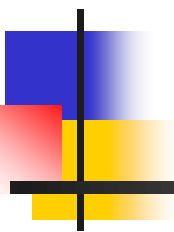


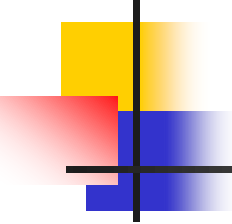
Two Days Conference on Taxation by
All India Federation of Tax Practitioners (Western
Zone) Jointly with The Southern Gujarat Income
Tax Bar Association, Surat on 7th & 8th April, 2012



Taxation of Non Residents

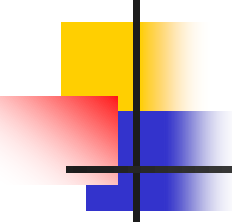
Presented by:
Mr. Paresh P. Shah

P.P. Shah & Associates
Chartered Accountants
Email: ppshahandassociates@gmail.com



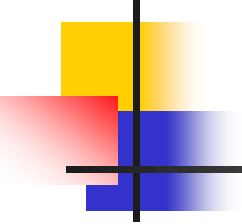
Overview of Presentation

- Need & the Rationale
- Definition of Non Resident under Foreign Exchange Management Act, 1999 (FEMA) & Income Tax Act, 1961 (ITA)
- FEMA & ITA compared
- Non Resident taxation
- Computation of Income
- Minimum Alternate Tax for foreign company
- Exemptions to non-residents
- Tax Deduction at Source
- Wealth Tax & Gift Tax
- Tax proposals in Finance Bill, 2012 – Amendments & GAAR
- Questions & Answers



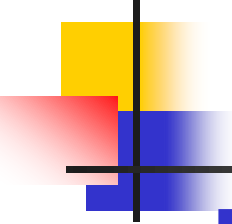
Need and Rationale

- Taxation on the basis of connecting factors of Subject (tax payer) of taxation or Object (activity) of taxation
- Source Rule for Object and Resident Rule for Subject. If all the countries adopt source as principle there will not be any Double taxation
- Taxation on the basis of Source Rule or Resident Rule, mix of the two is most common
- State has right to tax subject on the basis of their participation in the economic, commercial and social life of any territory
- Capital export and import neutrality



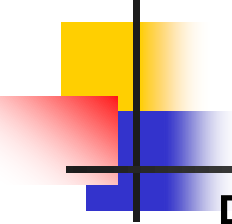
Definitions

- Section 6 of the ITA, 1961
- Section 2(v) of FEMA
- A Person can be Resident (R) or Non Resident (NR) under both the Acts
- A Person can be Resident under one of the Acts & Non Resident under the another
- Illustration



Residential Status under ITA

- S. 6(1) Basic conditions for individuals
 - Physical presence test of 182 days, or
 - Physical presence test of 60 days in a financial year & 365 days or more in preceding 4 years to the subject previous year (on an average 92 days over 4 preceding years)
 - Exception in case of citizens going abroad for employment or for an employment as a member of crew of an Indian ship
 - NRI/PIO (on visit to India) as defined under Expln. to S.115C(e) – a restricted meaning
- S. 6(6) Not ordinarily Resident if Individual is
 - Non resident in India for 9 out of 10 previous years or
 - his stay in India is less than 730 days in 7 preceding years (on an average 104 – 105 days over 7 preceding years)
- Other Assesseees are resident if management & control is in India except in case of Companies, management & Control is situated wholly in India
- Returning persons who were in employment are not included in the exception to S.6(1)



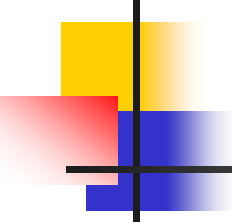
Residential Status under FEMA

Person Resident in India (PRII) means

- A person residing in India for more than 182 days during the course of preceding financial year but does not include
 - A person who has gone out of India or who stays outside India in either case for specified purposes
 - A person who come to or stays in India in either case otherwise than for the specified purposes

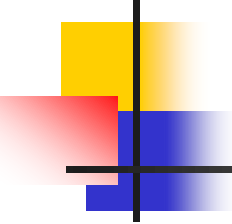
* Specified purposes: Employment, business or intention to stay for uncertain period

- Other Person are treated as residents on the basis of their incorporation or registration
- An Office, Branch or Agency in India of a PROI
- An Office, Branch or Agency outside India of a PRII



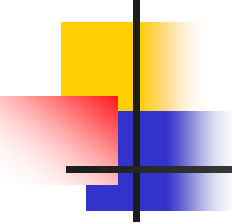
Determination of Residential Status

- Mr. Emigrant, an Indian citizen, leaves India on 26th September 2011 to take up employment in Dubai
- Mr. Traveller stays outside India for about more than 182 days for the purpose of his employment



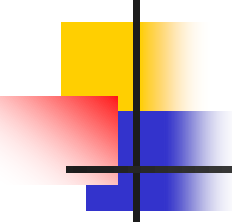
Determination of Residential Status

- Mr. Traveller, an Indian citizen & Managing Director of Global Pharma Co., visits various countries for aggregate of 190 days during the F.Y. 2011-12, in connection of his export business from India
- Mr. Traveller stays less than 182 days in India



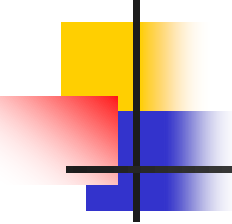
Determination of Residential Status

- Mr. Arrival a non resident research scholar of USA arrives in India for permanent settlement on 10th October 2011. He has never visited in India in last five years before his arrival
- Mr. Arrival comes to India permanently & stays for less than 182 days



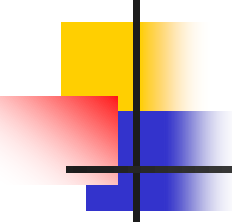
Planning of Residential Status

- Departure from India & Arrival into India
 - Date of travel
 - Purpose of travel
 - Previous travel record
 - Stay period in the year of arrival/departure
 - Procedural issues
- Residential status in Treaty State & Double Tax Avoidance Agreement – Article 4 of the Double Tax Convention may apply



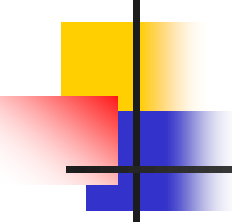
FEMA & ITA - Purpose

- Taxation in India – Purpose under ITA
- Permissibility of a transaction in case of NR/R under FEMA and Taxation in India under ITA
- Duration of the Residential Status
- Current & Capital Account Transactions under FEMA
- Tax law can determine residential status on last day but FEMA can decide on a daily basis



Non Resident Taxation

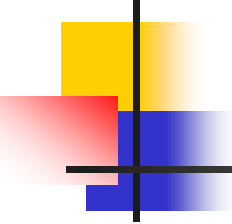
- Chargeability & Scope of the Taxation – Sec. 4, 5, 6 & 9 of ITA
- Proposed GAAR provisions in the Finance Bill, 2012
- Taxation of Non Resident Indians (NRIs)
- Taxation of Non Residents (including foreigners)
- Exemptions
- Procedure & Returns



Scope of Taxation

- In case of Non Resident
 - Income received or deemed to be received in India (irrespective of accrual)
 - Income accrues or arises in India or deemed to accrue or arise in India is chargeable to tax u/s 5(2)(a) & 5(2)(b) respectively
- Concept of “Receipt”, “Accrues or arises” and “deemed to Accrue or arise”

Performing Right Society Ltd. Vs CIT 106 ITR 11 (SC): Place of signing the agreement is not relevant for accrual



