After studying this Chapter, you will be able to –

- **determine** the residential status of different persons and **examine** the scope of income taxable in the hands of non-residents.
- **determine** the residential status of a company, other than an Indian company, based on Place of Effective Management (POEM).
- **identify** whether a particular income is exempt in the hands of a non-resident based on the provisions of the Income-tax Act, 1961.
- **compute** the profits and gains from shipping business, business of operation of aircraft, business of civil construction etc. in certain turnkey power projects in the case of non-corporate non-residents and foreign company applying the presumptive tax provisions under the Income-tax Act, 1961.
- **determine** the quantum of head office expenditure allowable as deduction, in the case of non-residents.
- **determine** the tax payable by non-residents on dividend, royalty and fees for technical service applying the special provisions of Chapter XII.
- **determine** the tax payable by non-residents applying the special provisions relating to certain incomes of non-residents prescribed under Chapter XII-A.
- **examine** the withholding tax provisions to determine the tax, if any, required to be deducted at source on certain payments made to non-residents.
- **compute** the total income of non-residents and tax payable thereon, applying the general provisions and special provisions applicable to non-residents under the Income-tax Act, 1961.
- **Integrate, analyse and apply** the relevant provisions of the Income-tax Act, 1961 to make computations and address related issues.
2.1 INTRODUCTION

Taxation of cross-border transactions are generally based on the two concepts:

1. Residence based taxation
2. Source based taxation

**Residence based taxation:** The concept of residence-based taxation asserts that natural persons or individuals are taxable in the country or tax jurisdiction in which they establish their residence or domicile, regardless of the source of income. In case of companies, the place of incorporation or the place of effective management is generally considered as its place of residence.

**Source based taxation:** According to this concept, a country considers certain income as taxable income, if such income arises within its jurisdiction. Such income is taxed in the country of source regardless of the residence of the taxpayer.

The overview of residence and source rules in India may largely be gathered from sections 5, 6 & 9 of the Income-tax Act, 1961. While residents are taxable on global income, non-residents are taxed on their India-source income or income that is received in India or has accrued or deemed to accrue in India.

2.2 IMPORTANT DEFINITIONS

Before we proceed further, it is important to have a recap of some basic definitions given in Section 2 of the Income-tax Act, 1961.

(1) **Assessee [Section 2(7)]**

“Assessee” means a person by whom any tax or any other sum of money is payable under this Act. In addition, it includes —

(i) every person in respect of whom any proceeding under this Act has been taken for the assessment of
   (a) his income; or
   (b) assessment of fringe benefits; or
   (c) the income of any other person in respect of which he is assessable; or
   (d) the loss sustained by him or by such other person; or
   (e) the amount of refund due to him or to such other person.

(ii) every person who is deemed to be an assessee under any provision of this Act;

(iii) every person who is deemed to be an assessee in default under any provision of this Act.
(2) **Person [Section 2(31)]**

The definition of ‘assessee’ leads us to the definition of ‘person’ as the former is closely connected with the latter. The term ‘person’ is important from another point of view also viz., the charge of income-tax is on every ‘person’.

Person includes –

(i) an individual,

(ii) a Hindu undivided family (HUF),

(iii) a company,

(iv) a firm,

(v) an association of persons (AOP) or a body of individuals (BOI), whether incorporated or not,

(vi) a local authority, and

(vii) every artificial juridical person e.g., idol or deity.

(3) **Assessment year [Section 2(9)]**

"Assessment year" means the period of 12 months commencing on the 1st day of April every year. The year in which income is earned is previous year and such income is taxable in the immediately following year which is the assessment year.

Income earned in the previous year 2017-18 is taxable in the assessment year 2018-19.

(4) **Previous year [Section 3]**

“Previous year” means the financial year immediately preceding the assessment year.

**Business or profession newly set up during the financial year** - In such a case, the previous year shall be the period beginning on the date of setting up of the business or profession and ending with 31st March of the said financial year.

If a source of income comes into existence in the said financial year, then, the previous year will commence from the date on which the source of income newly comes into existence and will end with 31st March of the financial year.

(5) **Domestic Company [Section 2(22A)]**

“Domestic company” means an Indian company, or any other company which, in respect of its income liable to income-tax under this Act, has made the prescribed arrangements for the declaration and payment, within India, of the dividends (including dividends on preference shares) payable out of such income.

(6) **Foreign Company [Section 2(23A)]**

“Foreign company” means a company which is not a domestic company.
(7) **India [Section 2(25A)]**

"India" means the
- territory of India as referred to in article 1 of the Constitution,
- its territorial waters, seabed and subsoil underlying such waters,
- continental shelf,
- exclusive economic zone or
- any other specified maritime zone and the air space above its territory and territorial waters.

Specified maritime zone means the maritime zone as referred to in the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976.

(8) **Resident [Section 2(42)]**

Resident means a person who is resident in India within the meaning of section 6.

(9) **Non-resident [Section 2(30)]**

"Non-resident" means a person who is not a "resident", and for the purposes of sections 92, 93 and 168 includes a person who is not ordinarily resident within the meaning of clause (6) of section 6.

<table>
<thead>
<tr>
<th>Section</th>
<th>Provision</th>
</tr>
</thead>
<tbody>
<tr>
<td>92</td>
<td>Computation of income from international transaction having regard to Arm’s Length Price (ALP). International transaction means a transaction between two or more associated enterprises, either or both of whom are non-residents.</td>
</tr>
<tr>
<td>93</td>
<td>Avoidance of income-tax by transfer of assets resulting in transfer of income to non-residents.</td>
</tr>
<tr>
<td>168</td>
<td>Determination of residential status of an Executor depending on the residential status of deceased person.</td>
</tr>
</tbody>
</table>

(10) **Transfer [Section 2(47)]**

"Transfer" in relation to a capital asset, includes,—
(i) the sale, exchange or relinquishment of the asset; or
(ii) the extinguishment of any rights therein; or
(iii) the compulsory acquisition thereof under any law; or
(iv) the owner of a capital asset may convert the same into the stock-in-trade of a business carried on by him. Such conversion is treated as transfer; or
(v) the maturity or redemption of a zero coupon bond; or

(vi) possession of an immovable property in consideration of part-performance of a contract referred to in section 53A of the Transfer of Property Act, 1882; or

(vii) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property.

### 2.3 CHARGE OF INCOME TAX [SECTION 4]

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

However, where by virtue of any provision of this Act income-tax is to be charged in respect of the income of a period other than the previous year, income-tax shall be charged accordingly. Further, in respect of income chargeable under section 4(1), income-tax shall be deducted at source or paid in advance, where it is so deductible or payable under any provision of this Act.

Thus, the charging section provides that

(a) income-tax shall be charged at the rate or rates prescribed in the Finance Act for the relevant previous year

<table>
<thead>
<tr>
<th>Rates of tax, surcharge and cess for foreign companies</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Rate of Tax:</strong> Foreign Companies are taxable at the rate of 40%. This would further be increased by surcharge, if applicable, and education cess and secondary and higher education cess (SHEC)</td>
</tr>
<tr>
<td><strong>Surcharge:</strong> Surcharge at the rate of 2% of such income-tax would be attracted, where the total income exceeds ₹ 1 crore but does not exceed ₹ 10 crores. Surcharge at the rate of 5% of such income tax would be attracted where the total income exceeds ₹ 10 crores.</td>
</tr>
<tr>
<td><strong>Education Cess and SHEC:</strong> Education cess and SHEC @3% of income-tax plus surcharge, if applicable.</td>
</tr>
<tr>
<td><strong>Note:</strong> For non-corporate non-residents, the rates are same as the rates applicable to residents. However, the higher basic exemption limit for resident individuals of the age of 60 years and above and 80 years and above at any time during the previous year would not be available for non-resident individuals.</td>
</tr>
</tbody>
</table>

(b) the charge of tax is on various persons specified in Section 2(31).
the income sought to be taxed is that of the previous year and not of the of assessment year (there are certain exceptions provided by sections 172, 174, 174A, 175 and 176); and

(d) the levy of tax on the assessee is on his total income computed in accordance with and subject to the appropriate provisions of the Income-tax Act, including provisions for the levy of additional income-tax.

2.4 RESIDENTIAL STATUS AND SCOPE OF TOTAL INCOME

(1) Residential Status [Section 6]

The tax incidence and imposition of tax is dependent upon the residential status of a person. Therefore, the identification and classification of the residence of a person is one of the first steps to be carried out in order to proceed with the assessing of income of a person. The rules for determining the residential status of a person is governed by section 6 of Income-tax Act. For all purposes of income-tax, taxpayers are classified into three broad categories on the basis of their residential status viz.

(i) Resident and ordinarily resident (ROR)

(ii) Resident but not ordinarily resident (RNOR)

(iii) Non-resident

(i) Residential status of an individual

As per Section 6(1) an individual is said to be resident in India in any previous year if he satisfies any one of the following conditions:

(a) He has been in India during the previous year for a total period of 182 days or more; or

(b) He has been in India during the 4 years immediately preceding the previous year for total period of 365 days or more and has been in India for at least 60 days in the previous year.

If the individual satisfies any one of the conditions mentioned above he is a resident. If the individual does not satisfy both the conditions he is said to be non-resident.

Exceptions:

The following categories of individuals will be considered as resident only if the period of their stay during the relevant previous year in India is 182 days or more.

(a) Indian citizen, who leaves India in any previous year as a member of the crew of an Indian ship or for the purposes of employment outside India, or
(b) Indian citizen or a person of Indian origin\(^1\), who, being outside India and comes on a visit to India in any previous year.

In other words, even if such persons were in India for 365 days during the 4 preceding years and 60 days in the relevant previous year, they will not be treated as resident.

**Resident and ordinarily resident/Resident but not ordinarily resident**

Only individuals and HUFs can be resident but not ordinarily resident in India. All other classes of assessees can be either a resident or non-resident. A not-ordinarily resident person is one who satisfies any one of the conditions specified under section 6(6).

(i) If such individual has been non-resident in India in any 9 out of the 10 previous years preceding the relevant previous year, or

(ii) If such individual has during the 7 previous years preceding the relevant previous year been in India for a period of 729 days or less.

**Note:** In simpler terms, an individual is said to be a **resident and ordinarily resident** if he satisfies both the following conditions:

(i) He is a resident in any 2 out of the last 10 years preceding the relevant previous year, and

(ii) His total stay in India in the last 7 years preceding the relevant previous year is 730 days or more.

If the individual satisfies both the conditions mentioned above, he is a resident and ordinarily resident but if only one or none of the conditions are satisfied, the individual is a resident but not ordinarily resident.

**How to determine period of stay in India for an Indian citizen, being a crew member?**

In case of foreign bound ships where the destination of the voyage is outside India, there was uncertainty regarding the manner and the basis of determining the period of stay in India for an Indian citizen, being a crew member.

To remove this uncertainty, *Explanation 2* has been inserted in section 6(1) to provide that in the case of an Individual, being a citizen of India and a member of the crew of a foreign bound ship leaving India, the period or periods of stay in India shall, in respect of such voyage, be determined in the prescribed manner and subject to the prescribed conditions.

Accordingly, the CBDT has vide, *Notification No. 70/2015 dated 17.8.2015*, inserted Rule 126 in the Income-tax Rules, 1962 to compute the period of stay in such cases.

---

\(^1\) A person is said to be of Indian origin if he or either of his parents or either of his grandparents were born in undivided India
According to Rule 126, for the purposes of section 6(1), in case of an individual, being a citizen of India and a member of the crew of a ship, the period or periods of stay in India shall, in respect of an eligible voyage, not include the following period:

**Period to be excluded**

<table>
<thead>
<tr>
<th>Period commencing from</th>
<th>Period ending on</th>
</tr>
</thead>
<tbody>
<tr>
<td>the date entered into the Continuous Discharge Certificate in respect of joining the ship by the said individual for the eligible voyage</td>
<td>and the date entered into the Continuous Discharge Certificate in respect of signing off by that individual from the ship in respect of such voyage.</td>
</tr>
</tbody>
</table>

**Meaning of certain terms:**

<table>
<thead>
<tr>
<th></th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) Continuous Discharge Certificate</td>
<td>This term has the meaning assigned to it in the Merchant Shipping (Continuous Discharge Certificate-cum Seafarer’s Identity Document) Rules, 2001 made under the Merchant Shipping Act, 1958.</td>
</tr>
<tr>
<td>(b) Eligible voyage</td>
<td>A voyage undertaken by a ship engaged in the carriage of passengers or freight in international traffic where – (i) for the voyage having originated from any port in India, has as its destination any port outside India; and (ii) for the voyage having originated from any port outside India, has as its destination any port in India.’.</td>
</tr>
</tbody>
</table>

**Important points:**

1. **Residential status is to be determined on year to year basis**
2. **The term “stay in India” includes stay in the territorial waters of India (i.e. 12 nautical miles into the sea from the Indian coastline). Even the stay in a ship or boat moored in the territorial waters of India would be sufficient to make the individual resident in India.**
3. **The residence of an individual for income-tax purpose has nothing to do with citizenship, place of birth or domicile. An individual can, therefore, be resident in more countries than one even though he can have only one domicile.**
4. **For the purpose of counting the number of days stayed in India, both the date of departure as well as the date of arrival are considered to be in India.**
5. **It is not necessary that the period of stay must be continuous or active nor is it essential that the stay should be at the usual place of residence, business or employment of the individual.**
(ii) **Residential status of a HUF, firm, AOP/BOI, local authorities and artificial juridical persons**

**Resident:** These persons would be resident in India if the control and management of their affairs is situated wholly or partly in India.

**Non-resident:** If the control and management of the affairs is situated wholly outside India it would become a non-resident.

**Control and Management of HUF:** It is with Karta or its Manager.

**Control and Management of Firm/AOP:** It is with Partners/Members.

**A HUF can be Resident and ordinarily resident (ROR) or Resident but not ordinarily resident (RNOR)**

If Karta of Resident HUF satisfies both the following additional conditions (as applicable in case of Individual) then Resident HUF will be ROR, otherwise it will be RNOR.

**Additional Conditions:**

1) Karta of Resident HUF should be resident in at least 2 previous years out of 10 previous years immediately preceding relevant previous year.

2) Stay of Karta during 7 previous year immediately preceding relevant previous year should be 730 days or more.

Firms, association of persons, local authorities and other artificial juridical persons can be either resident or non-resident but they cannot be resident but not ordinarily resident in India.

**Meaning of the term “control and management”:**

- **The expression ‘control and management’ referred to under section 6 refers to the central control and management and not to the carrying on of day-to-day business by servants, employees or agents.**

- **The business may be done from outside India and yet its control and management may be wholly within India. Therefore, control and management of a business is said to be situated at a place where the head and brain of the adventure is situated.**

- **The place of control may be different from the usual place of running the business and sometimes even the registered office of the assessee. This is because the control and management of a business need not necessarily be done from the place of business or from the registered office of the assessee.**

- **But control and management do imply the functioning of the controlling and directing power at a particular place with some degree of permanence.**
(iii) Residential status of a Company

With effect from Assessment year 2017-18, a company would be 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.

“Place of effective management” means a place where key management and commercial decisions that are necessary for the conduct of the business of an entity as a whole are, in substance made [Explanation to section 6(3)].


Place of effective management’ (POEM) is an internationally recognised test for determination of residence of a company incorporated in a foreign jurisdiction. Most of the tax treaties entered into by India recognises the concept of ‘place of effective management’ for determination of residence of a company as a tie-breaker rule for avoidance of double taxation. CBDT has recently issued a circular on Guiding Principles for determination of Place of Effective management of a Company. The guidelines prescribed by CBDT create a distinction between companies engaged in active business outside India and companies not engaged in active business outside India.

Whether the company is engaged in active business outside India? - An important criterion for determination of POEM

A company shall be said to be engaged in 'active business outside India'

- if passive income is not more than 50% of its total income, and
- less than 50% of its total asset are situated in India; and
- less than 50% of total number of employees are situated in India or are resident in India; and
- the payroll expenses incurred on such employees is less than 50% of its total payroll expenditure.

Meaning of certain terms:

<table>
<thead>
<tr>
<th>Term</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>Income</td>
<td>(a) As computed for tax purpose in accordance with the laws of the country of incorporation; or</td>
</tr>
<tr>
<td></td>
<td>(b) As per books of account, where the laws of the country of incorporation does not require such a computation.</td>
</tr>
</tbody>
</table>
## NON RESIDENT TAXATION

<table>
<thead>
<tr>
<th>Value of assets</th>
<th>(a) In case of an individually depreciable asset</th>
<th>The average of its value for tax purposes in the country of incorporation of the company at the beginning and at end of the previous year; and</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(b) In case of pool of fixed asset, being treated as a block for depreciation</td>
<td>The average of its value for tax purposes in the country of incorporation of the company at the beginning and at end of the year;</td>
</tr>
<tr>
<td></td>
<td>(c) In case of any other asset</td>
<td>Value as per books of account</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Number of employees</th>
<th>The average of the number of employees as at the beginning and at the end of the year and shall include persons, who though not employed directly by the company, perform tasks similar to those performed by the employees.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pay roll</td>
<td>This term includes the cost of salaries, wages, bonus and all other employee compensation including related pension and social costs borne by the employer.</td>
</tr>
</tbody>
</table>
| Passive income      | It is the aggregate of, -  
(i) income from the transactions where both the purchase and sale of goods is from/to its associated enterprises; and  
(ii) income by way of royalty, dividend, capital gains, interest or rental income;  
However, any income by way of interest shall not be considered to be passive income in case of a company which is engaged in the business of banking or is a public financial institution, and its activities are regulated as such under the applicable laws of the country of incorporation. |

### Place of Effective Management:

### (i) In case of Companies engaged in Active Business outside India

POEM of a company engaged in active business shall be presumed to be outside India if the majority of the board meeting are held outside India.

However, in case the Board is not exercising its powers of management and such powers are being exercised by either the holding company or any other person, resident in India, then POEM shall be considered to be in India.

For this purpose, merely because the Board of Directors (BOD) follows general and objective principles of global policy of the group laid down by the parent entity which may be in the field of Pay roll functions, Accounting, Human resource (HR) functions, IT infrastructure and network platforms, Supply chain functions, Routine banking operational procedures, and not being specific to any entity or group of entities per se; would not constitute a case of BoD of companies standing aside.
For the purpose of determining whether the company is engaged in active business outside India, the average of the data of the previous year and two years prior to that shall be taken into account. In case the company has been in existence for a shorter period, then data of such period shall be considered. Where the accounting year for tax purposes, in accordance with laws of country of incorporation of the company, is different from the previous year, then, data of the accounting year that ends during the relevant previous year and two accounting years preceding it shall be considered.

The final guidelines have clarified that mere following of global policies laid down by the Indian holding company would not constitute that Board is standing aside.

(ii) In case Companies not engaged in active business outside India

The guidelines provide a two stage process for determination of POEM in case of companies not engaged in active business.

(a) First stage: Identifying the person(s) who actually make the key management and commercial decisions for the conduct of the company as a whole.

(b) Second stage: Determine the place where these decisions are, in fact, being made.

The place where these management decisions are taken would be more important than the place where such decisions are implemented. For the purpose of determination of POEM, it is the substance which would be conclusive rather than the form.

The conditions specified in the circular are depicted in the flow charts below:

© The Institute of Chartered Accountants of India
**What is ABOI test?**

A company is said to be engaged in ABOI, if it fulfills the cumulative conditions of:

1. Its passive income* (wherever earned) is 50% or less of its total income
2. Less than 50% of its total assets situated in India
3. Less than 50% of the total number of employees are situated in India or are residents in India
4. Payroll expenses incurred on such employees are less than 50% of its total payroll expenditure

---

* Passive income of a company shall be aggregate of:

1. *Income from the transactions where both the purchase and sale of goods is from/to its associated enterprises; and*
2. *Income by way of royalty, dividend, capital gains, interest (except for banking companies and public financial institutions) or rental income whether or not involving associated enterprises*

---

Some of the guiding principles which may be taken into account for determining the POEM are as follows:

(a) **Location where the Board of Directors meet and makes decisions**: This location may be the place of effective management of a company provided, the Board –

   (i) retains and exercises its authority to govern the company; and

   (ii) does, in substance, make the key management and commercial decisions necessary for the conduct of the company’s business as a whole.

It may be mentioned that mere formal holding of board meetings at a place would by itself not be conclusive for determination of POEM being located at that place. If the key decisions by the directors are in fact being taken in a place other than the place where the formal meetings are held then such other place would be relevant for POEM.

As an example this may be the case where the board meetings are held in a location distinct from the place where head office of the company is located or such location is unconnected with the place where the predominant activity of the company is being carried out.
If a Board has *de facto* delegated the authority to make the key management and commercial decisions for the company to the senior management or any other person including a shareholder, promoter, strategic or legal or financial advisor etc. and does nothing more than routinely ratifying the decisions that have been made, the company’s place of effective management will ordinarily be the place where these senior managers or the other person make those decisions.

“Senior Management” in respect of a company means the person or persons who are generally responsible for developing and formulating key strategies and policies for the company and for ensuring or overseeing the execution and implementation of those strategies on a regular and on-going basis. While designation may vary, these persons may include:

(i) Managing Director or Chief Executive Officer;
(ii) Financial Director or Chief Financial Officer;
(iii) Chief Operating Officer; and
(iv) The heads of various divisions or departments (for example, Chief Information or Technology Officer, Director for Sales or Marketing).

(b) Location of Executive Committee, in case powers are delegated by the Board: A company’s board may delegate some or all of its authority to one or more committees such as an executive committee consisting of key members of senior management. In these situations, the location where the members of the executive committee are based and where that committee develops and formulates the key strategies and policies for mere formal approval by the full board will often be considered to be the company’s place of effective management.

The delegation of authority may be either *de jure* (by means of a formal resolution or Shareholder Agreement) or *de facto* (based upon the actual conduct of the board and the executive committee).

(c) Location of Head Office: The location of a company’s head office will be a very important factor in the determination of the company’s place of effective management because it often represents the place where key company decisions are made. The following points need to be considered for determining the location of the head office of the company:

If the company’s senior management and their support staff are based in a single location and that location is held out to the public as the company’s principal place of business or headquarters then that location is the place where head office is located.

If the company is more decentralized (for example where various members of senior management may operate, from time to time, at offices located in the various countries) then the company’s head office would be the location where these senior managers,

(i) are primarily or predominantly based; or
(ii) normally return to following travel to other locations; or
(iii) meet when formulating or deciding key strategies and policies for the company as a whole.

Members of the senior management may operate from different locations on a more or less permanent basis and the members may participate in various meetings via telephone or video conferencing rather than by being physically present at meetings in a particular location. In such situation the head office would normally be the location, if any, where the highest level of management (for example, the Managing Director and Financial Director) and their direct support staff are located.

In situations where the senior management is so decentralised that it is not possible to determine the company’s head office with a reasonable degree of certainty, the location of a company’s head office would not be of much relevance in determining that company’s place of effective management.

**“Head Office” of a company would be the place where the company’s senior management and their direct support staff are located or, if they are located at more than one location, the place where they are primarily or predominantly located. A company’s head office is not necessarily the same as the place where the majority of its employees work or where its board typically meets.**

(d) **Use of modern technology:** The use of modern technology impacts the place of effective management in many ways. It is no longer necessary for the persons taking decision to be physically present at a particular location. Therefore physical location of board meeting or executive committee meeting or meeting of senior management may not be where the key decisions are in substance being made. In such cases the place where the directors or the persons taking the decisions or majority of them usually reside may also be a relevant factor.

(e) **Decision via circular resolution or round robin voting:** In case of circular resolution or round robin voting the factors like, the frequency with which it is used, the type of decisions made in that manner and where the parties involved in those decisions are located etc. are to be considered. It cannot be said that proposer of decision alone would be relevant but based on past practices and general conduct; it would be required to determine the person who has the authority and who exercises the authority to take decisions. The place of location of such person would be more important.

(f) **Decisions made by Shareholders are not relevant factor in determination of POEM:** The decisions made by shareholder on matters which are reserved for shareholder decision under the company laws are not relevant for determination of a company’s place of effective management. Such decisions may include sale of all or substantially all of the company’s assets, the dissolution, liquidation or deregistration of the company, the modification of the rights attaching to various classes of shares or the issue of a new class of shares etc. These decisions typically affect the existence of the company itself or the rights of the shareholders as such, rather than the conduct of the company’s business from a management or commercial
perspective and are therefore, generally not relevant for the determination of a company’s place of effective management.

However, the shareholder’s involvement can, in certain situations, turn into that of effective management. This may happen through a formal arrangement by way of shareholder agreement etc. or may also happen by way of actual conduct. As an example if the shareholders limit the authority of board and senior managers of a company and thereby remove the company’s real authority to make decision then the shareholder guidance transforms into usurpation and such undue influence may result in effective management being exercised by the shareholder.

