



RESIDENCE AND SCOPE OF TOTAL INCOME



LEARNING OUTCOMES

After studying this chapter, you would be able to -

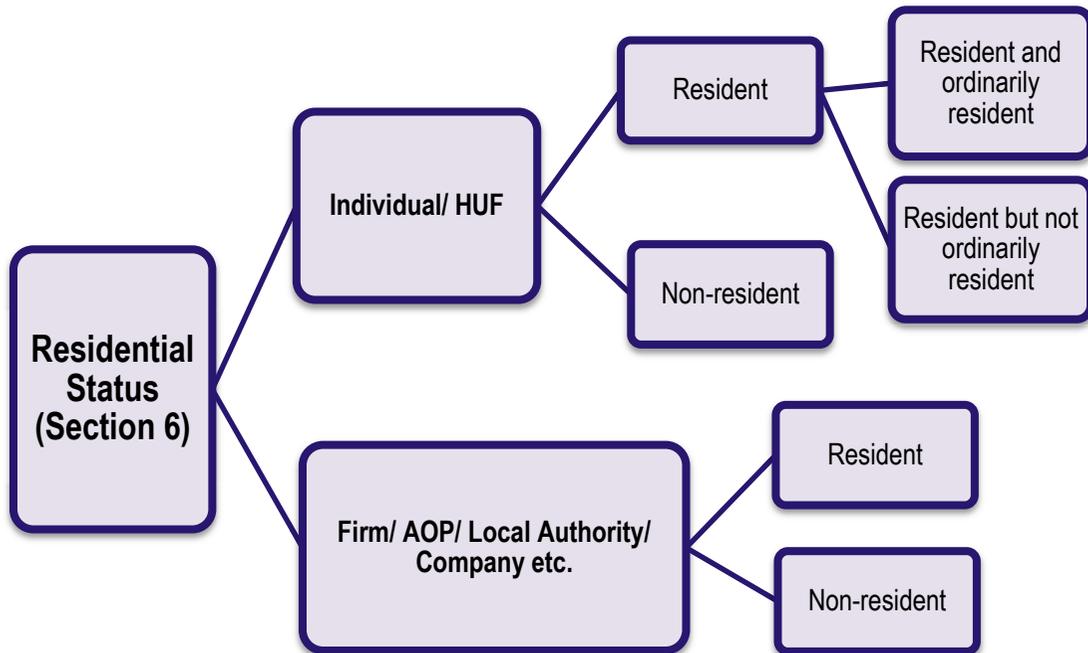
- ❑ **determine** the residential status of Individuals, HUF, AOPs/ BOIs, Firms & Companies;
- ❑ **examine** the scope of income chargeable to tax in respect of different persons, after ascertaining their residential status;
- ❑ **appreciate** how the residential status of a person determines the income includible in his total income and consequently impacts his income-tax liability.



2.1 RESIDENTIAL STATUS [SECTION 6]

The incidence of tax on any assessee depends upon his residential status under the Act. For all purposes of income-tax, taxpayers are classified into three broad categories on the basis of their residential status viz.

- (1) Resident and ordinarily resident
- (2) Resident but not ordinarily resident
- (3) Non-resident



The residential status of an assessee must be ascertained with reference to each previous year. A person who is resident and ordinarily resident in one year may become non-resident or resident but not ordinarily resident in another year or *vice versa*.

The provisions for determining the residential status of assessee are:

(1) Residential status of Individuals

Under section 6(1), an individual is said to be resident in India in any previous year, if he satisfies **any one** of the following conditions:

- (i) He has been in India during the previous year for a total period of 182 days or more, or

- (ii) He has been in India during the 4 years immediately preceding the previous year for a total period of 365 days or more and has been in India for at least 60 days in the previous year.

If the individual satisfies any one of the conditions mentioned above, he is a resident. If both the above conditions are not satisfied, the individual is a non-resident.

Notes:

- (a) The term “stay in India” includes stay in the territorial waters of India (i.e., 12 nautical miles into the sea from the Indian coastline). Even the stay in a ship or boat moored in the territorial waters of India would be sufficient to make the individual resident in India.
- (b) It is not necessary that the period of stay must be continuous or active nor is it essential that the stay should be at the usual place of residence, business or employment of the individual.
- (c) For the purpose of counting the number of days stayed in India, both the date of departure as well as the date of arrival are considered to be in India.
- (d) The residence of an individual for income-tax purpose has nothing to do with citizenship, place of birth or domicile. An individual can, therefore, be resident in more countries than one even though he can have only one domicile.

Exceptions:

The following categories of individuals will be treated as resident in India only if the period of their stay during the relevant previous year amounts to 182 days. In other words, even if such persons were in India for 60 days or more (but less than 182 days) in the relevant previous year, they will not be treated as resident due to the reason that their stay in India was for 365 days or more during the 4 immediately preceding years.

