

# **Section 195 - Issues**

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# Some broad principles

- If a person is not liable for payment of tax at all, at any time, the collection of tax from him with a possible contingency of refund at a later stage, will not make the original levy valid : Bhawani Cotton Mills Ltd vs State of Punjab (1967) 20 STC 290 (SC), Suman Enterprises 69 KLJ 1 Kar and Bharti Airtel 372 ITR 33 Kar
- ***ex abundanti cautela*** - Poompuhar Shipping Corpn. Ltd. vs. ITO (2007) 108 TTJ (Chennai) 970

# Statutory obligation on payer



- Making TDS is mandatory
- TDS does not substitute the obligation of receiver of income to file return
- If TDS is not done, receiver is finally liable – Sec 191
- Tax free income to be grossed up for TDS purpose [Sec 195A]
- Tax deducted is income received [Sec 198]

# TDS and Receiver's status

## ▶ Resident - Certain payments

- Salaries [192 & 192A]
- Interest on securities [193]
- Dividend [194]
- Other interest [194A]
- Lottery/horse race [194B&BB]
- Contracts [194C]
- Insurance commission [194D]
- Life Insurance policy [194D]
- NSS payments [194EE]
- Repurchase of some units [194F]
- Lottery commission [194G]
- Commission/brokerage [194H]
- Rent [194I]
- Purchase of Imm. property [194IA]
- Professional payment [194J]
- Compensation for non agri land [194LA]
- Income of business trust [194LBA(1)]
- Investment fund [194LBB]

## ◀ Non resident - All payments

- Any interest [195]
- Any other sum chargeable under IT Act (except salaries) [195]
- Income in respect of units of Non Residents [196A]
- Income & Long term capital gain of offshore fund [196B]
- Interest/long term capital gain from bonds/GDRs [196C]
- Interest on securities of FIIs [196D]
- Non resident sportsmen/association [194E]
- Interest from infrastructure debt fund [194LB]
- Income of business trust [194LBA(2)]
- Interest from Indian company [194LC]
- Payment to FII/QFI [194LD]

# Payments to a Non-Resident

- ❖ General payments (excluding salaries) – Sec 195
- ❖ Income from units of mutual fund – Sec 196A (NA)
- ❖ Income & Long term capital gain of offshore fund [196B]
- ❖ Interest/long term capital gain from bonds/GDRs [196C]
- ❖ Interest on securities of FIIs [196D]
- ❖ Non resident sportsmen/association [194E]
- ❖ Interest from infrastructure debt fund [194LB]
- ❖ Income of business trust [194LBA(2)]
- ❖ Interest from Indian company [194LC]
- ❖ Payment to FII/QFI [194LD]

# PAYMENTS REQUIRING TDS IN RESPECT OF PAYMENTS TO NON RESIDENTS

Sec 192 : Salary

Sec 194 B : Winnings from lottery or crossword puzzle

Sec 194BB : Winnings from horse race

Sec 194G : Commission etc on the sale of lottery tickets

## Section 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 under sec 194LB/LC 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:

## **Section 195 (1) - Exceptions**

- 1. Provided** that in the case of interest payable by the Government or a public sector bank within the meaning of clause (23D) of section 10 or a public financial institution within the meaning of that clause, deduction of tax shall be made only at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode :]
- 2. Provided further** that no such deduction shall be made in respect of any dividends referred to in section 115-O



## **Section 195 (1) – Explanation 1**

1. For the purposes of this section, where any interest or other sum as aforesaid is
2. credited to any account, whether called "Interest payable account" or "Suspense account" or by any other name, in the books of account of the person liable to pay such income,
3. such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly

## **Section 195 (1) – Explanation 2**

1. For the removal of doubts, it is hereby clarified that the obligation to comply with sub-section (1) and to make deduction thereunder
2. applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to
3. 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

# Section 195 – Some basic aspects

Payer

Payee

Payer
Payee

# Section 195 – Recent Issues

Domestic payments	Turnkey contracts
Section 115E	Provision entries
Retrospective default	TDS and net payments
Payment in kind	Section 206AA
Section 40a(i)/(iii)	Lower TDS certificate
TRC requirement	Grossing up
HO and PE	Others

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PAYER

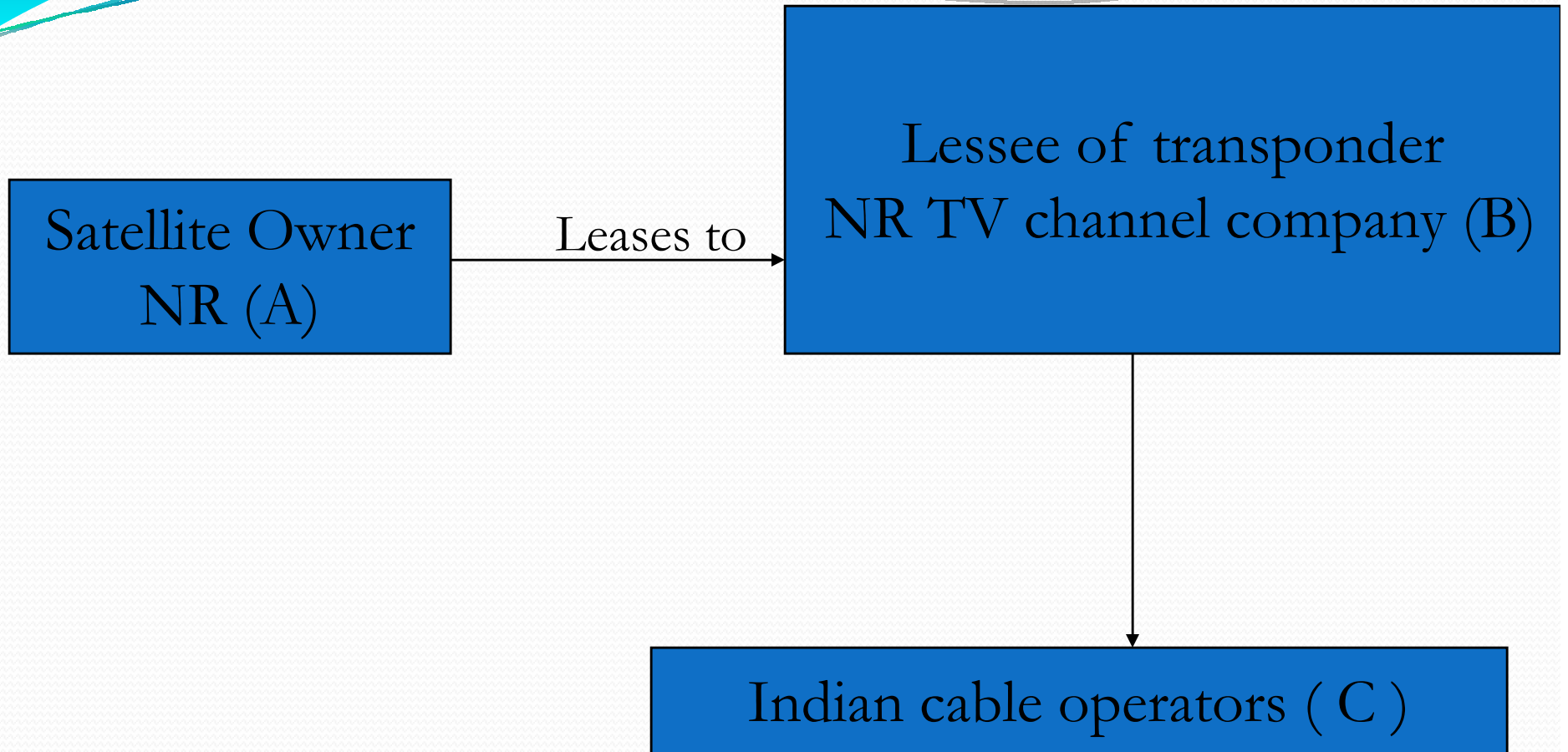


# BASIC ASPECTS

# Any person responsible for paying - Payer

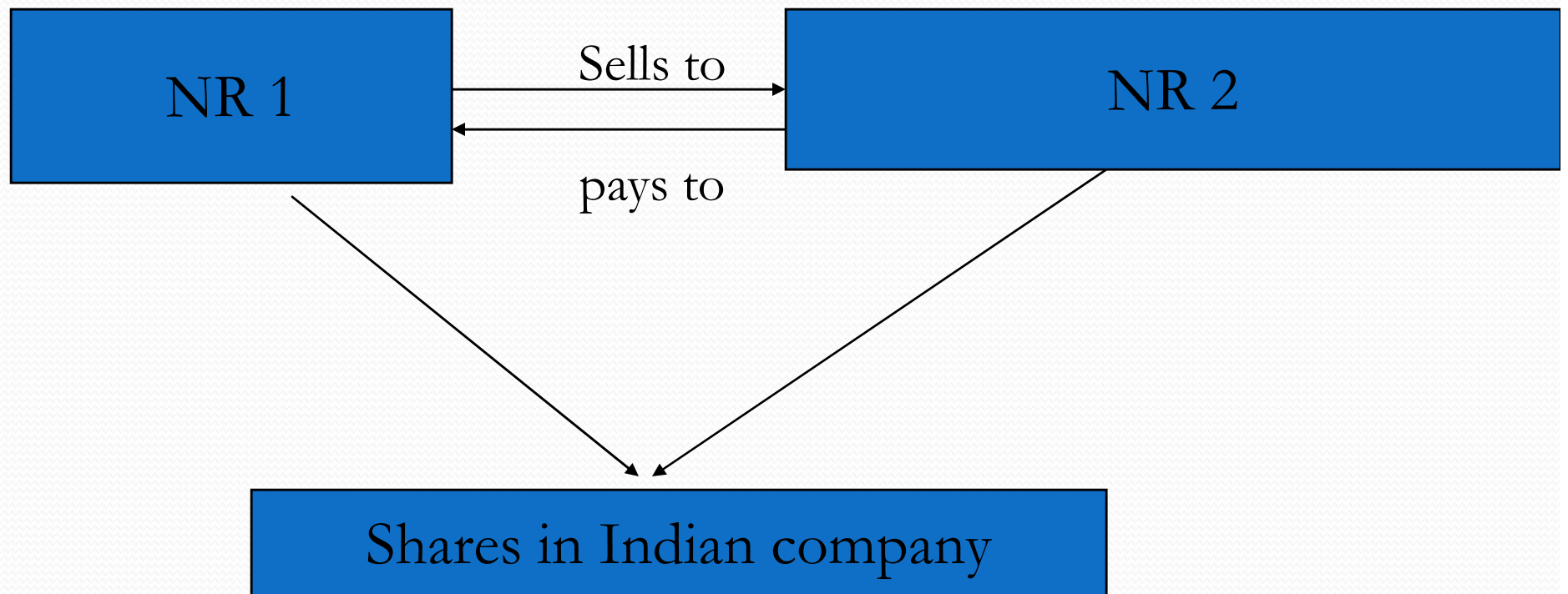
- Person : See section 2(31)
- Covers individual, HUF also
- Covers person of any residential status – NR/NOR/R
- NR paying to another NR in respect of payment outside India is also covered

