

INTERNATIONAL TAXATION

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SECTION 195: (TDS Deduction in Foreign Remittance):

- **Sub-section (1):** Payment to NON Residents which are taxable in India , the payer is under the obligation to deduct tax at the ' rates in force' at the time of credit or at the time of payment which ever is earlier.
- **Meaning of Rates in Force for section 195: Section 2(37A):**

The rate or rates of income tax specified in this behalf in the Finance Act of the relevant year or the rate or rates of income tax specified in an agreement entered in to by the Central Govt. u/s 90, which ever is applicable by virtue of the provisions of section 90.
- **CASE LAWS:**
- **Deduction of TDS u/s 195 arises only if the payment is chargeable to tax in India:**
 - G.E.India Technology Centre Pvt Ltd Vs. CIT (2010) 327 ITR 456 (SC).
 - CIT Vs. Neyveli Lignite Corporation Ltd (2000) 243 ITR 459 (Mad.HC).
- **No PE in India no tax on business profit of Non Resident.**
 - CIT Vs. Hyundai Heavy Industries Co. Ltd (2007) 281 ITR 482 (SC).
 - Ishikawajma Harima Heavy Industries Ltd Vs. DIT (2007) 288 ITR 408 (SC).

- **TDS deducted wrongly deductor is entitled to refund claim with interest provided no TDS certificate was issued to deductee.**
 - Sunflag Iron & Steel Co. Ltd Vs. CBDT (2016) 387 ITR 674 (Bom.HC).
 - UOI Vs. Tata Chemicals Ltd (2014) 363 ITR 658 (SC).
 - Cleanwind Power Kurnool Pvt Ltd Vs. DCIT. (W.P.(C) 3902/2020 & CM APPL 13961/2020. Order dated 08/07/2020.

- **TDS to be deducted at the time of payment in the case of remittances to non resident with DTAA**
 - National Organic Chemical Industries Ltd Vs. DcIT (2006) 6 SOT 317 (Mum. ITAT)
 - Saira Asia Interior Pvt. Ltd. Vs. ITP (2017) 79 taxmann.com 460 (Ahd. ITAT)

- **Un availed Foreign Tax Credit is not allowed as an expenditure u/s 37.**
 - **CIT Vs. Kerala Lines Ltd (1993) 201 ITR 106 (Mad.HC).**

Income tax is a charge on profits . It is not an item of expenditure hence not to be deducted .
 - **K.E.C International Ltd Vs. ITO (1997) 63 ITD 278 (Mum.Trib)**

Taxes paid in the foreign country is only an application of income not incurred for the purpose of

- **Sub-section (2):** Payer may apply to AO for determination of the rate of TDS (Except salary).

- **Sub-section (3):** Payee may apply to AO for determination of the rate of TDS.

- **CASE LAWS:**

- **Deduction of TDS u/s 195 is tentative, provisional and AO has the right to determine the actual rate during regular assessment.**
 - Transmission Corporation of A.P Ltd Vs. CIT (1999) 239 ITR 587 (SC).
- **Order of AO u/s 195(2) is appealable before CIT (A) u/s 248.**
 - Bangalore International Airport Ltd Vs. ITO (Intl.Tax) (2018) 96 taxmann.com 86 (Kar.HC).
- **Sec 248: Tax to be borne by the payer. After depositing the tds payer is claiming that no tax is required to be deducted on such remittance to the income of the Non Resident , he can file appeal before CIT (A).**
- **Time limit- u/s 249(2): 30 days from the date of payment of tax.**
- **CBDT Instruction No:02/2014 , Dated 26/02/2014: TDS u/s 195 (1) has to be deducted on Income portion only not on the entire amount.**
- **A.Mohiuddin Vs. Addl.DIT (Intl.Taxation). (2015) 67 SOT 251 (Bang.Trib):**

On the date of purchase it was known to the assessee that Capital Gain is not going to be taxed in the hands of the NRI vendor due to relief u/s 54 hence the assessee purchaser is not required to deduct tax .
- **Shri Bhagwandas Nagla Vs. ITO (Intl.Tax). ITA NO: 143/Hyd/2017. Order Dated 25/01/2018.**

Non deduction of TDS u/s 195 assessee has to be held as defaulted under section 201(1) and u/s 201(1A).
- **Sub-section (6): Submission of information by the payer. (I.Tax Rules 37BB). (Form 15CA,15CB,15CC).**
- **SECTION 195A: Payer is bearing the TDS burden , grossing up at the' rates in force'.**

RULE 37BB: Requirement of Form 15CB & 15CA .

