

## NEWS & VIEWS

*From President's Desk...*



**Dear Professional Colleagues and Readers,**

I am honoured to take charge as 39<sup>th</sup> President of our prestigious organisation for the year 2021-22. My journey of the Association from Student Member to President of the Association was very memorable. My sincere thanks are due to my Family & my seniors for their support & guidance in this journey.

Life throws curveballs. And while there might be blockers to success, it's imperative to keep pushing with the knowledge. Even the world's most successful individuals have experienced their fair share of setbacks and hardships. There's much to learn from their challenges as well as their success.

India's foreign exchange reserves surged to all time high & touched \$609 billion. With sharp fall in COVID 19 cases in India & sharp increase in forex reserves, India is on the verge of V shaped recovery of economic growth.

Monsoon season in Mumbai has started with a bang & to enjoy nature at its best, Membership & Recreation Committee has organised Monsoon picnic at Uperdek Resort, Lonavla on 30<sup>th</sup> & 31<sup>st</sup> July 2021.

News Bulletin Committee has started with "Dreamzz Unlimited : Stories that inspire" as a part of News & Views so that young professionals can get inspirations from Seniors. Also, we will be coming up with Audio version of articles published in News & Views so that maximum Members can get benefits from it.

### **The Passion to Unlock Potential**

One needs to believe in himself to unlock potential within. Also, with widespread reach of Social Media platforms, I urge Committee members to use social media to reach out to Members & Public for spreading knowledge & communicate activities of the Association.

Lastly, I would like to convey my best wishes on the festival of Raksha Bandhan & Happy Independence Day to all readers.

*Thank you all..... Always in Gratitude*

*CA Rahul Nagda*

*"Leadership is unlocking people's potential to become better."*

*- Bill Bradley*

**August 1, 2021**

# NRI

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## SENSE OF OWNERSHIP BINDS YOU (APARIGRAHA)



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### FROM THE DESK OF CHAIRMAN

APARIGRAHA is the concept of Non-Possessiveness, Non Greed and Non-Attachment. It is one of the codes of ethical behavior. The word comes from the Sanskrit a Prefix meaning “Non” Pari meaning “On all sides” and graha meaning “To Take” “To Grab” or “To Seize”. Therefore aparigraha translates as not taking more than one needs”.

Aparigraha is the concept in which possessions should include only what is necessary at a particular stage in one's life . It is a form of Self – restraint. Possessiveness is delusion. It does not mean having a collection of things; it is the feeling of being the owner of those thing. The 'number of things' therefore does not determine an individual's possessiveness; it is the attitude he harbours toward those thing. The way he relates to them that determines his possessiveness.

Our sense of ownership is not restricted to things alone. We display feeling of ownership even toward people. A husband tries to own his wife; a father his son and a teacher, his student. Possessiveness is just another dimension of violence because no one can own another without exercising violence by talking away his independence.

Perhaps because man has no authority over himself, he tries to make up for that 'lack of command' by ruling others. We wish to become independent by making others dependent on us. But we do not realise that dependence is on both sides; both parties get tied.

We become slaves to the one's we try to possess; we get bound to them because our sense of ownership is dependent on them. If the ones we claim to own leave us, with them goes our ownership too. If our ownership is dependent on others, then how can we be called their owner?

We collect things so that they can serve us but instead, we end up serving them. Does the treasure chest look after us or do we look after it? Objects are not to be blamed. We become their slaves of our own accord. It is our perception, our thought and beliefs that brings about this slavery. How can things make anyone their slave? They are not even aware that humans believe they own them. If you are filled with desire for things, you experience bondage. With no desire, you are free.

One who has no longing to make anyone slave and does not wish to own anything or anyone – he alone his real owner in this world. He alone whose ownership is not dependent on others is truly possessive and is truly happy, peaceful, settled and secure. This is the essence of 'aparigraha' or non-possessiveness.

We accumulate things and relationship to fill the emptiness we feel inside. Since the inner deficiency could not be filled by the presence of external objects, then can giving them up fill the space? The problem is that first you wish to fill the inner chasm by collecting external things and having attained them, when you are

realize that they cannot fill the inner void, you relinquish them. However what cannot be filled with the addition of things will not be filled by subtracting them either. **Non- possessiveness does not mean giving up outer things.it means attaining inner completeness by realizing the self**, abiding in the self. Then the emptiness within is filled and frenzy to collect outer objects ceases. Having experiences inner absoluteness, the desire to either hoard of things or to give them up vanishes. Outer association drop, on their own.

When the self is realized, inner wealth is attained. The alone, does one understand how vain the efforts of collections or re announcing outer things is. Once inner completeness is attained, the hold over external things is automatically given up. Realizing that it is futile to hold on anything, one becomes non possessiveness in the midst of all.

The meaning of non- possessiveness is not to have the sense of ownership. It means transformation in one's relationship to other. When the sense of ownership wanes, it result in non- possessiveness.

*TREAT OTHERS THE WAY YOU WANT TO BE TREATED*

*REMEMBER !!!! THE SOUL IS ON A JOURNEY*

*Thank you all..... Always in Gratitude*

*CA Dinesh Shah*



# RESIDENTIAL STATUS UNDER INCOME TAX AND FEMA LAW – UNLOCKING THE CONFUSION



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Taxability in India is dependent on the residential status of an individual.

Residential Status is the starting point to determine

- the extent and scope of income taxable in India; and
- the extent to which a person shall be regulated for the cross border transactions.

The purpose and manner of determining residential status of a person is different under the ITA and FEMA. ITA is a revenue law and is only concerned with taxable income and the tax thereon. On the other hand, FEMA is a regulatory law and is concerned with the permissibility of the transactions undertaken by an individual depending upon his residential status.

So lets us try to unlock the confusion of the residential status as per the Income Tax Act (ITA) and the Foreign Exchange Management Act (FEMA).

## RESIDENTIAL STATUS OF INDIVIDUAL AS PER INCOME TAX ACT:

As per ITA, there are three categories of residential status:-

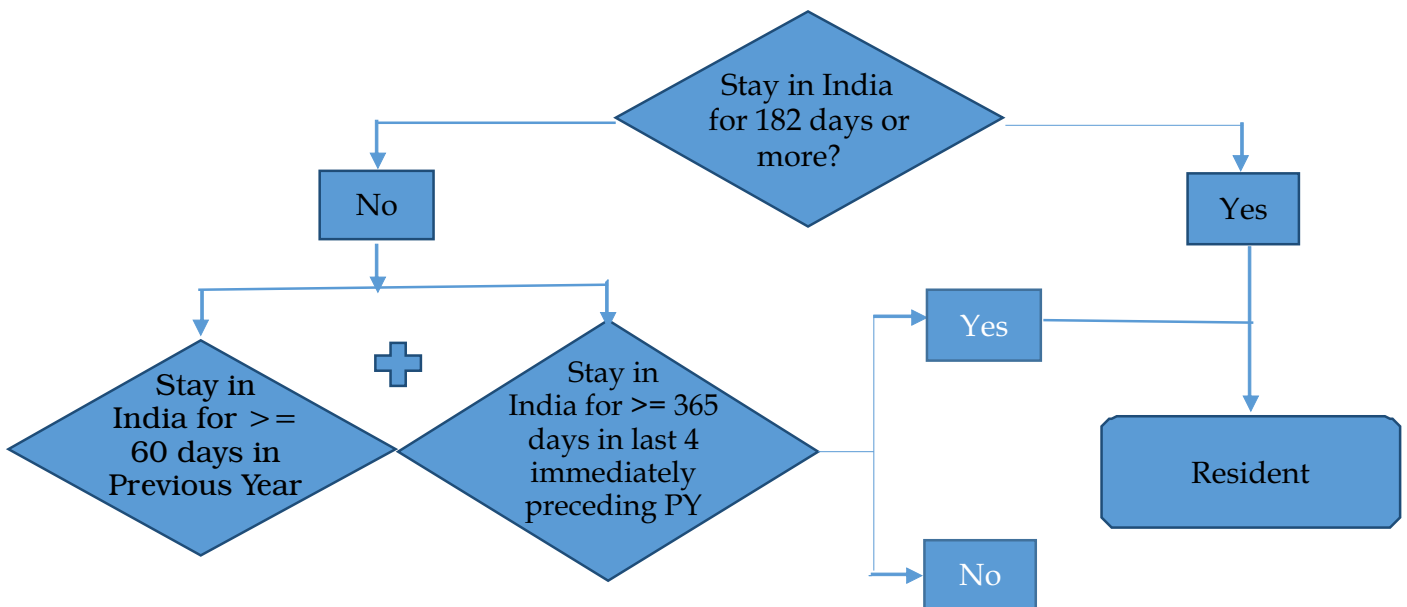
- Resident and Ordinary Resident (ROR)
- Resident and Not Ordinary Resident (RNOR)
- Non Resident Indian (NRI)

## RESIDENT AND ORDINARY RESIDENT (ROR) S.6(1):-

Section 6 of the ITA defines Residence. It is the number of days which determines the residential status. A person will be considered as a Resident of India if he satisfies any of the 2 conditions understated:-

Condition		Status
1.	He stays in India for 182 days or more in a year (S.6(1)(a))	Resident
2.	He stays in India for 60 days or more in a previous year <b>AND</b> stays for 365 days or more in the preceding four years (S. 6(1)(c)) ( <i>Cumulative conditions</i> )	Resident (subject to exceptions mentioned below) Many tend to forget to apply this second test for determining the residential status of the person





### Exceptions:-

- Relief has been provided in Explanation 1(a) to S. 6(1) for an Indian citizen who is resident in India and he leaves India for the purpose of employment outside India / as a member of ship crew. In such case, 60 days in 2<sup>nd</sup> condition has been substituted by 182 days. Hence, an Indian citizen who leaves India for employment in a year and has stayed in India for less than 182 days shall be considered as Non-Resident. The condition of 365 days in the preceding four years becomes redundant in such case.
- Similar concession has been provided in Explanation 1(b) to S. 6(1) for an Indian citizen or a Person of Indian Origin (PIO) who are outside India and comes on a visit to India.