- (i) Indian citizens, who leave India during the relevant previous year as a member of the crew of an Indian ship or for purposes of employment outside India, or
- (ii) Indian citizen or person of Indian origin¹ engaged outside India in an employment or a business or profession or in any other vocation, who comes on a visit to India in any previous year

How to determine period of stay in India for an Indian citizen, being a crew member?

In case of foreign bound ships where the destination of the voyage is outside India, there is uncertainty regarding the manner and the basis of determining the period of stay in India for an Indian citizen, being a crew member.

¹A person is said to be of Indian origin if he or either of his parents or either of his grandparents were born in undivided India.

To remove this uncertainty, *Explanation 2* to section 6(1) provides that in the case of an Individual, being a citizen of India and a member of the crew of a foreign bound ship leaving India, the period or periods of stay in India shall, in respect of such voyage, be determined in the prescribed manner and subject to the prescribed conditions.

Accordingly, the CBDT has vide, *Notification No. 70/2015 dated 17.8.2015*, inserted Rule 126 in the Income-tax Rules, 1962 to compute the period of stay in such cases.

According to Rule 126, for the purposes of section 6(1), in case of an individual, being a citizen of India and a member of the crew of a ship, the period or periods of stay in India shall, in respect of an eligible voyage, not include the following period:

Period to be excluded

Period commencing from	And	Period ending on
the date entered into the Continuous Discharge Certificate in respect of joining the ship by the said individual for the eligible voyage	And	the date entered into the Continuous Discharge Certificate in respect of signing off by that individual from the ship in respect of such voyage.

Meaning of certain terms:

Terms	Meaning
(a) Continuous Discharge Certificate	This term has the meaning assigned to it in the Merchant Shipping (Continuous Discharge Certificate-cum Seafarer's Identity Document) Rules, 2001 made under the Merchant Shipping Act, 1958.
(b) Eligible voyage	A voyage undertaken by a ship engaged in the carriage of passengers or freight in international traffic where – (i) for the voyage having originated from any port in India, has as its destination any port outside India; and (ii) for the voyage having originated from any port outside India, has as its destination any port in India.

ILLUSTRATION 1

Mr. Anand is an Indian citizen and a member of the crew of a Singapore bound Indian ship engaged in carriage of passengers in international traffic departing from Chennai port on 6th June, 2018. From the following details for the P.Y.2018-19, determine the residential status of Mr. Anand for A.Y.2019-20, assuming that his stay in India in the last 4 previous years (preceding P.Y.2018-19) is 400 days and last seven previous years (preceding P.Y.2018-19) is 750 days:

Particulars	Date
<i>Date entered into the Continuous Discharge Certificate in respect of joining the ship by Mr. Anand</i>	<i>6th June, 2018</i>

Date entered into the Continuous Discharge Certificate in respect of signing off the ship by Mr. Anand	9 th December, 2018
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SOLUTION

In this case, the voyage is undertaken by an Indian ship engaged in the carriage of passengers in international traffic, originating from a port in India (i.e., the Chennai port) and having its destination at a port outside India (i.e., the Singapore port). Hence, the voyage is an eligible voyage for the purposes of section 6(1).

Therefore, the period beginning from 6th June, 2018 and ending on 9th December, 2018, being the dates entered into the Continuous Discharge Certificate in respect of joining the ship and signing off from the ship by Mr. Anand, an Indian citizen who is a member of the crew of the ship, has to be excluded for computing the period of his stay in India. Accordingly, 187 days [25+31+31+30+31+30+9] have to be excluded from the period of his stay in India. Consequently, Mr. Anand's period of stay in India during the P.Y.2018-19 would be 178 days [i.e., 365 days – 187 days]. Since his period of stay in India during the P.Y.2018-19 is less than 182 days, he is a non-resident for A.Y.2019-20.

Note - Since the residential status of Mr. Anand is “non-resident” for A.Y.2019-20 consequent to his number of days of stay in P.Y.2018-19 being less than 182 days, his period of stay in the earlier previous years become irrelevant.

Resident and ordinarily resident/ Resident but not ordinarily resident

Only individuals and HUF can be resident but not ordinarily resident in India. All other classes of assesseees can be either a resident or non-resident. A not-ordinarily resident person is one who satisfies any one of the conditions specified under section 6(6).

- (i) If such individual has been non-resident in India in any 9 out of the 10 previous years preceding the relevant previous year, or
- (ii) If such individual has during the 7 previous years preceding the relevant previous year been in India for a period of 729 days or less.

Note: In simpler terms, an individual is said to be a **resident and ordinarily resident** if he satisfies both the following conditions:

- (i) He is a resident in any 2 out of the last 10 years preceding the relevant previous year, **and**
- (ii) His total stay in India in the last 7 years preceding the relevant previous year is 730 days or more.

