



**Fill Day Seminar on TDS u/s. 1925 on Foreign Remittances including  
Procedural Aspects on 3<sup>rd</sup> August, 2019**

**Questions for Brain Trusts Session including Case Studies and Q & A under  
Section 195 of the Act**

**Chairman : CA T. P. Ostwal  
Panelists: CA Sushil Lakhani  
Shri M. P. Lohia, Ex-IRS**

**1. Dual Residency –I:**

Mr. A is an Indian Citizen residing in India since the past many years and is a Tax Resident of India. Recently, he acquired citizenship of USA and hence a Tax Resident of USA under the domestic law of USA. He has moved with his family to USA.

Now he is a Dual Resident i.e. of India as well as USA. During FY 2019-20, Mr. A is earning income from India as well as from USA.

**Query-1:**

If as per the Tie Breaker Test under India-USA DTAA, Mr. A is a Tax Resident of USA, how will India withhold taxes on payment of income to Mr. A?

**Query-2:**

In India, whether he will file his tax returns as Resident or Non Resident? Whether he has to make his foreign asset disclosure in the tax returns?

**2. Dual Residency –II:**

Mr. B is a Green Card Holder of USA. He moved back to India with his family a few years ago. He has not given up his Green Card status. As per the USA tax laws, he is a Tax Resident of USA. As per the Indian Income Tax Act, he

is a Tax Resident of India. Mr. B is receiving income from India, USA and UK. As per the Tie Breaker Test under India-USA DTAA, he is a Tax Resident of India.

**Query-1:**

What will be the withholding tax implication if Mr. B is receiving income from UK i.e. whether India – UK DTAA, India – USA DTAA or UK – USA DTAA will apply, considering Mr. B is a Resident of India as well as USA?

**Query-2:**

Further, whether income of UK will be taxed in India or in USA, considering he is Tax Resident in both the Countries?

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**3. Availability of Tax Residency Certificate:**

M/s. A has to make royalty payment to M/s. B USA. As per the agreement entered into between them, every 5<sup>th</sup> of the month, a fixed amount has to be paid. To avail the benefits of DTAA, Tax Residency Certificate from M/s. B is required. The same is available for the calendar year 2018 but for the calendar year 2019, the same was under process. Till the date of payment, the same was not obtained.

**Query 1:**

At the time of making the remittance to M/s B, whether benefit of DTAA can be availed even though TRC for 2019 is not available but applied for?

**Query 2:**

At the time of making the remittance to M/s B, benefit of DTAA is not availed since TRC was not produced and hence TDS was deducted at a higher rate

of tax. Subsequent to filing the Form 15CA/CB and making the payment to M/s B after deduction of TDS, it furnishes the TRC (before the date of depositing the tax with the Govt.), whether Form 15CA/CB can be revised/withdrawn and TDS not be paid to the Govt.?

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**4. Change of residential status during the year:**

Mr. A is a Tax Resident of India since the past many years. He is now leaving India on 15<sup>th</sup> May 2019 for the purpose of employment in Sydney. He sold his residential house in India (valued at less than Rs. 50 lacs) to Mr. B on 2<sup>nd</sup> April 2019. For the F.Y 2019-20, Mr. A becomes Non Resident. Mr. B has not deducted any TDS while making the payment to Mr. A on 2<sup>nd</sup> April 2019 since he was a Tax Resident as on that day.

**Query:**

Will Mr. B be considered in default for non-deduction of TDS u/s 195 of the Act while making payment to Mr. A? In practice, what precautions should one take or declaration should one obtain from the payee before making the payment.

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## 5. Taxability of gifts by residents to non-residents:

Finance (No 2) Bill 2019 proposes to insert section 9(1)(viii) of the Act widening the scope of 'income deemed to accrue or arise in India' to include any sum of money or property in India transferred, on or after 5 July 2019 from a resident to a non-resident for inadequate consideration or without consideration.

