



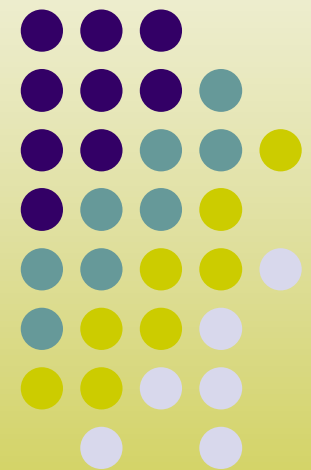
**J. B. NAGAR CPE STUDY CIRCLE
OF**

WIRC of the Institute of Chartered Accountants of India

TAXATION OF NON-RESIDENT INDIANS (NRIs)

Natwar G. Thakrar

Sunday, 23rd February, 2014



Presentation Outline

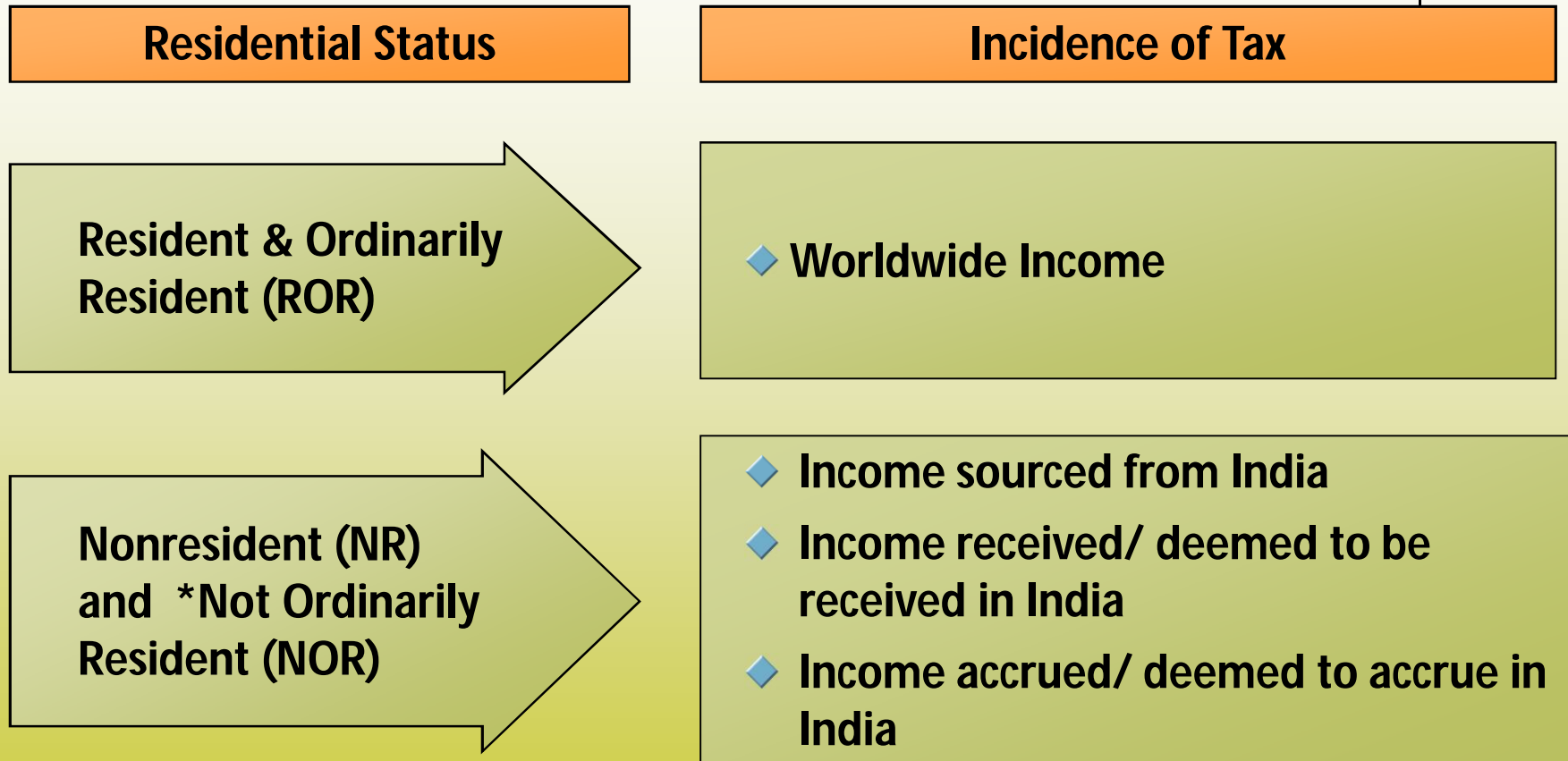


- Part I - Tax Incidence & Determination of Residential Status of NRI
- Part II- Taxation of Capital Gains
- Part III - Exempt Income
- Part IV- Separate Tax Regime For Non-resident Indians ('NRIs')
- Part V - Procedure for outward remittance (Form 15CA/15CB)



