

TDS ON NON-RESIDENT PAYMENTS

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Overview – Section 195

Section	Provisions
195(1)	Scope and conditions for 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 the CBDT to issue Notifications
195(6)	Furnish the information relating to the payment of any sum
195A	Grossing up of tax



SECTION 195

COVERAGE

Coverage Of Section 195

Who is covered?

- Any person responsible for paying to non-resident or foreign company
- Includes a non-resident whether or not NR has any presence in India
- Payee includes a foreign company having POEM in India [Notification to Section 115JH]
- Resident but not ordinary resident? United Breweries Ltd. v ACIT [1995] 211 ITR 256 (Kar)

What is covered?

- Any interest or any other sum chargeable to tax other than
 - 194LB - Income by way of interest from infrastructure debt fund
 - 194LC - Income by way of interest from Indian company
 - 194LD - Income by way of interest on certain bonds and Government securities
 - 194LBB - Income of unit holder of investment fund
 - 196B/C/D - Income from GDR/offshore funds
 - 194E - Payments to sportsman, entertainer or sports association
 - 192 - Income Chargeable under the head salaries
 - Personal Payments?

When is it applicable?

- At the time of payment or credit whichever is earlier

Rates and threshold

- No threshold prescribed
- At rates in force

Section 195(1) – Chargeability Under Act / DTAA

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

Section 195 - Scope

- Income exempt from TDS not covered
 - 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)]
 - Incomes covered under EQL
- Void Agreement - Ericsson Communications Ltd. - [2002] 81 ITD 77 (DELHI)
- Agreement not concluded - Income does not accrue as right to receive income not crystallised - no tax deductible - Motor Industries Co. [2001] 115 TAXMAN 222 (KAR.)
- TDS should not be deducted on service tax/GST

Sum Chargeable To Tax

- **Sum chargeable to tax - Gross vs Net**
- Transmission Corporation of A.P. Ltd. v. CIT (239 ITR 587) (SC)
- The Hon'ble Supreme Court has held that “..... Hence, there was no substance in the contention of the appellant that the expression ‘any other sum chargeable under the provisions of the Act’ would not include cases where any sum payable to the non-resident is a trading receipt which may or may not include ‘pure income’. The language of section 195(1) for deduction of income-tax by the payee is clear and unambiguous and casts an obligation to deduct appropriate tax at the rates in force.”
- CIT v. Samsung Electronics Co. Ltd. (185 Taxman 313)(Kar)
- Payments to non-residents are subject to withholding tax on the whole of the sum, unless taxpayer obtains an order from tax authorities for determination of appropriate W H

Sum Chargeable To Tax

- CIT v. GE India Technology Cen. (P) Ltd. (SC) - [2010] 327 ITR 456
- The moment a remittance is made to a non-resident, obligation to deduct tax at source does not arise; it arises only when such remittance is a sum chargeable under Act, i.e., chargeable under sections 4, 5 and 9
- Section 195(2) is not a mere provision to provide information to ITO (TDS) so that department can keep track of remittances being made to non-residents outside India; rather it gets attracted to cases where payment made is a composite payment in which certain proportion of payment has an element of 'income' chargeable to tax in India and payer seeks a determination of appropriate proportion of sum chargeable
- Application to the Assessing Officer under Section 195(2) of the Act is necessary only when the payer is unsure of the portion of payment which would be subject to withholding tax or the quantum of withholding tax. Section 195(2) of the Act is only a safeguard as observed in the Transmission Corporation case
- Tax is deductible only from income portion of a payment and not the gross payment itself
 - CBDT circular no. 02/2014 dated 26.2.2014 states that interest u/s. 201 will be on portion representing income (not the whole amount)
 - CBDT circular no. 03/2015 dated 12.2.2015 states that disallowance u/s. 40(a)(i) will be on sums chargeable to tax (not the whole amount)

