



Form 15 CB/15 CA – A Discussion

Gurgaon Branch of NIRC of ICAI

27th August, 2016 by CA Sanjay Agrawal



WHAT SHOULD BE OUR TAKE AWAYS?

- Understand the objective & importance of Form 15 CB & 15 CA.....
- Understand the procedure, process and implementation
- *How to Determine the exact nature of remittances*
- *Understanding of chargeability under the Act on the basis of nature of each remittance*
- *Brief Understanding of DTAA's*
- How to safeguard our own interest and that of our client.....



Objective of Form 15 CA/15 CB



Form 15 CB/ 15 CA

- Whether Form 15 CB is an Alternate to Sec 195(2)?
- Mahindra & Mahindra Ltd vs. ADIT 106 ITD 521 (Mum ITAT) (2007)
- *“It is clear that the new scheme of remittance being allowed on the basis of Form 15 CB is not in substitution of the scheme u/s 195(2) but merely to supplement the same.”*
- The Form 15 CB has no role to play for determination of TDS liability but is merely to support payer’s contention while making remittance to a non-resident
- Although payer makes remittance to a non-resident on the basis of Form 15 CB. However, consequences of non-deduction/short deduction will be that of payer.



Form 15 CB/ 15 CA – Continue.....

- “Non resident” status of the receiver – at what point of time to be considered?
 - –at the time of signing of agreement or
 - –the previous financial year or
 - –at the time of remittance
- 15CA can only be uploaded after obtaining 15CB
- No time limit for remittance of funds after electronic submission of Form 15CA.
- Effect of an amendment in law or a judicial decision or circular subsequent to issue of certificate but before remittance.



Growing Importance of 15CA/CB



Growing Importance of Form 15 CA/15 CB

- More and More Cross Border Payments
- Increased revenue's attention like form 15CA and 15CB
- Self regulatory mechanism
- Recent amendment in Section 195 (6)
- Default consequences for payer:
 - *Demand u/s Section 201; Interest of 201(1A)*
 - *Penalty u/s Section 221 &/or 271C*
 - *Prosecution u/s Section 276B*
 - *Penalty for non compliance Section 195 (6)-271I*
 - *Disallowance of expense u/s Section 40(a)(i)*



Growing Importance of Form 15 CA/15 CB

- Unlike personal payments exempted in section 194C etc; no exclusion for the same in section 195 (all payments covered *except salaries*) e.g. payment to foreign architect for residential house construction etc
- Unlike threshold criteria specified in section 194C etc, no basic limit in section 195 even Re 1 payment is covered
- Unlike other provisions in Chapter XVII (TDS provisions), section 195 uses a special phrase "chargeable to tax under the Act"
- All payers covered irrespective of legal character HUF, Individual etc
- Multi-dimensional as involves understanding of DTAA/Treaty
- The payee covered are Non-Resident, not being a company, or to a foreign company



Steps to Follow while issuing form 15 CB

- Step 1: Determination of Nature of Remittance;
- Step 2: See chargeability under Act;
- Step 3: Rate Applicable If Chargeable;
- Step 4: Whether DTAA Applicable;
- Step 5: Which DTAA Applicable;
- Step 6: Chargeability under DTAA;
- Step 7: Rate Applicable under DTAA;
- Step 8: Whether PAN available?;
- Step 9: If yes, apply DTAA Rate or Income tax rate, whichever is beneficial for assessee;
- Step 10: If No, apply Section 206AA (subject to Rule 37BC);



Rule 37BB: Furnishing of information for payment to a non-resident

(Amended by N. No. 93/2015 dt 16.12.15)

(1)

Person responsible for paying to a non-resident, not being a company, or to a foreign company, **any sum chargeable** under the provisions of the Act.

(i) Amount of payment or the aggregate of such payments, as the case may be, made during the financial year does not exceed five lakh rupees

Shall furnish information in Part A of form 15CA

(ii) For payments other than (i)

(b) after obtaining a certificate in form no. 15CB from an accountant

Shall furnish information in Part C of form 15CA

(2)

Person responsible for paying to a non-resident, not being a company, or to a foreign company, **any sum which is not chargeable** under the provisions of the Act.

