

Withholding on Foreign Remittance

Domestic tax provision vs Treaty Benefit

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CA Rishabh Agarwal

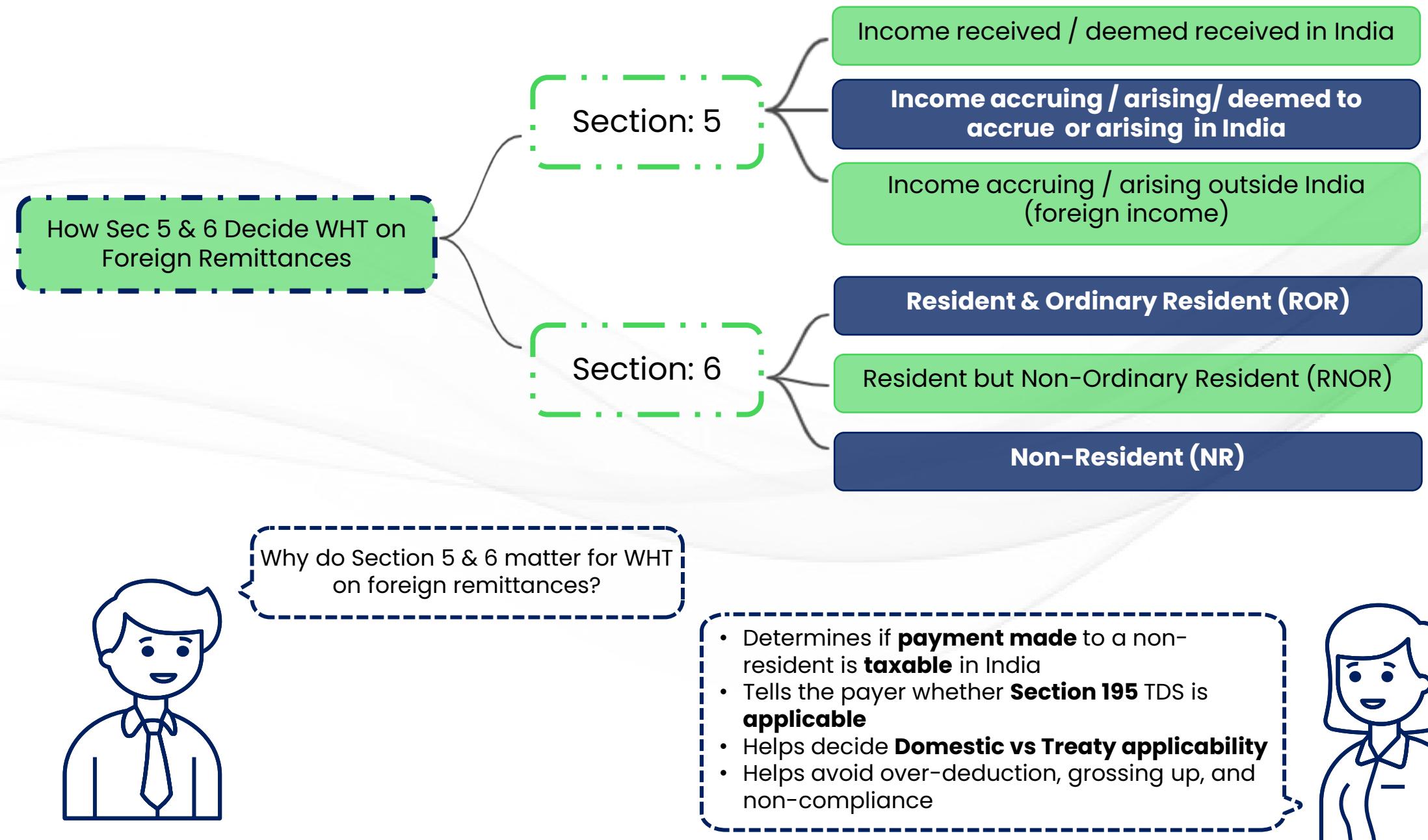
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Tax Basics that Drive WHT

Any withholding tax analysis begins with Sections 5 and 6, which define the **scope of taxable income** in India based on a person's **residential status**. These provisions tell us what income falls within India's tax net.

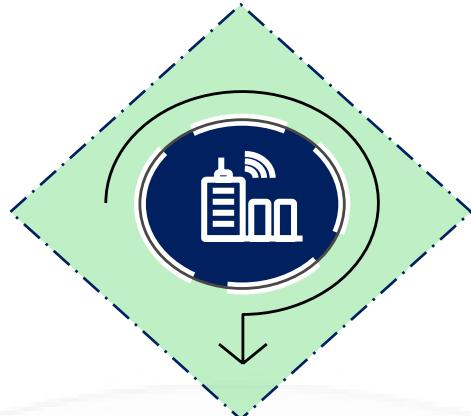


Taxability Matrix u/s 5 read with 6

S. No.	Type of Income	ROR	RNOR	NR
1	Income received in India	Taxable u/s 5(1)(a)	Taxable u/s 5(1)(a)	Taxable u/s 5(2)(a)
2	Income deemed to be received in India	Taxable u/s 5(1)(a)	Taxable u/s 5(1)(a)	Taxable u/s 5(2)(a)
3	Income accruing or arising in India	Taxable u/s 5(1)(b)	Taxable u/s 5(1)(b)	Taxable u/s 5(2)(b)
4	Income deemed to accrue or arise in India	Taxable u/s 5(1)(b)	Taxable u/s 5(1)(b)	Taxable u/s 5(2)(b)
5	Income accruing or arising outside India	Global Income Taxable u/s 5(1)(c)	Taxable only if: • Business controlled from India, OR • Profession set up in India	Not taxable under any circumstances

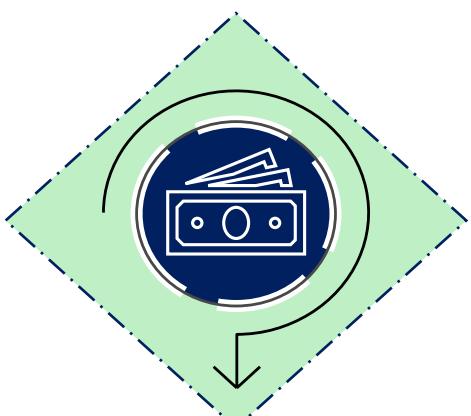
Once we know who is taxable under Sec 5 & 6, **Sec 9** determines **what income is deemed to accrue/ arise**, and **Sec 195** specifies the **withholding required** on such payments.

Sec 9(1): When is Income deemed to accrue/arise in India ?



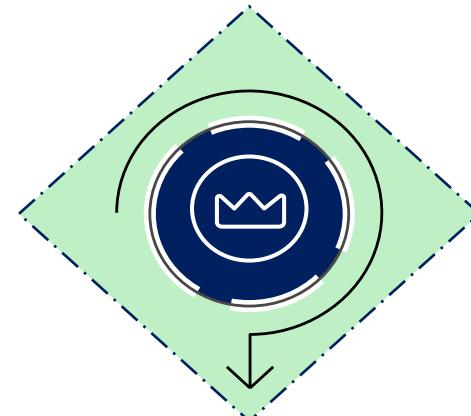
Sec 9(1)(i) Business Connection/ SEP

Eg: Foreign SaaS company servicing Indian clients via app



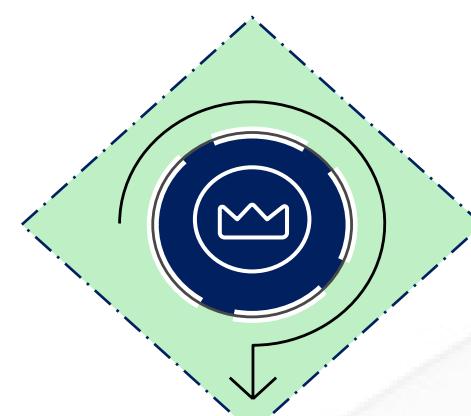
Sec 9(1)(ii) (iii) Salaries

Eg: Employee working in Mumbai office or Indian diplomat posted abroad



Sec 9(1)(vi) Royalty

Eg: Payment for software license used in India



Sec 9(1)(iv) Dividend

Eg: Dividend declared by Infosys Ltd to a foreign shareholder



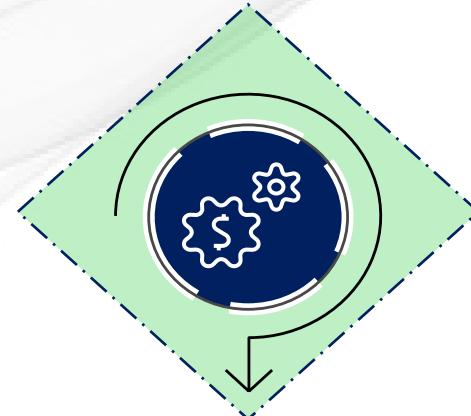
Sec 9(1)(v) Interest

Eg: Loan interest received by NR



Sec 9(1)(viii) Gift / Sum of Money (>₹ 50,000)

Eg: Resident gifting ₹75,000 to NR friend; Resident gifting ₹1 lakh to RNOR relative



Sec 9(1)(vii) Fees for Technical Services

Eg: Engineering consulting fees

Section:195 TDS Triggers



Liable Deductor: Any person (resident or non-resident) making a payment to a non-resident.

