

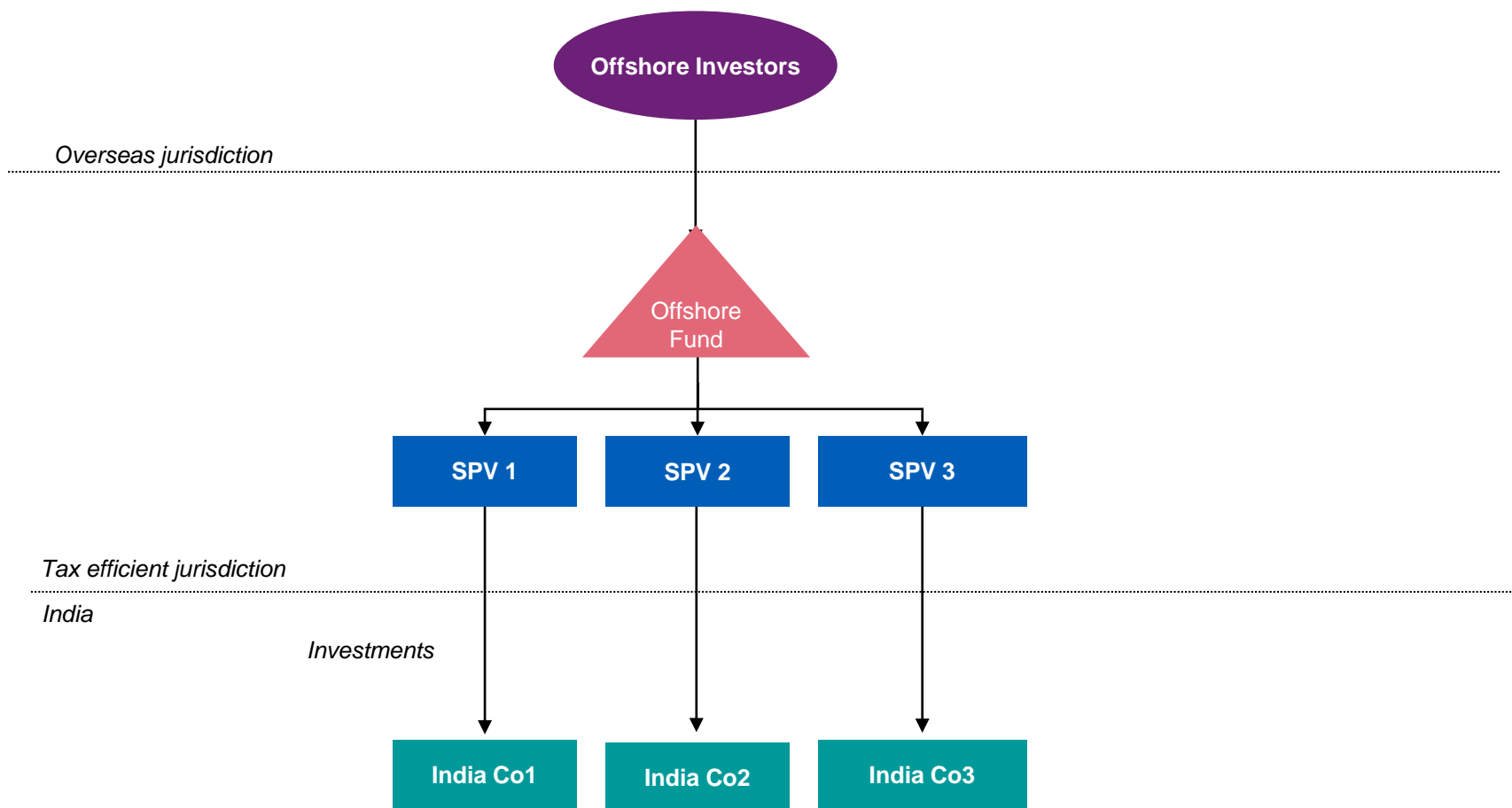
A photograph of a desk setup. In the foreground, a small green plant in a glass jar sits on a dark desk. To its right is a laptop, a pen, and some sticky notes. A desk lamp is visible in the background, casting light on the scene. The background is a plain, light-colored wall.