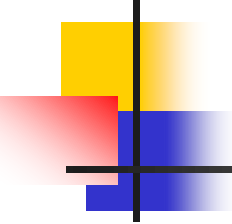
Income deemed to accrue or arise

- Sec. 9 of the ITA provides for list of income which is deemed to accrue or arise in India
 - Income accrues directly or indirectly from any business connection in India or from or through- any property/source of income or transfer of asset [Sec (9)(1)(i)] –Amendment in Finance Bill, 2012
 - Income from Salaries earned in India [Sec (9)(1)(ii)]& salary paid by Govt for services rendered out side India 9(1)(iii)]
 - Dividend paid by Indian Co. [Sec (9)(1)(iv)]
 - Income in the nature of interest, royalties & fees for technical services [Sec (9)(1)(v), (vi) & (vii)]
 - S. 9(1)(vi)-Amendment in Finance Bill, 2012



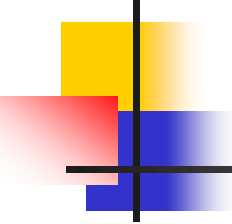
Taxability of Non-Residents under the Income Tax Act, 1961

Section	Nature of Income	Description / Source Rule
9(1)(i)	Business Income	Income from a business connection in India or through or from any property or capital asset or source of income or transfer of capital asset situated in India
9(1)(ii)	Salaries	Salaries for services rendered in India
9(1)(iii)	Salaries	Salaries by Govt. to Indian citizen for services outside India
9(1)(iv)	Dividend	Dividend paid by an Indian company outside India (now exempt)
9(1)(v)	Interest	Interest by Govt. or by a resident (unless for the purposes of a business or source outside India)
9(1)(vi)	Royalty	Royalty by Govt. or a resident (unless for the purposes of a business or source of Income outside India)
9(1)(vii)	FTS	Fees for Technical Services by Govt. or a resident (unless for a business or source outside India)



Definition: Royalty – S.9(1)(vi)

- IT Act, 1961: Consideration 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 on working of ;
 - (iii) the use of any patent, invention, ;
 - (iv) the imparting of any information or skill ;



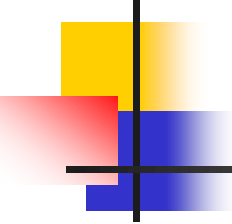
Definitions: Royalty (con't)

- IT Act, 1961: Consideration for

(iva) the use or right to use equipment but not including the amounts referred to in section 44BB;

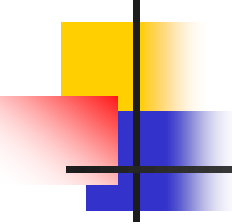
(v) the transfer of all or any rights (including the granting of a licence) in respect of any copyright, , but not including cinematographic films ; or

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



Definition: Fees for Technical Services – S.9(1)(vii)

- FTS defined under the Act as 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”
[Explanation 2 to Section 9(1)(vii)]



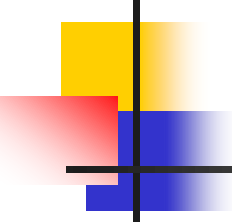
Source Rule - Royalty

- As per S.9(1)(vi), income by way of royalty payable by—

(a) the Government ; or

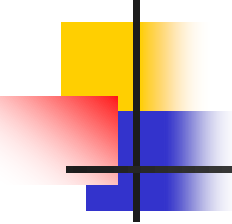
(b) a person who is a resident, except where the royalty is payable in respect of any right, property or information used or services utilized for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India ; or

(c) a person who is a non-resident, where the royalty is payable in respect of any right, property or information used or services utilized for the purposes of a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India



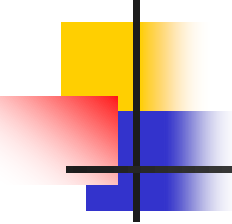
Source Rule - FTS

- As per S. 9(1)(vii), income by way of Fees for Technical Services payable by—
 - (a) the Government ; or
 - (b) a person who is a resident, except where the fees are payable in respect of services utilized in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India ; or
 - (c) a person who is a non-resident, where the fees are payable in respect of services utilized in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India



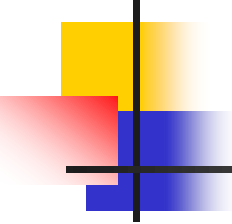
Source Rule & Scope - FTS

- Services are paid by specified persons, Government, Resident & Non-resident
- Services are in accordance with the proposals approved by the Government
- Services are used / utilised in India
- What about location of services to be rendered in India
 - Rendered in India and utilised in India
[Territorial nexus: Ishikawajima's case 288 ITR 408(SC)]
 - Retrospective clarificatory amendment w.e.f. 1.4.1976 through Finance Act, 2007 to Section 9
 - Deemed to accrue or arise in India and shall be included in the total income of the non-resident whether or not
 - (i) the non-resident has a residence or place of business or business connection in India or
 - (ii) the non-resident had rendered services in India



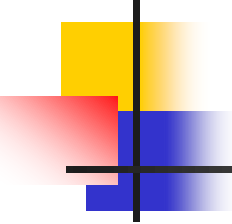
Taxation of Non Residents – Treaty Operation

- Source Rule
- Source taxation limitation
- Lower rates of taxation
- Narrower scope of income
- Not a charging provision, can only reduce burden
- Treaty, a part of domestic law
- Computation rule of ITA applies
- Article 3(2) of DTAA
- Non discrimination under Article 24 of DTAA



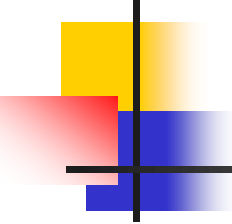
Taxation of Non Residents – Computation of Income

- Specific provisions Vs general provisions
 - CIT Vs Copes Vulcan Inc. [167 ITR 884 (MAD.)]
- Exclusion from income of each type
- Gross basis of taxation Vs net basis
- Scheme of the ITA – Gross basis, Net basis, Tax rates & TDS
- Simultaneous operations of the provisions are normally avoided
- Circular No. 333 dt. 2nd April, 1982 & S.90(2): If provisions of the DTAA are beneficial, then that shall prevail
 - CIT Vs Vishakhapatnam Port Trust [144 ITR 146 (SC)]



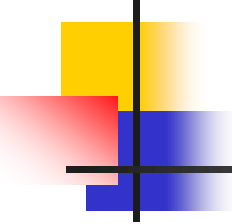
Taxation of Non Residents – Computation of Income

- Section 9(1)(i)
 - Business Connection Test: R. D. Aggarwal's case [56 ITR 20 (SC)]
 - Rule 10 of ITA, proportionate method a guess work, No. of HC and SC's decision on the subject of determination of proportion.
 - Expanded meaning of Business Connection-Presence of Agent
 - Exclusions u/s. 9(1) & Articles 5 & 7 of the DTAA
 - Under the Treaty, income is taxed only if NR has PE in India as per the attribution rules of Article 7 subject to S.44 C of ITA
- Section 9(1)(ii)
 - Salary income if it is earned in India
 - S. 10(6)(vi), S. 16 & 17 of ITA read with Article 16 of DTAA
- Section 9(1)(iii)
 - Salary income payable by the Government to a citizen of India for services outside India read with Article 19 of DTAA on Government services



