

# International Taxation & Issuance of Form 15CA and 15CB

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FOR ROHINI CPE STUDY CIRCLE OF ICAI

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# Glossary

<b>Act</b>	<b>Income-tax Act, 1961</b>
<b>AO</b>	<b>Assessing Officer</b>
<b>CBDT</b>	<b>Central Board of Direct Taxes</b>
<b>CG</b>	<b>Central Government</b>
<b>DTAA</b>	<b>Double Taxation Avoidance Agreement</b>
<b>FTS</b>	<b>Fees for Technical Services</b>
<b>FY</b>	<b>Financial Year</b>
<b>HC</b>	<b>High Court</b>
<b>ITAT</b>	<b>Income-tax Appellate Tribunal</b>
<b>NR</b>	<b>Non Resident</b>
<b>PAN</b>	<b>Permanent Account Number</b>
<b>SC</b>	<b>Supreme Court</b>
<b>TRC</b>	<b>Tax Residency Certificate</b>
<b>u/s</b>	<b>Under Section</b>
<b>WHT</b>	<b>Withholding Tax</b>

# Setting the context

# Finalisation of Balance Sheet

1. True & Fair
2. AS- 22

# Why we are studying it?

## Negative Outlook

- First of all penalty u/s 271 I **for just Rs. 1 lac only** for not complying sec 195 (6) w.e.f 01/06/2015 on assessee.
- Penalty of Rs. 10000/- u/s 271J on CA`s
- Cut & Paste.
- Cert. are cross checked after two years of issuance. Notices from international tax division and/or during assessment proceedings. **Currently within 6 months notice are coming**
- Disciplinary committee of ICAI.

## Positive Outlook

- Benefits of DTAA over Income tax Act and helping the client or company with better compliances & save in working Capital, if possible.
- Agreement Drafting for both Inbound & outbound.
- More Earning opportunities & professional development

# Consequences of non compliance

# Consequences of non compliance...

Applicable section	Nature of default	Consequence
40(a)**	Withholding tax not deducted or not deposited within prescribed time	Disallowance of expenses in computation of taxable income of payer; deduction in year of payment
201(1)	Tax not withheld/ deposited appropriately	Recovery of tax not withheld/ deposited or short withheld/ deposited
201(1A)	Tax not withheld/ deposited appropriately	Interest @ 1% per month or part of the month
221	Tax withheld not paid	Penalty, not exceeding the amount of tax not paid
271C	Tax not withheld or short withheld	Penalty, not exceeding the amount of tax not withheld



# ...Consequences of non compliance

<b>Applicable section</b>	<b>Nature of default</b>	<b>Consequence</b>
272A	Delay in issuing withholding tax certificate/ filing withholding tax statement	Penalty @ Rs 100 per day for period of default, subject to maximum of the tax withheld
276B	Withholding Tax not deposited within prescribed time	Prosecution of the principal officer, by way of imprisonment for a term between 3 months to 7 years and with fine

**Non compliance  
results in severe  
consequences**



# Assessee in Default

The Act provides that where taxes has been paid by payee, payer will not be assessee in default and only interest for delay will have to be paid

**SEC-161/163**



## Liability of representative assessee.

161. (1) Every representative assessee, as regards the income in respect of which he is a representative assessee, shall be subject to the same duties, responsibilities and liabilities as if the income were income received by or accruing to or in favour of him beneficially, and shall be liable to assessment in his own name in respect of that income; but any such assessment shall be deemed to be made upon him in his representative capacity only, and the tax shall, subject to the other provisions contained in this Chapter, be levied upon and recovered from him in like manner and to the same extent as it would be leviable upon and recoverable from the person represented by him.

(1A) Notwithstanding anything contained in sub-section (1), where any income in respect of which the person mentioned in clause (iv) of sub-section (1) of section 160 is liable as representative assessee consists of, or includes, profits and gains of business, tax shall be charged on the whole of the income in respect of which such person is so liable at the maximum marginal rate :

**Provided that** the provisions of this sub-section shall not apply where such profits and gains are receivable under a trust declared by any person by will exclusively for the benefit of any relative dependent on him for support and maintenance, and such trust is the only trust so declared by him.

(2) Where any person is, in respect of any income, assessable under this Chapter in the capacity of a representative assessee, he shall not, in respect of that income, be assessed under any other provision of this Act.

## CWT Vs Ellis Bridge Gymkhana (1998)229 ITR 1 (SC)

- It was held as:-

*“ the rule of construction of a charging section is that before taxing any person, it must be shown that he falls within the ambit of the charging section by clear words used in the section.*

***No one can be taxed by implication.***

*A charging section should have to be construed strictly. If a person has not been brought within the ambit of the charging section by clear words, he cannot be taxed at all.....”*

**This decision reiterates the constitutional mandate enshrined in article 265 of the constitution**

## A. V Fernandez Vs. State Of Kerala, AIR 1957 SC 657

- While explaining interpretation of taxation provisions, the Apex Court in the above said case made the following observations

*“....tax can be charged only if the activity sought to be taxed falls squarely within the taxing entry;*

*A tax cannot be imposed by presumption, but must be imposed only as per the specific language of the taxing entry.*

*Each Word used in a taxing provision must be given effect to”*

Further it added to say that what was not written should not read into



**BASIS OF CHARGE**  
Charge of income-tax.

4. (1) **Where any Central Act enacts that income-tax shall be charged for any assessment year at any rate or rates**, income-tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions (including provisions for the levy of additional income-tax) of, this Act **in respect of the total income of the previous year of every person** :

**Provided** that where by virtue of any provision of this Act income-tax is to be charged in respect of the income of a period other than the previous year, income-tax shall be charged accordingly.

(2) **In respect of income chargeable under sub-section (1), income-tax shall be deducted at the source or paid in advance**, where it is so deductible or payable under any provision of this Act.



## Summary of Section 4(2)


- Section 4(2) facilitates deduction of tax at source and payment of advance tax. Chapter XVII- Parts B & C contain provisions relating to deduction of tax at source and payment of advance respectively.
- As section 4 provides for charge on total income, it does not refer to section 5.
- Issues in applicability of Sec 194N and Sec 206C. **Case laws:** **Madras HC in writ of central cooperative Bank (2<sup>nd</sup> week of June, 2020) and Kerala HC in Service cooperative Bank case (27<sup>th</sup> may , 2020).** Other case law of Bombay HC where it was already held that there has to be income first so as to make the liability under TDS provisions and it is not vice versa.





## Sec. 2(45)

(45) "total income" means the total amount of **income** referred to in section 5, computed in the manner laid down in this Act ;

- 
- Section 2(45) thus provides for integration of the charging provisions and the computation provisions. One says that the observation of the Supreme Court in CIT v. B.C. Srinivasa Shetty [1981] 128 ITR 294 (SC) that the charge and computation constitute an integrated code finds its edifice in section 2 (45).

## Income Includes

Sec 2(24) "income" includes—

- (i) profits and gains ;
- (ii) dividend ;
- (iii) voluntary contributions received by a trust created wholly or partly for charitable or religious purposes or by an institution established wholly or partly for such purposes or by an association or institution referred to in clause (21) or clause (23), or by a fund or trust or institution referred to in sub-clause (iv) or sub-clause (v) or by any university or other educational institution referred to in sub-clause (iiiad) or sub-clause (vi) or by any hospital or other institution referred to in sub-clause (iiiie) or sub-clause (via) of clause (23C) of section 10 or by an electoral trust.

*Explanation.*—For the purposes of this sub-clause, "trust" includes any other legal obligation ;

- (iii) the value of any perquisite or profit in lieu of salary taxable under clauses (2) and (3) of section 17 ;

(*iiia*) any special allowance or benefit, other than perquisite included under sub-clause (*iii*), specifically granted to the assessee to meet expenses wholly, necessarily and exclusively for the performance of the duties of an office or employment of profit ;

(*iiib*) any allowance granted to the assessee either to meet his personal expenses at the place where the duties of his office or employment of profit are ordinarily performed by him or at a place where he ordinarily resides or to compensate him for the increased cost of living ;

(*iv*) the value of any benefit or perquisite, whether convertible into money or not, obtained from a company either by a director or by a person who has a substantial interest in the company, or by a relative of the director or such person, and any sum paid by any such company in respect of any obligation which, but for such payment, would have been payable by the director or other person aforesaid ;

(*iva*) the value of any benefit or perquisite, whether convertible into money or not, obtained by any representative assessee mentioned in clause (*iii*) or clause (*iv*) of sub-section (1) of section 160 or by any person on whose behalf or for whose benefit any income is receivable by the representative assessee (such person being hereafter in this sub-clause referred to as the "beneficiary") and any sum paid by the representative assessee in respect of any obligation which, but for such payment, would have been payable by the beneficiary ;

- (v) any sum chargeable to income-tax under clauses (ii) and (iii) of section 28 or section 41 or section 59 ;
- (va) any sum chargeable to income-tax under clause (iia) of section 28 ;
- (vb) any sum chargeable to income-tax under clause (iib) of section 28 ;
- (vc) any sum chargeable to income-tax under clause (iic) of section 28 ;
- (vd) the value of any benefit or perquisite taxable under clause (iv) of section 28 ;
- (ve) any sum chargeable to income-tax under clause (v) of section 28 ;
- (vi) any capital gains chargeable under section 45 ;
- (vii) the profits and gains of any business of insurance carried on by a mutual insurance company or by a co-operative society, computed in accordance with section 44 or any surplus taken to be such profits and gains by virtue of provisions contained in the First Schedule ;
- (viii) the profits and gains of any business of banking (including providing credit facilities) carried on by a co-operative society with its members;
- (viii) [*Omitted by the Finance Act, 1988, w.e.f. 1-4-1988. Original sub-clause (viii) was inserted by the Finance Act, 1964, w.e.f. 1-4-1964;*]
- (ix) any winnings from lotteries, crossword puzzles, races including horse races, card games and other games of any sort or from gambling or betting of any form or nature whatsoever.
- Explanation.*—For the purposes of this sub-clause,—
- (i) "lottery" includes winnings from prizes awarded to any person by draw of lots or by chance or in any other manner whatsoever, under any scheme or arrangement by whatever name called;
- (ii) "card game and other game of any sort" includes any game show, an entertainment programme on television or electronic mode, in which people compete to win prizes or any other similar game ;

- (x) any sum received by the assessee from his employees as contributions to any provident fund or superannuation fund or any fund set up under the provisions of the Employees' State Insurance Act, 1948 (34 of 1948), or any other fund for the welfare of such employees ;
- (xi) any sum received under a Keyman insurance policy including the sum allocated by way of bonus on such policy.

*Explanation.*—For the purposes of this clause, the expression "Keyman insurance policy" shall have the meaning assigned to it in the *Explanation* to clause (10D) of section 10 ;

(xii) any sum referred to in clause (va) of section 28;

<sup>1a</sup>[(xiii) *the fair market value of inventory referred to in clause (via) of section 28;*]

(xiii) any sum referred to in clause (v) of sub-section (2) of section 56;

(xiv) any sum referred to in clause (vi) of sub-section (2) of section 56;

(xv) any sum of money or value of property referred to in clause (vii) or clause (viiia) of sub-section (2) of section 56;

(xvi) any consideration received for issue of shares as exceeds the fair market value of the shares referred to in clause (viib) of sub-section (2) of section 56;

(xvii) any sum of money referred to in clause (ix) of sub-section (2) of section 56;

<sup>2</sup>[(xviiia) any sum of money or value of property referred to in clause (x) of sub-section (2) of section 56;

<sup>1a</sup>[(xviiib) *any compensation or other payment referred to in clause (xi) of sub-section (2) of section 56*;

(xviii) assistance in the form of a subsidy or grant or cash incentive or duty drawback or waiver or concession or reimbursement (by whatever name called) by the Central Government or a State Government or any authority or body or agency in cash or kind to the assessee other than,—

(a) the subsidy or grant or reimbursement which is taken into account for determination of the actual cost of the asset in accordance with the provisions of *Explanation 10* to clause (1) of section 43; or

(b) the subsidy or grant by the Central Government for the purpose of the corpus of a trust or institution established by the Central Government or a State Government, as the case may be

## Scope of total income

### Sec 5(1)

Subject to the provisions of this Act, the total income of any previous year of a person who is a resident includes all income from whatever source derived which—

(a) **is received or is deemed to be received** in India in such year by or on behalf of such person ; or

(b) **accrues or arises or is deemed to accrue or arise to him** in India during such year ; or

(c) accrues or arises to him outside India during such year :

Provided that, in the case of a person not ordinarily resident in India within the meaning of sub-section (6) of section 6, the income which accrues or arises to him outside India shall not be so included unless it is derived from a business controlled in or a profession set up in India.



## Scope of total income

### Sec 5(1)

Subject to the provisions of this Act, the total income of any previous year of a person who is a resident includes all income from whatever source derived which—

(a) is received or is deemed to be received **in India** in such year by or on behalf of such person ; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year ;  
or

(c) **accrues or arises to him outside India during such year :**

**Provided** that, in the case of a person not ordinarily resident in India within the meaning of sub-section (6) of section 6, the income which accrues or arises to him outside India shall not be so included unless it is derived from a business controlled in or a profession set up in India.

## SEC. 9(1)(i)

9. (1) The following incomes shall be deemed to accrue or arise in India :—

(i) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India.