**Query 1:** Examine applicability of section 195

- (a) Generous India Ltd is donating USD 1 million to an International charitable organization.
- (b) Mr. Goodman a Indian Resident is gifting Rs.5,00,000/- to his friend who is a resident of USA

Restrictive scope under tax treaties:

- Article dealing with 'Other Income' in certain tax treaties entered into by India grants exclusive taxation rights to the country of residence of the recipient of the other income. E.g. UAE, Korea, Kuwait, Saudi Arabia and Philippines. Accordingly, question arises whether amendment of the Act would override the provisions of the applicable tax treaty giving rise for obligation for deduction of tax on gifts given by Indian resident.
- It is also pertinent to note that certain tax treaties which India has entered into do not have 'Other Income' Article (viz. Netherland, Libya). In such cases, question arises whether the Contracting States may tax the income in their respective states according to their domestic laws.

Meaning of the term 'property':

- Provisions of section 56(2)(x) read with provisions of section 56(2)(vii) of the Act defines 'property' to mean following capital asset - immovable property, shares and securities, jewellery, drawings, paintings, any work of art, bullion, etc.
- Accordingly, question arises whether the aforesaid provisions would be applicable in case of transfer of intangibles such as patents, trademarks, etc.

- Also, in case where any property is acquired from a resident by a non-resident as a business asset and not as a capital asset, whether it be argued that such transaction could not be covered under the proposed amendments and hence no withholding obligations are triggered.

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**6. Issues Relating To Gift Of Shares:**

An NRI – Mr. A holds shares in a Singapore company which holds 100% shares in Indian company. Singapore Company derives substantial value from assets located in India pursuant to Explanation 5 to Section 9(1) (i) of the Act. Mr. A proposes to gift the shares of Singapore Company to Mr. B, a non-relative who is also overseas.

**Query:**

Is there any TDS obligation under section 195?

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**7. Purchase of a house property by a Resident from a Non Resident:**

Mr. Ronald who is an NRI has a house property in India. He intends to sell his house to Mr. Parekh who is a resident of India. Mr. Ronald did calculation of the capital gain on the proposed sale transaction. As per the calculation, there is long term capital loss. CA Mr. Smart advised Mr. Ronald that as there is capital loss in the transaction, he need not seek lower withholding tax certificate from the tax department as it is very clear that there is a loss in the

transaction. Mr Smart also said he will certify the computation of the capital gain which will be given to Mr. Parekh.

**Query:**

Whether above approach is in line with the law?

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**8. Applicability of Form 15CA/15CB to payment of interest on long term infrastructure debt bonds:**

X, resident of a foreign country has subscribed to long term infrastructure debt bonds issued by ABC Limited, a domestic Indian company. ABC Ltd pays interest to X at the rate of 10%. ABC has withheld tax at the rate of 5% as per Section 194LB. Sec. 195(1) excludes cases involving payment of interest referred to in Section 194LB. Whereas, Sec. 195(6) which prescribes issuance of Form 15CA and 15CB for payment to non-residents does not contain any such exclusion.

**Query:**

Whether the procedure of issuance of Form 15CA and Form 15CB are required to be complied with while remitting such interest to Non Resident?

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**9. TDS from Reimbursement / Cost allocation of Expenses:**

Many Indian subsidiaries / affiliates of foreign companies are reimbursing various expenses to the regional offices or the head office or fellow subsidiaries or parent company, for the expenses incurred by them on behalf of Indian subsidiary, branch or operations. Sometimes such reimbursement also includes payment of share of cost and expenses allocated by the regional office / head office or the parent company to the Indian subsidiary / affiliate. Such reimbursement of expenses / allocated costs have the following nature / characteristics:

1. Reimbursement of Travelling and Hotel Expenses of Personnel visiting India from the Regional Office or the Head office
2. Reimbursement of expenses incurred by HO / RO or Parent company in respect of personnel from India visiting HO/RO/PC in connection with various business meetings.
  - a. Allocation of various common communication costs, Coaching / training expenses, management development centre expenses, marketing
  - b. expenses and other various executive and general administrative expenditure incurred by the parent company / RO / HO and allocated to Indian subsidiary / branch / office on a suitable allocation key with or without a nominal mark up to cover common cost incurred.

**Queries:**

- (i) Whether allocation of actual expenses by the Head or Regional Office on the basis of fair and equitable Allocation Keys would be sufficient to state that Non Resident has no Income in India ? Normally documentary proof / supporting vouchers in respect of such allocation arenot available; would it make a difference? Whether inclusion of mark up to cover administrative / overhead expenses would make a difference to the taxability thereof?
- (ii) What are the guiding principles and precautions to be taken in this regard?

