



WIRC OF THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

Overview of Section 195 and Form 15CA/CB

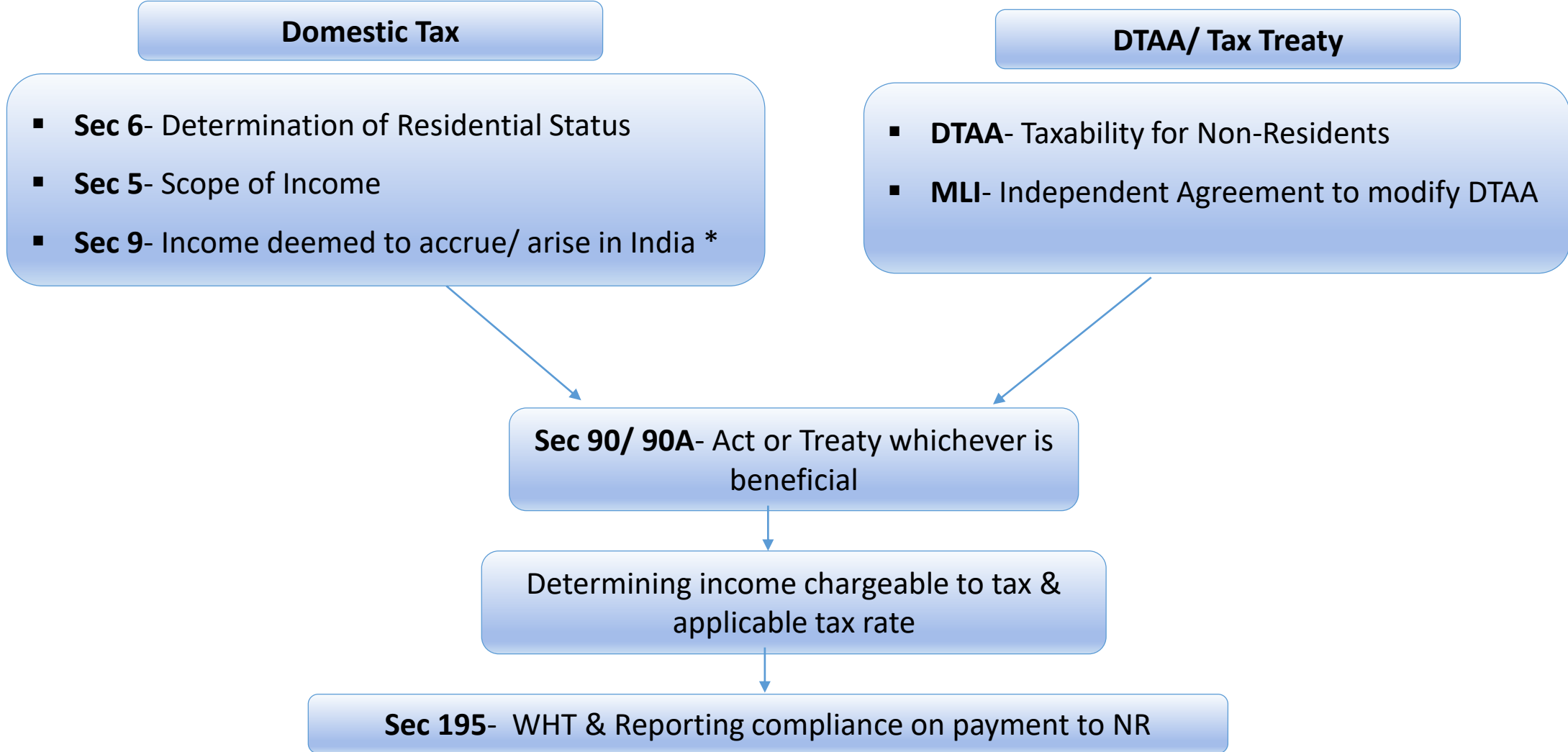
- CA Niraj B. Chheda

Webinar on FEMA & International Taxation for CA Students

17 September 2022



BIRD'S EYE VIEW : NON-RESIDENT



* Other deductions/ exemptions/ provisions of the Act to be considered.



