

J.B. Nagar CPE Study Circle of WIRC

Section 195 – TDS on non-residents



Jagat Mehta

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Agenda



Key Features and overview of Section 195

Section 195(1) – an analysis

Section 195A – Grossing up of tax

Section 195(2) to Section 195(4) and Section 197

Section 206AA and proposed Section 206AB

Multilateral Instrument - Brief

Section 195(6) read with Rule 37BB

Refund of taxes withheld

Documentation to be maintained

Some issues

Key takeaways



Key Features and Overview of Section 195

Key Features

- Tax collection at the earliest point of time
- Section 195 of the Act applicable if any sum **chargeable to tax** is paid as against **any sum** referred in other provisions of Chapter XVII
- Applicable to all tax payers (say Individual / HUF etc.)
- No threshold limit prescribed for the applicability of section 195 of the Act
- Section 195 to be read alongwith other provisions of the Act (such as section 5, section 6, section 9 etc.) and the Double Tax Avoidance Agreements (if any) entered by India
- Where the assessee does not withhold taxes under Section 195, the tax officer is required to determine the income component involved in the sum on which withholding tax liability is to be computed and the payer to be considered as in default for non-withholding of taxes only in relation to such income component - CBDT Instruction No 2/2014

Overview

Section	Provision
195(1)	Scope and conditions for applicability
195(2)	Application by the Payer to the Tax Officer for determination of the appropriate proportion of sum chargeable to tax
195(3)	Application by the Payee to the Tax Officer for granting certificate of no deduction of tax
195(4)	Validity of certificate issued by the Tax Officer
195(5)	Powers of the CBDT to issue Notifications
195(6)	Furnishing of information relating to payments
195(7)	Authority of CBDT to specify class of person or cases who shall make application under Section 195(2)

Section 195(1) – An analysis



Section 195(1)...

“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.

...Section 195(1)

Explanation 2 – For the removal of doubts, it is hereby clarified that the obligation to comply with subsection (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”*

Key terms referred in Section 195(1)...

Person [Section 2(31)]

“(31) "person" includes

- (i) an individual,*
- (ii) a Hindu undivided family,*
- (iii) a company,*
- (iv) a firm,*
- (v) an association of persons or a body of individuals, whether incorporated or not,*
- (vi) a local authority, and*
- (vii) every artificial juridical person, not falling within any of the preceding sub-clauses.*

Explanation.—For the purposes of this clause, an association of persons or a body of individuals or a local authority or an artificial juridical person shall be deemed to be a person, whether or not such person or body or authority or juridical person was formed or established or incorporated with the object of deriving income, profits or gains;”

...Key terms referred in Section 195(1)...

Non-resident [Section 2(30)]

“(30) "non-resident" means a person who is not a "resident", and for the purposes of sections 92, 93 and 168, includes a person who is not ordinarily resident within the meaning of clause (6) of section 6”

Foreign Company [Section 2(23A)]

“(23A) "foreign company" means a company which is not a domestic company”

Domestic Company [Section 2(22A)]

“(22A) "domestic company" means an Indian company, or any other company which, in respect of its income liable to tax under this Act, has made the prescribed arrangements for the declaration and payment, within India, of the dividends (including dividends on preference shares) payable out of such income”

...Key terms referred in Section 195(1)

Rates in force [Section 2(37A)]

“(37A) "rate or rates in force" or "rates in force", in relation to an assessment year or financial year, means-

(i) ;

(ii) ;

(iii) for the purposes of deduction of tax under section 194LBA or section 194LBB or section 194LBC or section 195, 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 90, or an agreement notified 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

Analysis of Section 195(1)...

Who is responsible to deduct?

- Responsibility of tax deduction is casted on 'person'
- The term person is defined in section 2(31) of the Act

Payment to whom

- Section 195 is attracted if the payment is made to non-resident or a foreign company

Issues for consideration:

- Applicability when the payment is made to Foreign Company whose Place of Effective Management is situated in India
- Applicability to payments to Resident but not ordinarily resident?
- Whether payment by one non-resident to another non-resident covered?

...Analysis of Section 195(1)...

Time of deduction

- At the time of payment or credit whichever is earlier
- Exception to Government, public sector banks and public financial institution – only on payment

Issues for consideration:

In some DTAA entered by India, Royalty or Fees for Technical Services arising in a Contracting State (i.e. India) and **paid** to a resident of the Other Contracting State (i.e. entity located in other jurisdiction such as Singapore, US etc.) may be taxed in that Other State. Can tax withholding be done on payment basis?

Rate to be applied

- Rates of income-tax specified in the Finance Act or the rates specified in the DTAA, whichever is more beneficial
- 20 percent (if it is higher rate) where no PAN / TRC is available

Finance Bill, 2021?

...Analysis of Section 195(1)

Exchange rate to be applied

- As per Rule 26 of Income-tax Rules, 1962, 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 a taxpayer outside India shall be the telegraphic transfer buying rate 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.

