

# Non Resident Indian: Status & Tax Incidence



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## INTRODUCTION

The 'Residential Status' of a person has to be determined for the purpose of Taxation, Exchange Control Laws and Foreign Direct Investment in India.

Residential status is the most important factor for determining the applicability and incidence of both the Income Tax Act, 1961 and the Foreign Exchange Management Act 1999 (FEMA), amongst other applicable laws.

However manner of determination of residential status is different under Income Tax Act and Foreign Exchange Management Act.

### Residential status under Income Tax Act

Under Section 115C (e) of the Income Tax Act, Non Resident Indian (NRI) is defined as 'An individual being a citizen of India or a person of India origin (PIO) who is not a resident'. A person is deemed to be a PIO if he or either of his parents or any of his grandparents, was born in undivided India.

Under the Income-tax Law, an individual will be treated as a resident in India for a year if he satisfies any of the following conditions (i.e. may satisfy any one or may satisfy both the conditions):

- (1) He is in India for a period of 182 days or more in that year; or
- (2) He is in India for a period of 60 days or more in the year and for a period of 365 days or more in 4 years immediately preceding the relevant year.

If an individual does not satisfy any of the above conditions he will be treated as non-resident in India.

**Note:** Condition given in (2) above will not apply to an Indian citizen leaving India for the purpose of employment or to an Indian citizen leaving India as a member of crew of Indian ship or to an Indian citizen/person of Indian origin coming on a visit to India.

### Residential Status & Tax Incidence

As per Indian income tax rules, when an individual becomes resident in India, he will be taxed on his global income. However, if the overseas income is already being taxed, one can make use of the Double Taxation Avoidance Agreements or DTAA to reduce tax liability. Also, all income that originates in India or is received in India will be taxable in India.

The table below illustrates taxability of various sources of income:

Nature of Income	Residential Status		
	ROR	NOR	NR
Income which accrues or arises in India	Taxed	Taxed	Taxed
Income which is deemed to accrue or arise in India	Taxed	Taxed	Taxed
Income which is received in India	Taxed	Taxed	Taxed
Income which is deemed to be received in India	Taxed	Taxed	Taxed
Income accruing outside India from a business controlled from India or from a profession set up in India	Taxed	Taxed	Not taxed
Income other than above (i.e., income which has no relation with India)	Taxed	Not taxed	Not taxed

## Residential status under FEMA

Person Resident in India means:

1. A person residing in India for more than one hundred and eighty-two days during the course of the preceding financial year but does not include:
  - (a) A person who has gone out of India or who stays outside India for employment outside India or carrying on business or vocation outside India or for any other purpose which would indicate his intention to stay outside India for an uncertain period.
  - (b) A person who has come to or stays in India, in either case, otherwise than-
    - He has come for or taking employment in India, or
    - For carrying on business or vocation in India, or
    - For any other purpose as would indicate his intention to stay in India for an uncertain Period  
(In simple terms even in this case residing in India for 182 days is essential)
2. Any person or body corporate registered or incorporated in India
3. An office, branch or agency in India owned or controlled by a Person resident outside India
4. An office, branch or agency outside India owned or controlled by person resident in India

## Comparison of Residential Status under FEMA and Income Tax Act

Due to different definitions under Income Tax and FEMA, there could be situations, where a person could be a resident under Income Tax Act, and non-resident under FEMA, or vice-versa. The major differences are:

1. Income Tax requires stay of 182 days in India while FEMA requires stay of more than 182 days to be resident in India
2. Income Tax Act considers current Financial year for determination of residential status, while FEMA considers preceding financial year for determining the number of days stayed in India
3. Income Tax Act does not consider the intention or the reason of stay in India or visit abroad whereas FEMA considers the intention.

4. Under Income Tax Act, a person is either resident or non-resident for the entire financial year i.e. one cannot be resident for part of the year and non-resident for rest of the year.

## Importance of Residential Status Under FEMA

1. Under FEMA there are regulations for undertaking specific transactions only by Non Residents. For example, NRIs can only keep the NRE deposits.
2. A person resident in India may hold, own or transfer foreign currency, foreign security or any immovable property situated outside India if such currency, security or property was acquired, held or owned by such person when he was resident outside India or inherited from a person who was resident outside India
3. A person resident outside India may hold, own or transfer 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

## Tax Planning Measures arising on account of different Residential Status under the two Acts

### Case Study

Consider a person Mr. X who leaves India to take up an employment outside India and returns to India after completion of assignment after some years. The Residential status in the years of his departure and arrival under the two Acts and Tax incidence in his case is as follows:

#### **Departure from India**

##### **1. Mr. X leaves India on 01-07-2005**

He shall be Non Resident under FEMA on the date he leaves India. He shall also be Non Resident under Income Tax Act for Financial Year 2005-06 as a person leaving India for employment shall be considered non-resident only if he resides in India for less than 182 days.

##### **2. Mr. X Leaves India on 01-10-2005**

He shall be Non Resident under FEMA on the date he leaves India but a resident under Income Tax Act for the Financial year 2005-6 (Assessment year 2006-07) since he stayed in India for 182 days or more.

However, in both the above two cases he can open an NRE Account in India the day he leaves India since he becomes Non Resident under FEMA and interest arising on such account shall be exempt u/s 10(4) even though he is resident for the subject year under Income Tax Act as per point 2 above.

### **Arrival in India**

#### **Mr. X arrives India during FY 2015-16 and has not resided in India for more than 182 days in the preceding FY 2014-15**

He shall be Non Resident under FEMA for Financial Year 2015-16. The interest income arising on such accounts shall continue to be exempt in India.

For the next Financial Year 2016-17 the residential status under FEMA shall depend upon the date of arrival in India during the Financial Year 2015-16:

- **Mr. X arrives India on 01-07-2015**  
He shall be Resident under FEMA for FY 2016-17 since he stayed for a period of more than 182 days during the preceding Financial Year
- **Mr. X arrives India on 5-10-2015**  
He shall be Non Resident for Financial Year 2016-17 since he stayed in India for less than 182 days during the preceding Financial Year.

His residential status under Income Tax Act will be determined by the number of days stayed in India during the FY 2015-16.

The date on which Mr. X becomes Resident under FEMA he shall not be allowed to maintain his NRE account and all the interest income arising on such Accounts shall be taxable in India. Thus in the first case ( date of arrival 01-07-2015) his NRE accounts will be re-designated as Resident accounts and accordingly the interest income will be taxable in the Financial Year 2016-17. In the second case(date of arrival 05-10-2015) if he has NRE Accounts he shall be allowed to retain them for Financial Year 2016-17 and accordingly interest shall be exempt on these accounts. The interest on these Accounts will be taxable in 2017-18 when these accounts are re-designated as Residents Accounts.

### **Conclusion:**

A person being Non Resident under FEMA can maintain NRE Account and interest income arising on such Account shall continue to be exempt even if the person is resident under Income Tax Act. Therefore, an assessee can plan his taxes on the Interest Income in India by planning the departure and arrival dates to India.