

Withholding Tax on Foreign Remittances under Section 195 of Income Tax Act

Content

Section Analysis

- Importance of Section 195
- Objective of Section 195
- Chargeability of Section 195
- Unique Feature of Section 195
- Overview of Section 195

Tax Rates/ 206AA

Exchange Rates

Latest Amendments in Section 195

Issues

Consequences of Non- Compliance of TDS ?

Importance of Section 195

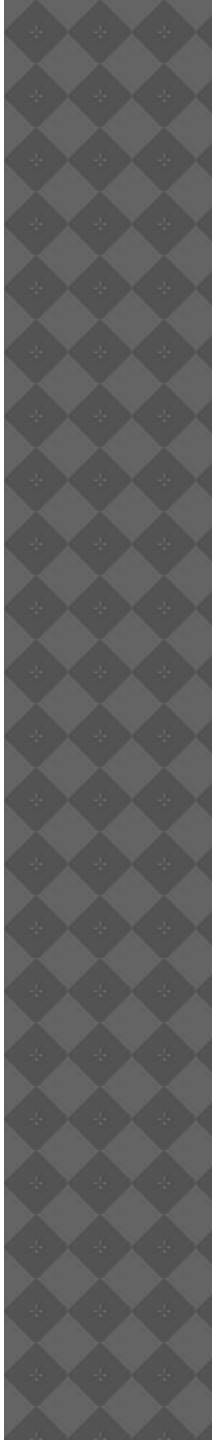
- More and More Cross Border Payments
- Increased revenue's attention like form 15CA and 15CB
- Professional Diligence for CA's
- Default consequences for payer:
 - *Demand u/s Section 201; Interest of 201(1A)*
 - *Penalty u/s Section 221 &/or 271C*
 - *Prosecution u/s Section 276B*
 - *Disallowance of expense u/s Section 40(a)(i)*

Objective of Section 195 of the Act

Circular No. 152 dt. 27-11-1974

- ❖ Tax is collected at the earliest point of time.
- ❖ No difficulty in collection of tax at the time of assessment.
- ❖ To avoid loss of revenue as the non residents may sometimes have no assets in India from which subsequent recovery can be made.
- ❖ Example of nature of payment covered in the circular – royalty/ fees for technical services.

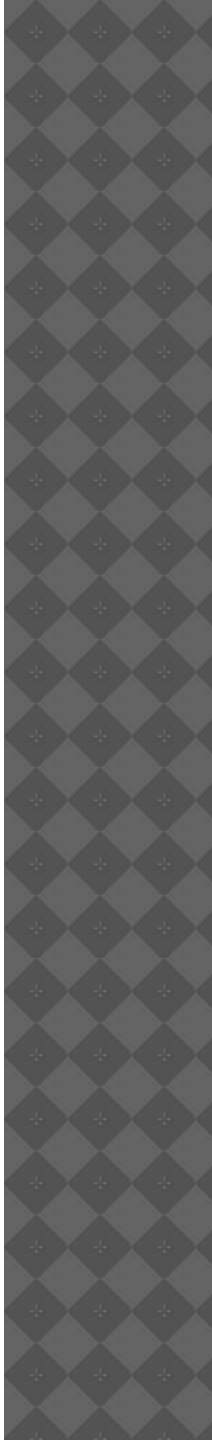
Chargeability.....u/s 195



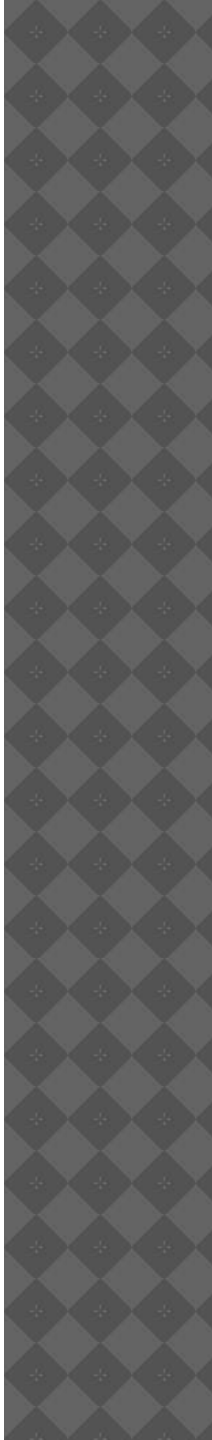
Unique Features of section 195 as compared to other TDS provisions

