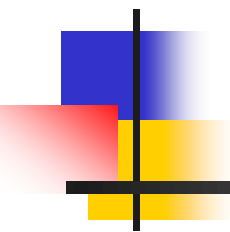


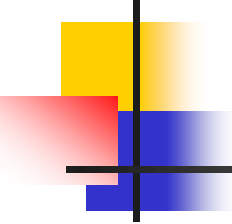
Two days National Conference of Mangaluru
Branch of SIRC of ICAI

FEMA and Issues in Taxation of Non Residents



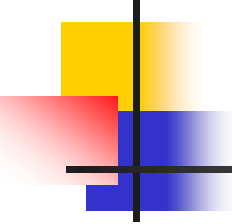
Presented by:
Mr. Paresh P. Shah

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



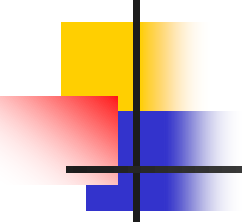
Overview of Presentation

- Need & the Rationale
 - Residential Status under Foreign Exchange Management Act, 1999 (FEMA) and Income Tax Act, 1961 (ITA)
 - Non Resident Taxation
 - Scope of Total Income & Computation of Income
 - Filing of Return of Income
 - Exemptions to non-residents
 - Wealth Tax & Gift Tax
 - Minimum Alternate Tax for foreign company
 - Tax Deduction at Source
 - Section 195, 197 & 206AA
 - Tax Residency Certificate
 - Form 15CA/CB



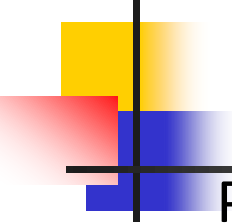
Need and Rationale

- 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 2(v) of FEMA
- Section 6 of the ITA, 1961
- 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



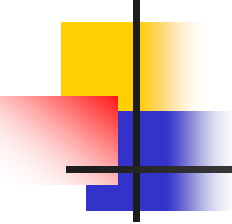
Residential Status under FEMA

Person Resident in India (PRII) means

- A person residing in India for more than 182 days in the preceding previous 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 or 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 owned & controlled by a PROI
- An Office, Branch or Agency outside India owned & controlled by a PRII



Determination of Residential Status

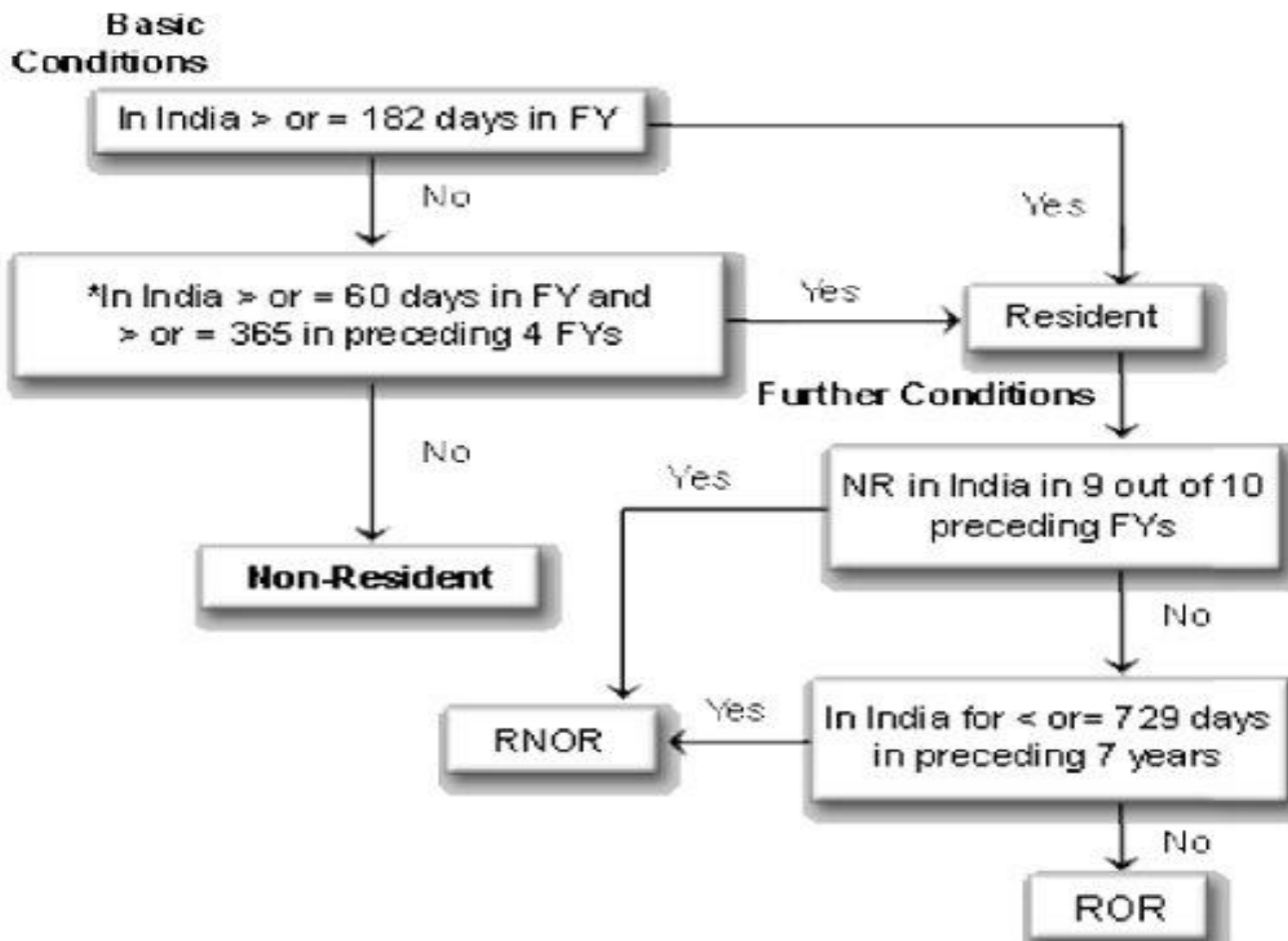
What is his residential status under ITA & FEMA in F.Y 19-20 in the following cases

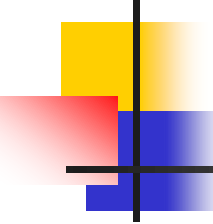
- Case 1 - Mr. A, an Indian citizen, leaves India on 26th September 2019 to take up employment in Dubai.
- Case 2 - Mr. T, an Indian citizen & Managing Director of Global Pharma Co., visits various countries for aggregate of 190 days during the F.Y. 2018-19, in connection of his export business from India. He stays for less than 182 days in India.
- Case – 3 Mr. S, a Non Resident, research scholar of USA arrives in India for permanent settlement on 10th October 2019. He has never visited in India in last five years before his arrival

Residential Status under ITA

- For Individuals

Status	Conditions	Avg Stay in India
Resident [S 6(1)(a)]	Present in India for at least 182 days in the previous year	
Resident [S 6(1)(c)]	Present in India for at least 60 days in the previous year AND at least 365 days in the 4 years preceding the previous year	92 days in a year for 4 years
Resident but not Ordinary Resident [S 6(6)(a)]	Present in India for less than 729 days during the preceding seven years OR who was a non resident in nine out of ten preceding previous years <i>(not a Resident v Non Resident)</i>	104 days in a year for 7 years
Non Resident	One who does not satisfy the above conditions	





Residential Status under ITA

- Explanation to Section 6(1)

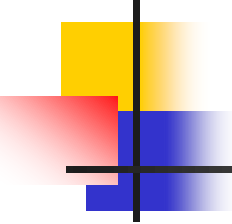
Explanation 1

- (a) Individual – Citizen of India – leaves India in P.Y – for purpose of employment outside India – or as a member of crew of Indian Ship, then 60 days would be substituted by 182 days in section 6(1)(c);
- (b) Individual - Citizen of India or a person of Indian origin - who being outside India - comes on a 'visit' to India in P.Y - then 60 days would be substituted by 182 days in section 6(1)(c).

Non Resident Indian (NRI) as defined u/s 115C (e) means an individual who is a Non Resident and an Indian Citizen or a Person of Indian Origin (PIO). A PIO means a person who himself, or either of his parents, or either of his grandparents, were born in undivided India.

