

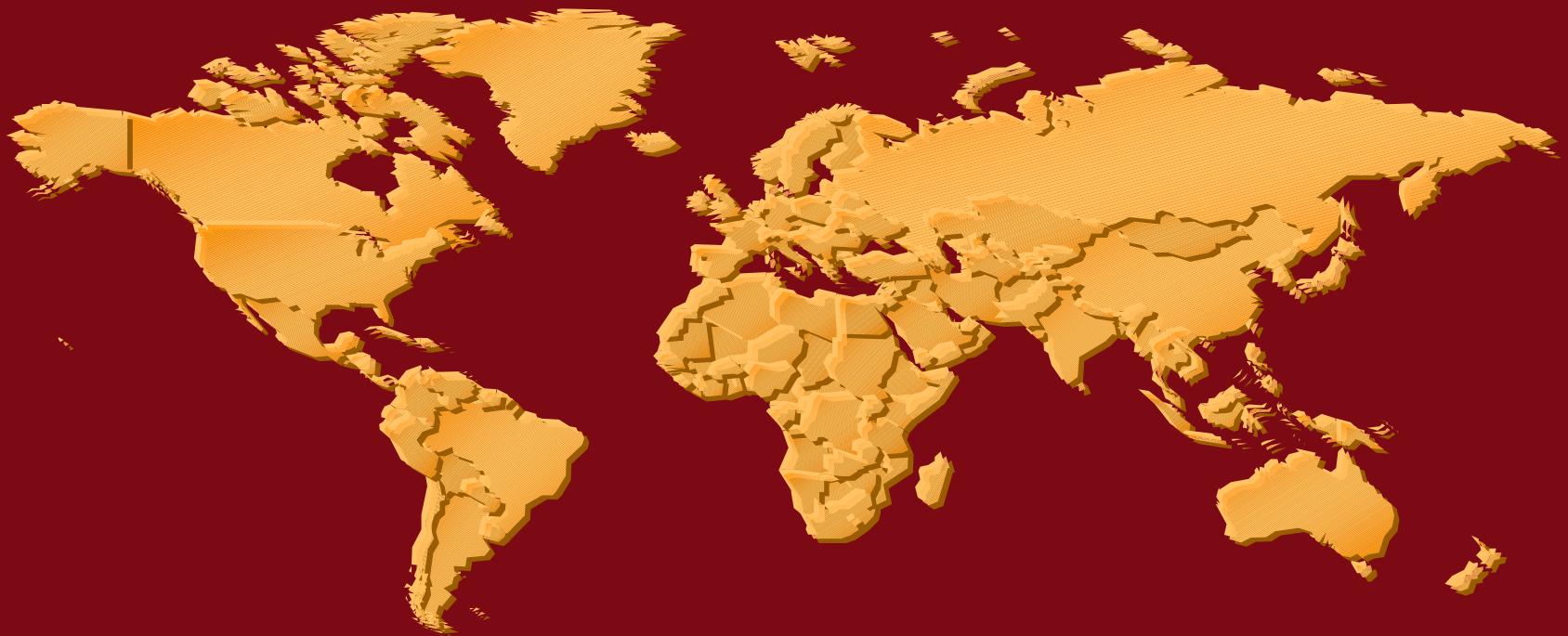
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Tax Planning for NRIs

