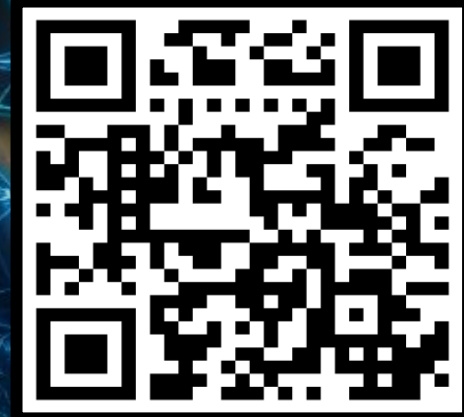




Overview of International Taxation

Presented By- CA Rishabh Agarwal
Team: Ramya Siravuri & Gopika
Support by: Voice of CA (NGO)

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Topics Covered

Section 5 - Scope of Total Income

Section 6 – Residential Status

Section 9 – Income deemed to accrue or arise in India

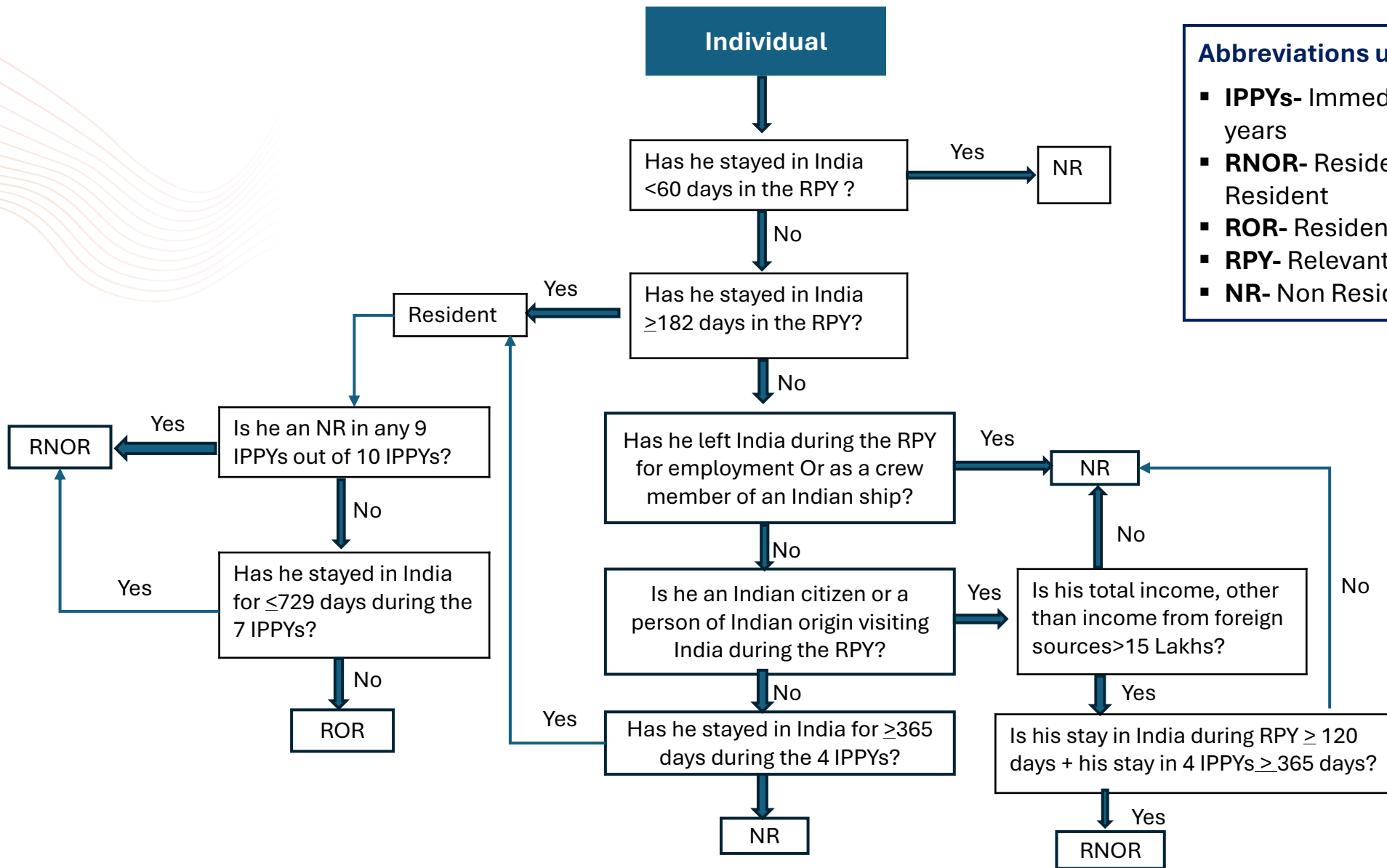


Section – 6: Residential Status

Residential Status of Individual

S.No	Condition	Any person shall be Considered resident if any of the below conditions are met for any of his stay in India
1.	Any individual	(i) 182 days or more in a Financial Year (“FY”) or (ii) 60 days in FY + 365 days in 4 preceding FY
2.	Crew Member of an Indian Ship	182 days or more in FY
3.	Indian citizen leaves India for employment outside India	
4.	Indian citizen or PIO visits India (other than specified in 5. below)	
