

Form 15CA / 15CB

Practical Issues & Challenges



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Shared at

Diploma Course in International Taxation, CITAX ICAI

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OBJECTIVE OF S. 195

- ❖ **CBDT circular No. 152 dt. 27.11.1974**
- ❖ **Tax is collected at earliest point of time**
- ❖ **There is no difficulty in collection of time at the time of assessment**
- ❖ **To avoid loss of revenue – as non-residents may not have any assets in India from which subsequent recovery can be made**

COMPONENTS OF S. 195

Payer

- Any person responsible for paying
- Includes NR, whether or not such NR has presence in India

Payee

- NR not being a company
- Foreign Company

Nature of Payment

- Interest or any other sum chargeable to tax
- Excludes salary, dividend subject to DDT

TDS

- At time of payment or credit whichever is less
- At the rates in force, only if subject matter is income chargeable to tax

CERTIFICATION IN FORM 15CA & 15CB

Twin Objective (As per memorandum explaining provisions of the Finance Bill, 2015)

- › **Ensuring deduction of tax at appropriate rate from taxable remittances**
- › **Identifying remittances on which tax was deductible but payer failed to deduct the tax**

BASIC PROVISIONS

Sections

- **195, 271 - I**

Rules

- **37BB, 37BC, 21AB**

Forms

- **15CA / 15CB / 15CC**

COMPLIANCE

Withholding

- At the time of payment or credit whichever is earlier
- At TT buying rate (SBI)

Remittance

- Certification in Form 15CA and undertaking in Form 15CB

Disclosure

- TDS Returns

195 VS. 194A, 194C, ETC.

	S. 195	Other sections, 194A, 194C, 194J, etc
Payer	Any Person	Specified
Payee	Non-Resident	Resident
Nature of payment	Income chargeable under IT Act	Specified, whether income or not
Minimum Threshold	No Threshold	Specified
Certificate for payment	Mandatory in specified cases	Not Required
Disallowance for non-deduction	S. 40(a)(i)	S. 40(a)(ia)
Lower TDS certificate	Payer as well as Payee can apply	Only Payee can apply
Requirement of TAN	Mandatory	Not required in 194-IA, IB

GROSS OR INCOME

- ❖ If no application was made u/s 195(2) & the payer failed to deduct tax, liability u/s 201 to be computed on taxable portion & not whole sum remitted
 - ❖ CBDT Inst. No. 2/2014 dt. 26.2.2014
- ❖ Disallowance u/s 40(a)(i) to be computed on the taxable portion & not the whole sum remitted
 - ❖ CBDT Circular No. 3/2015 dt 12.2.2015

GROSS OR INCOME

- ❖ **S. 195(2) is based on 'principle of proportionality' & is attracted only in case of a composite payment having an element of taxable income.**
- ❖ **The obligation to deduct tax on composite payments would be limited to the appropriate proportion of income forming part of the gross sum remitted**
 - ❖ *GE India Technology Centre (P.) Ltd. [2010] 193 Taxman 234 (SC)*

IS WHT ON ALL PAYMENTS?

- ❖ Not all. Examples could be:
- ❖ Capital payments being gift, loan, repayment of loan, etc. - Rule 37BB / Schedule III of CAT Rules
- ❖ Specifically exempt – dividend u/s 115 O, salaries
- ❖ Revenue payments not chargeable to tax in India
- ❖ Exchange rate fluctuation between date of TDS i.e. credit to the payee's account and the remittance date
 - ❖ *Sandvik Asia Ltd [2012] 49 SOT 554 (Pun ITAT)*

DETERMINATION OF TDS

- ✘ Check whether payment covered within s. 195
- ✘ Other sections for 192, 194LC, 194LD etc
- ✘ Based on documents, determine nature of payments & applicable provisions
- ✘ Certificate u/s 195(2) / 195(3) / 197
- ✘ Determine whether payee eligible for treaty benefits and whether relevant documents obtained to grant treaty relief