If the individual satisfies both the conditions mentioned above, he is a resident and ordinarily resident but if only one or none of the conditions are satisfied, the individual is a resident but not ordinarily resident.

ILLUSTRATION 2

Brett Lee, an Australian cricket player visits India for 100 days in every financial year. This has been his practice for the past 10 financial years. Find out his residential status for the assessment year 2019-20.

SOLUTION**Determination of Residential Status of Mr. Brett Lee for the A.Y. 2019-20:-**

Period of stay during previous year 2018-19 = 100 days

Calculation of period of stay during 4 preceding previous years (100 x 4=400 days)

2017-18	100 days
2016-17	100 days
2015-16	100 days
2014-15	100 days
Total	400 days

Mr. Brett Lee has been in India for a period more than 60 days during previous year 2018-19 and for a period of more than 365 days during the 4 immediately preceding previous years. Therefore, since he satisfies one of the basic conditions under section 6(1), he is a resident for the assessment year 2019-20.

Computation of period of stay during 7 preceding previous years = 100 x 7=700 days

2017-18	100 days
2016-17	100 days
2015-16	100 days
2014-15	100 days
2013-14	100 days
2012-13	100 days
2011-12	100 days
Total	700 days

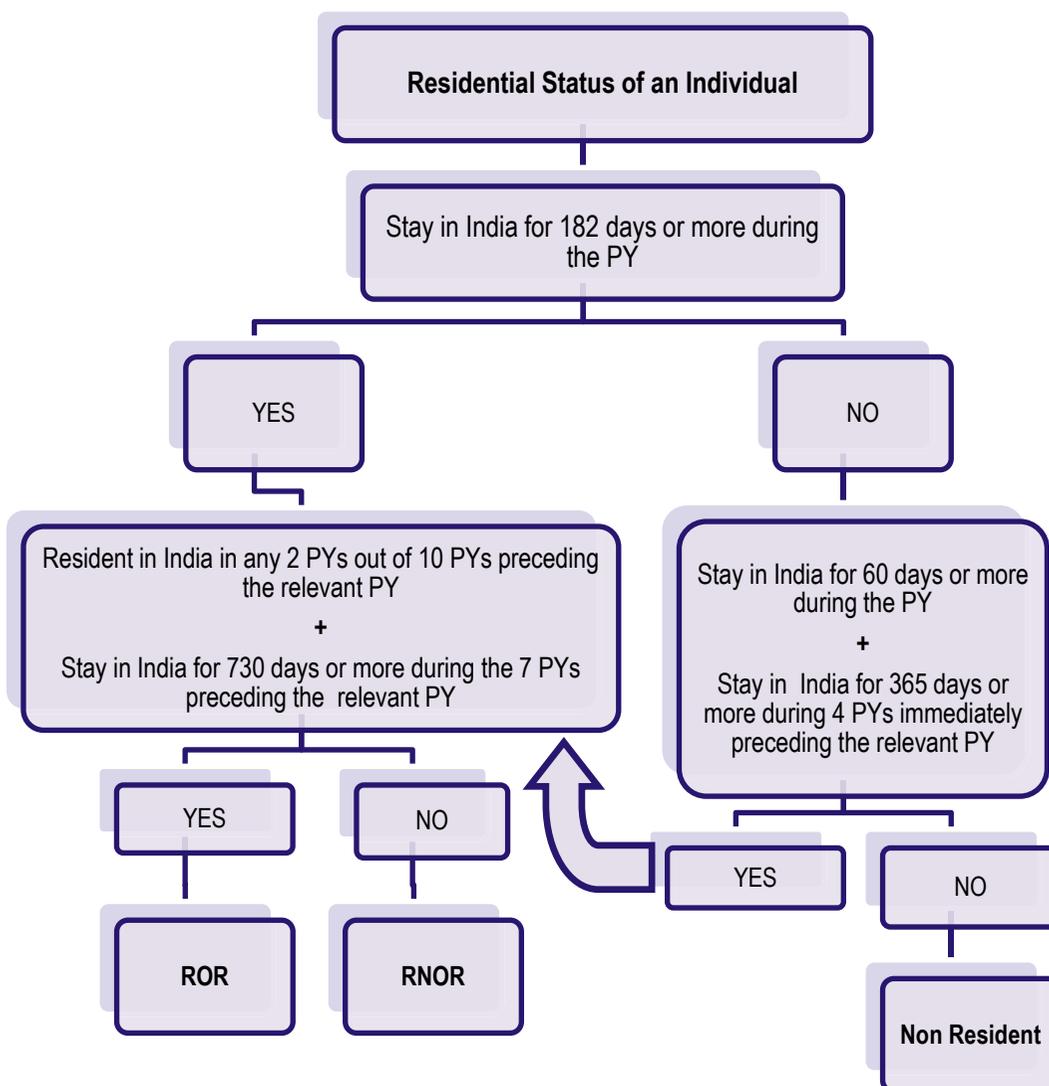
Since his period of stay in India during the past 7 previous years is less than 730 days, he is a not-ordinarily resident during the assessment year 2019-20. (See Note below)

Therefore, Mr. Brett Lee is a resident but not ordinarily resident during the previous year 2018-19 relevant to the assessment year 2019-20.

