After studying this Chapter, you will be able to –

- **determine** the residential status of foreign companies applying the Place of Effective Management (POEM) Guidelines;
- **examine** the scope of income taxable in the hands of non-residents;
- **examine** when income arising in the hands of non-resident from a transaction is deemed to accrue or arise in India;
- **appreciate** the circumstances when the presence of eligible fund manager in India would not constitute business connection in India for an eligible investment fund;
- **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.
2.1 INTRODUCTION

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

1. Residence based taxation
2. Source based taxation

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

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

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

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.

2.2 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. The provisions of these sections except determination of residential status of foreign companies applying the Place of Effective Management (POEM) Guidelines are discussed in detail in Chapter 2: Residential Status and Scope of Total Income in Module 1 of Part I – Direct Tax Laws.

(1) Residential status of a Company

With effect from assessment year 2017-18, a company would be resident in India in any previous year, if-

(i) it is an Indian company; or
(ii) its place of effective management, in that year, is in India.
“Place of effective management” means a place where key management and commercial decisions that are necessary for the conduct of the business of an entity as a whole are, in substance made [Explanation to section 6(3)].


Place of effective management' (POEM) is an internationally recognised test for determination of residence of a company incorporated in a foreign jurisdiction. Most of the tax treaties entered into by India recognises the concept of 'place of effective management' for determination of residence of a company as a tie-breaker rule for avoidance of double taxation.

The CBDT has laid down the following guiding principles to be followed for determination of POEM.

Concept of Substance over form

Any determination of the POEM will depend upon the facts and circumstances of a given case. The POEM concept is one of substance over form. It may be noted that an entity may have more than one place of management, but it can have only one place of effective management at any point of time. Since “residence” is to be determined for each year, POEM will also be required to be determined on year to year basis.

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

The process of determination of POEM would be primarily based on the fact as to whether or not the company is engaged in active business outside India.

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

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

Meaning of certain terms:

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

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

### Number of employees

The average of the number of employees as at the beginning and at the end of the year and shall include persons, who though not employed directly by the company, perform tasks similar to those performed by the employees.

### Pay roll

This term includes the cost of salaries, wages, bonus and all other employee compensation including related pension and social costs borne by the employer.

### Passive income

It is the aggregate of:

(i) income from the transactions where both the purchase and sale of goods is from/to its associated enterprises; and

(ii) income by way of royalty, dividend, capital gains, interest or rental income;

However, any income by way of interest shall not be considered to be passive income in case of a company which is engaged in the business of banking or is a public financial institution, and its activities are regulated as such under the applicable laws of the country of incorporation.

### Place of Effective Management:

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

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

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

For this purpose, merely because the Board of Directors (BOD) follows general and objective principles of global policy of the group laid down by the parent entity which may be in the field of Pay roll functions, Accounting, Human resource (HR) functions, IT infrastructure and network platforms, Supply chain functions, Routine banking operational procedures, and not being specific to any entity or group of entities per se; would not constitute a case of BoD of companies standing aside.
CBDT Circular No. 25/2017, dated 23.10.2017 clarifies that so long as the Regional Headquarter operates for subsidiaries/group companies in a region within the general and objective principles of global policy of the group laid down by the parent entity in the field of Pay roll functions, Accounting, HR functions, IT infrastructure and network platforms, Supply chain functions, Routine banking operational procedures, and not being specific to any entity or group of entities per se; it would, in itself, not constitute a case of BoD of companies standing aside and such activities of Regional Headquarter in India alone will not be a basis for establishment of PoEM for such subsidiaries/group companies.

It is further mentioned in the said Circular that the provisions of General Anti-Avoidance Rule contained in Chapter X-A of the Income-tax Act, 1961 may get triggered in such cases where the above clarification is found to be used for abusive/aggressive tax planning.

For the purpose of determining whether the company is engaged in active business outside India, the average of the data of the previous year and two years prior to that shall be taken into account. In case the company has been in existence for a shorter period, then data of such period shall be considered. Where the accounting year for tax purposes, in accordance with laws of country of incorporation of the company, is different from the previous year, then, data of the accounting year that ends during the relevant previous year and two accounting years preceding it shall be considered.

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

(ii) In case Companies not engaged in active business outside India
The guidelines provide a two stage process for determination of POEM in case of companies not engaged in active business.

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

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

The place where these management decisions are taken would be more important than the place where such decisions are implemented. For the purpose of determination of POEM, it is the substance which would be conclusive rather than the form.
The conditions specified in the circular are depicted in the flow charts below:

**The 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

**What is ABOI test?**

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 are situated in India or are residents in India
- Payroll expenses incurred on such employees are less than 50% of its total payroll expenditure

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* 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.

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

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

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

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

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

As an example this may be the case where the board meetings are held in a location distinct from the place where head office of the company is located or such location is unconnected with the place where the predominant activity of the company is being carried out.

If a Board has *de facto* delegated the authority to make the key management and commercial decisions for the company to the senior management or any other person including a shareholder, promoter, strategic or legal or financial advisor etc. and does nothing more than routinely ratifying the decisions that have been made, the company’s place of effective management will ordinarily be the place where these senior managers or the other person make those decisions.

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

(i) Managing Director or Chief Executive Officer;

(ii) Financial Director or Chief Financial Officer;

(iii) Chief Operating Officer; and

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

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

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

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

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

(i) are primarily or predominantly based; or

(ii) normally return to following travel to other locations; or

(iii) meet when formulating or deciding key strategies and policies for the company as a whole.

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

In situations where the senior management is so decentralised that it is not possible to determine the company’s head office with a reasonable degree of certainty, the location of a company’s head office would not be of much relevance in determining that company’s place of effective management.
“Head Office” of a company would be the place where the company's senior management and their direct support staff are located or, if they are located at more than one location, the place where they are primarily or predominantly located. A company’s head office is not necessarily the same as the place where the majority of its employees work or where its board typically meets.

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

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

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

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

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

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

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

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

(i) The fact that a foreign company is completely owned by an Indian company will not be conclusive evidence that the conditions for establishing POEM in India have been satisfied.

(ii) The fact that there exists a Permanent Establishment of a foreign entity in India would itself not be conclusive evidence that the conditions for establishing POEM in India have been satisfied.

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

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

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

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

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

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

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

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

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

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

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

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

(i) 30% income from the transaction where both purchase and sale is from/to associated enterprises; and
(ii) 10% income from interest.

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

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

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

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

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

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

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

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

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

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

**ILLUSTRATION 1**

ABC Inc., a Swedish company headquartered at Stockholm, not having a permanent establishment in India, has set up a liaison office in Mumbai in April, 2019 in compliance with RBI guidelines to look after its day to day business operations in India, spread awareness about the company’s products and explore further opportunities. The liaison office takes decisions relating to day to day routine operations and performs support functions that are preparatory and auxiliary in nature. The significant management and commercial decisions are, however, in substance made by the Board of Directors at Sweden. Determine the residential status of ABC Inc. for A.Y. 2020-21.

**SOLUTION**

Section 6(3) provide that a company would be resident in India in any previous year, if-

(i) it is an Indian company; or

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

In this case, ABC Inc. is a foreign company. Therefore, it would be resident in India for P.Y.2019-20 only if its place of effective management, in that year, is in India.

**Explanation** to section 6(3) defines “place of effective management” to mean 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. In the case of ABC Inc., its place of effective management for P.Y.2019-20 is not in India, since the significant management and commercial decisions are, in substance, made by the Board of Directors outside India in Sweden.

ABC Inc. has only a liaison office in India through which it looks after its routine day to day business operations in India. The place where decisions relating to day to day routine operations are taken and support functions that are preparatory or auxiliary in nature are performed are not relevant in determining the place of effective management.

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Hence, ABC Inc., being a foreign company is a non-resident for A.Y.2020-21, since its place of effective management is outside India in the P.Y.2019-20.

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

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

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

(b) In a case where the determination regarding foreign company to be resident in India has been made in the assessment proceedings relevant to any previous year, then, these transition provisions would also cover any subsequent previous year, if the foreign company is resident in India in that previous year and the previous year ends on or before the date on which such assessment proceeding is completed. In effect, the transition provisions would also cover any subsequent amendment upto the date of determination of POEM in an assessment proceeding. However, once the transition is complete, then, normal provisions of the Act would apply.

(c) In the notification issued by the Central Government, certain conditions including procedural conditions subject to which these adaptations shall apply can be provided for and in case of failure to comply with the conditions, the benefit of such notification would not be available to the foreign company.

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

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

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

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

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

(e) Accordingly, in exercise of the power under section 115JH(1) of the Income-tax Act, 1961, the Central Government has, vide notification No. 29/2018, dated 22nd June, 2018, specified the exceptions, modifications and adaptions subject to which, the provisions of the Act relating to computation of income, treatment of unabsorbed depreciation, set-off or carry forward and set off of losses, special provision relating to avoidance of tax and the collection and recovery of taxes shall apply in a case where a foreign company is said to be resident in India in any previous year on account of its POEM being in India and the such foreign company has not been resident in India before the said previous year.

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<td><strong>If the foreign company is assessed to tax in the foreign jurisdiction</strong></td>
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<td></td>
<td>Where depreciation is required to be taken into account for the purpose of</td>
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<td>computation of its taxable income, the WDV of the depreciable asset as per</td>
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<td>the tax record in the foreign country on the 1st day of the previous year</td>
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<td>shall be adopted as the opening WDV for the said previous year.</td>
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<td><strong>Where WDV is not available as per tax records</strong>, the WDV shall be calculated</td>
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<td>assuming that the asset was installed, utilised and the depreciation was</td>
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<td>actually allowed as per the provisions of the laws of that foreign jurisdiction. The WDV so arrived at as on the 1st day of the previous year shall be adopted to be the opening WDV for the said previous year.</td>
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<td><strong>If the foreign company is not assessed to tax in the foreign jurisdiction</strong></td>
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<td>WDV of the depreciable asset as appearing in the books of account as on the 1st</td>
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<td>day of the previous year maintained in accordance with the laws of that foreign</td>
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<td></td>
<td>jurisdiction shall be adopted as the opening WDV for the said previous year.</td>
</tr>
<tr>
<td>Brought forward loss and unabsorbed</td>
<td><strong>If the foreign company is assessed to tax in the foreign jurisdiction</strong></td>
</tr>
<tr>
<td>depreciation</td>
<td>Brought forward loss and unabsorbed depreciation as per the tax record shall</td>
</tr>
<tr>
<td></td>
<td>be determined year wise on the 1st day of the said previous year.</td>
</tr>
<tr>
<td></td>
<td><strong>If the foreign company is not assessed to tax in the foreign jurisdiction</strong></td>
</tr>
</tbody>
</table>
|                                   | Brought forward loss and unabsorbed depreciation as per the books
of account prepared in accordance with the laws of that country shall be determined year wise on the 1st day of the said previous year.

**Other provisions**

Such brought forward loss and unabsorbed depreciation shall be deemed as loss and unabsorbed depreciation brought forward as on the 1st day of the said previous year and shall be allowed to be set off and carried forward in accordance with the provisions of the Act for the remaining period calculated from the year in which they occurred for the first time taking that year as the first year. However, the losses and unabsorbed depreciation of the foreign company shall be allowed to be set off only against such income of the foreign company which has become chargeable to tax in India on account of it becoming resident in India due to application of POEM.

In cases where the brought forward loss and unabsorbed depreciation originally adopted in India are revised or modified in the foreign jurisdiction due to any action of the tax or legal authority, the amount of the loss and unabsorbed depreciation shall be revised or modified for the purposes of set off and carry forward in India.

| Period of profit and loss account and balance sheet in cases where accounting year of foreign company does not end on 31st March | The foreign company is required to prepare profit and loss account and balance sheet for the period starting from the date on which the accounting year immediately following said accounting year begins, upto 31st March of the year immediately preceding the period beginning with 1st April and ending on 31st March during which the foreign company has become resident.

The foreign company is also required to prepare profit and loss account and balance sheet for succeeding periods of twelve months, beginning from 1st April and ending on 31st March, till the year the foreign company remains resident in India on account of its POEM.

Example 1: If the accounting year of the foreign company is a calendar year and the company becomes resident in India during P.Y. 2019-20 for the first time due to its POEM being in India, then, the company is required to prepare profit and loss account and balance sheet for the period 1st January, 2019 to 31st March, 2019. It is also required to prepare profit and loss account and balance sheet for the period 1st April, 2019 to 31st March, 2020.

For the purpose of carry forward of loss and unabsorbed depreciation in this case, since the period 1st January, 2019 to 31st March, 2019 is less than 6 months, it is to be included in the accounting year immediately preceding the accounting year in which the foreign company is held to be resident in India for the first time. Accordingly, the profit and loss and balance sheet of the 15 month period from 1 January, 2018 to 31st March, 2019 is to be prepared. |
Example 2: If the accounting year of the foreign company is from 1st July to 30th June and the company becomes resident in India during P.Y. 2019-20 for the first time due to its POEM being in India, then, the company is required to prepare profit and loss account and balance sheet for the period 1st July, 2018 to 31st March, 2019. It is also required to prepare profit and loss account and balance sheet for the period 1st April, 2019 to 31st March, 2020.

For the purpose of carry forward of loss and unabsorbed depreciation in this case, since the period is more than 6 months, it is to be treated as a separate accounting year.

