

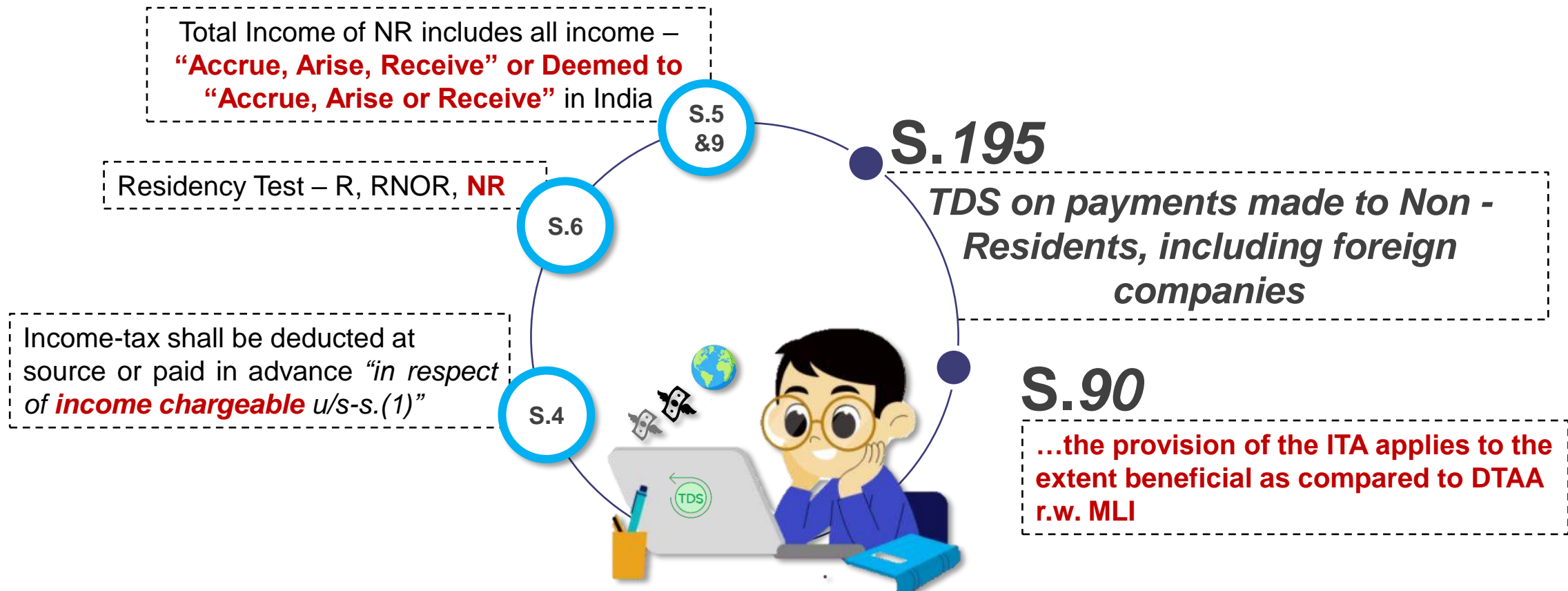
WESTERN INDIA  
REGIONAL COUNCIL



# PRACTICAL ISSUES UNDER S.195

JINAL M. JAIN | AUGUST 19, 2023

# BASIC FRAMEWORK | A BIRD EYE VIEW



# OVERVIEW | S.195(1)

**Payer**  
“**Any person**”  
responsible for  
paying



**Nature**  
**Any interest** or **any other sum**  
**chargeable** under the provision  
of IT Act (other than Salaries)

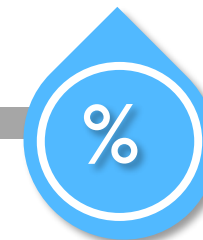


**Payee**  
A **non-resident**, not  
being a company or to  
**a foreign company**

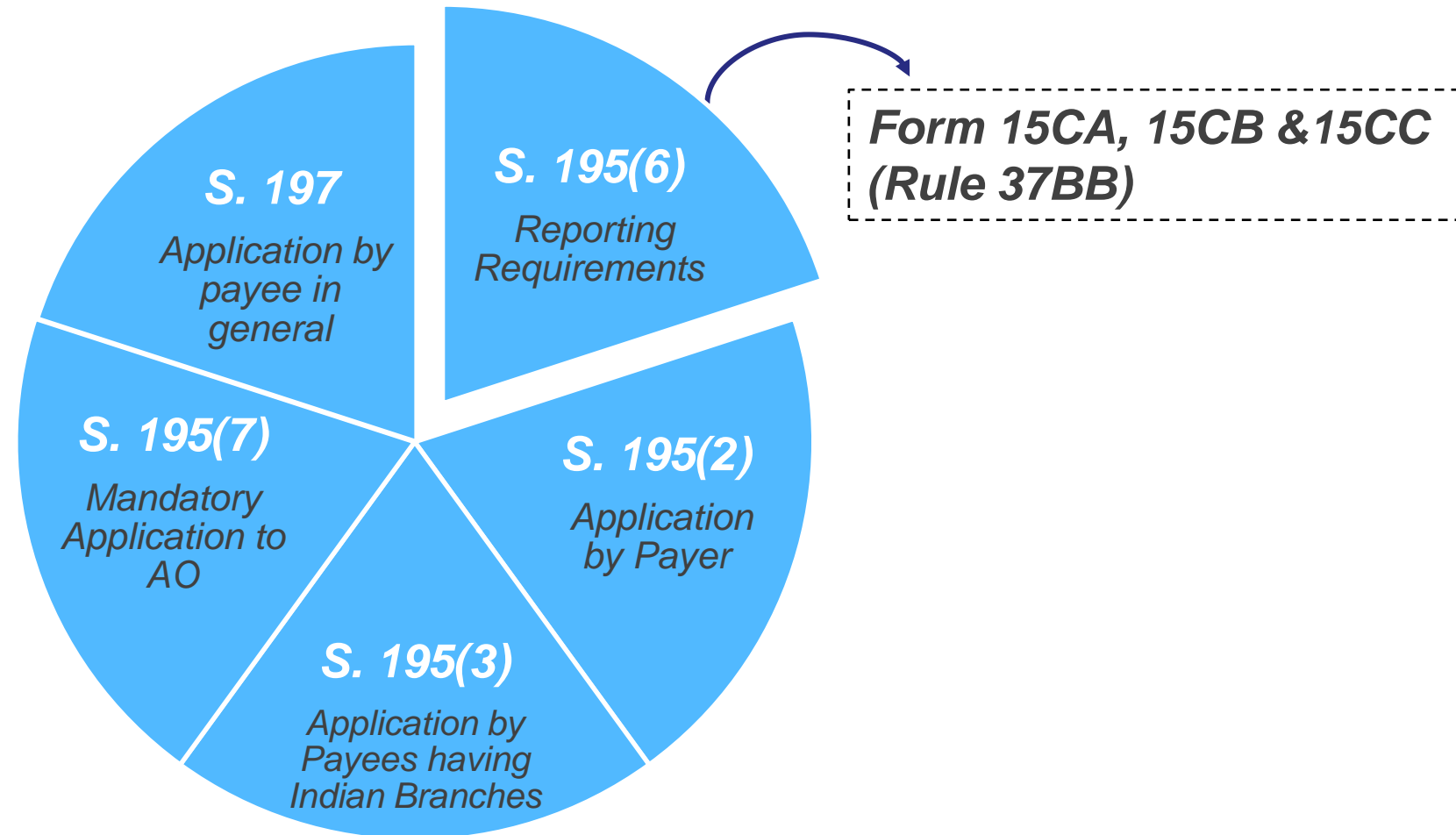


**Limit**  
**No threshold**

**Rate**  
Rates in force



# GLIMPSE OF CERTIFICATE & FORMS PROVISION



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# FORM 15CA AND 15CB | GENESIS

Circular 759 dated 18.11.1997

Withdrawal of NOC by CBDT. However, self-declaration via an **undertaking** and **CA certificate** from R→RBI, then RBI → AO

Circular 767 dated 22.05.1998

For ADs authorized remittances, AD to **forward copy of undertaking and certificate to AO**

Circular 10/2002 dated 09.10.2002

Since the certificate does not provide reason for non-deduction of TDS, format of certificate and undertaking was revised

Notification 67/2013 dated 02.09.2013 and Notification 93/2015 dated 16.12.2015

*Substitution in Rule 37BB & corresponding overhaul of Form 15CA-CB i.e. Introduction of parts (A,B,C,D), giving wide coverage of compliance in case of foreign remittance (taxable, not taxable & exempt)*

Continues till date.....