WIRC Training Key Tax aspects in SPAs

Nilay Shah

09 February 2019

Typical Private Equity Fund Structure



Key Tax Considerations

Sellers' perspective

Gains – Business Income vs Capital Gains

Capital gains exemption under Tax Treaty (Article 13) – Treaty grandfathering for Singapore and Mauritius

Eligibility for Treaty Benefits
- TRC

Jurisdictional Substance – Trigger of Judicial GAAR

Buyer's perspective

Tax Withholding Obligation – section 195

Alternative Approach

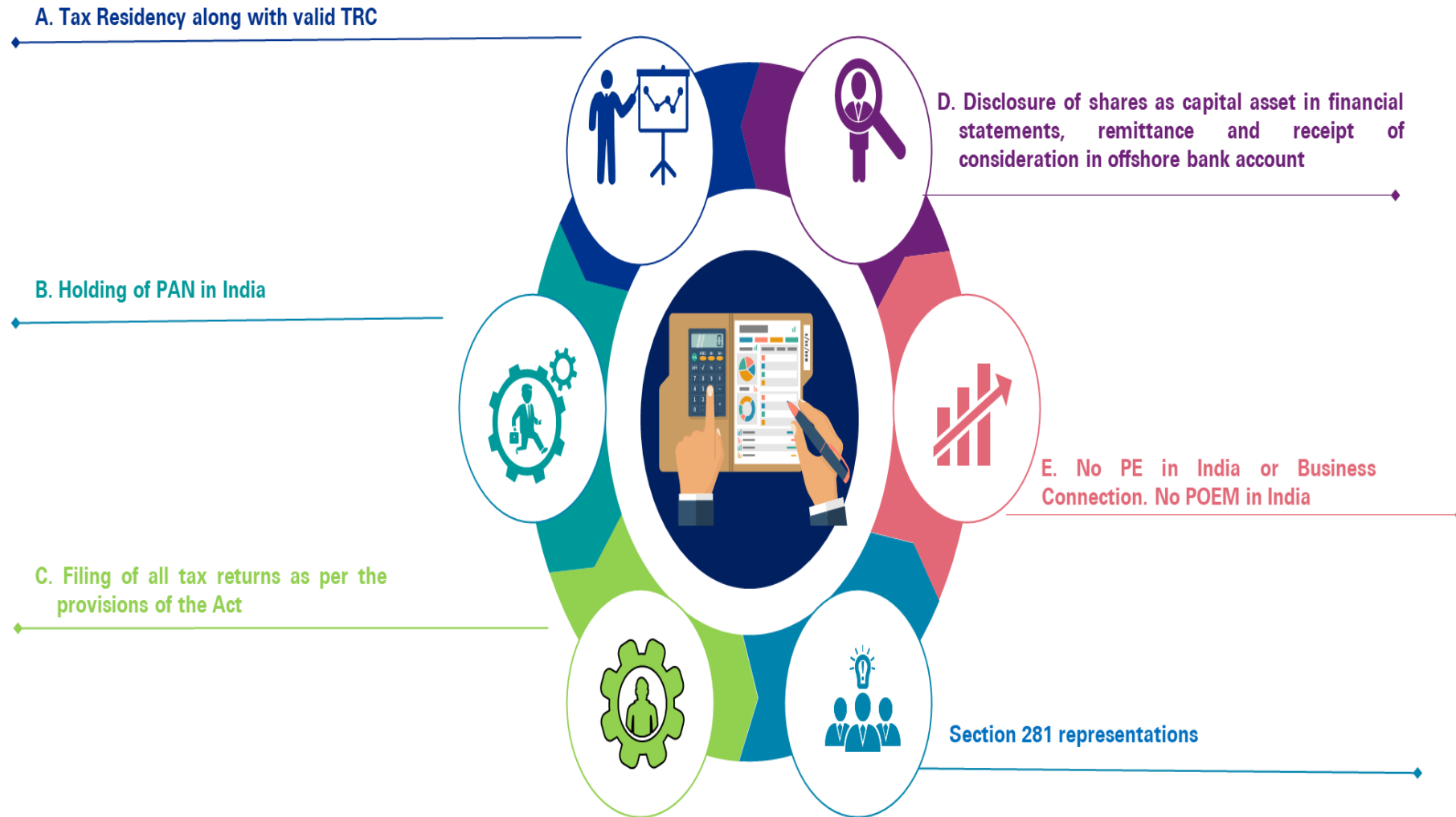
- 1) Nil Withholding Certificate
- 2) Authority for Advance Rulings

