

Bombay Chartered Accountants' Society

“Practical Issues in TDS U/s. 195”

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PRESENTATION DIVIDED INTO FOUR PARTS

Part – A : Overview Of Relevant Provisions

Part – B : Remittance Certificate By CA

Part – C : Scope Of Income Of A Non-resident

Part – D: Certain Cross Border Payments Withholding Tax Issues

PART - A

OVERVIEW OF RELEVANT PROVISIONS


Relevant Provisions :

Section	Provisions
195(1)	Scope and conditions of 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 CBDT to issue Notifications
195(6)	Furnish the information relating to the payment of any sum
195(7)	Power of CBDT to specify class of persons or cases where application to AO u/s 195(2) compulsory.
195A	Grossing up of tax
206AA	Permanent Account Number
90 (2)	Act or Treaty whichever more beneficial to non-resident
90 (4)	Tax Residency Certificate

Scope Of Section 195 (1):

- ▶ Any person responsible for paying
 - ▶ To a non-resident
 - ▶ Or a Foreign Company
- ▶ Any interest or any other sum
 - ▶ **Chargeable to tax** under the provisions of this Act
- ▶ 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(1) (contd.)



What is covered	<ul style="list-style-type: none">• Any int. or any other sum chargeable to tax under the provisions of this Act
Who are covered	<ul style="list-style-type: none">• Any person responsible for paying to Non-Resident or a foreign company
When it is applicable	<ul style="list-style-type: none">• At the time of credit or at the time of payment whichever is earlier – 125 ITR 525; 211 ITR 256;

AN OVERVIEW OF TDS U/S. 195 (Cont..)

Section 195(1) contd....

- “**Any Person** making payment -----” --Scope of ?
- New Explanation 2 added retrospectively:

“For the removal of doubts, it is hereby clarified that the obligation to comply with section 195 sub section (1) and to make deduction thereunder applies and shall be deemed to have always applied and extends and shall have deemed to be always extended to all persons, residents or non-residents, whether or not the non-resident person has-

- A residence or place of business connection in India; or
- Any other presence in any manner whatsoever in India”.

AN OVERVIEW OF TDS U/S. 195 (Cont..)

Section 195(1) – Contd...

- “Any sum chargeable to tax means”
 - GE India Technology Centre (234 CTR 153) (SC)
 - The moment there is a remittance out of India, it does not trigger Sec 195. The payer is bound to deduct tax only if the sum is chargeable to tax in India read with sec 4, 5 and 9.
 - Sec 195 not only covers amounts which represents pure income payments but also covers composite payments which has an element of income embedded in them
 - However, obligation to deduct TDS on such composite payments would be limited to the appropriate proportion of income forming part of the gross sum

AN OVERVIEW OF TDS U/S. 195 (Cont..)

Section 195(1) – “any Sum Chargeable “—scope of?

- Chargeability to tax governed by provisions of Act/DTAA

Nature of Income	Act*	Treaty
Business/Profession	S. 9(1)(i)	A.5, A.7 & A.14
Salary Income	S. 9(1)(ii)	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(1)(i), S.45	A.13

* Apart from S.5, wherever applicable

ACT/DTAA, Whichever is beneficial prevails

AN OVERVIEW OF TDS U/S. 195 (Cont..)

Section 195(1) – Any Sum Chargeable Contd...

- **Tax withholding from payment in kind**
 - Kanchanganga Sea Foods Ltd. (325 ITR 540) (SC)
- Payments by one non-resident to another non-resident inside / outside India ? (Asia Sat – (85 ITD 478(Del)); Vodafone, [White Consolidated Ind. Inc (ITA 250 of 1995 (AAR)) & AP Power (105 ITD 423) for non-compliance by a NR of TDS provisions if recipient pays advance tax)
- Sec 195 applies w.r.t. Payments made to a foreign company (2(23A)) which is resident in India (ITO v. Intel Tech India Pvt. Ltd.)
- Payment of sum exempt under sec 10 should not be subject to TDS (Hyderabad Industries Ltd. 188 ITR 749 Kar)

AN OVERVIEW OF TDS U/S. 195 (Cont..)

Issues --- Sec 195 (1)

- Can one rely on the residential status of the previous year? (218 ITR 413 (AAR); 212 ITR 275 (AAR))
- Income to FII – Section 196D & not Section 195.

AN OVERVIEW OF TDS U/S. 195 (Cont..)

Issues --- Sec 195(1) Cont...

- Payments by a Branch of a foreign entity to its HO or other Branches ? (Circular 740 & Circular 649, Sumitomo Mitsui Banking Corpn. (26 taxmann.com 111 (Mum)), Mizuho Corporate Bank Ltd. (24 taxmann.com 268 (Mum)), ABN Amro Bank (198 Taxman 376 (KOL); Dresdner Bank (11 SOT 158 (Mum)) DCIT v British Bank of Middle East (2008) 19 SOT 730)
- Payments by a resident to a branch in India of a foreign entity say Citibank? (Circular No. 20 dt. 3.8.1961)
- Payment made to a Foreign branch of an Indian Company is a payment to a Resident only
- Payments by a resident to an “agent” (U/s. 163) of non-resident ? (35 ITR 134).

AN OVERVIEW OF TDS U/S. 195 (Cont..)

Time of deduction:

- Twin conditions for attracting section 195
 - For payer – credit or payment of income
 - For payee – Sum chargeable to tax in India

AN OVERVIEW OF TDS U/S. 195 (Cont..)

Time of deduction Contd...:

- On credit or payment whichever is earlier (125 ITR 525; 211 ITR 256; 267 ITR 727)
- Merely on the basis of a book entry passed by the payer no income accrues to the non-resident recipient - ITO Vs. M/s. Pipavav Shipyard Ltd. – Mumbai ITAT - ITA No. 2603/Mum/2011
- Exception for interest payment by Government or PSB.
- When FEMA/RBI approval awaited ? (211 ITR 256; 249 ITR 141; 259 ITR 391)
- TDS when adjustment of amount payable to a non-resident against dues i.e. when no payment no credit ? (223 ITR 271)
- Dividend is declared but not paid pending govt. approval, accrues in the year of payment (Pfizer Corporation v. CIT (2003) 259 ITR 391 (Bom)).