# Example 1





## Example 2



## Payer ( contd..)

- Does it amount exercise of extra territorial jurisdiction when TDS is sought to be enforced on a non resident outside India – section 173 and section 228A
- Constitution – 245 (2)
  1. CIT vs. Eli Lilly and Co. [2009] 312 ITR 225 [SC]
  2. Extra territorial operation does not render the statute invalid.  
*Electronic Corp. 183 ITR 43 SC*  
But a nexus with something in India is necessary
  3. If connection is real, its extent is not relevant  
*Wadia 17 ITR 63 (FC),*  
*Hoechst vs. State of Bihar 154 ITR 64 SC*  
*Worley Parsons 312 ITR 273 AAR*  
*GVK Industries 332 ITR 130 Constitution Bench*

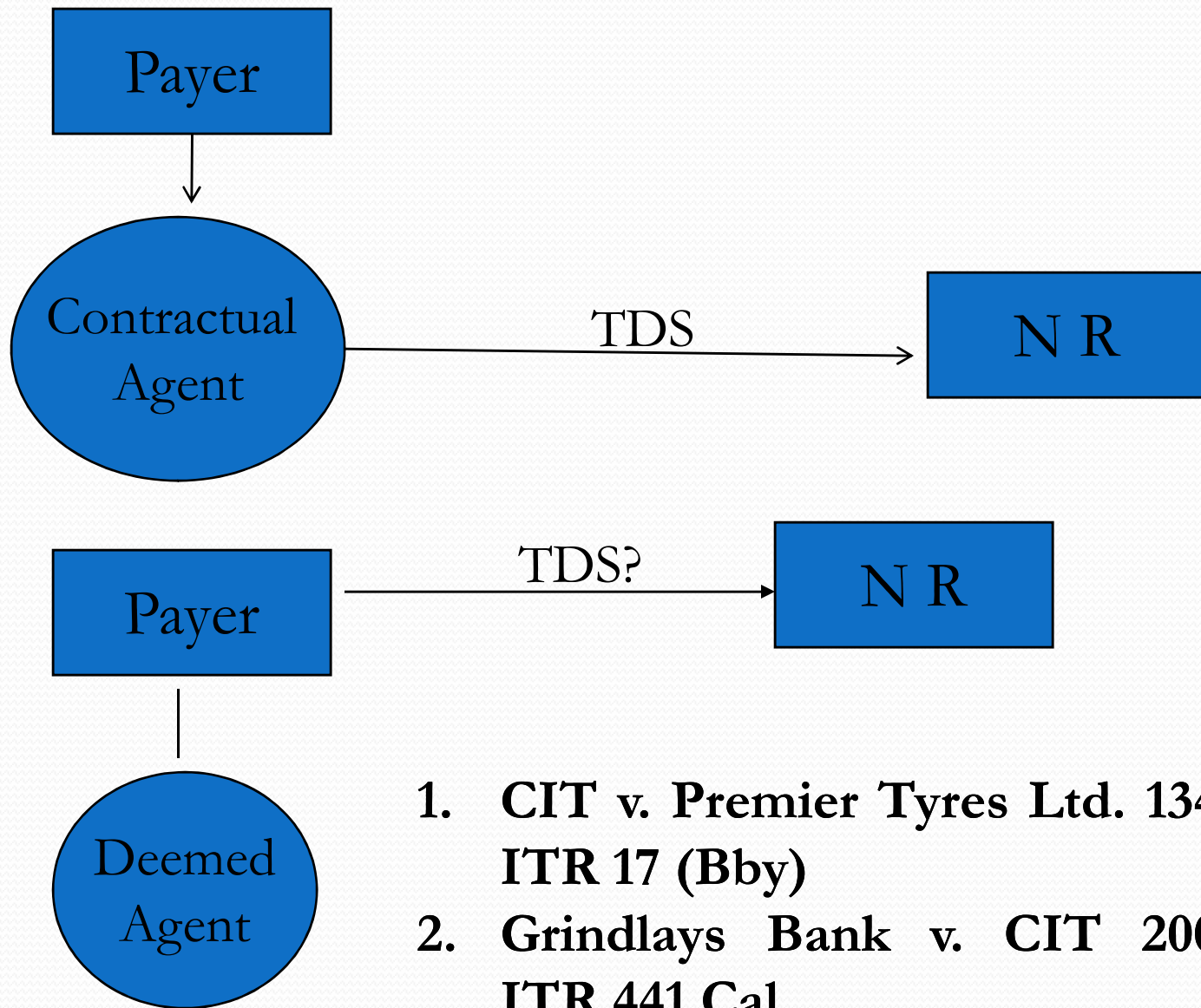
## Payer ( contd..)

- Vodafone 341 ITR 1 SC
- FA 2012 amendment – Explanation 2 to section 195(1) wref 1.4.1962

## Payer ( contd..)

- When a payer pays through his agent?
- NR paying another NR through agent
- Such agent could be contractual agent [160(1)(i)] or fictional agent [163]
- When contractual agent pays on behalf of NR
- When deemed agent pays to NR himself – [Sec 195(1) before amendment by FA 1987 wef 1.6.87]

# Example



1. **CIT v. Premier Tyres Ltd.** 134 ITR 17 (Bby)
2. **Grindlays Bank v. CIT** 200 ITR 441 Cal

## Payer ( contd..)

- Payer himself is the person responsible and if payer is a company, the company itself including the principal officer thereof [204(iii)]
- Principal officer : section 2(35)

## Payer ( contd..)

- POEM implications
- When a payer [foreign company] becomes a resident because of POEM test

# Interest, Royalties & FTS

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graph TD; A[Interest, Royalties & FTS] --> B[Payer]; A --> C[Payee]; B --> D{Government}; C --> E{Indian Income}
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Payer

