

TDS on Payments to Non-residents u/s. 195

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Similar versions presented at Seminars of WIRC & Virar Branch of ICAI;
CPE Study Cirles of Vile Parle, Dahisar & Matunga

Updated up to 31st October 2015

Why discuss Section 195?

- ▶ Stringent consequences for all parties to the transaction
 - ▶ Deductor
 - ▶ Deductee
 - ▶ CA!
- ▶ Scope expanded in recent times
 - ▶ Retrospectively
 - ▶ Extraterritorial Operation
- ▶ Tax Department's eye on international payments
 - ▶ Nokia & Cairn Energy
- ▶ Ongoing controversy for Remittance Procedures

Contents

LEGAL PROVISIONS

- Scope & Methodology
- Consequences & Refunds


PRACTICAL ISSUES

- Certificates & Procedures
- Approach & Safeguards

LEGAL PROVISIONS - Scope & Methodology

- Scope of Section 195(1)
 - Who, What, When & How?
- Section 206AA
- Tax Residency Certificate
- Interplay of DTAA, PAN and TRC
- Grossing up of tax
- Deductibility vis-à-vis certain payments
 - Business Incomes
 - Royalty & FTS
 - Capital Gains
 - Reimbursements
 - Other payments

Scope of Section 195

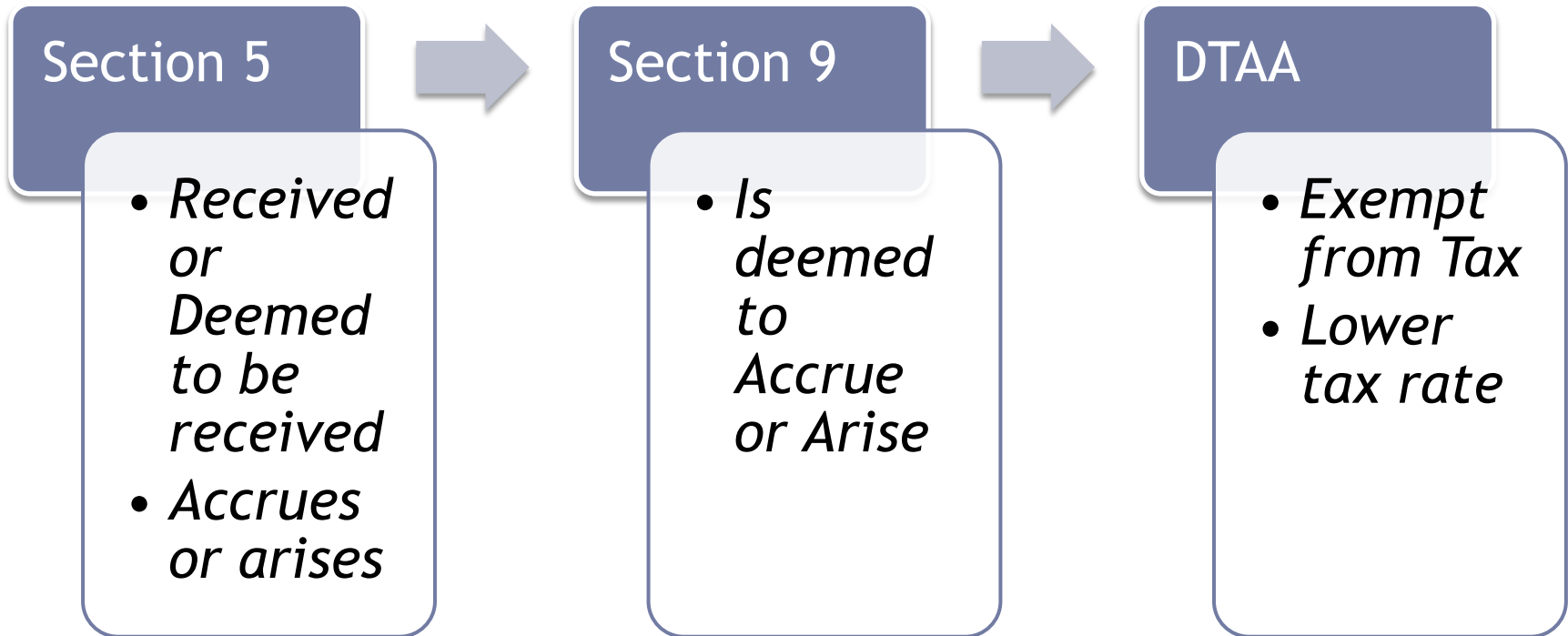


Who are covered?	<ul style="list-style-type: none">• Any person responsible for paying• To a non-resident or a Foreign Company
What is covered?	<ul style="list-style-type: none">• Any interest or any other sum• Chargeable to tax under the provisions of this Act
When is it applicable?	<ul style="list-style-type: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

Scope of Section 195 - What is covered?

- ▶ Sums chargeable to tax
 - ▶ Except for:
 - ▶ Salaries; Dividends; Interest [S.s 194LB, 194LC & 194LD]; Income from units of a business trust [S. 194LBA]; Payments to sportsman, entertainer or sports association [S. 194E]; Winnings from Lottery, etc. [S. 194B]; Income received by a unit holder of investment fund [S. 194LBB]; Payments u/s.s 115AB, 115AC, 115AD [S.s. 196B, 196C & 196D].
 - ▶ Exempt from TDS:
 - ▶ Shipping income u/s. 172; Interest paid by Offshore Banking unit to an NR or RNOR [S. 197A(1D)]; Capital Gain earned by FII [S. 196D(2)].
- ▶ Without any threshold limit
- ▶ From pure incomes or composite payments where income is embedded
 - ▶ Transmission Corporation - 239 ITR 587 (SC)
 - ▶ GE India Technology Centre - 193 TAXMANN 234 (SC)
- ▶ Section 195(7) - whether or not chargeable to tax
 - ▶ No cases/persons prescribed yet

Taxability – Steps



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

Scope of Section 195 - Who are covered?

- ▶ **Payer - Any person**
 - ▶ Even if NR?
 - ▶ Extraterritorial operation
 - ▶ GVK Industries
 - ▶ Vodafone
 - ▶ Retrospective amendment - Explanation 2 to S. 195(1)
 - ▶ Obligation to deduct whether or not NR has any presence in any manner whatsoever in India!
- ▶ **Payee should be**
 - ▶ Non-residents (other than companies); or
 - ▶ Foreign Co - whether or not NR!
 - ▶ If POEM is in India, foreign company is an Indian resident
 - ▶ Will Section 195 apply or other sections apply?

Scope of Section 195 - When is it applicable?