[Explanation 2A.—*For the removal of doubts, it is hereby clarified that the significant economic presence of a non-resident in India shall constitute "business connection" in India and "significant economic presence" for this purpose, shall mean—*

(a) *transaction in respect of any goods, services or property carried out by a non-resident in India including provision of download of data or software in India, if the aggregate of payments arising from such transaction or transactions during the previous year exceeds such amount as may be prescribed; or*

(b) *systematic and continuous soliciting of business activities or engaging in interaction with such number of users as may be prescribed, in India through digital means:*

**Provided** that the transactions or activities shall constitute significant economic presence in India, whether or not,—

- (i) the agreement for such transactions or activities is entered in India; or
- (ii) the non-resident has a residence or place of business in India; or
- (iii) the non-resident renders services in India:

**Provided further** that only so much of income as is attributable to the transactions or activities referred to in clause (a) or clause (b) shall be deemed to accrue or arise in India.]

## Section 9(1)(viii) & Sec 2(24)(xviiia)

- **Following clause (viii) shall be inserted after clause (vii) of sub-section (1) of section 9 by the Act No. 23 of 2019, w.e.f. 1-4-2020 :**

*(viii) income arising outside India, being any sum of money referred to in sub-clause (xviiia) of clause (24) of section 2, paid on or after the 5th day of July, 2019 by a person resident in India to a non-resident, not being a company, or to a foreign company.*

### **Section 2(24)**

**(xviiia)** any sum of money or value of property referred to in clause (x) of sub-section (2) of section 56

## SEC. 15

### **Salaries.**

**15.** The following income shall be chargeable to income-tax under the head "Salaries"—

- (a) any salary due from an employer or a former employer to an assessee in the previous year, whether paid or not;
- (b) **any salary paid or allowed to him in the previous year by or on behalf of an employer or a former employer though not due or before it became due to him;**
- (c) any arrears of salary paid or allowed to him in the previous year by or on behalf of an employer or a former employer, if not charged to income-tax for any earlier previous year.

***Explanation 1.*—For the removal of doubts, it is hereby declared that where any salary paid in advance is included in the total income of any person for any previous year it shall not be included again in the total income of the person when the salary becomes due.**

*Explanation 2.*—Any salary, bonus, commission or remuneration, by whatever name called, due to, or received by, a partner of a firm from the firm shall not be regarded as "salary" for the purposes of this section.

## SEC. 17

### "Salary", "perquisite" and "profits in lieu of salary" defined.

17. For the purposes of [sections 15](#) and [16](#) and of this section,—

(i) "salary" includes—

(i) wages;

(ii) any annuity or pension;

(iii) any gratuity;

(iv) **any fees, commissions, perquisites or profits in lieu of or in addition to any salary or wages;**

(v) **any advance of salary;**

(va) any payment received by an employee in respect of any period of leave not availed of by him;

(vi) the annual accretion to the balance at the credit of an employee participating in a recognised provident fund, to the extent to which it is chargeable to tax under rule 6 of Part A of the Fourth Schedule;

(vii) the aggregate of all sums that are comprised in the transferred balance as referred to in sub-rule (2) of rule 11 of Part A of the Fourth Schedule of an employee participating in a recognised provident fund, to the extent to which it is chargeable to tax under sub-rule (4) thereof; and

(viii) the contribution made by the Central Government or any other employer in the previous year, to the account of an employee under a pension scheme referred to in section 8oCCD;

(2) **"perquisite" includes—**

(i) the value of rent-free accommodation **provided to the assessee by his employer;**

(ii) the value of any concession in the matter of rent respecting any accommodation **provided to the assessee by his employer;**

*Explanation 1.*—For the purposes of this sub-clause, concession in the matter of rent shall be deemed to have been provided if,—

(a) in a case where an unfurnished accommodation is provided by any employer other than the Central Government or any State Government and—

(i) the accommodation is owned by the employer, the value of the accommodation determined at the specified rate in respect of the period during which the said accommodation was occupied by the assessee during the previous year, exceeds the rent recoverable from, or payable by, the assessee;

(ii) the accommodation is taken on lease or rent by the employer, the value of the accommodation being the actual amount of lease rental paid or payable by the employer or fifteen per cent of salary, whichever is lower, in respect of the period during which the said accommodation was occupied by the assessee during the previous year, exceeds the rent recoverable from, or payable by, the assessee;

(b) in a case where a furnished accommodation is provided by the Central Government or any State Government, the licence fee determined by the Central Government or any State Government in respect of the accommodation in accordance with the rules framed by such Government as increased by the value of furniture and fixtures in respect of the period during which the said accommodation was occupied by the assessee during the previous year, exceeds the aggregate of the rent recoverable from, or payable by, the assessee and any charges paid or payable for the furniture and fixtures by the assessee;

(c) in a case where a furnished accommodation is provided by an employer other than the Central Government or any State Government and—

(i) the accommodation is owned by the employer, the value of the accommodation determined under sub-clause (i) of clause (a) as increased by the value of the furniture and fixtures in respect of the period during which the said accommodation was occupied by the assessee during the previous year, exceeds the rent recoverable from, or payable by, the assessee;



(ii) the accommodation is taken on lease or rent by the employer, the value of the accommodation determined under sub-clause (ii) of clause (a) as increased by the value of the furniture and fixtures in respect of the period during which the said accommodation was occupied by the assessee during the previous year, exceeds the rent recoverable from, or payable by, the assessee;

(d) in a case where the accommodation is provided by the employer in a hotel (except where the assessee is provided such accommodation for a period not exceeding in aggregate fifteen days on his transfer from one place to another), the value of the accommodation determined at the rate of twenty-four per cent of salary paid or payable for the previous year or the actual charges paid or payable to such hotel, whichever is lower, for the period during which such accommodation is provided, exceeds the rent recoverable from, or payable by, the assessee.

*Explanation 2.*—For the purposes of this sub-clause, value of furniture and fixture shall be ten per cent per annum of the cost of furniture (including television sets, radio sets, refrigerators, other household appliances, air-conditioning plant or equipment or other similar appliances or gadgets) or if such furniture is hired from a third party, the actual hire charges payable for the same as reduced by any charges paid or payable for the same by the assessee during the previous year.

*Explanation 3.*—For the purposes of this sub-clause, "salary" includes the pay, allowances, bonus or commission payable monthly or otherwise or any monetary payment, by whatever name called, from one or more employers, as the case may be, but does not include the following, namely:—

- (a) dearness allowance or dearness pay unless it enters into the computation of superannuation or retirement benefits of the employee concerned;
- (b) employer's contribution to the provident fund account of the employee;
- (c) allowances which are exempted from the payment of tax;
- (d) value of the perquisites specified in this clause;
- (e) any payment or expenditure specifically excluded under the proviso to this clause.

*Explanation 4.*—For the purposes of this sub-clause, "specified rate" shall be—

- (i) fifteen per cent of salary in cities having population exceeding twenty-five lakhs as per 2001 census;
  - (ii) ten per cent of salary in cities having population exceeding ten lakhs but not exceeding twenty-five lakhs as per 2001 census; and
  - (iii) seven and one-half per cent of salary in any other place;
- (iii) the value of any benefit or amenity granted or provided free of cost or at concessional rate in any of the following cases—
- (a) by a company to an employee who is a director thereof;
  - (b) by a company to an employee being a person who has a substantial interest in the company;

(c) by any employer (including a company) to an employee to whom the provisions of paragraphs (a) and (b) of this sub-clause do not apply and whose income under the head "Salaries" (whether due from, or paid or allowed by, one or more employers), exclusive of the value of all benefits or amenities not provided for by way of monetary payment, exceeds fifty thousand rupees:

*Explanation.*—For the removal of doubts, it is hereby declared that the use of any vehicle provided by a company or an employer for journey by the assessee from his residence to his office or other place of work, or from such office or place to his residence, shall not be regarded as a benefit or amenity granted or provided to him free of cost or at concessional rate for the purposes of this sub-clause;

(iii) [\*\*\*]

(iv) **any sum paid by the employer** in respect of any obligation which, but for such payment, would have been payable by the assessee;

(v) any sum payable by the employer, whether directly or through a fund, other than a recognised provident fund or an approved superannuation fund or a Deposit-linked Insurance Fund established under section 3G of the Coal Mines Provident Fund and Miscellaneous Provisions Act, 1948 (46 of 1948), or, as the case may be, section 6C of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952), to effect an assurance on the life of the assessee or to effect a contract for an annuity;

(vi) **allotted or transferred, directly or indirectly, by the employer, or former employer, free of cost or at concessional rate to the assessee.**

*Explanation.*—For the purposes of this sub-clause,—

(a) "specified security" means the securities as defined in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) and, where employees' stock option has been granted under any plan or scheme therefor, includes the securities offered under such plan or scheme;

(b) "sweat equity shares" means equity shares issued by a company to its employees or directors at a discount or for consideration other than cash for providing know-how or making available rights in the nature of intellectual property rights or value additions, by whatever name called;

(c) the value of any specified security or sweat equity shares shall be the fair market value of the specified security or sweat equity shares, as the case may be, on the date on which the option is exercised by the assessee as reduced by the amount actually paid by, or recovered from, the assessee in respect of such security or shares;

(d) "fair market value" means the value determined in accordance with the method as may be prescribed;

(e) "option" means a right but not an obligation granted to an employee to apply for the specified security or sweat equity shares at a predetermined price;

(vii) the amount of any contribution to an approved superannuation fund by the employer in respect of the assessee, to the extent it exceeds one lakh and fifty thousand rupees; and

(viii) the value of any other fringe benefit or amenity as may be prescribed:]

**Provided** that nothing in this clause shall apply to,—

(i) the value of any medical treatment provided to an employee or any member of his family in any hospital maintained by the employer;

(ii) any sum paid by the employer in respect of any expenditure actually incurred by the employee on his medical treatment or treatment of any member of his family—

(a) in any hospital maintained by the Government or any local authority or any other hospital approved by the Government for the purposes of medical treatment of its employees;

(b) in respect of the prescribed diseases or ailments, in any hospital approved by the Principal Chief Commissioner or Chief Commissioner having regard to the prescribed guidelines:

(iii) any portion of the premium paid by an employer in relation to an employee, to effect or to keep in force an insurance on the health of such employee under any scheme approved by the Central Government or the Insurance Regulatory and Development Authority established under sub-section (1) of section 3 of the Insurance Regulatory and Development Authority Act, 1999 (41 of 1999), for the purposes of clause (ib) of sub-section (1) of section 36;

(iv) any sum paid by the employer in respect of any premium paid by the employee to effect or to keep in force an insurance on his health or the health of any member of his family under any scheme approved by the Central Government or the Insurance Regulatory and Development Authority established under sub-section (1) of section 3 of the Insurance Regulatory and Development Authority Act, 1999 (41 of 1999), for the purposes of section 80D;

<sup>34(v)</sup> [\*\*\*]

- (vi) any expenditure incurred by the employer on—
- (1) medical treatment of the employee, or any member of the family of such employee, outside India;
  - (2) travel and stay abroad of the employee or any member of the family of such employee for medical treatment;
  - (3) travel and stay abroad of one attendant who accompanies the patient in connection with such treatment, subject to the condition that—
    - (A) the expenditure on medical treatment and stay abroad shall be excluded from perquisite only to the extent permitted by the Reserve Bank of India; and
    - (B) the expenditure on travel shall be excluded from perquisite only in the case of an employee whose gross total income, as computed before including therein the said expenditure, does not exceed two lakh rupees;
- (vii) any sum paid by the employer in respect of any expenditure actually incurred by the employee for any of the purposes specified in clause (vi) subject to the conditions specified in or under that clause :
- Provided further** that for the assessment year beginning on the 1st day of April, 2002, nothing contained in this clause shall apply to any employee whose income under the head "Salaries" (whether due from, or paid or allowed by, one or more employers) exclusive of the value of all perquisites not provided for by way of monetary payment, does not exceed one lakh rupees.

*Explanation.*—For the purposes of clause (2),—

(i) "hospital" includes a dispensary or a clinic or a nursing home;

(ii) "family", in relation to an individual, shall have the same meaning as in clause (5) of section 10; and

(iii) "gross total income" shall have the same meaning as in clause (5) of section 80B;

(3) "profits in lieu of salary" includes—

(i) the amount of any compensation due to or received by an assessee from his employer or former employer at or in connection with the termination of his employment or the modification of the terms and conditions relating thereto;

(ii) any payment (other than any payment referred to in clause (10), clause (10A), clause (10B), clause (11), clause (12), clause (13) or clause (13A) of section 10), due to or received by an assessee from an employer or a former employer or from a provident or other fund, to the extent to which it does not consist of contributions by the assessee or interest on such contributions or **any sum received under a Keyman insurance policy including the sum allocated by way of bonus on such policy.**



*Explanation.*—For the purposes of this sub-clause, the expression "Keyman insurance policy" shall have the meaning assigned to it in clause (10D) of section 10;  
(iii) any amount due to or received, whether in lump sum or otherwise, by any assessee from any person—  
(A) before his joining any employment with that person; or  
(B) after cessation of his employment with that person.

