

Stranded? You could be in taxman's land!

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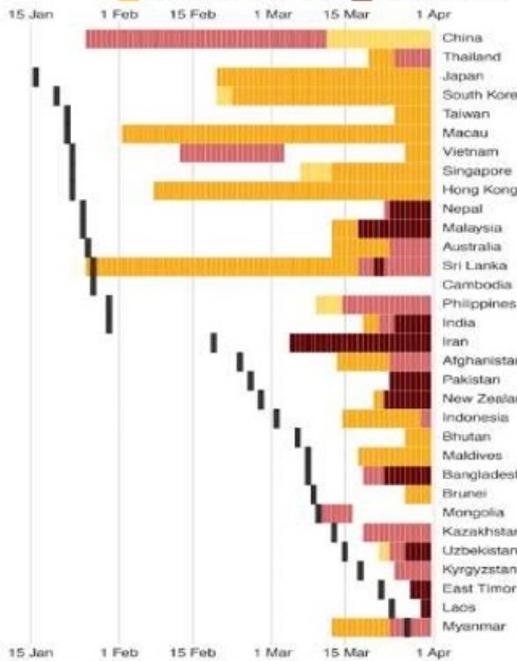
One common response measure of all countries to COVID 19 pandemic has been the restrictions on international travel. These restrictions have led to many people getting stranded at various places which may have unintended implications on their tax residency and eventual taxability in different taxable jurisdictions.

To put things in perspective the following graphic presentation shows the date-wise restriction on movement imposed by various countries which may have, in some cases, lead to non-residents being unable to return to the respective countries.

Asia, Australia and New Zealand in lockdown

Dates and severity of restricted internal movement by country

■ First case
 ■ Localised recommendations
 ■ Localised lockdown
 ■ National recommendations
 ■ National lockdown

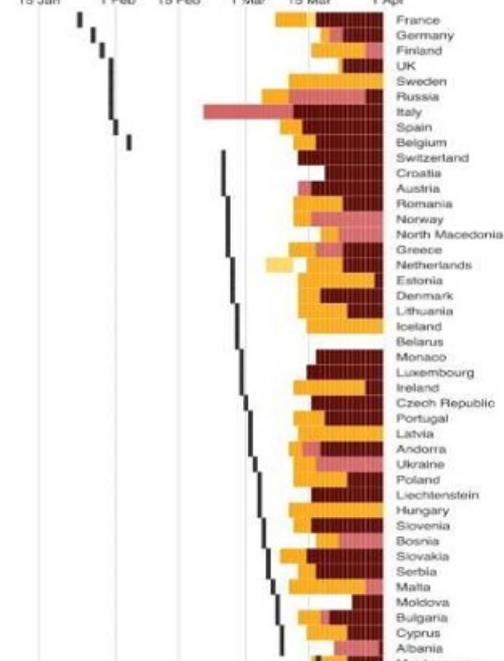


Note: China and Thailand confirmed their first cases prior to 15 January 2020
 Source: Oxford COVID-19 Government Response Tracker, BBC Research

European countries in lockdown

Dates and severity of restricted internal movement by country

■ First case
 ■ Localised recommendations
 ■ Localised lockdown
 ■ National recommendations
 ■ National lockdown

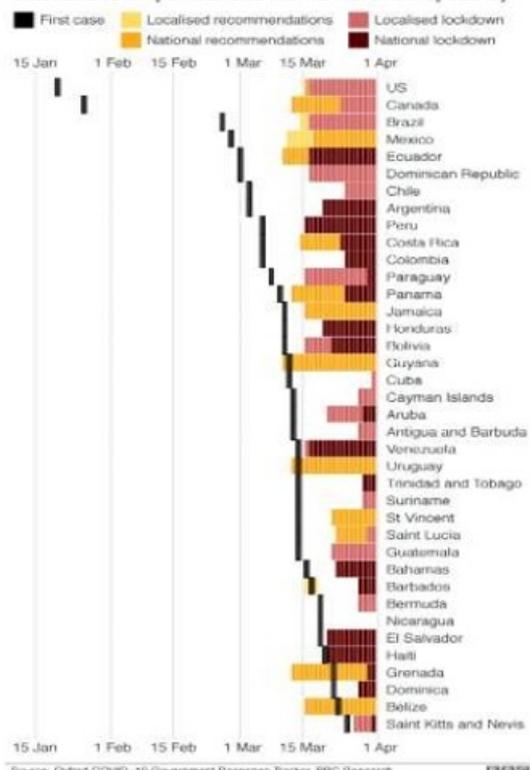


Source: Oxford COVID-19 Government Response Tracker, BBC Research

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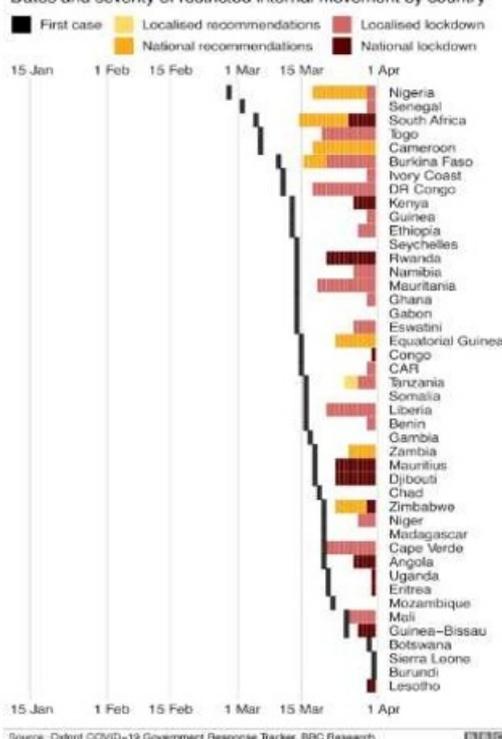
Countries in the Americas in lockdown

Dates and severity of restricted internal movement by country



Sub-Saharan African countries in lockdown

Dates and severity of restricted internal movement by country



Section 6 of the Indian Income Tax Act, 1961 contains the provisions relating to territorial connection amounting to residence for all taxable entities. This section emphasises the physical presence of a person in India. Section 5 provides for the assessment of income on the basis of residential status of a taxable entity in India during the previous year.