Part I – Tax Incidence & Determination of Residential Status of NRI

Incidence of Tax for NRI's



***Exception for NOR– Income accruing/ received outside India in respect of a business set-up in India is taxable in India**

Residential Status



Determining Factors

- Individual
 - Physical Presence (Discussed separately)
- HUF, Firm, AOP
 - Control & Management- Non-Resident where control and management of its affairs is wholly situated outside India
- Company
 - Place of Incorporation / Control & Management- Foreign Company will be resident of India if control & management of its affairs is wholly situated in India
- Others
 - Control & Management- Non resident if control and management of its affairs is wholly situated outside India



Test of Residence - Individuals

- **Two Basic Conditions:-**
 - Stay in India is for 182 days or more during the previous year

OR

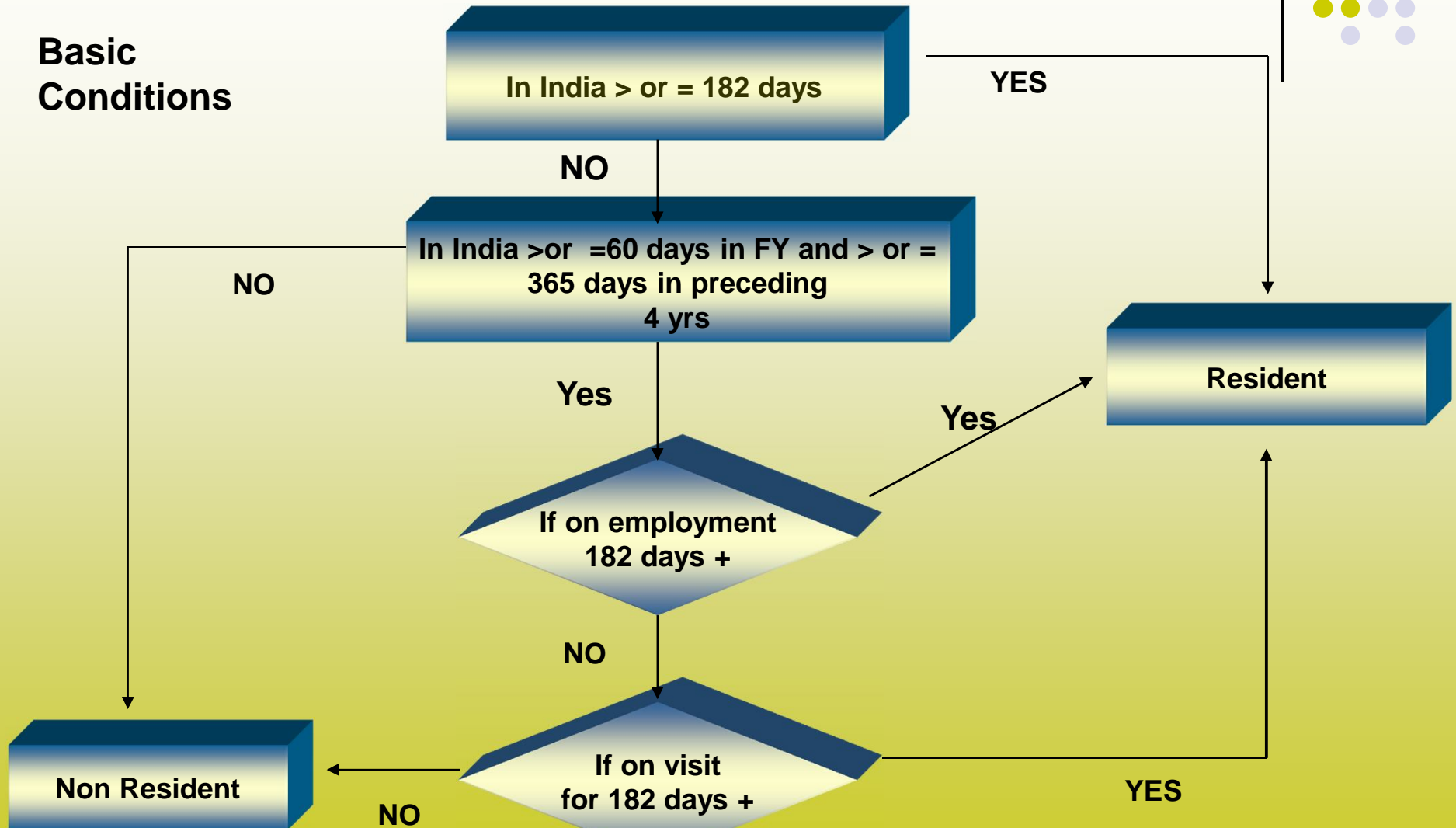
 - Stay in India is for 60* days or more during the previous year if presence in India is for 365 days or more during 4 preceding previous years
- ***Relaxation of No. of days to 182 days in the 2nd Basic Condition under three circumstances:-**
 - Citizen leaving India “*as a member of crew of Indian Ship*”
 - Citizen leaving India “*for the purpose of Employment outside India*”
 - NRI or PIO coming to India “*on a visit*”

