

# Overview of TDS Provision Applicable for 15CA/CB and Residential Status

Organised by:

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# Object of section 195

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**Circular: No. 152 dated 27-11-1974**

- To ensure that the tax due from non-resident persons is secured at the earliest point of time so that there is no difficulty in collection of tax subsequently at the time of regular assessment.
- Failure to deduct tax at source from payment to a non-resident may result in loss of revenue as the non-resident may sometimes have no assets in India from which tax could be collected at a later stage.
- Tax should, therefore, be deducted in all cases where it is required to be deducted under section 195 before the payment is made to the non-resident and the tax so deducted should be paid to the credit of the Central Government as required by section 200 read with rule 30.
- Failure to do so would render a person liable to penalty under section 201 read with section 221, and would also constitute an offence under section 276B.



# Applicability of Section 195

The scope of reporting expanded to any payment to NR, whether or not taxable in India

## Responsibility

Any person responsible for paying to a non-resident, not being a company, or to a foreign company

## Types of payments

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")

## When

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

## Rate

Deduct income-tax thereon at the rates in force. The rate or rates of income-tax specified in this behalf in the Finance Act of the relevant year or in Agreement entered u/s 90 or notified 90A



Non-Resident payer - Place of Resident or business Connection in India or not?



Any Threshold Limit? Payment in cash or kind or both?



Exchange Rate-SBI Buying rate as on the date on which the tax is required to be deducted at source?



Difference in rates between Act and Finance Bill pending approval?

## Payee

- Resident but Not ordinary Resident? United Breweries Ltd. ACIT [1995] 211 ITR 256 (Kar)
- Foreign company having POEM in India? Notification No.29 dated 22 June 2018
- POA holder of payee

## Chargeable

- Exempt sums? GE India Pvt Ltd [2010] 327 ITR 456 (SC)
- Personal payment?
- Act v/s DTAA – Beneficial to payee?

## FTS / Royalty Payments

- FTS should be taxable in the year in which the amounts are received and not otherwise/payment basis & not on accrual basis
- Siemens Aktiengesellschaft [ITA No. 124 of 2010] (Bom); Pizza Hut International LLC [2012] 54 SOT 425 (Del);
- Flakt (India) Limited [2004]267 ITR 727 (AAR) [Contrary View]

## Rate calculations

- Rate Beneficial under Act or DTAA
- Surcharge & Cess to be added? Capgemini SA (2016) 72 taxmann.com 58 (Mum), CIT v. K. Srinivasan [1972] 83 ITR 346 (SC)

# Determination of 'Any sums chargeable to tax'

Nature of Income	Basis of Tax	Income-tax Act	Treaty/DTAA
Salary Income (Excluded)	Taxable if services are rendered in India	Section 9(1)(ii)	Article 15
Business/Profession	Taxable if Business Connection in India or property or asset or source of income in India or transfer of a capital asset is situated in India	Section 9(1)(i): Concept of Business Connection	Article 5; 7; 14: Concept of PE or Fixed Base
Dividend Income (if not covered u/s115-O)	Taxable if paid by an Indian company	Section 9(1)(iv) and section 115A	Article 10
Interest Income	Taxable if sourced in India with certain exceptions	Section 9(1)(v) and section 115A	Article 11
Royalties		Section 9(1)(vi) and section 115A	Article 12
FTS		Section 9(1)(vii) and section 115A	Article 12
Capital Gains	Taxable if situs of shares/ property is in India	Section 9(1)(i) and section 45	Article 13

DTAA need to be considered in light of amendments made on account of MLI

# Form 15CA/CB

## Part A

- Remittance does not exceed INR 5 lacs and amounts chargeable to tax.
- Chartered Accountants Certificate in Form 15CB not required

## Part B

- Remittance exceed INR 5 lacs and amounts chargeable to tax or order u/s 195(2)/195(3)/197 has been obtained from Income-tax Officer
- CA Certificate in Form 15CB not required

## Part C

- Remittance does exceed INR 5 lacs and amounts chargeable to tax under provisions of Income-tax Act
- Certificate from Chartered Accountants in Form 15CB required
- Form has 2 Sections A & B

## Part D

- Remittance is not taxable under the provisions of Income-tax Act other than payments referred in Rule 37BB(3) by the person referred in Rule 37BB(2)

## Issues?

- Payments taxable under the Act, but exempt under the DTAA – Part C or Part D?
- Where there is a transfer of shares from a non-resident and the same results into capital loss. Thus, there is no income - Part C or Part D?