Note: A not-ordinarily resident person is one who satisfies any one of the conditions specified under section 6(6), i.e.,

- (i) If such individual has been non-resident in India in any 9 out of the 10 previous years preceding the relevant previous year, or
- (ii) If such individual has during the 7 previous years preceding the relevant previous year been in India for a period of 729 days or less.

In this case, since Mr. Brett Lee satisfies condition (ii), he is a not-ordinary resident for the A.Y. 2019-20.



(2) Residential status of HUF

Resident: A HUF would be resident in India if the control and management of its affairs is situated wholly or partly in India.

Non-resident: If the control and management of the affairs is situated wholly outside India it would become a non-resident.

Meaning of the term “control and management”

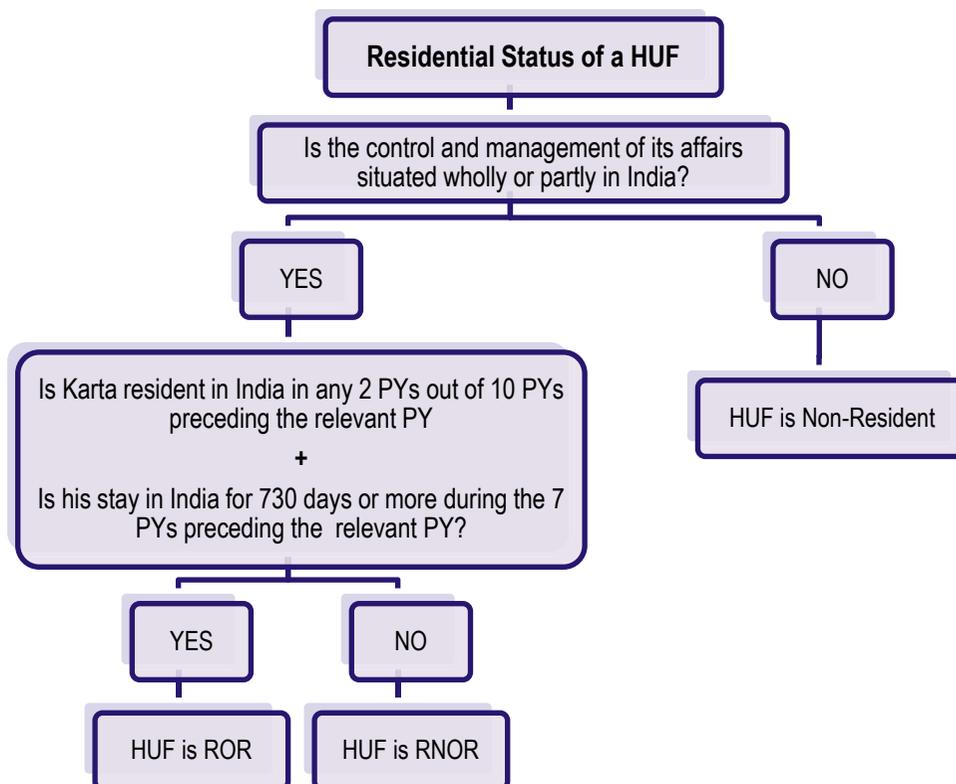
- The expression ‘control and management’ referred to under section 6 refers to the central control and management and not to the carrying on of day-to-day business by servants, employees or agents.
- The business may be done from outside India and yet its control and management may be wholly within India. Therefore, control and management of a business is said to be situated at a place where the head and brain of the adventure is situated.
- The place of control may be different from the usual place of running the business and sometimes even the registered office of the assessee. This is because the control and management of a business need not necessarily be done from the place of business or from the registered office of the assessee.
- But control and management do imply the functioning of the controlling and directing power at a particular place with some degree of permanence.

Resident and ordinarily resident/ Resident but not ordinarily resident

If Karta of resident HUF satisfies both the following additional conditions (as applicable in case of individual) then, resident HUF will be Resident and ordinarily resident, otherwise it will be Resident but not ordinarily resident.

Additional conditions:

1. Karta of resident HUF should be resident in at least 2 previous years out of 10 previous years immediately preceding relevant previous year.
2. Stay of Karta during 7 previous years immediately preceding relevant previous year should be 730 days or more.



(3) Residential status of firms and association of persons

Resident: A firm and an AOP would be resident in India if the control and management of its affairs is situated wholly or partly in India.

