NRI - TAXATION AND FEMA ASPECTS

BY J B Nagar CPE Study Circle of WIRC

- By CA Prakash Kotadia & CA Vinay Deshmane

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GLOSSARY

AAR	Authority for Advance Rulings
Act	The Income Tax Act, 1961
AY	Assessment Year
CBDT	Central Board of Direct Taxes
DDT	Dividend Distribution Tax
DTAA	Double Taxation Avoidance Agreement
FATCA	Foreign Account Tax Compliance Act
FCNR	Foreign Currency Non Resident Account
FEMA	Foreign Exchange Management Act, 1999
FTS	Fees for Technical Services
FY	Financial Year
HNI	High Net Worth Individual
IDR	Indian Depository Receipts
LRS	Liberalized Remittance Scheme
LTCG	Long Term Capital Gains

NR	Non Resident
NRE	Non Resident External Account
NRNR	Non Resident Non-Repatriable Account
NRSR	Non Resident (Special Rupee) Account
NRI	Non Resident Indian Account
NRO	Non Resident Ordinary
OCI	Overseas Citizen of India
PAN	Permanent Account Number
PE	Permanent Establishment
PIO	Person of Indian Origin
RBI	Reserve Bank of India
RNOR	Resident but Not Ordinarily Resident
ROR	Resident and Ordinarily Resident
SEP	Significant Economic Presence
STCG	Short Term Capital Gains

BACKGROUND

BACKGROUND

- International mobility is increasingly becoming a way of life as individuals, particularly millennials, aspire for the best career opportunities and better quality of life. Deputations are a natural extension of the globalized economy and the available pool of talent plus cost advantage has made India a hotspot of outbound deputations. All of this has contributed to the growing number of Indians relocating overseas, popularly known as NRIs.

- NRIs have significant financial interest in India evidenced by investment in businesses, listed shares, deposits with bank, immovable properties, etc.

- In view of the diversified portfolio, NRIs may have a host of reporting and other obligations in addition to adherence to the tax laws in India as well as foreign jurisdiction.

Non-resident and NRI

- As per section 2(30) of the Act, a NR means a person who is not a “resident” subject to certain exceptions.

- As per section 115C(e) of the Act, a NRI means an Individual being citizen of India or PIO who is not a “resident”.

A person shall be deemed to be PIO if he, or either of his parents or any of his grand-parents, was born in undivided India;

BACKGROUND

- There are over 3 crore NRIs settled outside India mainly in the US, UK, UAE, Malaysia and Canada.

- Certain country-wise population of NRIs

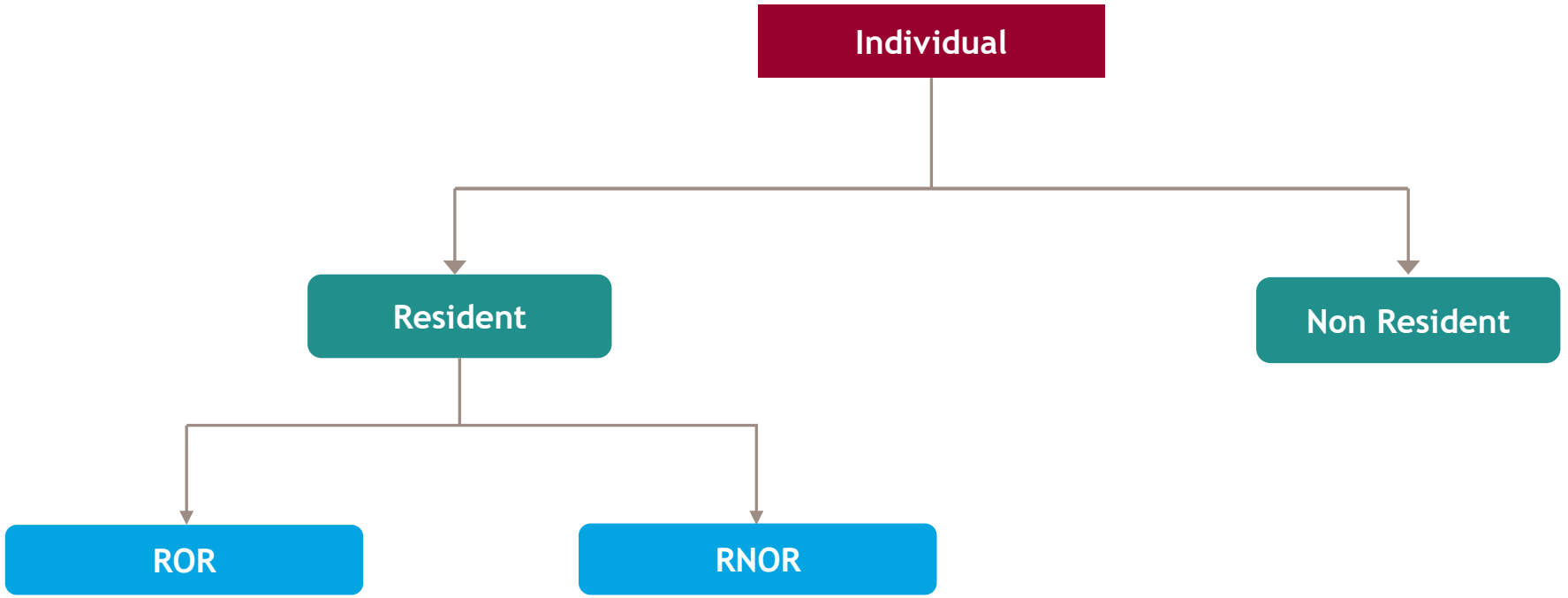
Country	NRI population
US	44,60,000
UAE	34,25,144
Malaysia	29,87,950
Myanmar	20,09,207
UK	17,64,000
Canada	16,89,055
Sri Lanka	16,14,000
South Africa	15,60,000
Kuwait	10,29,861
Mauritius	8,94,500
Singapore	6,50,000

Source: https://mea.gov.in/

- UAE and US continue to drive most of the remittances to India.

BACKGROUND

- Section 4 of the Act is the basic charging section under which income tax is chargeable on the total income of every person.
- Section 5 outlines the scope of total income for various categories of persons depending upon their residential status.
- Residential status in case of an individual as per the Act



BACKGROUND

- Scope of taxability of total income

Residential Status	Scope of taxability of total income
ROR	Worldwide Income
RNOR	▪ Income received, accrued or arisen or deemed to be received or accrued or arisen in India ▪ Income accruing or arising outside India that is controlled from business or profession set up in India
NRI	Income received, accrued or arisen or deemed to be received or accrued or arisen in India

- Income deemed to accrue or arise in India

  - All income (subject to certain exceptions) accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India [Section 9(1)(i)]
  - Salary if it is earned in India [Section 9(1)(ii)] or payable by the Government to a citizen of India for service outside India [Section 9(1)(iii)]
  - Dividend paid by an Indian company outside India [Section 9(1)(iv)]
  - Income by way of interest in specified cases [Section 9(1)(v)]
  - Royalty [Section 9(1)(vi)
  - FTS [Section 9(1)(vii)]

RESIDENTIAL STATUS OF AN INDIVIDUAL AS PER PROVISIONS OF THE ACT

RESIDENCY PROVISIONS UP TO 31 MARCH 2020

- As per section 6(1) of Act as applicable up to 31 March 2020, an individual is said to be resident in India in a FY if either of the following conditions of stay are met:
  - if he has been in India for an overall period of 182 days in that FY [section 6(1)(a)] or
  - if he has been in India for an overall period of 365 days or more within 4 preceding years coupled with stay in India for an overall period of 60 days or more in that FY [section 6(1)(c)].

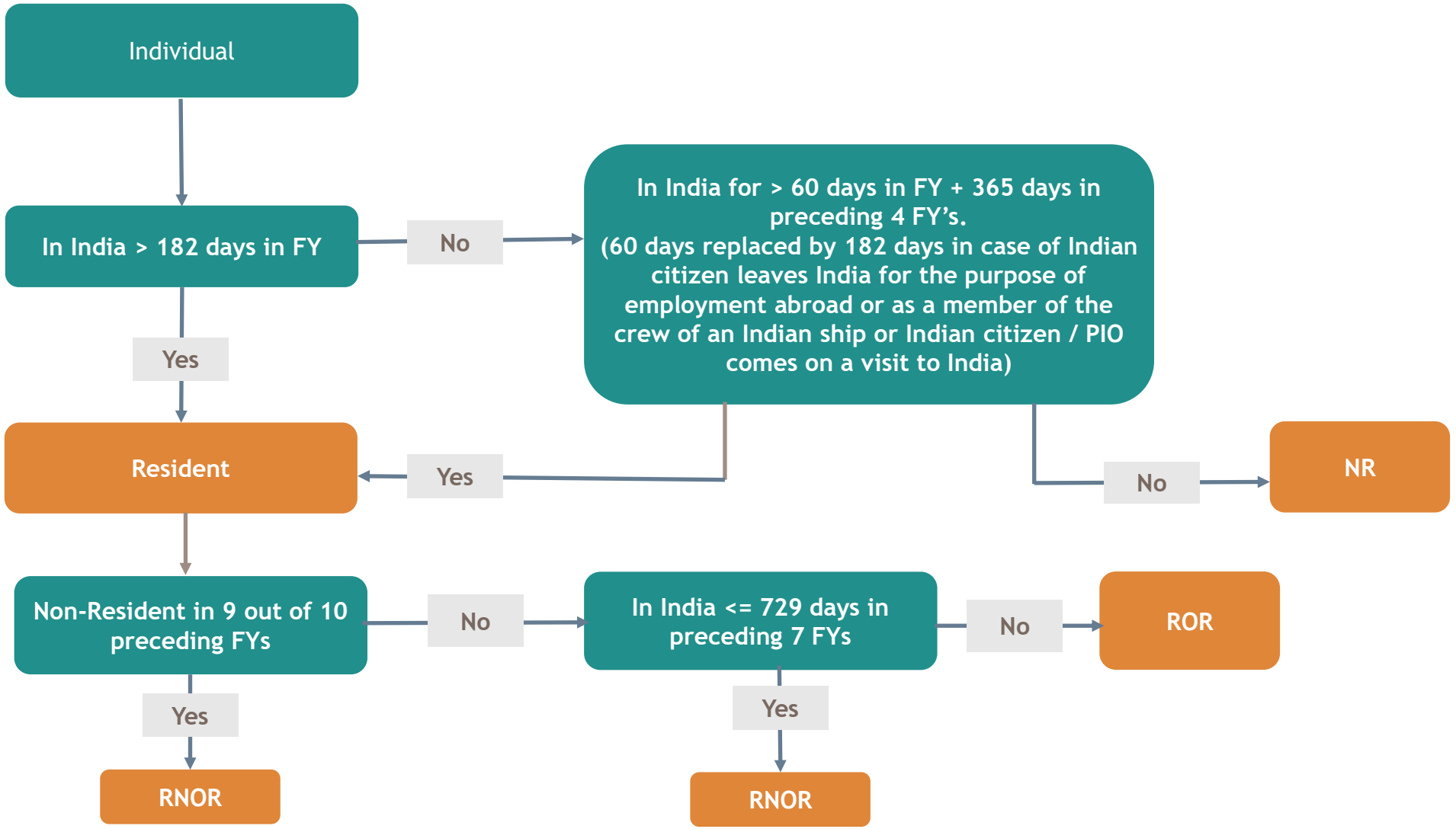
  Explanation 1(a) to section 6(1) of the Act grants extension from the period of 60 days to 182 days in case of an Indian citizen leaving India for the purpose of employment or as a crew member of Indian ship. Explanation 1(b) to section 6(1) provides for similar extended period of stay in India from 60 days to 182 days in case of Indian citizen or a PIO on his visit to India for the purpose of section 6(1)(c) of the Act.

