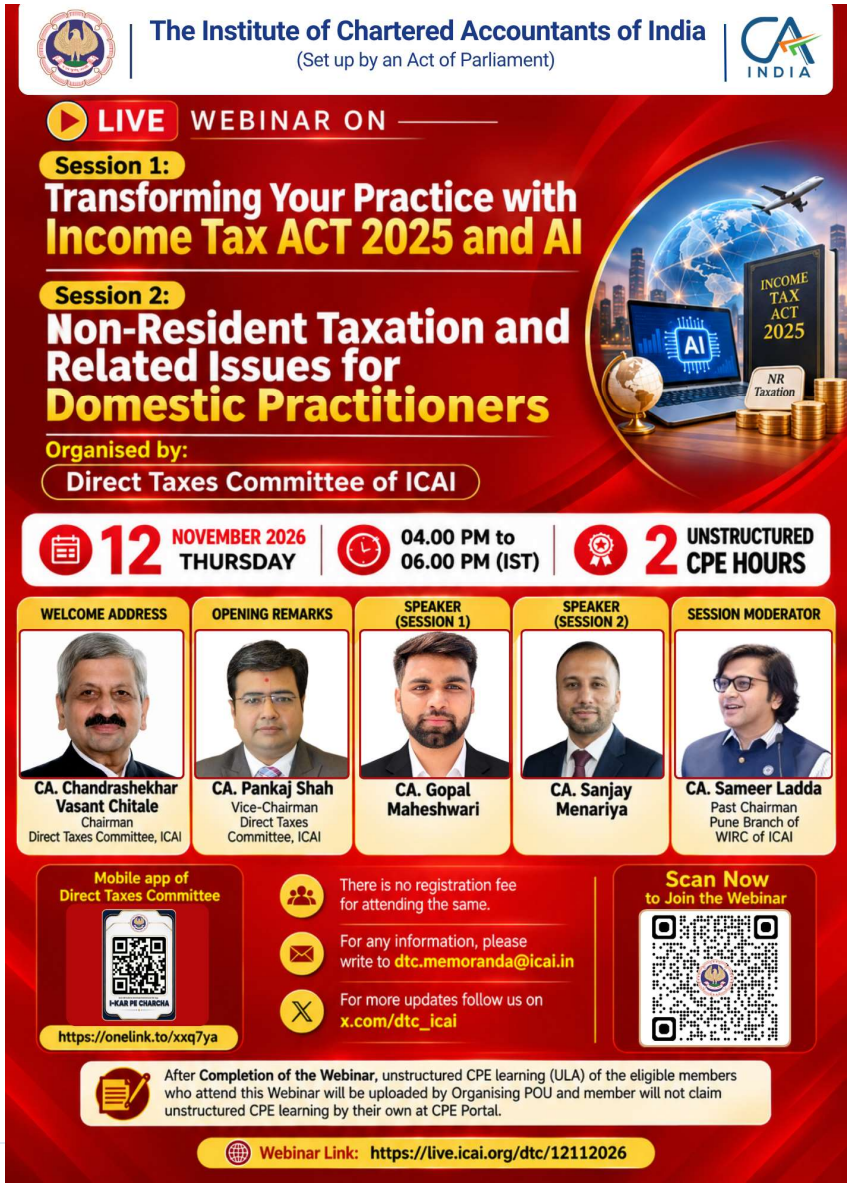
Non-Resident Taxation and Related Issues for Domestic Practitioners

Income Tax Act, 2025

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Why should every CA understand non-resident taxation?

You may have encountered following questions at Your Offices

- An Indian company paying a foreign consultant.
- An NRI selling property in India.
- An Indian company paying software subscription charges to a foreign company.
- A foreign company deputing employees to India.
- An Indian company paying commission to an overseas agent.

Why should every CA understand non-resident taxation?

You may think about – These Five Questions

- Who is the recipient and what is their residential status?
- What is the nature of the income?
- Is the income taxable in India under domestic law?
- Does the DTAA provide relief or restrict India's taxing rights?
- What are the withholding and compliance obligations?

The practitioner's six-step analysis

1 | Person

Who is the recipient? Individual, company, firm, fiscally transparent entity? What is the tax-year residence?

2 | Source

Where is the income received, accrued or deemed to accrue? Identify Indian source/nexus.

3 | Character

Salary, business profits, interest, dividend, royalty, FTS, capital gains or other income?

4 | Treaty

Is a DTAA available? Which article? Does it restrict domestic taxing rights?

5 | Withholding

Is the sum chargeable? What provision, timing, rate and certificate route apply?