AN OVERVIEW OF TDS U/S. 195 (Cont..)

Time of deduction Contd...:

- If no income accrues to non-resident although accounting entry incorporating a liability is passed no TDS. (UB Ltd. Vs. DCIT 211 ITR 256 (Kar.))
- Payee should be ascertainable. (IDBI V. ITO 107 ITD 45 (Mum))
- Time of Deduction from the point of view of the payer and not payee. Relevant in cases where one of them maintain the books on cash basis and the other on accrual basis (C.J. International Hotels 91 TTJ (Del) 318))

AN OVERVIEW OF TDS U/S. 195 (Cont..)

Rates in force

(Section 2(37A)(iii); Circular 728 & 740)

- Is surcharge to be added to Treaty rates ?
- Is Education Cess to be added to Treaty rates?
- (33 taxmann.com 252) (22 taxmann.com 310)
- Section 44D/44DA read with 115A
- Section 44B-Non-resident in shipping business (7.5% DPR)
- Section 44BB-Non-resident's business of prospecting. Etc of mineral oil (10% DPR)
- Section 44BBB-Non-resident civil construction business in certain turnkey power projects (10% DPR)
- Presumptive provisions (44B, 44BB, 44BBB etc).

EXCHANGE RATE APPLICABLE

▶ Rule 26

- TDS to be deducted
- On income payable in foreign currency
 - Value of rupee shall be SBI TT buying rate on the date on which tax is required to be deducted

▶ Rule 115

- Rate of exchange of income in foreign currency shall be SBI TT buying rate as follows:
- Income from salaries, int. on securities, Profits and gains from shipping business, dividend and capital gains
 - Last day of the month immediately preceding the month in which the income is due
- Income from house property, profits and gains of business or profession and other sources
 - Last day of the previous year of the assessee

AN OVERVIEW OF TDS U/S. 195 (Cont..)

Tax Residency Certificate (Section 90(4))

- 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 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.

AN OVERVIEW OF TDS U/S. 195 (Cont..)

- **Furnishing TRC mandatory requirement**
- Notification 57/2013 dated 1 August 2013 issued by CBDT, which mandates submission of following information in Form 10F:
 - Status (individual, company, etc) of the assessee
 - Nationality or country or specified territory of incorporation or registration
 - Assessee's tax identification number in the country or specified territory of residence and in case there is no such number, then, a unique number on the basis of which the person is identified by the Government of the country or the specified territory of which the assessee claims to be a resident;
 - Period for which the residential status, as mentioned in the certificate referred to in sub-section (4) of section 90 or sub-section (4) of section 90A, is applicable; and
 - Address of the assessee in the country or specified territory outside India, during the period for which the certificate, as mentioned in (iv) above, is applicable.
- Declaration not required, if TRC contains above particulars

AN OVERVIEW OF TDS U/S. 195 (Cont..)

Grossing up of tax (Section 195A):

- 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
- Absence of the words “tax to be borne by the payer” in case of net of tax payment contracts (175 ITR 243 (AP))

AN OVERVIEW OF TDS U/S. 195 (Cont..)

Section 206AA

“(1) Notwithstanding anything contained in any other provisions of this Act, any person entitled to receive any sum or income or amount, on which tax is deductible under Chapter XVIIIB (hereafter referred to as deductee) shall furnish his Permanent Account Number to the person responsible for deducting such tax (hereafter referred to as deductor), failing which tax shall be deducted at the higher of the following rates, namely:-

- i. at the rate specified in the relevant provision of this Act; or*
- ii. at the rate or rates in force; or*
- iii. at the rate of twenty per cent.*

.....”

AN OVERVIEW OF TDS U/S. 195 (Cont..)

Section 206AA cont..

Issues:

- Whether it is applicable to those who are exempt from obtaining PAN ? (Sec 139A(8)(d), Rule 114C (1) & Sec 272BB) (Smt. A. Kowsalya Bai -22 Taxmann.com 157)
- Whether Section 206AA applies to payments to non-residents?
- Whether Section 206AA applies only when tax is deductible?
- Validity of sec206AA when the basic rate of taxation is lower than 20% :
 - Bhavani Cotton Mills (20STC 290 SC)
 - Ely Lilly (312 ITR 225 SC)
 - Suman Enterprises v. SOK 2010 (69) Kar. L. J. 1(HC)
- Whether Section 206AA overrides the beneficial tax rates under a Tax Treaty?
206AA vs. 90

AN OVERVIEW OF TDS U/S. 195 (Cont..)

Issues Contd...:

- Whether the rate of 20% under section 206AA is subject to levy of surcharge or education cess?
- Whether TDS deducted at higher rate on account of Sec 206AA can be claimed as a refund by filing a return u/s 139 by the non-resident??
- Whether Section 206AA overrides the DTAA (Dy. Dir. Of IT Vs. Serum Institute of India (ITA no. 792/PN/2013))

AN OVERVIEW OF TDS U/S. 195 (Cont..)