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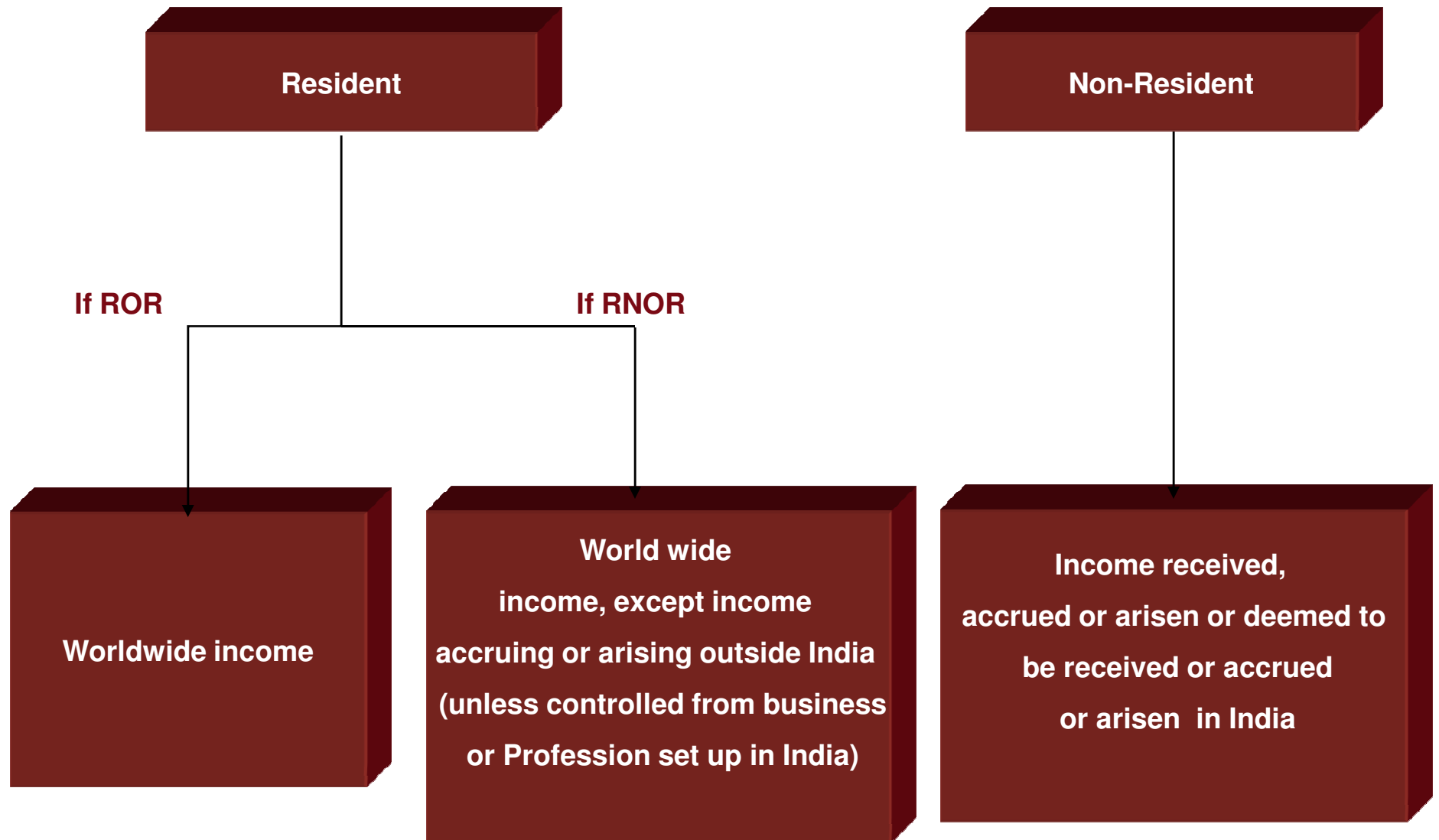


Scope of Total Income

Scope of Total Income

- While Section 4 is the charging section, Section 5 outlines the scope of total income for various categories of persons depending upon their residential status
- Section 5(1) – Taxable income of residents
 - Worldwide income is taxable in India
- Section 5(2) - Taxable income of non-residents include:
 - Income received or deemed to be received in India
 - Income which accrues or arises in India
 - Income which is deemed to accrue or arise in India (Section 9)

