Select Issues in Taxation of and Filing of Tax Returns for Non-Residents

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Agenda

Residential Status and Scope of Total Income for Non-Residents

Specific Provisions applicable to Income-tax return filing for Non-Residents

IT Return Filing and Few Other Aspects

Residential Status and Scope of Total Income for Non-Residents

Residential Status – Importance

Importance of determining Residential Status

- For determining the scope of total income u/s 5
- Withholding Tax Implication - Rates differ for residents and non-residents
- Application of specific taxation regime / computation provisions / tax rates
- Disclosure requirement under the ITA – Foreign Assets Schedule is applicable only to ROR

Criteria for determining residency of a person provided in S. 6

Residential Status of an Individual is categorized as under

- Resident and Ordinarily Resident (“ROR”)
- Resident but not Ordinarily Resident (“RNOR”)
- Non-Resident (“NR”)

Residential Status under ITA

Section 6(1)

(1) An individual is said to be resident in India in any previous year, if he—
(a) is in India in that year for a period or periods amounting in all to one hundred and eighty-two days or more ; or
(b) [***]
(c) having within the four years preceding that year been in India for a period or periods amounting in all to three hundred and sixty-five days or more, is in India for a period or periods amounting in all to sixty days or more in that year.
Explanation 1—In the case of an individual,—
(a) being a citizen of India, who leaves India in any previous year as a member of the crew of an Indian ship as defined in clause (18) of section 3 of the Merchant Shipping Act, 1958 (44 of 1958), or] for the purposes of employment outside India, the provisions of sub-clause (c) shall apply in relation to that year as if for the words "sixty days", occurring therein, the words "one hundred and eighty-two days" had been substituted;
(b) being a citizen of India, or a person of Indian origin within the meaning of Explanation to clause (e) of section 115C, who, being outside India, comes on a visit to India in any previous year, the provisions of sub-clause (c) shall apply in relation to that year as if for the words "sixty days", occurring therein, the words "one hundred and eighty-two days" had been substituted and in case of such person 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.

Residential Status under ITA

Section 6(6)

(6) A person is said to be "not ordinarily resident" in India in any previous year if such person is—
(a) an individual who has been a non-resident in India in nine out of the ten previous years preceding that year, or has during the seven previous years preceding that year been in India for a period of, or periods amounting in all to, seven hundred and twenty-nine days or less; or
(b) a Hindu undivided family whose manager has been a non-resident in India in nine out of the ten previous years preceding that year, or has during the seven previous years preceding that year been in India for a period of, or periods amounting in all to, seven hundred and twenty-nine days or less 57; 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).

Residential Status – Individuals

Section 6(1) (a) – Basic Condition 1 (Alternative to Basic Condition 2)			
Condition	**Additional Conditions**	**Income other than Foreign Source Income**	**Residential Status**
Physical Stay in India in PY >= 182 days	Applies irrespective of nationality / citizenship. **Additional Condition 1** Resident in 2+ out of last 10 years AND **Additional Condition 2** Stay in India 730+ days over last 7 years	Not relevant	If Basic Condition 1 is YES AND both Additional Condition 1 and 2 are Yes – **ROR** If Basic Condition 1 is YES AND one or both Additional Condition are No – **RNOR** If Basic Condition 1 is NO – **NR** but check for Basic Condition 2

Residential Status – Individuals

Section 6(1) (c) – Basic Condition 2 (Alternative to Basic Condition 1)			
Requirement	**Additional Conditions**	**Income other than Foreign Source Income**	**Residential Status**
Physical Stay in India in PY >= 60 days AND Stay in India in 4 preceding previous years >= 365 days	See next slide for exceptions **Additional Condition 1** Resident in 2+ out of last 10 years AND **Additional Condition 2** Stay in India 730+ days over last 7 years	See next slide	If Basic Condition 2 is YES AND both Additional Condition 1 and 2 are Yes – **ROR** If Basic Condition 2 is YES AND one or both Additional Condition are No – **RNOR** If Basic Condition 2 is NO – **NR**

Residential Status – Individuals

Section 6(1) (c) – Basic Condition 2 (Alternative to Basic Condition 1)			
Requirement	**Exception**	**Income other than Foreign Source Income**	**Residential Status**
Physical Stay in India in PY >= 60 days AND Stay in India in 4 preceding previous years >= 365 days	Not applicable in case of: Expln 1(a). Indian citizen leaving India as member of the crew of an Indian ship OR Indian citizen leaving India for the purpose of employment outside India	Not relevant	Basic Condition 2 is modified for stay in PY to be >= 182 days i.e. only Basic Condition 1 to apply.
	Not applicable in case of: Expln 1(b). Indian citizen / person of Indian origin, being outside India, coming on a visit to India	Upto INR 15 lakhs	Basic Condition 2 is modified for stay in PY to be >= 182 days i.e. only Basic Condition 1 to apply.
	Not applicable in case of: Explan 1(b). Indian citizen / person of Indian origin, being outside India, coming on a visit to India	Exceeds INR 15 lakhs	Basic Condition 2 is modified for stay in PY to be >= 120 days. Further such person is considered RNOR as per S. 6(6)(c)

Residential Status – Certain Issues

- *Issue 1: Does the stay in India need to be continuous? Is the purpose of stay in India relevant?*

Stay in India need not be continuous. Total number of days in various broken periods of stay, if any, must be considered.

Place and purpose of stay in India is immaterial. However, if a person is compelled to stay in India because of external circumstances beyond his control for e.g. where his passport is impounded then the period for which the passport was impounded has to be excluded for in determining his residential status. Refer [2015]375 ITR 172 [Delhi] Suresh Nanda

Residential Status – Certain Issues

- *Issue 2: Counting of days – whether to include or exclude day of arrival or departure?*

OECD Commentary: both days (arrival & departure) to be included, all days spent in the country to be considered, including holidays, non-working days, whether before or after the work, sick days etc. Days in transit and any day spent wholly outside the country to be ignored.

Gautam Baneerjee case (ITA No. 2374 of 2004 - Mumbai) – arrived at midnight at Indian airport and Tribunal held not to be included.

