

Withholding tax provisions for payment to nonresident

The Institute of Chartered Accountants of India – WIRC Chapter, Mumbai

Seminar on TDS – Law & Practice

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Agenda



Concept of withholding tax (WHT) provisions for nonresident

An overview of Section 195

Operational rules

Case study

Key takeaways

Questions

Concept of WHT provisions for nonresident

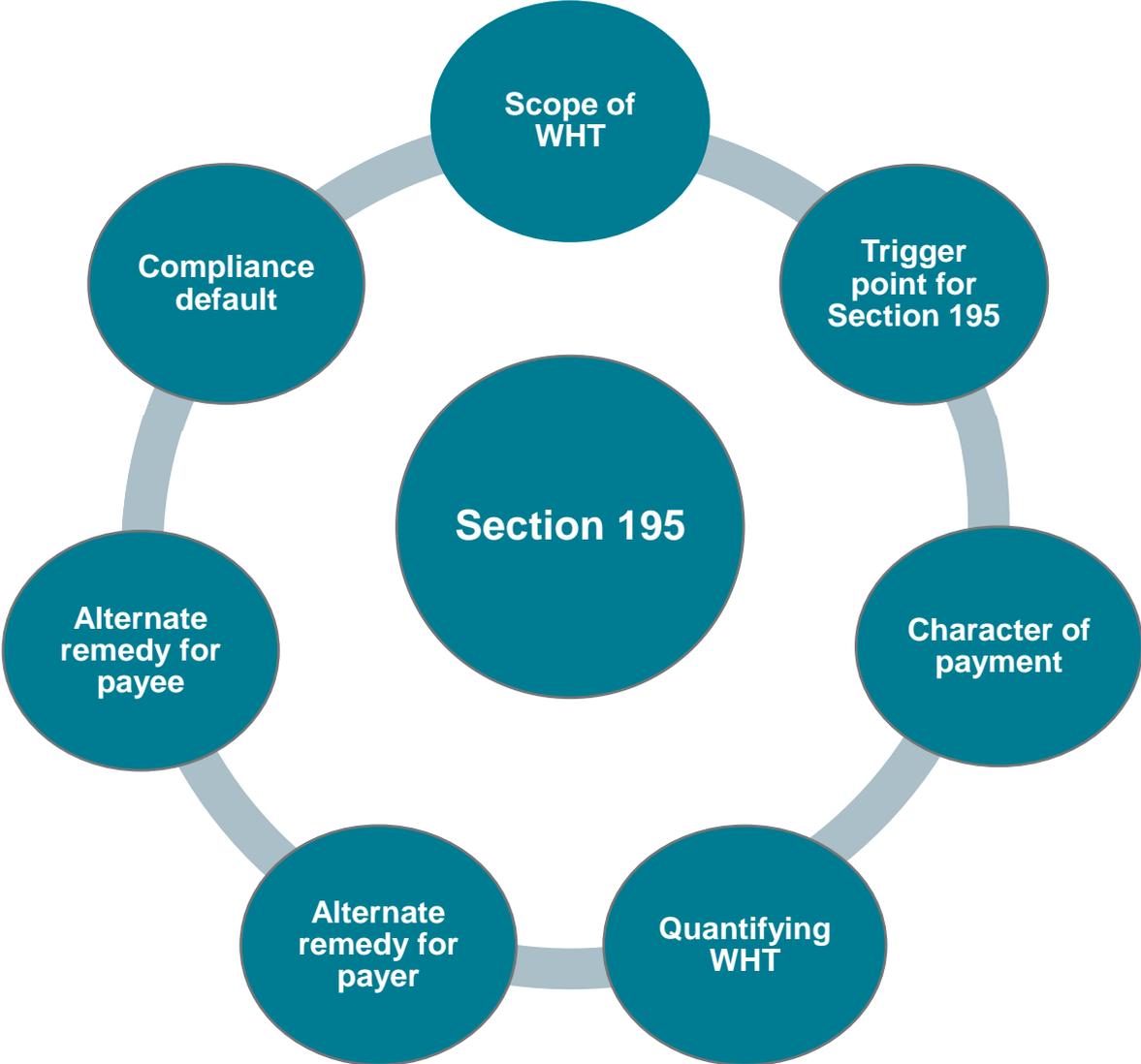
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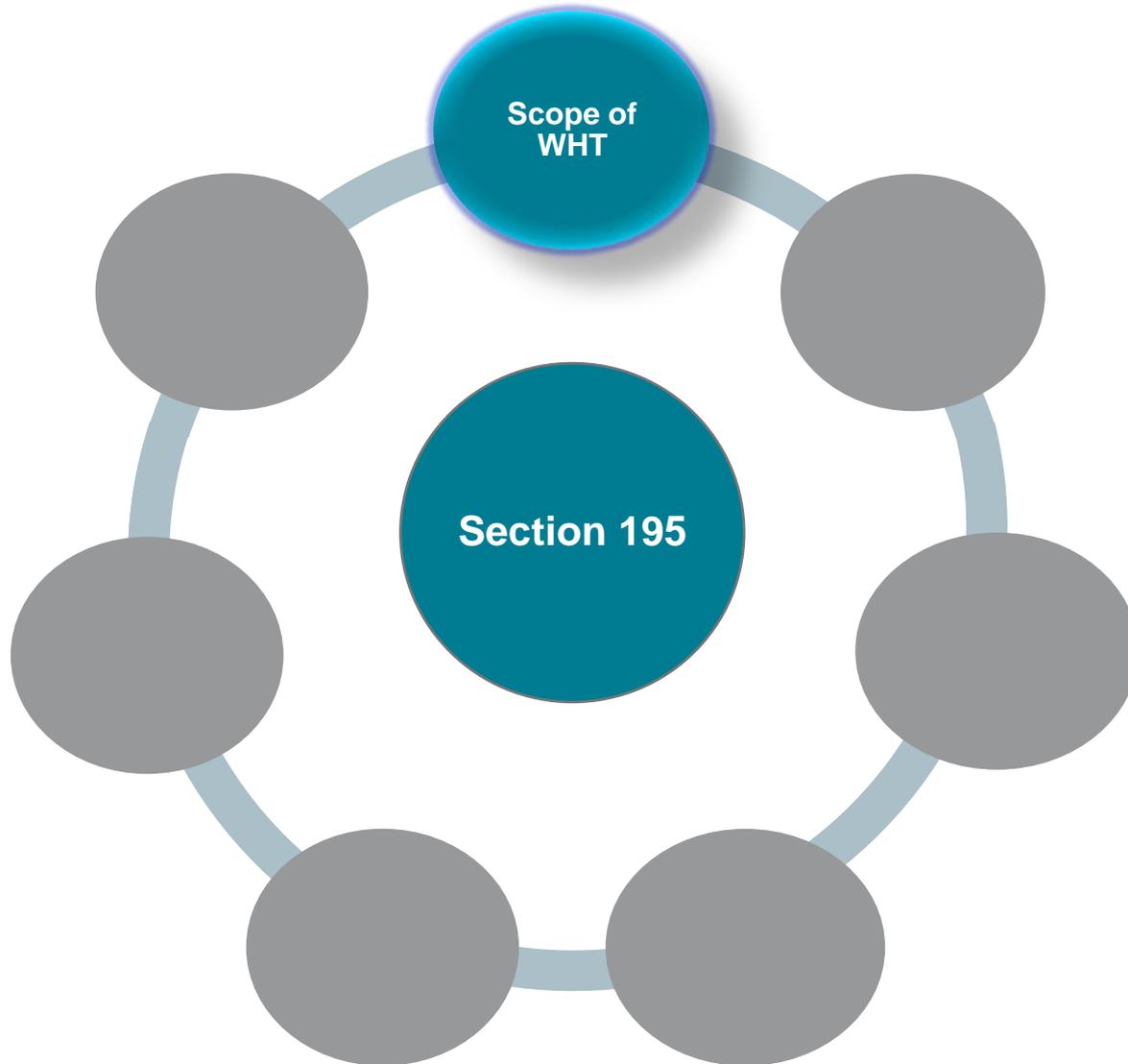
Compliance procedures

Determination and analysis

Applicability of the provisions

An overview of Section 195





Scope of WHT (1/2)

Operative provision of Section 195 of the Income-tax Act, 1961 (IT Act)

“Other sums.

