E-Book

Interesting Aspects in Non-Resident Taxation

The Institute of Chartered Accountants of India

(Set up by an Act of Parliament)

Southern India Regional Council

Chennai

E-Book

Interesting Aspects in Non-Resident Taxation

This e-book has been authored by

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The Institute of Chartered Accountants of India
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THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

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Southern India Regional Council

FOREWORD

Income Tax Law and Practice has been an important domain expertise for all our members both in practice and industry. With notable number of Indians settled abroad and their track record of bringing income earned abroad to India on a regular basis exposes them to Indian Income Tax subject to various provisions contained in that Act, leading to specialization requirement of Non Resident Taxation.

I am feeling elated to share my happiness amongst the members and other stakeholders in bringing out an informative e-book on **Interesting Aspects in Non-Resident Taxation.**

This e-book highlights the various provisions in respect of Sections 9, 10, 90 and 91 of Income Tax Act, 1961. Issues like Presumptive Taxation, Foreign Tax Credit have also been discussed in detail giving appreciable insights on those aspects. Coverage on Rate of Exchange for Computation of Total Income and for the purpose of TDS, Withholding Tax Provisions have been dealt with in a practice friendly manner. In all this e-book gives a deep perspective in the ever-increasing domain of Direct Taxation in general and Non- Resident Taxation in particular.

This e-book, one in a series of member centric publications planned by SIRC, aims to serve as a Handbook and Guide for the professionals who intend to practice in the area of NRI taxation and I am confident that it will serve the intended purpose.

On behalf of SIRC, I wish to place our sincere gratitude and appreciation to CA. V K Subramani, for sharing his rich experience and expertise on the Non Resident Taxation amongst our members through this e-book. I also take the privilege of thanking CA. M K Sridhar for reviewing the basic draft of e-book and adding value to the substance of the e-book.

Comments and suggestions on the e-book are welcome at sirc@icai.in

CA.K. JALAPATHI
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CONTENT

Sl. no	PARTICULARS
1	Residential Status
2	Scope of total income
3	Section 9 and section 10
4	Presumptive Taxation
5	Section 90 and 91
6	Specific provisions applicable for NRIs
7	Foreign Tax Credit
8	Rate of exchange for computation of total income & for the purpose of TDS
9	Withholding tax provisions

I. Residential Status

Income-tax is levied on the total income computed as per the provisions of the Income-tax Act, 1961. Determination of residential status is the first step and thereafter further provisions relating to computation of total income and resultant tax liability would follow. Section 2(42) defines “resident” to mean a person who is resident in India within the meaning of section 6.

Section 6 deals with 3 categories viz. (i) resident and ordinarily resident; (ii) resident but not ordinarily resident; and (iii) non-resident. Since the status of other taxable units does not involve much of technical interpretation, this chapter is confined to discussing the residential status of individual taxpayers only despite taking note of the fact that a foreign company may become resident due to application of POEM.

The Finance Act, 2020 brought in certain amendments for bestowing deemed residential status in the case of persons of Indian origin who do not have to pay income-tax outside India but have income beyond certain limit (Rs.15 lakhs) in India. This is just to tax the income earned outside India also by inserting a deeming provision to provide deemed resident status to those persons. However, the rigour of this contained in section 6(1) is mitigated by section 6(6)(c) and section 6(6)(d).

Before we embark on how the deemed resident status is diluted by section 6(6), let us have a look at section 6 per se to refresh our memories on residential status.

Resident and ordinarily resident: An individual is said to be resident in India if he (i) is in India for a period or periods amounting in all to 182 days or more; or (ii) has been in India for 365 days or more in 4 previous years preceding that (previous) year and has been in India for 60 days or more in that (previous) year.

In the case of a person citizen of India who leaves India in any previous year as a member of the crew of an Indian ship (defined in section 3(18) of the Merchants Shipping Act, 1958) or for the purpose of employment outside India, instead of 60 days given in (ii) above it should be taken as 182 days. Thus we come across instances where persons leaving India for employment preferably depart before 30th September in order to avoid tax liability in respect of income earned outside India. This line of thinking or interpretation is without taking note of DTAA which generally provide for taxation of income from employment in the State of source and for the time being, it is not elaborated at this place.

Similarly, a person being a citizen of India or a person of Indian origin comes on a visit to India in any previous year the number of days of stay in India during the previous year should be taken as 182 days and not 60 days given in (ii) above.

The Finance Act, 2020 amended the duration of stay in the case of persons being citizens of India or persons of Indian origin by creating yet another class of persons viz. in the case of persons whose total income (excluding income from foreign sources) exceeds Rs.15 lakhs, and for whom instead of 60 days given in (ii) above it should be read as 120 days. Thus a person being citizen of India or a person of Indian origin comes on a visit to India and has income from Indian sources (contra to foreign sources) exceeding Rs.15 lakhs, if the number of days of stay in India during the previous year is 120 days or more, he shall be treated as (deemed) resident and ordinarily resident.

For the purpose of deciding whether a person is an Indian citizen or a person of Indian origin, reference has to be made to section 115C(e) which says a person shall be deemed to be of Indian origin if he or either of his parents or any of his grand-parents, was born in undivided India.

In the case of stateless persons: Section 6(1A) inserted by the Finance Act, 2020 w.e.f.1.4.2021 says that notwithstanding anything contained in section 6(1), an individual, be a citizen of India having total income in India exceeding Rs.15 lakhs during the previous year shall be deemed to be resident in India in that previous year, if 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. The Explanation to section 6(1A) says that it would not apply in the case of an individual who is said to be resident in India in the previous year under section 6(1).

Thus (i) Clause (b) of the Explanation 1 to section 6(1) has reduced the period of stay to 120 days instead of 182 days where a citizen of India or a person of Indian origin comes on a visit to India in any previous year as deemed resident if his total income in India exceeds Rs.15 lakhs; and (ii) In the case of persons who is not liable to tax in any country or jurisdiction in respect of his income earned therein shall be deemed to be resident if his total income in India exceeds Rs.15 lakhs during the previous year. The category (ii) given above, has no connection to number of days of stay in India, as a criteria.

Resident but not ordinarily resident: A person is said to be 'not ordinarily resident' if such person (a) has been a non-resident in 9 out of 10 previous years preceding that year ; or (b) his stay in India in 7 previous years preceding that year aggregating in all to 729 days or less.

The Finance Act, 2020 w.e.f.1.4.2021 has inserted clause (c) to section 6(6) whereby a citizen of India or a person of Indian origin whose total income in India (excluding income from foreign sources) exceeds Rs.15 lakhs and covered by clause (b) of the Explanation 1 to section 6(1) who

has been in India for 120 days or more but less than 182 days shall be deemed to be "resident but not ordinarily resident". ***Thus the rigour of clause (b) of the Explanation 1 to section 6(1) which bestows deemed resident status gets converted into resident but not ordinarily resident by virtue of section 6(6)(c).*** The impact of this would be more apparent when we consider section 5 dealing with scope of total income in the next Chapter.

Similarly, section 6(6)(d) inserted by Finance Act, 2020 w.e.f. 01.04.2021 says that a person being a citizen of India who is deemed to be resident under section 6(1A) shall be vested with the residential status of "resident but not ordinarily resident". In the case of persons referred to as 'stateless' in the earlier part of this Chapter who have total income in India exceeding Rs.15 lakhs will be considered as "resident but not ordinarily resident" and not in the status of "resident and ordinarily resident". Thus the status of resident but not ordinarily resident (hereinafter referred to as RNOR) would insulate such taxpayers from being subjected to tax in respect of income earned outside India.

Explanation to section 6(6) says income from foreign sources would mean income which accrues or arises outside India (except income derived from a business controlled in or a profession set up in India) and which is not deemed to accrue or arise in India.

