

# TDS provisions including Section 195 – Important developments

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# TDS provisions including Section 195 – Important developments - Presentation Layout

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# Introduction & Background

# Taxation at Source

- ▶ Tax Deduction at Source - a simultaneous tax collection mechanism
- ▶ Almost 50% of gross tax collection is through TDS
- ▶ In recent times, tax at source provisions introduced for more than just tax collection
- ▶ For collation of data
  - ▶ 1% or even 0.1% rates
  - ▶ Increase in TCS provisions in 2020 after a long time
- ▶ For increasing the tax base
  - ▶ To catch parties entering into large transactions
  - ▶ To catch non-filers

# Where we are

- ▶ Compounded with introduction of several compliances:
- ▶ Trend of last 5 years
- ▶ 2 new provisions every year on average
  - ▶ Covers wide range of transactions
  - ▶ Covers more persons
  - ▶ Requiring system changes and increased compliance and reconciliations
- ▶ 4-5 amendments every year in existing provisions
  
- ▶ Resulting in a cacophony of provisions
  - ▶ Loose drafting
  - ▶ Overlaps and Interplays
  - ▶ Plethora of circulars to clarify and relax provisions
  
- ▶ Total number of TDS & TCS provisions – around 45!
- ▶ More than 10 different deduction rates applicable now
- ▶ Interest, penalty, prosecution made tighter and effective

# Consequences

- ▶ Disallowances u/s. 40(a)(i)
- ▶ Interest
- ▶ **Penalties:**
- ▶ For failure to pay tax deducted – S. 221
- ▶ For failure to deduct tax – S. 271C
- ▶ For failure to file TDS return – S. 272A
- ▶ For failure to furnish information or for furnishing inaccurate information under S. 195 – S. 271-I – Rs. 1,00,000
- ▶ **On CA for furnishing incorrect information in certificate – S. 271J - Rs. 10,000 for each such certificate**
- ▶ **Other consequences:**
- ▶ Assessee in default
- ▶ Charge on all the assets – S. 201(2)
- ▶ Tax may be recovered from any assets which are or may at any time come within India – S. 173
- ▶ Prosecution for failure to pay tax deducted – S. 276B

Thankless job of Government  
turned into a nightmare

# Recent Prosecutions led to convictions

- ▶ Tax deducted but not deposited with Govt.
- ▶ Assessee's contention
  - ▶ Financial difficulties
  - ▶ TDS deposited with interest & penalty before court proceedings
- ▶ Revenue's contention
  - ▶ Habitual offender
  - ▶ Remuneration to directors was paid regularly
- ▶ Imprisonment cannot be avoided
  - ▶ Even if tax paid with interest and penalty

# TDS provisions other than S. 195 – Important developments



# Important TDS & TCS provisions recently introduced

Section	Provision	Inserted by
194R	TDS on Benefit or perquisite arising from business or profession of recipient	FA 2022
194S	TDS on Transfer of Virtual Digital Asset (VDA)	FA 2022
194-O	TDS on Payment by E-commerce operator to E-commerce participant	FA 2020
194Q	TDS on Purchase of goods	FA 2021
206C(1H)	TCS on Sale of goods	FA 2020

## S. 194R - TDS on Benefits or perquisites [FB 2022]

- ▶ **Payee being:**
  - ▶ Resident, and
  - ▶ Benefit or perquisite arising from his business/profession
- ▶ Value of benefit or perquisite > Rs. 20,000
- ▶ TDS @ 10% of the value
- ▶ Non-applicability – Deductor being Individual / HUF
  - ▶ Business Turnover upto Rs. 1 crore; or
  - ▶ Professional receipts upto Rs. 50 Lakhs in preceding FY.
- ▶ Wholly in kind or partly in kind & partly in cash
  - ▶ Deductor's responsibility to ensure tax payment
- ▶ Applicable from 1<sup>st</sup> July 2022

# Issues in S. 194R - TDS on Benefits or perquisites

- ▶ Very low threshold
- ▶ When is benefit provided?
  - ▶ Coupons, points, etc. – only when encashed or used?
  - ▶ Franchise agreements, contractual arrangements, etc.
  - ▶ Incentives, discounts, services, etc. given for sales promotion of producer/seller
- ▶ Benefit or Perquisite cannot be in cash
  - ▶ SC in case of Mahindra & Mahindra [2018] 93 taxmann.com 32
  - ▶ Partly in cash & party in kind??
- ▶ Payer's responsibility to ensure tax payment
  - ▶ Where benefit is in kind
  - ▶ Chain of transactions?
- ▶ Cost of benefit when item resold?
- ▶ Valuation guidelines required
- ▶ Interplay with S. 194-O
- ▶ Disallowance u/s. 37(1) – impact on S. 40(a)(i)?
- ▶ Lacuna in applicability
  - ▶ Memorandum - Applicable from 1<sup>st</sup> July 2022, but not specified in Finance Bill

# Issues in S. 194R - TDS on Benefits or perquisites

- ▶ Several genuine commercial transactions may come under radar:
- ▶ Samples distributed free of cost having no value etc.,
- ▶ Price concession for selling a product at a less price, combination pricing, incentives through credit notes, volume discounts, early payment discounts, discounting facility for invoice,
- ▶ Providing support services to vendors/ distributors/ dealers like:
  - ▶ training to salesperson of distributors;
  - ▶ support in inventory planning;
  - ▶ assistance in developing marketing plan;
  - ▶ arranging of workshops where dealers are informed about company's products;
  - ▶ access to portal to connect with other dealers, etc.,
- ▶ Referral bonus given through bills/ credit notes,
- ▶ Health insurance for dealers and their staff, Covid care incentives, e.g.,

## Explanation 3 inserted to S. 37(1) [FB 2022]

- ▶ Disallowance of expense being:
  - ▶ Offence or prohibition under any law, in / outside India
  - ▶ **Provision of benefit or perquisite to a person**
    - ▶ Acceptance by recipient is in violation of rules governing his conduct
  - ▶ Compounding of an offence under any law, in / outside India
  
- ▶ Applicable from AY 2022-23

## S. 194S – TDS on Transfer of VDA [FB 2022]

- ▶ Based on S. 115BBH – income on transfer of VDAs taxable @ 30%
- ▶ S. 194S: TDS on **consideration** for transfer of a Virtual Digital Asset
- ▶ Payer – Any person “responsible for paying”
- ▶ Payee – Resident
- ▶ TDS @ 1% from 1<sup>st</sup> July 2022
- ▶ Wholly in kind or partly in kind & partly in cash
  - ▶ Payer’s responsibility to ensure tax payment
- ▶ Threshold for applicability:
  - ▶ Consideration upto Rs. 50,000 & payer is Individual/ HUF with
    - ▶ Business Turnover upto Rs. 1 crore; or
    - ▶ Professional receipts upto Rs. 50 Lakhs in preceding FY.
  - ▶ Consideration upto Rs. 10,000 in other cases.
- ▶ TAN & higher deduction for non-filers – Not applicable

