



Foreign remittances – section 195 perspective

- ✓ Foreign remittances from India –evolving landscape
- ✓ Provisions of section 195
- ✓ Rates of TDS
- ✓ Reporting of foreign remittances
- ✓ Miscellaneous aspects
- ✓ Certain recent developments
- ✓ Certain recent rulings

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Foreign remittances from India – evolving landscape

Liberalised Indian economy with seamless cross border transactions

Government initiatives to woo foreign investments and enhance ease of doing business in India

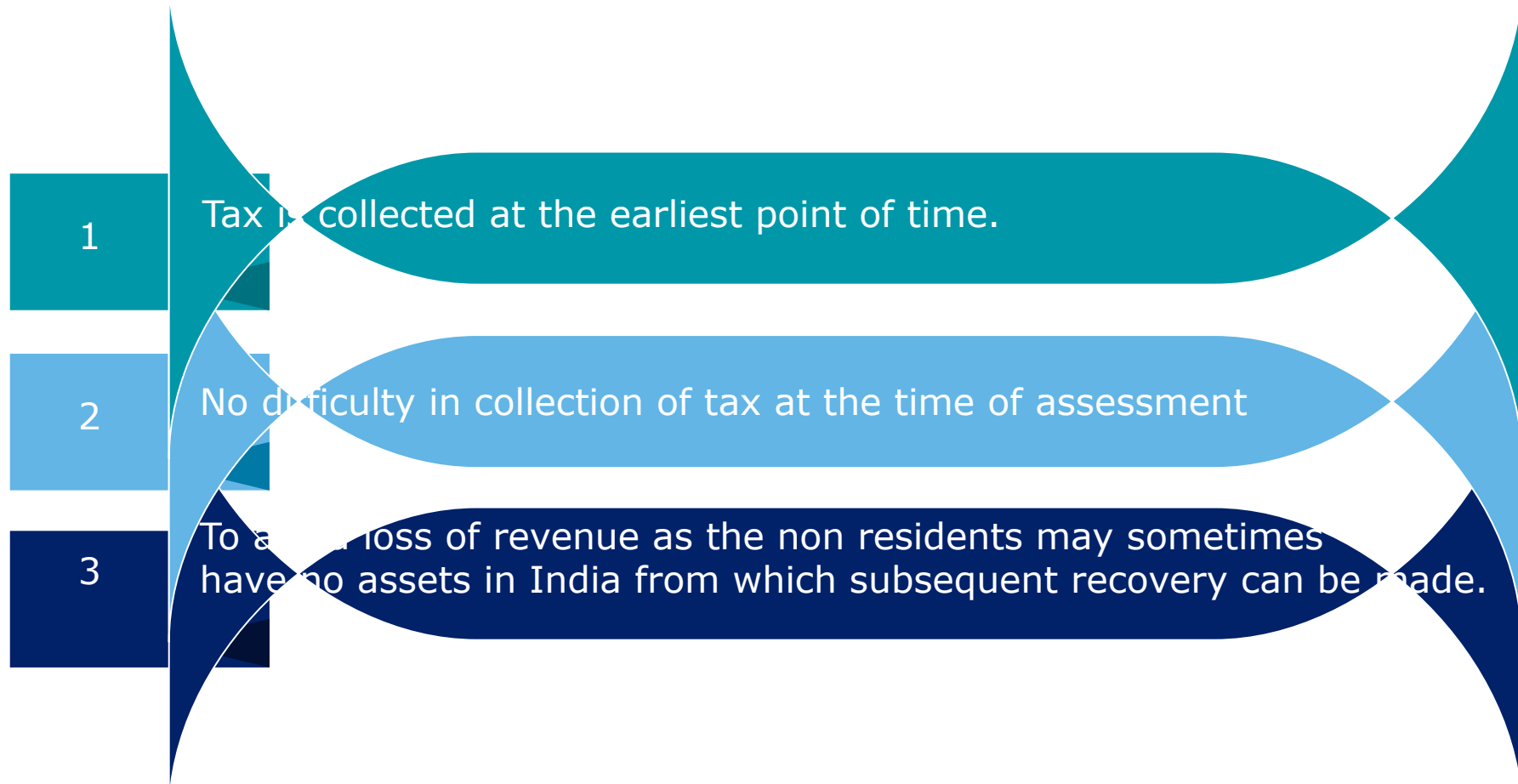
Substantive provisions being broadened – eg. Business Connection, Royalty, FTS

