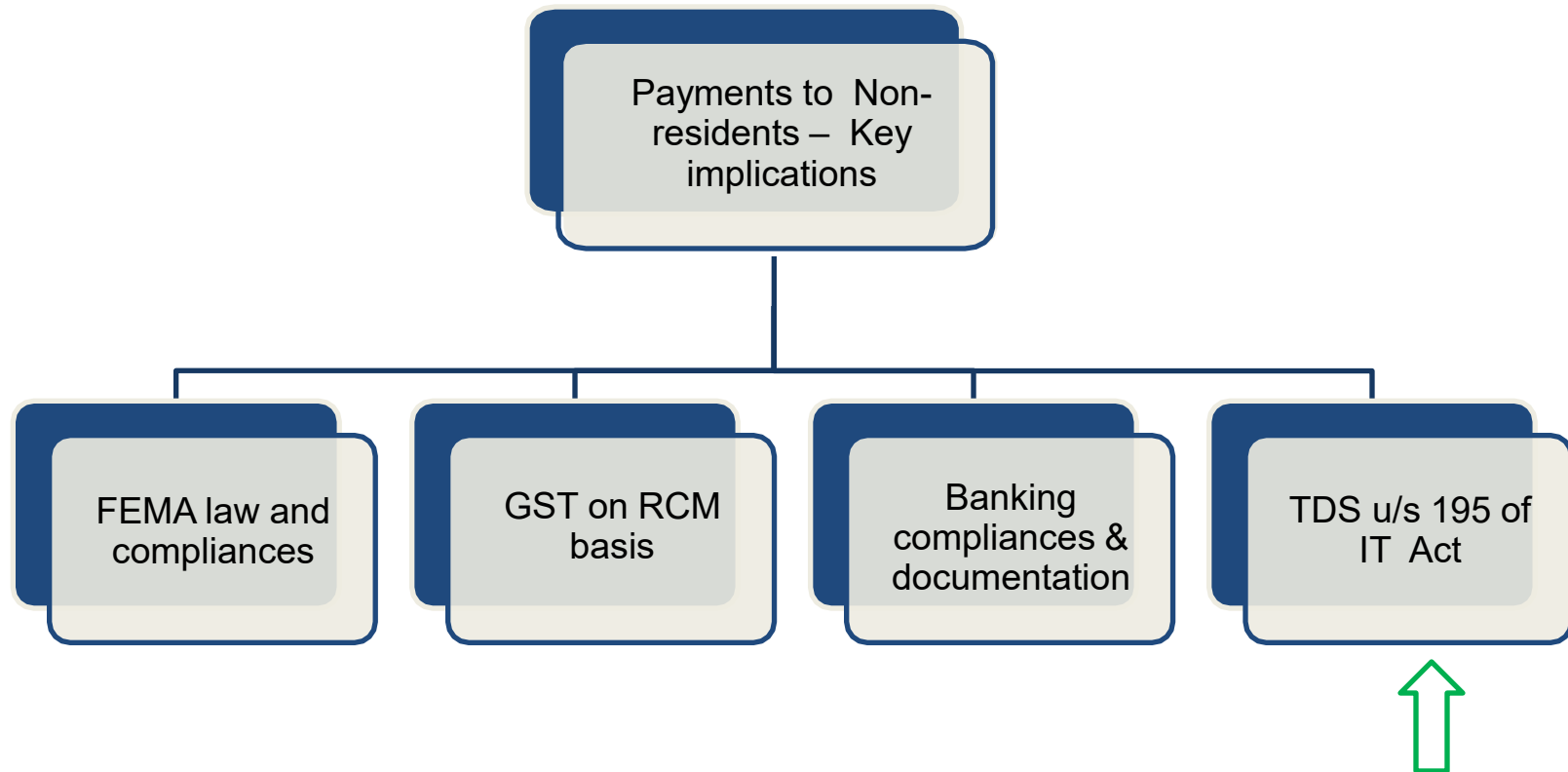


# **TDS on Payments to Non-Residents u/s 195 - Laws & Procedures**

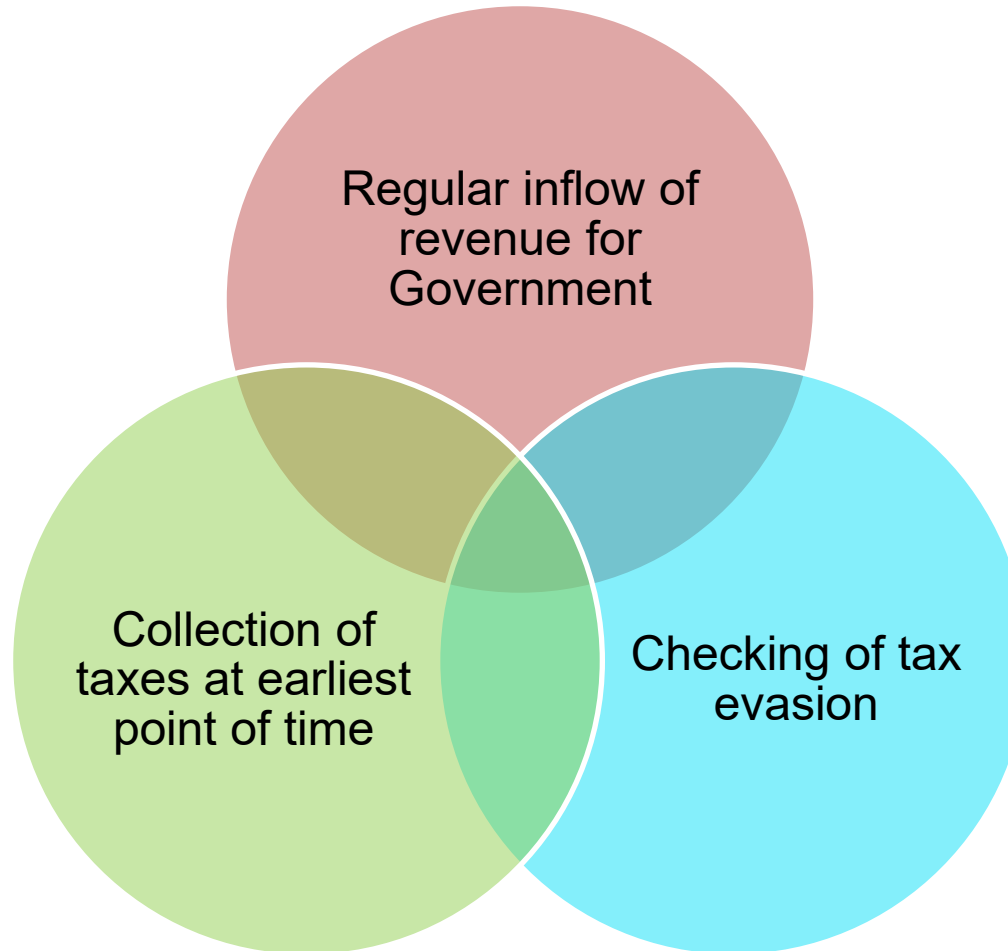
**CA Zeel Gala  
13 December 2018**



# Payments to Non-resident



# Objective of Section 195



# Objective of Section 195

- CBDT Circular No. 152 dated 27.11.1974 - 98 ITR (St.) 19

*“The object of section 195 is to ensure that the tax due from non resident persons is secured at the earliest point of time so that there is no difficulty in collection of tax subsequently at the time of regular assessment. Failure to deduct tax at source from payments to a non resident may result in loss of revenue as the non resident may sometimes have no assets in India from which tax could be collected at a later stage.*