  An individual who does not satisfy either of the above conditions is a NR.

- Residents are classified into further categories viz. RNOR and ROR. RNOR is an individual who qualifies as Resident but satisfies any of the following conditions:
  - NR in 9 out of the 10 previous FYs preceding that FY, or
  - Overall period of stay in India is 729 days or less during the 7 FYs preceding that FY

  On meeting either of the conditions, a resident individual is classified as RNOR.

RESIDENCY PROVISIONS UP TO 31 MARCH 2020



RESIDENCY PROVISIONS – BRIEF HISTORY

- Up to FY 1989-90, non-resident individual visiting India even for 90 days (along with the condition of stay in of 365 days or more in preceding 4 FYs) would be considered a resident under section 6(1)(c) of the Act.

- In 1991, India started liberalization of the economy by attracting investment from non-residents. Vide the Finance Act, 1990, the aforesaid threshold was increased to 150 days.

- Vide Finance Act 1994, the said threshold was further increased from 150 to 182 days.

- Till FY 2003-04, the provision relating to RN*OR status read as under:*

  A person is said to be "not ordinarily resident" in India in any previous year if such person is— (a) an individual who ***has not been resident*** *in India in nine out of the ten previous years preceding that year or has not during the seven previous years preceding that year been in India for a period of, or periods amounting in all to, seven hundred and thirty days or more.*

  The above provision meant that before return to India, if an individual was a NR for 2 successive years he would enjoy the RNOR status for 9 subsequent FYs. This is so because till the completion of 9 years, he would not satisfy the condition of being resident in India in nine out of 10 fiscal years, to be treated as RNOR.

- The aforesaid provision relating to RNOR was abused by people becoming tax residents of foreign country. For example, an individual could stay in a foreign country for a period of 13 months (15th September of one year to 15th October of the next year.) and claim to be non-residents for two FYs. On his return in the 14th month, he could claim NR in the 2 years and RNOR status in the subsequent 9 years. Thus his income earned abroad could not be taxed in India.

RESIDENCY PROVISIONS – BRIEF HISTORY

- The provision relating to RNOR was amended by the Finance Act, 2003 with effect from 1 April 2004, which read as under:

  "A person is said to be "not ordinarily resident" in India in any previous year if such person is— (a) an individual who ***has been a non-resident*** *in India in nine out of the ten previous years preceding that year, or has not during the seven previous years preceding that year been in India for a period of, or periods amounting in all to, seven hundred and twenty nine days or less."*

- The amendment provided that individual to be considered as a RNOR, he should have been a NR in 9 out of previous 10 FY, as opposed to the earlier provision whereby an individual having NR status for 2 successive FYs, would enjoy the RNOR status for next 9 FYs.

RESIDENCY PROVISIONS WITH EFFECT FROM 1 APRIL 2020

Basic Conditions

- The Finance Bill 2020, as introduced, proposed to restrict the period of 182 days in the second limb [Explanation 1(b) to section 6(1) of the Act] to 120 days i.e. in cases of Indian citizen or PIO if he visits India, under the proposed provision, the number of days of stay in India should be 120 days instead of 182 days as per provisions up to FY 2019-20.

- The object of bringing the aforesaid amendment has been stated to be that the Government feels that certain individuals, who are actually carrying out substantial economic activities from India, manage their period of stay in India, so as to remain NR in perpetuity and are not required to declare their global income in India due to such relaxation in period of visit to India.

- However, the Finance Bill 2020 as passed by the Lok Sabha on 23 March 2020 has restricted the application of amended provisions i.e. restricting number of days of stay in India to 120 days only to Indian citizen or a PIO whose total income, other than income from foreign sources, exceeds INR 15 lacs during the FY.

- For this purpose, income from foreign sources means income, which accrues or arises outside India (except income derived from a business controlled in or a profession set up in India).

Reducing the threshold of physical presence to 120 days in a year will make visiting Indian citizen or a PIO having total income (other than income from foreign sources), exceeding INR 15 lacs more conscious of their travel dates.

RESIDENCY PROVISIONS WITH EFFECT FROM 1 APRIL 2020

Additional conditions for residents

- The Finance Bill 2020, had initially proposed to modify the conditions for RNOR. It was proposed to remove the second limb of condition and also liberalise the first limb by reducing the years as NR from 9 to 7 out of 10 years.

- The Finance Bill, 2020 (as passed by the Lok Sabha on 23 March 2020) omitted the aforesaid amendment. Thus, the existing conditions as contained under section 6(6) of the Act shall continue. However, the Finance Bill, 2020 (as passed by the Lok Sabha on 23 March 2020) has introduced following additional condition for RNOR in addition to the existing 2 conditions of (i) NR in 9 out of the 10 previous FYs preceding that FY and (ii) overall period of stay in India is 729 days or less during the 7 FYs preceding that FY

  - Indian citizen or PIO having total income, other than income from foreign sources, exceeding INR 15 lacs during the FY, who has been in India for a period or periods exceeding 119 days but less than 182 days.

RESIDENCY PROVISIONS WITH EFFECT FROM 1 APRIL 2020

Citizen of India - deemed to be resident in India - stateless person for taxation in other countries

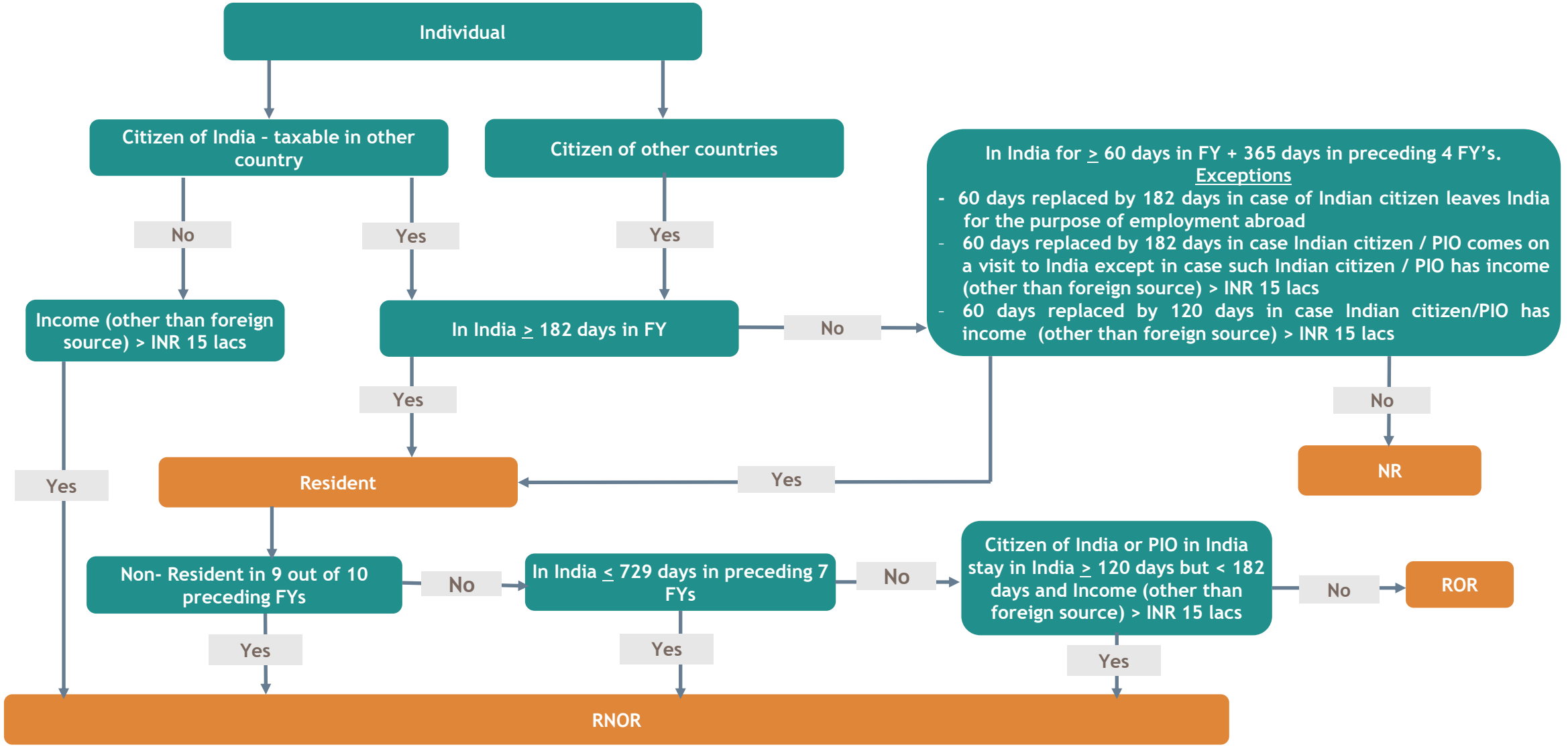
- To address the issue of stateless persons where it is entirely possible for an individual to arrange his affairs in such a fashion that he is not liable to tax in any country or jurisdiction during a year, the Finance Bill, 2020 proposed to introduce a deeming fiction of treating a 'Citizen of India' as resident in India if he is not liable to pay tax in any other country or territory by reason of his domicile or residence or any other criteria of similar nature.

