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Update

CBDT issues circular regarding tax residency of individuals stranded in India in FY 2020-21 due to C

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To contain the spread of Covid-19 several travel restrictions were imposed during the financial year 2020-21, leaving many individuals stranded in India. Given that Indian tax residency of an individual depends upon the period of physical stay in India, there were apprehensions that a prolonged stay in India could lead to such an individual qualifying as an Indian tax resident.

The Central Board of Direct Taxes (**CBDT**) had issued a circular on 8 May 2020 in response to various representations filed before the CBDT and the Revenue Secretary in this regard. The circular provided that while determining the residential status for the financial year (**FY**) 2019-20 in respect of an individual who came to India on a visit before 22 March 2020, the duration of extended stay in India due to the pandemic will not be included.

Similar representations were filed before the CBDT for FY 2020-21 as well. Following a press release issued by the CBDT in this respect, it was expected that a similar circular (excluding the period of stay of these individuals up to the date of normalization of international flight operations) would be issued for the determination of tax residential status for FY 2020-21. However, in the circular for FY 2020-21 issued on 3 March 2021, the CBDT has not provided any blanket exclusion/exemption for the determination of tax residential status for FY 2020-21. Instead, the circular suggests that there does not appear to be a possibility of double taxation for an individual stranded in India due to Covid-19.

The circular concludes by stating that if any individual is still facing double taxation for FY 2020-21 as a result of being stranded in India due to the Covid-19 pandemic, such individual should file prescribed form-NR by 31 March 2021. After examining the possible situations of double taxation based on such filings, the CBDT may consider granting general or specific relief. The circular notes that such an approach (instead of a blanket exemption) has been adopted due to the following reasons:

1. **A short stay should generally not result in Indian tax residency:**The circular notes that on a general basis, an

individual who was a non-resident in the preceding year will become an Indian tax resident for FY 2020-21 only if such individual stays in India for 182 days or more during the year. Therefore, a short stay would generally not result in Indian tax residency, except in the following situations:

(a) A citizen of India or a person of Indian origin, having stayed in India for 365 days or more in the preceding four years, stays in India for 120 days or more in FY 2020-21. Further, the total income from Indian sources of such individual for FY 2020-21 exceeds INR 15 lakh (USD 20,000 approximately).

(b) An individual who is not a citizen of India or a person of Indian origin, having stayed in India for 365 days or more in the preceding four years, stays in India for 60 days or more in FY 2020-21.

For cases other than those listed above, the general 182-day rule would be applicable. Therefore, a short stay should generally not result in Indian tax residency.

In an exceptional situation wherein an individual qualifies as a tax resident of the home jurisdiction as well as India despite having spent less than 182 days in India during FY 2020-21, the circular notes that the '*tie-breaker*' clause in the relevant tax treaty may be applied to resolve such dual tax residency. Under the '*tie-breaker*' clause, in a case of dual tax residency, an individual is deemed to be the tax resident of the country where such individual's permanent home is located. If permanent homes are available in both the countries, the individual is deemed to be a tax resident of the country where the centre of vital interests is located. If the country in which the centre of vital interests is located cannot be determined, the individual is deemed to be the tax resident of the country where the habitual abode of the individual is located. If habitual abodes are located in both countries (or in neither of them), the individual is deemed to be a tax resident of the country of which such individual is a national. If the individual is a national of both countries (or neither of them), the dual tax residency is required to be resolved by invoking the mutual agreement procedure under the relevant tax treaty.

The circular further notes that even in an exceptional scenario wherein an individual qualifies as an Indian tax resident for FY 2020-21, such individual is not likely to qualify as '*ordinarily resident*' in India for such year. Accordingly, the individual's foreign sourced income will not be subject to tax in India.

2. Possibility of dual non-residency in case general exemption is provided: The circular notes that most countries stipulate a 182-day physical stay to trigger tax residency. Therefore, if a blanket exemption / exclusion is provided in India, it may result in dual non-residency, i.e. individuals may not be required to pay tax in any country for FY 2020-21.

3. Employment income would only be subject to tax in India if the thresholds specified under the treaty are crossed: Separately, the circular notes that even if an individual stranded in India during FY 2020-21 is employed with a non-resident employer, and continues to perform employment from India, in terms of treaty provisions, the salary income paid by the non-resident employer would not be subject to tax in India so long as:

(a) the individual's stay in India does not exceed 183 days in the relevant tax year;

(b) the remuneration is paid by, or on behalf of, an employer who is not a resident of India; and

(c) the remuneration is not deductible in computing the profits of an enterprise chargeable to tax in India.

4. Credit for taxes paid in other country: Further, the circular notes that an individual qualifying as an Indian tax resident would be eligible to claim the credit of taxes paid in the home country, subject to fulfilment of applicable conditions.

The circular also notes that the OECD has recognized that tax treaties contain necessary provisions to resolve cases of dual tax residency arising due to Covid-19. Further, from an international perspective, while certain countries have provided relief for a certain number of days subject to the fulfilment of prescribed conditions, others have not. This is based on the reasoning that there would not be any factual inequity if the right to tax is transferred from one country to

another due to change in circumstances.

The circular concludes by noting that there does not appear to be a possibility of double taxation for an individual stranded in India due to Covid-19. However, if any individual is still facing double taxation for FY 2020-21, they should file prescribed form-NR online. The form is to be filed by 31 March 2021. After examining the possible situations of double taxation, the CBDT would consider:

(i) if any relaxation is required to be provided in this regard; and

(ii) whether general relaxation is to be provided for a class of individuals, or specific relaxation to be provided in individual cases.

Prescribed form-NR is fairly exhaustive in nature and apart from factual details, also requires the submission of details such as nature of income likely to be subject to double taxation, and reasons for double taxation despite applicability of treaty provisions. Considering the short timeframe within which the form is to be filed, it is likely to cause substantial inconvenience for individual taxpayers. Considering this and the subjectivity involved in the process, a blanket exclusion / exemption for a certain number of days may have been procedurally simpler for the taxpayers concerned.