*Tax should, therefore, be deducted in all cases where it is required to be deducted under section 195 before the payment is made to the credit of the Central Government as required by section 200 of the Income tax Act read with rule 30 of the Income tax rules, 1962. Failure to do so would render a person liable to penalty under section 201 read with section 221 of the Income tax Act, and would also constitute an offence under section 276B of the Income tax Act.”*

# Objective of Section 195

- Vodafone International Holdings B.V. v. Union of India [2012] 341 ITR 1 (SC)

*“The object of Section 195 is to ensure that tax due from non-resident persons is secured at the earliest point of time so that there is no difficulty in collection of tax subsequently at the time of regular assessment.”*

# Overview of Section 195

| Section | Provisions  |
|---------|---|
| 195(1)  | Scope and conditions for applicability  |
| 195(2)  | Application by the 'Payer' for determining sum chargeable   |
| 195(3)  | Application by the 'Payee' for Nil withholding  |
| 195(4)  | Validity of certificate issued by the AO u/s 195(3)   |
| 195(5)  | CBDT empowered to make Rules in respect of sec 195(3)   |
| 195(6)  | CBDT empowered to provide forms in which information to be furnished  |
| 195(7)* | CBDT empowered to specify class of persons or cases (where recipient is NR) who will be mandated to furnish application to AO for determination of sum chargeable |
| 195A    | Grossing up of tax  |

*\* Introduced by Finance Act, 2012, no notification issued till date*

# Section 195(1) reads as under

*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 :*

*Provided that in the case of interest payable by the Government or a public sector bank within the meaning of clause (23D) of section 10 or a public financial institution within the meaning of that clause, deduction of tax shall be made only at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode :*

*Provided further that no such deduction shall be made in respect of any dividends referred to in section 115O.*

# Section 195(1) reads as under

*Explanation 1.—For the purposes of this section, where any interest or other sum as aforesaid is credited to any account, whether called "Interest payable account" or "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.*

*Explanation 2.—For the removal of doubts, it is hereby clarified that the obligation to comply with sub-section (1) and to make deduction thereunder applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to all persons, resident or non-resident, whether or not the non-resident person has—*

*(i) a residence or place of business or business connection in India; or*

*(ii) any other presence in any manner whatsoever in India.*



# Section 195(1) – Scope and applicability

## Payer / Deductor

- Any person (being a resident or a non-resident)

## Payee / Deductee

- Non-resident or a foreign company

## Nature of payment

- Any interest or
- Any other sum chargeable under provisions of IT Act
- Excluding interest u/s 194LB, 194LC, 194LD; salary; dividend under section 115-O

## Time of Deduction

- Payment or credit whichever is earlier

## Rate of Deduction

- Rates in Force

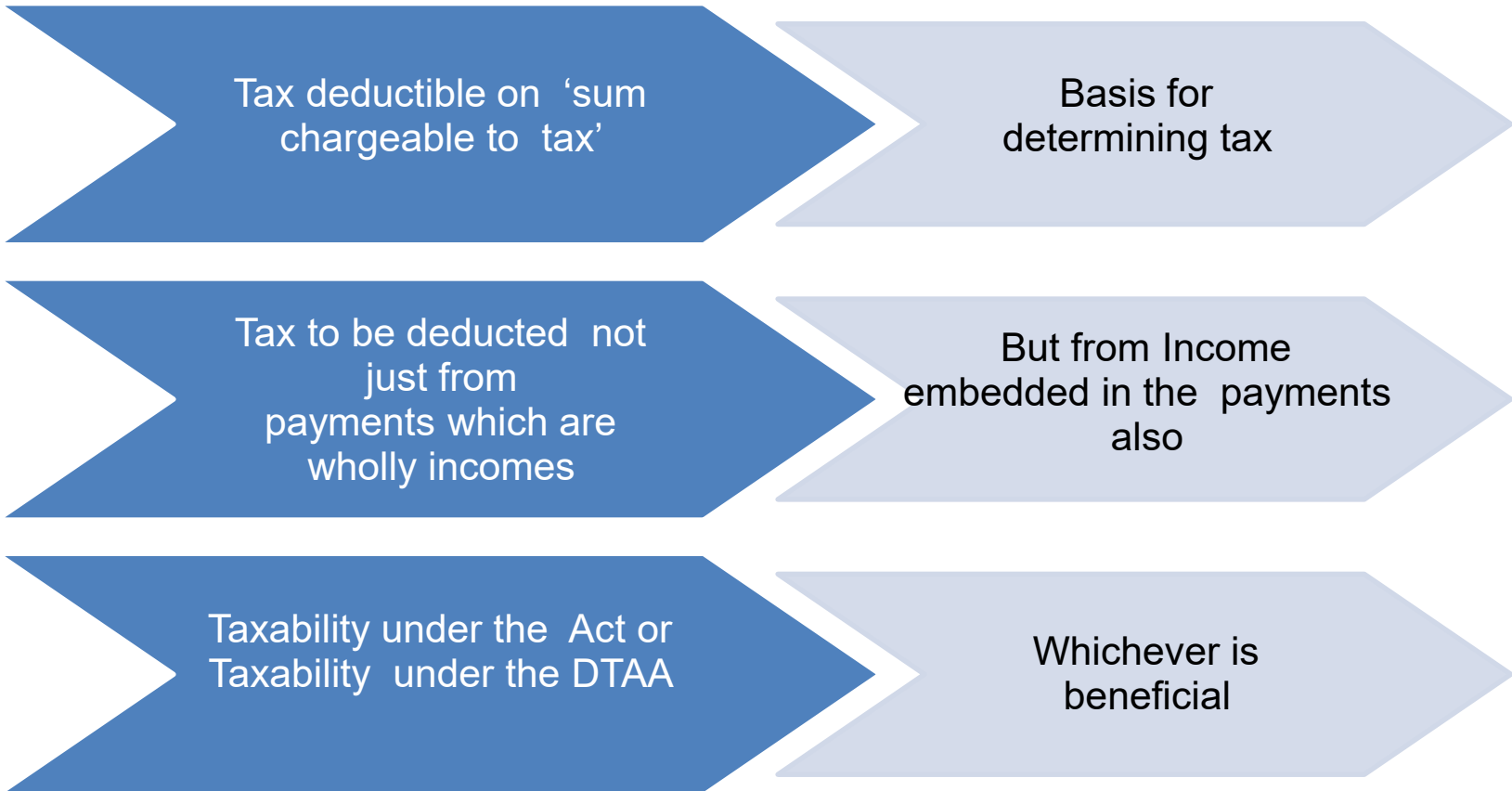
# Section 195(1) – Scope and applicability