RATE OF TDS

- ✘ Rates in force - section 2(37A)(iii) - For the purpose of TDS u/s 195, rates in force mean the beneficial of:
 - + Rates specified in Part II of First Schedule to the Finance Act of the relevant year; or
 - + Rates specified under the applicable DTAA
- ✘ Rule 21AB – To claim DTAA benefit, NR to furnish TRC & Form 10F
- ✘ Surcharge & Education cess not to be added to the tax rate specified under DTAA

S. 206AA W.R. RULE 37BC

- ✘ **Not applicable for payments in nature of interest, royalty, FTS & transfer of any capital asset, if following details submitted to deductor:**
 - + **Name, e-mail id, contact no**
 - + **Address in country or specified territory outside India of which deductee is resident**
 - + **Certificate of he being resident of other country by Govt. of that country, if law of that country permits**
 - + **Tax identification No. and in case no such no. is available then unique no. on the basis of which deductee is identified by government of that country**

RATE U/S 115A

- ✘ In case of a non-resident taxpayer where the total income of such taxpayer includes:
 - + Income by way of Royalty and
 - + Fees for technical services (FTS) from Government or an Indian concern after 31.03.1976
 - + AND which is not effectively connected with permanent establishment, if any, of the non resident in India
 - + Tax shall be levied at the rate of 10% on the gross amount of such income

PAYMENT TO POA HOLDER

- ✘ Where payment is made by assessee to an individual Resident in India in respect of purchase of land which belonged to non-residents but rights therein were assigned unequivocally to said resident as POA holder, such payment could not be regarded as payment to non-resident so as to require TDS u/s 195
- ✘ When non-resident himself nominates a particular agent to whom payment should be made and pursuant to that direction, the assessee pays the sum to the agent so nominated, the provisions of s. 195 will apply
- ✘ *Rakesh Chauhan vs DDIT (International Taxation) [2010] 128 TTJ 116 (CHD)*

FORM 15CA

- ✘ It is a Declaration given by Remitter & is used as a tool by statutory authorities for collecting information in respect of payments which are chargeable to tax in hands of recipient non-resident.
- ✘ This is an effective Information Processing System which is utilized by ITD to independently track foreign remittances and their nature to determine tax liability.

FORM 15CB

- ✘ Its a certificate from a Chartered Accountant.
- ✘ It is Tax Determination Certificate where the issuer CA examines the remittance having regard to chargeability provisions u/s 5 & 9 along with provisions of DTAA with Recipient's Residence Country.

FORM 15CB

**WHO CAN ISSUE
FORM 15CB ??**

SECTION 195(6)

- ❖ **As substituted by Finance Act, 2015**
- ❖ ***“(6) The person responsible for paying to a non-resident, not being a company, or to a foreign company, any sum, whether or not chargeable under the provisions of this Act, shall furnish the information relating to payment of such sum, in such form and manner, as may be prescribed.”***

SECTION 195(6) - ANALYSIS

- ❖ **Information to be furnished by payer to a NR / FC**
- ❖ **Filing may be required even if payment is not taxable, say, due to:**
 - ❖ **Non-accrual in India (Sec. 9)**
 - ❖ **Income that has accrued in India, but has been expressly exempted (Sec. 10)**
 - ❖ **Treaty benefit (Sec. 90)**
- ❖ **Filing to be made in prescribed form, manner (Rule 37BB)**

SECTION 271 -I

- ❖ **As inserted by Finance Act, 2015**
- ❖ ***“If a person, who is required to furnish information u/s 195(6), fails to furnish such information, or furnishes inaccurate information, the AO may direct that such person shall pay, by way of penalty, a sum of Rs. 1 Lakh”***

PARTS OF 15CA - RULE 37BB(1)/(2)

A

- If aggregate of such remittances does not exceed Rs. 5 Lacs during the FY

B

- If aggregate of such remittances exceed Rs. 5 Lacs & order / certificate u/s 195(2)/ 195(3)/ 197 obtained