The day of arrival is to be excluded for calculating number of days – Fausta C. Cordeiro [2012] 53 SOT 522 (Mumbai ITAT);

Only day of departure to be considered as "in India" – Jaipur ITAT (No. 1230 dt. 22.8.86) (ITO v Dr. R. K. Sharma); similar ruling in case of Manoj Kumar Reddy [2009] 34 SOT 180 (Bangalore).

Similar support from Section 9 of General Clauses Act 1897

Residential Status – Certain Issues

- *Issue 3: Can benefit of Explanation 1(b) for substituting 60 days with 182 days be availed by an Indian citizen who comes to India on a visit but decides to stay here permanently?*

Smita Anand (AAR 1091 of 2011) – Benefit of Explanation 1(b) not available to employee who shifts back to India on giving up employment in the same year.

- *Issue 4:* Relaxation in period of 60 days as contained in Explanation 1 is for the purposes of employment outside India. Few issues in regard to meaning of the term and scope of *"purposes of employment" outside India*

Courts have held that this would also cover cases where a person is deputed by his Indian employer for assignments abroad and the emphasis was on leaving India for the purposes of employment outside India.
Refer [1989] 31 ITD 21 (Bangalore) Ram Sagar Choudhary; [2006] 287 ITR 462 (AAR) British Gas India Pvt. Ltd.

The term employment should not be given a technical meaning but should be understood to include self-employment like business or profession to avail benefit of this relaxation. Refer [2011] 337 ITR 267 [Ker HC] O. Abdul Razak.
However this would not cover persons going outside on foreign tours, refer (1990) 33 ITD 714 (Bom) (AT) K. Y. Patel; (31 ITD 183) (Mum)(SB) Abbott Industries

Residential Status under ITA

Section 6(1A)

*(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.*
Explanation.—For the removal of doubts, it is hereby declared that this clause shall not apply in case of an individual who is said to be resident in India in the previous year under clause (1).

Residential Status – Stateless Persons

- Concept of deemed residence for "stateless persons" introduced by FA, 2020 with effect from AY 2021-22
- Applies only to citizens of India. Only applies where S. 6(1) residency test is not met.
- Intention is to target "stateless" Indian citizens provided two conditions are met: Income other than Foreign Sources exceeding INR 15 lakhs and not liable to tax in any other country
- Such Indian citizens would be deemed to Resident but Not Ordinarily Resident in India
- Foreign Source Income has been defined to mean Income which accrues or arises outside India. It specifically excludes income from business controlled in or a profession set up in India.
- Liable to Tax – This term has been defined in S. 2(29A) to mean there must be income tax liability on a person under the law of that country. Further it also includes a person who has been subsequently exempted from such liability under the law of that country.

Residential Status & DTAAs

- S. 90 empowers Central Government to enter into DTAAs with the objective of
  - granting of relief in case of doubly taxed income
  - avoidance of double taxation of income
  - exchange of information for the prevention of evasion or avoidance of income-tax
  - recovery of income-tax
- S. 90(2) – in case of assessee to whom such DTAA applies, the provisions of the Act to the extent they are more beneficial apply to that assessee.
- S. 90(4) – mandatory to obtain TRC to establish tax residence in foreign country to claim benefits under a DTAA and S. 90(5) to also furnish information in Form 10F
- DTAAs are structured to provide for distribution of taxing rights between the country of residence of the taxpayer and the source country. For this, the DTAA normally seeks to identify the country of residence of the tax payer.

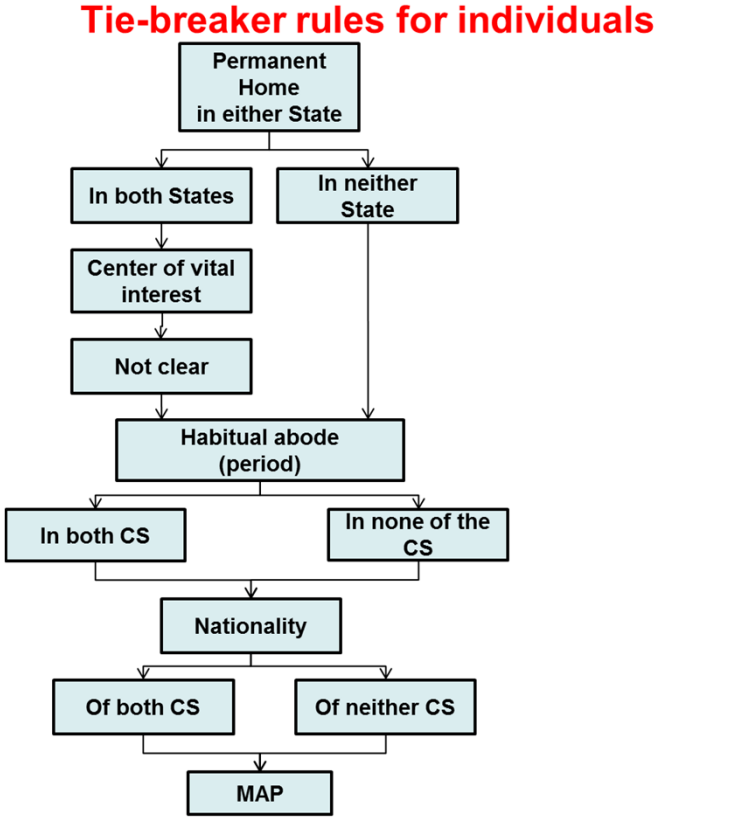
Residential Status & DTAAs

- DTAAs contain distributive rules for e.g. Articles 11 which deals which Interest Income – which provides for a maximum cap for the amount of tax which can be levied by the source country and corresponding mechanism for granting of FTC by the country of residence. Given this determining residence is important to avail and apply DTAAs.
- An individual is considered to be a resident of both the contracting states which may commonly happen if one country determines residence based on nationality and another country determines residence based on physical presence of the person or in cases where a person leaves the country for deputation in the middle of the tax year
- A dual resident person is typically taxed as per domestic law of both countries where he/she is a resident and recourse may be had to the tie-breaker rules in the DTAA to determine the country of residence
- The 2017 OECD Model Treaty text provides a hierarchy of tests called the tie-break rules to determine the country of residence of the individual for the purposes of the tax treaty.

