

Law & Procedure for foreign remittances

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Scope and Provisions

Particulars	Section	Provision
Scope	195(1)	Scope and conditions for applicability
	192/ 194LB / 194LC / 194LD /196B/ 196C/ 196D	192 – Salary payments 194LB/ 194LC/ 194LD – Interest received on specified funds / bonds / foreign currency borrowings / Govt. securities 196B/ 196C/ 196D – Income from specified securities
Procedure	195(2) / 195(3) / 197	Application by the Payer / Payee to the Tax Authorities for determining the appropriate proportion of sum chargeable to tax
	195(6)	Furnishing of information relating to payments in Form 15CA / 15CB
Rate of tax in certain cases	195A	Grossing up of tax
	206AA	Provisions in case payee does not have PAN

A close-up photograph of a person's hands in an office environment. The right hand holds a black pen, and the left hand holds a smartphone. The background is blurred, showing a laptop keyboard and some papers. A blue arrow-shaped graphic points to the right, containing the text 'Section 195 and analysis thereof'.

Section 195 and analysis thereof

Analysis of Section 195(1)

Who is responsible to deduct?

- Any person, including individuals, HUFs, partnership firms, companies, whether resident or non-resident*

Payment to whom?

- Non-residents and foreign companies
- It does not include RNOR
 - NR includes RNOR for Sections 92, 93 and 168, but not for section 195

Nature of payment?

- Interest (excluding interest under Sections 194LB, 194LC and 194LD) or any other **sum chargeable to tax**
- Salaries and exempt dividends are excluded

*Whether section 195 is applicable for transactions between two non-residents

- Single member decision in the case of Vodafone International Holdings BV v. Union of India [340 ITR 1 (SC)] held that section 195 applies only to transactions between residents and non-residents and not in cases where transaction is between two non-residents situated outside India.
- Subsequently, the law was amended vide Finance Act 2012 by insertion of Explanation 2 to Section 195 which now covers transactions between two non-residents for the purpose of section 195.

Sum Chargeable to Tax

Taxability under the Act

As per the charging provisions of the Act i.e. Section 4, Section 5 and Section 9, the following sums shall be chargeable to tax:

- Income received in India or deemed to be received in India
- Income accrued in India or arise in India
- Income deemed to accrue or arise in India

Taxability under the DTAA (Certain Examples)

Article 6	Income from Immovable Property	Article 11	Interest
Article 7	Business Profits	Article 12	Royalties and Fees for technical services
Article 8	Shipping, Inland waterways transport and Air Transport	Article 13	Capital Gains
Article 10	Dividend	Article 21	Other Income

If any sum is chargeable to tax under the Act but not chargeable under the DTAA, the said sum would not be 'sum chargeable to tax' under the Act

Analysis of Section 195(1) - 'Sum Chargeable to Tax'

Whether section 195 applies only if sum chargeable to tax?

Transmission Corporation of A. P.Ltd. [239 ITR 587 (SC)]