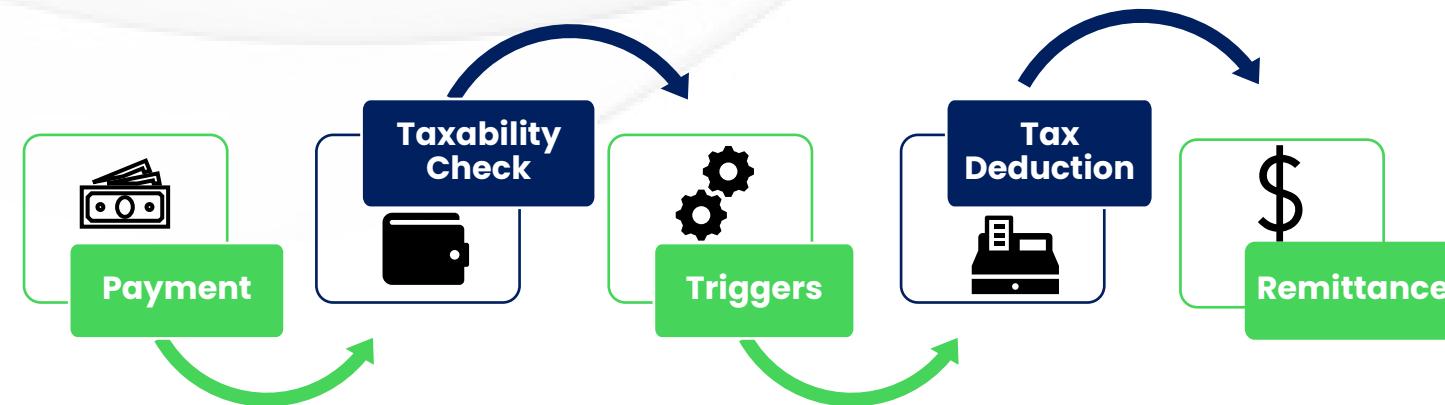
Trigger Condition: Sum that is chargeable to tax in India under the Act.

Payment Coverage: Applies to all sums: fees, royalties, cloud services, interest, professional charges, etc.

No-Presence Requirement: TDS applies even if income is partial, services are outside India, or NR has no PE.

Timing: Tax must be deducted at the earlier of crediting the amount to the payee or making actual payment, including remittance or book-entry adjustments.

Order: Deduction must occur before the remittance is sent outside India.



Specific TDS Rates

Once a payment to a non-resident is covered under Section 195, the next question is: **At what rate should TDS be deducted?**

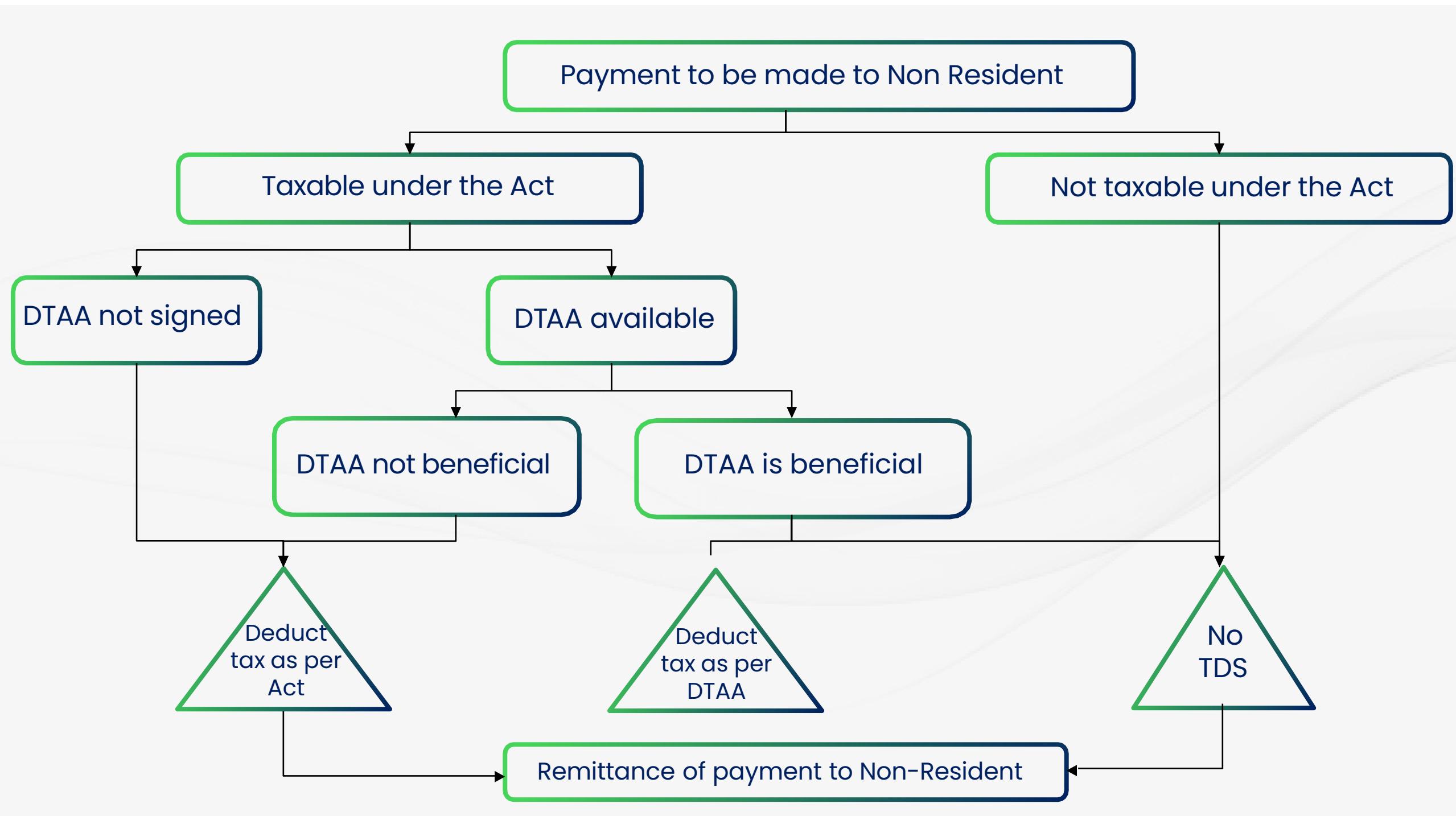
Section	Nature of Payments	Rate (excl. surcharge and cess)
194E	Income referred to u/s 115BBA payable to non-resident sportsmen, sports association, or entertainer	20%
194LB	Interest payable by infrastructure debt fund to a non-corporate non-resident or foreign company	5%
194LBA (2)	Distribution of any interest income received or receivable by a business trust from a SPV to its unit holders	5%
	Distribution of any dividend income received or receivable by a business trust from a SPV exercising option to pay tax at concessional rate u/s 115BAA, to its unit holders	10%
194LBA (3)	Distribution of any income received from renting/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 exempt u/s 10(23FBB)]	
194LBC(2)	Income in respect of investment made in a securitization trust (specified in Explanation to section 115TCA)	