- W.e.f. 1 April 2016, Form 15CB to be furnished electronically
- Form cannot be amended or modified after uploading
- On submission, status of the Form shall appear as “Submitted”
- On successful filing of the corresponding Form 15CA-Part C, status of Form 15CB shall update to “Consumed”
- If the Form 15CA against which Form 15CB was consumed is withdrawn, status of Form 15CB shall change to “Withdrawn”



# Payments exempt from reporting under Rule 37BB

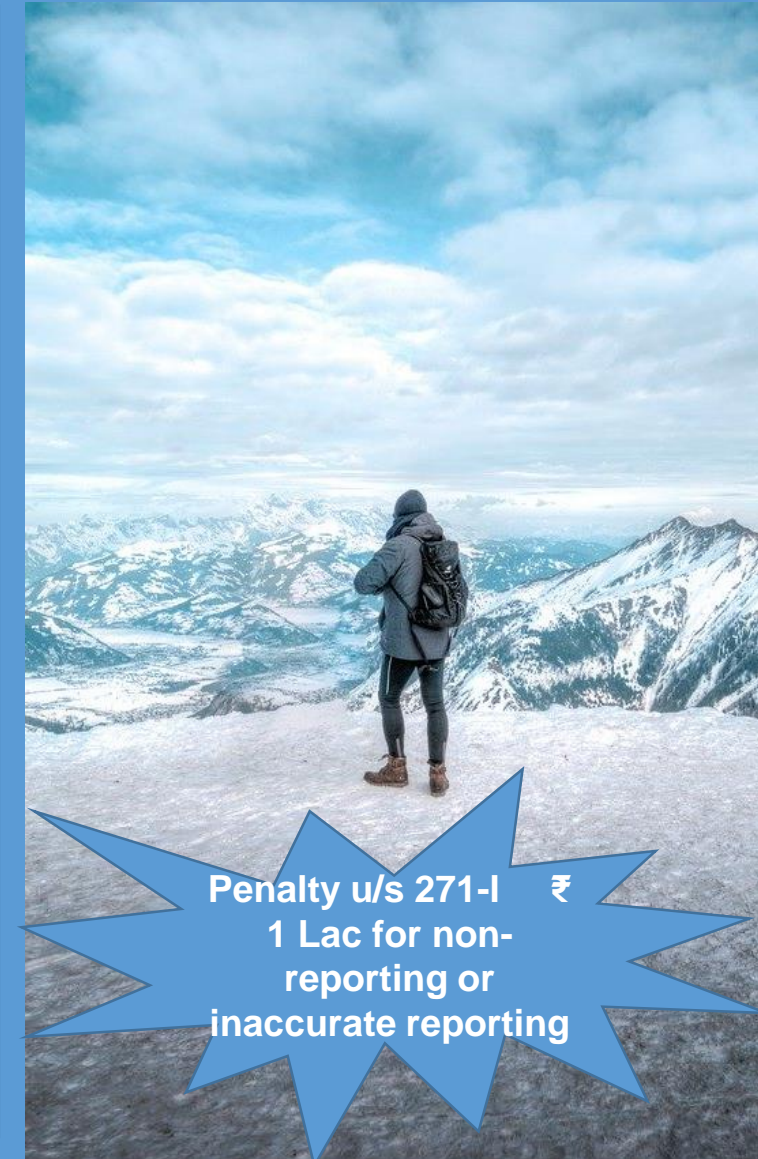
The scope of reporting expanded to any payment to NR, whether or not taxable in India

No information is required to be furnished for any sum which is not chargeable under the provisions of the Act, if,

- the remittance is made by an individual and it does not require prior approval of Reserve Bank of India as per the provisions - section 5 of the Foreign Exchange Management Act, 1999 (42 of 1999) read with Schedule III to the Foreign Exchange (Current Account Transaction) Rules, 2000; or
- Remittance in the nature as specified under

