TDS ON SALARIES

WESTERN INDIA REGIONAL COUNCIL
THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

ICAI BHAWAN – BKC, MUMBAI

23th January 2016

I AM THE COUNTRY'S DRAFTSMAN,

I DRAFT THE COUNTRY'S LAWS,

FOR MOST OF THE LITIGATION,

I AM THE CAUSE!

AS QUOTED BY RETD.JUSTICE SMT. SUJATA MANOHAR

TDS ON SALARIES

OVER VIEW:

- **Section 192**
- **Circular No. 20 /2015 dated 2nd December 2015**
- **Judgments leading to amendments in circular**
- **Section 192(2D)**
- **Losses to be considered, to what extent**
- **Section 192A**
- **National Pension Scheme**
- **Form 24Q quarterly and annual statement in Q4**
- **Issues related to Form 24Q – Form No. 16 Part A & Part B**

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RELEVANT SECTIONS, RULES, CIRCULARS :

- **SECTION 192**

Salary.

(1) Any person responsible for paying any income chargeable under the head "Salaries" shall, at the time of payment, deduct income-tax on the amount payable at the **average rate** of income-tax computed on the basis of the rates in force for the financial year in which the payment is made **on the estimated income** of the assessee under this head for that financial year.

- Circular 20/2015 dated 02.12.2015
- Circular 17/2014 dated 10.12.2014
- Circular 8/2013 dated 10.10.2013
- Circular 8/2012 dated 5.10.2012
- Circular No. 5/2011 dated 16.08.2011

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MAX MUELLER BHAVAN, *268 ITR 31 AAR*

May 31, 2004

Section 192 of the Income-tax Act, 1961 - Deduction of tax at source - Salary - Applicant-Institute has proposed to engage honorary part-time teachers on contract basis to take classes in German language - Terms of proposed agreement between applicant and part-time teachers clearly indicate **fact of control of teachers by applicant both in regard to work to be done and manner in which it should be done -** Whether mere fact that agreement gives liberty to teachers to work for any place, institute or company during tenure of agreement and it clarifies that teacher shall not have status of employee nor shall be entitled to avail benefits of regular employees, will militate against **relationship of master and servant** between applicant and teacher - Held, no - Whether, therefore, applicant is obliged to deduct tax at source from payment of honorarium to honorary part-time teachers under section 192 - Held, yes

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The circulars generally start with explaining the provisions as enacted in the Law:

*Every person who is responsible for paying any income chargeable under the head "Salaries" shall deduct income-tax on the **estimated** income of the assessee under the head "Salaries" for the financial year ….. The income-tax is required to be calculated on the basis of the rates given above, subject to the provisions related to requirement to furnish PAN as per sec 206AA of the Act, and shall be deducted at the time of each payment. No tax, however, **will be required** to be deducted at source in any case unless the **estimated** salary income including the value of perquisites, for the financial year exceeds ……., as the case may be, depending upon the age of the employee.*

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The circulars generally further contain the general spirit in the following words:

The amount of tax as arrived at para 6.3 should be deducted every month in equal installments. Any excess or **deficit arising out of any previous deduction can be adjusted by increasing or decreasing the amount of subsequent deductions** during the same financial year.

These instructions are **not exhaustive** and are issued only with a **view to help the employers to understand the various provisions relating to deduction of tax from salaries.**

However the terms used have been interpreted and applied in a manner to lead to following decisions:

Commissioner of Income Tax v. ITI Ltd. 183 Taxman 219 (SC)
Commissioner of Income Tax & anr. V. Larsen & Toubro ltd. 313 ITR 1 (SC)

JANUARY 21, 2009

Section 10(5), read with section 192, of the Income-tax Act, 1961 - Leave travel concession - Whether an employer is under no statutory Obligation to collect evidence to show that its employee has actually utilized amount paid towards leave travel concession/conveyance allowance for purpose of TDS under section 192 - Held, yes

HELD

The beneficiary of exemption under section 10(5) is an individual employee. Further, ***there is no circular of the Central Board of Direct Taxes (CBDT) requiring the employer under section 192 to collect and examine the supporting evidence*** *to the declaration to be submitted by an employee(s). For the above reasons, it was to be held that the assessee-employer was under no statutory obligation to collect the evidence to show that its employees had actually utilized the amount paid towards leave travel concession/conveyance allowance.*

