

TDS u/s. 195 on various payments

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15th February 2014

Why discuss Section 195?

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

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LEGAL PROVISIONS - Scope & Methodology

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 - What, Who, When & How?
- Section 206AA
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- Interplay of DTAA, PAN and TRC
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- Deductibility vis-à-vis certain payments
 - Business Incomes
 - Royalty & FTS
 - Capital Gains
 - Reimbursements
 - Other payments

Section 195(1)

- ▶ Any person responsible for paying
- ▶ To a non-resident
- ▶ Or a Foreign Company
- ▶ Any interest or any other sum
- ▶ **Chargeable to tax** under the provisions of this Act
- ▶ 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

Scope of Section 195

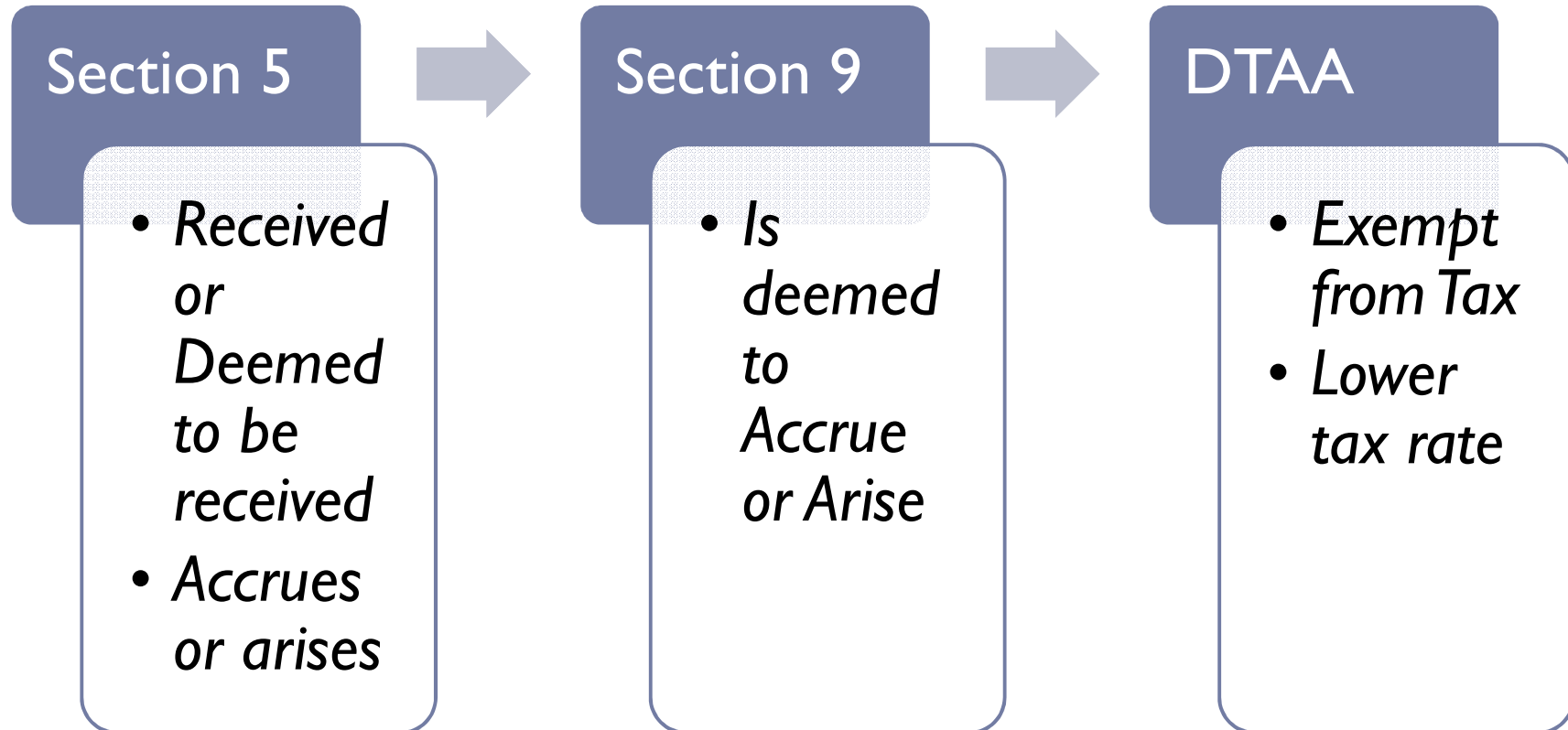


What is covered?	<ul style="list-style-type: none">• Any interest or any other sum• Chargeable to tax under the provisions of this Act
Who are covered?	<ul style="list-style-type: none">• Any person responsible for paying• To a non-resident or a Foreign Company
When is it applicable?	<ul style="list-style-type: 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 u/s.s 194LB, 194LC & 194LD, Shipping income u/s. 172; Payments to sportsman, entertainer or sports association u/s. 194E; Payments u/s.s 196B, 196C & 196D.
- ▶ 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)
 - ▶ Karnataka High Court in Samsung Electronics overruled
- ▶ 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

Taxability – 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