Non-resident: Where the control and management of the affairs is situated wholly outside India, the firm and AOP would become a non-resident.

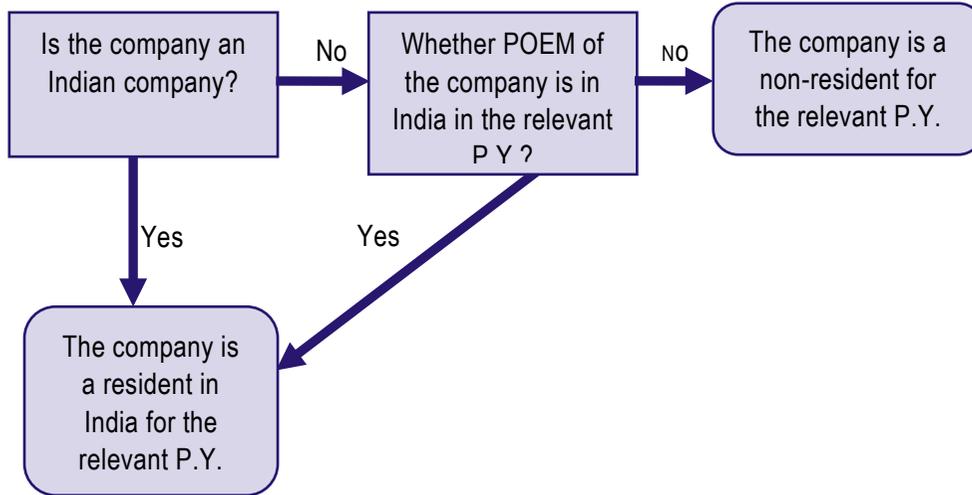
(4) Residential status of companies

A company would be resident in India in any previous year, if-

- (i) it is an Indian company; or
- (ii) its place of effective management, in that year, is in India.

“Place of effective management” to mean a place where key management and commercial decisions that are necessary for the conduct of the business of an entity as a whole are, in substance made [Explanation to section 6(3)]

Determination of residential status of a company



Note: Guidelines for determination of POEM of a company, other than an Indian company would be dealt with in Chapter 1: Non-resident Taxation in Module 4 of the Study Material containing the chapters relating to Part II: International Taxation.

(5) **Residential status of local authorities and artificial juridical persons**

Resident: Local authorities and artificial juridical persons would be resident in India if the control and management of its affairs is situated wholly or partly in India.

Non-resident: Where the control and management of the affairs is situated wholly outside India, they would become non-residents.



2.2 SCOPE OF TOTAL INCOME

Section 5 provides the scope of total income in terms of the residential status of the assessee because the incidence of tax on any person depends upon his residential status. The scope of total income of an assessee depends upon the following three important considerations:

- (i) the residential status of the assessee;
- (ii) the place of accrual or receipt of income, whether actual or deemed; and
- (iii) the point of time at which the income had accrued to or was received by or on behalf of the assessee.

The ambit of total income of the three classes of assessee would be as follows:

(1) **Resident and ordinarily resident**

The total income of a resident assessee would, under section 5(1), consist of:

- (i) income received or deemed to be received in India during the previous year;
- (ii) income which accrues or arises or is deemed to accrue or arise in India during the previous year; and
- (iii) income which accrues or arises outside India even if it is not received or brought into India during the previous year.

In simpler terms, a resident and ordinarily resident has to pay tax on the total income accrued or deemed to accrue, received or deemed to be received in or outside India.

(2) Resident but not ordinarily resident

Under section 5(1), the computation of total income of resident but not ordinarily resident is the same as in the case of resident and ordinarily resident stated above except for the fact that the income accruing or arising to him outside India is not to be included in his total income.

However, where such income is derived from a business controlled from or profession set up in India, then it must be included in his total income even though it accrues or arises outside India.

(3) Non-resident

A non-resident's total income under section 5(2) includes:

- (i) income received or deemed to be received in India in the previous year; and
- (ii) income which accrues or arises or is deemed to accrue or arise in India during the previous year.

Note: All assesseees, whether resident or not, are chargeable to tax in respect of their income accrued, arisen, received or deemed to accrue, arise or to be received in India whereas residents alone are chargeable to tax in respect of income which accrues or arises outside India.

Clarification regarding liability to income-tax in India of a non-resident seafarer receiving remuneration in NRE (Non-Resident External) account maintained with an Indian Bank [Circular No.13/2017, dated 11.04.2017 and Circular No.17/2017, dated 26.04.2017]

Income by way of salary, received by non-resident seafarers, for services rendered outside India on-board foreign ships, is being subjected to tax in India for the reason that the salary has been received by the seafarer into the NRE bank account maintained in India by the seafarer. On receiving representations in this regard, the CBDT examined the matter and noted that section 5(2)(a) of the Income-tax Act, 1961 provides that only such income of a non-resident shall be subjected to tax in India that is either received or is deemed to be received in India.

