

# **Introduction to International Tax viz. Section 195**

---

-CA Niraj B Chheda

# Scope of Presentation

Sr. No.	Particulars
1	Glossary
2	Basic Sections of ITA
3	Residential Status as per ITA
4	Scope of Total Income
5	Double Taxation Relief
6	Basic Structure of DTAA
7	Tie Breaker Test
8	Business Connection

## Scope of Presentation

Sr. No.	Particulars
9	Permanent Establishment (Article 5)
10	Business Profits (Article 7)
11	Shipping Activities (Article 8)
12	Interest Income (Article 11)
13	Royalties, Fees for Technical Services (Article 12, 12A)
14	Capital Gains (Article 13)
15	Other Income (Article 21)

# Scope of Presentation

Sr. No.	Particulars
16	<u>Elimination of Double Taxation</u>
	- Methods for claiming Foreign Tax Credit
	- Domestic Law
17	Section 195
18	Failure to furnish PAN
19	Grossing up
20	Practical issues
21	Form 15 CA / CB

# Glossary

Abbreviations	Full Forms
ABOI	Active Business Outside India
AO	Assessing Officer
BEPS	Base Erosion and Profit Shifting
CBDT	Central Board of Direct Taxes
DAPE	Dependent Agent Permanent Establishment
DTAA	Double Tax Avoidance Agreement
FEMA	Foreign Exchange Management Act, 1999
FTC	Foreign Tax Credit
FTS	Fees for Technical Services
FY	Financial Year

# Glossary

Abbreviations	Full Forms
GAAR	General Anti Avoidance Rule
ITA	Income Tax Act, 1961
MAP	Mutual Agreement Procedure
NR	Non-Resident
NRE	Non-Resident External rupee account
OECD	Organisation for Economic Co-operation and Development
PE	Permanent Establishment
POEM	Place of Effective Management
Sch	Schedule
TDS	Tax Deducted at Source
TRC	Tax Residency Certificate

# Basic Sections of the Income Tax Act, 1961

## Section 4

- Charging Section

## Section 5

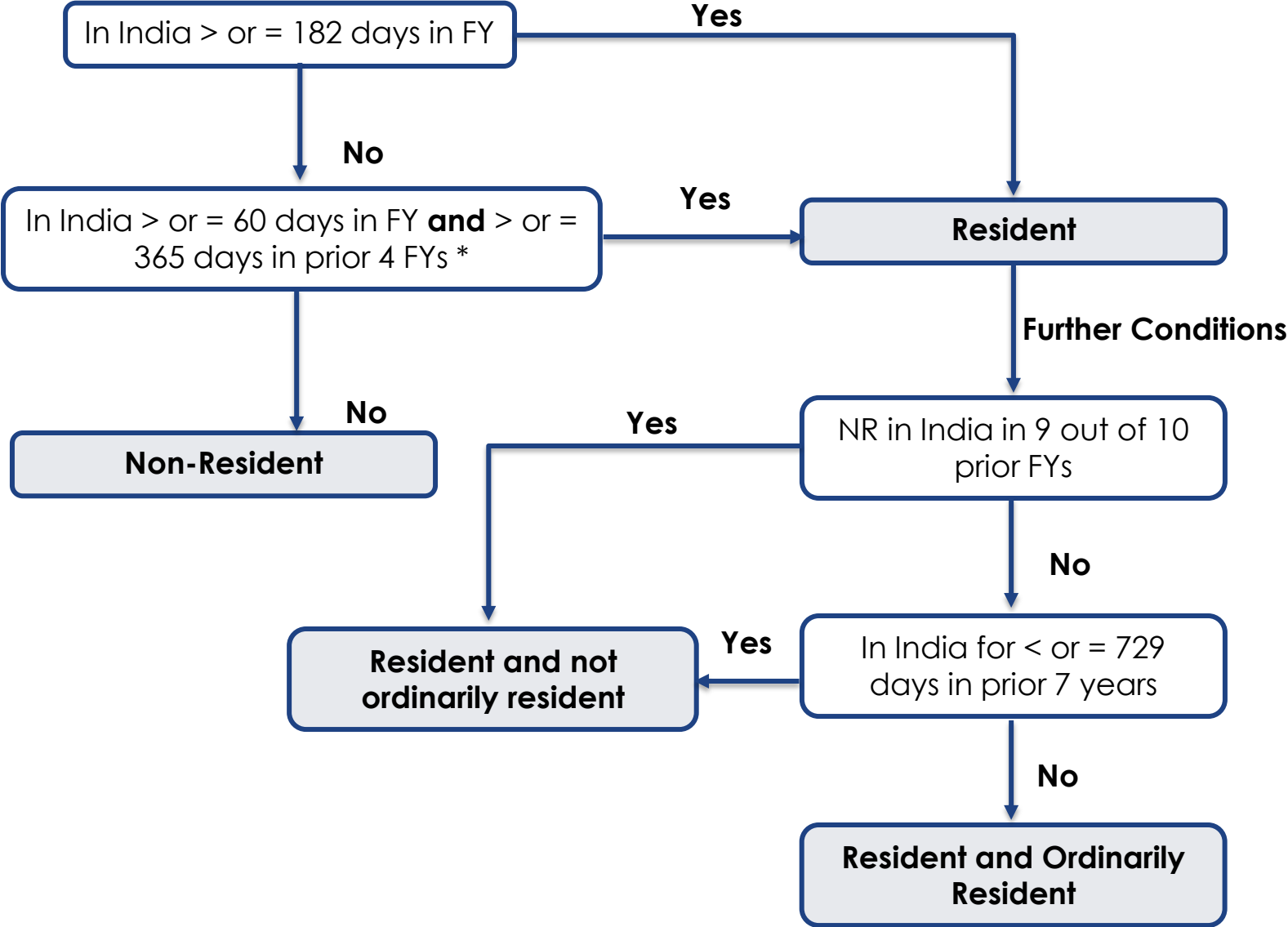
- Scope of Total Income

## Section 6

- Residential Status

## Section 9

- Income deemed to accrue or arise in India  
(covered along with DTAA)





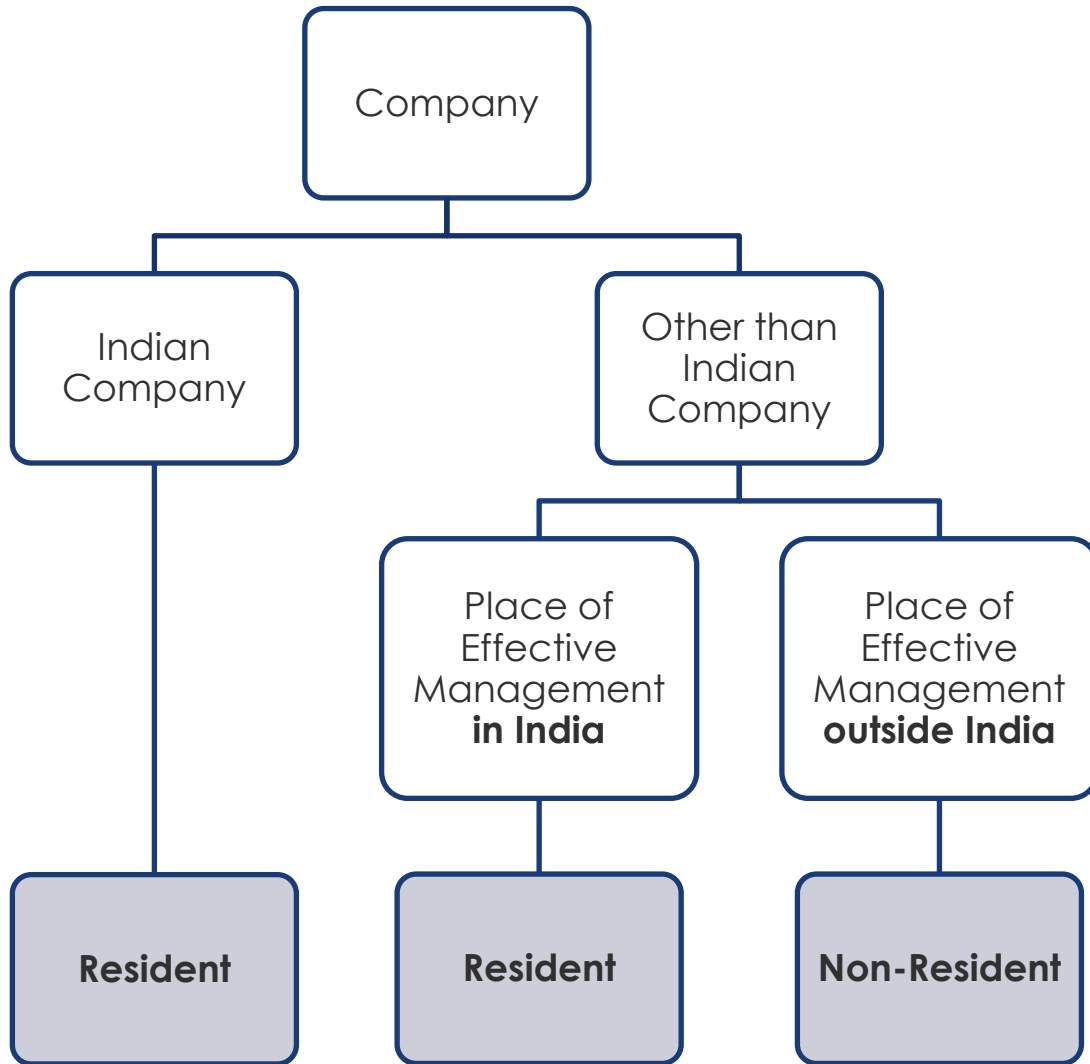
\* For the following individuals, this condition shall not apply to determine their residential status:

Indian citizen who leaves India during the previous year for employment outside India (or as a member of the crew of an Indian ship – Rule 126)

Indian citizen or a person of Indian origin who, being outside India, comes on a visit to India in any previous year

Person of Indian origin is a person who himself or any of his parents or any of his grandparents was born in undivided India before 15th August 1947.