Taxation certainty vs Effects on deal timeline

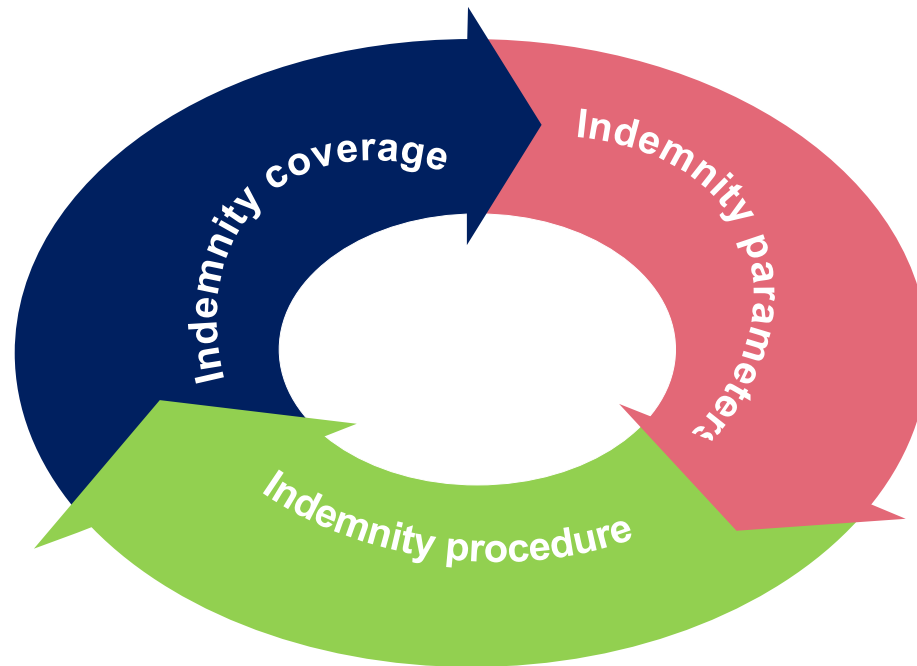
Buyers' risk for no Tax withholding

SPA Tax Negotiations

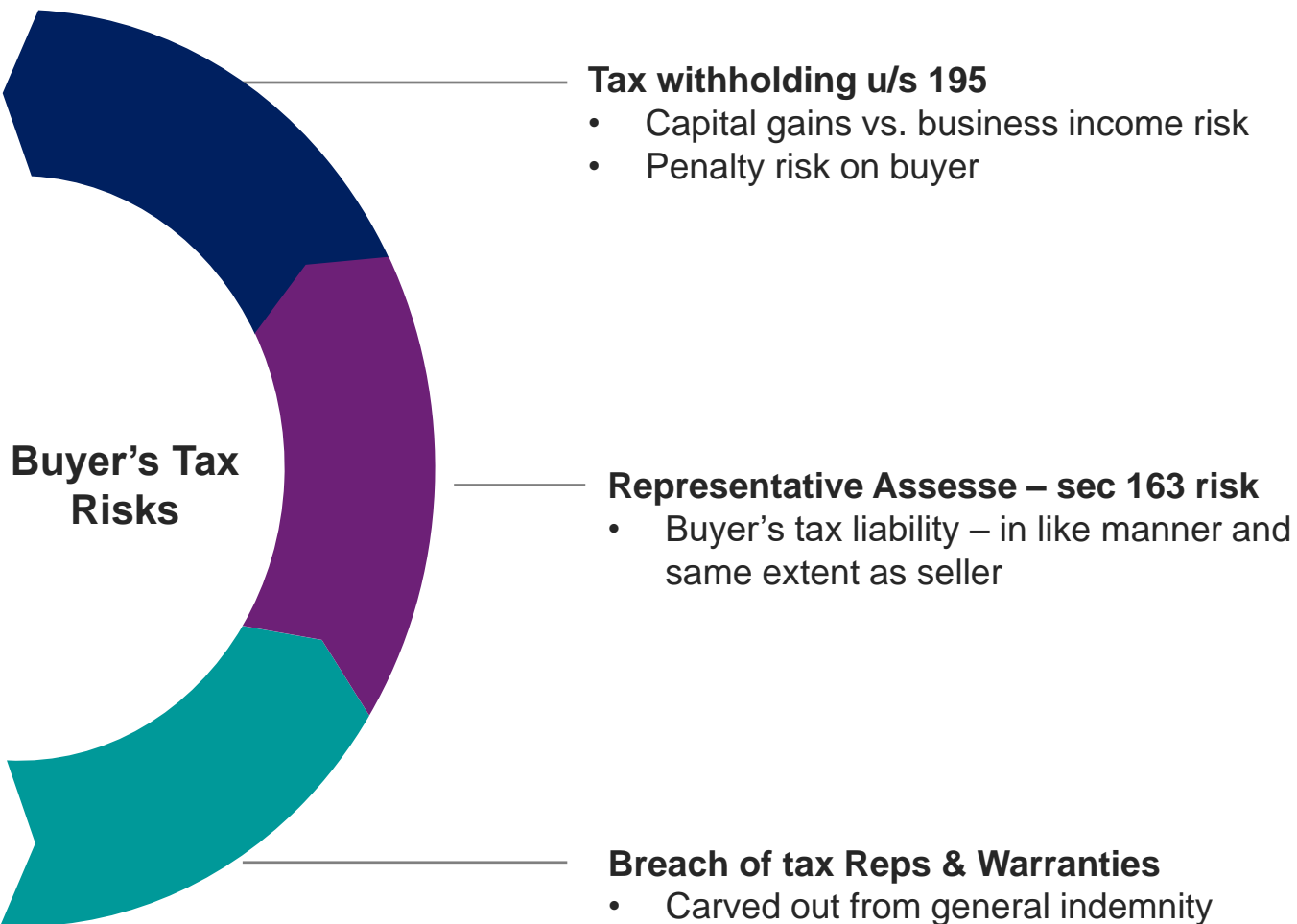
Key Seller Representations and Warranties