Explanation 2 (w.e.f 01.04.2015)

-Individual – Citizen of India – Member of crew of foreign bound ship leaving India – period of stay in India – manner as may be prescribed
(Notification 70/2015 dated 17.08.2015 – Rule No. 126)



Person leaving India for Employment

1. An Indian employee leaving India in the course of his existing employment on a business visit. He continues to be on the payroll of the Indian company.
NOT ENTITLED to the benefit of the explanation.
2. An Indian employee leaving India on deputation. He continues to be on the payroll of the Indian company
ENTITLED to the benefit of the explanation.
3. An Indian employee leaving India for taking up a new employment with his existing employer; (e.g. on deputation). His payroll is transferred to the payroll of the overseas entity.
ENTITLED to the benefit of the explanation.
4. An Indian employee leaving India for taking up a new employment, with a new employer
ENTITLED to the benefit of the explanation

Residential Status under ITA

- For Others

Status	Assessee	Conditions
Resident [S 6(2)]	HUF/Firm/AOP	Resident in India EXCEPT where in that year control & management of its affairs is situated wholly outside India
Resident but not Ordinary Resident [S 6(6)(b)]	HUF	Karta/Manager is present in India for less than 729 days during the preceding seven years OR who was a non resident in nine out of ten preceding previous years <i>(not a Resident v Non Resident)</i>
Resident [S 6(3)]	Company	-Indian Company - Control & Management of its affairs is situated wholly in India (upto 31.03.2016) -Place of Effective Management is in India (w.e.f 01.04.2016) <i>(Refer Draft POEM Guidelines dated 23.12.2015)</i>



Calculating No. of Days Stay in India

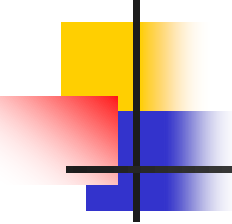
While determining the residential status, the following needs to be kept in mind;

- Date of Travel
- Purpose of travel
- Previous travel record
- Stay period in the year of arrival/departure

While calculating the no. of days of stay in India of an individual;

- ❑ One must include both, the day of entry in India as well as day of exit from India. *{Petition No. 7 of 1995 225 ITR 462 (AAR)}*
- ❑ Both days should be counted as “in India” *{AAR 233 ITR 462}*
- ❑ Day of arrival is to be excluded -*Fausta C. Corderio [2012] 53 SOT 522 (Mum ITAT)*
[Manoj Kumar Reddy v. ITO [2009] 34 SOT 180 (Bang.) wherein reference was made to section 9 of General Clauses Act, the first day in series of days had to be excluded
- ❑ Only day of departure has to be considered as “in India” *{ITO v Dr. R.K Sharma (Jaipur Tribunal No. 1230 dated 22.08.86)}*

A better view is to include both the day of entry as well as exit.



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

Place of Effective Management

Where management decisions are taken and not where such decisions are implemented

General Provisions Place where Board of Directors meets provided they -

- 1) Retain and exercise their authority to govern the company.
- 2) Make the key management and commercial decisions from that place.
- 3) Not routinely accept the decisions of senior management team
- 4) Exercises their power available and it is not exercised by someone else say holding Co. or shareholder
- 5) That these powers are not delegated to the committee formed by the senior management

POEM where senior management (SM) and support staff is located



- 1) If they formulate the key strategic policy and oversee that these are executed and/or implemented;
- 2) Place known to the public as head quarter or principal place of business

If SM located at many places then -



Place where SM is predominantly based
Or Where SM's base cannot be decided then
Location of CEO/ CFO with support staff is the POEM



Cannot be determined then the test fails

POEM for Active and other business

Active Business



Defined



If Board Of Directors meet outside India and makes decisions on key managerial and commercial decisions.

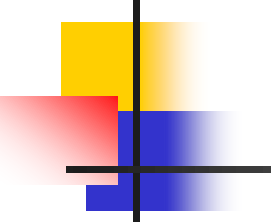
Other Business



General Test Applies

None of the fixed Place is available due modern day technology then -

- a) Place of main/ substantial activity;
- b) Place of accounting record



**NO POEM
IF :**

Parent Co. is in India

One or more directors of Foreign Co. reside in India

Local management is situated in India in relation to the operations in India

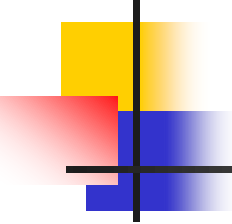
Support functions that are preparatory and auxiliary in character carried out in India

Routine operational decisions by junior and middle management

Exemption to Foreign Companies from this provision:

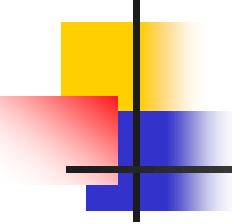
1. Circular no 6 of 2017 dated 24.01.2017
2. Circular no 8 of 2017 – F No. 142/11/2015-TPL dated 23.02.2017

Subject to chapter XII BC- Section 115JH of the ITA



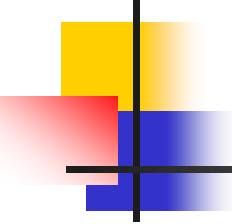
Non Resident Taxation

- Chargeability & Scope of the Taxation – Sec. 4, 5, 6 & 9 of ITA
- Taxation of Non Resident Indians (NRIs)
- Taxation of Non Residents (NR's & NRI's)
- 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

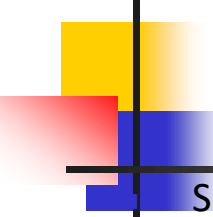


Income deemed to accrue or arise

- 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)]
 - 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)(viii) : Payment by Resident to Non Resident

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)
9(1)(viii)	Gift	Income arising outside India, being any sum of money referred to in section 2(24)(x) r.w.s 56(2)(viia) to 56(2)(x)



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
- Business Connection: Acting on behalf of Non Resident (Explanation 2 to section 9 w.e.f 01.04.2019)
- Significant Economic Presence Test (Explanation 2A to section 9 w.e.f 01.04.2019)

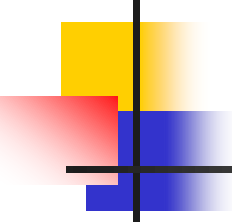
■ Section 9(1)(ii)

- 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

Section 9(1)(i) – Business Connection Concluding Contracts



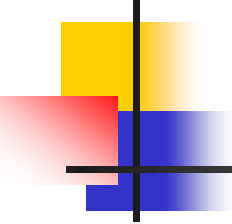
- W.e.f 01.04.2019 as per Explanation 2 to Section 9 has been amended to define business connection to include business activity carried out through a person who, acting on behalf of the non-resident;
 - who habitually exercises in India authority to conclude contracts on behalf of the non-resident where the contracts are
 - (i) in the name of the non-resident; or
 - (ii) for the transfer of the ownership of, 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
 - (iii) for the provision of services by the non-resident; or

Section 9(1)(i) – Business Connection Economic Presence

- W.e.f 01.04.2019 as per Explanation 2A to Section 9 has been introduced wherein it is clarified that significant economic presence of a NR in India shall constitute Business Connection;
- "significant economic presence" (SEP) 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,-

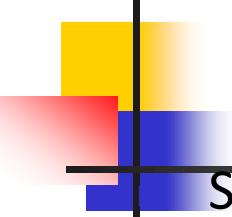
- (i) the agreement for such transactions or activities is entered in India; or
- (ii) the non-resident has a residence or place of business in India; or
- (iii) the non-resident renders services in India:



Taxation of Non Residents – Computation of Income

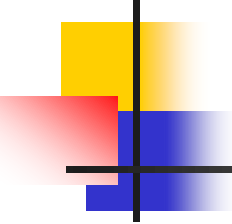
- Section 9(1)(iv)
 - A dividend paid by Indian company outside India
 - Exempt under ITA u/s. 10(34) (to the extent of Rs. 10 lacs but not applicable to Non-Residents), Article 10 of DTAA may reduce tax on dividend as and when applicable. Tax credit of DDT in COR
- Section 9(1)(v) – Source rule for interest:
Definition 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

Definition: Royalty – S.9(1)(vi)



S 9 (1)(vi): Royalty: Consideration for the transfer of all or any rights (including the granting of a license) and information, use and imparting of skill, use of equipment, copy rights and services as defined.

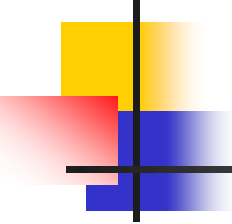
- Therefore, Income by way of 'royalty' payable by a person who is a resident of India is deemed to accrue or arise in India (except when the royalty is payable in respect of any right, property or information used or services utilized for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India).
- Consideration for transfer of rights (including granting of a license) in respect of a trade mark or similar property or for use of a trademark or transfer of rights (including granting of a license) in respect of any copyright, literary, artistic or scientific work, falls under the definition of 'Royalty' under the IT Act.



