Withholding Taxes under Section 195 and Form No. 15CA/CB

Committee on International Taxation
The Institute of Chartered Accountants of India
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Foreword to the First Edition

India has become fifth largest economy in the world. The Government is focused on the Make in India initiative to ensure that the business ecosystem in the nation is conducive for the investors doing business in India and contributing to growth and development of the Nation. The recent reform like National Single Window System (NSWS) is a great measure taken by the Government which contributes to the ease-of-doing-business initiative by providing a single digital platform to investors for approvals and clearances. This initiative has saved a lot of time and cost of the investors by integrating multiple existing clearance systems of the various departments of Government of India and State Governments to enhance the investor experience. At the same time the Government is rationalizing many restrictions put under the FEMA for evolving business environment and changing practices in cross-border transactions.Further, recently launched income-tax portal which facilitates online filing of various forms, approval of certificates and faceless appeals etc. act as a bridge in compliance for the investors and non-residents.

In this scenario comprehensive knowledge and documentations can only provide trail to the transactions for the approving authority as well as the reporting entity. The members of Institute of Chartered Accountants of India (ICAI) who have been casted responsibility under the income-tax as well many other laws to certify the transactions are expected to have in depth understanding of the subjects. One of the important responsibilities provided to chartered accountants is validation of the payments made by to non-residents by assessee being a resident or a non-resident, after proper deduction of tax at source under section 195.

I appreciate the endeavours of Chairman of the Committee on International Taxation, CA. Sanjay Kumar Agarwal and Vice-Chairman, CA. Cotha S. Srinivas and other members of the Committee on International Taxation who recognized the importance of the subject and took steps for bringing out this publication which will guide the members while reporting the transactions regarding payments to non-residents, if such sum is chargeable to Income tax.

I am sure that this publication will assist members in discharging their responsibilities in most effective manner.

Date: 17.01.2023 **CA. (Dr.) Debashis Mitra**

Place: New Delhi ***President, ICAI***

Preface to the First Edition

Globalization has affected individuals and businesses in many ways. The traditional trade and practices which was within the boundary of a state has now shifted at global scale. The economic integration raised social standard of the individuals, generated employment opportunities, provided alternate markets for the indigenous products and revived local industries. Further, it made possible, exchange of knowledge, experience and technology between businesses and economies across the world. Today, economic policy of every state has allowed free flow of goods, services, capital and technology which has resulted into expansion of cross border trade.

India has emerged as a global market after the economic integration. The inflow of foreign direct investment has increased significantly in past decade. At the same time the import and foreign remittances have also increased. The Indian Revenue authority is aptly concerned about the sources of income emanating from India from taxation perspective. While taxing the income, the residential status of the person plays an important role. Generally, the global income of resident is taxed in the country where such person is resident as per income-tax act whereas the challenges may arise in case of non-residents. The income of non-resident from sources in India may remain untaxed unless such income is arising through Permanent establishment in India. To tax those income withholding tax provision may be applied which protect the base erosion and make the remittances more transparent. The Government of India has always kept trust on the members of the Institute of Chartered Accountant of India (ICAI) who assist the Government through their transparent reporting of such withholding taxes. In such a situation the expectation from the members to have explicit knowledge and comprehensive understanding of documentation becomes utmost necessary.

Taking into consideration, the Committee on International Taxation, ICAI has come out with the first edition of this publication on "*Withholding Taxes u/s 195 of Income-tax Act, 1961 and Form 15CA/CB"* which provides a lot of insights on the type of withholding and reporting thereof. This publication discusses about the applicability of withholding u/s 195 vis-a-vis withholding under the equalization levy and application of multilateral agreement. This also includes the recent circulars, notifications and practical case studies for the guidance to the members.

We would like to express our sincere thanks to CA. (Dr.) Debashis Mitra President, ICAI and CA. Aniket S. Talati, Vice-President, ICAI, for unstinted

support for all initiatives being taken by the Committee on International Taxation.

We place on record our deep appreciation for the valuable time spared and sincere efforts taken by CA. Manoj Kumar Mittal, CA. Sachin Sinha, CA. Naman Shrimal, CA. Mithilesh Sai Sannareddy, CA. Akshat Maheshwari and CA. Neha Gupta in placing each brick of this publication. Notably, they are the special invitees of the Committee on International Taxation for the year 2022-23.

We would also like to extend our appreciation to Mr. S. P. Singh (Ex-IRS) who was a guiding force behind this publication. He has reviewed extensively this publication. His varied experience including that of working in Government has provided holistic view to the discussions in this book.

We gratefully acknowledge the assistance provided by the Committee Council members CA. Chandrashekhar Vasant Chitale, CA. Vishal Doshi, CA. Purushottamlal Khandelwal, CA. Mangesh Pandurang Kinare, CA. Priti Savla, CA. Umesh Sharma, CA. Sridhar Muppala, CA. Rajendra Kumar P, CA. Sushil Kumar Goyal, CA. Rohit Ruwatia, CA. Anuj Goyal, CA. Gyan Chandra Misra, CA.(Dr.) Raj Chawla, CA. Pramod Jain, CA. Charanjot Singh Nanda, CA.(Dr.) Sanjeev Kumar Singhal, Shri Ritvik Ranjanam Pandey, *Co-opted members:* CA. Avinash Gupta, CA. Rajat Sharma, CA. Mithilesh Sai Sannareddy, CA. Anup Kumar Sanghai, CA. Kaushik Mukerjee, CA. Nandkishore Chidambar Hegde, CA. Sanjay Bhattacharya, *Special invitees:* CA. Aseem Chawla, CA. Kriti Chawla Khanna, CA. Gaurav Singhal, CA. Smita Patni, CA. Ajay Rotti, CA. Akshay Kenkre, CA. Dilip Gupta, CA. Hari Om Jindal, CA. Deepender Kumar Agarwal, CA. Raju Kumar, CA. Parthasarathi Dasgupta, CA. Tejveer Singh, CA. Raj Kumar Nahata, CA. Parul Jolly, CA. Gaurav Geol, CA. Harpreet Singh, CA. Vikas Gupta, , CA. Surinder Kumar Kalra and CA. Geetika Gupta.

Last but not least, we recognize the efforts taken by CA. Mukta Kathuria Verma, Secretary to the Committee along with team members, CA. Vikas Gupta, Deputy Secretary and CA. Harshita Sagar Jaiswal, Project Associate for providing technical assistance and also for co-ordinating the entire project.

We are hopeful that this publication will be of immense use to the members.

Place: New Delhi
Date: 17.01.2023

CA. Sanjay Kumar Agarwal
Chairman, Committee on International Taxation

CA. Cotha S. Srinivas
Vice-Chairman, Committee on International Taxation

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Chapter 1
Introduction

Tax Deduction at source, also called 'Withholding Tax' or 'Tax as You Earn' has, along with Advance Tax, been the major contributor to the direct taxes collection in India. Its contribution has been around 40% of the total Direct Taxes Collection. Since its introduction, as a part of the Income-tax Act, 1961, its scope has expanded to cover almost all major types of payments. It has twin aims of making taxpayers become a part of tax collection mechanism, and at the same time reducing the cost of the same. The main thrust here is on self assessment and with-holding tax, which in itself is a self regulatory mechanism. However, for the purpose of validation, certification from a professional is mandatory for several provisions.

Withholding tax assumes a greater importance in the case of non-residents due to the nimbleness with which a non-resident can go beyond the jurisdiction of Indian tax authorities. Consequently, over the years two pronged actions have been taken by the Government – firstly, a special provision, namely section 195 has been introduced in the Income-tax Act, 1962 addressing payments to non-residents, and secondly, specific forms and certificates, namely Forms 15CB to be issued by a chartered accountant and a self declaration in form 15CA read with rule 37BB of Income Tax Rules, 1962 have been introduced to monitor such payments. This book analyses the basic facts regarding taxation of non-residents, salient features of regulations concerning withholding taxes in respect of non-residents and then goes on to explain the legal and practical aspects of the forms and the rules thereto. Finally, the concepts are explained with the help of case studies.

Chapter 2 discusses, in brief, the basis of charging Income-tax. Section 4 of the Income-tax Act, 1961 (the Act) unambiguously lays down rules regarding jurisdiction of the Act. It also introduces the concept of withholding tax. The chapter goes on to discuss section 5 of the Act which identifies scope of total income depending upon the residential status of the assessee (taxpayer). It gives rise to two important concepts, residential status and deeming provision. Section 9, which basically is a deeming section brings to tax the income which accrues or arises or is deemed to accrue or arise in India. It only shifts the place of taxation of income outside India to India by deeming

fiction, without converting non-income to income and timing of accrual of the income. The chapter highlights the salient features of the various provisions under this section. Certain types of income are exempt from taxation, including certain income in the hands of non-residents. Such provisions are mentioned in Chapter 3.

India has entered into Double Taxation Avoidance Agreements with more than 90 countries. These provide a bridge between tax laws of India and treaty partner countries. The DTAAs provide certainty to taxpayers and reliefs from double taxation. The Act clarifies that in case of conflict between the domestic law and DTAA the latter will prevail. Hence, understanding of the concept of DTAA is important. These are discussed, in brief, in Chapter 4.

Chapter XII in the Act includes provisions in respect of "*Determination of Tax in Certain Special Cases*", which are enshrined in sections 110 to 115BBI. Further Chapter XII-A, which includes sections 115C to 115-I, deals with "Special Provisions Relating to Certain Incomes of Non-Residents". Some of the provisions under these chapters which are relevant for this book are discussed in brief in Chapter 5.

Section 195 is a part of Chapter XVII of the Act which deals with collection and recovery of tax – deduction of tax at source. The objective of section 195 is to ensure, that tax is collected at the time of earning of income itself so that revenue is not required to track the non-resident for recovering taxes from those whose connection with India may be transient or whose assets in India are not sufficient to recover the taxes. The important features of this section, which are discussed in detail in this book, are summarised as follows:

Sl.No	Criteria	Particulars
01.	Applicability	Non-resident, not being a company, or to a foreign company
02.	Deductible	On Interest and any other sum chargeable under this Act
03.	Rates	at Rates in force
04.	Limit	No limit prescribed, TDS starts from Re. 1
05.	Payer Status	Government, Resident and Non-resident

Sl.No	Criteria	Particulars
06.	Payee Status	Non-resident at the time of deduction
07.	Deduction	On Credit to account of payee OR Payment whichever is earlier
08.	Basis of Deduction	Tax is deducted on Gross amount paid or payable
09.	Lower Deduction	Payee can apply for NIL or Lower Deduction of tax under section 195(3) & section 197
10.	Payer to apply	Payer can apply for NIL or Lower Deduction of tax u/s.195(2)
11.	Exemptions	Salary income is chargeable under section192 and not under section 195
12.	Person Responsible	Person who pays, Principal officer of Co., Authorised Dealers, etc.,
13	PE Declaration	No Permanent Establishment declaration to be obtained
14	TRC	Tax Residency Certificate or Form 10F to be obtained
15	POEM	Place of Effective Management in case of Foreign Companies
16	Business Profits	If Non-resident has no PE in India, then BPs is not taxable in India
17	Make Available	Check for make available clause in DTAA
18	Secondment	Employees assigned to India for a particular project
19	Apportionments	Depend upon the nature of payment
20	Re-imbursements	Depend upon the nature of payment, General expenses. No upliftment
21	DTAA	Double Taxation Avoidance Agreements to be examined.
22	Cash Withdrawal	Withdrawing cash from our own account,

Sl.No	Criteria	Particulars
		TDS U/s.194N is applicable
23	Advance Payment	If the end payment is subject to TDS, then Yes
24	Payment in Kind	If sum chargeable to tax, then it is subject to TDS
25	Rules	Important Rules- 28, 29B, 29BA, 37BB, .37BC of the Income-tax Rules, 1962
26	Forms	Relevant Form Nos. - 13, 15C,15D,15E, 15CA, 15CB, 15CC, 27Q
27	Information	To be filed by Deductor in Form no. 15CA – Part A, B, C, D.
28	Certification	Nature of remittance and Rate of TDS in Form No. 15CB
29	LRS & Specified List	Remittance under LRS and Specified List, no need for 15CA
30	Sur-charge & Cess	For payment to Non-Residents tax to include surcharge and cess
31	PAN / Aadhar	Compulsorily to be provided – Sec. 206AA
32	TAN	Tax Deduction Account Number or Tax Collection Account Number is a 10-digit alpha- numeric number issued by the Income-tax Department - Required to deduct tax
33	Filing of ITR	Certain sections exempt Non Resident from filing Return of income
34	Foreign Exchange	Amount payable in Foreign Currency to be converted - Rule 26, 115
35	Punishments	Disallowance, Interest, Fee, Penalty, Prosecution
36	Penalty – 271I	Rs. 1 Lakh penalty for failure or inaccurate furnishing of information
37	Revised Returns	Returns can be revised any number of

Sl.No	Criteria	Particulars
		times, no due dates
38	Adjustment	Any excess Tax deducted can be adjusted with Previous Year and Next Year
39	Intimation	Within 1 year from end of Financial Year in which return is filed - Section 200A
40	Rectification	Intimation recieved under section 200A can be rectified under section 154
41	Appeal	Order u/s. 201 is Appealable
42	Assessee Not in Default	Rule 37BCA and Form No. 26A
43	Rounding Off	TDS amount to be rounded off to nearest Rs. 10/-.as per section 288B
44	Decimal	In return tax rates cannot be given for more than 2 decimals
45	Non-filers of ITR	Section 206AB applies only to those Non Resident who have PE in India
46	DSC	Digital Signature Certificate- For filing Form No. 15CA – DSC is not compulsory, For filing Form No. 15CB it is compulsory.
47	UDIN	Unique Document Identification Number (UDIN) to be generated and uploaded in IT portal
48	Other Sections	Sections 194B, 194BB, 194E, 194EE, 194LB, 194LBA, 194LBB, 194LBC, 194LC, 194LD, 196A, 196B, 196C, 196D

Chapter 6 of this book analyses various provisions under section 195 of the Act, such as responsibility to deduct tax, persons responsible for deducting tax, rates of deduction, and gives a snapshot of some of the important decisions on withholding of tax in respect of non-resident. The consequences of failure to deduct tax under section 195 of the Act and some other relevant provisions are mentioned in Chapter 7. Some of the rules

relevant for withholding of tax are mentioned in Chapter 8, while the impact of Multilateral Instrument (MLI) are discussed in Chapter 9.

It is very important to keep in mind the stages of withholding tax.The table below mentions the stages of deduction, dates and events to be taken into account:

D	**DEDUCTION**	**Date of Deduction**	Credit or payment whichever is earlier
P	**PAYMENT**	**Mode of Payment**	Electronic Payment in Challan no. 281
		Due Dates	7th of subsequent month and 30th April
R	**RETURNS**	**Periodicity & Forms**	Quarterly in Form No. 27Q,
		Due Dates	31st July, 31st October, 31st January, 31st May
C	**CERTIFICATE**	**Due Dates**	15th August, 15th November, 15th Feburary, 15th June

D	**DEDUCTION**	**Not Deducted**	1. Disallowance of Expenditure under section 40(a)(i) 2. Penalty under section 271C
		Deducted not Paid	1. Disallowance of Expenditure under section 40(a)(i) 2. Prosecution Under section 276B
P	**PAYMENT**	**Delayed Payment**	Interest under section 201
R	**RETURNS**	**Not Filed**	Penalty under section 271H
		Delay in Filing	Fee under section 234F
C	**CERTIFICATE**	**Not Issued**	Penalty under section 272A

As mentioned above, withholding tax is applicable to a large number of

transactions – domestic as well as international; and whether the recipient of income is a resident or a non-resident. However, there are some differences between the regulations applicabe to residents and non-residents. The major similarities and differences are as follows:

Sl. No	Similarities	Resident TDS	Non-resident TDS
01	**Date of Deduction**	Credit or Payment whichever is earlier	Credit or Payment whichever is earlier
02	**Date of Remittance**	7th of subsequent month & 30th Apr	7th of subsequent month & 30th Apr
03	**Date for Returns**	31st July, 31st October, 31st January, 31st May	31st July, 31st October, 31st January, 31st May
04	**Date for Certificates**	15th August, 15th November, 15th Feburary, 15th June	15th August, 15th November, 15th Feburary, 15th June
05	**NIL or Lower Cert.**	Can be applied by payee under section 197	Can be applied by payee under sections 195 & 197
06	**Assessee Not in Default**	If payee does certain activity	If payee does certain activity
07	**PAN**	Resident to give PAN / Aadhar	Non-resident to give PAN
08	**Gross Amount**	Tax to be deducted on Gross Amount	Tax to be deducted on Gross Amount

Sl. No	Differences	Resident TDS	Non resident TDS
01	**TDS rate**	As specified in the respective section	At rates or rates in force
02	**Limit**	Are specified in the respective section	No limits specified, taxable from re. 1
03	**Type of deduction**	Tax deduction at source	Withholding of tax
04	**Surcharge & cess**	Only specified TDS rate is deductible	Sur-charge & cess be added to

Sl. No	Differences	Resident TDS	Non resident TDS
			withholding tax
05	**Nil or lower certificate**	Payer cannot apply for the certificate	Payer can apply for certificate under section 195(2)
06	**Information**	Payer need not furnish information	Payer needs to furnish information
07	Disallowance	Disallowance u/s. 40(a)(ia) @ 30%	Disallowance u/s. 40(a)(i) @ 100%
08	Other legislations	No need to refer other legislations	Need to refer dtaa & fema

Form No. 15CA and Form No. 15CB are discussesd elaborately in Chapter 10. It first mentions the legislative framework and objective of the forms and then goes on to discuss procedure of filing these forms.

Impact of SEP and Equalisation Levy are discussed in Chapter 11 and Chapter 12 respectively. Chapter 13 highlights practical issues and FAQs in respect of Form 15CA and Form 15CB, while a few Case Studies are discussed in Chapter 14. Several landmark cases are briefly discussed in Chapter 15. Finally, Chapter 16 reproduces important circulars, notifications and instructions issued by the Central Board of Direct Taxes.

The book seeks to provide a working knowledge about withholding tax on non-resident and filing of Form No. 15CA and Form No. 15CB. The book incorporates the relevant abstracts from the earlier works done in the form of articles and presentation on various aspects of Section 195, Form 15CA and 15CB by various members of the Insititute of Chartered Accountants of India (ICAI) and outsiders. Further, this book has taken into consideration the earlier publications on the topics incorporated in this book as well as other publications by the ICAI.

It is expected that this book will be very helpful to all stake holders in taxation and in withholding tax provisions.

Chapter 2

Basis of Charge

Basic provisions of taxation, in general, and for non-residents in particular

While Section 4 and 5 of the Income-tax Act determines the chargeability to tax any sum whether paid or accruing or arising, or deemed to accrue or arise to resident or to non-resident, Section 195 of the Income-tax Act, 1961 is a machinery provision which deals with deduction of tax at source either under the DTAA or under the Income-tax Act from payment (which are chargeable to tax in India under section 4 and 5 read with section 9 as referred above) made to non-resident, not being a company or foreign company whether in India or outside India .

The relevant sections are as follows:

Section 4

Charge of income-tax.

4. *(1) Where any Central Act enacts that income-tax shall be charged for any assessment year at any rate or rates, income-tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions (including provisions for the levy of additional income-tax) of, this Act in respect of the total income of the previous year of every person :*

Provided *that where by virtue of any provision of this Act income-tax is to be charged in respect of the income of a period other than the previous year, income-tax shall be charged accordingly.*

(2) In respect of income chargeable under sub-section (1), income-tax shall be deducted at the source or paid in advance, where it is so deductible or payable under any provision of this Act.

Chargeability and deductibility

This section provides for **chargeability of Income** in the hands of a **person on total income** of the previous year or other than previous year at the rates or rates and **deduction of tax or advance payment of tax** in respect of such income which is chargeable to tax.

Once, an income is chargeable to tax, it is checked through section 5 as to

whether it is a part of total income or not.

Scope of total income

5. *(1) Subject to the provisions of this Act, the total income of any previous year of a person who is a 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 ; or

(c) accrues or arises to him outside India during such year :

Provided *that, in the case of a person not ordinarily resident in India within the meaning of sub-section (6)* of section 6, the income which accrues or arises to him outside India shall not be so included unless it is derived from a business controlled in or a profession set up in India.*

(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.

Explanation 1.—Income accruing or arising outside India shall not be deemed to be received in India within the meaning of this section by reason only of the fact that it is taken into account in a balance sheet prepared in India.

Explanation 2.—For the removal of doubts, it is hereby declared that income which has been included in the total income of a person on the basis that it has accrued or arisen or is deemed to have accrued or arisen to him shall not again be so included on the basis that it is received or deemed to be received by him in India.

Section 5 basically provides jurisdiction of taxability under the Act in the hands of Resident and ordinary resident; Resident but not ordinary resident; and Non Resident.

Whereas section 5(1) deals with scope of income in the hands of Resident

and ordinary resident, and Resident but not ordinary resident, Section 5(2) deals with the scope of income in the hands of Non-resident.

Section 2(45) establishes a link between income referred to in section 5 and computation of total income

It reads as follows:

"total income" means the total amount of income referred to in section 5, computed in the manner laid down in this Act ;

Residence in India

6. *For the purposes of this Act,—*

(1) An individual is said to be resident in India in any previous year, if he—

(a) is in India in that year for a period or periods amounting in all to one hundred and eighty-two days or more ; or

(b) [***]

(c) having within the four years preceding that year been in India for a period or periods amounting in all to three hundred and sixty-five days or more, is in India for a period or periods amounting in all to sixty days or more in that year.

Explanation 1.—In the case of an individual,—

(a) being a citizen of India, who leaves India in any previous year as a member of the crew of an Indian ship as defined in clause (18) of section 3 of the Merchant Shipping Act, 1958 (44 of 1958), or for the purposes of employment outside India, the provisions of sub-clause (c) shall apply in relation to that year as if for the words "sixty days", occurring therein, the words "one hundred and eighty-two days" had been substituted ;

(b) being a citizen of India, or a person of Indian origin within the meaning of Explanation to clause (e) of section 115C, who, being outside India, comes on a visit to India in any previous year, the provisions of sub-clause (c) shall apply in relation to that year as if for the words "sixty days", occurring therein, the words "one hundred and eighty-two days" had been substituted and in case of such person having total income, other than the income from foreign sources, exceeding fifteen lakh rupees

during the previous year, for the words "sixty days" occurring therein, the words "one hundred and twenty days" had been substituted.

Explanation 2.—For the purposes of this clause, in the case of an individual, being a citizen of India and a member of the crew of a foreign bound ship leaving India, the period or periods of stay in India shall, in respect of such voyage, be determined in the manner and subject to such conditions as may be prescribed.

(1A) Notwithstanding anything contained in clause (1), an individual, being a citizen of India, having total income, other than the income from foreign sources, exceeding fifteen lakh rupees during the previous year shall be deemed to be resident in India in that previous year, if he is not liable to tax in any other country or territory by reason of his domicile or residence or any other criteria of similar nature.

Explanation.—For the removal of doubts, it is hereby declared that this clause shall not apply in case of an individual who is said to be resident in India in the previous year under clause (1).

(2) A Hindu undivided family, firm or other association of persons is said to be resident in India in any previous year in every case except where during that year the control and management of its affairs is situated wholly outside India.

(3) A company is said to be a resident in India in any previous year, if—

(i) it is an Indian company; or

(ii) its place of effective management, in that year, is in India.

Explanation.—For the purposes of this clause "place of effective management" means a place where key management and commercial decisions that are necessary for the conduct of business of an entity as a whole are, in substance made.

(4) Every other person is said to be resident in India in any previous year in every case, except where during that year the control and management of his affairs is situated wholly outside India.

(5) If a person is resident in India in a previous year relevant to an assessment year in respect of any source of income, he shall be deemed to be resident in India in the previous year relevant to the assessment year in respect of each of his other sources of income.

(6) A person is said to be "not ordinarily resident" in India in any previous year if such person is—

(a) an individual who has been a non-resident in India in nine out of the ten previous years preceding that year, or has during the seven previous years preceding that year been in India for a period of, or periods amounting in all to, seven hundred and twenty-nine days or less; or

(b) a Hindu undivided family whose manager has been a non-resident in India in nine out of the ten previous years preceding that year, or has during the seven previous years preceding that year been in India for a period of, or periods amounting in all to, seven hundred and twenty-nine days or less; or

(c) a citizen of India, or a person of Indian origin, having total income, other than the income from foreign sources, exceeding fifteen lakh rupees during the previous year, as referred to in clause (b) of Explanation1 to clause (1), who has been in India for a period or periods amounting in all to one hundred and twenty days or more but less than one hundred and eighty-two days; or

(d) a citizen of India who is deemed to be resident in India under clause (1A).

Explanation.—For the purposes of this section, the expression "income from foreign sources" means income which accrues or arises outside India (except income derived from a business controlled in or a profession set up in India)] [36][and which is not deemed to accrue or arise in India].

Analysis of Sec 6

While Section 5 determines the scope of total income based on the residency of a person; section 6 defines the rule to determine the residential status of the person whether, it is Individual, HUF, Company or Artificial judicial person, Firm, AOP, BOI etc.

It further defines rules to determine who would qualify as Resident and ordinary resident or Resident but not ordinary resident

Under this section, the residency has been determined on the following

criteria:

1. For Individual, number of days of stay in India or number of days of stay in India plus economic relationship with India exceeding a minimum threshold
2. For HUF, IF Control and management of its affairs is **wholly** situated in India;
3. For company, based on being Indian company or its place of **effective** management is in India
4. For other person, **IF any** Control and management of its affairs is situated in India;

Not Ordinarily Resident (NOR)

An Individual is said to be Not Ordinarily Resident in 4 cases below:

- Individual who has been Non-Resident in India for 9 out of 10 preceding years, OR
- Individual has been in India for 729 days or less in preceding 7 previous years immediately preceeding that year.

(If an assessee does not fall in both the above criteria in any Previous Year, then he is considered as Ordinarily Resident for tax purpose in that Previous Year)

- Citizen of India or Person of Indian Origin, having total income exceeding 15 lakhs during the previous year (other than income from foreign source) and stays in India for 120 days or more but less than 182 days.
- Deemed Indian Resident

Deemed Indian Resident: An Individual will be considered as Deemed Resident in the below case:

- Individual being a Citizen of India, AND having total Income in excess 15 lakhs in the Previous Year (Other than income from foreign Source) AND not liable to tax in any other country/territory, by reason of domicile, residence or any similar criteria.
- *"Income from foreign sources*" means income which accrues or arises outside India (except income derived from a business controlled in or a

profession set up in India and which is not deemed to accrue or arise in India)

"*Non-resident Indian (NRI)"* means an individual, being a citizen of India or a person of Indian origin who is not a "Resident".

"Person of Indian Origin (PIO): A person shall be deemed to be of Indian origin if he, or either of his parents or any of his grand-parents, was born in undivided India;

"*Place of effective management"* means a place where key management and commercial decisions that are necessary for the conduct of business of an entity as a whole are, in substance made.

It may be mentioned that section 6(5) has become otiose with the introduction of uniform previous year for all the source of Income under section 3 as amended w.e.f 1st April 1989.

Income Accrued or Deemed to Accrue in India

Section 5 rovides that the Non-resident will be taxable in respect of the following income:

1. Income Received or Deemed to be received in India
2. Income accrued or arise or deemed to accrue or arise in India

The legislature through section 9 deems certain income accruing outside India as accrued in India.

There are four important factors for charging any income to tax under the Act; these are:-

1. Income
2. Time
3. Person
4. Accrual

Section 9 does not convert non-income into income, it does not change timing of accrual of income, it does not change the person in whose hands it is to be taxed. **It only shifts the place of taxation of Income outside India to India by deeming fictions.**A brief of the list of income covered into it are as follows:

1. All income accruing or arising, directly or indirectly, through or from any business connection in India or through or from any property in India or through or from any asset or source of income in India or through the transfer of capital assets situated in India.

   Under this clause, income accruing outside India is liable to be taxed in India, e g business connection, this is a settled law that income of business is taxed in the resident state but here, it is provided that to the extent the business is carried on in India, the proportionate income will be taxed in India, Similarly, the property is rented in India but the agreement for rent is entered in some other country and rent is enforceable in other country, then the rental income is accrued in other country but for sub section 9(1), it is deemed as accrued or arose in India. Similar are other provisions.

   It is also provided that significant economic presence shall also constitute business connection.

2. Income under the head salaries is chargeable if it is earned in India. Salary is earned in India if the services are rendered in India even if the contract for services are entered outside India and is enforceable outside india.

3. Salaries payable by the Government to a citizen of India for services outside India are also income deemed to accrue or arise in India.

4. Dividend paid by an Indian company outside India.

5. Interest payable by the Government or by a resident / non-resident in respect of any debt incurred, or moneys borrowed and used, for the purposes of business or profession carried on by such person in India or for the purpose of making or earning any income from any source in India.

6. All royalties payable by the Government and royalties' payable by a resident or a non-resident in respect of any right, property or information used for purposes of business or profession carried on by such person in India or for the purpose of making or earning any income from any source in India.

7. All Fees for technical services payable by the Government and Fees for technical services payable by a resident or a non-resident in respect of services used for purposes of business or profession

carried on by such person in India or for the purpose of making or earning any income from any source in India.

8. Income arising outside India by virtue of **any sum of money** referred to in section 2(24)(xviia) paid by a person resident in India to a non-resident. This sub section refers to money only and not property in kind.

(For detailed text, refer Section 9 of Income-tax Act, 1961)

Chapter 3

Income Which Does Not Form Part of Total Income

Where section 4, 5, 9 provides for chargeability of income, section 10 carves out exception by providing exemption for certain incomes which are as follows:

Section 10 provides that in computing the total income of any person, the following income will not be included in total Income:-

(4)(i) *In case of a non-resident, any income by way of interest on such securities or bonds as the Central Government may, by notification in the Official Gazette, specify in this behalf, including income by way of premium on the redemption of such bonds shall not be included in total income;*

(4)(ii) *In case of an individual, any income by way of interest on moneys standing to hiss credit in a Non-Resident (External) Account in any bank in India in accordance with FEMA, 1999 shall not be included in total income;*

Provided that such individual is a person resident outside India as defined in clause (w) of the said Act or is a person who has been permitted by the Reserve Bank of India to maintain the aforesaid Account.

(4B) *In case of an individual, being a citizen of India or a person of Indian origin, who is a non-resident, any income from interest on such savings certificates issued [before the 1st day of June, 2002] by the Central Government as that Government may, by notification in the Official Gazette, specify in this behalf shall not be included in total income;*

(4C) *Any income by way of interest payable to a non-resident, not being a company, or to a foreign company, by any Indian company or business trust in respect of monies borrowed from a source outside India by way of issue of rupee denominated bond, as referred to in clause (ia) of sub-section (2) of section 194LC, during the period beginning from the 17th day of September, 2018 and ending on the 31st day of March, 2019 shall not be included in total income;*

(4D) *Any income accrued or arisen to, or received by a specified fund as a result of transfer of capital asset referred to in clause (viiab) of section 47, on a recognised stock exchange located in any International Financial Services*

Centre and where the consideration for such transaction is paid or payable in [convertible foreign exchange or as a result of transfer of securities (other than shares in a company resident in India) or any income from securities issued by a non-resident (not being a permanent establishment of a non-resident in India) and where such income otherwise does not accrue or arise in India or any income from a securitisation trust which is chargeable under the head "Profits and gains of business or profession", to the extent such income accrued or arisen to, or is received, is attributable to units held by non-resident (not being the permanent establishment of a non-resident in India) [or is attributable to the investment division of offshore banking unit, as the case may be, shall not be included in total income;

(4E)*Any income accrued or arisen to, or received by a non-resident as a result of transfer of non-deliverable forward contracts* ***[****or offshore derivative instruments or over-the-counter derivatives,****]*** *entered into with an offshore banking unit of an International Financial Services Centre as referred to in sub-section (1A) of section 80LA, which fulfils such conditions as may be prescribed shall not form part of total income;*

(4F) *Any income of a non-resident by way of royalty or interest, on account of lease of an aircraft [or a ship****]*** *in a previous year, paid by a unit of an International Financial Services Centre as referred to in sub-section (1A) of section 80LA, if the unit has commenced its operations on or before the 31st day of March, 2024 shall not form part of total income;*

(4G) *Any income received by a non-resident from portfolio of securities or financial products or funds, managed or administered by any portfolio manager on behalf of such non-resident, in an account maintained with an Offshore Banking Unit in any International Financial Services Centre, as referred to in sub-section (1A) of section 80LA, to the extent such income accrues or arises outside India and is not deemed to accrue or arise in India shall not form part of total income;*

(6) *In the case of an individual who is not a citizen of India*

(ii) the remuneration received by him as an official, by whatever name called, of an embassy, high commission, legation, commission, consulate or the trade representation of a foreign State, or as a member of the staff of any of these officials, for service in such capacity shall not form part of total income.

(vi) The remuneration received by him as an employee of a foreign enterprise for services rendered by him during his stay in India shall not form part of total income, provided the following conditions are fulfilled:

(a) the foreign enterprise is not engaged in any trade or business in India

(b) his stay in India does not exceed in the aggregate a period of ninety days in such previous year; and

(c) such remuneration is not liable to be deducted from the income of the employer chargeable under this Act

(viii) any income chargeable under the head "Salaries" received by or due to any such individual being a non-resident as remuneration for services rendered in connection with his employment on a foreign ship where his total stay in India does not exceed in the aggregate a period of ninety days in the previous year shall not be included in total income.

(XI) the remuneration received by him as an employee of the Government of a foreign State during his stay in India in connection with his training in any establishment or office of, or in any undertaking owned by

(i) *the Government or*

(ii) *any company in which the entire paid-up share capital is held by the Central Government, or any State Government or Governments, or partly by the Central Government and partly by one or more State Governments or*

(iii) *any company which is a subsidiary of a company referred to in item (ii) or*

(iv) *any corporation established by or under a Central, State or Provincial Act or*

any society registered under the Societies Registration Act, 1860 (14 of 1860), or under any other corresponding law for the time being in force and wholly financed by the Central Government, or any State Government or State Governments, or partly by the Central Government and partly by one or more State Governments ;

***(6A)** In case of a foreign company deriving income by way of royalty or fees for technical services received from Government or an Indian concern in pursuance of an agreement made by the foreign company with Government or the Indian concern after the 31st day of March, 1976 but before the 1st day of June, 2002 and*

(a) where the agreement relates to a matter included in the industrial policy, for the time being in force, of the Government of India, such agreement is in accordance with that policy; and

(b) in any other case, the agreement is approved by the Central Government,

the tax on such income payable, under the terms of the agreement, by Government or the Indian concern to the Central Government, shall not form part of total income;

(6B) *In case of a non-resident (not being a company) or of a foreign company deriving income (not being salary, royalty or fees for technical services) from Government or an Indian concern in pur-suance of an agreement entered into before the 1st day of June, 200 by the Central Government with the Government of a foreign State or an international organisation, the tax on such income is payable by Government or the Indian concern to the Central Government under the terms of that agreement or any other related agreement approved before that date by the Central Government, shall not form part of total income;*

(6BB) *In case of the Government of a foreign State or a foreign enterprise deriving income from an Indian company engaged in the business of operation of aircraft, as a consideration of acquiring an aircraft or an aircraft engine (other than payment for providing spares, facilities or services in connection with the operation of leased aircraft) on lease under an agreement entered into after the 31st day of March, 1997 but before the 1st day of April, 1999, or entered into after the 31st day of March, 2007 and approved by the Central Government in this behalf and the tax on such income is payable by such Indian company under the terms of that agreement to the Central Government, shall not form part of total income.*

(6C) *Any income arising to such foreign company, as the Central Government may, by notification in the Official Gazette, specify in this behalf, by way of royalty or fees for technical services received in pursuance of an agreement entered into with that Government for providing services in or outside India in projects connected with security of India shall not form part of total income;*

(6D) *Any income arising to a non-resident, not being a company, or a foreign company, by way of royalty from, or fees for technical services rendered in or outside India to, the National Technical Research Organisation shall not form part of total income;*

(7) *Any allowances or perquisites paid or allowed as such outside India by the Government to a citizen of India for rendering service outside India shall not form part of total income;*

(8) *in the case of an individual who is assigned to duties in India in connection with any co-operative technical assistance programmes and projects in accordance with an agreement entered into by the Central Government and the Government of a foreign State (the terms whereof provide for the exemption given by this clause)—*

(a) the remuneration received by him directly or indirectly from the Government of that foreign State for such duties, and

(b) any other income of such individual which accrues or arises outside India, and is not deemed to accrue or arise in India, in respect of which such individual is required to pay any income or social security tax to the Government of that foreign State ;

Provided *that nothing contained in this clause shall apply to such remuneration and income of the previous year relevant to the assessment year beginning on or after the 1st day of April, 2023;*

(8A) *in the case of a consultant—*

(a) any remuneration or fee received by him or it, directly or indirectly, out of the funds made available to an international organisation hereafter referred to in this clause and clause (8B) as the agency under a technical assistance grant agreement between the agency and the Government of a foreign State ; and

(b) any other income which accrues or arises to him or it outside India, and is not deemed to accrue or arise in India, in respect of which such consultant is required to pay any income or social security tax to the Government of the country of his or its origin.