In other words, the above categorized individuals falling in the exceptions are non-resident if they stay in India for less than 182 days i.e. they do not satisfy the 1<sup>st</sup> condition alone.

### Amendment in Explanation 2 to Section 6(1) vide Finance Act, 2020:-

The Finance Act, 2020 (w.e.f. AY 2021-22) has amended the above exception to provide that the period of 60 days as mentioned in condition (2) above shall be substituted with 120 days, if an Indian citizen or POI has total income, other than income from foreign sources, exceeds Rs. 15 lakhs during the previous year.

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).

The following table summarizes the exception to the basic test of residential status:

Citizen of India / PIO	Indian Income > Rs.15L	Residing in India for 120 days or more	Amendment Applicable u/s 6(1)
Y	Y	Y	Y
Y	N	Y	N
Y	Y	N	N
N	Y	Y	N

**Derived from a business controlled in or Profession set up in India:-**

Indian Income means Total Income earned in India + Income accrued or arisen outside India from business controlled in India or Profession set up in India.

Eg.:- Mr. A, and Indian citizen, is a Chartered Accountant having certificate of Practice from Chartered Accountants of India. He has his set up in India and a branch outside India. He advises mostly foreign clients and as such he is normally in his foreign branch for more than 182 days every year. He performs his backend operations from his office in India and during AY 2021-22, his stay in India is for 125 days. His income from Indian clientele is Rs.75 lakhs while his professional fees from foreign clients is Rs.2.25 crores.

Prior to the amendment, Mr. A is a non-resident and hence his income from Indian sources of Rs.75 lakhs was subject to Indian income tax. However, post the amendment in Finance Act, 2020, Mr. A shall become Resident in India since he is an Indian citizen residing in India for more than 120 days, having income from Indian sources exceeding Rs.15 lakhs. There could also be a view that his total income of Rs.3 crores is taxable in India since his profession is set up in India; he performs his backend operations from his office in India and assuming he has branch outside India just for conducting meetings with his foreign clients. So the onus would be on the assessee to establish as to from where were the operations done.

However it may be noted that one will have to check the DTAA Tie-Breaker Rule.

**Computation of Indian Income of Rs. 15 Lakhs:-**

There are many income which are otherwise exempt / deductible to Non-Resident but are taxable in the hands of a Resident individual like interest on rupee denominated bonds (S.10(4C)) and capital gain on transfer thereof (S. 47(viia)), interest on FCNR deposits, etc. Further by virtue of DTAA, many incomes may become exempt for a NR, while a Resident cannot claim the benefit under these DTAA provisions.

Therefore, there arises a question as to whether such nature of income which are exempt if the individual is a NR under the Act and whether the relief under DTAA is to be considered while computing the threshold of total income of Rs.15 lakhs?

In such cases, two views must be possible

- Residential status should be evaluated first, so as to compute the threshold of Rs.15 lakhs: Under this view, the first step would be to evaluate the residential status. Accordingly, exemptions available to a NR should not be considered till determination of residential status. Consequently, the computation of income should be made considering the individual to be a resident so as to evaluate the applicability of Rs.15 lakhs threshold.
- Exemption available to NR to be considered so as to compute the threshold of Rs. 15 lakhs: Under this view, exemption available to NR should be allowed by considering such individuals as NR and accordingly any such exempt income will not be considered while computing total income for evaluating applicability of Rs.15 lakhs threshold. However, if the total income still exceeds Rs. 15 lakhs, then such individual qualifies as RNOR and accordingly, the total income shall be reworked.

**Introduction of new Section 6(1A) - Concept of Deemed Residency:-**

The Finance Act, 2020 has further inserted new section 6(1A) which provides that an Indian citizen shall be deemed to be Resident in India if his total income, other than foreign sources, exceeds Rs. 15 lakhs during the previous year. However, such an individual shall be deemed to be an Indian resident only when he is

not liable to tax in any country or jurisdiction by reason of his domicile or residence or any other criteria of similar nature. Nevertheless, this provision will still need to be read with Article 4 of the applicable tax treaties (Double Tax Avoidance Agreement), which may give suitable relief.

Income from foreign sources shall have the same meaning as explained above.

Thus, from AY 2021-22, an Indian Citizen earning total income in excess of Rs.15 lakhs (other than from foreign sources shall be deemed to be resident in India if he is not liable to pay tax in any country.

A person shall be deemed to be of Indian origin if he, or either of his parents or any of his grandparents, was born in undivided India.

The following table summarizes the amendment:

Citizen of India / PIO	Indian Income > Rs.15L	Liable to tax in any other country	Deemed to be Indian Resident
Y	Y	N	Y
Y	Y	Y	N
Y	N	N	N
Y	N	Y	N
N	Y	Y	N

### **Why Amendment?**

The Memorandum to the Finance Bill 2020 clarifies the rationale by stating that high networth individuals, who are Indian citizens and have been planning their affairs in such a manner so as to avoid paying taxes on income earned by them to any country by being non-residents of all the countries imposing income-tax. Thus, the intent of the Indian Government seems to be to plug this loophole to prevent Indian citizens from exploiting the residency rules of multiple jurisdictions to their advantage and to avoid tax in all countries (Tax Nomads).

These tax nomads would plan their stay in the different countries in such manner that their "number of days' criteria required to be classified as resident is not met. The person in the above scenario intending to escape the "residential status", so as to escape the clutches of tax norms, is what is referred to by the Memorandum to Finance Bill 2020 as a "Stateless Person". This issue of "Stateless Income" was also raised during the discussion surrounding the foundation of the Base Erosion and Profit Shifting (BEPS) Action Plan and had emphasized to implement different measures to put an end to the phenomenon of "Stateless Income".

### **Not Liable to Tax:-**

The term "Not liable to tax" is not the same as "exemption from tax" or "non-payment of tax" or "not being subjected to tax". The expression "liable to tax" does not necessarily imply that person should actually be liable to tax or should have paid tax. It is enough if the other contracting state has the right to tax such person, whether or not such right is exercised and irrespective of whether such person essentially pays any tax or not. This has been considered under various judgements including;



M.A. Rafiq, In re (1995) 213 ITR 317 (AAR)

Cyril Eugene Pereira, In re (1999) 239 ITR 650 (AAR)

Union of India Vs. AzadiBachaoAndolan, 263 ITR 706 (SC)

Emirates Shipping Line Vs. ACIT, 349 ITR 493 (Delhi)

ITO Vs. Birla Sunlife Management Co. Ltd., (2010) 3 taxmann.com 782 (Mum)

Thus based on the above paragraphs and the memorandum of the Finance Bill, one can reasonably conclude that the impact of the amendment should be only on such Indian citizens who are not liable to tax in any country by not qualifying the as resident of any country and not on those being subject to tax under the local laws of the Country like UAE.

### **RESIDENT BUT NOT ORDINARILY RESIDENT (RNOR) S. 6(6):-**

This is applicable to Non-Residents who are returning to India. If you are not a ROR, you can still be RNOR. An individual is a RNOR is he satisfies any of the conditions understated:-

Condition		Status
1.	He is a resident, as per the above provisions, for at least 9 out of 10 PYs prior to the PY under consideration	RNOR
2.	His stay in India during the 7 PYs prior to the PY under consideration should not be 730 days or more	RNOR
3.	If he is an Indian citizen AND not a tax resident in any other country AND Indian Total Income > Rs. 15 lakhs (S. 6(1A) as explained above)	RNOR
4.	If he is an Indian Citizen or POI AND his Indian Total income > Rs.15 lakhs in the PY under consideration AND his stay in India in the PY ranges from 120 days to 181 days (Explanation 1(b) to S. 6(1) as explained above)	RNOR

*Note:- Generally, a person who is returning to India after 9 years of stay outside India (and who was NR for each of the 9 years) shall remain RNOR for a period of 2 years after returning to India.*

### **NON-RESIDENT (NR):-**

An individual who is not a Resident (ROR or RNOR) shall be a Non-Resident Indian.

**TAXABILITY:-**

Particulars	Levy of Tax in India		
	ROR	RNOR	NR
Income received or deemed to be received in India	Yes	Yes	Yes
Income accrued or deemed to be accrued in India	Yes	Yes	Yes
Income accruing outside India from a business controlled in or a profession set up in India	Yes	Yes	No
Income accruing outside India from a business controlled in or a profession set up outside India	Yes	No	No

**Notes:-**

- Income received outside India, but subsequently remitted to India does not amount to receiving income in India. 1<sup>st</sup> receipt is important for consideration.
- While counting the period of stay, continuous stay or stay at a particular location in India is irrelevant.
- While computing the period of stay in India, both the days of entering in India and the day of leaving from India shall be counted in period of stay in India (conservative approach since there are many contrary judgements).