TDS on payments to non-residents – mechanism to collect due taxes and enforce associated compliances

Complexities associated with evolving business models and digital economy

Enhanced responsibility towards withholding tax compliances under section 195 towards foreign remittances

Objective of section 195 - CBDT Circular 152 dated 27.11.1974

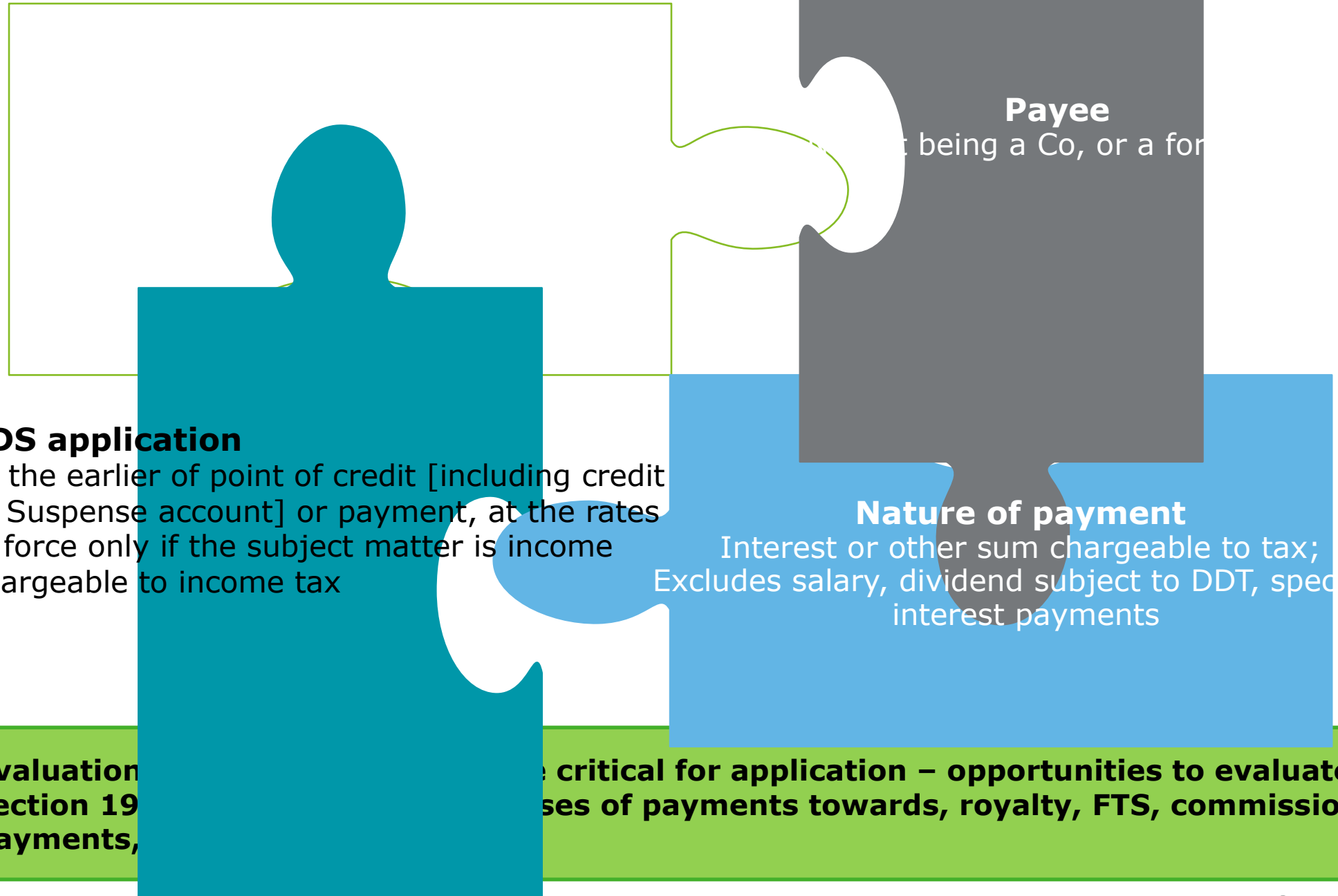


The above objectives define the contours of the provisions u/s 195

Section 195 provisions & key terms

Section 195(1) – key constituents

Provisions of section 195(1) – key cons



Section 195

Other provisions u/s 195 and broad comparative
Key terms

Other provisions under section 195

Section 195 provisions – a comparison

| Particulars | section 195(2) | section 195(3) | section 197 |
|--|---|--|---|
| Application by | Payer | Payee | Payee |
| Purpose | To determine the taxable proportion of the remittance | To receive sums without deduction of tax | To receive sums without deduction of tax or on deduction of tax at a lower rate |
| Whether appealable? | Appealable u/s 248 | No appeal, Writ Petition can be filed | No appeal, Writ Petition can be filed |
| Whether a revision petition u/s 264 can be filed? | Yes | Yes | Yes |

Note: Order u/s 197 disposed off online without giving reasons

Bently Nevada Llc vs Income Tax Officer, Ward-1(1) [Delhi High Court] – It was held that reasons for disposal must be separately communicated to the Petitioner not later than 1 week thereafter.

Payer, Payee:

Payer

- Includes any person responsible for making payment to NR
- Earlier held that provisions do not apply to NR payers not having tax presence in India - Vodafone International Holdings B.V. [2012] (341 ITR 1)(SC)
- Explanation 2 inserted by Finance Act, 2012 w.r.e.f 1 April 1962 to provide that section 195 applies to NR payers, whether or not such NR has residence, place of business, business connection or any other presence in India
- Unlike the TDS provisions for payments to residents, exclusion not made for Individual & HUF payers (whether or not carrying business)

Payee

- Covers NR, including foreign Co
- In case a foreign Co is treated as a resident based on its POEM in India, section 195 shall apply & not the TDS provisions applicable for payments to residents - Draft Notification No. 370142/19/2017-TIPL dated 15 June 2017 u/s 115JH

Mode of Payment:

- section 195(1) covers payment in cash, by cheque or draft or by 'any other mode'

