

# **CHAMBER OF TAX CONSULTANTS**

## **WITHHOLDING U/S 195**

### **RECENT TRENDS**

#### **15CA and 15CB**

#### **Lower Deduction**

# COVERAGE – SECTION 195

- ❖ IMPORTANCE
- ❖ OBJECTIVE AND PURPOSE
- ❖ SECTION 5 – TAXABILITY IN CASE OF NON RESIDENT
- ❖ BASIC LAW – SECTION 195
- ❖ COMPLIANCES – FORM 15CA AND 15CB
- ❖ APPLICATION FOR LOWER OR NIL RATE OF TDS
- ❖ CERTIFICATION BY PROFESSIONALS AND ISSUES THERETO
- ❖ REFUND MECHANISM
- ❖ CONSEQUENCES OF NON COMPLIANCE
- ❖ ISSUES AND RELEVANT CASE LAWS ON THE SAME

# IMPORTANCE

- ❖ Increase in cross border transactions
- ❖ Increase in vigilance by revenue authorities
- ❖ Professional diligence by CA's
- ❖ Multi dimensional approach – Income Tax Act, 1961 as well as understanding of various DTAA's to determine taxability
- ❖ Knowledge of FEMA and GST under reverse charge mechanism on imports of services
- ❖ Gateway for International Tax

# OBJECTIVE

CIRCULAR NO 152 DATED 27/11/1974

- Tax to be collected at the earliest
- No difficulty at the time of assessment
- Difficulty in recovery from non residents due to lack of assets and presence in India
- Especially in case of payment of Royalty and Fees for Technical Services

# SECTION 5

5(2) -Subject to the provisions of this Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which—

- ❖ (a) is received or is deemed to be received in India in such year by or on behalf of such person ; or
- ❖ (b) accrues or arises or is **deemed to accrue or arise** to him in India during such year.”

# SECTION 5

- ❖ “Accruing” and “Arising” not defined under the Act
- ❖ Increased reliance is placed on deeming provisions of Section 9(1)

# OVERVIEW - 195

Sub sections	Particulars
195(1)	Any person making payment to Non Resident is required to with hold tax if such sum is chargeable to tax in India
195(2)	Determination of quantum of income chargeable to tax incase of composite receipts – Application by Payer
195(3)	Lower or Nil rate Tax Deduction Certificate – Application by Payee – <b>Section and rules suggest payment without deduction</b>
195(4)	Validity of Certificate u/s 195(3)
195(5)	Power of CBDT to notify rules relating to grant of certificate u/s195(3)
195(6)	Power to notify rules for furnishing of information
195(7)	Board to notify certain persons or transactions for lower or nil tax deduction

# Applicability of section 195:

## ❖ Subsection (1) – Tax to be deducted

- by the **person responsible** for making payment
- When payments are made to
  - Non residents other than companies
  - to foreign companies
- Payment should be in the nature of
  - Interest (other than interest on which TDS is applicable u/s. 194LB, 194LC and 194LD)
  - Any **other sum chargeable under the provisions of this act** but other than salaries
- Tax should be deducted
  - At the time of credit of such amount or
  - Payment thereof by way of cash/cheque/draft/any other mode
- Tax to be deducted at **the rates in force**



# Applicability of section 195:

## ❖ Certain relief given in certain cases

- in the case of interest payable by the Government or a public sector bank within the meaning of clause (23D) of section 10 or a public financial institution within the meaning of that clause, deduction of tax shall be made only at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode
- no such deduction shall be made in respect of any dividends referred to in **section 115-O**

# Applicability of section 195:

## ❖ Explanations - 1

- where any interest or other sum as aforesaid is credited to any account, whether called "**Interest payable account**" or "**Suspense account**" or by any **other name**, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee

# Applicability of section 195:

## ❖ Explanations - 2

- The obligations and the compliances shall have to be made by all persons, **resident or non-resident, whether or not** the non-resident person has-
  - (i) a residence or place of business or business connection in India; or
  - (ii) any other presence in any manner whatsoever in India.

# Applicability of section 195:

- ❖ All types of payments including personal payments by individual
- ❖ No threshold, starts from Re. 1/-
- ❖ Any income chargeable to tax
- ❖ All types of persons/entities covered
- ❖ No applicability of tax audit as required for certain regular payments to residents in case of individuals and HUF
- ❖ Multi dimensional approach – Income Tax Act, 1961 as well as understanding of various DTAA required, FEMA and GST

# Applicability of section 195:

Who is responsible to deduct TDS	Any person- as defined u/s 2(31) Includes virtually everyone Resident or Non Resident
Payment to Whom	To Non Resident only Not Applicable on payment to RNOR
To Determine status of Non Resident	Section 6 In case of tie breaker – Provisions of DTAA to be applied
Payments Covered	All sum chargeable to tax under the Act Except salary and dividend u/s 115O
When TDS to be deducted	At the time of credit or payment whichever is earlier
Rate at which TDS to be deducted	Rates in Force

