

TDS u/s 195- Capital Gains and Interest

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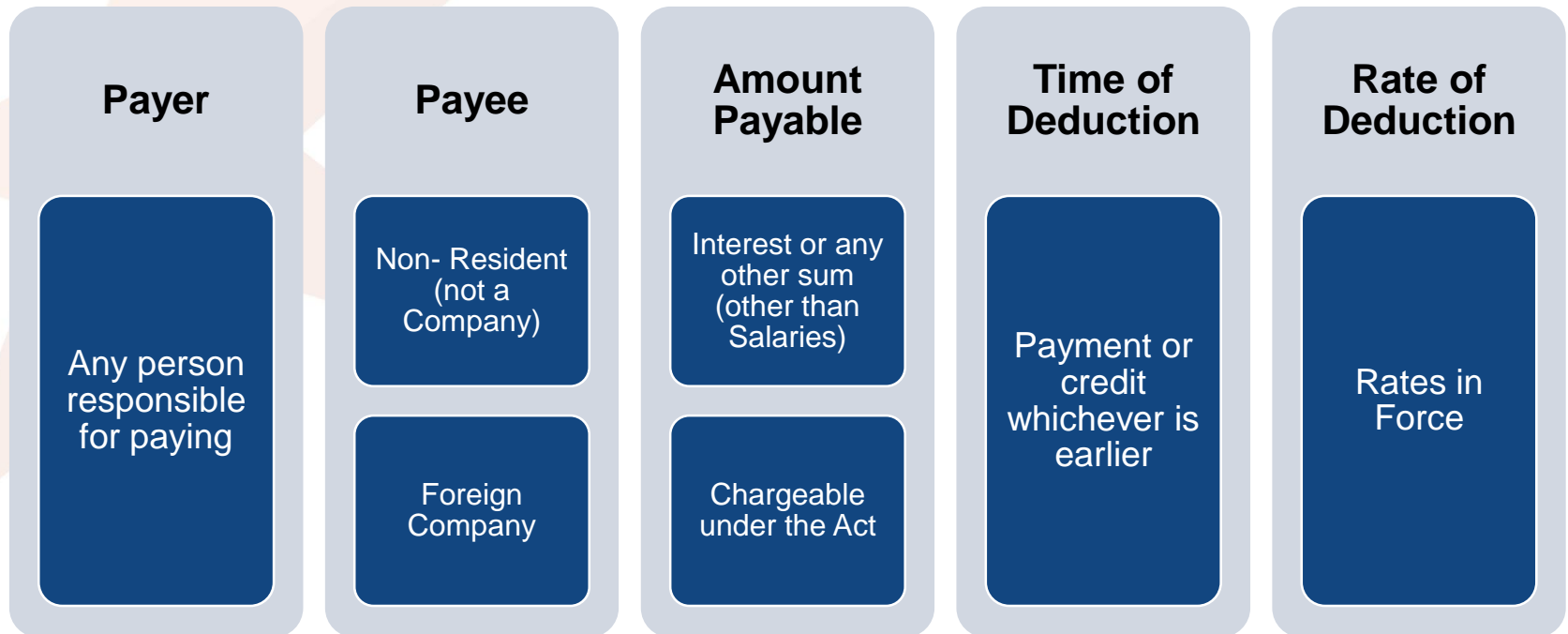
Section 195- Key Provisions

Section 195 – Overview

Section	Provisions
195(1)	Scope and conditions for applicability
195(2)	Application by the 'Payer' for lower or Nil withholding
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195(5)	CBDT empowered to make Rules in respect of sec 195(3)
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195(7)	CBDT empowered to specify class of persons or cases (where recipient is NR) who will be mandated to furnish application to AO for determination of withholding rate
195A	Grossing up of Tax

Section 195(1) – Provisions

Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest (not being interest referred to in section 194LB or section 194LC or section 194LD) or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries") shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force.....



Section 195(1) – Provisions

- No WHT in respect of any dividends referred to in section 115-O
- WHT obligation arises even where any interest or other sum is credited to any account called “Interest Payable Account” or “Suspense Account”
- The obligation to comply with WHT provisions arises irrespective of -
 - The payer is a resident or non resident; and
 - Whether or not non-resident has a residence, a place of business, a business connection or any other presence in India
 - [Explanation 2 inserted by Finance Act, 2012 with retrospective effect from 1 April 1962]
- Sums which are not at all chargeable to tax in India (under the Act or the DTAA) shall continue to remain outside the ambit of section 195 {GE India Technology Centre (P) Ltd. v. CIT [2010] 327 ITR 456 (SC)} (Capital Gain transactions under DTAA, indirect transfers under DTAA etc.)

Section 195A

- If the payer bears the tax liability i.e. payment is “net of tax” then for computing TDS, income should be grossed up
- Example – Amount payable to non-resident is 100 and TDS rate is 10%; gross amount for TDS purpose would be $111.11 - (100 \times 100 / 90)$

Issues

- Whether grossing up would be required to be done in case payment is made net of tax to a foreign company whereby provisions of section 206AA is applicable
 - Income could be grossed up using the applicable rate; example 10% and tax could be withheld at 20%
 - For example: say total amount to be paid net of tax as per agreement be INR 100. Income increased to INR 111.11 - (grossed by 10%). Tax needs to be withheld @ 20% on 111.11 = 22.22

Bosch Ltd v. ITO [2013] 141 ITD 38 (Bangalore ITAT)

Recent
Developments &
Issues relating to
taxation of Capital
Gains

Definition and Taxation of Capital Gains

Definition of Capital Gains

- The term capital gains is neither defined under the Act nor defined under treaty
- Profits or gains arising from transfer of capital asset is generally regarded as “Capital Gains”

Definition of Capital Assets

- As per Section 2(14) of the Act, capital asset means property of any kind held by *assessee, whether or not connected* with his business or profession
- Every movable or immovable property except specific exclusions shall be a capital asset in the hands of assessee

