

CONFUSION WORSE CONFOUNDED – RECENT AMENDMENTS TO SECTION 6 OF THE INCOME-TAX ACT, 1961



Anil Harish
[View Profile](#)

Published : August 15, 2020

1. When John Milton in "Paradise Lost" created the most striking and memorable phrase, "confusion worse confounded", he could not possibly have imagined that three and a half centuries later, these words would be considered apt to describe a provision of the laws of a country called India!

2. Sec.6 of the Income-tax Act, 1961 ("IT Act") which contains the provisions relating to the status of Non Residents should be a clear section which defines the status objectively. However, over a period of time, this section has become very complex with the introduction of clauses and sub-clauses and Explanations and the addition of different tests for determining whether a person is Resident and Ordinarily Resident ("ROR") or Non Resident ("NR") Resident but not Ordinarily Resident ("RNOR").

3. The Finance Bill, 2020 proposed certain amendments to Sec.6. However, there were immediate protests against the proposed amendments and the Government, presumably, realized that the amendment would affect the Indian diaspora very prejudicially and would result in many Non Residents giving up their Indian citizenship and withdrawing their funds from India. Accordingly, the amendments proposed were not introduced in that form, but were further modified and the Finance Act, 2020 came to contain a different set of words.

4. The meaning of the recent amendments is now sought to be understood and while doing this, one should also look at the overall structure of sec.6, to decipher it.

5. Many issues and questions arise on a reading of this section. However, this article will attempt to explain the provisions as they will apply in most cases, without too much reference to the possible legal issues, as those issues will need a sequel !

6. Sec.5 of the Income-tax Act which relates to scope of total income, must first be considered .

* Resident or Non-Resident. The category of "Resident" is further subdivided into two, "Resident and Ordinarily Resident" ("ROR") and "Resident but Not Ordinarily Resident" ("RNOR"). So, effectively there are 3 kinds of status - (a) ROR (i.e. Resident and Ordinarily Resident) ; (b) NR (i.e. Non-Resident) and (c) RNOR (i.e. Resident but Not Ordinarily Resident).

7. In essence, Sec.5 states that if a person is ROR i.e. Resident and Ordinarily Resident of India, then he is liable to declare to the Indian Tax Authorities his worldwide assets and is liable to pay tax in India on his worldwide income.

RECENT ARTICLES

BAIL AND ANTICIPATORY BAIL

- By Haresh Jagtiani

INVESTMENT ADVISERS, PAY HEED

- By Agram Legal Consultants

INHERITANCE OF IMMOVABLE PROPERTY IN INDIA BY AN NRI/OCI CARDHOLDER

- By Divya Alexander

8. In the event that a person is NR, i.e. Non-Resident, then the person is liable to pay tax in India on Indian income but is not required to declare his overseas income and assets to the Tax Authorities in India, nor has he to pay tax in India on the overseas income.

9. The third status referred to in section 5 is RNOR. After a person has been Non Resident of India for a number of years or has spent a substantial amount of time outside India for a number of years, he is then allowed some latitude. So, if, for example, a person has been NR for the requisite period in the past, and has then spent time in India in a later year, he may be Resident of India for that later year, if one were to consider only his stay in that later year. However, on account of the past, he may be treated as RNOR. This is therefore a double barreled status : "R" if one looks at that year alone; and "NOR" if one looks at the past or other relevant factors. This would mean that his Indian income would continue to be taxed in India, of course, but his overseas assets and overseas income would not be required to be declared or taxed in India. (There is an exception to this and that is if a person is RNOR and has a business controlled in India or a profession set up in India, then if that Indian business or professional activity has overseas income, then that overseas income will be taxable in India). The RNOR status is therefore, a kind of grace period.

10. Sec.6 then goes on to define the broad status of R, the status of NR and the status of the sub category of RNOR, and by implication, the sub category of "Resident and Ordinarily Resident".

11. As a result of the recent amendments, there are now three clauses of sec.6 which relate to the residential status of an individual. The other clauses relate to companies, firms etc. These 3 clauses which relate to individuals are sec.6(1) as amended, new sec.6(1A) and sec. 6(6) as amended. These are set out below, for ready reference –

6 (1) An individual is said to be resident in India in any previous year, if he-

(a) is in India in that year for a period or periods amounting in all to one hundred and eighty-two days or more ; or

*(b) [***]*

(c) 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.