- ▶ On credit or payment whichever is earlier
 - ▶ From the point of view of payer
 - ▶ Exception for interest payable by Government, Public Sector Bank or Public Financial Institution
- ▶ Amount adjusted, not paid
 - ▶ Raymond Ltd. (80 TTJ 120)
- ▶ FEMA or RBI Approval
 - ▶ United Breweries Ltd. - [2002] 81 ITD 77 (Delhi)
- ▶ Govt. Approval
 - ▶ Pfizer Corpn. [2003] 129 TAXMAN 459 (BOM.)

Scope of Section 195 – How is it applicable?

- ▶ Rate or rates in force - Section 2(37A)(iii)
 - ▶ Part II to the First Schedule of Finance Act
 - ▶ DTAA rates
- ▶ Surcharge to be added to DTAA Rate?
 - ▶ No
- ▶ Education Cess to be added to DTAA Rate?
 - ▶ No
- ▶ Presumptive provisions: 44B, 44BB, 44BBA, 44BBB
- ▶ Section 44DA r.w. Section 115A
 - ▶ Only applicable for final payment of tax
 - ▶ Deductibility on basis of Schedule II to Finance Act

Section 206AA – PAN requirement

- ▶ Non-obstante provision -
 - ▶ “Notwithstanding anything contained in any other provisions of this act ...”
- ▶ Obligation to furnish PAN on **any person** receiving any sum or income or amount on which **tax is deductible**
- ▶ In absence of PAN, tax shall be deducted at the higher of the following rates:
 - ▶ At the rate specified in the relevant provision of the Act; or
 - ▶ At the rate or rates in force; or
 - ▶ At the rate of 20%
- ▶ Tentative tax, Refund of higher tax deducted available
- ▶ Section applicable also when PAN incorrect or invalid
- ▶ Certificate u/s. 197 will not be issued without PAN

Section 206AA - Issues

- ▶ **Treaty Override?**
 - ▶ If DTAA cap is lower than rate as per Act?
 - ▶ Serum Institute of India Limited & Infosys BPO Ltd
 - ▶ Credit in the other country may not be available for additional tax burden
- ▶ **Applicable where no tax payable?**
 - ▶ No, as provision applicable only on sum or income or amount on which tax is deductible
 - ▶ Even in cases where income not taxable under DTAA
- ▶ **Surcharge or educational cess not to be added**
- ▶ **Grossing up of tax under Section 206AA**
 - ▶ Literal reading of Section 195A refers to ‘rates in force’
 - ▶ Bosch Ltd.

Impact of Section 115A

- ▶ **Rate @ 10% u/s115A for Royalty and FTS**
 - ▶ 25% between 1st April 2013 to 31st March 2015
 - ▶ Can this be rate be applied?
- ▶ **At the rate specified in the relevant provision of the Act**
 - ▶ Rate as per deduction provisions - 194J, 194C, 194I, etc.,
 - ▶ Not as per substantive tax provisions like S. 115A
 - ▶ No rate specified in Section 195
- ▶ **At the rate or rates in force**
 - ▶ Section 195 refers to “rates in force”
 - ▶ Section 2(37A)(iii) "rates in force" means -
 - ▶ for the purposes of deduction of tax under section 195, the rate or rates of income-tax specified in this behalf in the **Finance Act** of the relevant year or the rate or rates of income-tax specified in an **agreement** entered into by the Central Government **under section 90, whichever is applicable by virtue of the provisions of section 90**
- ▶ **44DA r.w. Section 115A**

