

International Taxation

CA Prerna Peshori

INDEX

Sr. No	Topic
1.	Charge of Income-tax
2.	Residency and POEM
3.	Scope of Total Income
4.	Income deemed to accrue or arise in India
5.	Indirect Transfer
6.	Salaries deemed to accrue or arise in India
7.	Dividend deemed to accrue or arise in India
8.	Interest/Royalties/Fees for Technical Services deemed to accrue or arise in India
9.	Special Tax Rates on Income from royalties, FTS, interest etc
10.	Gift of Money from Resident to Non-resident
11.	Fund Manager not to constitute business connection
12.	Exempt Income
13.	Computation of Capital gains in case of Non-resident
14.	Special Provision for NRI
15.	Capital Gains on ADR/GDR
16.	Capital Gains on units purchased in foreign currency or capital gains arising from their transfer in case of offshore fund
17.	Special provision for foreign portfolio investors
18.	Non-resident sportsperson
19.	Withholding tax
20.	Double tax avoidance agreements
21.	Foreign Tax Credit
22.	Treaty Concepts

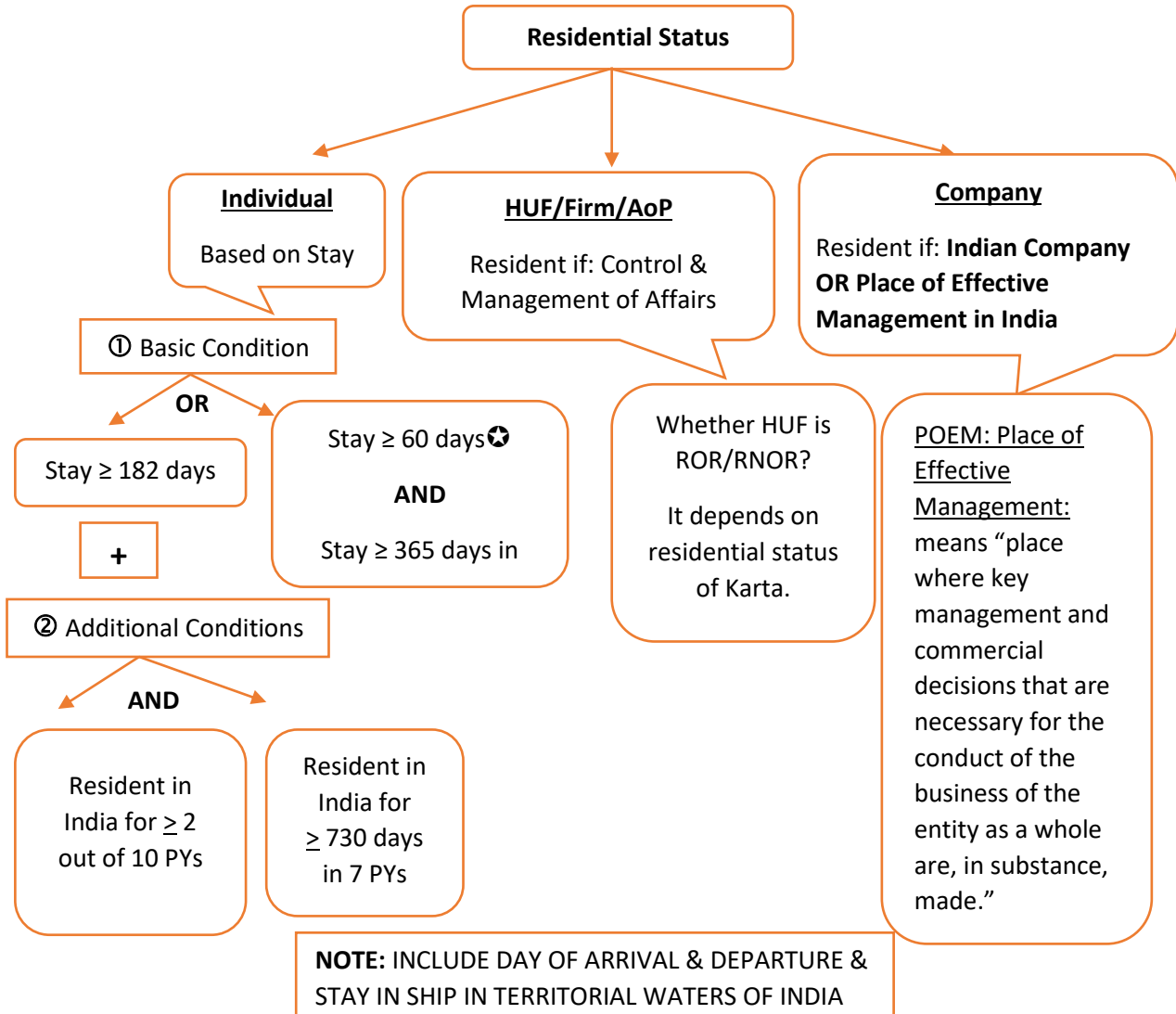
International Taxation

CA Prerna Peshori

1. Charge of Income-tax [Section 4]

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

2. Residential Status [Section 6]



International Taxation

CA Prerna Peshori

❖ **Exception 1: Replace 60 days with 182 days:**

- a) Indian citizen leaving India in the previous year, as a **MEMBER OF A CREW OF AN INDIAN SHIP** or for the purpose of employment outside India.
- b) Indian citizen or Person of Indian Origin, being outside India engaged in employment/B&P/Vocation outside India comes on visit to India.

❖ **Exception 2: Replace 60 days with 120 days:**

Indian citizen or person of Indian origin (non-resident Indian as defined under Explanation to clause (e) to Section 115C) having total income, other than the income from foreign sources > Rs. 15 Lakh during the previous year. If such individual has been in India for 120 days or more but less than 182 days, he shall be considered as RNOR.

❖ **Exception 3: Deemed Resident**

Indian citizen, having total income, other than the income from foreign sources > Rs. 15 Lakh if he is not liable to tax in any country or territory by reason of his domicile or residence or any other criteria of similar nature.

This condition shall apply if a person is not a resident of India as per criteria above. Such individual shall be considered as RNOR.

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) and which is not deemed to accrue or arise in India

Indian citizen and a member of the crew of a FOREIGN BOUND SHIP LEAVING INDIA:

The period or periods of stay in India, in respect of eligible voyage, **shall not include** the period commencing from the date entered into the Continuous Discharge Certificate in respect of:

**JOINING THE SHIP
UPTO
SIGNING OFF THE SHIP**

Eligible voyage refers to 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.

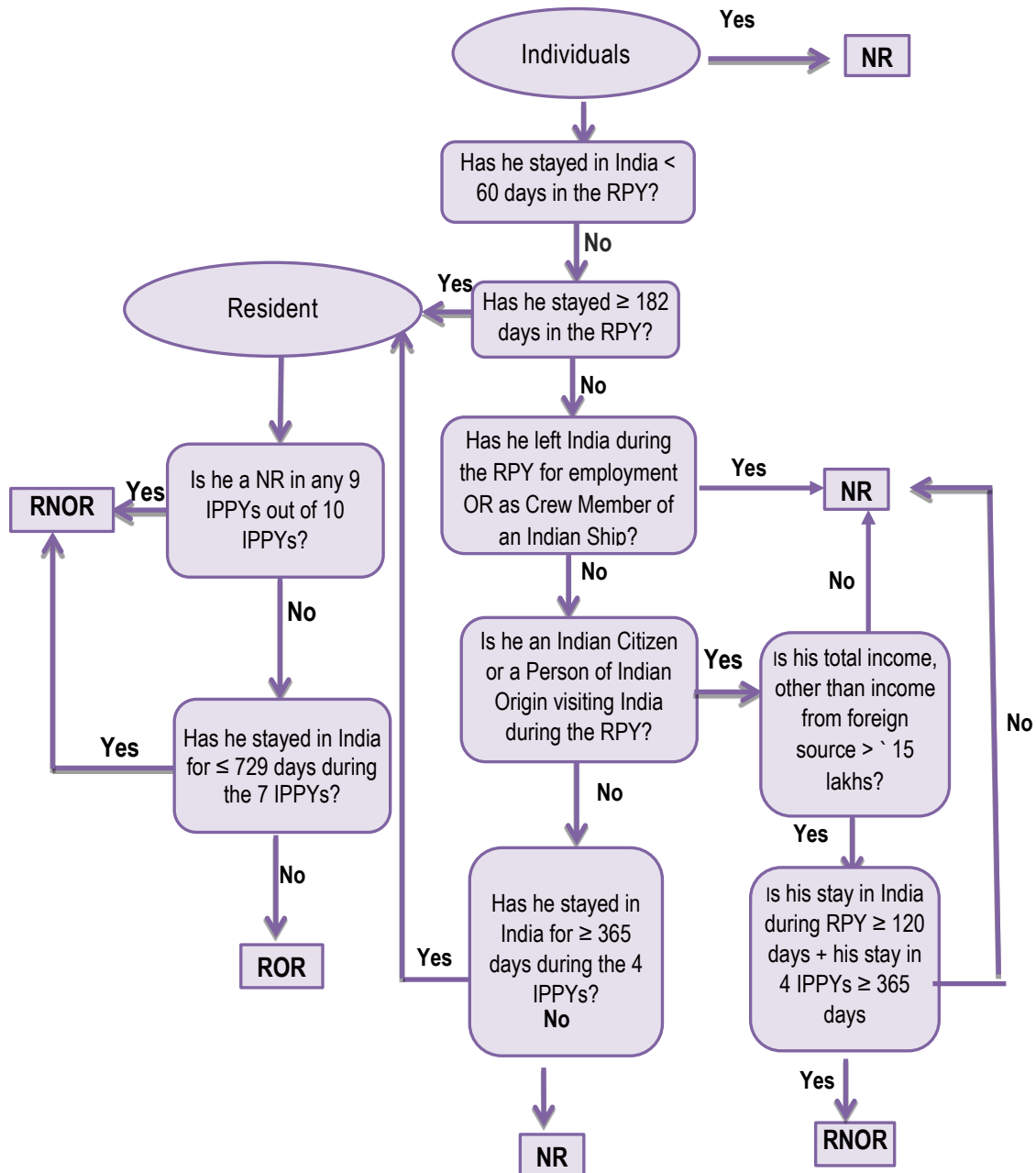
CBDT Circular 13/2017 r.w. 17/2017:

Clarification regarding liability of Income Tax in India for a non-resident sea farer receiving remuneration in NRE account maintained with Indian Bank

- As per Section 5- Only that income of non-resident shall be subject to tax in India that is either received or is deemed to be received in India.
- Hence, salary accrued to a non-resident seafarer for services rendered outside India on a foreign going ship (with Indian flag or foreign flag)- Not to be included in total income merely because the said salary is credited in the NRE account maintained with an Indian Bank.

International Taxation

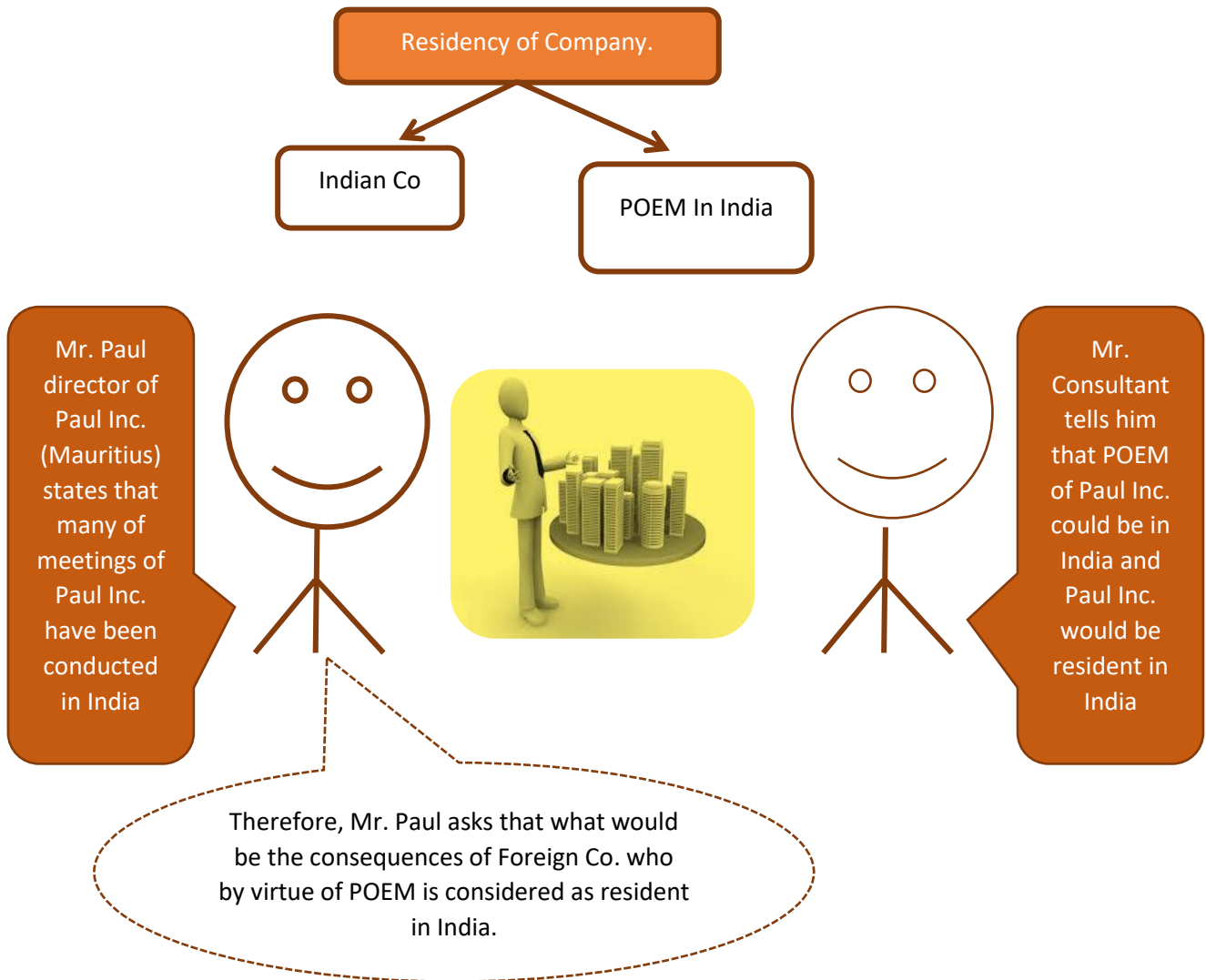
CA Prerna Peshori



International Taxation

CA Prerna Peshori

a. Place of Effective Management (POEM) [Section 6]



b. Transition Mechanism for companies whose POEM is determined in India [Section 115JH]

Vide the powers granted under section 115JH, CBDT has issued the final Notification which provides that if foreign company which has not been resident in India in any of the previous years preceding the said P.Y., then notwithstanding anything contained in the Act, the provisions of the Act relating to the computation of total income, treatment of unabsorbed depreciation, setoff or carry forward losses, collection and recovery and special provisions relating to avoidance of tax shall apply to the foreign company for the said previous year with exceptions, modifications and adaptations specified hereunder:

1. Determination of Written Down Value and Brought Forward Loss

The Notification lays down the manner in which the written down value (“WDV”) of a depreciable asset as well as the brought forward loss and unabsorbed depreciation for the purposes of carrying forward and setting-off are to be calculated in case of an India resident foreign company

International Taxation

CA Prerna Peshori

Situation 1: Where the foreign company is assessed to tax in the foreign jurisdiction

- Where **depreciation is taken into account** while computing taxable income - the WDV of a depreciable asset shall be determined as per the **company's foreign tax records**.
- Where **depreciation is not taken into account**, the WDV is to be calculated as per the provisions **of the laws of that foreign jurisdiction**.
- The brought forward loss and unabsorbed depreciation shall be determined year wise on the basis of the foreign tax records of the company.

Situation 2: Where the foreign company is not assessed to tax in the foreign jurisdiction

The WDV and the brought forward loss and unabsorbed depreciation (year wise) is to be determined on the basis of the books of account, maintained in accordance with the laws of the jurisdiction in which company is incorporated. In case there is any revision or modification in the foreign jurisdiction with respect to the brought forward loss and unabsorbed depreciation originally adopted in India due to any action of the tax or legal authority in the foreign jurisdiction, the amount of the loss and unabsorbed depreciation shall be revised or modified for the purposes of set off and carry forward.

2. Limitation on setting off against India sourced income

The Notification clarifies that 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 have become chargeable to tax in India on account of it becoming an Indian resident. Further, it has been clarified that the Notification does not apply to such income of any foreign company which was taxable in India irrespective of the residence status of such foreign company (e.g.- India sourced income of a foreign company).

3. Preparation of Balance Sheets for period before a company becomes India resident

In cases where the accounting year of the foreign company does not end on 31st March, it shall be required to prepare profit and loss account ("P&L account") and balance sheet for the extended period starting from the date on which its accounting year begins, up to 31st March of the year immediately preceding the financial year during which the foreign company has become resident ("Extended Period"). However, where this Extended Period is:

- a) less than six months, it shall be included in that accounting year;
- b) equal to or more than six months, that period shall be treated as a separate accounting year.