# Issues in S. 194S – TDS on Transfer of VDA

- ▶ **Several issues in S. 115BBH itself:**
- ▶ Wide definition – “or otherwise” – undefined terms
  - ▶ E-Way Bills, Credit Card points, etc.
- ▶ Cost of acquisition – for self-generated VDAs?
  - ▶ Expenses not allowed to be claimed
- ▶ No clarity on nexus of VDA for cross-border transfers
- ▶ Possible overlaps between 115BBH, Equalisation levy and SEP

# Definition of Virtual Digital Asset

- ▶ Section 2(47A) has been introduced to define virtual digital asset ('VDA') to mean as under:
- ▶ (a) any information or code or number or token (not being Indian currency or foreign currency) which:
  - ▶ Is generated through cryptographic means or otherwise ; and
  - ▶ Provides a digital representation of value exchanged with or without consideration, with the promise or representation of having inherent value; or
  - ▶ Functions as a store of value or a unit of account including its use in any financial transaction or investment, but not limited to investment scheme; and
  - ▶ **Can be transferred, stored or traded electronically**
- ▶ (b) a non-fungible token or similar token;
- ▶ (c) any other VDS notified by Central Govt.



# Issues in S. 194S – TDS on Transfer of VDA

- ▶ **Issues in S. 196S:**
- ▶ Who is “person responsible for paying”?
  - ▶ NR Exchange?
- ▶ No guidance for valuation
  - ▶ Impacts taxability u/s. 56
- ▶ Difficult for buyer to trace the seller
  - ▶ Direct peer to peer transfer on exchanges
- ▶ Goods exchanged for Bitcoins
  - ▶ Payer to ensure tax payment
- ▶ Overlap with S. 194-O, EL, SEP

# S. 194-O - Payment by e-commerce operator to e-commerce participant

- ▶ **Definitions:**
- ▶ E-commerce operator (ECO)
  - ▶ owns, operates or manages digital or electronic facility or platform for “electronic commerce”
- ▶ E-commerce participant (ECP)
  - ▶ person resident in India selling goods or providing services or both, including digital products, through digital or electronic facility or platform for electronic commerce;
- ▶ Electronic commerce
  - ▶ supply of goods or services or both, including digital products, over digital or electronic network
- ▶ Services includes
  - ▶ Fees for technical services & professional services – S. 194J

# S. 194-O - Payment by e-commerce operator to e-commerce participant

- ▶ TDS @ 1%
  - ▶ Sale of goods or provision of service of ECP
  - ▶ Facilitated by ECO
  - ▶ Through its digital or electronic facility or platform
- ▶ TDS also applicable where:
  - ▶ Payment made by the buyer directly TO ECP
- ▶ Threshold
  - ▶ ECP is an Individual or HUF where gross amount of sale or services during PY does not exceed Rs. 5 Lakhs and
  - ▶ ECP has furnished PAN
- ▶ W.E.F. 1<sup>st</sup> October 2020

# Issues in S. 194-O

- ▶ Payment made by the buyer directly to ECP
  - ▶ ECO still responsible for TDS
  - ▶ Except for e-auctions if all conditions met
  
- ▶ What if ECO is a Non-Resident?
  
- ▶ Cancellation or sales return
  - ▶ Whether it will attract TDS?
  
- ▶ Overrides all other TDS provisions - 194-O(2) r.w. (3)
  - ▶ Services below Rs. 5 lakhs provided through ECO - no tax deduction?
  - ▶ Not applicable where payment is for hosting advertisements or providing other services not in connection with sale or services referred to in (1)
  
- ▶ Case study of mobile phone:
  - ▶ List price: Rs. 1,00,000
  - ▶ Delivery charge: Rs. 500
  - ▶ Discount by ECO: Rs. 5,000
  - ▶ Net payment received by ECO: Rs. 95,500
  - ▶ Payment by ECO to ECP: Rs. 1,00,000
  - ▶ TDS on which amount?

## S. 194Q & S 206C(1H) - TDS and TCS on Sale of Goods

- ▶ Deductor as well as Collector:
  - ▶ Turnover of preceding FY > Rs. 10 crores; and
  - ▶ TDS / TCS @ 0.1% on amount exceeding Rs. 50 Lakhs.
- ▶ TDS - Resident Payee only
- ▶ TCS - Not applicable on exports
- ▶ TCS not applicable where:
  - ▶ Buyer liable for TDS & “Has deducted” such amount.
- ▶ TDS not applicable where:
  - ▶ TDS applicable under any other provision; and
  - ▶ TCS applicable other than 206C(1H)
- ▶ All TDS provisions override 206C(1H)

# Sale of “Goods”

- ▶ Goods not defined under ITA
- ▶ **S. 2(7) of Sale of Goods Act 1930:**
  - ▶ "goods" means every kind of movable property
  - ▶ Other than actionable claims and money;
  - ▶ and includes stock & shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.
- ▶ Wide definition

# Comparative table

Particulars	194-O	194Q	206C(1H)
Nature	TDS	TDS	TCS
Person responsible	E-commerce Operator	Buyer	Seller
With effect from	1/10/2020	1/7/2021	1/10/2020
Rate	1%	0.1%	0.1%
Threshold	None - but only ECOs liable for transactions facilitated by it for ECP through its digital or electronic facility or platform	Turnover or Gross receipts or sales from the <b>business of the buyer</b> exceeds Rs. 10 cr in FY preceding the relevant FY	Receipts / Sales from the <b>business of the seller</b> exceeds Rs.10 cr in FY preceding the relevant FY
Applicable on	Sale of goods or <b>provision of services</b> facilitated by ECO.	Sum exceeding Rs. 50 lakhs in a F.Y. of <b>goods purchased.</b>	Sum exceeding Rs. 50 Lacs in a F.Y. of <b>sales consideration</b> received on sale of goods.