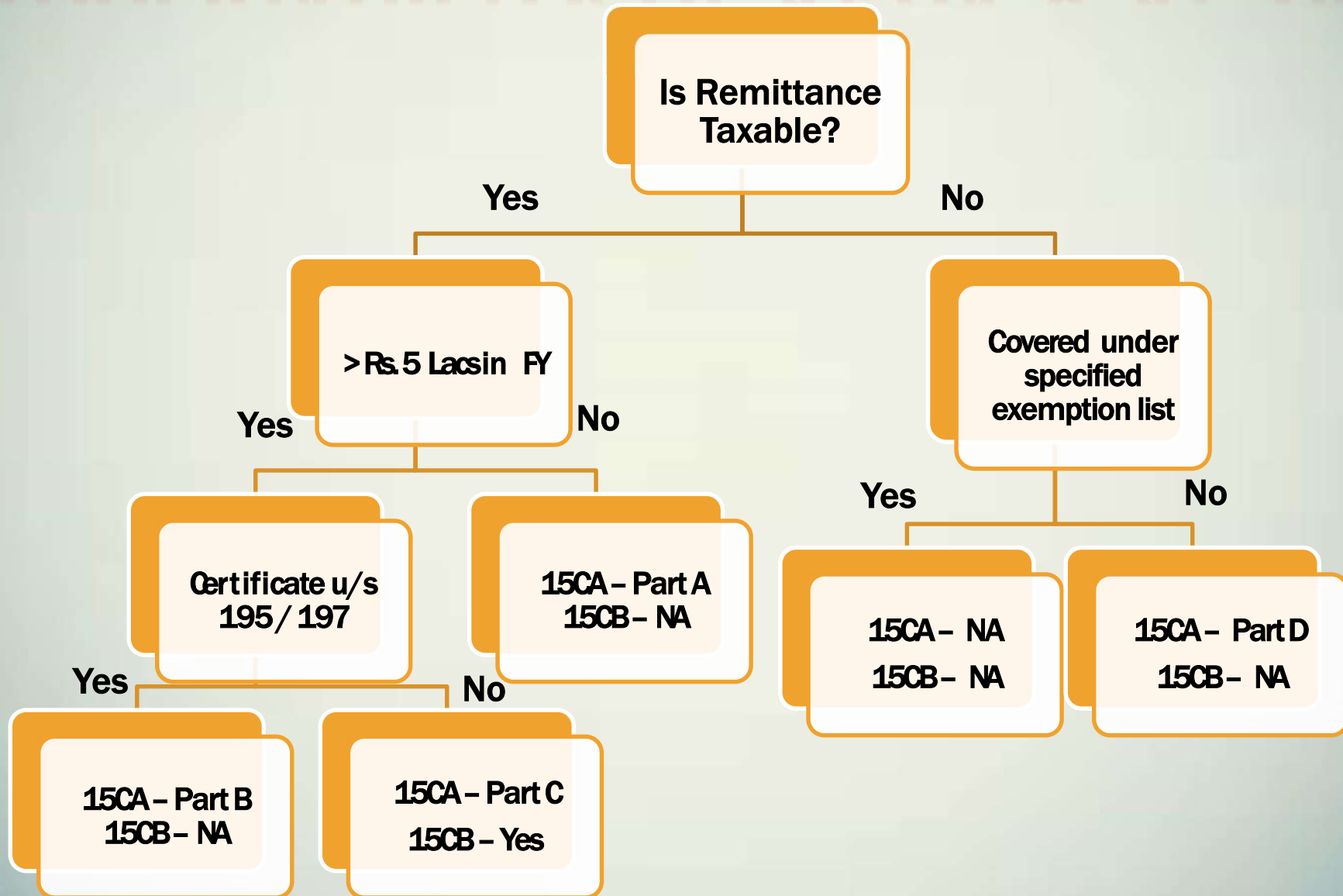
C

- If aggregate of such remittances exceed Rs. 5 Lacs & certificate in Form 15CB obtained from CA

