

Withholding Taxes – S.195

Diploma in International Taxation

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Objective of section 195

Circular No. 152 dt. 27/11/1974

- ❑ *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 payments 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 credit of the Central Government as required by section 200 of the Income tax Act read with rule 30 of the Income tax rules, 1962.*
- ❑ *Failure to do so would render a person liable to penalty under section 201 read with section 221 of the Income tax Act, and would also constitute an offence under section 276B of the Income tax Act.”*

Overview of Section 195

Sections	Provisions
195(1)	Scope and conditions of applicability
195(2)	Application by the “payer” to the AO
195(3)	Application by the “payee” to the AO
195(4)	Validity of certificate issued by the AO
195(5)	Powers of CBDT to issue Notifications
195(6)	Furnish the information relating to the payment of any sum
195(7)	Power to CBDT to specify class of persons or cases where application to AO u/s 195(2) compulsory.
195A	Grossing up of tax

Unique features – Sec. 195

- Unlike personal payments exempted in section 194C etc; no exclusion for the same in section 195 (all payments covered *excl salaries*)
- No threshold limit
- All payers covered irrespective of legal character HUF; Individual etc
- Unlike other provisions in Chapter XVII (TDS provisions), section 195 uses a special phrase “any sum chargeable under the provisions of this Act” – “any sum “ Vs “any income by way of”
- Covers only non residents and not RNOR's
- WHT not conclusive – subject to regular assessment

Unique features – Sec. 195

- Nature of payment to be determined from payee's point of view.
- Income in the hands of NR recipient must be chargeable to tax to attract WHT – Cir.786 dt.7th Feb 2000



Sec 195(1) : Scope & Conditions for applicability

Who is responsible to deduct TDS	<i>- Any person responsible for paying to a non-resident, not being a company, or to a foreign company.</i>
Payment covered	<i>-Any interest [(not being interest referred to in section 194LB or section 194LC)] [or section 194LD] or - Any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries") -Provided further that no such deduction shall be made in respect of any dividends referred to in section 115-O</i>
At what time TDS has to be deducted	<i>Deduction of tax shall be made at the time of credit of such income or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier</i>

Sec 195(1) : Scope & Conditions for applicability

Chargeability to tax governed by provisions of Act / DTAA

Nature of Income	Act*	DTAA (OECD model)
Business/ Profession	S.9(1)(i)	A.5 , A.7 & A.14
Salary Income	S.9(1)(ii), S.9(1)(iii)	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
Capital Gains	S.9(i)(i), S.45	A.13

* Apart from S. 5, wherever applicable

Act/ DTAA, whichever is beneficial prevails

Sec 195(1) : Scope & conditions for applicability

- As per Income Tax Act: Surcharge and Education-cess should be added if it crosses the limit specified.
- Rates prescribed by DTAA are inclusive of all taxes . No need to add Education-cess and surcharge.

✓ *Capgemini SA Vs DCIT (International Tax)-2 (1) [2016] 160 ITD 13 (Mumbai - Trib.)*

✓ *DIC Asia Pacific Pte. Ltd. v. ADIT [2012] 18 ITR (Trib) 358 (Kolkata),*

✓ *CIT vs. Arthusa Offshore Co. [2008] 169 Taxman 484 (Uttarakhand HC)},*

✓ *Parke Davis and Company LLC v. ACIT [2014] 41 taxmann.com 193 (Mumbai - Trib.),*

✓ *Sunil V. Motiani v. ITO [2013] 33 taxmann.com 252/59 SOT 37*

Sec 195(1) : Scope & conditions for applicability

- The obligation to comply with section 195(1) applies to all payers, whether resident or non-resident and irrespective of whether they have a place of residence or business connection or any presence in India. This amendment is primarily to overcome the Vodafone judgment – Expln 2 inserted by Finance Act, 2012
- Taxability determined as per sec.5 read with sec.9
- At what point of time withholding is to be done.
 - at the time of credit or payment whichever is earlier royalty and FTS –taxable on payment basis – as per OECD MC/ UN MC
 - ✓ *National Organic Chemicals Industries Ltd vs DCIT [2004] 96 TTJ 765 (Mumbai ITAT)*
 - ✓ *DCIT vs Uhde GmbH [1996] 54 TTJ 355 (Mumbai ITAT)*
 - year end provisions – right to receive whether crystallized?

