REQUIREMENTS U/S 195

DISCUSSION ON TDS PROVISIONS

BY: CA SANJAY K. AGARWAL

Sec. 195- Provisions in brief

- Tax to be deducted on any interest or any other **sum** ***chargeable*** under the provisions of this Act (other than salaries).
- Where the ***person responsible for making the payment*** is of the opinion that such sum (or a proportion thereof) is *not the income chargeable in case of recipient, an application to be made to AO* to determine that proportion of such sum so chargeable. *[s.s (2) of sec. 195]*

- Non Resident/Foreign Company (according to def u/s 6/2(23A) of the Act)
- For Sum Chargeable to Tax under the Act excl. Salaries (according to section 5 read with section 9(1) READ WITH SEC 90(2))

Sec. 195(3)/(4)…….

- *Recipient of interest or other sum (other than salary) may make an **application** in the prescribed form **to the AO** and obtain a certificate authorizing the person responsible for making such payment to pay without deducting tax thereon.*

Note: application to be made in form 15C by banking Co. and 15D by others recipients (carrying on business/ profession in India through branch for any sum not being int./div. **[Rule 29B]**
certificate issued u/s 195(3) to be valid until cancelled by AO.

Contd.…

- ***Sec. 195(6)*** - Person referred to in sec. 195(1) shall furnish the information relating to payment of any sum in **Form No. 15CA,** after obtaining a certificate from a Chartered Accountant in **Form No. 15CB. [read with Rule 37BB inserted w.e.f. 1-07-2009]**

Ref: Circular no. 4/2009 dated 29-06-2009 providing the manner for submitting and processing the details of payment.

No requirement of obtaining 15CB in case of while remitting consular receipts abroad by diplomatic missions.[circular no. 9/2009,dated 30-11-2009

- Information to be furnished electronically. [rule 37BB]

Note: DGIT(Systems) to provide the necessary procedures, formats and standards and to deal with day to day administration in relation to the information furnished. Circular no. 759 & 767 are now not relevant because of Rule 37BB.

TDS u/s 195- Features

- all sums other than salaries covered- so scope widest, without any threshold limit.
- Application u/s 197 is also possible by payee non resident/foreign company (Form No 13/Rule 28)
- application to Authority for Advance Ruling is maintainable for Sec 195 Tax Withholding
- Sec. 195 to be rws 4,5 & 9 of IT Act 1961.

Sec. 9- a brief

- Section 9 defines **Income deemed to accrue or arise in India.** Following payments are covered:

i. **all income** through or from **any business connection in India/ any property in India/ any asset or source of income in India/ capital asset situated in India**.

ii. **income** under the head "**Salaries**", if it is **earned in India**.

iii. income under the head "**Salaries" payable by the Government to a citizen of India for service outside India** ;

iv. **dividend** paid by an Indian company outside India ;

v. Interest

vi. Royalty

vii. fees for technical services

Sec. 9- notes

- *[Int./ royalty/ FTS shall be deemed to be income accruing or arising in India if paid by Govt. or a resident person [except for utilizing the fund/ property, intellectual rights, information/ services for any business or profession or earning income outside India]*
- *Further, such income from non-resdt. Also included provided the same is in connection with business/profession in India or earning income in India.]*
- *The term "royalty" is defined in Explanation 2of clause(vi/ (vii) of s.9(1) respectively.* ***However, where DTAA exists between two countries, definition specifically covered in DTAA override the definition given in law.***

ISSUE

Payment to non-resident for Purchase of software cannot be treated as royalty[r.w. Art. 12 of DTAA- India-Singapore/ article 7 of the India-USA DTAA]-

Kansai Nerolac Paints Ltd. v. Addl. DIT (2010) 134 TTJ 342 (Mum.)/ Dy. DIT v. M/s Reliance Industries Ltd., ITA No. 1190/Mum/2009

A computer software when put in to a media and sold becomes goods and, thus payment for purchase of software cannot be treated as royalty- no liability to deduct TAS u/s 195.

Since, definition **of royalty** in DAA clauses overrides definition of sec. 9(1)(vii) and foreign party not having any PE in India.

RULE 37BB-Furnishing of information under sub-section (6) of section 195.

- 1) The information u/s 195(6) shall be furnished by the payer, after obtaining a certificate from an accountant as defined in the Explanation to section 288 of the Income-tax Act, 1961.
- (2) The information to be furnished in Form No. 15CA and shall be verified in the manner indicated therein and the certificate from an accountant to be obtained in Form No. 15CB.
- (3) The information in Form No. 15CA to be furnished electronically and thereafter signed printout of the said form shall be submitted prior to remitting the payment.
- (4) The DGIT (Systems) shall specify the procedures, formats and standards for ensuring secure capture, transmission of data and shall also be responsible for the day-to-day administration in relation to furnishing the information in the manner specified.
- ***Note:*** *Form 15CA (undertaking) can be signed by the person authorised to sign the return of income of the remitter or a person so authorised by him in writing.*

Meaning of Rates In Force

- ***As per Section 2(37A)***

"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 DTAA

❑ Circular No. 728, dated 30/10/1995 : (1995) 6 TCR 167 (St.) / 216 ITR (St.) 141

In case of remittance to a country with which DTAA is in force the tax will be deducted at rate provided in Finance Act or DTAA **which ever is more beneficial to the assessee**

Applicability of Surcharge in case of NR/Foreign Co.