## SEC. 64

**64.** (1) In computing the total income of any individual, there shall be included all such income as arises directly or indirectly—

(i) [*Omitted by the Finance Act, 1992, w.e.f. 1-4-1993.*]

(ii) to the spouse of such individual by way of salary, commission, fees or any other form of remuneration whether in cash or in kind from a concern in which such individual has a substantial interest :

**Provided** that nothing in this clause shall apply in relation to any income arising to the spouse where the spouse possesses technical or professional qualifications and the income is solely attributable to the application of his or her technical or professional knowledge and experience ;

(iii) [*Omitted by the Finance Act, 1992, w.e.f. 1-4-1993.*]

(iv) subject to the provisions of clause (i) of section 27, to the spouse of such individual from assets transferred directly or indirectly to the spouse by such individual otherwise than for adequate consideration or in connection with an agreement to live apart ;

(v) [Omitted by the Finance Act, 1992, w.e.f. 1-4-1993.]

(vi) to the son's wife, of such individual, from assets transferred directly or indirectly on or after the 1st day of June, 1973, to the son's wife by such individual otherwise than for adequate consideration;

(vii) to any person or association of persons from assets transferred directly or indirectly otherwise than for adequate consideration to the person or association of persons by such individual, to the extent to which the income from such assets is for the immediate or deferred benefit of his or her spouse ; and

(viii) to any person or association of persons from assets transferred directly or indirectly on or after the 1st day of June, 1973, otherwise than for adequate consideration, to the person or association of persons by such individual, to the extent to which the income from such assets is for the immediate or deferred benefit of his son's wife.

*Explanation 1.*—For the purposes of clause (ii), the individual in computing whose total income the income referred to in that clause is to be included, shall be the husband or wife whose total income (excluding the income referred to in that clause) is greater ; and where any such income is once included in the total income of either spouse, any such income arising in any succeeding year shall not be included in the total income of the other spouse unless the Assessing Officer is satisfied, after giving that spouse an opportunity of being heard, that it is necessary so to do.

*Explanation 2.*—For the purposes of clause (ii), an individual shall be deemed to have a substantial interest in a concern—

- (i) in a case where the concern is a company, if its shares (not being shares entitled to a fixed rate of dividend whether with or without a further right to participate in profits) carrying not less than twenty per cent of the voting power are, at any time during the previous year, owned beneficially by such person or partly by such person and partly by one or more of his relatives ;
- (ii) in any other case, if such person is entitled, or such person and one or more of his relatives are entitled in the aggregate, at any time during the previous year, to not less than twenty per cent of the profits of such concern.

*Explanation 2A.*—[Omitted by the Finance Act, 1992, w.e.f. 1-4-1993.]

*Explanation 3.*—For the purposes of clauses (iv) and (vi), where the assets transferred directly or indirectly by an individual to his spouse or son's wife (hereafter in this *Explanation* referred to as "the transferee") are invested by the transferee,—

- (i) in any business, such investment being not in the nature of contribution of capital as a partner in a firm or, as the case may be, for being admitted to the benefits of partnership in a firm, that part of the income arising out of the business to the transferee in any previous year, which bears the same proportion to the income of the transferee from the business as the value of the assets aforesaid as on the first day of the previous year bears to the total investment in the business by the transferee as on the said day ;

(ii) in the nature of contribution of capital as a partner in a firm, that part of the interest receivable by the transferee from the firm in any previous year, which bears the same proportion to the interest receivable by the transferee from the firm as the value of investment aforesaid as on the first day of the previous year bears to the total investment by way of capital contribution as a partner in the firm as on the said day, shall be included in the total income of the individual in that previous year.

**(1A) In computing the total income of any individual, there shall be included all such income as arises or accrues to his minor child,** not being a minor child suffering from any disability of the nature specified in section 80U :

**Provided** that nothing contained in this sub-section shall apply in respect of such income as arises or accrues to the minor child on account of any—

(a) manual work done by him; or

(b) activity involving application of his skill, talent or specialised knowledge and experience.

*Explanation.*—For the purposes of this sub-section, the income of the minor child shall be included,—

(a) where the marriage of his parents subsists, in the income of that parent whose total income (excluding the income includible under this sub-section) is greater ; or

(b) where the marriage of his parents does not subsist, in the income of that parent who maintains the minor child in the previous year,

and where any such income is once included in the total income of either parent, any such income arising in any succeeding year shall not be included in the total income of the other parent, unless the Assessing Officer is satisfied, after giving that parent an opportunity of being heard, that it is necessary so to do.

(2) Where, in the case of an individual being a member of a Hindu undivided family, any property having been the separate property of the individual has, at any time after the 31st day of December, 1969, been converted by the individual into property belonging to the family through the act of impressing such separate property with the character of property belonging to the family or throwing it into the common stock of the family or been transferred by the individual, directly or indirectly, to the family otherwise than for adequate consideration (the property so converted or transferred being hereinafter referred to as the converted property), then, notwithstanding anything contained in any other provision of this Act or in any other law for the time being in force, for the purpose of computation of the total income of the individual under this Act for any assessment year commencing on or after the 1st day of April, 1971,—

(a) the individual shall be deemed to have transferred the converted property, through the family, to the members of the family for being held by them jointly ;

(b) **the income derived from the converted property or any part thereof shall be deemed to arise to the individual and not to the family ;**

(c) where the converted property has been the subject-matter of a partition (whether partial or total) amongst the members of the family, the income derived from such converted property as is received by the spouse on partition shall be deemed to arise to the spouse from assets transferred indirectly by the individual to the spouse and the provisions of sub-section (1) shall, so far as may be, apply accordingly :

**Provided** that the income referred to in clause (b) or clause (c) shall, on being included in the total income of the individual, be excluded from the total income of the family or, as the case may be, the spouse of the individual.

*Explanation 1.*—For the purposes of sub-section (2),—

"property" includes any interest in property, movable or immovable, the proceeds of sale thereof and any money or investment for the time being representing the proceeds of sale thereof and where the property is converted into any other property by any method, such other property.

*Explanation 2.*—For the purposes of this section, "income" includes loss.

# CONTINUED-----

## Income Deemed to be Received (Only Two Sections)

### ❖ Section 7

- i) S. 7(i) Annual accretions to the balance at the credit of an employee participating in recognized provident Fund.
- ii) S.7(ii) So much of the ‘transferred balance” to the credit of an employee participating in a recognized provident fund
- iii) S.7(iii) Contribution by Cent. Govt. to the pension scheme u/s. 8oCCD

### ❖ S. 198 - All TDS.



## SEC. 198

### **Tax deducted is income received.**

**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 :

**Provided** that the sum being the tax paid, under sub-section (1A) of section 192 for the purpose of computing the income of an assessee, shall not be deemed to be income received.



# Tax Residency Certificate

The Finance Act, 2012, introduced new provisions that in order to be eligible to claim any relief under the treaty, the taxpayer is required to produce a Tax residency Certificate (TRC) issued by the Government of the respective country or the specified territory in which such taxpayer is resident, Containing Certain prescribed particulars. In other words, in the absence of TRC the taxpayer shall not be entitled to claim any relief under the treaty.



## Continue..

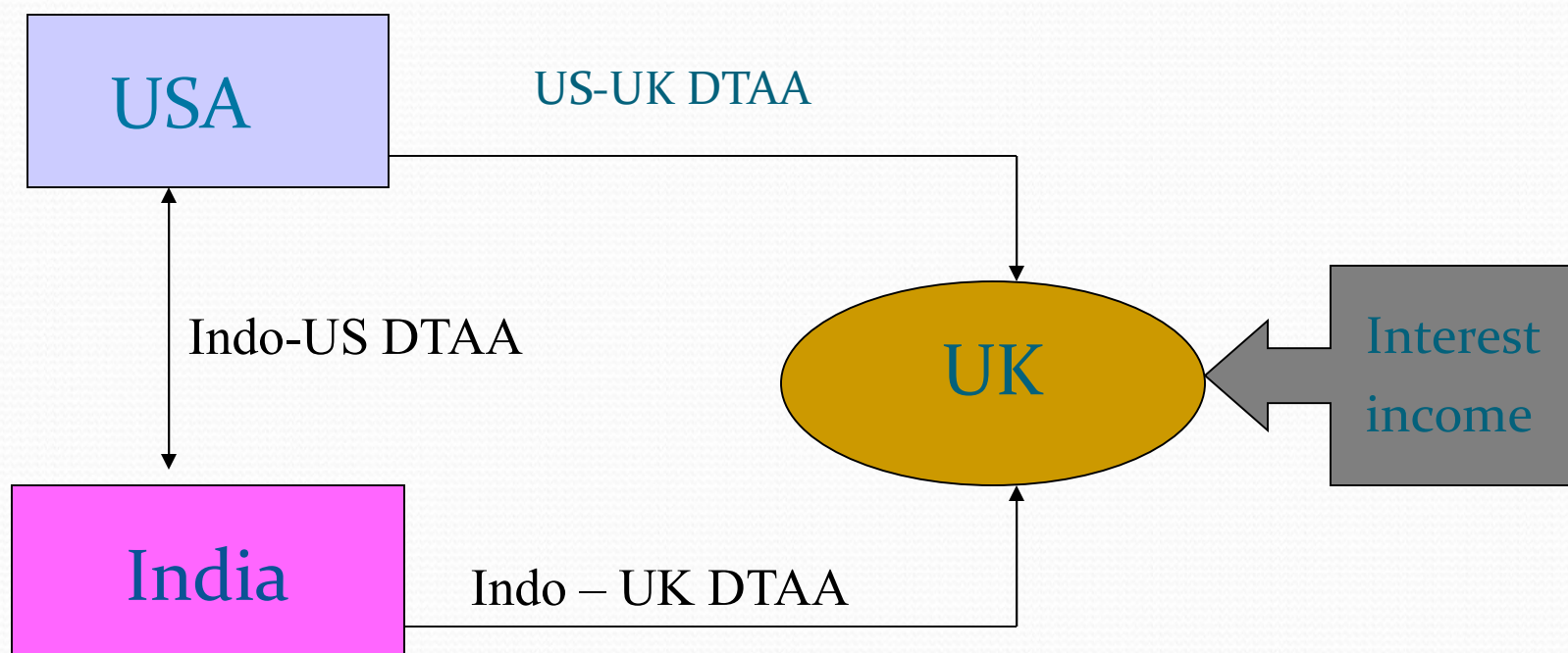
Subsequently, the Finance Act, 2013, had done away with the requirement of obtaining prescribed particulars in the TRC. In other words, the taxpayer can produce the TRC as issued to him by the tax authorities of his respective country. The Finance Act, 2013, also introduced a provision to clarify that the taxpayer shall be required to furnish such other information or documents as may be prescribed. In August 2013, the CBDT issued a notification amending the Rules prescribing the additional information required to be furnished by non-residents along with the TRC. The following details are required to be furnished in Form 10F:

# Continue...

- Status (individual, company, firm, etc.) of the taxpayer;
- Permanent Account Number (PAN) of the taxpayer if allotted;
- Nationality (in case of an individual) or country or specified territory of incorporation or registration (in case of others);
- Taxpayer's tax identification number in the country or specified territory of residence and in case there is 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 of which the taxpayer claims to be a resident;
- Period for which the residential status, as mentioned in the TRC, is applicable; and
- Address of the taxpayer during the period for which the certificate is applicable.

Indian Company having PE in U.S.A from where loan has been given to U.K

## Triangular treaty situation



Determination of which of the DTAA will be applicable.

**SEC- 194 (J)**



## **Fees for professional or technical services.**

194J. (1) Any person, not being an individual or a Hindu undivided family, who is responsible for paying to a resident any sum by way of—

- (a) fees for professional services, or
- (b) fees for technical services, or
- (ba) any remuneration or fees or commission by whatever name called, other than those on which tax is deductible under section 192, to a director of a company, or
- (c) royalty, or
- (d) any sum referred to in clause (va) of section 28,

shall, at the time of credit of such sum to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to 55[two per cent of such sum in case of fees for technical services (not being a professional services) or royalty where such royalty is in the nature of consideration for sale, distribution or exhibition of cinematographic films and ten per cent of such sum in other cases,] as income-tax on income comprised therein :



**Provided** that no deduction shall be made under this section—

(A) from any sums as aforesaid credited or paid before the 1st day of July, 1995; or

(B) where the amount of such sum or, as the case may be, the aggregate of the amounts of such sums credited or paid or likely to be credited or paid during the financial year by the aforesaid person to the account of, or to, the payee, does not exceed—

(i) thirty thousand rupees, in the case of fees for professional services referred to in clause (a), or


(ii) thirty thousand rupees, in the case of fees for technical services referred to in clause (b), or

(iii) thirty thousand rupees, in the case of royalty referred to in clause (c), or

(iv) thirty thousand rupees, in the case of sum referred to in clause (d) :

**Provided further** that an individual or a Hindu undivided family, whose total sales, gross receipts or turnover from the business or profession carried on by him exceed 56[one crore rupees in case of business or fifty lakh rupees in case of profession] during the financial year immediately preceding the financial year in which such sum by way of fees for professional services or technical services is credited or paid, shall be liable to deduct income-tax under this section :





**Provided also** that no individual or a Hindu undivided family referred to in the second proviso shall be liable to deduct income-tax on the sum by way of fees for professional services in case such sum is credited or paid exclusively for personal purposes of such individual or any member of Hindu undivided family:

**Provided also** that the provisions of this section shall have effect, as if for the words "ten per cent", the words "two per cent" had been substituted in the case of a payee, engaged only in the business of operation of call centre.

