Overview of International Taxation

Concept of Residence Section 6 (Including Deemed Resident), Source Rule Sections 4, 5, 9, & Withholding Of tax under Sec. 195 read with Sec.195A, 206AA & other relevant sections .

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Contents



1. Glossary
2. Setting the context(Definitions)
3. Section 5, 6, 7, 8, 9, 195, 195 A, 206AA, 40a(i)
4. TRC, TREATY, MFN, FTC, ART. 4
5. Recent developments
6. Other interesting issues
7. Refund of taxes withheld u/s 195
8. Consequences of non-compliance
9. Key takeaways

Glossary

Act	Income-tax Act, 1961
AO	Assessing Officer
CBDT	Central Board of Direct Taxes
CG	Central Government
DTAA	Double Taxation Avoidance Agreement
FTS	Fees for Technical Services
FY	Financial Year
HC	High Court
ITAT	Income-tax Appellate Tribunal
NR	Non Resident
PAN	Permanent Account Number
SC	Supreme Court
TRC	Tax Residency Certificate
u/s	Under Section
WHT	Withholding Tax

Setting the context

Why we are studying it?

Negative Outlook

- First of all penalty u/s 271 I for just Rs. 1 lac only for not complying sec 195 (6) w.e.f 01/06/2015 on assessee.
- Penalty of Rs. 10000/- u/s 271J on CA`s
- Cut & Paste.
- Cert. are cross checked after two years of issuance. Notices from international tax division and/or during assessment proceedings. Currently within 6 months notice are coming
- Disciplinary committee of ICAI.

Positive Outlook

- Benefits of DTAA over Income tax Act and helping the client or company with better compliances & save in working Capital, if possible.
- Agreement Drafting for both Inbound & outbound.
- More Earning opportunities & professional development

DEFINITION as per Income-tax Act, 1961

COMPANY SEC 2(17)

"Company" means—

(*i*) Any Indian company, or

(*ii*) Any body corporate incorporated by or under the laws of a country outside India, or

(*iii*) any institution, association or body which is or was assessable or was assessed as a company for any assessment year under the Indian Income-tax Act, 1922 (11 of 1922), or which is or was assessable or was assessed under this Act as a company for any assessment year commencing on or before the 1st day of April, 1970, or

(*iv*) Any institution, association or body, whether incorporated or not and whether Indian or non-Indian, which is declared by general or special order of the Board to be a company:

Provided that such institution, association or body shall be deemed to be a company only for such assessment year or assessment years (whether commencing before the 1st day of April, 1971, or on or after that date) as may be specified in the declaration ;]

Status of the following:-

1. LLP incorporated in India
2. LLP incorporated outside India
3. LLC incorporated outside India

❖ FIRM SEC 2(23A)

i. "Firm" shall have the meaning assigned to it in the Indian Partnership Act, 1932 (9 of 1932), and shall include a limited liability partnership as defined in the Limited liability Partnership Act, 2008

ii. "partner" shall have the meaning assigned to it in the Indian Partnership Act, 1932 (9 of 1932), and shall include,—

a) Any person who, being a minor, has been admitted to the benefits of partnership; and

b) a partner of a limited liability partnership as defined in the Limited Liability Partnership Act, 2008 (6 of 2009);

(*iii*) "Partnership" shall have the meaning assigned to it in the Indian Partnership Act, 1932 (9 of 1932), and shall include a limited liability partnership as defined in the Limited Liability Partnership Act , 2008 (6 of 2009);]

Section 4 of the Indian Partnership Act, 1932, defines expressions "firm", "partner" and "partnership" as follows:

"Partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.

Persons who have entered into partnership with one another are called individually "partners" and collectively "a firm", and the name under which their business is carried on is called the "firm name".

- **FOREIGN COMPANY 2(23A)**

"Foreign company" means a company which is not a domestic company.

- **DOMESTIC COMPANY SEC 2(22A)**

"domestic company" means an Indian company, or any other company which, in respect of its income liable to tax under this Act, has made the prescribed arrangements for the declaration and payment, within India, of the dividends (including dividends on preference shares) payable out of such income ;]

- **INDIAN COMPANY 2(26)**

Indian company" means a company formed and registered under the Companies Act, 1956 (1 of 1956), and includes—

(*i*) a company formed and registered under any law relating to companies formerly in force in any part of India (other than the State of Jammu and Kashmir [and the Union territories specified in sub-clause (*iii*) of this clause]) ;

[(*ia*) a corporation established by or under a Central, State or Provincial Act;

(*ib*) any institution, association or body which is declared by the Board to be a company under clause (17) ;]

ii) in the case of the State of Jammu and Kashmir, a company formed and registered under any law for the time being in force in that State ;

[(*iii*) in the case of any of the Union territories of Dadra and Nagar Haveli, Goa, Daman and Diu, and Pondicherry, a company formed and registered under any law for the time being in force in that Union territory :]

- **RESIDENT SEC 2(42)**

"Resident" means a person who is resident in India within the meaning of section 6.

Definition of Body Corporate & LLP under New Co. Law, 2013 & LLP Act, 2008

Limited liability partnership (As per LLP act 2008)

(1) A limited liability partnership is a body corporate formed and incorporated under this Act and is a legal entity separate from that of its partners.

(2) A limited liability partnership shall have perpetual succession;

(3) Any change in the partners of a limited liability partnership shall not affect the existence, rights or liabilities of the limited liability partnership.

Body corporate

Body corporate broadly means a corporate entity has a legal existence

As per Section 2(11) of Companies Act, 2013

"body corporate" or "corporation" includes a company incorporated outside India,

but does not include—

- a co-operative society registered under any law relating to co-operative societies; and
- any other body corporate (not being a company as defined in this Act), which the Central Government may, by notification, specify in this behalf;

GENERAL PROVISIONS

Base Erosion & Base Protection:

BASE EROSION

To avoid the Indian Income-tax, a Non-Resident assessee may try several games (1) Try to show that the income has been earned outside India and hence India has no jurisdiction or (2) he may try to claim a categorisation / characterisation of income which attracts "NIL" or lower tax rate. (3) The person try to be non resident of india.

BASE PROTECTION

(1) To catch such incomes escaping Indian tax, there are deeming provisions. Income which under normal accounting practices would be considered as foreign income is deemed to be Indian Income under section 9. (2) Categorisation of income and few specific concepts are matters of huge litigation. (3) To bring Anti abuse provisions

BASIS OF CHARGE
Charge of income-tax.

4. (1) Where any Central Act enacts that income-tax shall be charged for any assessment year at any rate or rates, income-tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions (including provisions for the levy of additional income-tax) of, this Act **in respect of the total income of the previous year of every person** :

Provided that where by virtue of any provision of this Act income-tax is to be charged in respect of the income of a period other than the previous year, income-tax shall be charged accordingly.

(2) **In respect of income chargeable under sub-section (1), income-tax shall be deducted at the source or paid in advance**, where it is so deductible or payable under any provision of this Act.

Summary of Section 4(2)

- Section 4(2) facilitates deduction of tax at source and payment of advance tax. Chapter XVII- Parts B & C contain provisions relating to deduction of tax at source and payment of advance respectively.
- **As** section 4 provides for charge on total income, it does not refer to section 5.
- Issues in applicability of Sec 194N and Sec 206C. **Case laws: Madras HC in writ of central cooperative Bank (2nd week of June,2020) and Kerala HC in Service cooperative Bank case (27th may , 2020). Other case law of Bombay HC where it was already held that there has to be income first so as to make the liability under TDS provisions and it is not vice versa.**

Sec. 2(45)

(45) "total income" means the total amount of income referred to in section 5, computed in the manner laid down in this Act ;

- Section 2(45) thus provides for integration of the charging provisions and the computation provisions. One say that the observation of the Supreme Court in CIT v. B.C. Srinivasa Shetty [1981] 128 ITR 294 (SC) that the charge and computation constitute an integrated code finds its edifice in section 2 (45).

Income Includes

Sec 2(*24*) "income" includes—

(*i*) profits and gains ;
(*ii*) dividend ;
(*iia*) voluntary contributions received by a trust created wholly or partly for charitable or religious purposes or by an institution established wholly or partly for such purposes or by an association or institution referred to in clause (*21*) or clause (*23*), or by a fund or trust or institution referred to in sub-clause (*iv*) or sub-clause (*v*) or by any university or other educational institution referred to in sub-clause (*iiiad*) or sub-clause (*vi*) or by any hospital or other institution referred to in sub-clause (*iiiae*) or sub-clause (*via*) of clause (*23C*) of section 10 or by an electoral trust.
Explanation.—For the purposes of this sub-clause, "trust" includes any other legal obligation ;
(*iii*) the value of any perquisite or profit in lieu of salary taxable under clauses (*2*) and (*3*) of section 17 ;

(*iiia*) any special allowance or benefit, other than perquisite included under sub-clause (*iii*), specifically granted to the assessee to meet expenses wholly, necessarily and exclusively for the performance of the duties of an office or employment of profit ;
(*iiib*) any allowance granted to the assessee either to meet his personal expenses at the place where the duties of his office or employment of profit are ordinarily performed by him or at a place where he ordinarily resides or to compensate him for the increased cost of living ;
(*iv*) the value of any benefit or perquisite, whether convertible into money or not, obtained from a company either by a director or by a person who has a substantial interest in the company, or by a relative of the director or such person, and any sum paid by any such company in respect of any obligation which, but for such payment, would have been payable by the director or other person aforesaid ;
(*iva*) the value of any benefit or perquisite, whether convertible into money or not, obtained by any representative assessee mentioned in clause (*iii*) or clause (*iv*) of sub-section (1) of section 160 or by any person on whose behalf or for whose benefit any income is receivable by the representative assessee (such person being hereafter in this sub-clause referred to as the "beneficiary") and any sum paid by the representative assessee in respect of any obligation which, but for such payment, would have been payable by the beneficiary ;

(*v*) any sum chargeable to income-tax under clauses (*ii*) and (*iii*) of section 28 or section 41 or section 59 ;
(*va*) any sum chargeable to income-tax under clause (*iiia*) of section 28 ;
(*vb*) any sum chargeable to income-tax under clause (*iiib*) of section 28 ;
(*vc*) any sum chargeable to income-tax under clause (*iiic*) of section 28 ;
(*vd*) the value of any benefit or perquisite taxable under clause (*iv*) of section 28 ;
(*ve*) any sum chargeable to income-tax under clause (*v*) of section 28 ;
(*vi*) any capital gains chargeable under section 45 ;
(*vii*) the profits and gains of any business of insurance carried on by a mutual insurance company or by a co-operative society, computed in accordance with section 44 or any surplus taken to be such profits and gains by virtue of provisions contained in the First Schedule ;
(*viia*) the profits and gains of any business of banking (including providing credit facilities) carried on by a co-operative society with its members;
(*viii*) [*Omitted by the Finance Act, 1988, w.e.f. 1-4-1988. Original sub-clause (*viii*) was inserted by the Finance Act, 1964, w.e.f. 1-4-1964;*]
(*ix*) any winnings from lotteries, crossword puzzles, races including horse races, card games and other games of any sort or from gambling or betting of any form or nature whatsoever.
Explanation.—For the purposes of this sub-clause,—
(*i*) "lottery" includes winnings from prizes awarded to any person by draw of lots or by chance or in any other manner whatsoever, under any scheme or arrangement by whatever name called;
(*ii*) "card game and other game of any sort" includes any game show, an entertainment programme on television or electronic mode, in which people compete to win prizes or any other similar game ;

(*x*) any sum received by the assessee from his employees as contributions to any provident fund or superannuation fund or any fund set up under the provisions of the Employees' State Insurance Act, 1948 (34 of 1948), or any other fund for the welfare of such employees ;
(*xi*) any sum received under a Keyman insurance policy including the sum allocated by way of bonus on such policy.
Explanation.—For the purposes of this clause, the expression "Keyman insurance policy" shall have the meaning assigned to it in the *Explanation* to clause (*10D*) of section 10 ;
(*xii*) any sum referred to in clause (*va*) of section 28;
[1a][(xiia) *the fair market value of inventory referred to in clause* (via) *of section 28;*]
(*xiii*) any sum referred to in clause (*v*) of sub-section (2) of section 56;
(*xiv*) any sum referred to in clause (*vi*) of sub-section (2) of section 56;
(*xv*) any sum of money or value of property referred to in clause (*vii*) or clause (*viia*) of sub-section (2) of section 56;
(*xvi*) any consideration received for issue of shares as exceeds the fair market value of the shares referred to in clause (*viib*) of sub-section (2) of section 56;

(*xvii*) any sum of money referred to in clause (*ix*) of sub-section (2) of section 56;

[2][(*xviia*) any sum of money or value of property referred to in clause (*x*) of sub-section (2) of section 56;]

[1a][*(*xviib*) any compensation or other payment referred to in clause (*xi*) of sub-section (2) of section 56;*]

(*xviii*) assistance in the form of a subsidy or grant or cash incentive or duty drawback or waiver or concession or reimbursement (by whatever name called) by the Central Government or a State Government or any authority or body or agency in cash or kind to the assessee other than,—

(*a*) the subsidy or grant or reimbursement which is taken into account for determination of the actual cost of the asset in accordance with the provisions of *Explanation 10* to clause (1) of section 43; or

(*b*) the subsidy or grant by the Central Government for the purpose of the corpus of a trust or institution established by the Central Government or a State Government, as the case may be

Scope of total income

Sec 5(1)

Subject to the provisions of this Act, the total income of any previous year of a person who is a resident includes all income from whatever source derived which—

(*a*) is received or is deemed to be received **in India** in such year by or on behalf of such person ; or

(*b*) accrues or arises or is deemed to accrue or arise to him in India during such year ; or

(*c*) **accrues or arises to him outside India during such year** :

Provided that, in the case of a person not ordinarily resident in India within the meaning of sub-section (6) of section 6, the income which accrues or arises to him outside India shall not be so included unless it is derived from a business controlled in or a profession set up in India.

SEC. 9(1)(i)

9. (1) The following incomes shall be deemed to accrue or arise in India :—
(*i*) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India.

[Explanation 2A.—*For the removal of doubts, it is hereby clarified that the significant economic presence of a non-resident in India shall constitute "business connection" in India and "significant economic presence" for this purpose, shall mean—*
*(*a*) transaction in respect of any goods, services or property carried out by a non-resident in India including provision of download of data or software in India, if the aggregate of payments arising from such transaction or transactions during the previous year exceeds such amount as may be prescribed; or*
*(*b*) systematic and continuous soliciting of business activities or engaging in interaction with such number of users as may be prescribed, in India through digital means:*

Provided *that the transactions or activities shall constitute significant economic presence in India, whether or not,—*

*(*i*) the agreement for such transactions or activities is entered in India; or*

*(*ii*) the non-resident has a residence or place of business in India; or*

*(*iii*) the non-resident renders services in India:*

Provided further that *only so much of income as is attributable to the transactions or activities referred to in clause (*a*) or clause (*b*) shall be deemed to accrue or arise in India*.]

Section 9(1)(viii) & Sec 2(24)(xviia)

- **Following clause (*viii*) shall be inserted after clause (*vii*) of sub-section (1) of section 9 by the Act No. 23 of 2019, w.e.f. 1-4-2020 :**

(viii) income arising outside India, being any sum of money referred to in sub-clause (xviia) of clause (24) of section 2, paid on or after the 5th day of July, 2019 by a person resident in India to a non-resident, not being a company, or to a foreign company.

Section 2(24)

(xviia) any sum of money or value of property referred to in clause (*x*) of sub-section (2) of section 56

SEC. 15

Salaries.

15. The following income shall be chargeable to income-tax under the head "Salaries"—

(*a*) any salary due from an employer or a former employer to an assessee in the previous year, whether paid or not;

(*b*) **any salary paid or allowed to him in the previous year by or on behalf of an employer or a former employer though not due or before it became due to him**;

(*c*) any arrears of salary paid or allowed to him in the previous year by or on behalf of an employer or a former employer, if not charged to income-tax for any earlier previous year.

***Explanation 1.*—For the removal of doubts, it is hereby declared that where any salary paid in advance is included in the total income of any person for any previous year it shall not be included again in the total income of the person when the salary becomes due.**

Explanation 2.—Any salary, bonus, commission or remuneration, by whatever name called, due to, or received by, a partner of a firm from the firm shall not be regarded as "salary" for the purposes of this section.

SEC. 64

64. (1) In computing the total income of any individual, there shall be included all such income as arises directly or indirectly—

(*i*) [*Omitted by the Finance Act, 1992, w.e.f. 1-4-1993*.]

(*ii*) to the spouse of such individual by way of salary, commission, fees or any other form of remuneration whether in cash or in kind from a concern in which such individual has a substantial interest :

Provided that nothing in this clause shall apply in relation to any income arising to the spouse where the spouse possesses technical or professional qualifications and the income is solely attributable to the application of his or her technical or professional knowledge and experience ;

(*iii*) [*Omitted by the Finance Act, 1992, w.e.f. 1-4-1993*.]

(*iv*) subject to the provisions of clause (*i*) of section 27, to the spouse of such individual from assets transferred directly or indirectly to the spouse by such individual otherwise than for adequate consideration or in connection with an agreement to live apart ;

(*v*) [*Omitted by the Finance Act, 1992, w.e.f. 1-4-1993.*]

(*vi*) to the son's wife, of such individual, from assets transferred directly or indirectly on or after the 1st day of June, 1973, to the son's wife by such individual otherwise than for adequate consideration;

(*vii*) to any person or association of persons from assets transferred directly or indirectly otherwise than for adequate consideration to the person or association of persons by such individual, to the extent to which the income from such assets is for the immediate or deferred benefit of his or her spouse ; and

(*viii*) to any person or association of persons from assets transferred directly or indirectly on or after the 1st day of June, 1973, otherwise than for adequate consideration, to the person or association of persons by such individual, to the extent to which the income from such assets is for the immediate or deferred benefit of his son's wife.

Explanation 1.—For the purposes of clause (*ii*), the individual in computing whose total income the income referred to in that clause is to be included, shall be the husband or wife whose total income (excluding the income referred to in that clause) is greater ; and where any such income is once included in the total income of either spouse, any such income arising in any succeeding year shall not be included in the total income of the other spouse unless the Assessing Officer is satisfied, after giving that spouse an opportunity of being heard, that it is necessary so to do.

Explanation 2.—For the purposes of clause (*ii*), an individual shall be deemed to have a substantial interest in a concern—

(*i*) in a case where the concern is a company, if its shares (not being shares entitled to a fixed rate of dividend whether with or without a further right to participate in profits) carrying not less than twenty per cent of the voting power are, at any time during the previous year, owned beneficially by such person or partly by such person and partly by one or more of his relatives ;

(*ii*) in any other case, if such person is entitled, or such person and one or more of his relatives are entitled in the aggregate, at any time during the previous year, to not less than twenty per cent of the profits of such concern.

Explanation 2A.—[*Omitted by the Finance Act, 1992, w.e.f. 1-4-1993.*]

Explanation 3.—For the purposes of clauses (*iv*) and (*vi*), where the assets transferred directly or indirectly by an individual to his spouse or son's wife (hereafter in this *Explanation* referred to as "the transferee") are invested by the transferee,—

(*i*) in any business, such investment being not in the nature of contribution of capital as a partner in a firm or, as the case may be, for being admitted to the benefits of partnership in a firm, that part of the income arising out of the business to the transferee in any previous year, which bears the same proportion to the income of the transferee from the business as the value of the assets aforesaid as on the first day of the previous year bears to the total investment in the business by the transferee as on the said day ;

(*ii*) in the nature of contribution of capital as a partner in a firm, that part of the interest receivable by the transferee from the firm in any previous year, which bears the same proportion to the interest receivable by the transferee from the firm as the value of investment aforesaid as on the first day of the previous year bears to the total investment by way of capital contribution as a partner in the firm as on the said day,

shall be included in the total income of the individual in that previous year.

(1A) **In computing the total income of any individual, there shall be included all such income as arises or accrues to his minor child,** not being a minor child suffering from any disability of the nature specified in section 80U :

Provided that nothing contained in this sub-section shall apply in respect of such income as arises or accrues to the minor child on account of any—

(*a*) manual work done by him; or

(*b*) activity involving application of his skill, talent or specialised knowledge and experience.

Explanation.—For the purposes of this sub-section, the income of the minor child shall be included,—

(*a*) where the marriage of his parents subsists, in the income of that parent whose total income (excluding the income includible under this sub-section) is greater ; or

(*b*) where the marriage of his parents does not subsist, in the income of that parent who maintains the minor child in the previous year,

and where any such income is once included in the total income of either parent, any such income arising in any succeeding year shall not be included in the total income of the other parent, unless the Assessing Officer is satisfied, after giving that parent an opportunity of being heard, that it is necessary so to do.

(2) Where, in the case of an individual being a member of a Hindu undivided family, any property having been the separate property of the individual has, at any time after the 31st day of December, 1969, been converted by the individual into property belonging to the family through the act of impressing such separate property with the character of property belonging to the family or throwing it into the common stock of the family or been transferred by the individual, directly or indirectly, to the family otherwise than for adequate consideration (the property so converted or transferred being hereinafter referred to as the converted property), then, notwithstanding anything contained in any other provision of this Act or in any other law for the time being in force, for the purpose of computation of the total income of the individual under this Act for any assessment year commencing on or after the 1st day of April, 1971,—

(*a*) the individual shall be deemed to have transferred the converted property, through the family, to the members of the family for being held by them jointly ;

(*b*) **the income derived from the converted property or any part thereof shall be deemed to arise to the individual and not to the family ;**

(*c*) where the converted property has been the subject-matter of a partition (whether partial or total) amongst the members of the family, the income derived from such converted property as is received by the spouse on partition shall be deemed to arise to the spouse from assets transferred indirectly by the individual to the spouse and the provisions of sub-section (1) shall, so far as may be, apply accordingly :

Provided that the income referred to in clause (*b*) or clause (*c*) shall, on being included in the total income of the individual, be excluded from the total income of the family or, as the case may be, the spouse of the individual.

Explanation1.—For the purposes of sub-section (2),—

"property" includes any interest in property, movable or immovable, the proceeds of sale thereof and any money or investment for the time being representing the proceeds of sale thereof and where the property is converted into any other property by any method, such other property.

Explanation 2.—For the purposes of this section, "income" includes loss.

Examples for Section 64 (1)/(1A)

1. Father being Non Resident and Wife/ Minor son being Resident of India
2. Father being Resident and Wife/ Minor son being Non Resident of India.
3. What are the incomes of Minor children which can`t be clubbed with the parents?

SCOPE OF TOTAL INCOME (Sec. 5)

- Subject to the provisions of this Act.

- Charge on the basis of status.
  - i) Resident
  - ii) Resident but not ordinary resident.
  - iii) Non resident

- In case of resident
  - i) Income is received or deemed to be received in India
  - ii) Accrues or arises or deemed to accrue or arises in India.
  - iii) Accrues or arises to him outside India

SCOPE OF TOTAL INCOME (Sec. 5)

- In case of resident but not ordinary resident.
  - Income mentioned in (i) and (ii) of resident and
  - Income accrues or arises to him outside India if it is derived from a business controlled in or profession set up in India.

- In case of non-resident.
  i) Income is received or deemed to be received in India.
  ii) Accrues or arises or deemed to accrue or arise in India

- Income from whatever source derived.
  - source has not been defined.
  - S. 14 classifies the head of Income – Five heads
  - Each head there could be different sources.
  - Income to be computed head wise.

Scope of Total Income – Section 2(45) & 5

- Section 2(45) of the Act, inter alia, defines total income to mean total amount of income referred to in section 5 of the Act

- Total income of a non-resident in any previous year is referred to in section 5(2) to include:
  - Income received in India by or on behalf of the non-resident
  - Income deemed to be received in India by or on behalf of the non-resident
  - Income accruing or arising to non-resident in India
  - Income deemed to be accruing or arising in India

- In other words, a non-resident is not liable to pay tax in India on any income which *accrues or arises outside India* or which is *received or is deemed to be received outside India*

- The terms "accrue" or "arise" have not been defined under the Act

Scope of Total Income – Judicial Precedents

- **E. D. Sassoon and Co. Ltd. (26 ITR 27)(SC)**

  Supreme Court has held that "income can be said to accrue when the payee acquires a vested right to receive coupled with corresponding debt owed by the payer"

- **Ashokbhai Chimanbhai (56 ITR 42)(SC)**

  Supreme Court held that "income is said to be received when it reaches the assessee and is said to accrue or arise when right to receive income vests in the assesse"

- **Carborandum Co. (108 ITR 335)(SC)**

  Supreme Court held that "furnishing of technical information by post was a service rendered outside India and putting the information to us in India was not relevant"

Domestic Law Charging Provision - Sec 4, 5

Particulars	R & OR	R but NOR	NR
Indian Income:			
▸ Accrued / sourced in India	Taxable	Taxable	Taxable
▸ Received in India	Taxable	Taxable	Taxable
Foreign Income :			
▸ Accrued outside India but deemed to accrue in India by virtue of Section 9	Taxable	Taxable	Taxable
▸ First receipt in India	Taxable	Taxable	Taxable
▸ **Any other income accruing outside India and received outside India**	**Taxable**	**Not taxable**	**Not taxable**

`Some fundamental issue:

The place of **receipt of income** is the place where the receiver gets complete control over the funds. Thus when an Indian resident remits funds to his non-resident supplier, India is only the place of payment. If the non-resident receives the money outside India in his bank account and he can exercise control over the funds outside India, then the place of receipt is outside India. Hence Section 5 (2) (a) does not cover such "payments".

Section 5 completed

Have all of you understood Section 5?

Understanding Section 5 is a $ two billion issue

- A significant percentage of disputes in "International Taxation" is on the issue – whether the income is covered by Section 5 or not. For taxation of Indian residents, this issue is irrelevant as his global income is taxable in India.

Vodafone's case involved two issues:

(i) Whether **Hutchison's** income was covered within the Scope of Total Income – Section 5 as extended by deeming provisions of Section 9.

(ii) And whether under section 1, India has jurisdiction to ask a Non-Resident – Vodafone to deduct tax at source.

(Click to view more)

A graph depicting Tax Base.

Indian Tax Base. Graph

Our tax base is – Our GDP - Section 5(1).

Add: Foreign GDP earned by Indian Residents - Section 5(1).

Add: Foreign GDP deemed to be taxable in India – Section 9.

When non-residents earn Indian income, it remains Indian tax base. Government of India shares tax on such incomes with foreign Government.

Foreign GDP earned by Non-Residents is not taxable in India.

Jurisdiction:

- How does Government of India (GOI) get jurisdiction outside India?
- How does a Foreign Government get jurisdiction to tax Indian Income?
- ITA Section 1 provides that the Act extends to whole of India. Can Government of India tax a foreign income?

It is now a settled principle that if there is a **connection** with India, the Government of India gets jurisdiction. This issue has been discussed at length in several cases – latest is the decision in Vodafone's case.

Let us see what that "Connection" means.

- A Government's tax jurisdiction is determined by **Connecting factors**.

Scope & Residence:

- There are two essential pillars of taxation.

(i) Assessee and

(ii) Income.

An assessee's income is taxable in India. If there is no income, there will be no tax. Assessee & income **both must exist** for charging income-tax. And at least **one of them** should be **connected** with India.

- For **assessee**, his **residential status** is the connecting factor giving jurisdiction to the Government for taxation. For **income** its **source country** gets the jurisdiction to tax the income.

- Hence the two connecting factors are: "Source" & "Residence". Source is defined under **section 5** and residence is defined under **section 6**.
- If an income is sourced in India, it is taxable irrespective of whether the assessee is an Indian resident or a non-resident. If the assessee is an Indian resident then his income is taxable irrespective of whether it was sourced in India or sourced outside India.
- When the assessee is non-resident, his income is taxable only if sourced in India.
- If a non-resident gets income sourced outside India then GOI has no jurisdiction to tax the same.

Note: This paragraphs narrates **interaction of Sections 5 and 6**.

CONTINUED------

Income Deemed to be Received (Only Two Sections)

- Section 7

  i) S. 7(i) Annual accretions to the balance at the credit of an employee participating in recognized provident Fund.

  ii) S.7(ii) So much of the 'transferred balance" to the credit of an employee participating in a recognized provident fund

  iii) S.7(iii) Contribution by Cent. Govt. to the pension scheme u/s. 80CCD

- S. 198 - All TDS.

SEC. 198

Tax deducted is income received.

198. All sums deducted in accordance **with the foregoing provisions of this Chapter** shall, for the purpose of computing the income of an assessee, be deemed to be income received :

Provided that the sum being the tax paid, under sub-section (1A) of section 192 for the purpose of computing the income of an assessee, shall not be deemed to be income received.

Section 9

The Place of the source of Income is a vital aspect of section 5 in deciding whether an income falls in its scope or not.

What is the place of accrual of income?

Is source of income same as place of accrual?

In an earning process, three factors are involved viz:-

1. **Instrumentality**
2. **Source of Income (Which is identified with Genus)**
3. **Place of its accrual (It is the legal right to receive)**

What is the need of section 9

- When a technocrat provides consultancy services, he earns Fees for Technical Services (FTS). If the services are provided outside India, then the place of accrual of business income is outside India. When Indian customer remits the fees abroad, the technocrat receives them outside India.
- Hence primarily under section 5 this income would be beyond the scope of total income. Hence such income would not be taxable in India.
- Thus, Section 9 makes a deeming provision. If the FTS is paid by an Indian resident etc., it is deemed to be taxable in India.

Fees for Technical Services – Section 9(1)(vii)

- FTS will be deemed to accrue or arise in India if payable by
  - Government
  - Resident except, if payable for services utilized for:
    - Business carried on by such person outside India
    - Earning any income from any source outside India
  - Non resident in respect of services utilized for carrying on business or profession in India

Income deemed to accrue or arise

Section 9

Income deemed to accrue or arise: Section 9

Chargeability to tax governed by provisions of Act / DTAA

Nature of Income	Act*	DTAA
Business/ Profession	S.9(1)(i); Concept of Business Connection	A.5 and A.7 , A.14**; Concept of P.E/ Fixed Base
Salary Income	S.9(1)(ii), S.9(1)(iii)	A.15, A.18, 19, 28
Dividend Income	S.9(1)(iv), S.115A	A.10
Interest Income	S.9(1)(v), S.115A	A.11
Royalties	S.9(1)(vi), S.115A	A.12
FTS	S.9(1)(vii), S.115A	A.12**
Capital Gains	S.9(i)(i) & S. 45	A.13

* Apart from S. 5, wherever applicable ** Not there in OECD Model treaty

Act/ DTAA, whichever is beneficial prevails

According to Sub-Section (2) of Section 5 of the Act, a non-resident is chargeable to tax only on income which is ***received or deemed to be received*** in India or which ***accrues or arise or is deemed to accrue or arise*** to him in India.

Section 9 deems the following income as accruing or arising in India in hands of a non-resident.

- All income accruing or rising, directly or indirectly, through or from any **business connection** in India or through or from **any property** in India or through or from any **asset or source of income** in India or through **the transfer of a capital asset situated in India.**
- Income under the head 'salaries' is chargeable if it is earned in India. (Supreme Court decision in the case of Eli Lilly & Co. (312 ITR 225)may be referred)
- Salaries payable by the Government to a citizen of India for services outside India are also deemed to accrue or arise in India.

- Dividend paid by an Indian company outside India.
- Interest payable by the Government or by resident/non-resident in respect of any debt incurred, or moneys borrowed and used, for the purposes of business or profession carries on by such person in India.
- All "royalties" payable by Government and royalties payable by a resident or a non-resident in respect of a right, property or information **used for purposes of a business or profession in India or for earning any income from any source in India;** and
- All "**Fees for Technical Services**" (FTS) payable by Government and FTS payable by a resident or a non-resident in respect of **services utilized for the purpose of business or profession in India or for earning any income from any source in India.**

(OVERVIEW OF SECTION 9)

Income is deemed to accrue or arise in India if it accrues, directly or indirectly

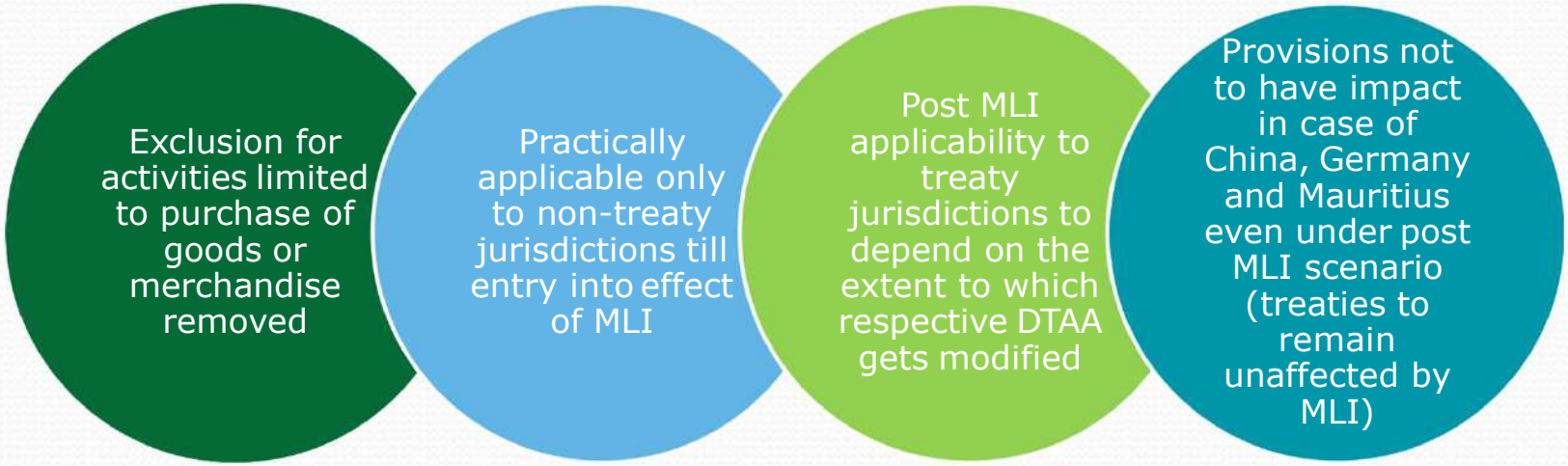
- through or from any business connection in India or
- through or from any property in India or
- through or from any asset or source of income in India or
- through the transfer of a capital asset situated in India.