- The Government proposed this amendment to address the practice typically employed by HNIs to avoid paying taxes to any country/jurisdiction on income they earn.

- The Finance Bill, 2020 (as passed by the Lok Sabha on 23 March 2020) has liberalised application of the proposed provisions. As per newly inserted section 6(1A), an Indian citizen having total income (other than income from foreign sources) exceeding INR 15 lacs shall be deemed to be RNOR if he is not liable to tax in any other country or territory by reason of his domicile or residence or any other criteria of similar nature. This amendment of deemed residency endeavors to tax Indian citizens who are stateless persons and have not been paying taxes in India by taking recourse to being qualified as NRI as per erstwhile provisions.

Objective of this provision is to tax such individuals who are stateless persons and are not liable to tax in any country by reason of their residence

SUMMARY OF RESIDENCY PROVISIONS WITH EFFECT FROM 1 APRIL 2020



CBDT CIRCULAR NO. 11 OF 2020

- Number of individuals had come on a visit to India during FY 2019-20 for a particular duration and intended to leave India before the end of FY 2019-20 for maintaining their status as NR or RNOR. However, due to declaration of the lockdown and suspension of international flights owing to outbreak of COVID-19, they are required to prolong their stay in India.

- In order to avoid genuine hardship in such cases, vide Circular No. 11 of 2020, the CBDT brought following relaxation in the residency provisions for FY 2019 -20 in respect of an individual who has come to India on a visit before 22 March 2020

  - In case such individual has not been able to leave India on or before 31 March 2020, his period of stay in India from 22 March 2020 to 31 March 2020 shall not be taken into account

  - In case such individual has been quarantined in India on account of Covid-19 on or after 1 March 2020 and has departed on an evacuation flight on or before 31 March 2020 or has not been able to leave India on or before 31 March 2020, his period of stay from the beginning of his quarantine to his date of departure or 31 March 2020, as the case may be, shall not be taken into account

  - In case such individual has departed on an evacuation flight on or before 31 March 2020, his period of stay in India from 22 March 2020 to his date of departure shall not be taken into account.

INCOME FROM FOREIGN SOURCES

- As per explanation to section 6(6) of the Act, the expression "income from foreign sources" means income which accrues or arises outside India (except income derived from a business controlled in or a profession set up in India).
- Examples of income from foreign sources
  - Salary income received on account of employment exercised outside India and services rendered outside India
  - Rental income from property outside India
  - Business income from overseas activities having no business connection/PE in India
  - Capital gains arising from transfer of property situated outside India
  - Interest income arising from foreign sources

Issue arises as to whether exempt income such as NRE bank interest etc. is to be included in computing the threshold of INR 15 lacs. It would be reasonable to argue that such income should not be included as the words used is total income which is understood as net of all exemptions.

RESIDENCY PROVISIONS WITH EFFECT FROM 1 APRIL 2020 - IMPACT OF AMENDMENTS

Sr. no.	**Stay of an individual during FY -** Indian Citizen or PIO who being outside India comes to visit India during the year and stay in India in the immediately preceding 4 years exceeds 365 days	Whether Individual liable to tax in any other country or territory by reason of his domicile or residence or any other criteria of similar nature	**Total income (other than income from foreign sources)**	**Residential status - prior to 1 April 2020**	**Residential status from 1 April 2020**
1.	Less than 120 days	Liable to tax	Less than or equal to INR 15 lacs	NRI	NRI
2.	Less than 120 days	Liable to tax	More than INR 15 lacs	NRI	NRI
3.	More than 119 days but less than 182 days	Liable to tax	Less than or equal to INR 15 lacs	NRI	NRI
4.	More than 119 days but less than 182 days	Liable to tax	More than INR 15 lacs	NRI	RNOR
5.	More than 182 days	Not relevant	Any income	ROR/RNOR*	ROR/RNOR*
6.	Less than 182 days	Not liable to tax	More than INR 15 lacs	NRI	RNOR
7.	Less than 182 days	Not liable to tax	Less than or equal to INR 15 lacs	NRI	NRI

*In case such individual is a non-resident in 9 out of 10 preceding years or if such individual has been in India for an aggregate period of 729 days or less in the preceding 7 years, then such individual shall qualify as RNOR

IMPACT OF AMENDMENTS

Indian citizens residing outside India and coming to India on visit

- The erstwhile provision of 182 days for determining residential status of NRIs visiting India shall continue in all cases, except where the limit of INR 15 lacs applies. Where the total income (other than income from foreign sources) exceeds INR 15 lacs, 120 days rule shall determine the residential status.
- The amendment would impact only NRIs/PIOs visiting India. The term 'visit' is subject to interpretation in the absence of specific definition.
- In view of INR 15 lacs threshold, in addition to monitoring the number of days present in India, visiting individuals would also need to keep track of their Indian sourced income.
- NRIs/PIOs intending to sell property/other capital assets in India and earning capital gains exceeding INR 15 lacs would be impacted as they may be subject to tax as RNOR as against NRI prior to the amendment.

Deemed residency provisions

- The deemed residency provisions would apply only to Indian citizens. This amendment would not impact PIOs, OCIs and other Foreign Citizens.
- Deemed residency provisions would get triggered if an Indian citizen having total income (other than income from foreign sources) exceeding INR 15 lacs is not 'liable to tax' in any other country. Issue arises as to whether Indian citizens not subject to tax as per local laws of such other country would be treated as 'not liable to tax'.
- The term "liable to tax" cannot be equated with 'payment of tax' - **Union of India vs. Azadi Bachao Andolan [2003] 263 ITR 7**
- It would be sufficient to say that a person is "liable to tax" in a jurisdiction if such jurisdiction has a "right to tax," irrespective of whether such person essentially pays any tax or not.

IMPACT OF AMENDMENTS

Tax implications of becoming RNOR

- Depending on fact of the case, an individual qualifying to be a NR would arguably not be taxed on income earned outside India from a business that may be effectively controlled from India. However, if such individual on account of the amendment qualifies to be a RNOR for any FY, such income from a business or profession controlled from India would be subject to tax in India.

- The terms “business controlled” or “profession set up in India” are very subjective and hence could lead to litigation.

- Tie breaker rule will assume importance to determine status of residence of the individual under the DTAA. Prior to the amendment, if an individual would qualify as a NR of India and a resident of the other country as per DTAA, he would qualify as a tax resident of that country. However, now when such individual qualifies as a RNOR, it can be argued that he is a tax resident of both the countries. Hence, if such individual qualifies as resident of India after applying the tie breaker test specified under the respective DTAA, various concessions given under the DTAA in India and the other country with regard to capital gains, dividend, interest, etc. will need to be revisited.

- DTAA benefits would be lost on becoming RNOR. For example, in case of dividend income, in case of RNOR, tax is required to be paid at slab rate applicable based on total amount of taxable income of the resident individual (highest tax slab 30% plus surcharge and cess). In case of NRIs, DTAAs with Singapore, UAE, Mauritius, Hong Kong etc. provide for concessional rates. Further, no surcharge or cess is required to be paid over the rate prescribed under DTAA.

- On becoming RNOR, reporting of foreign assets shall be required as follows:
  - Details of Foreign Bank Accounts
  - Details of financial interest in any entity
  - Details of immovable property
  - Details of any other capital asset
  - Details of account(*s*) in which one has signing authority and which has not been included above

IMPACT OF AMENDMENTS

Other tax implications of becoming RNOR…contd.

- Following concessional tax provisions applicable to non-resident would not be applicable to RNOR

Section		Tax rate
115A(1)(a)(i)	Dividend income	20% subject to reduced rate under DTAA
115A(1)(a)(ii)	Interest received from Government or an Indian concern on moneys borrowed or debt incurred by Government or the Indian concern in foreign currency	20%
115A(1)(a)(iia)	Interest received from an infrastructure debt fund referred to in section 10(47)	5%
115A(1)(*a*)(iiaa)	Interest received from an Indian company on rupee denominated bonds	5%
115A(1)(*a*)(iiab)/(iiac)	Interest on rupee denominated bond referred to in section 194LD and income from units of business trust referred in section 194LBA	5%
115(1)(*a*)(*iii*)	Income received in respect of mutual fund units specified under 10(23D) or units of UTI purchased in foreign currency	20%
115A(1)(b)	Royalty or fees for technical services received by a foreign company or non-resident non-corporate assessee	10%
115AC	Interest or dividend income arising in the hands of a non-resident from specified bonds or Global Depository Receipts or income in the nature of long-term capital gains arising from transfer of the bonds.	10%

RESIDENTIAL STATUS OF AN INDIVIDUAL AS PER PROVISIONS OF DTAA

RESIDENCY RULES AS PER DTAA

- As per section 90(2) of the Act, provisions of the Act or DTAA, whichever are beneficial, shall apply to the taxpayer.
- India is also a signatory to the MLI notified under Action Plan 15 of BEPS Action Plans, which will be applied alongside existing DTAAs. MLIs are effective in India from 1 April 2020. As such, DTAA provisions will have to be read along with MLI provisions, if any adopted by the countries.
- As per respective DTAAs with various countries concluded by India, term "Resident" has been defined differently. For example, as per India-UAE DTAA, an individual is considered to be a resident as follows:

India	• any person who, under the laws of India, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature
UAE	• An individual who is present in the UAE for a period or periods totaling in the aggregate at least 183 days in the calendar year concerned

- DTAAs with Singapore, UK, USA etc. provide that individual would be resident of India or Singapore/UK/USA if such individual is liable to tax in India or Singapore/UK/USA by reason of his domicile, residence, citizenship, any other criteria as per laws of the respective country.