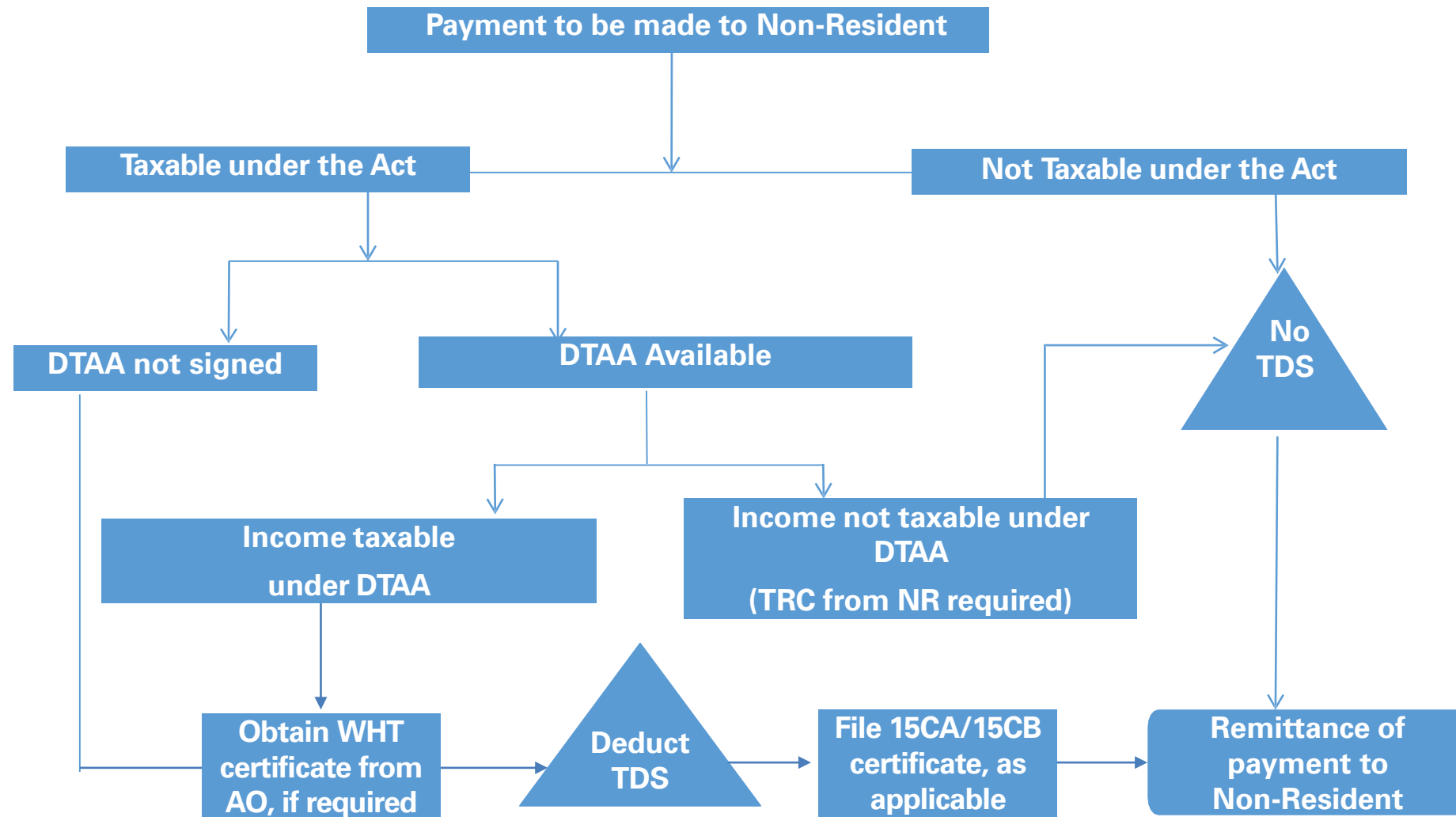
- Payment to NR towards purchase of machinery and erection & commissioning thereof
- Assessee's contention – Section 195 applies only in respect of sums comprising of pure income or profit
- Held that:
 - TDS applicable not only to amount which wholly bears income character but also to sums partially comprising of income
 - Obligation to deduct tax limited to portion of the income chargeable to tax
 - Section 195 is for tentative deduction of tax and by deducting tax, rights of the parties are not adversely affected
 - Rights of parties safeguarded by Sections 195(2), 195(3) and 197
 - File application to AO – If no application filed, tax to be deducted

Is it mandatory to file application to AO if income is not taxable at all?

GE India Technology Centre (P) Ltd. [327 ITR 456 (SC)]

- Payer not liable to deduct tax if amount not chargeable to tax
- Section 195(2) applies where the payer is in no doubt that tax is payable in respect of some part of the amount
 - It applies only in cases of composite payment, in which certain portion has an income element
- If payer is fairly certain, then he can make his own determination of TDS without approaching AO

Withholding Tax under section 195 - Summary



Certain Examples - 'Sum Chargeable to Tax'

Example	Implication	Consequences
FTS payment to a Company in Cayman Islands	Entire payment subject to tax	Tax should be withheld
Payment of FTS – Taxability under Act v/s DTAA (where 'make available benefit' is available)	Not taxable as provisions of DTAA to apply to the extent they are more beneficial	No withholding tax required
Payment to Google for advertisements (Equalization levy applicable)	Not taxable as specified services on which equalization levy is applicable is exempt from tax under section 10(50) in the hands of NR	No withholding tax required. Equalisation levy of 6% on gross consideration to be paid by payer
Contract for short duration (payee contends no constitution of PE)	Payer believes that tax should be withheld but payee does not agree	Apply to AO for determination of TDS
Import of goods on FOB basis – title transfer outside India	Entire payment not chargeable to tax under the Act	No withholding tax required
Lump sum payment for purchase of equipment incl. design, engineering, etc.	Transaction is for purchase of equipment, payment not to be treated as royalty	No withholding tax required ¹

¹ CIT v. Neyveli Lignite Corpn. Ltd. (243 ITR 459 (Mad))

Certain Examples

Example	Implication	Consequences
Contract for offshore supply of goods and onshore supply of services (Supply & service component demarcated)	Part of payment subject to tax Offshore supply – not taxable Onshore supply – taxable	Tax should be withheld on the appropriate proportion of sum chargeable to tax ¹
Turnkey project – Indivisible contract for offshore supply and services	Part of payment subject to tax in India – Payer unable to determine appropriate portion of the sum chargeable to tax	Apply to AO for determination of TDS
Payments covered under presumptive tax basis – for eg. Section 44BB	10% of payment subject to tax under section 44BB of the Act	Taxes shall be withheld at effective tax rate on income (could be litigative)
Shipping income referred under section 172	Non-resident shipping company not taxable	Section 195 not applicable ²
Decretal payments (judgement debts)	Deductions subject to Code of Civil Procedure	No withholding tax required ³

¹ CBDT Instruction No. 2/2014 dated 26 February 2014

² V.S. Dempo & Co. (P) Ltd. [381 ITR 303 (Bom.)]