- Rule 37BB says about requirement of Form 15CB and Form 15CA for making foreign remittances.
- **Sub Rule 1:** Once income is chargeable to tax in India , payer is required to furnish information relating to the foreign transaction in Part A , B & C of the Form 15CA.

Part	Description
Part A	To be filled up if the remittance is chargeable to tax under the I.T Act,1961 and the remittance or the aggregate of such remittances 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 I.T Act,1961 and the remittance or the aggregate of such remittances does not exceed five lakh rupees during the financial year and an order u/s 195(2) or u/s 195(3) or LDC u/s 197 has been obtained from the AO.
Part C	To be filled up if the remittance is chargeable to tax under the I.T Act,1961 and the remittance or the aggregate of such remittances exceeds five lakh rupees during the financial year after obtaining a certificate in Form 15CB from CA
Part D	To be filled up if the remittance is not chargeable to tax under the provisions of the IT Act other than payments referred to in Rule 37BB(3).

Situations where no Form 15CB will be required:

- Form 15CB will not be required till the aggregate of remittances during the Financial Year does not exceed Rs5.00 Lakhs.
- Form 15CB will also not be required where order or certificate of lower deduction / no deduction is taken from the AO u/s 195(2),u/s 195(3) or u/s 197.
- Form 15CB will also not be required where the amount is not taxable to tax including 33 items specified in Rule 37BB (3).
- **Sub Rule 2:** Information in Part D of Form 15CA to be provided in the case of Non Taxable Foreign Transactions.
- **Sub Rule 3:** Part D of Form 15CA not to be filled up where transaction is under taken by an Individual which does not require prior approval of RBI as per FEMA and 33 items given in the table.

Sec 206AA: Requirement to furnish Permanent Account No:

- **Sub-Section : 1 . Consequences if PAN is not furnished to the deductor by the deductee:**

Notwithstanding any thing contained in any other provisions of this Act , PAN No. was not produced by the deductor to the deductee than TDS rate to be applied higher of the following.

(i)at the rate specified in the relevant provision of this Act, or

(ii)at the rate in force , or

(iii)at the rate of 20%

- **Sub-Section : 2,3,4,5 & 6** are relating to PAN No. to be mentioned in all transactions where TDS factor is applicable. Invalid or wrong PAN higher rate of TDS as per section 260AA(1).

(7)Sec 206AA not applicable in case of Non Resident:

The above provisions of section 206AA shall not apply to a non resident , not being a company or to a foreign company. **(Rule 37BC).**

Non resident submits full particulars about him except PAN NO: in India

Case Laws:

- **Non Resident is belonging to the Country with whom India has signed DTAA even if PAN NO. is not there still provisions of section 90(2) is applicable accordingly DTAA rate or rate as per I.T Act which is beneficial to the assessee is applied subject to submission of TRS and Form 10F. That means DTAA provision overrides section 206AA.**
 - Danisco India (P) Ltd Vs. UOI (2018) 90 taxmann.com 295 (Del.HC)
 - Nagarjuna Fertilizers Pvt Ltd Vs. ACIT (2017) 78 taxmann.com 264 (Hyd.Trib)-SB.
 - DIT(IT) Vs. Serum Institute of India Ltd (2015) 68 SOT 254 (Pune.Trib).
- **Rate 20% given u/s 206AA is inclusive of SC and Cess. TDS deducted wrongly not to be refunded to the payer/ deductor where Tds certificates issued.**
 - Computer Sciences Corporation India (P) Ltd Vs. ITO (2017) 77 taxmann.com 306 (Del.ITAT).

SECTION 90: Double Taxation relief on taxes paid in those Countries with whom India has signed Double Taxation Avoidance Agreements. (DTAA's). (Applicable to Residents and Non Residents).