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DCIT vs. HCL INFOSYSTEMS LTD. (2005) 4 SOT 428 (Del)
TDS—Salary—Non deduction of tax from leave travel allowance—If the **estimate** of salary income made by the employer for the purpose of deduction of tax at source is **bona fide and honest**, the requirements of s. 192 stand complied with and the employer in such case cannot be made liable for the amount of short deduction of tax, if any—Assessee had obtained categoric declarations from the concerned employees of having incurred leave travel expenditure—Thus, there was sufficient material on record for the assessee to entertain a **bona fide belief** that the leave travel allowance granted to its employees was exempt under s. 10(5)—Therefore, the **obligation cast on the assessee-company under s. 192 was duly discharged by it**—There being nothing on record to show any instance of any of the employees having not actually incurred the amount of leave travel allowance granted, there was no case to treat the assessee-company as an assessee in default in respect of the short deduction of tax from salaries as well as to charge interest under s. 201(1A)

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CIRCULAR OF 2015

"*DDOS empowered to obtain evidence of proof or particulars of the prescribed claim (including claim for set-off of loss) under the section 192(2D):*

DDOs have been authorized u/s 192 to allow certain deductions, exemptions or allowances or set-off of certain loss as per the provisions of the Act for the purpose of estimating the income of the assessee or computing the amount of tax deductible under the said section. …

To bring certainty and uniformity in this matter, Finance Act, 2015 inserted section 192(2D). Section 192(2D) provides that person responsible for paying (DDOs) shall obtain from the assessee evidence or proof or particular of the prescribed claim (including claim for set off of loss) in the form and manner as may be prescribed."

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CIRCULAR OF 2013 and 2014 – Stark Difference in comparison with all earlier circulars. The recommendatory tone is now the mandatory tone.

"*DDOS TO SATISFY THEMSELVES ABOUT THE GENUINENESS OF CLAIM:*

*The Drawing and Disbursing Officers **should** satisfy themselves about the actual deposits/ subscriptions / payments made by the employees, by calling for such particulars/ information as they deem necessary before allowing the aforesaid deductions. In case the DDO is not satisfied about the genuineness of the employee's claim regarding any deposit/ subscription/ payment made by the employee, he **should not** allow the same, and the employee would be free to claim the deduction/ rebate on such amount by filing his return of income and furnishing the necessary proof etc., therewith, to the satisfaction of the Assessing Officer."*

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Om Parkash Gupta *v.* ITO, Chandigarh

58 SOT 304 (Chd) (Trib) APRIL 29, 2013

Section 10(5) of the Income-tax Act, 1961, read with rule 2B of the Income-tax Rules, 1962 - Leave Travel Concession [Foreign travel] - Assessment year 2007-08 - Whether, leave travel concession is exempt under section 10(5), read with rule 2B, only if assessee-employee undertakes journey to **any place in India** - Held, yes - Whether section 10(5), read with **rule 2B no way provides that assessee is at liberty to claim exemption out of his total ticket package spent on his overseas travel and part of journey within India** - Held, yes

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SECTION 17(2)(vii): Superannuation fund contribution: When FBT provisions were introduced, the contribution to Superannuation was subjected to FBT in the hands of the employer. After one year, it was revised and the amount subjected tax was only in excess of Rs.1 lac per employee per year. With the withdrawal of FBT the taxability has shifted back to the employee and thus the contribution of amounts exceeding Rs. 1 lac is subjected to tax in the hands of the employee. The employee is thus taxed for an amount which he does not receive in hand. Further on retirement, when the annuity is taken, the same is again subject to tax.

SUGGESTION:

Employers should contribute to the fund to the extent of Rs. 1 lakh per annum and the excess may be deposited in the **National Pension Fund** so that the deduction u/s 80CCD(2) can be allowed to the employee. No doubt that the annuity or commuted value on attaining the age of 60 years will be fully taxable.