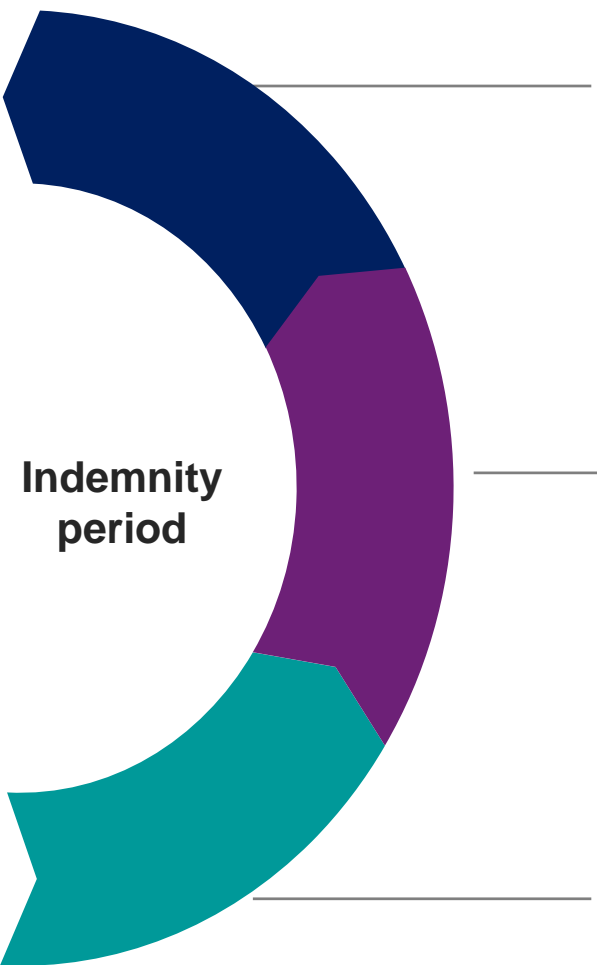
Tax Indemnities



Indemnity Coverage



Tax Indemnity Parameters- Survival Duration



Failure to deduct tax Sec. 201

- Order to be made within 7 years from EORFY in case of failure to deduct tax on payments to **Residents**
- No separate time limits specified in case of payments to Non-residents
- Judicial precedents