Sec 195(1) : Scope & conditions for applicability

- Inter adjustment of dues – WHT applies – *JB Boda & Co vs CBDT [1996] (223 ITR 271) (SC)*
- Tax withholding on ‘payments in kind’? - Yes
 - ✓ *Kanchanganga Sea Foods vs CIT [2010] 192 Taxman 187 (SC)}*;
 - ✓ *BIOCON Biopharmaceuticals Private Ltd. v. ITO [2013] TS-347-ITAT-2013-Bang (Bang)*
- Payments to agents u/s 163 of non-residents – covered
 - ✓ *Grindlays Bank Ltd 200 ITR 441 (Cal.) (HC)*
 - ✓ *Narsee Nagsee & Co 35 ITR 134 (Bom.)*

Sec 195(1) : Scope & conditions for applicability

Is it on Income element or Gross amount

- In *Transmission Corpn. Of A.P.Ltd vs. CIT* (1999) 105 Taxman 742/239 ITR 587 (SC)

the Supreme Court held that unless an order u/s 195(2) has been obtained by the tax payer, tax is deductible u/s 195 on the gross sum.

- The same was followed by Karnataka High Court in the case of *Samsung Electronics* [2009] 185 Taxman 313 (Karnataka)/[2010] 320 ITR 209
- However, these issues were set at rest by the landmark judgment of the Supreme Court in the case of *GE India Technology Cen. (P.) Ltd.* (2010) 193 TAXMAN 234 (SC) wherein it was held that any payments to non residents will be subject to withholding tax only when such payments are chargeable to tax in India as per Sec.4 , 5 & 9 of the Act. Sec. 195 covers not only pure income payments but also composite payments. The obligation to deduct tax on composite payments would be limited to the appropriate proportion of income forming part of the gross sum.

Extra Territorial Jurisdiction- 195

- The Supreme Court in its Vodafone decision observed *“Now the question is whether section 195 has got extra territorial operations. It is trite that laws made by a country are intended to be applicable to its own territory, but that presumption is not universal unless it is shown that the intention was to make the law applicable extra territorially. One has to examine whether the presumption of territoriality holds good so far as section 195 is concerned and is there any reason to depart from that presumption.*
- *The expression "any person", in our view, looking at the context in which Section 195 has been placed, would mean any person who is a resident in India.*
 - Now it applies to resident as well as non-resident – Expln 2 inserted by Finance Act, 2012.

Extra Territorial Jurisdiction- 195

- The Supreme Court in *Eli Lilly & Co.(India)(P.) Ltd (2009) 312 ITR 225 (SC)* held that the chargeability under section 9 would constitute sufficient nexus on the basis of which any payment made to non-residents as salaries would come under the scanner of S.192 and accordingly, tax should have been withheld even on the portion of salary paid abroad. The obligation to withhold is on Indian JV.
- In *GVK Industries Ltd. Vs ITO (2011) 197 Taxman 337 (SC)* the Supreme Court held that the Parliament does not have the powers to legislate for any territory outside India unless such extra-territorial operations have an impact on or nexus with India. Such connection to India should be real or expected to be real and not illusory or fanciful. If these connections are established then the law cannot be invalidated only on account of such extra territorial operation.

Exchange Rate

- Exchange rate of RBI on the day on which TDS is required to be deducted has to be considered .
- Exchange Rate Applicable (Rule 26 - TT Buying Rate of SBI)



Section 195(2): Application by the Payer to the AO for determining appropriate portion of sum chargeable

- S. 195(2) – Requirement to apply to AO for determination of appropriate portion of sum chargeable to tax.
 - plain paper application
 - amount chargeable to tax and not the rate of tax.
 - AO cannot grant total exemption - *Graphite Vicarb India Ltd vs ITO 28 TTJ 425 (Cal.)*
- Is it obligatory to approach AO for non-withholding of taxes?
 - *GE Technology Case (supra)*
 - *Instruction No. 02/2014 of CBDT dated 26.02.2014*

Section 195(2): Application by the Payer to the AO for determining appropriate portion of sum chargeable