The loss and unabsorbed depreciation as per tax record or books of account, as the case may be, of the foreign company shall, be allocated on proportionate basis.

| Applicability of provisions of Chapter XVII-B (TDS provisions) | Where more than one provision of Chapter XVII-B of the Act applies to the foreign company as resident as well as foreign company, the provision applicable to the foreign company alone shall apply.
Compliance to those provisions of Chapter XVII-B of the Act as are applicable to the foreign company prior to its becoming Indian resident shall be considered sufficient compliance to the provisions of said Chapter.
The provisions of section 195(2) relating to application to Assessing Officer to determine the appropriate proportion of sum chargeable to tax shall apply in such manner so as to include payment to the foreign company. |
| Availability of deduction under section 90 or 91 (Foreign tax credit) | The foreign company shall be entitled to relief or deduction of taxes paid in accordance with the provisions of section 90 or section 91 of the Act.
Where income on which foreign tax has been paid or deducted, is offered to tax in more than one year, credit of foreign tax shall be allowed across those years in the same proportion in which the income is offered to tax or assessed to tax in India in respect of the income to which it relates and shall be in accordance with the provisions of rule 128 of the Income-tax Rules, 1962 [Given as Annexure 1 at the end of this material]. |
<p>| Non applicability of the notification | The above exceptions, modifications and adaptations shall not apply in respect of such income of the foreign company which otherwise would have been chargeable to tax in India, even if the foreign company had not become Indian resident. |
| Applicability of the notification where foreign company becomes resident in the subsequent year | In a case where the foreign company is said to be resident in India during a previous year, immediately succeeding a previous year during which it is said to be resident in India; the exceptions, modifications and adaptations shall apply to the said previous year subject to the condition that the WDV, the brought forward loss and the unabsorbed depreciation to be adopted on the 1st day of the previous year shall be those which |</p>
<table>
<thead>
<tr>
<th>previous year also</th>
<th>have been arrived at on the last day of the preceding previous year in accordance with the provisions of this notification.</th>
</tr>
</thead>
<tbody>
<tr>
<td>No effect on other transactions</td>
<td>Any transaction of the foreign company with any other person or entity under the Act shall not be altered only on the ground that the foreign company has become Indian resident.</td>
</tr>
<tr>
<td>Applicability of other provisions relating to foreign company</td>
<td>Subject to the above exceptions, modifications and adoptions specifically provided vide this notification, the foreign company shall continue to be treated as a foreign company even if it is said to be resident in India and all the provisions of the Act shall apply accordingly. Consequently, the provisions specifically applicable to,— (i) a foreign company, shall continue to apply to it; (ii) non-resident persons, shall not apply to it; and (iii) the provisions specifically applicable to resident, shall apply to it.</td>
</tr>
<tr>
<td>Applicability of tax rate on foreign company</td>
<td>In case of conflict between the provision applicable to the foreign company as resident and the provision applicable to it as foreign company, the later shall generally prevail. Therefore, the rate of tax in case of foreign company i.e., 40% shall remain the same, i.e., rate of income-tax applicable to the foreign company even though residency status of the foreign company changes from non-resident to resident on the basis of POEM.</td>
</tr>
<tr>
<td>Applicability of notification</td>
<td>This notification shall be deemed to have come into force from 1st April, 2017.</td>
</tr>
<tr>
<td>Meaning of foreign jurisdiction</td>
<td>The place of incorporation of the foreign company.</td>
</tr>
<tr>
<td>Applicability of rule 115 of the Income-tax Rules, 1962.</td>
<td>The rate of exchange for conversion into rupees of value expressed in foreign currency, wherever applicable, shall be in accordance with provision of rule 115 of the Income-tax Rules, 1962. [Given as Annexure 2 at the end of this material]</td>
</tr>
</tbody>
</table>

**Determination of Residential Status: A summary**

<table>
<thead>
<tr>
<th>Abbreviations used in the Flow Charts in pages 2.19 &amp; 2.20</th>
</tr>
</thead>
<tbody>
<tr>
<td>IC = Indian Citizen</td>
</tr>
<tr>
<td>R = Resident</td>
</tr>
<tr>
<td>iPPYs = Immediately Preceding Previous Years</td>
</tr>
<tr>
<td>N &amp; OR = Resident but Not Ordinarily Resident</td>
</tr>
<tr>
<td>ROR = Resident and Ordinarily Resident</td>
</tr>
</tbody>
</table>
### Determination of Residential Status of Individual

- **Individual**
  - **Has he stayed in India < 60 days?**
    - Yes: **NR**
    - No: **Resident**

- **Resident**
  - **Has he stayed ≥ 182 days in the RPY?**
    - Yes: **NR**
    - No: **R & NOR**
      - **Is he a NR in any 9 IPPYs out of 10 IPPYs?**
        - Yes: **R & NOR**
        - No: **ROR**

- **ROR**
  - **Has he stayed in India for ≤ 729 days during the 7 IPPYs?**
    - Yes: **NR**
    - No: **ROR**

- **NR**
  - **If he left India for employment OR as Crew Member of Indian Ship**
    - Yes: **NR**
    - No: **NR**
      - **Is he an Indian Citizen or a Person of Indian Origin visiting India during the RPY?**
        - Yes: **NR**
        - No: **ROR**

- **ROR**
  - **Has he stayed in India for ≥ 60 Days during the RPY & ≥ 365 days during the 4 IPPYs?**
    - Yes: **NR**
    - No: **NR**
Determination of Residential Status of HUF/ Firm/ AOP/ Company

**HUF / FIRM / AOP**

- **Control & Management**
  - Is it wholly or partly in India?
    - No → **NR**
    - Yes → **R**

- **Resident HUF**
  - Is the Karta NR in any 9 PPY out of 10 PPY?
    - Yes → **RNOR**
    - No → **HUF ROR**

- Is the Karta’s stay in India ≤ 729 days during the 7 PPYs?
  - Yes
  - No → **HUF ROR**

**Company**

- **Is it an Indian Company?**
  - No → **NR**
  - Yes → **R**

- Is the Place of Effective Management in India?
  - No → **NR**
  - Yes → **R**
Section 5 provides the scope of total income in terms of the residential status of the assessee because the incidence of tax on any person depends upon his residential status.

### Summary of scope of Total Income

<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 outside India and received outside India from a business controlled from India</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Income which accrue or arise outside India and received outside India in the previous year from any other source</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>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</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
</tbody>
</table>
(i) **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.

**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:
  - Any Business Connection in India
  - Any property/asset or source of income in India
  - Transfer of capital asset situated in India

**Income deemed to accrue or arise in India [Clause (v), (vi) (vii) & (viii) of Section 9(1)]**

- Interest, if payable by:
  - Person resident in India
  - Government
  - A non-resident

**Exception**

- If the money borrowed and used or technical services or royalty services are utilised for the purpose of business or profession carried on outside India
- If the money borrowed and used or technical services or royalty services are utilised for making income from any source outside India
- If money is borrowed and used for the purpose of business or profession carried on in India
- If technical services or royalty services are utilised for the purpose of business or profession carried on in India or making income from any source in India

- Income arising outside India, being any sum of money paid without consideration, by a resident Indian to a non-corporate non-resident or foreign company on or after 5.7.2019, where aggregate of such sum > ₹ 50,000
The categories of income which are deemed to accrue or arise in India are:

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

(i) through or from any business connection in India,

(ii) through or from any property in India,

(iii) through or from any asset or source of income in India or

(iv) through the transfer of a capital asset situated in India

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

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

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

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

(a) must have an authority, which is habitually exercised in India, to conclude contracts on behalf of the non-resident or

habitually concludes contracts or plays the principal role leading to conclusion of contracts by that non-resident and such contracts are

- in the name of the non-resident; or

- for the transfer of the ownership of, or for the granting of the right to use, property owned by that non-resident or that non-resident has the right to use; or

- for the provision of services by that non-resident.

**Note** - This amendment in the definition of “business connection” is for the purpose of alignment with the provisions of the Double Taxation Avoidance Agreement (DTAA) as modified by Multilateral Instrument (MLI) so as to make the provisions in the treaty effective.

(b) in a case, where he has no such authority, but habitually maintains in India a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the non-resident, or

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

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

i. such other non-resident controls the non-resident or

ii. such other non-resident is controlled by the non-resident or
iii. such other non-resident is subject to same control as that of non-resident.

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

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

A broker, general commission agent or any other agent shall be deemed to have an independent status where he does not work mainly or wholly for the non-resident.

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

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

**Significant economic presence [Explanation 2A to section 9(1)(i)]**

Significant economic presence of a non-resident in India shall also constitute business connection in India.
Significant economic presence means-

<table>
<thead>
<tr>
<th>Nature of transaction</th>
<th>Condition</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) transaction in respect of any goods, services or property carried out by a non-resident in India including provision of download of data or software in India,</td>
<td>Aggregate of payments arising from such transaction or transactions during the previous year exceeds such amount as may be prescribed</td>
</tr>
<tr>
<td>(b) systematic and continuous soliciting of business activities or engaging in interaction with users in India through digital means</td>
<td>The users should be of such number as may be prescribed</td>
</tr>
</tbody>
</table>

The threshold of “aggregate of payments” in (a) and “users” in India in (b) would be prescribed by Rules. Further, the above transactions or activities shall constitute significant economic presence in India, whether or not,—

(i) the agreement for such transactions or activities is entered in India;

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

(iii) the non-resident renders services in India:

However, where a business connection is established by reason of significant economic presence in India, only so much of income as is attributable to the transactions or activities referred to in (a) or (b) above shall be deemed to accrue or arise in India.

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

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

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

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

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

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

(e) **Activities confined to display of rough diamonds in SNZs [Explanation 1(e) to section 9(1)(i)]:** In case of a foreign company engaged in the business of mining of diamonds, no income shall be deemed to accrue or arise in India to it through or from the activities which are confined to display of uncut and unassorted diamonds in any special zone notified by the Central Government in the Official Gazette in this behalf.

(ii) & (iii) **Income from property, asset or source of income in India**

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

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

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

Capital gains arising through or from the transfer of a capital asset situated in India would be deemed to accrue or arise in India in all cases irrespective of the fact whether

- The capital asset is movable or immovable, tangible or intangible;
- The place of registration of the document of transfer etc., is in India or outside; and
- The place of payment of the consideration for the transfer is within India or outside.

Accordingly, the expression “through” shall mean and include and shall be deemed to have always meant and included “by means of”, “in consequence of” or “by reason of”. [Explanation 4 to section 9(1)(i)]
Further, an asset or a capital asset being any share or interest in a company or entity registered or incorporated outside India shall be deemed to be and shall always be deemed to have been situated in India, if the share or interest derives, directly or indirectly, its value substantially from the assets located in India. **[Explanation 5 to section 9(1)(i)]**

However, an asset or capital asset, which is held by a non-resident by way of investment, directly or indirectly, in Category-I or Category-II foreign portfolio investor under the Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2014, made under the Securities and Exchange Board of India Act, 1992, shall not deemed to be or deemed to have been situated in India **[Proviso to Explanation 5 to section 9(1)(i)]**

The CBDT has, vide Circular No. 28/2017, dated 07.11.2017, clarified that the provisions of section 9(1)(i) read with Explanation 5, shall not apply in respect of income accruing or arising to a non-resident on account of redemption or buyback of its share or interest held indirectly (i.e. through upstream entities registered or incorporated outside India) in the specified funds (namely, investment funds, venture capital company and venture capital funds) if such income accrues or arises from or in consequence of transfer of shares or securities held in India by the specified funds and such income is chargeable to tax in India.

However, the above benefit shall be applicable only in those cases where the proceeds of redemption or buyback arising to the non-resident do not exceed the pro-rata share of the non-resident in the total consideration realized by the specified funds from the said transfer of shares or securities in India. It is further clarified that a non-resident investing directly in the specified funds shall continue to be taxed as per the extant provisions of the Act.

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**Declaration of dividend by a foreign company** outside India does not have the effect of transfer of any underlying assets located in India. **Circular No. 4/2015, dated 26-03-2015**, therefore, clarifies that the dividends declared and paid by a foreign company outside India in respect of shares which derive their value substantially from assets situated in India would **NOT** be deemed to be income accruing or arising in India by virtue of the provisions of section 9(1)(i).

**Explanation 6 to section 9(1)(i)** provides that the share or interest in a company or entity registered or incorporated outside India, shall be deemed to derive its value substantially from the assets (whether tangible or intangible) located in India, if on the specified date, the value of Indian assets, -

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

**Meaning of certain terms:**

<table>
<thead>
<tr>
<th>Term</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>Value of an asset</td>
<td>The <em>fair market value as on the specified date</em>, of such asset without <em>reduction of liabilities</em>, if any, in respect of the asset, determined in prescribed manner.</td>
</tr>
</tbody>
</table>
### Specified date

The date on which the **accounting period** of the company or, as the case may be, the entity **ends** preceding the date of transfer of a share or an interest. However, the date of transfer shall be the specified date of valuation, in a case where the book value of the assets of the company or entity on the date of transfer exceeds by at least 15%, the book value of the assets as on the last balance sheet date preceding the date of transfer.

### Accounting period

Each period of 12 months ending with 31st March. However, where a company or an entity, referred to in *Explanation 5*, regularly adopts a period of 12 months ending on a day other than 31st March for the purpose of—

(a) complying with the provisions of the tax laws of the territory, of which it is a resident, for tax purposes; or

(b) reporting to persons holding the share or interest, then, the period of twelve months ending with the other day shall be the accounting period of the company or, as the case may be, the entity:

### First Accounting Period

First accounting period of the company or, as the case may be, the entity shall **begin from the date of its registration or incorporation** and **end with the 31st March** or such other day, as the case may be, following the date of such registration or incorporation.

### Later accounting period

Later accounting period shall be the **successive periods of twelve months**

### Accounting period of an entity which ceases to exist

If the company or the entity ceases to exist before the end of accounting period, as aforesaid, then, the accounting period shall end immediately before the company or, as the case may be, the entity, ceases to exist.

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**Note** - The manner of determination of fair market value of the assets of the foreign company is given in Rule 11UB. Determination of income attributable to assets in India is given in Rule 11UC\(^1\).

*Explanation 7 to section 9(1)(i)* provides that **no income shall be deemed** to accrue or arise to a non-resident from transfer, outside India, of any share of, or interest in, a company or an entity, registered or incorporated outside India, in the following cases:

| (1) | Foreign company or entity **directly** owns the assets situated in India | AND | the **transferor** (whether individually or along with its associated enterprises), at any time in the twelve months preceding the date of transfer, **does not hold**
|     |                                                                          |     | • the right of management or control in relation to foreign company or entity; or
|     |                                                                          |     | • the voting power or share capital or interest |

---

\(^1\) For detailed reading of Rule 11UB and 11UC of the Income-tax Rules, 1962, students may visit [https://www.incometaxindia.gov.in/Pages/default.aspx](https://www.incometaxindia.gov.in/Pages/default.aspx)
| (2) | Foreign company or entity **indirectly** owns the assets situated in India | AND | the transferor (whether individually or along with its associated enterprises), at any time in the twelve months preceding the date of transfer, **does not hold**

- the right of management or control in relation to foreign company or entity; or
- any right in, or in relation to, such foreign company or entity which would entitle him to the right of management or control in the company or entity that directly owns the assets situated in India; or
- such percentage of voting power or share capital or interest in foreign company or entity which results in holding of (either individually or along with associated enterprises) a voting power or share capital or interest exceeding 5% of the total voting power or total share capital or total interest, as the case may be, of the company or entity that directly owns the assets situated in India; |

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

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

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

In case the transfer is of shares or interest in a foreign entity which does not hold the Indian assets directly then the exemption shall be available to the transferor if he along with its associated enterprises,-

- neither holds the right of management or control in relation to such company or the entity,
- nor holds any rights in such company which would entitle it to either exercise control or management of the direct holding company or entity or entitle it to voting power or share capital or total interest exceeding 5% in the direct holding company or entity.