Type of Assessee	EC & SHEC	Surcharge
Non resident (other than a foreign co.) [other than Salary]	Applicable	N.A.
Non resident i.r.o salary	Applicable	N.A.
Foreign Co.	Applicable	@ 2% (if income after deduction exceeds Rs. 1 Cr.)

ISSUES on Sec. 195(2)

- ***CIT v. Swaraj Mazda Ltd. [2011] 10 taxmann.com 178 (P & H) ,***

- held that where no objection certificate granted to assessee u/s195(2) permitting it for non-deduction of TAS, was never cancelled, it **could not be treated as assessee in default for non-deduction of tax at source**

- ***CIT v/s Jai Engineering Works Ltd. (1984) 149 ITR 425 (Del)***

  Where no form is prescribed for application u/s 195(2) it cannot be said that the application must contained in it all the requirement of sec. 195(2) to unable the AO to excise jurisdiction. An assessee can approach AO by merely stating that an order u/s 195(2) may be made.

- ***CIT v/s Tata Engineering & Locomotive Co Ltd. (2000) 245 ITR 823 (Bom)***

  The order passed u/s 195(2) are not conclusive they do not pre-empt the department from passing appropriate order of assessment

contd…

- ***CIT v. Elbee Services (P) Ltd. [2001] 115 Taxmann 618 (Bom.)***
  The findings given u/s 195(2) will not preclude the department from taking contrary view in the assessment proceedings.
- ***[Chloride India Ltd. v. ITO (1986) 25 TTJ 507 (Cal. Trib.)]*** Sec. 195(2) is for determining the appropriate proportion of such sum which is chargeable to tax not for determining the rate of tax that has to be applied to the appropriate proportion of the sum held to be chargeable to tax .
- ***[NQA Quality Syatems Registrar Ltd. v. Dy. CIT (2005) 2 SOT 249 (Del)]*** where the payments are not liable for tax in India, no obligation is cast upon the payer to make an application u/s 195(2).

contd…

- ***[BCCI v. DIT (Exemption) (2005) 96 ITD 263 (Mum.)]***While acting u/s 195(2), AO is duty bound to make requisite enquiries evaluate facts in the context of Provision of law and then pass a reasoned order.

- ***Indopal Garments (P) Ltd. v. DCIT : 86 ITD 102 (Mad.)*** If there is no income chargeable to tax, it is not necessary for an assessee to get concurrence of assessing officer u/s 195(2)

RELEVANT CIRCULARS

Circular no. 4/2009 dt. 29-06-2009

CBDT ON REMITTANCE TO NON-RESIDENTS UNDER SECTION 195

- TDS u/s 195 mandatory from payments made or credit given to non-residents at the rates in force. The RBI has also mandated that except in the case of certain personal remittances which have been specifically exempted, **no remittance shall be made to a non-resident unless NOC has been obtained from the Income Tax Department.**

contd…

- remittances allowed without NOC, if the person making the remittance furnishes an undertaking (addressed to the AO - Form 15CA) accompanied by a certificate from an Accountant in a specified format [Form 15CB]
- The certificate and undertaking are to be submitted (in duplicate) to the RBI/ authorised dealers who in turn are required to forward a copy to the AO concerned.
- The revised procedure for furnishing information regarding remittances being made to non-residents **w.e.f. 1st July, 2009** is specified.

revised procedure for furnishing information regarding remittances being made to non-residents w.e.f. 1st July, 2009

(i) The remitter will obtain a certificate from an accountant (other than employee) in Form 15CB.

(ii) The remitter will then access the website to electronically upload the remittance details to the Department in Form 15CA (undertaking). The information to be furnished in Form 15CA is to be filled using the information contained in Form 15CB (certificate).

(iii) The remitter will then take a print out of this filled up Form 15CA (which will bear an acknowledgement number generated by the system) and sign it. **Form 15CA (undertaking) can be signed by the person authorised to sign the return of income of the remitter or a person so authorised by him in writing.**

contd…

- iv) The duly signed Form 15CA (undertaking) and Form 15CB (certificate), will be submitted in duplicate to the RBI / authorized dealer. The RBI/ authorized dealer will in turn forward a copy the certificate and undertaking to the AO concerned.
- (v) A remitter who has obtained a certificate from the AO regarding the rate at or amount on which the tax is to be deducted is not required to obtain a certificate from the Accountant in Form 15CB. However, he is required to furnish information in Form 15CA (undertaking) and submit it along with a copy of the certificate from the AO as per the procedure mentioned from Sl.No.(i) to (iv) above.