Provided *that nothing contained in this clause shall apply to such remuneration, fee and income of the previous year relevant to the assessment year beginning on or after the 1st day of April, 2023.*

(9) *the income of any member of the family of any such individual as is referred to in clause (8) or clause (8A) or, as the case may be, clause (8B) accompanying him to India, which accrues or arises outside India, and is not deemed to accrue or arise in India, in respect of which such member is required to pay any income or social security tax to the Government of that foreign State or, as the case may be, country of origin of such member;*

Provided *that nothing contained in this clause shall apply to such income of the previous year relevant to the assessment year beginning on or after the 1st day of April, 2023;*

(15)(iid) *Interest on such bonds, as the Central Government may, by notification in the Official Gazette shall not form part of total income, specify, arising to-*

(a) a non-resident Indian, being an individual owning the bonds ; or

(b) any individual owning the bonds by virtue of being a nominee or survivor of the non-resident Indian ; or

(c) any individual to whom the bonds have been gifted by the non-resident Indian;

(15)(iiia) *Interest payable to any bank incorporated in a country outside India and authorized to perform central banking functions in that country on any deposits made by it, with the approval of the Reserve Bank of India, with any scheduled bank shall not form part of total income;*

(15)(iv) *interest payable—*

(a) by Government or a local authority on moneys borrowed by it before the 1st day of June, 2001 from, or debts owed by it before the 1st day of June, 2001 to, sources outside India;

(b) by an industrial undertaking in India on moneys borrowed by it under a loan agreement entered into before the 1st day of June, 2001 with any such financial institution in a foreign country as may be approved in this behalf by the Central Government by general or special order ;

(c) by an industrial undertaking in India on any moneys borrowed or debt incurred by it before the 1st day of June, 2001 in a foreign country in respect of the purchase outside India of raw materials or components or capital plant and machinery, to the extent to which such interest does not exceed the amount of interest calculated at the rate approved by the Central Government in this behalf, having regard to the terms of the loan or debt and its repayment.

Explanation 1.—For the purposes of this item, "purchase of capital plant and machinery" includes the purchase of such capital plant and machinery under a hire-purchase agreement or a lease agreement with an option to purchase such plant and machinery.

Explanation 2.—For removal of doubts, it is hereby clarified that the usance interest payable outside India by an undertaking engaged in the business of ship-breaking in respect of purchase of a ship from outside India shall be deemed to be the interest payable on a debt incurred in a foreign country in respect of the purchase outside India;

(d) by the Industrial Finance Corporation of India established by the Industrial Finance Corporation Act, 1948 (15 of 1948), or the Industrial Development Bank of India established under the Industrial Development Bank of India Act, 1964 (18 of 1964), or the Export-Import Bank of India established under the Export-Import Bank of India Act, 1981 (28 of 1981), or the National Housing Bank established under section 3 of the National Housing Bank Act, 1987 (53 of 1987), or the Small Industries Development Bank of India established under section 3 of the Small Industries Development Bank of India Act, 1989 (39 of 1989), or the Industrial Credit and Investment Corporation of India a company formed and registered under the Indian Companies Act, 1913 (7 of 1913), on any moneys borrowed by it from sources outside India before the 1st day of June, 2001, to the extent to which such interest does not exceed the amount of interest calculated at the rate approved by the Central Government in this behalf, having regard to the terms of the loan and its repayment;

(e) by any other financial institution established in India or a banking company to which the Banking Regulation Act, 1949 (10 of 1949), applies (including any bank or banking institution referred to in section 51 of that Act), on any moneys borrowed by it from sources outside India before the 1st day of June, 2001 under a loan agreement approved by the Central Government where the moneys are borrowed either for the purpose of advancing loans to industrial undertakings in India for purchase outside India of raw materials or capital plant and machinery or for the purpose of importing any goods which the Central Government may consider necessary to import in the public interest, to the extent to which such interest does not exceed the amount of interest calculated at the rate approved by the Central Government in this behalf, having regard to the terms of the loan and its repayment;

(f) by an industrial undertaking in India on any moneys borrowed by it in foreign currency from sources outside India under a loan agreement approved by the Central Government before the 1st day of June, 2001 having regard to the need for industrial development in India, to the extent to which such interest does not exceed the amount of interest calculated at the rate approved by the Central Government in this behalf, having regard to the terms of the loan and its repayment;

(fa) by a scheduled bank to a non-resident or to a person who is not ordinarily resident within the meaning of sub-section (6)† of section 6

on deposits in foreign currency where the acceptance of such deposits by the bank is approved by the Reserve Bank of India.

(g) by a public company formed and registered in India with the main object of carrying on the business of providing long-term finance for construction or purchase of houses in India for residential purposes, being a company eligible for deduction under clause (viii) of sub-section (1) of section 36 on any moneys borrowed by it in foreign currency from sources outside India under a loan agreement approved by the Central Government before the 1st day of June, 2003, to the extent to which such interest does not exceed the amount of interest calculated at the rate approved by the Central Government in this behalf, having regard to the terms of the loan and its repayment.

(15)(viii) *any income by way of interest received by a non-resident or a person who is not ordinarily resident, in India on a deposit made on or after the 1st day of April, 2005, in an Offshore Banking Unit referred to in clause (u) of section 2 of the Special Economic Zones Act, 2005;*

(15)(ix) *any income by way of interest payable to a non-resident by a unit located in an International Financial Services Centre in respect of monies borrowed by it on or after the 1st day of September, 2019.*

(15A) *any payment made, by an Indian company engaged in the business of operation of aircraft, to acquire an aircraft or an aircraft engine (other than a payment for providing spares, facilities or services in connection with the operation of leased aircraft) on lease from the Government of a foreign State or a foreign enterprise under an agreement, not being an agreement entered into between the 1st day of April, 1997 and the 31st day of March, 1999, and approved by the Central Government in this behalf :*

Provided *that nothing contained in this clause shall apply to any such agreement entered into on or after the 1st day of April, 2007.*

(23FF) *any income of the nature of capital gains, arising or received by a non-resident or a specified fund, which is on account of transfer of share of a company resident in India, by the resultant fund or a specified fund to the extent attributable to units held by non-resident (not being a permanent establishment of a non-resident in India) in such manner as may be prescribed, and such shares were transferred from the original fund, or from its wholly owned special purpose vehicle, to the resultant fund in relocation, and where capital gains on such shares were not chargeable to tax if that relocation had not taken place.*

(48) *any income received in India in Indian currency by a foreign company on account of sale of crude oil, any other goods or rendering of services, as may be notified by the Central Government in this behalf, to any person in India:*

Provided *that—*

(i) receipt of such income in India by the foreign company is pursuant to an agreement or an arrangement entered into by the Central Government or approved by the Central Government;

(ii) having regard to the national interest, the foreign company and the agreement or arrangement are notified by the Central Government in this behalf; and

(iii) the foreign company is not engaged in any activity, other than receipt of such income, in India;

(48A) *any income accruing or arising to a foreign company on account of storage of crude oil in a facility in India and sale of crude oil therefrom to any person resident in India:*

Provided *that—*

(i) the storage and sale by the foreign company is pursuant to an agreement or an arrangement entered into by the Central Government or approved by the Central Government; and

(ii) having regard to the national interest, the foreign company and the agreement or arrangement are notified by the Central Government in this behalf;

(48B) *any income accruing or arising to a foreign company on account of sale of leftover stock of crude oil, if any, from the facility in India after the expiry of the agreement or the arrangement referred to in clause (48A) or on termination of the said agreement or the arrangement, in accordance with the terms mentioned therein, as the case may be, subject to such conditions as may be notified by the Central Government in this behalf;*

It is advised that the above section should be read with the notifications, instructions and circulars issued in reference to that.

Chapter 4

Avoidance of Double Taxation

An income from international transaction can be subject to double taxation due to overlapping of taxing jurisdiction. It is possible that in one jurisdiction tax is imposed based on residence principle, whereby the global income of the taxpayer is subject to taxation in the country of residence. At the same time, the source country may tax the same income in the same year due to the source principle. This type of double taxation is known as Jurisdictional Double Taxation.

There is another type of double taxation where the same income is subject to double taxation in the hands of two persons in the same year. This is known as Economic Double Taxation. This happens due to transfer pricing adjustment.

Either type of double taxation is undesirable for growth of international trade. Hence, countries have enacted domestic laws to avoid double taxtion. However, such laws are found to be inadequate in dealing with double taxation. To overcome this, countries enter into double taxation avoidance agreements or tax treaties.

In order to achieve uniformity in the tax treaties, international organisations, such as the Organisation for Economic Cooperation and Development (OECD) and United Nations (UN) have developed model tax trearties. These models provide starting points for treaty negotiations. The Commentaries thereto help tax authorities as well as taxpayers in interpreting the provisions of the tax treaty.

The Income-tax Act, 1961 has two specific sections dealing with avoidance or reduction of double taxation:-

1. *Section 90*-To enable tax authority to enter into double taxation avoidance agreement with another country;
2. *Section 91*- To provide relief from double taxation where there is no DTAA with the other country involved.

Beneficial Provisions of DTAA (DTAA V/S Income Tax Act)

Section 90, read with the agreement entered into does not create any new

charge on the taxpayer. It only provides for distribution of taxing powers between the countries entering into the DTAA. In its scheme of distribution of taxing powers, certain incomes which may have been included in the scope of total income of a person under the Act, more particularly under section 5, may now be kept out of tax. This could happen in cases where India agrees to give away its taxing rights in respect of such incomes. In such cases, the DTAA will prevail over section 5.The DTAA cannot be more onerous than the Act. Where the provisions of the Act are more beneficial, the latter would prevail as provided in section 90(2).

The essential parameters of section 5 and the principles of accrual/arisal/deemed accrual/arisal and receipt as understood under section 5 do not change due to application of the DTAA. DTAA may, however alter the point of time of taxation by insisting that certain incomes may be taxed only upon receipt, viz., articles dealing with interest, royalties and fees for technical services.

Agreement with Foreign Countries or Specified Territories (Section 90/90A)

Bare Provisions of Law

(1) The Central Government may enter into an agreement with the Government of any country outside India or specified territory outside India—

(a) for the granting of relief in respect of—

(i) income on which have been paid both income-tax under this Act and income-tax in that country or specified territory, as the case may be, or

(ii) income-tax chargeable under this Act and under the corresponding law in force in that country or specified territory, as the case may be, to promote mutual economic relations, trade and investment, or

(b) for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country or specified territory, as the case may be, [without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in the said agreement for the indirect benefit to residents of any other country or territory),] or

(c) for exchange of information for the prevention of evasion or avoidance

of income-tax chargeable under this Act or under the corresponding law in force in that country or specified territory, as the case may be, or investigation of cases of such evasion or avoidance, or

(d) for recovery of income-tax under this Act and under the corresponding law in force in that country or specified territory, as the case may be,

and may, by notification in the Official Gazette, make such provisions as may be necessary for implementing the agreement.

(2) Where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee.

(2A) Notwithstanding anything contained in sub-section (2), the provisions of Chapter X-A of the Act shall apply to the assessee even if such provisions are not beneficial to him.

(3) Any term used but not defined in this Act or in the agreement referred to in sub-section (1) shall, unless the context otherwise requires, and is not inconsistent with the provisions of this Act or the agreement, have the same meaning as assigned to it in the notification issued by the Central Government in the Official Gazette in this behalf.

(4) An assessee, not being a resident, to whom an agreement referred to in sub-section (1) applies, shall not be entitled to claim any relief under such agreement unless a certificate of his being a resident in any country outside India or specified territory outside India, as the case may be, is obtained by him from the Government of that country or specified territory.

(5) The assessee referred to in sub-section (4) shall also provide such other documents and information, as may be prescribed

Explanation 1.—For the removal of doubts, it is hereby declared that the charge of tax in respect of a foreign company at a rate higher than the rate at which a domestic company is chargeable, shall not be regarded as less favorable charge or levy of tax in respect of such foreign company.

Explanation 2—For the purposes of this section, "specified territory" means any area outside India which may be notified as such by the Central Government.

Explanation 3.—For the removal of doubts, it is hereby declared that where any term is used in any agreement entered into under sub-section (1) and not defined under the said agreement or the Act, but is assigned a meaning to it in the notification issued under sub-section (3) and the notification issued thereunder being in force, then, the meaning assigned to such term shall be deemed to have effect from the date on which the said agreement came into force.

Explanation 4.—For the removal of doubts, it is hereby declared that where any term used in an agreement entered into under sub-section (1) is defined under the said agreement, the said term shall have the same meaning as assigned to it in the agreement; and where the term is not defined in the said agreement, but defined in the Act, it shall have the same meaning as assigned to it in the Act and explanation, if any, given to it by the Central Government.

Note:

- Similar provisions are contained in section 90A for relief from double taxation where any specified association in India enters into an agreement with a specified association in the specified territory outside India.
- "*Specified Association*" means any institution, association or body, whether incorporated or not, functioning under any law for the time being in force in India or the laws of the specified territory outside India and which may be notified as such by the Central Government for the purposes of this section
- "*Specified Territory"* means any area outside India which may be notified as such by the Central Government for the purposes of this section.

Analysis

Section 90(1) empowers the Central Government to enter into agreement with countries or specified territories outside India to eliminate the chances of double taxation of income or non-taxation of income with the aim of promoting fair trade, economic relations and investments between two countries or specified territories.

Further, it also facilitates exchange of information and recovery of tax

between two countries or specified territories to for the prevention of tax evasion or avoidance of chargeability of tax on income as per laws of either of or both countries or specified territories.

The purpose of such agreements is to avoid double taxation and sharing of tax revenues by two countries as per the mutually agreed terms between two countries.

Section 90(2) explains that where Central Government enters into an agreement with any country or specified territory outside India, then the assessee can either use provisions of Income Tax Act or provisions of DTAA whichever is more beneficial to the assessee.

The assessee is immune from liability either wholly or partly to levy income tax in view of beneficial provisions of DTAA (Vishakhapatnam Port Trust [Andhra Pradesh HC] 144 ITR 146). This position is further affirmed by the Supreme Court of India in Azadi Bachao Andolan 263 ITR 706.

The assessee can take benefit of beneficial provisions for different sources or types of incomes separately, for example, for royalty income the assessee can follow provisions of Income Tax Act and for business income provisions of DTAA if they are beneficial to the assessee.

Further, the assessee can also switch to use of different provisions in different years for same type of income, for example, the assessee can use provisions of DTAA in FY 2018-19 for Royalty income and can use provisions of Income Tax Act in FY 2019-20 for the same income, if they are beneficial to the assessee in respective years.

The summary of relevant provisions under the Act and corresponding Articles under OECD Model Convention is given in the below table:

Nature of Transaction	Under the Act	Under OECD Model
Business Income	Section 9(1)(i)	Article 5,7 & 14
Royalty and Fee for Technical Services	Section 9(1)(vi) & (vii) & 115A	Article 12
Capital Gains	Section 9(1)(i) & 45	Article 13
Interest Income	Section 9(1)(v) & 115A	Article 11
Dividend Income	Section 9(1)(iv) & 115A	Article 10
Salary Income	Section 9(1)(ii)	Article 15

Section 90(2A) specifies that the provisions of Chapter X-A (General Anti

Avoidance Rules) should be applied to the assessee whether these are beneficial to the assessee or not.

Section 90(3) specifies that any term mentioned in sub-section (1) is neither defined in Income Tax Act nor in the agreement, then the meaning of the term will be taken from notification if any issued by the Central Government in this reference unless that meaning is inconsistent with the matter explained therein. Further, as per Explanation 3 to Section 90, if notification has been issued by the Central Government to explain the meaning of term not defined then such notification will be deemed to be effective from the date of agreement.

Section 90(4) specifies that any person who is not resident of India can take benefit of DTAA with India only, if he obtains the tax residency certificate (TRC) from the Government of the country or specified territory outside India of which he claims to be tax resident containing the prescribed particulars and submits the same with the remitter of payment.

Section 90(5) specifies that the non-resident specified in sub-section (4) also need to submit other documents or information as may be prescribed. The CBDT notified Rule 21B prescribing the additional information which is required to be furnished by Non-Residents along with TRC in prescribed Form-10F. The particulars of Form 10F are as follows:

- Status of the assessee (Individual, Company, Firm etc.)
- Permanent Account Number or Aadhar Number, if any
- Nationality or Country or specified territory of Incorporation or registration
- Assessee's tax identification number in the country or specified territory of residence and if there is 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 of which the assessee claims to be a resident
- Period for which the residential status as mentioned in TRC, is applicable
- Address of the assessee in the country or territory outside India during the period for which the TRC is applicable.

Mandatory E-Filing of Form No. 10F

The Finance Act, 2012 inserted section 90(4) of the Income-tax Act, 1961 ('the Act') to provide that a non-resident shall not be entitled to the benefit of a Double Taxation Avoidance Agreement ('DTAA') unless such non-resident obtains a Tax Residency Certificate ('TRC') from the Government of the country of which he is a resident.

Further, section 90(5) of the Act, inserted vide Finance Act, 2013, along with Rule 21AB of the Income Tax Rules, 1962 ('the Rules') provides for furnishing a self-declaration in Form 10F ("the form") in case the TRC, obtained from the Government of a particular country, does not contain certain details. While the TRC obtained from tax authorities generally contains most of the information as required under Rule 21AB (1) of the Rules, Form 10F is furnished by the non-resident taxpayer for the balance information as a matter of precaution. The Form is signed physically by the non-resident taxpayer and furnished along with the TRC to the resident payers for the purpose of determining the withholding tax implications under section 195 of the Act or to the tax authorities during scrutiny proceedings if required.

Notification No. 03/2022 dated 16th July 2022 issued by the Director General of Income-tax (Systems), with the approval of the CBDT, mandates that certain forms, including Form 10F, shall be furnished electronically in the manner prescribed under Rule 131(1) of the Rules.

It is important to note that prior to the above mentined notification there was no specified mode of furnishing the form along with the TRC to obtain the benefits of a Double Tax Avoidance Agreement (DTAA). However, post this Notification, it shall now be mandatory to furnish this Form No. 10F electronically.

Chapter 5

Determination of Income and Tax Rate in Certain Special Cases

Chapter XII in the Act includes provisions in respect of **"Determination of Tax in Certain Special Cases",** which are enshrined in sections 110 to 115BBI. Further Chapter **XII-A, which includes sections 115C to 115-I deal with "Special Provisions Relating to Certain Incomes of Non-Residents".**

As mentioned in this book, the taxability of an income is determined, basically as provided under sections 4, 5 and 9 of the Act. The computations of the income are provided under various concerned provisions of the Act. However, there are certain types of income which need special treatment. Similarly, determination of certain types of income in the hands of Non-Residents has to be done differently in view of the concerned provisions of the Act. The two chapters of the Act address such situations that is chapter XII and Chapter XII-A discussed supra and chapter XVII in respect of TDS rate for certain income.

Before determining tax payable or deductible it is important to go through these and other special provisions after proper analysis of facts and applicable tax treaty.

Discussed here under are some of the above mentioned types of income:

Section	Chapter XII Provision
115A	Dividends, Royalty & FTS in the case of Foreign Companies
115AB	Income (including Capital Gains) from units purchased in Foreign Currency (Forex)
115AC	Income (including Capital Gains) from bonds/ GDRs purchased in Forex
115ACA	Income (including Capital Gains)) from GDRs purchased in Forex (ESOP)
115AD	Income (including Capital Gains) of FIIs from Securities
115BBA	NR Sportsmen or Sports Associations
115BBD	Certain dividends received from Foreign Companies

Section 115A- Tax on dividends, royalty and technical service fees in the case of foreign companies.

(1a) Where the total income of a non-resident (not being a company) or of a foreign company, includes any income by way of—

(i) dividends; or

(ii) interest received from Government or an Indian concern on monies borrowed or debt incurred by Government or the Indian concern in foreign currency or

(iia) interest received from an infrastructure debt fund referred to in clause (*47*) of section 10; or

(iiaa) interest of the nature and extent referred to in section 194LC; or

(iiab) interest of the nature and extent referred to in section 194LD; or

(iiac) distributed income being interest referred to in sub-section (2) of section 194LBA

(iii) income received in respect of units, purchased in foreign currency, of a Mutual Fund specified under clause (*23D*) of section 10 or of the Unit Trust of India

Income-tax payable shall be-

A) Amount of income-tax calculated on the amount of income by way of dividends or interest or units referred to in sub-clause (*iii*) **is twenty percent (20%)**

B) Amount of income-tax calculated on the amount of income by way of interest referred to in:

sub-clause (ii) at the rate of **twenty percent (20%)**

(*BA*) the amount of income-tax calculated on the amount of income by way of interest referred to in,—

(i) sub-clause (*iia*), if any, included in the total income, at the rate of five per cent;

(ii) sub-clause (*iiaa*) or sub-clause (*iiab*) or sub-clause (*iiac*), if any, included in the total income, at the rate provided in the respective sections referred to in the said sub-clauses;

(*C*) the amount of income-tax calculated on the income in respect of units referred to in sub-clause (*iii*), if any, included in the total income, at the rate of twenty per cent ;

(D) the amount of income-tax with which he or it would have been chargeable had his or its total income been reduced by the amount of income referred to in sub-clause (i), sub-clause (ii), sub-clause (iia), sub-clause (iiaa), sub-clause (iiab), sub-clause (iiac) and sub-clause (iii) ;

(b) Where the total income of a non-resident (not being a company) or of a foreign company, includes any income by way of royalty or fees for technical services other than income referred to in sub-section (1) of section 44DA received from Government or an Indian concern in pursuance of an agreement made by the foreign company with Government or the Indian concern after the 31st day of March, 1976, and where such agreement is with an Indian concern, the agreement is approved by the Central Government or where it relates to a matter included in the industrial policy, for the time being in force, of the Government of India, the agreement is in accordance with that policy, then, subject to the provisions of sub-sections (1A) and (2).

Income-tax payable shall be-

Amount of income-tax calculated on the income by way of royalty or fee for technical service, if any, included in the total income, at the rate of **ten percent (10%)**

115AB- Tax on income from units purchased in foreign currency or capital gains arising from their transfer.

(1) Where the total income of an assessee, being an overseas financial organisation includes:

(a) income received in respect of units purchased in foreign currency; or

(b) income by way of long-term capital gains arising from the transfer of units purchased in foreign currency,

Income-tax payable shall be-

Amount of income-tax calculated on the income in respect of units referred to in clause (a) or the long-term capital gains referred to in clause (b) at the rate of **ten percent (10%)** and amount of income-tax with which the financial organization would have been chargeable had its total income been reduced by the amount of income referred to in clause (a) and clause (b).

115AC- Tax on income from bonds or Global Depository Receipts

purchased in foreign currency or capital gains arising from their transfer.

(1) Where the total income of an assessee, being a non-resident, includes—

(a) income by way of interest on bonds of an Indian company issued in accordance with such scheme as the Central Government may, by notification in the Official Gazette, specify in this behalf, or on bonds of a public sector company sold by the Government, and purchased by him in foreign currency; or

(b) income by way of dividends on Global Depository Receipts

(c) income by way of long-term capital gains arising from the transfer of bonds referred to in clause (*a*) or, as the case may be, Global Depository Receipts referred to in clause (*b*),

Income-tax payable shall be-

(i) amount of income-tax calculated on the income by way of interest or dividends in respect of bonds referred to in clause (*a*) or Global Depository Receipts referred to in clause (*b*) long-term capital gains referred to in clause (*c*), at the rate of **ten percent (10%) and** amount of income-tax with which the non-resident would have been chargeable had his total income been reduced by the amount of income referred to in clauses (a), (b) and (c).

115ACA- Tax on income from Global Depository Receipts purchased in foreign currency or capital gains arising from their transfer.

(1) Where the total income of an assessee, (an individual), who is a resident and an employee of an Indian company engaged in specified knowledge based industry or service, or an employee of its subsidiary engaged in specified knowledge based industry or service declared—

(a) income by way of dividends on Global Depository Receipts of an Indian company engaged in specified knowledge-based industry or service, issued in accordance with such Employees' Stock Option Scheme as the Central Government may, by notification in the Official Gazette, specify in this behalf and purchased by him in foreign currency; or

(b) income by way of long-term capital gains arising from the transfer of Global Depository Receipts referred to in clause (*a*),

Income-tax payable shall be-

Amount of income-tax calculated on the income by way of dividends in respect of Global Depository Receipts referred to in clause (a) or long-term capital gains referred to in clause (b) at the rate of ten percent (10%) and amount of income-tax with which the resident employee would have been chargeable had his total income been reduced by the amount of income referred to in clauses (a) and (b).

115AD- Tax on income of Foreign Institutional Investors from securities or capital gains arising from their transfer.

(1) Where the total income of a specified fund or Foreign Institutional Investor includes—

(a) Income received in respect of securities (other than units referred to in section 115AB); or

(b) income by way of short-term or long-term capital gains arising from the transfer of such securities,

Income-tax payable shall be-

(i) Amount of income-tax calculated on the income in respect of securities referred to in clause (a), if any, included in the total income,—

- *at the rate of **twenty per cent** in case of Foreign Institutional Investor **(20%)**;*
- *at the rate of **ten per cent** in case of specified fund **(10%)**:*

Provided** that the amount of income-tax calculated on the income by way of interest referred to in section 194LD shall be at the rate of five per cent **(5%)

*(ii) Amount of income-tax calculated on the income by way of short-term capital gains referred to in clause (b), if any, included in the total income, at the rate of **thirty per cent (30%)***

Provided** that the amount of income-tax calculated on the income by way of short-term capital gains referred to in section 111A shall be at the rate of **fifteen per cent (15%)

*(iii) Amount of income-tax calculated on the income by way of long-term capital gains referred to in clause (b), if any, included in the total income, at the rate of **ten per cent (10%)***

***Provided** that in case of income arising from the transfer of a long-term capital asset referred to in section 112A, income-tax at the rate of*

ten per cent shall be calculated on such income exceeding one lakh rupees;

(iv) Amount of income-tax with which the specified fund or Foreign Institutional Investor would have been chargeable had its total income been reduced by the amount of income referred to in clause (a) and clause (b)

115BBA- Tax on non-resident sportsmen or sports associations.

(1a) Where the total income of an assessee being a sportsman (including an athlete), who is not a citizen of India and is a non-resident, includes any income received or receivable by way of—

(i) participation in India in any game (other than a game the winnings wherefrom are taxable under section 115BB) or sport; or

(ii) advertisement; or

(iii) contribution of articles relating to any game or sport in India in newspapers, magazines or journals; or

(1b) Where the total income of an assessee being a non-resident sports association or institution, includes any amount guaranteed to be paid or payable to such association or institution in relation to any game (other than a game the winnings wherefrom are taxable under section 115BB) or sport played in India

(1c) Where the total income of an assessee being an entertainer, who is not a citizen of India and is a non-resident, includes any income received or receivable from his performance in India

Income-tax payable shall be-

Amount of income-tax calculated on income referred to in clause (1a) or clause (1b) or (1c) at the rate of ***twenty percent (20%)*** *and amount of income-tax with which the assessee would have been chargeable had the total income of the assessee been reduced by the amount of income referred to in clause (1a) or (1b) or (1c)]*

115BBD- Tax on certain dividends received from foreign companies.

(1)Where the total income of an assessee, being an Indian company, includes any income by way of dividends declared, distributed or paid by a specified foreign company, the income-tax payable shall be the aggregate of

Income-tax payable shall be at the rate of ***fifteen percent (15%)***

The provisions of this section shall not apply to any assessment year beginning on or after the 1st day of April, 2023.

Chapter XVII- Collection and Recovery – Deduction at Source

Section 194LC – Income by way of interest from Indian company.

Income by way of interest as mentioned below is payable to a non-resident, not being a company or to a foreign company, by a specified company or a business trust, the person responsible for making the payment, shall at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct the income-tax thereon at the rate of five per cent.

The interest referred shall be the income by way of interest payable by the specified company or the business trust,—

(i) in respect of monies borrowed by it in foreign currency from a source outside India,—

(a) under a loan agreement at any time on or after the 1st day of July, 2012 but before the 1st day of July 2023; or

(b) by way of issue of long-term infrastructure bonds at any time on or after the 1st day of July, 2012 but before the 1st day of October, 2014; or

(c) by way of issue of any long-term bond including long-term infrastructure bond at any time on or after the 1st day of October, 2014 but before the 1st day of July, 2023,

as approved by the Central Government in this behalf; or

(ia) in respect of monies borrowed by it from a source outside India by way of issue of rupee denominated bond before the 1st day of July, 2023;

*(ib) in respect of monies borrowed by it from a source outside India by way of issue of any long-term bond or rupee denominated bond on or after the 1st day of April, 2020 but before the 1st day of July, 2023, which is listed only on a recognised stock exchange located in any International Financial Services Centre,

**In case of income by way of interest referred to *clause (ib) of sub-section (2), the income-tax shall be deducted at the rate of four per cent*

(ii) to the extent to which such interest does not exceed the amount of

interest calculated at the rate approved by the Central Government in this behalf, having regard to the terms of the loan or the bond and its repayment.

Section 194LD – Income by way of interest on certain bonds and Government securities.

Any person who is responsible for paying to a person being a Foreign Institutional Investor or a Qualified Foreign Investor any income by way of interest, shall at the time of credit of such income to the account of the payee or at the time of payment of such income in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rate of five per cent

The income by way of interest shall be the interest payable,—

(a) on or after the 1st day of June, 2013 but before the 1st day of July, 2023 in respect of the investment made by the payee in—

  (i) a rupee denominated bond of an Indian company; or

  (ii) a Government security;

(b) on or after the 1st day of April, 2020 but before the 1st day of July, 2023 in respect of the investment made by the payee in municipal debt securities:

Provided that the rate of interest in respect of bond referred to in sub-clause (i) of clause (a) shall not exceed the rate as the Central Government may, by notification in the Official Gazette, specify.

Chapter XII – A: Special Provisions Relating Certain Incomes of Non-Resident

115C- Definitions.

This section contains definitions of the various terms such as convertible foreign exchange, foreign exchange asset, investment income, long-term capital gains, non-resident Indian and specified asset.

115D- Special provision for computation of total income of non-residents.

(1) No deduction in respect of any expenditure or allowance shall be allowed under any provision of this Act in computing the investment income of a non-resident Indian.

(2) Where in the case of an assessee, being a non-resident Indian,—

(a) the gross total income consists only of investment income or income by way of long-term capital gains or both, no deduction shall be allowed to the assessee [under Chapter VI-A and nothing contained in the provisions of the second proviso to section 48 shall apply to income chargeable under the head "Capital gains"];

(b) the gross total income includes any income referred to in clause (*a*), the gross total income shall be reduced by the amount of such income and the deductions under Chapter VI-A shall be allowed as if the gross total income as so reduced were the gross total income of the assessee.

115E- Tax on investment income and long-term capital gains.

Where the total income of an assessee, being a non-resident Indian, includes

(a) any income from investment or income from long-term capital gains of an asset other than a specified asset;

(b) income by way of long-term capital gains,

Income-tax payable shall be-

(i) Amount of income-tax calculated on the income in respect of investment income referred to in clause (*a*), if any, included in the total income, at the rate of **twenty percent (20%)**

(ii) Amount of income-tax calculated on the income by way of long-term capital gains referred to in clause (*b*), if any, included in the total income, at the rate of **ten percent (10%)** and

(iii) the amount of income-tax with which he would have been chargeable had his total income been reduced by the amount of income referred to in clauses (*a*) and (*b*)]

115F- Capital gains on transfer of foreign exchange assets not to be charged in certain cases.

(1) In case of an assessee being a non-resident Indian, any long-term capital gains arise from the transfer of a foreign exchange asset and the assessee has, within a period of six months after the date of such transfer, invested the whole or any part of the net consideration in any specified asset , or in any savings certificates referred to in clause (*4B*) of section 10, or such savings certificates being hereafter in this section referred to as the

new asset), the capital gain shall be dealt with in accordance with the following provisions of this section.

(a) if the cost of the new asset is not less than the net consideration in respect of the original asset, the whole of such capital gain shall not be charged under section 45;

(b) if the cost of the new asset is less than the net consideration in respect of the original asset, so much of the capital gain as bears to the whole of the capital gain the same proportion as the cost of acquisition of the new asset bears to the net consideration shall not be charged under section 45.

Chapter 6

Withholding Tax in Respect of Non-Resident

Section 195 is a machinery provision that provides for revenue authorities to collect the tax at the time of earning of income itself. It is meant to ensure recovery of taxes from non-residents whose connection with India may be transient or whose assets in India are not sufficient to recover the taxes.

Provisions of Section 195

(1) ***Any person*** *responsible for paying to a non-resident, not being a company, or to a foreign company, any interest (not being interest referred to in section 194LB or section 194LC or section 194LD or* ***any other sum chargeable under the provisions of this Act*** *(not being income chargeable under the head "Salaries") shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon* ***at the rates in force****:*

Provided that 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.

Explanation 1. —For the purposes of this section, 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 and the provisions of this section shall apply accordingly.

Explanation 2 —For the removal of doubts, it is hereby clarified that the obligation to comply with sub-section (1) and to make deduction thereunder applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to 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.

(2) Where the person responsible for paying any such sum chargeable under this Act 6[(other than salary)] to a non-resident considers that the whole of such sum would not be income chargeable in the case of the recipient, he may make an application 7[in such form and manner to the Assessing Officer, to determine in such manner, as may be prescribed], the appropriate proportion of such sum so chargeable, and upon such determination, tax shall be deducted under sub-section (1) only on that proportion of the sum which is so chargeable:

(3) Subject to rules made under sub-section (5), any person entitled to receive any interest or other sum on which income-tax has to be deducted under sub-section (1) may make an application in the prescribed form to the [Assessing Officer] for the grant of a certificate authorising him to receive such interest or other sum without deduction of tax under that sub-section, and where any such certificate is granted, every person responsible for paying such interest or other sum to the person to whom such certificate is granted shall, so long as the certificate is in force, make payment of such interest or other sum without deducting tax thereon under sub-section (1).

