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Objective of section 195

Objective of section 195

- Mechanism to collect due taxes and enforcing associated compliances.
- Enhanced responsibility towards withholding tax compliances under section 195 of Income Tax Act 1961 ('the Act') towards foreign remittances
- Substantive provisions being broadened – e.g. Business Connection, Royalty, FTS, etc.
- Tax collection at the earliest point of time
- Assessment and collection of tax
- Avoid loss of revenue

Overview and analysis of section 195

Overview of section 195

Section	Provisions
195(1)	Scope and conditions for applicability
195(2)	Application by the “payer” to the AO
195(3)	Application by the “payee” to the AO
195(4)	Validity of certificate issued by the AO
195(5)	Powers of the CBDT to issue Notifications
195(6)	Furnish the information relating to the payment of any sum
195(7)	Special power to board
195A	Grossing up of tax

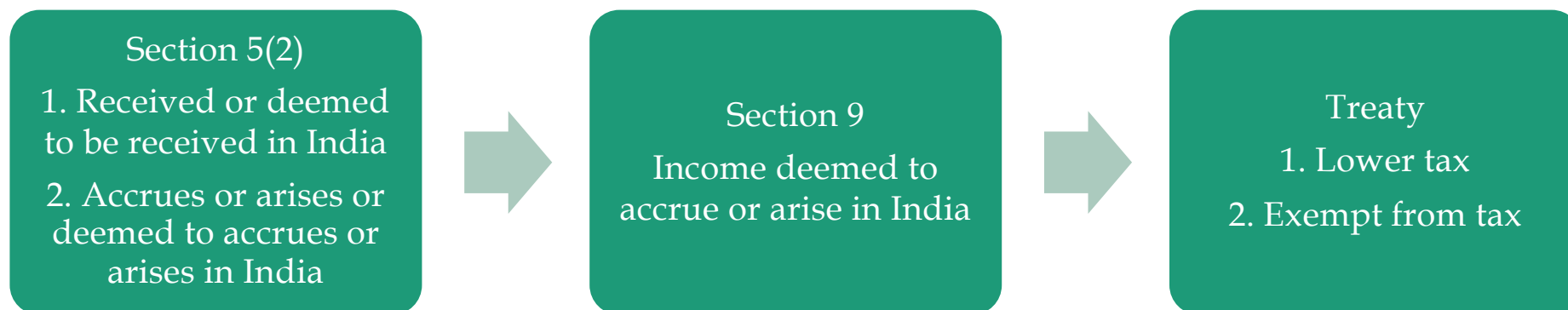
Section 195

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

Section 195 - Breaking down

Payer

Chargeable to tax



Coverage of section 9 and Treaty

Nature of Income	Basis of tax	Income Tax Act	Treaty
Business/ Profession	Taxable if business connection in India or property or asset or source of income in India - Income attributable to operations carried out in India - Significant economic presence	9(1)(i)	Article 5 and 7 - Concept of PE or Fixed Base
Salary	Taxable if services are rendered in India	9(1)(ii)	Article 15
Dividend	Taxable if paid by Indian Company	9(1)(iv), 115A	Article 10
Interest	Taxable if sourced in India with certain exceptions section 195LB, 194LC and 195LD	9(1)(v), 115A	Article 11
Royalty		9(1)(vi), 115A, 44DA	Article 12
Fees for Technical Services ('FTS')		9(1)(vii), 115A, 44DA	Article 12
Capital Gains	Transfer of capital asset	9(1)(i), 45	Article 13

Mode of payment

Section 195(1) covers payment in cash, by cheque or draft or by 'any other mode'

Examples of any other mode:

- Kanchanganga Sea Foods Ltd.[2010](325 ITR 540)(SC) – charter fee for fishing vessels was paid in the form of fish catch
- Biocon Biopharmaceuticals (P.) Ltd.[2013](144 ITD 615)(Bangalore ITAT) – shares were issued as consideration for provision of technology & know-how

Amount payable to NR is deducted by the NR from amounts due to the resident Payer;

- Such adjustment shall also be considered as 'any other mode' – Raymond Ltd [2003](86 ITD 791)(Mum ITAT)

Royalty - Section 9(1)(vi)