Therefore, whether the shareholder involvement is crossing the line into that of effective management is one of fact and has to be determined on case-to-case basis only.

(g) **Day to day routine operational decisions are not relevant for determination of POEM:** It may be clarified that day to day routine operational decisions undertaken by junior and middle management shall not be relevant for the purpose of determination of POEM. The operational decisions relate to the oversight of the day-to-day business operations and activities of a company whereas the key management and commercial decision are concerned with broader strategic and policy decision. For example, a decision to open a major new manufacturing facility or to discontinue a major product line would be examples of key commercial decisions affecting the company’s business as a whole. By contrast, decisions by the plant manager appointed by senior management to run that facility, concerning repairs and maintenance, the implementation of company-wide quality controls and human resources policies, would be examples of routine operational decisions. In certain situations it may happen that person responsible for operational decision is the same person who is responsible for the key management and commercial decision. In such cases it will be necessary to distinguish the two type of decisions and thereafter assess the location where the key management and commercial decisions are taken.

If the above factors do not lead to clear identification of POEM then the final guidelines provide that following secondary factors may be considered:

- Place where main and substantial activity of the company is carried out; or
- Place where the accounting records of the company are kept.

It needs to be emphasized that the determination of POEM is to be based on all relevant facts related to the management and control of the company, and is not to be determined on the basis of isolated facts that by itself do not establish effective management, as illustrated by the following examples:

(i) The fact that a foreign company is completely owned by an Indian company will not be conclusive evidence that the conditions for establishing POEM in India have been satisfied.
(ii) The fact that there exists a Permanent Establishment of a foreign entity in India would itself not be conclusive evidence that the conditions for establishing POEM in India have been satisfied.

(iii) The fact that one or some of the Directors of a foreign company reside in India will not be conclusive evidence that the conditions for establishing POEM in India have been satisfied.

(iv) The fact of, local management being situated in India in respect of activities carried out by a foreign company in India will not, by itself, be conclusive evidence that the conditions for establishing POEM have been satisfied.

(v) The existence in India of support functions that are preparatory and auxiliary in character will not be conclusive evidence that the conditions for establishing POEM in India have been satisfied.

It is reiterated that the above principles for determining the POEM are for guidance only. No single principle will be decisive in itself. The above principles are not to be seen with reference to any particular moment in time rather activities performed over a period of time, during the previous year, need to be considered.

In other words, a “snapshot” approach is not to be adopted. Further, based on the facts and circumstances if it is determined that during the previous year the POEM is in India and also outside India then POEM shall be presumed to be in India if it has been mainly /predominantly in India.

The CBDT also clarified that the Assessing Officer (AO) shall, before initiating any proceedings for holding a company incorporated outside India, on the basis of its POEM, as being resident in India, seek prior approval of the Principal Commissioner or the Commissioner, as the case may be.

Further, in case the AO proposes to hold a company incorporated outside India, on the basis of its POEM, as being resident in India then any such finding shall be given by the AO after seeking prior approval of the collegium of three members consisting of the Principal Commissioners or the Commissioners, as the case may be, to be constituted by the Principal Chief Commissioner of the region concerned, in this regard. The collegium so constituted shall provide an opportunity of being heard to the company before issuing any directions in the matter.

**Example 1:** Company A Co. is a sourcing entity, for an Indian multinational group, incorporated in country X and is 100% subsidiary of Indian company (B Co.). The warehouses and stock in them are the only assets of the company and are located in country X. All the employees of the company are also in country X. The average income wise breakup of the company’s total income for three years is,

(i) 30% of income is from transaction where purchases are made from parties which are non-associated enterprises and sold to associated enterprises;
(ii) 30% of income is from transaction where purchases are made from associated enterprises and sold to associated enterprises;

(iii) 30% of income is from transaction where purchases are made from associated enterprises and sold to non-associated enterprises; and

(iv) 10% of the income is by way of interest.

Interpretation: In this case, passive income is 40% of the total income of the company. The passive income consists of,

(i) 30% income from the transaction where both purchase and sale is from/to associated enterprises; and

(ii) 10% income from interest.

The A Co. satisfies the first requirement of the test of active business outside India. Since no assets or employees of A Co. are in India the other requirements of the test is also satisfied. Therefore, company is engaged in active business outside India.

Example 2: The other facts remain same as that in Example 1 with the variation that A Co. has a total of 50 employees. 47 employees, managing the warehouse, storekeeping and accounts of the company, are located in country X. The Managing Director (MD), Chief Executive Officer (CEO) and sales head are resident in India. The total annual payroll expenditure on these 50 employees is of ₹5 crore. The annual payroll expenditure in respect of MD, CEO and sales head is of ₹3 crore.

Interpretation: Although the first limb of active business test is satisfied by A Co. as only 40% of its total income is passive in nature. Further, more than 50% of the employees are also situated outside India. All the assets are situated outside India. However, the payroll expenditure in respect of the MD, the CEO and the sales head being employees resident in India exceeds 50% of the total payroll expenditure. Therefore, A Co. is not engaged in active business outside India.

Example 3: The basic facts are same as in Example 1. Further facts are that all the directors of the A Co. are Indian residents. During the relevant previous year 5 meetings of the Board of Directors is held of which two were held in India and 3 outside India with two in country X and one in country Y.

Interpretation: The A Co. is engaged in active business outside India as the facts indicated in Example 1 establish. The majority of board meetings have been held outside India. Therefore, the POEM of A Co. shall be presumed to be outside India.

Example 4: The facts are same as in Example 3 but it is established by the Assessing Officer that although A Co.’s senior management team signs all the contracts, for all the contracts above ₹10 lakh the A Co. must submit its recommendation to B Co. and B Co. makes the decision whether or not the contract may be accepted. It is also seen that during the previous year more than 99% of the contracts are above ₹10 lakh and over past years also the same trend in respect of value contribution of contracts above ₹10 lakh is seen.

© The Institute of Chartered Accountants of India
**Non Resident Taxation**

**Interpretation:** These facts suggest that the effective management of the A Co. may have been usurped by the parent company B Co. Therefore, POEM of A Co. may in such cases be not presumed to be outside India even though A Co. is engaged in active business outside India and majority of board meeting are held outside India.

**Example 5:** An Indian multinational group has a local holding company A Co. in country X. The A Co. also has 100% downstream subsidiaries B Co. and C Co. in country X and D Co. in country Y. The A Co. has income only by way of dividend and interest from investments made in its subsidiaries. The Place of Effective Management of A Co. is in India and is exercised by ultimate parent company of the group. The subsidiaries B, C and D are engaged in active business outside India. The meetings of Board of Director of B Co., C Co. and D Co. are held in country X and Y respectively.

**Interpretation:** Merely because the POEM of an intermediate holding company is in India, the POEM of its subsidiaries shall not be taken to be in India. Each subsidiary has to be examined separately. As indicated in the facts since B Co., C Co., and D Co. are independently engaged in active business outside India and majority of Board meetings of these companies are also held outside India. The POEM of B Co., C Co., and D Co. shall be presumed to be outside India.

Further, the CBDT vide Circular no. 8/2017 dated 23.02.2017 also clarified that POEM guidelines shall not apply to a company having turnover or gross receipts of ₹50 crores or less in a financial year.

**Transition Mechanism for a company incorporated outside India and has not been assessed to tax earlier [Chapter XII-BC – Section 115JH]**

A transition mechanism for a company which is incorporated outside India, which has not been assessed to tax in India earlier and has become resident in India for the first time in A.Y. 2017-18 due to application of POEM, has been provided in Chapter XII-BC comprising of section 115JH.

(a) Accordingly, the Central Government is empowered to notify exception, modification and adaptation subject to which, the provisions of the Act relating to computation of income, treatment of unabsorbed depreciation, set-off or carry forward and set off of losses, special provision relating to avoidance of tax and the collection and recovery of taxes shall apply in a case where a foreign company is said to be resident in India due to its POEM being in India for the first time and the said company has never been resident in India before.

(b) In a case where the determination regarding foreign company to be resident in India has been made in the assessment proceedings relevant to any previous year, then, these transition provisions would also cover any subsequent previous year, if the foreign company is resident in India in that previous year and the previous year ends on or before the date on which such assessment proceeding is completed. In effect, the transition provisions would also cover any subsequent amendment up to the date of determination of POEM in an assessment proceeding. However, once the transition is complete, then, normal provisions of the Act would apply.
(c) In the notification issued by the Central Government, certain conditions including procedural conditions subject to which these adaptations shall apply can be provided for and in case of failure to comply with the conditions, the benefit of such notification would not be available to the foreign company.

Accordingly, where in a previous year, any benefit, exemption or relief has been claimed and granted to the foreign company in accordance with the notification, and subsequently, there is failure to comply with any of the conditions specified therein, then –

(i) the benefit, exemption or relief shall be deemed to have been wrongly allowed;

(ii) the Assessing Officer may re-compute the total income of the assessee for the said previous year and make the necessary amendment as if the exceptions, modifications and adaptations as per the notification does not apply; and

(iii) the provisions of section 154 shall, so far as may be, apply thereto and the period of four years for rectification of mistake apparent from the record has to be reckoned from the end of the previous year in which the failure to comply with the condition stipulated in the notification takes place.

(d) Every notification issued in exercise of this power by the Central Government shall be laid before each house of the Parliament.

<table>
<thead>
<tr>
<th>Abbreviations used in the Flow Charts in pages 2.21 &amp; 2.22</th>
</tr>
</thead>
<tbody>
<tr>
<td>IC = Indian Citizen</td>
</tr>
<tr>
<td>R = Resident</td>
</tr>
<tr>
<td>PPy = Preceding Previous Year</td>
</tr>
<tr>
<td>N &amp; OR = Resident but Not Ordinarily Resident</td>
</tr>
<tr>
<td>ROR = Resident and Ordinarily Resident</td>
</tr>
<tr>
<td>RPY = Relevant Previous Year</td>
</tr>
<tr>
<td>NR = Non-resident</td>
</tr>
<tr>
<td>AOP = Association of Persons</td>
</tr>
<tr>
<td>HUF = Hindu Undivided Family</td>
</tr>
</tbody>
</table>
Determination of Residential Status of Individual

Individual

Stayed in India < 60 days

Yes → NR

No

Stayed ≥ 182 days RPY

Yes

If Left for Employment OR Crew Member of Indian Ship

Yes

Indian Citizen or a Person of Indian Origin visiting India during RPY

Yes

Stayed ≥ 60 Days during the RPY & ≥ 365 days during the 4 PPY

Yes

R & NOR

No

Stayed ≤ 729 days during the 7 PPY

Yes

Stayed ≥ 60 Days during the RPY & ≥ 365 days during the 4 PPY

Yes

ROR

No

NR any 9 PPY out of 10 PPY

Yes

Resident

No

© The Institute of Chartered Accountants of India
**Determination of Residential Status of HUF/ Firm/ AOP/ Company**

1. **HUF / FIRM / AOP**
   - Control & Management
     - Is it wholly or partly in India?
       - **Yes**: R
       - **No**: NR
         - Resident HUF
           - Is the Karta NR in any 9 PPY out of 10 PPY?
             - **Yes**: RNOR
             - **No**: HUF ROR
               - Is the Karta’s stay in India ≤ 729 days during the 7 PPYs?
                 - **Yes**: HUF ROR
                 - **No**: NR

2. **Company**
   - Is it an Indian Company?
     - **Yes**: R
     - **No**: NR
       - Is the Place of Effective Management in India?
         - **Yes**: R
         - **No**: NR
(2) Scope of Total Income [Section 5]

Section 5 provides the scope of total income in terms of the residential status of the assessee because the incidence of tax on any person depends upon his residential status. The scope of total income of an assessee depends upon the following three important considerations:

(i) the residential status of the assessee;
(ii) the place of accrual or receipt of income, whether actual or deemed; and
(iii) the point of time at which the income had accrued to or was received by or on behalf of the assessee.

A non-resident’s total income under section 5(2) includes:

(i) income received or deemed to be received in India in the previous year; and
(ii) income which accrues or arises or is deemed to accrue or arise in India during the previous year.

Note: All assessees, whether resident or not, are chargeable to tax in respect of their income accrued, arisen, received or deemed to accrue, arise or to be received in India.

(i) Meaning of “Income received or deemed to be received”

All assessees are liable to tax in respect of the income received or deemed to be received by them in India during the previous year irrespective of -

(i) their residential status, and
(ii) the place of its accrual.

Income is to be included in the total income of the assessee immediately on its actual or deemed receipt. The receipt of income refers to only the first occasion when the recipient gets the money under his control. Therefore, when once an amount is received as income, remittance or transmission of that amount from one place or person to another does not constitute receipt of income in the hands of the subsequent recipient or at the place of subsequent receipt.

Income deemed to be received in India [Section 7]

- Contribution in excess of 12% of salary to Recognised provident fund or interest credited in excess of 9.5% p.a. (Annual accretion to the credit of RPF)
- Contribution by the Central Government or other employer under a pension scheme referred u/s 80CCD
- Amount transferred from unrecognised provident fund to recognised provident fund (being the employer’s contribution and interest thereon)
(ii) Meaning of income ‘accruing’ and ‘arising’

Accrue refers to the right to receive income, whereas due refers to the right to enforce payment of the same. For e.g. salary for work done in December will accrue throughout the month, day to day, but will become due on the salary bill being passed on 31st December or 1st January.

Similarly, on Government securities, interest payable on specified dates arise during the period of holding, day to day, but will become due for payment on the specified dates.

Example: Interest on Government securities is usually payable on specified dates, say on 1st January and 1st July. In all such cases, the interest would be said to accrue from 1st July to 31st December on 1st January, it will fall due for payment.

It must be noted that income which has been taxed on accrual basis cannot be assessed again on receipt basis, as it will amount to double taxation.

With a view to removing difficulties and clarifying doubts in the taxation of income, Explanation 1 to section 5 specifically provides that an item of income accruing or arising outside India shall not be deemed to be received in India merely because it is taken into account in a balance sheet prepared in India.

Further, Explanation 2 to section 5 makes it clear that once an item of income is included in the assessee’s total income and subjected to tax on the ground of its accrual/deemed accrual or receipt, it cannot again be included in the person’s total income and subjected to tax either in the same or in a subsequent year on the ground of its receipt - whether actual or deemed.

(iii) Income deemed to accrue or arise in India [Section 9]

Certain types of income are deemed to accrue or arise in India even though they may actually accrue or arise outside India.
The categories of income which are deemed to accrue or arise in India are:

(1) **Any income accruing or arising to an assessee in any place outside India whether directly or indirectly**

   (a) through or from any business connection in India,
   (b) through or from any property in India,
   (c) through or from any asset or source of income in India or
   (d) through the transfer of a capital asset situated in India

   would be deemed to accrue or arise in India. [*Section 9(1)(i)*]

(a) **What is Business Connection?**

   ‘Business connection’ shall include any business activity carried out through a person acting on behalf of the non-resident [*Explanation 2 to section 9(1)(i)*]  

For a business connection to be established, the person acting on behalf of the non-resident –

(i) must have an authority which is habitually exercised to conclude contracts on behalf of the non-resident or;
However, if his activities are limited to the purchase of goods or merchandise for the non-resident, this provision will not apply.

(ii) In a case, where he 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

(iii) habitually secures orders in India, mainly or wholly for the non-resident.

Further, there may be situations when the person acting on behalf of the non-resident secure order for other non-residents. In such situation, business connection for other non-residents is established if,

(a) such other non-resident controls the non-resident or
(b) such other non-resident is controlled by the non-resident or
(c) such other non-resident is subject to same control as that of non-resident.

In all the three situations, business connection is established, where a person habitually secures orders in India, mainly or wholly for such non-residents.

---

**Agents having independent status are not included in Business Connection:** Business connection, however, shall not be established, where the non-resident carries on business through a broker, general commission agent or any other agent having an independent status, if such a person is acting in the ordinary course of his business.
A broker, general commission agent or any other agent shall be deemed to have an independent status where he does not work mainly or wholly for the non-resident.

He will, however, not be considered to have an independent status in the three situations explained above, where he is employed by such a non-resident.

Where a business is carried on in India through a person referred to in (i), (ii) or (iii) of (a) above, only so much of income as is attributable to the operations carried out in India shall be deemed to accrue or arise in India [Explanation 3 to section 9(1)(i)]

In the case of a Non-resident the following shall not, however, be treated as business connection in India [Explanation 1 to section 9(1)(i)]:

(i) In the case of a business, in respect of which all the operations are not carried out in India [Explanation 1(a) to section 9(1)(i)]: In the case of a business of which all the operations are not carried out in India, the income of the business deemed to accrue or arise in India shall be only such part of income as is reasonably attributable to the operations carried out in India. Therefore, it follows that such part of income which cannot be reasonably attributed to the operations in India, is not deemed to accrue or arise in India.

(ii) Purchase of goods in India for export [Explanation 1(b) to section 9(1)(i)]: In the case of a non-resident, no income shall be deemed to accrue or arise in India to him through or from operations which are confined to the purchase of goods in India for the purpose of export.

(iii) Collection of news and views in India for transmission out of India [Explanation 1(c) to section 9(1)(i)]: In the case of a non-resident, being a person engaged in the business of running a news agency or of publishing newspapers, magazines or journals, no income shall be deemed to accrue or arise in India to him through or from activities which are confined to the collection of news and views in India for transmission out of India.

(iv) Shooting of cinematograph films in India [Explanation 1(d) to section 9(1)(i)]: In the case of a non-resident, no income shall be deemed to accrue or arise in India through or from operations which are confined to the shooting of any cinematograph film in India, if such non-resident is:

- an individual, who is not a citizen of India or
- a firm which does not have any partner who is a citizen of India or who is resident in India; or
- a company which does not have any shareholder who is a citizen of India or who is resident in India.

(v) Activities confined to display of rough diamonds in SNZs [Explanation 1(e) to section 9(1)(i)]: In order to facilitate the Foreign Mining Companies (FMCs) to undertake activity of display of uncut diamond (without any sorting or sale) in a Special Notified Zone (SNZ), clause (e) has been inserted in Explanation 1 to section 9(1)(i) to provide that in the case of a foreign company engaged in the business of mining of diamonds, no income shall be deemed to accrue or arise in India to it through or from the activities which are confined to display of
uncut and unassorted diamonds in any special zone notified by the Central Government in the Official Gazette in this behalf.

(b) & (c) Income from property, asset or source of income in India

Any income which arises from any property (movable, immovable, tangible and intangible property) in India or from any asset or source of income in India, would be deemed to accrue or arise in India.

Examples:
- Hire charges or rent paid outside India for the use of the machinery or buildings situated in India,
- Deposits with an Indian company for which interest is received outside India etc.

(d) Income through transfer of a capital asset situated in India

Capital gains arising through or from the transfer of a capital asset situated in India would be deemed to accrue or arise in India in all cases irrespective of the fact whether
- The capital asset is movable or immovable, tangible or intangible;
- The place of registration of the document of transfer etc., is in India or outside; and
- The place of payment of the consideration for the transfer is within India or outside.

Accordingly, the expression “through” shall mean and include and shall be deemed to have always meant and included “by means of”, “in consequence of” or “by reason of”. [Explanation 4 to section 9(1)(i)]

Further, an asset or a capital asset being any share or interest in a company or entity registered or incorporated outside India shall be deemed to be and shall always be deemed to have been situated in India, if the share or interest derives, directly or indirectly, its value substantially from the assets located in India. [Explanation 5 to section 9(1)(i)]

Assets which are not be deemed to be or deemed to have been situated in India [Proviso to Explanation 5 to section 9(1)(i)]

- Any asset or capital asset being investment held by non-resident, directly or indirectly, in a Foreign Institutional Investor, as referred to in clause (a) of the Explanation to section 115AD for any assessment year commencing on or after 1st April 2012 but before 1st April 2015.
- An asset or capital asset, which is held by a non-resident by way of investment, directly or indirectly, in Category-I or Category-II foreign portfolio investor under the Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2014, made under the Securities and Exchange Board of India Act, 1992.

Declaration of dividend by a foreign company outside India does not have the effect of transfer of any underlying assets located in India. Circular No. 4/2015, dated 26-03-2015, therefore, clarifies that the dividends declared and paid by a foreign company outside India in respect of shares which derive their value substantially from assets situated in India would NOT be deemed to be income accruing or arising in India by virtue of the provisions of section 9(1)(i).
**Explanation 6 to section 9(1)(i)** provides that the share or interest in a company or entity registered or incorporated outside India, shall be deemed to derive its value substantially from the assets (whether tangible or intangible) located in India, if on the specified date, the value of Indian assets, -

- exceeds the amount of ₹ 10 crore; and
- represents at least 50% of the value of all the assets owned by the company or entity, as the case may be;

**Meaning of certain terms:**

<table>
<thead>
<tr>
<th>Term</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>Value of an asset</td>
<td>The <strong>fair market value as on the specified date</strong>, of such asset <strong>without reduction of liabilities</strong>, if any, in respect of the asset, determined in prescribed manner</td>
</tr>
<tr>
<td>Specified date</td>
<td>The date on which the <strong>accounting period</strong> of the company or, as the case may be, the entity <strong>ends</strong> preceding the date of transfer of a share or an interest. However, the date of transfer shall be the specified date of valuation, in a case where the book value of the assets of the company or entity on the date of transfer exceeds by at least 15%, the book value of the assets as on the last balance sheet date preceding the date of transfer.</td>
</tr>
</tbody>
</table>
| Accounting period                            | Each period of twelve months ending with 31st March. However, where a company or an entity, referred to in Explanation 5, regularly adopts a period of twelve months ending on a day other than 31st March for the purpose of—

  (a) complying with the provisions of the tax laws of the territory, of which it is a resident, for tax purposes; or
  
  (b) reporting to persons holding the share or interest,

  then, the period of twelve months ending with the other day shall be the accounting period of the company or, as the case may be, the entity: |
| First Accounting Period                      | First accounting period of the company or, as the case may be, the entity shall **begin from the date of its registration or incorporation** and **end with the 31st March** or such other day, as the case may be, following the date of such registration or incorporation. |
| Later accounting period                      | Later accounting period shall be the **successive periods of twelve months**                                                                                                                             |
| Accounting period of an entity which ceases to exist | If the company or the entity ceases to exist before the end of accounting period, as aforesaid, then, the accounting period shall end immediately before the company or, as the case may be, the entity, ceases to exist.                                      |
Explanation 7 to section 9(1)(i) provides that no income shall be deemed to accrue or arise to a non-resident from transfer, outside India, of any share of, or interest in, a company or an entity, registered or incorporated outside India, in the following cases;

<table>
<thead>
<tr>
<th></th>
<th>Foreign company or entity directly owns the assets situated in India</th>
<th>AND</th>
<th>the transferor (whether individually or along with its associated enterprises), at any time in the twelve months preceding the date of transfer, does not hold</th>
</tr>
</thead>
</table>
| 1 | | | • the right of management or control in relation to foreign company or entity; or  
|   | | | • the voting power or share capital or interest exceeding 5% of the total voting power or total share capital or total interest, as the case may be, of the foreign company or entity; or |
| 2 | Foreign company or entity indirectly owns the assets situated in India | AND | the transferor (whether individually or along with its associated enterprises), at any time in the twelve months preceding the date of transfer, does not hold |
|   | | | • the right of management or control in relation to foreign company or entity; or  
|   | | | • any right in, or in relation to, foreign company or entity which would entitle him to the right of management or control in the company or entity that directly owns the assets situated in India; or  
|   | | | • such percentage of voting power or share capital or interest in foreign company or entity which results in holding of (either individually or along with associated enterprises) a voting power or share capital or interest exceeding 5% of the total voting power or total share capital or total interest, as the case may be, of the company or entity that directly owns the assets situated in India; |

In effect, the exemption shall be available to the transferor of a share of, or interest in, a foreign entity if he along with its associated enterprises,

- neither holds the right of control or management,
- nor holds voting power or share capital or interest exceeding 5% of the total voting power or total share capital or total interest,

in the foreign company or entity directly holding the Indian assets (direct holding company).

In case the transfer is of shares or interest in a foreign entity which does not hold the Indian assets directly then the exemption shall be available to the transferor if he along with its associated enterprises,
• neither holds the right of management or control in relation to such company or the entity,
• nor holds any rights in such company which would entitle it to either exercise control or management of the direct holding company or entity or entitle it to voting power or share capital or total interest exceeding 5% in the direct holding company or entity.