Taxability under the ITA



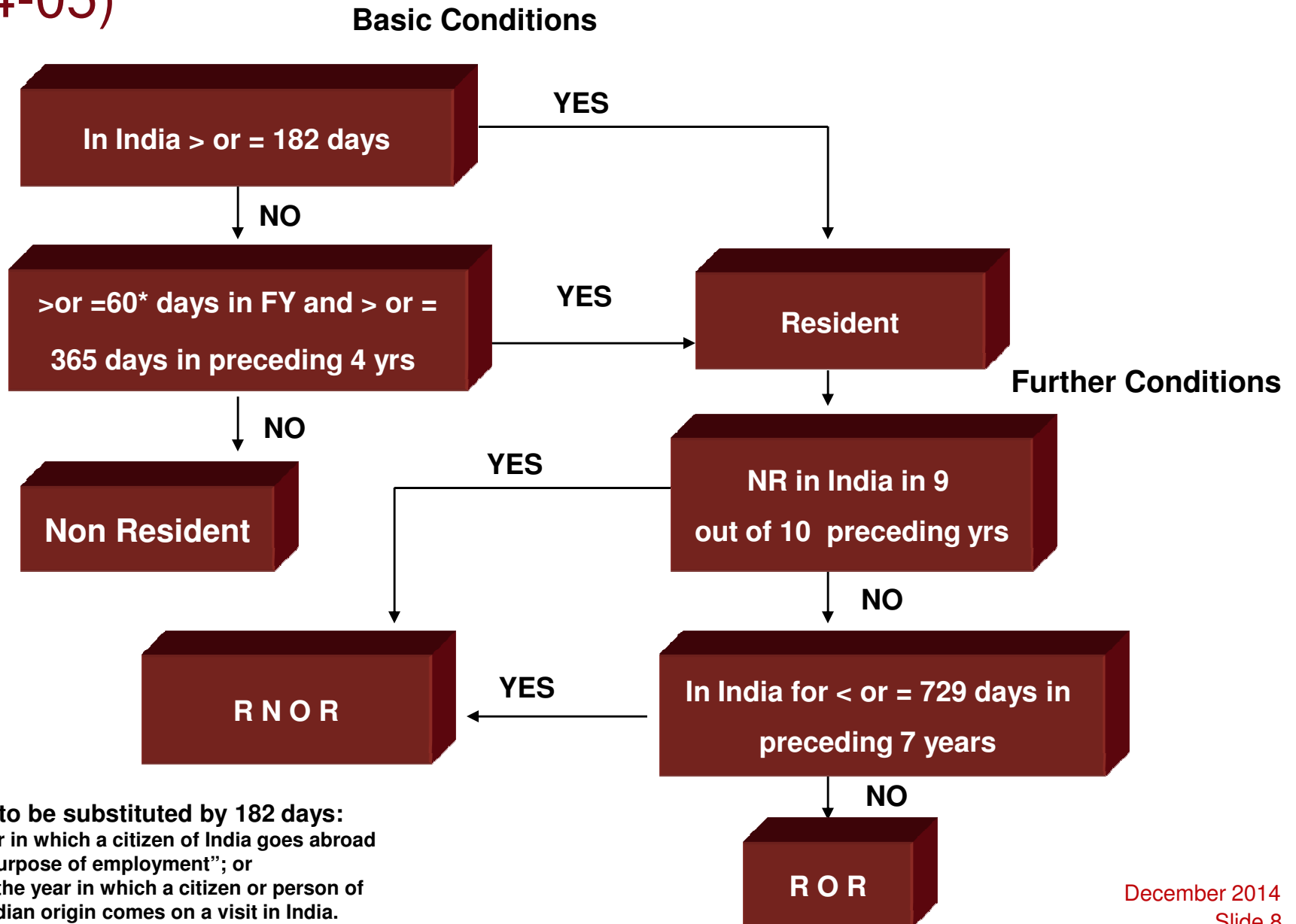
'Non-Resident' under Income Tax Act

Residential Status – Section 6

- All Assesseees are divided into three categories:
 - Resident and ordinarily resident
 - Resident but not ordinarily resident
 - Not resident
- Determining factors
 - Individual – Physical presence
 - HUF, Firm, AOP, others – Control and Management of its affairs
 - Company – Status of company (Indian company/foreign company) or Control and Management of its affairs

Every person other than individual and a company is non-resident only if the control and management of its affairs is situated wholly outside India

Individual - Residence Rule under ITA (w.e.f. AY 2004-05)



- * 60 days to be substituted by 182 days:
- In the year in which a citizen of India goes abroad “for the purpose of employment”; or
 - In the year in which a citizen or person of Indian origin comes on a visit in India.