³ Islamic Investment Co. Union of India (122 Taxman 719 (Bom.))

Analysis of Section 195(1)

What rate to apply?

- Deduct tax at the rates in force [as provided in the Finance Act]
- Wherever DTAA is available, rates of income-tax specified in the Finance Act or the rates specified in the DTAA shall apply, whichever is more beneficial


When to deduct?

- **The Act:** At the time of payment or credit of income to the account of the payee, whichever is earlier
 - Exception to Government, public sector banks and public financial institution – only on payment
- **Tax Treaty:**
 - Royalty or FTS arising in a Contracting State and paid to a resident of the Other Contracting State may be taxed in that Other State
 - However, such Royalty or FTS may also be taxed in the State in which they arise and according to the laws of that State

Analysis of Section 195(1)

Payment of Royalty to a Company resident in Germany under the Act v/s DTAA

Particulars	Example 1	Example 2
Date of credit	31 March 2018	10 April 2018
Date of payment	10 April 2018	31 March 2018
When to withhold tax? (at the time of payment as DTAA is more beneficial)	10 April 2018	31 March 2018

- Are rates prescribed under DTAA to be increased by surcharge and Education Cess?
 - DIC Asia Pacific Pte. Ltd. [52 SOT 447 (Kol.)]
 - Sunil V. Motiani [59 SOT 37 (Mum.)]
 - M Far Hotels Ltd. [58 SOT 261 (Cochin)]
- Payment of royalty/ FTS effectively connected with recipient's PE in India
 - TDS @40%* on net basis or 10%* on gross basis? 
- Whether TDS applicable on the goods and service tax component?
 - CBDT Circular No 23/2017 dated 19 July 2017

* Excluding surcharge and cess

Section 195(2) – Application by Payer

- **Section 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.”*
- Can application under Section 195(2) be made for NIL withholding order?
 - **Favourable**
 - Van Oord ACZ India (P) Ltd. [323 ITR 130 (Del.)]
 - Mangalore Refinery and Petrochemicals Ltd. [113 ITD 85 (Mum.)]
 - **Unfavorable**
 - GE India Technology Centre (P) Ltd. [327 ITR 456 (SC)]
 - Czechoslovak Ocean Shipping International Joint Stock Company [81 ITR 162 (Cal.)]

Section 195(2) – Application by Payer – Whether Appealable?

- Order under section 195 is per se not an appealable order
- However, order under Section 195(2) is appealable under Section 248
 - only if tax is to be borne by the payer
 - within 30 days of payment of tax [Section 249(2)(a)]
- Liability of TDS can be appealed before CIT(A) even without order from AO [Section 248]
 - CMS (India) Operations & Maintenance Co. [38 taxmann.com 92 (Chennai)]
- Order under Section 195(2) amenable to revision under Section 263 – Board of Control for Cricket in India [96 ITD 263 (Mum.)]

Section 195(3) / 197 – Application by Payee

- **Section 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(4)** – *“A certificate granted under sub-section (3) shall remain in force till the expiry of the period specified therein or, if it is cancelled by the Assessing Officer before the expiry of such period, till such cancellation.”*
- **Section 197(1)** – *“ Subject to rules made under sub-section (2A), where, in the case of any income of any person or sum payable to any person, income-tax is required to be deducted at the time of credit or, as the case may be, at the time of payment at the rates in force under the provisions of sections 192, 193, 194, 194A, 194C, 194D, 194G, 194H, 194-I, 194J, 194K, 194LA, 194LBB, 194LBC and 195, the Assessing Officer is satisfied that the total income of the recipient justifies the deduction of income-tax at any lower rates or no deduction of income tax, as the case may be, the Assessing Officer shall, on an application made by the assessee in this behalf, give to him such certificate as may be appropriate.”*

Section 195(3) / 197 - Application by Payee

Section 195(3) - Payee satisfying certain conditions can make an application

(Form 15C for banking companies or Form 15D for non-banking companies who carry out business in India through a branch)