This Explanation again fortifies the view that <u>unless</u> the income earned outside India is connected to India by virtue of business controlled in or set up in India or in other cases, is deemed to accrue or arise in India; it would not be taxed in India.

Rule 126: Clause (a) of Explanation 1 to section 6(1) deals with two aspects viz (i) citizen of India leaving India as a member of the crew of an Indian ship defined in section 3(18) of the Merchant Shipping Act, 1958; and (ii) leaving India for the purpose of employment outside India.

Rule 126 deals with computation of period of stay in India in the case of individual being a citizen of India and a member of the crew of a ship. 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, shall be excluded.

Continuous Discharge Certificate shall have the meaning assigned to it in the Merchant Shipping (Continuous Discharge Certificate – cum-Seafarer's Identity Document) Rules, 2001 made under the Merchant Shipping Act, 1958.

"Eligible voyage" would mean a voyage undertaken by a ship engaged in the carriage of passengers or freight in international traffic where (a) for the voyage having originated from

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

Readers may take note of Circular No.17 /2017 dated 26.04.2017 where it is clarified that salary accrued to a non-resident seafarer for services rendered outside India on a foreign going ship (with India flag or foreign flag) shall not be included in the total income merely because the salary was credited in the NRE account maintained with a bank in India by the seafarer.

In *CIT v. O.Abdul Razak (2011) 198 Taxman 1 (Ker)* it was held that going abroad for the purpose of employment would not necessarily mean that the assessee has to take up employment or any avocation referred to in CBDT Circular No.346 dated 30.06.1982 *and even taking up own business by the assessee outside India satisfies the condition of going abroad for the purpose of employment referred to in Explanation (a) to section 6(1)(c).*

II. Scope of Total Income

In the previous chapter, the discussion revolved on the recent developments in residential status. The scope of total income decides the tax liability and subsequent events viz., it being accepted or challenged by the assessee. Accrual of income is the corner stone for levying income tax and the mere possibility to make a computation of income per se will not lead to taxation of such computed income.

The liability to pay income-tax would arise only when the income accrues. As a corollary, income accrues when the assessee acquires the right to receive the same and not when it is actually received [*CIT v. Shri Goverdhan Ltd (1968) 69 ITR 675 (SC)]*. In the case of service, the income would accrue the moment the services are rendered [*CIT v. Punjab Tractors Co-operative Multi Purpose Society Ltd (1997) 95 taxmann.com 579 (P&H)]*. It may be noted that liability to tax would be dependent on the method of accounting followed by the assessee in spite of the accrual of income taking place as stated above.

The impact of residential status would get reflected in the computation of total income which is governed by section 5 with the title "scope of total income".

In the case of resident and ordinarily resident:

Section 5(1) says that subject to the provisions of the Act, the total income of a **person resident in India** shall include all income from whatever source derived by him. It includes –

(a) Any income received or deemed to be received in India in such year by such person or by any person on his behalf;

(b) Any income which accrues or arises or is deemed to accrue or arise to him India during such year;

(c) Any income which accrues or arises to him outside India during such year.

A bare reading of section 5(1) given above shows that the total income computation of a resident is (i) subject to the provisions of the Act; and (ii) all income are liable to tax without regard to the source from which it was derived. The legality of the income is not a criteria for its inclusion or otherwise. We have the benefit of legal decision viz. *CIT v. Piara Singh (1972) 83 ITR 678 (P&H)* that even profits from illegal business could be subjected to income-tax.

In the case of resident but not ordinarily resident (RNOR):

The proviso to section 5(1)(c) says that in the case of a person not ordinarily resident in India within the meaning of section 6(6) the income which accrues or arises to him outside India shall not be included unless it is derived from a business controlled in or a profession set up in India.

The proviso to section 5(1)(c) carves out an exception. Section 5(1)(c) says that any income which accrues or arises outside India during the previous year is chargeable to tax in the case of resident and ordinarily resident. The proviso says that in the case of RNOR the income which accrues or arises outside India shall not be included unless it is derived from a business controlled in or a profession set up in India.

Now on reference to section 6(1A) read with section 6(6)(c) it is clear that in the case of a person having total income in India exceeding Rs.15 lakhs, his income from foreign sources will not be subjected to tax in India unless it is covered by the proviso to section 5(1)(c).

Example: Mr.X being a person of Indian origin comes on a visit to India and stays in India for 130 days in the previous year 2020-21. He has total income in India of Rs.18 lakhs. He has income from foreign sources say Rs.20 lakhs. His income from foreign sources will not be subjected to tax in India by virtue of section 6(6)(c) read with proviso to section 5(1)(c). Initially, such person is treated as resident as per clause (b) of Explanation 1 to section 6(1). However, by virtue of section 6(6)(c) his residential status would be "resident but not ordinarily resident". Thus by applying proviso to section 5(1)(c) such income will not be taxed in India. However, if his income outside India (i.e income from foreign sources) is from a business controlled in or a profession set up in India, then it is liable to tax in India.

The Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 w.e.f. 01.04.2021 has inserted yet another relief by amending the Explanation to section 6(6). The income from foreign sources would mean income which accrues or arises outside India but excludes (i) income derived from a business controlled in or a profession set up in India; **and** (ii) **which is not deemed to accrue or arise in India**.

The second condition “which is not deemed to accrue or arise in India” is significant to interpret the Explanation. If an assessee is employed in a foreign branch of an Indian company and when his services are outside India such income is not deemed to accrue or arise in India. However, it would satisfy the first condition of the Explanation to section 6(6)(d) viz. from a business controlled in or profession set up in India. Thus the rigour of clause (b) of Explanation 1 to section 6(1) and section 6(1A) is toned down significantly by insertion of section 6(6)(c) and section 6(6)(d) respectively.

III. Sections 9 and 10

It is an easy exercise to tax an income which is received by the assessee or accrued in favour of the assessee. However, if the taxpayer arranges his affairs in such a way that the amount of income is not received or does not accrue prima facie, it would be difficult if not impossible to impose tax on such income. Section 9 has the title “Income deemed to accrue or arise in India”. This section creates a fiction to tax an item of income on deemed basis instead of the actual receipt of income or accrual of income.

All income accruing or arising whether directly or indirectly through or from any business connection in India or from any property in India or through or from any asset or source of income in India or through the transfer of the capital asset situated in India *is chargeable to tax*. This could be sub-divided as (i) income from business connection; (ii) income from any property in India; (iii) income from any asset or source of income in India; and (iv) income through transfer of a capital asset situated in India. [Section 9(1)]

Explanation 1 to section 9(1)(i) provides clarity to the above said section by explaining as under:

(i) In the case of income from business (other than the business having business connection in India on account of significant economic presence) only such part of income is deemed to accrue or arise in India as is reasonably **attributable to the operations carried out in India;**

(ii) No income shall be deemed to accrue or arise in India in the case of a non-resident, in respect of the *activities or operations which are confined to purchase of goods in India for the purpose of export;*

(iii) No income shall be deemed to accrue or arise in India in the case of a non-resident engaged in the business of running a news agency or publishing newspapers or magazines or journals where such income accrues or arises through or from activities which are *confined to the collection of news and views in India for transmission out of India;*

(iv) No income shall be deemed to accrue or arise in India in the case of a non-resident (a) who is not a citizen of India; or (b) a firm which does not have any partner who is a citizen or resident of India; or (c) a company which does not have any shareholder who is a citizen or resident of India if the *income is from operations which are confined to shooting of cinematograph film in India;*

(v) No income shall be deemed to accrue or arise in India in the case of a foreign company engaged in the business of mining of diamonds where it accrues or arises through or from activities which are confined to the *display of uncut and unassorted diamonds in a special zone notified by the Central Government in this behalf in the Official Gazette.*

Business connection:

Explanation 2 to section 9(1) says business connection shall include any business activity carried out through a person who, acting on behalf of non-resident does the following activities:

(i) Habitually exercises authority to conclude contracts on behalf of non-resident or habitually concludes contracts or habitually plays the principal role to conclusion of contracts (i) in the name of non-resident; or (ii) for the transfer of ownership of or for granting of the right to use, property owned by the non-resident or that the non-resident has right to use; or (iii) for the provision of services by the non-resident;

(ii) Has no such authority but habitually maintains stock of goods or merchandise and regularly delivers goods or merchandise on behalf of non-resident;

(iii) Habitually secures orders in India, mainly or wholly for the non-resident subject to control exercised by the non-resident.

