

Law and procedure in relation to foreign remittances

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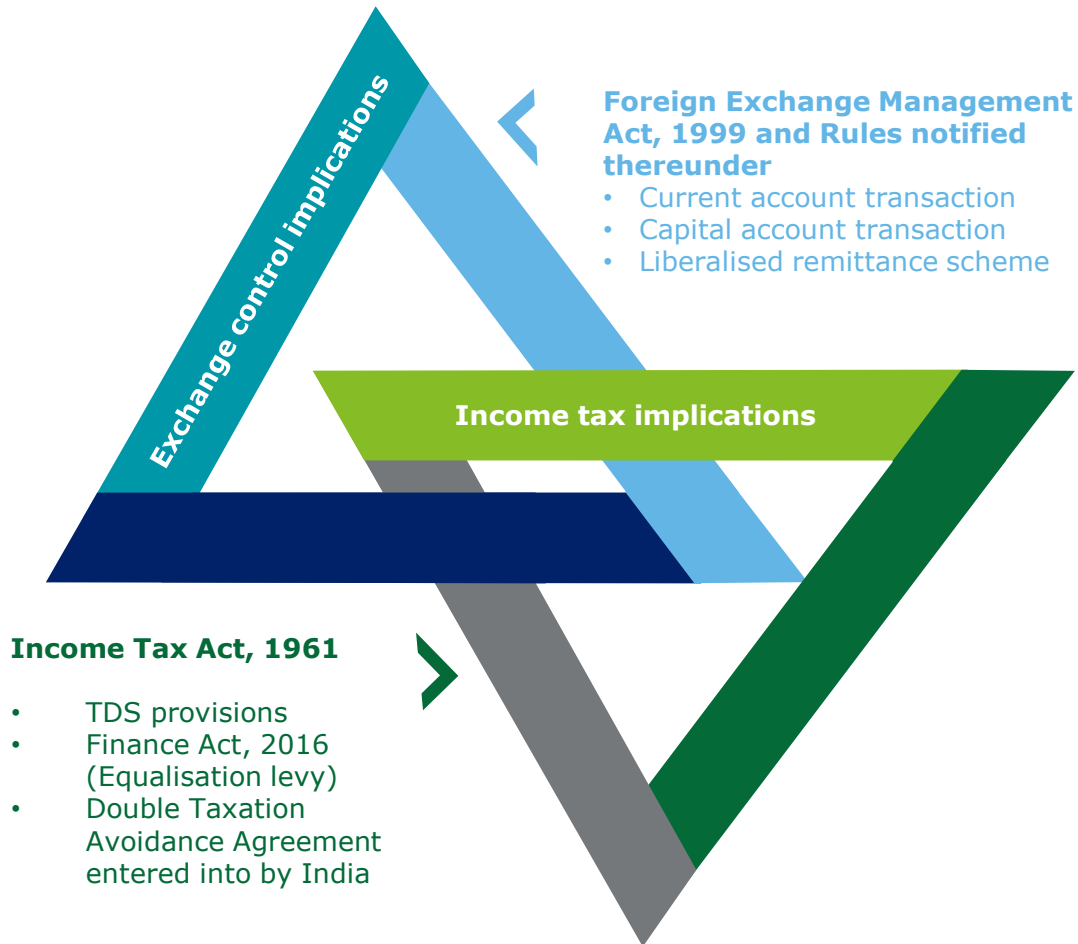
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Contents

- Foreign remittances – Discussion overview
- Exchange control regulations
 - Capital Account transaction
 - Current Account transaction
 - Liberalised Remittance Scheme
- TDS provisions under the Income-tax Act, 1961
 - Gist of applicable provisions for foreign remittances to non-residents
 - Section 195 - Provisions and key aspects (including rates in force and requirement for Tax Residency Certificate)
 - Recourse available to payer for determining sum chargeable to tax
 - Recourse available to payee for determining the TDS rate
 - Certification requirements under section 195(6)
- Key proposals of Finance Bill, 2020
- Multilateral Instrument – Relevance and impact
- Case studies

Foreign remittances

Discussion overview



Foreign remittance

Exchange control regulations

Exchange control regulations Framework

FEMA – Regulators and Enforcers

- Government dictates
- RBI regulates
- Enforcement Directorate enforces
- Authorised Dealers act as gate keepers

Statutory Documents:

- Foreign Exchange Management Act
- Authorised Persons Circulars (AP-DIR Circulars)
- FEMA Notifications
- Master Directions
- Government Regulations – a new system in place
- Press Releases
- Frequently Asked Questions

First 5 are statutory documents.
The remaining 2 are informative & sometimes practical

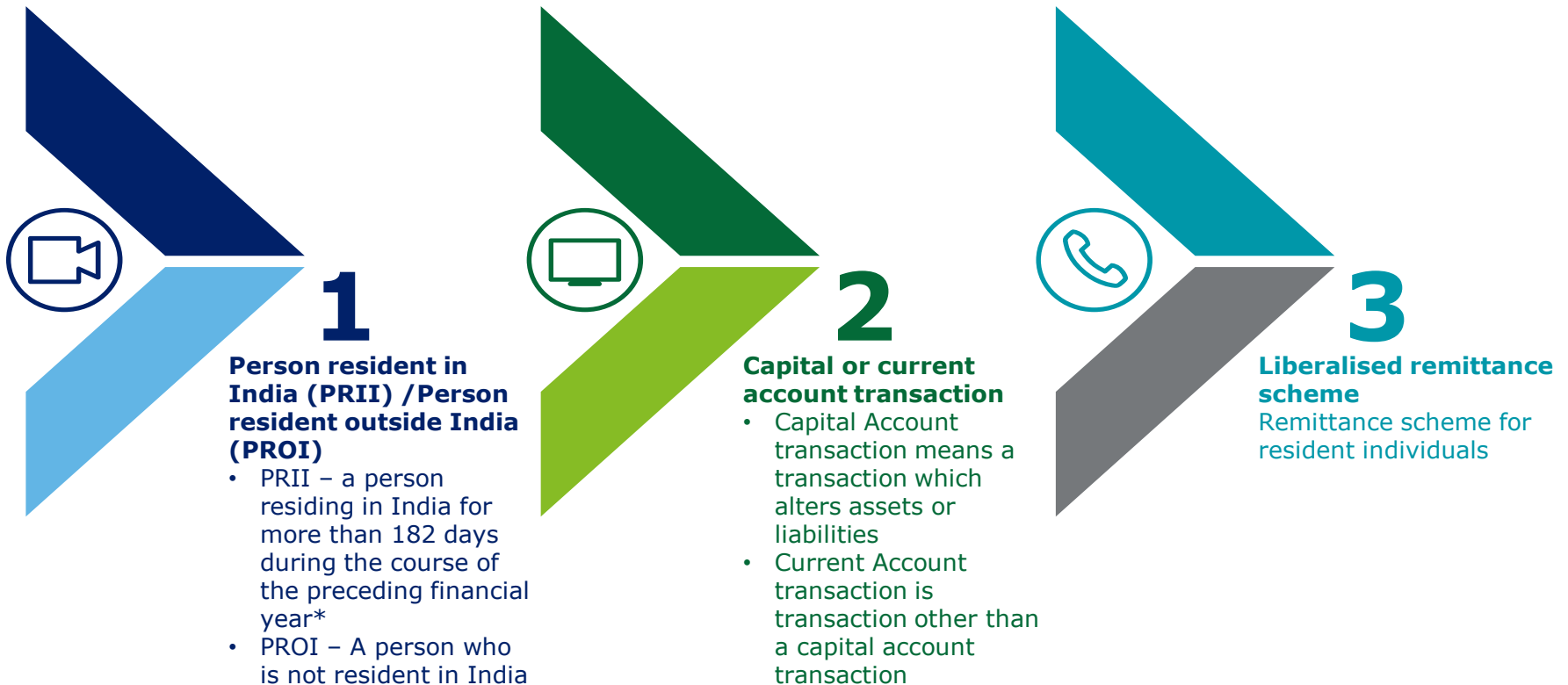
Regulation Principles

Regulation is based on:

- Person – whether the person is a Resident in India or person resident outside India or Non-resident
- Transaction – whether it is a Current or Capital Account transaction

Exchange control regulations

Key aspects



*But does not include

- A. a person who has gone out of India or who stays outside India, in either case
 - A. for or on taking up employment outside India, or
 - B. for carrying on outside India a business or vocation outside India, or
 - C. for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period
- B. a person who has come to or stays in India, in either case, otherwise than
 - A. for or on taking up employment in India, or
 - B. for carrying on in India a business or vocation in India, or
 - C. for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period

Exchange control regulations

Current and Capital Account transaction

Particulars	Regulations
Definition	<ul style="list-style-type: none">• Capital Account transaction means a transaction which alters assets or liabilities including contingent liabilities outside India of person resident in India or assets or liabilities including contingent liabilities in India of person resident outside India.• Current Account transaction is transaction other than a capital account transaction.
Permissible	<ul style="list-style-type: none">• Capital Account transactions are prohibited unless permitted• Current Account transactions are freely permitted unless prohibited

Exchange control regulations

Current Account transaction

Particulars	Regulations
Current Account Transaction	<ul style="list-style-type: none">• Current account transactions are governed by Foreign Exchange Management (Current Account Transaction) Rules, 2000 ("Current Account Transactions Rules").• Payments in relation to foreign trade/business is automatically permitted under Current Account Transactions Rules except for transactions specified in schedules I, II and III- <p>Schedule I – Prohibited Transactions - Illustrative transactions –</p> <ol style="list-style-type: none">1. Remittance out of lottery winnings2. Remittance of income from racing/riding etc., or any other hobby3. Remittance for purchase of lottery tickets, banned/prescribed magazines, football pools, sweepstakes etc. <p>Schedule II – Transactions requiring prior approval of Government of India – Illustrative transactions-</p> <ol style="list-style-type: none">1. Cultural tours2. Remittance of container detention charges exceeding the rate prescribed by Director General of Shipping <p>Schedule III – Transactions requiring prior approval of RBI – Illustrative transactions-</p> <p>Individuals (payment above USD 250,000)</p> <ol style="list-style-type: none">1. Gift or donation2. Maintenance of close relative abroad3. Studying aboard <p>Other than Individuals</p> <ol style="list-style-type: none">1. Remittances exceeding USD 1,00,00,000 for consultancy services in infrastructure projects and USD 10,00,000 for other consultancy services2. Donations subject to prescribed conditions and limit.

Exchange control regulations

Capital Account transaction

Particulars	Regulations
Capital Account Transaction	<ul style="list-style-type: none">• Permissible capital account transaction of a person may be classified under the following heads, namely- • Transaction, specified in Schedule I, of a person resident in India – Illustrative Transactions<ol style="list-style-type: none">1. Investment by a person resident in India in foreign securities2. Foreign currency loans raised in India and abroad by a person resident in India3. Transfer of immovable property outside India by a person resident in India4. Guarantees issued by a person resident in India in favour of a person resident outside India • Transactions, specified in Schedule II, of a person resident outside India – Illustrative Transactions-<ol style="list-style-type: none">1. Acquisition and transfer of immovable property in India by a person resident outside India.2. Guarantee by a person resident outside India in favour of, or on behalf of, a person resident in India.

Exchange control regulations

Import of Goods & Services

Particulars	Regulations
Regulations	Import of Goods and Services into India is being allowed in terms of Section 5 of the Foreign Exchange Management Act 1999 (42 of 1999), read with Notification No. G.S.R. 381(E) dated May 3, 2000 viz. Foreign Exchange Management (Current Account Transaction) Rules, 2000.
Time Limit for Settlement of Imports	Remittances against imports should be completed within 6 months from the date of Shipment except where amounts are withheld towards guarantee of performance, etc.
Extension of time	AD can consider granting extension of time for settlement of import dues up to a period of 6 months at a time (maximum up to the period of three years) irrespective of the invoice value.

Exchange control regulations

Import of Goods & Services

Particulars	Regulations in India
Evidence of Import - Physical Imports	<p>In case of all imports, irrespective of the value of foreign exchange remitted / paid for import into India, it is obligatory on the part of the AD to ensure that the importer submits:-</p> <ul style="list-style-type: none">• Bill of entry number, port code and date for marking evidence of import• Customs Assessment Certificate or Postal Appraisal Form• Exchange Control Copy of the Ex-Bond Bill of Entry or Bill of Entry in certain cases
Interest on Import Bills	<ul style="list-style-type: none">• AD bank may allow payment of interest on usance bills or overdue interest for a period of less than three years from the date of Shipment at the rate prescribed for trade credit from time to time.• In case of pre-payment of usance import bills, remittances may be made only after reducing the proportionate interest for the unexpired portion of usance bills.
Advance Remittance for import of goods and services	<p>AD may allow advance remittance for import of goods and services without any ceiling subject to the conditions specified in the regulations.</p>

Exchange control regulations

Other regulations notified – Illustrative list

- Acquisition and Transfer of Immovable Property
- Borrowing and Lending transactions in Indian Rupee between Persons Resident in India and Non-Resident Indians/ Persons of Indian Origin
- Deposits and Accounts
- Direct Investment by Residents in Joint Venture (JV) / Wholly Owned Subsidiary (WOS) Abroad
- Establishment of Branch Office (BO)/ Liaison Office (LO)/ Project Office (PO) or any other place of business in India by foreign entities
- Export of Goods and Services
- External Commercial Borrowings, Trade Credit, Borrowing and Lending in Foreign Currency by Authorised Dealers and Persons other than Authorised Dealers
- Foreign Investment in India
- Remittance of Assets
- Other Remittance Facilities

Liberalised Remittance Scheme (for resident individuals)

Exchange control regulations

Liberalised remittance scheme

- LRS brought in as a relief to all Indian Residents to remit money outside India
- Brought in partial capital account convertibility by allowing specified capital account transactions up to the LRS limit
- Available to all Resident Individuals including minors
- Up to USD 250,000 per financial year can be remitted
 - Introduced on February 4, 2004, with a limit of USD 25,000
 - Limit has increased over the years but reduced in between due to forex reserve position
- All earlier facilities for release of exchange or for remittances for current account transactions under Para 1 of Schedule III are subsumed under the overall limit of USD 250,000 – no separate limits for gifts, donations, etc.
- Income and sum remitted need not be brought back into India and can be reinvested overseas

Liberalised remittance scheme

Permitted transactions

Current account transaction

LRS specifies "permissible" current account transactions

- Private visits to any country (except Nepal and Bhutan).
- Gift or donation.
- Going abroad for employment.
- Maintenance of close relatives abroad.
- Travel for business or attending a conference or specialised training; or for meeting expenses for meeting medical expenses, or check-up abroad; or for accompanying as attendant to a patient going abroad for medical treatment/ check-up.
- Expenses in connection with medical treatment abroad.
- Studies abroad.
- Any other current account transaction

Capital account transaction

- Opening of foreign currency account abroad with a bank;
- Purchase of property abroad
- Making investments abroad- acquisition and holding shares of both listed and unlisted overseas company or debt instruments;
- Acquisition of qualification shares of an overseas company for holding the post of Director;
- Acquisition of shares of a foreign company towards professional services rendered or in lieu of Director's remuneration;
- Investment in units of Mutual Funds, Venture Capital Funds, unrated debt securities, promissory notes;
- Setting up Wholly Owned Subsidiaries and Joint Ventures (with effect from August 05, 2013)
- Extending loans including loans in Indian Rupees to Non-resident Indians (NRIs) who are relatives as defined in Companies Act, 2013.

