THE CHAMBER OF TAX CONSULTANTS

Estd. 1926
ज्ञानं परमं बलम्

The Chamber's Journal

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Non-Resident Indians – *Current Tax & Exchange Control Issues*

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Glimpses of the Full Day Seminar on "Global Transfer Pricing Summit" held on 17th May, 2025 at Walchand Hirachand Hall, IMC, Mumbai



Dignitaries at the Inaugural Function



CA Vijay Bhatt (President) giving his opening remarks

Seen from L to R: CA Karishma Phatarphekar (Chairperson), Mr. Sanjay Agrawal (CCIT – (IT TP) – WZ), CA T. P. Ostwal and CA Sanjay Tolia



CA Karishma Phatarphekar (Chairman) welcoming the speakers and the delegates



Mr. Sanjay Agrawal (CCIT – (IT TP) – WZ) giving Keynote Address



CA Sanjay Tolia addressing the audience



Fireside Chat - (L-R) CA Maulik Doshi (Panel member), CA Waman Kale (Moderator), CA Pradeep Mitra (Panel Member), CA Anish Thacker & CA Natwar Thakrar

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Contents



From the President
— Vijay Bhatt 6

From the Editor's Desk
— Anish Thacker 8

Special Feature on Non-Resident Indians – Current Tax & Exchange Control Issues

Why Residential Status Matters
— Amber Bhavsar 10

Claiming Tax Treaty (DTAA) Benefits – Get a lower tax rate
— Anjali Gandhi & Krina Koladiya 19

Sending Money Out of India: A Guide for NRIs & PIO on Remittance of Assets
— Tanvi Vora & Heta Jhaveri 29

Non-residents – Declaring Assets & Income Properly
— Paras Doshi & Vimal Bhayal 38

Lower/Nil Tax Deduction Certificate – Avoid Extra TDS
— Hinesh Doshi & Aarti Karwande.....49

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Notices that Non-Residents Commonly Face – and the Correct Technical Response
— Nirav Jagani 65

NRE vs. NRO Accounts – Using the correct one
— Vishal Shah & Parakramsingh Rajpurohit.....72

Capital Gains Exemptions – Can Non-Residents Use Section 54 / 54F?
— Namrata Dedhia 80

Direct Taxes - Important Judgements
Supreme Court
— Keshav Bhujle 87

High Court
— Jitendra Singh, Radha Halbe & Harsh Shah.....91

Tribunal
— Nikhil Mutha, Viraj Mehta & Kinjal Bhuta.....94

International Taxation - Important Judgements Case Law Update
— Dr. Sunil Moti Lala 100

Indirect Taxes - Important Judgements GST
— Naresh Sheth & Jinesh Shah 110

Service Tax
— Rajiv Luthia & Keval Shah.....119

Corporate Laws - Important Judgements Case Law Update
— Makarand Joshi.....124

Other Laws
FEMA Updates & Analysis
— Hardik Mehta & Tanvi Vora.....130

The Chamber News
— Mehul Sheth & Neha Gada.....132



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From the President

CA Vijay Bhatt

Dear Members,

The month of May was an eventful month at Chamber.

On 16th May, the Chamber had a great opportunity to be invited by the Select Committee of Members of Parliament for suggestions on the Income-tax Bill, 2025, in Mumbai and make an 'in person' representation. The select committee comprised of Honorable Members of Parliament from various political parties. It was heartening to note that these Members of Parliament asked very pertinent questions. My compliments to CA Ketan Vajani, Chairman, Law & Representation Committee, CA Anish Thacker (PP), CA Mahendra Sanghvi (PP) and CA Chintan Ghelani, Convener, L & R Committee, for preparing exhaustive Representation in a short span of time, working late hours. The Chamber's Representation was highly appreciated by the Honorable Members of the Select Committee. I thank all the contributors for their efforts in making this representation.

On 17th May, the International Taxation Committee organized "The Global Transfer Pricing Summit" at IMC, Mumbai, on completion of 25 years of Transfer Pricing in India. The event was well attended by about 120 participants from Mumbai as well as from other cities. The summit was addressed by eminent personalities including Shri Amit Shukla, the Honorable member of the ITAT, Mumbai, Shri Sanjay Agrawal, Honorable Chief Commissioner of Income Tax (IT TP) – WZ, Smt. Ramapriya Raghavan, Commissioner of Income Tax (TP), Mumbai, for which I express my sincere gratitude to each one of them. My hearty thanks to Shri Saktijit Dey, Honorable Vice President of the ITAT, Mumbai and other Honorable members from the ITAT Mumbai for gracing the event by their presence.

On 24th May, The Indirect Tax Committee organized a Seminar on GST at Nasik jointly with Nasik Branch of WIRC, which was attended by about 140 members.

Our Study Circle & Study group Committee, Direct Tax Committee, Indirect Tax Committee, Internation Taxation Committee, Student Committee, Commercial & Allied Law Committee and Delhi Chapter organized various meetings virtually during the month for the benefit of the members.

Starting 10th June, the Chamber has organized a series of "Workshop on GST Law" jointly with GSTPM, AIFTP (WZ), BCAS, MCTC & WIRC of ICAI in virtual mode. I encourage the members to enroll for this course for updating their knowledge on GST Law.

In the month of June, the Student Committee has organized "8th Dastur National Direct Tax Moot Court Competition", jointly with the Government Law College, Mumbai, wherein students from various colleges across India will participate. The Semi Final Rounds will be judged by the Honorable members of the ITAT, Mumbai and Finals will be judged by Honorable Judges of the Bombay High Court, for which I express my deepest gratitude to both the honorable forums.

Thanks to the efforts of the IT Connect & Social Media Committee, the Chambers has now more than 10,000 followers on Linkedin. The Chamber has moved aggressively in the direction of effective communication on the various social media platforms.

Oh! I realize how time flies as I write this prestigious President Page for the last time at the end of my Presidential Term on 4th July, 2025 for the year 2024-25. The 99th year of the Chamber of Tax Consultants has quickly led us to the Gateway of Centenary Year Celebration upcoming on 4th July, 2025, which is very well designed by the Centenary Year Committee of the Chamber.

The Inaugural Function for the Centenary Year celebration will be held at Hotel Sahara Star, Mumbai and I am very happy to inform you all that His Lordship, Hon'ble Dr. Justice D. Y. Chandrachud, Former Chief Justice of India will be the Chief Guest of the grand event. The details for registration for the event are available on the CTC website. I encourage you all to register for the event and witness the Inaugural Program of the Centenary Year of the Chamber of Tax Consultants.

Before I conclude, I heartily congratulate CA Jayant Gokhale for being elected as President of the Chamber for the term 2025-26, which is the Centenary Year. I am sure that his vast experience as as Past Member of Central Council of ICAI and as Past Chairman of WIRC of ICAI, will lead the Chamber to the greater heights. My best wishes to all the newly elected Managing Council Members in the team of CA Jayant Gokhale.

There are many personalities, whom I owe a vote of thanks. Firstly, I offer my sincere prayers to the Almighty for giving me a learning opportunity in leading the Chamber. I heartily thank my team of Office Bearers viz. CA Jayant Gokhale, Vice-President (and now President Elect), CA Neha Gada & CA Mehul Sheth, both the Hon. Jt. Secretaries and CA Vitang Shah, the Hon. Treasurer, for their all time support to me. I thank all the members of Managing Council for their invaluable guidance to me at every step. I am thankful to the esteemed Past Presidents for their faith in me. I sincerely thank Editor CA Anish Thacker, Journal Committee Chairman CA Ameya Kunte, his team and members of the Editorial Board for providing invaluable input in designing the Chamber's monthly Journal. I heartily thank members of Delhi Chapter & Study Groups of Bengaluru, Hyderabad & Pune for carrying out various educational activities at their ends. I am very happy to put on record that all the core group members of various committees have organized all the events enthusiastically with novel ideas.

I am running short of expressing my thanks to all the authors, faculties at various events, sister organizations, participating colleges and various Government forums in joining hands with Chamber in spreading education. I also highly appreciate the efforts of CTC Staff team headed by Mr. Hitesh Shah, Manager in fulfilling action points allotted to them. I thank all the CTC members for their whole-hearted encouragement to me through my interaction during various seminars, webinars, courses, RRCs and through personal mails/calls/ messages to me. My Best Wishes to all the esteemed members of the Chamber!

This month's Journal features a special story on "Non-Resident Indians – Current Tax & Exchange Control Issues". I thank CA Ameya Kunte and his team for selecting this unique topic. I thank all the authors for their contributions.

Assuring always my service to the Chamber in future,

Jai Hind !

CA Vijay Bhatt
President



From The Editor's Desk

CA Anish M. Thacker

My Brothers and Sisters,

"Follow effective action with quiet reflection. From the quiet reflection will come even more effective action."

– Peter F. Drucker

I write this message on a quiet Sunday night at the end of a very hectic work week and the cusp of the beginning of an even more hectic one. The month of June has arrived and soon, for us at the Chamber, it will be the start of something magical, our centenary year will begin! And there will be even more action, more programmes, better programmes, our six special issues of the Journal will be released in the centenary year, and there is so much more to be planned and executed.

And, I am using this Sunday night to quietly recall what I can, of what the Chamber has done in its 99 years, which is undoubtedly, a lot. I am also excited and optimistic to launch into a new year, a special year. Which is why, these moments of quiet reflection, present an opportunity to share something close to my heart.

The subject I want to touch upon is the importance of writing and journalling. I am sure most of you would have read the interview of the IPL's Orange Cap Holder, Sai Sudharshan, all of 25 years old, and promising to be India's next big talent on the international stage. In his interview, he was questioned as to why he writes a lot, in his note book. His reply was that his parents had instilled in him, the importance of writing and journalling, from a very young age, and when he writes about various cricketing things, it helps him put things in perspective and think and reflect better on what he needs to do to make his game better.

In today's day and age, the art of writing is fast diminishing. The carrying of a notebook and a pen or a pencil has become old fashioned and passe. Digital devices with audio capabilities are replacing the traditional writing tools. And, with that, the art of noting things down is dying. I would urge all of us to reflect on what noting things down and writing them down, did for us when we were Sai Sudharshan's age. Did we not remember things better when we wrote them down? Did not expression of an idea in our own words, help us polish a crude thought into implementable action? Did our writing not help us paint an indelible picture in our brains? If the answer to that is in the affirmative, why are we not passing down the habit of writing to not only our children, but to our juniors in the office. I have many a times seen Pradip Kapasi, my dear friend and Past President of the Chamber, dictate things to his juniors in his office, who would at the first instance, diligently write these down by hand and then and only then, transcribe the thoughts into submissions or opinions in a MS Word Document. I am sure that this habit of writing not only improves motor skills in a person but also helps contextualise ideas which can be random, into implementable actions. Therefore, I urge each and every one to cultivate and rekindle the habit of writing things down by hand.

The utility of maintaining a diary or a journal is equally understood. I would however want to not elaborate on journaling in this editorial but would want to reserve it for a future more appropriate time.

Coming to this issue of the Journal, it deals with a very important practical subject of 'Non Resident Indians – Current Tax & Exchange Control Issues''. We all have NRI clients and sometimes find ourselves stumped

by some quite illogical and perplexing practical challenges while dealing with their tax and FEMA matters. The experienced authors of the articles in this issue, have taken up some of these cases and have given their learned views on what needs to be done, which will be of good use to the readers (and don't forget to write good suggestions down!). From the Journal Committee, Chairman, Ameya Kunte, and Vice Chairman Jiger Saiya have painstakingly and methodically curated this issue. I am grateful to the authors and the Chairman and curators for this extremely useful issue of the Journal.

As mentioned, another year is close to ending, my first year as Editor of this unique and prestigious Journal is drawing to a close in the blink of an eye. I do hope you readers have found my messages useful and thought provoking. I thank each and every one of you readers for being with me throughout this year's journey. I would like to express my sincere gratitude to the Office Bearers, President, Shri Vijay Bhatt, Vice President, Shri Jayant Gokhale, Ho, Secretaries, Ms. Neha Gada and Shri Mehul Sheth and Treasurer, Shri Vitang Shah for their guidance an support throughout this year. My grateful thanks from the bottom of my heart to the Editorial Board Members, S/Shri Pradip Kapasi, Kishor Vanjara, Mahendra Sanghvi, Yatin Desai, Manoj Shah and Vipul Choksi, (my friend always there for me in need, and therefore who is a friend indeed!) for their contribution to this year's issues. My team of the best Assistant Editors, S/Shri Chirag Wadhwa, Dharan Gandhi, Fenil Bhatt, Haresh Chheda, Nikhil Tiwari, Rakesh Upadhyay, Sachin Sastakar, Vikram Mehta, and above all, my dear dear friend, Yatin Vyavaharkar (we have been secretaries together and our bonding since then has been nothing short of Amazing!) has been my backbone throughout the year and the Journal's quality is improved by their sincere and hardworking inputs. Thanks a ton, Guys! The Journal Committee, Chairman, Shri Ameya Kunte, Vice Chairman, Shri Jiger Saiya and Convenors, Shri Bhavik B Shah, Smt Toral Shah and Jagruti Sheth have breathed so much life into the Journal and also given it a befitting look for the Centenary Year. Thank You so much too!

I end with an apt quote for this occasion.

"For last year's words belong to last year's language and next year's words await another voice. And to make an end is to make a beginning."

– T.S. Eliot

Jai Hind!

CA Anish M. Thacker
Editor



WHY RESIDENTIAL STATUS MATTERS



CA Amber Bhavsar

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* See Disclaimer on page 4

Overview

With a growing number of individuals having a global footprint, determining tax residency has become a critical factor in managing cross-border tax exposure. This article explores why residential status under India's Income-tax Act, 1961 is central to an individual's tax obligations, influencing the scope of taxable income, foreign asset disclosures, and eligibility for treaty relief. It highlights common pitfalls – such as miscounting days, misunderstanding deemed residency, and confusing FEMA and tax residency rules – and explains how tie-breaker provisions under DTAAs can override domestic law in dual residency cases.

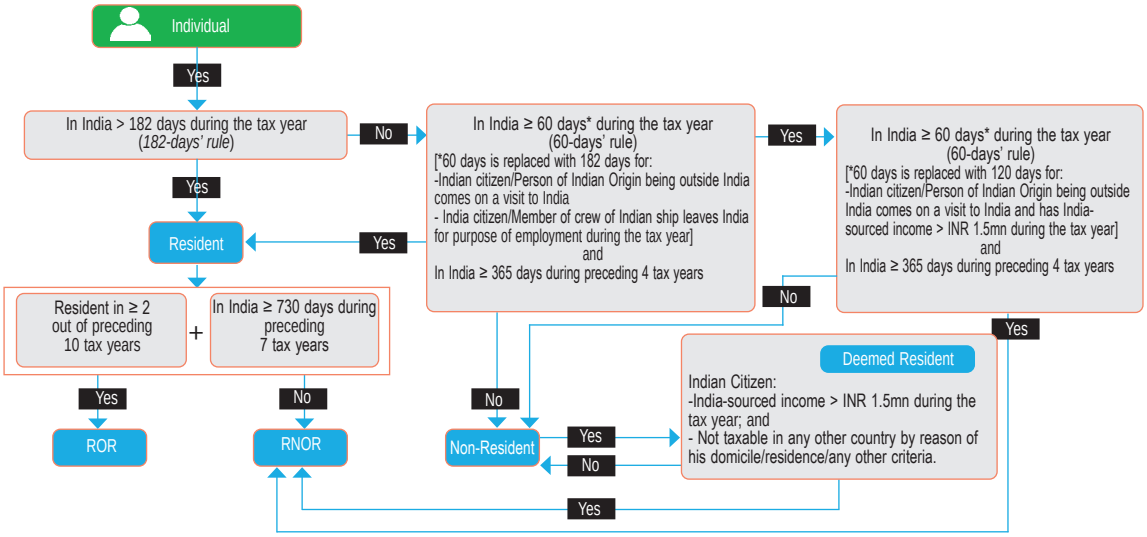
Through recent judicial precedents, the article illustrates how courts have applied treaty-based residency rules, even recognizing split-year scenarios in practice. It also offers practical guidance on procedural compliance, including accurate return disclosures, income bifurcation, and documentation strategies for defending non-resident status.

In India, the tax residency rules under Income-tax Act, 1961 ('the Act') are the cornerstone of how an individual is taxed. The charge of tax is not based on domicile or citizenship but on an individual's physical stay in India. These rules are not only pivotal for determining an individual's tax obligations, but they also dictate the scope of taxable income, eligibility for tax credits, and the applicability of Double Taxation Avoidance Agreements ('DTAAs'). For Non-Resident Indians ('NRIs'), Overseas Citizens of India ('OCIs'), entrepreneurs with a global footprint and expatriates, comprehending these regulations is essential to planning and assessing their Indian tax status. This article explores the practical aspects of tax residency in India and shares insights into some common misnomers.

Determining Tax Residency in India

Under the Act, an individual's residency status is assessed annually based on their physical presence in India during a tax year from April 1 to March 31. The rules are prescribed under section 6 of the Act. Below is a detailed illustration of the criteria:

Under the Act, an individual's residency status is assessed annually based on their physical presence in India during a tax year from April 1 to March 31. The rules are prescribed under section 6 of the Act.



Category	Test for Residency in India
Basic Condition	Stay ≥ 182 days in India during the Financial Year (FY) OR Stay ≥ 60 days in India + ≥ 365 days in preceding 4 FYs
Relaxation for Indian citizens or OCIs visiting India	60 days replaced by 182 days (or 120 days if total Indian income > INR 1.5 million/ INR 15 lacs)
Additional conditions for **Resident and Ordinary Tax Resident ('ROR')** per section 6(6) of the Act	Resident in 2 out of last 10 FYs and Stay ≥ 730 days in last 7 FYs

The sum and substance of the above has been tabulated as a snapshot:

If the basic conditions are not met individual would be treated as a **Non-Resident ('NR')** for tax purposes in India and if basic conditions are met but additional conditions are not met individual would be treated as a **Resident but Not Ordinary Tax Resident ('RNOR')** for tax purposes in India.

The scope of taxable income also depends on the tax residential status:

Indian tax residential Status	Income taxable in India
ROR	Global income taxable
RNOR	Indian sourced income and foreign income from Indian business/profession controlled from India
NR	Only income received or accrued in India

The above classification also affects reporting obligations, foreign asset disclosures, and eligibility for benefits/credits under DTAAs.



Triggers for Residency

While most individuals may plan their stay in India and take appropriate advice and measures to understand their tax status; several scenarios can unexpectedly trigger tax residency. Some of them have been enumerated below:

- Miscalculation of days spent in India due to:
  - Ignoring arrival/departure days: Both are counted as days in India, but people often skip including those while calculating days present in India.
  - Assuming calendar year: India follows the financial year (April–March), not the calendar year. Several individuals erroneously provide information related to the calendar year that shows the incorrect picture.
- Misinterpreting the rules with respect to the specified threshold:
  - Many individuals mistakenly apply the 60-day rule without considering the cumulative 365-day condition for the preceding four years.
  - Many individuals also end up misinterpreting the 182-day viz. 120-day rule post-Finance Act 2020.
  - Ignoring "deemed residency" under section 6(1A) of the Act: Indian Citizens/Persons of Indian Origin earning INR 15 lakh or more from Indian sources but not liable to tax elsewhere and spending 120–182 days in India may be deemed RNOR.
- Not tracking frequent short visits: Multiple short trips to India may cumulatively breach the 60-day threshold. Not tracking these thoroughly could result in crossing the mark.
- Remote work from India: Working remotely for a foreign employer while in India still counts as a presence. Physical presence regardless of purpose is considered while computing tax residency in India.
- Medical emergencies or family events: Extended stays due to personal reasons can inadvertently tip the balance and result in unplanned residency. While these cannot be avoided, planning or being informed beforehand could be useful.

Additional factors to monitor

There are various scenarios, which also need to be tracked to ensure one is on the right side of tax-related matters as under:

- **Managing businesses while on holiday:** Holiday stays that involve work often blur the lines between personal and professional purposes of stay. Running a business or attending meetings while on a personal trip to India may have tax implications. An individual would need to be mindful of the following:

  – Active involvement in Indian operations may be construed as having a business connection.

An individual would need to be mindful of the following:
- **Active involvement in Indian operations may be construed as having a business connection.**
- **Digital footprints (emails, meetings, transactions) can be used to establish a presence in India.**

  – Digital footprints (emails, meetings, transactions) can be used to establish a presence in India

- **Trailing Income**

  Bonus/ stock income/ social security income and withdrawals/any trailing income relating to the Indian service period will be taxable in India, irrespective of the Indian tax residential status. Relevant withholding of Indian taxes would also take place. Hence, NR-category taxpayers need to be mindful of this aspect. Several promoters/key management personnel who continue to hold stakes in corporations where they may have served in India would have trailing income which would be taxable in India when accrued/received in India.

- **Confusion between definitions under the Act and Foreign Exchange Management Act, 1999 ('FEMA")**

  – As seen above, the Act being a revenue law provides for tax residency as a foundation for assessing the taxability of income.

  – FEMA in contrast being a regulatory law defines residency as a framework of cross-border transactions.

  – Residency under FEMA is based on intention to stay in India along with physical presence, while the Income Tax Act is purely based on physical presence.

  – A person could be a resident under FEMA but a non-resident under the Income Tax Act or vice versa.

  – Residency under FEMA warrants certain formalities such as redesignating bank accounts etc. However, taxability would be considered qua the Act in all cases.

- **OCI card holders**: While this category of visitors enjoys a certain set of relaxations with respect to Immigration/ visa formalities; the tax residency rules applicability is still the only factor for tax incidence. Several individuals from this category either used to be regular Indian citizens who have emigrated abroad or continue to have family ties in India. Many OCIs enter into transactions for inherited/ancestral assets, continue



to have bank accounts in India or are looking to plan their estates, which include Indian assets. Hence, tax and foreign exchange rules need to be addressed in tandem for them.

- **Applicability of Foreign Tax Credits**

  – DTAAs dictate when and how foreign tax credits can be availed so that individuals are not burdened with double tax on the same income.

  – Typically, only ROR cases can claim foreign tax credits while filing their India tax return subject to the fulfilment of prescribed conditions.

  – In a case of split residency, NR/ RNOR status may restrict credit eligibility.

- **Reporting and Disclosure Obligations**

  – RORs must disclose all foreign assets and income in Schedule FA in the tax return form. This schedule includes disclosure of assets like bank accounts abroad, signing authority of an account, investment in financial instruments etc.

  – All taxpayers regardless of their tax residential status must disclose the below:

  - Directorship and unlisted shareholding details

  - Details of Indian Assets and Liabilities in Schedule AL in the tax return form when their taxable income in India exceeds INR 50,00,000. RORs must disclose a total of Indian and Foreign Assets in schedule AL.

  – Under Black Money Act, 2015 provisions; a penalty amounting to INR 10,00,000 for failure to furnish details of foreign income and assets or furnish incorrect details in the return of income by every ROR taxpayer may be levied provided the aggregate value of such asset or assets (other than immovable property) exceeds INR 20,00,000

Split Tax Residency

In recent times, the term global nomad has gained significance. It is not uncommon for individuals to be stationed in multiple jurisdictions and be considered tax residents of more than one country based on local country-specific rules for tax residency. Hence, an individual may be a resident

It is not uncommon for individuals to be stationed in multiple jurisdictions and be considered tax residents of more than one country based on local country-specific rules for tax residency.

in Country A for some months in a year and a tax resident of Country B for the

Courts and tribunals have consistently relied on Article 4 of DTAAs to determine the "residency" of individuals who qualify as residents under the domestic laws of both India and a foreign jurisdiction.

balance part. This concept is known as split residency.

India's tax laws, however, do not recognize the concept of split residency within a single financial year. This means that an individual's residency status for the entire year is determined based on their physical presence in India during that year.

However, when an individual qualifies as a resident in both India and another country under their respective domestic laws, the provisions of the relevant DTAA need to be examined. The tie-breaker test needs to be applied to determine the country that has the ultimate right to treat the individual as a tax resident under both local and tax treaty provisions. However, there are several instances where these may hold true only for a partial year.



The following factors are relevant in determining residency under the DTAA when using the tie-breaker test:

1. Permanent Home
2. Centre of Vital Interests
3. Habitual Abode
4. Nationality

However, the tiebreaker conditions are provided in the DTAA without any explanation/definition of various terms and hence, reliance is usually placed on various commentaries on DTAA and judicial precedents available in India. While the concept of split residency is not provided in the Act, it is provided in the Organization for Economic Co-operation and Development (OECD) commentary. It may be noted that India is not a member country of the OECD and hence the OECD commentary has only persuasive value in the courts of law and accordingly, split residency still is considered a contentious issue, which needs through examination of facts on a case-by-case basis.

The above concept and its resolution under DTAAs have been the subject of detailed judicial scrutiny in India. Courts and tribunals have consistently relied on Article 4 of DTAAs to determine the "residency" of individuals who qualify as residents under the domestic laws of both India and a foreign jurisdiction. The tie-breaker tests under Article 4(2) are applied sequentially beginning with the "permanent home" test, followed by the "centre of vital interests," "habitual abode," and finally, "nationality" and mutual agreement, where applicable.

In ***Azadi Bachao Andolan vs. Union of India [(2003) 263 ITR 706 (SC)]***, the Supreme Court of India upheld the supremacy of tax treaties over domestic legislation. The Court emphasized that the provisions of a DTAA, once notified, override conflicting provisions of the Income-tax Act. This

case laid a foundational precedent for applying the tie-breaker rule in dual residency situations, affirming that treaty-based residency determination is both valid and enforceable.

In ***ITO vs. Rahul Bhatia [ITAT Delhi, 2021]***, the Delhi Tribunal dealt with an individual who was a dual resident under the domestic laws of India and another country. Applying the tie-breaker rule under the applicable DTAA, the Tribunal concluded that the taxpayer was a non-resident in India for treaty purposes. As a result, India could not tax his global income, and only Indian-sourced income remained taxable. This ruling demonstrates the practical application of treaty provisions in shielding foreign income from Indian taxation.

In ***Dinesh Vazirani vs. ACIT [ITA No. 844/Mum/2022],*** the Mumbai Tribunal examined the case of an individual who left India mid-year and was treated as a resident under Indian domestic law. However, upon applying the tie-breaker rule under the India-UAE DTAA, the Tribunal held that the taxpayer was a resident of the UAE for treaty purposes. Consequently, only Indian-sourced income was taxable in India. This decision underscores the importance of treaty-based residency analysis in cross-border mobility cases.

In ***DCIT vs. Shri Kumar Sanjeev [ITA No. 1655/Bang/2017]***, the Bengaluru Tribunal addressed the case of a U.S. citizen who was treated as a resident of India under section 6 of the Act. The Tribunal applied the tie-breaker rule under Article 4 of the India-U.S. DTAA, and upon finding that the "permanent home" test was inconclusive, moved to the "centre of vital interests." It held that the taxpayer's personal and economic relations were closer to the U.S., thereby resolving his residency status in favour of the United States.

A similar principle was upheld in ***Sameer Malhotra vs. ACIT [TS-1010-ITAT-2022(DEL)]***, involving a taxpayer who qualified as a resident under the Act but also maintained significant ties with Singapore. The Delhi Bench of the ITAT considered the applicability of the India-Singapore DTAA and concluded that for a part of the financial year, the taxpayer's centre of vital interests and habitual abode was situated in Singapore. Accordingly, salary income earned in Singapore during this period was held not taxable in India—demonstrating the recognition of split-residency situations in line with treaty provisions.

In ***Raman Chopra vs. ITO [TS-5466-ITAT-2016(DELHI)]***, the taxpayer claimed exemption on income earned in the U.S. on the basis of Article 16 of the DTAA. Although he satisfied the domestic residency test under section 6, the tribunal held that his personal and economic ties during the relevant period were stronger with the U.S., thus resolving his tax residency in favour of the U.S. through the Article 4 tie-breaker mechanism.

However, the Tribunal has not hesitated to deny treaty relief where evidence suggests a stronger nexus to India. In ***Shalini Seekond vs. ITO [TS-366-ITAT-2016(Mum)]***, the taxpayer, a Sri Lankan national, claimed to be a resident of Sri Lanka. However, based on her permanent relocation to India post-marriage, the sale of Sri Lankan assets, and investment in Indian mutual funds and real estate, the ITAT concluded that her centre of vital interests had shifted to India. She was thus held to be a resident of India for tax purposes, and global income, including gains from Sri Lanka, was deemed taxable in India. Though the ruling was adverse

to the taxpayer, it reaffirmed the analytical framework laid down under Article 4(2).

The position has also been upheld in AAR rulings such as ***Dr. Rajnikant R. Bhatt vs. CIT [1996, 222 ITR 562 (AAR)]*** and ***Mohsinally Alimohammed Rafik vs. CIT [213 ITR 317 (AAR)]***, where the Authority meticulously applied Article 4 of the India-UAE DTAA to assign residency status based on factors like vital interests and habitual abode. These rulings have played a significant role in shaping the jurisprudence on tie-breaker applications under tax treaties.

The above cases illustrate that while Indian tax laws do not recognize split residency, the application of tie-breaker rules under DTAAs can lead to a determination of ultimate tax residency that could potentially split the year between two countries.

Procedural Considerations for Split Residency Cases

In addition to maintaining robust documentation, individuals evaluating a split residency position should be mindful of several procedural aspects when filing their Indian tax returns. These considerations are critical to ensure accurate reporting and to avoid potential challenges from tax authorities:

- **Correct Disclosure of Residential Status in Tax Return:**

  When applying tie-breaker rules under a Double Taxation Avoidance Agreement (DTAA) to determine final tax residency, it is essential to reflect the appropriate residential status in the Indian tax return. Failure to do so may result in the denial of split residency claims or treaty benefits. While there is no explicit guidance on the correct selection in such cases, taxpayers should consider the following:

  – If an individual qualifies as a resident only for part of the Indian tax year, they may still need to report as a ROR to claim foreign tax credits (FTCs) and disclose exempt income under treaty provisions. Declaring NR status for the entire year may trigger scrutiny or correspondence from the tax department.

  – The Schedule FA (Foreign Assets) in the return is highly specific. In split residency scenarios, even partial-year ROR status may necessitate disclosure of overseas assets and related income. Careful bifurcation between taxable and non-taxable income is essential.

- **Income Bifurcation and Taxability:**

  Accurate segregation of income based on the period of Indian tax residency is crucial. For individuals qualifying as ROR for only part of the year, global income is taxable only for that duration. Detailed calculations and supporting documentation should be maintained to substantiate the rationale for income inclusion or exclusion.

- **Supporting Documentation for Split Residency Claims:**

  To strengthen the split residency position and claim treaty benefits, the following documents should be obtained and retained:

  – Tax Residency Certificate (TRC) from the other country, covering the relevant period.



- Form 10F, which provides additional information required to claim DTAA benefits.

- Records of foreign assets, income earned, taxes paid, and any other relevant documentation to support FTC claims and comply with disclosure requirements.

Supporting NR Status: A Practical Toolkit

Maintaining detailed records and documents is essential for all taxpayers, but it is especially crucial for NR taxpayers in India. Here are some practical tips to help defend NR tax residency status:

- Maintain Travel Logs: Keep records of passport stamps, boarding passes, work permits, and visa details for yourself and your family.

- Track Days Spent in Each Country: Regularly update a tracker of the days spent in each country, particularly if substantial travel is involved.

- Document Employment Contracts and Agreements: Retain copies of employment contracts, shareholder agreements, and asset details.

- Retain Tax Residency Certificates: Keep tax residency certificates from foreign countries and any other proofs of foreign taxes paid.

- Preserve Digital Evidence: Save emails, work logs, lease agreements, and utility bills as digital evidence.

- Substantiate Split Residency: If it is a candidate for split residency, maintain robust documentation to substantiate the nexus to a particular jurisdiction. This includes voting rights, children's schooling information, and other evidence of social, economic, and familial ties.

Tax residency in India is more than a compliance checkbox—it shapes the entire tax profile of an individual.

Tax residency in India is more than a compliance checkbox—it shapes the entire tax profile of an individual. With increasing global mobility, digital footprints, and cross-border income, understanding and managing residential status is paramount. Whether it is an NR returning home, an OCI visiting family, or a digital nomad, staying informed and being proactive could facilitate in mitigating unexpected tax liabilities and other resulting obligations. By maintaining proper documentation, planning and seeking professional advice, when necessary, individuals can navigate the nuances of multi-jurisdictional tax residency.

■

CLAIMING TAX TREATY (DTAA) BENEFITS – GET A LOWER TAX RATE





CA Anjali Gandhi *CA Krina Koladiya*

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Overview

With increasing mobility, and India citizen settling abroad while continuing to have passive sources of income in India, in form of interest, dividend, rental income, capital gains on investments one of the pain points/key concerns for such NRIs has been cross border taxation. Such income would likely be taxed in India (source-based taxation) as well as be taxed in the resident country (residence-based taxation).

To address the issue of double taxation, India has entered into double tax avoidance agreements (DTAAs) with more than 90 countries. Whilst there DTAAs provide for allocation of taxing rights amongst the countries, tax relief through exemptions, reduced tax rates, foreign tax credit mechanism, availing of DTAA benefit is not automatic in nature. To avail treaty benefits one would be required to fulfil condition as prescribed under the Act as well as the DTAA.

This article would delve into the relevant provisions of the Income Tax Act, 1961 (Act) its interplay with DTAA, procedural aspects and practical nuances surrounding documentation requirement such as tax residency certificate, filing of Form 10F, no permanent establishment declaration and other relevant declarations that the NRIs must provide to avail DTAA benefits.



1. Background

1.1. With advent of globalisation, Indian citizens who have settled abroad for work or otherwise, generally end up earning income across several jurisdictions. While their active source of income may be outside India, they may continue to have a passive source of income in India say in the form of interest on bank deposits, rental income from property in India, income from investments such as dividend, capital gains, etc.

1.2. One of the key concerns for such Non-Resident Indians ('NRI') has been cross border taxation since such source of passive income being India can be taxed in India (source-based taxation) as well as be taxed in their country of tax residence (residence-based taxation).

1.3. To address the issue of double taxation, India has entered into Double Tax Avoidance Agreement ('DTAA/ Treaty') with more than 90 countries. The DTAAs focus on allocation of taxing rights between source country and resident country. Further, the DTAAs amongst other also provide for mechanism of claiming tax credit, tax exemptions and lower/beneficial tax rate provisions.

1.4. Per the provisions of the Indian Income Tax Act, 1961 ('the Act') the India sourced income (i.e., accruing/arising, deemed to accrue/arise, received or deemed to be received in India) would generally be subject to withholding of taxes at source ('TDS'). The Act provides that taxes are required to be withheld as per the rates under the Act or DTAA whichever is beneficial.

The beneficial provisions under the DTAA are subject to fulfilment of certain conditions under the DTAA as well as the Act.

1.5. Further, the NRIs may have certain exemptions/relaxation in their home country on such passive income; say interest income is not taxable in the resident country if below specified threshold, and hence, may not qualify for foreign tax credit or taxable at lower rate of 10%.

To address the issue of double taxation, India has entered into Double Tax Avoidance Agreement ('DTAA/Treaty') with more than 90 countries.