- ✓ Employment includes self-employment as well as business.
- ✓ In computing the period of 182 days, the day of entry into India and the day of exit from India both shall be included.

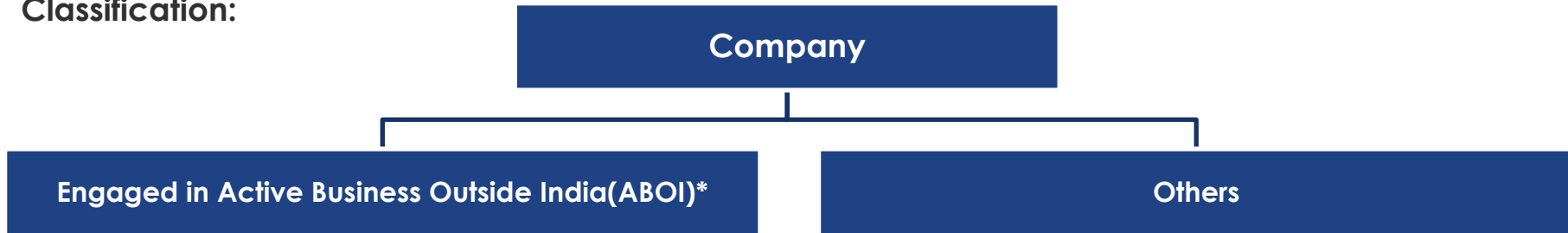


## Place of effective management

- 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.
- Applicable only if the turnover or gross receipts of the company exceed Rs. 50 Crores. – **Circular No. 8 of 2017, dated 23-02-2017.**
- **Circular No. 6/2017, dated 24-01-2017:** Guiding Principles for determination of Place of Effective Management of a Company. (Covered in next slide)

## Guiding Principles for POEM

- **Classification:**



- **ABOI if (Average of the data of the preceding year and two years prior)**

Passive Income	<= 50%
Total Assets in India	<50%
Total no. of employees situated in India or Indian Resident	<50%
Payroll Expenses of above employees	<50%

- **Passive Income:-**

Royalty, Dividend, Capital Gains, Interest, Rental Income, Income **where both** purchase **and** sale are with associated enterprises.

*\*Relaxations provided for applicability of POEM*

### POEM

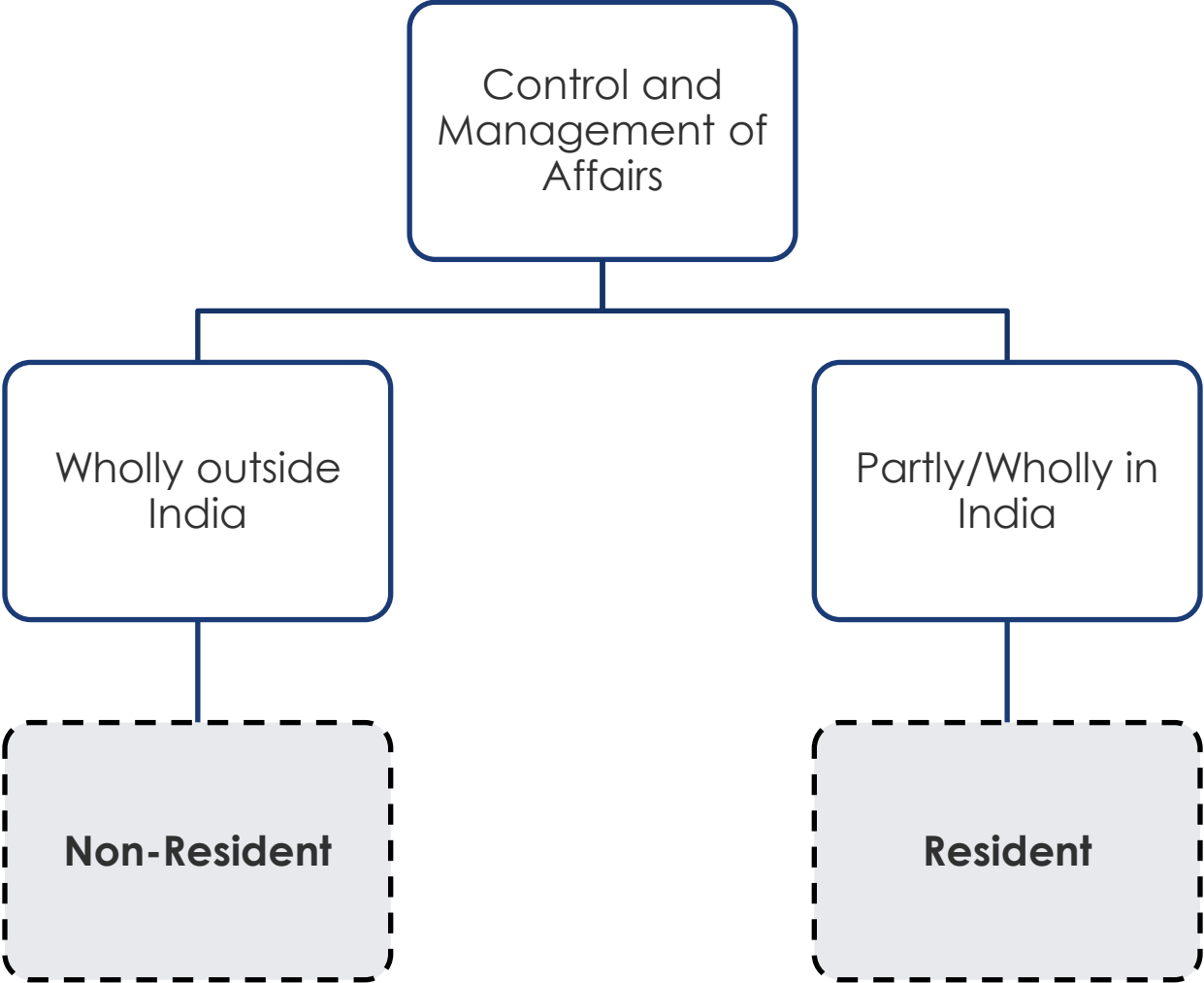
```
graph TD; POEM[POEM] --> ABOI[ABOI]; POEM --> OTHERS[OTHERS];
```

#### ABOI

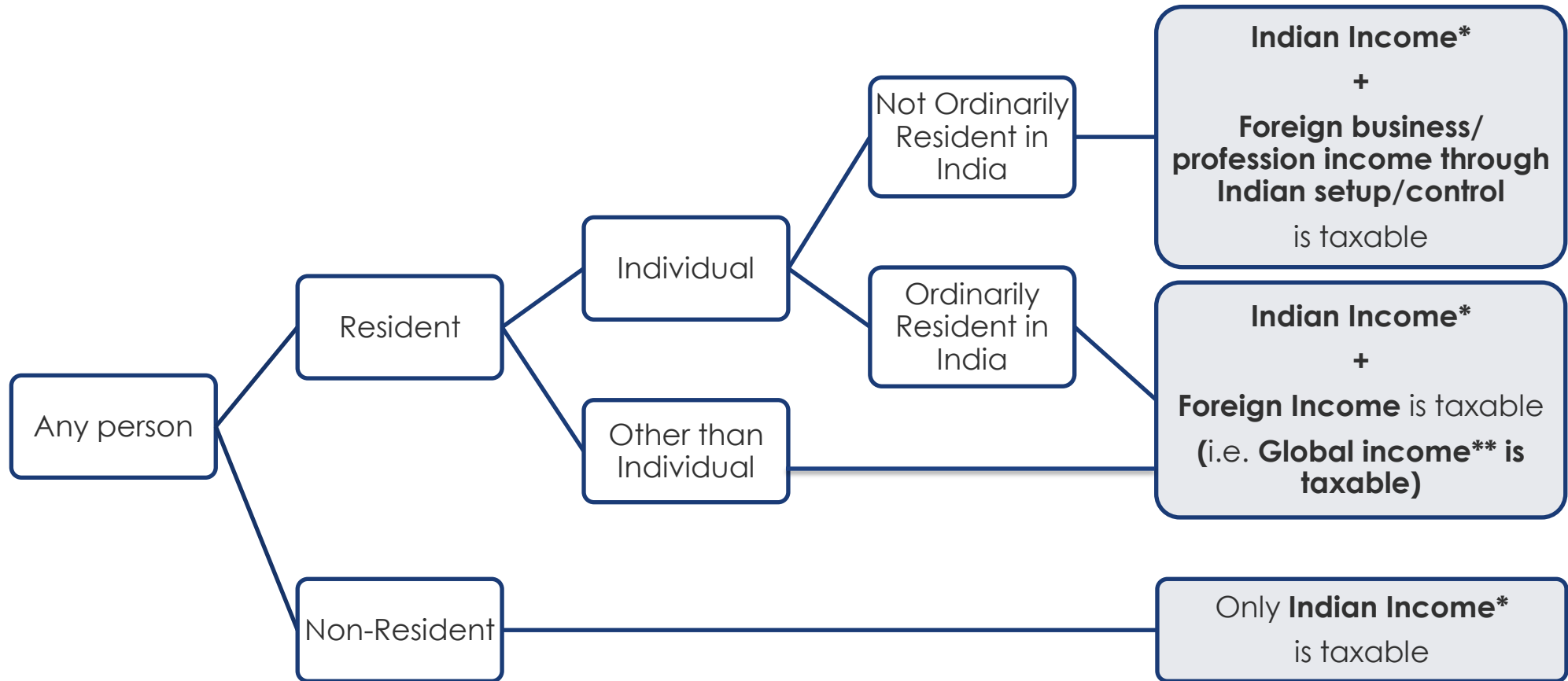
- Majority Board meetings held outside India => POEM o/s India
- If BOD powers exercised by any Other Indian Resident => POEM in India
- Merely following global policies in field of payroll, Accounting, HR, Routine Banking Operational Procedures not constitute BOD to be standing aside.
- Regional Head Quarter for above functions – Does not constitute POEM  
*(CBDT Cir No. 25/2017 dated 23.10.2017)*