# Hierarchy of applicability for Sections 194-O, 194Q & 206C(1H)

194-O by ECO @1%

194Q by Buyer @ 0.1%

206C(1H) by Seller @ 0.1%

- ▶ S. 194-O overrides S. 194Q if both apply
- ▶ S. 194-O overrides S. 206C(1H) also
  - ▶ Primary responsibility is of ECO
  - ▶ Cannot be condoned if TCS collected by seller
  - ▶ S. 194-O prescribes higher rate than S. 206C(1H)
- ▶ S. 194Q v/s. 206C(1H)
  - ▶ If seller collects tax before buyer deducts
  - ▶ No TDS required



# Interplay of Sections 194-O, 194Q & 206C(1H)

- ▶ TDS by ECO u/s. 194-O
  - ▶ S. 194Q not applicable
  - ▶ S. 206C(1H) also not applicable
- ▶ S. 194-O overrides S. 194Q if both apply
- ▶ S. 194-O overrides S. 206C(1H) also
  - ▶ Primary responsibility is of ECO
  - ▶ Cannot be condoned if TCS collected by seller
  - ▶ S. 194-O prescribes higher rate than S. 206C(1H)
- ▶ S. 194Q v/s. 206C(1H)
  - ▶ If seller collects tax before buyer deducts
  - ▶ No TDS required

# Circular 13/2021 dated 30<sup>th</sup> June 2021

- ▶ S. 194Q not applicable
  - ▶ Securities & commodities traded through RSEs
  - ▶ Transaction in electricity, renewable energy certificates & energy saving certificates traded through registered power exchanges
- ▶ No TDS on GST component u/s. 194Q
  - ▶ Only if TDS is on credit & GST component is indicated separately
- ▶ TDS on full amount
  - ▶ If Payment is earlier than credit (even if GST separate?)
- ▶ Purchase Return
  - ▶ TDS can be adjusted against the next purchase from same seller
  - ▶ No adjustment if purchase return is replaced by the goods by seller

# Various Circulars issued for S. 194-O, 194Q & 206C(1H)

## ▶ **Circular 17/2020 dated 29<sup>th</sup> September 2020**

- ▶ Payment Gateway
- ▶ Insurance agent or insurance aggregator
- ▶ Sale of motor vehicle
- ▶ Sales Return, discount, indirect taxes
- ▶ Fuel supplied to non-resident airlines

## ▶ **Circular 20/2021 dated 25<sup>th</sup> November 2021**

- ▶ E-auction services carried out through electronic portal
- ▶ Adjustment of various state levies and taxes other than GST
- ▶ Applicability of section 194Q of the Act in cases where exemption has been provided under section 206C (1 A) of the Act
- ▶ Applicability of the provisions of section 194Q in case of department of Government not being a public sector undertaking or corporation

# Circular 13/2021 dated 30<sup>th</sup> June 2021

- ▶ Payer is Non-Resident & all thresholds are satisfied
  - ▶ S. 194Q not applicable if Purchase is not connected with PE in India
- ▶ S. 194Q & 206(1H) not applicable
  - ▶ Person against whom tax is deducted or collected is a person who is Exempt from ITA or any other Act
  - ▶ Person or income?
- ▶ TDS on full amount including GST, etc., if payment is earlier than credit
- ▶ Purchase Return
  - ▶ TDS can be adjusted against the next purchase from same seller
  - ▶ No adjustment if purchase return is replaced by goods by seller

# S. 206AB & 206CCA - TDS & TCS at higher rate for non-filers

- ▶ Introduced vide FA 2021
  - ▶ Non-filing of ROI for 2 preceding years
    - ▶ Whose due date u/s. 139(1) is expired, and
  - ▶ Total TDS & TCS is  $\geq$  Rs. 50,000 in both years
- ▶ FB 2022 – Condition of 2 years reduced to 1 year
- ▶ Applicable from AY 2022-23
- ▶ S. 206AB – Non-applicability extended
  - ▶ S. 194-IA, 194-IB, 194M


# Case study – Higher deduction for Non-filers [S. 206AB]

- ▶ Transaction on 2<sup>nd</sup> April 2022
- ▶ Due date u/s. 139(1) for PY 2021-22 is not expired (31.07.2022)
- ▶ For PY 2020-21, if:
  - ▶ Total TDS & TCS is  $\geq$  Rs. 50,000, and
  - ▶ Return of income is not filed
- ▶ TDS @ higher rate u/s. 206AB
  
- ▶ Transaction on 2<sup>nd</sup> August 2022
- ▶ Payee = Salaried Individual
- ▶ Due date u/s. 139(1) for PY 2021-22 is expired (31.07.2022)
- ▶ For PY 2021-22, if:
  - ▶ Total TDS & TCS is Rs. 50,000 or more
  - ▶ Return of income is not filed
- ▶ TDS @ higher rate u/s. 206AB

# TDS on payments to Non-Residents

## - Important developments

# Scope of Section 195



<b>Who are covered?</b>	<ul style="list-style-type: none"><li>• <b>Any person</b> responsible for paying</li><li>• To a non-resident or a Foreign Company</li></ul>
<b>What is covered?</b>	<ul style="list-style-type: none"><li>• Any interest or any other sum</li><li>• <b>Chargeable to tax</b> under the provisions of this Act</li></ul>
<b>When is it applicable?</b>	<ul style="list-style-type: none"><li>• At the time of credit or at the time of payment</li><li>• <b>Whichever is earlier</b></li></ul>
<b>How is it to be applied?</b>	<ul style="list-style-type: none"><li>• Deduct income-tax thereon at the <b>rates in force</b></li></ul>



# Sum chargeable to tax

- ▶ Tax is deductible on “**sum chargeable to tax**”
  - ▶ This is the basis of determining whether tax is to be deducted or not.
- ▶ Tax is to be deducted not just from payments which are wholly incomes but also from payments where only a portion of the payment may be income [Income embedded in the payment.]
  - ▶ **Transmission Corp. 239 ITR 587 (SC).**
  - ▶ **GE India Technology Cen. Pvt. Ltd. - (193 Taxman 234) 2010 SC - ).** Not correct to say the moment a remittance was made to a foreign party tax became deductible under the provisions of Section 195 of the Income Tax Act.
- ▶ In other words, **tax is deductible only from income portion** of a payment and not the gross payment itself
  - ▶ Understanding clarified by CBDT:
  - ▶ **CBDT circular no. 02/2014 dated 26.2.2014** states that interest u/s. 201 will be on **portion representing income** (not the whole amount)
  - ▶ **CBDT circular no. 03/2015 dated 12.2.2015** states that disallowance u/s. 40(a)(i) will be on **sums chargeable to tax** (not the whole amount)