6 | Evidence

Contract, invoice, deliverables, travel/PE facts, TRC, treaty forms, tax workings and remittance trail.

Residence: establish the status before computing scope

Income-tax Act, 2025: section 6 — residence in India; section 5 — scope of total income

Individual: apply the day-count tests and special rules for citizens/PIOs, including the relevant income threshold and visit/departure conditions

Company: examine incorporation and Place of Effective Management (POEM), where relevant

Evidence: passport/travel history, visa, employment/assignment letter, overseas residence and tax records, board/management evidence

SECTION MAPPING & TRANSITION

Residential Status Framework

Structural evolution of stay parameters and employment carve-out mechanics

SEC 6(2) ITA 2025 Old: Sec 6(1)

Preserved Stay Tests

182-day rule & 60-day test preserved. Terminology refined to **"cumulatively"** in Sec 6(2)(b) replacing historical aggregate phrasing.

SEC 6(3) ITA 2025 Old: Sec 6(1) Expln

Employment Carve-Out

Explicitly turns off 60/365-day test for citizens leaving for foreign employment or crew members on Indian ships.

AUDIT

Audit Stay Logs

Verify physical passport entry/exit stamps across broken visits rather than relying on self-declarations.

Residential Status: Who Is a Non-Resident?

Individual residential status

- Basic stay tests under the Income-tax Act, 2025
- 182-day test and alternative 60-day/365-day test, subject to statutory exceptions
- Special provisions for Indian citizens and Persons of Indian Origin
- Deemed Residence

Classification as:

- Resident and Ordinarily Resident (ROR) = Resident in 2 /10 yrs +
  + Stay of 729 days in Preceding 7 years
- Resident but Not Ordinarily Resident (RNOR)
- Non-Resident (NR)

Company residential status

- Indian company vs Foreign company
- Place of Effective Management (POEM)

STATELESS TAXPAYERS & RNOR SCOPE

Deemed Residency & RNOR Thresholds

Navigating Section 6(7) mechanics and global income protection limits

STATUTORY RULE

Section 6(7)

ITA 2025 Framework

Deemed residency applies to Indian Citizens with Indian-sourced income exceeding **₹15 Lakhs** who are not liable to tax globally.

CLASSIFICATION DEFAULT

Strict RNOR Status

RNOR Trigger Windows

- **120-to-181 Days:** Stay window triggered when Indian-sourced income exceeds ₹15 Lakhs.
- **History Rule:** 9 out of 10 prior tax years Non-Resident OR ≤ 729 days stay in preceding 7 years.

⚠ Practitioner Trap

Global income remains untaxed in India for RNOR assessees *unless* derived from an Indian business connection or profession set up in India.

REFERENCE: Section 6(7) & Section 6(8) — Income Tax Act, 2025

ROR, RNOR and NR: Why Does the Distinction Matter?

Particulars	ROR	RNOR	NR
Income received in India	Taxable	Taxable	Taxable
Income accruing in India	Taxable	Taxable	Taxable
Foreign income received and accrued outside India	Taxable	Generally not taxable, subject to exceptions	Generally not taxable
Foreign income from business controlled in India/profession set up in India	Taxable	Taxable	Generally not taxable merely on this basis

- Visiting Indian Citizens/PIO or Deemed Residents
- Schedule FA Diff - Foreign Assets and Bank A/c's
- The Returning NRI Buffer
- Domestic TDS vs Section 393(2) Previously Section 195

Scope of total income: the source question

Resident

Section 5(1): broadly, worldwide income, subject to RNOR limitation for specified foreign income.

Non-resident

Section 5(2): income received/deemed received in India, or accruing/arising/deemed to accrue or arise in India.

Deemed source

Section 9: Indian asset/source/property, business connection, Indian employment/services, interest, royalty, FTS and indirect transfer rules.

Scope of Total Income of a Non-Resident

Section 5 – Scope of Total Income

A non-resident is generally taxable in India on:

- Income received or deemed to be received in India.
- Income accruing or arising in India.
- Income deemed to accrue or arise in India.

IMPORTANT DISTINCTIONS

- Receipt of income versus remittance of income
- Place of rendering services versus place of payment
- Source of income versus location of bank account
- Income earned in India versus income earned outside India

KEY PRINCIPLE

Mere transfer of income already received outside India to India does not ordinarily constitute a fresh taxable receipt.

Income Deemed to Accrue or Arise in India

Cross-border income may become taxable in India under specific deeming provisions.