D

- If remittance is not chargeable to Tax

APPLICABILITY OF 15CA & 15 CB



RULE 37BB

- ✘ (3) Notwithstanding anything contained in sub-rule (2) [Part D of 15CA], no information is required to be furnished (15CA / 15CB) for any sum which is not chargeable under the provisions of the Act, if,—
 - + Remittance is made by an **individual** and it does not require prior approval of RBI as per the provisions of section 5 of the FEMA read with Schedule III to the Foreign Exchange (Current Account Transaction) Rules, 2000;
 - + Schedule list

FEMA

- ✘ **S. 5 of FEMA Act**
- ✘ **Any person may sell or draw foreign exchange to or from an authorised person if such sale or drawal is a current account transaction**
- ✘ **Provided that the CG, in public interest and in consultation with the Reserve Bank, impose such reasonable restrictions for current account transactions as may be prescribed**

SCH. III - FOREIGN EXCHANGE (CAT) RULES

✘ Within limit of USD \$250000

- + Private visits to any country (except Nepal & Bhutan)**
- + Gift or donation.**
- + Going abroad for employment**
- + Emigration**
- + Maintenance of close relatives abroad**
- + Travel for business, or attending a conference or specialised training or for meeting expenses for meeting medical expenses, or check-up abroad, or for accompanying as attendant to a patient going abroad for medical treatment / check-up.**
- + Expenses in connection with medical treatment abroad**
- + Studies abroad**

SPECIFIED LIST

Sl. No	Purpose code as per RBI	Nature of payment
1	S0001	Indian investment abroad -in equity capital (shares)
2	S0002	Indian investment abroad -in debt securities
3	S0003	Indian investment abroad -in branches and wholly owned subsidiaries
4	S0004	Indian investment abroad -in subsidiaries and associates
5	S0005	Indian investment abroad -in real estate
6	S0011	Loans extended to Non-Residents
7	S0101	Advance payment against imports

Sl. No	Purpose code as per RBI	Nature of payment
8	S0102	Payment towards imports - settlement of invoice
9	S0103	Imports by diplomatic missions
10	S0104	Intermediary trade
11	S0190	Imports below Rs.5,00,000 - (For use by ECD offices)
12	S0202	Payment for operating expenses of Indian shipping companies operating abroad
13	S0208	Operating expenses of Indian Airlines companies operating abroad
14	S0212	Booking of passages abroad - Airlines companies

Sl. No	Purpose code as per RBI	Nature of payment
15	S0301	Remittance towards business travel
16	S0302	Travel under basic travel quota (BTQ)
17	S0303	Travel for pilgrimage
18	S0304	Travel for medical treatment
19	S0305	Travel for education (including fees, hostel expenses etc.)
20	S0401	Postal services
21	S0501	Construction of projects abroad by Indian companies including import of goods at project site
22	S0602	Freight insurance - relating to import and export of goods

Sl. No	Purpose code as per RBI	Nature of payment
23	S1011	Payments for maintenance of offices abroad
24	S1201	Maintenance of Indian embassies abroad
25	S1202	Remittances by foreign embassies in India
26	S1301	Remittance by non-residents towards family maintenance and savings
27	S1302	Remittance towards personal gifts and donations
28	S1303	Remittance towards donations to religious and charitable institutions abroad

Sl. No	Purpose code as per RBI	Nature of payment
29	S1304	Remittance towards grants and donations to other Governments and charitable institutions established by the Governments
30	S1305	Contributions or donations by the Government to international institutions
31	S1306	Remittance towards payment or refund of taxes
32	S1501	Refunds or rebates or reduction in invoice value on account of exports
33	S1503	Payments by residents for international bidding.