# FOREIGN COMPANY

- (23A) “foreign company” means a company which is not a domestic company;
- (22A) “domestic company” means an Indian company, or any other company which, in respect of its income liable to tax under this Act, has made the prescribed arrangements for the declaration and payment, within India, of the dividends (including dividends on preference shares) payable out of such income;

# LOWER TDS – APPLICATION BY PAYER

- Person making the payment can apply to AO for determination of quantum or portion of the payment chargeable to tax in India so as to quantify the amount of withholding tax to be deducted and the AO has to pass appropriate order to this effect – S. 195(2)
- No form prescribed

# LOWER TDS – APPLICATION BY PAYEE

- The recipient of such income can also apply to AO to receive income **without deduction of tax** and the AO has to pass appropriate order to this effect – S. 195(3) - read with rule 29B and forms 15C and 15D
- The certificate granted in S. 195(3) shall remain in force till the expiry of the period mentioned in the certificate or till the cancellation by the AO of the same – S. 195(4)
- Board has to powers to make rules for application and granting of certificate S. 195(3) – S.195(5)



# LOWER TDS – APPLICATION BY PAYEE

## Rule 29B

- person entitled to receive any interest, or other sum, on which income-tax has to be deducted under section 195(1)
- Application to receive payment **without** TDS
- By Banking Company in [Form 15C.pdf](#)
- By others in [Form-15D.pdf](#)
- Subject to conditions in sub rule 2

# LOWER TDS – APPLICATION BY PAYEE

Conditions specified in sub rule 2

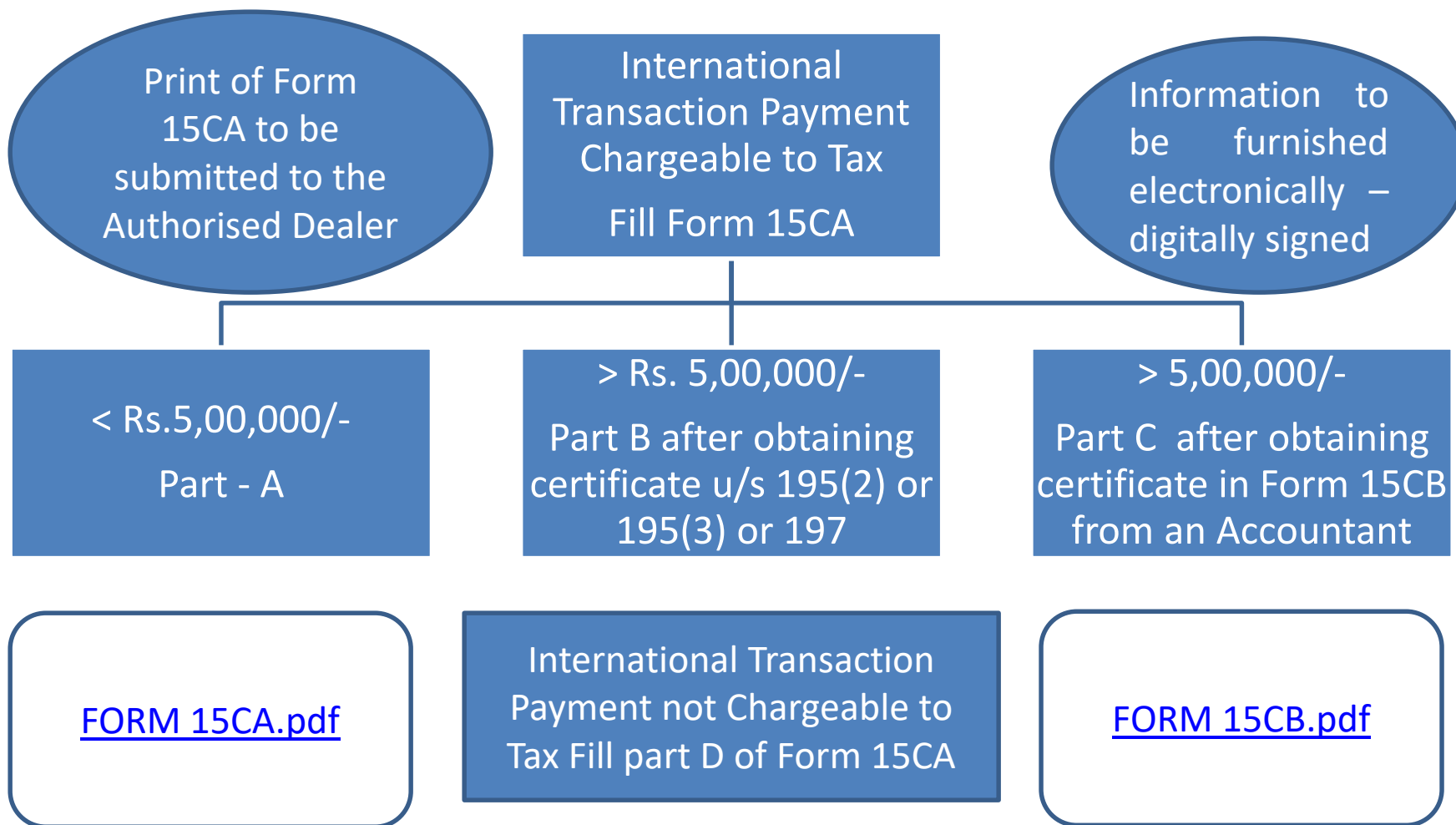
- Regularly assessed to income tax and duly filed all returns till date
- Not in default or deemed default in respect of any tax, interest, penalty, fine or any other sum
- For person other than banking company:
  - Business presence in India of more than 5 years
  - Assets in excess of Rs.50 lakhs
- An application for a fresh certificate may be made, if required, after the expiry of the period of validity of the earlier certificate, or within three months before the expiry thereof

