

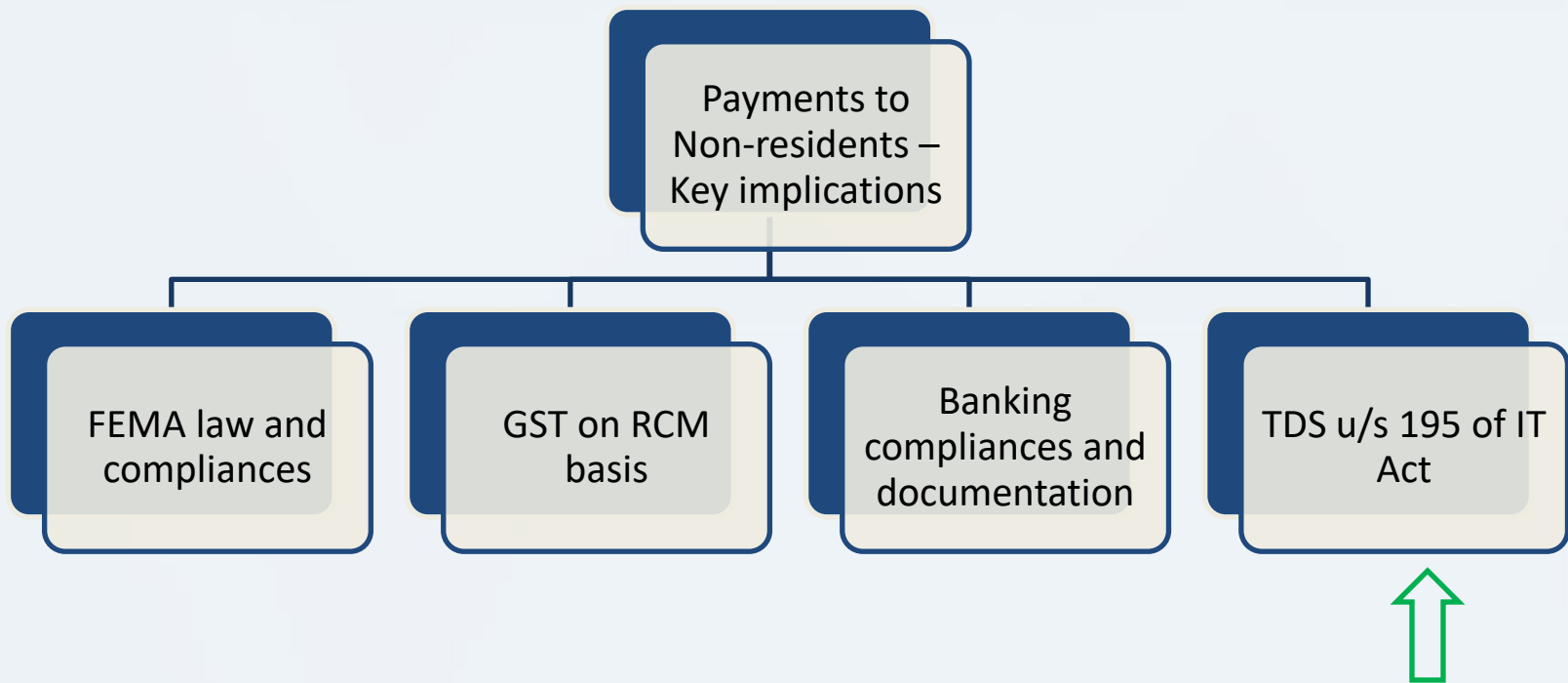
# Overview of Section 195

30 December, 2017

WIRC of ICAI



# Payments to Non-resident





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## Section 195 - Analysis

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# Section 195 - Analysis

## Payer/Deductor

- Any person (being a resident or a non-resident)
- responsible for paying to a non-resident or a foreign company

## Nature of payment

- Any interest or
- any other sum chargeable to tax
- Excluding interest u/s 194LB, 194LC, 194LD; salary; dividend under section 115-O