Further, where all the assets owned, directly or indirectly, by a company or, as the case may be, an entity registered or incorporated outside India, are not located in India, the income of the non-resident transferor, from transfer outside India of a share of, or interest in the foreign company or entity, deemed to accrue or arise in India under this clause, shall be only such part of the income as is reasonably attributable to assets located in India and determined in the prescribed manner.

“Associated enterprise”, in relation to another enterprise, means an enterprise—
• which participates, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise; or
• in respect of which one or more persons who participate, directly or indirectly, or through one or more intermediaries, in its management or control or capital, are the same persons who participate, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise.

(2) Income from salaries earned in India [Section 9(1)(ii)]

Income, which falls under the head “Salaries”, deemed to accrue or arise in India, **if it is earned in India.** Salary payable for service rendered in India would be treated as earned in India.

Further, any income under the head “Salaries” payable for rest period or leave period which is preceded and succeeded by services rendered in India, and forms part of the service contract of employment, shall be regarded as income earned in India.

(3) Income from salaries payable by the Government for services rendered outside India [Section 9(1)(iii)].

Income from ‘Salaries’ which is payable by the Government to a citizen of India **for services rendered outside India** would be deemed to accrue or arise in India.

However, allowances and perquisites paid outside India by the Government is exempt, by virtue of section 10(7).

(4) Dividend paid by a Indian company outside India [Section 9(1)(iv)]

All dividends paid by an Indian company must be deemed to accrue or arise in India. Under section 10(34), income from dividends referred to in section 115-O is exempt from tax in the hands of the
shareholder. It may be noted that dividend distribution tax under section 115-O does not apply to deemed dividend under section 2(22)(e), which is chargeable in the previous year in which such dividend is distributed or paid.

(5) **Interest [Section 9(1)(v)]**

Under section 9(1)(v), an interest is deemed to accrue or arise in India if it is payable by -

(i) the Government;

(ii) a person resident in India;

**Exception:** Where it is payable in respect of any money borrowed and used for the purposes of a business or profession carried on by him outside India or for the purposes of making or earning any income from any source outside India, it will not be deemed to accrue or arise in India.

(iii) a non-resident when it is payable in respect of any debt incurred or moneys borrowed and used for the purpose of a business or profession carried on in India by him.

**Exception:** Interest on money borrowed by the non-resident for any purpose other than a business or profession, will not be deemed to accrue or arise in India.

**Example:** If a non-resident ‘A’ borrows money from a non-resident ‘B’ and invests the same in shares of an Indian company, interest payable by ‘A’ to ‘B’ will not be deemed to accrue or arise in India.

---

**Taxability of interest payable by the Permanent Establishment of a non-resident engaged in banking business to the head office**

In order to provide clarity and certainty, on the issue of taxability of interest payable by the PE of a non-resident engaged in banking business to the head office, an Explanation has been inserted in section 9(1)(v). Accordingly, in the case of a **non-resident, being a person engaged in the business of banking**, any interest payable by the PE in India of such non-resident to the head office or any PE or any other part of such non-resident outside India, shall be deemed to accrue or arise in India.

Such interest shall be chargeable to tax in addition to any income attributable to the PE in India.

Further, the PE in India shall be deemed to be a person separate and independent of the non-resident person of which it is a PE and the provisions of the Act relating to computation of total income, determination of tax and collection and recovery would apply accordingly.

Also, the PE in India has to deduct tax at source on any interest payable to either the head office or any other branch or PE, etc. of the non-resident outside India. Non-deduction would result in disallowance of interest claimed as expenditure by the PE and may also attract levy of interest and penalty in accordance with relevant provisions of the Act.

**Permanent establishment** includes a fixed place of business through which the business of the enterprise is wholly or partly carried on.
(6) **Royalty [Section 9(1)(vi)]**

Royalty will be deemed to accrue or arise in India when it is payable by -

(i) the government;

(ii) a person who is a resident in India

**Exception:** where it is payable for the transfer of any right or the use of any property or information or for the utilization of services for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India, or

(iii) a non-resident only when the royalty is payable in respect of any right, property or information used or services utilised for purposes of a business or profession carried on in India or for the purposes of making or earning any income from any source in India.

**Important points:**

(I) **Lumpsum royalty not deemed to accrue arise in India:** Lumpsum royalty payments made by a resident for the transfer of all or any rights (including the granting of a licence) in respect of computer software supplied by a non-resident manufacturer along with computer hardware under any scheme approved by the government under the policy on computer software export, software development and training, 1986 shall not be deemed to accrue or arise in India.

(II) **Meaning of Computer software:** “computer software” means any computer programme recorded on any disc, tape, perforated media or other information storage device and includes any such programme or any customised electronic data.

(III) **Meaning of Royalty:** the term ‘royalty’ means consideration (including any lumpsum consideration but excluding any consideration which would be the income of the recipient chargeable under the head ‘capital gains’) for:

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

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

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

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

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

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

(vii) the rendering of any service in connection with the activities listed above.

The definition of ‘royalty’ for this purpose is wide enough to cover both industrial royalties as well as copyright royalties. The deduction specially excludes income which should be chargeable to tax under the head ‘capital gains’.

(IV) Consideration for use or right to use of computer software is royalty within the meaning of section 9(1)(vi)

Explanation 4 provides that the consideration for use or right to use of computer software is royalty by clarifying that, transfer of all or any rights in respect of any right, property or information includes and has always included transfer of all or any right for use or right to use a computer software (including granting of a licence) irrespective of the medium through which such right is transferred.

Consequently, the provisions of tax deduction at source under section 194J and section 195 would be attracted in respect of consideration for use or right to use computer software since the same falls within the definition of royalty.

Note - The Central Government has, vide Notification No.21/2012 dated 13.6.2012 to be effective from 1st July, 2012, exempted certain software payments from the applicability of tax deduction under section 194J. Accordingly, where payment is made by the transferee for acquisition of software from a resident-transferor, the provisions of section 194J would not be attracted if –

(1) the software is acquired in a subsequent transfer without any modification by the transferor;

(2) tax has been deducted either under section 194J or under section 195 on payment for any previous transfer of such software; and

(3) the transferee obtains a declaration from the transferor that tax has been so deducted along with the PAN of the transferor.

(V) Consideration in respect of any right, property or information – Is it royalty?

Explanation 5 provides that Royalty includes and has always included consideration in respect of any right, property or information, whether or not,

(a) the possession or control of such right, property or information is with the payer;

(b) such right, property or information is used directly by the payer;

(c) the location of such right, property or information is in India.
(VI) **Meaning of Process:** *Explanation 6* provides that the term “process” includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret.

(7) **Fees for technical services [Section 9(1)(vii)]**

Any fees for technical services will be deemed to accrue or arise in India if they are payable by -

(i) the Government.

(ii) a person who is resident in India

*Exception:* where the fees is payable in respect of technical services utilised in a business or profession carried on by such person outside India or for the purpose of making or earning any income from any source outside India.

(iii) a person who is a non-resident, only where the fees are payable in respect of services utilised in a business or profession carried on by the non-resident in India or where such services are utilised for the purpose of making or earning any income from any source in India.

**Fees for technical services** mean any consideration (including any lumpsum consideration) for the rendering of any managerial, technical or consultancy services (including providing the services of technical or other personnel). However, it does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head ‘salaries’.

---

**Income deemed to accrue or arise in India to a non-resident by way of interest, royalty and fee for technical services to be taxed irrespective of territorial nexus (Explanation to section 9)**

Income by way of interest, royalty or fee for technical services which is deemed to accrue or arise in India by virtue of clauses (v), (vi) and (vii) of section 9(1), shall be included in the total income of the non-resident, whether or not –

(i) the non-resident has a residence or place of business or business connection in India; or

(ii) the non-resident has rendered services in India.

In effect, the income by way of fee for technical services, interest or royalty, from services utilized in India would be deemed to accrue or arise in India in case of a non-resident and be included in his total income, whether or not such services were rendered in India.

---

(3) **Presence of Eligible Fund Manager in India not to constitute Business Connection in India of such Eligible Investment Fund on behalf of which he undertakes Fund Management Activity [Section 9A]**

(i) **Fund Management Activity through an eligible fund manager not to constitute business connection [Section 9A(1)]:** In the case of an eligible investment fund, the fund management activity carried out through an eligible fund manager acting on behalf of such
fund shall not constitute business connection in India of the said fund, subject to fulfillment of certain conditions.

(ii) **Location of Fund Manager in India not to affect residential status of an eligible investment fund [Section 9A(2)]:** An eligible investment fund shall not be said to be resident in India merely because the eligible fund manager undertaking fund management activities on its behalf is located in India.

(iii) **Conditions to be fulfilled by an Eligible Investment Fund [Section 9A(3)]:** The eligible investment fund means a fund established or incorporated or registered outside India, which collects funds from its members for investing it for their benefit. Further, it should fulfill the following conditions:

(a) the fund should not be a person resident in India;

(b) the fund should be a resident of a country or a specified territory with which an agreement referred to in section 90(1) or section 90A(1) has been entered into or is established or incorporated or registered outside India in a country or a specified territory notified by the Central Government in this behalf.

(c) the aggregate participation or investment in the fund, directly or indirectly, by persons being resident in India should not exceed 5% of the corpus of the fund;

(d) the fund and its activities should be subject to applicable investor protection regulations in the country or specified territory where it is established or incorporated or is a resident;

(e) the fund should have a minimum of 25 members who are, directly or indirectly, not connected persons;

(f) any member of the fund along with connected persons shall not have any participation interest, directly or indirectly, in the fund exceeding 10%;

(g) the aggregate participation interest, directly or indirectly, of ten or less members along with their connected persons in the fund, shall be less than 50%;

(h) the investment by the fund in any entity shall not exceed 20% of the corpus of the fund;

(i) no investment shall be made by the fund in its associate entity;

(j) the monthly average of the corpus of the fund shall not be less than \( \text{₹} 100 \) crore. If the fund has been established or incorporated in the previous year, the corpus of fund shall not be less than \( \text{₹} 100 \) crore rupees at the end of such previous year;

   **However, this condition shall not be applicable to a fund which has been wound up in the previous year.**

(k) the fund shall not carry on or control and manage, directly or indirectly, any business in India;
(l) the fund should neither be engaged in any activity which constitutes a business connection in India nor should have any person acting on its behalf whose activities constitute a business connection in India other than the activities undertaken by the eligible fund manager on its behalf.

(m) the remuneration paid by the fund to an eligible fund manager in respect of fund management activity undertaken on its behalf should not be less than the arm’s length price of such activity.

(iv) Certain conditions not to apply to investment fund set up by the Government or the Central Bank of a foreign State or a Sovereign Fund [Proviso to Section 9A(3)]

The following conditions would, however, not be applicable in case of an investment fund set up by the Government or the Central Bank of a foreign State or a sovereign fund or such other fund notified by the Central Government:

(a) the fund should have a minimum of 25 members who are, directly or indirectly, not connected persons;

(b) any member of the fund along with connected persons shall not have any participation interest, directly or indirectly, in the fund exceeding 10%;

(c) the aggregate participation interest, directly or indirectly, of ten or less members along with their connected persons in the fund, shall be less than 50%.

(v) Eligible Fund Manager [Section 9A(4)]: The eligible fund manager, in respect of an eligible investment fund, means any person who is engaged in the activity of fund management and fulfills the following conditions:

(a) the person should not be an employee of the eligible investment fund or a connected person of the fund;

(b) the person should be registered as a fund manager or investment advisor in accordance with the specified regulations;

(c) the person should be acting in the ordinary course of his business as a fund manager;

(d) the person along with his connected persons shall not be entitled, directly or indirectly, to more than 20% of the profits accruing or arising to the eligible investment fund from the transactions carried out by the fund through such fund manager.

(vi) Furnishing of statement in prescribed form [Section 9A(5)]: Every eligible investment fund shall, in respect of its activities in a financial year, furnish within 90 days from the end of the financial year, a statement in the prescribed form to the prescribed income-tax authority. The statement should contain information relating to –

(a) the fulfillment of the above conditions; and

(b) such other relevant information or document which may be prescribed.
(vii) **Non-applicability of special taxation regime under section 9A [Section 9A(6)]:** This special taxation regime would not have any impact on taxability of any income of the eligible investment fund which would have been chargeable to tax irrespective of whether the activity of the eligible fund manager constituted business connection in India of such fund or not.

Further, the said regime shall not have any effect on the scope of total income or determination of total income in the case of the eligible fund manager.

(viii) **CBDT to prescribe guidelines for the manner of application of the provisions of this section.**

(ix) **Meaning of certain terms:**

<table>
<thead>
<tr>
<th>Term</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>Associate</td>
<td>An entity in which a director or a trustee or a partner or a member or a fund manager of the investment fund or a director or a trustee or a partner or a member of the fund manager of such fund, holds, either individually or collectively, share or interest, being more than 15% of its share capital or interest, as the case may be.</td>
</tr>
<tr>
<td>Corpus</td>
<td>The total amount of funds raised for the purpose of investment by the eligible investment fund as on a particular date.</td>
</tr>
<tr>
<td>Connected person</td>
<td>Any person who is connected directly or indirectly to another person and includes,— (a) any relative of the person, if such person is an individual; (b) any director of the company or any relative of such director, if the person is a company; (c) any partner or member of a firm or association of persons or body of individuals or any relative of such partner or member, if the person is a firm or association of persons or body of individuals; (d) any member of the Hindu undivided family or any relative of such member, if the person is a Hindu undivided family; (e) any individual who has a substantial interest in the business of the person or any relative of such individual; (f) a company, firm or an association of persons or a body of individuals, whether incorporated or not, or a Hindu undivided family having a substantial interest in the business of the person or any director, partner, or member of the company, firm or association of persons or body of individuals or family, or any relative of such director, partner or member; (g) a company, firm or association of persons or body of individuals, whether incorporated or not, or a Hindu undivided family, whose director, partner, or member has a substantial interest in the business.</td>
</tr>
</tbody>
</table>
of the person, or family or any relative of such director, partner or member;

(h) any other person who carries on a business, if -

(i) the person being an individual, or any relative of such person, has a substantial interest in the business of that other person; or

(ii) the person being a company, firm, association of persons, body of individuals, whether incorporated or not, or a Hindu undivided family, or any director, partner or member of such company, firm or association of persons or body of individuals or family, or any relative of such director, partner or member, has a substantial interest in the business of that other person;

2.5 EXEMPT INCOME OF NON RESIDENTS

Section 10 of the Income-tax Act, 1961 exempts from tax various incomes including the following in the hands of a non-resident:

(1) Interest on notified securities and bonds issued to non-residents [Section 10(4)]

Income falling within any of the following clause shall not be included in the income of Non-Resident:

(i) Section 10(4)(i) provides that in the case of a non-resident, any income by way of interest on specified securities and bonds notified by the Central Government will be exempt. Even income by way of premium on the redemption of such bonds is exempt.

However, the Central Government shall not notify any such bonds or securities after 1.6.2002. Hence, this exemption will no more be available in respect of any further issue of bonds or securities on or after the 1.6.2002.

(ii) As per section 10(4)(ii), in the case of an individual, any income by way of interest on moneys standing to his credit in a Non-resident (External) Account (NRE A/c) in any bank in India in accordance with the Foreign Exchange Management Act, 1999 (FEMA, 1999), and the rules made thereunder, would be exempt, provided such individual;

❖ is a person resident outside India, as defined in FEMA, 1999, or

❖ is a person who has been permitted by the Reserve Bank of India to maintain such account.

In this context, it may be noted that the joint holders of the NRE Accounts do not constitute an AOP by merely having these accounts in joint names. The benefit of exemption under section 10(4)(ii) will be available to such joint account holders, subject to fulfillment of other conditions contained in that section by each of the individual joint account holders.

Example: Mrs. Neena Kansal, is resident of Singapore since year 2000. She holds an NRE account with Bank of Baroda, New Delhi Branch. Interest of ₹10,000 was credited to such
account during financial year 2017-18. Such interest income earned by her shall be exempt from income-tax while she files her tax return for A.Y 2018-19.

(2) Interest on specified savings certificates to non-residents [Section 10(4B)]

(i) An Indian citizen or a person of Indian origin, who is a non-resident shall be entitled for exemption in respect of interest on such saving certificates issued before 1.6.2002 by the Central Government and notified by it in the Official Gazette in this behalf.

(ii) However, to claim such exemption, the individual should have subscribed to such certificates in convertible foreign exchange remitted from a country outside India in accordance with the provisions of the FEMA, 1999 and any rules made thereunder.

It is important to note that the exemption will be available only to the original subscribers to the savings certificates.

(3) Remuneration received by individuals, who are not citizens of India [Section 10(6)]

(i) Remuneration received by officials of Embassies etc. of Foreign States [Section 10(6)(ii)]:

The remuneration received by a person for services as an official by whatever name called of an embassy, high commission, legation, commission, consulate or trade representation of foreign state, or a member of staff of any of these official is exempt.

Conditions

(a) The remuneration received by our corresponding Government officials resident in such foreign countries should be exempt.

(b) The above-mentioned officers should be the subjects of the respective countries and should not be engaged in any other business or profession or employment in India.

Examples:

1. Mr. A, a citizen of India but resident of USA since year 2012, was appointed as a senior official of the US embassy in India. He earned a remuneration of ₹10 lakhs during FY 2017-18. Being an Individual who is a citizen of India, though fulfilling other conditions of the section, such remuneration shall not be exempt in his hands for AY 2018-19.

2. Mr. Vikram Kohli, an Indian born person but currently the resident and Citizen of USA, was appointed as a senior official of the US embassy in India. He earned a remuneration of ₹10 lakhs during FY 2017-18. Being an Individual who is not a citizen of India and also fulfilling other conditions of the section, such remuneration shall be exempt in his hands for AY 2018-19.

3. Mr. Frank D’Souza, an Irish Citizen but currently the resident of USA, was appointed as a senior official of the US embassy in India. He earned a remuneration of ₹10 lakhs during
FY 2017-18. **Being an Individual who is not a citizen of India, such remuneration shall be exempt in his hands for AY 2018-19.**

(ii) **Remuneration received for services rendered in India by a Foreign National employed by foreign enterprise [Section 10(6)(vi)]:** The remuneration received by a foreign national as an employee of a foreign enterprises, for services rendered by him during his stay in India is also exempt from tax.

**Conditions**

(a) The foreign enterprise is not engaged in any business or trade in India:

(b) The employee’s stay in India does not exceed in the aggregate a period of ninety (90) days in such previous year and

(c) The remuneration is not liable to be deducted from the income of the employer chargeable under the Income-tax Act.

**Examples:**

1. **Mr. A, citizen of India but resident of USA since year 2012, was appointed in India as an employee of a US enterprise. Such US enterprise is not engaged in any business in India. A’s job requires him to visit his US office every twenty five (25) days for reporting purposes.**

   **During FY 2017-18, A earned a remuneration of ₹ 10 Lakhs for his India related assignment and his stay in India in aggregate was less than ninety (90) days. Further such US enterprise has not claimed any deduction of such remuneration under the Income-tax Act of India.**

   **Being an Individual who is a citizen of India, such remuneration shall not be exempt in his hands for AY 2018-19 under this section, though he may get exemption under any other provisions of the Income-tax Act, 1961.**

2. **In the above case, let’s consider that Mr. A is a citizen of USA. All other facts remaining same, his remuneration shall be exempt from tax in his hands for AY 2018-19 under this section.**

3. **Let’s take another variation, Mr. A is a citizen of USA but the remuneration paid to him is borne by the permanent establishment of such US enterprises in India. ₹ 10 lakhs paid to A is cross charged by US enterprise to its Indian permanent establishment (‘PE’).**

   **In this case, the remuneration shall not be exempt from taxation in the hands of Mr. A as the same is getting deducted from the income of the Indian PE of such foreign enterprises.**

(iii) **Salary received by a non-citizen for services rendered in connection with employment on foreign ship [Section 10(6)(viii)]:** Any income chargeable under the head “Salaries” received by or due to, non-citizen of India who is also a non-resident as remuneration for services
rendered in connection with his employment on a foreign ship is exempt provided his total stay in India does not exceed ninety (90) days during the previous year.

(iv) Remuneration received by Foreign Government employees during their stay in India for specified training [Section 10(6)(xi)]: Any remuneration received by employee of the Government of a foreign state from their respective Government during his stay in India, is exempt from tax, if remuneration is received in connection with training in any establishment or office of or in any undertaking owned by,-

(a) the Government, or
(b) any company owned by the Central Government or any State Government or
(c) any company which is subsidiary of a company referred to in (b) above, or
(d) any statutory corporation; or
(e) any society registered under Societies Registration Act, 1860 or under any law and wholly financed by the Central Government or any State Government.

It may be carefully noted that exemption is available under section 10(6) only to an Individual who is not a citizen of India.

(4) Tax paid by Government or Indian concern on income of a non-resident non-corporate or foreign company [Section 10(6A)/(6B)/(6BB)/(6C)]

(i) Tax on royalty or fees for technical services derived by foreign companies [Section 10(6A)]

(a) Where a foreign company renders technical services to the Government of India or to an Indian concern and for such services a foreign company is paid income by way of royalty or fees.

(b) Such fees or royalty is paid by an India concern or Government in pursuance of an agreement entered into after the 31-3-1976 but before 1-6-2002 and such agreement is approved by Government of India.

(c) However, where the agreement relates to a subject matter which is included in the industrial policy of the Government of India and such agreement is in accordance with that policy, no approval of Central Government is required.

(d) Since royalty or fees paid to a foreign company accrues in India, so such income is liable to be taxed in India and as per agreement, the payer of income in India pays tax liability of the foreign company.

(e) Tax so paid by Government or an Indian concern will be exempted i.e., it will not be grossed up with the income of the foreign company.

Example: A US based enterprise renders technical services to an Indian company and as per agreement such US enterprise is to be paid a fee of ₹ 10 lakh. Tax of ₹ 10,000 (tax rate assumed @10%) on such fees is also paid by the Indian company. Tax paid by the Indian
company will be exempt and so it will not be grossed up with the income of the foreign company and such foreign company’s income will be ₹10 lakh.

(ii) **Tax paid on behalf of non-resident [Section 10(6B)]**

Amount of tax paid by Government or an Indian concern on behalf of a non-resident non-corporate or a foreign company in respect of its income (not being salary, royalty or fees for technical services) in pursuance of an agreement entered before 1.6.2002 between the Central Government and the Government of foreign State or an international organisation under the terms of that agreement or of any related agreement which has been approved before 1.6.2002 by the Central Government, will not be included in computing the total income of such non-resident non-corporate or foreign company.

(iii) **Tax paid on behalf of foreign State or foreign enterprise on amount paid as consideration of acquiring aircraft, etc. on lease [Section 10(6BB)]**

In case any income is received by a foreign Government or a foreign enterprise from an Indian company which is engaged in the operation of aircraft and such income is by way of consideration of acquiring an aircraft or an engine of aircraft (other than payment for providing spares or services in connection with the operation of leased aircraft) on lease under an agreement entered into after 31-3-1997 but before 1-4-1999 or entered into after 31-3-2007 and approved by the Central Government in this behalf, and the tax on such income is payable by such Indian company under the terms of agreement, the tax so paid shall be fully exempted.

This benefit shall be available only to that foreign enterprise which is non-resident.

(iv) **Income from projects connected with the security of India [Section 10(6C)]**

Any income derived by a foreign company (so notified by Central Government) by way of royalty or fees for technical services under an agreement with that Government for providing services in or outside India in projects connected with security of India shall be fully exempted.

(5) **Other incomes of non-residents exempt from tax – remuneration under co-operative technical assistance and income of consultants and technical assistance [Section 10(8)/(8A)/(8B)/(9)]**

(i) **Co-operative technical assistance programmes [Section 10(8)]**

Individual who are serving in India in connection with any co-operative technical assistance programme in accordance with an agreement entered into by the Central Government and a foreign Government would be exempt from tax on their receipt by way of:

(a) remuneration received directly or indirectly from the foreign Government on such duties; and
(b) any other income accruing or arising outside India and is not deemed to accrue to arise in India, provided that such individual is required to pay any income or social security tax to the foreign Government.

(ii) **Consultant remuneration [Section 10(8A)]**

Section 10(8A), provides that the following incomes in case of a consultant are exempt from tax

(a) any remuneration or fee received by him or it, directly or indirectly, out of the funds made available to an international organization (hereinafter referred to as the agency) under the technical assistance grant agreement between the agency and the foreign Government; and

(b) any other income which accrues or arise to him or it outside India, and is not deemed to accrue or arise in India in respect of which such consultant is required to pay any income or social tax to the Government of the country of his or its origin.

