Pre-Immigration Planning Considerations

This article sets forth some basic planning considerations applicable to non-resident persons intending to immigrate to India. For a non-resident person planning to immigrate from one jurisdiction to another, it is vital to undertake a properly planned pre-immigration exercise taking into account various factors such as residential status, exchange controls, reporting obligations with respect to assets in different jurisdictions and so on. This would help the non-resident person in understanding the potential ramifications of settling in another jurisdiction. The article highlights the tax policies and regulations which would affect the income and assets of non-resident persons and suggests various planning considerations which would help non-resident persons in avoiding unintended legal consequences and achieving ideal tax results upon migrating to India. Read on to know more...

1. Introduction

1.1. With the increasing trend of reverse brain drain, when a non-resident person plans to immigrate from one jurisdiction to another, it is vital to consider various aspects such as residential status, exchange controls, reporting obligations with respect to assets in different jurisdictions, and so on as part of pre-immigration planning. A properly planned pre-immigration exercise, taking into account, *inter alia,* global tax planning and cross-border law assimilation, would help the non-resident person in avoiding unintended legal consequences upon settling in another jurisdiction. This article sets forth some basic planning considerations applicable to non-resident persons intending to immigrate to India, which will help them in understanding the potential legal implications and achieving ideal tax results in various jurisdictions upon immigration.

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1.2. In the recent past, given that the tax authorities and the regulators across the globe are tightening the noose on people attempting to take advantage of any potential loopholes in tax laws for tax avoidance, people who are planning to migrate to another jurisdiction must be mindful of the tax policies and regulations in such jurisdiction. Further, since incomes earned and assets created when the person was a non-resident generally enjoy some tax reliefs in the new home jurisdiction, it becomes even more critical for a person to keep the house in order as far as tax laws are concerned.

2. Tax residency rule in India

2.1. In India, as in many other countries, the charge of income-tax and the scope of taxable income varies with the factor of residence. The tax residency rule depends upon the category of taxpayer. For example, while a company incorporated in India is always regarded as an Indian tax resident, a foreign company is regarded as an Indian tax resident if its place of effective management[1] is in India. When it comes to individuals, Indian tax residency rule depends primarily upon the number of days for which such individual remains physically present in India in the relevant financial year (i.e. a period of 1 year from 1st April to 31st March). This means that determining tax residency of an individual is an annual exercise with an objective criterion.

2.2. The major repercussions of an individual being regarded as an Indian tax resident are that such individual is (i) taxed in India on its global income and (ii) required to disclose even its foreign assets. An individual is said to be a tax resident of India in any financial year, if he/she—

2.2.1. is physically present in India in that financial year for a period(s) amounting in all to 182 days or more; or

2.2.2. having within the 4 financial years preceding that financial year been in India for a period(s) amounting in all to 365 days or more, is in India for a period(s) amounting in all to 60 days or more in that financial year.

If an individual spends 182 days in India in a financial year, then, even if such individual does not intend to settle in India, he/she would be regarded as an Indian tax resident and thus, be taxed in India on its global income.

The above provisions are applicable to all individuals irrespective of their nationality.

2.3. *However, in the case of the following individuals, the condition specified in clause 2.2.2 above is not applicable and thus, such persons' tax residency in India is determined on the basis of the condition specified in clause 2.2.1 above only:*

2.3.1. *in the case of an individual, being a citizen of India, who leaves India in any previous year as a member of the crew of an Indian ship as defined in the Merchant Shipping Act, 1958, or for the purposes of employment outside India[2];*

2.3.2. *in the case of an individual, being a citizen of India, or a person of Indian origin[3], who, being outside India, comes on a visit to India in any financial year.*

2.4. Thus, basis the aforesaid provisions, it becomes apparent that if an individual spends 182 days in India in a financial year, then, even if such individual does not intend to settle in India, he/she would be regarded as an Indian tax resident and thus, be taxed in India on its global income. In this regard, in counting the number of days' stay in India, the following aspects must be kept in mind:

2.4.1. both the day of entry and the day of departure should be treated as the day of stay in India (i.e. 2 days stay in India) *- Dates stamped on Passport are normally considered as proof of dates of departure from and arrival in India*,

2.4.2. it is not necessary that the stay should be for a continuous period. If there are multiple visits to India during the relevant financial year, then, the aggregate number of days stayed in India during all such visits would be considered to determine the tax residency of such individual,

[1] "Place of effective management" means a place where key management and commercial decisions that are necessary for the conduct of business of an entity as a whole are, in substance made.
[2] Official tours abroad in connection with employment in India shall not be regarded as employment outside India.
[3] A person shall be deemed to be of Indian origin if he, or either of his parents or any of his grand-parents, was born in undivided India.