- Order of AO u/s 195(2) is appellable u/s 248 by the payer provided he has to bear the tax under the agreement, after payment of taxes as ordered.
 - Sec 248 not to apply if the payee is not a non-resident
 - *Raza Textile Ltd vs ITO 87 ITR 539 (SC)*
- Revision of order u/s 263/264 possible. {*Board of Control for Cricket in India vs DIT [2005] 278 ITR 83 (Mum ITAT)*}
- Order u/s 195(2) determining amount of TDS to be deducted – not an appellable order *Bangalore International Airport Ltd {2016} 68 taxmann.com 228*

Section 195 (3): Application by Payee

- Payee who is eligible as per the conditions in Rule 29B can make an application in Form 15D (banking company Form 15C)
- For nil deduction certificate
- 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 (including advance tax and tax payable under section 140A);
 - 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) & 195(5)

- **Sec 195(4)- Validity of Certificate**

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

- **Sec 195(5)- Power of CBDT to issue notification**

The Board may make rules specifying the cases in which, and the circumstances under which, an application may be made for the grant of a certificate under sub section (3) with the specified conditions

- Certificate u/s 195(3) is not appellable.

Sections 195(2), 195(3) & 197 – Comparison

Particulars	195(2)	195(3)	197
Application by	Payer	Payee (subject to Rule 29B)	Payee in form 13
Purpose	To determine appropriate withholding rate for a specified payment	For claiming 'Nil' withholding rate for a specified receipt	For claiming 'Nil'/lower rate of withholding for all receipts
Applicability	Applicable to specified payments	Applicable to specified receipts	Applicable to all receipts
Whether appealable?	Appeal u/s 248 denying liability to deduct tax after payment of tax	No appeal	No appeal
Whether revisable u/s 263 or 264	Yes	Yes	Yes

In all the above cases, unlike CA Certificate issued in Form 15CB, no interest or penalty is leviable in case the Assessing Officer takes a contrary view at the time of assessment proceedings.

Section 195 (6)

- Requires the person making payment to NR to furnish the information relating to payments whether or not taxable. Failure will result in penalty under new sec.271- I of Rs 1 lakh – w.e.f. 1-6-2015
- **Furnishing of information Rule 37BB**
 - Furnish information to the tax department - Form 15CA
 - Obtain CA certificate before making payment to NR - Form 15CB



Rule 37BB - Form 15CA/15CB

- Form 15CA is now divided into four parts.
- Part A – To be filled up in case the amount of payment or aggregate of such payments made during the financial year does not exceed INR 5 lakh.
- Part B – To be filled up for payments (other than the payments referred in Part A) made by the remitter after obtaining a certificate from the AO under S.197 or an order from the AO under Sections 195(2) or 195(3).
- Part C – To be filled up for payment (other than the payments referred in Part A) made by the remitter after obtaining a certificate in Form 15CB from a Chartered Accountants as defined in Section 288 (2) of the Act.