Shall furnish information in Part D of form 15CA

(3)

Notwithstanding anything contained in sub-rule (2), **no information is required to be furnished** for any sum which is not chargeable under the provisions of the Act, if,

(i) the remittance is made by an individual for current account transactions (it does not require prior approval of RBI u/s 5 of FEMA read with schedule III

(ii) the remittance is made in respect of 33 items

5 new items:

S0101: Advance against imports

S0102: Payment towards imports-settlement of invoice

S0103: Import by Diplomatic Missions

S0104: Intermediary trade

S0190: Imports below Rs. 5Lakhs (for use by ECD offices)

(a) after obtaining
(1) certificate u/s 197
or
(2) order u/s 195(2) or 195(3)

Shall furnish information in Part B of form 15CA



Rule 37BB.....(Cont.)

- Rule 4: Form 15CA shall be furnished electronically under digital signature
- Rule 5: An income-tax authority may require the authorised dealer to furnish the signed printout of Form No.15CA
- Rule 6: The certificate in Form No. 15CB shall be furnished and verified electronically
- Rule 7: The authorised dealer shall furnish a quarterly statement for each quarter of the financial year in Form No.15CC to the Principal Director General of Income-tax
- New rule is applicable from 01.04.2016

Procedure – Form15CB

Download Form 15CB utility from
<http://incometaxindiaefiling.gov.in/>

Fill the required details regarding remitter, remittee & transaction.... Details will be available in dropdown list of form

This filled form will be saved in .xml format

Now download the DSC utility from
<http://incometaxindiaefiling.gov.in/>

.xml file will be uploaded on this DSC form. Now signature will be generated

Log in into income tax portal being practicing CA

Upload .xml & signature file

The screenshot displays the 'Upload Form' page on the Income Tax India e-Filing portal. The page includes a 'Quick Link' section with 'Upload Form' and 'Tax Calculator'. The main form area is titled 'Upload Form' and contains the following fields and options:

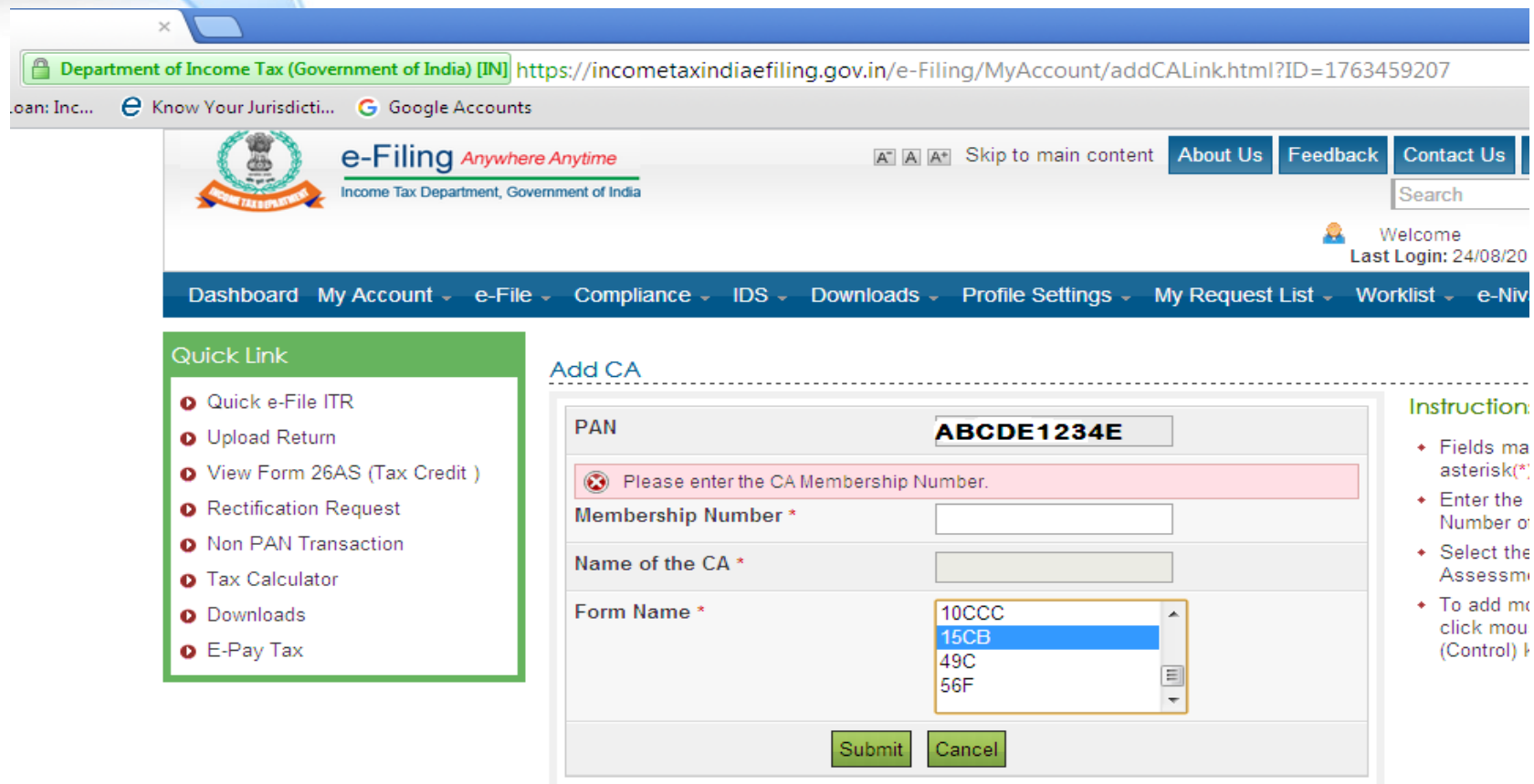
- User ID:** ARCA
- PAN/TAN of the Assessee *:** (Empty field)
- PAN of the CA *:** (Empty field)
- Form Name *:** 15CB (Selected from dropdown)
- Filing Type *:** Original (Selected from dropdown)
- Attach the XML file *:** Choose File (No file chosen)
- Click here to download the DSC Utility** (Link with question mark icon)
- Steps to Digitally Sign ITR:**
 - Download the "ITD e-Filing DSC Management Utility".
 - Generate the signature file. Follow the instructions in the Utility.
 - Attach the generated signature file.