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

“Associated enterprise”, in relation to another enterprise, means an enterprise—

- which participates, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise; or
- in respect of which one or more persons who participate, directly or indirectly, or through one or more intermediaries, in its management or control or capital, are the same persons who participate, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise.

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

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

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

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

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

However, allowances and perquisites paid or allowed outside India by the Government to an Indian citizen for services rendered outside India is exempt, by virtue of section 10(7).

ILLUSTRATION 2

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 31.3.2020 for services rendered by him in Tokyo. Besides, he was allowed perquisites by the Government. He is a non-resident for the assessment year 2020-21. Examine the taxability of salary, allowances and perquisites in the hands of J for the assessment year 2020-21.

SOLUTION

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. 2020-21.

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

All dividends paid by an Indian company would be deemed to accrue or arise in India. Under section 10(34), income from dividends referred to in section 115-O i.e., dividend distributed by a domestic company on which DDT is leviable in the hands of the company, is exempt from tax in the hands of the shareholder. However, it will not be exempt if such dividend is chargeable to tax under section 115BBDA. Section 115BBDA, which brings to tax dividend in excess of ₹ 10 lakh in the hands of the shareholder @10%, does not apply to the non-residents.

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

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

(i) the Government;

(ii) a person resident in India;

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

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

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

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

**Meaning of interest:** Interest means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilized.

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

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

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

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

**Permanent establishment** includes a fixed place of business through which the business of the enterprise is wholly or partly carried on.

**Royalty [Section 9(1)(vi)]**

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

(i) the Government;

(ii) a person who is a resident in India

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

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

**Important points:**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Note** - The Central Government has, vide Notification No. 21/2012 dated 13.6.2012 to be effective from 1st July, 2012, exempted certain software payments from the applicability of tax deduction under section 194J. Accordingly, where payment is made by the transferee for acquisition of software from a resident-transferor, the provisions of section 194J would not be attracted if –
(1) the software is acquired in a subsequent transfer without any modification by the transferor;
(2) tax has been deducted either under section 194J or under section 195 on payment for any previous transfer of such software; and
(3) the transferee obtains a declaration from the transferor that tax has been so deducted along with the PAN of the transferor.

5. Consideration in respect of any right, property or information – Is it royalty?

Explanation 5 provides that Royalty includes and has always included consideration in respect of any right, property or information, whether or not,
(a) the possession or control of such right, property or information is with the payer;
(b) such right, property or information is used directly by the payer;
(c) the location of such right, property or information is in India [Explanation 5]

6. Meaning of Process

Explanation 6 provides that the term “process” includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret [Explanation 6]

ILLUSTRATION 3

Mr. Soham, an Indian Citizen, left India on 20-04-2017 for the first time to setup a software firm in Singapore. On 10-04-2019, he entered into an agreement with LK Limited, an Indian Company, for the transfer of technical documents and designs to setup an automobile factory in Faridabad. He reached India along with his team to render the requisite services on 15-05-2019 and was able to complete his assignment on 20-08-2019. He left for Singapore on 21-08-2019. He charged `50 lakhs for his services from LK Limited.

Determine the residential status of Mr. Soham for the Assessment Year 2020-21 and examine whether the fees charged from LK Limited would be chargeable to tax as per the Income-tax Act, 1961.

SOLUTION

Determination of residential status of Mr. Soham

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

(i) He has been in India during the previous year for a total period of 182 days or more, or
(ii) He has been in India during the 4 years immediately preceding the previous year for a total period of 365 days or more and has been in India for at least 60 days in the previous year.

In the case of an Indian citizen leaving India for the purposes of employment outside India during the previous year or an Indian citizen, who being outside India, comes on a visit to India in any previous year, the period of stay during the previous year in condition (ii) above, to qualify as a resident, would be 182 days instead of 60 days.

In this case, Mr. Soham is an Indian citizen who left India to set up a software firm in Singapore on 20.04.2017. Therefore, he is an Indian citizen living in Singapore, who comes on a visit to India during the P.Y.2019-20. His stay in India during the period of his visit is only 99 days (i.e., 17+30+31+21 days). Since his stay in India during the previous year 2019-20 is only 99 days, he does not satisfy the minimum criterion of 182 days stay in India for being a resident. Hence, his residential status for A.Y.2020-21 is Non-Resident.

**Taxability of income**

As per section 5(2), in case of a non-resident, only income which accrues or arises or which is deemed to accrue or arise to him in India or which is received or deemed to be received in India in the relevant previous year is taxable in India.

In this case, Mr. Soham, a non-resident, charges fees from LK Ltd., an Indian company, for transfer of technical documents and designs to set up an automobile factory in Faridabad. He renders the requisite services in India for which he stays in India for 99 days during the P.Y.2019-20.

Section 9(1)(vi) defines “royalty” to mean consideration for transfer of all or any rights in respect of, *inter alia*, a design and also for the rendering of services in connection with such activity. Transfer of rights in the above definition includes transfer of right for use or right to use a computer software also. Therefore, the fees received by Mr. Soham for transfer of technical documents and designs and rendering of requisite services in relation thereto would fall within the meaning of “royalty”.

As per section 9(1)(vi), income by way of royalty payable by a person who is a resident (in this case, LK Limited, an Indian company) would be deemed to accrue or arise in India in the hands of the non-resident (Mr. Soham, in this case), except where such royalty is payable in respect of any right or property or information used or for services utilized for the purpose of a business carried on by such person outside India or for the purposes of making or earning income from any source outside India.

In this case, since the royalty is payable by LK Limited, an Indian company, to Mr. Soham, a non-resident, in respect of services utilized for a business in India (namely, for setting up an automobile factory in Faridabad), the same is deemed to accrue or arise in India and is hence, taxable in India in the hands of Mr. Soham, a non-resident for the A.Y. 2020-21.
(7) Fees for technical services [Section 9(1)(vii)]

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

(i) the Government.

(ii) a person who is resident in India

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

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

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

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

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

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

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

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

ILLUSTRATION 4

Miss Vivitha paid a sum of 5000 USD to Mr. Kulasekhara, a management consultant practising in Colombo, specializing in project financing. The payment was made in Colombo. Mr. Kulasekhara is a non-resident. The consultancy is related to a project in India with possible Ceylonese collaboration. Is this payment chargeable to tax in India in the hands of Mr. Kulasekhara?

SOLUTION

A non-resident is chargeable to tax in respect of income received outside India only if such income accrues or arises or is deemed to accrue or arise to him in India.
The income deemed to accrue or arise in India under section 9 comprises, *inter alia*, income by way of fees for technical services, which includes any consideration for rendering of any managerial, technical or consultancy services. Therefore, payment to a management consultant relating to project financing is covered within the scope of “fees for technical services”.

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 in case of a non-resident and be included in his total income, whether or not such services were rendered in India or whether or not the non-resident has a residence or place of business or business connection in India.

In the instant case, since the services were utilized in India, the payment received by Mr. Kulasekhara, a non-resident, in Colombo is chargeable to tax in his hands in India, as it is deemed to accrue or arise in India.

**(8) Any sum of money paid by a resident Indian to a non-corporate non-resident or foreign company [Section 9(1)(viii)]**

Income arising outside India, being any sum of money paid without consideration, by a Indian resident person to a non-corporate non-resident or foreign company on or after 5.7.2019 would be deemed to accrue or arise in India if the same is chargeable to tax under section 56(2)(x) i.e., if the aggregate of such sum received by a non-corporate non-resident or foreign company exceeds ₹ 50,000.

### ILLUSTRATION 5

Compute the total income in the hands of an individual, aged 55 years, being a resident and ordinarily resident, resident but not ordinarily resident, and non-resident for the A.Y. 2020-21:

<table>
<thead>
<tr>
<th>Particulars</th>
<th>Amount (₹)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Interest on UK Development Bonds, 50% of interest received in India</td>
<td>10,000</td>
</tr>
<tr>
<td>Income from a business in Chennai (50% is received in India)</td>
<td>20,000</td>
</tr>
<tr>
<td>Short term capital gains on sale of shares of an Indian company received in London</td>
<td>20,000</td>
</tr>
<tr>
<td>Dividend from British company received in London</td>
<td>5,000</td>
</tr>
<tr>
<td>Long term capital gains on sale of plant at Germany, 50% of profits are received in India</td>
<td>40,000</td>
</tr>
<tr>
<td>Income earned from business in Germany which is controlled from Delhi (₹ 40,000 is received in India)</td>
<td>70,000</td>
</tr>
<tr>
<td>Profits from a business in Delhi but managed entirely from London</td>
<td>15,000</td>
</tr>
<tr>
<td>Income from house property in London deposited in an Indian Bank at London, brought to India (Computed)</td>
<td>50,000</td>
</tr>
<tr>
<td>Interest on debentures in an Indian company received in London</td>
<td>12,000</td>
</tr>
</tbody>
</table>
### SOLUTION

#### Computation of total income for the A.Y. 2020-21

<table>
<thead>
<tr>
<th>Particulars</th>
<th>Resident and ordinarily resident ₹</th>
<th>Resident but not ordinarily resident ₹</th>
<th>Non-resident ₹</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fees for technical services rendered in India but received in London</td>
<td>8,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Profits from a business in Bombay managed from London</td>
<td>26,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pension for services rendered in India but received in Burma</td>
<td>4,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Income from property situated in Pakistan, received there</td>
<td>16,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Past foreign untaxed income brought to India during the previous year</td>
<td>5,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Income from agricultural land in Nepal received there and then brought to India</td>
<td>18,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Income from profession in Kenya which was set up in India, received there but spent in India</td>
<td>5,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Gift received on the occasion of his wedding</td>
<td>20,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Interest on savings bank deposit in State Bank of India</td>
<td>12,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Income from a business in Russia, controlled from Russia</td>
<td>20,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Dividend from Reliance Petroleum Limited, an Indian Company</td>
<td>5,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Agricultural income from a land in Rajasthan</td>
<td>15,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Income Source</td>
<td>Gross Total Income</td>
<td>Less Deduction</td>
<td>Total Income</td>
</tr>
<tr>
<td>-----------------------------------------------------------</td>
<td>--------------------</td>
<td>----------------</td>
<td>----------------</td>
</tr>
<tr>
<td>Interest on debentures in an Indian company received in London</td>
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<td>-</td>
<td>-</td>
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<td>-</td>
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</tr>
<tr>
<td>Income from agricultural land in Nepal received there and then brought to India</td>
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<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Income from profession in Kenya which was set up in India, received there but spent in India</td>
<td>5,000</td>
<td>5,000</td>
<td>-</td>
</tr>
<tr>
<td>Gift received on the occasion of his wedding <strong>[not taxable]</strong></td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Interest on savings bank deposit in State Bank of India</td>
<td>12,000</td>
<td>12,000</td>
<td>12,000</td>
</tr>
<tr>
<td>Income from a business in Russia, controlled from Russia</td>
<td>20,000</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Dividend from Reliance Petroleum Limited, an Indian Company <strong>[Exempt under section 10(34)]</strong></td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Agricultural income from a land in Rajasthan <strong>[Exempt under section 10(1)]</strong></td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td><strong>Gross Total Income</strong></td>
<td><strong>3,51,000</strong></td>
<td><strong>2,17,000</strong></td>
<td><strong>1,82,000</strong></td>
</tr>
<tr>
<td>Less: Deduction under section 80TTA</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>[Interest on savings bank account subject to a maximum of ₹10,000]</td>
<td>10,000</td>
<td>10,000</td>
<td>10,000</td>
</tr>
<tr>
<td><strong>Total Income</strong></td>
<td><strong>3,41,000</strong></td>
<td><strong>2,07,000</strong></td>
<td><strong>1,72,000</strong></td>
</tr>
</tbody>
</table>

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

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

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

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

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

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

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

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

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

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

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

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

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

(j) the monthly average of the corpus of the fund shall not be less than ₹ 100 crore. If the fund has been established or incorporated in the previous year, the corpus of fund should not be less than ₹ 100 crore rupees **at the end of a period of six months from the last day of the month of its establishment or incorporation, or the end of such previous year, whichever is later;**
However, this condition shall not be applicable to a fund which has been wound up in the previous year.

(k) the fund shall not carry on or control and manage, directly or indirectly, any business in India;

(l) the fund should neither be engaged in any activity which constitutes a business connection in India nor should have any person acting on its behalf whose activities constitute a business connection in India other than the activities undertaken by the eligible fund manager on its behalf.

(m) the remuneration paid by the fund to an eligible fund manager in respect of fund management activity undertaken on its behalf should not be less than the amount calculated in the prescribed manner.

(iv) **Certain conditions not to apply to investment fund set up by the Government or the Central Bank of a foreign State or a Sovereign Fund or other notified fund [Proviso to Section 9A(3)]:** The following conditions would, however, not be applicable in case of an investment fund set up by the Government or the Central Bank of a foreign State or a sovereign fund or such other fund notified by the Central Government (i.e., an investment fund set up by a Category-I or Category-II Foreign Portfolio Investor registered under the Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2014, made under the Securities and Exchange Board of India Act, 1992:

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

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

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

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

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

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

The CBDT has, vide Circular No.8/2019 dated 10.5.2019, clarified that a fund manager includes an Asset Management Company (AMC) approved by SEBI under the SEBI (Mutual Funds) Regulations, 1996. This is because AMCs are engaged in
the activity of fund management of Mutual Funds and hence are, in substance, Fund Managers.

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

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

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

(a) the fulfillment of the above conditions; and

(b) such other relevant information or document which may be prescribed.

If any eligible investment fund fails to furnish such statement or information or document within 90 days from the end of the financial year, the income-tax authority prescribed under the said sub-section may direct that such fund shall pay, by way of penalty, a sum of ₹ 5,00,000. [Section 271FAB]

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

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

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

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

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

2.3 EXEMPT INCOME OF NON RESIDENTS

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

(1) Interest on moneys standing to the credit of individual in his NRE A/c
[Section 10(4)(ii)]

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

- is a person resident outside India, as defined in FEMA, 1999, or
- is a person who has been permitted by the Reserve Bank of India to maintain such account.

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

**Example:** Mrs. Neena Kansal, is resident of Singapore since year 2000. She holds an NRE account with Bank of Baroda, New Delhi Branch. Interest of ₹10,000 was credited to such account during financial year 2019-20. Such interest income earned by her shall be exempt from income-tax while she files her tax return for A.Y 2020-21.