**Impact of the amendments:-** Once an individual gets qualified as RNOR pursuant to the amendments, he will have to go through the understated consequences:

- Widening of the scope of total income: Income accruing or arising outside India from a business in or profession set up in India shall now become taxable in the hands of RNOR.
- Benefits of exemptions lost: Various benefits available to NR will be lost on becoming RNOR.
- Benefits of presumptive scheme / concessional rate of tax lost: Various nature of income that are taxable under concessional tax rates or are exempt in the hands of NR will now be taxable at normal slab rates in the hands of RNOR.
- Uncertainty in the rate of deduction of tax at source: Since the provision of residency test is based on various parameters, confusion may arise as to at what rate tax is to be deducted (S.195 for NR or other provisions applicable for Resident individuals)

**RELIEF MEASURES ANNOUNCED UNDER COVID 19:-**

With the outbreak of COVID 19 in India and the suspension of international flights on 22<sup>nd</sup> March, 2020 and declaration of lockdown in India and many other countries, many Non-Residents were forcefully bound for an extended stay in India. Hence, a relief circular was issued by CBDT on 8<sup>th</sup> May, 2020 (Circular No.11/2020) for granting a relief corresponding to FY 2019-20. In this circular, it was stated that for the computation of period of stay in India, such period shall be ignored if it pertains to

- Inability to leave India (period between 22.03.2020 to 31.03.2020)
- Departure on evacuation flight on or before 31.03.2020 (period between 22.03.2020 to date of departure)
- Departure before 31.03.2020 or has been stuck in India as on 31.03.2020 due to quarantine in India post 01.03.2020 (Period from 01.03.2020 to the date of departure or 31.03.2020)

CBDT via Circular No. 2/2021 dated 3<sup>rd</sup> March, 2021 has concluded that since OECD as well as most of the countries have clarified that in view of the provisions of the domestic income tax law read with the DTAA's, there does not appear a possibility of double taxation of income for PY 2020-21. However, in order to understand the possible situations in which a particular tax payer is facing double taxation due to forced stay in India, he may furnish the information in Form-NR which can be submitted electronically to the Principal Chief Commissioner of Income Tax (International Taxation). Hence no relief measures have been announced yet for FY 2020-21.

### **RESIDENTIAL STATUS OF INDIVIDUAL AS PER FOREIGN EXCHANGE MANAGEMENT ACT:**

Residential status as per FEMA, 1999 is determined by the number of days in India in the preceding financial year (FY) and / or his purpose of stay. As per S. 2(v) of FEMA, 1999, any individual shall be considered as resident under FEMA if he resides in India for more than 182 days during the course of the preceding financial year. There are two exceptions in clause (A) and (B) which provides that even if an individual is resident due to his presence in India for more than 182 days in the preceding year, still he be a non-resident if he satisfies conditions mentioned in any of the exceptions in the Clauses. Clause (A) is for persons leaving India and Clause (B) is for persons coming to India.

#### **Clause (A) Persons leaving India:-**

If a person leaves India for any of the understated purposes, he will not be a Resident in India:-

- For taking up employment outside India; OR
- For carrying on any business outside India; OR
- For any purpose which indicates his intention of stay outside India for an uncertain period.

#### **Clause (B) Persons coming to India:-**

If a person comes to India for any of the understated purposes, he will be a Resident in India:-

- For taking up employment in India; OR
- For carrying on any business in India; OR
- For any purpose which indicates his intention of stay in India for an uncertain period.

Clause (B) is trickily worded in the Act. There is an exception to an exception. Hence, a person will be Resident in India if he comes to India for the above-mentioned purposes.

Hence, a person is said to be resident in India if he has resided in India for more than 182 days during the preceding FY and

- He has gone out of India for purpose other than employment outside India / other than business or vocation outside India / for a certain period or

- He has come for employment in India / for carrying business or vocation in India/ for an uncertain period.

So, when a person comes to India for a purpose other than employment / business or vocation / for an uncertain period, he shall be a person resident outside India irrespective of the number of days his stay in India in the preceding PY.

Similarly when a person goes out of India for the purpose of employment / business or vocation / for an uncertain period, he shall be a resident outside India irrespective of the number of days of his stay in India in the preceding PY.

A mere intention does not determine the residential status of the individual. When a person has come for employment or business in India, he is a resident. This is a fact and has nothing to do with intention. Intention comes into picture only when he comes to India under any other situation. But there also his intention to go back has to be supported by the facts.

### **Now let's look at the key differences between the Residential Status under the ITA and FEMA:**

<b><u>Income Tax Act, 1961</u></b>	<b><u>FEMA, 1999</u></b>
Income Tax Act is a Revenue Law	FEMA is a Regulatory Law
Governs the taxability of income and tax thereon	Regulates the permissibility of financial and investment transactions
Residential Status is checked at the time of filing of Return of Income	Residential Status is checked at the time of entering into every financial transaction
No approval is required to earn income in India by NRs (except illegal activities)	Approval is required to undertake the financial transactions
Residential Status is decided based on stay in India	Residential Status is decided based on purpose of stay in India

**Hence due to different definitions under ITA and FEMA, there could be circumstances where person can be a resident under ITA and non-resident under FEMA.** Let us try to decode this with the help of an example:-

**Eg.1:-** Mr.A is a resident Indian who takes up a job in USA in November 2020. He was in India before November, 2020. In this case, Mr. A has become Non-resident under FEMA from November, 2020 onwards regardless of the number of days of stay in India in FY 2019-20. However, under Income Tax Act, he will still be a resident for FY 2020-21 since he was in India for more than 182 days. Accordingly, his salary from Nov'20 to Mar'21 will be taxable in India subject to relief under DTAA. Hence an individual can have dual residency under FEMA but not in ITA.

**Eg.2:-** Mr. A is a NRI having FCNR fixed deposits. He returns to India in Nov'20. Under FEMA, he will become a Resident from Nov'20. However under ITA, he will still be a NR in FY 20-21 since his stay in India in the preceding 4 PYs is less than 365 days.

Under FEMA, Mr. A can continue to hold his FCNR deposits upto maturity. However for ITA, the interest on such FCNR deposits will be taxable since he is a resident under FEMA and hence the relief of exemption u/s 10(4)(ii) cannot be availed.

#### **Impact of NRI status under FEMA:-**

- Once the residential status changes to NRI under FEMA, he must visit all his banks, brokers and wealth managers to change his residential status from Resident to Non-Resident.
- A NRI cannot hold savings bank account. Hence on change of residential status to NRI under FEMA, he will need to open a NRO (Non-Resident Ordinary Rupee) account. NRO account can be jointly held by 2 or more NRIs. Only inward remittance from outside India is possible in NRO account and are non-repatriable to another country.
- NRI can also open NRE (Non-Resident External Rupee) account. NRE account permits money transfer services from outside India and the entire amount can be repatriated back to the country of residence of the NRI. Income earned in this account is exempt from tax.
- NRIs are permitted to enter into financial transactions only post approval from RBI.

#### **CONCLUSION:-**

**Both Income Tax Act and FEMA are important laws deciding the residential status. Hence one should check the residential status from both taxation point of view and for every transaction to assess the requirement of RBI approvals.**





# TAX ISSUES FOR DUAL TAX RESIDENT INDIVIDUALS



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Albert Einstein once said "The Hardest thing in the World is to understand the income tax"

Imagine the magnification of complexities if an individual becomes tax resident of two countries. Dual tax residency leads to tax compliances in two geographies and going through mazes of tax treaty between countries as well as domestic tax laws of both jurisdictions. We will be looking ahead today on step-by-step tax solution for issues from Indian tax perspective.

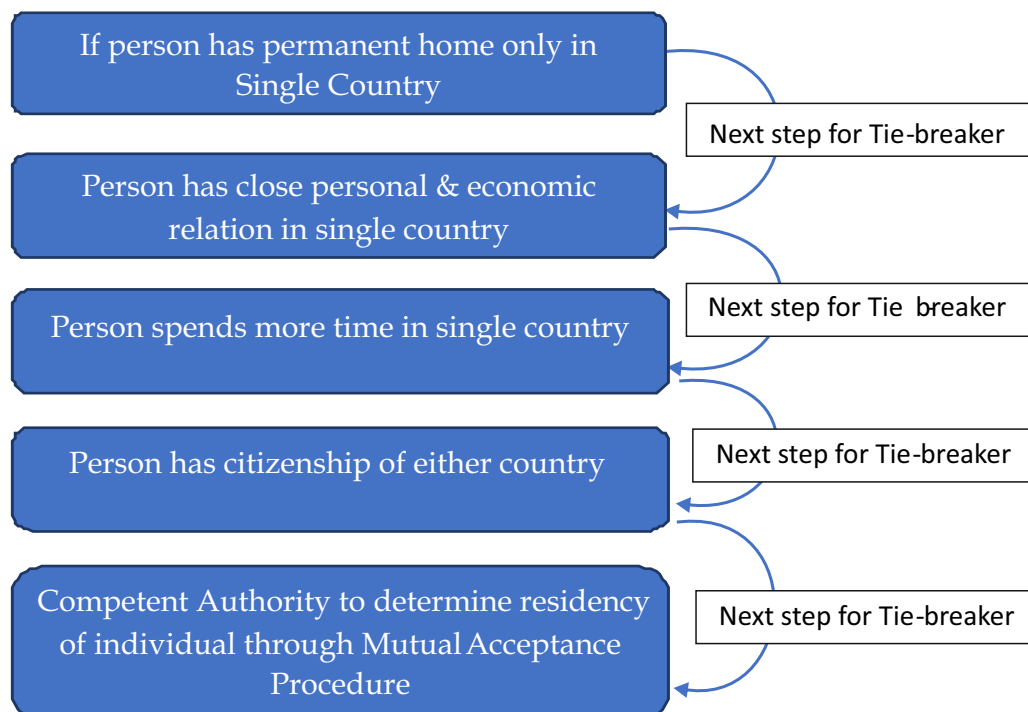
## Step 1: Ascertaining Residential Status of Individual

- A. Person need to ascertain whether it is a Resident or Resident but not ordinarily resident in India
- B. For claiming any Double Tax Avoidance Agreement (DTAA) benefit, Individual need to identify himself as tax resident of either country

### Determining tax residency under DTAA

Generally, tax treaties provide provisions to determine residency of individual in cases of individual being resident of both countries.