Accordingly, the CBDT has, vide this circular, clarified that that salary accrued to a non-resident seafarer for services rendered outside India on a foreign going ship (with Indian flag or foreign flag) shall not be included in the total income merely because the said salary has been credited in the NRE account maintained with an Indian bank by the seafarer.

Residential Status and Scope of Total Income: Whether the following incomes are to be included in Total Income?

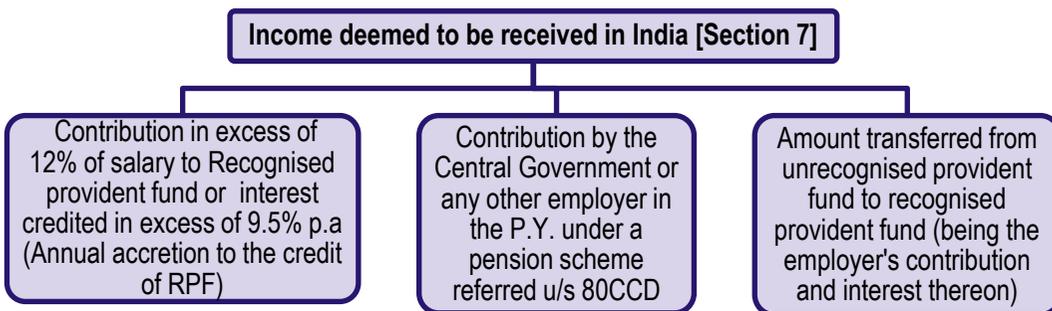
Scope of total Income	Resident and Ordinarily Resident	Resident but not Ordinarily Resident	Non-Resident
Income received or deemed to be received in India during the previous year	Yes	Yes	Yes
Income accruing or arising or deeming to accrue or arise in India during the previous year	Yes	Yes	Yes
Income accruing or arising outside India during the previous year	Yes, even if such income is not received or brought into India during the previous year	Yes, but only if such income is derived from a business controlled in or profession set up in India; Otherwise, No.	No

Meaning of “Income received or deemed to be received”

All assesseees are liable to tax in respect of the income received or deemed to be received by them in India during the previous year irrespective of -

- (i) their residential status, and
- (ii) the place of its accrual.

Income is to be included in the total income of the assessee immediately on its actual or deemed receipt. The receipt of income refers to only the first occasion when the recipient gets the money under his control. Therefore, when once an amount is received as income, remittance or transmission of that amount from one place or person to another does not constitute receipt of income in the hands of the subsequent recipient or at the place of subsequent receipt.



Meaning of income 'accruing' and 'arising'

Accrue refers to the right to receive income, whereas due refers to the right to enforce payment of the same. For e.g. salary for work done in December will accrue throughout the month, day to day, but will become due on the salary bill being passed on 31st December or 1st January.

Similarly, on Government securities, interest payable on specified dates arise during the period of holding, day to day, but will become due for payment on the specified dates.

Example:

Interest on Government securities is usually payable on specified dates, say on 1st January and 1st July. In all such cases, the interest would be said to accrue from 1st July to 31st December and on 1st January, it will fall due for payment.

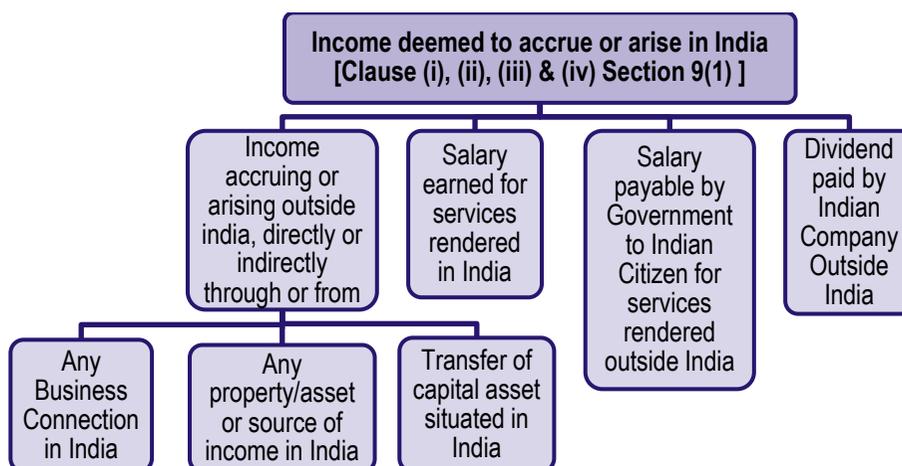
It must be noted that income which has been taxed on accrual basis cannot be assessed again on receipt basis, as it will amount to double taxation.