Sl. No.	Purpose code as per RBI	Nature of payment
(1)	(2)	(3)
1	S0001	Indian investment abroad - in equity capital (shares)
2	S0002	Indian investment abroad - in debt securities
3	S0003	Indian investment abroad - in branches and wholly owned subsidiaries
4	S0004	Indian investment abroad - in subsidiaries and associates
5	S0005	Indian investment abroad - in real estate
6	S0011	Loans extended to Non-Residents
7	S0101	Advance payment against imports
8	S0102	Payment towards imports - settlement of invoice
9	S0103	Imports by diplomatic missions
10	S0104	Intermediary trade
11	S0190	Imports below Rs.5,00,000 - (For use by ECD offices)
12	SO202	Payment for operating expenses of Indian shipping companies operating abroad
13	SO208	Operating expenses of Indian Airlines companies operating abroad
14	S0212	Booking of passages abroad - Airlines companies
15	S0301	Remittance towards business travel
16	S0302	Travel under basic travel quota (BTQ)
17	S0303	Travel for pilgrimage

Sl. No.	Purpose code as per RBI	Nature of payment
18	S0304	Travel for medical treatment
19	S0305	Travel for education (including fees, hostel expenses etc.)
20	S0401	Postal services
21	S0501	Construction of projects abroad by Indian companies including import of goods at project site
22	S0602	Freight insurance - relating to import and export of goods
23	S1011	Payments for maintenance of offices abroad
24	S1201	Maintenance of Indian embassies abroad
25	S1202	Remittances by foreign embassies in India
26	S1301	Remittance by non-residents towards family maintenance and savings
27	S1302	Remittance towards personal gifts and donations
28	S1303	Remittance towards donations to religious and charitable institutions abroad
29	S1304	Remittance towards grants and donations to other Governments and charitable institutions established by the Governments
30	S1305	Contributions or donations by the Government to international institutions
31	S1306	Remittance towards payment or refund of taxes
32	S1501	Refunds or rebates or reduction in invoice value on account of exports
33	S1503	Payments by residents for international bidding.



Penalty u/s 271-I ₹  
1 Lac for non-reporting or  
inaccurate reporting

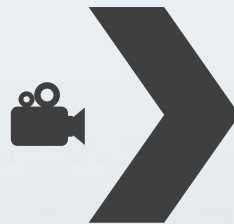
# Steps for 15CA & 15CB

## Step 2

Under “e-file” option select “Prepare and Submit online forms other than ITR” Select 15CA in it

## Step 4

For options of C, 15CB of CA is required. So if C is selected it will ask for the 15CB e-filed acknowledgement no.



### Step 1

Log to e-filing portal “work list” option under main menu click “For your information section”. 15CB efiled by CA will appear. Select the form download Ack No. file of 15CB & 15CB PDF file (P/w PAN + DOB)



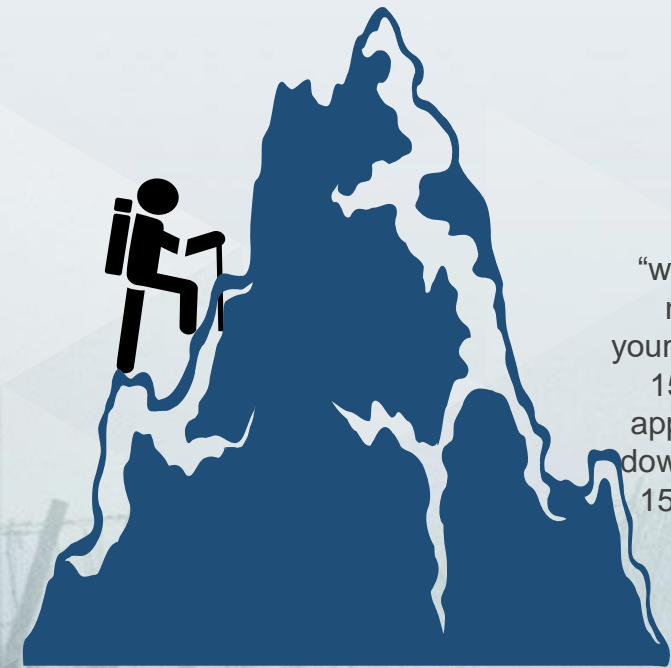
### Step 3

Client to validate the DSC file and on choosing the DSC file it will ask for which Part of 15CA to be chosen Part -A/ B/ C/ D



### Step 5

Post filling 15CB e-filed Acknowledgement No., 15CA is populated fill the necessary details then submit and subsequently under “My Account” section in “View” option the 15CA e-filed can be viewed





