

## Non Residents And Income Tax

It is of utmost importance that one understands the term Non resident and person resident outside India very clearly.

As per **Section 6** of the Income Tax Act, there are three categories of tax residence.

1. Resident and Ordinarily Resident (ROR)
2. Resident But Not Ordinarily Resident (RNOR)
3. Non-Resident (NR)

**A person would be Resident if he satisfies ANY of the following two conditions:**

1. He is in India for 182 days in the financial year; OR
2. He is in India for 365 days in 4 preceding financial years AND **60 days** in the financial year.

**Condition 2 is not applicable if he is leaving India for employment or as a member of crew of Indian merchant ship.** For such cases, 60 days in condition 2 is replaced by 182 days. Hence, condition 2 automatically becomes ineffective.

***Simply put , a person has to leave the country before 28<sup>th</sup> Sept of a year if he is to be treated as a non resident for that year. If not he would be completing 182 days stay in India and he would thus be considered as a resident in India.***

3. Condition 2 is also not applicable for **Indian Citizens or persons of Indian Origin** (PIO) who stay abroad but are on a visit to India. In this case, period of 60 days is replaced by 182 days .

As per Income Tax Act, a **person can be considered as a person of Indian Origin if he is a citizen of any country (other than Pakistan or Bangladesh) , if he has held an Indian passport at any time , or either of his parents or any of his grandparents were born in undivided India or is the spouse of an Indian citizen .**

### Who is RNOR?

This is applicable to Non-residents who are returning to India. If a person is a resident (as per above definition), he can be either be ROR or RNOR.

A person would be an **RNOR** if he satisfies **ANY** of the following conditions:

1. He has been an NRI in 9 out of 10 years preceding the financial year under consideration. **OR**
2. Has been in India for not more than 729 days during 7 previous years preceding the financial year under consideration.

### Important issues :

1. For those **who are returning permanently to India, 60 days is not replaced by 182 days (under Condition 2)**. So if a person was in India for 365 days in 4 preceding financial years and return to India permanently before February, he will be considered Resident for that financial year as per Income Tax Act.
2. Preceding financial year means the financial year that precedes the financial year under consideration. So, if you are trying to determine residential status for FY2016-17, four preceding financial years will be FY2012-13 to FY2015-16 i.e. April 1, 2012 to March 31, 2016.

**FEMA has two classifications for residential status.**

1. Resident in India
2. Resident outside India (NRI)

“person resident in India” means—

(i) a person residing in India for **more than one hundred and eighty-two days** during the course of the **preceding financial year** but does not include—

(A) a person who has gone out of India or who stays outside India, in either case—  
(b) for carrying on outside India a business or vocation outside India, or  
(c) for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period;

(B) a person who has come to or stays in India, for any purpose other than—

(a) for or on taking up employment in India, or  
(b) for carrying on in India a business or vocation in India, or  
(c) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period;

In simple terms, the above can be understood as follows : If a person leaves India for the purpose of employment, business or for any other purpose that indicates his intention to stay outside India for an uncertain period, then he becomes a non-resident from the day he leaves India for such purpose.

The residential status of a person returning to India will be determined as follows: If a person comes to India for the purpose of employment, business or for any other purpose that indicates his intention to stay in India for an uncertain period; then he becomes a resident from the day he comes to India for such purpose

***Non-resident Indian (NRI) means a person resident outside India who is a citizen of India or person of Indian origin (PIO).***

In such cases, he will be considered **Resident in India under FEMA** even if he has stayed in India for less than 182 days during the **preceding financial year**.

***If a person settled abroad comes to India for a purpose other than employment or business and has no intention to stay in India permanently, he will continue to be considered Resident Outside India(NRI) irrespective of his duration of stay in India.***

**FEMA definitions throw up the following points:**

1. If a person goes abroad for employment, business or vocation, he is an NRI as per FEMA from day one of his departure. The period of stay in India is not relevant. Even if one leaves India on March 1<sup>st</sup> for taking up employment, then, he will still be NRI from March 2<sup>nd</sup>.
2. Similarly, persons returning to India permanently are considered **residents** from the day of return.
3. If you are a student leaving India to study abroad, you are NRI from day 1 of your departure from India. RBI has clarified this in a circular.

4. There is no requirement of continuous stay in India. Your stay in India can be staggered over multiple trips/visits.

### Differences between definition under FEMA and Income Tax Act

1. Under Income Tax Act, for a person to be considered as a resident, he has to stay in India for 182 days or more while FEMA requires stay of **more** than 182 days, say minimum of 183 days
2. Income Tax Act considers **Current Financial year** for determination of residential status. FEMA considers **preceding financial year**.
3. Income Tax Act **DOES NOT** consider the reason of stay in India or visit abroad for determination of residential status. But as per **FEMA, the intention of stay abroad or presence in India is very important**. Income Tax Act merely considers number of days of stay in India.
4. When it comes to Income Tax Act, a person is either resident or non-resident for the entire financial year i.e. you cannot be resident for part of the year and non-resident for rest of the year.

