

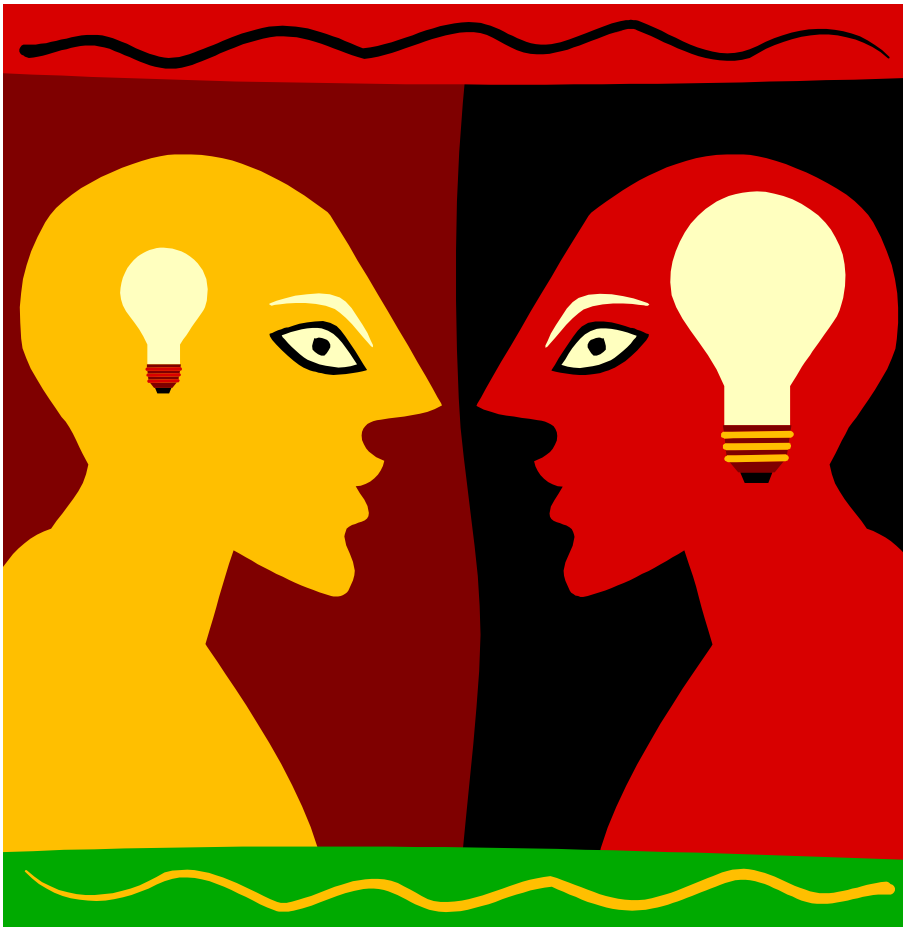


# The Institute of Chartered Accountants Of India

**15CA- 15CB**  
**Filing, Issues & Precautions**

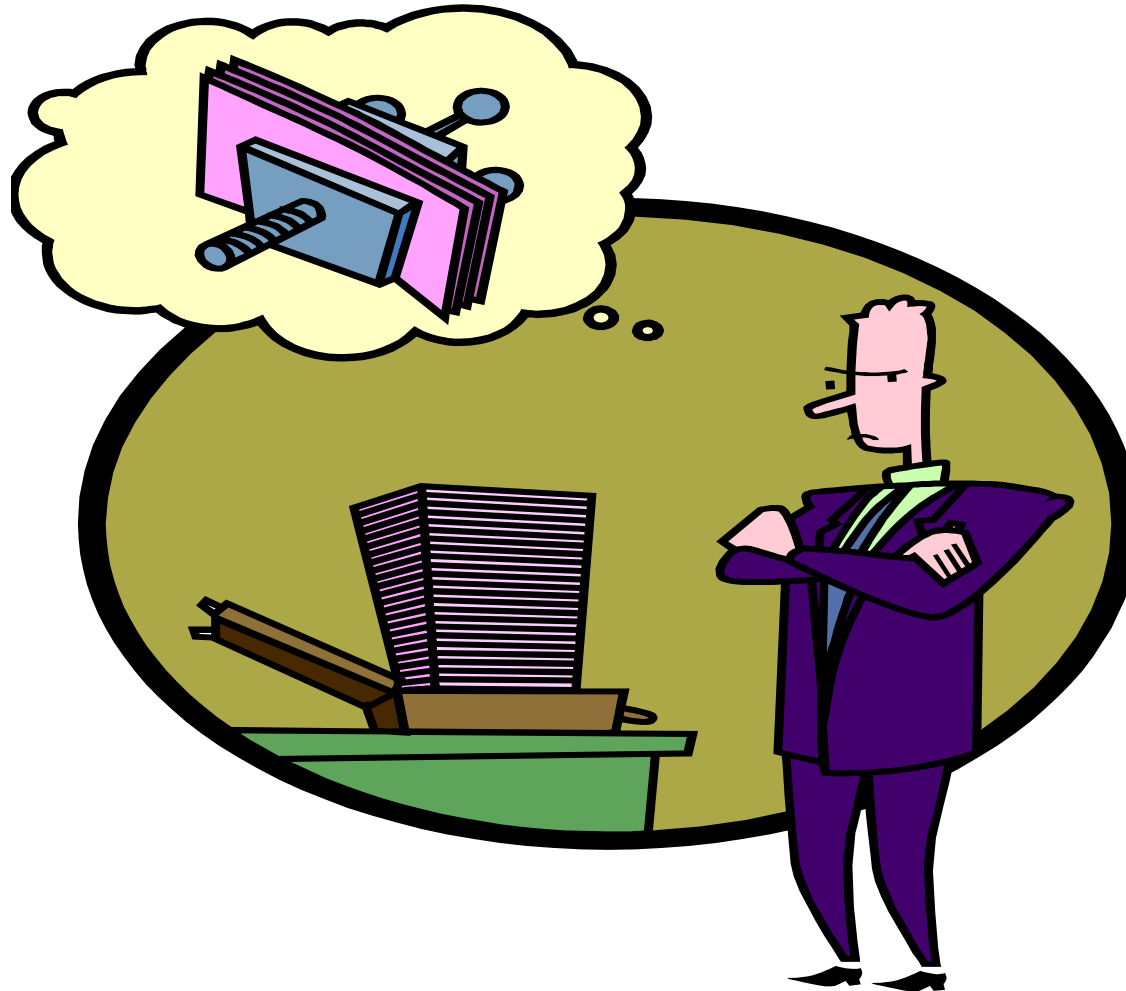
**Natwar G. Thakrar**  
**Saturday, 30<sup>th</sup> December, 2017**