**Tour v. Transfer....An important criterion in the year of departure
60 days rule (for tour) v. 182 days rule (for employment)**

Determining Residential Status for Outbound Assignees



Basic
Conditions



23/02/2014

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Taxability- Key trigger points



- Timing of transfer
 - Would ascertain the residential status in the year of departure/arrival
- Nature of the assignment & place of service
 - Whether employee proceeds abroad on employment/ tour/transfer
 - Income from employment for services rendered in India covered by virtue of Explanation to s. 9(1)(ii)
- Nature of payment
 - Whether allowances or reimbursement.
 - Reimbursement of actual relocation expenses are exempt
- Place of payment
 - Income received in India is taxable in India irrespective of its place of accrual [subject to treaty relief]

Resident Employer Test



- The enterprise whose instructions / directions are to be followed and of whose organization a person becomes a part is an employer.
- Factors to determine the real employer :
 - Who has authority to instruct about manner of work performance.
 - Who takes responsibility or risk of results of work.
 - Who controls the place at which work is performed.
 - Who provides tools/material for the work.

Meaning of Employment Outside India



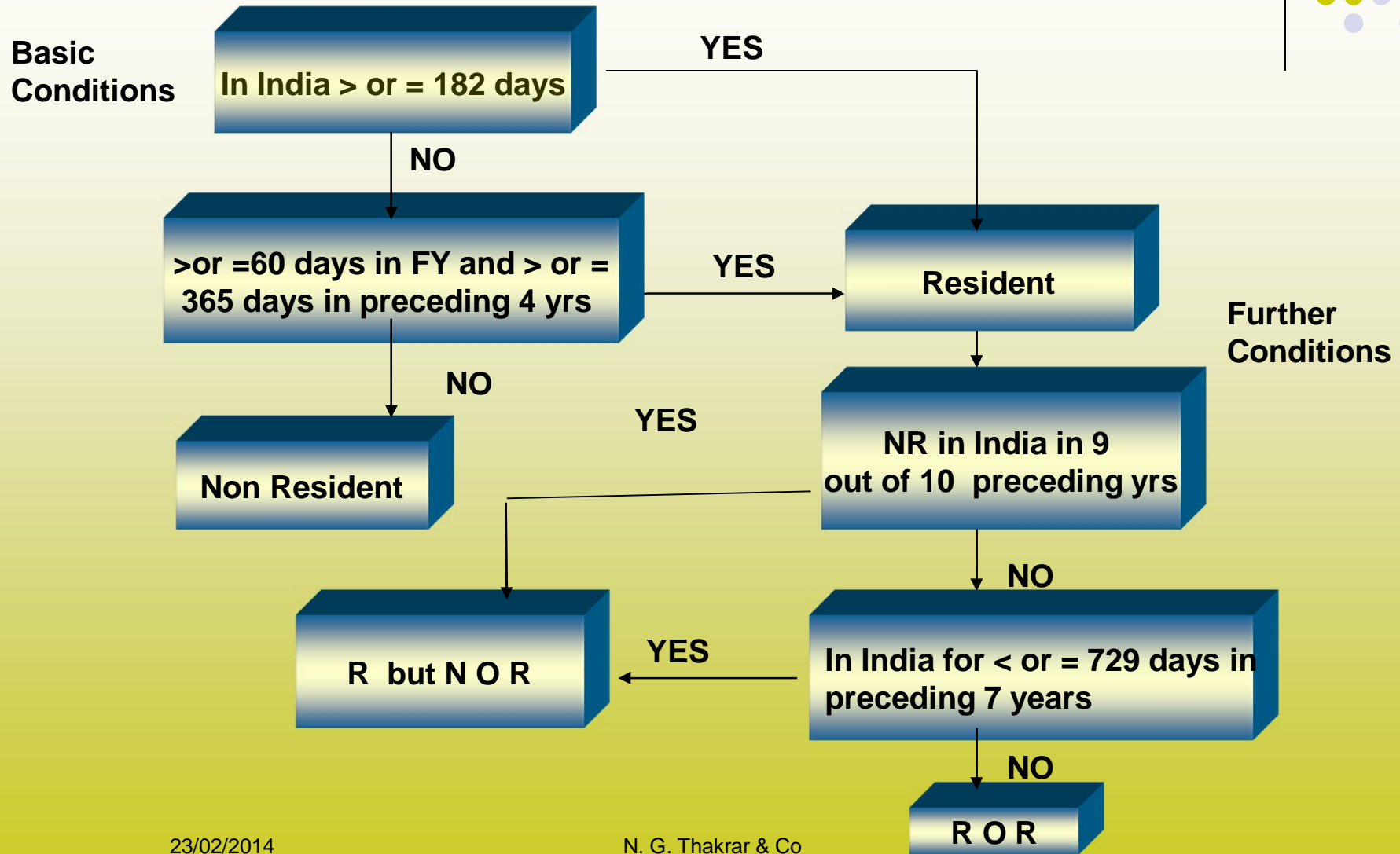
- Employment outside INDIA would mean a case where the employee is posted outside INDIA either temporarily or for a long period and would not include the case of an employee who has gone abroad for few days though posted in INDIA.
- **Second ITO v. K.Y. Patel (33 ITD 714) (Mum).**
 - Held resident as traveling abroad for 218 days was in connection with and not for the purpose of employment
- **ITO v. Abbott Laboratories Pvt. Ltd. (31 ITD 183)(Mum).**
 - When employee goes abroad for few days, though posted in India can not be considered as employment outside India
- **CIT Vs. Indo Oceanic Shipping Co. Ltd 114 Taxmann 722 (Mum)**
 - Place where contracts are entered is not material in determining the place of employment