- **All payers covered irrespective of legal character** (including Individual, HUF, etc)
  - The obligation to comply with section 195(1) applies to all payers, whether resident or non-resident and irrespective of whether they have a place of residence or business connection or any presence in India – Explanation 2 inserted by Finance Act, 2012
- Section 195(1) deals with deduction of tax at source from **payments to non-residents and foreign companies**
  - Excludes RNOR [Section 2(30) – United Breweries Ltd. ACIT [1995] 211 ITR 256 (Kar)]
  - Foreign companies having POEM in India – Notification No.29 dated 22 June 2018
- **All payments covered (excluding salaries and specified payments)** – eg, payment to foreign architect for residential house construction
- No threshold limit prescribed

# Unique features – Section 195

- No prescribed rate of TDS – tax to be deducted at the ‘rates in force’
- Multi-dimensional, as involves understanding of DTAA
- Unlike personal payments exempted in section 194C etc.; no exclusion for the same in section 195 (all payments covered excl. salaries)
- Unlike other provisions in Chapter XVII (TDS provisions), section 195 uses a special phrase “any sum chargeable under the provisions of this Act” – “any sum “ Vs “any income by way of”
- Nature of payment to be determined from payee’s point of view.
- Any subsequent amendment through retrospective effect cannot create any obligation upon the payer which did not exist at the time of crediting or actual payment of the sum

# Chargeability



# Meaning of 'Any sums chargeable'

- **Any sum chargeable to tax means**
  - Amount paid which wholly bears the character of income or
  - Gross amount, the whole of which may or may not represent income or profits

Transmission Corporation of AP Ltd. (1999) (239 ITR 587) (SC)

- **Section 195 does not apply if sums paid to NR is exempt from tax**

GE India Pvt Ltd [2010] 327 ITR 456 (SC)

# Determination of 'Any sums chargeable to tax'

| Nature of Income    | Act   | Treaty/DTAA                                   |
|---------------------|---|---|
| Business/Profession | Section 9(1)(i): Concept of Business Connection | Article 5; 7; 14: Concept of PE or Fixed Base |
| Salary Income*      | Section 9(1)(ii)                                | Article 15                                    |
| Dividend Income*    | Section 9(1)(iv) and section 115A               | Article 10                                    |
| Interest Income     | Section 9(1)(v) and section 115A                | Article 11                                    |
| Royalties           | Section 9(1)(vi) and section 115A               | Article 12                                    |
| FTS                 | Section 9(1)(vii) and section 115A              | Article 12                                    |
| Capital Gains       | Section 9(1)(i) and section 45                  | Article 13                                    |

\* Excluded from Section 195

Provision of Act or DTAA, whichever is beneficial shall apply

# Scope and conditions for applicability of Section 195

- Applicability on presumptive tax
  - Frontier Offshore Exploration (India) Ltd v. DCIT [2009] 118 ITD 494 (Chen) - TDS to be on whole payment
  - Frontier Offshore Exploration (India) Ltd [2011] 10 taxmann.com 250 (Chen)
    - TDS on income element only (4.1 % in case of 44BB covered cases)
    - Supreme Court observations in the case of GE India Technology followed
- On Gross basis on Royalties/ FTS/ Investment Income/ Lotteries etc.

# Time of Deduction & Payment Covered

**View 1** Para 1 of Article 12 gets attracted only if there is actual payment of FTS

Siemens Aktiengesellschaft  
[ITA No. 124 of 2010] (Bom)

FTS should be taxable in the year in which the amounts are received and not otherwise

Pizza Hut International LLC  
[2012] 54 SOT 425 (Del)

- Initial point of taxation is the arising of the royalty in India, but it is finally taxed on the basis of amount of royalty paid to the non-resident
- Irrespective of the system of accounting, royalties are taxable on cash basis

CSC Technology Singapore Pte Ltd  
[2012] 50 SOT 399 (Del)

FTS is taxable on payment basis and not on accrual basis

Uhde GmbH [1996]  
54 TTJ 355 (Mum)

Royalties are taxable only when the payment is received and not upon accrual



# Time of Deduction & Payment Covered

## View 2

FTS may be taxed on cash basis or accrual basis

Flakt (India) Limited [2004]  
267 ITR 727 (AAR)

- Article 12 does not particularise the stage at which tax can be levied in India. Such income is to be taxed in accordance with laws of India and it can be on cash basis or on accrual basis (Obiter Dicta)
- The main issue was to withhold tax at the time of credit in the books of Accounts and the AAR held that requirement of Section 195 of the Act is not contradictory to Article 12

Article 3(2) r.w. Section  
43(2)

- Article 3(2) - Any term not defined in the DTAA to be interpreted in accordance with the provision of domestic laws
- Section 43(2) - Defines 'paid' to include 'incurred according to the method of accounting followed'
- This has not been discussed in Flakt's decision

# Exchange Rate

Rate of  
exchange for  
TDS

## SBI TT Buying Rate

- 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 exchange rate fluctuates between the date of deduction of tax and the date on which payment is made to the non-resident

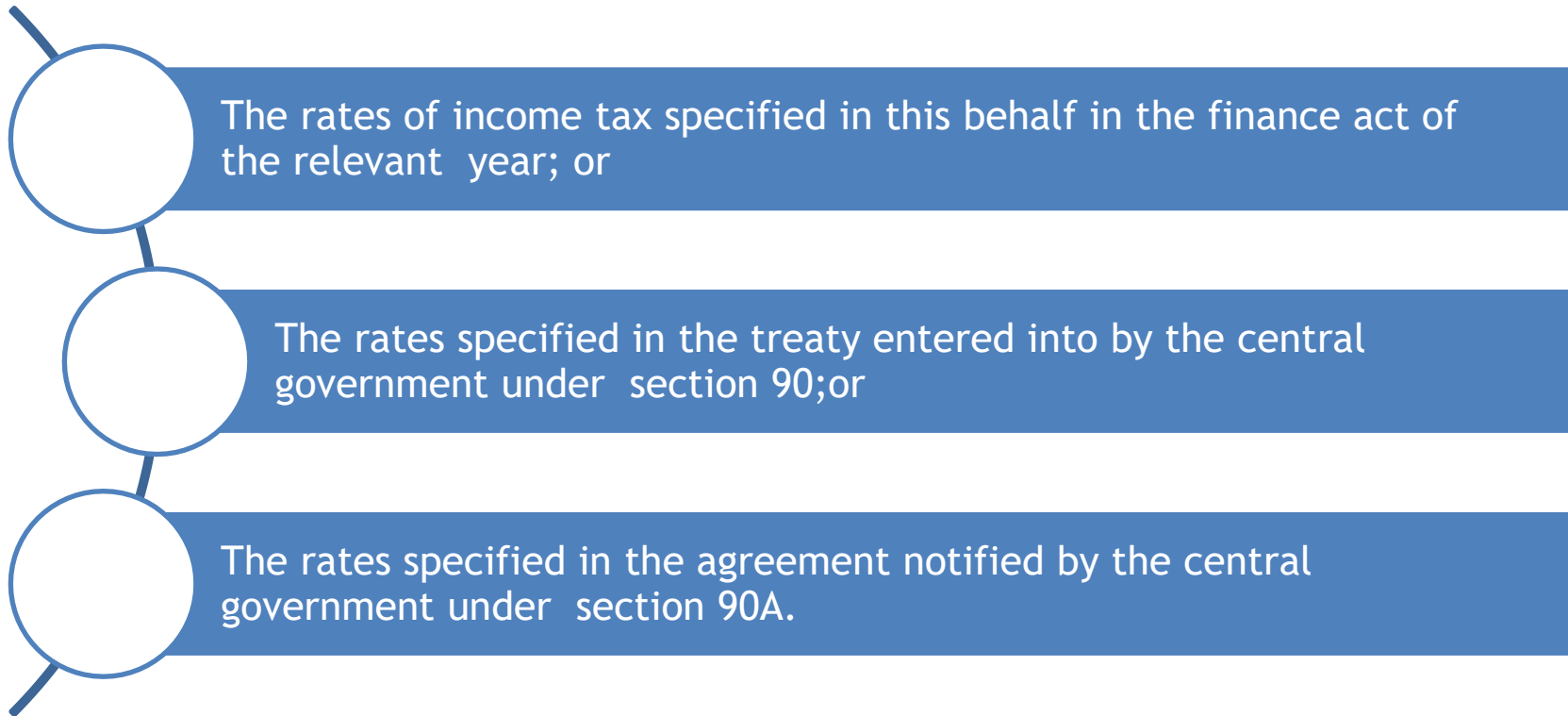
- the difference between the exchange rates shall be ignored for TDS purposes