Exchange control regulations

Summary

Particulars	Remittances	Compliances/ Documentation
Current account transaction	<ul style="list-style-type: none">• Dividend• Interest• Fees for technical services• Royalty• Import of goods and services	<ol style="list-style-type: none">1. Form A22. Bill of entry and other specified documents (for import of goods)3. Form 15CA4. Form 15CB
Capital account transaction	<ul style="list-style-type: none">• Investment in Joint Venture or wholly owned subsidiary by subscribing to the shares of foreign entity• Extending loans to foreign entity	<ol style="list-style-type: none">1. Form ODI
Liberalized Remittance Scheme	<ul style="list-style-type: none">• Private visits to any country (except Nepal and Bhutan).• Gift or donation.• Going abroad for employment.• Maintenance of close relatives abroad.• Travel for business or attending a conference or specialised training; or for meeting expenses for meeting medical expenses, or check-up abroad; or for accompanying as attendant to a patient going abroad for medical treatment/ check-up.• Expenses in connection with medical treatment abroad.• Studies abroad.• Any other current account transaction	<ol style="list-style-type: none">1. Form A2

Interplay

Exchange control regulations and income tax provision

- Under exchange control regulations, remittance is permitted only **if appropriate income tax has been paid**
- Authorised Dealer/s to ensure that tax has been paid prior to permitting the remittance from India

Income tax implications

Provisions governing TDS on payments to non-residents

Relevant provisions

TDS on payments to non-residents

192	• Salary
194E	• Payment to non-resident sportsmen or sports associations
194EE	• Payment in respect of deposits under National Savings Scheme, etc.
194F	• Payments on account of repurchase of units by Mutual Fund or Unit Trust of India
194G	• Commission, etc., on the sale of lottery tickets
194LB	• Income by way of interest from infrastructure debt fund
194LBA	• Certain income from units of business trusts
194LBB	• Income in respect of units of investment funds
194LBC	• Income in respect of investment in securitization trust
194LC	• Income by way of interest from Indian company
194LD	• Income by way of interest on certain bonds and Government securities
194N	• Payment of certain amounts in cash
195	• Other sums
196B	• Income from units
196C	• Income from foreign currency bonds or shares of Indian company
196D	• Income of Foreign Institutional Investors from securities

Relevant provisions

Exemption from TDS

- Shipping income under section 172 [CBDT Circular no. 723 dated 19 September 1995].
- Capital Gain earned by Foreign Portfolio Investor [Section 196D(2)]
- Payment of interest by Offshore Banking unit to a non-resident or not ordinarily resident [Section 197A(1D)]
- Payment liable to Equalisation Levy [Section 163 of Finance Act 2016]

Section 195 – Other sums

Section 195

Overview

195(1)

- Payment by any person responsible for paying to a non-resident
- Interest or any other sum chargeable to tax
- Other than salary, interest referred to in section 194LB or 194LC and dividend referred in section 115-O – Highlighted portion proposed to be deleted (Finance Bill 2020)
- Deduct tax at the time of credit or payment whichever is earlier
- Deduct tax at rates in force

195(2)

- Application to AO by payer if it considers whole of sum (other than salary) is not income chargeable in the hands of the recipient non-resident

195(3), (4),(5)

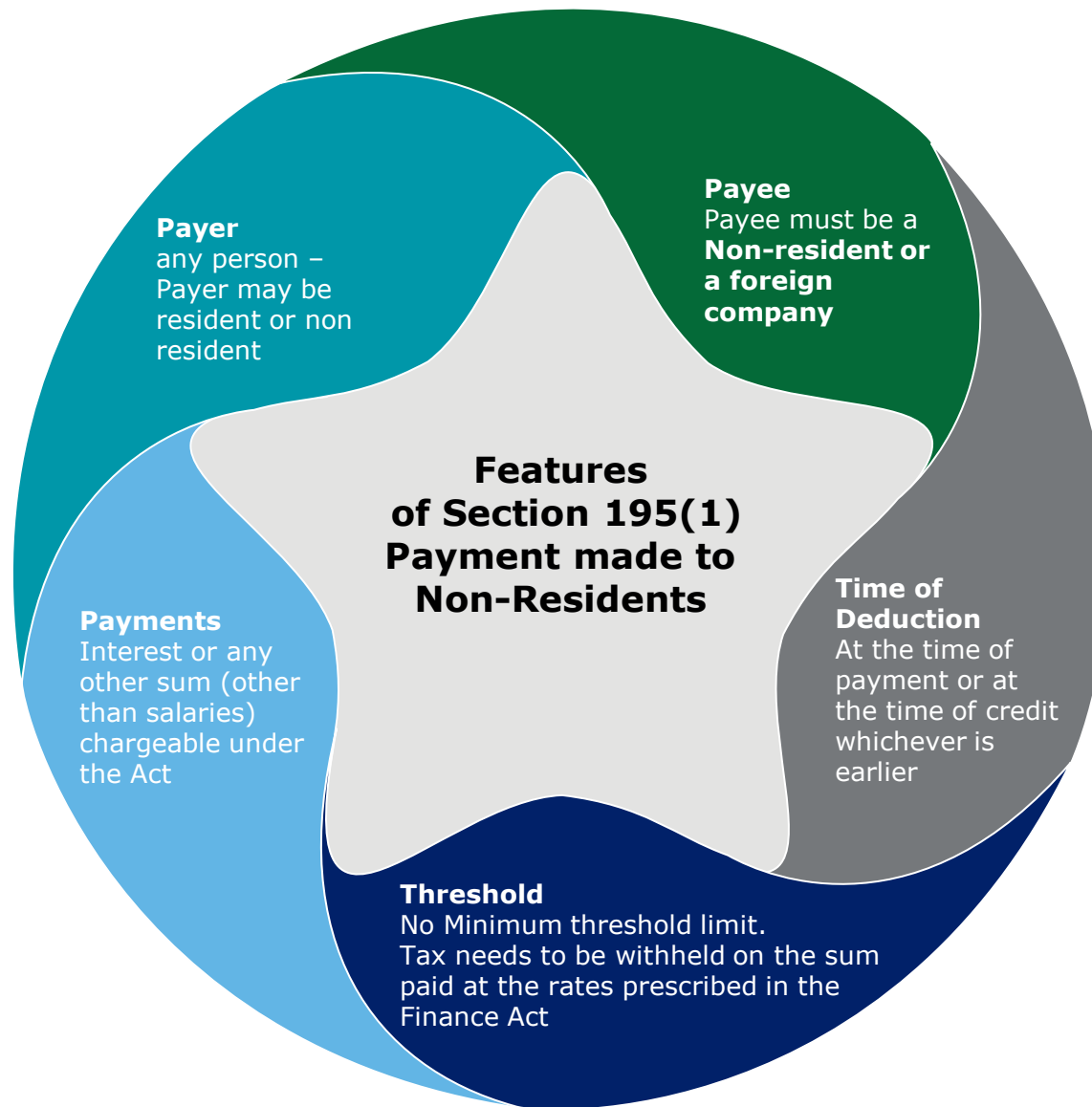
- Application to the AO by payee viz. Foreign Banking Company or non-resident having branch in India for Nil withholding – 195(3) & (4)
- Powers to CBDT to make rules – 195(5)

195(6)

- Payer to furnish information in prescribed form viz. Form 15CA/15CB in respect of any sum whether chargeable or not under the Act, subject to conditions specified under Rule 37BB.