# FURNISHING OF INFORMATION

- 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 - 195(6)
- Rule 37BB prescribes the information and the forms to be furnished by the person making the payment u/s 195(1)

# PROCEDURES AND COMPLIANCES

## Rule 37BB – Furnishing of Information



# PROCEDURES AND COMPLIANCES

In case of specified transactions the said information need not be given :

- the remittance is made by an individual and it does not require prior approval of Reserve Bank of India as per the provisions of section 5 of the Foreign Exchange Management Act, 1999 (42 of 1999) read with Schedule III to the Foreign Exchange (Current Account Transaction) Rules, 2000; or
- the remittance is of the nature specified in column (3) of the specified list

# FEMA

## Schedule III to the Foreign Exchange (Current Account Transaction) Rules, 2000

Individuals can avail of foreign exchange facility for the following purposes within the limit of USD 2,50,000 only. Any additional remittance in excess of the said limit for the following purposes shall require prior approval of the Reserve Bank of India.

- Private visits to any country (except Nepal and Bhutan).
- Gift or donation.
- Going abroad for employment.
- Emigration.
- Maintenance of close relatives abroad.
- Travel for business, or attending a conference or specialised training or for meeting expenses for meeting medical expenses, or check-up abroad, or for accompanying as attendant to a patient going abroad for medical treatment/ check-up.
- Expenses in connection with medical treatment abroad.
- Studies abroad.
- Any other current account transaction

# SPECIFIED LIST

Sl. No.	Purpose code as per RBI	Nature of payment
(1)	(2)	(3)
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

# SPECIFIED LIST

11	S0190	Imports below Rs.5,00,000 - (For use by ECD offices)
12	S0202	Payment for operating expenses of Indian shipping companies operating abroad
13	S0208	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



# SPECIFIED LIST

22	S0602	Freight insurance - relating to import and export of goods
23	S1011	Payments for maintenance of offices abroad
24	S1201	Maintenance of Indian embassies abroad
25	S1202	Remittances by foreign embassies in India
26	S1301	Remittance by non-residents towards family maintenance and savings
27	S1302	Remittance towards personal gifts and donations
28	S1303	Remittance towards donations to religious and charitable institutions abroad
29	S1304	Remittance towards grants and donations to other Governments and charitable institutions established by the Governments
30	S1305	Contributions or donations by the Government to international institutions
31	S1306	Remittance towards payment or refund of taxes
32	S1501	Refunds or rebates or reduction in invoice value on account of exports
33	S1503	Payments by residents for international bidding.

# FORM 15CB - CERTIFICATION AND ISSUES

- Ascertainment of Income/nature of remittance
- Determination of rate of deduction of Tax
- Examine the nature of transactions properly for determining the character of income on the basis of agreement, contract or other relevant document
- Determination of taxability under the Act
- Whether any relief claimed under the relevant DTAA
- Obtain Tax Residency Certificate - Section 90 read with rule 21AB

# FORM 15CB - CERTIFICATION AND ISSUES

- In case of income in the nature of Royalty, Fees for Technical services, interest or dividend – whether the same is connected to permanent establishment in India or otherwise
- In case of business income whether the same is taxable in India and basis of arriving at the rate of deduction – profit apportionment
- Whether the recipient has a permanent establishment in India
- In case of Capital gains, whether long term or short term and basis of taxability

# DOCUMENTATION BY CA

- Agreement and Invoices;
- Payment details
- Correspondences
- Technical Advice
- Proof of services being rendered in case of Group Company transactions
- E-mails etc regarding pricing in case of Group Company transactions – TP Policy of group if any.
- Remitting bank details
- Rate of conversion of foreign currency
- Tax Residency Certificate

# DOCUMENTATION BY CA

- Declaration/Certificate from payee for :—
  - no PE,
  - tax residency,
  - beneficial owner,
  - treaty entitlement,
  - Indemnification from payee
  - Proposed period of stay (for e.g. for purpose of IPS)
- Appropriate MR to be taken from Payer also