# Time of Deduction & Payment Covered

- **Tax withholding on ‘payments in kind’? - Yes**
  - Kanchanganga Sea Foods v. CIT [2004] 265 ITR 644 (AP)
  - BIOCON Biopharmaceuticals Private Ltd. v. ITO [2013] 144 ITD 615 (Bang)

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

# 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 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

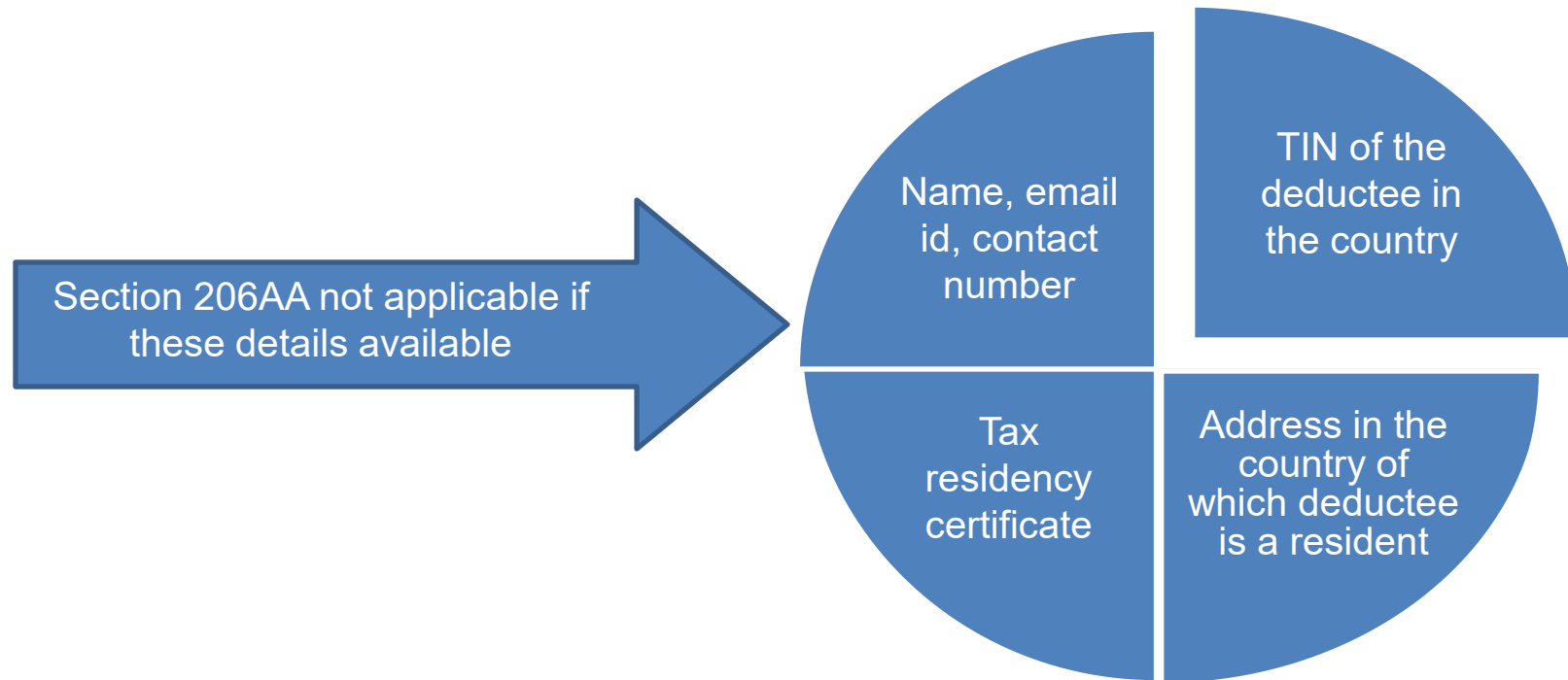
Whether Section 206AA overrides DTAA rates?

- 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. ([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