Issues Contd...:

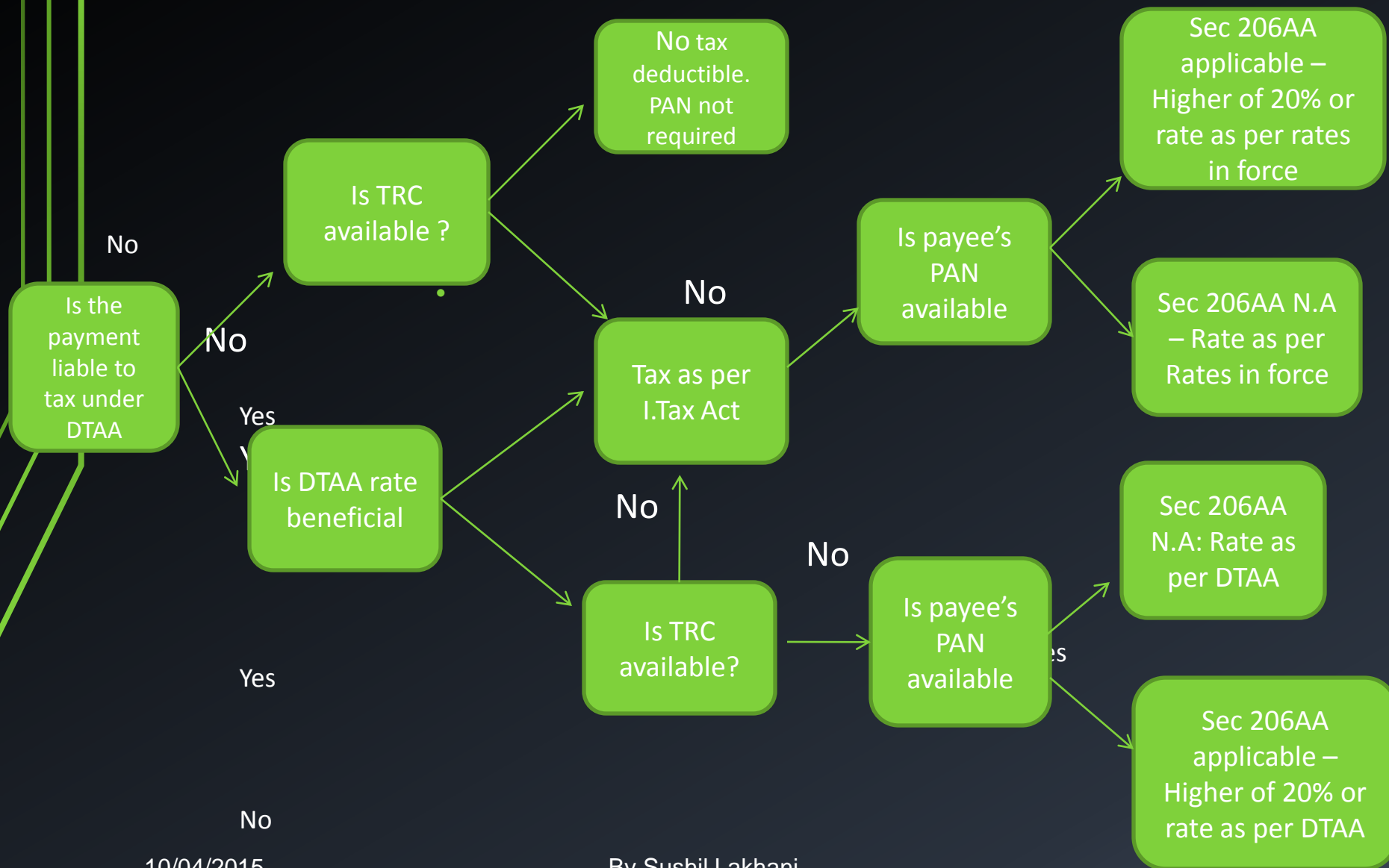
Is Section 206AA applicable where “Grossing up” applies.

PARTICULARS	Option I	Option II	Option III
Net of Tax Payment to non-resident	100	100	100
(+) Grossing up	11.11*	11.11*	20
Total	111.11	111.11	120
(-) TDS	11.11	22.22	20
Payment to be made to the non-resident	100	88.89	100

* Assuming a treaty rate of 10%

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

Interplay of DTAA, PAN & TRC



AN OVERVIEW OF TDS U/S. 195 (Cont..)

Section 195(2) – Application by Payer

- S.195(2) - Application by the Payer to the AO for determining appropriate portion of sum chargeable
- Appeal against order under S. 195(2) - S. 248
 - Amendment by Finance Act 2007
 - S. 248 allows the payer to file an appeal before the CIT(A) provided the tax is deposited by the payer in the exchequer of the Government
 - If tax is borne by the payee, a payer cannot file an appeal under section 248 of the Act

AN OVERVIEW OF TDS U/S. 195 (Cont..)

Section 195(2) - Application by Payer Contd...

- **Whether an application can be made under S. 195(2) for NIL Withholding order?**
 - Held yes in case of Mangalore Refinery and Petrochemicals Ltd (113 ITD 85) (Mum)
 - However, a contrary view has been taken in the following cases:
 - Czechoslovak Ocean (81 ITR 162) (Cal)
 - Graphite Vicarb India Ltd (28 TTJ 425) (Cal)
 - Biocon Biopharmaceuticals (36 taxmann.com 291) (Bang)
 - Practical Purposes, Application u/s 195(2) is adopted for both nil as well as lower withholding tax rate order

AN OVERVIEW OF TDS U/S. 195 (Cont..)

Section 195(2) - Application by Payer Contd...

- Whether applying for WHT certificate compulsory?
Principles laid down in GE India Technology Centre (234 CTR 153) (SC):
 - Application u/s 195(2) presupposes that the payer is in no doubt that tax is payable in respect of some part but is not sure as to what should be the amount on which tax is so deductible.
 - Where a person is fairly certain about the portion of sum chargeable to tax, then he can make his own determination as to whether TDS is deductible and if so what should be the amount.
 - In case of composite payments, where a payer has a **doubt** regarding determining the appropriate portion of sum chargeable under the act, he **must** make an application u/s 195
- [List of cases on the above issue before the above Supreme Court Decision was delivered:
 - Held yes in 320 ITR 209 (Kar), 274 ITR 20 (Delhi), 117 TTJ 456(Delhi ITAT),278 ITR (AT) 57 (Bangalore ITAT), 22 DTR 361 (MUM-SB), 86 ITD 791 (Mum), 90 ITD 793 (Mum)
 - Held no in 230 CTR 365 (Delhi HC), 2010-TIOL-182-ITAT-MAD-SB (Chennai SB), 99 ITD 91 (Mum, ITAt), 76 ITD 37 (Hyd. ITAT),111 ITD 155 (Chennai ITAT), 114 TTJ 632]

AN OVERVIEW OF TDS U/S. 195 (Cont..)