Section 195(1)

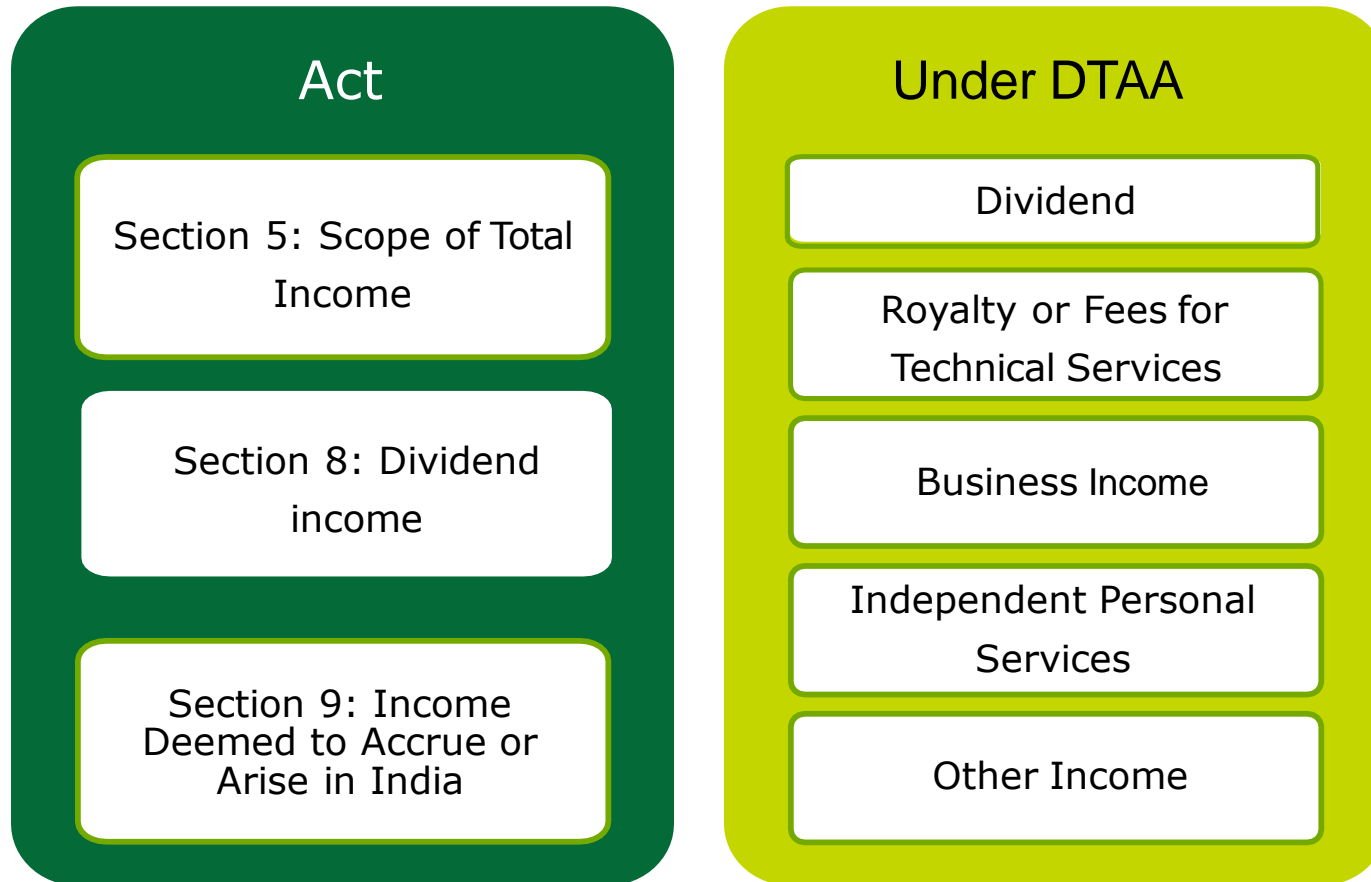
Features



Key aspects

Key aspects

Chargeability of income



Scope of taxation in India - combination of "residence rule"
& "source rule"
(GVK Industries) (SC) (371 ITR 453)

Key aspects

Any sum chargeable to tax

Transmission Corporation (239 ITR 587) SC:

- Sum chargeable to tax may include income or income hidden or embedded in gross sums.
- TDS provisions may apply to gross sums, whole of which may not be income of recipient
- Adequate safeguards provided in Section 195(2) / (3) / 197 where recipient can apply to AO to determine proportion of income liable to TDS

GE India Technology Centre Pvt. Ltd (327 ITR 456) SC

- Where payment, made by resident to non-resident, was an amount not chargeable to tax in India, no tax is deductible at source even though assessee has not made an application before the AO

CBDT Instruction No 2/2014 dated 26th February 2014

- CBDT vide Instruction No 2/2014 instructed that in cases where the assessee does not withhold taxes under section 195 of the Act, the AO is required to determine the income component involved in the sum on which the withholding tax liability is to be computed and the payer would be considered as being in default for non-withholding of taxes only in relation to such income component

Key aspects

Payer

- Any person
 - Responsible for paying
 - Payer itself and in case of company, the company including the principal officer
 - Including an Individual and HUF (whether or not carrying business)
- Whether payer includes a non resident?
- Whether payment by one non-resident to another non-resident is covered by section 195(1)?
 - Explanation 2 to sub-section (1) of the section 195 clarifies that the obligation to comply with sub-section (1) and make deduction thereunder applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to all persons, resident or non-resident whether or not the non-resident person has a residence or place of business or business connection in India or any other presence in any manner whatsoever in India.

Finance Bill, 2020 - Meaning of "person responsible for paying" for the purpose of TDS provisions expanded - In the case of a NR, it would mean the person himself; or any person authorized by such NR; or the agent of such NR in India including any person treated as an agent under section 163 of the Act

Key aspects

Address of the Non-resident

Meena S. Patil vs ACIT (International Taxation, Circle 19(1), [2008] (114 ITD 181) Bangalore Tribunal

- Assessing Officer was correct in passing an order under section 201(1A) imposing interest liability on assessee. Assessee's contention that it was not and could not have been aware of fact that seller was a non-resident cannot be considered since the sale agreement seller's address was clearly mentioned which showed that he was residing abroad.

Syed Aslam Hashmi (55 SOT 441) Bangalore Tribunal

- Where seller of Indian property was NRI according to address given in sale deed, assessee-purchaser ought to have made TDS under section 195 on sale consideration payable to NRI seller, failing which he was to be treated as assessee-in-default under section 201(1).

Key aspects

Payment to Power of Attorney holder

Rakesh Chauhan vs DDIT (International Taxation) [2010] (128 TTJ 116) Chandigarh Tribunal)

- Where payment is made by assessee to an individual Resident say (P) in India in respect of purchase of land which belonged to non-residents but rights therein were assigned unequivocally to said resident as power-of-attorney holder, such payment could not be regarded as payment to non-resident so as to require deduction of tax at source under section 195.
- When non-resident himself nominates a particular agent to whom payment should be made and pursuant to that direction, the assessee pays the sum to the agent so nominated, the provisions of section 195 of the Act will apply.

Key aspects

Payment through intermediary

ITO vs. Abu Dhabi Commercial Bank (65 SOT 43) Mumbai Tribunal

- The assessee bank made remittance on behalf of brokers in respect of gains on the basis of NIL certificate issued by a Chartered Accountant
- The bank was only acting as an authorised dealer in transferring the funds on behalf of the broker and is not liable to deduct tax under section 195 and consequently is not an assessee in default

Commissioner of Income-tax v. Hardarshan Singh (350 ITR 427) Delhi HC

- Assessee carried on business of commission agent by arranging for transportation of goods through other transporters
- As contract was between clients and lorry owners/transporters assessee did not deduct tax at source while making payments to transporters
- Tribunal set aside orders holding that assessee acted only as a facilitator or intermediary and there was no privity of contract between assessee and client for carriage of goods - Accordingly, Tribunal concluded that assessee was not liable to deduct tax at source

Key aspects

Payment in kind & Net payment received

- **Payment in kind**

Kanchanganga Sea Foods Ltd. v. CIT [2010] (325 ITR 540) SC

BIOCON Biopharmaceuticals Private Ltd. v. ITO [2013] 144 ITD 615 (Bang)

The assessee is liable to deduct tax at source under section 195 on the payment made to the non-resident even though the payment is not made in cash but made in kind.

