

The Institute of Chartered Accountants of India

Varachha Kamrej CPE Study Circle Surat

Form 15 CA and Form 15 CB- recent changes in procedure

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Importance of Section 195

- More and More Cross Border Payments
- Increased revenue's attention like form 15CA and 15CB
- Professional Diligence for CA's
- Gateway to International Taxation for Domestic Persons
- Default consequences for payer:
 - *Demand u/s Section 201; Interest of 201(1A)*
 - *Penalty u/s Section 221 &/or 271C*
 - *Prosecution u/s Section 276B*
 - *Disallowance of expense u/s Section 40(a)(i)*

Unique Features of section 195 as compared to other TDS provisions

- Unlike personal payments exempted in section 194C etc; no exclusion for the same in section 195 (all payments covered *excl salaries* provided chargeability there) e.g. payment to foreign architect for residential house construction etc
- Unlike threshold criteria specified in section 194C etc, no basic limit in section 195 even Re 1 payment is covered
- Unlike other provisions in Chapter XVII (TDS provisions), section 195 uses a special phrase “chargeable to tax under the Act”
- All payers covered irrespective of legal character HUF; Indl etc
- Multi-dimensional as involves understanding of DTAA/Treaty

Objective behind section 195

- *Non resident transient connection*
- *Potential Difficulty in Recovery having little/no assets in India*
- *To Avoid Hassles of recovery from Non resident*
- AAR in 238 ITR 575 & CBDT Circular of 1974

Nature of TDS Provisions : SC

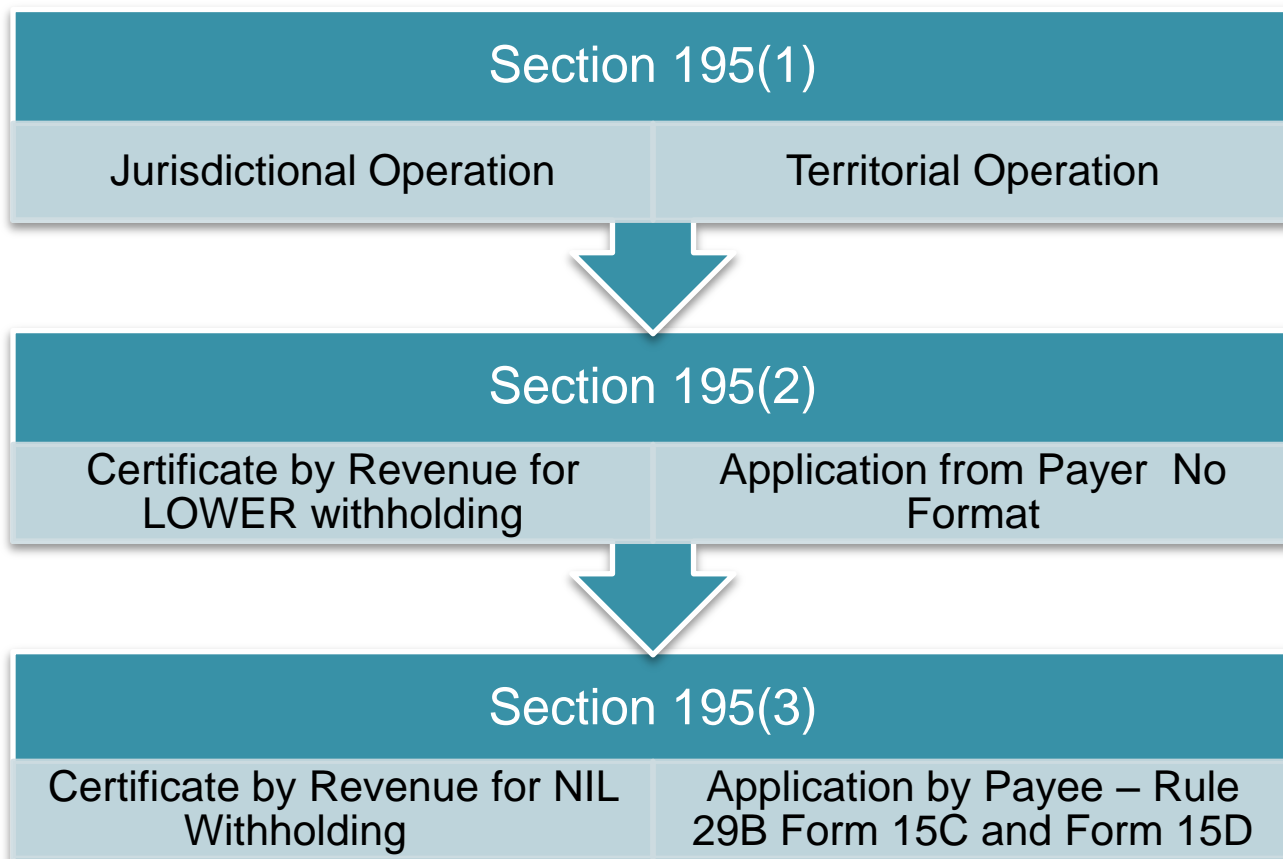
SC views in Eli Lily 312 ITR 225:

The purpose of TDS provisions in Chapter XVII B is to see that the sum which is chargeable under Section 4 for levy and collection of income-tax, the payer should deduct tax thereon at the rates in force, if the amount is to be paid to a non-resident.