- Unlike **personal payments** exempted in section 194C etc; no exclusion for the same in section 195 (all payments covered *excl. salaries* provided chargeability there) 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

Overview of section 195



Overview of section 195



Section 195(1)

Who is responsible to deduct TDS	<ul style="list-style-type: none">- Any person- as defined u/s 2(31)- Includes virtually everyone
Payment made to non resident	<ul style="list-style-type: none">- Includes all non- resident having presence in India or not- It does not include RNOR
Determine-Status of NR	<ul style="list-style-type: none">- Under sec 6- In case of dual residence and if tie breaker - DTAA is applied
Payment covered	<ul style="list-style-type: none">- Any sum chargeable under the Act- Except Salary and dividend referred u/s 115O
At what time TDS has to be deducted	At the time of credit or payment whichever is earlier.
Rate of TDS	Relevant rate in force

Section 195(2): Application by Payer for lower or nil withholding certificate

- ☐ Application by the Payer to the AO for determining (by general or special order) appropriate portion of such sum chargeable, upon such determination, tax shall be deducted under subsection (1) only on that proportion of the sum which is so chargeable.
- ☐ Alternate Mechanism: CA certificate*

Sec 195(3)- Application by payee

- ❖ Payee can make an application for a certificate.
- ❖ Application can be made in prescribed format :-
 - form No. 15C in case of banking company
 - form No. 15D in any other cases
- ❖ Condition for issue of certificate u/s 195(3) of the Act (Rule 29B).

Sec 195(4)- validity of certificate

- A certificate granted under sub-section(3) shall remain in force till the expiry of period specified therein or, if it is cancelled by the Assessing Officer before the expiry of such period, till such cancellation.

Sec 195(5)- power of cbdt to issue notification

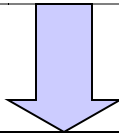
- The Board may make rules specifying the cases in which, and the circumstances under which, an application may be made for the grant of a certificate under sub section (3) with the specified conditions.

Section 195(6)

New Rules for Information

Section 195(6) introduced by Finance Act 2008 (w.e.f. 1/4/2008)

- ▯ **Requires the person making payment to NR to furnish the information relating to payment**



Furnishing of information - Rule 37BB (w.e.f. 1 July 2009)

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

Sec 195(7) :- authorize a board to specify class of persons or cases

Applicable w.e.f 1/07/2012 Notwithstanding anything contained in sub-section (1) and sub-section(2), the board may, by notification in the Official Gazettee, 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.

**Rates prescribed under ACT being required to be increased by
surcharge & education cess**

SURCHARGE & EDUCATION CESS

• In case of Non-domestic Companies where payment for Non-domestic Surcharge

Section 206AA(1)

(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 XVIIB (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 20% (twenty percent).

(2) Further, PAN to be quoted on all correspondences, bills, vouchers, etc. between payer and payee.

Exchange Rates

- ❑ Exchange rate of RBI on the day on which TDS is required to be deducted has to be considered.

Amendment in Section 195 – Finance Act 2012

- 1) The scope of withholding tax obligation on payment of income to non-resident expressly extended to all persons including non-residents irrespective of them having a residence or place of business or business connection or any other presence in India
- 2) Effective 1 July 2012, payment to non-residents by specified persons or in specified cases (to be notified) to require an application to be made to the Tax Officer for determination of withholding tax, irrespective of whether such payment is taxable in India or not

Obligation to withhold the tax will be applied regardless of absence of any territorial nexus.

Amendment in section 90

- ❖ As per recent amendment to the Indian Income Tax Act as announced in Union Budget 2012, NRIs who wish to avail DTAA benefit have to mandatorily provide '**Tax Residency Certificate (TRC)**' to the deductor (Bank). This is applicable for all NR customers who wish to avail DTAA benefit with effect from 1st April 2012..
- ❖ TRC is issued by the tax/government authority of the country where the NRI resides. So please check with the Tax Department or Finance Ministry in your country or with your Chartered Accountant abroad as to procedure to obtain TRC. No other document in lieu of TRC shall be considered for availing the DTAA rate for the said financial year.
- ❖ Section 90(4) has been inserted in the aforesaid section with effect from assessment year (AY) 2013-14 to provide that an assessee, not being a resident, to whom a DTAA applies, shall not be entitled to claim any relief under such DTAA unless a certificate, containing prescribed particulars, 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.

