

Splitting the Dual Residency

Apr 13, 2023



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1. Concept of Dual Residency and Split Residency:

1.1 With the increase in cross-border deputations and frequent international travels, the issue of 'dual residency' is becoming increasingly common. In order to determine the taxable income of an individual in a particular country, it is imperative to determine the country of tax residence of such individual under the domestic tax laws and tax treaties.

1.2 Dual residency gets attracted when an individual qualifies as a resident of two countries under the respective domestic tax laws, whereby both the countries seek to tax the global income of such individual. This leads to double taxation of the same income.

- To illustrate, when a person deputed in Canada relocates to India permanently, there could be a situation where he is the resident of both India and Canada in the year of re-location, leading to taxation of his income in both the countries.

1.3 In such a case, the conflict of dual residency is resolved by applying Article 4(2) of the tax treaty, which is based on certain tests like availability of the permanent home, centre of vital interest, habitual abode, nationality, etc. to be applied in a hierarchical manner to determine tax residency in a particular country. These tests are commonly referred as 'tie-breaker rules'. In this way, preference of residency of one country is established over the other country by application of tie-breaker rules under the tax treaties.

1.4 Where an individual shifts his residency at the end or the beginning of the fiscal year of the either country, there should not be an issue in determining the tax residential status of an individual under Article 4(2) of the tax treaty.

- For example, if an individual permanently relocates from US to India in April 2023, he may be classified as tax resident of both US (for the period January 2023 to December 2023) and India (for the period April 2023 to March 2024) under the domestic tax laws of the respective countries. However, by applying Article 4(2) of India-US tax treaty, if an individual tie-break to India, then for calendar year 2023, the individual would be treated as tax resident of US for the period January 2023 to March 2023 (3 months) and tax resident of India for the period April 2023 to December 2023 (9 months).

1.5 There may arise a situation where an individual shifts his residential status from one country to another in the middle of a year and not at the end or the beginning of the fiscal year of the either country.

- To illustrate, if an individual permanently relocates from US to India in August 2023, he may be classified as tax resident of both US (for the period January 2023 to December 2023) and India (for the period April 2023 to March 2024) under the domestic tax laws of the respective countries.

1.6 In such a situation, question arises whether Article 4(2) of India-US tax treaty be applied to resolve dual residency in a manner such that for calendar year 2023, the individual is treaty as tax resident of US for the period January 2023 to July 2023 (7 months) and tax resident of India for the period August 2023 to December 2023 (5 months) and thereby restricting the India's right to taxation of global income for the period April 2023 to July 2023. In other words, can the period of dual residency be split from middle of the fiscal/tax year by applying tax treaties to determine the tax residency and taxation rights? This situation is commonly referred as 'Spilt Residency'.

2. Analysis:

2.1 At the outset, India does not recognize 'split residency' under section 6 of the Act. In other words, India domestic tax law determines residential status for an entire previous year and not for a part of the previous year.

2.2 Furthermore, Article 4(1) of most of the Indian tax treaties provides supremacy to domestic tax laws of the concerned contracting states for the purpose of determining tax residency under tax treaties. When applying Article 4(1), if the case of dual residency is established, Article 4(2) comes into play to only resolve the conflict by supplementing and not by overriding the full year-based residency criteria envisaged in the domestic tax law.

2.3 It is imperative to note that application of tie-breaker rules under Article 4(2) of the tax treaties demands certain degree of permanence to satisfy the tests, more particularly, in case of test of 'habitual abode' where the determination of habitual residency must cover a sufficient length of time to ascertain the frequency, duration and regularity of stays. [Refer Paragraph 19 of Article 4 of OECD Model Commentary 2017]. Accordingly, the tie-breaker tests envisaged under Article 4(2) of the tax treaties may not be of such nature that could be tested on a particular day (in this case, date of relocation from US to India) but to be tested holistic basis with some degree of permanence.

Judicial views:

2.4 Recently, the Hon'ble Delhi Tribunal in case of **Sameer Malhotra** [\[TS-1010-ITAT-2022\(DEL\)\]](#) upheld the concept of split residency. In the instant case, the taxpayer was employed in India till November 2014 and thereafter re-located to Singapore from 6 December 2014 onwards. Applying tie-breaker test as per Article 4(2) of India-Singapore tax treaty, the tax authorities held the taxpayer to be resident of India for entire FY 2014-15. On appeal, the Hon'ble Tribunal held the taxpayer to be resident of Singapore for the period December 2014 to March 2015 applying the test for centre of vital interest and habitual abode under Article 4(2) of India-Singapore tax treaty for particular period. Therefore, the salary income earned in Singapore for the period December 2014 to March 2015 was held to be excluded from taxable income in India.

2.5 In the case of **Raman Chopra** [\[TS-5466-ITAT-2016\(DELHI\)-O\]](#), the taxpayer was resident of India for FY 2010-11 and was also resident of US for the period of 1 April 2010 to 30 June 2010. The tax officer denied the claim of exemption of salary earned for the period 1 April 2010 to 30 June 2010 in US. On applying tie-breaker test under Article 4(2) of India-US tax treaty, the Hon'ble Tribunal held the taxpayer to be tax resident of US for the period 1 April 2010 to 30 June 2010 and thereby upheld the exemption claimed for salary earned in US.

2.6 In the case of **Kumar Sanjeev Ranjan** [\[TS-191-ITAT-2019\(Bang\)\]](#), the taxpayer was citizen of the US and was working in India since June 2006 on a temporary cross border assignment. After completion of assignment, he moved to US permanently on 10 August 2012. He qualified as a tax resident of India for the period 1 April 2012 to 31 March 2013 under domestic tax law of India and also tax resident of the US, being a US citizen. The Hon'ble Tribunal applied tie-breaker test of 'centre of vital interest' under India-US tax treaty and held that the taxpayer tie-breaks to India for the period 1 April 2012 to 10 August 2012 and to the US for the balance period between 11 August 2012 to 31 March 2013. Accordingly, the Tribunal upheld the treaty exemption of salary income earned in relation to services performed in the US period between 11 August 2012 to 31 March 2013.

2.7 At this juncture, it is important to note that both OCED and UN Model Commentaries 2017 on Article 4(2) observes that the special rules of treaty would apply for the period when the residence of the

taxpayer affects tax liability, which may be less than an entire taxable period. This was also referred by the Hon'ble Delhi Tribunal in case of Sameer Malhotra (supra).

3. Conclusion:

While determination of tax residency of an individual in case of split residency is a contentious issue, one can draw support from the favorable Court rulings to apply the tie-breaker tests under Article 4(2) of tax treaties in a split manner. It is pertinent to note that tax residency analysis by application of tie-breaker tests under the tax treaties is a fact sensitive exercise and therefore it is important that the taxpayers to maintain robust documentation to justify tax residency in a particular country determined by claiming treaty benefit.