5.	Indian citizen or PIO visits India having income from Indian Sources exceeding INR 15 Lakhs in FY	(i) 120 days in FY and (ii) 365 days in 4 preceding FY

Determination of Residential Status of an Individual



Abbreviations used:

- **IPPYs**- Immediately preceding previous years
- **RNOR**- Resident but not Ordinarily Resident
- **ROR**- Resident and Ordinarily Resident
- **RPY**- Relevant Previous Year
- **NR**- Non Resident

Section – 6(1A) – Deemed Resident

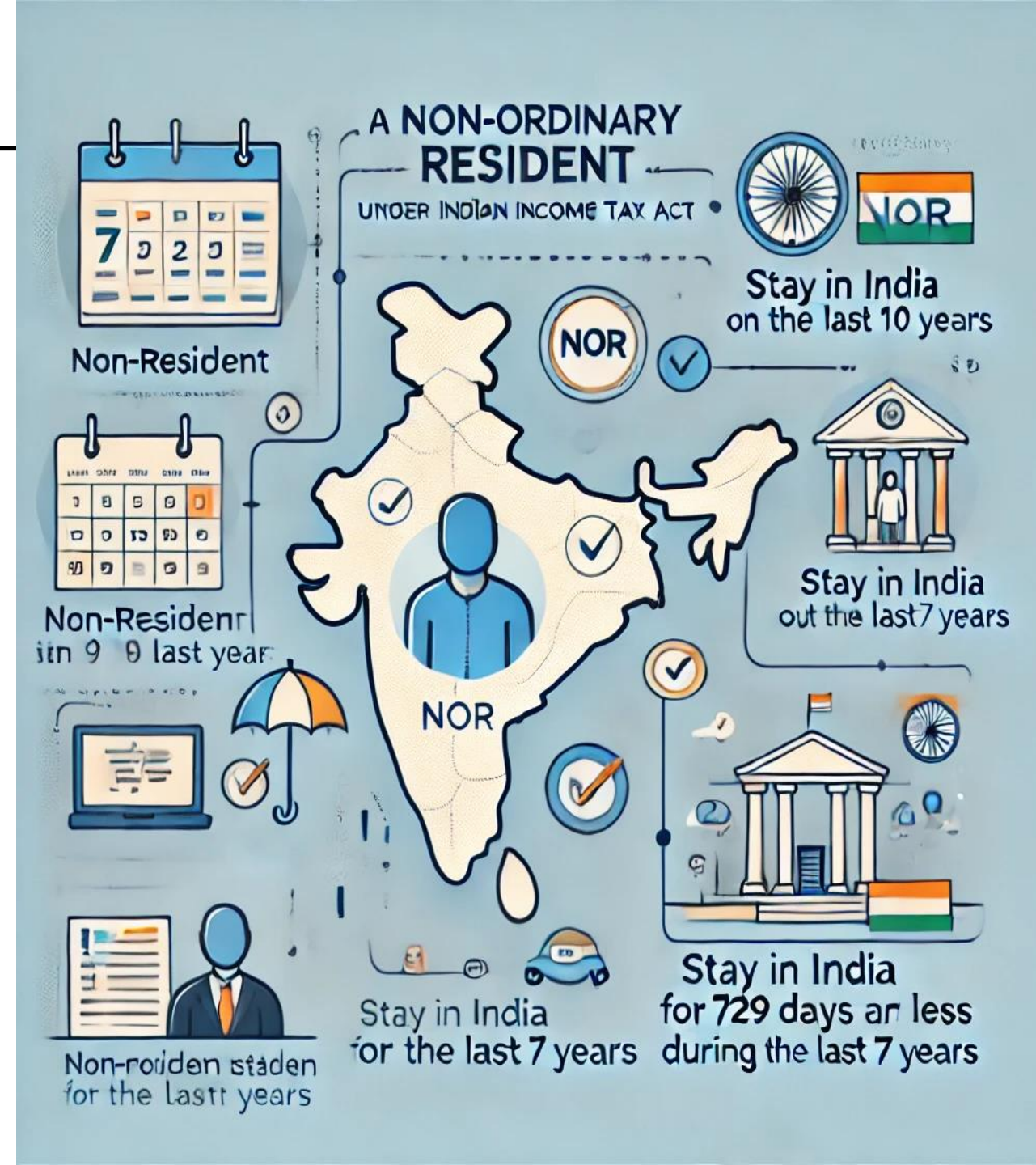
In case of **Indian citizen**, having **total income (other than foreign source income)**, exceeding **15 lakhs** during the PY shall be **deemed to be resident** in India in that PY, if he **is not liable to tax** in any other country or territory by reason of his domicile or residence or any other criteria of similar nature & he is **always treated as R but NOR**.