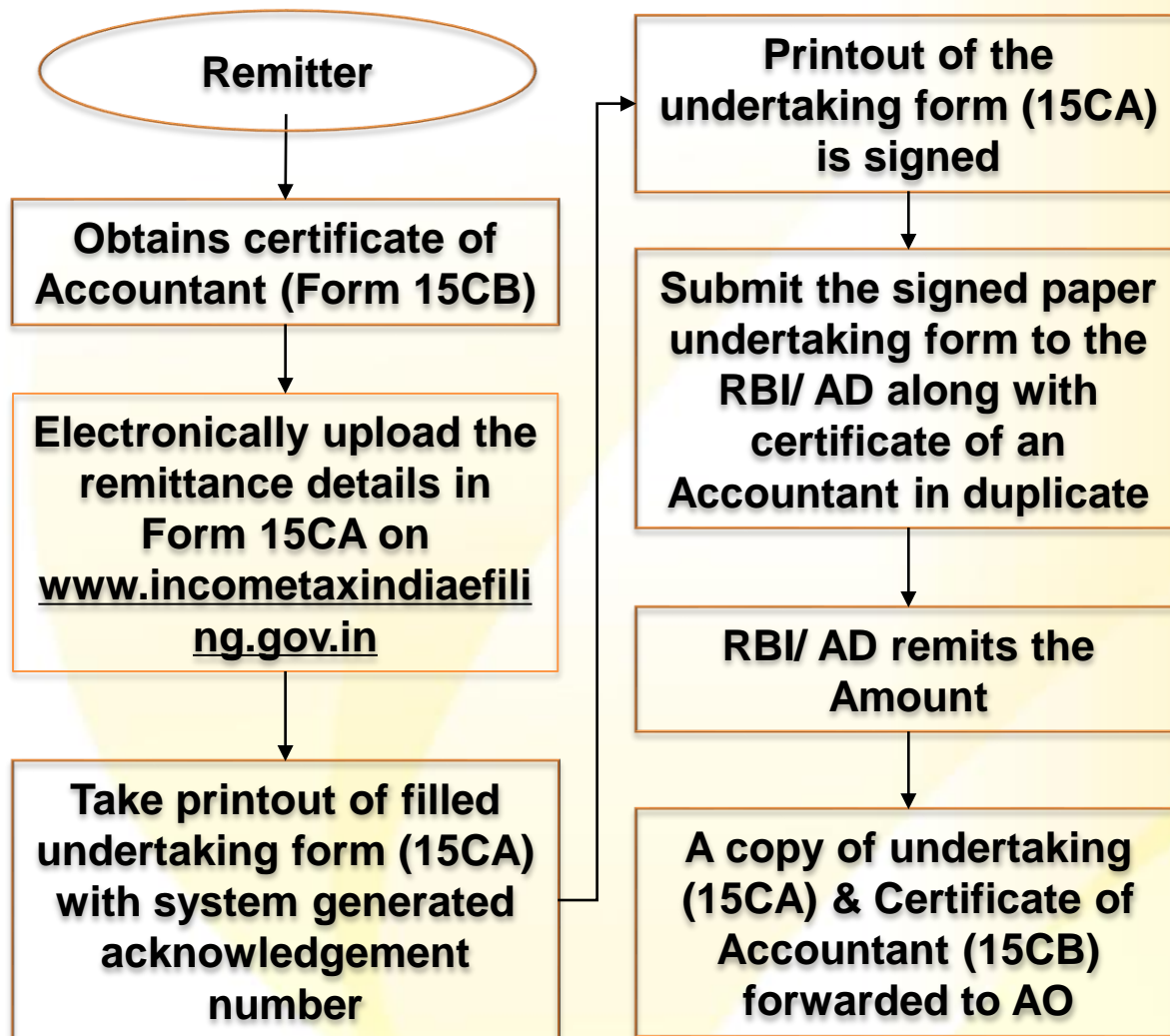
Form 15CA/15CB

- Part D – To be filled up by the remitter for the payment which is not chargeable under the Act. However, this information in respect of any sum not chargeable to tax is not required to be furnished if the remittance is made by an individual and it does not require prior approval of the RBI as per Section 5 of the FEMA and the payments which are exempted from reporting as per the rule.

Notification no. 93/2015. F.No. 133/41/2015-TPL dated 16 December 2015.

Applicable w.e.f. 1-04-2016.

Procedure Form 15CA and 15CB



1. Every remittance other than those covered under specified list required to follow procedure even if not chargeable to tax in India.
2. Requires the payer to provide PAN of the non resident
3. Form 15CB needs to be uploaded electronically – information requirement is same as Form 15CA

Sec 195 (7):- Authorizes Board to specify class of persons or cases

Sub.sec(7) was inserted by Finance Act, 2012 to partially neutralise the impact of ratio of *GE Technology Centre (Supra)* and thereby the Board may specify a class of persons or cases where the payer has to approach AO through an application to determine proportion of sum chargeable to tax for deduction of tax accordingly.

Grossing up- Sec 195A

- Grossing up required in case of net of tax payments.
 - ❖ Payer agrees to bear the tax
 - ❖ Sec 10(6A) amended w.e.f 01/04/2003 hence grossing up to be done.
 - ❖ Does not apply when profits of non resident covered by presumptive provisions – sec 44B, 44BB, 44BBA & 44BBB etc.
– *CIT vs ONGC 264 ITR 340 (Uttaranchal) (HC)*
 - ❖ Cir.785 dt.24th Nov 1999 – grossed up income is the income of the payee u/s 198 of the Act.