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)]



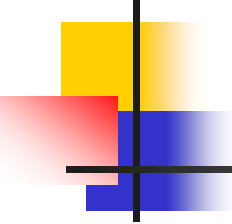
Source Rule - Royalty

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

(a) the Government ; or

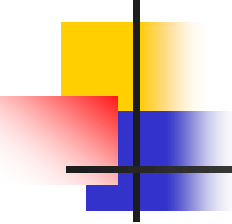
(b) a person who is a resident, except where the royalty is payable in respect of any right, property or information used or services utilized for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside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



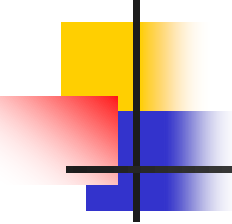
Source Rule & Scope - FTS

- 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- should be Rendered in India and utilised in India

[Territorial nexus: Ishikawajima's case 288 ITR 408(SC) {2007}]

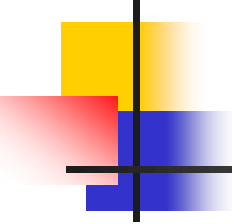
[Aspect Software Inc vs. aDIT [2015] 61 taxmann.com 36 (Del ITAT)]

- Retrospective clarificatory amendment to Section 9 w.e.f. 1.4.1976 through Finance Act, 2007
- 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



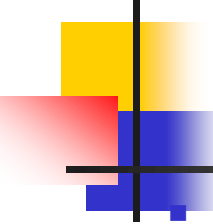
Taxation of Non Residents – Treaty Operation

- 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
- GAAR
- Multi Lateral Instruments (MLI)



Taxation of Non Residents – Computation of Income

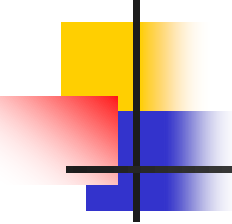
- Specific provisions Vs general provisions
 - CIT Vs Copes Vulcan Inc. [167 ITR 884 (MAD.)]
- Exclusion from income of each type
- Gross basis of taxation Vs net basis of taxation
- Scheme of the ITA – Gross basis, Net basis, Tax rates & TDS
- Simultaneous operations of the provisions are normally avoided
- 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)]



Computation of income of NR in India

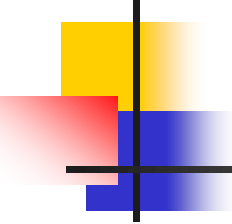
Normal computation procedure of S. 16 to 27 in case of salaries & income from house property and u/s 28 to 44C for business income is applicable

- 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
- 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 in a case where accounts are maintained and lower tax option is available under the provisions of S.44BB and 44BBB.



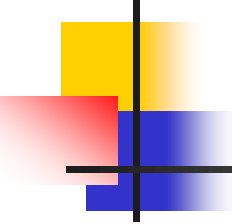
Special Provisions for NRIs - Chapter XIIA

- 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
- Option available to Non Resident



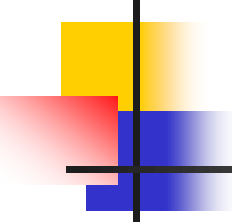
Special Provisions for NRI - XIIIA

- 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%



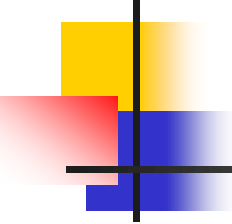
XIIA - Computation of Income

- 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.



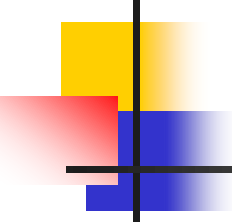
Capital Gains on shares & debentures

- Capital Gains where Securities Transaction Tax is applicable
 - LTCG exempt from tax [sec 10(38) of ITA upto Rs. 1 lac] balance taxable @ 10%
 - 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% in case of listed securities (other than a unit or a zero coupon bond) under proviso to S. 112 without applying 2nd proviso to S. 48
 - Provisions of the DTAA – Article 13



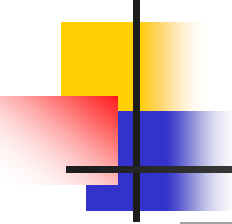
Special tax provisions for NRs

- 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 purchased in foreign currency taxed @ 10%
- 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



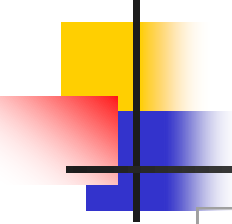
Special Provisions – 115A

Nature of Income	Div	MFs Units	Int	Int - Debt Fund	Roy Amended by Finance Act, 2015	FTS Amended by Finance Act, 2015	
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						



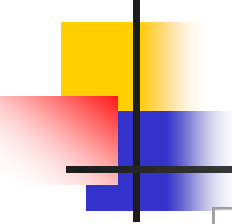
Special Provisions – 115AB

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 (5% u/s 194LD)	30 (15% if STT is paid)	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			



Filing of return by Non Residents Indians

NRI's are not required to file tax returns in India in the following situations;

- If income is below basic exemption limit for that F.Y.
- Total Income consists of only investment income or LTCG or both & TDS has been deducted on such income [Section 115G (Chp XII-A)]
- No Return in case of specified Income u/s 115A. The relaxation of not filing of Return of Income is available only in respect of Dividend Income (referred to in Sec 115-O) and Interest Income on which tax has been deducted [Sec. 115A(5)]
- If return of income is not filed within due date, application for condonation of delay can be filed for 6 A.Y's for claiming refund, subject to certain conditions (CBDT Circular No 9/2015 dtd 09.06.2015)

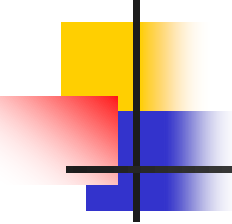
Note:

- NRI's cannot avail different exemption limits on basis of gender or age as

the Residents can avail

- If income is LTCG & no TDS is deducted – then even if it is lower than basic exemption, you need to file the returns (as basic exemption limit cannot be availed)

- If TDS has been deducted and the assessee is entitled to refund, you may file the return in order to claim the refund



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

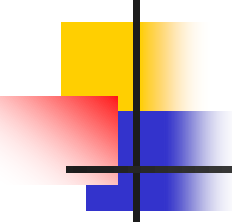
Presumptive Taxation – Special provisions in case of Non-Residents engaged in certain business

	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
Effective Tax Rate under ITA	40% of 7.5% i.e. 3%	40% of 10% i.e. 4%	40% of 5% i.e. 2%	40% of 10% i.e 4%

Tax rate as applicable to foreign companies is 40% excluding surcharge & 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, non-resident entertainer
Deemed Income	7 ½% of gross receipts	20% of gross receipts
Computation of lower income	Available	Not available
Effective Tax Rate under ITA	40% of 7.5% i.e 3%	40% of 20% i.e 8%
Tax rate as applicable to foreign companies is 40% excluding surcharge & cess		



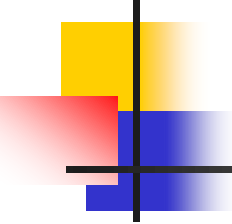
Taxation: S. 44DA

- 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 in pursuance of approved agreement.
- Income is computed under the head 'Profits & Gains of business or profession' and taxed on net basis
- If income not effectively connected with the PE in India, then provisions of section 115A shall apply & income will be taxed on gross basis
- Provisions of S. 44BBB shall not apply (Note the exclusion u/s. 9(1)(vii))
- Articles 5 & 7 of the DTAA also applies