(2) **Interest income of a non-corporate non-resident or foreign company on specified offshore Rupee Denominated Bonds issued by an Indian company or business trust [Section 10(4C)]**

Interest payable by an Indian company or business trust to a non-corporate non-resident or a foreign company in respect of money borrowed from a source outside India by way of issue of rupee denominated bond during the period from 17.9.2018 to 31.3.2019 would be exempt.

(3) **Income of a specified fund on transfer of certain specified asset on recognized stock exchange, to the extent such income accrues or arises to, or is received in respect of units held by a non-resident [Section 10(4D)]**

Income accrued or arising to or received by specified fund on transfer of a capital asset, being a bond of an Indian Company or a public sector company (sold by the Government and purchased by the specified fund in foreign currency), GDR or rupee denominated bond or derivative or any other notified security, on a recognized stock exchange located in any IFSC would be exempt –

(i) where the consideration is paid or payable in convertible foreign exchange,

(j) to the extent such income accrues or arises to, or is received in respect of units held by a non-resident.

**Meaning of certain terms:**

<table>
<thead>
<tr>
<th>S. No.</th>
<th>Term</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Specified fund</td>
<td>A fund established or incorporated in India in the form of a trust or a company or a LLP or a body corporate, –</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(i) which has been granted a certificate of registration as a Category III Alternative Investment Fund and is regulated under the SEBI</td>
</tr>
</tbody>
</table>

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(Alternative Investment Fund) Regulation, 2012, made under the SEBI Act, 1992
(ii) which is located in any IFSC
(iii) of which all the units are held by non-residents other than units held by a sponsor or manager

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>Trust</td>
</tr>
<tr>
<td></td>
<td>A trust established under the Indian Trust Act, 1882 or under any other law for the time being in force.</td>
</tr>
<tr>
<td>3</td>
<td>Unit</td>
</tr>
<tr>
<td></td>
<td>Unit means beneficial interest of an investor in the fund and shall include shares or partnership interests.</td>
</tr>
<tr>
<td>4</td>
<td>Manager</td>
</tr>
<tr>
<td></td>
<td>Any person or entity who is appointed by the Alternative Investment Fund to manage its investment by whatever name called. Manager may also be same as the sponsor of the Fund.</td>
</tr>
<tr>
<td>5</td>
<td>Sponsor</td>
</tr>
<tr>
<td></td>
<td>Any person or persons who set up the Alternative Investment Fund and includes promoter in case of a company and designated partner in case of LLP.</td>
</tr>
</tbody>
</table>

(4) 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 an individual, who is not a citizen of India, for services as an official by whatever name called of an embassy, high commission, legation, commission, consulate or trade representation of foreign state, or a member of staff of any of these official is exempt.

Conditions

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

(b) The above-mentioned member of the staff of such officials 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 F.Y. 2019-20. 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 A.Y. 2020-21.

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 F.Y. 2019-20. 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 A.Y. 2020-21.

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 F.Y. 2019-20. Being an Individual who is not a citizen of India, such remuneration shall be exempt in his hands for A.Y. 2020-21, subject to fulfilment of the conditions.

(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 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 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, 1961.

Examples:

1. Mr. A, citizen of India but resident of USA since year 2012, was appointed in India in October, 2018 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 F.Y. 2019-20, Mr. A earned a remuneration of ₹ 10 lakhs for his India related assignment and his stay in India in aggregate was 85 days. Further, such US enterprise has not claimed any deduction of such remuneration under the Income-tax Act, 1961.

Being an Individual who is a citizen of India, such remuneration shall not be exempt in his hands for A.Y. 2020-21 under this section i.e., section 10(6)(vi), though he may get exemption under any other provision of the Income-tax Act, 1961, subject to fulfilment of conditions stipulated thereunder.

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 A.Y. 2020-21 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 enterprise in India. ₹ 10
lakhs paid to A is cross charged by the 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 enterprise.

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

(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(s) or partly by the Central Government and partly by one or more State Governments.

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

### Exempt Income of Non-Residents

<table>
<thead>
<tr>
<th>Section</th>
<th>Income</th>
<th>Available to</th>
</tr>
</thead>
<tbody>
<tr>
<td>10(4)(ii)</td>
<td>Interest on money standing to the credit in a Non-resident (External) account of an Individual in any bank in India as per the FEMA Act, 1999.</td>
<td>Individual resident outside India (under FEMA Act) or an individual who has been permitted to maintain said account by RBI</td>
</tr>
<tr>
<td>10(4C)</td>
<td><strong>Interest payable by an Indian company or business trust in respect of moneys borrowed from a source outside India by way of issue of</strong></td>
<td>A non-corporate non-resident or foreign company</td>
</tr>
<tr>
<td>Clause</td>
<td>Description</td>
<td>Taxpayer Details</td>
</tr>
<tr>
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<tr>
<td>10(4D)</td>
<td>Income on transfer of a capital asset, being a bond of an Indian Company or a public sector company (sold by the Government and purchased by the specified fund in foreign currency), GDR or rupee denominated bond or derivative or any other notified security, on a recognized stock exchange located in any IFSC is exempt – &lt;br&gt; (i) where the consideration is paid or payable in convertible foreign exchange; &lt;br&gt; (ii) to the extent such income accrues or arises to, or is received in respect of units held by a non-resident</td>
<td>A specified fund</td>
</tr>
<tr>
<td>10(6)(ii)</td>
<td>Remuneration received by Foreign Diplomats/Consulate and their staff (Subject to conditions)</td>
<td>Individual (not being a citizen of India)</td>
</tr>
<tr>
<td>10(6)(vi)</td>
<td>Remuneration received as an employee of a foreign enterprise for services rendered by him during his stay in India, if: &lt;br&gt; a) Foreign enterprise is not engaged in any trade or business in India; &lt;br&gt; b) His stay in India does not exceed the aggregate a period of 90 days in such previous year; and &lt;br&gt; c) Such remuneration is not liable to deducted from the income of employer chargeable under this Act</td>
<td>Individual - Salaried Employee (not being a citizen of India) of a foreign enterprise</td>
</tr>
<tr>
<td>10(6)(viii)</td>
<td>Salary received by or due for services rendered in connection with his employment on a foreign ship if his total stay in India does not exceed 90 days in the previous year.</td>
<td>Individual Salaried Employee (Non-resident who is not a citizen of India) of a foreign enterprise</td>
</tr>
<tr>
<td>10(6)(xi)</td>
<td>Remuneration received as an employee of the Government of a foreign state during his stay in India in connection with his training in any Government Office/ Statutory Undertaking/corporation/ registered society etc.</td>
<td>Individual - Salaried Employee (not being a citizen of India) of Government of foreign state</td>
</tr>
<tr>
<td>10(6A)</td>
<td>Tax paid by Government or Indian concern (under terms of agreement entered into after 31-3-1976 but before 1-6-2002 by the Government or Indian concern with the foreign company) on income</td>
<td>Foreign Company</td>
</tr>
<tr>
<td>Section</td>
<td>Description</td>
<td>Eligibility</td>
</tr>
<tr>
<td>---------</td>
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</tr>
<tr>
<td>10(6B)</td>
<td>Tax paid by Government or Indian concern under terms of agreement entered into before 1-6-2002 by Central Government with Government of foreign State or international organization on income derived by a non-corporate non-resident or foreign company from the Government or Indian concern, other than income by way of salary, royalty or fees for technical services.</td>
<td>Non-corporate non-resident or foreign company</td>
</tr>
<tr>
<td>10(6BB)</td>
<td>Tax paid by Indian company, engaged in the business of operation of aircraft, which has acquired an aircraft or an aircraft engine on lease, under an approved (by Central Government) agreement entered into between 1-4-1997 and 31-3-1999, or after 31-3-2007, on lease rental/income derived (other than payment for providing spares or services in connection with the operation of leased aircraft) by the Government of a Foreign State or foreign enterprise.</td>
<td>Government of foreign State or foreign enterprise (i.e., a person who is a non-resident)</td>
</tr>
<tr>
<td>10(6C)</td>
<td>Royalty income or fees for technical services under an agreement with the Central Government for providing services in or outside India in projects connected with security of India.</td>
<td>Foreign company (notified by the Central Government)</td>
</tr>
<tr>
<td>10(6D)</td>
<td>Royalty income from or fees from technical services rendered in or outside India to, the National Technical Research Organisation (NTRO).</td>
<td>Non-corporate non-resident or foreign company</td>
</tr>
<tr>
<td>10(8)</td>
<td>Foreign income; and Remuneration received by an individual from the Government of a foreign State, in connection with any co-operative technical assistance programme and project under agreement between Central Government and the Government of a foreign State.</td>
<td>Individual who is assigned to duties in India</td>
</tr>
<tr>
<td>10(8A)</td>
<td>Foreign income; and Any remuneration or fee received by such person (agreement relating to his engagement must be approved) out of funds made available to an international organization (agency like World Bank or any other multi-lateral agency) under a technical assistance grant agreement between that agency and the Government of a foreign State (such</td>
<td>Consultant, being (i) An individual: a) not being an Indian citizen; or b) being an Indian citizen who is not ordinarily resident in India, or</td>
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<tr>
<td>2.50 INTERNATIONAL TAXATION</td>
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<tr>
<td>technical assistant should be in accordance with an agreement between the Central Government and the agency).</td>
<td>(ii) any other person, being a non-resident engaged by the agency for rendering technical services in India in connection with any technical assistance programme or project in accordance with the approved agreement.</td>
<td></td>
</tr>
<tr>
<td>10(8B)</td>
<td>Foreign income; and Remuneration received, directly or indirectly, by an individual who is assigned to duties in India in connection with any technical assistance programme and project in accordance with an agreement entered into by the Central Government and the agency from a consultant referred to in section 10(8A)</td>
<td>Employee of a consultant, being an individual: a) not being an Indian citizen; or b) being an Indian citizen who is not ordinarily resident in India Contract of service must be approved by the prescribed authority before commencement of service.</td>
</tr>
<tr>
<td>10(9)</td>
<td>Foreign income</td>
<td>Any family member of individual as referred to in section 10(8)/(8A)/(8B), accompanying him to India.</td>
</tr>
</tbody>
</table>

**Foreign income** referred in section 10(8)/(8A)/(8B)/(9) above refers to the other income accruing or arising outside India. Such income would be exempt provided:

(i) it is not deemed to accrue or arise in India; and

(ii) the individual is required to pay any income tax or social security tax of such income to the Government of that Foreign State or Country of origin of such member.

<p>| 10(15)(iiia) | Interest on deposits made by a foreign bank with scheduled bank with approval of RBI. | Bank incorporated outside India and authorised to perform Central Banking functions in that country. |
| 10(15)(iv)(fa) | Interest payable by scheduled bank on deposits in foreign currency where acceptance of such deposits is duly approved by RBI. [Scheduled bank does not include co-operative bank] | a) Non-resident b) Individual or HUF being a resident but not ordinary resident |
| 10(15)(viii) | Interest on deposit on or after 01.04.2005 in an Offshore Banking Unit |   |</p>
<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>10(15)(ix)</td>
<td>Interest payable by a unit located in an IFSC in respect of monies borrowed by it on or after 1.9.2019</td>
<td>Non-resident</td>
</tr>
<tr>
<td>10(15A)</td>
<td>Lease rental paid by Indian company, engaged in the business of operation of aircraft, to acquire an aircraft or an aircraft engine on lease (other than payment for providing spares or services in connection with the operation of leased aircraft) under an approved (by Central Government) agreement not entered into between 1-4-1997 and 31-3-1999, or after 31-3-2007.</td>
<td>Government of foreign State or foreign enterprise (i.e., a person who is a non-resident)</td>
</tr>
<tr>
<td>10(23BBB)</td>
<td>Income of European Economic Community derived in India from interest, dividends or capital gains from investment out of its funds under notified scheme of Central Government.</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.</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. Foreign company and agreement should be notified by the Central Government in national interest.</td>
<td>Foreign company on account of sale of crude oil, any other goods or rendering of services. It should not be engaged in any other activity in India.</td>
</tr>
<tr>
<td>10(48A)</td>
<td>Income accruing or arising on account of storage of crude oil in a facility in India and sale of crude oil therefrom to any person resident in India. Foreign company and agreement should be notified by the Central Government in national interest.</td>
<td>Foreign company on account of storage of crude oil in a facility in India and sale of crude oil therefrom.</td>
</tr>
<tr>
<td>10(48B)</td>
<td>Income from sale of leftover stock of crude oil from facility in India after the expiry of agreement or arrangement referred to in section 10(48A) or on termination of the said agreement or arrangement, in accordance with the terms mentioned therein, as the case may be, subject to such conditions, as may be notified by the Central Government.</td>
<td>Foreign company from sale of leftover stock of crude oil from the facility in India.</td>
</tr>
</tbody>
</table>

### 2.4 Presumptive Taxation for Non Residents

Section 28 details the income chargeable to tax under the head “Profits and Gains of Business or Profession”. Certain provisions have been incorporated in the Income-tax Act, 1961, whereby the
“Profits and gains of business or profession” of certain non-resident assessee is computed on the basis of certain percentage of the amount accrued or arisen and received in India.

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

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

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

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

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

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

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

### Analysis of section 44B and section 172:

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

**Manner of computation of presumptive Income:**

Notwithstanding anything to the contrary contained in sections 28 to 43A, in the case of an assessee, being a non-resident, engaged in the business of operation of ships, a sum equal to 7.5\% of the aggregate of the -

- amount paid or payable (whether in or outside

Where a ship carries passengers, livestock, mail or goods shipped at a port in India, a sum equal to 7.5\% of

- the amount paid or payable on account of such carriage to the owner or the charterer or to any person on his behalf,
India) to the non-resident or to any other person on his behalf on account of the carriage of passengers, livestock, mail or goods shipped at any Indian port and

- the amount received or deemed to be received in India on account of the carriage of passengers, livestock, mail or goods shipped at any port outside India.

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

whether that amount is paid or payable in or out of India,

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

**Other provisions of section 172**

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

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

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

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

(ii) **Assessment [Section 172(4)]:** This section provides for a summary procedure of assessment. On receipt of the return filed by the master of the ship or by any person on this behalf, the Assessing Officer has to determine the tax payable on the taxable income. By virtue of the provisions of section 172(2), the taxable income is a sum equal to 7.5% of the amount paid or payable on account of carriage of passengers etc. to the owner or charterer or to any person on his behalf, whether that amount is paid or payable in or out of India. The tax payable on such taxable income is to be calculated at the rate or rates in force applicable to the total income of a foreign company. The master of the ship is liable for payment of such tax.
(iii) **Time limit for passing the assessment order [Section 172(4A)/(5)]:** It is incumbent on the Assessing Officer to pass the order of assessment within 9 months from the end of the financial year in which the return of income under section 172(3) is filed.