# Presentation Outline



- ❑ Brief Analysis of section 195
- ❑ Determination of taxability of a non-resident
- ❑ Analysis of Rule 37BB /Form 15CA
- ❑ Analysis of important Clauses of Form 15CB
- ❑ Q & A

## Brief analysis of section 195



## Brief Analysis of Section 195

- ❑ Very wide scope.
- ❑ Covers payments to Non-residents & Foreign Companies (irrespective of their residential status).
- ❑ Covers all payers (irrespective of their legal status e.g. individuals / HUF).
- ❑ No minimum threshold exemption. Tax is deductible even if the payment is negligible.
- ❑ No prescribed rate for TDS- Tax is to be deducted at the rates in force- Section 2(37A(iii))
- ❑ Section has extra territorial jurisdiction.
- ❑ Even NR to NR payments made outside India are covered if chargeable to tax in India.
- ❑ On credit or payment whichever is earlier (125 ITR 525; 211 ITR 256; 267 ITR 727).

# Brief Analysis of Section 195

## □ Meaning of "Person responsible for paying".

- AD in case of Capital Gains on Transfer of Foreign Exchange Asset (Chapter XII-A) in case of P.I.S. account except Short Term Capital Gains – Section 204(iia)
- In other cases, payer himself, or if payer is a company, the company itself including the principal officer thereof – Section 204(iib) inserted w.e.f. 1.04.2017

## □ Meaning of "Sum Chargeable"

- Chargeable - s. 4, 5 & 9
  - Provisions of s.195 will not apply if charge U/s. 4 fails or income exempt U/s. 10
- When the whole of the sum payable is not chargeable to tax -
  - Transmission Corporation of A.P. Ltd. vs. CIT 239 ITR 587 (SC)
  - GE India Technology Centre P. Limited vs CIT & Others 193 Taxmann 234(SC)
  - Frontier Offshore Exploration (India) Ltd Vs. DCIT - ITA No. 200/Mds./2009
  - Formula One World Championship Ltd Vs. CIT, Int.Tax (2017)SCC Online SC 474

## □ Rates in force

- Rates specified in this behalf in the Finance Act of the relevant year (refer Part II of the First Schedule to the Finance Act); or
- Rates specified in DTAA entered with respective country, whichever is more beneficial.

## Section 206AA – Coverage & relaxation

### □ **S. 206AA – Sum chargeable - Payee does not furnish - implications:**

- TDS at the higher of
  - Rate specified under the relevant provision of the Act;
  - Rates in force;
  - 20%.
- No surcharge – **Computer Science Corporation India P. Ltd 77 taxmann.com 306 (ITAT-Delhi) / Quick Flight Ltd. Vs. ITO (ITAT- Ahd)**
- Can treaty override section 206AA- **(2015)- 56 taxmann 1 (ITAT-Pune) DDITVs. Serum Institute India Ltd.**
- In absence of PAN , no certificate U/s. 197 for lower/ NIL deduction shall be granted.