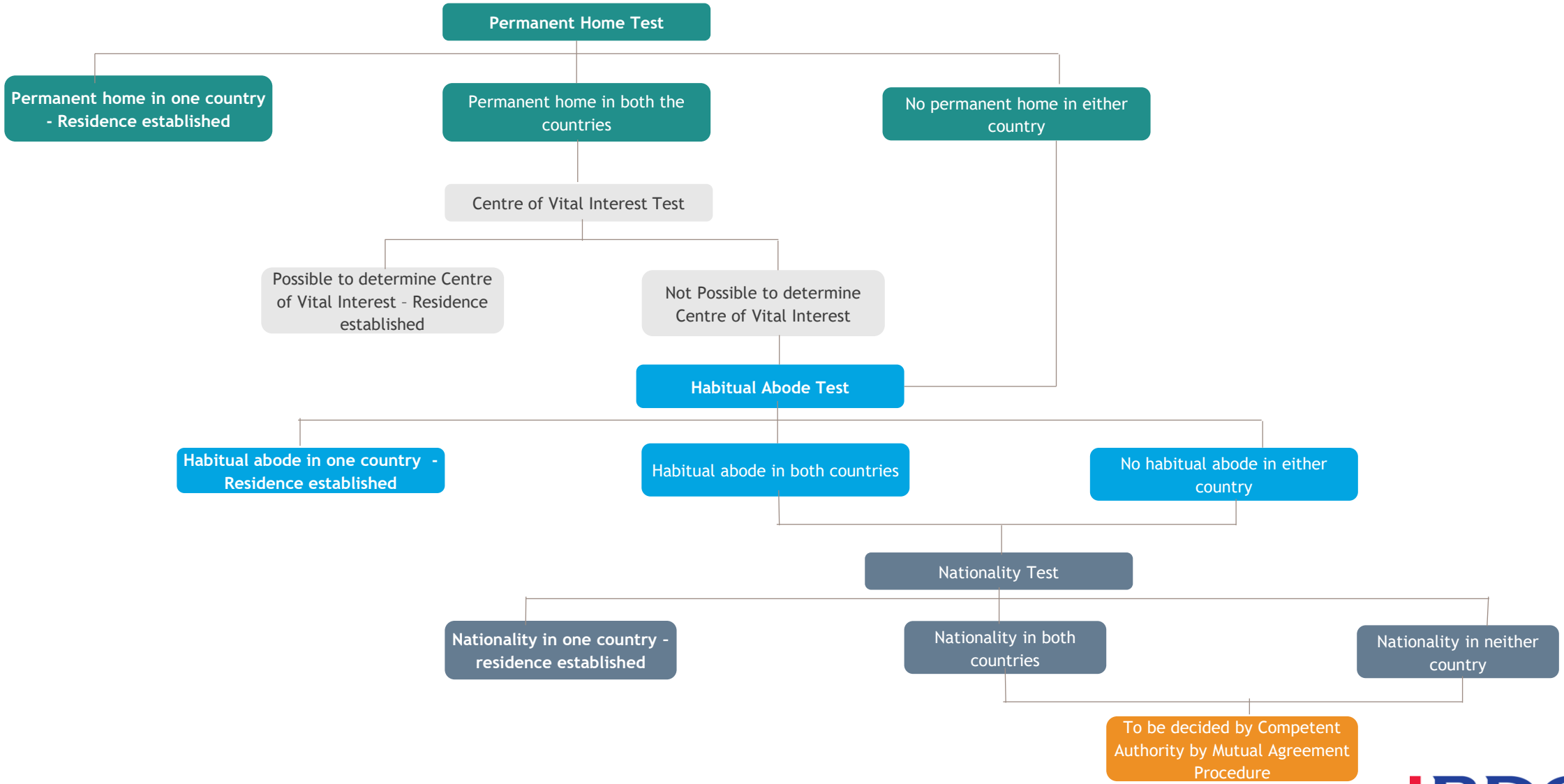
RESIDENCY RULES AS PER DTAA

- Typically, Article 4(2) of the DTAA sets out the tie-breaker tests for determination of jurisdiction of taxation when an individual is a resident of two jurisdictions.

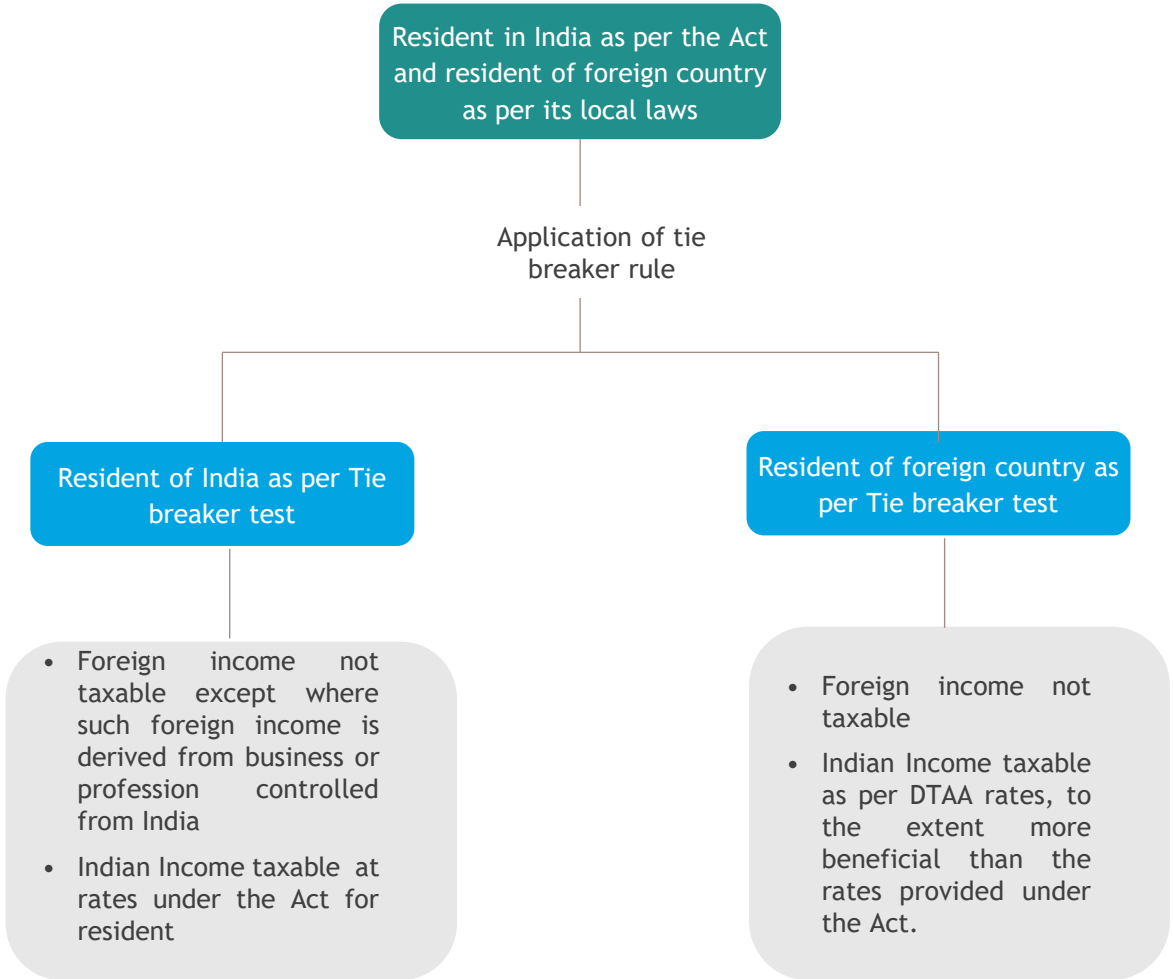
- Tie breaker rule is to be applied in the following order of priority
  - Location of permanent home arranged and retained for permanent use
  - Personal and economic relations – Centre of Vital Interest
  - Habitual abode
  - Nationality of individual
  - To be decided by mutual agreements by the competent authorities

- Tie breaker rule will assume importance as an individual is more likely to qualify as resident of both countries pursuant to the amendments by the Finance Act, 2020.

RESIDENCY RULES AS PER DTAA – APPLICATION OF TIE BREAKER RULE

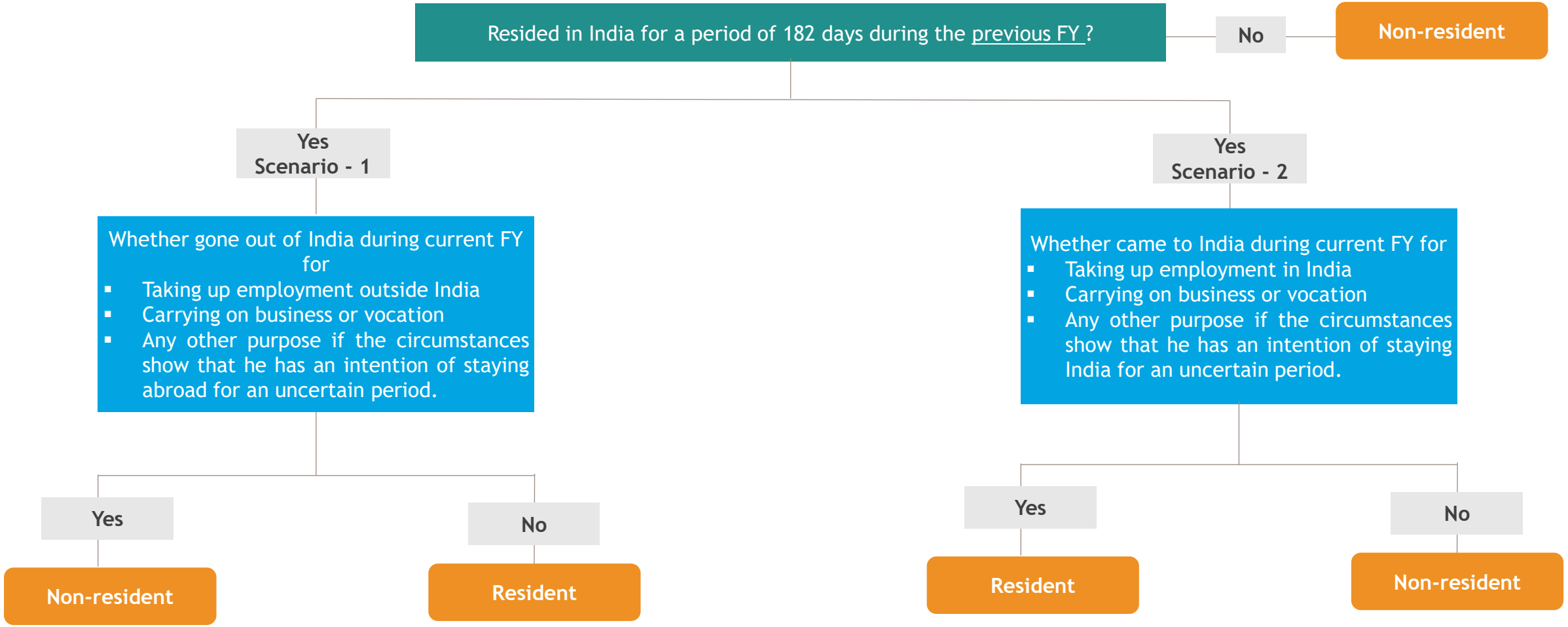


TIE BREAKER RULE - IMPLICATIONS



RESIDENTIAL STATUS OF AN INDIVIDUAL AS PER FEMA

RESIDENTIAL STATUS UNDER FEMA



RESIDENCY PROVISIONS – FEMA VS INCOME TAX

- Under FEMA, an individual's residential status can be determined from a particular date. Thus an individual can be a resident for part of the FY and non-resident for rest of the FY. However, under the Act, the residential status is for the full year.