In such scenario, if taxes are withheld at higher rate in India (say at highest effective tax rate of 39%) and not at beneficial rate under DTAA (generally tax rate of 10-15%) it can be highly tax inefficient. Further, if taxable at lower rate in home country, the foreign tax credit of taxes withheld in India may be restricted or not fully available.

Hence it becomes imperative for the NRIs to optimise the tax rate in India by option for lower/beneficial provisions under the DTAA as against higher rates of taxation under the domestic tax law.

1.6. In this article we have delved into the relevant provisions of the Act, conditions to be fulfilled for availing beneficial provisions of the DTAA and practical challenges thereof. The discussion primarily focuses on passive streams of income of the NRIs such as interest, rent, dividend, capital gains, etc.

2. Overview of the relevant provisions of the Act

Obligation to withhold taxes – Section 195 of the Act

2.1. Section 195 of the Act provides that any person responsible for paying to a non-resident interalia any sum chargeable under the provisions of the Act shall at the time of credit or payment, whichever is earlier, deduct TDS at rates in force.

2.2. Accordingly, the obligation to withhold taxes u/s 195 of the Act, would arise only if such payment is chargeable to tax in India[1].

Chargeability of income

2.3. Per section 4 read with section 5 of the Act, following income of non-resident would be taxable in India:

- Received or deemed to be received in India; or
- Accrued or deemed to be accrued in India.

2.4. Incomes which are deemed to accrue or arise in India, are listed down in section 9 of the Act, which amongst others would include:

- Income through or from any asset or transfer of capital asset situated in India
- Dividend paid by an Indian company outside India
- Interest payable by Government
- Interest payable by person resident in India (unless borrowed for business or profession outside India)
- Interest payable by non-resident (if borrowed for business or profession in India)

Section 90(2) of the Act, provides, wherever India has entered into a DTAA, applicable to a non-resident, the provisions of the Act or DTAA whichever is beneficial will apply.

Beneficial Treaty provisions override provisions of the Act

2.5. Section 90(2) of the Act, provides, wherever India has entered into a DTAA, applicable to a non-resident, the provisions of the Act or DTAA whichever is beneficial will apply.

2.6. To simply state if the DTAA provides that certain income is not chargeable to tax then the source country (in this case India) does not have taxing right or provides a beneficial/lower rate of tax and the non-resident shall be eligible to claim relief under the DTAA, in accordance with provisions of section 90(2) of the Act.

3. Availability of benefits under DTAA

Per the provisions of the Act as well DTAA, the availability of DTAA benefits to a non-resident, is subject to fulfilment of specified conditions and is not automatic in nature.

3.1. Tax residency certificate ('TRC')

3.1.1. Per section 90(4) of the Act, the eligibility to claim relief under DTAA would be subject to such non-resident having obtained a TRC from the Govt. of the country of residence.

Whether absence of TRC could lead to denial of treaty benefits?

1. *GE India Technology Centre Pvt. Ltd. vs. CIT (2010) 327 ITR 456 (SC)*

Reference is drawn to the ruling of the Hon'ble Ahmedabad Tribunal wherein it was observed that as per section 90(2) provisions of the Act, can apply only to the extent beneficial to the non-resident taxpayer. Hence, in absence of TRC, provisions of section 90(4) cannot be invoked to deny treaty benefits.

3.1.2. As mentioned in above paras, section 90(2) of the Act provides that provisions of the Act or DTAA, whichever is more beneficial to the non-resident should apply. Hence, a question may arise, whether the provisions of section 90(4) can override the provisions of section 90(2) of the Act i.e., can absence of TRC be construed as a limitation/be regarded as reason for denial of treaty benefits?

3.1.3. In this regard, reference is drawn to the ruling of the Hon'ble Ahmedabad Tribunal[2] wherein it was observed that as per section 90(2) provisions of the Act, can apply only to the extent beneficial to the non-resident taxpayer. Hence, in absence of TRC, provisions of section 90(4) cannot be invoked to deny treaty benefits. However, the Hon'ble Tribunal also observed that the onus is on the non-resident to substantiate residency as per article 4(1) of the DTAA.

The aforesaid ruling was followed by the Hon'ble Hyderabad Tribunal[3] wherein it was held that income not taxable in India as per the DTAA, could not be taxed in India, merely on the grounds that TRC was not available.

3.1.4. It should be noted that generally Article 1 of the DTAA, state that the DTAA would be applicable to the residents of the contracting state. Further, generally Article 4(1) of the DTAA *interalia* defines the term 'residents of the contracting state' to mean any person who is liable to tax therein by reason of his domicile, residence, citizenship, place of management, place of incorporation, or any other criterion of a similar nature, provided.

Hence, to avail the treaty benefits, the non-resident should qualify as resident of the contracting states, per the DTAA.

3.1.5. Based on the above, one may argue that as long as the non-resident is able to substantiate his tax residency in the relevant country outside India, the treaty benefits ought not to be denied merely on the grounds that TRC has not been obtained.

3.1.6. However, it may be noted that in practice the lower authorities may still proceed to deny treaty benefits in absence of TRC.

Further, tax deduction at source being an onerous obligation, the deductor may proceed to withhold taxes at higher rate prescribed under the Act (and not pass on treaty benefits) if TRC is not provided by the non-resident deductee.

Accordingly, to avoid protracted litigation or higher withholding of taxes, the NRIs should obtain TRC. In case of recurring transactions, the NRIs could

2. *Skaps Industries India (P.) Ltd. vs. ITO, International Taxation [2018] 94 taxmann.com 448 (Ahmedabad - Trib.)*
3. *Ranjit Kumar Vuppu vs. ITO (International Taxation) [2021] 127 taxmann.com 105 (Hyderabad - Trib.); Sreenivasa Reddy Cheemalamarri vs. ITO (International Taxation) [2020] 118 taxmann.com 684 (Hyderabad - Trib.)*

consider applying for the TRC well in advance.

3.1.7. In a scenario, wherein despite the efforts, TRC cannot be obtained, it recommended to maintain the following (illustrative):

- Document the efforts undertaken for obtaining the TRC (such as application filed and acknowledgement thereof, follow-up emails, etc.)
- Return of income filed in the resident country as tax resident
- Other documents to prove residency/domicile

Practical issues/nuances

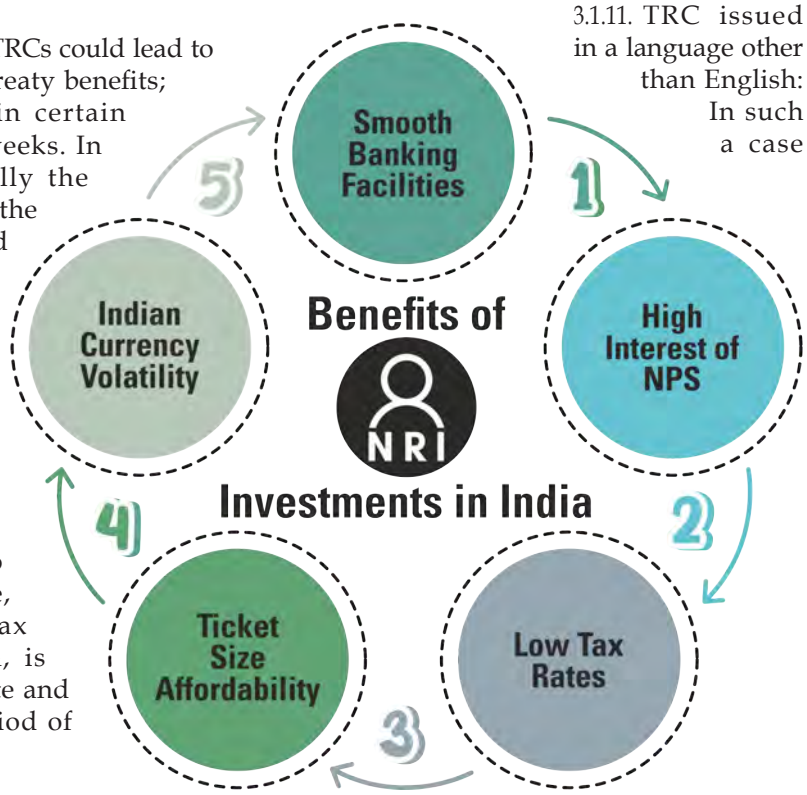
3.1.8. Delay in obtaining of TRCs could lead to temporary denial of treaty benefits; obtaining of TRCs in certain countries takes 6-8 weeks. In such cases, practically the non-resident may let the deductor withhold taxes at higher rate and once the TRC is obtained, claim refund of excess taxes, at the time of filing return of income in India.

3.1.9. Format of TRCs could differ from country to country; for instance, the TRC issued by tax authorities in Spain, is issued for specific date and does not contain period of residency. Per the provisions of the Act, TRC should be valid on the date of transaction/date on which taxes are to be withheld. If the transaction spans over the financial year, such TRC issued on particular date without reference to the period of residency could be challenged.

In such cases, generally the deductor may proceed to withhold taxes at higher tax rate on a conservative basis.

3.1.10. If income in India (say interest) spans over say financial year 2025-26 however, the TRC is issued by the Govt. of resident country for say calendar year 2025; in absence of TRC for calendar year 2026, the treaty benefits could be denied in respect of income for the period not covered (in this case Jan – Mar 2026).

3.1.11. TRC issued in a language other than English: In such a case



certified translated copy may be obtained and kept on record by the non-resident.

3.2. Form 10F

3.2.1. Section 90(5) read with Rule 21AB of the Income Tax Rules, 1962 ('the Rules') provides that in addition to the TRC, the non-resident taxpayer shall also be required to provide the following information in Form 10F:

- Status of the taxpayer
- Nationality/country of incorporation or registration
- Tax identification number; in case no such number then unique number basis which he is identified in the resident country
- Address in the resident country

Practical issues/nuances

3.2.2. Per Rule 21AB(2) of the Rules, the non-resident may not be required to provide the above information if it forms part of the TRC obtained. In such scenarios, the non-residents are not required to file Form 10F.

However, in practice, there have been instances wherein notices have been received by the non-resident who filed their return of income in India claiming beneficial DTAA provisions, but Form 10F had not been filed.

In such instances, whilst the treaty benefits could not be denied automatically and an opportunity may be provided to the non-resident to demonstrate that the required details are appropriately captured in the TRC and hence, the non-resident was not required to file Form 10F, it could invite unnecessary scrutiny or result into prolonged communication with income tax office.

Hence, practically, the non-resident may file Form 10F (irrespective of the information captured in TRC) specifically if claiming treaty benefits.

3.2.3. Form 10F is required to be filed electronically on the Indian income tax portal. In filing the said Form, following practically issues/challenges could arise:

- For filing the said Form, an account needs to be created on the income tax portal by the non-resident; technical glitches such as delayed/non-receipt of One Time Password ('OTP') on foreign mobile no. or email address with domain name other than those generally recognised (such as gmail.com, etc.)
- Non-residents may not be well versed with the terms of the Act (such as previous year, assessment year, etc.) and thereby fill incorrect details; such incorrect information in Form 10F could lead to higher deduction of TDS as per the Act.

3.3. No permanent establishment ('PE') declaration

3.3.1. Generally, as per the DTAAs entered into by India, the beneficial tax rate under the specific income article for interest, dividend, capital gains, is subject to such non-resident not having a PE in India or such income being attributable to PE in India.

3.3.2. Accordingly, from a withholding tax perspective, the deductor along with documents such as TRC, Form 10F would also obtain a no PE declaration. There is no standard format for such declaration. The deductor may provide its own format or request the non-resident to provide a simple declaration on letterhead stating that the non-resident does not have a PE in India.

3.3.3. For the purpose of making no PE declaration, it shall be imperative for NRIs to evaluate the possibility of forming a PE in India in scenarios (illustrative) where say NRI provides managerial, technical or consultancy services, to a person resident in India, and in connection with the same has stayed in India for certain number of days, or such NRI is earning business income through a dependent agent in India, or such NRI has come to India on a vacation and has been operating his business during such time form his residential house in India, etc.

Note that the concept of PE is highly nuanced and requires detailed analysis. Since the primary focus of this article is to highlight the procedural aspects and practical nuances involved in claiming the DTAA benefits, the technical contours of what constitutes a PE are not being delved into.

3.3.4. It may be noted that generally in case of NRIs settled outside India and working abroad, without any business or profession in India, it is highly unlikely for such NRIs to form a PE in India. Accordingly, for such NRIs no PE declaration would merely be a procedural compliance.

3.4. Residential status declaration

3.4.1. The applicability of the DTAA as also discussed in para 3.1.4 above, is subject to the non-resident qualifying as resident of the other country with which India has entered a DTAA.

3.4.2. Along with the no PE declaration, the deductor of TDS would require the non-resident to provide a declaration that the person is tax resident of the residence country as per the applicable DTAA and continue to maintain 'tax residence' status in respective country or jurisdiction.

3.4.3. In this regard, it shall be imperative for NRIs to evaluate whether they qualify as tax resident of the said resident country and thereby eligible to claim treaty benefits.

Practical issues/nuances

3.4.4. In case of NRIs there is a possibility of dual residency due to varying conditions for determining tax residence across the globe (financial year v. calendar year concept for residency, statutory residency provisions irrespective of period of stay upon meeting certain conditions, etc.).

In such dual residency scenarios, Article 4 of the DTAAs provide for tie-breaker test for individuals based on:

- Permanent home test: In which country does the person have a permanent dwelling?
- Centre of vital interest: The location of personal and economic relations of such person

- Habitual abode: The country where the person habitually resides

- Nationality

Note that in case if the tie does not break basis the above tests in favour of any one country, the non-resident would be required to resort to mutual agreement procedure ('MAP'). The MAP to determine the tax residency for DTAA purposes, could be lengthy and tedious. Pending conclusion, the NRIs is likely to be denied beneficial provisions of DTAA especially by the deductor of TDS.

3.4.5. This article does not delve into determination of residential status u/s 6 of the Act as well as the DTAA, as these aspects would be comprehensively covered in other chapters of this journal. However, to conclude the presumption in case of NRIs settled abroad who are visiting India for a short stay, even if the tie breaker test must be applied, the tie would likely break in the residence country of such NRI (i.e., outside India).

3.5. Other documents and declarations

3.5.1. In practice, non-residents may receive emails prescribing documents to be submitted for claiming of treaty benefits generally from Bank at the start of relevant FY/Companies once dividend is declared. The said emails, require the non-resident to provide following documents in addition to self-attested TRC, e-filled Form 10F, no PE and tax residency declaration:

- Self-attested copy of PAN; in case PAN is not available furnish details such as name, email id, contact number, address in resident country and tax identification number.

- Self-declaration by recipient that they are the beneficial owner of the relevant income ('BO declaration').

Practical issues/nuances

3.5.2. There is no standard format for BO declaration and same could vary for each Bank/Company declaring dividend. This results into administrative inconvenience for the NRIs since, he may have to provide a BO declaration to each such Bank/Company from which interest or dividend is to be received as per the specific format provided. For instance, if the NRIs hold listed shares of 50 different companies and presuming all the said companies declare dividend, BO declaration for each would have to be provided separately, in the specific format provided by the Company declaring dividend.

If the investments of the NRIs are routed through intermediate holding companies (in say countries like Mauritius, Singapore, etc.) it is likely that the lower tax authorities could challenge the beneficial ownership of such income from investments.

3.5.3. If the investments of the NRIs are routed through intermediate holding companies (in say countries like Mauritius, Singapore, etc.) it is likely that the lower tax authorities could challenge the beneficial ownership of such income from investments. Whilst there have been rulings by various Tribunals and Courts that TRC should suffice as proof of beneficial the same could be disregarded at lower tax authorities' level.

3.5.4. Late submission/non-submission of the information requested for by Bank/ Companies, could result into deduction of TDS at higher rates and thereby cash flow issues for the NRIs.

4. Illustrative checklist for NRIs having income from India

To summarise the above, it would be imperative for NRIs intending to avail DTAA benefits, to ensure that the following documents are in place/filed in timely manner:

Document	*Key points for consideration*
TRC	Ensure the following: • application for obtaining TRC is made well in advance; and • valid as on the date of transaction/relevant financial year.
Form 10F	• Form 10F may be filed at the beginning of the relevant FY
Declarations (no PE, tax residency and BO declaration)	• Ensure that declarations are filed in the format provided by the deductor. • Filed within the specified deadlines. • Ensure factually accuracy and evaluate in detail the declarations being made, to avoid misrepresentation.
Rates as per DTAA	• Understand applicability of DTAA and relevant tax rate applicable for the income proposed to be received/ earned.
Dual residency	• Evaluate dual residency specifically in cases where there is change in residential status in middle of the relevant year. • Obtain an opinion on dual residency and tie breaker test and keep it on record.

5. Conclusion

5.1. Interplay between provisions of the Act and DTAA, would be critical in case of NRIs who continue to have a passive source of income in India. Whilst such income could be taxable per the provisions of the Act or a higher rate of tax is applicable per the provisions of the Act, relief could be sought by the NRIs under the DTAA. As discussed in detail above, the applicability of DTAA benefits is not automatic and subject to conditions specified under the Act as well as DTAA.

Judicial precedents in the Indian parlance have time and again underscored the importance of documents as such TRC and Form 10F.

5.2. Judicial precedents in the Indian parlance have time and again underscored the

importance of documents as such TRC and Form 10F. Procedural lapses in fulfilling the prescribed conditions, or absence or inadequacy thereof, could lead to denial of treaty benefits/higher deduction of TDS, cash flow issues, invite unnecessary scrutiny or protracted litigation.

5.3. Going forward, it is imperative for the NRIs and specifically Chartered Accountants advising such NRIs to adopt a strategic approach and move beyond the compliance centric approach. This would include maintaining robust documentation, proactively evaluating treaty eligibility aspects such as residency, beneficial ownership, PE are thoroughly evaluated and ensuring consistency across the documents including return of income to be filed in India by such NRIs.

5.4. To summarise, the DTAA offer significant benefits to NRIs. That said, the access to DTAA benefits is becoming constrained and narrow, with emphasis being placed on thoroughness of procedural aspects substantiated by appropriate documentation/evidence. Professional advising the NRIs are required to stay abreast of judicial trends, administrative constraints and practical solutions and ensure tax efficiency with robust documentation. Proactive planning, timely compliance, efficient documentation and grasp of interplay between the provisions of the Act and DTAA would be key to sound tax strategy for the NRIs. Ultimately, a well guided NRI, backed by precise and diligent execution would not only achieve tax efficiency but also avoid unnecessary scrutiny/protracted litigation.

■

Assisted by CA Kartik Mehta.

" God is present in every Jiva;
there is no other God besides that.
Who serves Jiva serves God indeed. "

Swami Vivekananda

SENDING MONEY OUT OF INDIA: A GUIDE FOR NRIs & PIO ON REMITTANCE OF ASSETS





CA Tanvi Vora *CA Heta Jhaveri*

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Overview

Sending money out of India The remittance of assets from India by Non-Resident Indians (NRIs) and Persons of Indian Origin (PIOs) is governed by the Foreign Exchange Management Act (FEMA) and related RBI guidelines. NRIs and PIOs can remit up to USD 1 million per financial year from their NRO accounts for assets such as property sale proceeds, inherited wealth, or other legally acquired assets. This limit resets annually and requires submission of appropriate documentation and tax compliance certifications.

While repatriation of funds from the sale of immovable property is permitted under the above mentioned USD 1 million scheme, a special provision for repatriation of immovable property sale proceeds is permitted under specific conditions, if the property was purchased using foreign funds, restricted to two residential properties in his/her lifetime. Property acquired while the person was a resident or inherited is treated differently, often requiring prior RBI approval for repatriation for remittances in excess of the USD 1 million scheme limit.

Current income like rent, dividends, and pensions is freely repatriable, with fewer restrictions. However, all remittance processes involve compliance with Indian tax laws, including filing Forms 15CA and 15CB.

Errors in form selection, documentation delays, and technical issues with the online portal are common hurdles. NRIs are encouraged to plan in advance and consult tax and banking professionals to ensure smooth remittance operations.

Introduction

The Reserve Bank of India (RBI), vide through its Notifications, Circulars and Master Directions under Foreign Exchange Management Act, 1999 (FEMA), provides the regulatory framework for repatriating various types of assets abroad. This article outlines the key provisions Non-Resent Indians (NRIs) and Persons of Indian Origin (PIO) should be aware of while undertaking asset remittances from India.

A NRI is a person resident outside India who is a citizen of India.

A PIO is a person resident outside India who is a citizen of any country other than Bangladesh or Pakistan or such other country as may be specified, satisfying certain conditions laid down under Foreign Exchange Management Act, 1999 (FEMA). PIO includes an Overseas Citizen of India (OCI) cardholder who is resident outside India.

Remittance of assets from India by Non-Resident Indians (NRIs) and Person of Indian Origin (PIO) is governed by the following under Foreign Exchange Management Act, 1999 (FEMA):

- Foreign Exchange Management (Remittance of Assets) Regulations, 2016 dated 1 April 2016 (Notification No. FEMA 13 (R)/2016-RB)
- Master Direction - Remittance of Assets (Master Direction No. 13/2015-16 dated 1 January 2016 updated as on 28 April 2016)
- Master Direction – Acquisition or Transfer of Immovable Property under Foreign Exchange Management Act, 1999 (FED Master Direction No. 12/2015-16 dated 1 January 2016 updated as on 1 September 2022)
- Frequently Asked Questions on Remittance of Assets

'Remittance of Assets' under FEMA

Remittance of Assets refers to the transfer of funds abroad from the following sources in India:

1. Deposits with a bank/company/firm
2. Provident fund or superannuation balances
3. Insurance maturity or claim proceeds
4. Sale proceeds of shares and securities
5. Sale proceeds of immovable property
6. Any other asset held in compliance with FEMA regulations

USD 1 Million Scheme for NRIs/PIOs

NRIs and PIO are permitted to remit up to USD 1 million per financial year from:

- out of balances in their NRO accounts

  A NRO account is a rupee-denominated bank account maintained in India by to manage their income earned in India. An



NRO account is used to deposit and manage income that arises or accrues in India, such as rental income from property; interest from fixed deposits or savings; dividends from Indian companies, pension, or any other Indian-source income, sale proceeds of assets held in India

- sale proceeds of assets
- assets acquired in India by way of inheritance/legacy

- in respect of assets acquired under a deed of settlement made by either of his/her parents or a relative as defined in the Companies Act, 2013. The settlement should take effect on the death of the settler

- in case settlement is done without retaining any life interest in the property i.e., during the lifetime of the owner/parent, it would be as remittance of balance in the NRO account

This is popularly known as the USD 1 Million scheme which covers only capital account transactions.

The limit is per person per financial year i.e. 1st April to 31st March and the limit replenishes every financial year.

Such remittances are required to be routed through the same Authorised Dealer bank when made in instalments. They should be supported by documentary evidence confirming the legal acquisition of the asset.

Additionally, the remitter must certify that the funds originate from legitimate Indian sources and are not sourced through loans or third-party transfers. In case of any false declarations, the NRI/PIO shall be held liable for any penal action.

Repatriation of sale proceeds of immovable property

As per section 6(5) of FEMA, a person resident outside India can hold, own, transfer or invest

Such remittances are required to be routed through the same Authorised Dealer bank when made in instalments.

in any immovable property situated in India if such property was acquired, held or owned by him/her when he/she was resident in India or inherited from a person resident in India. Accordingly, assets (e.g. property or shares) acquired when the person was a resident in India or inherited thereafter are protected under Section 6(5). However, a person acquiring property in accordance with section 6(5) of FEMA or his successor cannot freely repatriate outside India sale proceeds of such immovable property without the prior permission of the RBI. If such a person is resident outside India, he/she can utilise the remittance limit of USD 1 million explained above.

Special Remittance Facility for Sale of Proceeds on Immovable Property

A PIO/NRI/OCI, in the event of sale of immovable property (other than agricultural land/farmhouse/plantation property) in India, may be allowed repatriation of the sale proceeds outside India without any monetary limit provided:

- the immovable property was acquired by the seller in accordance with the provisions of the foreign exchange law in force at the time of acquisition;

- the amount for acquisition of the immovable property was paid in foreign

However, a person acquiring property in accordance with section 6(5) of FEMA or his successor cannot freely repatriate outside India sale proceeds of such immovable property without the prior permission of the RBI. If such a person is resident outside India, he/she can utilise the remittance limit of USD 1 million explained above.

exchange received through banking channels or out of funds held in FCNR(B) account or NRE account;

- in the case of residential property, the repatriation of sale proceeds is restricted to only two residential properties

Said special dispensation would also be available if the immoveable property was purchased by PIO resident outside India or an NRI or a OCI out of housing loans AD banks/housing finance institutions and the repayments for such loans are made out of remittances received from abroad through banking channels or by debit to the NRE/FCNR(B) account of such person since such repayments may also be treated as equivalent to foreign exchange received in satisfaction of the above mentioned condition.

Remittances of other income like dividends, rents, etc.

Remittance of current income like rent, dividend, pension, interest etc. of NRIs/PIO do not fall under the definition of 'remittance of assets' and are freely repatriable as current account transactions.

NRIs/PIO have the option to receive (permissible credit) the current income to their Non-Resident (External) Rupee account or Non-resident (Ordinary) Rupee account, provided the AD Bank is satisfied that the credit represents current income of the non-resident account holder and income tax thereon has been deducted/provided for. All balances in NRE account and all current incomes in NRO account are also freely repatriable without any limit.

Persons making payments to such NRIs/PIOs may even remit directly to their foreign accounts, on the basis of appropriate certification by a Chartered Accountant certifying that the amount proposed to be remitted is eligible for remittance and that applicable taxes have been paid/provided for.

Other Practical and Regulatory Aspects for NRIs/PIOs on Remittances under FEMA

In addition to tax and procedural compliance, NRIs and PIOs must consider the following operational and regulatory provisions when planning cross-border remittances from India:

Power of Attorney (POA) Restrictions

While NRIs can authorise a resident Power of Attorney (POA) holder to operate their NRO account, the POA is limited to remitting current income such as rent, interest, or dividends. The POA holder cannot repatriate capital or principal (e.g., sale proceeds of property or investments) without the express permission and documentation from the NRI.

ECB-Linked Charges on Immovable Property

AD banks may allow NRIs or OCIs to create a charge or mortgage on Indian immovable property in favour of overseas lenders to raise External Commercial Borrowings (ECBs). However, if such a charge is enforced, the property must be sold only to a resident Indian, and the proceeds used strictly for repayment of the ECB—not for general repatriation.

Nationality and Eligibility Restrictions

The benefits of the remittance of sale proceeds of immoveable property regulations are only available to NRIs, OCI and PIOs as defined under FEMA. Individuals who are citizens of restricted countries— Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Hong Kong, Macau, Nepal, Bhutan or Democratic People's Republic of Korea—must obtain

Although most asset remittances by NRIs and PIOs are allowed under the automatic route (delegated to AD banks), prior RBI approval is required in certain cases to ensure compliance under FEMA.

prior approval from the RBI before acquiring, transferring, or repatriating immovable property or assets from India.

Students Going Abroad Treated as NRIs under FEMA

As per A.P. (DIR Series) Circular No. 45 dated 8 December 2003, an individual who goes abroad for the purpose of studies may be treated as a Non-Resident Indian (NRI) from the day they leave India, even if their intended stay abroad is temporary. This classification is based on the purpose of stay and not the duration. Thus, such students are eligible for all facilities available to NRIs under FEMA. This includes:

- Opening and maintaining NRE, NRO, and FCNR(B) accounts
- Making investments in shares, mutual funds, and property in India as per NRI regulations
- Availability of USD 1 Million scheme for remittance of assets
- Repatriation of income and investment proceeds, subject to documentation and tax compliance

RBI Approval

Although most asset remittances by NRIs and PIOs are allowed under the automatic route (delegated to AD banks), prior RBI approval is required in certain cases to ensure compliance under FEMA.

RBI approval is specifically required when:

1. *The remittance amount exceeds USD 1 million per financial year:*

   NRIs/PIO are allowed to remit up to USD 1 million per financial year from NRO accounts, including sale proceeds of assets or inherited property. Any request exceeding this limit, by NRIs/PIOs out of the balances held in NRO accounts/sale proceeds of assets/the assets acquired by way of inheritance/legacy even if from inherited or legacy assets, requires prior RBI permission

2. *On account of hardship:*

   Application may be made RBI for prior approval for remittance to a person resident outside India on the ground that hardship will be caused to such a person if remittance from India is not made.

3. *The asset was acquired under Section 6(5) of FEMA:*

   A person who has acquired the property U/s 6(5) of FEMA or his successor cannot repatriate the sale proceeds of such property without RBI approval. However, if such person was resident outside India, he/she may utilise the USD 1 million limit. If such assets were acquired without compliance with prevailing FEMA rules, or if the source of acquisition is unclear, RBI approval is necessary before remittance.

4. *The transaction falls outside standard delegated authority of AD banks:*

   AD banks are permitted to process remittances under specific categories and limits. Transactions that do not clearly fall within these guidelines (e.g. hybrid



assets, disputed ownership, unclear tax status, etc.) must be referred to the RBI for a decision on genuine hardship or special consideration under Regulation 7 of FEMA 13(R)/2016-RB.

Income-Tax Compliances

Remittances are subject to payment of applicable taxes in India. Under FEMA, it is mandatory on the part of AD Banks to ensure compliance with the requirement of tax laws, as applicable.

The relevant provisions governing taxability of foreign remittances and the compliance requirements with respect to the same are provided under Section 195 of the Income-tax Act and Rule 37BB of the Income-tax Rules, 1962.

Provisions under Indian income-tax law

Section 195 of the Income-tax Act states that any person responsible for paying to a non-resident, not being a company or foreign company, any interest (excluding certain kinds of specified interest) or any other sum chargeable under the provisions of the Income-tax Act (not being the income under salaries) shall at the time of credit of such income to the payee in any specified mode, deduct income-tax thereon at the rates in force. The provisions of Section 195 of the Income-tax Act are applicable only if the payment to non-residents is chargeable to tax in India. Further, Section 195(6) of the Income-tax Act requires reporting of any payment to a non-resident in Form 15CA/15CB (as prescribed under Rule 37BB) irrespective of whether such payments are chargeable to tax in India.

As per Rule 37BB(3) of the Income-tax Rules, 1962 read with CBDT Notification No. 93/2015 dated 16.12.2015, 33 categories of remittances are exempt from filing Form 15CA and Form 15CB.

As per Rule 37BB, the remitter is required to furnish:

- **Form 15CA** – A declaration by the remitter that contains all the information in respect of payments made to non-residents
- **Form 15CB** – A Tax Determination Certificate in which the Chartered Accountant examines a remittance with regard to chargeability provisions.

The applicability of these forms depends on the amount and taxability of the remittance:

- ***Form 15CA – Part A*** is required to be filed where the amount of remittance is less than or equal to ₹ 5 lakh during the financial year
- ***Form 15CA – Part B*** must be submitted where the remittance is chargeable to tax but made after obtaining a certificate from the Assessing Officer under section 197, section 195(2) or section 195 (3)
- ***Form 15CA – Part C*** applies where the remittance exceeds ₹ 5 lakh and is chargeable to tax in India. In this case, Form 15CB certificate (from a Chartered Accountant) is mandatory before submission
- ***Form 15CA – Part D*** is applicable where the remittance is not taxable in India under the Income-tax Act, 1961. No Form 15CB is required in such cases.

Form 15CB has six sections to be filled before submitting the form which are as under:

1. Certificate
2. Remittee (Recipient) Details
3. Remittance (Fund Transfer) Details
4. Taxability under the Income-tax Act (without tax treaty relief)
5. Taxability under the Income-tax act (with tax treaty relief)
6. Accountant Details (Chartered Accountant's details)

These forms can be submitted both online and offline (bulk mode) through the e-filing portal. A Chartered Accountant who is registered on the e-filing portal and one who has been assigned Form 15CA – Part C by the person responsible for making the payment is entitled to certify details in Form 15CB.

As per Rule 37BB(3) of the Income-tax Rules, 1962 read with CBDT Notification No. 93/2015 dated 16.12.2015, 33 categories of remittances are exempt from filing Form 15CA and Form 15CB. These exceptions are applicable only if the payment is not chargeable to tax in India.

Compliance for Remitting Funds Abroad

Remittance of Sale Proceeds

In case of remittance from NRO to NRE account/foreign bank account as permitted under the USD 1 million limit prescribed for remittance of assets (e.g. sale of house property), the following compliance will have to be obtained/filed:

Compliance to be undertaken by	For which event	Form
By the buyer of the property	when depositing funds into NRO/NRE account of the NRI seller	Form 15CA – Part B/Part C and Form 15CB (If the NRI seller has applied for a Lower Deduction or Nil Deduction Certificate from the tax authorities under Section 197 of the ITA in order to minimise their tax liability, Form 15CA – Part B will be applicable, otherwise Part C
By the NRI seller	when transferring funds from NRO account to NRE account	Form 15CA – Part D

The transfer from NRO to NRE/foreign bank account may fall within one of the purposes under the category of remittances which may not contain an income element and thus would not be chargeable to tax in India. As such, there should not be any requirement of obtaining Form 15CB and reporting would only be required in Part D of Form 15CA. However, most AD banks insist on furnishing Form 15CA along with Form 15CB for source of funds from which remittance is sought to be made in order to process the remittance. In such cases, reporting would be required in Part C of Form 15CA and the CA would be required to report the taxability of such remittance.

It may be noted that furnishing of inaccurate information or non-furnishing of Form 15CA can trigger penalty of sum of ₹ 1 lakh under section 271-I of the Income-tax Act. Thus, in order to avoid any future litigation and to be compliant from an income-tax perspective, it would be advisable to comply with the reporting obligation under Part C of Form 15CA and obtain Form 15CB from a Chartered Accountant at the time of making remittance from NRO account to NRE/foreign bank account.

Practical issues

While Form 15CA and Form 15CB are essential components of the foreign remittance process, NRIs frequently encounter practical and procedural challenges in complying with these requirements. The following are some of the most common difficulties:

- NRIs are often unclear about whether their remittance is chargeable to tax in India. This leads to errors in selecting the correct part of Form 15CA, or omission of Form 15CB in cases where it is mandatory.

- Further, a common misconception is that all personal transfers or NRO to NRE transfers are exempt from these forms, even when they pertain

to taxable income like rent or capital gains.

- Obtaining the necessary documents—such as sale deeds, PAN details, Tax Residency Certificates (TRC), and Form 10F—can be time-consuming, especially when the NRI is overseas and dependent on local representatives or advisors. Coordination between the NRI, the Chartered Accountant, and the AD bank is another significant bottleneck, often causing delays in submission and remittance.

- Technical issues while filing Form 15CA on the income-tax portal, including access problems and validation errors, further complicate the process. Mistakes in data entry, especially mismatches in the remittance amount between Form 15CA and 15CB, frequently result in rejection of remittance by banks.

- Another key issue arises with remittances from jointly held NRO accounts, where banks insist on additional declarations or no-objection certificates from all account holders. This often applies in case of inherited or co-owned property.

- Lastly, the requirement to file Form 15CA/CB for each transaction—such as monthly rent or recurring remittances—is often overlooked by NRIs who presume a one-time compliance is sufficient.

Addressing these challenges requires advance preparation, clarity on tax implications, and close liaison with a competent Chartered Accountant and the concerned bank to ensure a smooth remittance process and adherence to regulatory norms.

