CHAPTER 44. TAXATION OF NON-RESIDENTS AND FOREIGN COMPANIES

SECTION 5
Scope of Total Income
As per section 5, incidence of tax on the taxpayer depends on
• his residential status,
• place of accrual or receipt of income.

The ambit of total income of the three classes of assessees would be as follows:
(1) **Resident and ordinarily resident**
The total income of a resident assessee would, under section 5(1), consist of:
(i) Income received or deemed to be received in India during the previous year;
(ii) Income which accrues or arises or is deemed to accrue or arise in India during the previous year; and
(iii) Income which accrues or arises outside India even if it is not received or brought into India during the previous year.

In simpler terms, a resident and ordinarily resident has to pay tax on the total income accrued or deemed to accrue, received or deemed to be received in or outside India.

(2) **Resident but not ordinarily resident**
Under section 5(1), the computation of total income of resident but not ordinarily resident is the same as in the case of resident and ordinarily resident stated above except for the fact that the income accruing or arising to him outside India is not to be included in his total income.

However, where such income is derived from a business controlled from or profession set up in India, then it must be included in his total income even though it accrues or arises outside India.

(3) **Non-resident**
A non-resident's total income under section 5(2) includes:
(i) Income received or deemed to be received in India in the previous year; and
(ii) Income which accrues or arises or is deemed to accrue or arise in India during the previous year.

SECTION 6
Residence in India
The incidence of tax on assessee depends upon his residential status under the Act. For all purposes of Income-tax, taxpayers are classified into three broad categories on the basis of their residential status viz.
(1) Resident and ordinarily resident
(2) Resident but not ordinarily resident
(3) Non-resident
The residential status of an assessee must be ascertained with reference to each previous year. A person who is resident and ordinarily resident in one year may become non-resident or resident but not ordinarily resident in another year or vice versa.

**SECTION 6(1)
Residential Status of Individual**

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

(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 period of 365 days or more and has been in India for at least 60 days in the previous year.

If the individual satisfies any one of the conditions mentioned above, he is a resident. If both the above conditions are not satisfied, the individual is a non-resident.

**Exceptions:**

The following categories of individuals will be treated as residents only if the period of their stay during the relevant previous year amounts to 182 days or more. In other words, even if such persons were in India for 365 days or more during the 4 preceding years and 60 days or more in the relevant previous year, they will not be treated as resident.

(a) Indian citizen, who leaves India in any previous year as a member of the crew of an Indian ship or for purposes of employment outside India, or

(b) Indian citizen or person of Indian origin, who being outside India, comes on a visit to India in any previous year. *(Amended by Finance Act 2020)*

**Explanation**— For the purposes of this clause, in the case of an individual, being a citizen of India and a member of the crew of a foreign bound ship leaving India, the period or periods of stay in India shall, in respect of such voyage, be determined in the manner and subject to such conditions as may be prescribed.

*(Added by Finance Act, 2015)*

**RESIDENT AND ORDINARILY RESIDENT/RESIDENT BUT NOT ORDINARILY RESIDENT**

An individual is said to be a resident and ordinarily resident if he satisfies both the following conditions:

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

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

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

---

**AMENDMENT MADE BY FINANCE ACT 2020:**

*Indian citizen / person of Indian origin visiting India [Expln. 1 (b) to sec. 6(1) and sec. 6(6)(c)]- An individual becomes resident in India if he satisfies any of the following two basic conditions given by section 6(1)-*

---

44.2
(a) if he is in India for at least 182 days during the previous year relevant for the assessment year; or
(b) if he is in India for at least 60 days during the relevant previous year and for at least 365 days during 4 years immediately prior to the relevant previous year.

Explanation 1 (b) to section 6(1) provides that an Indian citizen or a person of Indian origin shall be resident if he is in India for 182 days instead of 60 days in basic condition (b) in that year. This provision provides relaxation to India citizens/persons of Indian origin allowing them to visit India for longer duration of 181 days without becoming residents of India, even if their aggregate stay in preceding 4 years is of more than 365 days.

Amendment- The period of 182 days in explanation 1(b) to section 6(1) for an Indian citizen/person of Indian origin (who visits India in the previous year) has been reduced to 120 days. Moreover, sub-clause (c) has been inserted in section 6(6). These two amendments provide that an individual shall be deemed to be resident but not ordinarily resident in India if he satisfies the following 4 conditions—
(a) he is an Indian citizen or a person of Indian origin;
(b) his total income or taxable income (other than the income from foreign sources) exceeds Rs. 15,00,000 during the relevant previous year;
(c) he comes in India on a visit during the relevant previous year, and
(d) he is in India for 120 days (or more but less than 182 days) during the relevant previous year and 365 days (or more) during 4 years immediately preceding the relevant previous year.

Income from foreign sources—“Income from foreign sources” means income which accrues or arises outside India (except income derived from a business controlled in or a profession set up in India).

Person of Indian origin—A person is deemed to be of Indian origin if he, or either of his parents or any of his grand-parents, was born in undivided India.

EXHAUSTIVE QUESTIONS ON ABOVE AMENDMENT:

Question 1:
X is an Indian citizen. Currently, he is in employment with a multinational company and posted in Singapore. During the previous year’s 2019-20 and 2020-21, he comes to India for a visit of 175 days and 145 days respectively. In earlier 4 years, he is in India for more than 1200 days. X wants to know his residential status for the assessment years 2020-21 and 2021-22. His annual income is as follows—

<table>
<thead>
<tr>
<th>Income Description</th>
<th>PY 2019-20 Rs.</th>
<th>PY 2020-21 Rs.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Income from salary, rent, consultancy and interest income earned and received in Singapore (a)</td>
<td>28,00,000</td>
<td>29,00,000</td>
</tr>
<tr>
<td>Income from business (accrued and received outside India, controlled from Singapore) (b)</td>
<td>17,00,000</td>
<td>21,00,000</td>
</tr>
<tr>
<td>Income from another business (accrued and received outside India, controlled from India) (c)</td>
<td>14,00,000</td>
<td>8,00,000</td>
</tr>
<tr>
<td>Interest on bank fixed deposits in India (d)</td>
<td>13,50,000</td>
<td>11,00,000</td>
</tr>
<tr>
<td>Any other income in India or outside India (e)</td>
<td>Nil</td>
<td>Nil</td>
</tr>
<tr>
<td>Life insurance premium paid in India (f)</td>
<td>2,70,000</td>
<td>2,60,000</td>
</tr>
</tbody>
</table>
Would it make any difference, if X is a foreign citizen but his maternal grandfather was born in a village near Karachi in 1946?

**Answer:**

*Explanation 1(b) to section 6(1)* is applicable in the case of an Indian citizen or a person of Indian origin. If grandfather of X was born in undivided India, X is a person of Indian origin (even if he is a foreign citizen). Consequently, in the given case, it does not make any difference whether X is an Indian citizen or a foreign citizen.

**Previous year 2019-20 (i.e., assessment year 2020-21)** – In the previous year 2019-20, X is in India for 175 days. Before the aforesaid amendment, an Indian citizen who comes to India on a visit of less than 182 days, is non-resident in India. Consequently, for the assessment year 2020-21, X is non-resident in India.

**Previous year 2020-21 (assessment year 2021-22)** – In the previous year 2020-21, X is in India for 145 days. Total income of X (other than income from foreign sources) is Rs. 17,50,000 (i.e., Rs. 8,00,000 + Rs. 11,00,000 – deduction under section 80C: Rs. 1,50,000). X satisfies 4 conditions given by *Explanation 1 (b)* to section 6(1) [read with sub-clause (c) of section 6(6)] as follows –

(a) X is an Indian citizen or a person of Indian origin;

(b) total income of X (other than the income from foreign sources) exceeds Rs. 15,00,000 during the relevant previous year;

(c) he comes to India on a visit during the previous year 2020-21, and

(d) he is in India for 175 days (i.e., his Indian visit is for 120 days or more but less than 182 days) during the relevant previous year and 365 days (or more) during 4 years immediately preceding the relevant previous year.

Consequently, for the previous year 2020-21, X is resident but not ordinarily resident in India.

**Question 2:**

In the above example, X informs that he is resident in 8 years out of preceding 10 years. Out of preceding 7 years, X is in India for 1200 days. Moreover, out of earlier 10 years, X is resident in India for 8 years.

**Previous year 2019-20 (i.e., assessment year 2020-21)** – For the previous year 2019-20, X is non-resident in India (as concluded earlier). In the case of non-resident, additional conditions of section 6(6)(a) are not relevant.

**Previous year 2020-21 (assessment year 2021-22)** – For the previous year 2020-21, X is deemed as resident but not ordinarily resident as he satisfies 4 conditions given by *Explanation 1 (b)* to section 6(1) [read with sub-clause (c) of section 6(6)]. Even if he satisfies the 2 additional conditions given by section 6(6)(a), he will be resident but not ordinarily resident in India for the previous year 2020-21.
Question 3:
Suppose in question 1, income of X from bank deposits in India for the previous year 2020-21 is Rs. 8,40,000 (and not Rs. 11,00,000).

For the previous year 2020-21, total income of X (other than income from foreign sources) is Rs. 14,90,000 (i.e., Rs. 8,00,000 + Rs. 8,40,000 – Rs. 1,50,000). As a consequence, X is unable to satisfy 4 conditions given by Explanation 1 (b) to section 6(1) [read with sub-clause (c) of section 6(6)]. X is, therefore, non-resident in India for the previous year 2020-21 (in such a case, an individual can become resident only if he is in India for at least 182 days during the relevant previous year).

Amendment No – 2:

DEEMED TO BE RESIDENT:

Clause (1A) has been inserted in section 6 to provide that an Indian citizen shall be deemed to be resident in India in any previous year, if in that year he is not liable to tax in any other country or territory by reason of his domicile or residence or any other criteria of similar nature. Moreover, sub-clause (d) has been inserted in section 6(6) to provide that in such a case, the individual would be resident but not ordinarily resident. To put it differently, section 6(1A) and 6(6)(d) cumulatively provide the following 3 conditions –

(a) the assessee is an Indian citizen;
(b) his total income (other than the income from foreign sources) exceeds Rs. 15,00,000 during the relevant previous year, and
(c) he is not liable to tax in any other country or territory by reason of his domicile or residence or any other criteria of similar nature.

If these 3 conditions are satisfied, the individual would be resident but not ordinarily resident in India.

Explanation.—For the purposes of this section, the expression "income from foreign sources" means income which accrues or arises outside India (except income derived from a business controlled in or a profession set up in India).

EXHAUSTIVE QUESTIONS ON ABOVE AMENDMENT:

Question 1:
X is an Indian citizen. Currently, he is in employment with an overseas company located in Dubai. During different years, he is in India as follows –

<table>
<thead>
<tr>
<th>Previous year</th>
<th>Presence in India</th>
<th>Previous year</th>
<th>Presence in India</th>
<th>Previous year</th>
<th>Presence in India</th>
</tr>
</thead>
<tbody>
<tr>
<td>2020-21</td>
<td>55 days</td>
<td>2017-18</td>
<td>170 days</td>
<td>2014-15</td>
<td>70 days</td>
</tr>
<tr>
<td>2019-20</td>
<td>190 days</td>
<td>2016-17</td>
<td>200 days</td>
<td>2013-14</td>
<td>71 days</td>
</tr>
<tr>
<td>2018-19</td>
<td>200 days</td>
<td>2015-16</td>
<td>250 days</td>
<td>2012-13</td>
<td>72 days</td>
</tr>
</tbody>
</table>

For the previous year 2020-21, X is not taxable in Dubai or in any other country / territory by reason of his domicile or residence. Income of X (other than income from foreign sources) for the previous year 2020-21 is Rs. 16,00,000 (Situation 1) or Rs. 14,00,000 (Situation 2). X wants to know his residential status for the previous year 2020-21.
**Situation 1** – X is in India for 55 days during the previous year 2020-21. He is unable to satisfy any of the basic condition given by section 6(1). However, he satisfies the following 3 conditions given by section 6(1A) –

(a) X is an Indian citizen;
(b) his total income (other than the income from foreign sources) exceeds Rs. 15,00,000 during the relevant previous year, **and**
(c) he is not liable to tax in any other country or territory by reason of his domicile or residence or any other criteria of similar nature.

He is deemed to be resident in India as per section 6(1A). However, he is resident but not ordinarily resident in India by virtue of section 6(6)(d). The data given in the table pinpoints that X is resident in India for 5 years out of preceding 10 years and he is in India for 1151 days out of preceding 7 years. He satisfies the two conditions of section 6(6)(a). However, the additional conditions of section 6(6)(a) are not relevant when a person is deemed to be resident in India within the parameters of section 6(1A).

**Situation 2** – X does not satisfy conditions of section 6(1A). Moreover, he does not satisfy conditions of section 6(1). Consequently, he is non-resident in India for the previous year 2020-21.

**Question 2:**
In the above example in **Situation 1**, X is a foreign citizen, but his mother was born in undivided India in 1945.

X is a foreign citizen, but he is a person of Indian origin. In the case of foreign citizen, section 6(1A) is not applicable. Moreover, he is unable to satisfy any of the basic condition given by section 6(1) for the previous year 2020-21. Consequently, X is non-resident in India for the previous year 2020-21.

**Question 3:**
The following individuals want to ascertain their residential status for the assessment year 2021-22 – (* or more)

<table>
<thead>
<tr>
<th>X</th>
<th>Y</th>
<th>Z</th>
<th>A</th>
<th>B</th>
<th>C</th>
<th>D</th>
<th>E</th>
</tr>
</thead>
<tbody>
<tr>
<td>Is he Indian citizen</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Is he person of Indian origin</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Whether his total income (other than income from foreign sources) is Rs. 15,00,000 or more</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Is he liable to tax in any other country / territory by reason of his domicile or residence or any other criteria of similar nature</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Presence in India during the Previous year 2020-21 (in no. of days)</td>
<td>3</td>
<td>3</td>
<td>3</td>
<td>3</td>
<td>123</td>
<td>182</td>
<td>182</td>
</tr>
<tr>
<td>Presence in India during earlier 4 years (in no. of days)</td>
<td>400</td>
<td>400</td>
<td>400</td>
<td>400</td>
<td>250</td>
<td>250</td>
<td>365</td>
</tr>
<tr>
<td>For how many years, he is resident in India out of earlier 10 years (in no. of years)</td>
<td>2*</td>
<td>2*</td>
<td>2*</td>
<td>2*</td>
<td>2*</td>
<td>2*</td>
<td>2*</td>
</tr>
<tr>
<td>For how many days X was in India during preceding 7 years</td>
<td>730*</td>
<td>730*</td>
<td>730*</td>
<td>730*</td>
<td>730*</td>
<td>730*</td>
<td>730*</td>
</tr>
</tbody>
</table>

---

44.6
Answers:

<table>
<thead>
<tr>
<th>Residential status on the basis of above data for the previous year 2020-21</th>
<th>NOR</th>
<th>NR</th>
<th>NR</th>
<th>NR</th>
<th>NOR</th>
<th>ROR</th>
<th>ROR</th>
<th>ROR</th>
</tr>
</thead>
</table>

**RULE 126**

**Computation of Period of Stay in India in Certain Cases**

1. For the purposes of section 6, in case of an individual, being a citizen of India and a member of the crew of a ship, the period or periods of stay in India shall, in respect of an eligible voyage, not include the period computed in accordance with sub-rule (2).

2. The period referred to in sub-rule (1) shall be the period beginning on the date entered into the Continuous Discharge Certificate in respect of joining the ship by the said individual for the eligible voyage and ending on the date entered into the Continuous Discharge Certificate in respect of signing off by that individual from the ship in respect of such voyage.

**Explanation**: For the purposes of this rule,—

(a) "Continuous Discharge Certificate" shall have the meaning assigned to it under the Merchant Shipping Act, 1958;

(b) "eligible voyage" shall mean a voyage undertaken by a ship engaged in the carriage of passengers or freight in international traffic where—

(i) for the voyage having originated from any port in India, has as its destination any port outside India; and

(ii) for the voyage having originated from any port outside India, has as its destination any port in India

**SECTION 6(2)**

**Residential Status of a HUFs/Firms and AOPs**

1. **RESIDENTIAL STATUS OF HUFS**

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

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

   **Resident and ordinarily resident/Resident but not ordinarily resident**: If the HUF is resident, then the status of the Karta determines whether it is resident and ordinarily resident or resident but not ordinarily resident.

   - If the Karta is resident and ordinarily resident, then the HUF is resident and ordinarily resident.
   - If the Karta is resident but not ordinarily resident, then HUF is resident but not ordinarily resident.

2. **RESIDENTIAL STATUS OF FIRMS AND ASSOCIATION OF PERSONS**

   **Resident**: A firm and an AOP would be resident in India if the control and management of its affairs is situated wholly or partly in India.

   **Non-resident**: Where the control and management of the affairs is situated wholly outside India, the firm and AOP would become a non-resident.
SECTION 6(3)

Residential Status of a Company

A company is said to 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.

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

(Substituted by Finance Act, 2015)

♦ ANALYSIS OF SECTION 6(3) ♦

1. Prior to amendment, a company was said to be resident in India in any previous year, if—
   (i) it is an Indian company; or
   (ii) during that year, the control and management of its affairs is situated wholly in India.

2. Due to the requirement that whole of control and management should be situated in India and that too for whole of the year, a company could easily avoid becoming a resident by simply holding a board meeting outside India. This could facilitate creation of shell companies which are incorporated outside but controlled from India.

3. In view of the above, section 6 of the Income-tax Act has been amended to provide that a person being a company shall be said to 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.

4. Further, the "place of effective management" has been defined 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.

Illustration:

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

CIRCULAR NO.6/2017, DATED 24-1-2017

Guiding Principles for Determination of Place of Effective Management (POEM) of A Company

Section 6(3) of the Income-tax Act, 1961 (the Act), prior to its amendment by the Finance Act, 2015, provided that a company is said to be resident in India in any previous year, if it is an Indian company or if during that year, the control and management of its affairs is situated wholly in India. This allowed tax avoidance opportunities for companies to artificially escape the residential status under these provisions by shifting insignificant or isolated events related with control and management outside India. To address these concerns, the existing provisions of section 6(3) of the Act were amended vide Finance Act, 2015, with effect from 1st April, 2016 to provide that a company is said to 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.

2. "Place of effective management" is defined in the Act 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.

3. The Finance Act, 2016 has changed the effectivity of the said amendment to section 6(3) of the Act. Therefore, the amended provision would now be effective from 1st April 2017 and will apply to Assessment Year 2017-18 and subsequent assessment years.

4. '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 guiding principles to be followed for determination of POEM are enumerated in the following paragraphs.

5. For the purposes of these guidelines, —

(a) A company shall be said to be engaged in "active business outside India" if the passive income is not more than 50% of its total income; and
   (i) less than 50% of its total assets are situated in India; and
   (ii) less than 50% of total number of employees are situated in India or are resident in India; and
   (iii) the payroll expenses incurred on such employees is less than 50% of its total payroll expenditure.
Explanation: For the aforesaid purpose, —

(A) the income shall be, —
   (a) as computed for tax purpose in accordance with the laws of the country of incorporation; or
   (b) as per books of account, where the laws of the country of incorporation does not require such a computation.

(B) the value of assets, —
   (a) In case of an individually depreciable asset, shall be the average of its value for tax purposes in the country of incorporation at the beginning and at end of the previous year; and
   (b) In case of pool of a fixed asset being treated as a block for depreciation, shall be 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;
   (c) In case of any other asset, shall be its value as per books of account;

(C) the number of employees shall be 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;

(D) the term "pay roll" shall include the cost of salaries, wages, bonus and all other employee compensation including related pension and social costs borne by the employer.

(b) "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;

(c) "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 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.

(d) "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).
6. 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. 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.

7. The place of effective management in case of a company engaged in active business outside India shall be presumed to be outside India if the majority meetings of the board of directors of the company are held outside India.

7.1 However, if on the basis of facts and circumstances it is established that the Board of directors of the company are standing aside and not exercising their powers of management and such powers are being exercised by either the holding company or any other person (s) resident in India, then the place of effective management 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.

7.2 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.

8. In cases of companies other than those that are engaged in active business outside India referred to in para 7, the determination of POEM would be a two stage process, namely:—

(i) First stage would be identification or ascertaining the person or persons who actually make the key management and commercial decision for conduct of the company's business as a whole.

(ii) Second stage would be determination of place where these decisions are in fact being made.

8.1 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.

8.2 Some of the guiding principles which may be taken into account for determining the POEM are as follows:
(a) The location where a company's Board regularly meets and makes decisions may be the company's place of effective management 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 of 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.

