Virtual Meeting on International Taxation

Organised by Hyderabad Branch of SIRC of ICAI

- Significant Economic Presence - Impact Analysis
- Presumptive Taxation

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Significant Economic Presence - Impact Analysis

History, Background and Need

- Change of business environment from the traditional brick and mortar system to the modern digital system has fundamentally changed the way businesses carry out their global activities

- Enterprise can now carry out business across jurisdictions **without maintaining or having a physical presence in a particular jurisdiction.**

- Therefore, the crucial question which arose was whether the international tax framework is flexible enough to accommodate difference business models with digital economy and ensure fair outcomes that may **align profits with the value creation**

- Recognising the enormity of the situation and with a view to develop a unified approach for tackling the tax challenges posed by the digital economy, the Organisation of Economic Co-operation and Development ('OECD'), at the request of the G20 finance ministers, launched an **Action Plan on Base Erosion and Profit Shifting ('BEPS') in July 2013**.

History, Background and Need - BEPS Action Plan 1

- OECD under its **BEPS Action Plan 1** addressed the tax challenges of the digital economy wherein it enlisted three alternatives that country could consider for tackling the tax challenges arising in a digital business

  i. A nexus based on the concept of significant economic presence
  ii. Withholding tax on digital tax transactions
  iii. Introducing and equalisation levy

- Over the years, many countries including India have introduced several **unilateral measures for taxing the digital economy**. Out of the aforementioned three alternatives, **India first introduced the equalisation levy ('EQL') in year 2016** to levy tax on certain stipulated online transaction, the scope of which was expanded in year 2020 to cover cross-border e-commerce transactions. Thereafter, in the **year 2018 the concept of significant economic presence ('SEP') was introduced** in the Income-tax Act 1961 ('Act')

Introduction of SEP in the Act

- The concept of SEP seeks to **expand the scope of income non-residents** that can be deemed to accrue or arise in India **by establishing a business connection of non-resident entities in India.**

- As per the Explanatory Memorandum, the existing Nexus rule based on the physical presence contained in section 9(1)(i) of the Act were not sufficient to tax the emerging business model of the digital economy. Therefore, **the law was amended by inserting explanation (explanation 2A) to a in section 9(1)(i) to provide that a SEP in India shall also constitute business connection of a non-resident in India.** Further the Act provides that either of the following two situation would constitute a SEP in India

  i. Transaction in respect of any goods, services or property carried out by a non-resident in India including provision of download of data or software India, if the aggregate of payment arising from such transaction or transactions during the previous year exceeds such amount as may be prescribed (**Revenue Threshold**)

  ii. Systematic and continuous soliciting of business activities or engaging in interaction with such number of user as may be prescribed in India through digital means (**User Threshold**)

Introduction of SEP in the Act

- Accordingly, if the aggregate of payments arising from the transaction in respect of any goods, services or property carried out by a non-resident in India including provisions of download of data or software in India exceeds the prescribed ‘revenue threshold’, then the transaction will result in a non-resident having a SEP and thereby a business connection in India

- Similarly, if the non-resident engages in systematic and continues soliciting of business or interaction with users in India through digital means and if you satisfy the prescribed ‘user threshold’, then it will result in a non-resident having a SEP and thereby a business connection in India

Provisions: Explanation 2A

Following *Explanation 2A* shall be inserted in clause (*i*) of sub-section (1) of section 9 by the Finance Act, 2020 w.e.f. 1-4-2022

Explanation 2A.—*For the removal of doubts, it is **hereby declared** that the significant economic presence of a non-resident in India shall constitute "business connection" in India and "significant economic presence" for this purpose, shall mean—*

(a) ***transaction in respect of any goods, services or property** carried out by a non-resident **with any person in India including provision of download of data or software in India**, if the aggregate of payments arising from such transaction or transactions during the previous year exceeds such amount as may be prescribed; or*

(b) ***systematic and continuous soliciting of business activities** or **engaging in interaction with such number of users in India**, as may be prescribed:*

Provided *that the transactions or activities shall constitute significant economic presence in India, **whether or not**—*

(i) ***the agreement** for such transactions or activities **is entered in India**; or*

(ii) *the non-resident has **a residence or place of business in India**; or*

(iii) *the non-resident **renders services in India**:*

Provided further *that **only so much of income as is attributable to the transactions or activities referred to in clause (a) or clause (b)** shall be deemed to accrue or arise in India.*

Amendment: Explaination 3A

- Thereafter, further amendment were made by the Finance Act, 2020 by inserting Explaination 3A and carving out SEP from the ambit/applicability of explaination 1(a) to section 9(1)(i) of the Act

Following *Explanation 3A* shall be inserted after *Explanation 3* to clause (*i*) of sub-section (1) of section 9 by the Finance Act, 2020, w.e.f. 1-4-2021 :

Explanation 3A.—*For the removal of doubts, it is hereby declared that the income attributable to the operations carried out in India, as referred to in* Explanation 1, *shall include* ***income from***—

(i) ***such advertisement which targets a customer who resides in India*** *or a customer who* ***accesses the advertisement through internet protocol address located in India****;*

(ii) ***sale of data collected*** *from a person who resides in India or from a person who uses internet protocol address located in India; and*

(iii) ***sale of goods or services using data collected from a person who resides in India or from a person who uses internet protocol address located in India****.*

Following proviso shall be inserted in *Explanation 3A* to clause (*i*) of sub-section (1) of section 9 by the Finance Act, 2020, w.e.f. 1-4-2022 :

Provided *that the provisions contained in this* Explanation *shall also apply to the income attributable to the transactions or activities referred to in* Explanation 2A

Whether applicable only on Digital Transaction

❖ **Whether introduction of SEP is targeted for digital transactions only?**

Intention-yes

BEPS Action plan 1- To curb Tax Challenges Arising from Digitalisation.

➢ **Memorandum of FA 2018 also states that**: Introduction of SEP provision- "*Therefore, emerging business models such as digitized businesses, which do not require physical presence of itself or any agent in India, ….*"

Law/Provision-No

SEP seeks to **cover all transactions** connected with India. As the provision language is **not restricted to digital transactions** only.

Whether applicable only on Digital Transaction- Impact

- The scope and ambit of SEP is quite wide and can potentially have far fetching implications. For instance, it can potentially cover any transaction carried out by a non-resident in India irrespective whether it is through digital means or otherwise. Thus, the SEP provisions can apply not only to social media platform, marketplace aggregators, online gaming business, online streaming websites but may also apply to physical import of goods by Indian resident from a non-resident based in country with whom India does not have a tax treaty

CBDT Notification Prescribing the Threshold

- The CBDT has recently issued a notification (Notification No. 41/2021/F No. 370142/11/2018-TPL dated 3rd May, 2021 prescribing the 'payment threshold' and 'user threshold' for the purpose of constituting a SEP in India. The threshold have been prescribed by inserting rule 11UD in the Income-tax Rules, 1962. As per the said notification, the thresholds are as follows:

Nature of Threshold	De Minimis Limit
'Payment threshold' or 'revenue threshold' (applicable for payments for transaction in respect of goods services or property with any person in India including transactions on download of data or software)	INR 20 Million (INR 2 crore)
'User threshold' (applicable in cases where there is a systematic and continuous soliciting of business activities or engaging or interacting with Indian users)	3 lac users

CBDT Notification Prescribing the Threshold Reproduced

In the Income-tax Rules, 1962, after rule 11UC, the following rule shall be inserted, namely:-

"11UD. Thresholds for the purposes of significant economic presence. — (1) For the purposes of clause (a) of Explanation 2A to clause (i) of sub-section (1) of section 9, the amount of aggregate of payments arising from transaction or transactions in respect of any goods, services or property carried out by a nonresident with any person in India, including provision of download of data or software in India during the previous year, shall be two crore rupees;

(2) For the purposes of clause (b) of Explanation 2A to clause (i) of sub-section (1) of section 9, the number of users with whom systematic and continuous business activities are solicited or who are engaged in interaction shall be three lakhs.".

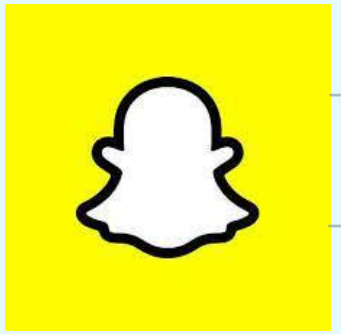
Applicability Matrix

Whether payments for transaction in respect of goods services or property with any person in India including transactions on download of data or software exceeds INR 2 Crore	Whether there is a systematic and continuous soliciting of business activities or engaging or interacting with Indian users exceeding 3 lac users	Whether SEP is established in India
Yes	Yes	Yes
Yes	No	Yes
No	Yes	Yes
No	No	No

Examples of SEP

- Sale or purchase of goods, services or property **through digital or physical means**
- Any transaction involving **download of data or software in India** (like in-app purchases)
- Provision of **online training / gaming services**
- Provision of services of **streaming of e-content (audio / video)**
- Interaction with customers such as for **troubleshooting**, etc
- **Websites, online database, cloud storage and computing services**, with significant user base in India

Case Study 1-Explaination 2A



Global Users → 90 crore

Indian Users → 50 Lac

Snapchat

**Assume snapchat is owned by an entity of country with which India does not have a DTAA*

Business connection established in India due to the threshold limit exceeds 3 lac users in India- SEP

If snapchat charges consideration from its users

Yes

Income attributable to the transaction would be taxable in India

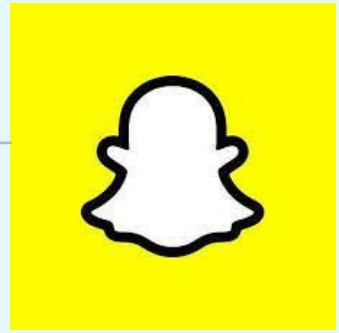
No

Since, no income attributable transaction arise, no taxability will arise in India (proviso)

Case Study 2 - Explanation 3A

Sold user data

Snapchat



Snapchat does not charge consideration from its users

Global Users

Indian Users

If users in India exceeds 3 lac

Yes

No

Assume snapchat is owned by an entity of country with which India does not have a DTAA

- Snapchat SEP established in India
- Income attributable to the transaction of sale of data of Indian users by Snapchat to USA entity would be taxable in India

- No SEP established in India
- Since, no business connection in India, no taxability arise

A bigger question to be addressed here is how will the Indian tax authorities come to know about any such transaction of sale of data of Indian users by snapchat to USA entity

Impact of SEP

Non-resident who can avail Treaty Benefit

India's existing treaties contain the conventional concept of permanent establishment (PE) for taxing business profits of a non-resident i.e. it covers only a fixed place of business in India without any reference to a virtual or economic presence and the inclusion of SEP in the ITA will not be read into the tax treaties unless they are amended.

No DTAA or Can't avail benefit of DTAA

Non-residents who do not have tax treaty benefits are directly impacted.

Conclusion:

The provisions may not have any significant impact as most taxpayers would opt for more beneficial tax treaty provisions on permanent establishments. The explanatory memorandum governing the introduction of the SEP provisions in the year 2018 also clarified that unless corresponding modifications to PE rules are made in the tax treaties, the cross-border business profits will continue to be taxed as per the existing treaty rules. **Given India's wide treaty network, the existing provisions may not have significant impact as these provisions will apply only to non-treaty entities only.**

SEP vs EL

1. Both EL and SEP are targeted towards taxation of digital economy

2. The scope of the equalization levy is very limited as compared to the scope of SEP. It is restricted only to certain online advertising and related services. The scope of was widened vide Finance Act, 2020 to cover even Royalty transaction but still it is narrower as compared to the scope of SEP

3. The ambit of concept of 'SEP' is very wide. It covers every type of digital service provided or every kind digital activity undertaken by an entity through which it generates revenue.

4. Considering the broad coverage of the concept of 'SEP', it seems that it even covers the services which are already covered under the Equalization levy regime. Therefore, there is an overlapping of the services covered under both regime

5. This gives rise to an apprehension of double taxation wherein on one hand equalization levy is being charged on the entire sale consideration of service provided (which includes the income element) and on other hand tax under the Income Tax Act, 1961 is being charged on the income derived from those services.

6. However, this apprehension is false. By virtue of section 10(50) of the Act, transactions which are subject to EL are exempted from Income tax. Therefore, once EL is charged on particular service, the income which would be ordinarily chargeable by virtue of concept of SEP will be exempt.

SEP vs EL

- As per explanation 3A to section 9(1)(i), income attributable to the operations carried out in India, as referred to in Explanation 1, shall include income from—

i. Sale of **advertisement**
ii. Sale of **data**
iii. Sale of goods or services using data

From the above, serial no. i and ii are already covered under the scope of EL and section 10(50) of the Act exempts income which are subject to EL. Therefore, where EL is applicable, provision of explanation 3A may not be applicable.

- Services providers based in non-treaty countries would now have to pay tax in India for any Indian transaction, even if such a transaction is not covered under the EL provisions or otherwise, even non-resident businesses that are from non-treaty jurisdictions and operating in online/digital space, SEP provisions will not apply vis-à-vis incomes that are chargeable to EL.

Issues and Challenges

- There could be a potential challenge in counting the number of users to determine the ‘user threshold’ and the revenue may find it difficult to verify the accuracy of the data.

- Currently there is no mechanism prescribed on how the data on number of users to be collected and the source from which data could relied upon (self declaration, certificate from internet service provider, internal report etc).

- There could also be challenges in counting the user threshold if the same user log into his account with multiple devices. In such a case, there will be multiple IP addresses which could be reflected for a single user, thereby inadvertently increasing the user threshold if the same is calculated bases the IP addresses

- There may be a mismatch between the year of payment and accrual of income. It may be possible that the SEP gets constituted due to payment in year 1 whereas, the income accrues to the non-resident in year 2.

- Presently, there is very limited guidance on how profits can be attributed in India in a case where a non-resident has a SEP in India as per the prescribed parameters. Whilst, Rule 10 of the Income-tax rules does lay down certain parameters in this regard, the officer has been given a discretionary power to compute an attribute profit in the manner he deems fit

Case Law: ABB FZ-LLC V. DCIT [ITA(TP) No. 1103/BANG/2013

The Bengaluru ITAT held that physical presence of employees is not important to create a service PE. The presence through virtual mode is enough to establish that Service PE is getting created

Relevant Facts of the case:

- The taxpayer is a UAE-based entity engaged in the business of providing regional service activities for the benefit of ABB legal entities in India, Middle East, and Africa. In pursuance of the regional headquarter service agreement between the taxpayer and ABB Ltd the taxpayer has rendered services to ABB Ltd during the financial year 2009-10 and 2010-11. In terms of the agreement the taxpayer has received payment from its associate concern

- The taxpayer claimed that the above amounts are not taxable in India under the tax treaty, as the tax treaty does not have a clause for fees for technical services and since this clause has been specifically excluded from the treaty, the taxability would fall under article 22 of the tax treaty. **As per article 22 of the tax treaty, the amount would be taxable in India only if the entity has a PE in India and in the instant case since there is no PE in India, the sum is not liable to be taxed in India**

Case Law: ABB FZ-LLC V. DCIT [ITA(TP) No. 1103/BANG/2013

Tribunal Decision on PE (Relevant Extracts):

- ***In the present age of technology where the services, information, consultancy, management etc, can be provided with various virtual modes like email, internet, video conference, remote monitoring, remote access to desktop etc, through various software, therefore, the argument of its place of business raised by the taxpayer that 3 employees were rendered service only for 25 days cannot be sustained, as the services can be rendered without physical presence of the employees of the taxpayer***

- ***It is not the state of the employees for more than 9 months, which is required to be there but it is a fact of rendering of services or activities which were required to be rendered for a period of 9 months***

***Please note that these facts and extracts just deals with the limited aspect of Tribunals ruling on PE and therefore, does not provide a complete picture of the ultimate outcome of the Ruling.**

PRESUMPTIVE TAXATION FOR NON-RESIDENTS

Overview:

Section	Special Provision which is covered
44B & 172	Shipping business in the case NRs
44BB	Business of exploration, etc., of mineral oils.
44BBA	Business of operation of aircraft in the case of NRs
44BBB	Companies engaged in civil construction, etc., in certain turnkey power projects.

Section 44B- Shipping Business of NR

- Section 44B – Relates to **taxation of shipping profits** derived by a person being a **non-resident (including corporate or individuals)** in India.

- In case of an NR engaged in the business of operating ships, **7.5%** of the following amounts shall be deemed to be the profits & gains from the business chargeable to tax:

  - ✓ ***amount paid/ payable in or out of India** to or on behalf of NR on account of carriage of passengers, livestock, mail or goods shipped at any port **in India**;

    AND

  - ✓ ***amount received/ deemed to be received in India** by or on behalf of NR on account of carriage of passengers, livestock, mail or goods shipped at any port **outside India**.

**Amount includes demurrage charges or handling charges or any other amount of similar nature.*

Applicability of Section 44B

Non-resident involved in Shipping Business → **Includes individuals & corporates**

carriage of passengers, livestock, mail or goods

Shipped at any port **outside India** → **amount received/ deemed to be received in India**

7.5%

Shipped at any port **in India** → **amount paid/ payable in or out of India**

✓ - Applicable

✓ - Applicable

Analysis-
"Notwithstanding anything contained in section 28-43A"

- **Other Income earned by Shipping Co. not covered:**
  It means if a non residents earn other income (for example: interest income from Indian companies) apart from shipping income, then such income shall be charged to taxation normally as per the provisions of ITA.

- **Depreciation & c/f of unabsorbed depreciation not allowed:**
  It means Depreciation as well as carried forward of unabsorbed Depreciation on the business of shipping **shall not be allowed s**ince they are governed by section 32.

- **Section 44B does not override the chapter VI and VIA.**
  Chapter VI in income tax Consisting of Section 70 to 80 , which deals with the provisions of "set off or carry forward and set off of losses" and chapter VIA consist of section 80C to 80U and 80 RRB along with profits linked deductions contained in the series of section 80 IA and onwards **is applicable.**

Section 44B reproduced

Special provision for computing profits and gains of shipping business in the case of non-residents.

44B. *(1) Notwithstanding anything to the contrary contained in sections 28 to 43A, in the case of an assessee, being a non-resident, engaged in the business of operation of ships, a sum equal to seven and a half per cent of the aggregate of the amounts specified in sub-section (2) shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession".*

(2) The amounts referred to in sub-section (1) shall be the following, namely :—

(i) the amount paid or payable (whether in or out of India) to the assessee or to any person on his behalf on account of the carriage of passengers, livestock, mail or goods shipped at any port in India; and

(ii) the amount received or deemed to be received in India by or on behalf of the assessee on account of the carriage of passengers, livestock, mail or goods shipped at any port outside India.

Explanation*.—For the purposes of this sub-section, the amount referred to in clause (i) or clause (ii) shall include the amount paid or payable or received or deemed to be received, as the case may be, by way of demurrage charges or handling charges or any other amount of similar nature.*

Section 172- Shipping Business of NR

- Section 172 – Recovery mechanism applicable only when the departure of the ship is from any port in India to ensure the effective recovery of taxation

- In case of an NR engaged in the business of operating ships, **7.5%** of the following amounts shall be deemed to be the profits & gains from the business chargeable to tax:

  - ✓ ***amount paid/ payable in or out of India** to or on behalf of NR on account of carriage of passengers, livestock, mail or goods shipped at any port **in India**;

**Amount includes demurrage charges or handling charges or any other amount of similar nature*

Section 172- Shipping Business of NR

- Section 172 applies to **each individual carriage** & hence is more beneficial to when there are
  - ✓ only 1 (or few) calls on Indian Ports and
  - ✓ assessee does not want to file Returns on a yearly basis but fulfil their Tax obligation at the time of departure itself.
- U/s 172, the Master of the vessel must **before departure from India**,
  - ✓ prepare & furnish Return of the full amount paid/payable on account of carriage
  - ✓ On Assessment by AO pay tax determined as specified under section 172 (i.e. 7.5% of amount from carriage from or to India Ports).

Applicability of Section 172

Non-resident involved in Shipping Business → **Includes individuals & corporates**

carriage of passengers, livestock, mail or goods

Shipped at any port **outside India**	**7.5%**	Shipped at any port **in India**
amount received/ deemed to be received in India		**amount paid/ payable in or out of India**

✗ - Not Applicable

✓ - Applicable

Analysis-

" Notwithstanding anything contained in the other provisions of this Act"

- **Other Income earned by Shipping Co. not covered:**
  It means if a non residents earn other income (for example: interest income from Indian companies) apart from shipping income, then such income shall be charged to taxation normally as per the provisions of ITA.

- **Depreciation & c/f of unabsorbed depreciation not allowed:**
  It means Depreciation as well as carried forward of unabsorbed Depreciation on the business of shipping **shall not be allowed s**ince they are governed by section 32.

- **Section 172 overrides the chapter VI and VIA.**
  Chapter VI in income tax Consisting of Section 70 to 80 , which deals with the provisions of "set off or carry forward and set off of losses" and chapter VIA consist of section 80C to 80U and 80 RRB along with profits linked deductions contained in the series of section 80 IA and onwards **is not applicable.**

Analysis-

“ Notwithstanding anything contained in the other provisions of this Act”

❖ **<u>TDS under Section 195 is not applicable:</u>**

✓ If a person makes payment to the shipping company engaged from business operated from port in India, fails to deduct the TDS or after deducting the TDS fails to make the payment, then also he is not liable for facing any penalty contained in section 201(1A) & other provisions like 40A(ia).

✓ The logic behind is that section 172 is itself a recovery procedure of taxes in this cases.
(Held as per Commissioner of Income-tax vs Dempo & Co. P. Ltd**)**

Section 172 reproduced

Shipping business of non-residents.

172. *(1) The provisions of this section shall, notwithstanding anything contained in the other provisions of this Act, apply for the purpose of the levy and recovery of tax in the case of any ship, belonging to or chartered by a non-resident, which carries passengers, livestock, mail or goods shipped at a port in India.*

(2) Where such a ship carries passengers, livestock, mail or goods shipped at a port in India, seven and a half per cent of the amount paid or payable on account of such carriage to the owner or the charterer or to any person on his behalf, whether that amount is paid or payable in or out of India, shall be deemed to be income accruing in India to the owner or charterer on account of such carriage.