For the purpose of determining the tax payable, Assessing Officer is empowered to call for such accounts and documents as he may require.

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

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

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

**Section 172 vis-à-vis section 44B**

In case the assessee is covered under section 172, 7.5 per cent of the amount paid or payable on account of the carriage of the passengers, livestock, mail or goods to the owner or the chartered or to any person on his behalf is deemed as his income and tax is levied on such income at a rate applicable to a foreign company i.e., 40% plus surcharge, if any, and plus health and education cess @4%.

Under the provisions of section 172(7), the non-resident owner or charterer is allowed an option to be assessed on his total income of the previous year in accordance with other provisions of the Act i.e., as per section 44B.

When such option is exercised, a regular assessment is made. In such a case, the tax already paid under the provisions of section 172(4) by the non-resident owner or charterer would be treated as tax paid in advance for that assessment year before determining the amount of tax finally due. The difference between the sum so paid and the amount of tax payable by him on such assessment shall be paid by the assessee or refunded to him (See Note below).
In that case, the non-resident assessee is liable to pay interest under sections 234B and 234C and also entitled to receive interest under section 244A of the Income-tax Act, 1961 as the case may be. [Circular No. 9/2001, dated 9-7-2001]

**Note** – Refund may arise in case of non-corporate non-residents, since they are liable to pay tax at a rate lower than the rate of 40% (plus surcharge, if any, and cess@4%) applicable to a foreign company.

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

**ILLUSTRATION 6**

*Sea Port Shipping Line, a non-resident foreign company ships is engaged in the business of carriage of goods shipped at Mumbai port. During the previous year ended on 31.3.2020, it 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. Compute its income applying the presumptive provisions under section 44B.*

**SOLUTION**

Section 44B 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 income from the shipping business in case of non-residents would apply notwithstanding anything to the contrary contained in the provisions of sections 28 to 43A of the Income-tax Act, 1961.

Therefore, in this case, M/s. Sea Port Shipping Line is required to pay tax in India on the basis of presumptive 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). The tax payable would be reduced by the amount of tax paid under section 172(4).
Section 44BB is a non-obstante clause. Accordingly, sections 28 to 41 and section 43 and 43A are not applicable in the case of a non-resident engaged in the business of providing services of facilities in connection with, or supplying plant and machinery on hire used, or to be used in the prospecting for, or extraction or production of, mineral oils.

(i) Eligible assessee: Section 44BB provides for determination of income of taxpayer being a non-resident engaged in the business of providing services and facilities in connection with, or supplying plant and machinery on hire used or to be used in the prospecting for, or extraction or production of mineral oils.

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

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

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

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

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

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

(b) “Mineral oil” includes petroleum and natural gas.

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

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

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

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

(ii) **Presumptive 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 7**

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 31.3.2020:

(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 31.3.2020 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 2020-21.

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

**SOLUTION**

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

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

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

<table>
<thead>
<tr>
<th>Particulars</th>
<th>₹</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amount received in India on account of carriage of passengers from Chennai</td>
<td>2,00,00,000</td>
</tr>
<tr>
<td>Amount received in India on account of carriage of goods from Chennai</td>
<td>1,00,00,000</td>
</tr>
<tr>
<td>Amount received in India on account of carriage of passengers from Singapore</td>
<td>3,00,00,000</td>
</tr>
<tr>
<td>Amount received in Singapore on account of carriage of passengers from Chennai</td>
<td>1,00,00,000</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>7,00,00,000</strong></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. 2020-21.

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 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).
### SUMMARY OF PRESUMPTIVE PROVISIONS APPLICABLE TO NON RESIDENTS

<table>
<thead>
<tr>
<th>Particulars</th>
<th>44B</th>
<th>44BBA</th>
<th>44BB</th>
<th>44BBB</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nature of business</td>
<td>Shipping business</td>
<td>Operation of aircraft</td>
<td>Business of providing services or facilities in connection with, or supplying P &amp; M on hire used, or to be used, in the prospecting for, or extraction or production of, mineral oils</td>
<td>Business of civil construction or the business of erection of P&amp;M or testing or commissioning thereof, in connection with turnkey power projects approved by the Central Government.</td>
</tr>
<tr>
<td>Eligible assessee</td>
<td>Non-resident</td>
<td>Non-resident</td>
<td>Non-resident</td>
<td>Only Foreign Co.</td>
</tr>
<tr>
<td>Presumptive income</td>
<td>7.5% of specified sum</td>
<td>5% of specified sum</td>
<td>10% of specified sum</td>
<td>10% of specified sum</td>
</tr>
<tr>
<td>Specified sum</td>
<td>(i) Amount paid or payable on account of carriage of passengers, livestock, mail or goods shipped at/ from any port/place in India; and (ii) Amount received or deemed to be received in India on account of the carriage of passengers, livestock mail or goods shipped at/ from any port/place outside India</td>
<td>(i) Amount paid or payable on account of the provision of such services or facilities for the aforesaid purposes in India; and (ii) Amount received or deemed to be received in India on account of the provisions of services or facilities for the aforesaid purpose outside India</td>
<td>Amount paid or payable on a/c of such civil construction, erection, testing or commissioning</td>
<td></td>
</tr>
<tr>
<td>Option to declare lower profits</td>
<td>Not available</td>
<td></td>
<td>Lower profits may be claimed u/s 44BB and u/s 44BBB provided the assessee maintains Books of account u/s 44AA and gets them audited u/s 44AB.</td>
<td></td>
</tr>
</tbody>
</table>

#### (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>Adjusted total income</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>
</tbody>
</table>

| Average adjusted total income | (a) The total income of the assessee, assessable for each of the three assessment years immediately preceding the relevant assessment year, one third of the aggregate amount of the adjusted total income in respect of previous years relevant to the aforesaid three assessment years is average adjusted total income. |
|                             | (b) When the total income of the assessee is assessable only for two of the aforesaid three assessment years, one half of the aggregate amount of the adjusted total income in respect of the previous year’s relevant to the aforesaid two assessment years is taken on average adjusted total income. |
|                             | (c) Where the total income of the assessee is assessable only for one of the aforesaid three assessment years, the amount of the adjusted total income in respect of the previous year relevant to that assessment year is average adjusted total income. |

<table>
<thead>
<tr>
<th>Head office expenditure</th>
<th>Executive and general administration expenditure incurred by the assessee outside India, including expenditure incurred in respect of:</th>
</tr>
</thead>
<tbody>
<tr>
<td>a.</td>
<td>rent, rates, taxes, repairs or insurance of any premises outside India used for the purpose of the business or profession.</td>
</tr>
<tr>
<td>b.</td>
<td>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;</td>
</tr>
<tr>
<td>c.</td>
<td>traveling by any employee or other person employed in, or managing the affairs, of any office outside India; and</td>
</tr>
<tr>
<td>d.</td>
<td>such other matters connected with executive and general administrative as may be prescribed.</td>
</tr>
</tbody>
</table>
**Deduction of Head Office expenditure in case of Non-residents while computing Profit and gains from business or profession**

Lower of

- 5% of adjusted Total Income
- Amount of Head Office expenditure incurred by the Non-resident attributable to the business or profession in India

**Meaning of Adjusted Total Income**
- Total Income, without giving effect to:
  - Head Office expenditure
  - Unabsorbed depreciation
  - Capital expenditure on family planning
  - Losses carry forward:
    - Business loss u/s 72(1)
    - Speculative business Loss u/s 73(2)
    - LTCL/STCL u/s 74(1)
    - Loss from owning and maintaining race horses u/s 74A(3)
  - Deductions under Chapter VI-A from GTI

**Meaning of Head Office expenditure**
- Executive and general administration expenditure incurred by the NR outside India, including:
  - (a) Rent, rates, taxes, repairs or insurance of any premises outside India used for business or profession
  - (b) Salary, wages, perquisites etc. to any employee or other person managing the affairs of any office outside India
  - (c) Travelling expenditure by any employee or other person managing the affairs of any office outside India
  - (d) Such other executive and general administration expenditure prescribed

**ILLUSTRATION 8**

The net result of the business carried on by a branch of foreign company in India for the year ended 31.03.2020 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 2020-21.

**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. 2020-21 will be as under:

<table>
<thead>
<tr>
<th>Particulars</th>
<th>₹</th>
</tr>
</thead>
<tbody>
<tr>
<td>Net loss for the year ended on 31.03.2020</td>
<td>(100 lakhs)</td>
</tr>
<tr>
<td>Add: Amount of head office expenses to be considered separately as per section 44C</td>
<td>200 lakhs</td>
</tr>
<tr>
<td>Adjusted total income</td>
<td>100 lakhs</td>
</tr>
<tr>
<td>Less: Head Office expenses allowable under section 44C is the lower of -</td>
<td></td>
</tr>
<tr>
<td>(i) ₹ 5 lakhs, being 5% of ₹ 100 lakhs, or</td>
<td>5 lakhs</td>
</tr>
<tr>
<td>(ii) ₹ 200 lakhs.</td>
<td></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, the following expenses are not allowed as deduction:

- expenditure or allowance incurred which is not wholly and exclusively for such permanent establishment or fixed place of service in India

- amount paid (otherwise than Reimbursement of actual expenses) by the permanent establishment to head office or to any of its other offices.

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

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

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

First Proviso to Section 48 read with Rule 115A:-

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

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

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

Benefit of indexation will not be applied in this case.

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

<table>
<thead>
<tr>
<th>(1)</th>
<th>(2)</th>
<th>(3)</th>
</tr>
</thead>
<tbody>
<tr>
<td>S. No.</td>
<td>Item</td>
<td>Date</td>
</tr>
<tr>
<td>(a)</td>
<td>Cost of acquisition of capital asset</td>
<td>Date of acquisition of capital asset</td>
</tr>
<tr>
<td>(b)</td>
<td>Expenditure incurred wholly and exclusively in connection with transfer of capital asset</td>
<td>Date of transfer of capital asset</td>
</tr>
<tr>
<td>(c)</td>
<td>Full value of consideration received or accruing as a result of transfer of a capital asset</td>
<td>Date of transfer of capital asset</td>
</tr>
</tbody>
</table>

For reconverting capital gains computed in the foreign currency initially utilized in the purchase of the capital asset into rupees, the telegraphic transfer buying rate of such currency, as on the date of transfer of the capital asset, is to be considered.

Meaning of certain terms

<table>
<thead>
<tr>
<th>Term</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>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>
</tbody>
</table>
Telegraphic transfer selling rate: 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.

However, the benefit of indexation and currency fluctuation would not be available in respect of capital gains arising from the transfer of the following long term capital assets referred to in section 112A –

(i) equity share in a company on which STT is paid both at the time of acquisition and transfer

(ii) unit of equity oriented fund or unit of business trust on which STT is paid at the time of transfer.

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. 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, then, tax on short term capital gains shall be payable at the rates specified in section 111A if transaction of sale of such security has been entered on or after October 1, 2004 on which STT is chargeable; and tax on long-term capital gains shall be payable on such securities as per section 112A, if STT has been paid both at the time of acquisition and transfer of equity share or at the time of transfer of unit of equity oriented fund or unit of business trust.

c. Section 50CA provides that where the consideration received or accruing as a result of transfer of a capital asset, being share of a company other than a quoted share, is less than the fair market value of such share determined in such manner as may be prescribed, such fair market value shall be deemed to be the full value of consideration received or accruing as a result of such transfer.

   This provision would, however, not be applicable to any consideration received or accruing as a result of transfer by such class of persons and subject to such conditions as may be prescribed.

d. Section 50D provides that, in case where the consideration received or accruing as a result of the transfer of a capital asset by an assessee is not ascertainable or cannot be determined, then, for the purpose of computing income chargeable to tax as capital gains, the fair market value of the said asset on the date of transfer shall be deemed to be the full value of consideration received or accruing as a result of such transfer.

e. 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.
ILIUSTRATION 9

Mr. A, a non-resident Indian remits US $ 40,000 to India on 16.09.2005. The amount is partly utilised on 3.10.2005 for purchasing 10,000 equity shares in A Ltd, an Indian Company, at the rate of ₹ 12 per share. These shares are sold for ₹ 48 per share on 30.03.2020. Fair Market value of these shares on 31.01.2018 was ₹ 35 per share.

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>16.09.2005</td>
<td>18</td>
<td>20</td>
</tr>
<tr>
<td>3.10.2005</td>
<td>19</td>
<td>21</td>
</tr>
<tr>
<td>30.3.2020</td>
<td>59</td>
<td>61</td>
</tr>
</tbody>
</table>

Compute Capital gain chargeable to tax for the A.Y. 2020-21 on the assumption that –

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

(b) These shares have been purchased and sold through a recognised stock exchange.

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 purchased and sold through a recognised stock exchange

<table>
<thead>
<tr>
<th>Particulars</th>
<th>₹</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sale consideration</td>
<td>4,80,000</td>
</tr>
<tr>
<td>Less: Cost of Acquisition</td>
<td>1,20,000</td>
</tr>
<tr>
<td>Higher of the following</td>
<td></td>
</tr>
<tr>
<td>Cost of acquisition</td>
<td></td>
</tr>
<tr>
<td>Lower of Fair market value as on 31.1.2018 and Full value of consideration (i.e., lower of ₹ 3,50,000 and ₹ 4,80,000)</td>
<td>3,50,000</td>
</tr>
<tr>
<td><strong>Long term capital gain</strong></td>
<td>1,30,000</td>
</tr>
</tbody>
</table>

Long term capital gains upto ₹ 1,00,000 would be exempt. Long term capital gains exceeding ₹ 1,00,000, i.e., ₹ 30,000 is taxable @10% under section 112A.

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2.66 INTERNATIONAL TAXATION

Fourth Proviso to Section 48

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

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

2.6 SPECIAL PROVISIONS PRESCRIBED UNDER CHAPTER XII-A

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

(1) Definitions [Section 115C]

<table>
<thead>
<tr>
<th>Terms</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) Convertible foreign exchange</td>
<td>Foreign exchange which is for the time being treated by the Reserve Bank of India as convertible foreign exchange for the purposes of the Foreign Exchange Management Act, 1999, and any rules made thereunder.</td>
</tr>
<tr>
<td>(b) Foreign exchange asset</td>
<td>Any specified asset which the assessee has acquired or purchased with, or subscribed to in, convertible foreign exchange</td>
</tr>
<tr>
<td>(c) Investment income</td>
<td>Any income derived (other than dividends referred to in section 115-O) from a foreign exchange asset.</td>
</tr>
<tr>
<td>(d) Long-term capital gains</td>
<td>Income chargeable under the head “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 “resident. A person shall be deemed to be of Indian origin if he, or either of his parents or any of his grand-parents, was born in undivided India</td>
</tr>
<tr>
<td>(f) Specified asset</td>
<td>Any of the following assets, namely: (i) Shares in an Indian company;</td>
</tr>
</tbody>
</table>
(2) Special provisions relating to taxation of investment income and on long term capital gains of a non-resident [Sections 115D to 115F]

(i) **On gross basis [Section 115D(1)]:** 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 [Section 115D(2)]:** No deduction under Chapter VI-A shall be allowed and indexation benefit will not be available, where the gross total income of a non-resident Indian consists only of investment income or/and long term capital gain.