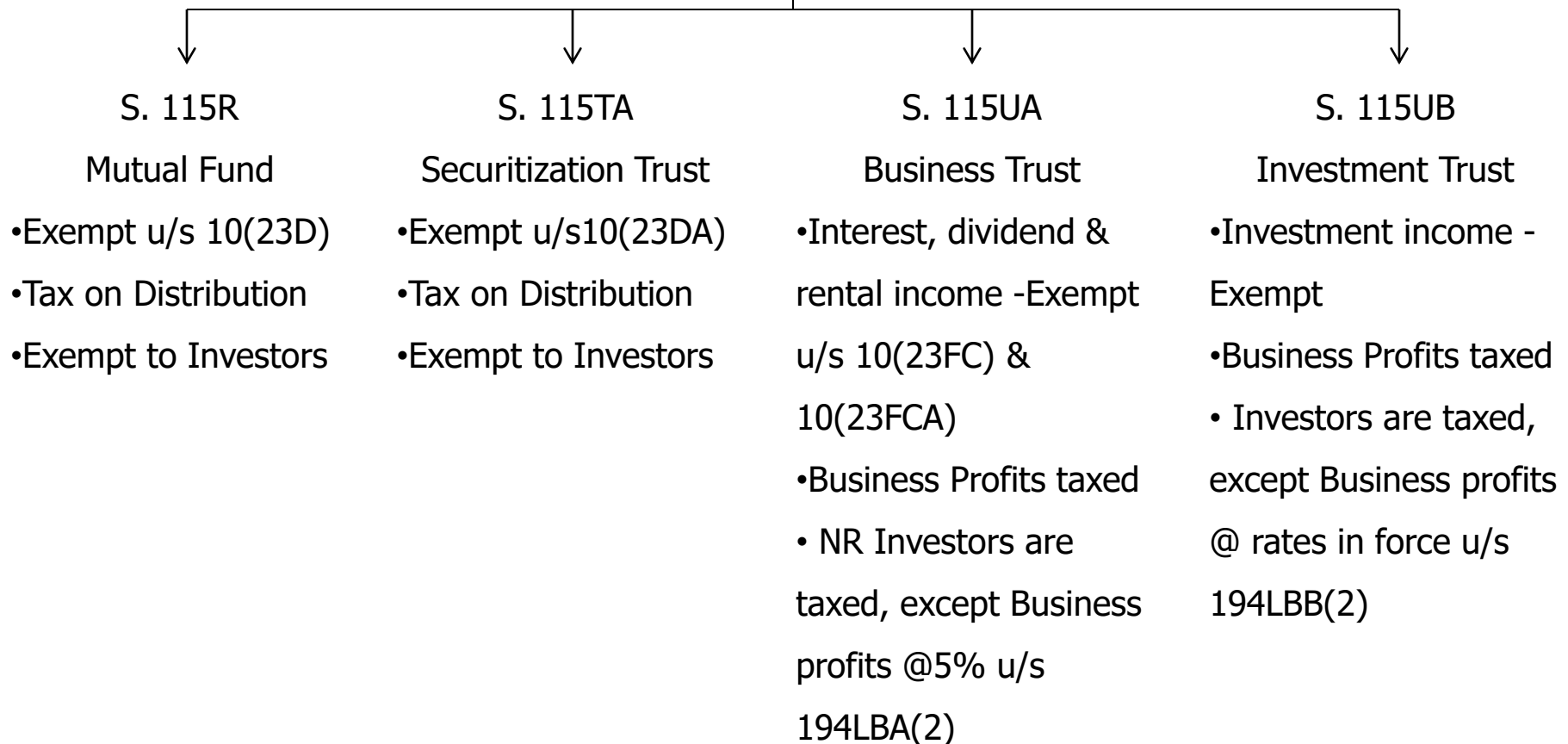


Taxation: S. 44DA

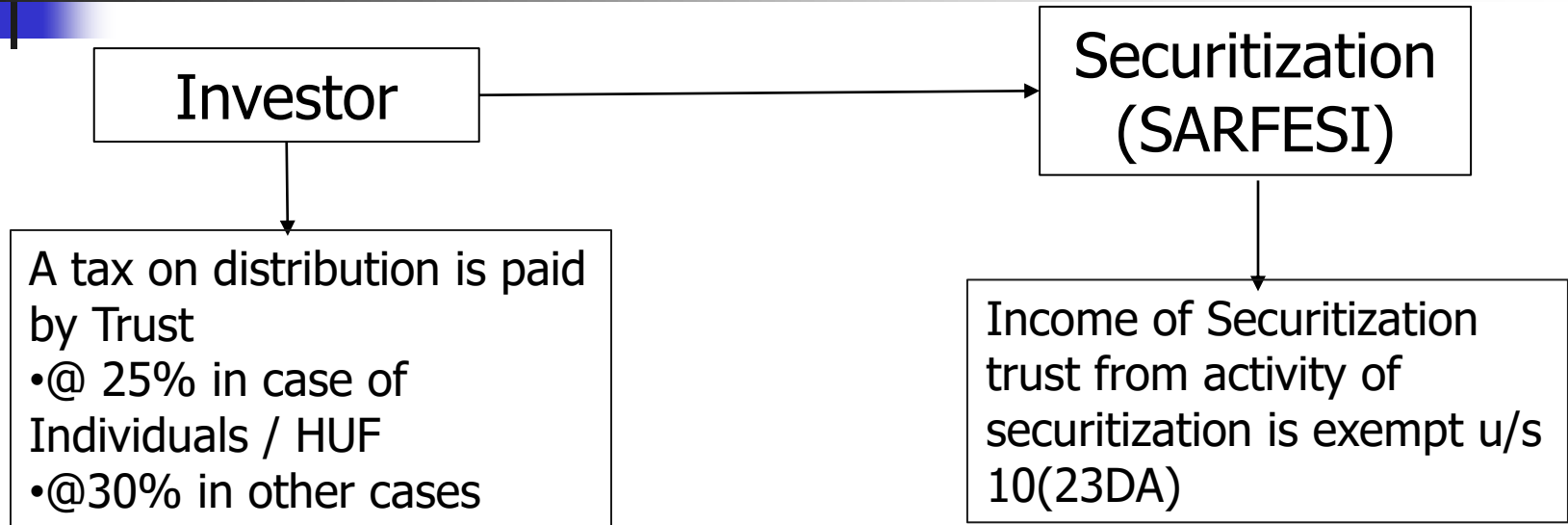
Receipts pursuant to agreement after 31.03.2003	Rate	Applicable Section	Basis of taxation
a) If effectively connected with PE or fixed place of profession even if Government approved or in accordance with industrial policy.	40%+s.c.	44DA	Net
b) Not effectively connected with PE i. Approved by Government or in accordance with Industrial policy ii. Not covered by (i.) above	10%+s.c. (As amended by Finance Act, 2015) 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 to HO			



Taxation of Trust & Investors

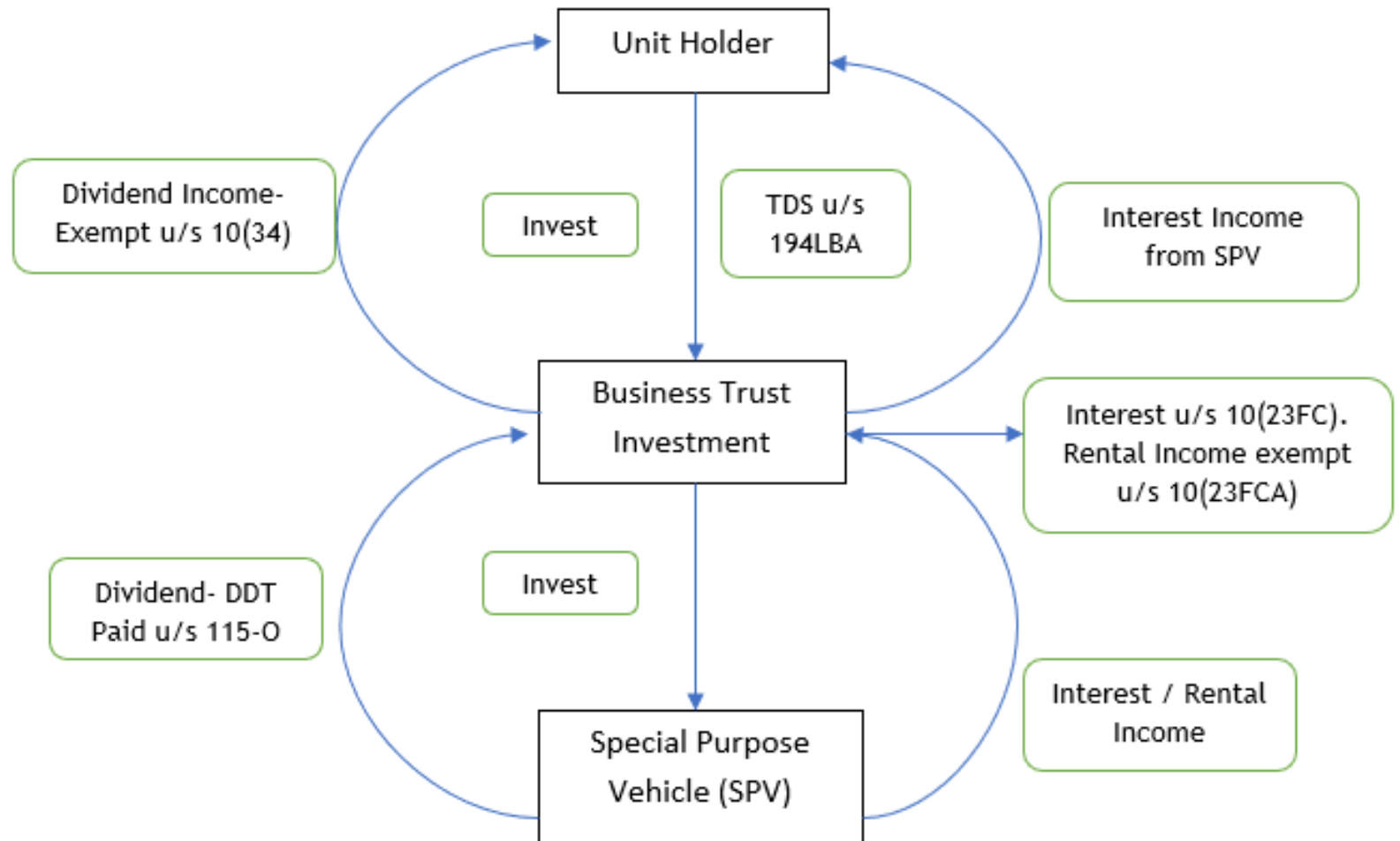


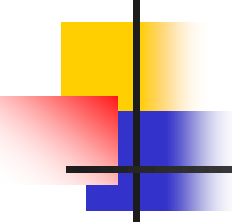
Taxation of Securitization Trust & Investors – sec 115TC/ 115TCA



- Income in the hands of the investor shall be of the same nature and proportion as it had been accrued/received by the trust
- Trust is required to deduct TDS at the time of payment / credit whichever is earlier u/s 194LBC for non-resident and foreign companies at the rate of TDS in force at the time

Taxation of Business Trust

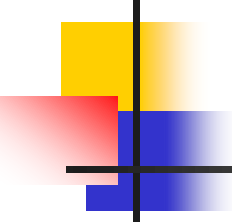




Exemptions to Non-residents

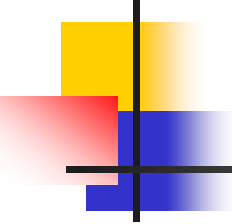
– Illustrative list

- 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)

- 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)] upto Rs. 1 lac



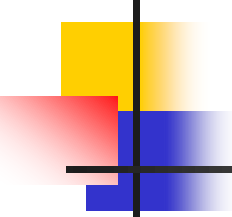
Wealth Tax & Gift Tax for Non Resident

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
- Wealth Tax is abolished w.e.f. 01.04.2015

Gift Tax

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

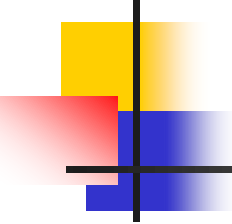


Minimum Alternate Tax (MAT) – Foreign Companies

- Provision does not apply to Foreign companies if;
 - The foreign company is a Resident of a country with which India has a DTAA & such foreign company does not have a PE in India as defined in DTAA
 - The foreign company is a Resident of a country with which India does NOT have a DTAA & such foreign company is not required to seek registration under Section 592 of the Companies Act 1956 or section 380 of the Companies Act 2013.