## Time of deduction

- At the time of credit or payment whichever is earlier

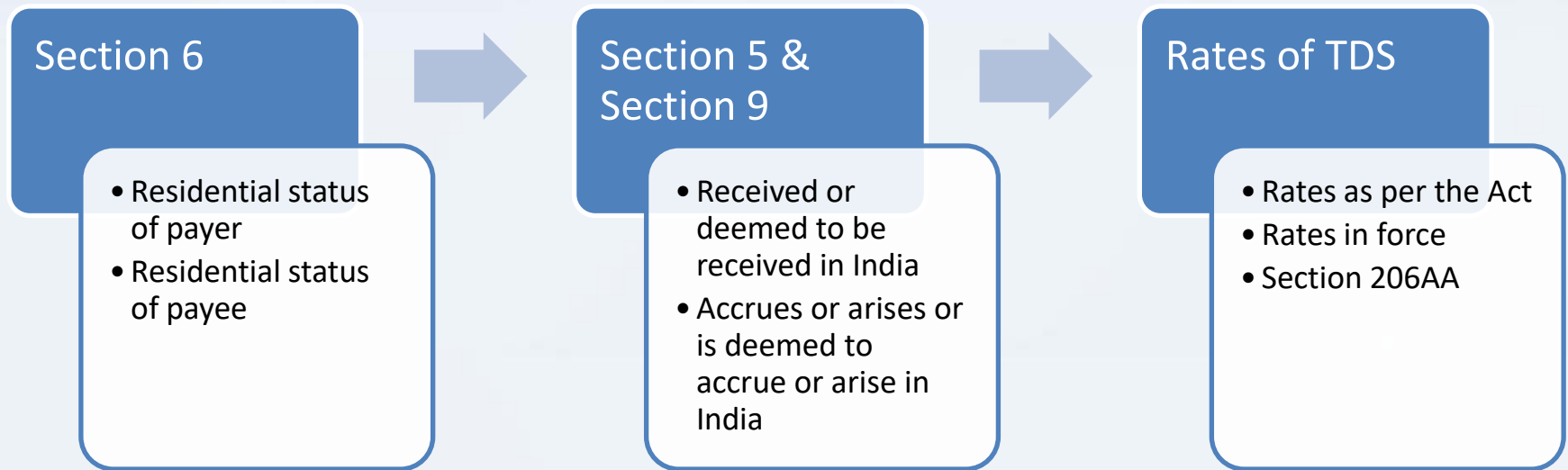
## Rate of Deduction

- Tax to be deducted at rates in force

## Section 195 – Comparison with Other TDS Provisions

Particulars	Section 195	Other TDS Provisions
Obligation to withhold taxes	At the time of payment of 'any sum chargeable to tax'	On payment of a specific nature
Basic Limit	There is no basic limit for amount of payment in section 195	Threshold criteria for amount of payment is specified in relevant sections
Applicability	Applicable to all income recipients	Special exemptions provided under each section
Certificate for remittance	Mandatory	Not required

# Determining Taxability and Rate of Tax



# Residential status as per Section 6

**Individual [6(1)]**



Period of Stay in India >  
183 days\*

**HUF [6(2)]**



Resident in India, except  
where control and  
management outside India

**Indian Co.[6(3)]**



Always resident in India


**Foreign Co. [6(3)]**



If POEM in India

\*Period of Stay 60 days (in PY) and 365 days in 4 preceding years

## Residential status of 'Individual' Payee – Issues



- Payer needs to determine the residential status of the Payee

- Issue of determining the status in the earlier months of the year

- Possible view: Status of the payee on the date of payment to be taken

- Alternate view: Status of payee for the preceding year to be taken unless payee has become non-resident at the time of payment



# POEM Provisions

## Section 6: Residence in India

- (3) A company is said to be a resident in India in any previous year, if—
- (i) it is an Indian company; or
  - (ii) its place of effective management, in that year, is in India.

Explanation - For the purposes of this clause "place of effective management" means a place where key management and commercial decisions that are necessary for the conduct of business of an entity as a whole are, in substance made.

Payer's POEM in India – whether an issue



Payee's POEM in India - whether an issue

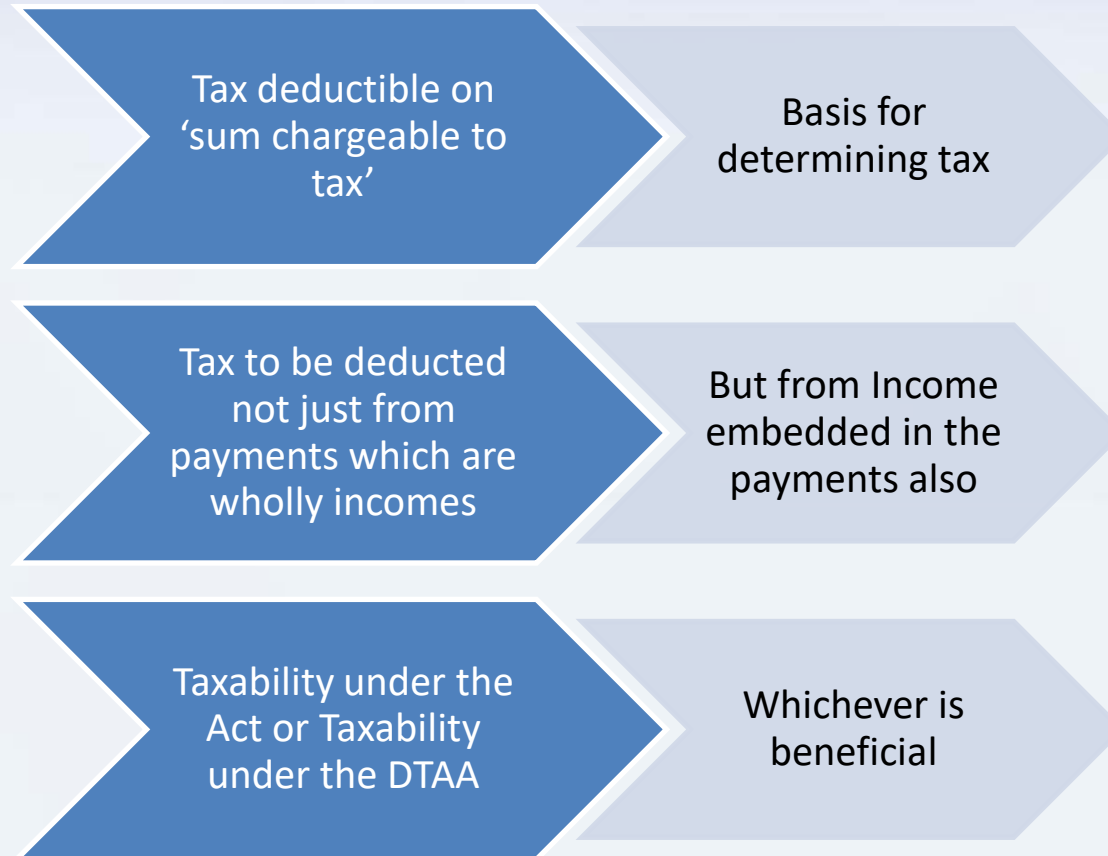


# Extract of section 195(1)

## Section 195: Other sums

(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:

# Chargeability



# Chargeability under Act/DTAA

Chargeability to tax governed by the provision of Act/DTAA:

Nature of Income	Act *(Section)	Treaty(Article)
Business/ Profession	9(1)(i)	5,7, & 14
Salary	9(1)(ii)	15
Dividend	9(1)(iv), 115A	10
Interest	9(1)(v), 115A	11
Royalty	9(1)(vi), 115A, 44DA	12
FTS	9(1)(vii), 115A, 44DA	12
Capital Gains	9(1)(i), 45	13

\* Apart from section 5 wherever applicable

# TDS on reimbursement of expenses

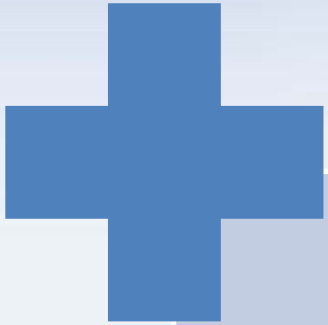

Whether reimbursement is income and subject to TDS?