The foreign company shall also be required to prepare profit and loss account and balance sheet for succeeding periods of twelve months till the year the foreign company remains resident in India on account of the POEM test.

Example: In case a foreign company follows the calendar year as its accounting year, and becomes resident in India in the financial year 2018-19, its shall prepare balance sheets and P&L accounts for January 1, 2018 to March 31, 2019 as one year. However, if the accounting year followed by the foreign company is from July 1 to June 30, it shall prepare separate balance sheets and P&L accounts for the period of July 1, 2017 to March 31, 2018.

International Taxation

CA Prerna Peshori

In a situation where the foreign company's accounting year does not end on March 31, its unabsorbed depreciation shall be allocated on a proportionate basis.

4. Foreign Tax Credits

The Notification expressly states that a foreign company shall be entitled to relief or deduction of taxes paid in accordance with the provisions of Section 90 or 91 of the ITA. Therefore, a foreign company shall be eligible to avail benefits of India's tax treaties after it becomes resident in India.

In a case 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 in accordance with applicable rules.

5. Conflict between provisions:

The Notification clarifies that a foreign company shall continue to be treated as a foreign company even if it is said to be resident in India on account of the POEM test and all the provisions of the ITA shall apply accordingly. As a result, provisions of the ITA which are specifically applicable to either a foreign company or a resident taxpayer shall be applicable to such companies. On the other hand, provisions relating to non-residents shall not be inapplicable in such cases. **It has been further clarified that in case of any conflict between provisions of the ITA applicable to a taxpayer as a foreign company and the provisions of the ITA applicable to it in its capacity as a resident, the former shall prevail over the latter.**

Also, specifically in the case of the provisions of the ITA dealing with tax deductions at source ("TDS") (as enshrined in Chapter XVII-B of the ITA), the Notification expressly states that where more than one provision applies to an India resident foreign company, the provision applicable to the foreign company alone shall apply. Compliance with the provisions which are applicable to the foreign company prior to its becoming Indian resident shall be considered sufficient compliance with the TDS related provisions of the ITA. This may lead to an illogical result where a resident may be required to withhold taxes on payments to a foreign company even after such foreign company becomes an Indian resident.

6. Transfer Pricing:

It has been expressly provided that all transactions of the foreign company with any other person or entity under the ITA shall not be altered only on the ground that such foreign company is treated as a resident on account of its POEM being in India. **This should lead to a result that transfer pricing provisions continue to apply even if a foreign associated enterprise is considered resident in India as per the POEM test.**

7. Rate of Tax

In case of conflict between the provision applicable to the foreign company as resident and the provision applicable to it as foreign company, the later shall generally prevail. **Therefore, the rate of tax in case of foreign company shall remain the same, i.e., rate of income-tax applicable to the foreign company even though residency status of the foreign company changes from non-resident**

International Taxation

CA Prerna Peshori

to resident on the basis of POEM. The foreign company shall be assessed to tax at the rate of 40% even if it becomes resident.

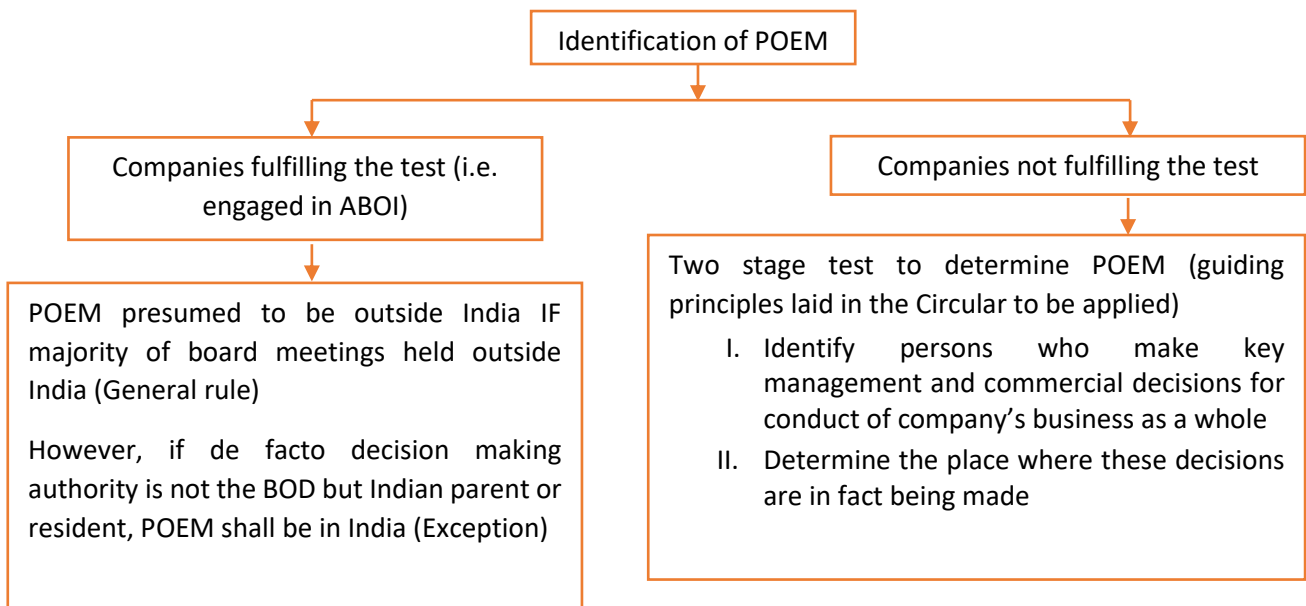
8. Treatment in subsequent assessment years

Where the foreign company continues to be resident in India, the Notification shall also apply to subsequent assessment years, provided the WDV, the brought forward loss and unabsorbed depreciation of the foreign company to be adopted on the 1st day of the previous year shall be those which have been arrived at on the last day of the preceding previous year in accordance with Notification.

c. Guidance for determination of Place of Effective Management (POEM)

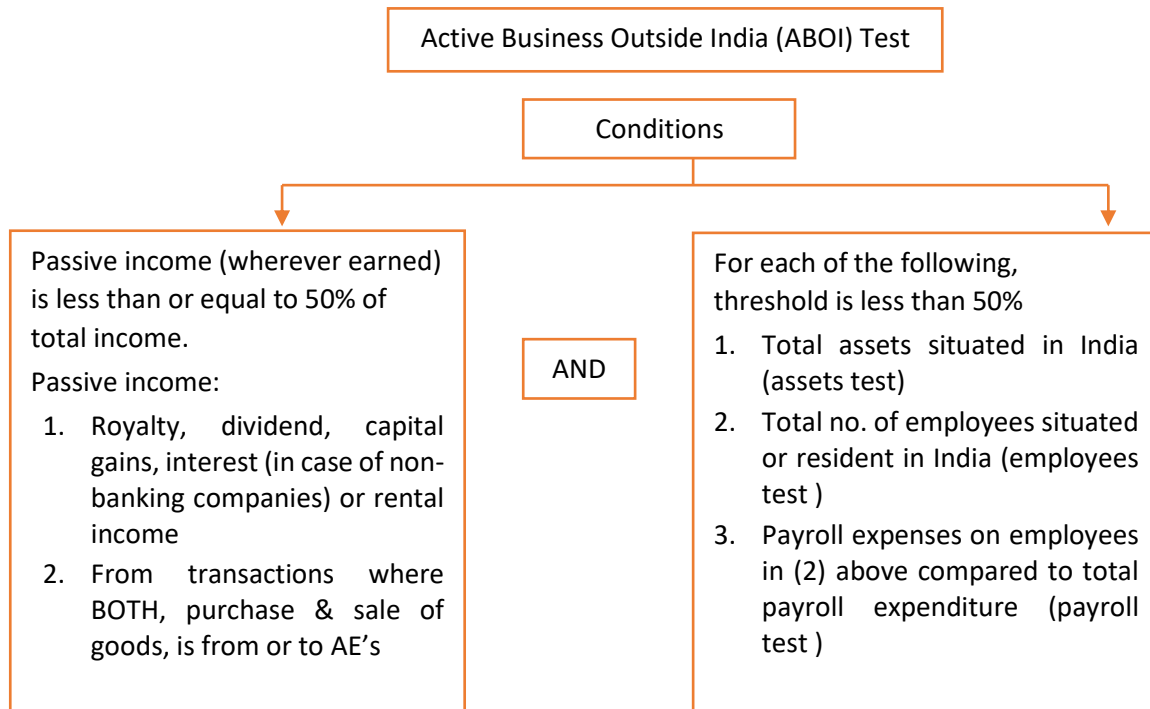
CBDT *vide* its Circular No. 06 of 2017, dated 24 January 2017, has laid down certain guiding principles for determination of POEM. **The CBDT has stated that these guidelines shall not apply to a company whose turnover or gross receipts are Rs. 50 crores or less in a financial year.** Accordingly, provisions of Section 6(3)(ii) will also not apply to a company having turnover or gross receipts are Rs. 50 crores or less in a financial year. (CBDT Circular No.8 of 2017)

The circular prescribes the Active Business Outside India Test (ABOI Test) in order to determine POEM:



International Taxation

CA Prerna Peshori



- It is pertinent to note that for passive income, income from purchase & sale should be from AE. If either of the condition is not fulfilled, it shall be considered as an active income.

Guiding Principles:

For companies other than those engaged in ABOI/not fulfilling ABOI conditions, the following guiding principles are to be applied:

S. No.	Particulars/ Situation	Place to be considered as POEM
a.	Where BOD retains and, in substance, exercises authority to govern company	Place where meetings are held and key decisions are taken
b.	Where authority delegated by BOD to senior managers, shareholders, financial advisors etc.	Place of such actual decision making
c.	When authority delegated formally or de facto to one or more committees	Place where committee develops and formulates key decisions for mere formal approval by BOD
d.	Use of modern technology for meetings and	Place where majority directors or persons taking decisions usually reside
e.	Circular resolution or Round Robin voting	Location of person who has authority to take decisions
f.	Decisions by shareholders on managerial issues	Location where such decision is taken
g.	Other factors	<ol style="list-style-type: none"> i. Location of Head Office: HO defined as the place where senior management and their direct support staff are predominantly located. It represents where key decisions are made.

International Taxation

CA Prerna Peshori

		<ul style="list-style-type: none"> ii. Place where main or substantial activity of the company is carried out. iii. Place where accounting records of the company are kept. iv. If POEM in India and also outside India, then presumed to be in India if it was mainly/ predominantly in India.
h.	Scenarios where POEM cannot be said to be in India:	<p>POEM cannot be established to be in India merely because:</p> <ul style="list-style-type: none"> i. The foreign company is wholly owned by an Indian company ii. The foreign company has a PE in India iii. One or some of the directors of a foreign company reside in India iv. Local management in India pertains to Indian activities of a foreign company v. There exists in India, support functions which are preparatory and auxiliary in nature

Illustration	Facts	CBDT interpretation															
1	<p>In Country X (Outside India)</p> <ul style="list-style-type: none"> ➤ A Co is subsidiary of B Co and is a sourcing entity for the Indian multinational group ➤ The assets (viz. stocks in warehouses) of A Co are located in country X ➤ All the employees of A Co are in Country X ➤ Average income-wise break up of total income of A Co for three years include <table border="1" style="margin-left: 20px;"> <thead> <tr> <th>Income(%)</th> <th>Purchase</th> <th>Sales</th> </tr> </thead> <tbody> <tr> <td>30%</td> <td>Non-AEs</td> <td>AEs</td> </tr> <tr> <td>30%</td> <td>AEs</td> <td>AEs</td> </tr> <tr> <td>30%</td> <td>AEs</td> <td>Non-AEs</td> </tr> <tr> <td>10%</td> <td colspan="2">Interest income</td> </tr> </tbody> </table>	Income(%)	Purchase	Sales	30%	Non-AEs	AEs	30%	AEs	AEs	30%	AEs	Non-AEs	10%	Interest income		<ul style="list-style-type: none"> ➤ Income Test Satisfied: Passive income is 40% of the total income of the company, consisting of: <ul style="list-style-type: none"> • 30% from the transaction where both purchase and sale is from/to AEs • 10% income from interest ➤ Assets Test, Employees Test: Since no assets or employees of A Co are in India the other requirements of the test is also satisfied ➤ A Co is engaged in A BOI
Income(%)	Purchase	Sales															
30%	Non-AEs	AEs															
30%	AEs	AEs															
30%	AEs	Non-AEs															
10%	Interest income																
2	<p>In addition to facts listed at Illustration no. 1, In Country X (Outside India)</p> <ul style="list-style-type: none"> ➤ Out of 50 employees of A Co, 47 employees, who are managing the warehouse, storekeeping and accounts of the company, are located in Country X. 	<ul style="list-style-type: none"> ➤ Passive Income Test (as above) and Employee Test is satisfied as more than 50% of the employees are also situated outside India ➤ Assets Test satisfied: All the assets are situated outside India 															

International Taxation

CA Prerna Peshori

	<ul style="list-style-type: none"> ➤ Annual pay roll expenditure of 50 employees is INR 50Mn in India ➤ The other three employees i.e. Managing director (MD), Chief executive officer (CEO) and Sales head are resident in India ➤ Annual pay roll expenditure of above employees is INR 30 Mn 	<ul style="list-style-type: none"> ➤ Payroll Test not satisfied: The pay roll expenditure in respect of the MD, CEO and the Sales head being employees resident in India exceeds 50% of the total payroll expenditure ➤ Therefore, A Co is not engaged in A BOI
3	<p>In addition to facts listed at Illustration No.1, In Country X (Outside India)</p> <ul style="list-style-type: none"> ➤ All the directors of the A Co are Indian residents During the relevant tax year, five meetings of the BOD is held, out of which two are held in Country X and one in Country Y ➤ Two out of five BOD meetings were held in India 	<ul style="list-style-type: none"> ➤ The A Co is engaged in active business outside India as the facts indicated in illustration 1 ➤ The majority of board meetings have been held outside India ➤ Therefore, POEM of A Co shall be presumed to be outside India.
4	<p>In addition to facts listed at Illustration No.3</p> <p>It is established by the AO that:</p> <ul style="list-style-type: none"> ➤ Although A Co's senior management team signs all the contracts, for all the contracts above INR 1 Mn, A Co must submit its recommendation to B Co and B Co makes the decision whether or not the contract may be accepted ➤ It is also seen that during the previous year more than 99% of the contracts were above INR 1 Mn and over past years also the same trend in respect of value contribution of contracts above INR 1 Mn is seen 	<ul style="list-style-type: none"> ➤ The facts suggest that the effective management of the A Co may have been usurped by the parent company B Co ➤ Therefore, POEM of A Co may, in such cases, be not presumed to be outside India even though A Co is engaged in active business outside India and majority of board meetings are held outside India
5	<ul style="list-style-type: none"> ➤ An Indian MNC group has a local holding company A Co in Country X ➤ A Co has 100% downstream subsidiaries in the form of B Co and C Co in Country X and D Co in Country Y ➤ A Co has income only by way of dividend and interest from investments made in its subsidiaries ➤ POEM of A Co is in India and is exercised by ultimate parent company of the group ➤ B Co, C Co and D Co are engaged in active business outside India ➤ Meetings of Board of Directors of B Co, C Co and D Co are held in respective countries 	<ul style="list-style-type: none"> ➤ Merely because the POEM of an intermediate holding company is in India the POEM of its subsidiaries shall not be taken to be in India. ➤ Each subsidiary has to be examined separately. ➤ Since B Co, C Co and D Co are independently engaged in active business outside India and majority of board meetings of these companies are also held outside India, POEM of these companies shall be

