After studying this Chapter, you will be able to –

- **examine** the scope of income taxable in the hands of non-residents.
- **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 the 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.
1.1 INTRODUCTION

There are two basic principles of International Taxation

1. Residence Based Taxation
2. Source Based Taxation

Residence Based Taxation: The principle 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 its place of residence.

Source Based Taxation: According to this principle a country consider certain income as taxable income if such income arises within its jurisdiction. Such income is taxed 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.

The term “Non-resident” is defined under section 2(30) of the Income-tax Act, 1961 as 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.

1.2 RESIDENTIAL STATUS AND SCOPE OF TOTAL INCOME

Section 6 contains the provisions for determining the residential status of a person, section 5 deals with scope of total income of resident, resident but not ordinarily resident and non-resident and section 9 pertains to incomes deemed to accrue or arise in India. The provisions of these sections are discussed in detail in Chapter 2: Residential Status and Scope of Total Income in Module I of Part I – Direct Tax Laws.

The summary of these provisions i.e., section 6, 5 and 9 is given below for the purpose of recapitulation:

<table>
<thead>
<tr>
<th>Abbreviations used in the Flow Charts given in pages 1.3 &amp; 1.4</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>

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Non Resident Taxation

Determination of Residential Status of Individual

Individual

Stayed in India < 60 days

Yes

NR

No

Resident

Stayed ≥ 182 days RPY

Yes

NR

No

Stayed < 182 days RPY

If Left for Employment OR Crew Member of Indian Ship

Yes

NR

No

Stayed ≤ 729 days during the 7 PPY

Yes

R & NOR

No

NR

No

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

Yes

NR

No

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

Yes

NR

No
“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)]

**CBDT Circular on Guiding Principles for determination of Place of Effective management (‘POEM’) of a Company:** CBDT has issued a circular No. 6/2017 dated 24 Jan 2017 on Guiding Principles for determination of Place of Effective management of a Company

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

**The determination of POEM is based on the following categorization of foreign companies:**

- **Active Business Outside India (Business Test)**

- **Companies fulfilling the test of ABOI**
  - POEM outside India, if majority BOD meetings are held outside India
  - If de facto decision making authority is not BOD but Indian parent or resident, POEM shall be in India

- **Companies other than those fulfilling the test of ABOI**
  - **Stage 1:** Identification of persons who actually make the key management and commercial decision for conduct of the company’s business as a whole
  - **Stage 2:** Determination of place where these decisions are, in fact, made

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1.6 INTERNATIONAL TAXATION

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

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

* Passive income of a company shall be 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 (except for banking companies and public financial institutions) or rental income whether or not involving associated enterprises

Scope of Total Income (Section 5)

<table>
<thead>
<tr>
<th>Particulars</th>
<th>Resident and Ordinary Resident</th>
<th>Not ordinary Resident</th>
<th>Non-Resident</th>
</tr>
</thead>
<tbody>
<tr>
<td>Income received or deemed to be received in India whether earned in India or elsewhere</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Income which accrue or arise or deemed to accrue or arise in India during the previous year whether received in India or elsewhere</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Income which accrue or arise</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
</tbody>
</table>

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outside India and received outside India from a business controlled from India

Income which accrue or arise outside India and received outside India in the previous year from any other source

Income which accrues or arises outside India and received outside India during the year preceding the year and remitted to India during the previous year

Yes

No

No

No

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

Under 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 given below in this chart:

Income deemed to accrue or arise in India [Clause (i), (ii), (iii) & (iv) Section 9(1)]

Income accruing or arising outside India, directly or indirectly through or from

Salary earned for services rendered in India

Salary payable by Government to Indian Citizen for services rendered outside India

Dividend paid by Indian Company Outside India

Any Business Connection in India

Any property/asset or source of income in India

Transfer of capital asset situated in India
1.8  INTERNATIONAL TAXATION

1.3  EXEMPT INCOME OF NON RESIDENTS

Section 10 of the Income-tax Act 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 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 individual, being a citizen of India 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 officers 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 in 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 enterprise 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 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 enterprise 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 will not be included in computing the total income of such non-resident non-corporate or foreign company 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.

(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 govt.) 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 cooperative 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; 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 Government of a foreign state; 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:

(i) any individual who is either not a citizen of India or being a citizen of India, 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 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 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 a employee of consultant are exempt from tax
(a) The remuneration received by an employee of the consultant referred to in the aforesaid para

(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 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 foreign income and an income 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) **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.

(7) **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.

(8) **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
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.

