

# Case Studies on TDS u/s 195

Payment to Non-residents

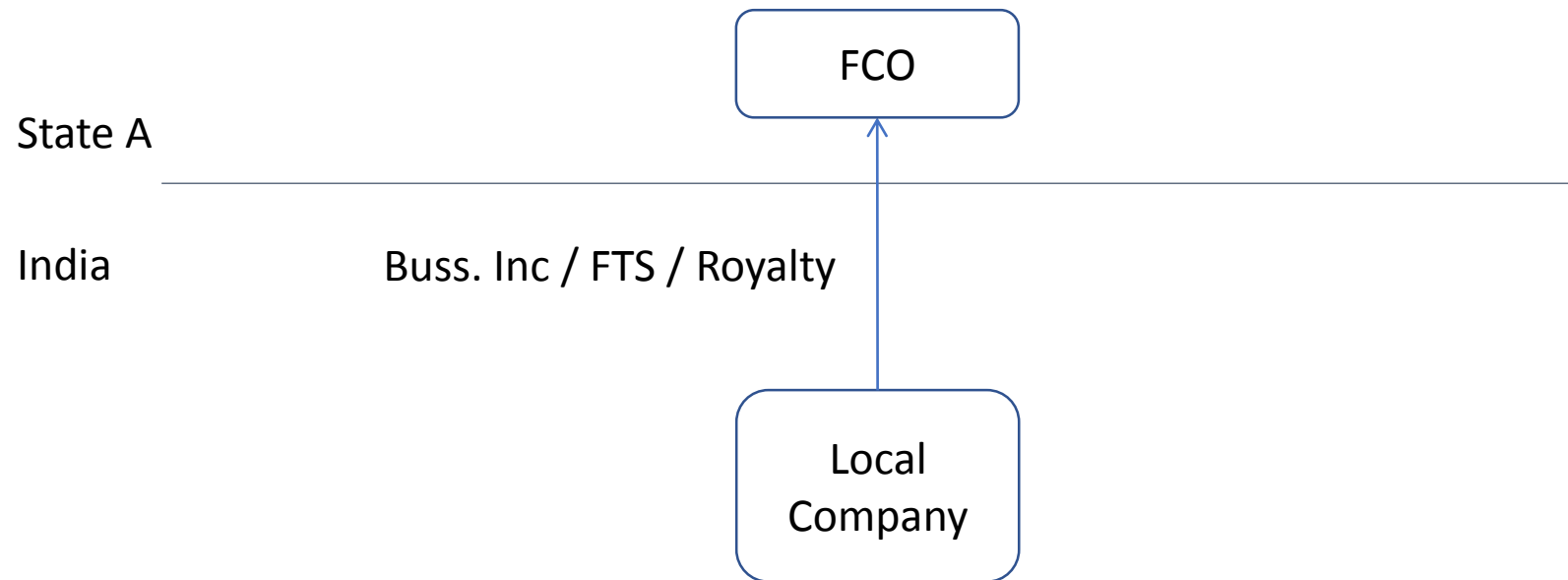
# Provisions of S. 195(1)

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

# Overview

Nature of payment	Basis of tax under ITA	ITA	DTAA
Business / Profession income	Taxable if BC at profits attributable to activities carried on in India	s. 9(1)(i)	Art. 5, 7, 14
Cap Gains	Taxable if situs in India	s. 9(1)(i)	Art 6, 13
Interest	If income sourced in India	s. 9(1)(v)	Art. 11
Royalties	If income sourced in India	s. 9(1)(vi) s. 115A	Art. 12
FTS	If income sourced in India	s. 9(1)(vii) s. 115A	Art. 12/13
Salaries	If employment exercised in India	s. 9(1)(ii)	Art. 15