Important categories include:

- Income through business connection in India
- Income through significant economic presence (SEP)
- Income from property or assets situated in India
- Salary for services rendered in India
- Interest payable by specified Indian residents or Government
- Royalty payable by specified Indian residents or in specified circumstances
- Fees for technical services (FTS)
- Capital gains from transfer of Indian assets

PRACTITIONER'S FOCUS

Identify the nature of income, its source and the relevant deeming provision before determining taxability.

Business Connection, SEP and Permanent Establishment

DOMESTIC LAW CONCEPTS

- Business connection in India
- Significant Economic Presence (SEP) – REVENUE THRESHOLD or USER THRESHOLD
- Attribution of income to Indian operations

DTAA CONCEPT – PERMANENT ESTABLISHMENT (PE)

Common forms of PE:

- Fixed Place PE
- Construction PE
- Service PE, where provided under the relevant DTAA
- Dependent Agent PE

Business Connection, SEP and Permanent Establishment

PRACTICAL QUESTIONS

- Can a foreign enterprise have a taxable presence without an Indian office?
- Does an Indian agent create a PE?
- Can digital business operations result in SEP?
- How much profit is attributable to Indian operations?

Domestic Law vs. DTAA: The Interaction

SECTION 159 – INCOME-TAX ACT, 2025

Provides the framework for relief under agreements with foreign countries or specified territories.

IMPORTANT: Treaty benefits are subject to prescribed conditions and anti-abuse provisions.

Domestic Law vs DTAA: The Interaction

How should a CA approach cross-border taxability?

STEP 1: Determine taxability under Indian domestic law.



STEP 2: Identify the applicable Double Taxation Avoidance Agreement (DTAA).



STEP 3: Examine the relevant treaty article and eligibility conditions.



STEP 4: Compare domestic law and treaty provisions.



STEP 5: Apply the more beneficial eligible provision, subject to applicable statutory conditions.

DTAA Eligibility: Documents and Conditions

A Tax Residency Certificate alone may not complete the treaty analysis.

Requirement	**Purpose**
Tax Residency Certificate (TRC)	Evidence of tax residency
Form 10F OR 41 / prescribed particulars	Furnishing required treaty information, where applicable
Beneficial ownership declaration	Relevant for specified treaty income
No-PE declaration	Relevant for business profits analysis
LOB provisions	Tests treaty eligibility under applicable agreements
PPT / MLI provisions	Addresses treaty abuse and entitlement

Treaty relief: domestic law first, then treaty

- Income-tax Act, 2025: section 159 — agreements with foreign countries/specified territories for double-taxation relief
- Compare domestic-law taxability with the relevant treaty article; apply the more beneficial treaty treatment where statutory conditions are met
- Check: treaty in force, residence article, characterization, PE/beneficial ownership, limitation-on-benefits and Principal Purpose Test
- Obtain and verify Tax Residency Certificate (TRC) and prescribed information/documentation (including applicable Form 10F-equivalent requirements)
- Read protocol, MLI matching positions and effective dates—not just the main article

DTAA Eligibility: Documents and Conditions

CA CHECKLIST

1. Verify the relevant DTAA and protocol.
2. Check the applicable treaty article.
3. Verify the recipient's eligibility.
4. Examine beneficial ownership wherever relevant.
5. Check LOB, PPT and MLI implications.

Characterization of Income: Royalty, FTS or Business Profits?

Nature of payment	Key tax question
Royalty	Is there a transfer/use of rights covered by domestic law and treaty?
Fees for Technical Services	Does the payment satisfy the domestic law and applicable treaty definition?
Business profits	Is there a PE in India under the relevant DTAA?
Interest	What is the applicable domestic and treaty rate?
Dividend	What does the relevant treaty provide?

*The **"Make Available"** Filter:* in key treaties (such as India–US, India–UK, India–Singapore, India–Canada, and India–Australia), FTS is taxable in India **only if the service provider "makes available" technical knowledge, skill, or know-how**—meaning the Indian recipient is enabled to apply that technology independently in the future. Furthermore, certain treaties (like India–UAE) contain **no FTS article at all**, pushing pure technical services into Business Profits (exempt without a PE).

Withholding tax: Statutory Framework – Chargeability is Starting Point

TDS on Payments to Non-Residents – Section 393(2)

- Earlier provision: Section 195 of the Income-tax Act, 1961.
- Current provision: Section 393(2), Income-tax Act, 2025.
- Relevant entry: Table Serial No. 17.
- Recipient: Non-resident individual or foreign company.
- Payer: Any person.
- Nature of payment: Interest or **any other sum chargeable** under the Act, other than salary.
- Rate: Rates in force.