Specific TDS Rates

Section	Nature of Payments	Rate (excl. surcharge and cess)
194LC	Interest payable by an Indian Company or a business trust to a non-corporate non-resident or foreign company	5%
195	Any other sum payable to a non-resident	At the rates in force
196A	Income on units of a mutual fund specified u/s 10(23D) or from the specified company referred to in section 10(35) payable to non-corporate non-resident or foreign company	20%
196B	Income from units & LTCG on such units	10% / 12.5%
196C	Income in respect of foreign currency bonds/deposits, government securities (interest payable to non-residents)	10%
196D	Income of FIIs from Securities (not being capital gains or interest under Section 194LD)	20%
	Income of specified from securities (not being capital gains or interest under Section 194LD or income exempt under Section 10[4D])	10%

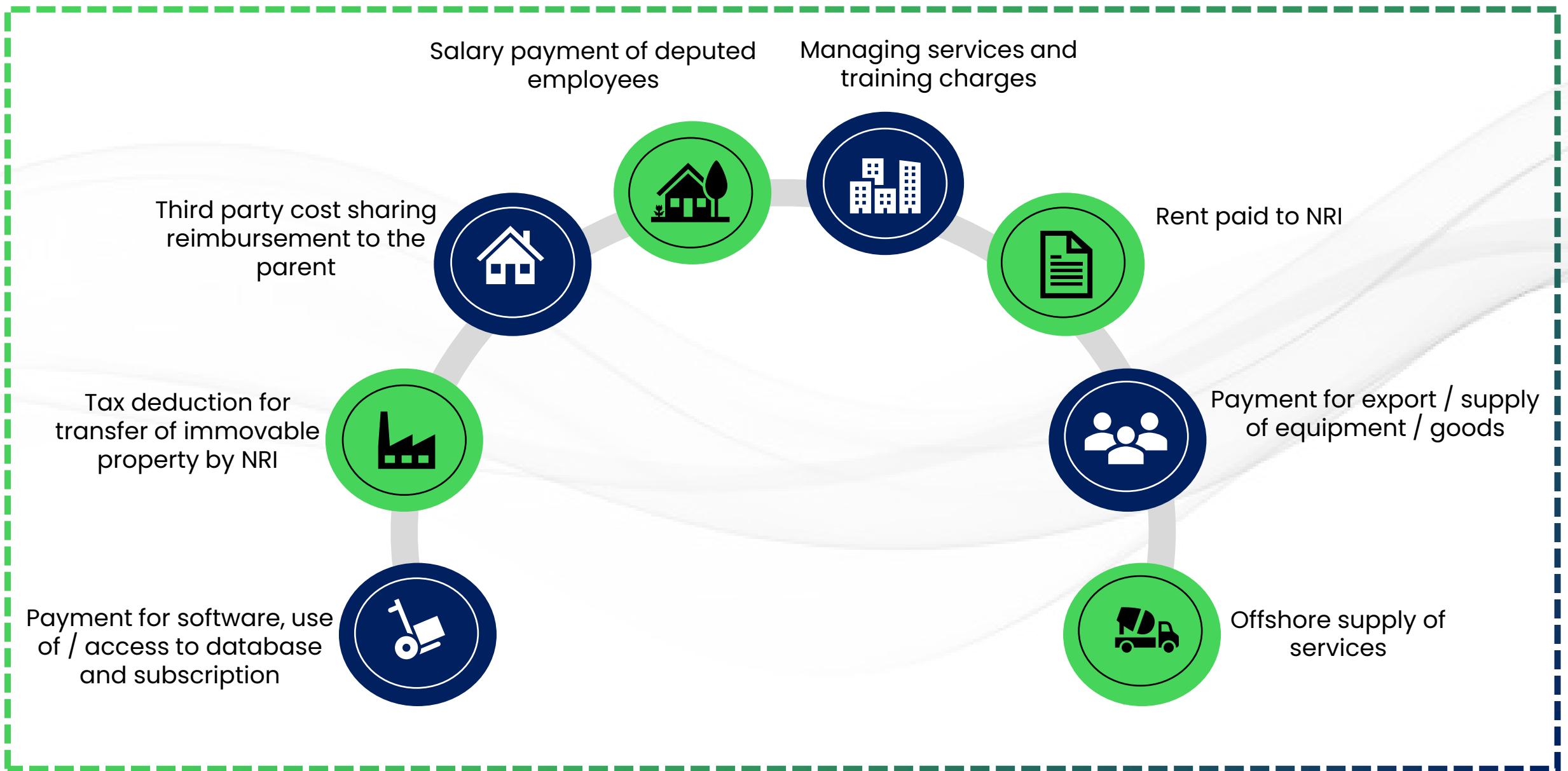
**TDS = Basic Rate under section + Applicable Surcharge + 4% HEC
(Except when DTAA rate applies → no surcharge / cess)**

TDS Decision Flow for Payments to NR



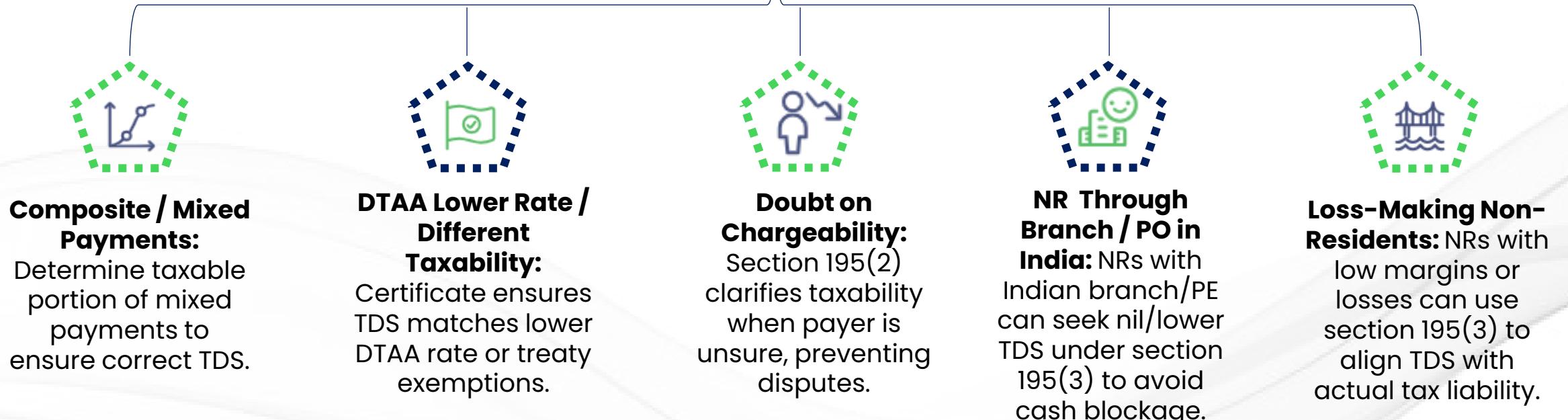
Typical Concerns for TDS

Key considerations for withholding tax on payments to non-residents across common transaction types:



Section: 195(2)&(3)- Lower/Nil TDS Mechanism

When is a Sec 195(2) & (3) Certificate Required?



Core Requirements & Practical Benefits

195(2) allows the payer to determine taxable portion; 195(3) lets the NR payee seek nil or lower TDS.

Certificate applies only to the specific payment, like royalty, FTS, interest, or software.

NR can apply under 195(3) if Rule 29B conditions are met, with no arrears and a business presence in India.

Certificate is valid only for the stated period and binding on the payer until expiry.

Payer must verify the certificate on TRACES before applying it.

Certificate prevents excess TDS, speeds refunds, and improves cash flow and compliance.

Section 115A: Taxation of Certain Non-Resident Income



Overview:

- Special tax provisions for non-residents and foreign companies on India-sourced income.
- Applies to non-resident individuals, foreign companies, and corporations.
- Covers dividends, interest, royalties, and fees for technical services (FTS).
- Income taxed on a **gross basis**, no general deductions allowed.