TDS applies even in cases where:-

- Payment is not in terms of money as the same would constitute 'any other mode':
 - ✓ **Kanchanganga Sea Foods Ltd.[2010](325 ITR 540)(SC)** – charter fee for fishing vessels was paid in the form of fish catch
 - ✓ **BIOCON Biopharmaceuticals (P.) Ltd.[2013](144 ITD 615)(Bng ITAT)** – shares were issued as consideration for provision of technology & know-how
- Amount payable to NR is deducted by the NR from amounts due to the resident-payer; such adjustment shall also be considered as 'any other mode' – **Raymond Ltd [2003](86 ITD 791)(Mum ITAT)**

Sums chargeable to tax under the Act

- Chargeability to tax, determined based on:-
 - Whether the income is received, accrues or can be deemed to be received or accrued in India
 - section 5 r.w.s. 9
 - Characterization of the income in the NR recipient's hands
 - NR's eligibility to claim DTAA benefits

- **Transmission Corpn. of A.P. Ltd. [1999](105 Taxman 742)(SC):**
 - Tax to be deducted on the gross amount, if the payment includes an amount exigible to tax in India
 - Application to be made u/s 195(2) for permission to deduct tax on lower amount (the same has been relied by ITAT in case of **Google India Pvt Ltd** [2017] (86 taxmann.com 237))

- **Samsung Electronics Co. Ltd. [2009](185 Taxman 313)(Kar HC):**
 - Unless an order was obtained u/s 195(2), the obligation to deduct tax arose the moment remittance was made to NR

- **GE India Technology Centre (P.) Ltd. [2010](193 Taxman 234)(SC):**
 - section 195(2) is based on the 'principle of proportionality' & is attracted only in case of a composite payment having an element of taxable income

- **CBDT Instruction No. 2/2014 dated 26 February 2014:**
 - If no application was made u/s 195(2) & the payer failed to deduct tax, liability u/s 201 to be computed on the taxable portion & not the whole sum remitted

- **CBDT Circular No. 3/2015 dated 12 February 2015:**
 - Disallowance u/s 40(a)(i) to be computed on the taxable portion & not the whole sum remitted

Exchange rate, Service tax/GST:

- **Exchange rate to be applied:**
 - SBI TT buying rate of the foreign currency on the date on which TDS u/s 195 applies i.e. credit or payment whichever is earlier – Rule 26
 - Further TDS would not apply in case of exchange rate fluctuation between the date of TDS i.e. credit to the payee's account and the remittance date - Sandvik Asia Ltd [2012](49 SOT 554)(Pun ITAT)