Section 195(2) - Application by Payer Contd...

- Whether a work involves multiple phase, in such scenario, is it sufficient if order under S. 195 is obtained for phase I of the work or whether order is to be obtained for all the phases of the work?
 - Mangalore Refinery and Petrochemicals Ltd. (113 ITD 85) (Mum)
- Whether order under S. 195(2) of the Act is subject to revision under S. 263?
 - BBCI vs. DCIT (exemption) (97 TTJ 751) (Mum)
- Whether order u/s 195(2) are not conclusive and whether the department can take a contrary view in the assessment proceedings?
 - CIT vs. Elbee Services Pvt. Ltd. 247 ITR 109 (Bom)

AN OVERVIEW OF TDS U/S. 195 (Cont..)

Section 195(2) - Application by Payer Contd...

- No time limit for passing order u/s 195(2):
 - Blackwood Hodge (India) Pvt. Ltd. 81 ITR 807 (Cal)
 - Central Associated Pigment Ltd. 80 ITR 631 (Cal)
- Application under Sec 195(2) can not be made for Salary payment

AN OVERVIEW OF TDS U/S. 195 (Cont..)

Section 195(3) - Application by Payee

- **Section 195(3) - Application by NR payee for NIL tax withholding (Rule 29B)**
 - Applicable to:
 - Foreign bank branches and
 - Other branches (in operation for at least 5 years)
 - Value of Fixed assets in India exceed Rs. 50 Lakhs
- **Whether certificate under S. 195(3) of the Act can be appealed?**

AN OVERVIEW OF TDS U/S. 195 (Cont..)

Section 195(4) – Validity of certificate issued by AO

- A certificate granted u/s 195(3) shall remain in force:
 - for FY mentioned therein, or
 - until cancelled by the AO before expiry of FY
- Provisional Certificate only
- Payer may be liable as an Agent u/s 163
 - National Industrial Development Corp. Limited (253 ITR 489) (Del) (HC)
 - Hindalco Industries (ITAT – Mumbai)

AN OVERVIEW OF TDS U/S. 195 (Cont..)

Refund of Tax Withheld u/s. 195:

- Conditions to be satisfied for refund :
 - contract is cancelled and no remittance is made to the NR
 - the remittance is duly made to the NR, but the contract is cancelled and the remitted amount has been returned to the payee
 - contract is cancelled after partial execution and no remittance is made to the NR for the non-executed part;
 - contract is cancelled after partial execution and remittance related to non-executed part made to the NR has been returned to the payee or no remittance is made but tax was deducted and deposited when the amount was credited to the account of the NR;
 - remitted amount gets exempted from tax either by amendment in law or by notification
 - an order is passed under Sec 154 or 248 or 264 reducing the TDS liability of the payee;
 - deduction of tax twice by mistake from the same income;
 - payment of tax on account of grossing up which was not required
 - payment of tax at a higher rate under the domestic law while a lower rate is prescribed in DTAA.
- Refund of TDS pursuant to favorable appellate order ?
 - TELCO (83 TTJ 458) (Mum)
 - Samcor Glass Ltd. (94 ITD 202) (Del)
 - Kotak Mahindra Primus (105 TTJ 578) (Mum)

Impact of Circular No. 7 dated October 23, 2007?

AN OVERVIEW OF TDS U/S. 195 (Cont..)

Refund of Tax Withheld u/s. 195 contd...

- However , the refund can be claimed subject to the following further conditions:
- Prior approval of the Chief Commissioner of Income-tax or the Director General of Income-tax concerned would be required;
- The claim for refund should be made within two years from the end of the financial year in which the tax is deducted at source.
- The excess tax can be first adjusted against the existing liability of the deductor if any and then the balance amount if any may be refunded;
- A undertaking stating that no certificate under section 203 of the Income Tax Act has been issued to the non- resident or in case where certificate has been issued, the same shall be recalled or he shall indemnify the Income Tax Department from any loss on account of any separate claim of refund for the same amount by the non-resident;
- The refund under this circular would be granted only if the deductee has not filed return of income and the time limit for filing the return of income has expired;
- The Circular also states that the amount paid into the Government account in such cases is no longer 'tax'. In view of this, no interest under section 244A is admissible on such refunds.

AN OVERVIEW OF TDS U/S. 195 (Cont..)

Consequences of non / short deduction of TDS

- Disallowance u/s. 40(a)(i) or Section 58(1)(a)(ii):
 - Favorable view – no disallowance if tax deducted though at incorrect rate – Apollo Tyres Ltd (35 taxmann.com 593), UE Trade Corpn. (28 taxmann.com 77), (25 taxmann.com 171), Bench of Mumbai ITAT in ITA No. 20/Mum/2010 in the case of DCIT v M/s Chandabhoy & Jassobhoy (17 taxmann.com 158), S K Tekriwal – Kolkata High Court (ITA No 1135/Kol/2010)
 - Against view - proportionate disallowance - Beekaylon Synthetics Ltd. (ITA No. 6506/M/08)
- Can depreciation be disallowed, if, TDS on capital expenditure not deducted? (3 SOT 798 (2005))
- If the Indian Co. has not deducted the Tax at source u/s 195, can the dept proceed to recover the tax from both?. i.e. Indian Party and Foreign party. (Explanation to Sec. 191 r.w. Section 205)

AN OVERVIEW OF TDS U/S. 195 (Cont..)

Interest u/s. 201(1A)

- Simple Interest @ 1% per month is payable by the person who fails to deduct the tax as required and/or pay it within time.
- ITAT decision in Todi Investments (P) Ltd. (4 ITD (Cal) 360) held that the date of actual deduction of tax is relevant for levying interest U/s. 201(1A).
- If the payee has already paid the tax due on the payment received, the payer is not liable for the tax but continues to remain liable for the interest & penalty. (Hindustan Coca-Cola Beverage (P) Ltd. (293 ITR 226(SC)))

Penalties

Prosecution - (Section 276 B)

Failure to pay the tax deducted - Section 221

Failure to deduct tax - Section 271C

Failure to file the TDS Return - Section 272A

AN OVERVIEW OF TDS U/S. 195 (Cont..)