Example



- Mr. A, is a senior manager on payroll of XYZ Industries Ltd in India. He is deputed by the company as a person in-charge of its newly opened branch at China on 1st July, 2010.
- He returns to India on vacation on following two occasions:-
 - From 1st December, 2011 till 3rd February, 2012.
 - From 1st December, 2012 till 2nd February, 2013.
- His Salary is in US \$ and is always paid to him in China by the branch office.
- Determine his residential status in India for the previous years 2010-11, 2011-12 & 2012-13.
 - British Gas 285 ITR 218(AAR)

Determining Residential Status for Inbound Expatriates



Physical Presence Test



- Stay at the same place or at different place does not matter
- Physical presence irrespective of time spent on duty
 - Intention /Purpose of stay irrelevant
 - Exception – sickness hindering return
- Stay need not be continuous
- Stay can even be on the territorial waters
- Exclude days outside India even while on training or duty or leave or vacation

Test of Residence – Points to Remember



- Previous year is from April 1st to 31st March for counting number of days stay in India
- Days of arrival into India and day of departure from India
 - Both the days should be counted – AAR 223 ITR 462
 - Only the day of departure has to be considered in India – Jaipur Tribunal (No. 1230 dt. 22.8.1986) (ITO Vs. Dr. R. K. Sharma)
- Dates stamped on Passport are normally considered as proof of date of arrival in and departure from India.
- In the 1st year of leaving India for the purpose of employment, plan to leave on or before September 28, to avoid taxation of foreign income in India for the year of departure.