# REQUIREMENT FOR AVAILING BENEFIT OF DTAA

- Tax Residency Certificate (TRC) required under section 90(4) of 90A(4)
- If TRC contains all the details required under rule 21AB(1) form 10F is not required from the payee.
- Resident Indians can apply for similar TRC in form 10FA
- TRC to be issued in Form 10FB

# PARTICULARS REQUIRED UNDER TRC/FORM 10F

- Name of the assessee;
- Status (individual, company, firm etc.) of the assessee;
- Nationality (in case of individual);
- Country or specified territory of incorporation or registration (in case of others);
- Assessee's tax identification number in the country or specified territory of residence or in case no such number, then, a unique number on the basis of which the person is identified by the Government of the country or the specified territory;
- Residential status for the purposes of tax;
- Period for which the certificate is applicable; and
- Address of the applicant for the period for which the certificate is applicable;

# LOWER OR NIL TDS U/S 197

## 197(1)

- Lower or nil rate of deduction on the basis of justification
- sections 192, 193, 194, 194A, 194C, 194D, 194G, 194H, 194-I, 194J, 194K, 194LA , 194LBB, 194LBC **and 195**

## 197(2)

- AO to issue Certificate to deduct TDS at nil or at lower rate
- Powers to cancel such certificate

## 197(3)

- Powers to CBDT to frame rules
- Rule 28, 28AA, 28AB, 29 and 37G. Form 13



# RULES REFERENCE TO S.197

RULES	PARTICULARS
28	Application to be made in <a href="#">Form 13</a> electronically under digital signature or through electronic verification code
28AA	Issue of Certificate subject to justification of lower or nil deduction on the basis of existing and estimated tax liability – other than dividend and other than person specified in Rule 28AB
28AB	Application by Charitable institutions or scientific research association, news agency, association or institution, fund or trust or university or other educational institution or any hospital or other medical institution or trade union referred to in sub-section (4C) of section 139
29	Certificate of no deduction of tax or deduction at lower rates from dividends – practically redundant
37G	Application for certificate for collection of tax at lower rates under sub-section (9) of section 206C

# CONSIDERATIONS FOR ESTIMATION

## TAX LIABILITY

### Rule 28AA

- Tax payable on estimated income of the previous year relevant to the assessment year;
- Tax payable on the assessed or returned <sup>2</sup>[or estimated income, as the case may be, of last four] previous years;
- Existing liability under the Income-tax Act, 1961 and Wealth-tax Act, 1957
- Advance tax payment <sup>3</sup>[tax deducted at source and tax collected at source for the assessment year relevant to the previous year till the date of making application under sub-rule (1) of rule 28]

# OTHER ASPECTS FOR ISSUE OF CERTIFICATE- Rule 28AA

- Valid for the period specified in the certificate or cancelled by AO
- Certificate to be issued directly to payer under advice to payee/applicant
- If number of deductee/payer are more than 100, certificate to be issued to payee to receive such income or sum after deduction at lower rate

# CERTIFICATE IN CASE OF RULE 28AB

- Charitable and other institutions
- Without deduction of tax
- Furnished all the returns as on the date of application
- Approved for the purpose of exemption as on date of application
- An application for a fresh certificate may be made, if the assessee so desires, after the expiry of the period of validity of the earlier certificate

# PROCEDURE FOR FILING FORM 13

- Register with TRACES as Tax Payer
- Login in TRACES
- Under the tab “Statements/Forms” select “Request for Form 13” [form 13.pdf](#)
- Fill in all the details
- Upload all the documents required to be submitted
- Submit Form 13 using digital signature or EVC
- Use “Track request for form 13” for status of application under “Statements/Forms”

# Documents to be submitted

- Estimated computation of Total Income of the year under consideration
- Reasons for claiming exemption of income claimed as exempt income
- In case of Charitable organisations certificate of registration, approval or exemption as the case may be
- In case previous 4 years returns not filed, than upload computation for the said years
- Copies of Return of Income in case of filing of paper return of previous 4 years.

# DETAILS TO BE OBTAINED BY AO FROM CPC

- Processed data or return of Income – 4 years
- PAN demand
- Efiled Return of Income – 4 years
- Audit Report – 4 years
- Assessment orders – 4 years

# ASSIGNMENT OF APPLICATION TO AO

- Application shall be forwarded to AO i.e. to Jurisdictional ITO or DCIT or ACIT based on revenue foregone and city
- Concerned AO to obtain other details required from CPC-ITR, Efiling and ITBA modules



# PROCESSING OF APPLICATION

- Review the application and other documents
- Seek further clarification
- Assessee to check if any clarification is needed by the AO in **INBOX** in **TRACES** portal through its login
- Assessee to submit the necessary response
- Based on the parameters as stated in the rules, system functionality to suggest estimated rate of tax
- AO may modify the rate based on his working by stating reasons
- Forward to Range Head
- Range head to process and grant approval or forward to CIT concerned
- Range head may seek clarification form AO
- CIT concerned after seeking clarification if required grant approval for issue the certificate or reject the application

# ISSUE OF CERTIFICATE

- Once the necessary approval is received from the competent authority, the AO shall either generate the certificate or reject the request and close the request
- Certificate shall be system generated and therefore shall not require any signature
- Certificate shall be available to Deductor as well as applicant through their respective traces login

# REFUND MECHANISM

**Circular No 7/2007, dt October 23,2007 and Circular No. 7/2011, dt September 27,2011:-**

- The contract is cancelled and no remittance is made to the non-resident.
- The remittance is duly made to the non-resident, but the contract is cancelled. In such cases, the remitted amount has been returned to the person responsible for deducting tax at source.
- The contract is cancelled after partial execution and no remittance is made to the non-resident for the non-executed part.