- **Net Payment received**

Raymond Ltd. v. DCIT [2003] (86 ITD 791) Mumbai Tribunal

The assessee is liable to deduct tax at source under section 195, even under an arrangement where he receives only net payment from other party after deducting commission/ management fees etc.

Key aspects

Amendment in Act whether applicable to DTAA

Amendments provisions under the Act cannot override provisions of DTAA

- CIT v. Siemens Aktiengesellschaft (310 ITR 320) Bombay HC
- DIT v. Nokia Networks OY [2013] (358 ITR 259) Delhi HC
- Sanofi Pasteur Holding SA [2013] (354 ITR 316) Andhra Pradesh HC
- Infrasoftware Ltd [2013] (220 Taxman 273) Delhi HC
- B4U International Holdings Ltd. (52 SOT 545) Mumbai Tribunal

Retrospective amendments made to the definition of 'royalty' in section 9(1)(vi) of the Finance Act, 2012 by inserting Explanations 4 and 5 with effect from 1 June 1976 applicable to India – Singapore DTAA

- Verizon Communications Singapore Pte. Ltd. [2013] (361 ITR 575) Madras HC

Rates in force

Rates in force

Meaning

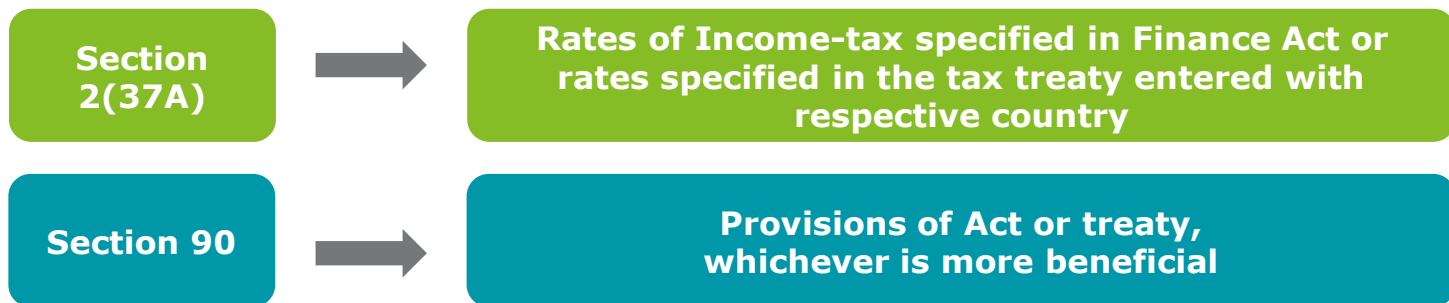
- Section 195 refers to deduction of tax at “rates in force” - Defined in section 2(37A)
- TDS to be deducted at rates in force ~ Circular No 728 dated 30 October 1995
- Rates specified in Finance Act of the relevant year (refer Part II of the First Schedule to the Finance Act) **OR** rates specified in the tax treaty entered with respective country, **whichever is more beneficial**

Exchange Rate

Rule 26 ~ SBI TT Buying rate as on the date of deduction of tax

- During the period when Finance Bill is pending approval, rates in force for the preceding year or rate proposed for the current year, whichever is more favourable will be applicable ~ **Section 294**
- **Applicability of surcharge (SC) and Education cess (EC)?**

Rates prescribed by tax treaty generally **inclusive** of SC and EC



Rates in force

Applicability of surcharge (SC) and Education cess (EC)

Does rates prescribed under DTAA to be increased by surcharge and Education Cess?

DTAA uses term 'Income-tax' to put cap. Hence no further surcharge or cess

- Capgemini SA (2016) (72 taxmann.com 58) (Mum)
- BOC Group Ltd. (2015) (64 taxmann.com 386) (Kol)
- Sunil v Motiani v. ITO [2013] 59 SOT 37 (Mum)
- DIC Asia Pacific Pte. Ltd. v. ADIT [2012] 18 ITR (Trib.) 358 (Kol)

'Income tax' includes surcharge

- CIT v. K. Srinivasan [1972] 83 ITR 346 (SC)
- Bank of America v. DCIT [2001] 78 ITD 1 (Mum)
- CIT v. Arthusa Offshore Co. [2008] 169 Taxman 484 (Utt)

Rates in force

Non furnishing of PAN

Section 2(37A)

- Section 2(37) states that rate or rates in force would mean for the purpose of section 195 – rates of income tax specified in Finance Act or rates as per the agreement by Central Government u/s 90 of the Act.

Section 90

- Section 90, an assessee can avail the provisions of section 90 only in case if the provisions of DTAA are more beneficial to him

Section 206AA

- In case of non availability of the PAN, tax is to be deducted at higher of the following-
 1. Rates specified in the Act,
 2. Rates as per DTAA
 3. 20%

Whether 206AA would prevail over section 90?

Non furnishing of PAN

Relaxation from deduction of tax at higher rate under section 206AA

- As per Income-Tax **Rule 37BC**, if the deductee (non-resident) furnishes the following details namely:
 - ✓ Tax residency Certificate (TRC)
 - ✓ Tax Identification number
 - ✓ Form 10F
 - ✓ Name, e-mail, contact number, address of country of his residence

Then, TDS shall be deducted either at the rates prescribed by the Act or rate as per the tax treaty, whichever is more beneficial

Tax Residency Certificate

Background

- Finance Act 2012 mandated non-residents to obtain TRC (in prescribed format) from tax authorities of their respective jurisdictions
- Finance Act 2013 which did away the format, stated that it would be enough if tax payer obtains TRC and maintains prescribed documents/information
- IT (Elevnth Amdt.) Rules, 2013 - Rule 21AB – specifies the information to be provided in Form 10F – if the same are not covered in the TRC.

Certificate of residence issued by Mauritian authorities constitute sufficient evidence for accepting the status of residence as well as beneficial ownership for applying India – Mauritius DTAA – Circular 789 dated 13 April 2000

Key aspects

Grossing up – Section 195A

- If payer bears tax liability i.e. payment is “net of tax”, then for computing TDS, income should be grossed up

Particulars	Amount (in INR)
Amount payable to NR (sum chargeable to tax in India)	100
Tax rate	10%
Grossed-up amount $(100) * (100 / (100 - 10))$	111.11
Tax payable $(111.11 * 10\%)$	11.11
Net remittance amount	100

- **Whether grossing-up required if payment made net of tax to foreign company which does not have a PAN in India?**

Income could be grossed up using applicable rate e.g. 10% and tax could be withheld @ 20%

Eg: Total amount paid net of tax INR 100, income increased to INR 111.11 (grossed up by 10%), TDS to be deducted @ 20% on to INR 111.11 = INR 22.22