Explanation 1 – In the case of an individual,–

a. being a citizen of India, who leaves India in any previous year as a member of the crew of an Indian ship as defined in clause (18) of section 3 of the Merchant Shipping Act, 1958 (44 of 1958), or for the purposes of employment outside India, the provisions of sub-clause (c) shall apply in relation to that year as if for the words "sixty days", occurring therein, the words "one hundred and eighty-two days" had been substituted ;

b. being a citizen of India, or a person of Indian origin within the meaning of Explanation to clause (e) of section 115C, who, being outside India, comes on a visit to India in any previous year, the provisions of sub-clause (c) shall apply in relation to that year as if for the words "sixty days", occurring therein, the words "one hundred and eighty-two days" had been substituted and in case of the citizen or person of Indian origin having total income, other than the income from foreign sources, exceeding fifteen lakh rupees during the previous year, for the words "sixty days" occurring therein, the words "one hundred and twenty days" had been substituted].



Explanation 2.—For the purposes of this clause, in the case of an individual, being a citizen of India and a member of the crew of a foreign bound ship leaving India, the period or periods of stay in India shall, in respect of such voyage, be determined in the manner and subject to such conditions as may be prescribed.

Following clause (1A) shall be inserted after clause (1) of section 6 by the Finance Act, 2020, w.e.f. 1-4-2021:

(1A) Notwithstanding anything contained in clause (1), an individual, being a citizen of India, having total income, other than the income from foreign sources, exceeding fifteen lakh rupees during the previous year shall be deemed to be resident in India in that previous year, 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.

(6) 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 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; or

(b) a Hindu undivided family whose manager has been a non-resident in India in nine out of the ten previous years preceding that year, or has 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 ; or

(c) a citizen of India, or a person of Indian origin, having total income, other than the income from foreign sources, exceeding fifteen lakh rupees during the previous year, as referred to in clause (b) of Explanation 1 to clause (1), who has been in India for a period or periods amounting in all to one hundred and twenty days or more but less than one hundred and eighty-two days; or

(d) a citizen of India who is deemed to be resident in India under clause (1A).

Explanation.—For the purposes of this section, 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)]."

11. Sec.6(1)(a) states that an individual will be Resident of India if he is in India for 182 days or more. Accordingly, if a person is in India for 182 days or more, than he cannot be Non Resident. He will be Resident but could fall in either of the sub-classifications of Resident, i.e. ROR "Resident and Ordinarily Resident" or RNOR "Resident but Not Ordinarily Resident".

12. Sec. 6(1)(c) sets out further conditions. This says that a person is resident in India if, in the 4 years preceding that year, he has been in India for 365 days or more and is in India, in that year, for 60 days or more.

13. Thus, if a person is in India for up to 59 days in a year, then he is clearly Non-Resident according to this sub-clause as it stands.

14. If, however, he is in India for 60 days or more, there are different possibilities.

15. Explanation 1 has two clauses, (a) and (b). Clause (a) states that:-

- a citizen of India
- who leaves India in any previous year (i.e. Financial Year, i.e. April through March, hereinafter referred to as "F.Y.");



- as a member of the crew of an Indian ship, or for the purpose of employment outside India, then he may stay in India for up to 181 days in that FY and will be Non-Resident.

16. On this basis, a citizen of India who leaves India for employment is permitted to stay up to 181 days in India in that F.Y. and will still be treated as Non-Resident, even though he has spent more than 365 days in India in the preceding 4 years. This is because there are two conditions in Sec.6(1)(c), and it is only if both conditions are satisfied that the person would be Resident.

17. However, if he does not leave India for employment then cl.(a) of Explanation 1 will not apply to him and the words of sec.6(1)(c) will apply and therefore if he has spent more than 365 days in India in the last 4 years, he will have to restrict his stay in India to 59 days in that FY, if he wants to be Non Resident in that F.Y.

18. Cl. (b) of Explanation 1 relates to a different situation. As India began to open up in the 1980s and 1990s and as travel became easier, many Non Residents began to spend more and more time in India. The law then was amended on several occasions and as a result of these amendments, if a person who had been Non-Resident visited India, then he would not be restricted to 59 days (as referred to in Section 6(1)(c)), but would be entitled to be in India up to 181 days and still be Non-Resident.