Section 9(1)(vi) - Definition of Royalty

income by way of royalty payable by –

- (a) the Government ; or
- (b) a person who is a resident, **except** where the royalty is **payable in respect** of any right, property or information used or services utilised **for the purposes of a business or profession carried** on by such person **outside India** or for the purposes of **making or earning any income** from **any source outside India**; or
- (c) a person who is a non-resident, where the royalty is **payable in respect** of any right, property or information used or services utilised for the purposes of a **business or profession carried** on by such person **in India** or for the purposes of **making or earning any income** from **any source in India**

Royalty - Section 9(1)(vi) (cont'd)

- Explanation 2 - For the purposes of this clause, "royalty" means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains")
- Explanation 3 - For the purposes of this clause, "computer software" means any computer programme recorded on any disc, tape, perforated media or other information storage device and includes any such programme or any customized electronic data
- Explanation 4 - Transfer of all or any rights includes right for or to use a computer software (including granting of a license) irrespective of the medium.
- Explanation 5 - Includes consideration in respect of any right, property or information, whether or not-on the possession or control is with the payer; or it is used directly by the payer; or the location is in India
- Explanation 6 - "process" includes transmission by satellite, cable, optic fibre, etc. whether or not secret

Royalty - Section 9(1)(vi) (cont'd)

Treaty text

- payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic, or scientific work, including cinematograph films or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right or property which are contingent on the productivity, use, or disposition thereof ; and
- payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial, or scientific equipment, other than payments derived by an enterprise described in paragraph 1 of Article 8 (Shipping and Air Transport) from activities described in paragraph 2(c) or 3 of Article 8

FTS - Section 9(1)(vii)

Section 9(1)(vi) - Definition of FTS

income by way of fees for technical services payable by

(a) the Government ; or

(b) a person who is a resident, **except** where the fees are payable **in respect of services** utilised in a business or profession **carried on by such person outside India** or for the purposes of **making or earning** any income from **any source outside India** ; or

(c) a person who is a non-resident, where the fees are payable **in respect of services** utilised in a business or profession **carried on by such person in India** or for the purposes of **making or earning** any income from **any source in India**

Explanation 2 - For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries"

FTS - Section 9(1)(vii) (cont'd)

Treaty

“fees for technical services” means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services

- a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3(a) is received ; or
- b) are ancillary and subsidiary to the enjoyment of the property for which a payment described in paragraph 3(b) of this Article is received ; or
- c) **make available** technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design

Make available - connotes something which results in transmitting the technical knowledge so that the recipient could derive an enduring benefit and utilize the same in future on his own without the aid and assistance of the provider

Rates of TDS

Rates of TDS

- Rates in force
- Section 206AA
- Surcharge and cess in case of treaty provisions
- Grossing up
- 195(2), 197
- 195(3)
- Special case – reimbursement of expenses

Rates in force

- Section 195(1) provides for TDS at the '**rates in force**'
- **Rates in force - section 2(37A)(iii):**
For the purpose of TDS u/s 195, rates in force mean the **beneficial of:**
 - the rates specified in Part II of the First Schedule to the Finance Act of the relevant year; or
 - the rates specified under the applicable Treaty
- **Section 90(2)** - Where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee
- **Sections 90(4), (5) r.w. Rule 21AB** - An assessee, not being a resident, to whom an agreement referred to in sub-section (1) applies, shall not be entitled to claim any relief under such agreement unless a certificate (TRC) of his being a resident in any country outside India or specified territory outside India, as the case may be, is obtained by him from the Government of that country or specified territory

Budget 2023 – Change in rate of TDS

- Rate of tax is increased from 10% to 20% w.e.f. April 1, 2023
- Effective tax rate to increase from 10.92% to 21.84%
- DTAA benefit will be available subject to other conditions
- Impact of this change – Exemption from filing Return of Income under section 115A

TRC and Form 10F

Tax Residency Certificate to be obtained from non-resident

Declaration in Form 10F

- Status of the assessee - Individual, Company, etc.
- PAN
- Nationality of country or specified territory of incorporation or registration
- Assessee's TIN or unique number used to identify 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 is mentioned in the TRC
- Address of the assessee in the country or specified territory outside India for which TRC is issued