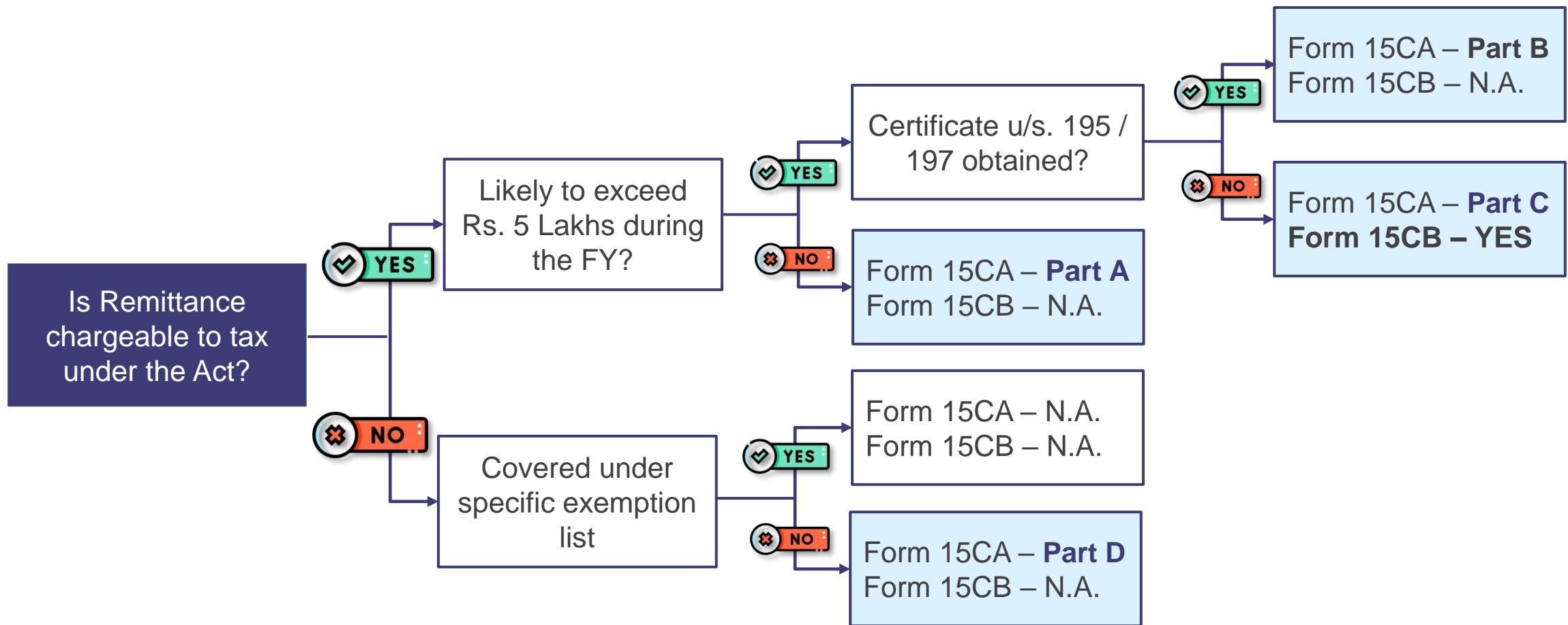
Notification 30/2009 dated 25.03.2009

Rule 37BB & Form was inserted for the first time - self-declaration in Form 15CA (without parts) and certificate of accountant in Form 15CB

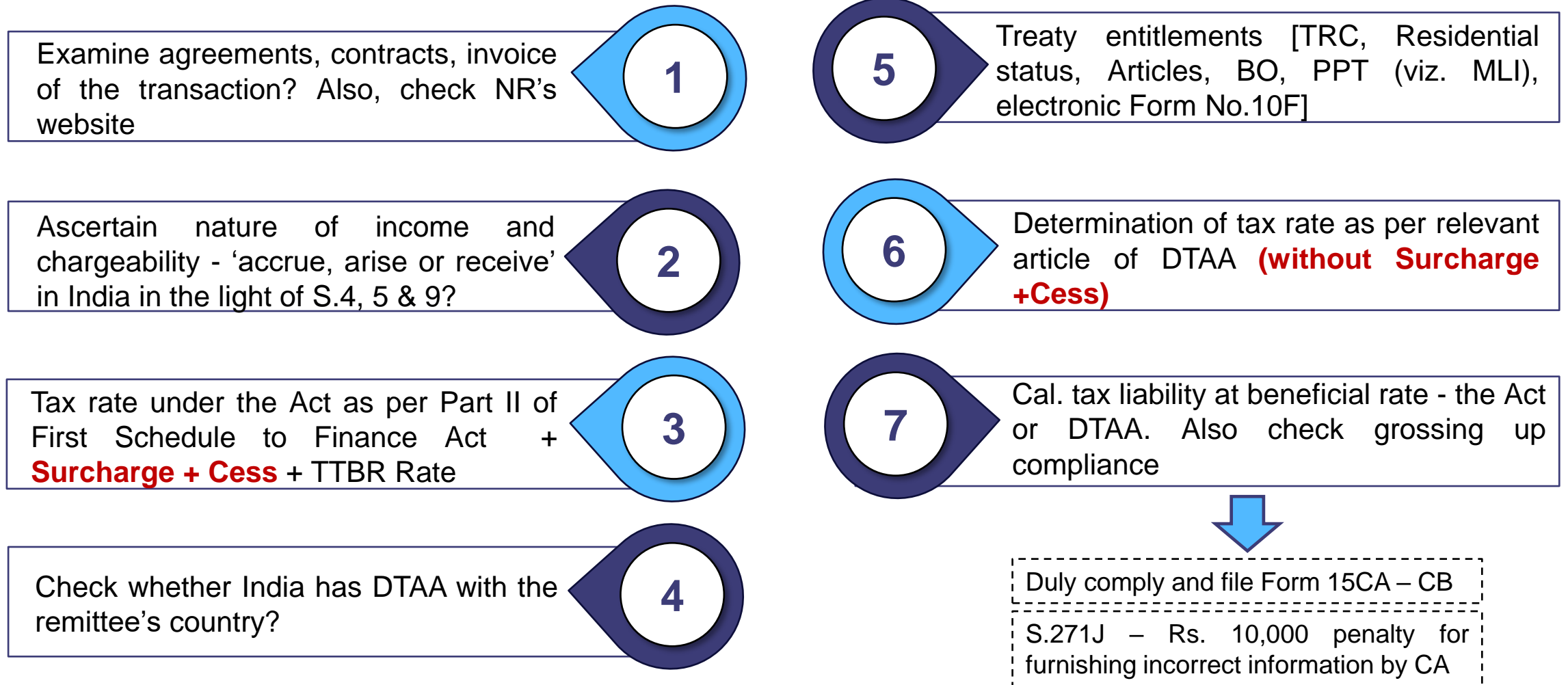
Finance Act 2008

There was substantial increase in foreign remittance, tracking and recovery of NR taxes was difficult, thereby S.195(6) inserted with introduction to **e-filing** on TIN NDSL website and submit physical copy to AO

# FORM 15CA AND 15CB | APPLICABILITY



# DETERMINATION OF TDS RATE



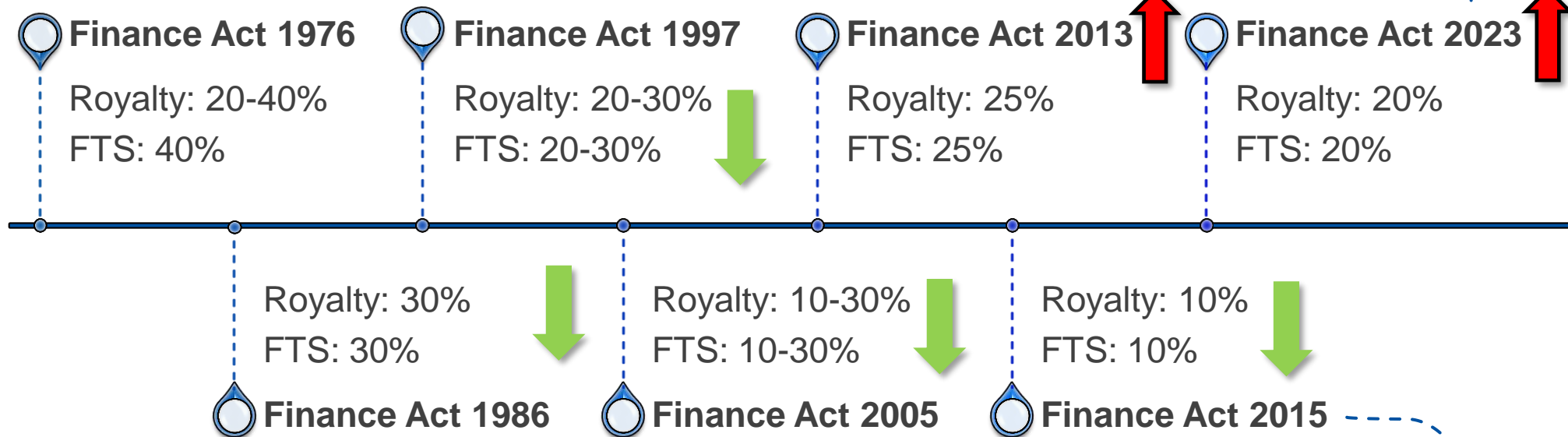
## DOUBLING TAX ON ROYALTY & FTS

The Finance Minister unexpectedly doubled the tax rate on Royalty and FTS from 10% to 20% in case of non-residents w.e.f. FY 2023-24