■

"Take up one idea. Make that one idea your life;
dream of it; think of it; live on that idea.
Let the brain, the body, muscles, nerves,
every part of your body be full of that idea, and
just leave every other idea alone.
This is the way to success, and this is the way great spiritual giants are produced."

Swami Vivekananda

NON-RESIDENTS – DECLARING ASSETS & INCOME PROPERLY





CA Paras Doshi *CA Vimal Bhayal*

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Overview

Understanding Income Tax Return filing requirements for Non-Residents under the Indian Income Tax Act is crucial. Filing of ITR is not just an obligation, but it offers various benefits such as serve as an evidence of income earned and taxes paid which can be submitted to the various authorities in India, for fresh visa/ extension, being compliant, etc.

Apart from this, there are various benefits which are available to the non-residents if the income is appropriately disclosed in the relevant ITR. Non-residents are taxed only on the India received, accrued or arised in India. Further, non-residents are not required to disclose foreign assets and liabilities in the ITR. There are special rates applicable to non-residents under the Indian Income Tax Act as well as under relevant Double Tax Avoidance Agreement. There are possibilities where non-residents may not require to file the ITR if the taxes are withheld appropriately as per the provisions of the Indian Income Tax Act. However, if non-residents are claiming the benefit of reduced rates of tax under Double Tax Avoidance Agreement then the filing of ITR should be mandatory. Separately, non-residents should keep in mind about the key disclosures in the ITR which include jurisdiction of tax residence, TIN/ Passport number, Directorships, unlisted equity shares, etc.

Over the past few decades, there has been a noticeable rise in the number of Indian citizens relocating abroad for employment, secondment, deputation or long-term settlement. Am I required to file an Income Tax Return (ITR) in India? Which forms could we opt to file? Is the filing done online? What are the disclosure requirements for Non-Residents ('NRs')? It has been observed that NRs have numerous such queries/ questions with respect to their taxability and income tax filing requirements.

The filing of ITRs is an essential responsibility of every taxpayer, including NRs. While NRs are taxed only on the income that accrues, arises or received in India or deemed to accrue or arise or received in India, the compliance

While NRs are taxed only on the income that accrues, arises or received in India or deemed to accrue or arise or received in India, the compliance requirements and disclosures under the Act are specific.

requirements and disclosures under the Act are specific and should be understood thoroughly to avoid fines and penalties.

In the following paragraphs, the efforts have been made to briefly discuss the key things that NRs should consider with respect to filing of ITRs in India.

1. Are there any provisions that provide an exemption to the NRs from filing the ITR?

If the total income of the NR is less than the basic exemption limit i.e. ₹ 4 lakhs then such NR is not required to file the ITR. However, it is pertinent to note that such NRs shall be required to file the ITR if during the year under consideration, the NR has:

- Deposited the amount aggregating to ₹ 1 crore in the bank account; or
- Incurred expenditure aggregating to ₹ 2 lakh on a foreign travel; or
- Incurred expenditure aggregating to ₹ 1 lakh towards electricity consumption.

Separately, if the NRs are in receipt of income such as dividend, royalty, interest and fees for technical service (such NRs are not in receipt of any other income) which is taxable under 115A of the Act and the tax deductible at source has been deducted at the rate specified in Section 115A, from such income then such NRs are not required to file ITR in India.



Such presumptive taxation schemes are not applicable to NRs.

2. Which forms should NR select to file the ITR?

Choosing the correct ITR form is the first step in ensuring proper compliance and avoiding notices from the Income Tax Department.

NR should use the following forms for the purpose of filing ITR:

- ITR 2 if the total income does not include income from business or profession
- ITR 3 if the total income includes income from business or profession

3. Whether NRs are eligible for Presumptive taxation schemes under the Act?

There are special provisions in the Act that allow the individual to compute income from business or profession on a presumptive basis. Such presumptive taxation schemes are not applicable to NRs.

Accordingly, the ITR form 4 which can be used by the resident individual who has opted for presumptive

taxation is not applicable in the case of NRs.

4. Whether NRs are required to disclose Foreign Assets?

NRs are not required to disclose foreign assets (assets held outside India). The requirement to disclose foreign assets is only applicable to the resident and ordinarily resident in India. However, if the NRs claims a tax refund and does not have a bank account in India, they must provide details of a foreign bank account for the refund to be processed.

Considering that the reporting of foreign assets is only applicable to the resident and ordinarily resident in India, it is very important for NRIs to plan their return back to India. Generally, the returning NRIs may not become resident and ordinarily resident in India immediately upon return to India. Having said that, it is very important to understand for the NRIs to keep track of their visits outside India (for the year for which

NRs are not required to disclose foreign assets (assets held outside India). The requirement to disclose foreign assets is only applicable to the resident and ordinarily resident in India.

the residential status is to be determined and for the past 10 years) to determine the residential status for a particular year under consideration. The returning NRIs on becoming resident and ordinarily tax resident has to furnish the details of foreign assets in the Schedule FA of the ITR. An individual considered as resident and ordinarily resident for a particular financial year is required to report the following foreign assets (held as beneficial owner, beneficiary or the legal owner) for the calendar year as on 31 December XXXX in the ITR:

- Depository and custodial accounts including the accounts in which such individual holds signing authority
- Equity and debt interest
- Cash value insurance or annuity contract
- Financial interest in any entity outside India (details of listed and unlisted shares)
- Immovable property outside India
- Any other capital asset outside India
- Details of Trust created outside India in which such individual is a trustee, beneficiary or a settlor
- Any other income derived from the foreign source (which is not reported in any of the above-mentioned assets)

Please note that the reference of reporting as on 31 December is not mentioned for the last two bullets points and accordingly it could be interpreted that the reporting of Trust and other foreign-sourced income should be reported for the financial year (i.e. for the period ending 31 March XXXX) for which the ITR is being filed.

Let's discuss the implications in the form of a case study

Facts:

- Mr. X, an Indian Citizen had moved to the UK on deputation in April 2021 for the purpose of taking employment.
- He has come back to India for good from 1 January 2025.

- During his overseas assignment, he had opened a bank account in the UK and acquired an immovable property in the UK.

Comments:

- Mr. X should be classified as a resident and ordinarily resident of India for the financial year 2024-25, since his total stay in India exceeded 60 days in the financial year 2024-25 and his stay in the four years preceding the financial year 2024-25 was more than 365 days.

- Mr. X should be classified as resident and ordinarily resident in India since his stay in India for the past seven years preceding the financial year 2024-25 shall exceed 730 days and he was a resident of India in two years out of 10 years preceding the financial year 2024-25.

The NRI who is a citizen of India and a person of Indian origin can opt for the special provisions under Chapter XII-A of the Act if their income comprises only:
- **Investment income (such as interest, dividends, etc.), and/or**
- **Long-term capital gains from specified foreign exchange assets.**

- Being resident and ordinarily resident in India Mr. X will have to disclose foreign income for the period 1 April 2024 to 31 December 2024. Mr. X will also have to mandatorily disclose the foreign assets (i.e. bank account and immovable property in the UK) in schedule FA of the ITR.

- Had Mr. X returned to India in February 2025, his stay in India would have been less than 60 days and accordingly, he could have been considered as NR in India for FY 2024-25 and consequently, he would have neither been taxed on his global income nor he was required to report the foreign assets and income in the ITR.

5. What are the penal provisions in case the foreign asset is not reported?

Section 43 of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 states that if a person being resident and ordinarily resident fails to furnish or furnish inaccurate particulars about foreign assets, then the Assessing Officer may direct the person to pay a penalty of Rs. 10 lakhs. However, no penalty shall be levied under the said section if the value of assets (other than immovable assets) does not exceed the amount of Rs. 20 lakhs.

6. What are the details which are only required to be disclosed by NRs in the ITR?

The following details are mandatorily required to be disclosed only by NRs:

- Jurisdiction where he is resident; and

- Taxpayer Identification Number (TIN) in that jurisdiction (Passport number can be quoted in the absence of TIN).

Separately, the NRIs (who are Persons of Indian Origin (PIOs) or Indian Citizens) are required to make the following disclosures:

- Number of days stayed in India for the year for which ITR is being filed; and

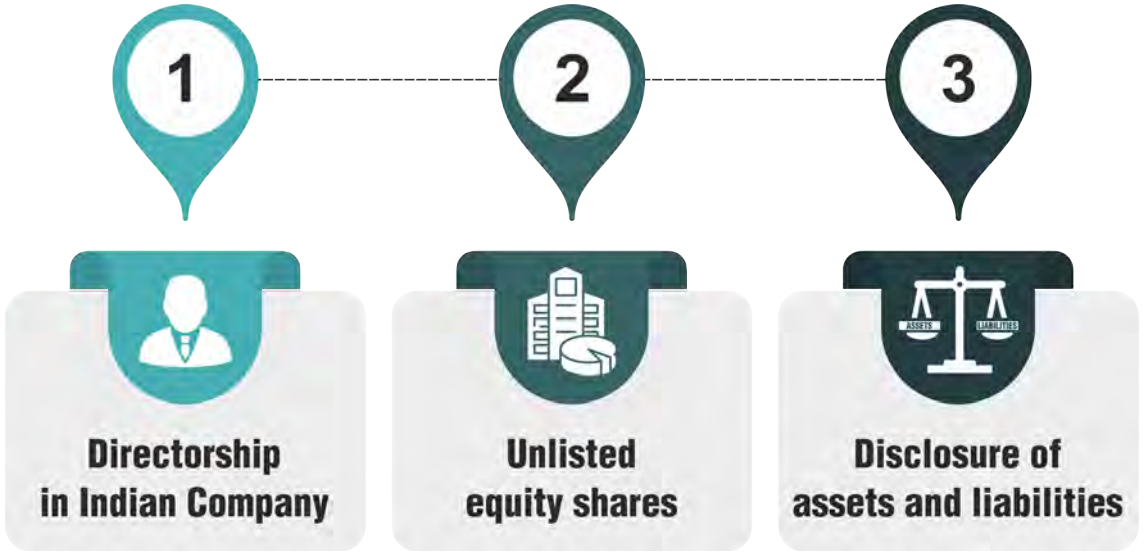
- Number of days stayed in India during the four years preceding the financial year for which ITR is being filed.

7. What other details are required to be reported by the NR in the ITR?

The NR is required to disclose the following other details in the ITR:

- Directorship: in the Indian company and foreign company (only if such company has any income received, accruing or arising in India)
  - Information to be disclosed – name, type and PAN of the Company, DIN and whether shares are listed on a recognised stock exchange (PAN and DIN are not mandatory for foreign directorship)
- Unlisted equity shares – name, type and PAN of the Company, opening balance (number of shares and cost), shares acquired/ transferred during the year and closing balance
  - Details of shares listed outside India is not required to be disclosed
  - It is not clear whether an NRI is required to report the unlisted equity shares held in foreign countries. One may consider reporting the same in the ITR to avoid penal consequences, if any, due to non-reporting
- Disclosure of assets and liabilities in Schedule AL (if the total income exceeds Rs. 1 crore): The following assets and liabilities are to reported:
  - Immovable assets viz. land and building; financial assets viz. bank deposits, shares and securities, insurance policies, loans and advances given, cash in hand, movable assets viz. jewellery, bullion, vehicles, yachts, boats, aircraft etc.
  - Liabilities in relation to the above assets

For NRs only details of assets located in India is required to be reported.



8. What is the process of filing ITR?

The filing of ITR has to be done online by the NRs. Once the ITR is uploaded online, the ITR is required to be verified electronically to complete the ITR filing process. NRs must e-verify their ITR within 30 days from the date of filing on the online portal. If the same is not e-verified within 30 days then the ITR filed will be considered as defective (as good as not filed). E-verification methods include:

- Using Aadhaar OTP (only if the mobile number is registered with Aadhaar).
- Generating Electronic Verification Code (EVC) – this can be generated by an individual assessee using their bank/ demat account.
- Using Digital Signature Certificate (DSC).

Ensuring proper e-verification is vital to avoid the ITR being treated as defective.

9. Are there any special benefits available to NRIs?

The NRI who is a citizen of India and a person of Indian origin can opt for the special provisions under Chapter XII-A of the Act if their income comprises only:

- Investment income (such as interest, dividends, etc.), and/or
- Long-term capital gains from specified foreign exchange assets.

If the total income of NRIs comprises of only income as mentioned above and if the appropriate TDS has been deducted by the payer on the above income, then NRI is not required to file ITR.

Additionally, NRI can avail the deduction under section 115F of the Act. Section 115F provides tax exemption on long-term capital gains for NRI from the transfer of foreign exchange assets, if the net consideration is reinvested within six months into specified assets or notified savings certificates. If the entire net consideration is reinvested, the full capital gain is exempt; if partially reinvested, the exemption is proportionate.

The relevant extract of the ITR where the above disclosures should be made has been reproduced below:

8	From sale of foreign exchange asset by NON-RESIDENT INDIAN *(If opted under chapter XII-4)*				
	a	LTCG on sale of foreign exchange asset (as per section 115F) where transfer was (computed without indexation)	8a		
		i. Before 23rd July 2024	8ai		
		ii. On or After 23rd July 2024	8aii		
	b	Less deduction under section 115F (Specify details in item D below)	8b		

		i. Before 23rd July 2024	8bi		
		ii. On or After 23rd July 2024	8bii		
	c	Balance LTCG on sale of foreign exchange asset where transfer was (8a – 8b)		B8c	
		i. Before 23rd July 2024		B8ci	
		ii. On or After 23rd July 2024		B8cii	
	e	Deduction claimed u/s 115F (for Non-Resident Indians)			
		i. Date of transfer of original foreign exchange asset	ei	dd/mm/yyyy	
		ii. Amount invested in new specified asset or savings certificate	eii		
		iii. Date of investment	eiii	dd/mm/yyyy	
		iv. Amount of deduction claimed	eiv		
	f	Total deduction claimed (1a + 1b + 1c + 1d + 1e)	f		

10. Can NR avail the benefit of Double Tax Avoidance Agreements (DTAA), if yes then how that should be disclosed in the ITR?

India has entered into DTAAs with various countries to prevent any particular income from being taxed in both countries—i.e., the country of residence and the country of source. Further, income such as dividends, interest, royalty, fees for technical services, etc. could be taxed at lower rates in the country of source if the beneficial owner of such income is the resident of the other country. Let's discuss this in the form of an illustration.

Mr. X, a tax resident of Singapore is in receipt of interest income from the investment made in India. Such income shall be subject to tax in India in the hands of Mr. X under the Act as per the applicable slab rate. Further, since Mr. X is a tax resident of Singapore, he is also liable to pay tax on such interest income in Singapore as per the local tax laws of Singapore.

In the present case, Mr. X is required to pay double tax on the same income i.e. in India and Singapore. However, as per Article 11 of the DTAA entered between India and Singapore, if a resident of Singapore is earning interest income from the other country (i.e. India) then, the interest may be taxed in the country of which the person is a resident (i.e. Singapore). However, the interest may be taxed in the country in which it is earned

(i.e. India). The rate at which such interest will be taxed in India shall not exceed 15%. Mr. X being a tax resident of Singapore can avail of this reduced tax rate and pay the tax on interest income at the rate of only 15% in India. In order to avail the benefit of reduced rates under DTAA, Mr. X must obtain the Tax residency certificate from the tax authorities of Singapore. Further, Mr. X shall also be required to file Form 10F on the Income tax online portal before filing his ITR to avoid being considered the ITR as defective. Mr. X should furnish the details of income and the beneficial rate availed under DTAA at the specific place in the ITR (the extract of the ITR where such details should be disclosed has been presented below):

f	Amount included in 1 and 2 above, which is claimed as chargeable at special rates in India as per DTAA (total of column (2) of table below)										2f	
	Sl. No.	*Amount of income*	*Item No. 1ai , 1aiii, 1b to 1d & 2 in which included*	*Country name & Code*	*Article of DTAA*	*Rate as per Treaty (enter NIL, if not charge-able)*	*Whether TRC obtained (Y/N)*	*Section of I.T. Act*	*Rate as per I.T. Act*	*Applicable rate [lower of (6) or (9)]*		
	(1)	*(2)*	*(3)*	*(4)*	*(5)*	*(6)*	*(7)*	*(8)*	*(9)*	*(10)*		
	I											
	II											

11. What are the disclosure requirements for Income from Capital gain and other Income of Non-Residents

There are separate disclosure requirements for NRs with respect to income from capital gains. The details of the various such disclosures along with the extract of ITR where such details of capital gain need to be reported have been presented below:

- Disclosure requirement for shares and debentures acquired in foreign currency:

5	For NON-RESIDENTS- from sale of shares or debenture of Indian company (to be computed with foreign exchange adjustment under first proviso to section 48)				
	A	LTCG computed without indexation benefit where transfer was i. Before 23rd July 2024 – Listed Debentures ii. Before 23rd July 2024 – other than Listed Debentures iii. On or after 23rd July 2024 (Only unlisted Shares or Listed Debentures)	5a 5ai 5aii 5aiii		

	B	Deduction under sections S4F (Specify details in item D below) where transfer was i. Before 23rd July 2024 – Listed Debentures ii. Before 23rd July 2024 – other than Listed Debentures iii. On or after 23rd July 2024 (Only unlisted Shares or Listed Debentures)	5b 5bi 5bii 5biii		
	C	LTCG on share or debenture (5a-5b) i. where transfer was before 23rd July 2024 – Listed Debentures ii. where transfer was before 23rd July 2024 — other than Listed Debentures iii. where transfer was on or after 23rd July 2024 (Only unlisted Shares or Listed Debentures)	B5c B5ci B5cii B5ciii		

- Disclosure requirement for unquoted shares and securities:

7	For NON-RESIDENTS- from sale of, (i) unlisted securities as per sec. 112(1)(c), (ii) bonds or GDR as referred in sec. 115AC, (iii) securities by FII as referred to in sec. 115AD (other than securities referred to in section 112A for which B8 is to be filled up) **Note** : For serial number (iii), break up of income based on date of transfer is not required						Where transfer was before 23rd July 2024 (i)	Where transfer was on or after 23rd July 2024 (ii)
	a	i	In case securities sold include shares of a company other than quoted shares, enter the following details					
			a	Full value of consideration received/receivable in respect of unquoted shares		ia		
			b	Fair market value of unquoted shares determined in the prescribed manner		ib		
			c	Full value of consideration in respect of unquoted shares adopted as per section 50CA for the purpose of Capital Gains (higher of a or b)		ic		

		ii	Full value of consideration in respect of securities other than unquoted shares	aii		
		iii	Total (ic + ii)	aiii		
	b	Deductions under section		48		
		i	Cost of acquisition without indexation	bi		
		ii	Cost of improvement without indexation	bii		
		iii	Expenditure wholly and exclusively in connection with transfer	biii		
		iv	Total (bi + bii +biii)	biv		
	c	Balance (6aiii – biv)		7c		
	d	Deduction under sections /54F (Specify details in item D below)		7d		
	e	(i) Long-term Capital Gains on assets at 7 above in case of NON-RESIDENT (7c - 7d) Where transfer was before 23rd July 2024 [applicable for 7(i) & 7(ii)] (ii) Where transfer was on or after 23rd July [applicable for 7(i) & 7(ii)] From sale of securities by FII as referred to in sec. 115AD		B7e B7ei B7eii B7eiii		

- Disclosure requirement for Other Income:

d	Any other income chargeable at special rate (total of di to dxx)			2d	
	i.	Dividends received by non-resident (not being company) or foreign company chargeable u/s 115A(1)(a)(i) other than proviso to section 115A(1)(a)(A)	di		
	ia.	Dividends received by non-resident (not being company) or foreign company from a unit an International Financial Services Centre, as referred to in sub-section (1A) of section 80LA chargeable under proviso to section 115A(1)(a)(A)	dia		

	ii.	Interest received from Government or Indian concern on foreign currency debts charge-able u/s 115A(1)(a)(ii)	dii		
	iii.	Interest received from Infrastructure Debt Fund chargeable u/s 115A(1)(a)(iia)	diii		
	iv.	Interest referred to in section 194LC(1) – chargeable u/s 115A(1)(a)(iiaa) @ 5%	div		
	v.	Interest referred to in section 194LD - chargeable u/s 115A(1)(a)(iiab)	dv		
	vi	Distributed income being interest referred to in section 194LBA - chargeable u/s 115A(1)(a)(iiac)	dvi		
	vii	Income from units of UTI or other Mutual Funds specified in section 10(23D), purchased in Foreign Currency - chargeable u/s 115A(1)(a)(iii)	dvii		
	viii	Income from royalty or fees for technical services received from Government or Indian concern chargeable u/s 115A(1)(b)(A) & 115A(1)(b)(B)	dviii		
	ix	Income by way of interest on bonds purchased in foreign currency by non-residents - chargeable u/s 115AC	dix		
	x	Income by way of Dividend on GDRs purchased in foreign currency by non-residents - chargeable u/s 115AC	dx		
	xi	Income by way of dividends from GDRs purchased in foreign currency by residents - chargeable u/s 115ACA	dxi		

Conclusion

Practically, it has been observed that a lot of NRs are not aware of many of the above-mentioned disclosures in the ITR. It is very important for NRs to make a proper disclosure in the ITR. Filing ITR as NR is not just a compliance requirement but also an opportunity to ensure transparency and proper disclosure of income and assets. Understanding the relevant provisions of the Act, choosing the correct ITR form, and making accurate disclosures can help NRs to avoid unnecessary scrutiny and penalties. ■

LOWER/NIL TAX DEDUCTION CERTIFICATE – AVOID EXTRA TDS





CA Hinesh Doshi *CA Aarti Karwande*

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Overview

This article presents a comprehensive analysis of the Lower/Nil Tax Deduction Certificate (LDC) process under Section 197 of the Indian Income Tax Act, focusing on its importance for Non-Resident Indians (NRIs) involved in property sales and other taxable transactions in India. It highlights the practical challenges NRIs face, as they are often subject to high TDS rates – typically 20–30% – on gross sale consideration, regardless of their actual tax liability or eligibility for exemptions under Sections 54, 54EC, & 54F. These excessive deductions create significant cash flow constraints and lengthy refund cycles, hindering reinvestment & effective financial planning. The article details the eligibility criteria, documentation, and the step-by-step online application process for obtaining an LDC through the TRACES portal, stressing the importance of advance planning due to the usual 30–45 days processing period. It also examines compliance responsibilities & risks for both buyers and sellers, including the need for buyers to verify LDC validity before applying reduced TDS rates. Drawing on judicial precedents & practical examples, the article demonstrates how timely and proper use of LDCs can prevent over-taxation, streamline property transactions, and reduce litigation risks, ultimately encouraging NRIs and their advisors to proactively leverage Section 197 for better tax alignment and cash flow management.

Introduction

Tax Deducted at Source (TDS) is a mechanism under the Income Tax Act, 1961 (Act), which mandates the payer to deduct a specified percentage of tax before making payments such as salary, rent, interest, professional fees, or sale proceeds to the recipient. This upfront tax collection ensures compliance and maintains a consistent cash flow for the government. Even for Non Resident Indians (NRIs), for avoiding any loss of revenue, Tax is usually deducted at source under section 195 at the earliest source as NRIs may not have any assets or income in India for subsequent recovery.

However, there are instances where the deductions of tax at source level exceed the recipient's actual tax liability. A common example is seen in property sale transactions involving Non-Resident Indians (NRIs). For an NRI, selling property in India involves navigating legal procedures, tax implications,

and strategic decisions to maximize returns on investment.

Section 197 of the Act enables an assessee to apply for a certificate to reduce or eliminate excessive TDS on various income streams. A certificate for lower or NIL deduction of tax, also known as the Lower Deduction Certificate (LDC) is an important tool for assessees to manage their tax outgo.

In this article, we have examined the different facets of the regulation around the LDC, to the extent they are relevant for NRIs. These include the need for the certificate, eligibility, validity, the roles and responsibilities of the assesseee and the tax authorities, as well as the challenges involved in procuring the LDC.

Is LDC Necessary?

When a non-resident Indian (NRI) sells immovable property or earns rental income in India, the buyer is legally obligated under **Section 195 of the Income Tax Act, 1961**, to deduct tax at source (TDS) on the income element embedded in the sale consideration in the case of sale of immovable property as against on the entire sale consideration whereas in case of rental income, the TDS is on the entire consideration. The applicable rate can reach as high as 30% (**plus surcharge and cess**) depending on transaction value, residency status, and PAN availability. This upfront deduction often creates liquidity challenges for NRIs, particularly when exemptions like **Section 54 or Section 54EC** or **Section 54F** apply.

Key Issue: As per one view, TDS under Section 195 is calculated on the **gross sale value** without accounting for potential exemptions. This conservative approach is rooted in law. In ***Transmission Corporation of A.P. Ltd. vs. CIT [(1999) 239 ITR 587 (SC)***], the Supreme Court held that under Section 195, tax must be deducted on the entire payment to a non-resident if it includes any taxable income, even if part of it is not income. The

Section 197 of the Act enables an assessee to apply for a certificate to reduce or eliminate excessive TDS on various income streams. A certificate for lower or NIL deduction of tax, also known as the Lower Deduction Certificate (LDC) is an important tool for assessees to manage their tax outgo.

Court clarified that unless a determination is obtained under Section 195(2), TDS applies on the gross amount. However, the Apex Court in the case of ***GE India Technology Centre (P.) Ltd vs. CIT, [(2010) 327 ITR 456(SC)***] has clearly expressed that tax has to be deducted only on the income/gains component. The relevant portion of the decision is expressed as under:

It may be noted that section 195 contemplates not merely amounts, the whole of which are pure income payments, it also covers composite payments which has an element of income embedded or incorporated in them. Thus, where an amount is payable to a non-resident, the payer is under an obligation to deduct TAS in respect of such composite payments. ***The obligation to deduct TAS is, however, limited to the appropriate proportion of income chargeable under the Act forming part of the gross sum of money payable to the non-resident****. This obligation being limited to the appropriate proportion of income flows from the words used in section 195(1), namely, "chargeable under the provisions of the Act". It is for this reason that vide Circular No. 728 dated 30-10-1995 that the CBDT has clarified that the tax deductor can take*

into consideration the effect of DTAA in respect of payment of royalties and technical fees while deducting TAS. [emphasis supplied]

This view is further supported by Instruction No. 2 of 2014 dated 26-02-2014.

Thus, for NRIs selling property, on a literal sense TDS is to be deducted only on the income component and not on the full sale value. However, on a practical basis, tax is deducted on the full sale value and not just the capital gain, highlighting the need for a lower deduction certificate under Section 197 to avoid excess withholding.

NRIs eligible for exemptions under **Section 54** or **Section 54F** —for reinvestment/investment in residential property- or under **Section 54EC** – for investment in bonds upto ₹ 50 lacs - can claim such relief only at the time of return filing. Consequently, excess TDS withheld upfront can only be recovered through refunds, often delayed by **12–18 months**, particularly if the return is selected for scrutiny.

The **Hyderabad ITAT** highlighted this procedural gap in ***DCIT (International Taxation) vs. Kamineni Hospitals Pvt. Ltd. (ITA No.1001/H/2013).*** The tribunal directed the Assessing Officer to verify Section 54F compliance before determining TDS liability under Sections 201(1) and 201(1A), underscoring the disconnect between upfront deductions and post-filing exemptions.

It is important to take into cognizance the decision of Bangalore bench of ITAT in the case of ***A.Mohiuddin vs. ADIT, [(2015) 53 taxmann.com 102]*** wherein the ITAT has expressly held that exemptions under section 54, 54F etc has to be taken into consideration and be given complete effect while deducting TAS under section 195 of the Act. However, the principle laid down by the above decision is considered academic in nature and rarely followed practically.

Practical Impact

- **Liquidity strain** due to blocked funds during protracted refund processes
- **Operational hurdles** in reinvesting sale proceeds for exemption compliance
- **Compliance risks** for buyers failing to deduct adequate TDS

To mitigate these challenges, obtaining a **Lower Deduction Certificate (LDC)** from the tax authorities becomes critical. An LDC allows TDS deduction on the **sale amount** (after factoring in exemptions), preserving liquidity and aligning statutory obligations with equitable outcomes.

The table below gives an overview of the funds which may remain blocked with the tax department in the absence of a LDC.

Amount in lakhs

No	*Particulars*	*Without LDC*	*With LDC at 3%*
A	Sale Price	250.00	250.00
B	Less: Indexed Cost of Acquisition	200.00	200.00
C	LTCG	50.00	50.00
D	Tax payable (C * 12.50%)	6.25	6.25

			Amount in lakhs
No	***Particulars***	***Without LDC***	***With LDC at 3%***
E	TDS[1] at 12.50%/3% of sales consideration	31.25	7.50
F	**Refund due (D-E)**	**25.00**	**1.25**

The absence of a Lower Deduction Certificate (LDC) worsens liquidity constraints for NRIs, as excess TDS deductions lock funds with tax authorities until refunds—often delayed by scrutiny or processing bottlenecks. While **Section 54 exemptions and DTAA reliefs** may substantially reduce final tax liability, standard TDS provisions ignore these adjustments, leading to disproportionate upfront deductions.

Apart from the reduced tax outflow, obtaining LDC mitigates litigation risks and ensures compliance by providing formal approval to deductors like buyers, banks, and tenants. It facilitates smoother financial transactions, as counterparties often hesitate to deduct lower TDS without proper authorization.

It is pertinent to note, ***that NRIs cannot file Form 15G/15H for non-deduction of tax***. This benefit is available to resident Indians only. This leaves them with the only option – to procure LDC in cases where the tax outflow is expected to be high.



Eligible Assessee

Section 197(1) of the Act reads as follows:

> *"Subject to rules made under sub-section (2A), where, in the case of any income of any person or sum payable to any person, income-tax is required to be deducted at the time of credit or, as the case may be, at the time of payment at the rates in force under the provisions of sections 192, 193, 194, 194A, 194C, 194D, 194G, 194H, 194-I, 194J, 194K, 194LA, 194LBA, 194LBB, 194LBC, 194M, 194-O, 194Q and 195, the Assessing Officer is satisfied that the total income of the recipient justifies the deduction of income-tax at any lower rates or no deduction of income-tax, as the case may be, the Assessing Officer shall, on an application made by the assessee in this behalf, give to him such certificate as may be appropriate."*

1. Surcharge and cess have not been considered for the sake of simplicity.

The scope of the benefit under section 197 is very wide as it allows residents as well as non-resident assessees to make an application for lower or NIL deduction of tax. Further, it covers a wide array of income/payments for which an application can be made.

The recipient of income/payment must make an application under section 197. ***The payer or the deductor cannot make an application for the recipient.***

Eligible Transactions

Section 195 of the Act provides that a payer must deduct TDS on any sum payable to a NRI & Non Resident's entity, that is chargeable to tax. Thus, TDS ought to be deducted in payment of interest, capital gains, dividend, rent, sale proceeds of immovable property etc.

Section 197 provides that where TDS is required to be deducted under section 195, the assessee may make an application for LDC if there is a valid reason that tax must be deducted at a lower or NIL rate. Here, it is pertinent to note that an application can be made for transactions where TDS is required to be deducted.

An LDC is particularly beneficial for NRIs in the following situations:

- claiming exemptions under section 54/54F (investment in another house) or section 54EC (investment in bonds);
- when proceeds are reinvested, leading to nil capital gain; or
- when the actual income falls below the basic exemption limit under the applicable tax slab.

Tax Rates and TDS Rates for NRIs

The table below summarizes the tax rates and the TDS applicable to NRIs for FY[2] 2025-26 for some of the most common sources of income that they earn in India.

Nature of income	*Tax Rate **	*TDS rate **
Rental income	Slab rates	30% on gross receipts
STCG[3] on the sale of immovable property	30%	30% of the sale consideration
LTCG[4] on the sale of immovable property	12.5%[5]	12.5%[6] of the sale consideration
Interest on fixed deposits (NRO account)	Slab rates	30% on gross receipts
Dividend	20%	20% on gross receipts
Interest on fixed deposits (NRE account)	Exempt	Not applicable

** Rates to be increased by applicable surcharge and cess.*

2. Financial Year or Previous Year
3. Short term capital gains - Property sold within 24 months of acquisition
4. Long term capital gains - Property sold beyond 24 months of acquisition
5. Effective rate can range from 13% to 14.95%, after considering surcharge and cess
6. Effective rate can range from 13% to 14.95%, after considering surcharge and cess

The tax and TDS rates under the Act applicable to NRIs on the sale of immovable property or on rental income are different from those applicable to Indian tax residents.

Tax deductions for Rental Income of NRIs

NRIs deriving rental income from immovable property situated in India are subject to TDS provisions under section **195** of Act. This differs significantly from the TDS regime applicable to resident taxpayers under section **194-IB**, which mandates TDS deduction only when monthly rent exceeds ₹ 50,000. In the case of NRIs, the obligation to deduct TDS arises **irrespective of the rent amount**, meaning TDS must be deducted on **every rental payment from the very first rupee**.

NRIs selling Immovable Property in India

The tax and TDS rates under the Act applicable to NRIs on the sale of immovable property are different from those applicable to Indian tax residents as elaborated in the table below:

Residential status	Resident	Non Resident
Applicable provision for Tax Deduction	Section 194IA	Section 195
Threshold limit	₹ 50 Lakhs	No Limit
Rate at which TDS is collected	1% above Rs. 50 Lakhs	12.5% + Surcharge + Cess

Hence, it becomes inevitable to make an application for the Lower Deduction Certificate (LDC).

Key challenges in TDS Compliance faced by NRIs in the case of Immovable Property

Many NRIs, either intentionally or unintentionally, fail to disclose their residential status to buyers. This lack of transparency, combined with buyers' unfamiliarity with TDS rates, often leads to complications.

A) Non-Disclosure of Residential Status by NRIs: Many NRIs, either intentionally or unintentionally, fail to disclose their ***residential status*** to buyers. This lack of transparency, combined with buyers' unfamiliarity with TDS rates, often leads to complications. When a buyer incorrectly deducts TDS at a 1% rate for an NRI seller, legal issues may arise, creating challenges for both parties.

Buyers must verify the seller's residential status before finalizing the transaction to avoid such pitfalls. Some sellers may withhold this information due to higher TDS rates for NRIs or a lack of awareness about lower TDS certificates. These challenges stem mainly from the fact that the TDS is deducted on gross consideration rather than on net income or gains, resulting in over-taxation.

While buyers and sellers must ensure compliance at their end, it might also be worthwhile for the Central Board of Direct Taxes (CBDT) to consider bringing in parity between the rates applicable to resident and non-resident assessees.

B) Deduction Disputes: Further, the ***cost of improvement, brokerage and other incidental costs*** are generally disregarded by the AO while calculating capital gains, despite all supporting documentation. Thus, the assessee loses out on the on the cost of improvement or deduction of expenses incurred for effecting the sale transaction, although the Act allows indexation on the same.

Additionally, there is always a chance that the AO may question the declared sale value or the cost basis. The onus of satisfying the AO about the fairness of the sale value and the cost lies on the assessee.

C) TDS on Token Payments: TDS must be deducted at a higher rate even on the amount of the token amount collected from the buyer as a commitment to purchase the property. The actual deal may take place after 2/3 months or may even be cancelled.

D) Ignoring Allowable Deductions: Often, the seller may claim a ***deduction under section 54 or 54F*** of the Act by investing in another property. Section 54 allows some time to the seller to purchase or construct another property within 2 years or 3 years, respectively, from the date of sale of the original property.