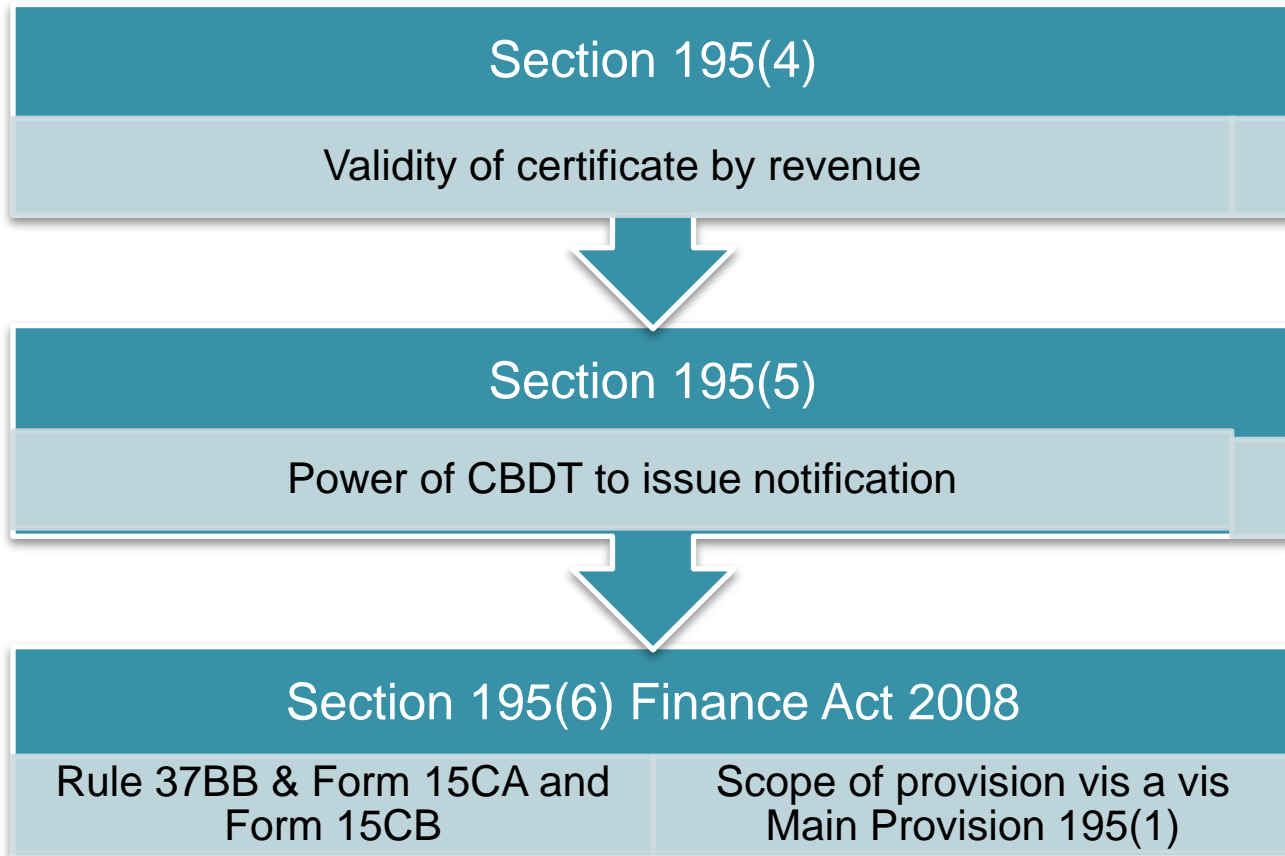
The said TDS provisions are meant for tentative deduction of income-tax subject to regular assessment. (see *Transmission Corporation of A.P. Ltd. and Anr. v. CIT* reported in [1999] 239 ITR 587 at p. 594).

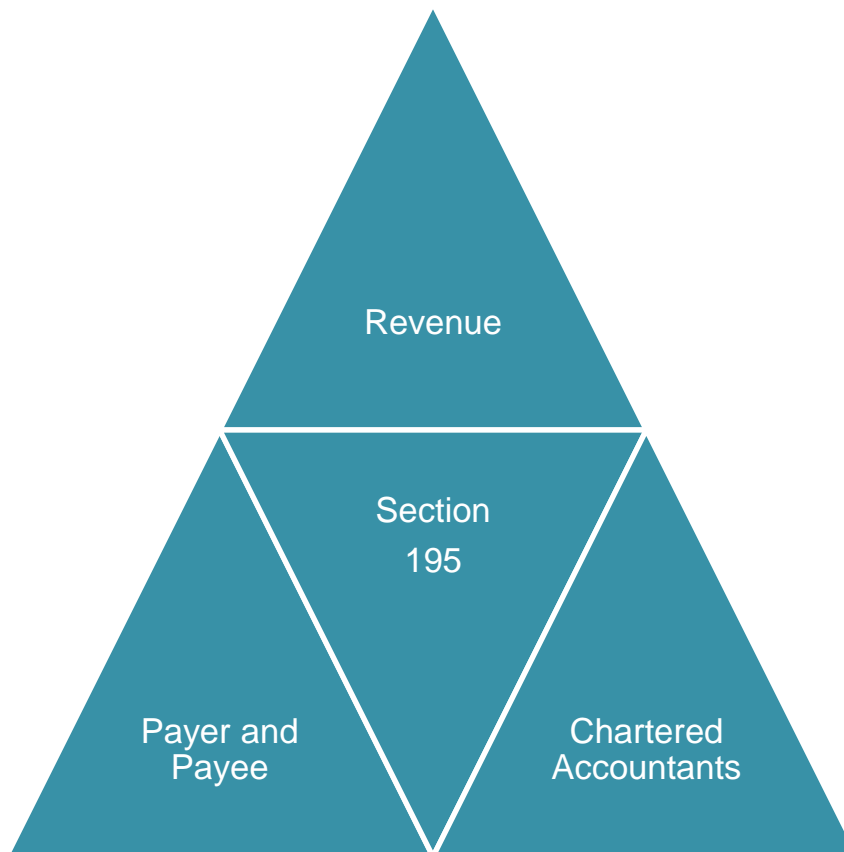
Similar views of Mum ITAT in IDBI Limited 104 TTJ 230 “17. In our humble understanding, conceptually, liability of TDS is in the nature of a vicarious or substitutionary liability which presupposes existence of a principal or primary liability. ...”

Overview of section 195



Overview of section 195





Section 195(6) : Rule 37BB

Section 195 [(6) 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.]