Steps in brief

remitter

1. Obtains 15CB
2. access www.tin-nsdl.com
3. Electronically uploads the remittance details in Form 15CA
4. Takes printout of filled undertaking form (15CA) with system generated acknowledgement number.
5. Printout of the undertaking form (15CA) is signed
6. Submits the signed paper undertaking form to the RBI/Authorized dealer along with certificate of an Accountant in duplicate.
7. RBI/Authorized dealer remits the Amount
8. RBI/Authorized dealer remits the Amount

Refund of TDS……?

Circular No. 7/2007 Dated 23/10/2007

Below mentioned cases are referred in it for consideration of refund in case of N.R.

- Contract is cancelled and no remittance to N.R.
- Remittance made to N.R. ,but the contract is cancelled and the remitted amount has been returned.
- Contract cancelled after partial execution and no remittance to N.R. for non executed part.
- Contract cancelled after partial execution and remittance related to non executed part is made to N.R. , either the remitted amount has been returned or not, but the tax was deducted and deposited.
- Exemption of the remittance either by amendment in law or by notification.
- Order is passed under section 154 or 248 or 264 reducing the tax liability or deductor under section 195.
- Deduction of tax twice by mistake.
- Payment of tax on account of grossing up, which was not required under the provisions.
- Tax deducted at higher rate, however lower rate is prescribed in the relevant DTAA

Refund of TDS……?

Circular No. 7/2007 Dated 23/10/2007

- In the above refereed cases either the N.R. not having received any payment would not apply for refund or made no claim for refund as he has no further dealing with then resident deductor of tax or the tax is to be born by the resident deductor. This resident deductor is therefore put to genuine hardship as he would not be able to recover the amount deducted and deposited.
- As no income accrued to N.R. ,the amount deposited to the credit of government cannot be said to be tax. Therefore it has been decided that this amount should be refunded after approval of CCIT or DGIT to the deductor.
- No interest under section 244A is admissible on such refund.
- AO may after giving intimation adjust it against any existing tax liability of deductor.
- Refund should be granted after obtaining and undertaking that no certificate under section 203 has been issued to N.R.
- The claim of refund shall be made within 2 years from the end of financial year in which the tax is deducted at source.

- Note **CIRCULAR NO. 2/2011 [F.NO. 385/25/2010-IT(B)], DATED 27-4-2011 is not applicable to TDS u/s 195**

Circular No. 728

- **Circular No. 728 of 30th October, 1995 (1995) 216 ITR (St.) 141, Circular No. 734 dated 24th January, 1996 (1996) 217 ITR (St.) 74 and Circular No. 786 of 2000 (2000) 241 ITR (St.)132 .**

  There are instructions from the Income Tax Department to the effect, that where double tax avoidance agreement is applicable to the facts of the case, the deducter can take into consideration the benefit of such agreement vide Board's

The application of DTAA depends on the date on which the contract agreement is signed, though it may be made applicable from an earlier day.

Circular No. 23, dated 23rd July, 1969 (now withdrawn by Circular No. 7/2009 dated 22-10-2009

The deduction of tax at source u/s 195 would arise if the income paid to non resident is taxable in India.

- When transactions of sale or purchase (export or import) are on principal to principal basis. No liability of non resident exporter shall arise in India and resident importer shall not be treated as agent of the exporter.

- A foreign agent of Indian exporter operates in his own country and no part of his income arises in India – Usually his commission is directly remitted to him ; therefore, not received by or on his behalf in India. Such an agent is not liable to Indian Income Tax.

Board Circular No. 155, dated 21st Dec. 1974, [see (1975) 98 ITR (St.) 110].

- where the tax payable by the N.R. is borne by the person making the payment, the income chargeable to tax in the hands of the recipient is determined by grossing up the tax payable by resident on behalf for N.R. and the income actually remitted to N.R.
- Ref: **CIT v. Compagine General – De – Geophysique [2004] 267 ITR 634 (Raj)**.

Circular No. 152 dated 27/11/1974: (1975)98 ITR (St.)19.],Transmission Corporation of A.P. Ltd. V. CIT [1999] 239 ITR 587.

Supreme Court has negatived the argument that where the entire payment does not have character of income, there is no need for tax deduction at source, The Supreme Court has accepted that section 195(1) is clear and unambiguous and casts an obligation only in respect of the appropriate proportion of chargeable amount, It is open to the assessee where he does not approach to the AO for determination of the appropriate portion either because he himself is fairly certain of the portion of chargeable income or where the AO did not responded to application ? The Supreme court says that the determination by authorities is a safeguard, it follows that where the person responsible for deduction is fairly certain, he can make his own determination.

