

# Transactions with Non-Residents under Income Tax (Care & Caution)



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**Shared at**

**Tax Bar Association & RTCA, Jodhpur**

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# NON-RESIDENT

- ❖ **Section 2(30) – “non-resident” means a person who is not a “resident”, and for the purposes of sections 92, 93 & 168, includes a person who is not ordinarily resident within the meaning of section 6(6)**

# TRANSACTIONS

- ❖ **Royalty**
- ❖ **FTS**
- ❖ **Capital Gain - Immovable Property**
- ❖ **Business**
- ❖ **Interest & Dividend**
- ❖ **Others**

# PROVISIONS UNDER IT ACT

S. No.	Section	Provision
1	2(30)	Definition of Non- Resident
2	4	Charge of Income
3	6	Residence in India
4	7	Income deemed to be Received
5	9	Income deemed to accrue or arise in India
6	9A	Certain activities not to constitute business connection in India
7	10(4) / (4B)	Interest – NRE, etc
8	10(6B)	Tax Paid by Employer / Indian Government
9	10(8A)/(8B)/9	Exemption to Consultant
10	40(a)(i)	Disallowance for not deducting tax
11	44B, 172	Shipping Business
12	44BB	Business of prospecting Mineral Oil

# PROVISIONS UNDER IT ACT

S. No.	Section	Provision
13	44BBA	Business of Operation of Aircraft
14	44BBB	Civil construction, etc in Turnkey Projects
15	44C	Head Office Expenditure
16	44DA	Royalty, FTS - when PE / Business Con. In India
17	47(viia)	Not Transfer GDR – NR to NR
18	Chapter IX	DTAA Relief – Ss. 90 / 90A / 91
19	92 to 92F	Transfer Pricing
20	93	Avoidance of income-tax by transactions resulting in transfer of income to non-residents.
21	115A	Tax on Dividend, Royalty, FTS and Interest
22	115AB	Tax on Income / CG on Units purchased in Foreign Currency

# PROVISIONS UNDER IT ACT

S. No.	Section	Provision
23	115AC	Income / CG on Bond / shares / GDR purchased in Foreign Currency
24	115AD	Tax on income of FII from securities
25	115BBA	Tax on Entertainer / Sportsmen / Sports association
26	115BBD	Tax on dividend received from certain Foreign Companies
27	Chapter XII-A	Spl provisions for NR – SS. 115C to 115-I
28	115C	Few Definitions – convertible foreign exchange, NRI, LTCG, etc
29	115D	Special provisions for computation of Income
30	115E	Tax on Investment income & LTCG
31	115G	Return of Income not to be filed in certain cases

# PROVISIONS UNDER IT ACT

S. N.	Section	Provision
32	115H	Benefit of Scheme available in certain cases even after becoming resident
33	115-I	Non-application of the scheme if NR so chooses
34	160 / 163	Agent
35	173	Recovery of Tax from his asset
36	194E	TDS - Entertainer / Sportsmen / Sports association
37	194LBA/LC/ LD	TDS - Interest
38	195	TDS
39	196A	TDS on Units
40	285	Statement by non-resident having liaison Office
41	286	Reporting of International Group
42		DTAA, BEPS, MLI

# 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

**Section**

- **195, 271 -I**

**Rule**

- **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.

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

# 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)*

# 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 dated 12.2.2015

# 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 the 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 the 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. R. 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

- × **Form 15CA is a Declaration given by Remitter and is used as a tool by statutory authorities for collecting information in respect of payments which are chargeable to tax in the hands of recipient non-resident.**
- × **This is an effective Information Processing System which is utilized by the Income tax Department to independently track the foreign remittances and their nature to determine tax liability.**

# FORM 15CB

- ✘ **The person making the payment needs to obtain a certificate from a Chartered Accountant in Form 15CB.**
- ✘ **Form 15CB is the Tax Determination Certificate where the issuer CA examines the remittance having regard to chargeability provisions u/s 5 and 9 of Income tax Act along with provisions of Double tax Avoidance Agreements with the Recipient's Residence Country.**

