

# SECTION 195 TDS FROM PAYMENTS TO NON RESIDENTS

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# Obligation cast u/s 195

Section 195 casts an obligation on the person responsible for paying to a non resident for deducting appropriate tax at source corresponding to the tax liability of the said non resident under the Act.

# Objective of Section 195

- Aptly brought out by the AAR in the case of *XYZ, In RE: (1999) 238 ITR 575* as under:-

“The objective is to ensure, as best as possible, that the tax liability on the income element, on the amount paid is got deducted at source itself so that the Department is not put to the hassles of recovering from a non resident whose connections with India may be transient or whose assets in India may not be sufficient to meet the tax liability.”

# Overview of Section 195

- Section 195(1): This sub section requires that any person responsible for paying to a non-resident (not being a company) or to a foreign company, any interest , or any other sum chargeable to tax (other than salaries) under the Act shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode whichever is earlier, deduct income tax thereon at the rates in force.



# Basic Conditions for attracting application of Section 195

Payee should be either a non resident (not being a company) or a foreign company.

The amount payable should be interest or any other sum (other than "salaries") chargeable under the provisions of the Act.

# Section 195(1) : Key Phrases



Any person responsible for paying to a; (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(other than salaries);



Shall at the time of credit or payment whichever is earlier;



Of the subject payment;



Shall deduct the tax at rates in force

# “Person responsible for paying”

Payer himself and in case of company including the principal officer thereof.

Whether  
payer  
includes Non  
resident ?

- Refer *Vodafone (2012) 341 ITR 1 (SC)*.
- Refer case of *Eli Lilly (2009) 312 ITR 225*
- If no nexus with India then no TDS.
- Obligation can extend to Non resident provided there is some kind of nexus with India.
- Amendment made by Finance Act 2012 wref 01.04.62

# Case of Vodafone (BOM HC) and Ely Lilly

- *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 Lilly, 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*

# Electronics Corp. of India

- The observations by the Supreme Court in this case (1990) 183 ITR 43 also seem to indicate that the obligation to deduct tax under Section 195 can extend to non residents, only if such non residents have some nexus in India.

# Vodafone Fact Chart

Let us see with two simple charts, the facts of the case of transfer of shares by Hutchison to Vodafone.

A Non-Resident of India (Hutchison) sold the shares of a Foreign Co. (Cayman Island Co.) to another Non-Resident – Vodafone. Payment is completed outside India. All contracts were executed outside India.

# Image chart1

Vodafone British Co.  
Non-Resident  
Of India.  
Buyer.

Hutchison.  
Hong Kong Co.  
Non Resident of India.  
Seller

Shares in a  
Cayman Island Co.  
A Foreign Co.



# Image Chart 2



# Vodafone Fact Chart

Can Government of India tax the capital gains arising from the sale? Shares are situated at the registered office of the company i.e., Cayman Island. Does India have a jurisdiction to tax foreign capital gains!



Assessee's stand was: Neither the assessee - seller is an Indian resident, nor the source of income is in India. Hence India has no jurisdiction. Hence all proceedings in the matter are void-ab-initio.

# SC on Vodafone

The Supreme Court on applicability of Section 195 held that since shareholding in non resident company was property located outside India, there was no liability for capital gains tax arising in India on offshore transfer of such shares between two non residents, and, consequently the question of deduction of TAS u/s 195 did not arise.

Justice Radhakrishnan went a step forward and held that Section 195 of Act would apply only if payments are made from a resident to another non resident and not between non residents situated outside India. 'Any person' in section 195 would mean any person who is resident in India.

Further in the absence of chargeability to tax, nothing could be recovered from agent u/s 163(1)(c). Merely because a person is agent or is to be treated as an agent, it would not lead to an automatic conclusion that he becomes liable to pay taxes on behalf of the non resident. Since there was no income chargeable to tax in India arising from transfer of shares of non resident entity, Vodafone could not be treated as agent of Hutch u/s 163 of the Act.