If the purchase or construction is already executed before the application for making LDC, the AO grants the certificate. However, the AO is often hesitant to issue the LDC if the purchase or construction is not completed or the requisite amount is not invested in the Capital Gains Account Scheme (CGAS). This is true even where the assessee gives an ***Indemnity Bond***. Thus, the intention of the seller to avail a deduction is likely to be ignored at the time of issue of LDC.

Moreover, the AO may also advise that, rather than procuring the LDC, the assessee must pay the applicable tax and claim a refund while filing the tax return.

E) Procedural Challenges – Faced by assessees

- **Missed opportunity for tax optimization due to limited awareness:** Filing an Indian tax return, especially when it involves capital gains, foreign accounts, or tax treaty benefits, can be complex for NRIs unfamiliar with Indian tax laws. Many NRIs are unaware of tax efficient tools like Lower or Nil Deduction Certificates under sections 197 and 195(3), leading to excessive TDS and delayed refunds. They often require professional help, which adds to the cost and compliance burden. Lack of clarity around rules for exemptions under sections like section 54 &/54F/54EC, and tax treaties can create confusion.

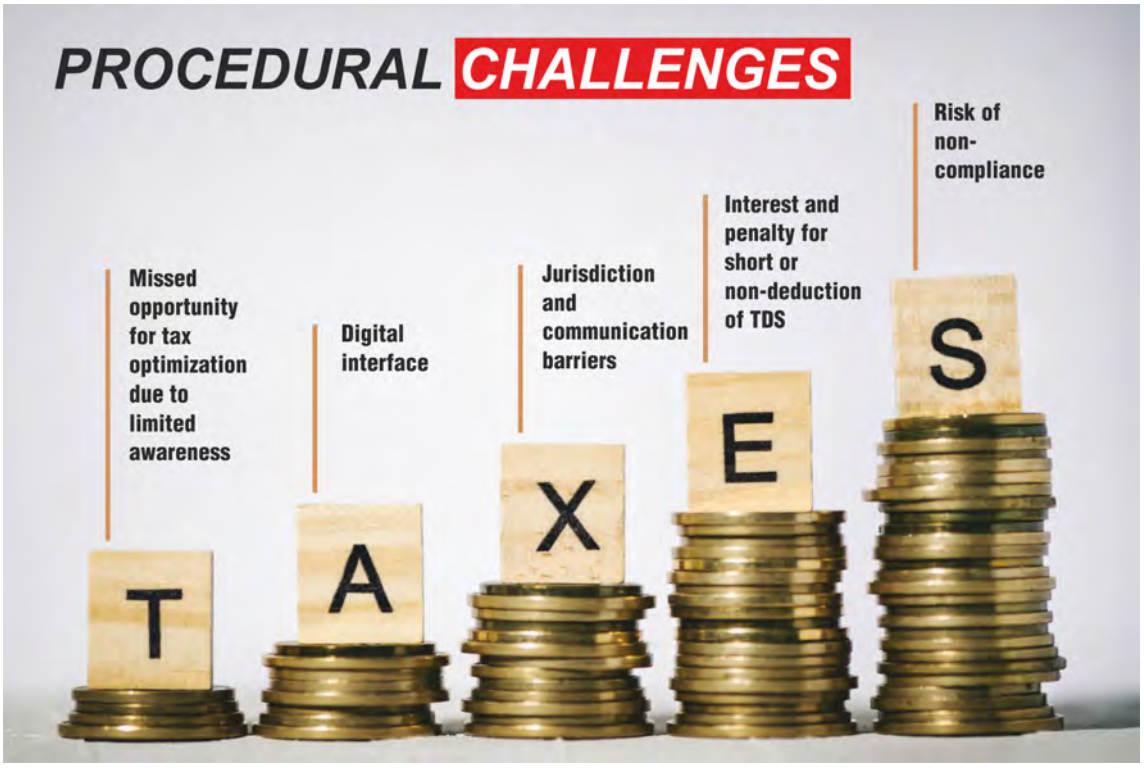
- **Digital interface:** NRIs unfamiliar with Indian tax system's digital interface may struggle with online filing processes. Processing by AO may take time, risking delay in transaction closure.

- **Jurisdiction and communication barriers:** NRIs often live in different time zones and face difficulty

in coordinating with Indian tax authorities or attending hearings or discussions if needed. Limited access to in-person assistance or physical jurisdiction offices makes the entire process more cumbersome. Coordination with the AO may be difficult without a representative in India.

– **Interest and penalty for short or non-deduction of TDS:** If a buyer fails to deduct TDS or deducts it at a lower rate under section 195—due to misclassification of the seller's residential status or incorrect advice—the Income Tax Department may initiate proceedings under sections 201(1) and 201(1A). Though the duty lies with the buyer, the NRI seller may face consequences, including the need to submit extensive documentation, bear interest, and face penalties. Without a valid Lower Deduction Certificate (LDC), the risk of default and resulting litigation increases significantly.

– **Risk of non-compliance:** Errors in TDS compliance, such as delayed filing of TDS returns by the buyer, incorrect PAN/TAN entries, or failure to deduct/apply the correct TDS rate, may lead to notices or penalties. NRIs may face tax scrutiny or litigation in India, despite being compliant on their part.



Considering the practical challenges involved, tax advisors may not advise the NRIs to make an application for LDC under section 197. Some NRIs may not even be aware of such a facility under the Act and may end up paying tax initially and claiming a refund later.

The Legal Remedy: Section 197 and the Lower Deduction Certificate (LDC)

Section 197 of the Act allows a taxpayer, including an NRI, to apply for a certificate permitting deduction of tax at a lower or nil rate. This application is made when the taxpayer reasonably expects that their total income is not liable to tax at the standard rate, or that exemptions or deductions will reduce the effective tax burden. From the NRI seller's perspective, this means **only the appropriate amount of tax** is withheld upfront, and no large refund will be pending. The Supreme Court has noted that provisions like Section 197 (and Section 195(2)) are important "**safeguards**" to ensure TDS is confined to the "appropriate proportion of the income chargeable" to tax. In ***GE India Technology Centre Private Limited vs. CIT [(2010) 327 ITR 456/193 (SC)]***, the Court clarified that the obligation to deduct tax is limited to the sum that is "chargeable under the Act", and mechanisms like these allow payers or payees to seek determination of the chargeable portion so as to deduct correctly. Thus, applying for a Section 197 certificate is fully in line with tax law – it's not an "evasion" but rather a procedure to ensure no more tax is deducted than necessary.

The Supreme Court has noted that provisions like Section 197 (and Section 195(2)) are important "safeguards" to ensure TDS is confined to the "appropriate proportion of the income chargeable" to tax.

Reference can also be made to case law where the ITAT (Chennai Special Bench) in the case of ***Income-tax Officer vs. Prasad Production Ltd. [2010] 125ITD 263/3 ITR (Trib) 0058*** has summarized the various situations that can arise for the applicability of section 195 of the Act and issued some directions in this regard which includes that "if the payer believes that only a part of the payment is chargeable to tax, then he can apply under section 195(2) of the Act for deduction of tax at appropriate rates and act accordingly."

The **AO** issues the Lower Deduction Certificate (LDC) after evaluating the financial data, such as the estimated capital gains, previous income tax filings, and the nature of exemptions claimed (like Sections 54, 54EC, 54F, etc.). It is important to highlight that when an application for a LDC is submitted under section 197, the department is required to either grant the LDC or reject the application, providing clear and valid reasons for the rejection. Reference can be made to the matter of The Bombay High Court in the case of ***Tata Teleservices (Maharashtra)Ltd. vs. Dy. CIT (TDS) [Writ Petition (ST) No. 95821 of 2020, dated17-12-2020]/[2021]*** by allowing the writ petition filed by the assessee-petitioner has held that "the Revenue is required to pass an order under section 197 of the Act either rejecting the application for such certificate(s) or allowing such application resulting in issuance of certificate(s) which may be at rates higher than nil rate sought for by the assessee, and such an order must be supported by reasons. Not only that, copy of such an order has to be furnished to the concerned assessee who may challenge the same under section 264 of the Act if he feels aggrieved. Not passing an order to that effect

or keeping such an order in file without communication will vitiate the certificate(s)."

In addition to Section 197, which enables NRIs to obtain a lower or nil TDS certificate based on estimated tax liability, Sections 195(2) and 195(3) also offer relief mechanisms. **Section 195(2)** allows the **payer** to apply to the Assessing Officer for determining the taxable portion of a payment. However, this is rarely used in NRI property transactions as buyers often lack complete financial details. **Section 195(3)** permits the **non-resident payee** (including NRIs) to apply for a **nil TDS certificate** on specified incomes (e.g., interest, dividends, capital gains), particularly where income is exempt under Indian law or a DTAA. The application is made in **Form 15D** as per **Rule 29B**. While all three provisions aim to prevent excess withholding, **Section 197** (via **Form 13**) remains the most practical and widely adopted route in property and rental income cases.

Together, these provisions serve as important tools to avoid excess withholding. However, **Section 197 remains the most widely used and practical route**, particularly for NRIs, due to its broader applicability to various income streams, including property sales and rentals, and its alignment with actual tax liability after considering exemptions and deductions.

Often, it may happen that TDS may be deducted at a higher rate irrespective of LDC being presented by the payeee to the payer. In that case, the assessee has the following remedies:

- it can claim a refund at the time of filing the tax return; or

Rule 28AA empowers the AO to grant Lower Deduction Certificate (LDC) if he is satisfied that the existing and the estimated tax liability of a person justifies the deduction of tax at a lower or a NIL tax rate.

- request the payer to make the necessary changes in TDS Returns, while full challan is paid for the payee

Justification for Procuring LDC

Section 197(1) of the Act states that the AO must be satisfied "*that the total income of the recipient justifies the deduction of income-tax at any lower rates or no deduction of income-tax.*" While the Act is open-ended, the Rules and notifications provide objectivity to the requirement of the AO being satisfied.

Rule 28AA empowers the AO to grant Lower Deduction Certificate (LDC) if he is satisfied that the existing and the estimated tax liability of a person justifies the deduction of tax at a lower or a NIL tax rate.

Documents usually required by the department for Application of LDC

A conjoint reading of Rule 28AA[7] and Notification No. 02/2023 dated 27.09.2023, and the real-life experiences suggest that the assessee must provide the **following documents** at the time of filing Form 13 to ensure that the AO is satisfied:

- Details of the assessee (recipient) and the deductor (payer):

7. https://incometaxindia.gov.in/communications/notification/notification-02-2023-27-09-2023.pdf

- Basic details like PAN, TAN, address, contact details, etc. (some details may be auto-populated);
- Proof of being an NRI (i.e., passport with entry and exit stamps, OCI card, employment letter, or Tax Residency Certificate (TRC));

• Details of the transaction

- Nature of the transaction, income generated, and tax due on it;
- Details of estimated income - TAN-wise, applicable section of TDS, requested rate of TDS;
- Advance tax, TDS and TCS already paid (Form 26AS, AIS & TIS) for the relevant AY;
- Proofs of expenses (eg. for effecting a sale of property);
- Purchase Documents (including Property Ownership Proof) and Cost of Acquisition, Cost of Improvements if any
- Proof of deductions claimed (eg. details of investment in the Capital Gains Account Scheme (CGAS) or permitted investments);
- Agreements/documents related to the transaction – for example, in case of sale of immovable property, the following documents may be required - property sale deed, details of registration and payment of stamp duty, payment schedule, valuation certificate under section 50C of the Act, bank account statement evidencing receipts. Here, is pertinent to note that ***the AO generally insists for an executed sale deed for the grant for LDC; a term sheet, Memorandum of Understanding (MoU) or a draft agreement between the parties is not acceptable;***

• Details of treaty benefits, if applicable;

NRIs are tax residents of foreign countries and are entitled to treaty benefits on income earned in India. The AO must consider the treaty benefits while issuing the LDC. This is also supported by certain judicial precedents as follows:

- Where the transaction of sale of shares of an Indian NBFC by assessee-promoter, a Mauritian Company, through IPO was not sham, capital gain arising out of sale of such shares could not be taxed in India as per the provision of Article 13 of India-Mauritius DTAA and, therefore, certificate under section 197 for no/less deduction of tax could not be denied ***[Indostar Capital vs. Asstt. CIT [2019] 105 taxmann.com 96/265 Taxman 59 (Bom.)]***.
- Where assessee (a resident of UAE) sought issuance of certificate under section. 197 at nil rate and AO held that income earned by assessee was fees for technical services (FTS) and tax was to be deducted at 10%, since India-UAE DTAA did not contain article of FTS and assessee had no PE in India, certificate under

section 197 was to be issued pegging withholding tax at 4% ***[WTS Energy DMCC vs. Dy. CIT [2023] 147 taxmann.com 454/292 Taxman 52/451 ITR 175 (Delhi)]***.

In addition to the above documents, Notification 02/2023 provides that if the AO or other senior tax authorities require any further information or documents, or clarification from the assessee for arriving at a decision, they can call for the same. All such documents and clarifications must be submitted online.

Timelines for Application and Issue of Lower Deduction Certificate

Making an application

It is important for NRIs to approach their tax advisors well in advance to seek the right advice and file an application for LDC in time. **Ideally, in the case of immovable properties, the application for the LDC must be made on the date of the transaction itself.**

Instruction No. 1/2020 dated 24-1-2020 allows the assessee to ***make an application before the commencement of the next FY during the period between 28 February to 15 March of the current FY.*** It reads as follows:

> *"In view of the time being taken to process the online request for lower/nil deduction certificate and to facilitate the applicants to get the certificates issued with effect from 1st April of the Financial Year, applicants can apply for lower/nil deduction certificate from 28th February of the immediately preceding Financial Year. …..*
>
> *……. no such request for issue of certificates for lower/nil deduction for a particular Financial Year shall be accepted after 15th of March of the Financial Year."*

Issue of Lower Deduction Certificate

The Act or the Rules do not provide for an outer time limit for the tax authorities to grant the certificate. However, there is an Instruction No. 1/2014, dated 15-1-2014[8], which reads as follows:

> *"As per the Citizens Charter the time line prescribed for a decision on application for no deduction of tax or deduction of tax at lower rate is one month. ……*
>
> *2. ……. all applications for lower or no deduction of tax at source filed under section 197 of the Income-tax Act, 1961 must be disposed of within the stipulated time frame as above."*

The Instruction provides for the issue of LDC within 30 days. ***Practically, the certificate is received within the period of 30 – 45 days from the date of making an application.***

Prompt responses to any queries from the AO and regular follow-ups can help to receive LDC on time. Sometimes, if time is limited and the parties are under pressure to close the transaction, the assessee (or his advisor) may approach the AO for expediting the case and issuing LDC on a priority basis.

8. https://www.itgoawbunit.org/pdf/7213533Instr%2001-14.pdf

Validity of Lower Deduction Certificate

Section 197(2) provides that:

> *"Where any such certificate is given, the person responsible for paying the income shall, until such certificate is cancelled by the Assessing Officer, deduct income-tax at the rates specified in such certificate or deduct no tax, as the case may be."*

Further, Rule 28AA reads as follows:

> *"(3) The certificate shall be valid for such period of the previous year as may be specified in the certificate, unless it is cancelled by the Assessing Officer at any time before the expiry of the specified period.*
>
> *(4) …….*
>
> *(5) The certificates referred to in sub-rule (4) shall be valid only with regard to the person responsible for deducting the tax and named therein and certificate referred to in proviso to the sub-rule (4) shall be valid with regard to the person who made an application for issue of such certificate."*

One may observe that the LDC has a restricted applicability. ***It is valid qua the assessee to whom it is issued, qua the payer and qua the time period mentioned therein.***

There are some crucial aspects as to the validity of the LDC as discussed below.

Immaterial changes

In practical scenarios, the annual income actually received by the assessee in the relevant FY may be greater than the estimated income mentioned in the application for LDC. For instance, the actual rental income may have increased due to an increase in the market rates. In such cases, the lessee must deduct TDS as per the rates mentioned in the LDC, even if the actual rate exceeds the estimated rent disclosed in the LDC application. A decision of the Kolkata Tribunal

This implies that the assessee must apply for the LDC every year even if the payer and the nature of income continues to remain the same.

in ***Twenty First Century Securities Ltd. vs. ITO [2017] 78 taxmann.com 152*** supports the view. It held that the statutory provision of deduction of tax at source at lower rate is 'person specific' and cannot be restricted to the amount specified by recipient while making an application for grant LDC.

Where a LDC was issued to the deductor, the mere fact that certificate was issued in respect of one unit while assessee got separate TANs for separate units, would not invalidate said certificates for another unit ***[CIT vs. Parle Biscuits (P.) Ltd. [2013] 31 taxmann.com 87/216 Taxman 13 (P&H)]***. Further, in ***Rotex Manufacturers & Engineers (P.) Ltd. vs. DCIT [2024] 163 taxmann.com 114 (Mumbai - Trib.)***, it was held that LDCs issued on old TAN are valid if the assessee obtains a new TAN during the year due to a change in jurisdiction.

Period of validity

The certificate is valid only for the period mentioned in the certificate, which generally ends on 31 March of the relevant FY. The lower/NIL tax rate mentioned in the certificate continues to apply until the validity of the certificate as mentioned therein. This implies that ***the assessee must apply for the***

LDC every year even if the payer and the nature of income continues to remain the same.

Further, the certificate cannot be applied backwards to periods before the its issue. The validity of the certificate would be there till it is cancelled, however, no retrospective effect is to be given to it ***[Essar Oil Ltd. vs. ITO [2013] 30 taxmann.com 39/215 Taxman 365 (Guj.)]***.

Cancellation of certificate

The AO has the powers to cancel the certificate before its expiry if, after the issue of the certificate, there is evidence of fraud or false declarations. The assessees and their tax advisors must ensure that the details and documents submitted provide an accurate representation of the matter.

In ***Tata Teleservices (Maharashtra) Ltd. vs. DCIT [2018] 90 taxmann.com 1 (Bom)***, it was held that where the petitioner was issued nil TDS certificate on the ground that it had huge carried forward losses and there was no likelihood of any tax becoming payable in subject AY, cancellation of said certificate without indicating any material to show any change in circumstances was not justified.

Steps Involved in Procuring Lower Deduction Certificate

An application for LDC must be made in Form No. 13. In case an immovable property is co-owned, ***separate applications for Lower Deduction Certificate (LDC) must be made for all co-owners.***

The application is submitted online via the TRACES portal. The broad steps involved, as elaborated in Notification 02/2023, are summarized below.

Initiating the Application

Applicants must log in to the TRACES portal using their credentials. For non-residents, the submission is made through the TRACES Non-Resident portal. Once logged in, the applicant selects the relevant option for Form No. 13 and proceeds to fill in the necessary details. These include estimated income, tax liability calculations, and justifications for requesting lower or no TDS deductions.

Supporting documents, as discussed above, are uploaded to substantiate the claim. Once all details are entered, the applicant submits the application and authenticates it using an Electronic Verification Code (EVC) or a digital signature. Non-resident applicants are required to use a digital signature.

Once an application is submitted, the system assigns the case to the appropriate jurisdictional AO based on either the first name or last name of the assessee. ***Often, the system assigns an incorrect jurisdiction and the assessee must first request a reassignment to the correct jurisdiction. Additionally, in cases involving co-owned immovable property, the application may be assigned to different jurisdictions based on variations in the names of the co-owners, despite the property being the same.***

Reference can be made to the case where the ITAT Bangalore Bench in the case of ***R. Prakash vs. ITO (International Taxation) [2013] (Bang. - Trib.)*** cautioned that where the assessee purchased a property jointly owned by co-owners, in view of the fact that one of the co-owners of the property was a non-resident, the assessee was required to deduct tax at source under section 195 of the Act to the extent sale consideration was paid to the said co-owner.

Processing and Verification

Upon submission of the application, the Central Processing Centre (CPC-TDS) retrieves past tax filings, and compliance details from previous FYs to assist in evaluating the request. The AO reviews the application and may seek additional clarifications from the assessee or schedule a hearing if necessary.

The AO determines an appropriate TDS rate based on the application made by the assessee and following the parameters laid down by Rule 28AA. However, the AO retains discretion to modify the rate using independent calculations or other relevant financial information. If adjustments are made, the officer must document the reasoning behind them.

Once the AO makes a decision, the application is sent to supervisory authorities (e.g., Range Head or CIT) for approval. If needed, it may be returned for further review. After final approval, the lower TDS certificate is issued via the TRACES-AO Portal.

There are various judicial precedents in the context of LDC that provide guidance to the tax authorities for issue and rejection of the LDC application:

- Where the assessee had cleared all outstanding dues of earlier years, Nil TDS deduction certificate could be issued for the relevant year ***[Management Committee (CFH Scheme) vs. ITO [2012] 25 taxmann.com 248/210 Taxman 491 (Orissa)]***.

- Where revenue rejected the application filed by the assessee for issuing certificate for nil TDS without computing the tax liability of assessee and concluding merely on guess work, the impugned order must be set aside, and the matter was to be remanded ***[Camions Logistics Solutions (P.) Ltd. vs. JCIT [2021] 124 taxmann.com 436 (Delhi)]*** Similar facts where also observed in ***[Hero Wind Energy (P.) Ltd. vs. CIT [2021] 130 taxmann.com 21/283 Taxman 53 (Delhi)]***[9].

- Application for issuance of a nil TDS certificate cannot be rejected primarily on ground of pendency of proceedings under section. 276 and 271 ***[Serco BPO (P.) Ltd. vs. ACIT [2012] 25 taxmann.com 4/210 Taxman 381 (P&H)]***.

Role of Deductors

Rules 28AA(4) provides that "*the certificate for deduction of tax at any lower rates or no deduction of tax, as the case may be, shall be issued direct to the person responsible for deducting the tax under advice to the person who made an application for issue of such certificate*." Thus, when the LDC certificate is issued to the deductor with a copy to the assessee making the application.

Deductors can also verify the certificate's authenticity via the TRACES portal before reporting TDS deductions in their filings. The system follows a First In, First Out (FIFO) method to ensure correct utilization of the certificate.

Judicial precedents cast a responsibility on the deductor to deduct TDS as per the

9. Also see *Rajagopalan Venkataraman vs. CIT [2023] 147 taxmann.com 399 (Karnataka), Bently Nevada LLC vs. ITO [2019] 107 taxmann.com 440 (Delhi)*

certificate and also protect them where a lower deduction has been made as per the certificate as follows:

- The deductor was required to act as per the said certificate/order and not assume or presume that the certificate is invalid ***[CIT vs. Prakausali Investments India (P.) Ltd. [2014] 45 taxmann.com 252 (Delhi)]***.

  – Where it was found that the assessee had a valid certificate under section 197 for non-deduction of tax, the assessee could not be held as an assessee in default for non-deduction of TDS on payment made to said payee ***[Oil India Ltd. vs. DCIT [2013] 37 taxmann.com 432 (Jodhpur - Trib.)]***.

  – A bank cannot simply defer the deduction of tax at source on interest on deposits and keep on waiting for the certificate under section 197 to be obtained by the depositor; it is liable to deduct tax as per the mandate of section 194A ***[Assistant General Manager (PR) vs. ITO [2015] 56 taxmann.com 200 (Chandigarh - Trib.)]***.

Concluding Thoughts

Section 197 of the Act plays a crucial role in ensuring that TDS is aligned with the actual tax liability of the recipient, especially when the standard TDS rates may result in excess deduction. This provision offers relief from cash flow constraints and avoids the administrative burden of claiming refunds later.

Chartered Accountants act as an important link between the assessees and the tax department to ensure that the interests of both the stakeholders are taken care of within the realms of the Act and Rules. They navigate through the procedural and technical aspects of LDC application. From assessing eligibility for LDC, collating the necessary documentation to applying through the TRACES portal, and liaising with the AO, their expertise is key to a smooth and timely issuance of the certificate. Moreover, understanding the applicant's total income, forecasting likely receipts, and supporting the case with strong financial data and prior return history demands deep professional acumen. Any error in application or delay in submission can lead to adverse tax consequences or cash flow issues for NRIs.

From the perspective of NRIs, the implications of section 197 are even more significant. Given the standard high TDS rates applicable to non-residents (often ranging from 20% to 30% plus surcharge and cess), an incorrect deduction can substantially reduce net remittances and tie up funds until refunds are processed. Furthermore, the cross-border nature of their income, DTAAs, and evolving compliance requirements make it essential for NRIs to seek professional advice well in advance. ■

Assisted by CA Ayush Doshi.

NOTICES THAT NON-RESIDENTS COMMONLY FACE – AND THE CORRECT TECHNICAL RESPONSE



Mr. Nirav Jagani

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Overview

Non-resident (NR) taxpayers often face automated tax notices primarily due to data discrepancies rather than deliberate evasion. Common triggers include mismatch between information available through TDS, AIS and Statement of Financial transactions. The accompanying paper provides an intentionally technical overview designed to shed light on the deeper methodologies covering current operational protocols and processes of the Indian Income Tax Department, particularly from the perspective of non-resident taxpayers.

With the digital transformation marked by the advent of Insight 2.0 analytics, automated Central Processing Centre (CPC) workflows, and the faceless assessment framework facilitated by the National Faceless Assessment Centre (NFAC), the complexities and hardships once commonplace – have been streamlined into a transparent, digitally-driven environment.

Non-residents are encouraged to proactively reconcile their income and transactions meticulously with the Annual Information Statement (AIS) and Form 26AS, ensuring consistency in reporting. Moreover, maintaining an organized and accessible digital archive of essential documents offers critical support during statutory compliance procedures which have strict due-dates and provisions for extension.

Introduction

Most NR notices arise not from malfeasance but from data incongruence—TDS deducted without income, or on account of variance between information available through AIS, or SFT in comparison to returns filed or not. The Department's AI pipeline is deterministic; once a variance breaches the rule threshold, a DIN-stamped notice is auto-generated. The remedy therefore lies in front-loading data integrity (reconciling AIS/26AS before filing) and back-ending evidence-rich, timeline-compliant replies. The statutory clocks are unforgiving—15 days for Section 139 (9), 7–30 days under Section 148A, and 30 days to contest Section 143 (1) adjustments—so the best insurance for a NRI is

- accuracy of returns to information present in AIS/SFT/26AS
- a disciplined portal-watch and
- an indexed document vault.

Income Tax Assessment Framework

For a non-resident taxpayer, India's end-to-end digital ecosystem now delivers a single, frictionless workflow: the Compliance Portal's Insight 2.0 analytics nudges you early if a TDS entry or high-value transaction doesn't square with your filings; the CPC's fully automated 143 (1) engine processes, adjusts and refunds returns without any officer interaction; and, if a case does escalate, the National Faceless Assessment Centre routes every scrutiny or reassessment task through its firewall-separated units, with DIN-stamped notices, online document uploads and optional video hearings—all inside the same e-Filing dashboard. The result is that an NRI can monitor risks, respond to queries, and close assessments from anywhere in the world, with clear statutory timelines, zero physical visits and a complete digital audit trail.

1. Insights 2.0 – compliance portal is the Income Tax's big-data engine built on a data warehouse and AI stack. Risk rules flag PANs as "High-risk non-ITR filer", "High-value transaction mismatch", "Possible under-reported income" etc. Insight pushes an e-Campaign/e-Verification task; an e-mail/SMS alert merely reminds the taxpayer to log in and respond. Responses are machine-scored; unresolved cases are routed to

    a. CPC for adjustment if only math errors, or

    b. NFAC for full scrutiny/ reassessment if deeper risk persists.

2. Central Processing Centre (CPC) is an automated back-office that only processes raw returns; no human AO is involved. XML of every filed return is fed into the CPC rules engine. Automatic cross-checks against data available from TDS/AIS/SFT sources and arithmetic and rule-based checks are implied. Intimation of differences, Defective returns , proposed adjustments and rectification orders are generated through the DIN. While matters requiring scrutiny are forwarded to the Faceless Assessment Ecosystem.

The result is that an NRI can monitor risks, respond to queries, and close assessments from anywhere in the world, with clear statutory timelines, zero physical visits and a complete digital audit trail.

3. Faceless Assessment - The paper-less, jurisdiction-free assessment architecture created by section 144B and CBDT orders. Operates through the National Faceless Assessment Centre; case work is split among four independent specialist teams: Assessment Unit (AU), Verification Unit (VU), Technical Unit (TU), Review Unit (RU).

4. Jurisdictional AO – after implementation of the faceless assessment , only matters pertaining to foreign income and search are seizures are referred to Jurisdictional officers which seldom are the case for NR's.

Why NRs get pulled into the automated risk funnel

- TDS deducted and no returns filed — as per Rule bucket NMS-402 = TDS/TCS ≥ ₹ 5,000, but no ITR meta data exists for Assessment Year; cross-checked with Sec 139(1) thresholds. PAN is tagged

"High-risk Non-ITR Filer" and queued for e-campaign. Usually, the response to the e-campaign risk query absolves any further action. However, in case of silence or unsatisfactory response and the case being marked as "unresolved". As per CBDT instruction 01/2024 (risk based selection) the record is handed over to the National Faceless Assessment Centre.

- TDS exceeds gross income in the return — The CPC's ETL job pulls the XML you just uploaded and runs the "TDS-vs-Income" rule-set (CPC rule bucket ITR-CPC-TDS-03/04) against the 26AS mirror it already holds. For every PAN in 26AS it derives an "implied gross receipt" = TDS ÷ rate. If any head of income in the return is lower than that implied receipt by ≥ ₹ 1,000 and ≥ 10 %, the row is marked MISMATCH = "02-High". Rule validator 6001-6003 raises error ; CPC treats this as a mismatch and either a Section 139 (9) defect or a Section 143 (1) intimation follows.

- Property worth ≥ ₹ 30 lakh bought or sold — reported through SFT-005 in Form 26AS/AIS. The risk-management strategy "PTP" (property transaction program) looks for matching capital-gain or investment disclosure; absence typically triggers a show-cause under Section 148A.

o When a property deal of ₹ 30 lakh or more is registered, the state registrar's e-filing system auto-generates an SFT-012 report (Rule 114E) with buyer/seller PAN, value and stamp-duty data and uploads it to the income-tax "Project Insight" data-lake. Within 48 hours the record appears in the taxpayer's AIS and is scored by risk rule NMS-602-PROP: a flag is raised if the seller shows no matching capital gain or the buyer's declared income seems too low. Insight first issues a soft e-Campaign on the Compliance Portal; if no satisfactory reply arrives in roughly three weeks, the file is pushed to the National Faceless Assessment Centre. There, assessment, verification, technical and review units can issue 148A(b) or 143(2)/142(1) notices, cross-confirm circle rates via registrar APIs, apply section 50C adjustments and finalise the order entirely online— allowing an NRI to clear the matter remotely with a full DIN-stamped audit trail.



- Non-Filing of returns – As per Rule 12 of Section 139(1), an NRI is required to file its tax returns, if the total income exceeds basic exemption limits.

When a non-resident's PAN shows tax traces but no return, the pipeline activates automatically. TDS XMLs (24Q/26Q/27Q) and SFT files (e.g., Code 11 time-deposits, Code 12 foreign-remittances, property SFT-012) land in the INSIGHT 2.0 data-lake within 24 hours of hitting TRACES or the state-registrar API; the same feeds refresh 26AS and AIS. Every night the Non-Filer Monitoring System applies rule sets NMS-402 (TDS/TCS ≥ ₹ 5 k, no ITR-ack) and NMS-410 (high-value SFT, no ITR). Hits are scored on a 1 000-point risk grid that factors value, prior compliance, and whether the deductor used Form 27Q (code 04 for non-residents).

- Scores ≥ 450 trigger an e-Campaign task on the Compliance Portal titled "Non-Filing of Return – TDS Credit Available"; the assessee gets 15–21 days to select ITR filed/will file/income below limit/other and upload proof.

- A satisfactory reply auto-closes the task, but no response—or a score ≥ 800—pushes the record overnight to the National Faceless Assessment Centre.

- The Re-assessment Unit then issues Section 148A(b) (7-day show-cause); failure or weak reply results in a Section 148 notice, forcing the NRI to e-file within three months, after which an Assessment Unit may open full scrutiny under Section 143(2)/142(1). Parallel deterrents kick in: the PAN is listed as a "specified person" under Section 206AB, compelling all payers to deduct TDS at 20 % or twice the normal rate, and CPC withholds any refund until a compliant XML reconciles every DIN trail entry—ensuring end-to-end digital enforcement without physical interaction.

Notice under Section 139 (9): "Defective return"

When your XML return hits the e-Filing gateway it first clears only syntactic validators; an overnight CPC pre-processing batch (rule-400x series) then looks for structural gaps such as a missing like an NRI trying to use ITR-1. If it passes that gate, the core Section 143-engine (rule-600x series) recomputes schedules and fires defects like 6005 (income-head mis-tie) or 6008 (foreign-asset schedule with NRI status); any hit moves the record to the "1399-QUEUE". Within 36 hours a DIN-stamped PDF—"Communication u/s 139(9)"—lands in View Notices/Orders giving exactly 15 days (one optional 15-day extension) to choose Agree & Correct (upload a replacement XML that retains the original Ack-No), Agree & Do Nothing (return lapses), Disagree (attach technical rationale for a DCIT review), or Request Extension.

A corrected file is tagged "1399-CORR", reruns through the engine in 24 hours and, if clean, flips status to "Processed"; a successful DCIT review sets status "Vacated".

Silence to the communication auto-invalidates the return at Day end after 15/30, causing all TDS credits and losses to vanish and flagging the PAN for higher-rate TDS under Section 206AB. Ensuring closure therefore means reading the diff-sheet, fixing every tag in the same form schema, embedding the original

Ack-No, uploading from the same login session, and saving the Success-Response-ID JSON; within 48 hours the defect flag clears, the Section 143(1) intimation issues, and the risk score resets.

Rectification path – e-File → e-Proceedings → Defective Return → Submit corrected JSON/XML .

Intimation under Section 143 (1)

After filing your tax returns, the CPC's PP-1000 loader writes a shadow on the uploaded returns and follows "143-PRE" rule stack (IDs 1401-1409), which recomputes every item, aggregates credits, and cross-checks MAT/AMT credits; any difference ≥ ₹ 1 surfaces. Flagged files are passed through additional steps (AUTO143) overnight in main batch.

Here clause-specific tests under Section 143 (1)(a) trigger internal rules—8101 (arithmetic error), 8120 (ineligible deduction, e.g. 80C by an NRI), 8135 (excess loss set-off), 8140 (MAT/AMT credit mismatch), 8151 (income visible in AIS/26AS but omitted) and 8160 (schedule totals mis-tie). If no rule fires the return is auto-processed and a DIN-stamped "Intimation u/s 143 (1)" posts to the portal.

If a rule fires, "Proposed Adjustment" follows with 30-days to either Accept, Part-accept, or Disagree; "Accept" recomputes tax immediately, "Disagree" routes the clause to appropriate Review desk that may deny or confirm it, and filing a revised return u/s 139(5) overwrites the XML and resets processing.

Failure to act by 31st day finalizes the proposed adjustment, locks TDS to the recomputed income, and, where the delta exceeds ₹ 10 lakh, auto-pushes the case to the CASS risk bucket "143-ADJ" for potential scrutiny.

Ensuring clean closure therefore means reconciling AIS/TDS before filing, responding to every clause inside 30 days, saving the Success-Response-ID after each upload, and confirming the status flips to "Processed" with no open DINs—at which point the risk score resets and the return leaves the compliance pipeline.

