

TDS on Payments to Non-residents u/s. 195

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**WORKSHOP ON TAXATION OF FOREIGN
REMITTANCES –
CHAMBER OF TAX CONSULTANTS**

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Why discuss Section 195?

- Stringent consequences for all parties to the transaction
 - Deductor
 - Deductee
 - CA!
- Scope expanded in recent times
 - Retrospectively
 - Extraterritorial Operation
- Tax Department's eye on international payments
- Controversy for Remittance Procedures – Is it **now** clear?

Contents

LEGAL PROVISIONS

- Scope & Methodology
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LEGAL PROVISIONS - Scope & Methodology

- Scope of Section 195(1)
 - Who, What, When & How?
- Section 206AA
- Tax Residency Certificate
- Interplay of DTAA, PAN and TRC
- Grossing up of tax
- Deductibility vis-à-vis certain types of payments

Scope of Section 195

Who are covered?

- **Any person** responsible for paying
- To a non-resident or a Foreign Company

What is covered?

- Any interest or any other sum
- **Chargeable to tax** under the provisions of this Act

When is it applicable?

- At the time of credit or at the time of payment
- **Whichever is earlier**

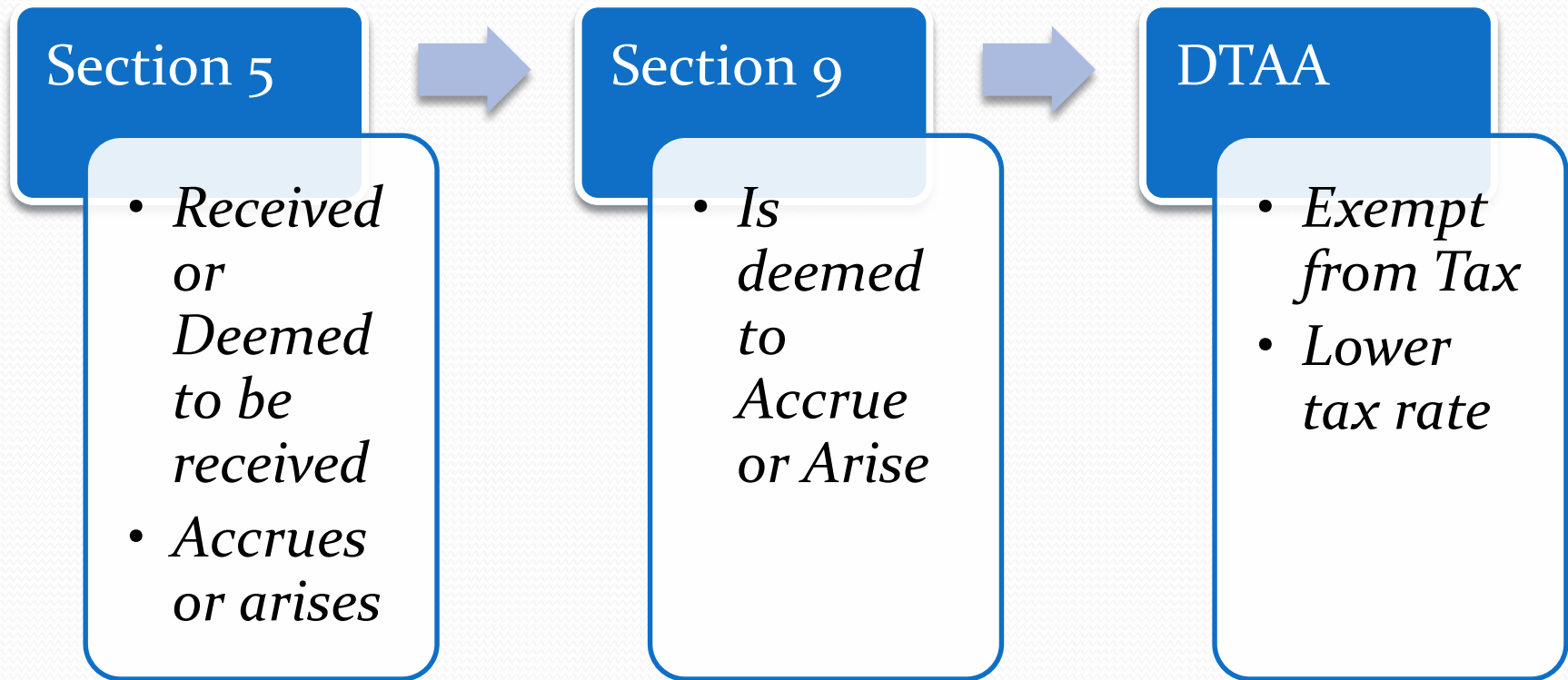
How is it to be applied?