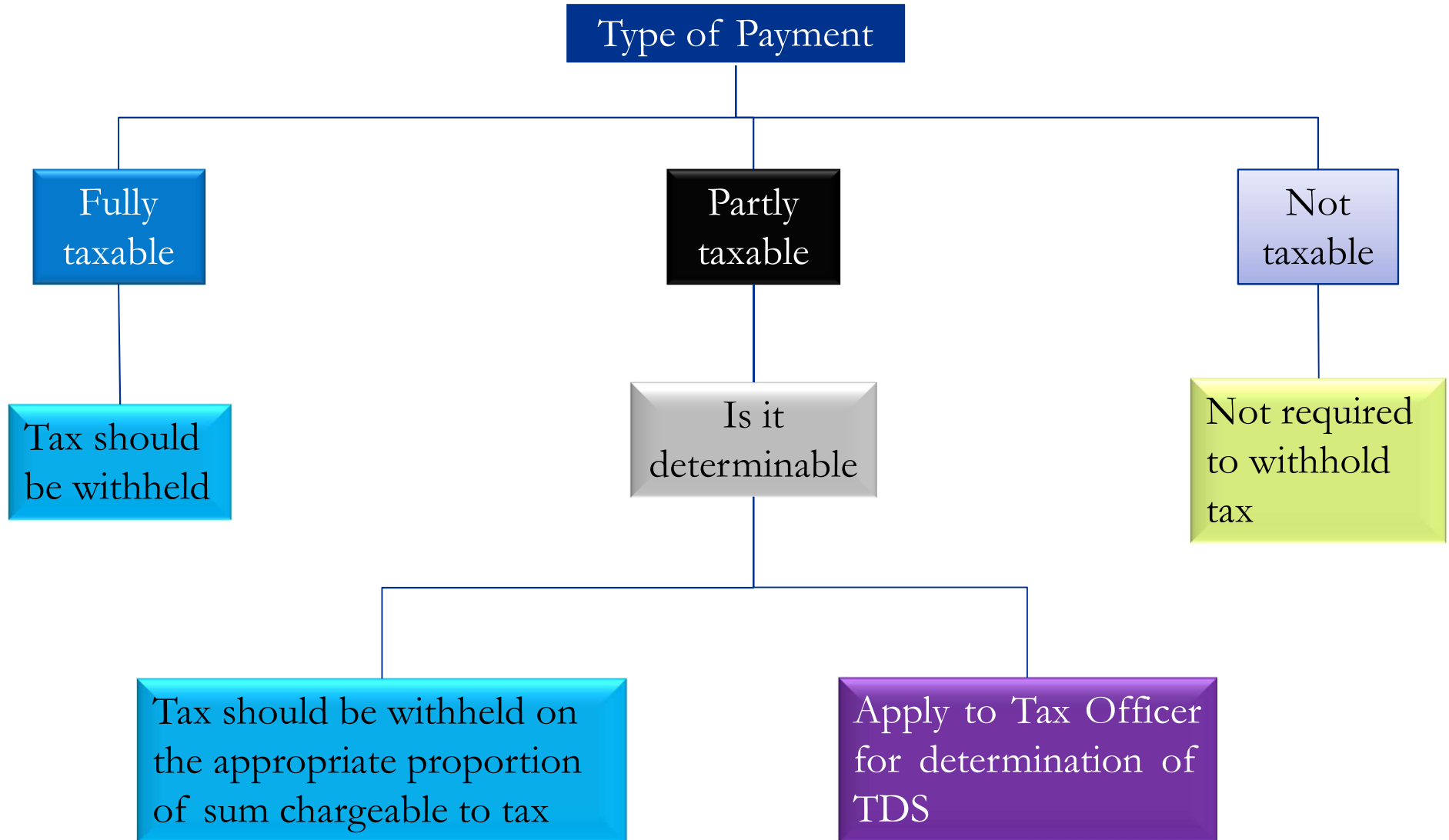
Analysis of Section 195(1) – specified exception

- Income which is not taxable in India
- Specifically covered by other Sections

Section	Particulars	Rate*
192	Salary	Average rate
194E	Payment to non-resident sportsperson	20%
194LB	Interest from infrastructure debt fund	5%
194LC	Interest from Indian company	5%
194LD	Interest on certain bonds and Government securities	5%
196B	Units of a MF specified in Sec.10(23D) purchased in foreign currency	10%
196C	Income from FCCBs or GDRs	10%
196D	Income of FIIs (except Capital Gains)	20%

* Exclusive of surcharge and education cess

Analysis of Section 195(1) – withholding snapshot



Provisions for taxing non-resident's income in India

Nature of income	Act*	Treaty
Business/ Profession	Section 9(1)(i)	Articles 5, Article 7 and Article 14
Salary Income	Section 9(1)(ii)	Article 15
Dividend Income	Section 9(1)(iv)	Article 10
Interest Income	Sections 9(1)(v), 115A	Article 11
Royalties/ FTS	Sections 9(1)(vi)/(vii), 115A	Article 12
Capital Gains	Sections 9(1)(i), 45	Article 13

* Apart from Section 5, wherever applicable

Case Study 1

Brief Facts

- X, a non-resident, owns 2 BHK flat in Khar, Mumbai
- During FY 2020-21, X sold this flat to Y, an Indian resident
- X had purchased this flat for INR 5 million in FY 2010-11 and the sales consideration is of INR 15 million

Issue for consideration:

- Whether tax withholding is required under section 195 or section 194-IA?
- Amount on which tax is to be withheld – gross consideration or net consideration?

Case Study 2

Brief Facts

- On 30 June 2020, X Ltd, a Company incorporated in Australia, acquired 100,000 shares of PQR Ltd, an Indian Company
- On 31 March 2021, PQR Ltd., declared dividend of INR 2 per share.
- As per India-Australia DTAA, grants taxing rights to India as well as Australia. The rate prescribed under the India-Australia DTAA is 15%

Issue for consideration:

- Whether tax withholding is required?
- Will the answer be the same if X Ltd was a Swiss Company? (under India-Switzerland DTAA, dividends are taxed at 10%)?