(4) A certificate granted under sub-section (3) shall remain in force till the expiry of the period specified therein or, if it is cancelled by the [Assessing Officer] before the expiry of such period, till such cancellation.

(5) The Board may, having regard to the convenience of assessees and the interests of revenue, by notification in the Official Gazette, make rules specifying the cases in which, and the circumstances under which, an application may be made for the grant of a certificate under sub section (3) and the conditions subject to which such certificate may be granted and providing for all other matters connected therewith.

(6) The person responsible for paying to a non-resident (not being a company), or to a foreign company, any sum, whether or not chargeable under the provisions of this Act, shall furnish the information relating to payment of such sum, in such form and manner, as may be prescribed.

(7) Notwithstanding anything contained in sub-section (1) and sub-section (2), the Board may, by notification in the Official Gazette, specify a class of persons or cases, where the person responsible for paying to a non-resident, not being a company, or to a foreign company, any sum, whether or not chargeable under the provisions of this Act, shall make an application [in such form and manner to the Assessing Officer, to determine in such

manner, as may be prescribed], the appropriate proportion of sum chargeable, and upon such determination, tax shall be deducted under sub-section (1) on that proportion of the sum which is so chargeable.

Snapshot of Section 195

- Section 195(1) – Scope and conditions for applicability.
- Section 195(2) – Application by payer to Assessing Officer for lower deduction of tax.
- Section 195(3) – Application by payee to Assessing Officer for Lower deduction of tax.
- Section 195(4) – Validity of certificate grated by Assessing Officer u/s 195(3).
- Section 195(5) – Power of CBDT to make Rules.
- Section 195(6) – Payer to furnish information in prescribed form.
- Section 195(7) – Power of CBDT to specify class of persons or cases where application to Assessing Officer u/s 195(2) is compulsory.

To make this section applicable on any transaction, the following conditions must be satisfied:

a) the payee should either be a non-resident, not being a company, or a foreign company.

b) the sum payable should either be interest, excluding interest referred to in Sec 194LB, 194LC or 194LD, or any other sum, chargeable under the provisions of this act not being salaries, chargeable under the Head salaries.

c) the sum payable being chargeable under the provisions of this Act should be covered under any of the provisions of section 5(2) of the Income Tax Act.

Responsibility to Deduct Tax

The person is responsible to deduct tax at the rates in force as defined in Section 2(37A) i.e. 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 90A, whichever is applicable by virtue of the provisions of section 90, or section 90A, as the case may be.

However, the following need to be considered:-

a) Where the payer has obtained a determination of the portion of the sum chargeable under the Act, the tax shall be deducted only on the sum so determined by the Assessing Officer.

b) Where the certificate of lower deduction under section 197 has been obtained by the payer or the payee from the Assessing officer, the tax shall be deducted at the rate given by the Assessing officer on such certificate.

c) Where the Assessing officer has issued a certificate authorising the person concerned to receive the income of interest or any sum without deduction of tax under sub section (1) of sec 195, no tax shall be deducted.

d) In the Finance Act, 2008 w.e.f. 01-04-2008, sub-section (6) was inserted in section 195 which reads as "*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"*.

   As per the provisions of erstwhile sub-section (6), the idea was that the information should be furnished by the payee to the Department relating to all payments which are chargeable to tax. By the Finance Act 2015, w.e.f. 01-06-2015, the provisions of sub-section (6) have been amended and now it reads as :

   "(6) The person responsible for paying to a non-resident, not being a company, or to a foreign company, any sum, whether or not chargeable under the provisions of this Act, shall furnish the information relating to payment of such sum and manner as may be prescribed."

The objective of this section is to ensure that the tax on the income of non-resident and foreign companies is deducted at source itself so that the Department should not be required to make any effort in recovering such tax from such non-resident. Where tax has been deducted by the person under sub-section (1), such person has to furnish information relating to payment in the prescribed Form No. 15CA and 15CB as per section 195(1) read with Rule 37BB.

By virtue of sub-section (6), Form 15CA is to be furnished for all the remittance of foreign nature which is made to a Non-Resident. There are certain slabs and amount on which the applicable part of the Form shall be

furnished. The person making a remittance has to furnish a Form 15CA online and in case of Form No. 15CB, a certificate is required from a chartered accountant.

Person responsible to deduct tax.

Any person making any payment, other than salaries, to any non-resident including a non-resident Indian or a foreign company is liable to deduct TDS u/s 195. The legal or residential status of a taxpayer and the sources of his income does not in any way effect his liability u/s 195.

Individuals and HUF, who are not liable for tax audit or whose sales, turnover or gross receipts, as the case may be, does not exceed the prescribed limit of rupees one crore are also liable to deduct tax while making payment to a non-resident if such sum is chargeable to tax as per the provisions of Income Tax Act.

Rates of Tax Deduction

Rates for deduction of tax at source is given in Part II of the Finance Act, which says, in every case under the provisions of sections 193, 194A, 194B, 194BB, 194D, 194LBA, 194LBB, 194LBC and 195 of the Income Tax Act, tax is to be deducted at the rates in force, deduction shall be made from the gross sum payable to the non-resident at the following rate:

[For Assessment year 2022-23]

Particulars	TDS Rates (in %)
1. In the case of a person other than a company	
Payment of any other sum to a Non-resident	
a) Income in respect of investment made by a Non-resident Indian Citizen	20
b) Income by way of long-term capital gains referred to in Section 115E in case of a Non-resident Indian Citizen	10
c) Income by way of long-term capital gains as referred to in Section 112A	10
d) Income by way of short-term capital gains referred to in Section 111A	15
e) Any other income by way of long-term capital	20

Particulars		TDS Rates (in %)
	gains [not being long-term capital gains referred to in clauses 10(33), 10(36) and 112A	
f)	Income by way of interest payable by Government or an Indian concern on moneys borrowed or debt incurred by Government or the Indian concern in foreign currency (not being income by way of interest referred to in Section 194LB or Section 194LC)	20
g)	Income by way of royalty payable by Government or an Indian concern in pursuance of an agreement made by it with the Government or the Indian concern where such royalty is in consideration for the transfer of all or any rights (including the granting of a licence) in respect of copyright in any book on a subject referred to in the first proviso to sub-section (1A) of Section 115A of the Income-tax Act, to the Indian concern, or in respect of any computer software referred to in the second proviso to sub-section (1A) of Section 115A of the Income-tax Act, to a person resident in India	10
h)	Income by way of royalty [not being royalty of the nature referred to point h) above] payable by Government or an Indian concern in pursuance of an agreement made by it with the Government or the Indian concern and where such agreement is with an Indian concern, the agreement is approved by the Central Government or where it relates to a matter included in the industrial policy, for the time being in force, of the Government of India, the agreement is in accordance with that policy	10
i)	Income by way of fees for technical services payable by Government or an Indian concern in pursuance of an agreement made by it with the Government or the Indian concern and where such agreement is with an Indian concern, the	10

Particulars	TDS Rates (in %)
agreement is approved by the Central Government or where it relates to a matter included in the industrial policy, for the time being in force, of the Government of India, the agreement is in accordance with that policy	
j) income by way of winning from lotteries, crossword puzzles, card games and any other games of any short.	30
k) income by way of winning from horse races.	30
l) income by way of dividend	20
m) Any other income.	30
2. In the case of a company-	
Where the company is not a domestic company.	
a) Income by way of long-term capital gains referred to in sub-clause (iii) of clause (c) of sub-section (1) of Section 112	10
b) Income by way of long-term capital gains as referred to in Section 112A exceeding one lakh rupees.	10
c) Income by way of short-term capital gains referred to in Section 111A	15
d) Any other income by way of long-term capital gains [not being long-term capital gains referred to in clauses 10(33) , 10(36) and 112A	20
e) Income by way of interest payable by Government or an Indian concern on moneys borrowed or debt incurred by Government or the Indian concern in foreign currency (not being income by way of interest referred to in Section 194LB or Section 194LC)	20
f) Income by way of royalty payable by Government or an Indian concern in pursuance of an agreement made by it with the Government or the Indian concern after the 31st day of March, 1976	10

Particulars	TDS Rates (in %)
where such royalty is in consideration for the transfer of all or any rights (including the granting of a licence) in respect of copyright in any book on a subject referred to in the first proviso to sub-section (1A) of Section 115A of the Income-tax Act, to the Indian concern, or in respect of any computer software referred to in the second proviso to sub-section (1A) of Section 115A of the Income-tax Act, to a person resident in India	
g) Income by way of royalty [not being royalty of the nature referred to in point (f) above] payable by Government or an Indian concern in pursuance of an agreement made by it with the Government or the Indian concern and where such agreement is with an Indian concern, the agreement is approved by the Central Government or where it relates to a matter included in the industrial policy, for the time being in force, of the Government of India, the agreement is in accordance with that policy— A. where the agreement is made after the 31st day of March 1961 but before the 1st day of April, 1976 B. where the agreement is made after the 31st day of March, 1976	 50 10
h) Income by way of fees for technical services payable by Government or an Indian concern in pursuance of an agreement made by it with the Government or the Indian concern and where such agreement is with an Indian concern, the agreement is approved by the Central Government or where it relates to a matter included in the industrial policy, for the time being in force, of the Government of India, the agreement is in accordance with that policy— A. where the agreement is made after the 29th	 50

Particulars	TDS Rates (in %)
day of February 1964 but before the 1st day of April 1976 B. where the agreement is made after the 31st day of March 1976	10
i) income by way of winning from lotteries, crossword puzzles, card games and any other games of any short.	30
j) income by way of winning from horse races.	30
k) income by way of dividend	20
l) Any other income	40

Surcharge and Education Cess

The above rates should be increased by applying the rate of surcharge as applicable as per the relevant Finance Act. The total amount of tax and surcharge would be the amount actually deductible from the payment made to the payee.

An issue arises as to whether surcharge should be added to the tax arrived at after applying the rates mentioned in the Treaty. In this regard;Article 2 of OECD MC uses the phrase **"all taxes imposed on total income"** while defining the applicability of the treaty. It means that the rates provided in treaty are inclusive of surcharge and education cess as applicable and no further tax in any form is to be added.

In view of above, the rates specified in the DTAA are all inclusive and they can be changed unilaterally. Hence neither surcharge nor education cess can be levied in a case where the treaty rates are applied. However, if the treaty does not prescribe any rate, the rates including surcharge as prescribed by the Act will apply.

Amount on which tax should be deducted

The question often arises as to whether TDS is to be deducted on the gross amount or the income element in the amount?

In the case of ***Transmission Corporation of A.P Ltd***, (239 ITR 587) the Apex Court affirmed the decision of HC in case of ***Superintending Engineer (152 ITR 753) (AP)*** that the power of the Income Tax Officer to treat the person responsible for deducting tax u/s 195 as being in default extends only

to the income element which is chargeable under the Act and not to gross sum of money. However, the SC has observed that unless an order u/s 195(2) has been obtained by the payer, tax is deductible u/s 195 on the gross sum.

In the landmark judgement of GE India Technology Centre (234 CTR 153) the SC clarified that it was not correct to say the moment a remittance was made to a foreign party, tax become deductible under the provisions of section 195 of the Income Tax Act. It further held that any payments made to a non-resident will be subject to withholding tax only when such payment is chargeable to tax in India. Further, section 195 not only covers amount which represents pure income payments but also covers composite payment which has an element of Income embedded in it. However, obligation to deduct tax on such composite payment would be limited to the appropriate proportion of income forming part of gross sum.

However, **CBDT has issued a circular no. 3/2015 which provides that** the Central Board of Direct Taxes has already issued Instruction No. 02/2014 dated 26.02.2014 (F.No.500/33/2013-FTD-I)regarding deduction of tax at source under sub-section (1) of section 195 read with section 201 of the act relating to payment made to non- resident in case where no application is filed by the deductor for determining the sum so chargeable under sub-section (2) of section 195 of the act. Vide this instruction Board has clarified that in case were tax is not deducted at source under section 195 of the Act, the Assessing Officer shall determine the appropriate portion of the sum chargeable to tax, as mentioned in sub-section(1) of section 195, to ascertain the tax-liability on which the deductor shall be deemed to be an assessee in default under section 201 of the Act. It has been further clarified that such appropriate portion of the said sum will depend on the facts and circumstances of each case taking into account the nature of remittances, income component therein or any other fact relevant to determine such appropriate proportion.

Grossing Up Where Income Payable Net of Tax (Section – 195A)

Bare Provisions of Law

In a case other than that referred to in sub-section (1A) of section 192, where under an agreement or other arrangement, the tax chargeable on any income referred to in the foregoing provisions of this Chapter is to be borne by the person by whom the income is payable, then, for the purposes of deduction

of tax under those provisions such income shall be increased to such amount as would, after deduction of tax thereon at the rates in force for the financial year in which such income is payable, be equal to the net amount payable under such agreement or arrangement.

Example:

Company X in UK provide services to Company A in India for a consideration of USD 10,000/- which falls under the category of Fee for technical services and as per agreement, Company X wants to receive the whole amount of USD 10,000/- and all the taxes or duties in India will be borne by the Indian Company.

As per Section 195 of the Act read with section 115A of the Act, the tax is deductible at 10 percent (assuming same rate in DTAA).

Particulars	Amount (in USD)
Consideration Payable (as per agreement)	10,000.00
Grossing-Up of Tax (10000*10/90)	1,111.11
Consideration Payable (to be reported) [A]	**11,111.11**
TDS to be Deducted (11,111.11 *10%) [B]	1,111.11
Net Amount to be Paid [A-B]	**10,000.00**

Timing of TDS and Applicability of Foreign Exchange Rate

Tax to be deducted at source at the time of credit or payment whichever is earlier. Explanation 1 of Section 195(1) provides that the payer is liable to deduct tax although amount is credited to payable account or suspense account.

In the case of **Raymond ltd (80 TTJ 120) (ITAT-Mum)** the amount payable to the assessee was not actually paid but was deducted out of the sale proceeds; hence there is neither a payment nor a credit, so 195 cannot be applied. However, the Court held that adjustments of this nature fall within the scope of “any other mode of payment” hence sec 195 shall be applicable.

Karnataka High Court, in the case of United Breweries Ltd (211 ITR 256) held that the time of deduction does not have any bearing on the requirement of obtaining approval under FEMA. Hence deduction has to be made at the

time of credit to the payee's account irrespective of FEMA approval.

As per **Rule 26** for the purpose of TDS on any income payable in foreign currency, the exchange rate shall be the TT buying rate of such currency as on the date on which tax is required to be deducted.

TT buying rate means the rate adopted by the State Bank of India for buying such currency.

Applicability of Section 206AA on TDS U/S 195 (Read With Rule 37BC)

Section 206AA was introduced by the Finance Act 2009 and the provisions of the section are applicable w.e.f. 01.04.2010. This section prescribes that unless the payee of a chargeable income has a PAN, tax shall be deductible at minimum of 20%. A number of issues have arisen as a result of insertion of this provision. Some of these issues are - whether this section overrides treaty rates, whether section 206AA applies even where otherwise the TDS was to be NIL, whether surcharge and education cess are required to be added to the prescribed rate of 20% in this section, etc.

In this regard, it may be mentioned that Section 206AA is a *non-obstante* clause which starts with *"notwithstanding anything contained in any other provisions of this Act"*. Section 90(2) talks about the provisions of the Act or provisions of the tax treaties, whichever is more beneficial, shall be applicable. Section 206AA requires PAN of the payee to claim the tax rate given in the treaty, if such tax rate is beneficial to the assessee. Section 206AA, being a non obstante clause, it seems that it will override the provisions of section 90(2). In this regard two views may be possible. One is, the provision of section 206AA cannot override the treaty provisions and the second, that the provisions of section 206AA covers payment to non-residents in absence of PAN.

The view that the provisions of sec 206AA cannot override the provisions of section 90(2) appears more plausible.

Hence, to overcome this controversy , **Rule 37BC was** inserted by the Income-tax (Seventeenth Amendment) Rules, 2016, w.e.f. 24-6-2016 which provides Relaxation from deduction of tax at higher rate under section 206AA under certain circumstances. The provisions of rule 37BC shall be read as below:

"(1) In the case of a non-resident, not being a company, or a foreign company (hereafter referred to as 'deductee') and not having permanent

account number the provisions of section 206AA shall not apply in respect of payments in the nature of interest, royalty, fees for technical services, dividend and payments on transfer of any capital asset, if the deductee furnishes the details and the documents specified in sub-rule (2) to the deductor.

(2) The deductee referred to in sub-rule (1), shall in respect of payments specified therein, furnish the following details and documents to the deductor, namely: —

i. name, e-mail id, contact number.

ii. address in the country or specified territory outside India of which the deductee is a resident.

iii. a certificate of his being resident in any country or specified territory outside India from the Government of that country or specified territory if the law of that country or specified territory provides for issuance of such certificate.

iv. Tax Identification Number of the deductee in the country or specified territory of his residence and in case no such number is available, then a unique number on the basis of which the deductee is identified by the Government of that country or the specified territory of which he claims to be a resident.

(3) The provisions of section 206AA shall not apply in respect of payments made to a person being a non-resident, not being a company, or a foreign company if the provisions of section 139A do not apply to such person on account of rule 114AAB."

Note: Sec 206AA does not apply where the tax is otherwise not deductible.

The question arises whether the rate given in 206AA shall be increased by the surcharge and education cess. As per the provisions of part II of the Finance Act 2020, in the case of every individual or HUF or AOP or BOI, whether or not incorporated, or every artificial juridical person, being a non-resident, the surcharge shall be calculated as below:

where the income or the aggregate of such incomes (including the income by way of dividend or income under the provisions of sections 111A and 112A of the Income-tax Act) paid or likely to be paid and subject to the deduction exceeds fifty lakh rupees but	10%

does not exceed one crore rupees;	
where the income or the aggregate of such incomes (including the income by way of dividend or income under the provisions of sections 111A and 112A of the Income-tax Act) paid or likely to be paid and subject to the deduction exceeds one crore rupees but does not exceed two crore rupees;	15%
where the income or the aggregate of such incomes (excluding the income by way of dividend or income under the provisions of sections 111A and 112A of the Income-tax Act) paid or likely to be paid and subject to the deduction exceeds two crore rupees but does not exceed five crore rupees;	25%
where the income or the aggregate of such incomes (excluding the income by way of dividend or income under the provisions of sections 111A and 112A of the Income-tax Act) paid or likely to be paid and subject to the deduction exceeds five crore rupees	37%
in case where the total income includes any income by way of dividend or income chargeable under section 111A and section 112A of the Income-tax Act,	15%

There is no reference of section 206AA in the Finance Act regarding the applicability of surcharge and education cess. Consequently a view can be drawn that the rate prescribed in section 206AA should not be increased by surcharge and education cess.

Some Peculiar Transactions and Applicability of Section 195

1. Payment made by branch to Foreign Company Head Office: CBDT vide *circular No. 740 dated 17.04.1996* it has been clarified that for the purposes of taxation, the Branch of a foreign company in India and it's HO are separate entities and that the Branch would be expected to deduct TDS from payment of Interest to the HO or any other Branch located outside India.

Circular No. 649 dated 31.03.1993 also states that the technical fees received by the Head Office will be taxable in accordance with the Double Taxation Avoidance Agreement read with Income-tax Act. In other words, if there is a tax treaty with the concerned country which supplies technical

services to the permanent establishment in India then the payment towards the technical fees will be taxable either on the gross or on the net basis depending on the agreement. On the other hand, if the fees are paid to a resident of a country with which there is no tax treaty then the payment will be taxable in accordance with the provisions of section 115A, read with section 44D of the Income-tax Act.

Explanation (a) to Sec 9(1)(v) inserted by the Finance Act, 2015 w.e.f 01.04.2016 says, any interest payable by the Branch in India to HO or Branch outside India shall be deemed to accrue or arise in India and shall be chargeable to tax in India and for this purpose, the Branch in India shall be deemed to be separate and independent entity and the provisions of Act relating to deduction of tax shall apply accordingly.

2. When payment is made to Non-resident for sale of property situated in India: Payments in the nature of capital gain also covered u/s 195 except the capital gain which is specifically exempt like gain arising from transfer of units of the Unit Trust of India,Scheme 1964 on sale after 31.03.2002 or gain arising from transfer of Agricultural land provided prescribed conditions are fulfilled, etc. In view of this, even when the property is purchased from a non-resident (including an NRI), tax needs to be deducted at source despite the fact that purchaser is an individual not carrying on any business etc and deduct the tax on the gross amount without giving a deduction or exemption unless the lower deduction certificate has been obtained by the seller to deduct the tax on some lower rate.

3. TDS on business profit of Non-resident: Section 9(1)(i) deems income accruing or arising out of the business connection in India shall be taxable in India only to the extent of activities attributable in India. Article 7 of the model tax treaties correspondingly provide that such business income of a non-resident is taxable in the source country only if it has a permanent establishment. As per the provisions of Article 5 of the model tax treaties, in India and the activities of such business are carried out through such permanent establishment.

4. TDS on professional fees to Non-resident: In the case of ***Bhupendra Prasad Ray (129 ITR 295)*** the SC held that business connection in Section 9(1)(i) includes professional connection. Under the treaties such fees are covered under the Article “Independent Professional Services” and are taxable in India only if the Non-resident has physical presence in India for more than the number of days prescribed in the treaties or has a fixed base in India.

5. TDS is required to be deducted even if payment made is in kind: In the case of ***Kanchanganga Sea Foods Ltd (265 ITR 664)(AP)***, the court has held that where a part of fish catch was given to the Non-resident company as hire charges for chartering fishing vessels, TDS is to be deducted on the payment in kind also.

Reimbursement of Expenses and Applicability of Section 195

As per the provisions of section 195, all payments to a Non-resident, other than salaries, which are chargeable to tax under the Income Tax Act, are covered u/s 195. A situation may arise that an Indian company is making payment of reimbursement to the foreign company and in such a case, how to deduct the tax if there is a profit element also embedded in such reimbursement.

In the case of ***Bovis Lend Lease (India) Pvt. Ltd. (127 TTJ 25) (2010)***, the Bangalore ITAT held that it is pertinent to note that the meaning of the term '*reimbursement'* for the purposes of chargeability is quite close to its dictionary meaning, viz., "*to pay back money spent by someone else on one's own count*". The Bangalore ITAT also laid down the essential conditions of reimbursement which is to be satisfied *cumulatively*:

(a) The actual liability to pay should be of the person who reimburses the money to the original payer.

(b) The liability ought to have been clearly determined. It should not be an approximate or varying amount.

(c) The liability ought to have crystallized. In other words, payments which were never required to be done, but were done just to avoid a potential problem may not qualify.

(d) There should be a clear ascertainable relationship between the paying and reimbursing parties. Thus, an alleged reimbursement by an unconnected person may not qualify.

(e) The payment should first be made by somebody else whose liability it never was, and the repayment should then follow to that person to square off the account.

(f) There should be clearly three parties existing - the payer, the payee and the reimburser.

In many cases, it is argued purely on the ground that reimbursement *per se*

does not have an income element and hence cannot be taxed at all. It depends upon the facts of the case, but it is important that only the repayment of money cannot be construed to be income of the recipient. However, the payer has to prove that the sum which he is liable to pay does not contain any element of profit and is pure reimbursement.

Generally following are the common reimbursement transactions and while issuing a certificate in Form 15CB, the Chartered Accountants should be more careful about the taxability of such transactions:-

a. *Reimbursement of salaries to foreign technicians*

Nowadays, it can be commonly seen that the Indian companies are entering into agreements with Foreign Companies for availing technical services and the foreign companies provide their employees who visits and stays in India to render services to the Indian companies and the Indian companies agrees to reimburse full or part of the salaries to such technical personnel. The question arises, whether the Indian company is liable to deduct TDS or not and if yes whether u/s 195 or u/s 192.

It clearly depends upon the facts of the case and on the finding as to whether or not the Indian company is economic/real employer of the seconded employee. In other words, whether the employer-employee relationship would be determined under a formal or legal relationship?

In order to analyse the taxability of the payment and the consequential application of TDS, it is important to ascertain the nature of the payment. in the case of ***IDS Software Solutions (India) Private Limited (32 SOT 25) (ITAT Bangalore).*** In the case of ***HCL Infosystem Limited (275 ITR 261) (Delhi HC)***, the decision went in favour of the assessee on the basis of the terms of secondment agreements and facts of the case.

On the other hand, in the case of ***Varizon Data Services (India) Private Limited (11 taxmann.com 177)*** and ***Dolphin Drilling Ltd. (29SOT 612) (Delhi)***, the decision was against the assessee based on the facts of the case.

b. Reimbursement of cost of third-party services

It generally happens that a foreign company takes some services from third party outside India and allocates such cost on subsidiaries or branch office situated in India. These services may be in the nature of

accounting software charges or internal control development charges etc. while issuing certificate in Form15CB. In such type of transactions, it is important to analyse whether reimbursement of expenses to a third party incurred by the Foreign Company on behalf of Indian company are taxable in India. If direct payment to third parties would be taxable in India, then the reimbursement for the same would be liable to tax in India and hence subject to TDS.

c. Reimbursement of expenses along with mark up

In such types of transactions, it is important that whether the full amount of reimbursement is taxable or only mark-up amount will be taxable. In the case of Coca Cola India Inc (7 SOT 224), the Delhi tribunal took a view that it is only the mark-up which should be taxable and not the whole amount including reimbursement. The similar view was taken by the DHC in the case of Industrial Engineering Products Private Limited (202 ITR 1014) and it was held that the reimbursement of expenses cannot be considered as the Assessee's income.

Application for Certificate of Lower Deduction of Tax (Section – 197)

Bare Provisions of Law

*1. Subject to rules made under sub-section (2A), where, in the case of **any income** of **any person** or sum payable to **any person**, income-tax is required to be deducted at the time of credit or, as the case may be, at the time of payment at the rates in force under the provisions of **sections 192, 193, 194, 194A, 194C, 194D, 194G, 194H, 194I, 194J, 194K, 194LA, 194LBB, 194LBC, 194M,194O and 195**, the Assessing Officer is satisfied that the total income of the recipient justifies the deduction of income-tax at any lower rates or no deduction of income-tax, as the case may be, the Assessing Officer shall, on an application made by the assessee in this behalf, given to him such certificate as may be appropriate. (emphasis added)*

2. Where any such certificate is given, the person responsible for paying the income shall, until such certificate is cancelled by the Assessing Officer, deduct income-tax at the rates specified in such certificate or deduct no tax, as the case may be.

2A. The Board may, having regard to the convenience of assessee' s and the

interests of revenue, by notification in the Official Gazette, make rules specifying the cases in which, and the circumstances under which, an application may be made for the grant of a certificate under sub-section (1) and the conditions subject to which such certificate may be granted and providing for all other matters connected therewith.

Analysis

Applicant - The recipient of payment (Resident or Non-Resident)

Form in which application to be made - FORM 13 **(Rule – 28)**

Where do we need to apply for certificate? – By making online application in Traces TDS Portal (tdscpc.gov.in)

Certificate issued to whom? – The certificate will be issued directly to the payer or person responsible to deduct the tax. However, the certificate of lower deduction can also be issued to the person making application for lower deduction of tax where person responsible to make payments likely to exceeds 100 and the details of such persons are not available at the time of making application with the person making such application. After receiving the certificate, the payer will deduct the tax at the rate specified in the certificate.

Rule – 28AA: Where the assessing officer is satisfied that existing and estimated tax liability of a person justifies the deduction of tax at lower rate or no deduction of tax the Assessing Officer shall issue a certificate for deduction of tax at such lower rate or no deduction of tax. This means the assessing officer is bound to issue the appropriate certificate.

Validity of Certificate: The Certificate will be valid for the period specified in the certificate unless the same certificate has been cancelled by the Assessing officer before the expiry of the specified period.

Lower Deduction or No Tax Deduction Certificate for Dividend Income (Rule 29):

The assessing officer shall issue certificate of lower or no deduction on being satisfied that the total income of the shareholder justifies lower or no deduction of tax. The certificate shall be issued directly to the principal officer of the company under the advice to the applicant shareholder.

Conditions

i. The shares in respect of which certificate is sought are in public company; &

ii. The shares are registered in the name of applicant and he is beneficial owner of shares; or registered in his name and held by him under trust wholly for charitable or religious purposes, and the dividends therefrom are exempt from tax under the provisions of sections 11 to 13.

The certificate for lower or no deduction shall be valid for period mentioned in certificate (not exceeding 3 years from the date of certificate, unless it is cancelled by the Assessing officer, at any time before the expiry of the specified period. An application for a fresh certificate may be made, if required, after the expiry of the period of validity of the earlier certificate.

The certificate shall be valid only for the person named therein and shall cease to be operative from the date of notice to the company of the transfer of any of the shares mentioned therein to another person, in respect of the shares so transferred.

Cancellation of Certificate

i. The certificate issued under section 197 cannot be cancelled without valid and cogent reasons. ***(Mckinsey and Co. Inc 324 ITR 367)***

ii. The principles of natural justice have to be complied and an opportunity of being heard should be provided to the assessee.

Judicial Precedents

i. At the time of issuing certificate, the officer is not required to conduct a detailed enquiry in respect of taxability of Income under the Income Tax Act. ***(National Petroleum Construction Company v/s DCIT 421 ITR 24 [2020])***

ii. The assessing officer is required to provide cogent reason for fixing tax rate and the order issuing certificate should contain reasons for arriving at a particular rate. ***(Bentley Nevada LLC [2019] 107 taxmann.com 440)***

Application for Lower Deduction of Withholding Tax (Section – 195)

The provision relating to making an application for lower deduction **certificate was inserted by the Income-tax (Fifth Amendment) Rules, 2021 which is applicable w.e.f. 1-4-2021.**

Rule 29BA. *(1) An application by a person for determination of appropriate proportion of sum chargeable in the case of non-resident recipient under sub-section (2) or sub-section (7) of section 195 shall be made in Form 15E electronically, -*

i. under digital signature; or

ii. through electronic verification code

(2) The Assessing Officer, in order to satisfy himself, shall examine whether the sum being paid or credited is chargeable to tax under the provisions of the Act read with the relevant Double Taxation Avoidance Agreement, if any, and if the sum is chargeable to tax, he shall proceed to determine the appropriate proportion of such sum chargeable to tax.

(3) The Assessing Officer shall examine the application and on being satisfied that the whole of such sum would not be the income chargeable in case of the recipient, may issue a certificate determining appropriate proportion of such sum chargeable under the provision of this Act, for the purposes of tax deduction under sub-section (1) of section 195.

(4) While examining the application, the Assessing Officer shall also take into consideration, following information in relation to the recipient: -

i. tax payable on estimated income of the previous year relevant to the assessment year.

ii. tax payable on the assessed or returned or estimated income, as the case may be, of preceding four previous years.

iii. existing liability under the Income-tax Act, 1961(43 of 1961) and Wealth-tax Act, 1957(27 of 1957);

iv. advance tax payment, 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).

(5) The certificate shall be valid only for the payment to the non-resident named therein and for such period of the previous year as may be specified in the certificate, unless it is cancelled by the Assessing Officer at any time before the expiry of the specified period.

(6) 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 or within three months before the expiry thereof.

(7) The Principal Director General of Income-tax (Systems) or the Director General of Income-tax (Systems), as the case may be, shall lay down procedures, formats and standards for ensuring secure capture and transmission of data and uploading of documents and the Principal Director General of Income-tax (Systems) or the Director General of Income-tax (Systems) shall also be responsible for evolving and implementing appropriate security, archival and retrieval policies in relation to the furnishing of Form No 15E and issuance of Certificate under sub-rule (3). (For Form 15E Refer Appendix)

There will be further effect of MLI (Multi Level Instrument) and SEP (Significance economic presence) while determining whether TDS is to be deducted or not or at what rate to be deducted. For this refer separate chapter on MLI and SEP. These are discussed in detail in other chapters of this book. For the sake of completeness, a brief discussion of these topics are given below:

Effect of MLI Provisions*

An important question which arises is, whether, due to applicability of MLI, is there any change in the regular provisions of issuing Form No. 15CA/CB certificate or whether Chartered Accountants have to look at the transactions with the provisions of MLI. The answer to this question is of course yes. In this segment, the author has tried to touch upon the relevant provisions of MLI which could broadly be required to be looked into while issuing Form No. 15CA/CB.

On 09.08.2019, Notification no. 57/2019 was issued by CBDT. The notable points, of which are as below:

(a) Whereas the Multilateral Convention to Implement Tax Treaty related Measures to Prevent Base Erosion and Profit Shifting (hereinafter referred to as the "the said Convention") was signed by India at Paris, France on the 7th day of June, 2017

(b) Whereas the said Convention entered into force on the 01st day of July, 2018, being the first day of month following expiration of three calendar months beginning on the date of deposit of the fifth instrument of ratification, in accordance with para 1 of Article 34 of the said Convention

(c) Whereas India had ratified the said Convention and had deposited the instrument of ratification along-with the list of Covered Tax

Agreements, reservations and notifications (hereinafter referred to as "India's Position under the said Convention") to the Depositary as in Article 39 of the said Convention, on the 25th day of June 2019.

(d) Whereas the date of entry into force of the said Convention for India is the 01st day of October 2019, being the first day of the month following the expiration of a period of three calendar months beginning on the 25th day of June 2019 being the date of deposit by India of the instrument of ratification, in accordance with para 2 of Article 34 of the said Convention.

(e) Whereas, the provisions of the said Convention shall have effect in India with respect to a Covered Tax Agreement in accordance with provisions of Article 35 of the said Convention; Now, therefore, in exercise of the powers conferred by sub-section (1) of section 90 of the Income-tax Act, 1961, the Central Government hereby notifies that the provisions of the said Convention shall be given effect to in the Union of India, in accordance with India's Position under the said Convention, as set out in the Annexure hereto.

[For further discussion refer to Chapter 9 of this book.]

Significant Economic Presence (SEP)

Explanation 2A inserted in clause (i) of sub-section (1) of Sec 9 by the Finance Act, 2020 which was earlier effective from 01.04.2021 i.e., applicable from financial year 2020-21 but proposed to defer for one year and now effective from 01.04.2022 i.e. applicable for the financial year 2021-22. In Explanation 2A it is said that significant economic presence of a non-resident in India shall constitute "business connection" in India and "significant economic presence" for this purpose, shall mean—

a. transaction in respect of any goods, services or property carried out by a non-resident in India including provision of download of data or software in India, if the aggregate of payments arising from such transaction or transactions during the previous year exceeds such amount as may be prescribed; or.

b. systematic and continuous soliciting of business activities or engaging in interaction with such number of users as may be prescribed, in India through digital means:

Provided that the transactions or activities shall constitute significant economic presence in India, whether or not,

(i) the agreement for such transactions or activities is entered in India; or

(ii) the non-resident has a residence or place of business in India; or

(iii) the non-resident renders services in India:

Provided further that only so much of income as is attributable to the transactions or activities referred to in clause (a) or clause (b) shall be deemed to accrue or arise in India.

While issuing Form 15CA/CB, this is very important aspect which should be looked into by the professionals very carefully because the provisions of this section may change the taxability of the transactions. Before applying this provision, the facts of the transactions should be analysed very carefully. Once it is established that the SEP of the recipient entity is in India, . the business connection of such entity is in India.

Once due to SEP, the business connection is established in India, the corresponding provisions in MLI and DTAA should be looked into and then the transaction should be taxed accordingly.

[For further discussion refer to Chapter 11 of this book.]

