

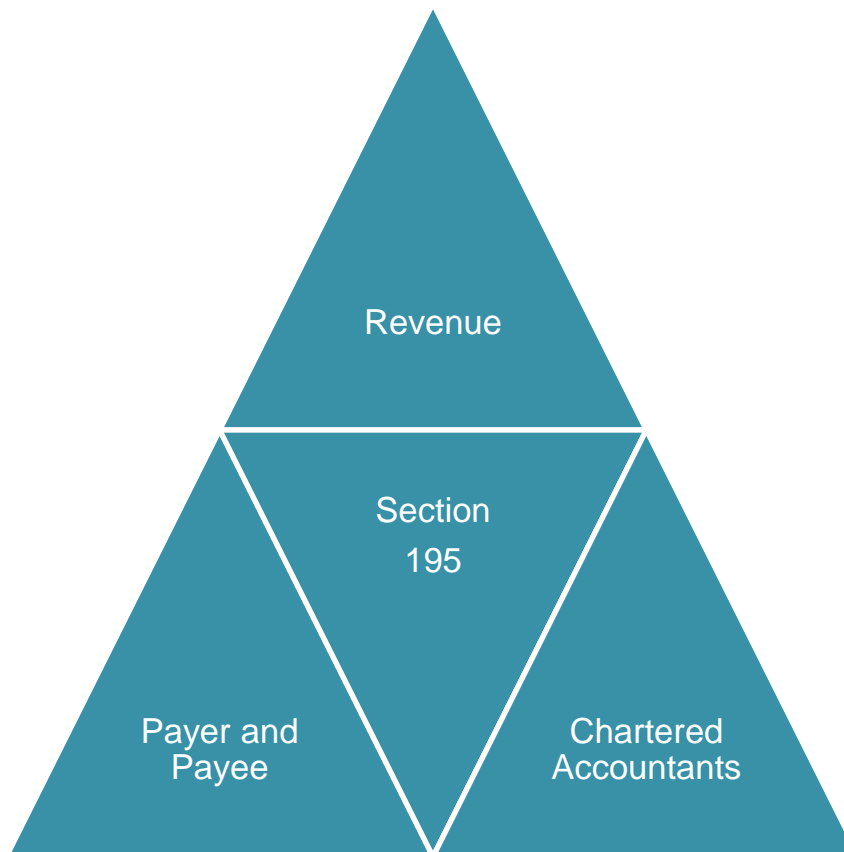
***The Institute of Chartered Accountants of India
Pune Branch of WIRC of ICAI***

**Section 195- Intricacies and
Practical Issues**

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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

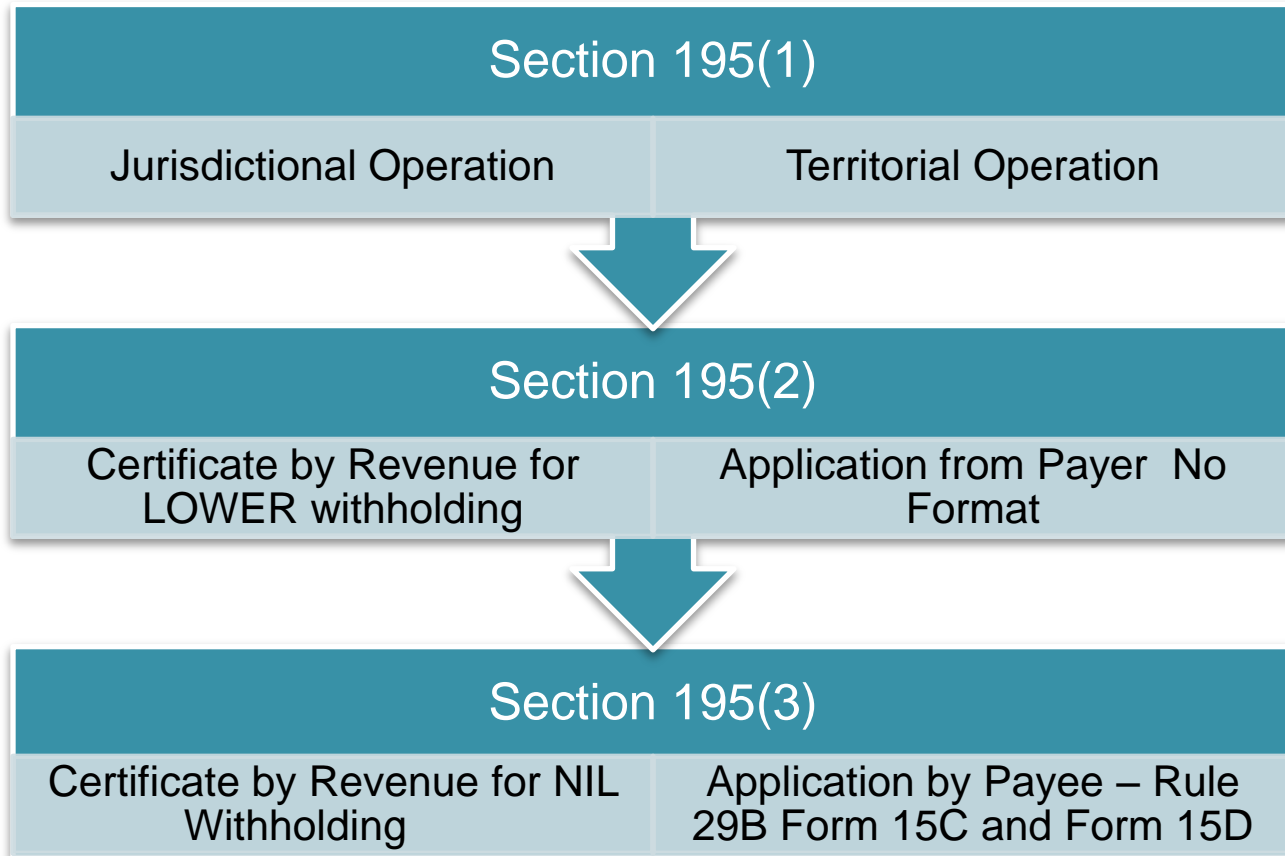
SC views in Eli Lily 312 ITR 225:

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.

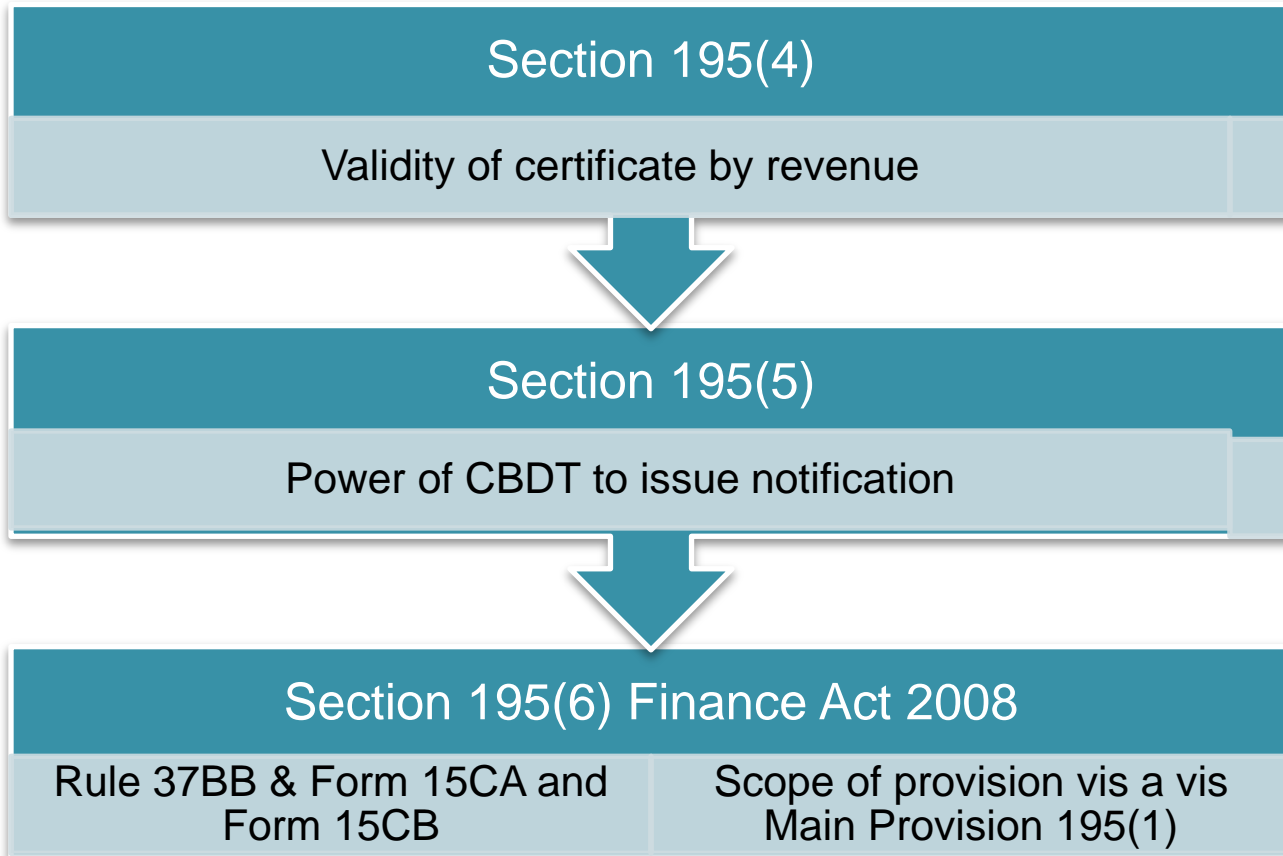
The said TDS provisions are meant for tentative deduction of income-tax subject to regular assessment. (see *Transmission Corporation of A.P. Ltd. and Anr. v. CIT* reported in [1999] 239 ITR 587 at p. 594).