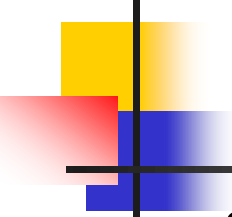
(Press Release dated 24.09.2015 w.e.f 01.04.2001)

- In line with the case of [The Timken Co., USA - [2010]326 ITR 193(AAR)] & Praxair Pacific Ltd [2010] 1193 Taxmann 1 (AAR) i.e. 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
- Note: SLP filed in case Castleton Investment Limited [2012] 224 taxmann.com 150 (AAR) which had taken a contrary view is now dismissed by the Supreme Court



TDS from income of NRs

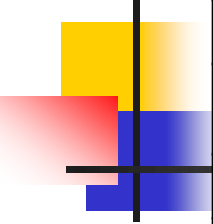
- S 192, in case of payment of salaries
- S 195, all other payments (except as under) sum chargeable to tax
- S 196B: Payments of income by MFs to Overseas Financial Organization @ 10%, however, no TDS is provided for LTCG
- S 196C: Dividend, Interest & LTCG from Bonds/GDR @ 10%
- S 196D: Income of FII & not LTCG @ 20%
- S 119 : Where the assessee fails to deduct TDS u/s 195, the AO cannot treat the whole sum remitted to the non-resident as being chargeable to tax but he has to determine the appropriate proportion of the sum chargeable to tax as mentioned in s. 195(1) for treating the assessee as being in default u/s 201 [CBDT Instruction No 02/2014 dated 26.02.2014 r.w. judgements of the Supreme Court in Transmission Corp of A. P. 299 ITR 587 and GE India Technology Pvt. Ltd 327 ITR 456]



Determination of Appropriate Tax

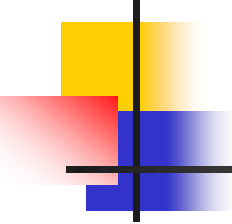
- S 195(1): Option to payer for application to A.O. for obtaining certificate to deduct tax at a lower rate
- S 195(2): Option to recipient NR to make application to AO for lower deduction of tax
- S 197(1): Application by the assessee to AO for lower deduction of tax
- S 245N: Application to AAR by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

Section 195 (1)



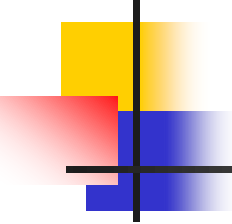
<i>Aspect</i>	<i>Condition</i>
Nature of Payment	All payments except salary, chargeable to tax in India
Status of Payee	Non- Resident, not being a company or foreign company
Responsibility to deduct tax	Section 195 (1) makes it obligatory for every person responsible for making the payment to deduct tax at source
Rate of TDS	As per Rates in Force i.e. Rates as per Finance Act or DTAA, whichever is more beneficial (Section 2(37A))
Time of deduction	Date of payment or credit, whichever is earlier

- No threshold limit prescribed
- Unlike other provisions in Chapter XVII (TDS provisions), section 195 uses a special phrase “any other sum chargeable under the provisions of this Act”
- Sum which are not at all chargeable to tax in India (under the Act or the Treaty) shall continue to remain outside the ambit of section 195 {GE India Technology Centre (P) Ltd. vs CIT [2010] 327 ITR 456 (SC)}
- In case income is embedded in the payment, TDS on the gross amount unless an order/certificate permitting lower/nil withholding of tax is obtained.



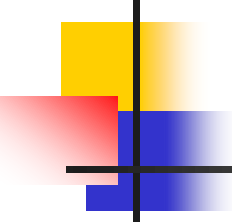
Section 195 (2)

- Application to be made to the AO by the Payer
- If he believes that payment made to Non Resident is not fully chargeable to tax in India in his hands
- Certificate can be issued for NIL or lower tax rate
- Once sum is ascertained to be even partially chargeable to tax in India, tax is required to be withheld at full rates on grounds of conservatism, unless an order u/s 195(2) or a certificate u/s 197 is obtained



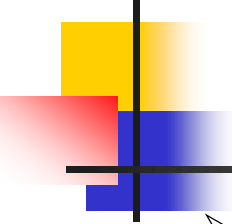
Section 195 (3), (4) & (5)

- Application to be made to the AO by Payee/Recipient of Income (Form 15C & 15D) for non withholding of tax at source
- Rule 29B prescribes conditions for the same.i.e.;
- Assessee has been regularly assessed to tax and has filed all returns of income due as on the date of filing of application;
 - Not defaulted in respect of any tax interest, penalty, fine, or any other sum;
 - Not subjected to penalty u/s 271(1)(iii);
 - Carrying on business in India continuously for at least five years and the value of the fixed assets in India exceeds Rs 50 lakhs
- Certificate valid till period mentioned therein (unless cancelled by AO). Can be renewed after expiry of period mentioned therein or 3 months prior to the expiry



Section 195 (6)

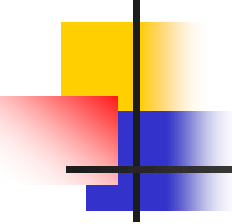
- the person responsible for paying to a non-resident, not being a company, or to a foreign company, any sum, whether or not chargeable under the provisions of this Act, shall furnish the information relating to payment of such sum, in such form and manner, as may be prescribed.
- Rule 37BB which prescribes the issue of CA Certificate under Form 15CA & Form 15CB
- Form 15CA – Information to be furnished by the Payer
- Form 15CB – Certificate to be obtained from Chartered Accountant



Form 15CA / 15CB

- Was introduced by Finance Act 2008 (Rule 37BB)
- Intention as per Circular No. 1/2009, dated 27-03-2009

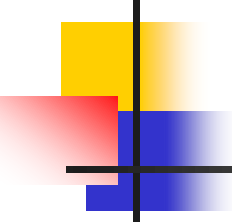
“..The purpose of the undertaking and the certificate is to collect taxes at the stage when the remittance is made as it may not be possible to recover the tax at a later stage from the non-residents. There has been substantial increase in foreign remittances, making the manual handling and tracking of certificates difficult. To monitor and track transactions in a timely manner, it is proposed to introduce e-filing of the information in the certificate and undertaking. The amendment therefore, proposes to provide that the person responsible for deduction of income tax shall furnish the information relating to payment of any sum to the non-resident or to a foreign company in a form and manner to be prescribed by the Board.....”



Form 15CA

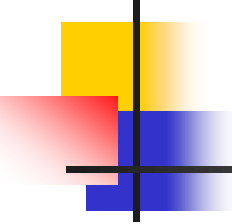
- A Declaration by Remitter – used as a tool to collect information in respect of payments made to non residents whether chargeable to tax in their hands in India
- Upto 31.05.2015 - Form 15CA was required only for reporting payments of interest, salary or any other sum chargeable to tax in India
- W.e.f 01.06.2015, Form 15CA is required for reporting any payments made of interest, salary or any other sum whether or not chargeable to tax in India.
- Rule 37BB specifies **33** types of payments for which no Form 15CA/CB is to be furnished

(Refer Press Release issued on 17.12.2015 which is w.e.f 01.04.2016)



