

Tax Implications for employees on deputation (inbound and outbound)

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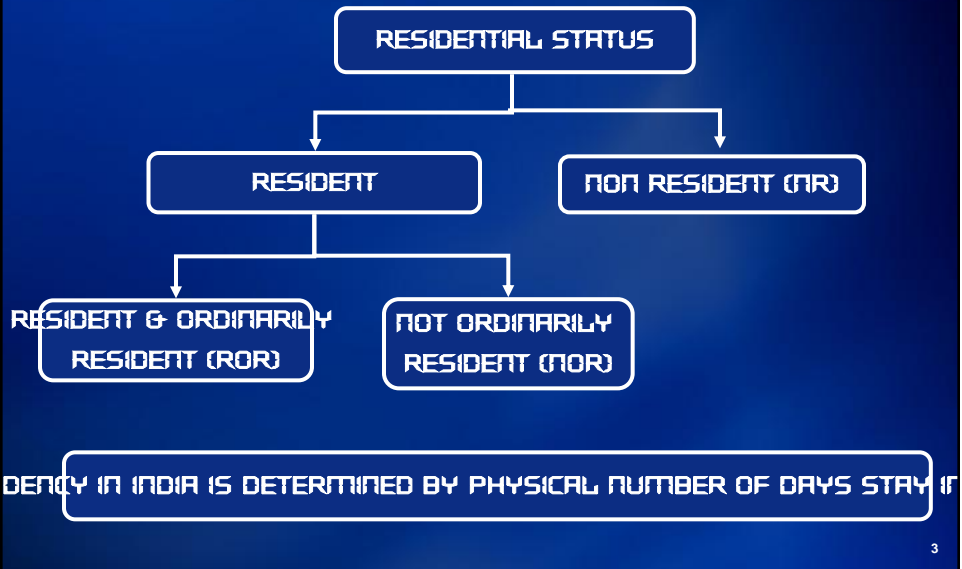
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Residential status in India



RESIDENCY RULES

BASIC CONDITIONS:

- (A) 182 DAYS OR MORE IN A FINANCIAL YEAR
- (B) 60 DAYS[^] OR MORE IN A FINANCIAL YEAR PLUS 365 DAYS OR MORE IN FOUR FINANCIAL YEARS PRECEDING THE RELEVANT FINANCIAL YEAR

Any one of the two condition satisfied

None of the condition satisfied

ROR / NOR

NR

Applicability of explanation to Section 6

Outbounds

- being a citizen of India, who leaves India in any previous year for the purposes of employment, the words “sixty days” shall be substituted with the words “one hundred and eighty-two days”.
- **British Gas India (P) Ltd. vs CIT [285 ITR 218]**
An individual deputed abroad for two years was considered a non-resident in India in the year of departure though his stay in India was for a period of 88 days, by virtue of Explanation to Section 6.

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Taxability of individuals

- **ROR**: Liable to tax on worldwide income
- **NOR**: Liable to tax on:
 - Income accruing or arising/deemed to accrue or arise in India;
 - Income received/deemed to receive in India; or
 - Income derived from a business controlled/profession set up in India
- **NR**: Liable to tax only on income sourced i.e. accruing or arising/deemed to accrue or arise in India or received/deemed to receive in India

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Section 10(14) read with Rule 2BB

Section 10(14)

- any allowance or benefit (not being in the nature of a perquisite)
- granted to meet expenses in performance of duties of office
- exempt to the extent actually incurred
- prescribed under Rule 2BB(1)

Rule 2BB(1)

- any allowance, granted on tour to meet the ordinary daily charges incurred by an employee on account of absence from his normal place of duty

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CIT Vs. Goslino Mario and Others – 241 ITR 312

- Daily allowances were received by foreign technician for meeting expenses (i.e. food and other expenses) while on assignment in India
- The technicians were required to stay away from their homes (normal place of residence) during their stay in India
- The HC held that the daily allowances provided were wholly and necessarily incurred in performance of duties. Accordingly, the same are exempt u/s 10(14) to the extent such expenses are actually incurred for that purpose.
- The Supreme court has upheld the above view of the HC.