Key message: Section 393(2), Table Serial No. 17, is the general withholding provision for relevant chargeable payments to non-residents.

Withholding tax: Scope of TDS under Serial No. 17

What payments are covered?

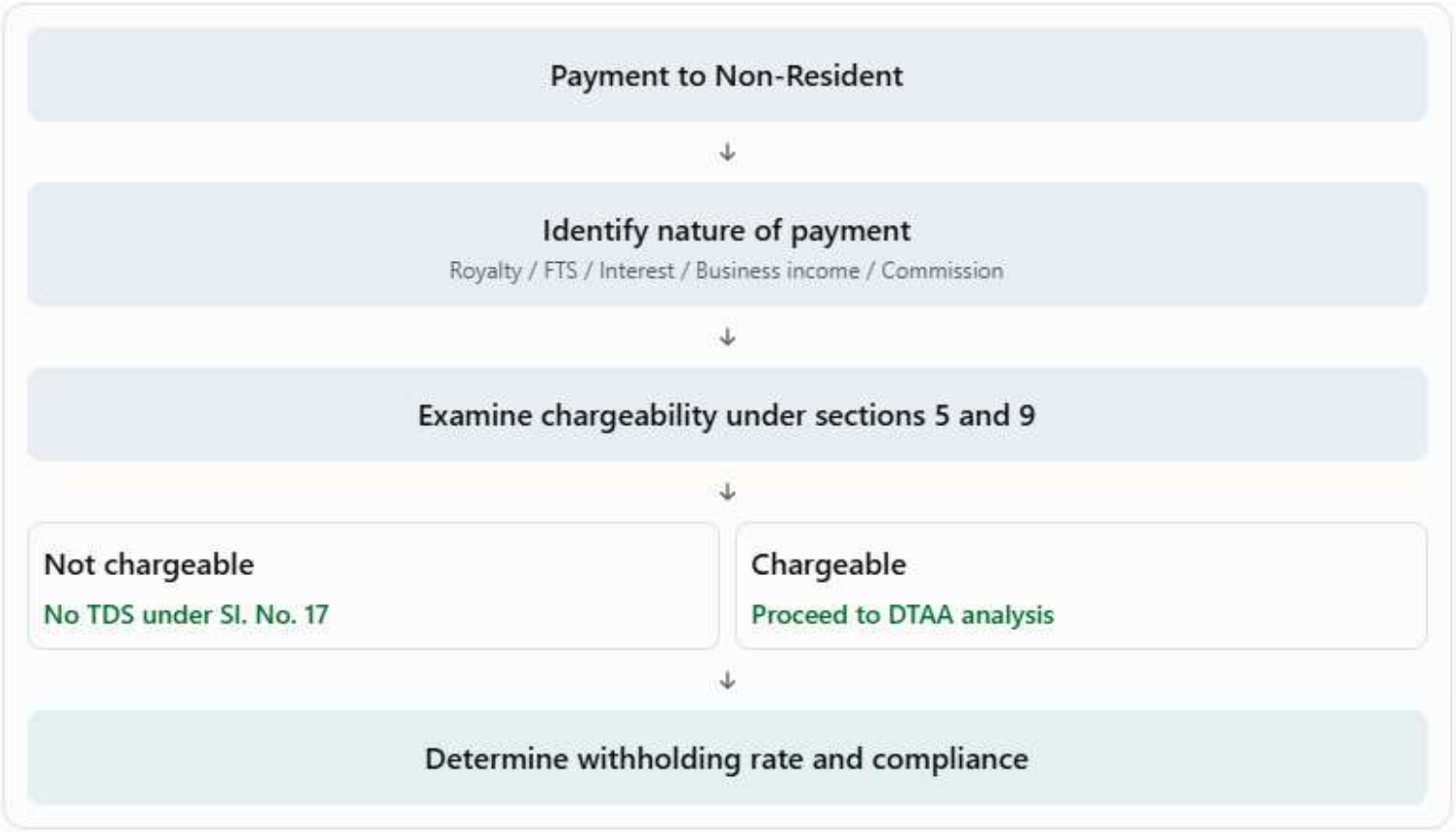
Particulars	Provision
Interest not covered by specified earlier entries	Covered
Royalty	Covered, if chargeable
Fees for Technical Services	Covered, if chargeable
Commission	Covered, if chargeable
Business income	Covered, if chargeable
Other taxable sums	Covered, if chargeable
Salary	Governed separately by section 392

Important statutory points:

- Deduction at the earlier of credit or payment.
- Applicable rate: Rates in force.
- Obligation applies to resident as well as non-resident payers.
- Physical presence of the recipient in India is not a prerequisite for the withholding obligation.