Source Rule u/s 9(1)(i) of the Act

- Section 9(1)(i) provides that all the income accruing or arising whether directly or indirectly through the transfer of capital asset situated in India shall be taxable in India
- Any capital asset which has situs/ location in India, gains arising from transfer of such assets will be taxable in India irrespective of the place where agreement is entered or consideration is payable

Taxation of Capital Gains

Source Rule under Treaty

- Under the OECD and the UN Model Treaties, the general rule seems to be that Capital Gains from alienation of property are taxed only in state of Residence of the alienator
- Different treatment is accorded for certain special types of Capital Gains

Para	Model	Convention
13(1)	UN & OECD	Immovable property – may be taxed in the state where the property is situated
13(2)	UN & OECD	Movable property forming part of a PE or Fixed Base – may be taxed in the state where the PE or Fixed Base is situated
13(3)	UN & OECD	Ships / aircrafts – shall be taxed only in the state in which “Place of Effective Management” (POEM) is situated
13(4)	UN	Shares in a company whose property principally consists of immovable property may be taxed in the state where immovable property is situated
13(5)	UN	Other shares, representing a participation of certain per cent, may be taxed in the state where the company is Resident.
13(6)	UN & OECD	Any other property shall be taxed only in the state of Residence of the alienator

Capital gains on transfer of equity oriented mutual funds / CCDs taxable under Article 13(5) in country of residence of company or under Article 13(6) in country of residence of alienator ?

Specific Issues and Judicial Precedents

Deferred consideration on sale of shares contingent upon certain events- whether taxable in year of transfer

Taxable in year of transfer

- Section 45(1) provides that the profits or gains arising from the transfer of a capital asset effected in the previous year shall be chargeable to income tax under the head 'capital gains', and shall be deemed to be the income of the year in which transfer takes place
- Income accrue in the year of transfer even though receipt of consideration is contingent upon certain future events
- Non receipt of deferred consideration shall be a capital loss in the year when consideration becomes recoverable
- *Ajay Guliyia v. ACIT, New Delhi [2012] 24 taxmann.com 276 (Delhi) HC*

Not taxable in year of transfer

- Income accrue when right to receive income is acquired – no right acquired when receipt is contingent upon certain events/ conditions
- Notional or hypothetical income cannot be taxed
- Income taxable in the year of actual receipt of consideration
- *CIT v. Mrs. Hemal Raju Shete [2016] 68 taxmann.com 19 (Bombay) HC*

Specific Issues and Judicial Precedents

Whether TDS u/s 195 shall charged on total consideration or net gains?

- Section 195 provides that tax is deductible only if income is chargeable to tax
- Phrase “any other sum chargeable under the provisions of the act” means “sum” on which income-tax is leviable
- Supreme Court in case of **GE India Technology Centre (P) Ltd. v. CIT [2010] 327 ITR 456 (SC)** has held that
 - person paying interest or any other sum to a non-resident is not liable to deduct tax if such sum is not chargeable to tax under the income-tax act
 - Section 195 covers not only pure income payments but also composite payments which has an element of income embedded in it
 - Obligation to deduct TDS in case of composite payment is limited to such income chargeable to tax forming the part of gross sum
- Tax shall be deductible on gains and not on gross consideration arising in the hands of non-resident as the same are chargeable to tax under the Act

Specific Issues and Judicial Precedents

- TDS to be deducted on gross amount in case of confusion regarding amount of gains chargeable to tax
 - *Transmission Corporation of A.P. Ltd and Another v. CIT [1999] 239 ITR 587 (SC)*
- To deduct TDS at lesser amount, application u/s 195(2) shall be made to ITO(TDS)

Practical Challenges in respect of Capital Gains on sale of shares of Indian Companies by non-resident Investors

Whether obtaining a TRC and No-PE declaration sufficient for obtaining benefit under tax treaty?

What are other modes / alternatives for insulation in case of lower / Nil withholding

- Tax indemnity, Tax insurance
- Obtaining a lower withholding tax order u/s 195 / 197 of the Act
- Ruling from Authority for Advance Rulings

Whether the interest element built into the deferred sale consideration taxable at rates applicable for capital gains or interest?

For any transactions covered u/s 47 – Will grandfathering under tax treaties with Singapore / Mauritius / Cyprus be available on transfer of equity shares so acquired under such transactions?

Specific Issues and Judicial Precedents

Whether Section 50C applicable on transfer of leasehold rights/ tenancy rights in immovable property situated in India by non-resident?

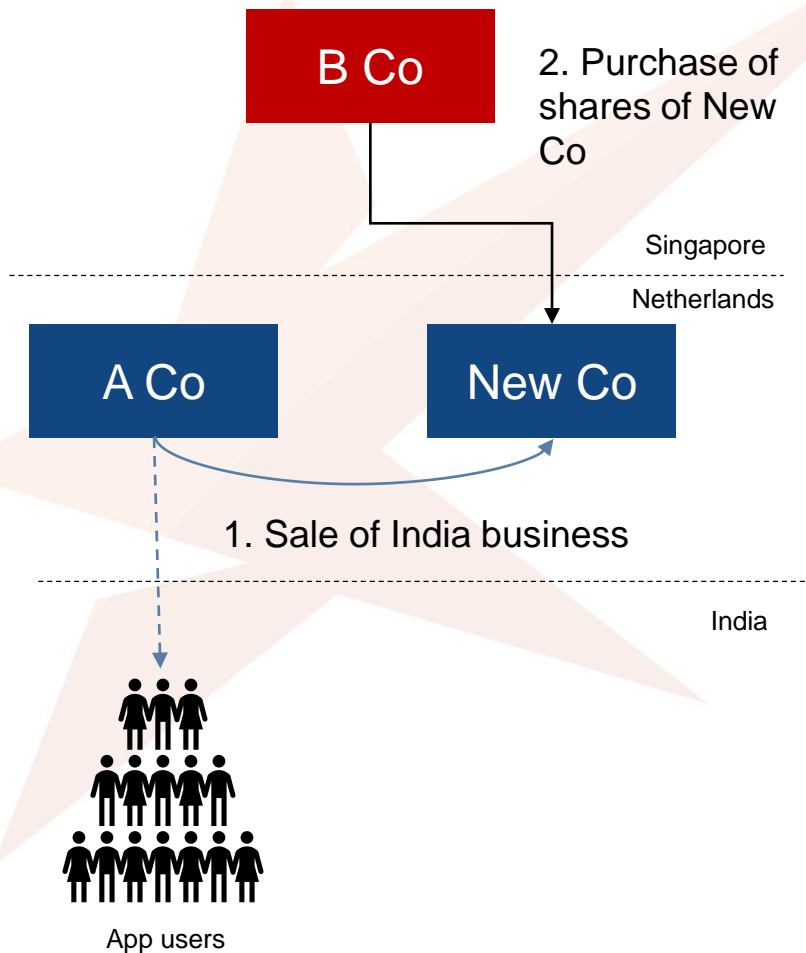
- Section 50C comes into play only in a situation where there is transfer of a capital asset being land or building or both
- Section 50C is special provision for full value of consideration in certain cases (*i.e. for land or building*)
- Transfer of leasehold rights in land or building cannot be equated with land or building per se
- Consideration received on transfer of leasehold right cannot be replaced with stamp duty value of land/ building
- Gains from transfer of leasehold right shall be taxable u/s 45 of the Act as leasehold right in land is a capital asset
- Benefit under treaty available- gains not taxable in India but shall be taxable in country of non-resident as per residuary clause of Article 13 of treaty
- *DCIT v. Tejinder Singh [2012] 19 taxmann.com 4(Kol.); ITO v. Pradeep Steel Re-Rolling Mills (P.) Ltd [2013] 39 taxmann.com 123 (Mumbai-Trib.); Kancast (P.) Ltd. v. ITO [2015] 55 taxamann.com 171 (Pune-Trib.); ITO v. Hari Om Gupta [2017] 82 taxmann.com 398 (Lucknow-Trib.)*