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(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 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?

Case Study: Relating to LOB in India Singapore DTAA

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.”.

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

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) The information under sub-section (6) of section 195 shall be furnished by the person responsible for making the payment to a non-resident, not being a company, or to a foreign company, after obtaining a certificate from an accountant as defined in the *Explanation* to section 288 of the Income-tax Act, 1961

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.....”

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

-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 (else obtain self declaration form (SDF) sufficiently detailed from payee as to tax residency of a country)- 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

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 Aktiengesellschaft 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

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

Jp ITAT in Modern Insulator 56

DTR 362/ 140 TTJ 715

“...criteria of residence, place of business or business connection of a non resident in India for fastening the tax liability has been done away with. Hence, the 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.** In the instant case, the sales commission is business profit of the non-resident. In the absence of a permanent establishment, such sales commission was not chargeable and therefore, there was no need for deducting the tax at source. Similarly, the payments in respect of **subscription and advertisement** cannot be considered to be covered under fees for technical services and therefore, no TDS was required to be deducted.

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)]

“ 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.

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
- 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
- Advertisement in Foreign Media : **Sandoz Private Limited**
(formerly known as Novartis Enterprises Pvt.)- Mumbai ITAT 2012
- Training Fees
- Spare Parts Supply
- Designer/Animation Fees

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-a)

- Managements expenses paid to Head Office

Issue (3- a)

Managements expenses paid to Head Office

- Not taxable??
- Mere re-imburesemnt of expenses -Global Manager's Salary apportioned – when no mark up is charged (Expeditors international Ltd. [2008] 118 TTJ 652 (Delhi))
- Consultant paid directly by foreign company- on behalf of Indian Company- Modicon network Pvt Ltd (14 SOT 205 (Delhi))
- Indian Company entered into agreement with Singapore company for operations management — held that such services did not “make available” technology under India- Singapore DTAA (Bevis Land Lease India P. Ltd v. ITO)

Issue (3-b)

- Reimbursements of expenses

Issue (3-b)

Reimbursement of Expenses

- No income element
- Bangalore International Airport v ITO [2008] 24 SOT 26 (Bang.)- mere reimbursement without mark-up
- Contrary view possible

Issue (3-c)

- Payment by resident to Indian Branch of Foreign Bank (Payment of Interest and Bank charges)

Issue (3-c)

Payment by resident to Indian Branch of Foreign Bank (Payment of Interest and Bank charges)

- Taxable

Issue (3-d)

- Payment by Offshore Branch of Indian Company to Offshore Branch of Indian Bank (Bank registered under Banking Regulation Act)

Issue (3-d)

Payment by Offshore Branch of Indian Company to Offshore Branch of Indian Bank (Bank registered under Banking Regulation Act)

- Not taxable

Issue (3-e)

- An American Company has an arrangement with an Indian company to depute its personnel to Indian Company on a hire out basis. The personnel deputed worked under supervision and control of Indian Company. The Indian company reimbursed to American Company, the salary paid to personnel.