International Taxation

CA Prerna Peshori

		presumed to be outside India.
--	--	-------------------------------

3. Scope of Total Income [Section 5]

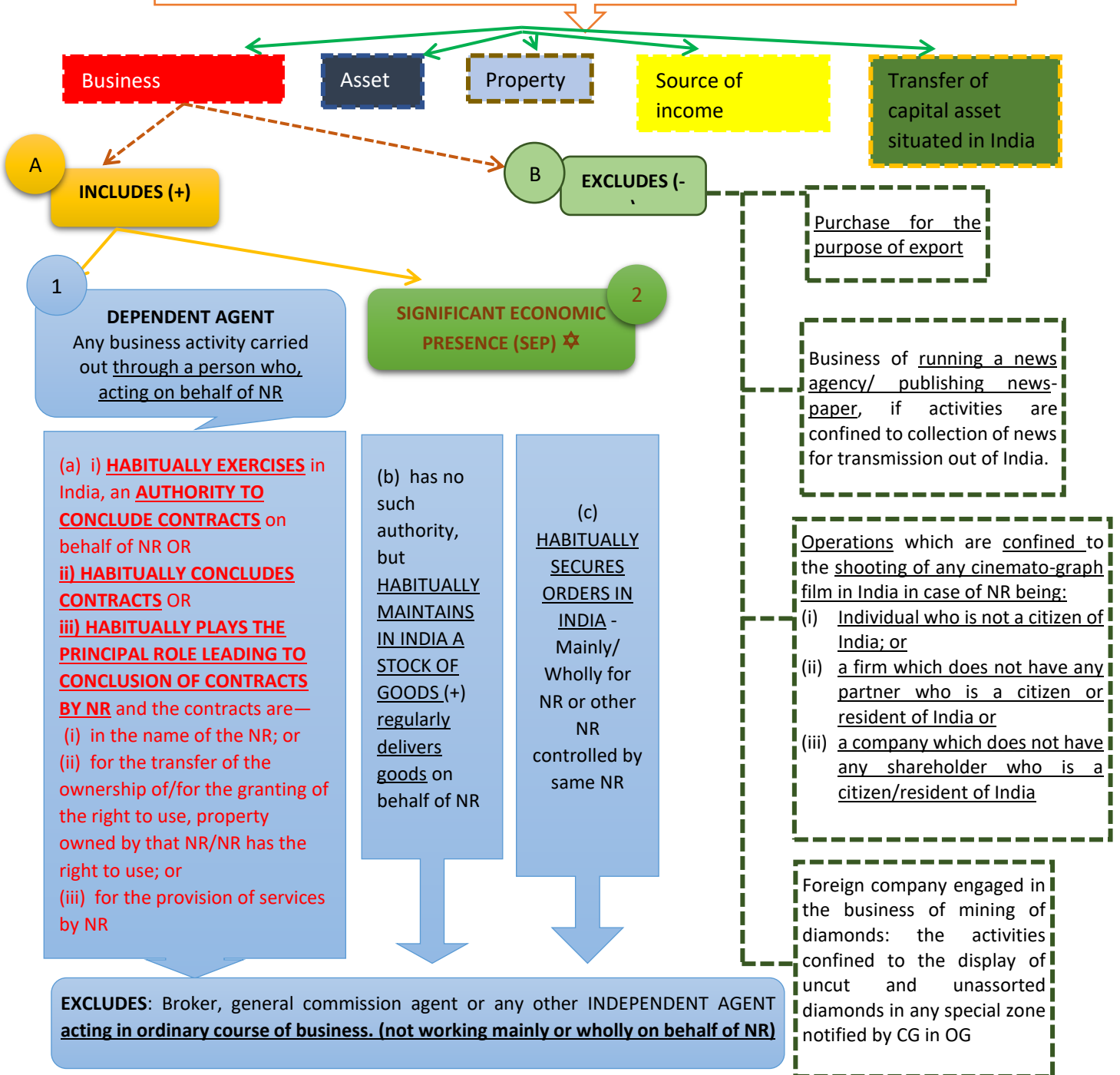
Particulars	ROR	R & NOR	NR
1. Income received or deemed to be received in India	Taxable Section 5(1)(a)	Taxable Section 5(1)(a)	Taxable Section 5(2)(a)
2. Income accruing or arising or deemed to accrue or arise in India	Taxable Section 5(1)(b)	Taxable Section 5(1)(b)	Taxable Section 5(2)(b)
3. Income accruing or arising outside India from -			
(a) Business controlled in India or Profession set up in India	Taxable Section 5(1)(c)	Taxable Section 5(1)(c)	Not taxable
(b) Any other source	Taxable Section 5(1)(c)	Not taxable Proviso. to Section 5(1)	Not taxable

4. Income deemed to accrue or arise in India [Section 9(1)(i)]

International Taxation

CA Prerna Peshori

Section 9(1)(i): Income Deemed to Accrue or Arise in India



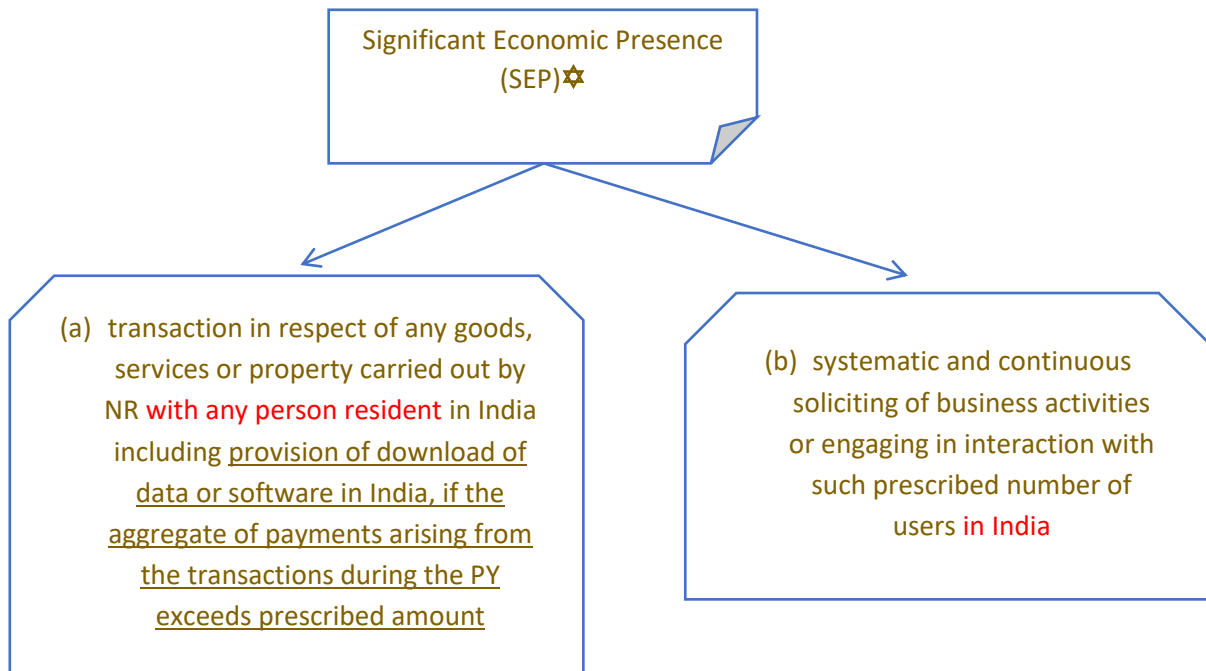
For ① Only Income **AS IS ATTRIBUTABLE TO THE OPERATIONS CARRIED OUT IN INDIA** shall be deemed to accrue/arise in India*

Liaison office:

maintained solely for carrying on preparatory & auxiliary services & not undertaking commercial, trading or industrial activity does not constitute business connection in India

International Taxation

CA Prerna Peshori



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

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.

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.

*Income attributable to the operations carried on in India or transactions or activities shall include:

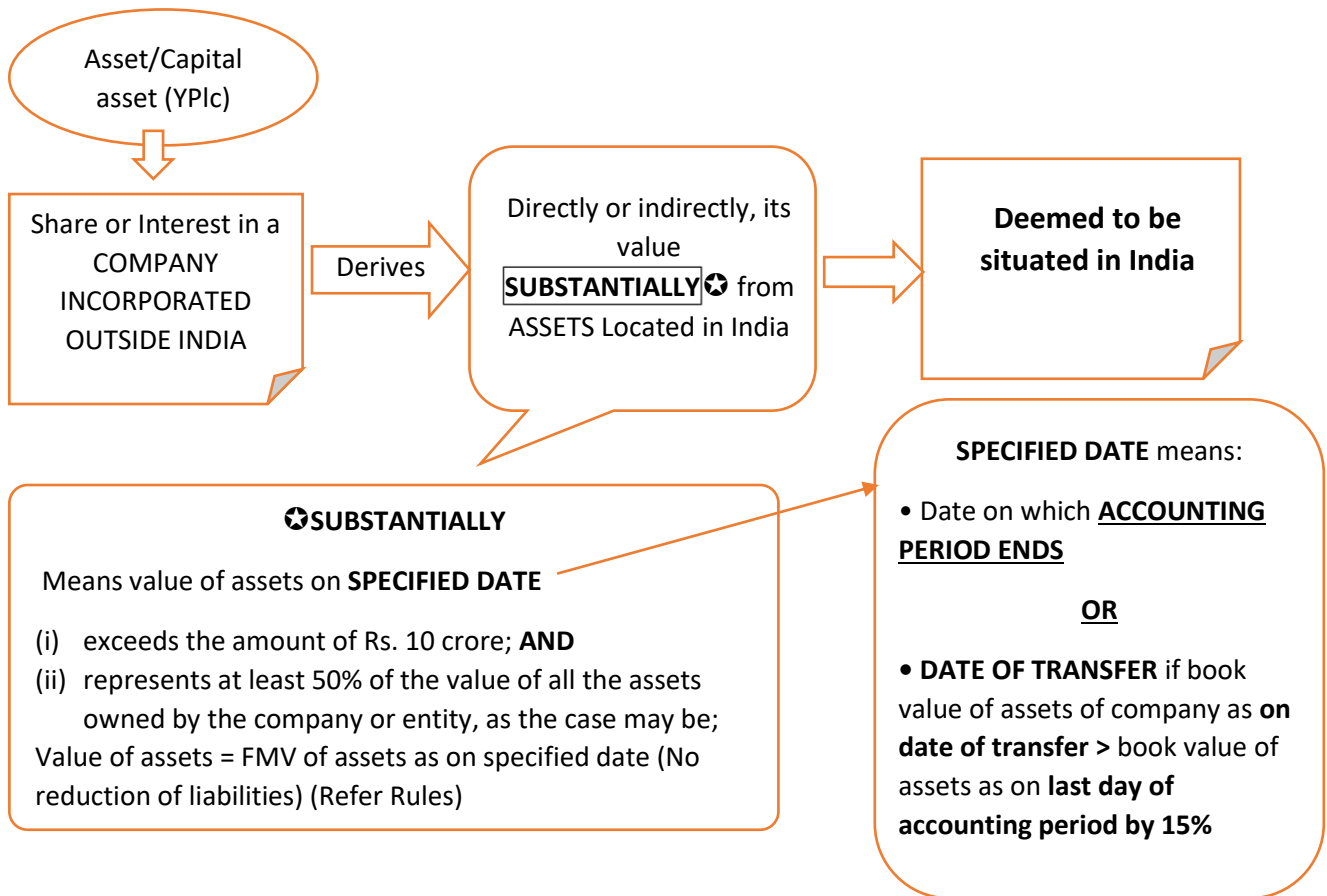
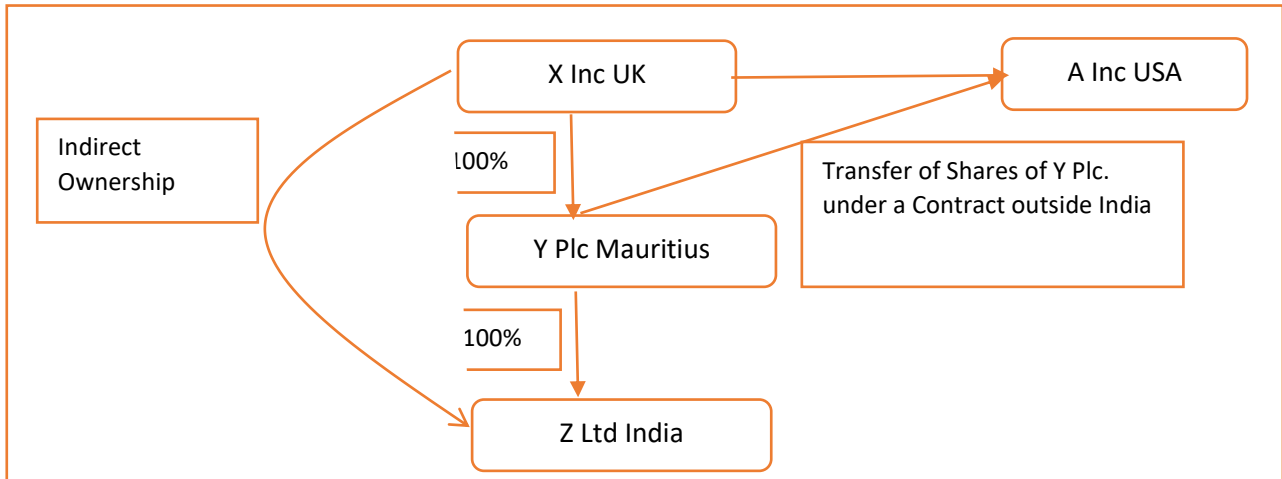
- (i) such advertisement which targets a customer who resides in India or a customer who accesses the advertisement through internet protocol address located in India;
- (ii) sale of data collected from a person who resides in India or from a person who uses internet protocol address located in India; and
- (iii) sale of goods or services using data collected from a person who resides in India or from a person who uses internet protocol address located in India.

International Taxation

CA Prerna Peshori

5. Indirect Transfer [Section 9]

Transfer of a Capital Asset Situated in India (Y Plc)



International Taxation

CA Prerna Peshori

EXCEPTION:

- Above rule is not applicable to investments held, directly or indirectly, in Category-I foreign portfolio investor under the **under the Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2019**
- In respect of income accruing or arising to a non-resident on account of redemption or buyback of its share or interest held indirectly (i.e. through upstream entities registered or incorporated outside India) in the specified funds (namely, investment funds, venture capital company and venture capital funds) if such income accrues or arises from or in consequence of transfer of shares or securities held in India by the specified funds and such income is chargeable to tax in India. However, the above benefit shall be applicable only in those cases where the proceeds of redemption or buyback arising to the non-resident do not exceed the pro-rata share of the non-resident in the total consideration realized by the specified funds from the said transfer of shares or securities in India. It is further clarified that a non-resident investing directly in the specified funds shall continue to be taxed as per the extant provisions of the Act.
- Declaration of dividend by a foreign company outside India does not have the effect of transfer of any underlying assets located in India. Circular No. 4/2015, dated 26-03-2015, therefore, clarifies that the dividends declared and paid by a foreign company outside India in respect of shares which derive their value substantially from assets situated in India would NOT be deemed to be income accruing or arising in India by virtue of the provisions of section 9(1)(i).
- Explanation 7 to Section 9(1)(i) provides that No income shall be deemed to accrue or arise to a non-resident from transfer, outside India, of any share of, or interest in, a company or an entity, registered or incorporated outside India, if transferor company DOES NOT HOLD (individually or jointly with AE) at any time in 12 months preceding the date of transfer:
 - right of management/Control AND
 - Voting power or share capital or interest > 5% of total voting power/share capital/interest in such foreign company.

Rule 11UB: Computation of the FMV of the various classes of assets:

CBDT has issued rules for determination of the fair market value (FMV) of assets (tangible or intangible) and the income attributable to assets located in India for the purpose of taxation of indirect transfer of assets u/s 9(1)(i) of the Act.

Nature of Asset	Manner of computation of FMV
Shares of a listed Indian company held as a part of the shareholding, conferring directly or indirectly any right of management or control	$FMV = (A+B)/C$, where A= market capitalisation of the Indian Company based on the Observable Price; B= book value of liabilities of the company on the Specified Date; C= the total number of outstanding shares

International Taxation

CA Prerna Peshori

Nature of Asset	Manner of computation of FMV
Shares of a listed Indian Company which is listed as on the Specified Date (other than shares those covered in proviso above)	FMV = Observable Price
Unlisted shares	FMV as determined by a valuation report as increased by the value of the liability, if any, considered in such determination
Interest in a partnership firm or in an AOP	<p>Step 1 - Computation of value of partnership firm on the basis of a valuation report as increased by the value of the liability, if any, considered in such determination</p> <p>Step 2 - Value determined Step 1 to be apportioned to the extent of capital of partnership firm or AOP in the ratio of partner's capital contribution</p> <p>Step 3 - Balance value to be apportioned on the basis of asset distribution ratio on dissolution of partnership firm/AOP or in absence thereof, in the profit sharing ratio</p> <p>Step 4 - FMV on interest in partnership firm/ AOP = Value as per Step 2 + Value as per Step 3</p>
Any other asset	Value as determined on the basis of valuation report as increased by the value of the liability, if any, considered in such determination
In case of transfer between persons who are not Connected Persons (as defined in section 102(4) of the Act for the purpose of application of General Anti-Avoidance Rule)	<p>FMV = A+B, where</p> <p>A= market capitalisation of the Foreign Company computed on the basis of the full value of consideration;</p> <p>B= book value of liabilities as certified by a merchant banker/accountant</p>
In case of transfer of shares of a Foreign Company listed on the stock exchange between Connected Persons	<p>FMV = A+B, where</p> <p>A= market capitalisation of the Foreign Company based on the Observable Price</p> <p>B= book value of liabilities of the company or the entity on the Specified Date</p>
In case of transfer of shares of a Foreign Company not listed on any stock exchange between Connected Persons	<p>FMV = A+B, where</p> <p>A= FMV of the Foreign Company as on the Specified Date based on valuation report</p> <p>B= value of liabilities of the company or the entity considered for determination of FMV in A above</p>

Rule 11UC: Computation of income attributable to assets in India:

The income attributable to indirect transfer of assets shall be determined on the basis of the following formula:

$$A \times B$$

C where:

A= Income from indirect transfer of assets

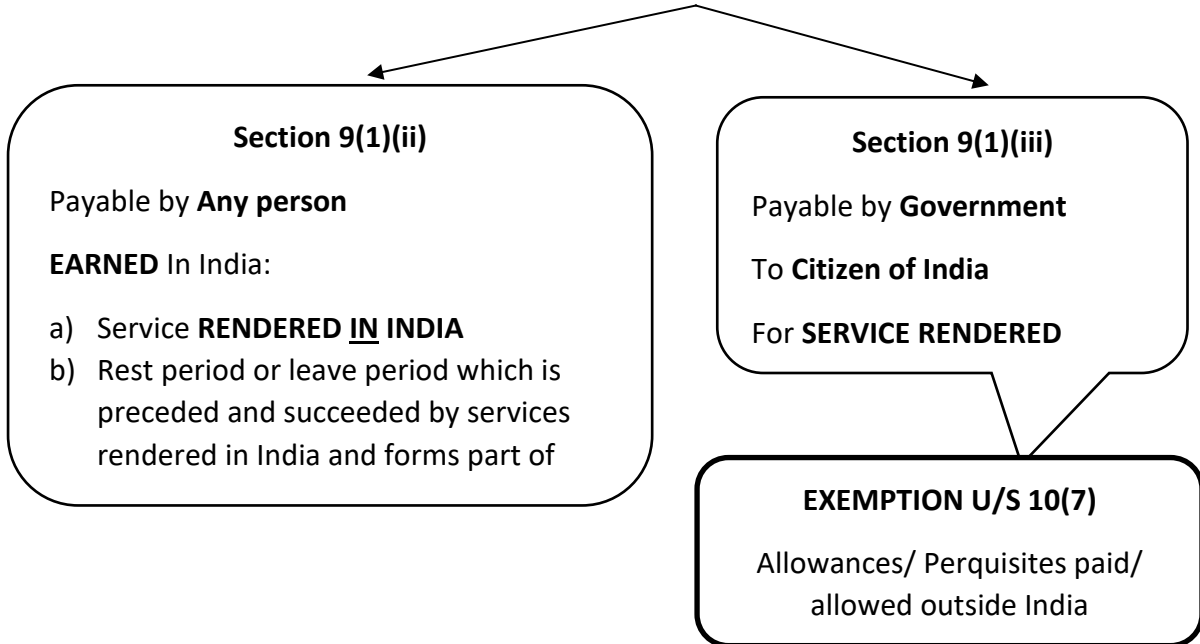
B= FMV of the Indian assets on the Specified Date

International Taxation

CA Prerna Peshori

C= FMV of all the assets of the company or entity as on the Specified Date

6. Salaries deemed to accrue or arise in India [Section 9(1)(ii)/(iii)]



7. Dividend deemed to accrue or arise in India [Section 9(1)(iv)]

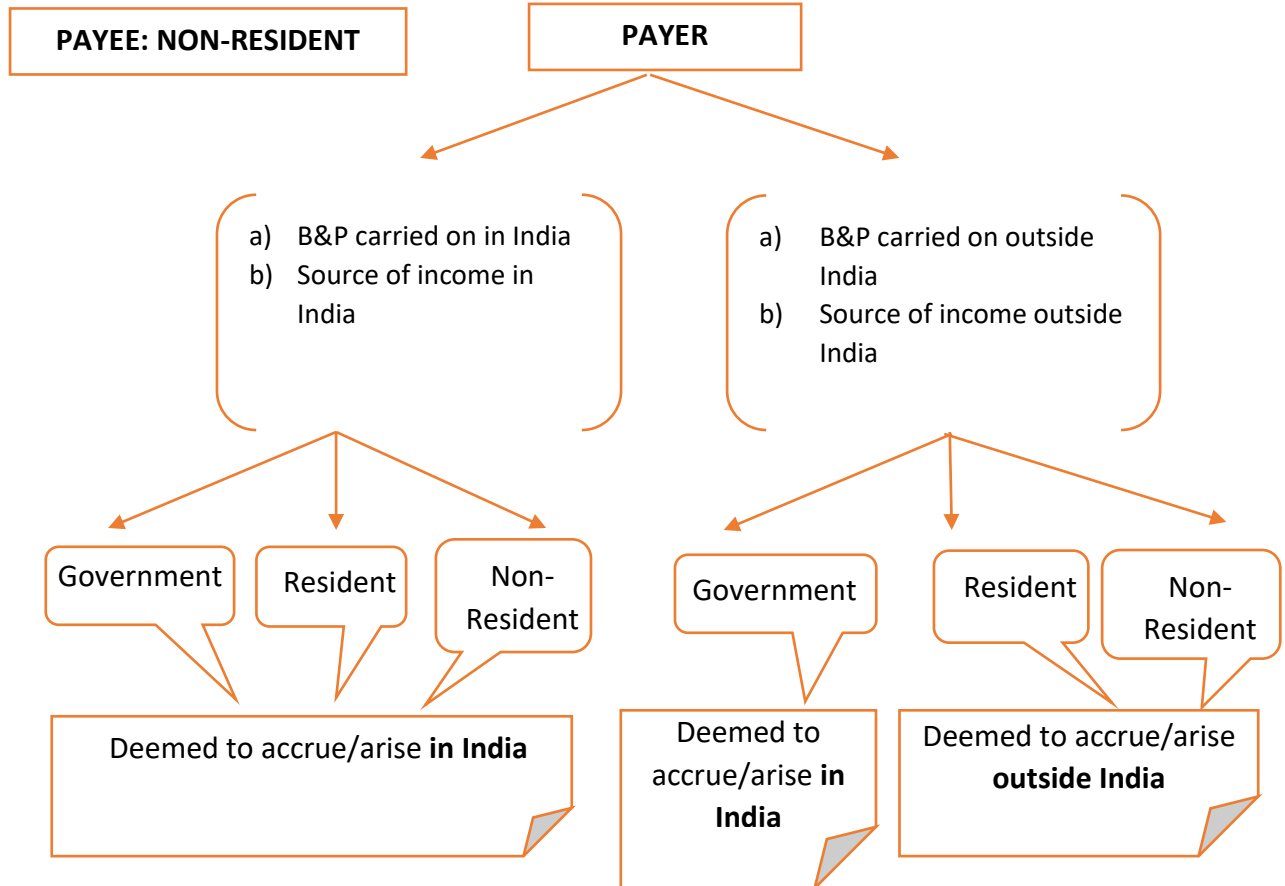
Dividend paid by INDIAN Company OUTSIDE India shall be deemed to accrue/arise in India. However, dividend paid by Indian company is exempt under section 10(34) in the hands of shareholder.

SHAREHOLDER	RESIDENT	NON RESIDENT
COMPANY		
INDIAN COMPANY	<ul style="list-style-type: none"> Individual: 10.4% to 35.88% LLP: 34.94% 	10.4% to 35.88%
FOREIGN COMPANY	Taxable u/s 115A/115BBD	Not taxable

International Taxation

CA Prerna Peshori

8. Interest/Royalties/Fees for Technical Services deemed to accrue or arise in India [Section 9(1)(v)/(vi)/(vii)]



The income of a non-resident shall be deemed to accrue or arise in India by way of interest u/s 9(1)(v) or royalty u/s 9(1)(vi) or fees for technical services u/s 9(1)(vii) and shall be included in the total income of the non-resident,

- (1) whether or not the non-resident has a residence or place of business or business connection in India or
- (2) whether or not the non-resident has rendered services in India.

International Taxation

CA Prerna Peshori

A. Interest Important points

INTEREST PAID BY INDIAN PE TO ITS FOREIGN HEAD OFFICE BANK

The CBDT, in its Circular No. 740, dated 17-4-1996 had clarified that branch of a foreign company in India is a separate entity for the purpose of taxation under the Act and accordingly TDS provisions would apply along with separate taxation of interest paid to head office or other branches of the non-resident, which would be chargeable to tax in India.

The view of CBDT was not accepted in various judicial decisions.

The interest paid by the permanent establishment to the head office or other branch etc. is an interest payment sourced in India and is liable to be taxed under the source rule in India.

Accordingly, to put an end to litigation, section 9(1)(v) was amended. if following two conditions are satisfied :

- The assessee is a non-resident and engaged in the business of banking.
- Interest is 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.
- **ANY INTEREST PAYABLE** by the 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
- **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 would apply.
- Accordingly, the PE in India shall be **obligated to deduct tax at source on any interest payable** to either the head office or any other branch or PE, etc. of the non-resident outside India (subject to DTAA).
- Further, non-deduction would result in disallowance of interest claimed as expenditure by the PE and may also attract levy of interest and penalty in accordance with relevant provisions of the Act.

B. Royalties Important points:

1. **Meaning of Computer software:** "Computer software" means any computer programme recorded on any disc, tape, perforated media or other information storage device and includes any such programme or any customised electronic data.
2. **Meaning of Royalty:** The term 'royalty' means consideration (including any lumpsum consideration but excluding any consideration which would be the income of the recipient chargeable under the head 'capital gains') for:
 - a. the transfer of all or any rights (including the granting of license) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property;
 - b. 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;
 - c. the use of any patent, invention, model, design, secret formula or process or trade mark or similar property;
 - d. the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill;
 - e. the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB;
 - f. the transfer of all or any rights (including the granting of licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with

International Taxation

CA Prerna Peshori

television or tapes for use in connection with radio broadcasting, ~~but not including consideration for the sale, distribution or exhibition of cinematographic films;~~

g. the rendering of any service in connection with the activities listed above.

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

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

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

- the software is acquired in a subsequent transfer without any modification by the transferor;
 - tax has been deducted either under section 194J or under section 195 on payment for any previous transfer of such software; and
 - the transferee obtains a declaration from the transferor that tax has been so deducted along with the PAN of the transferor.
- Consequently, the provisions of tax deduction at source under section 194J and section 195 would be attracted in respect of consideration for use or right to use computer software since the same falls within the definition of royalty.

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

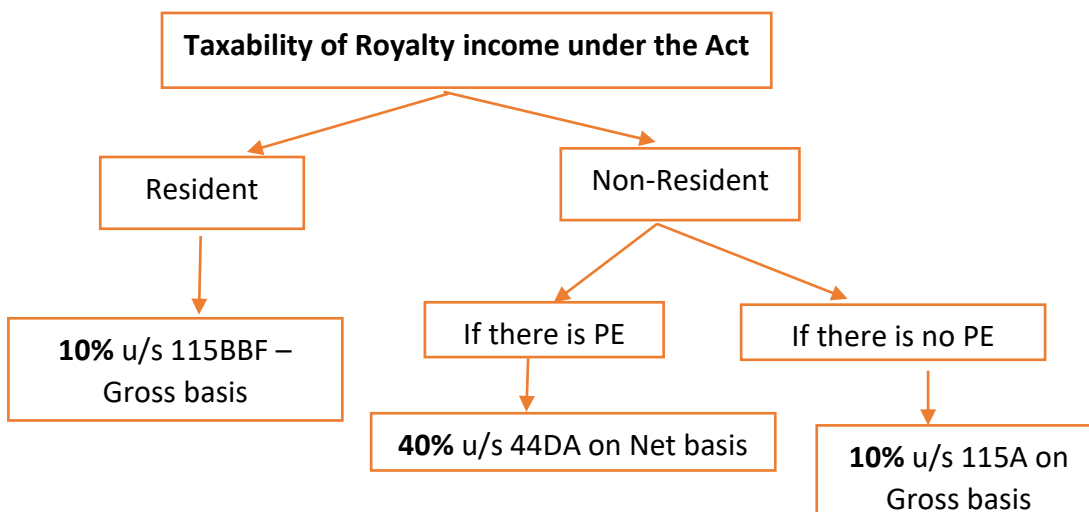
Royalty includes and has always included consideration in respect of any right, property or information, whether or not,

- (a) the possession or control of such right, property or information is with the payer;
- (b) such right, property or information is used directly by the payer;
- (c) the location of such right, property or information is in India [Explanation 5]

5. Meaning of Process

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

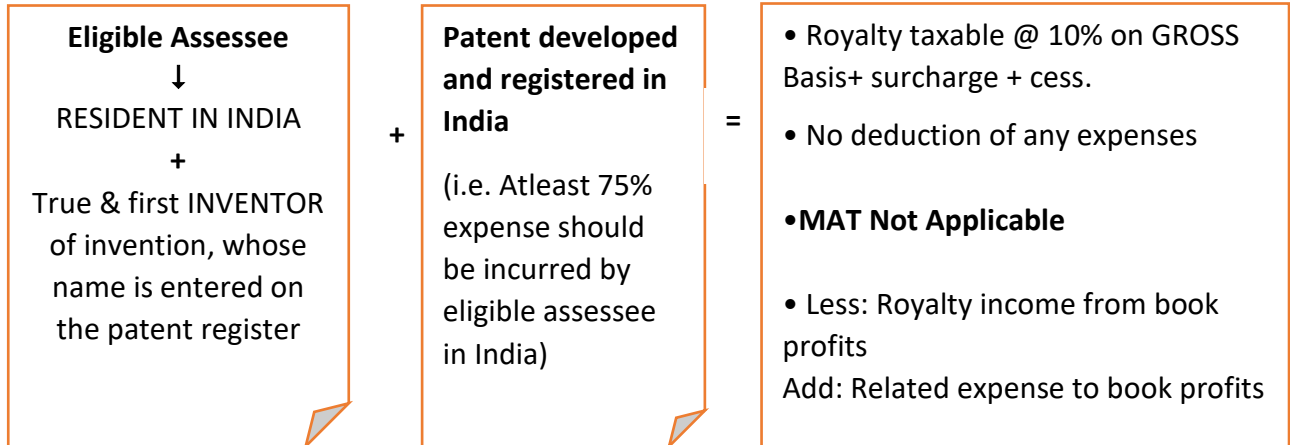
6. Taxability of Royalty



International Taxation

CA Prerna Peshori

Section 115BBF: Concessional Taxation Regime for Royalty income in respect of patent developed & registered in India



OPTION to be governed by this scheme – Exercise option before due date u/s 139(1)

If assessee has opted for this scheme, however, does not offer income in accordance with this section in any of the 5 years, then assessee shall not be eligible to claim benefit for next 5 assessment years following the A.Y. in which provisions are not complied.

7. Specific issues in taxability of royalty

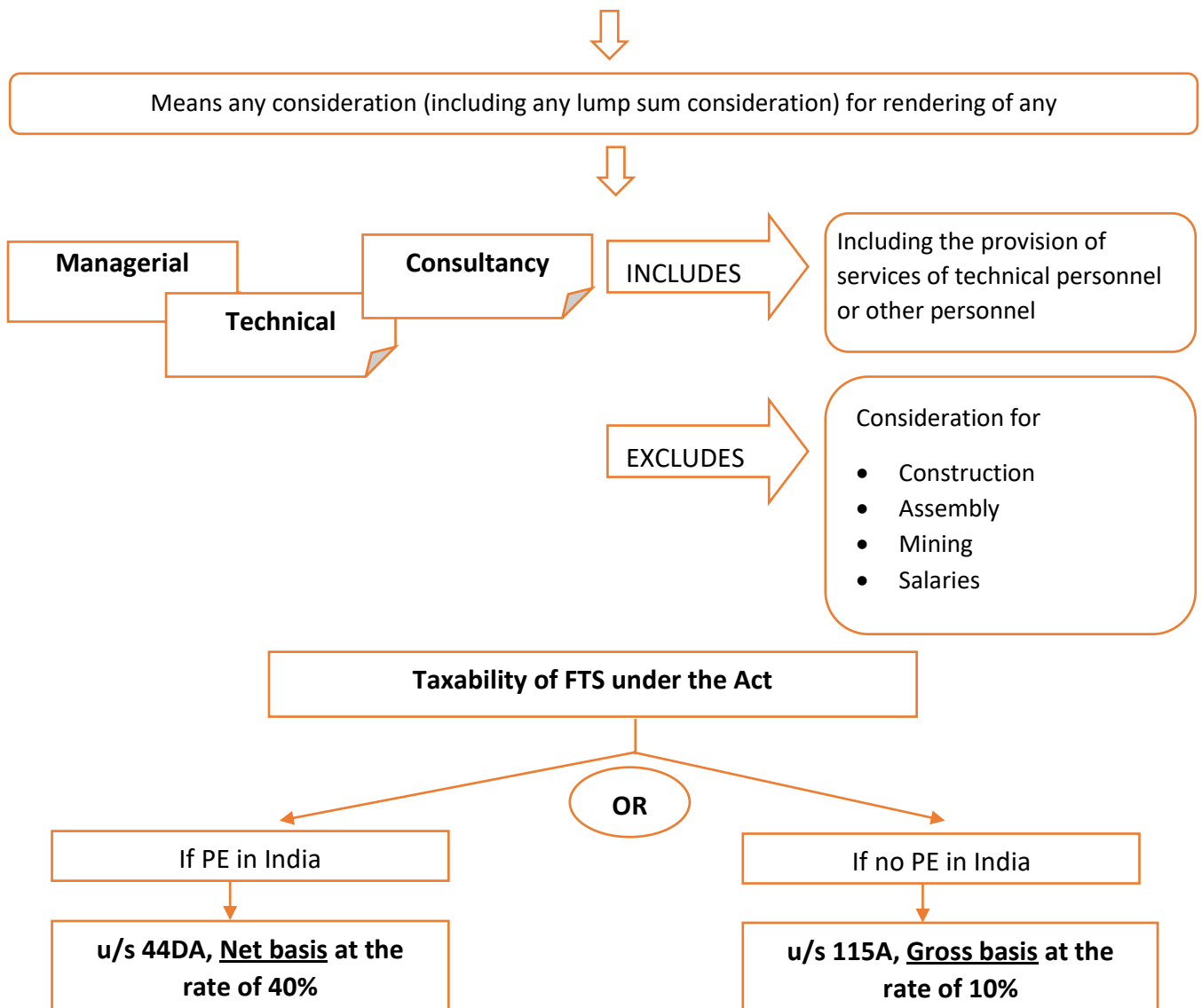
ISSUES	TAXABILITY OF ROYALTY UNDER THE ACT
PAYMENT FOR LEASE SPACE SEGMENT IN A SATELLITE/ TRANSPONDER	<p>Royalty includes consideration for use/right to use any industrial/commercial/scientific equipment.</p> <p>As per EXPLANATION 5 to section 9(1)(vi), royalty includes consideration in respect of any right, property or information, whether or not –</p> <ol style="list-style-type: none"> a) the possession or control of such right, property or information is with the payer; b) such right, property or information is used directly by the payer; c) the location of such right, property or information is in India. <p>Therefore, in the instant case, the payment shall be characterised as ‘Royalty’ notwithstanding that:</p> <ul style="list-style-type: none"> ✓ the payer didn’t possessed or controlled the satellite transponder or ✓ such property is not used exclusively (directly) by the payer or ✓ the location of such equipment is not in India.
SOFTWARE PRODUCTS/ COPYRIGHTED ARTICLES & COPYRIGHT VS COPYRIGHTED ARTICLE	<p>It is pertinent to distinguish between the copyright and copyrighted article.</p> <p>In Copyright = Copies of the software can be reproduced, therefore, it’s a right to use.</p> <p>In Copyrighted Article = Sale of Product</p> <p>As per EXPLANATION 4 to section 9(1)(vi), sale of copyright or copyrighted article is taxable as royalty.</p>
SUPPLY OF SOFTWARE EMBEDDED IN HARDWARE	<div style="display: flex; align-items: center;"> <p>CIT v. Alcatel Lucent Canada (2015) (Del HC)</p> </div>