Indirect Transfers

- Explanations 5, 6 & 7 have been added to section 9(1)(i) retrospectively to tax indirect transfers, which provides for India to tax gains arising from transfer of shares of foreign entity by non-residents if such shares derives significant value from assets located in India
- Indirect transfers are taxable as per the Act, however in terms of section 90, the assessee still has the option to determine his taxability under the Act or under DTAA, whichever is more favorable to him.
- Right of India to tax Indirect Transfer
 - Available under DTAA with US, Brazil, Australia, Canada
 - Not available under DTAA with UAE, Luxembourg, Russia, Ireland, Belgium, France etc

Sanofi Pasteur Holding SA v. Department of Revenue, Ministry of Finance [2013] 354 ITR 316
Andhra Pradesh High Court - amended provision of section 9 of the Act cannot override the provisions of tax treaty

Case Study – Indirect transfer



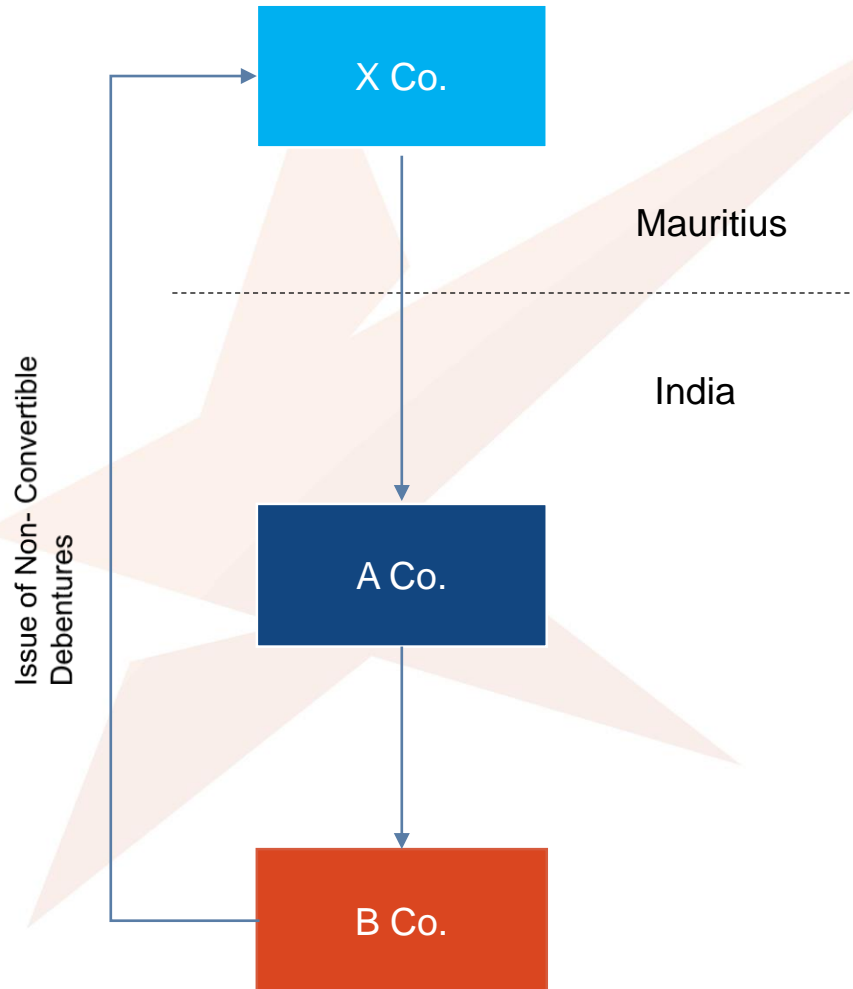
- A Co and New Co is incorporated in Netherlands and is a tax resident of Netherlands
- A Co and New Co do not have a PE in India
- It is a technology company whose App / technology platform is used by people across multiple countries
- A Co sells its India business to New Co so as to segregate India business from other businesses
- Thereafter, B Co acquires shares of New Co
- The valuation of shares of New Co is arrived at, basis the following
 - Technology platform - USD 100 mn
 - User contracts – USD 150 mn
 - Data – USD 250 mn

Case Study – Indirect transfer

Issues for consideration

- Whether capital gains arises in India
 - on sale of India business by A Co to New Co
 - On purchase of shares of New Co by B Co
- In case consideration for sale of India business by A co. to New Co. is less than FMV of business, whether implications u/s 56(2)(x) can arise in the hands of New Co.?
- Whether Contracts, data constitute capital assets for Indian tax purposes? If yes, whether sale of Contracts, Data be taxable in India?
- What is the situs of the following
 - Data (in respect of Indian users/market stored and analysed at servers in Netherlands)
 - User contracts digitally signed by A Co and Indian Users on the App
- Can the promotional and brand-building spends by A Co in India for amassing the huge user base for its App in India be available as a deduction while computing capital gains on sale of intangibles?