Chapter 7

Penalties, Interest and Consequences

Since a tax system is based on voluntary compliances by the taxpayers, it is said to be efficient and effective if the nationals cooperate with the Government by giving forth their honest and accurate self assessments. However, the willingness of taxpayers to pay taxes is linked to their trust in the institutions, the perceptions of corruption, as well as satisfaction with the public services. It is basically the pyscology of the human nature and other reasons many taxpayers default in complying with the requirements of law. This has adverse effect on the revenue which a Government needs for carrying out its duties, including welfare measures. Consequently, tax laws have incorporated both fiscal and criminal penalties for non-compliance depending on the factors leading to such non-compliance.

As mentioned earlier in this book, the concept of withholding tax on payments to non-residents has been introduced to protect the revenue base and at the same time encourage voluntary compliance of tax laws. As payer is the person who has first and complete information about income in the hands of non-residents and as non-residents are domiciled outside India, responsibility comes upon the taxpayers in India to deduct tax appropriately and pay to the Government.

To enforce compliance provisions in the form of fiscal penalty in the form of interest and refusal to grant expenditure in respect of such payments to non-residents have been built into the Act. Where an assessee has paid any sum chargeable to tax under the Income Tax Act to non-resident on which tax has been deducted or after deduction it has not been paid, then he may face any of the following consequences:

Section	Nature of Default	Consequences
40(a)(i) & (iii)	Failure to deduct the whole or any part of tax	Disallowance of expense deduction
201(1A)	Failure to deduct, pay or pay after deducting	Payer will be considered as assessee in default and simple interest @ 1% or 1.5% for month or

Section	Nature of Default	Consequences
		every part of the month will be leived
221	Default in making payment of tax in prescribed time	Simple interest @ 1% and penalty up to an amount equivalent to 100% of the tax arrears.
271C	Failure to deduct whole or any part of tax	Penalty equal to 100% of whole or part of tax, as applicable
271-I	Failure to furnish information or furnishing inaccurate under Section 195	Penalty of Rs. 1 Lakh
272A	Failure to File TDS Return	Penalty of Rs. 100/- per day (maximum up to the tax deductible) for failure to file the TDS return within time.
276B	Failure to pay tax deducted	Rigorous imprisonment for 3 Months to 7 Years along with fine.

Under the Act, responsibilities have been given to Chartered Accountants to file information and certificates in relation to transactions undertaken by taxpayers, such as Form No. 3CEB, Form No.15CA, 15CB etc. Penalty u/s 271J amounting to Rs.10,000 for each report or certificate, may also be levied upon the chartered accountant on furnishing of incorrect information in reports or certificates issued by him. While introducing this provision in the Finance Bill, 2017 the Memorandum to the Bill explained as follows:

> *"The thrust of the Government in recent past is on voluntary compliance. Certification of various reports and certificates by a qualified professional has been provided in the Act to ensure that the information furnished by an assessee under the provisions of the Act is correct. Various provisions exist under the Act to penalise the defaulting assessee in case of furnishing incorrect information. However, there exist no penal provision for levy of penalty for*

furnishing incorrect information by the person who is responsible for certifying the same. In order to ensure that the person furnishing report or certificate undertakes due diligence before making such certification, it is proposed to insert a new section 271J so as to provide that if an accountant or a merchant banker or a registered valuer, furnishes incorrect information in a report or certificate under any provisions of the Act or the rules made thereunder, the Assessing Officer or the Commissioner (Appeals) may direct him to pay a sum of ten thousand rupees for each such report or certificate by way of penalty."

It is not the amount which matters but the impression which goes with the penalty is important, it is therefore necessary that CAs must be doubly sure about the reporting.

Section 201 – Consequence of failure to deduct or pay

This section was introduced for the first time by the Finance Act, 1966 and has undergone several amendments thereafter, the last by the Finance Act 2008.

The section provides for consequences for failure to deduct or pay tax. It reads as follows:

1.1 Any person, including the principal officer of the company

(a) Who is required to deduct any sum in accordance with the provisions of this act or

(b) Referred to in sub-section 1(A) of section 192, being an employer

Fails to deduct or fails to deposit the whole or any part of tax, then such person shall be deemed to be an assessee in default in respect of such tax.

1.2 In continuation to above, such person shall not be deemed to be an assessee in default in respect of such tax if the payee:

(a) Furnishes the return u/s 139, and

(b) Has included the such sum in computing total income in such return, and

(c) Has paid the tax due on income declared in such return of income

and the person furnishes a certificate to this effect from an accountant in such form as may be prescribed.

1.3 If such person/principal officer of company dos not deduct the tax or after deducting fails to pay the tax as required, he or it shall be liable to pay simple interest –

(a) At one percent for every month or part of month from the date when such tax was deductible to the date on which such tax is deducted

(b) At one and one-half percent for every month or part of month such tax was deducted to the date on which such tax is actually paid.

such interest shall be paid before furnishing the statement in accordance with the provisions of sub-section (3) of section 200.

Provided that in case any person, including the principal officer of a company is not deemed to be an assessee in default, the interest shall be payable from the date on which such tax was deductible to the date of furnishing of return of income by such payee.

Provided further that where an order is made by the Assessing Officer for the default, the interest shall be paid by the person in accordance with such order.

1.4 Where the tax has not been paid as aforesaid after it is deducted, the amount of the tax together with the amount of simple interest thereon referred to in sub-section (1A) shall be a charge upon all the assets of the person, or the company, as the case may be.

1.5 No order shall be made by Assessing Officer deeming a person to be an assessee in default for failure to deduct the tax from a person resident in India, at any time after the expiry of seven years from the end of the financial year in which payment is made or credit is given or two years from the end of the financial year in which the correction statement is delivered under the proviso to sub-section (3) of section 200, whichever is later

1.6 The provisions of sub-clause (ii) of sub-section (3) of section 153 and

of Explanation 1 to section 153 shall, so far as may, apply to the time limit prescribed above.

1.7 The term assessee in default means any assessee for whom any tax or any other sum is payable under the Act and he fails to pay the same.

Section 204 – Meaning of "person responsible for paying"

1.1 In case of payments of income chargeable under the head "Salaries", other than payments by the central government or the State Government – the employer himself or, if the employer is a company, the company itself, including the principal officer thereof.

1.2 In case of payments of income chargeable under the head "Interest on Securities", other than payments by or on behalf of the Central Government or the Government of a State, the local authority, corporation or company, including the principal officer thereof.

1.3 In case of any sum payable to a NRI, being any sum representing consideration for the transfer by him of any foreign exchange asset, which is not a short-term capital asset, the authorised person shall be responsible for remitting such sum to the non-resident Indian or for crediting such sum to his Non-resident (External) Account maintained in accordance with the Foreign Exchange Management Act, 1999 (42 of 1999), and any rules made thereunder.

1.4 In case of furnishing of information relating to payment to a non-resident, not being a company, or to a foreign company, of any sum, whether or not chargeable under the provisions of this Act, the payer himself, or, if the payer is a company, the company itself including the principal officer thereof

1.5 In case of credit, or, as the case may be, payment of any other sum chargeable under the provisions of this Act, the payer himself, or, if the payer is a company, the company itself including the principal officer thereof;

1.6 In case of credit, or as the case may be, payment of any sum chargeable under the provisions of this Act made by or on behalf of the Central Government or the Government of a State, the drawing

and disbursing officer or any other person, by whatever name called, responsible for crediting, or as the case may be, paying such sum;

1.7 In case of a person not resident in India, the person himself or any person authorised by such person or the agent of such person in India including any person treated as an agent under section 163,

(i) assist in understanding the respective responsibilities of the taxpayer enterprise and the accountant;

(ii) guide the accountant as to the nature and scope of information to be obtained by him from the taxpayer enterprise to enable him to conduct the examination;

(iii) provide guidance on the verification procedures to be adopted by the accountant for giving the report and the prescribed particulars in the annexure thereto; and

(iv) explain the circumstances where a disclosure or qualification or disclaimer may be required from the accountant while giving his report.

Apart from the fiscal penalties the Act has provisions for prosecution of the default of non-payment of tax withheld. The provision reads as follows:

"*Failure to pay tax to the credit of Central Government under Chapter XII-D or XVII-B.*

276B. *If a person fails to pay to the credit of the Central Government,—*

(a) the tax deducted at source by him as required by or under the provisions of Chapter XVII-B; or

(b) the tax payable by him, as required by or under—

(i) sub-section (2) of section 115-O; or

(ii) the proviso to section 194B,

he shall be punishable with rigorous imprisonment for a term which shall not be less than three months but which may extend to seven years and with fine."

Chapter 8

Rules Relating to Withholding of Tax

Rule 26 – Rate of exchange for the purpose of deduction of tax at source on income payable in foreign currency

For the purpose of deduction of tax at source on any income payable in foreign currency, the rate of exchange for the calculation of the value in rupees of such income payable to an assessee outside India shall be the telegraphic transfer buying rate (TTBR) of such currency as on the date on which the tax is required to be deducted at source under the provisions of Chapter XVIIB by the person responsible for paying such income.

For the purposes of this rule, *"telegraphic transfer buying rate*", in relation to a foreign currency, means the rate or rates of exchange adopted by the State Bank of India constituted under the State Bank of India Act, 1955 (23 of 1955), for buying such currency, having regard to the guidelines specified from time to time by the Reserve Bank of India for buying such currency, where such currency is made available to that bank through a telegraphic transfer.

Rule 37BB – Furnishing of information for payment to a non-resident, not being a company, or to a foreign company

The person responsible for paying to a non-resident, not being a company, or to a foreign company, any sum chargeable under the provisions of the Act, shall furnish the following, namely:

- the information in Part A of Form No.15CA, if the amount of payment or the aggregate of such payments, as the case may be, made during the financial year does not exceed five lakh rupees
- for payments other than the payments referred in above, the information,—
  - (a) in Part B of Form No.15CA after obtaining,—
    - (I) a certificate from the Assessing Officer under section 197; or

(II) an order from the Assessing Officer under sub-section (2) or sub-section (3) of section 195;

(b) in Part C of Form No.15CA after obtaining a certificate in Form No. 15CB from an accountant as defined in the Explanation below sub-section (2) of section 288.

The person responsible for paying to a non-resident, not being a company, or to a foreign company, any sum which is not chargeable under the provisions of the Act, shall furnish the information in Part D of Form No.15CA

Further no information is required to be furnished for any sum which is not chargeable under the provisions of the Act, if,—

(i) 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

(ii) the remittance is of the nature specified in column (3) of the specified list (Attached as an appendix)

The information in Form No. 15CA shall be furnished,—

(i) electronically under digital signature in accordance with the procedures, formats and standards specified by the Principal Director General of Income-tax (Systems) and thereafter printout of the said form shall be submitted to the authorised dealer, prior to remitting the payment; or

(ii) electronically in accordance with the procedures, formats and standards specified by the Principal Director General of Income-tax (Systems) and thereafter signed printout of the said form shall be submitted to the authorised dealer, prior to remitting the payment.

The certificate in Form No. 15CB shall be furnished and verified electronically in accordance with the procedures, formats and standards specified by the Principal Director-General of Income-tax (Systems)

The authorised dealer shall furnish a quarterly statement for each quarter of the financial year in Form No.15CC to the Principal Director General of Income-tax (Systems) or the person authorised by the Principal Director General of Income-tax (Systems) electronically under digital signature within fifteen days from the end of the quarter of the financial year to which such

statement relates in accordance with the procedures, formats and standards specified by the Principal Director General of Income-tax (Systems).

Rule 37BC – Relaxation from deduction of tax at higher rate under section 206AA

In the case of a non-resident, not being a company, or a foreign company (hereafter referred to as 'deductee') and not having permanent account number the provisions of section 206AA shall not apply in respect of payments in the nature of interest, royalty, fees for technical services, dividend and payments on transfer of any capital asset, if the deductee furnishes the details and the documents specified below to the deductor.

The deductee referred to above, shall in respect of payments specified therein, furnish the following details and documents to the deductor, namely:—

(i) name, e-mail id, contact number;

(ii) address in the country or specified territory outside India of which the deductee is a resident;

(iii) a certificate of his being resident in any country or specified territory outside India from the Government of that country or specified territory if the law of that country or specified territory provides for issuance of such certificate;

(iv) Tax Identification Number of the deductee in the country or specified territory of his residence and in case no such number is available, then a unique number on the basis of which the deductee is identified by the Government of that country or the specified territory of which he claims to be a resident.]

The provisions of section 206AA shall not apply in respect of payments made to a person being a non-resident, not being a company, or a foreign company if the provisions of section 139A do not apply to such person on account of rule 114AAB.

Rule 115 – Rate of exchange for conversion into rupees of income expressed in foreign currency

The rate of exchange for the calculation of the value in rupees of any income accruing or arising or deemed to accrue or arise to the assessee in foreign currency or received or deemed to be received by him or on his behalf in

foreign currency shall be the telegraphic transfer buying rate of such currency as on the specified date.

"*specified date" means—*

(a) in respect of income chargeable under the head "Salaries", the last day of the month immediately preceding the month in which the salary is due, or is paid in advance or in arrears;

(b) in respect of income by way of "interest on securities", the last day of the month immediately preceding the month in which the income is due;

(c) in respect of income chargeable under the heads "Income from house property", "Profits and gains of business or profession" and "Income from other sources" (not being income by way of dividends and "Interest on securities", the last day of the previous year of the assessee;

(d) in respect of income chargeable under the head "Profits and gains of business or profession" in the case of a non-resident engaged in the business of operation of ships, the last day of the month immediately preceding the month in which such income is deemed to accrue or arise in India;

(e) in respect of income by way of dividends, the last day of the month immediately preceding the month in which the dividend is declared, distributed or paid by the company;

(f) in respect of income chargeable under the head "Capital gains", the last day of the month immediately preceding the month in which the capital asset is transferred

Provided that the specified date, in respect of income referred to in sub-clauses (a) to (f) payable in foreign currency and from which tax has been deducted at source under rule 26, shall be the date on which the tax was required to be deducted] under the provisions of the Chapter XVII-B.

2) Nothing contained in sub-rule (1) shall apply in respect of income referred to in clause (c) of the Explanation to sub-rule (1) where such income is received in, or brought into India by the assessee or on his behalf before the specified date in accordance with the provisions of the Foreign Exchange Regulation Act, 1973 (46 of 1973).]

Chapter 9

Impact of MLI to Section 195

Introduction

Base Erosion and Profit Shifting ('BEPS') refers to tax avoidance techniques used by Multi-National Companies ('MNC') to artificially shift profits to lower/nil tax jurisdictions. With an increase in service portion of economy and rise in the value of Intangibles, there has been a substantial increase in such practices. The current set of rules/laws of various countries and their bilateral treaties, are based on an system designed for manufacturing and physical bases. Technological changes have made it easier to shift bases to low/nil tax jurisdiction thereby leading to depletion the tax base of a country.

Therefore, the Organization for Economic Co-operation and Development ('OECD') worked on a 15 points BEPS Action plans to curb MNCs tax avoidance strategies and aggressive tax planning. These action plans could have been brought by changes in various bilateral treaties between various countries leading to changes in more than 3,000 treaties. However, considering the time and resources to be taken to change all those treaties, BEPS Action plan 15 implemented a radical reform in Tax treaties which would change many treaties by one stroke – i.e, a Multilateral Instrument ('MLI')[1] The MLI offers concrete solutions for governments to close the gaps in existing international tax rules by transposing results from the OECD/G20 BEPS Project into bilateral tax treaties worldwide. The MLI modifies the application of thousands of bilateral tax treaties concluded to eliminate double taxation. It also implements agreed minimum standards to counter treaty abuse and to improve dispute resolution mechanisms while providing flexibility to accommodate specific tax treaty policies.

Significant aspects of MLI

1) The MLI would not amend a Tax Treaty. It would be applied alongside the existing treaties, modifying the application of tax treaties in order to implement the BEPS measures.

2) Existing treaties for which, with respect to which each country has made a notification for application of the MLI are called as Covered Tax Agreements ("CTA")

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[1] https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm

3) Countries have the ability to opt out completely or partially of certain provisions with respect to all or with respect to certain CTAs.

4) Some of the clauses have alternatives, which can be chosen by the countries.

5) There are certain minimum standards which signatory countries needs to adhere to. However, alternative ways to achieve minimum standard have also been provided.

Basics of Application of MLI into Bilateral Treaties

Although the current chapter is restricted only to Impact of MLI on Section 195 of Income-tax Act, 1961 ('the IT Act') , some basic application of MLI into Bilateral treaties would be required to be understood before reading it for the purpose of Section 195.

An existing bilateral treaty shall be considered as a CTA, only if the following conditions are satisfied –

1) **Both the countries are signatories to MLI.** For e.g like India is a signatory to MLI and has notified USA in the list of tax treaties which are to be modified by MLI, USA is not a signatory to MLI and therefore MLI will not impact India-USA tax treaty

2) **Both the countries have ratified the MLI and deposited the ratified copy of MLI with the Depository**.

3) **Both the countries have listed each other in the list of tax treaties which are to be modified by MLI.** For e.g. India and China are signatories to MLI, but both have not notified each other in the list of their tax treaties which are modified by MLI. Therefore, the India-China Tax Treaty will not be impacted by MLI. Also, India has notified its treaty with Mauritius which are to be read with MLI, but Mauritius has not notified India. Therefore, the India-Mauritius Tax Treaty will not be impacted by MLI.

Important Dates for MLI Application

Entry into force – Countries which have signed the MLI , need to ratify the same as per their domestic law requirement. Post ratification by OECD, MLI can enter into force for a specific treaty, three clear calendar months after ratification by both the countries.

Entry into effect – Once the MLI entered into force between the two countries, the MLI enters into effect as follows:

1) **For Withholding taxes -** Taxable period that begins on or after the later date of entry into force for both the countries.

2) **For all other taxes -** taxable periods beginning on or after 6 months after the later date of entry into force of the MLI for the both countries.

Keeping a track of which country's treaties have been impacted by MLI could be difficult task. Therefore, OECD has released a MLI matching Database[2] which can be used to check the status as on a particular date. An overview of step by step approach for application of MLI is available at https://www.oecd.org/tax/treaties/step-by-step-tool-on-the-application-of-the-MLI.pdf

India Status

India deposited the ratified document along with a list of its Reservations and Options on 25th June, 2019. **Article 34(2) of the MLI provides that the MLI shall enter into force for a signatory on the first day of the month following the expiration of a period of three calendar months from the date of deposit of the ratified instrument. Therefore, in the Indian context, the MLI entered into force on 1st October, 2019.** On 9th August 2019, the MLI was Notified by the Indian Ministry of Finance as per the provisions of Section 90(1) the IT Act.

Further, Article 35(1)(a) of the MLI provides that the MLI shall come into effect in respect of withholding taxes on the first day of the calendar year (or financial year in the case of India) that begins after the latest date on which the MLI enters into force for each of the Contracting Jurisdictions to the CTA. **As the MLI has entered into force for India in October, 2019, it has come into effect and would result in the modification to the DTAA from 1st April, 2020** where the MLI has entered into force for the other signatories to the DTAA prior to 1st April, 2020 as well. In the Indian context, Synthesized texts, of MLI read with DTAA has been hosted on Indian Income Tax website. These Synthesized texts can be used for understanding of the applicability of MLI for a particular treaty. However, it is to be noted that these are just for guidance purpose and for all legal purposes, the provisions of the MLI needs to be read alongside CTA. As of 18-08-2022, India has synthesized texts in respect of tax treaties with the following jurisdictions:

S.No.	Country	S.No.	Country	S.No.	Country
1	Australia	11	Hungary	21	Poland
2	Austria	12	Iceland	22	Portuguese Republic

[2] https://www.oecd.org/tax/treaties/mli-matching-database.htm

S.No.	Country	S.No.	Country	S.No.	Country
3	Belgium	13	Ireland	23	Russia
4	Canada	14	Japan	24	Serbia
5	Cyprus	15	Latvia	25	Singapore
6	Czech Republic	16	Lithuania	26	Slovak Republic
7	Estonia	17	Luxembourg	27	Slovenia
8	Finland	18	Malta	28	UAE
9	France	19	Netherlands	29	UK
10	Georgia	20	Norway	30	Ukraine

Application of MLI to Indian withholding tax cases – u/s 195

Impact of following important changes would need to considered by Indian remitter while deducting taxes under Sec 195 of the IT Act -

1) Principal Purpose Test ('PPT')–

Article 7 of the MLI provides that 'Notwithstanding any provisions of a Covered Tax Agreement, a benefit under the Covered Tax Agreement **shall not be granted in respect of an item of income or capital if it is reasonable to conclude**, having regard to all relevant facts and circumstances, that obtaining that benefit was **one** of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, **unless** it is established that granting that benefit in these circumstances would be in accordance with the **object and purpose** of the relevant provisions of the Covered Tax Agreement.'

The article 7(1) to 7(5) of MLI, attempts to deny treaty benefit, in case it is reasonable to conclude that obtaining the said benefit was one of the principal purposes of the arrangement and transaction. Therefore, the payer, before making a payment to non-resident would need to ensure that the non-resident satisfies the PPT and then only treaty benefit, if any, can be allowed for the said transaction. Attention is also drawn to Section 163(1)(c) which makes the payer an agent of non-resident recipient.

As deduction u/s 195 mostly results in the final tax amount having to be paid by non-resident, the responsibility of ascertaining the PPT becomes more important and hence the following pointers needs to be kept in mind –

a) A declaration can be obtained from the recipient that obtaining the benefit under the DTAA is not one of the principal purposes of the arrangement or the transaction.

b) The professional, while issuing form 15CB, is advised to use professional skepticism even after receipt of such declaration from the recipient. Though it is impossible to fairly judge the authenticity of transaction at the time of payment, a professional should definitely question the reason of the transaction to be routed through such jurisdiction and document such reasoning.

c) It can be said that payer can approach to tax authorities to decide on the issue by using the provisions of section 195(2) or Section 197. However, it is not practically possible every time as the process normally is time-consuming and may lead to delays.

d) One view is that if the payer is not comfortable with respect to a certain set of facts in the transaction, it is advisable to deduct Tax u/s 195 without giving treaty benefits as the non-resident can always file an Income Tax return and claim refund of additional Tax deducted, if any. However, in manycases , tax deduction is grossed up and, in such cases, it becomes an additional cost for the Payer.

Important Treaty countries where PPT has been inserted due to MLI are as follows :

a) Netherlands

b) Singapore

c) United Kingdom

d) Japan

It is to be noted that even before MLI, some of the Indian treaties had inserted a Limitation of Benefit Clause (LOB) which restricted Treaty benefits in cases where certain thresholds are not met. Couple of examples are India-USA treaties and India-Mauritius Treaty.

2) Avoidance of Permanent Establishment "PE"

MLI has extended scope of definition of PE in the following manner:

a) **Article 12 of MLI – Agency PE-** A dependent agent of a non-resident, who was not used to conclude contract on behalf of non-resident, was not considered as PE of non-resident. However, post MLI, even if such agent habitually plays a principal role in conclusion of contract, it may be considered as PE of non-resident. Finance Act, 2018 has also amended the term business connection, wherein the dependent agent who habitually concludes contract or habitually plays the principal role leading to conclusion of contract on behalf of non-resident can lead to its business connection in India

b) **Article 13 of MLI – Preparatory & Auxiliary Activities -** In most DTAAs, the term PEs is defined not to include the work which were traditionally considered as preparatory. For example – having facility just for the purpose of storage, delivery, display, processing by other enterprise, collecting of information etc. However due to technological advances, some of these activities have become integral part of business of the companies and therefore can't just by their standalone nature considered as preparatory. Therefore, exemption from the constitution of a PE through a fixed place of business would not be available, if the activities along with activities are not specifically preparatory or auxiliary in nature considering the nature foreign company.

c) **Article 13 of MLI - Anti-Fragmentation** – MNCs having multiple foreign companies use to divide various activities among themselves so as to none of them fall into the purview of PE being established in the source country. Also, sometimes a foreign company resorts to dividing its operations into various different streams in the source country so that each one of them/some of them do not form a PE. However, post MLI, if the various activities provided by one enterprise or by closely related enterprises constitute complimentary functions that are part of a cohesive business operations, the overall activities resulting from the combination of these activities would be considered to check the threshold of PE.

d) **Article 14 of MLI – Splitting up of contracts** - For construction or installation of PE, the number of days threshold that needs to be met will include connected activities undertaken by closely-related enterprises.

3) Dividends

Article 8(1) of the MLI provides that, 'Provisions of a Covered Tax Agreement that exempt dividends paid by a company which is a resident of a Contracting Jurisdiction from tax or that **limit the rate at which such dividends may be taxed**, provided that the beneficial owner or the recipient is a company which is a resident of the other Contracting Jurisdiction and which owns, holds or controls more than a certain amount of the capital, shares, stock, voting power, voting rights or similar ownership interests of the company paying the dividend, shall apply only if the ownership conditions described in those provisions are met **throughout a 365-day period** that includes the day of the payment of the dividends....'

Normally in a DTAA between two countries there is cap on tax (15%-25%) to be deducted by the source country on the payments with respect to dividend. However generally that cap is lower (5%-15%) in in case of an investor who has shareholding

% higher than a given threshold. This is generally done to increase Foreign direct investment in the source country as direct investment is more permanent in nature which helps in growth of the overall economy of source country.

However, such objective threshold, is prone to abuse, because a non-resident may try to take benefit of the concessional rate by meeting the threshold requirement only for the period in which dividend is received. The BEPS Action 6 had identified such misuse, and prescribed a solution to it by prescribing a threshold period (365 days) for which shareholding is required to be held.

It is to be noted that the above provision of MLI is an optional provision and will apply to only treaties where both the countries agree to applicability of Article 8 and also agree on the manner in which it is applicable. As on 18-08-2022, in the following treaties impact of such threshold period can be seen –

Country	Condition for minimum shareholding	Rate if condition is met	Rate if condition not met
Canada	10%	15%	25%
Denmark	15%	15%	25%
Serbia	25%	5%	15%
Slovak Republic	25%	15%	25%
Slovenia	10%	5%	15%

It is interesting to note that the time period when such 365 days is to be met has not been prescribed i.e. it is not imperative that such 365 day limit is met at the time of declaration of dividend, and the future dates could also be counted for the same. That means even if a payer takes an assurance from payee that such shareholding will be maintained for at least 365 days, it may not be possible to deduct lower taxes as there is no guarantee to such assurance. In such a case, it is advisable that payer deducts tax based on higher rate, if applicable. The recipient company can claim benefit of lower taxes while filing its return in India and claim the tax refund.

Important consideration/Steps to be taken by Payer for

1) Whether the DTAA is modified by MLI (OECD Tracker can be used for the same)

2) If PPT clause is applicable – Check whether conditions related to PPT are satisfied. Obtain declaration from the Payee.

3) Check if any of the PE threshold are crossed and profits needs to be attributed to such PE in India. Obtain declaration in case such threshold is not crossed.

4) In case of dividend check whether holding period, condition is met at the time of remitting the amount.

5) It is suggested that the following line items be inserted in No-Permanent Establishment certificate –

   a. I/We, am/are eligible to claim benefits under the said DTAA and meet the requirements of the DTAA under Principal Purpose Test, Limitation of Benefits Clause and any other anti-abuse provision under the DTAA

   b. I/We, am/are not having any dependent agent in India who

      i. has and habitually exercises in India, an authority to conclude contracts on behalf of me/us; or

      ii. habitually concludes contracts; or

      iii. habitually plays the principal role leading to conclusion of contracts by me/us; or

      iv. has no authority, but habitually maintains in India a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of me/us; or

      v. habitually secures orders in India, mainly or wholly for the company or for the any other company or organizationunder same common control as that of mine/ours

   c. I/We, am/are holding the shares for more than ____ number of days and are entitled to lower withholding as per India-XXXXX DTAA

Conclusion

MLI has added additional layer of complexity into International Transactions. Apart from understanding the Income Tax act, DTAA between two more countries, MLI application will also need to be checked. This chapter has been an attempt to impart basic knowledge about the implications of MLI while deducting tax u/s 195. Payers and Chartered Accountants issuing 15CB certificates are advised to understand MLI in depth before finalizing any transaction.

Chapter 10

Form 15CA AND FORM 15CB

FORM 15CA

Legislative Framework

The Finance Act, 2008 inserted sub-section (6) in section 195 to furnish prescribed information to the CBDT. Further, Rule 37BB was inserted by the Income Tax (Seventh Amendment) Rules, 2009 to lay down the procedures for issuance of Forms 15CA and 15CB.

Forms 15CA and 15CB were introduced in this regard and the procedure was that the person making the remittance was required to obtain the certificate of a Chartered Accountant in Form No. 15CB, submit Form No. 15CA online based on the same, and finally submit both these documents to his bankers to complete the transaction and whenever a person is making remittance to the Non-Resident outside india documents are to be filed for such remittance in compliance with the above rule .

Objective

The object of this chapter is to provide guidance to accountants in discharging their responsibilities in issuance of Form No. 15CA and Form No.15CB. It intends to:

(i) assist in understanding the respective responsibilities of the taxpayer enterprise and the accountant;

(ii) guide the accountant as to the nature and scope of information to be obtained by him from the taxpayer enterprise to enable him to issue the forms; and

(iii) provide guidance on the verification procedures to be adopted by the accountant for giving the report and the prescribed particulars in the annexure thereto.

Documents/Information required for filing form 15CA:

- **Details of Remitter**
  - Remitter's Name
  - Remitter's Address

- Remitter's PAN Number
- Principal Place of Business of the Remitter
- E-Mail Address and Phone No. Of Remitter
- Status of the Remitter (Firm/Company/Other)

❖ **Details of Remittee**

- Name and Status of the Remittee
- Address of the Remittee
- Principal Place of Business
- Country of the Remittee

❖ **Details of the Remittance**

- Country to Which Remittance Is Made
- Currency in Which Remittance Is Made
- Amount of Remittance in Indian Currency
- Proposed Date of Remittance

❖ Nature of Remittance as Per Agreement

❖ Bank Details of the Remitter

- Name of Bank of the Remitter
- Name of Branch of the Bank
- BSR Code of the Bank

❖ Others

- Father's Name of the person signing
- Designation of the person signing

Procedure of filing form 15CA

To file the "Form 15CA", the user should hold valid PAN/TAN and should be registered in e-Filing. If not already registered, user should go to 'Register Yourself', Select 'User Type' and complete the registration process. Form No. 15CA has 4 Parts:

Part of Form No. 15CA Required	Applicable to
Part A	If the remittance amount, is chargeable to tax under the provisions of Income-tax Act,1961 and the remittance or the aggregate of such remittance as the case may be, does not exceed 5 lakhs rupees during the financial year.
Part B	If the remittance amount, is chargeable to tax under the provisions of Income-tax Act,1961 and the remittance or the aggregate of such remittance as the case may be exceeds 5 lakh rupees during the Financial year and an order/ certificate u/s 195(2) 195(3)/197 has been obtained from the assessing officer.
Part C	Where the remittance is chargeable to tax under the provisions of the Income-tax Act,1961 and the remittance or the aggregate of such remittance as the case may be exceeds five lakh and a certificate in form No. 15CB from an accountant as defined in the Explanation below of sub section (2)of section 288 has been obtained.
Part D	If the remittance is not chargeable to tax as per provisions of the Act [other than the remittance where no RBI approval is required as per Schedule III of the Foreign Exchange (Current Account Transaction) Rules, 2000; and of the nature specified in column (3) of the specified list appended to notification].

Steps for Filing Form 15CA (Offline/Bulk Mode):

Step – 1: Login to e-Filing portal. Navigate to "e-File" menu and select File Form 15CA under File Forms sub-menu

Step – 2: On selection of Form 15CA, PAN/TAN of Assessee is auto populated. Provide Financial Year, Filing Type and Submission Mode "Offline/Bulk".

Step – 3: Download the Form 15CA Offline Utility. Alternatively, the utility can also be downloaded from "Downloads" section of the Homepage under Income Tax Forms page.

Step – 4: Prepare individual XML's for Remitter, Remittee and CA (only for Part-C) combination. Zip single/multiple XML's.

In case of Part-C, the taxpayer has to import XML of Form 15CB submitted by the CA. The submitted Form 15CB XML can be downloaded from View e-Filed Forms functionality post login.

Step – 5: Upload the zip file and submit using prescribed modes of e-verification. A Token Number is generated.

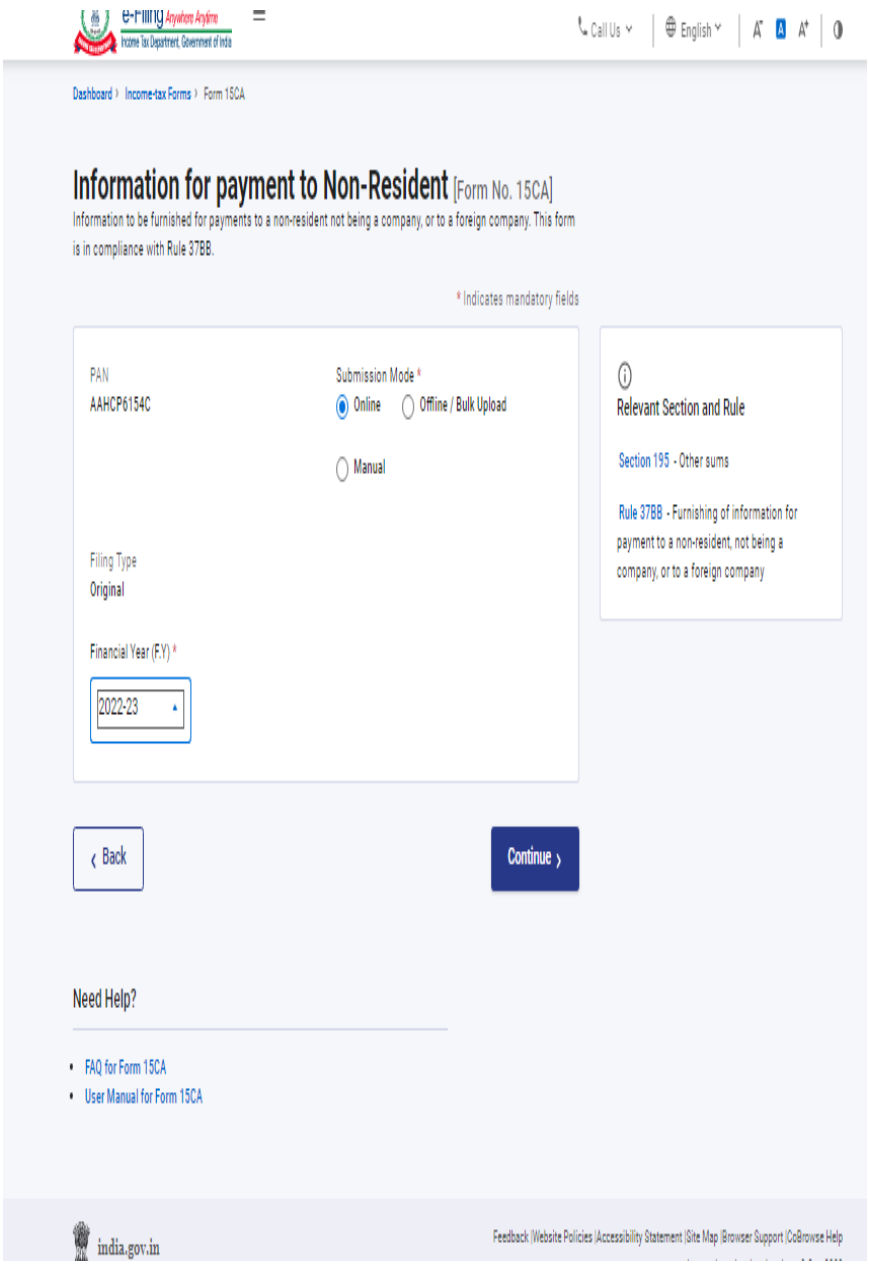
Step – 6: Login to e-Filing portal. Navigate to "e-File" menu and select View Form 15CA Offline/Bulk menu under View Income Tax Forms sub-menu.