(b) 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) 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.

(d) 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) 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) 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) 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.

8.3 If the above factors do not lead to clear identification of POEM then the following secondary factors can be considered:
(i) Place where main and substantial activity of the company is carried out; or
(ii) Place where the accounting records of the company are kept.

9. 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.

10. 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

11. 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.

11.1 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.

CIRCULAR NO.8/2017, DATED 23-2-2017
Clarification for Determination of Place of Effective Management (POEM) of A Company, Other Than an Indian Company
It is clarified that, POEM Guidelines given in Circular No. 6/ 2017, shall not apply to a company having turnover or gross receipts of Rs. 50 crores or less in a financial year.

CIRCULAR NO.25/2017, DATED 23-10-2017
Clarification Related to Guidelines for Establishing Place of Effective Management (POEM) In India
The concept of 'Place of Effective Management' (POEM) for deciding residency status of a company, other than an Indian company, was introduced in the Income-tax Act, 1961 (the Act) which has become effective from 1st April, 2017, i.e., Assessment Year 2017-18 onwards.

2. Guiding Principles for determination of POEM of a company were issued on 24th January, 2017 vide Circular No. 06 of 2017. Further, vide Circular No 08 of 2017 dated 23rd February, 2017, it has been clarified that the POEM provisions shall not apply to a company having turnover or gross receipts of Rs. 50 crore or less in a financial year.

3. Representations have been received from the stakeholders wherein concerns have been raised that as per the existing guidelines, POEM may be triggered in cases of certain multinational companies with regional headquarter structure merely on the ground that certain employees having multi-country responsibility or oversight over the operations in other countries of the region are working from India, and consequently, their income from operations outside India may be taxed in India.

4. In this regard, it may be mentioned that Para 7 of the guidelines provides that the place of effective management in case of a company engaged in active business outside India (ABOI) shall be presumed to be outside India if the majority meetings of the board of directors (BOD) of the company are held outside India.
4.1 However, Para 7.1 of the guidelines provides that if on the basis of facts and circumstances it is established that the Board of directors of the company are standing aside and not exercising their powers of management and such powers are being exercised by either the holding company or any other person(s) resident in India, then the POEM shall be considered to be in India.

4.2 It has also been provided that for this purpose, merely because the 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.

5. In view of the above, it is clarified 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.

6. It may be mentioned 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.

♦ ANALYSIS OF CBDT CIRCULARS ♦

CLAUSE (ii) of section 6(3), [i.e. a company other than Indian Company shall be resident in India in any previous year if its Place of Effective Management in that year is in India] shall not apply to a company having turnover or gross receipts of Rs. 50 crores or less in a Financial year. Therefore, the guidelines for determining POEM as given in circular dated 24.01.2017 shall apply to a company having turnover or gross receipts exceeding Rs. 50 crores in the financial year.

1. A company is said to be engaged in "ACTIVE BUSINESS OUTSIDE INDIA" and hence its POEM is outside India

<table>
<thead>
<tr>
<th>If it satisfies all the following conditions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Passive income is</td>
</tr>
</tbody>
</table>

Note 1: Income to be computed as per tax laws of the country where such company is incorporated. Otherwise as per books of account if tax laws of that country does not require computation.
Note 2: The value of assets shall be
(a) Depreciable assets - Average of its value for tax purposes at the beginning and end of Previous Year.
(b) Other assets - Value as per books of account

Note 3: Number of Employees shall be average of number of employees at the beginning and end of the previous year. Employees shall include persons who are not directly employed but performs functions similar to employees e.g. contractual persons.

Note 4: "Payroll" includes cost of salaries, wages, bonus plus employee's compensation including pension and social costs borne by employer.

Note 5: Passive income shall be aggregate of
(i) Income from 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 and rental income whether derived from associated or non-associated enterprises.

However, in case of Money Lending Business Interest Income is not Passive Income.

However, if it is established that Board of Directors are standing aside and not exercising their powers of management and such powers of management are exercised by holding company or any other person resident in India, then POEM SHALL BE CONSIDERED 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 Payroll 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 company standing aside.

Example 1: Esprit GmbH., incorporated in Germany, is a sourcing entity, for an Indian Company, Astra Ltd., and is 100% subsidiary of Indian company. The warehouses and stocks in them are the only assets of the German company and are located in Germany. All the employees of the company are also in Germany. 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 Esprit GmbH satisfies the first requirement of the test of active business outside India. Since, no assets or employees of Esprit GmbH are in India, the other requirements of the test are also satisfied. Therefore, company is engaged in active business outside India. If majority of Board meetings are held outside India, then POEM of Esprit GmbH is outside India.

**Example 2:** The other facts remain same as that in Example 1 with the variation that Esprit GmbH has a total of 50 employees. 47 employees, managing the warehouse, storekeeping and accounts of the company, are located in Germany. 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 Rs. 5 crore. The annual payroll expenditure in respect of MD, CEO and sales head is of Rs. 3 crore.

**Interpretation:** Although, the first limb of active business test is satisfied by Esprit GmbH 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 employee's resident in India exceeds 50% of the total payroll expenditure. Therefore, Esprit GmbH is not engaged in active business outside India. Hence, POEM of Esprit GmbH is in India.

**Example 3:** The basic facts are same as in Example 1. Further facts are that all the directors of the Esprit GmbH 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 Germany and one in Paris.

**Interpretation:** The Esprit GmbH 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 Esprit GmbH 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 Esprit GmbH's senior management team signs all the contracts, for all the contracts above Rs. 10 lakh the Esprit GmbH must submit its recommendation to Astra Ltd. and Astra Ltd. 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 Rs. 10 lakh and over past years also the same trend in respect of value contribution of contracts above Rs. 10 lakh is seen.

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

## 2. COMPANIES OTHER THAN THE COMPANIES ENGAGED IN ACTIVE BUSINESS OUTSIDE INDIA

<table>
<thead>
<tr>
<th>First Stage</th>
<th>Second Stage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Identify the persons who actually make key management and commercial decisions for conduct of company's business as a whole.</td>
<td>Determination of place where the decisions are in fact being made. Place where management decisions are taken would be more, important than the place where such decisions are implemented.</td>
</tr>
</tbody>
</table>
GUIDING PRINCIPLES

GUIDING FACTOR I: Location Where Board Meetings are held

The location where a company's Board regularly meets and makes decisions may be the company's place of effective management 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.

Note 1: 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.

For example, a foreign company has head office in Mumbai and if factory is in Malaysia, BOD meets in Malaysia, then Malaysia is POEM. However, if BoD meets in Paris, then POEM is not Paris.

Note 2: 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.

GUIDING FACTOR II: Board Delegating Authorities to Committees

If BOD has delegated some or all of its major authorities to one or more committees like executive committee, consisting of senior management, the POEM shall be at the place where

- Members of executive committee are based and
- Where committee develops and formulate key decisions for formal approval by Board

For example, a foreign company has head office in London. Board of Directors meetings are held in London. But BOD has delegated major powers to a committee in Mumbai and members of this committee are based in Mumbai. The BOD formally approves decisions of committee.

Now POEM shall be in Mumbai, i.e. India

GUIDING FACTOR III: Location of Head Office

"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;

Location of Head Office is very important in determining POEM. Head office represents the place where key decisions are taken.
If company's head office, i.e. the place where senior management and their support staff are based, is in one place and that location is held out to public as principal place of business, then POEM is at the place where Head Office is located.

**GUIDING FACTOR IV: Residence of Directors and Other Key Management Persons**

In today's modern world, physical presence is not required to take a decision. The decisions may be taken by Video-conferencing, Skype, and use of technology without person being physically present. Therefore, the place where directors and key management persons resides will be a determinative factor for POEM.

**GUIDING FACTOR V: Circular Resolutions**

If decisions are taken by circular resolution, then it should be determined that which persons have the authority to pass Circular Resolution. The place of location of these persons will be determinative of POEM.

**GUIDING FACTOR VI: Location of strategic shareholders**

Normally, the decisions like dissolution, liquidation, sale of major part of undertaking, etc., are taken by shareholders. These decisions are for existence of company and do not relate to management of company. Therefore, shareholders location is not determinative of POEM. But if shareholders through a shareholder's agreement takes indirectly the management of a company, for example,

- Any contract above 10,00,000 to be approved by shareholders
- Any payment above 5,00,000 to be approved by shareholders
- In the above case, the management is in fact in hands of shareholder.

Therefore, the location of shareholders will determine the POEM.

**OTHER GUIDING FACTORS:**

If the above factors do not lead to clear identification of POEM, then the following secondary factors can be considered:

(i) Place where main and substantial activity of the company is carried out; or
(ii) 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 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.

SECTION 115JH

Foreign Company Said to Be Resident in India (Inserted by Finance Act, 2016)

(1) Where a foreign company is said to be resident in India in any previous year and such foreign company has not been resident in India in any of the previous years preceding the said previous year, then, notwithstanding anything contained in this Act and subject to the conditions as may be notified by the Central Government in this behalf, the provisions of this Act relating to the computation of total income, treatment of unabsorbed depreciation, set off or carry forward and set off of losses, collection and recovery and special provisions relating to avoidance of tax shall apply with such exceptions, modifications and adaptations as may be specified in that notification for the said previous year:

Provided that where the determination regarding foreign company to be resident in India has been made in the assessment proceedings relevant to any previous year, then, the provisions of this sub-section shall also apply in respect of any other previous year, succeeding such 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.

(2) Where, in a previous year, any benefit, exemption or relief has been claimed and granted to the foreign company in accordance with the provisions of sub-section (1), and, subsequently, there is failure to comply with any of the conditions specified in the notification issued under sub-section (1), then,—

(i) such benefit, exemption or relief shall be deemed to have been wrongly allowed;
(ii) the Assessing Officer may, notwithstanding anything contained in this Act, 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 referred to in sub-section (1) did not apply; and

(iii) the provisions of section 154 shall, so far as may be, apply thereto and the period of four years specified in sub-section (7) of that section being reckoned from the end of the previous year in which the failure to comply with the condition referred to in sub-section (1) takes place.

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

Notification of exceptions, modifications and adaptations under Section 115JH for applicability of the provisions of the Income-tax Act on a foreign company said to be resident in India on account of PoEM [Notification No. 29/2018, dated 22-06-2018]

With effect from 1.4.2017, Chapter XII-BC consisting of Section 115JH has been inserted by the Finance Act, 2016 to provide that where a foreign company is said to be resident in India in any previous year on account of Place of Effective Management (PoEM) and such foreign company has not been resident in India in any of the previous years preceding the said previous year, then, notwithstanding anything contained in this Act and subject to the conditions as may be notified by the Central Government in this behalf, the provisions of this Act relating to the computation of total income, treatment of unabsorbed depreciation, set off or carry forward and set off of losses, collection and recovery and special provisions relating to avoidance of tax shall apply with such exceptions, modifications and adaptations as may be specified in that notification for the said previous year.

Accordingly, the Central Government has, vide this Notification, specified the exceptions, modifications and adaptations 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.

<table>
<thead>
<tr>
<th>Particulars</th>
<th>Provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Determination of opening WDV</td>
<td>If the foreign company is assessed to tax in the foreign jurisdiction. Where depreciation is required to be taken into account for the purpose of computation of its taxable income, the WDV of the depreciable asset as per the tax record in the foreign country on the 1st day of the previous year shall be adopted as the opening WDV for the said previous year. Where WDV is not available as per tax records, the WDV shall be calculated assuming that the asset was installed, utilised and the depreciation was 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>
</tr>
<tr>
<td><strong>Brought forward loss and unabsorbed depreciation</strong></td>
<td><strong>If the foreign company is not assessed to tax in the foreign jurisdiction</strong></td>
</tr>
<tr>
<td>-------------------------------------------------</td>
<td>-------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>WDV of the depreciable asset as appearing in the books of account as on the 1st day of the previous year maintained in accordance with the laws of that foreign jurisdiction shall be adopted as the opening WDV for the said previous year.</strong></td>
<td><strong>If the foreign company is not assessed to tax in the foreign jurisdiction</strong></td>
</tr>
<tr>
<td><strong>Brought forward loss and unabsorbed depreciation as per the tax record shall be determined year wise on the 1st day of the said previous year.</strong></td>
<td><strong>If the foreign company is not assessed to tax in the foreign jurisdiction</strong></td>
</tr>
<tr>
<td><strong>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.</strong></td>
<td><strong>Other provisions</strong></td>
</tr>
<tr>
<td><strong>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.</strong></td>
<td><strong>Period of profit and loss account and balance sheet in cases where accounting year of foreign company does not end on 31st March</strong></td>
</tr>
<tr>
<td><strong>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.</strong></td>
<td><strong>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.</strong></td>
</tr>
<tr>
<td><strong>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.</strong></td>
<td><strong>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.</strong></td>
</tr>
<tr>
<td><strong>Examples:</strong></td>
<td><strong>Examples:</strong></td>
</tr>
</tbody>
</table>
| **Example 1:** If the accounting year of the foreign company is a calendar year and the company becomes resident in India during P.Y. 2018-19 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, 2018 to 31st March, 2018. It is also
required to prepare profit and loss account and balance sheet for the period 1st April, 2018 to 31st March, 2019.

For the purpose of carry forward of loss and unabsorbed depreciation in this case, since the period 1st January, 2018 to 31st March, 2018 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, 2017 to 31st March, 2018 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. 2018-19 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, 2017 to 31st March, 2018. It is also required to prepare profit and loss account and balance sheet for the period 1st April, 2018 to 31st March, 2019.

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 4 at the end of this material]. |
| Applicability of the notification where foreign company becomes | 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
Clarification Regarding Liability to Income-Tax in India For a Non-Resident Seafarer Receiving Remuneration in NRE (Non-Resident External) Account Maintained with An Indian Bank

Representations have been received in the Board that income by way of salary, received by non-resident seafarers, for services rendered outside India on-board foreign ships, are being subjected to tax in India for the reason that the salary has been received by the seafarer into the NRE bank account maintained in India by the seafarer.

1. The matter has been examined in the Board Section 5(2)(a) of the Income-tax Act provides that only such income of a non-resident shall be subjected to tax in India that is either received or is deemed to be received in India. It is hereby clarified that salary accrued to a non-resident seafarer for services rendered outside India on a foreign going ship (with Indian flag or foreign flag) shall not be included in the total income merely because the said salary has been credited in the NRE account maintained with an Indian bank by the seafarer.
**DEFINITIONS:**

- Foreign company means a company which is not a domestic company.
- Domestic company means an Indian company or any other company which, in respect of its income liable to tax under this Act, has made prescribed arrangements for the declaration and payment, within India, of dividends payable out of such income.

**Note:** Refer Summary to understand when Interest, Royalty & Fees for Technical Services is accrued in India as per sec 9.

**EXPLANATION TO SECTION 9: INCOME DEEMED TO ACCRUE OR ARISE IN INDIA**

For the removal of doubts, it is hereby declared that for the purposes of this section, income of a non-resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vii) of sub-section (1) and 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.

*(Inserted by Finance Act, 2010 w.r.e.f. 1.6.1976)*

**MEMORANDUM EXPLAINING FINANCE BILL, 2010**

**INCOME DEEMED TO ACCRUE OR ARISE IN INDIA TO A NON-RESIDENT**

Section 9 provides for situations where income is deemed to accrue or arise in India. Vide Finance Act, 1976, a source rule was provided in section 9 through insertion of clauses (v), (vi) and (vii) in sub-section (1) for income by way of interest, royalty or fees for technical services respectively. It was provided, inter alia, that in case of payments as mentioned under these clauses, income would be deemed to accrue or arise in India to the non-resident under the circumstances specified therein.

The intention of introducing the source rule was to bring to tax interest, royalty and fees for technical services, by creating a legal fiction in section 9, even in cases where services are provided outside India as long as they are utilized in India. The source rule, therefore, means that the situs of the rendering of services is not relevant. It is the situs of the payer and the situs of the utilization of services which will determine the taxability of such services in India.

In order to remove any doubt about the legislative intent of the aforesaid source rule, it is proposed to add Explanation to section 9 to specifically state that the income of a non-resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vii) of sub-section (1) of section 9 and shall be included in his total income, whether or not:

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

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

**ANALYSIS**

Royalty and fees for technical services paid to a non-resident / foreign company for acquiring know-how shall be taxable in India in hands of Non-resident / Foreign Company if the know-how has to be utilized in India. It is irrespective whether

- know-how is delivered outside India; or
- payment is made to Non-resident/ Foreign Company outside India; or
- non-resident / foreign company has a place of business in India/ residence in India/
- business connection in India or not; or
- know-how is made available in India or outside India.

**WHAT IS RELEVANT IS THAT KNOW-HOW SHOULD BE UTILISED IN INDIA** and in that case the royalty / fees for technical services paid to Non-Resident/ foreign company is taxable in India in hands of Non-resident / Foreign Company.

**DETERMINATION OF TAX IN CERTAIN SPECIAL CASES**

**SECTION 115A: TAX ON INTEREST IN CASE OF NON-RESIDENTS & FOREIGN COMPANIES**

<table>
<thead>
<tr>
<th>Where the total income of a foreign company OR A NON-RESIDENT includes any income by way of</th>
<th>Applicable Rate of Tax</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Interest received from Government or an Indian concern on moneys borrowed by the Government/ Indian concern in foreign currency, other than referred below.</td>
<td>20% of such interest</td>
</tr>
<tr>
<td>(2) Interest referred to in section 194LB received from an infrastructure debt fund referred to in section 10(47) on money borrowed by infrastructure debt fund.</td>
<td>5% of such interest</td>
</tr>
<tr>
<td>(3) Interest referred to in section 194LC received from an Indian company,— (i) in respect of monies borrowed by it at any time on or after the 1st day of July, 2012 but before the 1st day of July, 2023 in foreign currency, from a source outside India,— (a) under a loan agreement; or (b) by way of issue of long-term bonds; or as approved by the Central Government in this behalf; (c) by way of issue of RDB from a source outside India before 1st July 2023; (Also Refer FA 2019 Amendment) However, the rate of TDS shall be four per cent on the interest paid/credited to a non-resident, in respect of monies borrowed in foreign currency from a source outside India, by way of issue of any long term bond or RDB on or after 1st April, 2020 but before 1st July, 2023 and which is listed only on a recognised stock exchange located in any IFSC. (Added by Finance Act 2020) and (ii) to the extent to which such interest does not exceed the amount of interest calculated at the rate approved by the Central Government in this behalf, having regard to the terms of the loan or the bond and its repayment.</td>
<td>4% of such interest</td>
</tr>
<tr>
<td>(4) Interest referred to in section 194LD received by Foreign Institutional Investor or Qualified Foreign Investor from an Indian company or Indian Government where such interest is payable on or after 1-6-2013 but before 1-7-2020 on investment made by Foreign Institutional Investor or Qualified Foreign Investor in: (a) Rupee denominated bond of an Indian Company; or (b) Government security. Amendment made by Finance Act 2020: The concessional rate of TDS of five per cent under the said section shall also apply on the interest payable, on or after 1st April, 2020 but before 1st July, 2023, to a FII or QFI in respect of the investment made in municipal debt security.</td>
<td>5% of such interest</td>
</tr>
</tbody>
</table>
Provided that the rate of interest in respect of bond referred to in (a) shall not exceed the rate notified by the Central Government.

| (5) Dividends | 20% of such interest |
| (6) Distributed income in the nature of interest from SPV received from Business Trust. | 5%/10% of such interest |

**AMENDMENT MADE BY FINANCE ACT (NO.2) 2019:**

Exemption of interest income of a non-resident arising from borrowings by way of issue of Rupee Denominated Bonds referred to under section 194LC (Sec 10(4C))

The existing provisions of section 194LC of the Act provide that the interest income payable to a non-resident by a specified company on borrowings made by it in foreign currency from sources outside India under a loan agreement or by way of issue of any long-term bond including long-term infrastructure bond, or rupee denominated bond shall be eligible for TDS at a concessional rate of five per cent.

In order to incentivise low cost foreign borrowings through Off-shore Rupee Denominated Bond, the press release dated 17th September, 2018, inter alia, announced that interest payable by an Indian company or a business trust to a non-resident, including a foreign company, in respect of rupee denominated bond issued outside India during the period from September 17, 2018 to March 31, 2019 shall be exempt from tax. Consequently, no tax was required to be deducted on the payment of interest in respect of the said bond. The exemption announced through the said press release is proposed to be incorporated in the law by amending section 10 of the Act so as to provide exemption to income payable by way of interest to a non-resident by the specified company in respect of monies borrowed from a source outside India by way of issue of rupee denominated bond, as referred to in section 194LC, during the period beginning from the 17th day of September, 2018 and ending on the 31st day of March, 2019.