Case Study – Premium on NCDs



Facts:

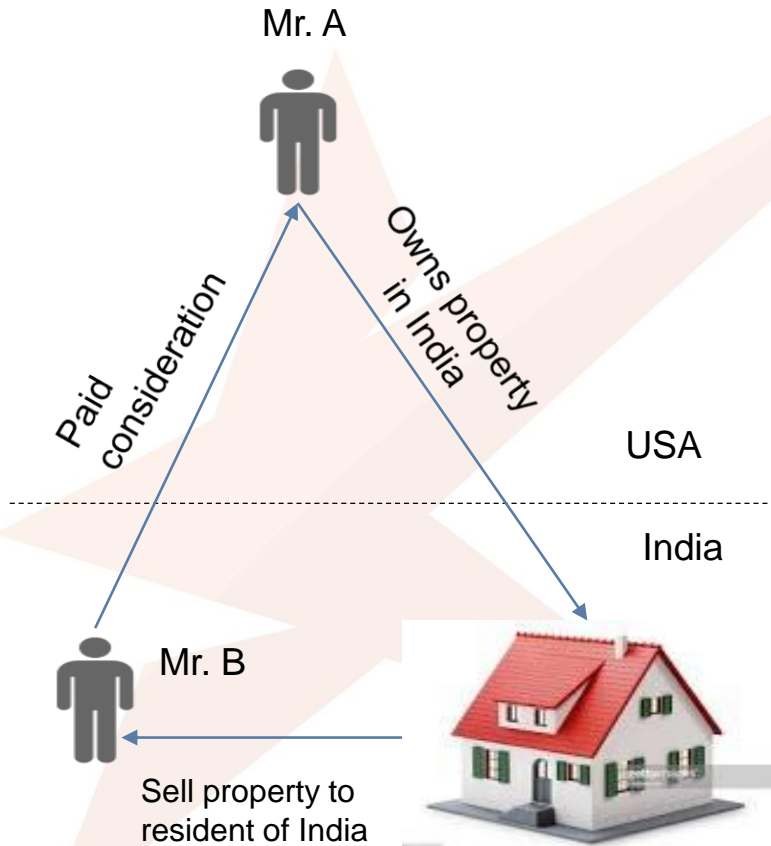
- A Co. and B Co. are two Indian Companies and B Co. is a subsidiary of A Co.
- A Co. is a subsidiary of X Co., resident of Mauritius
- B Co. has issued zero coupon non-convertible debentures of Rs 100 each redeemable after 5 years to X Co.
- NCDs redeemable at 30% premium after 5 years

Case Study – Premium on NCDs

Issues for consideration

- In case X Co. transfers NCDs before maturity to Y Co., another Mauritian Company, gains arising on such transfer shall be taxable as interest income or capital gains under the Act and treaty?
- Whether redemption of NCDs constitute transfer u/s 2(47) of the Act?
- Whether premium receivable on redemption of NCDs be considered as interest under the act or treaty?
- Whether such premium be taxable in India?
- Whether TDS u/s 195 shall be deducted by B Co. at the time of payment to X Co.?
- What will be the tax treatment if NCDs are issued at discount and redeemed at face value?

Case Study – Capital gains on immovable properties



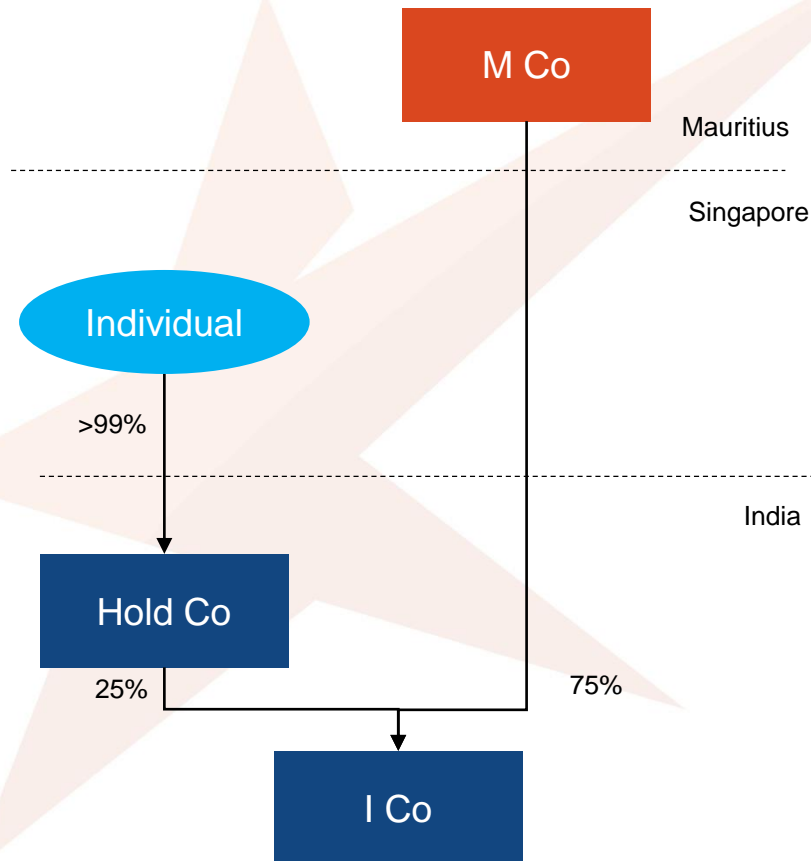
Facts:

- Mr A is a resident of USA
- Mr A owns an immovable property in India
- Mr. A is contemplating to sell the immovable property located in India to Mr B, resident of India for INR 2 crores + car parking for INR 20 lakhs
- Actual Stamp duty Value of property is INR 3 crores

Issues:

1. Whether capital gains arising from transfer of immovable property is taxable in India?
2. Whether car parking fees paid by Mr. B shall be a part of consideration payable to Mr. A?
3. Whether Mr. B is liable to deduct TDS u/s 195 of the Act?
4. If TDS is deductible u/ s 195, on what amount such TDS shall be deductible considering provisions of Sec. 50C ?