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Assignments

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Short Term Assignments

- Period of assignment – predetermined short duration
- Services rendered on behalf of – home / Host Country
- Visa travelled on – Business Visa
- Reporting – report to home / host country
- Performance manager – home / host country
- Family not authorised to travel – Generally family not auth to accompany for entire duration of assignment
- Chargeback of costs – Salary costs are borne by home country entity
- Accommodation – temporary accommodation

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Long Term Assignments / Transfer

- Duration of assignment - > 1 Year
- Services rendered on behalf of the host Country
- Visa travelled on – Employment Visa
- Reporting – Shifts to host country
- Performance manager – host country
- Family may accompany –
- Relocation Benefits – shifting of personal effects
- Chargeback of costs – payroll may shift / costs are borne by host country entity

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To be analyzed while structuring

- PE Exposure for the home country
- In case of cross charge of salary costs to I Co:
 - TDS implications on reimbursement of costs
 - Service tax exposure
- TP Implications in respect of cross charge of costs

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Hypo tax

- **Concept of Hypo Tax**
 - Employee will be required to contribute only towards stay at home tax liability payable (assuming employee was not on assignment)
- **CIT vs. Dr. Percy Batlivala [ITA No. 1308/2008]**
 - The Delhi high court has held that Hypo tax was deductible from salary as the same was never received / accrued to the employee

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PF implications for IW

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PF applicability for International Workers

Inbound:

- Expatriates working for an establishment to which the PF Act applies, will now be covered under the PF scheme unless the expatriate is from a country with whom India has signed a SSA;
- Every eligible IW has to be enrolled with effect from 1 November 2008 or on the first date of his employment in India, which ever is later;
- Impact for employee / employer

Outbound:

- Where India has signed a SSA, EE may not be required to contribute to social security in host country

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Tax Implications on PF

- Gross up of employee contributions borne by employer
- If the assignment duration is less than 5 years, at the time of withdrawal, the following will be taxed:
 - employer contribution;
 - accrued interest; and
 - employee contributions to the extent of 80C deduction.

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Relief from Double taxation

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Under the DTAA

- **Tax relief under the DTAA can be resorted to when the same income is liable to tax in two or more jurisdictions**
- **Tax relief can be in the nature of:**
 - Exemption of income which is liable to tax in two or more jurisdictions (Article 16 of the Indo-US DTAA - Article on dependent personal services)
 - Advance Ruling in the case of S Mohan (AAR 741 of 2007, dated 24 August 2007)
 - Advance Ruling in the case of British Gas India (P) Ltd v. CIT [2006] 157 Taxman 225
 - Credit of taxes on doubly taxed income (Article 25(2)(a) of the Indo-US DTAA - Article on relief from double taxation / elimination of double taxation)

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Significance of concept of “Residence”

- Determines the DTAA’s scope of application
- Resolve situations where double taxation arises as a consequence of dual residence
- Resolve situations where double taxation arises as a consequence of taxation in the country of residence and in the country of source or situs

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Article 4 (1) – Resident of a Contracting State

Person:

- **Liable to tax** under the laws of the contracting state
- by reason of his domicile, residence, place of management or any other criterion of similar nature
- but does not include person liable to tax only on income from sources in that state.

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Determination of status if an individual is a resident of both contracting States (TIE BREAKER FOR INDIVIDUALS)

Article 4(2)

The following tests to be applied, IN ORDER:

- Permanent home available
- Personal & economic relations (centre of vital interests);
- Habitual abode;
- Nationality

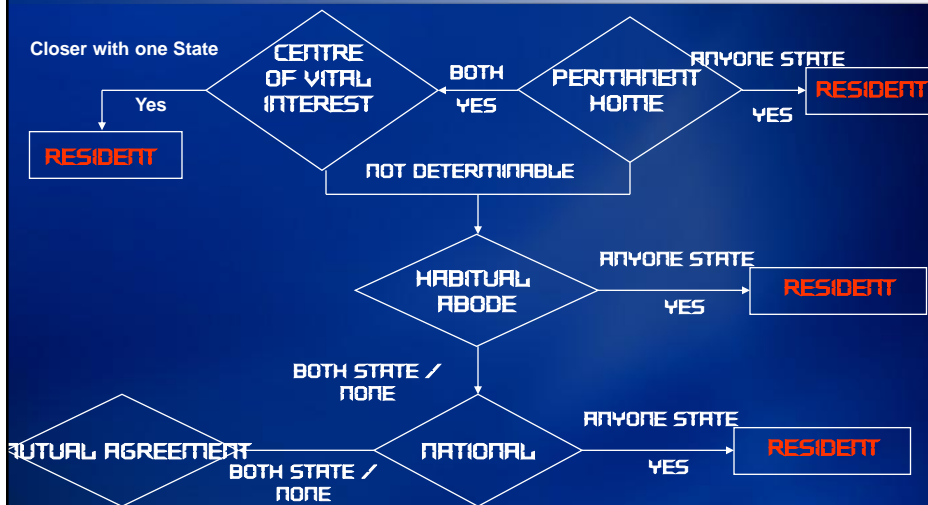
If none of these tests point to a conclusion



Competent Authorities to settle by Mutual Agreement

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Article 4 (2) - Tie-breaker rule as per Treaty



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Preliminary-what we need to be aware of..