Note: The generated signature file is valid only for one transaction.
- Attach the Signature file *:** Choose File (No file chosen)
- Submit** and **Cancel** buttons.

The footer of the page includes the 'india.gov.in' logo, the text 'The national portal of India', and website policies, RTI, Grievance, Useful Links, Terms of Use, Site Map, and Disclaimer. Copyright is attributed to the Income Tax Department, Ministry of Finance, Government of India. All Rights Reserved. Site Best Viewed in 1024 x 768 resolution | Site Last Updated on 24/08/2016.

Procedure – Form 15CB (Adding CA in client's profile on IT portal)

Log in by client and add Chartered Accountant for 15CB



The screenshot shows the Income Tax e-Filing portal interface. The browser address bar displays the URL: <https://incometaxindiaefiling.gov.in/e-Filing/MyAccount/addCALink.html?ID=1763459207>. The page header includes the e-Filing logo and navigation links: About Us, Feedback, Contact Us, and a Search bar. The user is logged in as 'Welcome' with a last login of '24/08/20'. The main navigation bar contains links for Dashboard, My Account, e-File, Compliance, IDS, Downloads, Profile Settings, My Request List, Worklist, and e-Niv. A 'Quick Link' sidebar on the left lists various services like Quick e-File ITR, Upload Return, View Form 26AS, Rectification Request, Non PAN Transaction, Tax Calculator, Downloads, and E-Pay Tax. The 'Add CA' form is displayed in the center, with a PAN field containing 'ABCDE1234E'. A red error message states: 'Please enter the CA Membership Number.' The form includes fields for 'Membership Number *', 'Name of the CA *', and 'Form Name *'. The 'Form Name *' dropdown menu is open, showing options: 10CCC, 15CB (selected), 49C, and 56F. At the bottom of the form are 'Submit' and 'Cancel' buttons. An 'Instruction' box on the right provides guidance: 'Fields marked with an asterisk(*) are mandatory', 'Enter the CA Membership Number', 'Select the appropriate Form Name', and 'To add the CA, click mouse button (Control) + Enter'.

Department of Income Tax (Government of India) [IN] <https://incometaxindiaefiling.gov.in/e-Filing/MyAccount/addCALink.html?ID=1763459207>

Know Your Jurisdiction... Google Accounts

e-Filing Anywhere Anytime
Income Tax Department, Government of India

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Quick Link

- Quick e-File ITR
- Upload Return
- View Form 26AS (Tax Credit)
- Rectification Request
- Non PAN Transaction
- Tax Calculator
- Downloads
- E-Pay Tax

Add CA

PAN **ABCDE1234E**

Please enter the CA Membership Number.

Membership Number *

Name of the CA *

Form Name *


10CCC
15CB
49C
56F

Submit Cancel

Instruction:


- Fields marked with an asterisk(*) are mandatory.
- Enter the CA Membership Number.
- Select the appropriate Form Name.
- To add the CA, click mouse button (Control) + Enter.