ISSUES

S.No	Content
1.	Section 9/DTAA
2.	Issues related to payments covered in section 195 ?
3.	Point of withholding tax
4	TDS on Gross or Net Amount ?
5.	Reverse Charge ?
6.	TDS on software ?
7.	Issues related to 15CA & 15CB
8.	Whether for all phases of work – separate certificate is required?
9.	Reimbursement of expenses
10.	Refund of Tax Deposit

Section 9/ DTAA

Chargeable to tax under Act: Act or DTAA/Treaty whichever is beneficial prevails

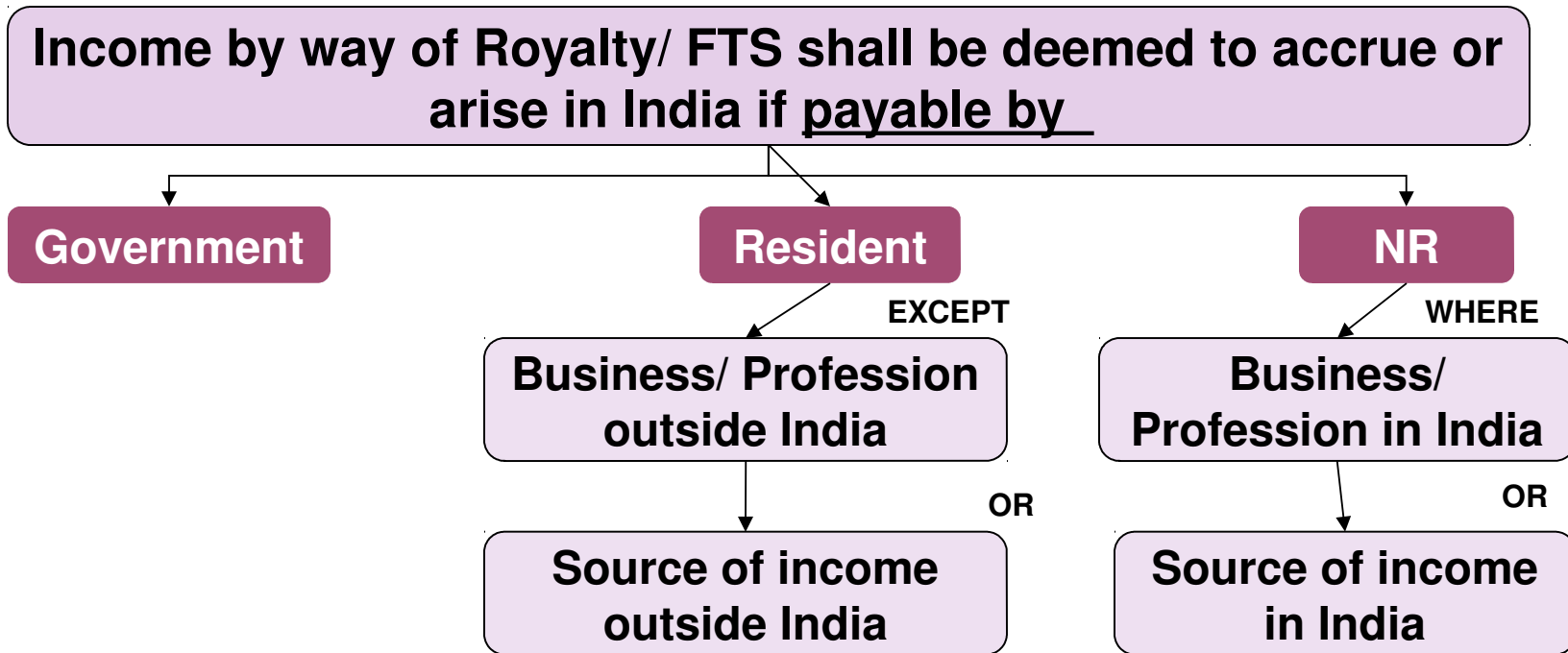
Nature of Income	Act (apart from section 5 where-ever applicable)	Treaty/DTAA
Business/Profession	Section 9(1)(i): Concept of Business Connection	Article 5;7; 14: Concept of Permanent Establishment/PE or Fixed Base
Salary Income	Section 9(1)(ii)	Article 15
Dividend Income	Section 9(1)(iv) and section 115A	Article 10
Interest Income	Section 9(1)(v) and section 115A	Article 11
Royalties	Section 9(1)(vi) and section 115A	Article 12
Fees for technical services/FTS	Section 9(1)(vii) and section 115A	Article 12
Capital Gains	Section 9(1)(i) and section 45	Article 13