Residential Status & DTAAs

Article 4.2 of the OECD MC prescribes hierarchy of tests to be applies to resolve cases of Dual Residence for individuals which is followed by most DTAAs in practice:

- Permanent Home
- Centre of vital interests (Personal & economic relations)
- Habitual Abode
- Nationality
- Mutual Agreement Procedure



Residential Status – Certain Issues

- *Issue 5: Concept of "Split residency"*

Scenario: Mr. A is a tax resident of India and he leaves India for the first time for the purposes of employment in USA on 1 January 2022.
India follows an April to March tax year and hence his physical stay during 1 Apr 2021 to 31 March 2022 >= 182 days and hence he is a tax resident.
USA follows a Jan to Dec tax year and we assume that he is tax resident during 1 Jan 2022 to 31 Dec 2022 in USA.
Q: Is the salary earned in USA during Jan to Mar 2022 taxable in India?

India does not have concept of split residency – typically where a person is considered to be a dual resident for only a portion of the tax period. However Courts have taken a liberal interpretation and granted relief based on specific facts of each case in Raman Chopra v DCIT [2016] 69 taxmann.com 452 (Del); DCIT vs. Sanjeev Kumar Ranjan (ITA No. 1655/Bang/2017)

Unresolved aspects: Lack of legislative basis; Disclosure in tax returns

Residential Status – Company

A company is said to be a resident in India in any previous year, if—

(i) it is an Indian company; or

(ii) its place of effective management, in that year, is in India.

Explanation.—For the purposes of this clause "place of effective management" means a place where key management and commercial decisions that are necessary for the conduct of business of an entity as a whole are, in substance made.

Residential Status – Company

- The definition of “Indian Company” in section 2(26) in essence covers a company registered under Indian company law.
- The alternate test for residence of other than Indian companies (i.e. Foreign Companies) was amended with effect from AY 2017-18. Prior to amendment, a foreign company was regarded as resident in India only if the control and management of its affairs was situated **wholly** in India.
- The FA 2016 amended section 6(3) with effect from AY 2017-18, to provide an alternative test for determining residence for other than Indian Companies which provides that a company would be considered to be resident in India if its place of effective management (“POEM”) in that year is in India.
- As per the explanation to section 6(3) POEM means a place where key management and commercial decisions necessary for the conduct of business of an entity as a whole are, in substance, made. This term “place of effective management” is commonly found in various Double Taxation Avoidance Agreements (DTAAs) entered into by India and is borrowed from there to align the test of residency for foreign companies in line with various DTAAs entered into by India.

Residential Status & DTAAs

Article 4.3 OLD - Tie-breaker rule for `persons other than individuals´

3. Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States,

then it shall be deemed to be a resident only of the State in which its place of effective management is situated.

Article 4.3 NEW - Tie-breaker rule for `persons other than individuals´

3. Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States,

the competent authorities of the Contracting States shall endeavour to determine by mutual agreement the Contracting State of which such person shall be deemed to be a resident for the purposes of the Convention…

In the absence of such agreement, such person shall not be entitled to any relief or exemption from tax provided by this Convention….

Section 5 – Taxability of Income based on Residential Status

Taxability of Income	Resident	Resident but Not Ordinarily Resident	Non-Resident
Income received or deemed to be received in India	Taxable	Taxable	Taxable
Income accrues / arises or deemed to accrue or arise in India	Taxable	Taxable	Taxable
Income which accrues or arises outside India and is derived from a business controlled in or a profession set up in India	Taxable	Taxable	Non-taxable
Income which accrues or arises outside India	Taxable	Non-taxable	Non-taxable

Tax Rates for NRs – Old Regime

Taxpayer Type	Tax Rate	Surcharge	Cess
Non-resident individual	Upto 2.5 Lakhs – Nil 2.5 Lakhs to 5 Lakhs – 5% 5 Lakhs to 10 Lakhs – 20% Above 10 Lakhs – 30%	0 to 50 Lakhs – Nil 50 Lakhs to INR 1 crore – 10% 1 crore to 2 crore – 15% 2 crore to 5 crore – 25% Above 5 crore – 37%	4%
Note: Rebate u/s 87A not available to NR; Beneficial slab rate for senior citizen and super senior citizen only available to residents; SC on dividend income and capital gains u/s 11A/112A is capped at 15%			
Firms/LLPs	30%	0 to 1 crore – Nil Above 1 crore – 12%	4%
Foreign Company (including their branches / PE)	40%	0 to 1 crore – Nil 1 crore to 10 crore – 2% Above 10 crore – 5%	4%

Tax Rates for NR Individuals /HUF – S. 115BAC

Taxpayer Type	Tax Rate	Surcharge	Cess
Non-resident individual u/s 115BAC	Upto 2.5 Lakhs – Nil 2.5 Lakhs to 5 Lakhs – 5% 5 Lakhs to 7.5 Lakhs – 10% 7.5 Lakhs to 10 Lakhs – 15% 10 Lakhs to 12.5 Lakhs – 20% 12.5 Lakhs to 15 Lakhs – 25% Above 15 Lakhs – 30%	0 to 50 Lakhs – Nil 50 Lakhs to INR 1 crore – 10% 1 crore to 2 crore – 15% 2 crore to 5 crore – 25% Above 5 crore – 37%	4%
Note: SC on dividend income and capital gains u/s 11A/112A is capped at 15%			

Exemptions - Section 10

- Section 10(4)(ii) - Interest on NRE account paid or credited to individual non-residents Indian who are permitted by RBI to maintain such account (Including person who may be 'Resident' in India as per Income Tax law, but are resident outside India under FEMA).
- Section 10(6) – in the case of an individual who is not a citizen of India:
  - Sub clause (vi) –remuneration received as an employee of a foreign enterprise for services rendered by him during his stay in India, subject to additional conditions;
  - Sub clause (viii) – remuneration for services rendered in connection with employment on a foreign ship where total stay in India does not exceed in the aggregate a period of ninety days in the previous year
- Section 10(15)(iv)(fa) – Interest paid by a scheduled bank on RBI approved foreign currency deposit / , FCNR A/c is exempt.
- Section 10(15)(viii) – Interest on a deposit made on or after the 1-4-2005, in an Offshore Banking Unit referred in section 2(u) of the Special Economic Zones Act, 2005 is exempt
- Section 10(15)(ix) – Interest paid by a unit located in an IFSC in respect of monies borrowed by it on or after 01.09.2019

Specific Provisions applicable to Income-tax return filing for Non-Residents

Filing of IT Returns – Certain Issues

- Example: F Co received royalty from its wholly owned subsidiary I Co in India during FY 21-22. I Co has deducted TDS u/s 195 @ 20% plus applicable SC and Cess. Q: F Co has approached you to understand if it is obligated to file income-tax return and/or transfer pricing audit report in Form 3CEB?