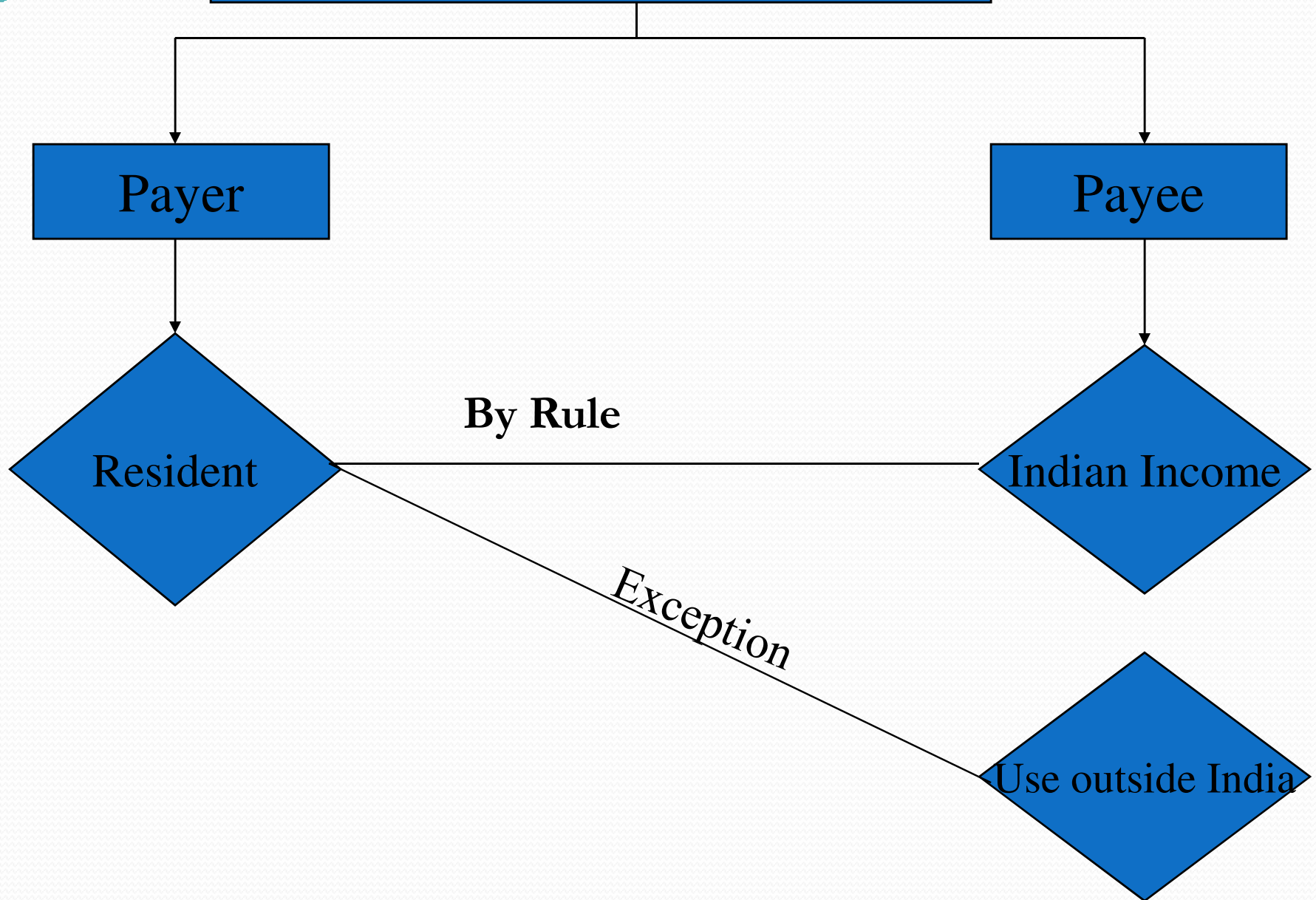
Government

Payee

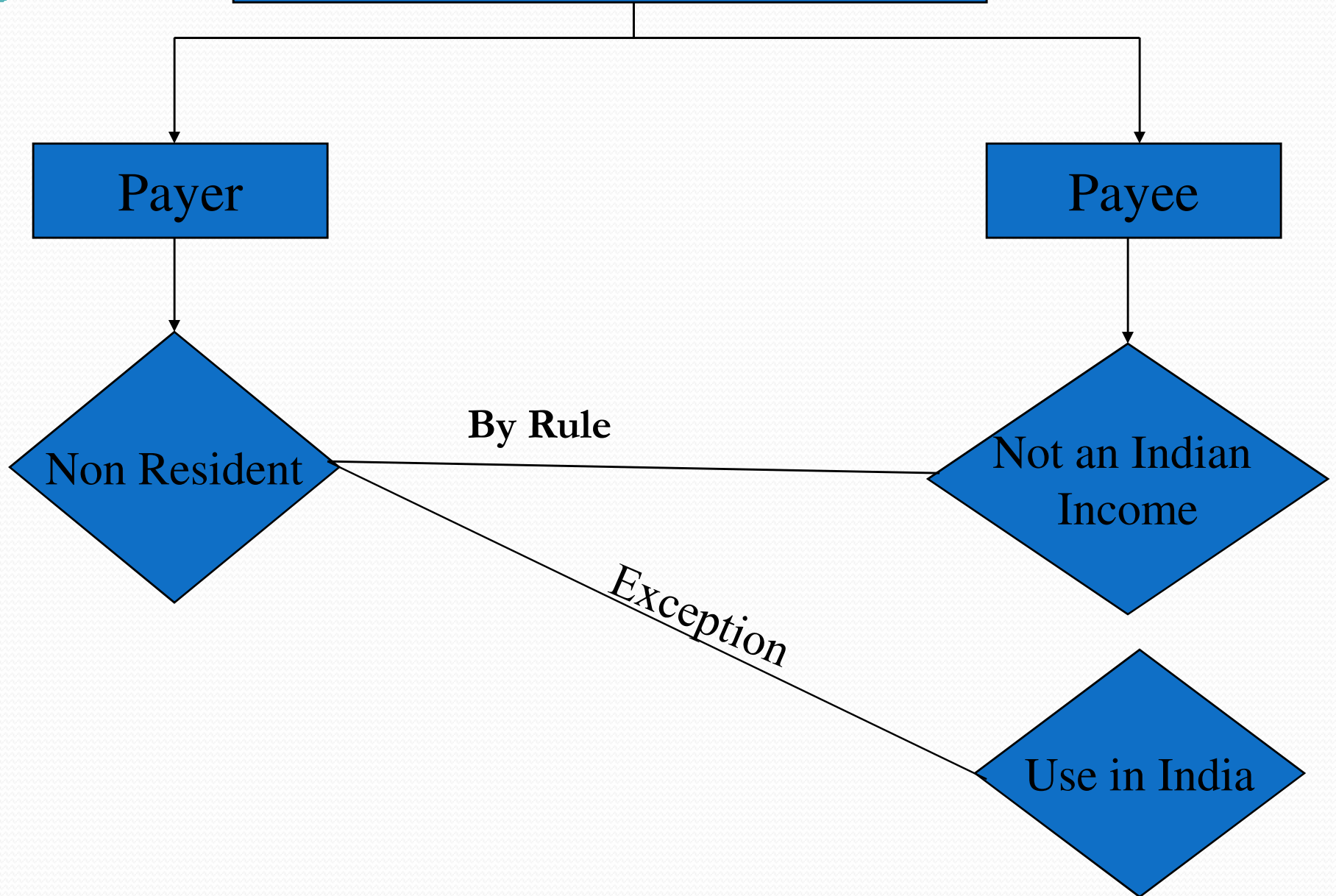
Indian Income



# Interest, Royalties & FTS



# Interest, Royalties & FTS



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PAYEE

## Non-resident, not being a company, or to a foreign company - Payee

- Payee is a non resident [2(30), 6] not being a company
- Payee is foreign company [2(23A)]
- Non resident includes NOR for the limited purpose of section 92, 93 and 168
- Meaning of 'Non resident' – as per IT Act or DTA?
- DTA may be referred to – Reliance on Circ 728 of 30.10.1995 on DTA rates

## Payee (contd..)

- As per IT Act – How to determine the status when PY has not ended, departure details and departure purposes not known
  
- Amendment to section 6(3) by FA 2015 : POEM implications
  
- Can one rely on residential status of the preceding previous year?
  
- See AAR in Monte Haris 218 ITR 413 and
- Robert W Smith 212 ITR 275

## Payee (contd..)

- As per DTA – Basic test : Liability to taxation by reason of domicile, residence, place of management etc.
- When resident as per IT Act as well as DTA : Application of tie breaker test requires information like centre of vital interests, habitual abode, nationality & mutual agreement
- If applying tie breaker test, payee is regarded as resident of say USA, should he be treated as non resident in India even though as per IT Act, he may be a resident in India?

## Payee (contd..)

- Where recipient is a resident agent of a non resident, section 195 is attracted



- Yes - Narsee Nagsee & Co. vs. CIT 35 ITR 134 (Bby)
- Yes - **Meena S. Patil vs. ACIT [2008] 113 TTJ (Bang) 863**
- Yes - circ no.723 dated 19.9.95 in respect of sec 172
- No - Rakesh Chauhan v. DDIT (2010) 128 TTJ (Chd.) 116
- No – Tecumesh Products 13 SOT 489 Hyd



**SUM CHARGEABLE**



## Interest or any other sum chargeable under the provisions of this Act (not being Salaries) – Sum chargeable

- Why ‘interest’ is separately used as ‘any other sum’ would have covered the same?
- Interest is defined in section 2(28A)
- Salary is excluded as the same is covered by section 192
- Section 195 applies if payment comprises income chargeable to tax in India

[Transmission of Corp of AP 239 ITR 587 SC]

## Sum chargeable (contd..)

- Scope of income chargeable to tax determined under section 5 read with section 9
  
- Payments could comprise:
  - Pure income payments – FTS / Royalty
  - Pure capital payments – Share / debenture subscription
  - Payments partly representing income payments – Redemption of debenture / preference share
  
- No deduction of tax from “pure capital” payments
  
- Nature of payments – whether capital or otherwise – to be decided from view point of payee and not payer

## Sum chargeable (contd..)

- Payment for purchase of goods
  - a) Where there is DTA
  - b) Where there is no DTA (Ishikawajima Harima 288 ITR 408 SC, TP Corporation of AP 239 ITR 587 SC, Worley Parsons 312 ITR 273 AAR)
  
- Agency commission – Sales commission
  - a) Circular No.23 dt 23.07.1969 & No.786 dt 07.02.2002  
[withdrawn vide **CIRCULAR NO 7 /2009**]
  - b) RD Agarwal 56 ITR 20 SC

## Sum chargeable (contd..)

- Purchase commission : Linde A.G. v. ITO (1997) 62 ITD 330 (Bby)
- Management commission v. underwriting commission : Mahindra & Mahindra Ltd. vs. DCIT (2009) 122 TTJ (Mumbai) (SB) 577 & RAYMOND LIMITED vs. DCIT 80 TTJ 120 (Mum)
- Success fee : **GVK Industries Ltd. v. ITO**, 371 ITR 453 SC

## Sum chargeable (contd..) – special cases

- Gifts received by a non resident individual or HUF taxable under section 56(2)(vii)
- Decretal amount in favour of a NR [Lalta Prasad Goenka 48 ITR 653 Cal, AIR v. Ramachandra Datar 41 ITR 446 SC, Islamic Investment 265 ITR 254(Bby)]
- Payment of sum exempt under sec 10 should not be subject to TDS [Hyderabad Industries Ltd. 188 ITR 749 Kar]
- Payment in void agreements (Ericsson Communications Ltd. 81 ITD 77 Delhi) : No income accrues from a void contract