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...**”

Other clauses of Section 195

Clauses	Other provisions applicable for Section 195 of IT Act
195(2)	Application by “Payer” to Tax Authorities (AO) to determine appropriate proportion of income chargeable to tax
195(3)	
195(4)	
195(5)	Powers of CBDT to issue Notifications
195(6)	Furnishing of information relating to payments
195(7)	Authority of board to specify class of person or cases to make application under Section 195(2)
195A	Income payable “net of tax” Grossing-up

Scope of WHT (2/2)

Responsibility of WHT



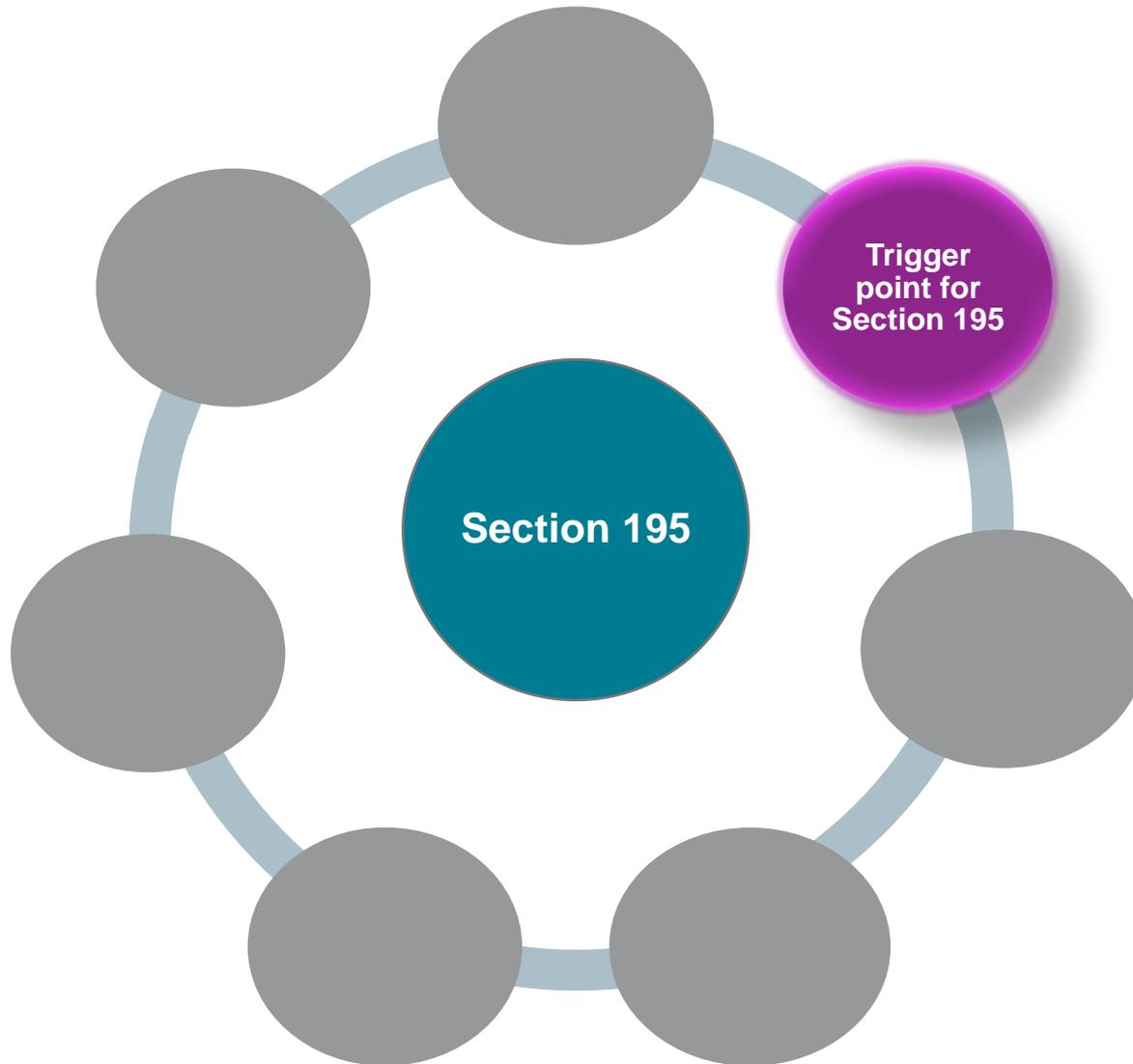
Payers covered

- “Any person” covered irrespective of their status - Includes person under Section 2(31) responsible for paying (including individuals and HUF)
- Payer itself in case of company, and the company includes principle officer
- It also includes all nonresidents having taxable presence in India or not – *Explanation 2 to Section 195; Circular No. 726 dated 18 October 1995*