- Prescribed conditions (Rule 29B):
 - Has been regularly filing tax returns and assessed to Income-tax
 - Not in default in respect of tax, interest, penalty, etc.
 - Additional conditions for non-banking companies:
 - Has been carrying on business or profession in India through a branch for at least 5 years
 - Value of Fixed Assets in India exceeds INR 50 Lakhs
- Certificate issued by the AO valid for the Financial Year mentioned therein

Section 197 - Any payee can apply for no deduction or lower rate of deduction

- Certificate issued by AO can be prospective only
 - Payment / credit made prior to the date of the certificate not covered
 - Circular No. 774 dated 17 March 1999

Lower withholding – A Snapshot

Particulars	Section 195(2)	Section 195(3)	Section 197
Overview	Payer having a belief that portion (not the whole amount) of any sums payable by him to non-resident is not liable to tax in India, may make an application to <u>AO to determine taxable portion</u>	Payee may make an application to AO for granting him a <u>certificate to receive income without TDS</u>	Payee may make an application to AO for granting him <u>certificate of 'Nil' or 'lower' withholding</u>
Application by	Payer	Non-resident Payee	Payee
Purpose	Determination of portion of such sum chargeable to tax	No withholding	Lower / Nil withholding
Form	No specific format	Rule 29B – Form 15C & 15D	Rule 28 - Form 13
Outcome	AO to determine the <u>appropriate proportion</u> chargeable to tax and issue order accordingly	Certificate issued by the AO subject to conditions specified in Rule 29B	Certificate to be issued by AO subject to conditions specified in Rule 28AA
Remedy	Order can be appealed under Section 248	<ul style="list-style-type: none"> • There is no provision under Chapter XX of the Act, to appeal against the certificate issued • Possible to pursue application under Section 264 • Possible to explore writ jurisdiction – Diamond Services International (P) Ltd [169 Taxman 201 (Bom)] 	

Online Applications for Lower/No Withholding Certificate under Section 197

Old procedure for filing applications

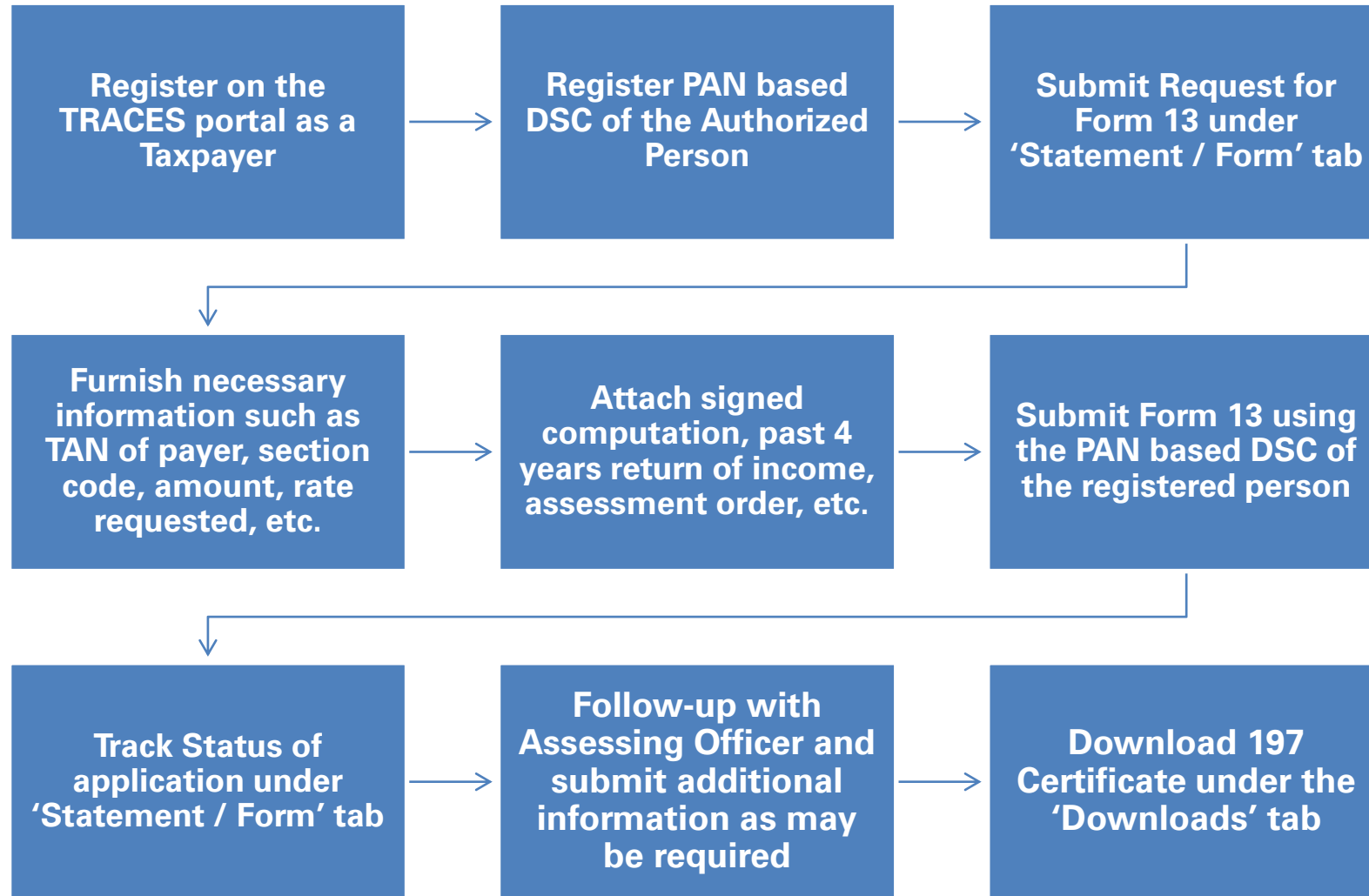
- Earlier application for lower or no withholding tax certificate were filed manually before the Assessing Officer