### □ **Relaxation - Rule 37BC vide CBDT Notification No.53/2016 dated 24th June 2016**

- Applicable only in respect of payments in the nature of Interest, Royalty, FTS & Capital gains
- The exemption is subject to the deductee providing followings-
  - Basic information i.e name , email id, contact number and address in the country of tax residence.
  - TRC, if the law of country of tax residence provides for issuance of such certificate.
  - Tax Identification Number (TIN), or where no such number is available, unique number on the basis of which the deductee is identified by the government of the country or the specified territory of which he claims to be a resident.

## Application to AO – Comparative analysis of sections 195(2), 195(3) & 197

Particulars	195(2)	195(3)	197(1)
<b>Applicant</b>	Payer	Payee (who satisfies conditions specified in Rule 29B )	Payee
<b>Purpose</b>	To determine the portion of income liable for tax withholding	To receive a specified payment without deduction of tax at source	To obtain nil/ lower tax withholding rate for all receipts
<b>Applicability</b>	Applicable to specified payments	Applicable to specified receipts	Applicable to all receipts
<b>Rule</b>	<b>No Rule</b>	Rule 29B	Rules 28 & 37G
<b>Forms</b>	No Forms Prescribed	Forms 15C/ 15D	Form 13
<b>Whether appealable under Section 248?</b>	Yes, but after deposit of the tax by the payer	No	No
<b>Whether revisable under Section 264</b>	Yes	Yes	Yes

**Is CA certificate a substitute to 195(2)/197? M & M Vs. ADIT 106 ITD 521**

## Payments to Non-residents not covered by Section 195

- ❑ Payment of salary (S. 192).
- ❑ Payment to sportsman, entertainer or sports association u/s. 115BBA (S. 194E).
- ❑ Income on units u/s. 115AB (S. 196B).
- ❑ Income on GDRs u/s. 115AC (S. 196C).
- ❑ Income of FII's u/s. 115AD (S. 196D).
- ❑ Winnings from horse racing, Lottery, puzzle, card games or any other game u/s. 115BB (S. 194B and S.194BB). (R + NR)





## Determination of Taxability

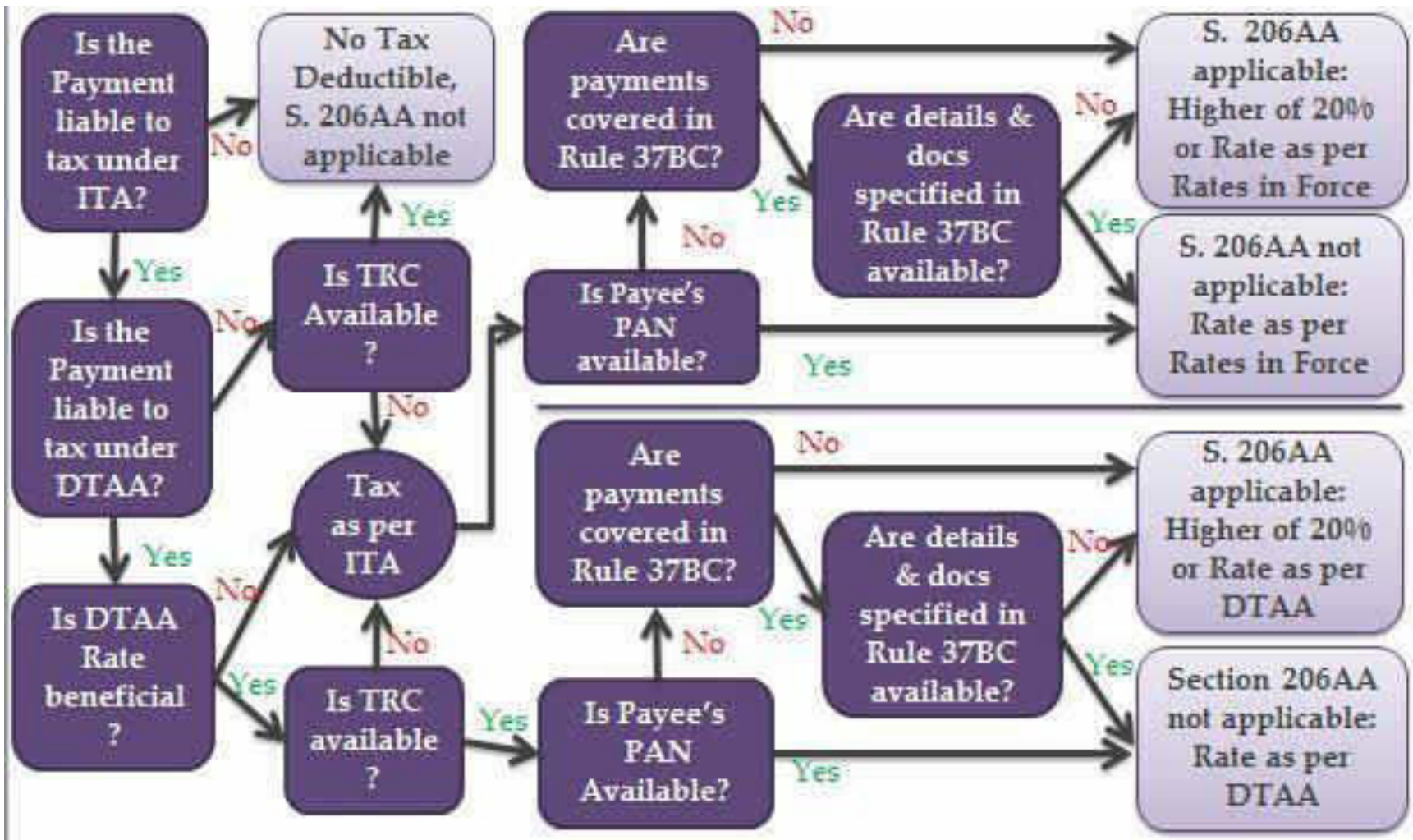
## Determination of Taxability -Domestic law