- *Issue 1: In case of a NR foreign company is it mandatory to file IT return where TDS has been deducted at the time of remittance or alternatively where income is taxable as per domestic law but completely exempt as per provisions of the applicable DTAA or where TDS has been deducted at lower rate as per DTAA?*

Section 139 – Filing of IT Return

- As per section 139, it is mandatory to file income-tax return for:
  - a company or a firm; or
  - any other person if his total income or the total income exceeded the maximum amount which is not chargeable to income-tax i.e. INR 2.5 Lakhs
  - definition of “company” as per section 2(17) of the Act, includes a foreign company
- Mandatory to file return as per requirement of section 139(1) even where the income is Nil / not taxable in view of DTAA.
  - VNU International B.V. [2011] 198 Taxman 454 (AAR - New Delhi)
  - Deere & Co. [2011] 200 Taxman 4 (AAR).
  - Castleton Investment Limited [2012] 211 Taxman 282 (AAR - New Delhi)
- No requirement to file income-tax return as there is no charge to income-tax.
  - Venenburg Group B.V. [2007] 159 Taxman 219 (AAR – New Delhi)
  - Factset Research Systems Inc. [2009] 182 Taxman 268 (AAR)

Section 115A - Tax on dividends, royalty and FTS fees in the case of NRs

- Relaxation contained in Section 115A(5) for NRs from filing tax return

(5) It shall not be necessary for an assessee referred to in sub-section (1) to furnish under sub-section (1) of section 139 a return of his or its income if—

(a) his or its total income in respect of which he or it is assessable under this Act during the previous year consisted only of income referred to in clause (a) [or clause (b)] of sub-section (1); and

[(b) the tax deductible at source under the provisions of Part B of Chapter XVII has been deducted from such income and the rate of such deduction is not less than the rate specified under clause (a) or, as the case may be, clause (b) of sub-section (1).]]

Scope and Rate of tax for NRs as per S. 115A:

- Section 115A(1)(a)(i) – Dividends – 20% [Note change in taxation of dividend income wef AY 2021-22]
- Section 115A(1)(a)(ii) – Interest – 20%
- Section 115A(1)(b) – Royalties and Fees for Technical Services – 10%

Section 115A(5) - Comparison

Before amendment by FA 2020	After amendment by FA 2020 wef AY 2020-21
(5) It shall not be necessary for an assessee referred to in sub-section (1) to furnish under sub-section (1) of section 139 a return of his or its income if — (a) his or its total income in respect of which he or it is assessable under this Act during the previous year consisted only of income referred to in clause (a) of sub-section (1); and (b) the tax deductible at source under the provisions of Chapter XVII-B has been deducted from such income.	(5) It shall not be necessary for an assessee referred to in sub-section (1) to furnish under sub-section (1) of section 139 a return of his or its income if — (a) his or its total income in respect of which he or it is assessable under this Act during the previous year consisted only of income referred to in clause (a) **or clause (b)** of sub-section (1); and (b) the tax deductible at source under the provisions of Part B of Chapter XVII has been deducted from such income **and the rate of such deduction is not less than the rate specified under clause (a) or, as the case may be, clause (b) of sub-section (1)**.

The old s. 115A(5) only contained a reference to sub-clause (a) which dealt with dividend and interest income which is now extended to sub-clause (b) to cover royalties and FTS. However the benefit of non-filing of returns which could previously be availed even where WHT was applied at lower rate as per DTAA is now no longer possible under the present scenario where DTAA benefits are claimed filing of return is mandatory. No such relaxation in section 92E.

Section 92E – TP Audit Report

- *Issue 2: In case of a NR foreign company which has international transactions with Associated Enterprise in India, is transfer pricing compliance applicable? Example: F Co received royalty from its wholly owned subsidiary I Co in India. I Co has deducted TDS u/s 195 @ 20% plus applicable SC and Cess. Q: F Co has approached you to understand if it is obligated to file income-tax return and/or transfer pricing audit report in Form 3CEB?*
- Text of Section 92E

Every person who has entered into an international transaction or specified domestic transaction during a previous year shall obtain a report from an accountant and furnish such report on or before the specified date in the prescribed form duly signed and verified in the prescribed manner by such accountant and setting forth such particulars as may be prescribed.

- Unlike section 115A(5), no relaxation provided for in section 92E for NR Foreign Company in respect of compliance with transfer pricing provisions.

Capital Gains and Non-Residents

- Section 9 of the Act extends scope of income for NR by deeming certain income to accrue or arise in India. In the context of capital gains, this would includes income which arise on account of transfer whether directly or indirectly of capital assets situated in India
- Charge to capital gains is contained section 45 of the ITA which provides that all profits and gains from the transfer of capital asset shall be chargeable to tax under the head “capital gains”
- Computation mechanism is contained in section 48 of the Act
- Taxability and rate of tax is broadly covered in the following sections:
  - Section 111A
  - Section 112
  - Section 112A

Capital Gains and Non-Residents

Period of Holding – Classification of Assets into Long-term and Short Term		
Particulars	**Long-term capital asset Section 2(29AA)**	**Short-term capital asset Section 2(42A)**
Type of Capital Asset	Securities listed in a recognised stock exchange in India (other than Units); Units of Equity Oriented MF; Zero Coupon Bonds held for more than 12 months	Securities listed in a recognised stock exchange in India (other than Units); Units of Equity Oriented MF; Zero Coupon Bonds held for 12 months or less
	Unlisted shares or immovable property being land or building or both held for more than 24 months	Unlisted shares or immovable property being land or building or both held for 24 months or less
	Other capital asset held for more than 36 months	Other capital asset held for 36 months or less

Capital Gains and Non-Residents

Short-term capital gains		
Type of Asset	**Condition**	**Tax Rate**
Equity shares; Units of Equity MF or unit of Business Trust	STT Paid	S. 111A – STCG @ 15%
All other cases / assets - Unlisted Shares/Securities - Bonds / Debentures whether listed / unlisted - Immovable Property / Others	STT not paid / STT not applicable	Not covered by S. 111A and hence taxable at applicable slab rate - Foreign Companies – 40% - Others – 30%