# REFUND MECHANISM

- The contract is cancelled after partial execution and remittance related to non-executed part is made to the non-resident. In such cases, the remitted amount has been returned to the person responsible for deducting the tax at sources or no remittance is made but tax was deducted and deposited when the amount was credited to the account of the non-resident.
- There occurs exemption of the remitted amount from tax either by amendment in law or by notification under the provision of Act.
- An order is passes under section 154 or 248 or 264 reducing the tax deduction liability of a deductor under section 195.

# REFUND MECHANISM

- There occurs deduction of tax twice from the same income by mistake.
- There occurs payment of tax on account of grossing up which was not required under the provision of the Act.
- There occurs payment of tax at a higher rate under the domestic law while a lower rate is prescribed in the relevant double taxation avoidance treaty entered into by India or vice versa.

# CONSEQUENCES OF NON COMPLIANCE

Section	Nature of Default	Consequences
40(a)	Non Deduction of TDS or not deposited before due date of filing of return	Disallowance of expenses in computation of taxable income of payer; Deduction in year of payment
201(1)	Tax not deducted and deposited	Recovery proceedings
201(1A)	Tax not deducted and deposited	Interest at 1% pm or part there off
221	Tax deducted not paid	Penalty to the extent of tax not deposited
271C	Tax not deducted or short deducted	Penalty to the extent of tax not deducted

# ISSUES FOR DISCUSSION

- ❖ Basis of deduction – income from which payment is made or other income of the payee also to be considered
- ❖ When does the provision gets attracted – payment of any nature or only when payment results in some income taxable under the ACT to payee
- ❖ Tax to be deducted on gross receipts or net income
- ❖ Whether tax to be deducted on advance
- ❖ Payments made to agent of Non resident in India
- ❖ Effect of pending permission from RBI
- ❖ Credit on Actual Payment or Credit in accounts- use of the word paid in DTAA
- ❖ Rate of deduction in case PAN not available Section 206AA
- ❖ Grossing up of income in case TDS to be borne by payer

# ISSUES FOR DISCUSSION

- ❖ Effect of exchange rate difference between Credit and Payment
- ❖ Effect of certificate granted u/s 195(2) on liability of agent u/s 163.
- ❖ What is effective rates of taxes
- ❖ Whether interest for non payment of advance tax in case of recipient applicable
- ❖ Orders passed u/s 195(2) are not conclusive
- ❖ Payment in Kind – TDS Deductible
- ❖ TDS deposited whether can be refunded
- ❖ Interest on Such Refunds
- ❖ Requirement of TRC for Benefits of DTAA



# BASIS FOR DEDUCTION

- ❖ Only that income which arises as a result of the payment is to be considered
  - ❖ Total tax assessed may be less or more than the actual deduction but deduction has to be made on the basis of the rates in force
- Transmission Corporation of A.P. Ltd. & Anr. vs. CIT (1999) 155 CTR (SC) 489 : (1999) 239 ITR 587 (SC)

# WHEN DOES THE PROVISION GET ATTRACTED

- ❖ When does the provision gets attracted – payment of any nature or only when payment results in some income to payee
- CIT & Ors. vs. Samsung Electronics Co. Ltd. & Ors. (2009) 227 CTR (Kar) 335 : (2010) 320 ITR 209 (Kar)
- GE India Technology Centre (P) Ltd. vs. CIT (2010) 234 CTR (SC) 153 : (2010) 327 ITR 456 (SC)

# TDS ON GROSS RECEIPTS OR NET INCOME

- Once there is an income embedded in the payment, the taxes are to be deducted as per the rates in force on the gross amount.
- The payer cannot step into the shoes of the AO and decide on the quantum of income
- If the payer feels that the whole of income is not liable to Tax – application can be made u/s 195(2) by payee for lesser deduction or no deduction

Transmission Corporation of A.P. Ltd. & Anr. vs. CIT  
(1999) 155 CTR (SC) 489 : (1999) 239 ITR 587 (SC)

# TDS ON ADVANCE PAYMENT

- The Calcutta High Court in P.C. Ray & Co. (India) Pvt. Ltd. vs. A.C. Mukherjee, ITO (1959) 36 ITR 365 (Cal) : TC5R.355 held that the law contemplated tax deduction at source not only on payments which were purely in the nature of income but also tax deduction at source on payment constituting a mixed composition, a part of which only might turn out to be taxable income. Therefore any advance should also be considered for the purpose

# TDS WHEN PAYMENT TO AGENTS OF NR IN INDIA

- The Bombay High Court in Narsee Nagsee & Co. vs. CIT (1959) 35 ITR 134 (Bom) : TC5R.418 held that the payment to an agent of a non-resident should be considered as payment to non-resident himself and under section 18(3A) and (3C) of the Indian IT Act 1922 (analogous to section 195 of 1961 Act) the assessee was liable to deduct tax.