Case Study – Transfer of call option

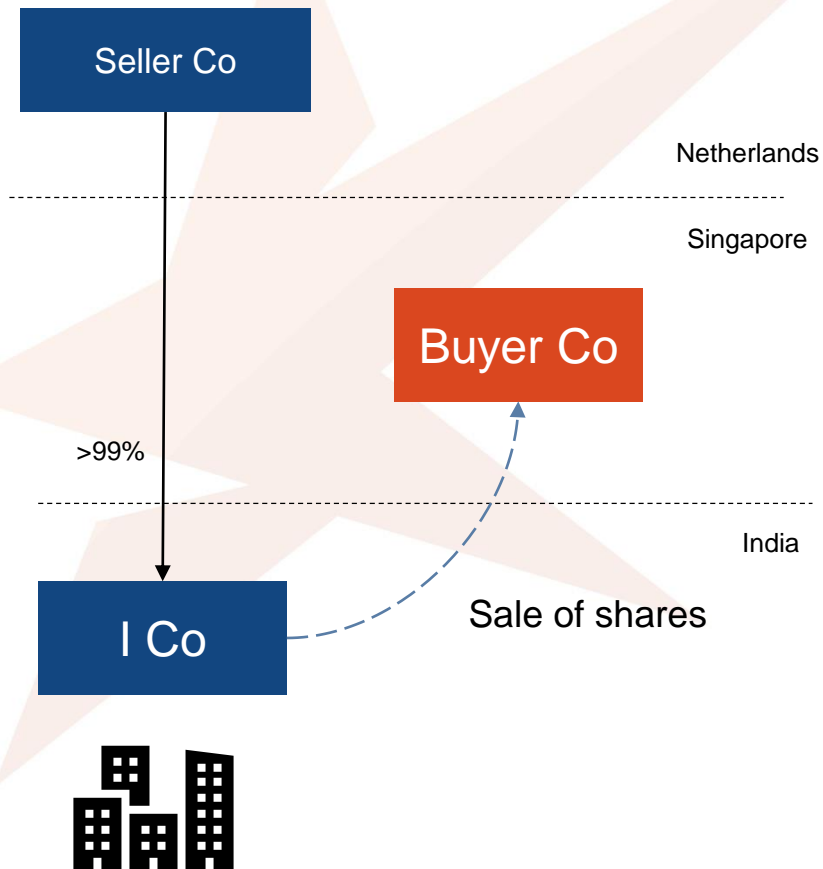


- An individual resident of Singapore holds 99% shares in Hold Co, India
- I Co, India is held by the following
 - Hold Co: 25%
 - M Co: 75%
- Individual and Hold Co under call options agreement granted M Co to call upon Hold Co / Individual sell their shareholding in Hold Co
 - Strike price of Call option – USD 1
 - Consideration under call option agreement – USD 500 mn
 - Call option spread over 150 years

Issues for consideration

- Whether grant of call option constitutes transfer of capital asset resulting in capital gains?
- Whether capital gains is taxable in India?

Case Study – Sale of shares having underlying immovable properties



- I Co is a wholly owned subsidiary of Seller Co, a tax resident of Netherlands
- I Co is in the business of developing and maintaining industrial park and the shares of I Co derive its value substantially from the value of underlying industrial parks
- Seller Co sold shares of I Co

Issue for consideration

- Whether capital gains on sale of shares is taxable in India under the India-Netherlands tax treaty?
 - Article 13(1) v Article 13(4)/ 13(5)

Recent
Developments &
Issues relating to
taxation of Interest

Definition of Interest

- Interest generally means income from debt claims of every kind, income from investments, bonds or government securities and income from purchase or sale of goods on credit
- Definition under Income-tax Act, 1961
 - As per section 2(28A) of the Act, interest means
“interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other 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 fully utilized”
- Brokerage or Manager’s Remuneration- Is it an interest?
Board’s Letter No. F.164/18/77-IT (A-1), dated 13 July 1978
- Interest received on delayed compensation under Land Acquisition Act- Is it an interest u/s 2(28A) *Bikram Singh vs. Land Acquisition Collector [1997] 224 ITR 551 (SC)*
- Interest received by a partner from the firm – taxable as Interest or business profits under tax treaty
Sunil V. Motiani v. ITO [2013] 59 SOT 37 (Mumbai Trib.)
- Interest included in compensation awarded under Arbitration relating to contractual dispute
Goldcrest Exports v. ITO [2010] 42 SOT 1 (Mumbai Trib.)

Definition of Interest

- Definition under OECD Model

- As per Article 11(3), interest 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 on late payment not an interest
- Definition under the Act is much wider than the definition under OECD Model
- Definition is an exhaustive definition and does not give any reference to the domestic tax law of any Contracting State