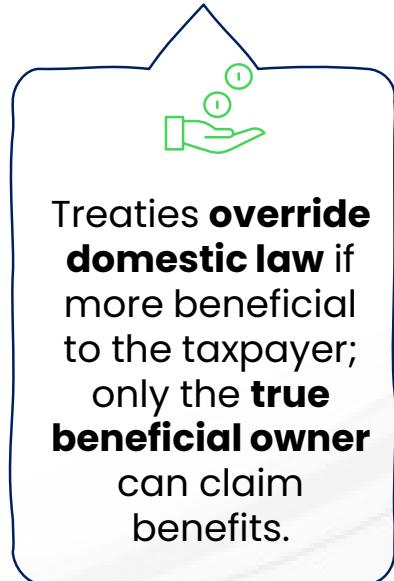
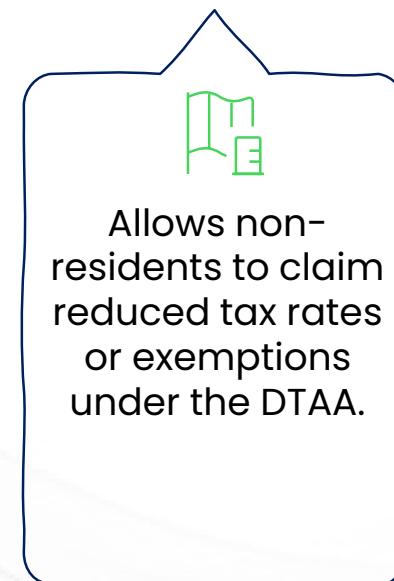
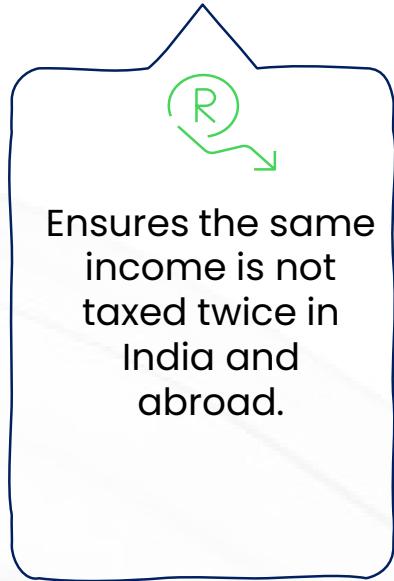
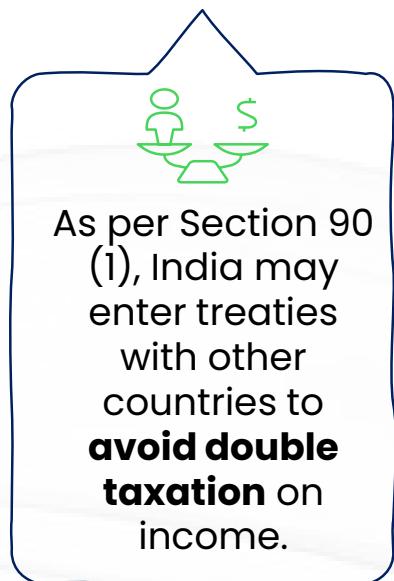
Income Type	Tax Rate	Special Cases
Dividend from Indian companies	20%	10% for IFSC units
Interest from India (Govt or Indian concern)	20%	Includes most loans & bonds; special rates apply for notified funds
Special interest (infrastructure)	5%	-
Interest under notified special provisions (like 194LC, 194LD)	As per specified rate	-
Income from units of mutual funds / Unit Trust of India	20%	Only to foreign currency purchases
Royalty from Government / Indian concern	20%	Includes copyright/books/software
Fees for Technical Services (FTS) from Government / Indian concern	20%	-

- Return filing under Section 139(1) not required if only 115A income and tax has been duly deducted at source, as provided in Section 115A(5).

Section: 90 Double Tax Avoidance

Once the TDS rate is finalized (as per Act), the next step is to check if treaty relief is available. We now move to Section 90 and the DTAA to see whether a lower treaty rate applies.

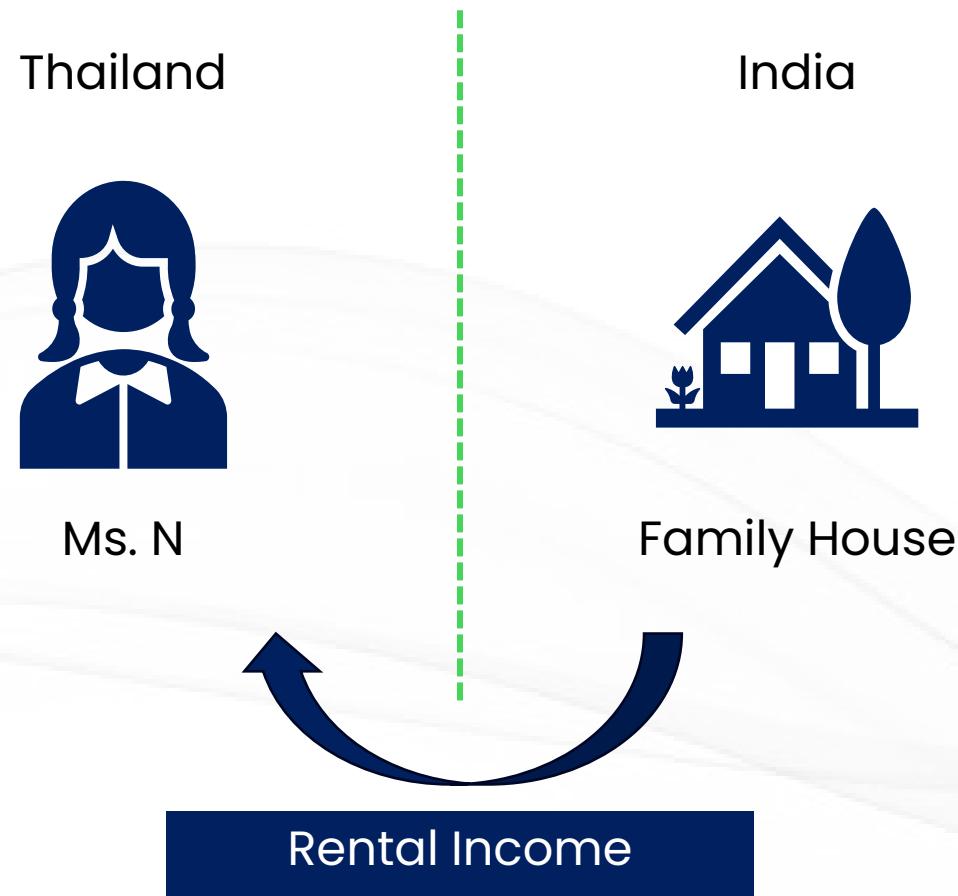
DTAA: Purpose & Key Principles



Conditions, Methods & Practical Implication

- **Sec 90(4)** allows **non-residents to claim lower DTAA TDS** subject to documentation.
- DTAA benefit can be applied directly by the Deductor when prescribed documentation (TRC & Form 10F) is furnished, as permitted under Sec 90(5).
- Sec 195(2) & (3) and DTAA work together- **domestic relief first, then treaty benefit if more favorable**.

Case Study: 1



- **Facts**

Ms. N inherited a house from her father in India. The house is let out for Rs. 10,000 per month.

- **Domestic Law**

Ms. N is a Non-resident, the liability to deduct tax arises under section 195 of the Income-tax Act.