Reimbursement of Expenses

Different Types of Reimbursement of Expenditure

- a) Reimbursement of salaries of employees seconded
- b) Reimbursement of actual expenses
- c) Reimbursement of cost of third party services
- d) Cost sharing arrangements
- e) Reimbursement of expenses along with a markup



Reimbursement of Expenses

a. Reimbursement of salaries of employees seconded

- Whether this would amount to payment of FTS to Group company?
- Legal employer Vs Economic employer
- Terms of agreement very critical *CIT vs Karlstorz Endoscopy India Ltd – ITA No. 13 of 2008 (Del.-Trib)*
- Cases in favour of assessee
 - *IDS Software Solutions 32 SOT 25 (Bang.)*
 - *HCL Infosystem Ltd 274 ITR 261 (Del.)*
- Cases against the assessee
 - *AT & S India (P) Ltd 157 Taxmann 198 (AAR)*
 - *Verizon Data Services 11 taxmann.com 177 (AAR)*

Reimbursement of Expenses

- Where a foreign company deputed its employees in India rendering managerial services to assessee-company requiring high expertise, salary reimbursed by assessee to foreign company in respect of those employees amounted to 'fee for technical services' in terms of Explanation 2 to sec. 9(i)(vii). *Food World Supermarkets Ltd. [2015] 63 taxmann.com 43 (Bangalore - Trib.)*
- Where in terms of 'secondment agreement' employees of overseas companies used their technical knowledge and skills while assisting assessee in conducting its business of quality control and management, amounts reimbursed by assessee to overseas companies towards salaries of seconded employees amounted to 'fee for technical services' liable to tax in India. *Centrica India Offshore (P.) Ltd. [2014] 51 taxmann.com 386 (SC) – SLP of assessee company dismissed by SC*

Reimbursement of Expenses

b. Reimbursement of actual expenses

- As per terms who has to bear these expenses
- Nomenclature will not help –
Cochin Refineries Ltd 222 ITR 354 (Kerala) ,
- Held as FTS
Hindalco Industries Ltd 94 ITD 242 (Mum.)
- *CIT vs Telco Ltd 245 ITR 823 (Bom)* – held that no part of expenses could be treated as fees and no tax was deductible.

Reimbursement of Expenses

c. Reimbursement of cost of third party services

- The nature of payment made to third party is critical
- Otherwise all the payments made to the third parties will escape withholding .
 - Where assessee company paid its share of expenses for ISO audit to its foreign parent company, tax was required to be deducted at source under Sec.195, as element of income was embedded in receipt of auditor, therefore, assessee's claim that tax was not deducted under bonafide belief that it had only reimbursed expenses, was not acceptable and, amount was to be disallowed under section 40(a)(i)

SPX India (P.) Ltd v. CIT(A) [2013] 36 taxmann.com 377 (Del.-Trib)

Reimbursement of Expenses

- When Indian subsidiary company incurs expenses or makes purchases or avails any service from some third party abroad and payment to such third party is routed through its holding or related company abroad, provision for deduction of tax at source apply as if assessee has made payment to such independent party de hors routing of payment through holding company -*C.U.Inspections (I) (P.) Ltd. [2013] 34 taxmann.com 75 (Mumbai - Trib.)*

Reimbursement of Expenses

d. Cost sharing arrangements

- If it is established that share of cost borne by the payer is supported by agreement and actual details – No withholding tax
 - ✓ *Dunlop Rubber Co Ltd 142 ITR 493 (Cal)*,
 - ✓ *ABB Ltd 322 ITR 564 (AAR)*
 - ✓ *Dampskibsselskabet vs ADIT 130 ITD 59 (Mum)*
 - ✓ *DECTA vs CIT 237 ITR 190 (AAR)*
- Contrary decisions
 - ✓ *International Hotel Licensing Co. S.A.R.L vs DIT 288 ITR 534 (AAR)*
 - ✓ *Danfoss Industries (P) Ltd 268 ITR 1 (AAR)*

Reimbursement of Expenses

e. Reimbursement of expenses along with a markup

- Whether the amount of markup or entire cost plus markup to be considered for withholding taxes
- *Coca Cola India Inc. vs DCIT (2006) 7 SOT 224 (Del-Trib)*
it was held that only the markup amount of 5 per cent is to be considered for tax deduction purposes.



