India, for the purpose of determining their tax residency status for FY 2019-20. A Press Release has also been issued in this regard which discusses the approach for the same concern regarding tax residency for current FY 2020-21.

Circular

For the purpose of determining tax residential status for FY 2019-20, the Circular provides relief to individuals who had come to India on a visit before 22 March 2020. The Circular has categorised such individuals into three broad categories and provided corresponding relief to them as under:

Categories	Relief provided
Category 1: Individual has been unable to leave India on or before 31 March 2020	Period of stay in India from 22 March 2020 to 31 March 2020 will be excluded for determining residential status

<p>Category 2: Individual has been quarantined in India due to Covid-19 on or after 1 March 2020 and</p> <p>(i) has departed on an evacuation flight on or before 31 March 2020; or</p> <p>(ii) has been unable to leave India on or before 31 March 2020</p>	<p>Period of stay in India from the beginning of his quarantine to the date of his departure or 31 March 2020, as the case may be (i.e. depending on (i) or (ii)), will be excluded for determining residential status</p>
<p>Category 3: Individual has departed on an evacuation flight on or before 31 March 2020</p>	<p>Period of stay in India from 22 March 2020 to date of departure will be excluded for determining residential status</p>

Press Release

The Press Release states that as the lockdown continues during FY 2020-21 and it is not yet clear as to when would international flight operations resume, a circular excluding the period of stay of these individuals up to the date of normalisation of international flight operations for determination of the residential status for FY 2020-21, will be issued after flights resume.

Comments

Due to travel restrictions and quarantine requirements, several foreigners / NRIs have been stranded and forced to stay 'involuntarily' in India. Several representations were made to the Government (including by us at Khaitan & Co) to disregard the number of days spent by such individuals in India on account of such 'involuntary stay'. Further, recently, the Organisation for Economic Cooperation and Development (OECD) had issued a guidance wherein it had suggested *inter alia* that respective governments should issue suitable relaxations to disregard the period of 'involuntary stay' for determining the tax residency of individuals. The Circular is timely and a welcome move by the Government as it has appreciated the genuine concerns of foreigners / NRIs with respect to their tax residential status.

However, it is important to note that the Circular deals only with the determination of tax residency of individuals; it does not deal with or provide for any relaxation with respect to similar issues that may arise in relation to 'Place of Effective Management' test (a test under Indian income-tax law which deems certain foreign companies as Indian tax residents) or the 'Permanent Establishment' exposure for foreign entities on account of foreigners' /NRIs physical presence in India. One hopes that suitable clarification in this regard will also be issued soon so that foreign entities are not unnecessarily burdened with Indian income-tax trigger, reporting requirements and litigation. Further, as mentioned above, the number of days spent by a person in India in a FY is relevant not only for determining his / her tax residency status for that particular year, but also for subsequent financial years. In light of this, it would have been ideal had the Government also stated that the number of days of 'involuntary stay' in FY 2019-20 would be disregarded while determining the tax residency status of such individual for any subsequent financial year.

On a separate note, it is worth mentioning that even before the lockdown, the Finance Act 2020 had amended the test for determination of tax residential status of certain Indian citizens / PIOs from FY 2020-21 and made it more stringent by reducing the prescribed threshold number of days' stay in a FY from 182 days to 120 days. Given that

there is lot of uncertainty still persisting around Covid-19 lockdown and travel restrictions, it will be in the interest of all if the Government could defer this amendment by at least a year so as to ease the burden in respect of FY 2020-21.

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