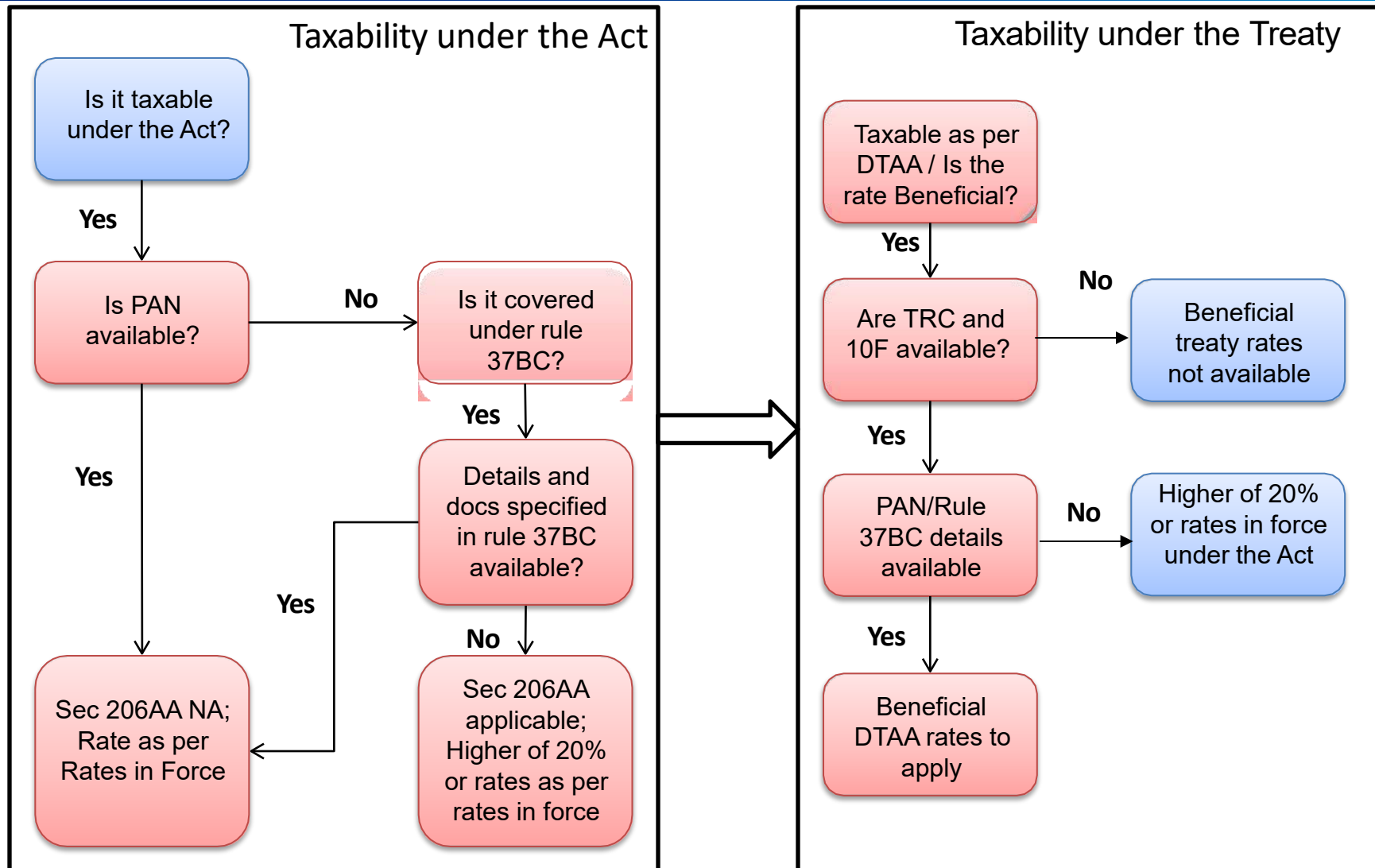
# Rule 37BC – Relaxation on applicability of Section 206AA



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



# Section 195A - Grossing-up of taxes

- In case the tax chargeable on any income is to be borne by the payer,
- then, for the purposes of withholding of taxes under section 195 such income shall be increased
- to such amount as would, after withholding of tax thereon at the rates in force, be equal to the net amount payable to payee.

| Particulars  | Amount  |
|--|---------|
| Amount payable to non-resident (net of tax)        | INR100  |
| Tax rate applicable                                | 20%     |
| Gross-up income: $100/80(100-20) * 100$ .          | INR 125 |
| Tax payable (INR 125 * 20%)                        | INR 25  |
| Net amount paid to non-resident (INR 125 – INR 25) | INR 100 |

# Section 195A read with section 206AA

## View-1: Section 206AA not applicable for grossing up under Section 195A of the Act

- Section 206AA of the Act were introduced with the object of improving compliance and not to impose any punitive tax incidence on the payee.
- Section 206AA starts with non-obstante clause.

## View 2: Section 206AA applicable for grossing up under Section 195A of the Act:

- Section 206AA does not by itself create any withholding obligation.
- Section 206AA supplements the primary withholding section in case of default in PAN.
- Thus, the rate of 20% as provided in section 206AA would be substituted for the rate provided under the respective provisions which creates the withholding tax obligation.

**View 1 upheld by Bangalore ITAT in case of Bosch Ltd**

# Section 195A - Grossing-up of taxes

- **Grossing up required in case of net of tax payments**
  - payer agrees to bear the tax
  - does not apply when profits of non resident covered by presumptive provisions - ONGC 264 ITR 340 (Uttaranchal)
  - Circular 785 dt. 24 November 1999 - grossed up income is the income of the payee u/s 198 of the Act

# Internal checks before applying tax treaty provisions

## Basic:

Access to Tax Treaty,

TRC, Declaration for no PE,  
Beneficial owner & payment  
basis (for few incomes)

- Tax Treaty - whether applicable?  
Legal Status; Persons covered; Taxes covered; Residential status

## Additional:

LOB Clause;

MFN Clause;

Protocols and Memorandum of  
Understanding

## Guidance:

Technical Explanation to DTAA  
by treaty partners(eg USA to  
India-US DTAA) ;

Jurisprudence/Case  
Laws(including foreign  
courts);

OECD Commentary and UN  
Model Convention  
Commentary; etc

# Section 195 - summary

Who is responsible to deduct TDS

- Any person - as defined u/s 2(31)
- Includes virtually everyone

Payment made to non resident

- Includes all non- resident having presence in India or not (as per the provisions of Act)

Determine-Status of NR

- Under Section 6 as well as respective DTAA
- To apply beneficial provisions of DTAA - TRC is a MUST

Payment Covered

- Any sum chargeable under the Act
- Except Salary and dividend referred u/s 1150

At what time TDS has to be deducted

- At the time of credit or payment whichever is earlier

Rate of TDS

- Relevant rates in force;
- Sec. 2(37A)(iii); Cir.No.728 dt:30/10/1995 & Cir.No.740 dt:17/04/1996 or rates as per DTAA whichever is beneficial
- 206AA / Rule 37BC applicability

## Section 195(2) – Application by the ‘Payer’ for determining sum chargeable

*195 (2) Where the person responsible for paying any such sum chargeable under this Act (other than salary) to a non-resident considers that the whole of such sum would not be income chargeable in the case of the recipient, he may make an application to the Assessing Officer to determine, by general or special order, the appropriate proportion of such sum so chargeable, and upon such determination, tax shall be deducted under sub-section (1) only on that proportion of the sum which is so chargeable.*

# Section 195(2) – Application by the ‘Payer’ for determining sum chargeable

## Applicant

- Application to be made by the payer before the jurisdictional AO

## When to Apply?

- When payer considers that the whole sum is not taxable in India

## Process & Consequences

Payer may approach the AO to determine the taxable portion of income in India.

- Plain Paper application; No Form prescribed
- AO to determine amount chargeable to tax
- AO may issue order, determining the portion of income chargeable to tax
- Order valid for the period specified
- No specified time limit available to pass the order under Section 195(2)

## Order u/s 195(2) Appealable ?

- Order of AO u/s 195(2) is appealable u/s 248 by the payer provided:
  - Payer has to bear the tax under the agreement and
  - Such taxes have been already paid by the payer
- Section 248 NA if the payee is not a non-resident - Raza Textile Ltd 87 ITR 539 (SC)



# Section 195(2) – Application by the ‘Payer’ for determining sum chargeable

- **Is it obligatory to approach AO for non-withholding of taxes?**
  - GE Technology v. CIT [2010] 327 ITR 456 (SC)
  - Instruction No. 02/2014 of CBDT dated 26.02.2014
- **Payer can make an application to AO for determining portion of income liable for WHT**
  - Review restricted to payment to be made by payer, total income of the payee not under scrutiny
- **Whether any time limit for passing order u/s 195(2)**
  - No time limit - Blackwood Hodge (India) Pvt. Ltd. [1971] 81 ITR 807 (Cal), Central Associated Pigment Ltd. [1971] 80 ITR 631 (Cal)
- **Whether the order passed u/s 195(2) is conclusive?**
  - Order u/s 195(2) not conclusive. Department may take a contrary view
- **Whether an application can be made u/s 195(2) for Nil withholding order?**
  - 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.)

