

Date: 12th July, 2021

To,

Shri Jagannath Bidyadhar Mohapatra

Chairman,
Central Board of Direct Taxes,
North Block,
Delhi – 110 001

Respected Sir,

Residency for individuals FY 2021-22 - Representation on exclusion of forced stay in India due to COVID-19

The Chamber of Tax Consultants (CTC), Mumbai, was established in 1926. CTC is one of the oldest (94 years old) voluntary non-profit making organizations in Mumbai formed with the object of educating and updating its members on Tax and other laws. It has robust membership strength of about 4000 professionals comprising of Advocates, Chartered Accountants and Tax Practitioners. It has from time to time made various representations to different Government Authorities drawing their attention to pressing issues.

A) Residency relief announced earlier in May 2020

- ▶ As we are aware, the COVID-19 pandemic has had an unprecedented impact on individuals – financially, mental stability, loss of jobs, etc. There are many expatriates (NRIs/PIOs and foreign citizens) who had come on visit to India but got stranded in India during the lock down period when international flights were not operating.
- ▶ In order to avoid genuine hardship on tax front, several countries provided benefit of relaxation of period of stay during the unforeseen forced stay in a country due to COVID-19. Following such trend, the CBDT issued Circular 11/2021 dated 8th May 2020, wherein relaxations were announced for FY 2019-20 for individuals who had come on a visit to India before 22nd March 2020. For determining residential status, the relaxation was provided by way of exclusion of the period from 22nd March 2020 (or date of quarantine after 1st March 2020) to 31 March 2020 or date of departure

before 31st March 2020 on evacuation flight for determining the residential status in India.

CBDT also issued a Press Release dated 9th May 2020, clarifying that, for determination of residential status for the tax year 2020-21, a **similar circular for excluding the period of stay of such individuals up to the date of normalization of international flights shall be issued after normalization.**

- ▶ This announcement coming during the peak of lockdown period provided much needed relief to the expats who legitimately believed that they need not bother about forced stay in India impacting their residential status in India. At this stage, it is important to note that but for such relaxation, such expats could turn residents or Not ordinarily residents (NOR) in India. The anxiety and consequences for such individuals is two-fold as follows :-
 - If they turn residents, their global incomes will be liable to tax in India. This would adversely affect expats particularly coming from Middle East countries where there is no personal income tax. Such persons are not worried about tax cost in their financial or other planning.
 - If they turn NOR, they would be liable to tax on Income sourced from India at higher rates and lose benefit of special rates applicable to non-residents. For example, interest and dividends earned from Indian entities become taxable at normal slab rates (which can be as high as 42.74%) as compared to lower rate of 20% (plus applicable surcharge and cess) under s.115A.
- ▶ However, the COVID-19 pandemic disturbance continues till date and international flights were not normalized in India till 31st March 2021. The expat taxpayers persistently represented to the CBDT to issue the Circular which was announced in Press Release dated 9th May 2020.
- ▶ There are several expatriates who are not able to leave India as several countries including UK, Singapore and others did not permit persons travelling from India to come in their country for several months.

B) Roll back of relief announced in May 2020 through CBDT Circular No. 2/2021

- ▶ However surprisingly CBDT has issued Circular No. 2/2021 dated 3rd March 2021 which seeks to justify non-grant of any relief to the expat taxpayers. Circular No. 2/2021 explains how there are lesser chances of double taxation risk for stranded individuals in view of the interplay of Indian domestic tax rules with Double Taxation Avoidance Agreement (DTAA) entered with other countries. It also provides opportunity to impacted individuals to provide relevant information to the

CBDT by 31st March 2021 on the risk of double taxation faced by them in order to enable the CBDT to announce a general or case-by-case individual relief.

C) Representations for reconsidering of announced relief of exclusion of period of forced stay in India

- ▶ It is humbly submitted that the CBDT should reconsider its stand and announce the relief as was promised earlier on 9th May 2020 for following reasons :-
 - The tax relief on determination of residency was announced during the peak of one of strictest lockdowns followed anywhere in the world. The legitimate relief is sought considering the unprecedented circumstances beyond the control of taxpayers..
 - The expat taxpayers will be liable to pay tax in India on the salary income earned by them while working in India during forced stay in India This is fair and justified. **But similar justification does not apply for other foreign incomes which become taxable in India only because the expat taxpayer becomes resident in India under forced stay.** The DTA relief for short stay exemption under Dependent Personal Services Article is available only if such taxpayer is treaty resident of other country.
 - There is no risk of double taxation due to DTA provisions and foreign tax credit. The difficulties faced by expat taxpayers due to forced stay in India during Covid 19 is by way of taxation of foreign incomes which otherwise would not have been taxed in India and taxation of Indian incomes at higher rates. The treaties or unilateral foreign tax credit provisions do not fully address these difficulties.
 - The amendment by Finance Act 2021 effective from A.Y. 2021-22 for defining the term 'liable to tax' to mean actual tax liability under a tax law (even though subsequently exempted) will further enhance the difficulties for expats from Middle East countries which do not have personal tax system. If they turn residents or NOR in India as per Section .6 of Income-tax Act, they will be unable to resort to tie breaker test to other country since treaty residency is generally determined by 'liable to tax' test. Apart from their foreign incomes becoming taxable in India, such taxpayers will also be unable to avail lower treaty rates for Indian incomes.
 - Even on treaty relief, there are lot of complexities and possibility for litigation. For example, as the Circular No. 2/2021 explains, the treaty tie breaker tests use factors like availability of permanent home, centre of vital interest, habitual abode, nationality and MAP (as last resort). Application of these tests becomes extremely subjective in many cases – for instance, for

applying centre of vital interest test which requires holistic consideration of all relevant personal and economic factors of the individual.

- Due to Government's assurance of providing relief, expatriates refrained from paying advance tax in the hope and expectation that the Circular as promised earlier will be announced any time before 31 March 2021. Now, they will not only be faced with higher taxes in India but also **interest for shortfall of advance tax** in earlier instalments.
- ▶ Accordingly, it is our humble representation that the Government should honour its commitment as promised in Press release dated 9th May 2020 of providing a blanket relaxation up to the date of normalization of international flights. The unprecedented circumstance of forced stay in India during Covid 19 pandemic requires a benign tax policy approach instead of pure legalistic or technical approach of merely avoiding double taxation. This will also enhance the image of the Country in the global arena.
- ▶ Without prejudice to our above referred submission, if the roll back is persisted, in the least, the CBDT should at least announce following reliefs through Circular or instructions :-
 - Waiver of interest u/s. 234B and s. 234C if tax is paid by 30th September, 2021.
 - Allow extended time to file revised return to claim foreign tax credit beyond 9 months from the end of the financial year. It should be extended to at least 2 years from the end of the financial year.

We look forward for your kind consideration to the request.

Yours Sincerely,

For THE CHAMBER OF TAX CONSULTANTS

Sd/-

Sd/-

Ketan Vajani
President

Mahendra Sanghvi
Chairman
Law & Representation Committee