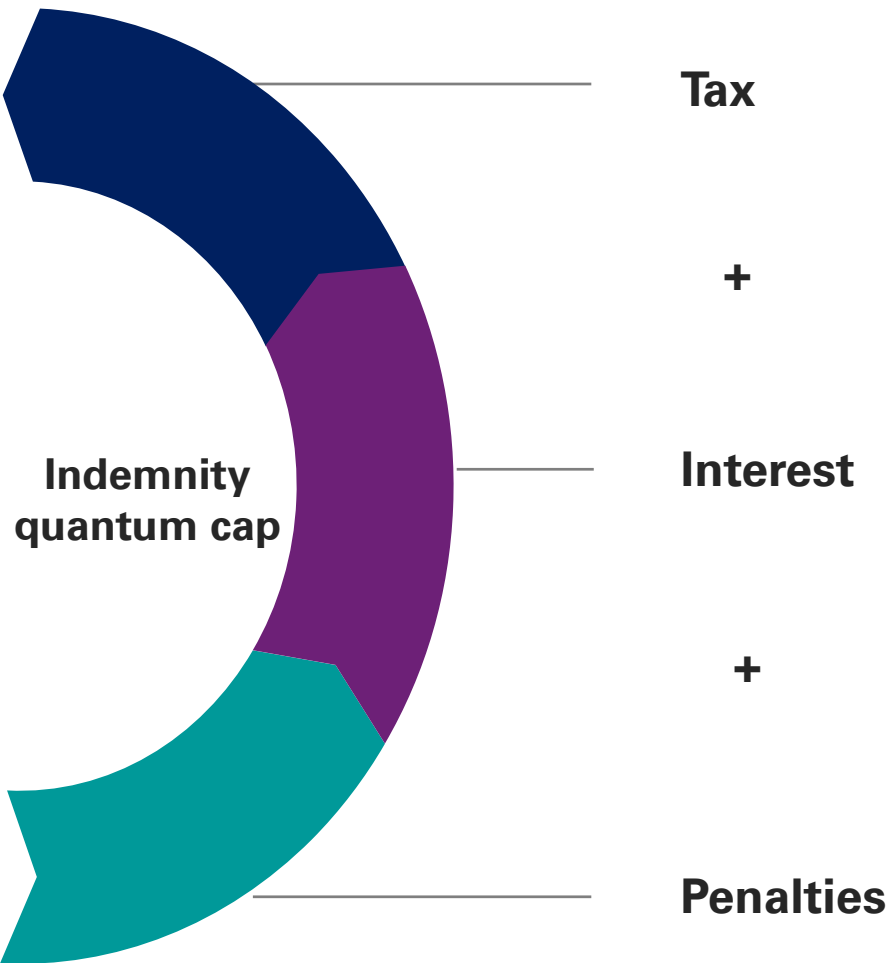
Regular assessment

- Issuance of notice – Generally 18 months from end of FY (6 months from end of FY in which return is filed)
- Assessment order
 - FY 2017-18 – 30 months from end of FY
 - Subsequent years – 24 months from end of FY

Re-assessment

- Issuance of notice – 7 years from end of FY (17 years in case of foreign assets)
- Assessment order
 - Notice issued on or before 31 March 2019 – 9 months from end of FY in which notice provided
 - Notice issued post 31 March, 2019– 12 months from end of FY in which notice provided