- **Whether Service tax/ GST includible in taxable income for TDS purpose?**
 - Service tax indicated separately, not to be included in taxable income for applying TDS – Circular 1/2014 dated 13 January 2014
 - GST indicated separately, not to be included in taxable income for applying TDS – Circular 23/2017 dated 19 July 2017
 - Both the Circulars however apply to payments made to residents – Can it be argued that TDS will also not apply on service tax/ GST element of sums payable to NRs, as service tax/ GST does not constitute income chargeable to tax?

Rates of TDS

Rates in force

Gross basis of taxation u/s 115A

Failure to furnish Payee's PAN

Interplay with section 206AA

Grossing up of 'net of tax' payments

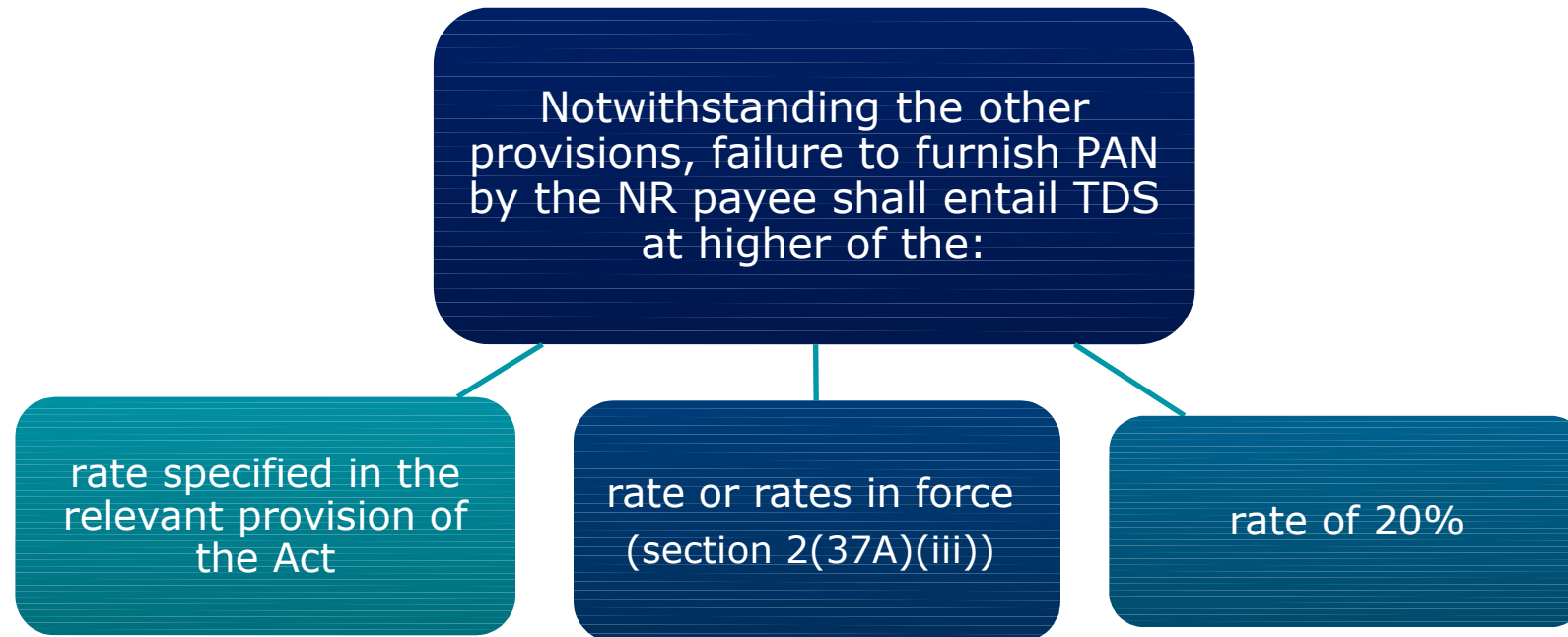
Rate of TDS

- Section 195(1) provides for TDS at the '**rates in force**'
- **Rates in force - section 2(37A)(iii):**
For the purpose of TDS u/s 195, rates in force mean the beneficial of:
 - the rates specified in Part II of the First Schedule to the Finance Act of the relevant year; or
 - the rates specified under the applicable DTAA
- **Payee's TRC - sections 90(4), (5) r.w. Rule 21AB:**
To claim DTAA benefit, NR to furnish TRC & Form 10F providing the following information, to the extent not covered in the TRC:
 - *Payee's Name & Status, PAN, Nationality or county of incorporation, Tax identification number & Address in the county of residence, Period of residential status as per TRC*
 - DTAA benefit denied as TRC did not cover relevant AY - ABB FZ-LLC [2017](83 taxmann.com 86)(Bng ITAT)
- **Surcharge & Education cess not to be added to the tax rate specified under DTAA:**
 - Sunil V Motiani [2013](59 SOT 37)(Mum ITAT)
 - BOC Group Ltd [2015](156 ITD 402)(Kol ITAT)
 - Capgemini SA [2016](72 taxmann.com 58)(Mum ITAT)

Gross basis of taxation / withholding u/s 115A

- **Rate specified u/s 115A :**
- The existing provisions of section 115A of the Act provide that
 - in case of a non-resident taxpayer,
 - where the total income of such taxpayer includes any income by way of Royalty and Fees for technical services (FTS) from Government or an Indian concern after 31.03.1976, and
 - which is not effectively connected with permanent establishment, if any, of the non-resident in India,
tax shall be levied at the rate of **10% on the gross amount** of such income.