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 the facility in India after the expiry of the agreement or the 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</td>
<td>Individual (not being a citizen of India)</td>
</tr>
<tr>
<td>10(6)(vi)</td>
<td>Remuneration received by non-Indian citizen 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>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>a)</td>
<td>Foreign enterprise is not engaged in any trade or business in India</td>
<td></td>
</tr>
<tr>
<td>b)</td>
<td>His stay in India not exceeding aggregate a period of 90 days in such previous year</td>
<td></td>
</tr>
<tr>
<td>c)</td>
<td>Such remuneration is not liable to deducted from the income of employer chargeable under this Act</td>
<td></td>
</tr>
</tbody>
</table>

| 10(6)(viii) | Salary received 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. | Individual (Non-resident who is not a citizen of India) - Salaried Employee |

| 10(6)(xi) | 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, etc. | Individual - Salaried Employee (not being a citizen of India) |

| 10(6A) | 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 salary, royalty or fees for technical services from Government or Indian concern | Foreign Company |

<p>| 10(6B) | Tax paid by Government or Indian concern under terms of agreement entered into before 1-6-2002 by Central Government with Government of | Non-resident non-corporate and foreign company |</p>
<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
<th>Category</th>
</tr>
</thead>
<tbody>
<tr>
<td>10(6BB)</td>
<td>Tax paid by Indian company, engaged in the business of operation of aircraft, who has acquired an aircraft for its 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</td>
</tr>
<tr>
<td>10(6C)</td>
<td>Income derived 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</td>
<td>Foreign company (notified by Central Government)</td>
</tr>
<tr>
<td>10(8)</td>
<td>Foreign income and remuneration received by individual in connection with any co-operative technical assistance programme and project under agreement between Central Government and the Government of a foreign State (Subject to certain conditions).</td>
<td>Individual</td>
</tr>
</tbody>
</table>
| 10(8A)  | Foreign income and remuneration 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 (Subject to certain conditions). | Individual, being a:  
  a) Non-Indian citizen; or  
  b) Indian citizen who is not ordinarily resident in India engaged by the agency for rendering technical services in India |
| 10(8B)  | 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 | Individual, being a:  
  a) Non-Indian citizen; or  
  b) Indian citizen who is not ordinarily resident in India |
### INTERNATIONAL TAXATION

<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.18</td>
<td>before commencement of service). (Subject to certain conditions).</td>
<td>resident in India</td>
</tr>
<tr>
<td>10(9)</td>
<td>Foreign income (Subject to certain conditions).</td>
<td>Any family member of individual as referred to in clause (8), or (8A) or of an employee referred to in clause (8B)</td>
</tr>
<tr>
<td>10(23BBB)</td>
<td>Income of European Economic Community from interest, dividends or capital gains from investment of funds under specified scheme</td>
<td>European Economic Community</td>
</tr>
<tr>
<td>10(23BBC)</td>
<td>Income of SAARC Fund for Regional Projects set up by Colombo Declaration issued on 21-12-1991</td>
<td>SAARC Fund for Regional Projects</td>
</tr>
<tr>
<td>10(48)</td>
<td>Income received in India in Indian currency on account of sale of Crude oil or any other goods or rendering of services as may be notified by the Central Government in this behalf</td>
<td>Foreign company on account of sale of Crude oil</td>
</tr>
<tr>
<td>10(48A)</td>
<td>Income accruing or arsing on account of storage of crude oil in a facility in India and sale of crude oil therefrom</td>
<td>Foreign company on account of storage of crude oil in a facility in India</td>
</tr>
<tr>
<td>10(48B)</td>
<td>Income from sale of leftover stock of crude oil from strategic reserves at the expiry of agreement or arrangement</td>
<td>Foreign company from sale of leftover stock of crude oil</td>
</tr>
</tbody>
</table>

### 1.4 PRESUMPTIVE TAXATION FOR NON RESIDENTS

Section 28 of the Income-tax Act describes the incomes chargeable to tax under the head “Profits and Gains of Business or Profession”. Certain provisions have been incorporated in the Income-tax Act whereby the total income of certain non-resident assessee 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 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.

**Analysis of section 44B read with Section 172:**

**Shipping Business [Sections 44B & 172]**

Section 44B contains special provisions for computing profits and gains of shipping business of a non-resident assessee. In the case of non-residents, such profits and gains will be taken at an amount equal to 7.5\% of the amount paid or payable 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 as also of 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.

Section 172, which is a complete code in itself, contains provisions for taxation of occasional shipping business of non-residents in respect of profits made by them from carriage of passengers, livestock, mail or goods shipped at a port in India.

At this juncture, it is appropriate to compare section 172 on this topic which is placed under Chapter XV- “Liability in Special Cases”. The heading of the section is “profit of non-residents from occasional shipping business”. It creates a tax liability in respect of occasional shipping by making a special provision for the levy and recovery of tax in the case of a ship belonging to or chartered by a non-resident which carries passengers, livestock, mail or goods shipped at any port in India.