Rule 37BB. *‘(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....’*

Objective of section 195(6)

“..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 the non-residents. There has been substantial increase in foreign remittances, making the manual handling and tracking of certificates difficult. To monitor and track transactions in a timely manner, it is proposed to introduce e-filing of the information in the certificate and undertaking. The amendment therefore, proposes to provide that the person responsible for deduction of income tax shall furnish the information relating to payment of any sum to the non-resident or to a foreign company in a form and manner to be prescribed by the Board.....”

New Form 15 CA and Form 15 CB

- The CBDT has issued Twelfth Amendment Rules on August 5, 2013 vide Notification No. 58/2013 whereby it amended Rule 37BB and prescribed new Forms 15CA and 15CB.
- However, within a couple of weeks, the CBDT issued one more amendment to Rule 37BB in suppression of earlier notification (amendment rules) Notification No. 67 dated 02-09-2013

Form 15 CA and Form 15 CB

- Form 15 CA is in two parts- Part A and Part B
- Part A- if transaction does not exceed Rs. 50,000/- and aggregate payment in year does not exceed Rs. 2,50,000/- (BOTH CONDITIONS SHOULD BE FULFILLED)
- Such cases are also absolved from obtaining Form 15CB

Form 15 CA and Form 15 CB

- Part B- If transaction exceeds Rs. 50,000 or aggregate payment in year exceeds Rs. 2,50,000/-
- After obtaining
 - CA Certificate in Form 15CB; or
 - Certificate u/s 197
 - order u/s 195(2) and 195(3)

Form 15 CA and Form 15 CB

- Form 15 CB – to be issued in hardcopy
- Form 15CA – to be filed electronically and then signed printout to be submitted

Form 15 CA and Form 15 CB

Specified List

- Explanation to Rule 37BB contains Specified List
- For these transactions – no requirement of filing Form 15CA and Form 15CB

SPECIFIED LIST

Sl. No. (1)	Purpose code as per RBI (2)	Nature of payment (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 operating abroad.
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
14	S0305	Travel for education (including fees, hostel expenses etc.)

SPECIFIED LIST

15	S0401	Postal services
16	S0501	Construction of projects abroad by Indian companies including import of goods at 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	S1202	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".

Form No 15CA and Form 15CB

Documentation by CA while issuing Form 15CB (from payer)

- Agreement and Invoices;
- Payment details
- Correspondences
- Technical Advice – prove bona-fides
- Proof of services being rendered in case of Group Company transactions
- E-mails etc regarding pricing in case of Group Company transactions
- Remitting bank details
- Rate of conversion of foreign currency

Form No 15CA and Form 15CB

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- Rate of conversion of foreign currency

Form No 15CA and Form 15CB

-Documentation by CA while issuing Form 15CB (from Payee)

- Tax Residency Certificate
- Declaration/Certificate from payee for –
 - no PE,
 - tax residency,
 - beneficial owner,
 - treaty entitlement, etc; and
 - Indemnification from payee
 - Proposed period of stay (for e.g. for purpose of IPS)
 - PAN

Obtain TRC (Tax Residency Certificate) of Payee so as to examine treaty provisions

- at appropriate places mention certificate based on declaration of payee eg declaration of payee on PE presence /income connection with PE may be required..)

Form 15CB: Example of language

Example of Certification language by CA:

“Since subject services being advertisement charges are classifiable as business profits under India- USA DTAA, in absence of payee’s PE under Article 5 of said DTAA, the subject remittance to payee is not taxable as business profits in India and hence it is concluded that no tax is deductible on the same” We place reliance upon following... “

“Since subject export commission payable to non resident payee is classifiable as business profits under India USA DTAA, in absence of payee’s PE under Article 5 of said DTAA, the subject remittance to payee is not taxable as business profits in India and hence it is concluded that no tax is deductible on the same”

Critical Points in Form 15CB

Beneficiary of Payment;
Documents Examined

Legal Status of Payee

Capital Gains and
Verification of PE (TIMING)

Form No 15CB whether applies to all payments? Rule versus
Act 195(1) versus 195(6)

No appeal against CA Certificate 106 ITD 521

Somersaults over TRC

- Section 90 (4) introduced by the Finance Act 2012- making TRC mandatory to claim DTAA benefit
- Subsequently Rule 21AB and Form 10FA and 10FB introduced by Notification dated 17-09-2012 (w.e.f. 01-04-2013)

Somersaults over TRC

- The Finance Bill 2013- proposed Section 90(5)- “TRC will be necessary but not sufficient evidence..”
- Press Release on March 1, 2013
- Rationalization by the Finance Act 2013-
Amendment in Section 90(4)- ..” a certificate of his being resident.” in place of earlier “.. A certificate containing such particulars as may be prescribed...”
Amendment in Subsection (5) –”...such other documents and information..”

Somersaults over TRC

- Notification No. 57 dated 01-08-2013 prescribed Form 10 F and Rule 21AB amended
- Form 10 F to be signed and submitted by Non resident along-with TRC

Somersaults over TRC (Contents of Form 10F)

“Form No. 10F

[See sub-rule (1) of rule 21AB]

Information to be provided under sub-section (5) of section 90 or sub-section (5) of section 90A of the Income-tax Act, 1961

I _____ *son/daughter of Shri _____ in the capacity of _____ (designation) do provide the following information, relevant to the previous year _____, *in my case/in the case of _____ for the purposes of sub-section (5) of *section 90/section 90A :-

Sl. No.	Nature of information		Details #
(i)	Status (individual, company, firm etc.) of the assessee	:	
(ii)	Permanent Account Number (PAN) of the assessee if allotted		
(iii)	Nationality (in the case of an individual) or Country or specified territory of incorporation or registration (in the case of others)	: :	
(iv)	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	:	
(v)	Period for which the residential status as mentioned in the certificate referred to in sub-section (4) of section 90 or sub-section (4) of section 90A is applicable	:	
(vi)	Address of the assessee in the country or territory outside India during the period for which the certificate, mentioned in (v) above, is applicable	:	

Somersaults over TRC (Contents of Form 10F)

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2. I have obtained a certificate referred to in sub-section (4) of section 90 or sub-section (4) of section 90A from the Government of _____ (name of country or specified territory outside India).