Sub-section 1: Authorises Central Govt. to enter in to DTAA's.

Subsection 2: Provisions of Income Tax or DTAA which is more beneficial to the assessee shall be applied.

- CBDT Circular No: 728 .Dated 30/10/1995.
- CBDT Circular No: 333 .Dated 02/04/1998.
- **Case Laws:**
 - UOI Vs. Azadi Bachao Andolan (2003) 263 ITR 706 (SC).
 - CIT Vs. P.V.L Kulandagan Chettiar (2004) 267 ITR 654 (SC).

Sub-section (2A): Notwithstanding any thing contained in sec 90(2) , the provisions of 'General Anti Avoidance Rules ' (GAAR) shall apply to the assessee non resident even if such provisions are not beneficial to him.

Sub-section 4 : Production of TRC by Non Resident .(W.e.f 1st April 2013).

Sub-section 5 : Non Resident Assessee has to submit declaration in Form No. 10F. (IT Rules 21AB)

Note: Assessee being resident in India for having 'TRC' has to apply on line in Form No:10FA and AO has to provide 'TRC' in Form No:10FB. **I.Tax Rules 21AB (3) & (4).**

Explanation:

1.Higher Tax Rate given under the I.T Act,1961 as applicable to a Foreign Company (i.e 40%) shall not be held as less favourable than the rate applicable to Domestic Company (i.e 30%).

4.Any term used in the DTAA shall have the meaning assigned to it in the DTAA. Where the term used in the DTAA is not defined in the agreement but defined in the I.T Act , it shall have the same meaning assigned to it in the I.T Act including the Explanation if any. **(w.e.f 1/04/2018).**

CASE LAWS:

'TRC' clause as defined u/s 90(4) is applicable w.e.f AY 2013-14 not retrospectively.

- Prashnat M. Tomblo Vs. CIT (2017) 84 taxmann.com 187 (Bom.Hc).

Non production of 'TRC' by the Non Resident shall not act as a bar to avail the 'DTAA' benefits.

- Skaps Industries India Pvt Ltd Vs. ITO . ITA Nos: 478 and 479/Ahd/2018. Order dated 21/06/2018.
- Prashant Kumar Gulati Vs. ITO (Intl.Tax),Nagpur . ITA Nos: 2038/PN/2012. Order dated 14/08/2014.

Tax credit is allowed in the doubly taxed income as per the Articles of DTAA . Once tax is payable in the source country as per DTAA , FTC to be allowed on that doubly taxed income even if no tax was paid in the source Country due to incentive provided by Local Govt.

- Krishak Bharati Cooperative Bank Ltd Vs. ACIT (2016) 158 ITD 777 (Del.Trib)

Tax Rates given under DTAA could not be enhanced by surcharge and cess.

- Sunil V. Motiani Vs. ITO (Intl.Tax) (2013) 33 taxmann.com 152 (Mum.Trib).
- DIC Asia Pacific Pte Ltd Vs. ADIT (Intl.Tax) (2012) 52 SOT 447 (Kol.Trib).
- R.A.K Ceramics UAE Vs. DCIT (2019) 176 ITD 294 (Hyd.Trib)
- Discussion of SC Judgment : PILCOM Vs. CIT (2020) 116 taxmann.com 394 (SC).

- **SECTION 91:DOUBLE TAXATION RELIEF WHERE DTAA's ARE NOT IN OPERATION: (UNILATERAL RELIEF): (APPLICABLE TO RESIDENTS ONLY)**

Sub-section (1): Any person who is resident in India in any previous year proves that, in respect of his income which accrued or arose during that previous year outside India (and which is not deemed to accrue or arise in India), he has paid in any Country with which there is no agreement u/s 90 for the relief or avoidance of double taxation , income-tax, by deduction or otherwise , under the law in force in that country, he shall be entitled to the deduction from the **Indian income-tax** payable by him of a sum calculated on such doubly taxed income at the **Indian rate of tax** or the **rate of tax** of the said Country which ever is lower , or at the Indian rate of tax if both the rates are equal.

In other words , in absence of DTAA where Sec 90 does not apply, unilateral relief u/s 91 will be available , if the following conditions are satisfied.