Step- 7: The status of each individual XML under the Token Number will be shown as a Success or Failure once the processing is completed. In case an XML is a Success, an Acknowledgement Number is generated for each Form 15CA. Downloadable PDF of Form 15CA will be made available in view filed forms. A valid acknowledgement is also generated for submission of 15CA/CB.

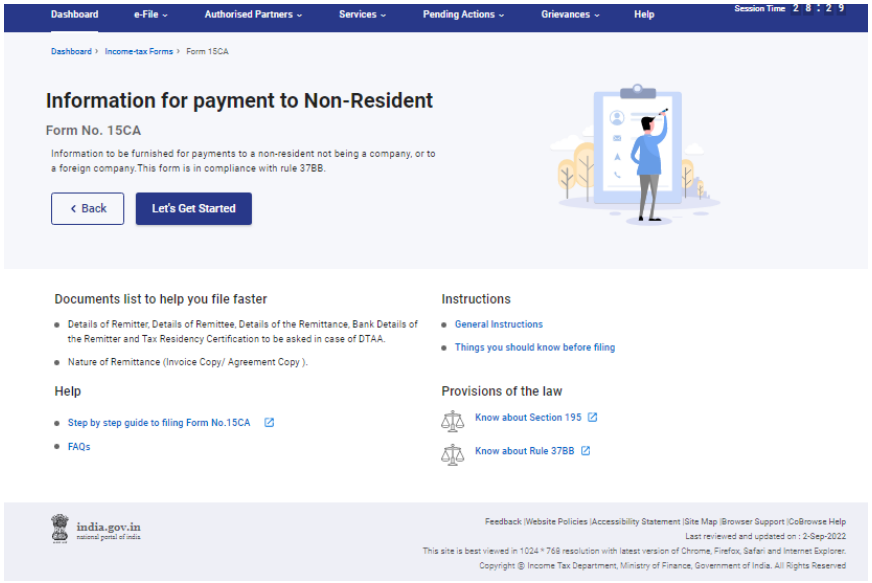
Step 8: In case of a Failure, no Acknowledgement Number will be generated and reasons for failure will be shown. Re-upload corrected XML file with corrected validations/data after considering reasons for failure. In this case the failed XML can be again zipped and uploaded. Taxpayers are also provided an export option to download the ARN number, processing status, XML file name to identify any failed XML's. Note: Only one Form No. 15CB Acknowledgement Receipt Number (ARN) can be used for filing one Form No. 15C

Steps for Filing Form 15CA (Online Mode):

Step – 1:



Step – 2:


Dashboard
e-File
Authorised Partners
Services
Pending Actions
Grievances
Help
Session Time 2 8 : 2 9
Dashboard > Income-tax Forms > Form 15CA
Information for payment to Non-Resident
Form No. 15CA
Information to be furnished for payments to a non-resident not being a company, or to a foreign company.This form is in compliance with rule 37BB.
Back
Let's Get Started
Documents list to help you file faster
Details of Remitter, Details of Remittee, Details of the Remittance, Bank Details of the Remitter and Tax Residency Certification to be asked in case of DTAA.
Nature of Remittance (Invoice Copy/ Agreement Copy).
Help
Step by step guide to filing Form No.15CA
FAQs
Instructions
General Instructions
Things you should know before filing
Provisions of the law
Know about Section 195
Know about Rule 37BB
india.gov.in
national portal of india
Feedback |Website Policies |Accessibility Statement |Site Map |Browser Support |CoBrowse Help
Last reviewed and updated on : 2-Sep-2022
This site is best viewed in 1024 * 768 resolution with latest version of Chrome, Firefox, Safari and Internet Explorer.
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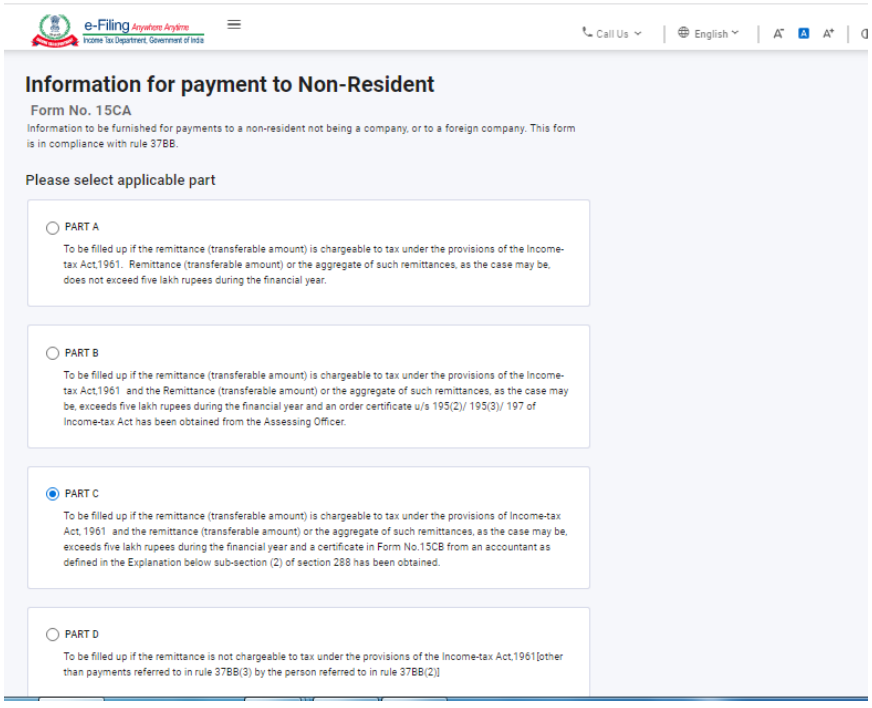
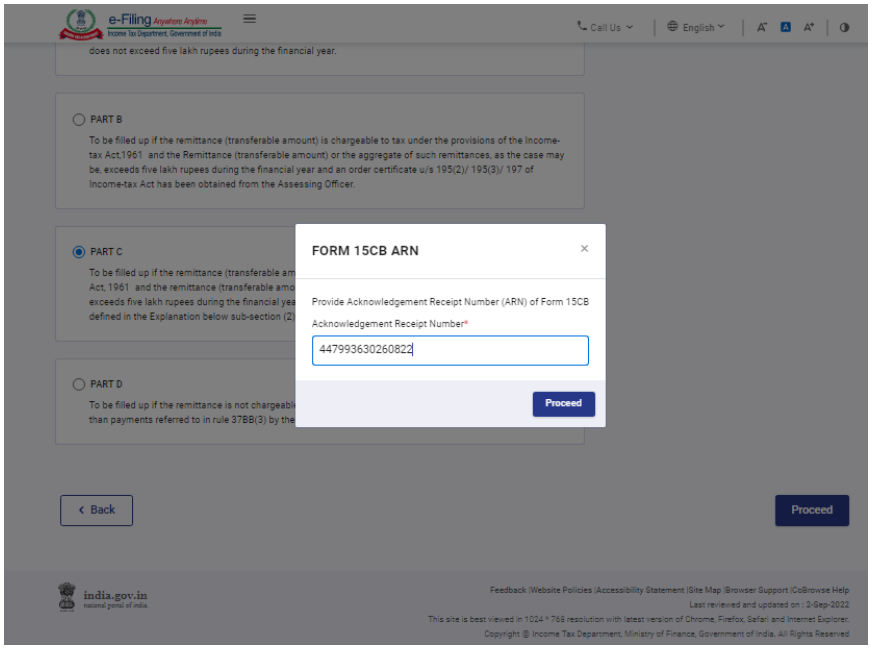
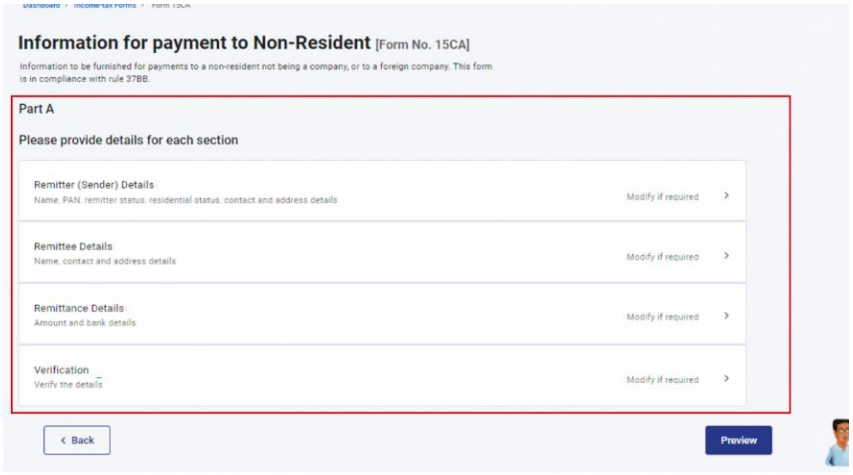
Step – 3:


e-Filing Anywhere Anytime
Income Tax Department, Government of India
Call Us
English
Information for payment to Non-Resident
Form No. 15CA
Information to be furnished for payments to a non-resident not being a company, or to a foreign company. This form is in compliance with rule 37BB.
Please select applicable part
PART A
To be filled up if the remittance (transferable amount) is chargeable to tax under the provisions of the Income-tax Act,1961. Remittance (transferable amount) or the aggregate of such remittances, as the case may be, does not exceed five lakh rupees during the financial year.
PART B
To be filled up if the remittance (transferable amount) is chargeable to tax under the provisions of the Income-tax Act,1961 and the Remittance (transferable amount) or the aggregate of such remittances, as the case may be, exceeds five lakh rupees during the financial year and an order certificate u/s 195(2)/ 195(3)/ 197 of Income-tax Act has been obtained from the Assessing Officer.
PART C
To be filled up if the remittance (transferable amount) is chargeable to tax under the provisions of Income-tax Act, 1961 and the remittance (transferable amount) or the aggregate of such remittances, as the case may be, exceeds five lakh rupees during the financial year and a certificate in Form No.15CB from an accountant as defined in the Explanation below sub-section (2) of section 288 has been obtained.
PART D
To be filled up if the remittance is not chargeable to tax under the provisions of the Income-tax Act,1961[other than payments referred to in rule 37BB(3) by the person referred to in rule 37BB(2)]

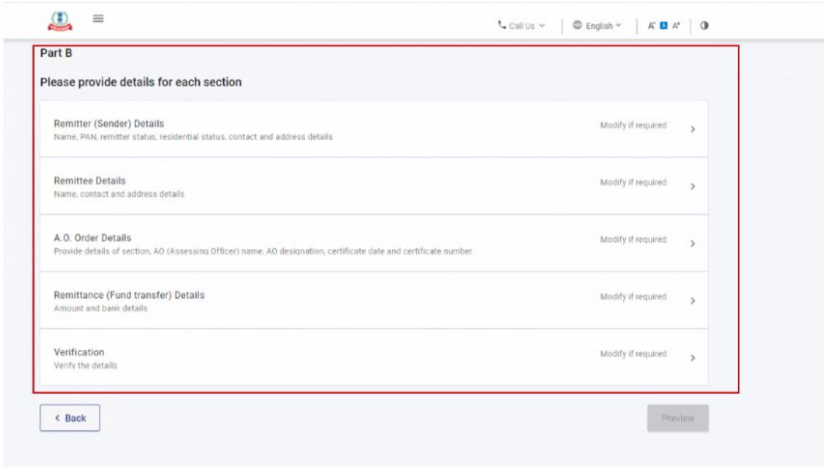
Step – 4:


e-Filing
does not exceed five lakh rupees during the financial year.
PART B
To be filled up if the remittance (transferable amount) is chargeable to tax under the provisions of the Income-tax Act,1961 and the Remittance (transferable amount) or the aggregate of such remittances, as the case may be, exceeds five lakh rupees during the financial year and an order certificate u/s 195(2)/ 195(3)/ 197 of Income-tax Act has been obtained from the Assessing Officer.
PART C
PART D
FORM 15CB ARN
Provide Acknowledgement Receipt Number (ARN) of Form 15CB
Acknowledgement Receipt Number*
447993630260822
Proceed
Back
Proceed
india.gov.in

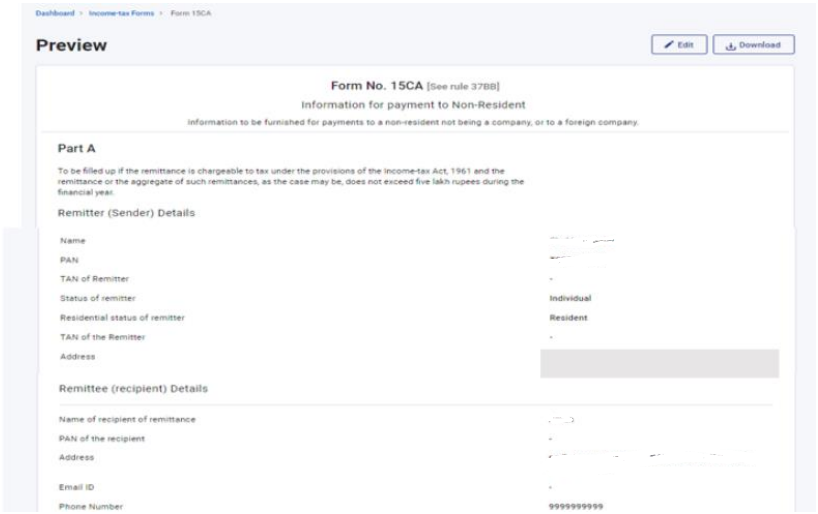
Step – 5:

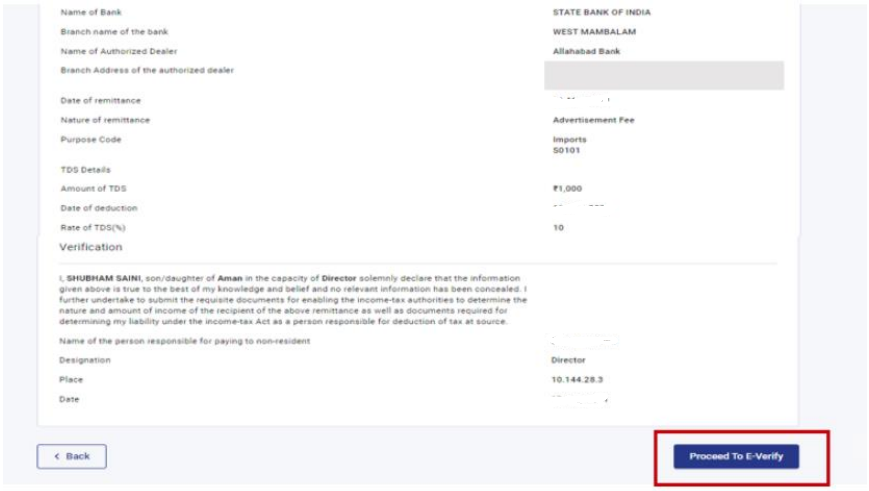

Information for payment to Non-Resident [Form No. 15CA]
Information to be furnished for payments to a non-resident not being a company, or to a foreign company. This form is in compliance with rule 37BB.
Part A
Please provide details for each section
Remitter (Sender) Details
Name, PAN, remitter status, residential status, contact and address details
Modify if required
Remittee Details
Name, contact and address details
Modify if required
Remittance Details
Amount and bank details
Modify if required
Verification
Verify the details
Modify if required
Back
Preview

Step – 6:

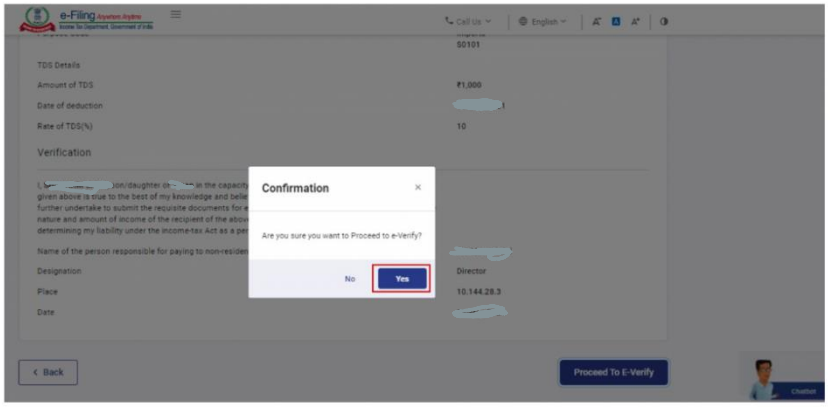

Call us
English
Part B
Please provide details for each section
Remitter (Sender) Details
Name, PAN, remitter status, residential status, contact and address details
Modify if required
Remittee Details
Name, contact and address details
Modify if required
A.O. Order Details
Provide details of section, AO (Assessing Officer) name, AO designation, certificate date and certificate number
Modify if required
Remittance (Fund transfer) Details
Amount and bank details
Modify if required
Verification
Verify the details
Modify if required
Back
Preview

Step – 7:

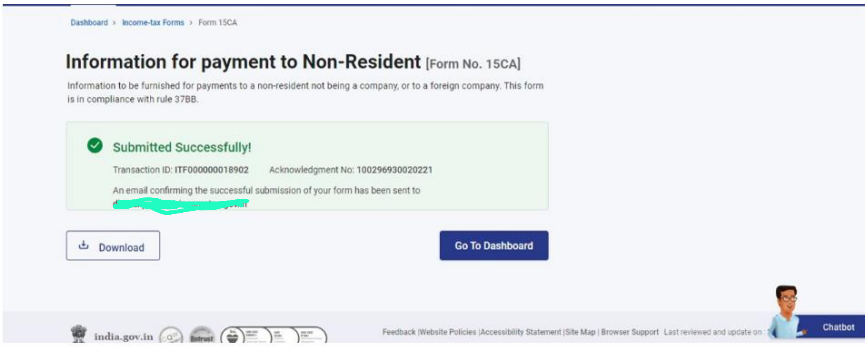

Dashboard > Income-tax Forms > Form 15CA
Preview
Edit
Download
Form No. 15CA [See rule 37BB]
Information for payment to Non-Resident
Information to be furnished for payments to a non-resident not being a company, or to a foreign company.
Part A
To be filled up if the remittance is chargeable to tax under the provisions of the Income-tax Act, 1961 and the remittance or the aggregate of such remittances, as the case may be, does not exceed five lakh rupees during the financial year.
Remitter (Sender) Details
Name
PAN
TAN of Remitter
Status of remitter
Individual
Residential status of remitter
Resident
TAN of the Remitter
Address
Remittee (recipient) Details
Name of recipient of remittance
PAN of the recipient
Address
Email ID
Phone Number
9999999999


Name of Bank
STATE BANK OF INDIA
Branch name of the bank
WEST MAMBALAM
Name of Authorized Dealer
Allahabad Bank
Branch Address of the authorized dealer
Date of remittance
Nature of remittance
Advertisement Fee
Purpose Code
Imports
S0101
TDS Details
Amount of TDS
₹1,000
Date of deduction
Rate of TDS(%)
10
Verification
I, SHUBHAM SAINI, son/daughter of Aman in the capacity of Director solemnly declare that the information given above is true to the best of my knowledge and belief and no relevant information has been concealed. I further undertake to submit the requisite documents for enabling the income-tax authorities to determine the nature and amount of income of the recipient of the above remittance as well as documents required for determining my liability under the income-tax Act as a person responsible for deduction of tax at source.
Name of the person responsible for paying to non-resident
Designation
Director
Place
10.144.28.3
Date
Back
Proceed To E-Verify

Step – 8:


e-Filing
S0101
TDS Details
Amount of TDS
₹1,000
Date of deduction
Rate of TDS(%)
10
Verification
Confirmation
Are you sure you want to Proceed to e-Verify?
No
Yes
Designation
Director
Place
10.144.28.3
Date
Back
Proceed To E-Verify

Step – 9:



Issuance of Form No.15CB - Procedure

Making payments outside India requires certain compliances. One such compliance is to submit Form No.15CA and 15CB, when required. Income Tax Form No. 15CB is a form that is required to be signed by a Chartered Accountant in order to obtain a certification concerning the rates and the relevant taxes paid by a taxpayer. Form No.15CB is essential as it comprises of specific details that are required while filing Income Tax Form No.15CA. In fact, Form No. 15CB is the Tax Determination Certificate where the CA examines the remittance with regard to chargeability provisions under section 5 and 9 of the Income-tax Act, 1961 along with the provisions of DTAA, if any.

The Income Tax Department has revised the rules relating to preparation & submission of Form No. 15CA and Form No. 15CB.[3] Rule 37BB defines the manner to furnish information in form no. 15CB and making declaration in form no.15CA.

Upload of Form no. 15CB is mandatory prior to filling Part C of Form no. 15CA. To prefill the details in Part C of Form no. 15CA, the Acknowledgement Number of e-Verified Form no. 15CB should be verified.

Form No. 15CB will not be required till the aggregate of remittances during the financial year does not exceed Rs. 5 lakhs. Form No. 15CB will also not be required where order/certificate of lower/no deduction is taken from the Jurisdictional Assessing Officer u/s 195(2), 195(3), 197 of the Income-tax Act, 1961.

[3] Earlier only form 15CA had to be filed online, now form 15CB is, also, to be filed online.

The CBDT has clarified in their portal that a CA who is registered on the e-Filing portal and one who has been assigned Form No. 15CA, Part-C by the person responsible for making the payment is entitled to certify details in Form No.15CB. The CA should also possess a DSC registered with the e-Filing portal for e-Verification of the submitted form. The prerequisites for a CA to file up Form No.15CB are as follows:

- CA should be registered as Chartered Accountat on the e-filing portal
- Status of PAN of CA should be Active
- CA should possess a valid Digital Signature Certificate that is not expired
- Taxpayer should have assigned Form 15CA Part-C to the CA and a request must be pending for the CA to accept or reject the same

The following are the details required to file Income Tax Form No. 15CB

- **Details of Remitter**

  Name of the remitter

  Address

  PAN/TAN of the remitter

  Email/ Contact No

  Name of Bank

  Branch of the Bank

  BSR/IFSC Code

- **Details of Remittee**

  Name

  Address of the remittee

  Country of the remittee

- **Details of the remittance**

  Country to which remittance is being made

  Amount of remittance in Indian currency

  Currency in which remittance is made

  Nature of remittance as per agreement

Proposed date of remittance

- **Other Details**

  Designation of the signing person

  Father's name of the signing person

- **Documents required from the Remittee**

  ✓A duly filed Income tax Form No, 10F by the authorised individual of the remittee

  ✓Tax Residency Certificate from the Remittee/ Tax Registration of the Country in which the Remittee is registered for the period under consideration

  ✓No PE/POEM Certificate for the period under consideration

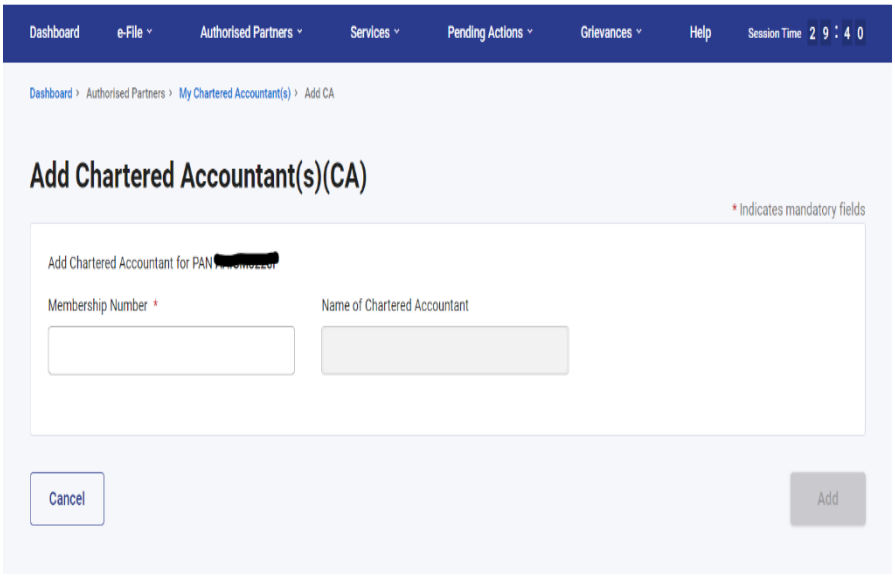
  ✓Relevant agreement and invoices

  ✓Rate of conversion of foreign currency

Procedure – Steps in Filing Form No.15CB

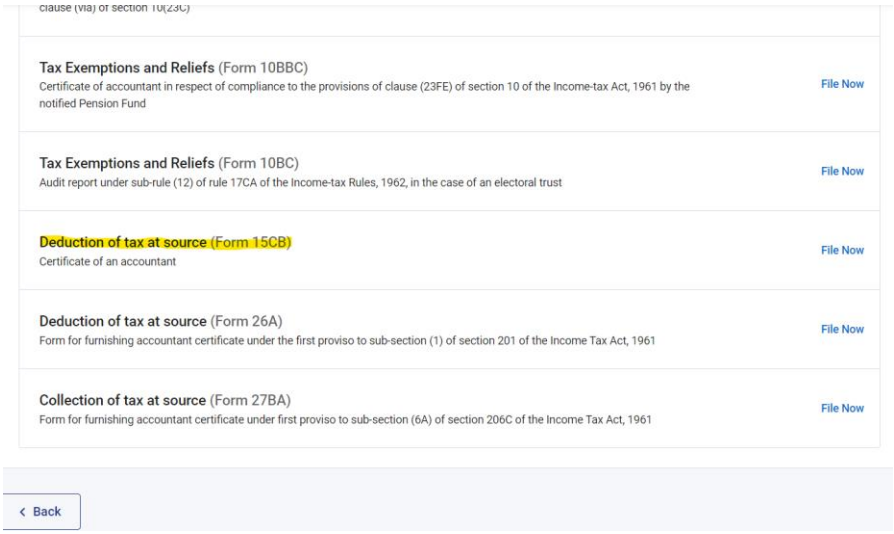
- **STEP 1:**

In the tax payer portal, assign CA in authorised partner tab as "My CA"



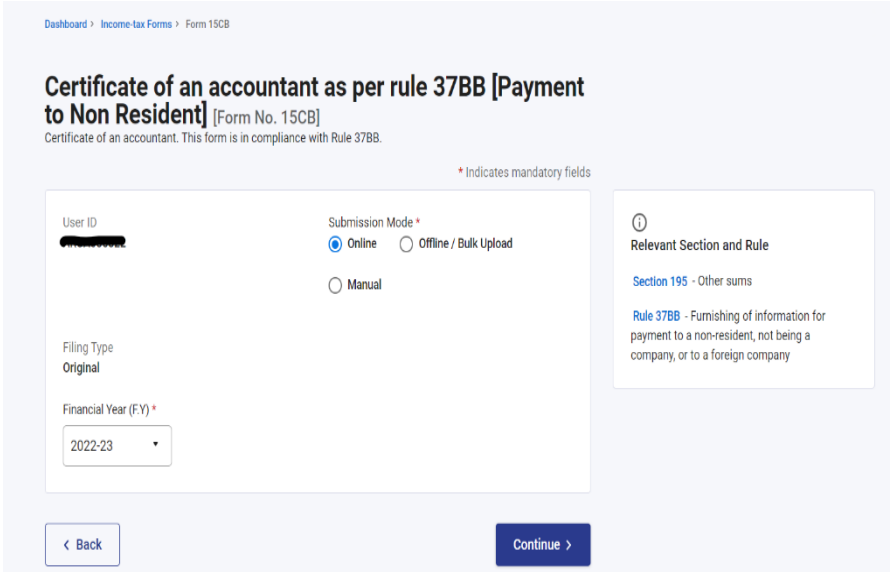
- **STEP 2:**

  Go to CA Portal for preparing Form 15CB > E File Tab > Income Tax Form > File Income Tax Form > Deduction of Tax at Source (Form 15CB)



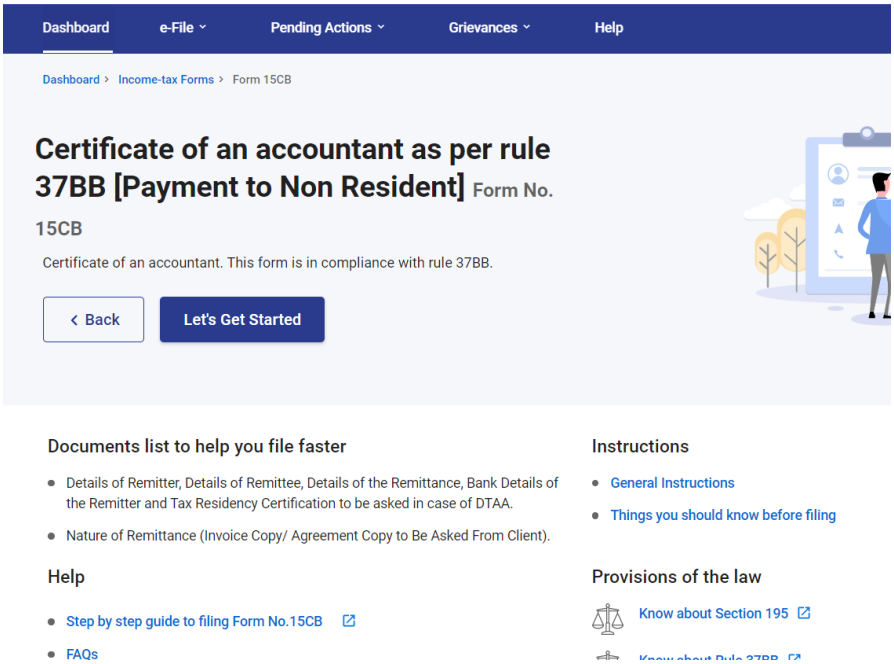
- **STEP 3:**

  File now option > Submission Mode Online/Offline Bulk Upload/Manual



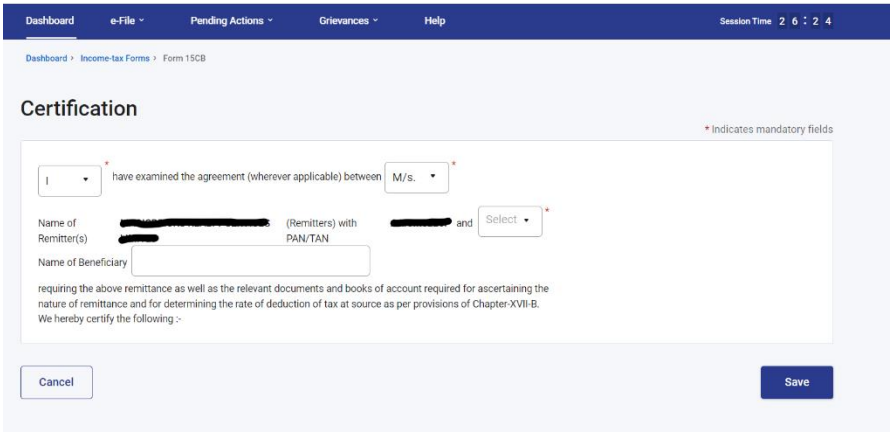
- **STEP 4:**

  Download the Offline utility and prepare the XML file or select financial year for online filing > Continue > Let's Get Started



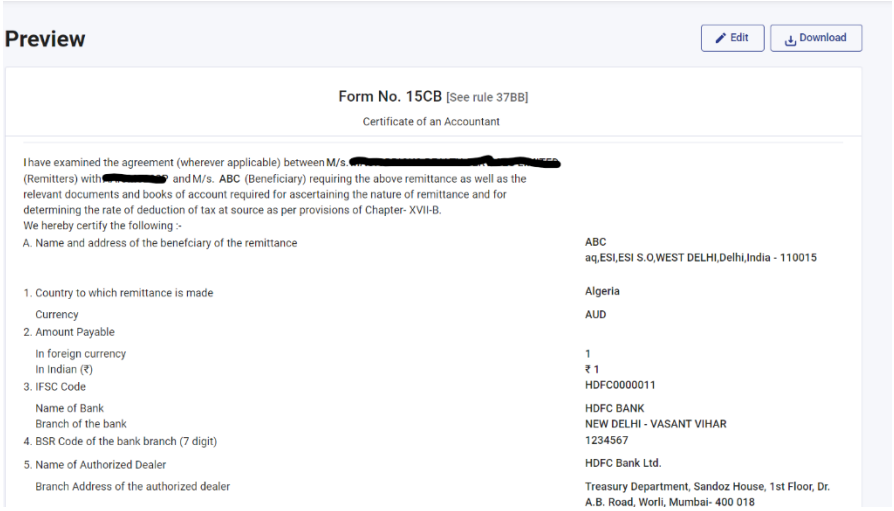
- **STEP 5**

  Enter PAN/TAN Details > Select Certification > Fill in the details > Click Save



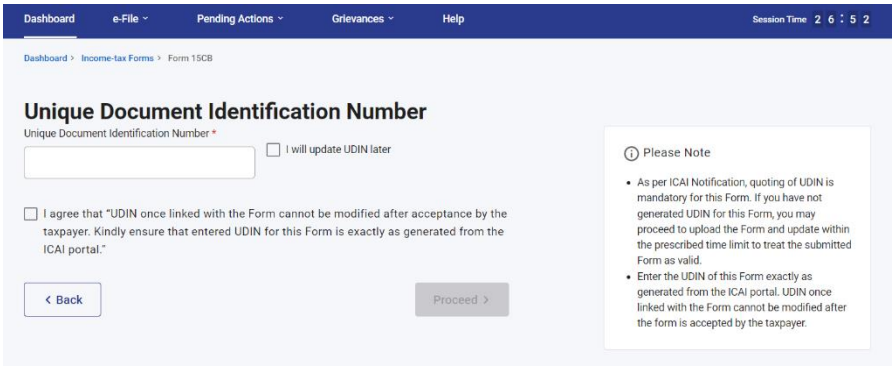
- **STEP 6**

Similarly add remittee details, remittance details, taxability under Income Tax Act (without DTAA), taxability under Income Tax Act (with DTAA relief), Accountant Details > Click Preview > Proceed To E-Verify



- **STEP 7**

  Proceed to E-Verify > Generate and input Unique Document Identification (UDIN)/Check box for I will update UDIN later > agree to term > Proceed



Download acknowledgment receipt of the income tax form. Thereafter download 15CB Form.

Disclaimer: *The afore-stated requirement and procedure is as on 16.10.2022, it is subject to changes/updation from time to time.*

Chapter 11

Significant Economic Presence

Explanation 2A to section 9

In Chapter 2 of this book the Basis of Charge in income tax has been discussed in brief. It has been stated that section 5 of the Act lays down the regulations regarding 'Scope of Income'. This includes the concept of "deeming" which extends the scope of taxation. This concept is dealt with in the Act in section 9.

Section 9(1)(*i*) deems the following income to accrue or arise in India:

> *"all income accruing or arising, whether directly or indirectly, through* or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India."

Explanation 1(*a*) to section 9(1)(*i*) provides that for the purposes of said clause, in the case of a business of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India.

Finance Act, 2018, *inter alia,* inserted *Explanation 2A* to section 9(1)(*i*) to clarify that the "significant economic presence" (SEP) of a non-resident in India shall constitute "business connection" in India. Second proviso to *Explanation 2A* to section 9(1)(*i*) stated that only so much of income as is attributable to the transactions referred to in clause (*a*) or clause (*b*) of the said *Explanation* was to be deemed to accrue or arise in India.