PART D OF 15CA

- ✘ To be filled up if the remittance is not chargeable to tax in India {other than payments referred to in rule 37BB(3)} by the person referred to in rule 37BB(2).
Information required to be furnished under this part:

Remitter	Remmitee	Currency	Bank	Remittance
Name	Name	Country to which remittance to be made	Name of bank	Date of remittance
Pan	Pan	Currency	Name of branch	Nature of remittance
Tan	Address	Amount in foreign currency	BSR code of bank	Purpose code as per RBI

PART D OF 15CA

Remitter	Remmited	Currency	Bank	Remittance
Address	Email & mobile no.	Amount in Indian currency		
Email & mobile no.				
Status				
Residential status				

PART A OF 15CA

- ✘ To be filled up if the remittance is chargeable to tax in India and the remittance or the aggregate of such remittances, as the case may be, does not exceed Rs. 5 Lacs during FY
- ✘ In addition to Part D information required:

TDS

AMOUNT PAYABLE BEFORE TDS

AMOUNT OF TDS

RATE OF TDS

DATE OF DEDUCTION

PART B OF 15CB

- ✘ To be filled up if the remittance is chargeable to tax in India and the remittance or the aggregate of such remittances, as the case may be, exceeds Rs. 5 Lacs during the FY AND an order / certificate u/s 195(2)/ 195(3)/ 197 of Income-tax Act has been obtained from the Assessing Officer

PART B OF 15CB

**INFORMATION REQUIRED IN ADDITION TO
ALREADY MENTIONED IN PART A & D :**

A.O. ORDER

**Section under which order/certificate has
been obtained**

**Name & designation of assessing officer who
issued the order/certificate**

Date of order/certificate

Order/certificate number

PART C OF 15CA

- ✘ To be filled up if remittance is chargeable to tax and remittance / aggregate of such remittances, as the case may be, exceeds Rs. 5 Lacs during FY AND a certificate in Form No. 15CB from CA. Further details in addition to A, B & D:

<u>Remitter</u>	<u>Remmited</u>	<u>Accountant</u>	<u>Taxes</u>	<u>DTAA*</u>
Principal place of the business	Principal place of the business	Name of the accountant signing certificate	Relevant section applicable	Applicability of DTAA
Area code	Status	Name of the proprietorship/firm of accountant	Amount of taxable income	Relevant DTAA

<u>Remitter</u>	<u>Remmited</u>	<u>Accountant</u>	<u>Taxes</u>	<u>DTAA*</u>
Range code	country to which remittance is made	Registration no. Of the accountant	Tax amount	Relevant article of DTAA
		Date of certificate	Basis of determining taxable income and tax liability	

***DTAA- Double Tax Avoidance Agreement**

****This part C of Form 15CA includes all particulars of Form 15CB in itself.**

FORM 15CB - PART A

- ✘ **Clause A - “name & address of the beneficiary” of the remittance.**
- ✘ **Beneficiary is the “legal owner” of the remittance. When the remittance is made to a third person on behalf of the “legal owner”, the clause requires details of the legal beneficiary.**
- ✘ **Applicable DTAA will be decided on the basis of the residential status of the beneficiary**

FORM 15CB

- ✘ **Clause B6 - requires nature of the remittance as per agreement/ document. This involves characterization of Income and is very crucial in determination of tax withholding liability and rate of tax.**
- ✘ **Clause B7 – requires grossing up of income in a case the remittance is “net of tax” payments**
- ✘ **In “net of tax” agreements, where tax liability is borne by the remitter, the payment needs to be grossed up in accordance with the provisions of section 195A.**

FORM 15CB

- ✘ **Clause B8 - requires computation of tax liability under provisions of the Income-tax Act (without considering DTAA)**
 - + If taxable, relevant section
 - + The amount of income and chargeability
 - + Basis of determining taxable income and tax liability.
- ✘ **Clause B9 – If income is chargeable to tax in India and relief claimed in DTAA**
 - + Whether TRC obtained
 - + Relevant DTAA & its article
 - + Taxable income as per DTAA and tax liability

FORM 15CB

- × **Clause B9 – A – If remittance is for Royalty, FTS, Interest, Dividend, etc (Not connected with PE)**
 - + **Article of DTAA & rate as per DTAA**
- × **Clause B9 – B - If remittance is for Business Income**
 - + **Whether liable to tax in India**
 - + **If, so basis of rate of TDS**
 - + **If, not reason in brief, specifying relevant article of DTAA**