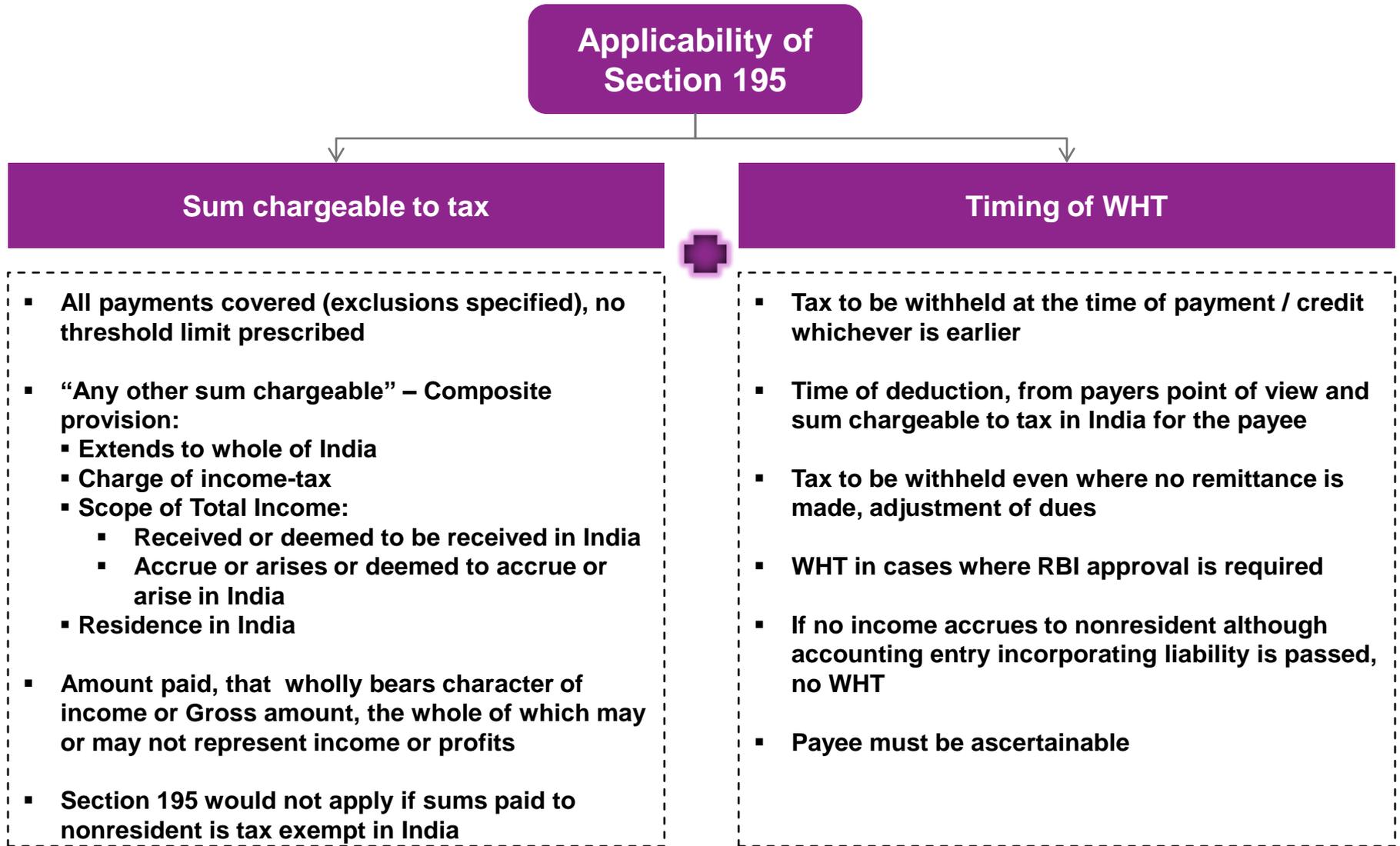
Payees covered

- Agent of a nonresident in India?
- Resident but not ordinary resident RNOR?
- Payment made to a foreign branch of an Indian Company?

Virtually includes everyone



Trigger point for Section 195 (1/3)



Trigger point for Section 195 (2/3)

Sum chargeable to tax..brief insight

- Where, payment made by resident to non-resident, was an amount not chargeable to tax in India, no tax is deductible at source
- Assessee liable to deduct TDS under Section 195 on payment made to non-resident even though payment is not made in cash but made in kind
- Payer is obligated to WHT, even if the receipt is not taxable in the hands of the payee in the country of residence
- Sums not liable to tax in India on satisfaction of conditions, the principles are enunciated under *Circular 23/1969 and 786/2000* (now withdrawn) like (P to P, nonresident operates outside India, contract signed outside India, title of goods passed outside India, payment is directly remitted abroad, etc.).
Payments to:
 - Agency commission payable to foreign agents;
 - Off-shore supply of goods and equipments; and
 - Consideration paid for outright purchase of designs and drawings is not royalty
- No significant impact of withdrawal of the Circulars

Trigger point for Section 195 (3/3)

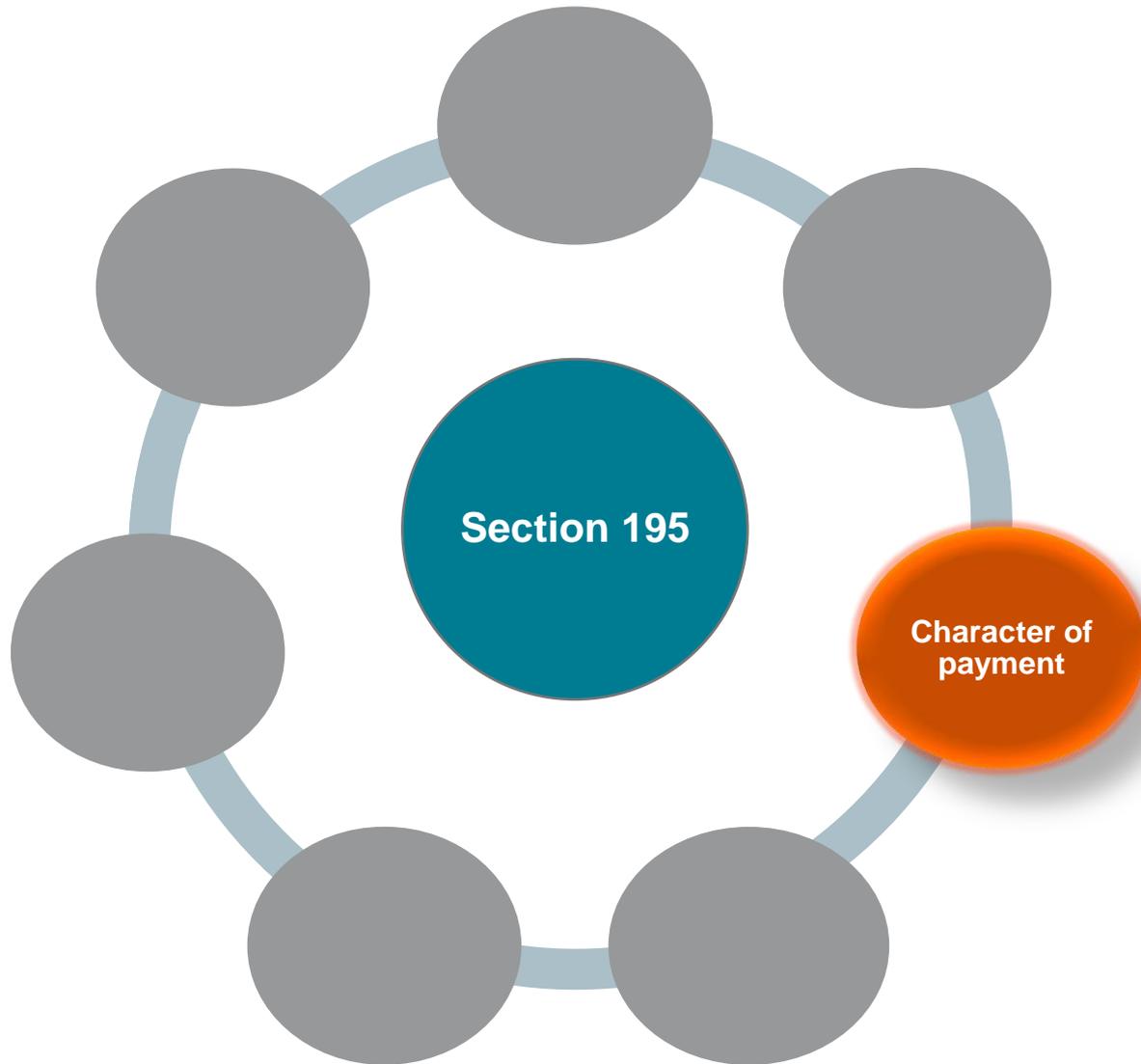
Specific exclusions for WHT



Sections	Particulars
115-O	Tax on distributed profits of domestic companies
192	Income from Salaries
194LB	Income by way of interest from infrastructure debt fund
194LC	Income by way of interest from Indian company
194LD	Income by way of interest on certain bonds and Government securities

Other specific sections

196B	Income from units
196C	Income from FCCBs or GDRs of Indian companies
196D	Income from FIIs now FPI except Capital Gains