19. This was very useful for a Non Resident person who was visiting India for long periods of time.

20. An amendment has been made by the Finance Act 2020 to this clause (b). It now says that:-

- an Indian Citizen or person of Indian origin (as defined in Sec.115C,
- having total income (other than foreign income)
- exceeding Rs. 15 lakhs during the previous year

will be permitted to stay for upto 119 days and not 181 days, as it was pre-amendment in India in order to be Non Resident for that year.

21. This would then mean that a citizen or PIO who has income of upto Rs. 15 lakhs in a year in India may visit India for upto 181 days and will be treated as Non Resident.

22. If, however, his Indian income exceeds Rs. 15 lakhs, then he may be in India only upto 119 days in order to be Non Resident.

23. Explanation 2 to section 6 refers to:-

- An individual
- Being a citizen of India
- And a member of the crew of a foreign bound ship leaving India.

For such a person, the period of periods of stay in India shall be determined in the manner and subject to such conditions as are set out in Rule 126 of the Income-tax Rules 1962.

24. Rule 126 states that in case of a Citizen of India who is a member of the crew of a ship, the period of time from joining the ship till the date of signing off in respect of that voyage, as evidenced by a CDC (Continuous Discharge Certificate), will be excluded from the period of time spent in India. An eligible voyage, for this purpose, is one from a port in India to a port outside India, or vice versa.

25. A new clause (1A) has been inserted in sec.6.



This states that:-

- Notwithstanding anything contained in clause(1)
- An individual, being a citizen of India
- Having total income in India
- Exceeding Rs. 15 lakhs during the F.Y.
- Shall be “deemed to be resident” in India in that F.Y.
- 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

26. This clause, therefore, creates a new category of persons, i.e. those who are “deemed to be Resident in India”.

27. This new clause would have created complications for many persons, and in particular for persons who live in the UAE and for seafarers etc.. However, sec.6(6)(d), which is discussed below, states that a citizen of India who is deemed to be resident of India under clause (1A) shall be treated as RNOR. The effect of Sec.6(6)(d) is that such a person will still not be liable to tax in India on overseas income (unless that overseas income is derived from a business set up in India or a profession controlled from India).

28. An important part of this clause is the phrase “Notwithstanding anything contained in clause (1).....” Sec.6(1A) therefore seems to completely override sec.6(1), and therefore could mean that clause (1A) will apply to Indian Citizens, regardless of any of the provisions of section 6 (1). That could lead to many strange situations which will be discussed in a subsequent article.

29. For now it is enough to state that the impact of the new concept of “deemed to be resident of India” is substantially watered down by sec.6(6)(d).

30. Sec.6 (6) has four sub-clauses and an Explanation and refers to persons who would be treated as “not ordinarily Resident”, or RNOR, in any financial year.

31. Sec.6(6)(a) states that a person will be RNOR if such person is:-

- an Individual
- who has been Non Resident in 9 out of the preceding 10 years

OR

- Has during the 7 preceding years been in India for 729 days or less.

32. Therefore, if a person is determining his residential status for FY 2020-21, then he may consider the 10 preceding F.Ys, i.e. F.Y. 2010-11 to F.Y. 2019-20. If, in those 10 years, a person had been Non Resident for at least 9 of those years, then he would get the facility of being RNOR in F.Y. 2020-21, even if he were to stay in India for more than 59 days or 119 days or 181 days, as referred to in sec.6(1) and 6(1)(a). Those 9 years out of the preceding 10 years need not have been consecutive. Therefore a person could have been Non Resident in F.Y. 2010-11, then Resident in say, F.Y. 2011-12, and then Non Resident in F.Y. 2012-2013 to F.Y. 2019-20. In this example, he would have been Non Resident in 9 out of 10 preceding years and therefore would be eligible for the status of RNOR in F.Y. 2020-21, even though he has spent a substantial number of days in India, even as many as 365 in F.Y. 2020-21.

33. The other test laid down is an alternate one. If, therefore, a person does not satisfy the 9 out of the 10 preceding years test, he could apply the test of 729 days in the last 7 years. So while determining his status for F.Y. 2020-21, he could look at F.Y. 2013-14 up to F.Y. 2019-20. In these 7 years, if he has spent



only up to 729 days in India, then even if he were to spend more than the prescribed number of days in F.Y. 2020-21, (i.e. more than 59 days or 119 days or 181 days), he would, at worst, be RNOR.