(3) Before the departure from any port in India of any such ship, the master of the ship shall prepare and furnish to the Assessing Officer a return of the full amount paid or payable to the owner or charterer or any person on his behalf, on account of the carriage of all passengers, livestock, mail or goods shipped at that port since the last arrival of the ship thereat:

Provided *that where the Assessing Officer is satisfied that it is not possible for the master of the ship to furnish the return required by this sub-section before the departure of the ship from the port and provided the master of the ship has made satisfactory arrangements for the filing of the return and payment of the tax by any other person on his behalf, the Assessing Officer may, if the return is filed within thirty days of the departure of the ship, deem the filing of the return by the person so authorised by the master as sufficient compliance with this sub-section.*

Section 172 reproduced

(4A) No order assessing the income and determining the sum of tax payable thereon shall be made under sub-section (4) after the expiry of nine months from the end of the financial year in which the return under sub-section (3) is furnished:
Provided *that where the return under sub-section (3) has been furnished before the 1st day of April, 2007, such order shall be made on or before the 31st day of December, 2008.*

(5) For the purpose of determining the tax payable under sub-section (4), the Assessing Officer may call for such accounts or documents as he may require.

(6) A port clearance shall not be granted to the ship until the Collector of Customs, or other officer duly authorised to grant the same, is satisfied that the tax assessable under this section has been duly paid or that satisfactory arrangements have been made for the payment thereof.

(7) Nothing in this section shall be deemed to prevent the owner or charterer of a ship from claiming before the expiry of the assessment year relevant to the previous year in which the date of departure of the ship from the Indian port falls, that an assessment be made of his total income of the previous year and the tax payable on the basis thereof be determined in accordance with the other provisions of this Act, and if he so claims, any payment made under this section in respect of the passengers, livestock, mail or goods shipped at Indian ports during that previous year shall be treated as a payment in advance of the tax leviable for that assessment year, and the difference between the sum so paid and the amount of tax found payable by him on such assessment shall be paid by him or refunded to him, as the case may be.

(8) For the purposes of this section, the amount referred to in sub-section (2) shall include the amount paid or payable by way of demurrage charge or handling charge or any other amount of similar nature.

Section 44BB- Business of exploration, etc., of mineral oils carried out by non-residents

- Section 44BB – In case of an NR engaged in the business of
  - ✓ providing services or facilities in connection with
  - ✓ or supplying plant* and machinery on hire used or to be used

in the prospecting for, or extraction or production of, mineral oils*

10% of the following amounts shall be deemed to be the profits & gains from the business chargeable to tax

- ✓ **amount paid/ payable in or out of India** to NR for business **in India**;

AND

- ✓ **amount received/ deemed to be received in India** to NR for business **outside India**.

**plant* *includes ships, aircraft, vehicles, drilling units, scientific apparatus and equipment, used for the purposes of the said business;*

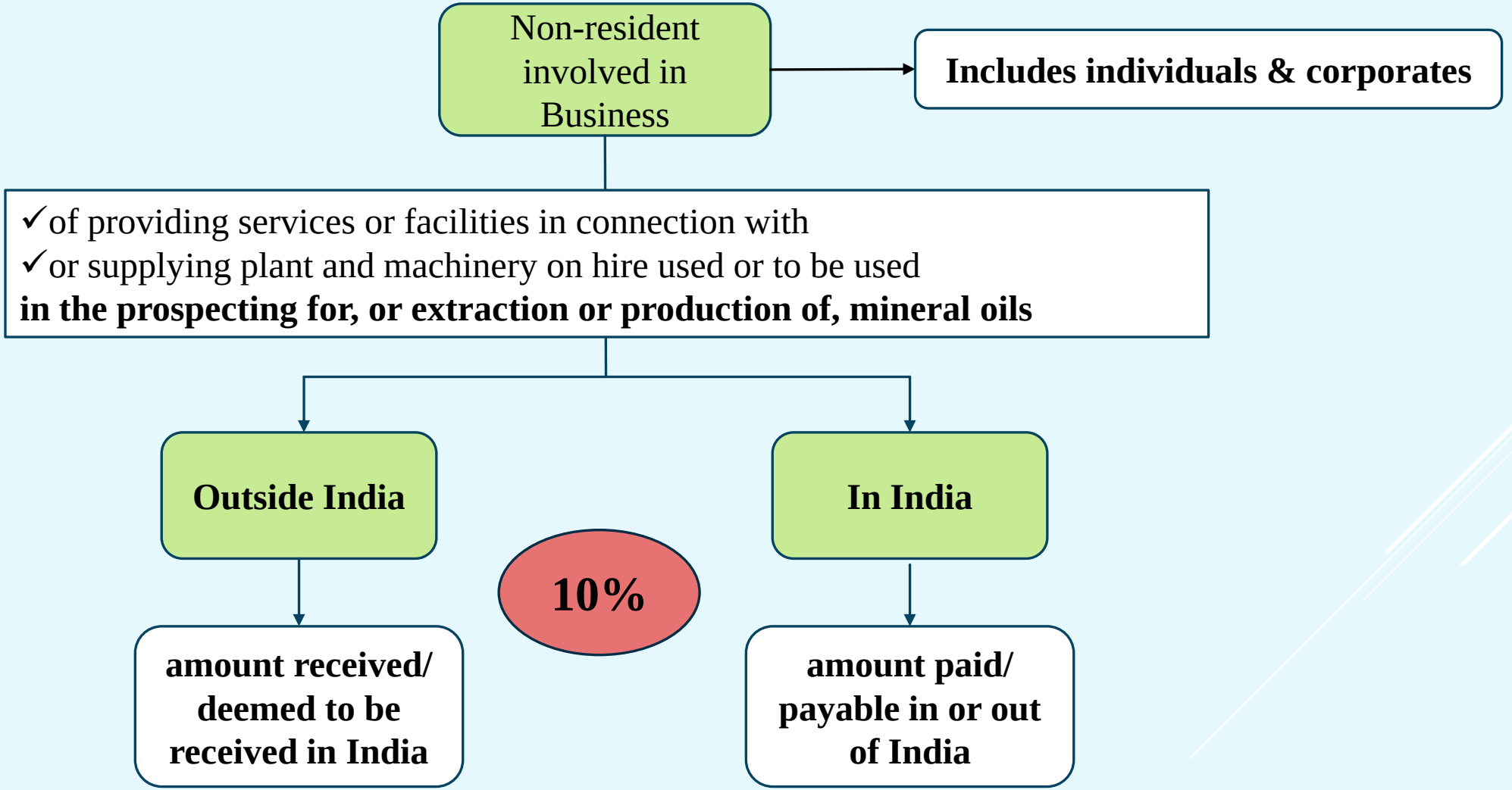
***mineral oil* *includes petroleum and natural gas.*

Section 44BB- Business of exploration, etc., of mineral oils carried out by non-residents

- Non-resident may claim lower profits and gains than the profits and gains as per section 44B (i.e. 10%) if
  - ✓ He keeps and maintains such books of account and other documents u/s 44AA(2)

    AND
  - ✓ gets his accounts audited and furnishes a report of such audit u/s 44AB.

Applicability of Section 44BB



Section 44BB reproduced

Special provision for computing profits and gains in connection with the business of exploration, etc., of mineral oils.

44BB. *(1) Notwithstanding anything to the contrary contained in sections 28 to 41 and sections 43 and 43A, in the case of an assessee, being a non-resident, engaged in the business of providing services or facilities in connection with, or supplying plant and machinery on hire used, or to be used, in the prospecting for, or extraction or production of, mineral oils, a sum equal to ten per cent of the aggregate of the amounts specified in sub-section (2) shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession" :*

Provided *that this sub-section shall not apply in a case where the provisions of section 42 or section 44D or section 44DA or section 115A or section 293A apply for the purposes of computing profits or gains or any other income referred to in those sections.*

(2) The amounts referred to in sub-section (1) shall be the following, namely :—

(a) the amount paid or payable (whether in or out of India) to the assessee or to any person on his behalf on account of the provision of services and facilities in connection with, or supply of plant and machinery on hire used, or to be used, in the prospecting for, or extraction or production of, mineral oils in India; and

(b) the amount received or deemed to be received in India by or on behalf of the assessee on account of the provision of services and facilities in connection with, or supply of plant and machinery on hire used, or to be used, in the prospecting for, or extraction or production of, mineral oils outside India.

Section 44BB reproduced

Special provision for computing profits and gains in connection with the business of exploration, etc., of mineral oils.

(continued….)

(3) Notwithstanding anything contained in sub-section (1), an assessee may claim lower profits and gains than the profits and gains specified in that sub-section, if he keeps and maintains such books of account and other documents as required under sub-section (2) of section 44AA and gets his accounts audited and furnishes a report of such audit as required under section 44AB, and thereupon the Assessing Officer shall proceed to make an assessment of the total income or loss of the assessee under sub-section (3) of section 143 and determine the sum payable by, or refundable to, the assessee.

Explanation.—For the purposes of this section,—

(i) "plant" includes ships, aircraft, vehicles, drilling units, scientific apparatus and equipment, used for the purposes of the said business;

(ii) "mineral oil" includes petroleum and natural gas.

Section 44BBA- Business of operation of aircraft in the case of non-residents

- Section 44BBA – Relates to **taxation of profits and gains in connection with engaged in the business of operation of aircraft** being a **non-resident (including corporate or individuals)** in India.

- In case of an NR engaged in the business of operation of aircraft, **5%** of the following amounts received on account of the **carriage of passengers, livestock, mail or goods** shall be deemed to be the profits & gains from the business chargeable to tax:

  - ✓ **amount paid/ payable in or out of India** for **carriage of passengers, livestock, mail or goods** from any place **in India**;

  AND

  - ✓ **amount received/ deemed to be received in India** for **carriage of passengers, livestock, mail or goods** from any place **outside India**.

Applicability of Section 44BBA

Non-resident involved in Business of **Operation of Aircraft**

→ **Includes individuals & corporates**

Amount on account of the carriage of passengers, livestock, mail or goods

Outside India

amount received/ deemed to be received in India

5%

In India

amount paid/ payable in or out of India

Section 44BBA reproduced

Special provision for computing profits and gains of the business of operation of aircraft in the case of non-residents.

44BBA. *(1) Notwithstanding anything to the contrary contained in sections 28 to 43A, in the case of an assessee, being a non-resident, engaged in the business of operation of aircraft, a sum equal to five per cent of the aggregate of the amounts specified in sub-section (2) shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession".*

(2) The amounts referred to in sub-section (1) shall be the following, namely :—

(a) the amount paid or payable (whether in or out of India) to the assessee or to any person on his behalf on account of the carriage of passengers, livestock, mail or goods from any place in India; and

(b) the amount received or deemed to be received in India by or on behalf of the assessee on account of the carriage of passengers, livestock, mail or goods from any place outside India.

Section 44BBB- business of civil construction, etc., in certain turnkey power projects in the case of foreign companies

- Section 44BBB – Relates to **taxation of profits and gains** in the business of
  - ✓ **civil construction or**
  - ✓ **erection of plant or machinery or**
  - ✓ **testing or commissioning in connection of turnkey power projects approved by Central Government** carried out by a **foreign entity** in India.

- In case of a foreign entity engaged in the such business, **10% of amount paid/ payable in or out of India** to assessee or to any person on behalf of assessee shall be deemed to be the profits & gains from the business chargeable to tax.

Section 44BBB reproduced

Special provision for computing profits and gains of foreign companies engaged in the business of civil construction, etc., in certain turnkey power projects.

44BBB. *(1) Notwithstanding anything to the contrary contained in sections 28 to 44AA, in the case of an assessee, being a foreign company, engaged in the business of civil construction or the business of erection of plant or machinery or testing or commissioning thereof, in connection with a turnkey power project approved by the Central Government in this behalf, a sum equal to ten per cent of the amount paid or payable (whether in or out of India) to the said assessee or to any person on his behalf on account of such civil construction, erection, testing or commissioning shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession".*

(2) Notwithstanding anything contained in sub-section (1), an assessee may claim lower profits and gains than the profits and gains specified in that sub-section, if he keeps and maintains such books of account and other documents as required under sub-section (2) of section 44AA and gets his accounts audited and furnishes a report of such audit as required under section 44AB, and thereupon the Assessing Officer shall proceed to make an assessment of the total income or loss of the assessee under sub-section (3) of section 143 and determine the sum payable by, or refundable to, the assessee.

Settled Issues

Whether service tax or any indirect tax collected should form a part of gross receipt while calculating income under presumptive taxation?

No, service tax or any such indirect tax collected is a statutory liability and does not involve any element of profit. A service provider is collects the same from its customers on behalf of the Government and, accordingly, it cannot be included in the total receipts for determining the presumptive income. This position has been taken in the following case laws:

i. Orient Overseas Container Line (35 taxmann.com 342)- Mumbai Tribunal
ii. Islamic Republic of Iran Shipping Lines v. DCIT [2011] 11 taxmann.com 349- Mumbai Tribunal
iii. Sedco Forex International Drilling Inc. vs Additional Director of Income tax, International taxation, Dehradun- Delhi ITAT
iv. Swiwar Offshore Pte Ltd [ITA/4994/Mum/2012;ITA/3680/Mum/2015]-Mumbai Tribunal

Settled Issues

Whether reimbursement received for extra arrangements done such as meal and accommodation while providing vessels to undertake the activity of transportation of goods and passenger should form a part of gross receipt while calculating income under presumptive taxation?

No, such reimbursement should not be included in gross receipts if such additional services do not form a part of main service contract. Further, if it is provided in the contract that these facilities if asked for will be provided at a specified rate or at actuals then also reimbursement receipts should not form part of gross receipts for determining the presumptive income. This position has been taken in the following case laws:

i. Sedco Forex International Drilling Inc. vs Additional Director of Income tax, International taxation, Dehradun- Delhi ITAT
ii. Swiwar Offshore Pte Ltd [ITA/3563/Mum/2015]-Mumbai Tribunal

For Discussion

Facts: Vessels supplied by service provider for carriage of passenger and goods of service recipient who will ultimately be engaged in extraction of oils and minerals.

Issue:

Whether supply of vessel will qualify as provision of shipping services and will be taxed under section 44B of the Act at the rate of 7.5% plus applicable surcharge and cess or it will be considered as providing services or facilities in connection with or supplying plant* and machinery on hire used or to be used in the prospecting for, or extraction or production of, mineral oils and will be taxed under section 44BB of the Act at the rate of 10% plus applicable surcharge and cess.

THANK YOU

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Virtual Meeting on International Taxation

Organised by Hyderabad Branch of SIRC of ICAI

Deduction of tax on payments to non-residents

Section 195 - Concepts and applications

196A & 196D – Taxation of dividends

CA Siddharth Banwat

26th June, 2021

The Beginning….. NEED!!!!

- Tax to be collected at **earliest point of time**. No difficulty in collection of tax at the time of assessment (Easiest mode of collection)
- To avoid loss of revenue as the non residents may sometimes have no asset in India from which subsequent recovery can be made.
- Protect tax revenue for government and prevent tax evasion

GENESIS:CBDT Circular 152 dated 27.11.1974

1158. Where whole payment would not be income chargeable to tax in the hands of recipient non-resident, person responsible for paying such sum may make application for determination of appro-priate portion

1. *I am directed to state that section 195 imposes a statutory obligation on any person responsible for paying to a non-resident any interest (not being "interest on security") or any other sum (not being dividends) chargeable under the provisions of the Income-tax Act to deduct income-tax at the "rates in force", unless he is himself liable to pay income-tax thereon as an agent. Payments to a non-resident, by way of royalty for the use of, or the right to use, any copyright (e.g., of literary, artis-tic or scientific work including cinematograph films or films or tapes for radio or television broadcasting), any patent, trade mark, etc., and payments for technical services rendered in India are some of the typical examples of sums chargeable under the provisions of the Income-tax Act to which the aforesaid require-ment of tax deduction at source will apply. The term "rates in force" means the rates of income-tax specified in this behalf in the Finance Act of the relevant year.*

2. *Where the person responsible for paying any such sum to a non-resident considers that the whole amount thereof would not be income chargeable under the Income-tax Act in the case of the recipient non-resident, he may make an application under section 195(2) to the Income-tax Officer for the determination of the appropriate portion of such payment which would be taxable and in respect of which tax is to be deducted under section 195(1).*

3. The object of section 195 is to ensure that the tax due from non-resident persons is secured at the earliest point of time so that there is no difficulty in collection of tax subsequently at the time of regular assessment. Failure to deduct tax at source from payment to a non-resident may result in loss of revenue as the non-resident may sometimes have no assets in India from which tax could be collected at a later stage. Tax should, therefore, be deducted in all cases where it is required to be deducted under section 195 before the payment is made to the non-resident and the tax so deducted should be paid to the credit of the Central Government as required by section 200 read with rule 30. Failure to do so would render a person liable to penalty under section 201 read with section 221, and would also constitute an offence under section 276B.

The Beginning….. OBJECTIVE!!!!

AAR, In RE: P.No.18 of 1995(1999) 238 ITR 575:

"The objective is to ensure, as best as possible, that the tax liability on the income element, on the amount paid is got deducted at source itself so that the ***department is not put to the hassles of recovering it*** *from the non resident whose connections with India may be* ***transient or whose assets in India may not be sufficient to meet the tax liability****"*

Vodafone International Holdings B.V. v. Union of India (2012)341ITR1(SC)

"The object of Section195 is to ensure that tax due from non-resident persons is secured at the earliest point of time so that there is no difficulty in collection of tax subsequently at the time of ***regular assessment****."*

Section 4: Basis of Charge

Charge of income-tax.

4. *(1) Where any Central Act enacts that income-tax shall be charged for any assessment year at any rate or rates, income-tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions (including provisions for the levy of additional income-tax) of, this Act in respect of the total income of the previous year of every person :*

Provided *that where by virtue of any provision of this Act income-tax is to be charged in respect of the income of a period other than the previous year, income-tax shall be charged accordingly.*

(2) In respect of income chargeable under sub-section (1), income-tax shall be deducted at the source or paid in advance, where it is so deductible or payable under any provision of this Act.

Chapter XVII ‘Collection and Recovery of Tax’

Deduction at source and advance payment.

190. (1) Notwithstanding that the regular assessment in respect of any income is to be made in a later assessment year, the tax on such income shall be payable by deduction or collection at source or by advance payment or by payment under sub-section (1A) of section 192, as the case may be, in accordance with the provisions of this Chapter.

(2) Nothing in this section shall prejudice the charge of tax on such income under the provisions of sub-section (1) of section 4.

Tax Deducted at Source From Income Of Non Residents

SECTION	NATURE OF PAYMENT
192	Payment of salary
194B	Income by way of winnings from lotteries, crossword puzzles, card games and other games of any sort
194BB	Income by way of winnings from horse races
194E	Specified payments to non-resident sportsmen/sports association or an entertainer
194LB	Payment of interest on infrastructure debt fund
194LBA(2)	Payment of interest on infrastructure debt fund
194LBA(3)	Distribution any interest income, received or receivable by a business trust from a SPV, to its unit holders.
194LBB	Investment fund paying income to a unit holder [other than income which is exempt under section 10(23FBB)].

Tax Deducted at Source From Income Of Non Residents

SECTION	NATURE OF PAYMENT
194LBC(2)	Income in respect of investment made in a securitisation trust
194LC	Payment of interest by an Indian Company or a business trust to a non-corporate non-resident or foreign company in respect of money borrowed in foreign currency from a source outside India under a loan agreement or by way of issue of long term bonds (including long term infrastructure bond) or by way of issue of rupee denominated bond
194LD	Payment of interest on rupee denominated bond of an Indian Company or Government securities to a Foreign Institutional Investor or a Qualified Foreign Investor
195	Payment of any other sum to a non-resident

Tax Deducted at Source From Income Of Non Residents

SECTION	NATURE OF PAYMENT
196B	Income from units of a mutual fund or UTI purchased in foreign currency (including long term capital gain on transfer of such units) payable to an Offshore Fund
196C	Income by way of interest on bonds of an Indian company or public sector company sold by the Government and purchased by a non-resident in foreign currency or GDRs referred to in section 115AC (including long term capital gain on transfer of such bonds or GDRs payable to a non-resident
196D	Income of foreign Institutional Investors from securities (not being income by way of interest referred to in section 194LD, dividend referred under section 115-O or capital gain arising from such securities)

Overview of Section 195

195(1)

- any person responsible for payment of any sum
- to a non resident
- interest or any other sum chargeable to tax
- payment or credit which ever is earlier
- at rates in force
- other than Salary and
- ~~dividend referred in section 115-O~~

195(2)

- Application by "Payer" if it considers whole of sum is not income chargeable

195(3),(4),(5)

- Application by "Payee" viz. Foreign Banking Company or non-resident having branch in India for lower or Nil Withholding
- Powers to CBDT to issue notification

195(6),(7)

- Furnishing of information in prescribed form viz. 15CA/15CB
- CBDT to specify class of persons or cases where application to AO is compulsory

Section 195 and Its Uniqueness!!

Even personal payments are not exempted. Unlike section 194C etc; no exclusion for the same in section 195 (all payments covered excluding salaries provided chargeability there)

No threshold limit in section 195; even Re 1 payment is covered

Section 195 uses a special phrase “chargeable to tax under the Act”

All payers covered irrespective of legal character HUF, Artificial juridical person

Involves understanding of DTAA/Treaty

SEC 195(1) - SCOPE AND CONDITIONS OF APPLICABILITY

195(1)"Any ***person*** *responsible for paying to a* ***non-resident****, not being a company or to a foreign company,* ***any interest*** *(not being interest referred to in section 194LB or sec 194 LC or sec 194LD)* ***or any other sum chargeable under the provisions of the Act*** *(not being the income chargeable under the head salaries) shall, at the* ***time of credit*** *of such income to the account of the payee or* ***at the time of payment*** *thereof in cash or by issue of cheque or draft or* ***by any other mode*** *deduct income tax thereon at the rates in force.*

Provided *that in the case of interest payable by the Government or a public sector bank within the meaning of clause (23D) of section 10 or a public financial institution within the meaning of that clause, deduction of tax shall be made only at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode :"*

SEC 195(1) - SCOPE AND CONDITIONS OF APPLICABILITY

"Any person responsible for paying"
Payer- "any person" defined as per section 2(31) of Income tax Act:
Section 2(31) –Person includes:

- An individual
- HUF
- A Company
- A firm
- AOP or BOI whether incorporated or not.
- Local Authority
- Every artificial Juridical Person, not falling above.

Whether person includes Non-Resident?

Explanation 2 to sub-section (1) of the section 195 clarifies that the obligation to comply with sub-section (1) and make deduction thereunder applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to all persons, resident or non-resident whether or not the non-resident person has a residence or place of business or business connection in India or any other presence in any manner whatsoever in India.

Foreign Company having POEM in India?

SEC 195(1) - SCOPE AND CONDITIONS OF APPLICABILITY

Payee- non-resident, not being a company, or to a foreign company

- Should include NRI
- Whether it will include R but NOR: RNOR are considered as Residents
- Whether it includes Foreign Company having POEM in India?