**Meaning of Consultant** - The expression “consultant” has been defined to mean:

(a) any individual who is either not a citizen of India or being a citizen of India, is not ordinarily resident in India or

(b) any other person being a non-resident engaged by the agency for rendering technical services in India in connection with any technical assistance programme or project in accordance with the agreement entered into by the Central Government and the said agency and the agreement relating to the engagement of the consultant is approved by the Additional Secretary, Department of Economic Affairs in Ministry of Finance, Government of India.

(iii) **Remuneration to employees of consultant [Section 10(8B)]**

Section 10(8B), provides that the following incomes in case of an employee of consultant are exempt from tax

(a) The remuneration received for by an employee of the consultant referred to in the aforesaid para

(b) any other income which accrues or arise to him outside India, and is not deemed to accrue or arise in India in respect of which such individual is required to pay any income or social tax to the Government of the country of his or its origin

provided such employees is either not a citizen of India or, being a citizen of India is not ordinarily resident in India and the contract of his service is approved by the prescribed authority before the commencement of his service.

Any family member of such individual as is referred to in clause (8), or (8A) or of an employee, mentioned above, accompanying him to India enjoys tax exemption in respect of income
accrues or arises outside India and is not deemed to accrue or arise in India, if the family member is required to pay income tax or social security tax to the foreign Government or Government of the country of his origin. [Section 10(9)]

(6) Interest income arising to certain persons [Section 10(15)]

(i) **Interest on Notified Bonds**: Section 10(15)(iid) exempts interest on NRI Bonds and NRI Bonds (Second series) and Resurgent India Bonds, 1998 issued by the State Bank of India arising to –

- a non-resident Indian who own such bonds, or
- an individual owning such bonds by virtue of being nominee or survivor of such non-resident Indian, or
- any individual donee to whom the bonds have been gifted by such non-resident Indian.

This exemption is available only if the bonds are purchased by a non-resident Indian in foreign exchange and the interest and principal received in respect of such bonds, whether on their maturity or otherwise is not allowable to be taken out of India.

The exemption will continue to apply even after the non-resident, after purchase of such bonds, becomes a resident in any subsequent year.

However, the exemption will not apply in the previous year in which such bonds are encashed prior to their maturity.

Further, the Central Government shall not notify any such bonds after 1.6.2002. Hence, this exemption will no more be available in respect of any further issue of bonds on or after the 1.6.2002.

(ii) **Interest on deposits to bank incorporated outside India**: Interest payable to any bank incorporated in a country outside India and authorised to perform central banking functions in that country on any deposits made by it, with the approval of the Reserve Bank of India, with any scheduled bank shall be exempt. [Section 10(15)(iiia)]

(iii) **Interest on loan for projects approved by Central Government**: Interest payable to the Nordic Investment Bank, being a multilateral financial institution constituted by the Governments of Denmark, Finland, Iceland, Norway and Sweden, on a loan advanced by it to a project approved by the Central Government in terms of the Memorandum of Understanding entered into by the Central Government with that Bank on the 25.11.1986 shall be exempt [Section 10(15)(iiib)].

(iv) **Interest on loan in pursuance of financial co-operation agreement**: Interest payable on a loan granted by it in pursuance of the framework-agreement for financial co-operation entered into by the Central Government with that Bank on 25.11.1993, to the European Investment Bank shall be exempt, [Section 10(15)(iiic)].
(v) **Interest on foreign currency deposits**: Interest payable by a scheduled bank on deposits in foreign currency held by a non-resident or to a person who is not ordinarily resident, where the acceptance of such deposits by the bank is approved by RBI is exempt.

It may be noted that for the purpose of exemption under this clause, a scheduled bank does not include co-operative bank [Section 10(15)(iv)(fa)]

(vi) **Interest on deposits in an offshore Banking Unit of SEZ**: Interest income received by a non-resident or a person who is not ordinarily resident, in India on a deposit made on or after the 1.4.2005, in an Offshore Banking Unit referred to in section 2(u) of the Special Economic Zones Act, 2005 shall be exempt [Section 10(15)(viii)].

(7) **Income of European Economic Community (EEC) [Section 10(23BBB)]**

This clause provides exemption on any income of the EEC derived in India by way of interest, dividends or capital gains from investments made out of its funds under a scheme notified by the Government.

(8) **Income derived by the SAARC Fund for Regional Projects [Section 10(23BBC)]**

Any income derived by the SAARC Fund for Regional Projects which was set up by Colombo Declaration shall be exempt.

(9) **Income received by certain foreign companies in India in Indian currency from sale of crude oil to any person in India [Section 10(48)]**

Any income received in India in Indian currency by a foreign company on account of sale of –

(a) Crude oil

(b) Any other goods or rendering of services as may be notified by the Central Government in this behalf

to any person in India shall be exempt subject to the following conditions being satisfied:

(i) The receipt of money in India by the foreign company is pursuant to an agreement or an arrangement which is either entered into by the Central Government or approved by it.

(ii) The foreign company and the arrangement or agreement has been notified by the Central Government in this behalf having regard to the national interest.

(iii) The receipt of the money is the only activity carried out by the foreign company in India

(10) **Income accruing or arising to a foreign company on account of storage of crude oil in a facility in Indian and sale of crude oil therefrom to any person resident in India [Section 10(48A)]**

Any income accruing or arising to a foreign company on account of storage of crude oil in a facility in India and sale of crude oil therefrom to any person resident in India shall be exempt:
### Conditions

(i) The storage and sale by the foreign company is pursuant to an agreement or an arrangement entered into by the Central Government or approved by the Central Government and

(ii) having regard to the national interest, the foreign company and the agreement or arrangement is notified by the Central Government in this behalf.

### Income accruing or arising to a foreign company on account of sale of leftover stock of crude oil, if any, from the facility in India after the expiry of the agreement or the arrangement [Section 10(48B)]

The Finance Act 2017 has inserted new clause (48B) in section 10 to provide that any income accruing or arising to a foreign company on account of sale of leftover stock of crude oil if any from a facility in India after the expiry of an agreement or an arrangement referred to in section 10(48A), shall also be exempt, subject to such conditions, as may be notified by the Central Government in this behalf.

### Exempt Income of Non-Residents: A Summary

<table>
<thead>
<tr>
<th>Section</th>
<th>Income</th>
<th>Available to</th>
</tr>
</thead>
<tbody>
<tr>
<td>10(4)(i)</td>
<td>Interest on bonds or securities notified before 01-06-2002 by the Central Government including premium on redemption of such bonds.</td>
<td>Non-resident</td>
</tr>
<tr>
<td>10(4)(ii)</td>
<td>Interest on money standing to the credit in a Non-resident (External) account in India.</td>
<td>Person resident outside India (under FEMA Act) or a person who has been permitted to maintain said account by RBI</td>
</tr>
<tr>
<td>10(4B)</td>
<td>Interest on saving certificates issued before 1.6.2002 by the Central Government</td>
<td>Indian citizen or a person of Indian origin, who is a non-resident if original subscribers to the savings certificates in convertible foreign exchange remitted from a country outside India</td>
</tr>
<tr>
<td>10(6)(ii)</td>
<td>Remuneration received by Foreign Diplomats/Consulate and their staff (Subject to conditions)</td>
<td>Individual (not being a citizen of India)</td>
</tr>
<tr>
<td>10(6)(vi)</td>
<td>Remuneration received as employee of a foreign enterprise for services rendered by him during his stay in India, if:</td>
<td>Individual - Salaried Employee (not being a citizen of India)</td>
</tr>
<tr>
<td>10(6)(viii)</td>
<td>Salary received by or due for services rendered in connection with his employment on a foreign ship if his total stay in India does not exceed 90 days in the previous year.</td>
<td>Individual (Non-resident who is not a citizen of India)- Salaried Employee</td>
</tr>
<tr>
<td>10(6)(xi)</td>
<td>Remuneration received as an employee of the Government of a foreign state during his stay in India in connection with his training in any Government Office/Statutory Undertaking/corporation/registered society etc.</td>
<td>Individual - Salaried Employee (not being a citizen of India)</td>
</tr>
<tr>
<td>10(6A)</td>
<td>Tax paid by Government or Indian concern (under terms of agreement entered into after 31-3-1976 but before 1-6-2002 by the Government or Indian concern with the foreign company) on income derived by way of royalty or fees for technical services by the foreign company from Government or Indian concern.</td>
<td>Foreign Company</td>
</tr>
<tr>
<td>10(6B)</td>
<td>Tax paid by Government or Indian concern under terms of agreement entered into before 1-6-2002 by Central Government with Government of foreign State or international organization on income derived by a non-resident non-corporate or foreign company from the Government or Indian concern, other than income by way of salary, royalty or fees for technical services</td>
<td>Non-resident non-corporate or foreign company</td>
</tr>
<tr>
<td>10(6BB)</td>
<td>Tax paid by Indian company, engaged in the business of operation of aircraft, which has acquired an aircraft or an aircraft engine on lease, under an approved (by Central Government) agreement entered into between 1-4-1997 and 31-3-1999, or after 31-3-2007, on lease rental/income</td>
<td>Government of foreign State or foreign enterprise (i.e., a person who is a non-resident)</td>
</tr>
<tr>
<td>Section</td>
<td>Description</td>
<td>Condition</td>
</tr>
<tr>
<td>---------</td>
<td>-------------</td>
<td>-----------</td>
</tr>
<tr>
<td>10(6C)</td>
<td>Income derived by way of royalty or fees for technical services under an agreement with the Government for providing services in or outside India in projects connected with security of India.</td>
<td>Foreign company (notified by Central Government)</td>
</tr>
<tr>
<td>10(8)</td>
<td>Foreign income; and Remuneration received by an individual from the Government of a foreign State, in connection with any co-operative technical assistance programme and project under agreement between Central Government and the Government of a foreign State.</td>
<td>Individual</td>
</tr>
<tr>
<td>10(8A)</td>
<td>Foreign income; and Any remuneration or fee received by consultant (agreement relating to his engagement must be approved) out of funds made available to an international organization (agency) under a technical assistance grant agreement between that agency and the Government of a foreign State.</td>
<td>(i) Individual, being a: a) Non-Indian citizen; or b) Indian citizen who is not ordinarily resident in India, or (ii) any other person, being a non-resident engaged by the agency for rendering technical services in India in connection with any technical assistance programme or project in accordance with the approved agreement.</td>
</tr>
<tr>
<td>10(8B)</td>
<td>Foreign income; and Remuneration received by an employee of the consultant as referred to in section 10(8A) (contract of service must be approved by the prescribed authority before commencement of service).</td>
<td>Individual, being a: a) Non-Indian citizen; or b) Indian citizen who is not ordinarily resident in India</td>
</tr>
</tbody>
</table>
| 10(9)  | Foreign income | Any family member of individual as referred to in section 10(8)/(8A)/(8B), accompanying him to India.
**Foreign income** referred in section 10(8)/(8A)/(8B)/(9) above refers to the other income accruing or arising outside India. Such income would be exempt provided:

(i) it is not deemed to accrue or arise in India; and  
(ii) the individual is required to pay any income tax or social security tax of such income to the Government of that Foreign State.

| 10(15)(iid) | Interest on notified bonds (notified prior to 01-06-2002) purchased in foreign exchange and the interest and principal received in respect of such bonds, whether on their maturity or otherwise, is not allowable to be taken out of India. | Individual, being a:  
a) Non-resident Indian (NRI) or nominee or survivor of NRI;  
b) Individual to whom bonds have been gifted by NRI. |
| 10(15)(iiia) | Interest on deposits made by a foreign bank with scheduled bank with approval of RBI. | Bank incorporated outside India and authorised to perform Central Banking functions in that country. |
| 10(15)(iiib) | Interest payable on loan advanced by Nordic Investment Bank to a project approved by Central Government in terms of MoU entered by Central Govt with that Bank on 25.11.1986 | Nordic Investment Bank |
| 10(15)(iiic) | Interest payable on loan granted by European Investment Bank in pursuance of framework agreement dated 25-11-1993 for financial corporation between Central Government and that Bank | European Investment Bank |
| 10(15)(iv)(fa) | Interest payable by scheduled bank on deposits in foreign currency where acceptance of such deposits is duly approved by RBI. | a) Non-resident  
b) Individual or HUF being a resident but not ordinary resident |
| 10(15)(viii) | Interest on deposit in an Offshore Banking Unit on or after 01.04.2005 | Person who is a non-resident or not ordinarily resident |
| 10(23BBB) | Income of European Economic Community from interest, dividends or capital gains from investment out of its funds under notified scheme of Central Government. | European Economic Community |
Section 28 details the income chargeable to tax under the head “Profits and Gains of Business or Profession”. Certain provisions have been incorporated in the Income-tax Act, 1961, whereby the total income of certain non-resident assessees is computed on the basis of certain percentage of their gross total receipts.

(1) Special provision for computing the profits and gains of shipping business in the case of non-residents [Section 44B]

Section 44B provides that profits and gains of a non-resident engaged in the business of operation of ships are to be taken @ 7.5% of the aggregate of the following amounts:

(i) paid or payable, whether in or out of India, to the assessee or to any person on his behalf on account of carriage of passengers, livestock, mail or goods shipped at any port in India; and

(ii) received or deemed to be received in India by or on behalf of the assessee on account of the carriage of passengers, livestock mail or goods shipped at any port outside India.

The amounts referred to in (i) and (ii) shall include demurrage charges or handling charges or any other amount of similar nature.

The amounts paid or payable or the amounts received or deemed to be received will also include the amount paid or payable or received or deemed to be received by way of demurrage charges or handling charges or any other amount of similar nature [CIT v. Japan Lines Ltd. 260 ITR 656 (Mad)]. Thus 7.5%
of the gross amounts mentioned above would be liable to tax and no deduction would be allowed for any expenditure, (i.e. the provisions of section 28 to 43A are not to be taken into account) however carried forward losses would be allowed to be set off from such income.

Analysis of section 44B and section 172:

<table>
<thead>
<tr>
<th>Section 44B</th>
<th>Section 172</th>
</tr>
</thead>
<tbody>
<tr>
<td>Presumptive tax provisions for non-residents engaged in shipping business. It does not, however, contain any procedure for assessment and collection of tax.</td>
<td>Complete code for taxation of occasional shipping business of non-residents, including assessment and collection of tax.</td>
</tr>
</tbody>
</table>

Manner of computation of presumptive Income:

Notwithstanding anything to the contrary contained in sections 28 to 43A, in the case of an assessee, being a non-resident, engaged in the business of operation of ships, a sum equal to 7.5% of the aggregate of the -
- amount paid or payable (whether in or outside India) to the non-resident or to any other person on his behalf on account of the carriage of passengers, livestock, mail or goods shipped at any Indian port and
- the amount received or deemed to be received in India on account of the carriage of passengers, livestock, mail or goods shipped at any port outside India.

shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession".

Where a ship carries passengers, livestock, mail or goods shipped at a port in India, a sum equal to 7.5% of-
- the amount paid or payable on account of such carriage to the owner or the charterer or to any person on his behalf, whether that amount is paid or payable in or out of India,

shall be deemed to be income accruing in India to the owner or charterer on account of such carriage.

The difference between section 44B and section 172 has been explained by the Karnataka High Court in V. M. Salgaocer & Bros Ltd. v. Deputy Controller (1991) 187 ITR 381. Those who do regular shipping business are covered by section 44B and they will be assessed in accordance with the provision of the Act applicable to the rates specified in section 44B, while causal visit of Indian port is covered by section 172.

Other provisions of section 172

(i) Furnish a return of the amount paid to the owner: Section 172(3) imposes an obligation on the master of the ship to prepare and furnish to the Assessing Officer a return of the full amount...
paid or payable to the owner or charterer or any person on this behalf, on account of the carriage of all passengers, livestock, mail or goods shipped at any port in India since the last arrival of the ship thereat. Such return is, ordinarily, to be furnished by the master of the ship before the departure, from that port in India, of the ship.

A return may, however, be filed by the person authorized by the master of the ship within 30 days of the departure of the ship from the port, if:

(a) the Assessing Officer is satisfied that it is not possible for the master of the ship to furnish the return required by section 172(3) before the departure of the ship from the port and

(b) the master of the ship has made satisfactory arrangement for the filing of the return and payment of tax by any other person on this behalf.

(ii) **Assessment:** Section 172(4) provides for a summary procedure of assessment. On receipt of the return filed by the master of the ship or by any person on this behalf, the Assessing Officer has to determine the tax payable on the taxable income. By virtue of the provisions of section 172(2), the taxable income is a sum equal to 7.5% of the amount paid or payable on account of carriage of passengers etc. to the owner or charterer or to any person on his behalf, whether that amount is paid or payable in or out of India. The tax payable on such taxable income is to be calculated at the rate or rates in force applicable to the total income. The master of the ship is liable for payment of such tax.

The Supreme Court, in *A.S. Glittre v CIT* (1997) 225 ITR 739 (SC), held that the assessment made under section 172(4) shall be an 'adhoc' assessment and it will be superceded if a regular assessment is opted as per the provisions of the Act.

(iii) **Time limit for passing the assessment order:** Under section 172(4A), it is incumbent on the Assessing Officer to pass the order of assessment within 9 months from the end of the financial year in which the return of income under section 172(3) is filed.

For the purpose of determining the tax payable, Assessing Officer is empowered to call for such accounts and documents as he may require [section 172(5)].

(iv) **Grant of port of clearance to the ship:** prohibits grant of A port clearance shall not be granted to the ship until the Collector of customs or other authorized officer, is satisfied that the tax assessable under section 172 has been duly paid or that satisfactory arrangements have been made for the payment thereof [Section 172(6)].

(v) **Option to pay tax as per normal provisions of the Income-tax Act, 1961 on the income chargeable to tax under section 172:** The owner or charterer has the option to claim before the expiry of the assessment year relevant to the previous year in which the date of departure of the ship from the Indian port falls, that an assessment in respect of his total income for the previous year and the tax payable on the basis thereof be determined in accordance with the other provisions of this Act. In such a case, any payment made under section 172 is to be treated
as a payment in advance of the tax leviable for that assessment year and the difference between the sum so paid and the amount of tax found payable by him on such assessment is to be paid by him or refunded to him as the case may be [Section 172(7)].

The sum chargeable to tax under this section shall include amounts payable by way of demurrage charge or handling charge or any other amount of similar nature [Section 172(8)].

Illustration 1

Sea Port Shipping Line, a non-resident foreign company operating its ships on the Indian Ports during the previous year ended on 31.3.2018, had collected freight of ₹ 100 lakhs, demurrages of ₹ 20 lakhs and handling charges of ₹ 10 lakhs. The expenses of operating its fleet during the year for the Indian Ports were ₹ 110 lakhs. The company denies its liability to tax in India. Examine.

Solution

The provisions of section 44B would be beneficial in this case. This section provides that in the case of an assessee, being a non-resident, engaged in the business of operation of ships, a sum equal to 7.5% of the aggregate of the following amounts would be deemed to be the profits and gains of such business chargeable to tax under the head “Profits and gains of business or profession”.

(i) The amount paid or payable, whether within India or outside, to the assessee or to any person on his behalf on account of the carriage of passengers, livestock, mail or goods shipped at any port in India; and

(ii) The amount received or deemed to be received in India by the assessee himself or by any other person on behalf of or on account of the carriage of passengers, livestock, mail or goods shipped at any port outside India.

The above amounts will include demurrage charges and handling charges.

These provisions for computation of the income from the shipping business in case of non-residents would apply notwithstanding anything to the contrary contained in the provisions of sections 28 to 43A of the Income-tax Act, 1961.

Therefore, in this case, M/s. Sea Port Shipping Line is required to pay tax in India on the basis of presumptive tax scheme as per the provisions of section 44B. The assessee shall not be entitled to set off any of the expenses incurred for earning of such income. Therefore, the Shipping Line is required to pay tax on deemed profit of ₹ 9.75 lacs (7.50% on the total receipts of ₹ 130 lacs).

(2) Special provision for computing profits and gains in connection with the business of exploration etc. of mineral oils [Section 44BB]

Section 44BB is a non-obstante clause. Accordingly, sections 28 to 41 and section 43 and 43A are not applicable in the case of a non-resident engaged in the business of providing services of facilities in connection with, or supplying plant and machinery on hire used, or to be used in the prospecting for, or extraction or production of, mineral oils.
(i) **Eligible assessee**: Section 44BB provides for determination of income of taxpayer being a non-resident engaged in the business of providing services and facilities in connection with, or supplying plant and machinery on hire used or to be used in the prospecting for, or extraction or production of mineral oils.

(ii) **Presumptive tax rate**: In such case, the profits and gains shall be deemed to be equal to 10% of the following amounts:

- paid or payable to the taxpayer or to any person on his behalf whether in or out of India, on account of the provision of such services or facilities or supply of plant & machinery for the aforesaid purposes in India; and
- received or deemed to be received in India by or on behalf of the assessee on account of such service or facilities or supply of plant and machinery used or to be used in prospecting for, or extraction or production of mineral oils outside India.

(iii) **Non-applicability of presumptive taxation under section 44BB**: The provisions of section 44BB shall not apply to any income to which the provisions of section 42 or section 44DA, 115A or 293A apply for the purpose of computing profit or gains or any other income referred to in these sections.

<table>
<thead>
<tr>
<th>Section</th>
<th>Provision</th>
</tr>
</thead>
<tbody>
<tr>
<td>42</td>
<td>Special provision for deductions in the case of business for prospecting, etc., for mineral oil</td>
</tr>
<tr>
<td>44DA</td>
<td>Special provisions for computing income by way of royalties, etc., in case of non-residents.</td>
</tr>
<tr>
<td>115A</td>
<td>Tax on dividends, royalty and fees for technical services in the case of foreign companies</td>
</tr>
<tr>
<td>293A</td>
<td>Power to make exemption, etc., in relation to participation in the business of prospecting for, extraction, etc., of mineral oils.</td>
</tr>
</tbody>
</table>

(iv) **Option to claim lower profits**: An assessee may claim lower income than the presumptive rate of 10%, if he keeps and maintains books of account under section 44AA(2) and get them audited and furnish a report of such audit under section 44AB. The assessment in all such cases shall be done by the Assessing Officer under section 143(3).

(v) **Meaning of certain terms**: For the purposes of this section,-

(a) Plant includes ships, aircraft, vehicles, drilling units, scientific apparatus and equipment, used for the purposes of the said business;

(b) “Mineral oil” includes petroleum and natural gas.
Note - If the income of a non-resident is in the nature of fees for technical services, it shall be taxable under the provisions of either section 44DA or section 115A irrespective of the business to which it relates. Section 44BB would apply only in a case where consideration is for services and other facilities relating to exploration activity which are not in the nature of technical services.

(3) Special provision for computing profits and gains of the business of operation of aircraft in the case of non-residents [Section 44BBA]

Section 44BBA is a non-obstante clause. Accordingly, sections 28 to 43A are not applicable in the case of a non-resident engaged in the business of operation of aircraft.

(i) Eligible assessee: Section 44BBA provides presumptive taxation rate in case of a non-resident engaged in the business of operation of aircraft.

(ii) Presumptive tax rate: Income from such business is calculated at a flat rate of 5% of the following:

(a) amount paid or payable, in or out of India, to the tax payer or to any person on his behalf on account or carriage of passenger, livestock, mail or goods from any place in India

(b) amount received or deemed to be received in India by or on behalf of the taxpayer on account of carriage of passenger, livestock, mail or goods from any place outside India.

Illustration 2

Mr. Q, a non-resident, operates an aircraft between Singapore and Chennai. He received the following amounts while carrying on the business of operation of aircrafts for the year ended 31.3.2018:

(i) ₹ 2 crores in India on account of carriage of passengers from Chennai.

(ii) ₹ 1 crore in India on account of carriage of goods from Chennai.

(iii) ₹ 3 crores in India on account of carriage of passengers from Singapore.

(iv) ₹ 1 crore in Singapore on account of carriage of passengers from Chennai.

The total expenditure incurred by Mr. Q for the purposes of the business during the year ending 31.3.2018 was ₹ 6.75 Crores.

Compute the income of Mr. Q chargeable to tax in India under the head “Profits and gains of business or profession” for the assessment year 2018-19.

What would be your answer in case the business was carried on by a foreign company, Q Airlines (P) Ltd?

Solution

Section 44BBA says for computing profits and gains of the business of operation of aircraft in the case of non-residents a sum equal to 5% of the aggregate of the following amounts -
(a) paid or payable, whether in or out of India, to the assessee or to any person on his behalf on account of the carriage of passengers, livestock, mail or goods from any place in India; and

(b) received or deemed to be received in India by or on behalf of the assessee on account of the carriage of passengers, livestock, mail or goods from any place outside India.