- Deduct income-tax thereon at the **rates in force**

Scope of Section 195

- Any Sum chargeable to tax
 - Except for:
 - Salaries; Dividends; Interest [S.s 194LB, 194LC & 194LD]; Income from units of a business trust [S. 194LBA]; Payments to sportsman, entertainer or sports association [S. 194E]; Winnings from Lottery, etc. [S. 194B]; Income received by a unit holder of investment fund [S. 194LBB]; Payments u/s.s 115AB, 115AC, 115AD [S.s. 196B, 196C & 196D].
 - Exempt from TDS:
 - Shipping income u/s. 172; Interest paid by Offshore Banking unit to an NR or RNOR [S. 197A(1D)]; Capital Gain earned by FII [S. 196D(2)].
- Without any threshold limit – unlike domestic TDS provisions
 - Duty to deduct tax at source u/s 195 does not arise unless the remittance contains wholly or partly taxable income.
 - GE India Technology Centre Pvt Ltd v CIT 327 ITR 456 (SC)
 - Where Tax authorities has accepted the fact that the NR is not liable to pay any tax in India, the payer is not liable to deduct TDS u/s 195.
 - Van Oord ACZ India (P) Ltd v COIT 36 DTR 425 (Del)

Taxability – Steps



Provisions of the Act or DTAA, whichever are more beneficial, prevail

Scope of Section 195 - Who are covered?

- Payer - Any person
 - Even if NR
 - Extraterritorial operation
 - Vodafone and other cases
 - Retrospective amendment – Explanation 2 to S. 195(1)
 - Obligation to deduct whether or not NR has any presence in any manner whatsoever in India- Obtain TAN and file eTDS returns
- Payee should be
 - Non-residents (other than companies) ; or
 - Payee should be non resident – at time of payment or at year end?
 - NOR not covered as NOR is first R
 - Foreign Co - whether or not NR!
 - If POEM is in India, foreign company is an Indian resident
 - Will Section 195 apply or other sections apply?

Section 195 - When is it applicable?

- On credit or payment whichever is earlier
 - From the point of view of payer
 - Exception for interest payable by Government, Public Sector Bank or Public Financial Institution (only payment basis)
- Amount adjusted, not paid
 - Raymond Ltd. (80 TTJ 120) - Payment for services related to GDR Issue netted out – **TDS applicable**
- FEMA or RBI Approval not received - **TDS applicable**
- ☞ United Breweries Ltd. - [2002] 81 ITD 77 (Delhi) -
- Govt. Approval Pending – no right to income arises to NR – hence TDS NA - Pfizer Corpn. [2003] 129 TAXMAN 459 (BOM.) - **TDS not applicable**

No withholding tax on wrong credit entry for royalty if payment of same is barred by DIPP guidelines

- Credit entry was passed pending approval from DIPP which was ultimately refused.
- Demand for TDS based on such credit was held to be contrary to provisions of Act
- DIT v. Ericsson Communications Ltd [2015] 61 taxmann.com 117 (Delhi)

Scope of Section 195 – How is it applicable?

- Rate or rates in force - Section 2(37A)(iii) -
 - Part II to the First Schedule of Finance Act
 - DTAA rates
 - Cir 728 dt. 30/10/1995 – beneficial of the above
- Surcharge / Education Cess to be added to DTAA Rate?
 - No – as per definition of “taxes covered” in DTAA – rate of DTAA shall not exceed specified rate

Rates of TDS

- Generally low rates on gross basis for passive income;
- Else Net income @40% / 30%
- When in doubt for rate or quantum taxable, approach ITO for certificate u/s 195(2) or 195(3) or 197

Section 206AA – PAN requirement

- Non-obstante provision –
 - “**Notwithstanding anything** contained in any other provisions of this act ...”
- Obligation to furnish PAN on **any person** receiving any sum or income or amount on which **tax is deductible**
- In absence of PAN, tax shall be deducted at the higher of the following rates:
 - At the rate specified in the relevant provision of the Act; or
 - At the rate or rates in force; or
 - At the rate of 20%
- Tentative tax, Refund of higher tax deducted available
- Section applicable also when PAN incorrect or invalid
- Certificate u/s. 197 will not be issued without PAN