New procedure for filing applications

- CBDT vide Notification dated 25 October 2018 CBDT launched an online facility to file applications for no/lower withholding certificates
- The taxpayer is required to file online application for lower withholding certificate on the TRACES portal

Note: Online facility is applicable only in case of applications under section 197 in Form No. 13

Online Applications for Lower/No Withholding Certificate under Section 197



Section 195A

- Section 195A** – *“In a case other than that referred to in sub-section (1A) of section 192, where under an agreement or other arrangement, the tax chargeable on any income referred to in the foregoing provisions of this Chapter is to be borne by the person by whom the income is payable, then, for the purposes of deduction of tax under those provisions such income shall be increased to such amount as would, after deduction of tax thereon at the rates in force for the financial year in which such income is payable, be equal to the net amount payable under such agreement or arrangement.”*
- In respect of payment made ‘net of tax’ also, the payer is under legal obligation to furnish TDS certificate to the payee [Circular no. 785 dated 24 November 1999]

Particulars	Gross up calculation	Presumptive Income*	Aircraft and engine lease
(A) Income	200	200	200
(B) Tax @ 10%	20	20	No grossing up as per section 10(6BB)
(C) Total	220	220	
(D) Tax @ 10% * B	2	NA	
(E) Total	222		
(F) Tax @ 10% * D	0.2		
(G) Total	222.2		
(H) Total Income	222.2	220	
(I) Tax @10% * H	22.2	22	

*CIT v. ONGC (264 ITR 340)

A close-up photograph of a person's hands in an office environment. The right hand holds a black pen, and the left hand holds a smartphone. The background is blurred, showing a laptop keyboard and some papers. A blue arrow-shaped graphic is overlaid on the bottom half of the image, containing white text.

Section 206AA and analysis thereof

Section 206AA - An Analysis

- Requirement to withhold tax at the higher of the following rates if deductee fails to provide its PAN to the deductor:
 - Rate specified in the relevant provision of the Act (i.e. specified rates in Chp XVII-B); or
 - Withholding tax rate specified in Finance Act; or
 - Rate of 20%
- TDS as per the rates specified in DTAA
 - Serum Institute of India Ltd. [68 SOT 254 (Pune.)]
 - Infosys BPO Ltd. [154 ITD 816 (Bang.)]

Section 206AA does not override Section 90(2) of the Act; held that lower TDS as per favourable DTAA provisions applicable and not higher rate under Section 206AA
- As per Section 206AA(7), the section shall not apply to a non-resident/foreign company, in respect of:
 - payment of interest on long-term bonds referred to in Section 194LC
 - any other payment subject to such conditions as may be prescribed

Section 206AA - An Analysis

- Surcharge or education cess on maximum rate of 20% as per Section 206AA?
 - Finance Act does not include Section 206AA in its ambit for the purpose of levy of surcharge or education cess
 - No surcharge and education cess would be leviable; provided maximum rate of 20% is applied
- Section 195A vis-à-vis Section 206AA
- Bosch Ltd. [141 ITD 38 (Bang.)] – for grossing up, 10% rate should be considered