Scope of Section 195 - Who are covered?

- ▶ **Payer - Any person**
 - ▶ Even if no income earned
- ▶ **Applicable to transactions between non-residents?**
 - ▶ Extraterritorial operation
 - ▶ “It extends to the whole of India” - Section 1(2)
 - ▶ 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 - Non-residents & Foreign Co. (whether or not NR)**
 - ▶ RNOR payee not covered, but RNOR payer covered

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**

Section 206AA – PAN requirement

- ▶ Non-obstante provision introduced from 1st April 2010
- ▶ Obligation to furnish PAN on NR receiving income
- ▶ 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%
- ▶ Section applicable also when PAN incorrect or invalid
- ▶ Certificate u/s. 197 will not be issued without PAN

Section 206AA - Issues

- ▶ **Treaty Override?**
 - ▶ 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
- ▶ **Surcharge or educational cess not to be added to 20%**
- ▶ **Refund of higher tax deducted available**
- ▶ **Grossing up of tax under Section 206AA**
 - ▶ Literal reading of Section 195A refers to 'rates in force'
 - ▶ Bosch Ltd.

Impact of Section 115A

- ▶ Rate @ 25% u/s 115A for Royalty and FTS
 - ▶ Can this rate be referred to?
- ▶ At the rate specified in the relevant provision of the Act
 - ▶ Applicable for deduction provisions – 194J, 194C, 194I, etc.
- ▶ 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**

Impact of Section 115A

- ▶ Foreign Co. X receives FTS from Indian concern
- ▶ Rates applicable:
 - ▶ As per DTA – 10%
 - ▶ As per 206AA – 20%
 - ▶ As per 115A – 25%
- ▶ What rate should tax be deducted at?
 - ▶ Both TRC and PAN available
 - ▶ 10%
 - ▶ TRC not available, nor PAN
 - ▶ 25%
 - ▶ TRC available, but no PAN
 - ▶ **20%**