Test of Residence – Points to Remember



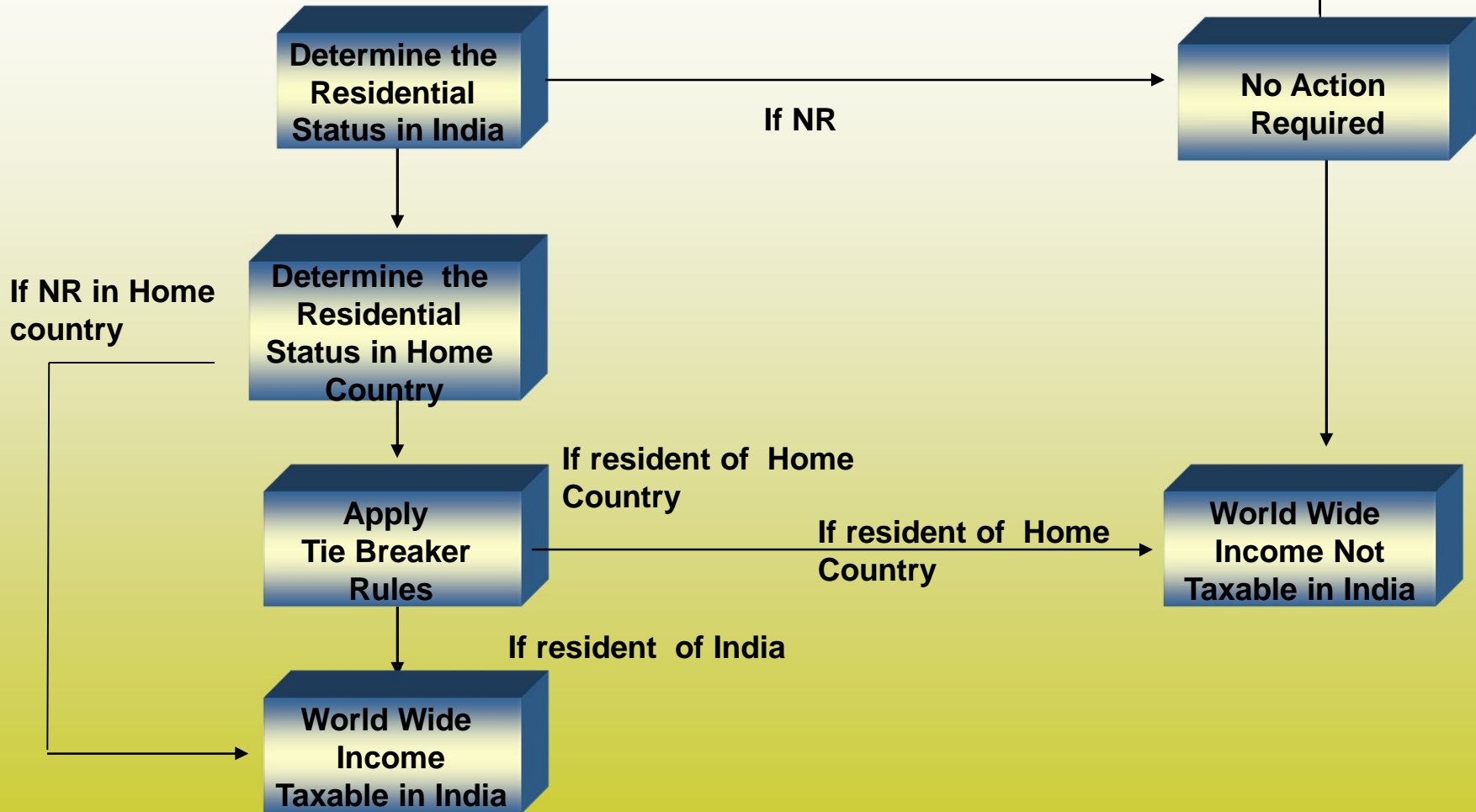
- During subsequent years, NRI /PIO can visit India up to a total of 181 days in a year. If however stay in India falls in two different financial year, number of days can get extended to 362. Person can come on 2nd October (3rd October in case of leap year) in the first following year.
- On final return to India, plan to come back on or after February 1st (or February 2nd in case of a leap year), since return before this date will result in stay exceeding 59 days.
- May be hit if stay in past 4 years exceeded 365 days.

Dual Residency



- A person can be a resident of two countries as per their domestic tax laws (specially in the year of departure / arrival).
- If this is the case, residential status under the DTAA has to be determined by applying tie breaking rules
- DTAA by itself does not prescribe any rules for residency, but resolves dual residency issues unresolved by the primary rule (domestic laws).

Determination of Residential Status under Treaty



Tie Breaking Tests



- Hierarchy of tie-breaking rules under model DTAA:-
 - Permanent home;
 - Centre of vital interests (personal & economic relations);
 - Habitual abode;
 - Nationality;
 - Mutual agreement procedure.

**M. A. Rafiq [1995] 213 ITR 317 (AAR)/ Dr. Rajnikant Bhatt [1996] 222 ITR 562 (AAR)
Abdul Razak A. Meman {2005} 276 ITR 306**

Dual Non-Residence



- Due to different fiscal year endings, a person may be a non-resident of both home country & the host country.
- As a non-resident of both the countries, he will not be entitled to DTA relief.

Dual Non-Residence



Example:

- A Singapore expatriate comes to India on 1st January, 2012 and he is in India throughout the year. His salary for services rendered in India is paid in Singapore.
- He will be a NR of Singapore for 2012.
 - Because Singapore follows calendar year
- In India, he will be a non-resident up to 31.3.12.
 - Because India follows fiscal year
- Salary earned in Singapore for January- March, 2012 – will become taxable in both the countries.
- He may also not get tax credit anywhere - leading to double taxation.



Part II – Taxation of Capital Gains

Taxation of Capital gains

General Provisions



- Section 112 read with Section 48
 - Section 48 provides mode of computation and Section 112 deals with the rates of taxation.
- Applicable when Non resident is either not covered by Chapter XII-A or opts not to be covered
- First Proviso to Section 48 is mandatory when shares & debentures are acquired in Foreign Exchange. No indexation benefits.
 - Rule 115A to apply. Tax U/s. 112(1)(a)(ii) @ 20%
- Second proviso to apply only when the assets is not specified or not acquired in Foreign Exchange
 - Rule 115A not to apply
- No minimum threshold exemption to NRIs
 - Proviso similar to clause (a) absent in clause (c) of S.112.

Taxation of Capital gains

General Provisions



- **Rule 115A**
- To apply for the purpose of computing capital gains arising from transfer of the specified assets-
- **For converting the cost of acquisition/ transfer:-**
The average of the TT buying rate and TT selling rate adopted by the SBI of the foreign currency initially utilized in purchase of the said asset, as on the date of its acquisition/transfer;
- **For converting the full value of consideration received or accruing as a result of the transfer:-**
The average of the TT buying rate and TT selling rate of the foreign currency initially utilized in purchase of the said asset, as on the date of transfer of the capital asset adopted by the SBI.
- **For reconverting capital gains:-**
The TT buying rate of such currency, as on the date of transfer of the capital asset adopted by the SBI.

