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TDS on Payments to Non-Residents

**ICAI Tower – BKC, Mumbai
2nd April, 2016**

Background

- *Popularly known as 'With Holding Tax (WHT)*
- *Includes Non-Resident person or Non-Resident Indian*
- *TDS rate applicable either as per DTAA or as per Income Tax Act.*
- *If as per DTAA – Provide TRC, PAN, Self declaration & Passport copy*
- *DTAA with 80 countries.*

Comparison

Difference between 195(2), 195(3) and Section 197

Factor	Section 195(2)	Section 195(3)	Section 197
Applicant	Payer	Payee	Payee
Purpose	To determine appropriate sum chargeable to tax and liability for withholding tax	Application for Lower/nil withholding in specified cases	Lower or NIL withholding
Application Form	No prescribed form	Form No 15C or 15D	Form No 13
Appeal	Appealable under section 248	Order not appealable- Writ petition to high court	Order not appealable- Writ petition to high court

Section 195 (1)

- Scope - Deduction on the earlier of credit or payment of **sum chargeable** at the **rates in force** – Person includes non-resident having place of business or residence in India or not – Finance Act , 2012
- Exception: – Sec192 - Salary – Sec194LC - Interest on approved foreign currency loans obtained by an Indian company – Sec115-O - Dividend referred in Dividend Distribution Tax

Analysis of 195 (1)

Sum chargeable – To be read with :

- Section 4 – Charge of Income Tax
- Section 5 – Scope of Total Income
- Section 6 – Residence in India
- Section 9 – Income deemed to accrue or arise in India.

Analysis of 195 (1)

Rate in force –

- The rate specified in the Finance Act or
- The rate specified in DTAA; whichever is beneficial.

- DTAA rate includes surcharge & EC
- TRC to be obtained for availing benefit of DTAA.

Issues in Obtaining TRC –

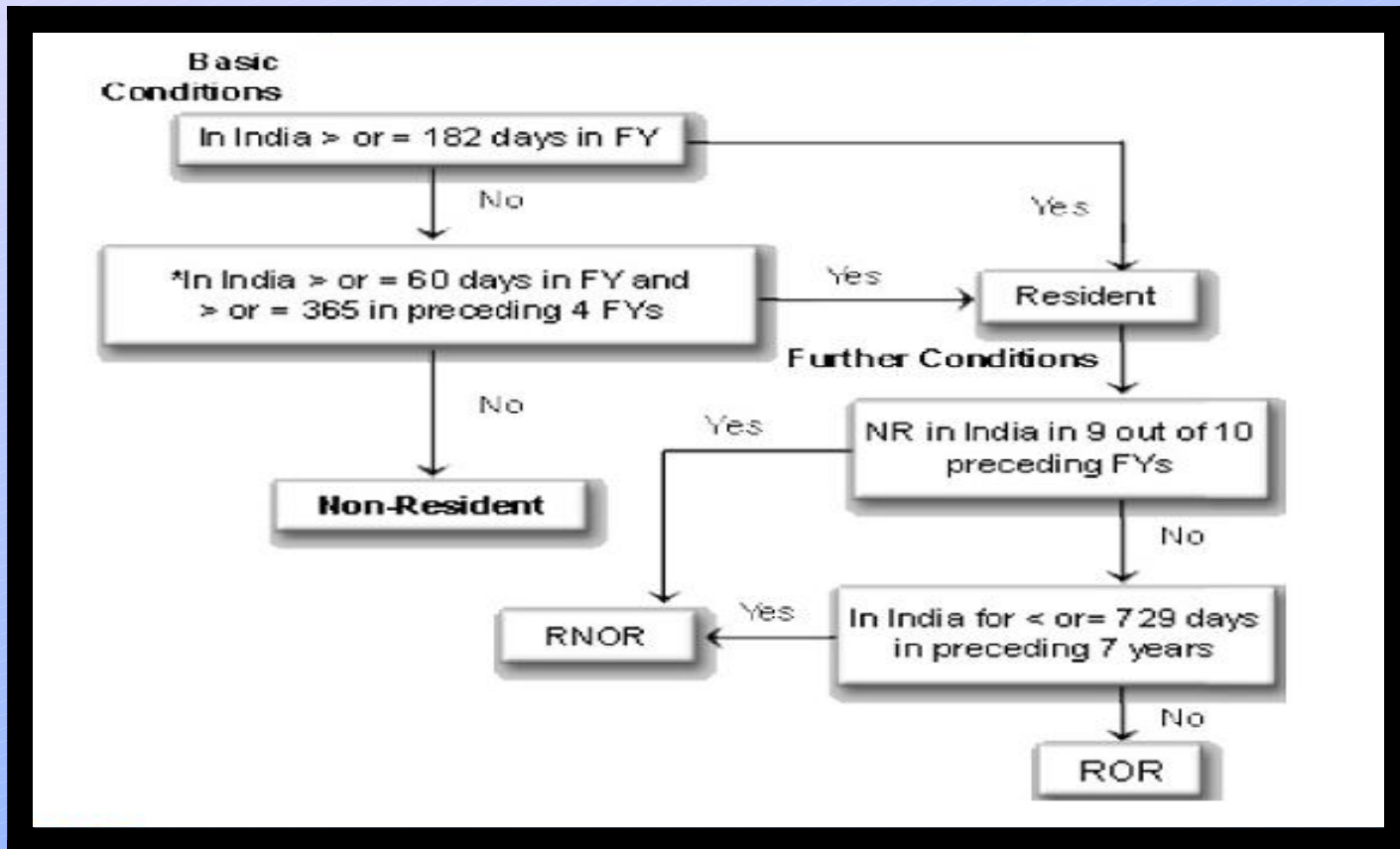
- Different Tax Years
- Delay in issuing TRC from home country
- TRC not obtainable