Form 15CA

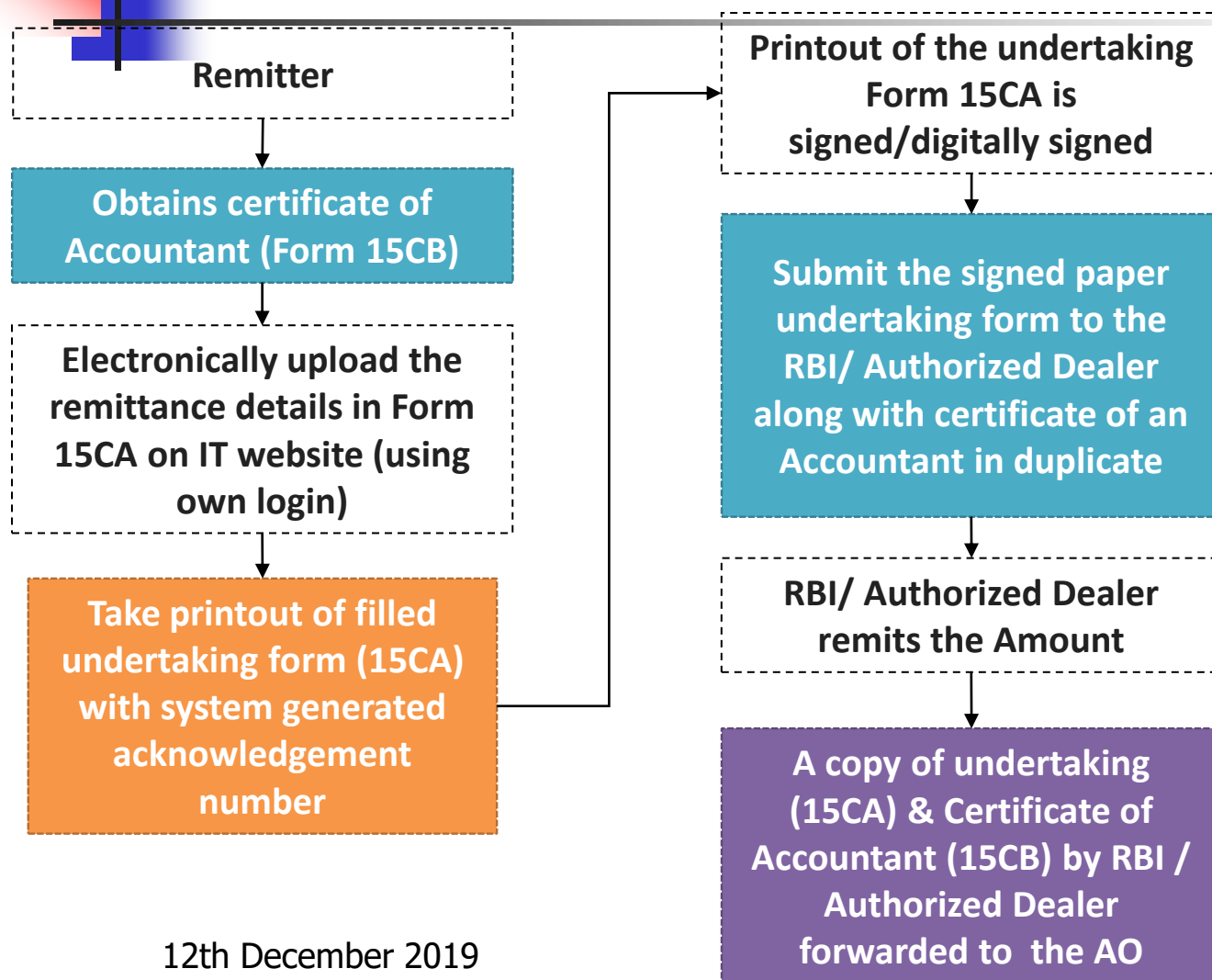
- Form 15CA is divided into 4 parts;
- Part A – Payment or aggregate of payments chargeable to tax & not exceeding Rs. 5,00,000 (No requirement to obtain CA certificate)
- Part B – Payment or aggregate of payments chargeable to tax & not exceeding Rs. 5,00,000 – after obtaining certificate from AO u/s 197 or 195 (2)/(3)
- Part C - Payment or aggregate of payments chargeable to tax & exceeding Rs. 5,00,000 - after obtaining certificate under Form 15CB from Chartered Accountant
- Part D – For all payments not chargeable to tax under Income Tax Act [other than those exempted under Rule 37BB(3)]



Form 15CB

- A certificate from Chartered Accountant on the basis on information provided by client in Form 15CA to determine the chargeability of income
- Form 15CB requires detailed 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 Tax Residency Certificate, applicable DTAA and its relevant article, as also tax liability under the DTAA are to be furnished.
- The nature of remittance is divided as — for royalties, FTS, interest, dividend; on account of business income; on account of short-term and long-term capital gains; and any other remittance.

Form 15 CA & 15CB: *Procedure*



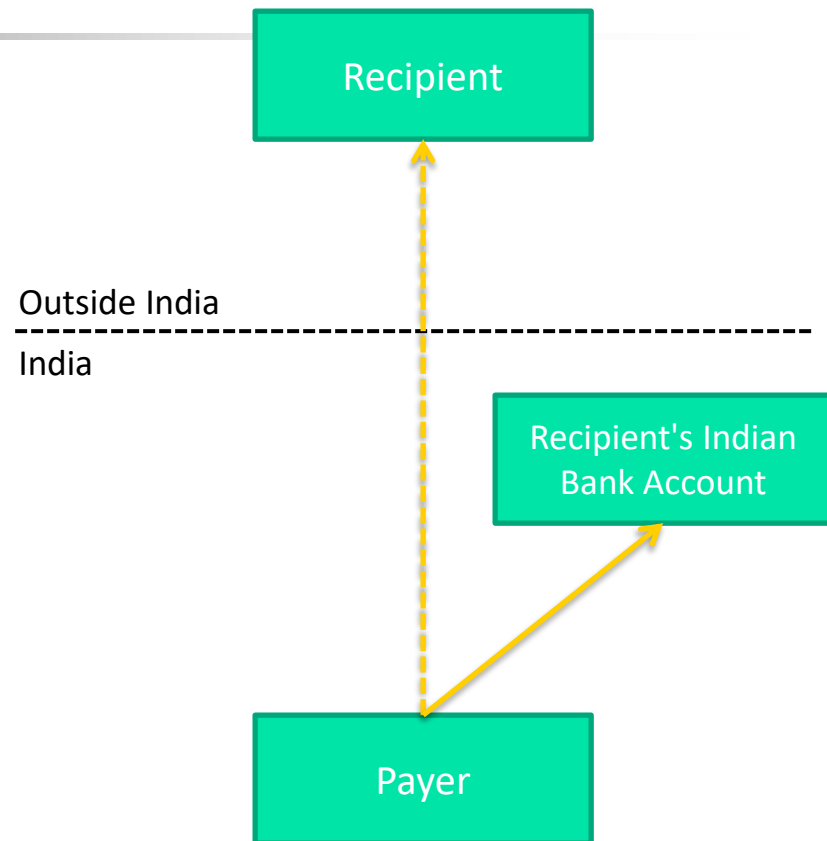
- **Every remittance required to follow this procedure**
- **New Rule 37BB prescribes list of payments for which this procedure would not be required.**

Form 15 CA & 15CB: *Certain Situations*

Payment to be made to non-resident outside India. However, the amount is to be deposited in the Non-resident's bank account in India.

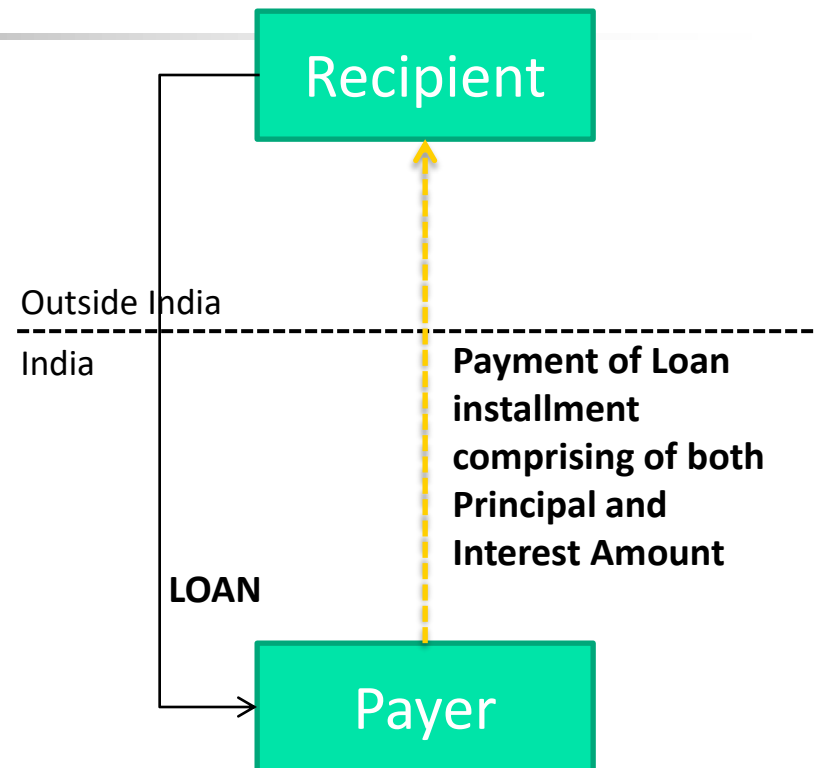
Whether the remittance of the amount would require following the attestation and documentation formalities contained in Section 195(6) and require filling Form 15CA/Form 15CB.

- Rule 37BB makes no specific distinction between Foreign remittance and other remittances.
- Form 15CA/15CB make specific reference to the country of remittance and the currency of Remittance.

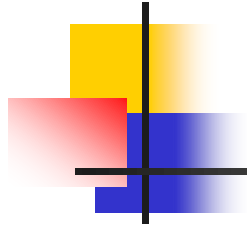


Form 15 CA & 15CB: *Certain Situations (Cont..)*

- Loan installment is being remitted by an Indian Company to a Foreign Company
- Installment consists of both interest and principal components.
- Since TDS is to be deducted on interest part only, whether one needs to submit 15CA, CB certificates separately for both interest and principal components or single certificate for whole installment would be suffice



Form 15 CA & 15CB: *Certain Situations (Cont..)*



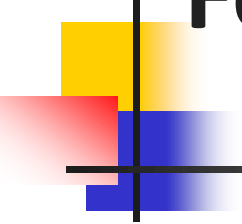
Rule 26 of Income Tax Rules, 1962

- For the purpose of deduction of tax at source on any income payable in foreign Currency, the rate of exchange for the calculation of the value in rupees of such income payable to an assessee outside India shall be the telegraphic transfer buying rate of such currency as on the date on which the tax is required to be deducted at source under the provisions of Chapter XVIIIB by the person responsible for paying such income.