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**10. TDS from payment of Fees for Services:**

Quality Diamonds Pvt. Ltd. Is engaged in export of Cut and polished diamonds. It's customers are mainly located in Europe. It proposes to engage services of M/s ABC, a partnership firm based in Luxemburg engaged in rendering professional services in relation to Accounts receivable [i.e. trade debtors]. M/s ABC does not have a Permanent Establishment in India.

M/s ABC shall provide a wide range of services such as (a) researching the business and financial back ground of the existing and prospective customers (b) following up collections with the customers in Europe and to ensure timely collection and (c) to undertake making payment in respect of exports if the customers fails to pay or become insolvent or is otherwise incapable of honouring the financial commitment on time. M/s ABC shall charge fees for rendering the said services linked to the volume of exports.

The CA of Quality Diamonds advise the company that India has not entered into a DTAA with Luxembourg and that the said payment is liable for taxation in India as Fees for Technical Services under section 9(1)(vii) and therefore the company should deduct TDS u/s 195 @ 10%+applicable surcharge and education cess as prescribed.

**Queries:**

- (i) What is the character of the payment made to M/s ABC? Is it in the nature of Fees for technical services?
- (ii) If the answer is in the affirmative, can the payer claim that the payment has been made for utilization of services in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India.
- (iii) If M/s ABC was located in a treaty country such as USA, UK, Singapore etc. which enshrine the concept of 'make available' in the relevant Article relating to FTS, can it be contended that the said fees are not liable to tax in India as M/s ABC does not make available any technical know-how to payer.



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11. **Applicability of Sec. 271J:**

Mr. Smart CA, has relied upon a tribunal decision while issuing Form 15CB wherein he took a position of non-applicability of TDS. At the time of assessment of his client, the said decision was subsequently reversed by the High Court and the AO disallowed the expenditure. AO now wishes to initiate action against Mr. Smart for furnishing inaccurate information in Form 15CB issued by him.

**Query:**

Department is seeking legal view if it can levy penalty u/s 271J on Mr. Smart.

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12. **Payment of interest on suppliers' credit (for supply of plant & machinery or supply of goods):**

Non-resident Supplier X exports heavy machinery to an Indian company for use in its factory. Supplier X has given two payment options to the Indian company as follows:

Option 1: Sale @ 105% of actual price of the machinery + credit period of 180 days.

Option 2: Advance payment + Sale at actual price of the machinery. If Indian company is not able to make advance payment to the supplier, then it needs to pay interest @ 5% for period starting the date of shipment.

**Query:**

Would TDS obligations differ between Option 1 & 2?

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**13. Hiring of Cloud Server:**

I Co. obtains following services from US Co:

- (a) Server space as may be required by I Co from time to time. There are no designated servers, all which may be located outside India.
- (b) RAM and operating systems and applications software for enabling I Co to use the server space.
- (c) Connectivity for enabling I Co and/or its customers/vendors to use the server.

I Co uses the services to provide a platform through which it's customers (through intermediaries such as mobile phone companies) can access data or information.

**Queries:**

- 1) What is the character of charges for server space, incidental operating system and connectivity charges by the Indian Co. especially after the insertion of Explanation 3 to section 9(1) (vi)? More generally, what are the criteria for differentiating between a FTS and use of equipment amounting to royalty?
  
- 2) What is the characterization of payments for the use of such software under the Act as well as under the Treaty?

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**14. Symposium abroad:**

An Indian company has participated in a foreign symposium of plastic manufacturers which is to be held in London. The agent for this global

conference is in Hong Kong. Payment for this event has been paid to the Hong Kong agent.

The event permits the Indian company to following benefits through the agent:

- Participation by 2 guests of the company.
- Networking facilities with the participants.
- One-to-one meetings with 3 participants of the symposium.
- Lectures in plastic industry.
- Technical information about latest technologies in plastic industry.
- Market and economic trends in plastic industry.
- Space for exhibition of the Indian company's products.
- Display of logo of the Indian company at 2-3 places at the Symposium venue.

**Query:**

Would participation fees attract TDS u/s 195?