- (i)The assessee in question must have been resident in India in the previous year.
- (ii) That some income must have accrued or arisen to him outside India during the previous year and it should be received outside India.
- (iii)Before any such relief is computed , the assessee has to prove that such income is not deemed to accrue or arise in India during the previous year.
- (iv)The income should be taxed both in India and in a foreign Country.
- (v)There should not be reciprocal arrangement for relief or avoidance from double taxation with the Country where income has accrued or arisen.
- (vi)In respect of that income, the assessee must have paid by deduction or otherwise tax under the law in force in the foreign Country in question in which the income outside India has arisen.

If the above conditions are certified than the Indian resident is entitled to deduction from the Indian Tax Payable by him of a sum calculated on such doubly taxed income.

Explanation:

- (i) the expression ‘ Indian income –tax’ means income tax charged in accordance with the provisions of this Act,
- (ii) the expression ‘**Indian rate of tax** ‘ means the rate determined by dividing the amount of India income tax after deduction of any relief due under the provisions of this Act but before deduction of any relief under this chapter , by the total income.
- (iii) the expression ‘ **rate of tax**’ of the said Country’ means the income tax and super tax actually paid in the said Country in accordance with the corresponding laws in force in the said Country after deduction of all relief due, but before deduction of any relief due in the said country in respect of double taxation , divided by the whole amount of the income assessed in the said country.
- (iv) the expression ‘ income tax ‘ in relation to any Country includes any excess profit tax or business profit tax charged on the profits by the Govt. of any part of that Country or a local authority (State Tax) in that Country.

Particulars	Amt (Rs.)
Income from business in India	7,00,000/-
Income from business in Argentina (No DTAA)	1,80,000/-
Income from other sources (FD Interest)	60,000/-
PPF Contribution	50,000/-
Tax Levied In Argentina	40,000/-
Computation of Relief u/s 91	
Gross Total Income	8,40,000/-
Less: Deduction u/s 80C	50,000/-
Net Income	7,90,000/-
Tax on Total income of Rs. 7,90,000/-	70,500/-
Add: Health Cess	2,820/-
Total tax payable	73,320/-
Indian Rate of Tax (73,320 / 7,90,000)	9.28%
Rate of Tax of Argentina (40,000/1,80,000)	22.22%
Rate of Tax of Argentine or India whichever is less	9.28%
Tax Relief u's 91 (Rs.1,80,000/- x 9.28%)	16,704/-
Un availed Foreign Tax Credit (Rs.40,000/- minus 16,704/-)	23,296/-
Net tax liability after Sec. 91 relief (Rs. 73,320/- Minus 16,704/-)	56,161/-

Rule for granting Foreign tax Credit : Rule 128 (W.e.f 01/04/2017).

- **Sub-Rule 1.** Foreign Tax Credit to be allowed in the year in which the income corresponding to such tax has been offered to tax or assessed to tax in India.
If such income is offered to tax / assessed to tax in India in more than one year than FTC shall be granted in proportionate to the income when it is offered to tax / assessed to tax.
- **Sub-Rule 2.** Meaning of foreign tax : The foreign tax referred to in rule 128(1) shall mean:
 - (a) Having DTAA: As per Article of DTAA. (Normally Article-2).
 - (b) No DTAA. Federal Tax plus any State Tax.
- **Sub-Rule 3.** Credit available against the amount of tax , surcharge and cess payable:
FTC only for Tax not for interest or penalty.

- **Sub-Rule 4. Credit not available in respect of disputed foreign tax:**

No credit under rule 128(1) for disputed foreign tax. On settlement of the dispute credit of foreign tax was availed on submission of proof towards settlement.

- **Sub-Rule 5. Manner of giving foreign tax credit:**

FTC is aggregate of the amounts separately computed for each source of income country wise.

(i) the FTC shall be the lower of the tax payable under the IT Act on such Income and the F. Tax on such income any excess shall be ignored.

(ii) Foreign Exchange Rate: Telegraphic Buying Rate of the SBI on the last day of the month immediately preceding the month in which such tax has been paid or deducted.