**Explanation.**—For the purposes of this section,—

- (a) "professional services" means services rendered by a person in the course of carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or advertising or such other profession as is notified by the Board for the purposes of section 44AA or of this section;
- (b) "**fees for technical services**" shall have the same meaning as in **Explanation 2 to clause (vii) of sub-section (1) of section 9**;
- (ba) "**royalty**" shall have the same meaning as in **Explanation 2 to clause (vi) of sub-section (1) of section 9**;
- (c) where any sum referred to in sub-section (1) is credited to any account, whether called "suspense account" or by any other name, in the books of account of the person liable to pay such sum, such crediting shall be deemed to be credit of such sum to the account of the payee and the provisions of this section shall apply accordingly.

**SEC- 194 (I)**




## Rent.

194-I. Any person, not being an individual or a Hindu undivided family, who is responsible for paying to a resident any income by way of rent, 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 rate of—

- (a) two per cent for the use of any machinery or plant or equipment; and
- (b) ten per cent for the use of any land or building (including factory building) or land appurtenant to a building (including factory building) or furniture or fittings:

Provided that no deduction shall be made under this section where the amount of such income or, as the case may be, the aggregate of the amounts of such income credited or paid or likely to be credited or paid during the financial year by the aforesaid person to the account of, or to, the payee, does not exceed 52[two hundred and forty thousand rupees] :

Provided further that an individual or a Hindu undivided family, whose total sales, gross receipts or turnover from the business or profession carried on by him exceed 53[one crore rupees in case of business or fifty lakh rupees in case of profession] during the financial year immediately preceding the financial year in which such income by way of rent is credited or paid, shall be liable to deduct income-tax under this section :



**Provided also** that no deduction shall be made under this section where the income by way of rent is credited or paid to a business trust, being a real estate investment trust, in respect of any real estate asset, referred to in clause (23FCA) of section 10, owned directly by such business trust.

**Explanation.**—For the purposes of this section,—

- (i) **"rent" means any payment, by whatever name called, under any lease, sub-lease, tenancy or any other agreement or arrangement for the use of (either separately or together) any,—**
  - (a) land; or**
  - (b) building (including factory building); or**
  - (c) land appurtenant to a building (including factory building); or**
  - (d) machinery; or**
  - (e) plant; or**
  - (f) equipment; or**
  - (g) furniture; or**
  - (h) fittings,****whether or not any or all of the above are owned by the payee;**
- (ii) where any income is credited to any account, whether called "Suspense account" or by any other name, in the books of account of the person liable to pay such income, 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.

# Royalty & Fts under the Act & DTAA

## Fees for Technical Services – Section 9(1)(vii)

- FTS will be deemed to accrue or arise in India if payable by
  - Government
  - Resident except, if payable for services utilized for:
    - Business carried on by such person outside India
    - Earning any income from any source outside India
  - Non resident in respect of services utilized for carrying on business or profession in India
- **Lufthansa Cargo India Ltd (Delhi HC) [2015] 375 ITR 85 (Delhi)**

Payment made for repairs and maintenance of aircraft (given on wet lease to F Co.s) carried on outside India is not taxable as FTS since such payments have been made for earning income from sources outside India

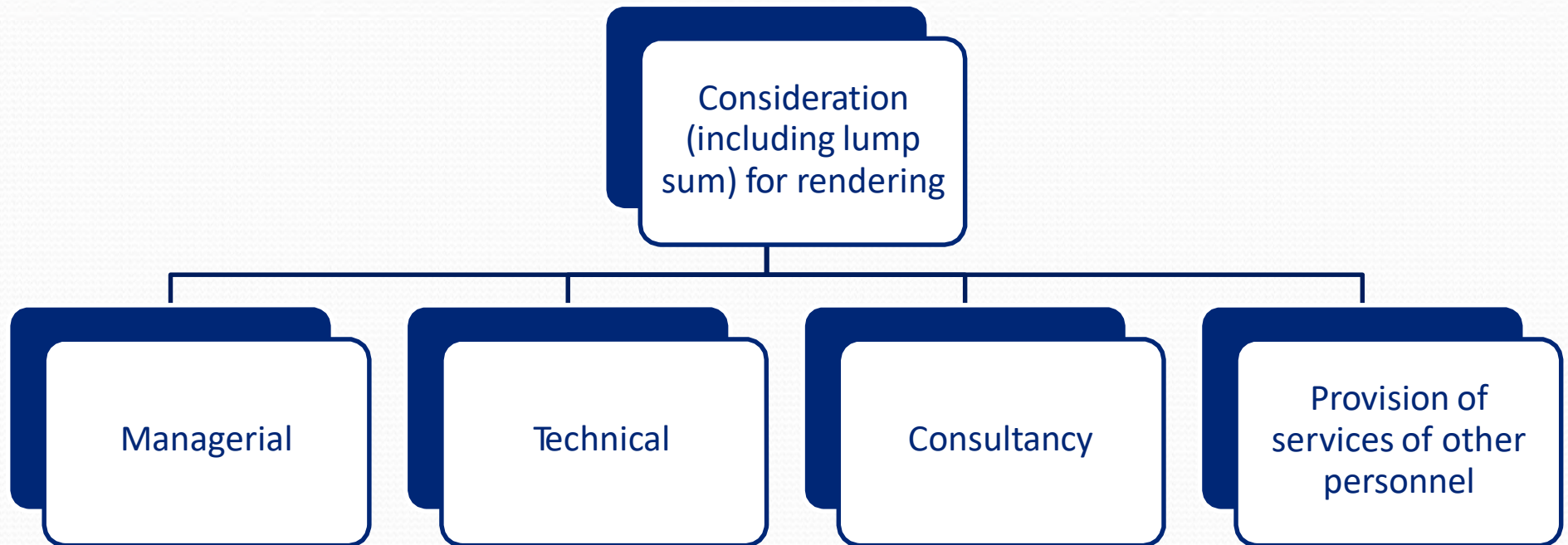
## ❖ FTS under the Income Tax Act (Explanation 2 of Section 9(1)(vii))

- *Explanation 2:*

*For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of **any managerial, technical or consultancy services** (including the provision of services of technical or other personnel) **but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient** or **consideration which would be income of the recipient chargeable under the head "Salaries"**.*

# Fees for Technical Services – Definition

FTS defined in Explanation 2 to S.9(1)(vii) of Income-tax Act, 1961:



*FTS does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries".*





## Meaning of FTS under the Income Tax Act, 1961 ('Act')

- ▶ Consideration for managerial or technical or consultancy services, including the provision of services of technical or other personnel.
- ▶ The technical services comprise of following broad elements:
  - ▶ Managerial Services
  - ▶ Technical Services
  - ▶ Consultancy Services
  - ▶ Provision of services of technical or other personnel



## Services excluded from the scope of FTS as defined in the Act

- ▶ **Explanation 2 to Section 9(1)(vii) specifically excludes the consideration for the following from the scope of FTS:**
  - any construction,
  - assembly,
  - mining or
  - like project undertaken by the recipient or
  - consideration which would be income of the recipient chargeable under the head “Salaries”.”

## Fees for Technical Services – Section 9(1)(vii) – Managerial Services

- Managerial means services in the nature of managing by direction, regulation, administration or supervision of activities performed by another
- Supreme Court in R. Dalmia has analysed the meaning of 'manage' to mean – to control, guide, administer... to conduct or direct affairs; carry on business
- Managerial services' may also be construed to be involving functions related to how a business is run as opposed to functions involved in carrying on that business
- Payment made by NR would be sourced in India under sec. 9(1)(vii)(c) if services are rendered and utilized in India. – IshikawajimaHarima Heavy Industries Ltd. (SC) [2007] 158 Taxman 259 (SC)/[2007] 288 ITR 408 (SC)
- **Bharti Cellular Ltd Vs CIT [2011] 330 ITR 239 (SC)**  
"Right from 1979 various judgments of the High Courts and Tribunals have taken the view that the words "technical services" have got to be read in the narrower sense by applying the rule of Noscitur a sociis, particularly, because the words "technical services" in section 9(1)(vii) read with Explanation 2 comes in between the words "managerial and consultancy services"



## Meaning of managerial Services

- ▶ *Endemol South Africa (Proprietary) Ltd. vs. DCIT, [2018] 98 taxmann.com 227 (Mumbai -Trib.)*
- ▶ Services rendered –
- ▶ The Assessee as a line producer was to act as a facilitator and coordinator for filming of the series in South Africa for an Indian Company. The scope of work included arranging for locational crew, transportation, paper work for various stunts to be performed and other requirements for setting up and filming series etc.



## Meaning of managerial Services

- ▶ **Decision** – Services held not to be FTS as the services provided by the assessee were found to be in the nature of administrative services (such as making logistic arrangements etc.). With regards managerial services the Tribunal held that the term ‘managerial services’ ordinarily means:
  - ▶ **handling management and affairs**
  - ▶ **controlling, directing, managing or administering the business or part of a business of service recipient**

## Fees for Technical Services – Consultancy Services

- Consultancy service means the act of offering expert or professional advice in a field.
- **Bharti Cellular Ltd (Delhi HC)[2009] 319 ITR 139 (Delhi)**
  - Consultancy is defined as the work or position of a consultant
  - "Consultant" has been defined as a person who gives professional advice or services in a specialized field. It is a derivative of "consult" that entails deliberations, consideration, conferring with someone, conferring about or upon a matter
- **GVK Industries Ltd (SC) [2015] 54 taxmann.com 347 (SC)**
  - A meeting in which a party consults or confers and eventually it results in human interaction that leads to rendering of advice

## Fees for Technical Services – Technical Services

- As per Oxford Dictionary, the word “Technical” means:
  - Having knowledge of or expertise in a particular art, science, or other subject
  - Pertaining to, involving, or characteristic of a particular art, science, profession, or occupation, or the applied arts and sciences generally
- **Skycell Communications (Madras HC)**
  - The term technical was generally understood as ‘involving or concerning applied and industrial science.’

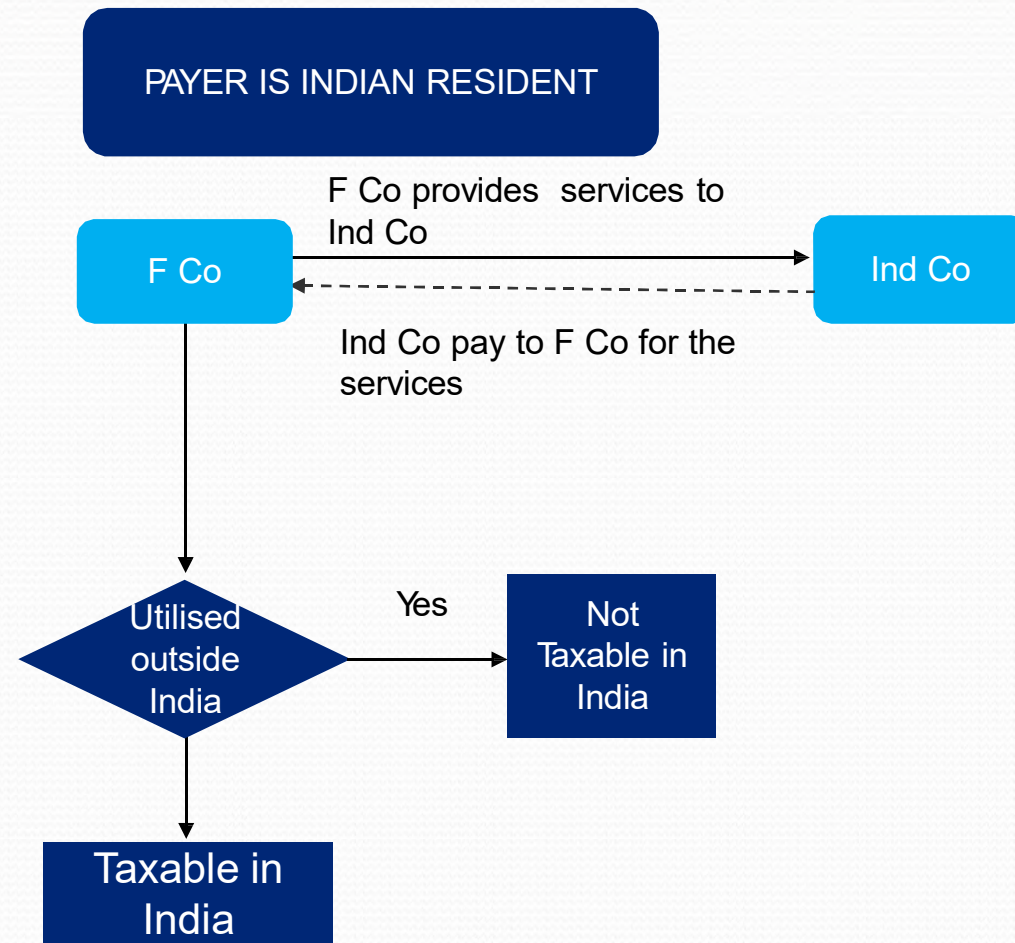


# Meaning of FTS - Act

- Explanation 2 to section 9(1)(vii)
- Exhaustive definition
- Definition similar to the wider definition in the DTAA's
- 'Consideration for rendering any managerial, technical or consultancy services (including the provision of services of technical or other personnel) '
- No make available clause
- **Exclusion**
  - consideration for construction, assembly, mining or like project undertaken by the recipient;
  - or consideration which is chargeable under the head 'salaries' in the hands of the recipient