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An American Company has an arrangement with an Indian company to depute its personnel to Indian Company on a hire out basis. The personnel deputed worked under supervision and control of Indian Company. The Indian company reimbursed to American Company, the salary paid to personnel

- No mark up
- Mere re-imburement
- Personnel under control and supervision of Indian Co.
- Not taxable since no portion of payment is income

Relevant cases

- Abbey Business Services (I) Pvt. Ltd. [Bang.-Trib]
- Tekmark Global solutions LLC. [Mumb.-Trib]
- IDS Software Solutions (I) Pvt. Ltd.[Bang.-Trib.]
- Cholamandlam MS Gen. Ins. Co. Ltd.[AAR-New Delhi]

Issue (3-f)

- Taxability of interest remitted by Branch of Bank to its Head Office abroad

Issue (3-f)

- Taxability of interest remitted by Branch of Bank to its Head Office abroad
- (Circular No 740 dated 17-4-1996)- separate payer/payee, Indian Branch taxed in India and claiming expenses

Issues (3-g)

- Interest paid by Indian Company to Singapore Branch of ABN Amro Bank(RBS)

Issue (3-g)

- Interest paid by Indian Company to Singapore Branch of ABN Amro Bank (RBS)
- interesting aspects of country to which remitted vs. country in which payee is resident

Issue (3-h)

- US company sharing management experiences and business strategies to Indian Company

Issue (3-h)

- US company sharing management experiences and business strategies to Indian Company
 - Wockhardt Limited case Mumbai Tribunal
- Not making available any technical knowledge, experience, skill, or know-how

Issue (4)

- TDS on Royalty and Fees for Technical Services- Whether following transactions are business income/royalty/fees for technical services:
 - A non-resident UK based company is providing the service of collecting data and analyzing it and making a database for providing information on suitable candidates for recruitment- discuss tax implications
 - Payment made to UK company for carrying calls and data outside India
 - Web-hosting charges/domain registration charges
 - Electronic Ordering and downloading of digital products
 - Data warehousing/Data Retrieval Services
 - Limited duration software /Single use software

Issue (4)

A non-resident UK based company is providing the service of collecting data and analyzing it and making a database for providing information on suitable candidates for recruitment-

- Real Resourcing Ltd. In re [AAR No. 828/2009 dt. 5-3-2010, 3 taxmann.com 19]- Not covered under para 4(a) /4 (c) of DTAA with UK
- Wipro Ltd. V. ITO [94 ITD 9](Bang.)- Payment to US based company for access to database- not royalty or fee for technical services- it is business income- DTAA applicability
- Maharashtra State Electricity Board v. CIT [2004] 90 ITD 793 Mum. – Income exempt under DTAA is not “income chargeable under the provisions of the Act” for Sec. 195

Issue (4)

Payment made to UK company for carrying calls and data outside India

- Cable and Wireless Networks India Pvt Ltd. , In re [2009] 182 Tax mann 76
- Held neither “royalty” nor “fees for technical services”
- It is business income but since no PE in India, not taxable

Issue (4)

- Web-hosting charges/domain registration charges
- Electronic Ordering and downloading of digital products
- Data warehousing/Data Retrieval Services
- Limited duration software /Single use software
- Discussed in detail by Tax Advisory Group (TAG) of OECD

Issue (5)

- A US company providing drug testing services and giving report to Indian Company

Issue (5)

- A US company providing drug testing services and giving report to Indian Company
- Wockhardt Limited case
- “not making available...”
- Recent decisions in Siemens Limited [Mumb.-Trib.-2013]

Issue (6)

- A US manufacturer has experience in the use of process for manufacturing wall board for interior walls of the houses which is more durable than standard products of its type. A Indian builder wishes to this product for its own use:
 - it rents a plant in India and US manufacturer sends experts to show Engineers of Indian Company, how to produce the extra strong wall board;
 - in above example, what will be the situation, if Indian Company provides raw material and US manufacturer uses its technology and gets fee for the same?

Issue (6)

- Article 14 of Indo –Canada Treaty – Independent Personal Services
- “make available” clause in Indo US and Indo Canada Treaty - Mumbai Tribunal in case of [Preroy A.G. (2010) 5 Taxmann .com 8]
Preroy’s case (held fees not taxable as *royalty* and fee is not taxable as “*fee for included services*”)
- DTAA of one country can be compared with DTAA of other country (AEG Telefunken v/s CIT [(1998) (233 ITR 129 (Karnataka HC))]

Issue (7)

- The payment made for exhibition outside India/ Participation Fees for the conference
- Fee for membership of various trade bodies/other organizations outside India
- Legal advisory services to Indian company in France by advocate in France
- Sales and Marketing Services provided to market products of Indian company in foreign country

DTAA v/s Domestic Law

Provisions of Double Taxation Avoidance Agreement overrule domestic tax laws of contracting states.