# How is to be determined?

## Section 6

- *Residential Status*

## Section 5

- *Received or Deemed to be received*
- *Accrues or arises*

## Section 9

- *Is deemed to Accrue or Arise*

## DTAA

- *As amended by MLI*
- *Exempt from Tax*
- *Lower tax rate*

**Provisions of the Act or DTAA, whichever are more beneficial, prevail**

# Tax Residency Certificate

- ▶ S. 90(4) – NR cannot avail benefit under Treaty without Tax Residency Certificate (TRC)
  - ▶ Applies to all NRs without any threshold limit
    - ▶ FinMin proposed bringing in threshold in 2015, but no action till date
- ▶ S. 90(5) – The assessee has to provide such other details as may be prescribed
  - ▶ R. 21AB specifies the information to be provided
  - ▶ To be provided in Form 10F – if the same are not covered in the TRC
  - ▶ Assessee should keep the relevant documents for the above information.
  - ▶ TRC and Form 10F go together
  - ▶ **Form 10F alone is not sufficient**
  - ▶ Self-attestation

# Tax Residency Certificate - Issues

## ▶ **If TRC is not available at the time of deduction?**

- ▶ Benefit of treaty provisions is not available
- ▶ Once the TRC is obtained, the treaty benefit would be available for the whole year it is obtained for
- ▶ **Ahmedabad ITAT in Skaps Industries India Private Limited held that TRC is not necessary. 90(4) does not override treaty.**
  - ▶ NR can claim treaty benefit if residential status substantiated by sufficient and reasonable documentary evidence
- ▶ **Sreenivasa Reddy Cheemalamarri vs. ITO [2020] TS-15 -ITAT-(Hyd.)**

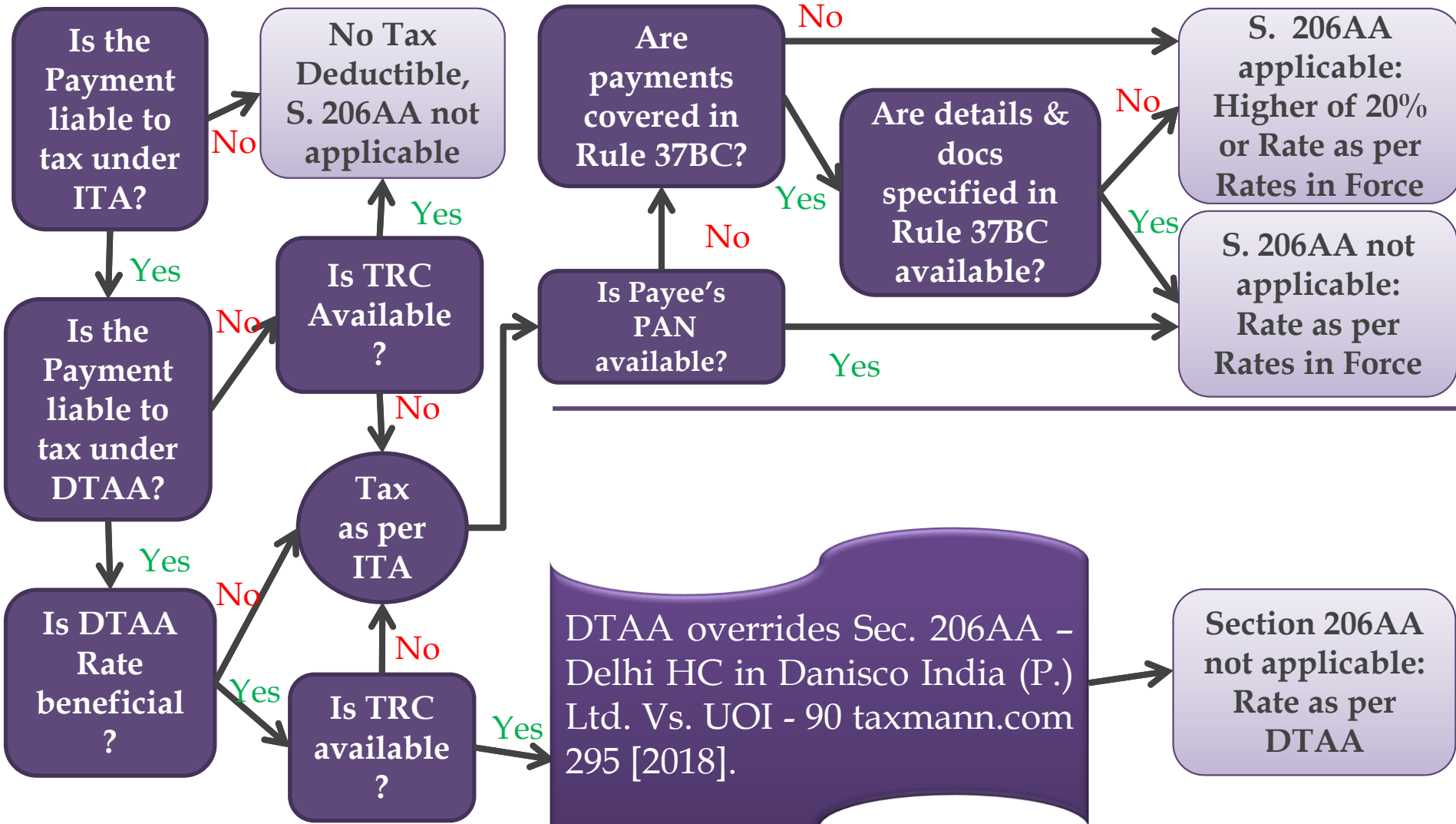
## ▶ **If the TRC is available, but it is for a different period?**

- ▶ The deductor can rely on the TRC for the period during which the income is earned, not necessary to cover the tax period concerned

## ▶ **Is TRC required in case tax is not payable under the Act itself?**

- ▶ As DTAA provisions are not employed, provisions of Sections 90(4), 90(5) and the relevant rules will also not be applicable
- ▶ Helpful in cases where TRC is not available and NR does not have business connection in India – however now check SEP provisions too