# Explanation 2 to Sub Section 1

*For the removal of doubts, it is hereby clarified that the obligation to comply with sub-section (1) and to make deduction thereunder applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to all persons, resident or non-resident, whether or not the non-resident person has --*

*(i) a residence or place of business or business connection in India; or*

*(ii) any other presence in any manner whatsoever in India.*

- (Inserted by Finance Act, 2012, w.r.e.f 01.04.1962)*

# Payees covered under Section 195

*Non resident Non company and Foreign Company (section 2 definitions)*

Branch/PE/Subsidiary of Foreign Co.

*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?

Payment made by Branch/HO to its HO/Overseas Branch.

What when payee non resident as per DTAA and not per section 6?

# Branch of Foreign Bank in India- ABN Amro Bank Case

- **Interest paid by a branch of a Foreign Bank to its HO is deductible in the hands of the branch. Such interest is not taxable in the HO's hands**

The assessee, a Netherlands Bank, carried on banking business through a PE in India. *The PE borrowed funds from its HO on which interest was paid.* The assessee claimed that in the computation of profits of the PE under Article 7(3)(b) of the India-Netherlands DTAA, the interest paid to the HO was deductible. The AO & CIT (A) held that while the interest was deductible in principle in the hands of the PE, it was taxable in the hands of the HO and as there was no TDS u/s 195, the interest had to be disallowed u/s 40(a)(i). *The result was that the interest paid by the PE to the HO was disallowed in the hands of the PE while being assessed in the hands of the HO.* On appeal, the **Special Bench (98 TTJ Kol 295)** held that the PE and the HO were the same person and the interest paid was neither deductible in the hands of the PE nor assessable in the hands of the HO. On appeal by the assessee, HELD reversing the Special Bench:



(i) As regards deductibility of the interest in the hands of the PE, though a branch and the HO are the "same person" in general law, **Articles 5 & 7 of the DTAA provide that the PE shall be assessable as a separate entity**. Under Article 7(3)(b) payment of interest by a bank's PE to its HO is allowed as a deduction. ***The result is that the interest paid by the PE to the HO is deductible in computing the PE's profits ;***

(ii) As regards taxability in the hands of the HO & obligation for TDS u/s 195, in accordance with the principles of apportionment of profits between the PE & the HO as laid down in **Hyundai Heavy Industries** 291 ITR 482 (SC) & **Morgan Stanley** 162 TM 165 (SC), only the PE is to be taken as the assessee and not the HO. ***As the interest was not chargeable to tax in the hands of the HO, the PE was under no obligation to deduct tax u/s 195 and consequently no disallowance u/s 40(a)(i) can be made in the hands of the branch.***

# Payments Covered u/s 195

All the payments to non residents (other than salaries) , which are chargeable to tax under the Act, are covered u/s 195.

Section 5(2) provides the scope of Income of a non resident.

Deemed to accrue or arise given in Section 9.

For chargeable to tax: Act or DTAA whichever is beneficial concept prevails.

# Section 9

Concept of Business Connection	Section 9(1)(i)
<i>Salary Income</i>	Section 9(1)(ii)
<i>Dividend Income</i>	Section 9(1)(iv) and section 115A
<i>Interest Income</i>	Section 9(1)(v) and section 115A
<i>Royalties</i>	Section 9(1)(vi) and section 115A
<i>Fees for technical services/FTS</i>	Section 9(1)(vii) and section 115A
<i>Capital Gains</i>	Section 9(1)(i) and section 45

# Amended Section 9(1)(i)

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

# Chargeable to tax under the Act

- If payment is not chargeable to tax under the Act, then no TDS is deductible and stand can be taken on chargeability point by payer itself, without approaching AO/TDS u/s 195(2). Examples are as follows:-
  - *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*

- The AAR in the case of Tekniskil 222 ITR 551 has held that “where the non resident is not chargeable to income tax in India on the income by way of royalty/FTS which effectively would form part of business profits of the non resident in its hands and the fact that non resident has no PE in India, is not in dispute, the question of TDS would not arise merely because the non resident gets income from a resident in India. Hence no liability to deduct TDS u/s 195.

- The Karnataka High Court has held that when payments are 'income' under the Act but do not form part of total income of the payee by virtue of any specific exemption under the Act, they should not be liable for deduction u/s 195.