# Background Preparation

Penalty  
u/s  
271J  
₹ 10000

- Underlying agreement /contract /SHA
- Invoice/Debit Note being paid
- Transaction details and correspondence between parties
- Review of secondary sources like NR's website to find out more about their Indian operations
- TRC & Form 10F of the payee
- Details of the payee's tax identification or other unique number in the country of residence
- Written confirmation from the payee about:
  - Being the beneficiary of the proposed remittance
  - Not having a PE in India
  - Being a tax resident of the home country (if TRC for the relevant period is pending)
- Order/ certificate issued u/s 195(2), 195(3), 197 of the Act
- SBI's certificate providing the required TT buying rates
- Indemnification
- ICAI Guidance Note on Audit Reports & Certificates for Special Purposes

Understand: Provisions of the Act • Provisions of the applicable DTAA (including Protocol, MFN and LOB clauses, if any) • Judicial precedents • Commentaries on the provisions of the Act & DTAA in light of MLI



# 206AA v/s DTAA

## PAN not available S. 206AA

If the non-resident payee does not furnish the PAN, then the rate of tax should be based on higher

- Rate Specified in the relevant provision
  - Rates in force
    - 20%

## Circular No. 333, dated 2-4-1982

DTAA provides for a particular mode of computation of income, the same should be followed, irrespective of the provisions in the Income-tax Act

Tax has to be deducted at source at fixed rate of 20 per cent and, thereupon, revenue authorities cannot levy surcharge & cess on amount of tax so deducted  
- Computer Sciences Corporation India (P.) Ltd.  
[2017] 77 taxmann.com 306  
(Delhi - Trib.)

## UOI v. Azadi Bachao Andolan [2003] 132 Taxman 373 (SC)

The provisions of such an agreement, with respect to cases to which where they apply, would operate even if inconsistent with the provisions of the Income-tax Act

The provisions of section 206AA shall not apply in respect of payments made to a person being a non-resident, not being a company, or a foreign company if the provisions of section 139A do not apply to such person on account of rule 114AAB.

## DDIT v. Serum Institute of India Ltd. [2015] 68 SOT 254 (Pune.)

TDS on payments made to non-residents who did not furnish their PAN can be deducted as per rate prescribed in DTAA and section 206AA cannot be invoked to insist on tax deduction at rate of 20 per cent.

## Rule 37BC

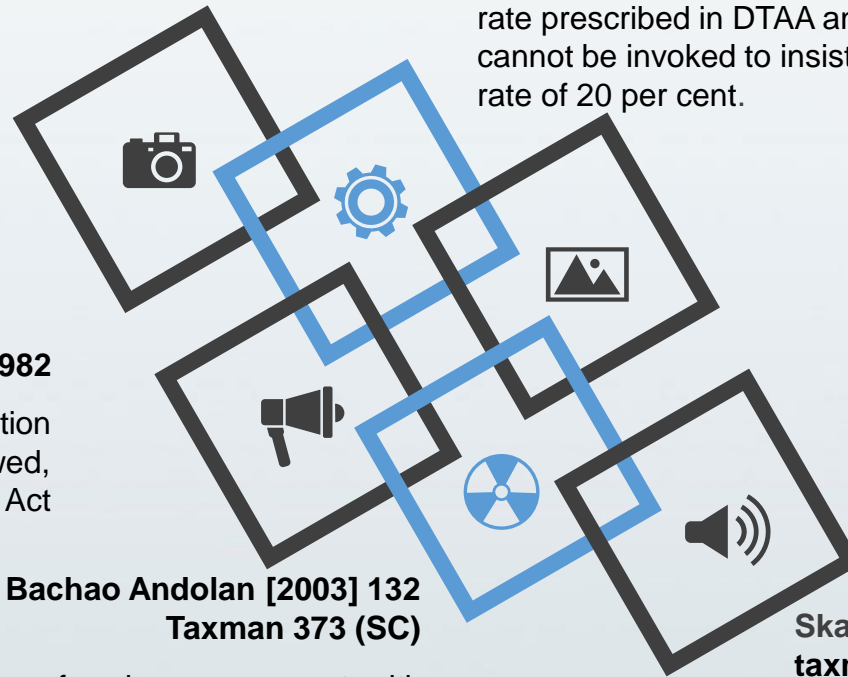
In absence of PAN, 206AA will not apply in case of payment of Interest, Royalty, FTS and payment on transfer of Capital asset, if payee provided

- Name, Email ID, Contact Number
- Address of resident country
- Tax Residency if available under law
- TIN/Unique number

Benefit not available to other payments like payments to artists & sportspersons, payments taxable as other income, etc.