This amendment will take effect from 1st April, 2019 and will, accordingly, apply in relation to the assessment year 2019-20 and subsequent assessment years.

**AMENDMENT MADE BY FINANCE ACT (NO.2) 2019- Sec 10(15)**

With a view to facilitate external borrowing by the units located in IFSC, it is proposed to amend the section 10 of the Act so as to provide that any income by way of interest payable to a non-resident by a unit located in IFSC in respect of monies borrowed by it on or after 1st day of September, 2019, shall be exempt.

This amendment will take effect from 1st April, 2020 and will, accordingly, apply in relation to the assessment year 2020-21 and subsequent assessment years.

**KEY NOTES:**

1. Special rate of tax is applicable on the above-mentioned incomes only. Balance income of the assessee will be chargeable to tax at normal rates applicable to assessee.
2. **No deduction in respect of any expenditure** or allowance shall be allowed to the assessee under sections 28 to 44C and section 57 in computing the above income.
3. Deduction under Chapter VI-A is not available on the above-mentioned income. Therefore, if gross total income of the assessee consists of above income only, then no deduction shall be allowed to him/it under chapter VI-A. However, if other incomes are also included in the gross total income, the deduction under Chapter VI-A is limited to other incomes only.
4. It shall not be necessary for the assessee to furnish a return of income under section 139(1) if the following conditions are satisfied:
(a) The total income consists of only the interest/Dividend income referred above; and
(b) the TDS on such income has been deducted under the provisions of Chapter XVII-B of the Act at the rates which are not lower than the prescribed rates under sub-section (1) of section 115A.

5. The provisions of Chapter VI, i.e., Set-off, Carry forward and set off of losses, are applicable. Therefore, the losses of the current year as well as brought forward losses can be set off against the income referred to in section 115A, subject to the provisions of Chapter VI.

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

---

AMENDMENT MADE BY FINANCE ACT(NO.2) 2019:

However, deduction under Chapter VIA shall be available to a unit located under IFSC as mentioned in Sec 80LA.

---

SECTION 115A: TAX ON ROYALTY AND TECHNICAL SERVICES FEE IN CASE OF NONRESIDENTS & FOREIGN COMPANIES

Where the total income of a foreign company OR A NON-RESIDENT includes any income by way of royalty or fees for technical services OTHER THAN THE INCOME REFERRED TO IN SECTION 44DA.

<table>
<thead>
<tr>
<th>Where the total income</th>
<th>Applicable Rate of Tax</th>
</tr>
</thead>
<tbody>
<tr>
<td>(A) received from the Government in pursuance of an agreement made by the non-resident/ foreign company with the Government, or</td>
<td>10% of such royalty or fee for technical services. However, if DTAA provides for a rate lower than 10%, then the provisions of DTAA or section 115A, whichever are more beneficial to the assessee shall apply i.e., the lower rate of DTAA shall apply instead of 10%.</td>
</tr>
<tr>
<td>(B) 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,</td>
<td></td>
</tr>
</tbody>
</table>

KEY NOTES:

1. Special rate of tax is applicable on the above mentioned incomes only. Balance income of the assessee will be chargeable to tax at normal rates applicable to assessee.
2. No approval of Central Government is required in case of an agreement referred to in (B) above if the agreement relates to a matter included in the industrial policy, for the time being in force, of the Government of India and the agreement is in accordance with that policy.
3. No deduction in respect of any expenditure or allowance shall be allowed to the assessee under section 28 to 44C and section 57 in computing the incomes at (A) and (B) above.
4. The provisions of Chapter VI, i.e., Set-off, Carry forward and set off of losses, are applicable. Therefore, the losses of the current year as well as brought forward losses can be set off against the incomes referred to in (A) and (B) above, subject to the provisions of Chapter VI.
5. The unabsorbed depreciation, current year as well as brought forward, of any business cannot be set off against the incomes referred to in (A) and (B) above, since the set off and carry forward of depreciation is governed by section 32.

6. Deductions under Chapter VI-A, if any, are available in respect of the incomes referred to in (A) and (B) above.

7. If the total income of Non-resident/Foreign Company consists of only royalty/fees for technical services and TDS has been deducted, then also there is an obligation to file ROI in India. (Amended by Finance Act 2020)

Now w.e.f 01.04.2020 the NR/Foreign Company is not required to file ROI if:
(a) The total income consists of only the Royalty/FTS income referred above; and
(b) the TDS on such income has been deducted under the provisions of Chapter XVII-B of the Act at the rates which are not lower than the prescribed rates under sub-section (1) of section 115A.

8. The definition of "fees for technical services" and "royalty" shall be same as given in section 9 which is reproduced below:

(a) "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but 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".

(b) "royalty" means consideration (including any lump sum 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 a 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;
   (iva) the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB;
   (v) the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with radio broadcasting, or
   (vi) the rendering of any services in connection with the activities referred to in (i) to (v). (DO NOT TRY TO BYHEART)

The Finance Act, 2012 has added following three Explanations to the definition of Royalty under section 9:

Explanation 4.—For the removal of doubts, it is hereby clarified that the 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 5.—For the removal of doubts, it is hereby clarified that the 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;
Explanation 6.—For the removal of doubts, it is hereby clarified that the expression "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.

ANALYSIS OF AMENDMENTS MADE BY FINANCE ACT. 2012
A. Explanation 4 to section 9 added by Finance Act, 2012 clarifies that payment received for transfer of:
- All or any right to use a computer software
- Including granting of a license for computer software
- is royalty.

Therefore, if a resident imports a software from abroad/get a license to use the software from abroad, then the payment received by foreigner shall be treated as royalty. Since the software is to be used in India, the royalty shall be taxable in hands of foreigner in India and the Indian making the payment shall deduct TDS under section 195 @ 10% as given in section 115A. [If rate as per DTAA is lower, TDS will be on such lower rate]

For example, Reliance imports software of Rs 10 lakhs from Microsoft U.S.A. Reliance has to deduct TDS @ 10% under section 195. [If rate as per DTAA is lower, TDS will be on such lower rate]

TAX TREATMENT IN HANDS OF PAYER OF ROYALTY
Section 40(a)(i) and section 40 (a)(ia) provides that deduction for any expenditure by way of royalty paid to non-resident and resident respectively, shall be allowed if TDS is deducted/paid as per the conditions specified therein.

Section 40(a)(i) and 40(a)(ia) provide that royalty shall have the same meaning as given in section 9. Now after the amendment by Finance Act, 2012, royalty includes payment for computer software. Therefore, amount paid for purchase of computer software is royalty and shall be allowed as deduction under section 37(1).

Income tax Rules, 1962 provides that computer software will be included in block of assets of computer and will be eligible for 40% depreciation but Income tax Act, 1961 provides that payment made for computer software is royalty. Income Tax Rules cannot override the Income Tax Act. Therefore, after the amendment by Finance Act 2012, amount paid to obtain the computer software will be treated as Revenue Expenditure under section 37(1) subject to section 40(a)(i) and section 40(a)(ia) and shall not be added to block of assets of computers.

B. Explanation 5 to section 9: Indian Banks make use of servers of foreigners for credit card transactions. For any credit card transaction where a swipe is made, the swipe transaction is verified by a server of foreigner which is located outside India. Indian banks make payment to this foreigner for all such swipes. Now, the foreigner argues that this income received by him is not taxable in India, because:
(i) Possession of server is not with Indian bank,
(ii) Server is not used directly by Indian bank,
(iii) The location of server is outside India.

Finance Act, 2012 clarifies the payment made to foreigner shall be treated as royalty even if:
(i) Possession of server is not within India,
(ii) Server is not used directly by Indian bank,
(iii) The location of server is outside India.

Therefore, on such payments, TDS shall be deducted under section 195.

C. **Explanation 6 to section 9:** Indian T.V. channels make use of satellite of foreigner to transmit their programs. Now the payment made to foreigner for transmission of programs by satellite is treated as royalty liable to tax deduction under section 195.

**Illustration 1:** A foreign company furnishes the following data for the previous year ended 31.3.2021

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) Royalty from Indian concerns under an agreement falling in Industrial Policy</td>
<td>Rs 20 lakhs</td>
</tr>
<tr>
<td>Depreciation</td>
<td>Rs 4 lakhs</td>
</tr>
<tr>
<td>Salaries</td>
<td>Rs 2 lakhs</td>
</tr>
<tr>
<td>Other expenditures as per limit laid in sections 28 to 44C</td>
<td>Rs 3 lakhs</td>
</tr>
<tr>
<td>(b) Royalty from Indian concerns under an agreement falling in Industrial Policy</td>
<td>Rs 10 lakhs</td>
</tr>
<tr>
<td>Depreciation</td>
<td>Rs 1 lakhs</td>
</tr>
<tr>
<td>Salaries</td>
<td>Rs 2 lakhs</td>
</tr>
<tr>
<td>Other expenditures as per limit laid in sections 28 to 44C</td>
<td>Rs 4 lakhs</td>
</tr>
<tr>
<td>(c) Collection charges paid on Deposit Certificate on Gold Monetisation</td>
<td>Rs 5 lakhs</td>
</tr>
<tr>
<td>(d) Interest received from Indian concern on moneys lent in Indian currency</td>
<td>Rs 7 lakhs</td>
</tr>
<tr>
<td>Collection charges paid</td>
<td>Rs 80,000</td>
</tr>
<tr>
<td>(e) Interest received from Government on moneys lent in foreign currency</td>
<td>Rs 4 lakhs</td>
</tr>
<tr>
<td>Expenditure on earning the interest</td>
<td>Rs 1 lakhs</td>
</tr>
<tr>
<td>(f) Income from units of Mutual funds purchased in foreign currency</td>
<td>Rs 2 lakhs</td>
</tr>
<tr>
<td>Expenditure on earning the income</td>
<td>Rs 25,000</td>
</tr>
<tr>
<td>(g) Other Business Income Receipts</td>
<td>Rs 25 lakhs</td>
</tr>
<tr>
<td>Expenditure as per sections 28 to 44C:</td>
<td>Rs 10 lakhs</td>
</tr>
<tr>
<td>(h) Short term capital gains</td>
<td>Rs 3 lakhs</td>
</tr>
</tbody>
</table>

Compute the total income of the foreign company and tax payable by it.
Answer: COMPUTATION OF TOTAL INCOME OF FOREIGN CO.

P/G/B/P

Assessment Year 2021-22

(i) Royalty 20 Lakhs
Less: Depreciation, Salaries & Expenses not allowed as per section 115A.
NIL 20 Lakhs

(ii) Royalty 10 Lakhs
Less: Depreciation & Expenses not allowed as per section 115A
NIL 10 Lakhs

(iii) Other Business Receipts 25 Lakhs
Less: Expenditures
10 Lakhs 15 Lakhs
P/G/B/P 45 Lakhs

Income from Other Sources

(i) Interest on Deposit on GMS 5,00,000
Less: Exempt under section 10(15) 5,00,000 NIL

(ii) Interest on money lent in Indian Currency 7,00,000
Less: Expenses (Section 115A does not apply) 80,000 6,20,000

(iii) Interest on money lent in foreign currency 4,00,000
Less: Expenses not allowed as per section 115A NIL 4,00,000

(iv) Units of Mutual Funds purchased in foreign currency 2,00,000
Less: Exempt under section 10(35) 2,00,000 NIL

Income from Other Sources 10,20,000

CAPITAL GAINS

Short Term Capital Gains (Assuming securities transaction tax has been paid) 3,00,000
Total Capital Gains 3,00,000

TOTAL INCOME 58,20,000

COMPUTATION OF TAX PAYABLE

(i) On Royalty of Rs 20,00,000 @ 10% under section 115A 2,00,000
(ii) On Royalty of Rs 10,00,000 @ 10% under section 115A 1,00,000
(iii) Interest on Loan in foreign currency of Rs 4,00,000 @ 20% under section 115A 80,000
(iv) On STCG of 3,00,000 @ 15% under section 111A 45,000
(v) On Rs 21,20,000 @ 40% 8,48,000
Total Tax 12,73,000

Add: 2% Surcharge (Surcharge shall not apply since total income does not exceed Rs 1 crore) NIL
Total tax & Surcharge 12,73,000

Add: 4% Health & Education cess

Total Tax Liability

44.33
Illustration 2: An Indian Company has to pay a royalty of Rs 10,00,000 to foreign company and the applicable tax rate as per section 115A is 10% and as per DTAA is 10%.

Case 1: As per Agreement tax has to be borne by Foreign Company

Indian Company will deduct TDS of 10% (without surcharge and education cess) i.e., Rs 1,00,000 and remit Rs 9,00,000 to foreign company. DTAA or section 115A whichever is beneficial shall apply. Foreign company shall file ROI as under:

| Royalty Income | 10,00,000 |
| Tax as per DTAA @ 10% | 1,00,000 |
| TDS | 1,00,000 |
| Tax payable | NIL |

Case 2: As per Agreement tax has to be borne by Indian Company

Indian Company shall pay following TDS from its own pocket:

$$(\text{Rs} 10,00,000 + \text{TDS}) \times \frac{10}{100} = \text{TDS}$$

TDS = 1,11,111

Foreign Company shall file ROI as under:

| Royalty | Rs 11,11,111 |
| Tax @ 10% | Rs 1,11,111 |
| TDS | Rs 1,11,111 |
| Tax payable/ (Refundable) | NIL |

TAXABILITY OF ROYALTY AND FEES FOR TECHNICAL SERVICES IN HANDS OF FOREIGN COMPANY OR A NON-RESIDENT

Where NON-RESIDENT OR FOREIGN COMPANY has permanent establishment in India or performs professional services through a fixed place of profession situated in India and the right, property or contract in respect of which royalties or fees for technical services are paid is effectively connected with such permanent establishment or fixed place of profession in India

Section 44DA shall apply

Income shall be computed under the head P/ G/ B/ P after allowing all expenses

- No deduction shall be allowed:
  (i) in respect of any expenditure or allowance which is not wholly and exclusively incurred for the business of such permanent establishment or fixed place of profession in India

Where NON-RESIDENT OR FOREIGN COMPANY does not have a permanent establishment in India or does not perform professional services through a fixed place of profession in India

Section 115A shall apply

No expenses shall be allowed in computing such income
(ii) in respect of any amount if any paid by the permanent establishment to its head office or to any of its other offices

**Note:** However, deduction shall be allowed in respect of reimbursement of actual expenses incurred by head office or other offices provided that such expenses are incurred for the permanent establishment in India

- Deduction under chapter VI-A if any shall be allowed
- Such income can result in a loss which shall be set off and carried forward as per Chapter-VI
- Losses of other businesses in India and losses from other activities shall be set off against the incomes referred in section 44DA subject to Chapter VI
- Compulsory maintenance of books of accounts and other documents
- Compulsory audit requirement and report of audit **before specified date u/s 44AB.**
- Tax @ 40% in case of foreign companies (plus 2% or 5% surcharge) plus 4% Health & education cess Tax at normal rates in case of non-resident.

**Illustration:** A foreign company Convergys Incorporation carries on business in India through a branch office located in India. It submits the following information for the year ended 31.03.2021.

1. Royalties received in pursuance of an agreement entered into with an Indian concern
   Expenditure to earn the above income:
   (i) Depreciation as per Income Tax Act on assets in branch in India 10 Lakhs
   (ii) Depreciation as per Income Tax Act on assets located in head office in U.S.A. which assets are partially used for Indian operations 9 Lakhs
   (iii) Salaries & other expenses of staff in India 120 Lakhs
   (iv) Payment to Singapore office for use of their data in India 6 Lakhs
   (v) Reimbursement of actual expenses incurred by Head office for the Indian Branch 12 Lakhs
   (vi) Paid to Head Office for apportionment of certain head office expenditure 15 Lakhs

**Note:** However, deduction shall be allowed in respect of reimbursement of actual expenses incurred by head office or other offices provided that such expenses are incurred for the permanent establishment in India

- Deduction under chapter VI-A if any shall be allowed
- Such income can result in a loss which shall be set off and carried forward as per Chapter-VI
- Losses of other businesses in India and losses from other activities shall be set off against the incomes referred in section 44DA subject to Chapter VI
- Compulsory maintenance of books of accounts and other documents
- Compulsory audit requirement and report of audit **before specified date u/s 44AB.**
- Tax @ 40% in case of foreign companies (plus 2% or 5% surcharge) plus 4% Health & education cess Tax at normal rates in case of non-resident.
2. Interest received from Indian concerns for moneys lent in foreign Currency 50 Lakhs
Collection charges for the interest 5 Lakhs

3. Commission income received in India 90 Lakhs
Expenses to earn the commission income 11 Lakhs

Answer:
Since the foreign company has a permanent establishment in India, section 44DA is applicable. It is assumed that the contract for royalty is effectively connected with such branch in India.

**Income under the head Profits and Gain of Business or profession**

(1) Royalties received 200 lakhs

<table>
<thead>
<tr>
<th>Less:</th>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i)</td>
<td>Depreciation as per Income Tax Act on assets in branch in India</td>
<td>10 lakhs</td>
</tr>
<tr>
<td>(ii)</td>
<td>Depreciation on assets located in head office not allowed since assets are not wholly and exclusively used for the Indian branch and also it does not amount to reimbursement of expenses</td>
<td>NIL</td>
</tr>
<tr>
<td>(iii)</td>
<td>Salaries &amp; other expenses of staff in India</td>
<td>120 lakhs</td>
</tr>
<tr>
<td>(iv)</td>
<td>Payment to Singapore office not allowed as it does not amount to reimbursement of expenses</td>
<td>NIL</td>
</tr>
<tr>
<td>(v)</td>
<td>Reimbursement of actual expenses incurred by Head Office</td>
<td>12 Lakhs</td>
</tr>
<tr>
<td>(vi)</td>
<td>Paid to Head Office for apportionment of Head Office expenses not allowed as it is not reimbursement of actual expenses</td>
<td>142 Lakhs</td>
</tr>
</tbody>
</table>

**Income from Royalty** 58 Lakhs

(2) Income from Interest 50 Lakhs

<table>
<thead>
<tr>
<th>Less:</th>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Expenses not allowed as per section 115A</td>
<td>NIL</td>
</tr>
</tbody>
</table>

(3) Commission Income 90 Lakhs

<table>
<thead>
<tr>
<th>Less:</th>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Expenses</td>
<td>11 Lakhs</td>
</tr>
</tbody>
</table>

**Total Income** 187 Lakhs

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tax on 58 Lakhs @ 40%</td>
<td>23.20 Lakhs</td>
</tr>
<tr>
<td>Tax on 50 Lakhs @ 20% w/s 115A (Assuming section 194LB, 194LC, 194LD is not applicable)</td>
<td>10.00 Lakhs</td>
</tr>
<tr>
<td>Tax on 79 Lakhs @ 40%</td>
<td>31.60 Lakhs</td>
</tr>
<tr>
<td>Surcharge @ 2%</td>
<td>1.296 Lakhs</td>
</tr>
</tbody>
</table>

**Total tax and surcharge** 66.096 Lakhs
EXPLANATION TO SECTION 9: INCOME DEEMED TO ACCRUE OR ARISE IN INDIA (AMENDMENT BY FINANCE ACT, 2015)

For the purposes of this clause,—
(a) it is hereby declared that in the case of a non-resident, being a person engaged in the business of banking, any interest payable by the permanent establishment in India of such non-resident to the head office or any permanent establishment or any other part of such non-resident outside India shall be deemed to accrue or arise in India and shall be chargeable to tax in addition to any income attributable to the permanent establishment in India and the permanent establishment in India shall be deemed to be a person separate and independent of the non-resident person of which it is a permanent establishment and the provisions of the Act relating to computation of total income, determination of tax and collection and recovery shall apply accordingly;

SPECIFIC SECTIONS

<table>
<thead>
<tr>
<th>Section 115AB</th>
<th>Section 115AC</th>
<th>Section 115AD</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Applicable To</td>
<td>Overseas Financial Organisation</td>
<td>NON-RESIDENT Including FOREIGN CO.</td>
</tr>
<tr>
<td>2. Applicable For</td>
<td>Units of UTI and Mutual Funds Purchased in foreign currency.</td>
<td>(i) Bonds of an Indian company issued abroad and purchased in foreign currency.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(ii) Bonds of public sector company sold by Government and purchased in foreign currency.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(iii) GDRs purchased in foreign currency.</td>
</tr>
<tr>
<td>3. Tax Rates</td>
<td>LTCG -10%</td>
<td>LTCG-10%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Interest-10%</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>4. Section 28 to 44C, Section 57</td>
<td>-</td>
<td>Not Applicable.</td>
</tr>
</tbody>
</table>
5. First Proviso to section 48 | Not Applicable | Not Applicable | Not Applicable
---|---|---|---
6. Second Proviso to section 48 | Not Applicable | Not Applicable | Not Applicable
7. Set off, C/F & Set off of losses [C/Y and B/F] against the incomes referred to in section | Possible subject to Provisions of Chapter VI. | Possible subject to Provisions of Chapter VI. | Possible subject to Provisions of Chapter VI.
9. Exemption from filing of ROI | Not Applicable | No ROI required to be filed if: (i) Total income includes only Interest referred in section 115AC and (ii) TDS deducted on such income. | Not Applicable

Note:
1. "Overseas Financial Organisation" means any fund, institution, association or body, whether incorporated or not, established under the laws of a country outside India and which has entered into an arrangement for investment in India with any public sector bank or public financial institution or mutual fund. Such arrangement should be approved by the Securities and Exchange Board of India.