Case Study 1

- Mr.X, an NRI purchases a flat from Mr.Y, another NRI.
- **Issue 1: Is TDS u/s 195 applicable?**
- **Issue 2: TDS should be deducted on sale consideration paid or on CG?**
- One view: TDS should be on sale proceeds.
 - Syed Aslam Hashmi - 26 taxmann.com 6 (Bang. ITAT 2012)
 - R. Prakash - 38 taxmann.com 123 (Bang ITAT) 2013
- **Counterview: TDS should be only on gain portion forming part of the sale consideration**
 - SC Decision in GE Technologies (supra). ITAT decisions cited above have not considered SC decisions in GE Technologies and Transmission Corporation in correct perspective
 - Shri Bhagwandas Nagla ITA No. 143/Hyd/2017
- **Issue 3: Can the payer himself determine the amount of tax to be deducted at source?**
 - Yes he can GE India Technology Centre (SC)
 - Approach tax officer u/s 195(2) if payer not able to determine

Section 195 – Timing Of Deduction

- 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
- FEMA or RBI Approval
 - United Breweries Ltd. - [2002] 81 ITD 77 (Delhi)
 - Motor Industries Co. (249 ITR 141) (Kar)
 - Pfizer Corporation (259 ITR 391) (Mum)
- Govt.Approval
 - Pfizer Corpn. [2003] 129 TAXMAN 459 (BOM.)
- **Payment of Royalty under DTAA - tax deductible only on payment?**
 - OECD Commentary
 - Uhde GMBH (54 TTJ355) (Bom)
 - National Organic (96 TTJ765) (Bom)
 - Flakt (India) Ltd (267 ITR 727) (AAR)
 - DIT (IT) v. Siemens Aktiengesellschaft (124 of 2010) Bombay HC
 - Johnson & Johnson V. ADIT (7865 of 2010) Mumbai ITAT
 - Section 43(2) defines “Paid”

Section 195 – Rate of TDS

- Rates in force
 - Part II to the First Schedule of Finance Act
 - DTAA rates
- Surcharge to be added to DTAA Rate?
 - No - Sunil V. Motiani - [2013] 33 taxmann.com 252 (Mumbai - Trib.)
- Education Cess to be added to DTAA Rate?
 - No - DIC Asia Pacific Pte. Ltd. - [2012] 22 taxmann.com 310 (Kol.)



SECTION 206AA

Section 206AA - Submission Of PAN

- 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%
- Section applicable also when PAN incorrect or invalid
- Now form 10F and Application u/s 197 cannot be made without PAN
- Relaxation for NR under Rule 37BC
- Rule 37BC - PAN not required for payment of “Specified incomes” if NR provides TRC and TIN:
 - Interest,
 - Royalty,
 - FTS, and
 - Capital Gains
 - Interest on Long Term Infrastructure bonds referred to in S. 194LC.
- Documents require for relaxation to be claimed from Section 206AA
 - TRC - if the foreign country’s law provide for TRC - TRC however still required for claiming DTAA relief
 - TIN or UIN
 - Name, email, contact
 - Address in resident country

Section 206AA - Issues

- If D TAA rate (cap) is lower than rate as per Sec. 206AA?
- Literal reading of provisions of section 206AA suggests that it shall have an overriding effect over provisions of the Act including Tax Treaty
- Treaty provisions override both charging and machinery provisions of Section 206AA irrespective of the non-obstante clause contained in Section 206AA
 - Delhi HC in Danisco India (P) Ltd. v. UOI 404 ITR 539; Special Bench of Hyderabad Tribunal in Nagarjuna Fertilizers and Chemicals Limited [2017] 78 taxmann.com 264
- Alternate view: DTA rate does not apply to TDS provisions which are provisional in nature. DTA rate is to determine final tax liability. TDS is only provisional. Domestic law can prescribe a higher 'TDS' rate.
 - NR would have to file a return in India and claim refund
 - The non-resident may not get credit in his home country as TDS may be higher than the DTA rate
- **Section 206AA - Surcharge and Education Cess**
 - Not to be included
 - Delhi Tribunal in Computer Sciences Corporation India (P) Ltd. [2017] 77 taxmann.com 306 (Delhi - Trib.)
 - If tax is as per rates in force under the Finance Act, Surcharge and Education Cess will apply.