Procedure – Form 15CA (Can be filed online)



Department of Income Tax (Government of India) [IN] <https://incometaxindiaefiling.gov.in/e-Filing/MyAccount/MyAccountHome.html?ID=37145119>

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Quick Link

- Upload Return
- View Form 26AS (Tax Credit)
- Rectification Request
- Tax Calculator
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[Upload Form 15CA \(Bulk\)](#)

[e-File u/s 119\(2\)\(b\)/92CD](#)

IMPORTANT !!!

Correct Email ID and Mobile Number against your profile. These details are important and will be used for all communications.

To update the details, please go to the menu "Profile Settings/My Profile"

Procedure – Form 15CA (can be filed using UTILITY)

The screenshot shows the ITD E-Filing Form Utility interface. The title bar reads "ITD E-Filing Form Utility". The menu bar includes "File". The toolbar contains icons for "Open", "Save Draft", "Validate", "Generate XML", "Previous", and "Next", along with the text "Form 15CA (Page 2 of 2)". The main content area displays "FORM NO. 15CA (See rule 37BB)". Below this, there are four parts (A, B, C, D) with their respective instructions. A dropdown menu is open, showing the options "PART-A", "PART-B", "PART-C", and "PART-D". A "Continue" button is visible below the instructions.

ITD E-Filing Form Utility

File

e-Filing Anywhere Anytime
Income Tax Department, Government of India

Open Save Draft Validate Generate XML Previous Next Form 15CA (Page 2 of 2)

Instructions Form - 15CA

FORM NO. 15CA
(See rule 37BB)

PART A - To be filled up if the remittance is chargeable to tax under the provisions of the Income-tax Act, 1961 and the remittance or the aggregate of such remittances, as the case may be, does not exceed five lakh rupees during the financial year.

PART B - To be filled up if the remittance is chargeable to tax under the provisions of the Income-tax Act, 1961 and the remittance or the aggregate of such remittances, as the case may be, exceeds five lakh rupees during the financial year and an order/ certificate u/s 195(2)/ 195(3)/ 197 of Income-tax Act has been obtained from the Assessing Officer.

PART C - To be filled up if the remittance is chargeable to tax under the provisions of Income-tax Act, 1961 and the remittance or the aggregate of such remittances, as the case may be, exceeds five lakh rupees during the financial year and a certificate in Form No. 15CB from an accountant as defined in the Explanation below sub-section (2) of section 288 has been obtained.

PART D - To be filled up if the remittance is not chargeable to tax under the provisions of the Income-tax Act, 1961 (other than payments referred to in rule 37BB(3)) by the person referred to in rule 37BB(2).

Please select the relevant part from the drop down.

Continue

Select

Select

PART-A

PART-B

PART-C

PART-D

**In both the cases, SIGNATURE FILE needs to be
UPLOADED**



Form 15 CB – Continue.....

Certificate of an accountant

I/We* have **examined the agreement** (wherever applicable) between

Mr./Ms./M/s*(Remitters)

and Mr./Ms./M/s*

(Beneficiary).....

requiring the above remittance as well as the **relevant documents and books of account**

required for ascertaining the **nature of remittance and for determining the rate** of deduction of tax at source as per provisions of Charter- XVII-B.



Form 15 CB – Continue.....

Documentation by CA while issuing Form 15CB (from payer)

- Agreement and Invoices;
- Payment terms per agreement.
- Correspondences for taking note of any deviation in terms of agreement.
- Technical Advice for determining nature of remittance, if required.
- Payer's Authorised Dealer details.
- Rate of conversion of foreign currency (date of certificate)
- Tax Residency Certificate of payee.



Form 15 CB – Continue.....

- **Declaration/Certificate to be obtained from payer relating to payee for :-**
 - no PE,
 - tax residency,
 - beneficial owner,
 - treaty entitlement, etc; and
 - Indemnification from payee
 - Proposed period of stay (for e.g. for purpose of IPS)
- ◆ 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 e.g. declaration of payee on PE presence /income connection with PE may be required..)



Tax Residency Certificate

- Finance Act, 2012 has introduced sub-section (4) to Section 90 w.e.f. 1-4-2013 to provide that a non-resident will not be entitled to claim benefits under the Treaty unless he obtains a Tax Residency Certificate (TRC) from the Government of his residence country/territory certifying that he is a tax resident of that country..
- The requirement applies to all Non Residents, whether Individuals, Companies, LLPs, etc., irrespective of the quantum of relief to be obtained.
- TRC must be compliant to contents of Form 10F.
- Form 10 FA for Application of TRC
- Form 10 FB for issue of TRC



Tax Residency Certificate Cont.....