2.4.3. it is not necessary that the stay should be at one place in India,

2.4.4. citizenship of a country and residential status of that country are two separate concepts. A person may be an Indian national/Citizen but may not be a resident in India and vice versa.

2.5. Resident but 'not ordinarily resident' (RNOR)

2.5.1. For individuals, especially the migrating class, the domestic tax law of India contains a uniquely relaxed category – RNOR. The two primary benefits of a RNOR category are that (i) RNOR is taxed in India only on its India sourced income (as against global income in case of residents) and (ii) RNOR is exempted from the requirement of disclosing foreign assets.

2.5.2. A person is said to be "not ordinarily resident" in India (i.e. RNOR) in any financial year if such person—

a) has been a non-resident for Indian income-tax purposes in 9 out of the 10 financial years preceding that financial year, or

b) has during the 7 financial years preceding that financial year been in India for period(s) amounting in all not more than 729 days.

3. Consequences of becoming a tax resident of India

3.1. The scope and ambit of taxation in case of an Indian tax resident is very wide as an Indian tax resident is taxed in India on its global income, i.e. in case of Indian tax residents, even the offshore income is liable to be taxed in India (of course, subject to relief under the relevant tax treaty). On the contrary, in case of non-residents, Indian income-tax is levied only in respect of income which is sourced from India or received in India.

3.2. An Indian tax resident is required to disclose, in the annual income-tax return, the details of foreign assets held by it (including any financial interest in any entity) or of any account located outside India in respect of which it has signing authority. Failure to do such disclosure attracts strict penalties. Such a disclosure requirement is not there in case of non-residents.

Thus, since dates stamped on passport are normally considered as proof of dates of departure from and arrival in India, it is advisable to keep several photocopies of the relevant passport pages for present and future use.

4. Pre-immigration planning for persons planning to migrate to India

4.1. *Indian financial year runs from 1st April to 31st March*

In India, the financial year period of 12 months runs from 1st April to 31st March. This becomes an essential factor for non-residents to consider as (i) the day count to be considered for the residency rule aforesaid is in respect of an Indian 'financial year', (ii) some countries follow other periods as a 'financial year' – such as 1st January to 31st December, 1st July to 30th June. Thus, non-residents planning to migrate / return to India should keep this factor also into consideration. Interestingly, in the recent past, the government of India was planning to change the Indian financial year cycle to the calendar year (i.e. 1st January to 31st December), but it seems to have shelved this plan for the time being.

4.2. *Evaluate the day count*

At the outset, since the penal provisions under Indian income-tax law are stringent and any non-compliance with the same could result into significant cash outgo, individuals planning to migrate to India must carefully evaluate their day count in India and outside India in the year of migration and a few years preceding the same. This is because as mentioned above, the primary determinant in the rule for Indian tax residency determination is the number of days for which such individual is physically present in India during the relevant financial year. Thus, since dates stamped on passport are normally considered as proof of dates of departure from and arrival in India, it is advisable to keep several photocopies of the relevant passport pages for present and future use. Further, it is advisable to ensure that date stamped on the passport is legible.

4.3. *Choose the date of return carefully*

During the last year of stay abroad, on transfer

Though the individuals are free to deal with their offshore assets even after they return to India, it is always advisable to have such a structure set up beforehand to avoid any potential taxation questions that may arise in case the structure is set up after the individual migrates to India.

of residence to India, the non-resident should ensure to come back on or after 1st Feb (or 2nd Feb in case of a leap year) since arrival before this date will result in stay in India exceeding 59 days. However, a person whose stay in India in preceding 4 financial years does not exceed 365 days, he may return after 30th September of the relevant financial year without loss of non-resident status.

4.4. *Step down from any executive role in any offshore company*

As mentioned above, a foreign company is regarded as an Indian tax resident if its place of effective management[1] is in India. This means that such a foreign company would be taxed in India on its global income (subject to relief under the applicable tax treaty). This could be a substantial tax cost for such a company. While the test for determining the place of effective management of a foreign company is a subjective test, if a director (or any person occupying an executive role in the company) takes managerial and commercial decisions in relation to such company from India, such foreign company's exposure to Indian tax levy increases. Resultantly, if the intent is that the foreign company should not get exposed to Indian taxation, individuals migrating to India should ideally step down from any executive role in any offshore company and refrain from undertaking any managerial and commercial decisions in relation to such foreign company from India.

