

Western India Regional Council of ICAI

Case Laws and Case Studies in TDS

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1) Section 192 – Salary

- a) Any employer whether Individual, HUF, Firm, Company, AOP, Trust or any other entity is liable to deduct tax at source from salary paid to employees.
- b) Residential Status,
 - a. Resident employee rendering service in India and outside India
 - b. Non – Resident employee rendering services only in India
- c) Employer – Employee relationship is a pre-requisite

| <u>Employee</u> | <u>Agent</u> |
|--|---|
| i) Master can tell what to do & how to do | i) Principal cannot tell how to do |
| ii) Complete control over employee | ii) Less control over agent |
| iii) Servant has no authority to make contract on behalf of employer | iii) Generally agent is appointed to make contract on behalf of principal |
| iv) Generally paid wages or salary | iv) Generally paid commission |

Laxmi Narayan Ram Gopal & Son Ltd. vs. Government of Hyderabad (1954) 25 ITR 449 (SC), 86 ITR 122 (SC), 40 ITR 17 (SC), 59 ITR 685 (SC), 59 ITR 699 (SC)

Ex-employees are also covered.

- d) Accrual and payment : both must exist
No TDS is contemplated u/s 192 in cases where payment towards salary has accrued but is not made.
CIT vs. Tej Quebecor Printing Ltd (2006) 281 ITR 170 (Del)
- e) Computation of Income:
 - i) Compute income u/s 15-17
 - ii) Allow deduction u/s 16
 - iii) Allow deduction u/c VI-A
 - iv) Allow rebate under Chapter VII
 - v) Allow exemption u/s 10Every year circular issued by CBDT.

- f) Citizen tax deducted by assessee- a Japanese organization, from the salary of its employee and directly paid to the concerned authorities in Japan which was never reached in hands of the employee, and did not form part of his income and therefore was not subject to TDS.
TDS vs. NHK Japan Broadcasting Corporate (2007) 291 ITR 331 (Del)
- g) Employer is bound to consider the information supplied by the employees for TDS from salary.
Where the employees furnishes information claiming rebate on the amount of investment in PPF for the purpose of TDS from salary, the employer has no authority to enquire about the sources of investment disbelieving the genuineness of such investment.
State Bank of Patiala vs. CIT & ANR (1999) 236 ITR 281 (P & H)
- h) Payment of salary abroad in respect of services rendered in India is liable for TDS Home Salary/ special allowance payment made by foreign company abroad is for rendition of services in India, then such payment would come u/s 9(1)(ii) and liable for TDS u/s 192
CIT vs. Eli Lilly & Co (India) P. Ltd. (2009) 312 ITR 225 (SC)
- i) Bona-fide mistake in deduction of tax at source.
Employer entertained bona-fide belief that LTA availed by employees was not liable for TDS. The action of A.O. to realize the amount with interest was not justified
CIT vs. HCL Infosystem Ltd. (2005) 196 CTR (Del) 129
- j) TDS at the time of payment
- i) TDS to be made at the time of payment and not at the time of credit
However where the credit is at the instance of the payee under his acknowledgement, consent or acquiescence, such credit may tantamount to payment.
 - ii) Tax to be deducted at average rate of income tax on estimated income of the assessee for the financial year
 - Employee retiring in say June 2013
TDS on 3 month salary
 - Bonus or other variable item of remuneration can be considered at the time of payment.
 - Increment can be considered if there is no “Efficiency Bar”
 - Incentives/Commission with reference to profit
Reasonable estimate at the beginning of the year
Revised estimate at the middle of the year
Final estimate at the end of the last deduction