The object of the section is to ensure the levy and recovery of tax in the case of ships belonging to or chartered by non-residents. The section brings to tax the profits made by them from occasional shipping by means of summary assessment in which 7.5\% of the gross amount received by them is deemed to be assessable profit by virtue of section 172(2).

The main difference between section 44B and section 172 is that the section 44B does not provide any procedure for assessment and collection of tax whereas the same is provided elaborately in section 172.

The incidence of tax under section 44B is on a non-resident engaged in the business of operation of ships or chartered by him or it, and if such income constituted the amount paid to payable on account of the carriage of passengers, livestock, mail or goods shipped to any port in India. While section 172 refers to levy and recovery of tax in the case of any ship belonging to or chartered by a non-resident which carries passengers, livestock, mail or goods shipped from any port in India.
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.

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 passenger, 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.

The proviso to section 172(3) however, provides that a return may 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.

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 taxable income by virtue of provision 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.

Under section 172(4A), it is incumbent on the AO 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.

Section 172(5) empowers the Assessing Officer, for the purpose of determining the tax payable, to call for such accounts and documents as he may require.

Section 172(6) prohibits grant of a port clearance 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.

Under section 172(7), the owner or charter has 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 may be made in the normal course under section 143. 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.

**Under section 172(8)** the sum chargeable to tax includes amounts payable by way of demurrage
charge or handling charge or any other amount of similar nature.

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 super ceded if a regular
assessment is opted as per the provisions of the Act.

**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

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).

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

(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 exploration for and exploitation 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; and
- received or deemed to be received in India by or on behalf of the assesses on account of such service or facilities or supply of plant and machinery used or to be used in the exploration for and exploitation of mineral oils.

(iii) **Non-applicability of presumptive taxation under section 44BB:** 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.

(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]**

(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 and
(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>
</tbody>
</table>
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).

### (5) Deduction in respect of head office expenses in case of non-residents [Section 44C]

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>
<tbody>
<tr>
<td><strong>Adjusted total income</strong></td>
<td>Total income computed in accordance with the provisions of the Act without giving effect to the following:</td>
</tr>
<tr>
<td></td>
<td>- Allowance under this section</td>
</tr>
<tr>
<td></td>
<td>- Unabsorbed depreciation allowance under section 32(2).</td>
</tr>
<tr>
<td></td>
<td>- Expenditure incurred by a company for the purpose of promoting family planning amongst its employees under first proviso to section 36(1)(ix).</td>
</tr>
<tr>
<td></td>
<td>- Business loss brought forward under section 72(1).</td>
</tr>
<tr>
<td></td>
<td>- Speculation loss brought forward under section 73(2).</td>
</tr>
<tr>
<td></td>
<td>- Loss under the head Capital Gain under section 74(1).</td>
</tr>
<tr>
<td></td>
<td>- Loss from certain specified source brought forward under Section 74A(3).</td>
</tr>
<tr>
<td></td>
<td>- Deduction under Chapter VI-A.</td>
</tr>
<tr>
<td><strong>Average adjusted total income</strong></td>
<td>(a) The total income of the assessee, assessable for each of the <strong>three assessment years</strong> 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.</td>
</tr>
<tr>
<td></td>
<td>(b) When the total income of the assessee is assessable only for <strong>two of the aforesaid three assessment years</strong>, 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.</td>
</tr>
<tr>
<td></td>
<td>(c) Where the total income of the assessee is assessable only for <strong>one of the aforesaid three assessment years</strong>, the amount of the adjusted total income in respect of the previous year relevant to that assessment year is average adjusted total income.</td>
</tr>
<tr>
<td><strong>Head office expenditure</strong></td>
<td>Executive and general administration expenditure incurred by the assessee outside India, including expenditure incurred in respect of:</td>
</tr>
<tr>
<td></td>
<td>a. rent, rates, taxes, repairs or insurance of any premises outside India used for the purpose of the business or profession.</td>
</tr>
</tbody>
</table>
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 (i) ₹ 5 Lakhs, being 5% of ₹ 100 Lakhs, or (ii) ₹ 200 Lakhs.</td>
<td>5 lakhs</td>
</tr>
<tr>
<td>Income to be declared in return</td>
<td>95 lakhs</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 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 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.