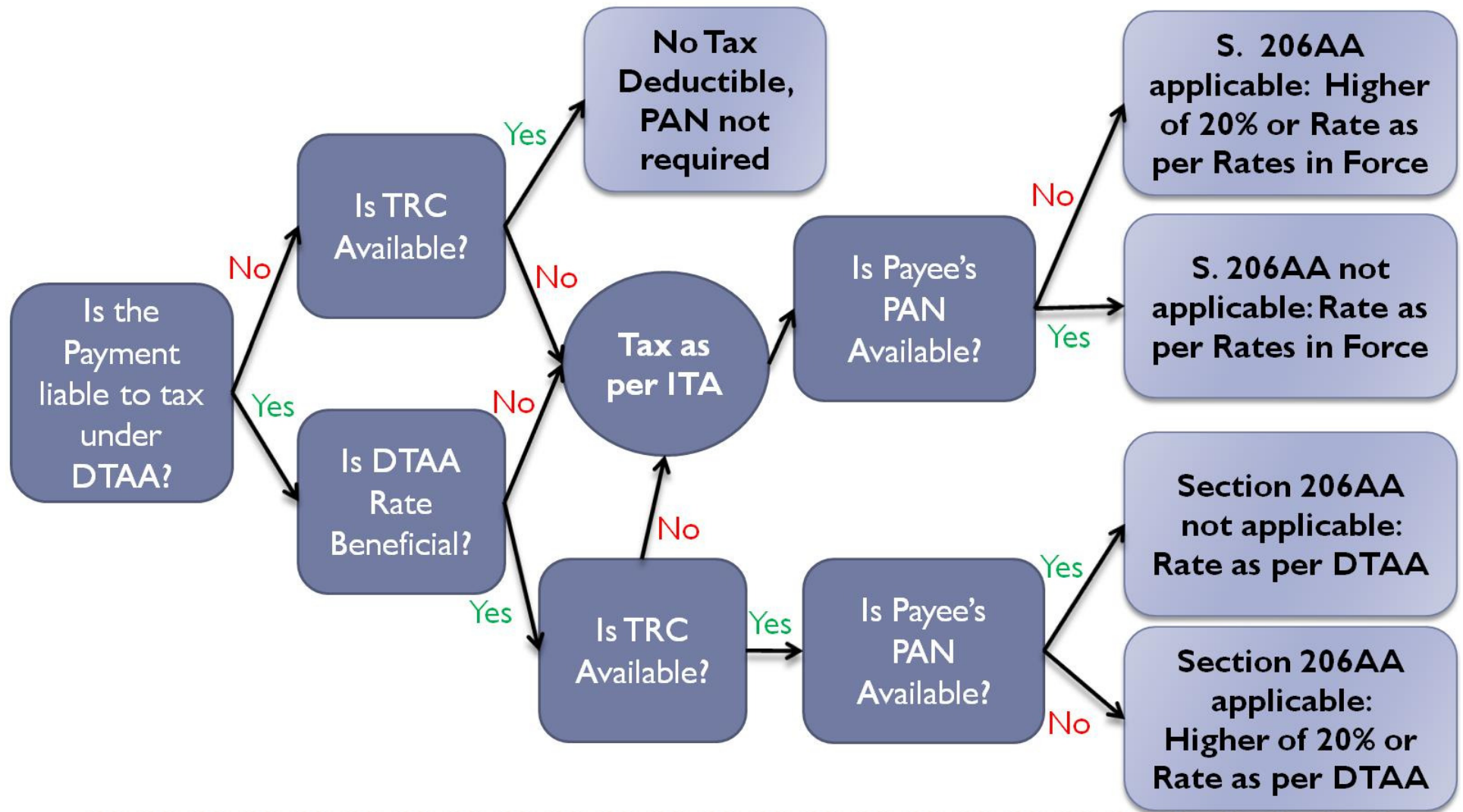
Tax Residency Certificate

- ▶ Section 90(4) & (5) – Introduced w.e.f 1.4.2013
- ▶ 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 S. 90(5)
 - ▶ Documents substantiating particulars to be maintained
 - ▶ By whom?
 - ▶ Details not covered in TRC be mentioned in Form 10F
 - ▶ Self-attestation

Tax Residency Certificate - issues

- ▶ TRC not required in case no treaty benefit availed
- ▶ LOB clause?
- ▶ The other country may not give all the details in their TRC. Will it be alright?
- ▶ TRC usually for the past year. Tax to be deducted for current year.
- ▶ TRC applied for, but not available on date of deduction

Interplay of DTAA, PAN & TRC



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

- ▶ **On Business income or Professional fees**
 - ▶ ‘Business Connection’
 - ▶ Professional Connection
 - ▶ PE or Fixed Base
 - ▶ Offshore supply
 - ▶ Payment to Foreign Agents of exporters
 - ▶ Withdrawal of Circular 23 of 1969 – impact?
 - ▶ ‘Force of Attraction’ clause in DTAA

Deductibility vis-à-vis certain payments...contd.

▶ On Royalties & Fees for Technical Services

Retrospective Expansion

Section 115A rate

Definition under Act vs. Treaty

Source Rule u/s. 9

'Most Favoured Nation' Clause

Royalties

Software Payments
E-commerce
transactions?

Transfer of know-
how

FTS

Rendering of service in India immaterial
"Make Available"
Marketing services

Deductibility vis-à-vis certain payments...contd.

- ▶ **On Capital gains**
 - ▶ On sale of shares
 - ▶ Mauritius
 - ▶ Cyprus
 - ▶ 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 FII's
 - ▶ Section 196D(2)
 - ▶ On gains earned by NRIs
 - ▶ On non-repatriable capital gains earned by NRIs from PIS

Deductibility vis-à-vis certain payments...contd.

- ▶ **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 certain payments...contd.