Withholding tax: Is the sum chargeable to tax in India?

TDS is not automatic merely because payment is made to a non-resident



Withholding tax: Domestic law versus DTAA

A two-stage analysis

Domestic law	Treaty analysis
Section 5 – Scope of total income	Section 159 – DTAA framework
Section 9 – Income deemed to accrue in India	Relevant treaty article
Characterise income	Check treaty definition
Determine domestic taxability	Check limitation of India's taxing rights

Documents and conditions to verify:
1.Tax Residency Certificate (TRC).
2.Prescribed particulars, including Form 10F-equivalent requirements, where applicable.
3.Beneficial ownership, where relevant.
4.Limitation of Benefits (LOB).
5.Principal Purpose Test (PPT).
6.Treaty protocol and Multilateral Instrument (MLI) modifications.

Withholding tax: Determination of appropriate taxable portion and lower/nil deduction

Section 395 – Certificate mechanism

Section	Purpose	Applicant
395(1)	Lower or nil deduction based on estimated income	Payee
395(2)	Determination of appropriate proportion chargeable to tax	Payer

Illustrative situation:
Total payment under composite agreement: ₹1 crore.
Portion determined as chargeable: ₹60 lakh.
Portion determined as not chargeable: ₹40 lakh.
Where the Assessing Officer determines that only ₹60 lakh is chargeable, withholding is made on the determined chargeable portion at the applicable rate.

Withholding tax: Rate of TDS and grossing up

Rate of deduction

Table Serial No. 17 prescribes deduction at "rates in force".

- Examine the relevant income category and applicable statutory rate.
- Consider surcharge and health and education cess, where applicable.
- Examine the beneficial DTAA rate, subject to eligibility and documentation.
- Check whether the payment is covered by a specific entry in the non-resident table instead of Serial No. 17.

Grossing up – Section 393(10)

Illustration: Net payment agreed to foreign consultant = ₹10,00,000.
Assumed withholding rate = 10%.

$$\text{Gross amount} = \frac{10,00,000}{1 - 10\%}$$

=Rs.11,11,111/- hence, TDS = ₹1,11,111.

Withholding tax: Foreign remittance compliance: Forms 145 and 146

Form 145 – Four parts

Important: Rule 220(3) specifies certain remittances for which Form 145 information is not required, even where the sum is not chargeable

Part	When applicable
A	Taxable remittance not exceeding ₹5 lakh during the tax year
B	Taxable remittance exceeding ₹5 lakh, with AO certificate/order under section 395(1)/(2)
C	Taxable remittance exceeding ₹5 lakh, with accountant's certificate in Form 146
D	Remittance not chargeable to tax, subject to Rule 220 exclusions

Withholding tax: Payment to a foreign technology company

Facts: An Indian private limited company makes the following payments to a US company:

Nature of payment	Amount
Cloud software subscription	₹30 lakh
Technical support	₹10 lakh
Customisation services	₹10 lakh
Total	₹50 lakh

The US company has no office or employees in India.

Questions for participants:
1.Is section 393(2), Table Serial No. 17, applicable?
2.Is the software subscription royalty?
3.Does technical support constitute FTS?
4.Does the India–US DTAA change the taxability?
5.Is there any PE in India?
6.Can the payer approach the AO under section 395(2)?

Practitioner's checklist

1. Identify the applicable tax year and Act.
2. Examine the agreement and nature of payment.
3. Determine chargeability under domestic law.
4. Examine the relevant DTAA and eligibility documents.
5. Determine the correct withholding rate and timing.
6. Evaluate section 395 certificate options, where appropriate.
7. Complete remittance reporting and preserve supporting documents.

Withholding tax: Five practical mistakes to avoid

1. Deducting TDS merely because payment is made to a foreign party.
2. Applying domestic rates without examining the DTAA.
3. Treating every software payment as royalty.
4. Assuming that absence of a physical office means absence of taxable presence.
5. Filing Form 145/146 without properly documenting the taxability analysis.

Quick Referencer:

NON-RESIDENT TAXATION IS NOT JUST ABOUT TDS.

- Residential status determines the scope of taxation.
- Source rules determine whether income is taxable in India.
- Domestic law and DTAA must be examined together.
- Correct characterisation of income is essential.
- TDS follows chargeability, subject to applicable statutory provisions.
- Proper documentation is critical for treaty benefits and remittance compliance.

So, “Every foreign remittance deserves a tax analysis before it becomes a banking transaction.”