- k) Place of Deposit of TDS
Salary payment at Balasore (Orissa) but TDS u/s 192 & payment of TDS done at regional office in Calcutta, assessee not in default
L & T Ltd. vs. ITO (2005) 278 ITR 369 (Ori)
- l) Employment with more than one employer – Section 192 (2)
Employer responsible for TDS in relation to salary received by employee from other employer if employee furnishes such particulars.
CIT vs. Marubeni India (P) Ltd (2007) 294 ITR 157 (Del)
CIT vs. Woodward Governor India P. Ltd. (2007) 295 ITR 1 (Del)
- m) Variation during the year is possible – Section 192 (3)
Person obliged to deduct tax can make adjustments in case of excess or deficient deduction and also in case of total failure to deduct tax during the financial year and therefore assessee is not liable for interest u/s 201(1A) for not deducting tax at source from salary payments in several months when it has deducted in the remaining months.
CIT vs. Enron Expat Services Inc (2011) 330 ITR 496 (Uttarakhand)
Only in respect of same employee and not between employees interse
- n) Liability on disbursement from funds – S 192 (4) & (5)
- o) Salary payable in foreign currencies – Section 192 (6)
Rule 115 – Telegraphic transfer buying rate adopted by State Bank of India
If the income is already converted into Indian Rupees, rule 115 is not attracted
CIT vs. Chowgule & Co. Ltd. (1996) 131 CTR (SC) 108
- p) Other Aspects
- i) Employer cannot be restrained from deducting tax at source on perquisite of accommodation under rule 3 r.w.s 17(2)(ii)
Narain Singh vs. BSNL (2007) 211 CTR (Del) 603
 - ii) Employees have remedy to approach A.O. u/s 197 for lower deduction of tax at source.
Kayamkulam NTPC Employees Union vs. NTPC (2012) 249 CTR (Ker) 439
 - iii) Indian Shipping Company need not deduct tax at source with respect to salary paid to its crew for the dues on which ship was outside terminal waters of India if number of such days exceeds 182 in any particular year.
CIT vs. ICL Shipping Limited (2009) 315 ITR 195 (Mad)

2) Section – 194A Interest other than Interest on Securities

- a) Who is liable to deduct TDS u/s 194A
 - a. Any person other than Individual or Hindu Undivided Family.
 - b. Individual or HUF liable for Tax Audit u/s 44AB is liable to deduct tax during financial year succeeding the financial year in which turnover exceeds the specified limit.
- Private Specific Trust representing individual/HUF not liable to deduct tax. “Individual is not restricted to human being or natural person but would cover artificial juridical persons
CIT vs. Sivasakthi Trust (2003) 185 CTR (Mad) 208
- Provident Fund Trust of employees is assessable in the status of “Individual” not liable for TDS while crediting interest amount to the account of ex-employees.
CIT vs. Food Corporation of India Contributing Provident Fund Trust (2008) 218 CTR (Del) 625
- b) Interest for delay in construction of flats
Interest for delay in construction of flats is in the nature of damages and not interest u/s 2(28A). Allottees had not given money to the Board by way of deposit nor Board borrowed money from allottees, not liable for TDS.
CIT vs. H. P. Housing Board (2012) 340 ITR 388 (HP)
- c) Liability where income of payee is exempt.
Where income is exempt u/s 10(22), 22(A): not necessary
Where income is exempt u/s 11: Statement u/s 194A or declaration u/s 197A or certificate u/s 197 from A.O. necessary.
- d) Liability in respect of joint account
If depositors indicate beneficial interest in deposit then in that proportion otherwise first named depositor.

- e) Interest – Section 2(28A)
 “Interest” means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilized.
- i) The assessee induced investors to entrust their money to the assessee and the very terms of the scheme imposed obligation on the assessee to repay the investor at the end of 36 months and also to ensure a monthly payment of 1.5% to the investor during that period. This payment is “interest” irrespective of nomenclature given by the assessee. The obligation to repay is akin to ‘deposit’
 Viswapriya Financial Services & Securities Ltd. vs. CIT (2002) 258 ITR 496 (Mad)
 - ii) Amount paid to ‘G’ for utilizing its unspent credit facilities for import is interest as it is in relation to debt incurred. Liable for TDS.
 Bhura Exports Ltd. vs. ITO (2012) 246 CTR (Cal) 482
 - iii) Difference between issue price and face value of Commercial Papers (CP) and Certificate of Deposits (CD) is discount and not interest – circular 647 dated 22-03-1993.
- f) When tax is to be deducted :
 At the time of payment or credit whichever is earlier
 Explanation: “credit to any account” is prospective in operation
 CIT vs. Zenith Commercial Agents Ltd (1993) 109 CTR (Raj) 115
 Also 226 ITR 506 (Guj) , 244 ITR 247 (Del)
- g) Deduction to be made out of Gross Interest and not Net Interest
 CIT vs. S.K. Sundermier & Sons (1999) 240 ITR 740 (Mad)
- h) Tax when not deductible – Section 194 A(3)
- i) Basic Exemption:
 Rs. 10000/- for Bank, Co-op. Bank, Post office
 Rs. 5000/- for others
 - ii) Interest paid to specified companies, corporations
 - iii) Interest credited/paid to partner by firm is only appropriation of profit.
 CIT vs. R.M. Chidambaram Pillai (1977) 106 ITR 292 (SC)
 - iv) Interest by Co-operative Society to its member.
 - v) Interest on deposits under specified scheme.