- An individual can have different residential status under FEMA and the Act in the particular FY. Consider the following examples:

  - An individual comes to India for tourism. He has to extend his stay due to unavoidable reasons such as illness etc. This results in his stay exceeding 182 days in a year. Such a person will become a resident under the Act. However, he has not come for employment or business in India. Further, it would not be case where his stay in India is uncertain. As such under FEMA, such a person will be a non-resident.

  - An Indian resident, takes up employment in Singapore in December 2020. From December 2020, he has become a non-resident under FEMA. However, as per the Act, he will be a resident. His salary earned in Singapore from December 2020 to March 2020 will be liable to tax in India subject to relief under India-Singapore DTAA.

- FEMA considers physical presence of a person in the preceding FY whereas the Act considers the physical presence of a person in the current FY.

SPECIAL TAX PROVISIONS FOR NRIs

CHAPTER-XIIA - OVERVIEW

- Chapter XIIA of the Act lays down certain special provisions relating to LTCG and investment income earned in India by NRIs. This Chapter provides for certain benefits such as reduced rate of tax, exemption from filing of income tax returns in certain cases, etc. Further, the Chapter also states that the provisions of this Chapter would apply even after the NRI becomes a resident of India in respect of specified assets.

- **Eligibility to opt for Chapter XIIA**

  NRI is eligible to opt for this Chapter only if he has investment income (i.e. income derived from foreign exchange asset) and LTCG arising on transfer from the following specified assets provided that they are acquired out of convertible foreign exchange:

  - Shares of an Indian company
  - Debentures or deposits with an Indian public limited company
  - Any security of the Central Government

CHAPTER-XIIA

- **Section 115E - Tax on investment income and LTCG**

Particulars	Investment income	LTCG
Tax rate	20% (plus applicable surcharge and 4% cess)	10% (plus applicable surcharge and 4% cess)
Deduction of expenses	Not allowed	Allowed as provided in the Act
Chapter VI-A deduction	Not allowed	

- **Section 115F - Exemption from LTCG**

  - LTCG arising on transfer of specified assets is exempt, if the net sale consideration is reinvested in specified assets or in any savings certificates referred to in section 10(4B) within a period of 6 months from the transfer date.
  - If only a portion of the net consideration is reinvested, then proportionate exemption is allowed.
  - The new asset must be held for a minimum period of 3 years failing which the capital gains exempted earlier becomes taxable.

CHAPTER-XIIA

Section 115G – Exemption from filing return of income

- An NRI is not required to file income tax return in India if
  - his income consists only of investment income or LTCG or both
  - tax has been withheld on the same

Section 115H – Continuation of benefits after becoming resident

- Provisions of Chapter XIIA shall continue to apply to NRI in relation to such income for the AY in which he becomes resident and for subsequent AYs until the transfer or conversion (otherwise than by transfer) into money of the specified assets.
- For the purpose, NRI needs to furnish a declaration in his return of income.

Section 115-I – Option to opt out of Chapter XIIA

- An NRI may choose to opt out of the provisions of Chapter XIIA for any year. Opting out for any year/s is applicable for that particular year only and does not restrict applicability of Chapter XIIA in any subsequent year/s as these provisions are deemed to be applicable unless opted out.
- In case an NRI opts out of Chapter XIIA, his total income for that particular year will be computed and taxed as per other normal provisions of the Act.

SECTION 115A - EXEMPTION FROM FILING INCOME TAX RETURN IN INDIA

- While section 115G under Chapter XIIA provides for exemption from filing income tax return in case of NRIs, section 115A provides for such exemption in case of all non-resident persons including foreign companies/entities, foreign national, NRIs etc.

- Section 115A of the Act provides that a non-resident whose total income (even if exceeding exemption limit) includes income by way of royalty or FTS or specified dividend or specified interest is not required to file income tax return in India provided taxes have been withheld on such income (in the nature of dividend, interest, royalty and FTS) at the rates prescribed in the Act.

- It is to be noted that exemption from filing return of income would not be available in cases where income (in the nature of dividend, interest, royalty and FTS is claimed as exempt as per the beneficial provisions of the relevant DTAA or when the non-resident opts for the rate under the relevant DTAA, which may be lower than the rate prescribed in the Act.

- In cases where the Indian payer has withheld tax at source at a higher rate, for instance, where the non-resident has not obtained a PAN in India, the person will be required to file an income tax return in case the excess tax withheld is sought to be claimed as refund.

- In several cases, considering the onerous consequences of non-withholding of tax, the Indian payer, in respect of issues that are controversial, may have withheld tax even when there was no obligation to do so to avoid litigation. For example, in case of reimbursement of expenditure, payment for purchase of off-the-shelf software etc. In such cases too, the NR shall be required to file an income tax return in order to claim a refund of taxes withheld.

- In certain cases, the foreign tax authorities may require the non-resident to furnish a copy of the income tax return filed in India for allowing claim of foreign tax credit qua taxes withheld in India. This may be required to ensure that such a person has not claimed a refund of tax withheld in India.

OTHER KEY INCOME TAX ASPECTS

TAXABILITY OF SALARY - OVERVIEW

- Salary income is taxable in India if it is towards services rendered in India or is received in India.

- Section 10(6)(vi) of the Act exempts remuneration received by a foreign citizen as an employee of a foreign enterprise for services rendered during his short stay in India, subject to the following conditions:

  - The foreign enterprise is not engaged in any trade or business in India

  - The employee's stay in India does not exceed 90 days in the aggregate during the year; and

  - Such remuneration is not deductible from the employer's income chargeable under the Act

- As per DTAAs concluded by India with various countries, the remuneration may primarily be taxed in the country where the employment is exercised. Notwithstanding this general rule, an exemption from source taxation applies if all of the following 3 conditions are met

  - the employee is present in the source country for 183 days or less in any 12-month period commencing or ending in the fiscal year concerned
  - the remuneration is paid by, or on behalf of, a non-resident employer
  - the remuneration is not borne by a PE or a fixed base of the non-resident employer, which is situated in the source country

- As per section 40(a)(iii) of the Act, any payment chargeable under the 'salaries' shall not be allowed as deduction if it is payable

  - outside India; or
  - to a non-resident

  and if tax is not deducted on such salary.

EMPLOYEES OF INDIAN COMPANY DEPUTED OUTSIDE INDIA - ISSUES

- **Whether salary received in India by non-resident employee for rendering services outside India can be subject to tax in India?**

  - The AAR in **British Gas India (P.) Ltd., In re [2006] 285 ITR 218** and **Hewlett Packard India Software Operation (P.) Ltd. [2018] 91 taxmann.com 473** held that salary is subject to tax only outside India as per DTAA, Indian employer need not deduct tax.

  - Bangalore ITAT in the case of **Smt. Maya C. Nair v. ITO [ITA No. 2407/Bang/2018, order dt. 31 October 2018]** dealt with the issue of taxability of employee deputed to US and received salary in her bank account in India. The ITAT held that salary is taxable only on accrual basis. Salary was accrued in the US since the services were rendered in the US. Thus such salary was not taxable in India.

  - However, this issue can be subject to litigation as the tax authorities may attempt to tax the salary on receipt basis unless it is proved beyond doubt that salary was accrued outside India and no services were rendered in India or no services were rendered to the Indian entity from outside India.

TAXABILITY OF BUSINESS INCOME

Taxability as per provisions of the Act

- Income arising to an NRI from a business connection in India or from a business set up in India, is taxable in India. The term 'business connection' has not been defined in the Act and the same has been widely interpreted by the Indian courts.

Taxability as per provisions of DTAA

- As per the DTAA concluded by India with various countries, business income of an NRI (who is a tax resident of foreign country) would be subject to tax in India only if it carries on business in India through a PE situated in India. The term PE has been defined to include, inter-alia the following

  - A fixed place of business (i.e. office, branch etc.)
  - Furnishing of services by employees or other personnel beyond a threshold period
  - Executing installation projects beyond threshold period
  - Services of a dependent agent etc.

  If it is established that an NRI or entity controlled by an NRI has a PE in India, then profits attributable to such PE would be subject to tax in India. While calculating the profits attributable to PE, deduction of expenses attributable to PE shall be allowed (to the extent such expenses are treated as tax deductible as per provisions of the Act) and only net profits would be subject to tax in India.

CAPITAL GAINS – KEY PROVISIONS

Section 195

- Any person responsible for paying to a non-resident any sum chargeable to tax (other than salary) shall deduct tax at the time of payment/credit

Section 9(1)(i)

- All income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India.

Section 45

- Any profits or gains arising from transfer of capital asset shall be chargeable to tax under the head capital gains

Section 112(1)(c)

- LTCG on sale of unlisted shares to be taxed @ 10% (plus applicable surcharge and education cess)

Section 115E

- LTCG on transfer of the shares of the company is subject to tax @ 10% (plus applicable surcharge and education cess), without any indexation benefit in case of an NRI subscribing to the shares of the company in convertible foreign exchange, subject to the prescribed conditions.

Section 112A

- LTCG @ 10% (plus applicable surcharge and cess) exceeding INR 1 lac, arising from transfer of a listed equity share in a company or unit of an equity-oriented fund (subject to STT) or a unit of business trust

TAXATION OF LTCG

Comparative summary of taxability in the hands of NRI as per section 112(1)(c) and 115E of the Act.

Particulars	Section 115E	Section 112(1)(c)
Tax rate	10%	10%
Benefit of protection against fluctuation in foreign exchange as provided in first proviso to section 48	Available	Not available
Filing of income tax return	Not required subject to the specified conditions	Required
Exemption from LTCG (subject to further Investments)	Available under section 115F	Available under section 54EC (Maximum INR 50 lacs) and under section 54F

TAXATION OF DIVIDEND

- Prior to 1 April 2020, income distributed as dividend by domestic companies / mutual funds was chargeable to DDT in the hands of company / mutual fund. Such dividend income was exempt in the hands of the shareholders and unitholders. In case of non-resident shareholders, no credit of DDT could be claimed in their home country.

- The Finance Act, 2020 has made a landmark amendment by abolishing the DDT and resorting to classical system of taxation of dividend income.