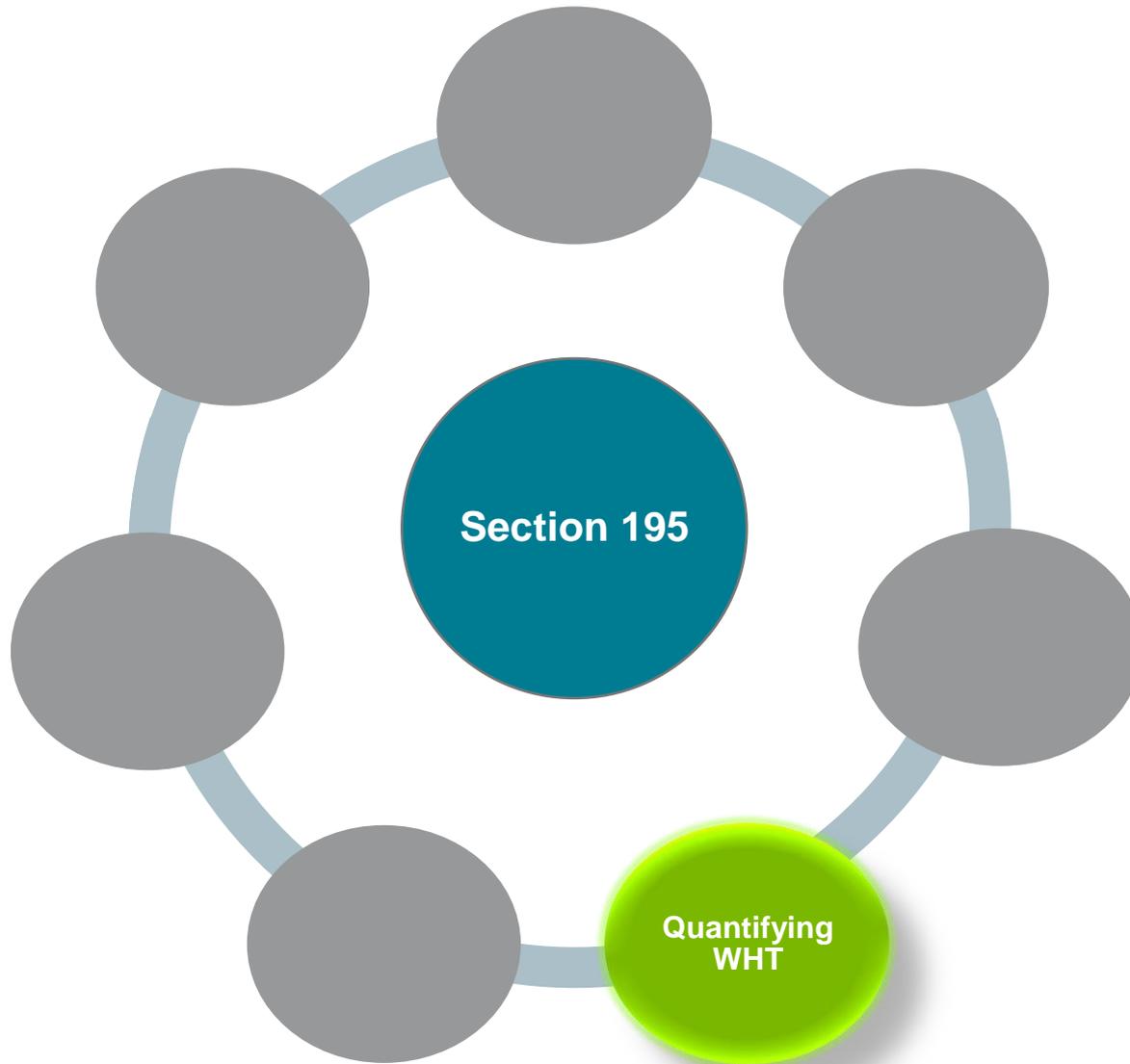


Character of payment

Determining the nature of payment

Nature of Income (payee perspective)	Basis of tax	Income chargeable under	
		IT Act	Tax Treaty
Business / Profession income	Taxable if Business Connection in India or property or asset or source of income in India or transfer of a capital asset situate in India	Section 9(1)(i)	Article 5, 7 and 14
Capital Gain	Taxable if situs of shares/ property is in India	Section 9(1)(i)	Article 13
Dividends	Taxable if paid by an Indian company	Section 9(1)(iv) (subject to DDT)	Article 10
Interest	Taxable if sourced in India	Section 9(1)(v)	Article 11
Royalties		Section 9(1)(vi)	Article 12
Fees for Technical Services (FTS)		Section 9(1)(vii)	
Salaries	Taxable if services are rendered in India	Section 9(1)(ii)	Article 15

Provisions of the IT Act or Tax Treaty, to the extent more beneficial to the taxpayer to apply



Rates in force



- Rates in force as defined under Section 2(37A) of the IT Act
- Rates of income-tax specified in IT Act / Tax Treaty under Section 2(37A)(iii), beneficial rates to apply
- The exchange rate is applicable as per Rule 26 – SBI TT buying rate
- Rates prescribed by tax treaty is generally inclusive of surcharge and education cess
- Tax to be withheld under Section 195 on gross basis

If PAN not furnished under IT Act, then?

- Section 206AA, is a non-obstante provision that overrides the entire IT Act effective 1-4-2010
- Attracted when the payee does not have a PAN or discloses incorrect PAN to the payer
- Section 206AA provides for WHT at the higher of the following rates, namely:
 - Specified rate in the relevant provisions of the IT Act; or
 - Rate / rates in force; or
 - 20%

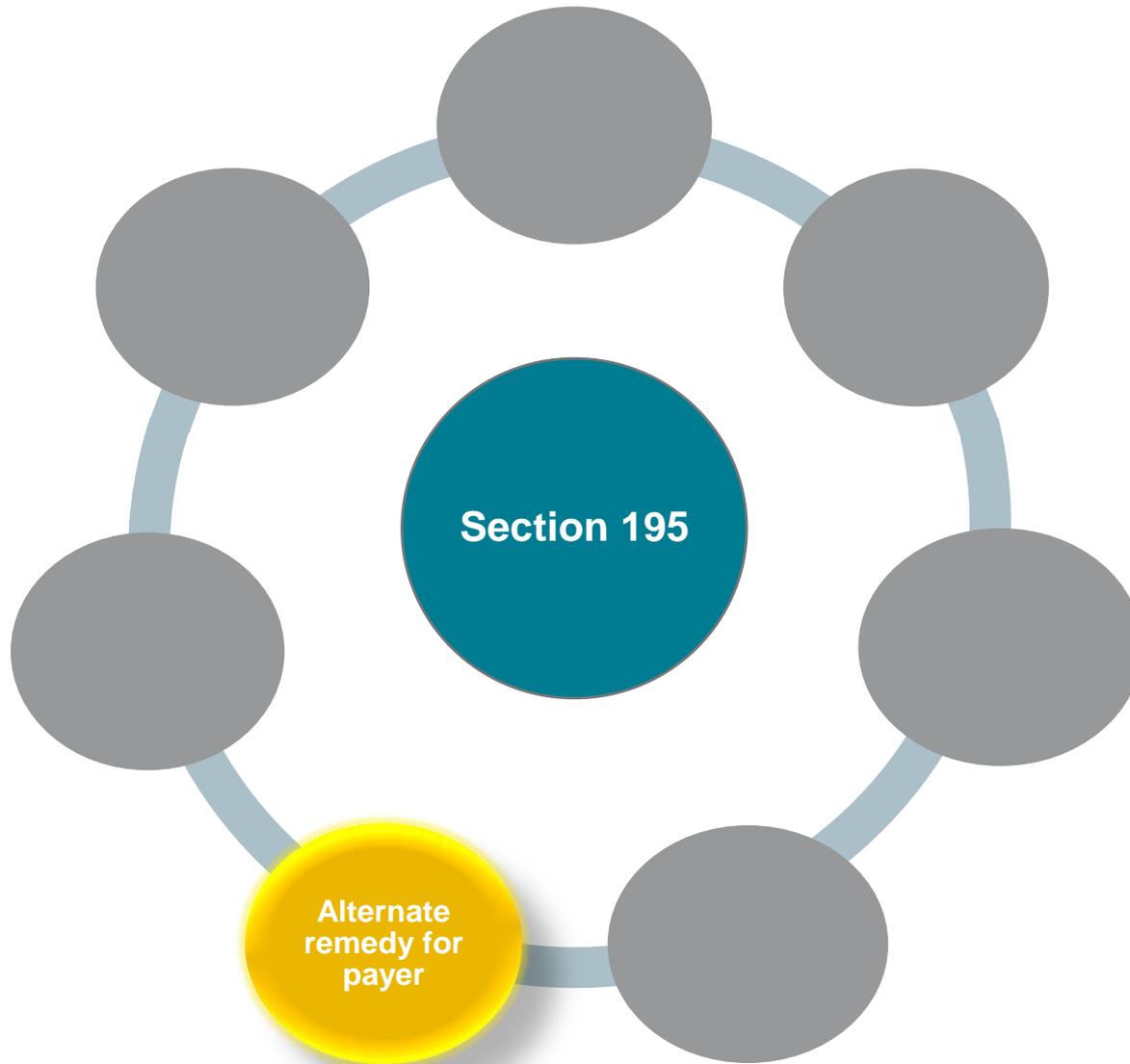
Section 195A – Income payable “net of tax” (Grossing-up)



- In the event of tax chargeable on any income is borne by the payer
- For the purposes of WHT under Section 195, income should be increased to such amount as would, after WHT thereon at the rates in force, be equal to the net amount payable to the payee
- Section 195A does not apply on notional income under Section 44BB
- Friction between Section 206AA and 195A – Section 206AA not applicable for grossing-up under Section 195A of IT Act
- Tax credit claimed by the payee to be restricted commercially – Compliance under Section 203?