- vi) Interest on deposits with banking company.
- vii) Interest payable under the provisions of direct taxes acts.
- viii) Interest on compensation awarded by MACT and payable by insurance company.
- ix) Interest in relation to Zero Coupon Bond.
- i) Right to adjust excess or deficiency: Section 194 A(4).
- j) Deduction of tax at lower rate.

3) Section – 194C Payment to Contractors

- a) 194-C applies not with reference to the status of the Contractor. Contractee or payer who are “Specified Persons” are liable to deduct tax. Individual, HUF, AOP, BOI are liable only if they are liable to tax audit u/s 44AB; then liability to deduct tax arises in subsequent year.
- b) Tax deduction from Gross Amount and not income.
- c) Rate of Tax is with reference to status of contractor or payee.

| | |
|---------------------------------|----|
| Where payee is individual / HUF | 1% |
| Others | 2% |
- d) Who is Contractor ?

Contract is a word of wide significance as any agreement enforceable in law is a contract.

Contract as contemplated under the law is “work component” or “contract for supply of labour”

 - i) Assessee an Indian Company markets a product which it got manufactured from M/s. Torrent Pharmaceuticals Ltd. Raw material for manufacture of this product was supplied to Torrent Pharmaceuticals Ltd. by foreign company by name Nova Dordisk, Denmark. Product produced by the use of raw material for manufacture of the product was stipulated to be exclusively sold to assessee. Assessee company was to pay Torrent Pharmaceuticals Ltd. 19% of landing cost of raw material. Held this payment is liable for TDS u/s 194-C
CIT vs. Nova Nordisk Pharma India Ltd. (2012) 341 ITR 451 (Kar)
 - ii) Hire Charges for hiring of ships does not attract 194C
CIT vs. Poompohar Shipping Corp. Ltd. (2006) 282 ITR 3 (Mad)

- iii) Where there is no written or oral agreement between assessee and transport for carriage of goods nor it is proved that any freight charges were paid to them in pursuance of a contract, there is no liability to deduct tax at source u/s 194C.
CIT vs. United Rice Law Ltd. (2008) 217 ITR 332 (P&H)
CIT vs. Asst. Manager (Accounts) Food Corporation of India (2010) 326 ITR 106 (P&H)
- iv) Purchase of printed packing material for which raw material was not supplied by assessee is a contract for sale not liable for TDS u/s 194C.
CIT vs. Hindustan Lever Ltd. (2008) 306 ITR 25 (Guj)
- v) Assessee manufacturer of fertilizer, purchased natural gas supplied by various agencies. Seller laid down pipeline and other equipment for supply of gas to assessee and other customers also. Ownership of gas passed on to the assessee only at point of delivery. The agreement is for purchase of gas and transportation charges only part of entire sale consideration. Transportation charges are fixed monthly charges and not on consumption of quantity of gas. TDS u/s 194C not applicable.
CIT vs. Krishank Bharati Cooperative Ltd. (2012) 349 ITR 68 (Guj)
- vi) Broad Casting and telecasting
Payment to television programme producer covered u/s 194C and not u/s 194J
CIT vs. Prasar Bharati (2007) 208 CTR (Del) 317

Payment by Cable operators to TV Channel also covered
Kurukshetra Darpan (P) Ltd. vs. CIT 217 CTR (P&H) 326
- vii) Payment of transport charges by firm to partners after deducting 3% commission charges for the firm having secured the contract. Since no separate contract between firm and partner, no liability to deduct TDS u/s 194C.
CIT vs. Grewal Brothers (2011) 240 CTR (P&H) 325

4) Section – 194H Commission or Brokerage

Who is liable to deduct TDS u/s 194H

- a. Any person other than Individual or Hindu Undivided Family.
- b. Individual or HUF liable for Tax Audit u/s 44AB is liable to deduct tax during financial year succeeding the financial year in which turnover exceeds the specified limit.