Taxation of Non Residents – Computation of Income

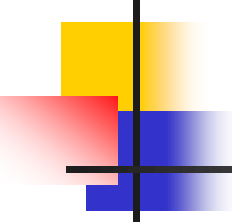
- Section 9(1)(iv)
 - A dividend paid by Indian company outside India
 - Exempt under ITA u/s. 10(34), Article 10 of DTAA may reduce tax on dividend as and when applicable. Tax credit of DDT in COR
- Section 9(1)(v) – Source rule for interest:
 - Defination Of Interest S.2(28A) and Art 11 of Art.11
 - Income by way of interest payable by (a) Government, (b) Resident, (c) Non Resident
 - Provisions of Article 11 of DTAA may reduce the burden of taxation on interest income of the Non Resident



Source Rule compared – Royalty & FTS

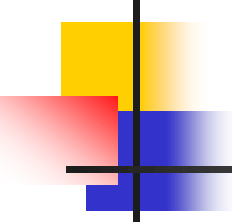
S. 9(1)(vi) & 9(1)(vii) Compared with Article 12 of the DTAA

- Royalties and FTS arising in a contracting state and paid to a resident of the other contracting state may be taxed in that other state [Article 12(1)]
- Royalties or fees for technical services shall be deemed to arise in a contracting state when the payer is a resident of that state. Where, however, the person paying the royalties, whether he is a resident of a contracting state or not, has in a contracting state a permanent establishment or a fixed base in connection with which the liability to pay the royalties was incurred, and such royalties are borne by such permanent establishment or fixed base, then such royalties shall be deemed to arise in the state in which the permanent establishment or fixed base is situated [Article 12(5)]
- Article 12(5) states only a source rule but no distribution rule as found in Article 12(1)



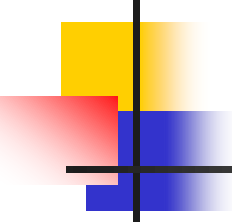
Taxation of NRIs - Chapter XIIA

- 115C – Definitions
- 115D – Computational Provisions
- 115E – Tax rates on investment, income & capital gains
- 115F – Capital gains on foreign exchange assets not to be charged in certain cases
- 115G – Filing Returns
- 115H – Benefits to Resident/s
- 115I – Option of the Assessee
- Planning for Non Residents



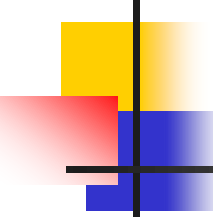
Special Provisions for NRI - XIIIA

- Eligible Assessee – Only NRIs
- Nature of Income – Investment Income & LTCG from foreign exchange asset, as specified
- Specified Asset – Shares, Debentures and Deposits of Public Company; Public Deposits and notified securities of Central Government
- Tax Rates: Investment Income @ 20%
Long term capital gain from specified asset @ 10%



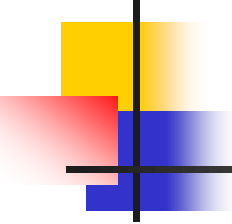
XIIA - Computation of Income

- Taxation on gross basis only
- No deduction of expenses
- No deduction u/c VIA of the Act
- Capital gains computation in Foreign currency as per 1st proviso to sec 48
- No capital gains if amount of gain is reinvested (sec 115F)
- No return of income is required if
 - Income includes only investment & LTCG
 - Tax as required is deducted as per ITA
- Provisions are redundant – e.g. Exempt dividend, LTCG & STCG with STT, Equity oriented Mutual Fund income, etc.



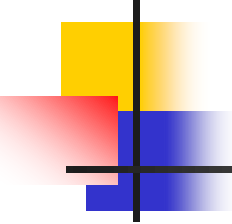
Capital Gains on shares & debentures

- Capital Gains where Securities Transaction Tax is applicable
 - LTCG exempt from tax [sec 10(38) of ITA]
 - STCG tax @ 15% (sec 111A)
- LTCG where STT is not applicable
 - Sec 48: Computation of capital gains
 - proviso to sec 48 provides for computation in FC
 - Sec 112 provides for rates of taxation
 - All Non resident persons are taxed @ 20%
 - Tax rates of 10% under proviso to S. 112 before application of 2nd proviso to S. 48 as held in Timken, France [AAR No. 739 of 2006]; Fujitsu Services [AAR No. 800 of 2009]
 - However, benefit of 10% under proviso to S. 112 not available to non-residents as held recently in Cairn UK Holdings [AAR No. 950/2010 dt. 01.08.2011]
 - Provisions of the DTAA – Article 13



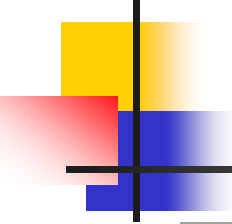
Special tax provisions for NRs

- Sec 115A: Applicable to all NRs in respect of income from dividend, interest, units of MFs, Royalties & FTS (except CG) received from Government or Indian concern
- Sec 115AB: Applicable to Overseas Financial Organization in respect of Income & LTCGs from units of MFs
- Sec 115AC: Applicable to NRs in respect of income from Bonds & GDR of Indian Co. or a public sector Co. or dividends from Bonds & GDR or LTCG from its transfer, Transfer of GDR by NR to NR, is not a transfer(S.47).Conversion of FCCB to shares is also not a transfer under clause 8 of the Scheme
- Sec 115AD: Applicable to only FII on income from securities & CGs



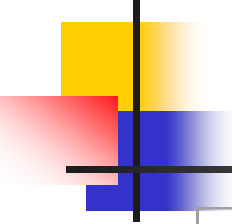
Special Provisions – 115A

Nature of Income	Div	MFs Units	Int	Int - Debt Fund	Roy	FTS	
Tax Rates	20	20	20	5	10	10	
Chap VIA dedn	No	No	NO	NO	Yes	Yes	
Dedn of exp and who can be payer	No expenses u/s 28 to 44C or sec. 57 of ITA and payment be made by Govt or Indian concern (not defined)						
Return of Income (ROI)	No ROI if a) income includes only dividend, interest & income from units of MFS, and b) TDS is deducted as per ITA						



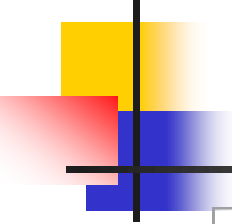
Special Provisions – 115AB

Nature of Income	Income from MF Units	LTCG from transfer of MFs Units
Tax Rates	10	10
Second Proviso to Sec. 48	-	Not Apply
Chapter VIA Deduction	Not available	
Return of Income (ROI)	No exemption for filing ROI	



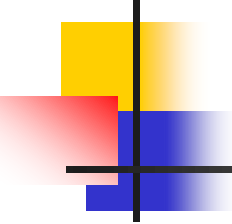
Special Incomes - Sec 115AC

Nature of Income	Div	Int	LTC
Tax Rates	10	10	10
Proviso to sec 48	-	-	Not Apply
Chap VIA dedn	Not Available		
Dedn of exp	No expenses available for deduction		
Return of Income (ROI)	No ROI if a) income includes only dividend, interest & income from units of MFS, and b) TDS is deducted as per ITA		



Special Income of FII–Sec 115AD

Nature of Income	Div	Int	STC	LTC
Tax Rates	20	20	30	10
Chap VIA dedn	Not Available			
Dedn of exp	No Expenses available for dedn			
Return of Income (ROI)	No ROI if a) income includes only dividend, interest & income from units of MFS, and b) TDS is deducted as per ITA			



Presumptive Taxation

- Income of Foreign Shipping Company in India (Sec 44B & 172) / Article 8 of DTAA
- Income from providing services etc. in connection with business of exploration etc. of mineral oils (Sec 44BB) / Article 5 & 7 of the DTAA & S.28 to 43 of ITA
- Business of operation of Aircrafts (Sec 44BBA) / Article 8 of DTAA
- Business of civil construction in Turnkey Power Projects (Sec 44BBB) / Article 5 & 7 of the DTAA & S.28 to 43C of ITA
- Non Resident Sportsmen or Sports Association (Sec 115BBA) / Article 7 of the DTAA