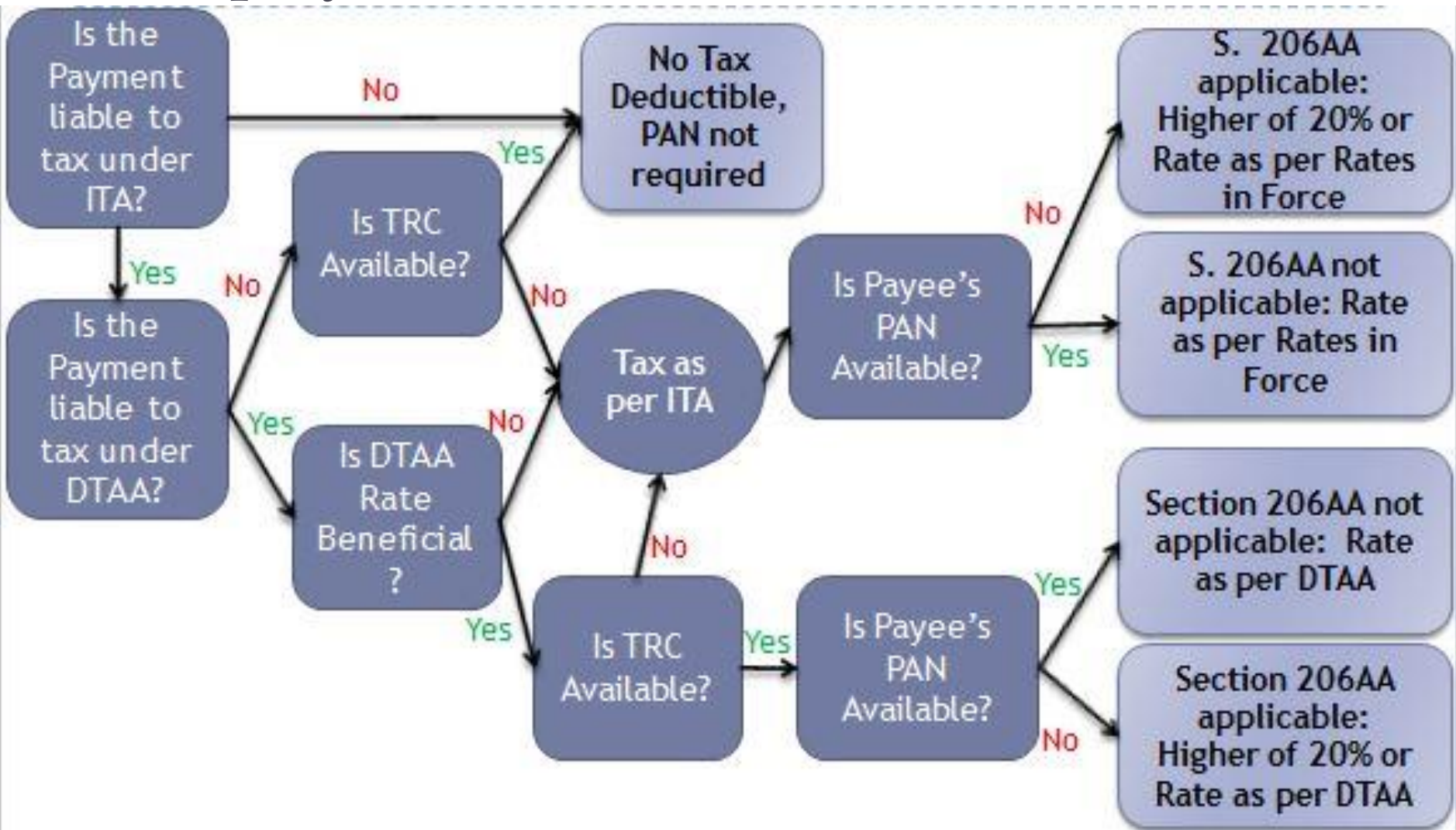
Tax Residency Certificate

- ▶ Section 90(4) & (5) - NR cannot avail benefit under Treaty without Tax Residency Certificate (TRC)
 - ▶ Applies to all NRs without any threshold limit
 - ▶ TRC will be necessary but not sufficient - past?
- ▶ Rule 21AB specifies prescribed particulars for Section 90(5)
 - ▶ Documents substantiating particulars to be maintained
 - ▶ By whom?
 - ▶ Details not covered in TRC to be mentioned in Form 10F
 - ▶ Form 10F alone not sufficient
 - ▶ Self-attestation

Tax Residency Certificate - issues

- ▶ TRC not required in case treaty benefit not availed
- ▶ LOB clause?
- ▶ TRC usually for the past year. Tax to be deducted for current year
- ▶ TRC applied for, but not available on date of deduction
- ▶ TRC not being provided in other jurisdiction

Interplay of DTAA, PAN & TRC



Interplay of DTAA, PAN and TRC... contd.

DTAA provisions are beneficial?	Is TRC available?	Is PAN available?	Result
Yes	Yes	Yes	The beneficial DTAA rate can be applied as TRC is available. Section 206AA will not have any effect as PAN is available.
Yes	No	Yes	As TRC is not available, benefit of DTAA will not be available. Rate will be as per ITA. Section 206AA will not have any effect as PAN is available.
Yes	Yes	No	While the payer can take benefit of the DTA provisions, as PAN is not available, higher of 20% or DTA rate will be applicable.
Yes	No	No	As TRC is not available, benefit of DTAA will not be available. As PAN is not available, higher of 20% or ITA rate will be applicable.
No or DTAA not applicable	NA	Yes	Rate will be determined as per “rates in force” provided in Part II of First Schedule of the Finance Act of the relevant year. As PAN is available, Section 206AA will not be applicable.
No or DTAA not applicable	NA	No	Rate will be determined as per “rates in force”. If this rate is lower than 20%, tax would be deductible at 20% as PAN is not available.

Grossing up of tax

▶ Section 195A - Income payable “net of tax”

Payment of Rs. 100, tax deductible @ 10%	Without Gross Up of Tax (A)	With Gross up of Tax (B)
Invoice Amount	100	100
Tax Deductible @ Source	10	10
Net Amount payable	90	100
Amount/Grossed up amount	100	$100 + 100 / [(100 / 10) - 1]$ = 111.11
Less: Tax deducted	10	11.11
Net Payment	90	100

Not applicable to Presumptive tax provisions?

- CIT vs. ONGC (264 ITR 340)



Deductibility vis-à-vis certain payments

- ▶ Business Incomes
- ▶ Royalty & FTS
- ▶ Capital Gains
- ▶ Reimbursements
- ▶ Other payments

Interplay between the Act & DTAA

Business Income

- Section 9(1)(i)
- Article 7 r.w. Article 5

Royalties/FTS

- Section 9(1)(vi) & (vii)
- Article 12

Capital Gains

- Section 9(1)(i)
- Article 13

Interest

- Section 9(1)(v)
- Article 10

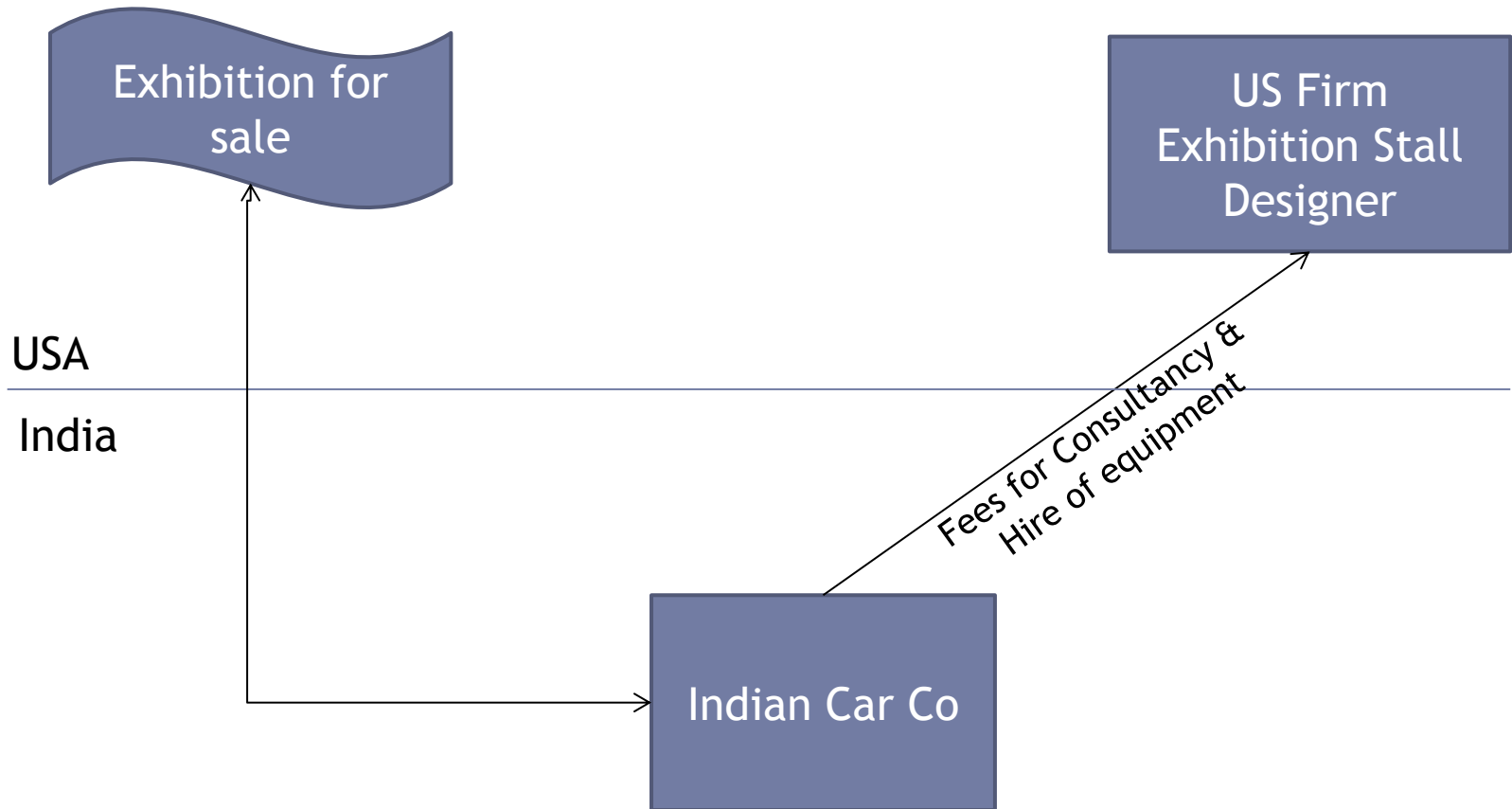
Deductibility on Business payments or Professional fees