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

(iii) **Tax rate on investment income and long term capital gains [Section 115E]:** 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 at 20%;

(b) income-tax on long term capital gains from transfer of specified assets (i.e., purchased in foreign currency) at 10%; 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) + Health and Education Cess@4%</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) + Health and Education Cess@4%</td>
</tr>
</tbody>
</table>
(iv) **Exemption for long-term capital gains [Section 115F]**

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

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

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

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

**Important points:**

1. Net consideration means the full value of consideration from transfer less expenditure incurred wholly and exclusively 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 10**

A non-resident Indian acquired shares in an Indian company, A Ltd., on 1.1.2009 for ₹ 1,00,000 in foreign currency. These shares are sold by him on 1.1.2019 for ₹ 3,00,000. He invests ₹ 3,00,000 in shares on 31.03.2019 and these shares are sold by him on 30.06.2019 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 2019-20**

<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><strong>Exempt long-term capital gain</strong></td>
<td><strong>NIL</strong></td>
</tr>
</tbody>
</table>
Capital Gain for Assessment year 2020-21:
1. LTCG of ₹ 2,00,000 which was exempt in A.Y.2019-20 becomes taxable this year.
2. STCG of ₹ 50,000 is also taxable this year.

ILLUSTRATION 11

Mr. John, a non-resident Indian, purchased unlisted shares of an Indian Company at a cost of ₹ 70,000 on 01.07.2010 in foreign currency. Mr. John sold the said shares for a consideration of ₹ 2,50,000 on 01.08.2019 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>

*1,70,000 × 150,000 = ₹ 1,06,250

2,40,000

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

A non-resident Indian need not furnish a return of income under section 139(1) 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) Tax deductible at source has been deducted from such income.

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

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

(b) The declaration shall be to the effect that the provisions of this chapter shall continue to apply to him in respect of the investment income derived from foreign
exchange assets being debentures, deposits, securities of Central Government and such other notified assets as specified under section 115C.

(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 assets.

(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 by furnishing his return of income for that assessment year under section 139 declaring therein that the provisions of Chapter XII-A shall not apply to him for that assessment year. In case where such an option is exercised by a non-resident Indian, his total income for that assessment year would be charged to tax under the general provisions of the Act.

**Summary**

<table>
<thead>
<tr>
<th>Specified asset</th>
<th>Acquired/purchased/ subscribed to in convertible foreign exchange</th>
</tr>
</thead>
<tbody>
<tr>
<td>Shares in an Indian Company</td>
<td>Debentures issued by an Indian Co. (other than a Pvt. Co.)</td>
</tr>
<tr>
<td></td>
<td>Deposits with an Indian Co. (other than a Pvt. Co.)</td>
</tr>
<tr>
<td></td>
<td>Any security of the CG</td>
</tr>
<tr>
<td></td>
<td>Other assets notified by the CG</td>
</tr>
</tbody>
</table>
Special Provisions relating to certain incomes of non-resident individual, being a citizen of India or person of Indian Origin

<table>
<thead>
<tr>
<th>Income Type</th>
<th>Rate of Tax</th>
<th>Deduction for expenses or allowance</th>
<th>Deduction under Chapter VI-A</th>
<th>Exemption u/s 115F</th>
</tr>
</thead>
<tbody>
<tr>
<td>Investment Income(^2) from FEA</td>
<td>20%</td>
<td>Not allowable</td>
<td>Not allowable</td>
<td>Allowable</td>
</tr>
<tr>
<td>LTCG relating to FEA, being a LTCA</td>
<td>10%</td>
<td>Allowable. However, benefit of indexation of COA is not available.</td>
<td>Not allowable</td>
<td>Allowable</td>
</tr>
<tr>
<td>LTCG of an asset, other than a specified asset</td>
<td>20%</td>
<td>Allowable. Benefit of indexation of COA is available.</td>
<td>Not allowable</td>
<td>Allowable</td>
</tr>
<tr>
<td>Other Income</td>
<td>Normal rates of tax</td>
<td>Allowable</td>
<td>Allowable</td>
<td>Allowable</td>
</tr>
</tbody>
</table>

- If entire net consideration is invested in specified asset (new asset), exemption is allowed. Exemption of entire LTCG.
- If part of net consideration is invested in specified asset (new asset), exemption is allowed. Exemption of proportionate LTCG.
- In case of transfer of new asset/conversion into money within 3 years of acquisition, Exempted LTCG deemed to be income chargeable to tax in the year of transfer.

\(^2\) Other than dividend referred to in section 115-O

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

Sections 111A, 112 and 112A have already been discussed Module 1 of Part I – Direct Tax Laws. The special provisions contained in other sections under Chapter XII are discussed hereunder -

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

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

<table>
<thead>
<tr>
<th>Where the total income of a foreign company or a non-corporate non-resident includes any income by way of</th>
<th>Rate of Tax</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Dividends [other than dividend referred to in section 115-O]</td>
<td>20%</td>
</tr>
<tr>
<td>(2) Interest received from the Government or an Indian concern on moneys borrowed or debt incurred by the Government /Indian concern in foreign currency, other than 3 and 4 mentioned below</td>
<td>20%</td>
</tr>
<tr>
<td>(3) Interest received from an infrastructure debt fund referred to in section 10(47)</td>
<td>5%</td>
</tr>
<tr>
<td>(4) Interest referred to in section 194LC received from an Indian company or business trust –</td>
<td>5%</td>
</tr>
<tr>
<td>- in respect of monies borrowed by an Indian company or business trust in foreign currency from sources outside India</td>
<td></td>
</tr>
<tr>
<td>• Under a loan agreement between 1.7.2012 and 30.6.2020 or</td>
<td></td>
</tr>
<tr>
<td>• by way of issue of long-term infrastructure bonds between 1.7.2012 and 30.9.2014 or</td>
<td></td>
</tr>
<tr>
<td>• by way of issue of long-term bonds including long term infrastructure bond between 1.10.2014 and 30.6.2020 as approved by the Central Government</td>
<td></td>
</tr>
<tr>
<td>- in respect of monies borrowed from sources outside India by way of rupee denominated bond before 1.7.2020</td>
<td></td>
</tr>
<tr>
<td>(5) Interest referred to in section 194LD payable between 1.6.2013 and 30.6.2020 to a Foreign Institutional Investor or Qualified Foreign Investor on investment made in –</td>
<td>5%</td>
</tr>
<tr>
<td>- Rupee denominated bond of an Indian company</td>
<td></td>
</tr>
<tr>
<td>- Government security</td>
<td></td>
</tr>
<tr>
<td>(6) Interest referred to in section 194LBA(2), being interest income of a business trust from a SPV, distributed by business trust to non-resident unit holders of a business trust</td>
<td>5%</td>
</tr>
</tbody>
</table>
(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 | 20%

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

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

**Important Points:**

1. Special rate of tax is applicable on the above mentioned incomes. The remaining 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 dividend and interest referred to in (i) above. **However, this condition would not be applicable to deduction allowed to a unit of an International Financial Services Centre (IFSC) under section 80LA i.e., a unit of an IFSC can claim deduction under section 80LA against dividend and interest referred to in (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 to in (i) above
   
   (b) Tax deductible at source has been deducted from such income.
Summary

Tax treatment of Royalty & Fees for technical service received from Government / Indian concern in pursuance of approved agreement

Is right, property or contract effectively connected with PE/Fixed Place of Profession (FPP) in India?

Yes

Royalty & FTS would be computed as per sec 44DA under the head “PGBP” as per the provisions of the Income-tax Act, 1961; and normal rates of tax would apply

No deduction of any expenditure or allowance is allowable u/s 28 to 44C or u/s 57

Concessional rate of tax@10% u/s 115A on gross royalty/FTS would apply

Deduction under Chap VI-A permissible

Accounts & Audit

Books of account to be maintained as per section 44AA

Books of account to be audited & Audit Report to be furnished along with return of income

Deduction of expenditure

No deduction in respect of expenses not incurred wholly & exclusively in relation to PE/Fixed place of profession in India

No deduction in respect of amount paid (other than reimbursement of actual expenses) by PE/Fixed place of profession to HO & other offices

No exemption from filing return of income u/s 139(1)

(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 (Offshore Fund) 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** of a mutual fund specified under section 10(23D) or units of UTI 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 benefit of indexation shall **not** be available in the computation of long term capital gains.

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

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

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

(v) It may be noted that long term capital gains upto ₹ 1,00,000 on units of equity oriented fund would be exempt and long term capital gains exceeding ₹ 1,00,000 shall be taxable @10% under section 112A provided securities transaction tax has been paid on the sale of such units.

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

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

(i) **Eligible assessee and special rate of tax:** According to section 115AC(1), where the total income of an assessee, being a non-resident includes:
(a) income by way of interest on bonds of an Indian company issued in accordance with such scheme as the Central Government may notify or on bonds of a public sector company sold by the Government, and purchased by him in foreign currency; or

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

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

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

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

(c) income by way of long-term capital gains arising from the transfer of above bonds or GDRs,

then, income-tax will be charged at the rate of 10% on the above income.

(ii) Deductions not allowable [Section 115AC(2)]: Where the gross total income of the non-resident consists only the aforesaid interest or dividend income referred to in (a) and (b) of (i) above, no deduction shall be allowed to him under section 28 to 44C or section 57(i) or 57(iii) or under Chapter VIA.

Deduction under Chapter VI-A is also not allowable against long term capital gains arising from transfer of bonds or GDRs

Where the gross total income of the non-resident consists of incomes other than interest, dividend and long term capital gains referred to in (a), (b) and (c) of (i) above, then, the deduction under Chapter VI-A will be available in respect of other incomes

(iii) Non-availability of indexation benefit and computation of capital gains in foreign currency [Section 115AC(3)]: The indexation benefit and benefit of computation of capital gains in foreign currency, shall not be available for the computation of long-term capital gains arising out of the transfer of long term asset, being bonds or GDRs

(iv) Filing of Return of Income not required [Section 115AC(4)]: It shall not be necessary for a non-resident to furnish under section 139(1), a return of income if his total income in respect of which he is assessable under the Act during the previous year consisted only of aforesaid interest or dividend income, and the tax deductible at source under the provisions of Chapter XVII-B has been deducted from such income.
(v) **Concessional tax treatment for GDR/Bonds acquired in course of Amalgamation** [Section 115AC(5)]: 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.

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

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

(b) foreign currency convertible bonds of issuing company;

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

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

<table>
<thead>
<tr>
<th>S. No.</th>
<th>Income</th>
<th>Rate of Tax</th>
</tr>
</thead>
</table>
| (a)   | Income received in respect of securities **other than**

  • income by way of dividends ref u/s 115-O
  • income on units ref u/s 115AB i.e., units of Mutual Fund specified u/s 10(23D) or UTI
  • Interest referred u/s 194LD

| (b)   | Interest referred u/s 194LD                                           | 5%          |
| (c)   | Income by way of Short term capital gains arising from the transfer of

  securities (other than Short term capital gains u/s 111A) | 30%         |
| (d)   | Income by way of Short term capital gains u/s 111A                   | 15%         |
| (e)   | Income by way of Long term capital gains arising from the transfer of

  securities (other than Long term capital gains u/s 112A) | 10%         |
| (f)   | Income by way of Long term capital gains u/s 112A exceeding ₹ 1 lakh | 10%         |
| (g)   | Other income of FII                                                  | At normal rates of tax |
Note - The Finance (No. 2) Act, 2019 has levied an enhanced surcharge of 25% and 37%, where the total income of an individual/HUF/AOP/BOI exceeds ₹ 2 crores and ₹ 5 crores, respectively. However, the enhanced surcharge of 25% and 37% has been withdrawn on tax payable at special rate under section 115AD by the FPI on the capital gains arising from the transfer of derivatives (Future & Options).

In case of assessee other than FPI, derivatives are not treated as capital asset and the income arising from the transfer of the derivatives is treated as business income. Further, it has been clarified that the business income arising from the transfer of derivatives to a person other than FPI would be liable to enhanced surcharge [Press Release dated 24-8-2019]

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

Deduction under Chapter VI-A is also not allowable in case of short term capital gain or long term capital gain arising from transfer of securities.

Where the gross total income of the Foreign Institutional Investor consists of incomes other than income referred to in (a), (b) and (c) of table in (i) above, then, the deduction under Chapter VI-A will be available in respect of other incomes.

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

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

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

<table>
<thead>
<tr>
<th>Assessee</th>
<th>Income</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) A sportsman (including an athlete), who is not a citizen of India and is a non-resident</td>
<td>Any income received or receivable by way of—</td>
</tr>
<tr>
<td></td>
<td>(i) participation in India in any game (other than a game the winnings wherefrom are taxable under section 115BB, being winning from crossword puzzles, races including horse races, card games and other games of any sort of gambling or betting) or sport; or</td>
</tr>
<tr>
<td></td>
<td>(ii) advertisement; or</td>
</tr>
</tbody>
</table>
(ii) **Deduction of expenditure not permissible:** No deduction in respect of any expenditure or allowance shall be allowed under any provision of this Act in computing the income referred to in (a) or (b) or (c) in the table given above.

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

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

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

**Note:** The issue as to whether the non-resident match referees and umpires in the games played in India fall within the meaning of "sportsmen" to attract taxability under the provisions of section 115BBA, and consequently attract the TDS provisions under section 194E in the hands of the payer was taken up by the Calcutta High Court in Indcom v. CIT (TDS) (2011) 335 ITR 485.

In order to attract the provisions of the section 194E, the person should be a non-resident sportsperson or non-resident sports association or institution whose income is taxable as per the provisions of section 115BBA.

Umpires and match referees can be described as professionals or technical persons who render professional or technical services, but they cannot be said to be either non-resident sportsmen (including an athlete) or non-resident sports association or institution so as to attract the provisions of section 115BBA and consequently, the provisions of tax deduction at source under section 194E are can not be attracted.