Penalties - (Section 221; Section 271C)(Refer Hindustan Coca Cola (293 ITR 226 (SC))

The Finance Act, 2008 was retrospectively amended wef 1.06.02, Section 201(1) of the Act to provide that if any person who is required to deduct tax in accordance with the Act does not deduct or does not pay whole or part of the amount, he shall be deemed to be assessee in default

Finance Act 2012 wef 1.7.12 inserted a proviso to section 201 to provide that such person will not be deemed to be an assessee in default if the recipient of the amount from which tax has to be deducted is Resident and if such resident:

- has furnished his return of income under section 139;
- has taken into account such sum for computing income in such return of income; and
- has paid the tax due on the income declared by him in such return of income,
- and the person furnishes a certificate to this effect from an accountant in such form as may be prescribed:

PART - B

CERTIFICATE BY A CA FOR REMITTANCE

(As Amended By Notification No.58/2013 w.e.f. 1st
October 2013)

CERTIFICATE BY A CA FOR REMITTANCE

- CA Certificate to be obtained in Form No. 15CB
- Form 15CA to be furnished electronically by the assessee on e-filing portal.
- As per Explanation 2 of Rule 37BB, the following 28 payments do not require any information to be furnished:

(Budget 2015 has proposed amendment to Section 195 (6) to make reporting mandatory in respect of every payment!!)

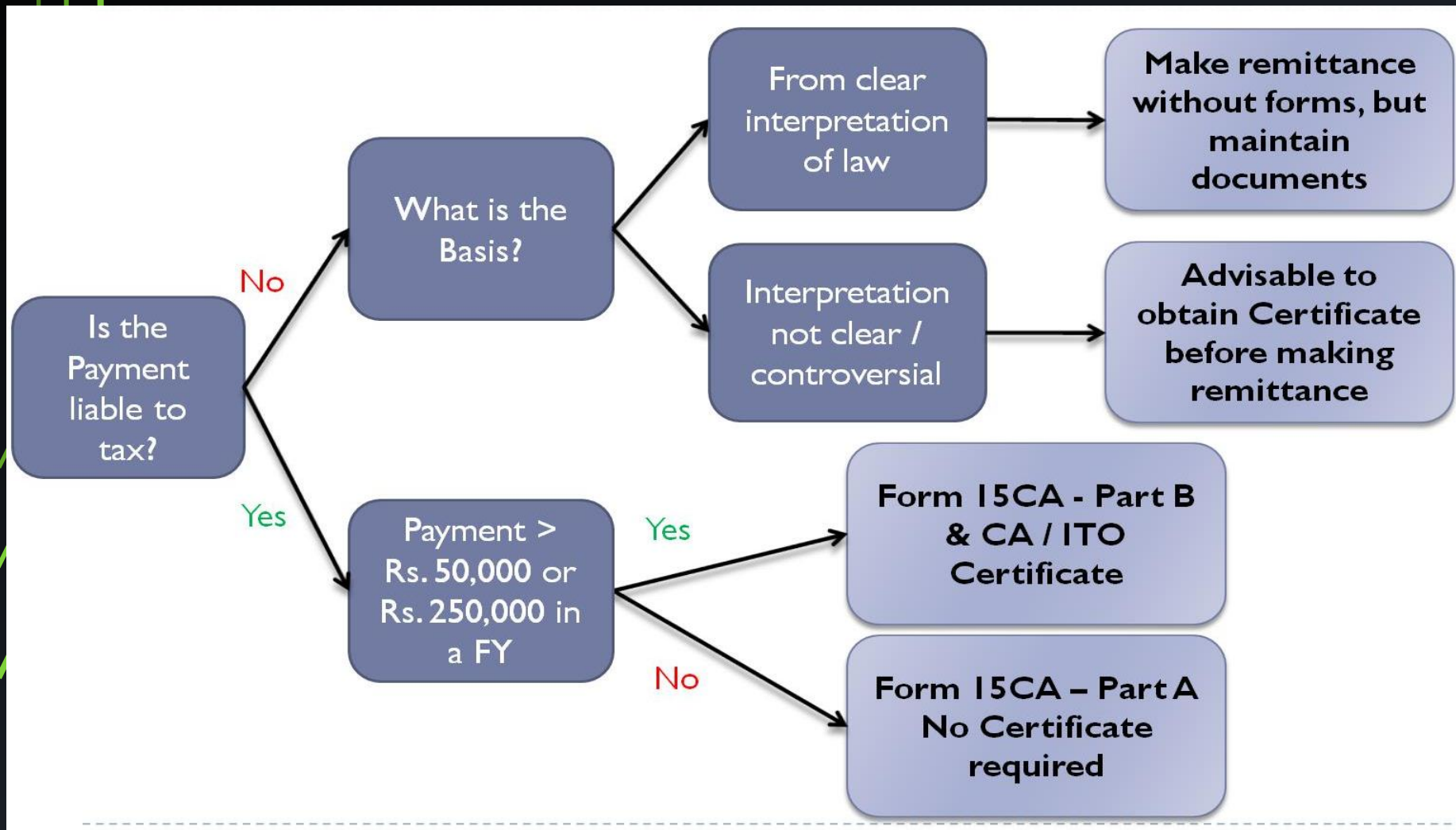
Sl. No.	Purpose code as per RBI	Nature of payment
1	S0001	Indian investment abroad-in equity capital (shares)
2	S0002	Indian investment abroad-in debt securities
3	S0003	Indian investment abroad-in branches and wholly owned subsidiaries
4	S0004	Indian investment abroad-in subsidiaries and associates
5	S0005	Indian investment abroad-in real estate
6	S0011	Loans extended to Non-Residents
7	S0202	Payment for operating expenses of Indian shipping companies operating abroad
8	S0208	Operating expenses of Indian Airlines companies operating abroad
9	S0212	Booking of passages abroad - Airlines companies
10	S0301	Remittance towards business travel
11	S0302	Travel under basic travel quota (BTQ)
12	S0303	Travel for pilgrimage
13	S0304	Travel for medical treatment