Signature: _____

Name: _____

Address: _____

Permanent Account Number: _____

Verification

I _____ do hereby declare that to the best of my knowledge and belief what is stated above is correct, complete and is truly stated.

Verified today the _____ day of _____.

Place: _____

Signature of the person providing the information _____

Notes :

1. * Delete whichever is not applicable.
2. # Write N.A. if the relevant information forms part of the certificate referred to in sub-section (4) of section 90 or sub-section (4) of section 90A.”.

Section 195(1) : Key Phrases

- Any person responsible for paying to ; (payer)
- a non resident, not being a company or to a foreign company ; (payee)
- Any Interest or other sum chargeable under the provisions of the Act;
- Shall at the time of credit or payment whichever is earlier;
- Shall deduct the tax at rates in force

Payer Covered

- Payment by branch to HO/another branch abroad whether payment by a “person” to a “payee” u/s 195? – Branch is PE and not a separate assessee- 5 Member Special Bench ITAT **Sumitomo Mitsui Banking Corp** 2012] 19 taxmann.com 364 (Mumbai - Trib.)(SB) (others incl. **97 ITD 89 Kol ITAT SB ABN Amro; Mum ITAT Dresdner Bank; British Bank at 108 ITD 375; 19 SOT 730**) **CBDT Circular No 746.**
- **Payment by Agent to Principal Abroad for Indian Collections (SC Narsee Nagsee 35 ITR 134; Bang ITAT 113 TTJ 863: – IF VENDOR OF PROPERTY NON RESIDENT – PURCHASER TO APPLY SECTION 195) exception Chd ITAT 33 DTR 469**
- Payment by Bank in India acting as agent for purchase/sale of securities on behalf of foreign resident

Payer Covered

- Whether Non Resident Payer Covered: e.g. purchase of Indian co. shares by A from B both are non residents : contract and payment outside India?; Payment outside India by Branch of Indian Co In Singapore to foreign people for Singapore branch business purposes (daily house keeping) etc?
- Refer BHC in Vodafone Sep 2010; SC in Eli Lily (supra)
*...Section 195 embodies a machinery that would render tax collection effective and must be construed to effectuate the charge of tax. **There is no limitation of extra territoriality involved though Parliament is cognizant of the fact that the provisions of the law can be enforced within the territory to which the Act extends.... As the Supreme Court observed in Eli Lily, the provisions of Section 195 of the Income Tax Act, 1961 are in the nature of a machinery provision enacted in order to effectuate the collection and recovery of tax.....** Even though the revenue laws of a country may not be enforceable in another, that does not imply that the Courts of a country shall not enforce the law against the residents of another within their own territories*

FINANCE ACT 2012

In section 195 of the Income-tax Act,—
in sub-section (1),—

(i) for the words “any interest”, the words, brackets, figures and letters “any interest (not being interest referred to in section 194LB or section 194LC)” shall be substituted;

(ii) the *Explanation* shall be numbered as *Explanation 1* thereof, and after *Explanation 1* as so numbered, the following *Explanation* shall be inserted and shall be deemed to have been inserted with effect from the 1st day of April, 1962, namely:—

“*Explanation 2.*—For the removal of doubts, it is hereby clarified that the obligation to comply with sub-section (1) and to make deduction there-under 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.”;

Responsible for Making Payment

- ***SC in GE Technology case 234 CTR 153***
- ***Vodafone case***
- ***Voluntary Payments eg Membership fees paid to overseas business chamber; may be Mutual concern operating on Mutuality basis***
- ***Contractual Obligation whether must? Eg Damages paid to Non resident person for non supply of plant and machinery***

Chargeable to tax under the Act

- *Jurisdictional Fact must exist like reasons must u/s 148 for reopening; DI Satisfaction must for search u/s 132; satisfaction must u/s 153C refer SC in Arun Kumar vs UOI*
- *SC GE case on above phrase:*
 - *Gives reasonable autonomy to payer to decide sum chargeable and its amount*
 - *Magnatise: Provision of Section 4;5;9 and 90(2)/Treaty Provisions ; 195 to be read with Charging provisions*
 - *Unique from other sections of TDS*

Chargeable to tax under Act

How to approach taxability of non resident payee while proceeding u/s 195 of the Act:

Step 1: Make the classification of transaction (eg whether covered u/s 9(1)(vii) or u/s 9(1)(i) resp. dealing with Fees for technical services and Business transaction in general etc)

Step 2: Check the taxability under Income Tax Act

Step 3: If Above is in affirmative, Check as per treaty entitlement and DTAA (if any), taxability under DTAA

Chargeable to tax under Act: ***Act or DTAA/Treaty whichever is beneficial prevails***

Nature of Income	Act (apart from section 5 where-ever applicable)	Treaty/DTAA
<i>Business/Profession</i>	Section 9(1)(i): Concept of Business Connection	Article 5;7; 14: Concept of Permanent Establishment/PE or Fixed Base
<i>Salary Income</i>	Section 9(1)(ii)	Article 15
<i>Dividend Income</i>	Section 9(1)(iv) and section 115A	Article 10
<i>Interest Income</i>	Section 9(1)(v) and section 115A	Article 11
<i>Royalties</i>	Section 9(1)(vi) and section 115A	Article 12
<i>Fees for technical services/FTS</i>	Section 9(1)(vii) and section 115A	Article 12
<i>Capital Gains</i>	Section 9(1)(i) and section 45	Article 13

Chargeable to tax under Act

Payments for which stand can be taken on chargeability point by payer itself, without approaching AO/TDS u/s 195(2):

- ***Payments for capital account: loans; their repayment, gift remittance etc***
- ***Payment for revenue account: Simpliciter raw material import***
- ***Payment expressly exempt under the Act eg section 10***

Taxation of services/FTS: Important Concepts (no FTS in DTAA; Connected with PE 44DA etc)

Make Available

- In treaties apart from technical nature criteria to make services taxable, it requires services should make *available* the underlying technology to payer

Utilization Concept

- “for the purposes of making or earning any income from any source outside India”- in section 9(1)(v);(vi) and (vii)

Independent Personal Services

- Clause 14 in DTAA - connected with stay/fixed base

Taxation of services: Important Concepts

Independent Personal Services

- Under treaty taxable only when professional (indl/firm if covered) is rendering services in source country with minimum stipulated presence

Payee Covered

- *Non resident Non company and Foreign Company* (section 2 definitions)
- Status at the time of payment or preceding year?
- Payment to agent of non resident (SC Narsee 35 ITR 134)
- Whether covers resident but not ordinarily resident as payee u/s 195? Seems No
- Branch/PE of Non resident Assessee CBDT Circular No 20/3-1-1961 – (foreign bank branch – practical way out – branches obtain 195(3) certificates)
- What when payee non resident as per DTAA and not as per section 6?
- Foreign Branch of Indian Bank?