## Skaps Industries India (P) Ltd. V. ITO [2018] 94 taxmann.com 448 (Ahmedabad - Trib.)

Section 90(4) [TRC] does not act as a bar for treaty entitlement in the sense it can not be seen as a limitation of superiority of treaty provisions vis-à-vis the domestic law provisions. The mere non-furnishing of TRC cannot *per se* be treated as a trigger to disentitlement to the treaty benefits..



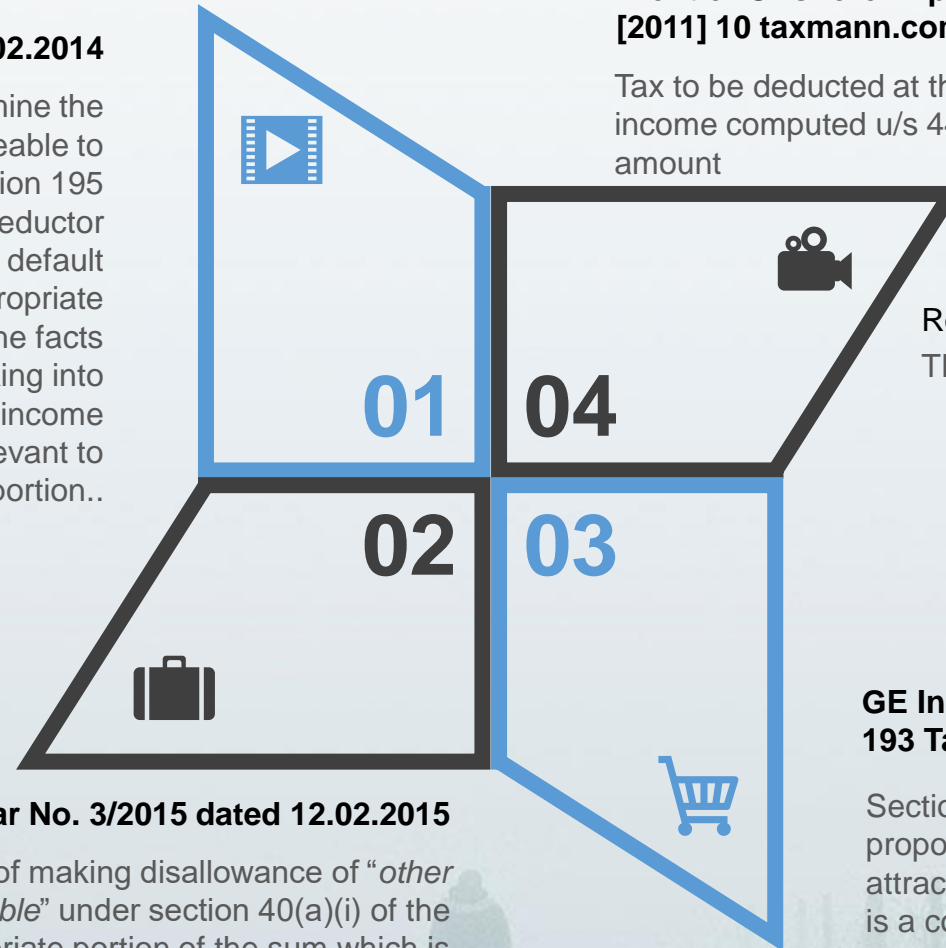
# TDS on Gross v/s Net

## Instruction No. 02/2014, Dated 26.02.2014

the Assessing Officer shall determine the appropriate proportion of the sum chargeable to tax as mentioned in subsection (1) of section 195 to ascertain the tax liability on which the deductor shall be deemed to be an assessee in default under section 201 of the Act, and the appropriate proportion of the sum will depend on the facts and circumstances of each case taking into account nature of remittances, income component therein or any other fact relevant to determine such appropriate proportion..

## Circular No. 3/2015 dated 12.02.2015

For the purpose of making disallowance of "other sum chargeable" under section 40(a)(i) of the Act, the appropriate portion of the sum which is chargeable to tax under the Act shall form the basis of such disallowance



## Frontier Offshore Exploration (India) Ltd [2011] 10 taxmann.com 250 (Chen)

Tax to be deducted at the specified rate on the income computed u/s 44BB and not on gross amount

Royalties/ FTS  
TDS on Gross Amount .