# Treaty Vs Act

- Section 90(2) of the Act provides that where the Central Government has entered into an agreement with the Government of any country outside India under Section 90(1) of the Act, then in relation to the assessee to whom such agreement applies, the provisions of the Treaty shall apply to the extent they are more beneficial to that assessee.

# Practical instances regarding payments covered

- Payment in kind is also covered. *SC ruling in Kachanganga Sea Foods Ltd* 265 ITR 644
- Court is required to deduct tax on decrual amount (in a suit) payable to non resident. 48 ITR 653
- Interest paid u/s 244(1A) of the Act is interest on debt claim & is covered in the definition of interest in Indo UK DTAA and hence TDS deductible. 236 ITR 637

# CBDT circular No. 786 dated 7<sup>th</sup> Feb 2000

- **CBDT circular No. 786 dated 7<sup>th</sup> Feb 2000 has now been withdrawn.**
- 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 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 is not required to be exercised. This is supported from SC/other rulings in
  - *a) Shoorji Plaoonji 39 ITR 775*
  - *b) Perofrming rights 106 ITR 11*
  - *c) Cal HC in 5 ITR 216*

# Chargeable to tax

- 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***

# Section 195(2): Application by Payer to Revenue

- Where the person making payment to the non resident believes that whole of sum is not chargeable to tax, he can apply to the Assessing Officer to determine the portion of sum so chargeable. On such application, the Assessing Officer passes an order determining the proportion of the sum on which tax is to be deducted under sub section 195(1).

# Section 195(2): Application by payer to revenue

- No prescribed format to make application is there.
- Section 195 applies even when sums paid are not wholly 'income or profits', but only a portion thereof has income element.:-
  - Anglo-India Jute Mills Co. Ltd. 30 ITR 525
  - Superintending Engineer, Upper Sileru 152 ITR 753
  - P.C Ray & Co. (India) Pvt. Ltd. 36 ITR 365
  - Transmission Corporation of AP 239 ITR 587.

# Unilateral decision by assessee for Low or No deduction

- In case of no deduction : Seems to be YES
- *ACIT Vs M/s Leap International P. Ltd. (Chennai tribunal)*
  - Mahindra & Mahindra Ltd. (ITA No. 2606,2607,2613,2614/Mum/2000)
  - Raymonds Ltd. 86 ITD 791
  - MSEB 90ITD 793
- In case of low deduction : Seems to be NO  
Transmission Corporation of AP 239 ITR 587(SC)



# Case of GE India (2010) 234 CTR (SC) 153

The moment a remittance is made to a non-resident, obligation to deduct tax at source does not arise; it arises only when such remittance is a sum chargeable under Act, i.e., chargeable under sections 4, 5 and 9. The section 195(2) is not a mere provision to provide information to ITO(TDS) so that department can keep track of remittances being made to non-residents outside India; rather it gets attracted to cases where payment made is a composite payment in which certain proportion of payment has an element of 'income' chargeable to tax in India and payer seeks a determination of appropriate proportion of sum chargeable.

# Transmission Corpn of AP Ltd.

## 239 ITR 587(SC)

**Scheme of tax deduction at source applies not only to amount paid which wholly bears 'income' character such as salaries, dividends, interest of securities, etc., but also to gross sums, whole of which may not be income or profits of recipient, such as payment to contractors and sub-contractors and payment of insurance commission**

**Expression 'any other sum chargeable under the provisions of this Act' would mean 'sum' on which income-tax is leviable**

**Expression 'any other sum chargeable under the provisions of this Act' would include cases where any sum payable to the non-resident is a trading receipt which may or may not include 'pure income'**

**Assessee who makes payments to non-residents under contract entered into is under obligation to deduct tax at source under section 195 and the obligation is limited only to appropriate proportion of income chargeable under Act .**

# GE Vs Transmission Corp.

- *In Transmission Corpn. of A.P. Ltd.'s case (supra ), it was held that TAS was liable to be deducted by the payer on the gross amount if such payment included in it an amount which was exigible to tax in India. It was held that if the payer wanted to deduct TAS not on the gross amount but on the lesser amount on the footing that only a portion of the payment made represented "income chargeable to tax in India", then it was necessary for him to make an application under section 195(2) to the ITO(TDS) and to obtain his permission for deducting TAS at lesser amount. Thus, it was held by the Court that if the payer had a doubt as to the amount to be deducted as TAS, he could approach the ITO(TDS) to compute the amount which was liable to be deducted at source.*