Section 206AA - Issues

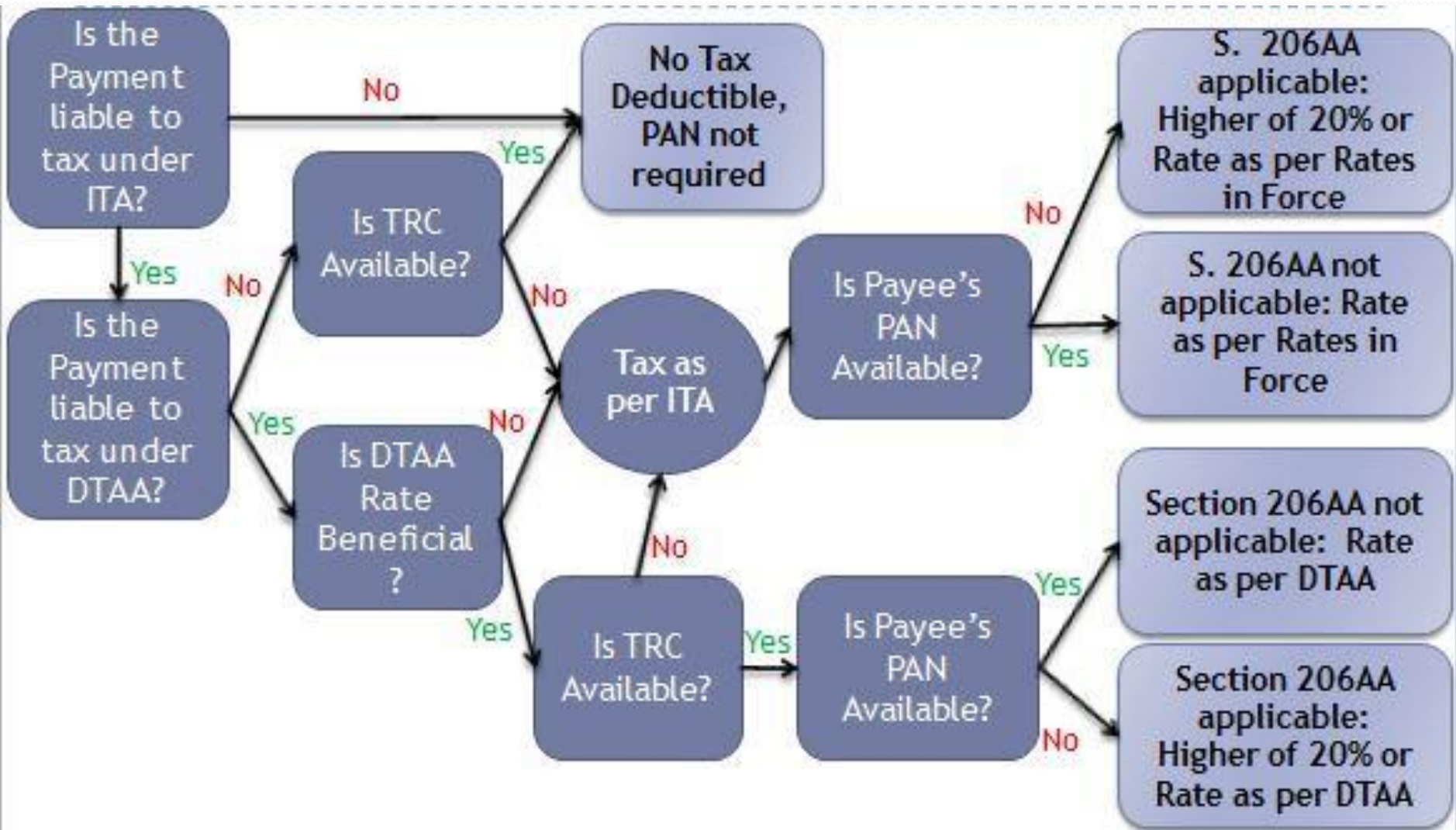
- Treaty Override?
 - If DTAA cap is lower than rate as per Act?
 - S 139A(8) rw R114C(1) – NR is not required to obtain PAN
 - DTAA rates to prevail over domestic rates - S 90(2) also has non obstante clause
 - Dy.DIT(ITII) Vs Serum Institute of India Ltd. in ITA No.792(Pune)2013 dated 30-03-2015.
 - Bosch Ltd Vs ITO Intl.Taxation in ITA Nos.552 to 558(B)/2011 dated 10-11-2012
 - Bharti Airtel Ltd Vs DCIT in ITA Nos.158 to 163 dated 14-08-2014
 - Credit in the other country may not be available for additional tax burden
- Applicable where no tax payable?
 - No, as provision applicable only on sum or income or amount on which tax is deductible – Reliance on annual circular for TDS on salaries
 - Even in cases where income not taxable under DTAA
- Surcharge or educational cess not to be added
- Grossing up of tax under Section 206AA
 - Literal reading of Section 195A refers to ‘rates in force’ - Bosch Ltd.