SECTION 115BB: TAX ON WINNINGS FROM LOTTERIES, CROSSWORD PUZZLES, RACES INCLUDING HORSE RACES, CARD GAMES AND OTHER GAMES OF ANY SORT OR GAMBLING OR BETTING OF ANY FORM OR NATURE WHATSOEVER

Where the total income of an assessee includes any income by way of winnings from any lottery or crossword puzzle or race including horse race (not being income from owning and maintaining race horses) or card game or other game of any sort or from gambling or betting of any form or nature whatsoever, the income tax payable shall be the aggregate of -

(a) the amount of income-tax calculated on income by way of such winnings, at the rate of 30%.
(b) the amount of income-tax which the assessee would have been chargeable had his total income been reduced by the amount of incomes referred to in (a).

KEY NOTES:
1. No deduction of any expenditure or allowance shall be allowed in computing the above incomes. (Section 58)
2. Can winnings of prize money on unsold lottery tickets held by the distributors lottery tickets be assessed as business income and be subject to normal rates of tax instead of the rates prescribed under section 115BB?

**CIT V. MANJOO AND CO. (KERALA) ( NOT IN SUMMARY )**

On the above issue, the Kerala High Court observed that winnings from lottery is included in the definition of income by virtue of section 2(24)(ix). Further, in practice, all prizes from unsold tickets of the lotteries shall be the property of the organizing agent and shall be refunded to the organizing agent.

The High Court contended that the receipt of winnings from lottery by the distributor was not on account of any physical or intellectual effort made by him and therefore cannot be said to be "income earned" by him in business. The said view was taken on the basis that the unsold lottery tickets cease to be stock-in-trade of the distributor because, after the draw, those tickets are unsaleable and have no value except waste paper value and the distributor will get nothing on sale of the same. Hence, the receipt of the prize money is not in his capacity as a lottery distributor but as holder of the lottery tickets which won the prizes.

Section 115BB and section 194B will apply to such income. Such income shall be taxable @ 30% under section 115BB and TDS shall be deducted @ 30%.

### SECTION 115BBA: TAX ON NON-RESIDENT SPORTSMEN OR SPORTS ASSOCIATIONS

<table>
<thead>
<tr>
<th>Where the total income of an assessee -</th>
<th>Applicable rate of tax</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) being a sportsman who is not a citizen of India and is a non-resident, includes any income received/ receivable by way of- (i) participation in India in any game (other than the games referred to in section 115BB) or sport; or (ii) advertisement, or (iii) contribution of articles relating to any game or sport in India in newspapers, magazines or journals; or</td>
<td>20% of such income</td>
</tr>
<tr>
<td>(b) being a non-resident sports association or institution, includes any amount guaranteed to be paid or payable to such association or institutions in relation to any game (other than the games referred to in section 115BB) or sport played in India;</td>
<td>20% of such income</td>
</tr>
<tr>
<td>(c) being an entertainer, who is not a citizen of India and is a non-resident, includes any income received or receivable from his performance in India</td>
<td>20% of such income</td>
</tr>
</tbody>
</table>

**KEY NOTES:**

1. Special rate of tax is applicable on the above mentioned incomes only. Balance income of the assessee will be chargeable to tax at normal rates applicable to assessee.

2. No deduction or Allowance shall be allowed in computing income referred to in (a), (b) and (c).

3. It shall not be necessary for the assessee to furnish return under section 139 if -
(i) The total income of the assessee consist of only the incomes referred to in (a), (b) and (c) above and
(ii) Tax at source has been deducted from such income.

4. Would non-resident match referees and umpires in the games played in India fall within the meaning of sportsmen to attract taxability under the provision of section 115BBA, and consequently attract the TDS provision under section 194E in the hands of the payer?

**INDCOM V. CIT (TDS) (CALCUTTA)**

On this issue, the Calcutta High Court observed that, in order to attract the provision of the section 194E, the person should be a non-resident sportsperson or non-resident sport association or institution whose income is taxable as per the provision of section 115BBA. The umpires and the match referees can be described as professionals or technical person who render professional or technical service, but they cannot be said to be either non-resident sportsmen (including an athlete) or on-resident sport association or institution so as to attract the provision of section 115BBA and consequently, the provision of tax deduction at source under section 194E are also not attracted in this case. Though for the purpose of section 194J, match referees and umpires are consideration as professionals, the tax deduction provision there under are attracted only in case where the deductee is a resident individual, which is not so in the present case.

Therefore, 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 provision of section 115BBA and thus, the assessee is not liable to deduct tax under section 194E.

**Note** - It may be noted that since income has accrued and arisen in India to the nonresident umpires and match referees, the TDS provision under section 195 would be attracted and tax would be deductible at the rates in force.

**Illustration 1:**
Non-resident sportsman wins a car of FMV of Rs 10,00,000 as Man of the Match Prize awarded by Sahara India. Now Sahara India shall deposit the following TDS:

\[(10,00,000 + \text{TDS}) \cdot 20.8/100 = \text{TDS}\]

TDS = 2,62,626

Now Income of non-resident sportsman in Rs 12,62,626. Tax thereon @ 20.80% is Rs 2,62,626 which has been deposited as TDS. The non-resident sportsman is not required to file ROI.

**Illustration 2:**
Michael Jackson, a citizen of U.S.A. and a non-resident makes a dance performance in Kolkata. He received Rs 10 crores for the dance performance. He has incurred the following expenditure:

1. Travel Expenditure = Rs 20 Lakh
2. Hotel accommodation = Rs 10 lakh
3. Other expenses = Rs 5 lakh
Here, section 115BBA shall be applicable. Rs 10 crores shall be taxable @ 28.496% and no deduction for any expense shall be allowed. TDS shall be deducted by the payer @ 28.496% on crores.

**SECTION 10(48): INCOME EXEMPT FROM TAX**

Any income received in India in Indian currency by a foreign company on account of sale of crude oil, any other goods or rendering of services as may be notified by Central Government in this behalf, to any person in India shall be exempt from tax.

Provided that—

(I) receipt of such income in India by the foreign company is pursuant to an agreement or an arrangement entered into by the Central Government or approved by the Central Government;

(II) having regard to the national interest, the foreign company and the agreement or arrangement are notified by the Central Government in this behalf; and

(III) the foreign company is not engaged in any activity, other than receipt of such income, in India.

**SECTION 10(48A): INCOME EXEMPT FROM TAX**

Any income accruing or arising to a foreign company on account of storage of crude oil in a facility in India and sale of crude oil therefrom to any person resident in India, shall be exempt from tax.

Provided that—

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

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

(Added by Finance Act, 2016)

**SALE OF LEFTOVER STOCK OF CRUDE OIL [SEC. 10(48B)]**

The existing provisions of section 10(48A) provides that any income accruing or arising to a foreign company on account of storage of crude oil in a facility in India and sale of crude oil therefrom to any person resident in India shall be exempt. This exemption is available only if the said storage and sale is pursuant to an agreement or an arrangement entered into by the Central Government; and having regard to the national interest, said foreign company and the said agreement or arrangement are notified by the Central Government in that behalf.

- **Amendment** - The benefit of exemption presently is not available to sale out of the leftover stock of crude after the expiry of said agreement or the arrangement. Given the strategic nature of the project benefitting India to augment its strategic petroleum reserves, a new clause (48B) has been inserted in section 10 (with effect from the assessment year 2018-19). It provides that any income accruing or arising to a foreign company on account of sale of leftover stock of crude oil, if any, from a facility in India after the expiry of an agreement or an arrangement [referred to in section 10(48A)] shall also be exempt (subject to such conditions as may be notified by the Central Government in this behalf).
AMENDMENT MADE BY FINANCE ACT 2018:

Exemption of income of foreign company from sale of leftover stock of crude oil on termination of agreement or arrangement [Sec. 10(48B)]

Section 10(48B) provides that any income accruing or arising to a foreign company on account of sale of leftover stock of crude oil, if any, from a facility in India after the expiry of the agreement or arrangement [as referred to under clause (48A)] shall be exempt subject to a few notified conditions.

Amendment- The above provisions of section 10(48B) have been amended (with effect from the assessment year 2019-20) to provide that any income accruing or arising to such foreign company on account of sale of leftover stock of crude oil, if any, from such facility in India on the termination of the agreement / arrangement [as referred to in clause (48A)], shall also be exempt (subject to the conditions as may be notified).

AMENDMENT MADE BY FINANCE ACT 2020:

Exemption in respect of certain income of Indian Strategic Petroleum Reserves Ltd. [Sec. 10(48C)]

Section 10(48C) has been inserted with effect from the assessment year 2020-21. It provides exemption to any income accruing or arising to Indian Strategic petroleum Reserves Ltd. (ISPRL), being a wholly owned subsidiary of Oil Industry Development Board, as a result of an arrangement for replenishment of crude oil stored in its storage facility in pursuance of the directions of the Central Government in this behalf. This exemption shall be subject to the condition that the crude oil is replenished in the storage facility within 3 years from the end of the financial year in which the crude oil was removed from the storage facility for the first time.

FUND MANAGERS OF OFFSHORE FUNDS

SECTION 9A

Certain Activities Not to Constitute Business Connection In India

(1) Notwithstanding anything contained in section 9(1) and subject to the provisions of this section, 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.

(2) Notwithstanding anything contained in section 6, an eligible investment fund shall not be said to be resident in India for the purpose of that section merely because the eligible fund manager, undertaking fund management activities on its behalf, is situated in India.

(3) The eligible investment fund referred to in sub-section (1), means a fund established or incorporated or registered outside India, which collects funds from its members for investing it for their benefit and fulfils the following conditions, namely:—

(a) the fund is not a person resident in India;
(b) the fund is a resident of a country or a specified territory with which an agreement referred to in section 90(1) or section 90A(l) has been entered into or is established or incorporated or registered 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 resident in India does not exceed 5% of the corpus of the fund;  
Provided that for the purposes of calculation of the said aggregate participation or investment in the fund, any contribution made by the eligible fund manager during the first three years of operation of the fund, not exceeding twenty-five crore rupees, shall not be taken into account;  (Proviso added by Finance Act 2020)

(d) the fund and its activities are 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 has 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 ten per cent;

(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 fifty per cent;

(h) the fund shall not invest more than 20% of its corpus in any entity;

(i) the fund shall not make any investment in its associate entity;

(j) the monthly average of the corpus of the fund shall not be less than Rs. 100 crore:

Provided that if the fund has been established or incorporated in the previous year, the corpus of fund shall not be less than one hundred crore rupees at the end of a period of six months from the last day of the month of its establishment or incorporation, or at the end of such previous year, whichever is later.

**AMENDMENT MADE BY FINANCE ACT 2020:**

Provided that if the fund has been established or incorporated in the previous year, the corpus of fund shall not be less than one hundred crore rupees at the end of a period of twelve months from the last day of the month of its establishment or incorporation.

Provided further that nothing contained in this clause shall apply 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 or from India;  
(Amendment by Finance Act, 2016)

(l) the fund is neither engaged in any activity which constitutes a business connection in India nor has 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 by him on its behalf is not less than the amount calculated in such manner as may be prescribed;

Provided that the conditions specified in clauses (e), (f) and (g) shall not apply 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 as the Central Government may subject to conditions if any, by notification in the Official Gazette, specify in this behalf.
(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 fulfils the following conditions, namely:—

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

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

(c) the person is 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 twenty per cent of the profits accruing or arising to the eligible investment fund from the transactions carried out by the fund through the fund manager.

(5) Every eligible investment fund shall, in respect of its activities in a financial year, furnish within ninety days from the end of the financial year, a statement in the prescribed form, to the prescribed income-tax authority containing information relating to the fulfilment of the conditions specified in this section and also provide such other relevant information or documents as may be prescribed.

(6) Nothing contained in this section shall apply to exclude any income from the total income of the eligible investment fund, which would have been so included irrespective of whether the activity of the eligible fund manager constituted the business connection in India of such fund or not.

(7) Nothing contained in this section shall have any effect on the scope of total income or determination of total income in the case of the eligible fund manager.

(8) The provisions of this section shall be applied in accordance with such guidelines and in such manner as the Board may prescribe in this behalf.

(9) For the purposes of this section,—

(a) "associate" means 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 fifteen per cent of its share capital or interest, as the case may be;

(b) "connected person" shall have the meaning assigned to it in clause (4) of section 102;

(c) "corpus" means the total amount of funds raised for the purpose of investment by the eligible investment fund as on a particular date;

(d) "entity" means any entity in which an eligible investment fund makes an investment;

SECTION 271FAB
Penalty for Failure to Furnish Statement or Information or Document by An Eligible Investment Fund

If any eligible investment fund which is required to furnish a statement or any information or document, as required under section 9A(5) fails to furnish such statement or information or document within the time prescribed under that subsection, the income-tax authority prescribed under the said sub-section may direct that such fund shall pay, by way of penalty, a sum of Rs. 5,00,000.
**PRESumptive Taxation**

**SECTION 44B: SPECIAL PROVISION FOR COMPUTING PROFITS AND GAINS OF SHIPPING BUSINESS IN CASE OF A NON-RESIDENT**

- Notwithstanding anything contained in section 28–43A in case of a non-resident engaged in the business of operation of ships a sum equal to $7\frac{1}{2}$% of the aggregate of the following sum shall be deemed to be the profits & gains of business or profession:
  
  (a) Amount paid or payable, whether in India or outside India, to the assessee or any person on his behalf for the carriage of passengers, livestock, mail or goods, shipped at any port in India.
  
  (b) the amount received or deemed to be received in India by or on behalf of the assessee for the carriage of passengers, livestock, mail or goods **shipped at any port outside India**.

The Finance Act, 1997 has amended the section to provide that the amount referred to in (a) and (b) above shall include the amount paid or payable or received or deemed to be received, as the case may be, by way of demurrage or handling charges or any other amount of similar nature.

**Key Point:**
1. **Universal Cargo Carriers Inc. v. CIT.** – In view of the clear language of section 44B, an assessee can claim set off of the carried forward business loss but not of carried forward unabsorbed depreciation.
2. Section 44B does not over-ride Chapter VI of the I.T. Act. Therefore, the current year losses and the brought forward business losses can be set off against the P/G/B/P determined under section 44B.

**SECTION 172: SHIPPING BUSINESS OF NON-RESIDENTS**

2. Provisions are for levy and recovery of tax in case of a ship belonging to or chartered by a non-resident which carries passengers, livestock, mail or goods shipped at any port in India.
3. Where a ship carries passengers, livestock, mail or goods shipped at a port in India, $7\frac{1}{2}$% of the amount paid or payable on account of such carriage to the owner or the charterer or any person on his behalf, whether that sum is payable in India or outside India, shall be deemed to be the income arising to the owner/charterer. The Finance Act, 1997 has amended the section to provide that the amount paid or payable shall include amount paid or payable by way of demurrage or handling charges or any other amount of similar nature.
4. Before departure from any port in India of any such ship, the MASTER of the ship shall prepare and furnish to the Assessing Officer a return of full amount carriage of
passengers, livestock, mail or goods shipped at that port since the last arrival of the ship.
However, if the Assessing Officer is satisfied that it is not possible for the master of the ship to furnish the return required before departure of ship from that port, and provided that the master of the ship has made satisfactory arrangements for filing the return and payment of tax by any other person, the Assessing Officer may, if the return is filed within 30 days of the departure of the ship, deem the filing of such return by the person so authorized by the Master as sufficient compliance.

5. On receipt of a return, the Assessing Officer shall assess the income and determine the sum payable as tax thereon. The rates of tax shall be the rates applicable to the total income of a company which has not made prescribed arrangements for payment & declaration of dividend in India and such sum shall be payable by the master of the ship. [i.e. the rates applicable to a foreign company i.e. 40% plus 2% surcharge (where total income exceeds Rs. 1 crores) plus 4% Health & education cess]

No order assessing the income and determining the sum of tax payable thereon shall be made under this section after the expiry of 9 months from the end of the financial year in which the return under Point No. 4 is furnished.

6. Assessing Officer has power to call for documents accounts.
7. A port clearance certificate shall not be granted to the ship until the collector of Customs is satisfied that the tax assessable under this section has been duly paid or satisfactory arrangements have been made.
8. Nothing in this section shall prevent the owner or charterer to claim before the expiry of the Assessment Year relevant to previous year in which the date of departure of ship from the India port falls, that an assessment be made on his total income of the P/Y and tax payable be determined in accordance with other provisions of the Act. If he claims, the payment of tax under this section shall be deemed to be payment of advance tax and difference be recovered/paid at assessment.

For example, if the departure of ship from the Indian port takes place on 20.02.2015, the owner of ship can claim by 31.03.2016 that an assessment be made on him in accordance with other provisions of the Act. Other provisions of the Act refer to section 44B and the normal tax rates as applicable to the owner of the ship.

**KEY POINTS:**

1. The Supreme Court in the case of *A.S. GLITTRE* held that once section 172 is attracted and the assessee pays tax therein, and thereafter the assessee opts for a regular assessment under the normal provisions of the Act, then all the normal provisions of the Income-tax Act in respect of advance tax shall apply to him. The tax paid by him under section 172 is treated as advance tax paid by him. On making a regular assessment, if there is any excess payment made by the assessee, then the assessee would be entitled to the refund of the excess amount paid and also interest on the refund. The Court held that the assessee will be entitled to interest on the refund, i.e., on the excess tax paid by him.

**Circular No. 9/2001 is issued by CBDT**

If the assessee opts for normal provisions of the Income-tax Act after being subjected to section 172, then the payment of tax made under section 172 is treated as advance tax. Therefore, the non-resident is also liable to pay interest under sections 234B and 234C where ever applicable.
2. Where there is a DOUBLE TAXATION AVOIDANCE AGREEMENT (DTAA) between the Government of India and Government of a foreign country and, as per the DTAA, the tax on the incomes referred to in section 172 is payable not in India but in the foreign country, then the provisions of section 172 shall not apply to such an assessee.

3. The provisions of section 172 are to apply notwithstanding anything contained the in Income Tax Act. Therefore in such cases the provisions of section 194C and 195 relating to TDS are not applicable. Further, section 194C is applicable only where the payments are made to a resident. There can be cases where payments are made to the resident shipping agents of the non-resident ship owners. Since the agent acts on behalf of the non-resident ship owner, he steps into the shoes of the principal. Accordingly, provisions of section 172 shall apply and the provisions of section 194C and 195 shall not apply.

Illustration 1:
Why should an assessee opt for the normal provisions of the Income-tax Act after being subjected to section 172?

Ans: An assessee will opt for the normal provisions of Income tax Act (i.e., section 44B and normal tax rates) after being subjected to section 172 in the following cases:
(a) If the ship is owned by a non-resident individual.
(b) To claim the set off of current year and brought forward of some other business carried on in India e.g. loses of manufacturing business.
(c) To claim deductions under Chapter VI-A.

Illustration 2:
A non-resident individual engaged in the business of operation of ships received Rs. 1 crore for carriage of goods from India. He also receives handing charges of Rs. 5 Lakhs from the customers in India. To earn these incomes, expenses amounted to Rs. 10 lakhs and depreciation amounted to Rs. 30 lakhs. The assessee also has a manufacturing business in India whose brought forward losses are Rs. 2.00 lakhs. Compute the total income of the non-resident assessee.