- ▶ ‘Business Connection’
 - ▶ Professional Connection
- ▶ PE - Article 5
 - ▶ Agency PE, Service PE, Construction PE
- ▶ Fixed Base - Article 14
 - ▶ Number of days
- ▶ Offshore supply of goods
 - ▶ Port of shipment & Bearing of risk
- ▶ Payment to Foreign Agents of exporters
- ▶ Withdrawal of Circular 23 of 1969 - impact?
- ▶ ‘Force of Attraction’ clause in DTAA
 - ▶ Scope under ITA may be narrower

Deductibility on Royalties & FTS

- ▶ Retrospective Expansion in definition under Act
- ▶ ‘Most Favoured Nation’ Clause
- ▶ Deemed accrual u/s. 9 - “Source Rule”
 - ▶ Treaty source rule wider
 - ▶ Taxable if payer is resident except for
 - ▶ Used for the purposes of a business or profession carried on by such person outside India; or
 - ▶ Used for the purposes of making or earning any income from any source outside India
 - ▶ Taxable if payer is non-resident only if
 - ▶ Used for the purposes of a business or profession carried on by such person in India; or
 - ▶ Used for the purposes of making or earning any income from any source in India

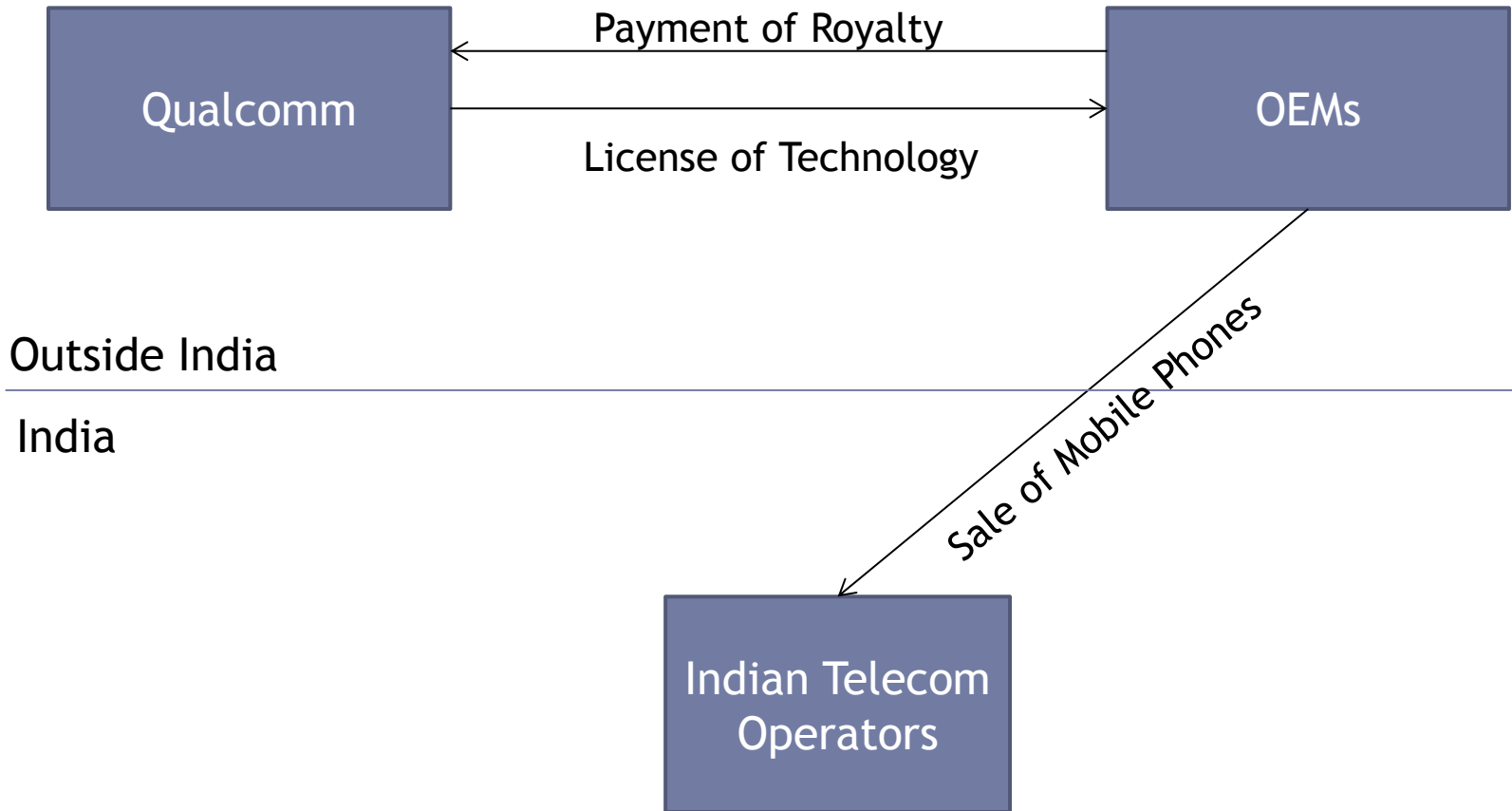
Source Rule – Payer Resident



Source Rule – Payer Resident ... contd.

- ▶ Section 9 to apply only if income does not accrue or arise in India
- ▶ Business or profession outside India
 - ▶ Office, Branch, PE
- ▶ Source of income outside India
 - ▶ Value addition
 - ▶ “Source” means not a legal concept but one which a practical man would regard as a real source of income
 - ▶ Source is the activity that gives rise to income
 - ▶ Customers not a source of income
 - ▶ Havells India Ltd.
 - ▶ Other than business income?