- ❑ Whether the receipt is 'income' in the first place?
  - Whether income received or deemed to be received / accrues / arises in India under – Whether Section 4 & 5 of the Act apply ?
  - Whether income is deemed to accrue or arise in India- section 9 ?
  - Examine Business Connection
    - CIT Vs. R.D. Aggarwal & Co. (**56 ITR 20**)
    - Characterisation – Eg. 9(1)(i) vs. 9(1)(vii), (vii) - **CIT Vs. Copes Vulcan (167 ITR 884) (MAD)**
- ❑ Exchange Rate - As of what date?
  - ❑ **Rule 26 – TT buying rat as of the date on which TDS is required to be deducted**
- ❑ Act or treaty? - Section 90(2) of the Act
- ❑ Whether TDS U/s. 195 applies to Reimbursement?
  - Circular no. 715 dt. August 8,1995 - TDS u/s 194C and 194J is deductible on gross amount including reimbursement.
  - May not apply to section 195 as section applies to “sum chargeable to tax” as against sections 194C and 194J which apply to “any sum paid”.

## Determination of Taxability - Tax Treaty

- ❑ Tax Treaty – Whether applicable
  - Legal Status
  - Persons covered
  - Taxes covered
  - Residential status
  
- ❑ Tax treaty – Do not forget
  - Entry into force & Termination
  - LOB clause
  - MFN clause
  - Protocols /Memorandum of Understandings
  
- Tax treaty – Eligibility conditions
  - S. 90(4) – TRC mandatory for DTAA relief .
  - S. 90(5) – The assessee has to provide such other details as may be prescribed.
  - **R. 21AB – Information prescribed in Form 10F – if already not covered in the TRC.**

# DTAA, PAN & TRC- Post 1<sup>st</sup> June, 2016



## Tax treaty Interpretation - Issues

- ❑ Which Treaty?
- ❑ Characterization – Business income, Royalty, FTS, Capital Gain, Other Income, etc - Which article to apply?
  - Determination of PE
  - Categorization as per Domestic Tax law or DTAA?
- ❑ ‘may be taxed’ / ‘shall be taxed’ / ‘shall only be taxed’
  - Kulandangan Chettiar (SC) (267 ITR 654)
  - Notification No. 91/ Explanation 4 to Section 90A
- ❑ Model Commentary
  - Ambulatory Vs. Static
- ❑ Technical explanation
- ❑ Commentaries by learned authors
- ❑ Judicial precedents
  - Indian as well as International cases



## Section 195(6)- Rule 37BB

(As substituted by IT (Twenty - First Amendment) Rules, 2015 w.e.f. 1<sup>st</sup> June, 2016)

## Section 195(6) – Furnishing of Information

### □ 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”.

## Introduction of Form 15CA & 15CB

- ❑ Form 15CA/15CB for the first time were prescribed vide amendment in Rule 37BB Vide Notification No. 67 dated 02/09/2013 w.e.f. 1st October, 2013
- ❑ Covered payments including interest or salary or any other sum within the ambit of Form 15CA/15CB
- ❑ Form 15CA required to be furnished electronically on [www.incometaxindiaefiling.gov.in](http://www.incometaxindiaefiling.gov.in).
- ❑ A printout of the form with system generated acknowledgement to accompany request for remittance along with form A-2/ 15CB (in duplicate) (wherever applicable)
- ❑ The income-tax authority empowered to require AD to furnish signed printouts for the purpose of any proceedings under the act.



## Form 15CA & 15CB – Up to 31.03.2015

### □ **Part A : -**

For remittances not exceeding Rs. 50,000 per transaction and the aggregate of such payments during the financial year not exceeding Rs. 2,50,000. Form 15CB is not mandatory.

### □ **Part B : -**

To be filled in for remittance other than specified in Part A & to be accompanied with Form 15CB

### □ **Exemption from filing Form15CA/15CB : -**

- ▶ Amount not chargeable to tax. This was in contradiction to s.195(6) substituted by Finance Act, 2015 w.e.f.1.06.2015.
- ▶ 28 categories of remittance covered by the specified list – Explanation (2) to Rule 37BB.