Summarisation of process to determine Individuals residency as per Article 4: Resident from OECD Model tax convention of 2017 is as follows:



**Step 2: Computation of Income**

As per section 90 & 90A of income tax act, assessee may select provisions of income tax act or DTAA whichever are more beneficial. While computation of Income as per Income tax, taxability of income from various sources needs to be determined along with provisions of DTAA.

Discussing major source of income for individuals and tax considerations to be taken by Individual:

Source of Income	Model DTAA taxability	Taxability in Foreign Jurisdiction as per OECD model tax convention*	Taxability in India	
			Resident	Resident but not ordinarily resident
Income from Salary	Salary income earned by employment in foreign country will be taxed in that foreign country if conditions laid down in treaty are achieved. Generally, DTAA provides for following 3 conditions: <ol style="list-style-type: none"> <li>1. Stay of individual exceeds number of days specified as per specific DTAA</li> <li>2. Remuneration is paid by or borne by resident of foreign country</li> <li>3. Remuneration is borne by Permanent establishment in foreign country</li> </ol>	Individual need to assess taxability as per DTAA	Taxable in India	Not Taxable in India if taxed abroad.
Income from Immovable Property	If DTAA contains Article of Immovable property: <ol style="list-style-type: none"> <li>1. Income earned from immovable property situated in foreign country will be taxed in country where it belongs.</li> <li>2. Home country may tax such income</li> </ol>	Taxable in foreign country	Income will be Taxable in India	Not taxable in India

Source of Income	Model DTAA taxability	Taxability in Foreign Jurisdiction as per OECD model tax convention*	Taxability in India	
			Resident	Resident but not ordinarily resident
Income from Capital Gains	Capital gains income earned by sale of immovable property or movable property situated in foreign country will be taxed in country where it belongs.  However, home country may as well tax such income.	Taxable in foreign country	Income will be Taxable in India	Not taxable in India
Independent Personal Services (Professional Services)	Income from Professional services earned from foreign country is taxable in country of residence.  Such income will be taxed in foreign country as well if that income is earned through fixed base in foreign country or stay in foreign country exceeds number of days defined.	Individual need to assess taxability as per DTAA	Taxable in India	Not Taxable in India if taxed abroad.

### **Step 3: Claiming relief of foreign tax credit**

For claiming credit of foreign tax credit, Individual need to determine relief as per DTAA. For providing further clarity on mechanism to claim such relief, CBDT had issued **Foreign Tax Credit Rules**.

Resident Individual can claim deduction of foreign taxes paid. However, relief in India can be claimed with riders and conditions attached to claiming foreign tax credit are as follows:

1. Credit shall be claimed in year in which income is offered to tax in India. In case of income offered across multiple years, credit of foreign tax can be claimed in the proportion to which income is offered to tax
2. Foreign taxes credit shall not be disputed in overseas jurisdiction. Individual may claim credit in India within 6 months of settlement of dispute overseas.
3. Individual shall not be claiming refund of such taxes in overseas jurisdiction
4. Tax credit shall be available only to the extent of tax applicable as per DTAA between India and respective country
5. Tax credit shall be lower of tax liability as per Income Tax Act and tax actually paid overseas.

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# IMPLICATIONS FOR NON-RESIDENTS STRANDED IN INDIA



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## 1. INTRODUCTION

The Coronavirus (COVID-19) pandemic has been devastating and has a profound impact globally. We can all agree, *“One cannot predict or control the future but only adapt to it.”* The rapid spread of the virus has strained local medical infrastructure, led to restrictions on travel and social contact and created unprecedented disruptions to the global economy. Many of the countries have urged their citizens to stay at home as much as possible and practice social distancing to limit face-to-face interactions with others. This not only has an impact on individuals but has also impacted countries as a whole from an economic standpoint, bringing an array of economic sectors to a standstill. Before the pandemic, the idea of Work From Home (WFH), virtual meetings and gatherings were just a fantasy to most of the people which turned out to be the “New Normal” in the COVID-19 times.

Such unique and almost unprecedented restrictions arising from government responses to COVID-19 have led to practical challenges for businesses and employees. Where the movement of people have been significantly restricted, the issue of residential status has thrown novel challenges. In the current Covid times, the concept of residential status and its impact on people stranded in India has attracted focused attention. This article intends to throw insights on tax and regulatory implications for individuals as well as business organizations on account of forced stay in India.

## 2. IMPLICATIONS ON INDIVIDUALS DUE TO UNINTENDED STAY IN INDIA

### 2.1. RESIDENTIAL STATUS OF AN INDIVIDUAL

The tax incidence and imposition of tax is dependent upon the residential status of a person. The residential status of a person must be ascertained with reference to each financial year. Therefore, the identification and classification of the residential status of a person is one of the first steps to be carried out for assessing the total income chargeable to tax in India. The provisions for determining the residential status are primarily based on the number of days of physical presence/absence in India as provided under section 6(1) of the Income Tax Act, 1961 (hereinafter referred to as “the Act”). An individual is classified into three broad categories based on their period of stay in India viz. i) Resident and Ordinary Resident (ROR) ii) Resident but not Ordinary Resident (RNOR) iii) Non-Resident (NR).

As per section 6(1) of the Act, an individual shall be resident in India in any previous year if such individual fulfils any one of the below mentioned conditions:

- a. Is in India for 182 days or more in the previous year or
- b. Is in India for 60 days or more in the previous year and has been in India for a total period of 365 days or more in the 4 years preceding the respective previous year

The second condition mentioned above is the one that is most worrisome for individuals who are stranded in India.



## 2.2. RELAXATIONS PROVIDED BY THE GOVERNMENT

### 2.2.1. Relaxations for Previous Year 2019-20

The unplanned extended period of stay in India, due to the declaration of the lockdown and suspension of international flight sat end of March 2020 could have changed the residential status of many non-residents affecting the taxability of their income under the Act. In order to address the genuine hardship faced by these stranded individuals, CBDT issued Circular No. 11/2020 dated 8th May, 2020, to exclude the period from 22nd March, 2020 (or date of quarantine after 1st March, 2020) to 31st March, 2020 or date of departure before 31st March, 2020 on evacuation flight for determining the residential status.

### 2.2.2. Specific Relaxations for Previous Year 2020-21

As the COVID-19 outbreak continued even for the previous year 2020-21, various representations were made to CBDT requesting relaxations in the determination of residential status for those who came to visit to India and intended to leave but could not do so due to the COVID-19 pandemic. The Circular No. 11/2020 and tweet from the official handle of Income Tax (@IncomeTaxIndia) on 8<sup>th</sup> May, 2020 along with the Press release dated 9<sup>th</sup> May, 2020 clarified that **a similar circular for excluding period of stay of such individuals up to the date of normalization of international flights shall be issued after normalization.** This created an impression that similar relaxations would be provided for the previous year 2020-21.

However, CBDT vide Circular No. 2 of 2021 (accompanied with a press release) deviated from its earlier stand of blanket exclusion of period of forced stay in India at the end of the year where limited options would have been available to individuals. The circular required the impacted individuals to furnish relevant information in Form NR electronically to CBDT by 31<sup>st</sup> March, 2021 for the risk of double taxation faced by them in order to enable CBDT to evaluate such genuine hardships and announce a general or case specific relief to individuals as the case maybe. The circular justifies how there are lesser chances of double taxation risk for such individuals in view of the interplay of Indian domestic tax rules and Double Taxation Avoidance Agreements (DTAA) entered with other countries. The deviation from the blanket exemption stand could possibly be to give benefit only in genuine cases and not to individuals who would have left the country in recent years to avoid implications under the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (commonly referred to as "the Black Money Act"). Writ petition has been filed for quashing this circular and related official memorandum with the Hon'ble Supreme Court on the grounds of constitutional validity.

Several countries such as UK, Singapore and others did not allow persons travelling from India to enter their country for quite some time. In such cases, Taxpayers can refer to the decision of *CIT v. Suresh Nanda [2015] 57 taxmann.com 448(Del)*, wherein the Hon'ble Delhi High Court held that while determining the residential status of an individual under section 6(1)(a) of the Income Tax Act, 1961, any period of "involuntary stay" must be excluded. In the said case, the passport of the taxpayer was impounded illegally by the authorities which resulted in a forced stay in India.