- ✓ However, this provision will not apply in case individual resident in PY as per section 6(1).
- ✓ **Liable to tax** means that there is **an income-tax liability on such person** under foreign country. It also **includes a person** who has subsequently been **exempted from such liability under the law of that country**.

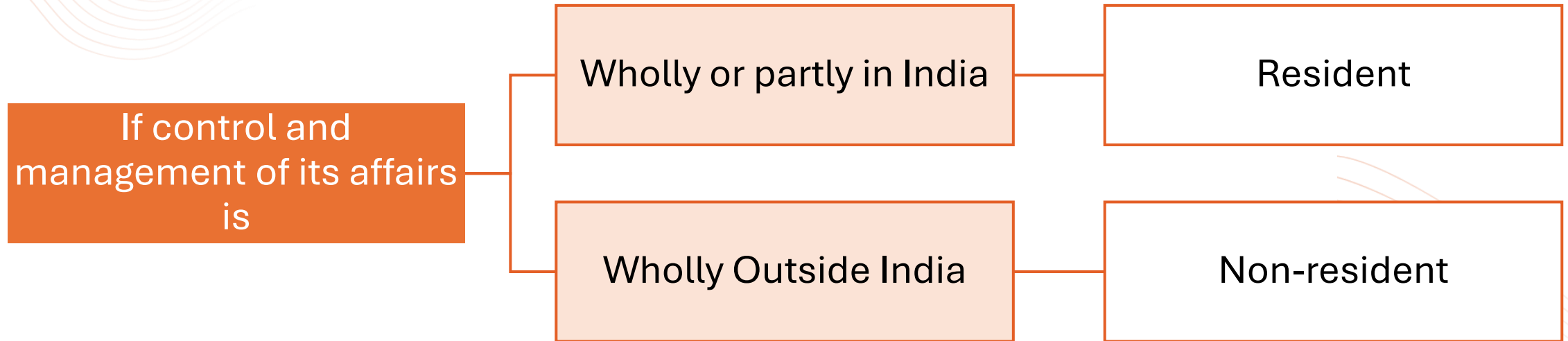
Additional NOR conditions u/s 6(6)

Even if an individual qualifies as a resident, they will be treated as a NOR if:

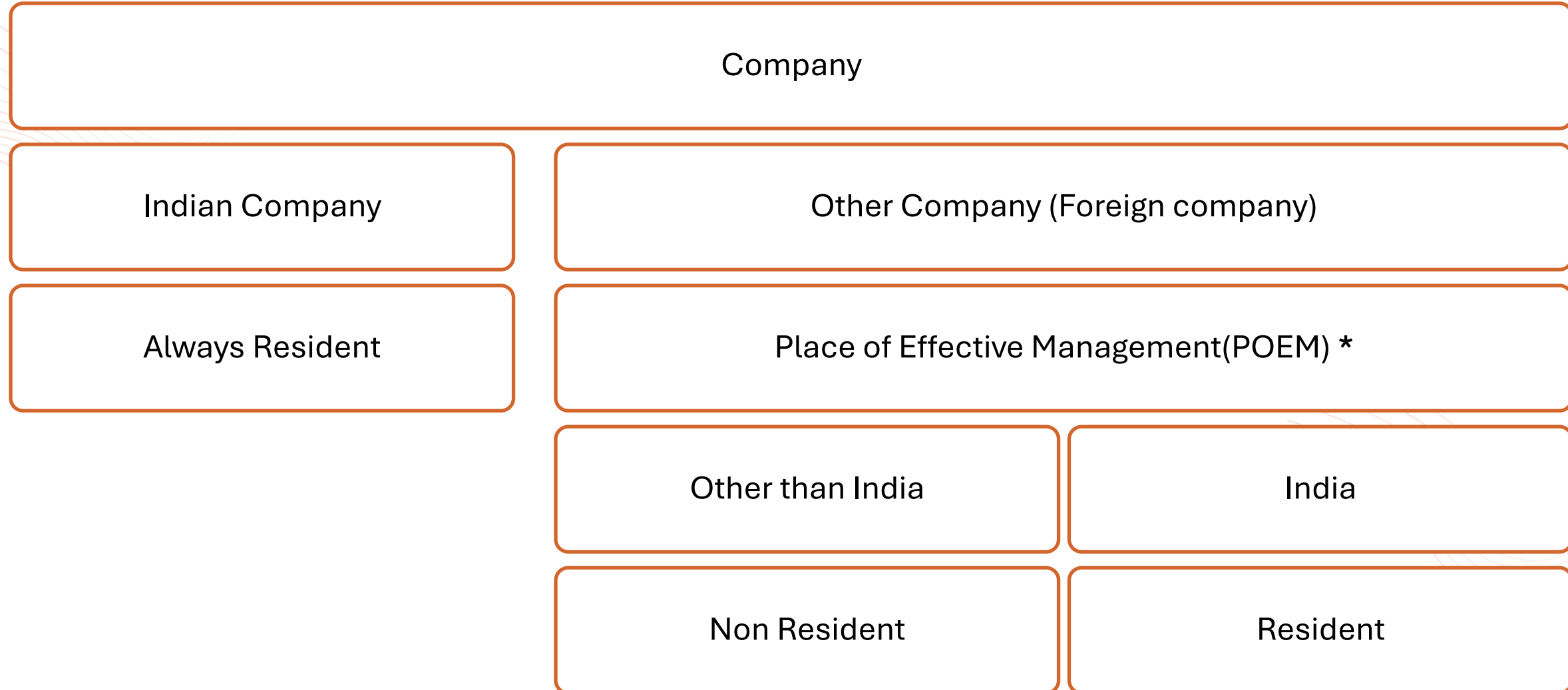
- 1.They have been a **non-resident in India in 9 out of the 10 preceding years**, OR
- 2.Their stay in India during the **preceding 7 years is 729 days or less**.



Residential Status of Firm/AOP/BOI/Local Authority/AJP



Residential Status of Company



* Determination of POEM is only Applicable if Turnover >Rs.50 crores

Place of Effective Management (POEM)

If both the conditions are satisfied then **POEM is not in India**

- Company having Active Business Outside India(ABOI)****
- Majority board meetings held outside India

**** ABOI Means: If **all** the following conditions are satisfied:

1. Passive Income is upto 50% of its total income
2. **Less than 50% of total assets** are situated in India
3. **Less than 50% of total employees** are situated in India or are resident Indians
4. **Payroll expenses** incurred on such employees is **less than 50%** of its total payroll expenditure

THE SCOPE OF TOTAL INCOME

SECTION - 5 ACT, 1961



INCOME RECEIVED, OR
OR DEMED ACCRUIS IN INDIA

Section - 5: Scope of Total Income

Scope of Total Income – Determinants

Scope of total income refers to **types of Income** which are **liable for taxation** in India under specific circumstances.

Scope of total income is determined based on the following

- Place of **Accrual** of income
- Place of **receipt** of income
- **Residential Status** of the assessee

Scope of Total Income – Categories

Based on where income is accrued / received Place of accrual or receipt can be classified into:

Indian Income

- Income **accrued and received** or deemed to be accrued and received **in India**
- Income accrued or deemed to be **accrued outside India but received in India**
- Income accrued or deemed to be **accrued in India but received outside India.**

Foreign income

- Income accrued and received or deemed to be **accrued and received outside India from a business controlled from India.**
- Income accrued and received or deemed to be **accrued and received outside India from a business controlled from outside India.**
- Non-Business Income accrued and received or deemed to be **accrued and received outside India.**

Summary of Taxability of Income in India

Particulars	Non-Resident	Ordinarily Resident*	Not ordinarily Resident
Income received in India whether or not accrued in India	Yes	Yes	Yes
Income deemed to be received in India	Yes	Yes	Yes
Income accruing or arising in India whether or not received in India	Yes	Yes	Yes
Income deemed to accrue or arise in India	Yes	Yes	Yes
Income received and accrued outside India from business controlled in India	No	Yes	Yes
Income received accrued outside India from business/ profession controlled outside India	No	Yes	No
Any income (other than business/ profession received accrued outside India)	No	Yes	No
Income accrued in earlier years as NRI brought in India as a resident	No	-	-

*Where a person is resident in India, additional conditions for ordinary resident or not-ordinarily resident needs to be checked. Where a person is not ordinarily resident certain incomes remain not taxable.