34. Sec.6(6)(b) relates to a HUF and is, therefore, not being considered here.

35. Sec.6 (6)(c) states that a person would be RNOR if such person is:

- a citizen of India or a person of Indian origin.
- having total Indian income exceeding Rs. 15 lakhs during the F.Y
- who had been in India for between 120 and 181 days during the F.Y.

36. Thus if a citizen of India or PIO has income of upto Rs. 15 lakhs in that FY in India, then this clause will not apply. If he has income of more than Rs. 15 lakhs and if he has been in India for between 120 days and 181 days in that year then he would be RNOR for that year. The effect of this is that overseas income would not be taxable in India and is not required to be declared in India (except if it is from a business controlled in or a profession set up in India).

37. Sec.6(6)(d) is a new and brief sub-clause which states that a citizen of India who is deemed to be Resident of India under clause (1A) will be RNOR. This is important as it takes away the sting of being "deemed to be resident". Another unusual feature of this is that this status is now available for an unlimited period of time. Although the normal criterion for being NR has now been changed to 119 days in India, if a person has income of more than Rs.15 lakhs in India in FY, and 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, he can maintain this status for any number of years.

38. The possibilities under these provisions are that:-

a. A person who is in India for up to 59 days in a F.Y. would normally be Non-Resident of India for that F.Y.;

b. If a person is in India for between 60 days and 119 days then in certain circumstances he will be R, in other circumstances he would be NR and in yet other circumstances he will be RNOR;

c. If a person is in India for between 120 and 181 days then he will be R or NR or RNOR or deemed to be resident and thus RNOR;

d. If he is in India for 182 days or more then he will either be R or RNOR.

39. Study is required to see in what category one falls, in view of these multiple careful possibilities

40. In practical terms, however, on a plain vanilla basis, and not taking all the possibilities and all the possible legal issues into account,

(a) If a person has lived in India and then decides to go abroad for employment, then in that first year he should be in India for a maximum of 181 days in order to be Non Resident for that year.

(b) If he does not go abroad for employment, but for business or education or other purpose, then he may spend only upto 59 days in India in order to be NR.

(c) Having become Non Resident in a particular year, either on the basis of sub-paragraph (a) or sub-paragraph (b) above, in a subsequent year if he visits India for upto 119 days, he would be clearly Non Resident.

(d) If his Indian income exceeds Rs. 15 lakhs and he visits India for between 120 and 181 days, he would be deemed to be Resident and therefore RNOR.



(e) If he spends 182 or more days in India he would be a Resident of India. If, however, he had been outside India for 9 out of 10 years then, even though he spends 182 or more days in the year in question, he would be RNOR. Alternatively, if his stay in India was up to 729 days in the last 7 years, then he would be RNOR in the year in question.

41. There are some variations depending on whether a person is of Indian origin or not of Indian origin.

42. As can be seen, all this is highly complex as the tests that are applied are the following:-

- Whether the person is an Indian citizen or a Person of Indian origin or a foreign citizen who is not of Indian origin;
- Whether a person has spent up to 365 days in India in the last four years.
- Whether a person leaves India for employment or as a member of the crew of an Indian ship
- Whether a person is employed on a foreign bound Vessel;
- Whether a person who being out of India "visits India";
- Whether a person has more than Rs. 15 lakhs income in India or not;
- Whether a person 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.
- Whether a person has been Non Resident in India for 9 out of the 10 preceding years;
- Or has been in India for 729 days in the last 7 years.

43. There are many legal issues which can arise and they will be dealt with separately.

44. When the Finance Bill and the Budget are tabled in Parliament every year, an Explanatory Memorandum is also issued. Every year the stated objective of some of the amendments is simplification and rationalization of the law. Section 6 of the Income-tax Act is certainly one which swims against the tide and becomes more complex and irrational with the passage of time, and the regaining, or gaining, of the Paradise of clarity, is but a distant dream!

DISCLAIMER

All the content of the Site (www.valuelaw.in) is only for general information and does not constitute an advertisement or advice and should not be relied upon in making (or refraining from making) any decision. Any specific advice or

QUICK LINKS

Submit Articles/Videos
List Events
Articles/Videos
Events
Courts
Tribunals
Law Schools

GET IN TOUCH

✉ info@valuelaw.in
✉ We are appointing Campus Ambassadors, E-mail us your resume for further details.
✉ Want to reach out to an author? Send us an E-mail with your message.

SUBSCRIBE

Enter e-mail for updates

Submit

in

ig

f