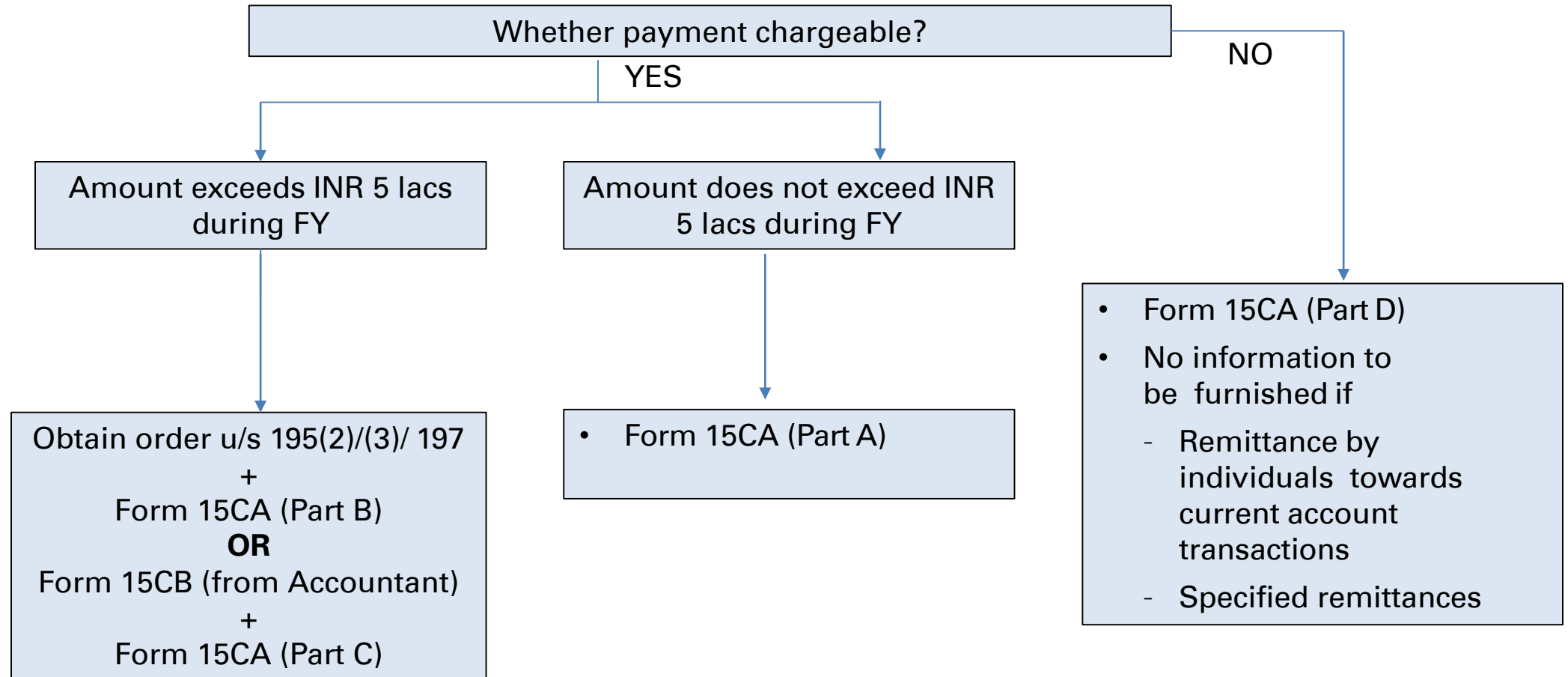
Gross-up Calculations

Particulars	Option 1 (Gross-up applicable in 'net of tax contracts')	Option 2 (Gross-up u/s 195A is done as per section 206AA)	Option 3 (Gross-up u/s 195A as per rate in force and not u/s 206AA)	Option 4 (Gross-up u/s 195A as per rate in force and penal rate is added to the amount arrived)
Net of Tax Payment to non- resident	100	100	100	100
(+) Grossing up	11.11	25	11.11	11.11
(+) Penal TDS	-	-	11.11	10
Total	111.11	125	122.22	121.11
(-) TDS (Gross up TDS + Penal TDS)	11.11	25	22.22	21.11
Payment to be made to the non-resident	100	100	100	100