SUMMARISED PROVISIONS

<table>
<thead>
<tr>
<th>Section No.</th>
<th>Particulars</th>
<th>Rate of Tax/Deduction of Expenses</th>
<th>Type of Business</th>
</tr>
</thead>
<tbody>
<tr>
<td>44B read with 172</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</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>44BBA</td>
<td>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).</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>-------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------</td>
<td>-------------------------------------------------------------------------------------------------</td>
<td>-------------------------------------------------------------------------------------------------</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 turkey power projects shall be computed on presumptive basis (Subject to certain conditions).</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>
<tr>
<td></td>
<td></td>
<td>a) 5% of adjusted total income; or</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>b) Head office exp. as attributable to business or profession of taxpayer in India.</td>
<td></td>
</tr>
</tbody>
</table>
Any person including a foreign company or other non-resident person 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. The provisions relating non-residents in respect of capital gains taxation are discussed in detail in Chapter 7: Capital Gains at Module 1 of Part I: Direct Tax Laws.

**Rate of exchange for conversion of rupees into foreign currency and reconversion of foreign currency into rupees for the purpose of computation of capital gains under the first proviso to section 48 (Rule 115A)**

**First Proviso to Section 48 read with rule 115A:**

The first proviso to the said section provides that in case of a non-resident, capital gains arising from transfer of a capital asset being shares in or debentures of an Indian company shall be computed by converting the cost of acquisition, the expenditure incurred wholly and exclusively in connection with such transfer and the full value of consideration received or accruing as a result of the transfer of the capital asset into the same foreign currency as was initially utilized in the purchase of the shares or debentures. Thereafter, the capital gains so computed in such foreign currency shall be re-converted into Indian currency.

Rule 115A of the Income-tax Rules, 1962 provides for the following rate of exchange for conversion of rupees into foreign currency and reconversion of foreign currency into rupees for the purpose of computation of capital gains under the first proviso to section 48:

(a) for converting the cost of acquisition of capital asset, the average of the telegraphic transfer buying rate and telegraphic transfer selling rate of the foreign currency initially utilized in the purchase of the said asset, as on the date of its acquisition;
(b) for converting expenditure incurred wholly and exclusively in connection with transfer of capital asset referred to in clause (a), the average of the telegraphic transfer buying rate and telegraphic transfer selling rate or the foreign currency initially utilized in the purchase of the said asset, as on the date of transfer of capital asset;

(c) for converting the full value of consideration received or accruing as a result of transfer of capital asset referred to in clause (a), the average of the telegraphic transfer buying rate and telegraphic transfer selling rate of the foreign currency initially utilized in the purchase of the said asset, as on the date of transfer of capital asset;

(d) 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 or such currency, as on the date of transfer of the capital asset.

Meaning of certain terms

<table>
<thead>
<tr>
<th>Term</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>Telegraphic transfer buying rate</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>Telegraphic transfer selling rate</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>2000</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.
### 1.6 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.

#### (1) Definitions

Section 115C defines the following terms,

<table>
<thead>
<tr>
<th>Terms</th>
<th>Particulars</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 “Capital gains” 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>
</tbody>
</table>
| (f) Specified asset             | means any of the following assets, namely:  
                                        (i) Shares in an Indian company;  
                                        (ii) Debentures issued by a public limited Indian company  
                                        (iii) Deposits in a public limited Indian Company  
                                        (iv) Any security of the Central Government  
                                        (v) Any other asset which the Central Government may notify |
Special provision for computation of “investment income” of a non-resident

(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 any provisions of the Act 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>↓</td>
</tr>
<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>↓</td>
</tr>
<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 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:

\[
\text{Capital Gains} = \frac{\text{Cost of acquisition of new asset}}{\text{Net Consideration}}
\]

**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>Taxable long-term capital gain</td>
<td>63,750</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
1.36 INTERNATIONAL TAXATION

assets being 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.

1.7 DETERMINATION OF TAX IN CERTAIN SPECIAL CASES [CHAPTER XII]

DTAA or Income-tax Act, 1961 whichever is beneficial: 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.

Sub-section (2) of section 90 in this regard states that 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-Residents & Foreign companies:

<table>
<thead>
<tr>
<th>Where the total income of a foreign company or a Non-resident includes any income by way of</th>
<th>Applicable Rate of Tax</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Dividends [other than dividend referred to in section 115-O]</td>
<td>20% of such dividend</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% of such interest</td>
</tr>
<tr>
<td>(3) Interest received from an infrastructure debt fund referred to in section 10(47)</td>
<td>5% of such interest</td>
</tr>
</tbody>
</table>
(4) Interest referred to in section 194LC received from an Indian company –
   - in respect of borrowing made by an Indian company or business trust in foreign currency from sources outside India
     - 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 Foreign Institutional Investor or Qualified Foreign Investor on investment made in –
   - Rupee denominated bond of an Indian company
   - Government security

(6) Distributed income, being interest referred to in section 194LBA(2), taxable in 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 technical services fees in case of Non-residents |
|---|---|
| **Applicable Rate of Tax** |
| 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. |

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(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.