The High Court stated that "*The Income Tax Act leaves the choice to the citizen to be in India and be treated as a resident for purposes of taxation or be not in India so as to avail the status of a non-resident. The simple test the muster of which is to be passed is the minimum prescribed period of presence in India in a particular financial year. It naturally follows that the option to be in India, or the period for which an Indian citizen desires to be here is a matter of his discretion. Conversely put, presence in India against the will or without the consent of the citizen, should not ordinarily be counted adverse to his chosen course or interest, particularly if it is brought about under compulsion or,*

*to put it simply, involuntarily. There has to be, in the opinion of this Court, something to show that an individual intended or had the animus of residing in India for the minimum prescribed duration"*

Similar analogy can be drawn considering the exceptional circumstances for individuals who have been stranded in India due to forced or unintended stay amid the COVID-19 outbreak. However, the decision regarding the same has to be taken after examining the facts and circumstances on a case to case basis considering the litigation involved. Also, it may be noted that the High Court in the aforementioned case has given a caveat that the conclusion reached was on the facts and circumstances and cannot be treated as a thumb rule to invariably exclude each period of involuntary stay.

### 2.3. **DUAL RESIDENCY: TIE BREAKER RULE**

An individual may become a resident in India in some cases even if he stays for less than 182 days. In such a situation, there may be a possibility of dual residency for individuals.

The Tie Breaker Rule in the DTAs generally signed by India provide for some subjective/ objective tests to determine a stronger connection of the individual between the two countries. Such individuals will become resident of only one country by applying the Tie Breaker Rule under the relevant DTA as follows:

- **Permanent Home**

The first criteria of Tie Breaker Rule is the test of permanent home i.e. an individual would be considered as a resident of the Contracting State where he has a permanent home available to him.

- **Centre of Vital Interest**

If the above criteria is inconclusive for the reason that the individual has a permanent home available to him in both the Contracting State, the next test is based upon his Centre of Vital Interest. In such a case an individual shall be considered as a resident of the Contracting State where his personal and economic interests are closer. In specific scenarios, where the individual has a permanent home available to him in both the contracting states and it is not possible to determine the Contracting State in which he has a centre of vital interest or where the individual does not have a permanent home available to him in either of the Contracting State, the next determining factor i.e. Habitual Abode has to be applied.

- **Habitual Abode**

Habitual abode refers to the frequency, duration and regularity of the stays that are part of the settled routine of an individual's life and are therefore more than transient. The determination must cover a sufficient length of time for it to be possible to ascertain the frequency, duration and regularity of the stays that are part of the settled routine of the individual's life.

- **Nationality**

If the individual has a habitual abode in both the Contracting State or neither of them, the next criteria to be looked into is his nationality. He would tie break in favour of the Contracting State of which he is a national.

- **Mutual Agreement Procedure**

In certain treaties as a last resort, if the individual is a national of both the Contracting States or neither of them, the competent authorities of both the Contracting States need to resolve the conflict of dual residency under the mutual agreement procedure.

In light of the above, where an individual qualifies as a resident of two countries, the Tie Breaker Rule needs to be applied to determine the residential status of an individual to resolve the conflict of dual residency.

## **2.4. INDIAN TAX IMPLICATIONS ON CHANGE IN RESIDENTIAL STATUS**

### **2.4.1. Change of residential status to ROR**

If the status of individual changes to ROR in India, his worldwide income shall be taxable in India. In case the individual has already paid taxes in the country of source of income, he can claim Foreign Tax Credit (FTC) of such taxes paid in foreign jurisdiction subject to satisfaction of the prescribed conditions under Rule 128. It may be noted that tax rates for individuals may be higher in India and despite the foreign tax credit, there can be an additional tax on such global income in India. In addition to the taxability of global income, such category of residents need to give a disclosure of their foreign assets across the globe while filing tax return in India. India has stringent provisions under the Black Money Act to deal with the menace of black money and imposes huge penalty and rigorous imprisonment on non-disclosure of foreign income and assets.

### **2.4.2. Change of Residential Status to RNOR**

In case an individual is regarded as RNOR, the provisions of the Indian tax laws are relaxed as compared to ROR. RNOR shall not be taxed on its global income except income earned outside India derived from a business controlled from India or professional setup in India. RNOR is not required to provide foreign asset disclosure in their Income Tax Return.

It may be possible that RNOR is not a resident of another country owing to the current situation. In such a case whether an individual can avail treaty benefits will have to be carefully evaluated on a case to case basis based on the specific language of relevant DTAA.

In cases where the residential status of individual changes from NR to ROR/RNOR, certain beneficial provisions under the Act applicable to NR may not be available. <sup>1</sup>An illustrative list of such beneficial provisions which may not be available to ROR/RNOR is:

- First proviso to section 48 providing foreign fluctuation benefit
- 10% tax rate without benefit of first & second proviso to section 48 on Long Term Capital Gains on unlisted securities or shares of a company not being a company in which public are substantially interested.
- 20% tax on Dividend income under section 115A
- 10% tax on Royalty/Fees for Technical services under section 115A

On the contrary, certain beneficial provisions are available to individuals resident in India as per the Act in contrast to non-residents like basic exemption limit, deductions under chapter VI-A, rebate under section 87A, etc.

### **2.4.3. Concerns related to employment income**

The right to tax the employment income under most of the treaties under the OECD model is allocated between the employee's jurisdiction of residence and the place where they effectively perform their

<sup>1</sup>Tax rates to be increased by surcharge and cess

employment according to the specific criteria. If a stranded individual begins to exercise their employment in the host jurisdiction, a treaty may allow that jurisdiction to tax the income only if the employee satisfies the day count test (usually 183 days) or the employer is a resident of that jurisdiction (or has a PE that bears the cost).

The OECD guidance on 21<sup>st</sup> January, 2021 considers the following specific situations:

- Wage subsidy and similar income received by cross-border workers that cannot perform their work due to restrictions should be treated as attributable to the work jurisdiction.
- A worker who is stranded in a jurisdiction where they are not resident but previously exercised employment would otherwise have left that jurisdiction, should reasonably be able to exclude days there for the day count test although the OECD notes that some countries do not support this approach.
- Cross-border workers' may frequently commute for work from their residence jurisdiction to a neighbouring one, with no guidance to follow. The OECD recognizes that some of the jurisdictions have agreed to treat COVID-19 as a force majeure or exceptional circumstance and accordingly the time spent by the employee teleworking in home jurisdiction shall not be included in the calculation of maximum work days outside the work jurisdiction.
- Changes in the jurisdiction where an employee exercises their employment can impact its employment income as payroll taxes are often withheld at source, addressing the change will result in increased compliance and administrative cost for the employer and employees. The OECD calls for an exceptional level of coordination between the jurisdictions to mitigate such additional burden associated with a temporary change of the place where employment is performed.

OECD Guidance would only have a persuasive value and clarification from the Indian government shall help to achieve clarity for such stranded expatriates.

## **2.5. FEMA IMPLICATIONS ON STRANDED INDIVIDUALS**

According to Foreign Exchange and Management Act, 1999 (FEMA), an individual will be treated as a resident in India if such an individual resides for more than 182 days in India but does not include an individual who is coming to India for the purpose of:

- a) Taking employment in India
- b) Carrying out business or vocation in India
- c) Any such circumstances where intention to stay in India is for uncertain period

Unlike the provisions of the Income Tax Act, FEMA emphasis on the intention of a person to stay in India or outside India to determine the residential status. This principle of FEMA law emerges to be of utmost relevance for individuals stranded in India due to the COVID-19 pandemic whose intention was to never stay in India but were forced to stay in India due to subsequent lockdowns and suppression of international flights. Thus it may so happen that an individual may become a resident in India due to his physical presence in India for the said period under the Act but may be a non-resident under the FEMA provisions due to his intention to stay outside India.

Interest earned from Non-Resident External (NRE) Rupee Account and Foreign Currency Non-Resident Deposit shall be exempt from tax under section 10 if such interest is earned by a non-resident person under FEMA even though he may be a resident as per the Act.



### **3. IMPLICATIONS ON FOREIGN ENTERPRISES DUE TO UNINTENDED STAY OF INDIVIDUALS IN INDIA**

During the pandemic period, many enterprises have faced curtailment of their operations and have been forced to close offices and other business premises forcing those businesses to change how their business is conducted (i.e. working from home). In many jurisdictions, international travel was either suspended or severely restricted for several weeks, leaving people stranded in a jurisdiction where they might not otherwise be. The temporary dislocation of people can have tax consequences for those individuals and the organization for which they work.

In light of the exceptional circumstances, OECD published updated guidance on 21<sup>st</sup> January, 2021 providing assistance on the interpretation of tax treaties on the creation of PE, tax residence of companies and individuals and taxation of income from employment amid the COVID-19 pandemic. The guidance indicates the general approach of jurisdictions and illustrates how some jurisdictions have addressed the impact of COVID-19 on the tax situations of individuals and employers. It further clarifies that the guidance seeks to address (and avoid) instances of double taxation but cannot be relied upon to create instances of double non-taxation.

#### **3.1. CONCERNS RELATING TO CONSTITUTION OF PERMANENT ESTABLISHMENT**

The business income of a foreign enterprise can be brought to tax in India if such enterprise constitutes a Permanent Establishment (hereinafter referred to as "PE") in India. PE means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

OECD considers the dislocation of employees to jurisdictions other than the jurisdiction in which they regularly work. In most cases, such employees continue to work from their homes, which consequently might create a PE for their employer in those jurisdictions, triggering new filing requirements and tax obligations for such foreign employers.