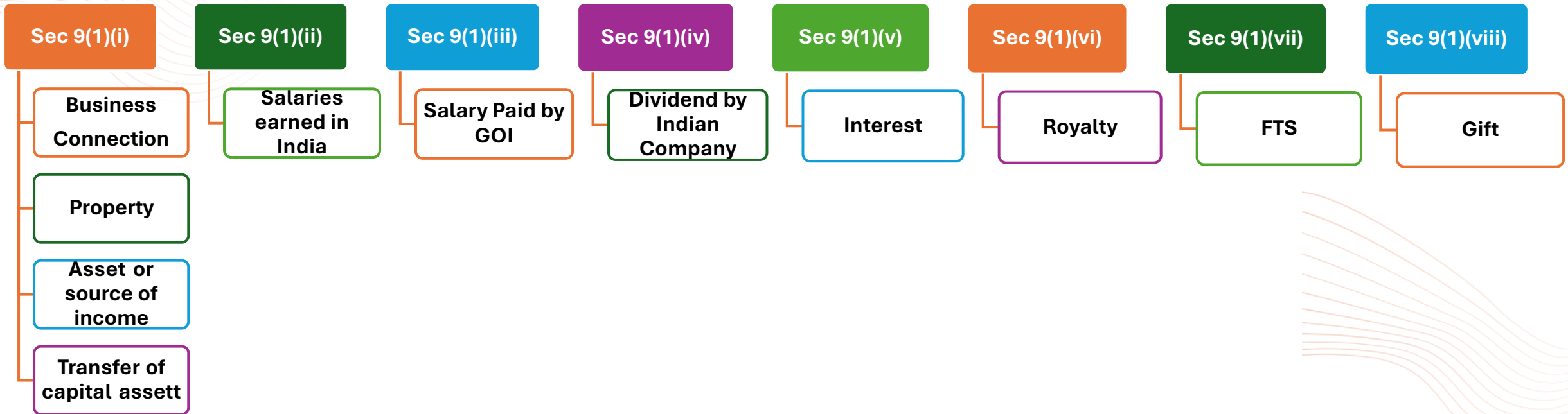
THE SCOPE OF TOTAL INCOME

SECTION - 5 ACT, 1961

**Section - 9:
Income deemed to
accrue or arise in
India**

INCOME RECEIVED, OR
OR DEMED ACCRUIS IN INDIA

Section – 9 Introduction



Section 9(1)(i)

The following incomes shall be deemed to accrue or arise in India. All income accruing or arising, whether directly or indirectly, through or from any

- ✓ **business connection** in India, or
- ✓ through or from any **property** in India, or
- ✓ through or from any **asset or source of income** in India, or
- ✓ through **the transfer of a capital asset** situated in India.

Business connection

- **A relationship** between a non-resident's business activities and India.
- **Continuous interaction** between the non-resident and India that contributes to earning income.
- Business connection includes activities that result in a "**significant economic presence**" of the non-resident in India, such as **systematic and continuous solicitation of business** in India and **Interaction with users in India through digital means, even without a physical presence.**
- If a non-resident carries out business through an **agent** in India, it constitutes a business connection. This applies when the agent.
 1. Has authority to conclude contracts on behalf of the non-resident.
 2. Secures orders for the non-resident.
 3. Maintains stock of goods for delivery.
- Activities of a **dependent agent** (not independent in status) that are habitually performed for the non-resident, such as negotiating or finalizing contracts, are included.

Business connection - Exceptions

Following should not be treated as business connection

- ❑ **Purchase** of goods in India **for exports**
- ❑ **Collection of news and views in India** for transmission out of India
- ❑ **Shooting of cinematograph films** in India if such NR is Individual, who is not a citizen of India or a firm which does not have any partner who is a citizen of India or who is resident in India or a company which does not have any shareholder who is a citizen of India or who is resident in India
- ❑ In case of **a foreign company** engaged in the business of mining of diamonds, from the activities which are confined to **display of uncut and unassorted diamonds** in any special zone notified by the CG.