# Recent Issues

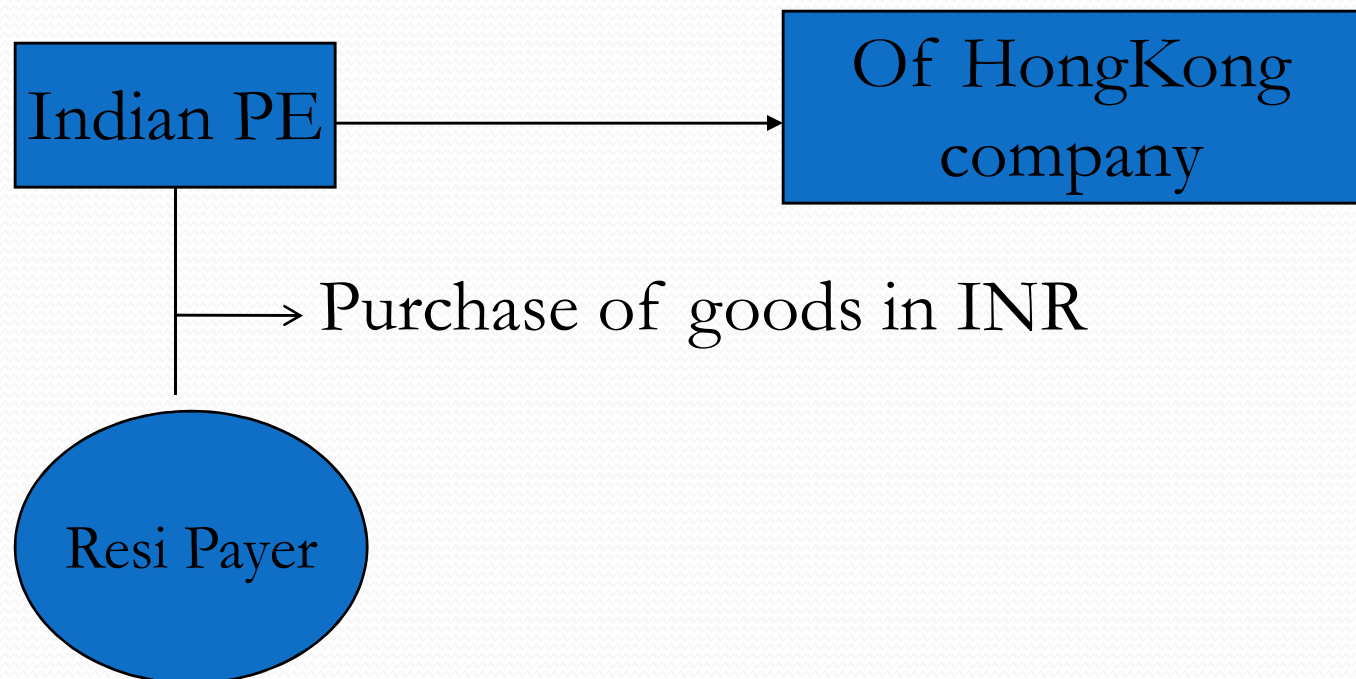
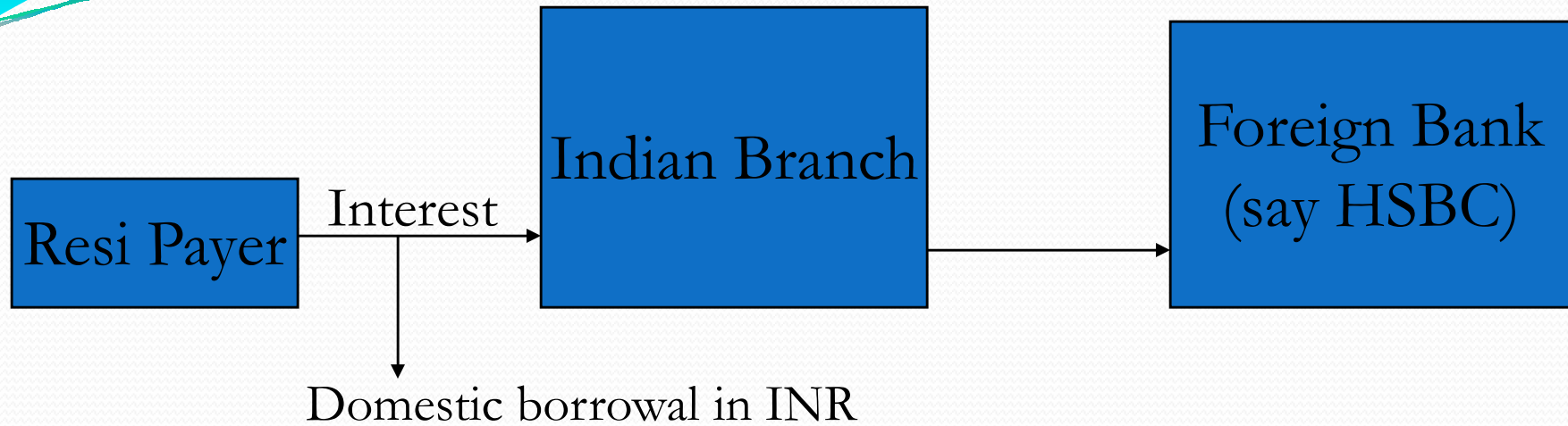
# DOMESTIC PAYMENTS

# Domestic payments and sec 195

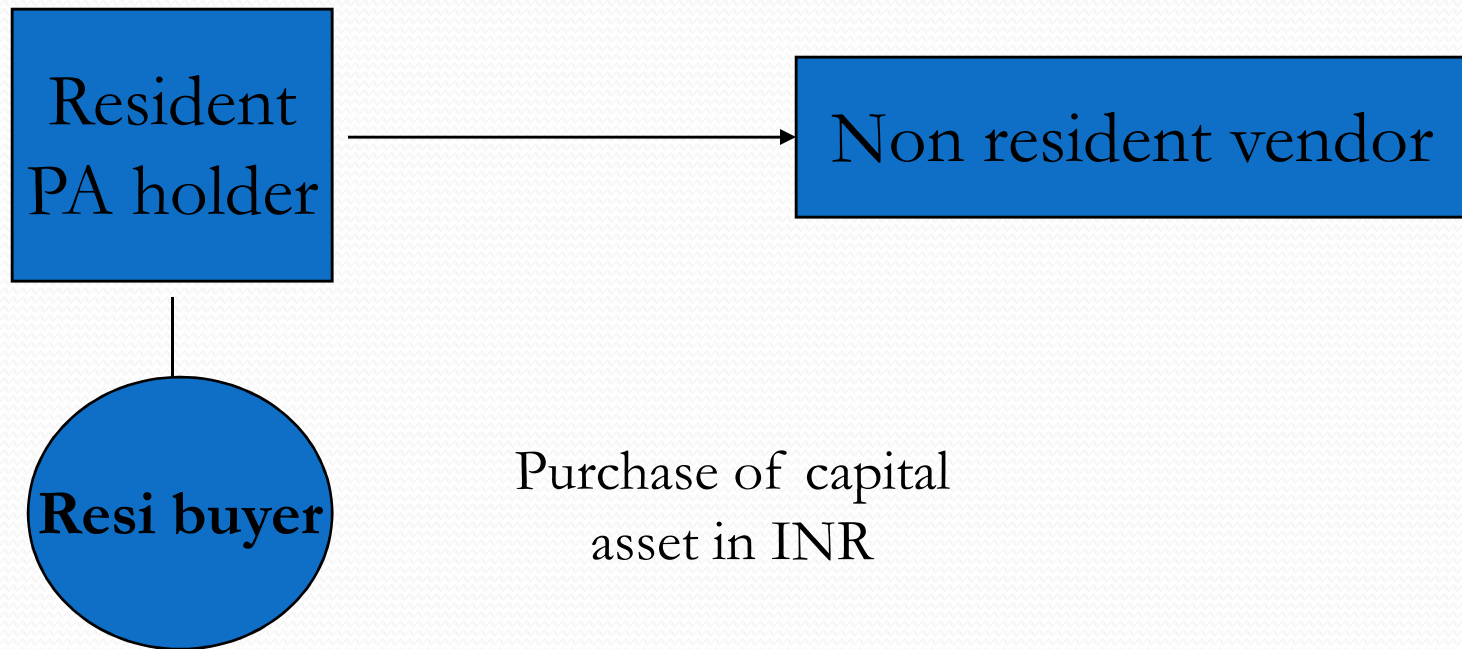
- Even domestic payments may come under sec 195
  - a) When interest (INR) is paid to Indian branch of a foreign bank – Circ No.20 of 3.8.1961
  - b) When purchase consideration (INR) is paid to Indian branch of a foreign company for goods bought or services availed
  - c) When purchase consideration (INR) is paid to a non resident upon purchase of a capital asset situated in India



# Examples



# Examples



- Yes - **Meena S. Patil vs. ACIT [2008] 113 TTJ (Bang) 863**
- **Sri Syed Aslam Hashmi ITA Nos.1313/Bang/2010 Date of Pronouncement: 28.09.2012**
- No - **Rakesh Chauhan v. DDIT (2010) 128 TTJ (Chd.) 116**
- No – **Tecumesh Products 13 SOT 489 Hyd**

# SECTION 115E

## Sec 115E

1. Where the total income of a NRI, includes—
  - (a) any income from investment or *income from LTCG of an asset other than a specified asset*;
  - (b) income by way of LTCG [sec 115C(d)],
  
2. The tax payable by him shall be the aggregate of—
  - (i) income-tax on investment income referred to in (a), at the rate of twenty per cent;
  - (ii) income-tax on LTCG referred to in (b), at the rate of ten per cent; and
  - (iii) income-tax with which he would have been chargeable had his total income been reduced by the amount of income referred to in (a) and (b).]