Business income - TDS not an issue since business income taxable on net basis

Issue on reimbursement of payments taxable on gross income basis (Royalty, FTS etc.)

Conflicting Judgements

# TDS on reimbursement of expenses

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- Dunlop Rubber Co. Ltd - Reimbursement of shared cost on R&D not an Income
  - Nathpa Jhakri Joint Venture – Reimbursement not taxable if it does not include any part in the nature of Income
  - AP Moller Maersk A S – Reimbursement of expenses cannot be income
  - Van Oord ACZ Marine – Technical and consultancy services rendered in shadow of reimbursement - taxable
  - C.U. Inspections (I) Pvt Ltd –expenses incurred by India Co. routed through Holding Co. – reimbursement taxable
  - Hindalco Ind. Ltd – reimbursement of incidental expenses – part of FTS – taxable in India

# Deduction on Income or Gross Payment

- Tax to be deducted from payments:
  - which are wholly incomes; and
  - payments where only a portion of the payment may be income [[Transmission Corp. 239 ITR 587 \(SC\)](#) & [GE India Technology Cen. Pvt. Ltd. \(193 Taxman 234\) 2010 SC](#)]
- CBDT clarifications on above:
  - CBDT circular no. 02/2014 dated 26.2.2014: Interest u/s. 201 will be on portion representing income (not the whole amount)
  - CBDT circular no. 03/2015 dated 12.2.2015: Disallowance u/s. 40(a)(i) will be on sums chargeable to tax (not the whole amount)

# Transmission Corporation of A. P. Ltd. [1999] 239 ITR 587 (SC)

## Facts:

- Assessee had made payments to Non Resident against purchase of machinery and erection & commissioning thereof
- Assessee's contended that Section 195 applies only in respect of sums comprising of pure income or profit and not the gross sum which would include cost of materials and other expenses

## Judgement:

- TDS is applicable not only to amount which wholly bears income character but also to sums partially comprising of income
- Obligation to deduct tax limited to portion of the income chargeable to tax
- Section 195 is for tentative deduction of tax and by deducting tax, rights of the parties are not adversely affected
- Payer and Payee are safeguarded for lower deduction by Sections 195(2), 195(3) and 197
- Required to file application to AO – If no application filed, tax to be deducted



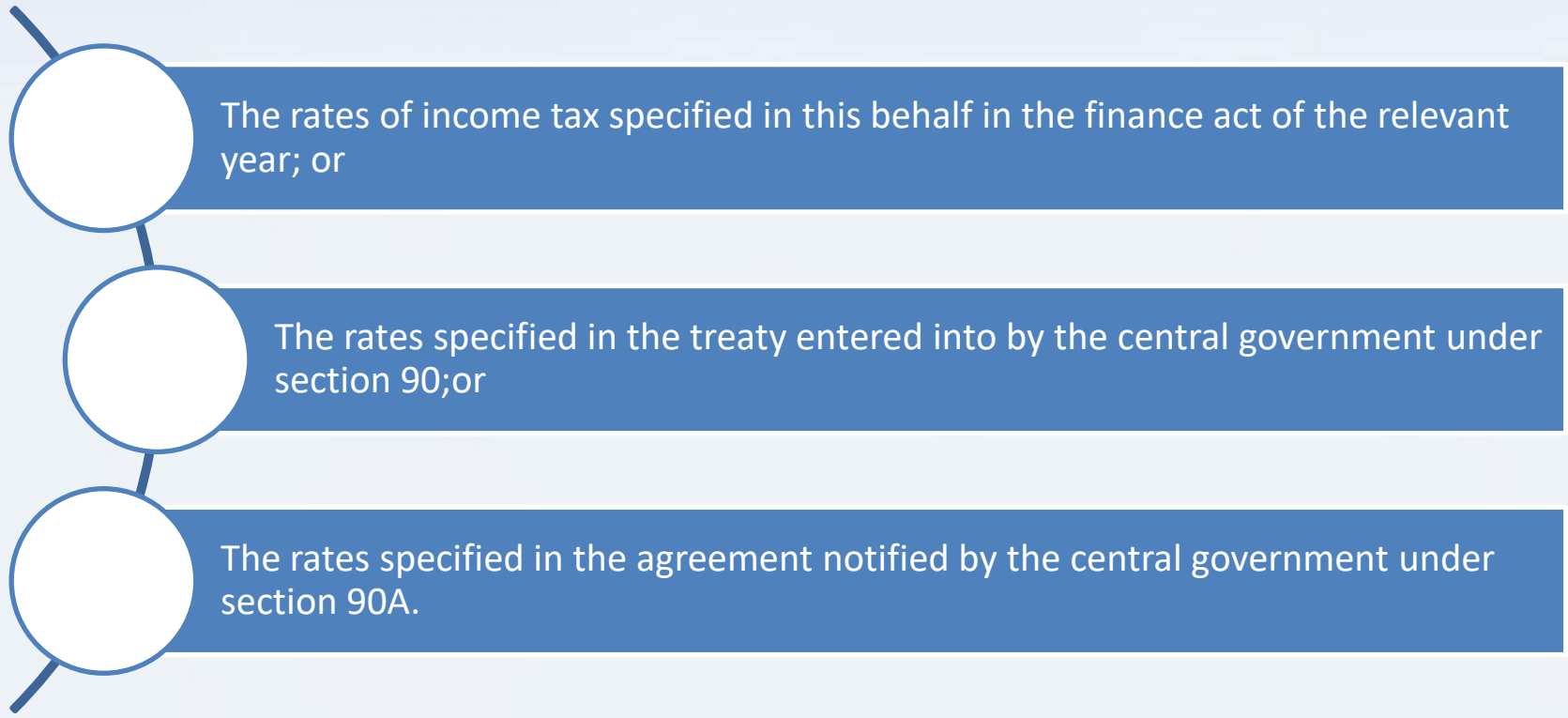
# GE India Technology Centre (P.) Ltd. 327 ITR 456 (SC)