Taxation of Capital gains

General Provisions



Mr. A purchased Shares of ABC Techno India Pvt. Ltd. worth US \$ 10000 in 2003 when avg. tt rate of SBI was 1 USD=INR 45 for Rs. 4,50,000/-. He sold the same for Rs. 6,00,000/- in 2013 when avg. Tt rate was 1 USD= INR 60.

Compute his capital gains tax liability

	Rs.	US \$
Sales (\$ 1= Rs. 60) in 2013	6,00,000	10,000
Purchase (\$1= Rs. 45) in 2003	4,50,000	10,000
	-----	-----
	1,50,000	Nil
	=====	=====

No capital gains tax is payable in the instant case as gains in \$ term is Nil.



Part III – Exempt Income

Income Exempt U/s. 10



- Sec 10(4)(ii) & 10(15)(fa)- Interest on NRE/FCNR accounts.
 - For this section meaning of NRI is as per the definition under FEMA
- Short stay exemption
 - Sec 10(6)(vi) - Remuneration received by employees of a foreign enterprise, who are not citizens of India, when their stay does not exceed 90 days and the payment is not borne by Indian base.
- Ship Stay exemption
 - Sec 10(6)(vii) – Payment to Non-resident who is present in India for less than 90 days when his remuneration is connected with the employment on a Foreign Ship
- Tax on Non monetary perquisites
 - Tax is paid on non monetary perquisites within the meaning of S. 17(2) at the option of the employer [RBF Rig Corp. Delhi Tribunal Special Bench (2007) – Tax borne by the employer is exempt from grossing up]
- Sec 10(33) - Capital gains on unit of a Unit Scheme, 1964 and the transfer takes place after 1st April, 2002

Income Exempt U/s. 10



- Sec 10(34) - Any income by way of dividends referred to in section 115-O.
- Sec 10(35) - Any income received in respect of Units of specified Mutual Funds.
- Sec 10(36) - Long term capital gains on equity share in an eligible company purchased between 1st day of March, 2003 and 1st day of March, 2004 and held for a period of twelve months or more.
- Sec 10(38) - Long term capital Gains on equity share in a company or units of an equity oriented Mutual fund on which Securities transaction tax is paid.



Part IV- Separate Tax Regime For Non-resident Indians ('NRIs')



Separate Tax Regime For NRIs

Chapter XIIA - Sections 115C to 115I

- **Scheme of the Chapter**
- In all seven Sections –s. 115C to s.115I
- Arrangement of the sections and their contents
 - 115C Definitions
 - 115D Computation Provisions
 - No benefit of cost inflation indexation or Chapter VI A deductions
 - 115E Tax on Long-term Capital Gains and Investment Income
 - 115F Benefit of Reinvestment
 - 115G No need to file Return of Income
 - 115H Continuation of benefits upon becoming “ Resident”
 - 115I Choice to opt for the Chapter



Separate Tax Regime For NRIs

Chapter XIA - Sections 115C to 115

- **Entities Covered :**

Exclusively for Non-resident Indians/PIOs.

- **Income Covered :**

Income includes Investment income (other than dividend u/s 115-0) and long- term capital gains derived from specified assets acquired in convertible foreign exchange. (excluding LTCG covered by STT)

- **Specified assets:**

- In case of a Public Company, shares, debenture or deposits,
- In case of a Private Company only shares,
- Securities issued by the Central Government,
- Securities Notified by the Central Government



Separate Tax Regime For NRIs

Chapter XIIA - Sections 115C to 115

- **Investment income**

Taxation on gross basis as a separate block @ 20 per cent.

- **Long-term capital gain**

Exempt from tax if the whole of the net consideration is invested in any specified assets within a period of six months.

Long-term capital gain which is not exempt is taxed @ 10 per cent.

Deduction for expenses incurred wholly and exclusively in connection with transfer of long-term Capital Asset only will be allowed.

- **Whether Short Term Capital Gains covered?**

- Smt. Trishla Jain vs. DCIT (34 ITD 523) (Del.) (Favour) / Sundardas Haridas vs. ACIT (67 ITD 89) (Mum.) (Against)

- **Chapter VIA Deductions**

No benefits shall be allowed under Chapter VI-A or Cost inflation indexation. However, capital gains shall be computed in terms the first proviso to section 48.



Separate Tax Regime For NRIs

Chapter XIA - Sections 115C to 115

- **Return of Income**

No return is required to be filed if total income consists of investment income and long term capital gain and the necessary tax has been duly deducted at source

- **Choice not to apply the Chapter**

Option can be exercised every year

- **Extended Benefits upon becoming Resident**

One time option by filing a declaration

Option once exercised will be valid until transfer or conversion into money of such assets.