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**RETRO DEFAULT**

## ➤ Tax liability created by retro amendments

- Explanation inserted in section 9 : FA 2010
  - Explanations 4 & 5 inserted in Section 9(1)(i) : FA 2012
  - Explanations 4, 5 & 6 inserted in Section 9(1)(vi) : FA 2012
  - Explanation 2 to section 195(1) : FA 2012
- Is payer liable to deduct in such cases?
- Article 20(1)
  - Draft report on retro amendment relating to indirect transfer [Shome Committee] : Para 4.16

## ➤ Case laws

- Canara Bank [2009] 121 ITD 1 (Nagpur)
- Channel Guide India Ltd vs. ACIT (ITAT Mumbai)
- Sterling Abraive (Ahd.-ITAT): 3 Int **Taxation 347**
- Hindustan Electro Graphites [2000] 243 ITR 48 (SC)
- Star India (P.) [2006] 280 ITR 321 (SC)
- Bharat Conductors [1999] 238 ITR 89 (Kar.)

## ➤ Case laws

- CIT v. Jupiter Bio-Science Ltd. [2011] 202 Taxman 80 Kar
- Emami Ltd. v. CIT [2011] 337 ITR 470 (Cal. – HC)
- BASF (India) Ltd. [2006] 280 ITR 136 (Bom.)
- ACIT v. Ajit Ramakant 57 Taxmann.com 357 Goa
- **ITO v. Clear Water Technology Service (P.) Ltd. [2014] 52 taxmann.com 115 Blr**



# PAYMENT IN KIND

# Payment in kind

- Gifts to Non residents
- Issue/transfer of shares for a price lower than FMV
- Issue of shares/securities for technology transfer
- Transfer of IPR for issue of shares – sec 56(2)(viib)
- Fresh GDRs issued in lieu of those maturing not exempt otherwise
- Bonds issued as repayment of bonds maturing

## Payment in kind

- Mercedes Benz. v. JCIT 111 ITD 307 (Pune) : Payment for technical know-how made by way of allotment of share is eligible for deduction under section 35AB
- Allotment of shares in consideration of transfer of know how at the time of incorporation is not an expenditure EIMCO KCP Ltd. 242 ITR 659 SC
- Circular no.21 of 1969 – paragraph 11 & Circular No. 382 dt. 4.5.1984

## Payment in kind

- Why 'interest' is separately used as 'any other sum' would have covered the same?
- Interest is defined in section 2(28A) : "interest" means interest payable in any manner in respect of .....
- Section 194B : Proviso specifically provides for payment in kind

## Payment in kind

“Any sum” v. “Any income by way of ....”

- a) Sec 194C, Sec 194J and 194LA refer to “any sum”
- b) Sec 194A, Sec 194H and Sec 194I refer to “any income by way of ....”
- c) Sec 195(1) refers to both “any sum” and “any income”
- d) Sec 195(2) refers to “any sum”
- e) Sec 195(3) and Sec 197(1) recognise both scenerios

## Payment in kind

- a) Section 206AA refers to sum, income and amount
- b) Section 206C dealing with TCS does not use the word 'sum' but uses the phrase 'tax collected'
- c) Meaning of "any sum" – wrt 2(22)(e)
- d) Govindarajulu Naidu 90 ITR 13 Mad.

## Payment in kind

- **“Any sums paid” contemplates payment of an amount of money : HH Sri Rama Verma v. CIT (1991) 187 ITR 308 SC :**
- **CIT Vs M/s Hindustan Lever Ltd 361 ITR 1 Kar**
- **BBMP v. ITO ITAT Online – 18.11.2014 BLR ITAT**
- **KANCHANGANGA SEA FOODS LTD 325 ITR 540 SC & Biocon v. ITO 36 taxmann.com 291 (Bang. – Trib.)**

## Payment in kind

- The phrase 'by any other mode' has to be read with the phrase 'any interest' and not with the phrase 'any sum'.
- Use of phrase 'by any other mode' following the words, 'in cash or by issue of a cheque or draft' is indicative of intention of legislature to provide for deduction where the deduction as such is conceivable [Ejusdem Generis]
- In the case of payment in kind, the deduction is inconceivable.



## Payment in kind

- The following decisions have analyzed the meaning of ‘valuable consideration’ following ‘cash, deferred payment’ used in the sales tax laws and have held that ‘valuable consideration’ has to be necessarily in terms of money:
  - a) *SAIL v. ACCT* [1996] 41 KLJ 322 Kar
  - b) *Mapra Laboratories Pvt. Ltd. v. State of Bihar and Others* [2004] 135 STC 157 [Pat.]
  - c) *Indian Steel & Wire Products Ltd. v. State of Madras* [1968] 21 STC 138 [SC]’ AIR 1968 SC 478

## Payment in kind

➤ **Section 198** : “**All sums deducted** in accordance with the foregoing provisions of this Chapter shall, for the purpose of computing the income of an assessee, be deemed to be income received.”

➤ **Section 200** : “Any person **deducting any sum** in accordance with the foregoing provisions of this Chapter shall pay within the prescribed time, the **sum so deducted** to the credit of the Central Government or as the Board directs.”

➤ **Rule 30(2)** **All sums deducted in accordance with the provisions of Chapter XVII-B** by deductors other than an office of the Government shall be paid to the credit of the Central Government—“.....”

## Payment in kind

➤ **Section 203(1)** : *‘Every person deducting tax in accordance with the foregoing provisions of this Chapter shall, within such period as may be prescribed from the time of credit or payment of the sum, or,*

- **Mandatory E-payment requires payment of tax deducted**
- **Absence of rule similar to Rule 26 and Rule 115**
- **Absence of valuation rules like Rule 3/11UA etc.**
- *‘lex non cogit ad impossibilia’*

**SECTION 40a(i)/(iii)**

## Implications Of Section 40a(i)/(iii)

- Can AO decide the TDS issue or should he await the order of TDS officer? – CIT v. JDS Apparels 370 ITR 454 Delhi
- When tax was remitted without deducting tax
- When the payee subsequently pays the tax
  - Implication of section 191
  - Is there a deemed payment under sec 40(a)(i)?
  - Sweet Chariot Cafe Vs ACIT, 2010-TIOL-275-ITAT-BANG & Jhaveri Flxi (ITAT) dt 23.12.10 (Unreported)
  - *Contra* : Nathpa Jhakri Joint Venture vs. ACIT (2010) 131 TTJ (Mumbai) 702
  - See Circular No. 8 of 2009 on TPA

# Section 40a(i)/(ia)(Contd.)

- Conflict between section 40a(i)/(ia) and section 40A(3)
- “Non withstante clause” – Restricted only to sec 30 to 38 or extendible to sec 28 also : ITO vs Ahaar Consumer Products 10 taxmann.com 181 (Delhi)
- Applicability to capital payments :

No : Nector Beverages 314 ITR 314 SC & SMS Demag Pvt Ltd [2010-TIOL-135-ITAT-DEL](#) [132 TTJ 498]

Yes : V Kay Translines (P) Ltd Vs ITO, [2011-TIOL-318-ITAT-MUM](#) & Spaco Carburettors (I) Ltd. 3 SOT 798 - Mum]

# Section 40a(i)/(ia)(Contd.)

- Not applicable when income computed on presumptive basis like section 44AD/44AE Shri B V Prabhu Vs ITO 2010-TIOL-420-ITAT-BANG
- Claim without entry in books to counter sec 40a(ia) : DCIT, New Delhi Vs M/s Umang Dairies - 2010-TIOL-88-ITAT-DEL does not however accept this.

# Section 40a(i)/(ia)(Contd.)

- Paid v. Payable
  - Applicable only to “payable” not to “paid”
  - **Merilyn Shipping & Transports v. ACIT [2012] 136 ITD 23 (Visakhapatnam – Trib.) (SB)**
  - **Vector Shipping Services P. Ltd. [2013] 357 ITR 642 (All.)**  
SLP dismissed
- Applicable to ‘paid’ also
  - **Merilyn Shipping & Transports v. ACIT - ITAT decision stayed in [2012-TIOL-971-HC-AP-IT](#)**
  - **P M S Diesels Vs CIT [2015-TIOL-1282-HC-P&H-IT](#)**
  - **M/s Palam Gas Service Vs CIT 225 Taxman 44**
  - **[CIT vs. Sikandarkhan N. Tunvar](#) 357 ITR 312 Guj**



# Section 40a(i)/(ia)(Contd.)

- MAT v. section 40a(i)
- Non discrimination article of DTAA
- Section 40a(i) is discriminatory in as much as it does not have provision similar to newly introduced second proviso to section 40a(ia) by FA 2012
  - Mitsubishi 50 taxmann.com 379 (Delhi-ITAT)
  - SMS Demag Pvt 132 TTJ 498 Delhi
  - Millennium Infocom 117 ITD 114 (Delhi)

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TRC

## Section 90(4)/(5)

(4) An assessee, not being a resident, to whom an agreement referred to in sub-section (1) applies, shall not be entitled to claim any relief under such agreement unless a certificate of his being a resident] in any country outside India or specified territory outside India, as the case may be, is obtained by him from the Government of that country or specified territory.]

(5) The assessee referred to in sub-section (4) shall also provide such other documents and information, as may be prescribed

## Rule 21AB(1)

The certificate referred to in sub-section (4) of section 90 and sub-section (4) of section 90A to be obtained by an assessee, not being a resident in India, from the Government of the country or the specified territory shall contain the following particulars, namely:—

- (i) Name of the assessee;
- (ii) Status (individual, company, firm etc.) of the assessee;
- (iii) Nationality (in case of individual);

## Rule 21AB(1)

(iv) Country or specified territory of incorporation or registration (in case of others);

(v) Assessee's TIN in the country or specified territory of residence or in case no such number, then, a unique number on the basis of which the person is identified by the Government of the country or the specified territory;

(vi) Residential status for the purposes of tax;

(vii) Period for which certificate is applicable; and

(viii) Address of the applicant for the period for which the certificate is applicable

## Rule 21AB

(2) The certificate referred to in sub-rule (1) shall be duly verified by the Government of the country or the specified territory of which the assessee, referred to in sub-rule (1), claims to be a resident for the purposes of tax.

