



Residential Status of Individual, HUF & Company

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INTRODUCTION

It is important for the Income Tax Department to determine the residential status of a tax paying individual or company. It becomes particularly relevant during the tax filing season. In fact, this is one of the factors based on which a person's taxability is decided.

A person's tax liability in the Indian subcontinent regarding income is regulated by the income tax under the Income-tax Act. Additionally, it depends upon the residential status of an individual in the financial year in which the income arises or accrues to him or is received by him. There are two types of taxpayers—residents in India and non-residents in India. Indian income is taxable in India whether the person earning income is resident or non-resident. Conversely, the foreign income of a person is taxable in India only if such a person is a resident of India.

The foreign income of non-resident is not taxable in India. The residential status may be subject to change from year to year, it must also be noted that the residential status of an individual under the Income Tax Act is different than that of under the Citizenship Act, FEMA, Aadhar Act and other acts, a person for instance may be a residential citizen in only one jurisdiction but maybe a resident in terms of taxes in more than one country depending upon the taxation laws of that country or countries.

The Income Tax Act by virtue of Section 6(1) provides that “an individual is said to be resident of India in any previous year if he- Is In India in that year for a period or periods amounting in all to one hundred and eighty-two days or more; or having within the four years preceding that year been in India for a period or periods amounting in all to three hundred and sixty-five days or more, is in India for a period or periods amounting in all to sixty days or more in that year.”

- Assesseees are either (a) resident in India, or (b) non-residents in India. As far as resident individuals and Hindu undivided families are concerned, they can be further divided into two categories, viz., (a) resident and ordinarily resident, or (b) resident but not ordinarily resident.
- All other assesseees (viz., a firm, an association of persons, company and every other person) can simply be either resident or non-resident.

Section 6 lays down the test of residence for (a)an individual, (b). a Hindu undivided family(c) a firm or an association of persons or a body of individuals (d) a company, and (e) every other person. It must be known that the onus of proof is upon the individual, company or firm to prove his/her residential status, in the case of Rai Bahadur Seth Teomal v. CIT it was held that Whether an assessee is a resident or a non-resident is a question of fact and it is the duty of the assessee to place all relevant facts before the Income-tax authorities.

Meaning and Importance of Residential Status

The term residential status has been coined under the income tax laws of India and must not be confused with an individual's citizenship in India. An individual may be a citizen of India but may end up being a non-resident for a particular year. If a person meets the conditions enlisted in section 6(1) of the Act, then he is said to be a resident and people who do not fulfil the conditions are said to be non-residents. For a better understanding let us assume the first condition is A1 and the second condition is A2 respectively i.e., Is In India in that year for a period or periods amounting in all to one hundred and eighty-two days or more; or having within the four years preceding that year been in India for a period or periods amounting in all to three hundred and sixty-five days or more is in India for a period or periods amounting in all to sixty days or more in that year respectively.

Now a person is said to be a resident of India if he satisfies any one of the above conditions namely A1 & A2, now while comprehending the first condition is not a herculean task, when not satisfied we proceed towards the 2nd condition that is A2, it stipulates two further conditions, first we need to check whether the period of stay in India is 60 or more days during the year, now if this condition is fulfilled we need to check if the period of stay in India during the preceding 4yrs is 365 days or more.

If both these conditions are fulfilled then he will be considered as the resident individual. When both above conditions A1 & A2 are not met he shall be considered as a non-resident for that year.

Exceptions to Residential Status

1. In the event an individual who is a citizen of India leaves India as a member of the crew of an Indian ship or for the purpose of employment during the FY, he will qualify as a resident of India only if he stays in India for 182 days or more.
2. Indian citizen or person of Indian origin who stays outside India comes on a visit to India during the relevant previous year. However, such a person having a total income, other than the income from foreign sources which exceeds Rs.15 lakhs during the previous year will be treated as a resident in India if he stays in India during the relevant previous year for 182 days or more, or he stayed in India for 365 days or more during the previous 4 years and has been in India for at least 120 days in the previous year.
3. If an individual qualifies as a resident, the next step is to determine if he/she is a Resident and ordinarily resident (ROR) or Resident but not ordinarily Resident (RNOR). He will be an ROR if he meets both of the following conditions: Has been a resident of India in at least 2 out of 10 years immediately previous years and has stayed in India for at least 730 days in 7 immediately preceding years.
4. An individual failing to satisfy the condition of stay in India for 182 days or more in the previous year or 60 days or more in the previous year and 365 days in the 4 years preceding previous years will be considered as a Non-Resident for that financial year.