Presumptive Taxation – Special provisions in case of Non-Residents engaged in certain business

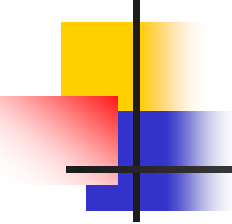
	Sec. 44B	Sec. 44BB	Sec. 44BBA	Sec. 44BBB
This section applies to -	Non-resident engaged in operating ships	Non-resident engaged in providing service / facilities or supplying plant / machinery for extraction or production of mineral oils (incl. petroleum & natural gas)	Non-resident engaged in operating Aircraft	Foreign company engaged in civil construction or erection, testing or commissioning of plant or machinery in connection with an approved turnkey power project
Deemed Income	7 ½% of gross receipts	10% of gross receipts	5% of gross receipts	10% of gross receipts
Computation of lower income	Not available	Available	Not available	Available

Tax rate as applicable to foreign companies is 40% + 2% Surcharge + 3% Education cess



Presumptive Taxation – Special provisions in case of Non-Residents engaged in certain business (con't)

	Sec. 172	Sec. 115BBA
This section applies to -	Non-resident engaged in operating ships	Non-resident sportsmen or sports associations
Deemed Income	7 ½% of gross receipts	10% of gross receipts
Computation of lower income	Available	Not available
Tax rate as applicable to foreign companies is 40% + 2% Surcharge + 3% Education cess		



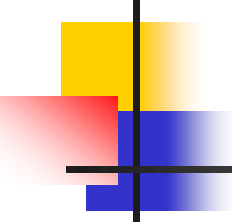
Taxation: S. 44DA

- This section applies to Non-resident (not being a company) or a foreign company receiving income by way of Royalty or Fees for Technical Services, right, property or contract in respect of which is effectively connected to a PE or fixed place of profession in India. PE is now defined U/S 92F(iia).
- Income is computed under the head 'Profits & Gains of business or profession'
- Provisions of S. 44BBB shall not apply (Note the exclusion u/s. 9(1)(vii))
- Articles 5 & 7 of the DTAA also applies



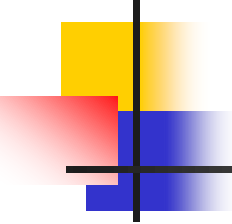
Taxation: S. 44DA

Receipts pursuant to agreement after 1.6.2005	Rate	Applicable Section	Basis of taxation
a) If effectively connected with PE or fixed place of profession even if Government approved or in accordance with industrial policy.	40%+s.c.	44DA	Net
b) Not effectively connected with PE i. Approved by Government or in accordance with Industrial policy ii. Not covered by (i.) above	10%+s.c. 40%+s.c.	115A S.28 r.w. amended S.44D	Gross Net (?)
• Whether TDS necessarily @ 10% even if receipt effectively connected with FE's PE? • Applicability of Section 115A for payment by PE of FCO in India., Can that satisfy the term Indian concern? • Allowance and reimbursements by NR'S PE in India			



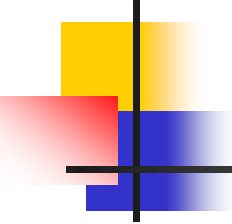
Minimum Alternate Tax (MAT)

- Provision applies to Foreign companies
 - Definition of a company in S. 2(17)
- Maintenance of books
- PE or presence
- Circumstances under which MAT does not apply to a Foreign company
- Provisions of MAT are not applicable to a foreign company that has no place of business or PE in India and is not required to make out annual accounts as per provisions of Companies Act [The Timken Co., USA - [2010]326 ITR 193(AAR)]



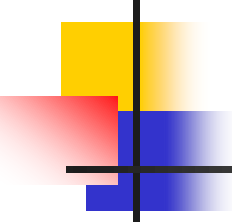
Exemptions to Non-residents

- Interest on NRE Deposit u/s. 10(4)(ii)
- Remuneration received by an Individual u/s. 10(6)(vi)
- Salary received from employment on a foreign ship u/s. 10(6)(viii)
- Fees earned by consultant u/s. 10(8A)
- Interest on specified securities u/s. 10(15)
- International sporting event held in India u/s. 10(39)
- Profits from units in FTZ/SEZ or an undertaking as EOU u/s. 10A, 10AA & 10B
- Eligible articles or things u/s. 10BA



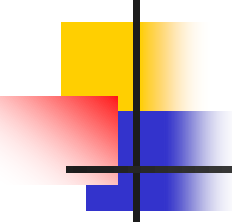
Exemptions to Non-residents (con't)

- Income of Foreign Venture Capital Investor (FVCI) / Venture Capital Fund (VCF) registered with SEBI is exempt from tax [S. 10(23 FB)]
 - Such investments to be made only in domestic unlisted companies
 - Investee companies to be engaged only in specified activities
- Such VCFs have 'pass through status' i.e. investors in VCF are taxed on any income distributed by the VCFs (S. 115U)
 - Tax treatment depends on nature of income viz. dividend, short-term gains, long-term gains
- No tax exemption for unregistered VCFs
 - It can however avail benefits of DTAA if India has with that jurisdiction



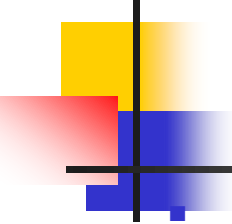
Exemptions to Non-residents (con't)

- Capital Gains on Units of Unit Scheme, 1964 [S. 10(33)]
- Any income by way of dividend referred to u/s. 115 [S. 10(34)]
- Any income received in respect of units of Mutual Funds [S.10(35)]
- Long term capital gains on Equity shares and Units of Equity oriented Mutual Funds on which STT is paid [S. 10(38)]



TDS from income of NRs

- S 192, in case of payment of salaries
- S 195, all other payments (except as under) sum chargeable to tax
- S 196B: Payments of income by MFs to Overseas Financial Organization @ 10%, however, no TDS is provided for LTCG
- S 196C: Dividend, Interest & LTCG from Bonds/GDR @ 10%
- S 196D: Income of FII & not LTCG @ 20%



Computation of income of NR in India

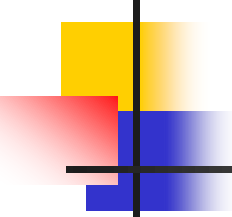
Normal computation procedure of S. 16 to 27 in case of salaries & income from house property and u/s 28 to 44C for business income is applicable

- Business income sec 9(1), Business connection in India, attribution as per rule 10 if
 - there is presence of Permanent Establishment of NR & income in India
 - Prominent example is Branch of a Foreign Bank
 - Other income of S. 9 is taxed on a gross basis
- Presumptive taxation in India S.115 applicable strictly as per the conditions of each of subsection, S.44 to S.44BBB etc. & S.172 of ITA(A code by itself as distinguished from S.44B).Provisions of S.172 are notwithstanding the Act. where as S.44B makes exception to S 28 to 44C
- MAT, surcharge & Education cess [S. 2(37A), on rates in force] on income in India
- Double Tax Avoidance Agreements [S. 90(2)]
- Advance Rulings u/s 245 of ITA
- Tax is deducted on most of the income either u/s 192 or u/s 195/196-Refer chart
- Income can be taxed on a net basis also. Tax rates are different for net basis of taxation.Sec 9(1),S.44DA,S.172 and where accounts are maintained and lower tax option is available under presumptive tax provisions ie.S.44BB and 44BBB.