Capital Gains and Non-Residents

Long-term capital gains		
Type of Asset	**Condition**	**Tax Rate**
Equity shares; Unit of Equity MF or unit of Business Trust	STT Paid	S. 112A – 10% on gains exceeding INR 1 Lakh
Listed securities (other than MF units), listed bonds, listed debentures	STT Not Paid / Not Applicable	S.112(1)(c)(ii) r.w. first proviso LTCG @ 20% (with indexation) OR LTCG @ 10% (no indexation)
Unlisted securities		S.112(1)(c)(iii) – 10% (no indexation)
Immovable Property / Others		S.112(1)(c)(ii) – 20% (with indexation)
FCEBs / GDRs		S. 115AC – 10% (no indexation)
NRIs - equity/preference shares, debentures of Indian Company which is not a private company & specified G-securities		S. 115E – 10% (no indexation)

Capital Gains and Non-Residents Mode of Computation – S. 48

- Step 1: Determine the Full Value of Consideration
- Step 2: Deduct
  - Cost of Acquisition / Indexed Cost of Acquisition;
  - Cost of Improvement / Indexed Cost of Improvement;
  - Expenses incurred wholly and exclusively for transfer of capital asset

  In doing so give effect to wording of First and Second Proviso to Section 48
- Step 3: Apply any exemptions, if applicable with the net result being taxable capital gains

Capital Gains and Non-Residents Mode of Computation – S. 48

- **First Proviso to Section 48 interplay with Second and Third Proviso**
  - Applies only where capital gains are earned by non-residents
  - On transfer of shares in or debentures of an Indian Company which were acquired in foreign currency or Reinvestment of sale proceeds of shares or debentures which were acquired in foreign currency
  - If the above conditions are met: capital gains are to be computed by converting the cost of acquisition, expenditure incurred and full value of consideration into the foreign currency which was initially utilised for purchase of the above securities and then the capital gains so computed in foreign currency are converted into INR. This proviso should be read along with Rule 115A
  - Further second proviso (benefit of indexation) does not apply. Second Proviso provides for indexation benefit to apply except in cases where transfer is covered by First Proviso.
  - Third proviso provides that first and second proviso don't apply in cases covered by s. 112A

Capital Gains and Non-Residents Mode of Computation – S. 48

Rule 115A (specific rule)		
Particulars	**Applicable FX rate of the foreign currency initially utilised in the purchase of the capital asset sold**	**Date**
Cost of Acquisition	Average of the TTBR and TTSR	Date of acquisition
Expenditure Incurred	Average of the TTBR and TTSR	Date of transfer
Full Value of Consideration	Average of the TTBR and TTSR	Date of transfer
Reconversion of capital gains into INR	TTBR	Date of transfer
Observations ❑ Gives foreign exchange fluctuation protection to NR taxpayer ❑ Conversion applicable even if sale consideration is in INR ❑ But indexation benefit not available		

Capital Gains
Mode of Computation – S. 48

Rule 115 (general rule)		
Particulars	**Applicable FX rate**	**Date**
Income chargeable under the head "Capital gains"	TTBR	Last day of the month immediately preceding the month in which the capital asset is transferred

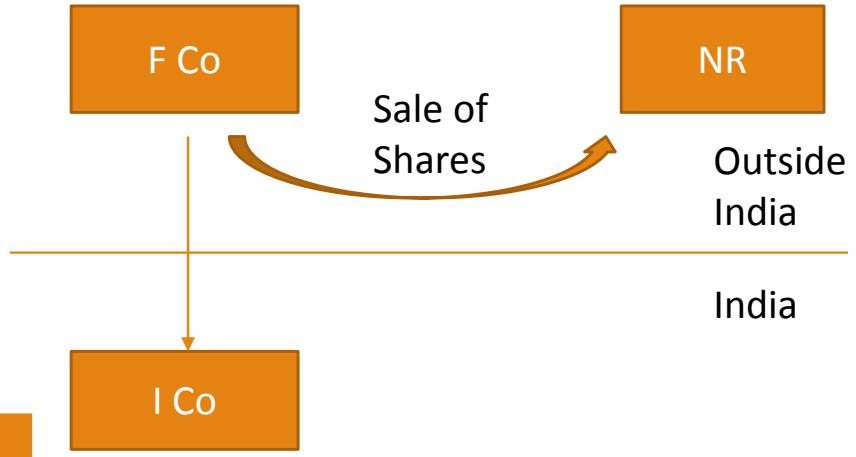
Observations

- ❑ Rule applies where any income accruing or arising or deemed to accrue or arise to the assessee in foreign currency or received or deemed to be received by him or on his behalf in foreign currency i.e. either cost or sale consideration or both in foreign currency
- ❑ No specific bar on indexation benefit not available
- ❑ Applies to both R and NR

Capital Gains and Non-Residents Example of sale of shares by F Co

Facts:

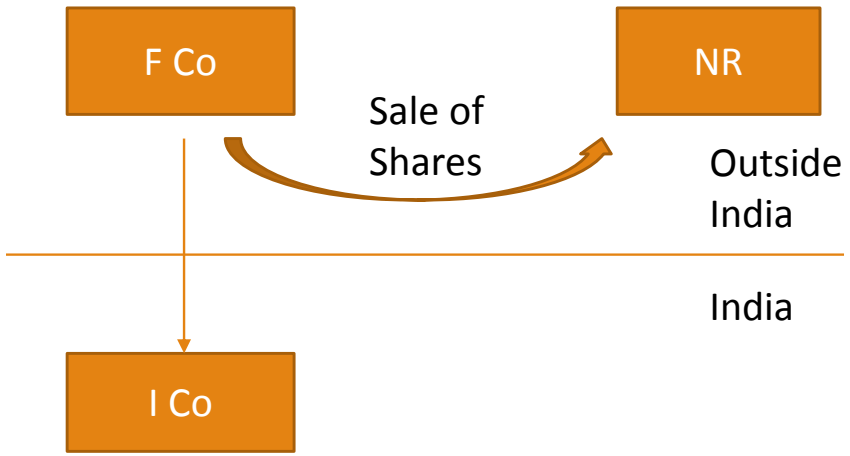
- F Co subscribed to 10,000 shares of I Co of FV INR 10 each on 1 January 2000
- At time of subscription FX rate was 1 USD = INR 49 and hence F Co remitted USD rate was 2041
- On 10 March 2022, F Co decided to sell shares of I Co to a NR for USD 20,000.