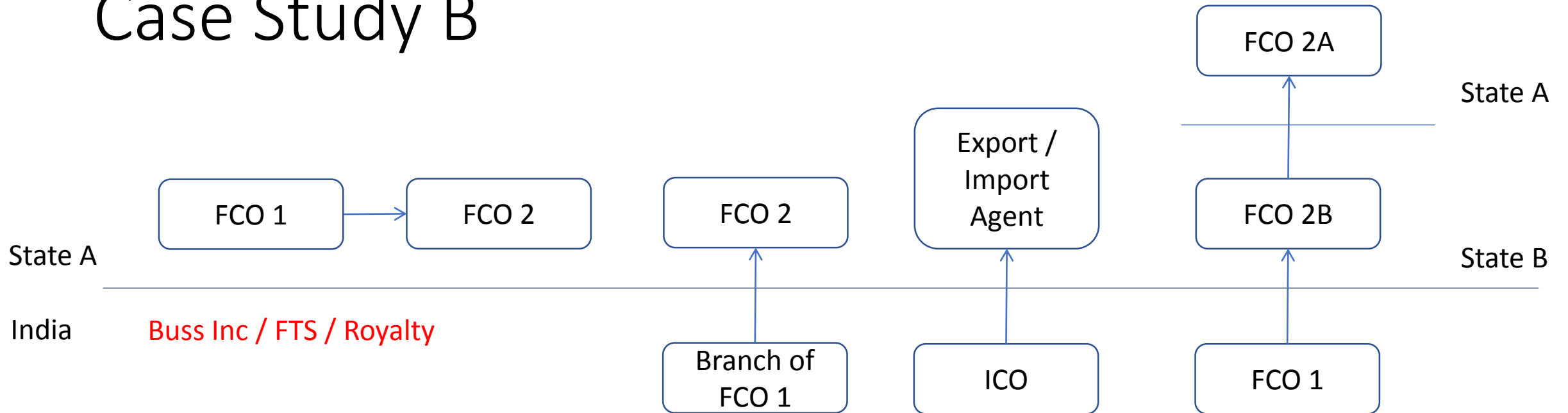
# Case Study A



- Sum chargeable – To be read with : Section 4 (Charge of Income Tax); Section 5 (Scope of Total Income); Section 6 (Residence in India); Section 9 (Income deemed to accrue or arise in India)

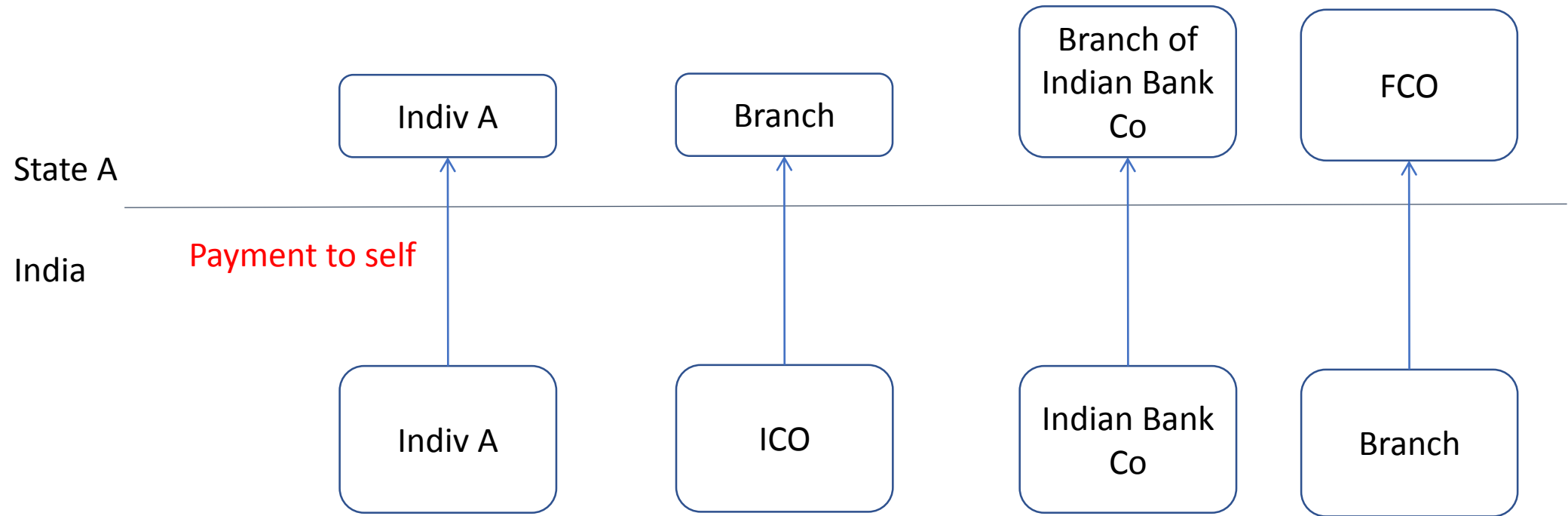
- Which and When Treaty to Apply?
- Which article to apply?
- When other article to apply?