(3) An assessee, being a resident in India, shall, for obtaining a certificate of residence for the purposes of an agreement referred to in section 90 and section 90A, make an application in Form No. 10FA to the Assessing Officer.

(4) The Assessing Officer on receipt of an application referred to in sub-rule (3) and being satisfied in this behalf, shall issue a certificate of residence in respect of the assessee in Form No. 10FB.]

## Is TRC applicable to payer?

1. Section 90(4) does not seem to directly apply to payer
2. Chapter XVII-B does not deal with the TRC directly
3. There are no provisions similar to section 206AA
4. Section 90(4) applies to only to relief under the DTA

# Is TRC applicable to payer?

Section 90(1) deals with two situations:

- (a) for the granting of *relief* in respect of—
  - (i) income on which have been paid both income-tax under this Act and income-tax in that country or specified territory, as the case may be, or
  - (ii) income-tax chargeable under this Act and under the corresponding law in force in that country or specified territory, as the case may be, to promote mutual economic relations, trade and investment, or
- (b) for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country or specified territory, as the case may be



# Is TRC applicable to payer?

Valibhai Khanbhai Mankad [2012-TIOL-892-HC-AHM-IT](#)

- Once conditions of second proviso of section 194C(3) are satisfied, liability of payer to effect TDS would cease.
- The requirement of such payee to furnish details to the income tax authority in the prescribed form within prescribed time would arise later and any infraction in such a requirement would not make the requirement of deduction at source applicable under section 194C(2)
- It may be that failure to comply such requirement by the payee may result into some other adverse consequences if so provided under the Act.
- However, fulfillment of such requirement cannot be linked to the deduction of tax at source.

# Is TRC applicable to payer?

- TRC v. section 195(2)/(3)/197 certificate
- TRC v. section 206AA



HO v. PE

## Self payments

- **Section 195(1) deals with bilateral payments**
- **PE is not a person at all as per section 2(31) as well as per Article 3 of the DTA**
- **Person – Resident – Enterprise – PE**
- **Royalty, FTS, Interest etc. arising in one State as per DTA: Indicate bilateral arrangement**

## Self payments

- **Nuclear Power Corporation of India Ltd., In re [2012] 343 ITR 220 (AAR) – Bilateral transaction requires TDS**
- Payments by branch of a foreign company to its Head Office or other branches [Circ 740, Circ 649, ABN Amro Bank 97 ITD 89 (SB) Kol]
- Reversed in **ABN Amro Bank, N.V. v. CIT [2012] 343 ITR 91 (Cal.) HC**
- **SUMITOMO MITSUI BANKING CORPORATION v. DDIT [2012] 136 ITD 66 (SB)**

## Section 9(1)(v) – Explanation (Newly Inserted)

‘Explanation.—For the purposes of this clause,—

(a) it is hereby declared that in the case of a non-resident, being a person engaged in the business of banking, any interest payable by the permanent establishment in India of such non-resident to the head office or any permanent establishment or any other part of such non-resident outside India shall be deemed to accrue or arise in India and shall be chargeable to tax in addition to any income attributable to the permanent establishment in India and the permanent establishment in India shall be deemed to be a person separate and independent of the non-resident person of which it is a permanent establishment and the provisions of the Act relating to computation of total income, determination of tax and collection and recovery shall apply accordingly.

## Section 9(1)(v) – Explanation (Newly Inserted)

(b) “permanent establishment” shall have the meaning assigned to it in clause (iiia) of section 92F.

## Explanation to section 9(1)(v)

- 1. In the case of NR engaged in the business of banking,**
- 2. any interest payable by PE in India of such non-resident to**
  - the head office or
  - any permanent establishment or
  - any other part of such non-resident outside India
- 3. shall be deemed to accrue or arise in India and shall be chargeable to tax in addition to any income attributable to the permanent establishment in India**



## Explanation to section 9(1)(v)

4. The PE in India shall be deemed to be a person separate and independent of the non-resident person of which it is a permanent establishment and
5. The provisions of the Act relating to computation of total income, determination of tax and collection and recovery shall apply accordingly.
6. “Permanent establishment” shall have the same meaning assigned to it in clause (iiia) of section 92F.

## **Explanation to section 9(1)(v) - Points**

- 1. It is a prospective amendment from AY 1.4.2016**
- 2. It applies only to NR in banking business**
- 3. Amendment to undo the following decisions;**
  - ABN Amro 343 ITR 91 Cal**
  - Sumitomo Mitsui 19 Taxmann.com 364 Mum SB**
- 4. Interest payable is allowable as a deduction in computing branch profit**

## Explanation to section 9(1)(v) - Points

- 1. It is a prospective amendment from AY 1.4.2016**
- 2. It applies only to NR in banking business**
- 3. PE need not carry on banking business**
- 4. Amendment to undo the following decisions;**
  - ABN Amro 343 ITR 91 Cal**
  - Sumitomo Mitsui 19 Taxmann.com 364 Mum SB**
- 5. Basic flaw – Self payment of interest is not deemed as income in sec 2(24). No word ‘income’ used in Explanation**

## **Explanation to section 9(1)(v) - Points**

- 1. Interest to be understood as per section 2(28)**
- 2. Section 44DA applies only to royalty/FTS and not to interest income**
- 3. Section 115A(1)(a) is not applicable as interest is not payable to Government or Indian concern**
- 4. Therefore, net based taxation with all deductions but at rate applicable to non resident**

## Explanation to section 9(1)(v) - Points

- 1. Interest payable is allowable as a deduction in computing branch profit – Circular 649/740 and no bar similar to section 44DA [First Proviso(ii)]**

## **TDS obligation on Indian branch**

- 1) Yes as per Memorandum/Circular 649/740**
- 2) Yes if as separate entity fiction is literally read**
- 3) No if separate entity fiction is held applicable only to non resident and not to Indian branch**
- 4) No as interest fails the income test and hence not taxable**
- 5) No as per Section 204(iii) – where payer is a company, company itself including its principal officer is ‘person responsible for paying’ : A person responsible for paying cannot pay to himself**
- 6) Section 2(35) – Principal Officer**

## **Fiction of PE is separate**

- 1. Scope of this fiction is limited to income deemed in terms of section 9(1)(v)**
- 2. It would apply only to interest income that is deemed to accrue to such non resident**
- 3. It would not apply to either status or scope of taxation of Indian branch except allowing such interest as an admissible deduction.**
- 4. If non resident pays interest to branch, branch need not pay tax as self payments are incomes**

## **Fiction of PE is separate**

- 1. The above fiction supports theory that otherwise HO and PE are not separate persons [say for sec 92A]**
- 2. HO and Indian branch to suffer separate assessments**
- 3. Section 139A and Rule 114A to provide for a person having multiple PANs**
- 4. Section 139A(4) Proviso bars a person possessing PAN to apply for another**



# DTA – Branch paying interest to HO

1. Allowability under article 7 v. TDS obligation
3. Hypothesis of Article 7(2)
4. DTA
  - a) Interest under art 11(4)
  - b) Inter-relationship between Art 11(1) and 11(6)

Article 11(4)

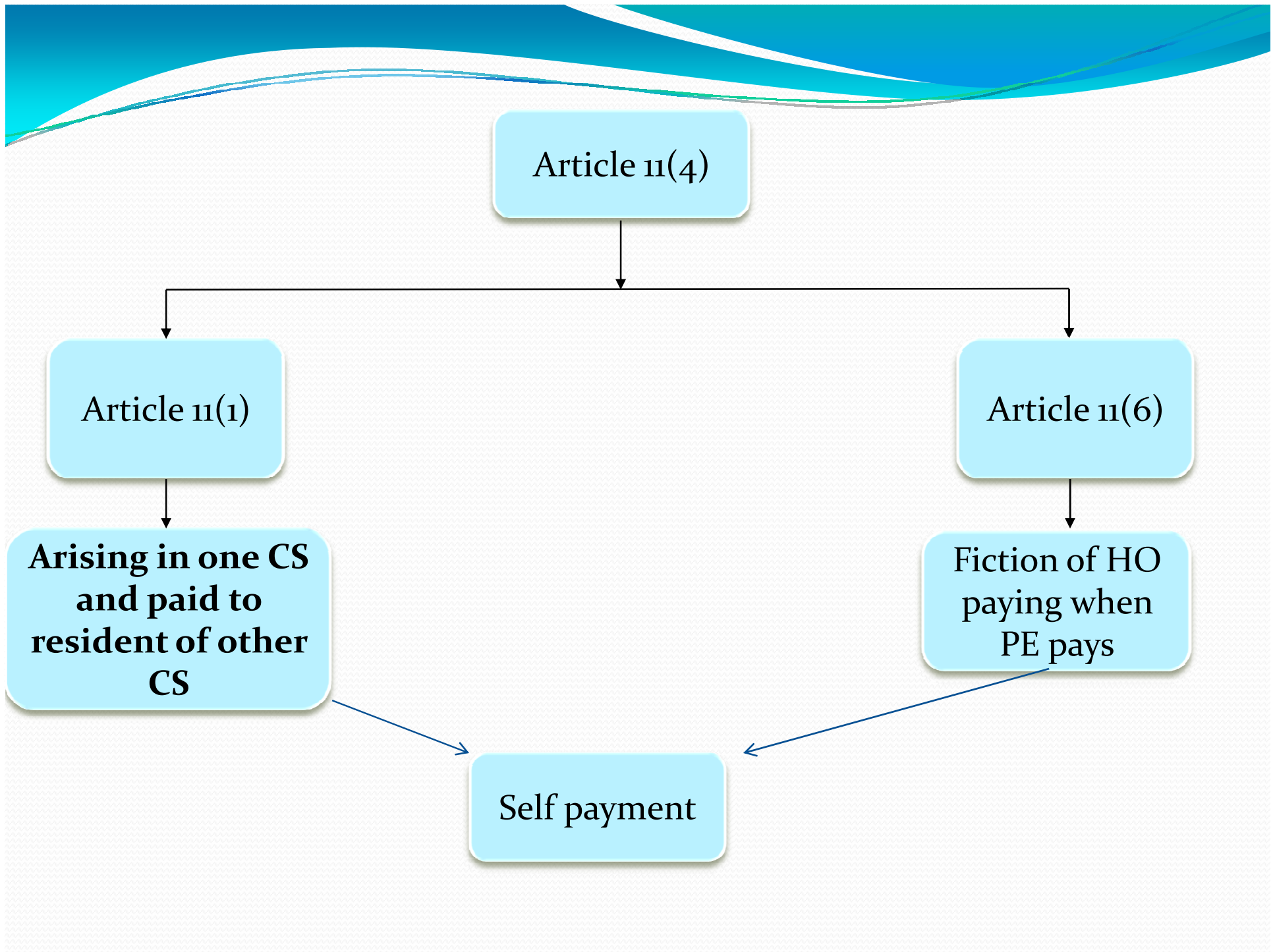
Article 11(1)