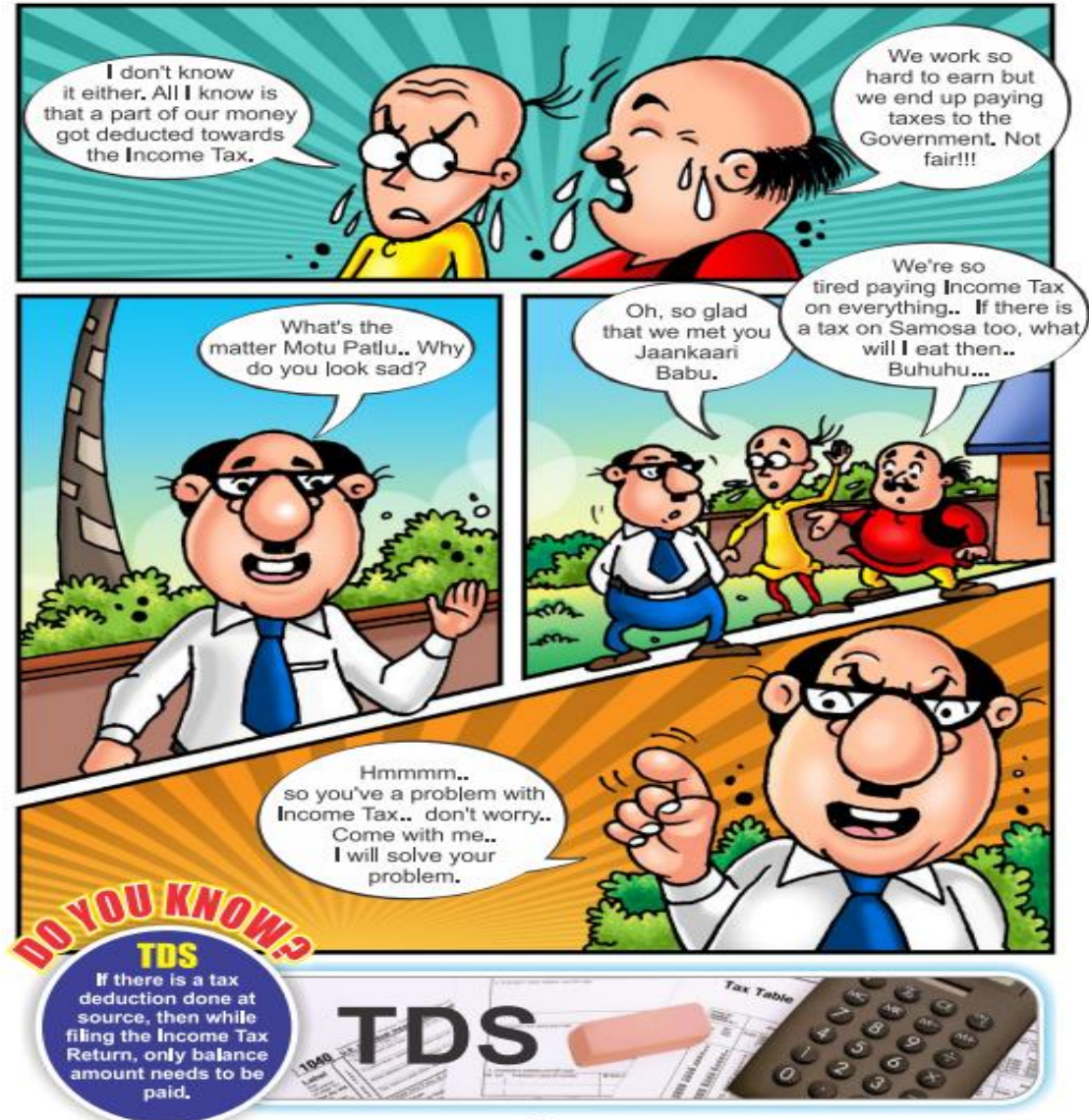
