

Taxability of non-residents under the Income Tax Act, 1961



Section 5:- Scope of "income" of a NR & NOR

- (i) Received or deemed to be received in India and/or
- (ii) Accrues or arises or is deemed to accrue or arise in India.

(Notes: NOR's income accruing or arising outside India excluded only if it is not derived from a business controlled in India or a profession set up in India)

Definition of Non-Residents



1. "Resident" as per I.T. Act:

Individual:

- (i) Physical presence \geq 182 days in a F.Y. or
- (ii) Physical presence \geq 365 days in four preceding F.Y. and \geq 60 days in the F.Y. or
- (iii) If a crew of Indian ship, or a NRI who comes on leave, or Indian citizen leaves India for the purpose of employment outside India physical presence \geq 182 days irrespective of presence in preceding four years.

Definition of Non-Residents (contd...)



"Resident" as per I.T. Act: (contd ...)

- Company:
 - (i) control & management wholly in India (Radha Rani Holding-110 TTJ 920(Delhi))
 - or**
 - (ii) if Indian company
- Other Entities (HUFs, Firms etc.)
Resident unless control & management **wholly outside India**

3

Definition of Non-Residents (contd...)



- Planning with respect to Residential status (Precautions):
- Day of arrival & day of departure from India are counted as one day each in India (i.e. 2 days stay) (223 ITR 462-AAR).
- In the 1st year of leaving India ensure that you leave before September 28th otherwise world income will be taxable.
- On final return (not on leave) to India ensure to come back on or after Feb. 1st if present for 365 days in previous 4 years. If not, one can return on September 28th.

4

Taxability of non-residents under the Income Tax Act, 1961 (contd...)

- “Deemed to accrue or arise in India” – meaning of:

Section	Sources Of Income	Description
9(1)(i)	Business Income	Income from a business connection in India or through or from any property or capital asset or source of income or transfer of capital asset situated in India.
9(1)(ii)	Salaries	Salaries for services rendered in India .
9(1)(iii)	Salaries	Salaries by Govt. for services outside India.
9(1)(iv)	Dividend	Dividend paid by an Indian Company outside India. (now Exempt)
9(1)(v)	Interest	Interest by Govt. or by a resident (unless for a business or source outside India)
9(1)(vi)	Royalty	'Royalty' by Govt. or a resident (unless for a business or a source outside India).
9(1)(vii)	FTS	'Fees for Technical Services (FTS)' by Govt. or a resident (unless for a business or a source outside India).

5

Taxability of non-residents under the Income Tax Act, 1961 (contd...)

- **Taxability of a Business Income of Non-Resident Sec. 9(1)(i)**

- * Taxability if **“Business Connection”** exists or if asset or **source** in India. (Vodafone ?)
(R.D. Agarwal (56 ITR 20(SC)); Cir. 23 of 1969 & Cir. 786)
- * Taxable only to the extent **“reasonably attributable”** to operations in India.

- Morgan Stanley-292 ITR 416 (SC);

- Galileo (ITAT - Delhi);

- Rolls Royce (ITAT - Delhi)

- * **Specific exclusions** – Explanation 1(b); 1(c) & 1(d) of Section 9(1)(i)

- * **Specific Inclusions** – Explanation 2 to section 9 (1)(i)

- * Treaty Concept of **dependent agent** introduced in Act (Set Satellite-106 ITD 175); Galileo (ITAT - Delhi); Rolls Royce (ITAT - Delhi)

- * Agent need not **be** in India but **must act** in India.

(Also refer Specialty Magazine (274 ITR 310(AAR)) – Difference between “mainly & “almost wholly”)

6

Taxability of non-residents under the Income Tax Act,1961(contd...)



- Taxability of a Business Income (of Non-Resident) (Cont...)
- Some important observations of SC in 288 ITR 408 :
 - Mere existence of a business connection may not result in income accruing or arising in India;
 - Existence of a Permanent Establishment does not necessarily mean existence of a business connection
 - Where severable part of a composite contract are performed in different jurisdictions , the principal of apportionment should be applied to determine profits taxable in each jurisdiction

Taxability of non-residents under the Income Tax Act,1961(contd...)



- ❖ Relevant Income tax Rules
 - Rule 10
 - percentage of turnover or
 - proportion to total receipts or
 - any other reasonable
 - Rule 26 :- Exchange Rate Applicable for TDS
 - Rule 115:- Exchange Rate Applicable for Returns
- ❖ Chapter XII A – For NRIs
- ❖ Transfer Pricing – Sec. 92 to Sec 92F