Nature of income- when taxable ?

Nature of Income	Taxability
Business Profession sec. 9(1)(i)	Taxable if Business Connection in India or property or asset or source in India or transfer of a capital asset situated in India
Capital Gains Sec. 9(i)(i)	Taxable if situated of Shares / Property in India
Interest Income Sec. 9(1)(v)	Taxable if sourced from India
Royalties Sec. 9(1)(vi)	Taxable if sourced from India
Fees for Technical Services ('FTS') Sec. 9(1)(vii)	Taxable if sourced from India

Royalty/ FTS as per the Act

Section 9(1)



Finance Act, 2012

Income shall be deemed to accrue or arise irrespective of whether:

- ◆ NR has residence/ place of business/ business connection in India

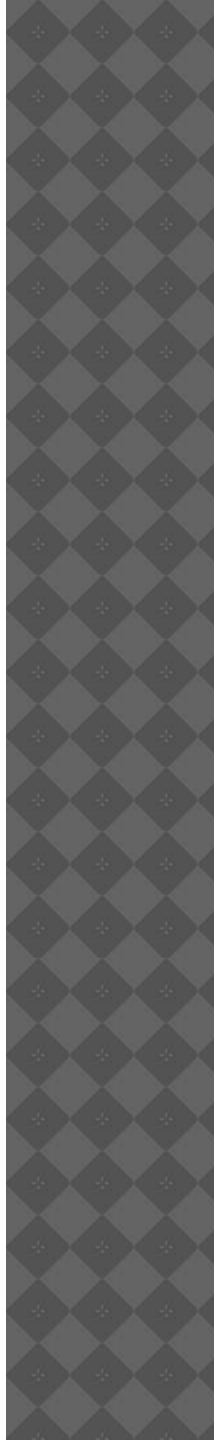
- ◆ NR has rendered services in India

Income deemed to be accruing or arising to non-residents directly or indirectly through the transfer of a capital asset situated in India is to be taxed in India with retrospective effect from 1 April 1962

Issues related to Payments covered in section 195

- 1) Payment for software-whether Royalty or not ?
- 2) Acquiring Controlling interest in Indian Company.
- 3) Payment made by Branch to HO/ other branch is subject to TDS.
- 4) Payment For Fees For technical services
- 5) Payment for Repair

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Payment For Fees For technical services

PAYMENT FOR USE OF TELEPHONE, ELECTRICITY Etc.

Case :- 1 – (251 ITR 53) (Mad) sky cell

❖ Issue :- whether FTS or Not ?

❖ Conclusion :- No

❖ FTS Excludes :-

- Construction, Assembly,
- Mining, Any like project,
- Income chargeable as salaries,

Payment For repair

Case 1

❖ **Specialized repairs –(79 TTJ 268) (Del)-Sahara**

❖ **Issues :- Whether is FTS or not ?**

❖ **Conclusion:- Specialized Repair is FTS**

Case 2

❖ **General repairs- (91 ITD 133)(Del)-Lufthansa**

❖ **Issues :- Whether is FTS or not ?**

❖ **Conclusion:- General repairs is not FTS.**

Facts of the case	Referred to Case Law
1. Payment are made from a resident to non-resident and not between two non-resident situated outside India.	Vodafone International Holding B.V Ltd(2012) 17 taxman.com 202
2. Payment made by Branch to HO/ other branch is subject to TDS	CBDT vide Circular No. 740 dt 17.4.1996, Dresdner Bank AG vs. Addl. CIT (2006) 108 ITD 375 (MUM)
3. TDS is to be deducted by branch for making interest payment to H.O	ABN Amro Bank NV (2011) 198 Taxman 376 (Cal)
4. TDS required to be deducted where Assessee treating himself as agent of non-resident	200 ITR 441 (Cal)- Grind lays Bank ltd v/s. CIT

Point of Tax Withholding

Withholding at the time of credit or payment whichever is earlier

- ◆ **Section 195(1)**

Payment of Royalty under DTAA - tax deductible on payment?