Determination of Appropriate Tax

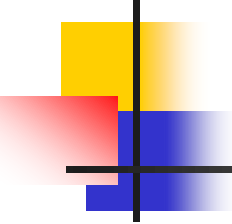
- S 195(2): Option to payer for application to A.O. for obtaining certificate to deduct tax at a lower rate
- S 195(2): Option to recipient NR to make application to AO for lower deduction of tax
- S 197(1): Application by the assessee to AO for lower deduction of tax
- S 245N: Application to AAR by a NR applicant or Resident payer for a transaction or proposed transaction
- Remittance
 - Cir No. 10/2002, dt. 9/10/2002
 - C.A. Certificate; Form 15 CA & Form 15 CB (Cir No 4/2009 dt. 29/06/2009)
- Net of tax income, S. 195A & presumptive tax
- Treaty rates and S. 2(37A)
- S. 206AA & TDS



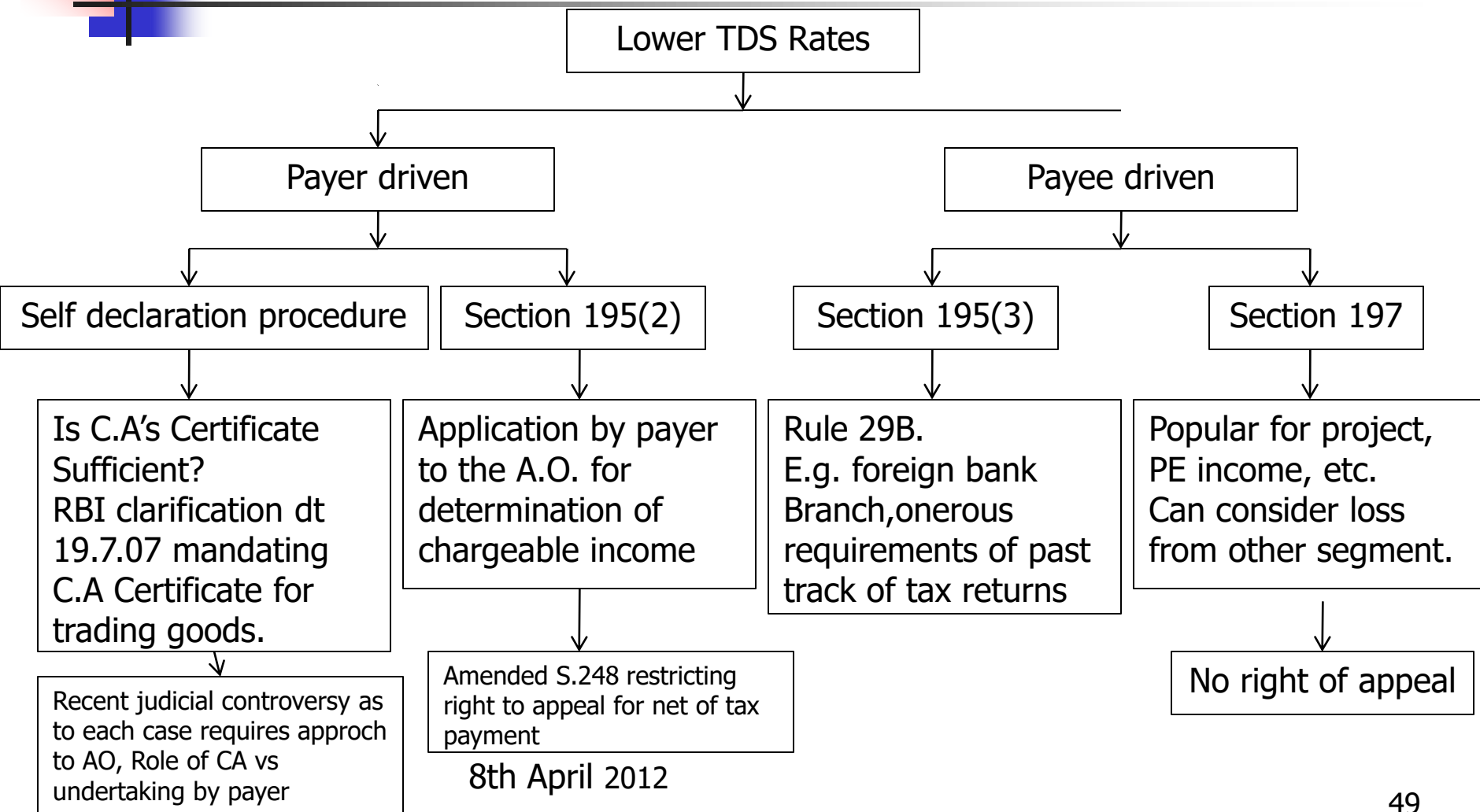
Overview of TDS u/s 195 & Certification by CA for remittances

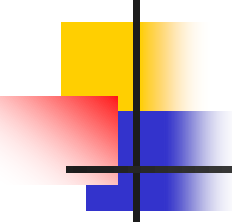
S. 195 & Treaty:

- Rule 26 for TDS AND 115 for computation, 115A for NRI
- Tax Residency Certificate (Azadi Bachao [263 ITR 706(SC), FA 2012 provides that it is NECESSARY but not sufficient ,new form will be prescribed.
- Whether CA duty-bound to determine existence of PE and / or place or residence of Non Resident?
- Whether CA certificate an alternative to S.195(2) (Mahindra & Mahindra Ltd. [106 ITD 521(Mum)]) , "Beneficiary" vs recipient of remittance in the Form 15 CA and Form 15 CB
- Validity period of undertaking / declarations from payee – for a year or for a single payment ?
- Applicability of S.195 and S.163; extent of simultaneous operation, simultaneous action by AO under Sec 201 AND s.163.
- Tax credit in the country of Residence of Non Resident
- FA 2012 provides for clarification that any person could be non resident with or without any presence in India who is liable to deduct TDS. Tax may be deducted even if the income is not chargeable to tax in a case CBDT so notifies for class of tax payers.



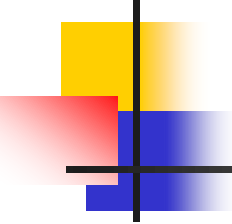
TDS Obligation





Return of Income by Non Resident

- Individual & HUF only, exempted from filing of ROI if income is below threshold limit
- Companies, Partnership firms & other assesseees are required to file their ROI irrespective of their income, subject to exemptions under ITA



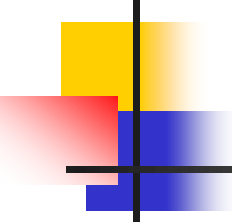
Wealth Tax & Gift Tax for Non Resident

Wealth Tax

- Assets located outside India are exempt in case of NR & NOR
- Assets of Returning Indians & PIOs exempt for 7 A.Ys following the year of return to India

Gift Tax

- Donee based taxation & precautionary provisions are now included under ITA

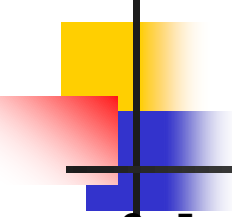


Tax proposals in Finance Bill, 2012 – Amendment to Section 9

- Amendment in Section 9 (as proposed to be inserted in Section 9(1) w.e.f. 01.04.1962)

Explanation 4 – For the removal of doubts, it is hereby clarified that the expression “through” shall mean and include and shall be deemed to have always meant and included “by means of”, “in consequence of” or “by reason of”

Explanation 5 – For the removal of doubts, it is hereby clarified that an asset or a capital asset being any share or interest in a company or entity registered or incorporated outside India shall be deemed to be and shall always be deemed to have been situated in India, if the share or interest derives, directly or indirectly, its value substantially from the assets located in India.