Points to discuss

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TDS on NRI

- Residential Status – Sec 6 of Income Tax Act.



TDS on NRI

How many members have NRI clients or deal with NRI taxation?

TDS on NRI

Common Issues:

- NRE v/s NRO account taxation
- Sale of property
- Repatriation of funds & filing Form 15 CA/CB u/s 195 (6)
- Income tax return filing

TDS on NRI

Practical case:

- NRI, but PIO card holder
- Has Term Deposits in NRE & NRO accounts
- Tax deducted at source by bank
- No return filed

TDS on NRI

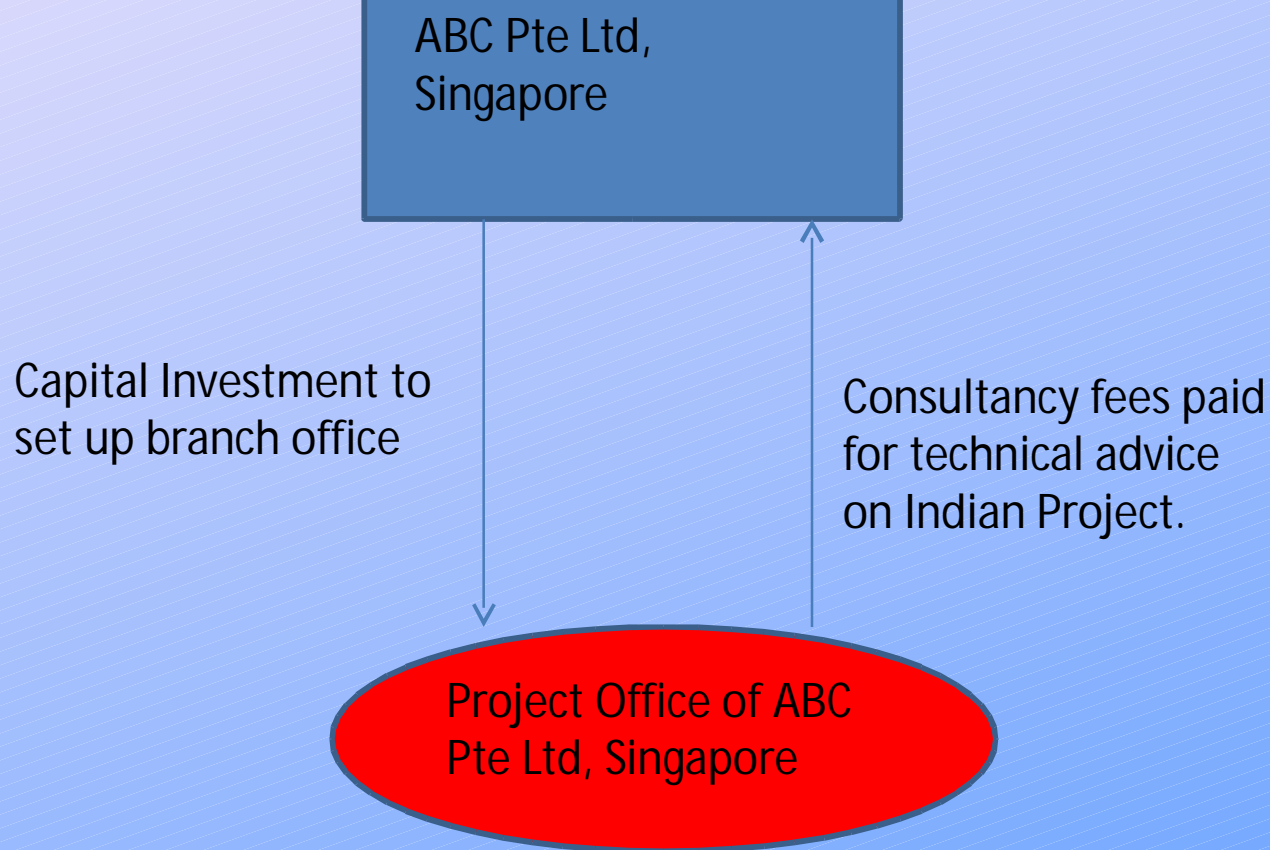
Practical case:

- Belgian Passport
- Residency in UAE*
- Working in Hong Kong
- Term Deposits in NRO account
- TDS & Return filing

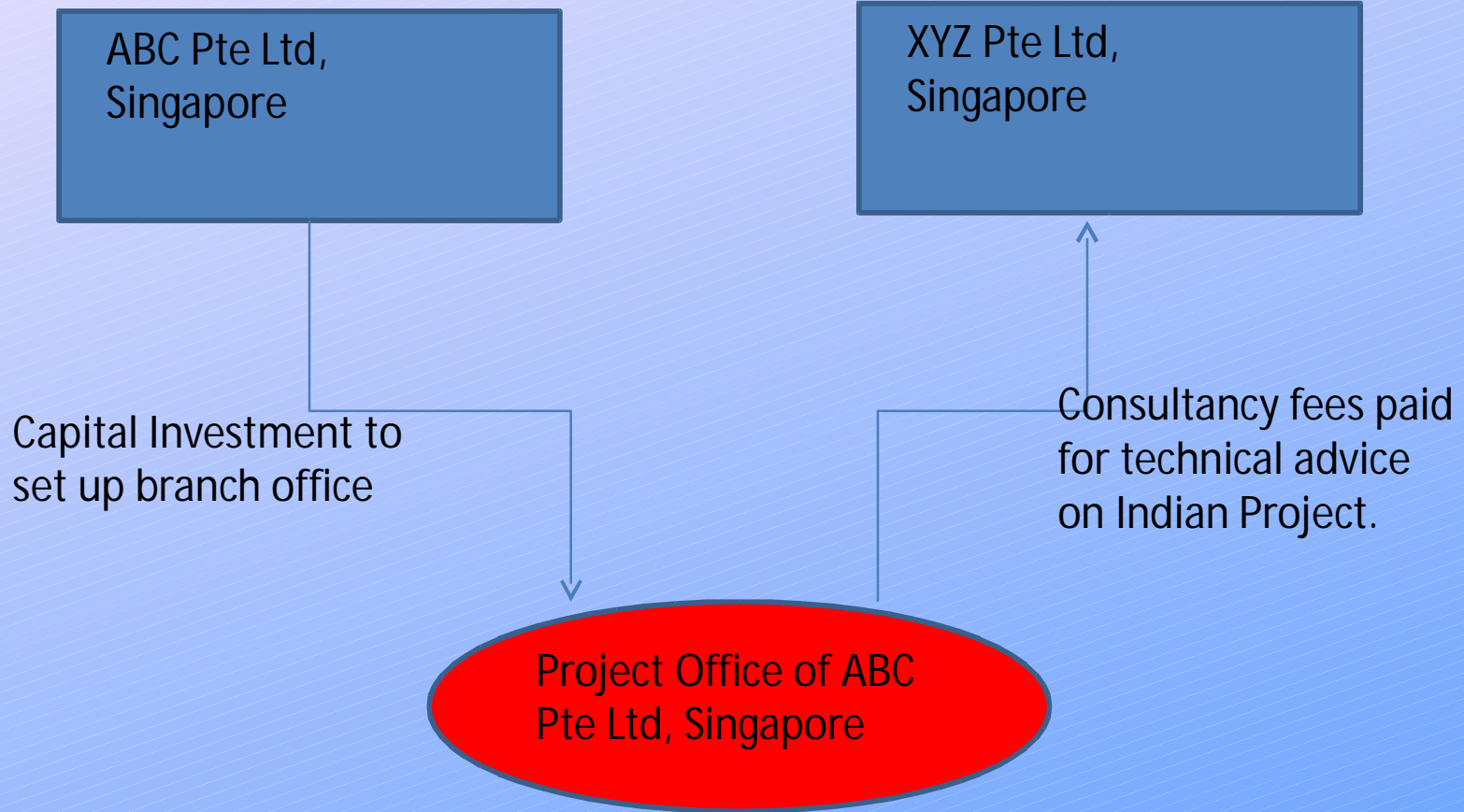
TDS on Foreign Co.