Term:- Business Connection

Business Connection – Definition under the Act

- Finance Act 2018 has amended the definition of "business connection" under the Act to align it with modified PE rule as per Multi Lateral Instruments
- As per the amended definition of "business connection" under Explanation 2 to section 9(1)(i), business connection would include any business activity carried out through a person who, acting on behalf of the non-resident:
  - has and habitually exercises in India, authority to conclude contracts on behalf of non-resident or habitually concludes contracts or **habitually plays the principal role leading to conclusion of contracts** by that non-resident and the contracts are:
    - In the name of the non-resident; or
    - For the transfer of the ownership, or for the granting of the right to use, property owned by that non-resident or that non-resident has the right to use; or
    - For the provision of services by the non-resident; or
  - has no authority, but habitually maintains in India, a stock of goods from which he regularly delivers goods on behalf of non-resident ; or
  - habitually secures orders in India, mainly or wholly for the non-resident or for that non-resident and other non-residents controlling, controlled by, or subject to the same common control, as that non-resident

Business Connection – Key considerations



- Various judicial pronouncements which have defined the term business connection has laid down the following principles:
  - There must be element of continuity as well as real and intimate connection.
  - A business connection involves a relation between a business carried on by a non-resident which yields profits or gains and some activity in the taxable territories which contributes directly or indirectly to the earning of those profits or gains
  - It predicates an element of continuity between the business of the non-resident and the activity in the taxable territories
  - There should be a real and intimate relation between trading activity carried on outside the taxable territories and trading activity within the territories, the relation between the two contributing to the earning of income by the non-resident in his trading activity

Business Connection – to include "significant economic presence"

- Finance Act 2018 has inserted a new explanation [Explanation 2A] to section 9(1)(i) of the Act to clarify that the significant economic presence of a non-resident shall constitute "business connection" in India
- "Significant economic presence" defined to mean –
  - transaction in respect of any goods, services or property **carried out by a non-resident in India** including provision of download of data or software in India provided the revenue therefrom exceeds monetary threshold as may be prescribed; or
  - systematic and continuous soliciting of business activities or engaging in interaction with users (exceeding the number as may be prescribed) in India through digital means.
- Whether or not the non-resident has a residence or place of business in India or renders services in India not relevant
- The aforesaid amendment in line with recommendations under BEPS Action Plan 1 on addressing tax challenges of the digital economy

Threshold of "revenue" and "users" to be decided after consultation with stakeholders

India to re-negotiate existing DTAs for inclusion of the new nexus rule

Cross border business profits to continue to be taxed as per existing treaty rules till the DTAs are modified

Non-treaty jurisdictions to be impacted by the proposed amendment

Amendment by Finance Act, 2020

- In section 9 of the Income-tax Act, in sub-section (1),–– (a) in clause (i);
- (ii) Explanation 2A shall be omitted with effect from the 1st day of April, 2021
- and the following Explanation shall be inserted with effect from the 1st day of April, 2022, namely:––
- 'Explanation 2A.—For the removal of doubts, it is hereby declared that the significant economic presence of a non-resident in India shall constitute "business connection" in India and "significant economic presence" for this purpose, shall mean—

(a) transaction in respect of any goods, services or property **carried out by a non-resident with any person in India** including provision of download of data or software in India, if the aggregate of payments arising from such transaction or transactions during the previous year exceeds such amount as may be prescribed; or

(b) systematic and continuous soliciting of business activities or engaging in interaction with such number of users in India, as may be prescribed: Provided that the transactions or activities shall constitute significant economic presence in India,

Amendment by Finance Act, 2020

- whether or not— (i) the agreement for such transactions or activities is entered in India; or (ii) the non-resident has a residence or place of business in India; or (iii) the non-resident renders services in India: Provided further that only so much of income as is attributable to the transactions or activities referred to in clause (a) or clause (b) shall be deemed to accrue or arise in India.';

Amendment by Finance Act, 2020

- In section 9 of the Income-tax Act, in sub-section (1),–– (a) in clause (i),–– (i) in Explanation 1, in clause (a), for the words "in the case of a business", the words "in the case of a business, other than the business having business connection in India on account of significant economic presence," shall be substituted with effect from the 1st day of April, 2022;

Amendment by Finance Act, 2020

(iii) after Explanation 3, the following Explanation shall be inserted with effect from the 1st day of April, 2021, namely:––

"Explanation 3A.––For the removal of doubts, it is hereby declared that the income attributable to the operations carried out in India, as referred to in Explanation 1, shall include income from––

(i) such advertisement which targets a customer who resides in India or a customer who accesses the advertisement through internet protocol address located in India;

(ii) sale of data collected from a person who resides in India or from a person who uses internet protocol address located in India; and

(iii) sale of goods or services using data collected from a person who resides in India or from a person who uses internet protocol address located in India.";

(iv) after Explanation 3A as so inserted, the following proviso shall be inserted with effect from the 1st day of April, 2022, namely:–– "Provided that the provisions contained in this Explanation shall also apply to the income attributable to the transactions or activities referred to in Explanation 2A.";

Section 9(1)(i) | Business connection

- Definition under the Act is inclusive and focuses on activities carried out through dependent agents.
- Exclusions from business connections

- Operations confined to purchase of goods for the purpose of export.
- Collection of news and views in India for the purpose of transmission outside India, in case of a non-resident.
- Operations confined to shooting of any cinematograph film in India, in case of a non-resident
- Display of uncut and unassorted diamonds in any special zone notified by the Central Government, in case of a foreign company engaged in mining of diamonds
- Business activity carried out by a broker, commission agent any agent having independent status.

Business Connection – Exceptions

- When all operations are not carried out in India [Sec.9(1)(i) - Explanation 1(a)].

  If all business are not carried out in India, income attribution should be restricted to the portion of operations carried out in India.

  Annamalais Timber Trust & Co [1961] 41 ITR 781 (Madras) where the only trading activity operation within India was negotiation and conclusion of the contract and the contract was entirely performed outside India, profit attribution to India was restricted to 10% of total profits.

Business Connection – Judicial Precedents

- **R.D. Agarwal & Co [1965] 56 ITR 20 (SC). – Business Connection involves:**
  - Real and close relation between a business carried on by a NR which yields profits or gains and some activity in the taxable territories which contributes directly or indirectly to the earning of those profits or gains
  - Element of continuity between the business of the NR and the activity in the taxable territories
  - Stray / isolated transaction not normally regarded as BC
- **G V K Industries (SC) [2015] 231 Taxman 18 (SC)/[2015] 371 ITR 453 (SC)**
  - Existence of close, real, intimate relationship and common interest between NR and Indian person
  - Control by NR, of management / finances / substantial holding of equity shares / sharing of profits of Indian Co.
  - Continuity of activity or operation
  - Isolated transaction is not enough to establish a BC
- **Anglo French Textile Co. Ltd [1953] 23 ITR 101 (SC)**
  - The activity was not in the nature of an isolated transaction of purchase of raw material
  - Continuity of business relationship between the person who helps to make the profits and the person outside India who receives or realizes the profits, constitute a BC

Business Connection vs. Permanent Establishment

- PE defined in sec. 92F(iiia) to include
  - Fixed place of business
  - through which the business of the enterprise
  - is wholly or partly carried on
- ambit of business connection is wider than PE
- Profits of NR are taxable only if PE exists in India through which such profits are earned
- Non-resident entitled to claim exemption from taxability of such profits arising through BC

  if NR does not have PE in India – Al Nisr Publishing (AAR) [1999] 239 ITR 879 (AAR)

Provisions of Indirect transfer – Section 9(1)(i)

- Through or from any property or asset or source of income
  - Any income that accrues or arises to the non resident through or from any property or asset or source of income in India, shall be taxable in India in hands of the non-resident.
  - The word "Source" means a place from which something is obtained. Source in India would bring into charge all sources of income in India.[Economic Connection]
- Through the transfer of a capital asset situated in India
  - Where a non-resident derives income through the transfer of capital asset situated in India, the capital gains derived by the non resident on such transfer shall be subject to tax in India.
- Considering the impact and the controversy that arose due to the Supreme Court ruling in the Vodafone case
  - Finance Act, 2012 inserted Explanation 5 to section 9(1)(i) to tax in India gains arising on transfer of shares/ interest in a foreign company which results in an indirect transfer of underlying Indian assets
  - Finance Act 2015 inserted the word substantially in Explanation 5. It provides that a share or interest in a company or entity registered or incorporated outside India would be deemed to be situated in India, if the share or interest derives, directly or indirectly, its value substantially from the assets located in India.

Provisions of Indirect transfer

- The term 'substantially' was not defined by Finance Act 2012. Considering the hardships faced by taxpayers in determining what constitutes substantial value, the meaning of the term substantially has been defined by the Finance Act 2015 by way of Explanation 6 and Explanation 7 to section 9(1)(i)
- Explanation 6 states that shares or interest of the foreign entity will be deemed to derive its value substantially from assets located in India, if on the specified date, the value of Indian asset:
  - Exceeds the amount of INR 10 crores; and
  - Represents at least 50% of the value of all the assets owned by the company or entity as the case may be.
  - [Indian Assets > 50% of Total Assets of FC]

Provisions of Indirect transfer

- Value of an asset means FMV of such asset as on the specified date without reduction of liabilities determined in such manner as may be prescribed
- Specified date of valuation will be the date on which accounting period of the company ends preceding the date of transfer
- However where the book value of assets on the date of transfer is more than 115% of the book value as on last balance sheet date, value as on date of transfer is to be considered.
- Taxability in respect of indirect transfer of shares will be done on proportionate basis

Finance Act, 2017 has clarified that Explanation 5 shall not apply to any asset or capital asset mentioned therein being investment held by non-resident, directly or indirectly, in a Foreign Institutional Investor, as referred to in clause (a) of the Explanation to section 115AD, and registered as Category-I or Category II Foreign Portfolio Investor under the Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2014 made under the Securities and Exchange Board of India Act, 1992, as these entities are regulated and broad based.

Salary Income – Section 9(1)(ii) & (iii)

- Income from Salary from service rendered in India is deemed to accrue or arise in India.
- Place of rendition of service is the factor and not the place of payment of salary.
- Income from salary for service rendered outside India , is taxable outside India.
- However, once the money is remitted by the employer to the accounts in India, same is taxable in India. Shri Tapan Kumar Pattanaik vs Assessee (Kolkota ITAT). (Contrary Judgement)
- Mumbai HC in case of CIT vs Avatar Singh Wadhwan [2001] 247 ITR 260 (Bombay) held that the salary from service rendered outside India is not taxable in India.
- However, salary paid by Indian Govt to employees (Indian Citizen) for services rendered outside India is taxable in India.

Income from Dividend & Interest – Section 9(1)(iv) & (v)

Dividend Income – section 9(1)(iv)

- Dividend paid by an Indian Co to a non-resident shareholder outside India is deemed to accrue or arise in India and taxable in India.
- However, the same is exempt from tax due to provisions of Sec.115-O

Interest Income – section 9(1)(v)

- Interest income earned is taxable in India if it is payable by
  - Government
  - Resident… Except, if payable in respect of debt incurred / money borrowed for the purposes of
    - Business carried on by such person outside India
    - Earning any income from any source outside India
  - Non Resident, in respect of debt incurred / money borrowed for carrying on business or profession in India
- Existence of BC or rendering of service in India – Not relevant
- Situs of utilization is to be considered

Royalties – Section 9(1)(vi)

- Royalty income earned by a non-resident is deemed to accrue or arise in India if it is payable by :
  - The Govt. or
  - A person resident in India.
- Exception: Royalty payable in respect of any right, property or information used or services utilized for the purpose of
  - A business carried on by such person outside India or
  - Earning any income from any source outside India.

Amendment by Finance Act, 2020

- (b) in clause (vi), in Explanation 2, in clause (v), the words “, but not including consideration for the sale, distribution or exhibition of cinematographic films” shall be omitted with effect from the 1st day of April, 2021

Fees for Technical Services – Section 9(1)(vii)

- FTS will be deemed to accrue or arise in India if payable by
  - Government
  - Resident except, if payable for services utilized for:
    - Business carried on by such person outside India
    - Earning any income from any source outside India
  - Non resident in respect of services utilized for carrying on business or profession in India
- **Lufthansa Cargo India Ltd (Delhi HC) [2015] 375 ITR 85 (Delhi)**

  Payment made for repairs and maintenance of aircraft (given on wet lease to F Co.s) carried on outside India is not taxable as FTS since such payments have been made for earning income from sources outside India

Residential Status

Residential Status :

Residential Status of an assessee is important in determining the scope of income on which income tax has to be paid in India.

Why one Need to know sec 6 properly

Provisions of the black money bill
Penalty for failure to disclose / furnish inaccurate particulars / failure to file RoI
Any resident person who fails to disclose any foreign asset / income (or discloses inaccurate particulars thereof) or fails to file the RoI shall be subject to penalty of Rs 10,00,000

CRITERIA FOR DECIDING RESIDENTIAL STATUS

- ***For an Individual - either of two conditions:***

  i) In India for a period or periods amounting in all to 182 days or more in that year.

  or

  ii) having within the four years preceding that year in India for all 365 days or more and 60 days or more in that year.

  But any person, being citizen of India, who leaves India in any previous year as a member of crew of an Indian ship or for the purpose of employment outside India the period of 182 days instead of 60 days to be considered

  or

  A person being a citizen of India or a person of Indian origin, who being outside India, comes on a visit to India , the period of 182 days instead of 60 days to be considered.

(Basis of above two proviso)

Continued..

WHO LEAVES INDIA FOR:

Self Employment ????

Salaried Employed ????

Professional ????

travel ????

Note : A Person is deemed to be of an Indian Origin, If he or his parent or any of his grand parents were born in Undivided India(i.e. India, Pakistan, Bangladesh)

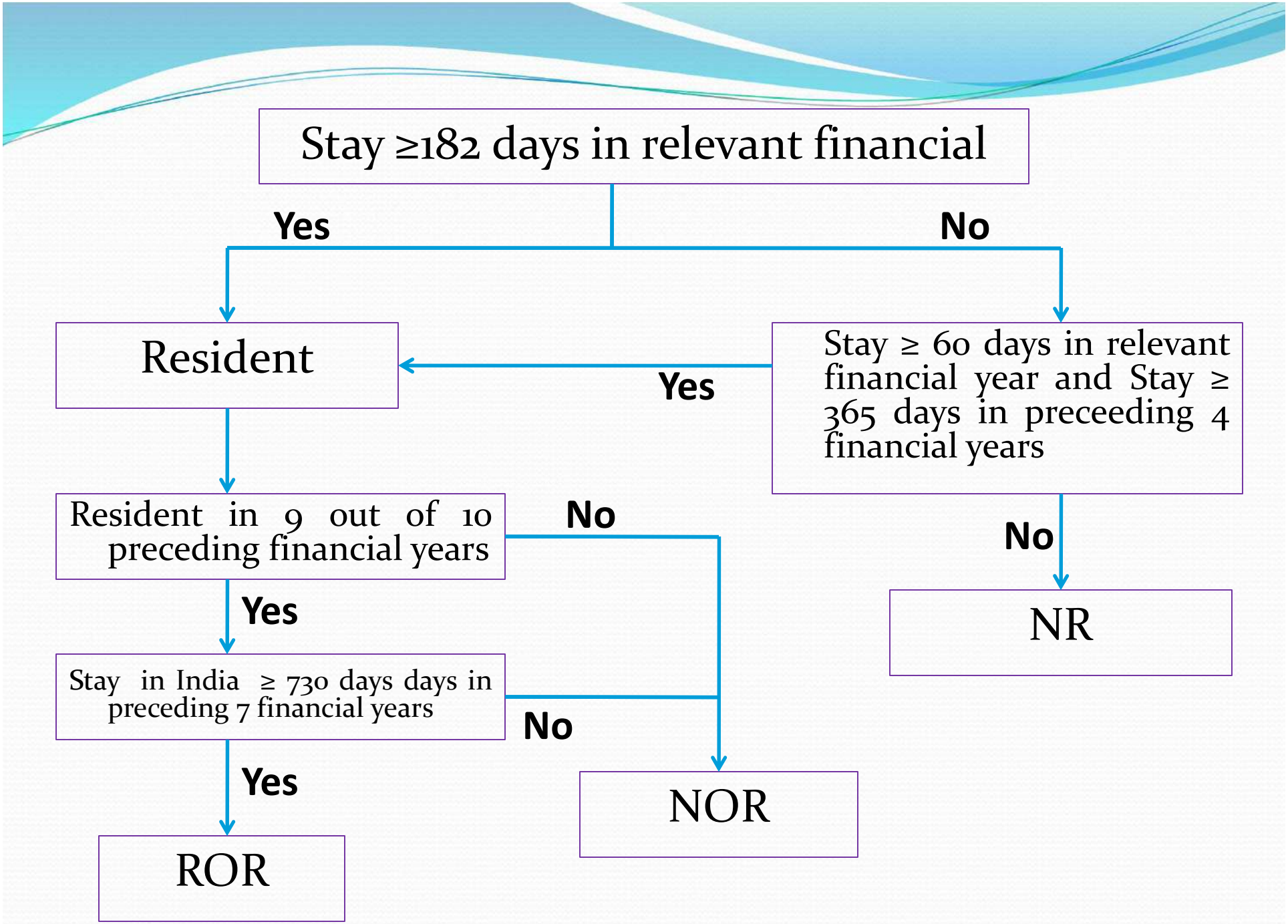
Further as per finance act, 2015 in proviso (a) for the member of foreign ship, the calculation of days will be done as per the procedure laid down in the Act.

SEC. 3

"Previous year" defined.

3. For the purposes of this Act, "previous year" means the financial year immediately preceding the assessment year :

Provided that, in the case of a business or profession newly set up, or a source of income newly coming into existence, in the said financial year, the previous year shall be the period beginning with the date of setting up of the business or profession or, as the case may be, the date on which the source of income newly comes into existence and ending with the said financial year.


Stay ≥182 days in relevant financial
Yes
No
Resident
Yes
Stay ≥ 60 days in relevant financial year and Stay ≥ 365 days in preceeding 4 financial years
Resident in 9 out of 10 preceding financial years
No
No
NR
Yes
Stay in India ≥ 730 days days in preceding 7 financial years
No
Yes
NOR
ROR

❖ Taxability of Income based upon Residential Status

Based on the residential status, the following income is taxable in the hands of the Individual:

ROR: Liable to tax on worldwide income in addition to income earned or received or deemed to be earned or received in India.

NOR/NR: Liable to tax only on the income earned or received or deemed to be earned or received in India(with some exceptions for NOR)

Computation of number of days present in DTAA/India??? (view)

- **Issue 1:** In case of Indian citizen visiting India during the period of their international assignment, whether the term "visit" would include any categories of visit be it official visits, business visits, personal visits or permanent visits?.
- **Issue 2:** Whether 60 days can be substituted with 182 days in a case where the individual being outside India comes on visits to India and repatriates back to India in latter part of the year after completion of international assignment?
- **Issue 3:** Whether the period of occasional visit to India by an employee sent on deputation abroad should be excluded for the purpose of calculating the threshold limit of 60 days as mentioned in s 6(1)(c') of the Act?

Issue for tax planning

The residential status has to be considered **separately for each previous year**. Thus, an assessee may be resident in year 1, non-resident in year 2 and again resident in year 3.

Consider an illustration. Mr. A has made investments abroad under liberalised remittance scheme (LRS) under FEMA. If he sells these investments, he is likely to earn capital gains.

Assume a case where Mr. A is likely to earn substantial capital gains abroad. Under normal circumstances, his foreign capital gains would be taxable in India. However, he may decide to go abroad for more than 182 days in a particular previous year. He would go abroad on employment. Once he has gone abroad, he would sell his investment and earn the capital gains.

These would be free from Indian tax. After completing 185 days abroad, Mr. A can return to India. He would not be liable to Indian Income-tax on the foreign capital gains.

India has not amended this loop hole even in the DTC.
Other countries have taken care of it – several decades back.
However, GAAR – if properly drafted, may partially cover this loop hole.

Perpetual Travelers or **Nomads.**

- There are some people who will live in India for less than 182 days and will not maintain "connections" with any country. They will have right to stay in several countries like Dubai, Mauritius etc. But they will be non-resident of all countries. These are **Perpetual Travelers** or **Nomads**. They do not pay tax in any country on "Global" basis. But they have to pay tax on "Source" basis in the country where they earn income. They will not get DTA relief in any country as they are non-residents everywhere.

- *For HUF/Firm/AOP/BOI*

  Said to be resident, **when control and management of its affairs** is situated either wholly or partly in India.

- *Not ordinarily resident*
- For Individual – who has been non-resident in India in 9 out 10 previous years preceding that year or has during the 7 previous years preceding that year been in India for less than 730 days.

- For HUF – Manager/Karta's status be considered.

For a non-individual entity, number of days presence in India cannot be counted. Hence the provision is based on "control & management of its affairs". When an HUF, a firm or an AOP has the **whole of** its control & management **outside India**, it is considered a non-resident of India. If even a part of its control & management is situated in India, it becomes an Indian resident and its global income becomes taxable in India.

- Consider an American partnership firm having 1,000 partners spread over several different countries. The firm has two partners looking after the Indian business. Since two partners are managing a portion of the firm's affairs in India, the firm will be treated as an Indian resident. Hence the global income earned by all the 1,000 partners will be taxable in India.

This is an archaic and a harsh provision. Even DTC has not reviewed the provision. Simple advice to all involved in international business: "Don't do business through an unincorporated body. Make a company to transact international business".

HUF

- The NOR status is granted to HUF also. HUF may have many members. Different members may have different residences. Hence the HUF's NOR status is made dependent upon its manager's residence.

  Hindu Law uses the term "Karta" of HUF.

  Income-tax Act uses the term "Manager of HUF".

- Section 6 (6) (b) provides for NOR status for an HUF. The HUF gets NOR status if its manager can fulfill any one of the above referred two conditions.
- It may be noted here that under section **6(2)** an HUF's residential status depends upon **control & management** of its affairs. Under section **6(6)(b)** the NOR status depends upon the **physical presence** of the manager. There can be mix up of the two conditions.

- Consider the illustration of an HUF. The manager is Indian resident. He spends almost 300 days every year in India. Hence the HUF will not get NOR status. The HUF has set up a business outside India. The manager would travel abroad every month for a few days. During those foreign visits he would give all necessary instructions and the business would be run by employees. He can claim that the control and management of HUF affairs have always been **exercised outside India**. Hence the HUF is a non-resident of India. Hence irrespective of NOR status, its foreign income would be exempt from Indian income-tax.

Amendment by Finance Act, 2020

- In section 6 of the Income-tax Act, with effect from the 1st day of April, 2021,–– (a) in clause (1), in Explanation 1, in clause (b), for the words "substituted" occurring at the end, the words "substituted and in case of the citizen or person of Indian origin having ***Total income***, ***other than the income from foreign sources***, exceeding fifteen lakh rupees during the previous year," for the words "***sixty days***" occurring therein, the words "***one hundred and twenty days***" had been substituted;

- . (b) after clause (1), the following clause shall be inserted, namely:–– "(1A) Notwithstanding anything contained in clause (1), **an individual**, **being a citizen of India**, having total income, other than the income from foreign sources, exceeding fifteen lakh rupees during the previous year shall be **deemed to be resident in India** in that previous year, if he is **not liable to tax in any other country or territory** by reason of his **domicile or residence or any other criteria of similar nature**;

(c) in clause (6), in sub-clause (b), for the words "days or less" occurring at the end, the following shall be substituted, namely:— "days or less; or (c) a **citizen of India, or a person of Indian origin**, having total income, other than the income from foreign sources, exceeding fifteen lakh rupees during the previous year, as referred to in clause (b) of Explanation 1 to clause (1), who has been in India for a period or periods amounting in **all to one hundred and twenty days or more but less than one hundred and eighty-two days;** or (d) **a citizen of India who is deemed to be resident in India under clause (1A).**

Explanation.—For the purposes of this section, the expression "income from foreign sources" means income which accrues or arises outside India (except income derived from a business controlled in or a profession set up in India).

Illustrative List of Impact of Clause 1A- Deemed Resident

Particulars	Effect
Senior Citizen	Higher Exemption Limit available
Super Senior Citizen	Higher Exemption Limit available
10(4)(ii)	Interest Not Exempt
10(4C)	Interest Not Exempt
10(6D)	Royalty/FTS
Expenses disallowable from 40(a)(i) to 40(a)(ia)	Less amount will be disallowed(30%)

Illustrative List of Impact of Clause 1A- Deemed Resident..Continued

Particulars	Effect
Presumptive Incomes for Non Residents u/s 44B,44BB and 44BBA	Non-Resident will not be able to avail option under Presumptive Income scheme
44C	Restriction for Non-Resident only
48 (First Proviso)	Foreign Currency conversion was available to Non-Resident
80DD, 80DDB	Available to Resident (Medical Treatment)
80RRB	Deduction in Respect of Royalty on Patents available to Resident
80U	Deduction in case of Person with Disability

❖ *For a company : either of two conditions*

(upto 31/03/2015)

i) It is an Indian co; or

ii) In any other case, during the year, **the control and management of its affairs** is situated wholly in India.

(From 01/04/2015)

i) It is an Indian co; or

ii) In any other case, where **the place of effective management** is situated in India, any time during the year, .

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(From 01/04/2015)

i) It is an Indian co; or

ii) In any other case, where **the place of effective management** is situated in India~~, any time during the year,~~ .

- *Control and Management/Poem:*
  - Where head and brain is situated - which directs the affairs of policy, finance, disposal of profits etc.
  - Not only a *de jure* control and management but a *de facto* control and management.
  - Control is not shareholding control.

Status of Virtual Board Meeting i.e video conferencing?

- *Deemed income for all assessee:*

  i) S.8 any dividend declared, or distributed, or paid by a co. u/s.2(22).

  ii) Interim dividend – if unconditionally made available by the co. to its members

Why Place of Effective Management in place of Control & Management.

- It is easy for one or more Indian residents to incorporate companies in Mauritius, Dubai or other tax havens. These companies would be totally controlled & managed from India. 100% of shares may be owned by Indian residents. All the directors may be Indian residents. Still, the company would be considered a non-resident and its foreign income would be free from Indian tax. Section 6 (3) (ii) provides that if during a previous year, the **whole** of the control & management of its affairs is situated in India, that company will be Indian Resident. It is fairly easy to ensure that at least a part of the control & management is situated outside India.
- Initially FERA was harsh. Indian residents could not invest abroad. After 1993 FERA has been liberalised. Slowly the liberalisation has become more substantial. Today Indian residents can easily invest abroad. Hence people have started incorporating companies abroad. Income-tax department has taken notice of this development.
- The new proposal is to substitute "Control & Management" by "**Place of Effective Management**". When the new definition comes in place, any company would be considered as an Indian resident if the place of its effective management is situated in India.

- Presently, a foreign company is considered resident in India if the control and management of its affairs is situated wholly in India.
- To curb the creation of shell companies which are incorporated outside India but controlled from India, the concept of Place of Effective Management ('POEM') is now being introduced. PoEM is an internationally recognized concept and accepted even by the OECD.
- It is proposed that a foreign company will be resident in India, if its PoEM is in India at any time during the year.
- The term 'PoEM' has been explained 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.
- It is also proposed that in due course a set of guiding principles for determination of PoEM would be issued.

Residence in India - Section 6 – PoEM

- **Tax residence of Fiscal Domicile**
  - As per section 6(3), a company is said to be resident in India if in previous year
    a) it is an Indian company or
    b) its place of effective management, in that year, is in India
- **PoEM – key principles**
  - Place where key management and commercial decisions necessary for the conduct of the business are taken
  - POEM as a test of corporate residency is not applicable to companies with turnover or gross receipts of Rs. 500 million or less in a financial year
  - A substance over form approach
  - Tested on year-on-year basis

PoEM is applicable from Assessment Year 2017-18. Final Guidelines issued by CBDT on 24 January 2017. Recently, a notification was issued dated 22 June 2018 prescribing exceptions, modifications and adaptations to various provisions of the Act for taxing foreign companies

PoEM Guidelines - Exclusions

Shareholder decisions by the parent company shall not get covered within the ambit of PoEM

Adherence to global group policies on accounting, HR, IT, supply chain and routine banking operations shall not lead to POEM in India

Routine operational decisions for oversight of day-to-day business operations shall not lead to POEM in India

The POEM guidelines shall not be applicable to companies having turnover or gross receipts of INR 50 crore or less in a financial year (this has been provided in the CBDT press release dated 24 January, 2017, but has not been stated in the guidelines)

Having a PE in India will not amount to a PoEM in India. Having a PE shall mean the income related to the PE is taxable in India; however having POEM in India means that the worldwide income of the foreign company is taxable in India

RESIDENTIAL STATUS UNDER THE DOUBLE TAXATION AVOIDANCE AGREEMENTS

Structure of Article 4

Article 4(1)

- Definition of a resident

Article 4(2)

- Tie-breaker rule for individuals

Article 4(3)

- Tie-breaker rule for persons other than individuals

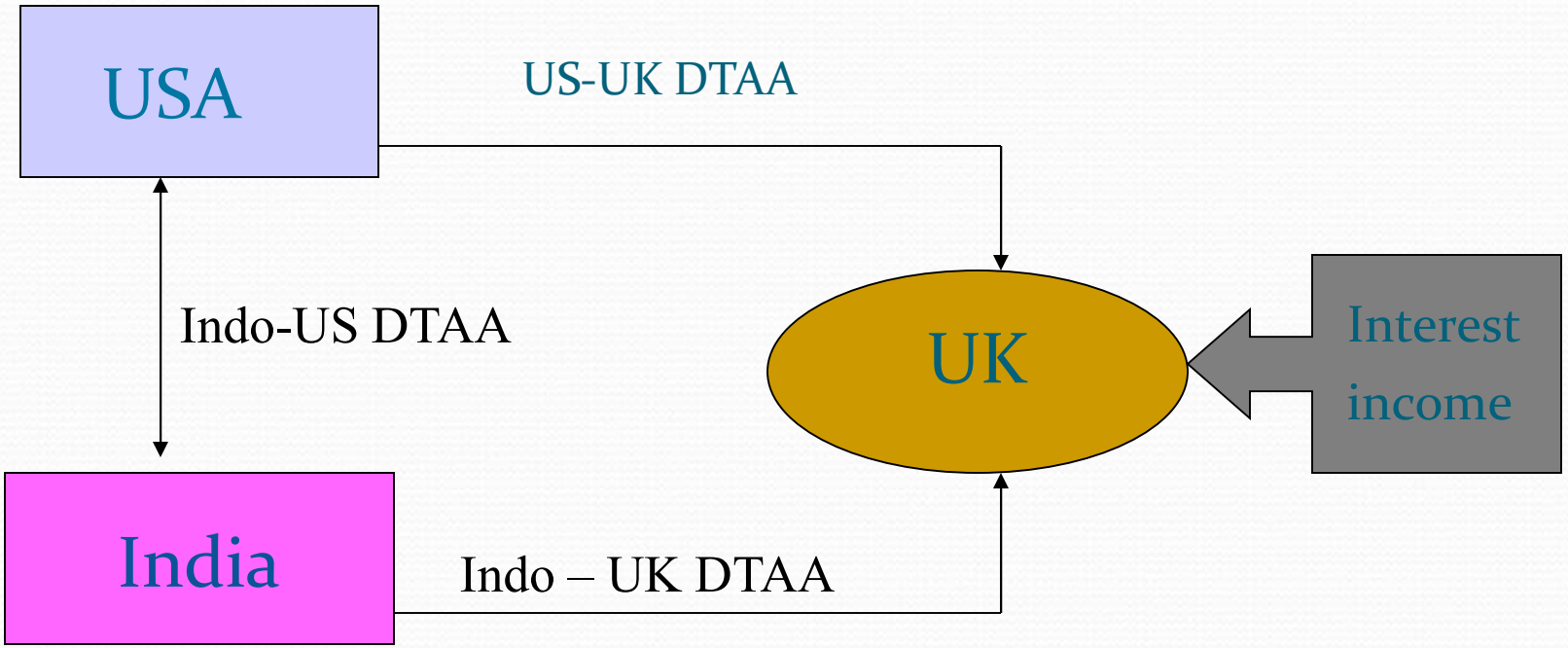
Article 4(1)

"**Resident of a CS" means:**

- Any person
- who under the laws of the State
- is liable to tax therein
- by the reason of his domicile, residence, place of management (place of incorporation also in UN MC)
- or any other criteria of similar nature
- and also includes that State, any Political sub-division or local authority thereof

Article 4(2) & 4(3)

Triangular treaty situation



Article 4(2) & 4(3) also determines which of the two CS will tax income from sources in a third State

Article 4(2)

Tie-breaker Rule

- Availability of a Permanent Home
- Closeness of personal and economic relations with a State (centre of vital interests)
- Habitual Abode
- Nationality
- Mutual Agreement Procedure

Should exist for the period for which taxation is an issue

Article 4(3)

Tie-breaker for persons other than individuals

If a person other than an individual is resident on both the States under Article 4(1), then it shall be deemed to be a resident only of the State in which its ***place of effective management is situated***

Article 4 – Some issues

- **Meaning of 'liable to tax'?**
- **Any other criteria of similar nature?**
- **Meaning of 'Permanent home'?**
- **Meaning of 'Centre of Vital Interests'?**
- **Meaning of 'Habitual Abode'?**
- **Meaning of 'Place of effective management'?**

  (view)

  Variation in DTAA`s. (View)

  Other issues for residency for Companies

Tax Residency Certificate

The Finance Act, 2012, introduced new provisions that in order to be eligible to claim any relief under the treaty, the taxpayer is required to produce a Tax residency Certificate (TRC) issued by the Government of the respective country or the specified territory in which such taxpayer is resident, Containing Certain prescribed particulars. In other words, in the absence of TRC the taxpayer shall not be entitled to claim any relief under the treaty.