Sl. No.	Purpose code as per RBI	Nature of payment
14	S0305	<i>Travel for education (including fees, hostel expenses etc.)</i>
15	S0401	<i>Postal services</i>
16	S0501	<i>Construction of projects abroad by Indian companies including import of goods at project site</i>
17	S0602	<i>Freight insurance - Relating to import and export of goods</i>
18	S1011	<i>Payments for maintenance of offices abroad</i>
19	S1201	<i>Maintenance of Indian embassies abroad</i>
20	S1 202	<i>Remittances by foreign embassies in India</i>
21	S1301	<i>Remittance by non-residents towards family maintenance and savings</i>
22	S1302	<i>Remittance towards personal gifts and donations</i>
23	S1303	<i>Remittance towards donations to religious and charitable institutions abroad</i>
24	S1304	<i>Remittance towards grants and donations to other Governments and charitable institutions established by the Governments</i>
25	S1305	<i>Contributions or donations by the Government to international institutions</i>
26	S1306	<i>Remittance towards payment or refund of taxes</i>
27	S1501	<i>Refunds or rebates or reduction in invoice value on account of exports</i>
28	S1503	<i>Payments by residents for international bidding.</i>

CERTIFICATE BY A CA FOR REMITTANCE

- W.e.f. 1.10.2013 :
- Only Taxable remittances are required to be reported in Form 15CA.
- Obtaining Form 15CB is not required if, taxable remittances are covered by Part A of new Form 15CA –sum remitted does not exceed Rs. 50,000 per transaction and the aggregate of such payments during the financial year doesn't exceed Rs. 2,50,000
- For sums other than above, 15 CB is required.
- Form 15CA to be signed by person competent to sign tax return
- Digital Signature not mandatory

Revised Remittance Procedures – Flow Chart



Form 15CB – Analysis

- CA certificate to be provided in physical form
 - Information to be uploaded online in Part B of Form 15CA
- Documents that should be reviewed
 - Certified copy of signed contract
 - Certified copy of signed/stamped invoice
 - Certified ledger account
 - Correspondence on which reliance is placed including emails
 - Supporting vouchers in case of reimbursements a must
 - Print out of website details of Payee
- Physical certificate should be amended for documents reviewed

CERTIFICATE BY A CA FOR REMITTANCE

Some Issues:

Whether CA Certificate 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 CA Certificate is not in substitution of the scheme u/s 195(2) but merely to supplement the same.”*
 - The CA Certificate has no role to play for determination of TDS liability but is merely to support assessee’s contention while making remittance to a non-resident
 - A payer at his own risk can approach a CA and make remittance to a non-resident on the basis of CA’s Certificate. Consequences of non-deduction and short deduction would, however, follow.
 - In the said case, it was also held that no appeal to a CIT (A) u/s 248 is maintainable against the CA Certificate issued under CBT circular no. 759

CERTIFICATE BY A CA FOR REMITTANCE

Some Issues (Contd...):

- Consequence of difference of opinion between a CA and AO
- Consequence of change in the view due to an amendment or a judicial decision or circular subsequent to issue of certificate.
- Determination of any “special relation” between payer and payee.
- Tax residency certificate – if not available?
- Tax residency certificate—not sufficient -- dual residency?
- Validity period of tax residency certificate / undertaking / declaration from the payee – for a year or for single payment?

PART - C

SCOPE OF INCOME OF A NON-RESIDENT

SCOPE OF A INCOME OF A NON-RESIDENT

1.	Business Profits	Taxable if Business Connection in India or property or asset or source in India or trf. of a capital asset situated in India.{New retrospective Explanations 4 and 5 to section 9(1)(i) for meaning of “through” and to cover indirect transfers}
2.	Salaries	Taxable if services are rendered in India [Section 9(1)(ii)] (Refer Eli Lilly (SC))
3.	Dividends	Taxable if paid by an Indian Company [Section 9(1)(iv)]- (At present exempt)
4.	Capital Gains on Shares / Property	Taxable if situs of Shares / Property in India
5.	Rental from Properties	Taxable if situs of Property in India
6.	Interest/Royalty/FTS	Taxable if sourced from India

SCOPE OF A INCOME OF A NON-RESIDENT

Explanation 4 and 5 to section 9(1)(i)

Explanation 4 :For the removal of doubts it is hereby clarified that the expression “through” shall mean and include and shall be deemed to be always meant and included “by means of”, “in consequence of”, or “by reason of”

Explanation 5: For the removal of doubts it is hereby clarified that an asset or a capital asset being any share or interest in a company or entity registered or incorporated outside India shall be deemed to have been situated in India, if the shares or interest derives, directly or indirectly, its values substantially from the asset located in India

SCOPE OF A INCOME OF A NON-RESIDENT

SOURCE RULE U/S 9

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

Royalty / FTS income is taxable in India if service is used / Utilised in India. Place of rendering service not relevant

SCOPE OF A INCOME OF A NON-RESIDENT

Source Rule (Contd...)

Source Rule Under Article 10,11 & 12 of the Treaty

Interest, Royalty & FTS are deemed to arise in India only if:

- Payer is a resident of India or
- Payer has a PE in India in Connection with which the liability to pay interest, royalty or FTS has arisen and
- Such payment is borne by the PE.

PART - D

CERTAIN CROSS BORDER PAYMENTS – WITHHOLDING TAX ISSUES:

- BUSINESS INCOME (OF NRI)
- ROYALTIES & FTS
- REIMBURSEMENT OF EXPENSES

CERTAIN CROSS BORDER PAYMENTS – WITHHOLDING TAX ISSUE

Business Income (of NR)...