Tax Residency Certificate

- Section 90(4) & (5) - NR cannot avail benefit under Treaty without Tax Residency Certificate (TRC)
 - Applies to all NRs without any threshold limit
 - TRC will be necessary but not sufficient – past?
- Rule 21AB specifies prescribed particulars for Section 90(5)
 - Documents substantiating particulars to be maintained
 - Details not covered in TRC to be mentioned in Form 10F
 - Form 10F alone not sufficient
 - Self-verification by beneficiary

Tax Residency Certificate - issues

- TRC not required in case treaty benefit not availed, e.g. sale proceeds of shares exempt as STT paid on long term assets, or share in profits of firm
- TRC usually for the past year. Tax to be deducted for current year
- Subjective TRC can be relied upon ? – e.g. Singapore TRC – based on representation by tax payer
- TRC applied for, but not available on date of deduction
- TRC not being provided in other jurisdiction – Even UAE issues TRC



Interplay of DTAA, PAN and TRC...

DTAA provisions are beneficial?	Is TRC available?	Is PAN available?	Result
Yes	Yes	Yes	The beneficial DTAA rate can be applied as TRC is available. Section 206AA will not have any effect as PAN is available.
Yes	No	Yes	As TRC is not available, benefit of DTAA will not be available. Rate will be as per ITA. Section 206AA will not have any effect as PAN is available.
Yes	Yes	No	While the payer can take benefit of the DTA provisions, as PAN is not available, higher of 20% or DTA rate will be applicable- subject to cases laws discussed
Yes	No	No	As TRC is not available, benefit of DTAA will not be available. As PAN is not available, higher of 20% or FA rate will be applicable.
No or DTAA not applicable	NA	Yes	Rate will be determined as per “rates in force” provided in Part II of First Schedule of the Finance Act of the relevant year. As PAN is available, Section 206AA will not be applicable.
No or DTAA not applicable	NA	No	Rate will be determined as per “rates in force”. If this rate is lower than 20%, tax would be deductible at 20% as PAN is not available.

Grossing up of tax – Payee will get full credit in home country

Payment of Rs. 100, tax deductible @ 10%	Without Gross Up of Tax (A)	With Gross up of Tax (B)
Invoice Amount	100	100
Tax Deductible @ Source	10	10
Net Amount payable	90	100
Amount/Grossed up amount	100	$100 + 100 / [(100/10) - 1]$ = 111.11
Less: Tax deducted	10	11.11
Net Payment	90	100

Not applicable to Presumptive tax provisions-
- CIT vs. ONGC (264 ITR 340)

Exchange Rate

- Exchange Rate Applicable –
 - Rate as on the day on which tax is deducted at source as per Rule 26 – Read with Rule 115
 - SBI TT Buying rate as on respective dates based on type of income
 - Difference between Forex rate on date of deduction and date of remittance
 - Forex gain or loss – no TDS required

Difficulty in getting SBI TT Buying rate

Overview of Section 195

Section 195(2) : Application by Payer to AO for lower deduction of tax:

- Determine appropriate portion of income subject to TDS
- Form for this application ?
- Rule 10
 - ☞ percentage of turnover or
 - ☞ proportion to total receipts or
 - ☞ any other reasonable manner.

Overview of Section 195

Section 195(2) : Application by Payer to AO for lower deduction of tax: (Cont...)

- Appeal against order u/s. 195(2) (Section 248)
 - ☞ within 30 days of payment of tax.
- Denial / failure to pay TDS u/s 195 attracts order u/s 201(1) treating the assessee as in default. This order is appealable u/s 246(1) – without requirement of prepayment.

Overview of Section 195

Section 195(3) : Application by payee for lower deduction of tax

- Rule 29B(2) – conditions
 - Regularly assessed and returns filed in time
 - Not in default for payment of taxes / interest
 - No penalty levied u/s 271(1)(c)
 - Minimum 5 years + 50 lakhs Fixed Assets
- “Certificate” by AO in Form 15E
- Rate / refusal not appealable.

S 195 (6) – effective 1/6/15

(6) 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 furnish the information relating to payment of such sum, in such form and manner, as may be prescribed.

- Till 31/5/2015

(6) The person referred to in sub-section (1) shall furnish the information relating to payment of any sum in such form and manner as may be prescribed by the Board.