Individual

- Personal presence in India
- The tests of residence for individual are alternative and not cumulative
- The term 'India' means geographical territories and territorial waters of India
- Calculation of presence
 - Walkie v. IRC [1952] (1 ALL ER 92)
 - P.N.7 of 1995, In re (223 ITR 462) (AAR)
 - CIT v. Savumiamurthy (14 ITR 185)
- Resident but not ordinarily resident
 - ARA No. P5 of 1995 (223 ITR 379)(AAR)
 - Pradip Mehta v. CIT (256 ITR 647)(Guj) – subsequently overruled by Supreme Court (300 ITR 231)
 - Amendment is prospective in nature – CIT v. Karan Bihari Thapar (2010-TII-17-HC-DEL-NRI)(Del)

Non-Resident and Non-Resident Indian (NRI)

- Section 2(30) – A “non-resident” means a person who is not a “resident” and includes a person who is a resident but not ordinarily resident for the purposes of Sections 92, 93 and 168
- Section 115C(e) – A “non-resident Indian” means an individual being citizen of India or person of Indian origin(PIO) who is not a “resident”

A person Shall be “deemed to be of Indian origin” if he or either of his parents or grandparents, was born in undivided India

Who can become NRI?

- An “Indian Citizen” who stays abroad for employment or for carrying on a business or vocation or any other purpose or circumstances including indefinite period of stay
- Indian citizens working abroad on assignment with foreign Government agencies like UN, IMF, World Bank
- Officials of Indian Government working abroad
- PIO as defined under Section 115C(e)

Income deemed to Accrue or Arise in India

Income deemed to accrue or arise in India

- through Business Connection, property, asset or source of income or transfer of capital asset situated in India [Section 9(1)(i)]
- Salary [Section 9(1)(ii)]
- Dividend [Section 9(1)(iv)]
- Interest [Section 9(1)(v)]
- Royalty [Section 9(1)(vi)]
- Fees for Technical Services
[Section 9(1)(vii)]



Property, Asset or Source of Income

- In a case where tangible property is situated in India, the income arising through or from such property is deemed to be income arising in India – CIT v. Currimbhoy Ebrahim & Sons Ltd.(3 ITR 395)(PC)
- Capital gains arising from the transfer of a capital asset situated in India at the time of transfer are deemed to accrue in India, irrespective of the place where the agreement of transfer is made or the consideration for the transfer is payable – CIT v. Assam Tea (167 ITR 215), CIT v.Quantas Airways Ltd.(256 ITR 84)(Del), Triniti Corpn (295 ITR 258)(AAR)
- Indirect transfer of assets outside India having substantial value from assets located in India – Taxable retrospectively (Overruled Vodafone SC judgement)
- Capital gains tax will be attracted when NRI sells any capital assets situated in India and accordingly, section 195 would apply on capital gains – Meena S. Patil v. ACIT (113 TTJ 863)(Bang)

Salaries

- Salary earned in India –
 - ✓ Salary payable for services rendered in India; and
 - ✓ The rest period or leave period which is preceded and succeeded by services rendered in India and forms part of the contract of employment
- Relevant test to decide the place of accrual of income is the place where the services are rendered

Salary will be taxable in India on the basis of services rendered in India irrespective of Residential status of employees (except to the extent of short-stay exemption)

CIT v. Eli Lilly & Co. (312 ITR 225)(SC)
CIT v. Avtar Singh Wadhwan (247 ITR 260)(Bom)
Capt. A. L. Fernandes v. ITO (81 ITD 203) (TM)
ITO v. Lohitakshan Nambiar (2010-TII-201-ITAT-BANG-NRI)(Bang)

Dividend

- Dividend income paid to a non-resident by Indian company is deemed to accrue in India only on payment and not on declaration.
- This is in contradistinction to section 8 which refers to a dividend declared, distributed or paid by a company.
- Dividend income in the hands of shareholder is exempt if the dividend declared by the company is subject to dividend distribution tax in India



Pfizer Corporation v. CIT
(259 ITR 391)(Bom)

Background: Interest, Royalties & Fees for Technical Service

- The Finance Act, 1976 had inserted three new clauses in Section 9(1) specifying comprehensive source rule (effective from AY 1977-78):
 - ✓ Interest
 - ✓ Royalty (arising out of agreement made on or after 1 April 1976)
 - ✓ Fees for technical services

Extra-territorial operation

Validity upheld in *Electronics Corporation of India Ltd. v. CIT* (183 ITR 44)(SC)
GVK Industries Ltd. v. ITO (4 SCC 36)(SC)