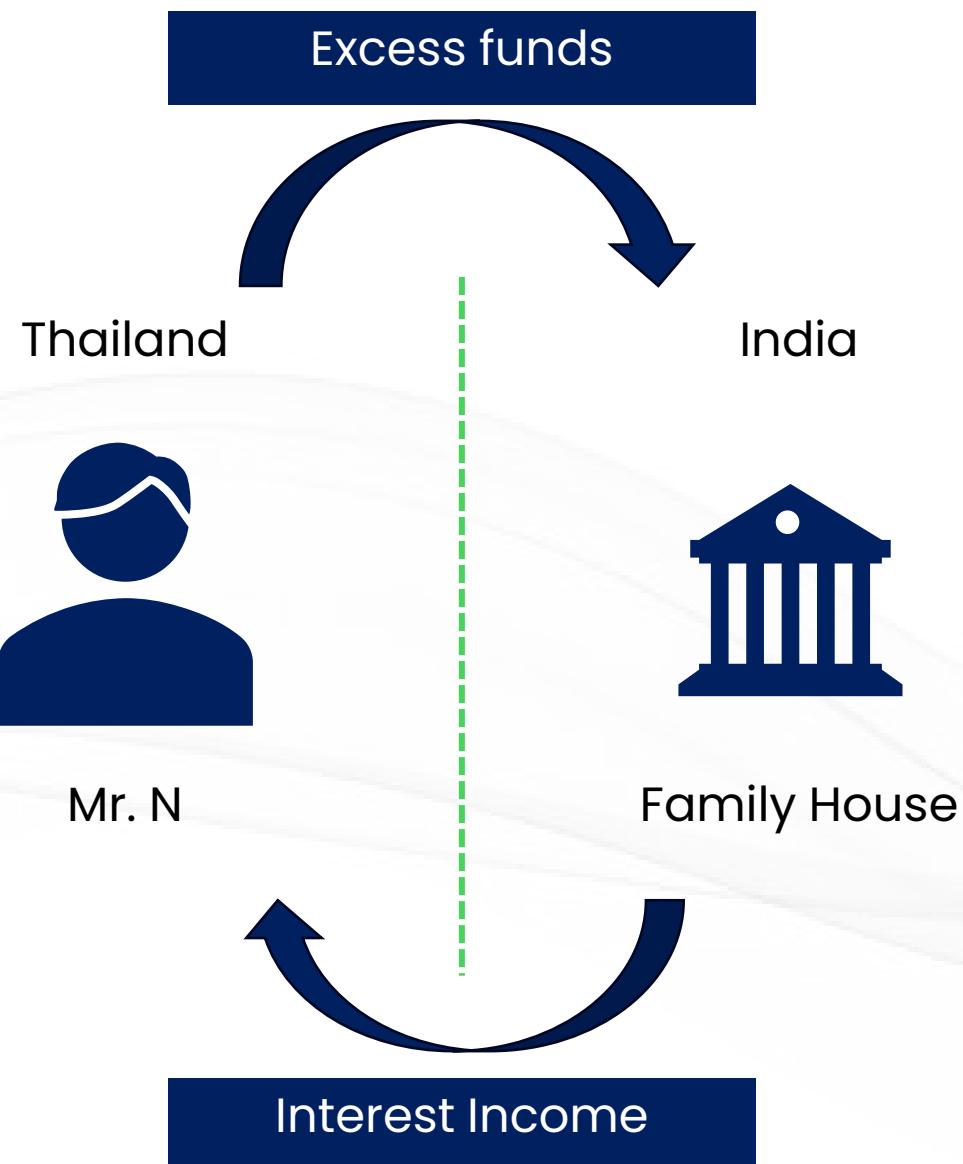
The rate applicable in this case will be 30% plus surcharge and education cess i.e. 31.2%.(min.) However, Ms. N can obtain a lower deduction certificate in India.

- **DTAA**

As per Article 6 of the India-Thailand DTAA, income from letting out of an immovable property is liable to tax in the country in which the property is situated (India).

However, the resident state (Thailand) can still tax its resident's worldwide income, and the tax credit of taxes paid or withheld in India will be available to Ms. N as per Article 23 of the DTAA

Case Study: 2



- **Facts**

Mr. N has funds deposited in Bank in India. He has fund both in NRO(Non-resident Ordinary) account and NRE(Non-resident External) account.

- **Domestic Law**

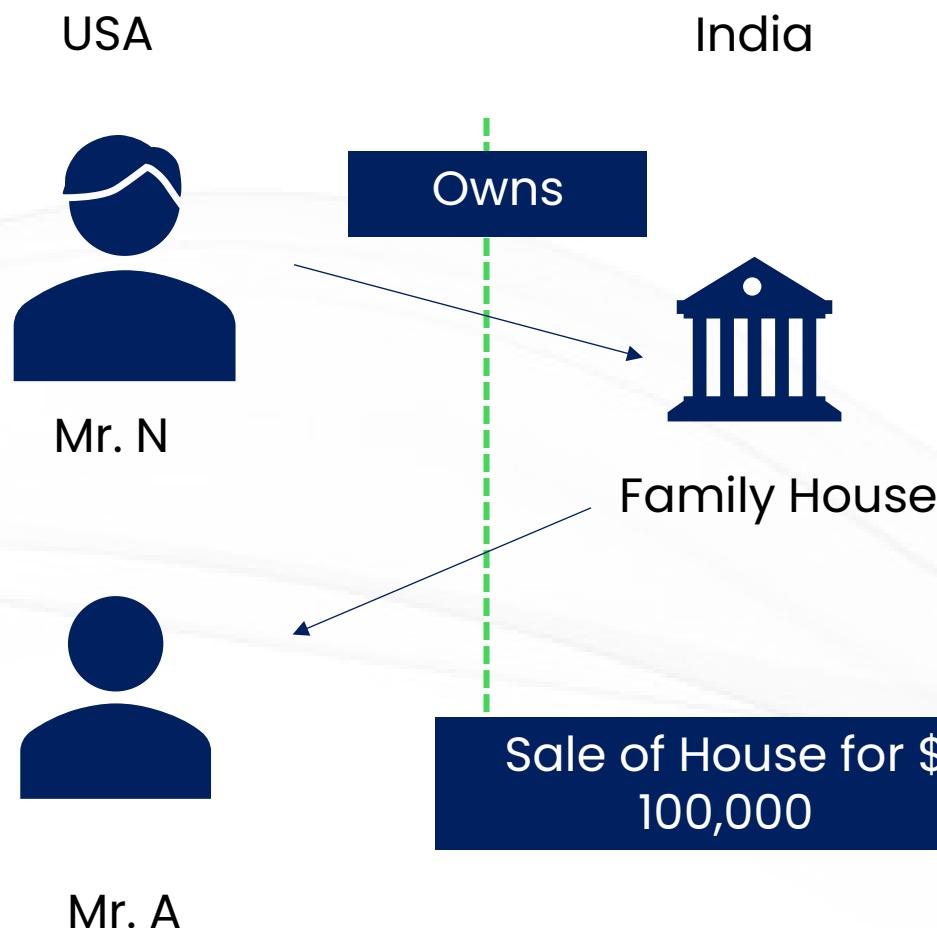
Interest accrues on both the deposits by Mr. N, as per section 9(1)(v), interest from bank account in India is liable to tax in India and further, as per section 195 r.w. 115A the bank is liable to withhold tax @ 20% on the interest component.

However, as per section 10(4) the interest on moneys standing to his credit in a Non-Resident (External) Account in any bank in India is exempt from taxation in India.

- **DTAA**

As per Article 11 of the India-Thailand DTAA, the withholding tax on interest in India is @10%. So, Mr. N can take the benefit of the treaty provision by presenting a TRC to the bank.

Case Study: 3



• Facts

Mr. N wholly owns a house in India. Which is sold by him during FY 23-24 for \$1,00,000 to Mr. A, a US resident.

• Domestic Law

- TDS on Sale of Property by NRI is required to be deducted on the gross payment as per the rates mentioned below:-
 - 12.5% if property held for at least 2 years
 - 30% if property held for less than 2 years.
- The seller shall file an application in Form 13 with the Income Tax Dept and request them to compute his Capital Gains.
- In case the seller does not opt for this certificate, he can also apply for Refund of the excess TDS deducted at the end of the year.
- In case there are 2 sellers (i.e. Co-owners), both would be required to file Form 13 separately for reducing the TDS Rates.