International Taxation

CA Prerna Peshori

	<p>Facts of the case: Assessee is engaged in manufacture of GSM telephone systems. It supplied hardware & software to various entities in India. The software was embedded as part of hardware. AO contended that consideration for supply of software embedded in hardware is 'royalty' under section 9(1)(v)</p> <p>Conclusion: The High Court observed that:</p> <ol style="list-style-type: none">Software embedded in hardware does not have independent existence & useSoftware was integral part of GSM mobile telephone systems and is used by cellular operators for providing services to customersFurther, software incorporated on a media would be liable to sales tax. <p>Accordingly, consideration for supply of software embedded in hardware is not 'royalty' under section 9(1)(v).</p>
--	--

C. Fees For Technical Services



International Taxation

CA Prerna Peshori

Important Case Laws:

Mere collection of a fee for use of a standard facility provided to all those willing to pay it is not for technical services

[Skycell Communications Ltd. (Madras HC)]

Interconnect charges to a mobile operator cannot be regarded as technical service, unless there is human involvement present.

[Bharti Cellular Ltd. (SC)]

No technical service is involved in payment of internet band with services.

Esstel Communication (P) Ltd. (Del. HC)

Amounts paid by the agent towards integrated communication system in order to help the agents and the expense of running system was shared by all agents, the payments were in nature of reimbursement of expenses and not FTS

[A.P. Moller Maersk]

9. Special Tax Rates on Income from royalties, FTS, interest etc.

Where the total income of a foreign company or a non-corporate non- resident includes any income by way of	Rate of Tax
(1) Dividends [other than dividend referred to in section 115-O]	20%
(2) Interest received from the Government or an Indian concern on moneys borrowed or debt incurred by the Government /Indian concern in foreign currency, other than 3 and 4 mentioned below	20%
(3) Interest received from an infrastructure debt fund referred to in section 10(47)	5%

International Taxation

CA Prerna Peshori

<p>(4) Interest referred to in section 194LC received from an Indian company or business trust –</p> <ul style="list-style-type: none"> - in respect of monies borrowed by an Indian company or business trust in foreign currency from sources outside India <ul style="list-style-type: none"> • Under a loan agreement between 1.7.2012 and 30.6.2020 or • by way of issue of long-term infrastructure bonds between 1.7.2012 and 30.9.2014 or • by way of issue of long-term bonds including long term infrastructure bond between 1.10.2014 and 30.6.2020 as approved by the Central Government - in respect of monies borrowed from sources outside India by way of rupee denominated bond before 1.7.2020 	5%
<p>(5) Interest referred to in section 194LD payable between 1.6.2013 and 30.6.2020 to a Foreign Institutional Investor or Qualified Foreign Investor on investment made in –</p> <ul style="list-style-type: none"> - Rupee denominated bond of an Indian company - Government security 	5%
<p>(6) Distributed Income referred to in section 194LBA(2), being interest income of a business trust from a SPV, distributed by business trust to non-resident unit holders of a business trust</p>	5%
<p>(7) Distributed income referred to in section 194LBA(2), being dividend income of a business trust from a SPV, distributed by business trust to non-resident unit holders of a business trust. The dividend shall be exempted if the SPV has not opted for concessional rate u/s 115BAA.</p>	10%
<p>(8) Income received in respect of units purchased in foreign currency of a mutual fund specified under section 10(23D) or of the Unit Trust of India</p>	20%

Important Points

1. 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.
2. Deduction under Chapter VI-A is not available in respect of dividend and interest referred to in (i) above. However, this condition would not be applicable to deduction allowed to a unit of an International Financial Services Centre (IFSC) under section 80LA i.e., a unit of an IFSC can claim deduction under section 80LA against dividend and interest referred to in (i) above.
3. It shall not be necessary for the assessee to furnish a return of income if the following conditions are satisfied :
 - (a) The total income consists of only the interest or dividend income **and the royalty or Fees for technical services**
 - (b) **Tax deductible at source has been deducted from such income as provided under the provisions of Part B of Chapter XVII and the rate of such deduction is not less than the rate specified above.**

International Taxation

CA Prerna Peshori

10. Gift of Money from resident to Non-resident [Section 9(1)(viii)]

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

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

BACKGROUND	<ul style="list-style-type: none"> ➤ The presence of fund manager in India may create sufficient nexus of the off shore fund in India and may create BUSINESS CONNECTION inspite of fund manager being an independent person. ➤ Further, if the fund manager located in India undertakes fund management activity in respect of investments outside India for an off-shore fund, the PROFITS MADE BY THE FUND FROM SUCH INVESTMENTS MAY BE LIABLE TO TAX IN INDIA. ➤ Further, presence of fund manager may lead to OFF-SHORE FUND BEING TERMED AS RESIDENT IN INDIA on the basis of control & management in India.
RATIONALE OF SECTION 9A	<ul style="list-style-type: none"> ➤ With a view to facilitate location of fund managers of off shore funds in India, subject to fulfilment of certain conditions by fund and fund manager: ➤ The tax liability in respect of income arising to the fund from investment in India would be neutral whether the investment is made directly in India or through fund manager located in India. ➤ Income of fund outside India would not be taxed in India solely on the basis that the fund management activity in respect of such investments has been taken through fund manager located in India. ➤ Fund management activity through an eligible fund manager not to constitute business connection. ➤ Location of fund manager in India not to affect residential status of eligible investment fund ➤ This section does not apply to Foreign Portfolio Investors.
ELIGIBLE FUND	<ul style="list-style-type: none"> ➤ Fund not be should be resident in India ➤ Fund should be resident of a country or a specified territory with which an agreement referred to section 90(1) or section 90A(1) or is established or

International Taxation

CA Prerna Peshori

	<p>incorporated or registered outside India in a country or a specified territory notified by the Central Government in this behalf</p> <ul style="list-style-type: none"> ➤ Fund shall not carry on or control and manage, directly or indirectly, any business in India; ➤ 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. ➤ Monthly average of the corpus of the fund \geq Rs. 100 Crores. If the fund has been established or incorporated in the previous year, the corpus of fund should not be less than Rs. 100 crore rupees at the end of a period of six months from the last day of the month of its establishment or incorporation, or the end of such previous year, whichever is later; However, this condition shall not be applicable to a fund which has been wound up in the previous year. ➤ The aggregate participation or investment in the fund, directly or indirectly, by persons resident in India should not exceed 5% of the corpus of the fund. 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. ➤ The fund should have minimum of 25 members, who, are directly or indirectly, not connected persons. ➤ the fund and its activities should be subject to applicable investor protection regulations in the country or specified territory where it is established or incorporated or is a resident; ➤ any member of the fund along with connected persons shall not have any participation interest, directly or indirectly, in the fund exceeding 10% ➤ the aggregate participation interest, directly or indirectly, of ten or less members along with their connected persons in the fund, shall be less than 50%; ➤ the investment by the fund in any entity shall not exceed 20% of the corpus of the fund; ➤ no investment shall be made by the fund in its associate entity. ➤ Remuneration paid by the fund to an eligible fund manager in respect of fund management activity undertaken on its behalf is not less than the arm's length price of such activity.
<p>ELIGIBLE FUND MANAGER</p>	<ul style="list-style-type: none"> ➤ Person is not an employee of the eligible investment fund or a connected person of the fund ➤ Person is registered as a fund manager or investment advisor in accordance with the specified regulations ➤ Person is acting in the ordinary course of his business as a fund manager ➤ Person along with these connected persons shall not be entitled, directly or indirectly, to more than 20% of the profits accruing or arising to the eligible investment fund from the transactions carried out by the fund through such fund manager.

12. Exempt Income for Non-resident [Section 10]

International Taxation

CA Prerna Peshori

Section	Income	Available to
10(4)(ii)	Interest on money standing to the credit in a Non- resident (External) account of an Individual in any bank in India as per the FEMA Act, 1999.	Individual resident outside India (under FEMA Act) or an individual who has been permitted to maintain said account by RBI
10(4C)	<i>Interest payable by an Indian company or business trust in respect of moneys borrowed from a source outside India by way of issue of rupee denominated bond during the period from 17.9.2018 to 31.3.2019</i>	<i>A non-corporate non- resident or foreign company</i>
10(4D)	<i>Income on transfer of a capital asset, being a bond of an Indian Company or a public sector company (sold by the Government and purchased by the specified fund in foreign currency), GDR or rupee denominated bond or derivative or any other notified security, on a recognized stock exchange located in any IFSC is exempt –</i> <i>(i) where the consideration is paid or payable in convertible foreign exchange or</i> <i>(ii) as a result of transfer of securities (other than shares in a company resident in India) or</i> <i>(iii) any income from securities issued by a non-resident (not being a permanent establishment of a non-resident in India) and where such income otherwise does not accrue or arise in India or</i> <i>(iv) any income from a securitisation trust which is chargeable under the head "Profits and gains of business or profession", to the extent such income accrued or arisen to, or is received, is attributable to units held by non-resident (not being the permanent establishment of a non-resident in India) computed in the prescribed manner</i>	<i>A specified fund</i>
10(6)(ii)	Remuneration received by Foreign Diplomats/ Consulate and their staff (Subject to conditions)	Individual (not being a citizen of India)

International Taxation

CA Prerna Peshori

10(6)(vi)	Remuneration received as an employee of a foreign enterprise for services rendered by him during his stay in India, if: a) Foreign enterprise is not engaged in any trade or business in India; b) His stay in India does not exceed the aggregate a period of 90 days in such previous year; and c) Such remuneration is not liable to deducted from the income of employer chargeable under this Act	Individual - Salaried Employee (not being a citizen of India) of a foreign enterprise
10(6)(viii)	Salary received by or due for services rendered in connection with his employment on a foreign ship if his total stay in India does not exceed 90 days in the previous year.	Individual Salaried Employee (Non-resident who is not a citizen of India) of a foreign enterprise
10(6)(xi)	Remuneration received as an employee of the Government of a foreign state during his stay in India in connection with his training in any Government Office/ Statutory Undertaking/ corporation/ registered society etc.	Individual - Salaried Employee (not being a citizen of India) of Government of foreign state
10(6A)	Tax paid by Government or Indian concern (under terms of agreement entered into after 31-3-1976 but before 1-6-2002 by the Government or Indian concern with the foreign company) on income derived by way of royalty or fees for technical services by the foreign company from Government or Indian concern.	Foreign Company
10(6B)	Tax paid by Government or Indian concern under terms of agreement entered into before 1-6-2002 by Central Government with Government of foreign State or international organization on income derived by a non-corporate non-resident or foreign company from the Government or Indian concern, other than income by way of salary, royalty or fees for technical services	Non-corporate non-resident or foreign company
10(6BB)	Tax paid by Indian company, engaged in the business of operation of aircraft, which has acquired an aircraft or an aircraft engine on lease, under an approved (by Central Government) agreement entered into between 1-4-1997 and 31-3-1999, or after 31-3-2007, on lease rental/income derived (other than payment for providing spares or services in connection with the operation of leased aircraft) by the Government of a Foreign State or foreign enterprise.	Government of foreign State or foreign enterprise (i.e., a person who is a non-resident)
10(6C)	Royalty income or fees for technical services under an agreement with the Central	Foreign company (notified by the Central Government)

International Taxation

CA Prerna Peshori

	Government for providing services in or outside India in projects connected with security of India	
10(6D)	Royalty income from or fees from technical services rendered in or outside India to, the National Technical Research Organisation (NTRO)	Non-corporate non-resident or foreign company
10(8)	Foreign income; and Remuneration received by an individual from the Government of a foreign State, in connection with	Individual who is assigned to duties in India
	any co-operative technical assistance programme and project under agreement between Central Government and the Government of a foreign State.	
10(8A)	Foreign income; and Any remuneration or fee received by such person (agreement relating to his engagement must be approved) out of funds made available to an international organization (agency like World Bank or any other multi-lateral agency) under a technical assistance grant agreement between that agency and the Government of a foreign State (such technical assistant should be in accordance with an agreement between the Central Government and the agency).	Consultant, being (i) An individual: a) not being an Indian citizen; or b) being an Indian citizen who is not ordinarily resident in India, or (ii) any other person, being a non- resident engaged by the agency for rendering technical services in India in connection with any technical assistance programme or project in accordance with the approved agreement.
10(8B)	Foreign income; and Remuneration received, directly or indirectly, by an individual who is assigned to duties in India in connection with any technical assistance programme and project in accordance with an agreement entered into by the Central Government and the agency from a consultant referred to in section 10(8A)	Employee of a consultant, being an individual: a) not being an Indian citizen; or b) being an Indian citizen who is not ordinarily resident in India Contract of service must be approved by the prescribed authority before commencement of service.
10(9)	Foreign income	Any family member of individual as referred to in section 10(8)/(8A)/(8B), accompanying him to India.

International Taxation

CA Prerna Peshori

<p>Foreign income referred in section 10(8)/(8A)/(8B)/(9) above refers to the other income accruing or arising outside India. Such income would be exempt provided:</p> <p>(i) it is not deemed to accrue or arise in India; and</p> <p>(ii) the individual is required to pay any income tax or social security tax of such income to the Government of that Foreign State or Country of origin of such member.</p>		
10(15)(iiia)	Interest on deposits made by a foreign bank with scheduled bank with approval of RBI.	Bank incorporated outside India and authorised to perform Central Banking functions in that country.
10(15)(iv)(fa)	Interest payable by scheduled bank on deposits in foreign currency where acceptance of such deposits is duly approved by RBI. [Scheduled bank does not include co-operative bank]	a) Non-resident b) Individual or HUF being a resident but not ordinary resident
10(15)(viii)	Interest on deposit on or after 01.04.2005 in an Offshore Banking Unit	
10(15)(ix)	Interest payable by a unit located in an IFSC in respect of monies borrowed by it on or after 1.9.2019	Non-resident
10(15A)	Lease rental paid by Indian company, engaged in the business of operation of aircraft, to acquire an aircraft or an aircraft engine on lease (other than payment for providing spares or services in connection with the operation of leased aircraft) under an approved (by Central Government) agreement not entered into between 1-4-1997 and 31-3-1999, or after 31-3-2007.	Government of foreign State or foreign enterprise (i.e., a person who is a non-resident)
10(23BBB)	Income of European Economic Community derived in India from interest, dividends or capital gains from investment out of its funds under notified scheme of Central Government.	European Economic Community
10(23BBC)	Income of SAARC Fund for Regional Projects set up by Colombo Declaration.	SAARC Fund for Regional Projects.
10(48)	Income received in India in Indian currency on account of sale of Crude oil or any other goods or rendering of services as may be notified by the Central Government in this behalf. Foreign company and agreement should be notified by the Central Government in national interest.	Foreign company on account of sale of crude oil, any other goods or rendering of services. It should not be engaged in any other activity in India.
10(48A)	Income accruing or arising on account of storage of crude oil in a facility in India and sale of crude oil therefrom to any person resident in India. Foreign company and agreement should be notified by the Central Government in national interest.	Foreign company on account of storage of crude oil in a facility in India and sale of crude oil therefrom.

International Taxation

CA Prerna Peshori

10(48B)	Income from sale of leftover stock of crude oil from facility in India after the expiry of agreement or arrangement referred to in section 10(48A) or on termination of the said agreement or arrangement, in accordance with the terms mentioned therein, as the case may be, subject to such conditions, as may be notified by the Central Government.	Foreign company from sale of leftover stock of crude oil from the facility in India.
10(50)	Any income arising from any specified service provided on or after the date on which the provisions of Chapter VIII of the Finance Act, 2016 comes into force or arising from any e-commerce supply or services made or provided or facilitated on or after the 1st day of April, 2021 and chargeable to equalisation levy under that Chapter.	