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NATIONAL PENSION FUND CONTRIBUTION AND EMPLOYEE BENEFIT			
SECTION	CRITERIA	DEDUCTION	EMPLOYERS ROLE
80CCD(1)	Individual (Employee) can deposit in NPS 10% of Salary in a year	Max Rs. 50000, Combined deduction with section 80C, 80CCC and 80CCD(1) maximum Rs. 150000	Consider the investment made, compare with 10% of Salary and consider the same for deduction while computing TDS under Salaries
80CCD(1B)	Individual ((Employee) can deposit Rs. 50000 in a year	claim full amount deposited as deduction without reference to any other cap or restriction	Consider the amount deposited for deduction upto Rs. 50000 from income for TDS deduction.
80CCD(2)	Employer deposits upto 10% of the salary in NPS	Full Amount (not subject to Rs.50000) allowed as a deduction to the employee from Salary Income'	Consider the amount deposited as deduction for Salary TDS; Adjust "Other pay" to the extent of amount deposited, so that CTC is not disturbed.
			Contribution by employer, to Superannuation Fund is 15% of Basic, and if the same exceeds Rs.100000, the excess is taxable. A proposal can be considered where the amount exceeding Rs. 100000 is deposited by the employer, in the NPS account.
80 CCD(3)		On withdrawal - i.e. pension on superannuation, fully taxable.	
"Salary" for the purpose of Section 80CCD means basic plus DA where applicable, but does not include other allowances and perquisites.			
The possibility of accumulated balance in SAF being transferred seems difficult as the approved scheme does not permit the withdrawal of the contribution except on resignation or retirement. However modification of the approved scheme would be required, with the approval by the Commissioner of Income Tax.			

229 ITR 394 [1998] 98 TAXMAN 138 (BOM.)
Commissioner of Income-tax *v.* D.P. Malhotra
JULY 28, 1997
Section 10(10AA) of the Income-tax Act, 1961 - Exemption - Leave encashment - Assessment year 1982-83 - Whether, if on retirement or even on resignation from employment, assessee gets by way of leave encashment any amount, he is entitled to benefit of section 10(10AA) - Held, yes

" it is clear from the language of cl. (10AA) itself that it has been used in the widest possible terms to mean and include all cases of retirement, whether on superannuation or otherwise. What is relevant is "retirement"—how it took place is immaterial for the purpose of this clause. It is, therefore, clear that if on retirement, even on resignation by the employee, an employee gets by way of leave encashment any amount, cl. 10(10AA) would apply and the assessee will be entitled to the benefit of the said clause to the extent mentioned therein.—CIT vs. R.J. Shahney 159 ITR 160 (Mad) **relied on.**

Approved Provident Fund Schedule IV Part A

There are various provisions contained in this part of the Act which create a liability to tax under the head “Salaries”:

- Employer’s annual contributions in excess of twelve per cent of the salary of the employee, and
- interest credited on the balance to the credit of the employee in so far as it 9.5%
- Withdrawal (not transfer) of accumulated balance where the employment with the employer is less than 5 years, except due to particular circumstances;
- Withdrawal to be taxed as “salaries”
- Tax on accumulated balance. As per Rule 9 of the said Schedule.

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SECTION 9
Income deemed to accrue or arise in India.
(1) The following incomes shall be deemed to accrue or arise in India—
(i) …..
(ii) income which falls under the head "Salaries", if it is earned in India.
[**Explanation :** For the removal of doubts, it is hereby declared that the income of the nature referred to in this clause payable for—
(a) service rendered in India; and
(b) the rest period or leave period which is preceded and succeeded by services rendered in India and forms part of the service contract of employment,shall be regarded as income earned in India.]
inserted w.e.f. 1-4-2000

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HISTORY:

- CIT v. S G Pgnatale 124 ITR 391 (Guj)
- Amendment
- CIT v. Eli Lilly Company India Private Limited. 312 ITR 225 SC
- Impact on Indians deputed abroad

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Arvind Singh Chauhan *v.* Income-tax Officer, Ward 1(2), Gwalior
42 taxmann.com 285 (Agra - Trib.)

- Salary income cant be said to accrue in India merely because appointment letter is issued in India
- Non-resident cant be deemed resident by applying sec. 6(5) as the said provision has become redundant since 1989-90

S.5: Scope of total income–Non–resident-Salary income-Accrual of Income from employment could not be taxed in India-DTAA-India-UK [S.90, Art.16]

- Where assessee, a NRI, received salary income in India against employment exercised in U.K. and offered same for taxation in U.K. in pursuance of article 16, it could not be taxed in India as per DTAA between India and U.K. (AY.2006-07)

ITO v. Sri Sunil Chitranjan Muncif (2013) 58 SOT 356 (Ahd.)(Trib.)

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Form 24 Q

Corrections Statements

Defect memos

Four quarters versus quarter 4

Openness of the data and amendments thereto.

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Thank you for a patient hearing!