Interest

- Payable by-

(a) the Government; or

(b) a person who is a resident, except where the interest is payable in respect of any debt incurred, or moneys borrowed and used for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or

(c) a person who is a non-resident, where the interest is payable in respect of any debts incurred, or moneys borrowed and used, for the purposes of a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India

J.K. Synthetics Ltd. v. Asst. CIT 185 ITR 540 (Del)
CIT v. Vijay Ship Breaking Corporation. (261 ITR 113)(Guj)

DTAA v. Income tax Act

- Taxability of Non-Resident is to be examined under the Income-tax Act, 1961 vis-à-vis under the Double Taxation Avoidance Agreement (“DTAA”)
- The Non-Resident can choose between the two, whichever is more beneficial [Section 90(2)]
- Tax Residency Certificate is must in order to avail Treaty benefits [Section 90(4)]

CBDT Circular No. 333 dated 2.4.1982
Azadi Bachao Andolan (263 ITR 706)(SC)
P. V. A. L. Kulandagan Chettiar (267 ITR
654)(SC)

Exemption of Income

Exemption of Income - Section 10

- Section 10(4) - Interest earned by a person resident outside India from non-resident external (NRE) accounts – Rachpal Singh v. ITO (94 ITD 79)(Amr) and CIT v. Asandas Khatri (283 ITR 346)(MP)
- Section 10(7) – any allowances or perquisites paid or allowed outside India by the Government to a citizen of India for rendering service outside India
- Section 10(14) – any special allowance or benefit [not in the nature of perquisites as defined in section 17(2)], specifically granted to meet expenses wholly, necessarily and exclusively incurred in the performance of the duties of an office or employment, to the extent of which such expenses are actually incurred for that purpose – Hindustan Powerplus Ltd. (271 ITR 433)(AAR) and CIT v. Goslino Mario (241 ITR 312)(SC)
- Section 10(15)(iid) – Interest on bonds issued (NRI bonds by SBI)

Exemption of Income - Section 10

- Section 10(15)(iv)(fa) - Interest earned by a NR or NOR from foreign currency deposits kept with Scheduled Bank FCNR(B)
- Section 10(15)(i) - Interest on notified securities, bonds, annuity certificates and savings certificates issued by the Central Government [Section 10 (15)]
- Section 10(34)/(35) - Dividends received from Indian companies and any income from specified mutual funds
- Section 10(34A) – Buy back of shares of unlisted Indian company, provided additional tax paid u/s. 115QA
- Section 10(38) - Long-term capital gains from the transfer of equity shares in a company or units of an equity oriented fund provided such transaction is subjected to securities transaction tax

Exemption of Income - Section 45

- Following transactions not regarded as “Transfer” for the purposes of section 45 (Section 47)
 - Any transfer of bonds or global depository receipts referred to in section 115AC, made outside India by a NRI to another NRI or NR.
 - Any transfer of a capital assets under a gift or will or an irrevocable trust
 - Any distribution of capital assets on total or partial partition of HUF
- Section 56(2)(vii) – Receipt of sum of money, specified property and immovable property, without consideration, more than INR 50,000 is however taxable in the hands of recipient (certain exemptions to transfer from any relative, on the occasion of marriage, under will or by way inheritance, trust, etc.)

Income from assets received under gift, inheritance shall be taxable in the hands of recipient (capital gains – cost and indexation benefit of predecessor will be available)

Deduction – Reinvestment Scheme – Section 54

Capital Gains on Sale of	Type of Capital Gain	Reinvestments of gains in	Period and restrictions
Residential House Property [Section 54]	Long term	Residential house Property	Within 1 year before or within 2 years after date of transfer or construct within three years.
Any long term capital asset [Section 54EC]	Long term	NHAI or REC bonds	Within 6 months of date of transfer. Max investment limit = 50 lac rupees

Deduction – Reinvestment Scheme – Section 54

Capital Gains on Sale of	Type of Capital Gain	Reinvestments of gains in	Period and restrictions
Any long term capital asset (other than residential house) [Section 54F]	Long term	Net consideration to be invested in residential house (not capital gains)	Purchase 1 year before or within 2years or construct within 3 years. No additional property should be constructed or purchase within 3 years of date of transfer