Ans: Option I – If assessee does not opt for the normal provisions of the Income tax Act (i.e. section 44B and normal tax rates).
It may be noted that section 172 shall apply in all cases whether assessee opts for normal provisions of Income-tax Act or not

<table>
<thead>
<tr>
<th>Assessment Year 2020-2021</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Income as per section 172= 7.5% of Rs. 1,05,00,000</td>
</tr>
<tr>
<td>Less: Brought forward losses of manufacturing business (not allowed as per section 172)</td>
</tr>
<tr>
<td>Total Income</td>
</tr>
<tr>
<td>Tax thereon @ 40% as per section 172</td>
</tr>
<tr>
<td>Add: Health &amp; Education cess @ 4%</td>
</tr>
<tr>
<td>Therefore the assessee shall pay tax of Rs. _____________ under section 172.</td>
</tr>
</tbody>
</table>
**Option II – If the assessee opts for the normal provisions of Income-tax Act (i.e., section 44B and normal tax rates)**

**Assessment Year 2020-2021**

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gross Receipts</td>
<td>Rs. 1,05,00,000</td>
</tr>
<tr>
<td><strong>Less:</strong> Expenses (as per section 44B)</td>
<td></td>
</tr>
<tr>
<td>Profits and Gains of Business or Profession as per section 44B @ 7.5%</td>
<td>Rs. 7,87,500</td>
</tr>
<tr>
<td><strong>Add:</strong> Brought forward losses of manufacturing business</td>
<td>Rs. 2,00,000</td>
</tr>
<tr>
<td><strong>Total Income</strong></td>
<td>Rs. 5,87,500</td>
</tr>
<tr>
<td>Tax as per normal rates</td>
<td></td>
</tr>
<tr>
<td><strong>Less:</strong> Tax paid u/s 172, treated as advance tax</td>
<td>Rs. 3,27,600</td>
</tr>
<tr>
<td><strong>Tax Refundable</strong></td>
<td>(Rs.</td>
</tr>
</tbody>
</table>

* As per Supreme Court in A.S. GLITTRE, the assessee shall also be entitled to interest on refund.

**Illustration 3**

A ship owned by a NRI comes to India and receives Rs. 60 lakhs for carriage of goods from Bombay. The ship also received port handling charges of Rs. 10 lakhs for these goods. Further Rs. 40 lakhs is received by him in London for carriage of goods from Bombay. The agent of the NRI also receives Rs. 90 lakhs in India for carriage of goods from U.K. to U.S.A. Expenses claimed to earn the above income amount to Rs. 170 lakhs. There is also a brought forward loss of Rs. 1,00,000 from some other business. Compute the tax liability of the assessee under section 172. Whether the assessee should opt for the normal provisions of the Income-tax Act in respect of the income referred to in section 172.

**Ans:** Option I – If assessee does not opt for the normal provisions of the Income tax Act in respect of incomes referred to in section 172.

It may be noted that section 172 shall apply in all cases whether assessee opts for normal provisions of Income-tax Act or not

**Assessment Year 2020-2021**

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gross Receipts referred to in section 172</td>
<td>=Rs. 1,10,00,000</td>
</tr>
<tr>
<td><strong>Less:</strong> Expenses (as per section 172)</td>
<td></td>
</tr>
<tr>
<td>Profits and Gains of Business or Profession</td>
<td>Rs. 1,10,00,000</td>
</tr>
<tr>
<td>As per section 172 @ 7.5% of Rs. 1,10,00,000</td>
<td>Rs. 8,25,000</td>
</tr>
<tr>
<td><strong>Less:</strong> Brought forward losses (not allowed as per section 172)</td>
<td></td>
</tr>
<tr>
<td><strong>Total Income</strong></td>
<td>Rs. 8,25,000</td>
</tr>
<tr>
<td>Tax paid u/s 172 @ 40% plus 4% Health &amp; education cess</td>
<td>Rs.</td>
</tr>
<tr>
<td><strong>Round off</strong></td>
<td>Rs.</td>
</tr>
</tbody>
</table>

* Note: For the other receipts of Rs. 90 lakhs, section 44B is
Taxation of Non-Residents and Foreign Companies

applicable. Assessee is bound to file ROI for the same.

<table>
<thead>
<tr>
<th>Receipts</th>
<th>Rs. 90,00,000</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less: Expenses (as per section 44B)</td>
<td>NIL</td>
</tr>
<tr>
<td>Profits and Gains of Business or Profession</td>
<td>Rs. 90,00,000</td>
</tr>
<tr>
<td>as per section 44B, @ 7.5%</td>
<td>Rs. 6,75,000</td>
</tr>
<tr>
<td>Less: Brought forward losses</td>
<td>Rs. 1,00,000</td>
</tr>
<tr>
<td>Total Income</td>
<td>Rs. 5,75,000</td>
</tr>
<tr>
<td>Tax as on Rs. 5,75,000 at normal rates</td>
<td>Rs. _______</td>
</tr>
</tbody>
</table>

Option II – If assessee opt for the normal provisions of the Income tax Act (i.e., section 44B and normal tax rates) in respect of incomes referred to in section 172

Assessment Year 2019-2020

<table>
<thead>
<tr>
<th>Receipts</th>
<th>Rs. 2,00,00,000</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less: Expenses (as per section 44B)</td>
<td>NIL</td>
</tr>
<tr>
<td>Profits and Gains of Business or Profession</td>
<td>Rs. 2,00,00,000</td>
</tr>
<tr>
<td>As per section 44B @ 7.5%</td>
<td>Rs. 15,00,000</td>
</tr>
<tr>
<td>Less: Brought forward losses</td>
<td>Rs. 1,00,000</td>
</tr>
<tr>
<td>Total Income</td>
<td>Rs. 14,00,000</td>
</tr>
<tr>
<td>Tax as per normal provisions</td>
<td>Rs. -</td>
</tr>
<tr>
<td>Add: Health &amp; Education cess @ 4%</td>
<td>Rs.</td>
</tr>
<tr>
<td>Rs.</td>
<td></td>
</tr>
<tr>
<td>Less: Advance tax paid u/s 172</td>
<td>Rs.</td>
</tr>
<tr>
<td>Tax Refundable</td>
<td>(Rs. )</td>
</tr>
</tbody>
</table>

*As per Supreme Court in A.S. GLITTRE, The assessee shall also be entitled to interest on refund.

SECTION 44BBA: SPECIAL PROVISION FOR COMPUTING PROFITS AND GAINS OF BUSINESS OF OPERATION OF AIRCRAFT IN CASE OF A NON-RESIDENT

- Notwithstanding anything contained in sections 28 – 43A
- Where a Non-Resident is engaged in the business of operation of aircraft
- a sum equal to 5% of the aggregate of the following amounts shall be deemed to be the profits and gains of the business under the head “P/G/B/P”:
(i) Amount paid or payable whether in India or outside India to the assessee or any person on his behalf on account of carriage of goods, passengers, livestock or mail from any place in India.

(ii) amount 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.

SECTION 44BBB: SPECIAL PROVISION FOR COMPUTING PROFITS AND GAINS OF FOREIGN COMPANIES ENGAGED IN THE BUSINESS OF CIVIL CONSTRUCTION ETC. IN CERTAIN TURNKEY PROJECTS

Section 44BBB(1):
- Notwithstanding anything contained in section 28 to 44AA
- Where a foreign company is engaged in the business of civil construction, or business of erection of plant or machinery, or testing & commissioning thereof
- in connection with a turnkey project approved by Central Government
- a sum equal to 10% of the sum paid / payable to the assessee or any person on his behalf in this connection whether in India or outside India.
- shall be deemed to be profits & gains of business chargeable under the head “P/G/B/P”.

Section 44BBB (2):
Notwithstanding anything contained in sub-section (1), an assessee may claim lower profits and gains than the profits and gains specified in sub-section (1), if he keeps and maintains such books of account and other documents as required under section 44AA(2) and gets his accounts audited and furnishes a report of such audit as required under section 44AB, and thereupon the Assessing Officer shall proceed to make an assessment of the total income or loss of the assessee under section 143(3) and determine the sum payable by, or refundable to, the assessee.

SECTION 44BB: SPECIAL PROVISION FOR COMPUTING PROFITS & GAINS IN CONNECTION WITH BUSINESS OF EXPLORATION, ETC OF MINERAL OILS IN CASE OF NON-RESIDENTS

- Notwithstanding anything contained in section 28 to 43A.
- in case of a non-resident
- engaged in the business of providing services, facilities in connection with, OR supplying plant & machinery on hire, to be used in prospecting / extraction / production of mineral oils,
- a sum equal to 10% of the following shall be deemed to be the business income.

(i) Amount paid or payable, whether in or out of India, to the assessee or any person on his behalf on account of provision of services/facilities / supply of plant or machine on hire to be used in prospecting / extraction / production of mineral oil IN INDIA.

(ii) Amount received or deemed to be received in India on account of provision of services / facilities / supply of plant or machine on hire to be used in prospecting / extraction / production of mineral oil OUTSIDE INDIA.
Notwithstanding anything contained above, an assessee may claim lower profits and gains than the profits and gains specified above if he keeps and maintains such books of account and other documents as required under section 44AA(2) and gets his accounts audited and furnishes a report of such audit as required under section 44AB, and thereupon the Assessing officer shall proceed to make an assessment of the total income or loss of the assessee under section 143(3) and determine the sum payable by, or refundable to, the assessee.

This section shall not apply where provisions of section 44DA or 115A apply.

EXTRACT OF MEMORANDUM EXPLAINING THE FINANCE BILL, 2010

Section 44BB provides that income of a non-resident taxpayer who is engaged in the business of providing services or facilities in connection with, or supplying plant and machinery on hire used, or to be used, in the prospecting for, or extraction or production of, mineral oils is computed at 10% of the aggregate of the amounts paid.

Section 44DA provides the procedure for computing income of a non-resident, including a foreign company, by way of royalty or fee for technical services, in case the right, property or contract giving rise to such income are effectively connected with the permanent establishment of the said non-resident. This income is computed as per the books of account maintained by the assessee.

Section 115A provides the rate of taxation in respect of income of a non-resident, including a foreign company, in the nature of royalty or fee for technical services, other than the income referred to in section 44DA i.e. income in the nature of royalty and fee for technical services which is not connected with the permanent establishment of the non-resident.

Combined effect of the provisions of sections 44BB, 44DA and 115A is that if the income of a non-resident is in the nature of fee 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 applies 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. However, owing to judicial pronouncements, doubts have been raised regarding the scope of section 44BB vis-à-vis section 44DA as to whether fee for technical services relating to the exploration sector would also be covered under the presumptive taxation provisions of section 44BB.

In order to remove doubts and clarify the distinct scheme of taxation of income by way of fee for technical services, section 44BB has been amended so as to exclude the applicability of section 44BB to the income which is covered under section 44DA. Similarly, section 44DA is also amended to provide that provisions of section 44BB shall not apply to the income covered under section 44DA.

For example, Hitech Drilling Ltd. Has taken an oil Rig on hire from Schelumbzer Inc. of Germany. Hitech Drilling Ltd. has to pay hire charges of Rs. 4 crores to Schelumbzer Inc. during the year ended on 31.03.2020. Compute the income of Schelumbzer Inc. liable to tax. In India.

Now, section 44DA and section 115A are not applicable since the agreement is not for royalty or technical services fees. Here section 44BB is applicable and the income of Schelumbzer Inc. is 10% of Rs. 4 crores i.e., Rs. 40 lakhs. Tax thereon shall be @ 41.6%. However, Schelumbzer Inc. can claim income lower than 10%.
SECTION 44C: TAXATION OF BRANCHES OF FOREIGN COMPANIES – HEAD OFFICE EXPENDITURE

1. The income of branches of foreign companies in India shall be computed normally as per sections 28-44D. However, the head office expenditure shall be allowed to the following extent:
   (i) Amount equal to 5% of ADJUSTED TOTAL INCOME; OR
   (ii) The amount of so much of the expenditure in the nature of head office expenditure attributable to business or profession of assessee in India WHICHEVER IS LESS

   KEY NOTE:
   ADJUSTED TOTAL INCOME means the total income computed in accordance with the income tax act, without giving effect to:
   ✓ Brought forward depreciation;
   ✓ Brought forward losses;
   ✓ deductions under chapter VI-A;
   ✓ Brought forward Capital Expenditure of Family Planning expenses and;
   ✓ Actual HO expense debited to P&L.

2. Section 44C also provides that WHERE ADJUSTED TOTAL INCOME OF THE ASSESSEE IS A LOSS, then, deduction under section 44C shall be 5% of AVERAGE ADJUSTED TOTAL INCOME.

   KEY NOTE:
   AVERAGE ADJUSTED TOTAL INCOME means:
   (i) If total income of branch is assessable in the three preceding previous years, the average of adjusted total income of such 3 previous years.
   (ii) If total income of branch is assessable in the two preceding previous years, the average of adjusted total income of such 2 previous years.
   (iii) If total income of branch is assessable in only one preceding previous year, the adjusted total income of one previous year.

Illustration 1:
The branch of a foreign company operating in India submits the following information:

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Net profit as per Profit &amp; Loss A/c</td>
<td>100 Lkhs</td>
</tr>
<tr>
<td>Expenses disallowable under Section 28-43D</td>
<td>20 Lkhs</td>
</tr>
<tr>
<td>Head office expenditure debited to Profit &amp; Loss A/c</td>
<td>40 Lkhs</td>
</tr>
<tr>
<td>Brought forward losses</td>
<td>10 Lkhs</td>
</tr>
</tbody>
</table>

Solution:

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>ADJUSTED TOTAL INCOME shall be:</td>
<td></td>
</tr>
<tr>
<td>Net profit as per Profit &amp; Loss A/c</td>
<td>100 Lkhs</td>
</tr>
<tr>
<td>Add: Expenses disallowable of 28-43D</td>
<td>20 Lkhs</td>
</tr>
<tr>
<td>Add: Head office expenditure</td>
<td>40 Lkhs</td>
</tr>
</tbody>
</table>
TAXATION OF NON-RESIDENTS AND FOREIGN COMPANIES

<table>
<thead>
<tr>
<th>Adjusted Total Income</th>
<th>160 Lakhs</th>
</tr>
</thead>
<tbody>
<tr>
<td>5% thereof</td>
<td>8 Lakhs</td>
</tr>
</tbody>
</table>

Therefore, income of foreign branch shall be computed as under:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Net Profit as per Profit &amp; Loss A/c</td>
<td>100 Lakhs</td>
</tr>
<tr>
<td>Add: Expenses disallowable u/s 28-43D</td>
<td>20 Lakhs</td>
</tr>
<tr>
<td>Add: Head office Expenses</td>
<td>40 Lakhs</td>
</tr>
<tr>
<td></td>
<td>160 Lakhs</td>
</tr>
<tr>
<td>Less: Deduction for Head office expenses under section 44C</td>
<td>8 Lakhs</td>
</tr>
<tr>
<td></td>
<td>152 Lakhs</td>
</tr>
<tr>
<td>Less: B/F Losses</td>
<td>10 Lakhs</td>
</tr>
<tr>
<td><strong>Total Income</strong></td>
<td><strong>142 Lakhs</strong></td>
</tr>
</tbody>
</table>

**Illustration 2:**

The total income of a branch of a foreign company operating in India is a loss of 200 lakhs after debiting the head office expenditure of 300 Lakhs.

**Solution:** The total income of branch of foreign company shall be as under:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Income</td>
<td>(200 Lakhs)</td>
</tr>
<tr>
<td>Add: Head office expenditure</td>
<td>300 Lakhs</td>
</tr>
<tr>
<td></td>
<td>100 Lakhs</td>
</tr>
<tr>
<td>Less: Deduction for head office expenditure 44C @ 5% of 100 Lakhs</td>
<td>5 Lakhs</td>
</tr>
<tr>
<td><strong>Total Income</strong></td>
<td><strong>95 Lakhs</strong></td>
</tr>
</tbody>
</table>

**TDS ON AMOUNT PAYABLE TO NON-RESIDENTS [SECTION 195]**

(1) **Applicability**

Any person responsible for paying interest (other than interest referred to in section 194LB or section 194LC or section 194LD) or any other sum chargeable to tax (other than salaries) to a non-corporate non-resident or to a foreign company is liable to deduct tax at source at the rates in force. Such persons are also required to furnish the information relating to payment of any sum in such form and manner as may be prescribed by the CBDT.

**Payee to be a non-resident** - In order to subject an item of income to deduction of tax under this section the payee must be a non-corporate non-resident or a foreign company.

**Payer may be a resident or non-resident** - Under section 195(1), the obligation to deduct tax at source from interest and other payments to a non-resident, which are chargeable to tax in India, is on “any person responsible for paying to a non-resident or to a foreign company”. The words “any person” used in section 195(1) is intended to include both residents and non-residents. Therefore, a non-resident person is also required to deduct tax at source before making payment to another non-resident, if the payment represents income of the payee non-
Taxation of Non-Residents and Foreign Companies

Explanation 2 clarifies that the obligation to comply with section 195(1) and to make deduction thereunder applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to all persons, resident or non-resident, whether or not the non-resident has:-
(a) a residence or place of business or business connection in India; or
(b) any other presence in any manner whatsoever in India.

(2) **Time of deduction**

The tax is to be deducted at source at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier.

Where any interest or other sum as aforesaid is credited to any account, whether called “Interest payable account” or “Suspense account” or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee.

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

(3) **Payments subject to tax deduction**

The statutory obligation imposed under this section would apply for the purpose of deduction of tax at source from any sum being income assessable to tax (other than salary income) in the hands of the non-resident/foreign company. However, no deduction shall be made in respect of any dividends declared/distributed/paid by a domestic company, which is exempt in the hands of the shareholders under section 10(34). (Deleted by Finance Act 2020)

Payment to a non-resident by way of royalties and payments for technical services rendered in India are common examples of sums chargeable under the provisions of the Act to which the liability for deduction of tax at source would apply.

(4) **Certificate of non-deduction of tax at source**

(i) Any person entitled to receive any interest or other sum on which income-tax has to be deducted under section 195(1) may make an application in the prescribed form to the Assessing Officer for grant of certificate authorizing him to receive such interest or other sum without deduction of tax thereunder.

(ii) Where any such certificate is granted, every person responsible for paying such interest or other sum to the person to whom certificate is granted make payment of such interest or other sum without deduction of tax at source under section 195(1), so long as the certificate in force.

(iii) Such certificate shall remain in force till the expiry of the period specified therein. However, if it is cancelled by the Assessing Officer before the expiry of such period, the certificate shall remain in force till such cancellation.
(iv) The CBDT is empowered to make rules specifying the cases in which, and the circumstances under which, an application may be made for the grant of certificate. While doing so, it should take into account the convenience of the assesses and the interests of the revenue.

(v) Such Rules would provide for the conditions subject to which such certificate may be granted and any other matter connected therewith.

(5) **Person responsible for paying any sum to non-resident to furnish prescribed information**

Section 195(6) provides that the person responsible for paying any sum, whether or not chargeable to tax under the provisions of the Act, to a non-corporate non-resident or to a foreign company, shall be required to furnish the information relating to payment of such sum in the prescribed form and prescribed manner.

(6) **Specified class or classes of persons, making payment to the non-resident, to mandatorily make application to Assessing Officer to determine the appropriate proportion of sum chargeable to tax**

(i) Under section 195(1), any person responsible for paying to a non-corporate non-resident or to a foreign company, any interest or any other sum chargeable under the provisions of the Act (other than salary), has to deduct tax at source at the rates in force.

(ii) Under section 195(2), where the person responsible for paying any such sum chargeable to tax under the Act (other than salary) to a non-resident, considers that the whole of such sum would not be income chargeable in the hands of the recipient, he may make an application to the Assessing Officer to determine, by general or special order, the appropriate proportion of such sum so chargeable. When the Assessing Officer so determines, the appropriate proportion, tax shall be deducted under section 195(1) only on that proportion of the sum which is so chargeable.

(iii) Consequent to the retrospective amendments in section 2(47), section 2(14) and section 9(1) by the Finance Act, 2012, sub-section (7) in section 195 provides that, notwithstanding anything contained in sections 195(1) and 195(2), the CBDT may, by notification in the Official Gazette, specify a class of persons or cases, where the person responsible for paying to a non-corporate non-resident or to a foreign company, any sum, whether or not chargeable under the provisions of this Act, shall make an application to the Assessing Officer to determine, by general or special order, the appropriate proportion of sum chargeable to tax. Where the Assessing Officer determines the appropriate proportion of the sum chargeable, tax shall be deducted under sub-section (1) on that proportion of the sum which is so chargeable.