Illustration of Section 195A

Particulars	Amount in INR
Amount payable to nonresident	100
Add: WHT (assumed to be 10% as per the tax treaty) grossed-up ($10 \times 100 / 90$)	11.11
Total income	111.11
Less: WHT applicable at 10%	11.11
Net amount payable to the nonresident (Recipient)	100



Alternate remedy for payer (1/2)

Application by payer to the AO under Section 195(2)

Application by whom?

The application to be made by the payer before the jurisdictional tax authority

When to apply?

When the payer is in doubt and believes that the whole of sum payable is not chargeable to tax in India

Process

The payer may approach the tax authority to determine the portion of income chargeable to tax in India

Consequence

- AO may issue a certificate, determining the portion of income chargeable to tax
- The permission is valid for the period specified
- No specified time limit available to pass the order under Section 195(2)

- Order under Section 195(2) is:
 - appealable after payment of tax; and
 - amenable to revision under Section 263
- Decision under Section 195(2) is inconclusive in determination of income in case of foreign entity

Alternate remedy for payer (2/2)

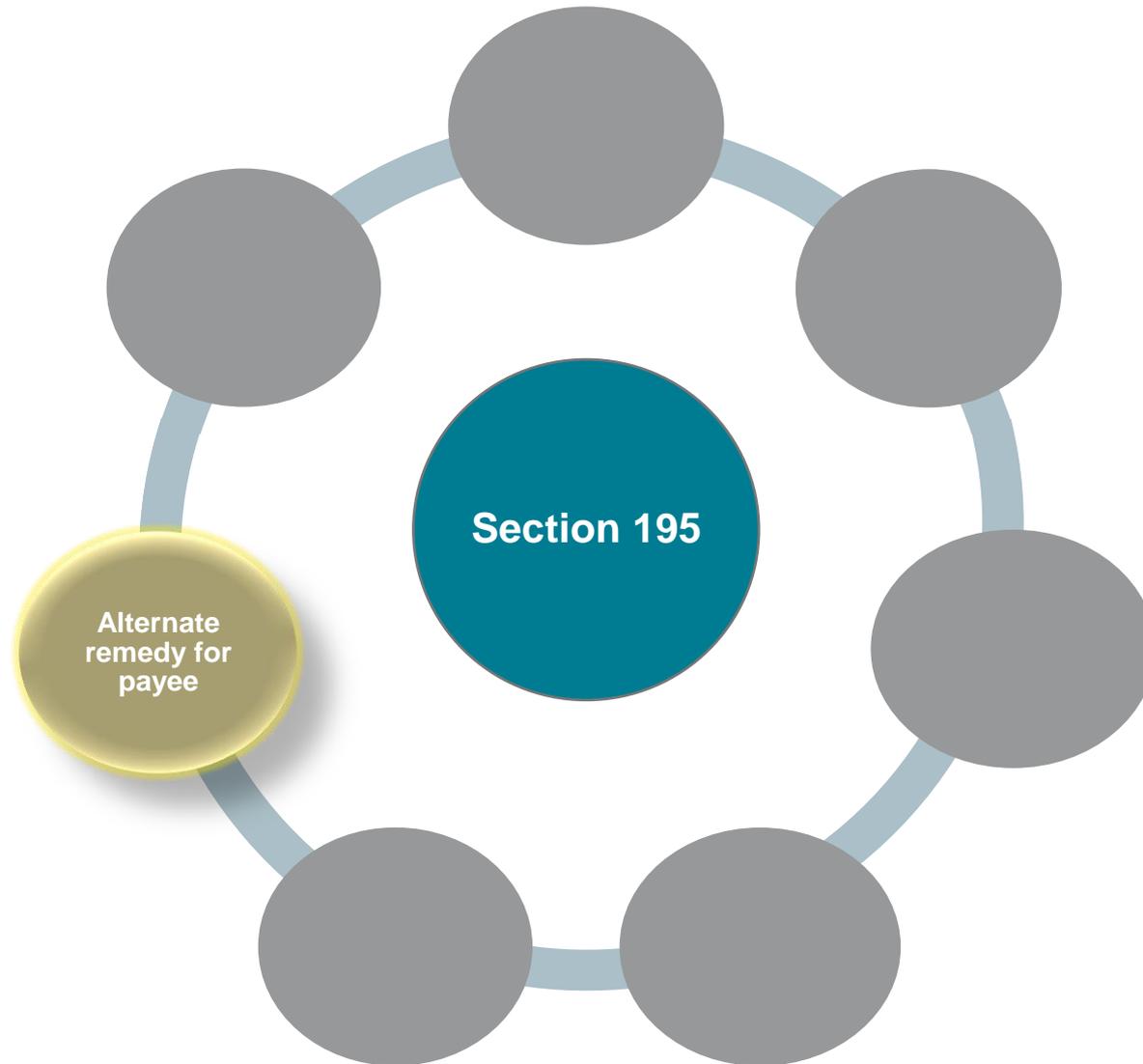
Chartered Accountants' (CA) Certificate under Section 195(6)

- Payment to nonresident also permitted by obtaining CA certificate as prescribed under *Circular 759*, read with *Circular 10/2002 dated 9/10/2002*
- Rule introduced by CBDT Notification

Detailed procedures discussed in the ensuing slides of operational rules

Advance Ruling under Chapter XIX-B of IT Act

- Ruling by quasi-judicial authority on reference by payer / payee
- Binding ruling on applicant as well as tax authorities unless change in facts / law (diluted)
- Upfront determination of taxability of transactions undertaken by nonresidents
- Fast track mechanism, protracted litigation may be avoided with certainty in tax treatment
- Ruling is appealable before the High Court