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 unabsorbed depreciation, current year as well as brought forward 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 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 consist 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 will apply to the 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. 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% u/s 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 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-
1.40 INTERNATIONAL TAXATION

(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, the 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 nothing contained in the first and second provisos to section 48 shall 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 [Section 115AC(4)].

(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—

(a) 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); or

(b) income by way of short-term or long-term capital gains arising from the transfer of such securities,

the income-tax payable shall be the aggregate of—

(i) income-tax @ 20% on the income in respect of securities referred to in clause (a)
However, in case of interest referred to in section 194LD, income-tax is payable @5%.

(ii) income-tax @30% on the income by way of short-term capital gains referred to in (b) **However,** the amount of income-tax payable on income by way of short-term capital gains referred to in section 111A is calculated @15%

(iii) income-tax @10% on the income by way of long-term capital gains referred to in (b)

(iv) income-tax with which the Foreign Institutional Investor would have been chargeable had its total income been reduced by the amount of income referred to in clause (a) and clause (b) [Section 115AD(1)].

(ii) **No deduction is allowed:** Where the gross total income of the Foreign Institutional Investor consists 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 VIA.

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. [Section 115AD(2)]

(iii) **First and second provisos to section 48 shall not apply:** Nothing contained in the first and second provisos to section 48 shall apply for the computation of capital gains arising out of the transfer of securities. [Section 115AD(3)]

(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,—

(a) being a sportsman (including an athlete), who is not a citizen of India and is a non-resident, includes 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) or sport; or
(ii) advertisement; or

(iii) contribution of articles relating to any game or sport in India in newspapers, magazines or journals; or

(b) being a non-resident sports association or institution, includes 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; or

(c) being an entertainer, who is not a citizen of India and is a non-resident, includes any income received or receivable from his performance in India,

the income-tax payable by the assessee shall be the aggregate of—

(i) the amount of income-tax calculated on income referred to in clause (a) or clause (b) or clause (c) at the rate of twenty per cent; and

(ii) the amount of income-tax with which the assessee would have been chargeable had the total income of the assessee been reduced by the amount of income referred to in clause (a) or clause (b) or clause (c): 

(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 clause (a) or clause (b) or clause (c).

(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 clause (a) or clause (b) or clause (c) of sub-section (1); 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>Income taxable under section 115BB</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Income from horse races</td>
<td>20,000</td>
<td></td>
</tr>
<tr>
<td>Total income</td>
<td>6,30,000</td>
<td></td>
</tr>
</tbody>
</table>
1.44 INTERNATIONAL TAXATION

Tax@ 20% under section 115BBA on ₹ 6,10,000

Tax@ 30% under section 115BB on income of ₹ 20,000 from horse races

Add: Education cess@2% and SHEC@1%

**Total tax liability of Smith for the A.Y.2018-19**

(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 *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.

<table>
<thead>
<tr>
<th>Particulars</th>
<th>₹</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tax@30% under section 115BB on winnings of ₹ 20,000 from horse races</td>
<td>6,000</td>
</tr>
<tr>
<td>Tax on ₹ 6,10,000 at the rates in force</td>
<td></td>
</tr>
<tr>
<td>Upto ₹ 2,50,000</td>
<td>Nil</td>
</tr>
<tr>
<td>2,50,000 – 5,00,000 @5%</td>
<td>12,500</td>
</tr>
<tr>
<td>5,00,000 – 6,10,000 @ 20%</td>
<td>22,000</td>
</tr>
<tr>
<td></td>
<td>40,500</td>
</tr>
</tbody>
</table>
1.8 WITHHOLDING TAX PROVISIONS FOR NON-RESIDENTS

(1) 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

(2) 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.

(3) 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 other withholding tax provisions which are only relating to non-residents/where tax deduction at source rate is different from rate applicable for residents, are discussed in detail in the following chapters:

<table>
<thead>
<tr>
<th>Section</th>
<th>Nature of payment</th>
<th>Chapter</th>
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<td>Income by way of interest from infrastructure debt fund</td>
<td></td>
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<td>194LBA(2)</td>
<td>Business trust shall deduct tax while distributing any interest income received or receivable by it from a SPV to its unit holders.</td>
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<td>194LBA(3)</td>
<td>Business trust shall deduct tax while distributing any income received from renting or leasing or letting out any real estate asset owned directly by it to its unit holders.</td>
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<td>194LBB</td>
<td>Investment fund paying an income to a unit holder [other than income which is exempt under Section 10(23FBB)].</td>
<td></td>
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<td>194LBC</td>
<td>Income in respect of investment made in a securitisation trust (specified in Explanation of section115TCA)</td>
<td></td>
</tr>
<tr>
<td>194LC</td>
<td>Payment of interest by an Indian Company or a business trust in respect of money borrowed in foreign currency 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>15: Deduction, Collection and Recovery of Tax (Module 3: Part I- Direct Tax Laws)</td>
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<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></td>
</tr>
<tr>
<td>195</td>
<td>Payment of any other sum to a Non-resident</td>
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</tbody>
</table>
1.9 MISCELLANEOUS PROVISIONS

(1) Recovery of tax in respect of non-resident from his assets [Section 173]

Without prejudice to the provisions of sub-section (1) of section 161 or of section 167, where the person entitled to the income referred to in clause (i) of sub-section (1) of section 9 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 and 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.

(2) 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 Board a certificate drawn up by him under section 222 and the Board 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 Board a certificate of recovery of any tax due under such corresponding law from a person having property in India and the Board may forward such certificate to Tax Recovery Officer for recovery of such tax.

The other miscellaneous provisions relating to non-residents are discussed in detail in the following chapters:

<table>
<thead>
<tr>
<th>Section</th>
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<td>Submission of statement by a non-resident having liaison office</td>
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</table>
Question 1

Piyush, who returned to India on 12th June, 2017 for permanently residing in India after a stay of about 20 years in U.K., provides the sources of his various incomes and seeks your opinion to know about his liability to income tax thereon in India in assessment year 2018-19:

(i) Income of rent of the flat in London which was deposited in a bank there. The flat was given on rent by him after his return to India since July, 2017.

(ii) Dividends on the shares of three German Companies which are being collected in a bank account in London. He proposes to keep the dividend on shares in London with the permission of the Reserve Bank of India.

(iii) He has got two sons, one of whom is of 12 years and other 19 years. Both his sons are staying in London and not returning to India with him. Each of his sons is having income of ₹75,000 in U.K. in foreign currency (not received in India) and of ₹20,000 in India.

(iv) During the preceding accounting year when he was a non-resident, he had sold 1000 shares which were acquired by him in British Pound Sterling and the sale proceeds were repatriated. The profit in terms of British Pound Sterling on sale of these 1000 shares was 175% of the cost at ₹37,500 while in terms of Indian Rupee it was ₹50,000.

Answer

Piyush returned to India on 12th June 2017 for permanently residing in India after staying in UK for 20 years. During the P.Y.2017-18, he stays in India for 293 days. Since he has stayed in India for a period of 182 days or more during the previous year 2017-18, he would be a resident in India for the A.Y.2018-19. However, he would be a resident but not ordinarily resident, assuming that he was a non-resident in nine out of ten previous years preceding P.Y.2017-18 / his stay in India during the seven previous years is less than 730 days. The residential status of Piyush for A.Y.2018-19 is, therefore, **Resident but Not Ordinarily Resident**.

As per section 5(1), only income which is received/deemed to be received/accrued or arisen/deemed to accrue or arise in India is taxable in case of a Resident but not Ordinarily Resident. Income which accrues or arises outside India shall not be included in his total income, unless it is derived from a business controlled in, or a profession set up in, India.

(i) Rental income from a flat in London which was deposited in a bank there shall not be taxable in the case of a resident but not ordinarily resident, since both the accrual and receipt of income are outside India.

(ii) Dividends from shares of three German Companies, collected in a bank account in London, would also not be taxable in the case of a resident but not ordinarily resident since both the accrual and receipt of income are outside India.
(iii) As per section 64(1A), all income accruing or arising to a minor child is includible in the hands of the parent, after providing for deduction of ₹ 1,500 per child under section 10(32).

Accordingly, income of ₹ 20,000 accruing to his minor son, aged 12 years, in India is includible in the income of Piyush, after providing deduction of ₹ 1,500. Therefore, ₹ 18,500 is includible in the income of Piyush. Income accruing to the minor child outside India (which is also received outside India) is not includible in the income of Piyush.

Since the other son is major, his income is not includible in the income of Piyush.

(iv) Repatriation of sale proceeds of 1000 shares sold in the preceding accounting year, when Piyush was a non-resident, is not taxable in the A.Y.2018-19 since it is not the income of the P.Y.2017-18.

Consequently, only the income includible under section 64(1A) would form part of the total income of Mr. Piyush for A.Y.2018-19. Since his total income (i.e., ₹ 18,500) is less than the basic exemption limit, there would be no liability to income-tax for A.Y.2018-19.