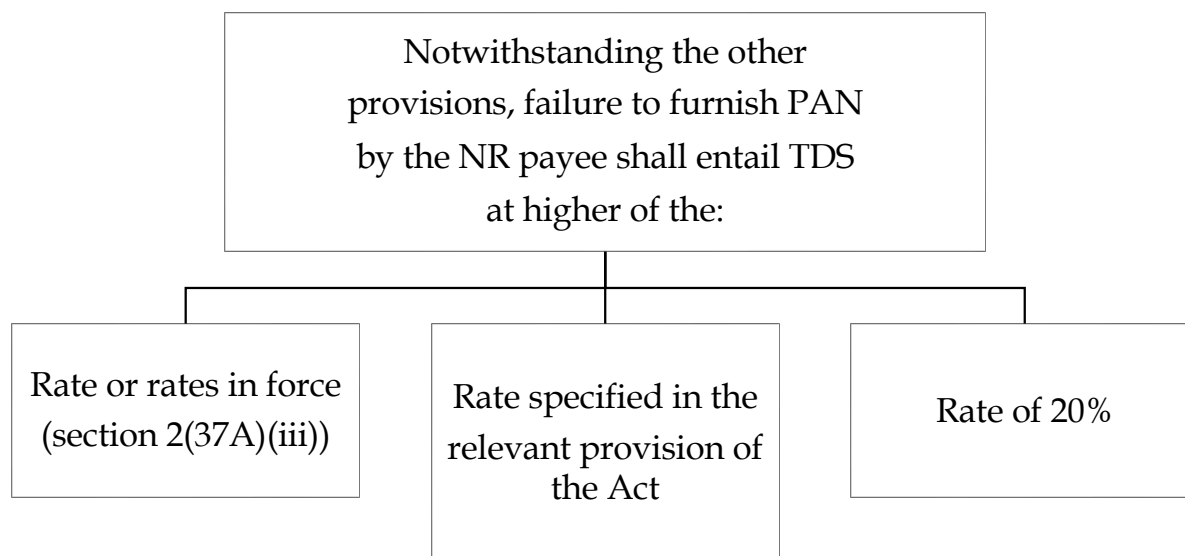
Form 10F Notification no 3/2022

- Self declaration of TRC in the prescribed format
- Notification 3/2022 – migration from physical to electronic filing ?
- Practical challenge – Online filing, PAN, DSC
- Manual filing allowed till September 30, 2023
- Denial of benefit if Form 10F is not filed ? (Azadi Bachao Aandolan)

Rates of Tax

Particulars	Rates
Income from the investment made by an NRI (Interest/Dividend)	20%
Long term capital gains arising from the transfer of the following assets as per Section 115E:	
- Shares of an Indian Company	
- Debentures and deposits of a Public Company in India	10%
- Securities issued by the government	
Long term capital gain from listed shares and securities referred to in Section 112A	10%
Any other long-term capital gain	20%
Short term capital gains under section 111A	15%
Interest payable by the Government or Indian concern on the money borrowed in foreign currency	20%
Royalty and Fees for technical services payable by the Government or an Indian concern	20%
Winnings from:	
- Card games, lotteries, crossword puzzles, and other games of any sort	
- Horse races	30%
- Any other income	
Any other income	30%

Section 206AA



Section 206AA(7)(ii) r.w. Rule 37BC:
Relaxation to payments in the nature of Interest, Royalty, FTS, Capital Gains, if the NR deductee furnishes following details, documents:

- Name, e-mail id, contact number, address in the country of residence
- TRC of the country of residence
- Tax identification or unique identification number in the country of residence

Relaxation not available for other payments, e.g. payments to artists & sportspersons, payments taxable as other income, etc.