Applicability of S. 206AA

Applicable rate of withholding tax if PAN is not there

- *Notwithstanding anything contained in any other provisions of this Act, any person entitled to receive any sum or income or amount, on which tax is deductible under Chapter XVIIB (hereafter referred to as deductee) shall furnish his Permanent Account Number to the person responsible for deducting such tax (hereafter referred to as deductor), failing which tax shall be deducted at the higher of the following rates, namely*
 - (i) *at the rate specified in the relevant provision of this Act; or*
 - (ii) *at the rate or rates in force ; or*
 - (iii) *at the rate of twenty per cent*

S. 206AA - Rule 37BC

In order to reduce compliance burden, the Finance Act, 2016 amended the provisions of section 206AA of the Act (w.e.f. June 1, 2016) to provide relaxation from higher withholding tax rate while making payment to non-resident deductees in the absence of PAN, subject to fulfillment of prescribed conditions.

For this purpose, CBDT has notified a new Rule 37BC in the Income-tax Rules, 1962 (the Rules) vide Notification No. 53 /2016, F.No.370 142/16/ 2016-TPL to specify the conditions to avail the aforesaid relaxation.



S. 206AA - Rule 37BC

Rule 37BC – Sec. 206AA of the Act shall not apply on following payments made to non-resident deductees who do not have PAN in India:

- 1) *Interest;*
- 2) *Royalty;*
- 3) *Fee for Technical Services; and*
- 4) *Payments on transfer of any capital asset*

In respect of the above specified payments, the non-resident deductees shall be required to furnish following details and documents:

- 1) *Name, e-mail, Contact number*
- 2) *Address in the country of residence*
- 3) *Tax Residency Certificate (TRC)*
- 4) *Tax Identification Number (TIN) in the country of residence. Where TIN is not available, a unique identification number is required to be furnished*

Applicability of S. 206AA

- The following issues arise for discussion:
 - Rule 114C read with Sec139A(8)(d) provides that provisions of 139A are not applicable to non residents, whereas cir. No.5/2010 dt.03rd June,2010 clarified that provisions of sec 206AA are applicable to non residents.
 - whether provisions of sec.206AA override the provisions of tax treaty?
 - Whether provisions of sec.206AA apply when there is no liability of tax under the DTAA?
 - In case higher rate of tax is deducted as per 206AA whether resident country would give tax credit for the same?

Applicability of S. 206AA

- Whether non resident can claim refund by filing tax return and applying correct rate of tax as per treaty?
- Hyderabad special bench ITAT in the recent case *Nagarjuna Fertilizers & Chemicals Ltd. [2017] 78 taxmann.com 264 (Hyderabad - Trib.) (SB)* held that If rate of tax applicable under DTAA is lower than 20% tax rate prescribed under section 206AA, TDS would have to be deducted at such lower rate even if non-resident deductee fails to furnish his PAN

Tax Residency Certificate

- Sections 90(4)/A(4) provide that treaty benefit will not be available to any NR unless he furnishes TRC from Government of other country including therein particulars as may be prescribed.
- The particulars required in such TRC have been prescribed by notification no 39 dated 17-9-2012
 - Finance Act, 2013 inserted sub. Sec(5) to sec 90 & 90A to provide that non resident assessee shall provide such other documents and information as may be prescribed.
 - Rule 21AB modified prescribed TRC format and now insists only on specific particulars of non residents in any format whatsoever.

Tax Residency Certificate

In addition to TRC the following information is to be furnished in Form 10F(Rule 21AB):

- i. Status (individual, company, firm etc.) of the assessee;
- ii. Nationality (in case of an individual) or country or specified territory of incorporation or registration (in case of others);
- iii. Assessee's tax identification number in the country or specified territory of residence and in case 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;

Tax Residency Certificate

- iv. 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; and
- v. Address of the assessee in the country or specified territory outside India, during the period for which the certificate, as mentioned in (iv) above, is applicable.

“The assessee may not be required to provide the information or any part thereof referred to in sub-rule (1) if the information or the part thereof, as the case may be, is contained in the certificate referred to in sub-section (4) of section 90 or sub-section (4) of section 90A.”