The Calcutta High Court held that although the payments made to non-resident umpires and the match referees are "income" which has accrued and arisen in India, the same are not taxable under the provisions of section 115BBA and thus, the assessee is not liable to deduct tax under section 194E.

It may be noted that since income has accrued and arisen in India to the non-resident umpires and match referees, the TDS provisions under section 195 would be attracted and tax would be deductible at the rates in force.
ILLUSTRATION 12

During the financial year 2019-20, Nadal, a tennis professional and a non-Indian citizen participated in India in a Tennis Tournament and won prize money of ₹ 15 lakhs. He contributed articles on the tournament in a local newspaper for which he was paid ₹ 1 lakh. He was also paid ₹ 5 lakhs 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 lakhs 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. 2020-21? 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 as deduction against such receipts. The rate of tax chargeable under section 115BBA is 20%, plus health and education cess @4%. The total tax liability works out to ₹ 4,36,800 being 20.8% 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 13

Smith, a foreign national and a cricketer came to India as a member of Australian cricket team in the year ended 31st March, 2020. 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 2020-21.

(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 2020-21?

(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.2020-21

<table>
<thead>
<tr>
<th>Particulars</th>
<th>₹</th>
<th>₹</th>
</tr>
</thead>
<tbody>
<tr>
<td>Income taxable under section 115BBA</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Income from participation in matches in India</td>
<td>5,00,000</td>
<td></td>
</tr>
<tr>
<td>Advertisement of product on TV</td>
<td>1,00,000</td>
<td></td>
</tr>
<tr>
<td>Contribution of articles in newspaper</td>
<td>10,000</td>
<td></td>
</tr>
<tr>
<td><strong>Income taxable under section 115BB</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Income from horse races</td>
<td>20,000</td>
<td></td>
</tr>
<tr>
<td><strong>Total income</strong></td>
<td><strong>6,30,000</strong></td>
<td></td>
</tr>
<tr>
<td>Tax@ 20% under section 115BBA on ₹ 6,10,000</td>
<td>1,22,000</td>
<td></td>
</tr>
<tr>
<td>Tax@ 30% under section 115BB on income of ₹ 20,000 from horse races</td>
<td>6,000</td>
<td>1,28,000</td>
</tr>
<tr>
<td>Add: Health and Education cess@4%</td>
<td>5,120</td>
<td></td>
</tr>
<tr>
<td><strong>Total tax liability of Smith for the A.Y.2020-21</strong></td>
<td><strong>1,33,120</strong></td>
<td></td>
</tr>
</tbody>
</table>

(ii)

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

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

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

Since Smith is a non-resident, the amount of tax to be deducted calculated at the prescribed rates mentioned above, would be increased by health and education cess@4%.

(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.2020-21.

(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><strong>Tax on ₹ 6,10,000 at the rates in force</strong></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><strong>Add: Health and Education cess@4%</strong></td>
<td>1,620</td>
</tr>
<tr>
<td><strong>Total tax liability</strong></td>
<td>42,120</td>
</tr>
</tbody>
</table>

### 2.8 SPECIAL PROVISIONS RELATING TO CONVERSION OF INDIAN BRANCH OF A FOREIGN BANK INTO A SUBSIDIARY COMPANY [CHAPTER XII-BB]

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

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

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

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

(iv) Further, the benefit of set-off of unabsorbed depreciation, set-off or carry forward and set-off of losses, tax credit in respect of tax paid on deemed income relating to certain companies available under the Act shall apply with such exceptions, modifications and adaptations as specified in the notification.
Accordingly, the Central Government has, vide notification no. 85/2018, specified the conditions to be fulfilled –

(1) **For Capital Gains exemption:**

Where a foreign company is engaged in the business of banking through its Indian branch and converts such Indian branch into its Indian subsidiary company in accordance with the scheme framed by RBI, the capital gains arising from such conversion would not be chargeable to tax, if -

(a) the Indian branch amalgamates with the Indian subsidiary company in accordance with the scheme of amalgamation approved by the shareholders of the foreign company and the Indian subsidiary company and sanctioned by the RBI

(b) all the assets and liabilities of the Indian branch immediately before conversion would become the assets and liabilities of the Indian subsidiary company;

(c) the asset and liabilities of the Indian branch are transferred to the Indian subsidiary company at values appearing in the books of account of the Indian branch immediately before its conversion.

**Note** - Any change in the value of assets consequent to their revaluation would not be considered while determining the value of the assets.

(d) the foreign bank or its nominee shall hold the whole of the share capital of the Indian subsidiary company during the period beginning from the date of conversion and ending on the last day of the previous year in which the conversion took place and continue to hold the shares of Indian subsidiary company carrying not less than 51% of the voting power for a period of five years immediately succeeding the said previous year;

(e) the foreign company does not receive any consideration or benefit, directly or indirectly, in any form or manner, other than by way of allotment of shares in the Indian subsidiary company.

(2) **Application of the provisions of the Income-tax Act, 1961 with modifications/exceptions**

The provisions of the Income-tax Act, 1961 relating to unabsorbed depreciation, set off or carry forward and set off of losses, tax credit in respect of tax paid on deemed income relating to certain companies and the computation of income in case of foreign company and Indian subsidiary company shall apply with following modifications, exceptions and adaptation –

<table>
<thead>
<tr>
<th>Purpose</th>
<th>Modification/exception/adaptation</th>
</tr>
</thead>
</table>
| (a) Allowance of depreciation under paragraph 20(h) of the Framework for setting up of wholly owned subsidiaries by foreign banks in India issued by the Reserve Bank of India vide Press release number 2013-2014/936 dated 6th day of November, 2013 | The aggregate deduction, in respect of depreciation on buildings, machinery, plant or furniture, being tangible assets, or know-how.
| (b) Set-off and c/f of loss and depreciation | The **accumulated loss** and the **unabsorbed depreciation** of the Indian branch would be deemed to be the loss or allowance for depreciation of the Indian subsidiary company for the previous year in which conversion was effected; and provisions of the Income-tax Act, 1961, relating to set off and carry forward of loss and allowance for depreciation shall apply accordingly. |
| (c) Determination of actual cost u/s 43(1) | The actual cost of the block of assets in the case of the Indian subsidiary company shall be the written down value of the block of assets as in the case of the Indian branch on the **date of its conversion** into the Indian subsidiary company. The actual cost of any capital asset on which deduction has been allowed or is allowable under section 35AD, shall be treated as 'nil' in the case of the Indian subsidiary company if the capital asset became the property of the Indian subsidiary company as a result of conversion of the Indian branch. |
| (d) Cost of acquisition of other capital assets | Where the capital asset other than those referred to in (c) above became the property of the Indian subsidiary company as a result of conversion of the Indian branch, the cost of acquisition of the asset for the purposes of computation of capital gains shall be deemed to be the cost for which the Indian branch acquired it or, as the case may be, the cost for which previous owner has acquired it. |
| (e) Tax credit | The **tax credit** of the Indian branch shall be deemed to be the tax credit of the Indian subsidiary company for the purpose of the previous year in which conversion was effected; and the provisions of section 115JAA of the Income-tax Act, 1961 shall apply accordingly. |
| (f) Amortisation of VRS Expenditure | The provisions of 35DDA of the Act shall be, as far as may be, apply to the Indian subsidiary company, as they would have applied to the Indian branch, if the conversion had not taken place. |
| (g) Deemed credit balance in provision for bad and doubtful debts | The credit balance in the provision for bad and doubtful debts account made under section 36(1)(viiia) of the Indian branch on the date of conversion shall be deemed to be the credit balance of the Indian subsidiary company and the provisions of section 36 of the Income-tax Act, 1961, shall apply accordingly. |
The provisions of section 56(2)(x) shall not apply to the transaction of receipt of shares in the Indian subsidiary company by the foreign company or its nominee in consequence of the conversion of the Indian branch into the Indian subsidiary company.

Meaning of certain terms (given in bold in the above table):

<table>
<thead>
<tr>
<th>Term</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>Accumulated loss</td>
<td>So much of the loss of the Indian branch before its conversion into Indian subsidiary company under the head “Profits and gains of business or profession” (not being a loss sustained in a speculation business) which such Indian branch would have been entitled to carry forward and set off under the provisions of section 72, if the conversion had not taken place.</td>
</tr>
<tr>
<td>Unabsorbed depreciation</td>
<td>So much of the allowance for depreciation of the Indian branch before its conversion into Indian subsidiary company, which remains to be allowed and which would have been allowed to the Indian branch under the provisions of the Act, if the conversion had not taken place.</td>
</tr>
<tr>
<td>Previous owner</td>
<td>In relation to any capital asset owned by the Indian subsidiary company means the last previous owner of the capital asset who acquired it by a mode of acquisition other than those referred in section 49(1)(i)/(ii)/(iii)/(iv) or section 115JG(1).</td>
</tr>
<tr>
<td>Tax credit</td>
<td>So much of the tax credit of the Indian branch before conversion into Indian subsidiary company which such Indian branch would have been entitled to carry forward and set off under the provisions of section 115JAA of the Act, if the conversion had not taken place.</td>
</tr>
</tbody>
</table>
| Date of conversion                 | The date, which the Reserve Bank of India appoints for the vesting of undertaking of the Indian branch in Indian subsidiary company

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

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

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

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

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4 under paragraph 20(i) of the Framework for setting up of wholly owned subsidiaries by foreign banks in India issued by the Reserve Bank of India vide press release number 2013-2014/936 dated 6th day of November, 2013.
(ii) In such a case, the Assessing Officer is empowered to re-compute the total income of the assessee for the said previous year and make the necessary amendment. This power is notwithstanding anything contained in the Income-tax Act, 1961.

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

(iv) Every notification under issued under this section shall be laid before each House of Parliament.

2.9 WITHHOLDING TAX PROVISIONS FOR NON-RESIDENTS

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

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

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

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

Section 192(6) deals with the provisions of withholding tax in case of salary payable in foreign currency. In case, where salary is payable in foreign currency, the amount of tax deducted is to be calculated after converting the salary payable into Indian currency at the telegraphic transfer buying rate as adopted by State Bank of India on the last day of the month immediately preceding the month in which the salary is due, or is paid in advance or in arrears [Rule 26 read with Rule 115].

Students may note that the Rule 26 and Rule 115 have been given as Annexure – 2 at the end of this material.

(2) Income from units [Section 196B]

The person responsible for making the following payment to an Offshore Fund shall deduct tax @ 10% plus surcharge, wherever applicable, plus health and education cess@4% 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

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(3) Income from foreign currency bonds or shares of Indian company [Section 196C]

The person responsible for making the following payment to a non-resident has to deduct tax @ 10% plus surcharge, wherever applicable, plus health and education cess @ 4% 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.

(4) Income of foreign institutional investors from securities [Section 196D]

(i) The person responsible for making the payment in respect of securities referred to in section 115AD(1)(a) to a Foreign Institutional Investor has to deduct tax @ 20% plus surcharge, wherever applicable, plus health and education cess @ 4% 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 summary of withholding tax provisions relating to non-residents is given below. These provisions are discussed in detail in the following chapters mentioned in Column (4):

<table>
<thead>
<tr>
<th>Section</th>
<th>Nature of payment</th>
<th>Rate of TDS</th>
<th>Chapter</th>
</tr>
</thead>
<tbody>
<tr>
<td>192</td>
<td>Salary</td>
<td>Normal Slab rates</td>
<td>15: Deduction, Collection and Recovery of Tax (Module 3: Part I- Direct Tax Laws)</td>
</tr>
<tr>
<td>192A</td>
<td>Premature withdrawal from EPF, aggregating to ₹ 50,000 or more</td>
<td>10%</td>
<td></td>
</tr>
<tr>
<td>194B</td>
<td>Income by way of winnings from lotteries, crossword puzzles, card games and other games of any sort, where payment to a person &gt; ₹ 10,000</td>
<td>30%</td>
<td></td>
</tr>
<tr>
<td>194BB</td>
<td>Income by way of winnings from horse races, where payment to a person &gt; ₹ 10,000</td>
<td>30%</td>
<td></td>
</tr>
<tr>
<td>194E</td>
<td>Specified payments referred under section 115BBA to non-resident sportsmen/sports</td>
<td>20%</td>
<td></td>
</tr>
</tbody>
</table>

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<table>
<thead>
<tr>
<th>194G</th>
<th>Commission etc. on the sale of lottery tickets, where payment to a person &gt; ₹ 15,000</th>
<th>5%</th>
</tr>
</thead>
<tbody>
<tr>
<td>194LB</td>
<td>Payment of interest on infrastructure debt fund</td>
<td>5%</td>
</tr>
<tr>
<td>194LBA(2)</td>
<td>Distribution any interest income, received or receivable by a business trust from a SPV, to its unit holders.</td>
<td>5%</td>
</tr>
<tr>
<td>194LBA(3)</td>
<td>Distribution of any income received from renting or leasing or letting out any real estate asset directly owned by the business trust, to its unit holders.</td>
<td>At the rates in force</td>
</tr>
<tr>
<td>194LBB</td>
<td>Investment fund paying income to a unit holder [other than income which is exempt under section 10(23FBB)].</td>
<td>12: Assessment of Various Entities (Module 2 Part I Direct Tax Laws)</td>
</tr>
<tr>
<td>194LBC(2)</td>
<td>Income in respect of investment made in a securitisation trust (specified in Explanation to section 115TCA)</td>
<td>15: Deduction, Collection and Recovery of Tax (Module 3 Part I Direct Tax Laws)</td>
</tr>
<tr>
<td>194LC</td>
<td>Payment of interest by an Indian Company or a business trust to a non-corporate non-resident or foreign company - in respect of money borrowed in foreign currency from a source outside India • under a loan agreement between 1.7.2012 and 30.6.2020 or • by way of issue of long term bonds (including long term infrastructure bond) between 1.10.2004 and 30.6.2020 as approved by Central Government or - in respect of money borrowed from source outside India by way of rupee denominated bond before 1.7.2020</td>
<td>5%</td>
</tr>
<tr>
<td>194LD</td>
<td>Payment of interest between 1.6.2013 and 30.6.2020 on rupee denominated bond of an Indian Company or Government securities to a</td>
<td>5%</td>
</tr>
</tbody>
</table>
### Non-Resident Taxation

<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
<th>Rate of Tax</th>
</tr>
</thead>
<tbody>
<tr>
<td>194N</td>
<td>On withdrawal of cash in excess of ₹ 1 crore</td>
<td>2% on amount exceeding ₹ 1 crore</td>
</tr>
<tr>
<td>195</td>
<td>Payment of any other sum to a non-resident</td>
<td>At the rates in force</td>
</tr>
<tr>
<td>196B</td>
<td>Income from units of a mutual fund or UTI purchased in foreign currency (including long term capital gain on transfer of such units) payable to an Offshore Fund</td>
<td>10%</td>
</tr>
<tr>
<td>196C</td>
<td>Income by way of interest on bonds of an Indian company or public sector company sold by the Government and purchased by a non-resident in foreign currency or GDRs referred to in section 115AC (including long term capital gain on transfer of such bonds or GDRs payable to a non-resident)</td>
<td>10%</td>
</tr>
<tr>
<td>196D</td>
<td>Income of foreign Institutional Investors from securities (not being income by way of interest referred to in section 194LD, dividend referred under section 115-O or capital gain arising from such securities)</td>
<td>20%</td>
</tr>
</tbody>
</table>

**Note:** In all the above cases, the rate of tax would be increased by surcharge, wherever applicable, and health and education cess @4%.