Precautions in applying DTAA and Referral check

Tax Treaty – whether applicable? Legal Status; Persons covered; Taxes covered; Residential status

Entry into force & Termination; LOB clause; MFN clause; Protocols and Memorandum of Understandings

Technical Explanations to DTAA by Treaty Partner (eg USA to India USA DTAA); Jurisprudence / Case Laws (incl foreign courts); OECD Commentary to MC and UN Model Convention Commentary etc

Payment covered

- *Where No credit nor payment ITAT in CJ Intl case*
- *Payment in Kind: SC ruling in Kachanganga Sea Foods Ltd*
IN 7/7/2010 *Approving APHC order 265 ITR 644*
- *Adjustment of Payment : SC JB Boda 223 ITR 271 ; Mum*
ITAT SB in Mahindra and Mahindra; Mum ITAT Raymond 86
ITD 791
- *Payment by book entry (Delhi ITAT in Right Tunneling Co.*
Ltd. on 04.04.2014)

Payment covered

- *Payment subject to Approval* : Adverse views in Kar HC in United Breweries Ltd 211 ITR 256 (favorable views in BHC in 259 ITR 391 & 249 ITR 141)
- Some treaties creates *chargeability at satisfaction of “payment” of Royalty etc*- Whether TDS arises at the time of provision or at payment stage (where chargeability gets completed) divided views – AAR (adverse) in 267 ITR 727 ; Mum ITAT 96 TTJ 765 (fav)

Payment covered

- Adhoc – Provision – Whether attracts TDS liability? Refer SC in 48 ITR 1 ; 55 ITR 699; - Kanga Palkivala etc- Possible view TDS liability is attracted when service provider etc can claim payment of amount credited
- Payment of Advance : In NR Payee follows accrual system- possible view- no chargeable income arises so as to attract TDS u/s 195 (However refer contra observations in AAR at 267 ITR 727)
- Income Tax Refund- Interest Thereon- Yes 195 applies (but classification dispute whether covered u/art 12 Interest income or is covered under business income (max. rate)- Held by Delhi ITAT in Pride Foramer 116 TTJ 369 covered u/art 12 @ 10%

Payment covered

- Remuneration to Non resident Partners (in case partners are carrying activities outside India for firm's business – could be argued that same is not chargeable to tax in India...)
- Award amount under court rule: DHC 127 DLT (2006) 401 = Held not applies ; same by BHC in 265 ITR 254
- Void Agreements Payment – Delhi ITAT in Ericsson 81 ITD 77 – no TDS applies

Section 195(2): Application by Payer to revenue: No Format

- *SC views on aforesaid provision in GE case Gist:*
 - *Based on principle of proportionality*
 - *Applies when payer has no doubt for chargeability vis a vis Payee : Computation in doubt*
 - *Is not applicable to every foreign remittance as revenue seeks to keep track of foreign payments through this and for admin convenience – Not tenable*

Section 195(2): Application by Payer to revenue: No Format

Whether applies to foreign company also? Seems yes

Whether can be taken for Nil TDS? ? Contrary decisions in 113 ITD 85 (YES) ; 81 ITR 162; 28 TTJ 425

(NO) – Better view : YES

whether for all phases of work – separate certificate is required? Held Yes in 113 ITD 85 ((issues: where ITAT order there for earlier period?; where AO/TPO order in payee case is there for earlier period? Etc)

Section 195(2): Application by Payer to revenue: No Format

Writ petition possible to be filed against 195(2) and section 264 revision also possible: refer Bombay High Court in L&T; Mc Kinsey and Diamond Star cases

For appeal against 195(2): Where cum tax arrangement section 248 possible) scope of section 248 whether much wider?

Section 195(2): Application by Payer to revenue: No Format

Case Study: If AO/TDS u/s 195(2) issues a certificate u/s 195(2) holding the field for a period of time, if payer based on the same makes some payment (partly), whether AO by cancelling and issuing/revising fresh 195(2) ask the payer to withhold the tax on revised say increased rate for earlier remittances also, contending that payer is having sufficient balance in his possession, to take care off the same?

Case Study: Whether 264 FAVORABLE order over 195(2) application is binding on AO in assessment of deductee? Seems to be NO

FINANCE ACT 2012

after sub-section (6), the following sub-section shall be inserted with effect from the 1st day of July, 2012, namely:—

“(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 to the Assessing Officer to determine, by general or special order, 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.”.