Capital gains

Clause B9 of 15CB -

- Amount of LTCG/STCG
- Basis of arriving taxable income

## GE India Technology Centre (P.) Ltd. [2010] 193 Taxman 234 (SC)

Section 195(2) is based on the "principle of proportionality". The said sub-Section gets attracted only in cases where the payment made is a composite payment in which a certain proportion of payment has an element of "income" chargeable to tax in India.

# TRC & Form 10F

## Rule 21AB

Certificate for claiming relief under an agreement referred to in sections 90 and 90A in Form 10F. Declaration not required if all specified information is mentioned in TRC

## Contents of Form 10F

- Status (individual, company, etc.) of the assessee
- PAN If available
- Nationality of country or specified territory of incorporation or registration
- Assessee's tax identification number or unique number used to identified by the Government of the country or the specified territory of which the assessee claims to be a resident;
- Period for which the residential status is mentioned in the TRC
- Address of the assessee in the country or specified territory outside India for which TRC is issued



## TRC Practical issues

- Where tax year is calendar year
- Year of remittance is different from that in which tax was deducted
- TRC available for earlier year, TRC applied but not received
- TRC in language other than English
- Business License as TRC?
- Certificate issued by Association or Self Regulatory Body
- Countries with no TRC

## Fields not in TRC of select countries

- Mauritius & Singapore – PAN
- US – Address in Resident Country & PAN
- UAE – Status, Nationality, Address in Resident Country & PAN

*PAN is not mentioned in Rule 21AB but Form 10F has prescribed*



# Grossing up

## Net of tax payments

In case the tax chargeable on any income is to be borne by the payer, then, for the purposes of withholding of taxes under section 195 such income shall be increased to such amount as would, after withholding of tax thereon at the rates in force, be equal to the net amount payable to payee.

### Scenarios 1 NR has PAN/TRC



- Amount payable net of Tax 100
- Rate in force – 10%
- Grossing – Rs 111.11 [ $100/100*90$ ]
- TDS u/s 195 – 11.11 [10% of 111.11]



### Scenarios 2 NR has no PAN/TRC

- Amount payable net of Tax 100
- Rate in force – 10%
- Grossing – Rs 111.11 [ $100/100*90$ ]
- TDS u/s 195 – 22.22 [20% of 111.11]

In view of Section 206AA, TDS at a higher rate of 20% will apply. 206AA is not charging section. Income to be grossed up @ 10% (i.e. the rate in force) & not @ 20% (i.e. the TDS rate) - Bosch Ltd [2012](141 ITD 38)(Bang ITAT)

# Other options for lower deduction

Particulars	195(2)	195(3)	197
Applicant	Payer	Payee	Payee
Purpose	To determine the taxable proportion of the remittance i.e. payer considers that the whole sum is not taxable in India *	To receive sums without deduction of tax i.e. NIL withholding tax certificate	To receive sums without deduction of tax or on deduction of tax at a lower Rate
Whether appealable	Appealable u/s 248, provided Payer has to bear the tax under the agreement & such taxes have been already paid by the payer	No appeal, Writ Petition can be filed	No appeal, Writ Petition can be filed
Revision u/s 264	Yes	Yes	Yes
Process	<p>Payer may approach the AO to determine the taxable portion of income in India.</p> <ul style="list-style-type: none"> <li>• Plain Paper application; No Form prescribed</li> <li>• AO to determine amount chargeable to tax</li> <li>• AO may issue order, determining the portion of income chargeable to tax</li> <li>• Order valid for the period specified</li> </ul> <p>No specified time limit available to pass the order under Section 195(2) - Central Associated Pigment Ltd. [1971] 80 ITR 631 (Cal)</p>	<p>Application in Form 15C (for Banking Co.) and 15D (all others) to the AO</p>	<p>Application can be made to the AO in Form 13 to determine the tax rate Application to be made before the payment/ credit, whichever is earlier. NIL Rate if</p> <ol style="list-style-type: none"> <li>Assessee has been regularly assessed to tax and has filed all returns of income due as on date of filling of application</li> <li>Not in default in respect of any tax, interest, penalty or any other sum</li> <li>Not subject to penalty u/s.271(1)(iii)</li> <li>Carrying on business in India continuously for at least 5 years and the value of the fixed assets in India exceeds Rs.50 Lakhs</li> </ol>

\* Practically, application u/s 195(2) is filed for both nil as well as lower withholding tax rate order; Mangalore Refinery and Petrochemicals Ltd. [2008] 113 ITD 85 (Mum.)