[Section 90(2)], Circular No. 333 of 1982, CIT v. VRSRM Firm [1984] 208 ITR 400

Difference may arise on account of

- Tax Rates
- Scope of Taxability

Check if the treaty is in effect

- Entry into force – check for each of the countries,
 - The Date of Entry into force of the convention
 - The Date of Effect of the convention

Ensure that the Treaty has not terminated!

- Treaty remains into force till terminated
- Some treaties provide for a period during which treaty cannot be terminated
- Termination requires notice through diplomatic channels
- Some treaties provide for period of notice and some do not
- Check if the treaty is in force before applying it!



Protocols

- DTAA: Relevance of Protocols and MFN Clause while interpreting DTAAs.

Check Protocols to Treaty!

- Protocols / MOUs
 - Generally provide amendments to the existing treaties
 - Provide for explanations to the treaty provision
- Check whether the treaty / protocol has the MFN Clause!



MFN Clause in Dutch Treaty

“ If after the signature of this Convention^[1] under any Convention or Agreement between India and a third State which is a member of the OECD India should limit its taxation at source on dividends, interest, royalties, fee for technical services or payments for the use of equipment at a lower rate or scope provided for in this Convention on the said items of income, then, as from the date on which the relevant India Convention or Agreement enters into force the same rate or scope as provided for in that Convention or Agreement on the said items of income shall also apply under this Convention.”

The Dutch treaty was signed on 30 July 1988

Original Text of Dutch Treaty

- 20% w/tax on royalties and fees for technical services
- Broad scope of royalties and fees for technical services
- Most favored nation clause (MFN) for royalties and fees for technical services, interest and dividends

Favorable Treaties since 1990

- US treaty 18 Dec 1990
- German treaty 26 Oct 1996
- Swedish treaty 25 Dec 1997

OECD Member Countries

- OECD MEMBER COUNTRIES
- Twenty countries originally signed the Convention on the Organization for Economic Cooperation and Development on 14 December 1960. Since then a further ten countries have become members of the Organization. The Member countries of the Organization and the dates on which they deposited their instruments of ratification are:
 - AUSTRALIA : 7 June 1971
 - AUSTRIA : 29 September 1961
 - BELGIUM : 13 September 1961
 - CANADA : 10 April 1961
 - CZECH REPUBLIC : 21 December 1995
 - DENMARK : 30 May 1961
 - FINLAND : 28 January 1969
 - FRANCE : 7 August 1961
 - GERMANY : 27 September 1961
 - GREECE : 27 September 1961

OECD Member Countries

- HUNGARY : 7 May 1996
- ICELAND : 5 June 1961
- IRELAND : 17 August 1961
- ITALY : 29 March 1962
- JAPAN : 28 April 1964
- KOREA : 12 December
1996
- LUXEMBOURG : 7 December
1961
- MEXICO : 18 May 1994
- NETHERLANDS : 13 November
1961

OECD Member Countries

- NEW ZEALAND : 29 May 1973
- NORWAY : 4 July 1961
- POLAND : 22 November 1996
- PORTUGAL : 4 August 1961
- SLOVAK REP. : 14 December 2000
- SPAIN : 3 August 1961
- SWEDEN : 28 September 1961
- SWITZERLAND : 28 September 1961
- TURKEY : 2 August 1961
- UK : 2 May 1961
- USA : 12 April 1961

MFN Clause- Another Example

- In Indo-France treaty, the MFN clause provided that if India demits its taxation at source in respect of income from dividend, interest, Royalty etc. in any treaty with a member of OECD after 1st September, 1989, the same terms will apply to Indo-France treaty w.e.f. from the date the other treaty enters into force

Favorable Treaties since 1989

- Indo-German treaty w.e.f 1-4-1997
- | Income | Original Rate | New Rate |
|------------------|---------------|----------|
| Royalty | 20% | 10% |
| Interest | 15% | 10% |
| Equipment Rental | 20% | 10% |

Favorable Treaties since 1989

- Indo- Sweden Treaty since 1-4-1998
- Provided for nil taxation at source in respect of rental of equipment
- More favorable because applicable to Indo-France treaty also and such income became taxable only on existence of a P. E in the state of source.

How TO READ CLAUSES OF DTAA

- Put names of contracting countries to easily understand the clauses

Issue (8)

- Is “Treaty Shopping” valid mean of tax planning?