ITA provisions overriding DTAA

- **Section 206AA**
- **Section 90 (2A)**
- **Section 91 (2A)**

Section 206AA(1)

(1) Notwithstanding anything contained in any other provisions of this Act, any person entitled to receive any sum or income or amount, on which tax is deductible under Chapter XVIIIB (hereafter referred to as deductee) shall furnish his Permanent Account Number to the person responsible for deducting such tax (hereafter referred to as deductor), failing which tax shall be deducted at the higher of the following rates, namely:—

- (i) at the rate specified in the relevant provision of this Act; or*
- (ii) at the rate or rates in force; or*
- (iii) at the rate of twenty per cent.*

Section 206AA(1): Salient Features

- Word used is “entitled to receive”
- Overrides the whole Act incl. Finance Act
- Applies when tax is deductible under any of the provisions of Chapter XVII-B
- One leg: “Rates in Force” is defined u/s 2(37A)(iii): DTAA/Act which ever is beneficial applies read with CBDT Circular No 728 30/10/1995 (also applies to same term used in section 195(1))
- Inserted by the Finance (No. 2) Act, 2009, w.e.f. **1-4-2010**

Objective behind section 206AA

Statutory provisions mandating quoting of Permanent Account Number (PAN) of deductees in Tax Deduction at Source (TDS) statements exist since 2001 duly backed by penal provisions. The process of allotment of PAN has been streamlined so that over 75 lakh PANs are being allotted every year. Publicity campaigns for quoting of PAN are being run since the last three years. The average time of allotment of PAN has come down to 10 calendar days. Therefore, non-availability of PAN has ceased to be an impediment. In a number of cases, the non-quoting of PANs by deductees is creating problems in the processing of returns of income and in granting credit for tax at deducted at source, leading to delays in issue of refunds.....

Objective behind section 206AA

.....In order to strengthen the PAN mechanism, it is proposed to make amendments in the Income Tax Act to provide that any person whose receipts are subject to deduction of tax at source i.e. the deductee, shall mandatorily furnish his PAN to the deductor failing which the deductor shall deduct tax at source at higher of the following ratesMemorandum Explaining Provisions of Finance No 2 Bill 2009

Press Release on 206AA

Clarified vide Press Release Dated January 20, 2010

....All deductees, including non-residents having transactions in India liable to TDS, are advised to obtain PAN by 31st March 2010 and communicate the same to their deductors before tax is actually deducted on transactions after that date....REF no. 402/92/2006 MC (04 OF 2010).

Issues u/s 206AA

Non residents

- Whether 206AA applies to non residents and overrides section 90(2): Highly debatable: Better view: Yes where NR has some chargeability
- Rule 114C; Unilateral DTAA/treaty modification ; no mention of 195(3) and 195(2) in 206AA ?
- Section 115A special rates of Act (for short term capital gains etc); Excess Collection and then refund can be a law policy?
- Non Obstante clause operation can be restricted *contextually*?

Education cess and Surcharge

- Whether 20% rate in 206AA needs to be uploaded with cess and surcharge? Seems No
- Finance Act also over-rides? Whether 206AA marriage results in divorce with all other provisions?

Grossing Up 195A and 206AA

- Perspective of Payer (4-5 options available) better no grossing up on 20% rate of 206AA
- Perspective of Payee

Issues u/s 206AA

Whether 206AA applies to section 192 payments?

- Seems Yes

Whether 206AA DEFAULT can be complied- PAN obtained at later stage?

- Seems Yes

Reimbursements

ACIT vs. Modicon Network (P) Ltd. (2007) 14 SOT 204 (Delhi).

Applied by Bang ITAT in CGI INFORMATION SYSTEMS & MANAGEMENT CONSULTANTS PVT LTD on software cost reimbursement (refer M&M SB ITAT)

For costs contributions refer E&Y Advance ruling; HMS Real Estate advance ruling; Case of M/s. Invensys Systems Inc. USA Applicant (no technical services involved etc) ; Advance Ruling in ABB Ltd; Held the reimbursement of research and development (“R&D”) expenses under Cost Contribution Agreement (“CCA”) is not liable to tax in India

Reimbursements

Documentation important; to ensure same is on actual: Refer

- Guj High Court ruling in the case of SCARLET DESIGNS PVT LTD TAX APPEAL No. 1849 of 2008;
- Delhi ITAT Grand Prix 34 DTR (Del)(Trib) 248;
- Expeditors International 118 TTJ 652;*
- Bang Bench in International Airport Ltd 116 ITD 446;*
- Krupp Udhe GMBH INCOME TAX APPEAL NO.2626 OF 2009
- CIT vs Siemens Aktiongesellschaft 310 ITR 320 (Bom)*
- Information Architechts BHC*
- Tekmark Global Solutions LLC Mum ITAT ITA No. 671/Mum/2007 February 23, 2010*
- Nathpa Jhakri Joint Venture vs ACIT Mumbai ITAT 37 SOT 160

BHC in Krupp GmbH

- The learned Counsel appearing on behalf of the Revenue has stated that the first and second question relate to the same issue namely whether reimbursement of expenses would be liable to be included in the income and hence they are taken up together Held
- In so far as the issue of reimbursement is concerned, the Tribunal held that though there was a conflict between the judgment of the Kerala High Court, which was relied upon by the Commissioner of Income Tax (Appeals) and the judgment of the Calcutta High Court in the case of CIT V/s. Dunlop Rubber Company Limited....

BHC in Krupp GmbH

- It would follow a view which was favourable to the assessee, consistent with the judgment in Vegetable Products Limited. The question as to whether a reimbursement for expenses would form part of the taxable income is not res integra in so far as this Court is concerned.
- In Commissioner of Income Tax V/s. Siemens Aktiengesellschaft⁵, a Division Bench of this Court held that it was in agreement with the view taken by the Calcutta High Court in Dunlop Rubber Company Limited (supra) and by the Delhi High Court in Commissioner of Income Tax V/s. Industrial Engineering Products (Private) Limited.

BHC in Krupp GmbH

- Further refer:
 - a) Delhi Bench ITAT in Grand Prix (in context of section 194C reimbursements to CHA etc) 34 DTR 248 & Expeditors International 118 TTJ 652
 - b) BHC in Information Architects
 - c) DHC in Fortis & Lear Automotives
 - d) Gujarat High Court in SCARLET DESIGNS PVT LTD
 - e) Bang Bench in International Airport Ltd 116 ITD 446

“ ITA 1088 OF 2011 M/S EXPEDITORS INTERNATIONAL (INDIA) PVT. LTD

“... ITA 1088 OF 2011 M/S EXPEDITORS INTERNATIONAL (INDIA) PVT. LTD. 5. The aforesaid contention of the appellant was refuted by Ms. Kapila, learned counsel appearing for the assessee submitting that core issue was as to whether nature of expenses is such that it attracts the provisions of TDS. Her submission was that at the payment raised was towards reimbursement of the expenses incurred by the parent company, namely, global management expenses and other expenses. When such payment was not chargeable to tax at all, the collecting machinery provision, whether Section 194J or Section 195, would not get triggered. According to her, there must be component of income chargeable to tax and only then the question of deduction of tax at source would arise in as much as tax at source is to be deducted on income and not on expenses.