#### OTHERS

- Identify person making key management and commercial decisions. POEM place where such decisions are made.
- Delegation of Authority to senior management/Shareholders/any other person
- Head Office
- Shareholders decision affecting existence of company/Shareholders rights
- Operational decisions not relevant
- Secondary factors



## Section 5 – Scope of Total Income



Any foreign income, which is first received in India, will be taxable in India irrespective of the residential mentioned above - **Circular 13/2017 – Seafarer receiving salary in NRE account**

\* Indian Income means any income accrued or received or deemed to be accrued or received in India.

\*\* Along with the global income, disclosure for all Foreign Assets and Incomes is required.

## Section 90 – Double Taxation Relief

**Agreement with the Government of any country or specified territory outside India**

Provisions of Income Tax

OR

DTAA

Whichever is beneficial

**Exceptions:** GAAR

**Prerequisites:** TRC + Form 10F

# Basic Structure of DTAA

	Groups	Articles	Heading	Comment
1	Scope Provisions	1	Scope of the Convention	The provisions contained in these Articles determine scope of persons, taxes, and time period covered by a treaty.
		2	Taxes Covered	
		30	Entry into Force	
		31	Termination	
2	Definition Provisions	3	General Definitions	The terms dividend, interest, royalty, fees for technical services etc., are separately defined in the respective Article
		<b>4</b>	<b>Residence</b>	
		<b>5</b>	<b>Permanent Establishment</b>	
3	Substantive Provisions	6	Income from Immovable Property	These Articles are applicable to particular categories of incomes, capital gains or capital and allocate tax jurisdictions between the two Contracting States.
		<b>7</b>	<b>Business Profits</b>	
		<b>8</b>	<b>Shipping, Inland Waterways, Transport and Air Transport</b>	
		9	Associated Enterprises	
		10	Dividends	
		<b>11</b>	<b>Interest</b>	
		<b>12</b>	<b>Royalties</b>	



## Basic Structure of DTAA

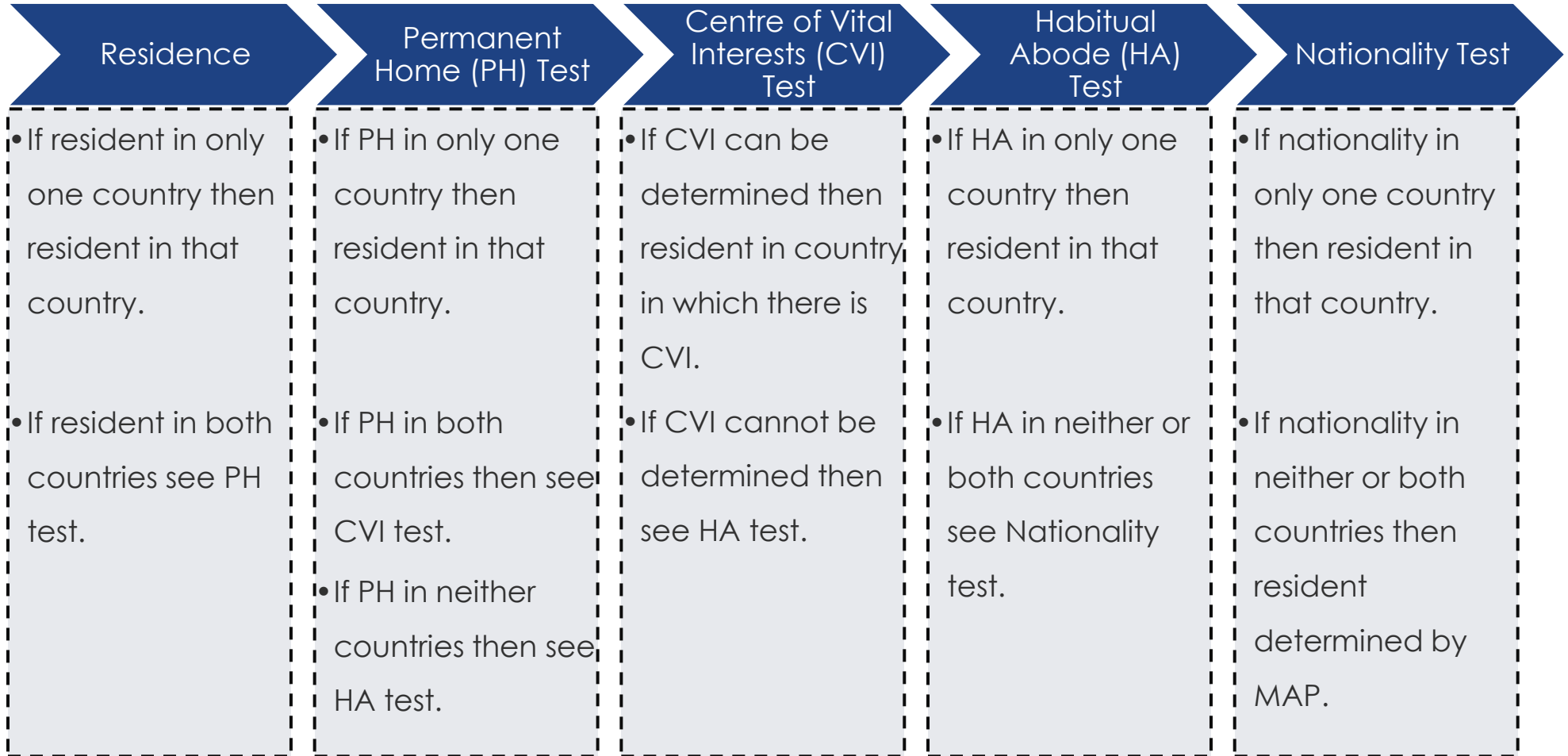
	Groups	Articles	Heading	Comment
		<b>12A</b>	<b>Fees for technical services</b>	
		<b>13</b>	<b>Capital Gains</b>	
		14	Independent Personal Services	
		15	Income from employment/ Dependent Personal Services	
		16	Directors' Fees and Remuneration for Top Level Managerial Officials	
		17	Income earned by Entertainers and Athletes	
		18	Pension and Social Security Payments	
		19	Remuneration and Pensions in respect of Government Services	
		20	Payments Received by Students and Apprentices	
		<b>21</b>	<b>Other Income</b>	

## Basic Structure of DTAA

	Groups	Articles	Heading	Comment
4	Provisions for elimination of double taxation	23	<b>Method of elimination of double taxation</b>	Both these Articles are very important as they deal with the central objective of the DTAA i.e. avoidance or elimination of double taxation.
		25	Mutual Agreement Procedure	
5	Anti-Avoidance Provisions	9	Associated Enterprises	Entitlement to benefits inserted corresponding to BEPS Action Plan 6: Preventing Treaty Abuse. These Articles are gaining importance day by day, and used widely by the tax authorities to prevent treaty shopping or abuse of treaty benefits.
		26	Exchange of information	
		29	Entitlement to benefits	
6	Miscellaneous Provisions	24	Non-Discrimination	The Article on Non-Discrimination is used to ensure justice and fair tax treatment to the assessee one of the Contracting State by the other Contracting States. Article 28 on Diplomats ensures that privileges of this category of persons remain unaffected.
		27	Assistance in collection of taxes	
		28	Diplomats	

# Article 4 – Residential Status – Tie Breaker Test

## Individuals



## Article 4 – Residential Status – Tie Breaker Test

Name of Test	Meaning
Permanent Home	Dwelling place available at all times continuously including place taken on rent for a prolonged period of time.
Centre of Vital Interest	Family, social relations , occupation, place of business, properties etc.
Habitual Abode	Frequency, duration, regularity of stays

### **Other than Individuals**

- If a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident of the State in which its POEM is situated.
- If POEM cannot be determined then residence determined by MAP.