Keeping in view the provisions of section 44BBA, the income of Mr. Q chargeable to tax in India under the head "Profits and gains of business or profession" is worked out hereunder-

<table>
<thead>
<tr>
<th>Particulars</th>
<th>₹</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amount received in India on account of carriage of passengers from Chennai</td>
<td>2,00,00,000</td>
</tr>
<tr>
<td>Amount received in India on account of carriage of goods from Chennai</td>
<td>1,00,00,000</td>
</tr>
<tr>
<td>Amount received in India on account of carriage of passengers from Singapore</td>
<td>3,00,00,000</td>
</tr>
<tr>
<td>Amount received in Singapore on account of carriage of passengers from Chennai</td>
<td>1,00,00,000</td>
</tr>
</tbody>
</table>

**Total:** 7,00,00,000

Income from business under section 44BBA at 5% of ₹ 7,00,00,000 is ₹ 35,00,000, which is the income of Mr. Q chargeable to tax in India under the head "Profits and gains of business or profession" for the A.Y. 2018-19.

In case the assessee is a foreign company, say, Q Airlines (P) Ltd, the answer would be the same since section 44BBA does not distinguish corporate and non-corporate taxpayers who operate aircraft provided their residential status is that of non-resident.

(4) **Special provision for computing profits and gains of foreign companies engaged in the business of civil construction etc. in certain turnkey power projects [Section 44BBB]**

(i) **Eligible assessee:** A foreign company engaged in the business of civil construction or the business of erection of plant or machinery or testing or commissioning thereof in connection with a turnkey power project approved by the Central Government in this behalf.

(ii) **Presumptive tax rate:** A sum equal to 10% of the amount paid or payable (whether in or out of India) to the said assessee or to any person on his behalf on account of such civil construction, erection, testing or commissioning shall be deemed to be the profits and gains of such business chargeable to tax under the head 'profits and gains of business or profession'.

(iii) **Option to claim lower profits:** An assessee may claim lower income than the presumptive rate of 10%, if he keeps and maintains books of account under section 44AA(2) and get them audited and furnish a report of such audit under section 44AB. The assessment in all such cases shall be done by the Assessing Officer under section 143(3).
In case of a non-resident, head office expenditure is allowed in accordance with the provision of section 44C. This section is a non-obstante provision and anything contrary contained in sections 28 to 43A is not applicable.

Deduction in respect of head office expenditure is restricted to the least of the following:

(a) an amount equal to 5% of “adjusted total income” or in the case of loss, 5% of the “average” adjusted total income; or

(b) the amount of so much of the expenditure in the nature of head office expenditure incurred by the assessee as is attributable to the business or profession of the assessee in India.

Meaning of certain terms:

<table>
<thead>
<tr>
<th>Term</th>
<th>Meaning</th>
</tr>
</thead>
</table>
| Adjusted total income       | Total income computed in accordance with the provisions of the Act without giving effect to the following :-
|                             | ▪ Allowance under this section
|                             | ▪ Unabsorbed depreciation allowance under section 32(2).
|                             | ▪ Expenditure incurred by a company for the purpose of promoting family planning amongst its employees under first proviso to section 36(1)(ix).
|                             | ▪ Business loss brought forward under section 72(1).
|                             | ▪ Speculation loss brought forward under section 73(2).
|                             | ▪ Loss under the head Capital Gain under section 74(1).
|                             | ▪ Loss from certain specified source brought forward under Section 74A(3).
|                             | ▪ Deduction under Chapter VI-A.                                                                                                                                                                           |
| Average adjusted total income | (a) The total income of the assessee, assessable for each of the three assessment years immediately preceding the relevant assessment year, one third of the aggregate amount of the adjusted total income in respect of previous years relevant to the aforesaid three assessment years is average adjusted total income.
|                             | (b) When the total income of the assessee is assessable only for two of the aforesaid three assessment years, one half of the aggregate amount of the adjusted total income in respect of the previous year’s relevant to the aforesaid two assessment years is taken on average adjusted total income. |
(c) Where the total income of the assessee is assessable only for one of the aforesaid three assessment years, the amount of the adjusted total income in respect of the previous year relevant to that assessment year is average adjusted total income.

<table>
<thead>
<tr>
<th>Head office expenditure</th>
</tr>
</thead>
</table>

Executive and general administration expenditure incurred by the assessee outside India, including expenditure incurred in respect of:

a. rent, rates, taxes, repairs or insurance of any premises outside India used for the purpose of the business or profession.

b. salary, wages, annuity, pension, fees, bonus, commission, gratuity, perquisites or profit in lieu of or in addition to salary, whether paid or allowed to any employee or other person employed in, or managing the affairs of, any office outside India;

c. traveling by any employee or other person employed in, or managing the affairs, of any office outside India; and

d. such other matters connected with executive and general administrative as may be prescribed.

Illustration 3

The net result of the business carried on by a branch of foreign company in India for the year ended 31.03.2018 was a loss of ₹ 100 lakhs after charge of head office expenses of ₹ 200 lakhs allocated to the branch. Explain with reasons the income to be declared by the branch in its return for the assessment year 2018-19.

Solution

Section 44C restricts the allowability of the head office expenses to the extent of lower of an amount equal to 5% of the adjusted total income or the amount actually incurred as is attributable to the business of the assessee in India.

For the purpose of computing the adjusted total income, the head office expenses of ₹ 200 Lakhs charged to the profit and loss account have to be added back.

The amount of income to be declared by the assessee for A.Y. 2018-19 will be as under:

<table>
<thead>
<tr>
<th>Particulars</th>
<th>₹</th>
</tr>
</thead>
<tbody>
<tr>
<td>Net loss for the year ended on 31.03.2018</td>
<td>(100 lakhs)</td>
</tr>
<tr>
<td>Add: Amount of head office expenses to be considered separately as per section 44C</td>
<td>200 lakhs</td>
</tr>
<tr>
<td>Adjusted total income</td>
<td>100 lakhs</td>
</tr>
<tr>
<td>Less: Head Office expenses allowable under section 44C is the lower of</td>
<td></td>
</tr>
</tbody>
</table>
(6) Special provision for computing income by way of royalties etc. in case of non-residents [Section 44DA]

(i) Eligible assessee: Section 44DA provides the method of computation of income by way of royalty or fees for technical services arising from the agreement made by the non-resident with the Indian company or Government of India after 31.03.2003 where:
   (a) such non-resident carries business/profession in India through permanent establishment or fixed place of profession; and
   (b) the right, property or contract in respect of which the royalty or fees for technical services are paid is effectively connected with such permanent establishment or fixed place of service.

(ii) Expenses not allowed as deduction: While computing the income chargeable to tax under this section, the following expenses are not allowed as deduction:
   - expenditure or allowance incurred which is not wholly and exclusively for such permanent establishment or fixed place of service in India
   - amount paid (otherwise than Reimbursement of actual expenses) by the permanent establishment to head office or to any of its other offices.

(iii) Non-applicability of section 44BB: The provisions of section 44BB do not apply in respect of income covered by this section.

(iv) Mandatory requirement to maintain books of account and get them audited: Under this section, the non-resident is mandatorily required to keep and maintain the books of account under section 44AA and get them audited and furnish a report of such audit.

**SUMMARY OF PRESumptive TAX PROVISIONS**

<table>
<thead>
<tr>
<th>Section</th>
<th>Particulars</th>
<th>Rate of presumptive income/deduction in respect of expenditure</th>
<th>Type of Business</th>
</tr>
</thead>
<tbody>
<tr>
<td>44B</td>
<td>Income from shipping business shall be computed on presumptive basis (subject to certain conditions).</td>
<td>7.5% of specified sum shall be deemed to be the presumptive income</td>
<td>Non-resident engaged in shipping business</td>
</tr>
<tr>
<td>44BB</td>
<td>Income of a non-resident engaged in the business of providing services or facilities in connection with, or supplying plant and machinery on hire used, or to be used, in the prospecting for, or extraction or production of, mineral oils shall be computed on presumptive basis (Subject to certain conditions). Lower profits may be claimed provided the assessee maintains books of account under section 44AA and gets them audited under section 44AB.</td>
<td>10% of specified sum shall be deemed to be the presumptive income</td>
<td>Non-resident engaged in business of exploration of mineral oils.</td>
</tr>
<tr>
<td>-------</td>
<td>--------------------------------------------------------------------------------------------------</td>
<td>------------------------------------------------------------------</td>
<td>------------------------------------------------------------------</td>
</tr>
<tr>
<td>44BBA</td>
<td>Income of a non-resident engaged in the business of operation of aircraft shall be computed on presumptive basis (Subject to certain conditions).</td>
<td>5% of specified sum shall be deemed to be the presumptive income.</td>
<td>Non-resident engaged in the business of operating of aircraft.</td>
</tr>
<tr>
<td>44BBB</td>
<td>Income of a foreign company engaged in the business of civil construction or the business of erection of plant or machinery or testing or commissioning thereof, in connection with turnkey power projects shall be computed on presumptive basis (subject to certain conditions). Lower profits may be claimed provided the assessee maintains books of account under section 44AA and gets them audited under section 44AB.</td>
<td>10% of specified sum shall be deemed to be the presumptive income.</td>
<td>Foreign Company</td>
</tr>
<tr>
<td>44C</td>
<td>Deduction for Head office Expenditure (subject to certain conditions and limits).</td>
<td>Deduction for head-office expenditure shall be limited to lower of following:</td>
<td>Non-resident</td>
</tr>
</tbody>
</table>
2.7 CAPITAL GAINS TAXATION FOR NON RESIDENTS

Any person including a foreign company or non-corporate non-resident is liable to capital gains tax in India, if there is a transfer of a property (capital asset) in India which results in profit or gain.

Section 45 provides that any profits or gains arising from transfer of a capital asset effected in the previous year shall be chargeable to income tax under the head “Capital gain” and shall be deemed to be the income of the previous year in which the transfer took place.

The requisites of a charge to income-tax, of capital gains under Section 45(1) are:

(i) There must be a capital asset.
(ii) The capital asset must have been transferred.
(iii) The transfer must have been effected in the previous year.

There must be a gain arising on such transfer of a capital asset. Such capital gain should not be exempt under Sections 54, 54B, 54D, 54EC, 54ED, 54F, 54G, or 54GA.

(1) Meaning of Capital Asset

Definition: According to section 2(14), a capital asset means –

(a) property of any kind held by an assessee, whether or not connected with his business or profession;
(b) any securities held by a Foreign Institutional Investor which has invested in such securities in accordance with the SEBI regulations.
However, it does not include—

(i) **Stock-in trade**: Any stock-in-trade [other than securities referred to in (b) above], consumable stores or raw materials held for the purpose of the business or profession of the assessee;

The exclusion of stock-in-trade from the definition of capital asset is only in respect of sub-clause (a) above and not sub-clause (b). This implies that even if the nature of such security in the hands of the Foreign Portfolio Investor is stock in trade, the same would be treated as a capital asset and the profit on transfer would be taxable as capital gains.

Further, the Explanatory Memorandum to the Finance (No.2) Bill, 2014 clarifies that the income arising from transfer of such security by a Foreign Portfolio Investor (FPI) would be in the nature of capital gain, irrespective of the presence or otherwise in India, of the Fund manager managing the investments of the assessee.

(ii) **Personal effects**: Personal effects, that is to say, movable property (including wearing apparel and furniture) held for personal use by the assessee or any member of his family dependent on him.

**EXCLUSIONS:**

(a) jewellery;
(b) archaeological collections;
(c) drawings;
(d) paintings;
(e) sculptures; and
(f) any work of art.

**Definition of Jewellery** - Jewellery is a capital asset and the profits or gains arising from the transfer of jewellery held for personal use are chargeable to tax under the head “capital gains”. For this purpose, the expression ‘jewellery’ includes the following:

(i) Ornaments made of gold, silver, platinum or any other precious metal or any alloy containing one or more of such precious metals, whether or not containing any precious or semi-precious stones and whether or not worked or sewn into any wearing apparel;

(ii) Precious or semi-precious stones, whether or not set in any furniture, utensil or other article or worked or sewn into any wearing apparel.

(iii) **Rural agricultural land** in India i.e., agricultural land in India which is not situated in any specified area.

As per the definition that only rural agricultural lands in India are excluded from the purview of the term ‘capital asset’. Hence urban agricultural lands constitute capital assets. Accordingly, the agricultural land described in (a) and (b) below, being land situated within the specified...
urban limits, would fall within the definition of “capital asset”, and transfer of such land would attract capital gains tax -

(a) agricultural land situated in any area within the jurisdiction of a municipality or cantonment board having population of not less than ten thousand according to last preceding census, or

(b) agricultural land situated in any area within such distance, measured aerially, in relation to the range of population according to the last preceding census as shown hereunder –

<table>
<thead>
<tr>
<th>(i)</th>
<th>Shortest aerial distance from the local limits of a municipality or cantonment board referred to in item (a)</th>
<th>Population according to the last preceding census of which the relevant figures have been published before the first day of the previous year.</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i)</td>
<td>≤ 2 kilometers</td>
<td>&gt; 10,000 ≤ 1,00,000</td>
</tr>
<tr>
<td>(ii)</td>
<td>≤ 6 kilometers</td>
<td>&gt; 1,00,000 ≤ 10,00,000</td>
</tr>
<tr>
<td>(iii)</td>
<td>≤ 8 kilometers</td>
<td>&gt; 10,00,000</td>
</tr>
</tbody>
</table>

Explanation regarding gains arising on the transfer of urban agricultural land -

*Explanation* to section 2(1A) clarifies that capital gains arising from transfer of any agricultural land situated in any non-rural area (as explained above) will not constitute agricultural revenue within the meaning of section 2(1A).

In other words, the capital gains arising from the transfer of such urban agricultural lands would not be treated as agricultural income for the purpose of exemption under section 10(1). Hence, such gains would be exigible to tax under section 45.


(v) Special Bearer Bonds, 1991 issued by the Central Government;

(vi) Gold Deposit Bonds issued under the Gold Deposit Scheme, 1999 or deposit certificates issued under the Gold Monetisation Scheme, 2015 notified by the Central Government.

**Note** – ‘Property’ includes and shall be deemed to have always included any rights in or in relation to an Indian company, including rights of management or control or any other rights whatsoever.
(2) Short term and Long term Capital Asset

(i) Section 2(42A) defines short-term capital asset as a capital asset held by an assessee for not more than 36 months immediately preceding the date of its transfer. Therefore, a capital asset held by an assessee for more than 36 months immediately preceding the date of its transfer is a long-term capital asset.

(ii) A security (other than a unit) listed in a recognized stock exchange, or a unit of an equity oriented fund or a unit of the Unit Trust of India or a Zero Coupon Bond will be considered as a long-term capital asset if the same is held for more than 12 months immediately preceding the date of its transfer.
Zero Coupon Bond (ZCB) – Section 2(48) defines the expression ‘Zero Coupon Bond’.

As per this definition, ‘zero coupon bond’ means a

- bond issued by any infrastructure capital company or infrastructure capital fund or a public sector company or a scheduled bank on or after 1st June, 2005,

- in respect of which no payment and benefit is received or receivable before maturity or redemption from such issuing entity and

- which the Central Government may notify in this behalf.

The income on transfer of a ZCB (not being held as stock-in-trade) is to be treated as capital gains.

Section 2(47)(iva) provides that maturity or redemption of a ZCB shall be treated as a transfer for the purposes of capital gains tax.

(iii) **Period of holding of unlisted shares to qualify as a long-term capital asset** - A share of a company (not being a share listed in a recognized stock exchange in India) would be treated as a short-term capital asset if it was held by an assessee for not more than 24 months immediately preceding the date of its transfer.

Thus, the period of holding of unlisted shares for being treated as a long-term capital asset would be “more than 24 months” instead of “more than 36 months”.

(iv) **Period of holding of an immovable property, being land or building or both to be reduced from “more than 36 months” to “more than 24 months”**

An immovable property, being land or building or both would be treated as a short-term capital asset if it was held by an assessee for not more than 24 months immediately preceding the date of its transfer.

Thus, the period of holding of an immovable property, being land or building or both, for being treated as a long-term capital asset has been reduced from “more than 36 months” to “more than 24 months” from A.Y.2018-19.

(v) Where share(s) of a company is acquired by the non-resident assessee on redemption of Global Depository Receipts referred to in clause (b) of section 115AC(1) held by such assessee, the period shall be reckoned from the date on which a request for such redemption was made.
Section 47 specifies certain transactions which will not be regarded as transfer for the purpose of capital gains tax in respect of non-residents and foreign companies.

(i) **Transfer of share/s held in an Indian company by amalgamating foreign company to amalgamated foreign company, in a scheme of amalgamation:** Any transfer, in a scheme of amalgamation, of shares held in an Indian company by the amalgamating foreign company to the amalgamated foreign company [Section 47(via)].

**Conditions** –

(a) At least 25 percent of the shareholders of the amalgamating foreign company must continue to remain shareholders of the amalgamated foreign company;

(b) Such transfer should not attract capital gains in the country in which the amalgamating company is incorporated.

(ii) **Transfer of share(s) of foreign company by amalgamating foreign company to amalgamated foreign company, in a scheme of amalgamation:** Any transfer, in a scheme of amalgamation, of a capital asset, being a share of a foreign company referred to in *Explanation 5* to section 9(1)(i), which derives, directly or indirectly, its value substantially from the share or shares of an Indian company, held by the amalgamating foreign company to the amalgamated foreign company.[Section 47(viab)]

**Conditions** –

(a) At least 25 percent of the shareholders of the amalgamating foreign company must continue to remain shareholders of the amalgamated foreign company;

(b) Such transfer should not attract capital gains in the country in which the amalgamating company is incorporated.

(iii) **Transfer of share(s) held in an Indian company by demerged foreign company to resulting foreign company, in a scheme of demerger:** Any transfer in a demerger, of a capital asset, being a share or shares held in an Indian company, by the demerger foreign company to the resulting foreign company [Section 47(vic)].
Conditions –

(a) The shareholders holding at least three-fourths in value of the shares of the demerged foreign company continue to remain shareholders of the resulting foreign company;

(b) Such transfer does not attract tax on capital gains in the country, in which the demerged foreign company is incorporated.

However, the provisions of sections 391 to 394\(^2\) of the Companies Act, 1956, shall not apply in case of demergers referred to in this clause.

(iv) Transfer of share(s) of foreign company by demerged foreign company to resulting foreign company, in a scheme of demerger: Any transfer, in a scheme of demerger, of a capital asset, being a share of a foreign company referred to in *Explanation 5* to section 9(1)(i), which derives, directly or indirectly, its value substantially from the share or shares of an Indian company, held by the demerged foreign company to the resulting foreign company.[Section 47(vicc)]

Conditions –

(a) At least 25 percent of the shareholders of the demerged foreign company must continue to remain shareholders of the resulting foreign company;

(b) Such transfer should not attract capital gains in the country in which the demerged foreign company is incorporated.

However, the provisions of sections 391 to 394\(^3\) of the Companies Act, 1956, shall not apply in case of demergers referred to in this clause.

(v) Transfer of bond or Global Depository Receipts by a non-resident to another non-resident outside India: Any transfer of bonds of an Indian company or Global Depository Receipts purchased in foreign currency [referred to in section 115AC(1)] [Section 47(viia)].

Conditions –

(a) The transfer must be made outside India;

(b) The transfer must be made by the non-resident to another non-resident.

(vi) Transfer of Rupee Denominated bond by a non-resident to another non-resident outside India: Any transfer, made outside India, of a capital asset being rupee denominated bond of an Indian company issued outside India, by a non-resident to another non-resident [Section 47(viia)].

(vii) Transfer of Government Security by a non-resident to another non-resident through an intermediary: Any transfer of a capital asset, -

(a) being a Government Security carrying a periodic payment of interest,

\(^2\) Sections 230 to 232 of the Companies Act, 2013

\(^3\) Sections 230 to 232 of the Companies Act, 2013
(b) made outside India through an intermediary dealing in settlement of securities,
(c) by a non-resident to another non-resident [Section 47(viib)]

(4) **Mode of computation of capital gains [Section 48]**

Section 48 lays down the mode of computation of capital gain and provides that the income chargeable under the head ‘Capital gains’ shall be computed by deducting the full value of consideration received or accruing as a result of the transfer of the capital asset the following amounts viz:

i) expenditure incurred wholly and exclusively in connection with such transfer; and
ii) the cost of acquisition of the asset and the cost of any improvement thereto.

However, no deduction shall be allowed in computing the income chargeable under the head “Capital Gains” in respect of any amount paid on account of securities transaction tax under Chapter VII of the Finance (No.2) Act, 2004.

For computation of long term capital gains, the cost of acquisition under section 48 will be increased by applying the cost inflation index (CII). Once the cost inflation index is applied to the cost of acquisition, it becomes indexed cost of acquisition.

Similarly, indexed cost of any improvement means an amount which bears to the cost of improvement, the same proportion as CII for the year in which the asset is transferred bears to the CII for the year in which the improvement to the asset took place.

(5) **Special provisions of computation in case of non-residents**

(i) **First Proviso to Section 48 read with Rule 115A:-**

In order to give protection to non-residents who invest foreign exchange to acquire capital assets, the first proviso to section 48 provides that capital gains arising from the transfer of shares or debentures of an Indian company is to be computed as follows:

- The cost of acquisition, the expenditure incurred wholly and exclusively in connection with the transfer and the full value of the consideration are to be converted into the same foreign currency with which such shares were acquired.
- The resulting capital gains shall be reconverted into Indian currency.

The aforesaid manner of computation of capital gains shall be applied for every purchase and sale of shares or debentures in an Indian company.

Benefit of indexation will not be applied in this case.

Rule 115A of the Income-tax Rules, 1962 provides that the average of the telegraphic transfer buying rate and telegraphic transfer selling rate of the foreign currency initially utilized in purchase of the capital asset as on the date specified in column (3) in the table below, shall be used to convert rupees into foreign currency for the purpose of computation of capital gains.
For reconverting capital gains computed in the foreign currency initially utilized in the purchase of the capital asset into rupees, the telegraphic transfer buying rate of such currency, as on the date of transfer of the capital asset, is to be considered.

### Meaning of certain terms

<table>
<thead>
<tr>
<th>Term</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Telegraphic transfer buying rate</strong></td>
<td>The rate or rates of exchange adopted by the State Bank of India for buying foreign currency having regard to the guidelines specified from time to time by the RBI for buying foreign currency where such currency, made available to that bank through a telegraphic transfer.</td>
</tr>
<tr>
<td><strong>Telegraphic transfer selling rate</strong></td>
<td>The rate of exchange adopted by the State Bank of India for selling foreign currency where such currency is made available by that bank through telegraphic transfer.</td>
</tr>
</tbody>
</table>

### Other Important Points:

- a. It is also provided that the aforesaid manner of computation of capital gains shall be applicable in respect of capital gains accruing or arising from every re-investment thereafter in and sale of shares in or debentures of an Indian company.

- b. However, if the total income of an assessee includes any income chargeable under the head ‘capital gains’ arising from transfer of a capital asset being an equity share in a company or unit of an equity oriented fund or unit of a business trust and transaction of sale of such security has been entered on or after October 1, 2004 on which Securities Transaction Tax is chargeable, then, short term capital gains shall be payable at the rates specified and no long-term capital gains shall be payable on such securities.

- c. Further, section 50C provides that the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being land or building or both, is less than
the value adopted or assessed by any authority of a State Government for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed shall, for the purpose of section 48, be deemed to be the full value of the consideration received or accruing as a result of such transfer.

d. The shares and debentures (whether listed or non-listed) of Indian companies only are covered under this proviso. Indian company shall include Government company. However, bonds of Central Government/State Government and RBI are not covered for this purpose.

Illustration 4

Mr. A, a non-resident Indian remits US $ 40,000 to India on 16.09.2001. The amount is partly utilised on 3.10.2001 for purchasing 10,000 shares in A Ltd an Indian Company at the rate of ₹ 12 per share. These shares are sold for ₹ 48 per share on 30.03.2018.

The telegraphic transfer buying and selling rate of US dollars adopted by the State Bank of India is as follows :-

<table>
<thead>
<tr>
<th>Date</th>
<th>Buying Rate (1 US$)</th>
<th>Selling Rate (1 US $)</th>
</tr>
</thead>
<tbody>
<tr>
<td>16.09.2001</td>
<td>18</td>
<td>20</td>
</tr>
<tr>
<td>3.10.2001</td>
<td>19</td>
<td>21</td>
</tr>
<tr>
<td>30.3.2018</td>
<td>59</td>
<td>61</td>
</tr>
</tbody>
</table>

Compute Capital gain chargeable to tax for the AY 2018-19 on the assumption that –

(a) These shares have not been sold through a recognised stock exchange

(b) These shares have been sold through a recognised stock exchange and securities transaction tax of ₹ 704 was paid by Mr. A.