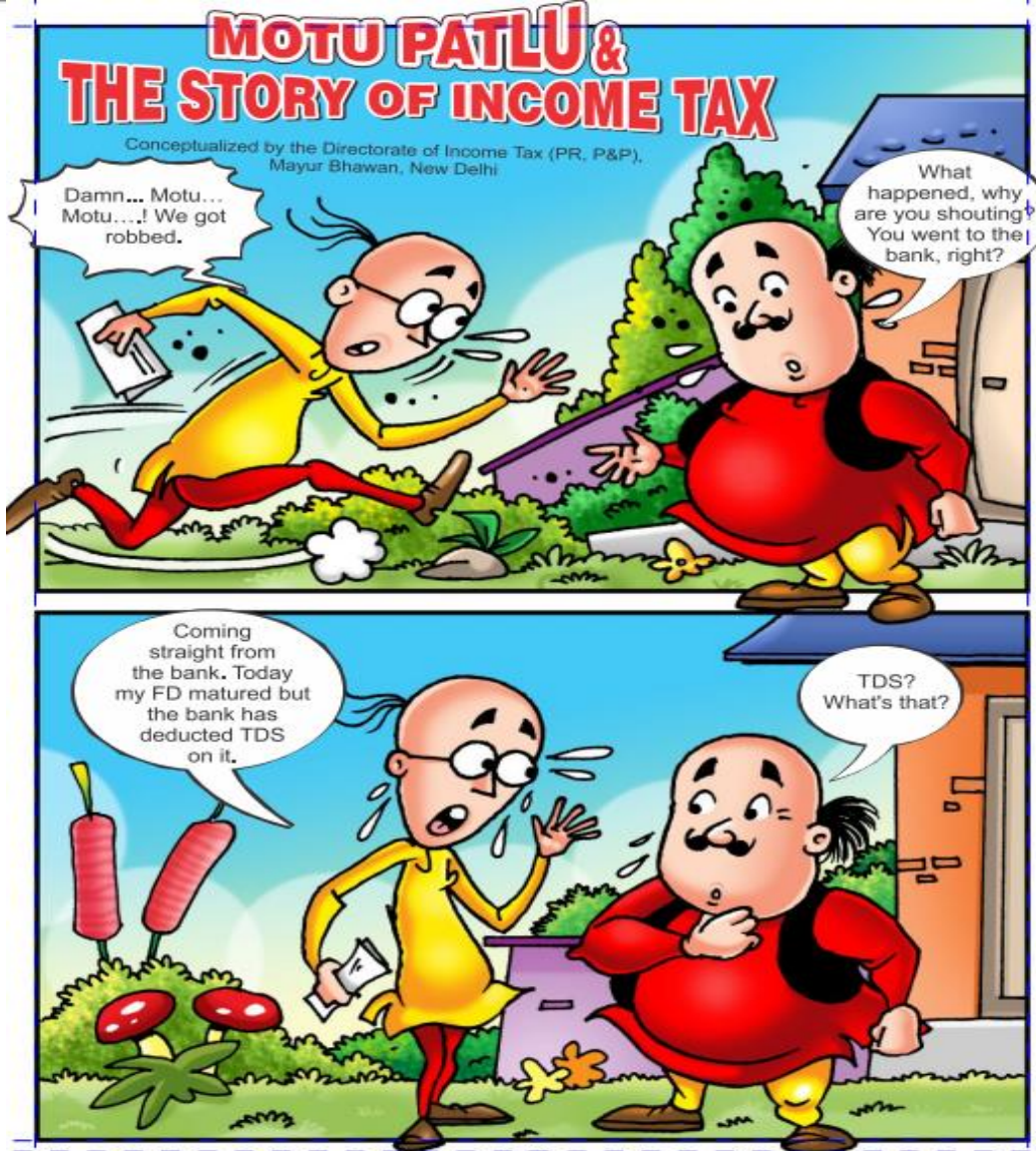
NATURE OF COMMON PAYMENTS