## Amended Rule 37BB- w.e.f. 1.4.2016

- ❑ Disclosure requirements even for sums not chargeable - inconsistency between amended S.195(6) and Rule 37BB removed.
- ❑ Dispensed with the requirements of an accountant's certificate in Form 15CB in respect of following remittances-
  - ▶ Payments/ aggregate payments in value up to Rs. 5 Lacs in a year.
  - ▶ Payments covered by the 33 categories in the Specified List - to be identified as per RBI purpose Code & Remittances by Individuals under automatic route. (i.e. payments which do not require RBI approval in terms of S. 5 of FEMA read with Schedule-III- Current Account Transaction Rules, 2000).
    - ▶ No requirement of self declaration in [Part D of Form 15CA] for such 33 categories covered in the Specified List.
  - ▶ Other sums which are not chargeable to tax – to be supported by self declaration in Part –D of Form 15CA .
- ❑ CA certificate in 15CB required for other payment if chargeable under provisions of the Act.
- ❑ Electronic furnishing of Forms 15CA/15CB with digital signatures made mandatory.
- ❑ ADs to furnish quarterly information in new Form 15CC.
- ❑ The income-tax authority empowered to ask ADs to furnish signed printouts for the purpose of any proceedings under the act.

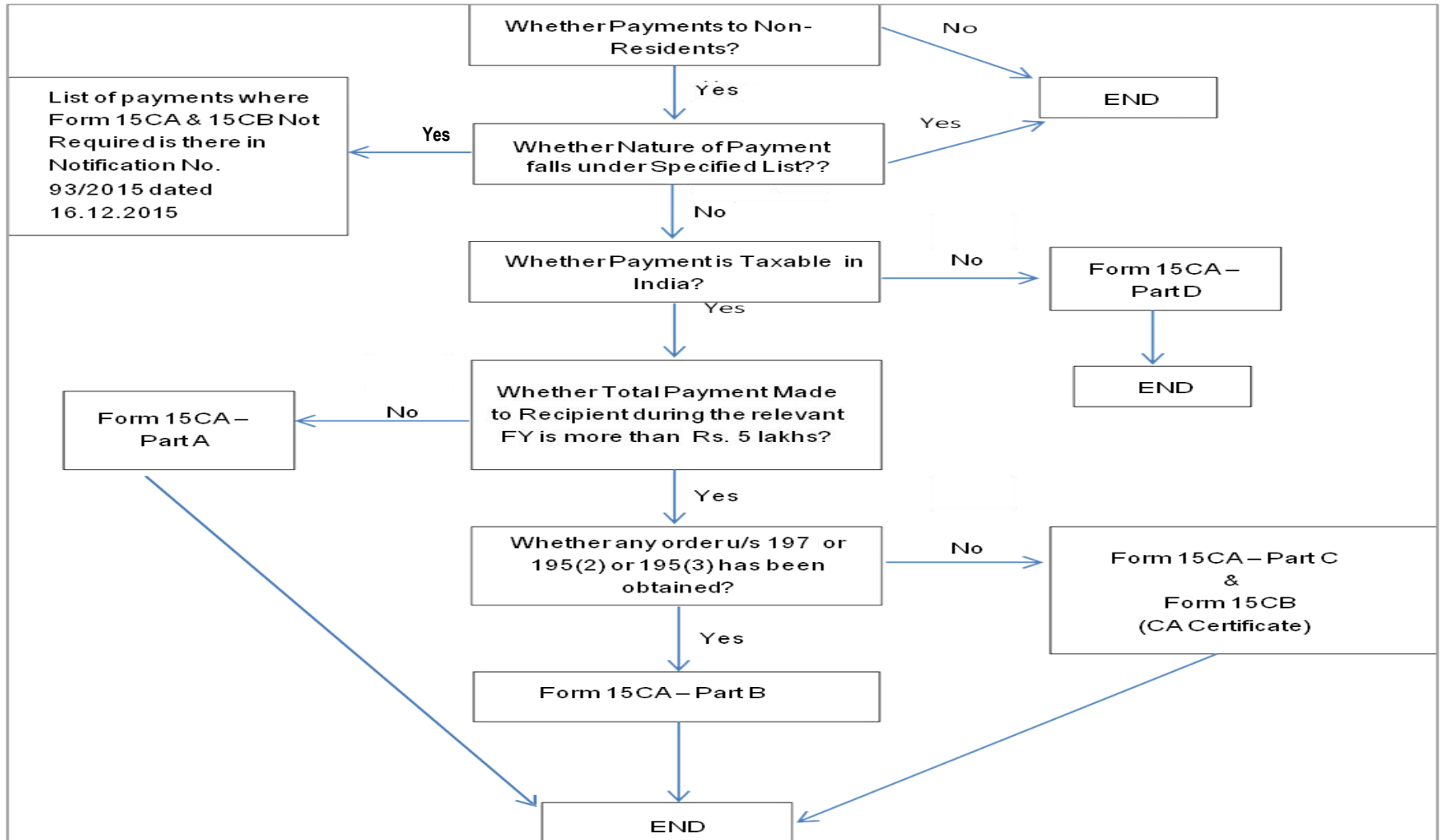
## New Form 15 CA w.e.f. 1.4.2016

- ❑ **Information in Form 15CA is divided in 4 Parts as follows:-**
- ❑ **Part A : -**
  - For payment or aggregate of payments during the financial year not exceeding Rs. 5,00,000.
- ❑ **Part B : -**
  - When a certificate from AO is obtained under section 197, or
  - An order from AO is obtained under section 195(2)/(3)
- ❑ **Part C : -**
  - For other payments taxable chargeable under the provisions of the Act
  - To be filed after obtaining a certificate in Form No. 15CB from a CA
- ❑ **Part D: -**
  - For payment of any sum which is not chargeable under the provisions of the Act

## Exemptions from filing Form 15 CA

- For any sum not chargeable to tax under provisions of the Act, if -
  - The remittance is made by an individual and it does not require prior approval of Reserve Bank of India as per the provisions of section 5 of the Foreign Exchange Management Act, 1999 (42 of 1999) read with Schedule III to the Foreign Exchange (Current Account Transaction) Rules, 2000; or
  - The remittance is of the nature of 33 categories provided in the specified list – Rule 37BB (3)(ii).

# Form 15 CA-15CB - Requirement



## Specified List of 33 Categories

Sr. No.	Purpose as per RBI	Nature of payment
1	S0001	Indian investment abroad-in equity capital (shares)
2	S0002	Indian investment abroad-in debt securities
3	S0003	Indian investment abroad-in branches and wholly owned subsidiaries
4	S0004	Indian investment abroad-in subsidiaries and associates
5	S0005	Indian investment abroad-in real estate
6	S0011	Loans extended to Non- residents
<b>7</b>	<b>S0101</b>	<b>Advance payment against imports</b>
<b>8</b>	<b>S0102</b>	<b>Payment towards imports- settlement of invoice</b>
<b>9</b>	<b>S0103</b>	<b>Imports by diplomatic missions</b>
<b>10</b>	<b>S0104</b>	<b>Intermediary trade</b>
<b>11</b>	<b>S0190</b>	<b>Imports below Rs. 5,00,000- (For use by ECD Office)</b>
12	S0202	Payment for operating expenses of Indian shipping companies operating abroad