- Notification 57/2013 dated 1 August 2013 issued by CBDT, which mandates submission of following information in Form 10F:
 - Name of the Tax payer;
 - Status Of the Tax Payer;
 - Nationality of the Tax Payer;
 - Country or specified territory of incorporation or registration of the Tax payer;
 - Assessee's TIN 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;
 - Residential Status for Tax purposes;
 - 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, is applicable.
- **10 F not required, if TRC contains above particulars**
- **Whether 10F alone is sufficient in the absence of TRC?**



Chargeability...

- Section 195: Any person responsible for paying to a non resident...any interest not covered in Section 194 LB, 194 LC, 194LD or any other sum(except Salaries) chargeable under the provisions of this Act shall...deduct income-tax thereon...
- Section 4: gives the authority to the government to charge Income-tax

Section 5: Scope of Total Income.....

- ◆ Income received or deemed to be received in India
- ◆ Income accrues or arises or deemed to accrue or arise in India



Income deemed to accrue or arise

Section 9

Nature of Income	Act*	DTAA (OECD model)
Business/ Profession	S.9(1)(i)	A.5 and A.7
Salary Income	S.9(1)(ii), S.9(1)(iii)	A.15
Dividend Income	S.9(1)(iv), S.115A	A.10
Interest Income	S.9(1)(v), S.115A	A.11
Royalties	S.9(1)(vi), S.115A	A.12
FTS	S.9(1)(vii), S.115A	A.12
Capital Gains	S.9(i)(i)	A.13

Act/ DTAA, whichever is beneficial prevails



How to Read DTAA

- Sample 1: Article 12- Royalty & FTS USA read as:

1. Royalties and fees for included services arising in a **Contracting State** and paid to a resident of the **other Contracting State** **may** be taxed in that **other State**.

2. However, such royalties and fees for included services may also be taxed in the **Contracting State** in which they arise and according to the laws of that State; but if the beneficial owner of the royalties or fees for included services is a resident of the **other Contracting State**, the tax so charged shall not exceed ;

Note: Replace Red with India and Blue with USA and Read again.....



DTAA Vs ACT

- Sample 1: Article 12 USA- Royalty means (Relevant Extract):

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**

Explanation 4 of Section 9 (1) (vi).—For the removal of doubts, it is hereby clarified that the transfer of all or any rights in respect of any right, property or information includes and has always included transfer of all or any right for use or right to use a **computer software** (including granting of a licence) irrespective of the medium through which such right is transferred.

Note: Explanation 4,5 and 6 has been inserted by FA 2012 w.e.f. 1976 widening the scope of royalty under the Act, but beneficial DTAA definition will apply.



DTAA Vs ACT

- Sample 2: Article 12 USA- FTS means (Relevant Extract):

make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design.....

Explanation 2 of Section 9 (1) (vii).—"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".

Note: We can see 'make available clause' in DTAA but not under Act; beneficial DTAA definition will apply.



DTAA Vs DTAA

- Sample 1: Article 13 of UK- Royalty means (Relevant Extract):

B. payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial or scientific equipment, other than income derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic...

India-Netherland DTAA wherein the definition of royalty does not include “payment for use or right to use of commercial, industrial or scientific equipment” Other countries with which renting shall not be taxable as royalty include: Belgium, Greece, Israel, and Sweden.

Note: In view of this Hire charges Not Royalty Under Netherland, Belgium, Greece, Israel and Sweden DTAA. (CIT vs. Van Oord ACZ Equipment BV [2015] 273 CTR 548 (Madras)).



DTAA Vs DTAA

- Sample 2: Article 15- IPS means (Relevant Extract):

UK & USA: Income derived by a person who is an individual or firm of individuals (other than a company).....

UAE & Bangladesh: Income derived by a resident of a Contracting State in respect of professional services or other activities of an independent character shall be taxable

Denmark & Germany: Income derived by an individual who is a resident of a Contracting State from the performance of professional services or other independent activities of a similar character shall be taxable

Note: As seen IPS covers Individual, Firm of Individuals, only resident in different DTAA.



Overview of Section 195

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)	Furnishing of information by payer
195 (7)	Power to CBDT to specify class of persons or cases where application to AO u/s 195(2) compulsory.