Finance Bill, 2012 – Amendment to Section 9 (con't)

9. Income deemed to accrue or arise in India – (1) The following incomes shall be deemed to accrue or arise in India –
- (i) all income accruing or arising, whether directly or indirectly through (“by means of”, “in consequence of” or “by reason of”) or from any business connection in India, or through (“by means of”, “in consequence of” or “by reason of”) or from any property in India, or through (“by means of”, “in consequence of” or “by reason of”) or from any asset or source of income in India, or through (“by means of”, “in consequence of” or “by reason of”) the transfer of a capital asset situate in India

Original DTC provision

5. (4)(g) income from transfer, outside India, of any share or interest in a foreign company unless at any time in twelve months preceding the transfer, the fair market value of the assets in India, owned, directly or indirectly, by the company, represent a least fifty per cent of the fair market value of all assets owned by the company

Tax proposals in Finance Bill, 2012 – Amendment to Section 9 (con't)

- Treaty provisions in case of indirect transfer

BVI Co /
US Co/UK Co



Mauritius
Co



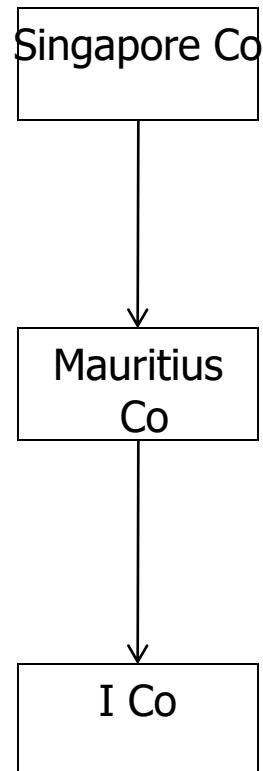
I Co

Transfer of shares of Mauritius Co by BVI or US /UKCo Outside India may be regarded as transfer by BVI of an asset located in India and may be regarded as chargeable to capital gains tax in India in case of “look through” approach.

DTAA with UK or USA does not provide any Special relief to a taxpayer in respect of capital gains income as it states that respective domestic tax law applies

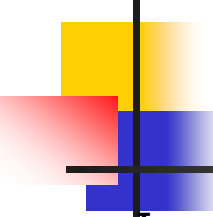
Tax proposals in Finance Bill, 2012 – Amendment to Section 9 (con't)

- Treaty provisions in case of indirect transfer



Transfer of shares of Mauritius Co by Singapore Co may be regarded as transfer of an asset located in India

In a case if M co is disregarded then treaty with Singapore may apply if the transfer is of shares of a company which is not a resident of India



Tax proposals in Finance Bill, 2012 – Amendment to Section 2(14) & 2(47)

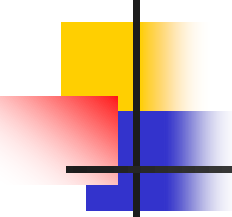
In section 2 of the IT Act –

- (i) in clause (14), at the end, the following Explanation shall be inserted and shall be deemed to have been inserted w.e.f. 1st April, 1962, namely:-

‘Explanation- For the removal of doubts, it is hereby clarified that “property” includes and shall be deemed to have always included any rights in or in relation to an Indian company, including rights of management or control or any other rights whatsoever’

- (iv) in clause (47), the Explanation shall be numbered as Explanation I thereof and after Explanation 1 as so numbered, the following Explanation shall be inserted and shall be deemed to have been inserted w.e.f. 1st April, 1962, namely:-

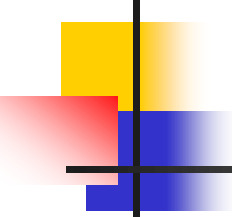
‘Explanation 2- For the removal of doubts, it is hereby clarified that “transfer” includes and shall be deemed to have always included disposing of or parting with an asset or any interest therein, or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by way of an agreement (whether entered into India or outside India) or otherwise, notwithstanding that such transfer of rights has been characterized as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India’



Finance Bill, 2012 – Amendment to S. 9(1)(vi)

In clause (vi) after Explanation 3, the following shall be inserted and shall be deemed to have been inserted w.e.f. 1st June, 1976:

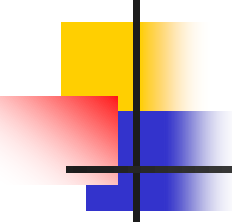
- Explanation 4 – For the removal of doubts, it is hereby clarified that the transfer of all or any rights in respect of any right, property or information includes and has always included transfer of all or any right for use or right to use a computer software (including granting of a licence) irrespective of the medium through which such right is transferred.
- Explanation 5 – For the removal of doubts, it is hereby clarified that the royalty includes and has always included consideration in respect of any right, property or information, whether or not –
 - (a) the possession or control of such right, property or information is with the payer;
 - (b) such right, property or information is used directly by the payer;
 - (c) the location of such right, property or information is in India



Finance Bill, 2012 – Amendment to S. 9(1)(vi)

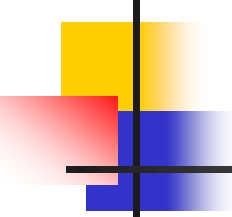
In clause (vi) after Explanation 3, the following shall be inserted and shall be deemed to have been inserted w.e.f. 1st June, 1976:

- Explanation 6 – For the removal of doubts, it is hereby clarified that the expression 'process' includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion or down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret



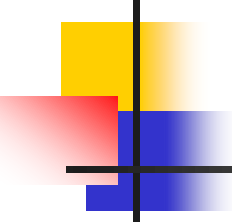
Finance Bill, 2012 – Definition of Royalty [w.e.f. 1st April, 1976]

- Payment towards use of 'process' is considered to be royalty income which is deemed to accrue or arise in India u/s. 9(1)(v)
- It is said that for removal of doubts, it is clarified, the expression 'process' is deemed to include transmission by satellite, cable, optic fibre or any other similar technology. The up-linking, amplification, down-linking of signals are also included.
- The 'process' need not be a secret process so as to be covered in the definition



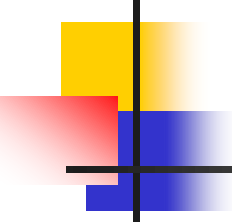
Finance Bill, 2012 – Definition of Royalty [w.e.f. 1st April, 1976] – con't

- A payment can be characterized as royalty even if:
 - Possession or control of such right, property or information is not with payer
 - Right, property or information is not used directly by payer
 - Location of such right, property or information is not in India
- Will adversely affect the telecom companies and related service providers
 - Area of overlap between service and Royalty is expanded
- The activity of transportation is distinct from the activity of transmission
- TDS obligation u/s. 194J extends also to royalties
 - Exposure to disallowance u/s. 40(ia) in view of retrospective amendment to Definition. S.40(ia) has been amended by the Finance Bill on a prospective basis



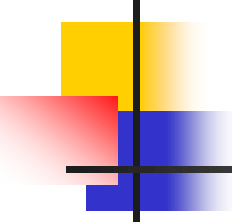
Finance Bill, 2012 – Transfer Pricing provisions

- Advance Pricing arrangement
- Domestic Transfer Pricing invoked
- Safety band specified
- Consequential issues



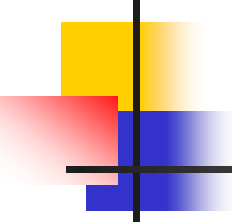
Finance Bill, 2012 – Advance Pricing – Main features