Continue..

Subsequently, the Finance Act, 2013, had done away with the requirement of obtaining prescribed particulars in the TRC. In other words, the taxpayer can produce the TRC as issued to him by the tax authorities of his respective country. The Finance Act, 2013, also introduced a provision to clarify that the taxpayer shall be required to furnish such other information or documents as may be prescribed. In August 2013, the CBDT issued a notification amending the Rules prescribing the additional information required to be furnished by non- residents along with the TRC. The following details are required to be furnished in Form 10F:

Continue…

- Status (individual, company, firm, etc.) of the taxpayer;
- Permanent Account Number (PAN) of the taxpayer if allotted;
- Nationality (in case of an individual) or country or specified territory of incorporation or registration (in case of others);
- Taxpayer's tax identification number in the country or specified territory of residence and in case there is no such number, then, a unique number on the basis of which the person is identified by the Government of the country or the specified territory of which the taxpayer claims to be a resident;
- Period for which the residential status, as mentioned in the TRC, is applicable; and
- Address of the taxpayer during the period for which the certificate is applicable.

N1

1. Whether TRC can be issued by two countries for the same period?
2. TRC of which period is to be taken, whether that of credit or paid?
3. What to do if TRC is in different Language???? (view)

Slide 116

N1 definition of paid???
Nitin-pc, 2/25/2015

TAX RESIDENCY CERTIFICATE

- Sections 90(4)/A(4) provide that treaty benefit will not be available to any NR unless he furnishes TRC from Government of other country including therein particulars as may be prescribed.
- The particulars required in such TRC have been prescribed by Notification No 39 dated September 17, 2012
  - Finance Act, 2013 inserted sub section (5) to section 90 & 90A to provide that non resident assessee shall provide such other documents and information as may be prescribed.
  - Rule 21AB modified prescribed TRC format and now insists only on specific particulars of non residents in any format whatsoever.
- In addition to TRC the following information is to be furnished in Form 10F (Rule 21AB):

  i. Status (individual, company, firm etc.) of the assessee;

  i. . Nationality (in case of an individual) or country or specified territory of incorporation or registration (in case of others);

  ii. . Assessee's tax identification number in the country or specified territory of residence and in case there is no such number, then, a unique number on the basis of which the person is identified by the Government of the country or the specified territory of which the assessee claims to be a resident;

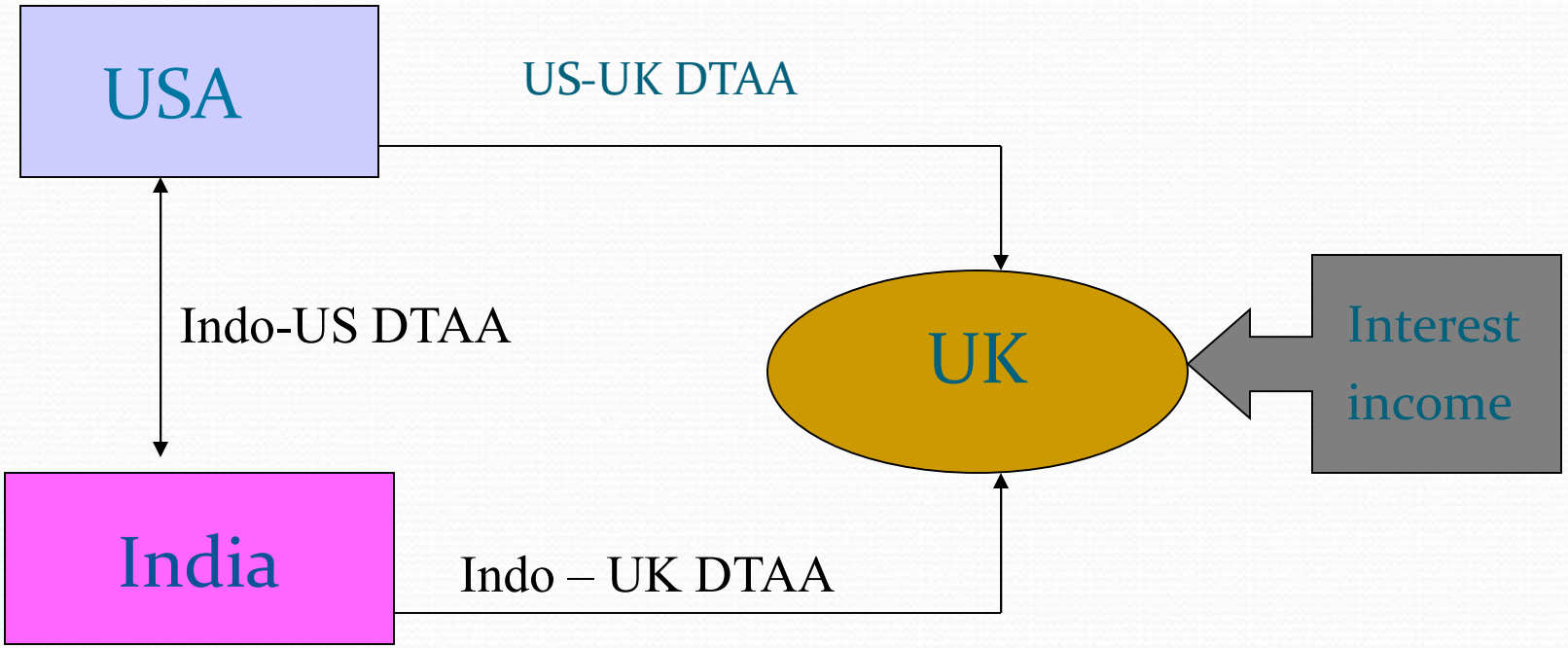
  iv. Period for which the residential status, as mentioned in the certificate referred to in sub-section (4) of section 90 or sub-section (4) of section 90A, is applicable; and

  v. Address of the assessee in the country or specified territory outside India, during the period for which the certificate, as mentioned in (iv) above, is applicable.

  "The assessee may not be required to provide the information or any part thereof referred to in sub- rule
  (1) if the information or the part thereof, as the case may be, is contained in the certificate referred to in sub-section (4) of section 90 or sub-section (4) of section 90A."

Indian Company having PE in U.S.A from where loan has been given to U.K

Triangular treaty situation



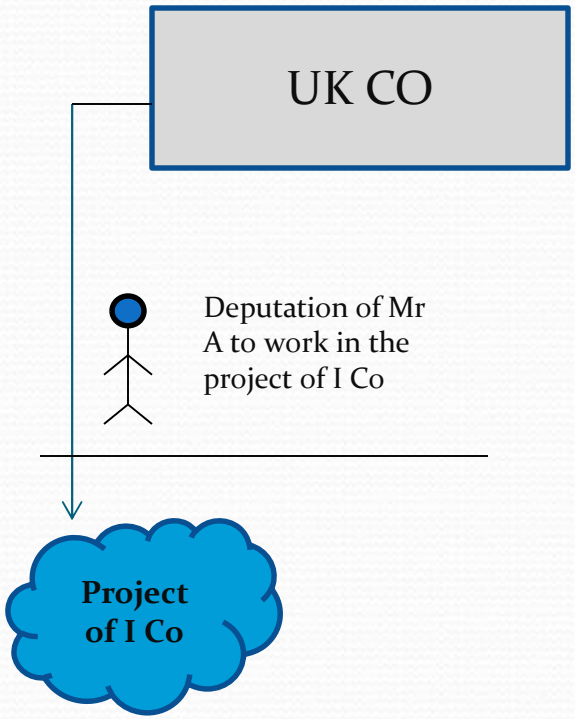
Determination of which of the DTAA will be applicable.

PAYEE?

- Non resident and Foreign Company (section 2 definitions)
- Residential Status at the time of payment or preceding year?
- Status when Payment to agent of non resident (SC Narsee 35 ITR 134)
- Whether covers resident but not ordinarily resident as payee u/s 195? What about International Tax Transfer Pricing?
- Branch/PE of Non resident Assessee CBDT Circular No 20/3-1-1961 – (foreign bank branch – practical way out – branches obtain lower /Nil ded. certificates)
- What when payee non resident as per DTAA and not as per section 6?
- Foreign Branch of Indian Bank?

Construction & overview of a Tax Treaty

Potential exposure of multi country taxation



- Fact pattern of Mr A who is deputed by UK Co to work in a project of I Co for six months

Tax Resident	Sweden
Citizenship	US
Employer	UK Company
Project of UK Co	India
Receipt of salary	Netherlands

❖ Articles of Model Convention

Chapter	Article	Topic covered
Chapter I : Scope of Convention	Article 1	Persons covered
	Article 2	Taxes covered
Chapter II : Definitions	Article 3	Definitions
	Article 4	Residence
	Article 5	Permanent Establishment
Chapter III : Taxation of Income	Article 6	Income from Immovable property
	Article 7	Business Profits
	Article 8	Shipping & air transport
	Article 9	Associated Enterprises
	Article 10	Dividends

❖ Articles of Model Convention

Chapter	Article	Topic covered
Chapter III: Taxation of Income (contd.)	Article 11	Interest
	Article 12	Royalties & Fees for Technical Services
	Article 13	Capital Gains
	Article 14	Independent Personal Services
	Article 15	Dependent Personal Services
	Article 16	Director's Fees
	Article 17	Artistes and sportsmen
	Article 18	Pensions
	Article 19	Government service
	Article 20	Students
	Article 21	Other Income

❖ Articles of Model Convention

Chapter	Article	Topic covered
Chapter III: Taxation of Income (contd.)	Article 22	Capital
Chapter IV: Methods for the elimination of double taxation	Article 23	Method for elimination of double taxation (tax credit / exemption)
Chapter V : Special Provisions	Article 24	Non-discrimination
	Article 25	Mutual Agreement Procedure
	Article 26	Exchange of Information
	Article 27	Assistance in collection of taxes
	Article 28	Diplomatic mission
Chapter VI: Final Provisions	Article 29	Entry into force
	Article 30	Termination

Treaty: Agreement between Governments

- Treaties are signed by two national jurisdictions to regulate matters concerning taxes
- Taxpayer is not a party to a tax treaty
- Desire of signatories to make business environment in their jurisdictions tax friendly
- Treaty represents understanding as to rights and obligations of respective country
  - to forego its right to tax,
  - to limit scope or rate of taxation,
  - to grant credit of tax paid directly or indirectly in other jurisdiction/s etc. etc.
- Understanding between Governments is to share tax revenues equitably as between themselves, while mitigating hardship for taxpayers

Juridical Vs. Economic Double Taxation

Juridical double taxation

It occurs when two or more states levy taxes on same entity or person on same income for identical periods. It is the result of a conflict between two tax systems and arises due to overlapping claims of tax jurisdictions on inter-related economic activities.

Economic double taxation

It occurs when same economic transaction, item or income is taxed in two or more states during the same period but in the hands of different taxpayers.

What is an MFN Clause?

- Most Favoured Nation Clause
- Extends similar benefits to one country as extended to certain other countries
- Ensures equal treatment between a subset of countries
- Examples of MFN-in terms of
  - Rates of taxes
  - Liability to tax
  - Deductions permissible
  - Narrower Scope

Example : MFN and the Indo-France DTAA

Other Examples Of MFN clause in protocol of DTAA with other countries.

Anti-avoidance Provisions in Indian Tax Treaties

Agenda

- Some general Anti-avoidance provisions in Indian Tax Treaties
- Different forms/approaches to deal with anti-abuse in Treaties

Relationship between Domestic Anti-Avoidance Rules and treaties

- Specific Anti-avoidance Rules in India :

The anti-avoidance rules in the domestic legislation can be classified into three broad heads:-

- Anti-avoidance measures based on general principles in the law
- General Anti-avoidance rules
- Specific Anti-avoidance Rules

Precautions in applying DTAA and Referral check

Tax Treaty – whether applicable? TRC, Legal Status; Persons covered; Taxes covered; _ Residential status

Entry into force & Termination; LOB clause; MFN clause Protocols and Memorandum of Understandings

Technical Explanations to DTAA by Treaty Partner (eg USA to India USA DTAA); Jurisprudence / Case Laws (incl foreign courts); OECD Commentary to MC and UN Model Convention Commentary etc

Taxability of Imports

- Different economic logics are given for this assumption. Income-tax is on the seller or supplier of goods & services. Income accrues where the seller exercises functions, utilises assets and takes risk.
- Doing business with india vis a vis With in india
- F.O.B vis a vis C.I.F

(View for Goods & services)

- Generally, an import transaction is not liable to tax in India, if

1. the same is entered into between the parties on principal to principal basis and arm's length basis,
2.contracts to sell are made outside India,
3.delivery of the goods is taken outside India on FOB basis, and
4. the foreign exporter of goods does not have any business connection or permanent establishment in India to which the transaction can be attributed.

In order to safeguard / ensure correctness of the claim, it would be advisable to adhere with the conditions specified above while entering into contracts of sale/ import transactions and to obtain the following documents from the foreign exporter/vendor:

- Tax Residency Certificate
- A declaration that the vendor does not have a business connection or permanent establishment in India.
- The contract of sale is on principal to principal basis and at arm's length basis.

Major Amendments by finance Act, 2012

1. Income deemed to be accruing or arising to non-residents directly or indirectly through the transfer of a share or interest in the company if it derives value substantially from the capital asset situated in India is to be taxed in India with retrospective effect from 1 April 1962.

2. Definition of Royalty expanded vis a vis as to Software & satellite.

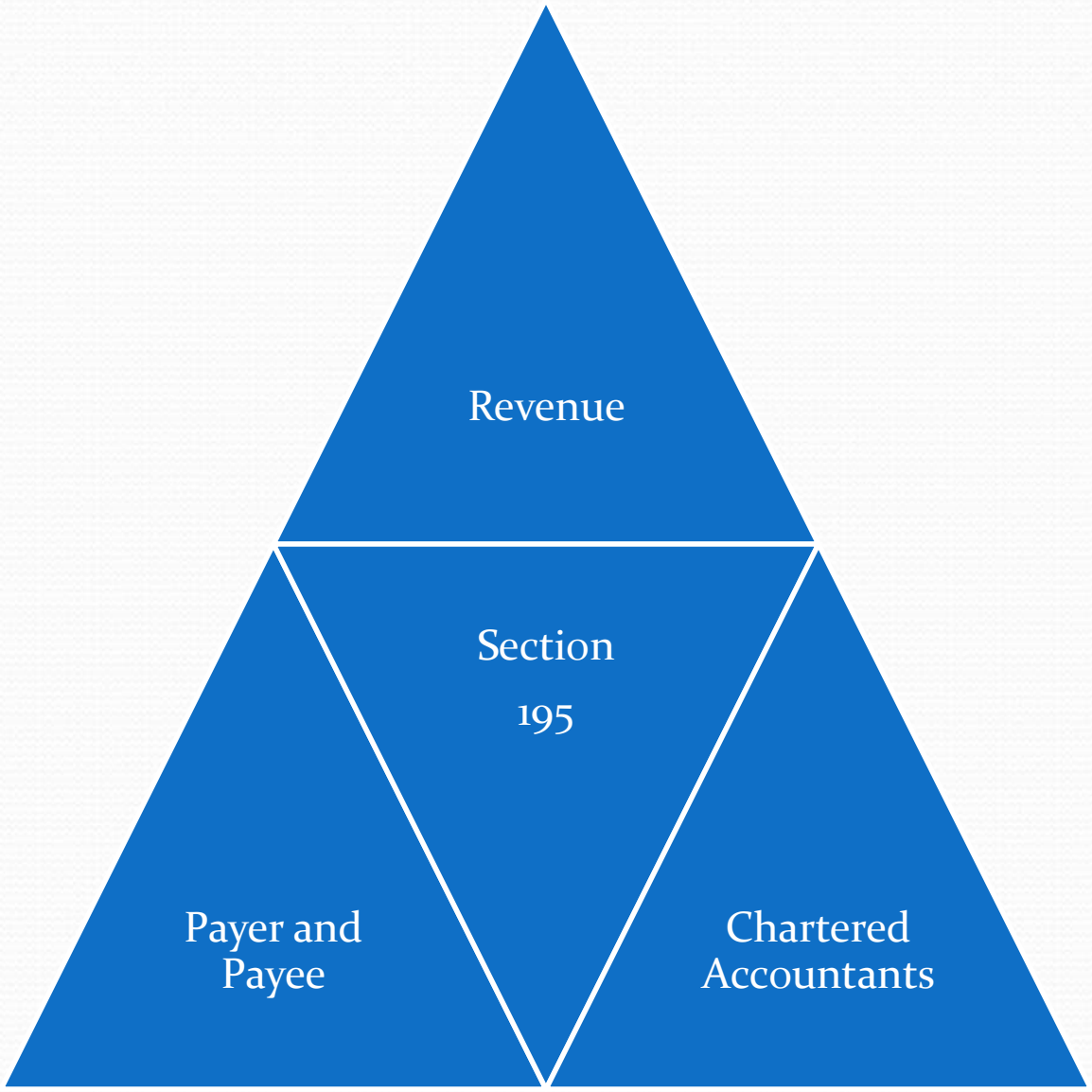
3. Definition of through added to sec 9(1)(i) which says that it mean & include by means of , in consequences of or by reasons of.

Major amendments as per finance Act, 2015

- ***Indirect transfer provisions –Clarifications***
- ***Indirect transfer on account of foreign company amalgamation and demerger***
- ***Rental income earned by Real Estate Investment Trusts (REITs)***
- ***Intended 'safe harbour' rules for fund managers***
- ***Tax pass-through treatment to Category II AIF***
- ***Taxability of interest payments to a foreign bank by its Indian branches***
- ***Taxation of GDRs***
- ***Transfer Pricing : Threshold for specified domestic transactions***

(Click to view)

Overview of Section 195


Revenue
Section
195
Payer and
Payee
Chartered
Accountants

Importance of Section 195

- More and More Cross Border Payments
- Increased revenue's attention like form 15CA and 15CB
- Professional Diligence for CA's
- Default consequences for payer:**
  - *Demand u/s Section 201; Interest of 201(1A)*
  - *Penalty u/s Section 221 &/or 271C*
  - *Prosecution u/s Section 276B*
  - *Disallowance of expense u/s Section 40(a)(i)*

(** has been covered in later part of the slides)

- ***Royalty and fees for technical services -reduction in tax rates***
- In order to reduce hardship faced by small entities and facilitate technology inflows, it is proposed to reduce the rate of tax on royalty and fees for technical services earned by non-residents, from 25% to 10%.

Section 195A
Grossing up of Tax

- Grossing up required in case of net of tax payments*

- Amount of tax payable by the NR has to be added to the income remitted to the NR and the tax payable by the NR should be determined with reference to the gross figure arrived at as above

** Not applicable in case of payments referred to in S.192(1A) - Non monetary perquisites taxable as salary*

Exceptions to section 195A

Issues

- Is Sec 195 A is applicable to whole of the payments or are their any exceptions to it??
- Further, An interesting issue that comes up is whether the grossing up provisions would be applicable even in cases where tax is recovered from the payer as an assessee in default u/s 201 under net of tax agreements.??

Section 195A – Key Aspects

Grossing up – Section 195A

- If payer bears tax liability i.e. payment is "net of tax", then for computing TDS, income should be grossed up

Particulars	Amount (in **INR**)
Amount payable to NR (sum chargeable to tax in India)	100
Tax rate	10%
Grossed-up amount (100)*(100/(100-10))	111.11
Tax payable (111.11*10%)	11.11
Net remittance amount	100

- Whether grossing-up required if payment made net of tax to foreign company which does not have a PAN in India?

  Income could be grossed up using applicable rate e.g. 10% and tax could be withheld @ 20%

  Eg: Total amount paid net of tax INR 100, income increased to INR 111.11 (grossed up by 10%), TDS to be deducted @ 20% on to INR 111.11 = INR 22.22

  Bosch Ltd v. ITO (141 ITD 38) (Bang ITAT)

- Applicability of section 195A in cases of presumptive taxation (section 44B, section 44BB, 44BBB)

  Not applicable ~ *CIT v. ONGC (276 ITR 585) (Utt HC)*

- Circular 785 dated November 24, 1999 – grossed up income is the income of the payee u/s 198 of the Act and the deductor is under an obligation to furnish the withholding tax certificate to the payee

Grossing up of 'net of tax' payments – section 195A:

Scenario I NR payee has a PAN and/or a TRC & other details as per Rule 37BC	**Amount payable to NR under 'net of tax' agreement = Rs.100** **Rate in force u/s 2(37A)(iii) = 10% [i.e. beneficial of: 10.815% as per Part II of the First Schedule to the Finance Act & 10% as per DTAA]** **Grossed up income u/s 195A = Rs.111.11 (i.e. 100*100/90)** **TDS u/s 195 = Rs. 11.11 (i.e. 111.11*10/100)**
Scenario II NR payee neither holds a PAN nor a TRC	Amount payable to NR under 'net of tax' agreement = Rs.100 Rate in force u/s 2(37A)(iii) = 10% Grossed up income u/s 195A = Rs.111.11 (i.e. 100*100/90) TDS u/s 195 = Rs. 22.22 (i.e. 111.11*20/100) Though TDS at a higher rate of 20% will apply u/s 206AA, income to be grossed up @ 10% (i.e. the rate in force) & not @ 20% (i.e. the TDS rate) - Bosch Ltd [2012](141 ITD 38)(Bang ITAT)

Section 206AA

- Section 206AA* stipulates withholding *at higher* of following rates in case PAN of payee is not furnished:
  - Rate specified in the relevant provisions of the Income-tax Act, 1961 (varying rates prescribed for different nature of payments); or
  - Rates in force (as specified in the Schedule to the Finance Act; relevant tax treaties); or
  - 20 percent.
- Further, PAN to be quoted on all correspondence, bills, vouchers, etc. between payer and payee. (Legislative intent:- To ensure that the ded. Knows the correct PAN No. of the deductee)



** with effect from 1 April 2010*

Exception to the applicability of 206AA:-

The Karnataka High Court in A. Kowaslya & others Vs. Union of India & others in a writ petition (W.P 12780-12782/2010) has held that the overriding provisions of 206AA, being in conflict with the provisions of Sec. 139A, are arbitrary and discriminatory in light of Art. 14 of the const. It has been held that it should be read down as being inapplicable to persons whose income is less than the taxable limit & bank & financial institution should not insist upon PAN from such small investors.

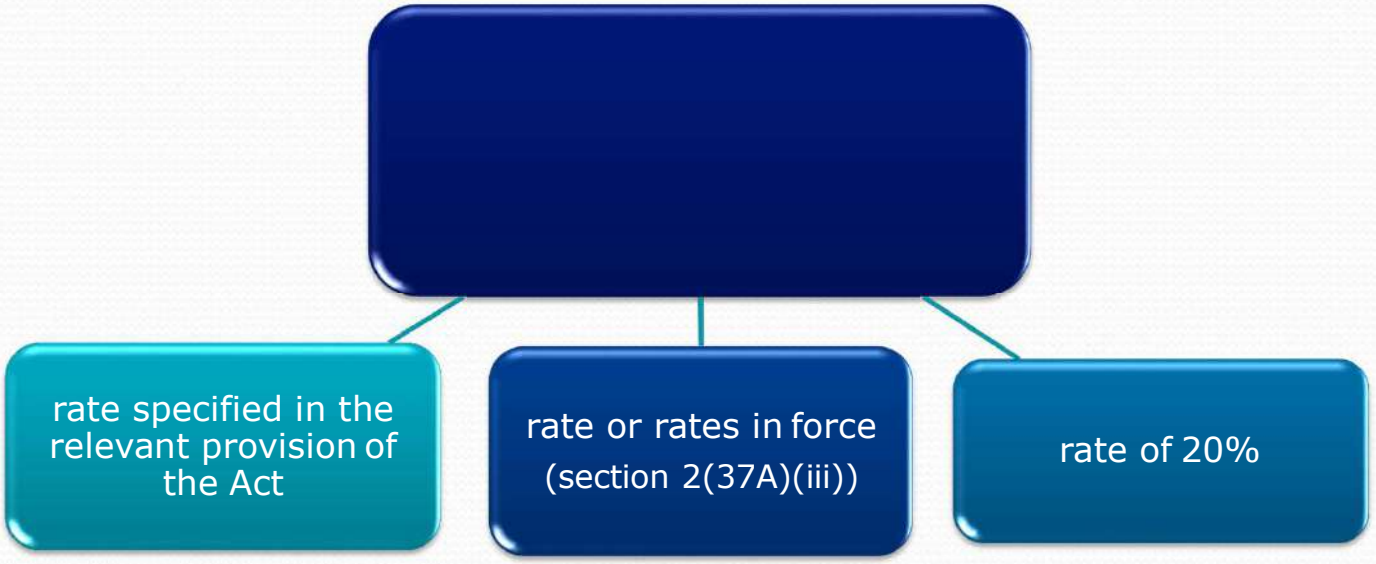
Now, in light of the above can an individual non resident getting small amount can also take the benefit of the above case????

Whether 206AA overrides Treaty? (view)

Applicability of Surcharge & Education Cess, 195A in special cases read with Sec 206 AA

- Where the average tax rate/ rate of taxation under the income tax act are less than 20%, then whether the 20% tax rate provided under 206AA should be further increased by surcharge & cess???
- Where the average tax rate/ rate of taxation under the income tax act and DTAA rate are less than 20%, then whether the 20% tax rate provided under 206AA should be grossed up in context of section 195 A, if the contract is of payment net of tax???

Failure to furnish Payee's PAN – section 206AA:



- **Section 206AA(7)(ii) r.w. Rule 37BC effective from June 2016:** Relaxation to payments in the nature of interest, royalty, FTS, capital gains, if the NR deductee furnishes following details, documents:
  - Name, e-mail id, contact number, address in the country of residence
  - TRC of the country of residence
  - Tax identification or unique identification number in the country of residence
- **Relaxation not available for other payments,** eg: payments to artists & sportspersons, payments taxable as other income, etc.

Quantifying WHT (3/4)

Developments on Section 206AA

Amendments

- **Practical difficulty to implement 206AA due to DTAA override**
- **Easwar Committee on tax simplification recommended to dilute 206AA provisions**
- **The Finance Act, 2016 accepts Easwar Committee Recommendation on 206AA**

Amendment under Finance Act, 2016

Section 206AA amended to exclude / relax non-residents on deduction of tax

- Form and the methods of conditions prescribed under Rule 37BC where the deductee shall furnish and the following details / documents to the deductor:

Name, email-ID, Contact number	Address of the resident country of the Payee	Resident certificate of the Payee	Tax Identification / Unique number registered with the Government

Interest **Royalty** **FTS** **Capital Gain**

Points to ponder

- If PAN not obtained, is nonresident obligated to file tax returns in India? Impact of penalty under section 270A
- Payments other than the prescribed nature of income how determined treated?
- Implications of amendment under section 139A of the Finance Act, 2018 and Section 206AA for nonresidents

Interplay with section 206AA

Beneficial DTAA provisions to override section 206AA irrespective of the non-obstante clause	• **Danisco India (P.) Ltd. [2018] 90 taxmann.com 295 (Delhi HC)** • **Nagarjuna Fertilizers & Chemicals Ltd. [2017](185 TTJ 569)(Hyd ITAT)(SB):** – **Unlike the GAAR provisions which override DTAA, there is no provision to give overriding effect to section 206AA**
Surcharge & Education cess not to be applied on 20% tax rate u/s 206AA	• Computer Sciences Corporation India (P.) Ltd. [2017](163 ITD 151)(Del ITAT)
Section 206AA cannot be invoked by not allowing correction of incorrect payee PAN in deductor's TDS statement	• Purnima Advertising Agency (P.) Ltd.[2017](83 taxmann.com 205)(Guj HC)

Applicability of Section 206AA

The following issues arise for discussion:

- Whether provisions of section 206AA override the provisions of tax treaty?
- Whether provisions of section 206AA apply when there is no liability of tax under the DTAA?
- In case higher rate of tax is deducted as per 206AA whether resident country would give tax credit for the same?
- Whether non resident can claim refund by filing tax return and applying correct rate of tax as per treaty?
- Hyderabad special bench ITAT in the recent case *Nagarjuna Fertilizers & Chemicals Ltd. [2017] 78 taxmann.com 264 (Hyderabad - Trib.) (SB)* held that If rate of tax applicable under DTAA is lower than 20 percent tax rate prescribed under section 206AA, TDS would have to be deducted at such lower rate even if non-resident deductee fails to furnish his PAN
- *DDIT v. Serum Institute of India Ltd (68 SOT 254) (Pune ITAT)* - Where TDS is deducted on the strength of beneficial provisions of the tax treaty, provisions of section 206AA of the Act cannot be invoked to insist on tax deduction at 20%, having regard to overriding nature of section 90(2)
- *DCIT v. Infosys BPO Ltd (154 ITD 816) (Bang ITAT)* - No scope of tax deduction at 20% as per section 206AA where treaty benefit is available to the assessee

Exchange rate applicable for foreign currency payments

As per Rule 26 for the purpose of TDS on any income payable in foreign currency, the rate of exchange to be used shall be the telegraphic transfer buying rate of such currency as on the date on which tax is required to be deducted at source.

Telegraphic transfer buying rate as per Explanation to Rule 26 means the exchange rate adopted by State Bank of India for buying such currency.