Certain incomes of wholly owned subsidiary of Abu Dhabi Investment Authority, Sovereign Wealth Fund and specified pension fund [Section 10(23FE)]

Nature of income exempted: Any income of a specified person in the nature of

- dividend,
- interest or
- long-term capital gains

arising from an investment made by it in India, whether in the form of debt or share capital or unit would be exempt, if such investment –

- (a) is made on or after 1st April, 2020 but on or before 31st March, 2024; and
- (b) is held for at least three years.

Eligible investment: Such investment should be in

- (a) a business trust; or
- (b) a company or enterprise or an entity carrying on the business of developing, or operating and maintaining, or developing, operating and maintaining any infrastructure facility as defined in Explanation to section 80-IA(4)(i) or such other business as notified by the Central Government in this behalf; or
- (c) a Category-I or Category-II Alternative Investment Fund regulated under the Securities and Exchange Board of India (Alternative Investment Fund) Regulations, 2012, made under the SEBI Act, 1992, having 100% investment in one or more of the company or enterprise or entity referred to in (b) above.

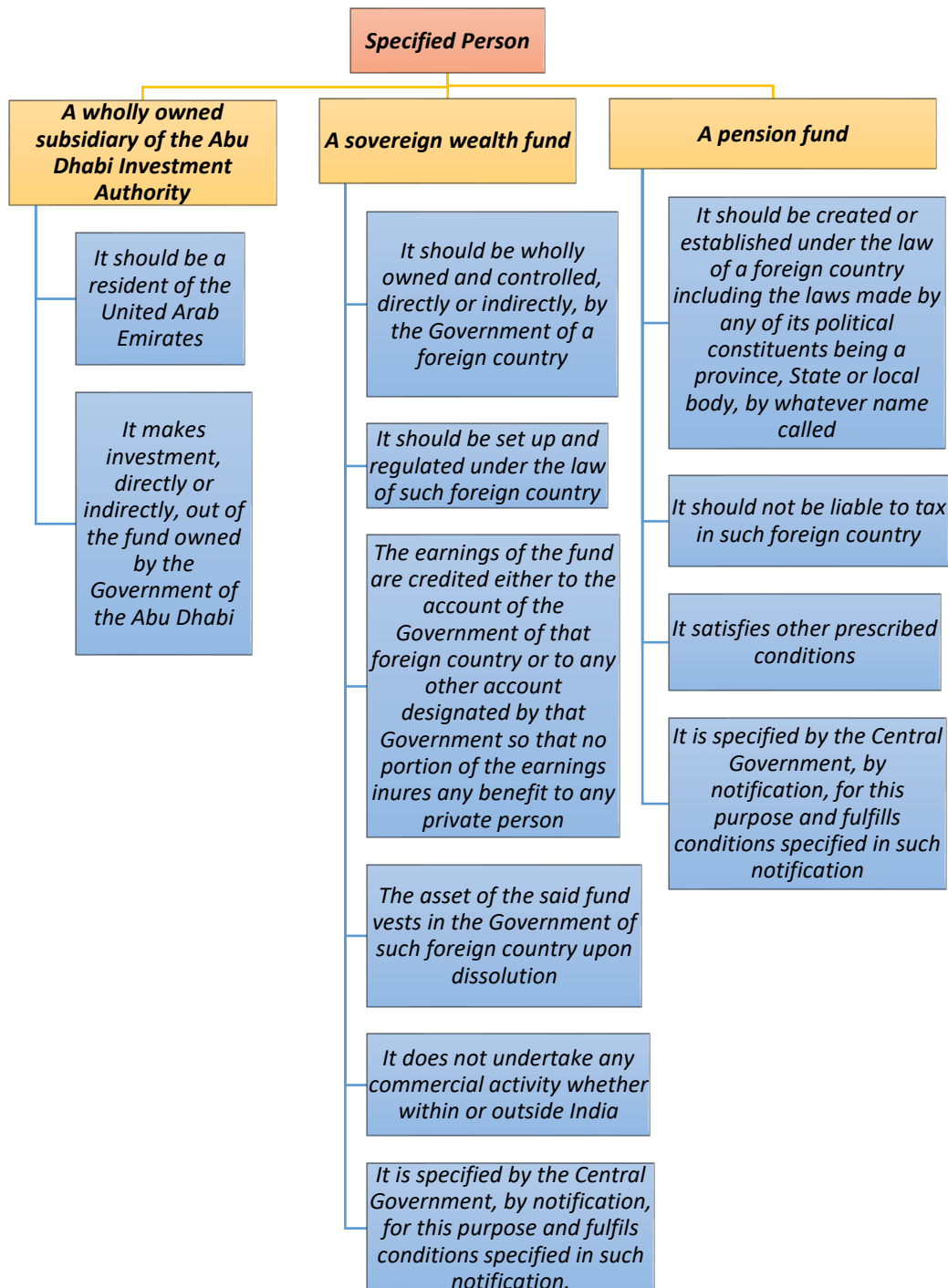
Power of CBDT to issue guidelines: In case any difficulty arises regarding interpretation or implementation of the provisions of this clause, the CBDT may issue guidelines for the purpose of removing the difficulty with the approval of the Central Government.

International Taxation

CA Prerna Peshori

Every guideline issued by the CBDT has to be laid before each House of Parliament, and shall be binding on the income-tax authorities and specified person.

Taxability on failure to satisfy the conditions: Where any income has not been included in the total income of the specified person due to the aforesaid provisions, and subsequently during any previous year the specified person fails to satisfy any of the conditions mentioned so that the said income would not have been eligible for such non-inclusion, such income shall be chargeable to income-tax as the income of the specified person of that previous year.



International Taxation

CA Prerna Peshori

13. Capital Gains Computation for Non-residents [first proviso to Sec. 48]

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

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

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

The aforesaid manner of computation of capital gains shall be applied for every purchase and sale of shares or debentures in an Indian company. Benefit of indexation will not be applied in this case.

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

(1) S. No.	(2) Item	(3) Date
(a)	Cost of acquisition of capital asset	Date of acquisition of capital asset
(b)	Expenditure incurred wholly and exclusively in connection with transfer of capital asset	Date of transfer of capital asset
(c)	Full value of consideration received or accruing as a result of transfer of a capital asset	Date of transfer of capital asset

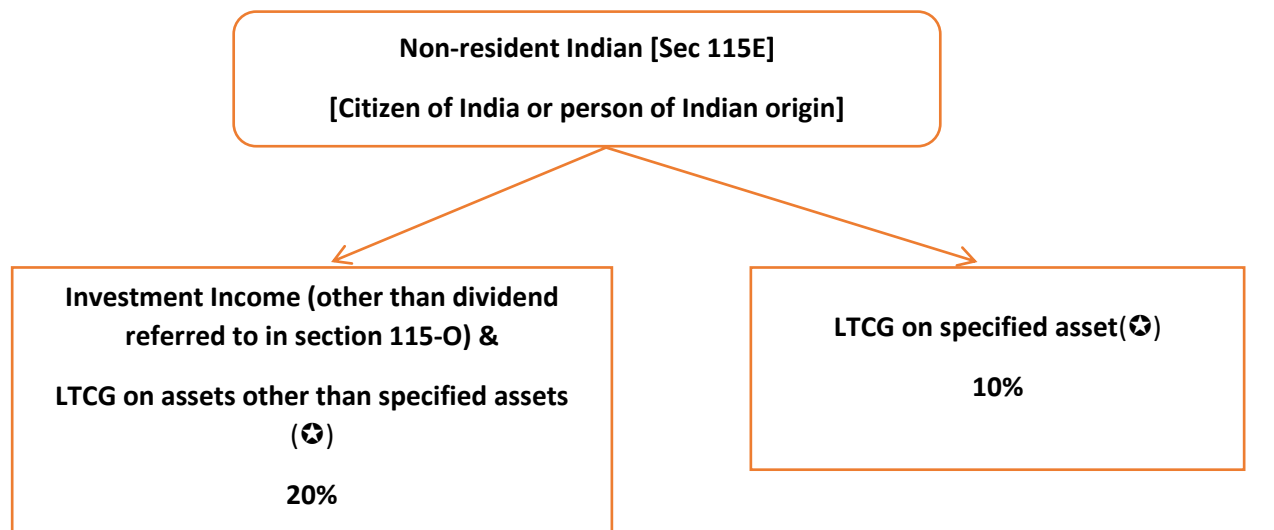
For reconvert capital gains computed in the foreign currency initially utilized in the purchase of the capital asset into rupees, the telegraphic transfer buying rate of such currency, as on the date of transfer of the capital asset, is to be considered.

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

14. Special Provision for Non-resident Indian [Chapter XIIA]

International Taxation

CA Prerna Peshori



Specified Asset should be purchased in convertible foreign exchange

- ✔ Specified asset means:
- (a) Shares of an Indian company,
 - (b) Debentures issued by an Indian Company which is not a private company,
 - (c) Deposits with an Indian Public limited company,
 - (d) Central Government securities,
 - (e) National Saving Certificate VI and VII issue.

Deduction under Chapter VIA
✖

- ✔ Specified asset means:
- (a) Shares of an Indian company,
 - (b) Debentures issued by an Indian Company which is not a private company,
 - (c) Deposits with an Indian Public limited company,
 - (d) Central Government securities,
 - (e) National Saving Certificate VI and VII issue.

Deduction under Chapter VIA ✔
2nd Proviso to Section 48 ✔

Specified Asset should be purchased in convertible foreign exchange

International Taxation

CA Prerna Peshori

Exemption u/s 115F [Similar to Section 54F]	
Applicability	Long Term Capital Gains
Eligible Asset for investment	Specified Asset
Time limit for investment	6 months from the date of transfer
Exemption u/s 115F	LTCG X <u>Amount invested</u> Net Sale Consideration
Withdrawal of exemption	If the new asset is transferred or converted into money within a period of 3 years from the date of its acquisition.
Consequences of withdrawal	The exemption granted earlier shall be taxed as long term capital gains of the PY in which the new asset is transferred or converted into money.

1. ROI not required to be filed if [Section 115G]

- a. Income consist only investment income or LTCG or both
- b. TDS is deducted on such income

2. Benefit under Chapter to be available in certain cases even after the assessee becomes resident [Section 115H]

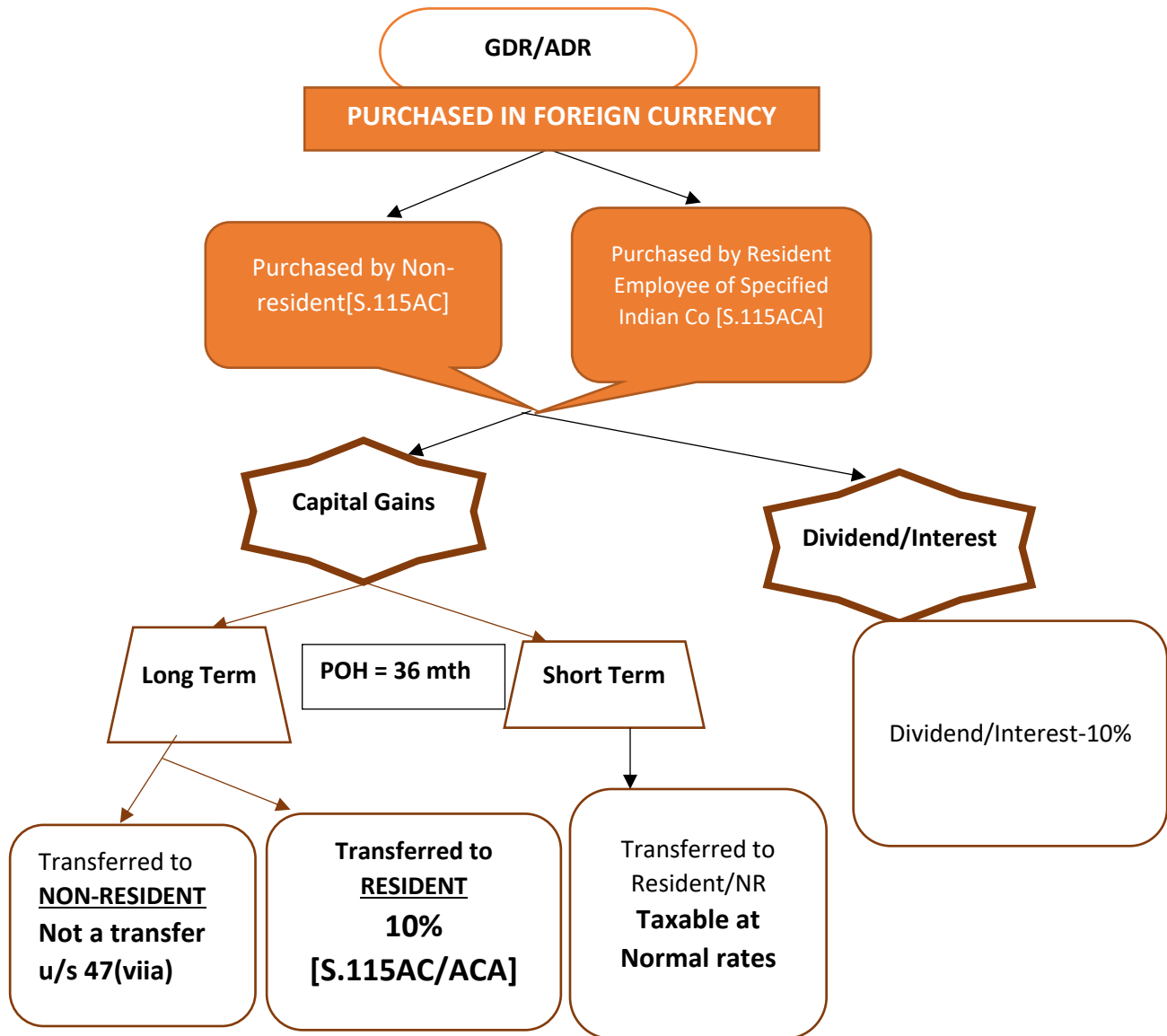
Where a person, who is a non-resident Indian in any previous year, becomes assessable as resident in India in respect of the total income of any subsequent year, he may furnish to the Assessing Officer a declaration in writing along with his return of income under section 139 for the assessment year for which he is so assessable, to the effect that the provisions of this Chapter shall continue to apply to him in relation to the investment income derived from any foreign exchange specified asset other than shares of Indian company; and if he does so, the provisions of this Chapter shall continue to apply to him in relation to such income for that assessment year and for every subsequent assessment year until the transfer or conversion (otherwise than by transfer) into money of such assets.

3. Non-resident Indian may choose to opt out of this provision by furnishing his return of income u/s 139 and declaring that such provision shall not apply to him and accordingly, the total income and tax thereon shall be computed as per the normal provisions of the Act [Section 115-I]