Grossing Up u/s 195A

- Section 195A requires grossing up where the payer is required to borne the taxes.
- Applicable rate for grossing up to be “rates in force”
- In cases where PAN is not available and rates in force is 10% as per DTAA - Whether grossing up should be on 10% being rates in force or on 20%
 - Bangalore Tribunal in case of Bosch Ltd.Vs. ITO 28 Taxmann.com 228 has taken a view that for grossing up principle 10% rate should be considered and not 20% as Section 206AA is not charging section

Scenario 1 [PAN/TRC available]	Scenario 2 [No PAN/TRC]
Amount Payable Rs. 100 Rates in force - 10% Grossing up - Rs. 111.11 [100/100*90] TDS u/s 195 - 11.11 [10% of 111.11]	Amount Payable Rs. 100 Rates in force - 10% Grossing up - Rs. 111.11 [100/100*90] TDS u/s 195 - 22.22 [20% of 111.11]



TRC

Tax Residency Certificate

- Section 90(4) mandates TRC for claiming treaty benefit
- Section 90(5) provides for Form 10F for providing other details not covered in TRC
 - Form 10F not required if all the specified information maintained in TRC
- Contents of Form 10F
 - Status
 - PAN
 - Nationality
 - TIN
 - Period of residential status
 - Address
- Circular 789 TRC will be sufficient evidence for residence and beneficial ownership in case of FIIs earning dividends and capital gains on shares
- Supreme Court in UOI vs. Azadi Bachao Andolan (2003) 263 ITR 706 (SC) upheld the validity of Circular.
- French Supreme Court: TRC - a prerequisite for availing treaty benefits, not for determining residential status
- Skaps Industries India Pvt. Ltd. v. ITO [TS-330-ITAT-2018(Ahd)], treaty benefit was granted even without TRC - non-obstante clause of Section 90(4) cannot be read as a limitation to the treaty superiority.
 - NR can claim treaty benefit if residential status substantiated by sufficient and reasonable documentary evidence
 - Followed in also Sreenivasa Reddy Cheemalamarri v. ITO [TS-158-ITAT-2020(HYD)]
- However, is TRC alone sufficient to grant treaty access?
 - **Beneficial ownership**
 - **LOB**
 - **PPT**

E-furnishing of Form 10F

- Notification No 03 2022 w e f July 16 2022 has mandated furnishing Form 10F online
- Form 10 F is appearing in the registered accounts on the income tax e-portal
- Steps to be followed
 - Go to e File Tab
 - Select 'Income Tax Forms' Then select 'File Income Tax Forms'
 - Next, select 'Persons not dependent on any Source of Income (Source of Income not relevant)'
 - From the list of forms available, find Form 10 F
 - Select the relevant Assessment Year (As on date, online Form 10 F can be filed only for AY 2022-23. Option to furnish the same for AY 2023-24 is not available)
 - Fill the requisite details in Form 10F
 - Please note that copy of TRC has to be attached alongwith Form 10 F
 - Submit with DSC or EVC
- **Issue: Obtaining PAN is not mandatory for NR but e-filing Form 10F requires PAN as one can create account with PAN**
- **Consequences if Form 10F is not furnished electronically**
- **Remittances made between 1st April 2022 to 15th July 2022?**
- **Remittances for FY 2022-23**

Tax Residency Certificate - Issues

- If TRC is not available at the time of deduction?
 - **ITAT: Finds delay in furnishing TRC justifiable; Allows benefit of India-USA DTAA on interest income [TS-769-ITAT-2021(Mum)]**
- Tax year is calendar year
- Year of remittance is different from tax year
- TRC available of earlier year, TRC applied but not received
- TRC in other language
- Countries with no TRC
- Business License as TRC



SOME COMMON TDS ISSUES

Some Common TDS Issues

- **TDS on purchase of goods**
 - Purchase for export - no TDS
 - Purchase - for sale in India - taxable
 - Purchase operations in India - for purchase of goods from outside India - taxable
 - Purchase of services ?
- **Export Commission**
 - Withdrawal of Circulars 23 (1969), 163 (1975), 786 (2000) have any implication?
- **Royalties**
 - Software royalties
 - Digitalised transactions
 - Database subscriptions
- **FTS**
 - Technical services
 - Managerial services
 - Make available
 - Professional and Legal services