Particulars	Dt. Of Acquisition	Dt. Of Transfer
SBI TTBR	49	74
SBI TTSR	51	76
Avg TTBR/TTSR	50	75

Capital Gains and Non-Residents Example of sale of shares by F Co

Computation of Capital Gains – Rule 115A	
Particulars	**Amount**
Sale Consideration [Already in Foreign Currency]	USD 20,000
Less: Cost of Acquisition	[INR 100,000/50] = USD 2,000
Capital Gains FC	USD 18,000
Capital Gains in INR	[USD 18,000 x 74] = INR 13,32,000



Specific provisions applicable to NRIs

Chapter XII-A was inserted by FA 1983 with an object to provide concessional rate of taxation to NRIs to encourage them to invest their foreign exchange earnings in assets and source of Income in India. It deals with the situations where the gross total income of a non-residents includes income from investment or income by way of long-term capital gain or both. The following sections are relevant for NRIs:

- *Section 115D - Special provision for computation of total income of NRI*

This section covers the situation or transaction in which this section can be invoked. It provides that no deduction or allowance to be allowed in respect of investment income dealt herein. Further no deduction in respect of Chapter VI-A and second proviso to s. 48 (indexation benefit) would not apply in computing the investment income of a NRI

- *Section 115E - Tax on investment income and long-term capital gains of NRI*
  - any income from investment or income from long-term capital gains of an asset other than a specified asset– 20%
  - income by way of long-term capital gains from specified assets – 10%

Specific provisions applicable to NRIs

Definition of key terms as contained in section 115C:

- "investment income" means any income derived [other than dividends referred to in section 115-O] from a foreign exchange asset;
- "long-term capital gains" means income chargeable under the head "Capital gains" relating to a capital asset, being a foreign exchange asset which is not a short-term capital asset;
- "foreign exchange asset" means any specified asset which the assessee has acquired or purchased with, or subscribed to in, convertible foreign exchange;
- "non-resident Indian" means an individual, being a citizen of India or a person of Indian origin who is not a "resident". Explanation.—A person shall be deemed to be of Indian origin if he, or either of his parents or any of his grand-parents, was born in undivided India;
- "specified asset" means: shares in an Indian company; debentures issued by an Indian company which is not a private company; deposits with an Indian company which is not a private company; any security of the Central Government; such other assets as the Central Government may notify.

Specific provisions applicable to NRIs

- CIT v N.P. Mathew 280 ITR 44, (2005) 198 CTR (Ker) 551

In a case where an assessee had made deposits in convertible foreign exchange under the "non-resident non-repatriable scheme", it was held that the benefit of reduced rate of taxation will be available even if the assessee becomes a resident and thereafter transfers the NR account from one bank to another bank. As long as the deposit was not converted into money, the deposit retains its character as a foreign exchange asset.

- Ravi Narayanan V., In re, 300 ITR 62 (AAR).

Interest earned on NRO deposit (made with convertible foreign exchange) will be treated as "investment income" under s 115C(c) and entitled to the concessional rate of tax of 20 per cent

- Manohar Dr. M v ACIT 339 ITR 49, (2011) 244 CTR (Mad) 642.

Interest earned on the re-invested interest earned from a foreign exchange asset will not be eligible for concessional rate of tax

Specific provisions applicable to NRIs

- Section 115F - Capital gains on transfer of foreign exchange assets not to be charged in certain cases for NRI

This is an exemption clause when the **capital gain arises** on transfer of long tern foreign exchange asset. This section deals with the situation where any LTCG arises from the transfer of foreign exchange assets and the assessee has within a period of six months after the date of such transfer invested the whole or any part of the net consideration in any **specified assets**

- Section 115G - Return of income not to be filed in certain cases for NRI

It gives the relief to a NRI from filing of return. It shall not be necessary for a NRI to furnish return u/s 139(1) if, his total income in respect of which he is assessable under this Act during the previous year consisted **only** of the investment income or income from LTCG or both and the tax deductible under the provision of chapter XVII-B has been deducted from such income.

Specific provisions applicable to NRIs

- Section 115H - Benefit under Chapter to be available in certain cases even after the assessee becomes resident.

Where a NRI in any previous year becomes resident, he may furnish to the AO a declaration in writing along with his return of Income u/s 139. The provision of this chapter shall continue to apply to him in relation to the investment income derived from any foreign exchange asset except shares in Indian Company and if he does so, the provisions of this 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 into money of such assets.

- Section 115I - Chapter not to apply if the assessee so chooses.

It says that applicability of Chapter XII-A is optional and a NRI may elect not be governed by the provisions of this chapter for any assessment year by furnishing his return of income for that assessment year u/s 139 declaring therein that the provision of this chapter shall not apply to him.

and many more..

- Section 115BBA - Income of NR or sports associations or institutions, by way of participation in India in any game or sports; or advertisement; or contribution of articles in newspapers, magazines or journals; Income of NR entertainer such as musicians, radio, television or theatre artists) arising from performance in India, is chargeable to tax @ 20%
- Section 44B - Income from business of operation of ship is deemed to be 7.5% of the gross receipts from such business
- Section 44BB - Income from business of providing services or facilities in connection with plant and machinery on hire used in the prospecting for, or extraction or production of, mineral oils including petroleum and natural gas is deemed to be 10% of gross receipt from such business
- Section 44BA - Income from business of operation of aircraft is deemed to be 5% of the gross receipts
- Section 44BBB – Income from business of foreign companies engaged in the business of civil construction, etc., in certain turnkey power projects is deemed to be 10% of gross receipts
- Section 44C - For computing the business income of non-resident, expenditure in the nature of head office expenses is allowable at least of the: Up to 5% of the adjusted income as specified in section; or Actual expenditure attributable to business in India