Through transfer of Capital Asset

- Income through transfer of Capital asset situated in India whether registration of documents of transfer in India or outside India or consideration received in India or outside India.
- **Indirect Transfer [Introduced to override SC Judgment in Case of Vodafone]**
- Explanation. 5: It is hereby clarified that capital asset being any share or interest in a company or entity registered or incorporated outside India shall be deemed to be and shall always be deemed to have been situated in India, if the share or interest derives, directly or indirectly, its value substantially from the assets located in India. its shares of foreign company deemed to be located in India if such shares derived its value from assets located in India. Capital gains applicable on transfer of such shares of foreign company.
- The shares of foreign entity derived its value substantially from Indian assets if on specified date (valuation date)
 1. FMV of Indian assets held by foreign company is more than 10 Crores: and
 2. It represents atleast 50% of value of all assets owned by foreign company.

Exceptions

Income shall not be deemed to accrue or arise to a NR from transfer interest in an foreign entity if the transferor along with its associated enterprises does not hold, the right of management or control in foreign entity or voting power/share capital more than 5% of the total voting power/share capital in the foreign entity at any time during the 12 months preceding the date of transfer.

Some Important Definitions

- **Valuation date:** last day of accounting year (**last b/s date**) preceding the date of transfer. However, Book Value of assets on date of transfer is higher by **15%, or more** of the book value of assets as on last day of last accounting year then valuation date shall **be date of transfer**
- **FMV of assets:** FMV of assets on valuation date **without reduction of liabilities.**
- **Where all the assets owned by the foreign entity are not located in India** only so much of income as **proportionate** to the assets located in India shall be deemed to accrue or arise in India.
- Assets held by a **NR** directly or indirectly in **Category I foreign portfolio investor** shall not be deemed to be situated in India even if deriving its value substantially from assets located in India

Section – 9(1)(v) – Interest

The following interest income is treated as deemed to be accrued or arise in India. If interest is payable by:

- Government, or
- Resident person [Exception: where money borrowed and used, for the purposes of a **business on profession carried on by him outside India or for the purposes of earning any income from any source outside India**], or
- NR when money borrowed **used** for the purpose of business or profession **carried in India by him.**

Section – 9(1)(vi) – Royalty

Income by way of royalty payable by

The Government

a person who is a resident, except where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India ; or

a person who is a non-resident, where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India :

Definition as per Sec 9 of ITA

Consideration (including lumpsum consideration) for :

Transfer of all or any rights (including license) in:

- Patent, invention, model, design, secret formula or process or trademark, etc.. (IP)
- copyright, literary, artistic or scientific work including films or video tapes/tapes for use in TV/radio broadcasting

[Expln 2(i) & (v) of Section 9(1)(vi)]

Imparting of any information concerning

- the working of or use of IP
- technical, industrial, commercial or scientific knowledge, experience or skill

[Expln 2(ii) & (iv) of Section 9(1)(vi)]

Use of

- any IP
- or right to use any industrial, commercial or scientific equipment (other than that referred to in section 44BB)

[Expln 2(iii) & (iva) of Section 9(1)(vi)]

Section – 9(1)(vii) – Fee for Technical Services

The following Income shall be deemed to accrue or arise in India:

Income by way of fees for technical services payable by

The Government

a person who is a resident, except where the fees is payable in respect of services utilized for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India

a person who is a non-resident, where the fees is payable in respect of services utilized for the purposes of a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India

Explanation 2 to Section 9(1)(vii)

“Fees for Technical Services” means any consideration (including any lump sum consideration) for the rendering of any

- managerial
- technical or consultancy services (including the provision of services of technical or other personnel)

but does not include consideration for any

- construction
- assembly
- mining or like project undertaken by the recipient or
- consideration which would be income of the recipient chargeable under the head “Salaries”

As such, the terms, “managerial”, “technical” and “consultancy” services are not defined in the Indian Income Tax Act, 1961, the General Clauses Act, 1897 or any of the DTAAs of India. Hence, the same has to be examined with the general or common usage alongwith various case laws pronounced by various courts. For the sake of clarity, these three terms are briefly explained:

The **managerial services** would include services that will control things or persons and would exercise executive, administrative and supervisory powers. The providers of the services would control, conduct, carry on, or supervise the functioning of the organisation. Obviously, this would involve a certain amount of day-to-day as well as strategic decisions and functioning services.