Taxation of Interest

Source Rule u/s 9 of the Act

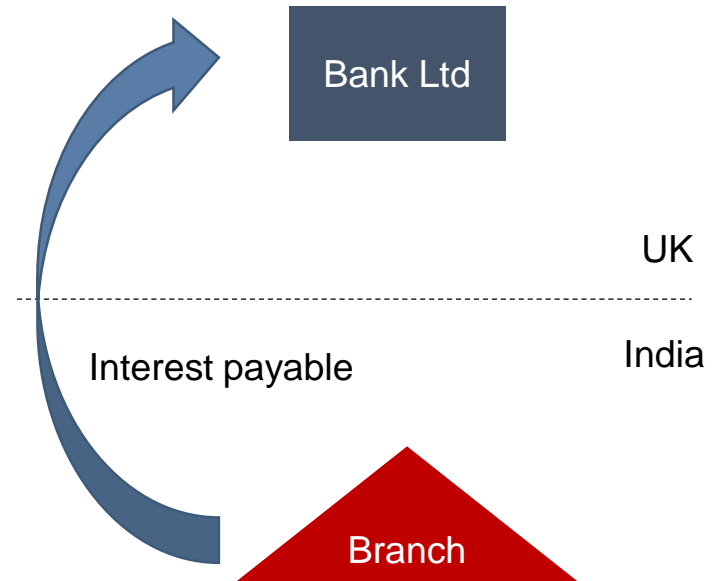
- Section 9(1)(v) of the Act deem interest to accrue or arise in India where it is:
 - Payable by the Government
 - Payable by resident unless it is payable in respect of any debt incurred, or moneys borrowed and used:
 - for the purpose of any business or profession carried on by such resident outside India; or
 - for the purpose of making or earning any income from any source outside India
 - Payable by non-resident only if it is payable in respect of debt incurred, or moneys borrowed and used:
 - for the purpose of or in the business or profession carried on by such non-resident in India

Interest is taxable in India if debt is used/ utilized in India

Taxation of Interest

Source Rule u/s 9 of the Act

- Bank Ltd is a tax resident of UK and headquartered in UK
- Bank Ltd has an Indian branch which is considered as PE of Bank Ltd in India
- Interest paid by PE is taxable in the hands of HO by virtue of Explanation to section 9(1)(v) of the Act which states that any interest payable by the PE to the HO shall be deemed to accrue or arise in India and shall be chargeable to tax in addition to any income attributable to the PE in India



This explanation inserted vide Finance Act 2015 brings position under the Act in line with tax treaty

Taxation of Interest

Source Rule under Article 11 of the Treaty

- Interest are deemed to arise in India only if:
 - Payer is a resident of India; or
 - Payer has a permanent establishment in India in connection **with which** the liability to pay interest has arisen **and**
 - Such payment is borne by the permanent establishment. Some examples under para 27 of OECD Commentary on Article 11 are:
 - Where management of PE has contracted a loan which it uses for specific requirements of the PE, shows it as its liabilities and pays interest directly to creditor
 - HO has contracted a loan and the proceeds are used solely for the purposes of the PE and interest is serviced by HO but ultimately borne by PE
 - HO has contracted a loan and the proceeds are used for the purposes of several PEs in different jurisdictions – In this case, interest is not considered as borne by the PE

Specific Issues and Judicial Precedents

Interest on income-tax refund to a non-resident having an Indian PE - Taxable as interest (WHT u/s 195 of the Act at 10% /15%) or business income ((WHT u/s 195 of the Act at 40%)?

Arguments in favour of characterization as interest income

- Income-tax refund is a debt claim payable by the Revenue and is taxable under the head 'Income from other sources' and not as 'business income'
- Responsibility of the non-resident assessee to pay tax from any source available with it
- Tax is not an expenditure for earning income but an appropriation of profits
- Accordingly, such interest not effectively connected with the PE either on the basis of asset test or activity test
- *ACIT v. Clough Enigneering [2011] 9 ITR(T) 618 (Delhi) (SB); Ansaldo Energia SPA v. CIT [2016] 384 ITR 312 (Madras); MSC Mediterranean Shipping Company, S.A. V. DDIT [2015] 38 ITR(T) 758 (Mumbai - Trib.)*

Arguments in favour of characterization as business Income

- As per Paragraph 6 of Article 11 - Interest which states that provisions of Article 7 Business Profits to apply if interest arises through a PE situated in India would become redundant if interest on income-tax refund characterized as Interest - *B.J. Services Co. Middle East Ltd. v. ACIT [2016] 380 ITR 138 (Uttarakhand)*

Rolls Royce Industrial Power (India) Limited v. DDIT [2016] 73 taxmann.com 37 (Delhi - Trib.) – issue remanded back to AO

Specific Issues and Judicial Precedents

Whether interest on unpaid purchase price fall within the scope of definition of “interest” under the Act or Article 11?

Arguments in favour that interest on unpaid price is not taxable as interest

- Interest payable on unpaid price is a part of sale consideration payable to supplier and such interest is not an independent source of income taxable under Act
- Interest paid outside India to a non-resident is not taxable in India
- Amount of unpaid price is not lent by supplier either in cash or kind
- No income in form of interest is accrued
- *CIT v. Saurashtra Cement & Chemicals Industries Ltd. [1975] 101 ITR 502 (Guj.)(HC); CIT v. Visakhapatnam Port Trust [1983] 144 ITR 146 (AP)(HC); Bombay Steam Navigation Co. [1953] Pvt. Ltd. v. CIT [1965] 56 ITR 52 (SC)*

Arguments in favour that interest on unpaid price is taxable as interest

- Word ‘interest’ is very wide and include interest on unpaid purchase price
- Interest paid on unpaid purchase price is debt outstanding
- Interest payable on purchase price and purchase price are separate items
- *CIT v. Vijay Ship Breaking Corporation [2003] 129 taxmann 120 (Guj.)(HC)*

Specific Issues and Judicial Precedents

Can upfront appraisal fees, front-end fees or arranger fees incurred for appraisal or arrangement of loan be considered as interest under the Act or treaty