International Taxation

CA Prerna Peshori

15. Capital Gains on ADR/GDR [Section 115AC/ACA]



Chapter VIA deduction

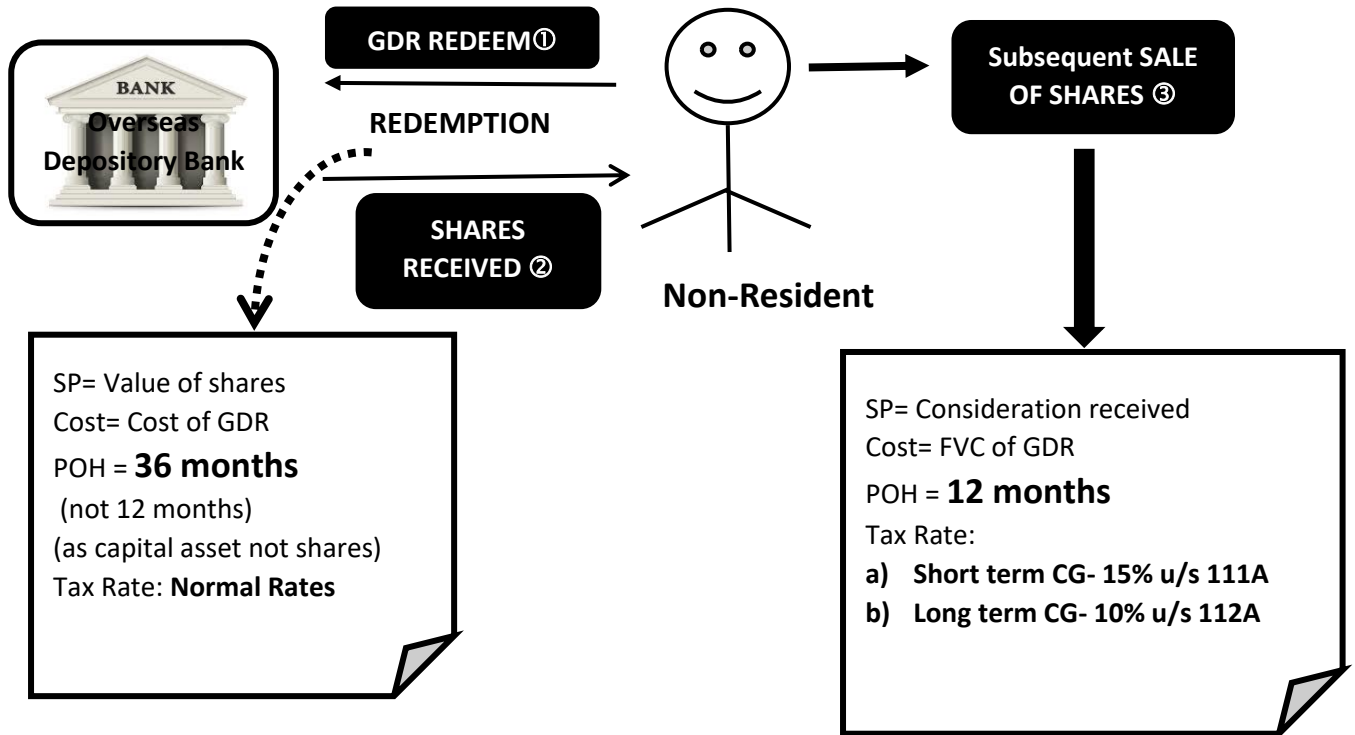
1st & 2nd Proviso to Section 48

ROI not to be filed if TDS deducted on the income from GDR

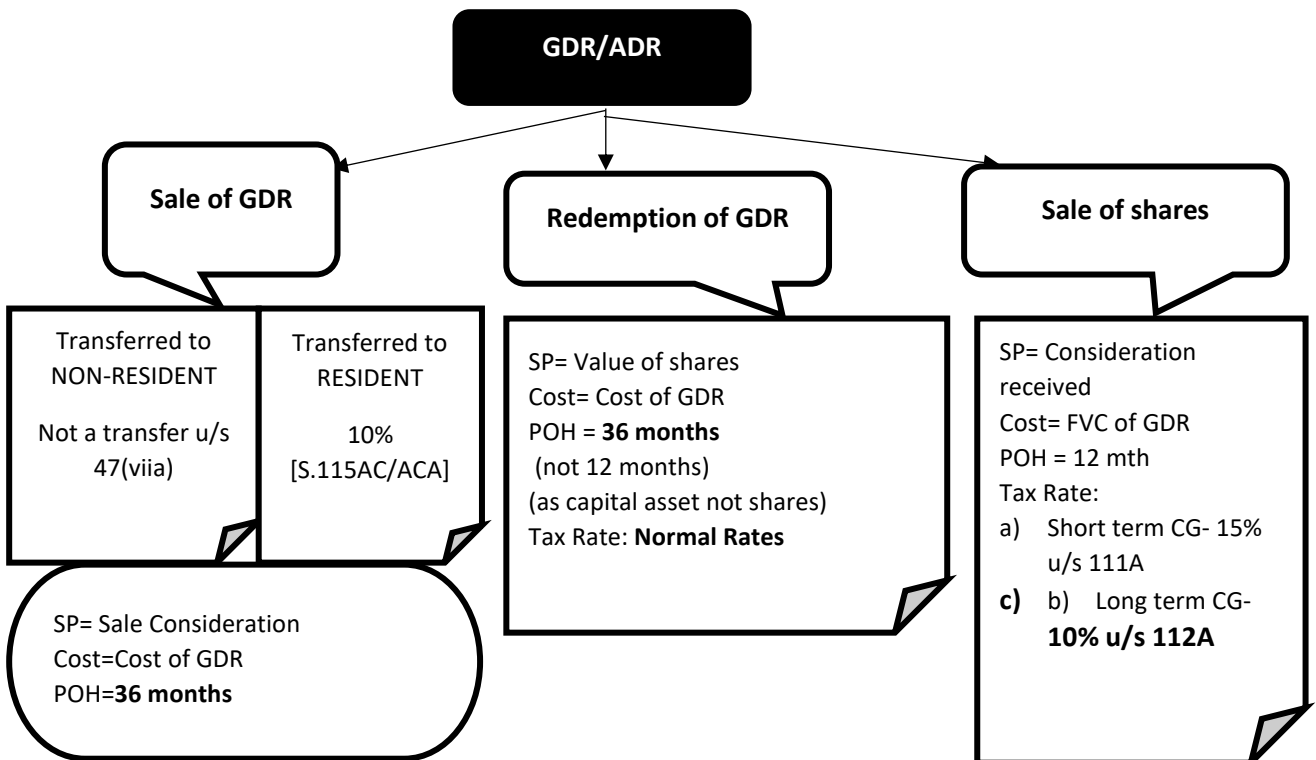
International Taxation

CA Prerna Peshori

Redemption of GDR into shares and Sale of Shares



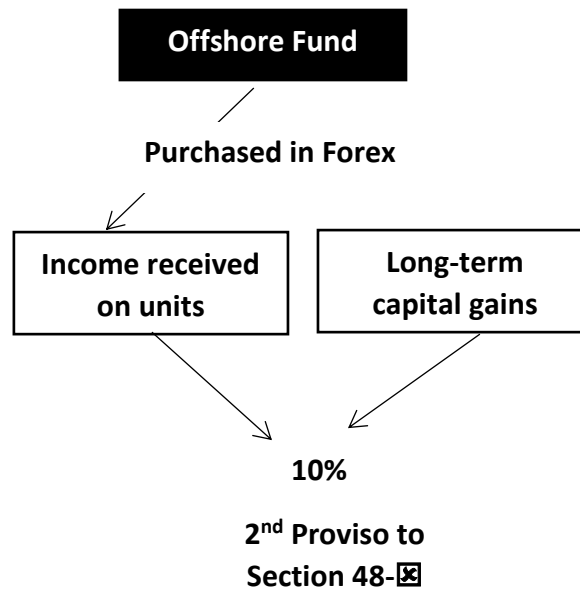
GDR/ADR



International Taxation

CA Prerna Peshori

16. Capital Gains on units purchased in foreign currency or capital gains arising from their transfer in case of offshore fund [Sec.115AB]



Deduction under Chapter VIA ✗

International Taxation

CA Prerna Peshori

17. Special provisions for computing tax on income of Specified Fund or Foreign Institutional Investors from securities or capital gains arising from their transfer [Section 115AD]

(1) S. No.	(2) Income	(3) Rate of Tax
(a)	In case of FII - Income received in respect of securities other than income on units ref u/s 115AB	20%
(b)	In case of specified fund - Income received in respect of securities other than income on units ref u/s 115AB	10%
(c)	Interest referred u/s 194LD	5%
(d)	Income by way of Short term capital gains arising from the transfer of securities (other than Short term capital gains u/s 111A)	30%
(e)	Income by way of Short term capital gains u/s 111A	15%
(f)	Income by way of Long term capital gains arising from the transfer of securities (other than Long term capital gains u/s 112A)	10%
(g)	Income by way of Long term capital gains u/s 112A exceeding ` 1 lakh	10%

- In case of specified fund, the provision of this section shall apply only to the extent of income that is attributable to units held by non-resident (not being a permanent establishment of a non-resident in India) calculated in the prescribed manner
- No deduction is allowed [Section 115AD(2)]: Where the gross total income of the Foreign Institutional Investor or Specified Fund comprises only of the aforesaid interest or dividend income from securities, no deduction shall be allowed to it under sections 28 to 44C or section 57(i) or 57(iii) or under Chapter VI-A.
- Deduction under Chapter VI-A is also not allowable in case of short term capital gain or long term capital gain arising from transfer of securities.
- Where the gross total income of the Foreign Institutional Investor consists of incomes other than income referred to in (a), (b) and (c) of table in (i) above, then, the deduction under Chapter VI-A will be available in respect of other incomes.
- First and second provisos to section 48 shall not apply [Section 115AD(3)]: The benefit of computation of capital gains in foreign currency and the benefit of indexation would not be available for the computation of capital gains arising on transfer of securities.
- "specified fund" means a fund established or incorporated in India in the form of a trust or a company or a limited liability partnership or a body corporate,—

International Taxation

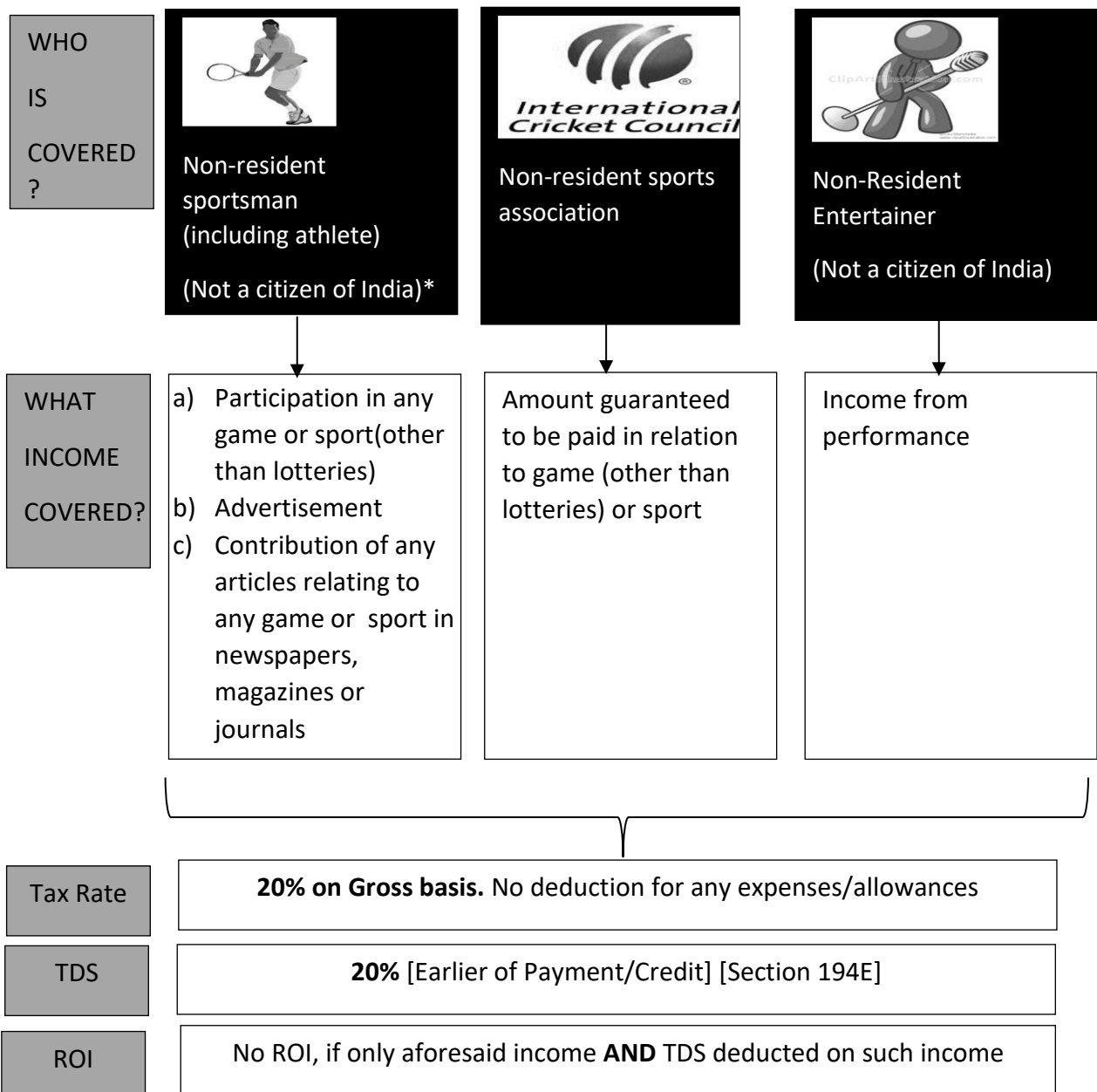
CA Prerna Peshori

- (i) which has been granted a certificate of registration as a Category III Alternative Investment Fund and is regulated under the Securities and Exchange Board of India (Alternative Investment Fund) Regulations, 2012, made under the Securities and Exchange Board of India Act, 1992 (15 of 1992);
- (ii) which is located in any International Financial Services Centre;
- (iii) of which all the units are held by non-residents other than unit held by a sponsor or manager.

18. Income in respect of units of Non-resident [Sec.196A]

Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any income in respect of units of a Mutual Fund specified under Sec. 10(23D) or UTI shall, at the time of credit of such income to the account of the payee or at the time of payment thereof by any mode, whichever is earlier, deduct income-tax thereon at the rate of 20%.

19. Special provision for computing tax on non-resident sportsmen or sports associations [Section 115BBA]



International Taxation

CA Prerna Peshori

20. TDS on payment to Non-resident [Section 195]

- i. **Applicability:** Any person responsible for paying interest (other than interest referred to in section 194LB or section 194LC or section 194LD) or any other sum chargeable to tax (other than salaries) to a non-corporate non-resident or to a foreign company is liable to deduct tax at source at the rates prescribed by the relevant Finance Act.
- ii. **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.
- iii. **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".
- iv. The words "any person" used in section 195(1) is intended to include both residents and non-residents. Therefore, a non-resident person is also required to deduct tax at source before making payment to another non-resident, if the payment represents income of the payee non-resident, chargeable to tax in India. Therefore, if the income of the payee non-resident is chargeable to tax, then tax has to be deducted at source, whether the payment is made by a resident or a non-resident.
- v. Explanation 2 clarifies that the obligation to comply with section 195(1) and to make deduction thereunder applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to all persons, resident or non-resident, whether or not the non-resident has:-
 - (a) a residence or place of business or business connection in India; or
 - (b) any other presence in any manner whatsoever in India.
 - (ii) Time of deduction: The tax is to be deducted at source at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier.
- vi. **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, on which dividend distribution tax has been paid under section 115-O.

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.

vii. Certificate of non-deduction of tax at source:

- (a) Any person entitled to receive any interest or other sum on which income-tax has to be deducted under section 195(1) may make an application in the prescribed form to the Assessing Officer for

International Taxation

CA Prerna Peshori

grant of certificate authorizing him to receive such interest or other sum without deduction of tax thereunder.

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

(c) Such certificate shall remain in force till the expiry of the period specified therein. However, if it is cancelled by the Assessing Officer before the expiry of such period, the certificate shall remain in force till such cancellation.

- viii. **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. Such form and manner is prescribed in Rule 37BB.
- ix. **Refund of excess tax deducted** - 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. 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. 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.

Grossing up of tax [Sec. 195A]

- i. Where, under an agreement or other arrangement, the tax chargeable on any income referred to in the foregoing provisions of this Chapter is to be borne by the person by whom the income is payable, then, for the purposes of deduction of tax under those provisions such income shall be increased to such amount as would, after deduction of tax thereon, be equal to the net amount payable under such agreement or arrangement.
- ii. However, no grossing up is required in the case of tax paid [under section 192(1A)] by an employer on the non-monetary perquisites provided to the employee.