Case Study 3

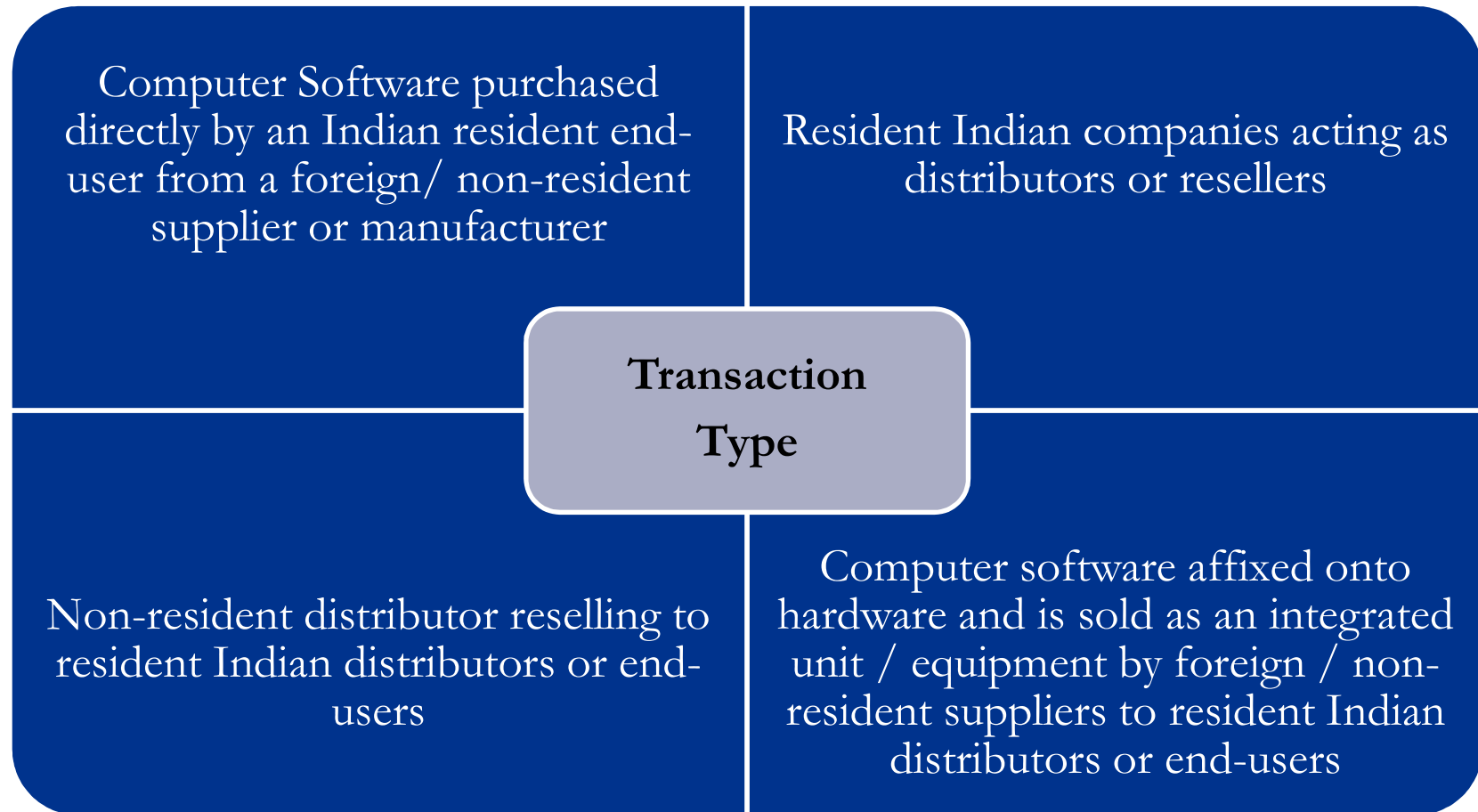
- X Ltd, an Indian Company, is an Indian distributor of Microsoft, a US Company.
- Y Ltd., an Indian Company, entered into an End User License Agreement (EULA) with Microsoft for its Microsoft Office module basis which it availed 1 years annual license. As per the EULA, Y Ltd. can only use it by installing it in the computer hardware owned by it and cannot in any manner reproduce the same for sale or transfer, contrary to the terms imposed by the EULA
- X Ltd. delivered the software on a CD, as it is (i.e. without making any changes in the source code) to Y Ltd.
- Y Ltd. made payment to X Ltd. who in-turn made payment to Microsoft.
- X Ltd. has classified this payment as Royalty in its books.

Issue for consideration:

- Whether X Ltd is liable to withhold tax from the payment made to Y Ltd.?

**Engineering Analysis Centre of Excellence Pvt. Ltd. Vs.
CIT (Civil Appeal Nos. 8733-8734 of 2018)**

Case Study 3 – SC Ruling...



Case Study 3 – SC Ruling...

- Once a DTAA applies, the provisions of the Income Tax Act can only apply to the extent that they are more beneficial to the taxpayer and not otherwise
- Where any term is defined in a DTAA, the definition contained in the DTAA is to be looked at. It is only where there is no such definition that the definition in the Income Tax Act can then be applied.
- The machinery provision contained in section 195 of the Income Tax Act is inextricably linked with the charging provision contained in section 9 read with section 4 of the Income Tax Act.
- SC's decision in PILCOM distinguished.
- Though the expression “copyright” has not been defined separately in the “definitions” section of the Copyright Act, section 14 of the Copyright Act makes it clear that “copyright” means the “exclusive right”, subject to the provisions of the Copyright Act, to do or authorise the doing of certain acts “in respect of a work”.
- Great reliance placed on Copyright Act

Case Study 3 – SC Ruling...

- Copyright is infringed when any use, relating to the said interest/right that is licensed, is contrary to the conditions of the licence so granted.
- The right to reproduce a computer programme and exploit the reproduction by way of sale, transfer, license etc. is at the heart of the said exclusive right.
- The comma after the word “copyright” does not fit as copyright is obviously spoken of as existing in a literary, artistic or scientific work
- Explanation 4 to section 9(1)(vi) of the IT Act is not inserted retrospectively
- Two latin maxims, *lex non cogit ad impossibilia*, i.e., the law does not demand the impossible and *impotentia excusat legem*, i.e., when there is a disability that makes it impossible to obey the law, the alleged disobedience of the law is excused.
- The “person responsible for paying” referred in section 195 of the Income Tax Act is not a non-resident taxpayer, but a person resident in India, who is liable to make deductions under section 195 of the Income Tax Act when payments are made by it to the non-resident taxpayer

Case Study 3 – SC Ruling

Reliance on OECD Model Commentary

- In all the DTAAAs entered by India, the term “Royalties” is defined in a manner either identical with or similar to the definition contained in Article 12 of the OECD Model Tax Convention.
- The position taken by India with regard to Article 12 of the OECD Model Tax Convention and the OECD Commentary, use the language “reserves the right to” and “is of the view that some of the payments referred to may constitute royalties”, it is not at all clear as to what exactly the nature of these positions are.
- After India took such positions qua the OECD Commentary, no bilateral amendment was made by India and the other Contracting States to change the definition of royalties contained in any of the DTAAAs under consideration, in accordance with its position.
- DTAAAs that were amended subsequently, incorporated a definition of royalties, not very different from the definition contained in the OECD Model Tax Convention
- DTAA would have to be bilaterally amended before any recommendation can become law in force for the purpose of the IT Act

Section 195A – Grossing up of tax



Section 195A - Grossing up of tax

- **Section 195A** – *“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.”*
- Section 195 envisages multiple grossing-up
 - For eg. amount payable to non-resident is 100 and TDS rate is 10%; Gross amount for TDS purpose would be 111.11 ($100 \times 100 / 90$)
- No multiple grossing-up in case of presumptive tax
 - Section 195A not applicable to Section 44BB
- Section 192(1A) – Tax on non-monetary perquisite – Not covered by Section 195A
- In respect of payment made ‘net of tax’ also, the payer is under legal obligation to furnish TDS certificate to the payee [Circular no. 785 dated 24 November 1999]

**Section 195(2) to
Section 195(4)
and Section 197**



Section 195(2) – Application by payer

- **Section 195(2)** – *“Where the person responsible for paying any such sum chargeable under this Act (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 to the Assessing Officer to determine, by general or special order, 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.”*
- Can application under Section 195(2) be made for NIL withholding order?
 - Favourable
 - Van Oord ACZ India (P.) Ltd. [2010] 323 ITR 130 (Del.)
 - Mangalore Refinery and Petrochemicals Ltd. [2008] 113 ITD 85 (Mum.)
 - Unfavourable
 - GE India Technology Centre (P.) Ltd. [2010] 327 ITR 456 (SC)
 - Czechoslovak Ocean Shipping International Joint Stock Company [1971] 81 ITR 162 (Cal.)
 - Graphite Vicarb India Ltd. [1986] 18 ITD 58 (Cal.)