## Judgement:

- Payer not liable to deduct tax if amount not chargeable to tax
- The obligation to deduct TAS is, however, limited to the appropriate proportion of income chargeable under the Act forming part of the gross sum of money payable to the non-resident.
- Section 195(2) applies where the payer is in no doubt that tax is payable in respect of some part of the amount
- It applies only in cases of composite payment, in which certain portion has an income element
- If payer is fairly certain, then he can make his own determination of TDS without approaching AO

# Rate of deduction u/s 195 - Rates In Force

The term “rates in force” for the purpose of section 195 as defined u/s 2(37A)(iii):



The rates of income tax specified in this behalf in the finance act of the relevant year; or

The rates specified in the treaty entered into by the central government under section 90; or

The rates specified in the agreement notified by the central government under section 90A.

The tax shall be deducted at the rate provided in the finance act or at the rate provided in DTAA, whichever is beneficial

## TDS rate chart under section 195\*

Particular	TDS Rate
Income in respect of investment made by a NRI	20%
Income by way of long term capital gains in section 115E in case of a NRI	10%
Income by way of long term gains on unlisted securities	10%
Short term capital gains under section 111A	15%
Any other income by way of long term capital gains	20%
Interest on money borrowed in foreign currency	20%
Income by way of royalty payable by government or an Indian concern	10%
Income by way of royalty, not being royalty of the nature referred to be payable by government or an Indian concern	10%
Income by way of fees for technical services payable by government or an Indian concern	10%
Any other income	30%

\*As per Finance Act

# Section 90 – Availing lower rate as per the DTAA

## Conditions for availing treaty rates

- Tax Residency Certificate to be submitted to payer (Section 90(4))
- Form 10F to be submitted to payer (Section 90(5))

## If TRC, 10F not available

- Benefits of DTAA rates not available

## Applicability of Surcharge and Cess

- Under the Act, rates of TDS are to be increased by Surcharge and cess
- However, treaty rates are all inclusive rates; surcharge and cess not to be added

## Section 206AA – Higher rate of tax deduction

If the non-resident payee does not furnish the PAN, then the rate of tax should be based on higher of the rates mentioned below

At the rates specified in the relevant provision of this act; or

at the rate or rates in force; or

At the rate of twenty percent

Post introduction of Rule 37BC, impact of section 206AA diluted significantly

# Section 206AA – Higher rate of tax deduction

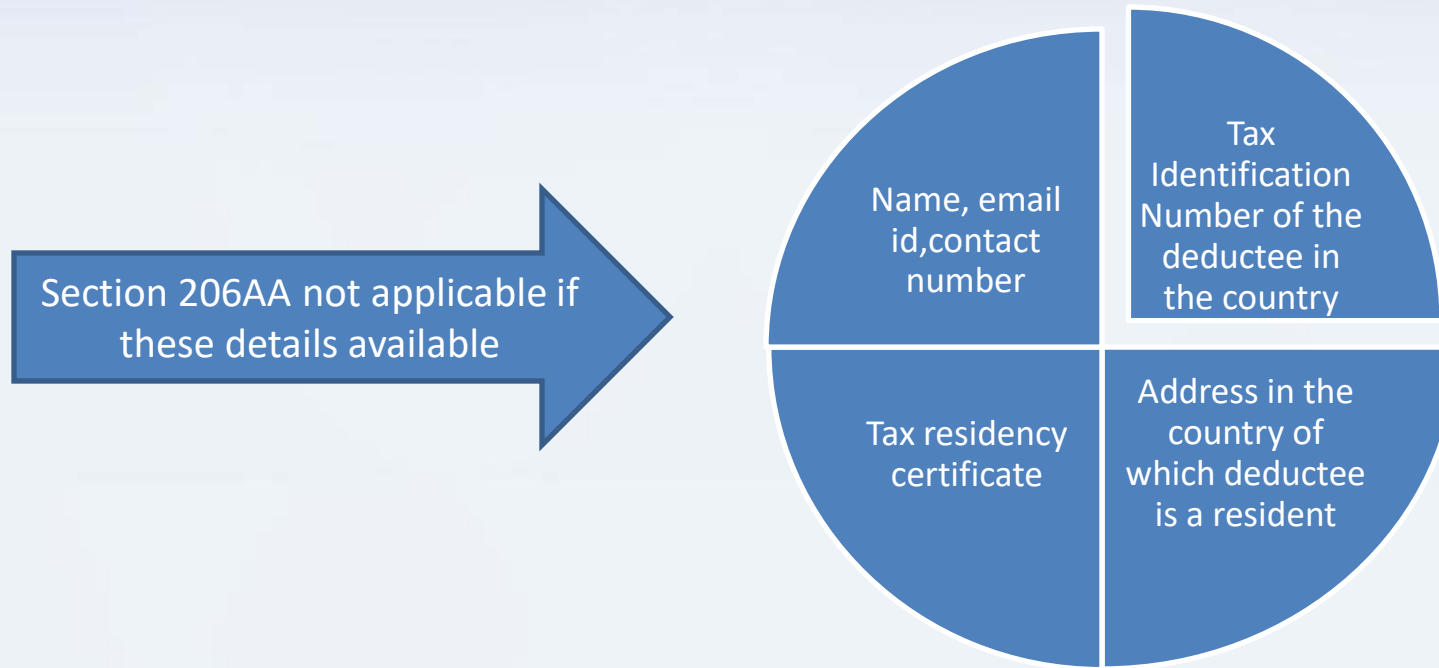
## **Whether Section 206AA overrides DTAA rates?**