- No deduction in respect of any allowance or expenditure shall be allowed to the assessee under section 28 to 44C of the Act.

Failure to furnish Payee's PAN – section 206AA:



- **Section 206AA(7)(ii) r.w. Rule 37BC effective from June 2016:** Relaxation to payments in the nature of interest, royalty, FTS, capital gains, if the NR deductee furnishes following details, documents:
 - Name, e-mail id, contact number, address in the country of residence
 - TRC of the country of residence
 - Tax identification or unique identification number in the country of residence
- **Relaxation not available for other payments,** eg: payments to artists & sportspersons, payments taxable as other income, etc.

Interplay with section 206AA

Beneficial DTAA provisions to override section 206AA irrespective of the non-obstante clause

- Danisco India (P.) Ltd. [2018] 90 taxmann.com 295 (Delhi HC)
- Nagarjuna Fertilizers & Chemicals Ltd. [2017](185 TTJ 569)(Hyd ITAT)(SB):
 - Unlike the GAAR provisions which override DTAA, there is no provision to give overriding effect to section 206AA

Surcharge & Education cess not to be applied on 20% tax rate u/s 206AA

- Computer Sciences Corporation India (P.) Ltd. [2017] (163 ITD 151)(Del ITAT)

Section 206AA cannot be invoked by not allowing correction of incorrect payee PAN in deductor's TDS statement

- Purnima Advertising Agency (P.) Ltd.[2017](83 taxmann.com 205)(Guj HC)

Grossing up of 'net of tax' payments – section 195A:

Scenario I

NR payee has a PAN and/or a TRC & other details as per Rule 37BC

Amount payable to NR under 'net of tax' agreement = Rs.100

Rate in force u/s 2(37A)(iii) = 10% [i.e. beneficial of: 10.815% as per Part II of the First Schedule to the Finance Act & 10% as per DTAA]

Grossed up income u/s 195A = Rs.111.11 (i.e. $100 \times 100 / 90$)

TDS u/s 195 = Rs. 11.11 (i.e. $111.11 \times 10 / 100$)

Scenario II

NR payee neither holds a PAN nor a TRC

Amount payable to NR under 'net of tax' agreement = Rs.100

Rate in force u/s 2(37A)(iii) = 10%

Grossed up income u/s 195A = Rs.111.11 (i.e. $100 \times 100 / 90$)

TDS u/s 195 = Rs. 22.22 (i.e. $111.11 \times 20 / 100$)

Though TDS at a higher rate of 20% will apply u/s 206AA, income to be grossed up @ 10% (i.e. the rate in force) & not @ 20% (i.e. the TDS rate) - Bosch Ltd [2012](141 ITD 38)(Bang ITAT)