– Refer Rule 37BB – Forms 15CA and 15CB

Rule 37BB and Forms

- Rule 37BB and forms 15CA and 15CB were prescribed under the old (now substituted) sec 195(6) which was in force till 31/5/2015.
- Said rules and forms were not changed after the section was changed.
- Notification dated 16th December, 2015 now amends the Rule 37BB and forms, effective 1st April, 2016.
- Question during the period up to 31/3/16 –
 - Old rule and forms applicable ?
 - New rule and forms applicable ?
 - Or no provisions to be complied till the new rule is effective

Effective date –

treatment during the period 1/6/15 to 31/3/16

- View 1
 - Old rules / forms under section 195(6) – hence reporting to be done as in the past. – **Conservative view**
- View 2
 - No rules / forms under section 195(6) – hence no reporting to be done – **Aggressive view**
- View 3
 - Rules / Forms now prescribed effective 1st April, 2016 will apply to AY 2016-17, hence these need to be followed 16/12/15 onwards. – **Better view (?) – but online forms not yet available; can one apply exemptions under new Rule before 1st April, 2016?**

New Rule 37BB – Form 15CA

- To be submitted to AD before making remittance
- Four Parts – A, B, C and D
- Residential status of remitter also to be mentioned
- Relevant purpose code as per RBI needs to be given
- Part A
 - to be filled up if payment or aggregate during the financial year does not exceed Rs 5 lakhs
 - This would apply if YTD amount \leq 5 lakhs
 - Self declaration about TDS applicability and rate/ taxable amount
 - To be verified electronically – with / without digital signature – procedures to be notified

New Rule 37BB – Form 15CA

- Part B
 - to be filled up in case certificate u/s 197 or order u/s 195(2)/(3) has been obtained by remitter / beneficiary.
 - Applicable if payment or aggregate during the financial year does not exceed Rs 5 lakhs
 - This part will apply if YTD amount \leq 5 lakhs
 - 197 certificate on application by the recipient for no / low TDS rate
 - 195(2) order on application by payer for determination of proportion of income liable to TDS
 - 195(3) order for NIL TDS based on application by recipient.
 - If no such certificate / order obtained, or amount $>$ 5 lakhs, to be kept blank, and fill other applicable part

New Rule 37BB – Form 15CA

- Part C where certificate from Chartered Accountant is obtained in Form 15CB
 - Applicable if payment or aggregate during the financial year exceeds Rs 5 lakhs
 - This would apply if YTD amount > 5 lakhs
 - Details of certificate u/s 197 or order u/s 195(2)/(3), if any, also to be given in this part.
 - Form 15CB now also to be furnished and verified electronically by Chartered Accountant – procedures to be notified.
 - CA can certify NIL TDS or lower rate, based on facts / applicable DTAA.
 - Disclaimer desirable

New Rule 37BB – Form 15CA

- Part D where the sum being remitted is not chargeable to tax **under the Income tax Act, 1961** (not taxable under DTAA will not be reported here) – e.g. dividends, exempt LTCG, etc.
 - Subject to exclusions not to be reported (33 items)
 - Hence for payments for 33 items listed in the Rule no reporting to be done, regardless of amount.
 - List includes
 - Imports
 - Gifts
 - Investments overseas,
 - Travel related remittances including pilgrimages
 - Remittance for medical treatments
 - Postal services
 - Family maintenance remittances by non residents

Form 15CB – CA certificate

- *Pari materia* with old form 15CB
- Applicable only if payment or aggregate during the financial year exceeds Rs 5 lakhs
- This would apply if YTD amount > 5 lakhs
- Details of certificate u/s 197 or order u/s 195(2)/(3), if any, also to be given in this part, as liability as per Act will be governed by such certificate / order
- To be verified and submitted electronically
- Digital signature ? – Procedures awaited
- Not to be obtained for (i) remittances < 5 lakhs; (ii) amounts not taxable under the Act.

Form 15CC

- Currently AD's sending copies of Form 15CA/15CB to ITO TDS in hard copy.
- Presumably under earlier RBI guidelines
- RBI since issued a circular that for tax matters, AD's would be governed by IT department's guidelines alone
- Now CBDT requires AD's to send quarterly summary of remittances of all remittances in the given format, with PAN of remitter (and remittee – if available), date, country and purpose code of remittance
- To be submitted within 15 days from end of each quarter, electronically, under digital signature .
- AD's will need to gear up their systems to capture the required data, for being able to upload details in time

Form 15CB – Analysis

- Nature of remittance as per agreement/document
 - Important for determining taxability of income
 - Documents reviewed must enable determination of nature of remittance – otherwise call for more documents
 - Declaration not enough
 - Documents that should be reviewed
 - Certified copy of signed contract
 - Certified copy of signed/stamped invoice
 - Certified ledger account
 - Correspondence on which reliance is placed including emails
 - Supporting vouchers in case of reimbursements a must
 - Print out of website details of Payee
 - Physical certificate should be amended for documents reviewed

Form 15CB...contd.

- Taxability under the provisions of the Act without considering DTAA
 - To be filled even if no tax payable as per DTAA
 - Relevant Section in case payment not income?
 - Basis of determining taxable income
 - Short reasoning online – details in physical certificate
- If the remittance is for royalties, fee for technical services, interest, dividend
 - Not connected with PE
 - No space to provide reasons
 - Proper reasoning to form part of the physical certificate
 - Detailed reasoning if rate lower than DTAA rate applied

Form 15CB...contd.