(iv) Consequently, where the CBDT specifies a class of persons or cases, the person responsible for making payment to a non-corporate non-resident or a foreign company in such cases has to mandatorily make an application to the Assessing Officer, whether or not such payment is chargeable under the provisions of the Act.
AMENDMENT MADE BY FINANCE ACT (NO.2) 2019:
Online filing of application seeking determination of tax to be deducted at source on payment to non-residents

Under sub-section (2) of section 195 of the Act, if a person who is responsible for paying any sum to a non-resident which is chargeable to tax under the Act (other than salary) considers that the whole of such sum would not be income chargeable in the case of the recipient, he can make an application to the Assessing Officer to determine the appropriate proportion of such sum chargeable. This provision is used by a person making payment to a non-resident to obtain certificate/order from the Assessing Officer for lower or nil withholding-tax. However, the process is currently manual. In order to use technology to streamline the process, which will not only reduce the time for processing of such applications, but shall also help tax administration in monitoring such payments, it is proposed to amend the provisions of this section to allow for prescribing the form and manner of application to the Assessing Officer and also for the manner of determination of appropriate portion of sum chargeable to tax by the Assessing Officer.

Similar amendment is also proposed to be made in sub-section (7) of section 195 which are applicable to specified class of persons or cases.

These amendments will take effect from 1st November, 2019.

(7) Procedure for refund of TDS under section 195 to the person deducting tax in cases where tax is deducted at a higher rate prescribed in the DTAA

(i) The CBDT has, through Circular No.7/2011 dated 27.9.2011, modified Circular No.07/2007, dated 23.10.2007 which laid down the procedure for refund of tax deducted at source under section 195 of the Income-tax Act, 1961 to the person deducting tax at source from the payment to a non-resident. The said Circular allowed refund to the person making payment under section 195 in the circumstances indicated therein as the income does not accrue to the non-resident or if the income is accruing, no tax is due or tax is due at a lesser rate. The amount paid to the Government in such cases to that extent does not constitute tax.

(ii) The said Circular, however, did not cover a situation where tax is deducted at a rate prescribed in the relevant DTAA which is higher than the rate prescribed in the Income-tax Act, 1961. Since the law requires deduction of tax at a rate prescribed in the relevant DTAA or under the Income-tax Act, 1961, whichever is lower, there is a possibility that in such cases excess tax is deducted relying on the provisions of relevant DTAA.

(iii) Accordingly, in order to remove the genuine hardship faced by the resident deductor, the CBDT has modified Circular No. 07/2007, dated 23-10-2007 to the effect that the beneficial provisions under the said Circular allowing refund of tax deducted at source under section 195 to the person deducting tax at source shall also apply to those cases where deduction of tax at a higher rate under the relevant DTAA has been made while a lower rate is prescribed under the domestic law.
Can payments made by an assessee to a non-resident agent who does not have any income assessable in India be disallowed under section 40(a)(i) for non-deduction of tax at source on the ground that no application was made by the assessee under section 195(2) for making deduction of tax at source at nil rate?

CIT V. MARUTI SUZUKI INDIA LIMITED [2018] (DEL)

High Court’s Observations:
1. The High Court observed that the non-resident agent who operated outside India did not have any income arising in India.
2. In order to come to this conclusion, the High Court relied on CIT v Model Exims [2013] 358 ITR 72 (All) where it was held that there was no obligation to deduct tax under section 195 from commission paid to a non-resident recipient who was not liable to tax in India. Further, in CIT v. Gujarat Reclaim & Rubber Products Ltd. [2016] 383 ITR 236 (Bom), it was held that the commission earned by a non-resident agent who was in the business of selling Indian goods abroad, did not accrue or arise in India, and hence no tax was deductible on such commission payment to a non-resident agent.

3. High Court’s Decision:
The High Court, accordingly, held that where the assessee has made payment to a non-resident agent where such income is not chargeable to tax in India, section 40(a)(i) could not be invoked to disallow deduction of such payment for non-deduction of tax at source, while computing the business income of the assessee.
**CHAPTER 50
TAXATION OF GIFTS**

Measures to prevent generation & Circulation of Unaccounted Money

*Sec 56(2)(x): Income from Other Sources*

- Where **ANY PERSON** receives,
- in any previous year **ON OR AFTER 1ST APRIL 2017,**
- from any person or persons

<table>
<thead>
<tr>
<th>Asset Gifted</th>
<th>Mode</th>
<th>Taxability</th>
</tr>
</thead>
<tbody>
<tr>
<td>Money</td>
<td>Without Consideration</td>
<td>If aggregate value of money exceeds Rs.50,000, the whole of the aggregate value of such money.</td>
</tr>
<tr>
<td>Immovable Property being Land or Building (Finance Act 2018 &amp; 2020 See Below)</td>
<td>Without Consideration</td>
<td>Stamp duty value of property if it exceeds Rs. 50,000.</td>
</tr>
<tr>
<td></td>
<td>With Consideration (If stamp duty value exceeds the purchase price by more than Rs. 50,000)</td>
<td>Value of Gift = Stamp Duty Value - Purchase Price</td>
</tr>
<tr>
<td>Property being</td>
<td>With Consideration (If the Fair Market value of such property exceeds the purchase price by more than Rs. 50,000)</td>
<td>Value of Gift = Fair Market Value - Purchase Price</td>
</tr>
<tr>
<td>- Shares &amp; Securities</td>
<td>Without Consideration</td>
<td>Fair Market Value of such property if it exceeds Rs. 50,000.</td>
</tr>
<tr>
<td>- Jewellery</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Archaeological Collections</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Drawings</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Paintings Sculptures</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Any work of Art; or Bullion</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

- shall be taxable as income from other sources.

CA AARISH KHAN
### Amendment made by Finance Act 2018 & 2020:

**Amendment to Sec 56(2)(x)**

<table>
<thead>
<tr>
<th>Amendment No-1</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Sec 56(2)(x)</strong> applicable only if stamp duty value exceeds <strong>105%</strong> of consideration - From the assessment year 2021-22, <strong>Sec 56(2)(x)</strong> will be applicable if the following conditions are satisfied -</td>
</tr>
<tr>
<td>1. A person receives an <strong>immovable property</strong> from any person.</td>
</tr>
<tr>
<td>2. Stamp duty value exceeds <strong>110</strong> per cent of consideration (FA 2020).</td>
</tr>
<tr>
<td>3. <strong>Difference</strong> between consideration and stamp duty value is <strong>more than Rs. 50,000.</strong></td>
</tr>
<tr>
<td>The difference between stamp duty value and consideration is taxable under the head &quot;Income from other sources&quot; only if the above conditions are satisfied.</td>
</tr>
</tbody>
</table>

**Amendment no-2**

**Sec 56(2)(x)** will **not be applicable** if a capital asset is received by a holding company from its **100 per cent subsidiary company** (and vice versa) provided the transferee company is an Indian company.

### Sec 49(4): Cost of Acquisition

Where the capital gain arises from the transfer of a property, the value of which has been subject to income-tax under **sec 56(2)(x)**, the cost of acquisition of such property shall be **deemed to be the value which has been taken into account** for the purposes of the **sec 56(2)(x)**.

**Sec 56(2)(x)** would, however, **not include** any receipt of money or property:  
- from any **relative**; or  
- on the occasion of the **marriage** of the individual from anyone; or  
- under a will or by way of **inheritance**; or  
- in **contemplation of death** of the payer; or  
- from any **local authority** as defined in **sec 10(20)**; or  
- from any fund or foundation or university or other educational institution or hospital or other medical institution or any trust or institution referred to in **sec 10(23C)**; or  
- from any trust or institution registered under **sec 12AA/12AB**.
by way of transaction not regarded as transfer under sec 47, in the form of amalgamation, demerger etc.

For the purposes of this clause, "relative" means—

(A) In case of an Individual

(i) spouse of the individual;
(ii) brother or sister of the individual;
(iii) brother or sister of the spouse of the individual;
(iv) brother or sister of either of the parents of the individual;
(v) any lineal ascendant or descendant of the individual;
(vi) any lineal ascendant or descendant of the spouse of the individual;
(vii) spouse of the person referred to in clauses (ii) to (vi).

(B) In case of Hindu Undivided Family (HUF), any member thereof.

Amendment made by Finance Act (No.2) 2019

Deemed accrual of gift made to a person outside India

In a few cases, gift received by a non-resident/ foreign company from a resident person, is not taxable in India [even if it is not covered by exceptions specified in sec 56(2)(x)]. There is no deeming provision under Sec 9 for this purpose.

To plug in this loophole, clause(viii) has been inserted in sec 9(1) with effect from the assessment year 2020-21. This clause is applicable if the following conditions are satisfied —

1. **Payer is resident** in India (or money is received from a person resident in India). Payer may be resident and ordinarily resident in India or resident but not ordinarily resident in India. Payer may be an individual, HUF, AOP, BOI, artificial juridical person, firm, LLP, company or any other person.

2. **Recipient is non-resident/foreign company** (or money is received by a non-resident/ foreign company).

3. **A sum of money is received** by non-resident/ foreign company on or after July 5, 2019.

4. Income arises outside India. The transaction is not covered by any of the exceptions specified by sec 56(2)(x).

If these conditions are satisfied, money received by a non-resident/foreign
company, shall be deemed to accrue or arise in India.

**Gift in contemplation of death**
- Where a person is ill and expects to die shortly,
- gift any movable property which can be dispose of by will, and
- delivers the possession of the moveable property.
- But such gift may be resumed by the giver, if donor recovers from the illness during which it was made,
- or if donee dies before the donor.

**Important Point**
Sec 56(2)(x) will have application to the ‘property’ which is in the nature of a capital asset of the recipient and therefore would not apply to stock-in-trade, raw material and consumable stores of any business of such recipient.

**Sec 43CA: Special provision for Full Value of consideration for transfer of assets other than capital assets in certain cases**
- Where the sales consideration received or accruing on transfer of a stock in trade, being land or building or both,
- is less than
- the value assessed or assessable by the stamp valuation authority for the purpose of payment of stamp duty,
- the value so assessed or assessable shall deemed to be the sale consideration.
- Where the assessee claims that
- the value so assessed or assessable exceeds the FMV of the property; and
- the value so assessed or assessable has not been disputed in any appeal or revision
- before any authority/ Court,
- the A.O. may refer the valuation of the stock in trade to a Valuation Officer.
Where value ascertained by Valuation Officer

- Exceeds the stamp duty value: Stamp duty value shall be taken as sales price
- is lower than stamp duty value: Value ascertained by Valuation officer shall be taken as sales price

Amendment made by Finance Act 2020:
SDV shall be taken as FVC only if SDV is “more than” 110% of actual sale consideration.

Note:
Where the date of agreement fixing the amount of consideration and date of registration are not same, then the SDV on the date of agreement may be taken as the full value of consideration.

However above proviso shall apply only in case where the amount of consideration or part thereof has been received by A/c payee cheque, A/c payee draft or ECS or such other electronic mode as may be prescribed, on or before the date of agreement.

The above 2 provisions are also covered in Sec 50C.

**Sec 56(2)(viib): Share Premium received by Closely held Company**
- Where a closely held company
- receives
- in any previous year
- from any person, being A RESIDENT
- any consideration
**TAXATION OF GIFTS**

- for issue of shares
- that exceeds the face value of such shares
- then

**Aggregate consideration**  -  **Fair Market value of the shares**

- shall be income from other sources in the hands of the company.

<table>
<thead>
<tr>
<th>Non-Applicability of Sec 56(2)(viib)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Sec 56(2)(viib) shall not apply</strong> where consideration for issue of shares is received:</td>
</tr>
<tr>
<td>1. By a venture capital undertaking from a venture capital company or a venture capital fund <strong>OR A SPECIFIED FUND</strong>, (Finance Act (No.2) 2019) (Specified Fund means a fund established in India in the form of a trust or a Company or a LLP or a Body Corporate which has been granted certificate as AIF - I &amp; II.)</td>
</tr>
<tr>
<td>2. By a Company from a class or class of persons as may be notified by Central Government. (Finance Act (No.2) 2019) (See Below)</td>
</tr>
<tr>
<td>3. This Sec <strong>does not apply</strong> where a closely held company issues shares to a <strong>Non-Resident</strong> at a premium in excess of FMV.</td>
</tr>
<tr>
<td>4. This Sec <strong>does not apply if a widely held company</strong> issues shares at a premium.</td>
</tr>
</tbody>
</table>

**Compliance with the notification of exemption issued under Sec 56(2)(viib):**

The Central Government is empowered to notify that the provisions of this Sec shall not be applicable to consideration received by a notified company. Certain notifications issued under this sub-clause by the Central Government provide for exemption, subject to the fulfilment of certain conditions. With a view to ensure compliance to the conditions specified in the notification, it is proposed to provide that in case of failure to comply with the conditions, the consideration received for issue of shares which exceeds the face value of such shares shall be deemed to be the income of the company chargeable to income-tax for the previous year in which the failure to comply with any of the said conditions has taken place. Further in such cases penalty of 200% of Tax Payable shall be applicable u/s 270A(9).  

{Finance Act 2019}

**ALL THE BEST**

CA AARISH KHAN
Sec 10AA: Deduction for newly established units in SEZ

10AA(1)

Total Income of a unit which begins manufacture or production of any article or things or computer software shall be deductible:

<table>
<thead>
<tr>
<th>(i)</th>
<th>(ii)</th>
</tr>
</thead>
<tbody>
<tr>
<td>100% of P &amp; G derived from export for 5 years.</td>
<td>for 5 years maximum 50% of profits, provided such amount is transferred to “SEZ Re-investment allowance Reserve Account” &amp; utilized for the purpose of the business in the manner laid down in sub Sec (2)</td>
</tr>
</tbody>
</table>

Sub Sec (2)

The deduction under clause (ii) shall be allowed only if following conditions are fulfilled:

<table>
<thead>
<tr>
<th>(a)</th>
<th>(b)</th>
</tr>
</thead>
<tbody>
<tr>
<td>amt credited to Reserve is to be utilized:</td>
<td>Specified particulars must be furnished along with ROI</td>
</tr>
<tr>
<td>(i)</td>
<td>(ii)</td>
</tr>
<tr>
<td>for new P&amp;M which is put to use before expiry of 3 years next following the P.Y in which reserve was created.</td>
<td>Reserve should be kept intact until the acquisitions of new P&amp;M</td>
</tr>
</tbody>
</table>

* Deduction under 10AA is not available if the units start its operation on or after 31.03.2020.
**DEEDUCTION FOR SEZ U/S 10AA**

<table>
<thead>
<tr>
<th>Sub Sec (3)</th>
<th>Deemed Income</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a)</td>
<td>(b)</td>
</tr>
<tr>
<td>If Reserve has been <strong>utilized for non-specified</strong> purpose</td>
<td>If Reserve, has <strong>not been utilized till</strong> the expiry of time limit</td>
</tr>
<tr>
<td>Of the year in which wrongly utilized.</td>
<td>Of the year immediately following the period of <strong>3 years.</strong></td>
</tr>
</tbody>
</table>

**Deduction u/s 10AA**

\[
\text{Profits of the undertaking} \times \frac{\text{Export T/o of the undertaking}}{\text{Total T/o of the undertaking}}
\]

1) **EXPORT TURNOVER:**

(a) means consideration in respect of export by the undertaking received in India in convertible foreign exchange **within a period of 6M** from the end of PY.

(b) but does **not include freight, Insurance** or other similar expenses.

(c) Further export T/O shall **not include cash compensatory support, Duty drawback** and **profit on sale of import entitlement licenses.**

2) **TOTAL TURNOVER:**

(a) shall **not include freight, insurance** or other similar expenses.

(b) Further it shall **not include CCS, DD and profit** on sale of import entitlement licenses. Total T/O includes Export T/O and Domestic T/O and
(c) It further includes even that portion of export T/O which is not received in convertible foreign exchange.

3) Profits of the business of the undertaking shall mean profits of the undertaking under the head PGBP. It was held by SC in the case of, Liberty India - that the words ‘derived’ are quite narrower as compared to the words ‘profit attributable to’ therefore it was held that export incentives like ccs, duty drawback etc are on account of statutory provisions of the Customs Act or schemes framed by Central Govt and they do not form part of profits of the eligible undertaking for the purpose of sec 80I A, 80 IB, 10AA etc and accordingly such receipts cannot form part of profits of the business of the undertaking.

Applying the principle of Liberty India, the Supreme Court again held in the year 2013 in the case of “Orchев Pharma Ltd” that such profits cannot be called as profits of the business of the undertaking.

Circular No. 1/2013 dated 17/1/2013

The following issues have been addressed by CBDT in the aforesaid circular: -

1) It is clarified that the software developed abroad at client place would be eligible for 10AA pursuant to a contract between client and SEZ unit.

2) It is further clarified that the profits earned as a result of deployment of technical manpower at client place abroad specifically for software development shall be eligible for 10AA pursuant to a contract between both the parties.

3) It is clarified that in case of change in ownership deduction shall be available during the unexpired period at applicable rates subject to fulfilment of prescribed conditions.

4) It has been clarified that the tax holiday should not be denied merely on the ground of physical relocation of an eligible SEZ unit from one place to another SEZ unit.
Extension in time limit for commencement of operations in SEZ:
Beginning of manufacture/ production of articles/things or providing of services referred to in sec 10AA, in a case where the letter of approval, required to be issued in accordance with the provisions of SEZ Act 2005, has been issued on or before March 31, 2020 then, the assessee may commence its activities on or before 30th June 2020 (Erstwhile last date was 31.03.2020) & claim deduction u/s 10AA.

Note:
It is an industry demand to further extend it. Let’s wait and watch whether the Government does so or not.

Example:
X Ltd., a manufacturing company, gets letter of approval to set up a manufacturing unit in MIDC, Andheri Mumbai (a notified SEZ in Maharashtra). As per the letter of approval, X Ltd. should commence manufacturing activities on or before March 31, 2020. However, by virtue of the Ordinance, the said date has been extended to June 30, 2020.

ALL THE BEST
**CHAPTER 54**

**NON-RESIDENT TAXATION**

### Sec 5: Scope of Total Income

<table>
<thead>
<tr>
<th>Income received OR Accrued in India</th>
<th>R &amp; OR</th>
<th>R &amp; NOR</th>
<th>NR</th>
</tr>
</thead>
<tbody>
<tr>
<td>Income Accrued &amp; Received outside INDIA</td>
<td>√</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>PGBP Accrued outside INDIA but controlled from INDIA</td>
<td>√</td>
<td>√</td>
<td>X</td>
</tr>
</tbody>
</table>

### Residential status of Individual:

<table>
<thead>
<tr>
<th>Stay in India for 182 days or more during PY.</th>
<th>(OR) 60 days in PY (+) 365 days in last 4 years.</th>
</tr>
</thead>
</table>

### R & OR

<table>
<thead>
<tr>
<th>Resident in at least 2 out of last 10 PY.</th>
<th>Stay for 730 days or more in INDIA in last 7 PY.</th>
</tr>
</thead>
</table>

### Exception: Only 182 days condition applicable:

<table>
<thead>
<tr>
<th>Indian citizen leaves INDIA during PY &quot;AS&quot; (clause (a))</th>
<th>(OR) India citizen or POI origin comes on a visit to INDIA in any PY. (See FA 2020 Amendment) {Clause (b)}</th>
</tr>
</thead>
<tbody>
<tr>
<td>Crew member of an Indian Ship.</td>
<td>For the Purpose of Employment outside India.</td>
</tr>
</tbody>
</table>
**Rule 126 for above Exception:**

**Individual + Citizen of India + Foreign going ship:**

Following period is excluded:

<table>
<thead>
<tr>
<th>START</th>
<th>ENDING</th>
</tr>
</thead>
<tbody>
<tr>
<td>Period beginning from date entered in CDC.</td>
<td>Date entered in CDC.</td>
</tr>
</tbody>
</table>

**Amendment No- 1 made by Finance Act 2020**

How many days an Indian citizen / a person of Indian origin visits India during the relevant previous year \(\{\text{Explanation 1(b) of Sec 6(1) & Sec 6(6)(c)}\}\)

<table>
<thead>
<tr>
<th>Less than 120 days</th>
<th>120 days or more but not more than 181 days</th>
<th>182 days or more</th>
</tr>
</thead>
<tbody>
<tr>
<td>Non-resident in India</td>
<td>If he satisfies both of the following conditions, he is R &amp; NOR -</td>
<td>If he satisfies both of the following conditions, he is R &amp; OR-</td>
</tr>
<tr>
<td></td>
<td>(i) During preceding 4 years, he was in India for 365 days or more; AND</td>
<td>(i) He has been resident in India in at least 2 out of 10 previous years immediately preceding the relevant previous year; AND</td>
</tr>
<tr>
<td></td>
<td>(ii) His taxable income (other than the income from foreign sources) exceeds Rs. 15,00,000 during the relevant previous year.</td>
<td>(ii) He has been in India for a period of 730 days or more during 7 years immediately preceding the relevant previous year.</td>
</tr>
<tr>
<td></td>
<td>If he satisfies one or none of the above two conditions, he is NR in India</td>
<td>If he satisfies one or none of the above two conditions, he is R &amp; NOR.</td>
</tr>
</tbody>
</table>
DEEMED RESIDENT [Sec. 6(1A)]
Sec 6(1A) and 6(6)(d) cumulatively provide the following 3 conditions -
(a) the assessee is an Indian citizen;
(b) his total income (other than the income from foreign sources) exceeds Rs. 15,00,000 during the relevant previous year, and
(c) he is not liable to tax in any other country or territory by reason of his domicile or residence or any other criteria of similar nature.
If these 3 conditions are satisfied, the individual would be resident but not ordinarily resident in India.