- **Sub-Rule 6. Foreign credit to be given even if the tax payable u/s 115JB and u/s 115JC:**

FTC as per Normal Provisions of the I.T Act.

Ex: Tax Payable u/s 115JB –Rs100/-. Foreign Tax –Rs.90/-. Normal Tax –Rs40/-.

FTC-Rs90.

- **Sub-Rule 7. Excess foreign tax to be ignored for MAT credit u/s 115JAA or u/s 115JD.**
No MAT credit either u/s 115JAA or u/s 115JD for the excess Foreign Tax.
MAT Credit-Rs90.00 Minus Rs40/-= Rs50/- not to be provided.
- **Sub-Rule 8. Documents required to be furnished for claiming foreign tax credit:**
Credit of any foreign tax shall be allowed on furnishing the following documents namely:
 - (i) Form No.67
 - (ii) Certificate or statement from the tax authority / person responsible of the Foreign Country.
 - (iii) Statement signed by the assessee accompanied by the proof of deposit of tax or proof of deduction of tax.
- **Sub-Rule 9. Statement / certificate of Income and foreign tax deducted to be furnished in the requisite form furnished before the due date of filling return specified u/s 139(1):**
Form 67 to be furnished on or before due date of filling return u/s 139(1) along with supporting documents.
- **(10) Not Relevant not discussed.**

IMPORTANT CASE LAWS:

- **K.V.A.L.M Ramanathan Chettiar Vs. CIT (1973) 88 ITR 169 (SC).**
 - Doubly taxed income is that income on which tax was paid in the foreign country and same income also bears the tax burden under the I.T Act,1961 in India.
- **Dy.CIT Vs. Birla Soft India Ltd . ITA No: 4713/Del/2011. Order dated 06/05/2014.**
 - Income increased due to additions / disallowances made by ITO during assessment , unavailed FTC has to be adjusted corresponding to increase in income.
- **Sunil Shinde Vs. ACIT (2017) 166 ITD 597 (Bag.Trib). CIT Vs. Ambalal Kalia (1994) 210 ITR 844 (Bom.HC):**
 - Tax (Federal & State Tax) withheld in the foreign country has not to be added back to quantify income taxable in India u/s 5(1)(c) r.w.s 198. FTC to be granted as per DTAA provisions. Credit has to be given only for Federal Tax not to State Tax.
- **Tata Sons Ltd Vs. Dy.CIT (2011) 10 taxmann.com 87 (Mum.Trib). Pritesh Rajesh Kotak Vs. ITO. ITA No: 1983/HYD/2017. Order dated 20/03/2019. (Hyd.Trib).**
 - Net income after deduction of tax has to be held as income taxable in the hands of the taxpayer in India. Assessee is entitled to get credit of both Federal and State Tax.

■ **Jeewanlal (1929) Ltd Vs. CIT (1971) 79 ITR 147 (Cal.HC).**

- Doubly taxed income has not been assessed to tax in India , No double taxation relief and NO FTC.

■ **Wipro Ltd Vs. Dy.CIT (2010) 382 ITR 179 (Kar.HC)**

- Sec 90(1) provides for relief from double taxation where income of assessee is chargeable to tax under the IT Act as well as in corresponding law in force in foreign country, there fore assessee would be entitled to take credit of Income Tax paid in a foreign country even in relation to income which is exempt u/s 10A.

■ **Reliance Infrastructure Ltd Vs. CIT (2017) 390 ITR 271 (Bom.HC)**

Indian assessee executes projects and paid tax in Saudi Arabia with whom no DTAA was signed. In India amount received in Saudi Arabia was entitled for relief u/s 80HHB & u/s 35B. Deduction allowed u/s 80HHB and u/s 35B of the foreign income could not be held as doubly taxed income for FTC u/s 91.

Unclaimed FTC was an allowable expenditure u/s 37.

■ **Mastek Ltd Vs. Dy.CIT (2014) 146 ITD 642 (Ahd.Trib)**

- Unclaimed FTC is allowable expenditure u/s 37.

■ **Dy.CIT Vs. Elitecore Technologies Pvt Ltd (2017) 165 ITD 153 (Ahd.Trib)**

- Unclaimed FTC is not allowable expenditure u/s 37.