# Interplay of DTAA, PAN & TRC – Post 1<sup>st</sup> June 2016



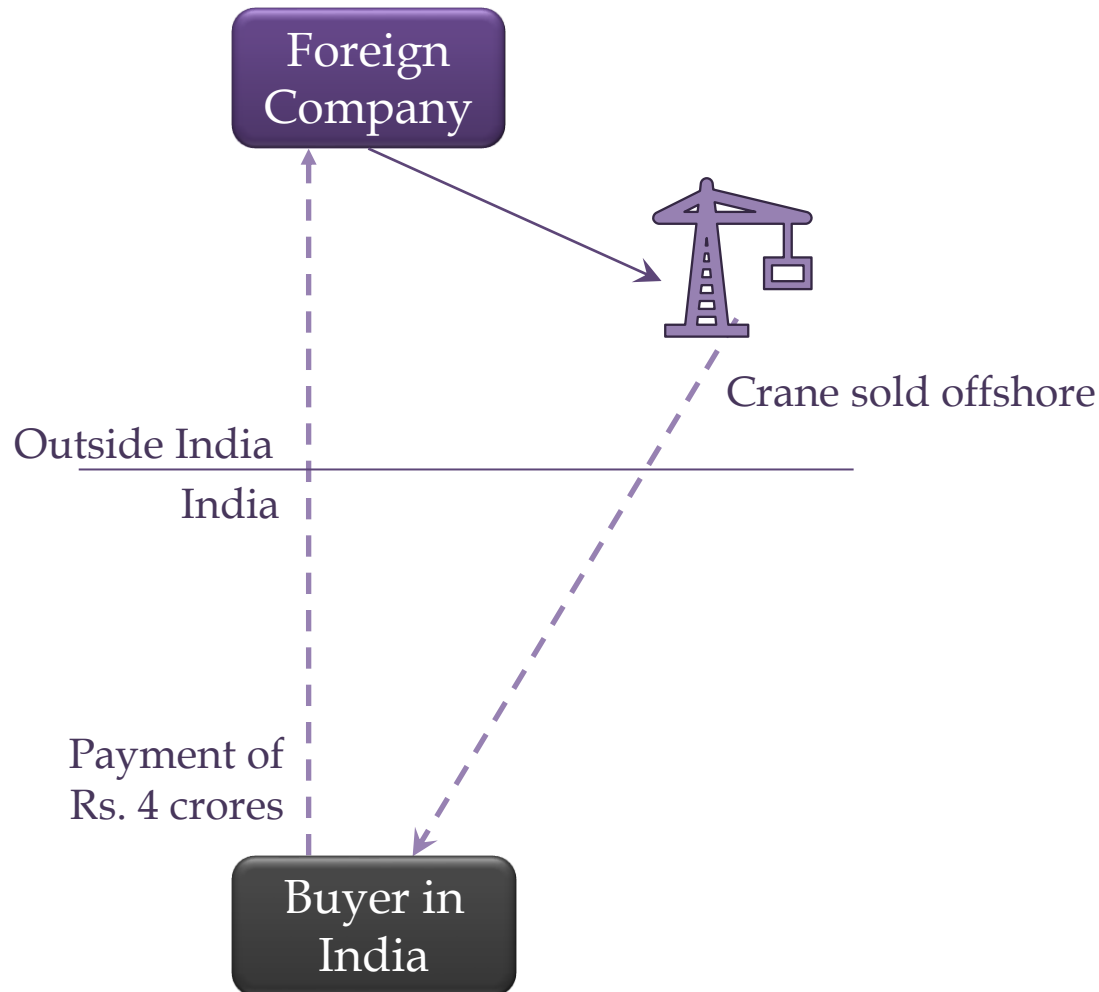
# Impact of MLI - Step-by-step approach

- ▶ Which countries are under consideration?
- ▶ Is it a Covered Tax Agreement?
- ▶ MLI Entry in to Force for such country
- ▶ MLI Entry into Effect for such country
- ▶ MLI positions adopted by India – reservations & notifications
- ▶ Similar positions of the other Contracting Jurisdiction
  
- ▶ Arrive at matching of these provisions
- ▶ Are there any matching conflicts? Resolve them
- ▶ Look at specific provisions of treaty under consideration
- ▶ Insert/modify treaty text as arrived at after matching
- ▶ Arrive at final reading of CTA with MLI
  
- ▶ To check:
  - ▶ OECD MLI Matching database
  - ▶ OECD flow-chart
  - ▶ Synthesised text
  - ▶ Consolidated text, if available
  - ▶ BCAS online publication on consolidated Indian treaties

# Significant Economic Presence (SEP) – Explanation 2A to S. 9(1)(i)

- ▶ Introduction of deeming concept u/s. 9(1)(i) – Business Connection as per Explanation 2A
- ▶ Transaction carried out by NR with any person in India
- ▶ In respect of any **goods, services or property**
- ▶ Including provision of download of data/software in India
- ▶ Total payment during PY > 2 crores. [R. 11UD]
- ▶ Systematic & continuous soliciting of business activities; or
- ▶ Engaging in interaction with users, in India
- ▶ Threshold of 3 Lakh users. [R. 11UD]

# Case Study on SEP



- ▶ Foreign company trades in cranes and has no PE in India.
- ▶ A crane has been sold to an Indian buyer for INR 4 crores.
- ▶ The crane was delivered outside India to the buyer
- ▶ Buyer paid customs duty to bring crane to India.
- ▶ Here, delivery of the crane is done outside India. As per other provisions of Income-tax Act and DTAA, the sale of crane is not taxable in India as income has accrued outside India.
- ▶ Will there still be tax payable under SEP?
- ▶ What if the crane not a business asset of the Foreign Company?



# Case Study on SEP – Issues

- ▶ As per Explanation 2A, NR has SEP in India when transaction of any **goods**, services or **property** is done with an Indian resident and threshold of Rs. 2 crores is crossed.
- ▶ Crane can get covered as goods
- ▶ When Crane is a capital asset, it can still get covered in 'property'?
- ▶ As threshold is met, **will SEP apply?**
  
- ▶ SEP was designed to tax highly digitalised transactions which were happening without presence of seller in India.
- ▶ Buying of crane happens mainly through offline mode and payments are made through bank. Still SEP can apply?
- ▶ SEP wording is too broad and leads to unintended consequences.
- ▶ Provision should be appropriately amended to cover only digitalised transactions.

## Case Study on SEP – Issues...contd.

- ▶ **How will buyer determine amount of income chargeable to tax?**
- ▶ Even if SEP applies, no attribution rules have been prescribed yet.
- ▶ There is no mechanism for buyer to compute the amount chargeable to tax himself.
  
- ▶ **What is the responsibility of the payer/deductor?**
- ▶ Can he take a declaration from the seller stating whether SEP conditions are fulfilled?
- ▶ Ideally Buyer (deductor) may make an application in Form 15E to determine the proportion of sale proceeds chargeable to tax in India under such scenarios.