# GE Vs Transmission Corp.

- *Section 195(2) is based on the 'principle of proportionality'. The said sub-section gets attracted only in cases where the payment made is a composite payment in which certain proportion of payment has an element of 'income' chargeable to tax in India. It is in this context that the Supreme Court stated, 'If no such application is filed, income-tax on such sum is to be deducted and it is the statutory obligation of the person responsible for paying such sum to deduct tax thereon before making payment. He has to discharge the obligation to TDS'.*

# GE Vs Transmission Corp.

- *If one reads the observation of the Supreme Court, the words 'such sum' clearly indicate that the observation refers to a case of composite payment where the payer has a doubt regarding the inclusion of an amount in such payment which is exigible to tax in India. The above observations of the Supreme Court in Transmission Corpn. of A.P. Ltd.'s case (supra) have been completely misunderstood by the Karnataka High Court to mean that it is not open for the payer to contend that if the amount paid by him to the non-resident is not at all 'chargeable to tax in India', then no TAS is required to be deducted from such payment. This interpretation of the High Court completely loses sight of the plain words of section 195(1) which in clear terms lay down that tax at source is deductible only from "sums chargeable" under the provisions of the Income-tax Act, i.e., chargeable under sections 4, 5 and 9.*



# CMS (India) Case

## (2012)148 TTJ 253 (Chennai)

### We can visualize various situations that can arise for the applicability of Section 195:

- (a) If the *bona fide* belief is that no part of the payment has any portion chargeable to tax, s.195 would be totally inapplicable.
- (b) If the payer believes that whole of the payment is income chargeable to tax, he will be liable to deduct tax under s.195(1) of the Act.
- (c) If he believes that only a part of the payment is chargeable to tax, he can apply under s.195(2) for deduction at appropriate rates.
- (d) If the payer believes that a part of the payment is income chargeable to tax and does not make an application under s.195(2), he will have to deduct tax from the entire payment.
- (e) If the payer believes that the entire payment or a part of it is income chargeable to tax and fails to deduct tax at source, he will face all the consequences under the Act.
- (f) If the payer believes that he has to deduct tax and expresses this duty of his to the payee, it is for the payee then to apply under s.195(3) to receive the payment without any deduction at source.
- (g) If the payee fails to obtain certificate under s.195(3), the payer, based on his belief will certainly withhold the tax.

# Determination of the amount by the Assessing Officer (Rule 10)

- In any case in which the Assessing Officer is of opinion that the actual amount of the income accruing or arising to any non-resident person whether directly or indirectly, through or from any business connection in India or through or from any property in India or through or from any asset or source of income in India or through or from any money lent at interest and brought into India in cash or in kind cannot be definitely ascertained, the amount of such income for the purposes of assessment to income-tax may be calculated :-
  - (i) at such percentage of the turnover so accruing or arising as the Assessing Officer may consider to be reasonable, or
  - (ii) on any amount which bears the same proportion to the total profits and gains of the business of such person (such profits and gains being computed in accordance with the provisions of the Act), as the receipts so accruing or arising bear to the total receipts of the business, or
  - (iii) in such other manner as the [Assessing Officer] may deem suitable.
- The SC in Nandlal Bhandari Mills Ltd. 60 ITR 173 has held that this rule applies only when the AO cannot ascertain the actual income/profits or gains arising to Non resident.

# Appeal against order u/s 195(2)

As per Section 248 where under an agreement or other arrangement, the tax deductible on any income, other than interest, under section 195 is to be **borne by the person by whom the income is payable**, and such person having paid such tax to the credit of the Central Government, claims that no tax was required to be deducted on such income, he may appeal to the Commissioner (Appeals) for a declaration that no tax was deductible on such income.

Express right to appeal u/s 246A against order u/s 201 holding payer to be assessee in default. (Section 248 not applicable in this case).