# Deeming Rules under the Act



Utilised **except** in a business or profession carried on outside India or for the purpose of earning income from any source outside India



## Source Rule – Section 9 (1)(vii)

- ▶ **When does FTS accrue or deemed to accrue or arise in India – SOURCE RULE – Explanation to s/s (2)**
- ▶ **Explanation. - For the removal of doubts, it is hereby declared that for the purposes of this section, income of a non-resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vii) of sub-section (1) and shall be included in the total income of the non-resident, whether or not,-**
  - (i) the non-resident has a residence or place of business or business connection in India; or**
  - (ii) the non-resident has rendered services in India.**

## Explanation 2 – Definition of Royalty

*““Explanation 2.—For the purposes of this clause, "royalty" means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains") for—*

*(i) **the transfer of all or any rights** (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property ;*

*(ii) **the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property ;***

## Explanation 2 (contd..)

*(iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property ;*

*(iv) the **imparting of any information** concerning technical, industrial, commercial or scientific knowledge, experience or skill ;*

*(iva) the **use or right to use any industrial, commercial or scientific equipment** but not including the amounts referred to in section 44BB;*

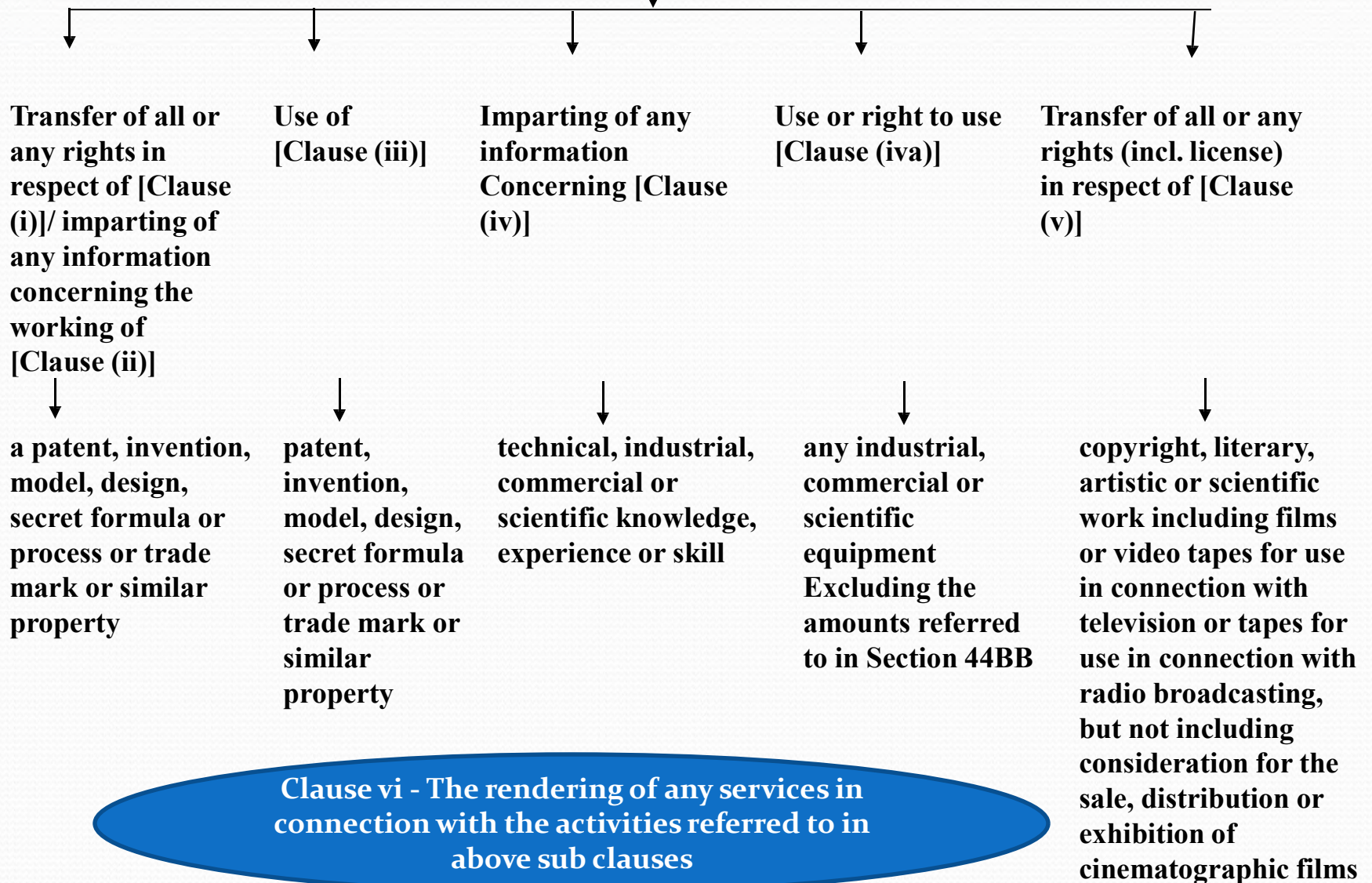
*(v) the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films ; or*

*(vi) the rendering of any services in connection with the activities referred to in sub-clauses (i) to (iv), (iva) and (v)*

# Definition - Royalty as per Income-tax Act

[Explanation 2 to section 9 (1) (vi)]

Royalty (excludes income which would be in the nature of capital gains)



# Amendments by finance act 2012 [W.e.f. 1.6.1976]

## Explanation 4

consideration for use or right to use of computer software is royalty by **irrespective of the medium through which such right is transferred.**

## Explanation 5

royalty includes and has always included consideration in respect of any right, property or information, whether or not:

- a) the **possession or control** of such right, property or information is **with the payer;**
- b) such right, property or information is **used directly by the payer;**
- c) the **location** of such right, property or information **is in India.**

## Explanation 6

“process” includes and shall be deemed to have always included **transmission by satellite** (including up-linking, amplification, conversion for down-linking of any signal), **cable, optic fibre** or by any other similar technology, **whether or not such process is secret.**

**No re-opening of completed assessments on account of retrospective clarificatory amendments if:**

- Assessment proceedings completed before 1 April 2012; and
- No notice for reassessment been issued prior to 1 April 2012.

*(Letter F. No. 500/111 12009-FTD-1 (Pt.) dated 29 May 2012)*

**No withholding under section 194J on transfer of software to a resident where:**

- Software acquired on subsequent transfer without any modification;
- Tax has been deducted on payment on any previous transfer;
- Transferee obtains a declaration that the tax has been deducted and PAN of the transferor.

Effective from 1 July, 2012.

(Notification No. 21/2012 dated 13 June 2012)

# TDS on software

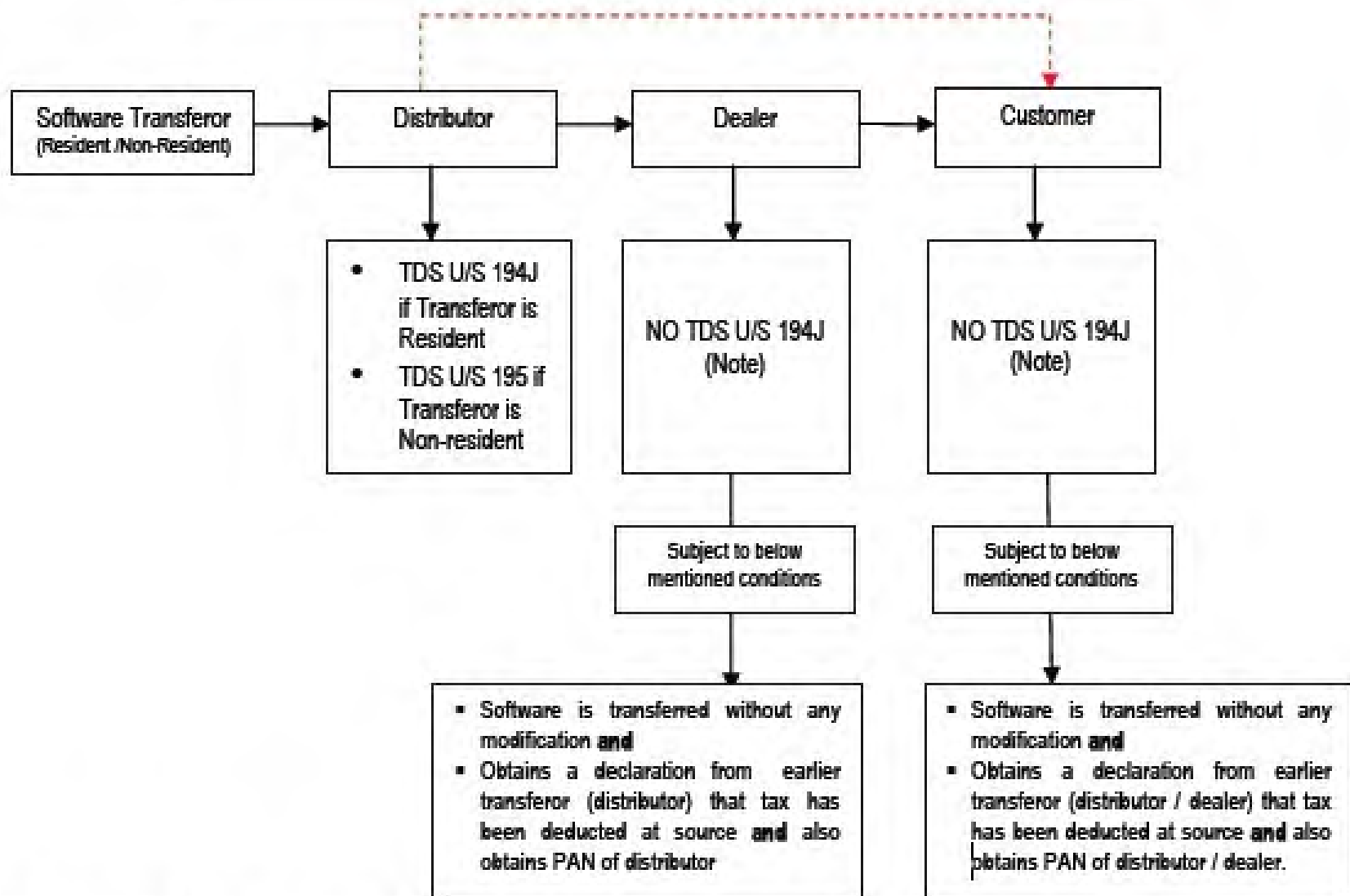
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- **The CBDT has issued a Notification No. SO 1323 (E), dated 13-06-2012**, that no deduction of tax at source shall be made from payment made for acquisition of software, if following conditions are satisfied:
  - Payment is made by a person ("transferee") for acquisition of software
  - Payment is made to another person ("transferor")
  - The transferor is a resident person
  - The software is acquired in subsequent transfer. *[In other words, the transferor should not be the original developer of the software and it must have acquired the same either from the original developer (from within India or outside India) or through a chain of dealers (from within India or outside India)]*



## TDS ON PURCHASE OF SOFTWARE

Cont.



**Note:** If the Non-resident Software Transferor claims the benefit of tax treaty or favorable judicial pronouncement and consequently tax is not deducted under section 195 then dealer or customer has to deduct TDS under section 194J while making payment to distributor or dealer as the case may be.

Scenario 1

Scenario 2

Cont.

ABC Inc. USA  
(Original developer)

XYZ Ltd. Cayman Island  
(Part of chain of dealers)

ABC Pvt. Ltd. India  
(Part of chain of dealers)

Indian dealers

Indian Customers

If tax not deducted by ABC  
from payment made to  
XYZ Ltd.

If tax deducted by ABC  
from payment made to  
XYZ Ltd.