**It is quite possible that a person is an NRI as per FEMA but a Resident as per Income Tax Act or vice versa.**

**Investments are governed by Residential status as per FEMA.** Eg NRI as per FEMA can open and operate NRE/NRO/FCNR(B) accounts. A NRI cannot open a new PPF account . An NRI as per FEMA is forbidden from purchasing agricultural land or plantations in India. However , income tax on income is governed by the provisions of the Income Tax Act.

Example:

A person leaves India for employment on 1st December , 2015. He will be a resident in India for the relevant FY as per Income Tax Act as he would be in India for 182 or more during the relevant year. But as per FEMA, he would be a NRI from the day of departure and resident till that date.

### Tax rates as applicable for the FY 2017-18 :

<b>Upto Rs. 2.50L</b>	<b>Nil</b>
<b>Rs. 2.50 L to 5.0L</b>	<b>5%</b>
<b>Rs.5.00 L to Rs 10L</b>	<b>20%</b>
<b>Above Rs.10L</b>	<b>30%</b>

In the case of Individuals for Income above Rs . 50.00 L surcharge of 10% is payable and for Income exceeding Rs 1 Crore surcharge of 15% of the tax is payable. Additionally educational cess and higher educational cess payable @ 3%. For NRIs the threshold basic exemption limit remains at Rs.2.50 L irrespective of whether he is a senior citizen or super senior citizen.

No entitlement **for rebate u/s 87A** (entitlement for residents– If income less than Rs 3.50 L rebate of Rs 2500/- )

For senior NRIs though not having business income , are liable to pay advance tax unlike resident senior citizens.

Dates are 15th June, 15th sept, 15th Dec and 15th March. The tax to be paid is not less than 15% , Not less than 45% and not less than 75% for the first , second and third instalment respectively.

All Non resident assesseees are also eligible like the normal resident assesseees to claim the benefit of deduction u/s 80C on payments made to specified schemes : Eg.

- Life insurance premium
- Housing loan instalments,
- Small savings scheme like POTD
- Notified Bonds , subscription to any unit issued Equity Oriented Mutual funds out of an eligible issue
- Tuition fees paid for education of children in a university , college or school or other educational institution situated in India, for full time education
- Term deposit with bank under Notified schemes -Bank Term Deposit Schemes 2006 ,

### House property Income :

There is no special benefit or disincentives to NRIs vis-à-vis residents with respect to tax on the income under the head "house properties". An NRI can maintain one residential house in India , which may be used by him for his family to stay or for his stay when he comes to India on visits. He cannot however derive any rental income from such property. If an NRI has more than one residential house in India, then he is entitled to claim exemption only for one such house on the ground that it is used for self occupation . The other properties will be deemed to be let out even if they are not actually let out and the notional income from such property will be taxable in his hands . The notional rental income is usually computed based on the fair rental value of such property.

When a residential house property is constructed with borrowed funds, then interest on such borrowed funds will be allowed as a deduction from the rental income to the extent of Rs 2.00 L. If a commercial property is constructed with borrowed capital , then interest actually payable on the loan can be claimed as deduction , from the rental income . However, if the net rental income computed under the head house property is a loss then loss of only upto Rs 2.00 L can be set off against income under other heads. The balance will be carried forward and set off against house property income of the subsequent 8 years .

### Capital Gains:

The treatment of Capital gains in the hands of NRIs is the same as that arising in the hands of a resident. Capital assets are classified as short term and long term based on the holding period of these assets. Generally the period of holding for a capital asset to qualify as a long term capital asset is 36 months. However, the holding period for land and building and unlisted shares in a company is now 24 months. In the case of listed shares and Units in an Equity Oriented Mutual funds, they will qualify as long term assets if held for more than 12months.

When an asset qualifies as long term capital asset, then the person can opt for inflation indexing of the capital gains . A new Inflation Index has been notified and the base year in this index starts from 01-04-2001. The new index is applicable from the assessment year 2018-19.

When long term securities being listed shares or units in an Equity oriented mutual fund are transferred, capital gains would be exempt from tax if STT is paid on **both purchase and sale** of these securities. For NRIs when the long term capital assets transferred are other than listed shares or units in equity oriented mutual funds , Eg., **unlisted securities or shares in a closely held company**, debentures, bonds, bonus shares etc., then the rate of tax would be at the option of the assessee, 10% of the capital gains computed without the indexation benefit or 20% after indexation whichever is beneficial. For immovable and all other assets the rate of long term capital gains tax is 20% .