Alternate remedy for payee

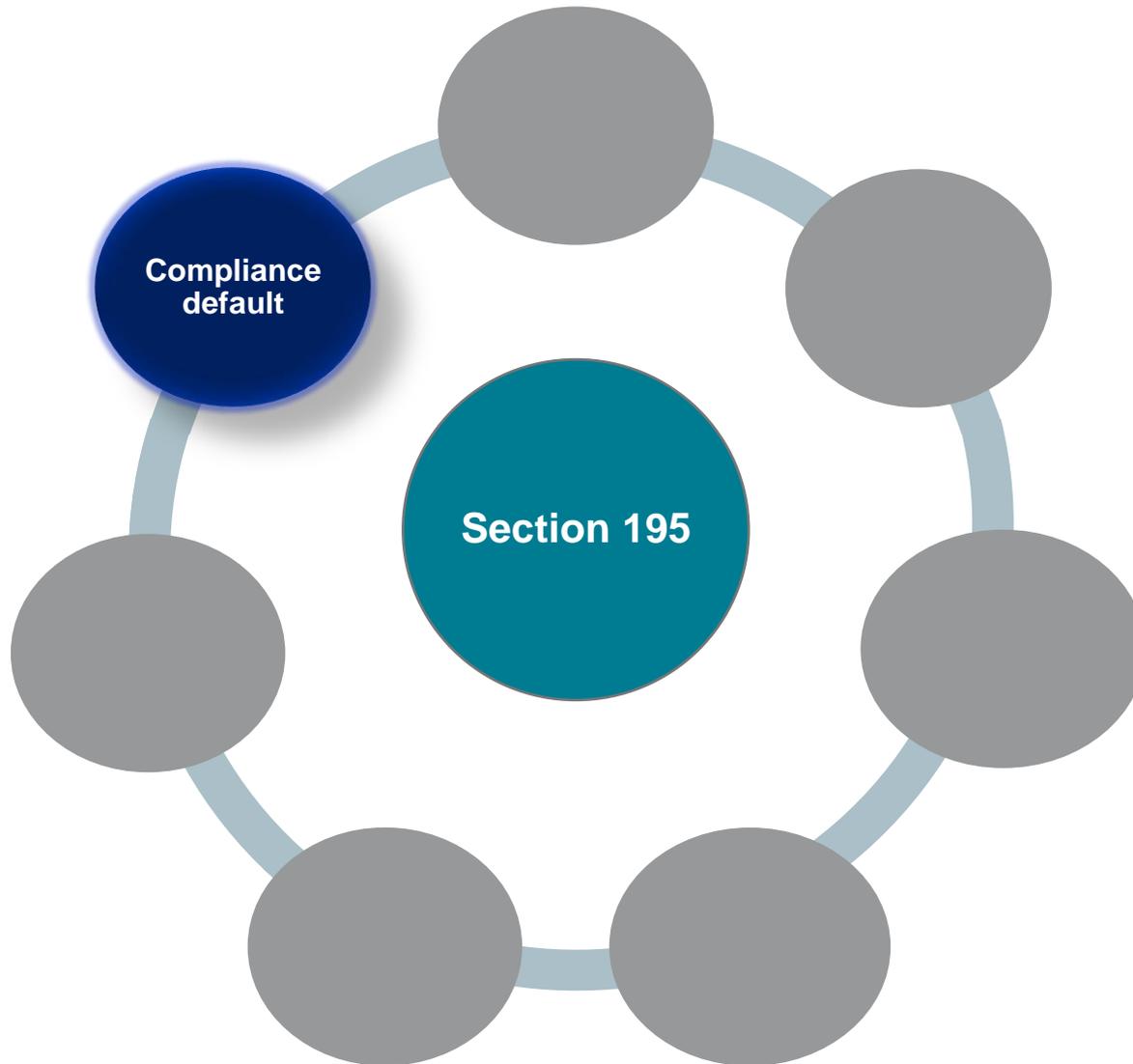
Application by payee to the AO under Section 195(3),(4) and (5)

- Payee to make application in prescribed the form (Form 15C or form 15D) for no WHT
- Prescribed conditions include Payee has (Rule 29B):
 - carries on business / profession in India for 5 years and has prescribed value of assets in India;
 - been regularly assessed to Income-tax;
 - not defaulted in tax, interest, penalty, fine or any other sum payable; and
 - not been subjected to penalty under Section 271(1)
- AO may issue provisional Nil WHT certificate
- Certificate issued by the AO valid for the Financial Year mentioned therein or until cancelled
- Renewal after the expiry or within 3 months before expiry of the certificate
- Certificate issued by AO can be prospective only
- Application after the payment of tax not entertained - *Circular 774 dated 17 March 1999*

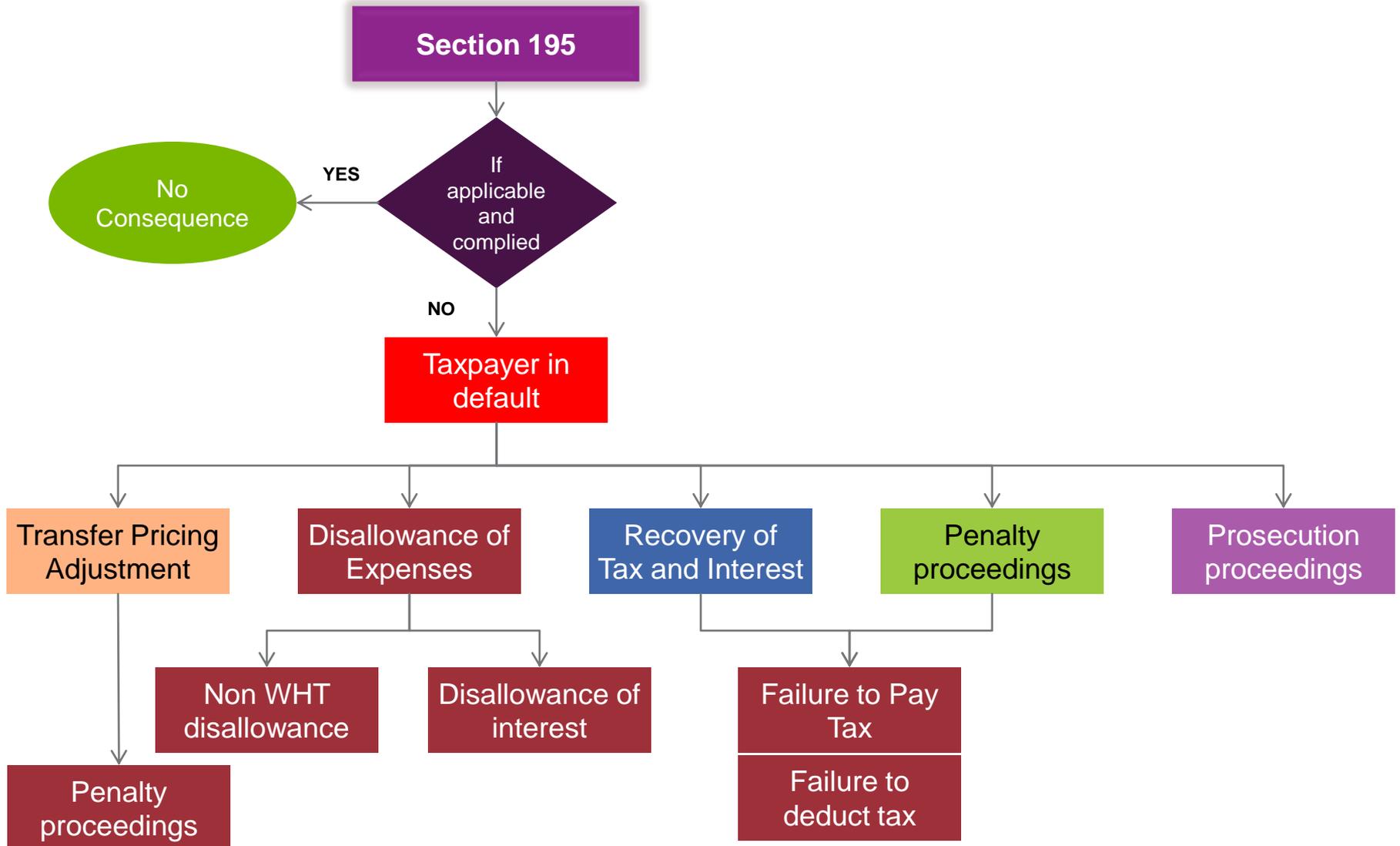
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Application by payee to the AO under Section 197(1)

- Application to be made by the payee under Section 197(1) for lower / no WHT in prescribed form (Form 13)
- Prescribed conditions (Rule 28AA):
 - Tax payable on estimated or existing income;
 - Tax payable of last 3 previous years;
 - Details of advance tax, TDS & TCS;
 - AO to issue certificate indicating rate / rates of tax whichever is higher of the following:
 - Average rate determined on the basis of advance tax; or
 - Average of average rates of tax paid by the taxpayer in last 3 years
- AO to issue certificate for lower / Nil WHT
- Application to be made before the payment / credit whichever is earlier
- Certificate issued by the AO valid for such period mentioned therein or until cancelled