Assuming a surcharge rate of 5% , effective tax rate increases to **21.84%**, unless the non-resident avails treaty benefit

**Rationale:** Tax Rate in treaties on royalty ranges from **10-25%**, whereas S. 115A provides for rate of 10%. In some cases, this has **resulted in taxation at a lower rate of 10% even if the treaty allows the income to be taxed at a higher rate.** In order to correct this anomaly, tax rate u/s 115A on royalty and FTS was increased to 25%

**Rationale:** The rationale behind the increase in tax rate is not known



**Rationale:** In order to facilitate technology inflow to small businesses at low costs and reduce hardship faced by small entities due to high tax rate of 25%, the tax rate on royalty and FTS was reduced to 10%



# DOUBLING TAX ON ROYALTY & FTS (CONT'D...)

## Grossed up arrangement impact

| Particulars                | Pre-Amendment | Post Amendment |
|----------------------------|---------------|----------------|
| Gross Remittance           | 10,00,00,000  | 10,00,00,000   |
| Base Rate                  | 10%           | 20%            |
| Surcharge                  | 5%            | 5%             |
| Cess                       | 4%            | 4%             |
| Effective Tax Rate         | 10.92%        | 21.84%         |
| Gross-up Income            | 11,22,58,644  | 12,79,42,682   |
| TDS                        | 1,22,58,644   | 2,79,42,682    |
| Excess Tax Cost (Amount)   | 1,56,84,038   | -              |
| <b>Excess Tax Cost (%)</b> | <b>15.68%</b> | <b>-</b>       |

# DOUBLING TAX ON ROYALTY & FTS (CONT'D...)

**10%**

- USA/UK\*
- Germany
- Ireland
- Mauritius\*
- Russia
- UAE
- Etc...

**15%**

- USA/UK\*
- Brazil\*
- Mauritius\*
- Belarus
- Turkey
- Oman
- Canada\*

**20%-30%**

- Brazil\*
- Bulgaria\*
- Canada
- Denmark
- Italy
- Spain\*
- Libyan

*\* Different rates prescribed depending on nature of income*

# DOUBLING TAX ON ROYALTY & FTS | IMPACT



## Entitlement to Treaty benefit has become critical

- Tax rate in treaties on Royalty & FTS ranges from 10-15%, generally
- No tax – exclusion of equipment royalty, no FTS clause, make available clause, no fixed base/stay in India in case of Independent Personal Services, etc.
- Anti-abuse provisions - Beneficial Owner test, Limitation of Benefit provisions (LOB), Principal Purpose Test (PPT) under Multilateral Instrument (MLI), etc.
- Valid TRC & Form 10F required to claim treaty benefit



## Filing of Return of Income

- S. 115A(5) provides relaxation from return filing where;
  - total income of the non-resident consist only of interest, dividend, royalty and/or FTS, **and**
  - tax deducted is not less than that prescribed u/s 115A(1)
- Due to increase in domestic tax rates, most non-resident will seek treaty benefit – Relaxation from ITR filing will not be available



## Additional Burden on Payer

- If tax authorities deny treaty benefit to NR, the Payer may be treated as 'assessee-in-default'
- Payer needs to be more vigilant and conduct reasonable due diligence to grant treaty benefit
- Significant increase in cost, where tax has to be borne by Payer

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# GENESIS OF FORM 10F

## 2012

**Finance Act, 2012 –**

- S. 90(4) inserted requiring furnishing of TRC to claim treaty benefit
- TRC to be issued by foreign government of the country of which assessee is a tax resident
- **TRC must contain such particulars as prescribed in Rule 21AB**

## 2013

**Finance Act, 2013 –**

- “a certificate containing such particulars as may be prescribed” **omitted** from S. 90(4)
- S. 90(5) inserted and correspondingly, Rule 21AB amended requiring self-certified Form 10F

## 2022

**Notification 03/2022 dated 16.07.2022**

Form 10F to be furnished electronically with immediate effect

## 2023

**Circular F. No. DGIT(S)-ADG(S)-3/E-FILING NOTIFICATION/FORMS/2023/13420, dated Mar 28, 2023**  
Relaxation from furnishing Form 10F in certain cases

# FORM 10F | RULE 21AB

## Content of Form 10F

- Status (individual, company, firm etc.) of the assessee;
- Nationality (in case of an individual) or country or specified territory of incorporation or registration (in case of others);
- Tax/Unique Identification Number in country of residence;
- Period for which the residential status, as mentioned in TRC, is applicable; and
- Address of the assessee in the country or specified territory outside India, during the period for which TRC, is applicable

## 10F not required

If TRC contains all the information required to be submitted in Rule 21AB(1), Form 10F is not required

## Power of AO

The AO may ask the non-resident to submit the documents in order to substantiate the information mentioned Rule 21AB(1)

## Pre-requisite of generating e-Form 10F

- TRC
- PAN

# FORM 10F | ELECTRONIC FORM

- **Prior to July 16 2022** – Manual Form 10F
- **W.e.f. July 16, 2022 vide Notification No. 03 2022** – Form 10F added to the prescribed list of forms to be furnished electronically
- **Partial relaxation from e-Form 10F** – In consideration of the practical challenges faced, “***non-resident taxpayers who are not having PAN and not required to have PAN as per relevant provisions of the Income-tax Act, 1961...***” are exempted from mandatory electronic filing of Form 10F till Sep 30, 2023. Circular F. No. DGIT(S)-ADG(S)-3/E-FILING NOTIFICATION/FORMS/2023/13420, dated Mar 28, 2023

# FORM 10F | PAN U/S 139A

Section 139A(1) - Every person,

- (i) if his total income or the total income of any other person in respect of which he is assessable under this Act during any previous year exceeded the maximum amount which is not chargeable to income-tax

Section 139A(1) - Every person,  
(ii) carrying on any business or profession whose total sales, turnover or gross receipts are or is likely to exceed five lakh rupees in any previous year

What happen in following cases –

- Income chargeable to tax both under ITA and DTAA
- Income chargeable to tax under ITA but not taxable as per DTAA

What happens in the following case –

- FCO is a foreign company providing business advisory services.
- FCO is a tax resident of UK
- It earns service fees from India Co. FCO does not have a PE or any business operation in India

## **Section 139A(8)(d) - Exemption from obtaining PAN**

- Non-residents including the Foreign Company who made the investment during the previous year in specified funds subject to fulfillment of conditions specified u/s. 139A(8)(d) r.w.r. 114AAB(1);
- Non-residents being eligible foreign investors who have made capital asset transactions referred to in section 47(viiab) listed in IFSC RSE, subject to fulfillment of specified conditions specified u/s. 139A(8)(d) r.w.r. 114AAB(2A)

# FORM 10F | TREATY BENEFIT

## Can treaty benefit be denied if e-Form 10F not generated?

- **Article 51(1)(c) of the Constitution of India:** The State shall endeavor to foster respect for international law and treaty obligations
- **Article 26 of VCLT:** *Pacta Sun Servanda* – Every treaty in force is binding upon the parties to it and must be performed by them in good faith
- It is a trite law that the beneficial provisions of the tax treaty are superior to the provisions of the Act – **UOI vs. Azadi Bachao Andolan [2003] 263 ITR 706 (SC) and Engineering Analysis Centre of Excellence (P.) Ltd . v. CIT [2021] 432 ITR 471 (SC)**
- Denial of treaty benefit on account of non-compliance with electronic filing will lead to unilaterally amending the bilateral agreement that the DTAA inherently is, which is not tenable – **DCIT vs. ITC Ltd. [2002] 82 ITD 239 (Kol Trib))**
- **Skaps Industries India (P.) Ltd. v. ITO (Intl Tax) [2018] 171 ITD 723 (Ahmd Trib)** – In the context of denial of treaty benefit in absence of TRC, ITAT held that S. 90(4) cannot be construed as a limitation to the superiority of treaty over the domestic law



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# TAX RESIDENCY CERTIFICATE (TRC)

2000

**CBDT Circular No. 789 dated 13-04-2000** – wherever a Certificate of Residence is issued by the Mauritian Authorities, such Certificate will constitute sufficient evidence for accepting the status of residence as well as beneficial ownership for applying the DTAC accordingly

2003

**UOI vs. Azadi Bachao Andolan [2003] 263 ITR 706 (SC):** Apex Court upheld the validity of the Circular thereby settling the dust on the controversy