Income chargeable on presumptive basis - WHT

- Business income of non-resident in certain cases i.e. under sections 44B, 44BB, 44BBA & 44BBB is taxed on presumptive basis .
- Deemed income = applying a specified percentage on the gross amount payable to non-residents.
- Issue - Whether TDS is to be deducted on gross sums or income element?
- *GE India Technology Centre P. Limited vs. CIT & Others reported in 327 ITR 456(SC)*
- *Frontier Offshores Exploration (India) Ltd. Vs. Deputy Commissioner of Income-Tax [2011] 10 Taxmann.com 250*
- In the above cases it was held that TDS is required to be computed on income element

Refund of TDS

- Referred to Circular No 7/2007, dt October 23,2007 and Circular No. 7/2011, dt September 27,2011:-
- Cases Covered:- In the following cases tax deducted u/s195 can be refunded to the deductor :-
 - a) the contract is cancelled and no remittance is made to the non-resident;
 - b) the remittance is duly made to the non-resident, but the contract is cancelled. In such cases, the remitted amount has been returned to the person responsible for deducting tax at source;



REFUND

Refund of TDS

- c) the contract is cancelled after partial execution and no remittance is made to the non-resident for the non-executed part;
- d) the contract is cancelled after partial execution and remittance related to non-executed part is made to the non-resident. In such cases, the remitted amount has been returned to the person responsible for deducting the tax at source or no remittance is made but tax was deducted and deposited when the amount was credited to the account of the non-resident;
- e) there occurs exemption of the remitted amount from tax either by amendment in law or by notification under the provisions of Income-tax Act, 1961;
- f) an order is passed under section 154 or 248 or 264 of the Income-tax Act, 1961 reducing the tax deduction liability of a deductor under section 195;

Refund of TDS

- g) there occurs deduction of tax twice from the same income by mistake;
- h) there occurs payment of tax on account of grossing up which was not required under the provisions of the Income-tax Act, 1961;
- i) there occurs payment of tax at a higher rate under the domestic law while a lower rate is prescribed in the relevant double taxation avoidance treaty entered into by India.
- j) there occurs payment of tax at a higher rate under the Treaty while a lower rate is prescribed in the domestic law.
- k) Prior approval of CCIT/DGIT required.
- l) The claim for refund should be made within 2 years from the end of financial year in which tax was deducted.

Refund of TDS

- m) Excess tax can be adjusted against any existing liability of deductor and the balance if any would be refunded.
- n) An undertaking that no certificate under 203 was issued to non resident and if issued the same shall be recalled. Indemnity bond to be given for any loss to the department.
- o) Refund can be granted only if the deductee has not filed return or the time for filing return has expired.
- p) Circular provides that no interest u/s 244A is admissible. However the Apex Court held that such interest is payable by the Govt. – *UOI vs Tata Chemicals Ltd [2014] 43 taxmann.com 240 (SC)*

Consequences of non compliance

Applicable section	Nature of default	Consequence
40(a)(i)	Withholding tax not deducted or not deposited within prescribed time	Disallowance of expenses in computation of taxable income of payer; deduction in year of payment
201(1A)	Tax not withheld/ deposited appropriately	Interest @ 1% per month or part of the month
221	Tax withheld not paid	Penalty, not exceeding the amount of tax not paid
271C	Tax not withheld or short withheld	Penalty, not exceeding the amount of tax not withheld
272A	Failure to file TDS Return	Penalty of Rs.100 per day (maximum upto the tax deducted) for failure to file the TDS return on time.
272B	Failure to pay tax deducted	Rigorous imprisonment for 3 months to 7 years along with fine

Popular Controversial Issues – Software Payments

Software payments - whether payment for licensed software is for product or royalty is unresolved

- *Reliance Infocom Ltd [2013] 39 taxmann.com 140 (Mum - Trib.)*

In this case software was supplied separately and not as embedded software along with equipment, payment for software embedded in hardware is for product and payment for standalone software is for royalty.

- *Infrasoft Ltd [2013] 39 taxmann.com 88 (Delhi HC)*

Right that is transferred is not a right to use the copyright but is only limited to the right to use the copyrighted material and the same does not give rise to any royalty income and would be business income.