Compliance default



Provisions for CA Certificate



- *Circular 10/2002* authorizes remittance of money through a CA Certificate
- CA Certificate required also for trade payments – *RBI Circular No. 32 dated 19 July 2007*
- Provision under Section 195(6) introduced by Finance Act, 2008 for CA certificate
- Rule 37BB introduced by CBDT vide *Notification 30/2009 dated 25/03/2009* :
 - Forms 15CA and 15CB to intimate payments to nonresidents and manner of disclosing amount:
 - Form 15CA, prescribes information to be furnished by the payer; and
 - Form 15CB, prescribes format of CA Certificate to be obtained by the Payer
- The taxpayer not absolved from penalty / prosecution if found that WHT was lower than required
- CA certificate merely acts as a guidance and is not a substitute adjudication by the AO
- The procedure for remittance was amended from 01 October 2013, with significant change in the procedure, being more technological robust and detailed
 - Specified list of 28 payments like outbound investments, gifts, etc. exempt from the procedures

Operational rules (2/5)

Amended procedures for CA Certificate

- Only taxable remittances to be reported in Form 15CA
- Obtaining Form 15CB in Parts:
 - **Part A:** Applicable to the following remittances chargeable to tax / not:
 - Small payments by remitter not exceeding INR 50,000 and aggregate of such payments during the Financial year does not exceed INR 2.5 lacs
 - **Part B:** Any other payments chargeable to tax
- Specific declaration by the payer to pay taxes with interest and being subjected to penalty if transaction found liable for WHT
- Undertaking in prescribed format from payee
- Form 15CA to be electronically uploaded on NSDL / income-tax website, amended to upload by digital signature of the Managing Director

Sample declaration from the Payee

<< On the letterhead of Payee >>

Date: _____

TO WHOMSOEVER IT MAY CONCERN

We, the Payee, hereby confirm as follows:

1. We are a Limited Company incorporated and registered in ___with Unique Entity Number _____.
2. We are a tax resident of ___as per Article 4 of the tax treaty
3. We do not have any Permanent Establishment / Fixed place in India as defined under Article 5 of the Treaty. Also we will not have a Permanent Establishment / Fixed place in India within the meaning of the Treaty for the financial year.
4. The amount payable and its nature under the tax treaty
5. The amount is to be remitted to payee are the beneficiaries hereof.
6. The place of world assessment of our income is _____
7. In the event there is any income-tax demand (include interest etc) raised in India in respect of this remittance we undertake to pay the demand forthwith and provide ___with all information/documents that may be necessary for any proceedings before income tax/appellate authority in India.

For Payee

Operational rules (3/5)

Suggested method for CA Certificate

Steps	Action plan
Payment covered under Section 195	Payment from resident to nonresident or from nonresident
Verify factual documents	Invoice, Contracts, Legal Status, obtain declaration, PAN, etc.
Determine character	Classification of payment, Business, Royalty, FTS, etc.
Evaluate taxability	
<i>Under IT Act</i>	Income-tax rates, Grossing-up, Section 206AA , Case law update
<i>Under tax treaty</i>	No PE, TP analysis, beneficial owner, entity characterization, Article, LOB clause, <u>Obtain TRC</u> , MFN, Protocol to the tax treaty, Technical explanation to the tax treaty, Model commentaries
Specific orders	Verify specific orders received from tax authorities, 195(2), etc.
Follow compliance	Complete the Form comply with WHT deadlines for deposit

Tax Residency Certificate (TRC)

- TRC requirement for all nonresidents to claim tax treaty benefits
- Furnishing of TRC mandatory to avail tax treaty benefits:
 - *SC in the case of UOI v. Azadi Bachao Andolan [2003] 263 ITR 706 (SC)*
 - *Circular 789 dated 13 April 2000*
 - Shome Committee report on GAAR recommends that *Circular 789 of 2000* should be retained
- Prescribed additional information to be furnished along with TRC
- CBDT clarified that the additional information prescribed may not be required if it already forms part of the TRC



**Notification No. 57/2013 dated
1/08/2013 [F.No.142/16/2013-TPL]
revised the Rule 21AB**

Operational rules (4/5)

Prescribed Form 10F

The additional details required to be furnished in Form 10F under Rule 21AB:

1. Status (Individual, Company, Firm, etc.) of the taxpayer
2. PAN of the taxpayer, if allotted
3. Nationality (in case of an individual) or country or specified territory of incorporation or registration (in case of others)
4. Taxpayer's tax identification number or a unique number, as the case may be
5. Period for which the residential status, as mentioned in the TRC, is applicable and
6. Address of the taxpayer during the period for which the certificate is applicable

CBDT clarified that declaration may not be required if TRC contains above particulars

Sample TRC

Tax Reference No. Date

SINGAPORE 018982

INLAND REVENUE AUTHORITY OF SINGAPORE

55 Newton Road
Singapore 307987
Tel: 1800-3568622
Fax: 63514360

Dear Sir/Madam

CERTIFICATE OF RESIDENCE FOR THE PURPOSE OF CLAIMING BENEFIT UNDER THE SINGAPORE / INDIA AVOIDANCE OF DOUBLE TAXATION AGREEMENT FOR INTEREST AND FEES

I refer to your request dated

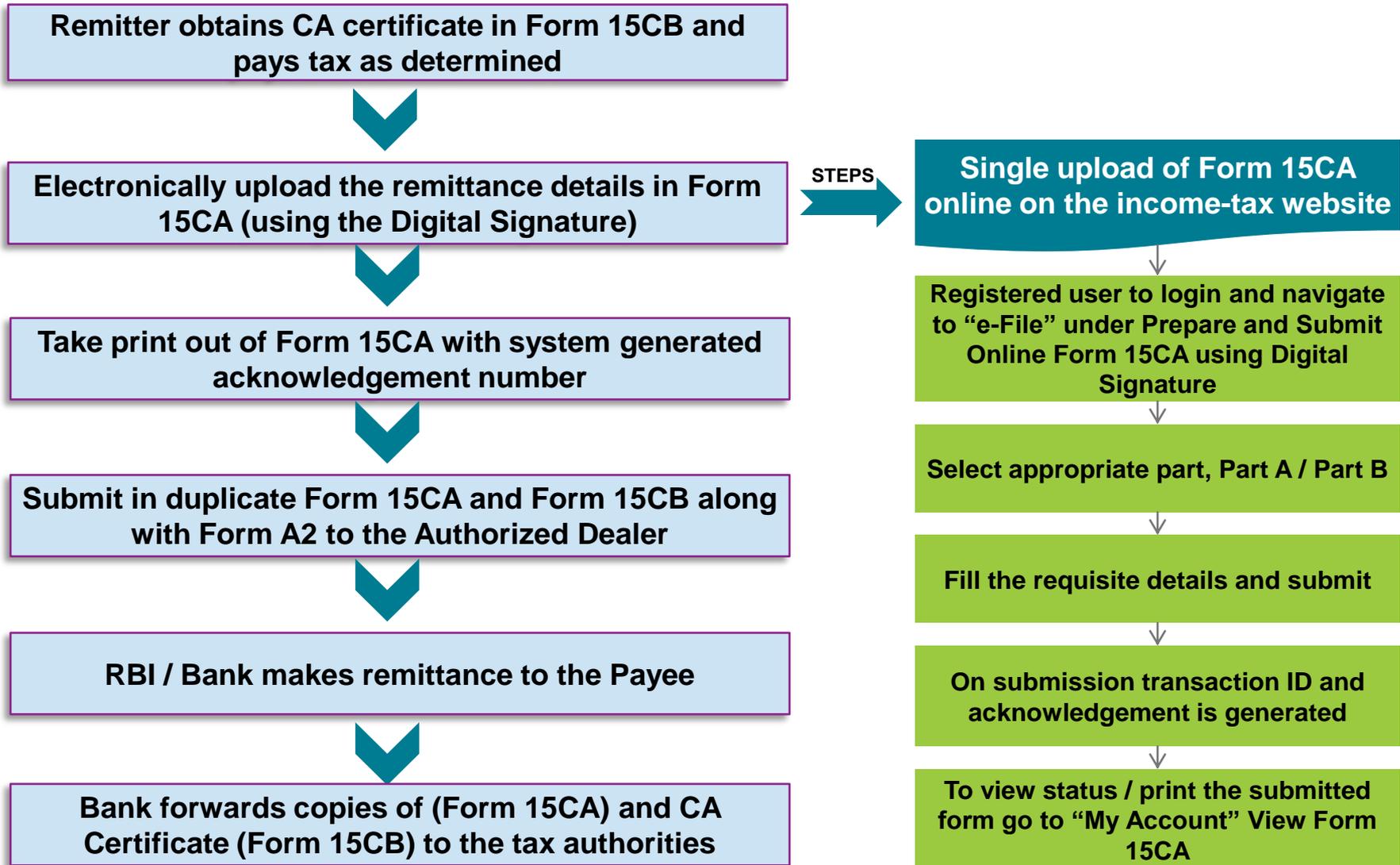
Based on your confirmation that the control and management of your business for the whole of 2013 will be exercised in Singapore, it is confirmed that your company will be regarded as resident in Singapore for income tax purposes for the Year of Assessment 2014.