Section 206AA (cont'd)

Beneficial Treaty provisions to override section 206AA irrespective of the non obstante Clause

- DDIT v. Serum Institute of India Ltd. [2015] 68 SOT 254 (Pune).
- Danisco India (P.) Ltd. [2018] 90 taxmann.com 295 (Delhi HC)
- Nagarjuna Fertilizers & Chemicals Ltd. [2017] (185 TTJ 569) (Hyd ITAT)(SB):

Unlike the GAAR provisions which override Treaty, there is no provision to give overriding effect to section 206AA

Surcharge & Education cess not to be applied on 20% tax rate u/s 206AA

- Computer Sciences Corporation India (P.) Ltd. [2017] (163 ITD 151) (Del ITAT)

Surcharge and cess – Treaty

- **Surcharge & Education cess not to be added to the tax rate specified under Treaty :**
 - Sunil V Motiani [2013](59 SOT 37)(Mum ITAT)
 - BOC Group Ltd [2015](156 ITD 402)(Kol ITAT)
 - Capgemini SA [2016](72 taxmann.com 58)(Mum ITAT)

Section 195A: Grossing up

Scenario I

NR payee has a PAN
and/or a TRC & other
details as per Rule
37BC

The amount payable to NR under 'net of tax' agreement = Rs.100

Rate in force u/s 2(37A)(iii) = 10% [i.e. beneficial of: 21.84% as per Part II of the First Schedule to the Finance Act & 10% as per DTAA]

Grossed up income u/s 195A = Rs.111.11 (i.e. $100 \times 100 / 90$)

TDS u/s 195 = Rs. 11.11 (i.e. $111.11 \times 10 / 100$)

Scenario II

NR payee neither
holds a PAN nor a
TRC

Amount payable to NR under 'net of tax' agreement = Rs.100

Rate in force u/s 2(37A)(iii) = 21.84%

Grossed up income u/s 195A = Rs.127.94 (i.e. $100 \times 100 / 78.16$)

TDS u/s 195 = Rs. 27.94 (i.e. $127.94 \times 21.84 / 100$)

Section 195(3) and 197

Particulars	195(3)	197
Applicant	Payee	Payee
Purpose	To receive sums without deduction of tax i.e. NIL withholding tax certificate	To receive sums without deduction of tax or on deduction of tax at a lower Rate
Whether appealable	No appeal, Writ Petition can be filed	No appeal, Writ Petition can be filed
Revision u/s 264	Yes	Yes
Process	Application in Form 15C (for Banking Co.) and 15D (all others) to the AO	Application can be made to the AO in Form 13 to determine the tax rate Application to be made before the payment/ credit, whichever is earlier. NIL Rate if <ol style="list-style-type: none"> a. Assessee has been regularly assessed to tax and has filed all returns of income due as on date of filling of application b. Not in default in respect of any tax, interest, penalty or any other sum c. Not subject to penalty u/s.271(1)(iii)

Section 195(2)

Particulars	195(2)
Applicant	Payer
Purpose	To determine the taxable proportion of the remittance i.e. payer considers that the whole sum is not taxable in India *
Whether appealable	Appealable u/s 248, provided Payer has to bear the tax under the agreement & such taxes have been already paid by the payer
Revision u/s 264	Yes
Process	<p>Payer may approach the AO to determine the taxable portion of income in India.</p> <ul style="list-style-type: none">• Plain Paper application; No Form prescribed• AO to determine amount chargeable to tax• AO may issue order, determining the portion of income chargeable to tax• Order valid for the period specified <p>No specified time limit available to pass the order under Section 195(2) - Central Associated Pigment Ltd. [1971] 80 ITR 631 (Cal)</p>

Special case – Reimbursement of expenses

Nature of Transaction: I Co makes payment to F Co for general expenses such as insurance, travelling, ESOP cost etc incurred on behalf of I Co. In such cases question arises whether TDS is applicable on such payments where there is no income element involved? Whether TDS should be deducted if mark up is charged by the Foreign entity for providing the services?

Cases in favour of Assessee

No TDS on reimbursement of actual expenditure to parent company, since no element of Income

- Hewlett Packard (India) Software Operations Pvt Ltd IT(TP)A No 2575/ Bang/2019
- ACIT vs. Timken India Ltd [2022 140 taxmann.com 313 (Ranchi-Trib)]
- Grant Thornton Advisory (P.) Ltd vs. DCIT [2022 140 taxmann.com 348 (Delhi - Trib.)]
- CIT vs Siemens Aktiengesellschaft : 310 ITR 320 (Bom HC)
- CIT vs. Industrial Engineering product Pvt. Ltd. : 202 ITR 1014 (Del)
- 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)
- CIT vs. Dunlop Pvt. Ltd. : 142 ITR 493 (Cal)
- T-3 Energy Services India (P.) Ltd [2018] 91 taxmann.com 334 (Pune - Trib.)