In this article, a humble attempt has been made to highlight the unintended tax implications that could possibly arise in India viz-a-viz global income/income sourced outside India and incomes exempt in India, of individuals who are stranded here and cannot travel abroad due to the restrictions on international travel and to explore answers to the vexed issues.

In the case of an individual, the incidence of taxation of any income, whether sourced in India or outside India, depends upon the residential status. Accordingly, the first inquiry to determine whether or not income is taxable in India is to find out the tax residency of the individual taxpayer.

As per the provisions existing till 31st March 2020 relevant to assessment year 2020-21 an individual was considered a tax resident of India, if he satisfies either of the following conditions, viz (a) Stay in India is at least 182 days during the previous year, or (b) Stay in India is at least 60 days during the previous year and at least 365 days during 4 preceding previous year. Explanation 1(b) to section 6 provides a relaxation to an Indian citizen or a Person of Indian Origin who, being outside India, comes on a visit to India by providing an extended period of 182 days instead of 60 days as stated in condition (b) above.

Section 6 has recently been amended with effect from 1st April 2020 resulting in reduction in the said extended period of 182 days to 120 days for those Indian citizens or PIOs having total income, other than income from foreign sources, exceeding Rs 15 lakhs during the previous year.

The test of residency provided in this clause for individuals are alternative and not cumulative. Each of the two tests requires the personal presence of the individual in India for the stated period in the course of the previous year.

In present circumstances, an individual, be it Indian national/PIO or a foreign national may have been compelled to reside in India against his will. And yet if the above conditions of section 6 are satisfied he shall become a resident in India in Assessment year 2020-21 and in some cases, possibly in assessment year 2021-22 also (if the prohibition on international travel extends beyond 30th May 2020). Resultantly, an individual may become liable to be taxed in India on his global/worldwide income which, but for this unintended extended stay, would not have been otherwise taxable.

Also, such a scenario may have various other tax implications such as double taxation of income, availing foreign tax credit, benefits under the Tax Treaties, denial of short stay exemption to foreign expatriates, taxability of foreign salary in India, taxability of otherwise exempt interest income earned from NRE accounts, compliance with Indian tax regulations, etc..

The question that arises is whether there is any redressal for such situations that are bound to crop up. In our humble opinion, under the present law there is no relief for such scenarios.

However, the Delhi High Court in the case of *Commissioner of Income-tax (C) -I v. Suresh Nanda [2015] (Delhi)* had an occasion to deal with a situation wherein a non-resident taxpayer was forced to stay in India for reasons beyond his control. The factual matrix of the said case (though not quite similar to the present circumstances) was that the taxpayer was subjected to search operations and on the basis of information and documents the tax officer made additions to the taxpayers income for relevant assessment years and further denied his claim to be treated as non- resident. The passport of the individual was also impounded to preclude him from leaving India.

The Delhi High Court while deciding the matter stated that *"It is trite that plain or literal interpretation of a statutory provision is not to be adopted if it produces manifestly unjust results or absurdly unreasonable consequences which could never have been intended. To obviate injustice flowing from mechanical interpretation and to bring about rationality, it is permissible, even in the field of taxation, to prefer such construction as results in equity over such literal meaning as is unjust."*

The Court accordingly arrived at the following conclusion *"that the Income-tax Act leaves the choice to the citizen to be in India and be treated as a resident for purposes of taxation or be not in India so as to avail the status of a non-resident. The simple test the muster of which is to be passed is the minimum prescribed period of presence in India in a particular financial year. It naturally follows that the option to be in India, or the period for which an Indian citizen desires to be here is a matter of his discretion. Conversely put, presence in India against the will or without the consent of the citizen should not ordinarily be counted adverse to his chosen course or interest, particularly if it is brought about under compulsion or, to put it simply, involuntarily. There has to be, in the opinion of this Court, something to show that an individual intended or had the animus of residing in India for the minimum prescribed duration. If the record indicates that - such as for instance omission to take steps to go abroad, the stay can well be treated as disclosing an intention to be a resident Indian.*

Equally, if the record discloses materials that the stay (to qualify as resident Indian) lacked volition and was compelled by external circumstances beyond the individual's control, she or he cannot be treated as a resident Indian."

To conclude, in the author's view the present circumstances definitely offer a more compelling reason than those that were before the Delhi High Court in Suresh Nanda's case cited above, provided the concerned taxpayers can demonstrate existence of their intention to maintain non-resident status in the concerned years. However, to pre-empt the litigation arising out of such scenarios, it is sincerely hoped that the Central Board of Direct Taxes would come out with guidelines relaxing the tax residency rules for persons where departure from India is prevented due to COVID 19.