Indian dealer shall deduct tax under  
Sec. 194J from payment being made  
to ABC Pvt. Ltd. because ABC has  
not deducted tax at source under  
Sec. 195 from payment made to  
XYZ

No need to deduct tax from  
payment made by Indian dealer to  
ABC Pvt. Ltd. as ABC has deducted  
tax at source under Sec. 195 from  
payment made to XYZ

No need to deduct tax from  
payment made by Indian customer  
to Indian dealer as tax has been  
deducted at previous occasion under  
Section 194J

No need to deduct tax from  
payment made by Indian customer  
to Indian dealer as tax has been  
deducted at previous occasion under  
Section 195



# *Taxability*

# Royalty – Definition as per OECD and UN Model

As per OECD Model

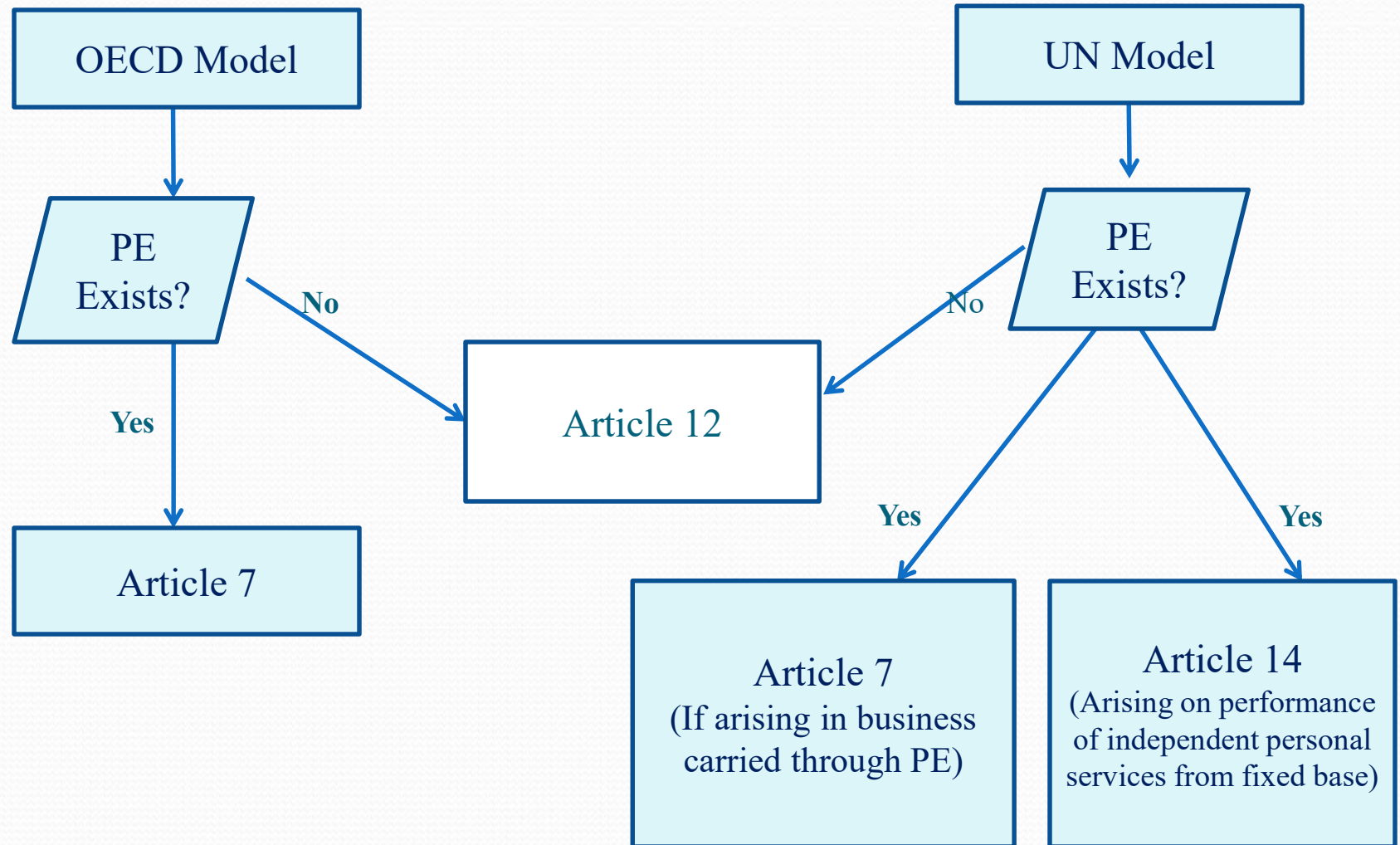
Consideration  
for use of right  
to use

As per UN Model

- copyright of literary, artistic, or scientific work including cinematograph films,
- any patent, trade mark,
- design or model,
- plan, secret formula or process,
- or for information concerning industrial, commercial or scientific experience

- Copyright of films or tapes used for radio or television broadcasting
- industrial, commercial or scientific equipment

# Taxability as per OECD and UN Model




# Taxability under Income tax Act

Section	Payer	Whether Taxable
9(1)(vi)(a)	Government	All
9(1)(vi)(b)	Resident	All except payments for business/profession/source of income of the payer outside India
9(1)(vi)(c)	Non Resident	Only payments for business/profession/source of income of the payer in India

Section	Royalty
Section 44DA <i>Special provision for computing income by way of royalties, etc., in case of non-residents where there is PE in India</i>	If arising out of PE/ fixed place of profession
Section 115A <b>Calculation of tax rates. For agreements made after 31.03.1976 the TDS rate is 25%</b>	No PE and in pursuance of agreement with the government or Indian concern

## Paraphrasing the royalty as per UN model

- a) Payments of any kind;
- b) Received as a consideration for
- c) Use of or the right to use of the following assets:
  - Copyright of literary, artistic or scientific work including cinematograph films, or films or tapes used for radio or television broadcasting;
  - Patent;
  - Trademark;
  - Design or model;
  - Plan;
  - Secret formula or process;
2. Industrial, commercial or scientific equipment;
3. Information concerning industrial, commercial or scientific experience.

- 
- This definition is exhaustive and not inclusive.
  - It does not begin with the qualifying phrase “unless the context otherwise requires”
  - This definition is narrower and truncated one in comparison to definition under IT Act, 1961.
  - The difference between the two definitions:-

Whereas under IT Act, 1961, any consideration for the transfer for all or any rights of the assets

On the contrary it is the payment for use or right to use of such assets as per UN model Treaty.

- The onus is on the A.O to prove that it is royalty.



# Royalty Cases

## TOPIC – (AREA OF DISPUTE)

Payments for off-the-shelf software

Payments for online access to databases  
(journal subscriptions, magazines etc.)

Fees for use of Satellite

Payment for leased line / internet connectivity

Payment for know-how, designs, drawings

Divisibility of contracts, Composite  
Agreements

**SEC- 194 A**




**Interest other than "Interest on securities".**

194A. (1) Any person, not being an individual or a Hindu undivided family, who is responsible for paying to a resident any income by way of interest other than income by way of interest on securities, 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 issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force :

Provided that an individual or a Hindu undivided family, whose total sales, gross receipts or turnover from the business or profession carried on by him exceed 38[one crore rupees in case of business or fifty lakh rupees in case of profession] during the financial year immediately preceding the financial year in which such interest is credited or paid, shall be liable to deduct income-tax under this section.

Explanation.—For the purposes of this section, where any income by way of interest as aforesaid is 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, 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.



(2) [Omitted by the Finance Act, 1992, w.e.f. 1-6-1992.]

(3) The provisions of sub-section (1) shall not apply—

(i) where the amount of such income or, as the case may be, the aggregate of the amounts of such income credited or paid or likely to be credited or paid during the financial year by the person referred to in sub-section (1) to the account of, or to, the payee, does not exceed—

(a) <sup>39</sup>[forty] thousand rupees, where the payer is a banking company to which the Banking Regulation Act, 1949 (10 of 1949) applies (including any bank or banking institution, referred to in section 51 of that Act);

(b) <sup>40</sup>[forty] thousand rupees, where the payer is a co-operative society engaged in carrying on the business of banking;

(c) <sup>40</sup>[forty] thousand rupees, on any deposit with post office under any scheme framed by the Central Government and notified by it in this behalf; and

(d) five thousand rupees in any other case:

**Provided** that in respect of the income credited or paid in respect of—

(a) time deposits with a banking company to which the Banking Regulation Act, 1949 (10 of 1949) applies (including any bank or banking institution referred to in section 51 of that Act); or

(b) time deposits with a co-operative society engaged in carrying on the business of banking;

(c) deposits with a public company which is formed and registered in India with the main object of carrying on the business of providing long-term finance for construction or purchase of houses in India for residential purposes and which is eligible for deduction under clause (viii) of sub-section (1) of section 36 ;



the aforesaid amount shall be computed with reference to the income credited or paid by a branch of the banking company or the co-operative society or the public company, as the case may be :

Provided further that the amount referred to in the first proviso shall be computed with reference to the income credited or paid by the banking company or the co-operative society or the public company, as the case may be, where such banking company or the co-operative society or the public company has adopted core banking solutions:

Provided also that in case of payee being a senior citizen, the provisions of sub-clause (a), sub-clause (b), and sub-clause (c) shall have effect as if for the words "41[forty] thousand rupees", the words "fifty thousand rupees" had been substituted.

Explanation.—42[\*\*\*]

(ii) [\*\*\*]

(iii) to such income credited or paid to—

- (a) any banking company to which the Banking Regulation Act, 1949 (10 of 1949), applies, or any co-operative society engaged in carrying on the business of banking (including a co-operative land mortgage bank), or
- (b) any financial corporation established by or under a Central, State or Provincial Act, or
- (c) the Life Insurance Corporation of India established under the Life Insurance Corporation Act, 1956 (31 of 1956), or
- (d) the Unit Trust of India established under the Unit Trust of India Act, 1963 (52 of 1963), or
- (e) any company or co-operative society carrying on the business of insurance, or
- (f) such other institution, association or body or class of institutions, associations or bodies which the Central Government may, for reasons to be recorded in writing, notify in this behalf in the Official Gazette:



[**Provided** that no notification under this sub-clause shall be issued on or after the 1st day of April, 2020;]

(iv) to such income credited or paid by a firm to a partner of the firm;

(v) to such income credited or paid by a co-operative society (other than a co-operative bank) to a member thereof or to such income credited or paid by a co-operative society to any other co-operative society;

Explanation.—For the purposes of this clause, "co-operative bank" shall have the same meaning as assigned to it in Part V of the Banking Regulation Act, 1949 (10 of 1949);


(vi) to such income credited or paid in respect of deposits under any scheme framed by the Central Government and notified by it in this behalf in the Official Gazette;

(vii) to such income credited or paid in respect of deposits (other than time deposits made on or after the 1st day of July, 1995) with a banking company to which the Banking Regulation Act, 1949 (10 of 1949) applies (including any bank or banking institution referred to in section 51 of that Act);

(viii) to such income credited or paid in respect of,—


(a) deposits with a primary agricultural credit society or a primary credit society or a co-operative land mortgage bank or a co-operative land development bank;

(b) deposits (other than time deposits made on or after the 1st day of July, 1995) with a co-operative society, other than a co-operative society or bank referred to in sub-clause (a), engaged in carrying on the business of banking;

- 
- (viii) to such income credited or paid by the Central Government under any provision of this Act or the Indian Income-tax Act, 1922 (11 of 1922), or the Estate Duty Act, 1953 (34 of 1953), or the Wealth-tax Act, 1957 (27 of 1957), or the Gift-tax Act, 1958 (18 of 1958), or the Super Profits Tax Act, 1963 (14 of 1963), or the Companies (Profits) Surtax Act, 1964 (7 of 1964), or the Interest-tax Act, 1974 (45 of 1974);*
  - (ix) to such income credited by way of interest on the compensation amount awarded by the Motor Accidents Claims Tribunal;*
  - (ixa) to such income paid by way of interest on the compensation amount awarded by the Motor Accidents Claims Tribunal where the amount of such income or, as the case may be, the aggregate of the amounts of such income paid during the financial year does not exceed fifty thousand rupees;*
  - (x) to such income which is paid or payable by an infrastructure capital company or infrastructure capital fund or a public sector company or scheduled bank in relation to a zero coupon bond issued on or after the 1st day of June, 2005 by such company or fund or public sector company or scheduled bank;*
  - (xi) to any income by way of interest referred to in clause (23FC) of section 10:*

**[Provided** that a co-operative society referred to in clause (v) or clause (viia) shall be liable to deduct income-tax in accordance with the provisions of sub-section (1), if—

- (a) the total sales, gross receipts or turnover of the co-operative society exceeds fifty crore rupees during the financial year immediately preceding the financial year in which the interest referred to in sub-section (1) is credited or paid; and*
- (b) the amount of interest, or the aggregate of the amounts of such interest, credited or paid, or is likely to be credited or paid, during the financial year is more than fifty thousand rupees in case of payee being a senior citizen and forty thousand rupees in any other case.]*



**Explanation 1.**—For the purposes of clauses (i), (vii) and (viia), "time deposits" means deposits (including recurring deposits) repayable on the expiry of fixed periods.

[**Explanation 2.**—For the purposes of this sub-section, "senior citizen" means an individual resident in India who is of the age of sixty years or more at any time during the relevant previous year.]

(4) The person responsible for making the payment referred to in sub-section (1) may, at the time of making any deduction, increase or reduce the amount to be deducted under this section for the purpose of adjusting any excess or deficiency arising out of any previous deduction or failure to deduct during the financial year.]

46[(5) The Central Government may, by notification in the Official Gazette, provide that the deduction of tax shall not be made or shall be made at such lower rate, from such payment to such person or class of persons, as may be specified in the said notification.]

**Explanation.**—[Omitted by the Finance Act, 1992, w.e.f. 1-6-1992.]





## **Issues as to Interest payment as per Domestic Tax Law**

1. Interest on Delayed Refund of Tax
2. Premium or prize attaching to Govt Securities, bonds & Debentures
3. Interest that is contractually charged by a supplier on unpaid purchase price
4. Interest from Escrow account
5. Interest awarded during arbitration proceedings
6. Front end fees by financier
7. Upfront appraisal fees
8. Prepayment Charges
9. Interest on credit sales
10. Interest earned by a partner from partnership firm
11. Interest on loans which effectively share the Risks run by the Debtor company
12. Interest that is paid subject to contingency
13. Bill discounting Charges or Guarantee Commission Payments under Non traditional financial instruments where there is no underlying Debt(Eg Interest Rate Swaps)
14. Penal charges for late payment
15. **Interest for delay in completing the process of buyback**



## Definition of Interest as per Section 2(28A):-

“Interest means interest payable in any manner in respect of any money borrowed or debt incurred (including a deposit, claim, or similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilized”



Article 11(3) of the UN Model defines Interest as follows:-

“The Term Interest as used in this article means **income from Debt claims of every kind**, whether or not secured by mortgage and **whether or not carrying a right to participate in the debtor’s profits**, and in particular **income from government securities and income from bonds or debentures including premiums and prizes attaching to such securities, bonds or Debentures. Penalty charges for late payment shall not be regarded as interest for the purpose of this article”**

Definition is same in OECD model treaty

# COMPONENTS OF INTEREST TAXATION

**Right of State of Residence to tax interest**

**Right of State of Source (India) to tax interest**

**What is covered/excluded under Interest?**

**PE in India – Impact on taxation**

**Source of Interest**

**Arm's length interest**

# Mechanics Of Article 11



# RESIDENCE BASED DEDUCTION

Interest due to FCO not allowed / Only interest due to M Co allowed ?