# TDS PENDING RBI PERMISSION

- It has been held by the Karnataka High Court in United Breweries Ltd. vs. Asstt. CIT & Anr. (1995) 126 CTR (KAR) 39 : TC5PS.236 that liability to deduct TDS arises as soon as credit entries are made in the account of non-resident notwithstanding that permission of RBI under section 9 of FERA is still pending.

# EFFECT OF WORD PAID IN DTAA

## ➤ FLAKT (INDIA) LTD., IN RE

- AUTHORITY FOR ADVANCE RULINGS- (2004) 72 CCH 0287 IAAR (2004) 189 CTR 0359 : (2004) 267 ITR 0727 : (2004) 139 TAXMAN 0238
- **OECD Commentary**
- "The term 'paid' has a very wide meaning, since the concept of payment means the fulfilment of the obligation to put funds at the disposal of the creditor in the manner required by contract or by custom."
- **Held:**
- There are two important points worth emphasizing. The first is that s. **195(1)** comes into play at the stage where a payer who is enjoined to deduct the tax, either credits such income to the account of the payee or makes payment thereof whether in cash or by way of cheque or draft or by any other mode. And the second is that the taxability of such amounts in the hand of the payee or occasioning of the taxable events, is alien for purposes of s. **195(1)** of the Act.

# NEXT 2 ISSUES

- ❖ **Rate of deduction in case PAN not available**
  - ❖ **Whether 206AA applicable in such cases and the rate applicable in such cases**
- ❖ **Grossing up of income in case TDS to be borne by payer**
  - ❖ **What should be the rate to be grossed up – at rates in force or 20% as applicable in sec. 206AA**



# NON AVAILABILITY OF PAN

## ❖ Rate of deduction in case PAN not available

❖ **Bosch Limited V. ITO – Bangalore Tribunal – Against Assessee**

❖ **Serum Institute of India Limited V. DDIT(IT-II) – Pune Tribunal**

❖ **Quick Flight Limited V. ITO – International Taxation – Ahmedabad Tribunal**

❖ **DANISCO INDIA PRIVATE LIMITED vs. UNION OF INDIA & ORS - (2018) 301 CTR 0360 (Del) : (2018) 163 DTR 0212 (Del) : (2018) 404 ITR 0539 (Delhi) : (2018) 253 TAXMAN 0500 (Delhi)**

## ❖ Grossing up of income in case TDS to be borne by payer

❖ **Bosch Limited V. ITO – Bangalore Tribunal**

# BOSCH LTD. V. ITO

## BANGALORE ITAT

- ❖ With respect to applicability of 206AA, the tribunal is of the view that it overrides the other provisions of the act. This is a provision to ensure that there is no evasion of tax by non resident. The recipient being non resident and its income liable to tax are under obligation to obtain PAN. Withholding tax to be deducted at 20%.

# BOSCH LTD. V. ITO

## BANGALORE ITAT

- ❖ With respect grossing up u/s 195A the tribunal agreed with the explanation of the assessee that the words used are rates applicable in force and not 20% as applicable u/s 206AA. The rates applicable is 10.5575 and not 20%.

# **Serum Institute of India Limited V. DDIT(IT-II)**

## **Quick Flight Limited V. ITO – International Taxation**

- ❖ Section 206AA applies to rates in force as per the Act or 20% whichever is more in case of no PAN of the Payee.
- ❖ Then compare with rates as per DTAA
- ❖ Apply one which is lower to give effect to section 90
- ❖ DTAA has precedence over section 206AA

# DANISCO INDIA PRIVATE LIMITED vs. UNION OF INDIA & ORS

- Justice Eashwar Committee Recommendations
  - Ease of Doing Business
  - Tax Identification No. or some Unique No. on the basis of which the said person is identified by the Govt. of that country
- Having regard to the position of law explained in *Azadi Bachao Andolan* (supra) and later followed in numerous decisions that a Double Taxation Avoidance Agreement acquires primacy in such cases, where reciprocating states mutually agree upon acceptable principles for tax treatment, the provision in Section 206AA (as it existed) has to be read down to mean that where the deductee i.e the overseas resident business concern conducts its operation from a territory, whose Government has entered into a Double Taxation Avoidance Agreement with India, the rate of taxation would be as dictated by the provisions of the treaty.