# Case Study B



- Extraterritorial operation of tax law?
- Impact with and without DTAA
- Condition precedent under the Act (s. 9 and 195) and under the Treaty?
- Without normal banking transactions, such as credit card, cross-entries, etc.
- Impact of beneficial ownership, (where FCO 2A is BO and FCO 2B is Int. Co.) Rule 37BA
- Impact of s. 206AA and Rule 37BC (specified payments) and TRC

# Case Study C



- When payment to self is subject to TDS
- Examples: payment of interest for transfer pricing purposes
- PE an independent entity – but payment to self restricted

# FTS under ITA

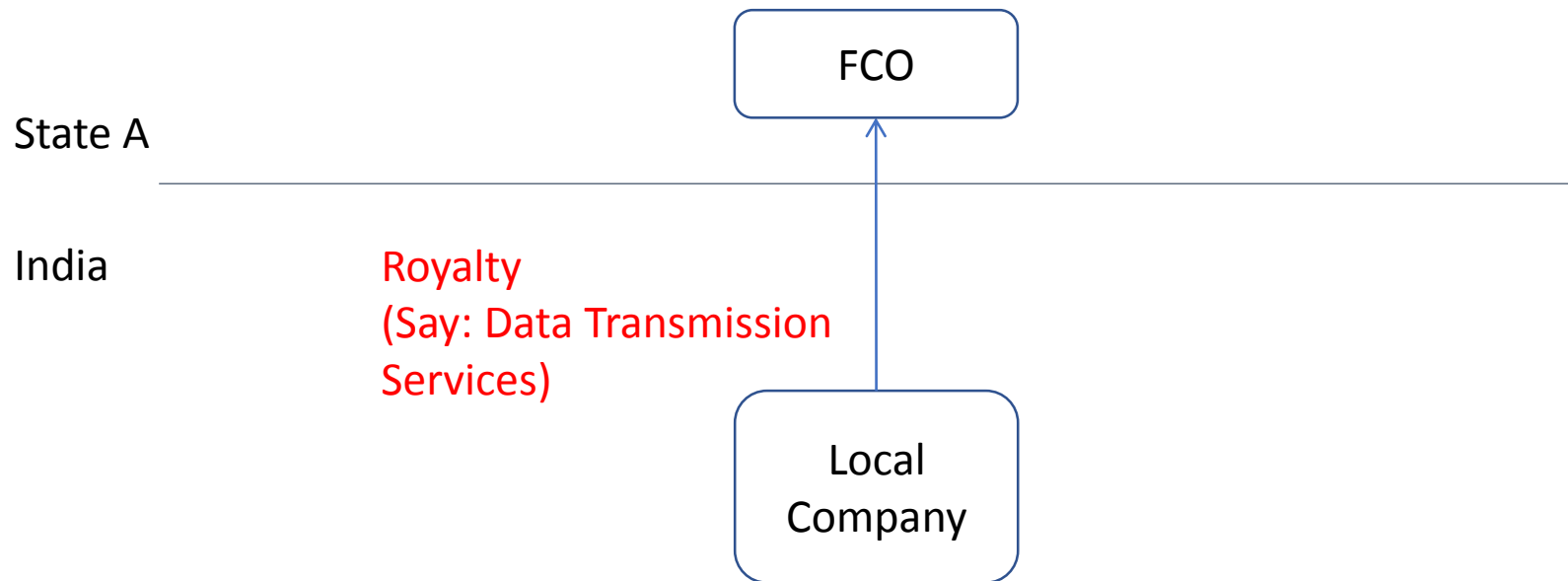
- FTS payable by R to NR, except where services are utilised in business outside India or for making/earning any income from any source outside India.
- FTS payable by NR to NR, where services are utilized in business in India or for making/earning any income from any source in India.
- FTS means any 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
- Deemed to accrue or arise in India whether or not the NR has residence or place of business connection in India or the NR has rendered services in India.