Solution

(a) Where the shares are not sold through recognised stock exchange

<table>
<thead>
<tr>
<th>Particulars</th>
<th>US $</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sale consideration (₹ 4,80,000/60)</td>
<td>8000</td>
</tr>
<tr>
<td>Less: Cost of Acquisition (1,20,000/20)</td>
<td>6000</td>
</tr>
<tr>
<td><strong>Long term capital gain</strong></td>
<td><strong>2000</strong></td>
</tr>
</tbody>
</table>

Long-term capital gain converted into $ 2000 x ₹ 59) = ₹ 1,18,000
(b) **Where the shares are sold through a recognised stock exchange:** The entire long-term capital gain shall be exempt as per section 10(38), assuming that the other conditions mentioned thereunder are satisfied.

(ii) **Fourth Proviso to Section 48**

As a measure to enable Indian companies to raise funds from outside India, the RBI has permitted them to issue rupee denominated bonds outside India. Accordingly, in case of non-resident assessee, any gains arising on account of rupee appreciation against foreign currency at the time of redemption of rupee denominated bond of an Indian company held by him shall not be included in computation of full value of consideration. This would provide relief to the non-resident investor who bears the risk of currency fluctuation.

| Non-residents and foreign companies to be subject to tax at a concessional rate of 10% (without indexation benefit or currency fluctuation) on long-term capital gains arising from transfer of unlisted securities or shares of a company in which public are not substantially interested [Section 112] |

(6) **Ascertaining cost in specified circumstances [Section 49]**

Section 49 provides for the guidelines for computing the cost of under different circumstances.

(i) **Cost of previous owner deemed as cost of acquisition of asset [Section 49(1)]:** In the following cases, the cost of acquisition of the asset shall be deemed to be cost for which the previous owner of the property acquired it. To this cost, the cost of improvement to the asset incurred by the previous owner or the assessee must be added:

Where capital asset became the property of the assessee:

a) by transfer referred to in section 47(via) of shares held in an Indian company in a scheme of amalgamation, by the amalgamating foreign company to the amalgamated foreign company;

b) by transfer of a capital asset, being a share of a foreign company, which derives directly or indirectly its value substantially from the share of shares of an Indian company, held by the amalgamating foreign company to the amalgamated foreign company, in the scheme of amalgamation referred to in section 47(viab).

c) **by any transfer of a capital asset, being share(s) held in an Indian company, by the demerged foreign company to the resulting foreign company, in a scheme of demerger referred to in section 47(vic).**

d) by transfer in the scheme of demerger referred under section 47(vicc), of a capital asset, being a share in a foreign company, which derives, directly or indirectly, its value substantially from the share or shares of an Indian company, held by the demerged foreign company to the resulting foreign company.
(ii) **Cost of acquisition of shares acquired on redemption of Global Depository Receipts**: The cost of acquisition of the capital asset, being share or shares of a company acquired by a non-resident assessee, consequent to redemption of GDRs [referred to in section 115AC (1)(b)] held by him would be the price of such share or shares prevailing on any recognized stock exchange on the date on which a request for such redemption was made. [Section 49(2ABB)]

---

### (7) Short term capital gains tax in respect of equity shares/ units of an equity oriented fund [Section 111A]

(i) **Concessional rate of tax**: This section provides for a concessional rate of tax (i.e. 15%) on the short-term capital gains on transfer of –

- an equity share in a company or
- a unit of an equity oriented fund or
- a unit of a business trust.

(ii) **Conditions**: The conditions for availing the benefit of this concessional rate are-

a) the transaction of sale of such equity share or unit should be entered into on or after 1.10.2004, being the date on which Chapter VII of the Finance (No. 2) Act, 2004 came into force; and

b) such transaction should be chargeable to securities transaction tax under the said chapter.

*However, short-term capital gains arising from transactions undertaken in foreign currency on a recognized stock exchange located in an International Financial Services Centre (IFSC) would be taxable at a concessional rate of 15% even though STT is not leviable in respect of such transaction.*

(iii) **Adjustment of unexhausted basic exemption limit**: The proviso to this section provides that in the case of resident individuals or HUF, if the basic exemption is not fully exhausted by any other income, then, the short-term capital gain will be reduced by the unexhausted basic exemption limit and only the balance would be taxed at 15%.

*However, the benefit of adjusting the unexhausted basic exemption limit is not available in the case of non-residents.*

(iv) **No deduction under Chapter VI-A against STCG taxable under section 111A**: Deductions under Chapter VI-A cannot be availed in respect of such short-term capital gains on equity shares of a company or units of an equity oriented mutual fund included in the total income of the assessee.

(v) **Meaning of “Equity oriented fund”**: The expression "equity oriented fund" has the same meaning assigned to it in the explanation to section 10(38) i.e., "Equity oriented fund" means a fund-
a) where the investible funds are invested by way of equity shares in domestic companies to the extent of more than 65% of the total proceeds of such fund; and

b) which has been set up under a scheme of a Mutual Fund specified under clause (23D).

(8) Tax on long term capital gains [Section 112]

(i) Where the total income of a non-resident non-corporate or a foreign company includes any income, arising from the transfer of a long-term capital asset, which is chargeable under the head "Capital gains", the tax payable by the non-resident or foreign company on the total income shall be the aggregate of —

(a) Long-term capital gains arising from the transfer of a capital asset, being unlisted securities, or shares of a company not being a company in which the public are substantially interested would be calculated at the rate of 10% on the capital gains in respect of such asset without giving effect to the indexation benefit provided under second proviso to section 48 and currency fluctuation under first proviso to section 48.

(b) In respect of other long-term capital gains, the applicable rate of tax would be 20%.

(ii) No deduction under Chapter VI-A against LTCG: The provisions of section 112 make it clear that the deductions under Chapter VIA cannot be availed in respect of the long-term capital gains included in the total income of the assessee.

(iii) Rate of tax on long-term capital gains for non-residents non-corporate or foreign company [Section 112]:

<table>
<thead>
<tr>
<th>Capital Asset</th>
<th>Period of holding to qualify as a long-term capital asset</th>
<th>Rate of tax on long-term capital gains</th>
</tr>
</thead>
<tbody>
<tr>
<td>Listed securities (other than unit) or Zero coupon bond</td>
<td>&gt; 12 months</td>
<td>10% (without indexation benefit)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>or 20% (with indexation benefit)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>whichever is more beneficial to the assessee</td>
</tr>
<tr>
<td>Unit of equity oriented fund</td>
<td>&gt; 12 months</td>
<td>20% (with indexation)</td>
</tr>
<tr>
<td>Unit of debt oriented fund</td>
<td>&gt; 36 months</td>
<td>20% (with indexation)</td>
</tr>
<tr>
<td>Unlisted securities/ shares of a private company</td>
<td>&gt; 24 months</td>
<td>10% (without indexation)</td>
</tr>
<tr>
<td>Other capital assets</td>
<td>&gt; 36 months</td>
<td>20% (with indexation)</td>
</tr>
</tbody>
</table>
2.8 SPECIAL PROVISIONS PRESCRIBED UNDER CHAPTER XII-A

Chapter XII-A has been introduced in the Income-tax Act 1961 with effect from June 01, 1983. This chapter contains seven sections viz. 115C, 115D, 115E, 115F, 115G, 115H, 115-I. The provisions of this Chapter are applicable to a non-resident Indian who derives investment income and or long term capital gains in respect thereof.

<table>
<thead>
<tr>
<th>Terms</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) Convertible foreign exchange</td>
<td>Foreign exchange which is for the time being treated by the Reserve Bank of India as convertible foreign exchange for the purposes of the Foreign Exchange Management Act, 1999, and any rules made thereunder.</td>
</tr>
<tr>
<td>(b) Foreign exchange asset</td>
<td>Any specified asset which the assessee has acquired or purchased with, or subscribed to in, convertible foreign exchange</td>
</tr>
<tr>
<td>(c) Investment income</td>
<td>Any income derived other than dividends referred to in section 115-O from a foreign exchange asset.</td>
</tr>
<tr>
<td>(d) Long-term capital gains</td>
<td>Income chargeable under the head &quot;Capital gains&quot; relating to a capital asset, being a foreign exchange asset which is not a short-term capital asset.</td>
</tr>
<tr>
<td>(e) Non-resident Indian</td>
<td>An individual, being a citizen of India or a person of Indian origin who is not a &quot;resident. 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</td>
</tr>
<tr>
<td>(f) Specified asset</td>
<td>Any of the following assets, namely:</td>
</tr>
<tr>
<td></td>
<td>(i) Shares in an Indian company;</td>
</tr>
<tr>
<td></td>
<td>(ii) Debentures issued by a public Indian company</td>
</tr>
<tr>
<td></td>
<td>(iii) Deposits in a public Indian Company</td>
</tr>
<tr>
<td></td>
<td>(iv) Any security of the Central Government</td>
</tr>
<tr>
<td></td>
<td>(v) Any other asset which the Central Government may notify</td>
</tr>
</tbody>
</table>

(2) Special provisions relating to taxation of investment income and on long term capital gains of a non-resident [Sections 115D to 115F]

(i) On gross basis: Section 115D deals with the computation of total income of non-residents. In computing the investment income of non-resident Indian, no deduction is to be allowed under any provision of the Act in respect of any expenditure or allowance thereabout.
(ii) **No deduction allowed:** No deduction under Chapter VI-A shall be allowed and nothing contained in the provision of second proviso to section 48 relating to indexation shall be applied, where the gross total income consists only of investment income or/and long term capital gain.

However, where the gross total income includes investment incomes or/and long term capital gain, the deduction under Chapter VI-A shall be allowed only on that portion of gross total income which does not include the investment income and long term capital gain.

(iii) **Tax rate on investment income and long term capital gains:** Under section 115E, the investment income and long-term capital gains of non-resident Indians are to be treated as a separate block and charged to tax at flat rates.

Tax payable by shall be aggregate of –

(a) income-tax on Investment income (other than dividend referred to in section 115-O) at 20% plus surcharge;

(b) income-tax on long term capital gains from transfer of specified assets at 10% plus surcharge; and

(c) income-tax on his other total income

<table>
<thead>
<tr>
<th>Investment Income</th>
</tr>
</thead>
<tbody>
<tr>
<td>20% + Surcharge (if applicable) + Education Cess + SHEC</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Long-term Capital Gain on Foreign Exchange Assets</th>
</tr>
</thead>
<tbody>
<tr>
<td>10% + Surcharge (if applicable) + Education Cess + SHEC</td>
</tr>
</tbody>
</table>

(iv) **Exemption for long-term capital gains [Section 115F]**

Where a NRI has transferred a Long-term foreign exchange asset and has within a period of six months after the date of such transfer, invested the whole or part of the net consideration in any specified asset then

(a) If the cost of the new asset is not less than the net consideration in respect of the original asset, the whole of the capital gains shall not be charged to tax under section 45

(b) If the cost of the new asset is less than the net consideration in respect of the original asset, the following shall not be charged to tax under section 45

\[
\text{Capital Gains} \times \frac{\text{Cost of acquisition of new asset}}{\text{Net Consideration}}
\]
Important points:

1. Net consideration means the consideration from transfer less expenditure in connection with transfer.

2. Where the new asset is transferred or converted into money within a period of 3 years from the date of its acquisition, the amount of capital gains arising from the transfer of original asset not charged to tax earlier shall be deemed to be the income under the head “Capital Gains” relating to long term capital assets. The same shall be charged to tax in the previous year in which new asset is transferred or converted into money.

Illustration 5

A non-resident Indian acquired shares on 1.1.2008 for ₹1,00,000 in foreign currency. These shares are sold by him on 1.1.2017 for ₹3,00,000. He invests ₹3,00,000 in shares on 31.03.2017 and these shares are sold by him on 30.06.2017 for ₹3,50,000. Discuss the tax implications. Ignore the effect of first proviso to section 48.

Solution

Computation of Long term Capital Gain for Assessment Year 2017-18

<table>
<thead>
<tr>
<th>Particulars</th>
<th>Amount (₹)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sale consideration</td>
<td>3,00,000</td>
</tr>
<tr>
<td>Less: Cost of Acquisition</td>
<td>1,00,000</td>
</tr>
<tr>
<td>Long Term Capital Gain</td>
<td>2,00,000</td>
</tr>
<tr>
<td>Less: Exemption under section 115F</td>
<td>2,00,000</td>
</tr>
<tr>
<td>Exempt Long-term Capital Gain</td>
<td>NIL</td>
</tr>
</tbody>
</table>

Long-term Capital Gain for Assessment year 2018-19:

1. LTCG of ₹2,00,000 which was exempt in A.Y.2017-18 becomes taxable this year.

2. STCG of ₹50,000 is also taxable this year.

Illustration 6

Mr. John, a non-resident Indian, purchased shares of an Indian Company at a cost of ₹70,000 on 01.07.2009 in foreign currency. Mr. John sold the said shares for a consideration of ₹2,50,000 on 01.08.2017 and the expenditure incurred wholly or exclusively in connection with the transfer is ₹10,000. Compute the taxable capital gain if he deposited in specified assets ₹1,50,000 out of sale consideration. Ignore the effect of first proviso to section 48.
Solution

<table>
<thead>
<tr>
<th>Particulars</th>
<th>Amount (₹)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sale Consideration</td>
<td>2,50,000</td>
</tr>
<tr>
<td>Less: Transfer Expenses</td>
<td>10,000</td>
</tr>
<tr>
<td>Net Consideration</td>
<td>2,40,000</td>
</tr>
<tr>
<td>Less: Cost of Acquisition</td>
<td>70,000</td>
</tr>
<tr>
<td>Long-term capital gain</td>
<td>1,70,000</td>
</tr>
<tr>
<td>Less: Exemption u/s 115F</td>
<td>1,06,250*</td>
</tr>
<tr>
<td><strong>Taxable long-term capital gain</strong></td>
<td><strong>63,750</strong></td>
</tr>
</tbody>
</table>

\[
* \frac{1,70,000 \times 1,50,000}{2,40,000} = 1,06,250
\]

(v) Option not to file income-tax return [Section 115G]

A non-resident Indian need not furnish a return of income under sub-section (1) of section if he satisfies the following two conditions:-

(a) His total income consists only of investment income or income by way of long-term capital gains or both; and

(b) Such income has been subjected to TDS.

(vi) Continuance of benefits after the non-resident becomes a resident [Section 115H]

(a) Where a person who is NRI in any previous year becomes assessable as a resident in any subsequent year, then he may furnish a declaration in writing along with the return of income under section 139 for the year in which he is so assessable

(b) The declaration shall be to the effect that the provisions of this chapter shall continue to apply to him in respect of the investment income derived from foreign exchange assets being shares, debentures, deposits, securities of Central Government and such other notified assets.

(c) 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 every subsequent year until the transfer or conversion into money of such asset.
(vii) **Option to opt out of Chapter XII-A [Section 115-I]**

This section gives an option to a non-resident Indian to elect that he should not be governed by the special provisions of chapter XII-A for any particular assessment year. Such option can be exercised by making a declaration in the relevant column of return of income for that assessment year. In case where such an option is exercised by a non-resident Indian, his total income for that assessment year is to be charged to tax under the general provisions of the Act.

2.9 **DETERMINATION OF TAX IN CERTAIN SPECIAL CASES [CHAPTER XII]**

**DTAA or Income-tax Act, 1961, whichever is more beneficial, to apply:** Non-residents can compute their tax liability as per the tax rates prescribed under the Income-tax Act or at the rates prescribed under the DTAs (Double Taxation Avoidance Agreements), whichever is more beneficial.

As per section 90(2), where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee.

1. **Special provisions for computing income by way of royalty, fees for technical service, interest etc. [Section 115A]**

(i) **Tax on dividend and interest in case of non-corporate non-residents & Foreign companies:**

<table>
<thead>
<tr>
<th>Where the total income of a foreign company or a non-corporate non-resident includes any income by way of</th>
<th>Rate of Tax</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Dividends [other than dividend referred to in section 115-O]</td>
<td>20%</td>
</tr>
<tr>
<td>(2) Interest received from the Government or an Indian concern on moneys borrowed or debt incurred by the Government /Indian concern in foreign currency, other than 3,4,5 mentioned below</td>
<td>20%</td>
</tr>
<tr>
<td>(3) Interest received from an infrastructure debt fund referred to in section 10(47)</td>
<td>5%</td>
</tr>
<tr>
<td>(4) Interest referred to in section 194LC received from an Indian company or business trust – in respect of borrowing made by an Indian company or business trust in foreign currency from sources outside India</td>
<td>5%</td>
</tr>
</tbody>
</table>
• Under a loan agreement between 1.7.2012 and 30.6.2020 or
• by way of issue of long-term infrastructure bonds between 1.7.2012 and 30.9.2014 or
• by way of issue of long-term bonds including infrastructure bond between 1.10.2014 and 30.6.2020
  - in respect of borrowing from sources outside India by way of rupee
denominated bond before 1.7.2020

(5) Interest referred to in section 194LD payable between 1.6.2013 and 30.6.2020 to a Foreign Institutional Investor or Qualified Foreign Investor on investment made in –
- Rupee denominated bond of an Indian company
- Government security

(6) Interest referred to in section 194LBA(2), being interest income of a business trust from a SPV, distributed by business trust to the hands of non-resident unit holders of a business trust

(7) Income received in respect of units purchased in foreign currency of a mutual fund specified under section 10(23D) or of the Unit Trust of India

(ii) Tax on royalty and fees for technical services in case of non-residents

<table>
<thead>
<tr>
<th>Where the total income of a foreign company or a non-corporate non-resident includes any income by way of royalty or fees for technical services other than the income referred to in section 44DA</th>
<th>Applicable Rate of Tax</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Received from the Government in pursuance of an agreement made by the non-resident/foreign company with the Government</td>
<td>10% of such royalty or fees for technical services. However, if the DTAA provides for a rate lower than 10%, then, the provisions of DTAA would apply.</td>
</tr>
<tr>
<td>(2) Received from the Indian concern in pursuance of an agreement made by the non-resident/foreign company with the Indian concern and the agreement is approved by the Central Government or where it relates to industrial policy of Government of India, the agreement in accordance with that policy.</td>
<td></td>
</tr>
</tbody>
</table>

Important Points:

1. Special rate of tax is applicable on the above mentioned incomes. Balance income of the assessee will be chargeable to tax at normal rates applicable to assessee.
2. No deduction in respect of any expenditure or allowance shall be allowed to the assessee under sections 28 to 44C and section 57 in computing the above income.
3. Deduction under Chapter VI-A is not available in respect of income referred to in point (i) above.

4. It shall not be necessary for the assessee to furnish a return of income if the following conditions are satisfied:
   (a) The Total income consists of only the interest or dividend income referred above
   (b) Tax deductible at source has been deducted from such incomes

5. The provisions of Chapter VI – set-off, carry forward and set off of losses are applicable.

6. The current depreciation as well as brought forward unabsorbed depreciation of any business cannot be set off against the income referred to in section 115A, since the set off and carry forward of depreciation is governed by section 32.

(2) Special provision for computing tax on income from units purchased in foreign currency or capital gains arising from their transfer in case of offshore fund [Section 115AB]

Where the total income of an overseas financial organisation includes the following incomes namely-

(i) Income received in respect of units purchased in foreign currency or
(ii) by way of long term capital gains arising from the transfer of units purchased in foreign currency,

Then, the income tax payable shall be the aggregate of the following:

(a) 10% on income referred to above

(b) the amount of income-tax with which the Offshore Fund would have been chargeable had its total income been reduced by the amount of Long term Capital Gains and income received referred to above.

Important Points:

(i) The first proviso and the second proviso to section 48 relating to benefit of computation of capital gains in foreign currency and benefit of indexation, respectively, shall not apply for the computation of long term capital gains.

(ii) No deduction shall be allowed to the assessee under sections 28 to 44C or section 57(i)/(iii) or under Chapter VI-A in computing the above income.

(iii) Where the gross total income of the Overseas Financial Organisation consists of other incomes, then, the deduction under Chapter VI- A will be available in respect of other incomes. The normal provisions of the Income-tax Act,1961 will apply for computation of other income.

(iv) “Unit” means unit of a mutual fund or of the Unit Trust of India.

(v) “Overseas Financial Organisation” means any fund, institution, association or body, whether incorporated or not, established under the laws of a country outside India, which has entered
into an arrangement for investment in India with any public sector bank or public financial institution or a mutual fund specified under section 10(23D). Such arrangement should be approved by the Securities and Exchange Board of India.

(vi) The provisions of Chapter VI – set-off, carry forward and set off of losses are applicable.

(vii) It may be noted that long term capital gains on units of equity oriented fund are exempt under section 10(38) provided securities transaction tax has been paid on the sale of such units. Therefore, such long term capital gains are not subject to section 115AB.

(viii) It may be noted that short term capital gains on units of equity oriented fund are taxable @15% under section 111A provided securities transaction tax has been paid on the sale of such units.

(3) Special provision for computing tax on income from bonds or Global Depository Receipts purchased in foreign currency or capital gains arising from their transfer [Section 115AC]

(i) **Eligible assessee and special rate of tax:** According to section 115AC(1), where the total income of an assessee, being a non-resident includes:

(a) income by way of interest on bonds of an Indian company issued in accordance with such scheme as the Central Government may notify or on bonds of a public sector company sold by the Government, and purchased by him in foreign currency; or

(b) income by way of dividends, other than dividends referred to in section 115-O, on Global Depository Receipts-

   (1) issued in accordance with such scheme as the Central Government may specify against the initial issue of shares of an Indian company and purchased by him in foreign currency through an approved intermediary; or

   (2) issued against the shares of a public sector company sold by the Government and purchased by him in foreign currency through an approved intermediary; or

   (3) issued or re-issued in accordance with such scheme as the Central Government may specify against the existing shares of an Indian company purchased by him in foreign currency through an approved intermediary; or

(c) income by way of long-term capital gains arising from the transfer of above bonds or GDRs, then, income-tax will be charged at the rate of 10% on the above income.

(ii) **No other deductions:** Where the gross total income of the non-resident consists only the aforesaid dividend or interest income, no deduction shall be allowed to him under section 28 to 44C or section 57(i) or 57(iii) or under Chapter VIA.

Where the gross total income of the non-resident consists of other incomes, then, the deduction under Chapter VI-A will be available in respect of other incomes [Section 115AC(2)].
(iii) **First and Second Proviso to Section 48 shall not apply:** Section 115AC(3) provides that the indexation benefit and benefit of computation of capital gains in foreign currency, shall not apply for the computation of long-term capital gains arising out of the transfer of long term asset, being bonds or GDRs [Section 115AC(3)].

(iv) **Filing of Return of Income not required:** By virtue of section 115AC(4), it shall not be necessary for a non-resident to furnish under section 139(1), a return of income if his total income in respect of which he is assessable under the Act during the previous year consisted only of aforesaid interest or dividend income, and the tax deductible at source under the provisions of Chapter XVII-B has been deducted from such income.

(v) **Concessional tax treatment for GDR/Bonds acquired in course of Amalgamation:** Where the assessee acquired GDR or bonds in an amalgamated or resulting company by virtue of his holding GDR or bonds in the amalgamating or demerged company, in accordance with the provisions of 115AC(1) the concessional tax treatment would apply to such GDR or bonds [Section 115AC(5)].

(vi) ** Meaning of Global Depository Receipts:** "Global Depository Receipts" means any instrument in the form of a depository receipt or certificate (by whatever name called) created by the Overseas Depository Bank outside India and issued to investors against the issue of —

(a) ordinary shares of issuing company, being a company listed on a recognised stock exchange in India; or

(b) foreign currency convertible bonds of issuing company;

### (4) Special provisions for computing tax on income of Foreign Institutional Investors from securities or capital gains arising from their transfer [Section 115AD]

(i) **Special rate of tax:** Where the total income of a Foreign Institutional Investor includes the income referred to in column (2), the same would be subject to tax at the rate mentioned in column (3), subject to exceptions mentioned in column (4) in the table below:

<table>
<thead>
<tr>
<th>(1)</th>
<th>(2)</th>
<th>(3)</th>
<th>(4)</th>
</tr>
</thead>
<tbody>
<tr>
<td>S. No.</td>
<td>Income</td>
<td>Rate of Tax</td>
<td>Exception</td>
</tr>
<tr>
<td>(a)</td>
<td>Income other than income by way of dividends referred to in section 115-O received in respect of securities (other than units referred to in section 115AB)</td>
<td>20%</td>
<td>Interest referred to in section 194LD taxable @5%</td>
</tr>
<tr>
<td>(b)</td>
<td>Income by way of short-term capital gains arising from the transfer of such securities</td>
<td>30%</td>
<td>Short-term capital gains referred to in section 111A taxable @15%</td>
</tr>
</tbody>
</table>
(c) Income by way of long-term capital gains arising from the transfer of such securities | 10% | -
(d) Other income of FII | At normal rates of tax | -

(ii) **No deduction is allowed [Section 115AD(2)]:** Where the gross total income of the Foreign Institutional Investor comprises only of the aforesaid interest or dividend income from securities, no deduction shall be allowed to him under section 28 to 44C or section 57(i) or 57(iii) or under Chapter VI-A.