Thus, the computation of income on account of SEP was governed by two provisions, namely, *Explanation 1*(*a*) and also the second proviso. To avoid this duplication, the said *Explanation 1*(*a*) has been amended with effect from assessment year 2022-23 to provide that the provisions contained in it shall not apply to the business having business connection in India on account of SEP.

Further, the said *Explanation 2A* has been omitted with effect from assessment year 2021-22. Instead, a new *Explanation 2A* has been inserted

by the Finance Act of 2022, with effect from assessment year 2022-23, which reads as follows:

> *"Explanation 2A.—For the removal of doubts, it is hereby declared that the significant economic presence of a non-resident in India shall constitute "business connection" in India and "significant economic presence" for this purpose, shall mean—*
>
> *(a) transaction in respect of any goods, services or property carried out by a non-resident with any person in India including provision of download of data or software in India, if the aggregate of payments arising from such transaction or transactions during the previous year exceeds such amount as may be prescribed; or*
>
> *(b) systematic and continuous soliciting of business activities or engaging in interaction with such number of users in India, as may be prescribed:*
>
> ***Provided** that the transactions or activities shall constitute significant economic presence in India, whether or not—*
>
> *(i) the agreement for such transactions or activities is entered in India; or*
>
> *(ii) the non-resident has a residence or place of business in India; or*
>
> *(iii) the non-resident renders services in India:*
>
> ***Provided further** that only so much of income as is attributable to the transactions or activities referred to in clause (a) or clause (b) shall be deemed to accrue or arise in India."*
>
> Section 295 has been amended to empower the CBDT to make rules for the purpose of *Explanation 2A* (*see* **Chapter 17**).

The income under *Explanation 2A* is subject to safe harbour rules in section 92CB (**para 9.1**) and Advance Pricing Agreement (APA) in section 92CC (**para 9.2**).

It is important to understand the rationale for introduction of this concept and subsequent changes. At the time of first introduction in 2018 the Memornadum to the Finanace Bill explained this concept as follows:

> *"The scope of existing provisions of clause (i) of sub-section (1) of section 9 is restrictive as it essentially provides for physical presence*

based nexus rule for taxation of business income of the non-resident in India. Explanation 2 to the said section which defines 'business connection' is also narrow in its scope since it limits the taxability of certain activities or transactions of non-resident to those carried out through a dependent agent. Therefore, emerging business models such as digitized businesses, which do not require physical presence of itself or any agent in India, is not covered within the scope of clause (i) of sub-section (1) of section 9 of the Act.

In view of the above, it is proposed to amend clause (i) of sub-section (1) of section 9 of the Act to provide that'significant economic presence' in India shall also constitute 'business connection'. Further, "significant economic presence" for this purpose ,shall mean-

(i) any transaction in respect of any goods, services or property carried out by a non-resident in India including provision of download of data or software in India if the aggregate of payments arising from such transaction or transactions during the previous year exceeds the amount as may be prescribed; or

(ii) systematic and continuous soliciting of its business activities or engaging in interaction with such number of users as may be prescribed, in India through digital means.

It is further proposed to provide that only so much of income as is attributable to such transactions or activities shall be deemed to accrue or arise in India. It is further proposed to provide that the transactions or activities shall constitute significant economic presence in India, whether or not the non-resident has a residence or place of business in India or renders services in India.

The proposed amendment in the domestic law will enable India to negotiate for inclusion of the new nexus rule in the form of 'significant economic presence' in the Double Taxation Avoidance Agreements. It may be clarified that the aforesaid conditions stated above are mutually exclusive. The threshold of "revenue" and the "users" in India will be decided after consultation with the stakeholders. Further, it is also clarified that unless corresponding modifications to PE rules are made in the DTAAs, the cross- border business profits will continue to be taxed as per the existing treaty rules."

The Finance Bill, 2020 explained that for the purposes of determining SEP of a non-resident in India, threshold for the aggregate amount of payments arising from the specified transactions and for the number of users were required to be prescribed in the Rules. Further, since discussion on this issue is still going on in G20-OECD BEPS project, these numbers have not been notified yet. G20-OECD report is expected by the end of December 2020. The Bill further stated that in view of the above facts, "it is proposed to defer the applicability of SEP to starting from assessment year 2022-23. Certain drafting changes have also been made while deferring the proposal." Accordingly the SEP provisions introduced by the Fianance Act, 2018 shall be omitted from assessment year 2021-22 and the new provisions will take effect from Assessment Year 2022-23.

It is important for a Chartered Accountant to fully appreciate the scope of SEP as that will have impact on Withholding tax.

Chapter 12

Equalization Levy – A Synopsis

Genesis

Digitalization all over the world is happening at a breathtaking pace. The traditional tax allocation rights between countries have been majorly based on location i.e. place of performance of the work. However, because of digitalization, there is a reduced need for physical location for provision of services. It leads to loss of tax revenue of service recipient countries and therefore Base Erosion and Profit Shifting "BEPS" Action Plan 1 was taken up to address the tax challenges of the digitalisation of the economy, and specifically aims to identify and address the main challenges that the digitalisation of the economy poses for the existing international tax rules[4].

The Action plan discussed that considerable work needs to be undertaken to resolve the issue. However, in the interim, countries may try out different unilateral methods like Specific economic presence and Digital service Taxes ("DST").

Background of Equalisation Levy 1.0

The digital transactions in India were also growing at a rapid pace wherein the Indian companies were advertising about their services and goods online and paying such digital companies, so it became necessary to address the challenges with regard to taxation of digital transactions at that time. Online advertisement companies were the beneficiaries of this increase in advertisement expenditure, where a major chunk of their revenue was being generated from outside their country of residence.

Such companies did not have to pay any tax in India as they did not have any place of business in India through which such services were offered, either were they subjected to any withholding taxes, since the performance for the requested services were not executed in India. The revenue from these services rendered cannot be attributed to the operations of the Indian entity and due to the lack of a PE in India, no tax was applicable on the said income.

As BEPS Action Plan 1 suggested DSTs., Equalization Levy was

[4] https://www.oecd.org/tax/beps/beps-actions/action1/

imposed. Equalization levy is part of the Finance Act 2016 and not a part of the Indian Income-tax Act, 1961, and therefore Treaty benefit would not apply on the same.

According to section 164(d) of Finance Act, 2016. Equalisation Levy as a tax is leviable on consideration received or receivable for any **specified service** or e-commerce supply or services.

Specified services means:

- Online Advertisement
- Any provision for digital advertising space or facilities/ service for the purpose of online advertisement.
- Any other service as may be notified by the Central Government in this behalf.

NOTE- Where 'Online' means a facility or service or right or benefit or access that is obtained through the internet or any other form of digital or telecommunication network

Chargeability of Equalisation Levy 1.0

Section 165 of Finance Act, 2016 talks about the chargeability:

- Applicable rate of tax of 6% of gross consideration to be paid.
- It is a Direct tax to be withheld while payment is made to Non-Resident service provider by a Resident carrying business or profession OR a Non-Resident having PE in India.
- The levy will be applicable only on B2B transaction and not on B2C or C2C transactions.

When Equalisation Levy 1.0 not Chargeable?

- When payment is made to a single service provider does not exceeds Rs.100000 in a financial year.
- When Non-resident providing services has a PE in India and the specified services is effectively connected with such PE.
- When specified services received by a resident are not for the purpose of carrying out his business or profession.

Equalisation levy 2.0

MEANING OF EQUALISATION LEVY 2.0 (EL)

According to section 164(d) of Finance Act, 2016. Equalisation Levy means the tax is leviable on consideration received or receivable for any specified service or e-commerce supply or services.

Consideration received or receivable from e-commerce supply shall include

Consideration for the sale of goods irrespective of whether the e-commerce operator owns the goods

Consideration for the provision of services whether service is provided or facilitated by the e-commerce operator.

However, it shall not include consideration value received by it where goods or services are sold by person resident in India or has a PE in India.

E-commerce supply or services mean:

- Online sale of goods owned by the e-commerce operator; or
- Online provision of services provided by e-commerce operator; or
- Online sale of goods or provision of services or both facilitated by the e-commerce operator; or
- combination of any of the above listed activities.

e-commerce operator means a non-resident who owns operates or manages digital or electronic facility or platform for online sale of goods or online provision of services or both.

"Online sale of goods" and **"online provision of services"** would include:

- Acceptance of offer for sale; or
- Placing of purchase order; or
- Acceptance of purchase order; or
- Payment of consideration; or
- Supply of goods or provision of services, partly or wholly.

It is to be noted that it is an inclusive definition and even if the transaction meets one of the criteria, it can be considered as online sale of goods. Therefore, the scope of equalization levy 2.0 is really expansive.

CHARGEABILITY OF EQUALISATION LEVY 2.0:

Section 165A of Finance Act, 2016 talks about the chargeability:

Equalisation Levy @2% would be chargeable on the amount of consideration received or receivable by an e-commerce operator from e-commerce supply or services made or provided or facilitated by it-

- To a person resident in India
- To a **non resident** in the **specified circumstances**
- Sale of advt. targeting a customer resident in India or who accesses the advt. thro IPA located in India; and
- Sale of data collected from a person resident in India or who uses IPA located in India.
- To a person who buys such goods or services or both using internet protocol address located in India.

WHEN EQUALISATION LEVY IS NOT CHARGEABLE

Equalisation levy will not be charged when-

- Where an e-commerce service provider has a permanent establishment in India and the service provided is **effectively connected** with such permanent establishment. (In that case it will be taxed as Foreign Company having PE in India)
- Where the sales/turnover or gross receipts of service provided by e-commerce operator **do not exceed Rs 2 Crores** during the year.
- Where the equalisation levy is **leviable under section 165. (In that case EL will be deducted @6%)**

Exemption of Income covered under Equalisation levy from Income Tax Act:

Section 10(50) of the Income Tax Act inserted under the Income-tax Act, **granted exemption** from income-tax on income which is chargeable to EL and hence eradicating the effects of double taxation.

Explanation 1 to section 10(50) states that income referred to in section 10(50) i.e. income covered under equalisation levy shall not include and never has included any income which is chargeable to tax as royalty and fees for technical service in India under the Income tax Act read with relevant Double Tax Avoidance Tax Agreement. Thus, if any income is getting taxed

as royalty or fees for technical services in India it will not be considered for tax under equalisation levy.

However, if an income which is getting covered under definition of fees for technical service as per Income tax act but outside the definition of fees for technical service as per DTAA, such service could be covered under exemption of section 10(50) of the Income tax Act. Similar amendment has been made in proviso to section 163 of the Finance Act, 2016. Relevant extracts of explanation 1 of section 10(50) and section 163 of Finance Act, 2016 is as under:

"*Explanation 1.—For the removal of doubts it is hereby clarified that the income referred to in this clause shall not include and shall be deemed never to have been included any income which is chargeable to tax as royalty or fees for technical services in India under this Act read with the agreement notified by the Central Government under section 90 or section 90A."*

"Provided that the consideration received or receivable for specified services and for e-commerce supply or services shall not include the consideration, which are taxable as royalty or fees for technical services in India under the Income-tax Act, read with the agreement notified by the Central Government under section 90 or section 90A of the said Act."

Disallowance for non-deduction of Equalisation levy:

Section 40(a)(ib) of the Income Tax Act inserted under the Income-tax Act, **disallowing 100% expense** on account of non-deduction of EL.

When to deposit Equalization levy?

As per section 166A of the Finance Act, 2016 equalization levy shall be deposited as per the table below:

Serial number	*Date of ending of the quarter of financial year*	*Due date of the financial year*
(1)	*(2)*	*(3)*
1.	*30th June*	*7th July*
2.	*30th September*	*7th October*
3.	*31st December*	*7th January*
4.	*31st March*	*31st March.*

Due date for furnishing statement under Equalisation levy:

As per rule 5 of Equalisation levy rules, 2016 **Form 1** of equalisation levy **shall be furnished on or before the 30th day of June** immediately following that financial year. This, form can be submitted online on e-filing website.

INTEREST & PENALTY for non-deduction or non-filing of statement in relation to Equalisation levy:

Interest for delayed payment of EL: (Section 170 of Finance Act, 2016)

One per cent of such levy for every month or part of a month by which such crediting of the tax or any part thereof is delayed.

Penalty for delayed payment of EL:

As per section 171 of the Finance Act, 2016, a person , who:

(a) fails to deduct the whole or any part of the equalisation levy as required under section 166; or

(aa) fails to pay the whole or any part of the equalisation levy asrequired under section 166A; or

(b) having deducted the equalisation levy referred to in sub-section (1) of section 165, fails to pay such levy to the credit of the Central Government in accordance with the provisions of sub-section (2) of that section,

shall be liable to pay,—

(i) in the case referred to in clause (a), in addition to paying the levy in accordance with the provisions of sub-section (3) of that section, or interest, if any, in accordance with the provisions of section 170, a penalty equal to the amount of equalisation levy that he failed to [deduct;

(ia) in the case referred to in clause (aa), in addition to the levy in accordance with the provisions of that section, or interest, if any, in accordance with the provisions of section 170, a penalty equal to the amount of equalisation levy that he failed to pay; and]

(ii) in the case referred to in clause (b), in addition to paying the levy in accordance with the provisions of sub-section (2) of that section and interest in accordance with the provisions of section 170, a penalty of

one thousand rupees for every day during which the failure continues, so, however, that the penalty under this clause shall not exceed the amount of equalisation levy that he failed to pay.

Penalty for failure to submit statement of EL:

As per section 172 of the Finance Act, 2016, failure to submit statement of Equalsation levy would attract a penalty of Rs.100 per day for each day till the failure continues.

Way Ahead

It is to be noted that Equalisation levy is just an interim measure and once the more permanent and multilateral solution would be insight (Pillar 1 and Pillar 2), countries including India will remove the same. However, till that time tax payers need to understand these concepts and need to take withhold/pay taxes accordingly.

Chapter 13

Practical Issues and FAQ

In the preceding chapters various aspects of tax deduction at source under section 195 of the Act and Form Nos. 15CA and 15CB of the Income-tax Rules, 1961 (the Rules) have been discussed. It is obvious that in respect of non-residents the Income Tax Department lays significant importance on tax deduction due to various reasons. The Department has developed mechanisms to monitor payments of income to non-residents. Incorporation of section 195 in the Act and Form Nos. 15CA and 15CB in the Rules are a part of this effort.

Any mechanism under tax system has to pass through the four canons of taxation, as enunciated by Adam Smith several centuries back - canon of equity, canon of certainty, canon of economy, and canon of convenience. When one analyses Form No. 15CA and Form No. 15CB, one comes across several complexities and problems in implementation. In this chapter some of the major issues connected to these two forms and possible approaches to deal with those are discussed.[5]

i) Issue – Revision/Withdrawal of Form 15CA and 15CB

Description - Presently there is a limited scope for withdrawal of Form No. 15CB viz., within 7 days of submission of the form. However, no option is provided for the revision of either Form 15CA or 15CB. Many times, practitioners and taxpayers commit unintentional errors such as putting wrong numbers or typing mistakes at the time of submitting the forms online and realizes the error after the time limit of 7 days provided for, withdrawal has passed. Further, owing to some particular circumstances there may be a requirement to withdraw or revise Form 15CA and Form 15CB after the time limit.

Solution - Where a revision is undertaken, a fresh UDIN may be generated for Form 15CB and the earlier UDIN may be revoked. Originally issued Form 15CB and corresponding Form 15CA may be marked as revoked specifically

[5] The possible solutions are indicative and not the final words and one must analyse the facts relating to the matter at hand and take a considered view before implementing the process of filing the forms.

and the same may be documented over a letterhead or email from the professional to the client.

Post revision/withdrawal through revoking of UDIN, immediate stakeholders' apart from client like the bankers may also be sent an email communication.

Maintenance of the documentation would assist the taxpayer at a later point in time to provide evidence when there is any query from the tax department (as the submitted Forms are taken as a base for scrutiny of international transactions and taxpayers are required to reconcile and explain the actions).

ii) Issue – Option for grossing up

In Form 15CA and Form 15CB the remittance being made is first mentioned and then followed up by the following field:

In case the remittance is net of taxes, whether tax payable has been grossed up?

The options available against such field are "Yes" and "No" in the Form.

— The option "Yes" has to be selected where the payments as agreed are made to the non-resident and taxes for TDS are borne by the deducting party by way of grossing up.

— The option "No" has to be selected where such grossing up is not done.

It may be mentioned that this field is not mandatory in a scenario where TDS is deducted on such gross remittance. This implies that disclosure in this field is to be made only where the TDS is borne by the deductor, and not the deductee receiving the remittance net of taxes.

However, inadvertently many practitioners end up checking "No" even though the remittance is at gross basis.This results in interpretation of such remittance amount to be net of taxes and grossing up not being complied with as per the provisions of the Act. Such dis closure may invite adverse action by the Department.

Hence, the details must be reported carefully. In case the entry has been made by mistake the form may be withdrawn and revised form may be submitted. Proper documentation may be maintained.

iii) Issue - Equalisation levy (EL)

It is observed that in many cases, the Equalisation levy deducted is mentioned in TDS column as no separate column/field is available in the Form for transactions where EL is deducted. This may create a difference in

the TDS reported in the systems for Income-tax department as per Form 15CA/CB and the TDS filings made.

It may be mentioned that as per the provisions of Section 10(50) of the Income-tax Act, 1961 (**ITA**), any income liable for Equalisation levy will be exempt under ITA.

One possible solution to this problem is for the CAs to mention the amount being chargeable to tax and mention the reason as follows:

"Equalization levy applicable as per Finance Act 2016 and remittance exempt u/s 10(50). Actual amount of remittance mentioned after deduction of Equalisation levy" (Where the liability to deduct EL is on the payer).

Further, the tax liability, TDS amount must be mentioned as "Zero" and the actual amount of remittance must be mentioned after EL deduction.

iv) Issue - Transfer of Indian shares/Assets between Non-residents

Where there is a transfer of Indian shares/Assets between Non-Residents, a technical and literal interpretation of the Section 195(6) would suggest that "Any person responsible for paying" need to file Form 15CA and Form 15CB.

The above interpretation creates challenges as in such a situation, no bank in India may be involved and therefore, fields like BSR Code, IFSC Code, Name of the Authorized dealer and Branch of Authorized dealer may not be available for the foreign bank used for making the remittance

Further, following two situations may arise:

Situation 1: Transfer at same price/lower price resulting in no taxability

The same is explained with the help of the example below:

A non-resident company had acquired shares from an Indian company and sold part of the shares to another non-resident entity for the same price at which it acquired the shares from the Indian entity. The resultant figure will not result in any tax payable situation in India.

A question arises, whether it is advisable to file Form No.15CA/ Form No. 15CB in view of the provisions of section 195 read with rule 37BB even if the transaction is not taxable. If yes, is compliance to be done under Part C of Form 15CA, or alternatively under Part D of Form15CA?

Possible approach: Section 195(6) read with rule 37BB requires reporting of any payment made to a NR irrespective of its chargeability to tax in India. While Part C of the Form 15CA is a full-fledged format which requires

elaborate details like provisions of the Act / DTAA under which payment is taxable, Part D applies where payments are not chargeable under the Act. Further, Part D is a simple self-declaration format which requires minimum details like country to which remittance is made, amount and nature of remittance etc. Apparently, there is no requirement of CA certification for this column.

Technically compliance is required even if the payments are not chargeable to tax in India. While in the current case, it is arguable that since there is no income taxable in India, Part D should be applicable. However, considering the magnitude of transactions, it may be advisable to comply with the reporting obligation under Part C of Form 15CA to avoid any litigation in future as there is a transfer and taxability is zero. Detailed reporting in Part C will thus be better compliance for the taxpayer.

Further, for the fields like BSR Code and IFSC Code any general IFSC applicable for treasury branches may be selected and the same may be mentioned in the field provided for relevant section for chargeability. It may be specifically mentioned that the same are selected for convenience and validation only. Furthermore, option to mention any other bank is also available where the filing is made through offline utility.

Situation 2: Transfer at higher price resulting in taxability where one of the transferee NR would also be required to comply with TDS obligations.

Comments above shall equally hold good in this case and Part C may be filled as the transfer is being made at a higher price resulting in taxable income

v) Issue - Transactions where there is no remittance or exchange of assets or transfer by way of book entries which are chargeable to tax under the provisions of the ITA

Similar to the situation (iv) above, technically, requirement to file Form No. 15CA and Form No. 15CB may not arise. The forms specifically mention "Remittance" in its heading and fields, since, there is no remittance involved, nothing may be required to be filled. However, another possible view is that the exchange or book entries are mere mode of repayment while person responsible for paying has chosen the route of making payment otherwise than through money. And therefore, liability to deduct TDS may still arise. For the compliance of TDS provisions, the deductor may be required to pay the

TDS by grossing up the consideration, even if payment to non-resident is in kind or through book entries.

Possible approach: Comments given in Situation (iv) may be perused and it would be advisable to file Form No. 15CA – Part C and Form No. 15CB.

Further, care should also be taken for the amount mentioned as remittance, as the same may require validation as per the provisions and rules of Income-tax.

Also, for the fields like BSR Code and IFSC Code, to be compliant, any general IFSC applicable for treasury branches may be selected and the reasoning may be mentioned in the filed provided for relevant section for chargeability. It may be specifically mentioned that the same are selected for convenience and validation only.

vi) Issue - Deferred payment of consideration/ Advance payment adjustable against final sum

As per Section 195(6), Form 15CA/CB may be required for each payment being made from India and the AD Bankers may require the taxpayers to submit such forms on each payment. As per the provisions of the section, the deductor would be required to withhold taxes at the time of credit even if the payment is made in a deferred manner.

Let us examine a few examples.

- Let us consider a situation where a single invoice is issued, and the entire TDS is deducted from first tranche of payment. Suppose an invoice of USD 1,00,000 is recorded as payable in the books by the deductor and the corresponding TDS in INR is 8,20,000 (USD 10,000) and the first tranche payment is only USD 20,000. Balance USD 80,000 is payable in four tranches over next four years as per the terms of invoice and agreement.

  For the first tranche – Form 15CB may mention the amount of remittance as USD 20,000 and TDS of USD 10,000 may be mentioned in the TDS column. In the field for relevant section of chargeability – along with section, the gross amount and the part now being paid may be mentioned.

  For the balance four tranches - Form 15CB may mention the entire amount of USD 20000 as remittance and TDS may be mentioned as Zero.In the field for relevant section of chargeability – along with

section, it may be mentioned that TDS is already deducted in the First tranche.

- In second scenario let us assume that invoices are raised as per the instalments/tranches due. In this case, every transaction may be mentioned separately whenever due and respective TDS obligations are to be complied with as and when the invoices are raised/advances are paid.

vii) Issue - Remittance is made to agent/POA holder of a Non-resident in India

When a non-resident himself nominates a particular resident as agent/POA holder to whom payment may be made and pursuant that direction, the payer pays the sum to the agent/POA holder so nominated. In such a case, the provisions of Section 195 will apply to such payments even if the agent/POA holder is in India.

In the above case, Form 15CA and Form 15CB should mention the details of the POA holder/agent. Further, it may be mentioned that the Form 15CA and Form 15CB provides India also as an option in the field "Country to which remittance is made"

viii) Issue - Payments from Branch to HO; HO to branch and branches inter se

Question arises as to whether the payment made by branch or Head office to other branch or to head office outside India be chargeable to tax in India.

To explain let us consider an example where I co. imported goods from an entity in Hong Kong and I co. obtained funding from ABC Bank India, Hong Kong branch. In order to repay this credit, I co. has availed another buyer's credit from Singapore bank. The proceeds of buyer's credit availed from Singapore Bank, credited to I Co's Indian Bank will be utilised to repay the buyer's credit availed from ABC HK. Whether Form 15CA/CB compliance is required for the payment made by I co to ABC HK?

Where ABC HK is regarded to be a branch of ABC India, payment made to ABC HK will be treated at par with payments being made to an Indian Bank (resident in India). This is for the reason that a foreign branch of an Indian Bank is regarded to be an extension of the Indian Bank itself and not a separate foreign entity. Once payment is made to a resident, no compliance under section 195(6) may be required.

ix) Issue - Reimbursement of expenses where mark-up is charged or where the ultimate transaction for which remittance is made is taxable

No TDS on reimbursement of actual expenditure to parent company, since no element of Income as per the following decisions:

— A.P. Moller Maersk [2017] 78 taxmann.com 287 (SC)

— CIT vs Siemens Aktiongesellschaft: 310 ITR 320 (Bom HC)

— CIT vs. Industrial Engineering product Pvt. Ltd: 202 ITR 1014 (Del)

— HNS India V. Set. Inc. vs. DCIT: 95 ITD 157 (ITAT Del)

— United Hotels Ltd. vs. ITO: 93 TTJ 822 (ITAT Del)

— Mahindra & Mahindra Ltd. v. Dy. CIT (2009) 30 SOT 374 (Mum

— CIT vs. Dunlop Pvt. Ltd: 142 ITR 493 (Cal)

— T-3 Energy Services India (P.) Ltd [2018] 91 taxmann.com 334(Pune - Trib.)

However, where the ultimate transaction for which the payment is made is taxable under the DTAA and is routed through group companies, TDS provisions may still apply and Form 15CA and Form 15CB may be filled accordingly.

x) Issue - Issuance of Form 15CA/CB for repayment of amount received due to cancellation of invoices

Technically, the repayment of amount upon cancellation of invoice may not constitute 'income' which is subject to tax in the hands of recipient.

However, the bankers may insist on submitting Form 15CA and 15CB. The bankers must be appraised and on specific insistence, Part D of the Form 15CA may be filled as the amount being paid is not chargeable to tax.

xi) Issue – Transfer of funds by a non-resident from his Indian bank A/c to another bank account outside India.

Example: Let us assume that one Mr. A is employed with ABC India Pvt Ltd (ABC) and he is sent on secondment to Singapore for 3 years by ABC to work with ABC Singapore. While on assignment to Singapore, he receives part of salary in India and part in Singapore. Further that, in the year he received the payment, he qualified as Non-resident of India as per the Income-tax Act, 1961. He wants to remit the said amount to Singapore from

his Indian bank account to his Singapore bank account for his family maintenance.

Let us examine the question whether any certification in the Form 15CA/15CB is required to be furnished for such remittance from Mr. A's Indian bank account to Mr. A's Singapore bank account? If yes, which Form is required to be furnished? Further, which part of the Form 15CA is applicable (Part A/ Part B/ Part C/ Part D)?

In the above case, Mr. A wants to remit funds to Singapore from Indian bank account to his Singapore bank account for family maintenance purposes. It may be argued that remittance from one account to another account of the same person is a 'payment to self' which is outside the scope of withholding under the Act. On similar lines, compliance under section 195(6) (read with Rule 37BB) is required in respect of payments made by any person to a non-resident.

Language of section 195(6) read with Rule 37BB reads as follows: *"The person responsible for paying to a non-resident, not being a company, or to a foreign company…"* supports that the compliance is arguably attracted when payment is made by one person to another. Consequently, it is not attracted when there is remittance from one account of individual to another account outside India of the same individual. Therefore, one view can be that considering specific language of the provision, the payments under both the cases are not covered within the ambit of reporting in Form 15CA/CB under Rule 37BB.

However, the concerned bankers may be apprised on the applicability of the provisions of Section 195 and relevant documents may be provided to substantiate the stand.

xii) Issue- Reduction of Capital

Let us consider a case where Z Co is an Indian private company where A Co and B Co, both non-residents, holds shares of Z Co in the ratio of 99.99% and 0.01% respectively. Z Co is in the process of undertaking capital reduction for repatriating surplus cash to its shareholders wherein shares of A Co and B Co will be cancelled on proportionate basis. In the absence of accumulated profits in Z Co, there is no DDT liability. Further, due to higher cost base (as compared to current fair value of Z Co), A Co and B Co shall suffer significant capital losses. Since there are no capital gains in the hands of A Co and B Co, it may be argued that Z Co will not be liable to withhold any tax in India (under section 195) on repatriation of surplus cash.

Let us examine a case where A Co and B Co suffer capital loss in India pursuant to reduction of its shares held in Z Co. A question arises whether Z Co is required to file Part C (and obtain certificate 15CB as well) or Part D (and no requirement to obtain certificate 15CB)?

In the above case it is assumed that on the capital reduction transaction there shall no implications under section 2(22)(d), since there are no accumulated profits and the capital gains computation as per the Act. Suppose the transaction results in a capital loss. The issue to be considered is whether Z Co is required to File Part C/ Part D of Form 15CA.

Section 195(6) read with Rule 37BB requires reporting of any payment made to a NR irrespective of its chargeability to tax in India. Thus, reporting in Form 15CA is triggered even if there is no tax liability arising for the NR on the impugned transaction. While Part C of Form 15CA is a full-fledged format which requires elaborate details like provisions of the Act/DTAA under which payment is taxable as also CA certificate in Form 15CB, Part D applies where payments are not chargeable under the Act. Further Part D is a simple self-declaration format which requires bare minimum details like country to which remittance is made, amount and nature of remittance etc. There is no CA certification required. Thus, technically compliance is required even if payments are not chargeable to tax in India. While in the current case, it could be argued that since the capital gains computation results in a loss, there is no tax liability in India, hence Part D should be applicable.

2. Refund of excess tax deducted u/s 195

Following are certain situations in which deductor of the TDS is entitled to make an application for the refund of excess tax deducted:

A. The contract is cancelled, and no remittance is required to be made to the non-resident.

B. The payment made to the non-resident after deducting TDS, and for some reason the payment has been returned to the payer and now there is no obligation to make payment to such non-resident.

C. After deducting and depositing, such payment becomes exempt by the amendment in law and now such payment is not chargeable to tax.

D. The tax has been wrongly deducted and tax deposited twice.

E. The payment has been made by making grossing up which later on decided to make the payment on net basis.

The payment of tax has been made to the non-resident at a higher rate under the domestic law while a lower rate is prescribed under the DTAA

FREQUENTLY ASKED QUESTIONS RELATED TO FILING OF FORM NOS. 15CA AND 15CB

The answers given here are possible views and do not form view of the ICAI and not for submission before any authority.

Q1. Whether Form No. 15CA has to be submitted in all cases since the Bankers demand it invariably?

A: In this regards the attention is invited to the Heading of the Form which provides as under:

FORM NO. 15CA (See rule 37BB) Information to be furnished for payments to a non -resident not being a company, or to a foreign company

Part A (To be filled up if the remittance is chargeable to tax under the provisions of the Income Tax Act,1961 and the remittance or the aggregate of such remittances, as the case may be, does not exceed five lakh rupees during the financial year

As can be seen from the above Form it clearly states that the form needs to be filled only if the remittance is chargeable to tax in India. Therefore, Form 15CA is not required to be filled if the remittance/payment to non-resident are not chargeable to tax.

Q2. What stand can a customer take if Bank demands Form No. 15CA but service is not taxable?

A. In such cases, the possible recourse is to submit a declaration in form of a note to Bank stating the nature of remittance and reason as to why it is not chargeable to tax and consequently exempted from the submission of Form 15CA.

Q3. Can Form No. 15CA once filed be withdrawn?

A: There is an option to withdraw Form 15CA even after it is filed. "Withdraw Form 15CA" link will be available to users to withdraw the uploaded FORM 15CA. Users can withdraw within 7 days of submission of FORM by clicking on "Withdraw Form 15CA" link against the Form uploaded to withdraw the uploaded FORM 15CA.

In case of withdrawal of Form 15CA against which Form 15CA was

consumed, the status of Form 15CB will change from "Consumed" to "Withdrawn". One Form 15CB can be consumed for filing one Form 15CA only.

Q4. Who can sign Form No. 15CA?

A. The Form 15CA shall be signed by the person authorised to sign the return of income of the remitter or the person so authorised by him in writing. For TAN Users DSC is Mandatory to file Form 15CA.

Q5. What will happen in case of invalid PAN and /or TAN No?

A. In case of invalid PAN and/or TAN No, the form shall not be generated.

Q6. Is certificate u/s 195(2)/ 195(3)/ 197 has been obtained, filing of both Form 15CA and 15CB is required?

A. If certificate u/s 195(2)/195(3)/197 has been obtained, only Form 15CA, Part B needs to be filed specifying section under which order/ certificate has been obtained, name and designation of Assessing Officer who issued the certificate, date of certificate and certificate number. Form 15CB is not required to be filed.

Q7. Which form is required to be filled first? Form No. 15CA or Form No. 15CB?

A: Upload of Form No. 15CB is mandatory prior to filling Part C of Form No.15CA. To prefill the details in Part C of Form No. 15CA, the Acknowledgment number of e-Filed Form No. 15CB should be provided.

Q8 Is Form 15CB required in case of filling Part A of the form 15CA?

A: No. Form No. 15CB is required only when filling Part C of Form No. 15CA.

Q9. In case consular receipts are remitted abroad by diplomatic missions in India will they be required to obtain a certificate from Accountant i.e. Form 15CB

A. In case consular receipts are remitted abroad by diplomatic missions in India will they will be required to submit only a self – certified undertaking in Form No. 15CA to the remitter bank. They are **not required to obtain a certificate** from an accountant/certificate of Assessing Officer (**Form No. 15CB**).

Q10. Is the CA certificate (Form No. 15CB) issued appealable?

A. The certificate issued by CA (Form No. 15CB) is not appealable. Refer Mahindra and Mahindra Ltd v Add. DIT (2007) 106 ITD 521 (Mumbai)

Q11. Applicability of Form No. 15CA and Form No. 15CB for remittance from NRO account by NRI

A Non-resident who earns income in India from interest income from Indian investments or rental income from his house property in India or sale proceeds of immovable properties in India or any other income and the same has been credited to his NRO account and the non-resident wants to transfer such amount from NRO account to NRE account.

Before transferring the same from NRO to NRE Account, the non-resident has to electronically furnish information in Form 15CA on the e-filing portal of the income tax department. Almost in all cases, banks ask for a copy of furnished Form 15CA with the income tax department and also, he has to obtain a certificate from a Chartered Accountant in Form 15CB.

Further, where the nature of payment is covered in the Specified List, no Form 15CA or Form 15CB is required. For example, in case of remittance by non-residents out of their savings or income in India towards family maintenance and savings (S1301) or remittance towards personal gifts and donations (S1302) is covered in the specified list and hence, there is no requirement to furnish Form 15CA or Form 15CB in terms of exemption granted under Rule 37BB(3)(ii) of Income Tax Rules 1962.

Q12. Whether Form 15CA/CB is applicable on remittance made using corporate credit card for purchase of data base from a foreign company?

A: Form 15CA/CB is required even if remittance has been made using corporate credit card for purchase of data base from foreign company.

Q13. Person "X" wants to send gift to his Brother "Y" residing in Canada, will Mr X be required to file Form No. 15CA/CB or the remittance can be made merely on the basis of gift deed?

A: In this case, the remittance cannot be made by Mr X merely on the basis of a gift deed. **Form No. 15CA is required in all cases**, where remittance is to Non - Resident, irrespective of the fact that amount of

remittance is taxable or not taxable in India, whereas Form No. **15CB** is required only when amount of remittance is taxable in India. Part D of Form No. 15CA needs to be filled where payment is not chargeable to tax in India (other than the payments referred to in rule 37BB(3) by the persons specified in Rule 37BB(2) Rule 37BB Serial No 27 covers the head *"Remittance Towards personal gifts and donation"*, therefore the same being not subject to tax and covered by the rule have not to be mentioned under Part D of Form 15CA.