# Business Income

## Business Connection (ITA Section 9)

- Indirect Transfer
- Significant Economic Presence

## Permanent Establishment (DTAA – Article 5)

- Fixed place
- Service
- Installation/Construction
- Dependent Agent

➤ **Extract of Section:**

- Any income accruing or arising, whether directly or indirectly, through or from any business connection in India shall be deemed to accrue or arise in India.
- In the case of a business of which all the operations are not carried out in India, only such part of the income as is reasonably attributable to the operations carried out in India shall be deemed to accrue or arise in India.

➤ **Certain Exceptions:**

- Income through or from operations which are confined to the purchase of goods in India for the purpose of export.
- Income through or from activities which are confined to the collection of news and views in India for transmission out of India if the person is engaged in the business of running a news agency or of publishing newspapers, magazines or journals.

# Business Connection

## As per various Judicial Rulings and Section 9 of ITA

Business Connection may arise in 3 situations:

**Existence of some organization in India**  
(eg. branch, factory, subsidiary etc.)

OR

**Agency in India**

OR

**Relationship in India**  
(eg. close financial association, grant of a continuing license)

## ➤ Dependent Agent:

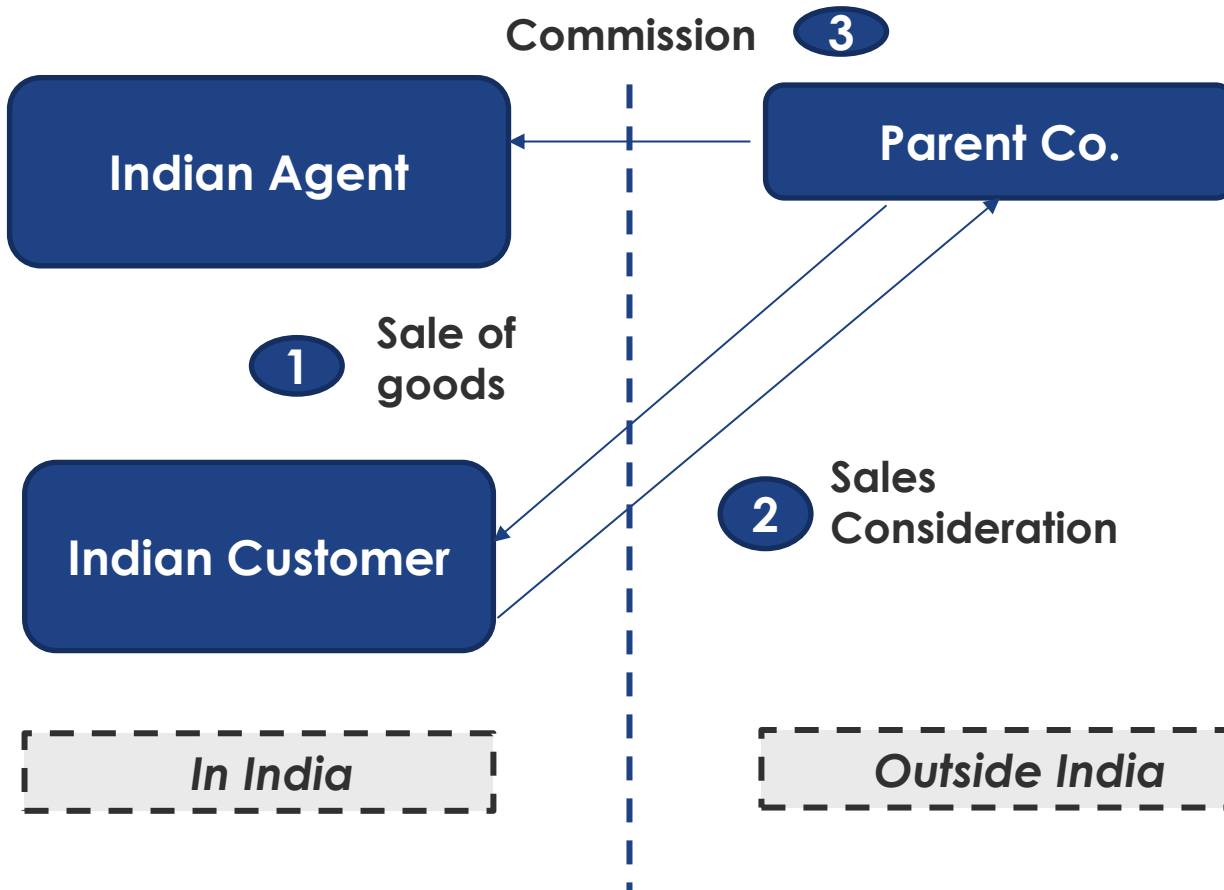
Business connection shall include any business activity carried out through a person who, acting on behalf of the non-resident—

1. has and habitually exercises in India, an authority to conclude contracts on behalf of the non-resident or habitually concludes contracts or habitually plays the principal role leading to conclusion of contracts by that non-resident and the contracts are—
  - a. in the name of the non-resident; or
  - b. for the transfer of the ownership of, or for the granting of the right to use, property owned by that non-resident or that non-resident has the right to use; or
  - c. for the provision of services by the non-resident; or
2. has no such authority, but habitually maintains in India a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the non-resident; or
3. habitually secures orders in India, mainly or wholly for the non-resident or for that non-resident and other non-residents controlling, controlled by, or subject to the same common control, as that non-resident.

## Exception:

Any business activity carried out through a broker, general commission agent or any other agent having an independent status who is acting in the ordinary course of his business i.e. who is not working mainly or wholly on behalf of the principal non-resident.

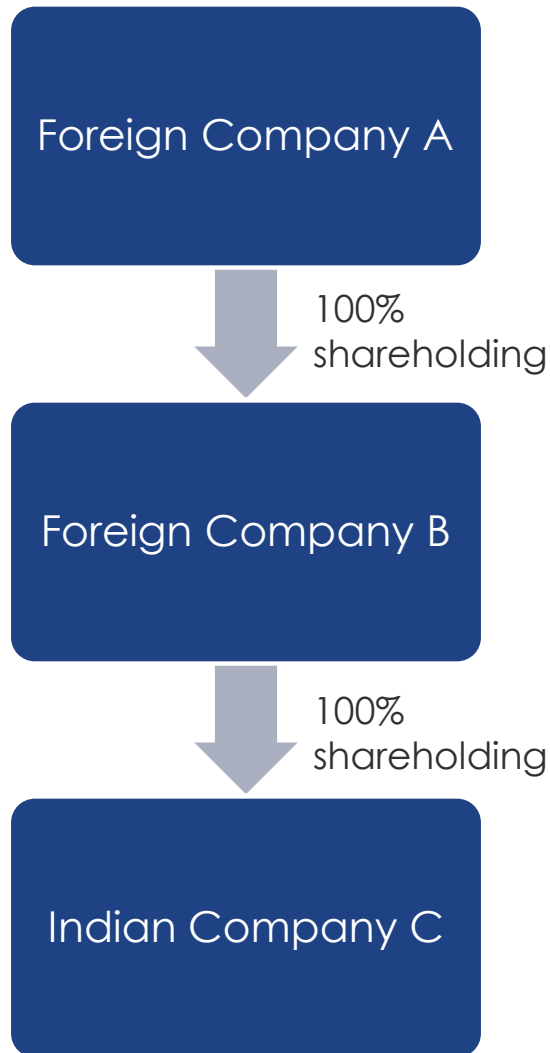




## Indian Taxation

- Aforementioned sale of goods by Parent Co. is taxable in India only when there exists:
  - ✓ Business Connection in India
  - OR
  - ✓ Dependent Agent PE (DAPE) in India

Taxation in India would be only to the extent of the profits attributable to business connection or DAPE in India, as the case maybe.



## Case I

Foreign Company A sells shares of Indian Company C

## Case II

Foreign Company A sells shares of Foreign Company B

When shares of foreign company or interest in any entity incorporated or registered outside India is transferred and if such shares or interest **derives its substantial value from assets located in India**, then such transfer is referred to as 'Indirect Transfer'.

In case of such indirect transfer, the income shall be deemed to accrue or arise in India and would be taxable for all including not ordinarily residents as well as non-residents.

### Conditions for Substantial Value in assets:

1. Value of such assets exceeds Rs. 10 Crores in India and;
2. It represents at least 50% of the total assets owned by the foreign entity.

### Small Shareholder Exception:

- No management / control in relation to foreign company or entity  
AND
- Voting Power / Share in Capital / Interest in entity does not exceed 5%  
during 12 months preceding date of transfer

# Article 5 - Permanent Establishment

## 1. Fixed Place PE:

- As per Article 5(1), PE means a fixed place through which business is wholly or partly carried on.
- **Essential conditions:**
  - Existence of a fixed place of business - covers any premises, facilities or installations etc. at the disposal of the non-resident entity through which its business is carried on in India (i.e. disposal test).
  - Distinct place (i.e. location test) with a certain degree of permanence and continuity (i.e. permanence test).