# APPLICABILITY OF EXCHANGE RATE

- Since tax is to be deducted on the date of payment or credit whichever is earlier – exchange rate shall be applicable accordingly, i.e. rate applicable on the date of event occurring earlier.
- Even if the liability would be higher at a future date the remitter would be absolved from such liability since incidence of TDS can be triggered only once as per the act.
- Rule 115 is qua income and not payment, guidance can also be taken from the same.

# LIABILITY AS AN AGENT

- Proceedings under S. 163 and 195 operate in completely different fields and, therefore, certificate issued under s. 195 does not preclude the AO from initiating proceedings under s. 163 - Aditya Birla Nuvo Ltd. vs. Dy. Director of IT (International Taxation) & Anr. (2011) 242 CTR (Bom) 561

# RATES IN FORCE - SEC. 2(37A)

"Rate or rates in force" or "rates in force," in relation to an assessment year or financial year, mean-

(i) ...

(ii) ...

(iii) for the purposes of deduction of tax under [section 195](#), the rate or rates of income-tax specified in this behalf in the Finance Act of the relevant year or the rate or rates of income-tax specified in an agreement entered into by the Central Government under [section 90](#), or an agreement notified by the Central Government under [section 90A](#), whichever is applicable by virtue of the provisions of [section 90](#), or [section 90A](#), as the case may be.



# APPLICATION OF INTEREST FOR NON PAYMENT OF ADVANCE TAX

DIT vs. Alcatel Lucent USA Inc (Delhi High Court)  
itatonline.org

## ➤ ASSESSEE CONTENTION:

Relying on Jacobs Civil Incorporated 330 ITR 578 (Del), that as it was a foreign company and the income was liable for TDS, it was not liable to pay advance-tax.

# APPLICATION OF INTEREST FOR NON PAYMENT OF ADVANCE TAX

[DIT vs. Alcatel Lucent USA Inc \(Delhi High Court\) itatonline.org](http://itatonline.org)

## RULLING:

- There is a distinction between a case where the assessee admits that it has income chargeable to tax in India but does not pay advance tax on the basis that the Indian payer ought to have deducted tax at source u/s 195. In such a case (as was the fact situation in Jacabs), the assessee is entitled to take credit for the tax which was “*deductible*” by the Indian payer while computing its advance tax liability even though no tax was in fact deducted. However, in a case where the assessee does not admit any income in the return, this benefit is not available. An inference or presumption can be drawn that the assessee had represented to its Indian telecom dealers not to deduct tax from the remittances made to it even though there is no positive or direct evidence to that effect;

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- The argument that the Indian parties should have discharged their TDS obligations u/s 195 despite the presumed request of the assessee is one of convenience or despair and not acceptable because in a practical view of the matter, the Indian payers could not have resisted the assessee's request given future business prospects and the need to keep the assessee in good humour;
- Also, having denied its tax liability and leading the Indian payers to believe that no tax was deductible it is inequitable & unfair on the assessee's part to shift the responsibility to the Indian payers & expect them to deduct tax from the remittances. The assessee must take responsibility for its volte face. Once liability to tax is accepted, all consequences follow; they cannot be avoided;
- Also, applying equitable principles, as the assessee deprived the revenue of the advance tax, it must pay compensation by way of interest.

# APPLICATION OF INTEREST FOR NON PAYMENT OF ADVANCE TAX

## ➤ DIRECTOR OF INCOME TAX INTERNATIONAL TAXATION vs. GE PACKAGED POWER INC.

(2015) 92 CCH 0019 DelHC (2015) 275 CTR 0020 (Del) : (2015) 115 DTR 0070 (Del) : (2015) 373 ITR 0065 (Delhi)

22. This Court, therefore, holds that *Jacobs (supra)* applies in such situations; *Alcatel Lucent (supra)* can be explained as a decision turning upon its facts; its seemingly wide observations, limited to the circumstances of the case. This Court, therefore, holds that the view taken by ITAT was correct; the primary liability of deducting tax (for the period concerned, since the law has undergone a change after the Finance Act, 2012) is that of the payer. The payer will be an assessee in default, on failure to discharge the obligation to deduct tax, under Section 201 of the Act.

23. For the above reasons, this Court finds that no interest is leviable on the respondent assessee's under Section 234B, even though they filed returns declaring NIL income at the stage of reassessment.

# ORDERS U/S 195(2) ARE NOT CONCLUSIVE

## ➤ **COMMISSIONER OF INCOME TAX vs. ELBEE SERVICES (P) LTD.**

(2000) 68 CCH 0289 MumHC (2001) 168 CTR 0044 : (2001) 247 ITR 0109 : (2001) 115 TAXMAN 0618

This appeal has been filed under s. 260A of the IT Act, 1961. The appeal is misconceived. No substantial question of law is raised in this appeal. It is well settled that the orders passed under s. **195(2)** of the IT Act are not conclusive. They do not pre-empt the Department from passing appropriate orders of assessment. We have already taken a view in ITA No. 217 of 2000 [CIT vs. Tata Engineering & Locomotive Co. Ltd. (2001) 165 CTR (Bom) 67] in which this Court has laid down that the findings given under s. **195(2)** of the IT Act will not preclude the Department from taking a contrary view in the assessment proceedings.