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**15. Chemical testing:**

An Indian resident has to get chemicals tested from a Hong Kong company. The chemical has to be sent abroad for analysis.

Supreme Court decision in the case of Bharti Cellular (193 Taxmann 97) has held that human intervention is a pre-requisite for payment for services to qualify as FTS. If services are automated, then the payment may not amount to FTS.

The chemical analysis will be done mainly by high-tech equipments. There will be of course be personnel who will be operating those equipments.

**Queries:**

- 1) Are such repair charges liable to TDS u/s 195?
- 2) How does one determine level of involvement of human element? While equipment may be analysing the chemicals, it is the person who will be analysing the results given by the equipment and present the findings. It is human being who operate the equipment.

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**16. Enrolment fees for MDP:**

A large Indian MNC has tied up with a foreign university for Management Development Program (MDP) for its senior executives. The program would be customised as per requirements of the Indian MNC. Sessions in MDP would prepare the senior executives for real-life exigencies likely to be faced in their industry. Teaching activity inherently constitutes a mode of knowledge transfer.

Sec. 9(1)(vi) defines royalty to include consideration for imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill.

**Query:**

Would payment by Indian MNC be considered as royalty and would attract TDS obligations u/s 195?

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**17. Appointment of purchase agent abroad:**

An Indian company imports trading goods from China. It avails services of an independent purchase agent who arranges logistics for export of goods from China to the Indian company. Due to increase in volume of imports, it is contemplating to employ the independent agent and retain him on the company payroll.

**Query:**

Would TDS become applicable to payment of salary if Indian company employs Chinese resident? If yes, whether u/s 192 or u/s 195?

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**18. Payment for boosting a post on social media:**

An Indian company has posted a photograph of Holi celebrations at its office. Social Media Company has offered the Indian company to promote such posts periodically against payment of consideration. Promotion of such posts would mean that such photographs of office celebrations would appear more often on the wall of the persons who have liked the page of the Indian company as well as their friends.

**Query:**

Can the Indian company consider that provision relating to equalization levy is not applicable on such payment? Would Sec. 195 apply in such case?

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**19. Rate of TDS on FTS effectively connected with PE:**

Sec. 115A (1)(b) while prescribing tax rate of 10% expressly excludes from its scope income referred to under Sec. 44DA. This means that tax rate of 10% on gross amount of FTS would not apply if such FTS is effectively connected with PE. Whereas, First Schedule of Finance Act while prescribing rate of TDS @ 10% on FTS payment to foreign company does not exclude income referred to under Sec. 44DA.

**Query:**

What is the rate of TDS on FTS that is effectively connected with PE in India?

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**20. Foreign company treated as a resident of India on account of POEM:**

M INC, a company incorporated and tax resident in USA is also a tax resident of India due to POEM in India.

**Query:**

Whether such a company needs to comply with section 195 when it makes payment to its vendors which are resident outside India?

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21. **Payment for Website - hire charges & maintenance:**

**Query:**

Whether payment to non-resident for domain charges, development and maintaining a website is liable to tax in India?

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22. **Payment of Equipment Hire Charges and Fees for operators services:**

**Scenario I:**

SR Asia Group Limited, Bangkok( 'SR Asia')is a parent company of SR Resources India Limited, ('SR India') It provided a high tech equipment to SR India on a monthly lease of US\$ 25,000/-. Since the equipment required specialized operational skill, SR Asia agreed to provide a skilled operator Mr. John Moses on monthly fees of US \$ 5,000/-.

**Query:**

What are tax withholding obligations under section 195 of SR India in respect of payment of lease charges and technical fees in terms of Income-tax Act and DTAA between India & Malaysia?

**Scenario II:**

In addition, SR Asia sent Mr. Harding, their employee to India to supervise technical operations at one of SR India's clients. Mr. Harding came to India on 2nd October, 2017 and is in India since then except two short trips to Malaysia for in all 15 days.

SR India remitted fees for Mr. Harding's services without withholding any TDS in terms of India- Malaysia DTAA until he completed 180 days in India in a year.

**Query:**

What will be tax withholding obligations of SR India in terms of 1) DTAA between India & Malaysia & 2) In terms of Income-tax Act, 1961?