RBI Circular AP(DIR)-Circular No. 03/2007-08/100, Dated 19/7/07

- Remitter of foreign exchange is required to submit to the authorized dealer, an undertaking and a CA certificate in the format prescribed by CBDT vide circular No. 10/2002 Dated Oct 09/2002. at a time of making remittance in foreign exchange to N.R. including remittances which are in the nature of trade transactions such as import payments.

TDS at higher rate without PAN

(PRESS RELEASE NO. 402/92/2006-MC (04 OF 2010), DATED 20-1-2010)- w.e.f 1-4-2010

TDS at higher of the prescribed rate or 20% where PAN of deductee is not available. Law will also apply to non-residents in respect of payments / remittances liable to TDS.

ISSUES

ISSUES……

Liability of TDS arises only when there is chargeability u/s 4,5 &9 of I.T Act, 1961.

The Hon'ble Supreme Court, in the case of G. E. India Technology Centre (P.) Ltd. v. CIT [2010] 327 ITR 456 (SC),

Held that *the obligation to withhold tax is limited to the* ***appropriate portion*** *of income which is chargeable to tax and forms part of the gross sum payable to the non-resident.*

Further held:

that 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.**

Contd….

- ***<u>View of the Kar. High Court in the case of CIT vs. Samsung Electronics Co. Ltd [2010] 320 ITR 209 , reversed, wherein it was held as under:</u>***
- as per mandate u/s195(1), every payment made by a resident payer to a non-resident recipient in respect of any goods/services supplied by non-resident, which resident payer is making use of in running of its business or any other activity indulged in as a part of its business/ professional activity, prima facie bears character of an income of recipient and, therefore, obligation under section 195(1) springs up

ISSUES……

Vodafone International Holdings B.V. v. UOI (BHC), 311 ITR 46 (Bom)

Purcahse of shares of foreign Co. to acquire Indian assets by one non-resident from another non-resident attracts Indian tax.

Followed: The landmark ruling of the Hon'ble Supreme Court in UOI v. Azadi Bachao Andolan [2003] 263 ITR 706 [that explained the law on the subject in great detail.]

The issue whether for purpose of getting relief under double tax avoidance agreement, the assessee should show that his income is assessed in the other country, even where the provisions of the agreement clearly spell out non liability in the home country, is a matter on which there is confusion especially because the distinction between avoidance and relief agreement has not been appreciated. If the income is not taxable in the home country but taxable in outside country than relief in home country is not possible.

Similar contention in

Richter Holding Ltd vs. ADIT (Karnataka High Court)- 24-03-2011, W.P 7716/2011

Further held: Corporate Veil can be lifted to tax sale of Foreign Co shares by one Non-Resident to another Non-Resident if Foreign Co holds shares in Indian Co

ISSUES

Services rendered pursuant to Data Processing Services are not managerial/ consultancy services

(2011) 11 Taxmann.com 94 (AAR, New Delhi) R.R Donnelley India Outsource Pvt. Ltd. In re

The nature of services undertaken by the UK company pursuant to the data processing services agreement, under no stretch of imagination, can be said to be technical, managerial or consultancy services and therefore, the consideration received for such services do not come within the purview of definition of 'fees for technical services' as given in Explanation 2 to clause (*vii*) of section 9(1) and hence, the same are not taxable in India .

ISSUES

- **ABC Ltd. In re [2007] 289 ITR 438 (AAR),** Held that:-
- There would be no tax liability where agreement was entered in to outside country, also the payment is made abroad, however the agreement is stamped in India. The Non resident would be liable to tax only, if there is a permanent establishment in India with operations .

Contd…

- **Cargo Community network (p). Ltd. In re [2007] 289 ITR 355 (AAR- New Delhi)**

  The authority of advance ruling has ruled that the payment for access to internet based in air cargo portals outside India would be royalty, because it is not merely for getting access to data, but use of portal for booking cargo, besides training of subscribers and rendering help connected therewith. [in context of India Singapore DTAA]

Contd

- **Morgan Stanley & Co. International Ltd., In re [2005] 272 ITR 416 (AAR)**

  Where the business of the assessee involves dealing in shares & securities, the income earned in traded derivatives, which had a small life, through brokers and custodians, acting in the ordinary course of business , would not be liable to tax in India if such activity is undertaken by the non resident without a permanent establishment or a fixed base in India.

ISSUES

Fees shared with non-resident for access to internet is not fee for technican services:

Where an assessee merely provides internet access of certain bandwidth to its subscribers and the main internet server was located in USA, it was held that there is no technical service within the meaning of the definition u/s 9(1)(vii). Consequently, no need of TDS.

CIT v. Estel Communications P. Ltd. (2009) 318 ITR 185 (Del) [SLP DISMISSED BY THE HON'BLE SUPREME COURT IN [2009] 310 ITR 2(SC)]

ISSUES

Mobilization and demobilization costs reimbursed to non-resident not liable for TDS

Where IT authorities had accepted that the non-resident recipient is not liable to pay any tax in India, the assessee payer was not liable to deduct TAS u/s 195(1) in respect of mobilization & demobilization costs reimbursed by it to the said non-resident company.