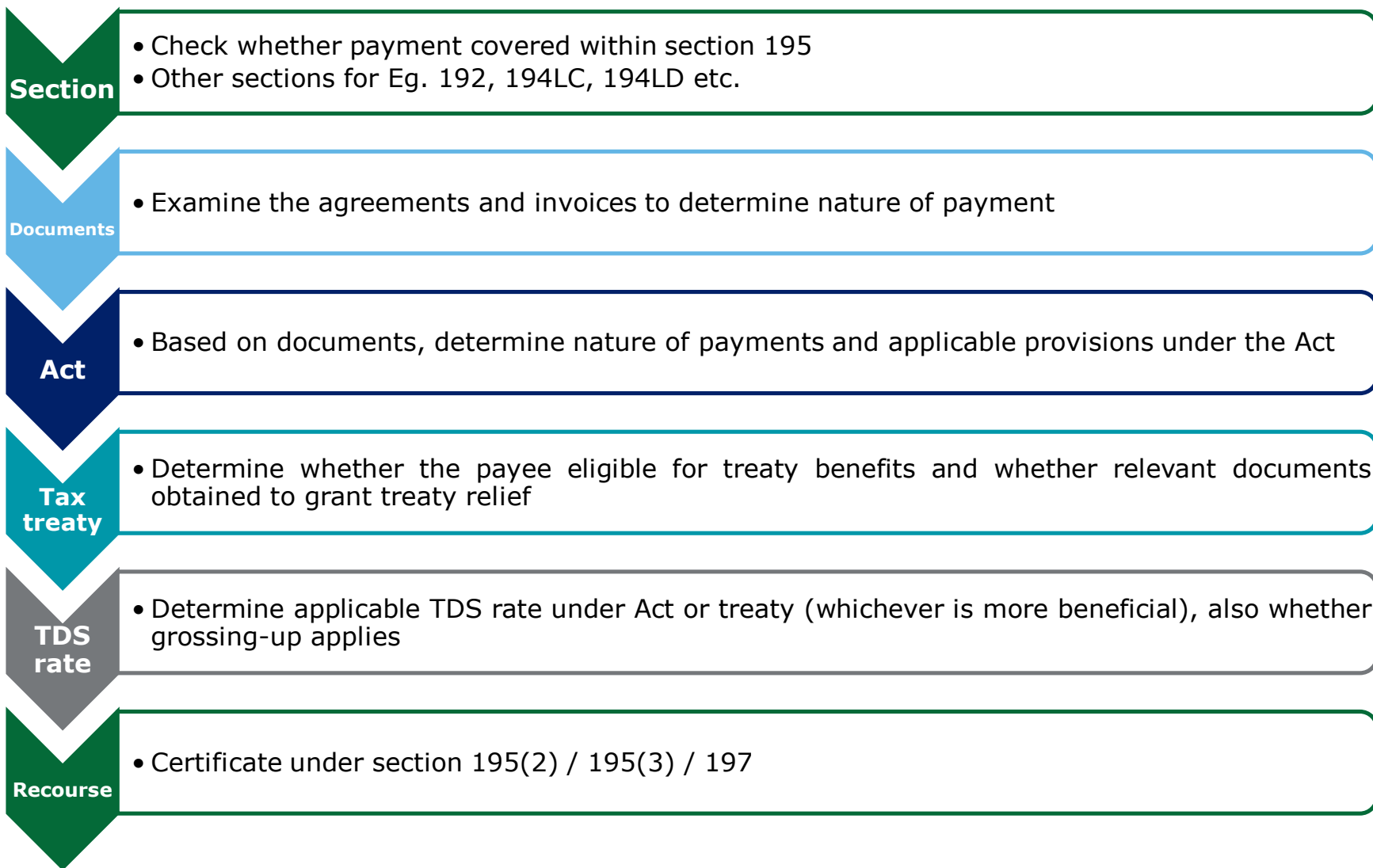
Bosch Ltd v. ITO (141 ITD 38) (Bang ITAT)

- **Applicability of section 195A in cases of presumptive taxation (section 44B, section 44BB, 44BBB)**

Not applicable ~ ***CIT v. ONGC (276 ITR 585) (Utt HC)***

Steps

Determination of TDS



Recourse available to Payer

Section 195(2)

Recourse available to a Payer

- Application to be made to AO when the payer considers whole income not to be chargeable
- AO to determine the portion of payment chargeable to tax and to issue a certificate accordingly
- The permission granted by the AO would be in force for the period as specified
- On determination, tax to be deducted on the sum chargeable to tax
- **Mangalore Refinery & Petrochemicals Ltd. V. DDIT [2008] (113 ITD 85)
(Mumbai Tribunal)**

The assessee cannot be treated in default under s. 201 of the Act because it has applied under s. 195(2) of the IT Act before the AO, prior to remitting the payment

Section 195(2)

Order under section 195(2) – Not conclusive

- **CIT vs. TELCO [2001] (245 ITR 823) Bombay HC**
- **CIT vs. Elbee Services P. Ltd. [2001] (247 ITR 109) Bombay HC**
- **Dodsal Pvt. Ltd. Vs. CIT [2003] (260 ITR 507) Bombay HC**
- **DCIT vs. Arthur Andersen ITA No. 9125/Mum/1995 dated 29-07-2003 (ITAT, Mumbai)**

Decision under section 195(2) should not be treated as a conclusion in the determination of income in the case of a foreign company

- **Aditya Birla Nuvo v. DDIT [2011] (342 ITR 308) (Bombay HC)**

The order under sec. 195(2) is tentative in nature and does not have any effect beyond providing immunity under sec. 201 and does not preclude the assessing officer to either reexamine the chargeability of income in regular assessment proceedings or to recover the taxes from the payer in his representative capacity.

Recourse available to Payee

Section 195(3)

Recourse available to a Payee

Section 195(3)

- Application to be made by payee viz. Foreign Banking Company (Form 15C) or non-resident (Form 15D) having branch in India for Nil Withholding
- Application to AO for grant of certificate for receipt of income without deduction of tax at source
- The permission is valid for the period specified unless cancelled [Section 195(4)]

Circular No. 774 dated 19 March 1999: No certificate after payment

Section 197

Recourse available to a Payee

- Application for lower rate or no deduction of income-tax
- Application can be made to the AO electronically in Form 13 to determine the tax rate – Rule 28
- Conditions for certificate under section 197 – Rule 28AA
 - AO to be satisfied that existing and estimated tax liability of a person justifies deduction of tax at lower rate or no deduction of tax
 - Existing and estimated tax liability of a person to be determined considering the following:
 - Tax payable on estimated income of the relevant AY
 - Tax payable as assessed or return, or estimated income, of last four previous years
 - Existing liability
 - Advance tax, TDS and TCS paid till the date of application.
 - The certificate is issued to the specified payer
 - The certificate is valid for the period of the specified assessment year as mentioned in the certificate

Section 197

Instructions by CPC(TDS) on Lower/Nil tax deduction certificates

- The CPC (TDS) vide instruction no. 01/2020 dated 24th January, 2020 has prescribed cut-off dates for applications relating to issue of lower/nil tax deductions certificates.
- In order to facilitate the issue of lower/ Nil withholding tax certificate with effect from the start of the year 1st April, online request has been facilitated from 28th February of immediately preceding year. For example, Nil/ lower withholding tax certificate application for FY 2020-21 can be submitted on or after 28 February 2020.
- Further, it has been clarified that considering the time required for obtaining relevant data from various sources and subsequent processing of online requests for Nil/ lower deduction certificate, no applications can be submitted on or after 15th of March of that Financial Year. For instance, applications for the certificates for F.Y. 2019-20 cannot be filed after 15.03.2020.