• DTAA

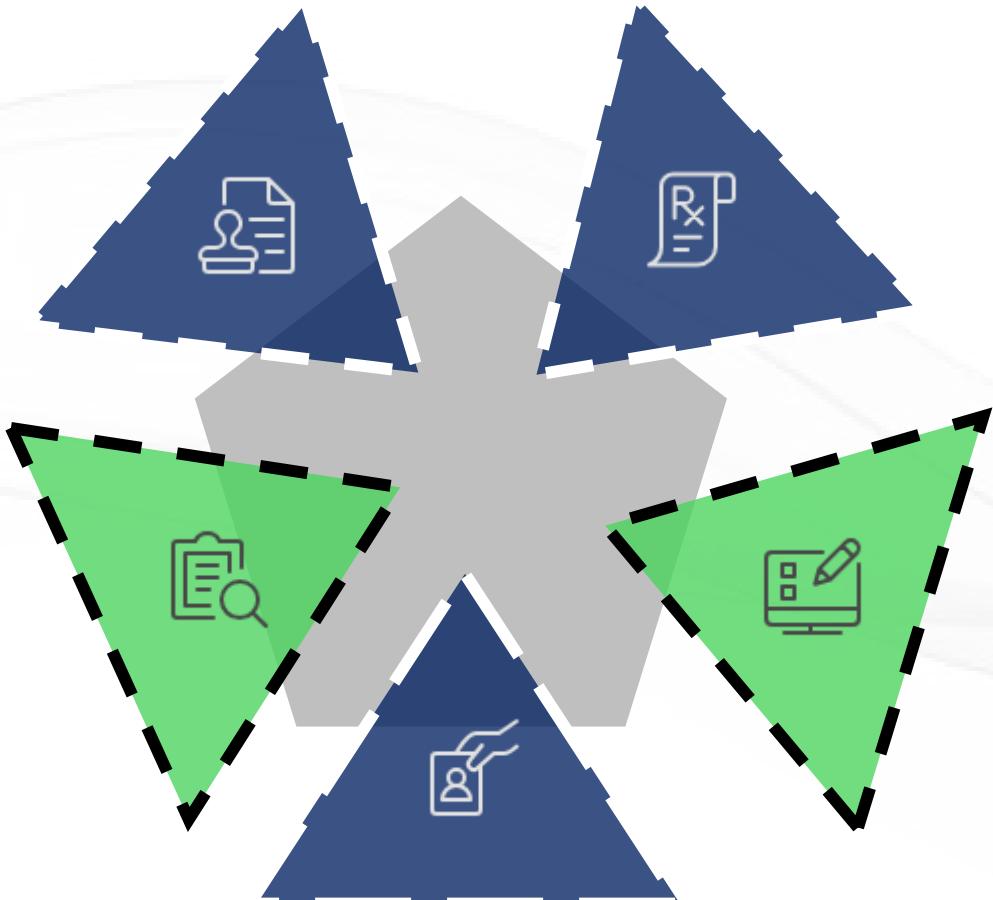
As per the India-US DTAA, each Contracting State may tax capital gains in accordance with the provisions of its domestic law.

Accordingly, Gains derived by Mr. N from the alienation of immovable property situated in India may be taxed in India.

The US may also tax Mr. N's global income, but he can claim credit for taxes paid in India to avoid double taxation.

Documentation required to claim Treaty Benefit

To apply DTAA benefits under Section 90, specific documentation must be furnished by the non-resident to substantiate eligibility.

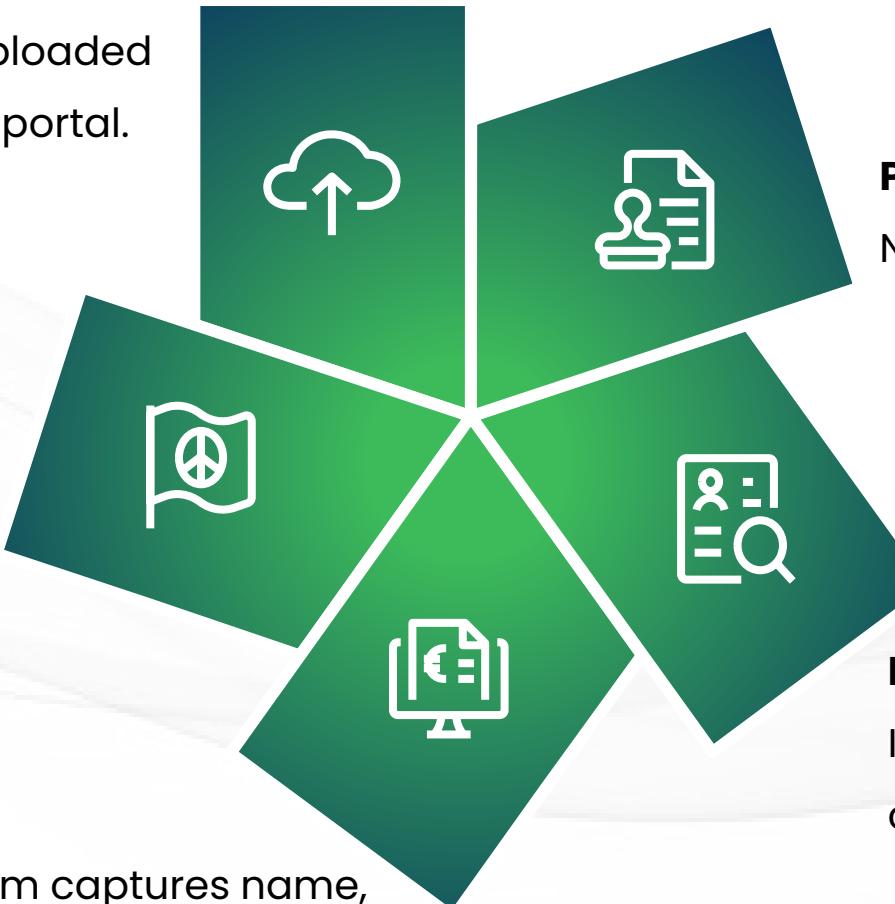


- ▶ **Tax Residency Certificate:** Mandatory under **Section 90(4)** for any non-resident claiming DTAA benefit.
- ▶ **Form 10F:** Required under **Section 90(5) read with Rule 21AB** to furnish prescribed information when TRC is insufficient.
- ▶ **PAN:** Needed in specified cases to avoid higher TDS under **Section 206AA**, unless exemption provided.
- ▶ **Beneficial Ownership Proof:** Supports DTAA eligibility by evidencing that the payee is the **true beneficial owner**.
- ▶ **No-PE Declaration:** Confirms the non-resident has **no Permanent Establishment in India**.

Form 10F- Now Online!

Non-Residents are required to mandatorily e-file Form 10F, providing key details related to their tax residency and income, which must be uploaded directly on the Income Tax portal.

Submission: The form is uploaded directly on the Income Tax portal.



Supporting Document: It is used along with TRC to claim treaty benefits.

Key Details: The form captures name, PAN, country of residence, TIN, period of stay, and nature of income.