- ✓ Serum Institute of India Ltd. [2015] 68 SOT 254 (Pune.)
- ✓ Infosys BPO Ltd. [2015] 154 ITD 816 (Bang.)
- ✓ Nagarjuna Fertilizers & Chemicals Ltd - [2017] 78 taxmann.com 264 (Hyderabad - Trib.) (SB)
- ✓ Pricol Ltd. [ITA. No.880 & 1141/Mds./2014] [Date of Order: 9.12.2015] (Chennai.)

## **Whether Surcharge/Cess applicable on Section 206AA rate?**

- ✓ Computer Sciences Corporation India (P.) Ltd. v/s ITO ([2017] 77 taxmann.com 306 (Delhi - Trib.) –
  - Not applicable as Income-tax Act does not expressly provide for the same
  - Whether 206AA gets absorbed into Section 195, and therefore can there be a contrary view?
- ✓ Circular No. 1/2017 – TDS u/s 192 – No Cess if Section 206AA is applied

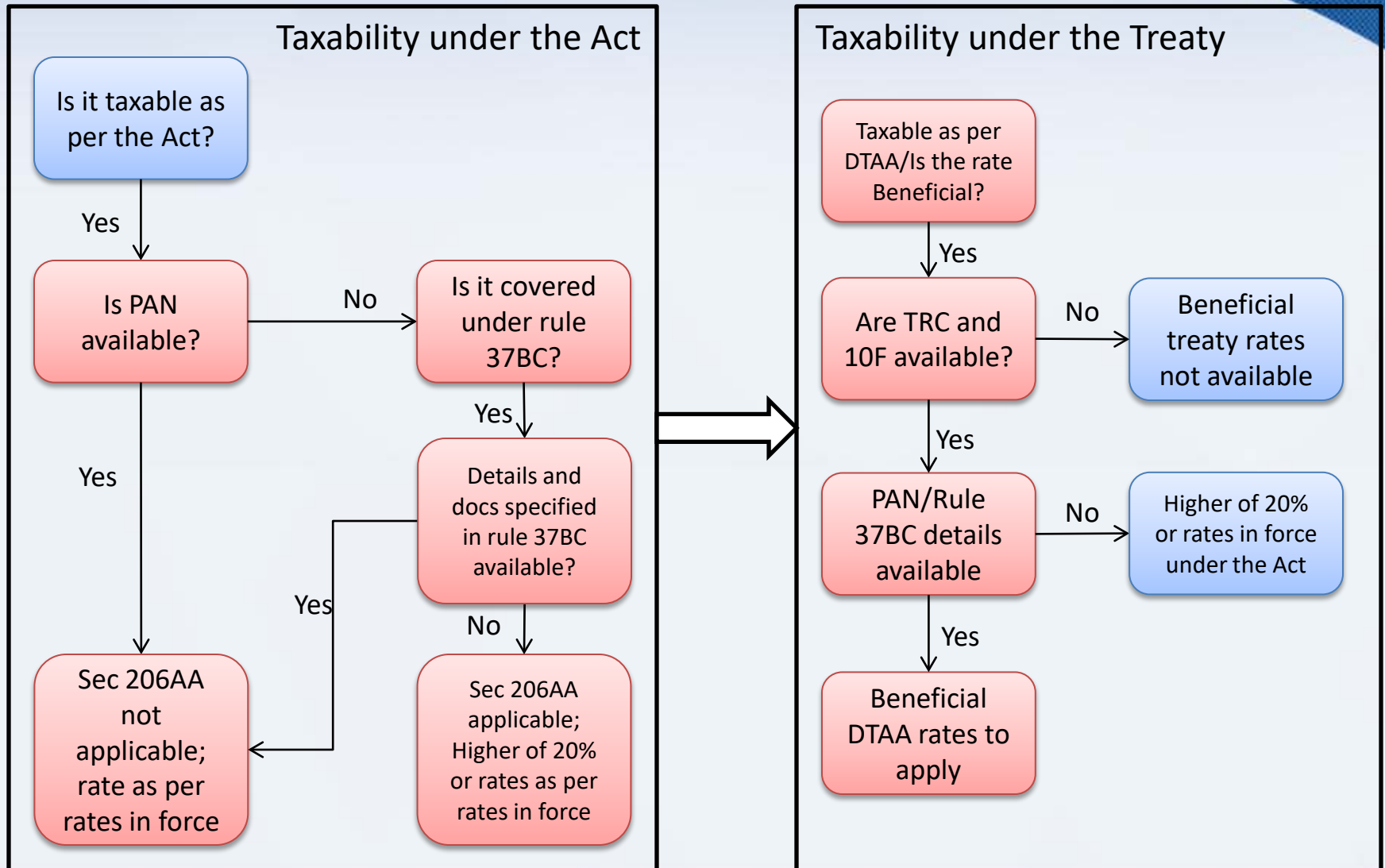
# Rule 37BC – Relaxation on applicability of Section 206AA



Rule 37BC applicable only in case of payment of Interest, Royalty, FTS and payment on transfer of Capital asset.