International Taxation

CA Prerna Peshori

Withholding tax rates

Section	Nature of payment	Rate of TDS
192	Salary	Normal Slab rates
192A	Premature withdrawal from EPF, aggregating to ` 50,000 or more	10%
194B	Income by way of winnings from lotteries, crossword puzzles, card games and other games of any sort, where payment to a person > ` 10,000	30%
194BB	Income by way of winnings from horse races, where payment to a person > ` 10,000	30%
194E	Specified payments referred under section 115BBA to non- resident sportsmen/sports association or an entertainer	20%
194G	Commission etc. on the sale of lottery tickets, where payment to a person > ` 15,000	5%
194LB	Payment of interest on infrastructure debt fund	5%
194LBA(2)	Distribution any interest income, received or receivable by a business trust from a SPV, to its unit holders.	5%
194LBA(2)	Distribution any dividend, received or receivable by a business trust from a SPV, to its unit holders. The dividend would be exempt if the SPV has not opted for concessional rate u/s 115BAA.	10%
194LBA(3)	Distribution of any income received from renting or leasing or letting out any real estate asset directly owned by the business trust, to its unit holders.	At the rates in force
194LBB	Investment fund paying income to a unit holder [other than income which is exempt under section 10(23FBB)].	
194LBC(2)	Income in respect of investment made in a securitisation trust (specified in <i>Explanation</i> to section 115TCA)	
194LC	Payment of interest by an Indian Company or a business trust to a non-corporate non-resident or foreign company <ul style="list-style-type: none"> in respect of money borrowed in foreign currency from a source outside India under a loan agreement between 1.7.2012 and 30.6.2023 or by way of issue of long term bonds (including long term infrastructure bond) between 1.10.2004 and 30.6.2023 as approved by Central Government or in respect of money borrowed from source outside India by way of rupee denominated bond before 1.7.2023 	5%

International Taxation

CA Prerna Peshori

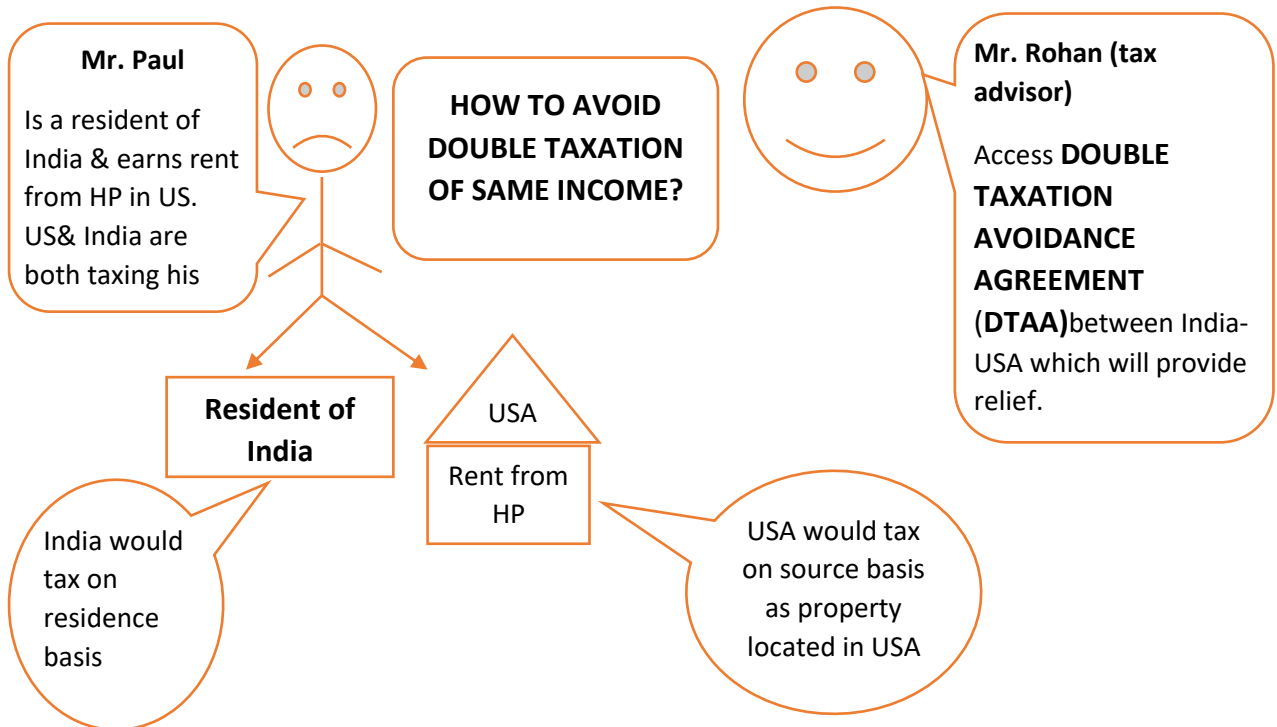
194LC	Payment of interest in respect of monies borrowed by it from a source outside India by way of issue of any long-term bond or rupee denominated bond on or after the 1st day of April, 2020 but before the 1st day of July, 2023, which is listed only on a recognised stock exchange located in any International Financial Services Centre,	4%
	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 17.9.2018 to 31.3.2019	Nil (Since such interest is exempt u/s 10(4C), no tax is deductible u/s 194LC)
194LD	Payment of interest between 1.6.2013 and 30.6.2023 on rupee denominated bond of an Indian Company or Government securities to a Foreign Institutional Investor or a Qualified Foreign Investor or on or after the 1st day of April, 2020 but before the 1st day of July, 2023 in respect of the investment made by the payee in municipal debt securities	5%
194N	On withdrawal of cash in excess of ` 1 crore	2% on amount exceeding Rs. 1 crore. If a person has not filed the ITR for all 3 PY for which time limit u/s 139(1) has expired, preceding the PY in which payment is made, 2% where payment in cash exceeds Rs. 20 Lakhs and does not exceed Rs.1 Crore; 5% if payment in cash exceeds Rs. 1 Crore
195	Payment of any other sum to a non-resident	At the rates in force
196A	Income in respect of units of a Mutual Fund specified u/s 10(23D) or specified company referred to u/s 10(35)	20%
196B	Income from units of a mutual fund or UTI purchased in foreign currency (including long term capital gain on transfer of such units) payable to an Offshore	10%

International Taxation

CA Prerna Peshori

	Fund	
196C	Income by way of interest on bonds of an Indian company or public sector company sold by the Government and purchased by a non-resident in foreign currency or GDRs referred to in section 115AC (including long term capital gain on transfer of such bonds or GDRs payable to a non- resident)	10%
196D	Income of foreign Institutional Investors from securities (not being income by way of interest referred to in section 194LD or capital gain arising from such securities)	20%
196D	Income in respect of securities, not being income by way of interest referred to in section 194LD, is payable to a specified fund [referred to in clause (c) of the Explanation to clause (4D) of section 10 – AIF located in IFSC]	10%

21. Double Tax Avoidance Agreements (DTAAs)



International Taxation

CA Prerna Peshori

RESIDENCE RULE

Where the person RESIDES

A resident is always liable on its global income. Therefore, a resident country always has the first right to tax, unless it grants some exemption/deduction.

VS

SOURCE RULE

Where Income is ACCRUED/RECEIVED

Country in which the situs of the transaction exists (Source State) also exercises such a right on the basis of Source Rule.

Double Taxation Avoidance Agreement (DTAA)

intends to avoid the double taxation of same income by providing relief either by exempting the income in the source state or by providing credit of taxes paid in the home country of taxes paid in source country. DTAA allocates right of taxation between source & resident country.

Objectives of DTAA

- Granting relief from double taxation
- Avoidance of double taxation
- Exchange of information
- Prevention of evasion of tax
- Recovery of income-tax

International Taxation

CA Prerna Peshori

Treaty Vs. Act

INCOME-TAX ACT

Royalty taxable at
15%

VS

DTAA

Royalty taxable at
10%

Section 90

Provisions of ACT OR DTAA whichever is BENEFICIAL

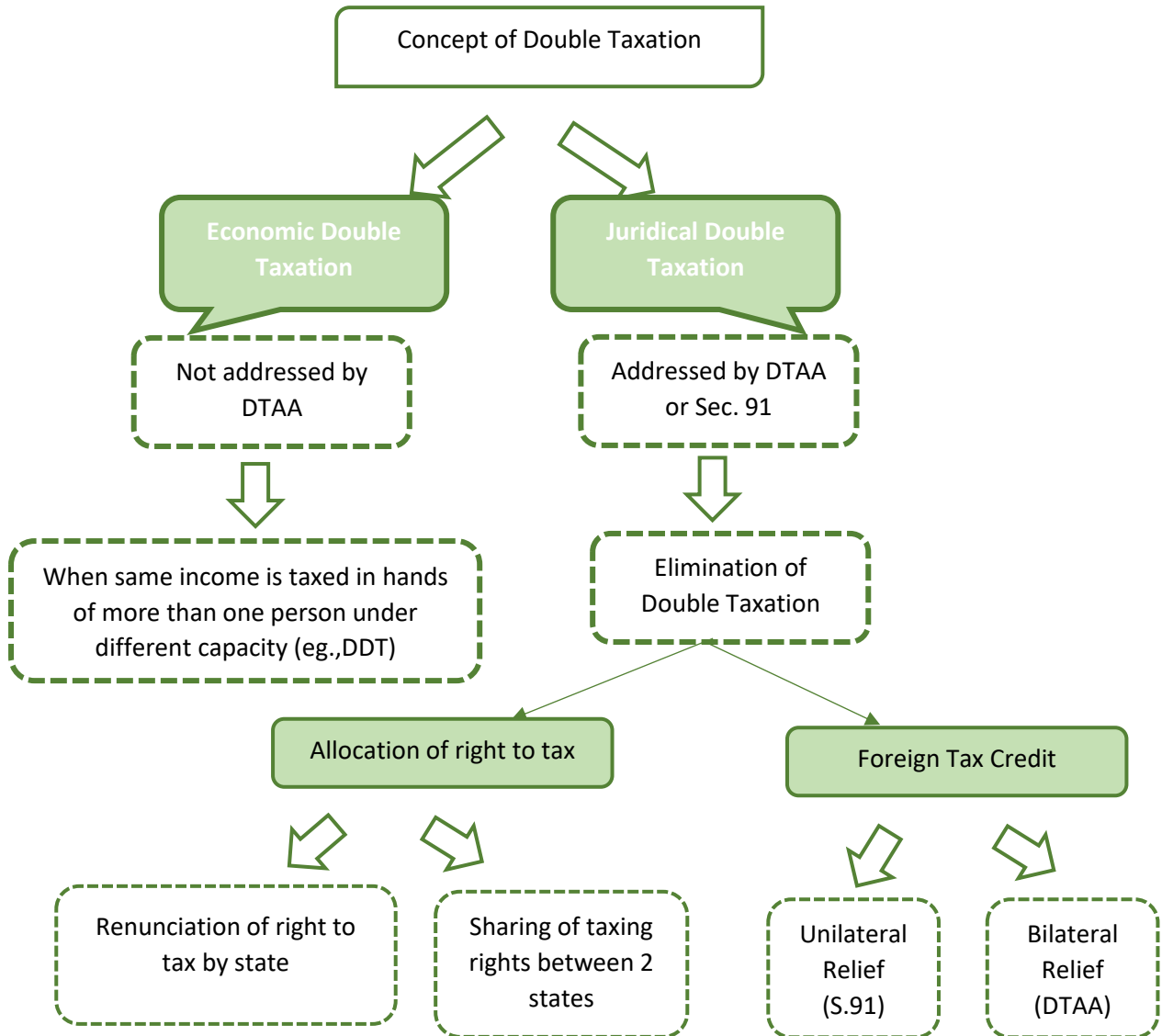
This shall mean that assessee has the option to apply the provisions under DTAA or under the Act, whichever are more beneficial to him. For eg.: if under the Act, royalty is taxable at 15%. However, under DTAA, royalty is taxable at 10%, then the assessee can opt for beneficial rate of 10% under DTAA and the **PROVISIONS OF DTAA SHALL OVERRIDE ACT.**

For claiming treaty benefit – Tax Residency Certificate is required to be produced from the Government of resident country along with Form 10F.

International Taxation

CA Prerna Peshori

22. Foreign Tax Credit



Foreign Tax Credit Rules			
FOREIGN CREDIT COUNTRY FOR WHICH AVAILABLE	<p>A) in respect of a country with which India has entered into a DTAA - taxes covered under that tax treaty.</p> <p>B) in respect of any other country - the tax payable under the law in force in that country in the nature of income-tax.</p>		
ELIGIBILITY TO CLAIM	<p>i) Only a resident can claim FTC</p> <p>ii) The tax should have been paid in foreign country</p> <p>iii) Credit should be claimed for corresponding income offered to tax.</p>		
FOREIGN CREDIT - TAXES	<table border="1"> <tr> <td>Income-tax</td> <td><input checked="" type="checkbox"/></td> </tr> </table>	Income-tax	<input checked="" type="checkbox"/>
Income-tax	<input checked="" type="checkbox"/>		

International Taxation

CA Prerna Peshori

FOR WHICH AVAILABLE	Surcharge & Cess	<input checked="" type="checkbox"/>
	Interest & Penalties	<input checked="" type="checkbox"/>
	Disputed foreign tax	<input checked="" type="checkbox"/> Allowed in year of settlement of dispute when income is offered to tax
COMPUTATION OF CREDIT	<p>Compute for each SOURCE OF INCOME LOWER OF:</p> <p>a) Tax payable under Act</p> <p>b) Foreign tax payable</p> <p>Credit shall be determined by conversion of the currency of payment of foreign tax at the TELEGRAPHIC TRANSFER BUYING RATE on the last day of the month immediately preceding the month in which such tax has been paid or deducted.</p>	
MAT CREDIT	<p>Credit shall be allowed against the tax paid u/s 115JB or 115JC as allowed against the tax paid under the normal provisions of Act.</p> <p>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 section 115JAA or section 115JD in respect of the taxes paid under section 115JB or section 115JC, as the case may be, such excess shall be ignored.</p>	

International Taxation

CA Prerna Peshori

23. Treaty Concepts

PERMANENT ESTABLISHMENT (PE)

What is Permanent Establishment?

1. Permanent Establishment (PE) means a fixed place of business through which the business of an enterprise is wholly or partly carried on. A place to be considered as a PE needs to fulfill the **physical criterion** (it should be in existence); the **subjective criterion** (assessee should have right to use that place) and the **functional criterion** (business activity must be carried on).
2. An enterprise resident of R country should not be liable for taxes on the profits derived by it in a source country S unless the enterprise has real, significant or substantial economic nexus with the source country S in which the profit accrues. An enterprise will have such real, significant or substantial economic nexus if it carries on business in the other country through a permanent establishment (PE) in that country.

Significance of Permanent Establishment:

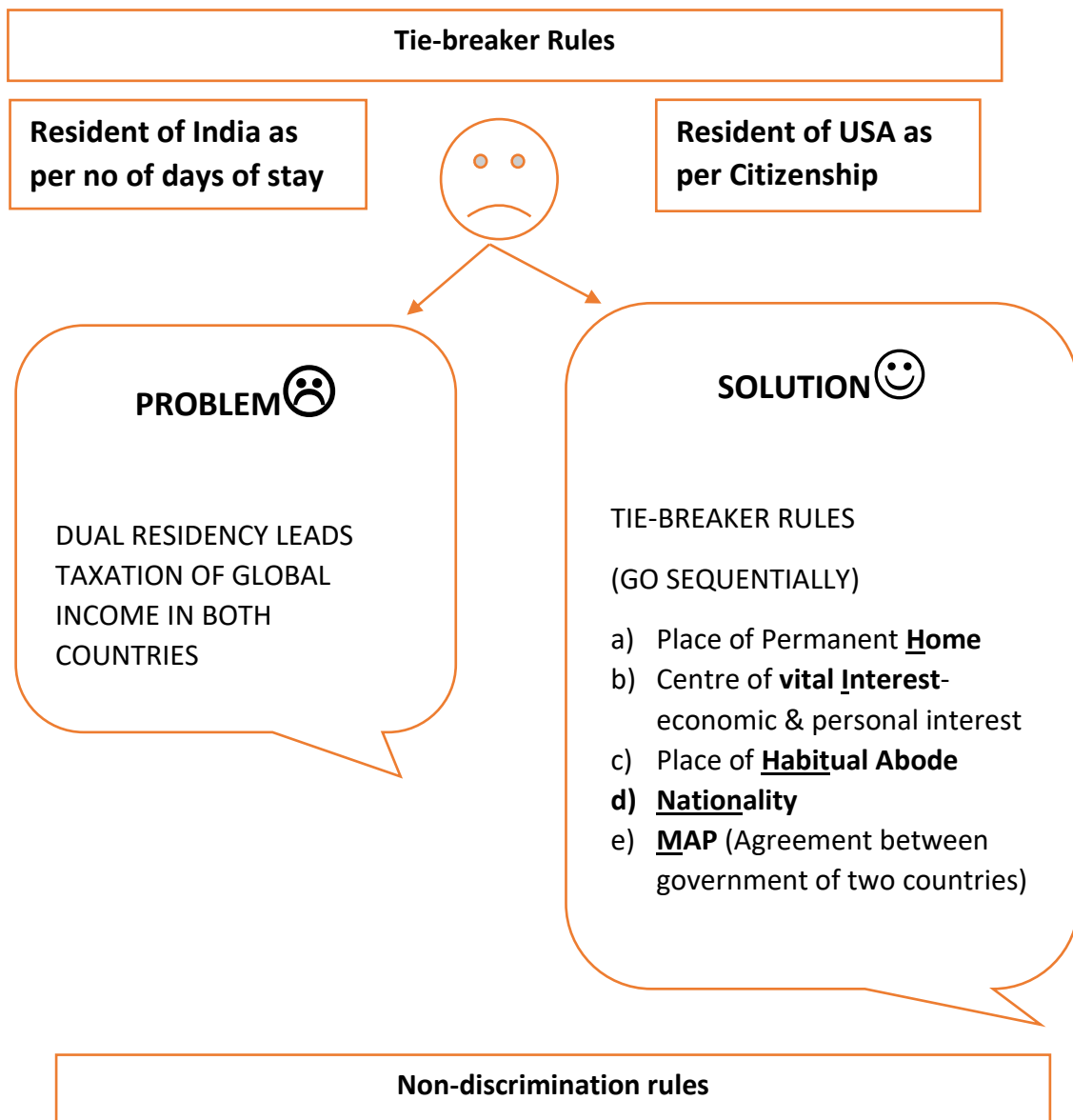
1. Business income of assessee would not be taxable unless the assessee has PE in India.
2. Section 9(1)(i) requires existence of business connection for deeming business income to accrue or arise in India.
3. DTAA's however provide that business income is taxable only if there is a permanent establishment in India.
4. Therefore, in cases covered by DTAA's, where there is no PE in India, business income cannot be brought to tax due to existence of business connection as per section 9(1)(i).

MAKE AVAILABLE UNDER FEES FOR TECHNICAL SERVICES (FTS)

Under many of DTAA's, FTS is charged to tax only if the service provider makes available the knowledge, technical know-how to the service recipient so that the service recipient can perform the service next time himself and not with the help of service provider.

International Taxation

CA Prerna Peshori



As per non-discrimination article under DTAA, the foreign national or company shall not be subjected to a tax treatment or rate which is unfavourable as compared to Indian resident or domestic company i.e. it shall not be discriminated as against the Indian company.

In India, tax rate of Foreign company is 40% whereas tax rate for domestic company is 30%.
Can one invoke non-discrimination article?

Explanation 1 to section 90(3) provides that the charge of tax in respect of a foreign company at a rate higher than the rate at which a domestic company is chargeable shall not