- Agreement between Tax Payer and Revenue about manner and Pricing of future transactions
- Valid for 5 years subject to certain factors
- Information from third parties
- Modified return in case of invalidity of agreement
- W.e.f. 1st July, 2012 applicable only in case of international transactions



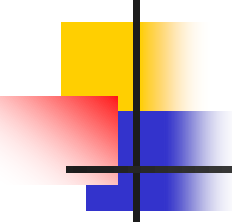
Finance Bill, 2012 – Domestic Transfer Pricing

- Applicability:
 - Undertaking under profit exemption scheme
 - Intra division
 - Closely connected parties
 - Entity & Related parties u/s. 40A
 - Specified transactions by CBDT
 - Limit to Rs. 5 crore & lower



Tax proposals in Finance Bill, 2012 – Transfer Pricing – other provisions

- Appeal by AO possible against the order of DRP
- DRP powers expanded
- Safety up to 3% on overall basis
- Industry-wise norms to be specified
- Expanded definition of International Transaction
- Overlapping transactions:
Transactions under domestic Transfer Pricing with
International Transactions



General Anti Avoidance Rules

- FA 2012 Introduced new chapter X A to the ITA-General Anti Avoidance Rules
- Any arrangement as defined u/s 102(1) by a tax payer may be treated as Impermissible Avoidance Arrangement if the main purpose of the arrangement is to obtain a tax benefit accompanied with certain obvious circumstances as described u/s 96(1) such as bonafide nature of, lacks commercial substance, not resembling ALP, not etc leading to its impermissibility under the Act.
- Consequences of declaring the arrangement as Impermissible: tax benefit or the treaty benefit will be appropriately decided by disregarding certain steps or structures or by recharacterising certain income, reallocating income between the persons, treating the place of residence of the party or location of the asset or the location of the transaction at different place under the arrangement or treating the tax payer and the accommodating party as one etc etc. as provided under S.98
- Provisions of Chapter will apply in addition to any other basis for determination of tax liability. Guidelines may be prescribed to apply the provisions of the chapter

Finance Bill, 2012 – Impermissible avoidance arrangement (S.96)

- Chapter X-A of the ITA -An arrangement is an “impermissible avoidance arrangement (IAA) if:

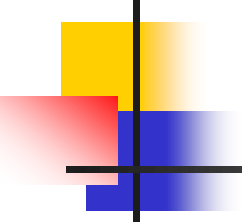
Primary condition

Main purpose or one of the main purpose is to obtain tax benefit
If there is tax benefit as defined, then onus is on tax payer to establish that it is not so.
(DTC had only main purpose test)

with

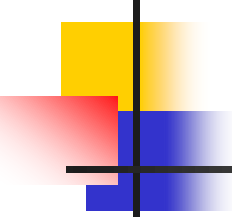
Presence of one of the following

Creates rights and obligations which are not ordinarily created between persons dealing at ALP, (can there be question even if transaction is at ALP but ordinarily not entered by unrelated parties?)
(DTC used the word 'normally' instead of 'ordinarily')
OR
Results, directly or indirectly, in the misuse or abuse of the provisions of the Act, (What can be meaning of misuse? Or abuse? No defn.)
OR
Lacks commercial substance or is deemed to lack commercial substance in whole or in part
(Defined with substantially wide scope in FB 2012)
OR
Entered into or carried out by means or in a manner which are not ordinarily employed for bona fide purposes
(DTC used the word 'normally' instead of 'ordinarily')



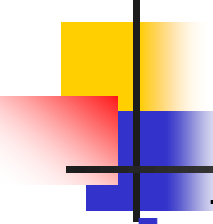
Finance Bill, 2012 – Tax benefit [S.102(11)]

- “Tax benefit” in relevant previous year or any other previous year means
 - A reduction, avoidance or deferral of tax or other amount payable under ITA
 - Increase in refund of tax or other amount under ITA
 - Reduction, avoidance or deferral of tax or other amount that would be payable under ITA as a result of a tax treaty
 - An increase in refund of tax or other amount under the ITA as a result of a tax treaty
 - A reduction in total income including increase in loss
- Presumption that arrangement is for main purpose of tax benefit unless taxpayer proves that such was not the main purpose [S.96(2)]



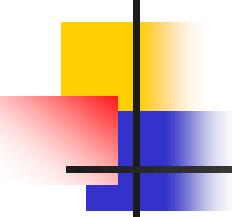
Finance Bill, 2012 – Meaning of “main purpose”

- Some dictionary meanings:
 - ‘Main’ – chief in size or extent; constituting the bulk; the chief part; of pre-eminent importance; principal; chief; leading
- “Quantum” of tax benefit vis-à-vis other parameters determine whether the ‘main purpose’ is to obtain a tax benefit
- The word “mainly” has been construed as:
 - A purely quantitative measure of more than 50%
 - As conveying the idea of dominant/prominent
 - More than anything else, for the most
 - Principally has been referred under tax treaty as more than 50%



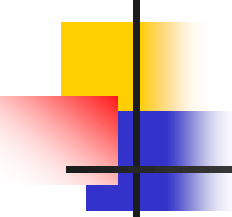
Finance Bill, 2012 – Presumption of purpose [S. 96(2)]

- If there is a tax benefit-
 - Burden of proof to prove that 'main purpose' of arrangement is not to obtain tax benefit is on taxpayer (same as DTC)
 - Burden of proof to establish one of the four criterion is on Revenue-this will only arise when tax payer is not able to discharge his burden to demonstrate that the purpose of the arrangement is not to obtain tax benefit
- Arrangement can be presumed to have main purpose as tax benefit even if:
 - Main purpose of step in, or a part of, the arrangement is to obtain tax benefit
- Recommendation of SCF was that onus of proof should lie on the Tax Authority



Finance Bill, 2012 – Determination of Tax benefit (S.99)

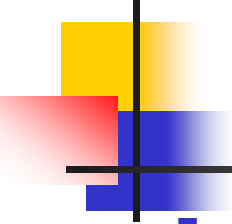
- To establish whether or not “tax benefit” exist:
 - Connected persons may be treated as one and the same person
 - Accommodating party may be disregarded
 - Accommodating party and other party may be treated as one and the same person
 - Arrangement may be considered or looked through by disregarding corporate structure



Finance Bill, 2012 – Lacks commercial substance [S.97(4)]

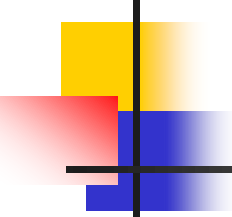
- No regard for following factors to decide whether an arrangement lacks commercial substance:
 - Period or time for which the arrangement (including operations therein) exists
 - Fact of payment of taxes, directly or indirectly, under the arrangement
 - Fact that an exit route (including transfer of any activity or business or operations) is provided by the arrangement

- No such provisions found in DTC



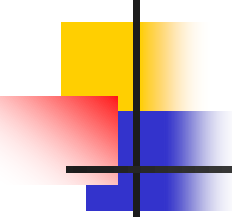
Finance Bill, 2012 – Tax consequence if GAAR invoked (S.98)

- Denial of tax benefit or a treaty benefit on a case to case basis based on circumstances of each case and presence of one or more of the four criterians such as to Bonafide, ALP, abuse or misuse of the Law or Commercial Substance.
- Examples - inclusive basis:
 - Disregard / combine / re-characterize steps or parts
 - Treat as if IAA not entered into or carried out
 - Disregard any 'accommodating party' or treat any 'accommodating party' and any other party as one and the same person
 - Deem persons who are connected to be one and the same person
 - Reallocate income / expense / deduction / relief, rebate, etc
- DTC provided exhaustive test



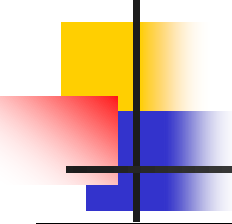
Finance Bill, 2012 – Tax consequence if GAAR invoked (S.98) – con't

- Illustrative list of consequences:
 - Treat place of residence of any party to be at a place other than its place of residence, location of asset or location of transaction
 - Treat situs of asset to be at a place other than its place of residence, location of asset or location of transaction
 - Treat situs of transaction to be at a place other than its place of residence, location of asset or location of transaction
 - Considering or looking through any arrangement by disregarding corporate structure
- Effect of the consequences [S. 98(2)]:
 - Treat equity as debt or vice versa
 - Treat accrual or receipt of capital nature as revenue and vice versa
 - Re-characterize expense / deduction / relief, rebate, etc.