# Appeal against order u/s 195(2)

If tax borne by payee – No right to appeal to CIT (A) against order of AO u/s 195(2)

Payee has to file return and claim refund

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

Revision u/s 263/264 of an order u/s 195(2) .*BCCI Case 97 TTJ 751*

# 'Rates in force'

Deduction u/s 195 has to be at the "rates in force" which has been defined u/s 2(37) (iii) to mean:-

- Rates specified in this behalf in Finance Act
- Rates specified in the Treaty entered into by CG us 90
- Rates notified in the Agreement notified by CG u/s 90A

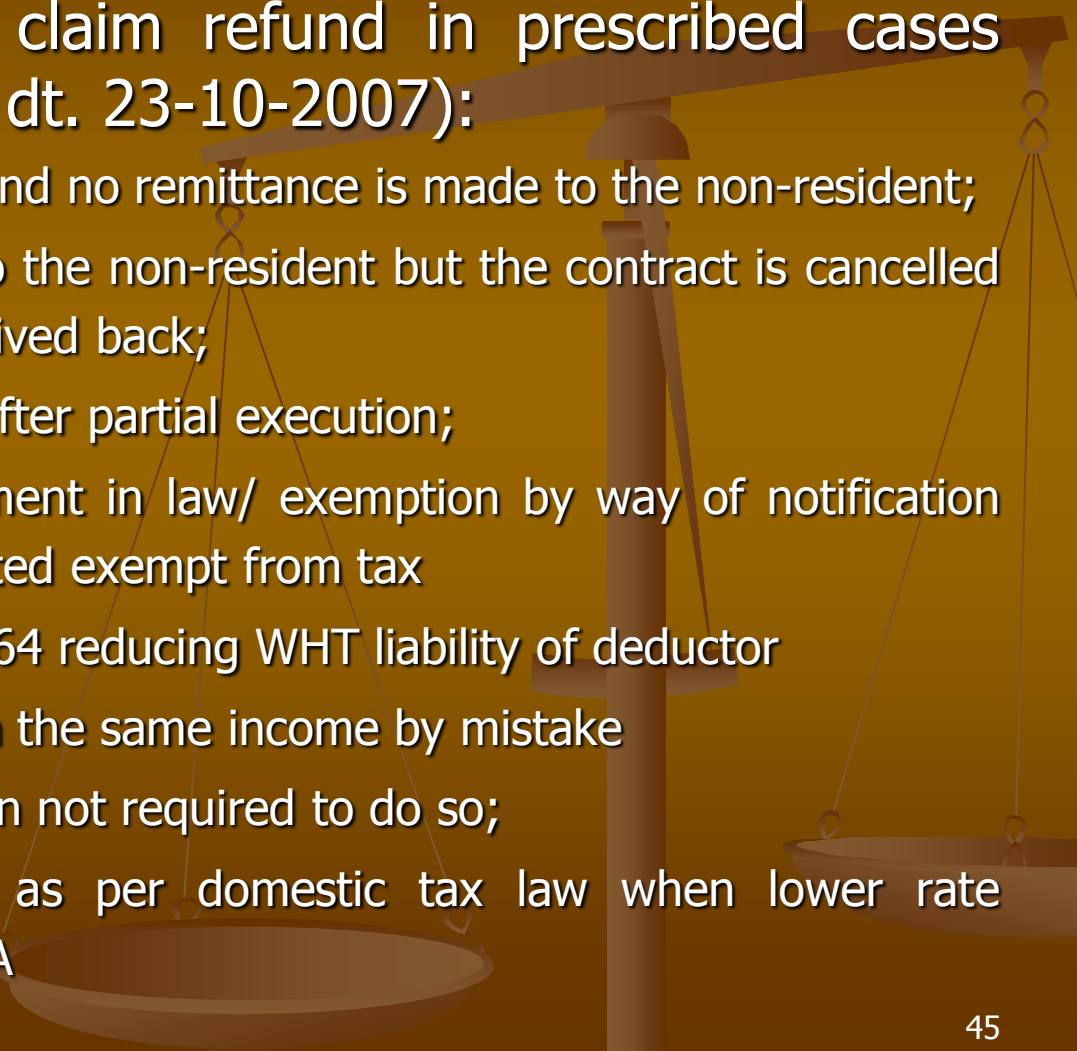
# 'Rates in force'