4.5. *Set up a structure for offshore assets and income streams*

In relation to the offshore assets and income streams of a migrating individual, it is always recommended that an offshore structure is set up. While the exact nature of such structure would depend upon the requirements and factual circumstances of the individual, structures that are commonly considered and adopted by such migrating individuals are discretionary trusts, holding company structures (separate for investments holding purposes and operating businesses). Though the individuals are free to deal with their offshore assets even after they return to India, it is always advisable to have such a structure set up beforehand to avoid any potential taxation questions that may arise in case the structure is set up after the individual migrates to India.

4.6. *Residential status from the perspective of exchange control regulations*

India has exchange control regulations, primarily with an intent to regulate the dealings of inflow and outflow of foreign exchange. The implications under these regulations also depends upon the residential status of the individual. Interestingly, though the criteria for residential status under exchange control regulations is also dependent upon the number of days for which the individual is physically present in India (like the tax law), the following two aspects are different and require careful evaluation:

4.6.1. Unlike tax law (which considers the day count of the relevant financial year itself), exchange control regulations take into consideration the number of days for which the individual stayed in India in the immediately preceding financial year[4].

4.6.2. Unlike the tax law, the test for residential status under the exchange control regulations takes into consideration the 'intention' of stay in India, apart from the number of days for which the individual was physically present in India. For instance, if the returning individual does not intend to stay in India for an uncertain period (i.e. if the returning individual's intent is to stay in India only for a certain period of time), then such individual can continue to enjoy the non-resident status under exchange control regulations for a financial year even if such individual had stayed in India for more

[4] Under Indian exchange control regulations, an individual is regarded as a 'person resident in India' for a financial year if he/she is in India for more than 182 days in the preceding financial year. Certain exceptions are also provided from the applicability of this rule.

than 182 days in the immediately preceding financial year. Needless to say, this aspect of intention would have to be factually demonstrated with sufficient documentary evidence.

This is a highly subjective criterion and must be critically examined well in advance before the non-resident plans to migrate to India because Indian residents are subject to greater restrictions when dealing with foreign exchange, property in India etc.

5. Conclusion

5.1. The Indian diaspora is the largest in the world today after China and has roots in almost every country on the globe. The diaspora contribution to their state of origin has been made in various ways, through remittances, global asset base, foreign direct investment (FDI), transfer of knowledge and entrepreneurial networks[5]. Thus, it becomes quite apparent that pre-immigration planning is, perhaps, the most important aspect which should be considered by any migrating/returning individual or family to India. Given that India has a well-codified, detailed and a complex tax law and exchange control regulations with stringent penal provisions, it is imperative for such persons to set the house in order well in advance before their migration / return to India. In case if the entire family is planning to migrate / return to India, this exercise becomes even more vital because in such a case, it becomes difficult to demonstrate that the intent was not to settle in India. Thus, non-residents returning to India or planning to return to India should keep track of the number of days spent in India from year to year and check the same before making the next trip to India. It is advisable to maintain a chart for the number of days stayed in the relevant financial year and in the preceding 7 financial years at least.

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5.2. While India may not be the most preferred jurisdiction for a person to migrate / return to India on account of its high tax rates, stringent penal provisions etc., in recent times, there has been a trend of High Net Worth Individuals (HNWI's) migrating from their country of residence to other jurisdictions. Such HNWI's pose a substantial tax risk since they may treat themselves as non-residents for taxation purposes in the first jurisdiction even though they may have strong personal and economic ties with that jurisdiction. In fact, for examining the taxation aspects of such HNWI's, the Government of India has recently constituted a Working Group[6]. This Working Group shall formulate India's position for various aspects related to taxation of migrating HNWI's. The Working Group shall also make recommendations for policy decision in respect of tax risks of the migrating HNWI population. It would be interesting to see what would be the recommendations of the Working Group. ■

[5] https://www.mea.gov.in/images/pdf/OIFCPublication2009GuidebookonTaxationforOI.pdf
[6] http://itatonline.org/info/wp-content/uploads/2018/04/CBDT-Working-Group-on-Taxation-Aspects-of-High-Net-Worth-Individuals-HNWIs.pdf