Part of Chapter XVII of the Act – A collection and recovery measure



Section 195(1)

Analysis

Scope

- ◆ Covers all sums
- ◆ Except salaries, interest in Section 194 LB, 194LC, 194LD

Time

- ◆ Credit or Payment, whichever is earlier

Rate

- ◆ Rates in force



Section 195(1) *Rates in Force*

Section 2(37A)(iii)

- ◆ Rates of income-tax specified in the Finance Act or DTAA

Circular No. 728 dt. 30 October 1995

- ◆ Beneficial rates to be applied

Rates prescribed under DTAA: to be increased by surcharge and education cess?



Section 195(2) *Application by Payer*

- Application by the Payer to the AO for determining appropriate portion of sum chargeable
- Alternate Mechanism: CA certificate





Section 195(3)/ 195(5)

Application by Payee/ Powers of CBDT

Section 195(3): Application by NR payee for NIL tax withholding

- Applicable to:
 - foreign bank branches and
 - other branches subject to certain conditions
 - In operation for at least 5 years
 - Value of fixed assets in India exceed Rs.50 lakhs

NR payee is regularly assessed to tax and should not have defaulted in respect of Indian tax, interest, penalty, fine etc.

Section 195(5): Powers of CBDT

- ◆ CBDT can by notification in the Official Gazette make rules specifying the cases for the grant of certificate u/s 195(3) and the related conditions



Section 195(4)

Validity of certificate issued by AO

- A certificate granted u/s 195(3) shall remain in force:
 - for the FY mentioned therein; or
 - until cancelled by the AO before expiry of FY
- Provisional Certificate only



Section 195(6)-Evolution

New Rules for Information

- Requires the person making payment to NR to furnish the information relating to payment (w.e.f. 1st April, 2008)

Furnishing of information - Rule 37BB (amended by N. No. 93/2015 wef 1.4.2016)

- ◆ Furnish information to the tax department - Form 15CA
- ◆ Obtain CA certificate before making payment to NR - Form 15CB



Section 195(6)

New Rules for Information

- *The person responsible for paying to a non-resident, (not being a company), or to a foreign company, any sum, whether or not chargeable under the provisions of this Act, shall furnish the information relating to payment of such sum, in such form and manner, as may be prescribed. (w.e.f. 1-6-2015)*
- *Penalty for failure to furnish information or furnishing inaccurate information under 271-I.*
- *If a person, who is required to furnish information under sub-section (6) of fails to furnish such information; or furnishes inaccurate information, the Assessing Officer may direct that such person shall pay, by way of penalty, a sum of one lakh rupees. (w.e.f 1-6-2015)*



Section 195(7)

- Notwithstanding anything contained in sub-section (1) and sub-section (2), the Board may, by notification in the Official Gazette, specify a class of persons or cases, where the person responsible for paying to a non-resident, not being a company, or to a foreign company, any sum, whether or not chargeable under the provisions of this Act, shall make an application to the Assessing Officer to determine, by general or special order, the appropriate proportion of sum chargeable, and upon such determination, tax shall be deducted under sub-section (1) on that proportion of the sum which is so chargeable. (w.e.f. 1-7-2012)



Section 195A *Grossing up of Tax*

- Not to be done in cases of presumptive Tax (ONGC (264 ITR 340) Uttranchal)
- Exchange Rate Applicable – (Rule 26 Vs Rule 115) – SBI TT Buying Rate.
- TDS Certificate to be issued even in case of Grossing up : Circular 785 dt. 24.11.1999
- In the case of Bosch Ltd [TS-904-ITAT-2012(Bang)], it was held that higher rate of deduction at 20% u/s 206AA is not applicable for tax grossing-up u/s 195A, if TDS is borne by the Indian payer. Higher TDS rate u/s 206AA is applicable only where non-resident recipient has income chargeable to tax in India and does not furnish Permanent Account Number (PAN) u/s 195

*



Section 206AA

- Section 206AA* stipulates withholding at higher of following rates in case PAN of payee is not furnished:
 - Rate specified in the relevant provisions of the Income-tax Act, 1961 (varying rates prescribed for different nature of payments); or
 - Rates in force (as specified in the Schedule to the Finance Act; relevant tax treaties); or
 - 20 percent.
- Further, PAN to be quoted on all correspondence, bills, vouchers, etc. between payer and payee.