# Interplay of Act, DTAA, PAN & TRC







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## Other Provisions

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# Grossing up of tax

- This example illustrates the approach of grossing up of tax:

Particulars	Amount
Invoice Amount	1000
Tax Deducted at Source@10%	100
Net Amount Payable	1000
Grossed up Amount ( $1000/90*100$ )	1111.11
Less: tax deducted ( $10%*1111.11$ )	111.11
Net Payment	1000

## Rule 115 – Rate of conversion for incomes

Nature of Income	Rate of conversion
Salary	when salary is due, paid in advance or arrears*
interest on securities	when interest is due*
Income from business or profession (operation of ships)	when income is deemed to accrue or arise*
dividends	when dividend is declared, distributed or paid*
Capital gains	when capital asset is transferred*
Income from house property	Last day of the previous year of the assessee
Income from business and profession (other than operation of ships)	
Income from other sources (other than interest on securities and dividend)	

\*Rates as on last day of immediately preceding month

# Rule 115A – Rate of conversion for Capital Gains

Rate of conversion for transfer of shares or debentures by Non resident (computation under proviso to clause (a) of Section 48(1))

Nature of Income	Rate of conversion
Cost of Acquisition	Avg of TT buying and selling rate on date of purchase
Expenditure incurred on transfer	Avg of TT buying and selling rate on date of transfer
Value of consideration	Avg of TT buying and selling rate on date of transfer
Reconverting capital gains	telegraphic transfer buying rate on date of transfer

# Foreign Exchange Rate

## Rate of exchange for TDS

- **Rate or rates** of exchange adopted by the State Bank of India for buying such currency
  - as on the date **on which the tax is required to be deducted at source**
  - **not when the tax is actually deducted**

## Incase of Fluctuation of rates

- If the exchange rate fluctuates between the date of deduction of tax and the date on which payment is made to the non-resident
  - the difference between the exchange rates shall be ignored for TDS purposes

# Representative Assessee

## Section 160(1)(i) and Section 163

- Includes Agent of the non-resident in respect of income u/s 9(1), including agent u/s 163
- As per Section 163 agent includes a person from or through whom the non-resident is in receipt of any income directly or indirectly

## Section 160(2)

- Every representative assessee shall be deemed to be an assessee

## Representative assessee – Implications for the payer

- The payer of income could be deemed to be a representative assessee for the Non-resident in respect of Income in India
- Accordingly, the payer should be careful in relation to payments to non-residents



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## Section 195 – Compliances

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## Section 195 – Compliance Procedures

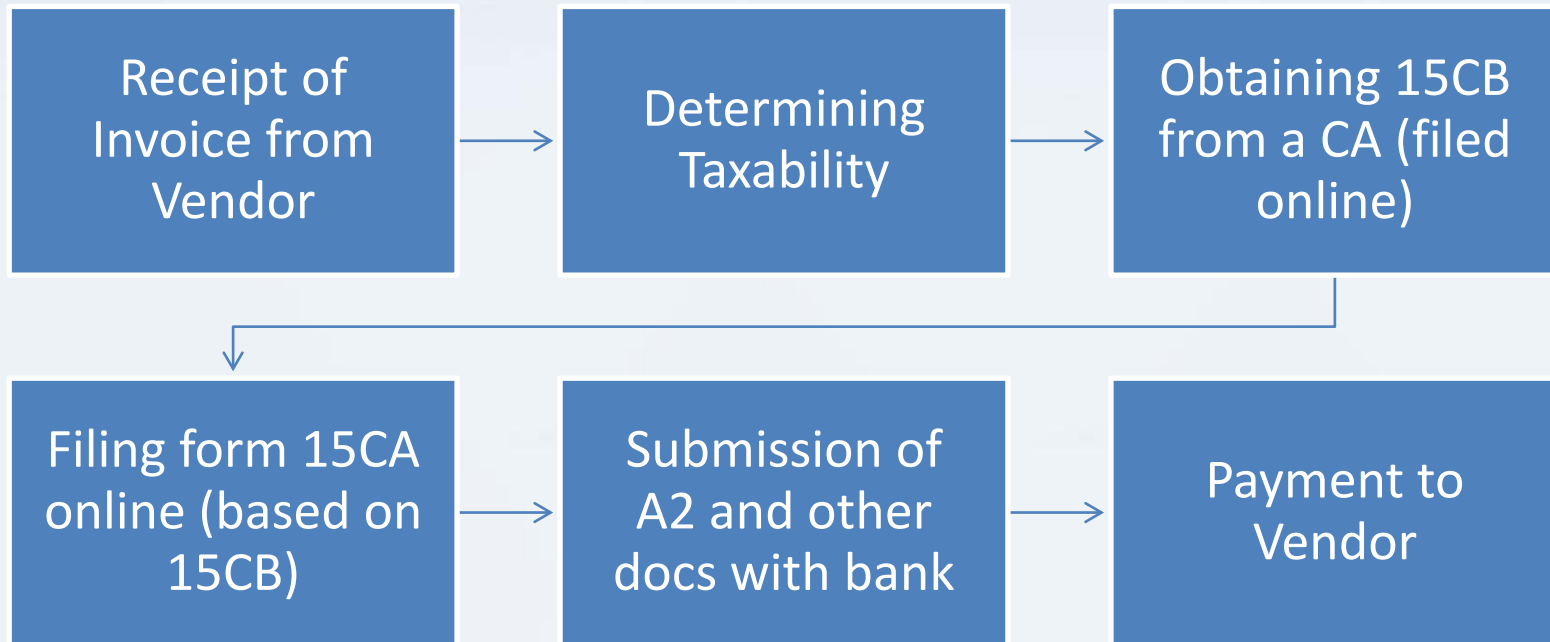
Compliance	Compliance dates
Date of Deduction of TDS	Time of making the payment or credit to the Non-Resident, whichever is earlier
Date of payment of TDS	On or before the 7 <sup>th</sup> of next month in which TDS is deducted
Furnishing of TDS certificate	15 days from the due date of TDS returns
Compliances at the time of payment	Filing of form 15CA(to be filed by the Payer) and 15CB (to be filed by a CA)