# Article 5 - Permanent Establishment

## 1. Fixed Place PE:

- **Certain Specific Inclusions:**

- A place of management
- Branch
- Office
- Factory
- Workshop

- **Specific Exclusions:**

- The overall activity of the fixed place of business if it is of a preparatory or auxiliary character.
- Examples: use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise

## 2. Service PE:

- Furnishing of services in India including consultancy services through employees or other personnel
- Such activities continue for more than xx days / months within any 12-month period.

## Article 5 - Permanent Establishment

### 3. Dependent Agent PE:

The definition of DAPE in Income Tax Act is similar to that in DTAA's and shall be constituted in India where a person **other than an Independent agent**:

- Habitually exercises an authority to conclude contracts on behalf of the Parent Co.
- Habitually maintains stock of goods from which he delivers goods on behalf of the Parent Co
- Habitually secures orders for the Parent Co.

An agent carrying on business in its ordinary course of business would be considered as an independent agent and would not constitute a PE unless his activities are devoted wholly or almost wholly on behalf of the enterprise.

### 4. Construction / Installation PE

## Article 5 - Permanent Establishment

### Extract of India Germany DTAA

1. For the purposes of this Agreement, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. ...

3. ...

4. ...

5. Notwithstanding the provisions of paragraphs 1 and 2, where a person other than an agent of an independent status to whom paragraph 6 applies is acting in a Contracting State on behalf of an enterprise of the other Contracting State that **enterprise shall be deemed to have a permanent establishment** in the first mentioned State, if this person,—

(a) has and habitually exercises in that State an authority to conclude contracts on behalf of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise ;

(b) has no such authority, but habitually maintains in the first mentioned State a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise ; or

(c) habitually **secures orders** in the first mentioned State, wholly or almost wholly for the enterprise itself or for the enterprise and other enterprises controlling, controlled by, or subject to the same common control, as that enterprise.

(continued...)

## Article 5 - Permanent Establishment

### Extract of India Germany DTAA [Article 5(6)]

6. An **enterprise shall not be deemed to have a permanent establishment** in a Contracting State merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business **and in their commercial and financial relations** to the enterprise no conditions are agreed or imposed which differ from those usually agreed between independent persons.

7. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.



## Article 5 - Permanent Establishment

### Extract of India Spain DTAA – Article 5(4)

1. For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.
2. ...
3. ...
4. Notwithstanding the provisions of paragraphs 1 and 2, where a person - other than an agent of an independent status to whom paragraph 5 applies - is acting in a Contracting State on behalf of **an enterprise of the other Contracting State that enterprise shall be deemed to have a permanent establishment in the first-mentioned State**, if, —
  - (a) he has and habitually exercises in that State an authority to **conclude contracts** on behalf of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise;
  - (b) he has no such authority, but habitually maintains in the first-mentioned State a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise.

## Article 7 – Business Profits

Business profits taxable only in case of a PE.

In such case, profits which are attributable to PE are generally taxable

### Case Laws

Payment of an arm's length price by the non-resident to the PE extinguishes any further attribution of profits - **Morgan Stanley [2007 162 taxmann 165 (SC)]**

## Article 8 – Shipping Activities

Para	Convention
1	Profits derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic shall be taxable only in that state.
2	<p><u>Includes:</u></p> <ul style="list-style-type: none"><li>• participation in a pool</li><li>• joint business</li><li>• international operating agency engaged in the operation of ships or aircraft.</li></ul>
3	Interest on funds connected with the operation of ships or aircraft in international traffic shall be regarded as profits derived from the operation of such ships or aircraft, and the provisions of Article 11 shall not apply in relation to such interest. (Subject to Treaty Language)
4	<p>Profits mean profits derived from the transportation by sea or air of passengers, mail, livestock or goods carried on by the owners or lessees or charterers of the ships or aircraft, including profits from:</p> <ol style="list-style-type: none"><li>a) the sale of tickets for such transportation on behalf of other enterprises;</li><li>b) the incidental lease of ships or aircraft used in such transportation;</li><li>c) the use, maintenance or rental of containers (including trailers and related equipment for the transport of containers) in connection with such transportation; and</li><li>d) any other activity directly connected with such transportation.</li></ol>

# Article 11 - Interest

## **Domestic Law**

Interest income is deemed to accrue or arise in India if 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

# Article 11 - Interest

## As per DTAA

Para	Convention
1	Interest income may be taxed in the state of residence.
2	Interest income may also be taxed in the source state.  The tax rate shall generally be - 10% /15%.
3	<b>Interest means:</b> <ul style="list-style-type: none"><li>• Debt claims of every kind</li><li>• Whether or not secured by mortgage</li><li>• Whether or not carrying a right to participate in debtor's profile</li></ul> <p><u>Includes:</u></p> <ul style="list-style-type: none"><li>• Income from government securities, bonds, debentures</li><li>• Premiums and prices attached to such bonds , debentures etc. (under OECD)</li></ul> <p><u>Excludes:</u></p> <p>Penalty charges for late payment</p>

# Article 11 - Interest

Section 2(28A) of the Income Tax Act defines interest as 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 utilised.

Type of Interest	Tax Rate
Interest received from Government or an Indian concern on monies borrowed or debt incurred by Government or the Indian concern in foreign currency <b>Exceptions:</b> 1. Interest u/s 10(47) 2. Interest u/s 194LC	20% + Surcharge + Cess
Interest u/s 10(47), 194LC, 194LD, 194LBA	5% + Surcharge + Cess
Any other interest	Slab Rates + Surcharge + Cess

# Article 11 - Interest

## Extract of India Mauritius DTAA – Article 11(2)

1. Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.
2. However, subject to provisions of paragraphs 3, 3A and 4 of this Article, such interest may also be taxed in the Contracting State in which it arises, and according to the laws of that State, but if the beneficial owner of the interest is a resident of the other Contracting State, the tax so charged shall not exceed **7.5 per cent** of the gross amount of the interest;
3. Interest arising in a Contracting State shall be exempt from tax in that State provided it is derived and beneficially owned by :
  - (a) the Government or a local authority of the other Contracting State ;
  - (b) any agency or entity created or organised by the Government of the other Contracting State ; or
  - (c) [ \*\*\* ]
- 3A. Interest arising in a Contracting State shall be exempt from tax in that State provided it is derived and beneficially owned by any bank resident of the other Contracting State carrying on bona fide banking business. However, this exemption shall apply only if such interest arises from debt-claims existing on or before 31st March, 2017.

## Article 12/12A – Royalties/ Fees for Technical Services

### Royalty / FTS is deemed to accrue or arise in India if it is payable by:

- Government
- Residents except when payment is for business / profession / source\* outside India
- Non-residents where payment relates to business / profession / source\* in India

\*Source means source where activities / business is carried out.

Royalty / FTS may be charged in any or both states as per DTAA.



## Article 12/12A – Royalties/ Fees for Technical Services

Royalty means consideration (including lump sum consideration but excludes income chargeable under the head 'Capital Gains') for:

1. Use of or Transfer of all or any rights( including granting of any license) in :
  - patent, invention, model, design, secret formula or process or trademark or similar property.
  - copyright, literary, artistic or scientific work including films or video tapes but excludes consideration for sale, distribution and exhibition of cinematographic films.
2. Imparting of any Information concerning:
  - working of or use of patent, model, design, secret formula, process, trademark or similar property.
  - technical, industrial, commercial or scientific knowledge, experience or skill.
3. Use or right to use:
  - industrial, commercial or scientific equipment (excluding those covered under Section 44BB).
  - patent, invention, model, design, secret formula, process, trademark or similar property.
4. Rendering of any services in connection with activities constituting Royalty.

## Article 12/12A – Royalties/ Fees for Technical Services

FTS means any consideration (includes lump sum consideration) for rendering any:

- Managerial
- Technical
- Consultancy Services

### **Includes**

- Provision of services of technical / other personnel

### **Excludes:**

- Construction; Assembly; Mining;
- Income chargeable as 'Salary'

**Human Intervention ?**

## Article 12/12A – Royalties/ Fees for Technical Services

Type of Interest	Tax Rate u/s 115A
Received from government in pursuance of an agreement made with the government	10%
Received from Indian concern in pursuance of an agreement with an Indian concern which: <ul style="list-style-type: none"><li>• is approved by the government</li><li>• relates to Industrial Policy of government</li></ul>	10%

- No deduction shall be allowed u/s 28 to 44C and section 57 as well as under Chapter VI-A.
- Income u/s 44DA is not eligible for the above rates.
- Rates under DTAA are 10% / 15%.

**Absence of FTS Article in the Treaty ??**

# Article 12/12A – Royalties/ Fees for Technical Services

## Concept of Make Available

- Technology is considered to be made available when the service recipient is enabled to apply the technology contained therein. **[Bharat Petroleum Corporation vs. JDIT(IT) (2007) 14 SOT 307 (Mum)]**
- The service recipient should be able to make use of the technical knowledge, skill etc. all by himself without recourse to the performer of the services in future.
- The technical knowledge, skills etc. must remain with the service recipient even after the rendering of the service has come to an end.
  
- **Example:**
  - India Singapore DTAA
  - India UK DTAA
  - India USA DTAA

# Article 13 – Capital Gains

The term “Capital Gains” is neither defined under the Act nor under the treaty. However, profits or gains arising from transfer of capital asset is regarded as Capital Gains.

Capital Asset means property of any kind whether or not connected with business or profession except specific exclusions.