Van Oord ACZ India(P) Ltd. v. CIT (2010) 36 DTR 425(Del)

ISSUES

Fee paid outside India for imparting distance education is not chargeable to tax

Where a resident assessee collected fees on behalf of a foreign company imparting distance education, and that the non-resident had no PE in India and was not liable for tax on its income from imparting distance education, there was no requirement of deducting TAS from remittance of the amounts so collected.

Federation of Indian Chambers of Commerce and Industry, re (2010) 320 ITR 124 (AAR), CIT (International taxation) v. Illinois IIT (India) P. Ltd. (2010) 321 ITR 79(Kar.)

- **DCIT v. Boston Consulting Group (P) Ltd.[2006] 280 ITR (AT)1(Mumbai)**

That business consultancy service as being non technical in nature, it may not be treated as royalty and technical fees, but only as professional services. Merely because such services are used in India, the income, there from, does not become taxable either under the domestic law or treated as royalty and technical fees under DTAA. It pointed that there could be a large difference in liability where the non technical service is treated as technical one. Even computation of income will be different because no expense will be allowed in respect of technical fees, while if it were business or professional income, the computation may well be different, besides being taxable in India only if there is permanent establishment or fixed base in India.

ISSUES

Reimbursement of expenses to non-resident

- No TDS u/s 195 on reimbursement of actual expenditure to non-resident parent company since no element of income.

- ***Cairn Energy India(P.) Ltd.v. Asstt.CIT (2010) 2 ITR(Trib.) 38(Chen-Trib.)***
- ***CIT vs. Dunlop Pvt. Ltd. : 142 ITR 493 (Cal)***
- ***CIT vs. Industrial Engineering product Pvt. Ltd. : 202 ITR 1014 (Del)***
- ***Hyder Consulting Ltd. vs. CIT: 236 ITR 640 (AAR)***
- ***HNS India V. Set. Inc. vs. DCIT: 95 ITD 157 (ITAT Del)***
- ***United Hotels Ltd. vs. ITO : 93 TTJ 822 (ITAT Del)***
- ***Mahindra & Mahindra Ltd. v. Dy. CIT (2009) 30 SOT 374 (Mum),***
- ***Nathpa Jhakri Joint Venture v. Asstt. CIT (2010) 37 SOT 160 (Mum-Tri.)***

Contd

- **Timken India Ltd., In re [2005] 273 ITR 67 (AAR)**

  Payments are often made to non resident by way of reimbursement of cost especially in transactions between holding and subsidiary company, the question whether the tax is deductible in such cases? AAR found that being in nature of fees for technical services, it was covered by the bar under sec. 44D against any deduction from royalty or technical fees taxed at presumptive rate u/s 115 A, so that question of computation of any income there from does not arise.

other ref: ***Danfoss Industries Pvt. Ltd. : 268 ITR 1 (AAR)***

Note: In the absence of any clear and specific judicial guidance on **reimbursement**, issue has to be decided on the facts of each case. However, Assessee should have various documents so as to substantiate the fact of reimbursement like Full particulars of the expenses, Photocopies of relevant Bills, Invoices, Vouchers, Debit Notes etc, agreements for reimbursement specifying basis of allocation etc.

ISSUES

- **Vijay Ship Breaking Corpn. & Ors. V. CIT (2009 314 ITR 309 (SC): [reversing the order of the Hon'ble DHC]**

  That in view of insertion of Explanation 2 to sec. 10(15)(iv)(c), assessee was not bound to deduct TAS i.r.o usance interest payable outside India by an undertaking engaged in the business of ship-breaking as tax was deductible only if income was to be assessed in India.

- **Knowerx Education (India) (P.) Ltd. (2008) 301 ITR 207 (AAR)**

  No tax is deductible u/s 195 in respect of activity of examination fees collected in India and remitted outside India.

Contd..

- ***[Advance ruling P.No. 13 of 1995 [1997] 94 Taxman 171/228 ITR 487 (AAR – New Delhi)]***

  N.R.I transfers Long term foreign exchange asset ***– payer, shall be Authorized dealer*** responsible for remittance or crediting such sum to Non resident(external) Account.

  Head office of Non resident Co. **does not require to deduct tax** where it pays to Non resident (Supplier of technology), where technology is used by company in India.

- ***[P.V. Raghava Reddi v. CIT (1962) 44 ITR 720 (SC)]*** Where income is received in India it shall attract TDS.

Contd.