CBDT Notification No. SO 3039(E) dated 22nd June 2018,point (x)

"(x)Where more than one provision of Chapter XVII-B of the Act applies to the foreign company as resident as well as foreign company, ***the provision applicable to the foreign company alone shall apply."***

SEC 195(1) – "Any Sum Chargeable to Tax"

Section 4 (Charge of Income Tax)- Income Tax shall be charged at the rates for that assessment year in accordance with the provisions of the Income Tax act 1961 in respect of total Income of **every person**.

According to **section 5(2)** of the Act, which states, the total income of any previous year of a person who is Non-resident includes all the income from whatever source derived which is received or is deemed to be received in India or accrues or arises or deemed to accrue or arise to him in India during the previous year.

Section 7 and 9 of the act explains the term "Income deemed to be received" and "Income deemed to accrue or arise in India".

Charging Section under Income Tax	**Section 4**
Section addressing 'Scope of Income' • **Accruing or deemed to accrue** • **Received or deemed to receive**	**Section 5**
Deemed Income	**Section 7 & 9**

SEC 195(1) – "Any Sum Chargeable to Tax"

Nature of Income	Act	Treaty
Business/Profession	Section 9(1)(i)	A.5, A.7 & A.14
Capital Gains	S. 9(1)(i), S.45	A.6 & 13
Salary Income	S. 9(1)(ii)	A.15
Dividend Income	S. 9(1)(iv), S.115A	A.10
Interest Income	S. 9(1)(v), S.115A	A.11
Royalties	S. 9(1)(vi), S.115A	A.12
FTS	S. 9(1)(vii), S.115A	A.12

***section 90- Provisions of IT ACT treaty read with MLI, Whichever is beneficial prevails**

SEC 195(1) – understanding section 9 to determine “Any Sum Chargeable to Tax”

Business Connection 9(1)(i)

- Business Connection not defined, has been explained by the Courts.
- Any activity which is regular is considered as Business Connection. Occasional activity is not covered.
- Income attributable only to Operations carried out in India is deemed to accrue in India.
- Income due to activities of Dependent agent are deemed to accrue in India. Income to the extent attributable to operations carried out in India is deemed to accrue in India.
- Income due to activities of Independent agent are not deemed to accrue in India.
- Significant Economic Presence in India will be considered as Business connection. (Deferred by FA 2020).

SEC 195(1) – understanding section 9 to determine “Any Sum Chargeable to Tax”

Indirect Transfer 9(1)(i), Explaination 5

Asset or Capital asset, being share or interest, in a company or entity, registered or incorporated outside India, shall be deemed to be situated in India, if the share or interest derives directly or indirectly, its value substantially from assets located in India.

Salary

Salary is deemed to accrue in India if:

- services are rendered in India. Rest period before and after the services are deemed to accrue in India.
- salary is paid by Government to an Indian citizen for services outside India

SEC 195(1) – understanding section 9 to determine "Any Sum Chargeable to Tax"

Interest, Royalty, FTS Section 9(1)(v),(vi),(vii)

Interest, Royalty and FTS are deemed to accrue in India if these are paid to a non-resident by:

- Government.

- Indian resident – unless it is for business carried on outside India, or for earning income from a source outside India.

(E.g. Indian resident has a branch outside India and interest is paid for that branch to a bank outside India, it is not considered as accrued in India.)

- Non-resident – if these are for carrying on business in India, or for earning income from a source in India.

(For interest payment, if it is paid for carrying on business in India, then only it is deemed to accrue in India.)
(E.g. If a non-resident pays management consultancy fees to UK firm for his Indian business, it is considered as accrued in India.)

SEC 195(1) – Determination of 'Any sums chargeable to tax'

Tax is deductible on "**sum chargeable to tax**". This is the basis of determining whether tax is to be deducted or not. If
the sum is "**not chargeable to tax**", than no TDS.

Chargeability to tax determined based on:

- Whether the income is received, accrues, or can be deemed to be received or accrued in India- section 5 r.w. section9

- Characterisation of Income in hands of Non residents.

- NR's eligibility to claim DTAA benefits.

SEC 195(1) – ‘Any sums chargeable to tax’

What would be the treatment in case of composite payments?

Transmission corporation of AP Ltd.(1999) (105taxman 742)(SC)

Tax liable to be deducted by payer on the gross amount, if the payment includes an amount chargeable to tax in India.

Google India pvt Ltd. (2017) (86 taxmann.com 237)

Application to be made u/s 195(2) for permission to deduct tax on lower amount

Samsung Electronics Co. Ltd.(2009) (185 Taxmann 313)(Karnataka HC)

HC held that obligation to deduct tax arises the moment there is remittance to the NR abroad. Until certificate obtained u/s 195(2) , he cannot interpret that income is not taxable in India. Unless an order was obtained u/s 195(2), the obligation to deduct tax arose the moment remittance is made to NR.

SEC 195(1) – 'Any sums chargeable to tax'

GE India Technology Centre (P) Ltd (234 CTR 153) (SC)

SC held that:

- sec 195(2) is based on ***"Principle of Proportionality***" & gets attracted where the ***payment is composite payment***.
- ***The moment there is a remittance out of India, it does not trigger Sec 195***. The payer is bound to deduct tax only if the sum is *chargeable to tax (i.e. there is an element of income)* in India read with sec 4, 5 and 9.
- Sec 195 not only covers amounts which represents pure income payments but also covers composite payments which has an element of income embedded in them
- However, obligation to deduct TDS on such composite payments would be limited to the ***appropriate proportion of income*** forming part of the gross sum.
- SC- Karnataka HC losen its sight on plain language of sec 195(1)

SEC 195(1) – 'Any sums chargeable to tax'

CBDT Circular

- CBDT issued Instruction no. 2/2014 (F. No. 500/33/2013-FTD-I) dated 26th February 2014, instructing AO that if no application made u/s 195(2) & assessee failed to deduct TDS u/s 195 of the act, ***default amount u/s 201 is on sum chargeable to tax & not on the whole amount.***

- CBDT Circular No.3/2015 dated 12 February 2015- Disallowance u/s 40(a)(i) to be computed on the taxable portion & **not on the whole sum remitted**

- In the said circular CBDT issues clarification with respect to the expression "*amounts not deductible*" under section 40(a)(i) of the Income-tax Act, 1961. The CBDT referred to its earlier Instruction No. 02/2014 dated 26.02.2014 and clarified that for the purpose of making disallowance of "*other sum chargeable*" under section 40(a)(i) of the Act, the appropriate portion of the sum which is chargeable to tax under the Act shall form the basis of such disallowance and shall be the same as determined by the AO having jurisdiction for the purpose of section 195(1) of the Act.

- Further, where determination of "*other sum chargeable*" has been made under sub-sections (2), (3) or (7) of section 195 of the Act, such a determination will form the basis for disallowance, if any, under section 40(a)(i) of the Act.

SEC 195(2) – 'Application by the Payer'

195(2) Where the person responsible for paying any such sum chargeable under this Act (other than salary) to a non-resident considers that the whole of such sum would not be income chargeable in the case of the recipient, he may make an application 48[in such form and manner to the Assessing Officer, to determine in such manner, as may be prescribed], the appropriate proportion of such sum so chargeable, and upon such determination, tax shall be deducted under sub-section (1) only on that proportion of the sum which is so chargeable.

- Application to be made to Assessing Officer (AO) when the payer considers whole income not to be chargeable
- AO to determine the portion of payment chargeable to tax and to issue a certificate accordingly
- The permission granted by the AO would be in force for the period as specified
- On determination, tax to be deducted on the sum chargeable to tax

SEC 195(2) – 'Application by the Payer'

- **Order under section 195 (2) should not be treated as a conclusion in the determination of income in the case of a foreign company**
  - CIT vs. TELCO [2000] 245 ITR 823 (Bom.)

  - Aditya Birla Nuvo v. DDIT (WP No. 345 of 2010) (Bom)

    The order under sec. 195(2) is tentative in nature and does not have any effect beyond providing immunity under sec. 201 and does not preclude the assessing officer to either re-examine the chargeability of income in regular assessment proceedings or to recover the taxes from the payer in his representative capacity

- **The assessee cannot be treated in default under s. 201 of the Act because it has applied under s. 195(2) of the IT Act before the AO, prior to remitting the payment**
  - Mangalore Refinery & Petrochemicals Ltd. V. DDIT (113 ITD 85) (Mum.)

- **If person responsible considers that the sum payable would not be income, would he be required to go to the A.O every time or will a CA certificate suffice?**
  - DCIT vs. Rediff.com India Ltd. (ITA No. 3061/Mum/2009)

    Chartered Accountant's certificate for TDS on payments to non-residents had no decisive impact on determination of taxability of payments to non-residents. It is only prima facie evidence about taxability status and **cannot substitute adjudication of taxability by the AO**

SEC 195(2) – 'Application by the Payer'

- **Whether an application can be made under S. 195(2) for NIL Withholding order?**
  - Held yes in case of Mangalore Refinery and Petrochemicals Ltd (113 ITD 85) (Mum)
  - contrary view has been taken in the following cases: Czechoslovak Ocean (81 ITR 162) (Cal), Graphite Vicarb India Ltd (28 TTJ 425) (Cal)
  - Practical Purposes, Application u/s 195(2) is adopted for both nil as well as lower withholding tax rate order
- **Time limit for passing order u/s 195(2)**
  - No time limit to pass order u/s 195(2); Blackwood Hodge (India) Pvt. Ltd. 81 ITR 807 (Cal), Central Associated Pigment Ltd. 80 ITR 631 (Cal)
- **Whether applying for NIL/lower WHT certificate compulsory?**
  - Principles laid down in GE India Technology Centre P Ltd(SC)

  In case of composite payments, where a payer has a **doubt** regarding determining the appropriate portion of sum chargeable under the act, he **must** make an application u/s 195. Where a person is fairly certain about the portion of sum chargeable to tax, then he can make his own determination as to whether TDS is deductible and if so what should be the amount.

SEC 195(3) – 'Application by the Payee'

195(3) "Subject to rules made under sub-section (5), any person entitled to receive any interest or other sum on which income-tax has to be deducted under sub-section (1) may make an application in the prescribed form to the Assessing Officer for the grant of a certificate authorising him to receive such interest or other sum without deduction of tax under that sub-section, and where any such certificate is granted, every person responsible for paying such interest or other sum to the person to whom such certificate is granted shall, so long as the certificate is in force, make payment of such interest or other sum without deducting tax thereon under sub-section (1)"

- Section 195(3) - Application by NR payee for NIL tax withholding (Rule 29B)
- Once such certificate granted , every person responsible for paying income shall make payment without TDS as long as the certificate is in force
- Payee can make an application in prescribed form (Form 15C and 15D) to the AO for nil WHT certificate
- Conditions prescribed under Rule 29B:
  - Assessee has been regularly assessed to tax and has filed all returns of income due as on the date of filing of application;
  - Not in default in respect of any tax interest, penalty, fine, or any other sum;
  - Not subjected to penalty u/s 271(1)(iii) of the Act;
  - Carrying on business in India continuously for at least five years and the value of the fixed assets in India exceeds Rs 50 lakhs.

SEC 195(4) – 'Validity of Certificate issued by AO'

195(4) "A certificate granted under sub-section (3) shall remain in force till the expiry of the period specified therein or, if it is cancelled by the Assessing Officer before the expiry of such period, till such cancellation."

- A certificate granted u/s 195(3) shall remain in force:
  - for the FY mentioned therein, or
  - until cancelled by the AO before expiry of FY

- Filing of subsequent application?
  - After the expiry of the period of validity of the earlier certificate, or within three months before the expiry thereof.

SEC 195(7) – 'Power of CBDT to specify class of persons:'

195(7) "Notwithstanding anything contained in sub-section (1) and sub-section (2), the Board may, by notification in the Official Gazette, specify a class of persons or cases, where the person responsible for paying to a non-resident, not being a company, or to a foreign company, any sum, whether or not chargeable under the provisions of this Act, shall make an application [in such form and manner to the Assessing Officer, to determine in such manner, as may be prescribed], the appropriate proportion of sum chargeable, and upon such determination, tax shall be deducted under sub-section (1) on that proportion of the sum which is so chargeable."

- Still the class of persons not notified.

Recent Notification

Order under 119 of The Income Tax Act, 1961 on issue of certificates for lower rate/nil deduction/collection of TDS or TCS under Section 195, 197 and 206C(9): **F.No. 275/25/2029- IT(B) dated 9th April, 2020**

- Date of Lower withholding certificate extended till 30th June for those assessee's who have been issued such lower or NIL certificates for FY 2019-20 and currently have applied for FY 2020-21 only in respect of those transactions and such deductors or collectors for whom the certificate was issued for FY 2019-20

- For those assessee who could not apply for issue of lower or NIL deduction of TDS for FY 2020-21 as on this date, but were issued such certificate for FY 2019-20, then such certificate shall be extended till 30.06.2020 for FY 2020-21. However there is a need to apply as soon as normalcy is restored or 30.06.2020 whichever is earlier by giving in the details of transaction, deductors or collectors.

- For those assessee's who have not applied for FY 2020-21 and do not have such certificate for FY 2020-21, than a modified approach has been prescribed to approach AO via email and attach all the relevant documents in email.

Section 197 – Application for lower or nil certificate by payee

Application by Whom	When	Process	Upon Determination
Payee	If payee considers that tax withholding can be at 'nil' or 'lower rate'.	Application can be made to the AO in Form 13 (online) to determine the tax rate. Application to be made before the payment/ credit, whichever is earlier	Tax shall be withheld only at the rate provided in the certificate issued by the A.O.

Section 197 – Procedural Aspect for Online Application

- Made effective from Financial Year 2018-19 vide Income Tax (Eleventh Amendment Rules, 2018) dated 26.10.2018;
- Application on TRACES Portal;
- Application to be in Form 13 online for all assessees;
- DSC of the Authorised Person registered on the Traces needs to sign or through a-verification (Net Banking) permitted;
- The mandatory fields and the details required are to be entered to ensure that the application is processed;
- Exempt Income details also needs to be given
- Computation of Estimated Total Income to be given Head wise;

Section 197 – Procedural Aspect for Online Application

Documents to be uploaded

- Estimated Income Computation for which F.Y certificate is sought.
- Computation of estimated total income any of the four previous year preceding to the previous year for which return of income has not been filed.
- Upload registration /exemption Certificate in case of certain entities covered under section 11 or 12 or section 139(4C).
- Assessment Orders if assessed, for the last four assessment years.
- Return of income for any of the four previous year has been filed in paper form.
- Details of income claimed to be exempt and not included in the total income: If amount is provided in column of basic details then this will be enabled & mandatory.
- Upload any other document.

195(6) Reporting of Foreign Remittances

195(6) "The person responsible for paying to a non-resident, not being company, or to a foreign company, any sum, whether or not chargeable under the provisions of this Act, shall furnish the information relating to payment of such sum, in such form and manner, as may be prescribed."

- Rule 37BB and Form 15CA, 15CB and 15CC are prescribed

- It is to be noted that section 195(1) does not cover in its scope interest under section 194LB, 194LC or 194LD and salaries but remittance of aforesaid has to be reported in applicable forms in terms of Rule 37BB

- 195(6) applies at the time of remittance i.e. reporting is required only when the payment is made

Rule 37BB: Furnishing of Information

Form 15CA - Information to be furnished by the Remitter electronically

PART	DESCRIPTION
Part A	If remittance is taxable and the total value of such remittance or remittances during the Financial Year is less than Rs. 5 lakh.
Part B	If remittance is taxable and the total value of such remittance or remittances during the Financial Year is more than Rs. 5 lakh and an order/ certificate u/s 195(2)/ 195(3)/ 197 of Income-tax Act has been obtained from the Assessing Officer.
Part C	If remittance is taxable and the total value of such remittance or remittances during the Financial Year is more than Rs. 5 lakh and a certificate in Form No. 15CB from an accountant as defined in the explanation below sub-section (2) of section 288 has been obtained.
Part D	To be filled up if the remittance is not taxable other than payments referred to in rule 37BB(3) by the person referred to in rule 37BB(2).

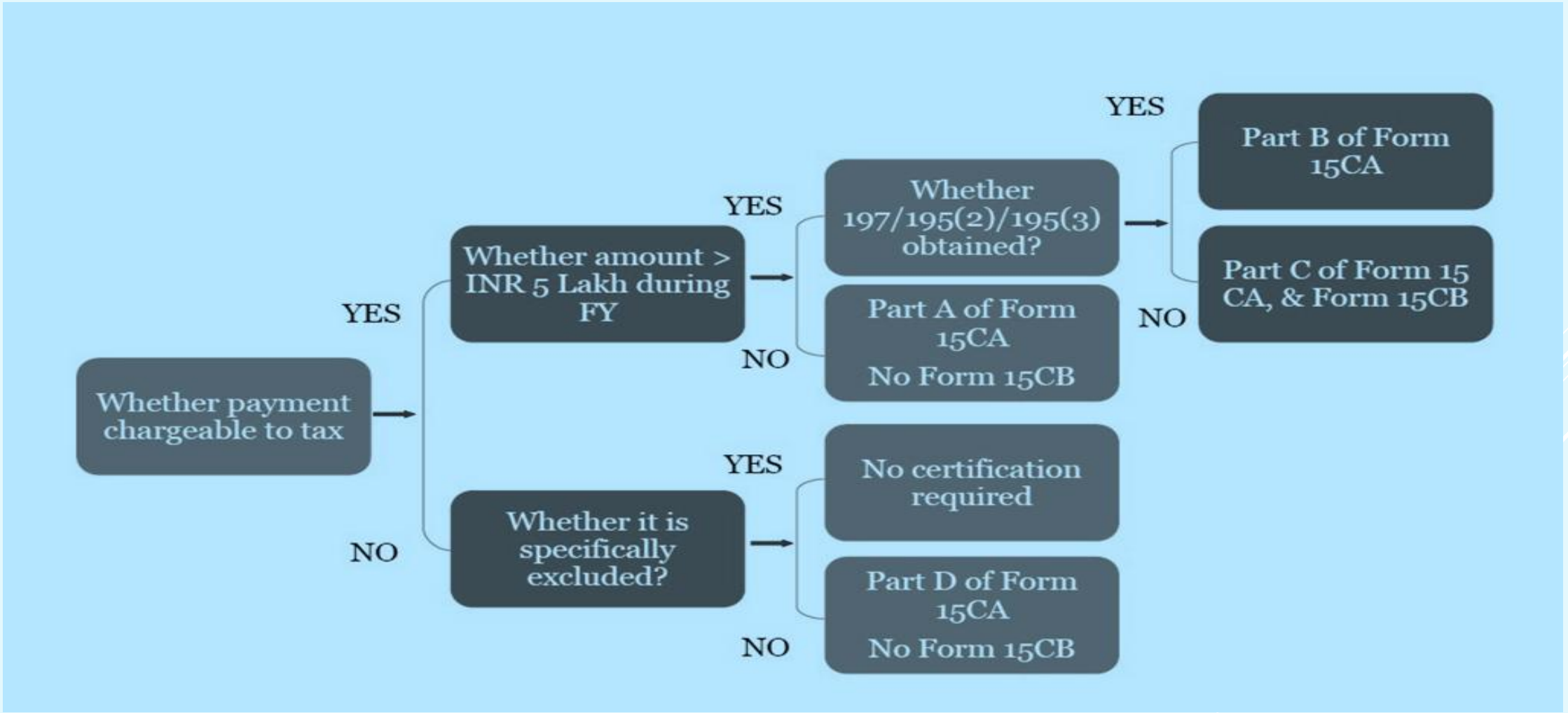
Rule 37BB: Furnishing of Information

- Form 15CB - Prescribes format of Certificate to be obtained from a CA by Remitter
  - Applicability– Only in respect of transactions reported in Part C of Form 15CA.
  - Form 15CB to be furnished electronically

- Form 15CC – Furnish information of remittances made by AD (Bankers) quarterly.

Note: A list of 33 specified transactions and remittance by individual under Liberalised Remittance Scheme, excluded from compliance under Rule 37BB(3)

Rule 37BB: Furnishing of Information



List of 33 specified transactions exempt from such compliance burden

Sl. No.	Purpose code as per RBI	Nature of payment
(1)	(2)	(3)
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	S0101	Advance payment against imports
8	S0102	Payment towards imports - settlement of invoice
9	S0103	Imports by diplomatic missions
10	S0104	Intermediary trade
11	S0190	Imports below Rs.5,00,000 - (For use by ECD offices)
12	SO202	Payment for operating expenses of Indian shipping companies operating abroad
13	SO208	Operating expenses of Indian Airlines companies operating abroad
14	S0212	Booking of passages abroad - Airlines companies
15	S0301	Remittance towards business travel
16	S0302	Travel under basic travel quota (BTQ)

List of 33 specified transactions exempt from such compliance burden

Sl. No.	Purpose code as per RBI	Nature of payment
17	S0303	Travel for pilgrimage
18	S0304	Travel for medical treatment
19	S0305	Travel for education (including fees, hostel expenses etc.)
20	S0401	Postal services
21	S0501	Construction of projects abroad by Indian companies including import of goods at project site
22	S0602	Freight insurance - relating to import and export of goods
23	S1011	Payments for maintenance of offices abroad
24	S1201	Maintenance of Indian embassies abroad
25	S1202	Remittances by foreign embassies in India
26	S1301	Remittance by non-residents towards family maintenance and savings
27	S1302	Remittance towards personal gifts and donations
28	S1303	Remittance towards donations to religious and charitable institutions abroad
29	S1304	Remittance towards grants and donations to other Governments and charitable institutions established by the Governments
30	S1305	Contributions or donations by the Government to international institutions
31	S1306	Remittance towards payment or refund of taxes
32	S1501	Refunds or rebates or reduction in invoice value on account of exports
33	S1503	Payments by residents for international bidding.

Basic Roadmap

Step 1: Check the scope and applicability of section 195.

Step 2: Verify the factual and basic documents.

Step 3: classify transaction on the basis of nature of income

Step 4: Check taxability as per Domestic Law.

Step 5: Check taxability as per DTAA along with availability of TRC/Form 10F.

Step 6: Check the rates of TDS applicable & applicable Exchange rate.