- Having abolished DDT, withholding tax has been introduced on dividend distributed by the domestic companies, which is 20% (plus applicable surcharge and 4% cess) in case of non-residents. Non-resident shareholders can apply lower DTAA rates, if any, for taxation of dividend.

SECTION 56(2)(X)

- As per section 56(2)(x) of the Act, receipt of the sum of money or the property including shares by any person (including non-resident) without consideration or for inadequate consideration in excess of INR 50,000 shall be chargeable to tax in the hands of the recipient under the head "Income from other sources".

- Amount liable to tax under section 56(2)(x)

Receipt of	Threshold for non-taxability	Amount liable to tax
Sum of money without consideration	Not exceeding INR 50,000	Entire amount received
Immovable property without consideration	Stamp duty value not exceeding INR 50,000	Stamp duty of immovable property
Immovable property for a consideration which is less than stamp duty value	▪ Difference between stamp duty value and consideration not exceeding INR 50,000; ▪ Stamp duty value not exceeding 110% of consideration, whichever is higher	Entire difference between stamp duty value and consideration
Movable property without consideration	FMV not exceeding INR 50,000	Entire FMV
Movable property received for a consideration which is less than FMV	Difference between FMV and consideration not exceeding INR 50,000	Entire difference

SECTION 56(2)(X) - EXCEPTIONS

Exceptions – Section 56(2)(x) not to apply to the any sum of money or any property received

- from any relative
- on the occasion of the marriage of the individual
- under a will or by way of inheritance
- in contemplation of death of the payer or donor
- from any local authority as defined in the Explanation to section 10(20)
- from any fund or foundation or university or other educational institution or hospital or other medical institution or any trust or institution referred to section 10(23C)
- from or by any trust or institution registered under section 12A or section 12AA
- by any fund or trust or institution or any university or other educational institution or any hospital or other medical institution referred to section 10(23C)
- by way of transaction not regarded as transfer under section 47, such as partition of HUF, transfer by WOS to Indian holding company, transfer by a company to its Indian WOS, transfer of capital asset on amalgamation or demerger or business reorganisation
- from an individual by a trust created or established solely for the benefit of relative of the individual

SECTION 56(2)(X) – TAXABILITY IN THE HANDS OF NON-RESIDENTS

- Section 9(1)(viii) as proposed in the Finance (No. 2) Bill, 2019 had covered income '*…arising from any sum of money paid, or any property situate in India transferred...*'

- However, section 9(1)(viii) as enacted reads as '*income arising outside India, being any sum of money referred to in sub-clause (xviia) of clause (24) of section 2 ...*'

- As per section 2(24)(xviia), income includes "*any sum of money or value of property referred to in clause (x) of sub-section (2) of section 56*".

- As compared to the proposed section, the finally enacted section excludes income arising from transfer of property situated in India from the ambit of section 9(1)(viii) leaving the amendment only in respect of sum of money paid without consideration. Further, the phrase "person outside India" is replaced with "non-resident, not being a company or a foreign company". Thus the scope of taxability under section 9(1)(viii) of the Act is restricted to sum of money (without consideration) received by a non-resident from a resident.

- In view of the above, issue arises as to whether transfer of property to a non-resident is out of the purview of section 56(2)(x) since gift of property situated in India is not covered by section 9(1)(viii).

- However, it appears that income of the nature referred to in section 2(24)(xviia) arising from any property situated in India transferred, by a person resident in India to a non-resident is still not out of the scope of taxation since

  - the existing section 9(1)(i) of the Act provides that all income accruing or arising whether directly or indirectly, from any property in India and/or through the transfer of a capital asset situate in India shall be deemed to accrue or arise in India.
  - section 2(24) of the Act includes transfer of a property as per section 56(2)(x) of the Act.
  - for section 56(2)(x) of the Act, the term "property" is defined under section 56(2)(vii) of the Act and it includes specified nine items (including immovable property).

WITHHOLDING TAX ON PAYMENTS TO NRIs - OVERVIEW

- As per section 195 of the Act, tax is required to be withheld at source when any payment is made to a non-resident, if the amounts paid represent income of the non-resident chargeable to tax in India.

- The provisions pertaining to withholding taxes are different for salary and payments other than salaries.

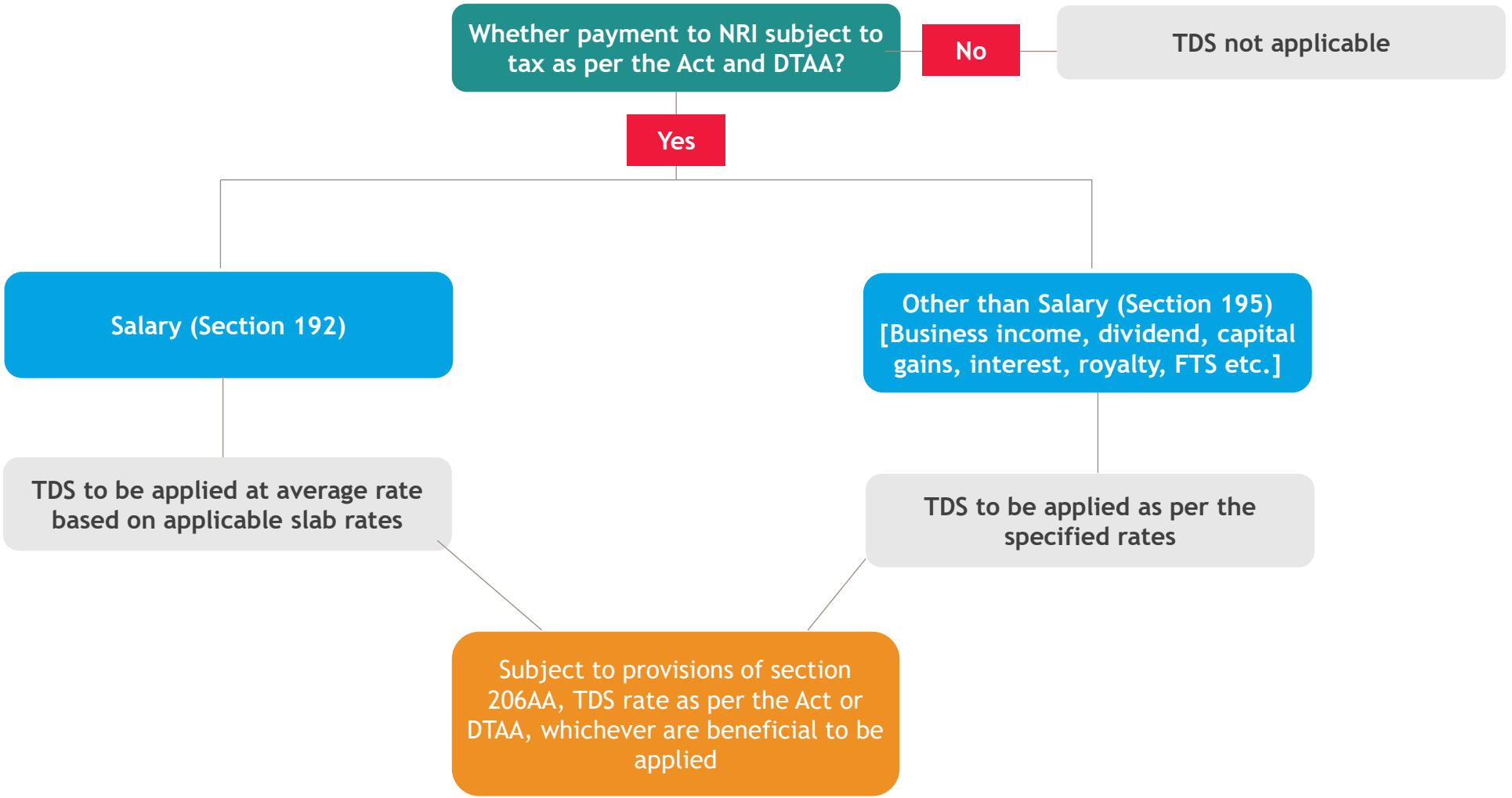
- Section 192 of the Act governs the withholding tax provisions when payment is made by an employer to a non-resident employee. It requires the employer to pay salary after withholding tax calculated on the basis of average tax rates applicable to the employee.

- Section 195 of the Act governs payments other than salaries. It requires the payer to deduct tax based on rates in force as specified in the Finance Act. Further, he is required to check the applicable DTAA provisions. The income may not be chargeable to tax as per the DTAA or may be taxable at a lower rate. If the provisions of the DTAA are more beneficial, he can consider the same while withholding taxes.

- As per section 206AA of the Act, higher withholding tax rate would apply if the payee (including non-resident) does not provide PAN or specified documents/details (in the absence of PAN) viz. Tax Residency Certificate, form 10F and other specified details).

  Failure to obtain PAN or specified documents / details by the non-resident (payee) could result in a withholding tax rate at the higher of the following:
  - Rate specified in the Act
  - Rates in force i.e. rates specified in the Finance Act or DTAA
  - 20%

WITHHOLDING TAX ON PAYMENTS TO NRIs - OVERVIEW



WITHHOLDING TAX ON CERTAIN PAYMENTS

Towards purchase of property from NRI

- Tax is required to be deducted by the buyer as per provisions of section 195.
- In case the property is held for more than 2 years, then there would be LTCG and tax @ 20% (plus applicable surcharge and 4% cess) is required to be deducted.
- In case the property is held for less than 2 years, then STCG would arise tax subject to TDS @ 30% (plus applicable surcharge and 4% cess)
- NRI can apply for certificate for lower TDS rate from income tax authorities if capital gains tax liability is less than 20%/30%.
- The amount on which tax is to be deducted in case of purchase of property from NRI depends on the following two situations:
  - When the certificate of computation of capital gain and rate of TDS has been obtained from the tax authorities – As per the certificate
  - When the certificate of computation of Capital Gain has not been obtained from the tax authorities
    - on the capital gains amount
    - If computation of capital gains is not available, on the entire transaction value
- Relevant compliances in respect of withholding tax
  - The buyer is required to deduct the tax within earlier of date of payment or date of credit of income.
  - Obtain CA certificate in Form 15CB and file Form 15CA.
  - The buyer is required to deposit the tax so deducted to the Government within a period of 7 days from the end of the month in which the tax has been deducted.
  - The buyer is required to submit the TDS return in Form 27Q within 1 month from the end of the quarter except in case of March quarter where it is to be filed by 31 May.
  - The buyer is required to issue Form 16A within 15 days from the due date of filing Form 27Q.

WITHHOLDING TAX ON CERTAIN PAYMENTS

Payment of dividend

- Tax is required to be withheld in accordance with the provisions of section 195 @ 20% (plus applicable surcharge and 4% cess) on the amount of dividend payable.