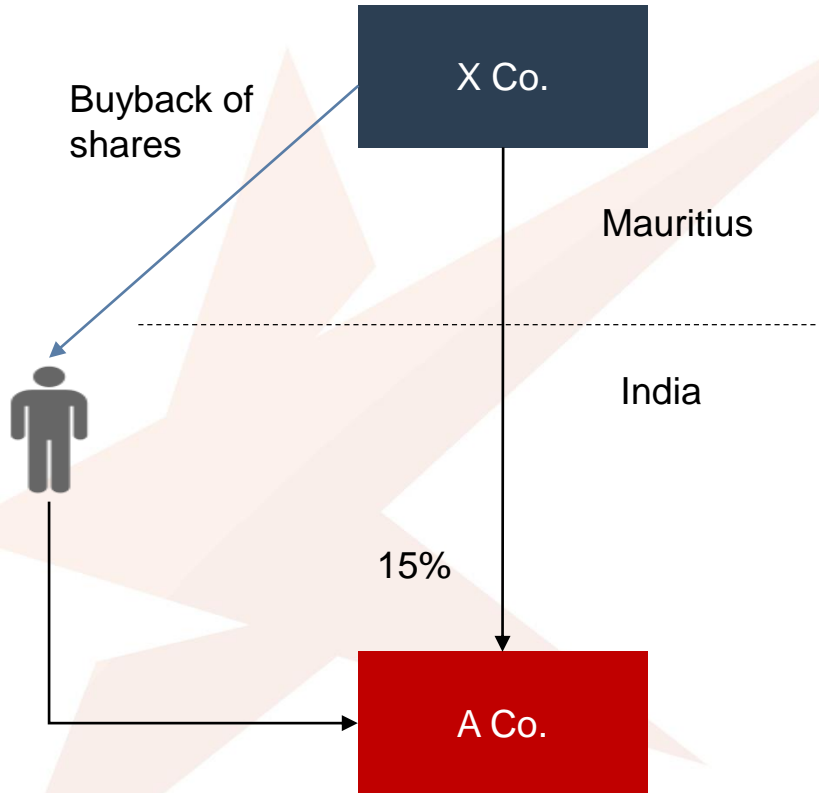
- Such charges are not interest under the Act or treaty:
 - Societe De Promotion Et De Participation Pour La Cooperation Economique [2018] 93 taxmann.com 475 (AAR- New Delhi.)
 - Idea Cellular Ltd. v ADIT (International Taxation) [2015] 58 taxmann.com 101 (Mumbai - Trib.)

Can prepayment discount given to foreign buyers considered as interest

DCIT v. Kothari Food & Fragrances [2014] 50 taxmann.com 213 (Lucknow- Trib)

- Assessee seller gave some discount to foreign buyers on sale and such discount was not a part of agreement entered between assessee and foreign buyer
- ITAT held that:
 - benefit allowed by assessee to its buyer under the name of discount was infact an interest as the same was in consideration of receiving advance payment.
 - On receiving advance payment, one may compensate the maker of advance payment by way of allowing interest or the same benefit can be given the name of discount but merely because a different nomenclature has been given, it does not change its character

Case Study - Interest



Facts:

- X Co., a company incorporated in Mauritius is holding 15% stake in A Co., Indian Listed Company
- At time of subscription by X Co., Mr. P, Promoter of A Co. agreed to compulsorily purchase back such shares after one year from the date of subscription from X Co. with an assured return at the rate of 25%
- The agreement executed between X Co. and Mr. P consist of arbitration clause so that dispute and difference can be referred to arbitration
- Further, it was decided that interest at the rate of 15% per annum on offer price shall be paid in case there was delay in buyback process

Case Study - Interest

Issues for consideration

Scenario I:

Mr. P after the end of one year from date of subscription initiated the buyback process. However, the process delayed due to regulatory formalities and interest at the rate of 15% p.a. was paid along with offer price by Mr. P to X Co

- Whether interest so paid shall be considered as interest referred u/s 2(28A) of the act?
- Whether such interest shall be taxable in India?
- Whether TDS u/s 195 shall be deducted on such interest?

Scenario II:

Mr. P does not fulfil his obligation and X Co. referred the matter for arbitration. Mr. P was ordered to pay compensation to X Co. along with interest at the rate of 10% for period beginning on date of order and ending on date of payment of compensation

- Whether interest paid on compensation can be considered as interest referred in the Act or treaty?
- Whether TDS u/s 195 shall be deducted on amount of such interest at the time of payment?



Procedural Aspects under Section 195

Procedural Aspects

Tax Residency Certificate- Sec 90(4)