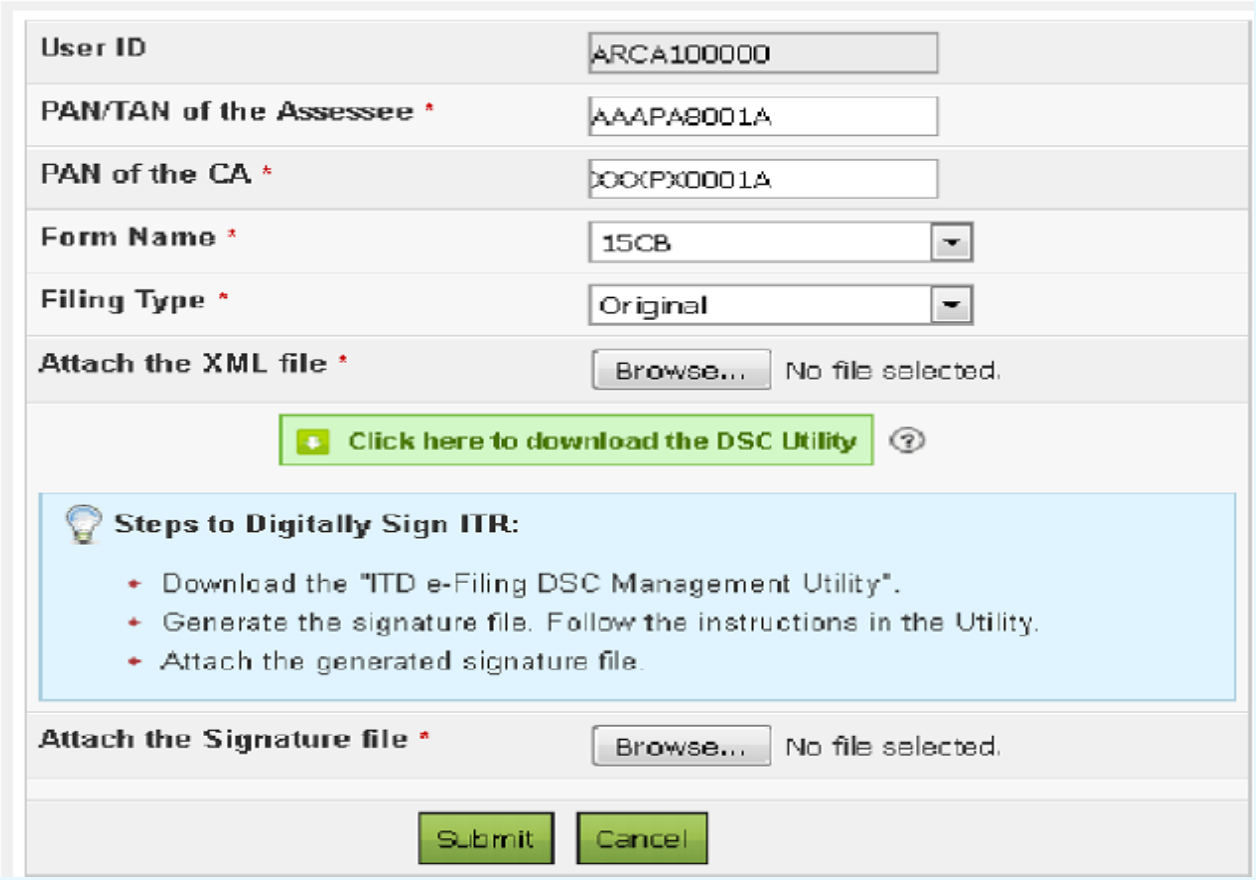
Step 7: identify the appropriate Form i.e. 15CA/15CB /195(2)/195(3)/197

Procedure to file Form 15CB

Step 1 – Taxpayer must **add CA** by entering membership number of the CA

Step 2 - Download Form 15CB utility and prepare XML file

Step 3 – Upload XML form and attach signature file

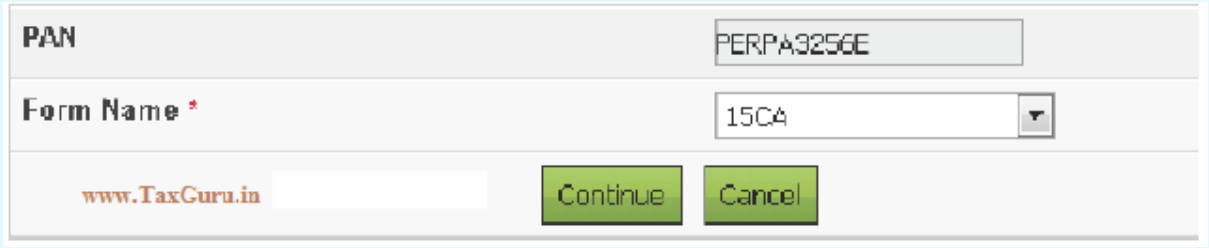


- Submission of FORM 15CB is mandatory before the Submitting FORM 15CA.
- FORM 15CA gives details about remittances rather than FORM 15CB is an assurance as to whether the applicable provisions of Income tax act and DTAA are being followed or not.
- To prefill the details in Part C of Form 15CA, the Acknowledgment number of e-Filed Form 15CB should be provided

Procedure to file Form 15CB

Step 1 – Login to e-Filing, go to e-File – Prepare and submit Online Form (Other than ITR)

Step 2 - Select Form 15CA from the drop down menu

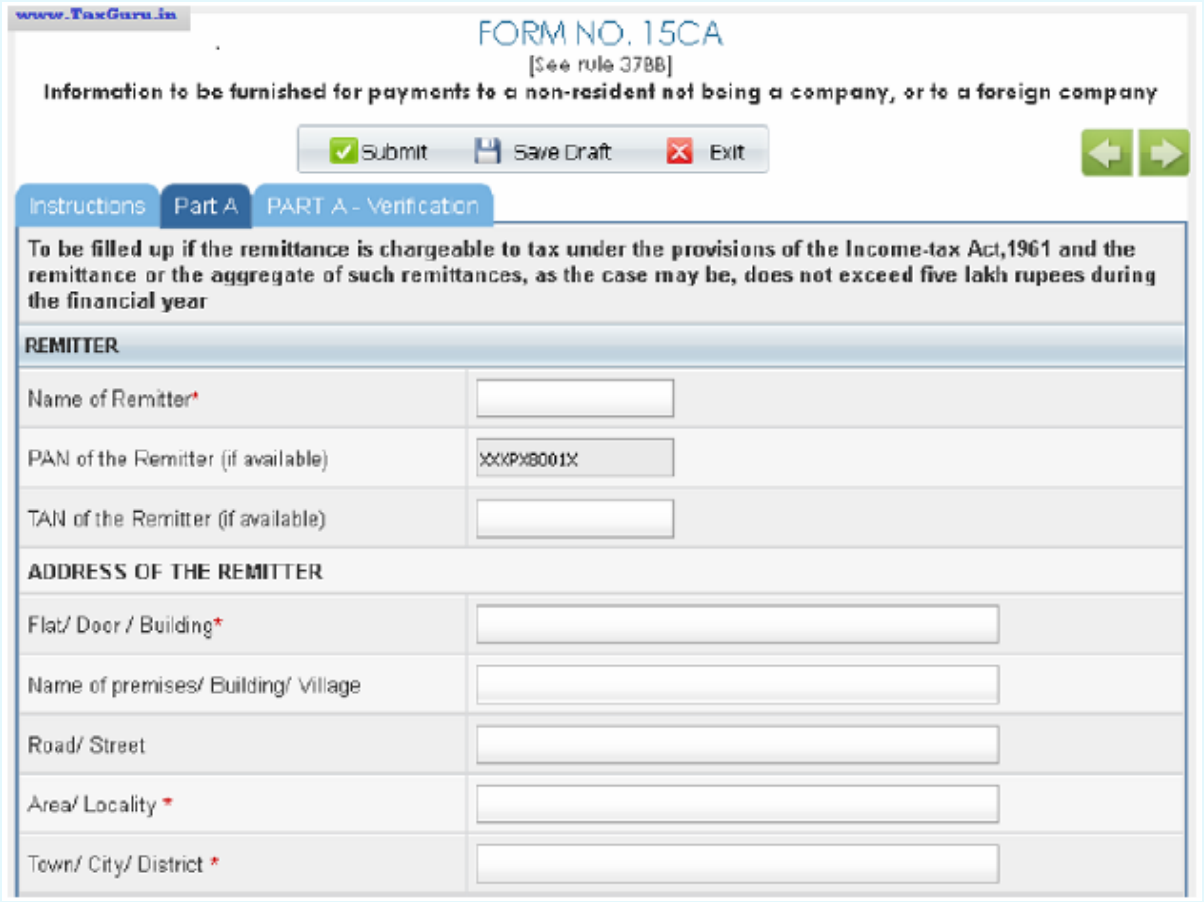


Step 3 – Generate signature file using DSC utility

Step 4 – Select relevant part of Form 15CA

Procedure to file Form 15CB

Step 5 – Form 15CA will appear, fill in required fields



Step 6 – On successful submission, transaction ID and E-mail confirming successful submission is generated

Documents for issuing 15CB

❖ For understanding of transaction

- ❑ Agreement / Purchase order & Invoice
- ❑ Transaction details and correspondence
- ❑ Technical advice (if obtained / required)
- ❑ Payee's certificate that it has no Business Connection in India
- ❑ SBI's TTBR certificate or **rates published by RBI**

❖ If availing DTAA benefit

- ❑ Valid TRC
- ❑ Form 10F
- ❑ NO Permanente Establishment (PE) certificate

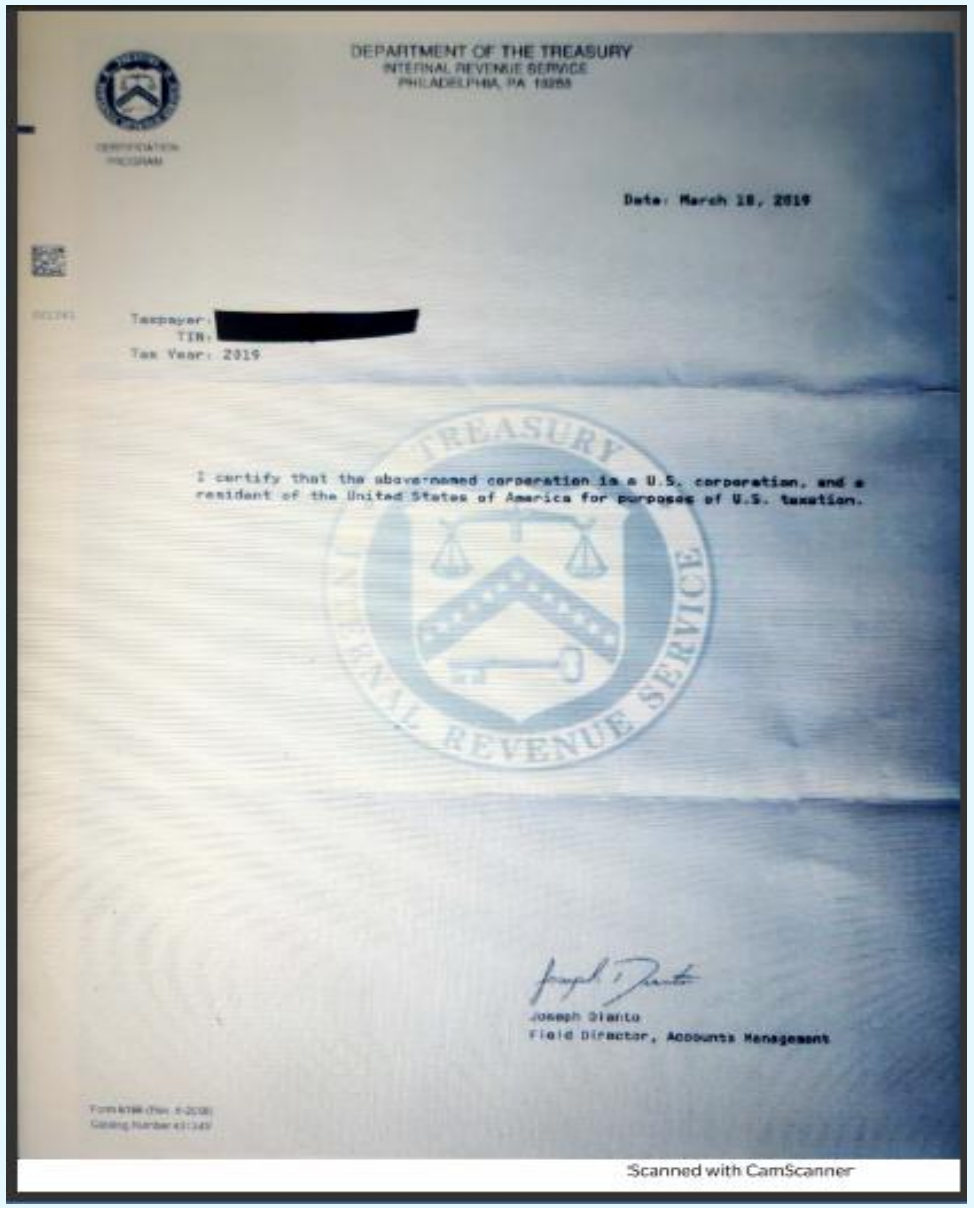
Documents for issuing 15CB

- **Declaration post MLI**

In framework of Article 7 of MLI- Prevention of Treaty abuse:

- **Obtaining benefit of treaty is not a principle purpose.**
- **Beneficial owner.**
- **Non resident payee is not a shell or conduit company.**
- **All necessary facts for purpose of WHT in India as per provisions of Income tax Act and treaty have been disclosed with the payer.**
- **Indemnification if required**

Tax Residency Certificate



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
PHILADELPHIA, PA 19255

Date: March 18, 2019

Taxpayer: [redacted]
TIN:
Tax Year: 2019

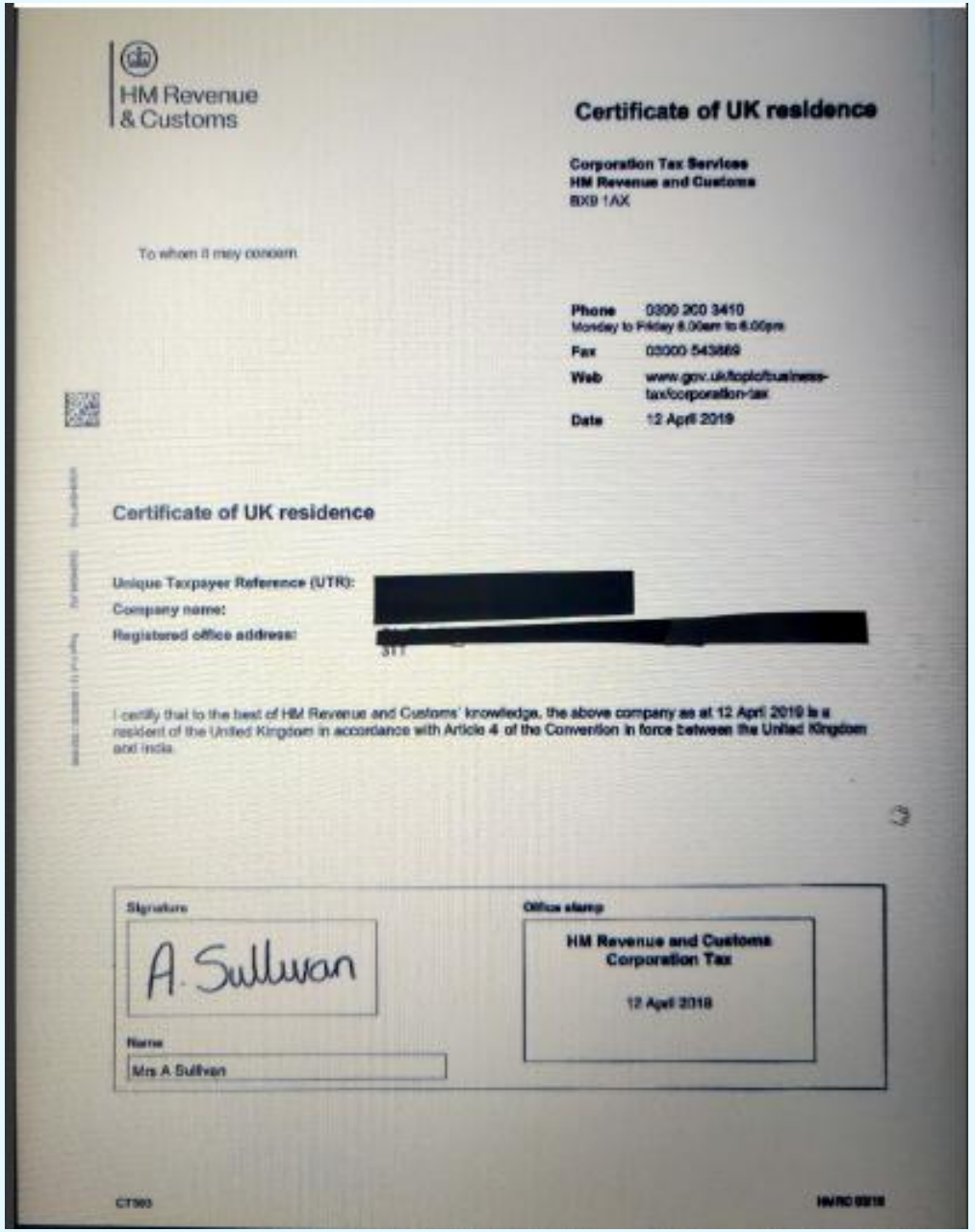
I certify that the above-named corporation is a U.S. corporation, and a resident of the United States of America for purposes of U.S. taxation.

Joseph Dianto
Field Director, Accounts Management

Scanned with CamScanner

US TRC
Issued by
Department of Treasury,
IRS, Philadelphia

Tax Residency Certificate



HM Revenue & Customs

Certificate of UK residence

Corporation Tax Services
HM Revenue and Customs
BX9 1AX

To whom it may concern

Phone 0300 200 3410
Monday to Friday 8.00am to 6.00pm
Fax 03000 543869
Web www.gov.uk/topic/business-tax/corporation-tax
Date 12 April 2019

Certificate of UK residence

Unique Taxpayer Reference (UTR): [redacted]
Company name: [redacted]
Registered office address: [redacted]

I certify that to the best of HM Revenue and Customs' knowledge, the above company as at 12 April 2019 is a resident of the United Kingdom in accordance with Article 4 of the Convention in force between the United Kingdom and India.

Signature A. Sullivan

Name Mrs A Sullivan

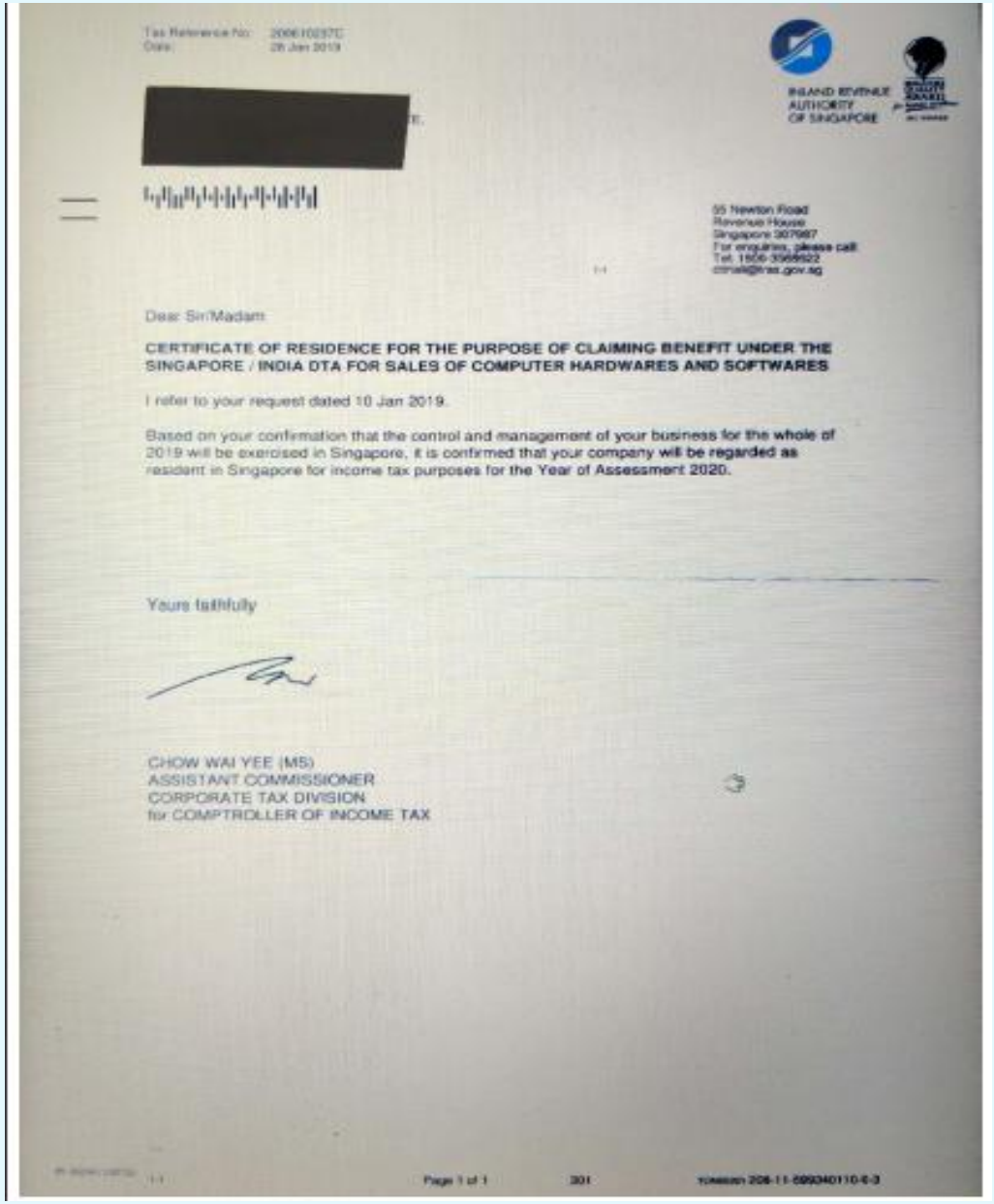
Office stamp
HM Revenue and Customs
Corporation Tax
12 April 2019

CT303

HMRC 03/18

UK TRC
Issued by HMRC

Tax Residency Certificate



Tax Reference No: 200610237C
Date: 28 Jan 2019

[redacted]

INLAND REVENUE AUTHORITY OF SINGAPORE

55 Newton Road
Revenue House
Singapore 307987
For enquiries, please call
Tel: 1800-3568622
cirrals@iras.gov.sg

Dear Sir/Madam

CERTIFICATE OF RESIDENCE FOR THE PURPOSE OF CLAIMING BENEFIT UNDER THE SINGAPORE / INDIA DTA FOR SALES OF COMPUTER HARDWARES AND SOFTWARES

I refer to your request dated 10 Jan 2019.

Based on your confirmation that the control and management of your business for the whole of 2019 will be exercised in Singapore, it is confirmed that your company will be regarded as resident in Singapore for income tax purposes for the Year of Assessment 2020.