- No TDS where payment is made to non resident foreign company for rendering services to customer located outside India.
  [Wipro Ltd v. ITO [2003] 133 Taxman 149 (Mag)]
- Sec.195 applies to those persons, who are treated as non resident under the Income Tax Act and not the non resident under the Foreign Exchange Regulation Act.
  [S.K. Dutt, ITO v. Anglo India jute Mills Co. Ltd. (1958) 33 ITR 866(Cal.)]
- Boarding, lodging, airfare expenses of foreign technicians held to be part of fees paid for technical services **[Cochin Refinery Ltd. vs. CIT: 222 ITR 354]**

Contd…

- **Standard Triumph Motor Co. Ltd. v. CIT [1993] 201 ITR 391 (SC)**

  Where recipient of income accounts income on receipt basis is not relevant for determining the taxability of income, it must be held in this case that the credit entry to the account of the assessee in the books of the Indian company does amount to its receipt by the assessee and is accordingly taxable and that it is immaterial when it did actually receive it in the outside country.

Contd…

- **DIT v. HCL Info System Ltd. (2005) 274 ITR 261(Del)**

  Amount paid to foreign technician and the question arose whether it was salary or fees for technical services, it was found that the services of technician were placed at the disposal of assessee and the payments were held to be salary.

- **Fertilizers and Chemicals Travancore Ltd. V. CIT (2002) 255 ITR 449(Ker).**

  Indian Co. had collaboration agreement with non resident Co., the foreign company should provide know-how and technician to Indian company. Indian company did not have any control over foreign technician. It was held that the non resident company rendered services in India and the amount payable for services was subject to TDS

Contd…

- **Liability to deduct is absolute, Situs or source of payment is not a relevant consideration**

  Satellite Television, Asian Region Ltd. v/s CIT (2006) 99 ITD 91/99 TTJ 1025 (Mum)

  The situs of the payment or the source of the payment is not relevant consideration under Sec. 195 of the Act. **Emphasis in section 195 is on chargeability** therefore, if payment is made to a non-resident **whether it is in India or outside India or in any manner, person making payment is liable for deducting tax at source**

Contd…

- **Lufthansa Cargo Indian Private Ltd. V. Dy. CIT [2005] 274 ITR (AT) 20 (Del).**

  Lease rent accrues where the asset is situated in the case of wet leasing of air crafts. But where in pursuance lease agreement executed abroad, the non resident undertakes overhaul repairs in workshop abroad, it cannot be assumed that the fees paid by the resident constitutes managerial, consultancy or technical services, so as to make it liable to tax in India. It is a business receipt not liable to tax in the absence of permanent establishment in India. However it could constitute works contract as decided in Hindustan Aeronautics Ltd. V. State of Karnataka [1984] 55 STC 314 (SC) in a sales tax case.

- **CIT v. Aktieengesellschaft Kuhnle Kopp and Kausch [2003] 262 ITR 513 (Mad.)**

  Where royalty and technical fees are given or paid by a resident to the non resident for services of technicians engaged for services outside India, such amounts cannot be treated as arising in India.

Contd…

- **CIT v. Ruti Machinery works Ltd. [2000] 243 ITR 442 (Mad).**

  where technology for manufacture of weaving machines in India was supplied from a swiss company for lump sum with license to use the name against royalty. While royalty was clearly taxable, payment for technology was not taxable since no part of the same arose in India, as non resident has no business nor any source in India.

Contd…

- **CIT v. Schlumberger Sea Co. Inc. [2003] 264 ITR 331 (Cal.)**

  Where the High Court held that the addition on account of tax borne by the payer of an amount taxable u/s 44 BB could only be confined to 10% of the tax and not tax on tax. Rectification to alter the tax to make further addition of tax on tax was without jurisdiction.

- **Ram Kumar Dhanuka v. UOI [2001] 252 ITR 205(Raj.)**

  The assessee claimed that the income was earned in Nepal, therefore his status was of N.R. in India, the period of stay was a question of fact, which requires to be proved by the assessee. Merely because evidence of stay is difficult in the context of free travel between India and Nepal, the assessee version need not be accepted. Even if he were a non resident, the assumption that the undisclosed income of about Rs. 58 lacs represented by jewellery, Foreign exchange and cash surfacing in India cannot be treated as earned in Nepal.

Contd…

- **Headstart Business Solutions (P) Ltd., In re [2006] 285 ITR 530 (AAR)**

  Assessee imported packaged business software solutions through a compact disc accompanied by software license key delivered by electronic mail over the internet, the issue was whether tax is deductible or not, the AAR in this case has held that the importer in India can customize the software according to the needs of the client with the permission of the supplier, therefore the amount would be taxable as payment for know how.

No TDS if the payment to a non-resident is not taxable in India:

- **Millennium Intocom Technologies Ltd. v. ACIT (2009) 309 ITR(AT) 18(Del)**
- **Cushman and Wakefield(s) Pte. Ltd. in Re (2008) 305 ITR 208 (AAR)**
- **JCIT v. George Williamson (Assam) Ltd. (2008) 305 ITR(AT) 422(Gau)**

❑ Where software maintenance services provided by non-resident assessee from outside India having no PE in India but another non-resident being its representative in India- no TDS on payment for repair & maintenance services.