- ◆ **Affirmed by - National Organic**
96 TTJ 765 (ITAT Mum)
- ◆ **Contrary View - Flakt (India) Ltd**
267 ITR 727 (AAR)

Point of Tax Withholding

Tax to be withheld even when no remittance on adjustment of dues

- ◆ **Raymond Ltd.**
86 ITD 791 (ITAT Mum)

Tax withholding in cases where RBI approval required

- ◆ **United Breweries Ltd**
(211 ITR 256) (Kar)
- ◆ **Pfizer Corporation**
259 ITR 391 (Mum)

TDS on Gross or Net Amount

- ❖ Grossing up required in case of net of tax payments*
- ❖ Amount of tax payable by the NR has to be added to the income remitted to the NR and the tax payable by the NR should be determined with reference to the gross figure arrived.

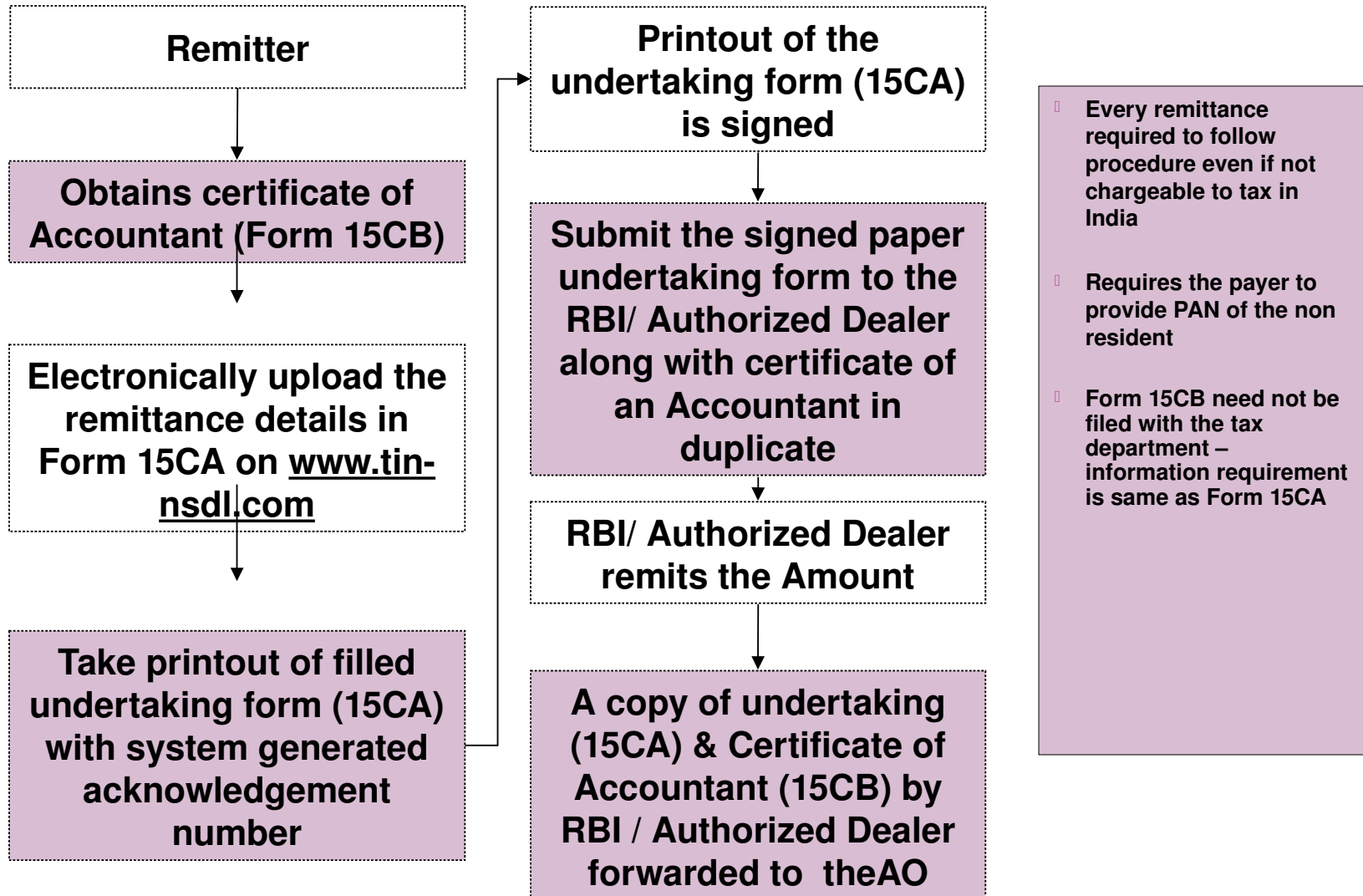
** Not applicable in case of payments referred to in S.192(1A) - Non monetary perquisites taxable as salary*