The term "technical services" in general, may include:

- technical field assistance;
- special services;
- inspection of equipment which has been disassembled by purchaser or others;
- technical evaluation or inspections of equipment;
- technical information, including data interpretation and reports;
- inspections, technical evaluation of inspections, technical analysis of materials and technical recommendations related to repair and modernization equipment or services;
- advice and consultation given regarding methods and procedures for installation, maintenance and/or calibration of the equipment or material.

The term "consulting", as per the Oxford Dictionary, means "the business of giving expert advice to other professionals". Black's Law Dictionary, Eighth Edition defines the word "consultation" as an act of asking for the advice or opinion of someone (such as a lawyer). It means a meeting in which a party consults or confers and eventually it results in human interaction that leads to the rendering of advice. Normally, "consulting" comes along with "management" or "technical". Hence, the commonly understood terms are "management consulting" or "technical consulting".

Illustrative list of services/transactions under FTS

Managerial	Technical	Consultancy
Human resources development	Architectural services	Advising in development of business strategies
Overall management, supervision, and direction	Feasibility and project report	Advising and assisting in development of information system
Overseeing operations/ functions	Customisation/modification on of software	Locating new business opportunities
Managing financial operations	Provision of technical assistance in preparation of drawings or designs	Supply of skilled labour by an employment agency
Building relationships with vendors and seeking their feedback	Provision of consulting and engineering services in the preparation of technical design	Conducting market surveys
Supplier development and material management	Fabrication of items on job work basis	Project management services
Development and administration of dealers, sales, and marketing services	Rendering technical assistance in preparation of project report	Liaising and coordination services
	Geological surveys	Legal and financial advisory
	Seismic survey	Services by an umpire or match referee
	Inspection and testing services	Advise on production related problems
	Quality check certification	
	R & D services	
	Repair and maintenance (including preventive maintenance)	
	Maintenance of software (including preventive maintenance)	
	Services involving specialised knowledge, experience, and skill in construction operation	

Case Law on Managerial Services

***R. Dalmia v. CIT (1977) 106 ITR 895 (SC)**

The words "person concerned in the management of the business" mean a person not only directly participates or engages in the management of the business but also one who indirectly controls its management through the managerial staff, from behind the scenes. Management includes the act of managing by direction, or regulation or administration or control or superintendence of the business.

Case Laws on Technical Services

Bharti Cellular Ltd (2010) 330 ITR 239 (SC) / Kotak Securities [2016] 383 ITR 1 (SC)

- Human intervention to be involved in technical services as the term technical is between Managerial & Consultancy Services [Bharti Cellular (SC)]
- Services to be specifically sought by the Customers and not a standard facility [Kotak Securities (SC)]

Case Laws on Consultancy Services

***GVK Industries Ltd (2015) 371 ITR 453 (SC) read with Bharti Cellular (Del HC)**

- The term "consultancy" has been defined in the Dictionary as "the work or position of a consultant; a department of consultants." "Consultant" itself has been defined, inter alia, as "a person who gives professional advice or services in a specialized field."
- It is obvious that the service of consultancy also necessarily entails human intervention. The consultant, who provides the consultancy service, has to be a human being. A machine cannot be regarded as a consultant.

Exception in sub-clause (b) of sec 9(1)(vi) - Source of Income outside India



CIT v. Havells India Ltd. (352 ITR 376)(Delhi)

Facts of the case

HAVELLS

- The assessee-company in India, engaged in manufacturing electrical products, made a payment to a US company for witness testing of an AC contractor as part of a certification process.
- The Indian company did not deduct tax at source under section 195 on this payment.
- The company argued that since the testing were paid outside India and was essentially for export product, thus the source of income is outside India. The Assessing Officer deemed the payment as fees for technical services under section 9(1)(vii)(b), while the company claimed an exception under the same section.
- The Commissioner(Appeals) upheld the disallowance, but the Tribunal eventually deleted the disallowance based on the exception, considering the testing was for export, not used for Indian business activities and the source of Income was outside India.