# Residential Status

Recent Amendment



# Residential Status Individual

Individual is resident if

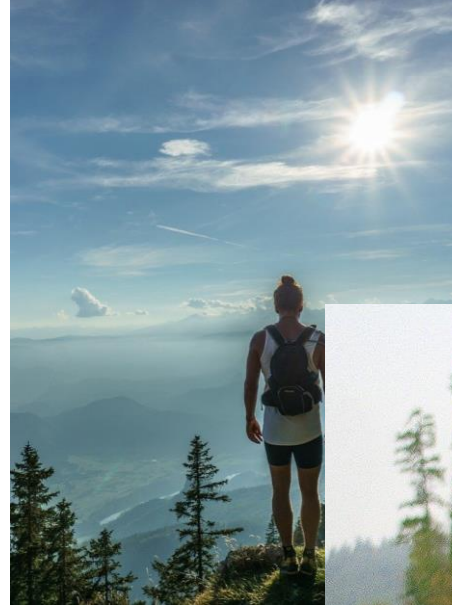
- Stay in India for a year is 182 days or more or
- Stay in India for the immediately 4 preceding years is 365 days or more and 60 days or more in the relevant financial year

In the event an individual who is a citizen of India or person of Indian origin leaves India who visits India in any previous year or person who has gone for employment outside India the period of period of 60 days is replaced by 180 days.

From the financial year 2020-21, the period of 180 days is reduced to 120 days or more for such an individual who is citizen of India or Indian origin whose total income (other than foreign sources) exceeds Rs 15 lakh

**Deemed Resident :** An individual who is a citizen of India who is not liable to tax in any other country will be deemed to be a resident in India, if the total income (other than foreign sources) exceeds Rs 15 lakh and nil tax liability in other countries or territories by reason of his domicile or residence or any other criteria of similar nature.

Further amendment has been made to treat such persons (who are considered as resident) as Resident but Not Ordinary Resident



# Taxability of Income

Nature of Income	Resident and Ordinary Resident	Resident and Not Ordinary Resident	Non-Resident
Received or is deemed to be received in India	✓	✓	✓
Accrues or arises or is deemed to accrue or arise to him in India	✓	✓	✓
Accrues or arises to him outside India	✓	X	X



# Issues with new deeming normal

## Income from Foreign Sources

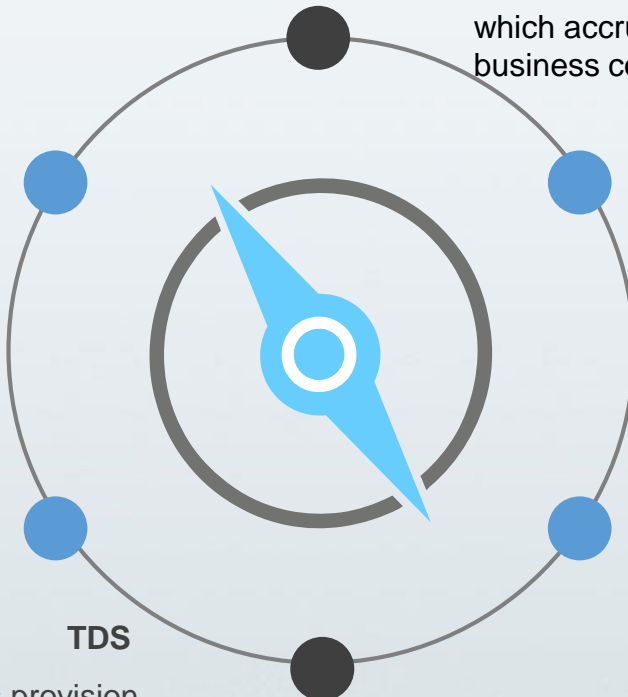
Income which accrues or arises outside India (except income derived from a business controlled in India or a profession set up in India) i.e. Total Income (-) income which accrues or arises outside India (+) income derived from a business controlled in India (+) income derived from a profession set up in India

- Gross Income or net of expenses?
- Chapter VIA Deduction available?