Yours faithfully

CHOW WAI YEE (MS)
ASSISTANT COMMISSIONER
CORPORATE TAX DIVISION
for COMPTROLLER OF INCOME TAX

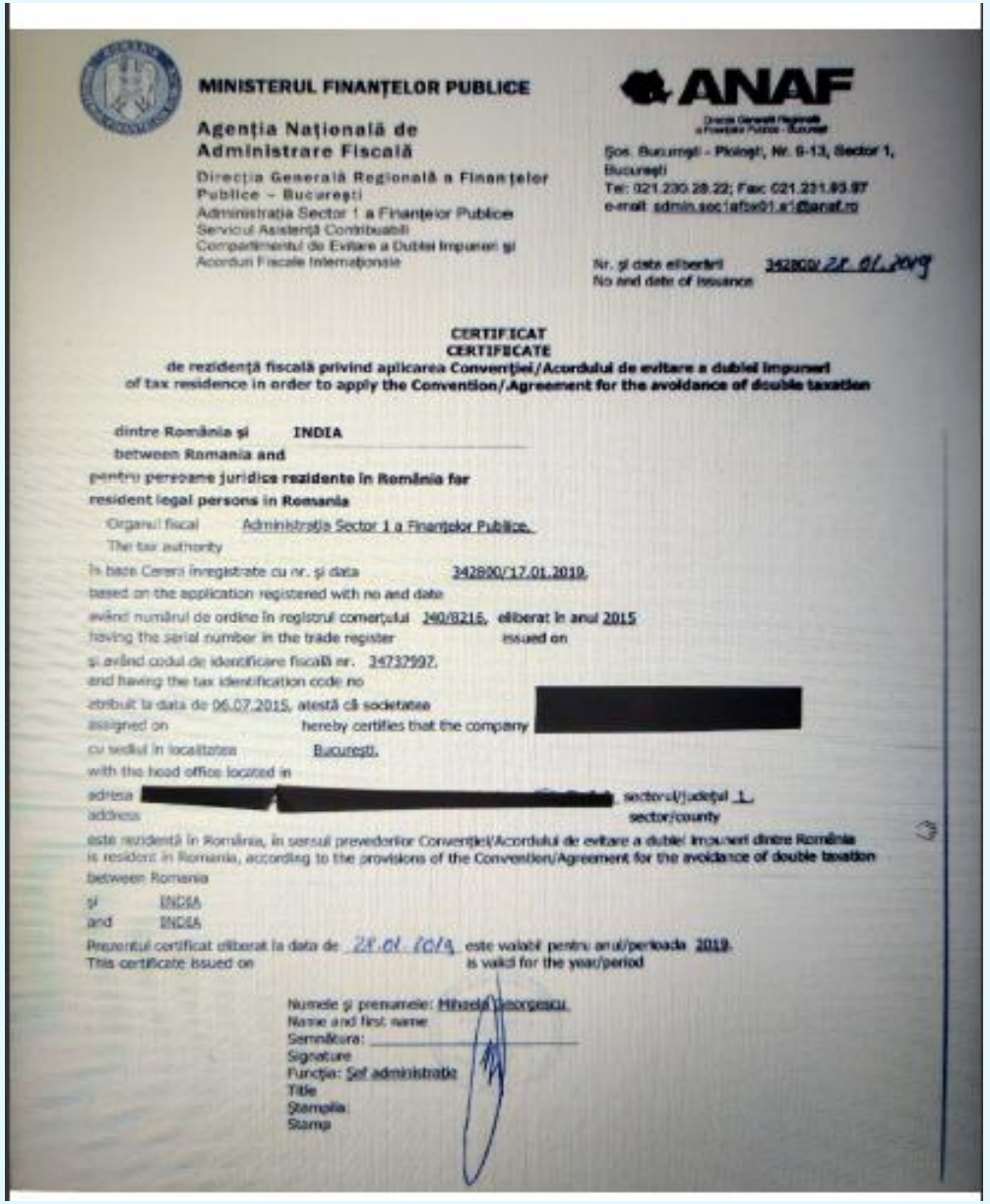
Page 1 of 1 301

Singapore TRC Issued by IRAS

Tax Residency Certificate

Netherlands TRC

Tax Residency Certificate



MINISTERUL FINANȚELOR PUBLICE

Agenția Națională de Administrare Fiscală

Direcția Generală Regională a Finanțelor Publice – București
Administrația Sector 1 a Finanțelor Publice
Serviciul Asistență Contribuabili
Compartimentul de Evitare a Dublei Impuneri și Acorduri Fiscale Internaționale

ANAF

Șos. București – Ploiești, Nr. 9-13, Sector 1, București
Tel: 021.230.28.22; Fax: 021.231.93.97
e-mail: admin.soc1afbx01.a1@anaf.ro

Nr. și data eliberării / No and date of issuance: 342800/ 28.01.2019

CERTIFICAT
CERTIFICATE
de rezidență fiscală privind aplicarea Convenției/Acordului de evitare a dublei impuneri
of tax residence in order to apply the Convention/Agreement for the avoidance of double taxation

dintre România și / between Romania and: INDIA

pentru persoane juridice rezidente în România / for resident legal persons in Romania

Organul fiscal / The tax authority: Administrația Sector 1 a Finanțelor Publice,

În baza Cererii înregistrate cu nr. și data / based on the application registered with no and date: 342800/17.01.2019,

având numărul de ordine în registrul comerțului / having the serial number in the trade register: J40/8216, eliberat în anul / issued on: 2015

și având codul de identificare fiscală nr. / and having the tax identification code no: 34737997,

atribuit la data de / assigned on: 06.07.2015, atestă că societatea / hereby certifies that the company: [redacted]

cu sediul în localitatea / with the head office located in: București,

adresa / address: [redacted], sectorul/județul / sector/county: 1,

este rezidentă în România, în sensul prevederilor Convenției/Acordului de evitare a dublei impuneri dintre România / is resident in Romania, according to the provisions of the Convention/Agreement for the avoidance of double taxation between Romania

și / and: INDIA

Prezentul certificat eliberat la data de / This certificate issued on: 28.01.2019 este valabil pentru anul/perioada / is valid for the year/period: 2019.

Numele și prenumele / Name and first name: Mihaela Georgescu
Semnătura / Signature:
Funcția / Title: Șef administrație
Ștampila / Stamp

Romania TRC

"FORM NO. 10F

[See sub-rule (1) of rule 21AB]

Information to be provided under sub-section (5) of section 90 or sub-section (5) of section 90A of the Income-tax Act, 1961

•I, ..., *son/daughter of Shri . . . . . in the capacity of . . . . . (designation) do provide the following information, relevant to the previous year 2019-20 *in my case/in the case of _____ for the purposes of sub-section (5) of * section 90/section 90A:—

Sl.No.	Nature of information		Details#
(i)	Status (individual; company, firm etc.) of the assessee	:	
(ii)	Permanent Account Number (PAN) of the assessee if allotted	:	
(iii)	Nationality (in the case of an individual) or Country or specified territory of incorporation or registration (in the case of others)	:	
(iv)	Assessee's tax identification number in the country or specified territory of residence and if there is no such number, then, a unique number on the basis of which the person is identified by the Government of the country or the specified territory of which the assessee claims to be a resident	:	
(v)	Period for which the residential status as mentioned in the certificate referred to in sub-section (4) of section 90 or sub-section (4) of section 90A is applicable	:	Tax year 2019 relevant to Financial Year 2019-20
(vi)	Address of the assessee in the country or territory outside India during the period for which the certificate, mentioned in (v) above, is applicable	:	

2. I have obtained a certificate referred to in sub-section (4) of section 90 or sub-section (4) of section 90A from the Government of _____ (name of country or specified territory outside India).

Signature: . . . . . .

Name: . . . . . .

Address: . . . . . .

Permanent Account Number: . . . . . .

Verification

I . . . . . do hereby declare that to the best of my knowledge and belief what is stated above is correct complete and is truly stated.

Verified today the … day of……, 2019

. . . . . .

Signature of the person providing the information

Place: . . . . . .

No PE certificate

[redacted]

1. We [redacted] are a company established in Israel.

2. We confirm that we are a tax resident of Israel within the meaning of Article 4 of the Double Taxation Avoidance Agreement entered into between India and Israel ('Treaty'), and hence we are eligible to claim relief under the provisions of Treaty for the period 1-January-2020- 31-December-2020.

3. AppsFlyer Ltd will continue to maintain the 'resident' status in Israel for the purpose of Article 4 of the Treaty, during the period referred hereinabove and in case there is a change in the status, we will inform you immediately.

4. We believe that the activity of AppsFlyer Ltd's subsidiaries in India does not give rise to a permanent establishment of AppsFlyer Ltd in India for the period 1-January-2020- 31-December-2020.

5. We further undertake to notify your good office immediately if there is a change in the facts or status of our company in relation to being or operating a Permanent Establishment as stated herein above.

[redacted]

[redacted]

Section 206AA

- Section begins with Non-obstante words – "**Not withstanding** anything contained in any other provisions of this act …".

- It mandates that recipient of sum, income or amount on which tax is deductible, has to furnish his PAN to the payer.

- In case if PAN is not furnished, payer has (obligation) to deduct tax at higher of the following rates:
  - rate in specific provision of the act;or
  - rate in force; or
  - rate of 20% (S. 206AA(1)(iii).

This emerged as a huge issue in cases where non-residents did not have PAN and as a result payer's were withholding tax @20%

Section 206AA

Rule 37BC vide CBDT Notification No.53/2016 dated 24th June 2016:

PAN not required for payment of: Interest on Long Term Infrastructure bonds referred to in S. 194LC. & for **"Specified incomes":** Interest, Royalty, FTS, and For transfer of capital asset (capital gain), **But** only if non-resident provides specified information and documents (Rule 37BC(2)).

- **Basic information** i.e name , email id, contact number, and address in the country of tax residence.
- **TRC if the law of country of tax residence** provides for issuance of such certificate.
- **Tax Identification Number**(where no such number is available, other unique number by which such payee is identified in the country of tax residence)

Practical Challenges

#1 Tax Residency Certificate (TRC)

Revenue
Cáin agus Custaim na hÉireann
Irish Tax and Customs

Aonad Gnó TCE 2
Rannóg na gCásanna Móra Corparáideacha
Teach Ballaugh, 73-79 Sráid an Mhóta Iocht
Baile Átha Cliath 2

Information, Communications & Technology District 2
Large Corporates Division
Ballaugh House, 73-79 Lower Mount Street
Dublin 2

To whom it may concern

02/01/2019

Ref : 9692928F

Re : FACEBOOK IRELAND LIMITED

Certification of Tax Residence for Tax Year 2019
Ireland/Poland Double Taxation Treaty

Dear Sir/Madam,

I confirm that the above named company is registered for corporation tax in Ireland and files its corporation tax returns, for the year stated above, on the basis that it is resident for tax purposes in Ireland. The company is therefore liable to Irish corporation tax on all of its profits wherever arising, for the said year.

Yours faithfully,

Áine Gorman
Information, Communications & Technology District 2
Large Corporates Division

Information, Communications & Technology District 2
Large Corporates Division

02/01/2019

Ballaugh House, 73-79 Lower Mount Street
Dublin 2

- TRC received in foreign language
- Available for earlier year(s), but not for current year
- TRC applied for, but not available on date of deduction

SKAPS INDUSTRIES (AHD.): DTAA benefits cannot be denied merely due to non-availability of TRC. When NR has substantiated its residential status by way of sufficient and reasonable documentary evidence, requirement of furnishing TRC would be persuasive and not mandatory

- Validity of TRC: Where tax year is a calendar year; TRC valid for multiple years
- Countries with no TRC
- Where following are furnished in place of TRC
  - Business license as a TRC
  - Certificate issued by an 'Association'
  - TIN / Unique No. by which Govt of that country identify him as resident

UNITED ARAB EMIRATES
MINISTRY OF FINANCE

الإمارات العربية المتحدة
وزارة المالية

Tax Domicile Certificate for Individuals

Submission Date: 16 September 2019

Application Number: TAX/ [illegible] 1/2019

Name: [illegible]
Nationality: India
Passport Number: XXXXXX
Visa Number: XXXXXX

Pursuant to the Agreement for the Avoidance of Double Taxation signed between the Government of the United Arab Emirates and the Government of **Republic of India** on **29 April 1992**, the UAE Ministry of Finance certifies that [illegible] is resident of the United Arab Emirates.

This certificate is valid from **16 September 2019** to **15 September 2020**.

This certificate is electronically certified without stamp and signature from Ministry Of Finance in United Arab Emirates on 12 October 2019 15:53

#2 Characterisation

- Inability to characterize the transaction, say, due to absence of a valid (or sufficiently detailed) agreement, purchase order, and / or any other document
- Conflicting court decisions as regards characterization
- Composite payment (i.e. different nature of remittances clubbed in a single invoice)
- The Authorized Dealer (AD) Banks fail to agree with the purpose code put in by C.A. On the other hand, the purpose code suggested by the banker does not do justice to the identification of nature of remittance and also could conflict with characterization of transaction

#3 'Transfer of Shares'

- A Netherland company had acquired shares in an Indian company in November, 2019
- In March, 2020 it sold the shares to another non-resident (BVI entity) for the same price shares were acquired. In other words, the same shall be classified as "short term" and taxable as per domestic law
- Assuming treaty benefit is unavailable. Accordingly, the same is taxable as per Domestic Tax law. However, as per the capital gain computation, the resultant figure will not result in any tax payable situation in India.

Issues

- Whether it is advisable to file 15CA/Form 15CB in view of provisions of section 195 read with Rule 37BB, even if the transaction is NOT taxable ?
- If yes, compliance to be done under Part C of 15CA, or alternatively under Part D of 15CA ?

** Same issue may arise if sale of shares results in capital loss*

#3 'Transfer of Shares'

Section 195(6) read with Rule 37BB requires reporting of any payment made to a NR irrespective of its chargeability to tax in India.

Part C-15CA	Part D- 15CA
Part C of the form 15CA is a full-fledged format which requires elaborate details like provisions of the Act/DTAA under which payment is taxable	Part D applies where payments are not chargeable under the Act. Part D is a simple self-declaration format which requires bare minimum details like country to which remittance is made, amount and nature of remittance etc
15CB i.e. CA certification required	No CA certification required

While it is arguable that since there is no income taxable in India, Part D should be applicable. However, considering the magnitude of transactions, it is advisable to comply with the reporting obligation under Part C of Form 15CA along with Form 15CB to avoid any litigation in future.

#4 ‘Consideration is paid in Kind’

- Sing Co. holds shares in I Co1.
- Sing Co. transfer shares held in ICo.1 to ICo2. In consideration ICo2 issues its shares to Sing Co. (swap of shares)

Issues:

- Whether the transfer of shares, wherein consideration is discharged by issue of shares requires furnishing of information under Section 195(6) read with Rule 37BB

**** Sing Co is company incorporated in Singapore and ICO1 and ICO2 are companies incorporate in India***

#4 ‘Consideration is paid in Kind’

- The provisions of Section 195 are wide enough to cover the transaction where consideration is discharged by way of issuance of shares (section uses the words - payment thereof in cash or by the issue of a cheque or draft or by any other mode)

- Resident payer may need to comply with requirements of Rule 37BB r.w. Form 15CA/CB even though there is no actual remittance but the payment is in kind (in this case share swap).

- Supreme Court ruling in the case **Kanchanjanga Sea Foods (265 ITR 644)** held that WHT obligation under section 195 is triggered even in a case where payment is made in kind.

- Therefore, it is advisable to file applicable Form. It is possible that ICo2 may face practical difficulties if the e-filing system does not recognise payment in kind and/or payment not involving foreign remittance from India

- However, to demonstrate taxpayer's sincerity and bonafides, it is suggested that the payer should retain the evidence of having attempted to upload Form No. 15CA and send the physical copy of Forms to the Tax Authority as physical record with proper explanation.

#5 ‘Transaction covered under presumptive taxation’

- A German company is providing services to an Indian company in connection with, or supplying plant and machinery on hire used, or to be used, in the prospecting for, or extraction or production of, mineral oils.

- The payment is covered under 44BB and therefore, a sum equal to ten per cent of the aggregate of the amounts paid/payable shall be deemed to be the profits and gains of such business chargeable to tax

Issues:

- Rate of TDS to be mentioned in Form 15CA/CB

- Whether it conflicts with section 206AA (assuming payee does not have PAN)

#5 ‘Transaction covered under presumptive taxation’

- Applying the provisions of section 44BB and doing the math, the rate at which tax is deductible comes to 4% (10% of 40%) plus applicable surcharge and cess. Assume the rate comes to 4.368%

- Accordingly the rate to be mentioned in form 15CA/15CB should be 4.368%

- 206AA is applicable when the payee does not have PAN. Accordingly, payer has (obligation) to deduct tax at higher of the following rates:
  - rate in specific provision of the act;or
  - rate in force; or
  - rate of 20% (S. 206AA(1)(iii).

- It can be argued that rate at which tax is deducted is actually (in substance) 40% which is higher than 20% and therefore, 206AA is complied.

#6 ‘Reimbursement’

- Indian Co reimbursing certain amount to foreign co incurred by the foreign co on behalf of the Indian Co.

Issues

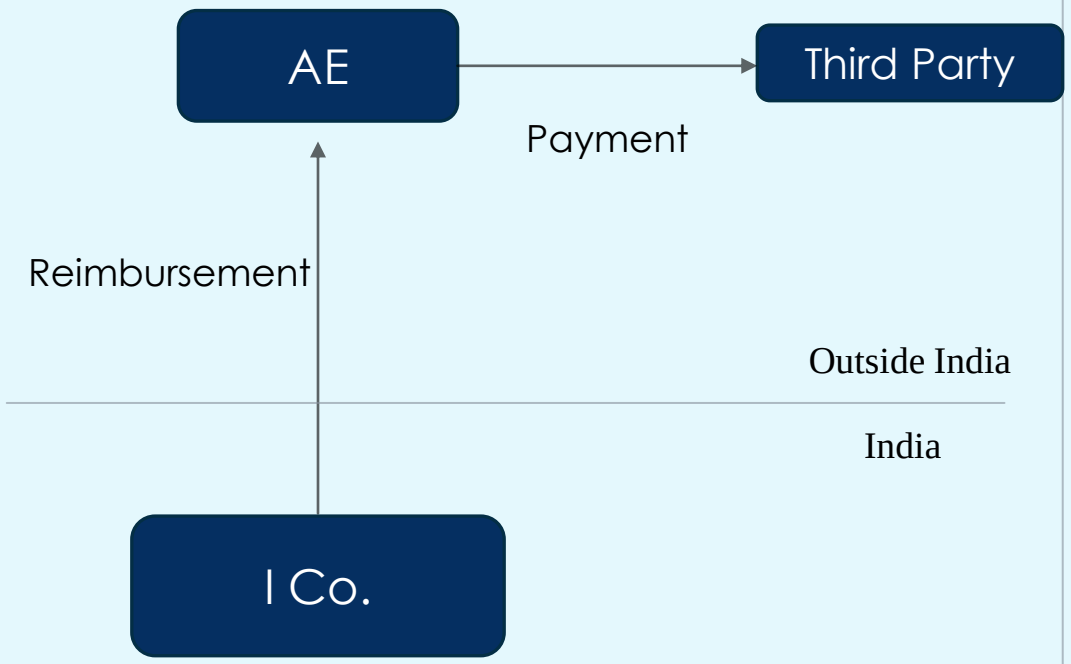
- Whether it is taxable in India
- Which part of 15CA should be filed

- There is no element of income when there is a reimbursement as reimbursement is made on a cost to cost basis.
- CIT vs. Siemens Aktiongesellschaft (310 ITR 320)

The reimbursement of expenses incurred on behalf of payer was not income chargeable to tax in payee's hands.

- Ideally, form 15CA-Part D should be filed as the remittance is not chargeable to tax in India. However, it has often been seen that AD banks insists for a CA certificate (NOC). As a result, 15CB is issued and accordingly, 15CA-Part C is filed.

#6A 'Reimbursement'



FACTS:

- I Co was availing services from a third party overseas.
- payment for these services were being routed through its AE, which claimed such receipts to be plain reimbursements

C.U. Inspection (I) P Ltd vs DCIT (Mumbai Tribunal); DCIT (TDS) vs Kodak India P Ltd (Mumbai Tribunal); Ershisanye Construction Group India P Ltd vs DCIT (Kolkata Tribunal)

- In such cases it was observed that had the Indian companies directly incurred such expenses, and therefore Withholding Tax Provisions should have applied to these.
- It is clear that just because a transaction is routed through a foreign group company this cannot alter the nature of the payment made as reimbursement.
- In such cases, the Indian companies were held to be liable to Withholding Tax on their payment to their foreign group companies

#7 Remittance made to a Foreign Bank Branch of an Indian Bank

- I CO imported goods from an entity in China
- I CO obtained funding (i.e. trade/buyer‟s credit against imports) from “MNO Bank India, China Branch (‘MNO China’)
- In order to repay this credit, I Co has availed another buyers credit from another bank say ABC Bank
- The proceeds of buyer’s credit availed from ABC Bank, credited to I Co’s Indian Bank will be utilised to repay the buyer’s credit (includes Principal, Interest and Bank charges) availed from MNO China

issue

- Whether 15CA/CB compliance is required for the payment made by I Co to MNO China ?

#7 Remittance made to a Foreign Bank Branch of an Indian Bank

- Where MNO China is regarded to be a branch of MNO India, payment made to MNO China will be treated at par with payments being made to an Indian Bank (resident in India)

- This is for the reason that a foreign branch of an Indian Bank is regarded to be an extension of the Indian Bank itself and not a separate foreign entity

- Reporting under 195(6) is required when the payment is made to a non-resident. In this case the payment is made to a resident therefore, no compliance under section 195(6) is required

#8 Remittance of funds by an NR from Indian bank a/c to his overseas bank a/c

- Mr. X is employed with ABC India Pvt. Ltd. (ABC). Mr. X is being sent on secondment to UAE for 3 years by ABC to work with ABC UAE.

- While Mr. X is on assignment to UAE, he receives part salary in India (in his NRO A/c) and part in UAE.

- Mr. X is a non-resident for the purpose of Income-tax. Since, the salary is received in India, it is taxable in India. Tax on this salary is duly deducted and deposited with the Indian Revenue Authorities

- Mr. X wants to remit the said amount to UAE from his Indian bank account to his UAE bank account for his family maintenance

Queries

- Whether any certification in the form of Form 15CA / Form 15CB is required to be furnished for such remittance from Mr. X Indian bank account to Mr. X UAE bank account ?

- In case yes, which Form is required to be furnished (whether both Form 15CB and Form 15CA or only Form 15CA)? Further, which part of the Form 15CA is applicable (Part A/ Part B/ Part C / Part D) ?