Royalty & Fts under the Act & DTAA

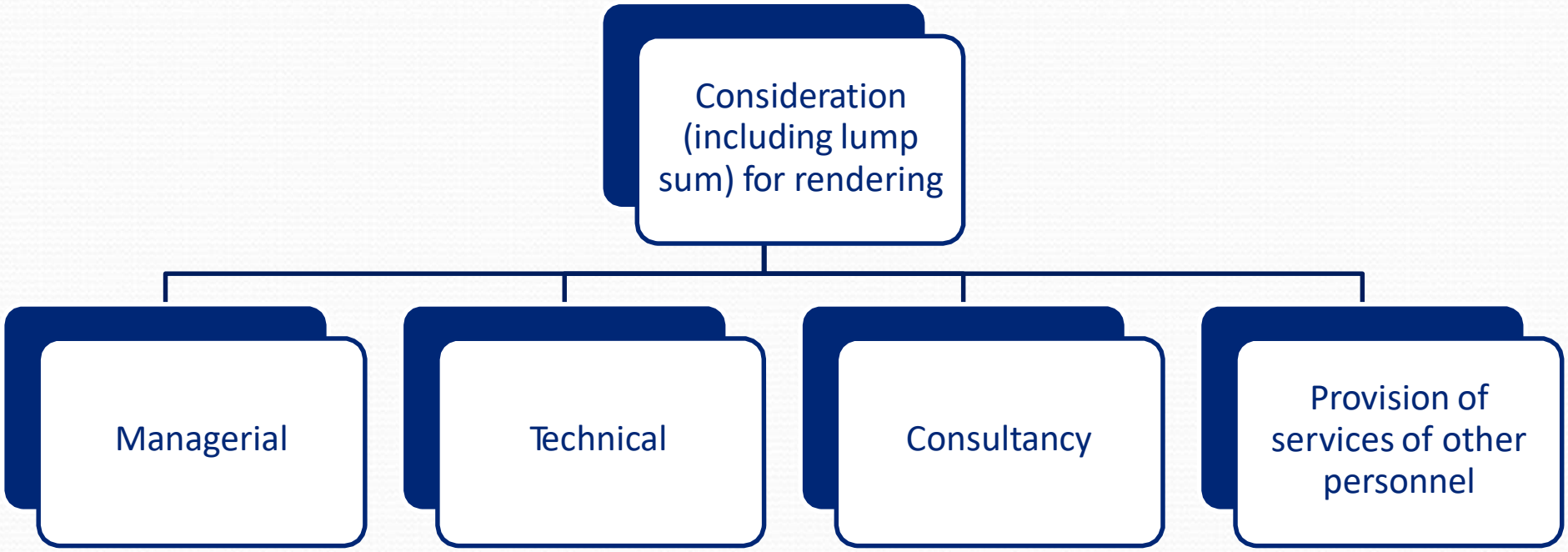
FTS under the Income Tax Act (Explanation 2 of Section 9(1)(vii))

- *Explanation 2:*

For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) ***for the rendering of any managerial, technical or consultancy services*** *(including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries".*

Fees for Technical Services – Definition

FTS defined in Explanation 2 to S.9(1)(vii) of Income-tax Act, 1961:

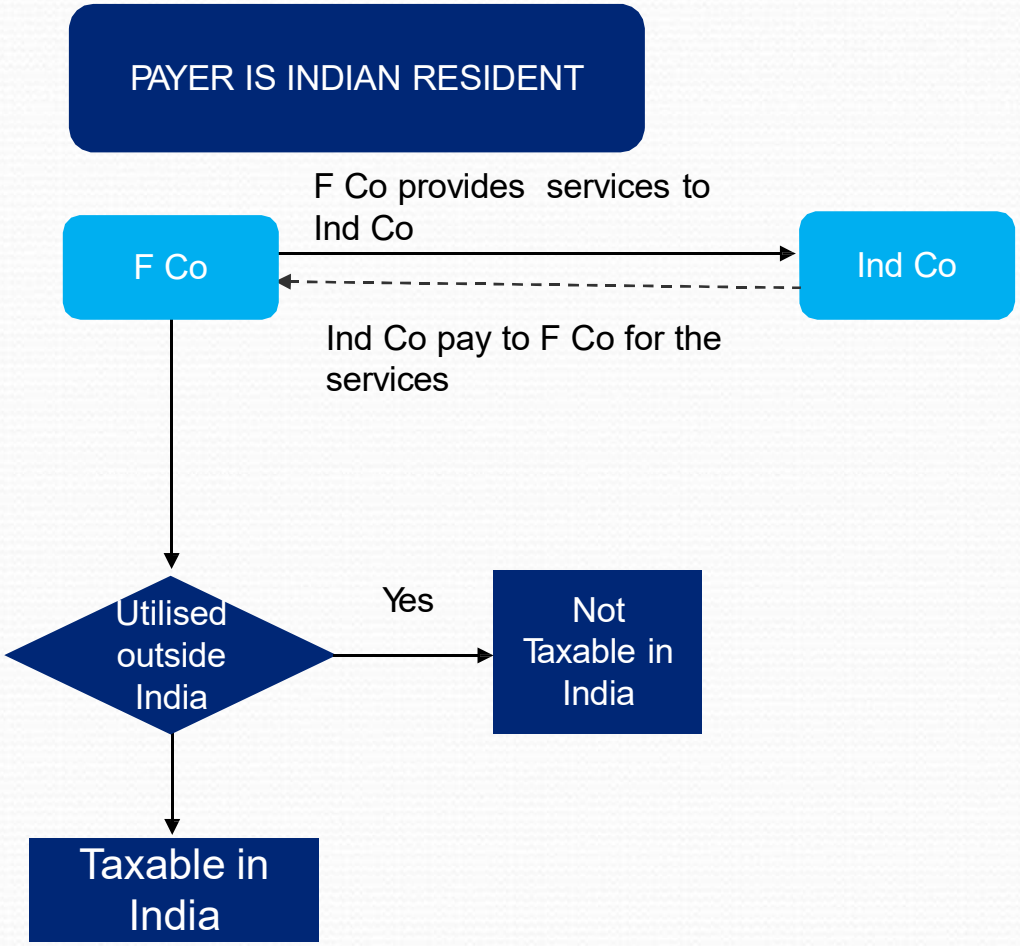


FTS does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries".

Meaning of FTS - Act

- Explanation 2 to section 9(1)(vii)
- Exhaustive definition
- Definition similar to the wider definition in the DTAAs
- 'Consideration for rendering any managerial, technical or consultancy services (including the provision of services of technical or other personnel) '
- No make available clause
- **Exclusion**
  - consideration for construction, assembly, mining or like project undertaken by the recipient;
  - or consideration which is chargeable under the head 'salaries' in the hands of the recipient

Deeming Rules under the Act



Utilised except in a business or profession carried on outside India or for the purpose of earning income from any source outside India

FTS Issues

S.No	TOPIC
1	Payments made for Commission Agents
2	Payments made for technical reports
3	Payments for use of 'Standard Facility'
4	Payments for Satellite up linking charges, use of internet bandwidth, etc.
5	Payments for hosting websites abroad, subscribing to online portals, etc.
6	Payments made accreditation, certification, etc.
7	Payments made for mineral oil exploration and related activities
8	Payments towards reimbursement of expenses
9	Payments made for manpower supply outside India
10	Human Intervention Test
11	Re-opening u/s 147 based on FTS
12	Exception clause in Section 9(1)(vii) of the Act

Section 9(1)(vi) – Royalty under IT Act

Globalca

The key part of the Royalty sub-section is the **Explanation 2** which defines Royalty

- Similar, not identical, to the Model Convention definition found in Article 12(2) and the definition in various Treaties
- Bottomline: Every word matters (!!) in the Royalty definition as we will find out…..

Explanation 2 – Definition of Royalty

*“”“**Explanation 2**.—For the purposes of this clause, "**royalty**" means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains") for—*

*(i) **the transfer of all or any rights** (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property ;*

*(ii) **the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process** or trade mark or similar property ;*

Explanation 2 (contd..)

*(iii) the **use of any patent, invention, model, design, secret formula or process** or trade mark or similar property ;*

*(iv) the **imparting of any information** concerning technical, industrial, commercial or scientific knowledge, experience or skill ;*

*(iva) the **use or right to use any industrial, commercial or scientific equipment** but not including the amounts referred to in section 44BB;*

(v) the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films ; or

(vi) the rendering of any services in connection with the activities referred to in sub-clauses (i) to (iv), (iva) and (v)

Royalties – Section 9(1)(vi) – Other Explanations

- **Explanation 3 to sec 9(1)(vi)**

  For the purposes of this clause, "computer software" means any computer program recorded on any disc, tape, perforated media or other information storage device and includes any such program or any customized electronic data

- **Explanation 4 to sec. 9(1)(vi)**

  Transfer of all or any rights in respect of any right, property or information includes and has always included

  – Transfer of all or any right for use or right to use a computer software (including granting of a license)

  – Irrespective of the medium through which such right is transferred

- **Explanation 5 to sec. 9(1)(vi)**

  Royalties includes and has always included consideration in respect of any right, property or information, whether or not

  – Possession or control of such right, property or information is with the payer

  – Such right, property or information is used directly by the payer

  – Location of such right, property or info is in India

Royalties – Section 9(1)(vi) – Other Explanations

- **Explanation 6 to sec 9(1)(vi)**

  "Process" includes and shall be deemed to have always included

  – Transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fiber

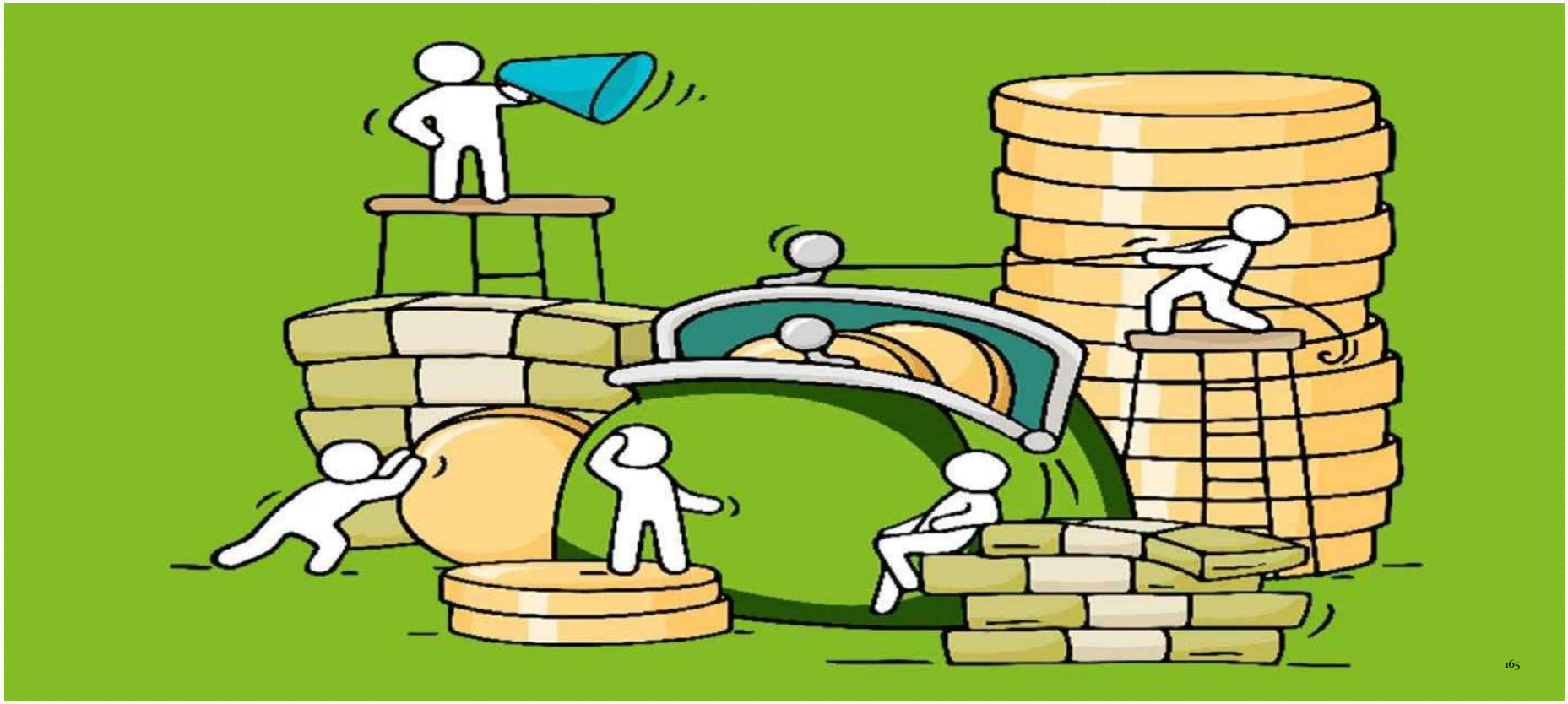
  – By any other similar technology, whether or not such process is secret

Issues for Royalty

- Whether the payment made for the misuse of the aforementioned asset is covered or not?
- Distinction between letting & alienation?
- What payments made for exclusivity?
- What about equipment leasing?
- What is the difference between Royalty and FTS?
- What is knowhow?
- Whether knowhow apply to payments for new information obtained as a result of performing services at the request of the payer?
- What about mixed contracts for both know how & provision of services?
- What about the payments for the use of an expired patent?

Section 195 Payment to Non-Residents

Section 195
Payment toNon-Residents



Agenda

- Brief overview of the TDS provisions
- Withholding tax (WHT) concept for nonresident
- Lifecycle of WHT provision under Section 195
- Practice and Operational rules
- Illustrations
- Key takeaways
- Questions

Overview of Section 195

Section	Provisions
195(1)	Scope and conditions for applicability
195(2)	Application by the "Payer" to the AO
195(3)	Application by the "Payee" to the AO
195(4)	Validity of certificate issued by the AO
195(5)	Powers of the CBDT to issue Notifications
195(6) & (7)	Furnishing of information by payer & Board powers
195A	Grossing up of tax

Part of Chapter XVII of the Act – A collection and recovery measure

Overview of section 195

Section 195(1)	
Jurisdictional Operation	Territorial Operation

Section 195(2)	
Certificate by Revenue for LOWER withholding	Application from Payer No Format

Section 195(3)	
Certificate by Revenue for NIL Withholding	Application by Payee – Rule 29B Form 15C and Form 15D

Overview of section 195

Section 195(4)

Validity of certificate by revenue

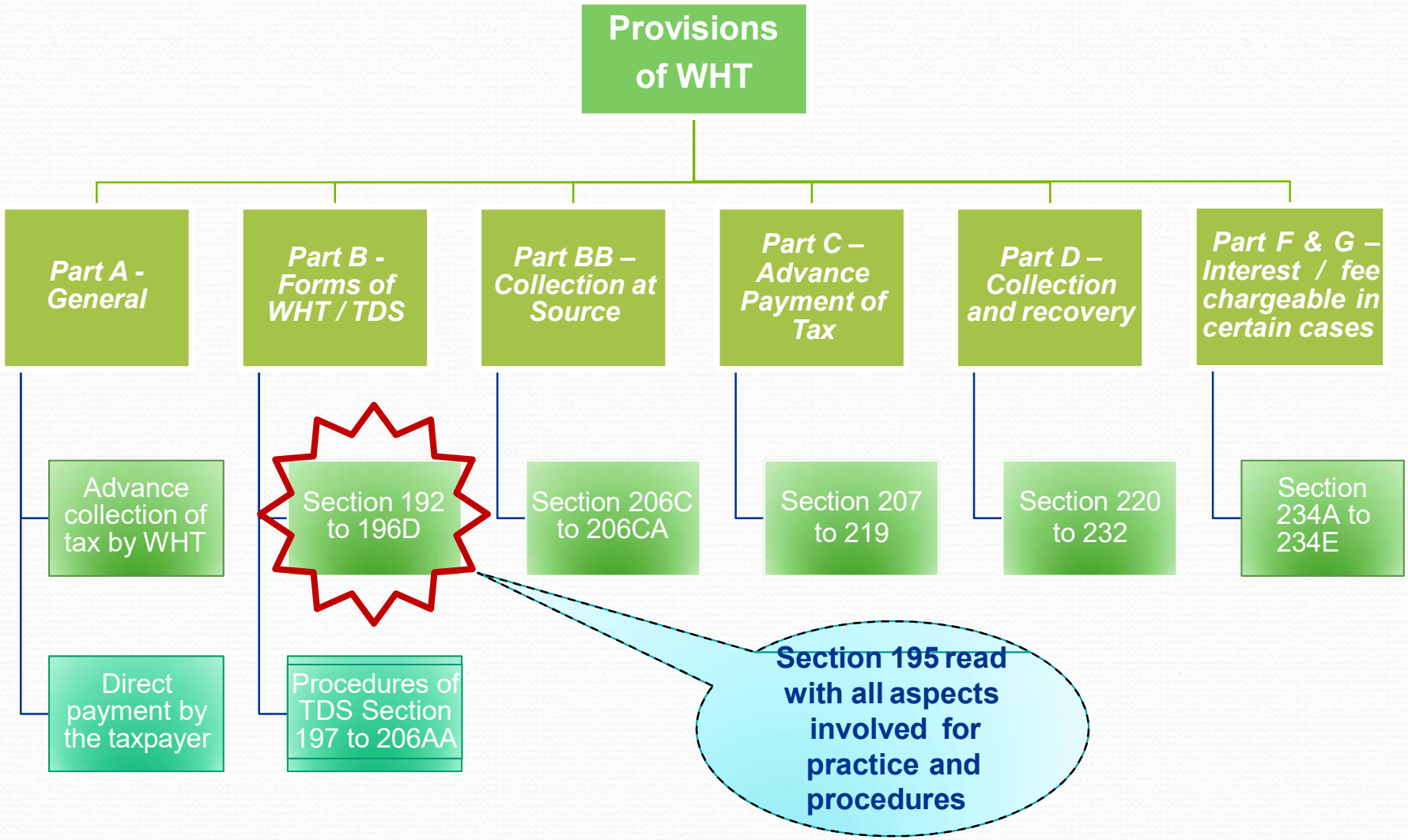
Section 195(5)

Power of CBDT to issue notification

Section 195(6) Finance Act 2008

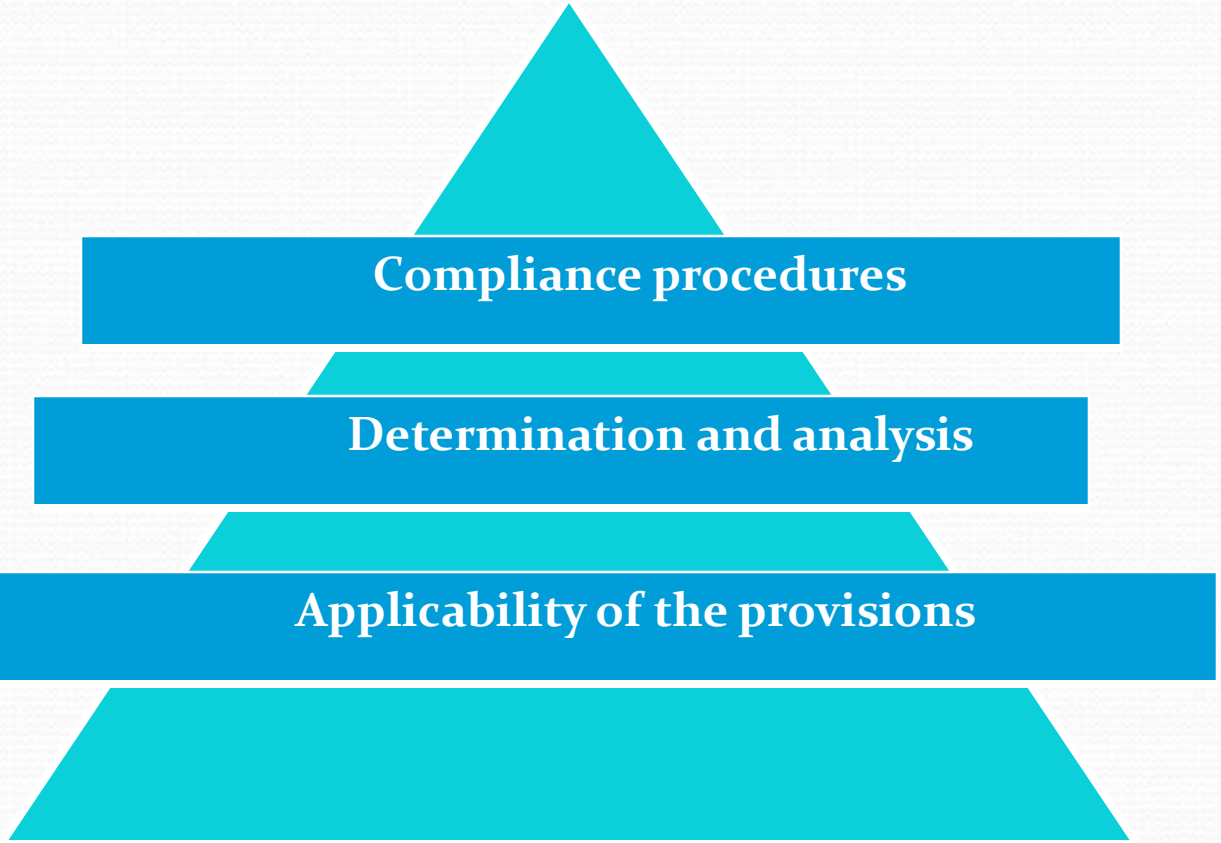
Rule 37BB & Form 15CA and Form 15CB	Scope of provision vis a vis Main Provision 195(1)

Overview of TDS provisions - Chapter XVII, Collection & Recovery of Tax Deduction at Source



WHT concept for non resident

Code by itself



Foreign remittances from India – evolving landscape

Liberalised Indian economy with seamless cross border transactions

TDS on payments to non-residents – mechanism to collect due taxes and enforce associated compliances

Government initiatives to woo foreign investments and enhance ease of doing business in India

Complexities associated with evolving business models and digital economy

Substantive provisions being broadened – eg. Business Connection, Royalty, FTS

Enhanced responsibility towards withholding tax compliances under section 195 towards foreign remittances

Objective of Section 195 of the Act

Circular No. 152 dt. 27-11-1974

- Tax is collected at the earliest point of time
- No difficulty in collection of tax at the time of assessment
- Avoiding loss of revenue as non residents may have no assets in India for subsequent recovery
- Examples of payments covered – royalty/ fees for technical services

XYZ, In Re: P.No.18 of 1995- 238 ITR 575

"the objective is to ensure, as best as possible, that the tax liability on the income element, on the amount paid is got deducted at source itself so that the ***department is not put to the hassles of recovering it from a non-resident*** *whose connection with India may be transient or whose assets in India may not be sufficient to meet the tax liability."*

Overview of section 195

Time of deduction

- Payment or credit, whichever is earlier
- Conversion rate to be applied – TT Buying Rate on the date on which tax is required to be deducted [Rule 26]

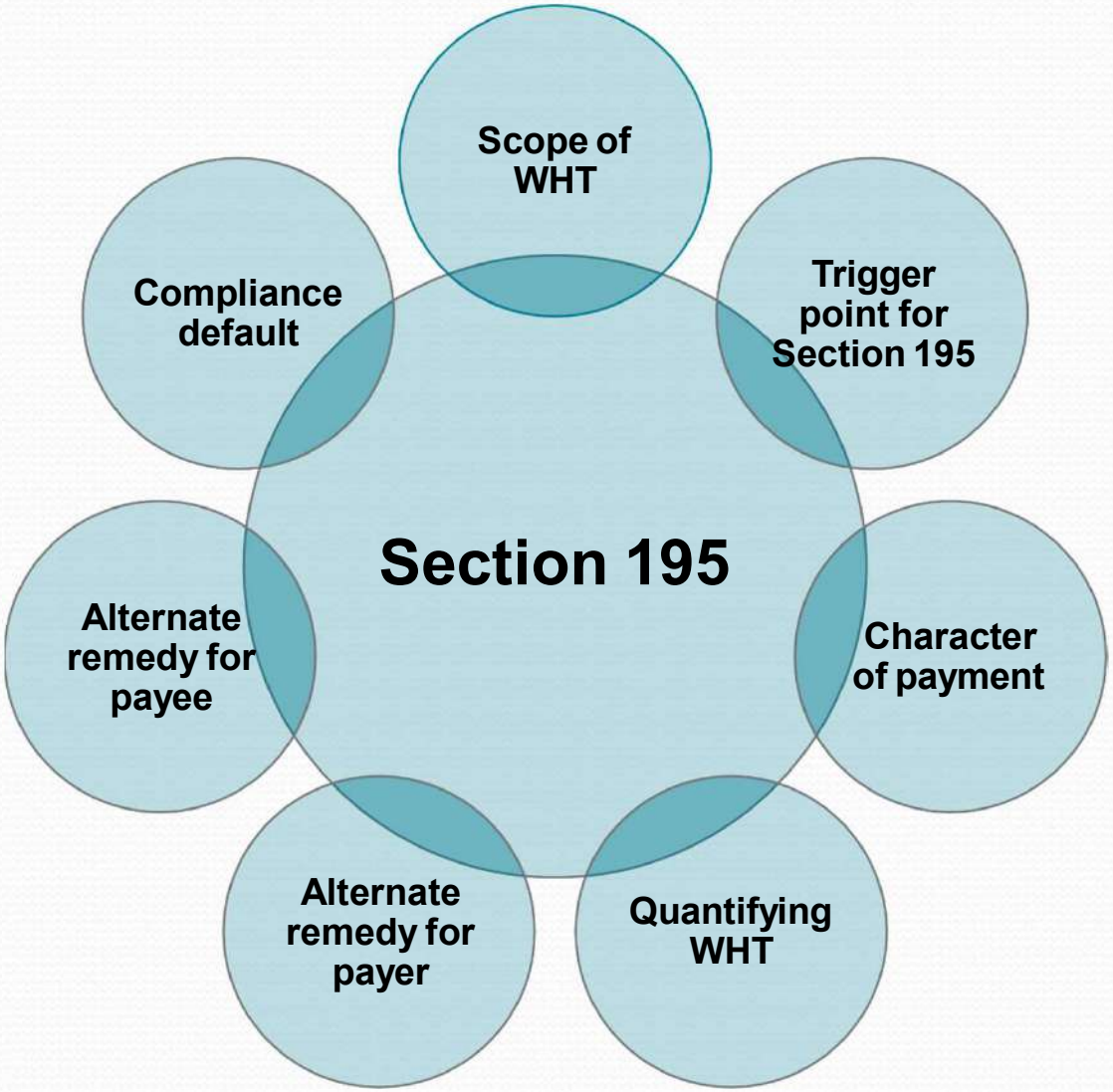
Remittance Compliance

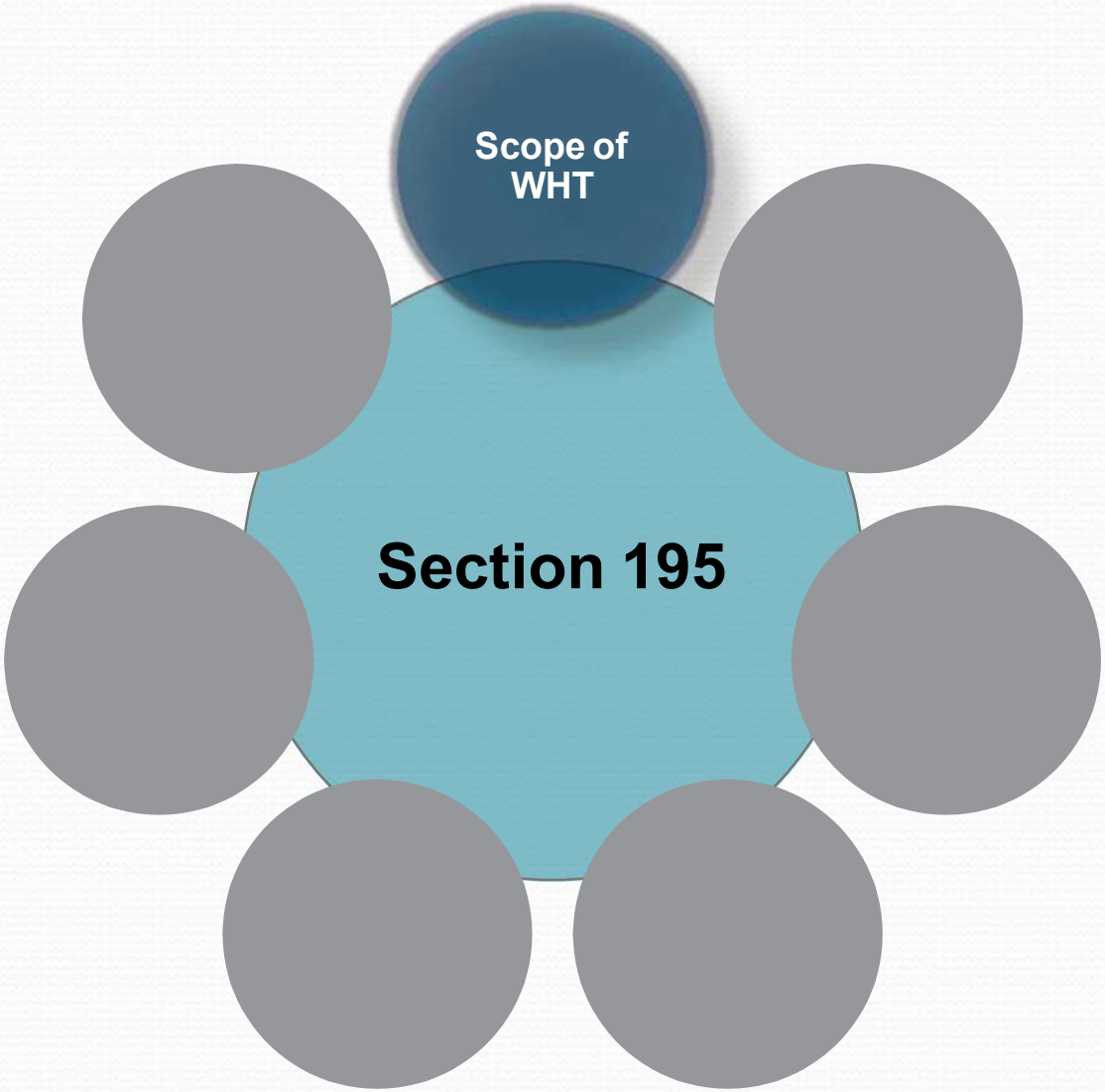
- Certification in Form 15CB and undertaking in Form 15CA
- Documentary evidence

Disclosure Requirement

- Filing withholding tax returns for foreign payments

Lifecycle of WHT provisions under Section 195




Scope of WHT
Section 195

Scope of WHT (1/2)

Operative provision of Section 195 of the Income-tax Act, 1961 (ITAct)

"Other sums.

*195. [(1) **Any person** responsible for paying to a non-resident, not being a company, or to a foreign company, any interest [(not being interest referred to in section 194LB or section 194LC)] [or section 194LD] or **any other sum chargeable under the provisions of this Act** (not being income chargeable under the head "Salaries") shall, **at the time of credit** of such income to the account of the payee or **at the time of payment** thereof in cash or by the issue of a cheque or draft or **by any other mode**, **whichever is earlier**, deduct **income-tax thereon at the rates in force**…"*

Other clauses of Section 195

Clauses	Other provisions applicable for Section 195 of ITAct
195(2)	Application by "Payer" to Tax Authorities (AO) to determine appropriate proportion of income chargeable to tax
195(3)	Application by "Payee" to AO for NIL WHT certificate
195(4)	Validity of certificate issued by AO
195(5)	Powers of CBDT to issue Notifications
195(6)	Furnishing of information relating to payments
195(7)	Authority of board to specify class of person or cases to make application under Section 195(2)
195A	Income payable "net of tax" Grossing-up

Scope of WHT (2/2)

Responsibility of WHT

Payers covered

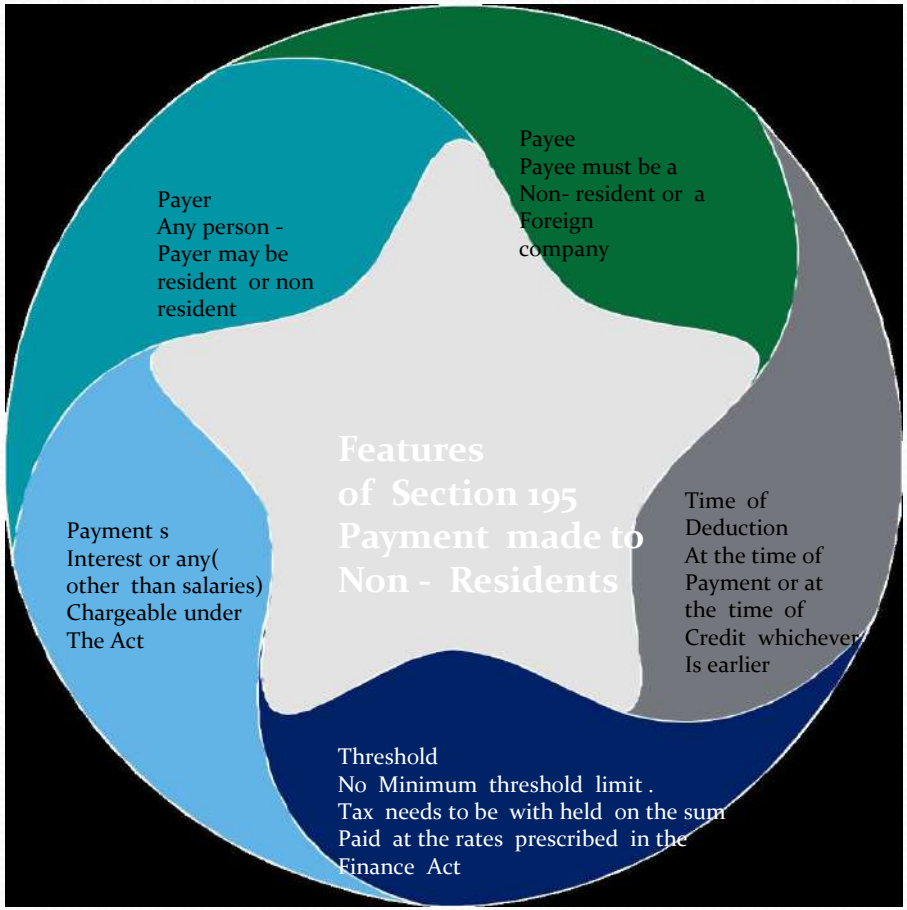
- "Any person" covered irrespective of their status - Includes person under **Section 2(31)** responsible for paying (including individuals and HUF)
- Payer itself in case of company, and the company includes principal officer
- It also includes all nonresidents having taxable presence in India or not as per *Explanation 2 to Section 195 and Circular No. 726 dated 18 October 1995*

Payees covered

- Nonresident Agent / POA holder of a nonresident in India?
- Resident but not ordinary resident RNOR?
- Payment made to a foreign branch of an Indian Company?

Virtually includes EVERYONE

Section 195 - Payment to Non-Residents
Section 195(1)



Section 195 – Payment to Non-Residents

Steps for determination of TDS

- Check whether payment covered within section 195
- Other sections for Eg. 192, 194LC, 194LD etc.

- Examine the agreements and invoices to determine nature of payment

- Based on documents, determine nature of payments and applicable provisions under the Act
- Certificate under section 195(2) / 195(3) / 197

- Determine whether the payee eligible for treaty benefits and whether relevant documents obtained to grant treaty relief
- Determine Whether the payee eligiable for benefits and whether relevant documents obtained to grant treaty relief.