The general OECD's output is that exceptional and temporary change of the location where employees exercise their employment because of COVID-19 pandemic, such as working from home, should not create PEs for the employer. Paragraph 18 and 19 of the Commentary on Article 5 of the OECD Model Tax Convention indicates that whether the individual is required by the enterprise to work from home or not is an important factor in this determination. Paragraph 19 notes that where a cross border worker performs most of their work from their home situated in one jurisdiction rather than from the office made available to them in another jurisdiction, one cannot consider the home is at the disposal of the enterprise because the enterprise did not require that home to be used for its business activities. To conclude, individuals' teleworking from home (i.e. the home office) as a public health measure imposed or recommended by at least one of the governments of jurisdiction would not create a fixed place of business PE for the business/employer.

Similarly, the temporary conclusion of the contracts in the home of employees or agents because of the COVID-19 pandemic should not create PEs for businesses. If the employee was habitually concluding contracts in their home jurisdiction before such measures commenced, or continues to do so afterwards, a different approach may be appropriate. In conclusion, the agent's activity in the jurisdiction should not be regarded as "habitual" if they have exceptionally begun working at home in that jurisdiction due to specific circumstances like the COVID-19 pandemic. This would not constitute a dependent agent PE provided the person does not continue those activities under the normal business environment post pandemic.



Even a construction site PE would generally not be regarded as ceasing to exist when work is temporarily interrupted, but jurisdiction may consider stopping the clock while public health measures are in force in light of the extraordinary circumstances of the COVID-19 pandemic. Thus, such a period should be excluded from the calculation of time thresholds for construction PE.

### **3.2. CONCERNS RELATED TO CHANGE OF RESIDENCE**

The Act provides for Place of Effective Management (POEM), an internationally recognized test, for determination of residence of a company incorporated in a foreign jurisdiction. Most of the tax treaties entered into by India recognize the concept of 'Place of Effective Management' for determining the residence of a company as a tie breaker rule for avoidance of double taxation.

The OECD guidelines address circumstances in which there is a potential change in the POEM of a company as a result of relocation, or inability to travel, of board members or other senior executives. The concern is that this may as a consequence affect company's residence under the relevant domestic laws of the other country.

The OECD guidance suggests that the COVID-19 situation likely would not create any changes to an entity's residence status under a tax treaty. A temporary change in the location of the board of members or other senior executive is an extraordinary and temporary situation due to the COVID-19 pandemic and such change of location shall not trigger a change in treaty residence.

The guidance also notes that in the case of dual-resident entities, the tie breaker provisions included in a tax treaty should not be impacted when individuals participating in the management and decision making of an entity cannot travel as a public health measure. All the relevant facts and circumstances must be considered as a whole for the determination of POEM in India.

The OECD has sought to provide a degree of certainty for the taxpayers affected by the dislocation of employees as a result of the COVID-19 pandemic. The OECD guidance is in respect of Article 5 of the OECD Model and does not cover a scenario of 'service PE' under the UN Model, but the reasoning in such cases could be the same as in the case of construction PE. However, the employer will need to review carefully and consider the displacements and changes due to COVID-19 may now be the "New Normal". OECD Guidance is only persuasive in nature and it shall be helpful if the Indian government comes up with similar relaxation or clarification to provide certainty to businesses.

## **4. CONCLUSION**

Alongside creating havoc in human life, the COVID-19 pandemic gave the world an adventurous experience in all possible scenarios one could have ever imagined. Even though the world has slowly started healing itself from the novel coronavirus, working arrangements may never be the same, as before the pandemic, atleast in the immediate near future. The new normal may result in a change in the value chain arrangement and requirement of locational presence. The current uncertainties likely are indicative of the many challenges that may lie ahead. The unpredictable life in today's era only urges all of us to go with the flow and await what the mother nature and tax environment have to offer in such life changing events.



# INVESTMENT IN IMMOVABLE PROPERTIES BY NON-RESIDENT (INDIVIDUALS)



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## 1.0 Introduction

NRIs/OCIs play a very important role in our economy, considering the same in mind, RBI has allowed the investment in immovable property by NRIs/OCIs in India, subject to certain conditions.

NRI/OCIs are permitted to invest in both residential and commercial properties. However, there are a few restrictions as to the investment in (a) agricultural land or (b) plantation property or (c) farmhouse property; (hereinafter called “**Restricted Property**”). The immovable property in India can be acquired by the NRI/OCIs either by direct purchase or a gift or inheritance. The rules governing the acquisition of immovable property in different modes are listed below:

## 2.0 Relevant Definitions

### 2.1 Non-Resident Indian

“NRI” or “Non-Resident Indian” means an individual resident outside India who is a citizen of India<sup>1</sup>

Non-Resident Indian (NRI) is a citizen of India, who stays abroad for employment /carrying on business or vocation outside India or stays abroad under circumstances indicating an intention for an uncertain duration of stay abroad.

### 2.2 Overseas Citizen of India

Overseas Citizen of India (OCI)<sup>2</sup> means a person resident outside India who is registered as an Overseas Citizen of India Cardholder under Section 7(A) of the Citizenship Act, 1955.

Following categories of foreign nationals are eligible for registration as OCI Cardholder:

- *Who was a citizen of India at the time of, or at any time after the commencement of the Constitution i.e. 26.01.1950; or*
- *who was eligible to become a citizen of India on 26.01.1950; or*
- *who belonged to a territory that became part of India after 15.08.1947; or*
- *who is a child or a grandchild or a great grandchild of such a citizen; or*
- *who is a minor child of such persons mentioned above; or*
- *who is a minor child and whose both parents are citizens of India or one of the parents is a citizen of India; or*
- *spouse of foreign origin of a citizen of India or spouse of foreign origin of an Overseas Citizen of India Cardholder registered under section 7A of the Citizenship Act, 1955 and whose marriage has been registered and subsisted for a continuous period of not less than two years immediately preceding the presentation of the application.*

<sup>1</sup>Sub-clause (aj) to clause 2, Foreign Exchange Management (Non-debt Instruments) Rules, 2019

<sup>2</sup>Sub-clause (ak) to clause 2, Foreign Exchange Management (Non-debt Instruments) Rules, 2019

However, no person, who or either of whose parents or grandparents or great grandparents is or had been a citizen of Pakistan, Bangladesh or such other country as the Central Government may, by notification in the Official Gazette, specify, shall be eligible for registration as an Overseas Citizen of India Cardholder.

### 2.3 **Transfer**<sup>3</sup>

“Transfer” includes sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien.

### 2.4 **Person of Indian Origin (PIO)**<sup>4</sup>

'Person of Indian Origin (PIO)' means a person resident outside India who is a citizen of any country other than Bangladesh or Pakistan or such other country as may be specified by the Central Government, satisfying the following conditions:

- a) Who was a citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955 (57 of 1955); or
- b) Who belonged to a territory that became part of India after the 15th day of August 1947; or
- c) Who is a child or a grandchild or a great grandchild of a citizen of India or of a person referred to in clause (a) or (b); or
- d) Who is a spouse of foreign origin of a citizen of India or spouse of foreign origin of a person referred to in clause (a) or (b) or (c)

Explanation: for the purpose of this sub-regulation, the expression 'Person of Indian Origin' includes an 'Overseas Citizen of India' cardholder within the meaning of Section 7(A) of the Citizenship Act, 1955.

### 3.0 **Nature of the transaction**

Investment in immovable properties (IP) by a Non-Resident is a capital account transaction. And as a rule, all capital account transactions are prohibited unless specifically permitted.

### 4.0 **Prohibition on transfer of immovable property in India**<sup>5</sup>

Save as otherwise provided in the Act or rules, no person resident outside India shall transfer any immovable property in India. However,

- (a) the Reserve Bank may, for sufficient reasons, permit the transfer subject to such conditions as may be considered necessary.
- (b) a bank which is an authorised dealer may, subject to the directions issued by the Reserve Bank in this behalf, permit a person resident in India or on behalf of such person to create charge on his immovable property in India in favour of an overseas lender or security trustee, to secure an external commercial borrowing availed under the provisions of the Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000;
- (c) an authorised dealer in India being the Indian correspondent of an overseas lender may, subject to the directions issued by the Reserve Bank in this regard, create a mortgage on an immovable property in India owned by an NRI or an OCI, being a director of a company outside India, for a loan to be availed by the company from the said overseas lender :

<sup>3</sup>Section 2(ze) of the Foreign Exchange Management Act (the Act)

<sup>4</sup>Clause 2(x), Notification No. FEMA 5(R)/2016-RB

<sup>5</sup>Rule 30, Foreign Exchange Management (Non-debt Instruments) Rules, 2019

Provided further that :- (i) the funds shall be used by the borrowing company only for its core business purposes overseas; (ii) in case of invocation of charge, the Indian bank shall sell the immovable property to an eligible acquirer and remit the sale proceeds to the overseas lender.

## 5.0 General Permission

From time to time, general permissions are given to certain non-resident person to acquire immovable property in India and those permissions were enshrined in following regulation and rules.

- Notification No. FEMA 21 /2000-RB, Foreign Exchange Management (Acquisition and transfer of immovable property in India) Regulations, 2000 dated 3rd May 2000
- Notification No. FEMA 21(R)/2018-RB, Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 dated 26/03/2018
- Chapter X titled Acquisition and transfer of immovable property in India in the rules called Foreign Exchange Management (Non-debt Instruments) Rules, 2019 dated 17/10/2019

Each subsequent regulation/rule superseded previous regulation.