Nature of Income	ITA (Section)	UN Model Convention	OECD Model Convention
Business Income	9 (1)(i)	Article 7/ Article 5/ Article 14	Article 5/ Article 7
Capital Gains	9 (1)(i)/ 111A/ 112/ 112A	Article 13	Article 13
Income from Immovable Property	9 (1)(i)	Article 6	Article 6
Other Income	9 (1)(i)/ 9 (1)(viii)	Article 21	Article 21
Salary	9 (1)(ii)/ 9 (1)(iii)	Article 15/ Article 16/ Article 19	Article 15/ Article 16/ Article 19
Dividend	9 (1)(iv), Sec 115A	Article 10	Article 10
Interest	9 (1)(v), Sec 115A	Article 11	Article 11
Royalty & Fees for Technical Services	9 (1)(vi)/9(1)(vii)/ Sec 115A/ 44DA	Article 12 / 12A	Article 12

Apart from above, charging sections and other computational provisions for respective head of income should also be referred.



MOTU PATLU & THE STORY OF INCOME TAX



* Source: <https://incometaxindia.gov.in/Documents/comic-books/Motu-patlu-and-the-story-of-income-tax-english.pdf>



TDS – GENERAL PRINCIPLES

Quick & smooth collection of Tax

Tackling tax evasion

Burden on deductors - Service to Government yet exposed to recovery, interest, penalties & prosecution!

44.3% contribution of TDS in Gross collection of Direct Taxes for F.Y. 2021-22 (*as on 16.03.2022*)

“TDS deduction is tentative & subject to adjustment at the time of final assessment. This exercise cannot and need not be as precise, scientific or accurate as the determination of the tax liability in the course of an assessment.”

- 238 ITR 575 (AAR)



OVERVIEW- SECTION 195

Section	Provisions
195(1)	Scope and conditions for applicability
195(2)	Application by the 'Payer' for lower withholding
195(3)	Application by the specified 'Payee' for Nil withholding
195(4)	Validity of certificate issued by the AO u/s 195(3)
195(5)	CBDT empowered to make Rules in respect of sec 195(3)
195(6)	CBDT empowered to provide forms in which information to be furnished
195(7)	CBDT empowered to specify class of persons or cases (where recipient is NR) who will be mandated to furnish application to AO for determination of withholding rate
195A	Grossing up of Tax



SECTION 195(1) - EXTRACT

Sec 195(1)

Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest (not being interest referred to in section 194LB or section 194LC or section 194LD) or **any other sum chargeable under the provisions of this Act** (not being income chargeable under the head "Salaries") shall, **at the time of credit** of such income to the account of the payee or at the time of **payment** thereof in cash or by the issue of a cheque or draft or by any other mode, **whichever is earlier**, deduct income-tax thereon at the **rates in force**.

No basic threshold



SECTION 195(1) - ANALYSIS

Payer

- **Any person** responsible for paying to a non-resident, not being a company, or to a **foreign company**
- Any Person – includes all persons, **resident or non-resident** whether or not the non-resident person has
 - (i) a residence or place of business or business connection in India; or
 - (ii) any other presence in any manner whatsoever in India
- No relaxation for individual/ HUF unlike domestic tax provision

Payee

- Non-resident, not being a company or foreign company
- Includes foreign company considered as Indian Resident based on POEM
(*Notification No. 29/2018 dated 22nd June 2018*)



Whether payee
Includes
Resident and Not
Ordinary Resident
(RNOR) ??