- In case remittance is on account of business income
 - Obtain proper declaration from payee for no PE in India
 - Proper validation of facts, cross-checking
 - If PE in India, whether CA can issue certificate for profits attributable?
- In case remittance is on account of Capital Gains
 - Can CA provide certificate for capital gains?
- In case of remittance other than income – mention the exact nature
 - Separate certificates for income and non-taxable capital receipts

Checklist - Facts

- Details about the transaction
- Locking down the facts
- Residential status of the assessee
 - Tax Residency Certificate
 - PE?
- Identify the legal status of the tax payer
- Determining the Country of Residence of tax payer (CoR)
- Determining the Country of Source of income (CoS)
- Ascertaining the nature of income and its categorisation
- Declaration to be obtained for key facts

Checklist - Tax treaty

- Applicability of treaty
 - Residential status
 - Taxes covered
 - Persons covered
- Must check
 - Technical Explanation (US)
 - Protocols and Memorandum of Understandings
 - MFN clause
 - LOB clause
- References
 - OECD and UN Model Convention Commentary
 - Commentaries by learned authors
 - Klaus Vogel
 - Arvid Skaar

Some practical aspects

- Cost benefit analysis
 - Credit in the home country against tax paid in India
- Tax return has to be filed
 - Final Assessment only on filing of tax return
- Complex legal structures & Unresolved issues
 - LLPs / Partnerships
 - Triangular treaty situation
- Law is always trying to catch up to business
 - Eg - E-commerce – 2012 amendments
- Consider for cross-checking
 - FEMA / Customs / Service tax / R & D Cess

No TDS under bonafide belief

- Where assessee-company made payment to a foreign company without deduction of tax at source on basis of certificate issued by Chartered Accountant, same was a bona fide mistake and hence, assessee was **not liable to penalty for concealment of income**

CIT v. Filtrex Technologies (P.) Ltd.

- [2015] 59 taxmann.com 371 (Karnataka)
- Is CA exposed to penalty / penal action for issuing such certificate?

S 195(7)

- Inserted in 2012
- CBDT may notify class of persons / cases where person responsible for paying may apply to AO to determine by general or special order appropriate proportion of sum chargeable for TDS u/s 195(1)
- No notification issued so far

Consequences of non / short deduction of TDS

- Disallowance u/s. 40(a)(i) or Section 58(1)(a)(ii)
- Interest u/s. 201(1A)
 - ☞ Cannot be levied if recipient has paid full tax (179 CTR 121)
- Penalties - (Section 221; Section 271C)
- Prosecution - (Section 276 B)

Refund of TDS -Circular No: 790 dt. 20/04/00 read with Cir 7/2007 dt 23/10/07

- Refund in following cases
 - Contract is cancelled & no remittance is made to Non Resident
 - Remittance is made to Non Resident & contract is cancelled - Refund received from NR
 - Exemption of amount remitted due to amendment / notification
 - Double TDS on same income more than once due to error
- Prior approval of Chief commissioner.
- Adjustment of Arrears of Tax.
- No Interest u/s. 244A
- T.D.S certificate not issued to N R

ISSUES ARISING U/S. 195 CASE LAWS / CASE STUDIES

Issues arising u/s. 195 in respect of certain specific payments.

- Section 9(1)(i) : Business (Connection) Receipts of a non-resident:
 - ➔ Taxability if “**business connection**” exists.
 - ➔ Taxable only to the extent “**reasonably attributable**” to operations in India.
 - ➔ **Specific exclusions** – Explanation 1(b); 1(c) & 1(d) of Section 9(1)(i)

Issues arising u/s. 195 in respect of certain specific payments.

Cont...

Section 9(1)(i) - (Cont.....)

- **Specific inclusions** – Explanation 2 to Section 9(1)(i)
- treaty concept of **dependent agent** introduced in Act
- agent need not be in India but **must Act** in India.

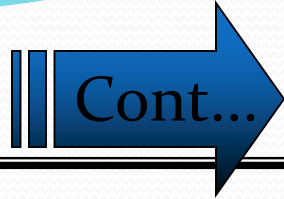
Issues arising u/s. 195 in respect of certain specific payments.

Cont...

Section 9(1)(i) - (Cont.....)

- “Business Connection” – Interpretation of:
 - ☞ CIT Vs. R.D. Aggarwal & Co. (56 ITR 20)
 - ☞ Circular 23 of 1969 & Circular 786
 - From other judicial rulings
 - ☞ existence of some organisation in India (223 ITR 416; 108 ITR 874)
 - ☞ Agency in India (239 ITR 879; 36 ITR 418; 120 ITR 887 etc)
- (Note: Explanation 2 now introduced to Section 9(1)(i))

Issues arising u/s. 195 in respect of certain specific payments.