Para	Convention (under UN and OECD model illustratively)
1	Gains from alienation of immovable property – may be taxed in the state where the property is situated
2	Where Movable Property: <ul style="list-style-type: none"><li>• forms part of business property of a PE or</li><li>• pertains to a fixed base</li></ul> AND such property is alienated for the purpose of performing independent personal services  Then gains from such alienation may be taxed in the state where such PE or Fixed Base is situated.
3	Gains from alienation of: <ul style="list-style-type: none"><li>• Ships in international traffic</li><li>• Aircrafts in international traffic</li><li>• Any movable property pertaining to operations of such ships and aircraft</li></ul> may be taxed in the state where such alienator is a resident.
4	Any other capital gains may be taxed in the state where such alienator is a resident.

# Article 13 – Capital Gains

## **Extract of India Singapore DTAA**

1. Gains derived by a resident of a Contracting State from the alienation of immovable property, referred to in Article 6, and situated in the other Contracting State may be taxed in that other State.
2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or together with the whole enterprise) or of such fixed base, may be taxed in that other State.
3. Gains from the alienation of ships or aircraft operated in international traffic or movable property pertaining to the operation of such ships or aircraft shall be taxable only in the Contracting State of which the alienator is a resident. (continued...)

## Article 13 – Capital Gains

### Extract of India Singapore DTAA – Article 13 (4A,4B,4C)

4. [omitted]

**4A.** Gains from the alienation of shares **acquired before 1 April 2017** in a company which is a resident of a Contracting State shall be taxable only in the Contracting State in which the alienator is a resident.

**4B.** Gains from the alienation of shares **acquired on or after 1 April 2017** in a company which is a resident of a Contracting State may be taxed in that State.

**4C.** However, the gains referred to in paragraph 4B of this Article which arise during the **period beginning on 1 April 2017 and ending on 31 March 2019 may be taxed** in the State of which the company whose shares are being alienated is a resident at a tax rate that shall **not exceed 50% of the tax rate** applicable on such gains in that State.

5. Gains from the alienation of any property other than that referred to in paragraphs 1, 2, 3, 4A and 4B of this Article shall be taxable only in the Contracting State of which the alienator is a resident.

## Article 13 – Capital Gains

### **Extract of India Netherlands DTAA**

1. Gains derived by a resident of one of the States from the alienation of immovable property referred to in Article 6 and situated in the other State may be taxed in that other State.
2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of one of the States has in the other State or of movable property pertaining to a fixed base available to a resident of one of the States in the other State for the purpose of performing independent personal services, including such gains from the alienation of such permanent establishment (alone or with the whole enterprise) or of such fixed base, may be taxed in that other State.
3. Gains from the alienation of ships or aircraft operated in international traffic or movable property pertaining to the operation of such ships or aircraft, shall be taxable only in the State in which the place of effective management of the enterprise is situated. For the purposes of this paragraph, the provisions of paragraph 3 of Article 8A shall apply. (continued...)



## Article 13 – Capital Gains

### Extract of India Netherlands DTAA – Article 13(5)

4. Gains derived by a resident of one of the States from the alienation of shares (other than shares quoted on an approved stock exchange) forming part of a substantial interest in the capital stock of a company which is a resident of the other State, the value of which shares is derived principally from immovable property situated in that other State other than property in which the business of the company was carried on, may be taxed in that other State. A substantial interest exists when the resident owns 25 per cent or more of the shares of the capital stock of a company.

5. Gains from the alienation of any property other than that referred to in paragraphs 1, 2, 3 and 4 shall be taxable only in the State of which the alienator is a resident. However, gains from the alienation of shares issued by a company resident in the other State which **shares form part of at least a 10 per cent interest in the capital stock** of that company, may be taxed in that other State if the alienation takes place to a resident of that other State. However, such gains shall remain **taxable** only in the State of which the alienator is a resident if such **gains are realised in the course of a corporate organisation, reorganization, amalgamation, division or similar transaction, and the buyer or the seller owns at least 10 per cent of the capital of the other.**

## Article 13 – Capital Gains

### Extract of India Switzerland DTAA – Article 13(4)

1. Gains derived by a resident of a Contracting State from the alienation of immovable property referred to in Article 6 and situated in the other Contracting State may be taxed in that other State.
2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State, or of movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or with the whole enterprise) or of such fixed base, may also be taxed in that other State.
3. Gains derived by an enterprise of a Contracting State from the alienation of ships or aircraft operated in international traffic, or movable property pertaining to the operation of such ships or aircraft shall be taxable only in that State.
4. Gains from the alienation of **shares** of a company, the property of which consists **principally of immovable property** situated in a Contracting State, may be taxed in that State. (continued..)

## Article 13 – Capital Gains

### Extract of India Switzerland DTAA – Article 13(5)

5. Gains from the alienation of **shares other than those mentioned in Paragraph 4**, of a company which is a resident of a Contracting State:

(a) shall be **taxable** only in the Contracting State of which the alienator is a resident;

(b) **notwithstanding the provision of subparagraph (a), India may tax gains from the alienation of shares in a company which is a resident of India.**

In this case the provisions of subparagraph (b) of paragraph 1, of Article 23 shall apply.

6. Gains from the alienation of any property other than that referred to in paragraphs 1, 2, 3, 4 and 5 shall be taxable only in the Contracting State of which the alienator is a resident.

# Article 21 – Other Income

## Extract as per UN Model – subject to Treaty Language

Para	Convention
1	<p>Items of income beneficially owned by a resident and not taxed under any other Articles shall be taxed in the state of residence.</p> <p><b>Exception:</b> Income paid from trust or estate of deceased person</p>
2	<p>In case of any income received in relation to a PE or Fixed Base, this article shall not apply.</p> <p><b>Exception:</b> Income from immovable property</p>
3	<p>Any income not taxed under any other Articles may be taxed in the state of source of such income.</p>

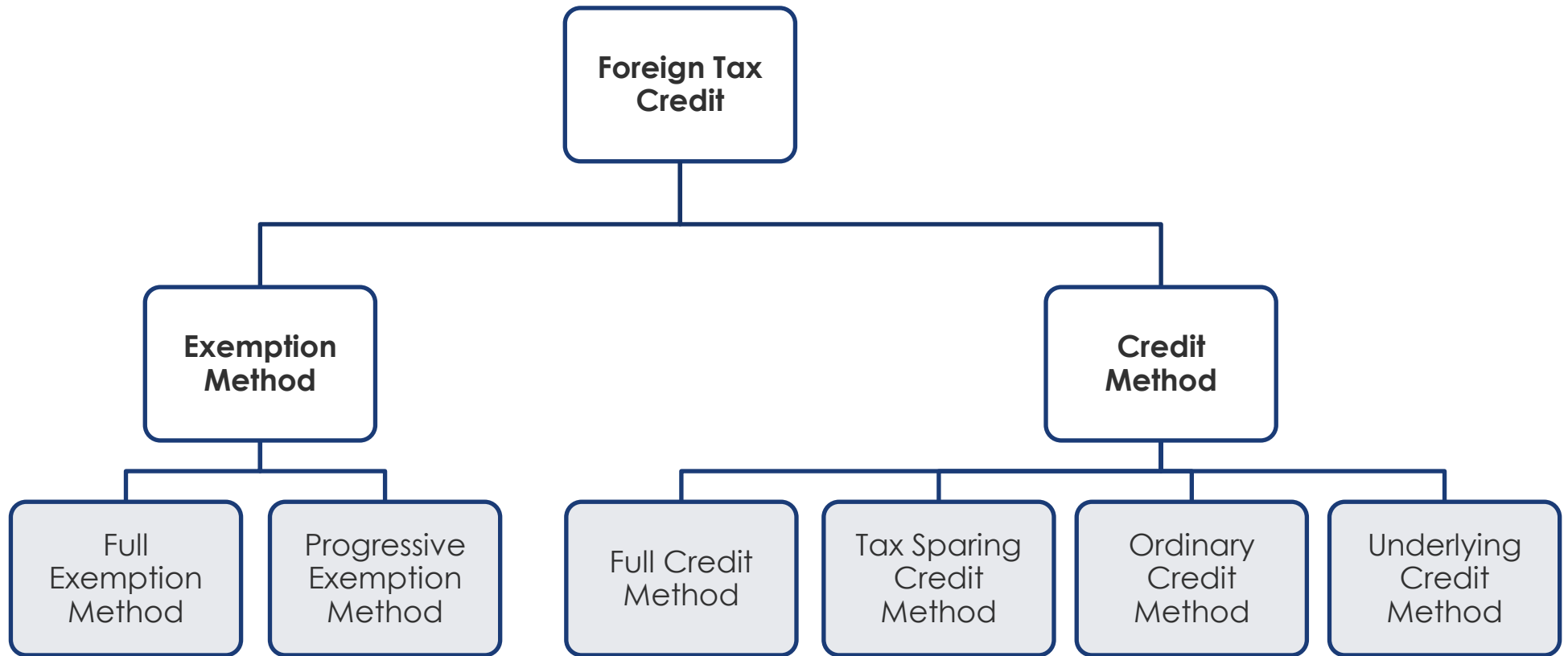
## Article 21 – Other Income

### **Extract of India Switzerland DTAA – Article 21(1)**

**1. Items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this Agreement shall be taxable only in that State.**

2. The provisions of paragraph 1 shall not apply to income, other than income from immovable property as defined in paragraph 2 of Article 6, if the recipient of such income, being a resident of a Contracting State, carries on business in the other Contracting State through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right or property in respect of which the income is paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 or Article 14, as the case may be, shall apply.