Certain issues connected with 206AA

- Applicability restricted to transactions where tax is deductible?
- Timing for applicability of Section 206AA?
- Applicability on payments to non residents?
- Overriding effect on tax treaties?
- Grossing up and determination of income liable to tax in payee's hands in 'net of tax' contracts?
- Levy of surcharge and education cess on maximum rate of 20%?
- Credit under relevant tax treaty of the non-resident's home country for higher taxes paid?



Rule 37BC: Relaxation from deduction of tax at higher rate under section 206AA.

- In the case of a non-resident, not being a company, or a foreign company
- and **NOT HAVING PERMANENT ACCOUNT NUMBER**
- the **provisions of section 206AA shall not apply**
- in respect of payments in the nature of interest, royalty, fees for technical services and payments on transfer of any capital asset
- **if** the deductee **furnishes** following details & documents
 1. **Name, e-mail id, contact number;**
 2. **Address in the country or specified territory outside India of which the deductee is a resident**
 3. **A certificate of his being resident in any country**
 4. **Tax Identification Number of the deductee in the country**
 5. **Above details will be furnished in 27Q**



Interest Developments



Sale of Software- Royalty ??

- *Halliburton Export Inc. vs. ADIT [2015] 152 ITD 803 (Delhi - Trib.)*
- HELD not Royalty in terms of article 12 of India US Double Taxation Avoidance Agreement;
- Follow decision of Jurisdictional High Court in case of DIT v. Infrasoftware Ltd. [2014] 220 Taxman 273/[2013] 39 taxmann.com 88 (Delhi)
- *It overruled the following decision:*
CIT v. Sunray Computers (P.) Ltd. [2012] 348 ITR 196 (Kar. HC);
Citrix Systems Asia Pacific (P.) Ltd., In re [2012] 343 ITR 1 (AAR - New Delhi);
CIT v. Samsung Electronics Co. Ltd. [2012] 345 ITR 494 (Kar.HC)



Fees for Technical Services

ITO vs. Bennet Coleman & Co. Ltd. [2015] 152 ITD 331 (Mumbai - Trib.)

Installation and Training No FTS HELD, consideration paid by assessee to Swiss company for installation/commissioning of complex 'mail room equipment' which involved proper alignment/positioning of various units and components to ensure optimum functioning, said activity would qualify as 'assembly' which fall in exclusion clause.

DCIT vs. Hofincons Infotech & Industrial Services (P.) Ltd. [2015] 152 ITD 249 (Chennai - Trib.)

HELD, since fees was paid to non-resident abroad for services utilized in business carried outside India, same was not liable for any deduction of tax at source.



Fees for Technical Services (Make Available)

- Sum paid for routine managerial services Not FTS under India-UK DTAA Measurement Technology Ltd. United Kingdom, In Re [2015] 60 taxmann.com 1 (AAR - New Delhi)
- Payment for Testing/certification made to US Company-Not FTS
- *ITO vs. Denial Measurement Solutions (P.) Ltd. [2015] 67 SOT 76 (Ahmedabad - Trib.)(URO)*
- Treaties with USA, UK, Singapore, Australia, Canada etc. have the concept of “make available” in the FTS definition
- Make available significantly narrows down the scope of FTS



Fees for Technical Services (No FTS Clause)

- NO FTS Clause in DTAA- Business Profit not taxable in the absence of PE in India.

McKinsey Business Consultants Sole Partner Limited Liability Company MEPE vs. DDIT [2015] 54 taxmann.com 300 (Mumbai - Trib.)

Countries with no FTS clause includes Greece, Thailand, Phillippines, Indonesia.

Other Similar Cases:

Bangkok Glass Industry Co. Ltd. v. ACIT [2013] 215 Taxman 116(Mag.) (Mad.)(HC), Mckinsey & Company (Thailand) Co. Ltd. v. Dy. DIT (Int. Tax.) [2013] 36 taxmann.com 375 (Mumbai-Trib.) (Country: Thailand), GECF Asia Ltd. vs. DDIT [2014] 65 SOT 257 (Mumbai - Trib.) (Country: Thailand), IBM India Private Limited vs DDIT [TS-78-ITAT-2014 (Bang.)) (Country: Phillipines) PT McKinsey Indonesia vs. DDIT (ITA No. 7624/Mum/2010) (Country: Indonesia)