Chargeability…

Section 195	Applicability: Section 1
Any person responsible for paying to a non resident…any interest or ***any other sum chargeable under the provisions of this Act*** shall…deduct income-tax thereon…	The Act applies to the ***whole of India*** and became effective from ***1 April 1962***
Scope of Total Income of NR: Section 5,7,8,9	**Charging Section: Section 4**
◆ Income received or deemed to be received in India ◆ Income accrues or arises or ***deemed to accrue or arise*** in India	Section 4 gives the ***authority to*** the government to ***charge Income-tax***

Nature of TDS Provisions :SC

- SC views in Eli Lily 312 ITR 225:

- The purpose of TDS provisions in Chapter XVII B is to see that the sum which is chargeable under Section 4 for levy and collection of income-tax, the payer should deduct tax thereon at the rates in force, if the amount is to be paid to a non-resident. The said TDS provisions are meant for tentative deduction of income-tax subject to regular assessment. (see Transmission Corporation of A.P. Ltd. and Anr. v. CIT reported in [1999] 239 ITR 587 at p. 594).

- Similar views of Mum ITAT in IDBI Limited 104 TTJ 230 "17. In our humble understanding, conceptually, liability of TDS is in the nature of a vicarious or substitutionary liability which presupposes existence of a principal or primary liability. ..."

Broad analysis of Section 195

Section 195(1) : Key Phrases

- *Any person responsible for paying to ; (payer)*
- *a non resident, not being a company or to a foreign company ; (payee)*
- *Any Interest or other sum chargeable under the provisions of the Act;*
- *Shall at the time of credit or payment whichever is earlier;*
- *Shall deduct the tax at rates in force*

Section 195(1)

- Who is responsible to deduct TDS

  -Any person- as defined u/s 2(31) - Includes virtually everyone

- Payment made to non resident

  - Includes all non- resident having presence in India or not

  - It does not include RNOR

- Determine-Status of NR : -Under sec 6

  -In case of dual residence and due to tie breaker – as per DTAA is applied, and status of the person changed to NR.

- Payment covered- Any sum chargeable under the Act

  -Except Salary and dividend referred u/s 115O

- At what time TDS has to be deducted

  -At the time of credit or payment whichever is earlier.

- Rate of TDS- Relevant rate in force

Unique Features of section 195 as compared to other TDS provisions

- Unlike personal payments exempted in section 194C etc; no exclusion for the same in section 195 (all payments covered excl. salaries provided chargeability there) e.g. payment to foreign architect for residential house construction etc
- Unlike threshold criteria specified in section 194C etc, no basic limit in section 195 even Re 1 payment is covered
- Unlike other provisions in Chapter XVII (TDS provisions), section 195 uses a special phrase "chargeable to tax under the Act"
- All payers covered irrespective of legal character HUF, Individual etc
- Multi-dimensional as involves understanding of DTAA/Treaty

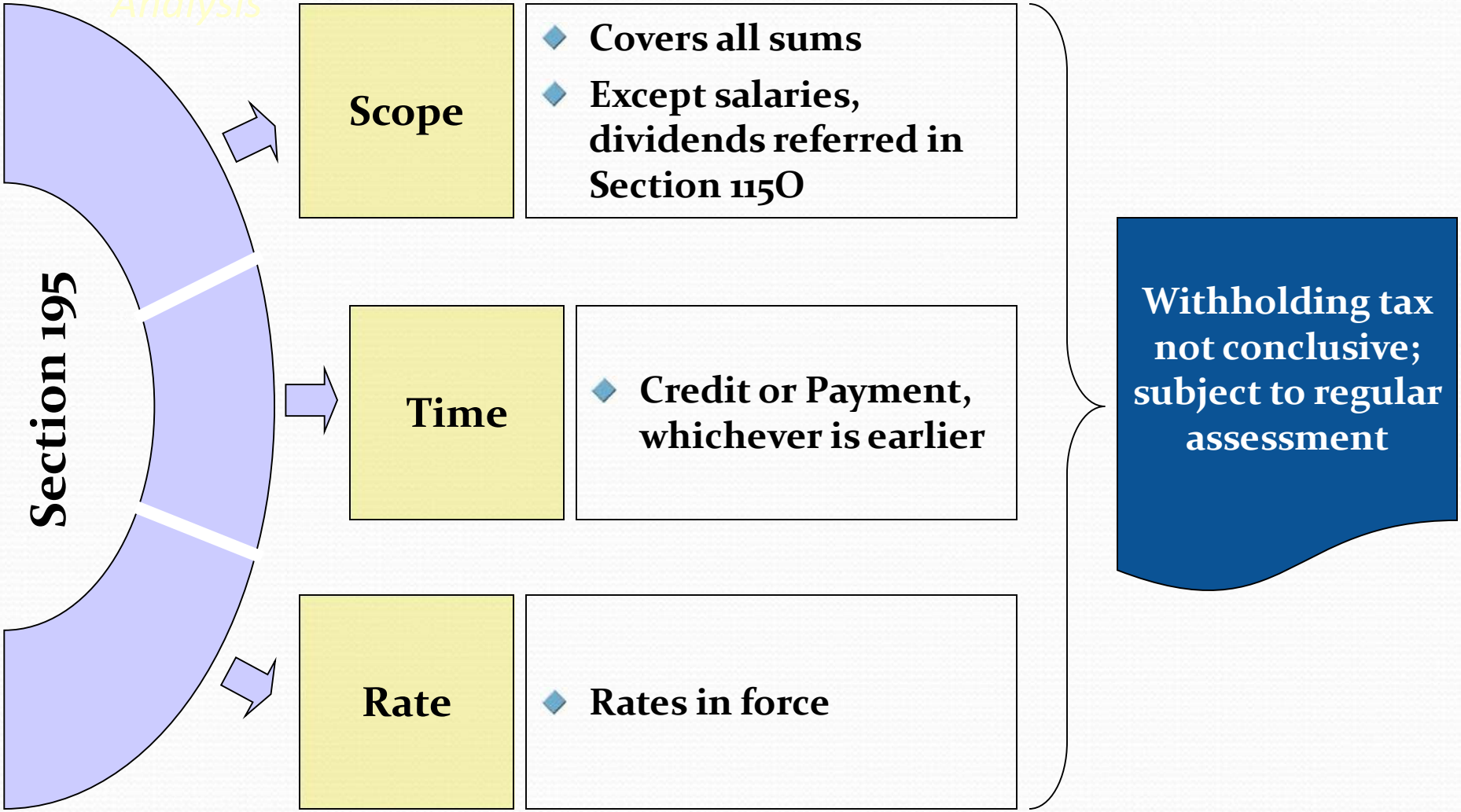
Objective of section 195 - CBDT Circular 152 dated 27.11.1974

1. Tax is collected at the earliest point of time
2. No difficulty in collection of tax at the time of assessment
3. To avoid loss of revenue as the non residents may sometimes have no assets in India from which subsequent recovery can be made

The above objectives define the contours of the provisions u/s 195

Section 195(1)

Analysis



Provisions of section 195(1) – key constituents

Payer
Any person (includes NR whether or not such NR has presence in India), who is responsible for paying

Payee
NR not being a Co, or a foreign Co

TDS application
At the earlier of point of credit [including credit to Suspense account] or payment, at the rates in force only if the subject matter is income chargeable to income tax

Nature of payment
Interest or other sum chargeable to tax; Excludes salary, dividend subject to DDT, specified interest payments

Evaluation of interplay of the above critical for application – opportunities to evaluate section 195 arises more often in cases of payments towards, royalty, FTS, commission payments, reimbursements etc.

Difference between key TDS provisions

Factor	Other TDS Provisions (Section 194C, 194J, etc.)	Section 195
Payer	Specified Person	Any person
Payee	Resident	Non Resident
Nature	Specific Payments, whether Income or not	Income chargeable under IT Act
Threshold	Specified	No Threshold
Certificate for Remittance	Not Required	Mandatory in specified cases

Payer, Payee:

Payer	Payee
• Includes any person responsible for making payment to NR • Earlier held that provisions do not apply to NR payers not having tax presence in India - Vodafone International Holdings B.V. [2012](341 ITR 1)(SC) • Explanation 2 inserted by Finance Act, 2012 w.r.e.f 1 April 1962 to provide that section 195 applies to NR payers, whether or not such NR has residence, place of business, business connection or any other presence in India • Unlike the TDS provisions for payments to residents, exclusion not made for Individual & HUF payers (whether or not carrying business)	• Covers NR, including foreign Co • In case a foreign Co is treated as a resident based on its POEM in India, section 195 shall apply & not the TDS provisions applicable for payments to residents - Draft Notification No. 370142/19/2017-TIPL dated 15 June 2017 u/s 115JH

Mode of Payment:

- Section 195(1) covers payment in cash, by cheque or draft or by 'any other mode'

- TDS applies even in cases where:-
  - Payment is not in terms of money as the same would constitute 'any other mode':

    ✓ **Kanchanganga Sea Foods Ltd.[2010](325 ITR 540)(SC)** – charter fee for fishing vessels was paid in the form of fish catch

    ✓ **BIOCON Biopharmaceuticals (P.) Ltd.[2013](144 ITD 615)(Bng ITAT)** – shares were issued as consideration for provision of technology & know-how

  - Amount payable to NR is deducted by the NR from amounts due to the resident- payer; such adjustment shall also be considered as 'any other mode' – **Raymond Ltd [2003](86 ITD 791)(Mum ITAT)**

Sums chargeable to tax as per section 195

Under the Act

- Section 5: Scope of Total Income
- Section 9: Income Deemed to Accrue or Arise in India

Under DTAA

- Royalty or Fees for Technical Services
- Business Income
- Independent Personal Services
- Other Income

Sums chargeable to tax under the Act

Section 5: Scope of Total Income - In case of Non – Resident

- Income received or deemed to be received in India; or
- Income accrues or arises or deemed to accrue or arise to him in India.

Section 9: Income Deemed to Accrue or Arise in India.

An income is said to be deemed to accrue or arise in India if the same is accruing or arising directly or indirectly, through

- a business connection in India or
- from any property in India or
- from any asset or source of income in India or
- the transfer of a capital asset in India* any other which derives its value from assets in India.
- It also includes any share or interest in a company or entity registered or incorporated outside India which derives its value from assets in India.

Finance Act 2015 & DIT v. Copal Research Ltd., Mauritius
[2014] 49 taxmann.com 125 (Delhi HC)

Sums chargeable to tax under the Act

- **Transmission Corpn. of A.P. Ltd. [1999](105 Taxman 742)(SC):**
  - TDS on the gross amount, if the payment includes an amount exigible to tax in India
  - Application to be made u/s 195(2) for permission to deduct tax on lower amount (same has been relied by ITAT in case of **Google India Pvt Ltd** [2017] (86 taxmann.com 237)

- **Samsung Electronics Co. Ltd. [2009](185 Taxman 313)(KarHC):**
  - Unless an order was obtained u/s 195(2), the obligation to deduct tax arose the moment remittance was made to NR

- **GE India Technology Centre (P.) Ltd. [2010](193 Taxman 234)(SC):**
  - Section 195(2) is based on the 'principle of proportionality' & is attracted only in case of a composite payment having an element of taxable income

- **CBDT Instruction No. 2/2014 dated 26 February 2014:**
  - If no application was made u/s 195(2) & the payer failed to deduct tax, liability u/s 201 to be computed on the taxable portion & not the whole sum remitted

- **CBDT Circular No. 3/2015 dated 12 February 2015:**
  - Disallowance u/s 40(a)(i) to be computed on the taxable portion & not the whole sum remitted

Sums not chargeable to tax under the Act

- The primary trigger point for attracting section 195 of the Act is that the payments should be chargeable to tax
- If the payments are not chargeable to tax, the provisions of section 195(1) of the Act are not attracted
- **Illustrative payments to Non-residents not chargeable under the Act:**
  - Payments on capital account, for example, gifts, loans, repayment of loans, etc.
  - Sums which are on revenue account and which are not chargeable to tax at all under the Act in the hands of the recipient
  - Sums which fall within the scope of Section 5 of the Act, but which are expressly exempt under the Act. for example, dividend income

Exchange rate, Service tax/GST:

- **Exchange rate to be applied:**
  - SBI TT buying rate of the foreign currency on the date on which TDS u/s 195 applies
    i.e. credit or payment whichever is earlier – Rule 26
  - Further TDS would not apply in case of exchange rate fluctuation between the date of TDS i.e. credit to the payee's account and the remittance date - Sandvik Asia Ltd [2012](49 SOT 554)(Pun ITAT)

- **Whether Service tax/ GST includible in taxable income for TDS purpose?**
  - Service tax indicated separately, not to be included in taxable income for applying TDS
    – Circular 1/2014 dated 13 January 2014
  - GST indicated separately, not to be included in taxable income for applying TDS –
    Circular 23/2017 dated 19 July 2017
  - Both the Circulars however apply to payments made to residents – Can it be argued that TDS will also not apply on service tax/ GST element of sums payable to NRs, as service tax/ GST does not constitute income chargeable to tax?

Rate of TDS

- Section 195(1) provides for TDS at the **'rates in force'**

- **Rates in force - section 2(37A)(iii):**
  For the purpose of TDS u/s 195, rates in force mean the beneficial of:
  - the rates specified in Part II of the First Schedule to the Finance Act of the relevant year; or
  - the rates specified under the applicable DTAA

- **Payee's TRC - sections 90(4), (5) r.w. Rule 21AB:**
  To claim DTAA benefit, NR to furnish TRC & Form 10F providing the following information, to the extent not covered in the TRC:
  - *Payee's Name & Status, PAN, Nationality or county of incorporation, Tax identification number & Address in the county of residence, Period of residential status as per TRC*

  - DTAA benefit denied as TRC did not cover relevant AY - ABB FZ-LLC [2017](83 taxmann.com 86)(Bng ITAT)

- **Surcharge & Education cess not to be added to the tax rate specified under DTAA:**
  - Sunil V Motiani [2013](59 SOT 37)(Mum ITAT)
  - BOC Group Ltd [2015](156 ITD 402)(Kol ITAT)
  - Capgemini SA [2016](72 taxmann.com 58)(Mum ITAT)

Objective of Section 195

Circular No. 152 dt. 27/11/1974

- ✓ To ensure that the tax due from non resident persons is secured at the earliest point of time so that there is no difficulty in collection of tax subsequently at the time of regular assessment.
- ✓ Failure to deduct tax at source from payments to a non resident may result in loss of revenue as the non resident may sometimes have no assets in India from which tax could be collected at a later stage.
- ✓ Tax should, therefore, be deducted in all cases where it is required to be deducted under section 195 before the payment is made to the credit of the Central Government as required by section 200 of the IT Act read with rule 30 of the Income tax Rules, 1962 ("IT Rules").
- ✓ Failure to do so would render a person liable to penalty under section 201 read with section 221 of the IT Act, and would also constitute an offence under section 276B of the IT Act.

Unique features – Section 195

- ✓ Unlike personal payments exempted in section 194C etc; no exclusion for the same in section 195 (all payments covered excluding salaries)
- ✓ No threshold limit
- ✓ All payers covered irrespective of legal character HUF; Individual etc
- ✓ Unlike other provisions in Chapter XVII (TDS provisions), section 195 uses a special phrase "any sum chargeable under the provisions of this Act" – "any sum " Vs "any income by way of"
- ✓ Covers only non residents and not RNOR's
- ✓ WHT not conclusive – subject to regular assessment
- ✓ Nature of payment to be determined from payee's point of view
- ✓ Income in the hands of NR recipient must be chargeable to tax to attract WHT – *Cir.786 dt.7th Feb 2000 – export commission payable to non-resident agents*

Gross basis of taxation /withholding u/s 115A

- **Rate specified u/s 115A :**

- The existing provisions of section 115A of the Act provide that
  - in case of a non-resident taxpayer,
  - where the total income of such taxpayer includes any income by way of Royalty and Fees for technical services (FTS) from Government or an Indian concern after 31.03.1976, and
  - which is not effectively connected with permanent establishment, if any, of the non-resident in India,

  tax shall be levied at the rate of **10% on the gross amount** of such income.

- No deduction in respect of any allowance or expenditure shall be allowed to the assessee under section 28 to 44C of the Act.

Payments to Non-residents – Important Aspects

Address of the Non-resident

- ***Meena S. Patil vs ACIT(International Taxation, Circle19(1), [2008] 114 ITD 181 (Bangalore)***

  Assessing Officer was correct in passing an order under section 201(1A) imposing interest liability on assessee. Assessee's contention that it was not and could not have been aware of fact that seller was a non-resident cannot be considered since the sale agreement seller's address was clearly mentioned which showed that he was residing abroad.

- ***Syed Alam Hashami 55 SOT 41 (Bangalore)***

  Where seller of Indian property was NRI according to address given in sale deed, assessee-purchaser ought to have made TDS under section 195 on sale consideration payable to NRI seller, failing which he was to be treated as assessee-in-default under section 201(1).

Payment in kind

- ***Kanchanganga Sea Foods Ltd. v. CIT, (SC) (2010 (6) SCALE 442***

  The assessee is liable to deduct tax at source under section 195 on the payment made to the non-resident even though the payment is not made in cash but made in kind

Payments to Non-residents – Important Aspects

Payments made to POA holder of Non-resident

- ***Rakesh Chauhan vs DDIT (International Taxation) [2010] 128 TTJ 116 (CHD.)***

  Where payment is made by assessee to an individual Resident say (P) in India in respect of purchase of land which belonged to non-residents but rights therein were assigned unequivocally to said resident as power-of-attorney holder, such payment could not be regarded as payment to non-resident so as to require deduction of tax at source under section 195.

  When non-resident himself nominates a particular agent to whom payment should be made and pursuant to that direction, the assessee pays the sum to the agent so nominated, the provisions of section 195 of the Act will apply.

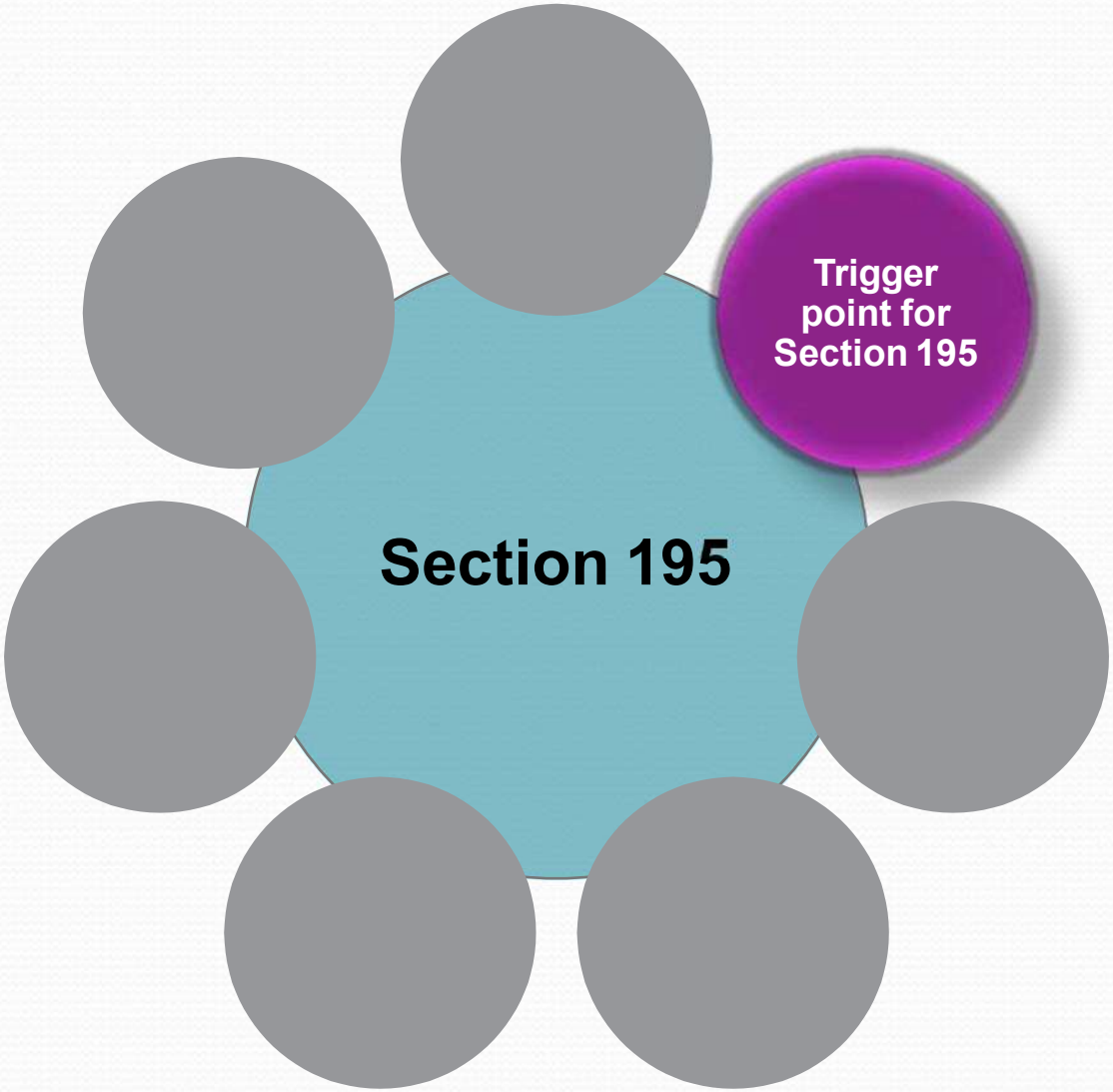
Net payment received

- ***Raymond Ltd. v. DCIT, (86 ITD 791) Mumbai ITAT***

  The assessee is liable to deduct tax at source under section 195, even under an arrangement where he receives only net payment from other party after deducting commission/ management fees etc.

Some peculiar transactions and provisions of TDS u/s 195

- Tax is required to be deducted u\s 195 from remuneration payable by a firm to its non-resident working partners;
- TDS is required to be deducted even when payment is made in kind. In **Kancnauganga Sea Foods Ltd vs. CIT (265 ITR 664 - AP)** it was held that where a part of fish catch was to be given to the non-resident company as hire charges for chartering fishing vessels, TDS u/s 195 was deductible on the payment in kind also;
- In **Lalta Prasad Goenka vs. Birtanngar lute Mills Ltd. (48 ITR 653 (Cal.))** it was held that the IT department has a right to require even a Court to deduct tax at source on decretal amount payable to a non-resident. On the other hand in **Islamic Investment Co. vs. Union of India (265 ITR 254)** it was held that when interest becomes part of a judgment debt, it loses its character of interest and tax is not deductible on interest component;
- Even the TDS is deductible by l.T. Department on interest payable on IT. Refunds to a Non-Resident (ABC, in r.w. (236 ITR 637).
- Other issues


Trigger point for Section 195
Section 195

Trigger point for Section 195 (1/3)

Applicability of Section 195

Sum chargeable to tax

•All payments covered (exclusions specified), no
threshold limit prescribed
•"Any other sum chargeable" – Composite provision:
• Extends to whole of India
•Charge of income-tax
•Scope of Total Income:
- Received or deemed to be received in India
- Accrue or arises or deemed to accrue or
- arise in India
• Residence in India
• Amount paid that bears character of income on
Gross basis that may or may not represent income or profits, CBDT Instruction No. 2/2014
• Section 195 would not apply if sums paid to nonresident is tax exempt in India

Timing of WHT

•Tax to be withheld at the time of payment / credit whichever is earlier

•Tax to be withheld even where no remittance is made, adjustment of dues

•WHT in cases where RBI approval is required

•If no income accrues to nonresident and simpleaccounting entry incorporating liability is passed,
then no WHT
•Payee must be identifiable / ascertainable
• Time of deduction, from payers point of view and sum chargeable to tax in India from payee point of view

Trigger point for Section 195 (2/3)

Sum chargeable to tax..brief insight

- Where, payment made by resident to non-resident, was an amount not chargeable to tax in India, no tax is deductible at source
- Assessee liable to deduct TDS under Section 195 on payment made to non-resident even though payment is not made in cash but made in kind
- Payer obligated to WHT, even if the receipt is not taxable in the hands of the payee in the country of residence
- Sums not liable to tax in India on satisfaction of conditions, the principles are enunciated under *Circular 23/1969 and 786/2000* (now withdrawn) like (P to P, nonresident operates outside India, contract signed outside India, title of goods passed outside India, payment is directly remitted abroad, etc.). Payments to:
  - Agency commission payable to foreign agents;
  - Off-shore supply of goods and equipments;
  - Consideration paid for outright purchase of designs and drawings is not royalty;
  - Applicability of withholding tax to shipping Company taxed under Section 172; and
  - Does amount paid as penalty to the regulators chargeable to tax under Section 195?
- No significant impact of withdrawal of the Circulars due to?

Trigger point for Section 195 (3/3)

Specific exclusions for WHT under 195

- **Payments on capital account like, gifts, loans, share purchase**
- **Sums chargeable under the Act but expressly exempt like, dividend**
- **Amounts being revenue in nature but, arguably are not chargeable to tax**

Sections	Particulars
115-O	Tax on distributed profits of domestic companies
192	Income from Salaries
194LB	Income by way of interest from infrastructure debt fund
194LBA	Income from units of a business trust
194LBB	Income from units of investment funds
194LBC	Income of investment in securitization trust

194LC	Income by way of interest from Indian company
194LD	Income by way of interest on certain bonds and Government securities
	Other specific sections
196B	Income from units
196C	Income from FCCBs or GDRs of Indian companies
196D	Income from FIIs now FPI except Capital Gains

Section 195 – Payment to Non-Residents

Under the Act

Chargeability – Income covered under section 5(2) & Section 9

Nature of income	Section of the IT Act*	Article of treaty
Business/Profession	9(1)(i)	5, 7 & 14
Salary income	9(1)(ii)	15 and 16
Dividend Income	9(1)(iv), 115A	10
Interest Income	9(1)(v), 115A	11
Royalty	9(1)(vi), 115A	12
Fees for technical services	9(1)(vii), 115A	12
Capital Gains	9(1)(i), 45	13

Under the Treaty

Section 90(2)

- Provisions of IT Act or treaty, whichever is beneficial
- Sums not chargeable to tax in India on account of treaty benefits should continue to remain outside the ambit of section 195

Section 195(1) – Scope & conditions

- As per IT Act: Surcharge and Education-cess should be added if it crosses the limit specified.
- Rates prescribed by DTAA are inclusive of all taxes. No need to add Education-cess and surcharge.
  - ✓ Capgemini SA Vs DCIT (International Tax)-2 (1) [2016] 160 ITD 13 (Mumbai - Trib.)
  - ✓ DIC Asia Pacific Pte. Ltd. v. ADIT [2012] 18 ITR (Trib) 358 (Kolkata),
  - ✓ CIT vs. Arthusa Offshore Co. [2008] 169 Taxman 484 (Uttarakhand HC)},
  - ✓ Parke Davis and Company LLC v. ACIT [2014] 41 taxmann.com 193 (Mumbai - Trib.),
  - ✓ Sunil V. Motiani v. ITO [2013] 33 taxmann.com 252/59 SOT 37
- The obligation to comply with section 195(1) applies to all payers, whether resident or non-resident and irrespective of whether they have a place of residence or business connection or any presence in India. This amendment is primarily to overcome the Vodafone judgment – Explanation 2 inserted by Finance Act, 2012 – *payment by non-residents to overseas branches of Idnian re*
- Taxability determined as per section 5 read with section 9 of the IT Act
- At what point of time withholding is to be done:
  - ✓ at the time of credit or payment whichever is earlier. Royalty and FTS – taxable on payment basis – as per OECD MC/ UN MC
    - DCIT vs Uhde Gmbh [1996] 54 TTJ 355 (Mumbai ITAT)
  - ✓ year end provisions – right to receive whether crystallized? - variouscases

SECTION 195(1) – SCOPE & CONDITIONS

- Section 195(1) covers payments in cash, by cheque or draft or by 'any other mode'
- Inter adjustment of dues – WHT applies – JB Boda & Co vs CBDT [1996] (223 ITR 271) (SC)
- Tax withholding on 'payments in kind'? - Yes as it would constitute 'any other mode'
  - ✓ Kanchanganga Sea Foods vs CIT [2010] 192 Taxman 187 (SC)};
  - ✓ Biocon Biopharmaceuticals Private Ltd. v. ITO [2013] TS-347-ITAT-2013-Bang (Bang)
- Payments to agents u/s 163 of non-residents – covered
  - ✓ Grindlays Bank Ltd 200 ITR 441 (Cal.) (HC)
  - ✓ Narsee Nagsee & Co 35 ITR 134 (Bom.)

Is it on Income element or Gross amount

- In *Transmission Corpn. Of A.P.Ltd vs. CIT (1999) 105 Taxman 742/239 ITR 587 (SC)* the Supreme Court held that unless an order under section 195(2) has been obtained by the tax payer, tax is deductible under section 195 on the gross sum.
- The same was followed by Karnataka High Court in the case of *Samsung Electronics [2009] 185 Taxman 313 (Karnataka)/[2010] 320 ITR 209*
- However, these issues were set at rest by the landmark judgment of the Supreme Court in the case of *GE India Technology Cen. (P.) Ltd. (2010) 193 Taxman 234 (SC)* wherein it was held that any payments to non residents will be subject to withholding tax only when such payments are chargeable to tax in India as per Section 4, 5 & 9 of the IT Act. Section 195 covers not only pure income payments but also composite payments. The obligation to deduct tax on composite payments would be limited to the appropriate proportion of income forming part of the gross sum.
  - be computed on taxable portion and not the whole sum remitted.
- CBDT circular No 3/2015 dated February 12, 2015 - Disallowance under section 40(a)(i) of the IT Act to

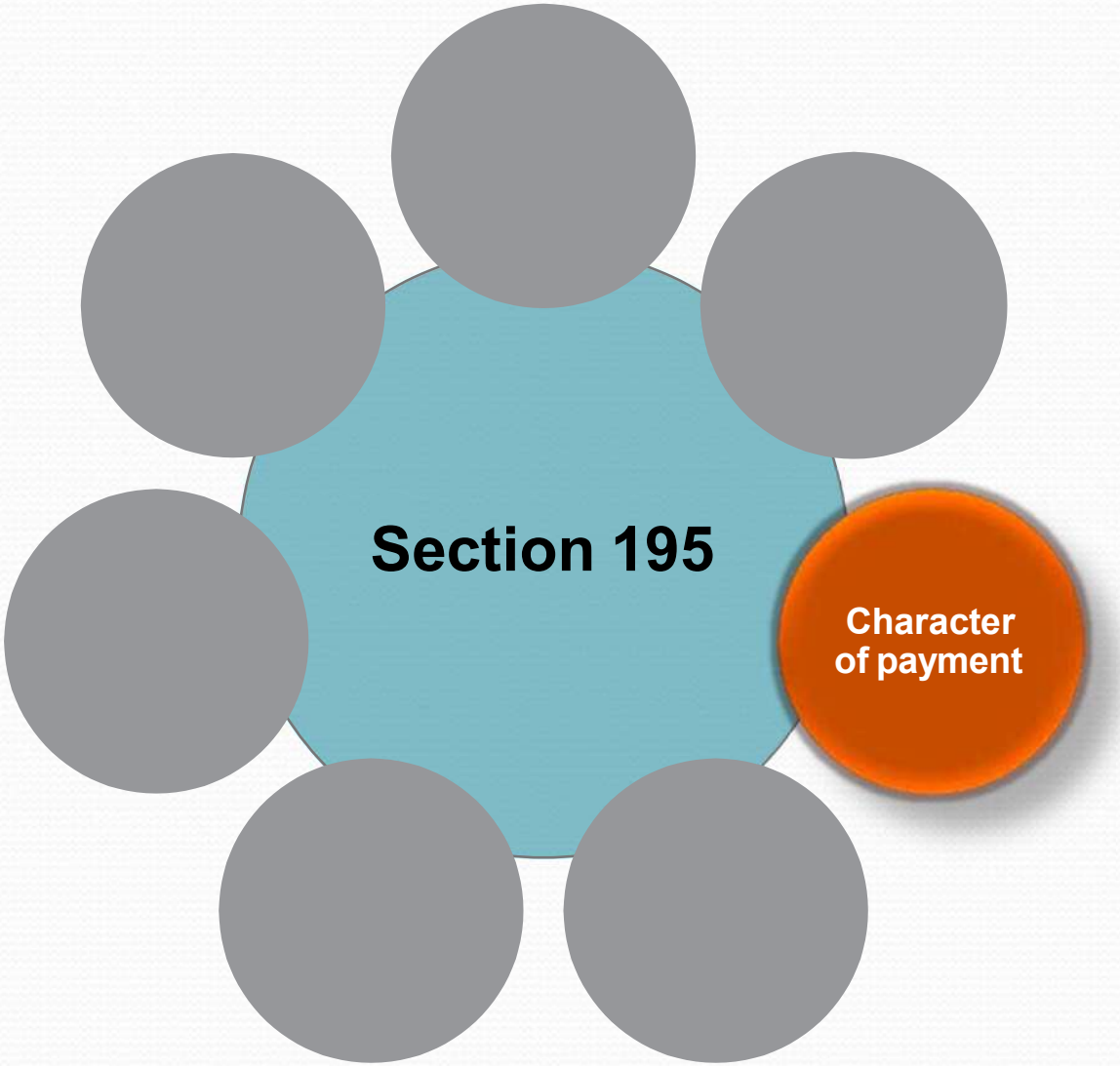
EXTRA TERRITORIAL JURISDICTION - 195

- The Supreme Court in its Vodafone decision observed

  "Now the question is whether section 195 has got extra territorial operations. It is trite that laws made by a country are intended to be applicable to its own territory, but that presumption is not universal unless it is shown that the intention was to make the law applicable extra territorially. One has to examine whether the presumption of territoriality holds good so far as section 195 is concerned and is there any reason to depart from that presumption.