Finance Bill, 2012 – other provisions / features

- GAAR provisions applicable from A.Y. 2013-14. Not likely to apply to transactions concluded prior to 31.3.2012 or to income accruing prior to A.Y. 2013-14
- In respect of continuing of past transactions and in respect of income pertaining to the period after 1.4.2012, GAAR will apply as few steps in the arrangement or the understanding are executed or carried out during the period after 1.04.2012



Tax proposals in Finance Bill, 2012 – GAAR: A process w.e.f. 1.4.2012

AO to make reference to CIT if during assessment / reassessment based on evidence / material considered necessary to invoke GAAR 1

CIT to give taxpayer an opportunity to be heard 2

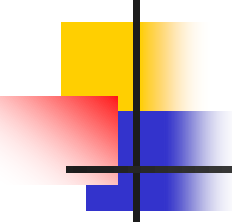
If CIT is of the opinion that provisions can be invoked, Then he shall refer matter to "Approving Panel" 3

After enquires & further reports, "Approving Panel" may either declare the arrangement to be IAA or otherwise and such Order be made within six Months from the CIT's reference 4

"Approving Panel" to determine consequences of IAA including the period 5

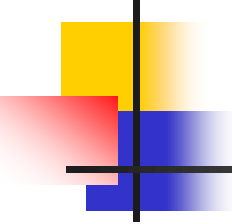
Final Order by AO after approval of CIT. Such order is Appealable to ITAT similar to Provisions for the order of DRP 6

- "Approving Panel" to comprise of minimum 3 members of Commissioner level and above
- Opportunity of being heard to be given to taxpayer as well as tax authority



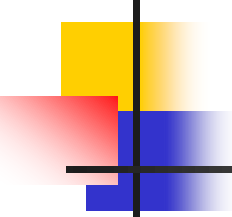
Finance Bill, 2012 – GAAR: Illustrative consequences

- In the given example if GAAR proceedings are initiated against US Co then AO can
 - Disregard formation of Mauritian Co
 - Regard Mauritian Co as an accommodating party
 - Treat M Co and US Co to be one (i.e. transaction is of US Co which sold the shares of I Co)
 - Reallocate income to US Co though income actually accrues to M Co
Considering 'look through' of arrangement and disregard Co
- If GAAR proceedings are initiated against M Co
 - Treat M Co and US Co to be one (i.e. US Co itself has sold shares of I Co)
 - The place of residence of M Co may be treated at a place other than Mauritius



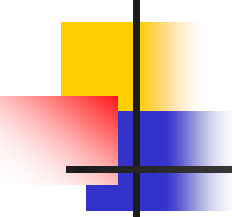
Finance Bill, 2012 – Amendment to Section 195

- Explanation 2 – For the removal of doubts, it is hereby clarified that the obligation to comply with sub-section (1) and to make deduction there under applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to all persons, resident or non-resident, whether or not the non-resident person has –
 - (i) a residence or place of business or business connection in India;
or
 - (ii) any other presence in any manner whatsoever in India.”



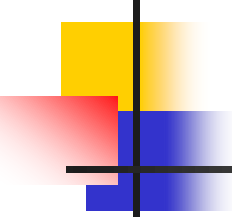
Finance Bill, 2012 – Amendment to Section 195 (con't)

- “(7) Notwithstanding anything contained in sub-section (1) and sub-section (2), the Board may, by notification in the Official Gazette, 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.”



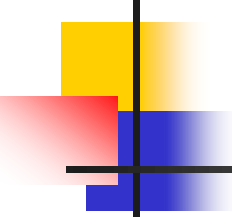
Finance Bill, 2012 – Amendment to Section 195 – Areas of caution

- Obligation of Non-Resident to deduct tax applies irrespective of:
 - Residence or place of business or business connection in India
 - Any other presence in any manner whatsoever in India(This will nullify the judge remarks in Vodaphone's case
CBDT to specify class of persons or cases who will be mandated to
make application to AO for determining withholding rate)
- When arrangement is "declared" as an IAA, it could mean that payer being connected/acomodating party liable to deduct Tax
- Payer may have exposure as an agent of Non-Resident
 - Time limitation extended under section 149(3) to six years



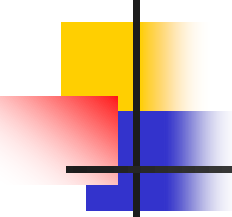
Tax proposals in Finance Bill, 2012 – Memorandum explaining the provisions of Finance Bill, 2012: excerpts

- The section codifies source rule of taxation wherein the state where the actual economic nexus of income is situated has a right to tax the income irrespective of the place of residence of the entity deriving the income. Where corporate structure is created to route funds, the actual gain or income arises only in consequence of the investment made in the activity to which such gains are attributable and not the mode through which such gains are realized.
- Certain judicial pronouncements have created doubts about the scope and purpose of sections 9 and 195.
- Therefore, there is a need to provide clarificatory retrospective amendment to restate the legislative intent in respect of scope and applicability of section 9 and 195 and also to make other clarificatory amendments for providing certainty in law.



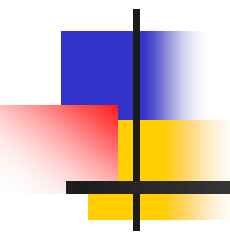
Tax proposals in Finance Bill, 2012 – Tax Residency Certificate ('TRC')

- It is provided that wef 1 st April 2013,treaty benefit will be available to Non-Resident only if he/it furnishes TRC from the Government of other country including therein particulars as may be prescribed
- Explanatory Memorandum to the Finance Bill, 2012:
 - Treaty benefits are obtained by those not resident of treaty country
 - Third party residents claims the treaty benefit
 - TRC is a necessary (but not sufficient) condition for treaty benefit
 - Issue – TRC required only in cases of remittance?
 - May or may not apply where S.195(2) / S.197 certificate is issued
 - May delay remittance process -Form 15CA / 15CB procedure



Finance Bill, 2012 – Term defined by Notification (S.90/90A)

- Meaning of an undefined term in Act or DTAA will now be assigned by notification issued by CG u/s 90/90A(3) and shall have effect from date on which DTAA comes into force-Benefit of Article 3(2) of the MC by Source state as India.
- Notification does not require reference to other contracting state for assigning meaning to undefined term, which may be drafted and most likely to benefit Source state in India
- Tax credit issue likely to arise in other contracting state mainly at Resident state, which does not agree to assigned meaning by India as Source state
- Date of applicability:
 - w.e.f. 1.10.2009 and w.e.f. 1.06.2006 in context of Explanation 3 to S.90(3) and in context of Explanation 3 to S.90A(3) respectively



Thank You