Payments Covered

- Any interest (not being interest referred to in section 194LB or section 194LC or section 194LD) **OR**
- **Any other sum chargeable under the provisions of this Act** (not being income chargeable the head "Salaries")
 - Any other sum chargeable under the provisions of this Act would mean sum on which income tax is leviable. – **Transmission Corpn. Of A.P.Ltd v. CIT [1999] 105 Taxman 742/239 ITR 587 (SC)**
 - Where payment, made by resident to non-resident, was an amount not chargeable to tax in India, no tax is deductible at source even though assessee has not made an application before the Assessing Officer(AO) - **GE India Technology Centre Pvt. Ltd (327 ITR 456) SC**
 - **CBDT Instruction No. 2/2014 dated 26 February 2014:** - *“...the Board hereby directs that in a case where the assessee fails to deduct tax under section 195 of the Act, the Assessing Officer shall determine the appropriate proportion of the sum chargeable to tax as mentioned in sub-section (1) of section 195 to ascertain the tax liability on which the deductor shall be deemed to be an assessee in default under section 201 of the Act...”*



Time of Deduction

Deduction shall be made

- **at the time of credit** of such income to the account of the payee or
- **at the time of payment** thereof in cash or by the issue of a cheque or draft or by any other mode,

whichever is earlier

Exception: Interest payable by the Government or a public sector bank or a public financial institution within the meaning of Sec 10 (23D) shall be made **only at the time of payment.**



DTAA – General

- **FTS, Royalty, Dividend, Interest**

- Arising in a contracting state and **paid** to a resident of the other contracting state...

- Royalty/ FTS taxable on payment basis

[(CIT vs Siemens Aktiengesellschaft (ITA No. 124 of 2010)(Bombay HC)]

- Matter referred to larger bench to examine connotations of expression 'paid' in treaty

[Ampacet Cyprus Ltd. (119 taxmann.com 277) (Mumbai Tribunal)]

- **Sec 43(6) Definition of "Paid"**

*"Paid means actually paid or **incurred** according to the method of accounting upon the basis of which the profits or gains are computed under the head 'Profits & Gains of Business or Profession'."*



Modes of Payment

Section 195(1) covers payment in cash, by cheque or draft or by any other mode

TDS applies even in cases where:-

- Payment is not in terms of money as the same would constitute 'any other mode':
 - Charter fee for fishing vessels was paid in the form of fish catch, **Kanchanganga Sea Foods Ltd.[2010](325 ITR 540)(SC)**
 - Shares were issued as consideration for provision of technology & know-how, **BIOCON Biopharmaceuticals (P.) Ltd.[2013](144 ITD 615)(Bang ITAT)**
- Amount payable to Non-resident is deducted by the Non-resident from amounts due to the resident payer; such adjustment shall also be considered as 'any other mode' – **Raymond Ltd [2003](86 ITD 791)(Mum ITAT)**



Deduction Rates

Deduction shall be made at the rates in force

- Sec 2 (37A)(iii) defines rates in force in connection with Sec 195 as:
 - Rates as specified in the Finance Act of the relevant year [Part II of First Schedule of Finance Act]

OR

- Rates specified in DTAA

whichever is beneficial as per Sec 90(2)/ 90A(2)

- No surcharge and education cess on rates specified in DTAA
- Exchange rate for TDS on foreign currency payments (Rule 26B) - SBI Telegraphic transfer buying rate (TTBR) as on date on which tax is required to be deducted at source.



SECTION 206AA R.W. RULE 37BC- FAILURE TO FURNISH PAN

Notwithstanding the other provisions, **failure to furnish PAN** by the NR payee shall entail TDS at **higher of the -**

- rate specified in the relevant provision of the Act
 - rate or rates in force
 - 20%
-
- Applicable even if PAN is incorrect/ invalid
 - Surcharge & Education cess not to be applied on 20% tax rate u/s 206AA - Computer Sciences Corporation India (P.) Ltd. [2017] (163 ITD 151)(Del ITAT)
 - Beneficial DTAA provisions to override section 206AA irrespective of the non obstante clause - Danisco India (P.) Ltd. [2018] 90 taxmann.com 295 (Delhi HC); Nagarjuna Fertilizers & Chemicals Ltd. [2017](185 TTJ 569)(Hyd ITAT)(SB), contrary view possible
 - Unlike GAAR provisions which override DTAA, there is no express provision to give overriding effect to section 206AA