Article 11(6)

**Arising in one CS  
and paid to  
resident of other  
CS**

Fiction of HO  
paying when  
PE pays

Self payment



PE pays Interest  
to HO

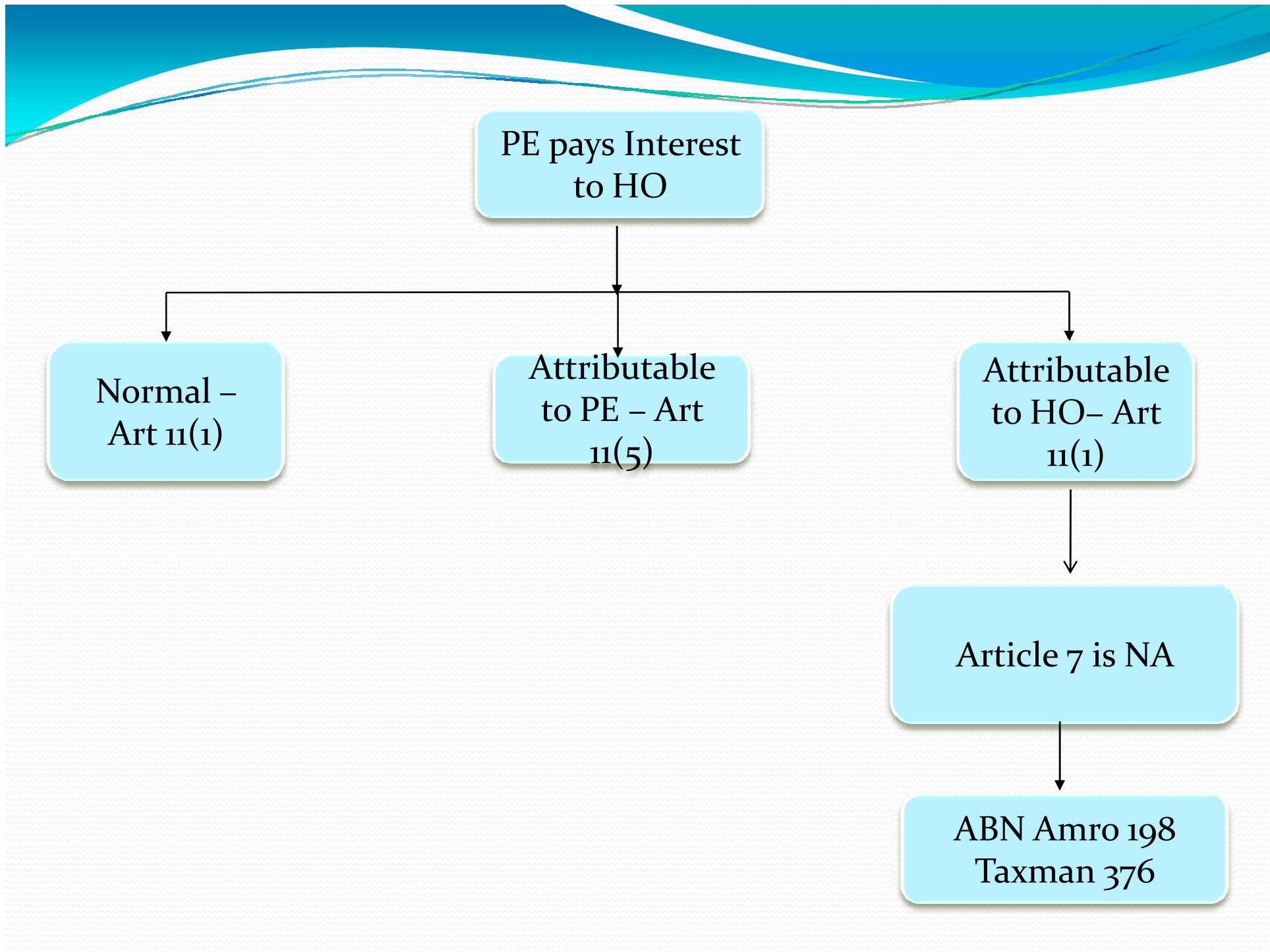
Normal –  
Art 11(1)

Attributable  
to PE – Art  
11(5)

Attributable  
to HO – Art  
11(1)

Article 7 is NA

ABN Amro 198  
Taxman 376



If PE pays  
commission to  
HO

IT Act

Explanation 1(a)  
to sec 9(1)(i)

DTA

Article 7

Profits of HO

No tax and no TDS

ABN Amro 198  
Taxman 376



# TURNKEY CONTRACTS

# Turnkey contract

- Turnkey contract can be split
  - 288 ITR 408 SC
  - 291 ITR 482 SC
  - 60 ITR 11 SC
  
- Vodafone effect– AAR tells a new tale
  - CTCI Overseas Corporation Ltd. AAR 342 ITR 217
  - Alstom Transport SA, 208 Taxman 223 (AAR)
  - Roxar [2012] 207 Taxman 293 AAR
  
- AAR ruling nullified : Linde AG 365 ITR 1 Delhi

# Consortium – Turnkey contract

- Is consortium an AOP?
  - CTCI Overseas Corporation Ltd. AAR 342 ITR 217
  - Alstom Transport SA, 208 Taxman 223 (AAR)
  - Linde AG 365 ITR 1 Delhi
- If so what is its status?
- TDS on payment made by principal to consortium

# Consortium – Turnkey contract

- TDS on payment by consortium to members – section 40ba

*Payments to the partners not in their capacity as partners, but made for the specific services rendered by them*

- CIT v. Rajam Ramaswamy and Sons [2008] 298 ITR 325 (Mad) HC
- CIT v. Gemini Productions [1977] 110 ITR 847 Mad.
- CIT v. Chitra Kalpana [1988] 169 ITR 678 AP



# PROVISION ENTRIES

# Provision Entries

- IDBI vs. ITO 104 TTJ 230 (Mum), 107 ITD 45 – Refers to Letter No.275/125/96 IT(B) dt 5.7.96 to TISCO clarifying no TDS if payee is not known despite Explanation.
- Pfizer Ltd [2012-TIOL-631-ITAT-MUM](#) : No TDS obligation for general credit entry & Kirloskar Oil [2015-TIOL-622-ITAT-PUNE](#)
- Bovis Lend Lease [2009-TIOL-666-ITAT-BANG](#): The aspect of "credit" of a sum to the account of the payee or any other account inviting or mandating the deduction of tax at source is not to be regarded as having an all pervasive effect.
- Circ no.3 of 2010 dated 2.3.2010 - TDS under sec 194A is not required in the absence of constructive credit followed in **Bank of Maharashtra v. ITO** [2010] 6 ITR (Trib) 824 (Ahmedabad)

# Provision Entries – Latest adverse decision

- **Ibm India Pvt Ltd Vs ITO 2015-TIOL-692-ITAT-BANG + Story**

# Provision Entries (Contd.)

- Reversal of provision – consequent excess deduction/remittance to be carried forward to next quarter : Circular 2 of 2011
- Rate changing between date of credit and date of payment has no impact - CIT Vs M/s MAC Charles (India) Ltd 2010-TIOL-488-HC-KAR, 195 Taxman 296
- Explanation may not apply when no income accrues to non-resident although accounting entry incorporating a liability is passed - ACIT Vs Motor Industries 249 ITR 141 Kar. Contra in UB Ltd. vs. DCIT 211 ITR 256 Kar

# TDS AND NET PAYMENT

## Net payment

- Cases relevant for credit / accrual aspect: Entry in the payer's books tantamounts to receipt by the payee
  - a) 44 ITR 720 Raghava Reddy v CIT (SC) - Yes
  - b) 125 ITR 525 CIT v Toshoku Ltd (SC) - No
  - c) 201 ITR 391 Standard Motor Triumph Co v CIT (SC) – Yes
  - d) 25 ITR 258 CIT vs. Nagaria Oil Mills AP – No
  - e) 146 ITR 479 Southern Brick Works Ltd. vs. CIT (Mad.)– Yes
  
- When NR adjusts his income and makes net remittance
  - a) JB Boda & Co. 223 ITR 271 SC
  - b) CIT v. Singapore Airlines 180 Taxman 128 Delhi
  - c) Mahindra & Mahindra 122 TTI 577 Bbv SB

## Net payment

- When dividend is declared but not paid pending govt approval, dividend accrues in the year of payment after govt approval : See Pfizer Corporation v CIT (2003) 259 ITR 391 (Bby)
- **Contra in UB Ltd. vs. DCIT 211 ITR 256 Kar**



# SECTION 206AA



# Section 206AA

Is it applicable to those who are exempt from PAN provisions?