- However, as per section 90 of the Act, a non-resident shareholder has the option to be governed by the provisions of the DTAA between India and the country of his tax residence, if they are more beneficial to the shareholder.

- For the purpose of DTAA benefits, non-resident shareholder will have to provide the following details to the company declaring dividend:
  - Self-attested copy of PAN card, if allotted
  - Self-attested copy of valid TRC obtained from the tax authorities of the country of which the shareholder is resident
  - Self-declaration in Form 10F, if all the details required in this form are not mentioned in the TRC
  - Self-declaration by the non-resident shareholder as to:
    - Eligibility to claim DTAA benefits based on the tax residential status of the shareholder
    - No PE / fixed base in India in accordance with the applicable DTAA and the Act
    - Shareholder being the beneficial owner of the dividend income to be received on the equity shares.

Payment of rent

- In case of a non-resident landlord, the tenant is required to deduct TDS @ 30% (plus applicable surcharge and 4% cess) on rent paid to the landlord if the rental income is taxable in India.

- As per DTAAs concluded by India with various countries, rental income from property in India is subject to tax in India.

- If an NRI's total taxable income (including this rental income) in India is below the taxable limit, there is arguably no requirement for the tenant to deduct tax on the rental amount. However, the tenant is not likely to know the taxable income of the NRI and he may not have any choice but to deduct tax unless the NRIfurnishes the tenant a lower or nil TDS certificate obtained from the tax authorities.

LOWER / NIL WITHHOLDING TAX CERTIFICATE

- When the Indian payer believes that total income of non-resident payee justifies withholding of tax at a lower rate or nil rate, he can apply to the tax officer under section 195(2) requesting lower or nil withholding tax certificate.
- Non-resident payee can also make an application to the tax officer under section 195(3)/197 to determine an appropriate amount on which tax is to be deducted.
- Orders under section 195 and 197 are not appealable. The only remedy available with the applicant is to proceed with filing of application for revision of order under section 264 of the Act or moving writ petition before the jurisdictional High Court.
- It is mandatory for a non-resident payee to have PAN while applying for certificate under section 197 of the Act

Obtaining lower/nil withholding tax certificate is a time consuming process and tax authorities are generally skeptical towards issuing certificate accepting taxpayer's contention about non-applicability of withholding tax on payments to non-residents. Thus, factors such as frequency of payment, quantum of payment, judicial precedents etc. would be relevant while ascertaining whether one should approach tax authorities for lower/nil withholding tax certificate.

FATCA

- India signed an “Intergovernmental Agreement” with the US on 9 July 2015 thereby making FATCA applicable in India. FATCA is part of a comprehensive US anti-tax evasion global reporting regime designed to locate income and assets held by US persons in offshore accounts (either directly or indirectly through ownership of foreign entities) and ensure that it is reported to the US tax authorities.

- FATCA requires US persons including individuals who live outside the US, to report their financial accounts held outside of the US and requires non-US financial institutions to report details of their US clients to the relevant tax authorities.

- In general, FATCA does not apply to non-US persons. A citizen or resident of the US (including a green cardholder) would be said to be a US person.

- Prescribed financial institutions (such as banks, mutual fund houses etc) are required to furnish the relevant information in Form 61B as per Rules 114F, Rule 114G and 114H of the Income Tax Rules, 1962. For the purpose, these institutions ask for self declaration from the customers. Broadly the following details are sought:
  - Name
  - PAN/Aadhar no.
  - Address
  - Place of birth
  - Country of birth
  - Nationality
  - Gross Annual Income
  - Occupation
  - Whether one is a resident of another country? If yes, the details of the country of residence, Tax ID number, and type

- The declaration specifically requires the inclusion of the US as a resident country if an individual is a US citizen or a green cardholder. This is valid even if such individual has moved to India and is presently an Indian resident. As a result of this disclosure, the tax authorities would have access to all the required information. Further, in case of any change in the above information, it is mandatory to inform the concerned financial institution within 30 days of the change.

KEY CONSIDERATIONS UNDER FEMA

INVESTMENT ON NON-REPATRIATION BASIS

Investment in equity instruments or convertible notes or units or contribution to the capital of an LLP on Non-Repatriation basis

- NRIs/OCIs including a company, a trust and a partnership firm incorporated outside India and owned and controlled by NRIs/OCIs may purchase/contribute, as the case may be, on non-repatriation basis the following:
  - Any equity instrument issued by a company without any limit either on the stock exchange or outside it.
  - Units issued by an investment vehicle without any limit, either on the stock exchange or outside it.
  - The capital of an LLP without any limit.
  - Convertible notes issued by a startup company in accordance with the specified rules.

Prohibition on purchase of equity instruments of certain companies

- NRIs/OCIs including a company, a trust and a partnership firm incorporated outside India and owned and controlled by NRIs/OCIs, shall not make any investment in equity instruments or units of a Nidhi company or a company engaged in agricultural/ plantation activities or real estate business or construction of farm-houses or dealing in Transferable Development Rights.

INVESTMENT ON NON-REPATRIATION BASIS

Other investments

- An NRI/OCI may without limit purchase or sell units of domestic mutual funds on non-repatriation basis, which invest more than 50% in equity.

Investment in a firm or a proprietary concern

- An NRI/OCI may invest, on a non-repatriation basis, by way of contribution to the capital of a firm/proprietary concern in India provided such firm/proprietary concern is not engaged in any agricultural/ plantation activity or print media or real estate business.

Investment in other than equity instruments (debt instruments)

- An NRI/OCI may, without limit, purchase the following debt instruments on non-repatriation basis

  - Government securities, treasury bills, units of domestic mutual funds or ETFs or Savings Certificates.
  - Listed non-convertible/redeemable preference shares or debentures issued on account of merger or demerger or amalgamation of Indian companies.

The investment made by NRI/OCI on non-repatriation basis will be deemed to be domestic investment at par with the investment made by residents.

INVESTMENT ON REPATRIATION BASIS

Investments in equity instruments on repatriation basis

- NRI/OCI can make investment in equity instrument of Indian entities (other than listed securities) subject to sectoral cap, pricing guidelines and other prescribed conditions.

Investment in IDRs

- An NRI/OCI may purchase, hold, or sell IDRs of companies resident outside India and issued in the Indian capital market, subject to the prescribed terms and conditions.

Investment in equity instruments of a listed Indian company

- An NR/OCI may, purchase or sell equity instruments of a listed Indian company on repatriation basis, on a recognized stock exchange in India, subject to the following conditions:
  - Purchase and sale should be through AD bank.
  - The total holding by any individual NRI/OCI should not exceed 5% of the total paid-up equity capital on a fully diluted basis or should not exceed 5% of the paid-up value of each series of debentures or preference shares or warrants issued by an Indian company.
  - The total holdings of all NRIs and OCIs put together should not exceed 10% of the total paid-up equity capital on a fully diluted basis or should not exceed 10% of the paid-up value of each series of debentures or preference shares or warrants. The aggregate ceiling of 10% can be raised to 24% if a special resolution to that effect is passed by the Indian company.
  - The amount of consideration shall be paid as inward remittance from abroad through banking channels or out of funds held in a NRE account. The NRE account will be designated as an NRE (PIS) Account and the designated account shall be used exclusively for putting through such transactions.

REMITTANCE FACILITIES FOR NRIs

General

- NRIs are permitted to remit outside India almost all incomes arising in India. Income such as rent, dividend, pension, interest from NRO account, share of partnership firms, interest from loans / deposits / debentures, etc. are allowed to be repatriated out of NRO account and / or credit of such income into NRE account.

- In case of NRIs not maintaining NRO account, the RBI has directed the AD banks to obtain CA certificate certifying eligibility of proposed remittance and payment/provision of applicable taxes.

- Repatriation of proceeds from sale of house property is restricted to maximum two such properties.

Remittance up to USD 1 million

- An NRI or a PIO may remit an amount up to USD 1 million, per FY, out of the balances held in his NRO account / sale proceeds of assets (inclusive of assets acquired by way of inheritance or settlement), for all bona fide purposes, subject to payment of applicable taxes in India.

- NRIs seeking repatriation are required to apply through the AD Bank in prescribed forms together with documents as regards source of NRO balances and payment of tax being in place and CA certificate certifying tax applicable and payment thereof.

- In respect of remittance of sale proceeds of assets acquired by way of inheritance or legacy or settlement, NRI/PIO should submit to the AD Bank documentary evidence in support of inheritance or legacy of the property is received by NRI/PIO by way of settlement. It may be reckoned as transfer by way of gift and the remittance of sale proceeds of such property would be guided by the extant instructions on remittance of balance in the NRO account.

- Where the remittance as above is made in more than one instalment, the remittance of all such instalments shall be made through the same AD Bank.

REMITTANCE FACILITIES FOR NRIs

Remittance of salary

- A person who is resident but not permanently resident in India and
  - is a citizen of a foreign state other than Pakistan; or
  - is a citizen of India, who is on deputation to the office or branch of a foreign company or subsidiary or joint venture in India of such foreign company,

  may make remittance up to his net salary (after deduction of taxes, contribution to provident fund and other deductions).

  For the aforesaid purpose, **a** resident but not permanently resident is a person resident in India on account of his employment or deputation of a specified duration (irrespective of length thereof) or for a specific job or assignments, the duration of which does not exceed 3 years.

- A citizen of a foreign state resident in India being in employment with a company incorporated in India may open, hold and maintain a foreign currency account with a bank outside India and remit the whole salary received in India in INR, to such account, for the services rendered to the Indian company, provided that applicable tax is paid on the entire salary accrued in India.

- Foreign nationals who come to India on employment and become residents as per FEMA and are eligible to open/hold a resident savings bank account, are permitted to re-designate their resident account maintained in India as NRO account on leaving the country after their employment to enable them to receive their legitimate dues subject to certain conditions.

Indian students studying abroad

- Students going abroad for studies are treated as NRIs and are eligible for all the facilities available to NRIs under FEMA. As non-residents, they will be eligible to receive remittances from India up to
  - Limits prescribed under the LRS which would include remittances from close relatives in India towards maintenance and remittances towards their studies. However, for the purpose of studies, the limits would be as demanded by the university abroad; and
  - USD 1 million per FY out of sale proceeds of assets / balances in their NRO account.

ACQUISITION AND TRANSFER OF IMMOVABLE PROPERTY IN INDIA BY NRIs

Acquisition of immovable property

- As per section 6(5) of FEMA, a person resident outside India can hold, own, transfer or invest in any immovable property situated in India if such property was acquired, held or owned by him when he was resident in India or inherited from a person resident in India.