Section 195(6) and Rule 37BB

Section 195(6) and Rule 37BB

Furnishing of information / CA certificate

- Information regarding remittance made to NR's needs to be furnished in prescribed form and manner as per Rule 37BB -
 - Form 15CA ~ Information to be furnished by remitter
 - Form 15CB ~ Certificate to be obtained from a CA by remitter
- Information regarding all foreign remittances are required to be furnished in Form 15CA, whether or not such sum was chargeable to tax under the Act.
- Specific Exemptions (remittance not chargeable to tax) -
 - Remittance made by individuals under Liberalised Remittance Scheme of RBI and does not require RBI's prior approval;
 - Remittance in the nature as provided in the 'specified list'. Currently, 33 transactions are provided

Section 195(6) and Rule 37BB

Rule 37BB – Excluded List

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	S0101	Advance payment against imports
8	S0102	Payment towards imports-settlement of invoice
9	S0103	Imports by diplomatic missions
10	S0104	Intermediary trade
11	S0190	Imports below Rs.5,00,000-(For use by ECD offices)
12	S0202	Payment for operating expenses of Indian shipping companies operating abroad
13	S0208	Operating expenses of Indian Airlines companies operating abroad
14	S0212	Booking of passages abroad - Airlines companies
15	S0301	Remittance towards business travel.
16	S0302	Travel under basic travel quota (BTQ)
17	S0303	Travel for pilgrimage

Section 195(6) and Rule 37BB

Rule 37BB – Excluded List

Sl. No.	Purpose code as per RBI	Nature of payment
18	S0304	Travel for medical treatment
19	S0305	Travel for education (including fees, hostel expenses etc.)
20	S0401	Postal services
21	S0501	Construction of projects abroad by Indian companies including import of goods at project site
22	S0602	Freight insurance - relating to import and export of goods
23	S1011	Payments for maintenance of offices abroad
24	S1201	Maintenance of Indian embassies abroad
25	S1202	Remittances by foreign embassies in India
26	S1301	Remittance by non-residents towards family maintenance and savings
27	S1302	Remittance towards personal gifts and donations
28	S1303	Remittance towards donations to religious and charitable institutions abroad
29	S1304	Remittance towards grants and donations to other Governments and charitable institutions established by the Governments
30	S1305	Contributions or donations by the Government to international institutions
31	S1306	Remittance towards payment or refund of taxes
32	S1501	Refunds or rebates or reduction in invoice value on account of exports
33	S1503	Payments by residents for international bidding.

Section 195(6) and Rule 37BB

Form 15CA – consists of 4 parts

Part A	Payment(s) made during FY does not exceed INR 500,000. No Form 15CB required for such payments
Part B	Certificate for lower WHT has been obtained in respect of payments which exceeds INR 500,000 during FY. No Form 15CB required for such payments
Part C	CA certificate obtained in Form 15CB in respect of payments which exceeds INR 500,000 during FY
Part D	Payment(s) made during FY which is not chargeable under the provisions of the Act. No Form 15CB required for such payments

Certificate

Important issues

- **DCIT vs. Rediff.com India Ltd. [2011] (ITA No. 3061/Mum/2009) Mumbai Tribunal**

Chartered Accountant's certificate for TDS on payments to non-residents had no decisive impact on determination of taxability of payments to non-residents. It is only prima facie evidence about taxability status and cannot substitute adjudication of taxability by the AO

- **ADIT vs. Tata Communications Ltd [2010] (ITA No. 3061/Mum/2009) Mumbai Tribunal**

Where the assessee had duly obtained the Chartered Accountant's certification regarding applicability of tax withholding and based on the certification, made the remittance for deduction at source. A demand u/s.201(1A) cannot be raised on the assessee merely because he had not obtained prior approval of the Assessing Officer u/s.195(2) of the Act

Comparative Analysis

Sections 195(2), 195(3) and 197

Particulars	195(2)	195(3)	197
Application by	Payer	Payee	Payee
Purpose	To determine portion of income liable for WHT	To receive specific payment without deduction of tax. Certificate valid till expiry of period mentioned therein	To obtain NIL / lower WHT certificate for all receipts. Valid till expiry of period mentioned therein
Applicability	Specified Payments	Specified Receipts	All receipts
Applicable Forms	To be made on plain paper <i>A new Form 15E is proposed to be introduced in the Rules to operationalize the provisions of the section 195(2) of the Act.</i>	Form 15C / Form 15D	Form 13

Compliances

Compliances

Filing of quarterly statement of TDS - Section 200(3) read with Rule 31A

TDS deducted under section 192	Form 24Q
TDS deducted under sections 193 to 196D	Form 27Q*

* in respect of deductee who is a non-resident not being a company or a foreign company or resident but not ordinarily resident

Due dates for furnishing statement

Date of ending of quarter of FY	Due Date
30 June	31 July of the FY
30 September	31 October of the FY
31 December	31 January of the FY
31 March	31 May of the FY immediately following the FY in which deduction made

Proposals for Finance Bill, 2020

Section 6

Change in residency rules for individuals

- Currently, an Indian citizen/person of Indian origin is considered to be resident in India if:
 - He has been in India for an overall period 365 days or more within four years preceding that year; and
 - He is in India for overall period of 182 days or more in that year
- This provision is now tightened by reducing the Indian citizen / person of Indian origin's stay in India to an overall period of 120 days or more (instead of 182 days)
- Likewise for qualifying to be a 'Not Ordinarily Resident', the assessee needs to be a non-resident in India in 7 out of 10 previous years as against the dual conditions earlier namely –
 - He has been a non-resident in India in nine out of ten previous year, or
 - He has been in India for 729 days or less in seven previous years
- Indian citizens not liable to tax in any other jurisdiction (by reason of his domicile or residence) shall be deemed to be resident in India

Press release issued by CBDT on 2 February 2020 clarifying the below:

In case of an Indian citizen who becomes deemed resident of India under the proposed provision, **income earned outside India by him shall not be taxed in India unless it is derived from an Indian business or profession.**

Section 194LC and 194LD

Rationalization of withholding tax rates on certain incomes of NRs

Rationale

- The Act provides for a reduced withholding tax rate of five percent under section 194LC of the Act on interest on loans raised by a specified company / business trust from NR before 1 July 2020
- Similar reduced withholding tax rate of five percent under section 194LD of the Act was provided on interest payments to FII and QFI on their investment in rupee denominated bonds of an Indian company or government securities before 1 July 2020
- To attract more foreign investment in India, the following amendments are proposed

Proposed amendments

- It is proposed that the period for applying the concessional withholding tax rate under section 194LC and 194LD of the Act be extended from 1 July 2020 to 1 July 2023
- Further, it is proposed that a lower withholding tax rate of four percent will be applicable on monies borrowed by a specified company / business trust from a source outside India by way of issue of any long-term bonds/ rupee denominated bonds after 1 April 2020 and before 1 July 2023, which is listed on a recognized stock exchange in an IFSC

This amendment will take effect from 1 April 2020

The corresponding amendment to the section 115A of the Act pertaining to the taxability of interest income has not been introduced – continues at five percent

Section 206C(1G) and 206C(1H)

Scope of section 206C widened

Proposed amendment

- Following amounts to be subject to TCS at five percent:
 - Amount received by an Authorised dealer exceeding INR 700,000 in a financial year for remittance out of India under the RBI's LRS.
 - Amount received by seller of an overseas tour program package.
- Above provisions not to apply to a buyer:
 - who is liable to TDS and has deducted such tax at source;
 - being the Central Government, a State Government , an embassy, etc. as defined in Explanation to section 10(20) of the Act or any other person to be notified.
- Every seller, who receives sale consideration of any goods exceeding INR 5 million in any previous year, other than specified goods* shall collect from the buyer TCS of 0.1 percent of the sale consideration exceeding INR 5 million.
- Where the buyer does not furnishes his PAN or Aadhaar number to the seller, then the tax shall be collected by the seller at the rate of one per cent. This provision not to apply if the buyer is liable to TDS and has deducted such tax at source.
- "Seller" to mean a person whose total sales, gross receipts or turnover from the business carried on by him exceed INR 100 million during the financial year immediately preceding the financial year in which the sale of goods is carried out, not being a person to be notified.
- Whether non-resident buyer or seller covered?

**Alcoholic Liquor for human consumption, tendu leaves, timber obtained under forest lease or any other mode, any other forest produce, scrap, coal, lignite, iron ore, motor vehicle of value exceeding INR 1 million, remittance under LRS or overseas tour program package*

The proposed amendment is effective from 1 April 2020.