Relaxation from Higher Withholding:

- For payments in the nature of Interest, Royalty, FTS, Dividend, Capital gains, if the NR payee furnishes following details/documents:
 - Name, e-mail id, contact number, address in the country of residence
 - TRC of the country of residence if the law of that jurisdiction issues TRC
 - Tax identification or unique identification number in the country of residence



SECTION 195 (2)

- Application by payer if whole sum payable to Non-Resident (other than salary) not chargeable to tax
- Application to be made in Form 15E (Rule 29BA)
- Valid only for non-resident payee mentioned in the certificate
- Valid for the period specified unless cancelled by the AO before the expiry
- Fresh application can be made after expiry or 3 months before the expiry of existing certificate
- Application for NIL TDS - Debatable



SECTION 195 (3)

- Application by payee (recipient of income) for receiving any sum without deduction of tax
- Eligible payee
 - Branch of Banking Company or an Insurer having any income (other than specified interest or dividend)
 - Any other branch carrying on business / profession (other than for interest or dividend)
- Eligibility conditions
 - Regularly assessed to tax and furnishes return of income
 - Not in default/ not deemed to be in default under the Act
 - Other than Banking Company/ Insurer
 - (i) Carrying on business/ profession in India continuously for minimum 5 years AND
 - (ii) Value of fixed assets in India exceeds INR 50 lakhs
- Application to be made by-
 - Banking Company/ Insurer – Form 15C
 - Others - Form 15D
- Certificate valid for specified F.Y. unless cancelled by AO
- Fresh application can be made after expiry or 3 months before the expiry of existing certificate



COMPARATIVE ANALYSIS

Particulars	Section 195(2)	Section 195(3)	Section 197
Application by	Payer	Eligible payee being Branch carrying on business/ profession in India	Payee *
Purpose	Application for nil withholding <i>(withholding at lower rate - debatable)</i>	Application for nil withholding	Application for lower/ nil withholding
Appealable	Appealable u/s 248 only if tax borne by payer	No appeal can be filed	No appeal can be filed
Application form	Form 15E	Form 15C/ 15D	Form 13

**PAN of payee is mandatory, for application of sec 197*



SECTION 195A - GROSSING UP

- If the payer bears the tax liability i.e. payment is “net of tax” then for computing TDS, income should be grossed up at the rate in force

- **Illustration:**

Tax Rate as per Treaty – 10%

Rate as per 206AA – 20%

Particulars	Treaty Rate	206AA	
		Scenario I	Scenario II*
Net of tax payment to NR	100	100	100
(+) Grossing up	11.11	25	11.11
Total	111.11	125	111.11
TDS	11.11	25	22.22

** In case of Bosch Ltd. Vs. ITO [28 taxmann.com 228 (Bang. Tr)] grossing up principle @ 10% rate should be considered and not 20% u/s 206AA. Other alternative calculations may be possible*



REFUND U/S 195 IN CASE TAX BORNE BY PAYER

- Application for refund of taxes deducted by payer
- Tax borne by payer under agreement/ arrangement in writing
- Applicable for TDS u/s 195 on Income (other than Interest)
- Application to be filed before AO within 30 days from the date of payment of such tax in Form 29D
- AO to pass order within 6 months from end of month in which application is received



TDS u/s 195 COMPLIANCE

▪ Compliance on Withholding:

Compliance	Due-dates
Date of payment of TDS	<ul style="list-style-type: none">▪ On or before 30th April for March▪ Other than March, 7th of next month in which TDS is to be deducted
Furnishing of TDS certificate	Within 15 days from due date of filing of TDS return

▪ Due date for filing TDS return in Form 27Q

Quarter	Due date for filing TDS return
April to June	July 31
July to September	October 31
October to December	January 31
January to March	May 31