[Airport Authority of India , in Re (2008) 299 ITR 102(AAR) (Del)]

Miscellaneous Issues

ISSUES- DTAA

Sponsorship of an event is not royalty

Sponsorship for popular sports events is often undertaken with the object of sales promotion especially when the title of the tournament itself is in the name of the sponsors and use of the copyrighted name is a condition for payment. But such condition to make payment cannot be of royalty, so as to require TDS at the time of payment under the terms of DTAA between India and Canada.

[DIT v. Sahara India Financial Corporation Ltd. (2010) 321 ITR 459 (Del)]

ISSUES- DTAA

- **Payment made by an Indian company to a Singapore company for providing data processing services is not royalty**-Unless there is material to establish that the circuit/equipment through which data processing support is provided by said Singapore company could be accessed and put to use by the assessee by means of positive acts, consideration paid for data processing services would not fall within category of "royalty" in clause (iva) of Explanation 2 to section 9(1)(vi)

[2011] 11 taxmann.com 105 (Mum. ITAT) , Standard Chartered Bank v. Dy DIT(IT)

ISSUES- DTAA

- Interest on income-tax refund earned by an Australian company, having a PE in India, is taxable under paragraph no. 2 of Article 11 of Indo-Australian DTAA-

  [2011] 11 taxmann.com 70 (Delhi - ITAT)(SB), Asstt. CIT v. Clough Engineering Ltd.

ISSUES- DTAA

- **Cushman & Wakefield (S) Pte., In re (AAR) 210.**

  Referral fee received by a Singaporean Company (applicant), from an Indian Company for referring customers to the latter is neither business income nor royalty nor fee for technical services and, therefore, it is taxable as business income in Singapore only **as the applicant has no PE in India.-** no taxability under the provisions of the IT Act or under the provisions of the DTAA, S. 195 is not attracted.

- **ITO V. Shriram Bearings Ltd. (1987) 164 ITR 419 (Cal)**

  The respondant company is not required to deduct TDS on any payment to N.R. for sale of Trade secrets. As pet DTAA between India and UAE, advertisements receipts by Nonresident are not taxable in view of Article 7 read with article 5, therefore no TDS

ISSUES- DTAA

- **Addl.CIT v. K.Ramabrahman & Sons (P) Ltd.(1978) 115 ITR 369 (AP)**

  The assessee being a stevedore made certain payments to masters and chief officers of various ships in accordance of customs in vogue, courts observed that the payments were made exgratia as there was no contractual agreement for the payments to be made or right to receive. Therefore it was held that the same could not be regarded as income chargeable to tax.

- **DCIT V.Tata Yodogawa Ltd.(1999) 68 ITD 47 (Pat-Trib)**

  As per DTAA between India and Austria, amount paid to foreign company towards technical services rendered by it are not taxable, therefore no TDS on it.

ISSUES- DTAA

- **A.T. & S.India P. Ltd. In re [2006] 287 ITR 421 (AAR)**

  where a non resident supplies technical services by deputing employees, whose salary is reimbursed by the resident to the non resident, such payments shall constitute fees for technical services. TDS has, therefore to be deducted at rate prescribed under Finance Act or DTAA whichever is less.

ISSUES- DTAA

- Where the amount paid is a total contract price involving supply of machine from the stage of designing to the stage of commissioning, what is paid is not royalty, though designing involves technological services, but the right in such design is not transferred to Indian assessee. Hence, it was found that it is not a case of royalty, therefore no part of the payment could be treated so as to require tax deduction at source.

  [CIT v. Neyveli Lignite Corporation Ltd. (2000) 243 ITR 459 (Mad.)]

OTHER ISSUES

No Obligation on part of a foreign bank's Indian branch to deduct TDS while making interest remittance to its head office abroad in view of DTAA provisions

- By virtue of the Indo-Netherlands convention, the head office of the foreign bank is not liable to pay any tax under the Income-tax Act; therefore, there was and still is no obligation on the part of the foreign bank's said branch to deduct tax while making interest remittance to its head office or any other foreign branch.
- Therefore, there is no scope for any argument that for the purpose of computation of expenditure the branch and the head office are to be taken as separate entities but for the purpose of payment of tax to be deducted at source on interest payment, it is to be taken as one bank and no deduction is to be made as sought to be made by the foreign bank.

ABN Amro Bank, N.V. vs. CIT, [2011] , 198 Taxman 376 (Cal.)