Tax Indemnity Parameters - Quantum

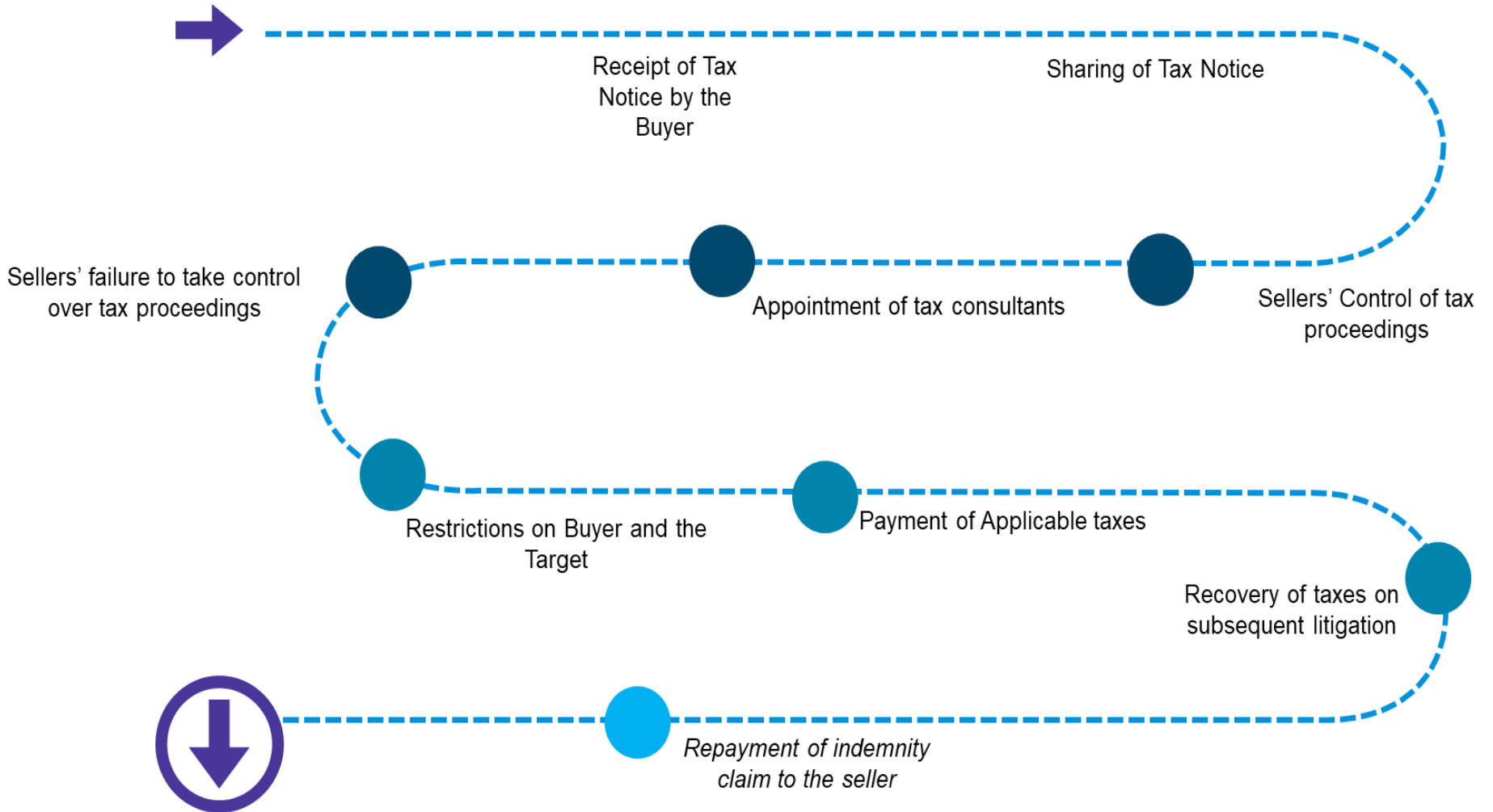


Particulars	Business Income Risk	Representative Assessee [163]	Non- Tax withholding
Tax	40%	Like manner and same extent	10% - 40%
Interest	1% per month [220 (2)]		1% per month [201 (1A)]
Penalty	50%- Under reporting 200% - Misreporting (270A)		100% of Tax amount (271C and 221)

Quantum Negotiation points

- Duration for Interest
- Under reporting vs misreporting (filing of tax return with appropriate disclosure of gains amount)
- Penal implications if tax position based on Expert opinion

Tax Indemnity Claim Procedure Key Aspects



Section 281- NOC

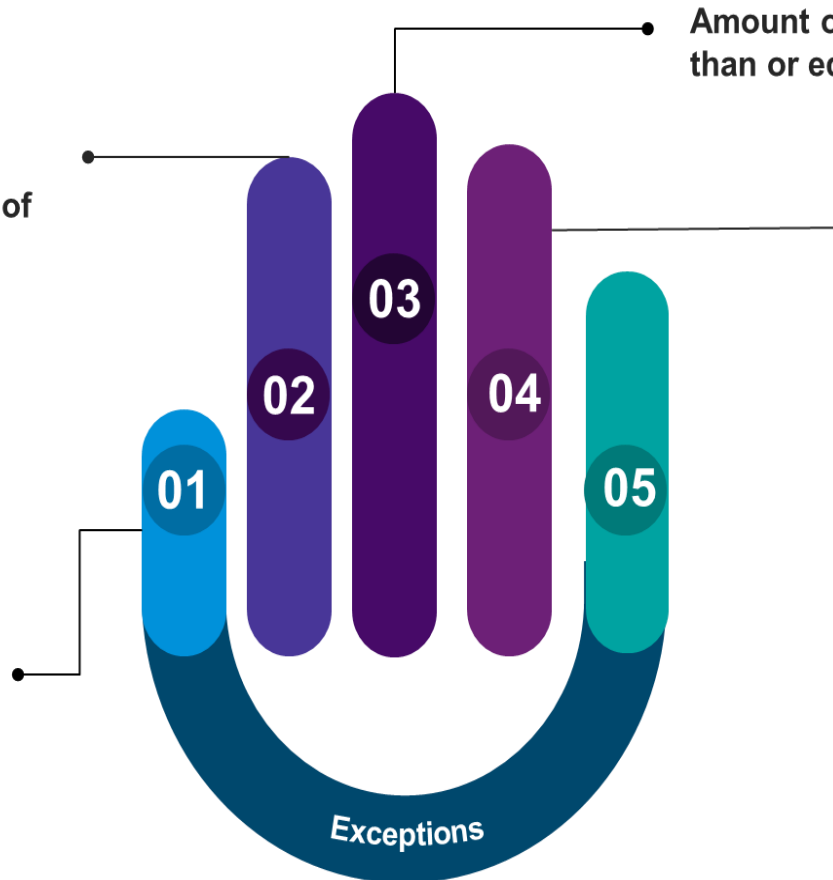
Sale transfer to be void against any claim of tax or an other sum payable by assessee if made during the Pendency of any proceeding or after completion of proceeding but before service of recovery notice