Residential status of HUF

→ Resident in India if Control & Management is wholly or partly in INDIA.
→ If Karta is R & OR, then HUF is R & OR.

Residential status of Firm/AOP/BOI etc:

→ Resident in India if Control & Management is wholly or partly in INDIA.

Sec 6(3): Residential status of Company

| (i) If it is an INDIAN Company | (ii) If its POEM in that year, is in INDIA |

POEM means a place + key mgmt + commercial decision + necessary for business are made.

CBDT guidelines for determining POEM:

CBDT → POEM is applicable only if T/O for a PY > Rs 50 Cr.
### IF A COMPANY’S ABOI, then POEM is outside INDIA

<table>
<thead>
<tr>
<th>(i)</th>
<th>(ii)</th>
<th>(iii)</th>
<th>(iv)</th>
<th>(v)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Passive Income &lt; 50% of Total Assets are situated in INDIA.</td>
<td>Less than 50% of Employees are situated in INDIA.</td>
<td>Less than 50% of payroll expense of employees situated in INDIA.</td>
<td>Majority of BM are held outside INDIA provided the BOD have authority to make such decisions.</td>
<td></td>
</tr>
<tr>
<td>Passive Income means:</td>
<td></td>
<td>(OR) Resident in INDIA AVG at Beginning &amp; End of PY.</td>
<td>(OR) Resident in INDIA of total payroll expenses.</td>
<td>If Holding Co. makes common policy for everyone, then it cannot be said BOD does not have power.</td>
</tr>
<tr>
<td>1. Income from both P &amp; S from / to AE</td>
<td>+ Take AVG at Beginning &amp; End of PY.</td>
<td>Employees will include contractual persons.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2. Royalty, CG, Dividend, Rental &amp; Interest.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(From AE or Non-AE)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>For Banks Interest is not a Passive Income.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### Companies other than ABOI:

<table>
<thead>
<tr>
<th>STAGE 1</th>
<th>STAGE 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>Identify the persons who makes key management &amp; commercial decisions.</td>
<td>Determination of place where decisions are made. Place where decisions are implemented are not important.</td>
</tr>
</tbody>
</table>
Other Guiding Principles:

GF- 1: Location of BOD Meetings:

→ Location where BOD meets & makes decision may be the POEM, provided the BOD has the power to exercise such authority.

→ Formal holding of BOD meetings is not relevant.

→ If BOD has delegated some key decision-making power to senior management, location of such senior management will be considered as POEM.

GF- II → BOD delegating authorities to Committees:

If BOD delegates one or more of major authorities to certain committees like executive committees etc, then POEM shall be place where:

| Such members are based | Where committee develops & formulate key decisions |

GF- III: Location of HO:

If HO i.e. place where senior mgmt & their support staff are based, is in one place & that location is held out to public as principal place of business, then POEM at such HO.

GF- IV: Residence of Directors:

In today’s modern world physical presence is not important due to video conferences, etc, Therefore, Place of Residence of director is an important factor.

GF- V: Circular Resolution / Round Robin Voting:

POEM will be the place where the person who has authority to pass such resolution is located.

GF- VI: Location of Strategic Shareholder:

→ Generally, shareholder’s location is not important.
However, if there is a strategic shareholder whose approval is important for decision making, then POEM will be such place.

Other GF:
If above factors **do not lead** to clear identification of POEM then:

<table>
<thead>
<tr>
<th>(i)</th>
<th>(ii)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Place where <strong>substantial activity</strong> is carried out.</td>
<td>(OR) Place where <strong>accounting</strong> records are kept.</td>
</tr>
</tbody>
</table>

**Conclusion:**
Ultimately POEM is determined based on **facts & circumstances** of every case.

**No single principle** can be decided, like Foreign Co is owned by INDIAN Co. or Directors residence in India or Local management is in INDIA or Liaison Office is in India etc.

**Procedure to HOLD POEM in India:**

<table>
<thead>
<tr>
<th>Step 1</th>
<th>Step 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>If AO wants to <strong>initiate</strong> proceedings to hold a Foreign Co’s POEM to be in INDIA, then he should take <strong>prior</strong> approval of CIT.</td>
<td>After that he should <strong>hold</strong> a Foreign Co’s Residence in India by taking approval from ‘Collegium’ i.e. <strong>group of 3 CIT.</strong></td>
</tr>
</tbody>
</table>

For **Sec 115JH** & its Notification Refer Page_______

**Clarification for NR Seafarer’s:**
Salary credited in NRE A/c in INDIA is **Exempt.**

**When is Interest Income accrued in India?**
Under **Sec 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 monies 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.

**MAKE DIAGRAM HERE:**

---

**When is Royalty/FTS Income accrued in India?**

Under sec 9(1)(vi)(vii), Royalty/FTS 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/FTS 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.

MAKE DIAGRAM HERE:

**Explanation to Sec 9 - Income deemed to accrue or arise in India.**

For removal of doubts it is hereby declared that the income of non-resident shall be deemed to accrue or arise in India irrespective of whether such non-resident has place of business in India. Further it is irrelevant whether the services are rendered in India or not.

Therefore, now what has to been seen that whether the services are utilized in India or not, irrespective of from where it is rendered i.e. location of payer is relevant to determine the taxability.

<p>| Sec 115A: Taxation of Interest/Dividend for Non-resident or Foreign co. |
|--------------------------|-----------------|------------------|-----------------|-----------------|
|                          | 115A(1)         | A(2)             | A(3)            | A(4)            |
| 1) Lender                | NR/Foreign Company | NR/Foreign Company | NR/Foreign Company | FII’S or QFI (Approved by SEBI) |
| 2) Borrower             | Indian Concern or Govt. 195 | Infrastructure debt fund. 194LB | Indian company. 194LC | Indian company or govt. 194LD |
| 3) Rate of tax          | 20%             | 5%               | 5% 5%/4%        | 5%              |</p>
<table>
<thead>
<tr>
<th>4) Time Limit</th>
<th>N.A</th>
<th>N.A</th>
<th>Money borrowed after 30/6/12 but before 1/07/23 + Approved (See FA 2020 Amendment Below)</th>
<th>Interest payable after 31/5/13 but before 1/07/23 + Approved (See FA 2020 Amendment Below)</th>
</tr>
</thead>
<tbody>
<tr>
<td>5) Rate of interest</td>
<td>To be decided between borrower &amp; lender</td>
<td>To be decided by Infrastructure debt fund</td>
<td>Not to exceed approved rate.</td>
<td>Not to exceed approved rate.</td>
</tr>
</tbody>
</table>

Dividend Income earned by NR or Foreign Company shall be taxable at 20% plus surcharge if applicable and health and education cess.

**Amendment made by Finance Act 2020:**

**Amendment in Sec 194LC:**

The rate of TDS shall be four per cent on the interest payable to a non-resident, in respect of monies borrowed in foreign currency from a source outside India, by way of issue of any long term bond or RDB on or after 1st April, 2020 but before 1st July, 2023 and which is listed only on a recognised stock exchange located in any IFSC.
Amendment in Sec 194LD:

The concessional rate of TDS of five per cent under the said section shall also apply on the interest payable, on or after 1st April 2020 but before 1st July 2023, to a FII or QFI in respect of the investment made in municipal debt security.

Key Points:

1) These special rates are applicable to only to special incomes i.e. other income will be taxable at normal rates applicable to assessee.

2) No deductions will be allowed under PGBP or IFOS of any expenditure or allowance. Further no deduction of UAD shall be allowed. Further no deduction of chapter VIA is available from special incomes. However, if the assessee has other incomes then chap VI can be taken subject to other incomes. Further provisions of set off and carry forward is applicable.

However, deduction under Chapter VIA shall be available to a unit located under IFSC as mentioned in Sec 80LA. {Finance Act (No.2) 2019}

3) No ROI if:

| GTI= Only Special Income (+) | TDS is deducted. |

4) The above incomes will not be liable to MAT in respect of Interest, if it is taxable at less than 15%.

Amendment made by Finance Act (No.2) 2019:

Amendment No-1

Interest i.r.of Rupee Denominated Bonds mentioned in Sec 194LC is exempt from tax if RDB are issued from 17\textsuperscript{th} September, 2018 to 31\textsuperscript{st} March, 2019. (Sec 10(4C))
Amendment No-2

As per Sec 10(15(ix) any income by way of interest payable to a Non Resident by a Unit in an IFSC i.r.of monies borrowed by in on or after 1st September, 2019.

Sec 115A: Tax on Royalty and Fees for Technical Services

1) The above income received by non-resident or foreign co. from Govt. or an Indian concern will be taxable at 10%.

No MAT on such Royalty & FTS which is taxable at less than 15%.

The non-resident or foreign co. must have entered into an agreement with the Govt. or Indian concern. Further the Indian concern has to take approval of by central govt.

⇒ Key Points:

1) Special rates applicable to special income only mentioned above. Balance will be chargeable at normal rates (Same as interest).

2) No deduction under PGBP and IFOS (same as interest).

3) The assessee can set off and carry forward losses against the above incomes (same as interest).

4) ROI has to be filed even if the TDS is deducted and income includes only the above income (different from interest).

Amendment made by Finance Act 2020

No ROI if:

| GTI= Only Special Income (+) | TDS is deducted & is not less than rate specified u/s 115A |

5) Deduction under CH VIA is allowed against Royalty & FTS (different from interest).
The word royalty and fees for technical services are defined in Sec 9 in an inclusive manner. Therefore, there requires a lot of clarification in respect of this definition and accordingly central govt. has inserted 3 Explanations to the definition Royalty u/s 9 as follows:-

**Explanation 4:** [Explanation to definition of Royalty in Sec 9]

Explanation 4 clarifies that for removal of doubts it is hereby clarified that payment recd for transfer of all or any rights to use the computer software including granting of a license for computer software is a Royalty and accordingly TDS has to be deducted @ 10% u/s 195 (If the rate as per DTAA is lower TDS will be on such lower rate).

**Treatment in the hands of payer of Royalty:**

Finance Act 2012 by inserting explanation 4 has clarified that payment for use of computer software is a royalty and accordingly deductible u/s 37(1) and subject to sec 40(a)(i) or 40(a)(ia).

However, the Income Tax Rules 1962 has included such computer software in the block of computer eligible for 40% Dep, whereas the income tax Act treated it as a royalty.

As a general principle 'Rules cannot override Act' therefore royalty or computer software will not be added to block and will be treated as Revenue expenditure subject to deduction of TDS.

**Explanation 5:** [Explanation to definition of Royalty in Sec 9]

Payment made to foreigners shall be treated as royalty even if the possession of server is not in India or server is not used directly by Indian bank or location of such server is outside India.

On such payment TDS has to be deducted u/s 195.

**Explanation 6:** [Explanation to definition of Royalty in Sec 9]

Indian TV channels use satellites of Foreign Co.’s to transmit their programs. Therefore, it has been clarified that payment made to foreign Co. for transmission of program is treated as Royalty liable for TDS u/s 195.
Taxability of Royalty and Fees for Technical Services in hands of Foreign Company or a Non-Resident where there is an approved Agreement

Where NR or Foreign Company has a PE.

Sec 44DA shall apply
Income shall be computed under the head P/ G/ B/ P after allowing all expenses

Where NR or Foreign Company does not have a PE

Sec 115A shall apply
No expenses shall be allowed in computing such income

- **No deduction shall be allowed:**
  
  (i) in respect of any expenditure or allowance which is *not wholly and exclusively* incurred for the business of such permanent establishment or fixed place of profession in India
  
  (ii) in respect of any amount if any paid by the permanent establishment to its head office or to any of its other offices

→ **Note:** However, deduction shall be allowed in respect of reimbursement of actual expenses incurred by head office or other offices provided that such expenses are incurred for the permanent establishment in India

- Deduction under chapter VI-A if any shall be allowed
- Such income can result in a loss which shall be set off and carried forward as per Chapter-VI

- **Losses of other businesses in India** and losses from other activities shall be set off against the incomes referred in Sec 44DA subject to Sec 115A subject to Chapter VI
- Compulsory maintenance of books of accounts and other documents
  - No such requirement
- Compulsory audit requirement and report of audit
  - No such requirement
- Tax @ 40% in case of foreign companies (plus 2% or 5% surcharge) plus 4% Health & education cess. Tax at normal rates in case of non-resident.

**Explanation to Sec 9: For Indian branches of Foreign Banks**

- Interest payment by BOA (Indian Branch) to BOA (H.O. USA) and BOA (Singapore), although amount to payment to self, but is deductible as an expense in hands of BOA (Indian Branch) as per provisions of DTAA.
- BOA (India) shall be treated as separate PE and its income is taxable in India from banking operations in India. Interest paid to BOA (USA) and BOA (Singapore) is allowed as deduction while comparing the income of BOA (India) as per DTAA.
- Several court decisions have held that this interest income is not taxable in India in hands of BOA (H.O. USA) and BOA (Singapore) as it is payment to self. DTAA do not talk about taxability of this income as per court decisions.
- Now, as per Finance Act, 2015, this interest income is taxable in hands of Non-Resident i.e., BOA (USA) and/ or BOA(Singapore), i.e., to the entity abroad to
whom interest is paid. BOA(India) has to deduct TDS on such interest and failure to deduct TDS will result in:

- Disallowance of such interest in hands of Indian P.E. i.e., BOA India.
- Levy of interest and penalty for non-deduction of TDS on interest.

<table>
<thead>
<tr>
<th>Particulars</th>
<th>Sec 115AB</th>
<th>Sec 115AC</th>
<th>Sec 115AD</th>
</tr>
</thead>
<tbody>
<tr>
<td>1) Applicable to</td>
<td>Overseas Financial organization</td>
<td>NR or Foreign Co</td>
<td>FII's</td>
</tr>
<tr>
<td>2) Applicable for</td>
<td>Units of UTI &amp; MF purchased in foreign currency.</td>
<td>1) Bonds of Indian Co.</td>
<td>Securities other than 115AB purchased in any currency</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2) Bonds of public sector Co.</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>3) GDR</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>All in foreign currency.</td>
<td></td>
</tr>
<tr>
<td>3) Tax Rate &amp; TDS</td>
<td>LTCG =10% Sec 196B</td>
<td>LTCG =10% Interest/Dividend = 10% Sec 196C</td>
<td>LTCG = 10% STCG =30% Interest/Dividend = 20% STCG - refered in 111A =15% LTCG - referred in 112A = 10% in excess of Rs.1 lac. (Refer Ordinance Amendment) Sec 196D</td>
</tr>
<tr>
<td>4) 28 to 44C &amp; 57 &amp; Chap VI A</td>
<td>-</td>
<td>Not allowed</td>
<td>Not allowed</td>
</tr>
<tr>
<td>5) 1st proviso to Sec 48</td>
<td>Not Applicable</td>
<td>Not Applicable</td>
<td>Not Applicable</td>
</tr>
<tr>
<td></td>
<td>2nd proviso to Sec 48</td>
<td>Not Applicable</td>
<td>Not Applicable</td>
</tr>
<tr>
<td>---</td>
<td>-----------------------</td>
<td>----------------</td>
<td>----------------</td>
</tr>
<tr>
<td>6</td>
<td>set off C/G</td>
<td>Allowed</td>
<td>Allowed</td>
</tr>
<tr>
<td>7</td>
<td>Exemption from ROI</td>
<td>No</td>
<td>Yes it</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Only Int Income</td>
<td>+ TDS DEDucted</td>
</tr>
</tbody>
</table>

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

**Taxation of Global Depository Receipts:**

(1) As per Sec 115AC, GDR means any instrument in the form of Depository Receipt created by overseas Bank outside India against the issue of shares of a LISTED Co in India. :: we conclude 115AC does not recognize GDR representing unlisted Company.
**Tax Implications:**

**Tax Implication No-1**

As per Sec 47(viia) transfer of GDR referred to in 115AC (i.e. Listed Co.) made outside India by a Non resident to another Non resident is exempt from Capital Gains. :: We conclude transfer of unlisted Co’s GDR by a Non Resident to another Non Resident outside India is taxable.

**Tax Implication No-2**

Let us assume that 100 GDR's are issued @ Rs. 1,000 each on 15/4/2019 to Mr. A, a Non resident. Now he wishes to trade in BSE. :: he has got the GDR redeemed against the equity shares of Infosys Ltd.

For that purpose, he made a request for redemption on 15/9/2019 for conversion into eq. shares. FMV of 1 eq sh of Infosys Ltd on that date is Rs. 2,200. Infosys Ltd allotted Mr. A 50 eq sh on 15/11/19. FMV of 1 eq sh on this date = Rs. 2,400.

As per the CBDT circular the sale consideration of such an exchange of GDR against equity shares shall be FMV of the shares on the date on which request for redemption was made. Compute CG on exchange of GDR against shares.

<table>
<thead>
<tr>
<th>Sales Consideration</th>
<th>(Rs.2200 x 50)</th>
<th>1,10,000</th>
<th>15/9/19</th>
</tr>
</thead>
<tbody>
<tr>
<td>(-) COA</td>
<td>(Rs.1000 x 100)</td>
<td>(1,00,000)</td>
<td>15/4/19</td>
</tr>
</tbody>
</table>

| STCG | 10,000 |

**Tax Implication No-3**

Suppose later on Mr. A sold 50 eq shares @ Rs. 3000 / share on 15/12/20. Compute CG.

<table>
<thead>
<tr>
<th>Sales Consideration</th>
<th>(50 x Rs.3000)</th>
<th>1,50,000</th>
</tr>
</thead>
<tbody>
<tr>
<td>(-) COA {As per Sec 49 (2ABB)}</td>
<td>(50 x Rs.2200)</td>
<td>(1,10,000)</td>
</tr>
</tbody>
</table>

| LTCG | 40,000 |

[15/9/19 to 14/12/20]
As per Sec 49(2ABB) the COA of the shares obtained on conversion of GDR = FMV of shares on the date on which request for redemption was made.

To determine whether the capital asset is long term or short term, period shall be considered from the date on which request for redemption was made.

Chapter XIA - Special provisions relating to certain incomes of NRI's - Secs 115C to 115-I

**Sec 115C: Definition**

NRI: Individual + Citizen of India/Person of Indian origin + Non-Resident


Foreign Exchange: Specified Assets purchased in convertible foreign exchange

LTCG: LTCG from foreign exchange assets.

II: Interest/Dividend income from foreign exchange assets.

**Sec 115D: Method of Computation**

II: Secs 28 to 44C, Sec 57 and Chapter VI-A are not available.

LTCG: Chapter VI-A not available.

First Proviso to Sec 48: Available.

Second Proviso to Sec 48: Not Available.

Other Incomes: Normal Provisions.

**Sec 115E: Tax Rates**

LTCG: 10%

II: 20%

Other Incomes: Normal Tax Rates
Sec 115F: Exemption (Same as Sec 54F)

- NRI derives LTCG
- Within Six months from the date of transfer
- Invests the net consideration in specified assets
- then
  LTCG X Cost of new asset/ Net consideration
  is not taxable
- New asset should be retained for 3 years from the date of its acquisition.
- If transferred/converted into money before 3 years, then the LTCG exempted earlier taxable as LTCG in the year in which the new asset is transferred.

Sec 115G: Exemption from Condition of Filing ROI

ROI not to be filed if:
1. Total income includes only II and/or LTCG.
2. TDS is deducted.

Sec 115H: Chapter to apply even if NRI becomes Resident

- NRI becomes Resident.
- Can file declaration with ROI of Assessment Year in which he becomes resident.
- To the effect that he wants to be governed by the provisions of this chapter.
- Chapter to apply for II from foreign exchange asset (no deduction of any expense, no deduction under Chapter VI-A and Tax Rate Flat 20%).
- Chapter to apply for subsequent Assessment Years also till the time the assets are transferred/converted into money.