Commission

- i) Discount granted by Treasury to licensed stamp vendors is not commission. Not liable for TDS 194H
Kerala State Stamp Vendor Association vs. Office of the Accountant General (2006) 200 CTR (Ker) 658 also refer (2002) 257 ITR 202 (Guj)
- ii) Concessional air ticket sold by assessee airline to travel agent being a sale transaction on principal to principal basis, does not involve payment of commission.
CIT vs. Singapore Air Lines Ltd. (2009) 224 CTR (Del) 168 also (2011) 332 ITR 253 (Bom)
- iii) Charges for supply of sim-cards and recharge coupons are not liable for Sales Tax to the State Government, hence liable for TDS u/s 194H.
Vodafone Essar Cellular Ltd. vs. ACIT (2010) 235 CTR (Ker) 393 also (2010) 325 ITR 148 (Del)

5) Section – 194I Rent

Who is liable to deduct TDS u/s 194I

- Any person other than Individual or Hindu Undivided Family.
 - Individual or HUF liable for Tax Audit u/s 44AB is liable to deduct tax during financial year succeeding the financial year in which turnover exceeds the specified limit.
- a) Security Deposit to be adjusted against rent payable and not refundable is in fact advance rent and liable for TDS u/s 194I
CIT vs. Reebok India Company (2000) 291 CTR 455 (Del)
 - b) Meaning of term 'Rent'
 - i) 'Rent' as defined u/s 194I is in wider sense and consideration paid by customers to the hotel on account of room charges is 'rent' liable for TDS u/s 194I
Krishna Oberoi vs. Union of India (2002) 257 ITR 105 (AP)
 - ii) Air craft landing fee and air craft parking fee is 'rent' for use of land liable for TDS.
United Air Lines vs. CIT (2006) 202 CTR (Del) 184
 - c) Where share of each legal heir is well determined under Hindu Succession Act 1956, income from house property is to be assessed in individual hands and not in the hands of AOP as per section 26 of the Income Tax Act. Since each co-owner has received less than threshold limit i.e. Rs.1,20,000/- as rent, not necessary to deduct tax u/s 194I.
CIT vs. SBI (2012) 81 CCH 056 (All- HC)

- d) Assessee carrying on freight and transportation business, giving sub contract for transportation of goods of its clients, payment made by assessee to sub-contractor was for work contract u/s 194C and not for taking cranes/trailers on rent so as to attract s.194I
CIT (TDS) vs. Swayam Shipping Services (P) Ltd (2011) 339 ITR 647 (Guj)

6) Section – 194J Fees for Professional or Technical Services

Who is liable to deduct TDS u/s 194J

- a. Any person other than Individual or Hindu Undivided Family.
 - b. Individual or HUF liable for Tax Audit u/s 44AB is liable to deduct tax during financial year succeeding the financial year in which turnover exceeds the specified limit.
- a) Payment to temporary consultants in the absence of employer / employee relationship would be covered u/s 194J
CIT vs. Coastal Power Co. (2008) 296 ITR 433 (Del)
- b) Tax is required to be deducted on any payment to a director (whether whole-time or not) by way of remuneration or fees or commission including sitting fee, which is not in the nature of salary, at the rate of 10% of such remuneration. (this amendment w. e. f. 1st July 2012)
- c) Professional Services
Besides those mentioned in section would include :
Authorised representatives, film artists, company secretary, sports persons, umpires, coaches, team physicians, event managers, commentators, anchors, sports columnist.
- d) Fees for Technical Services
- i) Payment to cellular mobile telephone service providers not covered.
Skycell Communications Ltd. vs. Dy. CIT (2001) 251 ITR 53 (Mad)
 - ii) FTS requires human interface. Accessing interconnect / port access not covered.
CIT vs. Bharti Cellular Ltd. (2008) 220 CTR (Del) 258
CIT vs. Bharti Cellular Ltd. (2010) 330 ITR 239 (SC)
 - iii) Payment by Third Party Administrators (TPA) to hospitals covered u/s 194J
Dedicated Health Care Services TPA (India) (P) Ltd. vs. ACIT (2010) 324 ITR 345 (Bom)
 - iv) Transaction Charges paid to stock exchanges for trading through BOLT System represent charges for managerial services liable for TDS.
CIT vs. Kotak Securities Ltd. (2012) 340 ITR 333 (Bom)

7) Section – 199 Credit for tax deducted

- a) Normally given in the year the income is offered to tax s.199 r/w/r 37BA
CIT vs. Smt. Pushpa Vijay & Anr. (2012) 247 CTR (Ker) 575