Some Common TDS Issues

- **Reimbursement**

- Pure Reimbursement non-taxable payments with no mark-up - no TDS
 - A P Moller Maersk A S [2017] 392 ITR 186 (SC)
- Allocation of Shared Costs
- Third-party services
- Salary / Living Allowances

- **Tax withholdings from payments in kind**

- Kanchanganga Sea Foods Ltd. (265 ITR 644) (AP)

- **TDS on Interest earned by NRIs**

- Only NRO interest taxable
- NRE and FCNR interest exempt from tax
- NRE interest exempt if Non-resident under FEMA - Section 10(4)(ii)
- FCNR interest exempt if NR or RNOR under Income-tax - Section 10(15)(fa)

Some Common TDS Issues

- **TDS on Salary payments**

- Salary earned by NR is generally taxable as per DTAA only in country where NR is resident, unless services are rendered in the other country and specified number of days is crossed
- ESOPs, Leave encashment - spread over a few years and across different countries. Should proportionate amounts be considered, or receipt in the final year should be considered?
 - ESOP exercised by NR, granted for employment in India, not eligible for treaty benefits Unnikrishnan V S [TS-14-ITAT-2021(Mum)]

- **Transfers from NRI's own NRO account to own NRE account**

- No element of income involved

- **Banks insist on Form 15CA-CB**

- Find out the source of funds lying in NRO account
- Trace them back to the incomes comprised therein
- Income-tax returns filed by the NRI in India for the period concerned
- Relevant years' Form 26-AS or TDS certificates
- Documents and issues pertaining to each type of income

Some Common TDS Issues

- **Transfers directly from third-parties into NRI's NRE Account:**
 - a certificate from the NRI's assessing officer under section 197
 - an undertaking or indemnity bond from the NRI
 - Payer would also need to obtain a C A certificate and provide Forms 15C A & 15CB
- **Transfers from third-parties in to NRO Account of NRI**
- Bank crediting the amount to the NRO account does not ask for compliance under Sec. 195(6) as no remittance is being made outside India
- However, as per Sec. 195(6), information is to be furnished by the payer - irrespective of whether the amount is remitted outside India or not
- Forms filed at this stage can be helpful in transferring the funds by NRI from NRO to NRE account
- **On gifts to NR non-relatives**
 - Section 9(1)(viii)

Foreign Exchange Rate

- Conversion rate has to be considered as on the date the tax is required to be deducted at source
 - Not when it is deducted at source [Rule 26]
- If the rate fluctuates between the date of deduction of tax, and payment to non-resident, the difference has to be ignored
- Confirmed by Honda Motorcycles 56 taxmann.com 238 Delhi ITAT



APPLICATION FOR LOWER/NIL WITHHOLDING TAX

Comparative Analysis of 195(2), 195(3) & 197

Particulars	195(2)	195(3)	197
Application by	Payer - whether mandatory?	Payee Payee eligible as per Rule 29B can only apply <ul style="list-style-type: none"> Foreign Bank having Indian Branch for interest or any other sum not being dividends Foreign Company having Indian Branch for any sum not being interest or dividends 	Payee
Purpose	To determine the appropriate proportion of sum chargeable as income	To receive the sums without deduction of tax i.e. Nil withholding tax certificate	No deduction/ deduction at lower rate
Whether appealable?	Appeal u/s 248 denying liability to deduct tax after payment of tax	No appeal	No appeal, Writ Petition can be filed
Process	<ul style="list-style-type: none"> Application on plain paper Order by AO determining portion of income chargeable to tax Order for specified period 	Application in Form 15C (Banking) and Form 15D (Others) <ul style="list-style-type: none"> Non resident has prior track record of assessment in India Non resident has been carrying on business or profession in India continuously for a period of 5 years Value of fixed assets in India exceeds Rs. 50 lakhs Should not have been deemed to be an assessee in default Not been subjected to penalty u/s 271(1)(iii) 	Application in Form 13 Application to be made before payment/credit whichever is earlier Determination of existing and estimated tax liability based on <ul style="list-style-type: none"> Tax payable on estimated income of previous year Tax payable on assessed/returned income of past 3 years Existing tax liability Advance tax payment & Tax deducted at source Certificate valid for such period of the previous year as specified
Revision u/s 264 available	Yes	Yes	Yes
Application for	Doubtful*	Yes	Nil or lower



REMITTANCE CERTIFICATE

Remittance Certificates - Section 195(6)

- Any person responsible for payment of any sum to non-resident whether or not chargeable to tax shall furnish information in prescribed manner
- Amendment is in conflict of Rule 37BB which states that information needs to be furnished on sum chargeable to tax - Act to prevail!!