Popular Controversial Issues – Software Payments

- *Bartronics India Ltd [2014]43 taxmann.com 16 (Hyd-Trib)* followed *Infrasoft* decision
- Payment made to non-resident companies for procuring standard and copyrighted software products, for distribution or re-sale purpose on principal to principal basis could not be treated as payment towards royalty. *Financial Software & Systems (P.) Ltd. v. DCIT/ACIT [2014] 47 taxmann.com 410 (Chennai - Trib.)*



Popular Controversial Issues – Software Payments

- *Payment for purchase of computer software for reselling to ultimate users, does not amount to royalty under section 9(1)(vi) of the Act. Locuz Enterprise Solutions Ltd [2015] 61 taxmann.com 47 (Hyderabad - Trib.)*
- *Payment for acquisition of software from its parent company to be used for its business purpose only, without any right of utilizing copyright of said programme, payment made in respect of same did not give rise to any royalty income. Atmel R & D India (P.) Ltd [2016] 74 taxmann.com 106 (Chennai - Trib.)*

Popular Controversial Issues

- Payment for use of 'process' provided by assessee, whereby through assured bandwidth, customer was guaranteed transmission of data and voice, was 'royalty' as per section 9(1)(vi)
- *ITO v Cognizant Technology Solutions India (P.) Ltd. [2014] 47 taxmann.com 409 (Chennai - Trib.)* Followed *Verizon Communications Singapore Pte Ltd. v. ITO [2013] 39 taxmann.com 70 (Mad.)*
- *Sec.40(a)(i) Additional Payment pursuant to rupee depreciation is not subject to tax deduction because under Sec.195 point of time for deduction is earlier of, credit or payment; once deduction is made on credit, further deduction on payment is not required. Honda Motorcycle & Scooters India (P) Ltd [2015] 56 taxmann.com 238 (Del - Trib)*

Sec.195A vs 206AA

- Higher rate of tax under section 206AA of the Income tax Act is not applicable for grossing up while tax is borne by the payer.
- As held in *Bosch Ltd v. ITO [2012] 28 taxmann.com 228 (Bang-Trib.)* grossing up u/s 195A of the Act is to be done at the rates in force for the financial year in which such income is payable and not at 20% as specified u/s 206AA of the Act.



Sec. 206AA v. DTAA

- *DCIT v. Infosys BPO Ltd [2015] 60 taxmann.com 465 (Bangalore - Trib.)*
- *Serum Institute of India Ltd [2015] 56 taxmann.com 1 (Pune - Trib.)*

“Where tax has been deducted in respect of payments made to non-residents (who do not furnish their PAN) on strength of provisions of DTAA and such rate is lower than 20 per cent, provisions of section 206AA cannot be invoked to insist on tax deduction at rate of 20 per cent, having regard to overriding nature of provisions of section 90(2).”
- Hyderabad special bench ITAT in the recent case *Nagarjuna Fertilizers & Chemicals Ltd. [2017] 78 taxmann.com 264 (Hyderabad - Trib.) (SB)* held that If rate of tax applicable under DTAA is lower than 20% tax rate prescribed under section 206AA, TDS would have to be deducted at such lower rate even if non-resident deductee fails to furnish his PAN

Other Issues

- Translation services involving translation of text from one language to another were not technical services and, therefore, payment made by assessee to non-resident translators would not fall within scope of 'fees for technical, managerial or consultancy services' as mentioned in Explanation 2 to section 9(1)(vii)

Cosmic Global Ltd. V. ACIT [2014] 48 taxmann.com 365 (Chennai - Trib.)

- Where amounts are paid outside India to persons outside Indian territory, who does not have any tax liability as far as I.T. Act, 1961 is concerned, said sum cannot be considered as 'sums chargeable' under provisions of this Act.

Prithvi Information Solutions Ltd. v. ITO [2014] 47 taxmann.com 214 (Hyderabad - Trib.)

- Payment to POA holder of a non resident – Section 195 not applicable – *Rakesh Chauhan v DDIT (2010) 128 TTJ 116 (Chandigarh)*

Other Issues

- **Commission paid to overseas agents on exports**

- ✓ *Pankaj A Shah v. ITO [2014] 47 taxmann.com 205 (Ahmedabad - Trib.)*
- ✓ *ACIT v. Rapid Pack Engg. (P.) Ltd [2014] 46 taxmann.com 330 (Mumbai - Trib.)*
- ✓ *ACIT v. T. Abdul Wahid Tanneries (P.) Ltd. [2014] 47 taxmann.com 133 (Chennai - Trib.)*

Whether the commission paid is for technical services or is to be treated as business profits is a live issue.

- Assessee was not liable to deduct tax at source when non resident agent provides services outside India on payment of commission-
Faizan Shoes (P.) Ltd. [2014] 48 taxmann.com 48 (Madras) (HC)

Education is the best friend. An educated person is respected everywhere. Education beats the beauty and the youth.

-Chanakya

Thank You