**Question 2**

Arjun who works as a Finance Controller of ABC Ltd. was deputed to work at the company’s office in U.K. on 26.09.2017 for a period of 2 years. He claims that he is a non-resident for the A.Y.2018-19. Is his claim valid? Discuss.

**Answer**

As per section 6, an individual is treated as resident if he has stayed for 182 days in India during the previous year or if he has stayed for 60 days in the current previous year and 365 days in total during the four preceding previous years. However, where an Indian citizen leaves India for the purpose of employment, he will be resident if he stayed for 182 days instead of 60 days during the previous year.

In the given case, Arjun is employed in India and he was deputed to work at the company’s branch office in U.K. on 26.09.2017 for a period of 2 years. Since, Arjun leaves India for the purpose of employment, the condition of 182 days in the current previous year would only be applicable for treating him as resident. However, during the P.Y. 2017-18, he stayed in India for 179 days. Hence, his claim that he is non-resident for the A.Y. 2018-19, is valid.

**Question 3**

J, a citizen of India, employed in the Indian Embassy at Tokyo, Japan. He received salary and allowances at Tokyo from the Government of India for the year ended 31.3.2018 for services rendered by him in Tokyo. Besides, he was allowed perquisites by the Government. He is a non-resident for the assessment year 2018-19. Examine the taxability of salary, allowances and perquisites in the hands of J for the assessment year 2018-19.
Answer

As per section 9(1)(iii), salaries payable by the Government to a citizen of India for services rendered outside India shall be deemed to accrue or arise in India. As such, salary received by J is chargeable to tax, even though he was a non-resident for A.Y. 2018-19.

As per section 10(7), all allowances or perquisites paid or allowed as such outside India by the Government to a citizen of India for rendering services outside India is exempt from tax. Therefore, the allowances and perquisites received by J are exempt as per section 10(7).

Question 4

Explain in the context of provisions of the Act, whether the income derived during the year ended on 31.03.2018 in the following case shall be subject to tax in the A.Y. 2018-19:

Mr. Ravi, an IAS Officer, was posted to USA by the Government of India on 11.07.17 for a period of three years. He was paid salary of ₹ 3 lakhs for the period 01.04.17 to 10.07.17 and of ₹ 12 lakhs for the period upto 31.03.18. He left India for USA in the night of 10.07.17 and did not come even for a day up till 31.03.2018.

Answer

The salary drawn by an IAS Officer by virtue of his posting in USA, despite the fact that he was a non-resident in the previous year, shall be subject to tax in India as per section 9(1)(iii) which states that income chargeable under the head "Salaries" payable by the Government to a citizen of India for his services outside India shall be deemed to accrue or arise in India. Therefore, the total amount of salary of ₹ 15 lakhs received by the IAS Officer in and outside India shall be subject to tax in India in the A.Y 2018-19.

Question 5

JJ Limited, a company incorporated in Australia has entered into an agreement with KK Limited, an Indian company for rendering technical services to the latter for setting up a fertilizer plant in Orissa. As per the agreement, JJ Limited rendered both off-shore services and on-shore services to KK Limited at fee of ₹ 1 crore and ₹ 1.5 crore, respectively. JJ Limited is of the view that it is not liable to tax in India in respect of fee of ₹ 1 crore as it is for rendering services outside India. Discuss the correctness of the view of JJ Limited.

Answer

The Explanation below section 9(2) clarifies that income by way of, inter alia, fees for technical services from services utilized in India would be deemed to accrue or arise in India under section 9(1)(vii) in case of a non-resident and be included in his total income, whether or not such services were rendered in India.

In this case, the technical services rendered by the foreign company, JJ Ltd., were for setting up a fertilizer plant in Orissa. Therefore, the services were utilized in India. Consequently, as per section 9(2), the fee of ₹ 2.5 Crore for technical services rendered by JJ Ltd. (both off-shore and
on-shore services) to KK Ltd. is deemed to accrue or arise in India and includible in the total income of JJ Ltd.

Therefore, the view of JJ Ltd. that it is not liable to tax in India in respect of fee of ₹1 Crore (as it is for rendering services outside India) is not correct.

**Question 6**

Examine with reasons whether the following transactions attract income-tax in India, in the hands of recipients under section 9 of Income-tax Act, 1961:

(i) A non-resident German company, which did not have a permanent establishment in India, entered into an agreement for execution of electrical work in India. Separate payments were made towards drawings & designs, which were described as “Engineering Fee”. The assessee contended that such business profits should be taxable in Germany as there is no business connection within the meaning of section 9(1)(i) of the Income-tax Act, 1961.

(ii) A firm of solicitors in Mumbai engaged a barrister in UK for arguing a case before Supreme Court of India. A payment of 5000 pounds was made as per terms of professional engagement.