Form 15CA

Part A Where the remittance or the aggregate of such remittance does not exceed ₹5 lakh during the FY.

PART B: Where remittances exceed Rs. 5 Lakh and order / certificate u/s 195(2) / 195(3) / 197 of the Act has been obtained from the AO

PART C Where remittances exceed Rs. 5 Lakhs and a certificate in Form No 15CB has been obtained.

PART D Where the remittance is not chargeable to tax under Act other than payments referred to in Rule 37BB(2)

Declaration And CA Certificate

- Form to be submitted prior to remittance.
- No facility of correction and withdrawal
- Remittance can be made to a country different from residence of payee.
- Form 15CA not required
 - by individual under Schedule III of Current Account Regulations under FEMA.
 - Payment for 33 listed items

<i>SPECIFIED LIST</i>		
<i>Sl. No.</i>	<i>Purpose code as per RBI</i>	<i>Nature of payment</i>
<i>(1)</i>	<i>(2)</i>	<i>(3)</i>
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)
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	SI101	Payments for maintenance of offices abroad
24	SI201	Maintenance of Indian embassies abroad
25	SI202	Remittances by foreign embassies in India
26	SI301	Remittance by non-residents towards family maintenance and savings
27	SI302	Remittance towards personal gifts and donations
28	SI303	Remittance towards donations to religious and charitable institutions abroad
29	SI304	Remittance towards grants and donations to other Governments and charitable institutions established by the Governments
30	SI305	Contributions or donations by the Government to international institutions
31	SI306	Remittance towards payment or refund of taxes
32	SI501	Refunds or rebates or reduction in invoice value on account of exports

Some Practical Issues

- If income is taxable under the ITA but exempt under DTAA, is form required?
 - Part C or Part D?
- Transfer of shares on loss
 - Part C or Part D
- No facility of correction .You can only withdraw and file fresh form
- Very little space to give reasons
- Credit card payments
- Paypal payments
- Payment through bitcoins



CONSEQUENCES & CHECKLIST

Penalties & Other Consequences

- Disallowance of expenditure u/s 40(a)(i)/(ia)/(iii)/58
- Payer as representative assessee
- Assessee in default u/s 201(1)
 - Relief available if NR has filed ITR and paid taxes
- Interest @ 1%/1.5% p.m for tax not withheld or not paid
- For failure to pay tax deducted - S. 221
- For failure to deduct tax - S. 271C
- For failure to file TDS return - S. 272A
- For failure to furnish information or for furnishing inaccurate information under S. 195 - S. 271-I - Rs. 1,00,000
- On CA for furnishing incorrect information in certificate - S. 271J - Rs. 10,000 for each such certificate
- Prosecution for failure to pay tax deducted - S. 276B

Checklist

- Clearly examine facts. Conduct due diligence.
 - Underlying agreement /contract/SHA
 - Invoice/Debit Note being paid
 - Transaction details
 - Other correspondence between parties
 - A visit to the NR's website to find out more about their Indian operations
- Residential status of the assessee
 - TRC and Form 10F
 - Beneficial ownership declaration
 - No PE certificate
- Identify the legal status of the tax payer
- Ascertaining the nature of income and its characterisation
- Applicability of treaty
 - Residential status
 - Taxes covered
 - Persons covered

Checklist

- Must check
 - Technical Explanation (US)
 - Protocols and Memorandum of Understandings
 - MFN clause
 - LOB clause
 - Changes due to MLI

- Anti-avoidance provisions
 - Changes due to MLI
 - BEPS Amendments in ITA
 - TP adjustments
 - GAAR
 - Indirect Transfers



CASE STUDIES

Case Study 2

- A Singapore company had acquired shares between March 2019 to June 2019 in an Indian company.
- Now on Nov 1, 2019, it would sell part of such shares to another non-resident (Cayman entity) for the same price shares were acquired.
- 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 ?