  The expression "any person", in our view, looking at the context in which Section 195 has been placed, would mean any person who is a resident in India.

- Now it applies to resident as well as non-resident – As per Explanation 2 inserted by Finance Act, 2012.
- The Supreme Court in *Eli Lilly & Co.(India) (P.) Ltd (2009) 312 ITR 225 (SC)* held that the chargeability under section 9 would constitute sufficient nexus on the basis of which any payment made to non-residents as salaries would come under the scanner of Section 192 and accordingly, tax should have been withheld even on the portion of salary paid abroad. The obligation to withhold is on Indian JV.
- In *GVK Industries Ltd. Vs ITO (2011) 197 Taxman 337 (SC)* the Supreme Court held that the Parliament does not have the powers to legislate for any territory outside India unless such extra- territorial operations have an impact on or nexus with India. Such connection to India should be real or expected to be real and not illusory or fanciful. If these connections are established then the law cannot be invalidated only on account of such extra territorial operation.

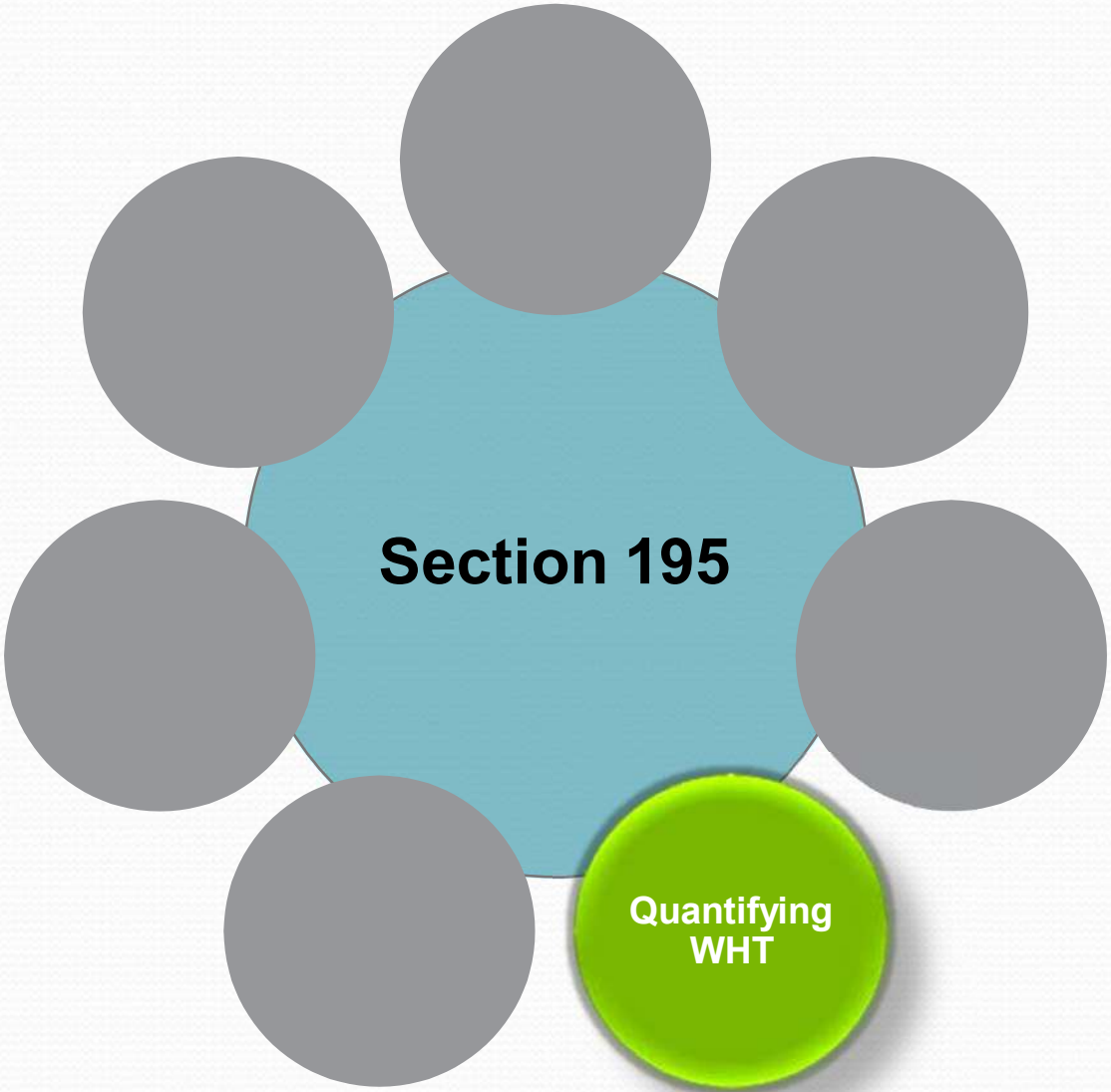

Section 195
Character of payment

Character of payment

Determining the nature of payment

Nature of Income (payee perspective)	Basis of tax	Income chargeable under	
		IT Act	Tax Treaty
Business / Profession income	Taxable if Business Connection in India or property or asset or source of income in India or transfer of a capital asset situate in India	Section 9(1)(i)	Article 5, 7 and 14
Capital Gain	Taxable if situs of shares/ property is in India	Section 9(1)(i)	Article 6 and 13
Dividends	Taxable if paid by an Indian company	Section 9(1)(iv) (subject to DDT)	Article 10
Interest	Taxable if sourced in India	Section 9(1)(v)	Article 11
Royalties		Section 9(1)(vi)	Article 12
Fees for Technical Services (FTS)		Section 9(1)(vii)	
Salaries	Taxable if services are rendered in India	Section 9(1)(ii)	Article 15

Provisions of the IT Act or Tax Treaty, to the extent more beneficial to the taxpayer to apply


Section 195
Quantifying WHT

SECTION 195(1) – 'RATES IN FORCE

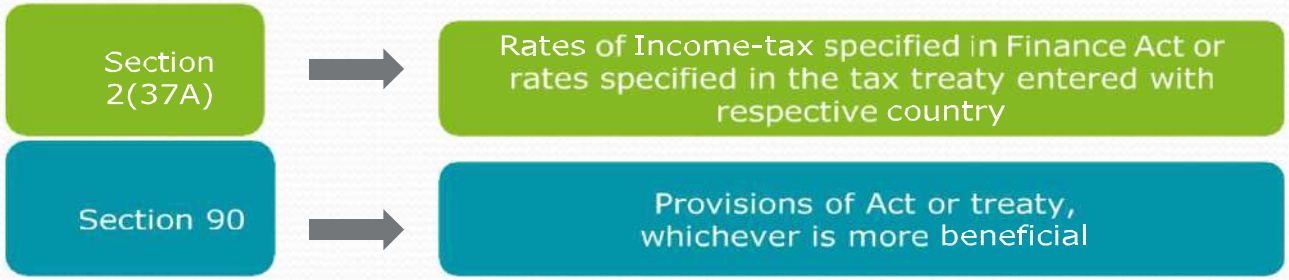
Rates in force

- Section 195 refers to deduction of tax at "rates in force" - Defined in section 2(37A)
- TDS to be deducted at rates in force ~ Circular No 728 dated 30 October 1995
- Rates specified in Finance Act of the relevant year (refer Part II of the First Schedule to the Finance Act) OR rates specified in the tax treaty entered with respective country, whichever is more beneficial

Exchange Rate

Rule 26 ~ SBI TT Buying rate as on the date of deduction of tax

- During the period when Finance Bill is pending approval, rates in force for the preceding year or rate proposed for the current year, whichever is more favourable will be applicable ~ Section 294



Quantifying WHT (1/4)

Rates in force

- Rates in force as defined under Section 2(37A) of the IT Act
- Rates of income-tax specified in IT Act / Tax Treaty under Section 2(37A)(iii), beneficial rates to apply
  - CBDT Circular No. 728 dated 30 October 1995
- The exchange rate is applicable as per Rule 26 – SBI TT buying rate
- Rates prescribed under the tax treaty are inclusive of surcharge and education cess?
- Tax to be withheld under Section 195:
  - Is on gross basis; and
  - Withholding tax rate under Section 195 is final
- Interplay between proposed Equalization levy under Finance Act, 2016 and the Income-tax Act, 1961
- Significance to obtain PAN while making the remittance to nonresidents
  - Section 206AA, is a non-obstante provision that overrides the IT Act effective 1-4-2010

Detailed provision of Section 206AA and nuances discussed in the ensuing slides

Quantifying WHT (2/4)

Existing provision under section 206AA

- Attracted when the payee does not have a PAN or discloses incorrect PAN to the payer
- Section 206AAprovides for WHT at the higher of the following rates, namely:
  - Specified rate in the relevant provisions of the ITAct; or
  - Rate / rates in force; or
  - 20%

Concerns on applicability of section 206AA for WHT under section 195

- Overriding provision dealt in Tribunal rulings where PAN was not obtained by nonresident
- Considering the litigation matter would be settled at the Tribunal, initial demand may be raised

Meshing issue of section 2(37A), 200A read with section 206AA

Ruling of Bosch Ltd was not considered and distinguished

Ruling does not refer on the taxability based on the Eli Lily case

Rulings

Quantifying WHT (3/4)

Developments on Section 206AA

Amendments

Practical difficulty to implement 206AA due to DTAA override

Easwar Committee on tax simplification recommended to dilute 206AA provisions

The Finance Act, 2016 accepts Easwar Committee Recommendation on 206AA

Amendment under Finance Act, 2016

Section 206AA amended to exclude / relax non-residents on deduction of tax

- Form and the methods of conditions prescribed under Rule 37BC where the deductee shall furnish and the following details / documents to the deductor:

Name, email-ID, Contact number	Address of the resident country of the Payee	Resident certificate of the Payee	Tax Identification / Unique number registered with the Government

Interest **Royalty** **FTS** **Capital Gain**

Points to ponder

- If PAN not obtained, is nonresident obligated to file tax returns in India? Impact of penalty under section 270A
- Payments other than the prescribed nature of income how determined treated?
- Implications of amendment under section 139A of the Finance Act, 2018 and Section 206AA for nonresidents

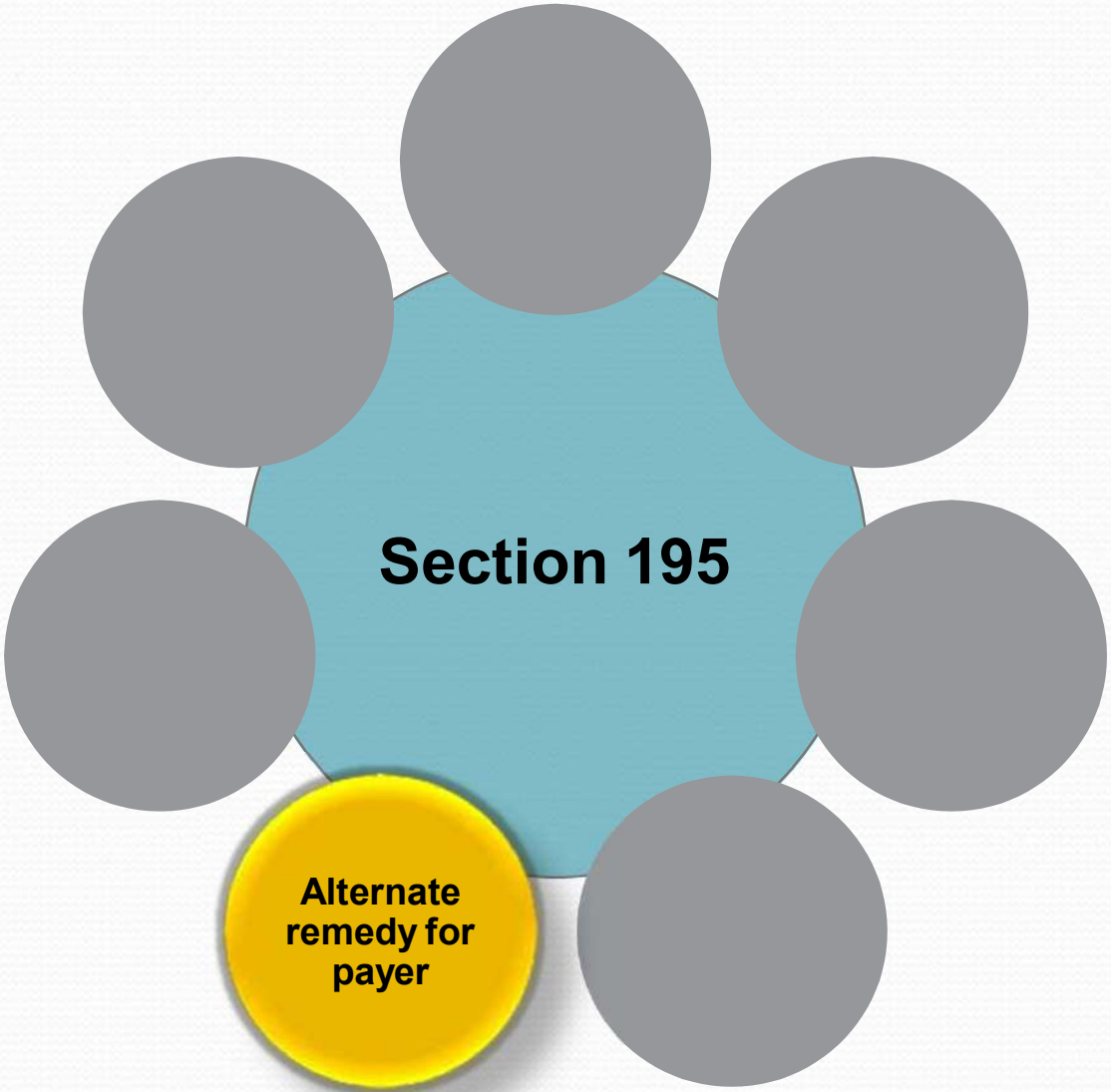
Quantifying WHT (4/4)

Section 195A – Income payable "net of tax" (Grossing-up)

- In the event of tax chargeable on any income is borne by the payer
- For the purposes of WHT under Section 195, income should be increased to such amount as would, after WHT thereon at the rates in force, be equal to the net amount payable to the payee
- Section 195A does not apply on notional income under Section 44BB
- Friction between Section 206AA and 195A – is Section 206AA applicable for grossing purposes?
- Tax credit claimed by the payee to be restricted commercially – Compliance under Section 203?
- Can refund be claimed if taxes are withheld erroneously under Section 195?

Illustration of Section 195A:

Particulars	Amount in INR
Amount payable to nonresident	100
Add: WHT (assumed to be 10% as per the tax treaty) grossed-up (10*100/90)	11.11
Total income	**111.11**
Less: WHT applicable at 10%	11.11
Net amount payable to the nonresident (Recipient)	**100**

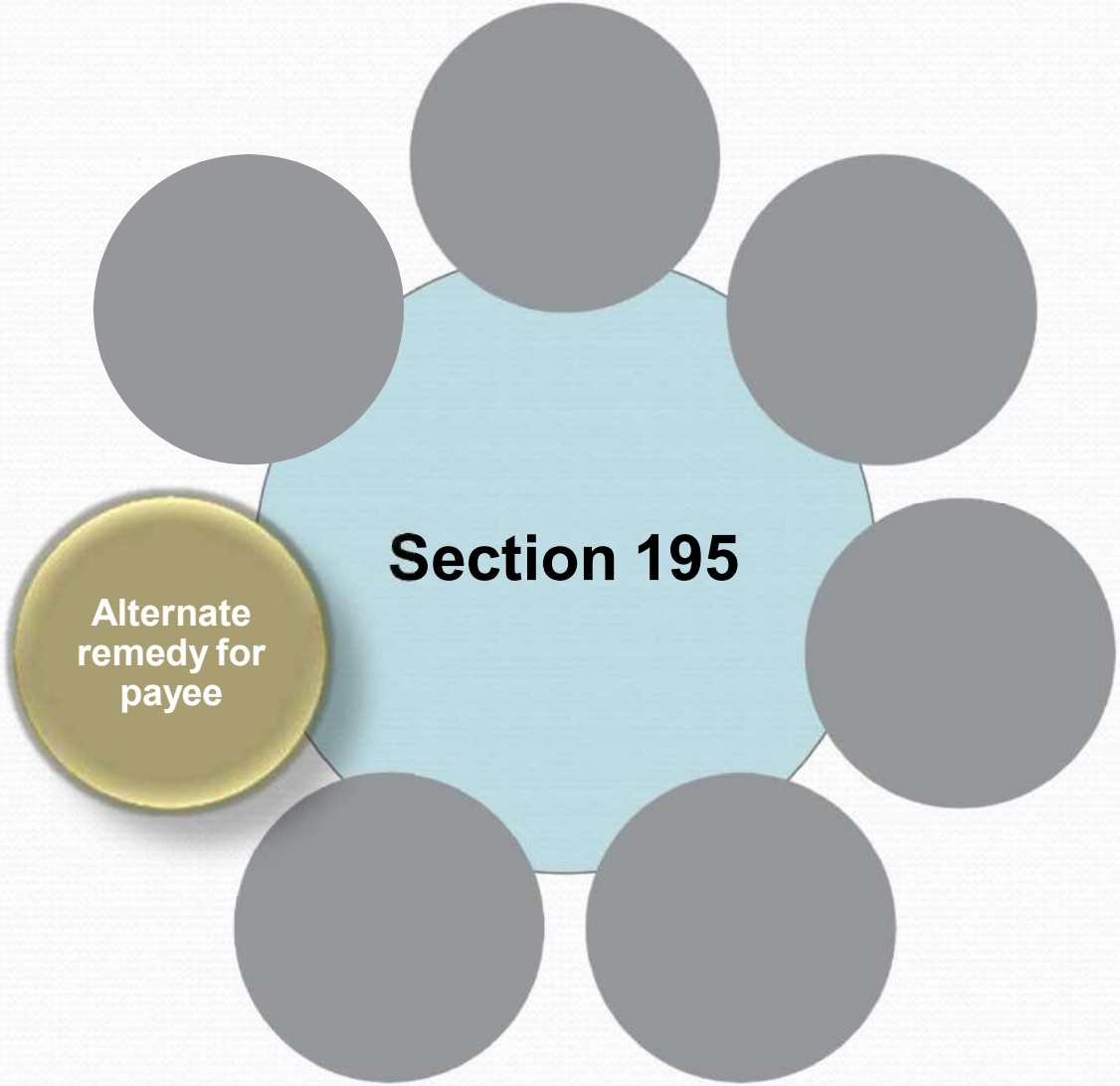

Section 195
Alternate remedy for payer

Alternate remedy for the payer

Application by payer to the AO under Section 195(2) and (4)

Application by whom?	The application to be made by the payer before the jurisdictional tax authority
When to apply?	When the payer is in doubt and believes that the whole of sum payable is not chargeable to tax in India
Process	• Payer to approach tax authority to determine portion of income chargeable to tax • Online system validated certificate prescribed
Consequence	• AO may issue a certificate, determining the portion of income chargeable to tax • The permission is valid for the period specified • No specified time limit available to pass the order under Section 195(2)

- Order under Section 195(2) is:
  - appealable after payment of tax
  - amenable to revision under Section 263
- Decision under Section 195(2) is inconclusive in determination of income in case of foreign entity


Section 195
Alternate remedy for payee

Alternate remedy for the payee

Application by payee to the AO under Section 195(3),(4) and (5)

- Payee to make application in the prescribed form (Form 15C or form 15D) for no WHT
- Prescribed conditions under Rule 29B:
  - carries on business / profession in India for 5 years and has prescribed value of assets in India;
  - been regularly assessed to Income-tax;
  - not defaulted in tax, interest, penalty, fine or any other sum payable; and
  - not been subjected to penalty under Section 271 (1)
- AO may issue provisional Nil WHT
- Certificate issued by the AO valid for th… Year mentioned therein or until cancelled
- Renewal after the expiry or within 3 months before expiry of the certificate
- Certificate issued by AO can be prospective only
- Application after the payment of tax not entertained - *Circular 774 dated 17 March 1999*

Advisory for online application & system validated certificate prescribed under 195(3) and 197

OR

Application by payee to the AO under Section 197(1)

- Application to be made by the payee under Section 197(1) for lower / no WHT in prescribed form (Form 13)
- …rescribed conditions under Rule 28AA:
  - Tax payable on estimated or existing income;
  - Tax paid of last 3 previous years; and
  - …vance tax, TDS & TCS
- AO to issue certificate indicating rate / rates of tax whichever is higher of the following:
  - Average rate determined on the basis of advance tax; or
  - …average rates of tax paid in last 3 years
- … certificate for lower / Nil WHT
- …ate …sued by the AO valid for such period …enti…ed therein or until cancelled
- Application to be made before the payment / credit whichever is earlier

Other alternate remedies for the payer and payee

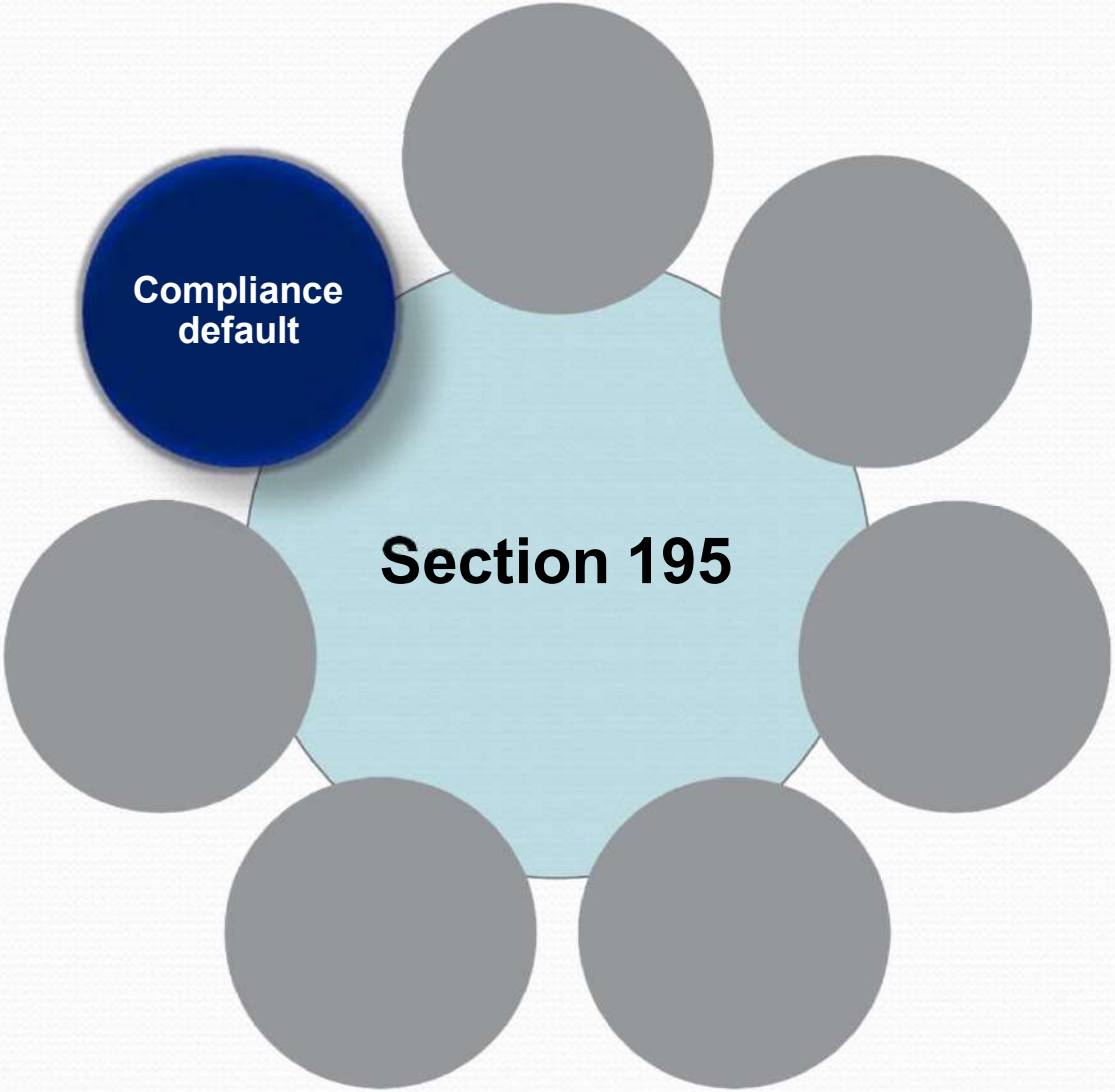
Chartered Accountants' (CA) Certificate under Section 195(6)

- Payment to nonresident also permitted by obtaining CA certificate as prescribed under *Circular 759*, read with *Circular 10/2002 dated 9/10/2002*
- Specific Rule introduced by the CBDT

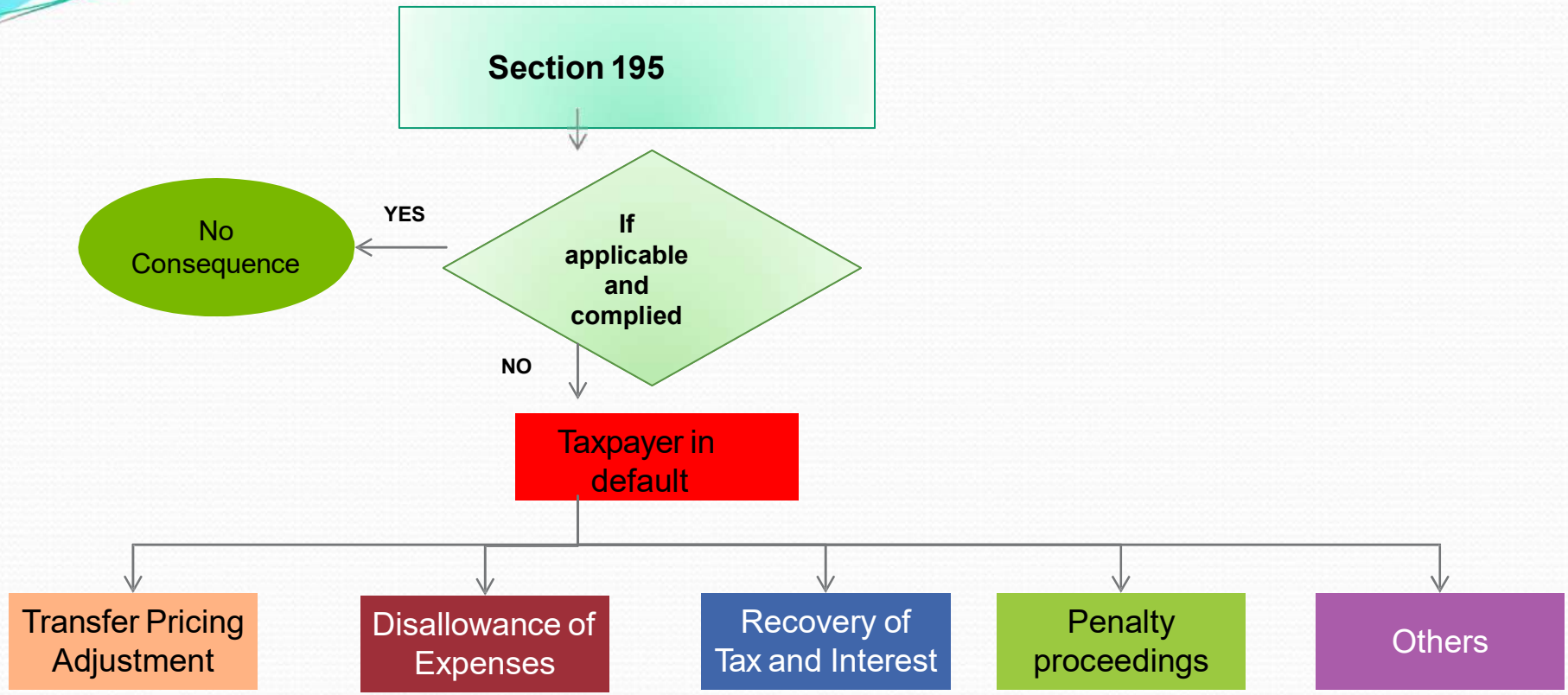
Detailed procedures discussed in the ensuing slides of operational rules

Advance Ruling under Chapter XIX-B of IT Act

- Ruling by quasi-judicial authority on reference by payer / payee
- Upfront determination of taxability of the transactions proposed with the nonresidents
- Binding ruling on applicant as well as tax authorities unless change in facts / law (diluted)
- Fast track mechanism, protracted litigation may be avoided with certainty in tax treatment
- Ruling is appealable before the High Court


Compliance default
Section 195

Compliance default



Practice and Operational rules (1/12)

Provisions for CA Certificate

- *Circular 10/2002* authorizes remittance of money through a CA Certificate
- CA Certificate required also for trade payments – *RBI Circular No. 32 dated 19 July 2007*
- Provision under Section 195(6) introduced by the Finance Act, 2008 for CA certificate
- Rule 37BB introduced by CBDT vide *Notification 30/2009 dated 25/03/2009*:
  - Forms 15CA and 15CB to remit payments to nonresidents and intimate the manner of disclosure:
    - Form 15CA, prescribes information to be furnished online by the payer; and
    - Form 15CB, prescribes format of CA Certificate to be obtained
- Taxpayer not absolved from penalty / prosecution if found that WHT was lower than required
- CA certificate merely acts as a guidance and is not a substitute to adjudication by the AO
- Procedure for remittance was amended from 01 October 2013, with significant change in the procedure, being more technological robust and detailed
  - Specified list of 28 payments like outbound investments, gifts, etc. exempt from the procedures
- **Notification issued on 16 December 2015 to amend Rule 37BB for new forms and compliances**
- Remittance certificate issued by CA subject to penal provisions prescribed per default

Practice and Operational rules (2/12)

Furnish information pertaining to foreign payment in the prescribed form and manner

Prescribed Form and manner is as per Rule 37BB and Form Nos. 15CA and 15CB issued in December 2015

Amended disclosure provisions prescribed under Section 195(6) (effective 1-6-2015)

Applicable to any person responsible of making payment to non-resident under section 195(1) any sum, whether or not chargeable to tax

Penalty for non-furnishing or inaccurate filing of information – INR 100,000

Practice and Operational rules (3/12)

Rule 37BB amended effective 1 April 2016 with an aim to strike balance between burden of compliance and collection of information

- Individuals exempt to comply with Form 15CAand 15CB procedures if:
  - Remittance does not require RBI approval under LRS and Current Account Transactions
- Specified list of remittances expanded to 33 for non applicability of Rule and additions include:

1. Advance payment against imports	**2. Payment towards imports-settlement of invoice**	**3. Imports by diplomatic missions**	**4. Intermediary trade**	**5. Imports below INR 5 lacs (for use by ECD offices)**

- Enhanced compliance of 15CA and 15CB information to be shared with Principal Director of Income-tax (Systems) including filing of quarterly information on remittance by the AD in Form 15CC
- Revised Form Nos. 15CA and 15CB divided in 4 parts:

Part A	**Remittance does not exceed INR 5 lacs and amounts chargeable to tax**	**Form 15CA & 15CB**	**Mirror image of CA Certificate Form 15CB where payments exceed INR 5 lacs**	**Part C**
Part B	**Subset of Part A and lower WHT certificate obtained under Section 195(2)/195(3)/197**		**Sum not chargeable to tax under the provisions of the Act**	**Part D**

Specified List

- Indian Investment Abroad-in equity capital(shares)
- Indian Investment Abroad- in Debt securities
- Indian Investment Abroad-in branches and wholly owned subsidiaries
- Indian Investment Abroad-in subsidiaries and associates
- Indian Investment Abroad- in Real Estate
- Loans Extended to Non-Residents
- Advance payment against Imports
- Payment towards imports –settlement of Invoice
- Imports by Diplomatic Missions
- Intermediary Trade
- Imports below Rs. 5,00,000/-(For use by ECD Offices)
- Payment for operating expenses of Indian Shipping companies operating abroad
- Operating Expenses of Indian Airlines Companies operating abroad

Specified List….continued

- Booking of passages abroad- Airlines Companies
- Remittance towards business travel
- Travel under Basic Travel Quota (BTQ)
- Travel for Pilgrimage
- Travel for Medical Treatment
- Travel for Education (including fees, hostel expenses etc.)
- Postal Services
- Construction of Projects abroad by Indian Companies including import of goods at project site
- Freight insurance- relating to import and export of goods
- Payments for maintenance of offices abroad
- Maintenance of Indian Embassies abroad
- Remittance by Foreign Embassies in India
- Remittance by Non-Residents towards family maintenance and savings

Specified List….continued

- Remittance towards personal gifts and donations
- Remittance towards donations to Religious and charitable institutions abroad
- Remittance towards grants and donations to other Governments and charitable institutions established by the Governments
- Contributions or donations by the Government to International institutions
- Remittance towards payment or Refund of Taxes
- Refunds or Rebates or reduction in invoice value on account of exports
- Payment by Residents for International Bidding

Practice and Operational rules (4/12)