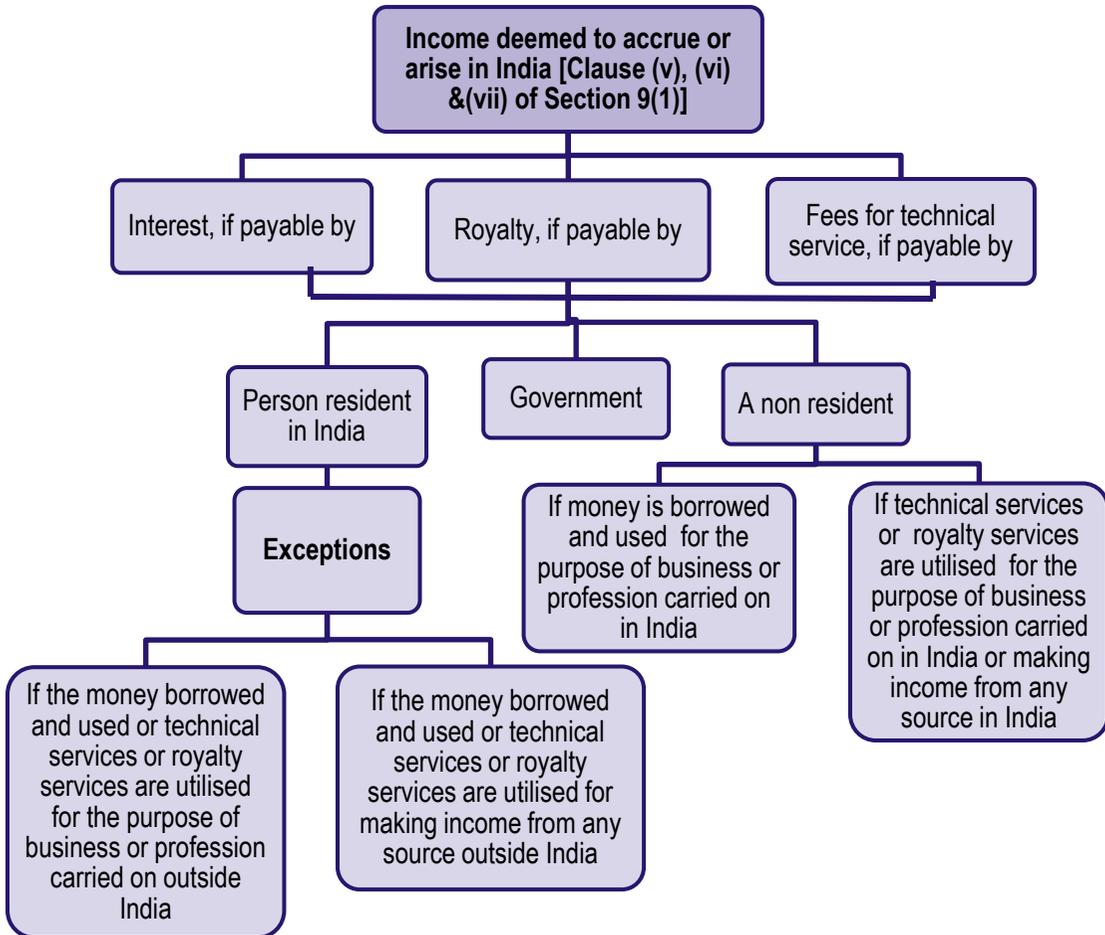
With a view to removing difficulties and clarifying doubts in the taxation of income, *Explanation 1* to section 5 specifically provides that an item of income accruing or arising outside India shall not be deemed to be received in India merely because it is taken into account in a balance sheet prepared in India.

Further, *Explanation 2* to section 5 makes it clear that once an item of income is included in the assessee's total income and subjected to tax on the ground of its accrual/ deemed accrual, it cannot again be included in the person's total income and subjected to tax either in the same or in a subsequent year on the ground of its receipt - whether actual or deemed.

Income deemed to accrue or arise in India [Section 9]

Under section 9, certain types of income are deemed to accrue or arise in India even though they may actually accrue or arise outside India. The categories of income which are deemed to accrue or arise in India are given below in this chart:





Note: Section 9 details the incomes deemed to accrue or arise in India and section 9A details the circumstances when the presence of eligible fund manager in India would not constitute business connection in India for an eligible investment fund. These provisions would be dealt with in detail in Chapter 1: Non-resident Taxation in Module 4 of Study Material containing the chapters relating to Part II: International taxation.

EXERCISE

Question 1

The business of a HUF is transacted from Australia and all the policy decisions are taken there. Mr. E, the karta of the HUF, who was born in Kolkata, visits India during the P.Y.2018-19 after 15 years. He comes to India on 1.4.2018 and leaves for Australia on 1.12.2018. Determine the residential status of Mr. E and the HUF for A.Y. 2019-20.