From other judicial rulings (Cont...)

- Close relationship in India - (119 ITR 986)
- Asiasat's case (85 ITD 478)

- Taxation of BPO units (Circular 5 of 2004)
- Difference between Business Connection & Permanent Establishment ?

Issues arising u/s. 195 in respect of certain specific payments.

Cont...

Sec. 9(1)(vi) & Section 9(1)(vii):

- Payment in nature of Royalty & FTS:
- Overrides s 9(1)(i)
 - ➡ Difference between “Royalty” & “FTS”
 - ➡ When are they deemed to accrue or arise in India
 - ➡ Place of accrual (230 ITR 206); (250 ITR 164); (262 ITR 513)

Issues arising u/s. 195 in respect of certain specific payments.

Cont...

Sec. 9(1)(vi) & Section 9(1)(vii) (Cont...):

- ➔ “Royalty” - Act Vs. Treaty
- ➔ “FTS” - Act Vs. Treaty
- ➔ “Make available” definition of FTS
- ➔ TDS where FTS Article is missing in Treaty

Issues arising u/s. 195 in respect of certain specific payments.



Sec. 9(1)(vi) & Section 9(1)(vii) (Cont...):

☞ Consideration for designs & drawings

- ☞ outright purchase not royalty (190 ITR 626)
(Pfizer's Case (271 ITR 101(AAR)))
- ☞ when it forms part of composite contract for supply of machines (243 ITR 459; 259 ITR 248; 255 ITR 354)
- ☞ Services provided in course of business not FTS (237 ITR 142)

Issues arising u/s. 195 in respect of certain specific payments.

Cont...

Sec. 9(1)(vi) & Section 9(1)(vii) (Cont...):

- ➔ Payment for initial know-how rendered from abroad (148 ITR 774; 145 ITR 84; 143 ITR 720 & 224 ITR 724 (SC))
- ➔ “information” – meaning – (263 ITR 230)
- ➔ Payment for erection of machinery supplied – (262 ITR 110; & 251 ITR 348)
- ➔ Payment for composite contract involving operations in India & outside India (Ishikawajima – (271 ITR 193(AAR))

Issues arising u/s. 195 in respect of certain specific payments.



Sec. 9(1)(vi) & Section 9(1)(vii) (Cont...):

- Payment for training to Indian personnel
 - In India – (224 ITR 203)
 - Outside India.
- Fees for deputing technicians to India - FTS (222 ITR 551)
- Reimbursement of daily allowance treated as FTS (230 ITR 206)

Expl. 6 to s 9(1)(vi) – added in 2012

- *Explanation 6.*—For the removal of doubts, it is hereby clarified that the expression “process” includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret
- *B4U Holdings (2012)18 ITR(T) 62 (Mum)*– (US) treaty definition to be followed, and hence above addition not relevant
- *Verizon Communications Singapore Pte. Ltd. v ITO (2014) 361 ITR 0575 (Mad)*] – Singapore DTAA definition also includes “process” and relying on Explanation held as Royalty.

Other Case laws/ Issues:

- Business Profits or Capital Gains (Fidelity (271 ITR 1 (AAR)))
- Liason Office held to be a PE (UAE Exchange Centre (268 ITR 9(AAR)))
- Liability to deduct tax for Sale of property arises when Sale deed clearly showed that seller is NR.
-Mrs. Meena S. Patil v ACIT 30 ITR 317 (Bang Tri)

Deductibility on Capital gains

- On sale of shares
 - Mauritius
 - Cyprus
 - Notified Jurisdictional Area
- On sale of property
 - Deduction on gross amount or capital gain?
 - Documents required to correctly compute gain
 - Can CA give certificate?
- On income earned by FIIs
 - Section 196D(2)
- On gains earned by NRIs
 - On non-repatriable capital gains earned by NRIs from PIS

Deductibility on Reimbursement of expenses

- What is directly taxable is taxable even if reimbursed
- Facts & supporting very important
- Pure Reimbursement – no mark-up
- Reimbursement with mark-up
- Allocation of Shared Costs
- Third-party services
- Incidental expenses
- Salary / Living Allowances

Issues

- Fee collected by resident on behalf of NR for imparting distance education is not taxable in India if no PE in India.
 - *FICCI 320 ITR 124 (AAR)*
 - *CIT v Illinois Institute of Technology (India) P Ltd 321 ITR 79*
- Sponsorship to popular sports events is sales promotion expenditure. It cannot be treated as royalty. Hence, no TDS.
 - *DIT v Sahara India Financial Corporation Ltd 321 ITR 459 (Del)*
- Discounting charges paid to NR who does not have any PE in India cannot be treated as interest. Hence, no need to deduct TDS u/s 195. *CIT v Cargile Global Trading (I) Pvt Ltd. 56 DTR 188 (Del)*