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*Practically, application u/s 195(2) is filed for both nil as well as lower withholding tax rate order*

# Section 195(3) – Application by the ‘Payee’ for Lower or Nil withholding

*195 (3) Subject to rules made under sub-section (5), any person entitled to receive any interest or other sum on which income-tax has to be deducted under sub-section (1) may make an application in the prescribed form to the Assessing Officer for the grant of a certificate authorising him to receive such interest or other sum without deduction of tax under that sub-section, and where any such certificate is granted, every person responsible for paying such interest or other sum to the person to whom such certificate is granted shall, so long as the certificate is in force, make payment of such interest or other sum without deducting tax thereon under sub-section (1).*

# Section 195(3) – Application by the ‘Payee’ for Lower or Nil withholding

## Applicant

- Payee who is eligible as per conditions in Rule 29B



## Why to Apply?

- Avail ‘NIL’ withholding tax certificate for interest / other sum chargeable to tax

## Process

- Application in Form 15C (for Banking Co.) and 15D (all others) to the AO

## Consequence

- AO may issue a ‘NIL’ withholding tax certificate
- Review restricted to the specified receipt, total income of the payee not under scrutiny
- The permission is valid for the period specified unless cancelled [Section 195(4)]

# Section 197 – Application by lower or nil certificate by payee

## Applicant

- Payee

## When to Apply?

- If payee considers that tax withholding can be at 'nil' or 'lower rate'.

## Process

- Application can be made to the AO in Form 13 to determine the tax rate
- Application to be made before the payment/ credit, whichever is earlier

## Consequence

- AO may issue a 'Lower' or 'NIL' withholding certificate upon satisfaction of the fact that existing and estimated tax liability of a person justifies the deduction of tax at 'Nil' or 'Lower Rate'
- Factors considered by AO:
  - Tax payable on the estimated income of the current year;
  - Tax payable in the last 3 years;
  - Existing liability;
  - Advance tax payments, WHT & TCS of current year in the current year.

# Comparative analysis of 195(2), 195(3) and 197

| Particulars                           | 195(2)  | 195(3)   | 197(1)   |
|---------------------------------------|---|--|--|
| Applicant                             | Payer   | Payee<br>(who satisfies conditions specified in Rule 29B)                | Payee  |
| Purpose                               | To determine the portion of income liable for WHT | To receive a specified payment <u>without</u> deduction of tax at source | To obtain nil/ lower tax withholding rate for all receipts |
| Applicability                         | Applicable to specified payments                  | Applicable to specified receipts   | Applicable to all receipts                                 |
| Applicable Forms                      | To be made on plain paper                         | Form 15C / 15D   | Form 13  |
| Whether appealable under Section 248? | Yes - where the tax is deposited by the payer     | No   | No   |

In all the above cases, unlike CA Certificate issued in Form 15CB, no interest or penalty is leviable in case the AO takes a contrary view at the time of assessment proceedings.

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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 (30 <sup>th</sup> April for March) |
| 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  |

# Section 195(6) – CA Certificate for remittance

- Requires the person making payment to NR to furnish the information relating to payments whether or not taxable. Failure will result in penalty under section 271- I for Rs. 1 lakh - w.e.f. 1 June 2015
- Furnishing of information Rule 37BB
  - Furnish information to the tax department - Form 15CA
  - Obtain CA certificate before making payment to NR - Form 15CB



# Section 195(6) – Overview of Rule 37BB

## FORM 15CA

- Information to be furnished *by the Remitter electronically*.
- New Form No. 15CA split into 4 parts vide Notification No 93/2015 dtd 16-12-2015
  - A. Payments chargeable to tax and  $\leq$  INR 5 Lakh; or
  - B. Payments chargeable to tax,  $>$  INR 5 Lakh and order/certificate u/s 195(2)/(3)/ 197 obtained; or
  - C. Payments chargeable to tax,  $>$  INR 5 Lakh and Form No 15CB is obtained; or
  - D. Part D - Applicable where the payments are not chargeable to tax

## FORM 15CB

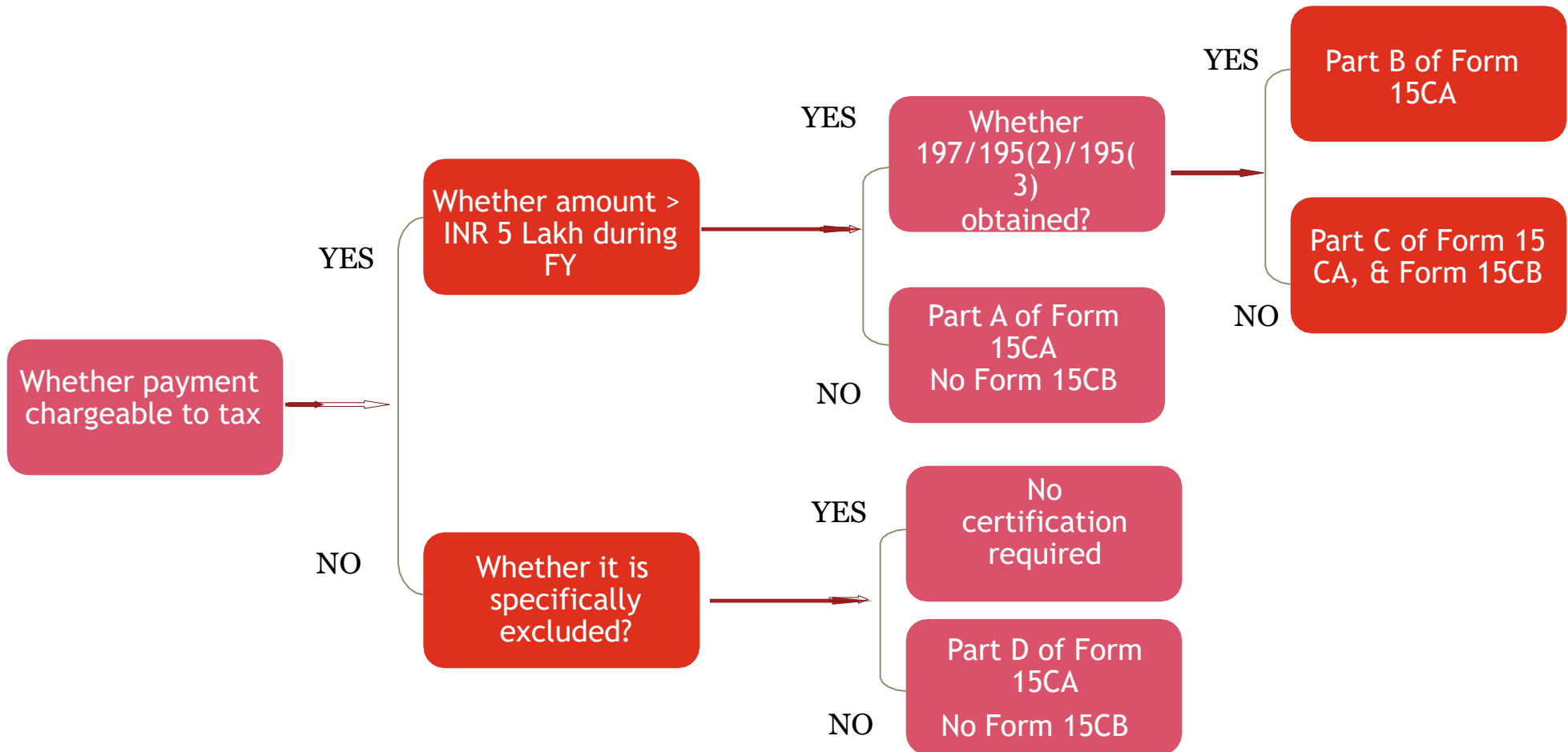
- Prescribes format of Certificate to be obtained from a CA (furnished electronically ) by Remitter
- Applicability- Only in respect of transactions reported in Part C of Form 15CA.