Interest paid by Indian branch to its head office/ overseas branches

- *Credit Agricole Corporate & Investment Bank vs. ACIT [2015] 67 SOT 208 (Mumbai - Trib.)(URO)*
- *Antwerp Diamond Bank NV vs. ADIT [2015] 152 ITD 446 (Mumbai - Trib.)*
- Interest paid by Indian branch to its head office/ overseas branches not taxable in India on principles of mutuality.
- *However, the above judgement shall not hold good in respect of interest payments w.e.f. 1.4.2015 by Indian branch to foreign head office due to amendment in Finance Bill 2015 whereby interest paid by Indian branch to foreign head office has specifically been made chargeable to income tax in India. Concept of 'Non-taxability of Income on grounds of mutuality/payment to self' no longer holds validity after 1.4.2015 in respect of interest payment by Indian branch to foreign head office* Explanation inserted after sub-clause (c) of clause (v) of sub-section (1) of section 9 by the Finance Act, 2015, w.e.f. 1-4-2016.



Capital Gain – Whether TDS on Gross?

- **Capital Gains:** *A. Mohiuddin vs. ADIT [2015] 67 SOT 251 (Bangalore - Trib.)* Where on date of purchase of house property from non-resident vendor, assessee was aware of fact that capital gain was not taxable in vendor's hands due to availability of deduction under section 54, he was not required to deduct tax at source while making payment of sales consideration.
- **Comment:** *The case is covered by the decision of the Hon'ble Supreme Court in the case of GE India Technology Cen. (P) Ltd. v. CIT [2010] 327 ITR 456/193 Taxman 234/7 taxmann.com 18 r.w. instruction No.2/2014 dated 26.02.2014 issued by the Board wherein it was held that the TDS in the payments required to be made u/s 195(1) ought to be deducted, if the element of income in such payment is involved.*



Interest paid by Indian branch to its head office/ overseas branches

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Reimbursement of Expense

- Reimbursement of Cost of services of Third Party engaged by Non Resident :
- C U Inspections India Pvt Ltd. (Mum – ITAT) (ITA No.577/Mum/2011) Not Taxable
- Wallace Pharmaceuticals P Ltd – 278 ITR 9 (AAR) Taxable
- Reimbursement of allocated cost:
 - CIT vs. Dunlop Rubber Co. Ltd., (1983) 142 ITR 493 (Cal.) Taxable Not
 - ABB Limited (2010) 322 ITR 564 (AAR) Taxable Not
 - Danfoss Ind. 268 ITR 1 (AAR) Taxable
- Payment for services rendered at cost:
 - Timken India Ltd - 273 ITR 67 (AAR) Taxable Not
 - AT&S P Ltd – 157 Taxman 198 (AAR) Taxable



Reimbursement of Expense (cont..)

- Reimbursement of living allowance, etc of a person deputed to India by the non-resident :
- BHEL - 252 ITR 218 (Del)
Not Taxable
- HCL Infosystems Ltd - 274 ITR 261(Del)
Taxable



Refund of Tax Withheld u/s 195...

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
- 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
- Tax deducted twice on the same income by mistake



Refund of Tax Withheld u/s 195

- Tax deducted at domestic tax rates; lower rate as per DTAA
- Prior Approval of the Chief Commissioner/ Director General
- Refund is first to be adjusted against any existing tax liability
- Interest u/s. 244A is not payable on such refunds
- Undertaking to be given by the payer that TDS certificate has not been issued
- Deductee has not filed the return of income and time of filing the return has also been lapsed
- Claim should be made within 2 years from the end of the FY in which tax has been deducted



Consequences for Payer

Applicable section	Nature of default	Consequence
40(a)	Withholding tax not deducted or not deposited within prescribed time	Disallowance of expenses in computation of taxable income of payer; deduction in year of payment
201(1)	Tax not withheld/ deposited appropriately	Recovery of tax not withheld/ deposited or short withheld/ deposited
201(1A)	Tax not withheld/ deposited appropriately	Interest @ 1% per month or part of the month
221	Tax withheld not paid	Penalty, not exceeding the amount of tax not paid
271C	Tax not withheld or short withheld	Penalty, not exceeding the amount of tax not withheld



Consequences for Payer

Applicable section	Nature of default	Consequence
271 I	Not Complying 195 (6)	Penalty of Rs. 100000.
272A	Delay in issuing withholding tax certificate/ filing withholding tax statement	Penalty @ Rs 100 per day for period of default, subject to maximum of the tax withheld
276B	Withholding Tax not deposited within prescribed time	Prosecution by way of imprisonment for a term between 3 months to 7 years and with fine



Consequences for Accountant

- *Loss of Client;*
- Disciplinary Action by ICAI;
- Harassment from IT Department;
- Loss of Reputation;



Open house

Questions...

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Thanks