## 6.0 Restrictions in acquiring IP in India

- **Property Based restriction** - Agricultural land /plantation property/farmhouse in India cannot be acquired by a Non-Resident.
- **Citizenship based restriction-**
  - Citizens of **eleven countries** (viz. Citizen of Pakistan or Bangladesh or Sri Lanka or Afghanistan or China or Iran or Nepal or Bhutan or Macau or Hong Kong or Democratic People's Republic of Korea (DPRK) cannot acquire IP in India irrespective of their residential status unless they obtain prior RBI approval. However, this prohibition shall not apply to an OCI card holder.
  - They can acquire IP on lease for a period not exceeding five years.
- Foreign nationals of non-Indian origin resident outside India are not permitted to acquire any immovable property in India unless such property is acquired by way of inheritance from a person who was resident in India (Sec 6(5) of the Act). However, to sell the said inherited property he will have to obtain prior permission of the RBI.

## 7.0 Change in residential status from Resident to Non-Resident

Section 6(5) reads as - A person resident outside India may hold, own, transfer or invest in Indian currency, security or any immovable property situated in India if such currency, security or property was acquired, held or owned by such person when he was resident in India or inherited from a person who was resident in India.

Section 6(5) permits a Non-Resident individual to hold, transfer or reinvest IP in India when his residential status changes from resident to nonresident subject to fulfillment of the conditions stated in the section.

## 8.0 Acquisition of the Immovable Property in India

As per Chapter X of Foreign Exchange Management (Non-debt Instruments) Rules, 2019, several types of Non-Resident can acquire /Transfer IP in India under automatic route subject to certain conditions to be fulfilled. Let's discuss in detail.

**8.1 Acquisition of the Immovable Property by way of Purchase other than Restricted Properties**

A NRI or an OCI may acquire immovable property in India other than an agricultural land or farmhouse or plantation property.

Provided that the consideration, if any, for transfer, shall be made out of

- (i) funds received in India through banking channels by way of inward remittance from any place outside India ; or
- (ii) funds held in any non-resident account maintained in accordance with the provisions of the Act, rules or regulations framed thereunder:

Provided further that no payment for any transfer of immovable property shall be made either by traveller's cheque or by foreign currency notes or by any other mode other than those specifically permitted under this clause.

**8.2 Acquisition of the Immovable Property by way of Gift other than Restricted Properties**

NRI or OCI can acquire any immovable property in India **other than** agricultural land or farm house or plantation property **by way of gift** from a person resident in India or from an NRI or from an OCI, who in any case is a relative as defined in clause (77) of section 2 of the Companies Act, 2013

**8.3 Acquisition of the Immovable Property by way of Inheritance (Including Restricted Properties)**

NRI or OCI can 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 these rules ;or from a person resident in India.

**8.4 Transfer of Immovable Property in India**

NRI or OCI can

- (i) Transfer any immovable property in India to a person resident in India.
- (ii) Transfer any immovable property other than agricultural land or farmhouse or plantation property to an NRI or an OCI.

**8.5 Summary**

RI = A person resident in India

ROI = A person resident outside India

Restricted Properties = agricultural land or farmhouse or plantation property



Following transactions are permitted under automatic route.

Transferor	Transferee	Type of the property	By way of	Regulation No.
RI or NRI or OCI*	NRI/OCI	Property in India other than Restricted Properties.	Purchase	24(a)
RI /NRI/ OCI, who is a relative as defined in sec 2(77) the Companies Act, 2013	NRI/OCI	Property in India other than Restricted Properties.	Gift	24(b)
RI or ROI	NRI/OCI	Any property including Restricted Properties.	Inheritance	24(c)
NRI/OCI	A person resident in India	Any property including Restricted Properties.	Any form of transfer	24(d)
NRI/OCI	NRI/OCI	Property in India other than Restricted Properties.	Any form of transfer	24(e)

\* The rule 24(a) silent about whether the nonresident must be NRI or OCI. However, FAQ published by the RBI on its website states transferor as NRI/OCI.

### 8.6 Joint acquisition of the Immovable Property by the spouse of a NRI or an OCI<sup>6</sup>

The joint acquisition has also been allowed by the spouse of an NRI/OCI of immovable property other than restricted property i.e. (a) agricultural land or (b) plantation property or (c) farmhouse property, subject to the following conditions:

**Consideration:** shall be paid from (i) funds received in India through banking channels, or (ii) funds held in any non-resident account maintained in accordance with the provisions of the Act;

**Marriage:** the marriage has been registered and subsisted for a continuous period of not less than two years immediately preceding the acquisition of such property.

**Other condition:** The non-resident spouse is not otherwise prohibited from such acquisition.

<sup>6</sup>Rule 25, Foreign Exchange Management (Non-debt Instruments) Rules, 2019

### 8.7 Acquisition by a long-term visa holder residing in India

A person being a citizen of Afghanistan, Bangladesh or Pakistan belonging to minority communities in those countries, namely, Hindus, Sikhs, Buddhists, Jains, Parsis and Christians who is residing in India and has been granted a Long Term Visa (LTV) by the Central Government may purchase only one residential immovable property in India as dwelling unit for self-occupation and only one immovable property for carrying out self-employment subject to the following conditions subject to certain conditions.

### 9.0 **Repatriation/Remittance of sale proceeds of the property.**

#### 9.1 Repatriation of the sale proceeds of the property (other than restricted properties) outside India.<sup>7</sup>

Repatriation means sending money back. When an NRI/OCI have invested in IP in India by sending money from abroad or using NRE or FCNR Account, they can repatriate sale proceeds of the said property back to their home country. Following are the rules.

In the event of sale of immovable property other than agricultural land or farm house or plantation property in India by an NRI or an OCI, the authorised dealer may allow repatriation of the sale proceeds outside India, provided the following conditions are satisfied, namely:-

- (a) the immovable property was acquired by the seller in accordance with the provisions of the foreign exchange law in force at the time of acquisition or the provisions of these rules;
- (b) the amount for acquisition of the immovable property was paid in foreign exchange received through banking channels or out of funds held in Foreign Currency Non-Resident Account or out of funds held in Non-Resident External Account;
- (c) in the case of residential property, the repatriation of sale proceeds is restricted to not more than two such properties.

#### 9.2 Remittance upto USD 1 million<sup>8</sup>

A Non-Resident Indian (NRI) or a Person of Indian Origin (PIO) may remit through an authorised dealer an amount, not exceeding USD 1,000,000 (US Dollar One million only) per financial year,

- (i) out of the balances held in the Non-Resident (Ordinary) Accounts (NRO accounts) opened in terms of Foreign Exchange Management (Deposit) Regulations, 2016/ sale proceeds of assets/ the assets acquired by him by way of inheritance/ legacy on production of documentary evidence in support of acquisition, inheritance or legacy of assets by the remitter;
- (ii) Under a deed of settlement made by either of his parents or a relative (relative as defined in Section 2(77) of the Companies Act, 2013) and the settlement taking effect on the death of the settler, on production of the original deed of settlement;

Where the remittance is to be made from the balances held in the NRO account, the account holder shall furnish an undertaking to the Authorised Dealer that:

The said remittance is sought to be made out of the remitter's balances held in the account arising from his/ her legitimate receivables in India and **not by borrowing** from any other person or **a transfer from any other NRO account** and if such is found to be the case, the account holder will render himself/ herself liable for penal action under FEMA.

<sup>7</sup>Rule 29, Foreign Exchange Management (Non-debt Instruments) Rules, 2019

<sup>8</sup>Clause 4(2), Notification No. FEMA 13 (R)/2016-RB

**9.3 Remittance exceeding USD1 million**

The Reserve Bank may, for sufficient reasons, permit any person to make remittance of any asset held in India by him or by any other person.

**9.4 In a nutshell**

Following are broad rules related to the IP In India to be held by a person resident outside India

Citizen of eleven neighboring countries and resident outside India unless they hold OCI Card	RBI approval required.
Foreign nationals of non-Indian origin resident outside India and resident outside India	Prohibited in acquiring property in India but can inherit it. However, they will require RBI approval at the time of sale.
Foreign nationals of Indian origin who have obtained OCI Card and resident outside India	General Permission
Indian national and resident outside India	General Permission



## "DREAMZZ UNLIMITED": STORIES THAT INSPIRE



CA Heetesh Veera (Partner EY)  
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(Editorial Note: CA Heetesh Kasturben Kalyanji Veera, first CA rank holder of our community and the first youngest Chartered Accountant at the age of 21, has written this brief autobiography in his own words at the request of the C.V.O CA Association.)

Quote by the writer:

***"Good, Better, Best, never let it rest....***

***Until Good becomes Better and Better becomes the Best....."***

Preamble (from CA Heetesh Veera):

(My own story of around 6 decades of my life has been penned by me at the request of the C.V.O CA Association solely for the purpose of providing motivation and guidance to the young millennials aspiring to grow, succeed and find purpose to their lives. There are several such examples of professional people in our community who have achieved success under adverse circumstances due to their determination and positive attitude towards life.)

### **The Journey of 58/59 years of my Life....**

Dear Friends,

First of all, I thank C.V.O. CA Association for allowing me to write and publish my own journey comprising of struggle, challenges, opportunities, success and several ups and downs. My parents, my teachers, my wife (Chetna), my leaders (with whom I have worked), my friends and all well-wishers have played a very important role in this entire journey.