IT Return Filing and Few Other Aspects

Applicable ITR Form for NR and RNOR

Form	Description	Comments
ITR-1 SAHAJ	For individuals being a resident (other than not ordinarily resident) having total income upto Rs.50 lakh, having Income from Salaries, one house property, other sources (Interest etc.), and agricultural income upto Rs.5 thousand	Not applicable for NR and RNOR
ITR-2	For Individuals and HUFs not having income from profits and gains of business or profession	Applicable
ITR-3	For individuals and HUFs having income from profits and gains of business or profession	Applicable
ITR-4 SUGAM	For Individuals, HUFs and Firms (other than LLP) being a resident having total income upto Rs.50 lakh and having income from business and profession which is computed under sections 44AD, 44ADA or 44AE	Not applicable for NR and RNOR
ITR-5	For persons other than- (i) individual, (ii) HUF, (iii) company and (iv) person filing Form ITR-7	Applicable
ITR-6	For Companies other than companies claiming exemption under section 11	Applicable
ITR-7	For persons including companies required to furnish return under sections 139(4A) or 139(4B) or 139(4C) or 139(4D) only	Applicable

Residential Status – Disclosure in ITR

- Care needs to be taken in filing the correct option
- In case of NR, country of tax residence and TIN to be disclosed
- In case of CIO / PIO additional information of number of stays
- What if you are a treaty NR?

(f)	**Residential Status in India (for individuals)** ***(Tick applicable option)***	**A. Resident**	☐ You were in India for 182 days or more during the previous year [section 6(1)(a)]
			☐ You were in India for 60 days or more during the previous year, and have been in India for 365 days or more within the 4 preceding years [section (6)(1)(c)] [where Explanation 1 is not applicable]
			☐ You are a citizen of India, who left India, for the purpose of employment, as a member of the crew of an Indian ship and were in India for 182 days or more during the previous year and 365 days or more within the preceding 4 years [Explanation 1(a) of section (6)(1)(c)]
			☐ You are a citizen of India or a person of Indian origin and have come on a visit to India during the previous year and were in India for a) 182 days or more during the previous year and 365 days or more within the preceding 4 years; or b) 120 days or more during the previous year and 365 days or more within the preceding 4 years if the total income, other than income from foreign sources, exceeds Rs. 15 lakh. [Explanation 1(b) of section (6)(1)(c)]
		B. Resident but not Ordinarily Resident	☐ You have been a non-resident in India in 9 out of 10 preceding years [section 6(6)(a)]
			☐ You have been in India for 729 days or less during the 7 preceding years [section 6(6)(a)]
			☐ You are a citizen of India or person of Indian origin, who comes on a visit to India, having total income, other than the income from foreign sources, exceeding Rs. 15 lakh and have been in India for 120 days or more but less than 182 days during the previous year [section 6(6)(c)]
			☐ You are a citizen of India having total income, other than the income from foreign sources, exceeding Rs. 15 lakh during the previous year and not liable to tax in any other country or territory by reason of your domicile or residence or any other criteria of similar nature [section 6(6)(d) rws 6(1A)]
		C. Non-resident	☐ **You were a non-resident during the previous year.** **(i) Please specify the jurisdiction(s) of residence during the previous year -**

S.No.	Jurisdiction of residence	Taxpayer Identification Number
1		
2		

(ii) In case you are a Citizen of India or a Person of Indian Origin (POI), please specify -

Total period of stay in India during the previous year (in days)	Total period of stay in India during the 4 preceding years (in days)

Schedule AL – Disclosure in ITR

- Schedule AL requires disclosure of all assets and liabilities if income exceeds Rs. 50 Lakhs.
- In case of residents this includes Indian and Foreign Assets including bank accounts
- In case of NR or RNOR only Indian assets to be disclosed

Schedule AL Assets and Liabilities at the end of the year (other than those included in Part A- BS) (applicable in a case where total income exceeds Rs.50 lakh)

DETAILS OF ASSETS AND LIABILITIES

A	Details of immovable assets				
Sl. No.	Description	Address	Pin code	Amount (cost) in Rs.	
(1)	(2)	(3)	(4)	(5)	
(i)					
(ii)					
B	Details of movable assets				
Sl. No.	Description			Amount (cost) in Rs.	
(1)	(2)			(3)	
(i)	Jewellery, bullion etc.				
(ii)	Archaeological collections, drawings, painting, sculpture or any work of art				
(iii)	Vehicles, yachts, boats and aircrafts				
(iv)	Financial assets			Amount (cost) in Rs.	
	(a) Bank (including all deposits)				
	(b) Shares and securities				
	(c) Insurance policies				
	(d) Loans and advances given				
	(e) Cash in hand				
C	Interest held in the assets of a firm or association of persons (AOP) as a partner or member thereof				
Sl. No.	Name and address of the firm(s)/ AOP(s)	PAN of the firm/ AOP		Assessee's investment in the firm/ AOP on cost basis	
(1)	(2)	(3)		(4)	
(i)					
(ii)					
D	Liabilities in relation to Assets at (A + B + C)				

Schedule AL - Assets and Liabilities at the end of the year

In case your total income exceeds Rs. 50 lakh, it is mandatory to disclose the details of movable and immovable assets etc. in this Schedule along with liabilities incurred in relation to such assets.

The assets required to be reported in this Schedule include immovable assets viz. land and building ; financial assets viz. bank deposits, shares and securities, insurance policies, loans and advances given, cash in hand,movable assets viz. jewellery, bullion, vehicles, yachts, boats, aircraft etc.

If you are a non-resident or 'resident but not ordinarily resident', only the details of assets located in India are to be mentioned.