## Specified List of 33 Categories

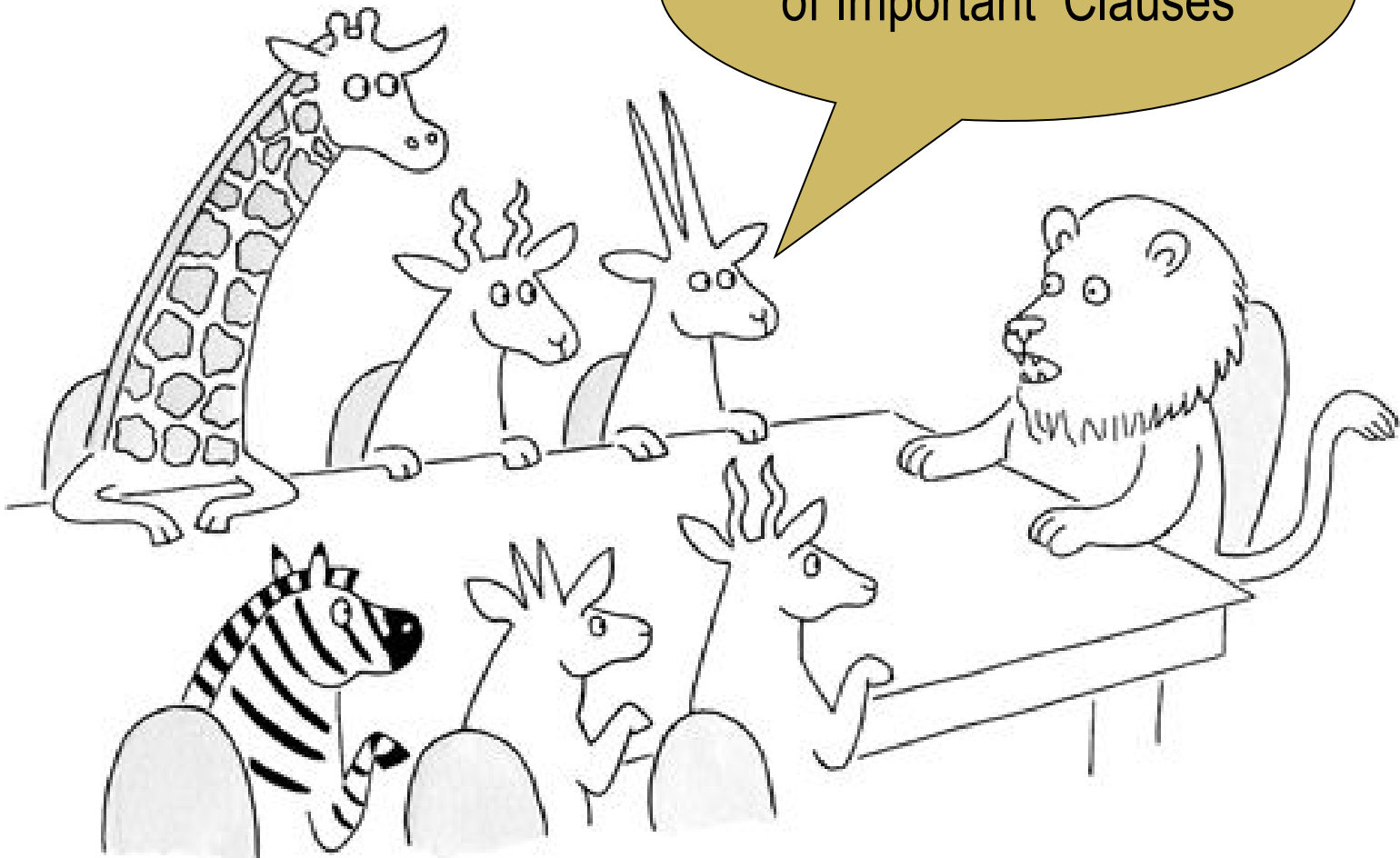
Sr. No.	Purpose as per RBI	Nature of payment
13	S0208	Operating expenses of Indian Airlines companies operating abroad
14	S0212	Booking of passages abroad- Airlines companies
15	S0301	Remittance towards business travel
16	S0302	Travel under basic travel quota (BTQ)
17	S0303	Travel for pilgrimage
18	S0304	Travel for medical treatment
19	S0305	Travel for education (including fees, hostel expenses etc.)
20	S0401	Postal services
21	S0501	Construction of projects abroad by Indian companies including import of goods at project site
22	S0602	Freight insurance- Relating to import and export of goods
23	S1011	Payments for maintenance of offices abroad

## Specified List of 33 Categories

Sr. No.	Purpose as per RBI	Nature of payment
24	S1201	Maintenance of Indian embassies abroad
25	S1202	Remittances by foreign embassies in India
26	S1301	Remittance by non-residents towards family maintenance and savings
27	S1302	Remittance towards personal gifts and donations
28	S1303	Remittance towards donations to religious and charitable institutions abroad
29	S1304	Remittance towards grants and donations to other Governments and charitable institutions established by the Governments
30	S1305	Contributions or donations by the Government to international institutions
31	S1306	Remittance towards payment or refund of taxes
32	S1501	Refunds or rebates or reduction in invoice value on account of exports
33	S1503	Payments by residents for international bidding.



Form 15CB- Analysis  
of Important Clauses



## Analysis of Important Clauses in Form 15 CB

- **Clause A** - requires “name & address of the *beneficiary*” of the remittance.
- Beneficiary is the “legal owner” of the remittance. When the remittance is made to a third person on behalf of the “legal owner”, the clause requires details of the legal beneficiary.
- Applicable DTAA will be decided on the basis of the residential status of the beneficiary.