## Disclosure of Foreign Assets

DR will not have to disclose details of foreign assets as required by fourth proviso to S. 139(1). It applies to R & OR and not to R & NOR

DR is Not Ordinary Resident, various provision of TDS would be coming applicable to him



TDS

## Black Money Act

Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 – Will not apply

## Stateless Persons u/s 6(1A)

Deemed to be resident of India even if not stayed in India for a Single day. Such person is subject to low rate of tax should not be deemed resident. DR subject to tax - Indian Income (+) income which accrues or arises to him outside India if it is derived from a business controlled in or a profession set-up in India

## Transfer Pricing

TP may not apply for the Transaction between Resident and Deemed resident

## Chapter XII-A

Individual covered by section 6(1A) is deemed to be a resident, he will be able to avail of the concessional provision in Chapter XII-A only if he opts for a declaration under section 115H. Accordingly, the provisions of the Chapter shall continue to apply to him in relation to such income for that assessment year and for every subsequent assessment year until the transfer or conversion (otherwise than by transfer) into money of such assets.

# Residency Lock-down Period

The CBDT decided that for the purpose of determination of the residential status under section 6 of the Act for previous year 2019-20 (assessment year 2020-21) in respect of an individual who had come to India on a visit before 22-3-2020 and:

- (i) had been unable to leave India on or before 31-3-2020, his period of stay in India from 22-3-2020 to 31-3-2020 shall not be taken into account; or
- (ii) had been quarantined in India on account of COVID-19 on or after 1-3-2020 and had departed on an evacuation flight on or before 31-3-2020 or had been unable to leave India on or before 31-3-2020, as the case may be, his period of stay from the beginning of his quarantine to his date of departure or 31-3-2020, as the case may be, shall not be taken into account; or
- (iii) had departed on an evacuation flight on or before 31-3-2020, his period of stay in India from 22-3-2020 to his date of departure shall not be taken into account.

## PoEM Now Reads Sad for Indian Cos with Arms Abroad

Cos fear that global income may be taxed as 'decision makers' are stranded in India

### A Brief Guide

**What is PoEM?**  
A regulation where tax department can slap domestic taxes on income of companies

**How much is the tax rate?**  
Tax rate can go up to 42%

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Decision makers' stranded in India

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Mumbai: Many Indian companies with foreign subsidiaries whose directors or senior executives are stranded in India due to the pandemic are now worried that they may have domestic tax implications under the place of effective management (PoEM) rule.

Under the PoEM regulations, overseas subsidiaries could be treated as domestic entities for tax purposes if they are controlled and managed from India.

In most cases, senior executives

their global income.

"For many companies, the decision makers are stranded in India for a long time and the fear is that they may have to pay taxes on their global income in India or foreign companies may become resident under PoEM. Since the government has still not clarified around this, many executives may have to make decisions around paying advance tax within the next few months," said Paras Savla, a partner at tax advisory firm KPB & Associates.

could travel to other countries where the subsidiaries are based, for some time every year, especially for board meetings. However, amid Covid-19, many executives and directors are now unable to travel — resulting in a situation where tax officials could construe that the decisions concerning the companies were made in India.

"As it stands today, the Indian government has not announced any relaxations under PoEM for such cases, tax experts said.

"In this 'exceptional' Covid scenario, an unintended side effect of the lockdown might trigger PoEM presence of foreign companies when their directors/managers, i.e. the key decision makers, are in India," said Amit Maheshwari, a partner of CA firm Ashok Maheshwary & Associates. "The IT department can consider these companies as residents in India. While the

A regulation where Indian tax department can slap domestic taxes on global income of companies

**How much is the tax rate?**  
Tax rate can go up to 42%

**What does this mean?**  
Many companies may have to cough up advance tax in coming months on their global income



decisions. This raises questions over the taxability of their global income.

"For many companies, the decision makers are stranded in India for a long time and the fear is that they may have to pay taxes on their global income in India or foreign companies may become resident under PoEM. Since the government has still not clarified around this, many executives may have to make decisions around paying advance tax within the next few months," said Paras Savla, a partner at tax advisory firm KPB & Associates.

The tax applicable on the global income of such companies could be as high as 42%, said tax experts. Worse, most of the companies would have to cough up this amount in the coming months and pay that as advance tax.

The problem has occurred for both multinationals as well as individuals. ET had first writ-

A silhouette of a hiker with a large backpack stands on a mountain peak, looking out over a landscape at sunset. The scene is framed by a large, light-colored triangle that points downwards. The sky is a mix of orange, pink, and blue, with some clouds. The hiker is in the center, facing away from the viewer.

# Thank you

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