Case Study 2

- Section 195(6) read with Rule 37BB requires reporting of any payment made to a NR irrespective of its chargeability to tax in India.
- While 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. Further 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. There is no CA certification required.
- Technically compliance is required even if payments are not chargeable to tax in India.
- While in the current case, it is arguable that since there is no income taxable in India, as there is no capital gains tax liability in India, hence 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 to avoid any litigation in future. Detailed reporting in Part C will thus be a better compliance for the taxpayer.

Case Study 3

- M Ltd., Mauritius holds 100% shareholding in XYZ Pvt. Ltd. (India) and PQR Pvt. Ltd. (India)
- Step 1 - ABC Pte Ltd. (Singapore) will acquire XYZ Pvt. Ltd. (India) and PQR Pvt. Ltd. (India) from its group company (M Ltd., Mauritius) on a fair value basis in cash.
- Step 2 - ABC Pte. Ltd. (Singapore) will then transfer its shareholding in XYZ Pvt. Ltd. (India) and PQR Pvt. Ltd. (India) to its subsidiary in India (I Co Pvt. Ltd.) in consideration of the shares of I Co Pvt. Ltd. i.e a swap of shares
- Whether the transfer of shares from Non-resident (M Ltd., Mauritius) to another Non-resident (ABC Pte. Ltd.) which is not taxable as per the provisions of India-Mauritius treaty would require compliances in Form 15CA and Form 15CB ?
- 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 (note that the transaction is also not taxable in India as per the provisions of India-Singapore treaty) ?

Case Study 3

- 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).
- This is irrespective of its chargeability to tax.
- 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.
- It may be advisable to comply with under part D of the New Rule 37BB even in case of barter transaction like share swap with a NR
- It is possible that ICo Pvt. Ltd 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 Form No. 15CA (as also Form 15CB, if payer decides to report in Part C with CA certificate) to the Tax Authority as physical record with proper explanation.

Case Study 4

- While filling Form no. 15CA Part A, Part B and Part C, limit of Rs. 5,00,000 needs to be computed. Whether the 33 exempted payments and the remittances made by individual where prior approval of RBI is not required as per Section 5 of FEMA, 1999 need to be considered while computing the limit of Rs. 5,00,000 ?
 - Rule 37BB(1) deals with payments chargeable to tax. Rule 37BB(2)/(3) deal with payments which are not chargeable to tax.
 - The limit of Rs. 5 lakhs is provided in Rule 37BB(1) which deal with payments chargeable to tax. Rule 37BB(i) provides that where such payments do not exceed Rs. 5 lakhs in a financial year, reporting may be made in Part A of Form 15CA.
 - Thus, the limit of Rs. 5 lakhs applies only to payments chargeable to tax to be reported in Part A/B/C of Form 15CA.
 - Headings of Part A/B/C clarify that the same is in relation with remittance which is taxable under the Act and limit of INR 5,00,000 is in relation with “the remittance” or aggregate of “such remittances”.

Case Study 5

- I Co. is in the process of acquiring the shares of Target Co
- I Co. is under an obligation to pay the purchase consideration to a NR Promoter to whom the consideration is paid in 2 parts i.e. Rs. 100 as upfront fee (remitted now) and Rs. 20 as deferred consideration (to be remitted after 12 months).
- The cost of acquisition is „NIL“ and the entire INR 120 is capital gains subject to tax @ 10%
- I Co has deducted entire tax of 12 and is planning to remit 88 now and remaining 20 at later date.
- Disclosure in Form 15CB