# Significant Economic Presence (SEP) – Explanation 3A to S. 9(1)(i)

- ▶ Explanation 3A.--For the removal of doubts, it is hereby declared that the income attributable to the operations carried out in India, as referred to in Explanation 1, shall include income from--
  - ▶ (i) such advertisement which **targets** a customer who resides in India or a customer who **accesses** the advertisement through internet protocol address located in India;
  - ▶ (ii) sale of **data** collected from a person who resides in India or from a person who uses internet protocol address located in India; and
  - ▶ (iii) sale of goods or services using data collected from a person who resides in India or from a person who uses internet protocol address located in India.

# Equalisation Levy 2.0 - FA 2020

- ▶ E-commerce supply/ services by e-commerce operator
  - ▶ to a resident
  - ▶ to a non-resident for sale of
    - ▶ advertisement targeted to a resident or accessed by Indian IP address
    - ▶ Data collected from resident or person who uses Indian IP address
  - ▶ to a person using Indian IP address
- ▶ Threshold of Rs. 2 crores
- ▶ EL @ 2%
- ▶ EL not applicable:
  - ▶ E-commerce operator has a PE in India, and the transactions are effectively connected with PE.
- ▶ S. 10(50) – Exemption where EL is paid

# Definitions under EL 2.0

- ▶ e-commerce operator means:
  - ▶ a non-resident who owns, operates or manages digital or electronic facility or platform
  - ▶ for online sale of goods or online provision of services or both
  
- ▶ e-commerce supply or services means:
  - ▶ online sale of goods owned by the e-commerce operator; or
  - ▶ online provision of services provided by the e-commerce operator; or
  - ▶ online sale of goods or provision of services or both, facilitated by the e-commerce operator; or
  - ▶ any combination of activities listed above.

# Retrospective amendments vide FA 2021

- ▶ Online sale of goods & online provision of services shall include
  - ▶ acceptance of offer for sale; or
  - ▶ placing or acceptance of purchase order; or
  - ▶ payment of consideration; or
  - ▶ supply of goods or provision of services, partly or wholly.
- ▶ Consideration for e-commerce supply or services shall include:
  - ▶ consideration for the sale of goods irrespective of whether the e-commerce operator owns the goods; and
  - ▶ consideration for the provision of services irrespective of whether service is provided or facilitated by the e-commerce operator
- ▶ Exemption u/s. 10(50) not available for
  - ▶ Royalty or FTS chargeable to tax in India under ITA r.w. DTAA

# EL 2020 - Applicability

## Provider

- Non-resident E-commerce Operator making or facilitating e-commerce supply or services

## Receiver

- Resident or NR in specified circumstances or person using IP address located in India

## Charge on

- Amount of consideration received or receivable for e-commerce supply or services made or provided or facilitated by

## Exclusions

- NR has PE in India to which the such supply or services are effectively connected with
- If EL 2016 applies
- Sales, Turnover or Gross Receipts of NR from ESS is less than Rs. 2 crores in PY

**EL 2020 applicable only if all above criteria are fulfilled**

# Interplay with the Income-tax Act

- ▶ Section 10(50): Exemption from tax on incomes arising to a non-resident from e-commerce supply or services chargeable to EL
  - ▶ Except for Royalty and FTS chargeable to tax as per ITA r.w. DTAA
- ▶ EL provisions and those under the Act are mutually exclusive
- ▶ Hierarchy as per the current position in law:

Royalty or FTS chargeable to tax

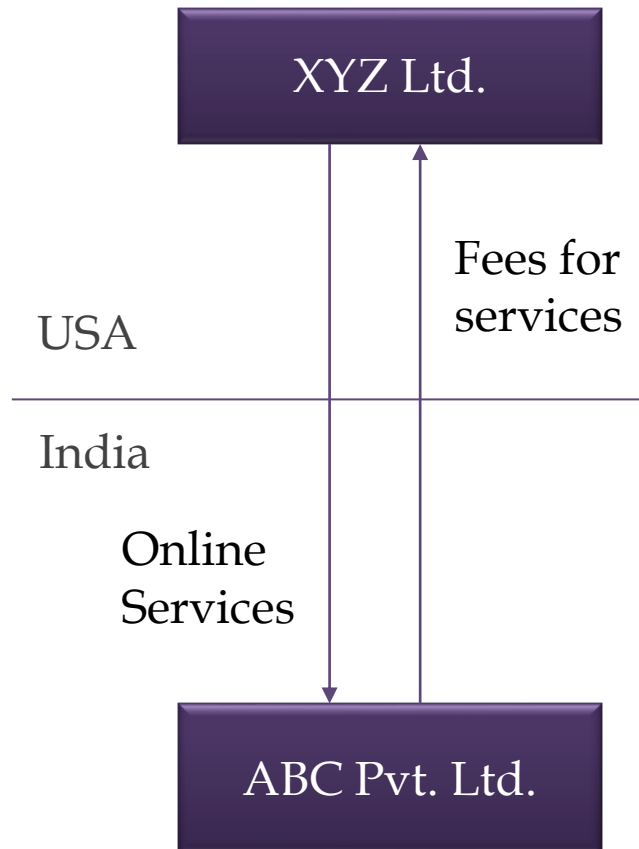
EL 2016

EL 2020

Income-tax Act



# Case Study – EL 2.0



- ▶ US Co. provides online services to Indian Co.
- ▶ Indian Co. pays fees for the same.
- ▶ Covered by FTS u/s. 9(1)(vii)
- ▶ Make available clause not satisfied
  - ▶ Article 12 of India-USA DTAA
- ▶ FTS chargeable to tax in India under ITA r.w. DTAA?
  - ▶ Not chargeable in India due to DTAA
- ▶ Hence Equalisation Levy @ 2%

# Taxation of Software licences

- ▶ Divergent rulings by various Indian courts
- ▶ Landmark Supreme Court decision
  - ▶ Engineering Analysis Centre of Excellence [2021] 125 taxmann.com 42
- ▶ Four business models categorized by SC:
  - ▶ Sale of software directly to an end user by a non-resident
  - ▶ Sale of Software by a non-resident to Indian distributors for resale to end customers in India
  - ▶ Sale of software by a non-resident to a foreign distributor for resale to end customers in India
  - ▶ Software bundled with hardware and sold by foreign suppliers to Indian distributors or end users
- ▶ The **transferee/licencee should acquire rights** - either in entirety or partially co-extensive with the owner/transferor who divests himself of the rights he possesses pro tanto (para 89 of the SC's decision).
- ▶ The **parting of intellectual property rights** inherent in and attached to the software product in favour of the licensee/customer is what is contemplated by the definition clause in the Act as well as the Treaty.
- ▶ **Merely authorizing** or enabling a customer to have the benefit of data or instructions contained therein without any further right to deal with them independently does not tantamount to transfer of rights in relation to copyright or conferment of the right of using the copyright. (para 89 of the SC's decision)
- ▶ Thus, the amounts paid by resident Indian end-users/distributors to non-resident computer software manufacturers/suppliers, as consideration for the resale/use of the computer software through EULAs/distribution agreements, is not the payment towards copyright in the computer software.