Leena J. Shah v. ACIT (6 SOT 721)(Ahd) – Reinvestment in house property outside India – not eligible for deduction under section 54F
Prema P. Shah v. ITO (100 ITD 60)(Mum) – Reinvestment in house property outside India – eligible for deduction under section 54

Exemption – Wealth tax

- Special exemptions upto 7 years under Wealth Tax Act is available to a returning NRI with an intention to permanently residing in India for following asset:
 - Money brought to India(including money in NRE account)
 - Assets acquired outside India brought in India
 - Value of assets acquired by him out of such moneys brought in India within one year immediately preceding the date of return to India

Concessional Rate of Tax

Concessional Rate

- Section 111A – short-term capital gains, where the transaction is subject to securities transaction tax to be taxed @ 15% of capital gains
- Section 112 – Long-term capital gains to be taxed @ 20% of capital gains [10% in the case of unlisted shares (without indexation benefit)]
- Proviso to Section 112(1) - Long-term capital gains from transfer of listed securities or unit or zero coupon bonds to be taxed @10% of capital gains without indexation benefit - Mcleod Russel Kolkatta Ltd. (299 ITR 79)(AAR) and Timken France Sas (294 ITR 513)(AAR) and contrary view in BASF Aktiegesellschaft v. DDIT (12 SOT 451)(Mum)
- Section 115A – Interest received from Government or an Indian concerned on monies borrowed or debt incurred by such Government or Indian concern in foreign currency @ 20% [in the case of ECB and issue of long-term infrastructure bonds (Section 194LC)– 5%]
- Section 115AC – Interest, dividends and long-term capital gains (without indexation) earned from bonds and global depository receipts respectively issued by Indian company to be taxed @ 10% (no need to file income tax return if the income is subject to TDS)

Special Regime for NRI

Special Regime – Chapter XII-A

- Section 115E
 - Long-term capital gains on sale of specified assets to be taxed @ 10%
 - Any income from investment or income from long-term capital gains of an asset other than a specified asset to be taxed @ 20% - V. Ravi Naryanan (300 ITR 62)(AAR) – Interest on NRO account
 - Other income to be taxed @ normal slab rates
- Section 115F – Capital gains tax exemption on sale of long-term specified assets if the capital gains is reinvested in any specified assets or any saving certificates specified in Section 10(4B), subject to certain conditions
- “Specified Asset” means following assets purchased in convertible foreign exchange-
 - (i) shares in an Indian company;
 - (ii) debentures issued by an Indian company which is not a private company
 - (iii) deposits with an Indian company which is not a private company
 - (iv) any security of the Central Government or notified assets

Special Regime – Chapter XII-A

- Section 115G - No Return of income is required to be filed by NRI if his income is consisted of only from long term capital gains or from investment income or both; and tax has been deducted at source from such income
- Section 115H – Benefit under Chapter XII-A can still be available to NRI who has become a resident in India on income from the specified assets (debenture, deposits, Government security or notified assets) till the date of transfer or conversion into money of such specified assets, provided such declaration is to be filed alongwith the return of income – Hari Gopal Chopra (237 ITR 135)(AAR) and CIT v. N.P. Mathew (280 ITR 44)(Ker)
 - Benefit u/s. 115H not available if the foreign exchange converted into Rupee – V.K. Subramanian v. ACIT (316 ITR 56)(Kar)
 - Redeposit of Interest on interest – no benefit (Dr. M. Manohar v. ACIT(201 Taxman 106)(Mad)
- Section 115I - NRI has an option to be governed by the normal provisions of the Income tax Act, provided such declaration is to be filed alongwith the return of income

Practical Issues

Withdrawal of Circular Nos. 23 & 786

- Does this affect interpretation of Section 9(1)(i) ?
- Taxability of Export Commission?
- Whether Export Commission is in the nature of Fees for Technical Services?
- Whether DIT v. Morgan Stanley (292 ITR 416)(SC) would become ineffective?

Section 206AA - Issues

- Is Section 206AA applicable only when tax is deductible?
- Whether Section 206AA applies to Non-residents?
- Whether Section 206AA overrides Treaty Rates?
- Whether the rate of 20% as per Section 206AA is further increased by surcharge and education cess?
- Grossing up ?
- Whether Section 206AA is redundant after Increase in Tax rate under Section 115A ???

Thank You



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