#8 Remittance of funds by an NR from Indian bank a/c to his overseas bank a/c

- Remittance from one account to another of the same person is a 'payment to self' which is outside the scope of withholding under the Act.

- On similar lines, compliance under section 195(6) (read with Rule 37BB) is required in respect of payments made by any person to a non-resident (NR) i.e. when two persons are involved.

- Language of section 195(6) r.w Rule 37BB which reads as follows: "The person responsible for paying to a non-resident, not being a company, or to a foreign company……" supports that the compliance is arguably attracted when payment is made by one person to another.

- Therefore, considering specific language of the provision, the payments under both the cases are not covered with the ambit of reporting in Form 15CA/B under Rule 37BB. However, there may arise some practical challenges since banks may nevertheless insist on compliance. In such cases 15CA-part D should be filed.

Name of Remitter	Mr. X
Name of recipient of remittance	Mr. X
Nature of remittance as per agreement/ document	REPATRIATION OF SURPLUS FUNDS
Relevant purpose code as per RBI	Capital Account S0099 - Other capital payments not included elsewhere

#9 Remittance is covered by Equalisation Levy

- Indian Co is making payment to a Foreign Co for online advertisement services rendered by Foreign Co.
- The said payment is covered under Equalisation Levy.
- Since, the payment is covered under Equalisation Levy, it is exempt under Income-tax in terms of the provisions of section 10(50).

Issues

- Whether reporting under 195(6) is required? Further, which part of the Form 15CA is applicable (Part A/ Part B/ Part C / Part D) ?

#9 Remittance is covered by Equalisation Levy

- The payment is subject to Equalisation Levy but not subject to tax. Further, Equalisation Levy is not levied under Income-tax. Therefore, the subject payment is not covered by the scope of section 195(1)

- However, section 195(6) read with Rule 37BB requires reporting of any payment made to a NR irrespective of its chargeability to tax in India [195(1)]

- **As the remittance is not chargeable to tax in India, Form 15CA-part D needs to be filed.**

#10 Payment made by the customer through Debit/Credit card in Foreign currency

- If the payments made by customer through Debit/Credit card in foreign currency is covered by Liberalised Remittance Scheme, there is no reporting requirement as per Rule 37BB(3)(i).

- Reporting requirement will apply only if (a) the payments are chargeable to tax in India or (b) the payments are not covered by Liberalised Remittance Scheme and Specified list of 33 exempted payments. In such case, mode of payment whether by way of bank remittance or through International Credit/Debit card may not be relevant

Consequence of non/short deduction of TDS & reporting failure

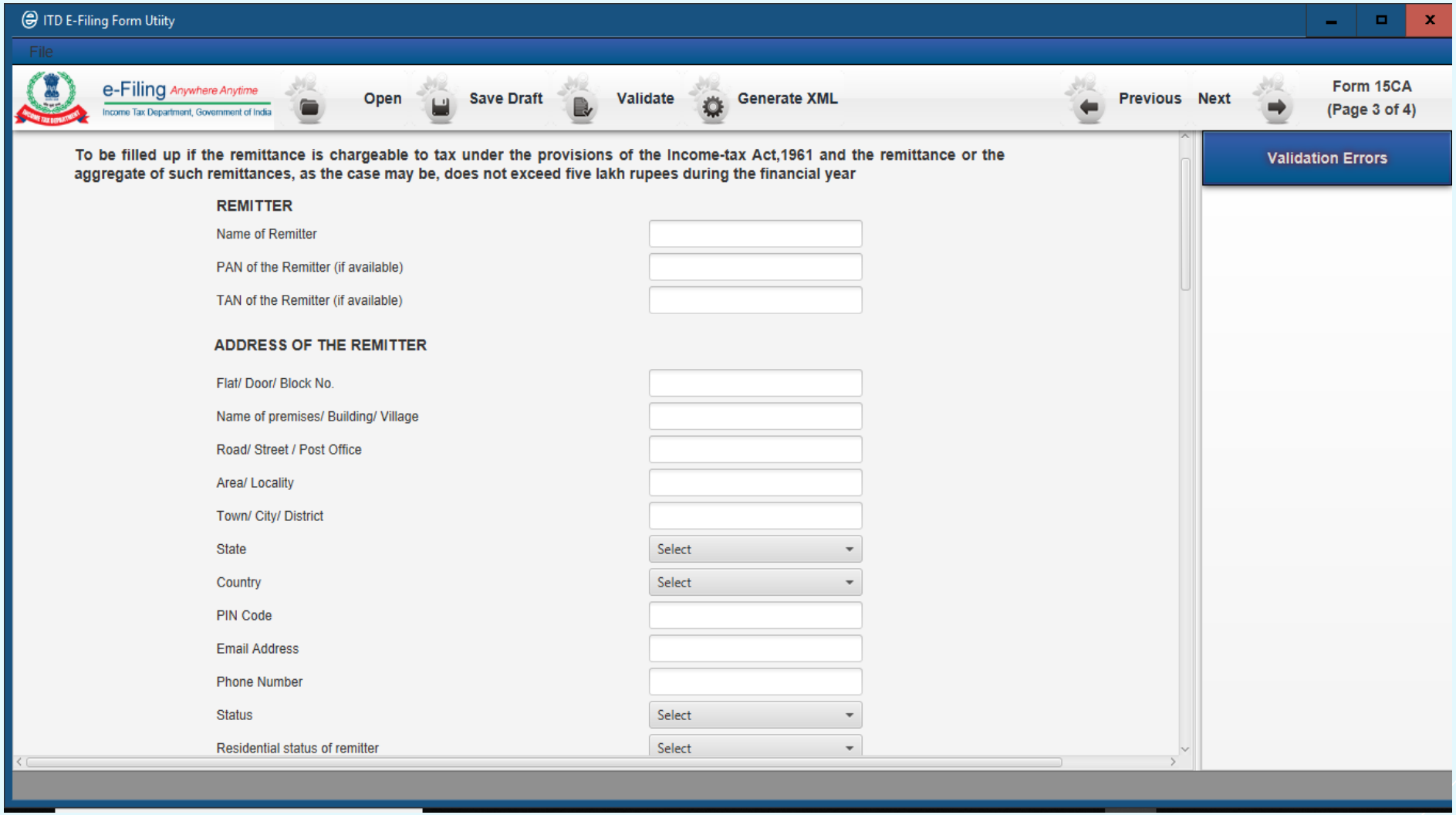
Applicable Section	Nature of Default	Consequence
40(a)(i)	WHT not deducted or not deposited within prescribed Time	Disallowance of expenses
201(1)	Tax not withheld/deposited appropriately	Recovery of tax not withheld/deposited or short withheld/deposited
Interest u/s 201(1A)	Tax not withheld/deposited appropriately	Interest @1% per month or part of the month for non deduction. Further Interest @1.5% per month is payable from the date of deduction till the date when tax is actually paid
Penalty u/s221	Tax withheld not paid	Penalty not exceeding the amount of tax not paid can be levied by AO

Consequence of non/short deduction of TDS & reporting failure

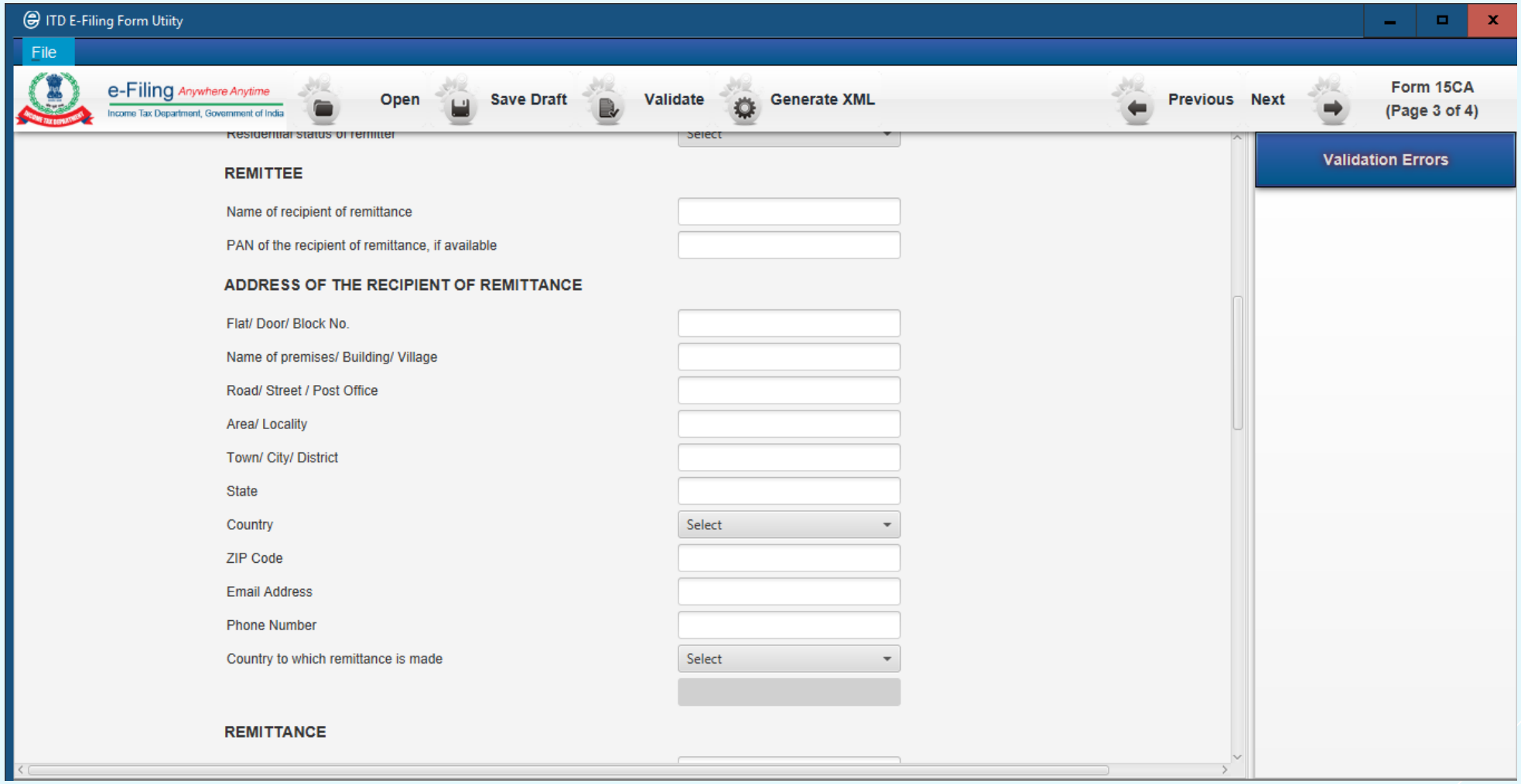
Applicable Section	Nature of Default	Consequence
Penalty u/s 271C	Tax not withheld or short withheld	Penalty, not exceeding the amount of tax not withheld can be withheld by Joint Commissioner
Penalty u/s 271-I	Non furnishing of Information or furnishing of incorrect information u/s 195(6)	Penalty of INR 1,00,000 per default
Prosecution u/s 276 B	Failure to pay tax deducted	Minimum: 3 months Maximum: 7 years
271J	Penalty for furnishing incorrect information in reports / certificates	Rs.10,000 for each such report(from 1st April 2017)

Screen Shots of Form 15CA-PartA/B/C/D

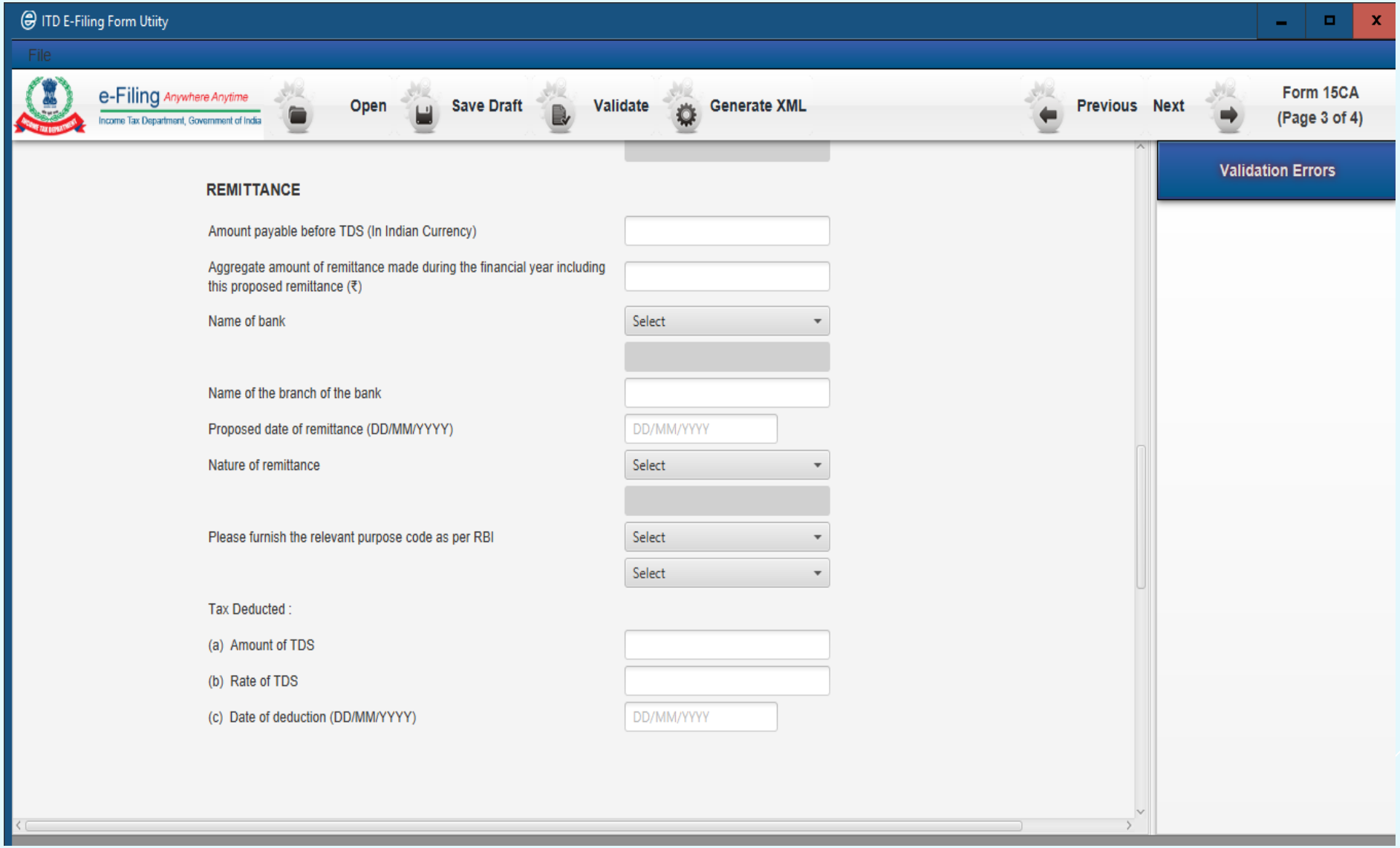
Form 15CA-Part A



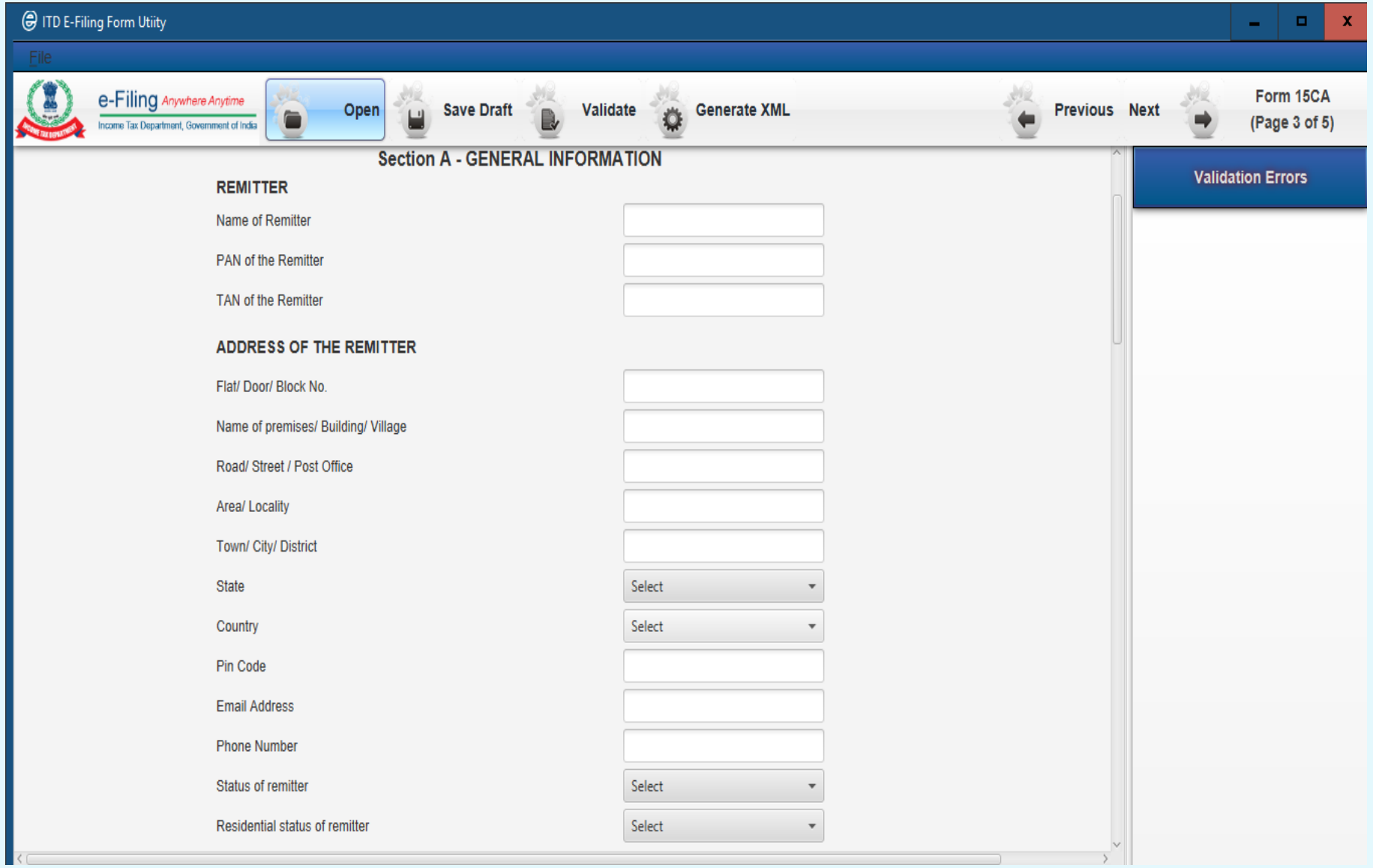
Form 15CA-Part A



Form 15CA-Part A



Form 15CA-Part B



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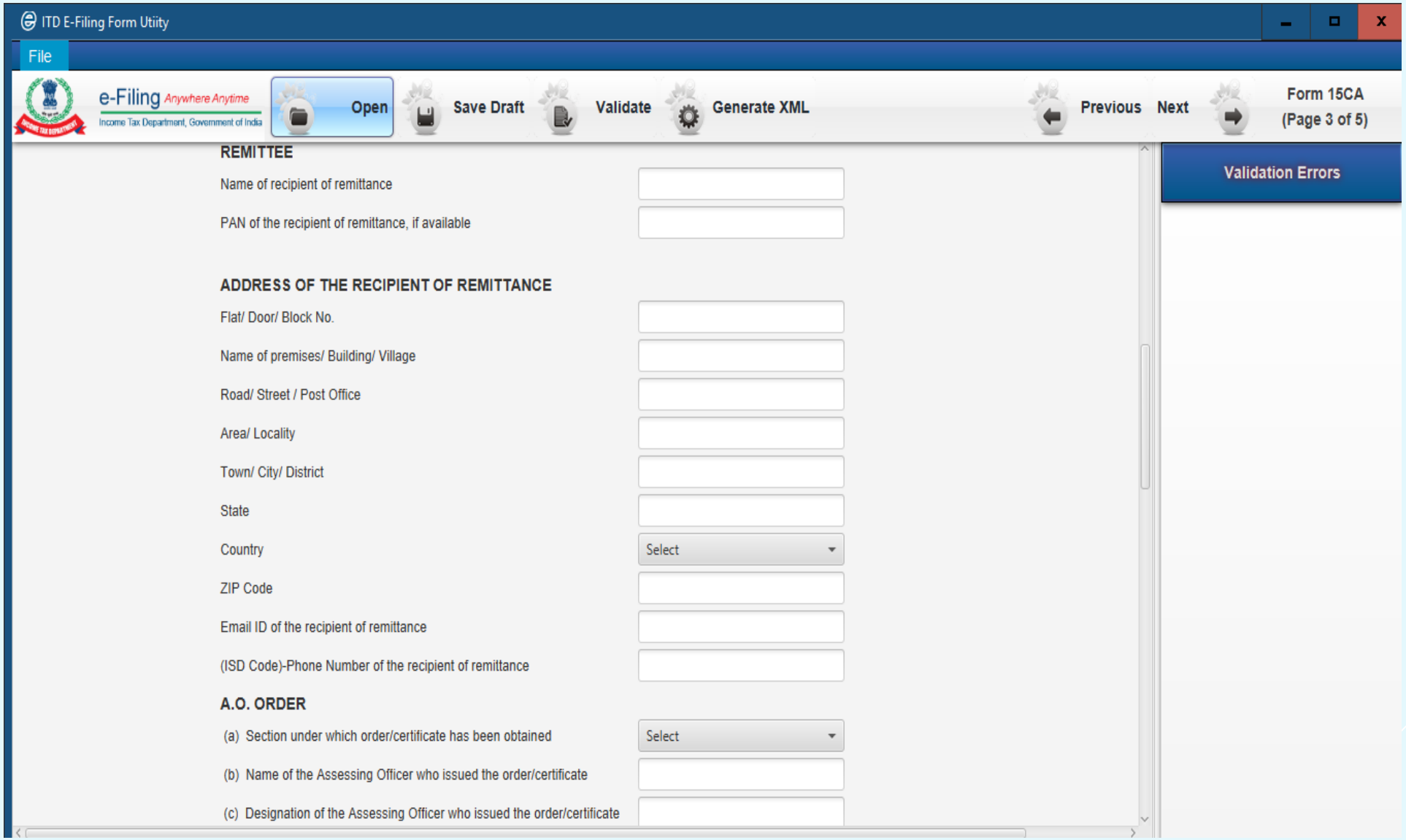