# FORM 15CB

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



# SECTION 195(6)

- ❖ **Sec. 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

- ❖ **S. 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

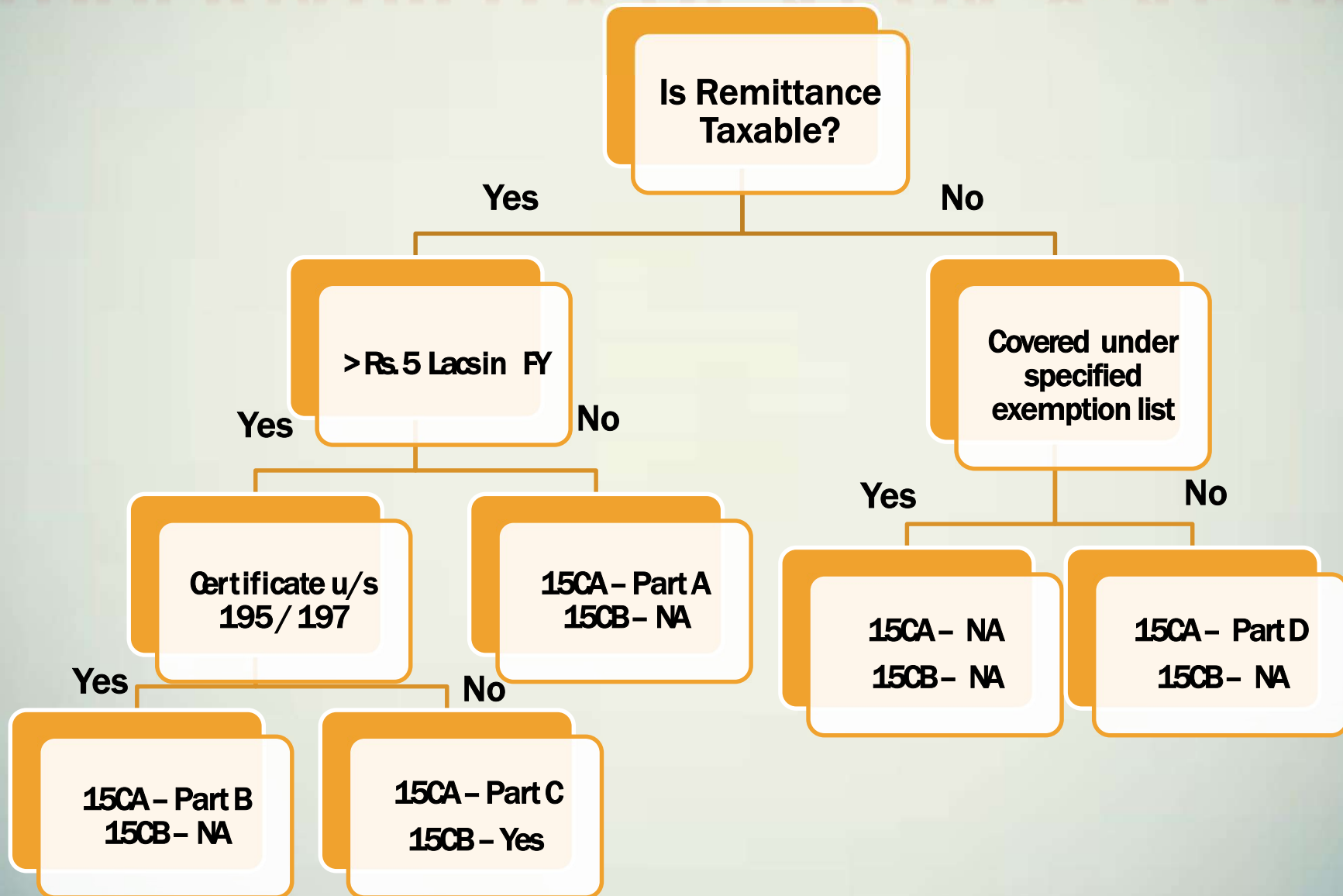
**C**

- 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

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

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

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

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

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

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

**\*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 - requires “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

# 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
  - ❖ 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

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