- NRI/OCI are permitted to acquire immovable property (residential or commercial) in India as follows
  - Purchase any immovable property in India other than agricultural land/ farmhouse/plantation property.
  - Acquire any immovable property in India (other than agricultural land/ farmhouse/plantation property) by way of gift from a person resident in India or from an NRI/OCI, who is a relative as defined in section 2(77) of the Companies Act, 2013.
  - Acquire any immovable property in India by way of inheritance from a person resident outside India who had acquired such property
    - in accordance with the provisions of the foreign exchange law in force at the time of acquisition by him or the provisions of FEMA
    - from a person resident in India.

- NRIs/OCIs can make payment for acquisition of immovable property out of funds received in India through banking channels by way of inward remittance from any place outside India or by debit to their NRE/ FCNR (B)/ NRO account

- A person resident outside India, not being an NRI/OCI, who is a spouse of an NRI/OCI may acquire one immovable property (other than agricultural land/ farmhouse/ plantation property), jointly with his/her NRI/ OCI spouse subject to the following conditions:
  - Consideration for transfer shall be made out of funds received in India through banking channels by way of inward remittance from any place outside India or by debit to non-resident account of the person concerned.
  - The marriage should have been registered and subsisted for a continuous period of not less than 2 years immediately preceding the acquisition of such property.

ACQUISITION AND TRANSFER OF IMMOVABLE PROPERTY IN INDIA BY NRIs

Transfer of immovable property

- NRI/OCI are permitted to transfer immovable property as follows
  - transfer any immovable property in India to a person resident in India.
  - transfer any immovable property (other than agricultural land/ farmhouse/plantation property) to an NRI or an OCI.
  - In case of transfer by way of gift, the transferee should be a relative as defined in section 2(77) of the Companies Act, 2013.

Repatriation of sale proceeds of immovable property

- Repatriation of sale proceeds is allowed subject to the following conditions
  - The immovable property was acquired by the seller in accordance with the provisions of the foreign exchange law in force at the time of his acquisition or the provisions of FEMA.
  - The amount for acquisition of the immovable property was paid in foreign exchange received through banking channels or out of funds held in FCNR Account or out of funds held in NRE account.
  - In case of residential property, the repatriation of sale proceeds is restricted to not more than 2 such properties.
  - An NRI/OCI, can repatriate sales proceeds of assets up to USD 1 million per FY.

Citizens of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal, Bhutan, Macau, Hong Kong and Democratic People's Republic of Korea cannot acquire or transfer immovable property in India (other than on lease, not exceeding 5 years) without prior permission of the RBI. For this purpose, the term "citizen" shall include natural persons and legal entities. The said prohibition shall not apply to an OCI.

GIFTS FROM/TO NRIs

- **Gifts by NRIs**

  There are no restrictions on maximum limit of remittances by NRIs to their relatives or non-relatives as per the FEMA. However, gifts to non-relatives will have income tax consequences.

- **Gifts to NRIs**

  A resident individual is permitted to make a rupee gift to an NRI/PIO who is a relative of the resident individual (relative as defined in section 2(77) of the Companies Act, 2013 under the LRS. The relevant conditions in respect of the same are as under:
  - Payment should be made by way of crossed cheque /electronic transfer
  - The amount should be credited to the NRO account of the NRI/PIO and credit of such gift amount may be treated as an eligible credit to NRO account.
  - The gift amount would be within the overall limit of USD 250,000 per FY as permitted under the LRS for a resident individual.
  - It would be the responsibility of the resident donor to ensure that the gift amount is within the LRS limit and all the remittances made by the donor during the FY including the gift amount have not exceeded the limit prescribed under the LRS.

- **Gift of shares of Indian company from resident individual to an NRI**

  A resident individual holding equity instruments (equity shares, debentures, preference shares and share warrants) in an Indian company may transfer such equity instruments to an NRI/OCI by way of a gift subject to a prior approval from the RBI and fulfillment of the following conditions:
  - The recipient is eligible to hold such a security under relevant Regulations.
  - The gift does not exceed 5% of the paid-up capital of the Indian company/each series of debentures/ each mutual fund scheme.
  - The applicable sectoral cap for FDI in the Indian company is not breached.
  - The donor and the recipient are ‘relatives’ within the meaning in section 2(77) of the Companies Act, 2013; and
  - The value of security to be transferred by the donor together with any security transferred to any person residing outside India as gift during the financial year does not exceed the rupee equivalent of USD 50,000

BORROWING AND LENDING IN FOREIGN CURRENCY/INDIAN RUPEES

Borrowing in foreign exchange by a resident individual from a person resident outside India

- An individual resident in India may borrow a sum not exceeding USD 250,000 or its equivalent from his/her relatives outside India subject to the terms and conditions specified by the RBI.

- An individual resident in India studying abroad may raise loan outside India not exceeding USD 250,000 or its equivalent, for the purposes of payment of education fees abroad and maintenance subject to the terms and conditions specified by the RBI.

Borrowing in Indian Rupees by a resident individual from a person resident outside India

- A person resident in India (other than a company), may borrow in INR from an NRI or relatives who are OCI Cardholders outside India, subject to the following conditions.

  - Borrowing shall be only on a non-repatriation basis
  - The amount of loan should be received either by inward remittance from outside India or by debit to NRE/NRO/FCNR(B)/NRNR/NRSR account of the lender, maintained with an AD bank in India
  - Period of loan shall not exceed 3 years
  - Rate of interest on the loan shall not be more than 2% above bank rate prevailing on the date of availing loan
  - Payment of interest and repayment of principal shall be made only to the NRO account of the lender.

BORROWING AND LENDING IN FOREIGN CURRENCY/INDIAN RUPEES

Lending in foreign currency

- Branches outside India of AD banks may extend foreign exchange loans against the security of funds held in NRE/ FCNR deposit accounts or any other account as specified by the RBI from time to time, maintained in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016.

- AD banks in India can grant loans against the security of the funds held in NRE accounts to the account holder/third party in India, without any limits, subject to the usual margin requirements. The loan cannot be repatriated outside India and shall be used for the following purposes:
  - Personal purposes or for carrying on business activities except for the purpose of relending or carrying on agricultural/plantation activities or for investment in real estate business
  - Making direct investment in India on non-repatriation basis by way of contribution to the capital of Indian firms/companies.
  - Acquiring flat/house in India for his own residential use

Lending in INR

- An AD bank may grant loan to an NRI/OCI for meeting the personal requirements/own business purposes/acquisition of a residential accommodation in India/ acquisition of motor vehicle in India / or for any purpose as per the loan policy laid down by the AD bank and in compliance with prudential guidelines of the RBI.
- A registered NBFC in India or a registered housing finance institution in India or any other financial institution as may be specified by the RBI, may provide residential housing loan, as the case may be, to a NRI/OCI Cardholder subject to such terms and conditions prescribed by the RBI.
- An Indian entity may grant loan in INR to its employee who is a NRI/OCI in accordance with the Staff Welfare Scheme subject to such terms and conditions prescribed by the RBI.

BORROWING AND LENDING IN FOREIGN CURRENCY/INDIAN RUPEES

Lending in INR..contd.

- A resident individual may grant INR loan to a NRI relative by way of crossed cheque/electronic transfer subject to the following terms and conditions:

  - The loan is free of interest and the minimum maturity of the loan is 1 year;
  - The loan amount should be within the overall limit under the LRS per FY available for a resident individual, who shall ensure that the applicable limit is not breached
  - The proceeds shall be utilised only for the own business of the borrower other than carrying on agricultural/plantation/real estate business, trading in transferable development rights and construction of farm houses
  - The loan amount shall not be remitted outside India but shall be credited to the NRO account of the borrower
  - Repayment of loan shall be made by way of inward remittances from outside India or by debit to the NRO/NRE/FCNR(B) account of the borrower or out of the sale proceeds of the shares or securities or immovable property against which such loan was granted.

THANK YOU

Ahmedabad
The First, Block C 907 & 908
Behind ITC Narmada, Keshavbaug
Vastrapur, Ahmedabad 380015, INDIA
Tel: +91 79 6816 1600

Bengaluru Office 1
Floor 6, No. 5,Prestige Khoday Tower
Raj Bhavan Road
Bengaluru 560001, INDIA
Tel: +91 80 6815 0000

Bengaluru Office 2
SV Tower, No. 27, Floor 4
80 Feet Road, 6th Block, Koramangala
Bengaluru 560095, INDIA
Tel: +91 80 6811 1600

Chennai
No. 443 & 445, Floor 5, Main Building
Guna Complex, Mount Road, Teynampet
Chennai 600018, INDIA
Tel: +91 44 6131 0200

Delhi NCR Office 1
The Palm Springs Plaza
Office No. 1501 10, Sector 54
Golf Course Road
Gurugram 122001, INDIA
Tel: +91 124 281 9000

Delhi NCR Office 2
Windsor IT Park, Plot No: A-1
Floor 2, Tower-B, Sector 125
Noida 201301, INDIA
Tel: +91 120 684 8000

Goa
701, Kamat Towers
9, EDC Complex, Patto Plaza
Panaji, Goa 403001, INDIA
Tel: +91 832 664 4842

Hyderabad
1101/B, Manjeera Trinity Corporate
JNTU-Hitech City Road, Kukatpally
Hyderabad 500072, INDIA
Tel: +91 40 6814 2999

Kochi
XL/215 A, Krishna Kripa
Layam Road, Ernakulam
Kochi 682011, INDIA
Tel: +91 484 430 0663

Kolkata
Floor 4, Duckback House
41, Shakespeare Sarani
Kolkata 700017, INDIA
Tel: +91 33 6766 1600

Mumbai Office 1
The Ruby, Level 9, North West Wing
Senapati Bapat Marg, Dadar (W)
Mumbai 400028, INDIA
Tel: +91 22 6277 1600

Mumbai Office 2
Floor 2, Enterprise Centre
Nehru Road, Near Domestic Airport
Vile Parle (E), Mumbai 400099, INDIA
Tel: +91 22 3358 9700

Mumbai Office 3
Floor 6, Raheja Titanium
Western Express Highway, Geetanjali
Railway Colony, Ram Nagar, Goregaon (E)
Mumbai 400063, INDIA
Tel: +91 22 6831 1600

Pune
Floor 6, Building No. 1
Cerebrum IT Park, Kalyani Nagar
Pune 411014, INDIA
Tel: +91 20 6763 3400

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