- ▶ On payments to Agent of Non-resident as per Sec. 163
- ▶ On payment by a firm to NR partners
- ▶ Transfer of own funds
- ▶ On gifts to NR non-relatives
- ▶ On shipping income
- ▶ On payments made by a branch to its HO
- ▶ On payment in kind
- ▶ On payment without remittance
- ▶ On payments through credit cards

LEGAL ISSUES – Consequences & Refunds

- **Consequences**
 - **Disallowance**
 - **Default**
 - **Interest**
 - **Penalty**
- **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

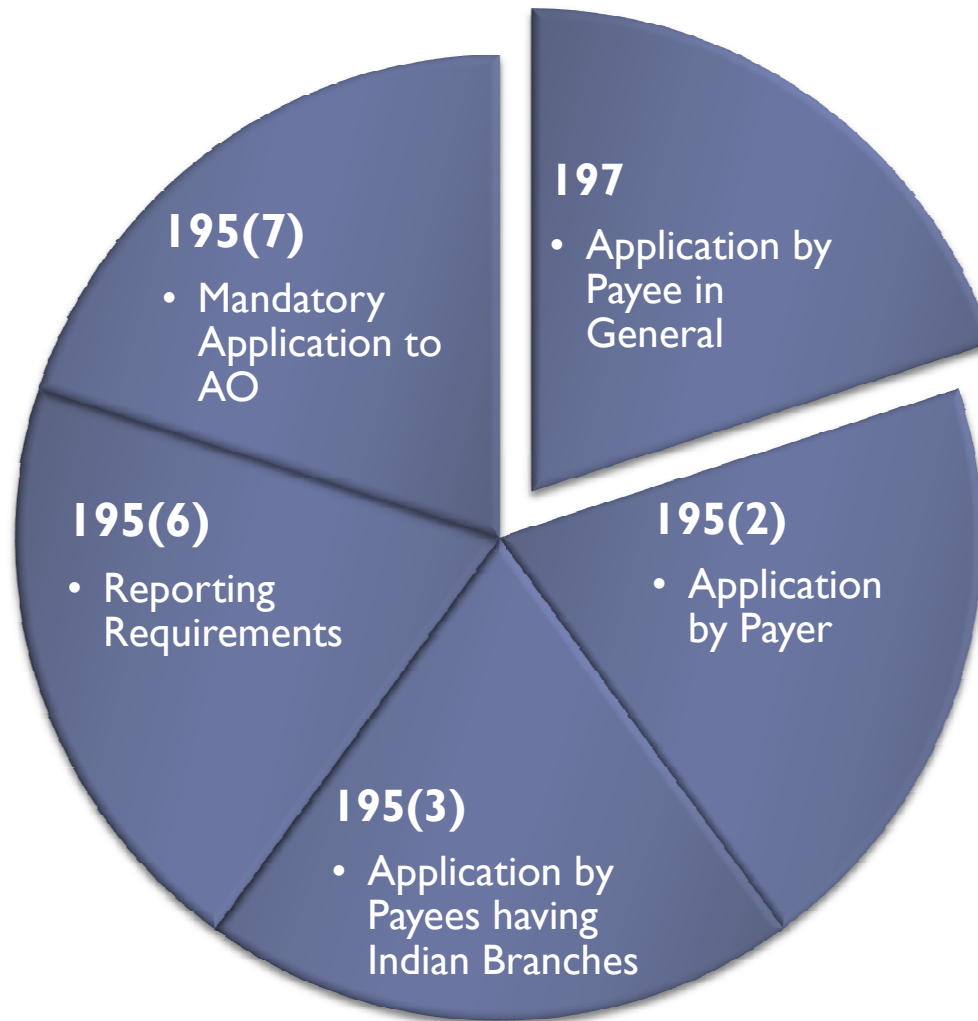
Refund of TDS

- ▶ 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)
- Revised Remittance Procedures
- Form 15CA
- Form 15CB - Analysis
- Mandatory application – Sec. 195(7)

Snapshot of Certification Provisions



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

Reporting u/s. 195(6)

- ▶ Person making payment to NR to furnish prescribed information online
 - ▶ Rule 37BB – recently amended
- ▶ Information & Undertaking – Form 15CA
- ▶ CA Certificate – Form 15CB
 - ▶ Separate certificate for each type of income
- ▶ Applicable for every remittance

Remittance Procedures

- ▶ RBI mandate for NOC from IT Department in case of remittance to NR
 - ▶ Objective of CBDT circular to dispense with NOC requirement
- ▶ Amendment in Rule 37BB mandating authorised dealer to furnish signed printout of Form 15CA
 - ▶ Existing CBDT circular not rescinded yet
- ▶ 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

Revised Remittance Procedures

- ▶ 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.)