Show-cause under Section 148A

Actions prior to issuing a Notice

The procedure is a three-step clock:

1. Section 148A(a) Enquiry (optional) — AO may conduct an enquiry with prior approval. The NR should insist on the entire 'information packet' as provisioned under CBDT Instruction 01/2022.

2. Section 148A(b) Show-cause — DIN-validated notice with a reply window of at least seven and not more than thirty days. Seek extension before expiry if documents are overseas; as provisioned under Circular 14/2021 para 2.3 permits.

3. Section 148A(d) Speaking order — AO must pass a reasoned order within one month of receiving the reply (or of the reply-due date) deciding whether to issue a notice under Section 148.

Key statutory limits: notices cannot be issued beyond three years from the end of the AY unless the alleged escapement (represented in an asset, expenditure or entry) exceeds

₹ 50 lakh, in which case the outer limit is five years (effective from 1st Oct, 2024).

- Typical NR fact patterns:

- Treaty-exempt capital gains read as escapement – provide Article 13 computation, purchase/sale evidence, TRC and residency proof.

- Sale of property where the buyer failed to deduct Section 195 TDS – attach Section 197 nil/lower-rate certificate or proof that the buyer has since deposited TDS with interest.

Preventive controls – the NR compliance checklist

- Portal surveillance – Log in at least monthly and review the Pending Actions and Activity Log so statutory timelines) are never missed.

- Make sure that your coordinates (Email ID & Mobile number) are correctly mentioned on the My profile section of the Income tax Website.

- Return hygiene – Reconcile AIS, TIS and Form 26AS before uploading; attach Form 67; keep JSON clean; this almost eliminates Section 139 (9) and Section 143 (1) friction.

- Bank/Broker KYC – Flag residency as "NR – Treaty Country" and provide Form 10F where payers insist on higher TDS; ensures correct Section 195/196D withholding.

- Property exits – Obtain a Section 197 certificate, may not be material if sale done after the recent changes, before registering a sale and make sure the buyer files Form 26QB inside 30 days; missing TDS is the single biggest catalyst for Section 148A.

- Document vault – Digitally store the fundamental documents indicating assets, income and deductions as and where applicable. Try to keep file size <5 MB PDFs; to ensure ease of upload to faceless replies.

- Mid-year AIS audit – A September review catches TDS posted by banks on April–August income that might otherwise be missed.

Step-wise practitioner play-book

1. When a Section 139 (9) notice lands: identify defect, export the error sheet, correct schedules, regenerate and upload JSON within 15 days. If the window has closed, cure the defect anyway, then raise a Section 154 rectification.

2. On receiving Section 148A(b): plot the statutory deadline; request extension (as far as possible) only once and well in advance; reply in three blocks – Facts, Law, Evidence; invoke Instruction 01/2022 para 3.3 to obtain the underlying information; where AY > 3 years and alleged escapement < ₹ 50 lakh, challenge jurisdiction (see ***Shyam Sunder vs. Union of India & Ors., W.P. (C) No. 12163/2023 (Del. HC)***, decided on 15 September 2023, before a Division Bench comprising Justices V. Kameswar Rao and Anoop Kumar Mendiratta).

3. Against a Section 143 (1) demand: download the intimation and compare

the observations against the filed version; submit online rectification in JSON mode ; or deny by reviewing 'Response to Outstanding Demand' file a response within 30 days.

4. Escalation protocol: CPC inaction beyond 30 days → e-Nivaran; beyond 60 days → check with the concerned faceless or jurisdictional officer or via CPGRAMS; beyond 90 days → representation to PCCIT(Faceless) quoting DIN trail.



Statutory timeline cheat-sheet

- Section 139 (9) – Defective-return notice. Served by CPC or jurisdictional AO via e-mail + portal. Reply within 15 days (AO can extend). Issuable only after a return is filed.
- Section 148A(b) – Show-cause prior to reopening. Served with DIN via portal. Reply window ≥ 7 and ≤ 30 days. Can be issued up to three years, or up to five years if escapement ≥ ₹ 50 lakh.
- Section 148 – Notice after Section 148A. 30 days to file a fresh ROI. Same time bars as above.
- Section 143 (1) – CPC intimation. Reply or seek rectification within 30 days. CPC must issue the intimation within nine months of the FY in which the ROI was filed.

Common practitioner errors – and how to avoid them

- Treating a Section 139 (9) notice like a tax demand – the real risk is invalidation of the return, not payment; focus on curing the defect.
- Mixing PDF evidence with XML corrections in Section 154 – CPC discards standalone PDFs; embed all numbers inside the schedules and attach PDFs only as supporting proof.
- Ignoring Activity-Log alerts because e-mails went to spam – the DIN clock keeps running; whitelist no-reply@insight.gov.in and donotreply@cpc.gov.in.
- Failing to distinguish "information" from "enquiry" in Section 148A(a) – courts quash notices lacking concrete information; demand disclosure.
- Assuming the buyer's Section 195 lapse protects the NR seller – AO still treats the gain as unreported; secure copy of Form 26QB or rely on Rule 37BA credit shift.

■

NRE VS. NRO ACCOUNTS – USING THE CORRECT ONE





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Overview

The article provides an in-depth comparison between NRE (Non-Resident External) and NRO (Non-Resident Ordinary) accounts for NRIs under the Foreign Exchange Management Act (FEMA), 1999. It starts by clarifying residential status rules, which impact account classification. NRE accounts are ideal for managing foreign income in India – they are rupee-denominated, tax-free, and allow full repatriation. Only NRIs can open them, and they support joint operation with other NRIs or designated relatives under power of attorney.

When it comes to managing income—both foreign and domestic—clarity and compliance under FEMA regulations are not optional. They are essential.

In contrast, NRO accounts are used to manage income earned within India, such as rent or dividends. They allow joint operation with residents and have tax implications – interest earned is taxable and subject to TDS. Repatriation from NRO accounts is restricted to $1 million per financial year (excluding current income).

The article also outlines permissible debits and credits, remittance procedures, and what changes when NRIs return to India – their accounts must be reclassified to reflect resident status. It emphasizes choosing the correct account based on income origin and future plans, underscoring the importance of compliance with FEMA and tax laws for efficient financial management.

In an increasingly mobile world, the financial lives of Indians often transcend borders. Whether working in New York, running a startup in Singapore, or retiring in Dubai, NRIs stay emotionally and financially attached to India. But when it comes to managing income – both foreign and domestic – ***clarity and compliance under FEMA regulations are not optional. They are essential.***

But here's where things get tricky.

Once your income, investments, or assets cross international borders, so do the legal frameworks. That's when FEMA – the Foreign Exchange Management Act, 1999 – comes into play. And FEMA isn't just another piece of

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financial jargon. It governs ***how*** **you can move money in and out of India, and** ***who*** **can do what.**

So, what's the first thing we would like to understand in FEMA? – **Residential Status.**

Section 2(v) of FEMA, 1999, defines the term "person resident in India" as:

(i) a person residing in India for more than 182 days during the course of the preceding financial year but does not include-

(A) a person who has gone out of India or who stays outside India, in either case-

(a) for or on taking up employment outside India, or

(b) for carrying on outside India a business or vocation outside India, or

(c) for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period;

(B) a person who has come to or stays in India, in either case, otherwise than-

(a) for or on taking up employment in India, or

(b) for carrying on in India a business or vocation in India, or

(c) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period;

Section 2(w) of FEMA, 1999, defines the term "person resident outside India" as a person who is not resident in India;

While the benchmark of staying in India for more than 182 days in the preceding financial year is the starting point, the Act wisely incorporates exceptions that reflect the intent behind a person's stay or departure. If an individual has left India for employment, business, or any other purpose indicating an indefinite stay abroad, he or she can be well considered as a non-resident from the date of departure—regardless of the days stayed in India. Similarly, a person entering India with an intention to stay indefinitely for similar reasons can be considered as a resident from day one of entering India with such intent.



This nuanced definition ensures that classification is not merely mechanical but intention-driven—an approach that brings clarity, especially when managing cross-border assets and liabilities.

It is equally important to understand various terms as defined under the Act and notifications thereunder like 'Non-resident Indian' (NRI), 'Person of Indian Origin (PIO)' and Overseas Citizen of India (OCI). We shall not dwell upon over it as the same is covered under other articles in this series already, hence moving to the main topic of discussion here.

So, you've packed your bags and moved abroad—or maybe you're just finalizing your plans. Amid all the excitement (and jet lag), there's one important financial question that deserves your attention:

"What happens to my Indian bank account now?"

Well, it's not as simple as just continuing your old savings account. If you're a Non-Resident Indian, your ***regular savings account must be designated into an NRO account*** for Indian income and **you may want open an NRE account to manage your foreign funds.**

Under Notification No. FEMA 5(R)/2016-RB, dated April 1, 2016, [Foreign Exchange Management (Deposit) Regulations, 2016], NRIs are allowed to open three specific types of accounts in India.

Let's break them down—

1. **Non-resident (External) Rupee Accounts (NRE Accounts)** opened under the Non-resident (External) Account Scheme, *specified in Schedule 1 of the "Deposit Regulations".*

2. **Non-resident (Ordinary) Rupee Accounts (NRO Accounts)** opened under the Non-resident (Ordinary) Account Scheme (NRO account) *specified in Schedule 3 of the "Deposit Regulations".*

3. **Foreign Currency Non-Resident (Banks) Accounts (FCNR(B) Accounts)** opened under the Foreign Currency (Non-resident) Account Banks Scheme (FCNR-B account) specified in *Schedule 2 of the "Deposit Regulations".*

Let us take a deeper look into different types of Bank accounts to be opened by a NRI in India and permissible credits and debits in such accounts –

1) Non-Resident (External) Rupee Accounts (NRE Accounts)

NRIs and Erstwhile PIOs (as the scheme was abolished in 2015 and merged with OCI and hence now includes OCI), can open and maintain NRE accounts for their foreign remittances. These are rupee denominated accounts and can be in the form of savings, current, recurring or fixed deposit accounts.

Key features of this account include the ability to credit by making remittance of funds in free foreign exchange brought in legally. Joint operation with other NRIs/PIOs is also permitted in this account. Further, Power of attorney can be granted to residents for ease of operation of accounts (for certain limited transactions). The deposits can be used for all legitimate purposes. And above all **the balance in the account is freely repatriable** with no questions being asked by the bank and by simply making a request to remit outside India.

From the Income Tax perspective, Interest lying to the credit of NRE accounts is **fully**

exempted from tax in the hands of the NRI under section 10(4)(ii) of Income-tax Act, 1961.

Such accounts can be **opened** only by the non-resident himself and not through the holder of the power of attorney however can be operated through power of attorney in favour of residents who is a relative of such NRI for the limited purpose of withdrawal of local payments or remittances through normal banking channels to the account holder himself and for facilitating investment in India on behalf of such NRI account holder.

NRIs are permitted to open NRE account with their resident close relatives' on 'former or survivor basis. The resident close relative shall be eligible to operate the account as a Power of Attorney holder in accordance with the extant instructions during the lifetime of the NRI PIO account holder. The term relative is not defined under FEMA but the definition is borrowed from section 2(77) Companies Act, 2013 and the same is applicable for the purpose of above.

Over drawings in NRE savings bank accounts: Authorised dealers/authorised banks may at their discretion/commercial judgment allow for a period of not more than two weeks, over drawings in NRE savings bank accounts, upto a limit of Rs. 50,000 and subject to the condition that such over drawings together with the interest payable thereon are cleared/ repaid within a period of two weeks, out of inward remittances through normal banking channels or by transfer of funds from other NRE/FCNR accounts.

Let us understand the Procedure for making remittance from this account

For making an outward remittance from NRE account, a simple request letter specifying the necessary details has to be filled with Bank. NRE account balances are freely repatriable. There is no limit specified for outward remittances from such accounts.

A person needs to understand that not all debits and credits are permitted to this account. Let us understand what are the Permissible credits and debits:

Permissible credits to NRE account are -

Inward remittance from outside India, interest accruing on the account, interest on investment, transfer from other NRE/ FCNR(B) accounts, maturity proceeds of investments (if such investments were made from this account or through inward remittance).

Current income like rent, dividend, pension, interest etc. will be construed as permissible credit to the NRE account. Further deposit of travellers cheques and drafts are also permitted however the same are out dated now.

Refund of share/debenture application money, provided investment amount was paid out of NRE account. Similarly refund of application/earnest money/purchase consideration made by the house building agencies/seller on account of non-allotment of flat/plot/cancellation of bookings/deals for purchase of residential/commercial property, together with interest, if any (net of income tax payable thereon), provided the original payment was made out of NRE.

Eligible debits to NRE account are -

Local disbursements, transfer to other NRE/ FCNR accounts of person eligible to open such accounts, remittance outside India, investments in shares/securities/commercial paper of an Indian company, etc.

Loan against the deposits in NRE: An NRI can avail loan in India or as well as outside India if required by him against the deposits in NRE as per terms specified in Schedule 1, Regulation 5(R) Foreign Exchange Management (Deposit) Regulations, 2016.

2) Non-Resident (Ordinary) Rupee Accounts (NRO Accounts)

These are Rupee denominated **non-repatriable accounts** and can be in the form of savings, current, recurring or fixed deposits. These accounts can be opened jointly with residents in India.

When a person resident in India leaves India for becoming a NRI other than Nepal or Bhutan, his bank account in India should be redesignated as an NRO account. It is important to inform such change in residential status to the bank by such person; Similarly, when an NRI wants to open a normal saving bank account in India for his/her Indian income, the bank will open an NRO account.

In other words, person resident outside India may open NRO account with an authorised dealer or an authorised bank for the purpose of putting through bona fide transactions in rupees not involving any violation of the provisions of the Act, rules and regulations made thereunder.

This account is normally maintained for crediting legitimate dues/earnings/income in India such as dividends, interest etc.

Banks are free to determine the interest rates for this account including term deposit accounts.

The interest earned on the NRO account is **fully taxable in India.** Currently, the applicable TDS rate is 30% plus applicable surcharge and cess, when the interest accrues on NRO deposit.

This account is denominated in Indian Rupees.

Let us understand what are the Permissible credits and debits to NRO Account

Permissible credits to NRO account are:

(i) Proceeds of remittances from outside India through normal banking channels received in any permitted currency.

ii) Transfers from rupee accounts of non-resident's bank accounts.



(iii) Legitimate dues in India of the account holder. This includes current income like rent, dividend, pension, interest, etc.

(iv) Sale proceeds of assets including immovable property acquired out of rupee/foreign currency funds or by way of legacy/inheritance.

(v) Resident individual may make a rupee gift to an NRI/PIO who is a close relative of the resident individual ['*Relative' means relative as defined in section 2(77) of the Companies Act, 2013*] by way of a crossed cheque/electronic transfer. The amount shall be credited to the Non-resident (Ordinary) Rupee (NRO) account of the NRI/PIO and credit of such gift amount will be treated as an eligible credit to NRO account.

(vi) Resident individual may lend to a Non-resident Indian (NRI)/Person of Indian Origin (PIO) close relative *['Relative' means relative as defined in Section 2(77) of the Companies Act, 2013*] by way of crossed cheque/electronic transfer. The loan amount should be credited to the NRO account of the NRI/PIO. Credit of such loan amount will be treated as an eligible credit to NRO account.

(viii) Transfers from other NRO accounts is a permissible credit for the account.

Permissible Debits to NRO Account are:

(i) All local payments in rupees including payments for investments in India subject to compliance with the relevant regulations made by the Reserve Bank of India.

(ii) Remittance outside India of current income like rent, dividend, pension, interest, etc., in India of the account holder.

NRO accounts may be held jointly with residents and/or with non-resident Indian.

(iii) Remittance up to USD one million per financial year (April-March), for all bona fide purposes, to the satisfaction of the Authorised Dealer bank.

(iv) Transfers to other NRO accounts

(v) Transfer to NRE account of NRI within the overall ceiling of USD one million per financial year subject to payment of tax, as applicable

Other unique features of this account are as follows:

NRI/PIO may remit from the balances held in NRO account an amount not exceeding USD one million per financial year, subject to payment of applicable taxes. The limit of USD 1 million per financial year includes sale proceeds of immovable properties held by NRIs/PIOs. However, this limit is not applicable to **remittance of current income** as mentioned in (ii) above.

NRO accounts may be held jointly with residents and/or with non-resident Indian.

NRO (current/savings) account can also be opened by a foreign national of non-Indian origin visiting India, with funds remitted from outside India through banking channel or by sale of foreign exchange brought by him to India.

Loans to non-resident account holders and to third parties may be granted in Rupees by Authorised Dealer/bank against the security of fixed deposits subject to certain

terms and conditions as specified in Schedule 3 to Regulation 5(R) Foreign Exchange Management (Deposit) Regulations, 2016.

Let us under understand the Procedure for making remittance from this account

For making an outward remittance from NRO account to NRE Account/Foreign bank account of the Non-Resident, in addition to the request form and the documentary proof of the source of the funds sought to be remitted, **an online certificate from a Chartered Accountant in Forms 15CB and an online declaration 15CA** is also required to be submitted to the bank.

Let's now imagine you are planning to come back to India-

Your homecoming is just the beginning — now let's realign your finances too.

You're coming back — maybe for work, maybe to start a new chapter with family, maybe for good.

But amidst packing bags and booking tickets, have you thought about your bank accounts in India?

Change of residential status of the account holder: From Non- Resident to Resident

The moment your intention to stay in India becomes permanent, your residential status changes under FEMA — it affects how your bank accounts are classified, how your income is taxed and how freely you can move funds.

NRO accounts should be re-designated as Regular Resident Rupee accounts.

NRE accounts should be re-designated as resident accounts or the funds held in these accounts may be transferred to the RFC accounts (if the account holder is eligible for maintaining RFC account) at the option of the account holder immediately upon the return of the account holder to India for taking up employment or for carrying on business or vocation or for any other purpose indicating intention to stay in India for an uncertain period.

Where the account holder is only on a short visit to India, the account may continue to be treated as NRE account even during his stay in India.

It is important to note that once the NRE balances are transferred to the RFC account, the funds in the RFC account are not subject to the $250,000 LRS (Liberalised Remittance Scheme) limit applicable to Residents.

Let us re-summarise the difference between an NRE Account and NRO Account

While an NRE account is used basically to store the money earned/received from outside India and is treated as foreign funds, the NRO account allows credit of the income earned in India.

While NRE account, funds are kept in rupee denomination the principal balance and interest earned are fully repatriable. Overseas funds remitted to India after converting to Indian rupee can be parked in India and since the same is fully repatriable remittance again outside India becomes easy, subject to exchange difference.

As discussed above, the NRE account is the account wherein an NRI can park their proceeds from outside India. It is crucial to note that an investment made from NRE account is considered as from outside India.

The funds in NRE account are fully repatriable. However, the funds in NRO

account are subjected to limitation w.r.t. repatriation.

Unlike an NRE account, NRO account repatriation is allowed only under specific conditions. As per the RBI's guidelines, it is permitted to repatriate only up to $1 million per financial year (April to March) in accordance with provisions of Notification 13(R) – Foreign Exchange Management (Remittance of Assets) Regulations, 2016, with exception for remittance of current income of NRI which can be fully repatriated subject to payment of taxes in India.

It may be noted that although the TDS is deducted at higher rate of tax, generally the impact of applicability of highest rate of surcharge and cess to such an individual should be looked into before issuing certificate under 15CA by a Chartered accountant.

Other points of consideration by NRI

Although for NRI (assuming Non-resident as per Income Tax provisions as well), there is no need to disclose their overseas accounts and assets in their tax return in India, it is important to disclose their NRO as well as NRE accounts in India.



Further the interest income earned from NRE account which is not captured in Form 26AS or AIS (Annual Information Summary) as it is tax exempt, the same should be disclosed at appropriate place in the tax return in India.

So, Which Account Is Right for You?

Whether you're earning in dirhams, dollars, or pounds—or receiving rent from your apartment back home—choosing between an NRE and NRO account isn't just a banking formality. It's a strategic decision that affects how your money moves, grows, and gets taxed.

- ✓ Are you sending money home from abroad? – Go with an NRE account for full repatriability and tax-free interest.
- ✓ Have income sources in India like rent, dividends, or a pension? – Use an NRO account to receive and manage those funds, but be aware of the repatriation and tax implications.
- ✓ Planning your return to India? – Don't forget to re-designate your accounts to align with your new residential status.

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CAPITAL GAINS EXEMPTIONS – CAN NON-RESIDENTS USE SECTION 54 / 54F?



CA Namrata Dedhia

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Overview

The article discusses the applicability of Sections 54 and 54F of the Income-tax Act, 1961 to Non-resident taxpayers, focusing on their eligibility to claim exemptions on long-term capital gains by reinvesting in another residential property in India, subject to compliance with conditions such as reinvestment within prescribed timeframes, use of the Capital Gains Account Scheme (CGAS), and lock-in period.

The article analyses judicial interpretations, including whether multiple adjacent units qualify as one house, and whether investments must be made in the assessee's name to be eligible for the exemptions. It also reviews conflicting tribunal decisions on counting foreign residential properties while assessing Section 54F eligibility. The final conclusion drawn is that while judicial precedents support non-residents' claims for exemption, careful compliance and documentation are essential to avoid litigation due to nuanced factual and legal interpretations.

Introduction

The taxation of capital gains in India has evolved over the years with the economic progress of the country. Not only has the scope of chargeability of transactions under this head of income increased to deal with changing laws and developing transaction structures, but even the exemptions provided have kept pace with the changing economic landscape. Over the last few years, as different asset classes in India attract more and more investments and the value of such investments grows, the available exemptions have been curtailed and the tax rates have also been gradually increased, reducing the avenues for mitigating capital gains tax.

Sections 54 and 54F of the Income-tax Act, 1961 are two provisions offering significant exemptions from long-term capital gains, and encouraging reinvestment in residential property.

Sections 54 and 54F of the Income-tax Act, 1961 are two provisions offering significant exemptions from long-term capital gains, and encouraging reinvestment in residential property. An examination of the exemption provisions becomes particularly relevant in view of rising investments by non-residents in India. This article seeks to discuss the various nuances of sections 54 and 54F pertaining to non-residents.

Provisions of Sections 54 and 54F

Section 54 provides exemption from long-term capital gains arising from the transfer of a residential house property, provided the gains are reinvested in another residential house property in India. The capital gains are exempt to the extent of the amount of reinvestment made in the new asset, subject to a limit of ₹ 10 crore.

Section 54F, on the other hand, offers exemption from long-term capital gains arising from the transfer of any capital asset other than a residential house property, provided the net consideration is invested in purchasing or constructing a residential house in India. If the amount reinvested in the new property is lower than the net consideration of the original property, the exemption would be calculated on a proportionate basis in the ratio of the amount reinvested to the net consideration. Here too, reinvestment exceeding ₹ 10 crore will be ignored for calculating the exemption.

The respective sections also lay down additional conditions that need to be satisfied in order to avail the exemptions, which have been discussed subsequently.

Both these sections are applicable for individuals and Hindu Undivided Families (HUFs), irrespective of their residential status. Accordingly, non-resident taxpayers are eligible to claim the exemptions under Sections 54 and 54F, subject to fulfilment of the conditions prescribed.

Key Conditions for availing Exemptions:

a) New Asset

The reinvestment must be made in one residential property located in India. Prior to 2015, the provisions referred to reinvestment in a residential property, without specifying the location of the same. Interpreting the old provisions, several High Courts and Tribunals held that even reinvestment in a residential property outside India would qualify for the exemption provisions, as long as all other conditions were satisfied. However, both the sections were amended by Finance (No.2) Act, 2014 with effect from 1st April 2015 to require reinvestment in one residential property located in India, thereby making it clear that the benefit of the exemptions was restricted to reinvestment within India and making the judgements, rendered in the context of the old provisions, no longer applicable.

Both these sections are applicable for individuals and Hindu Undivided Families (HUFs), irrespective of their residential status.

Further, the requirement of "one" residential property has been repeatedly held by the Courts to include multiple units, if it can be demonstrated that the units are not independent and meant to be used as a single "house". Facts such as a common kitchen and living room between multiple units, internal access between the multiple units, modification of the plan of the multiple units to combine them into a single dwelling unit have been typically held to be indications that the multiple units are not independent, allowing exemption in respect of the reinvestment in multiple units. The honourable High Courts in the case of ***CIT vs. D. Ananda Basappa [2009] 309 ITR 329 (Karnataka)*** and ***CIT vs. Gita Duggal 2013 SCC Online***

Del 752 have upheld the allowance of the exemption to the taxpayer in such cases. Conversely, the honourable High Courts in the case of ***Pawan Arya vs. CIT [2011] 200 Taxman 66 (Punjab & Haryana) (Mag.)*** and ***Mrs. Kamla Ajmera vs. Pr. CIT [2024] 169 taxmann.com 119 (Delhi)*** have explicitly denied the benefit of these sections to the taxpayers where multiple units are situated physically in a manner that they cannot be combined and used as a single dwelling unit.

It is pertinent to note that Section 54 provides an option to the taxpayer to claim the exemption in respect of cost purchase or construction of two residential houses if the amount of capital gain does not exceed Rs. 2 crore. This option can be exercised by the taxpayer only once and if exercised, it will not be available to him again in the same or subsequent year.

b) Time Limit for Reinvestment

Where the taxpayer purchases a property, the same must be done within 1 year before or 2 years after the date of transfer to be eligible for exemption. The exemption is also available if the new residential house is constructed within a period of 3 years from the date of transfer, either by the taxpayer himself or by investing in an under-construction property.

One of the practical issues in case of construction of the new property is that the taxpayer does not have control on timeline of completion of construction. Projects often get delayed, resulting in the construction not being completed within the stipulated 3-year timeline in sections 54 and 54F. Recognising the practical difficulty in ensuring completion of construction within the 3 years' time limit, the courts have time and again held that the benefit of the exemption provisions cannot be denied merely because the construction has not been completed, particularly where the entire amount of gain or net consideration, as the case may be, is reinvested within the prescribed time limit.

The broad points that emerge from the pronouncements in the case of ***CIT vs. Sardarmal Kothari [2008] 302 ITR 286 (Mad.), CIT vs. Sambandam Udaykumar [2012] 206 Taxman 150 (Karnataka), CIT vs. Smt. B. S. Shanthakumari [2015] 233 Taxman 347 (Karnataka)*** and various other tribunal judgements which have relied on these High Court orders are as under –

i) Sections 54, 54F and similar other exemption sections are beneficial provisions and must be interpreted liberally.

ii) In order to avail the exemption, it is enough if the taxpayer establishes that the taxpayer had invested the entire net consideration within the stipulated period, even if construction is not entirely complete.

iii) Facts such as construction being on the verge of completion, pendency of only minor fittings, obtaining possession of the new property, etc. further the case of the taxpayer in availing the exemption.

iv) Where the construction is delayed due to factors beyond the control of the taxpayer, he would not be

disentitled from the benefit of the exemption.

While the aforesaid pronouncements clearly favour the assessee, it must be borne in mind that the facts of each case would have a bearing on the allowability of exemption where construction is not completed within 3 years and that adopting an aggressive stance is likely to be met with litigation at least at the assessment level.



c) Deposit in Capital Gains Account Scheme (CGAS)

While the time limit for reinvestment into the new asset is 2 years or 3 years as the case maybe, the taxpayer would need to claim the exemption benefit much before the expiry of this time limit, in the return of income for the year in which the capital gains has arisen. If the reinvestment is not made before the due date of filing the return, the amount is required to be deposited in a CGAS account in India, to be able to claim the benefit of the exemption provisions, to the extent of the amount deposited.

If any amount remains unutilised in the CGAS account at the end of the stipulated period, in respect of which the exemption has been claimed, then, the corresponding amount of exemption shall be withdrawn and be taxed as capital gains in the year in which the period of 3 years from the date of transfer of the original asset expires.

Once the amount is deposited in the CGAS account, it can be utilised only to make payments towards the purchase or construction of the property. In the event that the amount remains unutilised in the CGAS account and is required to be withdrawn, the taxpayer would require an approval from the jurisdictional assessing officer.

d) Lock-in period for new property

The new residential property purchased by the taxpayer to avail the exemption will have to be held for a period of 3 years from the date of its purchase or construction. If the new property is transferred within the said period of 3 years, it would

result in withdrawal of the exemption benefit. The implication under section 54 is that the cost of the new asset is reduced to the extent of the exemption already availed, thereby, increasing the capital gains taxable on the new asset. However, in case of section 54F, the exemption is withdrawn by taxing it as Long-Term Capital Gains of the previous year in which the new property is transferred. Thus, while the effect of the withdrawal of exemption would be given in the year of transfer of the new asset in both cases, in case of section 54, the capital gain liable to be taxed may be either short-term or long-term in nature, depending on the period of holding of the new property, whereas, the capital gain is assumed to be long-term in terms of section 54F.

e) Additional condition under Section 54F

As the exemption under Section 54F is allowed in respect of capital gains from any long-term asset other than a residential property, it is important to ensure that the exemption is availed as intended and that the taxpayers do not transfer their long-term assets only to end up buying residential properties in order to claim the exemption. Accordingly, Section 54F lays down an additional condition that the exemption benefit will not be available if the taxpayer owns more than one residential house, other than the new asset, on the date of transfer of the original asset; or purchases or constructs any residential house, other than the new asset, within a period of 1 year and 3 years respectively from the date of transfer of the original asset.

If the taxpayer purchases or constructs any residential house, other than the new asset, within a period of 2 years or 3 years, as the case may be, from the date of transfer of the original asset, then, the amount of exemption claimed would be treated as Long-Term Capital Gains of the previous year in which such residential house is purchased or constructed.

In the case of ***Smt. Maries Joseph vs. DCIT [2023] 199 ITD 631 (Cochin – Trib.)***, the honourable Tribunal examined whether the above condition of owning not more than 1 residential house, other than the new asset, will also take into account residential houses owned outside India and it was held that the condition should be interpreted to mean ownership of residential houses in India and accordingly, the benefit of the exemption should be allowed even if the taxpayer owns residential house outside India. However, the honourable Vishakhapatnam Tribunal in the case of ***DCIT vs. Babu Rajendra Prasad [2023] 201 ITR 704 (Vishakhapatnam – Trib.)*** took a diametrically opposite view. In this case it was held that since the taxpayer was a co-owner of a property situated in USA where he habitually resided and had also disclosed address of said property in his passport, the taxpayer was not entitled to benefit of deduction under section 54F as he owned more than one residential house at time of transfer of original asset.

Reinvestment in whose name

The provisions of section 54 and 54F are silent with regards to the person in whose name the new residential property should be purchased. However, given the system of taxation in India where every person pays tax and files their return of income in individual capacity, it seems implied that

the reinvestment ought to be made in the name of the same person, in whose name the capital gain from transfer of the original asset arises.

However, in one of the earliest litigation on this aspect, the honourable Madras High Court in the case of ***C. V. Ramanathan vs. CIT [1980] 125 ITR 191 (Madras)*** observed that section 54 did not expressly stipulate that the vendor and the purchased must be the same and allowed the benefit of the exemption under section 54 to property constructed by the legal heir upon the death of the assessee. In similar facts, the honourable Andhra Pradesh High Court in ***Late Mir Gulam Ali Khan vs. CIT [1987] 165 ITR 228***, allowed the exemption while observing that "the object of granting exemption under section 54 of the Act is that an assessee who sells a residential house for purchasing another house must be given exemption so far as capital gains are concerned. The word "assessee" must be given wide and liberal interpretation so as to include his legal heirs also. There is no warrant for giving too strict an interpretation to the word "assessee" as that would frustrate the object of granting exemption."

Rejecting the liberal view of the Andhra Pradesh High Court and distinguishing the facts, the honourable Bombay High Court in the case of ***Prakash vs. ITO [2009] 312 ITR 40 (Bombay***) held that in order to qualify for exemption under section 54F, it is necessary and obligatory to have investment made in residential house in name of assessee only and not in name of any other person and accordingly rejected the claim of the assessee for exemption in respect of investment of sale proceeds in the name of his adopted son. Similarly, in the case of ***Ganta Vijaya Lakshmi vs. ITO [2015] 54 taxmann.com 301 (AP)***, capital gains exemption under sections 54B and 54F was denied to the assessee on properties purchased in the name of the assessee's married daughters. Even in the case of ***Jai Narayan vs. ITO [2008] 306 ITR 335 (P&H)***, it was held that agricultural lands purchased in the name of son and grandson would not be entitled to deduction under section 54B, which was thereafter followed in the case of ***CIT vs. Dinesh Verma [2015] 233 Taxman 409 (P&H)*** where the agricultural land was purchased in the name of the assessee's wife. Several tribunals, particularly those within the jurisdiction of the above High Courts, have followed these decisions and denied the benefit of the exemptions under various sections where the new asset was purchased in the name of another person.

Despite the above views of various High Courts, in case of ***CIT vs. V. Natarajan [2006] 154 Taxman 399 (Mad.)***, where the assessee claimed he had purchased the new asset in the name of his wife as Benami for himself and that he was the real owner of the property, it was held that the property purchased by the husband in the name of his wife was exempt. Further, the honourable Karnataka High Court in the specific facts of the case of ***DIT, Intl. Tax vs. Mrs. Jennifer Bhide [2012] 349 ITR 80 (Karnataka)*** allowed the benefit of exemption to the taxpayer as the entire consideration for purchase of the new residential property had flown from her and no consideration had flown from her husband, and also observed that to attract section 54 and section 54EC what is material is investment of sale consideration in acquiring residential premises or constructing a residential premises or investing amount in bonds set out in section 54EC and that there is no requirement that such investment should be in name of assessee only. Both these decisions

were also followed in the case of ***CIT vs. Kamal Wahal [2013] 351 ITR 4 (Delhi)*** and the precedent has since been followed by numerous Tribunals.

An interesting view was also taken by the honourable Gujarat High Court in the case of Principal ***CIT vs. Vaidya Panalalmanilal (HUF) [2018] 259 Taxman 19 (Gujarat)***, where distinguishing the decision in the case of ***Prakash sv. ITO (supra)*** on facts, it was held that where consideration that arose in hands of HUF on sale of capital asset had been invested for purchase of new residential house in the name of some of its members instead of assessee (HUF), deduction under section 54F in hands of HUF would still be permissible, as the capital asset was sold by the HUF and purchased by the HUF as reflected in the accounts, while the names of two members of the HUF shown in the sale deed was only cosmetic in nature.

From the plethora of decisions discussed above, it can be understood that there are contrary views on the issue of whether investment in the name of a person different than the assessee would be eligible for the exemptions and the applicability of different views is dependent on the facts of each case, as also the view of the jurisdictional High Court.

FEMA Considerations for Non-Residents

As non-residents undertaking the transactions of sale and purchases, care also needs to be taken with regard to the FEMA considerations relating to these transactions. Following are the key points to be kept in check -

- Only Non-resident Indians (NRIs) and Persons of Indian Origin (PIOs) can acquire residential property in India without prior approval.

- Non-residents cannot purchase agricultural land, plantation property, or farmhouse. Thus, the new residential house property purchased, cannot fall within this prohibited category.

- If the non-resident intends to take the funds out of India, repatriation of sale proceeds is allowed up to two properties, subject to certain limits and conditions.