2012

**Vodafone International Holdings B.V. vs. UOI [2012] 341 ITR 1 (SC):** Circular No. 789, dated 13-4-2000 would not preclude the Income-tax Department from denying the tax treaty benefits, if it is established, on facts, that the Mauritius company has been interposed as the owner of the shares in India, at the time of disposal of the shares to a third party, solely with a view to avoid tax without any commercial substance

2013

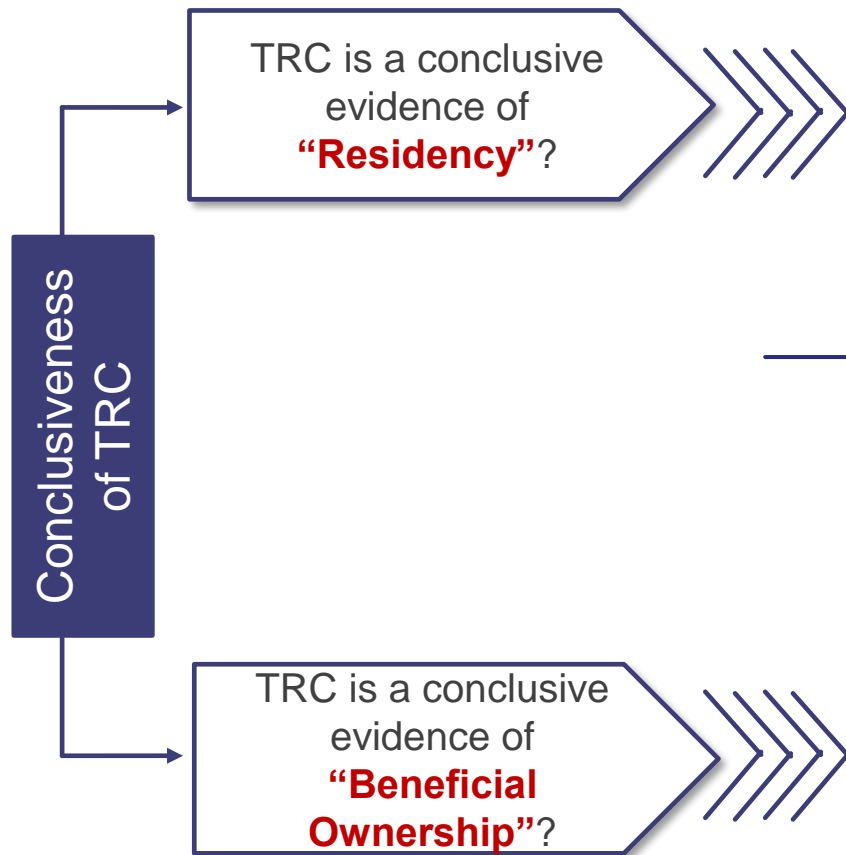
- **Finance Bill, 2013** proposed to insert S. 90(5) clarifying that TRC shall be necessary but not a sufficient condition for claiming any relief under the agreement referred to therein
- **Press Release** dated March 01, 2013, issued stating TRC produced by non-resident will be accepted as evidence for tax residency and the Income-tax Authorities in India will not go behind the TRC and question his resident status. The Finance Ministry further clarified that Circular 789 (*supra*) to be in force
- Proposed S. 90(5) was dropped, and present sub-section (5) was inserted (i.e. Form 10F).

2012

**Finance Act, 2012:** S. 90(4) inserted to provide treaty benefit to non-resident on furnishing of valid TRC

**Explanatory Memorandum:** TRC would be “a necessary but not sufficient condition for availing benefits of the agreements”

# TRC | CONCLUSIVE EVIDENCE?



- Serco BPO (P.) Ltd. v. AAR [2015] 379 ITR 256 (P&H HC)
- HSBC Bank (Mauritius) Ltd v. DCIT [2018] 96 taxmann.com 544 (T.Mum)
- CIT v. Alibaba.com Singapore E-commerce P. Ltd [2023] 152 taxmann.com 110 (Bom HC)
- Bid Services Division Mauritius Limited v. AAR (WP No. 713/2021) (Bom HC)
- Blackstone Capital Partners v. ACIT [WP(C) 2562 of 2022] (Delhi HC)
- Sapein Funds v. CIT [ITA No. 976/Del/2022]

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## TRC is a conclusive evidence of Beneficial Ownership

- DIT v. Universal International Music B.V. [2013] 31 taxmann.com 223 (Bom HC)
- HSBC Bank(Mauritius) Ltd v. DCIT [2018] 96 taxmann.com 544 (TMum)

## TRC is not a conclusive evidence of Beneficial Ownership

- Indostar Capital v. ACIT [2019] 105 taxmann.com 96 (Bom HC)
- Italian Supreme court decision in case of Ovvio Italia Spa
- Google India P. Ltd V. JDIT [2018] 194 TTJ 385 (TBang.)
- “AB” Mauritius, In re [2018] 402 ITR 311 (AAR – New Delhi)
- E trade Mauritius Ltd., In re [2010] 324 ITR 1 (AAR - New Delhi)

# TRC | TREATY ENTITLEMENT IN ABSENCE OF TRC

## Judicial precedents –

### ■ Skaps Industries India (P.) Ltd [2018] 171 ITD 723 (TAhmd)

S. 90(4) requiring Assessee to furnish TRC do not start with a non-obstante clause; Reference to section 90(2A) which provides that GAAR provisions shall override section 90(2); Hence, mere non-furnishing of TRC cannot be construed as a limitation to treaty benefits

### ■ Sreenivasa Reddy Cheemalamarri (ITA No. 1463/Hyd/2018)

It has been held that despite best possible efforts, if Assessee is not able to procure; TRC from country of residence, then the situation may be treated as “impossibility of performance”

### ■ Recent

■ Vamsee Kundhurthi v. ITO [2021] 190 ITD 68 (THyd)

■ Ranjit Kumar Vuppu v. ITO [2021] 190 ITD 455 (THyd)

■ Maya Nair v. ITO [ITA No. 2407/Bang/2018]

French Supreme Court on 14.12.2020 held that TRC is required to obtain benefits under the DTAA



**Can application of TRC be considered?**



**As a good diligence TRC should be obtained!**

# TRC | WHAT POINT OF TIME?

- **Specimen text of TRC**

- **Past “as at date” or “period”**

*“I certify to the best of HMRC’s knowledge, **as at** 24.02.2021, the Company X is resident in the UK in accordance with Article 4 of the Convention” - Date of issue of TRC – 03.05.2021 **OR***

*“I certify....., the Company **during the period** 01.01.2020 to 31.08.2020 is resident in .....”- Date of issue of TRC 13.11.2020*

- **Futuristic TRC**

*“Certificate of Tax Residence for Tax Year 2023 – Date of issue of TRC 05.01.2023*

- **At the time of Assessment**

Haresh Sheth v. ITO [ITA No. 1380 / Mum /2020], the Tribunal admitted the reason for delay in obtaining TRC and allowed treaty benefit despite failure to obtain and furnish TRC in Assessment proceedings

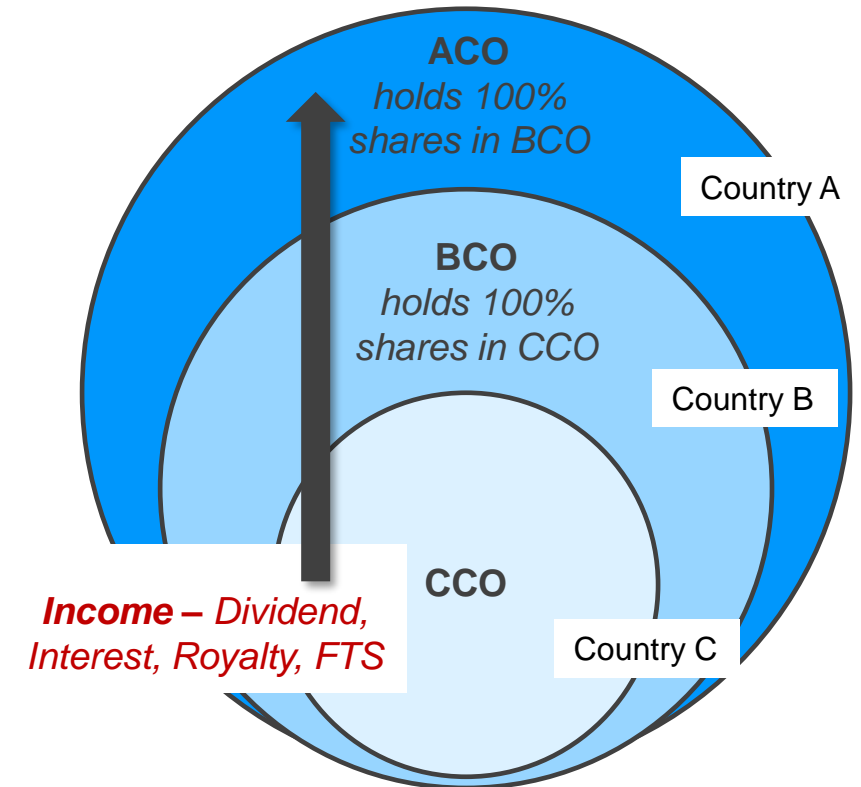


- **As at invoice date or date of remittance**

## 5

## BENEFICIAL OWNER (BO)

| Treaty                                | Text   |
|---------------------------------------|--|
| Indo-Netherlands DTAA<br>(Article 10) | <p>1. Dividends paid by a company which is a resident of one of the States to a resident of the other State may be taxed in that other State</p> <p>2. However, <b>such dividends</b> may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, <b>but if the recipient is the beneficial owner</b> of the dividends, the tax so charged shall not exceed 10 per cent of the gross amount of the dividends</p> |