## FORM 15CC

- Furnish information of remittances made by AD (Bankers) quarterly.

*A list of 33 specified transactions and remittance by individual under Liberalised Remittance Scheme, excluded from compliance u/r. 37BB(3)*

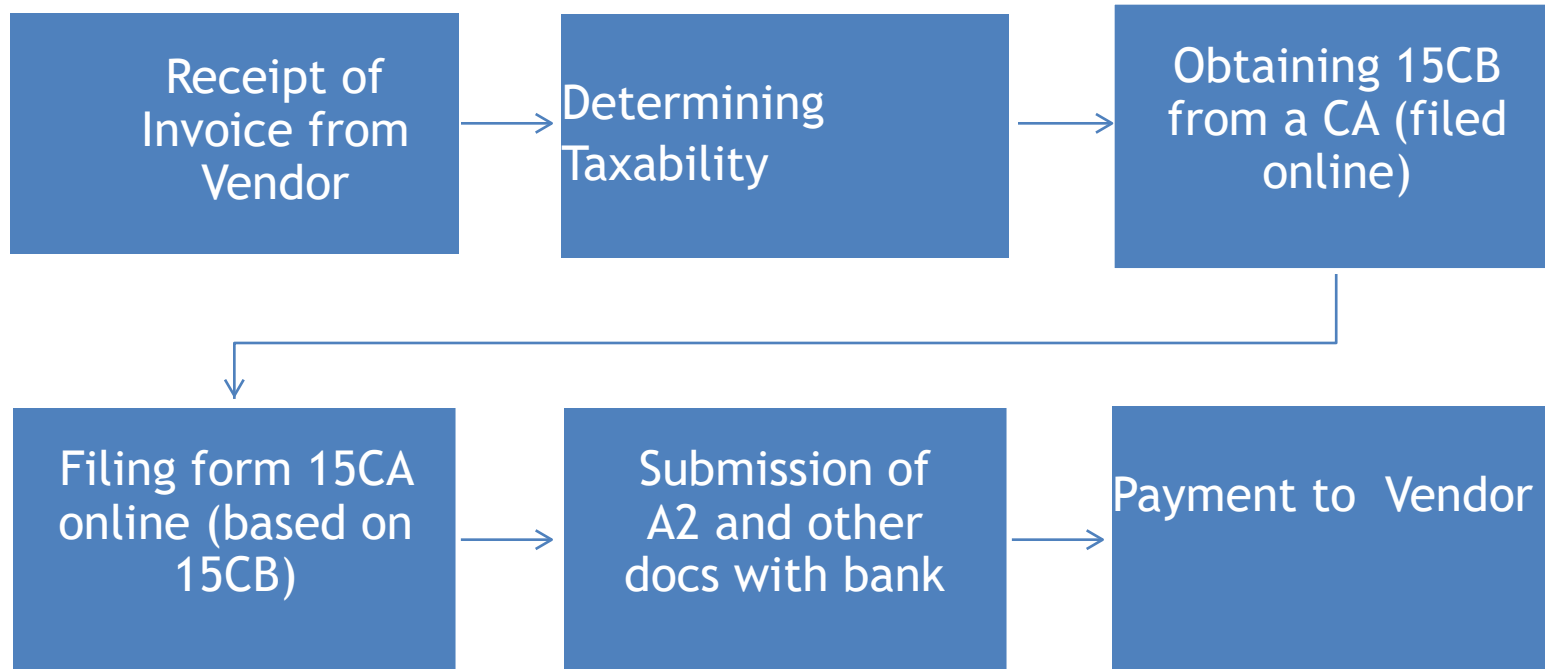
# Section 195(6) – CA Certificate for remittance



# Section 195(6) – CA Certificate for remittance

- **Documentation by CA while issuing Form 15CB**
  - Agreement and Invoices;
  - Tax Residency Certificate of the payee
  
- **Declaration/Certificate from payee for** - No PE, tax residency, beneficial owner, treaty entitlement, etc. and/or indemnification from payee
  - Payment details
  - Correspondences
  - Technical Advice, if any

# Procedure – Form 15CA and 15CB



1. Every remittance other than those covered under specified list required to follow procedure even if not chargeable to tax in India.
2. Requires the payer to provide PAN of the non resident
3. Form 15CB needs to be uploaded electronically - information requirement is same as Form 15CA

# Approach for applying provisions of Section 195

| Sr . No. | Step  | Remark  |
|----------|---|---|
| 1        | Check if payment is covered by section 195                        | Payment from Resident to Non - Resident<br>Non - Resident to Non - Resident covered             |
| 2        | Verify the factual and basic documents                            | Like invoice, contract, Legal status of payee, Tax Residency (TRC), No PE Declaration, PAN, etc |
| 2        | Make Classification of transaction                                | Business income, FTS, Royalty, etc  |
| 3        | Check taxability under the Act                                    | Check taxability as well as rate of tax including applicability of section 195A or 206AA        |
| 4        | Check taxability as per DTAA                                      | Ensure special checks discussed in earlier slide  |
| 5        | Check if order or certificate for 'NIL' or 'Lower' rate available | Either by payer or payee (also possibility of obtaining same can be explored)                   |

# Section 195(7)

- Sub.sec(7) was inserted by Finance Act, 2012 to partially neutralise the impact of ratio of GE Technology Centre (Supra) and thereby the Board may specify a class of persons or cases where the payer has to approach AO through an application to determine proportion of sum chargeable to tax for deduction of tax accordingly.
- No such class of persons or cases have been specified till date