- Due dates for submitting of TDS return in Form 27Q:

TDS deduction on quarterly basis	Filing Due Date
1 <sup>st</sup> April to 30 <sup>th</sup> June	31 <sup>st</sup> July
1 <sup>st</sup> July to 30 <sup>th</sup> September	31 <sup>st</sup> Oct
1 <sup>st</sup> October to 31 <sup>st</sup> December	31 <sup>st</sup> Jan
1 <sup>st</sup> January to 31 <sup>st</sup> March	31 <sup>st</sup> May



## Remittance Procedure - Form 15CA And Form 15CB



# Section 195(2), Section 197 and Section 195(3)

## Section 195(2)

Application can be made by payer

Application for appropriate proportion of sum chargeable to tax

Application to be made on plain paper

Application to be made for each payment.

## Section 197

Application can be made by payer and payee

Application for lower or NIL rate for deduction of tax at source

Application in Form 13

Application can be for a particular period.

Application to be made prior to credit/payment of amount subject to tax

## Section 195(3)

Application can be made by payee

Application for Nil rate of tax at source

Application in form No. 15C (banking Co.) and form No. 15D (other cases)

Application can be for a Financial year

Grant of Certificate subject to conditions in rule 29B(2)

## Section 195(2) for 'Nil' withholding

Favorable cases	Against cases
Van Oord ACZ India (P.) Ltd.[2010] 323 ITR 130 (Del.)	GE India Technology Centre (P.) Ltd. [2010] 327 ITR 456 (SC)
Mangalore Refinery and Petrochemicals Ltd. [2008] 113 ITD 85 (Mum.)	Czechoslovak Ocean Shipping International Joint Stock Company [1971] 81 ITR 162 (Cal.)
	Graphite Vicarb India Ltd. [1986] 18 ITD 58 (Cal.)

Advisable to for 195(2) for proportionate sum chargeable to tax and not in case of Nil withholding



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Section 195 –  
Consequences of Non  
Compliance and other  
important provisions

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# Consequences of non compliance of Section 195

Withholding tax not deducted or not deposited within prescribed time

- Disallowance of expenses u/s 40(a)(i)

Tax not withheld /deposited appropriately

- Recovery of tax u/s 201(1)
- Interest@ 1% per month for delay in deduction and 1.5% for delay in payment

Tax withheld not paid

- Penalty, not exceeding the amount of tax (section 221)

Tax not withheld or not paid


- Penalty, not exceeding the amount of tax (section 271C)

# Refund of TDS paid u/s 195


Circular No. 7 dated 23rd October, 2007 provides for refund of excess tax paid in the following cases with the prior approval of Chief Commissioner of Income - tax or DGIT within 2 years from the end of the financial year in which tax was deducted:




- Contract cancelled and remittance not made to the non-resident.



- Remittance has been made, but the contract gets cancelled then the remitted amount shall be returned.



- Partial Cancellation of the contract and no remittance is made for the unexecuted part of the contract.




- Partial Cancellation where remittance has been made for the unexecuted part of the contract then the amount remitted for the unexecuted part shall be returned.


# Refund of TDS paid u/s 195




- Tax deducted on the same amount twice by mistake.




- Retrospective amendment in law/exemption by way of notification making the sum remitted exempt from tax.



- An order is passed under section 154, 248 or 264 of the Income Tax Act, 1961 reducing the tax deduction liability of a deductor under section 195.



- Withholding done at higher rate prescribed by the Act when lower rate prescribed under DTAA.



- Grossing up done when not required to be done so.



# Equalisation levy

## Applicability and Rates

- Applicable w.e.f. 01/06/2016
- Payable @ 6% of the amount of consideration exceeding Rs. 1 lakh
- Income exempt for recipient u/s 10(50)

## Chargeability

- Specified Services: online advertisement, any provision for digital advertising space or any other facility or service for the purpose of online advertisement
- Payer: Resident (carrying on business and profession) or PE of a non resident
- Recipient: Non-resident not having a PE in India

## Compliances and consequences

- Due date for payment – 7<sup>th</sup> of following month
- Due date for furnishing Equalisation levy Statement – 30<sup>th</sup> June
- In case of non compliance, expenditure disallowance u/s 40(a)(ib), Penalty for non-deduction, penalty @ 1,000 per day for EL deducted but not paid





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## Section 195 – Key points and typical issues

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## TDS u/s 195 – Key Points

Legal status of the payee

Residential status –both under the Act and DTAA

Nature of income and its categorization e.g. Royalty, FTS etc

General Anti Avoidance Rules (GAAR)

Existence of Business connection/Permanent Establishment

Taxability and rate of withholding-under the Act and DTAA

Exchange rate-as provided under rules 115/115A/26

## TDS u/s 195 – Key Points

Determining the Country of Residence of tax payer (CoR)

Determining the Country of Source of income (CoS)