However, when the assets transferred by the NRIs are shares in or debentures of an Indian Company and they were purchased in foreign currency , then, the capital gains would be computed by conversion of the cost of acquisition and the sale consideration into the same foreign currency with which the securities were purchased and the resultant capital gains if any will be reconverted into Indian rupees and tax levied . However, no indexation benefit would be available to the NRI in such cases.

If listed shares and units in equity oriented funds which are short term assets are transferred and if STT is paid on sale , then the short term capital gains is chargeable @15%. Short term capital gains on all other assets are chargeable at normal slab rates applicable to the concerned person.

For NRIs, the concession granted to residents to set off the unexhausted basic exemption limit against chargeable capital gains – both long term and short term – is not applicable . In other words, NRIs will be liable to pay income tax on capital gains without any basic exemption.

### **Income From Other Sources :**

Special rates of tax for non-residents - specified investments to be made in foreign exchange:

- (i) shares in an Indian company;
- (ii) debentures issued by an Indian company which is not a private company
- (iii) deposits with an Indian company which is not a private company (deposits with banks considered as deposits with Indian companies )
- (iv) any security of the Central Government as defined in clause (2) of section 2 of the Public Debt Act, 1944 (18 of 1944);
- (v) such other assets as the Central Government may specify in this behalf by notification in the Official Gazette.

### **the tax payable by him shall be –**

- (i) the amount of income-tax calculated on the income in respect of investment income, if any, included in the total income, at the rate of twenty per cent; For the balance income tax is payable at the normal rates .
- The provisions of this Chapter shall continue to apply to him in relation to such income for that assessment year and for every subsequent assessment year until the transfer or conversion (otherwise than by transfer) into money of such assets.

As per **section 10(15) (iv)(fa)** the interest payable to a **Non resident or RNOR**, on deposits in foreign currency where the acceptance of such deposits by the bank is approved by the RBI , will be fully exempt from tax.

Dividends received on shares on which DDT has been paid is exempt in the hands of the shareholders including NRIs . For NRIs the new provision of levying tax as a separate block on dividends when the aggregate dividends exceed Rs 10.00 L is not applicable .

### **Tax deduction at source:**

The provisions of tax deduction at source on payments to NRIs is governed by a separate section (s.195) of the Income Tax Act . Hence the concessional rates prescribed for TDS on payments to residents are not applicable to NRIs.

### **On sale of immovable properties:**

When a non resident transfers an immovable property the purchaser even if he is an individual is required to deduct tax at source from the sale consideration at the full rate of 20% plus surcharge and cess on long term capital gains. The compliance burden on the purchaser if he is an individual is very cumbersome as he has to obtain a Tax Deduction Account No (TAN) to remit the tax deducted and file the quarterly return just because he was required to deduct tax at source on this

### **On interest :**

A non resident cannot file a declaration in Form No 15G/H for non deduction of tax at source . Tax is required to be deducted at source on interest paid to NRIs at full rates and not @ 10% as applicable to residents.

## Double Taxation Avoidance Agreements (DTAA)

Double Taxation Avoidance Agreement (DTAA) also referred as Tax Treaty is a bilateral economic agreement between two nations that aims to avoid or eliminate double taxation of the same income in two countries.

### Some Common queries that recurs from NRIs

- 1) **If an individual of Indian origin staying abroad has to remit some money to his parents in India, will such repatriation of money to India affect the taxability of the parents?**

Ans.: Repatriation of money to parents of an individual will not be liable to be taxed in India in the hands of the parents. This is because gifts made to relatives are not taxable as per the Income-tax Act in the hands of the recipients.

- 2) **Which is the preferred mode of remittance into India from abroad – credit to NRE account of the NRI or a foreign exchange Instrument or through a exchange house ?**

From tax point of view best way is to remit the money to the NRE account and there after transfer the money to the parent or relative . This would complete the trail of the transaction without any loose ends and would help in easily explaining the source to the Tax authorities in case the relatives are later called upon to explain the source of the credits.

- 3) **Is interest earned on NRE and NRO Deposits taxable?**

Ans.: The interest earned on deposits in an NRE account is exempt from tax in the hands of the NRI while the interest earned on deposits in an NRO account is taxable in the hands of the NRI as per the normal income tax slab rates.

- 4) **How are various transactions tracked by the Income Tax Department ? Usually when is a notice calling for details issued to an NRI?  
( S.285BA and Rule 114E (As per separate sheet)**

- 5) **Is a Non resident liable to file a return of income in India ? How can a NRI file his return of income even if he is not physically present in India?**

As per Income Tax provisions , any person who has total income that is in excess of the maximum amount exempt from tax, he is liable to file his return . As already explained, presently the basic exemption limit is Rs 2.50 L.