Section 197: Certificate for deduction at Lower Rate or no deduction of tax from income :

Sub Section (1): Issuing Authority : AO on his satisfaction.

Sub Section (2): Validity : Period for which it was issued and until cancelled by AO.

Sub Section (2A): Rules : Rules 28,28AA & 28AB of I.Tax Rules notified by CBDT.

Rule-28: On line application by Form No.13 .

Rule-28AA: Applicable to all Assessee's except Charitable Establishments registered u/s 12A.

Sub Rule (1): Satisfaction of AO with existing and estimated tax liability.

Sub Rule (2): Manner of determining existing and estimated liability:

(i) tax payable on estimated income of the previous year

(ii) tax payable on the assessed or returned or the estimated income of last 4 years

(iii) existing liability under the I.T Act, 1961 and WT Act, 1957.

(iv) Advance tax deposited including tax deducted or collected of the FY up to the date of application.

- **Rule-28AB:** Applicable to Charitable Establishments registered u/s 12A and Institutions filling return u/s 139(4C).
- **Sub Rule (2):**
 - (i) No pending Income Tax Returns.
 - (ii) Valid Approval or Registration in Existence:
- **Sub Rule (3):** Apply in Form No: 13 though on line.

Lower deduction certificate when to be applied : CBDT Instruction No:01/2020,Dated: 24/10/2020.

For following Year application has to be made on or after 28th of the last FY.

For current FY application can be made up to 15th March .

Time Limit for issuance of lower deduction certificate u/s 197.

Within 1 Month from date of application. CBDT Instruction No.01/2014, Dated 15/01/2014.

CASE LAWS:

- **Rate of tds given in lower deduction certificate is tentative , interim and provisional subject to final determination by AO during final assessment.**
 - CIT Vs. Bovis Lend Lease (India) Pvt Ltd (2012) 208 Taxman 168 (Kar.HC)
 - Aditya Birla Nuva Ltd Vs. DCIT (2011) 200 Taxman 437 (Bom.HC)
 - Areva T&D S.A Vs. ACIT (2011) 200 Taxman 84 (Del.HC)

- **Charitable Trusts and Institutions filing return u/s 139(4C) are covered u/r 28AB.**
 - S.T.Stephens Hospital Society Vs. DCIT . W.P (Civil) No: 5635/2014, Order dated 13/01/2015. (Del.HC)
 - Management Committee (CHF Scheme) Vs. ITO (TDS),Cuttack. W.P © No: 201731 of 2011, Order dated 03/07/2012. (Orissa.HC).

- **Demand outstanding shall not be a ground for not issuing LDC u/s 197.**
 - L&T Another Vs. ACIT (TDS) & Others . (2010) 326 ITR 514 (Bom.HC).
 - Serco BPO Pvt Ltd Vs. ACIT (TDS) . (2012) 253 CTR 410 (P&H.HC).

- **Existence of PE of non resident requires a detailed study not to be judged while issuing LDC u/s 197.**
 - National Petroleum Construction Co Vs. DCIT (2019) 112 taxmann.com 364 (Del.HC)

- **Lower deduction certificate u/s 197 is person specific not specified to amount specified in the LDC**
 - Twenty First Century Securities Ltd. Vs. ITO (TDS.) (2017) 78 taxmann.com 152 (Kol. Trib.)
 - Tata Communications Ltd. Vs. DCIT. ITA nos: 7084 &7085/Mum/2017. Order Dated 25/10/2019.
- **LDC u/s 197 issued in favour of one unit can be used by other unit of the same organization.**
 - CIT Vs. Parle Biscuits Pvt. Ltd. (2013) 351 ITR 138 (P&H HC)
- **Where nature of business and transaction is remaining same lower TDS rate should remain unaltered as granted in earlier years.**
 - MC Kinsey & Co. Inc Vs. UOI (2010) #24 ITR 367 (Bom. HC)
- **Issurance of LDC solely on the discretion of AO not by the superior Authority**
 - Bently Nevada LLCv Vs. ITO (2019) 107 taxmann.com (Del. HC)

THANK YOU

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