- Tax residential status in the home country and host country;
- Fiscal year of the home and host country;
- Income liable to tax in home and host country; and
- Foreign taxes eligible for credit under the DTAA

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Exemption under the Treaty (India point of view)

Assignment type	When applicable	Taxability thereon
Outbound	Article 16(1) on dependent personal services Applicable to <i>salary</i> derived by resident of US in respect of an employment exercised in US	<ul style="list-style-type: none">● Resident of US as per Treaty● Income taxable in India only for the proportionate period of services rendered in India
Inbounds	Article 16(2) on dependent personal services Applicable to <i>salary</i> derived by a resident of US in respect of an employment exercised in India	<ul style="list-style-type: none">● Resident in US as per Treaty● Income entirely exempt in India (subject to fulfillment of certain conditions)

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Exemption Method [Article 16(1)]

- Any salaries, 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 Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.
- Salaries, wages and other similar remuneration includes benefits in kind received in respect of an employment (e.g. the use of a residence or automobile, health or life insurance coverage and club membership).
- Employment exercised is the place where the employee is physically present when performing the activities for which the employment income is paid.

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British Gas vs CIT [287 ITR 462]

Issues:

- Whether Salary received in India for rendering services o/s India is taxable in India ?
 - Salary paid by the Indian company to employee shall not be taxable in India, if the same has been offered to tax in the U.K. – Article 16(1)

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Short-stay exemption under DTAA (Article 16(2))

- Physical presence in India should not exceed the stipulated number of days during the stipulated period (definition of 'period' vary from Treaty to Treaty)
- Physical presence includes day of arrival and day of departure
- Residential status in the other jurisdiction relevant
- Resident of US as per the DTAA
- Citizenship not a criteria as compared to 10(6) of the Act
- Conditions for claiming exemption vary from Treaty to Treaty
- Usually applicable in the case of inbounds who continue to remain on overseas payroll while rendering services in India

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Short Stay under the Act

10(6)(vi) –

- Foreign Citizen receiving salary from F Co
- Present in India for less than 90 days
- F Co is not engaged in any business
- Deduction in respect of salary not claimed by F Co for India tax purposes

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Short-stay exemption.. continued

The conditions to be fulfilled for claiming short-stay exemption under the Treaty vary from Treaty to Treaty. Few examples:

Indo-US:

183 days in the relevant tax year
Salary paid by employer who is NR in India
Remuneration not borne by PE

Indo-UK:

183 days during the relevant fiscal year
Salary paid by employer who is NR in India
Remuneration not tax deductible while
computing profits of the enterprise in India

Indo-Australia:

183 days in the year of earning income in
India
Salary paid by employer who is NR in India
Remuneration not tax deductible while
computing profits of PE/fixed base in India

Indo-Swiss:

183 days in any 12 month period commencing
or ending in the fiscal year concerned
Salary paid by employer who is NR in India
Remuneration not borne by PE/fixed base

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Short-stay exemption... Important pointers

Citizenship/nationality
irrelevant under Treaty

Period – 183 days
vis-à-vis 182 days
under the Act

Applicable only
for salary income

Should be a
resident of the
other country

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Tax credit

- The credit method is applicable where taxes are payable on the same income in more than one jurisdiction.
- Tax credit is usually applicable in a scenario where a resident of one country ('home country') has tax liability in home and host country.
- Under the principle of credit, the country of residence includes the income of the other country and then allows credit of tax paid in the other country against the tax liability.
- Tax Credits [if no treaty exists]
 - ROR is liable to tax on world income
 - Proportionate foreign tax credits allowed against the Indian taxes on doubly taxed income

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Applicability of the Treaty.. Different scenarios

Different scenarios	Residential status		Tax relief available
Case I	Resident in India	Resident in US	<i>Tax credit</i> in the country of residence as per tie-breaker rules (Article 4)
Case II	Resident in India	Non-resident in US	<i>Tax credit</i> in the country of residence i.e. India
Case III	Non-resident in India	Resident in US	<i>Tax credit</i> in the country of residence i.e. US
Case IV	Non-resident in India	Non-resident in US	Treaty not applicable

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Applicability of the Treaty.. continued

Different scenarios	Residential status		Tax relief available
Case V	Non-resident in India	Resident in US	<i>Exemption of income in India under Article 16(1)</i>
Case VI	NOR/NR in India	Resident in US	<i>Short stay exemption in India under Article 16(2)</i>

Note: From an India tax perspective, Case I to IV is usually applicable in the case of both inbounds and outbounds.

Case V is applicable for outbounds.

Case VI is applicable to inbounds.

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Thank You

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