The first proviso to Explanation 2 to section 9(1) says business connection would not include business activity carried out through a broker, general commission agent or any other agent having independent status and who acts in the ordinary course of his business. *This would mean an **independent agent in India** will not create business connection to a non-resident by virtue of acting as agent for the non-resident.*

On the contrary, the further proviso says that where the broker, general commission agent or any other agent works mainly or wholly for non-resident under the control of the non-resident similar to that of principal-agent relationship then he shall not be deemed to be an agent of independent status. Thus, business connection would be present in such cases.

Explanation 2A - Significant economic presence:

Clause (a) of the Explanation 1 to section 9(1) says that only in the case of business connection **other than significant economic presence** such portion of income **reasonably attributable to**

the operations carried out in India is chargeable to tax as income deemed to accrue or arise in India. Explanation 2A inserted by the Finance Act, 2020 applicable from the assessment year 2022-23 explains the term 'significant economic presence'.

Significant economic presence means –

(a) Transaction in respect of any goods or 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 from such transactions exceeds such amount as may be prescribed; or

(b) Systematic and continuous soliciting of business activity or engaging in interaction with such number of users, as may be prescribed.

Note: CBDT vide notification dated 3rd May, 2021 has notified the **revenue threshold limit as Rs.2 crores and number of users threshold limit as 3 lakhs** for application of Explanation 2A .

The above said explanation would show that non-resident supplying goods or services to any person in India when the aggregate transaction exceeds certain prescribed limit or exceeds certain number of users so prescribed, it is deemed that there is significant economic presence for the non-resident in India.

The proviso to Explanation 2A says that the above said transaction and 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.

Mere supply of goods or services by non-resident to persons in India (including download of data or software in India) beyond monetary limit and beyond specified number of uses, would lead to significant economic presence for the non-resident or foreign entity in India.

However, further proviso provides the limit for taxation of income arising therefrom by putting a rider that the income as is attributable to the transactions or activities shall only be deemed to accrue or arise in India.

Explanation 3A – advertisement and sale of data vis a vis deemed accrual of income:

The Finance Act, 2020 taking note of the increased usage of electronic medium for reaching the potential customers cutting across the geographical barriers has inserted Explanation 3A for **taxation of income attributable to advertisement or sale of data or sale of goods or services by using data collected from persons residing in India.**

Clause (a) of the Explanation 1 to section 9(1)(i) limits the income liable to be taxed by putting a limit and by using the expression "the income as is reasonably attributable to the operations carried out in India". The coverage of Explanation 3A is given below:

Income which accrues from –

(i) 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 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 India or from a person who uses internet protocol address located in India;

Both Explanation 2A and 3A have inbuilt prescription of limits by stating that **the income as is attributable to the transactions or activities shall only be liable to tax in India**. Thus sale of goods or services concurrently fall both under Explanation 2A and Explanation 3A to section 9(1)(i).

Income under the head 'salaries' and 'interest':

Section 9(1)(ii) says that income which fall under the head 'salaries' shall be deemed to accrue or arise in India, if it is earned in India. The Explanation to the section 9(1)(ii) says that the income shall be regarded as earned in India if it is (i) for the services rendered in India; and (ii) also covers the rest period whether precedes or succeeds the period of service in India, if it forms part of service contract of employment.

In the case of salary paid by the Government to a citizen of India for services rendered outside India, it shall be deemed that the income by way of salary is deemed to accrue or arise in India and therefore is covered by section 9(1)(ii).

Section 9(1)(v) deals with income by way of interest deemed to accrue or arise in India. It says that the following items of interest are taxable in India:

(i) Interest payable by the Government;

(ii) Interest payable by a person who is a resident in respect of debt incurred or moneys borrowed for the purpose of business or profession carried on in India. Where the debt incurred or money borrowed and used for the purpose of business or profession carried on by such person outside India then such interest shall not be deemed to accrue or arise in India. It would accrue outside India.

(iii) Interest payable by a non-resident where the interest is payable in respect of any debt incurred or money borrowed and used for the purpose of business or profession carried on by such person in India. Thus a non-resident borrowing money or incurring debt for business or profession carried on by him outside India, shall not be deemed to accrue or arise in India;

Income by way of royalty and fees for technical services:

Section 9(1)(vi) says royalty income shall be chargeable to tax as deemed to accrue or arise in India in the following cases:

(i) Royalty payable by the Government;

(ii) Royalty payable by a person who is a resident in respect of royalty payable for any right, property or information used or services utilized for the purpose of business or profession carried on in India. However, royalty payable for use of any right, property or information for the purpose of business or profession carried on outside India shall not be deemed to accrue or arise in India;

(iii) Royalty payable by a non-resident where the royalty is payable in respect of any right, property or information used or services utilized for the purposes of business or profession carried on by such person in India. However, where it is for purpose of making or earning any income from any source outside India, it shall not be deemed to accrue or arise in India;

Landmark decision:

In *Engineering Analysis Centre of Excellence (P) Ltd v. CIT (2021) 432 ITR 471 (SC)* the Supreme Court dealt with meaning of term 'royalty' in the context of DTAA and withholding tax under section 195 of the Income-tax Act. It classified group of appeals pending before it into four categories viz. (i) the computer software is purchased directly by an end-user, resident in India, from a foreign, non-resident supplier or manufacturer; (ii) resident Indian companies act as distributors or resellers, by purchasing computer software from foreign, non-resident suppliers or manufacturers and reselling the same to resident Indian end-users; (iii) distributor happens to be a foreign, non-resident vendor, who, after purchasing software from a foreign, non-resident seller, resells the same to resident Indian distributors or end-users; and (iv) computer software is affixed onto hardware and is sold as an integrated unit / equipment by foreign, non-resident suppliers to resident Indian distributors or end-users.

The apex court held that end-user licence merely allows the person to use the software and does not grant any right or interest to reproduce the computer software. The reproduction of computer software by copying is expressly interdicted and it is expressly stated that no copyright is transferred either to distributor or to the end-user. What was licenced by the

foreign, non-resident supplier to the distributor and which is resold to end-user is the same physical object which is contained in embedded computer program and which is only a sale of goods. The distributors resold shrink-wrapped copies of computer programs already put in circulation and it is only a distribution of copyrighted computer software and therefore it would not constitute grant of an interest in copyright. Thus it does not necessitate deduction of tax at source under section 195 of the Act.

Section 9(1)(vii) says that income by way of **fees for technical services** shall be deemed to accrue or arise in India in the following cases:

(a) Fees for technical services payable by the Government;

(b) Fees for technical services payable by a person who is a resident where the fees are payable in respect of services utilized in a business or profession carried on by such person in India shall be deemed to accrue or arise in India. However, where the fees are payable for the purpose making or earning any income from any source outside India, it shall not be deemed to be accruing or arising in India;

(c) Fees for technical services payable by a person who is a non-resident, where the fees are payable in respect of services utilized in 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 it shall be deemed to accrue or arise in India. However, where fees for technical services are payable by a non-resident where the fees are in respect of services utilized in a business or profession carried on outside India, it shall not be deemed that it is accruing or arising in India;

The following circulars may be referred to with regard to section 9:

Circular No.23 dated 23.07.1969

Circular No.786 dated 07.02.2000

Circular No.4 dated 20.02.1969

Exempt Incomes [Section 10]

(i)	Section 10(4)(ii) – Interest on moneys standing to the credit of an individual in a Non-Resident External Account in any bank in India when maintained in accordance with FEMA, 1999.
(ii)	Section 10(4C) – Interest income of a non-corporate non-resident or foreign company on specified offshore Rupee Denominated Bonds issued by an Indian company or business trust.