Section 195(2) – Application by payer

- Order under Section 195(2) amenable to revision under Section 263 – Board of Control for Cricket in India [2005] 96 ITD 263 (Mum.)
- Order under Section 195(2) is appealable under Section 248
 - only if tax is to be borne by the payer
 - within 30 days of payment of tax [Section 249(2)(a)]
- Liability of TDS can be appealed before CIT(A) even without order from AO [Section 248]
 - CMS (India) Operations & Maintenance Co. 38 taxmann.com 92 (Chennai)

Section 195(3) – Application by payee

- **Section 195(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).*”
- **Section 195(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.*”

Section 195(3) – Application by payee

- Section 195(3) - Payee satisfying certain conditions can make an application (Form 15C for banking companies or Form 15D for non-banking companies)
- Prescribed conditions (Rule 29B):
 - Has been regularly filing tax returns and assessed to Income-tax
 - Not in default in respect of tax, interest, penalty, etc.
 - Additional conditions for non-banking companies:
 - Has been carrying on business or profession in India through a branch for at least 5 years
 - Value of Fixed Assets in India exceeds INR 50 Lakhs
- Certificate issued by the AO valid for the Financial Year mentioned therein

Section 197 – Application by payee

- **Section 197(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, 194-I, 194J, 194K, 194LA, 194LBB, 194LBC 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, give to him such certificate as may be appropriate.”*
- **Section 197 – Any payee can apply for no deduction or lower rate of deduction**
- Certificate issued by AO can be prospective only
 - Payment/ credit made prior to the date of the certificate not covered
 - Circular No. 774 dated 17 March 1999

Lower withholding – Bird’s eye view

Particulars	Section 195(2)	Section 195(3)	Section 197
Overview	Payer having a belief that portion (not the whole amount) of any sums payable by him to non-resident is not liable to tax in India, may make an application to <u>AO to determine taxable portion</u>	Payee may make an application to AO for granting him a <u>certificate to receive income without TDS</u>	Payee may make an application to AO for granting him <u>certificate of ‘Nil’ or ‘lower’ withholding</u>
Application by	Payer	Non-resident Payee	Payee
Purpose	Determination of portion of such sum chargeable to tax	No withholding	Lower / Nil withholding
Form	No specific format	Rule 29B – Form 15C and 15D	Rule 28 - Form 13

Lower withholding – Bird’s eye view

Particulars	Section 195(2)	Section 195(3)	Section 197
Outcome	AO to determine the <i>appropriate proportion</i> chargeable to tax and issue order accordingly	Certificate issued by the AO subject to conditions specified in Rule 29B	Certificate to be issued by AO subject to conditions specified in Rule 28AA
Remedy	Order can be appealed under Section 248	<ul style="list-style-type: none"> • There is no provision under Chapter XX of the Act, to appeal against the certificate issued • Possible to pursue application under Section 264 • Possible to explore writ jurisdiction – Diamond Services International (P.) Ltd. [2008] 169 Taxman 201 (Bom) 	

Section 206AA



Section 206AA

- **Section 206AA(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 XVIIB (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.

Provided that where the tax is required to be deducted under section 194-O, the provisions of clause (iii) shall apply as if for the words "twenty per cent", the words "five per cent" had been substituted.

Section 206AA – an analysis

- Requirement to withhold tax at the higher of the following rates if deductee fails to provide its PAN to the deductor:
 - Rate specified in the relevant provision of the Act (i.e. specified rates in Chp XVII-B); or
 - Rates in force; or
 - Rate of 20%
- TDS as per the rates specified in DTAA
 - Serum Institute of India Ltd. [2015] 68 SOT 254 (Pune.)
 - Infosys BPO Ltd. [2015] 154 ITD 816 (Bang.)
 - Pricol Ltd. [ITA. No.880 & 1141/Mds./2014] [Date of Order: 9.12.2015] (Chennai.)
 - Section 206AA does not override Section 90(2) of the Act; held that lower TDS as per favourable DTAA provisions applicable and not higher rate under Section 206AA

Section 206AA – an analysis

- Surcharge or education cess on maximum rate of 20% as per Section 206AA?
 - Finance Act does not include Section 206AA in its ambit for the purpose of levy of surcharge or education cess
 - No surcharge and education cess would be leviable; provided maximum rate of 20% is applied
- Section 195A vis-à-vis Section 206AA
- Need for grossing up
 - View 1 – no grossing up required
 - Neither Section 195A makes reference to Section 206AA, nor Section 206AA provides for grossing up
 - View 2 – grossing up required only vis-à-vis clause (ii) of Section 206AA(1)
 - As per Section 195A, grossing up where TDS at the rates in force
 - View 3 – grossing up in all three cases

Section 206AA – an analysis

- Manner of grossing up
 - In cases where rate in force is 10% as per DTAA – Whether grossing up should be on 10%, being rate in force or on 20%?

Particulars	Option 1	Option 2	Option 3	Option 4
Net of Tax Payment to non-resident	100	100	100	100
(+) Grossing up	11.11	11.11	21.11	25
Total	111.11	111.11	121.11	125
(-) TDS	11.11	22.22	21.11	25
Payment to be made to the non-resident	100	88.89	100	100

- Bosch Ltd. [2013] 141 ITD 38 (Bang.) – for grossing up, 10% rate should be considered

Section 206AA – an analysis

- As per Section 206AA(7), the section shall not apply to a non-resident/foreign company, in respect of:
 - payment of interest on long-term bonds referred to in Section 194LC
 - any other payment subject to such conditions as may be prescribed

Rule 37BC contains details and documents to be furnished by the non-resident to avail relaxation under Section 206AA(7)

Rule 37BC

- Section 206AA shall not apply on the following payments to non-resident deductees who do not have PAN in India, subject to deductee furnishing the specified details and documents to the deductor:
 - Interest;
 - Royalty;
 - Fees for Technical Services;
 - Dividend; and
 - Payment on transfer of any capital asset
- Details / Documents to be furnished:
 - name, e-mail id, contact number
 - Deductee's residence country address
 - a certificate of his being resident from the Government of that country if the law provides for issuance of such certificate
 - Tax Identification Number of the deductee/ a unique number on the basis of which the deductee is identified by the Government of deductee's residence country

Is TRC Mandatory?