...

“... ITA 1088 OF 2011 M/S EXPEDITORS INTERNATIONAL (INDIA) PVT. LTD

“... Global management expenses were reimbursement of cost and as per the decision in the case of ***Van Oord ACZ India (P) Ltd. v. CIT, [2010] 323 ITR 130 (Delhi)***, tax was not deductible. 6. Prima facie, we find force in the argument of learned counsel for the assessee. In any case, this is the view already taken by this Court in the case of this very assessee affirming the earlier decision of the Tribunal in ITA Nos.475/2009 and 751/2010 and we see no reason to deviate from the same. Therefore, in our opinion, no substantial question of law arises and the appeal is dismissed.

Issue (1):

Refund of TDS u/s 195

Whether refund of excess
TDS deducted and paid u/s
195 is possible?

Issue (1)

Refund of TDS u/s 195

Refund of sums deducted: CBDT Circular no 7 of 2007 23/10/2007- Contract cancellation (when no remittance to non resident, in case amount remitted to non resident- same is returned to payer); Subsequent exemption under law; deduction of tax twice; by mistake; higher tds rate applied when law provides lower rate, order is passed to deductor u/s 195 – giving relief in section 154;264 etc)

Other interesting Issues related to 195

- Time limit u/s 201 for non resident payee?
- Disallowance u/s 40(a)(i) for capitalised cost with No TDS
- Advance Ruling recourse to be weighted
- No Surcharge/Education cess if treaty rates applied, ordinarily (SC 83 ITR 346 etc) - Section 44BB/44BBB/section 112 application

Commission Expense Post Withdrawal of Circular No 786/2K

"Commission" simpliciter is not Fees For Technical Services u/s 9(1)(vii) of the Act and same being in the nature of "business income" for recipient of income/payee/non resident, is also not taxable in India vide section 9(1)(i) in case of absence of business connection in India. Therefore, since chargeability for non resident agent providing services to Indian Party is clear as per aforesaid understanding and since there is NIL chargeability under the Act itself for non resident payee, option to approach AAR/AO u/s 195/197, in my considered view, is not required to be exercised, in facts of instant case. This is supported from SC/other rulings in

- a) *Shapoorji Paloonji 39 ITR 775*
- b) *Performing rights 106 ITR 11*
- c) *Cal HC in 5 ITR 216*
- d) *Hyderabad ITAT decision on 09.05.2012 in case of Bhagiradha Chemicals and Ind.*

Further, one would be on much stronger footing, in case relevant DTAA contains in Article 12 (mainly) dealing with royalty and fees for included services "make available" concept.

Latest precedents on commission payment

“Jp ITAT in Modern Insulator 56 DTR 362/ 140 TTJ 715

... Looking to the services being rendered, one cannot say that sales commission is fees for technical services. Similarly, in respect of the other agreements, it is seen that the agents are providing services for promoting sales and collection of payments

Implication of amendment by the Finance Act, 2010 has done away with rendering of service in India.

However, the Explanation to section 9(2) is applicable to clauses (v), (vi) and (vii) of section 9(1) and is not applicable to section 9(1)(i) of the Act.

- **Exotic Fruits – Bangalore ITAT (04/10/2013)**
- Also, discussed implication of withdrawal of Circular No., 23/1969 [decision of Mumbai ITAT in **Gujarat Reclaim and Rubber Products (2013)**]
- **Chennai ITAT in Faizan Shoes (23.04.2013)**- only procuring orders and collecting payments is not a technical service
- Also, refer **Hyderabad ITAT in Aurbindo Pharma (31/01/2014)**
- **BHC in Chirag M Bhakta- 06/03/2014**

DHC in RIO TINTO

TECHNICAL SERVICES

“... 24. The payment in the present case is for **furnishing of evaluation report.** The fee paid is for the said purpose. To collect and collate the information and furnish evaluation report, the assessee was required and it was necessary to undertake certain tests, mapping and studies. Drilling for tests as to evaluate is to gain information and knowledge. The payment which is received is for furnishing of information and not —businessll income or composite income including —businessll income as held by the tribunal The fee received from the third party in such cases is **fee for technical services**, if it satisfies and is covered by the Explanation 2 to Section 9(1)(vii).

(to the same/similar effect order of Madras High Court in Chennai Metropolitan sewerage board)

DHC in RIO TINTO TECHNICAL SERVICES

*“... The payment made is to acquire technical information. .Therefore it is —fee for technical services. It will be immaterial whether the assessee had acquired and gained the said technical information because of business or trading activity or after conducting tests, mapping etc. The nature and character of the information furnished and for which the fee or consideration is paid is the relevant criteria for deciding whether or not Explanation 2 to Section 9(1)(vii) is applicable. **In the present case, as per the clauses quoted above, the fee was paid to acquire technical and managerial information.***

Service of technical nature vs. 'technical services'

- Explanation 2 to Section 9(1)(vii)
- 'Managerial'- wider than "execution"
- 'Consultancy'- "consultancy" means advice or opinion
- 'Technical'- "*noscitur a sociis*"- human involvement

Relevant cases-

- *Siemens Ltd.* [2013- 30 taxmann.com 200 (Mum.- Trib.)]
- *Mumbai ITAT in UPS SCS Asia Limited*
- *Bharti Cellular Ltd.* [2008- 175 Taxman 573 (Delhi)]
- *Skycell Communications* ([2001- 119 Taxman 496 (Madras)]