(iii)	Section 10(4D) – Income of a specified fund on transfer of certain asset.
(iv)	Section 10(6)(ii) – Remuneration received by officials of Embassies etc of Foreign States.
(v)	Section 10(6)(vi) - Remuneration received for services rendered in India by a foreign national employed by a foreign enterprise.
(vi)	Section 10(6)(vii) – Salary received by a non-citizen for services rendered in connection with employment on foreign ship.
(vii)	Section 10(6)(xi) – Remuneration received by foreign government employee during stay in India for specified training.
(viii)	Section 10(15)(iv)(fa) – Interest payable by a scheduled bank on deposits in foreign currency where such acceptance of such deposit is approved by RBI and the interest is payable to (i) non-resident; (ii) individual or HUF being a resident but not ordinarily resident.
(ix)	Section 10(15)(viii) – Interest on deposit on or after 01.04.2005 in a offshore banking unit payable to (i) non-resident; (ii) individual or HUF being resident but not ordinarily resident;
(x)	Section 10(15)(ix) – In the case of non-resident interest from a unit located in IFSC in respect of moneys borrowed by it on or after 01.09.2019.
(xi)	Section 10(23)(FBC) – Income accruing to a unitholder being non-resident from a specified fund or on transfer of units in a specified fund.
(xii)	Section 10(48) – For a foreign company in respect of income received in India in Indian currency on account of sale of crude oil, any other goods or rendering of services as may be notified by the Central Government in this behalf.
(xiii)	Section 10(48A) – Income to a foreign company on account of storage of crude oil in a facility in India and sale of crude oil therefrom.
(xiv)	Section 10(48D) – Income from sale of leftover stock of crude oil from a facility in India in the case of foreign company.

IV. Presumptive Taxation for Non-residents

Similar to resident taxpayers the Income-tax Act, 1961 contains presumptive provisions for non-resident taxpayers also. In this chapter, a cursory look is given to the presumptive provisions contained in the Income-tax Act, 1961 applicable for non-residents.

1. Profits and gains of shipping business of non-residents – Section 44B:

This provision is applicable to a non-resident engaged in the business of operation of ships. Such non-resident can offer 7.5% of the eligible amount as income from profits and gains of such business chargeable to tax under the Act. This provision starts with non-obstante clause and would apply in spite of anything contrary contained in sections 28 to 43A of the Act.

The 7.5% would be reckoned on the following amounts:

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

(ii) The amount received and deemed to be received in India on account of passengers, livestock, mail or goods shipped at any port outside India;

Explanation to the section says that the above said amounts would include amounts receivable by way of demurrage charges or handling charges or any other charges of similar nature.

"Any amount deemed to be received in India" contained in (ii) above is significant that regardless of the destination of the ship carrying passengers etc if the amount is received or deemed to be received in India becomes chargeable to tax as per this provision.

It may be noted 7.5% of the gross amount is the income computed notwithstanding anything contained in sections 28 to 43A of the Act. Thus other provisions of the Act applicable for inclusion or deduction on the said income so computed have to be applied. Even brought forward loss if any is eligible for deduction on the amount of income computed as per this presumptive provision.

Section 44B is applicable only to those non-residents who have a regularity of business of operating ships. Where ship casually visits Indian port it is covered by section 172 and not by section 44B. *CIT v. Taiyo Gyogya Kabushiki Kaisha (2000) 111 taxman 343 (Ker.)*.

2. Profits and gains in connection with the business of exploration etc of mineral oils - Section 44BB:

This section also starts with non-obstante clause to nullify or tone down the applicability of sections 28 to 41 and sections 43 and 43A in the case of non-residents. This section also is applicable on transaction specific of the non-resident assessee. It is applicable for the non-resident engaged in the business of providing services or facilities in connection with or supplying plant and machinery on hire used, or to be used, in the prospecting for, or extraction, production of, mineral oils. The presumptive income is 10% of the aggregate amount specified in this provision and such amount shall be deemed to be the profits and gains of such business chargeable to tax under the Act.

The above said extract of section 44BB(1) broadly covers non-resident engaged in (i) the business of providing services in the prospecting for or extraction or production of mineral oils; (ii) providing facilities with regard to prospecting for or extraction or production of mineral oils; and (iii) supplying plant and machinery on hire used in the prospecting for or extraction or production of mineral oils.

The proviso to the section carves out exception is stating that the provision would not apply where the provisions of section 42 or section 44D or section 44DA or section 115A or section 293A apply for the purposes of computing profits or gains on any other income referred to in those sections.

10% of the aggregate amounts given below shall be the presumptive income of the non-resident.

(a) Amount paid or payable whether in India or outside India to the assessee or to any person on his behalf on account of provision of services and facilities in connection with, or supply of plant and machinery on hire used or to be used, in the prospecting for or extraction or production of, mineral oils in India; and

(b) Amount received or deemed to be received in India by or on behalf of the assessee on account of the provision of services and facilities in connection with, or supply of plant and machinery on hire used or to be used, in the prospecting for, or extraction or production of mineral oils outside India.

A non-resident assessee may claim lower profit and gains than the presumptive 10% and in such case he has to maintain books of account and other documents as per section 44AA and the books of account have to be audited and report under section 44AB must be furnished to the Assessing Officer. Such lower income would be liable for assessment under section 143(3) of the Act.

The term ‘plant’ would include ships, aircrafts, vehicles, drilling units, scientific apparatus and equipment, used for the purpose of said business.

“Mineral oil” includes petroleum and natural gas.

Services provided in connection with prospecting for or extraction or production of mineral oil is eligible for determination of income as per this presumptive provision irrespective of the nature of services. The only condition is that the services so rendered must be intimately connected to prospecting and exploration of oil. *Geofizyka Torun Sp.zo.o,In re (2010) 186 Taxman 213 (AAR – New Delhi)*. This provision will not apply where the non-resident has PE in India. *DIT v. Western Geco International Ltd (2013) 35 taxmann.com 345 / 216 Taxman 216 (Uttarakhand)*.

Mineral oil would not cover only petroleum and natural gas. It covers both crude oil (crude petroleum) and liquid products derived from crude petroleum which are in the nature of mixtures of hydrocarbons, viz. motor spirit, kerosene and other allied articles. *Hyundai Heavy Industries Co Ltd, In re (2017) 392 ITR 37 (AAR – New Delhi)*.

3.Profits and gains of the business of operation of aircraft by non-residents – Section 44BBA:

Like the previous two legal provisions this section also starts with non-obstante clause. It is applicable for non-resident engaged in the business of operation of aircraft. The presumptive income is 5% of the aggregate of the amounts specified therein.

The said 5% would be applied on the following amounts:

(i) The amount paid or payable whether in India or outside India to the assessee on account of carriage of passengers, livestock, mail or goods from any place in India; and

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

This provision is similar to section 44B applicable for non-residents engaged in shipping business. Whatever is observed in section 44B is applicable for this provision as well.

4.Profits and gains of foreign companies engaged in the business of civil construction etc in certain turnkey power projects – Section 44BBB:

This section starts with non-obstante clause and overrides sections 28 to 44AA of the Act. It is applicable for foreign companies engaged in the business of (i) civil construction; or (ii) business of erection of plant and machinery or testing or commissioning thereof. However, it must be in connection with a turnkey power project approved by the Central Government in this behalf.