CONSEQUENCES FOR NON-COMPLIANCE

Section	Non-Compliance	Consequences
40(a)(i)	Non deduction of TDS or non payment of tax deducted on or before due date u/s 139(1)	100% disallowance
	Above tax deducted in subsequent year or payment for unpaid TDS of earlier year done in subsequent year post due date u/s 139(1)	Allowance in the year of tax payment
201(1)	Person making default in deduction or deposit of TDS	Treated as Assessee in Default; penalty u/s 221
201(1A)	Person making default in deduction or deposit of TDS	Interest @1% or 1.5% per month or part of the month from the date on which tax was deductible/ deducted till date of tax deduction or payment
221	Person considered as Assessee in Default due to non-payment of tax	Penalty as prescribed by AO the amount of which shall not exceed the amount of tax in arrears.

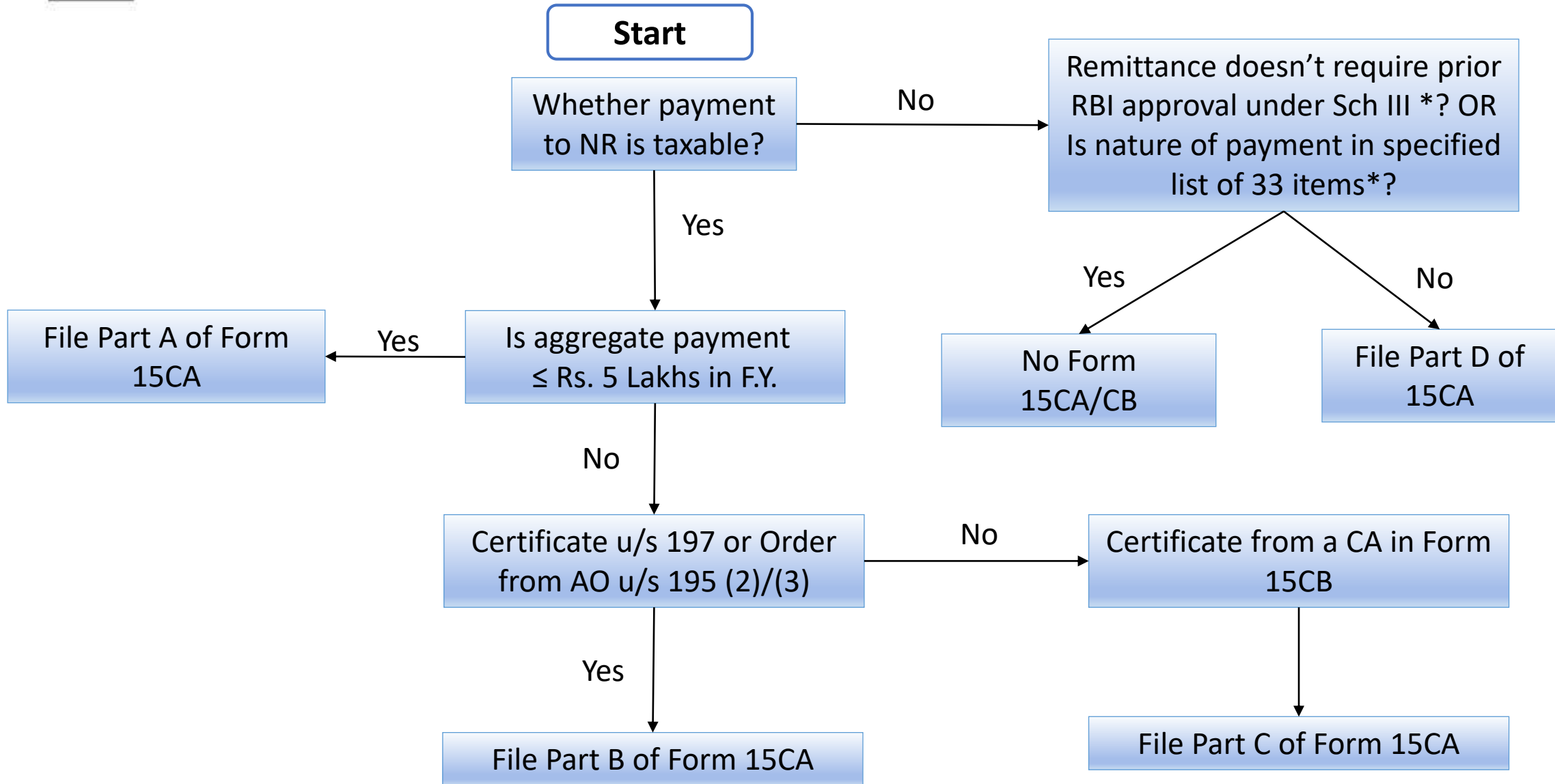


CONSEQUENCES FOR NON-COMPLIANCE

Section	Non-Compliance	Consequences
271C	Failure to deduct tax appropriately or payment of tax	Penalty - Amount equivalent to such tax not deducted/ paid
271I	Failure to furnish information or furnishing inaccurate information as required by Sec 195(6)	Penalty - INR 1,00,000
271J	CA furnishing incorrect information in certificates	Penalty - INR 10,000 for each such certificate



FORM 15CA/CB



* Current Account Rules under FEMA, Rule 37BB



FORM 15CA / 15CB

- Form 15CB requires details of payment, TDS rate, TDS deduction as per Section 195 of the ITA / DTAA, and other details of nature and purpose of the remittance
- UDIN is to be generated at the time of signing the certificate
- Form 15CA /CB has to be filed before remittance is made. Form does not allow prior dates under field 'proposed date of remittance'
- Form 15CA/CB can be withdrawn within 7 days of submission
- Once form 15CA Part C is filed, form 15CB cannot be withdrawn
- Once form 15CA Part C is withdrawn, corresponding 15CB will also get withdrawn