Reporting of foreign remittances

Payments exempt from reporting

Forms 15CA, 15CB, 15CC

Aids to determine taxability & applicable TDS

Procedure for online upload of Forms 15CA, 15CB

Practical Issues

Provisions - section 195(6) r.w. Rule 37BB

- **Finance Act, 2008 inserted section 195(6) to provide for reporting of taxable foreign remittances by the payer; Rule 37BB was introduced to:**
 - Prescribe electronic reporting in Form 15CA based on CA certificate in Form 15CB;
 - Specify a list of 28 remittances to which the reporting did not apply

- **W.e.f. 1 June 2015, Finance Act 2015:**
 - Amended section 195(6) to extend the scope of reporting to any payment to NR, whether or not taxable in India
 - Introduced a new section 271-I to provide penalty of INR 1 lakh for failure to report or inaccurate reporting of remittances u/s 195

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Payments exempt from reporting under Rule 37BB (1/2)

1. Indian investment abroad-in equity capital
2. Indian investment abroad-in debt securities
3. India investment abroad in branches & WOS
4. Indian investment abroad-in subsidiaries & associates
5. Indian investment abroad-in real estate
6. Loans extended to Non-residents
7. Advance payment against imports
8. Payment towards imports-settlement
9. Imports by diplomatic missions
10. Intermediary trade
11. Imports below INR 5,00,000
12. Payment for operating expenses of Indian shipping cos operating abroad
13. Operating expenses of Indian airlines cos operating abroad
14. Booking of passages abroad - Airlines cos
15. Remittance towards business travel
16. Travel under basic travel quota (BTQ)
17. Travel for pilgrimage
18. Travel for medical treatment
19. Travel for education (incl fees, hostel exps)
20. Postal services
21. Construction of projects abroad by Indian companies including import of goods at project site
22. Freight insurance relating to import-export of goods
23. Payments for maintenance of offices abroad
24. Maintenance of Indian embassies abroad
25. Remittances by foreign embassies in India
26. Remittance by NR for family maintenance & savings
27. Remittance for personal gifts & donations
28. Remittance towards donations to religious and charitable institutions abroad
29. Remittance towards grants & donations to other Governments & charitable institutions established by the Governments
30. Contributions or donations by the Government to international institutions
31. Remittance towards payment or refund of taxes
32. Refunds rebates or reduction in invoice value on account of exports
33. Payments by residents for international bidding.
34. Remittances by individuals not requiring approval under LERS

Payments exempt from reporting under Rule 37BB (2/2):

- The specified payments are exempt from reporting only if not chargeable to tax in India – Rule 37BB(3)
- No such condition in the erstwhile Rule 37BB
- **Though the listed payments may prima facie appear to be non-taxable in India, each payment would need to be analysed based on facts, eg: taxability may arise in case of payment to NR against import of goods, if such imports are attributable to the NR's PE in India**

The specified payments would also have to be reported, if chargeable to tax

New Form 15CA – A Snapshot

| Part A | Part B | Part C | Part D |
|---|---|---|---|
| <p>Applicable if:</p> <ul style="list-style-type: none"> Remittance is taxable Remittance or aggregate thereof does not exceed INR 5 lakh in FY <p>CA Certificate: Not required</p> | <p>Applicable if:</p> <ul style="list-style-type: none"> Remittance is taxable Remittance or aggregate thereof exceeds INR 5 lakh in FY Order/ | <p>Applicable if:</p> <ul style="list-style-type: none"> Remittance is taxable Remittance or aggregate thereof exceeds INR 5 lakh in FY <p>CA Certificate: Required</p> | <p>Applicable if:</p> <ul style="list-style-type: none"> Remittance is not taxable under the Act <p>CA Certificate: Not required</p> |

- Interplay between Parts:**
- Payments taxable under the Act, but exempt under the DTAA – Part C or Part D? certificate is obtained u/s 195(2)/195(3)/197
 - Where there is a transfer of shares from a non-resident on stock exchange and the same results into capital loss. Thus, there is no income. Part C or Part D? 197
 - Payments exceeding INR 5 lakh for which an order/certificate is obtained from the Assessing Officer u/s 195(2)/195(3)/197 – Part B or Part C? CA Certificate: Not required