Case Study 5

Particulars (as per Form 15CB)	On remittance of Upfront Fee of Rs. 100	On remittance of deferred consideration of Rs. 20
Amount Payable	Rs. 100	Rs. 20
Amount of income chargeable to tax	Rs. 120	Rs. 120
Tax Liability	Rs. 12	Rs. 12
Basis of determining taxable income and tax liability (To give the required remarks)	<ul style="list-style-type: none"> Amount payable denotes the amount payable by I Co. as on the *date of remittance of upfront fee* While the total income chargeable / accrued as on the date is Rs. 120, an amount of Rs. 20 shall be remitted only in future and therefore, the company has deducted tax on the entire Rs. 120 and remitted the same (i.e. 120 * 	<ul style="list-style-type: none"> Amount payable denotes the amount payable by I Co. as on the *date of remittance of deferred consideration* While the total income chargeable accrued as on the date is Rs. 120, an amount of Rs. 100 (less TDS) was already remitted which was certified vide Form No. 15CB date and the tax on the entire Rs. 120/- was appropriately deducted at that time. Therefore, the company has shown amount of TDS as Nil

CASE STUDY 6

- I CO imported goods from an entity in Hongkong
- I CO obtained funding (i.e. trade/buyer's credit against imports) from "ABC Bank India, Hong Kong Branch („ABC HK")
- In order to repay this credit, I Co has availed another buyers credit from a Singapore Bank
- The proceeds of buyer's credit availed from Singapore 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 ABC HK
- Whether 15CA/CB compliance is required for the payment made by I Co to ABC HK ?
- Where ABC HK is regarded to be a branch of ABC India, payment made to ABC HK will be treated at par with payments being made to an Indian Bank (resident in India)
- Once payment is made to a resident, no compliance under section 195(6) is required.

CASE STUDY 7

- Mr. A is employed with ABC India Pvt. Ltd. (ABC). Mr. A is being sent on secondment to Singapore for 3 years by ABC to work with ABC Singapore
- While Mr. A is on assignment to Singapore, he receives part salary in India and part in Singapore.

- Mr. A has received annual bonus along with salary in India.
- Case A: The salary and bonus is received in India and hence, taxable in India. Tax on this bonus and salary is duly deducted and deposited with the Indian Revenue Authorities.
- Case B: The salary and bonus is received in India and hence, as per the domestic tax laws, taxable in India, However, the said income is eligible for exemption under the tax treaty (it has already been evaluated that Mr. A is eligible for treaty relief analysis). Tax on this bonus and salary is deducted from the assignee as hypothetical tax but not deposited with the Indian Revenue Authorities as ABC is claiming tax treaty relief at withholding stage itself for Mr. A
- In the year he received the payment, he qualified as a Non Resident of India as per the Income-tax Act, 1961yb
- He wants to remit the said amount to Singapore from his Indian bank account to his Singapore bank account for his family maintenance (approx. INR 16 lakh)
- Whether any certification in the form of Form 15CA / Form 15CB is required to be furnished for such remittance from Mr. A's Indian bank account to Mr. A's Singapore 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 15CB is applicable (Part A/ Part B/ Part C / Part D) ?

CASE STUDY 7

- Mr. A (NR) wants to remit funds to Singapore from his Indian bank account to his Singapore bank account for family maintenance purposes.
- 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.
- 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.

CASE STUDY 8

- Z Co is an Indian private company.
- A Co and B Co, both non-residents, holds shares of Z Co in the ratio of 99.99% and 0.01% respectively.
- Z Co is in the process of undertaking capital reduction for repatriating surplus cash to its shareholders wherein shares of A Co and B Co will be cancelled on proportionate basis.
- There is no deemed dividend due to no accumulated profits. Further, there would be capital losses
- Since there is no capital gains in the hands of A Co and B Co, Z Co will not be liable to withhold any tax in India (under section 195) on repatriation of surplus cash.
- Given that A Co and B Co suffer capital loss in India pursuant to reduction of its shares held in Z Co, whether Z Co is required to file Part C (and obtain certificate 15CB as well) or Part D (and no requirement to obtain certificate 15CB) ?
- Section 195(6) r.w. Rule 37BB requires reporting of any payment made to a NR irrespective of its chargeability to tax in India. Thus reporting in Form 15CA is triggered even if there is no tax liability arising for the NR on the impugned transaction.
- While in the current case, it could be argued that since the capital gains computation results in a loss, there is no tax liability in India, hence Part D should be applicable.

Thanks !



THANKS !



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