# PAYMENT IN KIND – TDS DEDUCTIBLE

## ➤ KANCHANGANGA SEA FOODS LTD. vs. COMMISSIONER OF INCOME TAX

(2002) 70 CCH 0395 APHC (2004) 187 CTR 0664 : (2004) 265 ITR 0644 : (2004) 136 TAXMAN 0008

On the facts and in the circumstances of the case, the Tribunal is correct in law in holding that the assessee is liable to deduct tax at source under s. **195** of the Act on the alleged payment made to the non-resident towards hire charges even though the alleged payment is not in cash; It was payment by giving 85% of fish catch as payment as hire charges of ship

# TDS DEPOSITED WHETHER CAN BE REFUNDED

## ➤ **FAG BEARINGS INDIA LTD. vs. CHIEF COMMISSIONER OF INCOME TAX**

(2012) 82 CCH 0310 GujHC (2013) 256 CTR 0413 (Guj) : (2013) 83 DTR 0136 (Guj) : (2013) 353 ITR 0405 (Guj) : (2012) 209 TAXMAN 0360 (Gujarat)

**10.** The facts are thus more than sufficiently clear. The petitioner though not required to deposit any tax at the time of making mere provision for payment of technical fees to the foreign company, deducted sum of Rs. 19,49,400/and also deposited with the Government. At the time of subsequent remittance, the petitioner deducted yet again a sum of Rs. 21,82,500/and also deposited with the Government. Such deposit of the amount twice was a mere mistake and the respondents ought to have refunded the original sum of Rs. 19,49,400/to the petitioner on the application being made.

**11.** Under the circumstances, we are of the opinion that such amount must be refunded. We are also of the opinion that such refund should carry reasonable interest atleast after reasonable period of the petitioner making application for such refund.

# INTEREST ON REFUNDED

## ➤ UNION OF INDIA THROUGH DIRECTOR OF INCOME TAX vs. TATA CHEMICALS LTD.

(2014) 88 CCH 0159 ISCC (2014) 267 CTR 0089 (SC) : (2014) 101 DTR 0193 (SC) : (2014) 363 ITR 0658 (SC)

39. In the present case, it is not in doubt that the payment of tax made by resident/ depositor is in excess and the department chooses to refund the excess payment of tax to the depositor. We have held the interest requires to be paid on such refunds. The catechize is from what date interest is payable, since the present case does not fall either under clause (a) or (b) of Section 244A of the Act. In the absence of an express provision as contained in clause (a), it cannot be said that the interest is payable from the 1st of April of the assessment year. Simultaneously, since the said payment is not made pursuant to a notice issued under Section 156 of the Act, Explanation to clause (b) has no application. In such cases, as the opening words of clause (b) specifically referred to “as in any other case”, the interest is payable from the date of payment of tax. The sequel of our discussion is the resident/deductor is entitled not only the refund of tax deposited under Section 195(2) of the Act, but has to be refunded with interest from the date of payment of such tax.



# REQUIREMENT OF TRC FOR DTAA BENIFIT

- **SCAP INDUSTRIES INDIA PRIVATE LIMITED V. ITO AHMEDABAD TRIBUNAL**  
– [itatonline.org](http://itatonline.org)

10. The judicial approval was, therefore, to the use of Section 90(4) in favour of the assessee in the manner set out above. In view of the provisions of Section 90(2), there cannot be any controversy on this aspect. That is qualitatively much different from the stand of the CIT(A) called into question before us. Our research did not indicate any judicial precedent which has approved the interpretation in the manner sought to be canvassed before us i.e. Section 90(4) being treated as a limitation to the treaty superiority contemplated under section 90(2), and that issue is an open issue as on now. In the light of this position, and in the light of our foregoing analysis which leads us to the conclusion that Section 90(4), in the absence of a non-obstante clause, cannot be read as a limitation to the treaty superiority under Section 90(2), we are of the considered view that an eligible assessee cannot be declined the treaty protection under section 90(2) on the ground that the said assessee has not been able to furnish a Tax Residency Certificate in the prescribed form. To this extent, the approach of learned CIT(A) is clearly erroneous.

# ISSUES – APPLICATION U/S 197

## Issues in Registration

- To register one of the 3 options needs to be filled:
  - Details of TDS deducted/collected
  - Challan details of tax deposited by tax payer
  - Details of 26QB in case of property
- Indian Address
- Indian Cell No.
- PAN

# ISSUES – APPLICATION U/S 197

## Subsequent Issues

- Filing of more than one application not possible
- Delay in issue of certificate – in case of migration of PAN
- View INBOX regularly to check any query raised or clarification required
- Size of Submission – 5mb max
- PAN based DSC
- Working on inbuilt logic or functionality for deriving the rate of Tax – may not consider stay of demand, covered matters, appeal effect, rectification application, etc.
- Only 50 Entries possible online
- Application to be signed by Principle Officer.



**THANK YOU**