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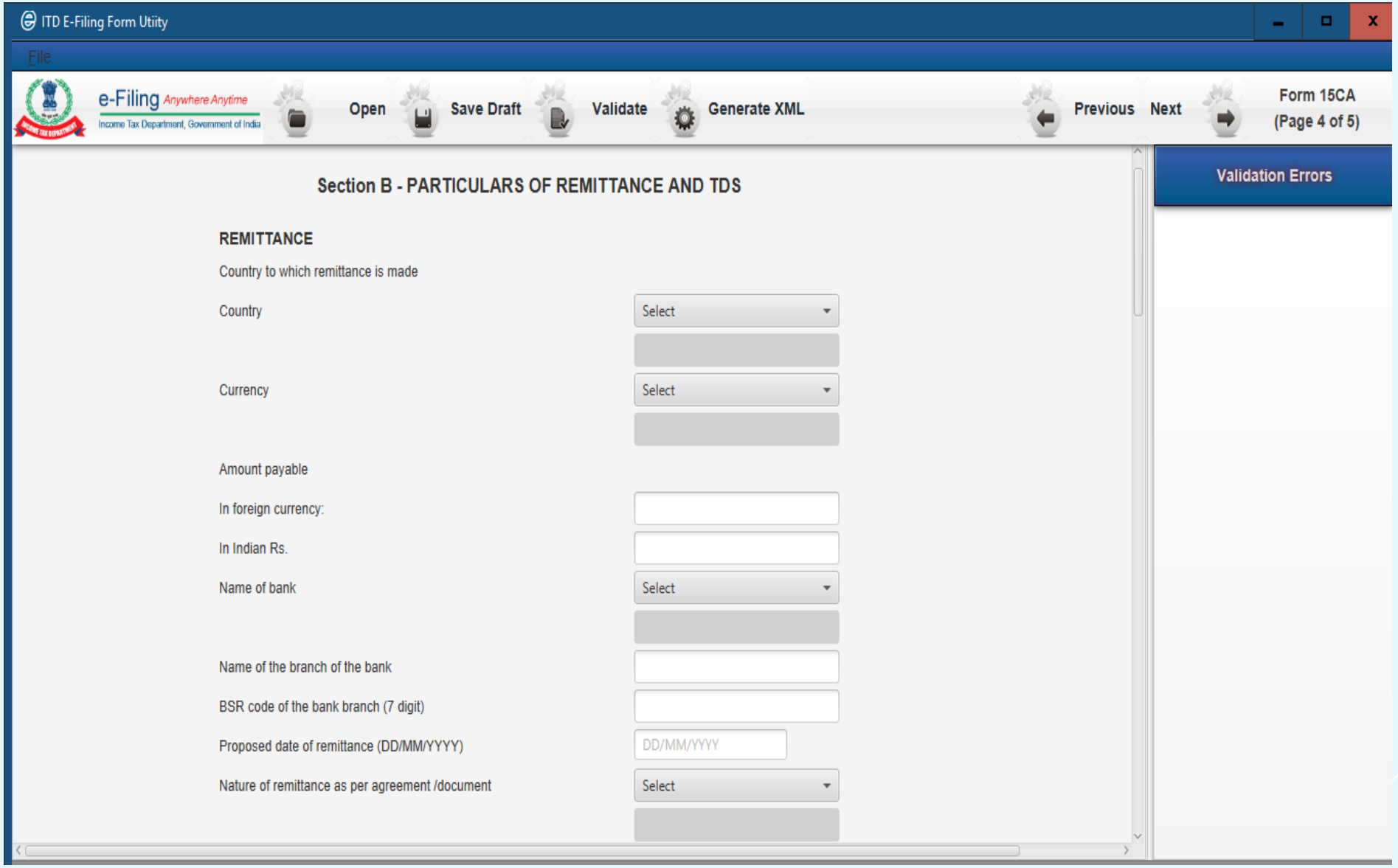

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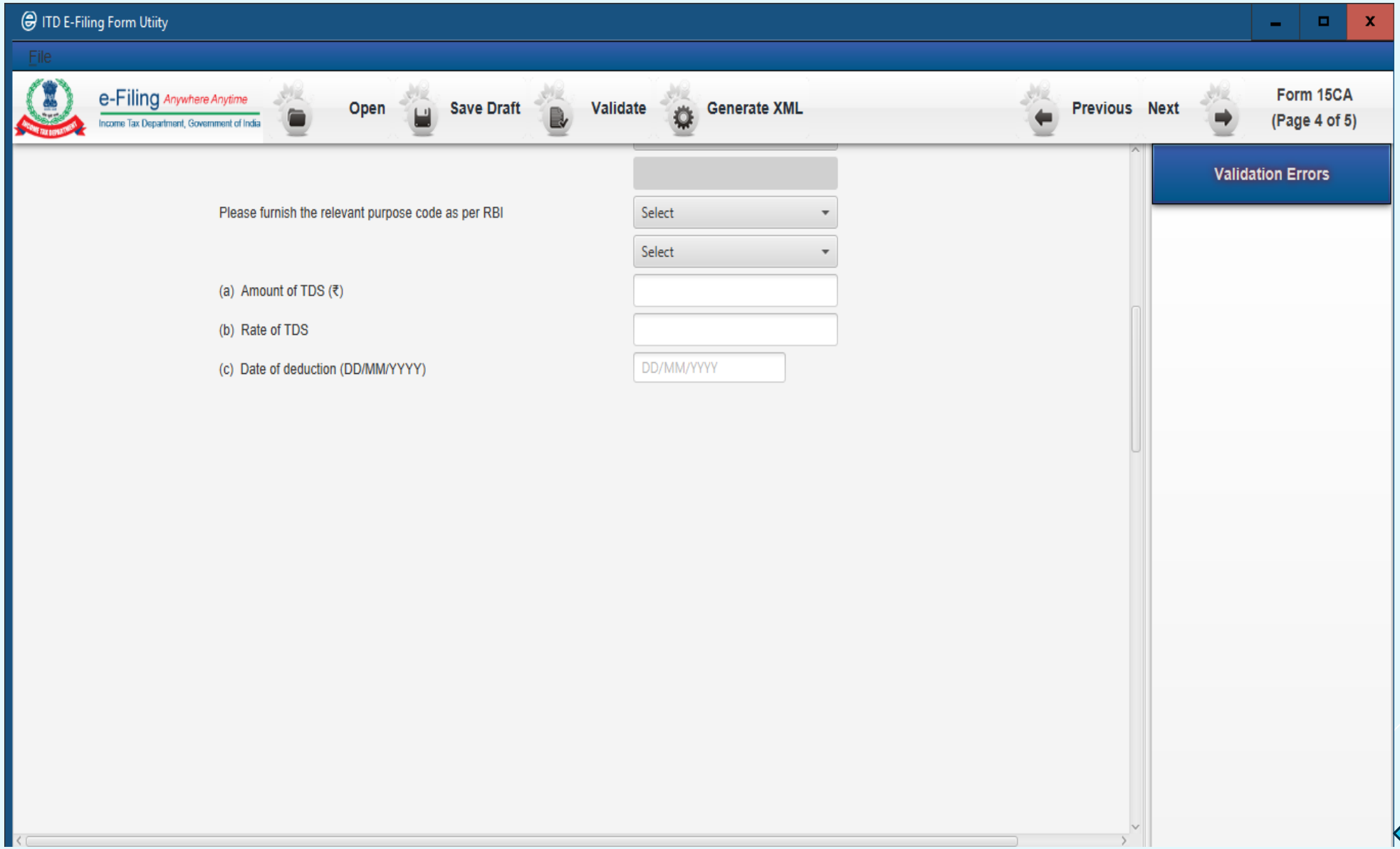
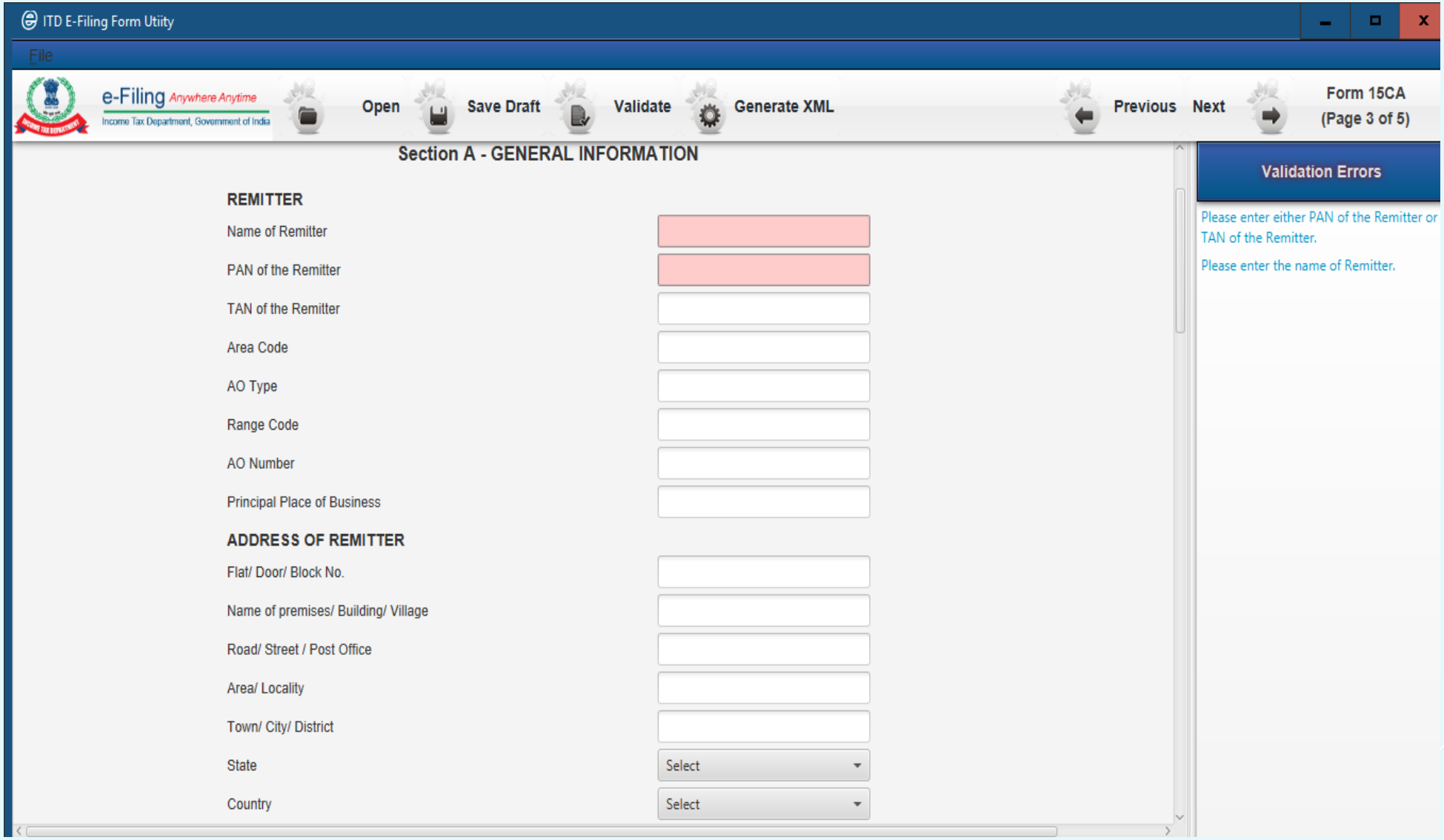


Form 15CA-Part C



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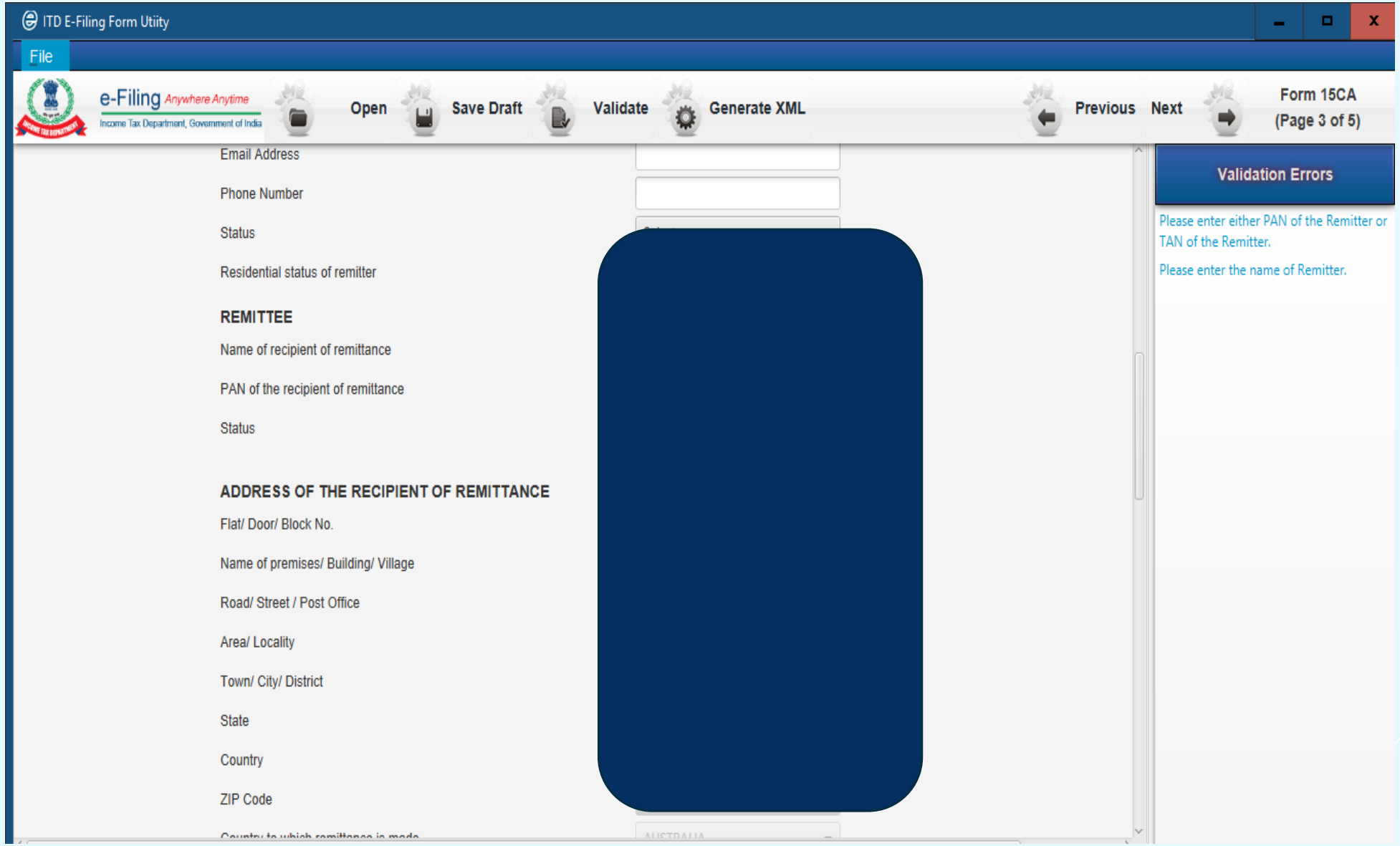

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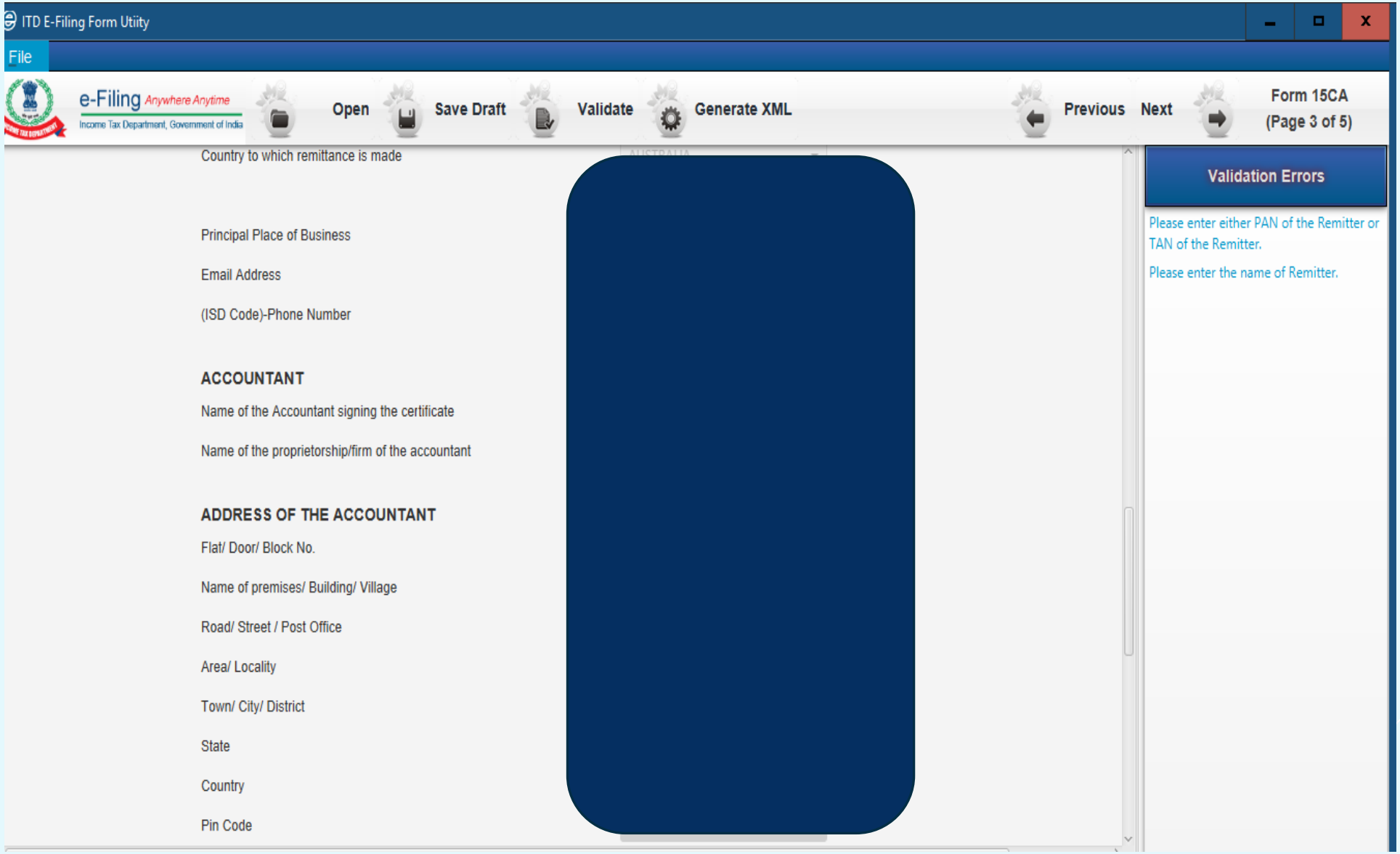

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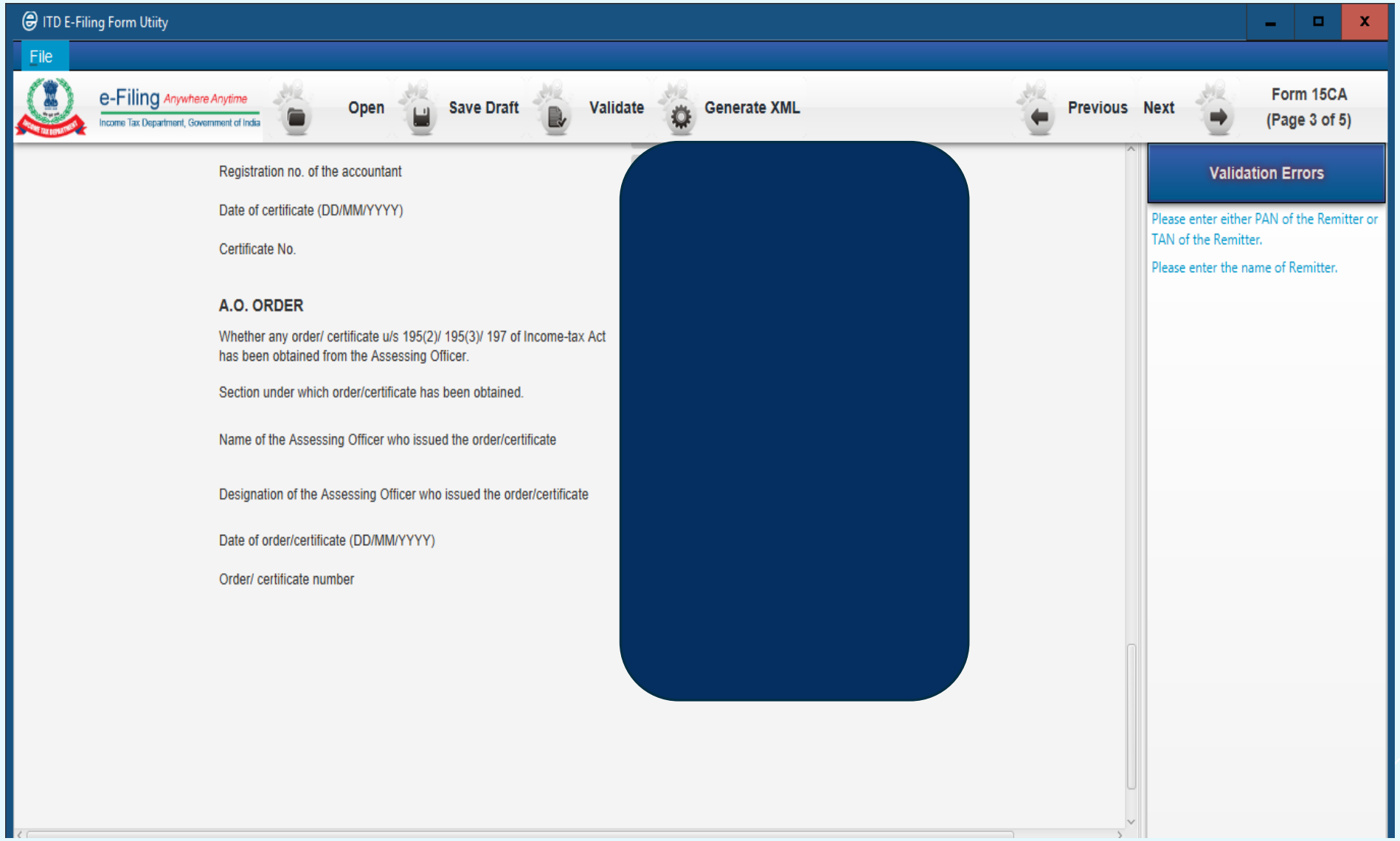