Issues related to 15CA & 15cb

S.No	Particulars
1.	Documentation by CA while issuing 15CB
2.	Whether <u>TAX RESIDENCY CERTIFICATE</u> sufficient evidence to claim Tax treaty benefits ?
3.	Verification of Permanent Establishment in India
4.	Issuance of certificate in absence of complete information about payee.
5.	Amount attributable to PE or not; if yes, then quantum of amount attributable?

Procedure

Form 15CA and 15CB (circular 4/2009)



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

- Agreement and Invoices;
- Payment details
- Correspondences
- Technical Advice
- Proof of services being rendered in case of Group Company transactions
- E-mails etc regarding pricing in case of Group Company transactions
- Remitting bank details
- Rate of conversion of foreign currency
- Tax Residency Certificate

- Declaration/Certificate from 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..)

whether for all phases of work – separate certificate is required?

Held Yes in 113 ITD 85 (issues: where ITAT order there for earlier period?; where AO/TPO order in payee case is there for earlier period? Etc)

Cost to cost reimbursement Obligation u/s 195

Cost to cost reimbursement doesnot requires TDS

Reimbursement of cost allocation

- ◆ **Danfoss**
268 ITR 1 (AAR)
- ◆ **Timken India Ltd.**
193 CTR 610 (AAR)

Reimbursement of expenses along with FTS

- ◆ **Cochin Refineries Ltd.**
222 ITR 354
(Ker)
- ◆ **Hyder Consulting Ltd.**
236 ITR 640
(AAR)

Refund of TDS u/s 195

- Referred to Circular No 7/2007, dt October 23,2007 and Circular No. 7/2011, dt September 27,2011:-
- Cases Covered:- In the following cases tax deducted u/s 195 can be refunded to the deductor:-
 - The contract is cancelled and no remittance is made to the non-resident.
 - The remittance is duly made to the non-resident, but the contract is cancelled. In such cases, the remitted amount has been returned to the person responsible for deducting tax at source.
 - The remittance is duly made to the non-resident, but the contract is cancelled. In such cases, the remitted amount has been returned to the persons responsible for deducting tax at source.

- The contract is cancelled after partial execution and no remittance is made to the non-resident for the non-executed part.
- The contract is cancelled after partial execution and remittance related to non-executed part is made to the non-resident. In such cases, the remitted amount has been returned to the person responsible for deducting the tax at sources or no remittance is made but tax was deducted and deposited when the amount was credited to the account of the non-resident.
- These occurs exemption of the remitted amount from tax either by amendment in law or by notification under the provision of Act.
- An order is passes under section 154 or 248 or 264 reducing the tax deduction liability of a deductor under section 195.

- There occurs deduction of tax twice from the same income by mistake.
- There occurs payment of tax on account of grossing up which was not required under the provision of the Act.
- There occurs payment of tax at a higher rate under the domestic law while a lower rate is prescribed in the relevant double taxation avoidance treaty entered into by India or vice versa.

Consequences of non compliance of TDS

Consequences of non compliance

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

Open house



Questions...

Thank you.....!!!!