# BO | OECD COMMENTARY

The key indicators to determine 'beneficial owner' are as under:

- The term is not to be understood in a narrow technical sense (such as meaning under domestic law), rather, **it should be understood in its context, in particular in relation to the words “paid ... to a resident”, and in light of the object and purposes of the Convention**, including avoiding double taxation and the prevention of fiscal evasion and avoidance
- **Agent or Nominees are not treated as beneficial owners** of income for tax purpose in the State of Residence (“State R”). They qualify as resident of State R but no potential double taxation arises
- **A conduit company cannot normally be regarded as the beneficial owner** if, though the formal owner, it has, as a practical matter, very narrow powers which render it, in relation to the income concerned, **a mere fiduciary or administrator acting on account of the interested parties**
- In these various examples (agent, nominee, conduit company acting as a fiduciary or administrator), the direct recipient of the dividend **is not the “beneficial owner” because that recipient’s right to use and enjoy the dividend is constrained by a contractual or legal obligation to pass on the payment received to another person**
- Such an obligation will normally derive from **relevant legal documents** but may also be found to exist on the basis of **facts and circumstances** showing that, in **substance**, the recipient clearly does not have the right to use and enjoy the dividend unconstrained by a contractual or legal obligation to pass on the payment received to another person

# BO | INTERNATIONAL CASE LAWS

- **Indofood International Finance Ltd. vs. JP Morgan Chase Bank, London Branch (2006 EWCA Civ 158)** (*Interest*): ‘Full privilege’ to benefit directly from the income. The meaning to be given to the phrase “beneficial owner” is plainly not to be limited by so technical and legal an approach. Regard is to be had to the substance of the matter.
- **Prévost Car Inc. vs. The Queen (2008) TCC 231** (*Dividend*): When corporate entities are concerned, one does not pierce the corporate veil unless the corporation is a conduit and has absolutely no discretion as to the use or application of funds or acts on someone else’s behalf pursuant to that person’s instructions without any right to do other than what that person instructs.
- **Re Swiss Swaps Case [Federal Supreme Court Judgment of 5 May 2015] ATF 141 II 447** (*Dividend*): There was at least a factual obligation to pass on the dividends
- **Italy’s Supreme Court decision no. 14756 of 10 July, 2020** (*Interest*): The fact that the income recipient is a pure holding company does not infer that the entity lacks economic substance and is a conduit company.
- **NetApp Denmark ApS [TS-32-FC-2023(DEN)]** (*Dividend*): The purpose of the group structure was an abuse of rights

# BO | INDICATIVE FACTORS TO DETERMINE BO

In light the OECD Commentary and global case laws on BO, few indicative factors for determining 'beneficial ownership are as under:

- Right to use and enjoy the income, unconstrained by any contractual or legal obligations i.e. dominion and control over the income; power of disposal of income;
- Direct recipient of income does not act as an agent, nominee or conduit company acting as a mere fiduciary or administrator; Absence of obligation to pass on the passive income;
- Organisation structure of the company and business activities of the members; Examination of legal and contractual documents
- Funding of investments (own funds or borrowed funds);
- Ownership of the property (say, shares) and rights therein (say, voting rights in the shares);
- Ability of parent to exert significant influence over management and activities of subsidiaries;
- Substantive business activity and presence of office, assets, employees, etc.;
- Assumption of risks *viz* foreign exchange risk, counter party risk, shareholder's risk, etc.



# BO | CAPITAL GAINS

## Beneficial Ownership not relevant for Capital Gains:

- **Blackstone Capital Partners (Singapore) VI FDI Three Pte. Ltd W.P.(C) 2562/2022 & CM APPL. 7332/2022 (Del HC) (Capital Gains):** Capital gain to be taxed on the basis of legal ownership and not beneficial ownership. In fact, the concept of beneficial ownership was attracted for taxation purposes only qua three transactions i.e. dividend, interest and royalty and not for capital gains.
- **Blackstone FP Capital Partners Mauritius V Ltd. vs. DCIT [2022] 138 taxmann.com 328 (Mum Trib) r.w. MA No. 258/Mum/22 (Capital Gains):** The concept of beneficial ownership being a sine qua non to entitlement to treaty benefits cannot, in the absence of specific provision to that effect, be inferred or assumed. Reading a beneficial ownership test, when such a test is not embedded in the treaty provision itself, is rather than a permissible interpretation of the treaty provisions, a rewriting the treaty provision itself.
- Colgate-Pamolive (case number 1996/2019) (Spanish Supreme Court) (Royalties)

# BO | CAPITAL GAINS (CONT'D...)

## **Economic/Beneficial Owner derives Capital Gains not Legal Owner:**

- ZAO Vladmirskiy Torgovy Dom [TS-649-FC-2017(RUS)]: Absent beneficial ownership of shares, Russian Court denies capital gains exemption under DTAA
- Lone Star Fund III (US) LP and Lone Star Fund III (Bermuda) LP [TS-713-FC-2016(KOR)]: Korean Supreme Court holds economic owner derives capital gains, not legal owner
- Dongwon Enterprise Co. Ltd [TS-893-FC-2014(KOR)]: Korean Supreme Court resolves Beneficial Owner v. Legal Owner controversy for capital gains exemption
- KT Co. Ltd. [TS-894-FC-2013(KOR)]: Korean Supreme Court holds legal ownership insufficient for capital gains exemption
- Aditya Birla Nuvo Ltd. vs. Dy. CIT [2012] 342 ITR 30 (Bom HC)

# IMPACT OF MLI ON WITHHOLDING TAX

## What is MLI?

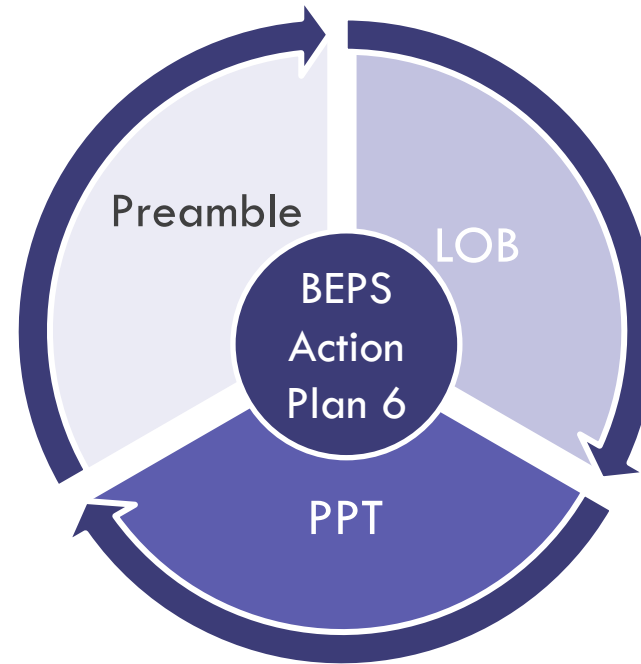
- MLI is a **multilateral convention** to be applied alongside existing bilateral treaties modifying their application
- MLI is an **outcome of OECD/G20 BEPS Project**
- Single instrument facilitating **modification** of existing + 3000 tax treaties in a **synchronised & consistent manner**
- Lex Posterior Derogat Legi Priori - Applies by virtue of 'later in time' rule

## Action Plans covered

- 👉 Action 2 – Hybrid mismatch arrangements
- 👉 Action 6 – Prevention of Treaty abuse (**Minimum Standard**)
- 👉 Action 7 – Avoidance of Permanent Establishment status
- 👉 Action 14 – Improving dispute resolution (**Minimum Standard**)

# IMPACT OF MLI ON WITHHOLDING TAX (CONT'D...)

**Clear statement of intent** in tax treaties to avoid creation of opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including through treaty shopping arrangements



Introduction of specific anti-abuse rule, for instance, the **Limitation-on-Benefits (“LOB”) rule**, that limits availability of treaty benefits to entities meeting certain conditions

Conditions based on legal nature, ownership in, and general activities of entity to ensure sufficient link between entity and State of residence

Introduction of a more general anti-abuse rule based on the **principal purposes test (“PPT”)**

# IMPACT OF MLI ON WITHHOLDING TAX (CONT'D...)

| <b>Preamble – Art. 6 of MLI</b>  | <b>Principal Purpose Test (Art. 7(1) of MLI)</b>   |
|--|--|
| <p><i>“Intending to eliminate double taxation with respect to the taxes covered by this agreement without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this agreement for the indirect benefit of residents of third jurisdictions),”</i></p> | <p><i>Notwithstanding any provisions of a Covered Tax Agreement (CTA),</i></p> <p><i>a benefit under the CTA shall not be granted in respect of an item of income or capital</i></p> <p><i>if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit,</i></p> <p><i>unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the CTA</i></p> |

# IMPACT OF MLI ON WITHHOLDING TAX (CONT'D...)

## Default in Withholding Tax – Consequences

- Payer to be treated as ‘assessee-in-default’ u/s 201;
- Interest liability u/s 201(1A);
- Disallowance of expense u/s 40(a)(i);
- Payer may be treated as Representative assessee u/s 160 r.w. S. 163;
- Other penal consequences;

# IMPACT OF MLI ON WITHHOLDING TAX (CONT'D...)

Is the Payer under an obligation to grant treaty benefit?