Rule 114AAB

- Section 206AA shall not apply in respect of payments made to a non-resident / foreign company if the provisions of section 139A do not apply to such person
- As per Rule 14AAB, section 139A shall not apply to in respect of taxpayer who has, during a previous year, made investment in a specified fund if the following conditions are satisfied:
 - It does not earn any income other than income from investment in the specified fund during the previous year;
 - any income-tax due on income of non-resident has been deducted at source and remitted to the Central Government by the specified fund at the rates specified in section 194LBB of the Act
 - Furnishes prescribed details (same as that contained in Rule 37BC)
- “Specified fund” means any fund established or incorporated in India in the form of a trust or a company or a limited liability partnership or a body corporate which has been granted a certificate of registration as a Category I or Category II Alternative Investment Fund and is regulated under the Securities and Exchange Board of India (Alternative Investment Funds) Regulations, 2012, and which is located in any International Financial Services Centre

Proposed section 206AB

- Proposed section 206AB shall be applicable when TDS under Chapter XVIIB (excluding section 192, 192A, 194B, 194BB, 194LBC, 194N) is made in respect of specified person.
- Specified person is a person who,
 - has not filed the returns of income for both of the two AY relevant to the two previous years immediately prior to the previous year in which tax is required to be deducted
 - the time limit of filing return of income under section 139(1) has expired; and
 - the aggregate of tax deducted at source and tax collected at source in his case is INR 50,000 or more in each of these two previous years
- Tax to be deducted at higher of the following:
 - at twice the rate specified in the relevant provision of the Act; or
 - at twice the rate or rates in force; or
 - at the rate of five per cent.
- Rate under 206AA and 206AB – whichever is higher will apply
- NR not having PE in India, excluded. PE is defined to include a fixed place of business through which the business of the enterprise is carried out.

Multilateral Instruments - Brief



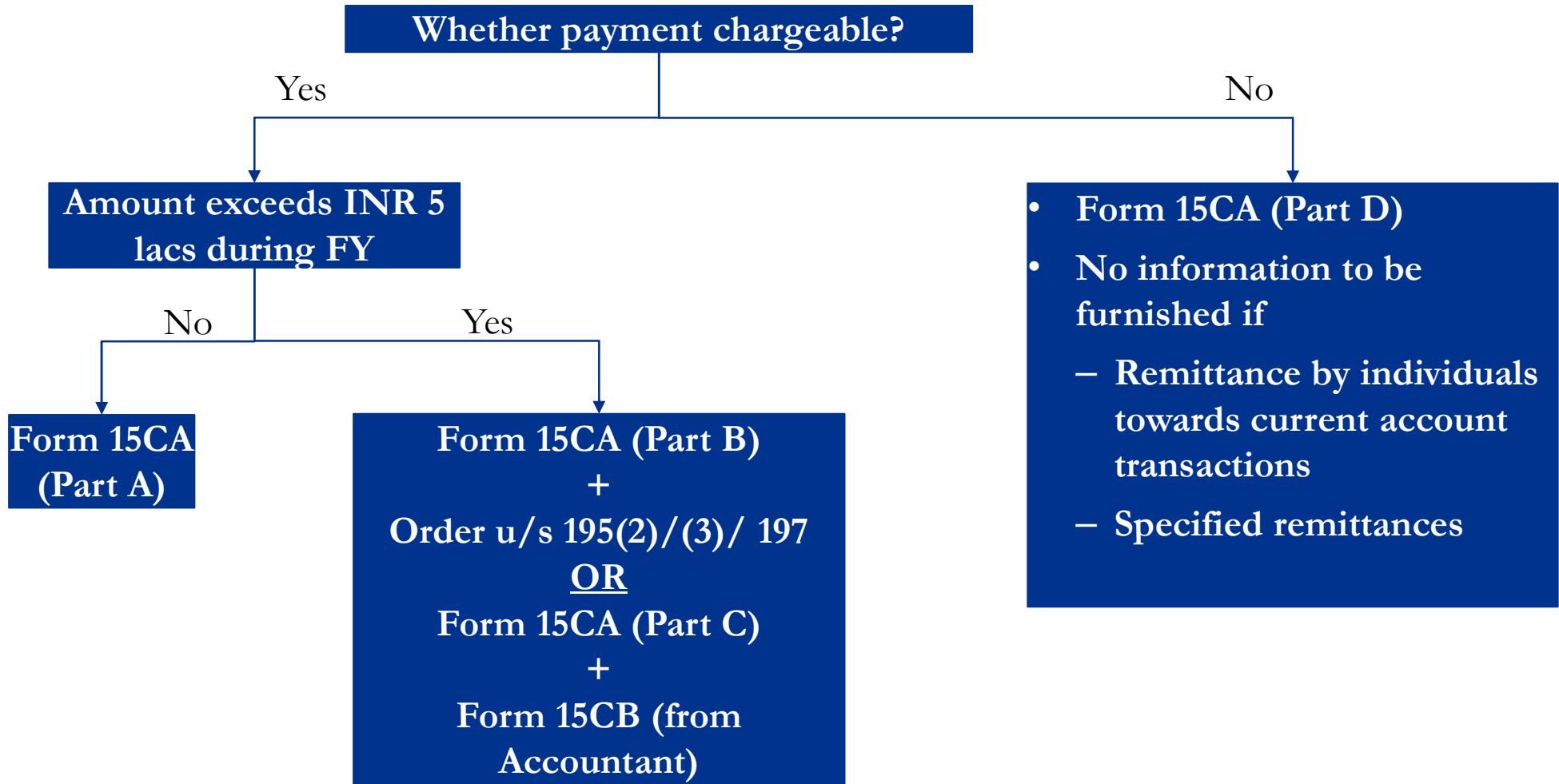
Multilateral Instruments (MLI)

- What is MLI?
- How does it impact India?
- Synthetised text of DTAA – Is it binding?
- What will happen if one country agrees to an Article, but India does not and vice versa?
- Will there be any impact on dividend taxation under the DTAA?