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**23. Payments to Foreign Shipping Companies:**

**Queries:**

- 1) Whether any tax is required to be deducted from the payments made to a non-vessel owning foreign shipping company 'FSC' (known as NVOCC) or its agent in India by way of (a) freight (b) Demurrage (c) Terminal Handling Charges (d) any other payment of similar nature?
  
- 2) Please explain the distinction between the provisions of sections 172 and 44B as both are similarly worded and applicable to Foreign Shipping Companies.
  
- 3) Will the answer be different if
  - i. FSC has a dependent agent in India?;
  - ii. Has an agent in India, but is not dependent on FSC in terms of Section 9(1)(i) and is a Tax resident of and also having a place of effective management in Hong Kong.

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**24. Attribution of Profits to a PE – Issue of Certificate by CA u/s 195**

Profits in respect of offshore supplies / offshore services to the extent attributable to a PE in India are taxable in India.

**Queries:**

- 1) Can a CA compute the same on a fair and equitable basis in accordance with generally accepted accounting principles, for the purpose of issuing a certificate u/s 195?
- 2) Since the issue of TDS from payments would arise when a particular project or contract is in progress, the CA will have to place great reliance on the projections / estimates prepared by the client. In such a situation, is it advisable for a CA to issue the Certificate or is it advisable for the client to approach the AO u/s 195(2)?

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**25. Different dates of Entry into Effect ('EIE') for withholding taxes and other taxes of Multilateral Instruments ('MLI')**

In Indian context, withholding tax obligation is provisional and dependent on tax liability of the primary taxpayer in terms of section 195 of the Act. In this context, it is pertinent to note that the date of EIE of provisions of MLI for withholding taxes may be different than the date of EIE for other taxes.

Since MLI provisions may become applicable for withholding taxes ahead of its applicability to other provisions, question arises whether the provisions of MLI will need to be considered by the payers while withholding tax under the Act though, from the perspective of primary taxpayer, such applicability of MLI provision is deferred.

**Example:**

- ✓ Foreign Company (FCo.) is carrying on a construction project in India in FY 2020-21 for an Indian Company (ICo.) and in order to prevent creation of construction PE in India, FCo. splits the contract with its associated enterprises in such manner that none of them trigger construction PE in India.
- ✓ It is presumed that EIE of MLI in Indian context shall be applicable from (i) FY 2020-21 - for withholding taxes and (ii) FY 2021-22 - for other taxes.
- ✓ ICo. has to make a payment to FCo. in November 2020 for the services and is required to withhold taxes on same if FCo. has a PE in India.
- ✓ In such case, an issue arises whether ICo. should apply the anti-fragmentation rule of MLI and thereby consolidate the time spent by FCo. and its associated enterprises for the purpose of determining PE of F Co. in India. If the anti-fragmentation rule is applied, FCo. would have a PE in India and ICo. would be required to withhold taxes on the payment made to FCo.
- ✓ On the contrary, for FY 2020-21, whether FCo. could argue that anti-fragmentation rule should be read in the tax treaty only after 1 April 2021 and hence during FY 2020-21, anti-fragmentation rule does not apply and hence FCo. does not have a PE in India.

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**26. Taxability on accrual basis or payment basis:**

Provisions of section 195 of the Act provides for deduction of tax at the time of payment or accrual, whichever is earlier. However, tax treaties entered into by India provides for taxability of certain income viz. interest, royalty and fees for technical services on payment basis. Accordingly, question arises whether tax

levy on the aforesaid income streams is attracted on receipt basis or accrual basis.

### **Points for consideration**

**View 1:** Taxability under the tax treaties gets triggered when there is an actual payment. Accordingly, if there is no payment, it would not be liable to tax under the tax treaty.

- ✓ OECD Commentary on Model Tax Convention - 'payment' has a very wide meaning, since the concept of payment means the fulfilment of the obligation to put the funds at the disposal of the creditors in the manner required by contract or by custom
- ✓ National Organic Chemical Industries Ltd. v. DCIT [2006] 5 SOT 317 (Mumbai Tribunal)
- ✓ Saira Asia Interiors (P.) Ltd. v. ITO [2017] 79 taxmann.com 460 (Ahmedabad Tribunal)
- ✓ DIT v. Siemens Aktiengesellschaft (ITA No. 124/2010) (Bombay High Court) (SLP admitted before Supreme Court)

**View 2:** The objective of the tax treaty is merely to distribute the taxing rights between the Contracting States and not to lay down the decisive rule on the timing of taxation which is governed by the provisions of the domestic tax laws. Accordingly, the taxability would be triggered on an accrual basis.