The presumptive income is 10% of the amount paid or payable whether in India or outside India to the foreign company or to any person on its behalf on account of the said activity. Such amount is chargeable to tax under the head 'Profits and gains of business or profession'.

Similar to section 44BB, foreign companies engaged in the business of civil construction etc in connection with turnkey power project (governed by section 44BBB), the assessee may claim lower profits and gains if he keeps and maintains books of account as per section 44AA and get his accounts audited and furnishes a report under section 44AB of the Act.

However, where the assessee admits income to be less than the presumptive income then the total income or loss shall be determined by invoking section 143(3) of the Act. This is also similar to section 44BB.

Section 44BB would apply to foreign company engaged in erection of steam turbines, turbo generators and auxiliary equipments / heaters for power projects in India where the foreign company is engaged in developing power projects on international basis and was awarded contract by an Indian company. *Toshiba Plant Systems & Services Corporation., In re (2011) 198 Taxman 26 (AAR – New Delhi)*.

V. Section 90 and Section 91

In the case of assessees who have income in more than one tax jurisdiction the levy of tax on the same income by both the jurisdictions would be burdensome and painful.

The assessee may be a resident of one State and the source of income may arise or accrue in another State. Chapter IX of the Income-tax Act, 1961 has the title 'Double Taxation Relief'. As the title indicates it is to avoid double taxation of the same income in the hands of the same assessee in two different jurisdictions. It is with this objective agreements are made between the nations for providing relief.

Section 90 - Agreement with foreign countries or specified territories:

The Central Government may enter into an agreement with the Government of any country outside India or specified territory outside India and it is known as Double Taxation Avoidance Agreement (DTAA). The purpose of such agreement would be for the following:

(i) For granting relief in respect of income on which Income-tax is paid in India and income-tax in the foreign jurisdiction;

(ii) For granting relief in respect of income-tax chargeable under Income-tax Act, 1961 and under the corresponding law in force in the foreign country, to promote mutual economic relations, trade and investment;

(iii) For the avoidance of double taxation of income under Income-tax Act, 1961 and the corresponding law in force in the foreign country or specified territory without creating opportunities for non-taxation or reducing taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in the said agreement for the indirect benefit to residence of any other country or territory);

(iv) For exchange for information for the prevention of evasion or avoidance of income-tax chargeable under Income-tax Act, 1961 or under the corresponding law in force in that country or specified territory, as the case may be or investigation of cases of such evasion or avoidance;

(v) For recovery of income-tax under the Income-tax Act, 1961 and under the corresponding law in force in that country (foreign country) or specified territory, as the case may be;

Benefit to the taxpayer:

Section 90(2) says that the Central Government may have entered into an agreement with the Government of a country outside India or specified territory as per section 90(1) for granting relief or as the case may be, avoidance of double taxation. In such

cases, the assessee may either opt for the provisions of the Income-tax Act, 1961 or the DTAA, whichever is more beneficial to him.

Explanation 1 to section 90 says that rate of tax in respect of foreign company when higher than the rate applicable for domestic company, it shall not be regarded as less favourable charge or levy of tax in respect of such foreign company.

However, the provisions dealing with General Anti-Avoidance Rule (GAAR) contained in Chapter X-A would be applicable even if such provisions are not beneficial to the taxpayer (Section 90(2A)).

In the case of conflict between the provisions of the Income-tax Act and DTAA, the provisions of DTAA would prevail over the provisions of the Act. *CIT v. P.V.A.L. Kulandagan Chettiar (2004) 137 Taxman 460 (SC)*.

Section 90 would prevail over provisions of sections 4,5 and 9. Where as per the DTAA a certain item of income is free from tax such income cannot be taxed by applying the provisions of the Act. *CIT v. Vishakapatnam Port Trust (1983) 144 ITR 146 (AP)*.

Even retrospective amendments to the domestic law will not override the provisions of DTAA. *Sanofi Pasteur Holdings SA v. Department of Revenue, Ministry of Finance (2013) 213 Taxman 504 (AP)*.

Meaning of the terms used:

Section 90(3) says any term used but which is not defined in the Act or in the DTAA unless the context otherwise requires and is not consistent with the provisions of the Act or the agreement, it shall have the meaning as assigned to it in the notification issued by the Central Government in the Official Gazette in this behalf.

Explanation 3 to section 90 says that where any term used in the agreement but which is not defined either in the agreement or in the Act but it is given meaning by means of notification in the official gazette, the meaning assigned shall be deemed to have effect from the date on which the said agreement came into force. It is to clarify that the meaning to a term in the notification would be retrospectively applicable from the date of agreement.

Explanation 4 to section 90 says that where any term used in the agreement is defined in agreement shall have the meaning so assigned in the agreement. However, where a

term is not defined in the agreement but defined in the Act, it shall have the meaning assigned to it in the Act and explanation, if any, given to it by the Central Government.

Tax Residency Certificate (TRC):

An assessee not being a resident to whom the DTAA grants some benefit or relief then such benefit or relief shall not be given unless a certificate of being a resident in any country outside India or specified a territory outside India is obtained by him from the Government of that country or specified territory. This is known as Tax Residency Certificate (TRC) to be furnished in order to avail the benefit of DTAA by a person who is not a resident. Readers may refer to Rule 21AB for further details.

Section 90A says that any specified association in India may enter into an agreement with any specified association in the specified territory outside India and the Central Government may by notification in the Official Gazette specified that such of those provisions may be adopted and implemented for providing the same kind of benefit as was discussed earlier in section 90(1).

Section 91 – Countries with which no agreement exists:

Section 91 is to mitigate the tax liability in the case of persons who have to pay tax in more than one tax jurisdiction due to the absence of DTAA between India and the tax jurisdiction outside India.

If any person who is resident in India proves that certain income which accrued or arose during the previous year outside India (and which is not deemed to accrue or arise in India) and has paid tax in a country with which there is no agreement under section 90 for providing relief from double taxation of the same income, he shall be entitled to deduction from the Indian income-tax payable of a sum calculated on such doubly taxed income at the Indian rate or the rate of tax of the said country whichever is lower or at the Indian rate if both the rates are equal.

Indian rate of tax means the average rate of tax computed by dividing the amount of Indian Income-tax after deduction of any relief due under the provisions of the Act but before deduction of any due under this Chapter, by the total income.

Rate of tax in the said country means the Income-tax or super tax actually paid in the said country in accordance with the provisions of law in force in the said country after deduction of all relief due but before deduction of any relief due in the said country in

respect of double taxation, divided by the whole amount of the income as assessed in the said country.

Doubly taxed income means only that portion of income on which tax has been imposed and has been paid by the assessee for the purpose of claiming double taxation relief. For example, if Rs.3 lakhs is the foreign income and Rs.1 lakh is provided as relief in India, the doubly taxed income is Rs.2 lakhs. Tax relief would be computed only with reference to the portion of the doubly taxed income.

Readers may refer to the following Circulars:

Circular No.333 dated 02.04.1982 where it is stated the DTAA shall prevail over statutory provision if it is beneficial to the assessee.

Circular No.11 dated 13.12.1963 where it is stated that the term 'relief' mentioned in section 91 would include relief allowed under section 90 under any agreement for avoidance of double taxation entered into by the Central Government with the Government of any foreign country.

VI. Specific provisions applicable for NRIs

There are certain provisions in the Income-tax Act, 1961 which are specifically meant for non-residents. These are discussed in brief in this chapter.