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# **Section 195 - Consequences of Non Compliance**

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# Consequences of non-compliance

| Section  | Nature of default   | Consequence   |
|----------|---|---|
| 40(a)(i) | Withholding tax not deducted or not deposited within prescribed time        | Disallowance of expenses in computation of income of payer; deduction in year of payment              |
| 201(1A)  | Tax not withheld/ deposited appropriately                                   | Interest @ 1% / 1.5% per month or part of the month   |
| 221      | Tax withheld not paid   | Penalty, not exceeding the amount of tax not paid   |
| 271C     | Tax not withheld or short withheld  | Penalty, not exceeding the amount of tax not withheld   |
| 272A     | Failure to file TDS Return  | Penalty of Rs.100 per day (maximum upto the tax deducted) for failure to file the TDS return on time. |
| 276B     | Failure to pay tax deducted   | Rigorous imprisonment for 3 months to 7 years along with fine   |
| 271I     | Failure to furnish information or furnishing inaccurate information u/s 195 | Penalty of Rs.1,00,000  |
| 271J     | Furnishing incorrect information in reports or certificate (Form 15CB)      | Penalty of Rs.10,000 for each such report or certificate (on the issuer of certificate / report)      |




# 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 CCIT 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 or vice versa



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

# Refund of TDS paid u/s 195

- Prior approval of CCIT/DGIT required.
- The claim for refund should be made within 2 years from the end of financial year in which tax was deducted.
- Excess tax can be adjusted against any existing liability of deductor and the balance if any would be refunded.
- An undertaking that no certificate under 203 was issued to non resident and if issued the same shall be recalled. Indemnity bond to be given for any loss to the department.
- Refund can be granted only if the deductee has not filed return or the time for filing return has expired.
- Circular provides that no interest u/s 244A is admissible. However the Supreme Court held that such interest is payable by the Govt. – UOI v. Tata Chemicals Ltd [2014] 363 ITR 658 (SC)

**The CBDT has clarified\* that if a resident deductor is entitled for refund of excess TDS deposited u/s 195, then he shall be allowed interest on refund u/s 244A from the date of payment of such tax**

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# Section 195 - Typical Issues

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# Typical Issues

- Software payments
- Payments towards commission to agents
- Reimbursement of salary of seconded employees
- Reimbursement of actual expenses
- Reimbursement of cost of third party services
- Cost sharing arrangements
- Payments towards online advertisements (prior to equalization levy)

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# Case Studies

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# Case Study 1

- X a non resident have subscribed to long term infrastructure debt bonds issued by ABC Limited a domestic Indian company
- ABC pays interest to X at the rate of 10%
- ABC has withheld tax at the rate of 5% as per Section 194 LB
- Whether the procedure of issuance of Form 15CA and Form 15CB are required to be complied with while remitting such interest to the Non Resident?

# Case Study 2

- ABC Limited is an entity incorporated in India and is undertaking a project outside India
- ABC Limited has availed services of X Co, a UK company, in relation to the aforesaid project
- ABC Limited makes payment to X Co
- Whether tax is to be withheld on such payment in India?



# Case Study 3

- PQR Limited is an entity incorporated in the United States of America (USA) and has manufacturing activities in India through its Project Office
- Project office sells goods to XYZ Limited a resident in India
- XYZ Limited makes payment to the PE of PQR Limited in India
- Whether tax is to be withheld on such payment and at what rate?

# Case Study 4

- Mr. X, a resident of UK, has a house property in India
- Mr. Y, a resident of India, purchases the aforesaid house property from Mr. X for INR 5 crores
- Whether Mr. Y to withhold tax on the amount to be remitted to Mr. X?
- If yes, at what amount i.e. Amount actually paid (i.e. INR 5 crores) or the capital gain to Mr X?
- Whether Mr. Y can take into account section 54 exemption (to be availed by Mr. X) if the documents / proofs to that effect are produced by Mr. X?

# Thank You

Zeel Gala

# Annexure 1 - Tax Residency Certificate

- **Notification 57/2013 dated 1 August 2013 issued by CBDT (applicable from 1<sup>st</sup> April 2013), which mandates submission of following information in Form 10F:**
  - Status (individual, company, etc) of the assessee
  - Nationality or country or specified territory of incorporation or registration
  - Assessee's tax identification number in the country or specified territory of residence and in case there is no such number, then, a unique number on the basis of which the person is identified by the Government of the country or the specified territory of which the assessee claims to be a resident;
  - Period for which the residential status, as mentioned in the certificate referred to in sub-section (4) of section 90 or sub-section (4) of section 90A, is applicable; and
  - Address of the assessee in the country or specified territory outside India, during the period for which the certificate, as mentioned in (iv) above, is applicable.
- **Declaration not required, if TRC contains above particulars**



# Annexure 1 - Tax Residency Certificate

- The comparison of various fields contained in TRC of key selected countries is given as follows: -

| Sr. No | Country   | Status | Nationality | TIN in resident country | Period of residency | Address the resident country | PAN |
|--------|-----------|--------|-------------|-------------------------|---------------------|------------------------------|-----|
| 1      | Singapore | √      | √           | √                       | √                   | √                            | ×   |
| 2      | USA       | √      | √           | √                       | √                   | ×                            | ×   |
| 3      | Mauritius | √      | √           | √                       | √                   | √                            | ×   |
| 4      | UAE       | ×      | ×           | √                       | √                   | ×                            | ×   |



**Back**

# Annexure 2 - Applicability of Surcharge and Cess to Treaty Rates

Does rates prescribed under DTAA to be increased by surcharge and Education Cess??

**DTAA uses term 'Income-tax' to put cap. Hence no further surcharge or cess**

- Capgemini SA (2016) (72 taxmann.com 58) (Mum)
- BOC Group Ltd. (2015) (64 taxmann.com 386) (Kol)
- Sunil v Motiani v. ITO [2013] 59 SOT 37 (Mum)
- DIC Asia Pacific Pte. Ltd. v. ADIT [2012] 18 ITR (Trib.) 358 (Kol)

**'Income tax' includes surcharge**

- CIT v. K. Srinivasan [1972] 83 ITR 346 (SC)
- Bank of America v. DCIT [2001] 78 ITD 1 (Mum)
- CIT v. Arthusa Offshore Co. [2008] 169 Taxman 484 (Utt)

**Difference in rates between Act and Finance Bill pending approval**

- Section 294 - Applicability of provisions of the Act or the Finance Bill whichever is favourable to the tax payer for charging of income-tax

***Back***

# Annexure 3 – Conditions as per Rule 29B

1. Assessee has been regularly assessed to tax and has filed all returns of income due as on the date of filing of application;
2. Not in default in respect of any tax interest, penalty, fine, or any other sum (including advance tax and tax payable under section 140A);
3. Not subjected to penalty u/s 271(1)(iii) **(has been omitted w.e.f. 5-5-2016)**;
4. In case of a person other than a foreign banking company -
  - a. Has been carrying only business in India continuously for at least 5 years.
  - b. Book value of fixed assets in India for the immediately preceding P.Y. exceeds Rs. 50 lakhs.