- CBDT vide Circular No.728 dated 30/10/1995 has clarified that rate whichever is more beneficial to assessee shall be applied.
- Rates specified in DTAA are all inclusive and no surcharge/education cess is leviable in case where treaty rates are applicable.
- Section 195A provides that for TDS income has to be grossed up.(Exception 264 ITR 340)
- Finance Act 2013 ! Has made it mandatory for NR payee to obtain PAN else tax deductible as per Section 206AA !

# 'Rates in force'

- Exchange Rates applicable for Foreign Currency Payments:-
  - As per Rule 26- Rate of Exchange shall be the telegraphic transfer buying rate of such currency as on the date on which tax is required to be deducted at source i.e exchange rate adopted by SBI for buying such currency.

# Refund of TDS

- 
- Payer is entitled to claim refund in prescribed cases (Circular No. 7/ 2007 dt. 23-10-2007):
    - Contract is cancelled and no remittance is made to the non-resident;
    - Remittance is made to the non-resident but the contract is cancelled and remittance is received back;
    - Contract is cancelled after partial execution;
    - Retrospective amendment in law/ exemption by way of notification making the sum remitted exempt from tax
    - Order u/s 154/ 248/ 264 reducing WHT liability of deductor
    - Tax deducted twice on the same income by mistake
    - Grossing up done when not required to do so;
    - WHT at higher rate as per domestic tax law when lower rate prescribed under DTAA

# Refund of TDS

- Undertaking to be given by deductor
  - No TDS certificate has been issued;
  - If TDS Certificate is issued –
    - It is obtained back by the applicant, or
    - Applicant must indemnify the department from any possible loss arising out of any delicacy of refund claim.
- Refund should be granted only if the deductee has not filed return of income and the time for filing of return of income has expired.
- Prior Approval of CCIT or DGIT required;
- No interest payable under section 244A;
- Adjustment of refund against existing liability by AO possible after intimating assessee;
- Refund claim must be made within 2 years from the end of F.Y in which the tax has been deducted

# Section 195(3) and (4)

- Section 195(3) and 195(4) :These sub sections provide a machinery under which the payee i.e. the non resident may apply for, and the Assessing Officer may give a certificate to the effect that any such payment to the non resident may be made without deduction of tax at source, or with deduction at a rate which is lesser than the prescribed rate of tax.



# Section 195(5)

- Section 195(5): This sub section empowers the CBDT to notify rules vis-à-vis application filed u/s 195(3) & for other connected matters. To date, the CBDT has prescribed Rule 29B notifying the conditions under which application can be filed u/s 195(3).



# Application by Payee for NIL deduction- Section 195(3)

- Application by non resident payee in prescribed form
- Form 15C for banking company and 15D for any other person.
- AO to issue certificate if he is satisfied that conditions laid down in Rule 29B(2) are satisfied.

# Rule 29B(2)

- (i) the person concerned has been regularly assessed to income-tax in India and has furnished the returns of income for all assessment years for which such returns became due on or before the date on which the application under sub-rule (1) is made;
- (ii) he is not in default or deemed to be in default in respect of any tax (including advance tax and tax payable under section 140A), interest, penalty, fine, or any other sum payable under the Act;
- (iii) he has not been subjected to penalty under clause (iii) of sub-section (1) of section 271;
- (iv) where the person concerned is not a banking company referred to in clause (i) of sub-rule (1)-
  - (a) he has been carrying on business or profession in India continuously for a period of not less than five years immediately preceding the date of the application, and
  - (b) the value of the fixed assets in India of such business or profession as shown in his books for the previous year which ended immediately before the date of the application or, where the accounts in respect of such previous year..... exceeds fifty lacs of rupees.

# Application u/s 197

Application u/s 197 in Form 13 can also be made for deduction of tax at lower or NIL rate.

CBDT vide Circular No. 774 dated 17/3/1999 has clarified that certificate issued u/s 197(1) of the Act will be applicable only in respect of payments made on after the date of certificate.