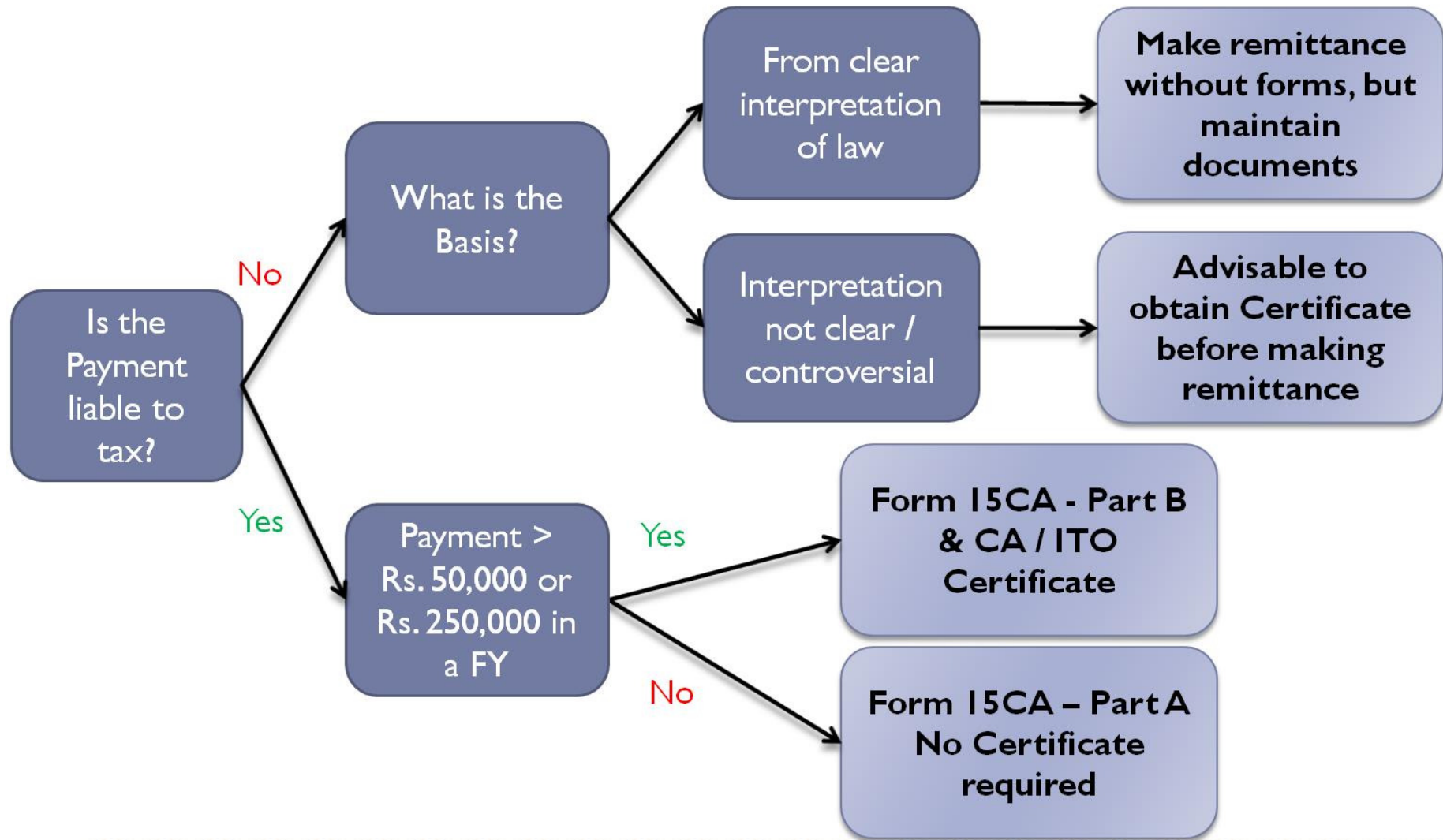
Specified Transactions...contd.