3. Notwithstanding the provisions of paragraph 1, if a resident of a Contracting State derives income from sources within the other Contracting State in the form of lotteries, crossword puzzles, races including horse races, card games and other games of any sort or gambling or betting of any form or nature whatsoever, such income may be taxed in that other Contracting State.



1. **Exemption Method**: Under Exemption method the income that is taxed in source country (foreign country) is exempted in Resident country either fully or progressively. The provisions to this effect is stated in the DTAA entered between the two countries.
  - i. **Full Exemption**: Under this method income taxed in the source country is exempt from taxation in the Resident Country. Here the income is not at all considered for the purpose of tax calculation by the Resident Country while calculating the tax on the rest of the income.
  - ii. **Progressive Exemption**: Though the income from the source country is exempted from tax in the country of residence the same is however considered for tax purpose for arriving at the tax rates.

2. **Credit Method**: Under this method the income which is taxed in the source country is also considered in the total income of the country of residence to arrive the tax base, but, deduction is allowed from its taxes paid in the source country. This may be again under different methods:

i. **Full Credit Method**: The Resident country grants credit for the taxes paid in the Source country without any restriction or limits.

ii. **Ordinary Credit Method**: This is generally adopted in many DTAA's where allowance of credit is given against tax payable in the resident country. The credit may be given only if the income is subjected to tax in the overseas jurisdiction. If the tax paid in overseas jurisdiction is in excess to the tax chargeable in the resident country it is ignored and no credit is given for the same. Further it may be restricted against the tax paid in the overseas jurisdiction against each head of income as well.



- iii. **Underlying Credit Method:** It attempts to minimize the economic double taxation. Economic double taxation occurs where the same income is taxed more than once in the hands of different person in the same tax jurisdiction.
- iv. **Tax Sparing Credit Method:** This is by arrived by way of granting a tax credit in the resident country for the amount of tax that would have been payable in the overseas jurisdiction.

### ➤ **Non Treaty Scenario (Section 91)**

The resident assessee shall get a deduction in Income Tax payable to the extent calculated as under:

At the Indian tax rate on doubly taxed income

OR

At the rate of tax of the country in which tax has been paid on doubly taxed income

Whichever is lower

### ➤ **Form 67**

Form 67 to be filed in all cases when FTC is availed – Refer Rule 128

Section	Provisions
<b>195(1)</b>	Scope and conditions for applicability
<b>195(2)</b>	Application by the 'Payer' for lower or Nil withholding
<b>195(3)</b>	Application by the 'Payee' for Nil withholding
<b>195(4)</b>	Validity of certificate issued by the AO u/s 195(3)
<b>195(5)</b>	CBDT empowered to make Rules in respect of sec 195(3)
<b>195(6)</b>	CBDT empowered to provide forms in which information to be furnished
<b>195(7)</b>	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
<b>195A</b>	Grossing up of Tax

(1) **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** :

**Provided** that in the case of interest payable by the Government or a public sector bank within the meaning of clause (23D) of section 10 or a public financial institution within the meaning of that clause, deduction of tax shall be made only **at the time of payment** thereof in cash or by the issue of a cheque or draft or by any other mode :

**Provided further** that no such deduction shall be made in respect of any dividends referred to in Sec 115-O.

*Explanation 1.*—For the purposes of this section, where any interest or other sum as aforesaid is credited to any account, whether called "Interest payable account" or "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.

*Explanation 2.*—For the removal of doubts, it is hereby clarified that the obligation to comply with sub-section (1) and to make deduction thereunder applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to all persons, resident or non-resident, whether or not the non-resident person has—

- (i) a residence or place of business or business connection in India; or
- (ii) any other presence in any manner whatsoever in India

### Who shall deduct?

- **any person** responsible for paying to a non-resident, not being a company, or to a **foreign company**
- Any Person – includes all persons, resident or non-resident whether or not the non-resident person has
  - (i) a residence or place of business or business connection in India; or
  - (ii) any other presence in any manner whatsoever in India.

Although a Foreign Company is treated as a resident based on its POEM in India, Section 195 shall apply instead of the TDS provisions applicable for payments to residents - **Notification No. 29/2018 SO 3039(E).**

**Resident and Not Ordinary  
Resident??**

### Deduction shall be made on which payments?

- any interest (not being interest referred to in section 194LB or section 194LC or section 194LD)
- under **any other sum chargeable under the provisions of this Act** (not being income chargeable the head "Salaries")
- **Exception:** any dividends referred to in section 115-O

Any other sum chargeable under the provisions of this Act would mean sum on which income tax is leviable. – **Transmission Corpn. Of A.P.Ltd v. CIT [1999] 105 Taxman 742/239 ITR 587 (SC)**

Where payment, made by resident to non-resident, was an amount not chargeable to tax in India, no tax is deductible at source even though assessee has not made an application before the Assessing Officer(AO) - **GE India Technology Centre Pvt. Ltd (327 ITR 456) SC**

### What are the modes of payment when deduction is to be made?

- Section 195(1) covers payment in cash, by cheque or draft or by **any other mode**

#### *TDS applies even in cases where:-*

1. Payment is not in terms of money as the same would constitute 'any other mode':

- **Kanchanganga Sea Foods Ltd.[2010](325 ITR 540)(SC)** – charter fee for fishing vessels was paid in the form of fish catch.
- **BIOCON Biopharmaceuticals (P.) Ltd.[2013](144 ITD 615)(Bng ITAT)** – shares were issued as consideration for provision of technology & know-how.

2. Amount payable to Non-resident is deducted by the Non-resident from amounts due to the resident payer; such adjustment shall also be considered as 'any other mode' – **Raymond Ltd [2003](86 ITD 791)(Mum ITAT)**

### Deduction shall be made at which rates?

- Deduction shall be made 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 specified in DTAAwhichever is applicable

### When shall the deduction be made?

- The deduction shall be made **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**
- **Exception:** Interest payable by the Government or a public sector bank within the meaning of clause (23D) of section 10 or a public financial institution within the meaning of that clause where deduction of tax shall be made **only at the time of payment**



Particulars	Section 195(2)	Section 195(3)
Application by	Payer	Payee
Purpose	Application for lower/ nil withholding	Application for nil withholding (controversial)
Whether appealable?	Appealable u/s 248 only if tax borne by payer	No appeal, Written Petition can be filed

## Section 206AA r.w. Rule 37BC – Failure to Furnish PAN

- Notwithstanding the other provisions, failure to furnish PAN by the NR payee shall entail TDS at higher of the:
  - rate specified in the relevant provision of the Act (First Schedule Part II)
  - rate or rates in force
  - rate of 20%

### **Relaxation:**

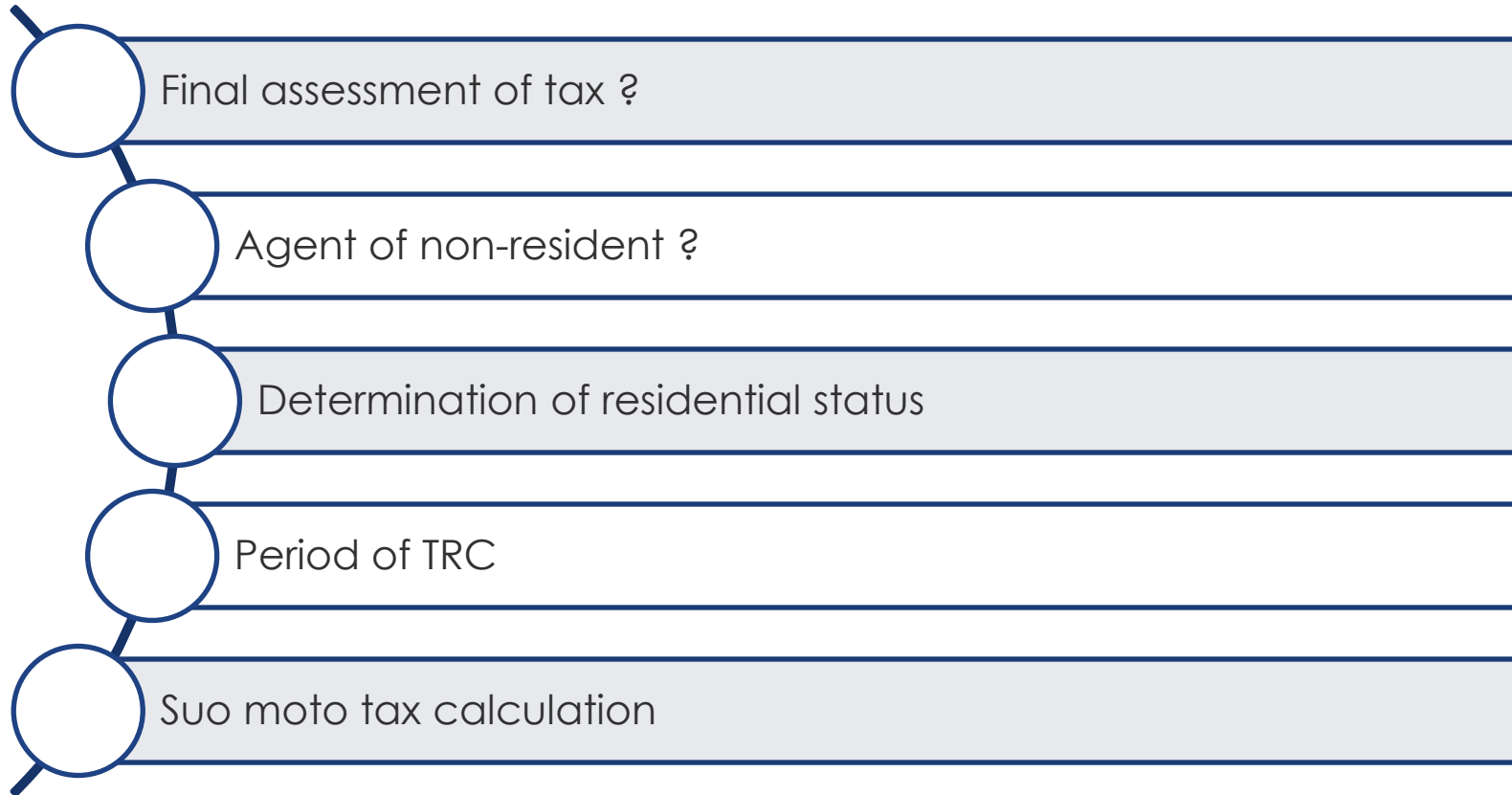
Relaxation to payments in the nature of interest, royalty, FTS, capital gains, if the NR deductee furnishes following details, documents:

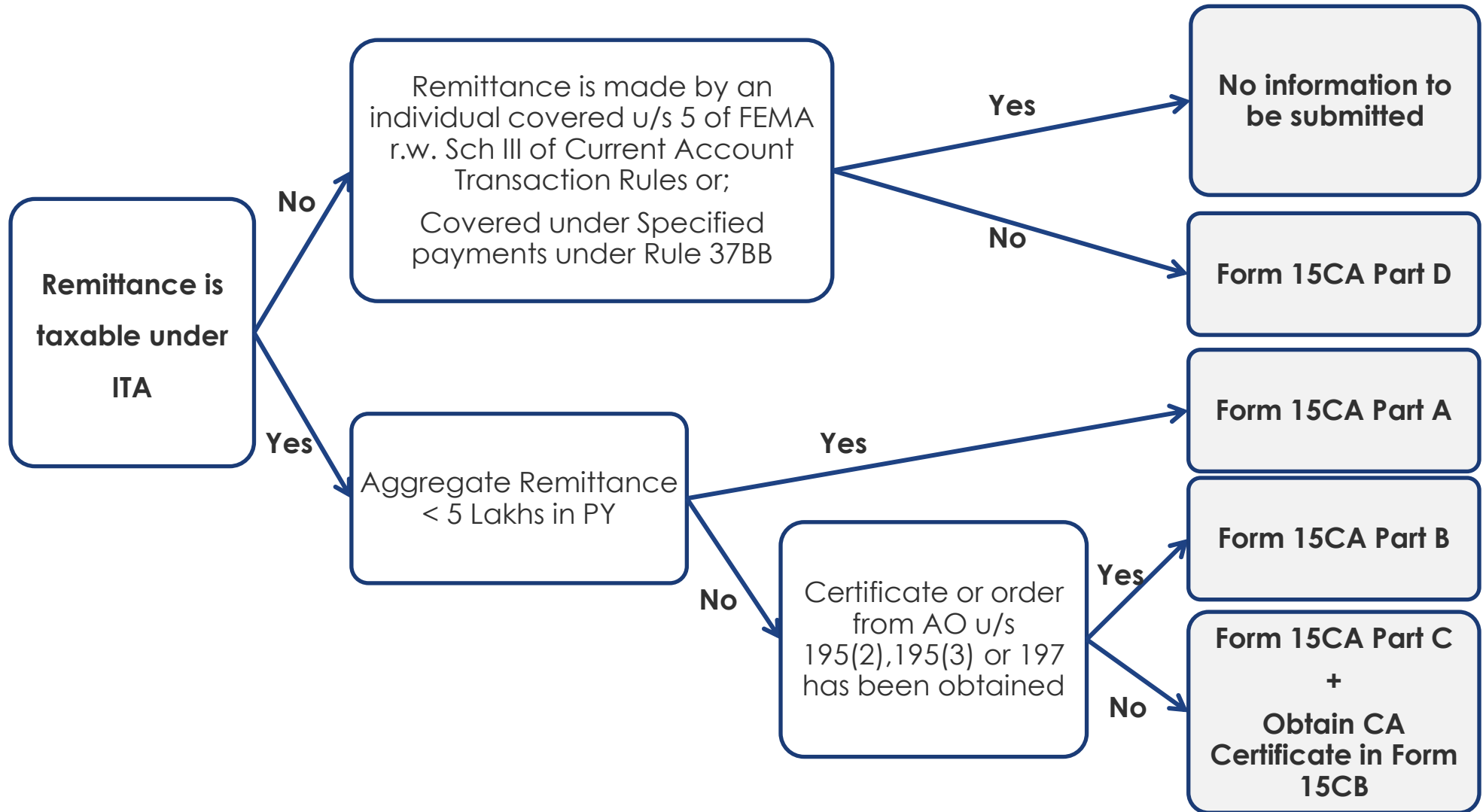
- Name, e-mail id, contact number, address in the country of residence
  - TRC of the country of residence
  - Tax identification or unique identification number in the country of residence
- Surcharge & Education cess not to be applied on 20% tax rate u/s 206AA - Computer Sciences Corporation India (P.) Ltd. [2017] (163 ITD 151)(Del ITAT)
  - Beneficial DTAA provisions to override section 206AA irrespective of the non obstante clause - Danisco India (P.) Ltd. [2018] 90 taxmann.com 295 (Delhi HC); Nagarjuna Fertilizers & Chemicals Ltd. [2017](185 TTJ 569)(Hyd ITAT)(SB)
  - Unlike the GAAR provisions which override DTAA, there is no provision to give overriding effect to section 206AA

## Section 195A - Grossing Up

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

**Grossing up in case of  
Section 206AA?**





## Form 15CB – CA Certificate

In Form 15CB, a CA certifies details of the payment, TDS rate, and TDS deduction as per Section 195 of the ITA, if any DTAA is applicable, and other details of nature and purpose of the remittance.

W.e.f. 1st April 2016, Form 15CB shall be furnished electronically.

The 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'.

Sl. No.	Nature of payment
1	Indian investment abroad - in equity capital (shares)
2	Indian investment abroad - in debt securities
3	Indian investment abroad - in branches and wholly owned subsidiaries
4	Indian investment abroad - in subsidiaries and associates
5	Indian investment abroad - in real estate
6	Loans extended to Non-Residents
7	Advance payment against imports
8	Payment towards imports - settlement of invoice
9	Imports by diplomatic missions
10	Intermediary trade
11	Imports below Rs.5,00,000 - (For use by ECD offices)

Sl. No.	Nature of payment
12	Payment for operating expenses of Indian shipping companies operating abroad
13	Operating expenses of Indian Airlines companies operating abroad
14	Booking of passages abroad - Airlines companies
15	Remittance towards business travel
16	Travel under basic travel quota (BTQ)
17	Travel for pilgrimage
18	Travel for medical treatment
19	Travel for education (including fees, hostel expenses etc.)
20	Postal services
21	Construction of projects abroad by Indian companies including import of goods at project site
22	Freight insurance - relating to import and export of goods



Sl. No.	Nature of payment
23	Payments for maintenance of offices abroad
24	Maintenance of Indian embassies abroad
25	Remittances by foreign embassies in India
26	Remittance by non-residents towards family maintenance and savings
27	Remittance towards personal gifts and donations
28	Remittance towards donations to religious and charitable institutions abroad
29	Remittance towards grants and donations to other Governments and charitable institutions established by the Governments
30	Contributions or donations by the Government to international institutions
31	Remittance towards payment or refund of taxes
32	Refunds or rebates or reduction in invoice value on account of exports
33	Payments by residents for international bidding.

Thank You

When You Win,  
We Win!



**Address:**

Benefice Business House, 3rd  
Level, 126, Mathuradas Mills  
Compound,  
N. M. Joshi Marg, Lower Parel  
(W), Mumbai – 400013, India.

**Contact Details:**

T: +91 22 3321 37 37

F: +91 22 3321 38 38

E: reachus@gbcaindia.com

**Disclaimer:**  
*The information contained in this write up is to provide a general guidance to the intended user. The information is based on our interpretation of various prevailing laws, rules, regulations, pronouncements as on date mentioned below. The information should not be used as a substitute for specific consultations. The information has been provided in simplified manner for general reference of the public which can lead to interpretation not intended under law. Although, the endeavour is to provide accurate and timely information, there can be no guarantee that there is an absence of any compilation error or such information is accurate as of the date it is received or that it will continue to be accurate in the future. Hence, we recommend that professional advice is sought before taking any action on specific issues. No part of this document should be distributed or copied by anyone without express written permission of the publisher.*