Off-shore Supply: (288 ITR 408 (SC))

- If title to goods passed outside India & payment outside India not taxable.
- Signing in India not relevant.
- Performing of certain activities in India (loading, unloading, inland transportation) not relevant.

Payments to Foreign Agents

- Operation outside India (CBDT Circulars 23 & 786)
- Not taxable in India – (125 ITR525 (SC),(267 ITR725)
- Contrary view taken by AAR in case of Wallace Pharma (278 ITR 97) & Rajiv Malhotra 284 ITR 564 (AAR)
- Marketing Survey Services and identifying potential customers—is “consultancy services”— (39 Taxmann.com 50)(Cochin Tribunal)

CERTAIN CROSS BORDER PAYMENTS- WITHHOLDING TAX ISSUE

Royalties & FTS (Sec. 9(1)(vi) & Sec. 9(1)(vii))

New Explanations 4, 5 and 6 to section 9(1)(vi)

Explanation 4: For the removal of doubts it is hereby clarified that the transfer of all or any rights in respect of any such a 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 license) irrespective of the medium through which such right is transferred.

Explanation 5 : For the removal of doubts it is hereby clarified that royalty includes and has always included consideration in respect of any right, property or information whether or not –

- The possession or control of such a right, property or information is with the payer
- such a right, property or information is used directly by the payer
- The location of such a right, property or information is in India

Explanation 6.—For the removal of doubts, it is hereby clarified that the expression “process” includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret;’.

CERTAIN CROSS BORDER PAYMENTS – WITHHOLDING TAX ISSUE (Cont..)

Royalties And FTS (Contd...)

- Software / E-Commerce Payments

License to use Software or for electronic downloading of computer programs / digital content may give rise to use of “copyright” as per Copyright Act.

Is it, thus, covered in “royalty”?

The Test (OECD / IRS View) : *What is the consideration for ?*

- *if for rights to use copyright then royalty;*
- *if use of copyright only incidental, then business profits;*
- *if for a copyrighted article then business profits;*

CERTAIN CROSS BORDER PAYMENTS – WITHHOLDING TAX ISSUE (Cont..)

Royalties And FTS (contd...)

The Test (OECD / IRS View) : *What is the consideration for ? (Contd)*

- *if for rights in the copyright i.e. for transfer of ownership then Business Income or Capital Gains.*
- *if for rights in relation to copyright – to use & make copies for operation only within its business – then business profits.*
- *if Capital Gains a Mixed Payment i.e. sale of hardware with embedded software then break-up unless one part is the dominant part & other parts are ancillary.*

CERTAIN CROSS BORDER PAYMENTS – WITHHOLDING TAX ISSUE (Cont..)

Purchase of Software..

Embedded in hardware

Sold As Copyrighted Article

– Not Royalty....

- If software is supplied along with hardware as part of the equipment
- software is an integral part of the supply of equipment
- there is no separate sale of software

– As decided in Ericsson(343 ITR 470), SIEMENS AKTIENGESELLSCHAFT(ITA No 4502/ Mum/ 2009).

Implications of New Explanation 4 to Section 9(1)(vi)

CERTAIN CROSS BORDER PAYMENTS – WITHHOLDING TAX ISSUE (Cont..)

- **Sold As Copyrighted Article :**

- **Not Held as Royalty:**

- **Velankani Mauritiys v. DDIT (ITAT Bangalore), Kansai Nerolac Paints v. ADIT (ITAT Mumbai) & Dassault Systems 229 CTR 105 (AAR) where it has been held following Tata Consultancy Services 271 ITR 401 (SC) that :income from software supply is not “royalty” but is “business profits” & not chargeable to tax in the absence of a PE**

- Delhi High Court in case of Infrasoftware Ltd (39 taxmann.com 88) held:

- *“What was transferred was neither the copyright in the software nor the use of the copyright in the software, but what was transferred was the right to use the copyrighted material or article which was distinguishable from the rights in a copyright”.*

- *“The right that was transferred was not a right to use the copyright but was only limited to the right to use the copyrighted material and the same would not give rise to any royalty income and would be business income”.*

CERTAIN CROSS BORDER PAYMENTS – WITHHOLDING TAX ISSUE (Cont..)

- **Sold As Copyrighted Article – Held as Royalty –**

In case of **Synopsys & Samsung (203 Taxmann477)**– Karnataka High Court held

- Software purchase are for certain rights in the copyrights & meets the definition of royalty as per applicable Treaty as well as under the act.
 - “right to make a copy of the software and storing the same in the hard disk of the designated computer and taking backup would amount to copyright work” – Samsung Verdict.
- Mumbai ITAT in case of **Reliance Infocom (Latest Decision)** explained
 - “It is well settled that copyright is a negative right. It is an umbrella of many rights and licenses granted for making use of the copyright in respect of software. Therefore, the contention of the taxpayer that there is no transfer of copyright or any part thereof under the agreements with the non-resident supplier of software cannot be accepted”
 - In the current case before ITAT, software was supplied separately and not as embedded software along with equipment and hence payments in this case amounts to Royalty

CERTAIN CROSS BORDER PAYMENTS – WITHHOLDING TAX ISSUE (Cont..)

- **E – Commerce :**

Right Florists (P.) Ltd. (32 taxmann.com 99)

- It is the Web-server and not the Website which constitutes a “Permanent Establishment” – examined only on the basis of website simplicitor and no other additional basis.

eBay International AG (140 ITD 20)

User Fees paid by Indian users of website cannot be characterised as “Fees For Technical Services”

- **Pinstorm (2012) and Yahoo India (2011)**

Whether payments for keyword advertising are for “use of equipment” —Held
No

CERTAIN CROSS BORDER PAYMENTS – WITHHOLDING TAX ISSUE (Cont..)

Royalties And FTS (Contd...)