# Taxation of Software licences

- ▶ Both sides – revenue and tax payer - considering this as a WIN
- ▶ Taxpayer's contention
  - ▶ Decision applicable for all software payments as principles upheld
- ▶ Revenue's contention
  - ▶ Decision applicable only to the 4 business models and not to other business models
  - ▶ Subscriptions, cloud-based applications, etc.
- ▶ Taxation of Software still not completely out of grey area

# Dividend payments to Non-residents

- ▶ Back to classical system of dividend taxation from 1.4.2020
- ▶ Dividend payment to NR shareholders
  - ▶ Form 15CA-CB applicable
- ▶ Treaty rates
  - ▶ Minimum shareholding applicable for concessional rates
  - ▶ Documents required for lower WHT
- ▶ MLI condition
  - ▶ Minimum holding period of 365 days needs to be checked

# Most Favoured Nation (MFN) Clause

- ▶ Limits taxation under a treaty to the extent of more favourable rate/scope in another treaty
- ▶ More favourable treaty should be between India and an OECD Member country
- ▶ India has MFN Clause with Sweden, France, Israel, Switzerland, Philippines, Belgium, Netherlands, Spain, Kazakhstan, Hungary, (Nepal – one sided).
- ▶ Indian treaties with Slovenia, Lithuania & Columbia have a favourable rate and are OECD Member countries.
  - ▶ However, all these countries have become members of OECD post signing of treaties with countries where MFN clause is present
- ▶ Can MFN apply even where treaty was signed, but treaty country was not member of OECD at the time of signing?
  - ▶ Delhi HC in case of Concentrix Services [2021] 127 taxmann.com 43
    - ▶ In favour of taxpayer
  - ▶ CBDT Circular No. 3/2022 dated 3rd February 2022
    - ▶ Clarifies that MFN clause benefit not applicable- lays down notification condition
  - ▶ Pune ITAT in GRI Renewable Industries S.L (ITA No. 202 / PUN/ 2021)
    - ▶ Strikes down CBDT Circular's notification point

# MFN Clause – Circular No. 3/2022

- ▶ **CBDT Circular No.3/2022 dated 03-02-2022:**
- ▶ **Para 5.** “In view of the above, it is hereby clarified that the applicability of the MFN clause and benefit of the lower rate or restricted scope of source taxation rights in relation to certain items of income (such as dividends, interest income, royalties, Fees for Technical Services, etc.) provided in India's DTAA's with the third States will be available to the first (OECD) State **only when all the following conditions are met:**
- ▶ (i) The second treaty (with the third State) is entered into after the signature/ Entry into Force (depending upon the language of the MFN clause) of the treaty between India and the first State;
- ▶ (ii) The second treaty is entered into between India and a State which is a member of the OECD at the time of signing the treaty with it;
- ▶ (iii) India limits its taxing rights in the second treaty in relation to rate or scope of taxation in respect of the relevant items of income; and
- ▶ (iv) **A separate notification** has been issued by India, importing the benefits of the second treaty into the treaty with the first State, as required by the provisions of sub-section (1) of Section 90 of the Income Tax Act, 1961.”

# TDS on Payments to non-residents – Practical aspects

# TDS on transfers by NRIs

- ▶ **Transfers from NRI's own NRO account to own NRE account:**
- ▶ Majority of remittances by an NRI are from his own NRO account
- ▶ Transfers from one's own bank account to another bank account
  - ▶ No element of income involved
  - ▶ Akin to transfer of money from one pocket to another
  - ▶ Deduction of tax at source is not required at all
- ▶ However, almost all banks want certainty that taxes are paid
  - ▶ Hence CA certificate becomes essential



# TDS on transfers by NRIs

- ▶ CA must look at the following before issuing a certificate for such a transfer:
- ▶ Find out the source of funds lying in NRO account
  - ▶ Trace them back to the incomes comprised therein
  - ▶ Can be a cumbersome task if funds are lying since years
- ▶ Income-tax returns filed by the NRI in India for the period concerned
- ▶ Relevant years' Form 26-AS or TDS certificates
- ▶ Documents and issues pertaining to each type of income
- ▶ Separate certificates required for each nature of income