My native place is Desalpur Kanthi, Mundra. I was born in a financially poor but very loving and caring family. My father, the sole bread earner of the family (at that point in time) was a low salaried person and had to change many jobs in his life. In my childhood, I had to switch four schools upto my S.S.C. grade. I started studying at Balmandir school in Desalpur and went to Hyderabad for my kinder garden to pre-secondary schooling in a English- Telgu medium school. Further, I came back to Desalpur to be admitted to 4<sup>th</sup> grade, without knowing the language 'Gujrati' (which was the basic learning language then). The school headmaster was not willing to give me admission there, as I lacked knowledge of the said language. He therefore persuaded me to restart from 1<sup>st</sup> grade. This would have been at the cost of losing three precious years of my life (1<sup>st</sup> Grade to 3<sup>rd</sup> grade). It was at this time where I had no clue as to what a tragedy I was getting into, that my beloved mother stepped in to help and assist me. My mother - who though herself wasn't educated was able to appreciate the value of those 3 years of schooling of my life. She was determined to ensure that I get admitted into 4<sup>th</sup> grade thereby taking up this challenge with the school principal promising him that I would be up to the speed of 4<sup>th</sup> grade students within 6 months. My rigorous

training of learning Gujrati started with my mother and private coaching with Miss Ratanben. With God's grace and my mother's confidence in me, I topped the 4<sup>th</sup> grade in final exams in this Gujrati medium school.

### **Lesson No 1:**

**Your parents are the most respectable and powerful source of your well-being and well-wishers of your success. Though not educated and financially poor, they will always wish the best for you -RESPECT THEM. Use their life experiences for betterment of your LIFE JOURNEY.**

Slowly, while I excelled in Gujrati, I started losing grip on English as there was no practice of the said language. Fortunately, to the best of my memory, the Village Mahajan appointed one retired teacher for students wanting to learn English – as an additional curriculum. I was one of the biggest beneficiaries of the same during my 5<sup>th</sup> and 6<sup>th</sup> grade as I could get grip on my basics again during that period – extremely thankful and grateful to the Village Mahajan and the Biharlilal master. He was undoubtedly very strict but extremely good at teaching. The process of getting a grip over the English language, was further strengthened here and played an important role for my future schooling and education.

### **Lesson No 2:**

**Your teachers are equally important as they educate you and create your base and foundation – so LEARN FROM THEM AND APPRECIATE THE KNOWLEDGE THEY BESTOW ON YOU.**

**Equally important to note is that – “Always take up the opportunity of learning – be it new language, new course, as they will always play an awfully important ROLE in your LIFE**

The struggle still continues... I had to shift to Mumbai (Bhandup region) for my 7<sup>th</sup> grade and yes switch my school again and with that came learning two different languages – Marathi and Hindi (for the first time). Again, my parents and teachers, helped me overcome this hurdle.

Soon then I had to shift to Mumbai (Chinchpokli region) wherein I completed my 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> grade at VLN High School. During my 10<sup>th</sup> grade, I topped the school with good scores.

The question was now – which field to choose and which college to enrol for? I was clueless! Back then, one of my friend's elder brother convinced me to go for Science and join Ruia College and we finalised on the same. However, the same very day, late evening they switched their minds and decided to go for Commerce instead and join Podar College. Following my friends, I decided to join Podar College as well. With utmost determination and hard work, I was successful in Commerce and topped all the 5 years of my college (i.e. up to T.Y. B Com), but unfortunately what I lacked the most was absence of guidance.

### **Lesson No 3:**

**When in doubt or clueless, ALWAYS seek GUIDANCE and TAKE VERY INFORMED DECISION. Our association, as well as our community provides excellent professional and financial support for providing guidance through such matters. It always helps! Hence do not shy away while seeking help when in doubt and need, simply worrying about the world's perception about you and your lack of knowledge. No one is perfect and everyone seeks guidance!**



Alongside college, I decided to pursue the Chartered Accountancy course, because it was one of the most valued courses in Commerce at that time as well as now. It was a struggle financially as well as physically and my family sacrificed a lot for my studies as they were working and I was studying to complete the Chartered Accountancy course simultaneously. I did my GCD, CA entrance, CA inter and CA final, cleared all in the first attempt in these 6 years.

The days were very hectic. To attend college early morning, take tuitions of the same class (in which I was studying) to earn money, go for articleship and simultaneously studying from late evening until midnight in Podar college library. I cleared the CA Final exam in first attempt with an All India Rank at the age of 21, alongside enjoying life with neighbours and chawl friends, college friends and studying in the night on the terrace of the building.

#### **Lesson No 4:**

**The difficult times always pass by. The positive attitude, determination and hard work has no substitute and will help you to achieve your dreams always. There is no exception to this rule.**

Now the next question was, what next after qualifying as a Chartered Accountant. The thought was always to get into CA practice, but the financial health of the family came in between and I had to join 'Premiere Automobiles' company to earn for the family.

At this stage, some of my college friends who did Chartered Accountancy course, either pursued higher studies like MBA and IAS and went abroad. Intellectually I believe I was capable to pursue that, however probably my destiny didn't allow the same.

Even at "Premiere Automobiles" I started off with Indirect Tax team, rather I was forced into Indirect Taxes Team, because of my experience during Articleship. I moved away from there to join ICICI Bank leasing division as an Indirect Tax specialist, so as to get back door entry into the financial world. Again, luck played an important role. The leasing division which was to be headed by Mr K.V. Kamat who became the Managing Director of ICICI Bank then, asked to me switch to their Corporate Taxation department, forcing me to give up the hopes of getting into Financial Services. It was clear that Indirect Tax was my destiny.

#### **Lesson No 5:**

**It is not necessary that you will always get what you desire. Sometimes, your bad luck or past karma plays vital role in your life. Even our Jain religion teaches the same. Accept it and move on in your life with the soul desire to succeed.**

In the interim, I got married to Chetna, and both of us also started working towards brokerage of financial services, fixed deposits and investments, and also applying for public issue of shares. She has been very helpful and supportive and apart from doing this work for many years, she diligently looked after both my children and parents.

**Lesson No 6:**

**Remember, your spouse plays a very important role for your well being and mental support. Always RESPECT him/her.**

The dream of starting own practice was fading away. I was looking for other opportunities. Indian economy was opening up. I had two offers – one from a financial services company and the other from one of the Big 5's - Arthur Anderson ('AA'), which was considered as the fastest growing accounting firm in the world. The offer was only for my Indirect Tax experience as otherwise, as a thumb rule AA never recruited at a Managerial Level. You have to start from your articles only. I wondered whether I would be successful as it was an altogether new ball game. This is because AA was fiercely competitive, successful and full of extremely intelligent and hard-working people.

The concern was whether to join AA which was a different world altogether compared to traditional employment or continue with the other financial services company. I took advice from some of my well-wishers and successful people who encouraged me to take up the AA challenge.

Initial phase was difficult, but it turned out to be a great success story for me. I was the first KVO person to join Big 4/ Big 5 and become a partner there.

**Lesson No 7:**

**Destiny always has something for you. GOD will always support you at some point in time. Generally good karma follows bad karma. Believe in yourself. Take advice and guidance from right people and most importantly at young age, accept the challenge.**

**Lesson No 8:**

**Change is constant. Be willing to change. Adopt to new skills and new style of working and set your mindset accordingly in the age of 25-35. Imbibing these qualities, strengthens your base and creates an extremely successful, professional or entrepreneurial career of next 25-30 years.**

AA required change of mindset, working style and gave global exposure to skills, the way you talk, walk and behave, client servicing skills and most importantly ethics and systems, these global firms follow are a great learning experience. The life was much more stable and rewarding. All of a sudden, AA closed down globally due to Enron. Again, things became uncertain for some time. However, the leaders in India played a very vital role in merging India branch with another Big 4 – EY.

I have been with EY all along thereafter with a successful indirect tax career.

**Lesson 9:**

**Working with good leaders always helps. Their vision and ability to take good decisions, helps you to save from chaos in the middle of your career and flourishes in the long run.**

Few years before, I was in a dilemma as to whether I should push myself for higher career positions or not. After very thorough thought, I made up my mind not to push for higher career positions and be contented with what I have achieved in life.

**Lesson No 10:**

**At some point in time, you need to take pause, breathe and decide the next steps/ milestones of your career/life. It is an individual choice.**

The life has been extremely challenging but fulfilling and satisfying. It has helped me to travel across the world, meet many intelligent and professionally successful people and entrepreneurs and changed my outlook towards the world.

I have also been element of charitable activities by supporting Shree Bidada Sarvodaya Trust (village Bidada) as well as Maru hospital (Parel) on a regular basis for last 25 years to return back the deeds I owe to the society. GOD has been kind to shower his blessings on me and my family, with my son Rahul - a practicing advocate, my daughter in law Nidhi - a practicing psychologist and my daughter CA Pankti who secured an All India 13<sup>th</sup> rank, presently working with a private equity.

I have also taken wrong decisions on financial front and otherwise which have costed me dearly. The challenges continue but the experience has taught me to remain cool and calm and face the situation.

I hope I have done justice to the task given to me and helped young millennials to learn through my experience and put the same into their practice more effectively in their career and their personal lives.

Thank you and All the very Best

Best Regards,  
CA Heetesh Veera