(iii) Amount paid by Government of India for use of a patent developed by Mr. A, who is a non-resident.

(iv) Sai Engineering, a non-resident foreign company entered into a collaboration agreement on 25/6/2016, with an Indian Company and was in receipt of interest on 8% debentures for ₹ 20 lakhs, issued by Indian Company, in consideration of providing technical know-how during previous year 2017-18.

**Answer**

(i) Fees for technical services is taxable under section 9(1)(vii). In this case, the separate payments made towards drawings and designs (described as “engineering fee”) are in the nature of fee for technical services and, therefore, it is taxable in India by virtue of section 9(1)(vii) [Aeg Aktiengesellschaft v. CIT (2004) 267 ITR 209 (Kar.)].

As per *Explanation* to section 9, where income is deemed to accrue or arise in India under section 9(1)(vii), such income shall be included in the total income of the non-resident German company, regardless of whether it has a residence or place of business or business connection in India.

(ii) As per section 9(1)(i), all income accruing or arising, whether directly or indirectly, through or from any business connection in India is deemed to accrue or arise in India.

In this case, there was a professional connection between the firm of solicitors in Mumbai and the barrister in UK. The expression “business” includes not only trade and manufacture; it includes, within its scope, “profession” as well. Therefore, the existence of
professional connection amounts to existence of “business connection” under section 9(1)(i). It was so held by the Supreme Court in Barendra Prasad Roy v. ITO (1981) 129 ITR 295.

Hence, the amount of 5,000 pounds paid to the barrister in UK as per the terms of the professional engagement constitutes income which is deemed to accrue or arise in India under section 9(1)(i). Hence, it is taxable in India.

(iii) As per section 9(1)(vi), income by way of royalty payable by the Government of India is deemed to accrue or arise in India. “Royalty” means consideration for, inter alia, use of patent. Therefore, the amount paid by Government of India for use of patent developed by Mr. A, a non-resident, is deemed to accrue or arise in India. Hence, it is taxable in India.

(iv) ₹ 20 lakhs, being the value of debentures issued by an Indian company in consideration of providing technical know-how, is in the nature of fee for technical services, deemed to accrue or arise in India to Sai Engineering, a non-resident foreign company, under section 9(1)(vii). Hence, it is taxable in India.

Further, as per section 9(1)(v), income by way of interest payable by a person who is a resident of India is deemed to accrue or arise in India. Therefore, interest income from debentures of an Indian company is deemed to accrue or arise in India in the hands of Sai Engineering by virtue of section 9(1)(v). Hence, it is taxable in India.

Note – Since the question specifically requires the candidates to examine the taxability of the above transactions under section 9, the provisions of double taxation avoidance agreement, if any, applicable in the above cases, have not been taken into consideration.

Question 7

Z, an American tourist, comes to India for the first time on June 17, 2017. He leaves India on September 29, 2017. Determine his residential status for the assessment year 2018-19. Does it make any difference if he comes to India on a business trip or if he is an Indian citizen?

Answer

Previous year 2017-18: 105 [14+31+31+29]
Previous year 2016-17: Nil
Previous year 2015-16: Nil

and so on ......

He is non-resident for the assessment year 2018-19 as he does not satisfy any of the basic condition. It does not make any difference if he comes on a business trip to India.

Further, it does not make any difference if he is an Indian citizen as far as the answer of non-resident is concerned. But there is a difference in application of basic conditions as an Indian citizen who comes on a visit to India during the previous has the option of only one basic condition of 182 days to become a resident.
Question 8

M/s. Global Airlines incorporated as a company in USA operated its flights to India and vice versa during the year 2017-18 (April, 2017 to March, 2018) and collected charges of ₹ 125 lakhs for carriage of passengers and cargo out of which ₹ 65 lakhs were received in New York in U.S Dollars for the passenger fare booked from New York to Mumbai. The total expenses for the year on operation of such flights were ₹ 195 lakhs. Compute the income chargeable to tax of the foreign airlines.

Answer

In the present case, the income chargeable to tax of M/s Global Airlines is as follows:

<table>
<thead>
<tr>
<th>Particulars</th>
<th>Fare booked from India to outside India whether received in India or not (₹)</th>
<th>Fare booked from New York to Mumbai (₹)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fare</td>
<td>60,00,000 (1,25,00,000 – 65,00,000)</td>
<td>65,00,000</td>
</tr>
<tr>
<td>Deemed income @5% u/s 44BBA</td>
<td>3,00,000 (60,00,000 × 5%)</td>
<td>Nil (since the amount not received in India)</td>
</tr>
</tbody>
</table>