Taxes covered, Persons covered

Characterization of Income

Beneficial Ownership

MFN clause, LOB clause, Protocols, Technical Explanation

BEPS Multilateral Instrument

# TDS on purchase of property from a Non Resident

Purchase of property from a resident, TDS @ 1% deducted u/s 194IA

Purchase from a non-resident, TDS to be deducted as per section 195

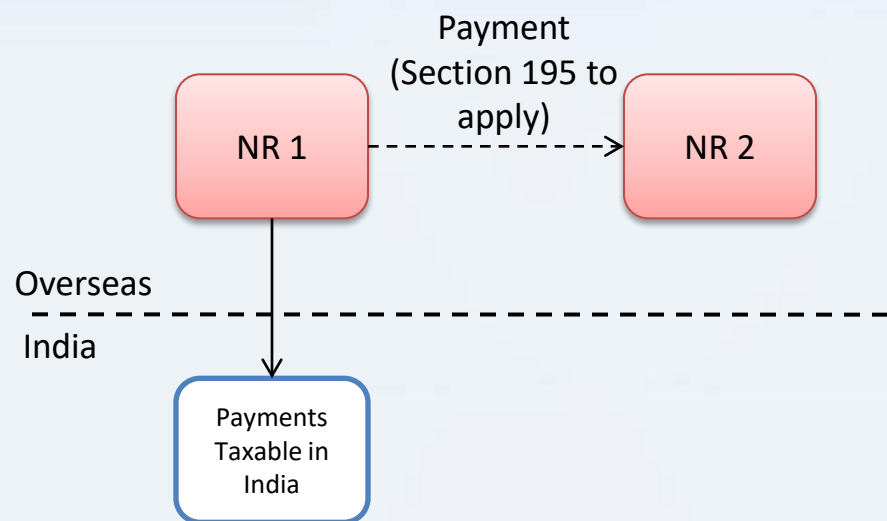
Whether Buyer can compute capital gains??

Whether buyer can take into account Section 54 exemption if document is produced?

Deduction on entire sales consideration – Cases: Syed Aslam Hashmi; R. Prakash

Form 15CB –requires mention of Capital gains hence net income computation presumed??

# NR to NR payments – Whether section 195 applies?



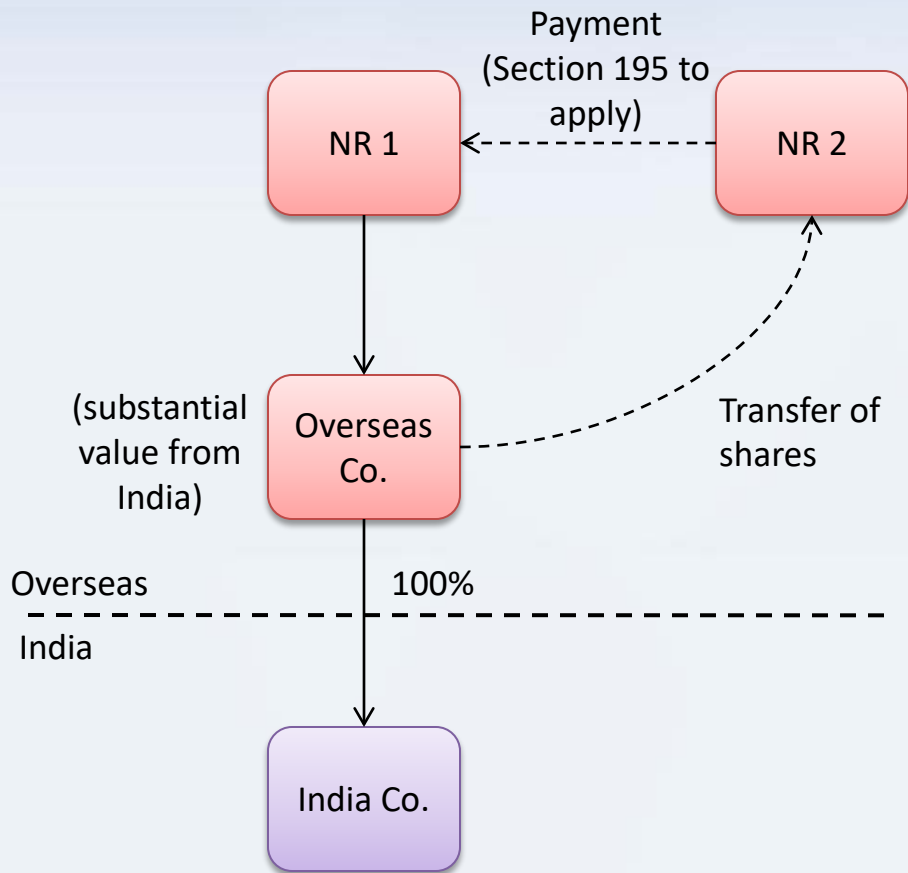
Section 195 applicable to payments made to a Non resident by a Non resident

Non resident required to deduct tax on payments chargeable to tax under the Act

TDS compliances to be done by non-resident

Vodafone International Holdings B.V (2012) (341 ITR 1)

# Indirect Transfer – Section 195



- Provisions of section 195 are applicable to payments made to a Non Resident.
- The payer is required to deduct tax on payment of any sum chargeable to tax under the provisions of the Income-tax Act.
- In case of payment made by a non-resident to another non-resident on acquisition of shares of a foreign company which is taxable u/s 9(1)(i), withholding tax provisions of Section 195 should be applicable.
- Accordingly, the Non resident should be liable to withhold tax on payment made to a Non Resident for purchase of shares.

# Employee stock option plan(ESOP) to Non-residents

Indian Co. issuing shares under ESOP plan to Non-resident employees of subsidiaries abroad

Difference between the fair value and the exercise price - a perquisite as per section 17(2)(vi)

Services rendered outside India; income accrues or arises outside India; not taxable u/s 5(2)(b) read with section 9(1)(ii)

Whether shares can be deemed to be received in India?  
Income taxable as per section 5(2)(a)?

Check DTAA for taxability of salary income; If taxable in India TDS required to be deducted u/s 195

# Thank You

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