May be covered under Non Discrimination and allowance may be claimed by ICO for interest to FCO

## KEY ISSUES AROUND ARTICLE 11



### Effect:

Investor lends to ICo which pays interest on such loan

### Issues:

- Whether interest should be taxed in :-
  - Source State only ?
  - Residence State only ?
  - Both Source State and Residence State ?
- What is meant by interest ?
- Whether only interest "paid" should be taxed or remaining unpaid should be taxed as well ?

## ARTICLE 11 (1) – INDIA USA TREATY – RIGHT OF STATE OF RESIDENCE TO TAX INTEREST

Interest **arising** in a Contracting State (Source State)

and

**paid** to a resident of the other Contracting State (Residence State)

**may be** taxed in that other State (Residence State) .

### KEY CHARACTERSTICS

- 1 Interest should be both (a) Arise in Source State (b) Paid
- 2 Recipient should be a Resident of the other Contracting State
- 3 Both Source and Resident State have right to tax
- 4 To ascertain whether interest has arises which provisions should be applicable ?

Definition of interest as per Article 11 should apply, unless the provision of IT Act are more beneficial



## AP 4: Interest deductions and others

- › **Concerns:** Adjusting the mix of debt and equity in MNE groups
  - Location of **third party interest** in high tax countries.
  - Using related party interest to generate interest deduction **in excess of group's actual interest cost**
  - Use of interest expense to fund **tax-exempt income**
- › No minimum standard, and only a recommendation
- › Linking interest deductions with taxable economic activity



## AP 4: Interest deductions and others

- › OECD Report – Nov. 1986
  - Tax advantages from use of loan capital instead of equity, inducing investor to infuse equity in form of loan (Hidden equity capitalization)
  - High proportion of debt to equity → Indication of possible thin capitalization

**DEBT**  
**EQUITY**

## AP 4: Interest deductions and others

### › Recommendations

- **Fixed ratio rule:** Allows net interest deduction up to fixed net interest / tax EBITDA ratio
- Applies to interest paid to 3rd parties and intra-group
- Fixed ratio between 10%-30% (Suggested several factors to assist countries in setting this ratio)
- Allowing carry-forward of disallowed interest

## AP 4: Interest deductions and others

### › Recommendations

- **Group ratio rule:** Allows interest deductions up to net interest / EBITDA ratio **of group**
- Countries may instead apply a different group ratio rule (e.g. **equity escape**) or no group ratio rule – To allow flexibility to countries with existing thin-cap regimes
- TP action plan deals separately, with intra-group interest

## AP 4: Interest deductions and others

- › Recommendations
  - **Monetary threshold:** Removing low risk where interest expense is below threshold
  - Based on net interest expense of group
- › Carry forward / back of disallowed interest / unused interest capacity
- › Targeted anti-avoidance rules

## AP 4: Interest deductions and others

### › Impact on India

- Sec. 94B (Interest to NR AE > INR 1 cr., to be deductible upto 30% of EBITDA)
- Potential re-characterization of debt into equity under GAAR

## Sec. 94B – Budget 2017

- › Restriction on deduction of interest paid to NR AE to 30% of EBITDA
- › Applicable to Indian Co. / PE of F.Co. (except banks, insurance), if interest exp. > INR 1 cr.
- › Disallowed exp. can be carried forward for 8 yrs.
- › Debt to be **deemed as issued by AE**, if:
  - AE provides an **implicit or explicit guarantee** to lender, or
  - AE **deposits corresponding matching funds** with lender



## Sec. 94B – Budget 2017

- › Wide definition of 'Debt'
  - Any loan, fin. instrument, fin. lease, fin. derivative, or
  - Any arrangement that gives rise to interest, discounts or other finance charges
  
- › Challenges
  - What is an 'Implicit guarantee'
  - Treatment in case of finance lease of machinery
  - Disallowance even if interest meets the arm's length test
  - A common preferred banker for group



# SEC 94B


- **Limitation on interest deduction in certain cases.**

- **94B.** (1) Notwithstanding anything contained in this Act, where an Indian company, or a permanent establishment of a foreign company in India, being the borrower, **incurs any expenditure by way of interest or of similar nature** exceeding one crore rupees **which is deductible in computing income chargeable under the head "Profits and gains of business or profession"** in respect of any debt issued by a non-resident, being an associated enterprise of such borrower, the interest shall not be deductible in computation of income under the said head to the extent that it arises from excess interest, as specified in sub-section (2) :

- **Provided** that where the debt is issued by a lender which is not associated but an associated enterprise either provides an implicit or explicit guarantee to such lender or deposits a corresponding and matching amount of funds with the lender, such debt shall be deemed to have been issued by an associated enterprise.

- (2) For the purposes of sub-section (1), **the excess interest shall mean an amount of total interest paid or payable in excess of thirty per cent of earnings before interest, taxes, depreciation and amortisation of the borrower in the previous year or interest paid or payable to associated enterprises for that previous year, whichever is less.**

- (3) Nothing contained in sub-section (1) shall apply to an Indian company or a permanent establishment of a foreign company which is engaged in the business of banking or insurance.



**•(4) Where for any assessment year, the interest expenditure is not wholly deducted against income under the head "Profits and gains of business or profession", so much of the interest expenditure as has not been so deducted, shall be carried forward to the following assessment year or assessment years, and it shall be allowed as a deduction against the profits and gains, if any, of any business or profession carried on by it and assessable for that assessment year to the extent of maximum allowable interest expenditure in accordance with sub-section (2):**

**•Provided that no interest expenditure shall be carried forward under this sub-section for more than eight assessment years immediately succeeding the assessment year for which the excess interest expenditure was first computed.**

**•(5) For the purposes of this section, the expressions—**

**• (i) "associated enterprise" shall have the meaning assigned to it in sub-section (1) and sub-section (2) of section 92A;**

**• (ii) "debt" means any loan, financial instrument, finance lease, financial derivative, or any arrangement that gives rise to interest, discounts or other finance charges that are deductible in the computation of income chargeable under the head "Profits and gains of business or profession";**

**• (iii) "permanent establishment" includes a fixed place of business through which the business of the enterprise is wholly or partly carried on.]**

# SEC. 40(ai)

- **Amounts not deductible.**

- **40.** Notwithstanding anything to the contrary in sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession",—

- (a) in the case of any assessee—


- (i) any interest (not being interest on a loan issued for public subscription before the 1st day of April, 1938), royalty, fees for technical services or other sum chargeable under this Act, which is payable,—

- (A) outside India; or

- (B) in India to a non-resident, not being a company or to a foreign company,

- **on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid on or before the due date specified in sub-section (1) of section 139 :**

- **Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.**


- 
- *Explanation.*—For the purposes of this sub-clause,—
  - (A) "royalty" shall have the same meaning as in *Explanation 2* to clause (vi) of sub-section (1) of section 9;
  - (B) "fees for technical services" shall have the same meaning as in *Explanation 2* to clause (vii) of sub-section (1) of section 9;
  - *Explanation.*—For the purposes of this sub-clause,—
  - (i) "commission or brokerage" shall have the same meaning as in clause (i) of the *Explanation* to section 194H;
  - (ii) "fees for technical services" shall have the same meaning as in *Explanation 2* to clause (vii) of sub-section (1) of section 9;
  - (iii) "professional services" shall have the same meaning as in clause (a) of the *Explanation* to section 194I;
  - (iv) "work" shall have the same meaning as in *Explanation III* to section 194C;
  - (v) "rent" shall have the same meaning as in clause (i) to the *Explanation* to section 194-I;
  - (vi) "royalty" shall have the same meaning as in *Explanation 2* to clause (vi) of sub-section (1) of section 9;
  -

# SEC.40(aia)

- (ia) thirty per cent of any sum payable to a resident, on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid on or before the due date specified in sub-section (1) of section 139 :

- Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, thirty per cent of such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid :**


- Provided further** that where an assessee fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter XVII-B on any such sum but is not deemed to be an assessee in default under the first proviso to sub-section (1) of section 201, then, for the purpose of this sub-clause, it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the resident payee referred to in the said proviso.



According to Sub-Section (2) of Section 5 of the Act, a non-resident is chargeable to tax only on income which is ***received or deemed to be received*** in India or which ***accrues or arise or is deemed to accrue or arise*** to him in India.

**Section 9 deems the following income as accruing or arising in India in hands of a non-resident.**

- All income accruing or rising, directly or indirectly, through or from any **business connection** in India or through or from **any property** in India or through or from any **asset or source of income** in India or through **the transfer of a capital asset situated in India**.
- Income under the head 'salaries' is chargeable if it is earned in India. (Supreme Court decision in the case of Eli Lilly & Co. (312 ITR 225) may be referred)
- Salaries payable by the Government to a citizen of India for services outside India are also deemed to accrue or arise in India.

- 
- Dividend paid by an Indian company outside India.
  - Interest payable by the Government or by resident/non-resident in respect of any debt incurred, or moneys borrowed and used, for the purposes of business or profession carries on by such person in India.
  - All “royalties” payable by Government and royalties payable by a resident or a non-resident in respect of a right, property or information **used for purposes of a business or profession in India or for earning any income from any source in India**; and
  - All “Fees for Technical Services” (FTS) payable by Government and FTS payable by a resident or a non-resident in respect of **services utilized for the purpose of business or profession in India or for earning any income from any source in India**.

(OVERVIEW OF SECTION 9)



# *Residential Status*





# *Residential Status :*

Residential Status of an assessee is important in determining the scope of income on which income tax has to be paid in India.

## CRITERIA FOR DECIDING RESIDENTIAL STATUS

### ❖ For an Individual - either of two conditions:

- i) In India for a period or periods amounting in all to 182 days or more in that year.

or

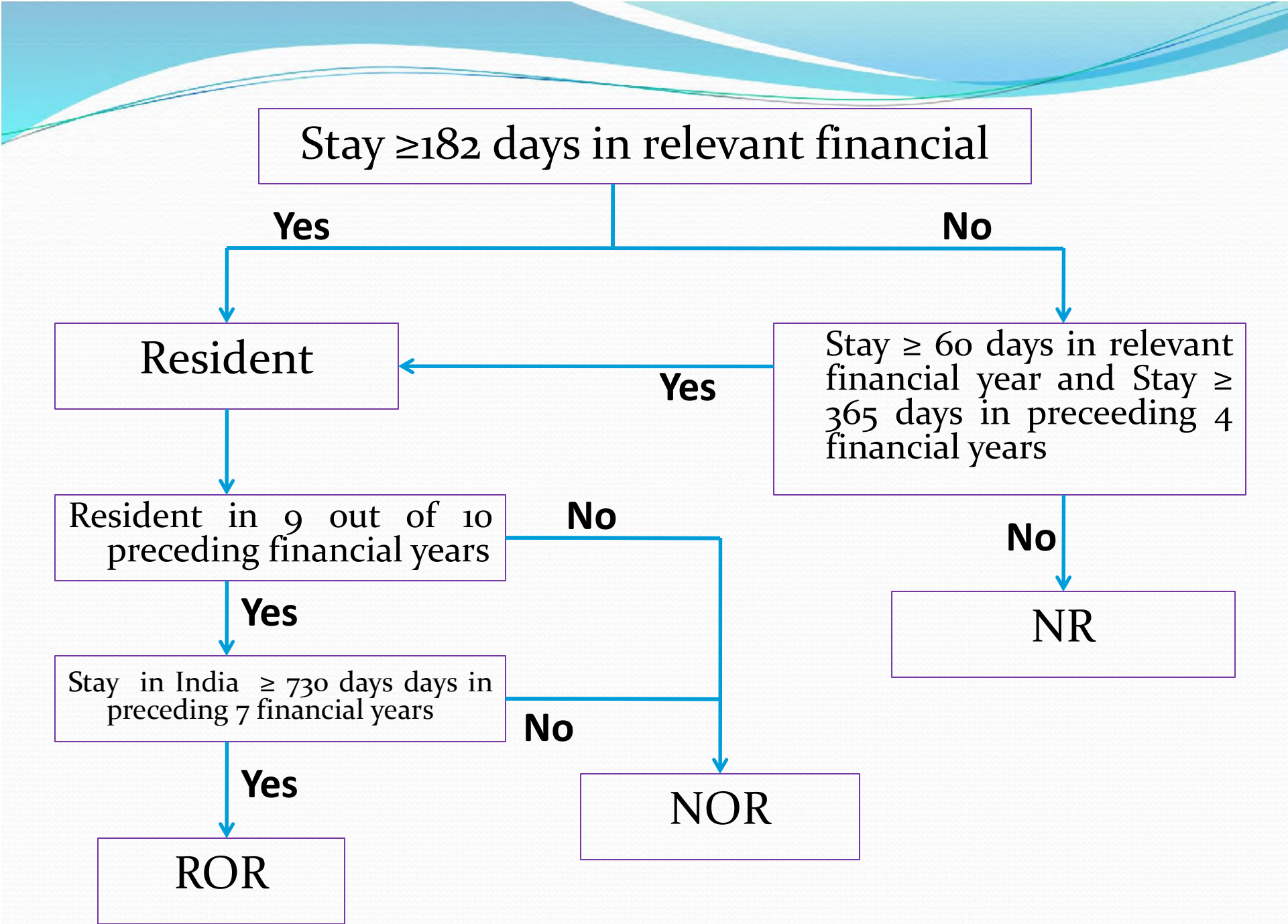
- ii) having within the four years preceding that year in India for all 365 days or more and 60 days or more in that year.