Tax on dividends, royalty and technical service fees in the case of foreign companies - Section 115A:

This section provides the rate of tax in the case of non-resident (not being a company) or a foreign company. For the following incomes no deduction in respect of any expenditure or allowance shall be allowed under sections 28 to 44C and section 57 of the Act. Where the gross total income of the assessee consists of, only the following incomes no deduction shall be allowed under Chapter VI-A. If the gross total income however consists of any other income besides income covered by section 115A, the gross total income shall be reduced by the income so covered by section 115A and only on the resultant deduction under Chapter VI-A shall be allowed. Also, the taxpayers having the below said incomes only and for which tax deductible at source under Chapter XVII-B has been deducted from such income as per the rate specified or exempted from filing return of income under section 139 of the Act. Thus the non-

residents having only the below said incomes for which tax has been deducted at source need not file ITR if the tax deduction is as per the rates specified therein.

The rates of tax specified will be applicable besides surcharge and HEC.

(i) Any income by way of dividend included in the total income is liable to tax at the rate of 20%.

(ii) Any income by way of interest received from government or Indian concern on moneys borrowed or debt incurred in foreign currency other than (iv) and (v) given below is liable to tax at 20%.

(iii) Interest received from infrastructure debt fund referred to in section 10(47) is liable to tax @ 5%.

(iv) Interest in respect of masala bond (covered in section 194LC) is liable to tax @4%.

(v) Interest received by FII or QFI by way of rupee denominated bond of an Indian company or a Government security (covered in section 194LD) is liable to tax at 5%.

(vi) Income distributed by business trust and income being of the nature referred to in section 10(23FC) or section 10(23FCA) is liable to tax @ 10%.

(vii) Income received in respect of units purchased in foreign currency of a mutual fund specified in section 10(23D) is liable to tax @20%.

(viii) In the case of income by way of royalty or fees for technical services (other than those referred to in section 44DA(1)) received from Government or Indian concern in pursuance of an agreement made by the foreign company with the Indian Government or the Indian concern after 31.03.1976 and where such agreement is approved by the Central Government or where it is relate to the matter included in the industrial policy it is chargeable to tax @ 10% both for royalty income and fees for technical services.

(ix) In the case of royalty or fees for technical services is in pursuance of an agreement made after 31.03.1976 the provisions of the annual Finance Act for calculating, charging, deducting or computing income-tax shall apply in relation to such income as if such income had been received in pursuance of the agreement made before 01.04.1976 if it is for the purposes of the first proviso to section 9(1)(vi).

Tax on non-resident sportsmen or sports association - Section 115BBA:

This section provides for flat rate of income-tax in the case of non-resident sportsmen or sports association for the incomes earned in India from certain specific activities.

In the case of a sportsman (including an athlete) who is not a citizen of India and non-resident the following incomes received or receivable in India are liable to tax at 20%.

(i) Participation in India in any game (other than a game covered in section 115BB) or sport;

(ii) Advertisement;

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

Similarly, income of non-resident sports association or institution including any amount guaranteed to be paid or payable to such association or institution in relation to any game (other than those taxable under section 115BB) or sport played in India is chargeable to tax @20%.

Income of entertainer who is not a citizen of India and non-resident in respect of any income received or receivable from his performance in India is chargeable to tax @20%.

No expenditure whatsoever is allowed while computing the income referred above.

Like section 115BB if the foreign citizen being a non-resident does not have any other income in India then if the tax deductible at source under section 194E has been deducted properly relief from filing income-tax return in India is provided in section 115BBA(2).

Special provisions relating to certain incomes of non-residents – Chapter XII-A:

In the case of non-residents to acquire foreign exchange assets (which means the assets acquired or purchased or subscribed in convertible foreign exchange) income by way of investment income from foreign exchange asset and long term capital gain from transfer of foreign exchange asset is eligible for concessional rate of tax. However, the rate of tax is at the flat rate without deduction of any expenditure and deduction under Chapter VI-A besides indexation benefit in the case of long-term capital gain from transfer of foreign exchange asset.

In the case of non-resident having income by way of investment income or transfer of foreign exchange asset resulting long-term capital gain the rate of tax shall be as under:

In respect of investment income and long-term capital gain other than specified asset it is taxable @20%.

In respect of long-term capital gain arising from transfer of specified asset it is taxable @10%.

In respect of other incomes comprised in the total income of the non-resident the regular slab rates of tax would apply.

The specified assets which are eligible for long-term capital gains tax @10% are as under:

(i) Shares in an Indian company;

(ii) Debentures issued by an Indian company not being a private company;

(iii) Deposits with an Indian company not being a private company;

(iv) Any security of the Central Government as defined in section 2(2) of the Public Debt Act, 1944;

(v) Such other assets as a Central Government may specify in this behalf by Notification in the Official Gazette.

Section 115F says that the long-term capital gain arising from transfer of foreign exchange asset shall not be chargeable to tax if the assessee within a period of 6 months after the date of transfer invests the net consideration in any specified asset or in saving certificates referred to in section 10(4B) of the Act. Where part of the consideration is only reinvested then so much of the capital gain as bears to the whole of the capital gain the same proportion as the cost of acquisition of the new asset bears to the net consideration shall not be charged under section 45.

However, if the assessee transfers the new asset within 3 years from the date of its acquisition, the capital gain exempted earlier would be chargeable to tax as long-term capital gain in that year of transfer of new asset. Further the short-term capital gain arising from the transfer of such (new) asset would be subjected to tax besides the long-term capital gain computed separately.

This section also provides relief from filing ITR if the non-resident Indian has total income assessable under the Act for the previous year consists of only investment income or long-term capital gain or both, provided the tax deductible at source under Chapter XVII-B has been deducted from such income.

A non-resident Indian governed by Chapter XII-A may continue to get governed by the same provisions even after becoming resident by furnishing a declaration in writing to the Assessing Officer which must accompany the ITR of the year in which is so assessable. Thus non-residents permanently returning to India and having income of the nature specified in Chapter XII-A may opt to get governed by the same provisions even after becoming resident of India subsequently.

A non-resident may opt not to be governed by Chapter XII-A of the Act and in such case he would be subjected to the same computation and tax consequence as that would be applicable for the resident taxpayers. However, it may be noted that he cannot get indexation benefit since the proviso to section 48 bars indexation benefit when the capital asset is acquired through foreign currency remittance.

VII. Foreign Tax Credit

The aspect of foreign tax credit is applicable only to residents who have income outside India. Though the publication is to discuss the legal provisions applicable for non-residents, the aspect of foreign tax credit assumes significance as the resident assessee may also have income outside India and has to pay tax in both the jurisdictions viz. India and foreign State.

Foreign Tax Credit – Rule 128:

Rule 128 of the Income-tax Rules says that an assessee being a resident is eligible for credit in respect of any foreign tax paid for the doubly taxed income. Where the income is taxed in India and for which the income has been assessed to tax outside India then the assessee is eligible to claim credit in respect of tax paid outside India in accordance with this rule.

However, where the income on which foreign tax has been paid is offered to tax in more than one year, credit in respect of foreign tax will be allowed across those years in the same proportion in which the income is offered to tax or assessed to tax in India.

Meaning of foreign tax:

Foreign tax means in respect of country or territory outside India with which India has entered into an agreement for double taxation relief in terms of section 90 or section 90A, the tax so covered in the said agreement.

Where there is no agreement then the foreign tax means in respect of any country or territory outside India, the tax payable in that country or territory being in the nature of Income-tax referred to in clause (iv) of the Explanation to section 91.

The credit in respect of foreign tax credit is available against income-tax, surcharge and cess. It may be noted that the foreign tax credit is not eligible for set off in respect of any sum payable by way of interest, fee or penalty. Also, where the assessee has disputed in the foreign tax either in whole or in part, he shall not be eligible for credit for the foreign tax paid.

Where the disputed tax is paid / finally settled the assessee shall be eligible for credit for the year in which the income is offered to tax in India. However, in order to claim credit of the foreign tax settled after dispute, the assessee shall within 6 months from the end of the month in which the dispute is settled in foreign State furnish evidence of settlement of dispute and evidence of discharge of tax. Also, the assessee must furnish an undertaking that no refund of the tax so paid in foreign State would be claimed by him either directly or indirectly after having discharged the liability previously.