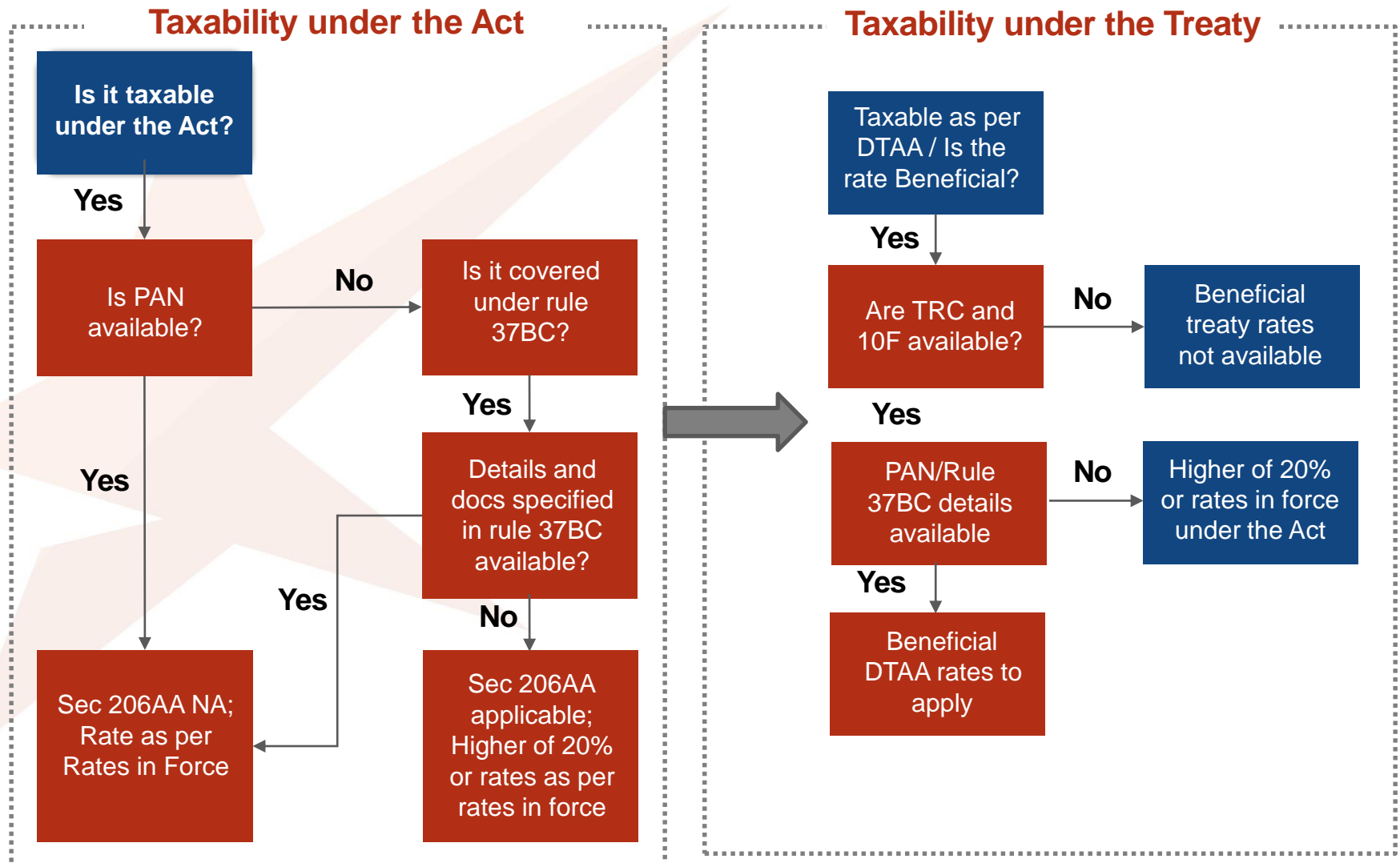
- Finance Act, 2012 has introduced sub-Sec (4) to Sec 90 w.e.f. 1-4-2013 to provide that a non-resident will not be entitled to claim benefits under the Treaty unless he obtains a tax residency certificate from the Government of his residence country/ territory certifying that he is a tax resident of that country
- The requirement applies to all Non-residents, whether Individuals, Companies, LLPs etc., irrespective of the quantum of relief to be obtained
- Furnishing TRC mandatory requirement
- Rule 21AB(1) provides information need to be furnished in Form 10F
- **Is TRC sufficient to claim benefit under Treaty?**
 - Favorable ruling - *AB Holdings Mauritius –II [TS-634-AAR-2017]; Skaps Industries india Private Limited v. ITO [ITA Nos. 478 and 479/Ahd/2018]*
 - Unfavorable Ruling – *“AB” Mauritius [TS-635-AAR-2017]*

Procedural Aspects

Requirement of PAN –Section 206AA

- In case of non-availability of PAN, taxes to be deducted at a rate higher of the following –
 - Rates specified under the relevant provisions of the Act
 - Rates in force;
 - 20%
- Applicability of section 206AA **only if tax is deductible** under Chapter XVII B
- Provisions not applicable in respect of payment of interest on long-term bonds referred to under section 194LC
- Effective 1 June 2016, provisions of section 206AA not applicable on specified payments to non-residents subject to prescribed conditions (Rule 37BC)
 - Deductee to furnish name, email id, contact number, tax identification number and address in the country of residence
 - A certificate of his being resident in any country from the government of that country if the government provides for issuance of such certificate (i.e. TRC) (mere Certificate of incorporation may not be sufficient)
 - Relaxation only in respect of payments in the nature of interest, royalty, FTS and capital gains

Procedural Aspects- Interplay between DTAA, PAN and TRC

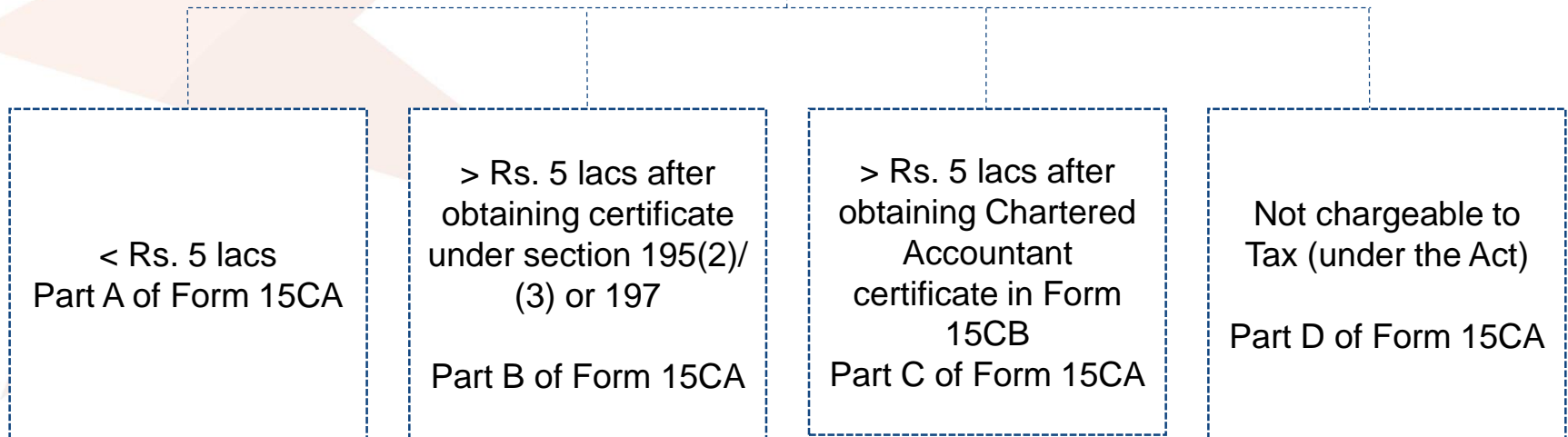


Procedural Aspects

Section 195(6)

- The person responsible for **paying to a non-resident**, not being a company, or to a foreign company, any **sum, whether or not chargeable under the provisions of this Act**, shall furnish the information relating to payment of such sum, in such form and manner, as may be prescribed

Payment made to a Non Resident (by Resident, whether or not chargeable to tax) or Non-Resident – if payment has Indian territorial nexus



Specified transactions prescribed whereby furnishing of information under section 195(6) not required to be furnished

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