Section 115-O

Abolition of DDT

It is proposed to tax the dividend income in the hands of the shareholder. Domestic companies will no longer be required to pay DDT but will be required to withhold taxes

Payer	Recipient	Nature of dividend income	Tax rate under the Act*
Domestic company	Resident shareholders (in excess of INR5,000)	Dividend on shares	10 percent
	NR including foreign company	Dividend on shares	20 percent
	NR including foreign company	Dividend on GDRs	10 percent
	Foreign Portfolio Investors	Dividend on shares	20 percent
	Individual being a NR	Dividend on foreign exchange asset	10 percent

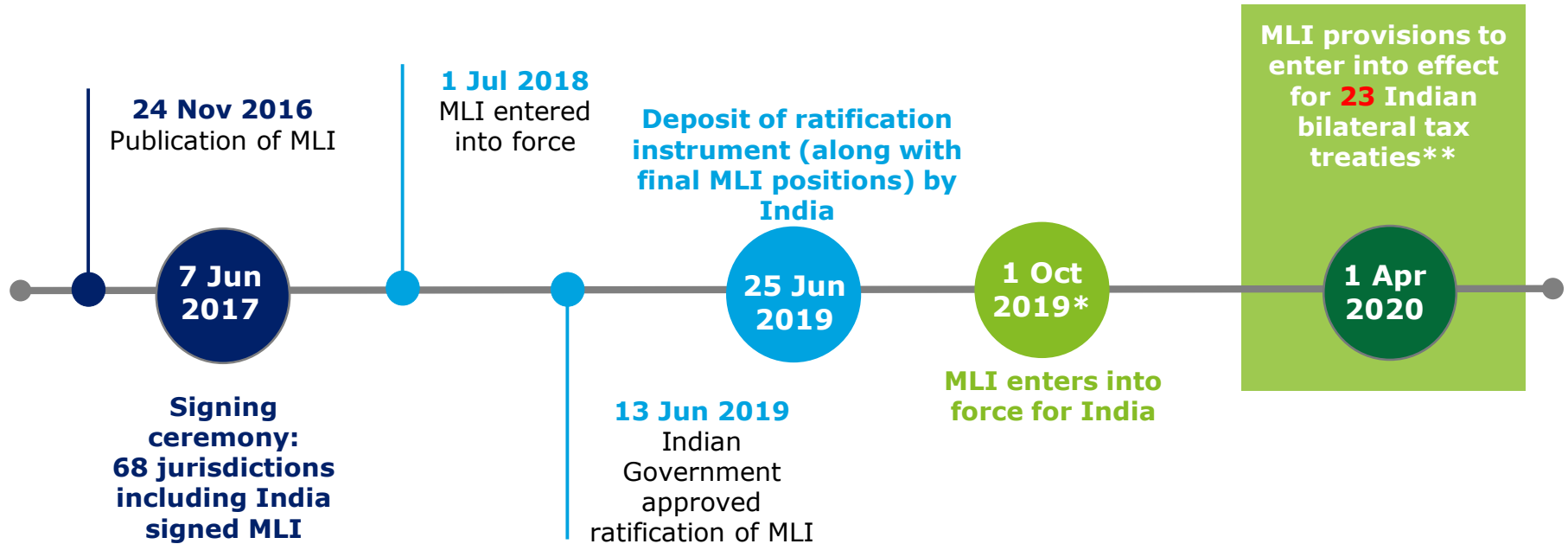
*Subject to benefits of a lower rate under tax treaties for NR including foreign company. Such lower rate would be subject to satisfying conditions relating to treaty eligibility including beneficial ownership

• **Withholding tax rate applicable on dividends?**

Multilateral Instrument (MLI)

How the MLI Operates

India Story so far



*That is, on the first day of the month following the expiration of three months beginning on the date of deposit of ratification instrument by India with the OECD Secretariat

**That is, Indian tax treaties with jurisdictions that have already deposited their ratification instrument with the OECD Secretariat latest by 30 June 2019 and have notified tax treaty with India as CTA

How the MLI Operates

Indian CTAs | MLI to enter into effect from 1 April 2020

List of jurisdictions that have notified tax treaty with India as CTA and have deposited their ratification instruments with OECD Secretariat

Austria	Australia	Belgium
Finland	France	Georgia
Ireland	Israel	Japan
Lithuania	Luxembourg	Malta
Netherlands	New Zealand	Poland
Russia	Serbia	Singapore
Slovak Republic	Slovenia	Sweden
United Kingdom	UAE	

“**Entry into effect**” with respect to CTA [Article 35]:

a) For Withholding Tax (WHT): On or after the first day of the next calendar year following the latest of the dates on which MLI enters into force for each of the party to the CTA. India has chosen to substitute “calendar year” with “taxable period”

b) For other taxes: Taxable period beginning on or after the expiry of six calendar months following the latest of the dates on which MLI enters into force for each of the party to the CTA

In relation to Indian bilateral tax treaties with jurisdictions tabulated (23), MLI to enter into effect for India from 1 April 2020 (for WHT and other taxes)

CTAs that get modified next ...

- Where CTA party deposits ratification document latest by 31 December 2019, MLI to come into effect for Indian CTA with such party from 1 April 2020 for WHT and 1 April 2021 for other taxes. For example: Canada, Norway, Ukraine, Denmark, Iceland and Switzerland which deposited its ratification instrument on 17 July 2019 and 8 August 2019 respectively
- MLI will not impact a) India-USA tax treaty (since USA has not signed MLI) and b) India tax treaties with China*, Germany, and Mauritius (since Indian tax treaties are not notified by said parties)

*India and China have recently amended its tax treaty through protocol signed on 26 November 2018. Amongst others, protocol incorporates changes required to implement treaty related minimum standards agreed under BEPS project

Impact of MLI

Form 15CB Certification

MLI Article	Impact
Article 4: Dual Resident Entities	<ul style="list-style-type: none">• In case of dual resident entities, in place of POEM tie-breaker rule, competent authorities would determine the residential status having regard to incorporation, POEM, etc• Till such determination, DTAA benefits shall not apply
Article 7: Principal Purpose test	<ul style="list-style-type: none">• No benefit of DTAA if one of the main purpose of transaction is to obtain DTAA benefit
Article 12: Commissionaire arrangements	<ul style="list-style-type: none">• Agent shall constitute PE if he plays a principal role in conclusion of contract• Agent is not independent if his activities are wholly or almost wholly on behalf of enterprise or closely related enterprise (CRE)
Article 13: Specific Activity exemption	<ul style="list-style-type: none">• Preparatory and auxiliary benefit for PE is not available if each activity is not preparatory and auxiliary• Activities of CRE in State to be considered
Article 14: Splitting of Contracts for Installation PE	<ul style="list-style-type: none">• Activities of CRE to be considered in determining number of days

Case Studies

Case Study 1

- Non-resident actor visiting India for participation in a shoot for a international series produced by a non-resident production house
- Actor does not hold a PAN
- He however holds a Tax Residency Certificate
- Income for the shoot is subject to tax in India

Questions

- Is the production house required to deduct tax at source?
- How would the applicable tax rate for deduction would be determined?
- Whether the certificates in Form 15CA and 15CB would be required to be submitted by the non-resident production house?

Case Study 2

- Fees for technical services payable by Company A, a Indian corporation to Company B, a UK Corporation.
- Payment is chargeable to tax in India under the Act.
- Under the India – UK DTAA, payment not chargeable to tax.

Questions

- Whether Company A is required to deduct tax at source?
- What is the recourse available to Company A to safeguard itself from any proceedings for lower deduction of tax?

Case Study 3

- X LLP is a Limited Liability Partnership in India
- Y Co. is a US company which owns and manages a social media website
- X LLP makes payment to Y Co. for online advertisement on the portal of Y Co.
- Y Co. hold a PAN

Questions

- Is X LLP required to deduct tax on payment made to Y Co?
- What would be the applicable rate for tax deduction?
- Whether the certificates in Form 15CA and 15CB would be required to be submitted by the non-resident production house?
- Will the answer to the above differ if Y Co. has a branch in India which is actively engaged in the sale of advertisement to X LLP?

Thank You !!

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