**Section 195(6)
read with
Rule 37BB**



Form 15CA / Form 15CB



Note

- 1) Form 15CA to be furnished electronically and thereafter printout to be submitted to AD
- 2) Form 15CB to be furnished electronically

Form 15CA / Form 15CB – specified remittances

Sr. No.	Purpose code as per RBI	Nature of payment
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	S0101	Advance payment against imports
8	S0102	Payment towards imports - settlement of invoice
9	S0103	Imports by diplomatic missions
10	S0104	Intermediary trade
11	S0190	Imports below Rs.5,00,000 - (For use by ECD offices)
12	S0202	Payment for operating expenses of Indian shipping companies operating abroad
13	S0208	Operating expenses of Indian Airlines companies operating abroad

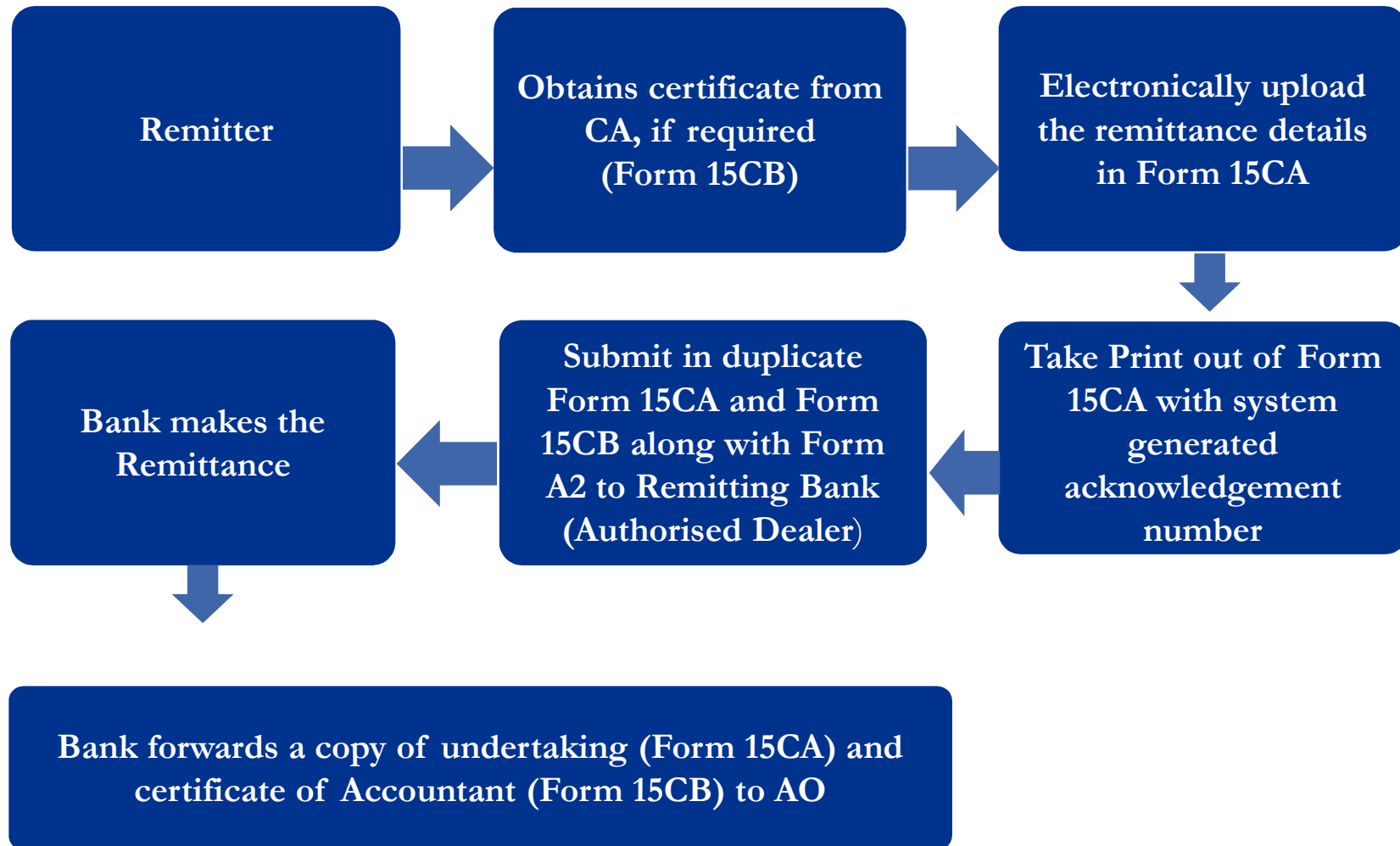
Form 15CA / Form 15CB – specified remittances

Sr. No.	Purpose code as per RBI	Nature of payment
14	S0212	Booking of passages abroad - Airlines companies
15	S0301	Remittance towards business travel
16	S0302	Travel under basic travel quota (BTQ)
17	S0303	Travel for pilgrimage
18	S0304	Travel for medical treatment
19	S0305	Travel for education (including fees, hostel expenses etc.)
20	S0401	Postal services
21	S0501	Construction of projects abroad by Indian companies including import of goods at project site
22	S0602	Freight insurance - relating to import and export of goods
23	S1011	Payments for maintenance of offices abroad
24	S1201	Maintenance of Indian embassies abroad
25	S1202	Remittances by foreign embassies in India

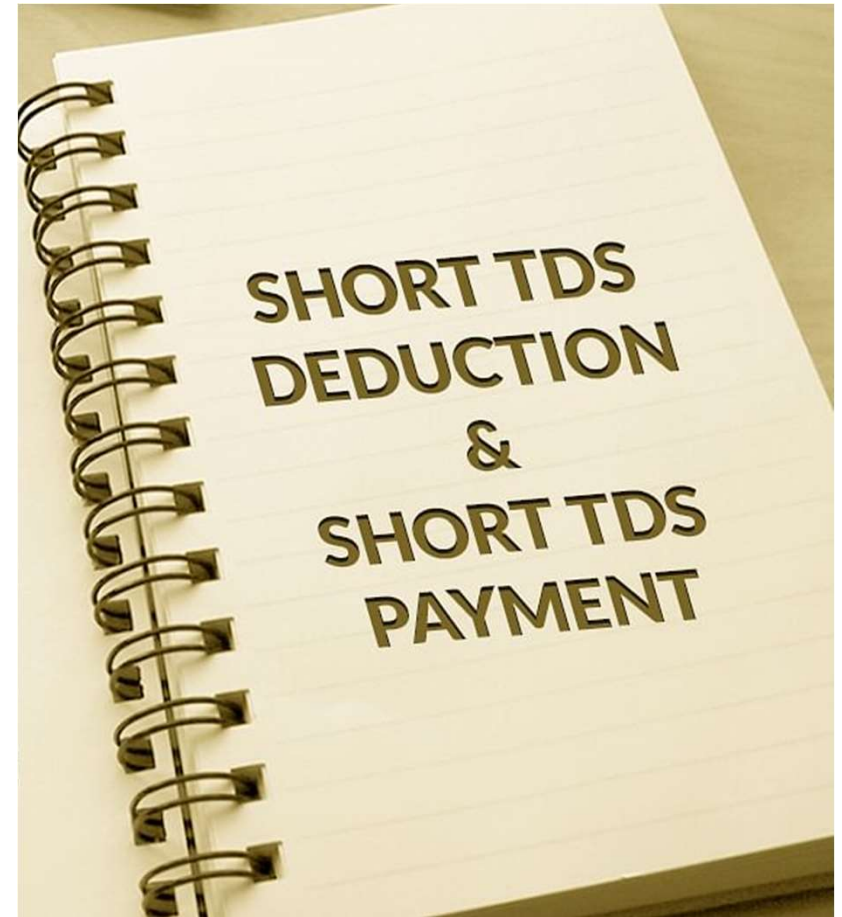
Form 15CA / Form 15CB – specified remittances