A non-resident, even though he/she is not physically present in India, can himself file his return of income by furnishing the same electronically on the website of Directorate of Income Tax by following the procedure mentioned therein.

A person having taxable income is required to furnish his return of income before the due date specified . For normal individuals the due date specified is 31<sup>st</sup> July following the end of the financial year. A new section has been **introduced (s.234F) with effect from the assessment year 2018-`19** onwards , as per which, a late fee Rs 5000/- is payable if the return is filed after the due date but before 31<sup>st</sup> December. If the filing of the return happens any time after 31<sup>st</sup> December a late fee of Rs 10,000/- is payable. However, where the taxable income does not exceed Rs 5.00 L , the late fees will be restricted to Rs. 1000/-.

- 6) **Are NRIs required to compulsorily obtain PAN and ADHAR?**

PAN is mandatorily required to be obtained only if the NRI has income exceeding the threshold limit. However PAN will have to be obtained as it is mandatory for a whole range of transactions from opening of a bank

account- NRE/ NRO , obtaining a credit card, buying and selling immovable property, opening a demat accounts for dealing in securities , etc .

As far as Income Tax provisions are concerned there were notifications issued recently that while filing the Income tax Returns, Aadhar No. will have to be linked to the PAN. However , other than this requirement , there are no provisions were Aadhar No is required for Income tax compliance purposes . Moreover, subsequently NRIs have been exempted from quoting the Aadhar no or linking it with their PAN for filing their return of income .

It may also be noted that merely because a person has a PAN he is not required to file his Income tax return if he has no taxable income .

**7) A non resident owns agricultural land inherited by him . Is there any tax implication if such land is transferred ?**

If the land sold is agricultural land , then there is no tax implication as agricultural land as contemplated in the Income Tax Act is not a capital asset and hence the consideration received on sale would be exempt. But agricultural land should be actually land used for agriculture and should be classified as such in revenue records . Such land should not be situated in any municipality with a population of not less than 10,000 or within a maximum arial distance of 8 Kms from the outer limits of such municipality. The distance from the limits of a municipality has been fixed based on the population as per the last census. (10,000 to 1 lakh , > than 1 Lakh but less than 10 Lakhs and more than 10 Lakhs ) .In other words , if such land is actually situated in the limits of such municipality or within the arial distance specified then even if the land is agricultural , it would be taxable.

**8) Can a person resident outside India invest in immovable property in India?**

An NRI or a foreign national of Indian Origin (PIO) can invest in immovable property in India, other than agricultural land/ plantation property or a farm house.

**9) Whether a gift of Rs 2.00 Lakhs to the relative of an NRI has any tax implication ?**

Gift to a relative has no tax impact – either for the donor or the receiptient relative . But the point to note is that , the word “relative” as a common person understands is not the same as defined in the Income Tax Act. As per the Income tax provisions, gifts received in excess of Rs 50,000 /- in aggregate in a year from non relatives are taxable in the hands of the recipient. Gifts need not be in the form of cash but can be in any form – even when any capital asset is purchased by a person from a non relative and the fair market value of the asset is more than Rs 50000/- compared to the purchase price, then the purchaser will be liable to pay tax on such difference as such amount will be deemed to be his income. So the term relative is very important . The following persons are considered as relatives under the Income tax provisions :

**In case of individual**

- Spouse of the individual
- Brother or sister of the individual
- Brother or sister of the spouse of the individual
- Brother or sister of either of the parents of the individual
- Any lineal ascendant or descendant of the individual
- Any lineal ascendant or descendant of the spouse of the individual
- Spouse of the person referred to in above points

The rigours of the section would also not be applicable in the following cases :

- on the occasion of the marriage of the individual; or
- under a will or by way of inheritance;
- in contemplation of death of the payer or donor, as the case may be;
- from any local authority as defined in the Explanation to clause (20) of section 10;
- from any fund or foundation or university or other educational institution or hospital or other medical institution or any trust or institution referred to in clause (23C) of section 10;
- from any trust or institution registered under section 12AA.

**10) I intend to gift Rs 10.00 L each to my two minor children and wife . Can I thus reduce my tax liability ?**

The understanding is not correct. When a person transfers any money or other assets without consideration to his minor children or spouse, the income arising to such minor child or spouse would be clubbed with the income of the donor. It may also be noted that , when a person transfers any income to any other person without transfer of the underlying asset to such person then the income so transferred will be assessed in the hands of the former.

**Thank you,**

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