Issues

- Payment for cost sharing of R&D Expenses is not treated as FTS or royalty. Hence, no TDS is to be deducted.
 - *ABB Limited (2010) TIOL 94 ARA-IT dt. 15.03.2010*
- Routine Data Processing services and document handling services provided by a NR who is not having any PE in India is not taxable.
 - *RR Donnelley India Outsourcing Pvt Ltd 56 DTR 1(AAR)*
 - *Position post 2012 amendment may not be same*
- Telecommunication facility provided by a NR outside India is not regarded as FTS. Hence, no TDS.
 - *Wipro Ltd. v ITO 133 Taxman 149 (Bang Tri)*
 - *Software Technology Parks of India v ITO 3 SOT 529 (Bang Tri)*
- Other charges reimbursed along-with royalty payment by a resident hotel company to US NR is not chargeable under Royalty under India-US DTAA. It is taxable in India only if NR have PE in India. *Six Continents Hotels Inc. v DCIT 11 taxmann.com 332 (Mum Tri)*

Issues

- Payment for Database maintained outside India by NR is not taxable in India if NR does not have PE in India.
 - *Gartner Ireland Ltd. v DCIT 42 SOT 21*
- Referral fee paid to NR is not taxable in India.
 - Cushman and Wakefield Pte Ltd. 305 ITR 208 (AAR)
- Reimbursement salaries & living allowances to deputees
-Held salaries of technicians:
 - HCL Infosystems (274 ITR 261 – Delhi)
 - CIT Vs. BHEL (252 ITR 218 – Delhi)
 - Held as FTS & salaries:
 - AT & S India (P) Ltd. (287 ITR 421 (AAR))
 - Verizon Data Services P.Ltd.(AAR) (May 2011)

Commission

- Commission Income received by a non-resident for negotiating with prospective customer for participation of show in India. Right to receive commission arises in India. Hence, taxable in India-*Rajiv Malhotra 155 Taxman 101 (AAR-Delhi)*
- Commission paid to NR for promoting products outside India is not taxable if there is no PE of NR in India.
 - *ACIT v Modern Insulators Ltd. 56 DTR 362 (JP Tri)*

For:

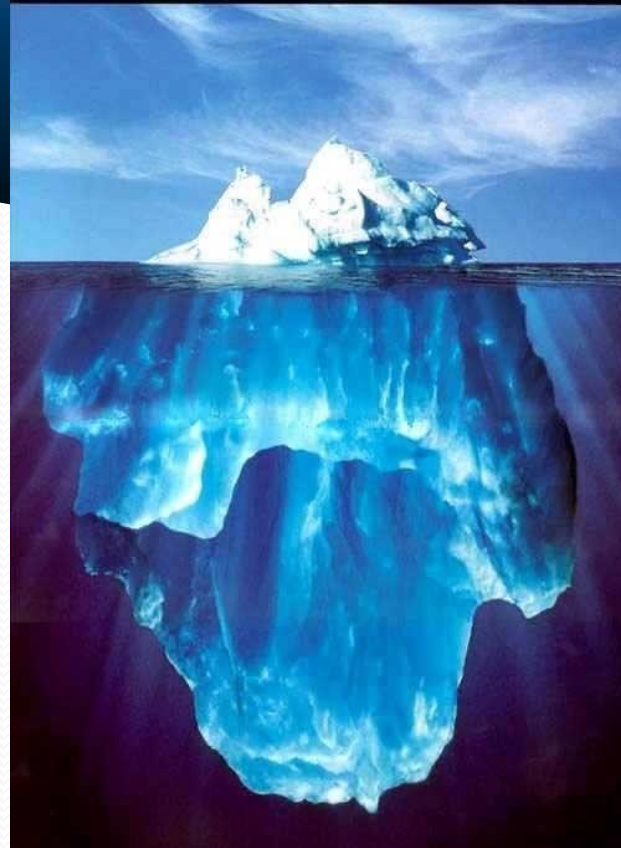
- Circular No. 23 dt. 23.7.1969
- Circular No. 786 dt. 07.02.2000.

This view is also supported by

- Supreme Court in *CIT v/s. Toshoku Ltd. (1980) 125 ITR 525 (SC)*.
- Delhi High Court in *CIT v/s Eon Technology P. Ltd.(Nov. 2011)*
- AAR in *Spahi projects P.Ltd. 315 ITR 374 (AAR)*

However there is a contrary ruling in case of *Wallace Pharmaceuticals P. Ltd. 278 ITR 197 (AAR)*

THANK YOU



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