Separate Tax Regime For NRIs

Chapter XIIA - Sections 115C to 115

- **Chapter XIIA v. Section 112 ?**

- Benefit of tax exemption if capital gains are reinvested within six months of the transfer date
- No need to file return in certain circumstances if proper tax is deducted at source.
- Tax rate under Chapter XII-A for LTCG is reduced to 10% w.e.f. A.Y. 1998-99.

- **Implications for an NRI not opting for the Chapter :**

- Long-term capital gains will be taxed under section 112 of the Act at the rate of 20 percent.
- No exemption on reinvestment of sale proceeds
- No exemption from filing of return even where tax has been deducted at source



Part V – Procedure for outward remittance (15CA/15CB)

(As amended by Notification No. 67/2013 w.e.f. 2nd November, 2013)

Introduction of Form 15CA & 15CB



- Finance bill 2008 introduced the process of e-filing of information pertaining to payment to non-resident via certificate and undertaking
- Earlier, the person making a remittance to NR was required to furnish certificate in a specified format circulated by RBI
- Basic purpose was to collect taxes at a stage when the remittance is made as it may not be possible to collect tax from the NR at a later stage
- There was a substantial increase in foreign remittance making the manual handling and specially tracking of such payments difficult
- Thus to monitor and track transactions in an efficient manner, it was proposed to introduce e-filing of information in the certificates and undertaking

Introduction of new Form 15CA & 15CB



- New formats for Form 15CA/15CB prescribed vide amendment in Rule 37BB Vide Notification No. 67 dated 02/09/2013 w.e.f. 1st October, 2013
- Payments including interest or salary or any other sum now covered within the ambit of Form 15CA/15CB
- Form 15CA is to be furnished electronically on www.incometaxindiaefiling.gov.in after client login
- A printout of the form with system generated acknowledgement should accompany request for remittance along with form A-2/ 15CB (in duplicate)
- The income-tax authority may require AD to furnish signed printouts for the purpose of any proceedings under the act.

Amendment to Rule 37 BB (Form 15 CA)



- **Part A : -**

For remittances not exceeding Rs. 50,000 per transaction and the aggregate of such payments during the financial year not exceeding Rs. 2,50,000. **Form 15CB is not to be furnished in such cases.**

- Issues

- What if the amount of remittance exceeds INR 2,50,000 during the year?
- Limit of INR 50,000 & INR 2,50,000, whether is per remitter or per beneficiary or for both ?

- **Part B : -**

To be filled in for remittance other than specified in Part A & to be accompanied with Form 15CB

- **No Form15CA/15CB required : -**

For 28 categories of remittance covered by the specified list &
Amount paid to NR and claimed not chargeable to tax. Onus is on the assessee

Specified List of 28 Categories



Sr. No.	Purpose as per RBI	Nature of payment
1	S0001	Indian investment abroad-in equity capital (shares)
2	S0002	Indian investment abroad-in debt securities
3	S0003	Indian investment abroad-in branches and wholly owned subsidiaries
4	S0004	Indian investment abroad-in subsidiaries and associates
5	S0005	Indian investment abroad-in real estate
6	S0011	Loans extended to Non- residents
7	S0202	Payment for operating expenses of Indian shipping companies operating abroad
8	S0208	Operating expenses of Indian Airlines companies operating abroad
9	S0212	Booking of passages abroad- Airlines companies
10	S0301	Remittance towards business travel

Specified List of 28 Categories



Sr. No.	Purpose as per RBI	Nature of payment
11	S0302	Travel under basic travel quota (BTQ)
12	S0303	Travel for pilgrimage
13	S0304	Travel for medical treatment
14	S0305	Travel for education (including fees, hostel expenses etc.)
15	S0401	Postal services
16	S0501	Construction of projects abroad by Indian companies including import of goods at project site
17	S0602	Freight insurance- Relating to import and export of goods
18	S1011	Payments for maintenance of offices abroad
19	S1201	Maintenance of Indian embassies abroad
20	S1202	Remittances by foreign embassies in India

Specified List of 28 Categories



Sr. No.	Purpose as per RBI	Nature of payment
21	S1301	Remittance by non- residents towards family maintenance and savings
22	S1302	Remittance towards personal gifts and donations
23	S1303	Remittance towards donations to religious and charitable institutions abroad
24	S1304	Remittance towards grants and donations to other Governments and charitable institutions established by the Governments
25	S1305	Contributions or donations by the Government to international institutions
26	S1306	Remittance towards payment or refund of taxes
27	S1501	Refunds or rebates or reduction in invoice value on account of exports
28	S1503	Payments by residents for international bidding.