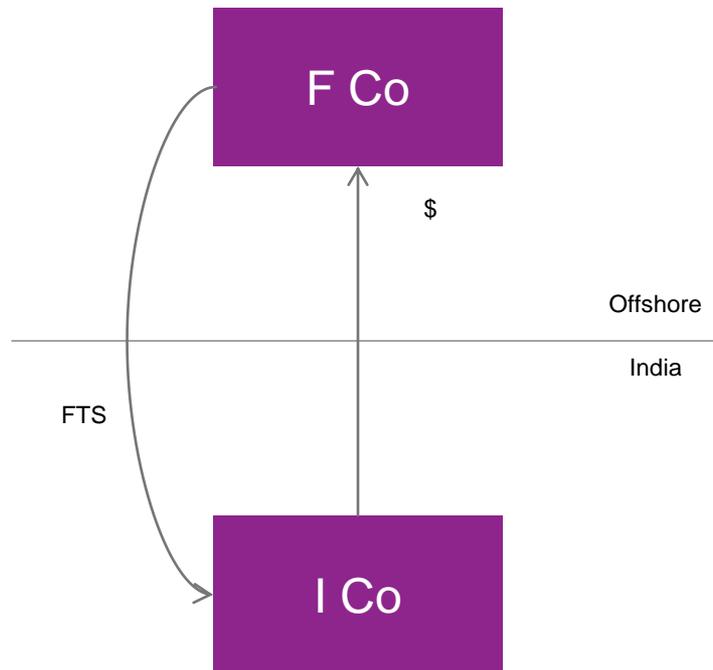
Based on the records available, the country or specified territory of incorporation or registration is Singapore.

Yours faithfully

TAX DIRECTOR
CORPORATE TAX DIVISION
for COMPTROLLER OF INCOME TAX

Operational rules (5/5)

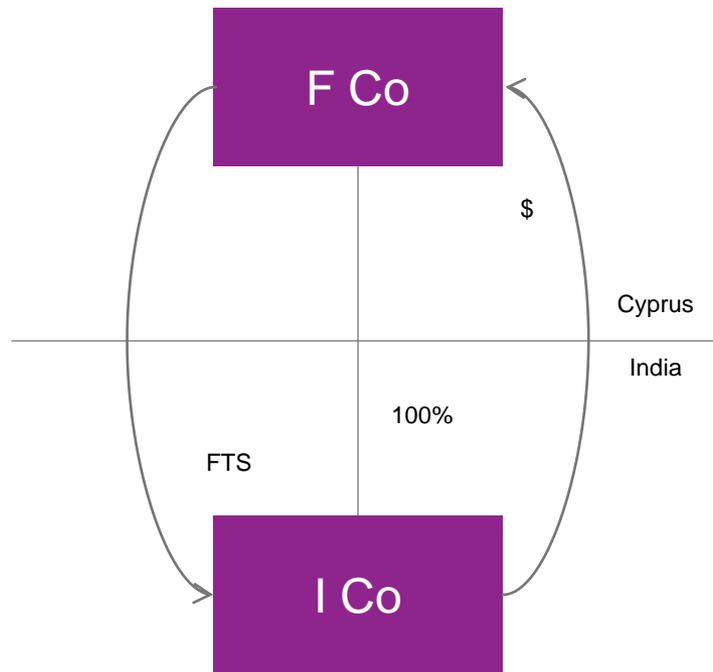




Applicable WHT rate for F Co in absence of PAN

- Section 206AA provides for WHT at the higher of the following rates, namely:
 - Specified rate in the relevant provisions of the IT Act; or
 - Rate / rates in force; or
 - 20%
- F Co has a valid TRC
- What should be the WHT rate for Section 195?

Case Study (Variation)



Applicable WHT rate for F Co in absence of PAN

- Implications when payment made to AE?
- If payment made to Cyprus?

Key takeaways

1.

Ignorance of rules may lead to undesirable litigation and cost, thus impacting business focus

2.

Alternate remedy of application before AO conservative, but time consuming

3.

Enhanced onerous provisions for issue of CA Certificate

4.

Cumbersome compliance provisions for non-resident payers'

5.

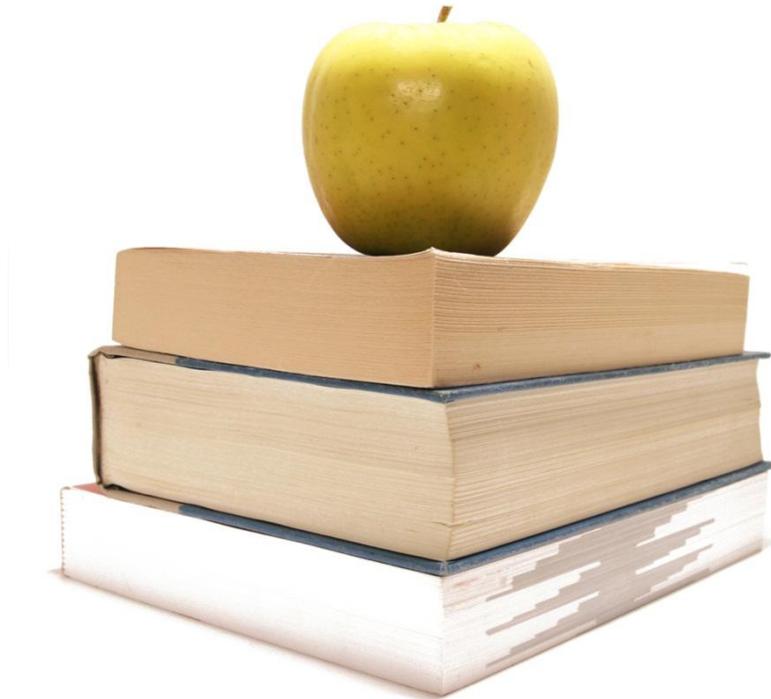
Stay updated or hire competent professionals for a comprehensive assessment

6.

Have patience and trust in Indian tax judiciary, accurate interpretation will enable success

Questions ?

Thank you!



Your feedback is valuable and will help me improvise my skill-sets

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