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	SI011	Payments for maintenance of offices abroad
19	SI201	Maintenance of Indian embassies abroad
20	SI 202	Remittances by foreign embassies in India
21	SI301	Remittance by non-residents towards family maintenance and-savings
22	SI302	Remittance towards personal gifts and donations
23	SI303	Remittance towards donations to religious and charitable institutions abroad
24	SI304	Remittance towards grants and donations to other Governments and charitable institutions established by the Governments.
25	SI305	Contributions or donations by the Government to international institutions
26	SI306	Remittance towards payment or refund of taxes.
27	SI501	Refunds or rebates or reduction in invoice value on account of exports
28	SI503	Payments by residents for international bidding.

Revised Remittance Procedures...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)

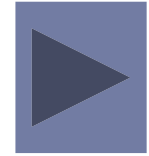
Revised Remittance Procedures – Flow Chart



Revised Remittance Procedures - Concerns

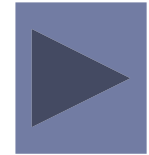
- ▶ Old Form 15CA now removed
 - ▶ Till 12th February 2014?
- ▶ Form 15CA to be signed by person competent to sign tax return
- ▶ Digital Signature not mandatory
- ▶ Form 15CA now available for offline filling
 - ▶ Multiple xmls can be filed through offline utility
 - ▶ Option to save data available only offline
 - ▶ Recall option not available
 - ▶ Space for detailed notes not available
- ▶ Banks not complying with new rules

Form 15CA - Part A



▶ Remitter's details

- ▶ PAN if available
- ▶ TAN if available
- ▶ Status



▶ Recipient's details

- ▶ PAN – if available - S. 206AA?
- ▶ Status no longer required
- ▶ Country to which remittance is made

▶ Principal place of business no longer required

Form 15CA – Part A... Contd.

▶ Remittance details

- ▶ Aggregate amount of remittance in FY
- ▶ Nature of Remittance
- ▶ Tax Deducted



▶ Verification

- ▶ No information is concealed
- ▶ Undertake to submit requisite documents to determine nature and amount of income as well as to determine tax liability
- ▶ Undertaking to pay the amount of shortfall in TDS not present



Form 15CA – Part B

- ▶ **Section A - same details as in Part A**

- ▶ PAN and TAN of Remitter Mandatory
- ▶ PAN of Recipient – Sec. 206AA
- ▶ Principal place of business required here



- ▶ **Section B – as per certificate of the accountant**



- ▶ **Verification Part**

- ▶ Certify that Accountant's certificate has been obtained
- ▶ Undertake to pay shortfall of TDS along with interest



Form 15CB – Analysis

- ▶ **CA certificate to be provided in physical form**
 - ▶ Information to be uploaded online in Part B of Form 15CA
- ▶ **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.



- ▶ **Clause A - Name and address of the beneficiary of the remittance**
 - ▶ 'Beneficiary of Remittance' not Beneficial Owner of Income

- ▶ **Clause B(6) - Nature of remittance as per agreement/document**
 - ▶ Important for determining classification of income
 - ▶ Documents reviewed must enable determination of nature of remittance – otherwise call for more documents
 - ▶ Declaration not enough
 - ▶ Reference to Specified List if necessary

Form 15CB...contd.

- ▶ **Clause B(7) - In case the remittance is net of taxes, whether tax payable has been grossed up?**
 - ▶ Provide computation on a separate sheet

- ▶ **Clause B(8) – 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
 - ▶ Liable to tax in India?
 - ▶ Obtain declaration for no ‘business connection’ in case DTAA not applicable

- ▶ **Clause B(9) – DTAA details**
 - ▶ TRC available

Form 15CB...contd.

- ▶ **Clause B(9)(A) - 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

- ▶ **Clause B(9)(B) - 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?

Form 15CB...contd.

- ▶ **Clause B(9)(C) - In case remittance is on account of Capital Gains**
 - ▶ Can CA provide certificate for capital gains?

- ▶ **Clause B(D) - In case of other remittance**
 - ▶ Nature of remittance
 - ▶ Provide reasons why classified as 'other remittance'
 - ▶ In case of remittance other than income – mention the exact nature
 - ▶ Separate certificates for income and non-taxable capital receipts

Mandatory application - Section 195(7)

- ▶ New provision brought in by Finance Act 2012
- ▶ 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!