- On successful filing of the corresponding Form 15CA-Part C, status of Form 15CB shall update to 'Consumed'



CHECKPOINTS FOR FORMS 15CA / 15CB

- PAN/Tax Identification Number
- Determination of Residential Status
- Agreements / Invoices / Correspondence
- Website of the payee, if any
- Taxability (Income Tax + Treaty benefit + MLI)
- Beneficial ownership / Limitation of Benefit / Principal Purpose Test
- TRC, Form 10F, Permanent Establishment Declaration
- Declaration for Significant Economic Presence
- Management Representation Letter
- Tax Indemnity Letter



IMPORTANT POINTS FOR TREATY BENEFIT

TRC

- Sec 90(4)- TRC mandatory to claim Treaty benefit
- Mere non-furnishing of TRC cannot deny treaty benefits [*Skaps Industries India Pvt.Ltd. v. ITO [TS-330-ITAT-2018(Ahd)]; Sreenivasa Reddy Cheemalamarri v.ITO [TS-158-ITAT-2020(HYD) -]*]
- Form 15CB asks specific question whether TRC is obtained

Form 10F

- Taxpayers are required to furnish certain information like status, nationality, address, TIN, residency period etc in Form 10F if the same is not mentioned in the TRC
- Online Filing of Form 10F w.e.f. 16th July, 2022 - Verification through DSC/EVC by payee
- PAN of payee is required to file Form 10F online
- Copy of TRC along with Form 10F to be submitted online on income tax portal
- Payee to obtain online copy of Form 10F filled along with acknowledgement- Practical challenges!



POINTS FOR DISCUSSION

- Payment to NRO A/c
- Payment by credit cards
- Income not taxable on account of losses – Part C/ Part D of Form 15CA
- TRC not available/ Available for prior period
- TRC not in English
- Business registration certificate instead of TRC
- Reimbursement of expenses
- Payment for import of goods



GLOSSARY

Abbreviations	Full Forms
AO	Assessing Officer
CBDT	Central Board of Direct Taxation
DTAA/Treaty	Double Taxation Avoidance Agreement
F.Y.	Financial Year
ITA/Act	Income Tax Act
MLI	Multilateral Instruments
NR	Non- Resident
TRC	Tax Residency Certificate
WHT	Withholding Tax