### 2.10 Miscellaneous Provisions

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

In a case where the person entitled to the income arising from any business connection in India or from any property in India or through or from any asset or source of income in India or through the transfer of a capital asset situated in India is a non-resident, the tax chargeable thereon, whether in his name or in the name of his agent who is liable as a representative assessee, may be recovered by deduction under any of the provisions of Chapter XVII-B. Further, any arrears of tax may be recovered also in accordance with the provisions of this Act from any assets of the non-resident which are, or may at any time come, within India. These provisions are without prejudice to the provisions of section 161(1) or of section 167.

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(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 is a resident of a country (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) or has any property in that country, forward to the CBDT a certificate drawn up by him under section 222. Thereafter, the CBDT may take such action thereon as it may deem appropriate having regard to the terms of the agreement with such country.

Similarly, the Government of the other country or any authority under that Government may send to the CBDT a certificate of recovery of any tax due under such corresponding law from a person having property in India and the CBDT may forward such certificate to Tax Recovery Officer having jurisdiction over the resident or within whose jurisdiction such property is situated, for recovery of such tax. Tax Recovery Officer can proceed to recover the amount specified in the Certificate by –

(a) attachment and sale of assessee’s movable or immovable property
(b) arrest of the assessee and his detention in prison.
(c) appointing a receiver for the management of assessee’s movable and immovable property.

He shall thereafter remit the sum so recovered to the CBDT.

(3) Submission of statement by a non-resident having liaison office [Section 285]

(i) A non-resident can operate in India through a branch or a liaison office set up after getting the approval of the Reserve Bank of India. Since the branch constitutes a permanent establishment of the non-resident, it has to file its return of income. However, prior to 1.6.2011, there was no such requirement as regards a liaison office since no business activity is allowed to be carried out in India via a liaison office of a non-resident.

(ii) With effect from 1.6.2011, such a non-resident is required to file a statement in the prescribed form [Form No.49C] to the Assessing Officer having jurisdiction, within 60 days from the end of the financial year, providing the details in respect of activities carried out by the liaison office in India during the financial year.

(iii) This requirement has to be complied with by every person, being a non-resident having a liaison office in India set up in accordance with the guidelines issued by the RBI under the Foreign Exchange Management Act, 1999.

(iv) The statement of a particular financial year should be filed on or before 30th May, of the succeeding financial year in electronic form along with digital signature. For example, the statement for F.Y. 2019-20 should be filed on or before 30th May, 2020. Further, the statement is to be verified by a Chartered Accountant or by the Authorized Signatory i.e., the person authorized by the non-resident in this behalf.
Furnishing of information or documents by an Indian Concern [Section 285A]

(i) There shall be a reporting obligation on the Indian concern through or in which the Indian assets are held by a foreign company or entity.

(ii) For the purposes of determination of any income accruing or arising in India under section 9(1)(i), an Indian concern has to furnish, within the prescribed period to the prescribed income-tax authority, the information or documents, in prescribed manner, if -

- any share of, or interest in, a company or an entity registered or incorporated outside India derives, directly or indirectly, its value substantially from the assets located in India, as referred to in Explanation 5 to section 9(1)(i), and

- such company or, entity, holds, directly or indirectly, such assets in India through, or in, the Indian concern.

(iii) The information has to be furnished in Form No.49D electronically within a period of 90 days from the end of the financial year in which the transfer of such share or interest referred to above takes place.

(iv) If any Indian concern fails to furnish the information or documents, the income-tax authority, as may be prescribed under the said section, may direct that such Indian concern shall pay, by way of penalty under section 271GA,—

(a) @2% of the value of the transaction in respect of which such failure has taken place, if such transaction had the effect of directly or indirectly transferring the right of management or control in relation to the Indian concern;

(b) ₹ 5,00,000 in any other case.

Note – Rule 114DB prescribes the time limit and Information or documents to be furnished under section 285A.

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

<table>
<thead>
<tr>
<th>Section</th>
<th>Provision</th>
<th>Chapter</th>
</tr>
</thead>
<tbody>
<tr>
<td>160</td>
<td>Who may be regarded as Representative Assessee?</td>
<td>22: Liability in Special Cases (Module 3 of Part I - Direct Tax Laws)</td>
</tr>
<tr>
<td>161</td>
<td>Liability of Representative Assessee</td>
<td></td>
</tr>
<tr>
<td>162</td>
<td>Rights of representative assessee to recover tax paid</td>
<td></td>
</tr>
<tr>
<td>163</td>
<td>Who may be regarded as agent?</td>
<td></td>
</tr>
</tbody>
</table>

For detailed reading of Rule 114DB of the Income-tax Rules, 1962, students may visit https://www.incometaxindia.gov.in/Pages/default.aspx
Question 1

Peeyush, returned to India on 12th June, 2019 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 2020-21:

(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, 2019.

(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

Peeyush returned to India on 12th June 2019 for permanently residing in India after staying in UK for 20 years. During the P.Y.2019-20, he stays in India for 294 days. Since he has stayed in India for a period of 182 days or more during the previous year 2019-20, he would be a resident in India for the A.Y.2020-21. 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.2019-20 and his stay in India during the seven previous years is less than 730 days. The residential status of Peeyush for A.Y.2020-21 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 Peeyush, after providing deduction of ₹ 1,500. Therefore, ₹18,500 is includible in the income of Peeyush. Income accruing to the minor child outside India (which is also received outside India) is not includible in the income of Peeyush.

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

(iv) Repatriation of sale proceeds of 1000 shares sold in the preceding accounting year, when Peeyush was a non-resident, is not taxable in the A.Y.2020-21 since it is not the income of the P.Y.2019-20.

Consequently, only the income includible under section 64(1A) would form part of the total income of Mr. Peeyush for A.Y.2020-21. 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.2020-21.

Question 2

Mr. David, a citizen of India, serving in the Ministry of External Affairs in India, was transferred to Indian Embassy in Canada on 31.03.2019. He did not visit India any time during the previous year 2019-20. He has received the following income for the Financial Year 2019-20:

<table>
<thead>
<tr>
<th>S.No.</th>
<th>Particulars</th>
<th>₹</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i)</td>
<td>Salary (Computed)</td>
<td>5,00,000</td>
</tr>
<tr>
<td>(ii)</td>
<td>Foreign Allowance</td>
<td>4,00,000</td>
</tr>
<tr>
<td>(iii)</td>
<td>Interest on fixed deposit from bank in India</td>
<td>1,00,000</td>
</tr>
<tr>
<td>(iv)</td>
<td>Income from agriculture in Pakistan</td>
<td>2,00,000</td>
</tr>
<tr>
<td>(v)</td>
<td>Income from house property in Pakistan</td>
<td>2,50,000</td>
</tr>
</tbody>
</table>

Compute his gross total income for Assessment Year 2020-21.

Answer

As per section 6(1), Mr. David is a non-resident for the A.Y. 2020-21, since he was not present in India at any time during the previous year 2019-20.

As per section 5(2), a non-resident is chargeable to tax in India only in respect of following incomes:

(i) Income received or deemed to be received in India; and

(ii) Income accruing or arising or deemed to accrue or arise in India.
In view of the above provisions, income from agriculture in Pakistan and income from house property in Pakistan would not be chargeable to tax in the hands of David, assuming that the same were received in Pakistan.

Income from 'Salaries' payable by the Government to a citizen of India for services rendered outside India is deemed to accrue or arise in India as per section 9(1)(iii). Hence, such income is taxable in the hands of Mr. David, even though he is a non-resident.

However, allowances or perquisites paid or allowed as such outside India by the Government to a citizen of India for rendering service outside India is exempt under section 10(7). Hence, foreign allowance of ₹ 4,00,000 is exempt under section 10(7).

**Gross Total Income of Mr. David for A.Y. 2020-21**

<table>
<thead>
<tr>
<th>Particulars</th>
<th>₹</th>
</tr>
</thead>
<tbody>
<tr>
<td>Salaries</td>
<td>5,00,000</td>
</tr>
<tr>
<td>Income from other sources (Interest on fixed deposit in India)</td>
<td>1,00,000</td>
</tr>
<tr>
<td><strong>Gross Total Income</strong></td>
<td>6,00,000</td>
</tr>
</tbody>
</table>

**Question 3**

Mr. A, a citizen of India, left for USA for the purposes of employment on 1.5.2019. He has not visited India thereafter. Mr. A borrows money from his friend Mr. B, who also left India for employment purpose one week before Mr. A’s departure, to the extent of ₹ 10 lakhs and buys shares in X Ltd., an Indian company. Discuss the taxability of the interest charged @10% in B's hands where the same has been received in New York.

**Answer**

An individual is said to be resident in India in any previous year, if he -

(i) has been in India during that year for a total period of 182 days or more, or

(ii) has been in India during the four years immediately preceding that year for a total period of 365 days or more and has been in India for at least 60 days in that year.

In the case of an Indian citizen leaving India for the purposes of employment outside India during the previous year, the period of stay during the previous year in condition (ii) above, to qualify as a resident, would be 182 days instead of 60 days.

In this case, Mr. A is an Indian citizen who left India for employment outside India on 01.05.2019. Mr. A has been in India only from 1.4.2019 to 01.05.2019 i.e. for 31 days. Since his stay in India during the previous year 2019-20 is only 31 days, he does not satisfy the minimum criterion of 182 days stay in India for being a resident. Hence, his residential status for A.Y. 2020-21 is Non-Resident. Mr. B, who left India one week before A’s departure, is also a non-resident for the same reasons.
Section 9(1)(v) provides that income by way of interest payable by a non-resident in respect of any debt incurred, or moneys borrowed and used, for the purposes of a business or profession carried on by such person in India shall be deemed to accrue or arise in India.

Therefore, interest payable by a non-resident in respect of any debt incurred, or moneys borrowed and used, for the purpose of making or earning any income from any source other than a business or profession carried on by him in India, shall not be deemed to accrue or arise in India. Therefore, interest payable by Mr. A on money borrowed from Mr. B to invest in shares of an Indian company shall not be deemed to accrue or arise in India and hence, is not taxable in India in the hands of Mr. B.

Question 4

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 the Explanation below 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 5

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 25/6/2019, 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 utilised in its business in Mumbai during previous year 2019-20.

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), since the services are utilized for execution of electrical work in India [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 in the hands of Mr. A.

(iv) ₹ 20 lakhs, being the value of debentures issued by an Indian company in consideration of providing technical know-how for use in its business in India, 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 6

Z, an American tourist, comes to India for the first time on June 17, 2019. He leaves India on September 29, 2019. Determine his residential status for the assessment year 2020-21. Does it make any difference if he comes to India on a business trip or if he is an Indian citizen?

Answer

Previous year 2019-20: 105 [14+31+31+29]
Previous year 2018-19: Nil
Previous year 2017-18: Nil
and so on ……

He is non-resident for the assessment year 2020-21 as he does not satisfy any of the basic conditions. It does not make any difference if he comes on a business trip to India.

Further, in this case, it does not make any difference if he is an Indian citizen as far as the answer of non-resident is concerned. However, 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 7

M/s. Global Airlines incorporated as a company in USA operated its flights to India and vice versa during the year 2019-20 (April, 2019 to March, 2020) 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

As per section 44BBA, in case of a non-resident engaged in the business of operation of aircraft, 5% of the following amounts would be deemed to be the profits and gains from such business:

(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

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In the present case, the income chargeable to tax of M/s Global Airlines applying the provisions of section 44BBA are 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</td>
<td>65,00,000</td>
</tr>
<tr>
<td></td>
<td>(1,25,00,000 – 65,00,000)</td>
<td></td>
</tr>
<tr>
<td>Deemed income @5% u/s 44BBA</td>
<td>3,00,000</td>
<td>Nil (since the amount not received in India)</td>
</tr>
<tr>
<td></td>
<td>(60,00,000 × 5%)</td>
<td></td>
</tr>
</tbody>
</table>

**Question 8**

Atlant Italy, a company incorporated in France, was engaged in manufacture, trade and supply equipment and services for GSM Cellular Radio Telephones Systems. It supplied hardware and software to various entities in India. Software licensed by assessee embodied the process which is required to control and manage the specific set of activities involved in the business use of its customers, and also made available to its customers, who used it to carry out their business activities. The Assessing Officer contented that the consideration for supply of software embedded in hardware is 'royalty' under section 9(1)(vi).

Examine the correctness of the action of the Assessing Officer assuming that the software that was loaded on the hardware and embedded in the system does not have any independent existence.

**Answer**

The issue under consideration in this case is whether consideration for supply of software embedded in hardware would tantamount to 'royalty' for attracting deemed accrual of income under section 9(1)(vi).

As per section 9(1)(vi), income by way of royalty payable by a person who is a resident in India would be deemed to accrue or arise in India. However, where it is payable for the transfer of any right or the use of any property or information or for the utilization of services for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India, the amount payable by way royalty would not be deemed to accrue or arise in India, in the hands of non-resident.

For this purpose, 'royalty' includes transfer of all or any right for use or right to use a computer software irrespective of the medium through which such right is transferred.

The facts of the case are similar to the facts in *CIT v. Alcatel Lucent Canada* (2015) 372 ITR 476, wherein the above issue came up before the Delhi High Court. The Court observed that the
software supply is an integral part of GSM mobile telephone system and is used by the cellular operators for providing cellular services to its customers. Where payment is made for hardware in which the software is embedded and the software does not have independent functional existence, no amount could be attributed as ‘royalty’ for software in terms of section 9(1)(vi).

In this case, since the software that was loaded on the hardware and embedded in the system does not have any independent existence, there could not be any independent use of such software. Therefore, the rationale of the Delhi High Court ruling can be applied to the case on hand. Accordingly, the action of the Assessing Officer in treating the consideration for supply of software embedded in hardware as royalty under section 9(1)(vi) is not correct.