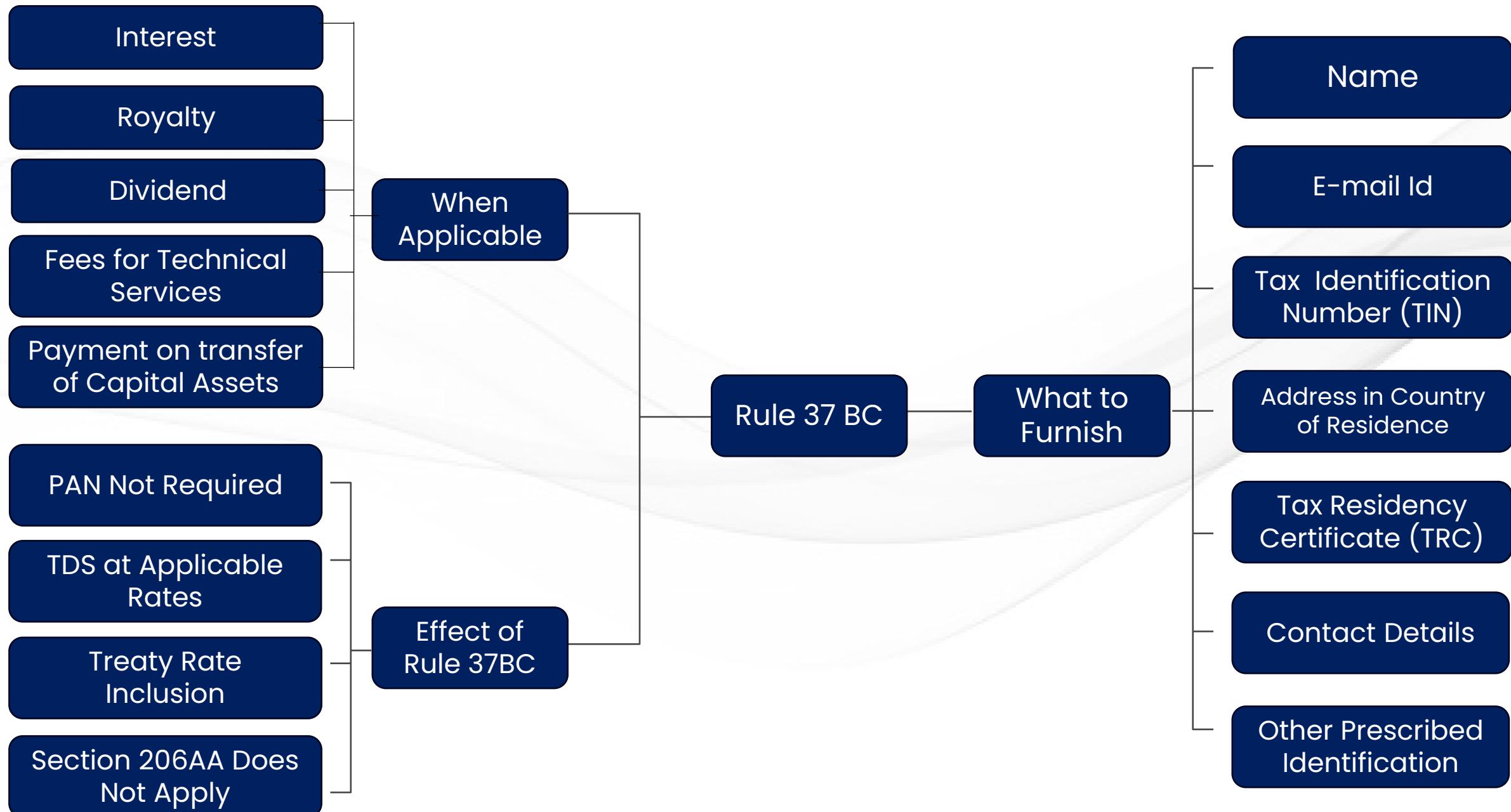
Purpose: Form 10F is a declaration by Non-Residents to claim DTAA benefits.

E-filing: It must be e-filed on the Income Tax portal, except in hardship cases.

- **Form 10F is mandatory** where the **TRC does not contain the prescribed particulars**.
- If **TRC already includes all required details**, furnishing **Form 10F is only recommendatory**.

Rule 37 BC: Relaxation for Non-Residents from Higher TDS

With Section 206AA imposing a higher TDS (20% or rate in force, whichever is higher) obligation on non-residents who do not furnish PAN, **Rule 37BC (inserted vide Notification No. 56/2016)** operates as a statutory relaxation to mitigate this impact..



Risks of Skipping WHT on NR Payments

Key disallowance provisions applicable for payments made to Non-Residents are discussed as under:

Section	Nature of Payments
40(a)(i)	<ul style="list-style-type: none">• 100% Disallowed if TDS not deducted/paid by due date u/s 139(1)• Allowed in year of actual TDS payment.• No disallowance if NR files return and payer not in default
40(a)(iii)	<ul style="list-style-type: none">• 100% Disallowed for salary to NR/outside India if TDS not deducted/paid thereon.

CBDT Circular No. 3 of 2015 – with respect to other sums chargeable to tax, **disallowance under Section 40(a)(i) is restricted** only to the appropriate portion of **sum chargeable to tax and not the whole of such sum.**

Risks of Skipping WHT on NR Payments

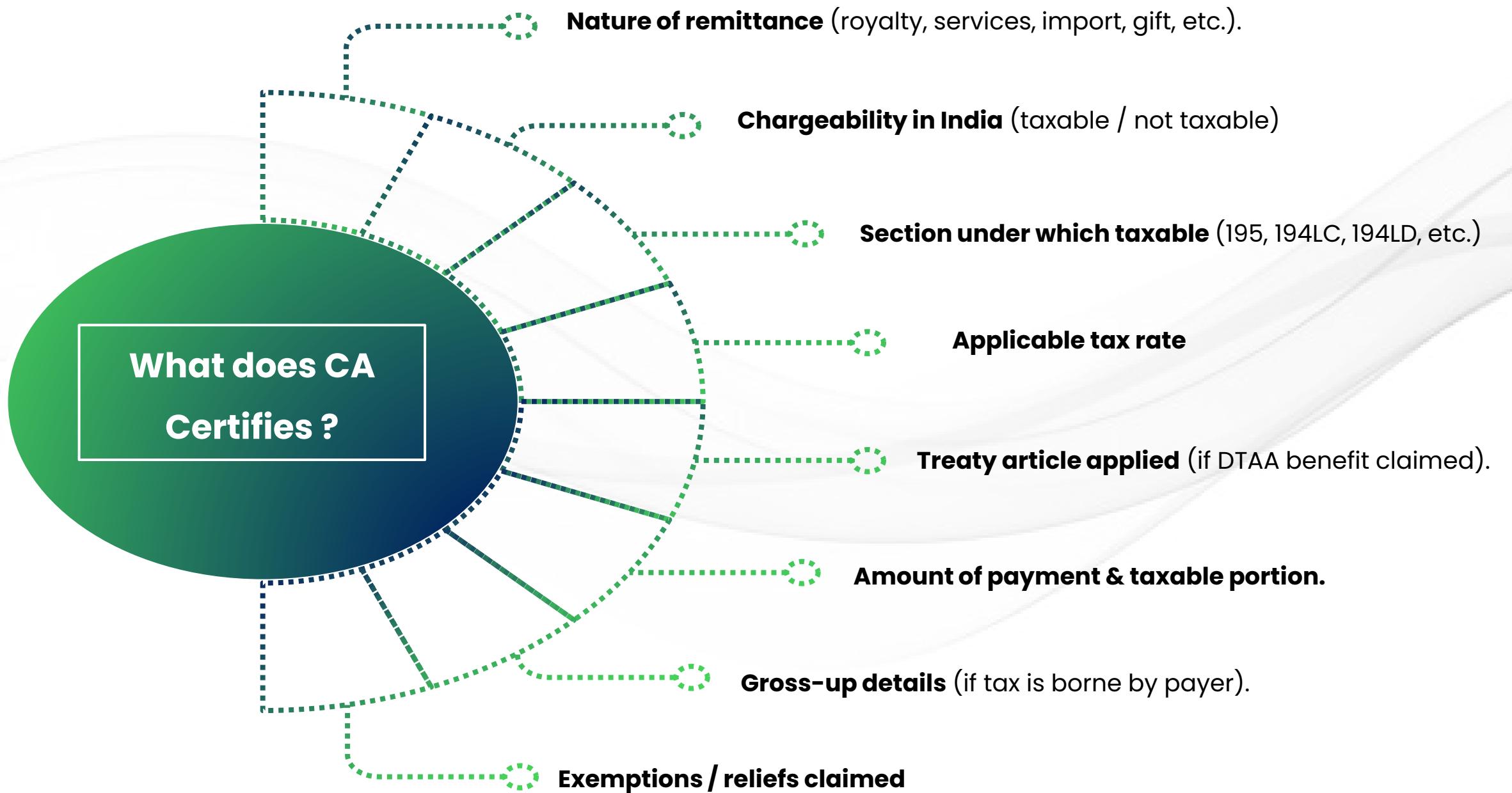
Key penalties applicable for payments made to Non-Residents are discussed as under:

Section	Penalties
201(1)/(1A)	<ul style="list-style-type: none">Failure to deduct/pay TDS , payer deemed in default; liable for interest (1%/1.5% p.m.) and penalty to the extent of tax in arrears.
271C	<ul style="list-style-type: none">Penalty equal to the amount of tax not deducted or short-deducted.
271I	<ul style="list-style-type: none">Penalty of ₹1,00,000 for failure to furnish / furnishing inaccurate information u/s 195 (Form 15CA/CB).
271J	<ul style="list-style-type: none">Penalty of ₹10,000 per incorrect report/certificate (e.g., incorrect Form 15CB) – applicable to the professional issuing the certificate
276B	<ul style="list-style-type: none">Prosecution for failure to pay TDS ; rigorous imprisonment from 3 months to 7 years plus fine. Compounding available as per notified procedure.