OTHER ISSUES

Goldcrest Exports vs. ITO (ITAT Mumbai)

Interest On Damages Not Assessable To Tax under DTAA If No PE

DCIT v. MRO (India) (P.) Ltd [2011] 10 taxmann.com 123(Del-ITAT),

Payment made to a New Zealand company for rendering liaison & coordinating services qua DNA testing at USA does not fall within ambit of royalty & FTS

Held: Nature of payment made by assessee to New Zealand company is of liaisoning and coordinating to ensure that blood samples collected by assessee is properly received at US and reports are received in time and as per terms fixed by US Embassy; neither of these services can be termed as services in nature of managerial, technical or consultancy nature; it is also not providing services of technical or other personnel; therefore, it also cannot be said that such services fall within term 'fee for technical services.' as contemplated by Article 12

OTHER ISSUES

- **Payment can be by any mode**
- Thus, where a company entered into an agreement with a non-resident company for fishing rights, and the consideration payable was agreed as hire charges in the form of receipt of 85 per cent to the fish catch by the non-resident company, the company was liable to deduct tax at source under section 195 on this form of 'payment' even though it was not made in cash - ***Kanchanganga Sea Foods Ltd. v. CIT[2004] 136 Taxman 8 (AP).***

contd…

- Payment of professional fees for registration of patent abroad not liable to TDS.

  [Titan Industries v. ITO (2007) 11 SOT 206 (Bang.)

- Purchase of copyrighted article is to a payment for copyright.

  [Sonata Information Technology Ltd. v. Addl. CIT(2006) 103 ITD 324(Bang.)]

- Payment for supply of information regarding Business Information Report not liable to TDS.

  Re, Dun & Bradstreet Espana S.A (2005) 272 ITR 99(AAR)]

ISSUE

- that assessee deductor u/s 195 cannot take unilateral decision on chargeability of non resident payee, without concurrence of AO u/s 195/197 and if so does, will be assessee in default u/s 201 and disallowance shall be attracted u/s 40(a)(i).

  Del ITAT in Haterew and Partner 25 SOT 347

  Mum ITAT in MRPL BCAJ Jul 2007

- *Contrary view in*

  Lufthansa 91 ITD 133 (Del-ITAT); Del ITAT in AB Hotels 25 SOT 368; Kar HC in 188 ITR 749; Raj HC in SBI Bikaner ITA 5/2006, Hyd ITAT in AVANTHI Leathers (Lex reported)& Hyderabad Ind 24 SOT 58

OTHER ISSUES

Dy. CIT v. ITC Ltd.[2002] 82 ITD 239 (Kol. - Trib.).

- Provisions in the DTAA clearly override the provisions of the Act to the extent the provisions are more favourable to the assessee. Therefore, **in case any DTAA provides for lower rate (which includes 'nil' rate) of taxes, such a rate will prevail over the rate provided in the Act.**

Kar HC in 211 ITD 526 – FEMA Approval has no bearing on time of TDS u/s 195(1)

Contd…

- **CIT v. Chowgule and Co. Ltd. [1996] 218 ITR 384 (SC)**

  Rule 115 provides for conversion of transactions expressed in foreign currency in to India rupee in computation of income., the Supreme court pointed out that where the transactions are in India Rupee, the rule shall have no application. But where the amounts from foreign buyers are outstanding on last day of Accounting Year, the rule has to be applied with reference to such date , so that any other view would not accord with the provisions of the rule, Constitutional validity of which was upheld by the Supreme Court..

Contd…

- When the non resident become resident, he can avail benefit of section 115H, that income from foreign exchange asset will continue to enjoy the same concessional rate of tax even after he become resident till such time, the asset is either transferred or converted into money.

  [**CIT v. N.P. Mathew (Decd.) [2006] 280 ITR 44 (Ker.)]**

- Word Interest for the purpose of section 40(a)(i) has to be understood as covering every payment, which is in the nature of Interest, even if it was the interest paid to the non resident for delayed payment of purchase price. So that tax becomes deductible at source.

  [CIT v. Vijay ship Breaking Corporation [2003] 261 ITR 113 (Guj.), J.K. Synthetics Ltd. V. CIT (Assessment) [1990] 185 ITR 540 (Delhi)]

- TDS where amount paid relates to income exempt u/s 10.

  [Hyderabad Industries Ltd. v. ITO (1991) 188 ITR 749(Kar.)]

- Where an income is taxed in both the participant countries, the agreement would provide for set off of the lesser tax on the doubly taxed income in the country of residence of the assessee. However as per Article 25 between India and U.S., where no tax is payable in India, the question of giving credit for tax paid in US so as to entitle the assessee who is a resident in India for refund in India does not arise.

  [JCIT v. Digital equipments India Ltd. [2005] 277 ITR (AT) 15 (Mumbai)]

- Where an employee deputed for service in India for the Non resident employer's business, Salary may be paid by the non – resident, but perquisite may well be taxable in India to the extent such perquisite is taxable, the duty to deduct tax would be of the resident, who makes such perquisite available to the employees.
- **[Motorola Inc. v. DCIT (2005) 95 ITD 269 (Del.) (SB)]**

THANK YOU

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