# Appeal against “Certificates” u/s 195(3) and 197

- No appealable
- No right to appeal either u/s 246A or 248  
*Garware Nylons Ltd. 212 ITR 242*
- Writ petition can be explored.

# Time of deduction

- Tax shall be withheld at the time of credit or payment whichever is earlier
- Tax withholding in cases where RBI approval required
  - Adverse view in case of United Breweries Ltd – (211 ITR 256) (Kar) (HC)
  - Favorable view for dividend in case of Pfizer Corporation – (259 ITR 391) (Mum) (HC)

# Section 195(6)

- Section 195(6): This sub section puts an obligation on the payer to furnish information relating to payment of sum in prescribed form and manner. Vide notification No: 30/2009 dated 25/03/2009, CBDT has inserted a new rule 37BB under the rules prescribing Form 15CA and Form 15CB, to be filed in relation to remittances to non residents.

# Section 195(6)

- 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



# Section 195(6)-Objective

- *"..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....."*



# CA Certificate for remittance

- New Procedure being introduced from 1 October 2013
- No change in electronic filing process by assessee:
  - Form 15CA to be filed electronically
  - Form 15CA divided into two parts viz. Part A & B;
- Specified list like outbound investments / Gifts / Donations etc – No requirement to furnish 15CA / 15CB
- Part A: Applicable to following remittances chargeable to tax :
  - Small payments by Remitter not exceeding INR 50,000 and aggregate of such payments during the tax year not exceeding INR 250,000;
- Part B: Any other payments chargeable to tax
  - Based on CA Certificate in Form 15CB or order u/s 195(2) or certificate u/s 195(3) or 197

# CA Certificate for remittance

- Documentation by CA while issuing Form 15CB
  - *Agreement and Invoices; Tax Residency Certificate*
  - **Declaration/Certificate from payee** for – no PE, tax residency, beneficial owner, treaty entitlement, etc and Indemnification from payee
  - *Payment details*
  - *Correspondences*
  - *Technical Advice – prove bonafides*
  - *Proof of services being rendered in case of Group Company transactions*
  - *E-mails etc regarding pricing in case of Group Company transactions*
  - **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..)

# Furnishing TRC mandatory requirement

- Furnishing of TRC made mandatory to avail treaty benefits
- Notification 57/2013 dated 1 August 2013 issued by CBDT, 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 or specified territory of residence and in case there is no such number, then, a unique number on the basis of which the person is identified by the Government of the country or the specified territory of which the assessee claims to be a resident;
  - Period for which the residential status, as mentioned in the certificate referred to in sub-section (4) of section 90 or sub-section (4) of section 90A, is applicable; and
  - Address of the assessee in the country or specified territory outside India, during the period for which the certificate, as mentioned in (iv) above, is applicable.
- Declaration not required, if TRC contains above particulars

# Critical Points in Form 15CB

- Beneficiary of Payment : Documents to be examined.
- Legal Status of payee.
- No appeal against CA Certificate. 106 ITD 521

# Section 195(7)

Section 195(7):CBDT empowered to specify class of persons or cases (where recipient is NR) who will be mandated to furnish application to AO for determination of withholding rate