Conclusion

In summary, non-residents are legally entitled to claim capital gains exemptions under Sections 54 and 54F of the Income-tax Act, 1961, provided they meet the statutory and regulatory requirements. However, due to the procedural and regulatory hurdles, including CGAS-related issues and FEMA restrictions, it is essential for non-residents to plan such investments carefully. Finally, although a lot of judicial pronouncements exist in favour of the taxpayers on various nuances of the exemption provisions, it is germane to understand the associated risks and costs of litigation arising from adopting an aggressive position as also that even a slight variation in the facts may affect the relevance of the judgements to the case on hand.

■

SUPREME COURT



Keshav B. Bhujle
Advocate

1 PRINCIPAL CIT VS. KISHORE KUMAR MOHAPATRA (2025) 475 ITR 198 (SC): DATED 05/04/2024:

Appeal to High Court — Exemption — Long-term capital gain — Unexplained money — Claim to an exemption of long-term capital gains made in the revised return filed during assessment — High Court affirming Tribunal's finding of failure of natural justice owing to Assessing Officer's denial of opportunity to assessee to cross-examine entry providers who made statement adverse to the assessee — High Court holding Assessing Officer failed to consider Board's circular permitting assessee to file a revised return if he omitted to make claim — High Court upholding the view of Tribunal and Commissioner (Appeal) holding issues involving questions of fact based on appreciation of facts — Supreme Court dismissed the special leave petition filed by the Department: Ss. 10(38), 68, 69 and 260A of ITA, 1961: A.Y. 2014-15

Where the Assessing Officer rejected the claim to exemption of long-term capital gains u/s. 10(38) of the Income-tax Act, 1961, made by the assessee in a revised return filed during the course of scrutiny assessment, but the Commissioner (Appeals) held in favour of the assessee and the Tribunal affirmed his order and also deleted the additions made by the Assessing Officer u/s. 68 and 69, the High Court held, dismissing the Department's appeal, the assessee did not have an opportunity to challenge the statements on the grounds of which additions were made u/s. 68 and 69 by the Assessing Officer, that the Tribunal was justified in holding that the failure to adhere to the principles of natural justice went to the root of the matter, and that the CBDT circular which permitted the assessee to file a revised return if he had omitted to make a claim was also not considered by the Assessing Officer. (See Principal ***CIT vs. Kishore Kumar Mohapatra: (2025) 475 ITR 195 (Orissa)***).

The Supreme Court dismissed the special leave petition filed by the Department and held as under:

"i) Heard the learned senior counsel appearing for the petitioner.

ii) Delay condoned.

iii) No case for interference is made out in the exercise of our jurisdiction under Article 136 of the Constitution of India. The special leave petition is, accordingly, dismissed"

2 AMBIENCE FARMS (P) LTD. V. ACIT (2025) 474 ITR 214 (SC): DATED 20/01/2025

Assessment – Jurisdiction – Jurisdiction to issue notices u/s. 142(1) and 143(2) – "Assessing Officer or prescribed authority" – Power of CBDT to prescribe authority not confined to authorizing ITO of NFAC alone as prescribed authority – Notification issued by CBDT authorizing Assistant Commissioner or Deputy Commissioner (International Taxation), Circle-1(1)(1) to issue notice – High Court Held, notice issued by such officer were within jurisdiction – Notices valid – Supreme Court dismissed the special leave petition filed by the Assessee: Ss. 142(1) and 143(2) of ITA, 1961: A. Y. 2023-24

The Delhi High Court dismissed the assessee's writ petition against the notice issued u/ss. 142(1) and 143(2) of the Income-tax Act. 1961, holding that the CBDT, in the exercise of power u/r. 12E of the Income-tax Rules, 1962, had authorized the Assistant Commissioner or the Deputy Commissioner (International Taxation), Circle-1(1)(1), Delhi to act as the "prescribed income-tax authority" for the purpose of issuance of notice u/s. 143(2), that the powers of the Board to notify the "prescribed authority" was not confined to authorizing ITO of the NFAC, and that the notices u/s. 142(1) and 143(2) are valid. (See ***Ambience Farms (P) Ltd. vs. ACIT, (2025) 474 ITR 209 (Delhi)***).

The Supreme Court dismissed the special leave petition filed by the Assessee and held as under:

"We are not inclined to interfere with the impugned judgement. Hence, the present special leave petition is dismissed"

3 RAVI AGRAWAL VS. UNION OF INDIA (2025) 475 ITR 455 (SC): DATED 20/08/2024

Special deduction u/s. 80DD(2)(a) – Maintenance and medical treatment of a dependent who is a person with a disability – Provision amended with effect from 01/04/2023 pursuant to order of a court on earlier writ petition enabling individual subscriber or member of a Hindu undivided family, on attaining 60 years to discontinue payment to scheme and make use of monitory benefit accumulated – Held, amendment cannot be given retrospective operation as that would not be interest of disabled persons – Court cannot give retrospective operation to insurance contract which is a commercial contract: S. 80DD(2)(a) of ITA, 1961

The assessee filed a writ petition under Article 32 of the Constitution of India as a public interest litigation seeking the following prayers to be granted in the exercise of the powers of the Supreme Court under Article 142 of the Constitution:

"(a) Issue a writ of mandamus under article 32 of the Constitution of India

or any other appropriate writ, order or directions under article 142 of the Constitution of India to the respondents to execute/carry out the decision/ directions of the Central Information Commission given on June 27, 2019, in Second Appeal No. CIC/LICOI/ A/2018/611292-BJ of the petitioner.

(b) Issue a writ of mandamus under Article 32 of the Constitution of India or any other appropriate writ, order or directions under Article 142 of the Constitution of India to the respondents to take cognizance of the judgment passed by the apex court in Writ Petition (Civil) No. 1107 of 2017 dated January 3, 2019 [***Ravi Agrawal vs. Union of India, (2019) 410 ITR 399 (SC); (2019) 18 SCC 180; 2019 SCC OnLine SC 5***.] and initiate suitable necessary action accordingly.

(c) Issue order or directions to annul/ strike down clause (a) of sub-section (2) of section 80DD of the Income-tax Act, 1961, which is against the objective of the legislation and violates the fundamental rights of the handicapped person provided under article 14 of the Constitution of India.

(d) Pass such other orders and further orders as may be deemed necessary on the facts and in the circumstances of the case."

The Supreme Court dismissed the writ petition and held as under:

"i) We have considered the submissions advanced at the Bar in the light of the object of section 80DD and the fact that pursuant to the order of this court, [***Ravi Agrawal vs. Union of India, (2019) 410 ITR 399 (SC); (2019) 18 SCC 180; 2019 SCC OnLine SC 5***.] Parliament has taken note of the observations made in the said order and has amended section 80DD as extracted above. We find it difficult to accept the plea made by the learned counsel for the petitioner to the effect that the said amendment be applied retrospectively to policies that were taken prior to 2014 so that the benefit of the amendment is given to those subscribers also. The reasons are not far to seek. The whole object of the Jeevan Aadhar Policy is to benefit disabled persons by making provisions for the subscriber post his demise. The concern and apprehension of a caregiver or subscriber of a policy for a disabled family member or other person for whose benefit the policy is taken after the demise of the caregiver is of utmost significance. It is only with that object that the caregiver or a subscriber would take such a policy so that he would not leave a disabled person in the lurch on his demise. If that is the object of the policy then we do not think the subscriber or the caregiver of the subscriber should be given the liberty to discontinue the policy during his lifetime on attaining 60 years of age. That would only go against the object with which the policy has been taken and against the interest of the beneficiary, namely, a disabled person.

ii) In the circumstances, we do not think that the plea for retrospective operation of the amendment is in the interest of the disabled persons nor can this court give a retrospective operation to the amendment. This is particularly true with regard to the fact that an insurance contract is in a sense, a commercial contract, having certain

terms and conditions and the substratum of the contract cannot be removed by giving a retrospective operation to the amendment. The benefit u/s. 80DD of the Act would have been availed of by the subscribers at the time when they subscribed to the policy.

iii) We have also considered the Proclamation on the Full Participation and Equality of the People with Disabilities in the Asian and Pacific Region, 1992; and the subsequent enactments, namely, the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 which has been substituted by the Rights of Persons with Disabilities Act, 2016, as well as the Convention on the Rights of Persons with Disabilities and Optional Protocol, 2006; and, the provisions of the Life Insurance Corporation Act, 1956.

iv) In view of the said observations, we are not inclined to take a different view of the matter and particularly having regard to the reasons assigned by us as aforesaid."

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HIGH COURT



Jitendra Singh
Advocate



Radha Halbe
Advocate



Harsh Shah
Advocate

1 CIT VS. NEW PUNJAB MOTOR TRANSPORT [2025] 174 TAXMANN.COM 71 (JHARKHAND)

Business Disallowance - Section 40(a)(ia) of the Income Tax Act, 1961 - 'payable' meaning of - amounts already paid without deducting TDS would also come within the ambit of provisions of section 40(a)(ia) of the Act

Facts

The assessee before the Hon'ble Jharkhand High Court is engaged in the business of transportation work. For the relevant assessment year under consideration, the assessee had filed return of income disclosing total income at ₹ 9,36,120/-. While finalizing the assessment under section 143(3) the AO had disallowed hire charges of ₹ 4,73,89,710/- under section 40(a)(ia) of the Act on the ground that tax at source was not deducted against the hire charges paid. Being aggrieved by the assessment order, the assessee challenged the same before the Ld. CIT(A). The first appellate authority upheld the action of the Ld. A.O. and sustained the disallowances made under section 40(a)(ia). The assessee carried the matter before the Income Tax Appellate Tribunal, Ranchi. The Tribunal, relying on the decision of Hon'ble Allahabad High Court in the case of ***CIT vs. Vector Shipping Services (P.) Ltd. [2013] 357 ITR 642 (All.)*** allowed the claim of the assessee by observing that all the amounts involved were paid during the year under consideration and no amount was unpaid and remaining payable at the end of the year, and therefore, provisions of section 40(a)(ia) have no application to the amounts already paid.

The revenue being aggrieved by the order of the Tribunal, challenged the same before the Hon'ble Jharkhand High Court under section 260A of the Act.

Ruling of the High Court

Hon'ble High Court had allowed the appeal of the department revenue by observing that the decision rendered by the Hon'ble Allahabad High Court in the case of Vector Shipping Services (P.) Ltd (supra.) has subsequently been overruled by the Hon'ble Apex Court in the case of ***Palam Gas Service vs. CIT [2017] 394 ITR 300 (SC)*** holding therein that the Allahabad High Court has not laid down good law. When the entire scheme of obligation to deduct the tax at source and paying it over to the Central Government is read holistically, it cannot

be held that the word "payable" occurring in Section 40(a)(ia) refers to only those cases where the amount is yet to be paid and does not cover the cases where the amount is actually paid. If the provision is interpreted in this manner, then even when it is found that a person, has violated the provisions of Chapter XVII-B, he would still go scot-free, without suffering the consequences of such monetary default in spite of specific provisions laying down the consequences. Thus, Section 40(a)(ia) covers not only those cases where the amount is payable but also when it is already paid.

Note: - Hon'ble High Court referred to the decision of Hon'ble Supreme Court in ***Directorate of Revenue Intelligence vs. Raj Kumar Arora [Criminal Appeal No. 1319 of 2013] (2025),*** and held that, when a previous judgment is overruled by a subsequent one, the later judgment operates retrospectively, as it clarifies the correct legal position that may have been misunderstood due to the earlier ruling, therefore, if the subsequent decision alters or overrules the earlier one, it cannot be said to have made a new law.

2 NEENA SINGH THAKUR VS. PR. CIT [2025] 174 TAXMANN.COM 732 (HIMACHAL PRADESH)

Reassessment - Section 148 of the Income Tax Act, 1961 - order passed under section 148A(d) without providing any reasons that escaped income is more than ₹ 50 Lakhs - re-assessment unjustified.

Facts

For the assessment year 2017-18, the AO had issued a notice under section 148A(b) of the Act on the ground that the assessee had purchased an immovable property worth ₹ 1.21 crores and had not disclosed the same in the return of income. The assessee replied to the above notice and explained that she had purchased the immovable property for ₹ 1.31 crores and also furnished various documentary evidences to support her case. The AO however passed the order under section 148A(d) stating that the assessee's reply is "not acceptable" and "required detailed examination." Further, no reason whatsoever has been given by the AO in support of the conclusion that the escaped income is more than ₹ 50,00,000/-. The AO had also issued notice under section 148 of the Act to reopen the assessment of the assessee.

The assessee being aggrieved by the above notice issued under section 148 notice, challenged the same before the Hon'ble Punjab and Haryana High Court.

Ruling of High Court

Hon'ble High Court was pleased to allow the petition filed by the assessee by observing that there is no law which provides that an inquiry contemplated under Section 148A must essentially culminate into a notice under Section 148. Rather, it was incumbent upon the AO to decide the case in terms of sub Section (d) of Section 148A based on the material on record including the reply of the assessee, whether it is a fit case to issue a notice under Section 148 by passing an order with the prior approval of the specified authority. The AO cannot shirk away from his responsibility of deciding the case on the material available on record by simply observing that "at the preliminary stage, the contention of the assessee is not acceptable and the same requires a detailed examination". The notice under Section 148 does have serious civil or evil consequences

and cannot be passed so lightly and reasons for the same must be recorded in the order itself. Failure to give reasons amounts to denial of justice. Reasons are live links between the minds of the decision-taker to the controversy in question and the decision or conclusion arrived at. Rea-sons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx," it can, by its silence, render it virtually impossible for the Courts to perform the appellate function or exercise the power of judicial review in ad-judging the validity of the decision. Right to reason is an indispensable part of a sound judicial system. Since the order passed by the Assessing Officer is bereft of any cogent or plausible reasons, the same is set aside. The matter is remanded back to the Assessing Officer to decide the same afresh in accordance with law.

3 PR. CIT VS. LATA GOEL [2025] 174 TAXMANN.COM 535 (DELHI)

Capital Gains - Exemption - Section 54F of the Income Tax Act, 1961 - no procedure is mentioned in section 54F for construction of residential house in a particular manner - residential units purchased on different floors - eligible for exemption under section 54F of the Act.

Facts

The assessee during the assessment year 2011-12, had sold the shares of an unlisted company and the capital gains earned from said transaction was utilized in the purchase of residential units on different floors in a property. The assessee claimed exemption under section 54F of the Act. The AO, however, while finalizing the reassessment order rejected the assessee's claim of exemption on the ground that the assessee had more than one residential unit, which would render the Assessee ineligible for claiming a deduction under Section 54F of the Act. Being aggrieved by the assessment order, the assessee challenged the same before the first appellate authority. The first appellate authority upheld the view of the AO and had dismissed the appeal filed by the assessee. The assessee being aggrieved carried the matter before the Appellate Tribunal. The Appellate Tribunal allowed the appeal of the assessee.

The revenue being aggrieved by the order of the Income Tax Appellate Tribunal, challenged the same before the Hon'ble Delhi High Court under section 260A of the Act.

Ruling of the Hon'ble High Court

Hon'ble High Court is pleased to dismiss the appeal of the department and upheld the order of the Income Tax Appellate Tribunal allowing the exemption under section 54F of the Act by observing that it is evident that separate floors of the singular house bearing the address D-6/5 Vasant Vihar, New Delhi, were purchased by the family members of the Assessee. The fact that different floors may be owned or partly owned would not detract from the fact that the portions owned were required to be considered 'one residential house' and therefore the exemption under section 54F of the Act cannot be denied to the assessee.

■

TRIBUNAL





CA Nikhil Mutha *CA Viraj Mehta* *CA Kinjal Bhuta*
Advocate

1 M/S G. L. CONSTRUCTION PRIVATE LTD. VS. ITO (ITA NO. 1884/MUM/2025 DT. 09.05.2025) (AY 2018-19)

Section 37 – Explanation 1 to Section 37 – Penalty & late fees paid towards contractual default - not paid towards any default in law – no disallowance can be made

Facts

Assessee is engaged in the business of road construction for government authorities. During the course of execution of such contracts, various departments/authorities deducted certain amounts from the assessee's bills, classifying them as "penalties" for reasons including, but not limited to, non-deployment of requisite machinery, delayed commencement of work, slow progress, incorrect or missing barricades, cracks or damage observed during quality inspections, non-maintenance of mandatory measurement records, failure to remove debris, inconvenience caused to the public due to delayed completion, failure to timely submit technical reports such as mix design/ job mix formula for asphaltic material, and non-compliance with tender conditions. During the year under consideration, the parties deducted a total amount of ₹ 45,91,698/- towards such penalties against certified bills. Ld. AO held the said deductions as being violative of section 37(1), disallowed a sum of ₹ 42,44,859/- claimed as business expenditure. Ld. CIT(A) upheld the order of the Ld. AO. Being aggrieved with the order, appeal is filed before Hon. ITAT.

Held

Hon. ITAT held that expenses incurred by the assessee towards penalty and late fees do not constitute an infraction of law. Rather, such payments arose from contractual terms in the normal course of business and were intended to preserve and facilitate business relationships with government entities. The Coordinate Benches of the Tribunal in ***DCIT vs. Mahavir Multitrade (P) Ltd, (2019) 180 ITD 730 (Del), DCIT vs. Ripley & Co Ltd, ITA No. 1301/Kol/2015*** and F***arseen Rubber Industries Ltd vs. DCIT, (2023) 203 ITD 765 (Kol)*** have consistently held that such payments do not attract disallowance under Explanation 1 to Section 37(1) of the Act. On said basis, Hon. ITAT allowed the appeal and deleted the disallowance.

2 BHADRESH L. JOSHI VS. DCIT (ITA NO. 6528/MUM/2024 DT. 09.05.2025) (AY 2012-13)

Section 50C – Property Sold – Year of Execution of Deed and Registration is different – Transfer said to be taken place in year of execution – 50C addition cannot be made in the year of registration – 50C addition deleted (Section 147)

Facts

Assessee has sold 3 properties at total consideration of ₹ 83,81,125/-, whereas the market value of these properties was shown at ₹ 2,23,20,000/-. Proceedings u/s 147 of the Act were initiated as the difference between the sale consideration and market value amounting to ₹ 1,39,38,875/- was not offered to tax under section 50C of the Act. Assessing Officer passed under section 143(3) r.w. section 147 of the Act added the differential amount being ₹ 1,39,38,875/- to the total income of the assessee under section 50C of the Act. The learned CIT(A) upheld that the initiation of proceedings under section 147 of the Act and also upheld the addition made under section 50C of the Act, being the difference between the sale consideration and market value of the three immovable properties sold by the assessee. Being aggrieved with the order, appeal is filed before Hon. ITAT.

Held

Hon. ITAT upheld deed of conveyance for all three sale transactions was executed by the assessee in the previous financial year, i.e., 2010-11 and the possession over the immovable property was also handed over to the purchaser, i.e., M/s. Dynesty Homemakers Pvt. Ltd., in the financial year 2010-11. Even the payment for registration as well as stamp duty charges were also paid in the financial year 2010-11. Deeds of conveyance were registered on 27.04.2011. Hon. ITAT relied on Hon'ble Supreme Court in ***Kanwar Raj Singh (D) Th. LRS. vs. Gejo (D) Th. LRS. & Ors., in Civil Appeal No.9098 of 2013,*** vide judgment dated 02.01.2024, while examining the provisions of section 47 of the Registration Act, 1908 held that when a compulsory registrable document is registered according to the Registration Act, it shall operate from a date before the date of registration, i.e., the date on which it is executed. Further, ***Ashwin C. Jariwala vs. ITO, reported in (2017) 164 ITD 255 (Mum.–Trib.)***, the Co-ordinate Bench of the Tribunal, following the decision of the Hon'ble Andhra Pradesh High Court in ***M. Syamala Rao vs. CIT, reported in [1998] 234 ITR 140 (AP),*** held that since the registration of sale deed related back to the date on which agreement for sale was executed in favour of the buyer by the owner, the capital gain arises from such sale is to be assessed in the year of execution of sale deed and not in the year of registration of the same. On said basis, it was held that since the deeds of conveyance were executed amongst the parties in respect of the sale of lands on 30.12.2010, addition under section 50C of the Act can only be made during the assessment year 2011-12. Accordingly addition made u/s 50C was held to be deleted and subsequently reopening u/s 147 was considered to be bad in law. On said basis, Hon. ITAT allowed the appeal and deleted the addition.

3 NARENDRA KHIMJI SAVLA VS. ITO, ITA NO: 6567/MUM/2024 (MUM ITAT) (AY 2012-13)

Section 143(2) – Reassessment initiated on incorrect PAN – assessee requested to treat return under correct PAN as return u/s. 148 – No notice u/s. 143(2) issued –notice u/s. 143(2) is mandatory – reassessment quashed.

Facts

The AO initiated reassessment proceedings and issued notice u/s. 148 of the Act on the assessee. The assessee replied that the notice was issued on the PAN, which was surrendered, and a cancellation request was filed. Copy of PAN cancellation letter was furnished. The assessee quoted his correct PAN and stated that he has been regularly filing the return under the said PAN. The assessee also submitted that the return filed under the correct PAN and requested that the same be treated as a return filed in response to notice u/s. 148. The AO held that the request for cancellation of PAN cannot be entertained during the pendency of the assessment proceeding and therefore called on the assessee to furnish the details pertaining to the loan. Since the assessee did not furnish any further details, the AO completed the assessment u/s. 144 r.w.s. 147 of the Act. Aggrieved, the assessee filed appeal before the CIT(A).

Before the CIT(A), the assessee submitted that the AO erred in initiating the reassessment proceeding u/s. 148 without issuing notice u/s. 143(2) of the Act. The assessee also raised grounds on merit. The CIT(A) dismissed the legal contention of notice u/s. 143(2) of the Act not being issued. On merits, the CIT(A) set aside the issue back to the AO for consideration. The assessee filed an appeal before the Hon'ble Tribunal against the order of the CIT(A).

Held

Before the Hon'ble Tribunal, the assessee submitted that he has been regularly filing returns under the new PAN, and as soon as he came to know that another PAN was existing in his name, he immediately filed an application for cancellation. The cancellation request was not processed by the revenue. The assessee argued that the issue of notice u/s. 143(2) is mandatory, and the proceedings done by the AO without issuing such notice are null and void. The assessee relied on the decision of the Co-ordinate Bench in the assessee's own case for AY 2011-12. The DR relied on the orders of the lower authorities.

The Hon'ble Tribunal held that the AO has ignored the assessee's request to treat the return filed under the new PAN as a return in compliance to notice u/s. 148 of the Act. Relying on the decision of the Co-ordinate bench in the assessee's own case, it was held that the reassessment order cannot be passed without compliance with the mandatory requirement of notice being issued u/s. 143(2). Reliance was placed on the decision of Hon'ble Supreme Court in the case of ***Hotel Blue Moon reported (2010) 188 taxmann.com 133***, which held that non-issuance of notice u/s. 143(2) after filing of return of income cannot be said to be a mere procedural irregularity, and the same is not curable u/s. 292BB of the Act. Non-issue notices u/s. 143(2), subsequent to the letter filed by the assessee, intimating the AO to treat the return filed under correct PAN as a return pursuant to the notice u/s. 148 of the Act would be fatal to reassessment order, especially when the AO considered the same return for computing taxable income in the hands of the assessee. The appeal of the assessee was allowed and the reassessment was quashed.

4 GAZALA HASSAN CHARIYARI VS. ITO (ITA NO. 5350/MUM/2024 DT. 16.05.2025) (AY 2017-18)

Section 147 - Reassessment- No addition made related to addition which are basis of recorded reasons – No other addition can be made upon – Reassessment bad in law

Facts

Case of the assessee was reopened on the basis of information from the 'insight portal', which was based on a tax evasion petition that assessee is engaged in financial transactions leading to the accumulation of black money and money laundering. AO picked up other issue of cash deposits in her bank account and asked the assessee to explain the source of cash deposit of ₹ 23,65,000/- and as to why it should not be treated as unexplained income under section 69A of the Act. Ignoring the submission of the assessee, an addition was made u/s 69A of ₹. 23,65,000/-. CIT(A) also upheld the addition made by AO. Being aggrieved with the order, appeal is filed before Hon. ITAT.

Held

Hon. ITAT held the AO reopened the case of assessee that income of the assessee has escaped from assessee on account of receiving/retaining amount of Haj Pilgrims and income chargeable to tax of ₹ 7.00 crores, secondly, the assessee has purchased flat No 403 in Al-Makkah Building in the name of her daughter and thirdly income from such flat aggregate to ₹ 11,60,000/-. Thus, as per reasons recorded, there is total escapement of income of ₹ 7.11 crores. AO on filing return of income and receipt of reply from assessee, dropped on both the items of escapement of income, which were made basis of escapement of income and reopening, thereby no addition was made by AO. The AO picked up some other issue which was not the subject matter of reasons recorded i.e. cash deposit in bank account of assessee. The AO made addition on cash deposit of ₹ 23,65,000/- u/s 69A. Admittedly, no addition has been made by the AO on the items which were basis of reasons recorded, therefore, Hon. ITAT held that the AO was not justified in making the addition on cash deposit, which was not included in reasons recorded. On said basis, Hon. ITAT allowed the appeal and deleted the addition.

5 K. VENKATESAN (HUF) VS. ACIT [ITA NO. 2945/CHNY/2024 (CHENNAI TRIB.)] (AY 2023-24)

Section 194-IA – Sale of agricultural land by assessee - TDS erroneously deducted @1% by buyer – CPC denied TDS credit – Tribunal held that assessee is eligible for full TDS credit.

Facts

The assessee, a Hindu Undivided Family, sold agricultural land. The buyer has erroneously deducted TDS at 1% u/s 194-IA of the Income Tax Act, 1961, which only applies to immovable property other than agricultural land. The assessee filed its return of income and claimed the credit of TDS appearing in Form 26AS, but did not offer the sale proceeds of the agricultural land in the Exempt Income schedule. The Central Processing Centre denied the credit for TDS for the reason that

the total receipts as per Form 26AS were higher than the total receipts as per Rule 37BA. The CIT(A) upheld this denial, stating that since the exempt sale consideration was not reported in the ITR's Exempt Income schedule, the corresponding TDS credit should not be granted. Aggrieved by the order of CIT(A), the assessee filed an appeal before the Hon'ble Tribunal.

Held

The assessee argued that Rule 37BA of the Income Tax Rules, 1962 does not apply for the reason that it only applies in the case of income that is assessable to tax. The DR relied on the orders passed by lower authorities. The Hon'ble Tribunal held that Section 194-IA does not apply to agricultural land. Rule 37BA does not apply to the assessee, as it is applicable only in cases where income is assessable to tax. The Hon'ble Tribunal also noted that the CPC does not take into account the agricultural income declared in the return of income when comparing the gross receipts of the return of income with those of the Form 26AS. Further, it was observed that the working of Rule 37BA under the intimation does not take into consideration the agricultural income shown in Schedule Exempt Income. Accordingly, the Hon'ble Tribunal accepted the contention of the assessee that even if the assessee had shown the exempt sale consideration as agricultural income in the return of income, the present restriction of TDS would still have been carried out owing to the incorrect application of Rule 37BA. The AO was directed to grant the credit of TDS.

6 SAVITA HOMEMAKERS LLP VS. ACIT, ITA NO: 2849/MUM/2024(MUM ITAT) (AY 2014-15)

Section 263 – AO disallowed interest on bogus loans in reassessment proceedings – Pr.CIT invoked revision u/s. 263 – Held that AO had conducted adequate enquiry and recorded specific findings – order is neither erroneous nor prejudicial.

Facts

The assessee's case was reopened u/s. 147 of the Income Tax Act, 1961, and the AO made an addition u/s. 69C on account of interest on alleged bogus loans. Subsequently, the Principal Commissioner of Income Tax (Pr. CIT) issued a notice u/s. 263 of the Act, alleging that the AO had failed to properly verify the interest on unsecured loans, and that the assessee had not offered deemed rental income for the property held as inventory, relying on the Delhi High Court judgment in Ansal Housing Finance and Leasing Co. Ltd. Before Pr.CIT, the assessee submitted that the loans have been duly verified during assessment proceedings for the immediately preceding year, and huge additions have been made on account of the unsecured loan in the said year. The AO treated only the interest as bogus for the current year. Accordingly, the assessee submitted before the Pr.CIT that there is no error with regard to the findings of the AO in respect of the unsecured loans. On the issue of income from House Property not offered, the assessee submitted that the issue is debatable in view of the contrary decisions taken by the different High Courts, and therefore, the provisions of section 263 of the Act cannot be invoked. The Pr.CIT relied on explanation 2 to Section 263, which specifies cases which shall be treated as deemed to be

erroneous and prejudicial to the interest of revenue. To which, the assessee replied that said explanation was inserted w.e.f. 01.06.2015 and is not applicable for the current year, i.e. AY: 2014-15. The Pr.CIT, however did not accept the submissions of the assessee and set aside the order of the AO. The assessee filed an appeal before the Hon'ble Tribunal against the order passed by Pr.CIT.

Held

Before the Hon'ble Tribunal, the assessee relied on various judicial precedents which held that explanation 2 to section 263 is not applicable for AY prior to 01.06.2015. It was further argued that even assuming that explanation 2 to section 263 is applicable to the assessee's case the AO has carried out adequate enquiry with regard to the unsecured loans and has made disallowance towards the interest while completing assessment u/s. 147 of the Act. Detailed finding was recorded by the AO with regard to each and every loan in the assessment order. On contrary, the DR supported the order of Pr.CIT.

The Hon'ble Tribunal analysed explanation 2 to section 263 and noted that prior to the insertion of such explanation, various courts have held that the order of the AO cannot be considered as erroneous merely because an inquiry made by the AO is considered to be inadequate by the Pr.CIT unless there is a complete lack of inquiry on the part of the AO. An inadequate enquiry would not by itself give occasion to exercising jurisdiction u/s. 263. The Hon'ble Tribunal further noted that, regardless of the applicability of the explanation, the Pr.CIT is required to make enquiries to record specific findings evidencing that there is an error in the order of the AO that is prejudicial to the interest of the revenue. It was held that Pr.CIT has completely ignored the fact that the AO has examined and recorded findings on each and every loan creditor. The AO has made interest disallowance on the alleged bogus loans, and the loan amounts are not added for the reason that it is already added in the preceding year. The finding of the Pr.CIT is grossly misplaced without actually examining the records to see whether there has been any inquiry or lack of inquiry by the AO. On the issue of Income from House property, the Hon'ble Tribunal held that where two views are possible and the AO has taken one of the views, with which the Pr.CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view taken by the AO is unsustainable in law. Accordingly, the order u/s. 263 was quashed. ■

" Comfort is no test of truth.
Truth is often far from being comfortable. "

Swami Vivekananda

CASE LAW UPDATE



Dr. CA Sunil Moti Lala
Advocate

A. HIGH COURT

1 AECOM TECHNICAL SERVICES INC. VS. ITO, IT [2025] 174 TAXMANN.COM 1173 (DELHI)

Where assessee, a US company, provided support services to Indian AEs, the Hon'ble HC held that cross charges received by the assessee from its AEs were not taxable as FTS/FIS or royalty under India-US DTAA, as the services did not make available technical knowledge etc. nor involved transfer of copyright.

Facts

i. Assessee, a company incorporated in USA, was engaged in business of design and consultancy services, construction management and infrastructure development. It had entered into agreements with its Indian AEs, pursuant to which it provided management and governance supports functions (in area of legal, tax, treasury, finance, information technology, human resources, enterprise risk management, etc.) to its Indian AE's.

ii. Assessee filed application under section 197 seeking 'nil' withholding tax certificate in respect of cross charges received from its AEs for services rendered by it.

iii. AO rejected the said application and held that charges paid to assessee by its AEs were taxable as fees for technical services (FTS) and fees for included services/ royalty under the India-USA DTAA. (FIS).

iv. Aggrieved by the order passed u/s 197, the assessee filed a writ petition before the Hon'ble HC.

Decision

i. The Hon'ble HC noted that the AO's conclusion was based on the assumption that since the IT infrastructure (of assessee) was used by the Indian AEs, the same would constitute making available the technical knowledge and skills to the AEs. The AO had also reasoned that since the assessee provided software development services with respect to the assessee's software application used by the Indian AEs

business, including the Oracle system; the same would also constitute making available the technical knowledge to the Indian AEs. The Hon'ble HC held that the said conclusions were unsustainable given the description of the services rendered by the assessee.

ii. The Hon'ble HC further held that the services rendered by the assessee did not make available technical knowledge, experience, skill, know-how, or processes to the Indian AEs. The expression 'make available' must be understood to mean transfer of technical knowledge, experience, skill or know-how, or process, which enables the recipient to absorb and utilise the same. If the service provided does confer any right in favour of the recipient in respect of the knowledge, experience, skill or know-how; the condition that the services 'make available' such technical knowledge, know-how, skill, or process so as to fall with the sweep of FIS is not satisfied. Reliance was placed on ***CIT vs. RELX Inc [2024] 160 taxmann.com 109 (Delhi)*** and ***CIT vs. De Beers India Minerals (P.) Ltd. [2012] 21 taxmann.com 214 (Karnataka).***

iii. The Hon'ble HC further held that none of the services could be considered as 'included services' within the meaning of Article 12 of the India-US DTAA as the same was not ancillary and subsidiary to the application or enjoyment of the right, property or information for which the assessee received royalty as covered under Article 12(3) of the India-US DTAA.

iv. Insofar as the IT infrastructure and software development was concerned, the Hon'ble HC noted that the assessee had explained that it maintained the network connectivity and ensured that the business of the Indian AEs was being maintained and run at optimum effectiveness and maximum security. The same would include the applications and software, which were used by the professionals of the Indian AEs. However, the assumption that there was any transfer of right in relation to the said software or applications to the Indian AEs was not supported by any material on record.

v. W.r.t AO's observation that part of the charges was taxable as royalties, the Hon'ble HC noted that the said information was premised on the basis that the assessee centrally procured software/tools for joint use by its AEs. The AO reasoned that cross charges would thus, be the reimbursement of the actual cost of such software/ tools and, therefore, taxed as royalty. Following the judgement of the Hon'ble SC in ***Engineering Analysis Centre of Excellence (P.) Ltd. vs. CIT [2021] 125 taxmann.com 42 (SC)*** the Hon'ble HC concluded that given the fact that the Indian AEs did not acquire any copyright in the software, the cross charges paid by them could not be construed as royalties within the scope of Article 12(3) of the India-US DTAA.

vi. The Hon'ble HC thus quashed the impugned order passed u/s 197 and directed the AO to issue the necessary certificate or 'NIL' withholding Tax Certificate in respect of the cross-cost charges received by the assessee from its Indian AEs.