# Royalty under ITA

- royalty payable by R to NR, except where royalty is utilized for business outside India or for making/earning any income from any source outside India.
- royalty by NR to NR, where royalty is utilized for business in India or making/earning any income from any source in India.
- Expln 2: use of any ICS equipment
- Expln 3: Customised electronic data
- Expln 4: Right to use computer software (including granting of license)
- Expln 5: Royalty, whether or not in possession or control of payer / not used directly by payer / situs outside India
- Expln 6: process (secret or otherwise) includes transmission by satellite or other similar technology
- Deemed accrual – whether or not NR has business in India or not



# Case Study D



- Definition of Royalty retrospectively amended under the Finance Act, 2012
- Does it amend DTAA definition?

- Treaty – conditions of accrual / MFN

Accrual under ITA	Accrual under DTAA
Payer R/NR and utilized for business in India / making income from Indian source	Payer R/NR(PE)

# New Skies Satellite BV (2016)

- The Delhi High Court held that any amendment in the domestic law cannot be read into the corresponding provisions of a tax treaty, and that the royalty definition in the tax treaties refers to “secret process” and not merely “process”. Finally, the court held that the interpretation given to the term “royalty” in Asia Satellite before the Amendment will continue to apply to the definition under tax treaties irrespective of the Amendment under the ITA.
- The court held that an amendment to the ITA could not be read in a manner so as to extend its operation to a tax treaty, irrespective of whether the amendment was retrospective prospective or clarificatory.
- Bifurcation between terms defined in a tax treaty and terms not defined: If not defined under DTAA, ITA definition to be used. However, if defined, ITA definition cannot apply.
- Nokia Networks – similar judgement for use of copyrighted articles.

## India-USA DTAA (relevant extracts)

1. Royalties and fees for included services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.
2. However, such royalties and fees for included services may also be taxed in the Contracting State in which they arise and according to the laws of that State; but if the beneficial owner of the royalties or fees for included services is a resident of the other Contracting State, the tax so charged shall not exceed

7. (a) Royalties and fees for included services shall be deemed to arise in a Contracting State when the payer is that State itself, a political sub-division, a local authority, or a resident of that State. Where, however, the person paying the royalties or fees for included services, 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 or fees for included services was incurred, and such royalties or fees for included services are borne by such permanent establishment or fixed base, then such royalties or fees for included services shall be deemed to arise in the Contracting State in which the permanent establishment or fixed base is situated.

(b) Where under sub-paragraph (a) royalties or fees for included services do not arise in one of the Contracting States, and the royalties relate to the use of, or the right to use, the right or property, or the fees for included services relate to services performed, in one of the Contracting States, the royalties or fees for included services shall be deemed to arise in that Contracting State.

## India-UK DTAA (relevant extracts)

1. Royalties and fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.
2. However, such royalties and fees for technical services may also be taxed in the Contracting State in which they arise and according to the law of that State; but if the beneficial owner of the royalties or fees for technical services is a resident of the other Contracting State, the tax so charged shall not exceed

7. Royalties and fees for technical services shall be deemed to arise in a Contracting State where the payer is that State itself, a political sub-division, a local authority or a resident of that State. Where, however, the person paying the royalties or fees for technical services, 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 obligation to make payments was incurred and the payments are borne by that permanent establishment or fixed base then the royalties or fees for technical services shall be deemed to arise in the Contracting State in which the permanent establishment or fixed base is situated.

# Types

- Downloading licensed software from NR website
- Purchase of Software/Business Reports (not off-the-shelf) from NR
- License to use Database maintained by NR
- Access to Portal (say travel portal by travel agency)
- Access to Customer Database
- Payment for equipment
- Data Processing for specialized services – FTS
- Customisation of software – FTS
- Payment for online advertising – no FTS/R but Equalization Levy (no PE)
- Human intervention – relevant for FTS / FIS but not for Royalty
- Payments for facility with no customization – could be use of space – no FTS
- Routine AMC services – no FTS
- Make-available technical services: Transfer of operational / engineering knowledge, expertise or skill of an enduring nature whether through seconded employees or otherwise

# Others

- Secondment of employees v. FTS/make-available v. reimbursement
- Employee of FCO working in India
- Employee of ICO working abroad
- Crew of ship and aircraft on-board and off-board duty in India
- Guarantee Fees
- Excess TDS refund to Payer
  - Section 200A(1)(f) and Circular 7/2007 – allows refund of TDS to Deductor when the contract is cancelled
  - Notification 45/2017: provides for electronic filing of form 26B (Rules 31A(3))

# Thank You

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