Amended procedures for CA Certificate

- Only taxable remittances to be reported in Form 15CA
- Select Form 15CA in Parts:
  - **Part A:** Applicable to remittances chargeable to tax for small payments that does not exceed INR 5 lacs or aggregate of such payments during the Financial
  - **Part B:** For any other payments chargeable to tax and lower / NIL WHT certificate is obtained
  - **Part C:** Form 15CA after obtaining CA certificate in Form 15CB for sums chargeable to tax
  - **Part D:** Information of any sum not chargeable to tax
- Form 15CA to be electronically uploaded on income-tax website. Amended process through generation of digital signatures for every payment
- Specific declaration / indemnity to be obtained by the payer for taxes and interest if payment is liable for WHT
- **Undertaking to be obtained from the payee**

Sample declaration from the Payee

<< On the letterhead of Payee >>

Date: _____

TO WHOMSOEVER IT MAY CONCERN

We, the Payee, hereby confirm as follows:

1. We are a Limited Company incorporated and registered in with Unique Entity Number_____.
2. We are a tax resident of as per Article 4 of the tax treaty and the place of world assessment of our income is in
3. We do not have any Permanent Establishment / Fixed place in India as defined under Article 5 of the Treaty. Also we will not have a Permanent Establishment / Fixed place in India within the meaning of the Treaty for the financial year.
4. The amount payable and its nature under the tax treaty
5. The amount is to be remitted to payee are the beneficiaries hereof.
6. In the event there is any income-tax demand (include interest etc) raised in India in respect of this remittance we undertake to pay the demand forthwith and provide with all information/documents that may be necessary for any proceedings before income tax/appellate authority in India.
7. Indemnity to protect from General Anti-Avoidance Rules

For Payee

Practice and Operational rules (5/12)

Suggested method for CA Certificate

Steps	Action plan
Payment covered under Section 195	Payment from resident or from non resident to nonresident
Verify factual documents	Invoice, Contracts, Legal Status, obtain declaration, PAN, etc.
Determine character	Classification of payment, Business profits, Royalty, FTS, etc.
Evaluate taxability under the	
• IT Act	Income-tax rates, Grossing-up, Section 206AA , Case law update
• Tax treaty	No PE, TP analysis, beneficial owner, entity characterization, Article, LOB clause, Obtain TRC, MFN, Protocol to the DTAA, MLI, OECD BEPS Technical explanation to the DTAA, Model commentaries
Specific orders	Verify specific orders received from tax authorities, 195(2), 195(3), etc.
Follow compliance	Complete the Form to comply with WHT deadlines for deposit

Tax Residency Certificate (TRC)

- TRC requirement for nonresidents to claim tax treaty benefits
- Also confirmed by Circular on Section 206AA
- Furnishing of TRC mandatory to avail tax treaty benefits:
  - *SC in the case of UOI v. Azadi Bachao Andolan [2003] 263 ITR 706 (SC)*
  - *Circular 789 dated 13 April 2000*
  - Shome Committee report on GAAR recommends that *Circular 789 of 2000* should be retained
- Prescribed additional information to be furnished along with TRC
- CBDT clarified that the additional information prescribed may not be required if it already forms part of the TRC

Notification No. 57/2013 dated 1/08/2013 [F.No.142/16/2013-TPL] revised the Rule 21AB

Practice and Operational rules (6/12)

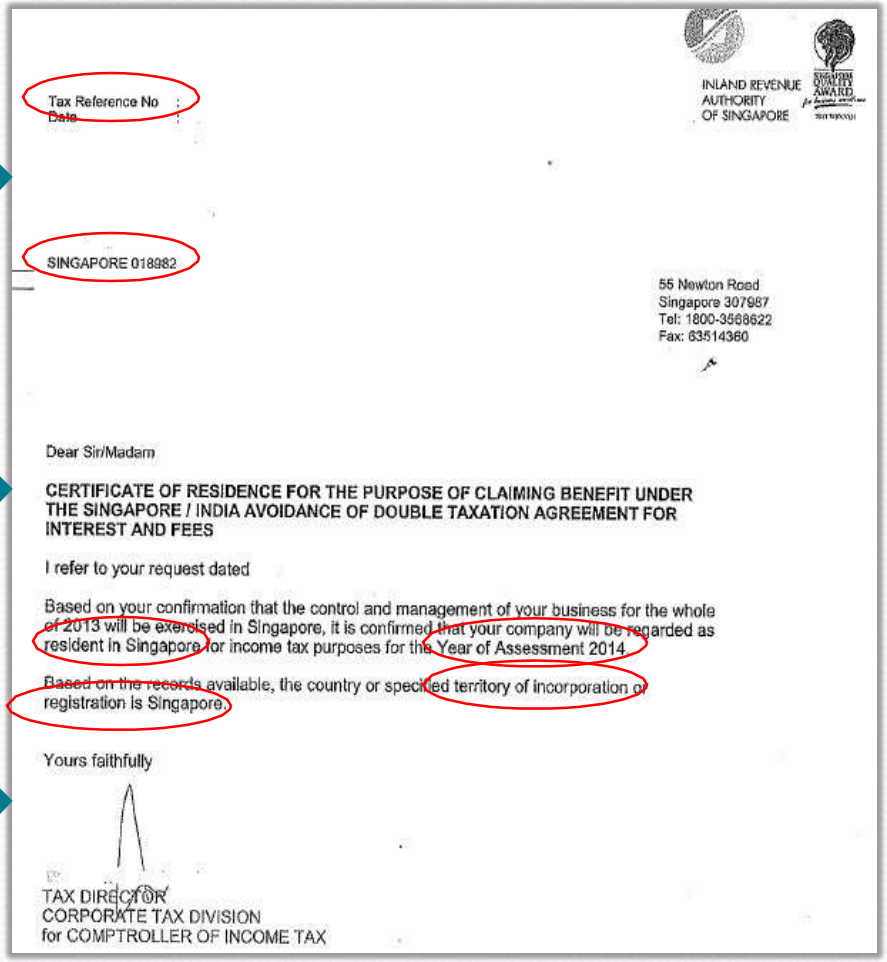
Prescribed Form 10F

The additional details required to be furnished in Form 10F under Rule 21AB:

1. Status (Individual, Company, Firm, etc.) of the taxpayer
2. PAN of the taxpayer, if allotted
3. Nationality (in case of an individual) or country or specified territory of incorporation or registration (in case of others)
4. Taxpayer's tax identification number or a unique number, as the case may be
5. Period for which the residential status, as mentioned in the TRC, is applicable and
6. Address of the taxpayer during the period for which the certificate is applicable

CBDT clarified that declaration may not be required if TRC contains above particulars

Sample TRC



Tax Reference No
Date

INLAND REVENUE AUTHORITY OF SINGAPORE

SINGAPORE 018982

55 Newton Road
Singapore 307987
Tel: 1800-3568622
Fax: 63514360

Dear Sir/Madam

CERTIFICATE OF RESIDENCE FOR THE PURPOSE OF CLAIMING BENEFIT UNDER THE SINGAPORE / INDIA AVOIDANCE OF DOUBLE TAXATION AGREEMENT FOR INTEREST AND FEES

I refer to your request dated

Based on your confirmation that the control and management of your business for the whole of 2013 will be exercised in Singapore, it is confirmed that your company will be regarded as resident in Singapore for income tax purposes for the Year of Assessment 2014.

Based on the records available, the country or specified territory of incorporation or registration is Singapore.

Yours faithfully

TAX DIRECTOR
CORPORATE TAX DIVISION
for COMPTROLLER OF INCOME TAX

Practice and Operational rules (7/12)

Form 15CA – Part A

Income-Tax Department	"FORM NO. 15CA (See rule 37BB) Information to be furnished for payments to a non-resident not being a company, or to a foreign company	Ack. No.

Part A

(To be filled up if the remittance is chargeable to tax under the provisions of the Income-tax Act,1961 and the remittance or the aggregate of such remittances, as the case may be, does not exceed five lakh rupees during the financial year)

REMITTER	Name of remitter	
	PAN of the remitter (if available)	
	TAN of the remitter (if available)	
	Complete address, email and phone number of the remitter	
	Status of remitter[1]	☐
	Residential status of remitter[2]	
REMITTEE	Name of recipient of remittance	
	PAN of the recipient of remittance, if available[3]	
	Complete address, email[4] and phone number[5] of the recipient of remittance	
	Country to which remittance is made	
REMITTANCE	Amount payable before TDS (In Indian Currency)	
	Aggregate amount of remittances made during the financial year including this proposed remittance	
	Name of bank	
	Name of the branch of the bank	
	Proposed date of remittance	
	Nature of remittance	
	Please furnish the relevant purpose code as per RBI	
	Amount of TDS	
	Rate of TDS	
	Date of deduction	

VERIFICATION

I/We*, _____ (full name in block letters), son/daughter of _____ in the capacity of _____(designation) solemnly declare that the information given above is true to the best of my knowledge and belief and no relevant information has been concealed. I/We* further undertake to submit the requisite documents for enabling the income-tax authorities to determine the nature and amount of income of the recipient of the above remittance as well as documents required for determining my liability under the Income-tax Act as a person responsible for deduction of tax at source.

Place: _____ Signature of the person responsible for paying to non-resident

Date: _____ Name and Designation of the person responsible for paying to non-resident

Form 15CA – Part B

Part B

(To be filled up if the remittance is chargeable to tax under the provisions of the Income-tax Act,1961 and the remittance or the aggregate of such remittances, as the case may be, does not exceed five lakh rupees during the financial year and an order/ certificate u/s 195(2)/ 195(3)/ 197 of Income-tax Act has been obtained from the Assessing Officer.)

REMITTER	Name of remitter		
	PAN of the remitter		
	TAN of the remitter[1]		
	Complete address, email and phone number of the remitter		
	Status of remitter[2]		☐
	Residential status of remitter[3]		
REMITTEE	Name of recipient of remittance		
	PAN of the recipient of remittance, if available[4]		
	Complete address, email[5] and phone number[6] of the recipient of remittance		
A.O. ORDER	Section under which order/certificate has been obtained		
	Name and designation of the Assessing Officer who issued the order/certificate		
	Date of order/certificate		
	Order/ certificate number		
REMITTANCE	Country to which remittance is made	Country:	Currency:
	Amount payable	In foreign currency:	In Indian Rs
	Name of the Bank	Branch of the Bank	
	BSR Code of the bank branch (7 digit)		
	Proposed date of remittance		(DD/MM/YYYY)
	Nature of remittance as per agreement/ document		
	Please furnish the relevant purpose code as per RBI		
	Amount of TDS		
	Rate of TDS		
	Date of deduction		

VERIFICATION

I/We*, _____ (full name in block letters), son/daughter of _____ in the capacity of _____(designation) solemnly declare that the information given above is true to the best of my knowledge and belief and no relevant information has been concealed. I/We* certify that a certificate/order under section 195(2)/195(3)/197 of the Income-tax Act, 1961 has been obtained, particulars of which are given in this Form. I/We* further undertake to submit the requisite documents for enabling the income-tax authorities to determine the nature and amount of income of the recipient of the above remittance as well as documents required for determining my liability under the Income-tax Act as a person responsible for deduction of tax at source.

Place: _____ Signature of the person responsible for paying to non-resident

Date: _____ Name and Designation of the person responsible for paying to non-resident

Practice and Operational rules (8/12)

Form 15CA - Part C

Part C

(To be filled up if the remittance is chargeable to tax under the provisions of Income-tax Act, 1961 and the remittance or the aggregate of such remittances, as the case may be, exceeds five lakh rupees during the financial year and a certificate in Form No. 15CB from an accountant as defined in the *Explanation* below sub-section (2) of section 288 has been obtained)

Section A — **GENERAL INFORMATION**

REMITTER	Name of the remitter					
	PAN of remitter		Area Code	AO Type	Range Code	AO No
	Principal Place of Business		TAN of remitter[1]			
	Complete address, email and phone number of the remitter					
	Status[2] ☐	Residential status of remitter[3] ☐				
REMITTEE	Name of recipient of remittance		PAN of recipient of remittance[4]			
	Status[5] ☐					
	Address		Country to which remittance is made			
	Principal place of business	Email address	(ISD code)-Phone Number ( )			
ACCOUNTANT	(a)	Name of the Accountant[6] signing the certificate				
	(b)	Name of the proprietorship/ firm of the accountant				
	(c)	Address				
	(d)	Registration no. of the accountant				
	(e)	Date of certificate (DD/MM/YYYY)	Certificate No.[7]			
A.O. ORDER	(a)	Whether any order/ certificate u/s 195(2)/ 195(3)/ 197 of Income-tax Act has been obtained from the Assessing Officer	(Tick) ☐ Yes ☐ No			
	(b)	Section under which order/certificate has been obtained				
	(c)	Name and designation of the Assessing Officer who issued the order/certificate				
	(d)	Date of order/certificate				
	(e)	Order/ certificate number				

Section B — **PARTICULARS OF REMITTANCE AND TDS** (as per certificate of the accountant)

REMITTANCE	1	Country to which remittance is made	Country:	Currency:
	2	Amount payable	In foreign currency:	In Indian Rs.
	3	Name of the Bank	Branch of the Bank	
	4	BSR Code of the bank branch (7 digit)		
	5	Proposed date of remittance	(DD/MM/YYYY)	
	6	Nature of remittance as per agreement/ document		
	7	Relevant purpose code as per RBI		
	8	In case the remittance is net of taxes, whether tax payable has been grossed up?	(Tick) ☐ Yes ☐ No	
I.T. ACT	9	Taxability under the provisions of the Income-tax Act (without considering DTAA)		
		(a) the relevant section of the Act under which the remittance is covered		
		(b) the amount of income chargeable to		

Form 15CB

Form No. 15CB

(*See* rule 37BB)

Certificate of an accountant[1]

I/We* have examined the agreement (wherever applicable) between Mr./Ms./M/s*..... and Mr./Ms./M/s*.....
(Remitters) (Beneficiary)
requiring the above remittance as well as the relevant documents and books of account required for ascertaining the nature of remittance and for determining the rate of deduction of tax at source as per provisions of Chapter- XVII-B.

We hereby certify the following :-

A	Name and address of the beneficiary of the remittance			
B	1.	Country to which remittance is made	Country:	Currency:
	2.	Amount payable	In foreign currency:	In Indian Rs.
	3.	Name of the bank	Branch of the bank	
	4.	BSR Code of the bank branch (7 digit)		
	5.	Proposed date of remittance	(DD/MM/YYYY)	
	6	Nature of remittance as per agreement/ document		
	7.	In case the remittance is net of taxes, whether tax payable has been grossed up?	(Tick) ☐ Yes ☐ No	
	8.	Taxability under the provisions of the Income-tax Act (without considering DTAA) (i) is remittance chargeable to tax in India	(Tick) ☐ Yes ☐ No	
		(ii) if not reasons thereof		
		(iii) if yes, (a) the relevant section of the Act under which the remittance is covered		
		(b) the amount of income chargeable to tax		
		(c) the tax liability		
		(d)basis of determining taxable income and tax liability		

Practice and Operational rules (9/12)

Form 15CA - Part C

		tax	
		(c) the tax liability	
		(d)basis of determining taxable income and tax liability	
DTAA	10.	If any relief is claimed under DTAA- (i) whether tax residency certificate is obtained from the recipient of remittance	(Tick) ☐ Yes ☐ No
		(ii) please specify relevant DTAA	
		(iii) please specify relevant article of DTAA	Nature of payment as per DTAA
		(iv) taxable income as per DTAA	In Indian Rs.
		(v) tax liability as per DTAA	In Indian Rs.
		A. If the remittance is for royalties, fee for technical services, interest, dividend, etc.(not connected with permanent establishment) please indicate:-	(Tick) ☐ Yes ☐ No
		(a) Article of DTAA	
		(b) Rate of TDS required to be deducted in terms of such article of the applicable DTAA	As per DTAA (%)
		B. In case the remittance is on account of business income, please indicate:-	(Tick) ☐ Yes ☐ No
		(a) The amount of income liable to tax in India	
		(b) The basis of arriving at the rate of deduction of tax.	

Form 15CB

9.	If income is chargeable to tax in India and any relief is claimed under DTAA- (i) whether tax residency certificate is obtained from the recipient of remittance	(Tick) ☐ Yes ☐ No
	(ii) please specify relevant DTAA	
	(ii) please specify relevant article of DTAA	Nature of payment as per DTAA
	(iii) taxable income as per DTAA	In Indian Rs.
	(iv) tax liability as per DTAA	In Indian Rs.
	A.If the remittance is for royalties, fee for technical services, interest, dividend, etc.(not connected with permanent establishment) please indicate:-	(Tick) ☐ Yes ☐ No

Practice and Operational rules (10/12)

Form 15CA - Part C

		C. In case the remittance is on account of capital gains, please indicate :-	(Tick) ☐ Yes ☐ No
		(a) amount of long term capital gains	
		(b) amount of short-term capital gains	
		(c) basis of arriving at taxable income	
		D. In case of other remittance not covered by sub-items A,B and C	(Tick) ☐ Yes ☐ No
		(a) Please specify nature of remittance	
		(b) Whether taxable in India as per DTAA	
		(c) If yes, rate of TDS required to be deducted in terms of such article of the applicable DTAA	
		(d) if not, please furnish brief reasons thereof specifying relevant article of DTAA	
TDS	11.	Amount of tax deducted at source	In foreign currency In Indian Rs.
	12.	Rate of TDS	As per Income-tax Act (%) or As per DTAA (%)
	13.	Actual amount of remittance after TDS	In foreign currency
	14.	Date of deduction of tax at source, if any	(DD/MM/YYYY)

VERIFICATION

I, I/We*, _____ (full name in block letters), son/daughter of _____ in the capacity of _____ (designation) solemnly declare that the information given above is true to the best of my/our* knowledge and belief and no relevant information has been concealed. I/We* certify that a certificate has been obtained from an accountant, particulars of which are given in this Form, certifying the amount, nature and correctness of deduction of tax at source. In case where it is found that the tax actually deductible on the amount of remittance has not been deducted or after deduction has not been paid or not paid in full, I/We* undertake to pay the amount of tax not deducted or not paid, as the case may be, along with interest due. I/We* shall also be subject to the provisions of penalty for the said default as per the provisions of the Income-tax Act, 1961. I/We* further undertake to submit the requisite documents for enabling the income-tax authorities to determine the nature and amount of income of the recipient of the above remittance as well as documents required for determining my/our liability under the Income-tax Act, 1961 as a person responsible for deduction of tax at source.

Place: Signature of the person responsible for paying to non-resident

Date: Name and Designation of the person responsible for paying to non-resident

Form 15CB

		(a) Article of DTAA	
		(b) Rate of TDS required to be deducted in terms of such article of the applicable DTAA	As per DTAA (%)
		B. In case the remittance is on account of business income, please indicate :-	(Tick) ☐ Yes ☐ No
		(a) Whether such income is liable to tax in India	(Tick) ☐ Yes ☐ No
		(b) If so, the basis of arriving at the rate of deduction of tax.	
		(c) If not, please furnish brief reasons thereof, specifying relevant article of DTAA	
		C. In case the remittance is on account of capital gains, please indicate :-	(Tick) ☐ Yes ☐ No
		(a) amount of long term capital gains	
		(b) amount of short-term capital gains	
		(c) basis of arriving at taxable income	
		D. In case of other remittance not covered by sub-items A,B and C	(Tick) ☐ Yes ☐ No
		(a) Please specify nature of remittance	
		(b) Whether taxable in India as per DTAA	
		(c) If yes, rate of TDS required to be deducted in terms of such article of the applicable DTAA	
		(d) if not , please furnish brief reasons thereof, specifying relevant article of DTAA	
	10.	Amount of TDS	In foreign currency In Indian Rs.
	11.	Rate of TDS	As per Income-tax Act (%) or As per DTAA (%)
	12.	Actual amount of remittance after TDS	In foreign currency
	13.	Date of deduction of tax at source, if any	(DD/MM/YYYY)

Certificate No.[3] ☐☐☐☐☐

Signature :
Name:

Name of the proprietorship/ firm:

Address:

Registration No.:

Practice and Operational rules (11/12)

Form 15CA – Part D

Part D

[To be filled up if the remittance is not chargeable to tax under the provisions of the Income-tax Act,1961 (other than payments referred to in rule 37BB(3)) by the person referred to in rule 37BB(2)]

REMITTER	Name of the remitter		
	PAN of the remitter, if available		
	TAN of the remitter, if available		
	Complete address, email and phone number of the remitter		
	Status of remitter[1]		☐
	Residential status of the remitter[2]		
REMITTEE	Name of recipient of remittance		
	PAN of the recipient of remittance, if available		
	Complete address, email and phone number[4] of the recipient of remittance		
	Country to which remittance is made	Country:	Currency:
	Country of which the recipient of remittance is resident, if available		
REMITTANCE	Amount payable	In foreign currency:	In Indian Rs.
	Name of the bank	Name of the branch of the bank	
	BSR code of the bank branch (7 digit)		
	Proposed date of remittance	(DD/MM/YYYY)	
	Nature of remittance		
	Please furnish the relevant purpose code as per RBI		

2. I certify that I have reason to believe that the remittance as above is not chargeable under the provision of Income-tax Act 1961 and is not liable for deduction of tax at source.

VERIFICATION

I/We*, _____ (full name in block letters), son/daughter of _____ in the capacity of _____(designation) solemnly declare that the information given above is true to the best of my/our* knowledge and belief and no relevant information has been concealed. In a case where it is found that the tax actually deductible on the amount of remittance has not been deducted or after deduction has not been paid or not paid in full, I/We* undertake to pay the amount of tax not deducted or not paid, as the case may be, along with interest due. I/We* shall also be subject to the provisions of penalty for the said default as per the provisions of the Income-tax Act, 1961. I/We* further undertake to submit the requisite documents for enabling the income-tax authorities to determine the nature and amount of income of the recipient of the above remittance as well as documents required for determining my/our* liability under the Income-tax Act as a person responsible for deduction of tax at source.

Place: _____ Signature of the person responsible for paying to non-resident

Date: _____ Name and Designation of the person responsible for paying to non-resident

Form 15CC

Form No.15CC
(See rule 37BB)

Quarterly statement to be furnished by an authorised dealer in respect of remittances made for the quarter of ..... of ..... (Financial Year)

1. Name and address of the authorised dealer: .....
2. Permanent Account Number: .....
3. Details of remittances made:

Sl. No.	Name of the remitter	PAN of the remitter	Name of the remittee	PAN of the remittee, if available	Amount of remittance	Date of remittance	Country to which remittance is made	Purpose Code as per RBI

Verification

I .....(full name in block letters), son/daughter of ..... solemnly declare that to the best of my knowledge and belief, the information given above are correct and complete.

Place ..... Signature .....

Date ..... Name and Designation .....

[Notification No. 93/2015, F.No.133/41/2015-TPL]

(PITAMBAR DAS)
DIRECTOR (TAX POLICY AND LEGISLATION)

Note.— The principal rules were published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (ii) vide notification number S.O. 969(E), dated the 26th March, 1962 and last amended vide notification number S.O.3357 (E), dated the 11th December,2015 .

Practice and Operational rules (12/12)

Remitter obtains digital CA certificate in Form 15CB in relevant Part after paying tax as determined for the remittance

Electronically upload the remittance details as per Form 15CB issued in Form 15CA (using the Digital Signature)

Take hard print of the Form 15CA along with system generated acknowledgement number

Submit in duplicate Form 15CA and Form 15CB along with Form A2 to the Authorized Dealer

RBI / Bank makes remittance to the Payee

1. AD Bank to furnish electronic copy of (Form 15CA) and CA Certificate (Form 15CB) to the tax authorities
2. AD Bank to also file Form 15CC quarterly with the Principal Director General of Income-tax (Systems)

STEPS

Single upload of Form 15CA online on the income-tax website

Registered user to login and navigate to "e-File" under Prepare and Submit Online Form 15CA using Digital Signature

Select appropriate Forms, Part A / Part B / Part C and Part D as applicable

Fill the requisite details / information and submit the Form

On submission transaction ID and acknowledgement is generated

To view status / print the submitted form go to "My Account" View Form 15CA

Key takeaways and safeguards

1. Ignorance of rules may lead to undesirable litigation and cost, thus impacting business focus
2. Other business functions should also support on the foreign payments made by the clients
3. Preliminary assessment of transfer pricing would be essential for related party transactions
4. Cumbersome compliance process for non-resident payers', noncompliance result in penalty
5. Safeguard to the taxpayer by taking an opinion and suggest paper trail if Part D is opted
6. Ensure patience and trust in Indian tax judiciary, accurate interpretation will lead to success

Section 195 – Payment to Non-Residents

Key Considerations

195(1) Payment by any person responsible to pay to an a non- resident

Interest or any other sum chargeable to tax

Deduct tax at the time of credit or payment whichever is earlier /at rate in force

Other than salary and dividend referred in section 115-o

195(2) Application to AO by payer if it considers whole of sum is not income chargeable in the hands of the recipient

195(3), (4),(5) Application to the AO by payee viz. Foreign company or non- resident having branch in India for lower or Nil with holding- 195(3) &(4)

Powers to CBDT to make rules -195(5)

195(6) Payer to furnish information in prescribed from viz. Form 15CA/15CB in respect of any sun whether Chargeable or not under the Act, subject to conditions sepicified under Rule 37BB

195(7) Power to CBDT to specify class of persons or cases where application to Ao u/s 195(2) compulsory

195A Grossing up of tax

SEC 195 (7):- AUTHORIZES BOARD TO SPECIFY CLASS OF PERSONS OR CASES

- Sub section (7) was inserted by Finance Act, 2012 to partially neutralize the impact of ratio of *GE Technology Centre (Supra)* and thereby the Board may specify a class of persons or cases where the payer has to approach AO through an application to determine proportion of sum chargeable to tax for deduction of tax accordingly.

Other provisions under section 195

195(2)

- Application to AO by the Payer for order determining the taxable portion, when the whole remittance is not taxable
- A foreign Co treated as a resident, based on its POEM in India, can apply for order u/s 195(2)- Draft Notification No. 370142/19/2017-TIPL dated 15 June 2017 u/s 115JH

195(3), (4),(5)

- Application to AO by the Payee viz. foreign banking Co or NR having branch in India for certificate authorizing receipt of sums without TDS
- Powers to CBDT to notify rules for grant of certificate u/s 195(3)

195(6)

- Payer to furnish information of remittances made in prescribed form, whether or not such remittances are chargeable under the Act

195(7)

- CBDT to notify class of persons or cases that may apply to the AO to determine the taxable portion
  - No cases notified so far

Foreign Remittance – Obtaining Certificate From Tax Officer

Section 195(2)

Application by Payer

- Application by the Payer to the AO for determining appropriate portion of sum chargeable
- Alternate Mechanism: CA certificate*



* *To be discussed later*

Section 195(2)

Application by Payer

Mandatory to approach AO?

Transmission Corporation of AP Ltd. *239 ITR 587 (SC)*

- **Once income is chargeable to tax, withholding on gross sum unless order obtained from AO**

Fact: Gross trading receipt with income element embedded therein

Other Judgments

Yes

- **Cheminor Drugs Ltd** *76 ITD 37 (ITAT Hyd)*
- **Intel Tech India (P) Ltd.** *130 TTJ 348 (ITAT Bang)*
- **Frontier Offshore Exploration (India) Ltd.** *118 ITD 494 (ITAT Chen)*

No

- **Maharashtra State Electricity Board** *90 ITD 793 (ITAT Mum)*
- **Indopel Garments** *86 ITD 102 (ITAT Mad)*
- **SOL Pharmaceuticals Ltd.** *83 ITD 72 (ITAT Hyd)*

Section 195(2)

Application by Payer – Income not taxable?

Samsung Electronics Co. Ltd. *227*
CTR 335 (Kar)

- **Obligation to withhold tax exists if the income is prima facie taxable, unless a 'nil' withholding tax certificate is obtained**

1999 — 2009 — 2010

Transmission Corporation of AP Ltd.
239 ITR 587 (SC)

- **Once income is chargeable to tax, withholding on gross sum unless order obtained from AO**

Fact: Gross trading receipt with income element embedded therein

Post Samsung decisions*

- **Liability to withhold tax does not arise where income is not taxable in India**

* **Van Oord ACZ India (P) Ltd; Maharishi Housing Development Finance Corporation Ltd; Prasad Production Ltd.**

Remedy available to the payer – Section 195(2)

Application to be made to Assessing Officer (AO) when the payer considers whole income not to be chargeable

AO to determine the portion of payment chargeable to tax and to issue a certificate accordingly

The permission granted by the AO would be in force for the period as specified

On determination, tax to be deducted on the sum chargeable to tax

Mangalore Refinery & Petrochemicals Ltd. V. DDIT (113 ITD 85) (Mum.)

The assessee cannot be treated in default under s. 201 of the Act because it has applied under s. 195(2) of the IT Act before the AO, prior to remitting the payment

Section 195(2)

Issues to be addressed in the case of Application by Payer to A.O./ CA. Cert.

What lies ahead

- Problems /issues for filing Application by the Payer to the AO for determining (by general or special order) appropriate portion of such sum chargeable, upon such determination, tax shall be deducted under sub-section (1) only on that proportion of the sum which is so chargeable.
- Problems in issuing CA certificate*



Order under section 195(2) – Not Conclusive

- Decision under section 195(2) should not be treated as a conclusion in the determination of

  income in the case of a foreign company

  - CIT vs. TELCO [2000] 245 ITR 823 (Bom.)
  - CIT vs. Elbee Services P. Ltd. [2001] 247 ITR 109 (Bom.)
  - Dodsal Pvt. Ltd. Vs. CIT [2003] 260 ITR 507 (Bom.)
  - DCIT vs. Arthur Andersen ITA No. 9125/Mum/1995 dated 29-07-2003 (ITAT, Mumbai)

- Aditya Birla Nuvo v. DDIT 342 ITR 308 (Bombay)

  The order under section 195(2) is tentative in nature and does not have any effect beyond providing immunity under sec. 201 and does not preclude the assessing officer to either reexamine the chargeability of income in regular assessment proceedings or to recover the taxes from the payer in his representative capacity.

Section 195(3)/ 195(5)

Application by Payee/ Powers of CBDT

Section 195(3): Application by NR payee for NIL tax withholding

- Applicable to:
  - foreign bank branches and
  - other branches subject to certain conditions
    - In operation for at least 5 years
    - Value of fixed assets in India exceed Rs.50 lakhs

NR payee is regularly assessed to tax and should not have defaulted in respect of Indian tax, interest, penalty, fine etc.

Section 195(5): Powers of CBDT

- **CBDT can by notification in the Official Gazette make rules specifying the cases for the grant of certificate u/s 195(3) and the related conditions**

Section 195 (3) & (4)

Application & Validity of certificate issued by AO

- Payee can make an application for a certificate.
- Application can be made in prescribed format :-
  - form No. 15C in case of banking company
  - form No. 15D in any other cases
- Condition for issue of certificate u/s 195(3) of the Act (Rule 29B).
- A certificate granted u/s 195(3) shall remain in force:
  - for the FY mentioned therein; or
  - until cancelled by the AO before expiry of FY
- Provisional Certificate only



Section 195(3): Application by the Payee

- Payee who is eligible as per the conditions in Rule 29B can make an application in Form 15D (banking company Form 15C)
- For nil deduction certificate
- Rule 29B
  - ➢ Assessee has been regularly assessed to tax and has filed all returns of income due as on the date of filing of application;
  - ➢ Not in default in respect of any tax interest, penalty, fine, or any other sum (including advance tax and tax payable under section 140A);
  - ➢ Carrying on business in India continuously for at least five years and the value of the fixed assets in India exceeds INR 50 lakhs

VALIDITY OF THE CERTIFICATE

The certificate shall be valid for the assessment year to be specified in the certificate, unless it is cancelled by the tax officer at any time before the expiry of the specified period. An application for a fresh certificate may be made, if required, after the expiry of the period of validity of the earlier certificate.

SECTION 195(4) AND 195(5)

- Sec 195(4)- Validity of Certificate

  A certificate granted under sub-section(3) shall remain in force till the expiry of period specified therein or, if it is cancelled by the Assessing Officer before the expiry of such period, till such cancellation.

- Sec 195(5)- Power of CBDT to issue notification

  The Board may make rules specifying the cases in which, and the circumstances under which, an application may be made for the grant of a certificate under sub section (3) with the specified conditions

- Certificate u/s 195(3) is not appellable.

Comparative Analysis – Sections 195(2), 195(3) and 197

Particulars	195(2)	195(3)	197
Application by	Payer	Payee (subject to Rule 29B)	Payee
Purpose	To determine portion of income liable for WHT	To receive specific payment without deduction of tax. Certificate valid till expiry of period mentioned therein	To obtain NIL / lower WHT certificate for all receipts. Valid till expiry of period mentioned therein
Applicability	Specified Payments	Specified Receipts	All receipts
Whether appealable under section 248?	Yes – where tax borne and deposited by payer	No	No
Revision under section 263 or section 264	Yes	Yes	Yes

In all the above cases, unlike CA Certificate issued in Form 15CB, no interest or penalty is leviable in case the Assessing Officer takes a contrary view at the time of assessment proceedings.