2 VIACOM 18 MEDIA (P.) LTD. VS. DCIT [2025] 174 TAXMANN.COM 389 (BOMBAY)

Assessee, an Indian company, had entered into agreement with a USA based company (Intelsat) for provision of satellite signal reception and re-transmission services. The assessee filed an application under section 195(2) for nil withholding tax certificate, contending that the payments made to Intelsat for AY 2009-20 to 2013-14 did not constitute royalty under article 12 of the India-USA DTAA (Treaty). The AO rejected the said application on the ground that the payments constituted royalty as per explanation 6 to section 9(1)(vi), introduced by the Finance Act, 2012. The AO further stated that in Article 12 of the India USA tax Treaty, the term 'process' is not defined and therefore, the meaning of the term 'process' as explained in the Act had to be imported for interpreting Article 12 and therefore, even under the Tax Treaty, the payment would constitute 'royalty'. W.r.t the reliance placed by the assessee on the decision of the Delhi High Court in the case of ***Asia Satellite Telecommunications Co. Ltd. vs. DIT [2011] 9 taxmann.com 168 (Delhi)***, the AO further stated that the same had not been accepted by the department, and the SLP had been preferred in that case. CIT(A) and Tribunal upheld the AO's order. Since the authorities below had failed to examine a) the nature of services rendered under agreement and b) whether Intelsat was held not liable to tax in India for relevant assessment years, the Hon'ble HC remanded the matter to CIT(A) for verification of factual position with the following directions:

i. If the Appellant-Assessee is able to show that there is a final determination of no taxability in the hands of Intelsat Corporation on payments made by the Appellant-Assessee, then there would be no withholding tax liability;

ii. If the payments are made prior to the Finance Act, 2012 then, then following decision of this Court in the case of ***CIT vs. Reliance Industries Limited – [ITXA 1655 of 2018, 576 of 2017, 591 of 2017 and 2129 of 2011 – [2024] 165 taxmann.com 653 (Bom)]*** no withholding tax liability can be imposed based on retrospective amendment;

iii. For payments made after the enactment of Finance Act, 2012, the CIT(A) to examine the nature of agreements for each assessment year and determine whether same constitutes 'royalty' under the domestic law or the Treaty and if same does not constitute 'royalty' then there would be no withholding tax liability after considering provisions of Section 90(2) of the Act.

B. TRIBUNAL

1 GAGIL FDI LTD. VS. ACIT [2025] 174 TAXMANN.COM 498 (DELHI – TRIB.)

The assessee, a company incorporated in Cyprus, held shares of Indian company (i.e. NSEIL) after obtaining the requisite approvals from the Indian regulatory authorities (SEBI, RBI, FIPB). It claimed benefit under article 13 of India-Cyprus DTAA (read with the Protocol) on sale of said shares. Since the aforesaid sale transaction was also approved by the regulatory authorities and the assessee had a valid TRC and had also shown that decisions of investment/disinvestment for assessee were carried out in Cyprus, it was held that the assessee was entitled to benefits of India-Cyprus DTAA which could not be denied on the alleged ground that the assessee was merely a shell company being run, controlled and managed by a US company, the ultimate beneficiary.

Facts

i. Assessee was a Cyprus based company. It acquired equity shares of an Indian company (NSEIL) from its holding company GA Global (also Cyprus based). The investment made by holding company 'GA Global' in Indian company was scrutinized by Indian regulatory authorities and thereafter, approved. It sold shares of NSEIL to unrelated independent third-party buyers which was also approved by the Indian regulatory authorities. It claimed benefit under article 13 of India-Cyprus DTAA (**read with the Protocol**) in respect of the capital gains earned on the aforesaid sale.

ii. The AO, after examining ownership structure of assessee, list of Directors of company and beneficiary of transactions of sale of shares came to conclusion that ultimate beneficiary of transaction of sale of shares on NSEIL was General Atlantic Company based in USA which was running, controlling and managing the Cyprus company (i.e. assessee). AO thus concluded that assessee was merely a shell company established in Cyprus with an intention of circumventing Indian tax laws using India-Cyprus DTAA as a tool.

iii. The DRP upheld the order of the AO.

iv. Aggrieved, the assessee filed appeal before the Hon'ble Tribunal.

Decision

i. The Hon'ble Tribunal noted that the Revenue, in order to show that the assessee was controlled from USA, had alleged that the Directors of the assessee, namely; MG, AP and CL were the Directors/CFO of General Atlantic company based in USA who were involved in all major decision-making activities. Therefore, the "mind" of the assessee was based in USA. The situs of the funds used by the assessee for making investment was also based in USA and that the assessee was

merely a pass-through entity for taking advantage of India Cyprus DTAA.

ii. It also noted the assessee's submission that at the time of purchase of shares by GA Global, RBI, SEBI and FIPB Unit, Department of Economic Affairs, Ministry of Finance had made detailed investigation and thereafter approved investments made by GA Global in NSEIL. Similarly, when GA Global transferred share of NSEIL to the assessee, similar exercise was carried out by all the aforesaid Indian agencies. This fact was evident from the approvals placed on record by the assessee in the paper book.

iii. It further noted that the Securities Contracts (Regulation) (Stock Exchange & Clearing Corporations) Regulations, 2012 under which SEBI grants approval for investment in shares of Stock Exchange. For the purpose of regulating ownership and governance in stock exchange, SEBI has laid down eligibility criteria for holding shares. Further, under Securities Contracts (Regulation) (Manner of Increasing and Maintaining Public Shareholding in Recognized Stock Exchange) Regulations, 2006 SEBI has restricted the shareholding in Stock Exchange. A bare perusal of relevant regulations showed that the investing institutions/persons have to pass scrutiny before approval is granted to them for making investment in shareholding of Stock Exchange. Any shell company making an endeavor to make such investment would be caught.

iv. It disagreed with the finding of the DRP that the claim of the assessee that there was intense scrutiny at the time of registration was a misguided contention. The Hon'ble Tribunal held that SEBI, RBI and FIPB are reputed agencies performing various regulatory functions and the approvals granted by the said agencies could not be undermined and procedure of granting approval by said agencies could not be termed as mere paper work. The DRP had erred in giving no weightage to the approvals granted by these agencies and had accepted observations by the AO as sacrosanct. It observed that SEBI before granting approval for investment in Stock Exchanges conducts fitness test of the person/institution on various parameters which is not merely a paper work. Similarly, RBI examines investments from various dimensions including violations under FEMA, etc. The approach of the DRP was superfluous. The approvals by regulators like SEBI, RBI, etc. are granted after intense scrutiny and therefore cannot be overlooked. It placed reliance on ***Saif II-Se Investments Mauritius Ltd. vs. ACIT,154 taxmann.com 617 (Delhi-Trib)*** wherein the coordinate Bench had deprecated the approach of Revenue in raising doubt over the investigations carried out by various agencies of the Government before granting the approval and allowed the benefit of the India-Mauritius DTAA to the assessee therein.

v. De hors, the approvals granted by Indian regulatory agencies, the Hon'ble Tribunal noted that the assessee had also shown that the decisions of investment/disinvestment for assessee were carried out in Cyprus. As evident from the gist of Board meetings, a perusal of the same revealed that only one Director from USA (i.e. AP), was present only in one meeting wherein the issue regarding transfers of shares

of NSEIL was discussed. In so far as other Board Meetings held during the relevant FY 2020-21, only Directors based in Cyprus were present in the meeting. The assessee had also placed on record Minutes of the Board Meetings held during the preceding FY 2020-21. Therefore, it was evident that the assessee-company was managed in Cyprus and not in the USA, as alleged by the AO. The AO's observation that the assessee was managed by a company in the USA was misconceived and contrary to the facts on record.

vi. W.r.t to the AO's allegation that the source of funds for investments were generated from US based company i.e. General Atlantic, and that therefore, the real beneficiaries were based in US, the Hon'ble Tribunal noted the structural flow chart of funds and the assessee's submission that funds were sourced from across the globe i.e. from Bermuda (91.15 per cent), Germany (8.65 per cent) and Delaware (0.21 per cent). The Hon'ble Tribunal held that once it was established that the assessee-company was carrying its business activities in Cyprus and undisputedly assessee was having TRC issued by Revenue Authority at Cyprus, the allegation of the Revenue that it is merely a pass-through entity had no feet to stand.

vii. Accordingly, the assesse's appeal was allowed.

2 HYOSUNG CORPORATION VS. ACIT [2025] 174 TAXMANN.COM 500 (DELHI – TRIB.)

The assessee, Korean company, had declared loss attributing to its PE in India and had also earned income from other sources in form of FTS, which though not connected to its PE was set off against the PE loss. The set off was disallowed by the AO, on the ground that, as evident from, Article 7 of the India-Korea DTAA, the set off could not be allowed as the FTS income was not attributed to the PE. The Hon'ble Tribunal held that since there was no specific provision regarding allowability of set off of intra head of income in the DTAA, assessee would be eligible to set off of loss of its PE against FTS income earned through other sources in India under provisions of section 71 notwithstanding the provisions of s.115A (which provide for taxation of FTS at a flat rate on gross basis without any deduction).

Facts

i. The assessee, a Korean based company, was engaged in power business in India. It had a PE in India and during the current year, the PE had no offshore supply and it had attributed expenses for running same in India, therefore, it had declared loss attributable to its PE in India. It had filed a nil return by setting off of business losses from FTS income and claimed refund of TDS.

ii. The AO observed that though the assessee had relied on the application of section 70, it had accepted that there was no specific provision which allowed the setting off of losses against the income from royalty and FTS. The AO observed from Article 7 of India-Korea

DTAA that such set off of business loss of PE with the income of HO was not allowable as FTS income could not be attributed to PE without any connection and thus the aforesaid income could not be set off against business loss of PE. He further held that FTS income would be taxed at the rate prescribed either under DTAA or the Act, whichever was beneficial to the assessee.

iii. The DRP upheld the AO's order.

iv. Aggrieved, assessee filed appeal before the Hon'ble Tribunal.

Decision

i. The Hon'ble Tribunal noticed that the assessee had two sources or streams of income, one was from the services to its clients through its PE and another was by providing services to its clients directly (FTS). It noticed that the first stream fell under the article 7 and the other under article 12 of the DTAA.

ii. It held that the income has to be determined under the six heads of income u/s 14 and then if there is any loss, net income has to calculated by applying the provisions of sections 70 and 71. Once the total income is determined then the provisions of taxation relating to Chapters VIA to XI are applicable. The Chapter XI, in which the provisions of double taxation and tax treaties are mentioned and applicable. Therefore, the Income-tax has to be charged to tax only after determining the total income after application of Chapter VI.

iii. It noted that the assessee had declared loss in the PE and had also earned income sourced in India which fell under FTS. However, both streams of income fell under the head business as far as the assessee was concerned. Therefore, the provisions of section 71 were applicable. Just because the income was chargeable to tax under special provisions and also TDS was collected, it did not change the determination of income under the Act.

iv. As per the provisions of section 44DA, it observed that as far as the income of royalty or FTS earned by the assessee through its PE was concerned, the same was chargeable to tax under this provision and it was chargeable to tax on gross basis. In the given case, the assessee had earned the FTS directly without the assistance of its PE. Therefore, the above section had no application.

v. W.r.t the provisions of section 115A,it noted that the provisions starts with the words, 'Where the total income of' which connotes the meaning that first we have to determine the total income and if the above total income includes the FTS as per the provisions of section 115A(1)(b), then the relevant FTS has to be excluded from the above income and then chargeable to tax at the specified rate (as per section 115A(1)(b)(B)). It observed that as per the provisions of section 115A(3), no deduction in respect of any expenditure or allowance shall be allowed to the assessee under the sections 28 to 44C and 57 in computing the income referred in section 115A(1). Therefore, from the above it was clear that first the total income which includes FTS is to be determined. If there is any loss in the PE, the same can be set off against the Gross income of FTS. The next question arose that when the provisions of section 115A(3) does not allow any expenditure or

allowance, whether the set off of loss is to be allowed or not. It observed that the legislature would normally specify the denial of set off of loss, if its intention was to restrict the same. Unlike section 115A, the provisions of section 115BBDA(2) and 115BBH(2), bar the claim of expenditure as well as loss. The provisions of section 115A is silent, hence, the assessee was eligible to set off of the loss of its PE against the income earned through other sources in India under the provisions of section 71.

vi. The Hon'ble Tribunal relied on the decision of the coordinate bench in the case of ***Foramer S.A vs. DCIT (1995) 52 ITD 115 (Delhi)*** which considered the issue of allowability of depreciation, when the rate of depreciation and allowability of the same was not prescribed under the Treaty. It was held that the assessee may choose to apply the relevant provisions contained in the provisions of the Act applicable in the contracting state and also it was held that the a foreign national governed by DTAA was entitled to ask for application of provision of the Income-tax Act, to the extent they are more beneficial to that assessee. Similarly, in this case, the Hon'ble Tribunal held that the issue involved was the issue of allowability of set off of intra head of income, for which the similar provisions were not present in the relevant treaty. Thus, the assessee had liberty to follow the provisions of Income-tax Act, which was beneficial to it.

vii. Accordingly, the assessee's appeal was allowed.

3 CROCS INC. VS. ACIT [2025] 174 TAXMANN.COM 419 (DELHI – TRIB.)

Assessee, a US based company, was engaged in business of designing, developing and marketing of footwear & accessories. It entered into service agreement with its Indian subsidiary (Crocs India) for providing administrative and support services. It filed its return claiming that its income was not chargeable to tax in India in view of article 12 of the India- USA DTAA (no PE and 'make available' clause not satisfied) The AO held that service charges received by assessee was nothing but FTS on the ground that assessee was using human resource with technical experience and expertise. The Hon'ble Tribunal held that since services rendered by assessee to Crocs India were provided by competent technical expertise and qualified professionals and were tailor-made, service provided by assessee were technical in nature within meaning of Section 9(1)(vii). However, since services rendered by assessee did not make available any technical knowledge and its expertise to Indian subsidiary, condition of 'make available' was not fulfilled and, therefore, service charges received by assessee could not be taxed in India by virtue of Article 12 of the DTAA. [International Management Group (UK) ITA No. 1013/2018[Para 8] followed.]

4 BOSCH GLOBAL SOFTWARE TECHNOLOGIES (P.) LTD. VS. ACIT - [2025] 174 TAXMANN.COM 76 (BANGALORE – TRIB.)

The Hon'ble Tribunal held that where assessee had not claimed any benefit of taxes paid in foreign country under provisions of section 90/91, assessee was eligible for deduction u/s 37(1) for the amount of tax paid in the foreign country. [***Bank of India vs. ACIT 125 taxmann.com 155 (Mum)*** followed.]

5 VIPUL CHANDRAKANT SAWALWADE VS. ITO [2025] 174 TAXMANN.COM 594 (PUNE – TRIB.)

The Hon'ble Tribunal held that

i. Filing of Form No. 67 read with rule 128 is only directory in nature and not mandatory; there-fore, belated filing of Form No. 67 would not bar claim of Foreign Tax Credit (FTC).

[***Duraiswamy Kumaraswamy vs. PCIT- [2024] 296 taxmann.com 582 (Mad)*** and ***Preeti Das vs. ITO (IT Appeal No. 2491(PUN) of 2024, dtd. 21.01.2025*** - followed.]

ii. Where assessee earned dividend income from USA based company, since rate of tax on said income is already prescribed under India-USA DTAA, same shall prevail over and above normal tax rate provided under Income-tax Act.

6 MILACRON INDIA (P.) LTD. VS. DCIT [2025] 174 TAXMANN.COM 800 (AHMEDABAD -TRIB.)

TPO had proposed upward adjustment in respect of notional interest on outstanding receivables from AEs treating same as an independent international transaction on the ground that delay in realization of receivables from AEs beyond the stipulated credit period of 150 days amounted to provision of credit or financing facility to AEs. The Hon'ble Tribunal held that since assessee had not charged interest on delayed payments from either AEs or non-AEs and there was no allegation of selective credit policy or preferential treatment to AEs and entire transaction had already been benchmarked under TNMM, no separate transfer pricing adjustment on account of receivables was warranted. As per rule 10B(1)(e)(iii), under TNMM, an appropriate adjustment is to be made to account for material differences between the tested party and comparables that could affect net margins, including differences in working capital. The OECD Transfer Pricing Guidelines also acknowledge that variations in accounts receivable, payable, and inventory levels affect business profits and should be neutralized through working capital adjustments (WCA). Thus,

where working capital adjustment has duly been made, and assessee's margin post such adjustment is within or above arm's length range, no separate transfer pricing adjustment on account of receivables is warranted, unless there is conclusive evidence of a standalone financing arrangement between assessee and its AEs.

[***Note***: Similar view has also been taken in ***ACIT vs. Intas Pharmaceuticals ltd. –{2025] 174 taxmann.com 867 (Ahmedabad –Trib.).***]

7 BANDO INDIA (P.) LTD. VS. ITO [2025] 174 TAXMANN.COM 647 (DELHI -TRIB.)

The TPO had determined value of royalty and FTS paid by assessee to its AE at NIL on ground that no benefits had accrued to assessee as a result of payments. The Hon'ble Tribunal noted that the said payments had been made by the assessee in the earlier year also for which the assessment had been completed u/s 143(3) and the same was not controverted by the Revenue. Further, thereafter no action was taken under section 147 or 263. In view of principle of consistency, the Hon'ble Tribunal held that the said payments made in the year under consideration were to be accepted to be at ALP [***Radhasoami Satsang vs. CIT - 193 ITR 321 (SC)*** and ***Cairn UK Holdings Ltd. vs. DIT- [2013] 38 taxmann.com 179 (Delhi)***- followed.]

8 DCIT VS. JODAS EXPOIM (P.) LTD. [2025] 174 TAXMANN.COM 651 (HYDERABAD-TRIB.)

The Hon'ble Tribunal held that where assessee maintained requisite TP documentation as mandated under section 92D read with Rule 10D and submitted the same during assessment, failure to file Form 3CEB within prescribed time would not attract penalty under section 271AA. Further, failure to file the report in Form 3CEB attracts separate penalty u/s 271AB of the Act.

■

" Stand up and be strong! No fear.
No superstition. Face the truth as it is! "

Swami Vivekananda

GST





CA Naresh Sheth *CA Jinesh Shah*

A. WRIT PETITIONS

1 ROHAN CORPORATION INDIA PVT. LTD. VS. UNION OF INDIA [2025] 173 TAXMANN.COM 480 (KARNATAKA) – KARNATAKA HIGH COURT

Facts and issues involved

Petitioner purchased a partly constructed commercial shopping complex 'Lotus Mall' through a public auction conducted by a liquidator. The sale was executed strictly on an "as is where is" basis without any accompanying agreement for the completion or continuation of construction. The property was transferred without any promise or obligation for future construction or development. Despite the absence of any construction-related service component, GST authorities demanded tax on the transaction, treating it as a taxable supply. Petitioner deposited ₹ 14.32 crore as GST under protest and subsequently filed for a refund, claiming that the sale constituted a transfer of immovable property and thus fell outside the purview of GST. The refund claim was rejected by the GST department (Respondent No. 3) on the grounds that the transaction was subject to GST under Entry 5(b) of Schedule II of the CGST Act, treating it as a taxable construction service.

Petitioner's Submissions

Petitioner contended that this transaction was a mere sale of immovable property and did not involve any service component or construction activity undertaken by the liquidator or any other party on behalf of the petitioner.

The petitioner argued that since there was no agreement for construction or development between the petitioner and the seller, the transaction could not be brought under Entry 5(b) of Schedule II of the CGST Act, which deems certain construction services as "supply of service." Instead, the petitioner relied on Entry 5 of Schedule III of the CGST Act, which specifically excludes the sale of land and, subject to clause (b) of paragraph 5 of Schedule II, the sale of a building, from the scope of "supply" under GST.

It was further submitted that the levy and collection of GST on such a transaction was without authority of law and contrary to the provisions of the CGST Act, and therefore, the amount paid under protest should be refunded with applicable interest.

Discussions by and Observations of High Court

High Court observed that the transaction entered into by the petitioner was a purchase of immovable property in the nature of a partly constructed commercial complex from a liquidator on an "as is where is" basis. Further, there was no agreement or contract between the petitioner and the liquidator or the corporate debtor to carry out or complete any construction activity on the said property.

It held that in the absence of any construction or service component involved in the transaction, the provisions of Entry 5(b) of Schedule II of the CGST Act were not attracted. The Court concluded that the transaction was in the nature of a transfer of immovable property and squarely fell within Entry 5 of Schedule III of the CGST Act, which excludes such transactions from the definition of "supply."

Accordingly, the Court held that the levy and collection of GST in respect of the transaction was unsustainable in law and directed the respondent authorities to refund the amount of ₹ 14,32,64,614 to the petitioner along with applicable interest as per law.

Decision of High Court

Petition was allowed. The refund rejection order was quashed and the GST Authorities were directed to refund the entire GST deposited by the petitioner.

2 FILATEX INDIA LTD. VS. UNION OF INDIA [2025] 174 TAXMANN.COM 79 (GUJARAT) – GUJARAT HIGH COURT

Facts and issues involved

Petitioner is a manufacturer of synthetic textile yarns, engaged in the export of goods without payment of tax under a Letter of Undertaking (LUT). It filed refund claims for unutilized Input Tax Credit (ITC) accumulated due to the inverted duty structure (hereinafter referred to as 'IDS'), where the rate of tax on inputs procured (i.e., 18%) was higher than the rate of tax on output supplies (i.e., 12%).

Rule 89(5) of the CGST Act, 2017 provides for the method of calculation of the refund amount under IDS. The formula mentioned in Rule 89(5) precludes taxpayers from availing refund of tax paid for input services i.e., only ITC on input goods was refundable.

Petitioner filed refund claims on the ground of inverted duty structure under Rule 89(5), computing the refundable amount based on "Net ITC," which, according to the Petitioner, includes credit of tax paid on both inputs and input services. However, GST Authorities partially sanctioned the refunds, excluding the portion of ITC attributable to input services, on the grounds that the judgment of Honourable Gujarat High Court in case of ***VKC Footsteps India (P.) Ltd. vs. Union of India [2020] 118 taxmann.com 81 (Gujarat)*** was pending before the Supreme Court and has not attained finality. Aggrieved by the reduction of refund amounts, the Petitioner preferred the appeals before the first appellate authority who relying upon pronouncement of the Hon'ble Supreme Court in ***Union of India vs. VKC Footsteps India (P.) Ltd. [2021] 130 taxmann.com 193 (SC)*** dismissed the appeals.

Discussions by and Observations of High Court

Since the refund application of the petitioner related to periods before the Supreme Court judgement and the subsequent Notification, the issue before the court was whether the benefit of the said Notification could be extended to refund claims which were decided on the basis of the old formula (i.e. before the amendment on 05.07.2022) of inverted duty structure?

This court in case of ***Ascent Meditech Ltd. vs. Union of India [2024] 168 taxmann.com 691*** held that amendment made by the Notification No. 14/2022 is clarificatory only as per the decision of the GST Council pursuant to the direction issued by the Hon'ble Apex Court. Further, it is a settled principle that if any amendment is made to make the provision workable or is required to be read into the section to give the section a reasonable interpretation, then the said amendment is to be treated as retrospective in operation.

The sum and substance of the aforesaid ratio in Ascent (supra), which has been approved by the Hon'ble Supreme Court by rejecting the Special Leave Petition No. 8134/2025 by the order dated 28.03.2025 is to the clear effect that the benefit of the amended Rule 89(5) as per the Notification No. 14/2022 dated 05.07.2022 would be applicable to all refund claims filed before or after 05.07.2022.

The petitioner cannot be denied the refund as per the provision of 54 (3) of the Act only because the petitioner has been granted the refund prior to 05.07.2022 as it would create a discrimination resulting into inequality between the assesses who have been granted refund prior to 05.07.2022 and the assesses who have applied for refund after 05.07.2022. It cannot be said that the refund applications filed after 05.07.2022 would only be entitled to the benefit of the amended Rule 89(5) of the Act.

Decision of High Court
Petition succeeds.

3 SHRINIVASA REALCON PVT. LTD. VS. DEPUTY COMMISSIONER, ANTI-EVASION, CGST & C. EX., NAGPUR [2025] 173 TAXMANN.COM 600 – BOMBAY HIGH COURT

Facts and Issues involved

Petitioner has been appointed as a developer by the owner vide agreement dated 07.01.2022 to develop the land of Plot No. 2 admeasuring 8000 sq. ft. into a multi-storied complex for the monetary consideration of ₹ 7/- crores and two apartments to be allotted to owner.

Department issued notice to recover GST from petitioner on transfer of development rights by owner to petitioner in accordance with entry 5B of Notification No. 13/2017 Central Tax (Rate), dated 28-6-2017 as amended by Notification No. 5/2019-Central Tax (Rate). Petitioner preferred a writ petition against impugned notice and consequent order.

Petitioner's Submissions

Petitioner contended that the transaction as witnessed by the Agreement of Development dated 7.1.2022 does not fall within the scope and ambit of clause (5-B) so as to attract GST as all that the clause indicates is a service supplied by any person by way of transfer of

development rights or FSI for construction of a project by a Promoter. The agreement dated 7.1.2022 indicate that it has nothing to do with supply of any TDR, which is defined under Regulation 11.2 of the Unified Development Control and Promotion Regulations for the State. Further, GST Act does not define what is meant by Transfer of Development Right (TDR).

Discussions by and observations of High Court

A perusal of the language of entry 5B, above would indicate, that it relates to services which can be said to be supplied by any person by way of transfer of development rights or Floor Space Index (FSI) [including additional FSI] for construction of a project by a promoter. The expression "transfer of development rights" read in conjunction with 'FSI' as indicated in entry 5B, would only relate to a TDR (Transferable Development Rights) as contemplated by clause 11.2.2 under the regulations for grant of TDR in the Unified Development Control and Promotion Regulations for the State of Maharashtra, clause 11.2.1 of which defines transferable development rights, to mean compensation in the form of Floor Space Index (FSI) or development rights, which shall entitle the owner for construction of built up area subject to the provisions in the said regulations. It, therefore, follows, that the TDR/FSI as contemplated by entry 5B, cannot be related, to the rights which a developer derives from the owner under the agreement of development for constructing the building for the owners, in lieu of the owner agreeing to permit the developer to transfer certain built-up units for consideration to be appropriated by the developer.

In the instant case, the agreement dated 07.4.2022 is an agreement of development entered into between the petitioner and the landowner, in terms of which, the petitioner, has been granted right to develop the property in question by utilizing its present FSI or any increases thereof. On the execution of agreement dated 07.4.2022, no TDR or FSI has been purchased by the owner or for that matter by the petitioner from any person/ entity whomsoever. It is, therefore, apparent, that the transaction as contemplated in terms of the agreement dated 07.4.2022 does not fall within entry 5B of the Notification.

Decision of High Court

Neither the show cause notice nor the consequent order can be sustained and are hereby quashed and set aside.

4 SHASHI RANJAN CONSTRUCTIONS PRIVATE LIMITED VS. UNION OF INDIA [2025] 174 TAXMANN.COM 356 – PATNA HIGH COURT

Facts and Issues involved

Petitioner is engaged in the business of undertaking construction and development of residential and commercial buildings and apartments. On 27th November 2014, the petitioner entered into a Development Agreement (DA) with landowner where in landowner granted development right to petitioner to develop the whole land in exchange for 43% of build-up area in shape of shops/offices/flats and reserved car parking spaces and petitioner was entitled to 57% of the constructed land.

GST authorities initiated proceedings against petitioner and issued Show Cause Notice u/s 73 of CGST Act on grounds that petitioner had received non-monetary consideration towards allotment of 36 flats under development agreement and that there is an element of supply of service and receipt of consideration under development agreement which is liable to tax under the Act.

Petitioner's Submissions

Petitioner argued that in case of a development agreement registered prior to coming into force of the GST laws with effect from 01.07.2017, the land stood transferred in favor of the builder. Once the land stood transferred prior to 01.07.2017, the transaction under the development agreement would not fall within the purview of the CGST Act. Notification No. 04 of 2019 is prospective in nature and the petitioner could have been made liable to pay tax in respect of transfer of development rights only on or after 01.04.2019.

The project in question was completed on 20.12.2018 and the petitioner handed over the portion of the immovable property to the landowner on the basis of the development agreement after issuance of the completion certificate. At the point of handing over of the immovable property/flat, the same would be classified as land and building falling under Schedule II of the CGST Act which in terms of Section 7(2) is to be treated neither a supply of goods nor supply of services.

Respondent's Submissions

The petitioner is misleading this Court by claiming that liability to pay tax on supply of development rights was introduced through Notification No. 04/2019 dated 29.03.2019. The submission is that in fact, in the instant matter, it is the supply of construction services (SAC code 9954) by the petitioner that has been taxed and not the supply by way of transfer of development rights (SAC code 9972). The supply of construction services was exigible to tax in accordance with Notification No. 11/2017 dated 28.06.2017. It is submitted that the petitioner has only tried at best to confuse the Court by using the term 'transfer of development rights' in place of the correct term 'supply of construction services'.

Hon'ble Telangana High Court in the case of ***Prahitha Construction Private Limited vs. Union of India and Others (WP 5493/2020) 2024 SCC OnLine TS 3994*** has categorically held that a development agreement between the landowner and the builder consists of two sets of transactions to be met in its entirety. It has been held that one component of the development agreement is between the landowner and the builder and another is the supply of construction services by the builder to the landowner and only thereafter sale of constructed area may be made to a third-party buyer.

Discussions and observations of High Court

It is evident upon a bare reading of the registered development agreement that the landowner has granted exclusive license to the developer to enter upon the said land and to take up and proceed with the development, planning and construction of the said building in terms of this agreement. The completion certification has been issued on 20.12.2018. The date of transfer of the owners' share in the project has not been disclosed in the writ petition.

The purport and object with which the parties thereto enter into a contract ought

to be ascertained only from the terms and conditions thereof. Neither the nomenclature of the document nor any particular activity undertaken by the parties to the contract would be decisive. By virtue of the execution and registration of the development agreement, the owner has already transferred the ownership in the land to the developer is only a misconceived submission.

The petitioner does not get any right on the said property until the completion of the project. After the project is completed and completion certificate is issued, the petitioner gets a right to sell the area of the property which is called "Developers Area". There is no substantial material to establish that with execution of the development agreement, the petitioner got ownership in the land. It is held that the transfer of development rights as it stands is amenable to GST and cannot be brought within the purview of sale of land subject to clause (b) of Paragraph 5 of Schedule-II, sale of building (as per Entry 5 of Schedule-III of the GST Act).

The petitioner has not controverted the submission of the State that vide Notification No. 11/2017 dated 28.06.2017, construction of a complex, civil structure etc. intended for sale to a buyer was made exigible to GST except where the entire consideration has been received after issuance of completion certificate or after its first occupancy, whichever is earlier. It has been specifically pleaded by the State-respondent that the consideration had been received by the petitioner in the form of transfer of development rights, which happened long before the issuance of completion certificate or first occupancy. The petitioner cannot, therefore, claim that it had received the consideration after the issuance of completion certificate or first occupancy.

Notification No. 4 of 2018 determines the time of supply by way of the transfer of development rights as well as supply of construction services. It has been brought with an aim to streamline the process for both landowners and developers, ensuring that taxation on transfer of development rights as well as supply of construction services occurs when the constructed area is handed over to the landowner upon project completion.

Court does not agree to the fact that the liability to pay tax on supply of development rights was introduced through Notification No. 04/2019 dated 29.03.2019. The supply of construction services is falling under SAC Code 9954 and the petitioner has been taxed under this code. The petitioner has not been taxed for supply by way of transfer of development rights (SAC code 9972).

Decision of Patna High Court

There is no ambiguity with regard to liability of the petitioner on account of 'GST' on 'RCM' on the constructions services rendered by him in lieu of the developments rights under the Development Agreement dated 27.11.2014. The writ application is dismissed.

B. RULINGS BY ADVANCE RULING AUTHORITY

1 GUJARAT NARMADA VALLEY FERTILIZERS & CHEMICALS LIMITED [ADVANCE RULING NO. GUJ/GAAR/R/2025/11] – GUJARAT AAR

Facts and Issues involved

Applicant is a public limited company and their shares are listed on the stock exchange. They initiated a share buyback program in December 2023. Applicant was of the view that they are eligible for Input Tax Credit ('ITC') on expenditure incurred for buyback program as the same is an activity undertaken in course or furtherance of its business.

Applicant sought an advance ruling as to whether expenditure incurred by applicant for buyback of its share in the course or furtherance of business, is eligible for ITC under GST regime?

Applicant's submissions

Buyback of shares improves company's financial standing, creates value for shareholders, contributes prestige, promotes company's image, reduce equity capital, etc. and hence, extends beyond just acquiring shares. The buyback program constitutes a business activity undertaken to achieve its core objectives. GST paid on expenses such as professional fees, legal charges, arrangement of buyback fees etc. incurred for buyback process are eligible for ITC under section 16(1) of CGST Act. Professional fees, advertising costs and other incidental expenses are directly linked to the company's business objective qualifying them as input services as defined u/s 2(60) of CGST Act. While buyback process doesn't directly result in immediate outward supply, it is an essential step towards optimizing financial health and ultimately increase its ability to make taxable supplies. The meaning of the expression 'transaction in securities' u/s 17(3) of CGST Act is very wide and should be read in conjunction with the value of exempt supply and not independently. Under buyback of shares, there is no sale and purchase transaction as the shares bought back have to be cancelled by the company.

Discussion by and Observations of AAR

Broadly, in terms of sections 16 and 17 of the CGST Act, cry registered person is entitled to take ITC on any supply of goods or services or both used or intended to be used in the course or furtherance of business subject to the prescribed conditions and restrictions.

Applicant has erred in assuming that they arc eligible for ITC. This is more so since section 16(1) of CGST Act states that every registered person shall be entitled to take credit of ITC charged on any supply of goods or services or both used or intended to be used in the course or furtherance of business. Now a conjoint reading of the definitions as provided in section 2(52), 2(101) and (102), ibid, states that the activity undertaken, ie. buy back of shares by the applicant is neither a supply of goods nor supply of services. Therefore, in terms of section 16(1), applicant is not eligible for availing ITC on the expenditure incurred for the buyback of its shares, it being neither goods nor services, a primary condition for availment of ITC. The applicant is therefore out of the ambit of section 16, ibid and is therefore not eligible to avail ITC on the

expenditure incurred for buyback of its shares. Hence, the primary requirement for ITC is not fulfilled. The term 'securities' is excluded from both goods and services. There is no need to examine the goods and services since the basic condition is not satisfied.

Ruling of AAR

Applicant is not eligible to avail the ITC involved in the expenditure incurred for buyback of its share and required to reverse the ITC on any common inputs and input services used in relation to the expenditure incurred for buyback of share.

2 INOX AIR PRODUCTS PVT LTD [ADVANCE RULING NO.GUJ/GAAR/R/2025/10] - GUJARAT AAR

Facts and Issues involved

Applicant is engaged in the manufacture and supply of industrial gases such as oxygen, nitrogen, and argon, both in liquid and gaseous form. These goods are transported in vacuum-insulated cryogenic tanks. During the transport of goods, a certain portion of liquid gases evaporate due to their volatile nature, this results in transit loss to applicant and the exact quantity received by the customer is only determined at the time of decanting at the customer's site.

Applicant was paying GST on the full quantity dispatched, including the portion lost in transit, as a precautionary measure. The formula adopted for calculating the transit loss, was as under:

Total quantity dispatched (-) quantity accepted by customer (-) residual quantity left

Applicant sought an advance ruling w.r.t. following questions:

1. Whether GST is payable on goods lost in transit?

2. If GST is payable, what should be the value of supply for the purpose of payment of GST?

3. If GST is not payable, whether the applicant is required to reverse the ITC in terms of section 17(5)(h) of the CGST Act, 2017?

4. If the applicant is required to reverse ITC in terms of section 17(5)(h) of the CGST Act, on what basis should the applicant be required to reverse?