FORM 15CB

- × **Clause B9 – C – If remittance is on account of Capital Gain**
 - + Amount of LTCG
 - + Amount of STCG
 - + Basis for arriving at taxable income
- × **Clause B9 – D - If remittance is any other**
 - + Specify nature
 - + Whether Taxable in India as per DTAA
 - + If yes, rate of TDS
 - + If not, reason in brief specifying article of DTAA

FORM 15CB

- ✘ Submission of FORM 15CB is mandatory before the Submitting FORM 15CA.
- ✘ FORM 15CA gives details about remittances rather than FORM 15CB is an assurance as to whether the applicable provisions of Income tax act and DTAA are being followed or not.
- ✘ To prefill the details in Part C of Form 15CA, the Acknowledgment number of e-Filed Form 15CB should be provided

PROCESS OF FILING 15CB & 15CA

- ✘ **15CB shall be furnished online by CA himself w.e.f. 1.4.2016.**
- ✘ **Person filing Form 15CA shall first add CA under his login details for Form 15CB.**
- ✘ **CA should Download the Java Utility for 15CB, Fill Up and generate xml.**
- ✘ **CA to log in to e-filing portal using user id**
- ✘ **Upload the 15CB xml generated with DSC procedure. There ends the work of a CA**

PROCESS OF FILING 15CB & 15CA

- ✘ **Step 1:** Client should log in to its account and in “work list” option under main menu click “For Your Information section” and see the list of returns e-filed.
- ✘ **Step 2:** 15CB e-filed by CA will appear in first. Select the form and download the Ack. No file of 15CB and also 15CB PDF file (password for PDF file is PAN & DOB/DOI)
- ✘ **Step 3:** Then under “e-file” option select “Prepare and Submit online forms other than ITR” Select 15CA in it.

PROCESS OF FILING 15CB & 15CA

- ✘ **Step 4: Client to validate the DSC file and on choosing the DSC file it will ask for which Part of 15CA to be chosen Part -A/ B/ C/ D.**
- ✘ **Step 5: For options of C, 15CB of CA is required. So if C is selected it will ask for the 15CB e-filed acknowledgement no.**
- ✘ **Step 6: On entering the 15CB e-filed acknowledgement no, 15CA is populated fill the necessary details then submit.**
- ✘ **Step 7: Finally under “My Account” section in “View” option one can see the 15CA e-filed.**

DOCUMENTS FOR 15CB

- ❖ For characterization of transaction
 - ❖ Agreement / Purchase order & Invoice
 - ❖ Transaction details and correspondence
 - ❖ Technical advice (if obtained / required)
 - ❖ Any other proof of services rendered (e.g. copy of report furnished by the NR / FC, etc.)
- ❖ Payee's certificate that it has No PE and / or Business Connection in India
- ❖ SBI's TTBR certificate

DOCUMENTS FOR 15CB

- ❖ If availing DTAA benefit
 - ❖ Valid TRC
 - ❖ Form 10F (if TRC doesn't contain prescribed details – discussed earlier)
 - ❖ Payee's certification of its DTAA entitlement and Beneficial ownership of payments made to it
- ❖ Indemnification: Not a statutory requirement, but may be considered on a case-to-case basis

PRACTICAL CHALLENGES

- ✘ TRC received in foreign language
- ✘ TRC not available
 - + Available for earlier year(s), but not for current year
 - + TRC applied for, but not available on date of deduction
 - + **SKAPS INDUSTRIES (AHD.):** DTAA benefits cannot be denied merely due to non-availability of TRC. When NR has substantiated its residential status by way of sufficient and reasonable documentary evidence, requirement of furnishing TRC would be persuasive and not mandatory



PRACTICAL CHALLENGES

- ✗ **Validity of TRC:**
 - + Where tax year is a calendar year
 - + TRC valid for multiple years
- ✗ **Year in which remittance is made, is different from that in which tax was deducted**
 - + Payable / Paid
 - + Sec. 195 read with S. 206AA / S. 90