- ✓ Flakt (India) Ltd. [2004] 139 Taxman 238 (AAR)
- Definition under the tax treaty specifies the nature and scope of the sum payable and does not specify the stage at which tax could be levied and thereby further held that income is to be taxed in accordance with the laws of India which could be on a cash basis or on an accrual basis.
- ✓ Google India (P.) Ltd. v. ACIT [2017] 86 taxmann.com 237 (Bangalore Tribunal)
- Tax treaties can provide only the characterisation of income, the country where it is to be paid and at what rate the income is to be taxed. It is not within the scope of the tax treaties to provide when the income is required to be taxed.

- Where the non-resident recipient of royalty income was following the mercantile method of accounting, royalty income should have been reflected on an accrual basis and not on a receipt basis by the non-resident.
- Literal reading of the tax treaties may lead to misuse of the provisions and avoidance of payment of taxes.
- ✓ Definition of 'paid' under section 43(2) of the Act:

*"paid" means actually paid or incurred according to the method of accounting upon the basis of which the profits or gains are computed under the head "Profits and gains of business or profession"*

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**27. Determination of taxability with 'pick and choose' methodology:**

Section 90(2) of the Act provides option to the taxpayers to consider the provisions of the Act or the tax treaty, whichever are beneficial, for the purpose of determining taxability of transactions with non-residents. Accordingly, question arises whether the taxpayer could simultaneously avail the benefit of provisions of the Act and the tax treaty in order to determine the taxability on a payment made to non-resident.

Say, US CO , a tax resident of USA , provided technical services to Ind Co, a tax resident of India. As per India –USA DTAA , TDS rate is 15% and as per Income Tax Act (ITA) it is 10%. Ind Co makes provisions for fees for technical services as at 31.03.2019 and does not provide for TDS considering the treaty as per which tax is to be deducted at the point of payment of the consideration. Indco makes payment after six months and deducts TDS as per the ITA @ 10%.

Whether above approach is in line with the law?.

**Points for consideration**

- ✓ Saira Asia Interiors (P.) Ltd. v. ITO [2017] 79 taxmann.com 460 (Ahmedabad Tribunal)

*“10. ...The adoption of lower rate under the domestic law, in our humble understanding, does not imply that non-resident recipient could have been saddled with tax liability at the point of accrual when, under the DTAA provisions, the non-resident could not have been taxed, in respect of accrual of the said income, in India. ...”*

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28. **Advertisement charges paid to non-resident:**

Equalisation levy applies on payments made for online / digital advertisement services.

**Queries:**

- (i) Whether payment of charges for advertisement in foreign newspapers, foreign magazines, and foreign trade journals attract TDS u/s 195?
- (ii) Will it make difference if the foreign newspaper, foreign magazine, foreign trade journal is not printed for circulation in India?

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**29. Payment for Online software and allied activities**

Eatery Logistics NV is a Netherland co has appointed a wholly owned subsidiary in India to carry out various activities to supply the Eatables belonging to various Food and eatable establishments such as Mc Donalds, Café Coffee Day etc. It has also made an arrangement with logistic co for delivery of the supplies procured from eateries to the end consumers.NV has established an online software which will be used by the consumers to place the order and same will be viewed by the Indian company and and order will be placed simultaneously with the nearest logistic delivery agent near the concerned restaurant who in turn will keep the order ready for delivery as he also uses the same software provided by the NV.

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Payment is collected by the agent and after deducting the commission it remits the entire payment to Indian Company.

Indian company makes the payment to the Restaurants and eateries and balance is credited to NV and paid periodically.

Kindly examine the taxability of the various payments involved in the business model when

- a.Payment is made by delivery logistics agent to the Indian comoany
- b. Indian company maked the payment to Eateries
- c.Indian co makes the payment to NV
- d, NV makes the payment to indian company on cost plus basis for the services rendered,

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