Source Rule – Payer Non-Resident



Source Rule – Payer Non-Resident... contd.

- ▶ Bajaj Hindustan
- ▶ Lufthansa Cargo
- ▶ Titan Industries
- ▶ Havells India
- ▶ Qualcomm 2013 - Assessee not taxable
 - ▶ Not proved if OEMs have carried on business in India and that they have used Qualcomm's patents for the purpose of making / earning income from a source in India
- ▶ Qualcomm 2015 - Matter remanded
 - ▶ The taxation of royalties for use of a technology, on the first principles, is the situs where the technology is used

Deductibility on Royalties

- ▶ **Software Payments**
 - ▶ Royalty definition as per DTAA and Act
 - ▶ Standardized vs Customized - any difference?
 - ▶ E-commerce transactions
- ▶ **Database subscriptions**
- ▶ **Transfer of know-how**
- ▶ **Use of industrial, commercial or scientific equipment**

Deductibility on Fees for Technical Services

- ▶ Rendering of service in India immaterial
- ▶ Technical services
 - ▶ Human element
- ▶ Managerial services
 - ▶ Not present in many DTAAAs
- ▶ Consultancy services
- ▶ “Make Available”
 - ▶ Enabled to apply the technology contained therein
 - ▶ For his own benefit
 - ▶ Without recourse to seller
 - ▶ In his own right
 - ▶ India-US Protocol

Deductibility on Fees for Technical Services

- ▶ Design, Development, Supply of design & drawings
- ▶ Testing, Certification services, etc.
- ▶ Professional and Legal services
 - ▶ Article 12 vs. Article 14
- ▶ Participation in conferences, workshops, etc.
- ▶ Standard Facility payments
- ▶ Manpower Supply
- ▶ Section 44BB and Section 44DA
- ▶ Commission services
- ▶ Construction, assembly, mining or like project
 - ▶ Mineral oil included

Deductibility on Capital gains

- ▶ **On sale of shares**
 - ▶ Mauritius
 - ▶ Cyprus
 - ▶ Notified Jurisdictional Area
- ▶ **On sale of property**
 - ▶ Deduction on gross amount or capital gain?
 - ▶ Documents required to correctly compute gain
 - ▶ Can CA give certificate?
- ▶ **On income earned by FIIs**
 - ▶ Section 196D(2)
- ▶ **On gains earned by NRIs**
 - ▶ On non-repatriable capital gains earned by NRIs from PIS

Deductibility on Reimbursement of expenses

- ▶ What is directly taxable is taxable even if reimbursed
- ▶ Facts & supporting very important
- ▶ Pure Reimbursement - no mark-up
- ▶ Reimbursement with mark-up
- ▶ Allocation of Shared Costs
- ▶ Third-party services
- ▶ Incidental expenses
- ▶ Salary / Living Allowances

Deductibility vis-à-vis other payments

- ▶ On payments to Agent of Non-resident as per Sec. 163
- ▶ On payment by a firm to NR partners
- ▶ On transfer of own funds from NRO to NRE account
- ▶ On payments through credit cards, bitcoins, paypal
- ▶ On payments made by a branch to its HO
 - ▶ New explanation for interest inserted from AY 2016-17
- ▶ On payment in kind
- ▶ On payment without remittance
- ▶ On gifts to NR non-relatives