Sec 139A(8)(d), Rule 114C(1) & Section 272BB

- Is it applicable to Non residents? Section 206AA v. section 90? – Concept of treaty override
- Validity of sec 206AA when the basic rate of taxation is lower than 20%
  - *Bhavani Cotton Mills 20 STC 290 SC*
  - *Ely Lilly 312 ITR 225 SC*
  - *Suman Enterprises v. SOK 2010 (69) KLJ 1 (HC)*
- Is Surcharge and cess to be applied on 20%

# Section 206AA

- No.402/92/2006-MC (04 of 2010) : The law will also apply to all non-residents in respect of payments / remittances liable to TDS.
- **Smt. A. Kowsalya Bai v. UOI [2012] 208 Taxman 208 (Kar.) : Section 206AA is not applicable to assesseees having agricultural income**
- *M/s Serum Institute of India Limited (ITA No.792/PN/2013 and ITA No.1601/PN/2014)*

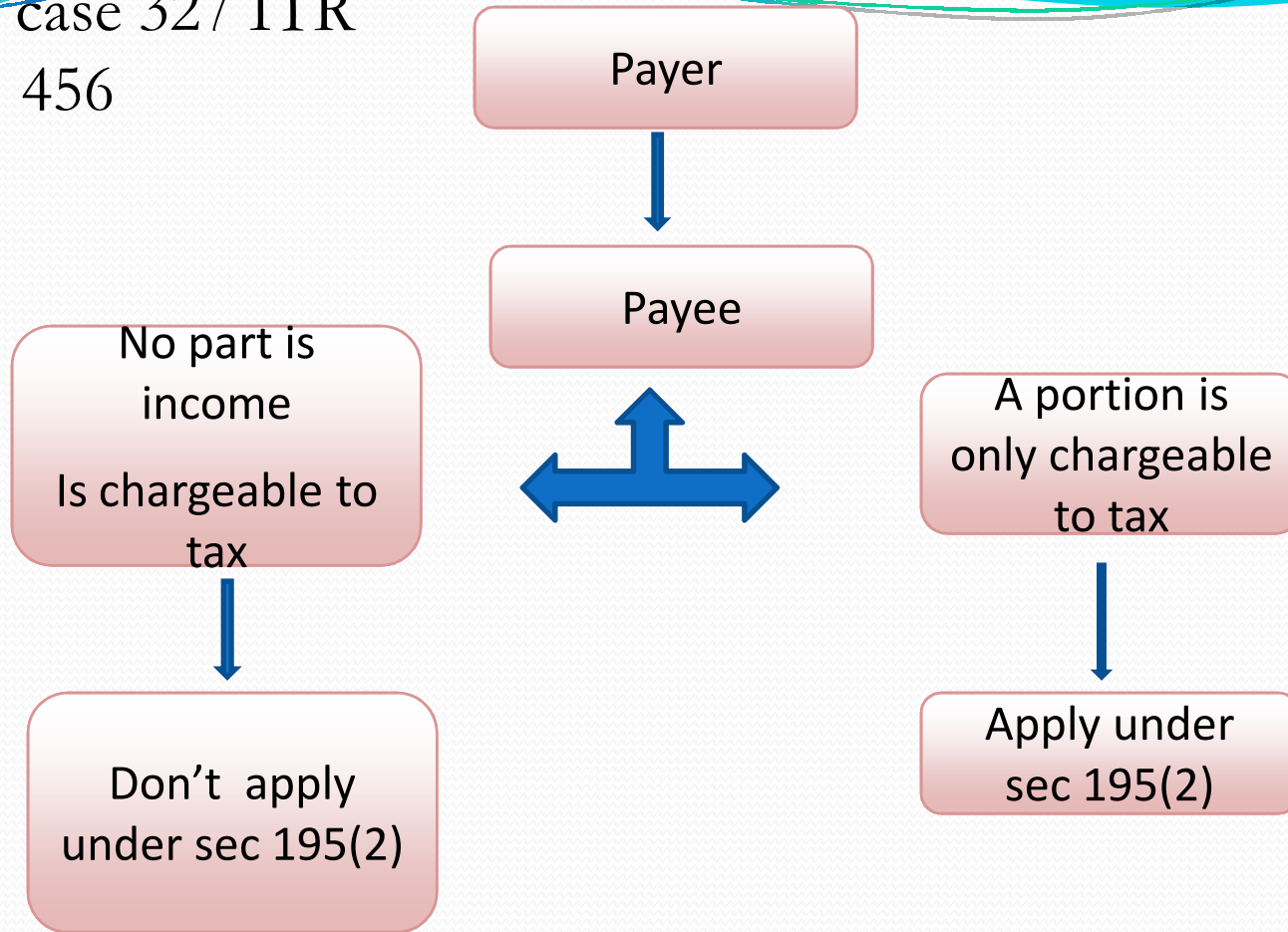


# LOWER DEDUCTION CERTIFICATE

## 195(2) Application by payer

- 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 subsection (1) only on that proportion of the sum which is so chargeable.

GE ITC case 327 ITR  
456



# 195(2) Application by payer

- When such application should be made? – Before or after credit/payment? Circular no.774 dt 17.03.1999
- Period of validity of such certificate
- Can CIT revise an order under sec 263? BCCI v. DIT 96 ITD 263 Mum
- Rejection of application under section 195(2) – open to challenge under section 264/writ petition : **Larsen & Toubro Ltd ACIT 326 ITR 514 (Bom)**

# 195(2) Application by payer

Latest controversy:

BIOCON Biopharmaceuticals Pvt. Ltd vs. ITO (ITAT Bangalore) ITAT Online – 29.07.2013 : S. 195(2) TDS: AO has no power to issue Nil TDS certificate

## 195(7)

- Notwithstanding anything contained in sub-section (1) and sub-section (2),
- the Board may, by notification in the Official Gazette, specify a class of persons or cases, where the person responsible for paying to a non-resident, not being a company, or to a foreign company,
- any sum, whether or not chargeable under the provisions of this Act,
- shall make an application to the Assessing Officer to determine, by general or special order, the appropriate proportion of sum chargeable,
- and upon such determination, tax shall be deducted under sub-section (1) on that proportion of the sum which is so chargeable



## 195(3) Application by receiver

- 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 AO
- for grant of a certificate authorizing him to receive such interest/sum
- without deduction of tax under that sub-section, and
- where any such certificate is granted, every person responsible for paying such interest/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).

## 195(3) Application

- 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 – Sec 195(4)
- The Board may, having regard to the convenience of assessee and the interests of revenue, by notification in the Official Gazette, make rules specifying the cases in which, and the circumstances under which, an application may be made for the grant of a certificate under sub-section (3) and the conditions subject to which such certificate may be granted and providing for all other matters connected therewith – Sec 195(5)

# Conditions for lower certificate

- Applicant has filed returns and has been regularly assessed for all past applicable years
- He is not in default or deemed to be in default – for tax, advance tax or self assessment tax, interest, penalty, fine or any other sum
- He is not subject to penalty for concealment of income
- **Non banking applicant – Additional conditions**
  - **Continuously in business in India for 5 years**
  - **Value of fixed assets as at end of preceding PY > 50L**

# Inter play between 195(2), 195(3) and 197

- Scope of each of the above
- Conditions differ
- Remedy differs

The background is a solid blue color with a gradient from a darker blue at the bottom to a lighter blue at the top. At the top, there are several wavy, overlapping lines in various shades of blue and cyan, creating a dynamic, abstract header effect.

**GROSSING UP**

## *Income payable “net of tax”. (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 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.

## *Grossing up (contd..)*

**Example:**

**Rs.**

Sum payable – Net

1000

TDS rate

10

Grossing up :  $(\text{Net} \times 100) / (100 - \text{Rate})$

1111

TDS

111

Net payable

1000

## *Grossing up (contd..)*

- TDS certificate has to be issued even in case of grossing up : Circ 785 dt 24.11.1999
- Multiple grossing up is not permissible : SLP against judgment dated May 21, 2004, of the Uttranchal High Court in I.T.A. No. 262 of 2001 CIT v. ONGC [264 ITR 340] dismissed: S.L.P.[C] No.1050 of 2005
- Grossing up when sec 206AA is invoked





# OTHER ASPECTS

# Other aspects

- A non resident of recipient of royalty and FTS is not spared from his obligation of filing the return – Sec 115A(5) spares only income covered under sec 115A(1)(a) and not sec 115A(1)(b)
- Non resident to reflect his income including TDS as per sec 198 (particularly relevant when payment is made net of tax : sec 195A)
- Reciprocal adjustment not permissible in case of variation in arm's length price – 2<sup>nd</sup> Proviso to Sec 92C(4) and Article 9(2) of DTA

# Other aspects

- DTA rate of tax is to be taken as inclusive of surcharge : DIC Asia Pacific Pte. Ltd. v. ADIT [2012] 18 ITR (Trib) 358 (Kolkata)
- Refund of TDS to the deductor under some circumstances – Circ 7 of 2007 dt 23.10.2007 read with Circular No. 7/2011 [F.No. 500/135/2007-FTD-I], dt. 27.09.2011

**THANK YOU**