Answer

- (a) During the P.Y.2018-19, Mr. E has stayed in India for 245 days (i.e. 30+31+30+31+31+30+31+30+1 days). Therefore, he is a resident. However, since he has come to India after 15 years, he does not satisfy any of the conditions for being ordinarily resident.

Therefore, the residential status of Mr. E for the P.Y.2018-19 is resident but not ordinarily resident.

- (b) Since the business of the HUF is transacted from Australia and nothing is mentioned regarding its control and management, it is assumed that the control and management is also wholly outside India. Therefore, the HUF is a non-resident for the P.Y.2018-19.

Question 2

From the following particulars of income furnished by Mr. Anirudh pertaining to the year ended 31.3.2019, compute the total income for the assessment year 2019-20, if he is:

- (i) Resident and ordinary resident;
 (ii) Resident but not ordinarily resident;
 (iii) Non-resident

	<i>Particulars</i>	<i>₹</i>
(a)	Short term capital gains on sale of shares in Indian Company received in Germany	15,000
(b)	Dividend from a Japanese Company received in Japan	10,000
(c)	Rent from property in London deposited in a bank in London, later on remitted to India through approved banking channels	75,000
(d)	Dividend from RP Ltd., an Indian Company	6,000
(e)	Agricultural income from lands in Gujarat	25,000

Answer

Computation of total income of Mr. Anirudh for the A.Y. 2019-20

Particulars	Resident & ordinarily resident (₹)	Resident but not ordinarily resident (₹)	Non-Resident (₹)
1) Short term capital gains on sale of shares of an Indian company, received in Germany	15,000	15,000	15,000
2) Dividend from a Japanese company, received in Japan	10,000	-	-
3) Rent from property in London deposited in a bank in London [See Note (i) below]	52,500	-	-
4) Dividend from RP Ltd., an Indian Company [See Note (ii) below]	-	-	-
5) Agricultural income from land in Gujarat [See Note (iii) below]	-	-	-
Total Income	77,500	15,000	15,000

Notes:

- (i) It has been assumed that the rental income is the gross annual value of the property. Therefore, deduction @30% under section 24, has been provided and the net income so computed is taken into account for determining the total income of a resident and ordinarily resident.

Particulars	₹
Rent received (assumed as gross annual value)	75,000
Less: Deduction under section 24 (30% of ₹75,000)	22,500
Income from house property	52,500

- (ii) Dividend received from Indian company upto ₹ 10 lakh is exempt under section 10(34).
 (iii) Agricultural income is exempt under section 10(1).

Question 3

Poulomi, a chartered accountant, is presently working in a firm in India. She has received an offer for the post of Chief Financial Officer from a company at Singapore. As per the offer letter, she should join the company at any time between 1st September, 2018 and 31st October, 2018. She approaches you for your advice on the following issues to mitigate her tax liability in India:

- (i) Date by which she should leave India to join the company;
- (ii) Direct credit of part of her salary to her bank account in Kolkata maintained jointly with her mother to meet requirement of her family
- (iii) Period for which she should stay in India when she comes on leave.

Answer

The following category of individuals will be treated as resident in India only if the period of their stay in India during the relevant previous year is 182 days or more :-

- (a) Indian citizens, who leave India in any previous year, *inter alia*, for purposes of employment outside India, or
 - (b) Indian citizen or person of Indian origin engaged outside India, *inter alia*, in an employment, who comes on a visit to India in any previous year.
- (i) Since Poulomi is leaving India for the purpose of employment outside India, she will be treated as resident only if the period of her stay during the previous year amounts to 182 days or more. Therefore, Poulomi should leave India on or before 28th September, 2018, in which case, her stay in India during the previous year would be less than 182 days and she would become non-resident for the purpose of taxability in India. In such a case, only the income which accrues or arises in India or which is deemed to accrue or arise in India or received or deemed to be received in India shall be taxable.

The income earned by her in Singapore would not be chargeable to tax in India for A.Y. 2019-20, if she leaves India on or before 28th September, 2018.

- (ii) If any part of Poulomi's salary will be credited directly to her bank account in Kolkata then, that part of her salary would be considered as income received in India during the previous year under section 5 and would be chargeable to tax under Income-tax Act, 1961, even if she is a non-resident. Therefore, Poulomi should receive her entire salary in Singapore and then remit the required amount to her bank account in Kolkata in which case, the salary earned by her in Singapore would not be subject to tax in India.
- (iii) In case Poulomi visits India after taking up employment outside India, she would be covered in the exception provided in (b) above and she will be treated as resident only if the period of her stay during the relevant previous year amounts to 182 days or more.

Therefore, when Poulomi comes India on leave, she should stay in India for less than 182 days during the relevant previous year so that her status remains as a non-resident for the relevant previous year. Moreover, she should not visit India again during the current previous year i.e. P.Y. 2018-19.