Exception in sub-clause (b) of sec 9(1)(vi) - Source of Income outside India

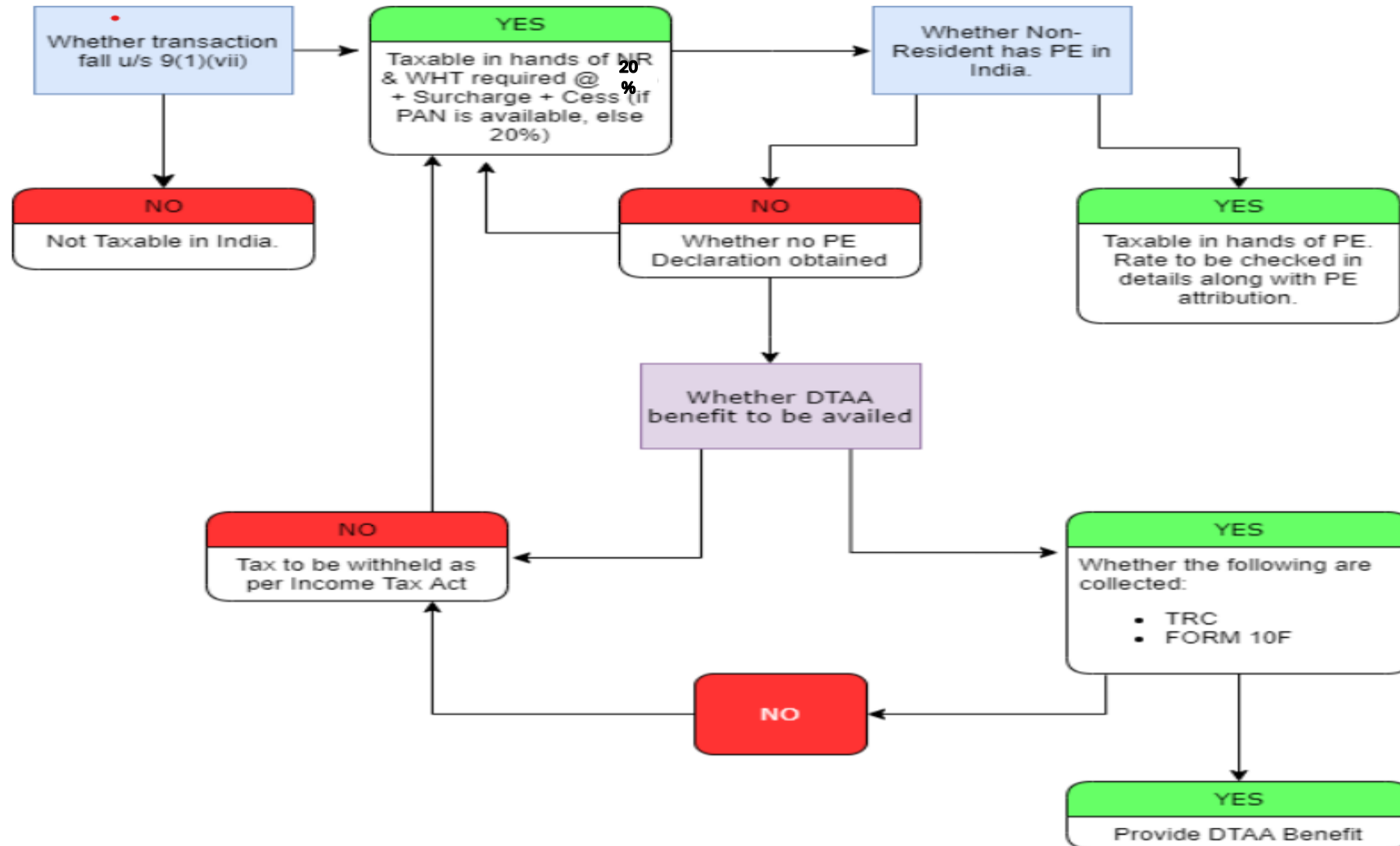


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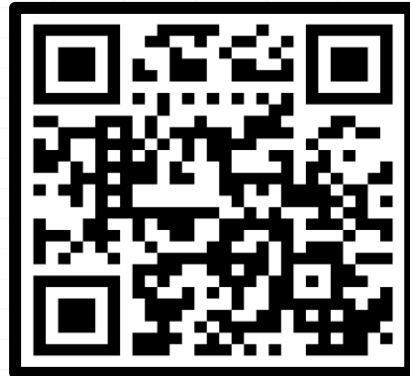
Held

- The Hon'ble High Court essentially differentiated between the source of income and source of monies.
- In order to fall within second exception provided in section 9(1)(vii)(b), source of income and not source of monies, should be situated outside India.
- In instant case, export activity having taken place or having been fulfilled in India, source of income was located in India and not outside and mere fact that export proceeds emanated from persons situated outside India did not constitute them as source of income but only source of monies.
- Therefore, fees for technical services was taxable in hands of US company in India and assessee was liable to deduct tax at source while making payment thereof

Decision tree for payment of fee for technical services



GOT QUESTIONS?



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