## View 1: *Prima facie* obligation in on the Payer

- ❑ **S. 90(2):** Where the Govt. has entered into a treaty granting relief of tax, the provisions of Act shall apply to the extent they are more beneficial to the taxpayer;
- ❑ **S. 195(1):** TDS at 'rates in force' defined u/s 2(37A);
- ❑ **S. 2(37A):** Rates specified in the Finance Act of the relevant year or Rates specified in the DTAA;
- ❑ **S. 90(4 & 5):** Non-resident assessee shall not be entitled to treaty benefit unless a TRC is obtained from Government of country of tax residency accompanied by self-certified Form 10F,
- ❑ **Shome Committee Report on GAAR (Refer Para 3.23)**

## View 2: Payer cannot grant treaty benefit

- ❑ ***PILCOM vs. CIT [2020] 116 taxmann.com 394 (SC)***
  - the obligation to deduct tax at source is not affected by the DTAA;
  - Advantage of the DTAA can be pleaded and taken by the Payee on whose account the deduction is made, not by the Payer;
  - If a case is made out by the Payee, the amount in question will always be refunded with interest.

# IMPACT OF MLI ON WITHHOLDING TAX (CONT'D...)

## SHOME COMMITTEE ON GAAR | **Recommendations on Withholding of taxes**

“ In view of the above, the Committee recommends that, while processing an application under section 195(2) or 197 of the Act pertaining to the withholding of taxes,

- a) **the taxpayer should submit a satisfactory undertaking** to pay tax along with interest in case it is found that GAAR provisions are applicable in relation to the remittance during the course of assessment proceedings; or
- b) in case the taxpayer is unwilling to submit a satisfactory undertaking as mentioned in (a) above, the Assessing Officer should have the authority with the prior approval of Commissioner, to inform the taxpayer of his likely liability in case GAAR is to be invoked during assessment procedure.

**There is a responsibility cast on the payer of any sum to a non-resident under Indian tax laws in the form of a withholding agent of the Revenue as well as representative assessee of the non-resident payee. The payer is required to undertake due diligence to ascertain the correct amount of tax payable in India and, in case of any default, it becomes the payer's liability to pay..... ”**



# IMPACT OF MLI ON WITHHOLDING TAX (CONT'D...)

## Exercise of Reasonable Due Diligence

- Payer cannot be treated as an assessee-in-default if WHT obligation discharged in a fair and reasonable manner
  - CIT vs. Nicholas Piramal India Ltd. [2008] 299 ITR 356 (Bom HC);
  - CIT vs. ITC Ltd. [2014] 220 Taxman 414 (All HC);
  - Gwalior Rayon Silk Co. Ltd. vs. CIT [1983] (140 ITR 832) (MP), etc.



### Extent of verification/due diligence by payer

- Practical challenges is obtaining data/details from the payer;
- Would a declaration from Payee stating that he is entitled to treaty benefit suffice?

## TDS BY “NON – RESIDENT”

TDS obligation u/s 195 on “**Any person responsible for paying** to a non-resident, not being a company, or to a foreign company”

### View 1: TDS obligation **cannot be** fastened on Non-Resident

- **Vodafone International Holdings B.V. vs. UOI [2012] 341 ITR 1 (SC):** “184. A literal construction of the words “any person responsible for paying” as including non-residents would lead to absurd consequences. A reading of Sections 191A, 194B, 194C, 194D, 194E, 194I, 194J read with Sections 115BBA, 194I, 194J would show that **the intention of the Parliament was first to apply Section 195 only to the residents who have a tax presence in India. It is all the more so, since the person responsible has to comply with various statutory requirements such as compliance of Sections 200(3), 203 and 203A**

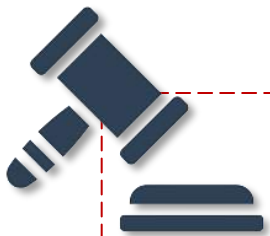
*185. The expression “any person”, in our view, looking at the context in which Section 195 has been placed, would mean any person who is a resident in India.....”*

- **CBDT Circular No. 726 dated 18-10-1995:** No TDS u/s 194J on payments to persons resident in India by foreign companies or foreign law firms that have no presence in India. However, such non-residents are required to send a quarterly statement, indicating the name and address of the person to whom the payments are made, to the concerned Indian Govt. authority

# TDS BY “NON – RESIDENT” (CONT'D...)

## View 2: TDS obligation fastened on Non-Resident

- Words “**any person**” is wide enough to cover both Resident and Non Resident provider of benefit
- **P. No. 13 of 1995, In re [1997] 228 ITR 487 (AAR):** TDS provisions comprehensively covers 'any person' responsible for paying any sums chargeable to income-tax. Foreign or non-resident companies and persons cannot be considered outside the scope of TDS provisions though it is true that there may be some practical difficulties in enforcing these obligations
- **DCIT v. Coastal Power Co. [2006] 9 SOT 89 (Delhi Trib):** The assessee, a non-resident was held to deduct tax u/s 194J on payment made to resident consultants.
- S. 204 which defines “Person responsible for paying” covers a non-resident payer



**Finance Act 2012** – Inserted Explanation 2 to S.195 to clarify that S. 195 is applicable to non-resident remitter – Retrospective effect from April 1, 1962

# TDS ON GROSS REMITTANCE OR ONLY INCOME COMPONENT

S. 195(2): Application to AO where deductor considers that “*the whole of such sum would not be income chargeable in the case of the recipient*”



In the absence of certificate u/s 195(2) or 197, deductee has to deduct tax on gross amount:

- **Transmission Corpn. of A.P. Ltd. v. CIT [1999] 239 ITR 587(SC)**
- **Syed Aslam Hashmi v. ITO (Intl. Taxn.) [2013] 55 SOT 441(Bang Trib)**

## **GE India Technology Centre Pvt. Ltd. v. CIT [2010] 327 ITR 456 (SC)**



- S. 195(2) and 195(3) are safeguards and of practical importance
- **Where the remitter is fairly certain, then he can make his own determination as to whether the tax is deductible at source and, if so, what should be the amount thereof.**
- AP Transmission’s case (*supra*) should be read in the context of the composite payments under consideration where the payer had a doubt as to the amount to be deducted as TDS

## ***Anusha Investments Ltd. v. ITO (IT) [2017] 378 ITR 621 (Madras):***

- No TDS u/s 195 where the non-resident has incurred capital loss in respect of shares of an Indian company

# TDS ON GROSS REMITTANCE OR ONLY INCOME COMPONENT (CONT'D...)



## **CBDT Instruction No. 2/2014 dated 26.02.2014:**

- the Assessing Officer shall determine the appropriate proportion of the sum chargeable to tax u/s 195(1) to ascertain the tax liability on which the deductor shall be deemed to be an assessee in default u/s 201

## **CBDT Circular No. 03/2015 dated 12.2.2015:**

- Interest on/ Disallowance of only income comprised in the sum paid/payable

## 9 PAYMENT BY 'ANY OTHER MODE'



S. 195(1).....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**,....

Whether payments in Kind, Net-banking, RTGS, NEFT, Credit Cards, Debit Cards covered?