(Translation)

Office of the Company Limited and Partnership Registration, Bangkok Metropolis
Department of Business Development
Ministry of Commerce

Official Emblem

No. Sar.Jor. 4894906

CERTIFICATE

This is to certify that this company has been registered under the Civil and Commercial Code to be a juristic person on 18th January 1990, registration number [REDACTED] (Previous No. [REDACTED]) As appeared in registration document on the date of issue as follows:

1. Name of Company: [REDACTED]
2. There are 5 company's directors namely:
 1. [REDACTED]
 2. [REDACTED]
 3. [REDACTED]
 4. [REDACTED]
 5. [REDACTED]
3. Number or Name of person authorized to sign to bind the company there are one of director sign with company's seal affixed. [REDACTED]
4. Registered capital : [REDACTED]
5. Head office is located at No. 1006E-69, 22nd Floor, Sathorn Nakhom Building, Sathorn Nuan Road, Si Lom Sub-district, Bang Rak District, Bangkok Metropolis
6. The company has 45 objectives as appeared in the annex 3 pages signed and sealed by Registrar of Office of the Company Limited and Partnership Registration.


Issued on 15th October 2015

-Signature- [REDACTED]
Official Seal Affixed

Significant particulars which should be known are as follows:


PRACTICAL CHALLENGES

- ✘ Countries with no TRC
- ✘ Where the Issuing Authority is not IRS / Tax office:
 - + Corporate regulatory authority
 - + Business license as a TRC
 - + Certificate issued by an 'Association'
 - + R. 37BC(2)(iv) – TIN / Unique No. by which Govt of that country identify him as resident



Business License
(Duplicate)
Registration No. [REDACTED]

Name [REDACTED]
Category Legal Person as the Business Entity [Limited Liability Company (Natural investment and holding)]
Address Room 1602, Building 2, Area 1,Nanfanzhuang, Fengtai District, Beijing
Legal Representative Ren Enjie
Registered Capital RMB ONE POINT ONE MILLION
Date of Incorporation July 14, 2006
Term of Operation From July 14, 2006 to July 13, 2026
Business Scope Hosting and organizing of exhibition, show, fair and conference; designing of images and advertisement of stand construction and decoration; providing services of information consultation, market investigation and enterprise image plan. (Companies have the freedom under the law to select what kind of business to engage in, and to start business operations. For business types that need approval, please apply to relevant city departments. Upon receiving approvals, you start the business within the authorized scope. Business operations that are prohibited or restricted by the city bylaws are not allowed.)

Registration Authorit 
May 11, 2016

PRACTICAL CHALLENGES

› Characterization

- Inability to characterize the transaction, say, due to absence of a valid (or sufficiently detailed) agreement, purchase order, and / or any other document**
- Conflicting court decisions as regards characterization**
- Composite payment**

PRACTICAL CHALLENGES

- › Can the C.A., while issuing Form 15CB, simply rely upon the 'No PE certificate' issued by Payee
- › What if there is a (reported) adverse decision for the payee, *albeit* for a different AY, wherein it has been held to have an Indian PE
- › Where payee has an Indian PE, but the remittance is not attributable to such PE – as certified by the Payee
- › Issuing Form 15CB for sensitive transactions (due to its quantum and / or complexity). Eg. remittance of purchase price of shares of an investment SPV, sold by a NR

PRACTICAL CHALLENGES

- › **Payment is made to a country other than RS of payee**
- › **Where the transaction price does not represent FMV as per S. 50CA of the Act**
- › **Where banker disagrees with Classification Code selected by C.A., and code suggested by banker could conflict with characterization of transaction**
- › **Determination of ‘beneficial ownership’: TRC constitutes sufficient evidence for accepting beneficial ownership (as per Circular 789, dt. 13 Apr. 2000) – Relied upon in Indostar Capital (Bom.)**

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