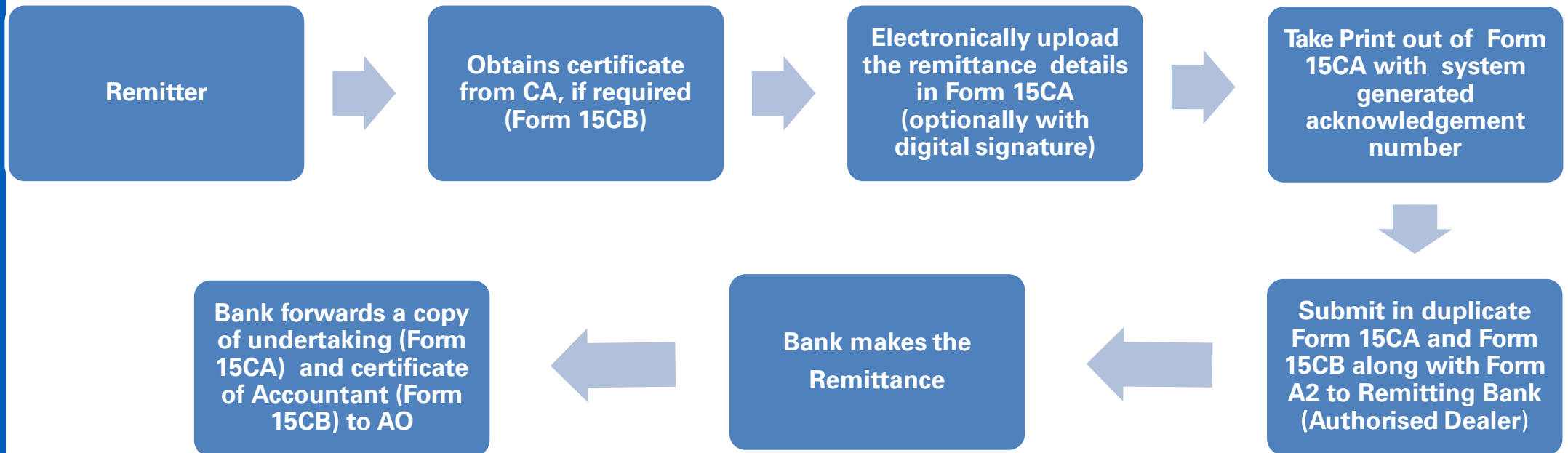
Rule 37BC

- Section 206AA shall not apply on the following payments to non-resident deductees who do not have PAN in India, subject to deductee furnishing the specified details and documents to the deductor:
 - Interest;
 - Royalty;
 - Fees for Technical Services; and
 - Payment on transfer of any capital asset
- In respect of the above, the deductee shall be required to furnish the following to the deductor:
 - name, e-mail id, contact number
 - address in the country outside India of which the deductee is a resident
 - a certificate of his being resident from the Government of that country if the law provides for issuance of such certificate
 - Tax Identification Number of the deductee/ a unique number on the basis of which the deductee is identified by the Government