- Judicial precedents have construed 'any other mode' as payment not in terms of money or in kind:
  - **Kanchanganga Sea Foods Ltd. [2010] 325 ITR 540 (SC)** – Charter fee for renting fishing vessels was determined to be 85% of gross earnings from the sale of fish. TDS u/s 195 was held to be deductible on payment made in form of 85% of the fish catch
  - **BIOCON Biopharmaceuticals P. Ltd. [2013] 144 ITD 615 (TBang.)** – Shares issued as consideration for provision of technology & know-how came within the purview of 'any other mode'
  - **Raymond Ltd [2003] 86 ITD 791 (TMum.)** - Amount payable to the NR is adjusted by the NR from the amounts due to the resident payer. Such adjustment shall also be considered as 'any other mode'
- The interpretation of words 'any other mode' used in S. 195 and S. 194LA are different. S. 194LA uses the phrase 'payment of such sum' in precedence to 'any other mode', which confines the meaning of the phrase 'any other mode' in light of the principle of *Ejusdem Generis*. [**Chief Accounts Officer v. ITO [2015] 167 TTJ 390 (TBang.)**]

## COMPUTER SOFTWARE – ROYALTY?

- **Engineering Analysis Centre of Excellence (P.) Ltd. vs. CIT [2021] 432 ITR 471 (SC):** Amount paid by resident Indian end-user or distributor to non-resident computer software manufacturers/ suppliers, as consideration for resale/use of computer software through EULAs/distribution agreement, **is not payment of royalty for use of copyright in computer software, and thus, same does not give rise to any income taxable in India**
- Revenue has preferred a **Review Petition** against SC judgement in Engineering Analysis which is pending disposal
- **Effect of Review Petition** – Mere filing of Review petition does not obliterate the ratio laid down in the judgment under review. It is only when an order on review is passed that the ratio can undergo change subject to the outcome of the review order. Till then, the ratio of the decision operates with force and remains binding on all the subordinate courts in the country.

# COMPUTER SOFTWARE – ROYALTY? (CONT'D...)

- Case Laws following Engineering Analysis (*supra*) even after Review Petition:
  - **CIT v. MOL Corporation [2023] 454 ITR 32 (SC)** – In case any order is passed, it will be open to the parties to rely upon the said order.
  - **Infosys Technologies Ltd. v. CIT [2022] 447 ITR 666 (SC)** – In case the review petition on the issue raised in the present special leave petitions is allowed, it will be open to the petitioner(s) to get the present special leave petitions revived.
  - **CIT v. M/s Nagravision S. A. (ITA 348/2022)(Del HC)**
- Retrospective amendment to IT Act provisions cannot fasten obligation to deduct tax at source, when the law is not in force at the time of TDS:
  - **CIT v. NGC Networks India Pvt. Limited (ITA No.397/2015)(Bom HC)**
  - **SGS India (P.) Ltd. v. ACIT [2020] 182 ITD 498 (Mum Trib)**
  - **P&G Distribution Company Ltd. v. DCIT [2018] 94 taxmann.com 280 (Mum Trib)**
  - **Channel Guide India Ltd. v. ACIT [2012] 139 ITD 49 (Mum Trib)**



# MOST FAVOURED NATION CLAUSE (MFN)

- MFN embodies the principle of **non-discrimination**. It ensures a level playing field for all members.
- MFN obligates a country to grant the most favourable treatment to every other country with which it has agreed to MFN clause, that it grants to the first country – **‘favour one, favour all’** – parity!
- MFN in Indian tax treaties,
  - Found in: Protocol which is an integral part of the treaty
  - Nature of income: Covers generally Dividend, Interest, Royalty and FTS
  - India Treaties having MFN clause: India’s treaty with Netherlands, Switzerland, Finland, Philippines, Sweden, Belgium, Spain, Hungary, France
  - Application of MFN: Depending upon the text, the MFN clause can be – Automatic, Subject to negotiation, Subject to notification

# MFN | TEXT IN TREATIES (CONT'D...)

## Netherlands



If **after the signature of this convention** under **any Convention** or Agreement **between India and a third State which is a member of the OECD India should limit** its taxation at source on dividends, interests, royalties, fees for technical services or payments for the use of equipment to a **rate lower or a scope more restricted** than the rate or scope provided for in this Convention on the said items of income, **then as from the date on which the relevant Indian Convention or Agreement enters into force** the same rate or scope as provided for in that Convention or Agreement on the said items of income shall also apply under this Convention.


## Philippines



With reference to Articles 8 and 9 if at any time after the date of signature of the Convention the Philippines agrees to a lower or nil rate of tax with a third State the Government of the Republic of the Philippines shall without undue delay inform the Government of India through diplomatic channels and the two Governments **will undertake to review these Articles** with a view to providing such lower or nil rate to profits of the same kind derived under similar circumstances by enterprises of both Contracting States.

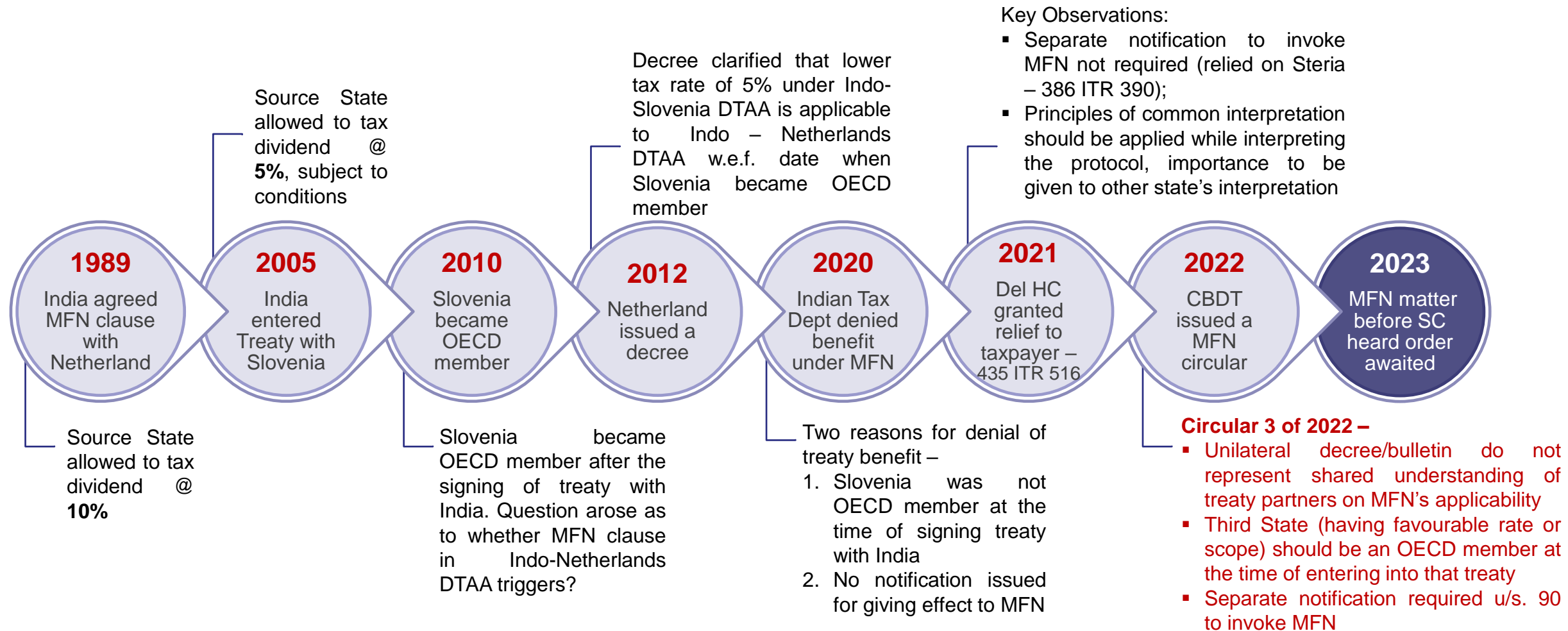
# MFN | TEXT IN TREATIES (CONT'D...)