Q14. In case Form No. 15CB uploaded earlier by CA is found to be incorrect, however no Form No. 15CA was uploaded in respect of the earlier incorrect Form No. 15CB , what would be the validity of Form No. 15CB filed earlier?

A: As the incorrect Form No. 15CB previously issued has not been utilised against Form No.15CA, the Form No. 15CB so issued would remain unrealised and therefore ineffective.

Q15. Whether Form 15CA & 15CB are required to be filed for purchase of property by resident from a non-resident person and payment is being made by resident to NRO a/c of NRI?

A: If payment is made to NRO account of NRI then Form Nos. 15CA & 15CB are not required. These forms are for remittance outside India only.

Q16. There are various sorts of income being paid to non-residents through their NRO accounts like interest, capital gains, rents etc. These are liable to TDS under section 195. However, it is not clear if furnishing of Form Nos. 15CA/ 15CB is also required under section 195(6) r.w. Rule 37BB. Banks are not insisting on these documents since payments are in INR and funds remain in NRO account only.

A. If payments are being made to NRO account then in that case Form Nos. 15CA and 15CB are not required.

Q17. There was some change in RBI Service Code in Form No. 15CB which was uploaded earlier. A fresh Form No. 15CB has been uploaded with revised code, whether fresh UDIN needs to be generated or previous UDIN would suffice?

A: It is be suggested that the previous UDIN be revoked and a fresh UDIN be generated for the revised/fresh Form no. 15CB so issued.

The UDIN once generated can be revoked or cancelled with narration. If any user had searched that UDIN before revocation, an alert message will go to him about revocation of the UDIN. After revocation of the UDIN, anybody searches for that UDIN, appropriate narration indicated by Member with the date of revocation will be displayed for that revoked UDIN

Q18. Is it mandatory to quote Unique Acknowledgement of the e-filed Form No. 15CA in Form No. 27Q (TDS Return)?

A. CBDT has vide **Notification No. 11/2013 dated 19.02.2013** mandated to quote the '**Unique Acknowledgement of the corresponding Form No. 15CA**' in the Form No. 27Q. Form No. 27Q is the quarterly e-TDS statement furnished for TDS from payments to non-resident under section 200(3) read with.

Chapter 14
Case Studies[6]

CASE STUDY 1: TRANSFER OF SHARES

Facts:

- A Singapore company acquired shares between March 2019 to June 2019 in an Indian company.
- Now on Nov 1, 2019, it would sell part of such shares to another non-resident (Cayman entity) for the same price shares were acquired. In other words, the same shall be classified as "short term" and taxable as per domestic law.
- are taking an assumption that treaty benefit is unavailable. Accordingly, the same is taxable as per Domestic Tax law. As per the capital gain computation, the resultant figure will not result in any tax payable situation in India.

Query:

- Whether it is advisable to file 15CA/Form 15CB in view of provisions of section 195 read with Rule 37BB, even if the transaction is NOT taxable?
- If yes, compliance to be done under Part C of 15CA, or alternatively under Part D of 15CA?

Resolution:

- Section 195(6) read with Rule 37BB requires reporting of any payment made to a Non – Resident irrespective of its chargeability to tax in India.
- While Part C of the form 15CA is a full-fledged format which requires elaborate details like provisions of the Act/DTAA under which payment is taxable, Part D applies where payments are not chargeable under the Act. Further Part D is a simple self-declaration format which requires bare minimum details like country to which remittance is

[6] *The study given here are possible views and do not form view of the ICAI and not for submission before any authority.*

made, amount and nature of remittance etc. There is no CA certification required.

- Technically compliance is required even if payments are not chargeable to tax in India.
- While in the current case, it is arguable that since there is no income taxable in India, as there is no capital gains tax liability in India, hence Part D should be applicable. However, considering the magnitude of transactions, it is advisable to comply with the reporting obligation under Part C of Form 15CA to avoid any litigation in future. Detailed reporting in Part C will thus be a better compliance for the taxpayer
- Furnishing of inaccurate information or non-furnishing of Form 15CA can trigger penalty of sum of INR 1 lakh rupees under section 271-I.

CASE STUDY 2: – PAYMENT TO FOREIGN BANK BRANCH OF AN INDIAN BANK

Facts:

- I CO imported goods from an entity in Hong Kong
- I CO obtained funding (i.e. trade/buyer's credit against imports) from "ABC Bank" India, Hong Kong Branch (ABC HK)
- In order to repay this credit, I Co has availed another buyers credit from a Singapore Bank
- The proceeds of buyer's credit availed from Singapore Bank, credited to I Co's Indian Bank will be utilised to repay the buyer's credit (includes Principal, Interest and Bank charges) availed from ABC HK

Query:

- Whether 15CA/CB compliance is required for the payment made by I Co to ABC HK?

Resolution:

- Where ABC HK is regarded to be a branch of ABC India, payment made to ABC HK will be treated at par with payments being made to an Indian Bank (resident in India)
- This is for the reason that a foreign branch of an Indian Bank is regarded to be an extension of the Indian Bank itself and not a separate foreign entity

- Once payment is made to a resident, no compliance under section 195(6) is required.

CASE STUDY 3: CONSIDERATION IN KIND

Facts:

- M Ltd., Mauritius holds 100% shareholding in XYZ Pvt. Ltd. (India) and PQR Pvt. Ltd. (India)
- Step 1 - ABC Pte Ltd. (Singapore) will acquire XYZ Pvt. Ltd. (India) and PQR Pvt. Ltd. (India) from its group company (M Ltd., Mauritius) on a fair value basis in cash
- Step 2 - ABC Pte. Ltd. (Singapore) will then transfer its shareholding in XYZ Pvt. Ltd. (India) and PQR Pvt. Ltd. (India) to its subsidiary in India (I Co Pvt. Ltd.) in consideration of the shares of I Co Pvt. Ltd. i.e. a swap of shares

Query:

- Whether the transfer of shares from Non-resident (M Ltd., Mauritius) to another Non-resident (ABC Pte. Ltd.) which is not taxable as per the provisions of India-Mauritius treaty would require compliances in Form 15CA and Form 15CB?
- Whether the transfer of shares, wherein consideration is discharged by issue of shares requires furnishing of information under Section 195(6) read with Rule 37BB (note that the transaction is also not taxable in India as per the provisions of India-Singapore treaty)?

Resolution:

- On the basis of Section 195 and 37BB the following can be inferred
- The provisions of Section 195 are wide enough to cover the transaction where consideration is discharged by way of issuance of shares (section uses the words - payment thereof in cash or by the issue of a cheque or draft or by any other mode)
- Where the transaction is not taxable in India, the self-declaration is required to be furnished in Part D of form 15CA, electronically
- Resident payer may need to comply with requirements of Rule 37BB w.r.t Form 15CA/CB even though there is no actual remittance but the payment is in kind (in this case share swap).

- This is irrespective of its chargeability to tax.
- Supreme Court ruling in the case Kanchanjanga Sea Foods (265 ITR 644) held that TDS obligation under section 195 is triggered even in a case where payment is made in kind.
- It may be advisable to comply with under part D of the New Rule 37BB even in case of barter transaction like share swap with a NR.
- It is possible that I Co. Pvt. Ltd may face practical difficulties if the e-filing system does not recognise payment in kind and/or payment not involving foreign remittance from India.
- In such circumstances, a taxpayer cannot be expected to do what is not possible as per the system in place.
- However, to demonstrate taxpayer's sincerity and bonafide intent, it is suggested that the payer should retain the evidence of having attempted to upload Form No. 15CA and send the physical copy of Form No. 15CA (as also Form 15CB, if payer decides to report in Part C with CA certificate) to the Tax Authority as physical record with proper explanation. This would be necessary considering that default in section 195(6) compliance attracts a penalty under section 271-I of INR 1 lakh.

CASE STUDY 4: DEFERRED CONSIDERATION

Facts:

- I Co. is in the process of acquiring the shares of Target Co
- I Co. is under an obligation to pay the purchase consideration to a Non-Resident Promoter to whom the consideration is paid in 2 parts i.e. Rs. 100 as upfront fee (remitted now) and Rs. 20 as deferred consideration (to be remitted after 12 months).
- The cost of acquisition is "NIL" and the entire INR 120 is capital gains subject to tax @ 10%.
- I Co have deducted entire tax of 12 and is planning to remit 88 now and remaining 20 at later date.

Query:

- Best possible way of disclosure in Form No. 15CB to fairly certify the remittance under consideration i.e. 88?

Resolution:

- From an accounting standpoint, I Co has taken a position to accrue the entire consideration including deferred considered in its books of accounts at closing (ie INR 120 would be accrued in its books at closing. As a result of this position, I Co is required to withhold taxes on the deferred consideration as well at time of accrual.
- I Co and the sellers have agreed that taxes payable on the entire consideration (including deferred consideration) would be withheld upfront at the time of payment of initial consideration and the remaining consideration would only be remitted to the sellers.
- Reporting requirement under section 195(6) arises at the time of payment, even if accrual of entire payment is done on an earlier date.

One may consider the following disclosure in clauses of Form 15CB:

Column No	Particulars (as per Form 15CB)	On remittance of Upfront Fee of Rs. 100	On remittance of deferred consideration of Rs. 20
B2.	Amount Payable	100	20
B8(b)	Amount of income chargeable to tax	120	120
B8(c)	Tax Liability	12	12
B8 (d)	Basis of determining taxable income and tax liability (To give the required remarks)	Amount payable as given in Col. B2. denotes the amount payable by I Co. as on the *date of remittance of upfront fee* • While the total income chargeable / accrued as on the date (as per Col B8 (b)) is Rs. 120, an amount of Rs. 20	Amount payable as given in Col. B2. denotes the amount payable by I Co. as on the *date of remittance of deferred consideration* • While the total income chargeable accrued as on the date (as per Col B8 (b)) is Rs. 120, an

Column No	Particulars (as per Form 15CB)	On remittance of Upfront Fee of Rs. 100	On remittance of deferred consideration of Rs. 20
		shall be remitted only in future and therefore, the company has deducted tax on the entire Rs. 120 and remitted the same (i.e. 120 * 10% = Rs. 12 (Col B8 (c))	amount of Rs. 100 (less TDS) was already remitted which was certified vide Form No. 15CB date _____ and the tax on the entire Rs. 120/- was appropriately deducted at that time. Therefore, the company has shown amount of TDS as Nil in Col. B10.
B10	Amount of TDS	12	Nil
B12	Actual amount of remittance after TDS	88	20

CASE STUDY 5: TRANSFER OF FUNDS BY A NON-RESIDENT FROM INDIAN BANK A/C TO HIS SINGAPORE BANK A/C

Facts:

- Mr. A is employed with ABC India Pvt. Ltd. (ABC). Mr. A is being sent on secondment to Singapore for 3 years by ABC to work with ABC Singapore.
- While Mr. A is on assignment to Singapore, he receives part salary in India and part in Singapore.
- Mr. A has received annual bonus along with salary in India. –

Case A: The salary and bonus are received in India and hence, taxable in India. Tax on this bonus and salary is duly deducted and deposited with the Indian Revenue Authorities.

Case B: The salary and bonus are received in India and hence, as per the domestic tax laws, taxable in India, However, the said income is eligible for exemption under the tax treaty (it has already been evaluated that Mr. A is eligible for treaty relief analysis). Tax on this bonus and salary is deducted from the assignee as hypothetical tax but not deposited with the Indian Revenue Authorities as ABC is claiming tax treaty relief at withholding stage itself for Mr. A

- In the year he received the payment, he qualified as a Non Resident of India as per the Income-tax Act, 1961
- He wants to remit the said amount to Singapore from his Indian bank account to his Singapore bank account for his family maintenance (approx. INR 16 lakh)

Query:

- Whether any certification in the form of Form 15CA / Form 15CB is required to be furnished for such remittance from Mr. A's Indian bank account to Mr. A's Singapore bank account?
- In case yes, which Form is required to be furnished (whether both Form 15CB and Form 15CA or only Form 15CA)? Further, which part of the Form 15CB is applicable (Part A/ Part B/ Part C / Part D) ?

Resolution:

- Mr. A (NR) wants to remit funds to Singapore from his Indian bank account to his Singapore bank account for family maintenance purposes
- Remittance from one account to another of the same person is a "payment to self" which is outside the scope of withholding under the Act.
- On similar lines, compliance under section 195(6) (read with Rule 37BB) is required in respect of payments made by any person to a non-resident (NR) i.e. when two persons are involved.
- Language of section 195(6) r.w Rule 37BB which reads as follows: "The person responsible for paying to a non-resident, not being a company, or to a foreign company....." supports that the

compliance is arguably attracted when payment is made by one person to another. Consequently, it is not attracted when there is remittance from one account of individual to another account outside India of the same individual.

- Therefore, considering specific language of the provision, the payments under both the cases are not covered with the ambit of reporting in Form 15CA/B under Rule 37BB.
- However, there may arise some practical challenges since banks may nevertheless insist on compliance.

CASE STUDY 6: CAPITAL REDUCTION

Facts:

- Z Co is an Indian private company.
- A Co and B Co, both non-residents, holds shares of Z Co in the ratio of 99.99% and 0.01% respectively.
- Z Co is in the process of undertaking capital reduction for repatriating surplus cash to its shareholders wherein shares of A Co and B Co will be cancelled on proportionate basis.
- In the absence of accumulated profits in Z Co, there is no DDT liability. Further, due to higher cost base (as compared to current fair value of Z Co), A Co and B Co shall suffer significant capital losses.
- Since there are no capital gains in the hands of A Co and B Co, Z Co will not be liable to withhold any tax in India (under section 195) on repatriation of surplus cash.

Query:

- Given that A Co and B Co suffer capital loss in India pursuant to reduction of its shares held in Z Co, whether Z Co is required to file Part C (and obtain certificate 15CB as well) or Part D (and no requirement to obtain certificate 15CB)

Resolution:

- Assumed that on the capital reduction transaction there shall be no implications under section 2(22)(d), since there are no accumulated profits and the capital gains computation as per the Act, results in a capital loss.

- The issue to be considered is whether Z Co is required to File Part C/ Part D of Form 15CA
- Section 195(6) .w.r.t Rule 37BB requires reporting of any payment made to a NR irrespective of its chargeability to tax in India. Thus reporting in Form 15CA is triggered even if there is no tax liability arising for the NR on the impugned transaction.
- While Part C of Form 15CA is a full-fledged format which requires elaborate details like provisions of the Act/DTAA under which payment is taxable as also CA certificate in Form 15CB, Part D applies where payments are not chargeable under the Act. Further Part D is a simple self-declaration format which requires bare minimum details like country to which remittance is made, amount and nature of remittance etc. There is no CA certification required.
- Thus, technically compliance is required even if payments are not chargeable to tax in India. While in the current case, it could be argued that since the capital gains computation results in a loss, there is no tax liability in India, hence Part D should be applicable.

CASE STUDY 7: MISCELLANEOUS

Query 1:

Whether Form 15CA/CB will be required on sale of foreign currency, issuance of travel currency card or travellers cheque?

Resolutions:

Said question is relevant when such instruments are issued by the Bank to customers who are Non-Resident for tax purposes but resident for FEMA purposes. If these instruments are issued to customers who are Resident for both tax and FEMA purposes, section 195(6) does not apply and there is no requirement of reporting in Form 15CA/CB.

If the issue of above referred instruments are covered by Liberalised Remittance Scheme for Residents, there is no reporting requirement in Form 15CA/CB as per Rule 37BB(3)(i).

Similarly, if the issue of above referred instruments are covered by Sr. No. 15 to 19 (covering remittances for business travel, basic travel quota, pilgrimage, medical treatment, education) of List specified in Rule 37BB(3)(ii), there is no reporting requirement in Form 15CA/CB.

Query 2:

While filling Form no. 15CA Part A, Part B and Part C, limit of Rs. 5,00,000 needs to be computed. Whether the 33 exempted payments and the remittances made by individual where prior approval of RBI is not required as per Section 5 of FEMA, 1999 need to be considered while computing the limit of Rs. 5,00,000?

Resolution:

Rule 37BB(1) deals with payments chargeable to tax. Rule 37BB(2)/(3) deal with payments which are not chargeable to tax.

The limit of Rs. 5 lakhs is provided in Rule 37BB(1) which deal with payments chargeable to tax. Rule 37BB(i) provides that where such payments do not exceed Rs. 5 lakhs in a financial year, reporting may be made in Part A of Form 15CA. Else, the payments are required to be reported either in Part B (supported by AO‟s NIL/lower TDS certificate) or Part C (supported by CA certificate in Form 15CB).

Thus, the limit of Rs. 5 lakhs applies only to payments chargeable to tax to be reported in Part A/B/C of Form 15CA.

Headings of Part A/B/C clarify that the same is in relation with remittance which is taxable under the Act and limit of INR 5,00,000 is in relation with "the remittance" or aggregate of "such remittances". Refer extract of Part A below (similar wording in part B/C also) –

"Part A (To be filled up if the remittance is chargeable to tax under the provisions of the Income-tax Act, 1961 and the remittance or the aggregate of such remittances, as the case may be, does not exceed five lakh rupees during the financial year)"

The reference to payments under Section 5 of FEMA 1999 not requiring RBI approval (i.e Liberalised Remittance Scheme for residents) and 33 exempted payments appear in Rule 37BB(3) which deal with payments which are not chargeable to tax. The threshold limit of Rs. 5 lakhs is not applicable to such payments.

Hence, these payments are not required to be considered for computing threshold limit of Rs. 5 lakhs.

Query 3:

Applicability of Rule 37BB on payment made by the customer through Debit/Credit card in foreign currency?

Resolution:

- If the payments made by customer through Debit/Credit card in foreign currency is covered by Liberalised Remittance Scheme, there is no reporting requirement as per Rule 37BB(3)(i).
- Reporting requirement will apply only if (a) the payments are chargeable to tax in India or (b) the payments are not covered by Liberalised Remittance Scheme and Specified list of 33 exempted payments. In such case, mode of payment whether by way of bank remittance or through International Credit/Debit card may not be relevant.

Query 4:

Whether the Bank needs to furnish the statement in "Form 15CC' for all outward remittances whether chargeable to tax or not including 33 exempt payments and exempt current account transactions as per FEMA?

Resolution:

Sub-rule (7) to new Rule 37BB requires an authorised dealer to furnish a quarterly statement electronically in the prescribed format. While Rule 37BB (7) is silent on subject matter of particulars to be furnished in this form, Form 15CC makes it clear that the reporting is in respect of "remittances" made during relevant quarter. The following information is required to be furnished.

→ Name of the remitter

→ PAN of the remitter

→ Name of the remittee

→ PAN of the remittee, if available

→ Amount of remittance Date of remittance Country to which remittance is made

→ Purpose code as per RBI

From a bare reading of Rule 37BB and above referred format, following points indicate that exempt payments may need to be reported by the Bank –

Sub-rule (7) as well as Form 15CC does neither indicate the scope of the remittances to be reported, nor do they specifically exclude exempt payments

The exclusion for exempt payments occurring in Rule 37BB (3) is only for reporting by payers. There is no such exclusion provided for Authorised Dealers for quarterly reporting of remittances.

The prescribed Form 15CC requires general information regarding remitter/ remitee (name, PAN) and the remittance (amount date, country, RBI code etc.). If the format is based on what authorised dealers are, in any case, required to report to RBI, the case for inclusion of exempt payments is stronger. The rationale from Tax Authority's perspective may be to obtain information of exempt payments going out of India on real time basis since such information will not be forthcoming from the payers by virtue of exclusion provided in Rule 37BB(3).

Chapter 15

Important Notifications and Circulars

1307. Announcement by Finance Minister in Lok Sabha on 7-9-1990 regarding deduction of tax at source from payments in respect of systems software

1. In his statement made in the Lok Sabha on September 7, 1990 the Finance Minister had, *inter alia,* announced :

"At present, customs duty is levied on the value of computer software by treating it as a commodity import. The non-resident licenser or seller is also subjected to income-tax on royalty payment for licensing of the software. To avoid this dual levy for exporters, Government has decided that lump sum payment for systems software supplied by the manufacturer along with the hardware itself would be subjected only to customs duty and not to income-tax. Application software forming part of an approved software export scheme would be subjected only to income-tax on the licenser or seller."

2. It has been decided that the concession, as above, *insofar as it relates to income-tax, will be available in relation to imports made during the current financial year itself and subsequent years.* Accordingly, where a taxpayer, engaged in the business of export of software for computer application, imports any systems software, supplied by the manufacturer of the computer hardware, along with the hardware itself, the lump sum payment made to the foreign supplier for acquisition of any right in relation to, or for use of, such systems software will not be liable to tax in India as payment by way of royalty or otherwise. Such lump sum payments will, henceforth, be allowed to be made without deduction of tax at source under section 195(1) of the Income-tax Act, 1961. Necessary amendment of the law in this regard will be introduced before Parliament shortly.

Circular : *No. 588, dated 2-1-1991.*

CIRCULAR NO. 723, DATED 19-9-1995

TAX DEDUCTION AT SOURCE FROM PAYMENT MADE TO FOREIGN SHIPPING COMPANIES

1. Representations have been received regarding the scope of sections 172,

194C and 195 of the Income-tax Act, 1961, in connection with tax deduction at source from payments made to the foreign shipping companies or their agents.

2. Section 172 deals with shipping business of non-residents. Section 172(1) provides the mode of the levy and recovery of tax in the case of any ship, belonging to or chartered by a non-resident, which carries passengers, livestock, mail or goods shipped at a port in India. An analysis of the provisions of section 172 would show that these provisions have to be applied to every journey a ship, belonging to or chartered by a non-resident, undertakes from any port in India. Section 172 is a self-contained code for the levy and recovery of the tax, ship-wise, and journey wise, and requires the filing of the return within a maximum time of thirty days from the date of departure of the ship.

3. The provisions of section 172 are to apply, notwithstanding anything contained in other provisions of the Act. Therefore, in such cases, the provisions of sections 194C and 195 relating to tax deduction at source are not applicable. The recovery of tax is to be regulated, for a voyage undertaken from any port in India by a ship under the provisions of section 172.

4. Section 194C deals with work contracts including carriage of goods and passengers by any mode of transport other than railways. This section applies to payments made by a person referred to in clauses (*a*) to (*j*) of sub-section (1) to any "resident" (termed as contractor). It is clear from the section that the area of operation of TDS is confined to payments made to any "resident". On the other hand, section 172 operates in the area of computation of profits from shipping business of non-residents. Thus, there is no overlapping in the areas of operation of these sections.

5. There would, however, be cases where payments are made to shipping agents of non-resident ship-owners or charterers for carriage of passengers etc., shipped at a port in India. *Since, the agent acts on behalf of the non-resident ship-owner or charterer, he steps into the shoes of the principal. Accordingly, provisions of section 172 shall apply and those of sections 194C and 195 will not apply.*

CIRCULAR NO. 769, DATED 6-8-1998

PROCEDURE FOR REFUND OF TAX DEDUCTED AT SOURCE UNDER SECTION 195

1. The Board has received a number of representations for granting approval for refund of excess deduction or erroneous deduction of tax at source under section 195 of the Income-tax Act. The cases referred to the Board mainly relate to circumstances where :—(*i*) after the deposit of tax deducted at source under section 195,(*a*) the contract is cancelled and no remittance is required to be made to the foreign collaborator;(*b*) the remittance is duly made to the foreign collaborator, but the contract is cancelled and the foreign collaborator returns the remitted amount to the person responsible for deducting tax at source;(*c*) the tax deducted at source is found to be in excess of tax deductible for any other reason;(*ii*) the tax is deducted at source under section 195 and paid in one assessment year and remittance to the foreign collaborator is made and/or returned to the Indian company following cancellation of the contract in another assessment year.

In all the cases mentioned above, where either the income does not accrue to the non-resident or excess tax has been deducted hereby resulting in a refund being due to the Indian enterprise which deposited the tax, at present a refund can be issued only if valid claim is made by filing a return.

2. In the absence of any statutory provision empowering the Assessing Officers to refund the tax deducted at source to the person who has deducted tax at source, the Assessing Officers insist on filing of the return by the person in whose case deduction was made at source. Even adjustments of the excess tax or the tax erroneously deducted under section 195 is not allowed. This has led to a lot of hardship as the non-resident in whose case, the deduction has been made is either not present in the country or has no further dealings with the Indian enterprise, thus, making it difficult for a return to be filed by the non-resident.

3. The matter has been considered by the Board. It has been decided that in the type of cases referred to above, a refund may be made independent of the provisions of the Income-tax Act, 1961 to the person responsible for deducting the tax at source from payments to the non-resident, after taking the prior approval of the Chief Commissioner concerned.

4. The excess tax deducted would be the difference between the actual payment made by the deductor and the tax deducted at source or that deductible. This amount should be adjusted against the existing tax liability

under any of the Direct Tax Acts. After meeting such liability, the balance amount, if any, should be refunded to the person responsible for deduction of tax at source.

5. Where the tax is deducted at source and paid by the branch office of the person responsible for deduction of tax at source and the quarterly statement/annual return of tax deduction at source is filed by the branch, each branch office would be treated as a separate unit independent of the head office. After meeting any existing tax liability of such a branch, which would normally be in relation to the deduction of tax at source, the balance amount may be refunded to the said branch office.

6. The adjustment of refund against the existing tax liability should be made in accordance with the present procedure on the subject. A separate refund voucher to the extent of such liability under each of the direct taxes should be prepared by the Income-tax Officer in favour of the "Income-tax Department" and sent to the bank along with the challan of the appropriate type. The amount adjusted and the balance, if any, refunded would be debitable under the sub-head "Other refunds" below the minor head "Income-tax on companies" major head "020 - Corporation Tax" *or* below the minor head "Income-tax other than Union Emoluments" major head"021 - Taxes on Incomes other than Corporation Tax", depending upon whether the payment was originally credited to the major head "020 - Corporation Tax" or to the major head "021-Taxes on Income other than Corporation Tax".

7. Since the adjustment/refund of the amount paid in excess would arise in relation to the deduction of tax at source, the recording of the particulars of adjustment/refund should be done in the quarterly statement of TDS/annual return under the signature of the ITO at the end of the statement, *i.e.,* below the signature of the person furnishing the statement.

CIRCULAR NO. 769, DATED 6-8-1998

PROCEDURE FOR REFUND OF TAX DEDUCTED AT SOURCE UNDER SECTION 195

1. The Board has received a number of representations for granting approval for refund of excess deduction or erroneous deduction of tax at source under section 195 of the Income-tax Act. The cases referred to the Board mainly relate to circumstances where :—(*i*) after the deposit of tax deducted at source under section 195,(*a*) the contract is cancelled and no remittance is required to be made to the foreign collaborator;(*b*) the remittance is duly made to the foreign collaborator, but the contract is cancelled and the foreign

collaborator returns the remitted amount to the person responsible for deducting tax at source;(*c*) the tax deducted at source is found to be in excess of tax deductible for any other reason;(*ii*) the tax is deducted at source under section 195 and paid in one assessment year and remittance to the foreign collaborator is made and/or returned to the Indian company following cancellation of the contract in another assessment year.

In all the cases mentioned above, where either the income does not accrue to the non-resident or excess tax has been deducted thereby resulting in a refund being due to the Indian enterprise which deposited the tax, at present a refund can be issued only if valid claim is made by filing a return.

2. In the absence of any statutory provision empowering the Assessing Officers to refund the tax deducted at source to the person who has deducted tax at source, the Assessing Officers insist on filing of the return by the person in whose case deduction was made at source. Even adjustments of the excess tax or the tax erroneously deducted under section 195 is not allowed. This has led to a lot of hardship as the non-resident in whose case, the deduction has been made is either not present in the country or has no further dealings with the Indian enterprise, thus, making it difficult for a return to be filed by the non-resident.

3. The matter has been considered by the Board. It has been decided that in the type of cases referred to above, a refund may be made independent of the provisions of the Income-tax Act, 1961 to the person responsible for deducting the tax at source from payments to the non-resident, after taking the prior approval of the Chief Commissioner concerned.

4. The excess tax deducted would be the difference between the actual payment made by the deductor and the tax deducted at source or that deductible. This amount should be adjusted against the existing tax liability under any of the Direct Tax Acts. After meeting such liability, the balance amount, if any, should be refunded to the person responsible for deduction of tax at source.

5. Where the tax is deducted at source and paid by the branch office of the person responsible for deduction of tax at source and the quarterly statement/annual return of tax deduction at source is filed by the branch, each branch office would be treated as a separate unit independent of the head office. After meeting any existing tax liability of such a branch, which would normally be in relation to the deduction of tax at source, the balance amount may be refunded to the said branch office.

6. The adjustment of refund against the existing tax liability should be made in accordance with the present procedure on the subject. A separate refund voucher to the extent of such liability under each of the direct taxes should be prepared by the Income-tax Officer in favour of the "Income-tax Department" and sent to the bank along with the challan of the appropriate type. The amount adjusted and the balance, if any, refunded would be debitable under the sub-head "Other refunds" below the minor head "Income-tax on companies" major head "020 - Corporation Tax" *or* below the minor head "Income-tax other than Union Emoluments" major head"021 - Taxes on Incomes other than Corporation Tax", depending upon whether the payment was originally credited to the major head "020 - Corporation Tax" or to the major head "021-Taxes on Income other than Corporation Tax".

7. Since the adjustment/refund of the amount paid in excess would arise in relation to the deduction of tax at source, the recording of the particulars of adjustment/refund should be done in the quarterly statement of TDS/annual return under the signature of the ITO at the end of the statement, *i.e.,* below the signature of the person furnishing the statement.

CIRCULAR NO.774,DATED 17-3-1999

WHETHER CERTIFICATE ISSUED UNDER SECTION 197(1) WILL BE APPLICABLE ONLY IN RESPECT OF CREDIT OR PAYMENTS, AS THE CASE MAY BE, SUBJECT TO TAX DEDUCTION AT SOURCE, MADE ON OR AFTER DATE OF SUCH CERTIFICATE

1. Section 197(1) of the Act envisages that, where tax is deductible at source in terms of sections 192, 193, 194, 194A, 194D, 194-I,194K and 195 of the Income-tax Act, and the recipient justifies the deduction of tax at any lower rate or no deduction of tax to the satisfaction of the Assessing Officer, the Assessing Officer shall issue an appropriate certificate. It has come to the notice of the Board that in certain cases a practice has developed to issue certificates under section 197(1) of the Income-tax Act even after the credit or payment of amounts subject to tax deduction at source. This is not in accordance with the provisions of law.

2. It is, therefore, clarified that *the certificate issued under section 197(1) of the Income-tax Act will be applicable only in respect of credit or payments, as the case may be, subject to tax deduction at source, made on or after the date of such certificate. Therefore, no certificate under section 197(1) of the Income-tax Act should be issued after the amounts subject to tax deduction at source stand credited or paid, whichever is earlier.*

3. In other words, henceforth, *application requesting for certificate under section 197(1) should not be acted upon if submitted after credit/payment of the amount subject to tax deduction at source. However, assessees having genuine hardship in submitting such applications on time may refer to the Board for condonation of delay in terms of section 119(2)(*b*) of the Income-tax Act.*

CIRCULAR NO.790,DATED 20-4-2000

SECTION 195 OF THE INCOME-TAX ACT, 1961 - DEDUCTION AT SOURCE - OTHER SUMS - PROCEDURE FOR REFUND OF TAX DEDUCTED AT SOURCE UNDER SECTION 195 TO PERSON DEDUCTING TAX

1. The Board has issued Circular No. 769, dated 6-8-1998, laying down procedure for refund of tax deducted under section 195, in certain situations to the person deducting the tax at source from the payment to the non-resident. After reconsideration, Circular No.769 is revoked with immediate effect and refund to the person deducting tax at source under section 195 shall be allowed in accordance with the provisions of this Circular.

2. The Board had received representations for approving grant of refund to the persons deducting tax at source under section 195 of the Income-tax Act, 1961. The cases referred to the Board mainly related to circumstances where after the deposit into Government account of tax deducted at source under section 195,—

(*a*) the contract is cancelled and no remittance is made to the non-resident;

(*b*) the remittance is duly made to the non-resident, but the contract is cancelled. In such cases, the remitted amount may have been returned to the person responsible for deducting tax at source.

In the cases mentioned above, income does not accrue to the non-resident. The amount deducted as tax under section 195 and paid to credit of Government, therefore, belongs to the deductor. At present, a refund is given only, on a claim being made by the non-resident with whom the transaction was intended.

3. In the type of cases referred to in sub-paragraph (*a*) of paragraph 2, the non-resident not having received any payment would not apply for a refund. For cases covered by sub-paragraph (*b*) of paragraph 2, no claim may be made by the non-resident where he has no further dealings with the resident

deductor of tax. This resident deductor is, therefore, put to genuine hardship as he would not be able to recover the amount deducted and deposited as tax.

4. The matter has been considered by the Board. In the type of cases referred to above, where no income has accrued to the non-resident due to cancellation of contract, the amount deposited to the credit of Government under section 195 cannot be said to be 'tax'. It has been decided that this amount can be refunded, with prior approval of Chief Commissioner concerned to the person who deducted it from the payment to the non-resident under section 195.

5. The refund being made to the person who made the payment under section 195, the Assessing Officer may after giving intimation to the deductor, adjust it against any existing tax liability of the deductor under the Income-tax Act, 1961, Wealth-tax Act, 1957 or any other direct tax law. The balance amount, if any, should be refunded to the person who made such payment under section 195. A separate refund voucher to the extent of such liability under each of the direct taxes should be prepared by the Income-tax Officer or the Assessing Officer in favour of the "Income-tax Department" and sent to the bank along with the challan of the appropriate type. The amount adjusted and the balance, if any, refunded would be debitable under the sub-head "Other refunds" below the minor head" Income-tax on Companies"—major head "020—Corporation Tax" or below the minor head "Income-tax other than Union Emoluments" major head "021—Taxes on Incomes other than Corporation Tax" depending upon whether the payment was originally credited to the major head "020—Corporation Tax" or to the major head "021—Taxes on Income other than Corporation Tax". Since the adjustment/refund of the amount paid would arise in relation to the deduction of tax at source, the recording of the particulars of adjustment/refund, should be done in the quarterly statement of TDS/annual return under the signature of the Income-tax Officer or the Assessing Officer at the end of the statement, *i.e.,* below the signature of the person furnishing the statement.

6. Refund to the person making payment under section 195 is being allowed as income does not accrue to the non-resident. The amount paid into the Government account in such cases, is no longer 'tax'. In view of this, no interest under section 244A is admissible on refunds to be granted in accordance with this Circular or on the refunds already granted in accordance with Circular No. 769.

7. A refund in terms of this Circular should be granted only after obtaining an

undertaking that no certificate under section 203 of the Income-tax Act has been issued to the non-resident. In cases where such a certificate has been issued, the person making the refund claim under this Circular should either obtain it or should indemnify the Income-tax Department from any possible loss on account of any separate claim of refund for the same amount by the non-resident.

8. The refund as per this Circular is permitted only in respect of transactions with non-residents, which have either not materialised or have been cancelled subsequently. It, therefore, needs to be ensured by the Assessing Officer that they disallow corresponding transaction amount, if claimed as an expense in the case of person making refund claim.

9. It is hereby clarified that refund shall not be issued to the deductor of tax in the cases referred to in clause (*i*)(*c*) of paragraph 1 of Circular No. 769, dated 6-8-1998.

10. The limitation for making a claim of refund under this Circular shall be two years from the end of the financial year in which taxis deducted at source.