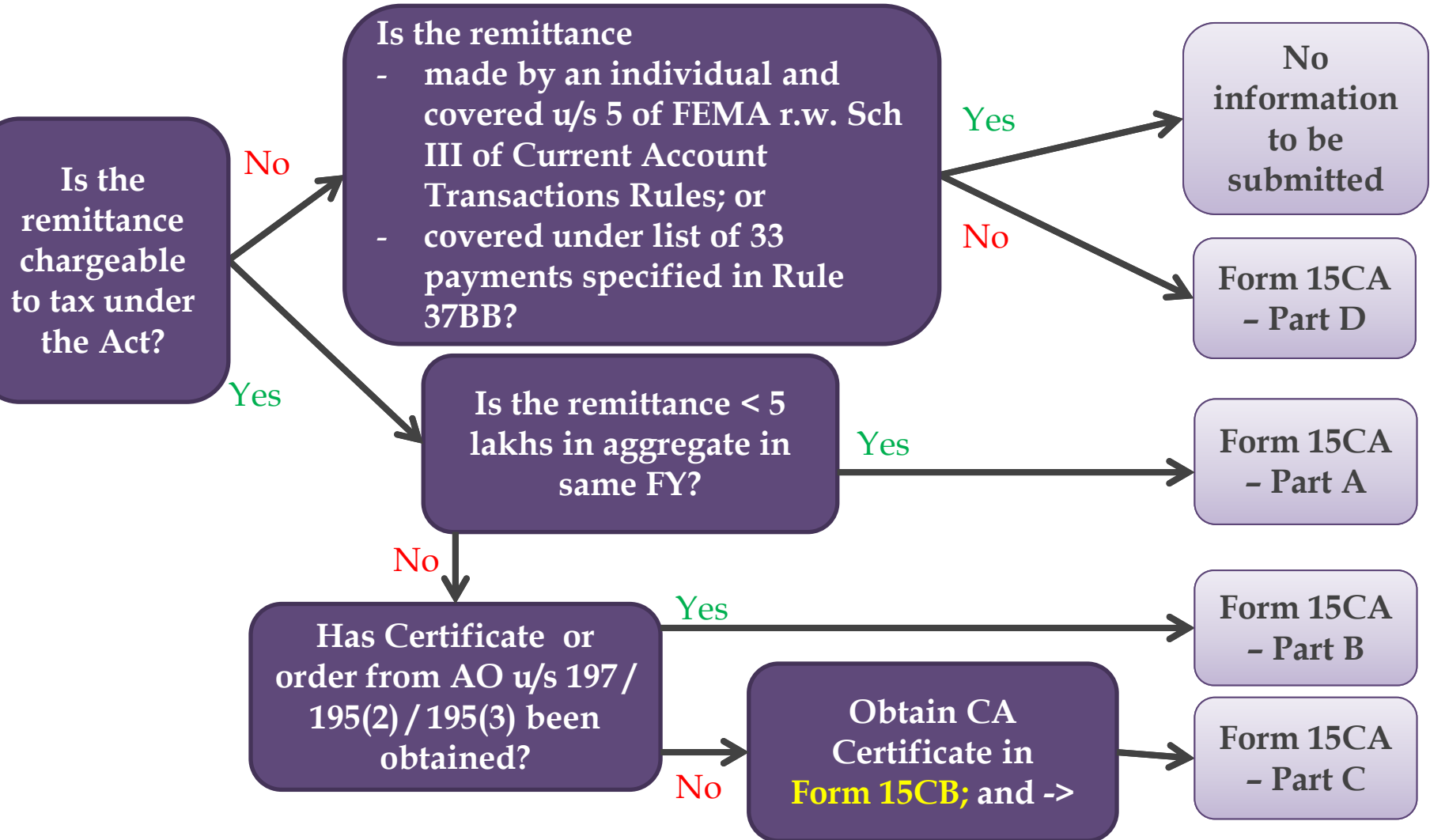
# TDS on transfers to NRIs

- ▶ **Transfers directly from third-parties into NRI's NRE Account:**
- ▶ Apart from documents listed earlier, third-parties can ask for following additional documents depending on facts:
  - ▶ a certificate from the NRI's assessing officer under section 197;
  - ▶ an undertaking or indemnity bond from the NRI;
  - ▶ an opinion from a consultant in case of controversial issues; etc.
- ▶ Payer would also need to obtain a CA certificate and provide Forms 15CA & 15CB

# TDS on transfers to NRIs

- ▶ **Transfers from third-parties in to NRO Account of NRI:**
- ▶ Bank crediting the amount to the NRO account does not ask for compliance under Sec. 195(6) as no remittance is being made outside India
- ▶ However, as per Sec. 195(6), information is to be furnished by the payer - irrespective of whether the amount is remitted outside India or not
  - ▶ Payer must keep on record the Form 15CB or ITO certificate as the tax office can always call for it later
- ▶ Forms filed at this stage can be helpful in transferring the funds by NRI from NRO to NRE account
  - ▶ NRIs should ideally obtain and keep on record Forms filed by the payer at the time of payment to NRO account itself

# Form 15CA – Which part applies?



# Checklist - Facts

- ▶ Clearly examine facts. Conduct due diligence.
- ▶ Determining the Country of Residence of taxpayer (CoR)
- ▶ Determining the Country of Source of income (CoS)
- ▶ Applicability of treaty
  - ▶ Residential status
    - ▶ Tax Residency Certificate & Form 10F
    - ▶ PE in India?
    - ▶ Beneficial Owner
  - ▶ Taxes covered
  - ▶ Persons covered
- ▶ Identify the legal status of the taxpayer
  - ▶ Obtain KYC - incorporation documents / passport copy.
- ▶ Details about the transaction - Ascertaining the nature of income and its characterisation
- ▶ Obtain a declaration of facts from the recipient:
  - whether business is done in or outside India;
  - whether there is an office in India;
  - whether there is a PE, Business Connection or SEP in India;
  - whether income is beneficially owned by NR
- ▶ For complex issues, or business payments with PE/SEP, obtain tax department's certificate.

# Checklist - Tax treaty

- ▶ Must check
  - ▶ Technical Explanation (US) & Protocols and Memorandum of Understandings
  - ▶ MFN clause, Non-discrimination clause, LOB clause, etc.
- ▶ Applicability of MLI
  - ▶ Date from which MLI is applicable
  - ▶ Changes in treaty due to MLI
  - ▶ Sanity check for PPT under MLI and LoB, if applicable
- ▶ References
  - ▶ OECD and UN Model Convention Commentary
  - ▶ Commentaries by learned authors including those by:
    - ▶ Klaus Vogel
    - ▶ Arvid Skaar
    - ▶ BCAS Compendium on MLI
    - ▶ CTC Compendium on International Tax

# Some more practical aspects

- ▶ Cost benefit analysis
  - ▶ Credit in the home country against tax paid in India
  - ▶ But limited to rate under treaty
- ▶ Tax return has to be filed
  - ▶ Final Assessment only on filing of tax return
- ▶ Complex legal structures & Unresolved issues
  - ▶ LLPs / Partnerships
  - ▶ Triangular treaty situation
- ▶ Law is always trying to catch up to business
  - ▶ Eg - E-commerce
- ▶ Consider for cross-checking
  - ▶ Equalisation Levy
  - ▶ FEMA
  - ▶ Customs
  - ▶ GST / Service tax
  - ▶ R & D cess
  - ▶ Information given to Banks
  - ▶ Accounting entries

# Flow of anti-tax avoidance measures

Limitation of Benefits

- Access to treaty denied

Principal Purpose Test

- Treaty benefit denied

SAAR under treaty

- Treaty benefit conditional

SAAR under Income-tax Act

- Act or treaty benefit conditional

GAAR

- Act or Treaty benefit denied and Income made taxable by recharacterization of income, etc.



# Other recent amendments

Section	Amendment	Proposed/ Inserted by
194IA	TDS on SDV, if it is higher than the transaction value	FB 2022
201(1A) & 206C(7)	Interest calculation as per Order by AO	FB 2022
194P	Payment by banks to specified Senior Citizens	FA 2021
196D	Proviso for treaty rate applicability for FIIs	FA 2021
194M	Payment by Individuals & HUFs for work contract	[FA (No. 2) 2019]
194N	TDS on cash withdrawal	
<b>Section 206C</b>	<b>TCS on</b>	<b>Inserted by</b>
(1G)(a)	Remittance under LRS	FA 2020
(1G)(b)	Overseas tour program package	FA 2020

# Thank You!

- ▶ Questions?
  
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