Section 195(6)

New Rules for Information

Section 195(6) introduced by Finance Act 2008 (w.e.f. 1 April 2008)

- Requires the person making payment to NR to furnish the information relating to payment

Furnishing of information - Rule 37BB (w.e.f. 1 July 2009)

- **Furnish information to the tax department - Form 15CA**
- **Obtain CA certificate before making payment to NR - Form 15CB**

Form No. 15CA/15CB – Practical issues and Challenges

Provisions - section 195(6) r.w. Rule 37BB

- **Finance Act, 2008 inserted section 195(6) to provide for reporting of taxable foreign remittances by the payer; Rule 37BB was introduced to**:
  - Prescribe electronic reporting in Form 15CA based on CA certificate in Form 15CB;
  - Specify a list of 28 remittances to which the reporting did not apply

- **W.e.f. 1 June 2015, Finance Act 2015:**
  - Amended section 195(6) to extend the scope of reporting to any payment to NR, whether or not taxable in India
  - Introduced a new section 271-I to provide penalty of INR 1 lakh for failure to report or inaccurate reporting of remittances u/s 195

The intent was to identify taxable remittances on which tax was not deducted & to set a penal mechanism in case of default

Provisions - section 195(6) r.w. Rule 37BB

- **Following consequential changes were made to Rule 37BB w.e.f. 1 April 2016:**
  - Number of payments exempt from reporting were increased from 28 to 33
  - Exemption from reporting was extended to payments by individuals not requiring

    approval under the Liberalized Remittance Scheme (LRS) of the RBI
  - Form 15CA additionally calls for Relevant purpose code as per RBI & Residential

    status of the remitter
  - Quarterly statements in Form 15CC be furnished by AD banks

Payments exempt from reporting under Rule 37BB (1/3)

1.Indian investment abroad-in equity capital	13.Operating expenses of Indian airlines cos operating abroad
2.Indian investment abroad-in debt securities	14.Booking of passages abroad - Airlines cos
3.India investment abroad in branches & WOS	15.Remittance towards business travel
4. Indian investment abroad-in subsidiaries & associates	16.Travel under basic travel quota (BTQ)
5. Indian investment abroad-in real estate	17.Travel for pilgrimage
6. Loans extended to Non-residents	18.Travel for medical treatment
7.Advance payment against imports	19.Travel for education (incl. fees, hostel expenses)
8.Payment towards imports-settlement	20.Postal services
9.Imports by diplomatic missions	21.Construction of projects abroad by Indian Cos. incl. import of goods at project site
10.Intermediary trade	22.Freight insurance relating to import-export of goods
11.Imports below INR 5,00,000	23.Payments for maintenance of offices abroad
12. Payment for operating expenses of Indian shipping cos operating abroad	24.Maintenance of Indian embassies abroad

Payments exempt from reporting under Rule 37BB (2/3)

25.Remittances by foreign embassies in India	**30.Contributions or donations by the Government to international institutions**
26.Remittance by NR for family maintenance & savings	31.Remittance towards payment or refund of taxes
27.Remittance for personal gifts & donations	32.Refunds rebates or reduction in invoice value on account of exports
28.Remittance towards donations to religious and charitable institutions abroad	33.Payments by residents for international bidding.
29.Remittance towards grants & donations to other Governments & charitable institutions established by the Governments	34. Remittances by individuals not requiring approval under LERS

Payments exempt from reporting under Rule 37BB (3/3)

- The specified payments are exempt from reporting only if not chargeable to tax in India – Rule 37BB(3)
- No such condition in the erstwhile Rule 37BB
- **Though the listed payments may primafacie appear to be non-taxable in India, each payment would need to analysed based on facts, eg: taxability may arise in case of payment to NR against import of goods, if such imports are attributable to the NR's PE in India**

The specified payments would also have to be reported, if chargeable to tax

New Form 15CA – A Snapshot

Part A	Part B	Part C	Part D
Applicable if: • Remittance is taxable • Remittance or aggregate thereof does not exceed INR 5 lakh in FY **CA Certificate: Not required**	Applicable if: • Remittance is taxable • Remittance or aggregate thereof exceeds INR 5 lakh in FY • Order/ certificate is obtained u/s 195(2)/195(3)/197 **CA Certificate: Not required**	Applicable if: • Remittance is taxable • Remittance or aggregate thereof exceeds INR 5 lakh in FY **CA Certificate: Required**	Applicable if: • Remittance is not taxable under the Act **CA Certificate: Not required**

Interplay between Parts:

- Payments taxable under the Act, but exempt under the DTAA – Part C or Part D?
- Where there is a transfer of shares from a non-resident on stock exchange and the same results into capital loss. Thus, there is no income. Part C or Part D?
- Payments exceeding INR 5 lakh for which an order/certificate is obtained from the Assessing Officer u/s 195(2)/195(3)/197 – Part B or Part C?

Reporting in Form 15CA – Past and Present comparison

Sr. No.	Particulars	Position up to 31 March 2016 (old Form 15CA)	Position from 1 April 2016 (new Form 15CA)
1	Small value taxable payments	Reporting in: Part A Threshold: Payments not exceeding Rs.50,000 singly and aggregate of Rs.2,50,000 in a FY CA certificate: Not required	Reporting in: Part A Threshold: Payments up to Rs.5,00,000 in a FY CA certificate: Not required
2	High value taxable payments where certificate/order u/s. 197, 195(2), 195(3) has been obtained	Reporting in: Part B Threshold: Payments exceeding Rs.50,000 singly and aggregate of Rs.2,50,000 in a FY CA certificate: Not required	Reporting in: Part B Threshold: Payments exceeding Rs.5,00,000 in a FY CA certificate: Not required
3	High value taxable payments where certificate/order u/s. 197, 195(2), 195(3) has not been obtained	Reporting in: Part B Threshold: Payments exceeding Rs.50,000 singly and aggregate of Rs.2,50,000 in a FY CA certificate: Required	Reporting in: Part C Threshold: Payments exceeding Rs.5,00,000 in a FY CA certificate: Required
4	Payments not taxable under the Act (other than specified payments which are exempt from reporting)	Based on the past provisions, a position was possible that reporting did not apply to non-taxable remittances	Reporting in: Part D CA certificate: Not required

Reporting in Form 15CA – Procedure to upload

Obtain a CA certificate (Form 15CB) in case of taxable remittance having aggregate value exceeding INR 5,00,000 in FY and where certificate/order u/s 197, 195(2), 195(3) has not been obtained from the AO

Generate signature with the DSC Management Utility available on incometaxindiaefiling.gov.in and the USB token/ pfx file. Login to the account, select 'Profile Settings/ Register Digital Signature Certificate' and upload the signature file

Navigate to 'e-File/Prepare and Submit Online Form (Other than ITR)' and select Form 15CA. Fill in the relevant Part (A/B/C/D) and submit the Form

On successful submission of Form, Acknowledgment will be sent to the email id on record. It can also be viewed under My Account/View Form 15CA. Print the filled Form 15CA and the system generated Acknowledgement. Sign the print out

Submit to the AD, the signed Form 15CA along with Acknowledgment and the Form 15CB (CA certificate) if applicable . AD shall then remit the amount.

Form 15CA filed online can be withdrawn within 7 days from the date of submission

Section 195(6) and Rule 37BB

Furnishing of information / CA certificate

- Information regarding remittance made to NR's needs to be furnished in prescribed form and manner as per Rule 37BB -
  - ➢ Form 15CA ~ Information to be furnished by remitter
  - ➢ Form 15CB ~ Certificate to be obtained from a CA by remitter
- Forms 15CA / 15CB revised vide CBDT Notification dated 16 December 2015
- Amended notification lays down that information regarding all foreign remittances are required to be furnished in Form 15CA, whether or not such sum was chargeable to tax under the Act
- Failure will result in penalty under new section 271-I of the IT Act of INR 100,000 with effect from 1-6- 2015
- Specific Exemptions -
  - ➢ Remittance made by individuals under Liberalised Remittance Scheme of RBI and does not require RBI's prior approval;
  - ➢ Remittance in the nature as provided in the 'specified list'. Currently, 33 transactions are provided

Section 195(6) and Rule 37BB

What is "Form 15CB"?

- Certificate issued by a CA wherein it specifies the documents verified by him
- Following documents are required while issuing Form 15CB -
  - ➢ Agreement entered between the parties (payer and payee)
  - ➢ Invoice / Documentary evidence
  - ➢ Challan evidencing payment of WHT (if tax payable)
  - ➢ TRC and TIN in case of claiming treaty benefit
  - ➢ Form 10F (where specific details as required by Government of India is not mentioned in TRC, in case of claiming treaty benefits)
- ➢ No PE declaration

Obligation of the Payer

- Onerous requirement to determine taxability of the payment
- Evaluate application of the provisions of the Act for taxability
- Evaluate applicability of the tax treaty
- Get confirmation whether payee has a PE in India
- Be aware of latest judicial precedents
- Observe deadlines for WHT and depositing the same

Section 195(6) and Rule 37BB

Form 15CA consists of 4 parts:

Payment chargeable to tax

Part A	Payment(s) made during FY does not exceed INR 500,000. No Form 15CB required for such payments
Part B	To be filled up for payments (other than the payments referred in Part A) made by the remitter after obtaining a certificate from the AO under Section 197 or an order from the AO under Sections 195(2) or 195(3)
Part C	CA certificate obtained in Form 15CB in respect of payments made during FY
Part D	To be filled up by the remitter for the payment which is not chargeable under the IT Act. *Exemptions –* -Remittance made by individuals under Liberalized Remittance Scheme of RBI and does not require RBI's prior approval -Remittance in the nature as provided in the 'specified list'. Currently, 33 transactions are provided

Notification no. 93/2015. F.No. 133/41/2015-TPL dated 16 December 2015. Applicable w.e.f. 1-04-2016.

Step wise procedure for foreign remittance

Obtain certificate of Accountant in Form 15CB

Electronically upload the remittance details in Form 15CA

Print out of the Form 15CA and Form 15CB

Submit the signed paper undertaking to AD Banker along with Form 15CB in duplicate. AD Banker remits the amount

1. Every remittance other than those covered under specified list required to follow procedure even if not chargeable to tax in India.
2. Requires the payer to provide PAN of the non resident
3. Form 15CB needs to be uploaded electronically – information requirement is same as Form 15CA

CA Certificate – Form 15CB

- A certificate issued by a CA specifying the documents verified & providing:
  - Detailed enumeration of the taxability of the remittance under the Act, without giving any effect to DTAA;
  - Details of payee's TRC, relevant Article & tax liability under DTAA, if applicable
- No material change in content under the past & amended provisions
- W.e.f. 1 April 2016, Form 15CB to be furnished electronically
- Cannot be amended or modified after uploading
- On submission, status of the Form shall appear as "Submitted"
-
- On successful filing of the corresponding Form 15CA-Part C, status of Form 15CB shall update to "Consumed"
- If the Form 15CA against which Form 15CB was consumed is withdrawn, status of Form 15CB shall change to "Withdrawn"

CA Certificate – Form 15CB

- Certificate issued by a Chartered Accountant wherein it specifies the documents are verified by him and provides -
  - Detail enumeration of the taxability of the amount under the Income-tax Act, without giving any effect to the DTAA.
  - Where DTAA provisions are sought to be applied, the details of the TRC, applicable DTAA and relevant article, as also tax liability under the DTAA. Nature of remittance — royalties, FTS, interest, dividend; on account of business income; on account of short-term and long-term capital gains; any other remittance
- Following documents are required while issuing form 15CB –
  - Agreement entered between the parties (payee and payer)
  - Invoice / documentary evidence
  - Challan evidencing payment of withholding tax (if tax payable)
  - Tax residency certificate (TRC) (in case of claiming DTAA benefit)
  - Form 10F (where specific details as required by the Government of India is not mentioned in TRC) (in case of claiming DTAA benefit)
  - No PE certificate

CA Certificate – Form 15CB

Requirement of Form 10F and TRC

- Name of the beneficiary
- Address of the beneficiary
- PAN (if allotted)
- Nationality
- TIN of the beneficiary
- Period of residential status

Whilst the prescribed format of TRC was done away with by the Finance Act, 2013, it did provide that additional information and documentation shall be furnished separately. Rule 21AB was consequently amended, which provides that aforesaid information of the foreign assessee is required to be furnished (Form 10F), and sufficient documentation to substantiate the same shall be maintained.

Form 10F is only an ad hoc requirement in order to enable the non-residents to disclose certain information which is not mentioned in the TRC. In case, if the TRC is inclusive of all the requisite information, there is no need to furnish the Form 10F.

Certificate in Form 15CB – Procedure to upload

Remitter adds the CA

- Remitter adds the CA on the e-filing portal under 'My Account/ Add CA', selects 15CB as the Form Name and clicks on submit.

CA registers and generates signature file

- CA registers as 'Chartered Accountant' under 'Tax Professional' and generates a signature file using DSC Management utility.

CA fills up the Form and uploads the xml file

- CA downloads the Form 15CB utility, fills it up, generates an xml file and uploads it i.e. submits the Form 15CB.

Remitter can view the Form uploaded by the CA

- Remitter can view the Form 15CB uploaded by the CA under 'Worklist/For Your Information'

Aids to determine taxability & applicable TDS

Documentary	Legal
• Underlying agreement /contract • Invoice/Debit Note being paid • Other correspondence between parties • A visit to the NR's website to find out more about their Indian operations • TRC & Form 10F of the payee • In case TRC of the relevant period is pending receipt, copy of the application filed for obtaining it • Details of the payee's tax identification or other unique number in the country of residence • Written confirmation from the payee about: – Being the beneficiary of the proposed remittance – Not having a PE in India – Being a tax resident of the home country (if TRC for the relevant period is pending) • Order/ certificate issued u/ss 195(2), 195(3), 197 of the Act • SBI's certificate providing the required TT buying rates	• Provisions of the Act • Provisions of the applicable DTAA (including Protocol, MFN and LOB clauses, if any) • Judicial precedents • Commentaries on the provisions of the Act & DTAA

Reporting Requirements – Practical issues and challenges

1. **Payment by a non-resident to another non-resident outside India -**
   - Explanation 2 to section 195(1) clarifies that obligation to comply with section 195(1) applies to all payers, whether resident or non-resident, and irrespective of whether such non-resident payer has a residence or a place of business or a business connection in India or any other presence in any manner in India
   - Information in Forms 15CA and 15CB is required to be furnished to enable AD in India to remit payment overseas. When a non-resident makes payment to another non-resident outside India, an AD in India would not be involved for remitting the amount
   - Form 15CA also requires furnishing of certain bank details in India which the non-resident might not have
   - How is the reporting requirement to be adhered to in the aforesaid case? Should a non-resident appoint a representative assessee in India for the said compliance?

Reporting Requirements – Practical issues and challenges

2. Payments covered under section 195, but not involving an AD (e.g.: payments by credit card, barter payments, book entries payments to an Indian branch of a foreign company, payments within India, etc.) -

- Information prescribed under section 195(6) of the Act has to be furnished in respect of taxable as well as non-taxable remittances.
- Such payments do not get covered within the list of payment which are exempt from reporting requirements in Para 4 are not required to be reported. Barring these, all other payments need to be reported regardless of the mode of payment.
- How is reporting to be done in such cases?

Reporting Requirements – Practical issues and challenges

3. Transfer of funds from a non-resident's ordinary ('NRO') account to external ('NRE') account: -

- Provisions of section 195(1) would apply only to payments to non-residents.
- Transfer from one account to another account of the same person is not a payment to any person. Thus, section 195 should not apply to such transactions
- However, AD may insist on Form 15CA on account of earlier circular of the RBI under the FEMA, permitting transfer of funds from NRO to NRE account after obtaining certificate and following same procedure of reporting for such remittances
- Practically, a person may not have a choice of not reporting the said transaction vide Form 15CA
- Similar shall be the case for repatriation of current/capital income by a non-resident to own overseas bank account

Reporting Requirements – Practical issues and challenges

4. Payments to non-residents covered under other specific provisions of the Act-

- The Act contains specific provisions for TDS in relation to certain types of payments to non-residents, illustratively the following:
  - Section 194E – payments to non-resident sportsmen or sports associations
  - Section 196A – income in respect of units payable to non-residents
  - Section 196B – income in respect of units payable to Offshore Funds
  - Section 196C – income in respect of bonds or global depository receipts payable to non-residents
  - Section 196D – income of Foreign Institutional Investors from securities
- As the above payments would also involve remittance overseas through an AD in India, a question could arise whether the reporting in Forms 15CA, 15CB would apply.
- Since TDS on the payments above is covered under specific provisions, the mechanism under section 195 of the Act would not apply.
- In aforesaid cases, AD may insist on certification for the purpose of remittance. Thus, practically, the remitter may need to file the forms though not required by law

Reporting Requirements – Practical issues and challenges

5. Payments to non-residents on account of sale of capital asset resulting in a capital loss in the hands of the non-resident-

- Sale of shares of an Indian entity by a non-resident to another person
- The non-resident incurs capital loss on the said transaction
- Section 195(1) of the Act triggers when a payment is made to the non-resident which is chargeable to tax under the provisions of the Act
- In this case, the non-resident has incurred a capital loss and thus, the amount payable to the non-resident is not chargeable to tax and accordingly, provisions of section 195 should not trigger
- However, a deductor shall have to either rely on the computation of the capital loss working as provided by the deductee or it may insist on a certificate of non-deduction u/s 197 from the deductee
- As regards the reporting in Form 15CA, generally the AD bankers may insist on a certificate under section 197, in the absence of which a certificate in Form 15CB may be insisted upon
- Reporting in Form 15CA – whether under Part C or D will have to be evaluated accordingly

Reporting Requirements – Practical issues and challenges

6. Whether Form 15CB is an alternate to an order under section 195(2) of the Act-

- Form 15CB has to be furnished only for taxable remittances exceeding INR 5,00,000 in a FY for which a certificate/ order under section 197/195(2)/195(3) has not been obtained from the AO. This would mean that payments which are not covered by an order/ certificate from the AO, can be remitted based on Form 15CB.
- Mumbai Tribunal, in the case of Mahindra & Mahindra Ltd [2007](106 ITD 521)(ITAT Mum) has held as follows:
  - Remittances being allowed on the basis of CA's certificate is not in substitution of the scheme of things envisaged under section 195(2) of the Act, but merely to supplement the same.
  - CA Certificate has no role to play in determination of TDS liability but is merely to support the assessee's stand while making remittance to a non-resident
  - A payer at his own risk can approach a CA and make remittance to a non-resident on the basis of CA's Certificate. Consequences of non-deduction and short deduction would however follow
- Thus, the Tribunal had held that a CA certificate does not substitute section 195(2) of the Act

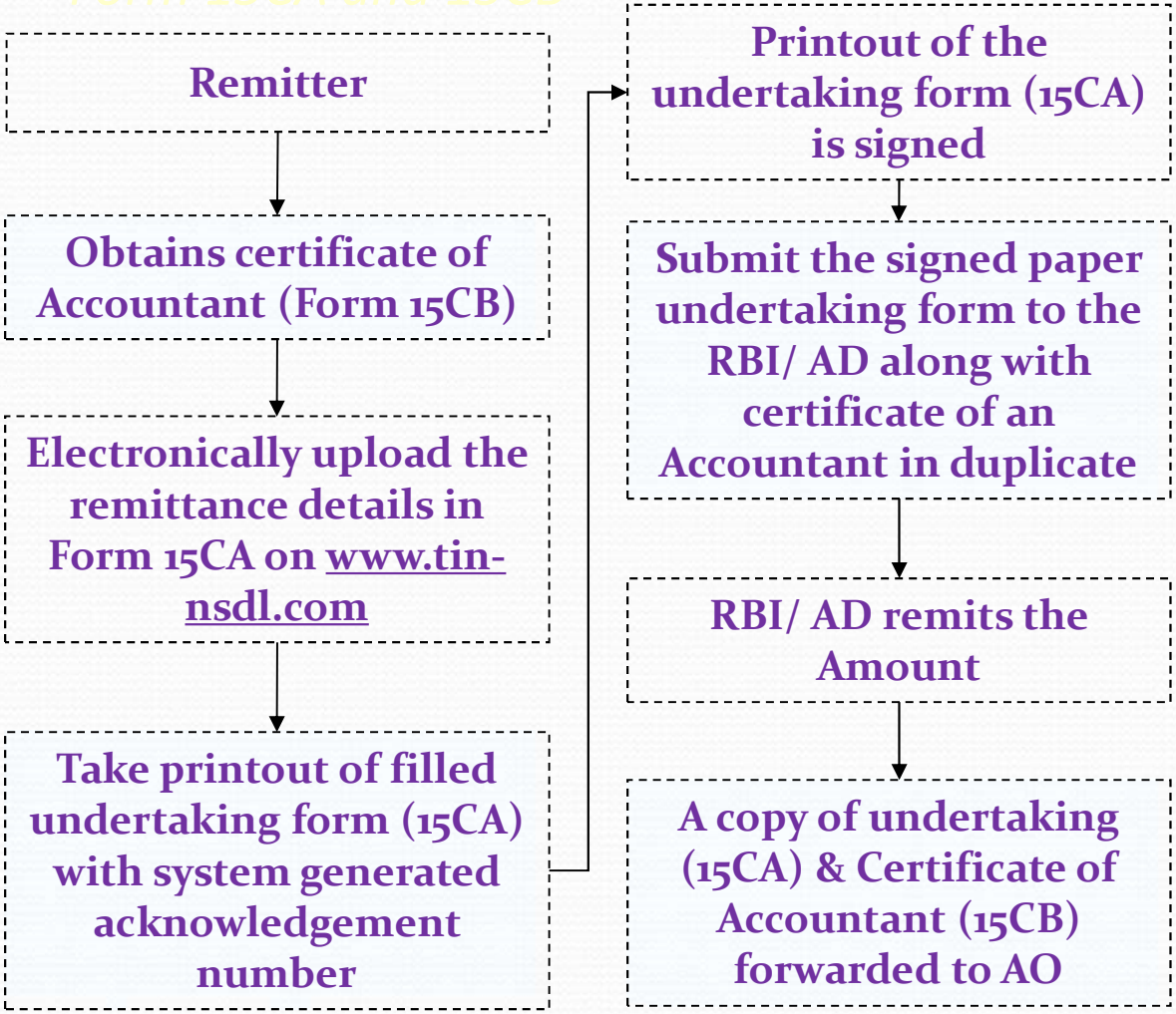
Amendment as per Finance Act, 2015

- ***Reporting of payments to non-residents***

In order to further scrutinize the payments to non-residents, it is proposed that payer shall be under obligation to report specific information in the prescribed form (whether or not such payment is chargeable to tax).

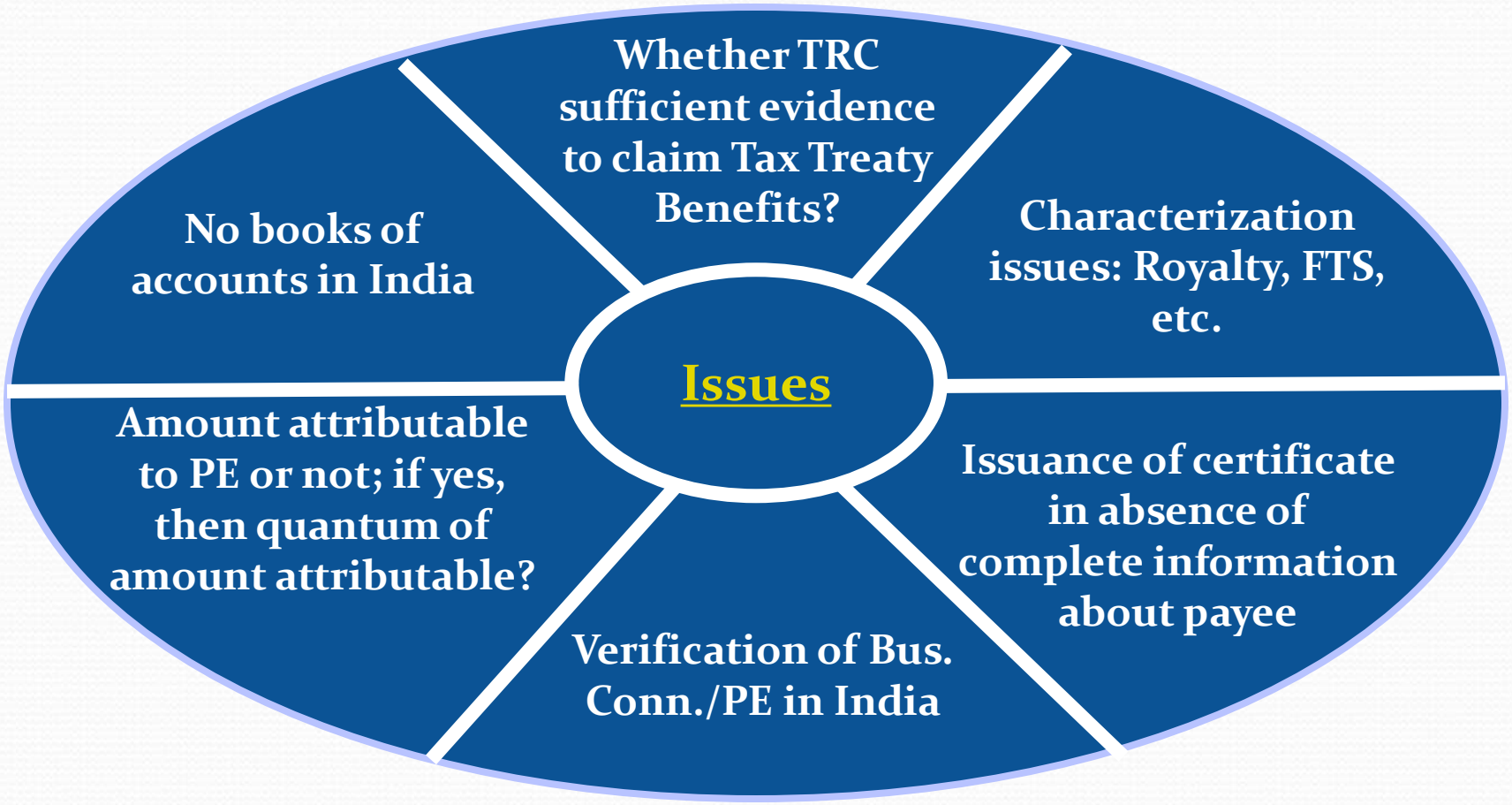
Procedure

Form 15CA and 15CB



- Every remittance required to follow procedure even if not chargeable to tax in India.*
- Requires the payer to provide PAN of the non resident else consequences u/s 206AA will follow
- Form 15CB need not be filed with the tax department – information requirement is same as Form 15CA

Practical Issues in certification by CA



Can Nil withholding foreign remittance certificate be issued???

Is Remittance Chargeable to Tax? (Rule 37BB)

Notification (view)

SN	TRANSACTION	Steps
1	Amount Exceeds Rs 50k or 250k in aggregate?	
2	Signed printout of 15CA to be submitted to the AD after Obtaining 15CB from the Accountant.	Filing of 15 CA & 15 CB
3	Electronically upload remittance details in 15CA	
4	RBI/AD remits the amount	

Sec 195(7) :- authorize a board to specify class of persons or cases

- Applicable w.e.f 1/07/2012 Notwithstanding anything contained in sub-section (1) and sub-section(2), the board may, by notification in the Official Gazettee, specify a class of persons or cases, where the person responsible for paying to a non-resident, not being a company, or to a foreign company, any sum whether or not chargeable under the provisions of this Act, shall make an application to the Assessing Officer to determine, by general or special order, the appropriate proportion of sum chargeable, and upon such determination, tax shall be deducted under sub-section(1) on that proportion of the sum which is so chargeable.

Amendment in Section 195 –

Finance Act 2012

1) The scope of withholding tax obligation on payment of income to non-resident expressly extended to all persons including non-residents irrespective of them having a residence or place of business or business connection or any other presence in India. (Explanation 2 added)

2) Effective 1 July 2012, payment to non-residents by specified persons or in specified cases (to be notified) to require an application to be made to the Tax Officer for determination of withholding tax, irrespective of whether such payment is taxable in India or not. 195(7)

Obligation to withhold the tax will be applied regardless of absence of any territorial nexus.

Refund of Tax Withheld Under Section 195

Refund of Tax Withheld u/s 195…

Payer is entitled to claim refund in prescribed cases

Circular No. 7/ 2007 dt. 23-10-2007

- Contract is cancelled and no remittance is made to the non-resident
- The contract is cancelled after partial execution and remittance related to non-executed part is made to the non-resident. In such cases, the remitted amount has been returned to the person responsible for deducting the tax at sources or no remittance is made but tax was deducted and deposited when the amount was credited to the account of the non-resident.
- Retrospective amendment in law/ exemption by way of notification making the sum remitted exempt from tax
- Order u/s 154/ 248/ 264
- Tax deducted twice on the same income by mistake

…Refund of Tax Withheld u/s 195

- Tax deducted at domestic tax rates; lower rate as per DTAA
- There occurs payment of tax on account of grossing up which was not required under the provision of the Act.
- Prior Approval of the Chief Commissioner/ Director General
- Refund is first to be adjusted against any existing tax liability
- Interest u/s. 244A is not payable on such refunds. However the Apex Court held that such interest is payable by the Govt. – *UOI vs Tata Chemicals Ltd [2014] 43 taxmann.com 240 (SC)*
- Undertaking to be given by the payer that TDS certificate has not been issued
- Deductee has not filed the return of income and time of filing the return has also been lapsed
- Claim should be made within 2 years from the end of the FY in which tax has been deducted

Section 192 – TDS on salaries

- Payment should be in the nature of salary
- The employer has to deduct tax from the salary that he pays
- **At what rate to deduct?** - TDS at average rate of tax on the estimated income of the employee under the head "Salaries"
- **When to deduct?** - TDS is attracted on payment basis. Thus, for example, if salary for March 2009 is paid on 7th April, 2009 then tax has to be deducted in April and not March even if the expense is booked in March
- **When to pay the TDS to the Govt.?** – Within 7 days from the end of the month in which tax is deducted

Consequences of non compliance

Consequences of non compliance…

Applicable section	Nature of default	Consequence
40(a)**	Withholding tax not deducted or not deposited within prescribed time	Disallowance of expenses in computation of taxable income of payer; deduction in year of payment
201(1)	Tax not withheld/ deposited appropriately	Recovery of tax not withheld/ deposited or short withheld/ deposited
201(1A)	Tax not withheld/ deposited appropriately	Interest @ 1% per month or part of he month
221	Tax withheld not paid	Penalty, not exceeding the amount of tax not paid
271C	Tax not withheld or short withheld	Penalty, not exceeding the amount of tax not withheld

…Consequences of non compliance

Applicable section	Nature of default	Consequence
272A	Delay in issuing withholding tax certificate/ filing withholding tax statement	Penalty @ Rs 100 per day for period of default, subject to maximum of the tax withheld
276B	Withholding Tax not deposited within prescribed time	Prosecution of the principal officer, by way of imprisonment for a term between 3 months to 7 years and with fine



Key takeaways

Concluding Thoughts

- Payment to non-residents should be thoroughly examined from tax withholding perspective
- Payments can be remitted under the alternate mechanism (with CA Certificate) if the case is strongly supported by judicial precedents
- In case of doubt coupled with substantial amount - Advisable to obtain tax withholding order u/s 195(2)
- Mitigate grave consequences of non compliance with S.195



Tax Withholding from cross-border transactions is critical

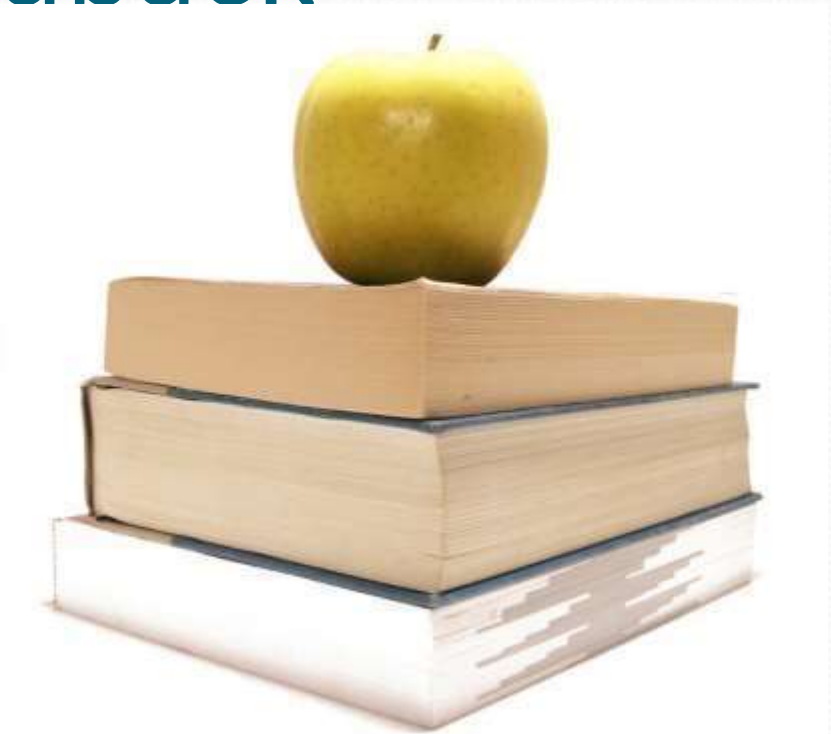
Open house



Questions…


WHERE?
HOW?
WHAT?
QUESTIONS?
WHY?
WHEN?
WHO?
WHAT IF?

Any Feedback



Your feedback is valuable and will help me improvise my skill-sets

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THANK YOU

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