The credit of foreign tax shall be the aggregate of the amount of credit computed separately for each source of income and shall be given effect in the following manner:

(i) The amount of tax payable on such income in India or the foreign tax paid on such income, whichever is less;

However, where the foreign tax paid exceeds the amount of tax credit such excess shall be ignored.

(ii) The credit shall be determined by converting the payment of foreign tax at the TT buying rate on the last day of the month immediately preceding the month in which the tax was paid.

Where the amount of foreign tax credit available against the tax payable under the provisions of section 115JB or section 115JC exceeds the amount of tax credit available against the normal provisions, then while computing the amount of credit under sections 115JAA or 115JD, as the case may be, such excess shall be ignored.

In order to claim credit of any foreign tax paid the following documents have to be furnished:

(i) The statement of income from the country or specified territory outside India offered for tax for the previous year and foreign tax deducted or paid in Form No.67 and verified in the manner specified therein;

(ii) Certificate of statement specifying the nature of income and the amount of tax deducted therefrom or paid by the assessee –

(a) from the tax authority of the country or the specified territory outside India; or

(b) from the person responsible for deduction of such tax; or

(c) signed by the assessee;

However, the statement furnished by the assessee shall be valid if it is accompanied by acknowledgement of online payment or bank counterfoil or challan for payment of tax where the payment has been made by the assessee and proof of deduction where the tax has been deducted.

The statement in Form 67 and other details given above must be furnished on or before the 'due date' specified for furnishing the return of income under section 139(1) of the Act, in the manner specified for furnishing such return of income.

Form 67 shall also be furnished in a case where the carry backward of loss of the current year results in refund of tax for which credit has been claimed in any earlier previous year or years.

Legal decision:

Foreign tax credit is dependent on the DTAA entered into by the contracting States. If the DTAA does not allow tax credit then the tax paid in the foreign jurisdiction cannot be claimed credit by the resident assessee. For example, the DTAA between India and the USA provides for tax credit in respect of Federal income taxes imposed by Internal Revenue Code but does not cover tax levied by the States and social security taxes. This was discussed in *Dy. CIT v. Tata Sons Ltd (2010) 8 taxmann.com 85 (Mum.)*. The assessee claimed tax relief under section 90/91 and also claimed deduction for the tax paid outside India under section 37. It was held that the assessee is entitled to deduction of tax paid abroad and thereafter allowance of deduction by way of

expenditure would lead to double benefit which is not envisaged in law. The decision hence was in favour of the Revenue.

In *Wipro Ltd v. Dy. CIT (2016) 382 ITR 179 (Karn.)* distinction was drawn between the DTAA of India and the USA vis a vis the DTAA of India and Canada. It was held that the assessee can claim tax credit in respect of income which is taxed in the USA. Whereas if the income is exempt from tax in India and the same income is subjected to tax in Canada, there is no double taxation and hence the benefit of tax credit is not available to the Indian assessee.

In *Reliance Infrastructure Ltd v. CIT (2017) 390 ITR 271 (Bom)* the assessee paid tax in Saudi Arabia on income which had arisen or accrued in India. The assessee is not eligible for relief under section 91 since the income is deemed to accrue or arise in India. The assessee claimed the tax so paid as expenditure. It was held that the word 'tax' defined in section 2(43) and Explanation to section 40(a)(ii) would show that the tax paid outside India is not liable for disallowance. Accordingly, it was held that the assessee is eligible to claim the tax paid abroad for the purpose arriving at global income on which income-tax is payable in India.

VIII. Rate of exchange for computation of total income & for the purpose of TDS

Legal provisions contained in the Income-tax Act, 1961 are ultimately meant for computation of correct amount of income chargeable to tax and for collection of tax. The legal provisions apply to all the taxpayers who have income in India being the source from which the income accrues or arises or deemed to accrue or arise besides assessees who are subjected to tax based on their residential status. The income when taxed based on their source originating in a State, it is called as situs rule.

When an assessee has income outside India which is chargeable to tax in India, it has to be computed by applying the relevant legal provisions. The heads of income are the same for classification of income which accrue outside India. So far as the computation under the Income-tax Act, 1961 is concerned, the prescribed deductions and allowances are to be allowed notwithstanding the foreign income is taxed in the other contracting State as per its relevant domestic law.

Rule 115 prescribes rate of exchange for conversion of foreign income into Indian rupee income for computing the total income chargeable to tax.

The rate of exchange for calculation of the value in rupee of any income accruing or arising or deemed to accrue or arise to an assessee in foreign currency or received or deemed to be received by him in foreign currency shall be the telegraphic transfer buying rate (TT buying rate) of such currency on the specified date.

Income under each head (of income) has to be computed by applying TT buying rate of the foreign currency on the specified date.

The specified dates for various heads of income are given below:

Income chargeable under the head 'salaries': The TT buying rate on the last day of the month immediately preceding the month in which the salary is due or is paid in advance or in arrears to be adopted. Thus if the salary for the month April, 2021 is due on 30th April, 2021 the TT buying rate as on 31st March, 2021 to be applied for conversion into Indian rupee. On the other hand, if the employment agreement provides that the salary is due on 10th day of the next calender month then the salary of April, 2021 is due on 10th May, 2021. The TT buying rate of the preceding the month in which the salary is due would be 30th April, 2021 and the TT buying rate as on that date would accordingly be applied.

Income by way of interest on securities: The TT buying rate on the last day of the month immediately preceding the month in which the income is due is to be adopted.

Income under the heads 'income from house property', 'Profits and gains of business or profession' and 'income from other sources' (not being income by way of dividend and 'interest on securities') : The TT buying rate on the last day of the previous year is to be adopted. For example, if the rental income for the financial year 2020-21 is received by the assessee during the course of the year yet for the purpose of computing the income liable to tax under the Act, the TT buying rate on the last day of the previous year i.e. 31st March, 2021 would be adopted. Same procedure would be adopted for computing income under the head 'Profits and gains of business or profession' (other than those non-residents engaged in the business of operation of ships) and 'Income from other sources'.

Income under the head 'Profits and gains of business or profession' in the case of non-resident engaged in the business of operation of ships: The TT buying rate on the last day of the month immediately preceding the month in which such income is deemed to accrue or arise in India.

Income by way of dividends: The TT buying rate of the month immediately preceding the month in which the dividend is declared, distributed or paid by the company. However, where the dividend is declared at the end of calender month but paid in the subsequent month would put some discomfort as regards the conversion of income in foreign currency into Indian currency due to lack of clarity in the rule.

Income chargeable under the head 'Capital gains': The TT buying rate on the last day of the month immediately preceding the month in which the capital asset is transferred.

Where in respect of the above said incomes payable in foreign currency the tax has been deducted under rule 26 then the specified date shall be the date on which the tax was required to be deducted under the provisions of Chapter XVII-B.

Rule 26 - Rate of exchange for the purpose of deduction of tax at source in respect of income payable in foreign currency:

For the purpose of deduction of tax at source on any income payable in foreign currency, the rate of exchange for the calculation of the value in rupees of such income payable to an assessee outside India shall be the TT buying rate of such currency on the date on which the tax is required to be deducted at source under the provisions of Chapter XVII-B of the Act.

It may be noted that rule 26 is to guide the domestic taxpayers who have to deduct tax at source in respect of any income payable in foreign currency.

On the contrary, in the case of resident taxpayers who have income outside India the tax credit shall be computed at the TT buying rate on the last day of the month preceding the month in which such tax was paid by the (resident) assessee or deducted by the foreign payer.

Capital gain computation in the case of non-residents – Rule 115A:

This rule prescribes the method of computing / quantifying the chargeable capital gain in the case of non-resident Indians who have acquired capital asset being shares in or

debentures of Indian company in foreign currency and the capital gain which arises on their transfer. It may be noted that it is applicable only to non-resident Indian and does not apply to foreign companies or foreign citizens.