LEGAL ISSUES - Consequences & Refunds

- Consequences
- Refund of TDS

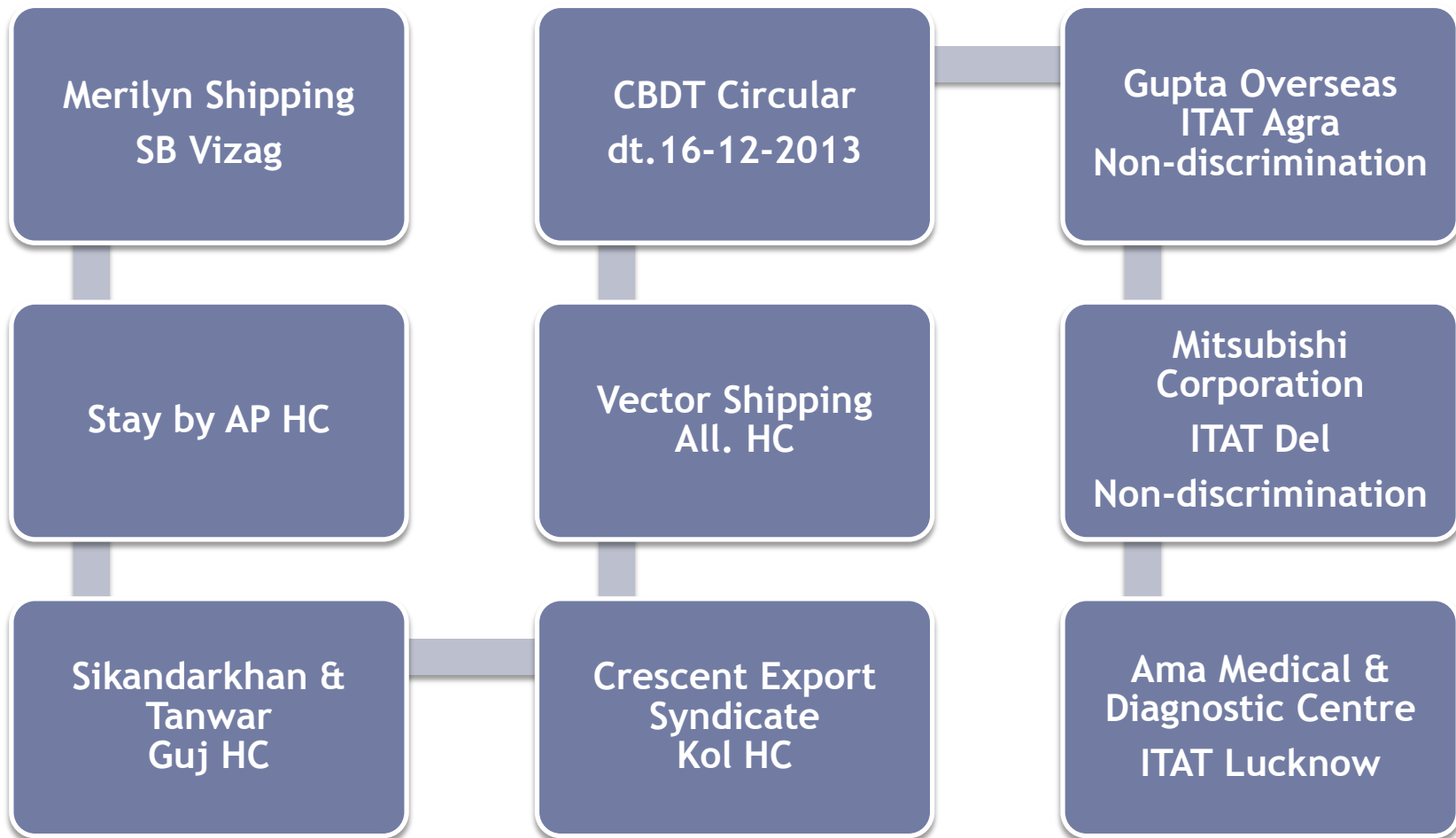
Consequences under law

- ▶ **Disallowance of expense u/s. 40(a)(i)**
 - ▶ Disallowance of Interest u/s. 58(1)(a)(ii)
- ▶ **Assessee in default u/s. 201(1)**
 - ▶ Retrospective effect from 1.6.2002
- ▶ **Penalties**
 - ▶ For failure to pay tax deducted - S. 221
 - ▶ For failure to deduct tax - S. 271C
 - ▶ For failure to file TDS return - S. 272A
- ▶ **Interest**
 - ▶ U/s. 220
 - ▶ U/s. 201(1A)

Consequences...contd.

- ▶ Charge on all the assets - S. 201(2)
- ▶ Prosecution for failure to pay tax deducted - S. 276B
- ▶ Payer Representative Assessee u/s. 161 r.w. S. 163
- ▶ Tax may be recovered from any assets which are or may at any time come within India - S. 173

Merilyn Shipping, Non-discrimination and its impact on Sec. 40(a)(i)



Section 40(a)(ia) amended to restrict disallowance to 30%

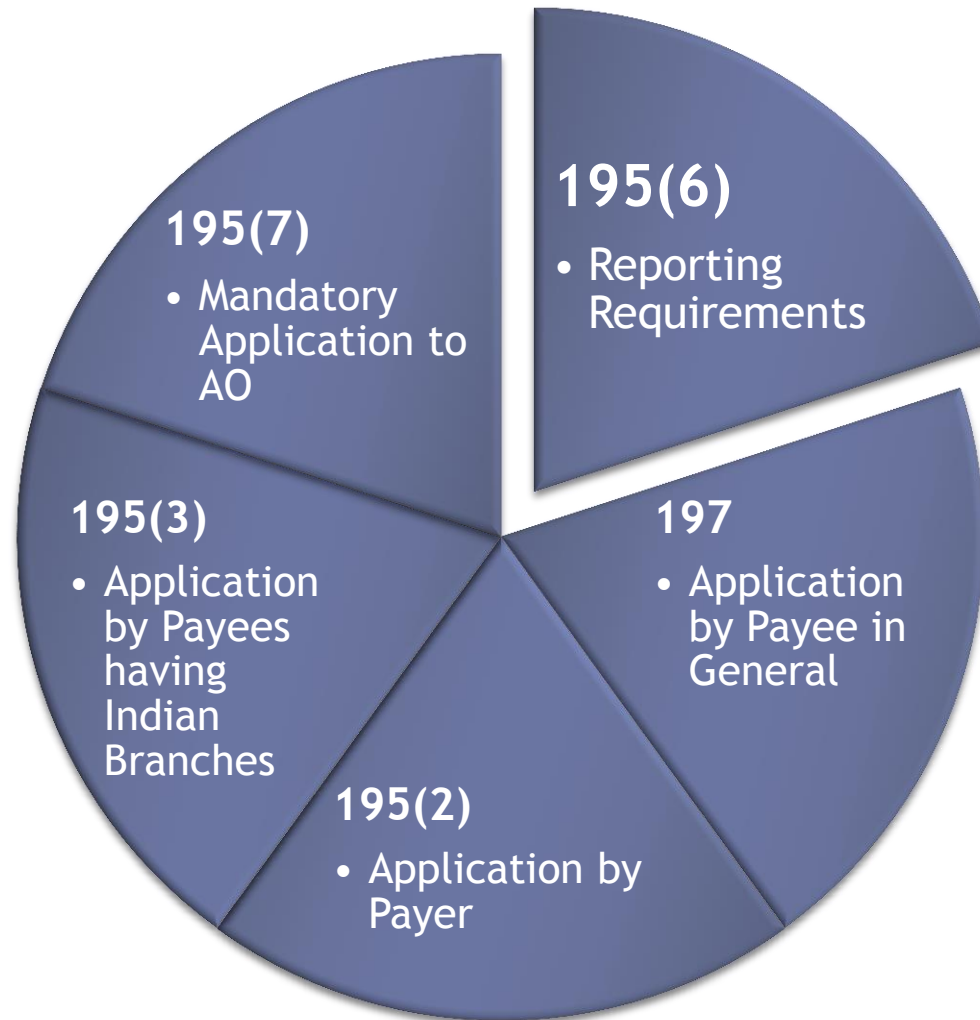
Refund of TDS

- ▶ Recipient to file return and claim refund
- ▶ Deductor - CBDT Circulars 7 of 2007 & 2011
- ▶ Application to be made within 2 years from end of FY in which tax is deducted at source
- ▶ Applicable to cases where:
 - ▶ Contract is cancelled in whole or partially
 - ▶ Change in law, or order, reducing tax liability
 - ▶ Mistakes in deduction or payment of tax
- ▶ Rule 31A(3A) - Form 26B notified

PRACTICAL ISSUES - Certificates & Procedures

- Snapshot of Certification Provisions
- Sec. 195(2) vs. Sec. 197
- Sec. 197 - Rules & Form
- Application by the Payee - Sec. 195(3)
- Reporting u/s. 195(6)
- Remittance Procedures
- Form 15CA
- Form 15CB - Analysis
- Mandatory application - Sec. 195(7)

Snapshot of Certification Provisions



Reporting u/s. 195(6)

- ▶ Person making payment to NR of any sum to furnish prescribed information online
 - ▶ *Whether or not chargeable to tax* - w.e.f. 1st June 2015
 - ▶ Scope of persons to furnish details expanded
 - ▶ But information to be furnished as prescribed
 - ▶ Rule 37BB prescribes Form 15CA and 15CB
 - ▶ Rule not yet amended
 - ▶ Procedure applicable only in case of sum *chargeable* to tax
 - ▶ Confusion prevails
 - ▶ Form 15CA and 15CB required by banks for most payments including import payments
 - ▶ New Rules awaited

Rule 37BB

- ▶ Relaxations for non-taxable payments
- ▶ Furnishing of information by the payer only if “any other sum chargeable to tax”
 - ▶ No forms to be filed on Nil deduction of tax at source?
- ▶ Forms not be filed for ‘Specified list’ of transactions
 - ▶ 28 transactions from Form A2
 - ▶ Rules amended on 5th August 2013 superseded
 - ▶ 11 transactions removed