Sec 115-I: Chapter is Optional
### (SUMMARY of TEN Secs to be filled by students)

<table>
<thead>
<tr>
<th>Particulars</th>
<th>115A(1)</th>
<th>115A(2)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1) Entity</td>
<td>Non Resident / Foreign Co.</td>
<td></td>
</tr>
<tr>
<td>2) Payer</td>
<td>Indian concern / government</td>
<td></td>
</tr>
<tr>
<td>3) Instrument with timing</td>
<td>Loan in foreign currency</td>
<td></td>
</tr>
<tr>
<td>4) Rates</td>
<td>20%</td>
<td></td>
</tr>
<tr>
<td>5) 28 to 44C, 57</td>
<td>NA</td>
<td></td>
</tr>
<tr>
<td>6) Chapter VIA</td>
<td>NA</td>
<td></td>
</tr>
<tr>
<td>7) Set off</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>8) Other Incomes</td>
<td>Normal Rates, CH VIA ✓</td>
<td></td>
</tr>
<tr>
<td>9) ROI</td>
<td>No, if TDS deducted (+) only Int Income</td>
<td></td>
</tr>
<tr>
<td>10) 1st Proviso to Sec 48</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td>11) 2nd Proviso to Sec 48</td>
<td>-</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>115A(3)</th>
<th>115A(4)</th>
<th>115A: Royalty / Fees for Technical services</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Particulars</td>
<td>44DA</td>
<td>115AB</td>
</tr>
<tr>
<td>---------------------------------</td>
<td>---------------</td>
<td>---------------</td>
</tr>
<tr>
<td>1) Entity</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2) Payer</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3) Instrument with timing</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4) Rates</td>
<td></td>
<td></td>
</tr>
<tr>
<td>5) 28 to 44C, 57</td>
<td></td>
<td></td>
</tr>
<tr>
<td>6) VIA</td>
<td></td>
<td></td>
</tr>
<tr>
<td>7) Set off</td>
<td></td>
<td></td>
</tr>
<tr>
<td>8) Other Incomes</td>
<td></td>
<td></td>
</tr>
<tr>
<td>9) ROI</td>
<td></td>
<td></td>
</tr>
<tr>
<td>10) 1st Proviso to Sec 48</td>
<td></td>
<td></td>
</tr>
<tr>
<td>11) 2nd Proviso to Sec 48</td>
<td></td>
<td></td>
</tr>
<tr>
<td>115AC</td>
<td>115AD</td>
<td>115C-I</td>
</tr>
<tr>
<td>-------</td>
<td>-------</td>
<td>--------</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sec 10(48) / 10(48A) / 10(48B):</td>
<td></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td><strong>10(48)</strong></td>
<td><strong>10(48A)</strong></td>
<td><strong>10(48B)</strong></td>
</tr>
<tr>
<td><strong>FA 2012</strong></td>
<td><strong>FA 2016</strong></td>
<td><strong>FA 2017</strong></td>
</tr>
<tr>
<td>Received <em>In India</em> (+) <strong>INR</strong> (+) By Foreign Co. (+) Sale of crude oil / other notified goods or services (+) to any <em>person in India</em>. (+) <strong>Not engaged</strong> in any other activity in India (+) agreement with CG &amp; there is a national interest.</td>
<td>Income accrued (+) By Foreign Co. (+) Storage of crude oil in India &amp; sale therefrom (+) to any resident in India (+) agreement with CG &amp; there is a national interest.</td>
<td>Income accrued (+) By Foreign Co. (+) Sale of leftover stock in India after the expiry of agreement</td>
</tr>
</tbody>
</table>

**AMENDMENT MADE BY FINANCE ACT 2020**

As per Sec 10(48C) any income accruing or arising to Indian Strategic Petroleum Reserves Limited (ISPRL), being a wholly owned subsidiary of Oil Industry Development Board under the Ministry of Petroleum and Natural Gas, as a result of an arrangement for replenishment of crude oil stored in its storage facility in pursuance to directions of the Central Government in this behalf shall be exempt. This exemption shall be subject to the condition that the crude oil is replenished in the storage facility within three years from the
end of the financial year in which the crude oil was removed from the storage facility for the first time.

---

### Sec 115BBA: NR Sportsmen/ Sports Association/ Entertainer:

<table>
<thead>
<tr>
<th>Where the total income of an assessee -</th>
<th>Applicable rate of tax</th>
</tr>
</thead>
</table>
| (a) being a sportsman who is **not a citizen of India** and is a **non-resident**, includes any income received/ receivable by way of-  
(i) participation in India in any game (other than the games referred to in Sec 115BB) or sport; or  
(ii) advertisement, or  
(iii) contribution of articles relating to any game or sport in India in newspapers, magazines or journals; or | 20% of such income |
| (b) being a non-resident sports **association or institution**, includes any amount guaranteed to be paid or payable to such association or institutions in relation to any game (other than the games referred to in Sec 115BB) or sport played in India; | 20% of such income |
| (c) being an **entertainer**, who is not a citizen of India and is a nonresident, includes any income received or receivable from his performance in India | 20% of such income |

1. **No deduction or Allowance** shall be allowed in computing income referred to in (a), (b) and (c).
2. It shall **not be necessary** for the assessee to **furnish return** under Sec 139 if-  
   (i) The total income of the assessee consist of **only the incomes** referred to in (a), (b) and (c) above and  
   (ii) **Tax at source** has been **deducted** from such income.  
3. **TDS** of above income for NR Payee will be deducted under sec 194E.
4. **Umpires & Referees are not covered** in this Sec, as they cannot be called as a sportsman. However, they are professional whose TDS will be deducted under sec 194J or 195 as the case may be.

5. The above incomes are **taxable flat @20%** without giving the benefit of Basic Exemption Limit.

---

**Sec 194E: TDS on payment to non-resident sportsmen or sportsmen association or entertainer**

**Deductor - Any Person**

**Deductee - Any non-resident sportsmen not citizen of India and non-resident sports association or non-resident entertainer**

**Time of Deduction - At the time of credit or payment, whichever is earlier.**

**Rate of TDS - 20%.**

**Threshold - NIL**

**Notes:**

1. **Umpires & Referees not covered** in this sec. They are covered u/s 194J for Resident Payee & sec 195 for NR Payee.

2. If payment is made to a Resident Sportsmen or Entertainer then TDS is deducted u/s 194J.

---

**Amendment made by Finance Act 2018:**

Royalty/fees for Technical services by National Technical Research Organisation (NTRO) to Non-Resident [Sec 10(6D)]

Any income arising to a **Non-resident/Foreign company** by way of royalty from (or fees for technical services rendered in or outside India to) the National Technical Research Organisation is exempt.
Sec 115JG: Conversion of an Indian Bank branch of Foreign Company into Subsidiary Indian Company

A foreign company namely Bank of Germany is operating banking business in India through its branch. Such branch is converted into an Indian subsidiary company of Bank of Germany on 10.1.2020.

Bank of Germany transfers all its assets of Indian branch to the Indian subsidiary company on 25.1.2020. Now as per provisions of Sec 115JG, in the previous year 31.3.2019:

(i) **No capital gains** will arise to Bank of Germany when it transfers the assets of Indian branch to its Indian subsidiary Company,

(ii) The brought forward **losses and unabsorbed depreciation** of branch shall be allowed to be carried forward and set-off by the Indian subsidiary company,

(iii) **MAT credit** available to Bank of Germany under Sec 115JAA shall be allowed to be carried forward and set-off by Indian subsidiary company.

The above benefits are available if conversion of branch into Indian Company took place **as per the scheme notified by the Government**.

If later on, let us say in Previous Year 31.3.2022, any of the conditions of the scheme notified are violated, then the above three benefits shall be withdrawn. Assessing Officer shall re-compute the total income of relevant Assessment Year 2021-22 and make rectification under Sec 154 upto 31.3.2026.

Presumptive Taxation for Non - Resident

**Sec 44B v/s Sec 172 - Shipping Business of Non Resident**

1) As per Sec 172 it **overrides the entire Income tax** law and it cover amount paid or payable to Non-Resident for carriage of passengers, livestock, mail or goods shipped at any port in India.

2) It has been clarified by an amendment that above charges will **include demurrage and handling charges**.

3) This Sec is a **recovery mechanism** from non-resident in respect of **ships leaving from India**. This Sec is mandatory to comply.

4) As it overrides the entire Income Tax Act **no deduction** in respect of any expense or allowance, **set off** or carry forward or Chapter VI A shall be allowed.
5) The assessee is supposed to pay tax at the rate of **40%** [2% or 5% surcharge if applicable plus 4% Health & Education cess]

6) The **deemed income** of the assessee under **Sec 172** shall be **7.5%** of the Amt paid or payable to the non-resident.

7) All these activities will be done in the previous year only.

8) In the **next year** i.e. in the AY the non-resident has an option to follow **Sec 44B** and accordingly in this sec following 2 incomes will be covered.
   a) Amt paid or payable to non-resident in respect of carriage of passengers, livestock mail or goods **shipped at any port in India**. [This income is already charged in **Sec 172**]
   b) The Amt **received in India** in respect of carriage of passengers etc. **shipped at any port outside India**. [This amt is not covered in **Sec 172** and therefore it will be chargeable only in **Sec 44B**]

9) Since it overrides only PGBP Secs. Therefore, as per **Sec 44B unabsorbed dep shall not be allowed** but brought forward **losses** and chap VIA shall be **allowed**.

10) The **tax rates** shall be **normal** rates applicable to assessee.

11) As per Supreme Court Judgement - **A.S GLITRE** the tax paid u/s **172** shall be considered as **Advance tax** and any refund of such amount shall be entitled for Interest.

<table>
<thead>
<tr>
<th><strong>Sec 44B</strong></th>
<th><strong>Sec 172</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>1. It is a charging Sec i.e., it deals with computation of income.</td>
<td>1. It is a recovery mechanism.</td>
</tr>
<tr>
<td>2. It covers the amounts paid/payable for carriage of passengers, live-stock, mail or goods <strong>shipped at any port in India</strong> as well as amounts received in India or deemed to be received in India for carriage of passengers, livestock mail or goods <strong>shipped at any port outside India</strong>.</td>
<td>2. It covers only the amounts paid/payable for carriage of passengers, livestock, mail or goods <strong>shipped at any port in India</strong>.</td>
</tr>
<tr>
<td>3. Normal tax rates shall apply.</td>
<td>3. Flat tax of 40% plus 2% or 5% surcharge (where total</td>
</tr>
</tbody>
</table>
income exceeds Rs. 1 crore or 10 crores) plus 4% Health education cess.

<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>5. Current year and brought forward losses of other businesses can be set off.</td>
<td>5. No set off is permissible as it over-rides Chapter VI.</td>
</tr>
<tr>
<td>6. Chapter VI-A deductions are available.</td>
<td>6. Chapter VI-A deductions are not available.</td>
</tr>
</tbody>
</table>

**Sec 44BBA: Presumptive Income in case of operation of AIRCRAFT for Non-Resident**

The following income of non-resident shall be chargeable under the head PGBP at the rate of 5% of Amount (i.e. 5% of Revenue)

1) Amount paid or payable in India or outside India in respect of carriage of goods etc from any place in India.

2) Amount received in India in respect of carriage of goods etc from any place outside India.

The tax rates will be the normal rates applicable to assessee.

**Sec 44BBB: Presumptive Income in case of Foreign company in respect of Civil Construction Business in a Turnkey Project**

1) If a Foreign Company is engaged in a business of civil construction or business of erection of Plant & Machinery or testing or commissioning thereof as a Turnkey Project then deemed income shall be 10% of amt paid or payable to foreign Co. in or outside India.

2) Erection of plant & Machinery means preparing the physical site for installing plant & machineries and fitting it in a place.

3) Testing or commissioning means checking whether all facilities are up to date or not.
4) Turnkey Project means such project constructed so that it could be sold to any payer as a completed project.

5) Where the assessee claims that the actual profits are lower than 10% then it can offer that by maintaining BOA as per Sec 44AA and conducting tax audit under Sec 44AB.

6) Can the AO change the Actual profit if it is higher than 10% of the Receipts?

It was held by Delhi High Court - 
DSD Noell GmbH that the benefit of declaring actual profits is with respect to Sec 44BBB is only with the assessee and the same cannot be invoked by the AO. This principle is applicable wherever the assessee has an option to offer Actual Profit.

**Sec 444BB:** Presumptive Income for Non-Resident in respect of facilities given for extraction, exploration of Mineral Oil.

1) If a non-resident is engaged in the business of providing services or facilities or supplying of plant & Machinery on hire for using in prospering / extraction / production of MINERAL OIL.

2) Deemed Income will be 10% of the following:-
   i) Amount paid or payable in or outside India in respect of prospecting etc. of mineral oil in India.
   ii) Amount received in India in respect of prospecting etc of mineral oil outside India.

3) The assessee has an option to offer ACTUAL PROFITS by complying Sec 44AA & Sec 44BB.

4) The issue under consideration is whether technical services in respect of prospecting etc of mineral oil be covered under Sec 115A or Sec 44DA or Sec 44BB. The Finance Act 2010 has clarified that if the amount is FTS, then it shall be taxable as per sec 115A or 44DA irrespective of the business of the assessee.
Note on Sec 44AD/44ADA/44AE/44B/44BB/44BBA/44BBA:
In case of Sec 44AD/ADA/AE the AO can assess income higher than Deemed Income because in those Secs the wording used is “% of Turnover or such higher Income as claimed to have been earned by assessee”.
However, in case of Sec 44B/44BB/44BBB/44BBA the AO does not have the power increase the income beyond Deemed Incomes.

Sec 44C: Taxation of branches of Foreign Companies - Head Office Expenditure
1. The income of branches of foreign companies in India shall be computed normally as per Secs 28-44D. However, the head office expenditure shall be allowed to the following extent:
   (i) Amount equal to 5% of Adjusted Total Income; OR
   (ii) The amount of so much of the expenditure in the nature of head office expenditure attributable to business or profession of assessee in India whichever is less

Key Note:
ADJUSTED TOTAL INCOME means the total income computed in accordance with the income tax act, without giving effect to:
✓ Brought forward depreciation;
✓ Brought forward losses;
✓ Deductions under chapter VI-A;
✓ Brought forward Capital Expenditure of Family Planning expenses and;
✓ Actual Expenditure debited to P&L.

Note: MAT is not applicable to a Foreign Company, if it earns income solely u/s 44B, 44BB, 44BBA or 44BBB.

Sec 9: Discussion on Income Accrued or Deemed to accrued in India Business Connection - Sec 9(1)(i)
'Business connection' shall include any business activity carried out through a person acting on behalf of the non-resident [Explanation 2 to Sec 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:
- 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.

(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.

---

**Diagram:**

- **Mr. A acting on behalf of Mr. X, non-resident**
  - Secures order for
    - Mr. X, non-resident
      - Business connection directly established
    - Mr. Y, non-resident
      - Business Connection established, if
        - (i) Mr. X is controlled by Mr. Y or
        - (ii) Mr. Y is controlled by Mr. X or
        - (iii) Commonly controlled by Mr. Z, being the person who controls Mr. X as well as Mr. Y.
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 Sec 9(1)(i)].

**Significant Economic Presence [Explanation 2A to Sec 9(1)(i)]**

Significant economic presence of a non-resident in India shall also constitute business connection in India with effect from 1st April 2022, i.e AY 2022-23:

- Explanation 2A.—For the removal of doubts, it is hereby declared that the significant economic presence of a non-resident in India shall constitute “business connection” in India and “significant economic presence” for this purpose, shall mean—

- (a) transaction in respect of any goods, services or property carried out by a non-resident with any person in India including provision of download of data or software in India, if the aggregate of payments arising from such transaction or transactions during the previous year exceeds such amount as may be prescribed; or

- (b) systematic and continuous soliciting of business activities or engaging in interaction with such number of users in India, as may be prescribed:

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

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

Provided further that only so much of income as is attributable to the transactions or activities referred to in clause (a) or clause (b) shall be deemed to accrue or arise in India.

Note - This provision has been inserted to take care of new business models such as digitized businesses, which do not require physical presence of itself or any agent in India. Such businesses can now be covered within the scope of Sec 9(1)(i).

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

In the case of a business [other than the business having business connection in India on account of Significant economic presence] 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.

Amendment made by Finance Act 2020
Explanation 3A.--For the removal of doubts, it is hereby declared that the income attributable to the operations carried out in India, as referred to in Explanation 1, shall include income from--

(i) such advertisement which targets a customer who resides in India or a customer who accesses the advertisement through internet protocol address located in India;

(ii) sale of data collected from a person who resides in India or from a person who uses internet protocol address located in India; and

(iii) sale of goods or services using data collected from a person who resides in
Provided that the provisions contained in this Explanation shall also apply to the income attributable to the transactions or activities referred to in Explanation 2A.

(b) **Purchase of goods in India for export** [Explanation 1(b) to Sec 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 Sec 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 Sec 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 Sec 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.

**Sec 9(1)(i): 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.

Amendment made by Finance Act 2020:

1. Computation of Income u/s 9(1)(i) will be subject to Safe Harbour Rules referred u/s 92CB.
2. Further the Board with the approval of Central Government may enter into an Advance Pricing Agreement with any person for determination of income referred u/s 9(1)(i).

The above amendments shall be seen after Transfer Pricing.

**Income from salaries earned in India [Sec 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.
Income from salaries payable by the Government for services rendered outside India [Sec 9(1)(iii)].

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

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

As per Sec 9(1)(iv) a Dividend paid by an Indian Company outside India is Deemed to Accrue in India.

For Discussion on Offshore Funds managed by Fund Manager-Sec 9A, Refer Page_____ in TextBook.

TDS on amount payable to Non-Residents [Sec 195]

(1) Applicability

Any person responsible for paying interest (other than interest referred to in Sec 194LB or Sec 194LC or Sec 194LD) or any other sum chargeable to tax (other than salaries) to a non-corporate non-resident or to a foreign company is liable to deduct tax at source at the rates in force. Such persons are also required to furnish the information relating to payment of any sum in such form and manner as may be prescribed by the CBDT.

Payee to be a non-resident - In order to subject an item of income to deduction of tax under this Sec the payee must be a non-corporate non-resident or a foreign company.

Payer may be a resident or non-resident - The words “any person” used in Sec 195(1) is intended to include both residents and non-residents. Therefore, a non-resident person is also required to deduct tax at source before making payment to another non-resident, if the payment represents income of the payee non-resident, chargeable to tax in India.
Explanation 2 clarifies that the obligation to comply with Sec 195(1) and to make deduction thereunder applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to all persons, resident or non-resident, whether or not the non-resident has:-

(a) a residence or place of business or business connection in India; or
(b) any other presence in any manner whatsoever in India.

(2) Time of deduction
The tax is to be deducted at source at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier.

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

(3) Person responsible for paying any sum to non-resident to furnish prescribed information
Sec 195(6) provides that the person responsible for paying any sum, whether or not chargeable to tax under the provisions of the Act, to a non-corporate non-resident or to a foreign company, shall be required to furnish the information relating to payment of such sum in the prescribed form and prescribed manner.

(4) Specified class or classes of persons, making payment to the non-resident, to mandatorily make application to Assessing Officer to determine the appropriate proportion of sum chargeable to tax
Under Sec 195(2), where the person responsible for paying any such sum chargeable to tax under the Act (other than salary) to a non-resident, considers that the whole of such sum would not be income chargeable in the hands of the recipient, he may make an application to the Assessing Officer to determine, by general or special order, the appropriate proportion of such
sum so chargeable. When the Assessing Officer so determines, the appropriate proportion, tax shall be deducted under Sec 195(1) only on that proportion of the sum which is so chargeable.

**Amendment made by Finance Act (No.2) 2019:**

Online filing of application seeking determination of tax to be deducted at source on payment to non-residents or Foreign Company.

These amendments will take effect from 1st November, 2019.

Can payments made by an assessee to a non-resident agent who does not have any income assessable in India be disallowed under sec 40(a)(i) for non-deduction of tax at source on the ground that no application was made by the assessee under sec 195(2) for making deduction of tax at source at nil rate?

**CIT v. Maruti Suzuki India Limited [2018] (Del)**

The High Court held that where the assessee has made payment to a non-resident agent where such income is not chargeable to tax in India, sec 40(a)(i) could not be invoked to disallow deduction of such payment for non-deduction of tax at source, while computing the business income of the assessee.