Issue

- **AZADI BACHAO ANDOLAN Case**
- **E-trade Mauritius Limited, in Re (AAR No 826 of 2009)**



Issue

TRANSACTION

Third Country

Investment Fund

Mauritius

Registered SPV

India

Indian Company

Issue

- Circular No. 789 of 2000 issued by the CBDT clarified that the certificate of residence issued by the Mauritian Authorities shall be treated as an evidence of residence as well as of beneficial ownership (as will establish that control & management lies in Mauritius) Consequently capital gains from sale of shares in India became non-taxable in India
- The Delhi High court quashed the above circular on the ground that the it was ultra-vires the Income Tax Act as it curtails powers of the AO to examine control & management in the foreign tax jurisdiction.
- It further held that this amounts to treaty shopping, which is illegal and therefore is forbidden.

Issue

- **ISSUES INVOLVED**

A Special Leave Petition was filed in the Supreme Court against the above order of the High Court on the following Grounds

- Whether the circular issued by the CBDT was ultra vires the Income Tax Act
- Since income from sale of shares is exempt in Mauritius whether such entities are eligible for benefits under the DTAA
- Treaty shopping – Whether it is illegal

Issue

Circular No. 789 is valid in Law

- The circular in question in no way curtails the jurisdiction of the AO and therefore is not ultra-vires the Income Tax Act.

Issue

Liability to Pay tax Vs Payment of Tax

- The court held that merely because exemption has been granted in respect of taxability of a particular source of Income, it cannot be said that the entity is not ***liable*** to tax therein.
- The Court held that the law cannot be interpreted to mean that avoidance of double taxation can only arise when tax is actually paid in one country.

Issue

Treaty Shopping

- In the absence of any contrary provisions, there is nothing to prevent nationals of third States to claim the benefits of the treaty.
- The transaction which is otherwise valid in law cannot be treated as void because of some underlying motive supposedly resulting in economic determinant to the nation.

Issue

- Indo-UAE treaty provides that the capital gains of resident of UAE are taxable in UAE. If in UAE capital gains are not taxed, whether Indian tax authorities contend that it can be taxed in India?

Issue

- Azadi Bachao Andolan
“Liability to tax” is “legal situation” and tax paid or payment of tax is “fiscal fact” – legal situation is relevant
- Meera Bhatia’s case (Mumbai ITAT)- Treat prevent not only “current” but also “potential” double taxation- a person “liable to tax” can claim benefit
- Ramesh Kumar Goenka v/s ITO [5 taxmann.com 17) Mumbai Tribunal
- Abdul Razak Memon

Issue (9)

- Mr. A , a resident has purchased residential flat at Ahmedabad 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 (10)

- 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

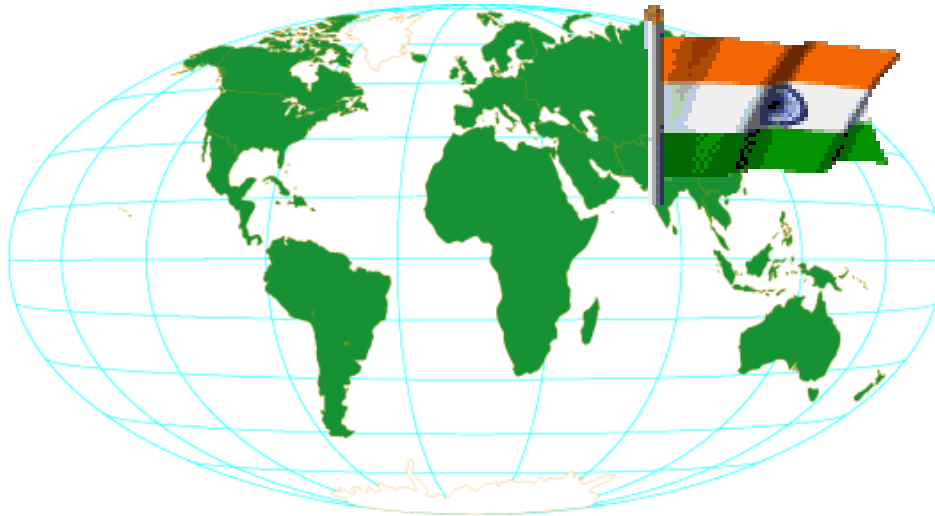
Laws related to expatriates
(DPS/IPS etc)

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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