CBDT Instruction No. 2 of 2014 - If no application is made under Section 195(2), then liability under Section 201(1)/(1A), is restricted to only to the appropriate portion of the sum chargeable to tax and not the whole of such sum.

What is Form 15CB ?

Form 15CB is a **CA certificate** required **before making foreign remittances** made to Non-Residents (not being a Company, or to a Foreign Company) **exceeding ₹5,00,000** in a financial year:



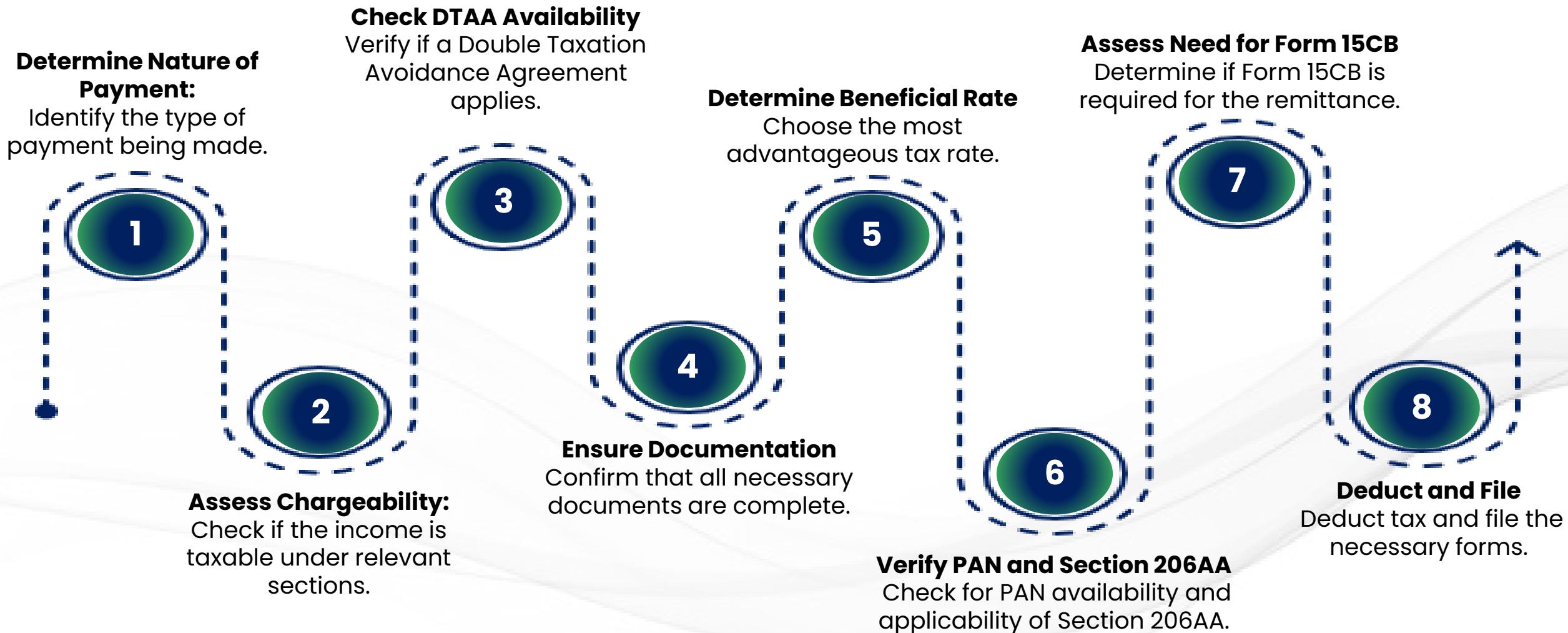
Main Fields of Form 15CB

The table below captures the Key fields in Form 15CB summarizing remittance, taxability, and treaty evaluation before foreign payment.

Field	What It Captures	Why It Matters
Remitter Details	Name, PAN, residential status, bank	Identifies the person responsible for TDS
Remittee Details	Foreign recipient, TIN, country, IBAN/SWIFT	Determines treaty eligibility & tax profile
Nature of Remittance	RBI purpose code + description	Decides chargeability + applicable section
Total Payment	Full amount being remitted	Basis for determining taxability + limits
Amount Chargeable to Tax	Taxable portion of the payment	Needed when <i>only part</i> of payment is taxable
Gross-up Requirement	Whether tax is borne by payer (Sec 195A)	Mandatory if contract says “net of taxes”
Tax Rate – Act vs Treaty	<ul style="list-style-type: none">Domestic law = tax + surcharge + cessDTAA = flat rate (no SC/cess)	Apply more beneficial rate to NR
DTAA Article Applied	Article for royalty / FTS / interest / other income	Supports lower rate + avoids disputes
TDS Amount	Final tax computed	Bank relies on this to remit funds

Form 15CB is issued before the foreign remittance, and the bank will not process the transfer unless the TDS computation in the CA certificate matches the details in Form 15CA (Part C).

Withholding Decision Flowchart



Common Pitfalls to Watch Out For:

- Ignoring gross-up clause when payer bears tax.
- Missing PE declaration → DTAA/treaty benefits denied.
- Assuming all cloud/software payments are business income, ignoring royalty/FTS.
- Not verifying beneficial ownership of the recipient.
- Treating remittance routed via an intermediary as non-taxable.
- Not checking for correct PAN / applicability of Section 206AA.

Case Laws

Tungsten Automation England Ltd. v. DCIT – Delhi HC(2025)



Background and Facts of the Case

UK-based **Tungsten Automation** licensed its cloud e-invoicing platform (OB10) to **Genpact India** for generating invoices for **GSK's overseas operations**, with **no India-linked activity**.



It received ₹2.9–3.3 crore from GIPL; despite submitting agreements, TRC and documents, the assessee claimed the receipts were **business income not taxable in India** due to **no PE**.

AO, DRP and ITAT treated the payments as **FTS under s.9(1)(vii)** and **Article 13(4)(c)** of the India-UK DTAA, prompting the assessee to appeal before the **Delhi High Court**.

Issues:

- Whether the payments received by the assessee from GIPL **constitute “Fees for Technical Services (FTS)”** under **Article 13(4)(c) of the India-UK DTAA**, i.e., **do the services “make available” technical knowledge, skill, know-how, or processes?**
- **If not FTS under DTAA**, then they cannot be taxed in India (and s.9(1)(vii) definition becomes irrelevant).

Tungsten Automation England Ltd. v. DCIT – Delhi HC(2025)- Arguments

Assessee:

The receipts were **business income** and not FTS, and since the assessee had **no PE in India**, the income was **not taxable** in India.

All activities (data conversion, invoice generation, archiving) were carried out on the assessee's **proprietary OB10 platform**; **no source code, technology, or exploitation rights** were provided to GIPL.

GIPL only received **operational access** to the portal; training was merely for usage and **did not transfer know-how**, so the "**make available**" condition under the DTAA was **not met**.

Revenue:

Services were **highly technical** and the training provided to GIPL staff **made available technical knowledge**, so payments qualified as **FTS under Article 13(4)(c)** of the India–UK DTAA.

Since **GIPL (the payer) is in India**, the income was deemed to **arise in India**, making the receipts taxable regardless of the assessee's claim that services related to overseas operations.

V/S

Tungsten Automation England Ltd. v. DCIT – Delhi HC(2025)- Judgement

1. No transfer of technology or rights:
GIPL/GIL were given only access to use the platform. They received no source code, no technical know-how, and no rights to exploit the software.

2. Make-available test not satisfied: GIPL could not generate e-invoices on its own after termination, and the training provided was merely operational, not technical; so no knowledge or skill was made available.

3. Not FTS under Article 13(4): The services were not ancillary to royalty or equipment, and did not make available any technical knowledge or process; therefore, they did not fall under any limb of Article 13(4) of the India-UK DTAA.

4. Not taxable in India: As the receipts were not FTS under the DTAA, they weren't taxable in India, and the assessment and ITAT orders were set aside .

Conclusion of the Court

- Payments **NOT FTS** under Article 13(4)(c).
- Receipts **not chargeable to tax in India**.
- Assessments and Tribunal order **set aside**.

Thank You



For any queries feel free to contact:

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