Explanation - "telegraphic transfer Buying rate, as rate adopted by the State Bank of India.

Issues regarding exchange rate:

- Rate may vary during the day owing to high volatility in Currency market
- Remittances are normally through other banks
- Tax is required to be deposited before certificate of CA is obtained and therefore, there would normally be some difference on the date of deposit and on the date of remittance.



Form 15 CA & 15CB: *Key Considerations*

Challenges
faced by
Chartered
Accountan
ts while
issuing the
requisite
Forms

Whether TRC sufficient evidence to claim Tax Treaty Benefits?

If TRC is not available and DTAA benefits are taken , will a PE declaration suffice?

Issuance of certificate in absence of complete information about payee

In the existence of a Permanent Establishment, the amount of payment attributable to the PE as profits?

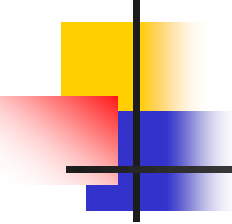
Verification of PE in India.

No books of accounts in India



Penalty – 271 I

- W.e.f 01.06.2015, if a person who is required to furnish information under S. 195(6), fails to furnish such information or furnishes inaccurate information, the AO may direct such person to pay penalty of Rs. 1 lac
- no clarity if penalty is per transaction or per financial year or per TAN/assessee
- penalty of Rs. 10,000/- u/s 271J for furnishing inaccurate certificate under Form 15CB by the Chartered Accountant
- Refer to **Mahindra & Mahindra Ltd vs. ADIT [2007] 106 ITD 521** wherein it was held that *“The certificates issued by the chartered accountants have no role to play so far as determination of withholding tax liability is concerned. These certificates cannot, and do not, impose any tax deduction liability on the assessee-tax deductors. The only role these certificates play is that when an assessee has to make a remittance to non-residents, based on the assessee’s own understanding of the withholding tax requirements and at his risk of consequences for short deduction of tax at source or non-deduction of tax at source, such a remittance has to be supported by a chartered accountant’s certificate in support of the assessee’s contention.”*



Section 197

- Application to be made to the AO by the assessee i.e. recipient of income (in Form 13)
- For any income
- If AO satisfied, certificate may be issued for Nil or lower rate of tax
- Such certificate is to be provided to the Payer in order to enable him to deduct TDS at rates mentioned therein
- Certificate valid (unless cancelled) for the period mentioned therein
- Now application under Form 13 can be made online

Comparison - Section 195 (2), 195(3) & 197

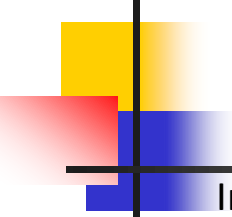
Particulars	195(2)	195(3)	197 *
Application by	Payer	Payee (subject to Rule 29B)	Payee
Purpose	To determine appropriate withholding rate for a specified payment	For claiming 'Nil' withholding rate for a specified receipt	For claiming 'Nil'/lower rate of withholding for all receipts
Applicability	Applicable to specified payments	Applicable to specified receipts	Applicable to all receipts
Application Form	Not prescribed	Form No. 15C or 15D	Form No. 13
Whether appealable?	Appeal u/s 248 denying liability to deduct tax after payment of tax	No appeal	No appeal
Whether revisable u/s 263 or 264	Yes	Yes	Yes

* Not as stringent as Rule 29B



Tax Residency Certificate & PE Declaration

- Section 90(4) & 90(5) – w.e.f 01.04.2013
- For Non Residents to avail benefits of DTAA, TRC is mandatory
- No threshold limit
- Provisions of 90(5) state that assessee shall also provide such other documents & information, as may be prescribed (in Form 10F) [Rule 21AB]
- Requirements/ contents in TRC/Form 10F:
 - Name, Status of assessee, Nationality
 - Country or specified territory of incorporation or registration
 - Assessee's tax identification number or unique number of host country
 - Residential status for purposes of tax
 - Period for which the TRC is applicable
 - Address for the period for which the TRC is applicable
- For obtaining TRC by assessee resident in India, application to be made in Form 10FA to the Assessing Officer; TRC would be issued in Form 10FB



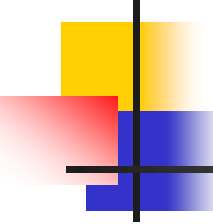
Section 195A

In a case other than that referred to in sub-section (1A) of section 192, where under an agreement or other arrangement, the tax chargeable on any income referred to in the foregoing provisions of this Chapter is to be borne by the person by whom the income is payable, then, for the purposes of deduction of tax under those provisions such income shall be increased to such amount as would, after deduction of tax thereon at the rates in force for the financial year in which such income is payable, be equal to the net amount payable under such agreement or arrangement.

Grossing up should be at the rates in force and not @ 20%

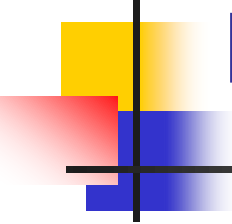
“A literal reading of sec. implies that the income should be increased at the rates in force for the financial years and not the rates at which the tax is to be withheld by the assessee. The Hon’ble Apex Court in the case of GE India Technology (cited Supra) has held that the meaning and effect has to be given to the expression used in the section and while interpreting a section, one has to give weightage to every word used in that section. In view of the same, we are of the opinion that the grossing up of the amount is to be done at the rates in force for the financial year in which such income is payable and not at 20% as specified u/s 206AA of the Act.”

Case Law: Bosch Ltd v. ITO [2012] 28 taxmann.com 228 (Bang-Tribunal)



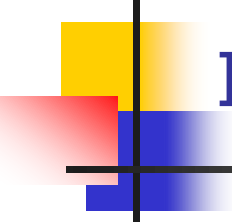
Section 206AA

- Overriding Provision / Non Obstante Provision
- Any person receiving any sum/income/amount on which TDS is deductible
- Shall furnish his PAN
- If not then rate of tax will be higher of the following;
 - Rate specified in the relevant provision of this Act;
 - At the rates in force i.e. rate mentioned in Finance Act or;
 - @ 20%
- Therefore, where TDS is not deductible, this provision does not get attracted
- If income is below basic exemption limit or not chargeable to tax then there is no question of TDS been deductible on the same and hence, provisions of section 206AA do not come into picture



Exception to Section 206AA

- Amendment to section 206AA by Finance Act 2016, wherein relaxation from deduction of TDS at higher rate. Rule 37BC provides that NR deductee without a PAN shall not be subject to higher tax u/s 206AA in respect of payments in nature of interest, royalty, FTS and payments on transfer of capital asset, if TRC & TIN is obtained along with certain other details as stated therein.



Interoperability of section 195, 195A & 206AA

- M/s X (in India) has to pay a sum of Rs. 5 crore to M/s Y (in UK) as per agreement
- M/s Y is a tax resident of UK as per TRC furnished by him and does not have a PANo. In India
- The tax liability of this transaction is to be borne by M/s X
- Provisions of section 195A & 206AA are applicable

Interoperability of section 195, 195A & 206AA

E.g. Amount Payable Under Agreement -

Rs. 5 Crore

Rate Of Tax As Per Treaty - 10%

Rate Of Tax As Per Income Tax - 25%
(earlier – now 10%)