Specified Transactions

Sr. No.	Purpose code	Nature of payment
(1)	(2)	(3)
1	S0001	Indian investment abroad -in equity capital (shares)
2	S0002	Indian investment abroad -in debt securities
3	S0003	Indian investment abroad -in branches and wholly owned subsidiaries
4	S0004	Indian investment abroad -in subsidiaries and associates
5	S0005	Indian investment abroad -in real estate
6	S0011	Loans extended to Non-Residents
7	S0202	Payment for operating expenses of Indian shipping companies operating abroad.
8	S0208	Operating expenses of Indian Airlines companies operating abroad
9	S0212	Booking of passages abroad -Airlines companies
10	S0301	Remittance towards business travel.
11	S0302	Travel under basic travel quota (BTQ)
12	S0303	Travel for pilgrimage
13	S0304	Travel for medical treatment
14	S0305	Travel for education (including fees, hostel expenses etc.)

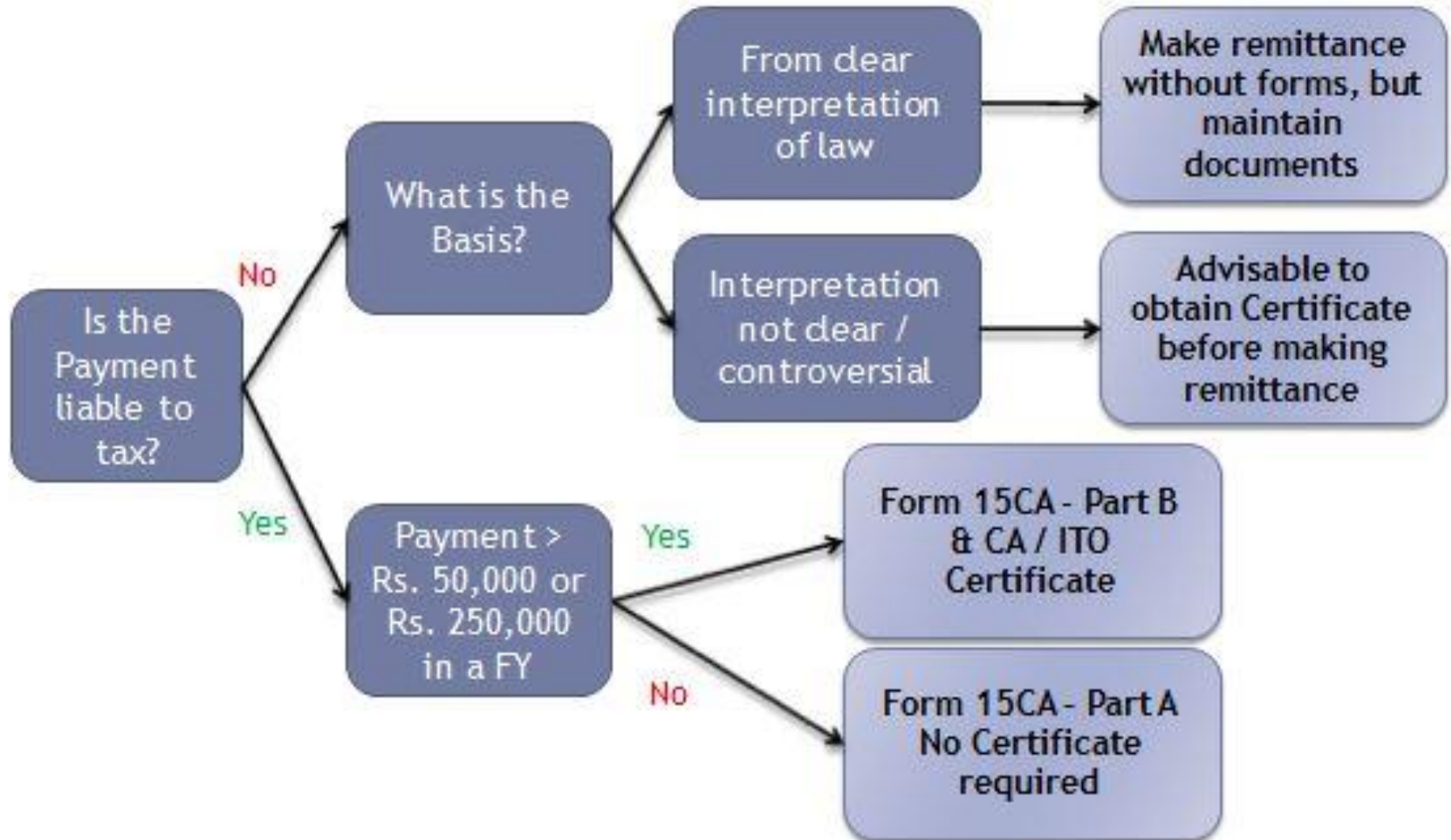
Specified Transactions...contd.

Sr. No.	Purpose code	Nature of payment
(1)	(2)	(3)
15	S0401	Postal services
16	S0501	Construction of projects abroad by Indian companies including import of goods at project site
17	S0602	Freight insurance - relating to import and export of goods
18	S1011	Payments for maintenance of offices abroad
19	S1201	Maintenance of Indian embassies abroad
20	S1 202	Remittances by foreign embassies in India
21	S1301	Remittance by non-residents towards family maintenance and-savings
22	S1302	Remittance towards personal gifts and donations
23	S1303	Remittance towards donations to religious and charitable institutions abroad
24	S1304	Remittance towards grants and donations to other Governments and charitable institutions established by the Governments.
25	S1305	Contributions or donations by the Government to international institutions
26	S1306	Remittance towards payment or refund of taxes.
27	S1501	Refunds or rebates or reduction in invoice value on account of exports
28	S1503	Payments by residents for international bidding.

Rule 37BB...contd.