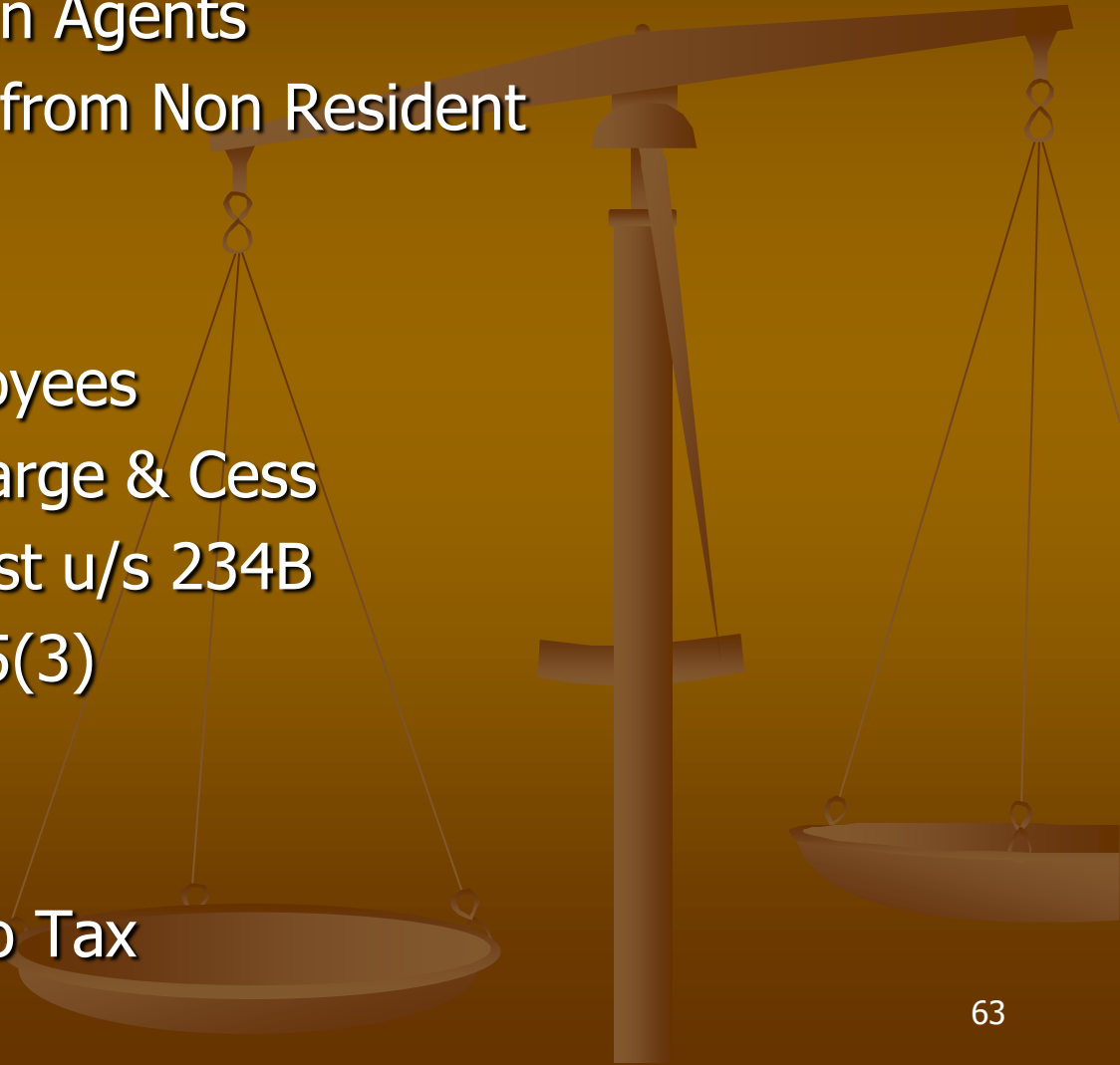
No Notification till date

# CONSEQUENCES OF NON/SHORT DEDUCTION

- Disallowance of payments u/s. 40(a)(i)
  - Tax deductible but not deducted or after deduction not paid within prescribed time
  - Allowable in the year of payment.
- Recovery of tax not deducted u/s 201(1).
- Levy of interest u/s. 201(1A) - simple interest
  - Failure to deduct tax - @ 1%
  - Failure to pay tax to the government after deduction – @ 1.5%
- Levy of penalty
  - U/s. 221 - Failure to pay tax
  - U/s. 271C - Failure to deduct tax
- Invoking of prosecution u/s. 276B
- Tax paid u/s 201 can be claimed in subsequent year u/s 40(a)(i)  
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# Judgements on various issues

- Commission to Foreign Agents
- Purchase of property from Non Resident
- Principle of Mutuality
- Section 206AA
- Secondment of Employees
- Applicability of Surcharge & Cess
- Applicability of Interest u/s 234B
- Section 195(2) vs 195(3)
- Reimbursement
- Time of Payment
- Income Chargeable to Tax





**THANK YOU**