Transfer made for adequate consideration
AND
without notice of pendency of proceedings or without notice of tax or other sum payable
Seamless Transition

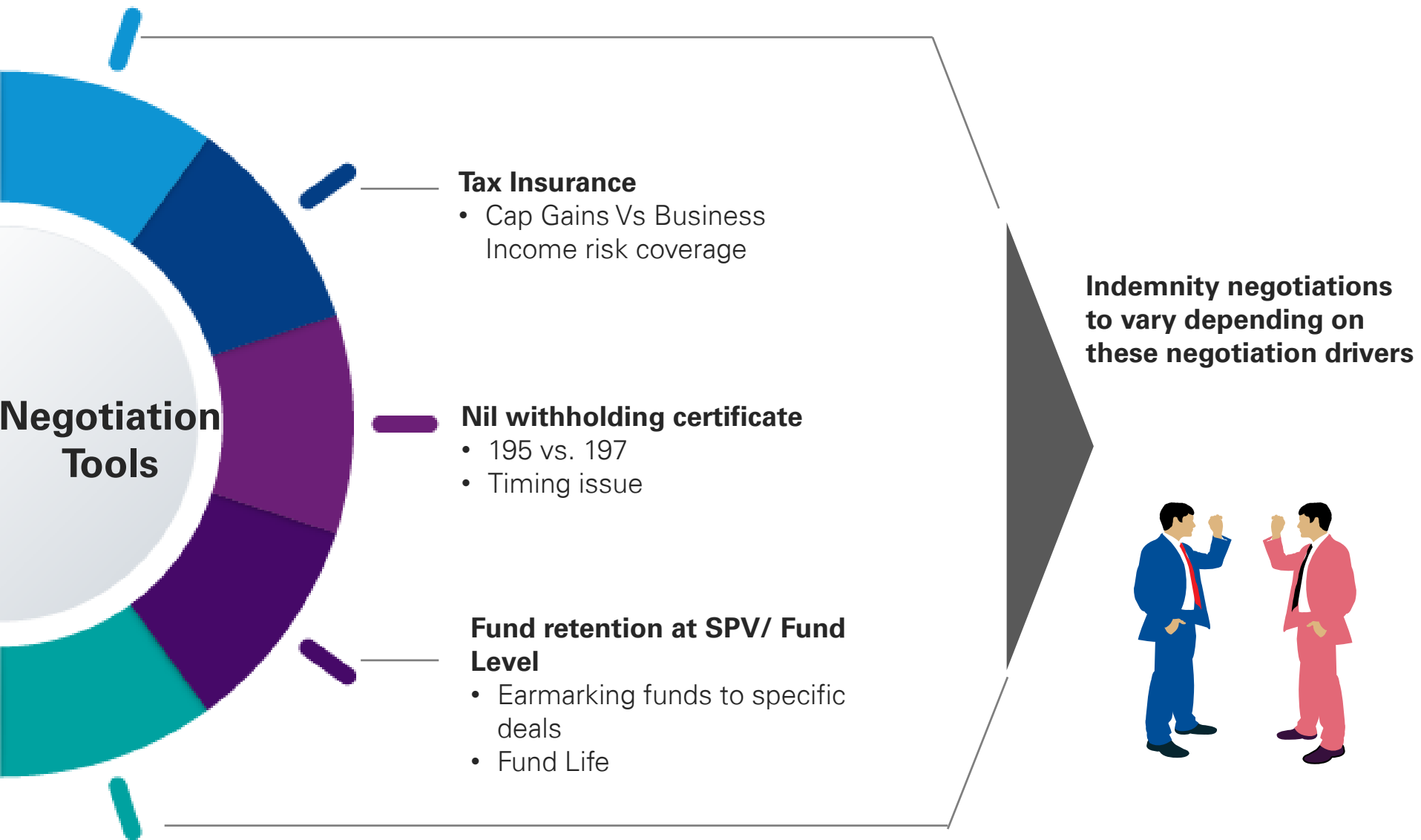
Transfer made with previous permission of AO