- ▶ Relaxations for small taxable payments
- ▶ If payment does not exceed Rs. 50,000 and aggregate does not exceed Rs. 2,50,000 in the FY
 - ▶ Form 15CA - Part A
 - ▶ Future payments to be estimated?
- ▶ Otherwise Form 15CA - Part B along with
 - ▶ CA certificate in Form 15CB; or
 - ▶ Order u/s. 197 or 195(3)

Remittance Procedures - Flow Chart



Remittance Certificates

- ▶ Information & Undertaking - Form 15CA
- ▶ CA Certificate - Form 15CB
 - ▶ Separate certificate for each type of income
- ▶ Applicable for every remittance
- ▶ RBI mandate for NOC from IT Department in case of remittance to NR
 - ▶ Objective of CBDT circular to dispense with NOC requirement
- ▶ Is it a statutory provision or administrative?
- ▶ CA certificate not a substitute for 195(2) or 195(3)
 - ▶ Not required where order u/s.s 195(2) or 195(3) available
- ▶ CA certificate cannot be appealed against

Form 15CA - Issues

- ▶ To be signed by person competent to sign tax return
 - ▶ Digital Signature not mandatory
- ▶ Foreign Exchange rate to be used
 - ▶ As on date of deduction.
 - ▶ If at time of payment forex rate results in higher remittance - no further certificate required

Form 15CB – Analysis

- ▶ Nature of remittance as per agreement/document
 - ▶ Important for determining taxability of income
 - ▶ Documents reviewed must enable determination of nature of remittance - otherwise call for more documents
 - ▶ Declaration not enough
 - ▶ Documents that should be reviewed
 - ▶ Certified copy of signed contract
 - ▶ Certified copy of signed/stamped invoice
 - ▶ Certified ledger account
 - ▶ Correspondence on which reliance is placed including emails
 - ▶ Supporting vouchers in case of reimbursements a must
 - ▶ Print out of website details of Payee
 - ▶ Physical certificate should be amended for documents reviewed

Form 15CB...contd.

- ▶ Taxability under the provisions of the Act without considering DTAA
 - ▶ To be filled even if no tax payable as per DTAA
 - ▶ Relevant Section in case payment not income?
 - ▶ Basis of determining taxable income
 - ▶ Short reasoning online - details in physical certificate
- ▶ If the remittance is for royalties, fee for technical services, interest, dividend
 - ▶ Not connected with PE
 - ▶ No space to provide reasons
 - ▶ Proper reasoning to form part of the physical certificate
 - ▶ Detailed reasoning if rate lower than DTAA rate applied

Form 15CB...contd.

- ▶ In case remittance is on account of business income
 - ▶ Obtain proper declaration from payee for no PE in India
 - ▶ Proper validation of facts, cross-checking
 - ▶ If PE in India, whether CA can issue certificate for profits attributable?
- ▶ In case remittance is on account of Capital Gains
 - ▶ Can CA provide certificate for capital gains?
- ▶ In case of remittance other than income - mention the exact nature
 - ▶ Separate certificates for income and non-taxable capital receipts

Section 195(2) vs. Section 197

Section 195(2)	Section 197
Application by Payer - mandatory?	Application by assessee (Payee)
Application for appropriate proportion of the sum chargeable to tax - generally rate is prescribed.	Application for lower rate or nil rate for deduction of tax at source
Application to be made for each payment. Binding only for particular transaction.	Application can be for a particular period. Applicable to period for which issued.
Appealable u/s. 248	Not appealable - only writ petition
Doubts on grant of total exemption	Can provide certificate for deduction at nil rate of tax
Application to be made on plain paper	Application in Form 13

Section 197 – Rules and Form

- ▶ Rule 28A
 - ▶ Form 13
- ▶ Rule 28AA - Conditions applicable
 - ▶ Determination of existing and estimated tax liability based on
 - ▶ Tax payable on estimated income of previous year
 - ▶ Tax payable on assessed/returned income of past 3 years
 - ▶ Existing tax liability
 - ▶ Advance tax payment & Tax deducted at source
 - ▶ Certificate valid for such period of the previous year as specified
 - ▶ Will be issued direct to the person responsible for deduction of tax at source

Application by Payee -195(3)

- ▶ Payee eligible as per Rule 29B can only apply
 - ▶ Foreign Bank having Indian Branch
 - ▶ For interest or any other sum not being dividends
 - ▶ Foreign Company having Indian Branch
 - ▶ For any sum not being interest or dividends
- ▶ **Conditions**
 - ▶ Income receivable on its own account
 - ▶ Regularly assessed to tax
 - ▶ Not in default of any tax, interest, penalty or fine
 - ▶ Available for a non-banking company
 - ▶ Carrying on business since last five years
 - ▶ Value of fixed assets exceeds Rs. Fifty Lakhs
- ▶ Application in Form 15C for Banks & Form 15D for others
- ▶ No prescribed format for issue of certificate, valid for that FY
- ▶ Certificate not appealable

Mandatory application - Section 195(7)

- ▶ Mandatory application to AO for determination of sum chargeable to tax
- ▶ Even if sum is not chargeable to tax as per provisions of the Act
- ▶ Specify a class of persons or cases by notification
 - ▶ No notification yet
- ▶ General or special order of the AO
- ▶ Once order provided, deduction of tax from such sum
- ▶ No provision for appeal?

PRACTICAL ISSUES - Approach & Safeguards

- Objectives
- Checklist - Facts
- Checklist - Tax Treaty
- Some Practical Aspects

Objectives

- ▶ To determine taxability in India
- ▶ To know the actual overall tax cost
 - ▶ How would it be treated in the residence country
- ▶ To provide a complete and practical solution
- ▶ Am I safeguarding myself properly?

Checklist - Facts

- ▶ Details about the transaction
- ▶ Locking down the facts
- ▶ Residential status of the assessee
 - ▶ Tax Residency Certificate
 - ▶ PE?
- ▶ Identify the legal status of the tax payer
- ▶ Determining the Country of Residence of tax payer (CoR)
- ▶ Determining the Country of Source of income (CoS)
- ▶ Ascertaining the nature of income and its categorisation
- ▶ Declaration to be obtained for key facts

Checklist - Tax treaty

- ▶ **Applicability of treaty**
 - ▶ Residential status
 - ▶ Taxes covered
 - ▶ Persons covered
- ▶ **Must check**
 - ▶ Technical Explanation (US)
 - ▶ Protocols and Memorandum of Understandings
 - ▶ MFN clause
 - ▶ LOB clause
- ▶ **References**
 - ▶ OECD and UN Model Convention Commentary
 - ▶ Commentaries by learned authors
 - ▶ Klaus Vogel
 - ▶ Arvid Skaar

Some practical aspects

- ▶ **Cost benefit analysis**
 - ▶ Credit in the home country against tax paid in India
- ▶ **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

Some practical aspects...contd.

- ▶ Deemed anti-avoidance provisions
 - ▶ TP adjustments
- ▶ Foreign Exchange Rate
 - ▶ Rate as on the day on which tax is deducted at source as per Rule 26
 - ▶ Difference between forex rate on date of deduction and date of remittance
 - ▶ Forex gain or loss - no TDS required
- ▶ Consider for cross-checking
 - ▶ FEMA
 - ▶ Customs
 - ▶ Service tax
 - ▶ R & D cess

Thank you!

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