Special case – Reimbursement of expenses

Cases Against the Assessee

- CIT v. CGI Information Systems & Management Consultants (P) Ltd, (Kar) 226 Taxman 319 - Hon'ble Karnataka High Court held that merely because the agreement provides that the term 'cost' does not include any mark-up and is limited to the actual cost, makes no difference in the eyes of law. Since the ultimate transaction is obtaining license to get the right to use the software though it is styled as 'cost sharing agreement', it is payment towards royalty both as per the provisions of I.T. Act as well as DTAA.
- C.U. Inspection (I) P Ltd vs DCIT (ITAT Mum) [2013] 34 taxmann.com 75 - ITAT held where Indian companies were availing services from overseas third party, but payment for these services were being routed through their foreign group companies, in such case TDS applies

Compliances – For
payments covered under
section 195

Compliance procedure

Compliance	Compliance dates
Compliances by payer and CA	Filing of form 15CA(to be filed by the Payer) and 15CB (to be filed by a CA)
Date of Deduction of TDS	At the time of making the payment or credit to the Non-Resident, whichever is earlier
Date of payment of TDS	On or before the 7 th of next month in which TDS is deducted
Furnishing of TDS certificate	15 days from the due date of TDS returns

Part A

Remittance does not exceed INR 5 lacs and amounts chargeable to tax.

Chartered Accountants Certificate in Form 15CB not required

Part B

Amount is chargeable to tax and remittance exceed INR 5 lacs and order u/s 195(2)/195(3)/197 has been obtained from Income-tax Officer

CA Certificate in Form 15CB not required

Form 15 CA/CB

Part C

Remittance exceed INR 5 lacs and amounts chargeable to tax under provisions of Income-tax Act

Certificate from Chartered Accountants in Form 15CB required

Part D

Remittance is not taxable under the provisions of Income-tax Act other than payments referred in Rule 37BB(3) by the person referred in Rule 37BB(2)

Payments exempt from reporting

No information is required to be furnished for any sum which is not chargeable under the provisions of the Act, if

- The remittance is made by an individual and it does not require prior approval of Reserve Bank of India as per the provisions of section 5 of the Foreign Exchange Management Act, 1999 (42 of 1999) read with Schedule III to the Foreign Exchange (Current Account Transaction) Rules, 2000; or
- Remittance in the nature as specified

Specified list

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	SO202	Payment for operating expenses of Indian shipping companies operating abroad
13	SO208	Operating expenses of Indian Airlines companies operating abroad
14	S0212	Booking of passages abroad - Airlines companies

Specified list

Sr. No.	Purpose code as per RBI	Nature of payment
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
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

Specified list

Sr. No.	Purpose code as per RBI	Nature of payment
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.

Non-compliance with section 195

Withholding tax not deducted or not deposited within prescribed time

- Disallowance of expenses u/s 40(a)(i)

Tax not withheld /deposited appropriately

Takeaways

Takeaways

Precautions while preparing Form 15CB

- PAN and Name mismatch
- Beneficiary Name vis-à-vis Bank Record
- Conversion rate – TT Buying rate
- Proposed date of remittance and date of tax deduction at source
- RBI purpose code
- Reference to DTAA
- Reason for non deduction of tax at source
- Amount of remittance after TDS

Takeaways (Cont'd)

Documentation to be maintained

- Gather information - Agreements/contracts, Invoice, note on activities or services rendered ([2022] 145 taxmann.com 248 (Madras)[23-11-2022] Murali Krishna Chakrala vs. Deputy Director, Directorate of Enforcement)
- Obtain TRC and/or Form 10F
- Determine whether PAN or no PAN case
- Determine source of income and nature of income
- Charging section and rate of tax under the Act
- Applicable article of tax treaty
- Jurisprudence - cases for and against the transaction under review
- Check protocols and Memorandum of understanding
- Special clauses - LOB, MFN

Thank you!!

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