Schedule EI – Disclosure in ITR

- Schedule EI requires disclosure of exempt income including income which is not taxable under DTAA

Schedule EI Details of Exempt Income (Income not to be included in Total Income or not chargeable to tax)

EXEMPT INCOME	1	Interest income			1	
	2	i	Gross Agricultural receipts (other than income to be excluded under rule 7A, 7B or 8 of I.T. Rules)	i		
		ii	Expenditure incurred on agriculture	ii		
		iii	Unabsorbed agricultural loss of previous eight assessment years	iii		
		iv	Net Agricultural income for the year (i – ii – iii) *(enter nil if loss)*		2	
		v	In case the net agricultural income for the year exceeds Rs.5 lakh, please furnish the following details (*Fill up details separately for each agricultural land*)			
		a	Name of district along with pin code in which agricultural land is located			
		b	Measurement of agricultural land in Acre			

		c	Whether the agricultural land is owned or held on lease *(drop down to be provided)*			
		d	Whether the agricultural land is irrigated or rain-fed *(drop down to be provided)*			
	3	Other exempt income (including exempt income of minor child)			3	
	4	Income not chargeable to tax as per DTAA				

Sl. No.	Amount of income	Nature of income	Country name & Code	Article of DTAA	Head of Income	Whether TRC obtained *(Y/N)*
I						
II						

	III	Total Income from DTAA not chargeable to tax	4	
	5	Pass through income not chargeable to tax *(Schedule PTI)*	5	
	6	Total (1+2+3+4+5+)	6	

Schedule FSI, TR and FA

Schedule	Description	Comments
Schedule FSI (Foreign Source Income)	Schedule FSI is applicable for the taxpayer who is resident in India. In this Schedule, one has to report the details of income, which is accruing or arising from any source outside India. Please note that such income should also be separately reported in the head-wise computation of total income. The relevant head of income under which such foreign source income has been reported should also be duly mentioned in the relevant column here.	Applies only in case of Residents
Schedule TR (Tax Reief)	In case of residents earning income from foreign sources on which taxes have been withheld in the foreign country, one may claim Foreign Tax Credit – see section 90 r.w. Rule 128. Form 67 needs to be filed before filing of the ITR and disclosure in respect of foreign income earned and taxes deducted in foreign country which are claimed as relief against Indian income-tax payable is required to be disclosed in this schedule	Applies only in case of Residents
Schedule FA (Foreign Assets)		Applies only in case of Residents

Schedule FSI, TR and FA

Schedule	Description	Comments
Schedule FA (Foreign Assets)	If you are a resident in India, you are required to furnish details of any foreign asset etc. in this Schedule. In tables A1 to G, please furnish the details of foreign assets or accounts of the following nature, held at any time during the relevant accounting period:- Table A1 – Foreign depository accounts Table A2 - Foreign custodian accounts Table A3 - Foreign equity and debt interest Table A4 - Foreign cash value insurance contract or annuity contract Table B - Financial interest in any entity outside India Table C - Any immovable property outside India Table D - Any other capital assets outside India. Table E – Any other account located outside India in which you are a signing authority (which is not reported in tables A1 to D) Table F – Trust created outside India in which you are a trustee, a beneficiary or settlor Table G – Any other income derived from any foreign source (which is not reported in tables A1 to F)	Applies only in case of Residents. This Schedule need not be filled up if you are 'not ordinarily resident' or a 'non-resident'.

Section 195

- The provisions for deduction of TDS for payment made to NRs is contained in Section 195 of the Act
- Section 195(1)
  - **Any person** responsible for paying to a non-resident or to a foreign company
  - any interest (not being interest u/s 194LB or u/s 194LC or section 194LD) or
  - **any other sum chargeable** under the provisions of this Act (excludes Salary)
  - shall, at the time of credit or payment, whichever is earlier,
  - deduct income-tax thereon at the **rates in force**

Section 195

- **Any person**
  - Wide scope to cover both R and NR
- **any other sum chargeable**
  - SC – GE India Technology Centre Pvt. Ltd (327 ITR 456) held that obligation of WHT arises only where there is sum chargeable under the Act.
  - However, where payment has an embedded element of income, s. 195 provisions come into play. While TDS applies on sums chargeable to tax in practice difficult to always bifurcate.
- **at the rates in force**
  - Section 2(37A)(iii) defines 'rates in force' as: Rates as specified in the Finance Act of the relevant year; or Rates as per DTAA entered into by the Government in the Treaty under section 90 or 90A. Given this, the tax shall be deducted at the rates provided in the FA or at the rate provided in DTAA, whichever is beneficial

Section 195

- **Interplay of S. 206AA r.w. Section 195(1) r.w S. 90(2)**
  - S. 206AA requires WHT at higher rate if the payee fails to furnish PAN
  - Can S. 206AA override WHT rates agreed under DTAA thereby negating effect of S. 90(2)
  - Courts have held that TDS on payments made to NRs 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
    - Serum Institute of India Ltd [2015] 56 taxmann.com 1 (Pune - Trib.)
    - Jyoti Ltd. [2021] 127 taxmann.com 596 (Ahmedabad - Trib.)
    - Edgeverse Systems Ltd [2020] 121 taxmann.com 38 (Bangalore - Trib.)
    - DaniscoIndia (P.) Ltd. [2018] 90 taxmann.com 295 (Delhi HC)

Section 195

- **Amendment to S. 206AA r.w Rule 37BC**
  - provisions of section 206AA shall not apply in respect of payments in the nature of interest, royalty, fees for technical services dividend and payments on transfer of any capital asset, if the deductee furnishes the details and the documents specified in Rule 37BC
- **Section 195(2) / 195(7)**
  - Payer may make application to AO u/s 195(2) r.w. Rule 29BA in Form 15E to determine the portion of payment on which deduction of TDS is required u/s 195(1)
- **Section 195(3) / Section 197(1)**
  - Payee may make application to AO u/s 195(3) r.w. Rule 29B in Form 15C / Form 15D for receiving income without deduction of TDS
  - Payee may make application to AO u/s 197(1) r.w Rule 28 in Form 13 for lower deduction tax certification

Section 195

- **Section 195(6) r.w. Rule 37BB**
  - Rule 37BB contains list of payments for which Form 15CA/15CB are not required for e.g. imports of goods

Requirement to furnish Form 15CA (and Form 15CB in some cases) in respect of remittance to NR

- Parts of Form 15CA Part A – Section A of Form 15CA is filled in by the remitter when the payment or the total sum of the payment to NR recipient during a particular Financial Year is Rs. 5 Lakhs or less.
- Part B – Section B of Form 15CA is in the role when such payments are more than Rs. 5 Lakhs. Information is entered after acquiring a certificate from Assessing Officer (valid under section 197) or the order from Assessing Officer under sub-section 195(2) or 195(3).
- Part C – If such payments made during a particular FY exceed Rs. 5 Lakhs, the related information has to be entered in Section C of Form 15CA along with CA certificate in Form 15CB
- Part D – Information in respect of payments made by the remitter during a particular year which is not taxable under domestic law is to be entered in Section D of Form 15CA.

Thank You !

Questions, Comments and Feedback is Welcome.

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