Applicant's submissions

There is no supply of gasses lost in transit, owing to the fact that it was lost in transit rather than having been supplied lo the customer. The applicant has recorded the value of lost gases as cost in the books of accounts. Assuming that they are including the value charged to customer, even in such a case, the applicant has discharged GST on the entire value of liquid gases removed from the factory premises.

In terms of section 17(5)(h) of CGST Act, ITC is not admissible in respect of goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples. At the time of availment of ITC, the goods were intended to be used in the manufacture of finished goods and therefore legally the ITC was eligible. Further, once the ITC is legitimately availed there is no enabling provision to demand the same back. There is no provision to demand that the ITC availed on inputs which have been issued in the manufacture of finished goods that are thereafter lost, stolen

or destroyed. The transit loss is not a loss akin to the one contemplated u/s 17(5)((h) of CGST Act.

Discussions by and observations of AAR

The value of transit loss is expensed out in the applicant's book and that there is no separate recovery for the transit loss made by the applicant from their customer or transporter. The coverage of marine insurance is in respect of transportation of liquid gas limited to accidental coverage and not normal loss.

Unlike for the legacy period wherein Central Excise duty was to be discharged on the loss in terms of circular No. 569/6/2001-CX dated 09.02.200, as far as GST is concerned, levy is on supply. The loss nomenclated as 'transit loss', which occurs during the course of transportation and during the course of delivery at buyers premises is on account of the low boiling point and volatility of the goods. It happens before the supply takes place ie during the course of transportation from applicant's premises to the buyer's premises.

In terms of section 10 of the IGST Act, 2017, the place of supply of goods other than supply of goods imported into or exported from India, where the supply involves movement of goods, shall be the location of the goods at the time at which the movement of goods terminates for delivery to the recipient, irrespective of whether the movement of the goods is by the supplier or the recipient or by any other person. Thus, the transit loss, as is evident, is before the place of supply of goods. The applicant is on record that the invoice is generated post the supply of goods before which, the transit loss has occurred.

It is evident that there is no supply of the said goods by the applicant to its customer more so since the loss is before the goods are handed over to the customer. Given the parameters of place of supply and the time of supply, since the loss occurs prior to both, the place of supply and the time of supply, in this peculiar situation, and hence, there is no supply as far as transit loss is concerned.

The provisions of section I7(5)(h) of CGST Act states that ITC is not eligible on goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples. The goods as mentioned above is lost/destroyed during the course of transit. It is not a manufacturing loss. Section 16 of the CGST Act, 2017, clearly states that a registered person shall be entitled to avail ITC charged on any supply of goods or services or both which are used/intended to be used in the course or furtherance of business. In this case, as far as the goods lost during the course of transit is concerned, it cannot be said that the inputs involved [involved in the goods manufactured and subsequently lost in transit] have been used in the course of furtherance of business, as it is already held above that there is no supply involved, as far as the transit loss is concerned. This renders the credit availed on the inputs used in the goods lost in transit to fail the vesting condition attached to the validity of the credit taken under section 16(1) being proper end use of the inputs. Credit is not a vested right at the time of receipt of inputs but can only be availed on satisfying all vesting conditions, including its participation in a taxable outward supply. This not being the case, applicant is hit by blocked credit as per section 17(5) of CGST Act.

Ruling of AAR

GST is not payable on the goods lost in transit. The applicant is not eligible for the ITC in respect of inputs used in the goods lost in transit and hence, is required to reverse the ITC in terms of section 17(5)(h) of the CGST Act.

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SERVICE TAX





CA Rajiv Luthia

Keval Shah
Advocate

1 M/S UNIQUE FAMILY SERVICES VS. COMMISSIONER OF CENTRAL EXCISE & SERVICE TAX, LUDHIANA 2025 (5) TMI 1918 - CESTAT CHANDIGARH

Backgrounds and facts of the case

- The appellant are sub-agents of their corporate agents for insurance companies.
- The appellant through its marketing patterns identify the potential customers who would buy the life insurance policies and refer them to their corporate agents, who in turn close the policies and these policy holders ultimately become the customers of the respective insurance companies.
- The appellants receive a portion of the commission received by the corporate agents from insurance companies in respect of the insurance policies sold by them. The appellants were further paying part of the commission received to their workers (down line members) working in the marketing set up run and operated/managed by the appellant. The part of the commission received by the appellant has been reflected as referral income in their balance sheet.
- During visit of the department and scrutiny of various records and balance sheet of the appellant it was observed that the appellant received three types of incomes:

  (1) Referral charges from corporate insurance agents;

  (2) Income on account of Processing Fee, Cheque Processing charges. Cheque Reissue charges, BC Transfer fee from their down line members, for services provided to their down line members for supportive working relationship with the customers of their Corporate Insurance agents; and

  (3) Income on account of CBT (Certified business training) charges from their down line members by providing training to them.
- The SCN was issued invoking extended period, covering the period 10-10-2005 to 31-03- 2010.

Arguments by the Appellant

- As far as Referral income is concerned that the appellants were in fact marketing only for Insurance Companies for selling insurance policies, apprising the clients as to which policy was better and beneficial to them and in motivating them to purchase the insurance policies. For these services in relation to Insurance Auxiliary Service by an Insurance Agent, the Service tax is to be paid by the Insurance Company which is also clarified by Board Circular No. B. 11/1/2002-TRU, dated 1-8-2002.

- The appellant stated that there is no service provided by the appellant to these Corporate Agents; neither the appellant had marketed these corporate agents in any manner, nor they have promoted any business of these corporate agents. Appellant had marketed only Insurance Companies on behalf of these corporate agents by creating customers/clients in purchasing insurance policies. Thus, the appellants are not covered under Business Auxiliary Services.

- In respect of demand on Income on Accounts of Processing Fee, Cheque Processing Charges, Cheque Re-Issue Charges & BC Transfer Fee Received from their Down Line Members, the appellant stated that all charges were deducted by the present appellant from the payments due to their down line members. These amounts have not been collected from anyone for any service; as no service is involved, demand of service tax on these incomes are not justified in the eyes of law.

- In respect of income on accounts of CBT charges, the appellant states that the amounts received were part of expenses borne by the appellant in giving training and conducting seminars at different place and was deducted from the payment of commission payable to their down line members. Thus, the activity cannot be covered under Commercial Training and Coaching Centre Service.

Arguments by the Respondent

- The appellant was not registered as Insurance Agent but was using the Agent Codes of the above- mentioned Corporate Agents who were registered with the insurance Companies; the Appellant was receiving commission from their corporate agents for such services, which was shown as "referral charges".

- The appellants have contended that the services provided by them are covered under the category of "Insurance Auxiliary services". The definition of the "Insurance Auxiliary Service", as provided by Section 65(55) of finance Act, 1994 and Section 2 of the Insurance Act, 1938 provides any services could be termed as "insurance auxiliary services "only if the same are provided or are to be provided - to a policy holder or any person) or (insurer, including-insurer) by an actuary or intermediary or insurance intermediary or insurance agent, in relation to insurance auxiliary services. The Appellant were not registered with any insurance Company in the capacity of actuary or intermediary or as agent and appellants were not providing any services to either the policy holders

or insurer or reinsurer; therefore, the services provided by them are not covered under the ambit of insurance auxiliary services. It is evident that the services provided by the Appellant are not covered under the definition of insurance auxiliary services and squarely fall under clauses (ii), (iv), (vi) and (vii) of the definition of Business Auxiliary Services.

- That the income received and shown by the Appellant as Processing Fee, Cheque Processing charges, Cheque Reissue charges etc are of the nature of incidental and auxiliary to the services provided by the Appellant to the corporate agents of Insurance Companies. Thus, these services are covered under the definition of Business Auxiliary Service.

- With respect to the receipt of CBT charges the Appellant imparted training for a consideration to the willing candidates, who acted as their down line members, and who acted to further generate business for them and their clients. Such an activity would be covered under Commercial Coaching or Coaching Centre Service' as defined under Section 65 of the Act.

Decision of the Hon'ble Tribunal

- The appellants and the Sub-agents of the insurance companies are together performing the same service and are sharing the commission paid by the Insurance Companies. The applicable service Tax on the Commission paid is discharged by the said Insurance Companies. There is no separate service rendered by the appellants to their clients, i.e. the sub-agents which could be taxable under "Business Auxiliary Services'. We find that non-registration of the appellants as insurance agent does not alter the nature of the services rendered by the appellants to sub-agents. It can be understood from the scheme of the things that the appellants and the sub-agents are rendering the same service to the insurance companies and are sharing the commission paid by the insurance companies to the sub-agents. We find that there is no such bar under the service tax law prohibiting such joint rendering of the service.

- As regards to, levy service tax on account of processing fee, cheque processing charge, cheque re-issue charges and B.C. Transfer fees. The charges recovered from the customer of the appellants and Revenue wants to treat the same as the consideration for the services rendered by the appellant to the insurance companies. We fail to understand the logic. If the consideration is flowing from the customers of the appellant to the customers, by no stretch of imagination the same can be considered as remuneration in the hand of the appellants received from either the corporate agents or the insurance companies. There is no service alleged to have been provided by the appellants to their customers in this regard so as to treat the same as remuneration. The relation of service provider, service recipient and the consideration is not established in respect of this activity. These have to be considered as incidental expenses recovered, or income generated in the course of business of the appellant and therefore

cannot be held to the eligible to service tax. Therefore, we find that no case has been established against the appellants on this account.

- As regards to, demand on account of Certified Business Training (CBT), We find that the so-called training given by the appellants is not an open training given to the general public for a consideration. Even though, certain amounts are taken as fees, the training is only to their down line members in order to improve their skills. This is a sort of in-house training for their own employees.

- We find that the appellants are not liable to pay Service Tax on any of the issues raised in the impugned Show Cause Notice and confirmed in the impugned order. The appellants are not liable to pay Service tax on the amounts received under various heads such as referral charges received from Corporate sub-agents; income on account of Processing Fee, Cheque Processing charges, Cheque Reissue charges, BC Transfer fee from their down line members and the income on account of CBT Certified Business Training charges received from their down line members.

2 MAHARANA MEWAR PUBLIC SCHOOL VS. COMMISSIONER OF CGST, UDAIPUR 2025 (5) TMI 1916 - CESTAT NEW DELHI

Backgrounds and facts of the case

- The appellant is engaged in providing the services in relation to Auxiliary Education Services.

- Show cause notice dated 16.10.2018 was issued demanding service tax amounting to ₹ 14,86,475/- on amount in the name of hostel fees on the basis of activity of providing accommodation alleged to be taxable activity.

Arguments by Appellant Assessee

- The appellant is a school and is affiliated with the Central Board of Secondary Education, Delhi ('CBSE') for imparting education. In the course of providing education, the appellant is required to provide other facilities to students, such as hostel, transportation etc. The charges for such facilities are specified and are recovered by it from the students in addition to the tuition fee & other charges. As all such services are naturally bundled and represented by education services, the Appellant was not paying any Service Tax thereon. Otherwise also such education services were covered under negative list of services under Section 66D(1) of the Act during the relevant period.

- Further, the issue involved in the present appeal stands already decided in favour of the appellant and the decision in the case of ***Modi Education Foundation vs. Commissioner of Central Excise, Jodhpur and Rajiv Gandhi University of Health Sciences, Karnataka vs. Principal ADG, Bengaluru Zonal Unit***

Decision of the Hon'ble Tribunal

- A perusal of the provisions of Section 66F of the Finance Act would indicate that if there are various elements of service which are naturally bundled in the ordinary course of business, the taxability of such bundled services shall be based on the service which gives the essential character to such bundle.

- The appellant has a boarding school, and it receives hostel fees from students in addition to the tuition fee and other charges. However, students who are day scholars and who do not opt to pay the hostel facility are not required to pay the hostel fees. The hostel facility cannot be provided without the provision of education services by a boarding school as it is not the case of the department and it cannot be that students who are not receiving education services can also avail hostel services. On the other hand, the students who are receiving education services, may or may not opt for hostel services. There is, therefore, a nexus between the two services. It cannot, therefore, be doubted that the hostel services and education services provided by a boarding school are naturally bundled in the ordinary course of business, and the education service is the service which gives the essential character to such bundle.

- Section 66D of the Finance Act provides for the negative list of services and it includes service by way of pre-school education and education up to higher secondary school or equivalent. Thus, education service would be covered within the purview of negative list contained in Section 66D of the Finance Act. It would, therefore, not be taxable.

- Accordingly, in view of the decision of the Hon'ble Supreme Court in the case titled as ***Assam State TaxBook Production and Publication Corporation vs. CIT reported in 2009 (17) SCC 391*** & Hon'ble High Court of Karnataka as well as of this Tribunal, dealing with identical issue as involved in the present appeal and finding no other fact which may distinguish the present appeal from those decisions, we hold that the issue stands already decided and we do not differ from the findings arrived at. Since, the findings of the order under challenge are contrary to those findings, we hereby set-aside the order under challenge and consequent thereto, the appeal is allowed.

■

" The Gita is a commentary on the Upanishads.
The Upanishads are the Bible of India. "

Swami Vivekananda

CASE LAW UPDATE



CS Makarand Joshi

Companies Act 2013

M/S. BANWARI LAL ARORA & SONS VERSUS M/S. S. R. FOILS & HYGIENE PRIVATE LIMITED NATIONAL COMPANY LAW TRIBUNAL (NCLT)

In the matter of *M/S. Banwari Lal Arora & Sons versus M/s. S. R. Foils & Hygiene Private Limited National Company Law Tribunal (NCLT)* -New Delhi Bench, dated 19th May 2023.

Facts of the case

- Banwari Lal Arora & Sons ('hereinafter referred to as Applicant') registered partnership firm had advanced a sum of ₹ 58,70,000- to S. R. Foils & Hygiene Private Limited (hereinafter referred to as Respondent),
- The advance was given in consideration for the supply of various categories of aluminum foil papers by the Respondent.
- The Respondent did supply a significant portion of goods amounting to ₹ 52,57,879 during the period from 19 July, 2018 to 26th November, 2018.
- A balance value of goods amounting to ₹ 6,12,121 was not delivered. In spite of repeated emails from the applicant asking for delivery of goods or refund of money, neither the goods were delivered, nor was the money refunded within 365 days.
- Therefore, the Applicant filed a petition before Hon'ble NCLT under section 73(4) of the Companies Act 2013 (the Act), praying that the pending amount of ₹ 6,12,121 be treated as a deposit and the Respondent company should be ordered to refund the same with interest thereon.

Arguments of the Applicant

- The Applicant filed a company petition under section 73(4) of the Act, seeking a direction for the Respondent to repay the outstanding amount of ₹ 6,12,121/-along with interest amounting to ₹ 2,40,589/-.
- Their primary argument was that the outstanding amount constituted a "deposit" within the meaning of the Act, and the Companies (Acceptance of Deposits) Rules, 2014, and therefore, the company was obligated to refund it.

- The goods corresponding to the outstanding amount were not supplied and the advance effectively transformed into a deposit that should be repaid.

- As per rule 2(1)(c)(xii)(a) of Companies Acceptance of Deposits rules 2014, the amount received by the company in the course of business as advance for the supply of goods or services can be treated as a deposit if it lies in the books of the company for more than 365 days.

Arguments of the Respondent:

- The Respondent did not appear before NCLT despite multiple hearings. Therefore, they did not present any formal arguments or defense in the NCLT proceedings.

- However, NCLT inherently considered the legal position of advances received for goods/services which implicitly forms the defense against the applicant`s claim of it being deposited.

Held

- Rule 2(1)(c)(xii)(a) of Companies Acceptance of Deposits Rules 2014, states that the advance received by the company is not treated as a deposit if it is allocated or appropriated against identified or specified goods or services within 365 days of acceptance. It is not necessary for the company to actually deliver the goods or services within 365 days. Moreover, a company may actually supply goods/materials/services ordered at its convenience as long as the advance received by it is set aside for such goods or services within 365 days.

- It is a trite law that an advance given for a particular purpose cannot be treated as a deposits. A mere monetary advance given without any purpose but intended to be refunded, with or without interest, would still be a deposit. However, if money is received as an advance against any purpose, it is an advance and not a deposit. Only advances that are received without any purpose will amount to a "deposit".

- As per the facts of the case, the fact is itself unconditionally admitted by the applicant that the advance was made towards the supply of various categories of aluminum foil papers.

- Having regard to the conspectus of facts and circumstances, the Tribunal was satisfied that the advance sum disbursed to the Respondent is appropriated for the supply of various categories of home foils in pursuance of which the goods were duly supplied to the Applicant.

- A mere perusal of the e-mail dated 28 November 2015, clearly mentioned that the advance money was already appropriated towards the Aluminum Foil as mentioned in the e-mail dated 28 November 2018.

- Hence, the said advance of ₹ 6,12,121/- could not be qualified to be a deposit under Section 2(31) of the Act read with Rule 2(1)(c)(xii)(a) of the Companies (Acceptance of deposits) Rules, 2014 and other relevant provisions of the act as the amount had been appropriated within a period of 365 days from the date of receipt of advance. Resultantly, the Company's petition stood dismissed.

SEBI

V. SHANKAR VS. SECURITIES AND EXCHANGE BOARD OF INDIA

Order of the Hon'ble Securities Appellate Tribunal in the matter of *V. Shankar vs Securities and Exchange Board of India.*

Background of the Case

V. Shankar ['Appellant'] was a Company Secretary in Deccan Chronicle Holdings Ltd ['DCHL'] for two years during 2009-2011. SEBI conducted an investigation in the script of DCHL. SEBI conducted an investigation in the scrip of DCHL and issued a show cause notice (SCN) to the Promoter director and Appellant on August 3, 2017 alleging that, the promoter director had **understated the outstanding loans** and interest in finance charges etc., in the annual reports for the year 2008-2009, 2009-2010 and 2010-2011 and being a signatory to the public announcement made by the company for the buyback of its equity shares without having adequate free reserves, Appellant had not exercised due diligence and care in authenticating public announcement of DCHL which lead to **misleading the investors/shareholders.**

Securities Exchange Board of India (SEBI) later held that the **company/promoters and directors had knowingly contributed in the dissemination of factually incorrect and distorted information relating to the annual financial statements of the company to the public in their annual reports**. SEBI found that the company carried out a buyback of its equity shares which were more than 25% of the total paid-up capital limit during the financial year 2011-2012 without having adequate free reserves and had thus misled the investors and shareholders about valuation and free reserves of the company. SEBI penalized DCHL, its directors, and promoters for violation of sections 68 and 77A of the Companies Act, 1956 read with Regulations 3 and 4 of the SEBI (PFUTP) Regulations, 2003 and Section 12A of the SEBI Act.

SEBI held that the Appellant liable for signing financial statements that were misleading. The appellant made an appeal to the Hon'ble Securities Appellate Tribunal against SEBI's adjudication order. Hon'ble Securities Appellate Tribunal vide its order dated November 1, 2022 reversed SEBI's order dated March 22, 2022, stating that the Appellant was not liable for the misrepresentation of financial information leading to misleading investors or for re-examining the veracity of certified accounts and that his responsibility was to only comply with Regulation 19 (3) of SEBI (Buyback of Securities) Regulation, 1998. Against this order of Hon'ble Securities Appellate Tribunal dated November 1, 2022. SEBI appealed to the Hon'ble Supreme Court, seeking to reinstate its original decision.

Hon'ble Supreme Court held as follows, "*Regulation 19(3) of the SEBI (Buyback of Securities) Regulations 1998 requires the company to nominate a compliance officer and an investors' service centre. The purpose of the nomination is twofold, namely (i) to ensure compliance with the buyback Regulations; and (ii) to redress the grievances of investors. There is a patent error on the part of the Tribunal in interpreting the Regulations. The Tribunal held that the role of the respondent, who was a Company Secretary, compliance officer, was limited to redressing the grievances of investors. In arriving at the finding, the Tribunal relied upon the latter part of Regulation 19(3) which dealt with redressal of the grievances of investors. The crucial point*

which had been missed by the Tribunal was that the compliance officer was also required to ensure compliance with the buyback regulations. Since the interpretation which had been placed by the Tribunal on the interpretation of 19(3) was contrary to the plain terms of Regulation 19(3), SAT impugned decision and remitted the proceedings back to the Tribunal for consideration of the facts afresh in the light of the interpretation which had been placed above on the provisions of Regulation 19(3)". The matter was again heard by SAT and SAT vide its order dt: May 5, 2025, exonerated the Appellant from the charge of misleading investors due to lack of doing due diligence.

Charges levied

Violation of section 68, 77A of Companies Act, 1956; section 12(a), (b)and (c) of SEBI Act 1992 and regulation 3(a), (b), (c), (d); regulation 4(1), (2), (f), (k) and (r) of SEBI (PFUTP) regulations, 2003 under section 15HA of SEBI Act.

Argument of the Appellant

- **Scope of Compliance Officer's Duty:** The appellant contended that his role as a Compliance Officer was to ensure procedural compliance and disclosures, not necessarily to independently verify the veracity of the company's financial accounts, especially those certified by statutory auditors. He contended that his role was to ensure timely filings and adherence to stipulated procedures for buyback, not to re-examine the accuracy of the underlying financial data that would typically be certified by auditors.

- **"Officer in Default" Definition:** The appellant's counsel delved into the definition of "Officer in Default" under Section 5(f) of the Companies Act, 1956. They argued that for a person to be held liable under this definition, they must be "charged by a Board with the responsibility of complying with that provision." In this case, for a Section 77A violation (buyback), the Appellant disputed that he was not specifically charged with the responsibility of verifying the company's reserves or the accuracy of its financial position relevant to the buyback.

- **Reliance on Certified Accounts:** Appellant argued that Company Secretary or Compliance Officer would typically rely on the audited or certified accounts provided by the finance department or statutory auditors for compliance purposes, especially concerning financial positions like free reserves.

- **Reliance on Oversight Mechanisms:** Mr. Shankar asserted that he was entitled to rely on the multiple tiers of oversight over the financial statements by competent bodies entrusted with this duty under the Listing Agreement. These included the Audit Committee, the Board of Directors, the statutory auditors, and the CEO/CFO. He argued that his role as Company Secretary did not extend to independently verifying the accuracy of the financial statements that had already been vetted by these higher authorities.

- **Limited Role in Buyback Process:** The appellant contended that his role in the buyback offer was limited to authenticating the contents of the balance sheet and the offer document, once approved by the Board of Directors. He argued that he was not required to inquire into the veracity of the buyback offer documents or its legal compliances before authenticating and signing them. He distinguished his role from that of

a Merchant Banker, who is specifically required to vet the disclosures related to buybacks.

- **No Independent Duty to Verify Financials:** Mr. Shankar argued that as a Company Secretary, his primary duty was related to compliance and secretarial functions, not the independent verification of the financial soundness or accuracy of the financial statements, which is the responsibility of the Board and the auditors.

- **Distinction from Promoters/Directors:** He emphasized that the primary responsibility for the accuracy of financial statements and the legality of corporate actions like buybacks lies with the promoters and directors who are involved in the decision-making process and have a deeper understanding of the company's financial affairs.

- **Regulation 19(3) of SEBI (Buyback of Securities) Regulations, 1998:** The appellant likely argued, as later noted by the Supreme Court in SEBI's appeal, that Regulation 19(3) which requires the company to nominate a compliance officer, should be interpreted in the context of ensuring compliance with the buyback regulations and redressing investor grievances, and not as imposing a duty to independently verify the financial basis of the buyback

SEBI's Arguments before Hon'ble Securities Appellate Tribunal

- **Reliance on certified accounts:** SEBI argued that V. Shankar, as the Company Secretary and a signatory to the public announcement for the buyback, had a duty to diligently examine liabilities when concerned with the buyback, even when relying on unaudited results. SEBI implied that V. Shankar should have known about the NCDs/loans, which would have been in DCHL's books, regardless of the accounts being certified.

  SEBI also contended that V. Shankar's claim of not attending Board Meetings where accounts were approved and not being invited to meetings was contradicted by his admission in reply to the SCN that he "assisted the conduct of the board of director meeting," suggesting he had a role in the process.

- **Scope of compliance officer's duty**: SEBI emphasized that V. Shankar's role as a Compliance Officer under Regulation 19(3) of the Buyback Regulations obligated him to ensure compliance with the buyback regulations, not just to redress investor grievances.

  SEBI maintained that he was obligated to diligently examine liabilities when concerned with the buyback based on unaudited results and that his argument of not being in charge of accounts was irrelevant as he had a duty to check NCDs/loans when signing the public announcement. According to SEBI, Sections 77A read with Section 5 of the Companies Act, 1956, and Regulation 19(3) and (8) of the Buyback Regulations made him responsible for ensuring compliance.

- **"Officer in Default" Liability:** SEBI argued that V. Shankar's failure to follow basic aspects of his role, given his experience, indicated active involvement in the fraud. Knowledge of loans taken would be known to a Company Secretary through preparing Board Minutes and maintaining the Register/Index of Debentures. SEBI concluded that

V. Shankar was equally liable for the fraudulent Public Announcement and his actions indicated willful default, making him an "Officer in Default." SEBI's case against V. Shankar primarily rested on the contention that he, as the Compliance Officer and Company Secretary, was an "Officer in Default" under the Companies Act, 1956, and thus liable for the company's alleged violations related to a buyback scheme.

Hon'ble Securities Appellate Tribunal Findings and Reasoning

Hon'ble Securities Appellate Tribunal thoroughly examined the AO's order and V. Shankar's arguments.

- **Lack of Specificity in Charges:** Hon'ble Securities Appellate Tribunal found that SEBI's charges against V. Shankar were not "clear and unambiguous." It noted that SEBI merely stated the Appellant was a signatory and "misled the investors" without pointing out any specific action or violation on his part. The Hon'ble Securities Appellate Tribunal stressed that a clear charge is essential when consequences are likely to be met.

- **Unfounded Presumption:** The Hon'ble Securities Appellate Tribunal critically analyzed the SEBI adjudicating officer's presumption that the Company Secretary/Compliance Officer "ought to have re-examined the veracity of the certified accounts." Hon'ble Securities Appellate Tribunal unequivocally held that "Such a presumption is without any legal foundation and therefore the impugned order is unsustainable in law." This is a key ruling, delineating the scope of a Compliance Officer's responsibility and pushing back against an overly broad interpretation of their duties to scrutinize audited financials.

- **Interpretation of "Officer in Default":** While the Hon'ble Securities Appellate Tribunal acknowledged Section 5(f) of the Companies Act, it implicitly upheld the principle that liability as an "Officer in Default" requires being "charged by a Board with the responsibility of complying with that provision." The AO's order failed to establish this specific responsibility for V. Shankar in the context of the alleged financial irregularities related to the buyback's accounting aspects.

The Hon'ble Securities Appellate Tribunal allowed the appeal and set aside the order dated March 22, 2022, passed by the Adjudicating Officer of SEBI. ■

"All differences in this world are of degree,
and not of kind, because oneness is the secret of everything."

Swami Vivekananda

FEMA – UPDATES AND ANALYSIS





CA Hardik Mehta *CA Tanvi Vora*

In this article, we have discussed recent amendments made in FEMA through Notifications, Circulars and Press Notes & Press Releases.

A. Update through A.P. (DIR Series) Circular

1. Reporting on FIRMS portal – Issuance of Partly Paid Units by Investment Vehicles

Currently, Alternative Investment Funds (AIFs) which has issued its units to a person resident outside India is required to file Form InVI within 30 days from the date of issue of units.

The NDI Rules, 2019 were amended on 14th March 2024 permitting issuance of partly paid units to persons resident outside India by investment vehicles by amending the definition of "units" under the NDI Rules to include partly paid-up units issued in accordance with and as permitted under the extant SEBI regulations.

Vide A.P. (DIR Series) Circular No. 7 dated 21st May 2024, RBI provided for the regularisation of partly paid units issued by AIFs to persons resident outside India prior to the amendment to the NDI Rules. As per the circular, AIFs should report the issuance of partly paid units on the Foreign Investment Reporting and Management System (FIRMS) portal and complete compounding proceedings for regularising the non-compliance.

Guidance has now been issued to investment vehicles to report issuances of partly paid units made prior to the date of this circular (i.e. 23 May 2025) in Form InVI within 180 days from the date of this circular. No late submission fees shall be applicable for such reporting made within this period.

However, issuances of partly paid units by investment vehicles on or after the date of this circular shall continue to be reported within 30 days, in accordance with the timelines specified under the Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019.

A.P. (DIR Series) Circular No.06 dated May 23, 2025

(Comments: This Circular clears the air regarding compliances to be completed for partly paid-up units issued before the amendment to NDI Rules which formalized the issuance of partial units)

B. Other Circulars

1. Investments by Foreign Portfolio Investors in Corporate Debt Securities through the General Route – Relaxations

As per the SEBI (FPI) Regulations, 2019, Foreign Portfolio Investors (FPIs) are permitted to invest in debt securities as allowed by RBI. The Foreign Exchange Management (Debt Instruments) Regulations, 2019 prescribes the eligible instruments, including Government securities, treasury bills, non-convertible debentures, bonds, etc.

To consolidate and streamline the regulatory framework, the RBI issued a Master Direction on 7 January 2025 (FMRD.FMD.10/14.01.006/2024-25) - Reserve Bank of India (Non-resident Investment in Debt Instruments) Directions, 2025, providing a unified framework governing non-resident investment in debt instruments. This Master Direction integrates various RBI circulars and outlines:

- Eligible investor categories (FPIs, NRIs, OCIs)
- Investment routes
- Applicable limits and conditions for each route

FPIs may invest in Indian debt securities through any of the following three routes:

Route	*Key Features*
General Route	Investment in Government and corporate debt, subject to specific limits
Voluntary Retention Route (VRR)	Long-term commitments with relaxed macro-prudential norms
Fully Accessible Route (FAR)	Unlimited access to specified Government securities

The general route is currently subject to conditions such as Minimum residual maturity requirement, Short-term Investment limit, Single/Group investor-wise limit, etc. The RBI has *now withdrawn* the following conditions under the General Route with immediate effect:

i. ***Short term investment limit*** – Short-term investments (residual maturity of upto 1 year) to not exceed 30% of the total investment in corporate debt securities.

ii. ***Concentration limit*** - Investment in Central Government securities and State Government securities by an FPI (including its related FPIs) shall not exceed 15% of prevailing investment limit for each category in case of long-term FPIs and 10% of prevailing investment limit for other FPIs.

FMRD.FMD.No.01/14.01.006/2025-26 dated May 8, 2025

(Comments: This move comes with a view to providing greater ease of investment to FPIs and will help in promoting inflow of foreign capital to India.)

■

THE CHAMBER NEWS



CA Mehul Sheth
Hon. Jt. Secretary



CA Neha Gada
Hon. Jt. Secretary

Important events and happenings that took place online/physical between **May 1, 2025 to May 31, 2025** are being reported as under:

I. ADMISSION OF NEW MEMBERS

The details of new members who were admitted in the Managing Council Meeting held on May 20, 2025 are as under:

Type of Membership

Life Member	Ordinary Member	Student Member	Associate Member	Total Members
7	31	6	3	47

II. PAST PROGRAMMES

INDIRECT TAXES

2.5.2025
Topic: Lecture Meeting on Important Recent Decisions under GST
Speaker: ***Sr. Adv. V. Raghuraman***

13.5.2025
Issues in Logistics Sector – Part-II
Group Leader : CA Raj Khona
Chairman : CA Jayesh Gogri

DELHI CHAPTER

6.5.2025
Topic: **Recent Cases on Income Tax**
Chairman : Mr. G. S. Pannu – Ex-Vice President, ITAT
Panel Members : CA Manoj Kumar & CA Sunil Goyal

INTERNATIONAL TAXATION

7.5.2025
Topic: **Study Circle - Recent Developments in International Tax Case Law**
Speaker: ***CA Hiren Shah***

17.5.2025
Topic: **Global Transfer Pricing Summit**

a Keynote address
Speaker: ***Mr. Sanjay Agrawal, CCIT – (IT TP) – WZ***

b Overview and evolution of Indian TP landscape (including Q&A)
Speaker: ***CA Sanjay Tolia***

c Fire side chat – Practical experience on TP Assessments
Moderator: CA Waman Kale
Panelist: CA Maulik Doshi, CA Pradeep Mitra

d Recent Global TP decisions and its implications on Indian TP landscape
Speaker: ***CA Akshay Kenkre***

e Arm's length requirements as per SEBI LODR/Companies Act
Speaker: ***Mr. Bhupendra Kothari***

f Case studies on Industry specific issues (including economic adjustments)
Moderator: CA Karishma Phatarphekar
Panelist: Mr. Amit Shukla, Hon'ble ITAT Member
Ms. Ramapriya Raghavan CIT (T.P.)
CA Vijay Iyer

22.5.2025
Topic: **FEMA Study Circle - Compounding Rules & Directions under FEMA including LSF provisions**
Speaker: ***CA Naren Madlani***

23.5.2025
Topic: **Study Circle - Capital Gains for Non-residents**
Speaker: ***CA Mahesh Nayak***

Topic: **2nd International Taxation Course for Beginners Jointly with Student Committee**

26.5.2025
a Some fundamental sections of IT Act (section 4, 5, 9 & 195) and Overview of International Taxation and How to read and interpret DTAA
Speaker: ***CA Anish Thacker***

30.5.2025
b Residential Status and Taxation of Salaries
Speaker: ***CA Kartik Badiani & CA Parag Doshi***

DIRECT TAXES

9.5.2025
Topic: ISG - Recent Important Decisions Under Direct Tax
Speaker: ***Adv. Gautam Thacker***

15.5.2025
Topic: Stay & Recovery Proceedings under IT Act, 1961
Speaker: ***Adv. Ananya Kapoor***

STUDY CIRCLE & STUDY GROUP

16.5.2025 & 19.5.2025
Topic: Section 45(5A) & its related issues
Chairman : Mr. Dharan Gandhi, Advocate
Group Leader : CA Parth Chokshi

PUNE STUDY GROUP

24.5.2025
Topic: Analysis of Recent Judgements of Various Courts on Income Tax Issues
Speaker: ***CA Rajendra Agiwal***

STUDENT

Topic: 2nd International Taxation Course for Beginners Jointly with International Taxation Committee

26.5.2025

a. Some fundamental sections of IT Act (section 4, 5, 9 & 195) and Overview of International Taxation and How to read and interpret DTAA
Speaker: ***CA Anish Thacker***

30.5.2025

b. Residential Status and Taxation of Salaries
Speaker: ***CA Kartik Badiani & CA Paras Doshi***

COMMERCIAL & ALLIED LAWS

29.5.2025
Topic: Study Circle - Insurance Laws in India
Speaker: ***Ms. Niyati Dholakia & Mr. Indranath Bishnu***

Glimpses of the Full Day Seminar on "Global Transfer Pricing Summit" held on 17th May, 2025 at Walchand Hirachand Hall, IMC, Mumbai



CA. Akshay Kenkre addressing the audience



Mr. Bhupendra Kothari addressing the audience,
Seen (L-R) sitting - CA Chaitanya Maheshwari (Convenor), CA Jayant Gokhale (Vice President), CA Niraj Chheda (Vice Chairman)



Seen (L-R):
CA Namrata Dedhia (Vice Chairperson), Mr. Amit Shukla, Hon'ble ITAT Member (Panel Member), CA Karishma Phatarphekar(Moderator), Ms. Ramapriya Raghavan (Panel Member), CA Vijay Iyer (Panel Member), CA Shabbir Motorwala (Co-Chairman)



Group Photo



View of the Audience

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