- Incorporated in the form of BO/PO/LO.
- Has PE in India
- FTS Payment made to Parent company outside India.
- TDS applicable or not?

TDS on Foreign Co.



TDS on Foreign Co.



TDS on Foreign Co.

Analysis:

- Fees paid to a NR.
- PE in India.
- Fees paid for the project in India.
- Doesn't matter if it is parent co. or any other NR

Case Studies

Case 1:

- Indian Co. pays charges for accessing database to a foreign co.
- This is a regular subscription charge.
- Whether amount is to be deducted or not?
- If yes, under what head?

Case Studies

Answer:

- Yes, Subscription charges paid to non-resident would amount to royalty liable to TDS.
- CIT vs. Infosys Technologies Ltd. [2015] 229 Taxman 335 (Karnataka)
- Since, it imparts commercial & industrial knowledge.

Case Studies

Case 2:

- An Indian consultancy firm pay FTS to a NR outside India.
- For a project outside India.
- Whether TDS is required to be deducted?
- If yes, why?

Case Studies

Answer:

- No, TDS is not required to be deducted.
- Since, fees were paid to a NR outside India, to carry out for outside India.
- Business activity is outside India and hence excluded u/s 9(1)(vii)(b)
- DCIT vs. Hofincons Infotech & Industrial Services (P.) Ltd. [2015]

Case Studies

Case 3:

- Capital Gains in case of sale of government securities in India.
- The NR person was a resident in UAE.
- DTAA with UAE, Capital gains taxable in UAE and not India.
- Should tax be deducted at source?

Case Studies

Answer:

- No, TDS is not required to be deducted.
- According to DTAA, capital gains are taxable in UAE.
- Therefore, it is not taxable in India.
- Hence, no TDS required.
- Clauses of DTAA with UAE revised.
- Minimum stay required – 183 days
- Capital Gains taxable in India.
- DIT vs. ICICI Bank Ltd. [2015]

Case Studies

Case 4:

- Satellite rights of a movie are transferred to an Indian Co.
- The right to use the movie is given for 99 years.
- Whether this amounts to sale or payment of royalty to use the satellite rights?

Case Studies

Answer:

- The said transfer is a sale in terms of Section 26 of Copyright Act.
- Since, it is a sale, it cannot be a payment of royalty, and hence no TDS.
- S. P. Alaguvel vs. DCIT [2015]

Case Studies

Case 5:

- The assessee (employer) paid salary to NR employee with deducting tax at source.
- The employer then makes the TDS payment in the next month.
- Can the expenditure be disallowed by the officer?

Case Studies

Answer:

- Yes. The AO can disallow the expense u/s 40 (1) (a) (iii), since tax is not deducted at source u/s 192 as required by law.
- Once disallowed, such disallowance is permanent.

Case Studies

Case 6:

- Your client is an Indian company, it has imported electronics from a foreign supplier.
- The goods have shipped to India.
- Payment is required to be made to this supplier.
- What compliances are required by the Indian company?

Case Studies

Answer:

- Prior to 31st March, 2016: The client was required to file Form 15CA, the CA was required to issue a certificate in Form 15CB.
- To issue Form 15CB, proof of import, copy of invoice, shipping bill etc. is required to be obtained by the CA as documentary proof.
- From 1st April, 2016 – It is not required* .

Case Studies

Practical Experience of Filing Form 15CA after
1st April, 2016

Perception

General perception of Non-Residents of Tax Authorities in India



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