Distinction between Old & New 15CA & 15CB as per Rule 37BB



Criteria	Earlier position till 30 th September, 2013	New Provisions Applicable from 1 st October, 2013
Applicability of Form 15CA	Applicable to all outward remittances, whether or not taxable.	<ul style="list-style-type: none"> - Reporting only in respect of payments which are taxable under the Act. - Additionally, no reporting for 28 specified category payments - Small payments, not exceeding Rs. 50,000 individually or aggregate Rs. 2,50,000 per financial year to be reported in Part A of Form 15CA. - All other payments to be reported in Part B of Form 15CA.
Obtaining Form 15CB	<ul style="list-style-type: none"> - Applicable to all outward remittances without ceiling whether or not taxable - included cases where an order or a certificate of the Assessing Officer was obtained u/s. 197/ 195(2)/ 195(3). 	<ul style="list-style-type: none"> - Form 15CB is not required where Part A of Form 15CA is filled in (small payments). - For Part B payments, it appears that either an AO order / certificate or 15CB may be used alternatively.

Distinction between Old & New 15CA & 15CB as per Rule 37BB



Criteria	Earlier position till 30 th September, 2013	New Provisions Applicable from 1 st October, 2013
Manner of furnishing	Though, practically Form 15CA is furnished to AD along with Form 15CB, the same was not mandated by then Rule 37BB.	Sub – rule (2) of the revised Rule 37BB mandates that Form 15CA shall be furnished to the authorized dealer prior to remitting the payment.
Onus on Authorized Dealer	No onus on AD under the Income – tax Act or Rules to deal with the details furnished by the remitter.	The revised Rule 37BB casts a duty on AD to furnish Form 15CA submitted by the remitter to an AO required for any proceedings under the Income-tax Act.
Section 206AA	The existing Forms does not contain specific reference to s. 206AA.	The revised Forms specifies that t in the absence of the PAN of the recipient, provisions of section 206AA shall apply.

Distinction between Old & New 15CA & 15CB as per Rule 37BB



Criteria	Earlier position till 30 th September, 2013	New Provisions Applicable from 1 st October, 2013
Form 15CB	<ul style="list-style-type: none"> - Currently, the certificate refers to the Income-tax Act only for the applicable rate of TDS. - In respect of the DTAA, the applicable rate of incomes needs to be provided. - The nature of remittance are categorized into – for Royalties, FTS, interest, dividend; for supply of articles or things; on account of business income; and any other remittance. 	<ul style="list-style-type: none"> - The revised Form 15CB requires detailed enumeration of the taxability of the amount under the Income-tax Act without giving effect to the DTAA. - Where DTAA provisions are sought to be applied, the details of the Tax Residency Certificate, applicable DTAA and its relevant article, as also tax liability under the DTAA are to be furnished. - The nature of remittance is divided as – for royalties, FTS, interest, dividend; on account of business income; on account of short-term and long-term capital gains; and any other remittance.

Amendment to Rule 37 BB (Form 15 CA & 15CB)



- **Some Practical Issues**

- Import payments
- Burden on AD
- Computation – judicial precedents
- Personal payments
- Payments to Non-residents operating in India
- Sums not chargeable to tax

Documentation



- Directly proportional to the ‘risk’ of the assignment
- Documentation should evidence “application of due care and skill”
- General documentation principles as stated in AAS should apply by analogy:
 - Management Representation Letter wherever relied upon
 - Tax Opinions / Expert Opinions
 - External Confirmations, etc.
- Extracts from the website of the payee
- Other Audit Evidences

Documentation



- The CA in general obtain followings documents for issuance of certificate –
 - **Copy of Invoice, Agreement, if any, Correspondence or any other document which is helpful in determining true character of the remittance**
 - **No Permanent Establishment declaration from the non-resident taxpayer**
 - **Tax Residency Certificate (TRC) – if DTAA benefits are claimed.**
 - **Self Certified copy of PAN – If remittance is taxable to avoid application of S. 206AA**
 - **Declaration that the non-resident taxpayer is the beneficial owner of income**
 - **Copy of accounting entry showing actual deduction of tax**
 - **Copy of challan of payment of tax**

Implication of S. 206AA



Implication if PAN is not furnished?

- Section 206AA starts with “Notwithstanding anything contained in any other provisions of this Act.....”
- Section 206AA is not attracted if sum is not chargeable to tax in India either under the Act or relevant DTAA
- For taxable payments, non submission of PAN will attract TDS at the higher of the followings-
 - Rate specified in the relevant provisions of the Act, or
 - At the rates in force (includes DTAA rates), or
 - At the rate of twenty percent
- No certificate U/s. 197 for lower/ NIL deduction shall be granted by the AO
- No corresponding amendments to Section 139A(1A)/Rule 114C(1)

Thank You

N. G. Thakrar & Co
Chartered Accountants

4, Big Three Building, 1st Floor,
88, Anandilal Poddar Marg,
Mumbai- 400 002

Tel: 2201 8184/ 2207 9094

Mobile: 98210-21841

Email: natwarthakrar@gmail.com