Amount of tax and other sums payable less than or equal to INR 5,000

Assets transferred exceeds INR 10,000



Indemnity Negotiation Tools



Section 195 vs. 197

- **Section 195 (2)** - Application by payer for paying any sum chargeable under this Act to non-resident; Application is made to Assessing Office for determination of appropriate tax rate through general or special order
- **Section 195(3)**- Application by recipient of income where tax is required to be deducted; Application is made to Assessing Officer for grant of certificate

- **Section 197**- Application may be made by person entitled to receive income or any sum chargeable to tax to Assessing Officer for grant of certificate for lower WHT/ Nil WHT

Both section 195(3) and 197 provides that the recipient of income can make an application to AO for grant of nil/lower WHT certificate

Section 195 (3)

Rule 29B provides that a following assessee can make application for grant of certificate u/s 195 (3)

- Banking company which is neither Indian company nor company which has made prescribed arrangements for declaration and payment of dividend within India and which carries operation in India through branch
- in the case of any other person who carries on a business or profession in India through a branch, any sum, not being interest or dividends,

Section 197

- Rule 28 provides that an application can be made by any person for grant of certificate in Form 13

197 Certificate- Tax representations required??

Section 195 - Form 15 CA and 15 CB

Sec 195 (6)

Person responsible for paying (Buyer) to a non-resident (seller) any sum whether or not chargeable under the provisions of the Act shall furnish information relating to payment in prescribed form

Rule 37 BB

Person responsible for payment to non-resident any sum chargeable under the provisions of the Act

- Part A – Amount of payment or aggregate payment in FY not more than INR 5 lakhs
- Part B – if certificate obtained u/s 197 or order u/s 195 (2)/(3)
- Part C – residual cases after obtaining CA certificate in form 15 CB

Person responsible for payment to non-resident any sum **NOT chargeable** under the provisions of the Act furnish details in **Part D** of form 15 CA

Key Issues

- Treaty exempt capital gains – Chargeable to tax under the provisions of the Act?
 - Buyer's argument – Chargeable to Tax –
 - Part C of 15 CA and
 - Furnishing form 15 CB by the seller – Disclosure of capital gains amount and consequent taxability under the Act
 - Seller's argument – Not Chargeable to Tax – Basic details to be provided in Part D of form 15 CA
- Timing for furnishing form 15 CA, 15 CB – Seller's AD banker to play crucial role

Primary Infusion – Key Company Representations and Warranties

- Filing of all tax returns and payment of all taxes (including withholding taxes) as and when the same are due
- Company does not have any transferee or successor liability for the Tax of another Person,
- No Liens in connection with any failure to pay tax.
- Continuance of tax concessions.
- Company not liable for tax in any other jurisdiction.
- The Company not a party to any transaction which is artificial or fictitious
- Past transaction structuring
- Findings in due diligence report

Indemnity Coverage

- Breach of Company tax representations and warranties
- Tax DD findings
- Claims against subsidiaries

Disclosure letter

- Disclosures in Disclosure letter– No liability of Company to indemnify
- Carve out to Company's indemnification obligation

Specific Indemnity Matters

Carve outs to the disclosure letter – Company to indemnify

Q & A



Thank You



Presented by:
CA Nilay Shah

This presentation is strictly for the training and understanding of members of WIRC and ICAI. The views in this presentation are personal views of the Presenter. The information contained is of a general nature for explaining the topics and issues. The presentation is not intended to serve as an advice or address the circumstances of any particular individual or entity. Although, the endeavor is to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such / this information without appropriate professional advice which is possible only after a thorough examination of facts / particular situation.