But any person, being citizen of India, who leaves India in any previous year as a member of crew of **an Indian ship** or **for the purpose of employment outside India** the period of 182 days instead of 60 days to be considered

or

A person being a citizen of India or a person of Indian origin, who being outside India, **comes on a visit to** India , the period of 182 days instead of 60 days to be considered.

(Basis of **above** two proviso)



❖ For HUF/Firm/AOP/BOI

Said to be resident, when control and management of its affairs is situated **either wholly or partly in India.**


❖ Not ordinarily resident


❖ For Individual – who has been non-resident in India in 9 out of 10 previous years preceding that year or has during the 7 previous years preceding that year been in India for less than 730 days.

❖ For HUF – Manager/Karta's status be considered.

# Amendment by Finance Act, 2020

- In section 6 of the Income-tax Act, with effect from the 1st day of April, 2021,— (a) in clause (1), in Explanation 1, in clause (b), for the words "substituted" occurring at the end, the words "substituted and in case of the citizen or person of Indian origin having ***Total income, other than the income from foreign sources***, exceeding fifteen lakh rupees during the previous year," for the words "***sixty days***" occurring therein, the words "***one hundred and twenty days***" had been substituted;

- 
- . (b) after clause (1), the following clause shall be inserted, namely:-- “(1A) Notwithstanding anything contained in clause (1), **an individual, being a citizen of India**, having total income, other than the income from foreign sources, exceeding fifteen lakh rupees during the previous year shall be **deemed to be resident in India** in that previous year, if he is **not liable to tax in any other country or territory** by reason of his **domicile or residence or any other criteria of similar nature**;



(c) in clause (6), in sub-clause (b), for the words “days or less” occurring at the end, the following shall be substituted, namely:— “days or less; or (c) a **citizen of India, or a person of Indian origin**, having total income, other than the income from foreign sources, exceeding fifteen lakh rupees during the previous year, as referred to in clause (b) of Explanation 1 to clause (1), who has been in India for a period or periods amounting in **all to one hundred and twenty days or more but less than one hundred and eighty-two days; or**

(d) a **citizen of India who is deemed to be resident in India under clause (1A).**

**Explanation.—For the purposes of this section, the expression “income from foreign sources” means income which accrues or arises outside India (except income derived from a business controlled in or a profession set up in India).**



## RESIDENTIAL STATUS UNDER THE DOUBLE TAXATION AVOIDANCE AGREEMENTS





## Structure of Article 4

### Article 4(1)

- ❖ Definition of a resident

### Article 4(2)

- ❖ Tie-breaker rule for individuals

### Article 4(3)

- ❖ Tie-breaker rule for persons other than individuals



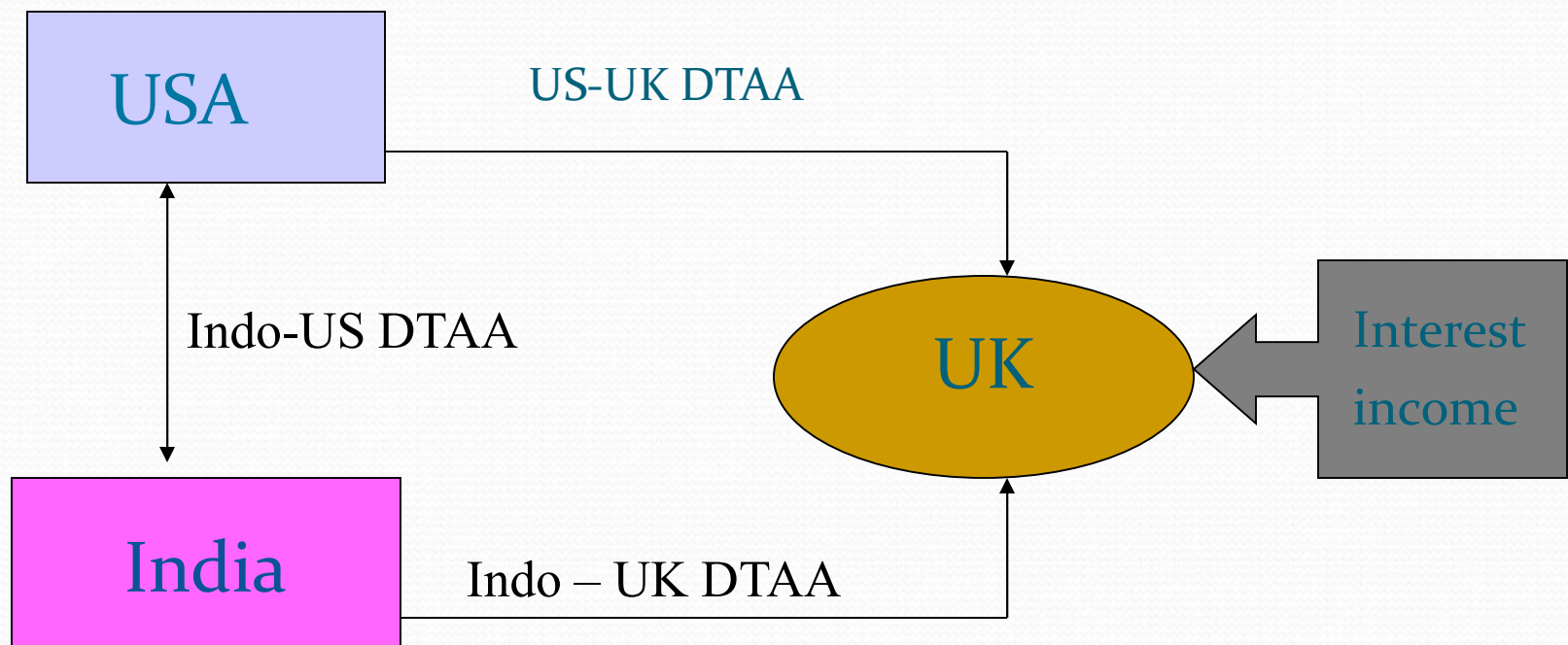
## Article 4(1)

### **“Resident of a CS” means:**

- ❖ Any person
- ❖ who under the laws of the State
- ❖ is liable to tax therein
- ❖ by the reason of his domicile, residence, place of management (place of incorporation also in UN MC)
- ❖ or any other criteria of similar nature
- ❖ and also includes that State, any Political sub-division or local authority thereof

## Article 4(2) & 4(3)

### Triangular treaty situation



Article 4(2) & 4(3) also determines which of the two CS will tax income from sources in a third State



## Article 4(2)

### **Tie-breaker Rule**

- ❖ Availability of a Permanent Home
- ❖ Closeness of personal and economic relations with a State  
(centre of vital interests)
- ❖ Habitual Abode
- ❖ Nationality
- ❖ Mutual Agreement Procedure

Should exist for the period for which taxation is an issue



## Article 4(3)

### Tie-breaker for persons other than individuals

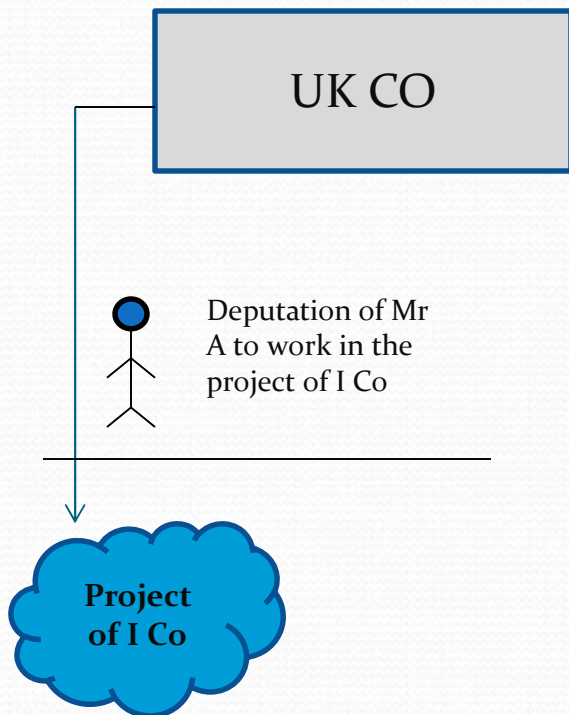
If a person other than an individual is resident on both the States under Article 4(1), then it shall be deemed to be a resident only of the State in which

its *place of effective management is situated*



# Construction & overview of a Tax Treaty

## ❖ Potential exposure of multi country taxation



- ▶ Fact pattern of Mr A who is deputed by UK Co to work in a project of I Co for six months

Tax Resident	Sweden
Citizenship	US
Employer	UK Company
Project of UK Co	India
Receipt of salary	Netherlands

# ❖ Articles of Model Convention

Chapter	Article	Topic covered
Chapter I : Scope of Convention	Article 1	Persons covered
	Article 2	Taxes covered
Chapter II : Definitions	Article 3	Definitions
	Article 4	Residence
	Article 5	Permanent Establishment
Chapter III : Taxation of Income	Article 6	Income from Immovable property
	Article 7	Business Profits
	Article 8	Shipping & air transport
	Article 9	Associated Enterprises
	Article 10	Dividends



# ❖ Articles of Model Convention

Chapter	Article	Topic covered
Chapter III: Taxation of Income (contd.)	Article 11	Interest
	Article 12	Royalties & Fees for Technical Services
	Article 13	Capital Gains
	Article 14	Independent Personal Services
	Article 15	Dependent Personal Services
	Article 16	Director's Fees
	Article 17	Artistes and sportsmen
	Article 18	Pensions
	Article 19	Government service
	Article 20	Students
	Article 21	Other Income

# ❖ Articles of Model Convention

Chapter	Article	Topic covered
Chapter III: Taxation of Income (contd.)	Article 22	Capital
Chapter IV: Methods for the elimination of double taxation	Article 23	Method for elimination of double taxation (tax credit / exemption)
Chapter V : Special Provisions	Article 24	Non-discrimination
	Article 25	Mutual Agreement Procedure
	Article 26	Exchange of Information
	Article 27	Assistance in collection of taxes
	Article 28	Diplomatic mission
Chapter VI: Final Provisions	Article 29	Entry into force
	Article 30	Termination

# ❖ What is an MFN Clause?

- Most Favoured Nation Clause
- Extends similar benefits to one country as extended to certain other countries
- Ensures equal treatment between a subset of countries
- Examples of MFN-in terms of
  - Rates of taxes
  - Liability to tax
  - Deductions permissible
  - Narrower Scope

Example : MFN and the Indo-France DTAA

Other Examples Of MFN clause in protocol of DTAA with other countries.



# Anti-avoidance Provisions in Indian Tax Treaties



# Agenda

- ❖ Some general Anti-avoidance provisions in Indian Tax Treaties
- ❖ Different forms/approaches to deal with anti-abuse in Treaties

# Relationship between Domestic Anti-Avoidance Rules and treaties

## ❖ Specific Anti-avoidance Rules in India :

The anti-avoidance rules in the domestic legislation can be classified into three broad heads:-

- Anti-avoidance measures based on general principles in the law
- General Anti-avoidance rules
- Specific Anti-avoidance Rules

# Precautions in applying DTAA and Referral check

**Tax Treaty - whether applicable? TRC, Legal Status; Persons covered; Taxes covered; Residential status**

**Entry into force & Termination; LOB clause; MFN clause Protocols and Memorandum of Understandings**

**Technical Explanations to DTAA by Treaty Partner (eg USA to India USA DTAA); Jurisprudence / Case Laws (incl foreign courts); OECD Commentary to MC and UN Model Convention Commentary etc**

# Key takeaways



# Concluding Thoughts

- ❖ Payment to non-residents should be thoroughly examined from tax withholding perspective
- ❖ Payments can be remitted under the alternate mechanism (with CA Certificate) if the case is strongly supported by judicial precedents
- ❖ In case of doubt coupled with substantial amount - Advisable to obtain tax withholding order u/s 195(2)
- ❖ Mitigate grave consequences of non compliance with S.195



**Tax Withholding from cross-border transactions is critical**

# Open house



**Questions...**



**WHERE?**

**HOW?**

**WHAT?**

**QUESTIONS?**

**WHY?**

**WHEN?**

**WHO?**

**WHAT  
IF?**

# Any Feedback



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

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**THANK YOU**

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