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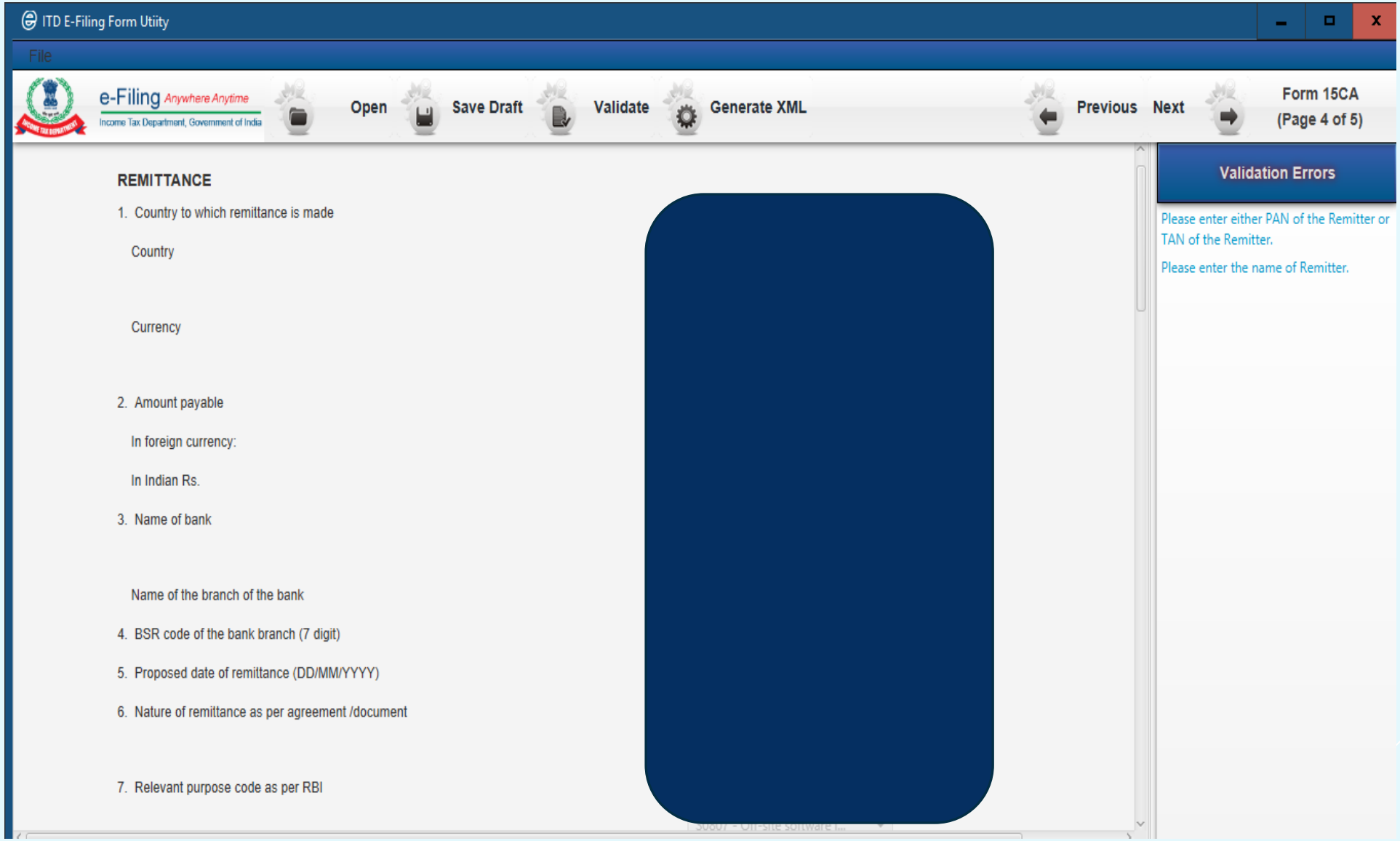

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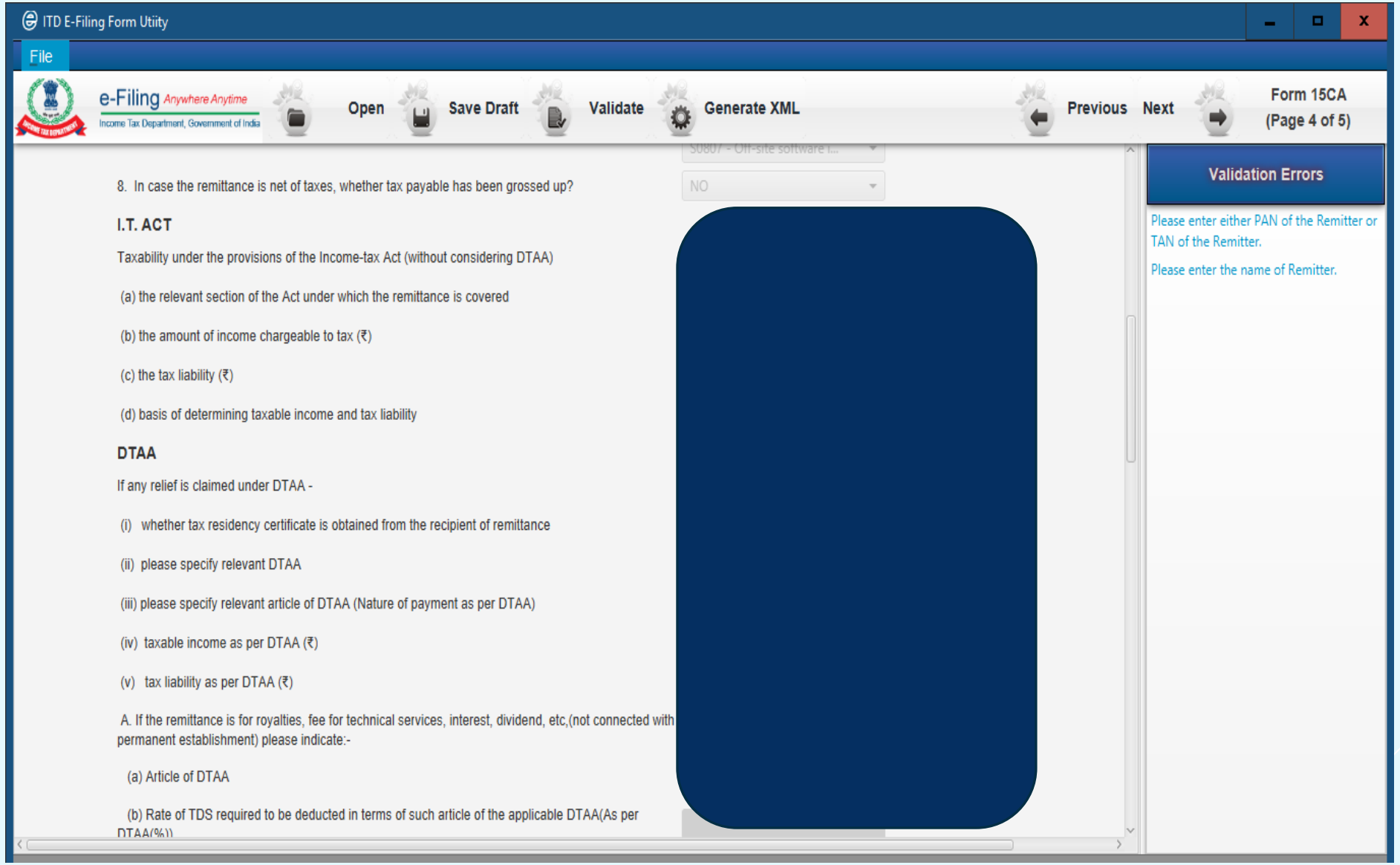
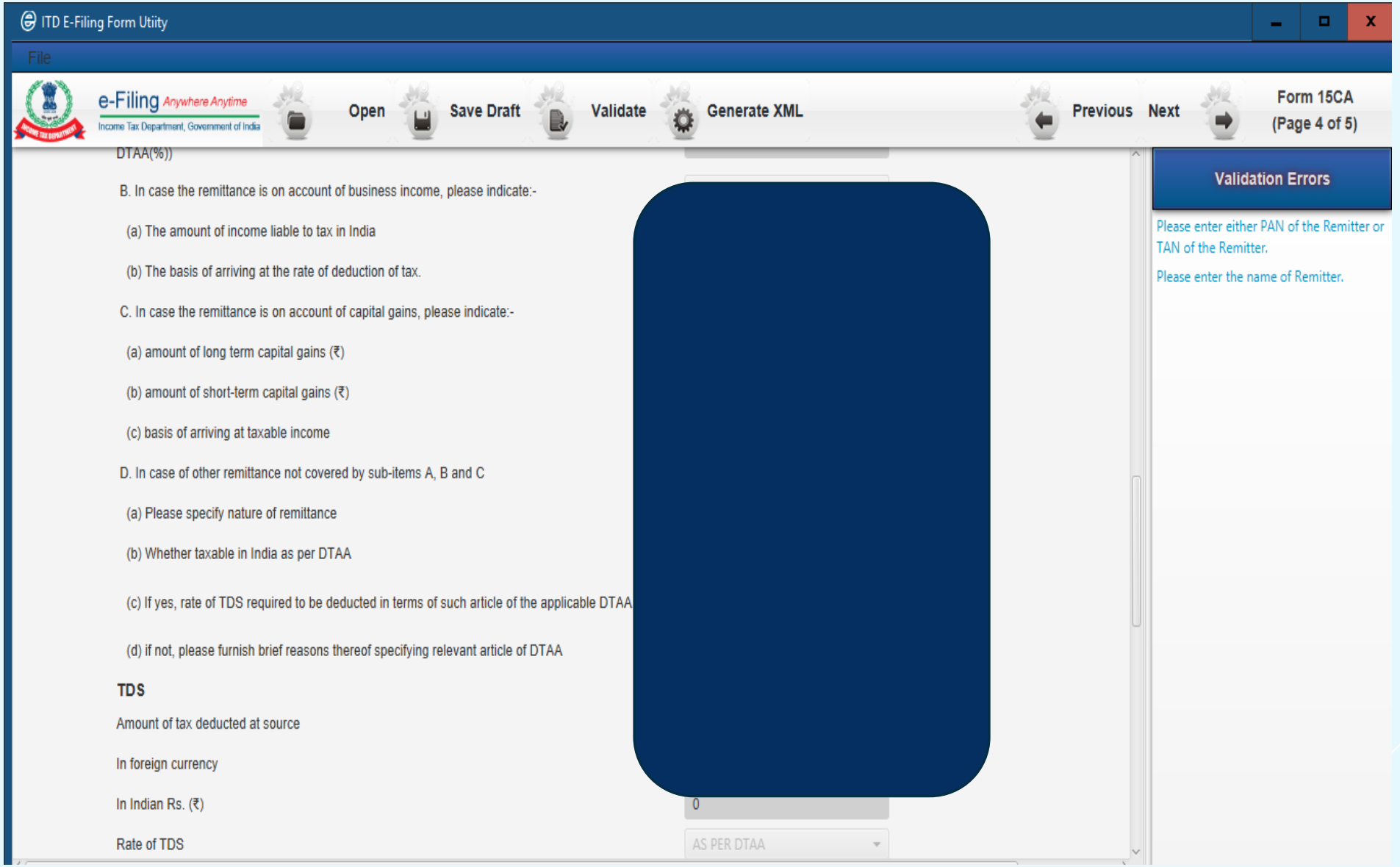
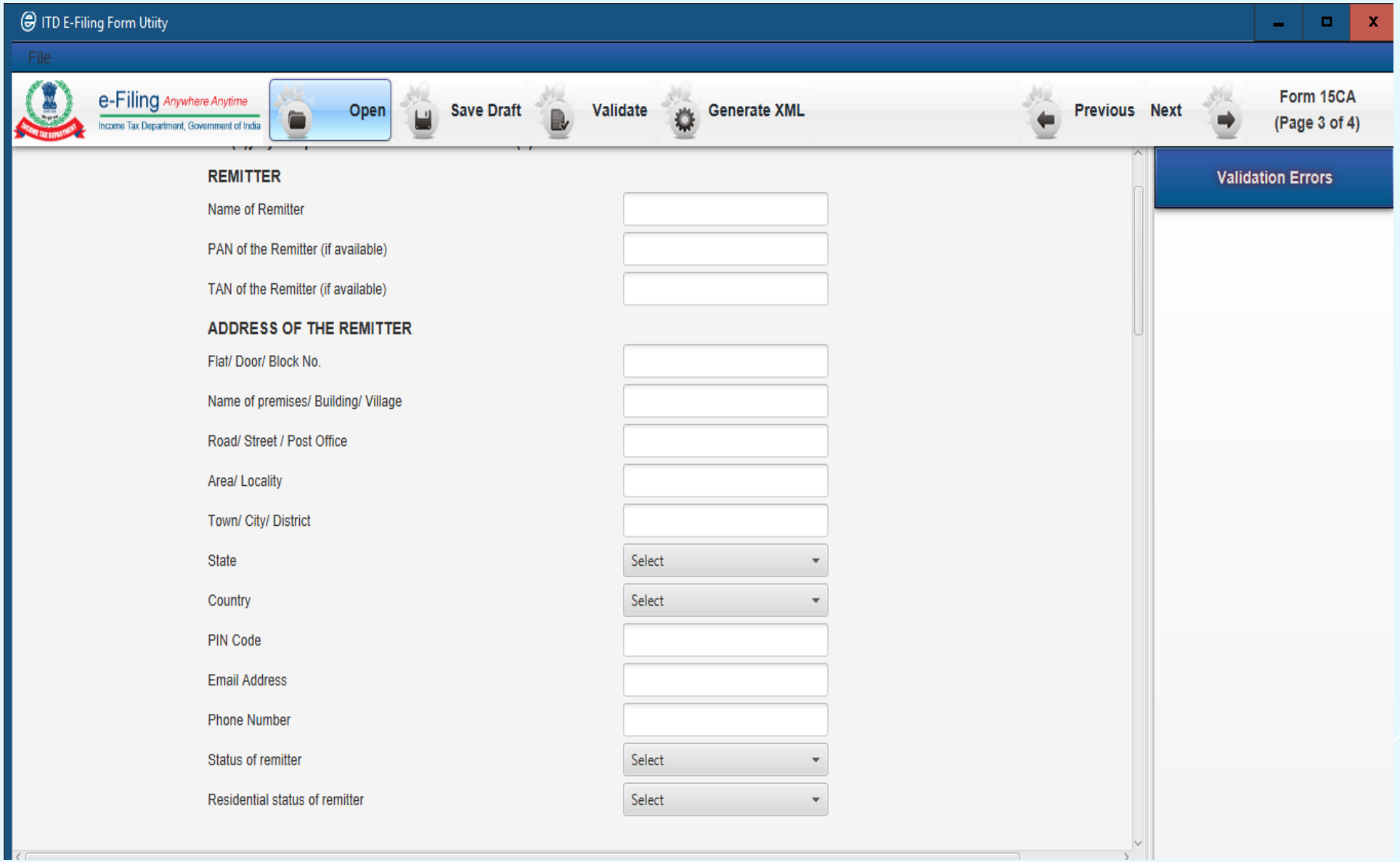


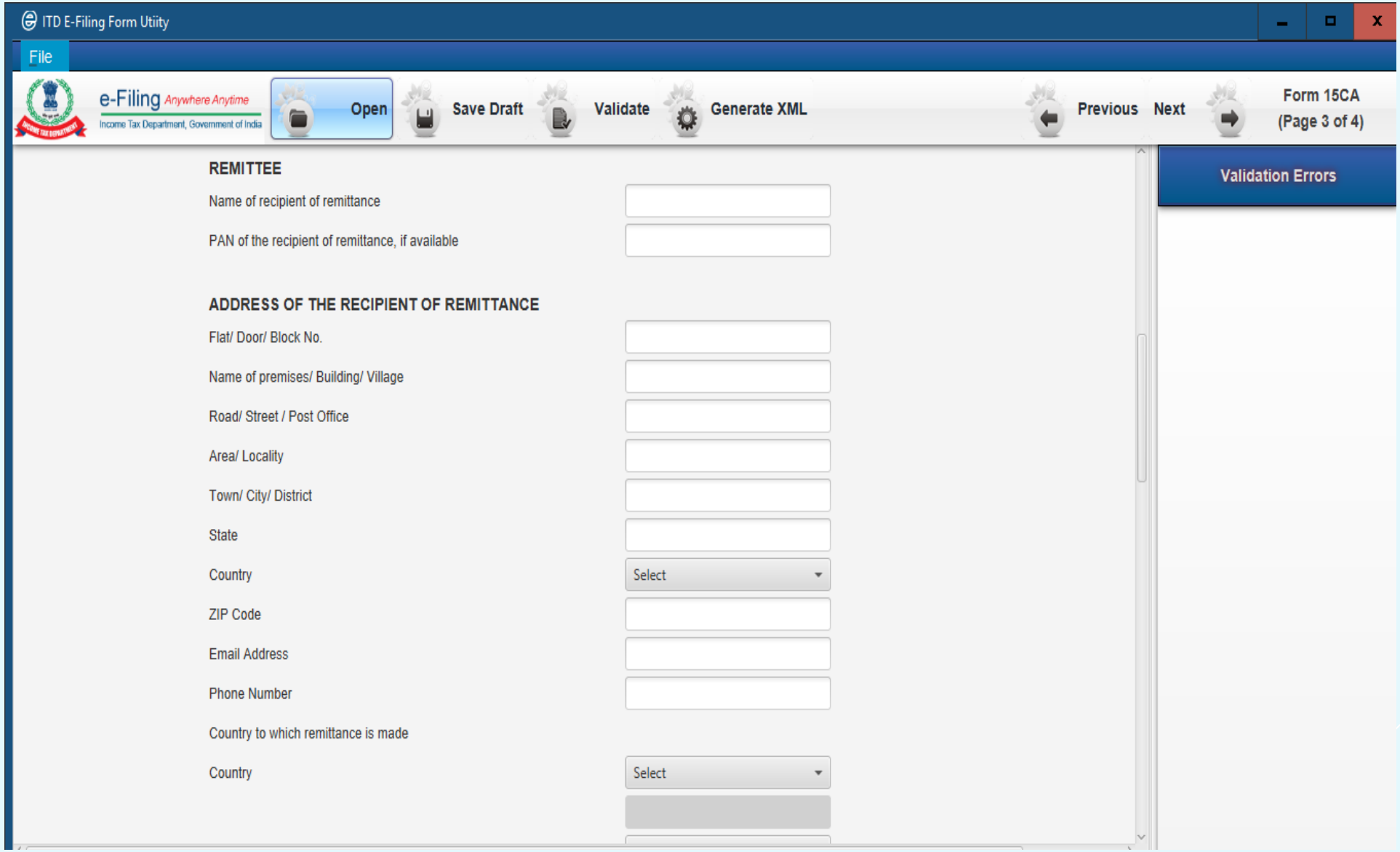
Form 15CA-Part C



Form 15CA-Part D



Form 15CA-Part D



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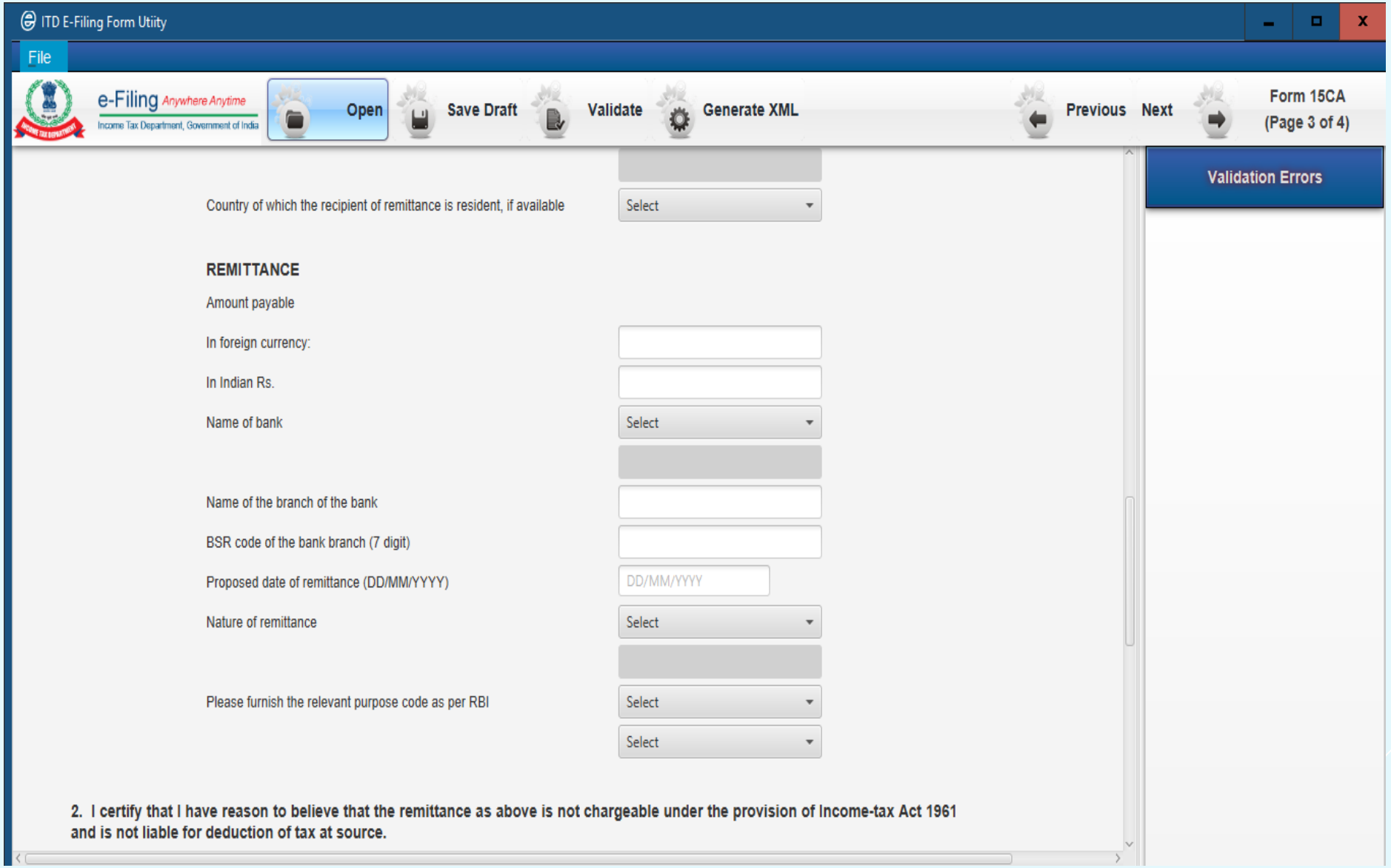

THANK YOU

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