## Finland

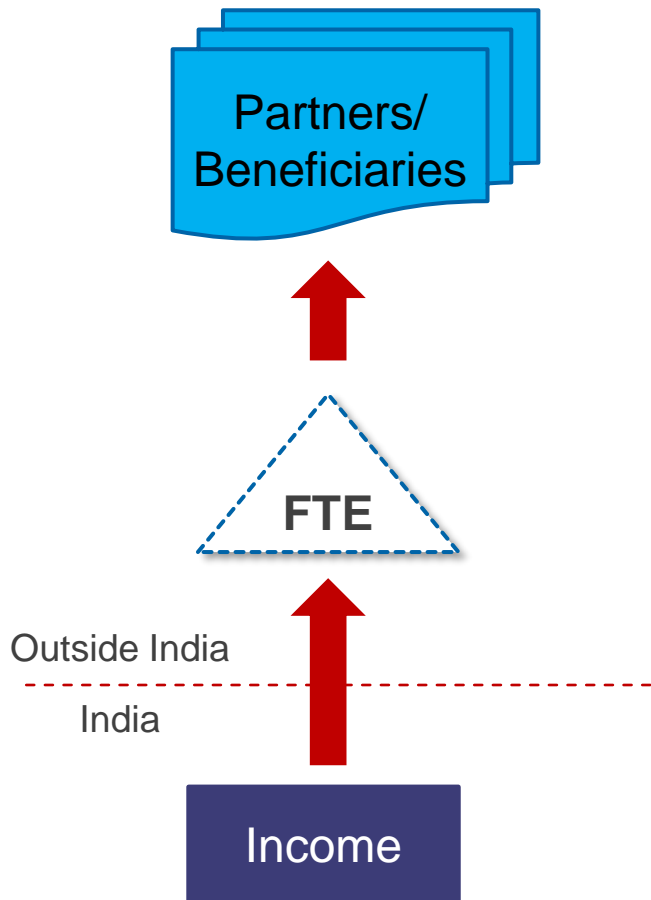


It is agreed that if after coming into force of this Agreement, any agreement or convention between India and a Member State of the OCED provides that India shall exempt from tax dividends, interest, royalties or FTS... arising in India, or limit the tax charged in India on the aforesaid (...) to a rate lower than that provided for in .... of the Agreement, such exemption or lower rate shall be made applicable to the dividends, interest, royalties or FTS.... arising in India and beneficially owned by a resident of Finland and dividend, interest, royalties or FTS arising in Finland and beneficially owned by a resident of India under the same conditions as if such exemption or lower rate had been specified in those paragraphs. **The competent authority of India shall inform the competent authority of Finland without delay that the conditions for the application of this paragraph have been met and issue a notification to this effect for application of such exemption or lower rate.**

# MFN | THE CONTROVERSY

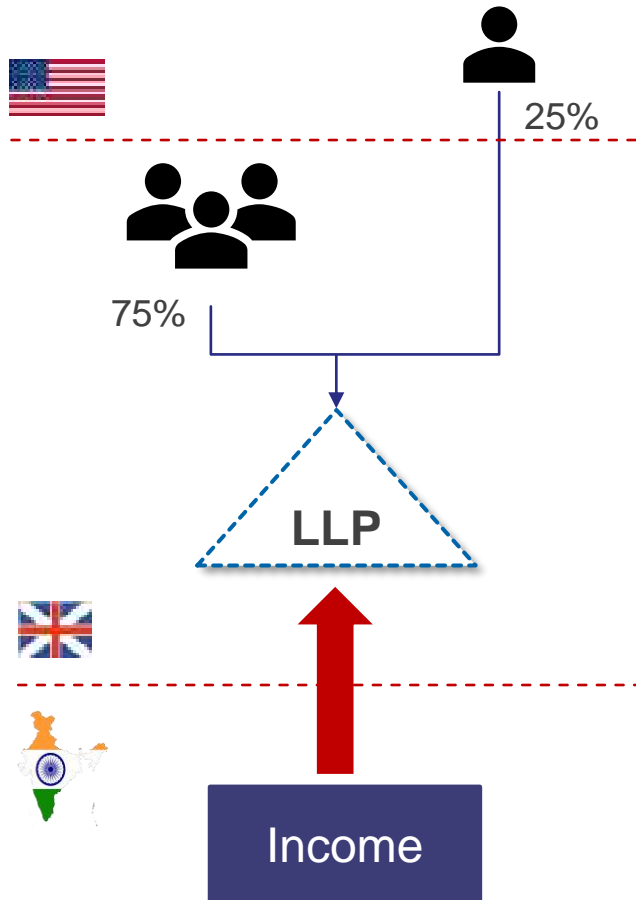


# FISCALLY TRANSPARENT ENTITIES (FTE)



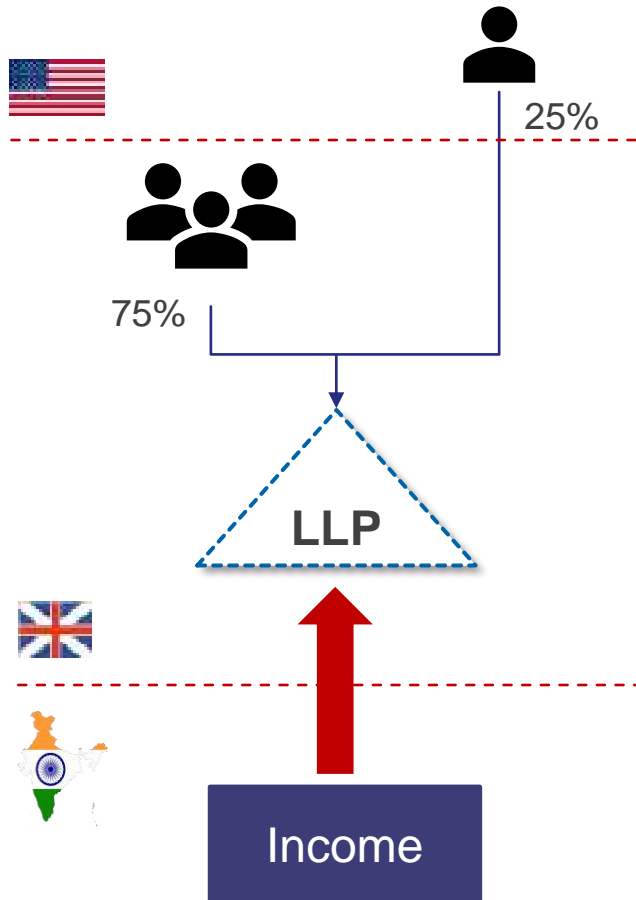
- **What is an FTE?**
  - Under the domestic laws of the Resident State, income derived by an entity is not taxable at entity level but at the level of persons holding interest in the entity
- **Complexities:**
  - Treaty benefit at FTE level – Person; Tax Residency, Beneficial Owner of Income?
  - Treaty benefit at Beneficiary/Partner Level
  - Claim of Foreign Tax Credit
  - Challenges where State R treats entity as FTE whereas State S treats it as opaque
- **Examples of FTE – Partnership Firms, LLP, Trusts, CIVs**

# FTE | CASE STUDY



- UK LLP is a law firm in UK. It is recognized as FTE under UK tax laws
- It has four partners,
  - 3 are tax residents of UK,
  - 1 is a tax resident of the US
- UK renders legal services to an Indian entity, for which it earns professional fees?
- Will UK LLP be entitled to treaty benefit? If yes, to what extent

# FTE | CASE STUDY (CONT'D...)



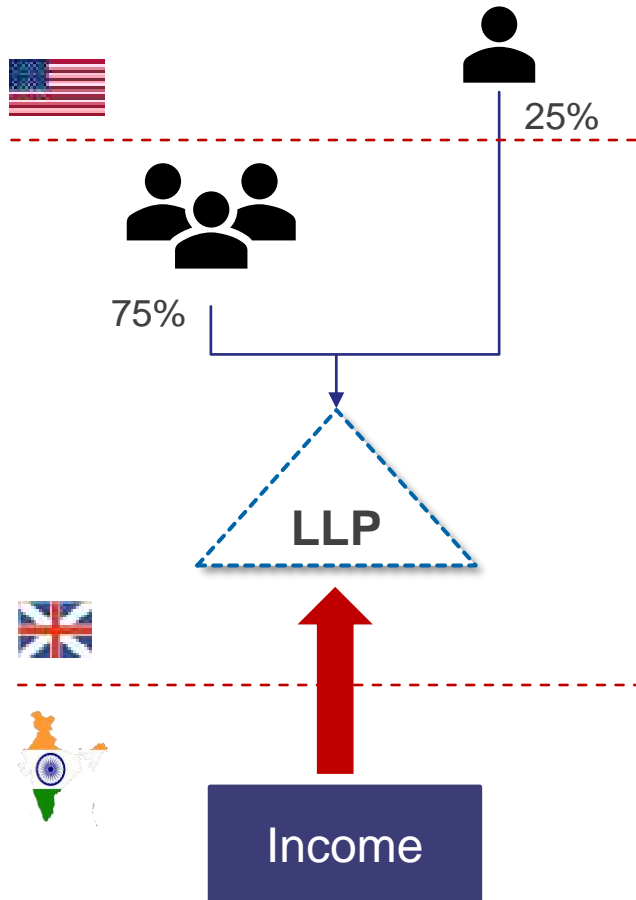
## ■ Article 4 – Indo-UK DTAA – Extract

*“1. For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management, place of incorporation, or any other criterion of a similar nature, provided, however, that:*

*(a) .....*

*(b) in the case of income derived or paid by a partnership, estate, or trust, this term applies only to the extent that the income derived by such partnership, estate, or trust is subject to tax in that State as the income of a resident, either in its hands or in the hands of its partners or beneficiaries.”*

# FTE | CASE STUDY (CONT'D...)



## Text of TRC

*“The partnership of UK LLP is **not itself resident in the UK** for the purpose of the UK/India Convention. However, I certify that to the best of HMRC’s knowledge, **the individual partners in UK LLP during the period are resident of UK** in accordance with Article 4 of the Convention in force between the UK and India. **A full list of the UK resident partners should be attached by the partnership**”*



ANY  
QUESTIONS





THANK YOU!

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