Where the gross total income of the Foreign Institutional Investor consists of other incomes, then, the deduction under Chapter VI-A will be available in respect of other incomes. [ ]

(iii) **First and second provisos to section 48 shall not apply [Section 115AD(3)]:** The benefit of computation of capital gains in foreign currency and the benefit of indexation would not be available for the computation of capital gains arising out of the transfer of securities.

(5) **Special provision for computing tax on non-resident sportsmen or sports associations [Section 115BBA]**

(i) **Eligible assessee and special rate of tax:** Where the total income of an assessee, referred to in column (2) includes income referred to in column (3) of the table below, such income would be chargeable to tax@20%.

<table>
<thead>
<tr>
<th>Assessee</th>
<th>Income</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) A sportsman (including an athlete), who is not a citizen of India and is a non-resident</td>
<td>Any income received or receivable by way of— (i) participation in India in any game (other than a game the winnings wherefrom are taxable under section 115BB, being winning from crossword puzzles, races including horse races, card games and other games of any sort of gambling or betting) or sport; or (ii) advertisement; or (iii) contribution of articles relating to any game or sport in India in newspapers, magazines or journals;</td>
</tr>
<tr>
<td>(b) A non-resident sports association or institution</td>
<td>Any amount guaranteed to be paid or payable to such association or institution in relation to any game (other than a game the winnings wherefrom are taxable under section 115BB) or sport played in India</td>
</tr>
<tr>
<td>(c) An entertainer who is not a citizen of India and is a non-resident</td>
<td>Any income received or receivable from his performance in India</td>
</tr>
</tbody>
</table>
(ii) **No other deduction:** No deduction in respect of any expenditure or allowance shall be allowed under any provision of this Act in computing the income referred to in (a) or (b) or (c) in the table given above.

(iii) **Filing of return of income not required:** The assessee is not required to furnish under sub-section (1) of section 139 a return of his income if—

(a) his total income in respect of which he is assessable under this Act during the previous year consisted only of income referred to in (a) or (b) or (c) above; and

(b) the tax deductible at source under the provisions of Chapter XVII-B has been deducted from such income.

**Illustration 7**

*During the financial year 2017-18, Nadal, a tennis professional and a non-Indian citizen participated in India in a Tennis Tournament and won the prize money of ₹15 lacs. He contributed articles on the tournament in a local newspaper for which he was paid ₹1 Lac. He was also paid ₹5,00,000 by a Soft Drink company for appearance in a T.V. advertisement. Although his expenses in India were met by the sponsors, he had to incur ₹3,00,000 towards his travel costs to India. He was a non-resident for tax purposes in India.*

*What would be his tax liability in India for A.Y. 2018-19? Is he required to file his return of income?*

**Solution**

Under section 115BBA, all the three items of receipts in India viz. prize money of ₹15 lakhs, amount received from newspaper of ₹1 lakh and amount received towards TV advertisement of ₹5 lakhs - are chargeable to tax. No expenditure is allowable against such receipts. The rate of tax chargeable under section 115BBA is 20%, plus education cess @2% and secondary and higher education cess @1%. The total tax liability works out to ₹4,32,600 being 20.6% of ₹21 lakhs. Thus, Nadal will be liable to tax on the income earned in India.

He is not required to file his return of income if -

(a) his total income during the previous year consists only of income arising under section 115BBA; and

(b) the tax deductible at source under the provisions of Chapter XVII-B have been deducted from such incomes.

**Illustration 8**

*Smith, a foreign national and a cricketer came to India as a member of Australian cricket team in the year ended 31st March, 2018. He received ₹5 lakhs for participation in matches in India. He also received ₹1 lakh for an advertisement of a product on TV. He contributed articles in a newspaper for which he received ₹10,000. When he stayed in India, he also won a prize of ₹20,000 from horse racing in Mumbai. He has no other income in India during the year.*
(i) Compute tax liability of Smith for Assessment Year 2018-19.

(ii) Are the income specified above subject to deduction of tax at source?

(iii) Is he liable to file his return of income for Assessment Year 2018-19?

(iv) What would have been his tax liability, had he been a match referee instead of a cricketer?

**Solution**

(i) Computation of tax liability of Smith for the A.Y.2018-19

<table>
<thead>
<tr>
<th>Particulars</th>
<th>₹</th>
<th>₹</th>
</tr>
</thead>
<tbody>
<tr>
<td>Income taxable under section 115BBA</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Income from participation in matches in India</td>
<td>5,00,000</td>
<td></td>
</tr>
<tr>
<td>Advertisement of product on TV</td>
<td>1,00,000</td>
<td></td>
</tr>
<tr>
<td>Contribution of articles in newspaper</td>
<td>10,000</td>
<td></td>
</tr>
<tr>
<td><strong>Total income</strong></td>
<td>6,30,000</td>
<td></td>
</tr>
<tr>
<td><strong>Tax@20% under section 115BBA on ₹ 6,10,000</strong></td>
<td></td>
<td>1,22,000</td>
</tr>
<tr>
<td><strong>Tax@30% under section 115BB on income of ₹ 20,000 from horse races</strong></td>
<td></td>
<td>6,000</td>
</tr>
<tr>
<td><strong>Add: Education cess@2% and SHEC@1%</strong></td>
<td></td>
<td>3,840</td>
</tr>
<tr>
<td><strong>Total tax liability of Smith for the A.Y.2018-19</strong></td>
<td></td>
<td>1,31,840</td>
</tr>
</tbody>
</table>

(ii) Yes, the above income is subject to tax deduction at source.

Income referred to in section 115BBA (i.e., ₹ 6,10,000, in this case) is subject to tax deduction at source@20% under section 194E.

Income referred to in section 115BB (i.e., ₹ 20,000, in this case) is subject to tax deduction at source@30% under section 194BB.

Since Smith is a non-resident, the amount of tax to be deducted calculated at the prescribed rates mentioned above, would be increased by education cess@2% and secondary and higher education cess@1%.
(iii) Section 115BBA provides that if the total income of the non-resident sportsman comprises of only income referred to in that section and tax deductible at source has been fully deducted, it shall not be necessary for him to file his return of income. However, in this case, Mr. Smith has income from horse races as well. Therefore, he cannot avail the benefit of exemption from filing of return of income as contained in section 115BBA. Hence, he would be liable to file his return of income for A.Y.2018-19.

(iv) The Calcutta High Court in \textit{Indcom v. CIT (TDS)} (2011) 335 ITR 485 has held that ‘match referee’ would not fall within the meaning of “sportsmen” to attract the provisions of section 115BBA. Therefore, although the payments made to non-resident ‘match referee’ are “income” which has accrued and arisen in India, the same are not taxable under the provisions of section 115BBA. They are subject to the normal rates of tax.

\begin{center}
\begin{tabular}{|l|c|}
\hline
\textbf{Particulars} & \textbf{₹} \\
\hline
Tax@30\% under section 115BB on winnings of ₹20,000 from horse races & 6,000 \\
\hline
\textbf{Tax on ₹6,10,000 at the rates in force} & \\
\hline
Upto ₹2,50,000 & Nil \\
\hline
2,50,000 – 5,00,000 @5\% & 12,500 \\
\hline
5,00,000 – 6,10,000 @ 20\% & 22,000 \\
\hline
\hline
\textit{Add: Education cess@2\% and secondary and higher education cess@1\%} & 1,215 \\
\hline
\hline
\textbf{Total} & 41,715 \\
\hline
\end{tabular}
\end{center}

\textbf{2.10 APPLICABILITY OF MAT ON FOREIGN COMPANIES [SECTION 115JB]}

As per section 115JB(1), in case of company (domestic or foreign), if the income-tax payable on the total income computed under the Income-tax Act, 1961 is less than 18.5\% of its book profit, such book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be the amount of income-tax at the rate of 18.5\% (add surcharge, if applicable, i.e., 7\% for domestic companies and 2\% for foreign companies, where the total income exceeds ₹1 crore but does not exceed ₹10 crore, and 12\% for domestic companies and 5\% for foreign companies where the total income exceeds ₹10 crore). Further, education cess @2\% and secondary and higher education cess@1\% shall be added on the aggregate of income-tax and surcharge.

In order to address the issue relating to the applicability of section 115JB(1) to Foreign
Institutional Investors (FIIs) who do not have a permanent establishment (PE) in India, the Finance Act, 2015 amended this section to provide that in case of a foreign company, any income by way of capital gains on transactions in securities or interest, royalty or fees for technical services chargeable to tax at the rates specified in Chapter XII, is credited to profit and loss account and income-tax payable thereon is at a rate lower than the rate specified in section 115JB, the same shall be reduced from the book profits; and the corresponding expenditure will be added back, if the same is debited to profit and loss account.

However, this amendment was prospective w.e.f. A.Y.2016-17. Therefore, the issue related to applicability for assessment year prior to A.Y.2016-17 remained to be addressed.

The Committee on Direct Tax matters headed by Justice A.P. Shah, set up by the Government to look into the matter, suggested that section 115JB be amended to clarify the applicability of Minimum Alternate Tax (MAT) provisions to Foreign Institutional Investors/ Foreign Portfolio Investors (FIIs/FPIs) in view of the fact that FIIs and FPIs normally do not have a place of business in India.

Keeping in mind the suggestions of the Committee and in order to ensure certainty in taxation of foreign companies, Explanation 4 has been inserted in section 115JB by the Finance Act, 2016 with retrospective effect from 01.04.2001 to provide for non-applicability of levy of MAT under section 115JB in the following cases:

<table>
<thead>
<tr>
<th>Existence of DTAA with the country of residence of the foreign company</th>
<th>Additional condition to be satisfied for non-applicability of MAT</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i) The foreign company is a resident of a country or a specified territory with which India has a DTAA under section 90(1) or the Central Government has adopted any agreement between specified associations for double taxation relief under section 90A(1)</td>
<td>It should not have a permanent establishment in India in accordance with the provisions of such Agreement</td>
</tr>
<tr>
<td>(ii) The foreign company is a resident of a country with which India does not have an agreement of the nature referred to in clause (i) above</td>
<td>It is not required to seek registration under any law for the time being in force relating to companies.</td>
</tr>
</tbody>
</table>

**Note:** For detailed understanding of the provisions of Minimum Alternate Tax, students may refer to Chapter 12: Assessment of Various Entities in Module 2 of Paper 7: Direct Tax Laws and International Taxation
2.11 SPECIAL PROVISIONS RELATING TO CONVERSION OF INDIAN BRANCH OF A FOREIGN BANK INTO A SUBSIDIARY COMPANY [CHAPTER XII-BB]

(1) Conversion of an Indian branch of foreign company into subsidiary Indian company [Section 115JG(1)]

(i) The provisions of this section apply to a foreign company engaged in banking business in India through its branch situated in India, which is converted into an Indian subsidiary company in accordance with the scheme framed by RBI.

(ii) If the conditions notified by the Central Government in this behalf are satisfied, then capital gains arising from such conversion would not be chargeable to tax in the assessment year relevant to the previous year in which such conversion takes place.

(iii) Also, the provisions of the Act relating to computation of income of foreign company and Indian subsidiary company would apply with such exceptions, modifications and adaptations as specified in the notification.

(iv) Further, the benefit of set-off of unabsorbed depreciation, set-off and carry forward of losses, tax credit in respect of tax paid on deemed income relating to certain companies available under the Act shall apply with such exceptions, modifications and adaptations as specified in the notification.

(2) Consequences of failure to comply with the specified conditions [Section 115JG(2)]

If the conditions specified in the scheme of RBI or notification issued by the Central Government are not complied with, then, all the provisions of the Act would apply to the foreign company and Indian subsidiary company without any benefit, exemption or relief under this section.

(3) Consequences of subsequent failure to comply with the conditions [Section 115JG(3)]

(i) If the benefit, exemption or relief has been granted to the foreign company or Indian subsidiary company in any previous year and thereafter, there is a failure to comply with any of the conditions specified in the scheme or notification, then, such benefit, exemption or relief shall be deemed to have been wrongly allowed.

(ii) In such a case, the Assessing Officer is empowered to re-compute the total income of the assessee for the said previous year and make the necessary amendment. This power is notwithstanding anything contained in the Income-tax Act, 1961.

(iii) The provisions of rectification under section 154, would, accordingly, apply and the four year period within which such rectification should be made has to be reckoned from the end of the previous year in which the failure to comply with such conditions has taken place.

(iv) Every notification under issued under this section shall be laid before each House of Parliament.
2.12 WITHHOLDING TAX PROVISIONS FOR NON-RESIDENTS

(1) Salary payable in foreign currency [Section 192]

By virtue of section 9(1)(ii), salary is deemed to accrue or arise in India, if services are rendered in India. Therefore, if a non-resident renders services in India, the salary income would be chargeable to tax in India and the person responsible for paying the salary income that is the employer has to deduct withholding tax in accordance with the provisions of Section 192.

Such income-tax has to be calculated at the average rate of income-tax computed on the basis of the rates in force for the relevant financial year in which the payment is made, on the estimated total income of the assessee.

Average rate of income-tax means the rate arrived at by dividing the amount of income-tax calculated on the total income, by such total income.

Section 192(6) deals with the provisions of withholding tax in case of salary payable in foreign currency. In case, where salary is payable in foreign currency, the amount of tax deducted is to be calculated after converting the salary payable into Indian currency at the telegraphic transfer buying rate as adopted by State Bank of India on the date of deduction of tax [Rule 26 read with Rule 115].

(2) Winnings from lotteries, crossword puzzles and horse races [Section 194B and 194BB]

(i) Rate of tax on casual income

Any income of a casual and non-recurring nature of the type of winnings from lotteries, crossword puzzles, card game and other game of any sort, races including horse races, etc. will be charged to income-tax at a flat rate of 30% [Section 115BB].

(ii) TDS on winning from lotteries, crossword puzzles etc.

According to the provisions of section 194B, every person responsible for paying to any person, whether resident or non-resident, any income by way of winnings from lottery or crossword puzzle or card game and other game of any sort, is required to deduct income-tax therefrom at the rate of 30% if the amount of payment exceeds ₹10,000.

(iii) Cases where winnings are partly in kind and partly in cash

In a case where the winnings are wholly in kind or partly in cash and partly in kind but the part in cash is not sufficient to meet the liability of deduction of tax in respect of whole of the winnings, the person responsible for paying shall, before releasing the winnings, ensure that tax has been paid in respect of the winnings.

(iv) Person responsible for deduction of tax under section 194BB

Section 194BB casts responsibility on the following persons to deduct tax at source -
(a) a bookmaker; or

(b) a person to whom a license has been granted by the Government under any law for the
time being in force -
   • for horse racing in any race course; or
   • for arranging for wagering or betting in any race course.

(v) **Threshold limit and rate of TDS under section 194BB**

The obligation to deduct tax at source under section 194BB arises when the above-mentioned
persons make payment to any person of any income by way of winnings from any horse race
in excess of ₹10,000. The rate applicable for deduction of tax at source is 30%.

Tax will have to be deducted at source from winnings from horse races even though the
winnings may be paid to the person concerned in installments of less than ₹10,000. Similarly,
in cases where the book-maker or other person responsible for paying the winnings, credits
such winnings and debits the losses to the individual account of the punter, the set off of the
loss against the income would be treated for this purpose as a constructive payment of the
income.

(vi) **Meaning of the expression “horse race”**

In the context of the provisions of section 194BB, the expression ‘any horse race’ used therein
must be taken to include, wherever the circumstances so necessitate, more than one horse
race. Therefore, winnings by way of jack pot would also fall within the scope of section 194BB.

### Payments to non-resident sportsmen or sports association [Section 194E]

(i) **Applicability:** This section provides for deduction of tax at source in respect of any income
referred to in section 115BBA payable to a non-resident sportsman (including an athlete) or an
entertainer who is not a citizen of India or a non-resident sports association or institution.

The following payments to non-resident sportsman (including an athlete are covered by section
115BBA:

(a) income by way of participation in India in any game or sport;
(b) income by way of advertisements; and
(c) income by way of contribution.

(ii) **Rate of TDS:** Deduction of tax at source @20% should be made by the person responsible for
making the payment.

(iii) **Time of deduction of tax:** Such tax deduction should be at the time of credit of such income
to the account of the payee or at the time of payment thereof in cash or by issue of a cheque
or draft or by any other mode, whichever is earlier.
(4) Income by way of interest from Infrastructure Debt Fund [Section 194LB]

(i) **Special rate of tax on interest received by non-residents from notified infrastructure debt funds:** Interest income received by a non-corporate non-resident or a foreign company from notified infrastructure debt funds set up in accordance with the prescribed guidelines would be subject to tax at a concessional rate of 5% under section 115A on the gross amount of such interest income as compared to tax @20% on other interest income of non-resident. The concessional rate of tax is expected to give a fillip to infrastructure and encourage inflow of long-term foreign funds to the infrastructure sector.

(ii) **Rate of TDS:** Accordingly, tax would be deductible @5% on interest paid/credited by such fund to a non-resident/foreign company.

(iii) **Time of deduction:** The person responsible for making the payment shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax @5%.

(5) Income from units of a business trust to non-resident [Section 194LBA]

(i) **Applicability and rate of tax:** A business trust shall be liable to deduct the tax at source where any distributed income referred to in section 115UA, being in the nature referred to in section 10(23FC)(a) or section 10(23FCA) is payable by the business trust to its unit holder, being non-resident non-corporate and foreign company [Section 194LBA(2) & (3)].

<table>
<thead>
<tr>
<th>Nature of distributed income to its non-resident non-corporate and foreign company unit holders</th>
<th>Rate of tax</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) Interest income received by business trust from a SPV referred to in section 10(23FC)(a)</td>
<td>5%</td>
</tr>
<tr>
<td>(b) Rental income arising to business trust, being real estate investment trust from real estate referred to in section 10(23FCA)</td>
<td>At the rates in force</td>
</tr>
</tbody>
</table>

(ii) **Time of deduction:** TDS shall be deducted at the time of credit of such payment 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 any other mode, whichever is earlier.

(iii) **Meaning of Business Trust:** “Business trust” means a trust registered as an Infrastructure Investment Trust (Invit) under SEBI (Infrastructure Investment Trusts) Regulations, 2014 or a Real Estate Investment Trust (REIT) under SEBI (Real Estate Investment Trusts) Regulations, 2014 and the units of which are required to be listed on a recognized stock exchange in accordance with the aforesaid regulations.
(6) Income of units of investment fund to non-resident unit holders [Section 194LBB]

(i) **Applicability and rate of tax:** Investment fund to deduct tax at source on any income (other than the proportion of income which is of the same nature as income chargeable under the head “Profits and gains of business or profession” which is taxable at investment fund level) payable by the investment fund to a unit holder at rates in force in case of payable to a non-resident non-corporate or non-corporate unit holder.

Any such income credited to any account, whether called “suspense account” or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be the credit of such income to the account of the payee, and the provisions of section 194LBB shall apply accordingly.

(ii) **No TDS if income is not chargeable under the Act:** In case of income payable to a non-resident non-corporate or non-corporate unit holder, no deduction is to be made in respect of any income that is not chargeable to tax under the Act.

(iii) **Time of deduction:** Such tax has to be deducted at the time of credit of such income to the account of the payee or at the time of payment, whichever is earlier.

(iv) **Meaning of Investment Fund:** Any fund established or incorporated in India in the form of a trust or a company or a limited liability partnership or a body corporate which has been granted a certificate of registration as a Category I or a Category II Alternative Investment Fund and is regulated under the Securities and Exchange Board of India (Alternative Investment Fund) Regulations, 2012, made under the Securities and Exchange Board of India Act, 1992;

(7) Income in respect of investment made in a securitisation trust [Section 194LBC]

(i) **Applicability and rate of tax:** Tax deduction at source under section 194LBC shall be effected by the securitisation at the rates in force trust where income is payable to an investor, being a non-resident non-corporate or a foreign company, in respect of investment in it.

Any such income credited to any account, whether called “suspense account” or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be the credit of such income to the account of the payee, and the provisions of section 194LBC shall apply accordingly.

(ii) **Time of deduction:** TDS shall be deducted at the time of credit of such payment 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 any other mode, whichever is earlier.

(iii) **Application for low or nil deduction of tax at source:** The facility for the investors to obtain low or nil deduction of tax certificate would be available; the investor can make an application to the Assessing Officer, and he can, on an application made by the assessee in this behalf, issue a certificate under section 197 in this behalf for no deduction of income-tax or deduction of income-tax at a lower rate.
(iv) **Meaning of certain terms:**

<table>
<thead>
<tr>
<th>Term</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) Investor</td>
<td>Means a person who is holder of any securitised debt instrument or securities or security receipt issued by the securitisation trust</td>
</tr>
<tr>
<td>(b) Securities</td>
<td>Means debt securities issued by a Special Purpose Vehicle as referred to in the guidelines on securitisation of standard assets issued by RBI</td>
</tr>
</tbody>
</table>
| (c) Securitisation trust | A trust being a –  
  (i) Special purpose distinct entity as defined in and regulated under SEBI (Public Offer and Listing of Securitised Debt Instruments) Regulations, 2008  
  (ii) Special Purpose vehicle as defined in and regulated by the guidelines on securitization of standard assets issued by the Reserve Bank of India  
  (iii) Trust set-up by a securitization company or a reconstruction company formed for the purpose of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 or any guidelines or directions issued by the RBI for the same. |

(8) **Income by way of interest from an Indian company [Section 194LC]**

(i) **Concessional rate of tax on interest on foreign currency borrowings by an Indian company or business trust:** Interest paid by an Indian company or business trust to a foreign company or a non-corporate non-resident in respect of borrowing made in foreign currency from sources outside India between 1.7.2012 and 30.6.2020 would be subject to tax at a concessional rate of 5% on gross interest (as against the rate of 20% of gross interest applicable in respect of other interest received by a non-corporate non-resident or foreign company from Government or an Indian concern on money borrowed or debt incurred by it in foreign currency).

To avail this concessional rate, the borrowing should be from a source outside India under a loan agreement at any time between 1.7.2012 and 30.6.2020 or by way of issue of long-term infrastructure bonds during the period between 1.7.2012 and 30.9.2014 or by way of issue of any long-term bond, including long-term infrastructure bonds during the period between 1.10.2014 and 30.6.2020 and approved by the Central Government in this behalf.

The interest to the extent the same does not exceed the interest calculated at the rate approved by the Central Government, taking into consideration the terms of the loan or the bond and its repayment, will be subject to tax at a concessional rate of 5%.
(ii) **Rate of TDS:** Such interest paid by an Indian company to a non-corporate non-resident or a foreign company would be subject to TDS@5% under section 194LC.

(iii) **Extension of applicability of concessional rate of TDS:** The benefit of concessional rate of TDS under section 194LC is extended to interest payable in respect of monies borrowed by an Indian company or business trust from a source outside India by way of issue of rupee denominated bond issued before 1st July, 2020.

(iv) **Non-applicability of higher rate of TDS under section 206AA for non-furnishing of PAN:** Levy of higher rate of TDS@20% under section 206AA in the absence of PAN would not be attracted in respect of payment of interest on long-term bonds, as referred to in section 194LC, to a non-corporate non-resident or to a foreign company.

(9) **Interest on Government securities or rupee-denominated bonds of an Indian company payable to a Foreign Institutional Investor (FII) or a Qualified Foreign Investor (QFI) [Section 194LD]**

(i) **Applicability and Rate of TDS:** Section 194LD provides that any income by way of interest payable during the period between 1.6.2013 and 30.6.2020 in respect of investment made by an FII or QFI in a rupee denominated bond of an Indian company or a Government security, shall be subject to tax deduction at source at a concessional rate of 5% (as against the rate of 20% of interest applicable in respect of other interest received by a QFI or FII).

The interest to the extent the same does not exceed the interest calculated at the rate notified by the Central Government in this behalf will be subject to tax deduction at a concessional rate of 5%.

(ii) **Time of deduction:** Any person who is responsible for paying to a person being a FII or a QFI, any such interest shall, at the time of credit of such income to the account of the payee or at the time of payment of such income in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon@5%.