- Payments for repairs
 - Sahara Airlines (79 TTJ 268) [Specialized Repairs – FTS]
 - Lufthansa Cargo (91 ITD 133 (Delhi)) [General repairs – Not FTS]
 - Airport Authority of India (273 ITR 437)
 - Contrary view – Mannesmann Demag (26 ITD 198)
- Payments for testing charges
 - Maruti Udyog Ltd. (34 SOT 480)(Delhi ITAT)
 - South West Mining Ltd (278 ITR 233)
 - Ashapura Minichem (ITAT Mumbai)
- Payments to Credit Rating Agency – Taxable as royalty under the Treaty as held in (Essar Oil)(4 SOT 161 / Mum)
- Payment for services related to GDR Issue(80 TTJ 120, 30 SOT 374, 34 SOT 187)

CERTAIN CROSS BORDER PAYMENTS – WITHHOLDING TAX ISSUE (Cont..)

Make Available

Meaning

- Included Services” defined narrowly to mean services which “**make available**” technical knowledge, experience, skill, know-how or processes or which consist of development and transfer of technical plan or technical design
- MoU of the India USA Tax Treaty:
 - Technology will be considered "made available" when the person acquiring the service is enabled to apply the technology
 - Provision of requiring technical input by the person providing the service does not per se mean that technical knowledge, skills, etc., are made available
 - Use of a product which embodies technology shall not per se be considered to make the technology available
- If the services do not “make available” technical knowledge, etc., then, they are outside the ambit of FIS Article and not taxable

CERTAIN CROSS BORDER PAYMENTS – WITHHOLDING TAX ISSUE (Cont..)

Make Available (Contd...)

Services regarded as “make available”:

- Providing technical plan, design and information to enable recipient to execute and install the water features [**Gentex Merchants (P) Ltd. 94 ITD 211 (Kol)**]
- Technical assistance to enable recipient to design, construct and operate a plant to manufacture aluminum and training for application of technical know how [**Hindalco Industries Ltd. v. ACIT 94 ITD 242 (Mum)**]
- Preparing a bankable project report with complete details and vetting a project report to enable the service recipient to raise a foreign loan for its project [**ITO v. Sinar Mas Pulp & Paper (India) Ltd. 85 TTJ 794 (Del)**]

CERTAIN CROSS BORDER PAYMENTS – WITHHOLDING TAX ISSUE (Cont..)

Make Available (Contd...)

Services not regarded as “Make Available”

- Services of preparing material safety data sheets in EU format which contained information required as per EU regulations [Nocil v. DCIT 96 TTJ 765 (Mum)]
- Strategy consultancy services such as marketing and sales strategy, business strategy and portfolio strategy [DCIT v. Boston Consulting Group Pte Ltd 93 TTJ 293 (Mum), 99 ITD 549 (Mum), 39 SOT 187 (Mum)]
- Services which are of general nature & which don't result into transfer of technology fall outside the purview of make available – [Veeda Clinical Research (Ahmedabad – ITAT) (35 Taxmann.com 577)]
- Repair of software [In re. Airports Authority of India 273 ITR 437 (AAR)]
- Surveillance for the purpose of ISO certification [NQA Quality Systems Registrar Ltd. v. DCIT 92 TTJ 946 (Del)]
- Managerial Services Not “Make available” [(80 TTJ 120)(Mum), (242 ITR 208 (AAR)) & (99 TTJ 857/Mum)]

CERTAIN CROSS BORDER PAYMENTS – WITHHOLDING TAX ISSUE (Cont..)

FTS to have HUMAN ELEMENT..

- In case of Bharti (319 ITR 139) , it was held the words "technical services" have to be read in the narrower sense by applying the rule of noscitur a sociis, particularly, because the words "technical services" appear in between the words "managerial and consultancy services”

Reimbursement -

Nature of Expenses	Case law in Favor of Assessee	Case law in against the Assessee
Reimbursement of Cost of services of Third Party engaged by Non Resident	<p>C U Inspections India Pvt Ltd. (Mum – ITAT) (ITA No.577/Mum/2011)</p> <p>Nathpa Jhakri Joint Venture – 37 SOT 160 (Mum)</p> <p>Madicon Network P Ltd – 14 SOT 204 (Del)</p>	Wallace Pharmaceuticals P Ltd – 278 ITR 9 (AAR)
Reimbursement of allocated cost	<p>CIT vs. Dunlop Rubber Co. Ltd., (1983) 142 ITR 493 (Cal.)</p> <p>ABB Limited (2010) 322 ITR 564 (AAR)</p>	Danfoss Ind. 268 ITR 1 (AAR)

Nature of Expenses	Case law in Favor of Assessee	Case law in against the Assessee
Payment for services rendered at cost	Timken India Ltd - 273 ITR 67 (AAR)	AT&S P Ltd – 157 Taxman 198 (AAR)
Reimbursement of incidental expenses in addition to payments of Royalty & FTS	<p>Telco Ltd - 245 ITR 823 (Bom)</p> <p>Industries Engg Project (P) Ltd - 202 ITR 1014 (Del)</p> <p>Clifford Chance - 82 ITD 106 (Mum)</p> <p>Mahindra and Mahindra Ltd - 1 SOT 896 (Mum)</p> <p>Fortis Healthcare Ltd - 45 SOT 190 (Chd)</p>	<p>CSC Singapore Pte Ltd - 2012-TII-35-ITAT-DEL-INTL (Del)</p> <p>Bovis Land Lease – 36 SOT 166 (Bang)</p> <p>Ashok Leyland - 120 ITD 14 (Chennai)</p> <p>SRK Consulting - 230 ITR 206 (AAR)</p> <p>Cochin Refineries Ltd - 222 ITR 354 (Ker)</p>
Reimbursement of living allowance, etc of a person deputed to India by the non-resident	<p>BHEL - 252 ITR 218 (Del)</p> <p>Goslino Mario - 241 ITR 312 (SC)</p> <p>Morgenstern Werner - 233 ITR 751(All)</p> <p>HCL Info System (274 ITR 261 (Delhi)</p>	Centerica Offshore (44 Taxmann.com 300 (Delhi)



THANK YOU

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