Residential Status of A Hindu Undivided Family

Under Hindu Law, an HUF is a family that consists of all persons lineally descended from a common ancestor and includes their wives and unmarried daughters also HUF cannot be created under a contract, it is created automatically in a Hindu Family. Jain and Sikh families even though are not governed by Hindu Law are treated as HUF under the said act. A Hindu Undivided Family, a HUF is treated as a 'person' under Section 2(31) of the Income Tax Act, 1961, it is treated as a separate entity for the purpose of assessment under the Act. An HUF would be resident in India if its management is made from the members in India, if not will be considered a Non-resident.

Resident and ordinarily resident/ Resident but not ordinarily resident:- If Karta (manager) of resident HUF satisfies the below conditions, then HUF will be treated as resident and ordinarily resident, otherwise, it will be resident but not ordinarily resident. Person should be resident in at least 2 previous years out of the last 10 years and stay in the last 7 years should be 730 days or more.

- Section 6(2) of the act “A Hindu undivided family is said to be a resident in India. Only if its control and management are wholly or partially situated in India. The residential status of the Karta in the previous years will be taken into consideration when determining whether a resident family has been ordinarily resident. There lies a lot of importance in the phrase “control and management “and the same has been defined by various courts, In the case of CIT vs Nandlal Gandlal, the court laid down the term de facto control defining it as Control and management means de facto control and management and not merely the right to control or manage.
- The head and brain are situated where vital decisions concerning the policies of the business, such as, raising finance and its appropriation for specific purposes, appointment and removal of staff, expansion, extension, or diversification of business, etc., are taken. In furtherance in the case of Annamalai Chettiar v. ITO, it was held that “The mere fact that the family has a house in India, where some of its members reside or the Karta is in India in the previous year, does not constitute that place as the seat of control and management of the affairs of the family unless the decisions concerning the affairs of the family are taken at that place. The mere fact of the absence of Karta from India does not make family non-resident.

A resident Hindu Undivided Family is an ordinarily resident in India if the Karta or the manager of the family satisfies the following two additional conditions laid down: –

Karta has been a resident in India in at least 2 out of the 10 previous years immediately preceding the relevant previous year; The Karta has been present in India for a period of 730 days or more during 7 years immediately preceding the relevant previous year. If the Karta or the manager of a resident Hindu Undivided Family does not satisfy the two additional conditions, the family is treated as resident but not ordinarily resident in India.

Question— “The Head Office of XY, a Hindu undivided family, is situated in Hong Kong. The family is managed by Y (since 1980) who has been resident in India in only 3 out of 10 years preceding the previous year 2021-22 and he has been present in India for more than 729 days during the last 7 years. Determine the residential status of the family for the assessment year 2022-23 if the affairs of the family’s business are (a) wholly controlled from Hong Kong, (b) partly controlled from India.

Solution — If the affairs of a Hindu undivided family are controlled from a place outside India, the family will be non-resident. Accordingly, XY Hindu’s undivided family is non-resident for the assessment year 2022-23 under situation (a). Under situation (b), affairs of the family’s business are partly controlled from India during the previous year 2021-22. Therefore, family is resident in India.

Residential Status of a Company

Residential status of a company is an important consideration to simplify the complex taxation landscape. In India, a company needs to qualify certain criteria to be eligible as a home company. Section 6(3) of Income Tax Act states the mandatory provision and place of effective management of a company. The term 'Place of Effective Management' refers to the place, where significant management and business decisions necessary for the overall functioning of the company are essentially made.

Resident company: A company is a resident if it is formed and mainly works in a specific country. It follows the tax rules of that country.

Non-resident company: If a company is created in one place but does most of its work in another, it is a non-resident. It needs to follow tax rules in both the place it is formed and where it operates.

Foreign company: A foreign company is formed in one country but works in a different one. It follows the tax rules of where it operates, not where it is created.