The taxpayer who has acquired shares in or debentures of an Indian company has to convert the cost of acquisition at the average of TT buying rate and TT selling rate of the foreign currency which was initially utilized in the purchase of the said asset, on the date of its acquisition.

For converting the expenditure incurred wholly and exclusively in connection with the transfer of capital asset referred above (being shares or debentures of Indian company) the average of the TT buying rate and TT selling rate of the foreign currency initially utilized for the purchase of the said asset, shall be applied as on the date of transfer of the capital asset.

For converting the full value of consideration received or accruing as a result of transfer of capital asset referred above (being shares or debentures of Indian company) the average of TT buying rate and TT selling rate of the foreign currency initially in the purchase of the said asset, as on the date of transfer of the capital asset.

For converting capital gains, computed in foreign currency initially utilized in the purchase of the capital asset in to rupees, the telegraphic buying rate of such currency shall be applied as on the date of transfer of the capital asset.

The 'TT buying rate' shall have the meaning as in the Explanation to rule 26.

The 'TT selling rate', in relation to a foreign currency, means the rate of exchange adopted by State Bank of India, for selling such currency where such currency is made available by that Bank through telegraphic transfer.

IX. Withholding tax provisions

For the domestic transactions section 192 to 194Q of Chapter XVII-B of the Income-tax Act, 1961 would apply. Where the transaction entails payment to non-resident or to a foreign company, section 195 being the residuary section in Chapter XVII-B is applicable. For deduction of tax at source where the payments is made to non-resident or to a foreign company it is called as withholding tax instead of tax deduction at source for the reason that the amount is deducted out of such payment.

Any person responsible for paying to a non-resident not being a company or a foreign company any interest or any other sum chargeable under the Act (except salary) shall deduct income tax thereon at the rates in force either at the time of credit of such income to the account of the payee or at the time of payment thereof, whichever is earlier.

It may be noted that the section makes reference to non-resident which is defined in section 2(30). **It does not cover resident but not ordinarily resident**. Only for the purposes of sections 92, 93 and 168 the term 'non-resident' would include not ordinarily resident.

The tax deduction is at the rates in force which means the rate of tax specified in Part II of first schedule to the Finance Act of every year. In other words, the rate of tax deduction is not specified in section 195 and recourse had to be made to the Finance Act of the respective year of the transaction for which the withholding of tax is to be made.

Section 195 has excluded interest referred to in section 194LB and section 194LC which were discussed in Chapter 6 of this booklet where the withholding tax is equivalent to the rate of income-tax applicable on such income.

In the case of interest payable by the Government or a public sector bank within the meaning of section 10(23D) or public financial institution, deduction of tax is warranted only at the time of payment and not when it is credited to the account of the payee.

Explanation 2 to section 195(1) says that the obligation to withhold tax shall be applicable in respect of all persons whether resident or non-resident regardless of whether the payee non-resident has (i) a residence or place of business or business connection in India; or (ii) has any other presence in any manner whatsoever in India.

Liability of payer to deduct tax at source – Section 195(2):

Where any person responsible for paying any sum which is 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 (payee) he may make an application to the Assessing Officer for determination of the appropriate portion of such sum chargeable to tax. He may accordingly upon determination of the amount deduct tax on that proportion of the sum which is so chargeable. [Section 195(2)]

Similarly, where a person (being non-resident or a foreign company) is entitled to receive any interest or other sum on which income-tax has to be deducted in India he may make an application to the Assessing Officer for grant of a certificate authorizing him to receive such interest or other sum without deduction of tax at source. Where such certificate is granted to the recipient (payee), every person responsible for paying such interest or other sum to the person to whom such certificate is granted shall make the payment without deduction of tax thereon. [Section 195(3)].

A certificate for non-deduction shall remain in force till the expiry of the period specified therein or till it is cancelled by the Assessing Officer whichever is earlier.

Section 195(6) says that any person responsible for paying to a non-resident or a foreign company any sum whether or not chargeable under the provisions of the Act, shall furnish information relating to such payment in such form and manner as may be prescribed. By virtue of this provision section 37BB of the Income-tax Rules prescribes the forms, procedures and instances where the relevant forms are to be furnished.

Rule 37 BB – Furnishing of information for payment to a non-resident (not being a company) or to a foreign company:

Any person responsible for paying to a non-resident (not being a company) or to a foreign company any sum chargeable under the provisions of the Act, shall furnish the following:

(i) Information in Part A of Form 15CA, if the amount of payment or the aggregate amount of such payments made during the financial year does not exceed Rs.5 lakhs;

(ii) In Part B of Form 15CA in respect of payments not covered in (i) above, after obtaining (a) a certificate from the Assessing Officer under section 197; or (b) an order from the Assessing Officer under section 195 (2) or section 195(3); Also Part C of Form 15CA after obtaining a certificate in Form 15CB from the accountant has to be furnished;

(iii) Any person responsible for paying to a non-resident (not being a company) or to a foreign company shall furnish the information in Part D of Form No.15CA if any sum which is not chargeable under the provisions of the Act.

Notwithstanding anything contained in Sub-rule 2 no information is required to be furnished for any sum which is not chargeable under the provisions of the Act if (i) the

remittance is made by an individual and does not require the prior approval of RBI as per section 5 of the FEMA Act, 1999; or the remittance is of the nature specified below:

SPECIFIED LIST

Sl. No.	*Purpose code as per RBI*	*Nature of payment*
(1)	*(2)*	*(3)*
1	*S0001*	*Indian investment abroad - in equity capital (shares)*
2	*S0002*	*Indian investment abroad - in debt securities*
3	*S0003*	*Indian investment abroad - in branches and wholly owned subsidiaries*
4	*S0004*	*Indian investment abroad - in subsidiaries and associates*
5	*S0005*	*Indian investment abroad - in real estate*
6	*S0011*	*Loans extended to Non-Residents*
7	*S0101*	*Advance payment against imports*
8	*S0102*	*Payment towards imports - settlement of invoice*
9	*S0103*	*Imports by diplomatic missions*
10	*S0104*	*Intermediary trade*
11	*S0190*	*Imports below Rs.5,00,000 - (For use by ECD offices)*
12	*SO202*	*Payment for operating expenses of Indian shipping companies operating abroad*
13	*SO208*	*Operating expenses of Indian Airlines companies operating abroad*
14	*S0212*	*Booking of passages abroad - Airlines companies*
15	*S0301*	*Remittance towards business travel*
16	*S0302*	*Travel under basic travel quota (BTQ)*
17	*S0303*	*Travel for pilgrimage*
18	*S0304*	*Travel for medical treatment*
19	*S0305*	*Travel for education (including fees, hostel expenses etc.)*
20	*S0401*	*Postal services*
21	*S0501*	*Construction of projects abroad by Indian companies including import of goods at project site*
22	*S0602*	*Freight insurance - relating to import and export of goods*
23	*S1011*	*Payments for maintenance of offices abroad*
24	*S1201*	*Maintenance of Indian embassies abroad*
25	*S1202*	*Remittances by foreign embassies in India*

26	*S1301*	*Remittance by non-residents towards family maintenance and savings*
27	*S1302*	*Remittance towards personal gifts and donations*
28	*S1303*	*Remittance towards donations to religious and charitable institutions abroad*
29	*S1304*	*Remittance towards grants and donations to other Governments and charitable institutions established by the Governments*
30	*S1305*	*Contributions or donations by the Government to international institutions*
31	*S1306*	*Remittance towards payment or refund of taxes*
32	*S1501*	*Refunds or rebates or reduction in invoice value on account of exports*
33	*S1503*	*Payments by residents for international bidding.*

The information in Form No.15CA shall be furnished electronically under digital signature.