Sr. No.	Purpose code as per RBI	Nature of payment
26	S1301	Remittance by non-residents towards family maintenance and savings
27	S1302	Remittance towards personal gifts and donations
28	S1303	Remittance towards donations to religious and charitable institutions abroad
29	S1304	Remittance towards grants and donations to other Governments and charitable institutions established by the Governments
30	S1305	Contributions or donations by the Government to international institutions
31	S1306	Remittance towards payment or refund of taxes
32	S1501	Refunds or rebates or reduction in invoice value on account of exports
33	S1503	Payments by residents for international bidding.

CA Certification and Remittance – Process to be followed



Non-compliance implications



Non-compliance with section 195

Disallowances:

- Disallowance under section 40(a)(i)
- Disallowance of 'salaries' under section 40(a)(iii)
- Disallowance under section 58

Interest and Penalty:

- Interest under section 201
- Interest under section 234E
- Penalty under section 271C equal to amount of tax
- Penalty under section 271-I of INR 1,00,000 per default

Refund of taxes withheld



Refund of tax in certain situations

- Circular No. 790 dated 20 April 2000 as modified by Circular 7/2007 dated 23 October 2007 – Situation under which tax paid under Section 195 can be refunded:
 - Contract is cancelled and remittance not made
 - Post remittance, contract cancelled and amount so remitted is returned by the non-resident
 - Contract is cancelled, partial execution and no remittance for non-executed part
 - Exemption of remitted amount by amendment in law or notification under income-tax provisions
 - Order passed under section 154 or section 248 or section 264 of the Act reducing tax deduction liability of the deductor
 - Double deduction of tax by mistake
 - Tax payment on account of grossing up not required
 - Tax payment at a higher rate under the domestic law while a lower rate is prescribed in the relevant double taxation avoidance treaty entered into by India.

Refund of tax in certain situations

- Prior approval of the Chief Commissioner of Income-tax or the Director General of Income-tax concerned is required.
- Such excess tax could be adjusted against the existing tax liability of the deductor
- Time limit for making the claim – 2 years from the end of the financial year in which tax is deducted at source
- Interest on refund of excess TDS
 - Tata Chemicals Ltd. [2014] 363 ITR 658 (SC) & Circular No. 11/2016 dated 26 April 2016
- Refund of TDS pursuant to favourable appellate order
 - Tata Engineering & Locomotive Co. Ltd. [2005] 92 ITD 111 (Mum.)
 - Kotak Mahindra Primus Ltd. [2007] 11 SOT 578 (Mum.)
 - Samcor Glass Ltd. [2005] 94 ITD 202 (Del.)



Documentation
to be maintained

Suggestive lists of documents to be maintained

Agreement between parties evidencing nature of payment, consideration, withholding tax borne by whom, etc.

Invoice

No PE declaration by non-resident

TRC, if DTAA benefit is availed

Declaration – (i) beneficial owner of royalty/ FTS / dividend; (ii) Non-residence in any other country; (iii) Main purpose of the transaction is not to obtain DTAA benefit?

Exchange rate letter

Copy of challan evidencing payment of taxes withheld

Opinion/ advice obtained from consultants while taking position on withholding tax implications on given transactions, if any.

CA certificate in Form 15CB

Some issues



Illustrative issues...

- Whether TDS required on payments in kind ?
 - Kanchanganga Sea Foods Ltd [2010] 325 ITR 540 (SC)
- Whether TDS required on adjustment against dues ?
 - Raymond Ltd [2003] 86 ITD 791 (Mum)
 - JB Boda & Co. [1997] 223 ITR 271 (SC)
- Are rates prescribed under DTAA to be increased by surcharge and Education Cess?
 - DIC Asia Pacific Pte. Ltd. [2012] 52 SOT 447 (Kol.)
 - Sunil V. Motiani [2013] 59 SOT 37 (Mum.)
 - M Far Hotels Ltd. [2013] 50 SOT 261 (Cochin)



Impact of
Sesa Goa
decision?

...Illustrative issues...

- Whether TDS applicable on the service tax component?
 - CBDT Circular No 1/2014 dated 15 January 2014

Whether TDS required on reimbursements ?

- ‘Reimbursement’ not defined in the Act – divergent views expressed by Tribunals and Courts
- Pure reimbursement should not constitute a reward or a compensation paid for a service rendered and therefore not to be construed as ‘fee’
 - What if the reimbursement is of payment which is in the nature of Fees for Technical Services?
- Applicability of Section 195 to presumptive tax
 - V.S. Dempo & Co. (P) Ltd. [2016] 381 ITR 303 (Bom.)
 - Frontier Offshore Exploration (India) Ltd [2011] 10 taxmann.com 250 (Chennai)

...Illustrative issues...