CA Certificate – Form 15CB

- A certificate issued by a CA specifying the documents verified & providing:
 - Detailed enumeration of the taxability of the remittance under the Act, without giving any effect to DTAA;
 - Details of payee’s TRC, relevant Article & tax liability under DTAA, if applicable
- No material change in content under the past & amended provisions
- W.e.f. 1 April 2016, Form 15CB to be furnished electronically
- Cannot be amended or modified after uploading
- On submission, status of the Form shall appear as “Submitted”
- On successful filing of the corresponding Form 15CA-Part C, status of Form 15CB shall update to “Consumed”
- If the Form 15CA against which Form 15CB was consumed is withdrawn, status of Form 15CB shall change to “Withdrawn”

Aids to determine taxability & applicable TDS

Documentary

- Underlying agreement /contract
- Invoice/Debit Note being paid
- Other correspondence between parties
- A visit to the NR's website to find out more about their Indian operations
- TRC & Form 10F of the payee
- In case TRC of the relevant period is pending receipt, copy of the application filed for obtaining it
- Details of the payee's tax identification or other unique number in the country of residence
- Written confirmation from the payee about:
 - Being the beneficiary of the proposed remittance
 - Not having a PE in India
 - Being a tax resident of the home country (if TRC for the relevant period is pending)
- Order/ certificate issued u/ss 195(2), 195(3), 197 of the Act
- SBI's certificate providing the required TT buying rates

Legal

- Provisions of the Act
- Provisions of the applicable DTAA (including Protocol, MFN and LOB clauses, if any)
- Judicial precedents
- Commentaries on the provisions of the Act & DTAA

Certain recent developments impacting foreign remittances

Recent Developments - Withholding tax provisions

Withholding tax orders/certificates

- With effect from 1 November, 2019, to reduce the time for processing of applications the process of obtaining a withholding tax order is proposed to be digitized, it is proposed to amend section 195 of the Act:
 - to allow for prescribing the form and manner of application; and
 - for the manner of determining the appropriate portion of sum chargeable to tax
- With effect from 1 September, 2019, it is proposed to amend section 197 of the Act to also allow a payee to seek a lower/nil withholding tax certificate for sums covered under the proposed section 194M of the Act

Recent Development - Revised ICAI Guidance Note on Audit Reports & Certificates for Special Purposes:

- A practitioner is expected to provide either a reasonable assurance (about whether the subject matter of examination is materially misstated) or a limited assurance (stating that nothing has come to the practitioner's attention that causes the practitioner to believe that the subject matter is materially misstated)
- Where appropriate, a description of any significant inherent limitations associated with the measurement or evaluation of the underlying subject matter against applicable criteria
- The practitioner should agree regarding the engagement terms including objective, scope & responsibilities of both the parties with the engaging party
- Report to express opinion (in a reasonable assurance engagement)/ a conclusion(in a limited assurance engagement)
- Criteria are applicable benchmarks used to measure or evaluate the underlying subject matter and they provide a suitable frame of reference
- Criteria for preparation of subject matter include relevance, completeness, reliability, neutrality and understandability
- The assurance report should be in writing and should contain a clear expression of the practitioner's opinion/conclusion about the subject matter of information.
- In all cases where reasonable assurance or limited assurance cannot be obtained and a qualified opinion/conclusion is insufficient the practitioner to disclaim the opinion/withdraw from the engagement

Certain practical aspects

Certain principles:

Practical aspects:

Does reporting apply to?

Business Connection – Dependent Agency PE – Under the Income Tax Act, 1961

As per Budget 2018, “Business connection” will include any business activities carried through a person who, acting on behalf of the non-resident, habitually concludes contracts or habitually plays the principal role leading to conclusion of contracts by the non-resident and the contracts are –

- in the name of the non-resident; or
- for the transfer of the ownership of, or for the granting of the right to use, property owned by that non-resident or that non-resident has the right to use; or
- for the provision of services by the non-resident.

Key considerations

Dependent Agency PE – Conditions

As per DTAA

- His activities are wholly and exclusively on behalf of the foreign enterprise; and
- Transactions between the two are not made on arm's length conditions.

E Funds IT Solutions Inc. v. DIT [2014]

- A dependent agent should have authority and should habitually exercise the said authority to conclude contracts on behalf of the foreign enterprise.
- Who habitually maintains stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the principal enterprise.
- When the agent habitually secures orders in the said country i.e. where he is located, almost wholly or wholly for the foreign enterprise

** The aforementioned decision has been affirmed by Apex Court in the case of E-Funds IT Solution Inc. [2017] 86 taxmann.com 240 (SC)*

Macro process flow to withholding tax decision u/s 195

Thank you!