(iii) **Meaning of FII and QFI:**

<table>
<thead>
<tr>
<th>Term</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i) FII</td>
<td>Foreign Institutional Investors specified by the Central Government by notification in the Official Gazette.</td>
</tr>
<tr>
<td>(ii) QFI</td>
<td>Qualified Foreign Investors i.e., Foreign Investors, being non-residents, who meet certain KYC requirements under SEBI laws and are hence permitted to invest in equity and debt schemes of Mutual Funds, thereby enabling Indian Mutual Funds to have direct access to foreign investors and widen the class of foreign investors in Indian equity and debt market. <strong>QFI does not include FII.</strong></td>
</tr>
</tbody>
</table>
Payment of any other sum to non-resident [Section 195]

(i) **Applicability:** Any person responsible for paying interest (other than interest referred to in section 194LB or section 194LC or section 194LD) or any other sum chargeable to tax (other than salaries) to a non-corporate non-resident or to a foreign company is liable to deduct tax at source at the rates prescribed by the relevant Finance Act. Such persons are also required to furnish the information relating to payment of any sum in such form and manner as may be prescribed by the CBDT.

**Payee to be a non-resident** - In order to subject an item of income to deduction of tax under this section the payee must be a non-corporate non-resident or a foreign company.

**Payer may be a resident or non-resident** - Under section 195(1), the obligation to deduct tax at source from interest and other payments to a non-resident, which are chargeable to tax in India, is on “any person responsible for paying to a non-resident or to a foreign company”.

The words “any person” used in section 195(1) is intended to include both residents and non-residents. Therefore, a non-resident person is also required to deduct tax at source before making payment to another non-resident, if the payment represents income of the payee non-resident, chargeable to tax in India. Therefore, if the income of the payee non-resident is chargeable to tax, then tax has to be deducted at source, whether the payment is made by a resident or a non-resident.

**Explanation 2** clarifies that the obligation to comply with section 195(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 has:-

(a) a residence or place of business or business connection in India; or
(b) any other presence in any manner whatsoever in India.

(ii) **Time of deduction:** The tax is to be deducted at source 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.

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.

However, in the case of interest payable by the Government or a public sector bank within the meaning of section 10(23D) or a public financial institution within the meaning of section 10(23D), 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.
(iii) **Payments subject to tax deduction:** The statutory obligation imposed under this section would apply for the purpose of deduction of tax at source from any sum being income assessable to tax (other than salary income) in the hands of the non-resident/foreign company. However, no deduction shall be made in respect of any dividends declared/distributed/paid by a domestic company, which is exempt in the hands of the shareholders under section 10(34).

Payment to a non-resident by way of royalties and payments for technical services rendered in India are common examples of sums chargeable under the provisions of the Act to which the liability for deduction of tax at source would apply.

(iv) **Certificate of non-deduction of tax at source:**

(a) Any person entitled to receive any interest or other sum on which income-tax has to be deducted under section 195(1) may make an application in the prescribed form to the Assessing Officer for grant of certificate authorizing him to receive such interest or other sum without deduction of tax thereunder.

(b) Where any such certificate is granted, every person responsible for paying such interest or other sum to the person to whom certificate is granted make payment of such interest or other sum without deduction of tax at source under section 195(1), so long as the certificate in force.

(c) Such certificate shall remain in force till the expiry of the period specified therein. However, if it is cancelled by the Assessing Officer before the expiry of such period, the certificate shall remain in force till such cancellation.

(d) The CBDT is empowered to make rules specifying the cases in which, and the circumstances under which, an application may be made for the grant of certificate. While doing so, it should take into account the convenience of the assessee and the interests of the revenue.

(e) Such Rules would provide for the conditions subject to which such certificate may be granted and any other matter connected therewith.

(v) **Person responsible for paying any sum to non-resident to furnish prescribed information:** Section 195(6) provides that the person responsible for paying any sum, whether or not chargeable to tax under the provisions of the Act, to a non-corporate non-resident or to a foreign company, shall be required to furnish the information relating to payment of such sum in the prescribed form and prescribed manner.

(vi) **Specified class or classes of persons, making payment to the non-resident, to mandatorily make application to Assessing Officer to determine the appropriate proportion of sum chargeable to tax**

(a) Under section 195(1), any person responsible for paying to a non-corporate non-resident or to a foreign company, any interest or any other sum chargeable under the provisions of the Act (other than salary), has to deduct tax at source at the rates in force.

(b) Under section 195(2), where the person responsible for paying any such sum chargeable to tax under the Act (other than salary) to a non-resident, considers that the whole of such sum would not be income chargeable in the hands of the recipient, he may make an
application to the Assessing Officer to determine, by general or special order, the appropriate proportion of such sum so chargeable. When the Assessing Officer so determines, the appropriate proportion, tax shall be deducted under section 195(1) only on that proportion of the sum which is so chargeable.

(c) Consequent to the retrospective amendments in section 2(47), section 2(14) and section 9(1) by the Finance Act, 2012, sub-section (7) in section 195 provides that, notwithstanding anything contained in sections 195(1) and 195(2), the CBDT may, by notification in the Official Gazette, specify a class of persons or cases, where the person responsible for paying to a non-corporate non-resident or to a foreign company, any sum, whether or not chargeable under the provisions of this Act, shall make an application to the Assessing Officer to determine, by general or special order, the appropriate proportion of sum chargeable to tax. Where the Assessing Officer determines the appropriate proportion of the sum chargeable, tax shall be deducted under sub-section (1) on that proportion of the sum which is so chargeable.

(d) Consequently, where the CBDT specifies a class of persons or cases, the person responsible for making payment to a non-corporate non-resident or a foreign company in such cases has to mandatorily make an application to the Assessing Officer, whether or not such payment is chargeable under the provisions of the Act.

(vii) Procedure for refund of TDS under section 195 to the person deducting tax in cases where tax is deducted at a higher rate prescribed in the DTAA

(a) The CBDT has, through Circular No.7/2011 dated 27.9.2011, modified Circular No.07/2007, dated 23.10.2007 which laid down the procedure for refund of tax deducted at source under section 195 of the Income-tax Act, 1961 to the person deducting tax at source from the payment to a non-resident. The said Circular allowed refund to the person making payment under section 195 in the circumstances indicated therein as the income does not accrue to the non-resident or if the income is accruing, no tax is due or tax is due at a lesser rate. The amount paid to the Government in such cases to that extent does not constitute tax.

(b) The said Circular, however, did not cover a situation where tax is deducted at a rate prescribed in the relevant DTAA which is higher than the rate prescribed in the Income-tax Act, 1961. Since the law requires deduction of tax at a rate prescribed in the relevant DTAA or under the Income-tax Act, 1961, whichever is lower, there is a possibility that in such cases excess tax is deducted relying on the provisions of relevant DTAA.

(c) Accordingly, in order to remove the genuine hardship faced by the resident deductor, the CBDT has modified Circular No. 07/2007, dated 23-10-2007 to the effect that the beneficial provisions under the said Circular allowing refund of tax deducted at source under section 195 to the person deducting tax at source shall also apply to those cases where deduction of tax at a higher rate under the relevant DTAA has been made while a lower rate is prescribed under the domestic law.
(11) Income payable net of tax [Section 195A]

(i) Where, under an agreement or other arrangement, the tax chargeable on any income referred to in the foregoing provisions of this Chapter is to be borne by the person by whom the income is payable, then, for the purposes of deduction of tax under those provisions such income shall be increased to such amount as would, after deduction of tax thereon, be equal to the net amount payable under such agreement or arrangement.

(ii) However, no grossing up is required in the case of tax paid [under section 192(1A)] by an employer on the non-monetary perquisites provided to the employee.

(12) Income from units [Section 196B]

The person responsible for making the following payment to an Offshore Fund shall deduct tax @ 10% 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.

- income in respect of units referred to in section 115AB or
- income by way of long-term capital gains arising from the transfer of such units

(13) Income from foreign currency bonds or shares of Indian company [Section 196C]

The person responsible for making the following payment to a non-resident shall deduct tax @ 10% 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.

- income by way of interest or dividends in respect of bonds or Global Depository Receipts referred to in section 115AC or
- income by way of long-term capital gains arising from the transfer of such bonds or Global Depository Receipts.

However, no deduction shall be made in respect of any dividends referred to in section 115-O.

(14) Income of foreign institutional investors from securities [Section 196D]

(i) The person responsible for making the payment in respect of securities referred to in clause (a) of sub-section (1) of section 115AD to a Foreign Institutional Investor shall deduct tax @ 20% 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.

(ii) However, no deduction shall be made in respect of the following

- any dividends referred to in section 115-O
- income, by way of capital gains arising from the transfer of securities referred to in section 115AD, payable to a Foreign Institutional Investor.

© The Institute of Chartered Accountants of India
(15) Certificate for deduction of tax at a lower rate [Section 197]

(i) This section applies where, in the case of any income of any person or sum payable to any person, income-tax is required to be deducted at the time of credit or payment, as the case may be at the rates in force as per the provisions of sections 192, 194G, 194LBB, 194LBC and 195.

(ii) In such cases, the assessee can make an application to the Assessing Officer for deduction of tax at a lower rate or for non-deduction of tax.

(iii) If the Assessing Officer is satisfied that the total income of the recipient justifies the deduction of income-tax at lower rates or no deduction of income-tax, as the case may be, he may give to the assessee such certificate, as may be appropriate.

(iv) Where the Assessing Officer issues such a certificate, then the person responsible for paying the income shall deduct income-tax at such lower rates specified in the certificate or deduct no tax, as the case may be, until such certificate is cancelled by the Assessing Officer.

(v) Enabling powers have been conferred upon the CBDT to make rules for prescribing the procedure in this regard.

(16) Credit for tax deducted at source [Section 199]

(i) Tax deducted at source in accordance with the above provisions and paid to the credit of the Central Government shall be treated as payment of tax on behalf of the-

   (i) person from whose income the deduction was made; or

   (ii) owner of the security; or

   (iii) depositor; or

   (iv) owner of property; or

   (v) unit-holder; or

   (vi) shareholder.

(ii) Any sum referred to in sub-section (1A) of section 192 and paid to the Central Government, shall be treated as the tax paid on behalf of the person in respect of whose income, such payment of tax has been made.

(iii) The CBDT is empowered to frame rules for the purpose of giving credit in respect of tax deducted or tax paid under Chapter XVII. The CBDT also has the power to make rules for giving credit to a person other than the persons mentioned in (1) and (2) above. Further, the CBDT can specify the assessment year for which such credit may be given.

(iv) Rule 37BA – Credit for tax deducted at source for the purposes of section 199

Rule 37BA(1) provides that credit for tax deducted at source and paid to the Central Government shall be given to the person to whom the payment has been made or credit has
been given (i.e., the deductee) on the basis of information relating to deduction of tax furnished by the deductor to the income-tax authority or the person authorized by such authority.

Clause (i) of Rule 37BA(2) provides that where under any provisions of the Act, the whole or any part of the income on which tax has been deducted at source is assessable in the hands of a person other than the deductee, credit for the whole or any part of the tax deducted at source, as the case may be, shall be given to the other person and not to the deductee.

However, the deductee should file a declaration with the deductor and the deductor should report the tax deduction in the name of the other person in the information relating to deduction of tax referred to in sub-rule (1) of Rule 37BA.

(17) Mandatory requirement of furnishing PAN in all TDS, bills, voucher and correspondence between the deductor and deductee [Section 206AA]

(i) With a view to strengthening the PAN mechanism, section 206AA provides that any person whose receipts are subject to deduction of tax at source i.e. the deductee, shall mandatorily furnish his PAN to the deductor failing which the deductor shall deduct tax at source at higher of the following rates –

(a) the rate prescribed in the Act;
(b) at the rate in force i.e., the rate mentioned in the Finance Act; or
(c) at the rate of 20%.

(ii) Tax would be deductible at the rates mentioned above also in cases where the taxpayer files a declaration in Form 15G or 15H (under section 197A) but does not provide his PAN.

(iii) Further, no certificate under section 197 will be granted by the Assessing Officer unless the application contains the PAN of the applicant.

(iv) If the PAN provided to the deductor is invalid or it does not belong to the deductee, it shall be deemed that the deductee has not furnished his PAN to the deductor. Accordingly, tax would be deductible at the rate specified in (ii) above.

(v) Non-applicability of section 206AA to non-residents: The provisions of section 206AA shall not apply in respect of payment of interest on long-term bonds and any other payment subject to such conditions as may be prescribed, as referred to in section 194LC, to a non-corporate non-resident or to a foreign company.

(vi) Other payments and conditions prescribed for non-applicability of section 206AA [Rule 37BC]:

For the purpose of reducing the compliance burden, Rule 37BC provides for non-applicability of the requirements contained in section 206AA to a non-corporate non-resident in respect of interest, royalty, fees for technical services and payment on transfer of any capital asset, provided the following details and documents are furnished to the deductor, namely:-

© The Institute of Chartered Accountants of India
a. name, e-mail id, contact number;

b. address in the country or specified territory outside India of which the deductee is a resident;

c. a certificate of his being resident in any country or specified territory outside India from the Government of that country or specified territory if the law of that country or specified territory provides for issuance of such certificate;

d. Tax Identification Number of the deductee in the country or specified territory of his residence and in case no such number is available, then a unique number on the basis of which the deductee is identified by the Government of that country or the specified territory of which he claims to be a resident [Notification No. 53/2016 dated 24th June, 2016].

(vii) Both the deductor and the deductee have to compulsorily quote the PAN of the deductee in all correspondence, bills, vouchers and other documents exchanged between them.

**Withholding tax provisions for Non-resident: A Summary**

<table>
<thead>
<tr>
<th>Section</th>
<th>Nature of payment</th>
<th>Rate of TDS</th>
</tr>
</thead>
<tbody>
<tr>
<td>192</td>
<td>Payment of salary</td>
<td>Normal Slab rates</td>
</tr>
<tr>
<td>194B</td>
<td>Income by way of winnings from lotteries, crossword puzzles, card games and other games of any sort</td>
<td>30</td>
</tr>
<tr>
<td>194BB</td>
<td>Income by way of winnings from horse races</td>
<td>30</td>
</tr>
<tr>
<td>194E</td>
<td>Specified payments to non-resident sportsmen/sports association or an entertainer</td>
<td>20</td>
</tr>
<tr>
<td>194LB</td>
<td>Payment of interest on infrastructure debt fund</td>
<td>5</td>
</tr>
<tr>
<td>194LBA(2)</td>
<td>Distribution any interest income, received or receivable by a business trust from a SPV, to its unit holders.</td>
<td>5</td>
</tr>
<tr>
<td>194LBA(3)</td>
<td>Distribution of any income received from renting or leasing or letting out any real estate asset directly owned by the business trust, to its unit holders.</td>
<td>At the rates in force</td>
</tr>
<tr>
<td>194LBB</td>
<td>Investment fund paying income to a unit holder [other than income which is exempt under section 10(23FBB)].</td>
<td>At the rates in force</td>
</tr>
<tr>
<td>194LBC(2)</td>
<td>Income in respect of investment made in a securitisation trust (specified in <em>Explanation</em> to section 115TCA)</td>
<td>At the rates in force</td>
</tr>
<tr>
<td>Code</td>
<td>Description</td>
<td>Rate</td>
</tr>
<tr>
<td>------</td>
<td>-----------------------------------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>194LC</td>
<td>Payment of interest by an Indian Company or a business trust to a non-corporate non-resident or foreign company in respect of money borrowed in foreign currency from a source outside India under a loan agreement or by way of issue of long term bonds (including long term infrastructure bond) or by way of issue of rupee denominated bond</td>
<td>5</td>
</tr>
<tr>
<td>194LD</td>
<td>Payment of interest on rupee denominated bond of an Indian Company or Government securities to a Foreign Institutional Investor or a Qualified Foreign Investor</td>
<td>5</td>
</tr>
<tr>
<td>195</td>
<td>Payment of any other sum to a non-resident</td>
<td>At the rates in force</td>
</tr>
<tr>
<td>196B</td>
<td>Income from units of a mutual fund or UTI purchased in foreign currency (including long term capital gain on transfer of such units) payable to an Offshore Fund</td>
<td>10</td>
</tr>
<tr>
<td>196C</td>
<td>Income by way of interest on bonds of an Indian company or public sector company sold by the Government and purchased by a non-resident in foreign currency or GDRs referred to in section 115AC (including long term capital gain on transfer of such bonds or GDRs payable to a non-resident</td>
<td>10</td>
</tr>
<tr>
<td>196D</td>
<td>Income of foreign Institutional Investors from securities (not being income by way of interest referred to in section 194LD, dividend referred under section 115-O or capital gain arising from such securities)</td>
<td>20</td>
</tr>
</tbody>
</table>

### 2.13 MISCELLANEOUS PROVISIONS

#### (1) Furnishing of Return of Income [Section 139(1)]

Filing an income-tax return in India is mandatory for non-residents except in the cases specified in “Chapter XII: Determination of tax in certain special cases” of the Income-tax Act, 1961 [Refer to para 2.9].

Section 139(1) of the Income-tax Act, 1961 requires every person,—

(a) being a company or a firm; or

(b) being a person other than a company or a firm, if his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the basic exemption limit,
to furnish a return of his income or the income of such other person during the previous year, in the
prescribed form and verified in the prescribed manner and setting forth such other particulars as may be
prescribed on or before the due date specified thereunder.

'Due date' means -

<table>
<thead>
<tr>
<th>Assessee</th>
<th>Due Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i) Where the assessee, other than an assessee referred to in clause (ii), is -</td>
<td>30th September of the assessment year</td>
</tr>
<tr>
<td>(a) a company,</td>
<td></td>
</tr>
<tr>
<td>(b) a person (other than a company) whose accounts are required to be audited under the Income-tax Act, 1961 or any other law in force; or</td>
<td></td>
</tr>
<tr>
<td>(c) a working partner of a firm whose accounts are required to be audited under the Income-tax Act, 1961 or any other law for the time being in force.</td>
<td></td>
</tr>
<tr>
<td>(ii) in the case of an assessee who is required to furnish a report referred to in section 92E.</td>
<td>30th November of the assessment year</td>
</tr>
<tr>
<td>(iii) in the case of any other assessee.</td>
<td>31st July of the assessment year</td>
</tr>
</tbody>
</table>

(2) **Who may be regarded as Representative Assessee? [Section 160]**

As per section 160(1)(i), in respect of the income deemed to accrue or arise in India to a non-resident under section 9(1), the agent of the non-resident including a person who is treated as an agent under section 163 would be treated as a representative assessee.

(3) **Who may be regarded as agent? [Section 163]**

An agent is considered a representative assessee but only if he is the agent of non-resident person. According to section 163, an agent, in relation to a non-resident person, includes any person in India:

(i) who is employed by or on behalf of the non-resident;

(ii) who is having any business connection with the non-resident;

(iii) from or through whom the non-resident is in receipt of any income, whether directly or indirectly;

(iv) who is trustee of the non-resident.

An agent also includes any other person who (whether resident or non-resident) has acquired a capital asset in India by means of a transfer.
A Broker: Can he be treated as an agent?

Where transactions are carried on in the ordinary course of business through a broker in India and the broker does not deal directly with or on behalf of a non-resident principal but deals with or through a non-resident broker, the broker in India cannot be treated as an agent in respect of the income arising to the non-resident from such transactions. Accordingly, where bona fide hedging transactions take place through a broker in India and a foreign broker acting for an undisclosed principal, the Indian broker cannot be deemed to be agent of the foreign principal. Thus, generally a broker is not deemed to be the agent of a non-resident person so long as he functions exclusively in his capacity as a broker.

Opportunity of being heard to be given before treating a person as an agent of a non-resident

Before a person can be treated as an agent of a non-resident he must be given a reasonable opportunity of being heard by the Assessing Officer as to his liability to be so treated.

(4) Liability of Representative Assessee [Section 161]

Every representative assessee has the same responsibilities, duties and liabilities as if the income were being received by or accruing to or in favour of him beneficially. He is liable to be assessed in his own name in respect of such income but the assessment is deemed to have been made upon him in his representative capacity. The tax is levied on and is recovered from such an assessee, in like manner and to the same extent as it would have been levied upon and recovered from the person represented by him.

If certain income is assessed in the hands of any person in the capacity of representative assessee, the same income shall not be assessed in his hands under any other provision of the Act.

(5) Rights of representative assessee to recover tax paid [Section 162]

Every representative assessee who pays any amount under the Act, is entitled to recover the sum so paid from the person on whose behalf he had paid it or to adjust it against any moneys in his possession, but belonging to the other persons. The representative assessee has the right to retain out of the moneys in his representative capacity, an amount equal to any sum paid by him under the Act in addition to the right to recover the same from the beneficial owner of the income.

Any representative assessee or any person who apprehends that he may be assessed in respect of any other person (principal) as a representative assessee, has the right to retain out of the money payable by him to such other person, amount to the extent of his estimated liability.

In case of disagreement between the principal and representative assessee, such representative assessee, may secure from the Assessing Officer a certificate stating the amount to be so retained pending final settlement of the liability. The certificate so obtained shall be treated as warrant authorising retention of the amount.

The amount recoverable from such representative assessee at the time of final settlement should not exceed the amount specified in such certificate. However, where a representative assessee
holds, in his hands, any additional assets of the principal at the time of final settlement, then the Assessing Officer may initiate the recovery of the balance tax liability of the principal from such representative to the extent of assets held by him.

(6) Direct assessment or recovery not barred [Section 166]

Direct assessment of the person on whose behalf or for whose benefit income is receivable, or the recovery from such person of the tax payable in respect of such income is not barred by any provision in Chapter XV of the Income-tax Act, 1961.

(7) Remedies against property in cases of representative assesseees [Section 167]

The Assessing Officer has the same remedies against all property of any kind vested in or under the control or management of any representative assessee as he would have against the property of any person liable to pay any tax, and in as full and ample a manner, irrespective of whether the demand is raised against the representative assessee or directly against the beneficiary.

(8) Recovery of tax in respect of non-resident from his assets [Section 173]

In a case where the person entitled to the income arising from any business connection in India or from any property in India or through or from any asset or source of income in India or through the transfer of a capital asset situated in India is a non-resident, the tax chargeable thereon, whether in his name or in the name of his agent who is liable as a representative assessee, may be recovered by deduction under any of the provisions of Chapter XVII-B. Further, any arrears of tax may be recovered also in accordance with the provisions of this Act from any assets of the non-resident which are, or may at any time come, within India. These provisions are without prejudice to the provisions of section 161(1) or of section 167.

(9) Recovery against the assessee's property in foreign countries [Section 228A]

Where an assessee is in default or is deemed to be in default in making a payment of tax, the Tax Recovery Officer may if the assessee has property in a country outside India (being a country with which the Central Government has entered into an agreement for the recovery of income tax under this Act and the corresponding law in force in that country) forward to the CBDT a certificate drawn up by him under section 222 and the CBDT may take such action thereon as it may deem appropriate having regard to the terms of the agreement with such country.

Similarly, the Government of the other country or any authority under that Government may send to the CBDT a certificate of recovery of any tax due under such corresponding law from a person having property in India and the CBDT may forward such certificate to Tax Recovery Officer for recovery of such tax.

(10) Submission of statement by a non-resident having liaison office [Section 285]

(i) A non-resident can operate in India through a branch or a liaison office set up after getting the approval of the Reserve Bank of India. Since the branch constitutes a permanent establishment
of the non-resident, it has to file its return of income. However, prior to 1.6.2011, there was no such requirement as regards a liaison office since no business activity is allowed to be carried out in India via a liaison office of a non-resident.

(ii) With effect from 1.6.2011, such a non-resident is required to file a statement in the prescribed form [Form No.49C] to the Assessing Officer having jurisdiction, within 60 days from the end of the financial year, providing the details in respect of activities carried out by the liaison office in India during the financial year.

(iii) This requirement has to be complied with by every person, being a non-resident having a liaison office in India set up in accordance with the guidelines issued by the RBI under the Foreign Exchange Management Act, 1999.

(iv) The statement of a particular financial year should be filed on or before 30th May, of the succeeding financial year in electronic form along with digital signature. For example, the statement for F.Y. 2017-18 should be filed on or before 30th May, 2018. Further, the statement is to be verified by a Chartered Accountant or by the Authorized Signatory i.e., the person authorized by the non-resident in this behalf.

**Note** – In this Chapter, the provisions of income-tax law which specifically relate to non-residents have been dealt with in detail. Further, certain significant general provisions of income-tax law, which are also applicable to non-residents in the same or modified form are discussed in some length. In addition to these provisions, there may be other general provisions of income-tax law, which are also applicable to non-residents. For a detailed discussion of these provisions, students are advised to refer to the Study Material of Paper 7: Direct Tax Laws and International Taxation, wherein the entire income-tax law is discussed in detail. Students are expected to be aware of such provisions and apply the same while solving problems and addressing issues related to non-residents in this Elective Paper.