Delhi High court in Ericsson AB

*“.... Thus, in order to treat the **consideration paid by the cellular operator** as royalty, it is to be established that the cellular operator, by making such payment, obtains all or any of the copyright rights of such literary work. In the present case, this has not been established. It is not even the case of the Revenue that any right contemplated under Section 14 of the Copyright Act, 1957 stood vested in this cellular operator as a consequence of Article 20 of the Supply Contract. **Distinction has to be made between the acquisition of a “copyright right” and a “copyrighted article”**. 60. Mr. Dastur is right in this submission which is based on the commentary on the OECD Model Convention. Such a distinction has been accepted in a recent ruling of the Authority for Advance Ruling (AAR) in Dassault Systems KK 229 CTR 125.*

Other Popular Payments

- **Marketing Payments**
- **Advertisement in Foreign Media :
Sandoz Private Limited (formerly
known as Novartis Enterprises Pvt.
Ltd.)- Mumbai ITAT 2012**

Other Popular Payments

- Internet-Bandwidth Payments refer: 332 ITR 340
CIT v. Estel Communications (P.) Ltd. [2008] 217 CTR
(Delhi) 102. Wipro Ltd. v. ITO [2003] 86 ITD 407
(Bang.). AAR in Cable and wireless 315 ITR 72
- Repair Charges AAR Intertek 307 ITR 418
- Training Fees

Other Popular Payments

- **Designer/Animation Fees- production of animation films-** (Hyderabad ITAT in **DQ International-** 28/03/2014)

Mumbai ITAT in Highlight pictures (28/03/2014)

- **Movie shooting** in foreign country- Article 7 vs. Article 14 vs. Article 22 of DTAA with Thailand
- **Payments to models** from UK in foreign shoot – applicability of Article 15 of DTAA vs. applicability of article 23 of DTAA with UK

Other Popular Payments

- Payment to foreign lawyer firm for arbitration proceedings in foreign country- Delhi Bench of ITAT in Right Tunneling Co. Ltd (04/04/2014)
- Payment to foreign lawyer firm for – dispute with customer in foreign country (Chennai ITAT in Wheels India – 26/11/2013)
- Professional charges/Registration and filing fee - (Hyderabad ITAT in Aurbindo Pharma- - 31/01/2014)

Other Popular Payments

- Service related to receiving goods, weighing, custom clearance, delivery to customers by foreign service provider in foreign country- held not to be FTS (Bangalore ITAT in Subbaraman Subramanian)
- C &F – held not FTS (Chennai ITAT in Leap International , ITAT Pune Bench in Mahindra Forgings)

No FTS clause in DTAA

- Bangalore ITAT in Wifi Networks (08.03.2013)- DTAA with UAE does not have FTS Clause- implication

Issue (2)

Section 195

- Whether it is mandatory for a person responsible for paying any sum chargeable under the Act , to a non-resident , to make an application to the Assessing Officer to determine the appropriate proportion of sum chargeable to tax?

Issue (2)

- Samsung Electronic Co. Ltd. [2009] 185 Taxmann 313- Karnatka High Court held that it is *statutory obligation*.....
- Transmission Corp. of AP Ltd. V CIT [1999] 239 ITR 587 (SC)- relied upon in above judgment
- Is above judgment based on current law

Issue (2)

- CBDT Circular No. 759 dated 18.11.1997
- RBI Circular No.48 dated 29.11.1997
- Subsection (6) inserted in Section 195 vide Finance Act 2008.
- Rule 37 BB (Form 15CA and 15CB) inserted with effect from July 1, 2009
- Millenium Infocom Technolgoies Ltd. [2009] 117 ITD 114

Issue (3)

- Mr. A , a resident has purchased residential flat at Udaipur from Mr. Y, resident of Dubai. Whether Mr. A should deduct tax u/s 195. Also, how a Chartered Accountant should issue Form 15 CB, if asked by Mr. A

Issue (4)

- RBI allows general remittance of USD 1 million per year subject to undertaking and CA Certificate. Authorized Dealers asks for CA Certificate. Mr. Nice, an NRI is remitting funds from his account in India to his account in UK. How a Chartered Accountant will certify this.

Must READ.....

Transfer Pricing

Concept of PE

Credit Mechanisms

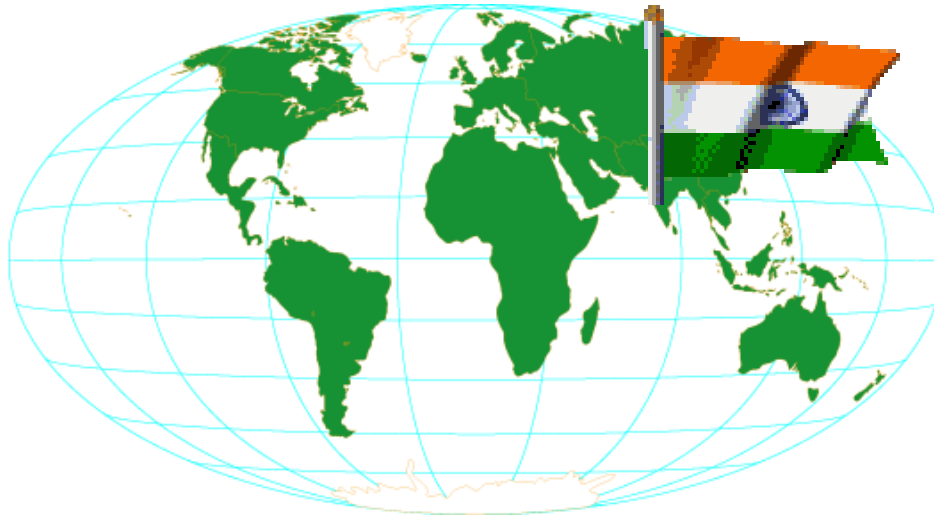
Laws related to expatriates
(DPS/IPS etc)

GAAR

Vodafone Judgment

International Tax

How undertaken in practice?





Opportunities for CAs

**International Tax Advisory/Planning
for Cross Border Transactions**

**Transfer Pricing Advisory and
Documentation**

Transfer Pricing Audit

Form 15 CB Certification

Domestic TP

Answering Your Questions..



Thank You!



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