- **Clause B6** - requires nature of the remittance as per agreement/ document.
- This involves characterization of Income and is very crucial in determination of tax withholding liability and rate of tax.
- **Clause B7** – requires grossing up of income in a case the remittance is “net of tax” payments
- In “net of tax” agreements, where tax liability is borne by the remitter, the payment needs to be grossed up in accordance with the provisions of section 195A.

## Section 195A- Grossing-up of taxes

- ❑ “Net of tax” payments where tax on remittance is to be borne by the payer:
- ❑ **Illustration:**

Particulars	Amount (in INR)
Amount payable to non-resident (net of tax)	100
Tax rate applicable	20%
Gross-up income: $100 * \frac{100}{(100-20)}$	125
Tax payable (INR 125 * 20%)	25
Net amount paid to non-resident (INR 125 – INR 25)	100

- ❑ Applicability of section 195A in cases of presumptive taxation (Section 44B, 44BB, 44BBB)?
  - Not applicable - **CIT vs ONGC [2003] 264 ITR 340 (Del HC)**; **CIT vs ONGC [2005] 276 ITR 585(Uttarakhand HC)**
- ❑ No grossing up u/s. 195A is required if tax is borne by the payer- **Bosch Ltd (28 Taxmann.com 228 – Bangalore ITAT)**

## Analysis of Important Clauses in Form 15 CB

- **Clause B8** - requires computation of tax liability under provisions of the Income-tax Act (without considering DTAA)
  - This requires determination of tax liability as per the provisions of Income-tax Act
  - Reasons, if the income is not considered to be taxable in India – e.g. import payments when there is no business connection under section 9(1)(i) of the Act.
  - If taxable, relevant section
  - The amount of income and chargeability
  - Basis of determining taxable income and tax liability
  
- ▶ Determination of **‘income’ comprised in the remittance** requires considerable degree of professional expertise.
- ▶ Can assessee or a Chartered Accountant compute income element in a composite payment and make determination of tax withholding liability?