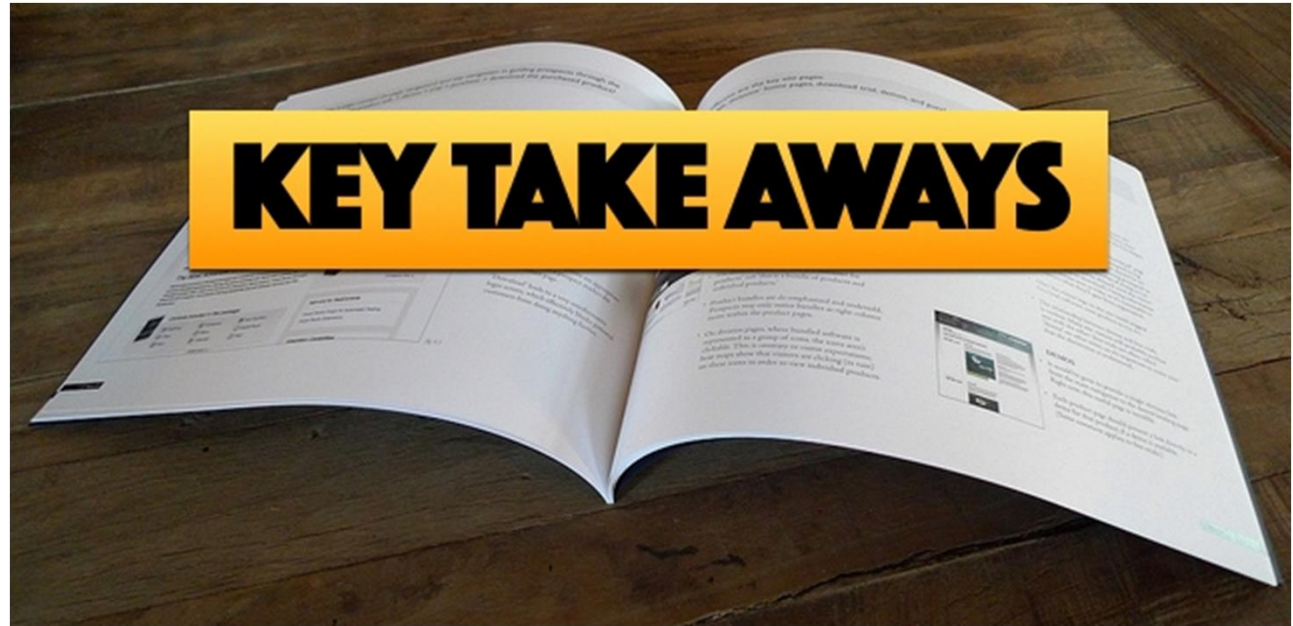
- Whether TDS required on payments to Resident agent of NR ?
 - TDS required
 - Narsee Nagsee & Co [1959] 35 ITR 134 (Bom.)
 - R. Prakash [2014] 64 SOT 10 (Bang.)
 - TDS not required
 - Tecumseh Products (I) Ltd. [2007] 13 SOT 489 (Hyd.)

...Illustrative issues

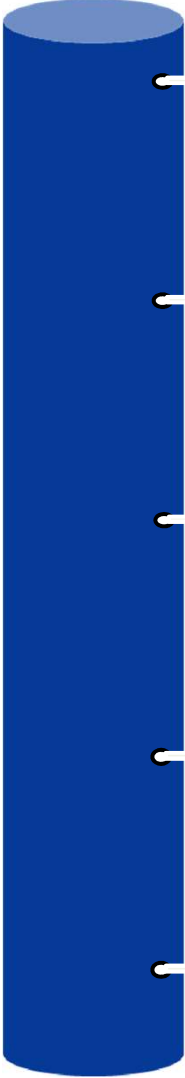
- Whether TDS required on payments by Indian branch to overseas HO/ branch ?
 - TDS required
 - CBDT Circular No. 740 dated 17 April 1996
 - Dresdner Bank [2007] 108 ITD 375 (Mum.)
 - CBDT Circular No. 649 dated 31 March 1993
 - TDS not required
 - ABN Amro Bank, N.V. [2012] 343 ITR 81 (Cal.)
 - Sumitomo Mitsui Banking Corpn [2012] 136 ITD 66 (Mum.) (SB)
 - Mizuho Corporate Bank Ltd. [2012] 54 SOT 117 (Mum.)

The Finance Act, 2015 inserted Explanation to Section 9(1)(v) –any interest payable by PE in India to HO or PE of such non-resident shall be deemed to accrue or arise in India

Key takeaways



Key takeaways

- 
- Payments to non-residents should be thoroughly examined from a withholding tax perspective – under the beneficial provisions of the Act or DTAA
 - Payments can be remitted under alternative mechanism (CA certificate route) if assessee fairly certain about TDS obligation
 - In case of a doubt or a substantial amount, it is advisable to obtain tax withholding order
 - Mitigate against severe consequences of non compliance of Section 195
 - Tax withholding from cross-border transactions is critical!!



*Thank
you*



CA Jagat G. Mehta

Handheld device : +91 9819936865

Email: jagatgm@gmail.com

jgmja@yahoo.co.in

Annexures

Provisions for taxing non-resident's income in India...

Source rule under Section 9

- Section 9(1)(vi)/(vii) of the Act deem royalty/FTS to accrue or arise in India where it is:
 - **Payable by the Government**
 - **Payable by resident**, unless it is payable in respect of any right, property or information used or services utilized:
 - for the purpose of or in the business or profession carried on by such resident outside India or
 - for the purpose of making or earning any income from any source outside India
 - **Payable by non-resident**, only if it is payable in respect of any right, property or information used or services utilised:
 - for the purpose of or in the business or profession carried on by such non-resident in India or
 - for the purposes of making or earning any income from any source in India

...Provisions for taxing non-resident's income in India

Source rule under Article 11 & 12 of the Tax Treaty

- Interest, Royalty & FTS are deemed to arise in India if:
 - Payer is a resident of India or
 - Payer has a PE in India in connection with which the liability to pay interest, royalty or FTS has arisen and such payment is borne by the PE

Pure reimbursements

TDS required	TDS not required
<ul style="list-style-type: none">• Cochin Refineries Ltd.[1996] 222 ITR 354 (Ker.)• Steffen, Robertson & Kirsten Consulting Engineers & Scientists [1998] 230 ITR 206 (AAR)• Hindalco Industries Ltd. [2005] 2 SOT 528 (Mum.)• Sedco Forex International Inc. [2008] 299 ITR 238 (Uttarakhand)• Arthur Anderson & Co. [2006] 5 SOT 393 (Mum.)	<ul style="list-style-type: none">• Siemens Aktiengesellschaft [2009] 310 ITR 320 (Bom.)• Industrial Engg. Projects (P) Ltd., [1993] 202 ITR 1014 (Del.)• Clifford Chance, United Kingdom [2002] 82 ITD 106 (Mum.)• Gujarat Ambuja Cements Ltd. [2005] 2 SOT 784 (Mum.)• Convergys Customer Management Group Inc. [2013] 58 SOT 69 (Del.)

Tax Residency Certificate

- As per Section 90(4) a non-resident will not be entitled to claim benefits under the Tax Treaty unless he obtains a TRC from the Government of his residence country
- Furnishing TRC mandatory requirement
- Notification 57/2013 dated 1 August 2013 issued by CDBT, which mandates submission of following information in Form 10F:
 - Status (individual, company, etc) of the assessee
 - Nationality or country or specified territory of incorporation or registration
 - Assessee's tax identification number in the country and in case there is no such number, then, a unique number on the basis of which the person is identified by the Government
 - Period for which the residential status is applicable; and
 - Address of the assessee in the country
- Declaration not required, if TRC contains above particulars