Whichever Is More Beneficial - 10%

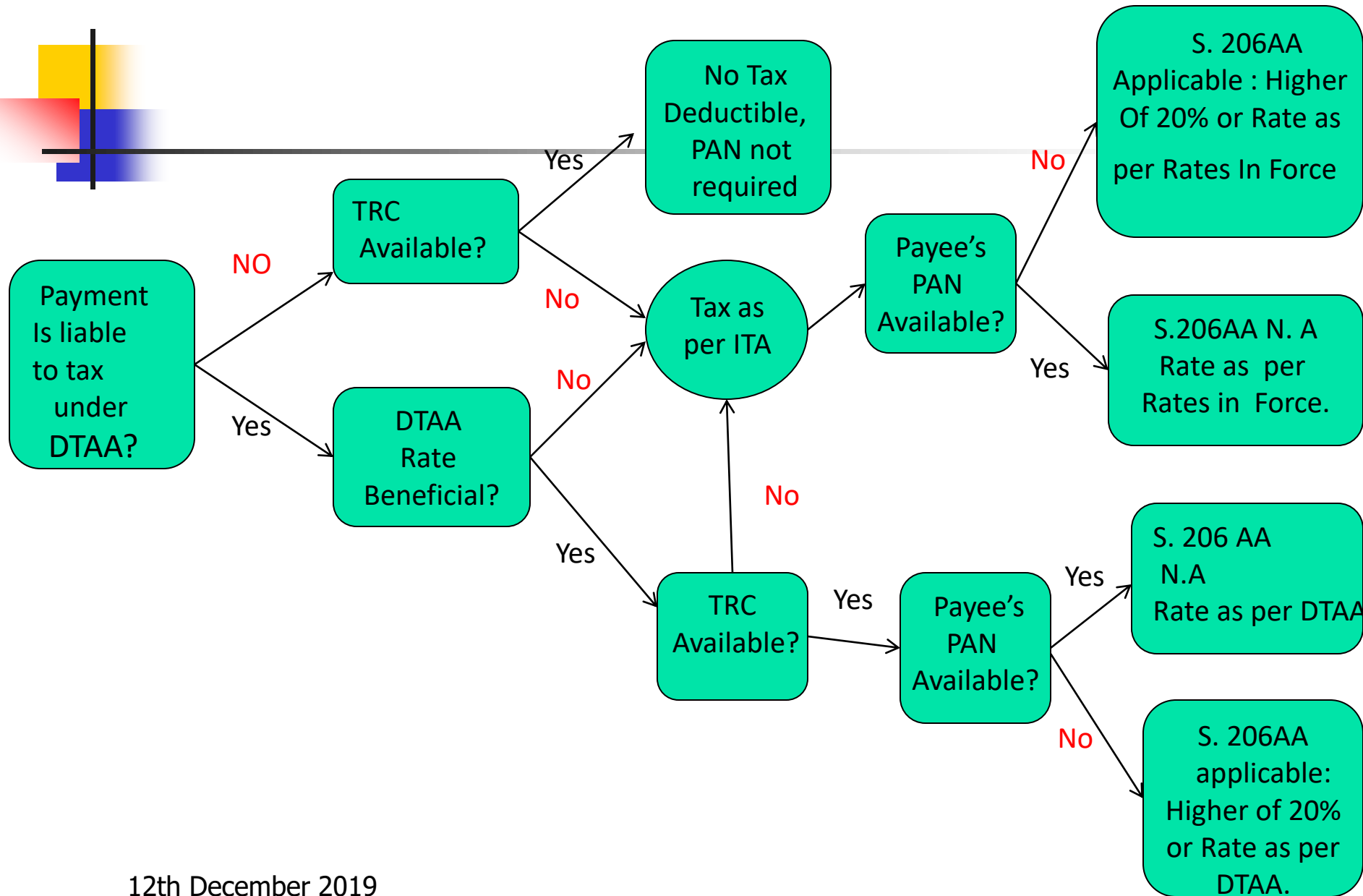
Deductee Has No Pan In India - Section
206AA applies - 20%

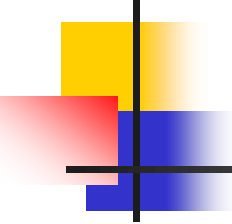
Deductor To Bear The Tax Amount – So
Grossing Up

Section 195A - Grossing Up At Rates In
Force

Particulars	Amount In Rs.	Effective Tax Rate
Section 195A Applied		
Payment	5,00,00,000	
Gross Up @ 10% (Rates In Force)	5,55,55,556	
Tds @ 20% On Above (A)	1,11,11,111	22.22
Section 195A Not Applied		
Payment	5,00,00,000	
Gross Up @ 20%	6,25,00,000	
Tds @ 20% On Above (B)	1,25,00,000	25
Difference (A-B)	13,88,889	2.78

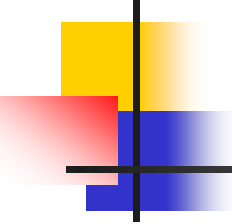
Interplay of DTAA, PAN & TRC





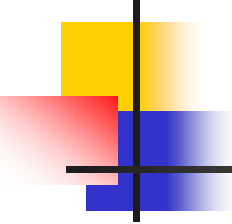
Issues that may arise

- Can treaty benefit be denied even if Taxpayer obtains TRC ?
- Is TRC a proof of Beneficial Ownership ?
- What are the implications if prescribed particulars are not provided?
- What is the time limit of providing prescribed particulars ?
- Impact on payer who is required to deduct tax
 - Obtaining TRC
 - Obtaining self attestation from NR
 - Maintaining documents to support information in attestation



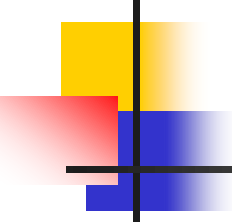
Issues that may arise

- Disallowance of expense u/s 40(a)(i)
- Disallowance of Interest u/s 58(1)(a)(ii)
- Assessee in default u/s 201 (1)
- Penalty for failure to pay tax deducted – S. 221
- Penalty for failure to deduct tax – S. 271C
- Penalty for failure to file TDS Return – S. 272A
- Interest u/s 220
- Interest u/s 201 (1A)

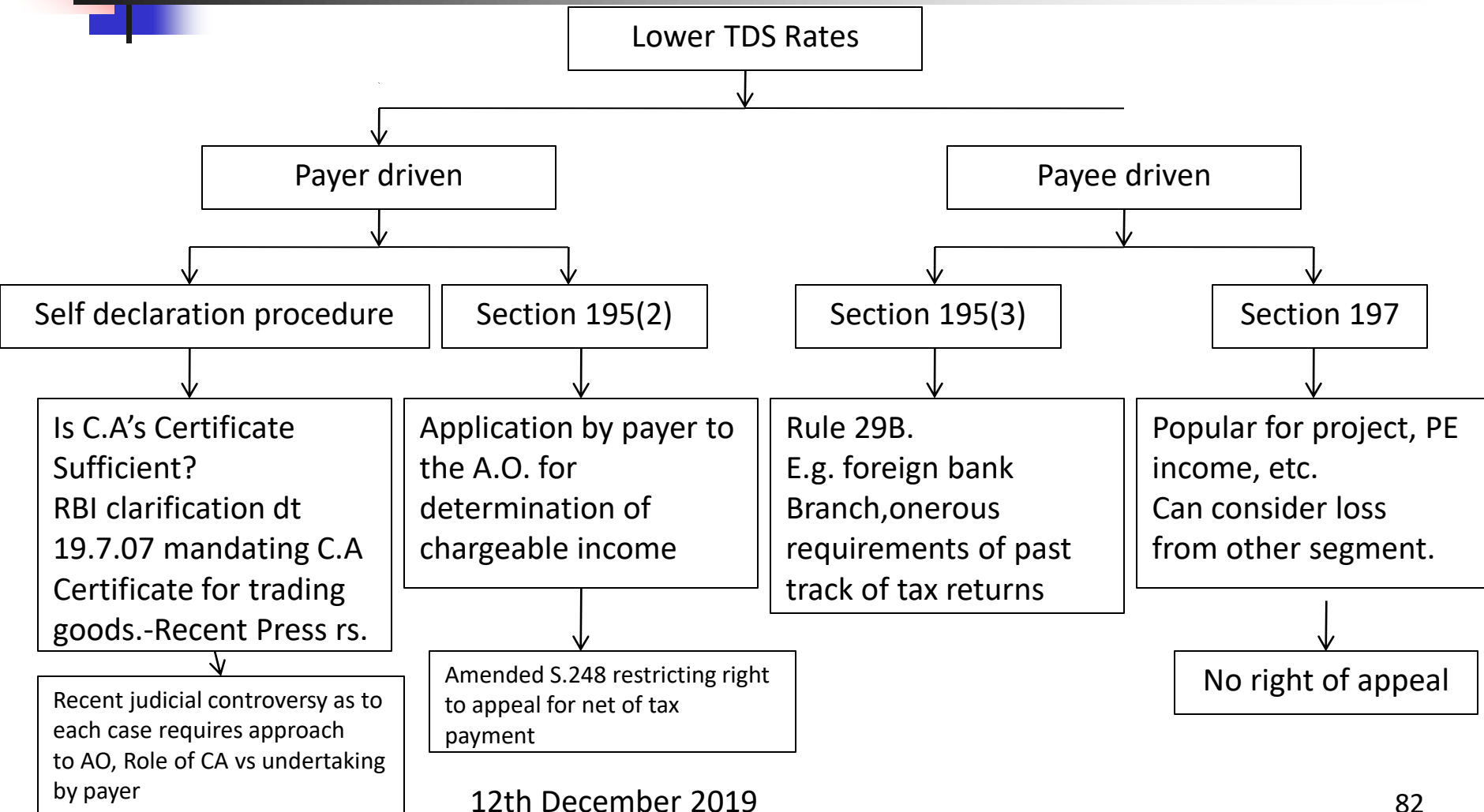


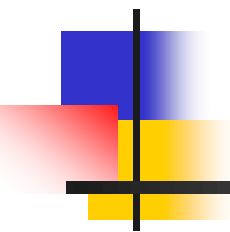
Refund of TDS paid u/s 195

- Circular No. 07/2007 dated 23.10.2017 describes procedure for refund of tax deducted at source under section 195 to the person deducting the tax
- Circular No. 9/2015 dated 09.06.2015 – claiming refund by filing condonation of delay
- Contract cancelled in whole or partially
- No remittance made to Non resident or amount refunded back
- Subsequent exemption under law
- Excess TDS deducted by mistake, double payment of TDS
- Higher rate applied when law provides for lower rate
- Form 26B [Rule 31A(3A)] – for claiming refund of excess TDS



TDS Obligation





Thank You