- b) Assessee purchased Deep Discount Bonds from original purchaser. TDS of Rs.91,800/- on entire interest of Rs.9,00,000/- paid to the assessee at the time of maturity and TDS certificate issued in the name of the assessee. Assessee entitled to credit of TDS of Rs.91,800/- even though interest of Rs.60,000/- offered to tax in the year of maturity.
CIT vs. Smt. Sonal Bansal (2008) 215 CTR (P&H) 65

8) Consequences of failure to deduct or pay TDS :

I. Interest u/s 201(1A)

- a. 1% p.m. from the date on which tax was deductible to the date on which it is actually deducted and 1.5 % p.m. from the date on which tax was deducted to the date on which it was actually paid.
- b. Charging of interest is mandatory
 - i) Banquet and restaurant tips collected and paid by hotel to employees attract TDS. There is no question of waiver of interest on the basis that default was unintentional.
CIT vs. ITC Limited (2011) 338 ITR 598 (Del).
 - ii) Where recipient has claimed refund of tax deducted at source, interest is not payable.
CIT vs. Rajasthan Rajya Vidyut Prasaran Nigam Ltd.(2006) 287 ITR 354 (Raj).
 - iii) Where recipient has paid tax on amount received by him, the deductor is not liable to pay interest u/s 201(1A) from the date on which recipient has paid tax.
CIT vs. Adidas Marketing Pvt. Ltd.(2007) 288 ITR 379 (Del) .
 - iv) Where payee has paid tax on the income on which there was short deduction of tax at source, recovery of tax can not again be made from deductor.
Hindustan Coca Cola Beverages Pvt. Ltd. vs. CIT (2007) 211 CTR (SC) 545.

II. Penalty

| Section | Nature of Default | Minimum Penalty | Maximum Penalty |
|----------|--|---|--|
| 221 | Failure to make payment of tax within prescribed time | Amount as the Assessing Officer may impose | 100% of Tax |
| 234 E | Fees for default in furnishing returns / statements within due dates Due Dates: Q1 April to June– 15 th July Q2 July to September– 15 th October Q3 October to December – 15 th January Q4 January to March – 15 th May | Rs. 200/- per day for the period of default | Total amount shall not exceed the total amount of tax deductible during the period |
| 271 C | Failure to deduct the whole or any part of tax as required u/s 192 to 195 | Amount of tax which should have been deducted or paid | - |
| 271 H | Penalty for failure to furnish statements within 1 year from due date or furnishing incorrect statements | Rs.10,000/- | Rs.1,00,000/- |
| 272 A(2) | Penalty for failure to furnish returns / statements | Rs.100/- per day for the period of default | Rs.200/- per day for the period of default |
| 272 BB | Failure to obtain TAN Number | Rs.10,000/- | - |

III. Prosecution u/s 276 B

CASE STUDY

- The assessee, Mr. Johnny Joseph, a proprietor of 'HR Placement Services' is engaged in the business of supply of technically skilled manpower like turners, fitters, welders, machine operators, etc.
- There is a company 'J Ltd' based in Japan and it has got contract for installation and commissioning of machines for another company 'D Ltd' based in Dubai.
- 'J Ltd' has approached assessee for supply of manpower to work at Dubai site of D Ltd. J Ltd agrees that it will pay assessee USD 5000/- per candidate per month.
- The assessee selects candidates in India and negotiates pay of USD 4000/- per candidate per month. The candidates are employed for specified period and sent on work permit visa.
- The assessee proposes to supply 10 skilled manpower to J Ltd.
- The skilled staff insists that remuneration be paid to them without deduction of tax at source because if they had worked in employment of foreign employer in Dubai, there was no question of TDS.
- The assessing officer of Mr. Johnny Joseph has disallowed salary to candidates of USD 4,80,000 per year u/s 40(a) with following remarks:
 - i. Since the employees work as per requirements of 'D Ltd', even though what is to be done may be decided by the assessee, how it is to be done is decided by 'D Ltd' and therefore there is no employer employee relationship and tax is deductible u/s 195 and not u/s 192.
 - ii. The amount of salary to candidates is reflected in the Profit and Loss A/c of the assessee hence he should have deducted tax at source.

The assessee has approached WIRC of ICAI to represent his case before learned CIT (A).