## Own determination of income – legal position

- ▶ The CBDT vide Circular No. 759, dt. 18th Nov., 1997 [(1997) 143 CTR (St) 290], dispensed with the requirement of obtaining No objection certificate from the AO before making a foreign remittance.
- ▶ The CBDT Circular No. 10 of 2002, dt. 9th Oct., 2002 [(2002) 177 CTR (St) 41], it is not necessary for an assessee to obtain prior determination by AO of his tax withholding liability.
- ▶ The deductor therefore can make own determination of his withholding tax liability from a remittance, and make a remittance on the basis of CA certification, provided the tax deductor provides prescribed undertaking to the AO.
- ▶ However, in case of an error, the payer runs risk of disallowances under section 40(a) of the Act, in addition to interest & penal consequences.

## Own determination of income in composite payment- Judicial precedents

- ▶ The Hon'ble Supreme Court in **Transmission Corporation of A.P. Ltd. vs. CIT** 239 ITR 587 held that the provisions of Section 195 shall apply not only to the amounts which wholly bear the character of income but also to gross sums, the whole of which may not be income or profit, but have income embedded therein.
- ▶ This observation of the Hon'ble Supreme Court was misinterpreted leading to considerable litigation due to several authorities taking a view that tax withholding was required on gross sums paid to non-residents even when only a portion of the remittance was chargeable to tax, unless a certificate was obtained from AO u/s. 195(2).
- ▶ The Hon. Supreme Court in the case of **GE India Technology Centre P. Limited vs CIT & Others -193 Taxmann 234 (SC)** observed that tax withholding is required only on the portion chargeable to tax and where a deductor is fairly certain that he can make his own determination of the sum chargeable, there is no bar under the law preventing him to make his own determination of income and his tax withholding liability.
- ▶ Recently, the Hon. Supreme Court, though this issue was not a subject matter of appeal, in its decision in the case of **Formula One World Championship Ltd vs CIT Civil Appeal No. 3849 of 2017** at Para 78 of the order while referring to the its own decision of **GE India Technology Centre P. Limited vs CIT & Others** remarked that it would be for the AO to adjudicate how much business income is attributable to PE in India, which is chargeable to tax. – ***Obiter dicta of Supreme Court? , Implications?***

## Analysis of Important Clauses in Form 15 CB

- ❑ **Clause B9** - requires details of relief claimed under DTAA . The clause requires following details:-
  - Whether Tax Residency Certificate is obtained along with Form 10F?
  - Determination of the relevant DTAA
  - Determination of the relevant Article of the DTAA
  - Nature of payment as per DTAA
  - Taxable income as per DTAA
  - Tax liability as per DTAA
  
- The above determination is necessary only in cases where income is taxable under provisions of the Act and the remitter has claimed relief under DTAA
- TRC should be valid i.e for the year along with Form 10F
- It should also be supported by appropriate PE Declaration.

## Payment of FTS – Application of “Make Available” Concept

- ❑ Make Available –
  - ▶ Certain tax treaties (e.g. treaty with UK & USA) depart from the normal definition under section 9(1)(vii) & several of the DTAAs..
  - ▶ The key difference is that as against reference to ‘rendering of’ technical services, the stress is on ‘make available’ technical knowledge, experience, skill, know-how or process etc.
  - ▶ Broadly, the term ‘make available’ means that the person acquiring the technical service is enabled to independently apply the technology. The word ‘enable’ is used in the sense that the technical services should be such that they make the recipient able or wiser in the subject matter.
  - ▶ Thus, where the recipient of technical services does not get equipped with the knowledge or expertise and the recipient would not be able to apply it in future independently without support from the service provider, it will not be a case of technical service having been ‘made available’.



## Documentation

- ❑ Copy of Invoice, Agreement, if any, Correspondence or any other document which is helpful in determining true character of the remittance
- ❑ Extracts of accounting entry showing actual deduction of tax
- ❑ Taxability & Rate of tax withholding – Both under the Act/ DTAA
- ❑ Copy of challan of payment of tax
- ❑ Residential Status- Both under the Act & DTAA
- ❑ Declaration - Business Connection/Permanent Establishment declaration
- ❑ PAN
- ❑ Tax Residency Certificate (TRC) along with Form 10F – if No PAN or DTAA benefits are claimed.
- ❑ Legal status of the payee
- ❑ Exchange rate – as provided under rules 115/115A
- ❑ Judicial precedents relied upon

# Thank You