CIRCULAR NO. 04/2009 ,DATED 29-6-2009

CBDT ON REMITTANCE TO NON-RESIDENTS UNDER SECTION 195

1. Section 195 of the Income-tax Act, 1961 mandates deduction of income tax from payments made or credit given to non-residents at the rates in force. The Reserve Bank of India has also mandated that except in the case of certain personal remittances which have been specifically exempted, no remittance shall be made to a non-resident unless a no objection certificate has been obtained from the Income Tax Department. This was modified to allow such remittances without insisting on a no objection certificate from the Income Tax Department, if the person making the remittance furnishes an undertaking (addressed to the Assessing Officer)accompanied by a certificate from an Accountant in a specified format. The certificate and undertaking are to be submitted (induplicate) to the Reserve Bank of India / authorised dealers who in turn are required to forward a copy to the Assessing Officer concerned. The purpose of the undertaking and the certificate is to collect taxes at the stage when the remittance is made as it may not be possible to recover the tax at a later stage from non-residents.

2. There has been a substantial increase in foreign remittances, making the manual handling and tracking of certificates difficult. To monitor and track

transactions in a timely manner, section 195 was amended vide Finance Act, 2008 to allow CBDT to prescribe rules for electronic filing of the undertaking. The format of the undertaking (Form 15CA) which is to be filed electronically and the format of the certificate of the Accountant (Form 15CB) have been notified vide Rule 37BB of the Income-tax Rules, 1962.

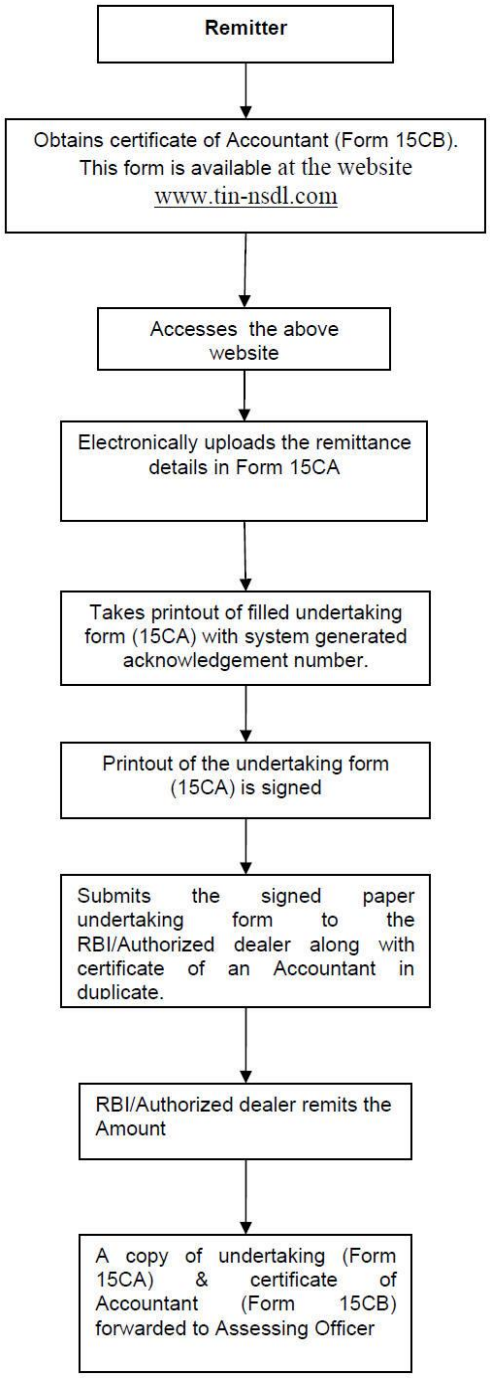
3. The revised procedure for furnishing information regarding remittances being made to non-residents **w.e.f. 1st July, 2009** is as follows:-(*i*) The person making the payment (remitter) will obtain a certificate from an accountant***** (other than employee) in Form15CB.(*ii*) The remitter will then access the website to electronically upload the remittance details to the Department in Form 15CA(undertaking). The information to be furnished in Form 15CA is to be filled using the information contained in Form15CB (certificate).(*iii*) The remitter will then take a print out of this filled up Form 15CA (which will bear an acknowledgement number generated by the system) and sign it. **Form 15CA (undertaking) can be signed by the person authorised to sign the return of income of the remitter or a person so authorised by him in writing.**

4. The duly signed Form 15CA (undertaking) and Form 15CB (certificate), will be submitted in duplicate to the Reserve Bank of India / authorized dealer. The Reserve Bank of India / authorized dealer will in turn forward a copy the certificate and undertaking to the Assessing Officer concerned.(*v*) A remitter who has obtained a certificate from the Assessing Officer regarding the rate at or amount on which the tax is to be deducted is not required to obtain a certificate from the Accountant in Form 15CB. However, he is required to furnish information in Form 15CA (undertaking) and submit it along with a copy of the certificate from the Assessing Officer asper the procedure mentioned from Sl.No.(i) to (iv) above.(*vi*) A flow chart regarding filing of Form 15CA and Form 15CB is enclosed at Annexure -A.

5. The Directorate General of Income-tax (Systems) (www.incometaxindia.gov.in) shall specify the procedures, formats and standards for running of the scheme as well as instructions for filling up Forms 15CA and 15CB. These forms shall be available for upload and printout at www.tin-nsdl.com.

6. The Reserve Bank of India is being requested to circulate the revised procedure among all authorised dealers.

Annexure – A- **Flow chart of filing undertaking form u/s 195 of I T Act 1961**


Remitter
Obtains certificate of Accountant (Form 15CB). This form is available at the website www.tin-nsdl.com
Accesses the above website
Electronically uploads the remittance details in Form 15CA
Takes printout of filled undertaking form (15CA) with system generated acknowledgement number.
Printout of the undertaking form (15CA) is signed
Submits the signed paper undertaking form to the RBI/Authorized dealer along with certificate of an Accountant in duplicate.
RBI/Authorized dealer remits the Amount
A copy of undertaking (Form 15CA) & certificate of Accountant (Form 15CB) forwarded to Assessing Officer

CIRCULAR NO. 9/2009 [F. NO. 142/19/2007-TPL]

SECTION 195 OF THE INCOME-TAX ACT, 1961 - DEDUCTION OF TAX AT SOURCE - PAYMENT TO NON-RESIDENT - CLARIFICATION REGARDING REMITTANCES OF CONSULAR RECEIPTS TO NON - RESIDENTS

CIRCULAR NO. 9/2009 [F. NO. 142/19/2007-TPL], DATED 30-11-2009

1. Reference is drawn to Circular No. 4/2009, dated 29th June, 2009 prescribing the revised procedure for furnishing information regarding remittances being made to non-residents w.e.f. 1st July, 2009.

2. As per Article 28 of Schedule to section 2 of the Diplomatic Relations (Vienna Convention) Act, 1972, the fees and charges levied by a diplomatic mission in the course of its official duties shall be exempt from all dues and taxes.

3. In view of the above, while remitting consular receipts abroad, diplomatic missions in India will be required to submit only a self-certified undertaking in Form No. 15CA to the remitter bank. They are not required to obtain a certificate from an accountant/certificate of Assessing Officer (Form 15CB). The procedure for furnishing information regarding remittances of Consular receipts by diplomatic missions in India will be as follows :—(*i*) The diplomatic mission will access the website to electronically upload the remittance details to the Income-tax Department in Form 15CA (undertaking).(*ii*) The diplomatic mission will then take a print out of this filled up Form 15CA (which will bear an acknowledgement number generated by the system) and sign it. Form 15CA (undertaking) can be signed by the Head of the mission or by an officer of the mission so authorized by the Head of the mission.(*iii*) The duly certified Form 15CA (undertaking) will be submitted in duplicate to the Reserve Bank of India/authorized dealer. The Reserve Bank of India/authorized dealer will in turn forward a copy of the undertaking to the Assessing Officer concerned.

INCOME-TAX (FOURTEENTH AMENDMENT) RULES, 2013

NOTIFICATION NO. S.O. 2659(E) [NO. 67/2013 (F. NO. 149/119/2012-SO (TPL))], DATED 2-9-2013

In exercise of the powers conferred by sub-section (6) of section 195 and section 192, section 194B, section 194BB, section 194E,section 194LB, section 194LC, section 194LD, section 196B, section 196C, section 196D read with section 295 of the Income-tax Act, 1961 (43 of 1961) and in

supersession of the notification of the Government of India in the Ministry of Finance, Department of Revenue, issued by the Central Board of Direct Taxes vide number S.O.2363(E) dated the 5th August, 2013 published in the Gazette of India, dated the 5th August, 2013, the Central Board of Direct Taxes hereby makes the following rules further to amend the Income-tax Rules, 1962, namely:—

1. (1) These rules may be called the Income-tax (14th Amendment) Rules, 2013.

(2) They shall come into force on the 1st day of October, 2013.

2. In the Income-tax Rules, 1962 (hereafter referred to as the said rules), for rule 37BB, the following rule shall be substituted, namely:—

"37BB. *Furnishing of information by the person responsible for making any payment including any interest or salary or any other sum chargeable to tax, to a non-resident, not being a company, or to a foreign company*—(1) Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest or salary or any other sum chargeable to tax under the provisions of the Act, shall furnish the following, namely:—(*i*) the information in Part A of Form No.15CA, if the amount of payment does not exceed fifty thousand rupees and the aggregate of such payments made during the financial year does not exceed two lakh fifty thousand rupees;(*ii*) the information in Part B of Form No.15CA for payments other than the payments referred in clause (*i*) after obtaining—(*a*) a certificate in Form No. 15CB from an accountant as defined in the *Explanation* below sub-section (2) of section288; or(*b*) a certificate from the Assessing Officer under section 197; or(*c*) an order from the Assessing Officer under sub-section (2) or sub-section (3) of section 195.

(2) The information in Form No. 15CA shall be furnished by the person electronically to the website designated by the Income-tax Department and thereafter a signed printout of the said form shall be submitted to the authorised dealer, prior to remitting the payment.

(3) An income-tax authority may require the authorised dealer to furnish the signed printout referred to in sub-rule (2) for the purposes of any proceedings under the Act.

(4) The Director General of Income-tax (Systems) shall specify the procedures, formats and standards for ensuring secure capture, transmission

of data and shall also be responsible for the day-to-day administration in relation to furnishing the information in the manner specified.

Explanation 1.— For the purposes of this rule, "authorised dealer" means a person authorised as an authorised dealer under sub-section (1) of section 10 of the Foreign Exchange Management Act, 1999 (42 of 1999).

Explanation 2.—For the removal of doubts, it is hereby clarified that for payments of the nature specified in column (3) of the specified list below, no information is required to be furnished under sub-rule (1).

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	S0202	Payment- for operating expenses of Indian shipping companies operatingabroad.
8	S0208	Operating expenses of Indian Airlines companies operating abroad
9	S0212	Booking of passages abroad -Airlines companies
10	S0301	Remittance towards business travel.
11	S0302	Travel under basic travel quota (BTQ)
12	S0303	Travel for pilgrimage
13	S0304	Travel for medical treatment

Sl.No.	Purpose code as per RBI	Nature of payment
14	S0305	Travel for education (including fees, hostel expenses etc.)
15	S0401	Postal services
16	S0501	Construction of projects abroad by Indian companies including import of goodsat project site
17	S0602	Freight insurance - relating to import and export of goods
18	S1011	Payments for maintenance of offices abroad
19	S1201	Maintenance of Indian embassies abroad
20	S1 202	Remittances by foreign embassies in India
21	S1301	Remittance by non-residents towards family maintenance and-savings
22	S1302	Remittance towards personal gifts and donations
23	S1303	Remittance towards donations to religious and charitable institutions abroad
24	S1304	Remittance towards grants and donations to other Governments and charitable institutions established by the Governments.
25	S1305	Contributions or donations by the Government to international institutions
26	S1306	Remittance towards payment or refund of taxes.
27	S1501	Refunds or rebates or reduction in invoice value on account of exports
28	S1503	Payments by residents for international bidding".

3. In the said rules, in Appendix II, for Form No.15CA and Form No. 15CB, the following Forms shall be substituted, namely:—

Income-Tax **FORM NO. 15CA** **Ack. No.**

Department	*(See* rule 37BB) **Information to be furnished for payments, chargeable to tax, to a non-resident not being a company, or to a foreign company**

FORM NO. 15CB

(*See* rule 37BB)

Certificate of an accountant[7]

Submission of No Objection Certificate in case of remittance to a non-resident

1. Section 195 of the Income-tax Act, 1961 provides that any person responsible for paying to a non-resident any sum chargeable under the Act shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by cheque or draft or any other mode, whichever is earlier, deduct income-tax thereon at the rates in force.

2. The Reserve Bank of India have provided in their Office Manual that no remittance shall be allowed unless a No Objection Certificate has been obtained from the Income-tax Department. It has since been decided that henceforth remittances may be allowed by the Reserve Bank of India without insisting upon a No Objection Certificate from the Income-tax Department and on the person making the remittance furnishing an undertaking (in duplicate) addressed to the Assessing Officer accompanied by a certificate from an Accountant (other than an employee) as defined in the *Explanation* below section 288 of the Income-tax Act, 1961 in the Form annexed to this circular. The person making the remittance shall submit the undertaking along with the said certificate of the Accountant to the Reserve Bank of India, who in turn, shall forward a copy thereof to the Assessing Officer.

3. The contents of this Circular may be brought to the notice of all the officers working in your charge.

UNDERTAKING

To

[7] To be signed and verified by an accountant (other than an employee) as defined in the Explanation below sub-section (2) ofsection 288 of the Income-tax Act, 1961.

.....

(Designation of the Assessing Officer)

.....

.....

I/We..... ..... (Name, address & Permanent Account Number)

propose to make a remittance of.....

(Amount)

being..... (nature of payment)

to.....

(name and complete address of the person to whom the remittance has been made)

after deducting a sum of Rs..... being the tax @....., which is the appropriate rate of tax deductible at source on the said amount of remittance.

2. A certificate from the accountant as defined in *Explanation* below section 288 of the Income-tax Act, certifying the nature and amount of income, amount of tax payable and the amount actually paid, is also annexed.

3. In case it is found that the tax actually payable on the amount of remittance made, has either not been paid or has not been paid in full, I/we undertake to pay the said amount of tax along with interest found due in accordance with the provisions of the Income-tax Act.

4. I/We will also be subject to the provisions of penalty and prosecution for the said default as per the Income-tax Act.

5. I/We also undertake to submit the requisite documents, etc., for enabling the Income-tax Department to determine the nature and amount of income and tax, interest, penalty, etc., payable thereon.

(Name and Signature)

Date.....

Place.....

(The Undertaking shall be signed by the person authorised to sign the return

of income of the person making the payment).

CERTIFICATE

I/We have examined the books of accounts of M/s.....

.....

(Name, address and Permanent Account Number of person making the remittance)

for ascertaining the nature of the remittance,

of.....

(amount of remittance)

to.....

(Name and complete address of the person to whom the remittance is being made)

and the rate at which the tax is deductible at source thereon and hereby certify that a sum of Rs..... has been deducted as tax at the appropriate rate and has been paid to the credit of the Government.

.....

Accountant

Place.....

Date.....

Circular : *No. 759, dated 18-11-1997.*

CLARIFICATION 1

1. Circular No. 759 dated 18-11-1997 was issued by the Board to dispense with the requirement of submission of a No Objection Certificate from income-tax authorities for remittance to a non-resident as required by the Reserve Bank of India (RBI). In paragraph 2 of the said Circular, it was stated that henceforth remittances may be allowed by the RBI without insisting upon a No Objection Certificate from the Income-tax Department provided the person making the remittance furnished an undertaking in duplicate addressed to the Assessing Officer which was accompanied by a certificate from an accountant other than an employee as defined in the *Explanation* below section 288 of the Income-tax Act, 1961 in the form annexed to the said Circular. The person making the remittance had to

submit the undertaking along with the said certificate of the accountant to the RBI, who would, in turn forward a copy thereof to the Assessing Officer.

2. A number of references have been received by the Board stating that RBI had delegated powers to authorised dealers to allow certain types of remittances to non-residents without obtaining approval of RBI. In such cases, RBI cannot forward the undertaking and certificate of the accountant to the Assessing Officer as prescribed in Circular No. 759. The RBI has already issued a Circular - AD (MA Series) Circular No. 48, dated 29th November, 1997 (*see* Annex) to all authorised dealers in foreign exchange directing them to forward a copy of the certificate together with a copy of the undertaking to the office of the Assessing Officer of the Income-tax Department as indicated in the undertaking. In view of the foregoing, it is clarified that Circular No. 759 would also be applicable to remittances made through authorised dealers in Foreign Exchange.

3. In accordance with Circular No. 759, the undertaking to be submitted by the person making the remittance to a non-resident is required to be signed by the person authorised to sign the return of income of the person making the payment. The person authorised to sign a return of income in the case of a company, in accordance with section 140 of the Income-tax Act, 1961 is the Managing Director and each undertaking for each remittance has, therefore, to be signed by the Managing Director. Representations pointing out administrative difficulties experienced by companies have been received. It has, therefore, been decided that the undertaking to be submitted at the time of making a remittance to a non-resident shall be signed by the person authorised to sign a return or a person so authorised by him in writing.

4. It is also clarified that Circular No. 759 will cover those remittances for which RBI had prescribed the production of a No Objection Certificate from the income-tax authorities under its Exchange Control Manual. Further, if an order under section 195(2) has been obtained by a person responsible for deducting tax, the new procedure of filing an undertaking along with a certificate prescribed in Circular No. 759 would not be applicable.

5. The contents of this Circular may be brought to the notice of all the officers working in your charge.

Circular : *No. 767, dated 22-5-1998.*

ANNEX

A.D. (M.A. SERIES) CIRCULAR NO. 48, DATED 29-11-1997, ISSUED BY THE RESERVE BANK OF INDIA.

1. Presently, authorised dealers have been delegated powers to allow certain types of remittances, subject to, among other things, production of NOC/Tax Clearance Certificate from income-tax authorities. Similarly, Reserve Bank also, while approving remittances for certain purposes, has been insisting on NOC/Tax Clearance Certificate from income-tax authorities. This procedure has been revised as notified by the Central Board of Direct Taxes, in their Circular No. 759 [F. No. 500/152/96-FTD] dated 18th November, 1997. In terms of the new procedure, a person making remittance of foreign exchange would not be required to produce NOC/Tax Clearance Certificate from income-tax authorities instead, the applicants have to submit an undertaking, in duplicate, addressed to the Assessing Officer, which should be signed by the person authorised to sign the income-tax returns of the applicant, together with a certificate (in duplicate) from the Accountant (other than the employee of the applicant) as defined in the *Explanation* below section 288 of the Income-tax Act, 1961 in forms prescribed in the Government Notification. Authorised dealers should, therefore, before allowing the remittance obtain the aforesaid Undertaking accompanied by a certificate from the Accountant for compliance with the income-tax provisions, where necessary.

2. Authorised dealers should, after making the remittance, immediately forward a copy of the certificate together with a copy of Undertaking to the office of Assessing Officer of the Income-tax Department as indicated in the Undertaking. The other copy each of the Undertaking and Certificate should be kept on record for verification by the Internal Auditors of the authorised dealer/Inspecting Officers of the Reserve Bank.

3. Amendments to the Exchange Control Manual will be advised separately. Meanwhile, authorised dealers may bring the contents of this circular to the notice of their concerned constituents.

4. The directions contained in this circular have been issued under section 73(3) of the Foreign Exchange Regulation Act, 1973 (46 of 1973) and any contravention or non-observance thereof is subject to the penalties prescribed under the Act

CLARIFICATION 2

1. Circular No. 759 dated 18-11-1997 was issued by the Central Board of Direct Taxes to dispense with the requirement of a No Objection Certificate from income-tax authorities for remittance to a non-resident as required by the Reserve Bank of India. By the aforesaid circular, remittances were allowed to be made by the RBI without insisting upon a No Objection Certificate from the Department provided the person making the remittance furnished an undertaking in duplicate accompanied by a certificate from an accountant. The format of the application and the certificate has been circulated to the authorised dealers by the Reserve Bank of India through their Circular No. AD (MA Series) Circular No. 48 dated 29-11-1997.

2. However, it has recently been observed that often the certificates have been issued prescribing *nil* deduction of tax at source in certain cases where tax was liable to be deducted or prescribing deduction of tax at a lower rate than was payable on the basis of the provisions of the Act and the applicable DTAC. The certificate does not provide for necessary details or the reasons for adopting a certain rate for deduction of tax. This results in unnecessary calling of information from the assessees at a later stage and thus gives rise to an avoidable perception of grievance on the part of the tax payer. Therefore, in order to streamline the procedure as well as to ensure the correct deduction of tax at source, the proforma of the undertaking to be given by the remitter and the certificate to be issued by a chartered accountant have been re-considered and new formats are being prescribed which are enclosed as Annexures A and B to this circular. The revised proforma for 'undertaking' as well as the 'certificate' shall to apply in terms of Circular No. 759, dated 18-11-1997 of CBDT. Other requirements of the Circular remain unchanged. It is reiterated that the persons making the remittances shall submit the undertaking and certificate as per Annexures A and B to the Reserve Bank of India/authorised dealer banks, who shall in turn forward the same to the Assessing Officer mentioned in the undertaking.

3. The Reserve Bank of India is being requested to circulate the amended format of the 'undertaking' and the 'certificate' to their authorised dealers.

4. This circular comes into effect with immediate effect.

ANNEXURE 'A'

FORM & APPLICATION FOR REMITTANCE UNDER SECTION 195 OF THE INCOME-TAX ACT

1.	Name and Address of the Applicant and principal place of business	:
2.	Name and Address of the Assessing Officer having jurisdiction over the remitters	:
3.	Applicant's PAN Number	:
4.	Name and address of the beneficiary of the remittance and the country towhich remittance is made	:
5.	Amount and nature of remittance	:
6.	Rate of deduction of tax at source	:
7.	Reference to provision of Act/DTAA under which the rate has been determined	:
8.	Certificate	

(*i*) I/We propose to make the above remittance as per deduction of tax at source indicated above. We have obtained a certificate from M/s. ..... who is an accountant as defined in section 288 of the Income-tax Act, certifying the amount, nature and correctness of deduction of tax at source.

(*ii*) In case the income-tax authority at any time finds that tax actually deductible on the amount of remittance has either not been paid or not paid in full, I/we undertake to pay the said amount of tax along with interest due.

(*iii*) I/We shall also be subjected to the provisions of penalty for the said default as per the provisions of Income-tax Act.

(*iv*) I/We undertake to submit the requisite documents, etc., for enabling the income-tax authorities to determine the nature and amount of income of the beneficiary of the above remittance as well as documents required for determining our liabilities under the Income-tax Act as a person responsible for deduction of tax at source.

(*v*) The information given above is true to the best of my/our knowledge and belief and no relevant information has been concealed.

.....

Name and Signature

[To be signed by a person responsible for signing the return of income (as to provisions of section 139(A) of the Income-tax Act) of the person making the remittance].

ANNEXURE 'B'

CERTIFICATE

I/We have examined the agreement (wherever applicable) between M/s. ..... and M/s. ..... requiring the
remitters beneficiary

above remittance as well as the relevant documents and books of account required for ascertaining the nature of remittance and for determining the rate of deduction of tax at source as per provisions of section 195. We hereby certify the following :—

1.	Name and address of the beneficiary of the remittance and the name of the foreign country to which remittance is being made.	:		
2.	Amount of remittance is foreign currency indicating the proposed date/month and bank through which remittance is being made.	:		
3.	Details of tax deducted at source, rate at which tax has been deducted and date of deduction.	:	Foreign Currency	Indian Currency
	Amount to be remitted		.....	.....
	Tax deducted at source		.....	.....
	Actual Amount remitted		.....	.....
	Rate at which deducted		.....	.....
	Date of Deduction		.....	.....
4.	In case the remittance as indicated in (2) above is net of taxes, whether tax payable has been grossed up? If so, computation thereof may be indicated.	:		
5.	If the remittance is for royalties, fee for	:		

	technical services, interest, dividend, etc., the clause of the relevant DTAA under which the remittance is covered along with reasons and the rate at which tax is required to be deducted in terms of such clause of the applicable DTAA.			
6.	In case the tax has been deducted at a rate lower than the rate prescribed under the applicable DTAA, the reasons thereof.	:		
7.	In case remittance is for supply of articles or things (*e.g.,* plant, machinery, equipment, etc.) or computer software, please indicate :—	:		
	i. Whether there is any permanent establishment in India through which the beneficiary of the remittance is directly or indirectly carrying on such activity of supply of articles or things?			
	ii. Whether such remittance is attributable to or connected with such permanent establishment?			
	iii. If so, the amount of income comprised in such remittance which is liable to tax.			
	iv. If not, the reasons in brief therefor.			
8.	In case remittance is on account of business income			
	please indicate :—	:		
	i. Whether such income is liable to tax in India?			
	ii. If so, the basis for arriving at the rate of deduction of tax.			
	iii. If not, the reasons thereof.			
9.	In case tax is not deducted at source for any other reason, details thereof.	:		

(Attach separate sheet duly authenticated wherever necessary)

.....

Name, Address and registration numbers

(To be signed and verified by an Accountant as defined in section 288 of the Income-tax Act).

Circular : *No. 10/2002, dated 9-10-2002.*

INSTRUCTION NO. 2/2014 [F.NO. 500/33/2013-FTD-I], DATED 26-2-2014

SECTION 119 OF THE INCOME-TAX ACT, 1961 - INCOME-TAX AUTHORITIES - INSTRUCTIONS TO SUBORDINATEAUTHORITIES

Section 195 of the Income-tax Act (hereafter referred to as ' the Act') provides that any person, responsible for paying to a non-resident not being a company or to a foreign company, any sum chargeable under the provisions of this Act, shall at the time of credit of such income to the account of the payee or at the time of payment thereof, whichever is earlier, deduct income-tax thereon at the rates in force. Section 201 of the Act inter alia provides that any person who is required to deduct tax in accordance with the provisions of the Act, does not do so, shall be deemed to be an assessee in default and shall also be liable to pay simple interest at the specified rate.

2. References were received from field officers on the issue of deduction of tax at source under section 195 of the Income-lax Act,1961 in the light of the decisions of the Supreme Court of India in the case of *GE India Technology (P.) Ltd.* v. *CIT* [2010] 7taxmann.com 18/193 Taxman 234/327 ITR 156 (SC) and *Transmission Corporation of AP Ltd. and another* v. *CIT* [1999] 105Taxman 742/239 ITR 587 (SC) and the decision of the Madras High Court in *CIT* v. *Chennai Metropolitan Water tax Cases* AppealsNos.500-501 of 2005, [2011] 14 taxmann.com 73/202 Taxman 454/[2012] 348 ITR 530 (Mad.) with a request for clarification as to whether the tax is to be deducted under sub-section (1) of section 195 on the whole sum being remitted to a non-resident or only the portion representing the sum chargeable to tax, particularly if no application has been made undo sub-section (2) of section 195 of the Act to determine the sum.

3. The matter has been examined in the Board and accordingly, in exercise of powers vested under Section 119 of the Act, the Board hereby directs that in a case where the assessee fails to deduct tax under section 195 of the Act, the Assessing Officer shall determine the appropriate proportion of the

sum chargeable to tax as mentioned in sub-section (1) of section 195 to ascertain the tax liability on which the deductor shall be deemed to be an assessee in default under section 201 of the Act, and the appropriate proportion of the sum will depend on the facts and circumstances of each case taking into account nature of remittances, income component therein or any other fact relevant to determine such appropriate proportion.

4. The undersigned is directed to state that the above position may be brought to the notice of all officers concerned.

CIRCULAR NO.11/2016 [F.NO.279/MISC./M-140/2015-ITJ], DATED 26-4-2016

SECTION 244A, READ WITH SECTION 195, OF THE INCOME-TAX ACT, 1961 - REFUNDS - INTEREST ON -PAYMENT OF INTEREST ON REFUND OF EXCESS TDS DEPOSITED UNDER SECTION 195

CIRCULAR NO.11/2016 [F.NO.279/MISC./M-140/2015-ITJ], DATED 26-4-2016

1. The procedure for refund of tax deducted at source under section 195 of the Income tax Act, 1961, to the person deducting the tax is delineated in CBDT Circular No. 7/2007 dated 23-10-2007. Circular No. 7/2007 states that no interest under section 244A of the Act, is admissible on refunds to be granted in accordance with the circular or on the refunds already granted in accordance with Circular No. 769 or Circular 790 dated 20.4.2000.

2. The issue of eligibility for interest on refund of excess TDS to a tax deductor has been a subject matter of controversy and litigation. The Hon'ble Supreme Court of India in the case of Tata Chemical Limited1, Civil Appeal No. 6301 of 2011 *vide* order dated 26-2-2014, held that, "Refund due and payable to the assessee is debt-owed and payable by the Revenue. The Government, there being no express statutory provision for payment of interest on the refund of excess amount/tax collected by the Revenue, cannot shrug off its apparent obligation to reimburse the deductors lawful monies with the accrued interest for the period of undue retention of such monies. The State having received the money without right, and having retained and used it, is bound to make the party good, just as an individual would be under like circumstances. The obligation to refund money received and retained without right implies and carries with it the right to interest. "

3. In view of the above judgment of the Apex Court it is settled that if a resident deductor is entitled for the refund of tax deposited under section 195

of the Act, then it has to be refunded with interest under section 244A of the Act, from the date of payment of such tax.

4. Accordingly, it is advised that no appeals may henceforth be filed on this ground by the officers of the department and appeals already filed on this issue may not be pressed upon.

5. This may be brought to the notice of all concerned.

1.[2014] 43 taxmann.com 240 (SC)

NOTIFICATION NO.8/2016 [F.NO.DGIT(S)/ADG(S)-2/TDS E-FILING NOTIFICATION/110/2016], DATED 4-5-2016

SECTION 195 OF THE INCOME-TAX ACT, 1961 - DEDUCTION AT SOURCE - OTHER SUMS - PROCEDURE FORSUBMISSION OF FORM 15CC BY AN AUTHORISED DEALER IN RESPECT OF REMITTANCES UNDER SECTION195(6)

1. Under sub-section (6) of section 195 of the Income-tax Act, person responsible for paying to a non-resident, not being a company, or to a foreign company, any sum, whether or not chargeable under the provisions of this Act, is required to furnish the information relating to payment of such sum, in such form and manner, as may be prescribed.

2. As per sub-rule (7) of rule 37BB of the Income-tax Rules, 1962, the authorised dealers are required to furnish a quarterly statement for each quarter of the financial year in Form No.15CC to the Principal Director General of Income-tax (Systems) or the person authorised by the Principal Director General of Income-tax (Systems) electronically under digital signature within fifteen days from the end of the quarter of the financial year to which such statement relates in accordance with the procedures, formats and standards specified by the Principal Director General of Income-tax (Systems) under sub-rule (8).

3. In exercise of the powers delegated by Central Board of Direct Taxes ('Board') under sub-rule (8) of Rule 37BB of the Income-tax Rules 1962, the Principal Director General of Income-tax (Systems) hereby lays down the procedure for submission of Form 15CCas follows:***(a)* Generation of ITDREIN:** The reporting entity is required to get registered with the Income Tax Department by logging in to the e-filing website with the login ID used for the purpose of filing the Income-tax Return of the reporting entity. In case if the reporting entity is not registered for filing Income-tax Return, it may get ITDREIN by logging in with its TAN.A link to register reporting entity has

been provided under "My Account>Manage ITDREIN". The reporting entity is required to apply for different ITDREIN for different reporting entity categories. Once ITDREIN is generated, the reporting entity will receive a confirmation e-mail on the registered e-mail ID and SMS at registered mobile number. There will be no option to de-activate ITDREIN, once ITDREIN is created.**(*b*) Submission of details of authorised person:** The reporting financial institution will then be required to submit the details of authorised person (who will file Form 15CC). Once the details of authorized person are entered by the reporting entity, the authorized person will need to confirm through activation link on e-mail by entering the OTP sent on the mobile of the authorized person and generate the password.**(*c*) Submission of Form 15CC:** Once the authorised person of the reporting entity gets registered successfully, it is required to submit Form 15CC. The authorised person is then required to login to the e-filing website with the ITDREIN, PAN and password. The prescribed schema for the report under Form 15CC and a utility to prepare XML file can be downloaded from the e-filing website home page under forms (other than ITR) tab. The authorised person will be required to submit the PAN of the reporting entity, period for which report is to be submitted and the reporting entity category for which the report is to be submitted. The authorised person will then be provided the option to upload the Form 15CC. The form is required to be submitted using a Digital Signature Certificate of the authorised person.

INCOME-TAX (FIFTH AMENDMENT) RULES, 2021 - INSERTION OF RULE 29BA AND FORM NO. 15E

NOTIFICATION NO. G.S.R. 194(E) [NO. 18/2021 F. NO. 370142/24/2019-TPL], DATED 16-3-2021

In exercise of the powers conferred by section 195, read with section 295 of the Income-tax Act, 1961 (43 of 1961), the Central Board of Direct Taxes, hereby, makes the following rules further to amend the Income Tax Rules, 1962, namely:—

Short title and commencement

1. (1) These rules may be called the Income-tax (5th Amendment) Rules, 2021.

(2) They shall come into force with effect from the 1st day of April, 2021.

2. In the Income Tax Rules, 1962 (hereinafter referred to as the principal rules), after rule 29B, the following rule shall be inserted, namely, —

"29*BA. Application for grant of certificate for determination of appropriate proportion of sum (other than Salary), payable to non-resident, chargeable in case of the recipients.*—(1) An application by a person for determination of appropriate proportion of sum chargeable in the case of non-resident recipient under sub-section (2) or sub-section (7) of section 195 shall be made in Form 15E electronically, -(*i*) under digital signature; or(*ii*) through electronic verification code.

(2) The Assessing Officer, in order to satisfy himself shall examine whether the sum being paid or credited is chargeable to tax under the provisions of the Act read with the relevant Double Taxation Avoidance Agreement, if any, and if the sum is chargeable to tax he shall proceed to determine the appropriate proportion of such sum chargeable to tax.

(3) The Assessing Officer shall examine the application and on being satisfied that the whole of such sum would not be the income chargeable in case of the recipient, may issue a certificate determining appropriate proportion of such sum chargeable under the provision of this Act, for the purposes of tax deduction under sub-section (1) of section 195.

(4) While examining the application, the Assessing Officer shall also take into consideration, following information in relation to the recipient:-(*i*) tax payable on estimated income of the previous year relevant to the assessment year;(*ii*) tax payable on the assessed or returned or estimated income, as the case may be, of preceding four previous years;(*iii*) existing liability under the Income-tax Act, 1961(43 of 1961) and Wealth-tax Act, 1957(27 of 1957);(*iv*) advance tax payment, 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).

(5) The certificate shall be valid only for the payment to non-resident named therein and for such period of the previous year as may be specified in the certificate, unless it is cancelled by the Assessing Officer at any time before the expiry of the specified period.

(6) 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 or within three months before the expiry thereof.

(7) The Principal Director General of Income-tax (Systems) or the Director General of Income-tax (Systems), as the case may be, shall lay down procedures, formats and standards for ensuring secure capture and transmission of data and uploading of documents and the Principal Director

General of Income-tax (Systems) or the Director General of Income-tax (Systems) shall also be responsible for evolving and implementing appropriate security, archival and retrieval policies in relation to the furnishing of Form No 15E and issuance of Certificate under sub-rule (3). "

3. In the principal rules, after form 15D, the following form shall be inserted, namely:—

"FORM No. 15E

[*See* rule 29BA]

Application by a person for a certificate under section 195(2) and 195(7) of the Income-tax Act, 1961, for determination of appropriate proportion of sum (other than salary) payable to non-resident, chargeable to tax in case of the recipient.