Furnishing of Information for Payment to Non-resident



CA Certificate and Remittance - Process to be Followed

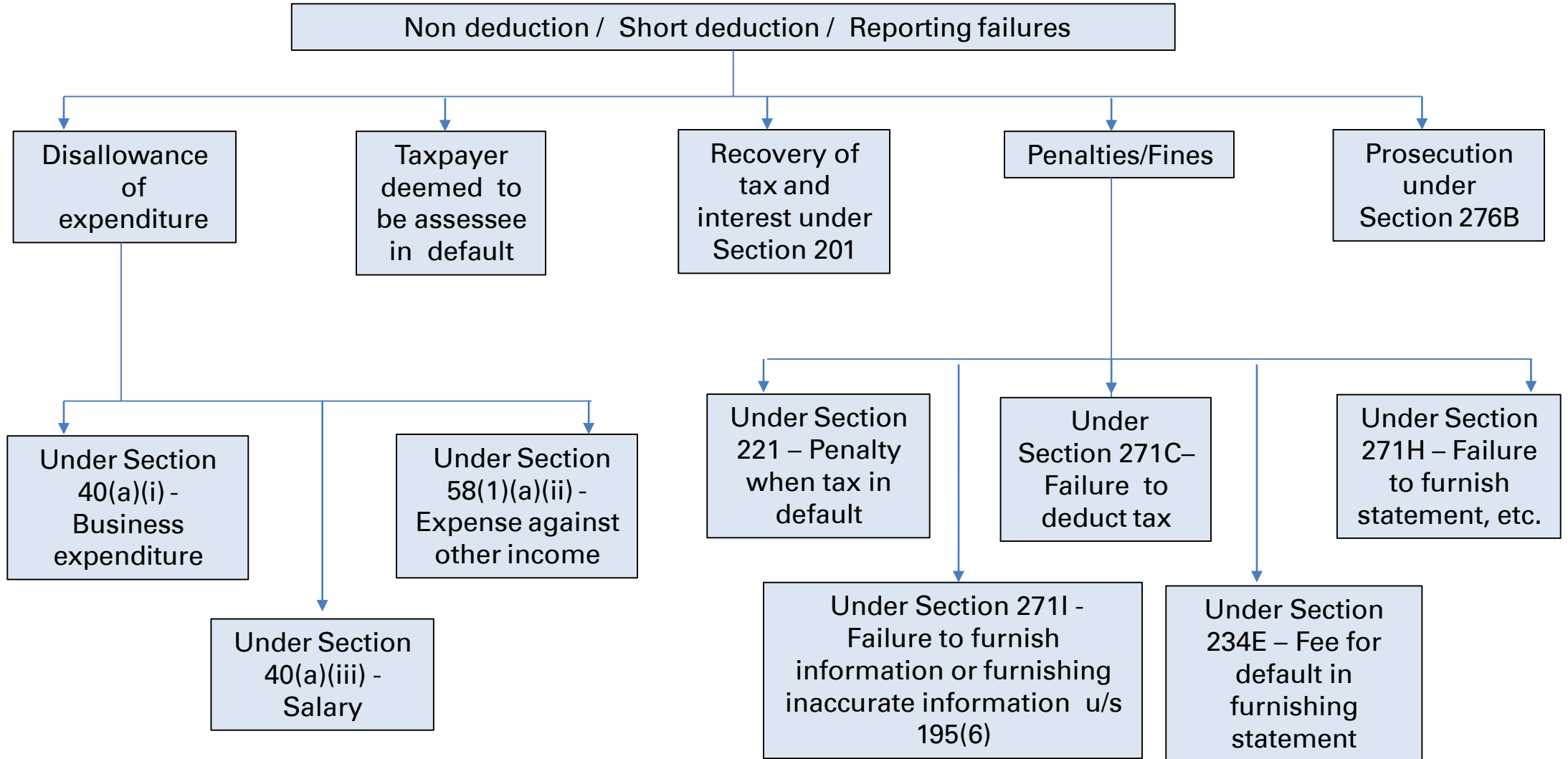


Note: For the purposes of conversion, payer shall ensure that taxes deducted at sources are converted by applying SBI TT Buying rate

Salient Documentation to be Maintained

- Suggested list – not exhaustive
 - Agreement between parties evidencing nature of payment, consideration, withholding tax borne by whom, etc.
 - Invoice
 - No PE declaration by non-resident
 - TRC in order to claim Treaty benefits
 - Declaration about the beneficial owner of royalty/ FTS
 - Opinion/ advice obtained from consultants while taking position on withholding tax implications on given transactions
 - Exchange rate letter
 - CA certificate in Form No. 15CB

Consequences of Non / Short Deduction or Reporting Failures



Questions & Answers



Questions



Answers



Tax Deduction on Specified Transactions

Section	Implication
194LB	TDS of 5% on interest income payable by a infrastructure debt fund referred under section 10(47)
194LC	TDS of 5% on interest income payable by a specified company or a business trust on foreign currency borrowings and rupee denominated bonds
194LD	TDS of 5% on interest income earned by FII or QFI on rupee denominated bonds of ICo or Govt. security
196B	TDS of 10% on income payable to offshore fund in respect of units specified in section 115AB or by way of long term capital gain arising on transfer of such units
196C	TDS of 10% on income by way of interest or dividends in respect of bonds or Global Depository Receipts or by way of long term capital gains arising on transfer of such bonds of Global Depository Receipts
196D	TDS of 20% on income of FII in respect of securities referred in section 115AD(1)(a), other than interest referred in section 194LD

Royalty under DTAA between India and Germany

Article 12 – Royalties and Fees for Technical Services

1. Royalties and fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.
2. However, such royalties and fees for technical services may also be taxed in the Contracting State in which they arise and according to the laws of that State, but if the recipient is the beneficial owner of the royalties, or fees for technical services, the tax so charged shall not exceed 10 per cent of the gross amount of the royalties or the fees for technical services.



TDS on Royalty under the Finance Act, 2018

Provision	Rate
<p>(v) on income by way of royalty [not being royalty of the nature referred to in sub-item (b)(iv)] payable by Government or an Indian concern in pursuance of an agreement made by it with the Government or the Indian concern and where such agreement is with an Indian concern, the agreement is approved by the Central Government or where it relates to a matter included in the industrial policy, for the time being in force, of the Government of India, the agreement is in accordance with that policy –</p> <p>(A) where the agreement is made after the 31st day of March, 1961 but before the 1st day of April, 1976;</p> <p>(B) where the agreement is made after the 31st day of March, 1976</p>	<p>50 per cent</p> <p>10 per cent</p>
<p>(vi) on income by way of fees for technical services payable by the Government or an Indian concern in pursuance of an agreement made by it with the Government or the Indian concern and where such agreement is with an Indian concern, the agreement is approved by the Central Government or where it relates to a matter included in the industrial policy, for the time being in force, of the Government of India, the agreement is in accordance with that policy –</p> <p>(A) where the agreement is made after the 29th day of February, 1964 but before the 1st day of April, 1976</p> <p>(B) where the agreement is made after the 31st day March, 1976</p>	<p>50 per cent</p> <p>10 per cent</p>





Thank You

The information contained herein is of general nature and is not intended to address the circumstances of any particular individual or entity. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.