

TDS – DEVELOPMENTS & CONTROVERSIES

WESTERN INDIA REGIONAL COUNCIL
THE INSTITUTE OF CHARTERED ACCOUNTANTS OF
INDIA

30th June 2018

***I AM THE COUNTRY'S DRAFTSMAN,
I DRAFT THE COUNTRY'S LAWS,
FOR MOST OF THE LITIGATION,
I AM THE CAUSE!***

AS QUOTED BY RETD.JUSTICE SMT. SUJATA MANOHAR

FACTORS GIVING RISE TO CONTROVERSIES:

- **Amendments to the act - TDS and other provisions**
 - **Issue of circulars, notifications and instructions**
 - **Interpretational issues**
 - **Case-laws and legal precedents**
 - **One giving rise to the other**

OVERVIEW:

- CAUTION
- Section 192. Salaries
- Section 194A. Interest other than Interest on Securities
- Section 194C. Payments to Contractors
- Section 194H. Commission and Brokerage
- Section 194J. Fees for professional and technical services
- Section 195. Other Sums – Non Residents
- Section 206AA. Requirement to furnish PAN
- Section 279. Prosecution
- Section 244A. Interest on refunds
- Section 133A. Survey

CAUTION

CAUTION:

- Deduction of Tax from a payment does not make it an allowable expenditure. The test of allowability u/s 36 or 37 has to be independently passed.
- Whether the payment in question is wholly and exclusively for the purpose of business has to be proved on its own footing, merely because all the compliances of TDS provisions have been made, the same cannot attain the status of allowable expenditure.
- Information Technology is all pervading – without the proficiency in **InfoTech** the knowledge of **Income Tax** may not be self sufficient.
- Tax Audit report clause 21(b) disallowance u/s 40(a).
- Tax Audit report clause 34 detailed report of compliance by the auditor.
- **WHO IS THE TDS ASSESSING OFFICER, NOW?**

SECTION 192

SALARIES

Section 192 Salary

Section 192(2D)- w.e.f. 1-6-2015

- Person responsible for making payment of Salary,
- Shall, for the purpose of estimating income of the assessee or computing tax deductible,
- **Obtain from the assessee the evidence or proof or particulars of prescribed claims** (including claim of set-off of loss)
- in such manner as may be prescribed.
- Form 12BB
- The paradox before the employer would be if the proof attached for the claim is higher than the details filled in the form, whether he should rely on proofs provided or on prescribed form filed.

Section (10)(10) : Gratuity income Exemption

Subsection (2) for government employees – as per Payment of Gratuity Act 1972

Subsection (3) for other gratuities – Approved Gratuity Trusts – exemption as per Notification by the CBDT

Increase in Gratuity Payment from Rs. 10 lacs to Rs 20 lacs under the Payment of Gratuity Act – Notification for other Gratuities NOT issued. How is the Principal Officer to carry out the function assigned to him? The stake involved is huge – Rs.3 lacs for a person retiring

KPTCL v. Income-tax Officer (OSD) (TDS), Bengaluru
[2018] 93 taxmann.com 89 (Bangalore - Trib.)
MAY 2, 2018

IT : Employees of statutory corporation cannot be regarded as employees of State or Central Govt. and, hence, not entitled to exemption of entire sum of unutilized leave encashment under section 10(10AA)(i)

- Where assessee-KPTCL as an employer failed to deduct tax at source on salaries paid to its employees by including payment received by an employee in respect of any leave period not availed by employee, it was held that assessee being statutory corporation, its employees could not be regarded as employees of State or Central Govt. and, therefore, exemption under section 10(10AA)(i) was not available and assessee was liable to deduct tax. However, since assessee was under **bona fide belief that its employees were to be regarded as employees of State Government** and that its employees were entitled to exemption of entire sum of unutilized leave encashment under section 10(10AA)(i), KPTCL had discharged its obligation under section 192 and **proceedings under sections 201(1) and 201(1A) were to be quashed.**

SECTION 194A.
INTEREST OTHER THAN “INTEREST ON
SECURITIES”

SECTION 194A:

- ACIT v Dilip Ranjrekar ITA/858/Bang/2016
- Interest on Accumulated Balance in recognised Provident fund account, post retirement – whether **exempt u/s 10(12) No** – as exemption is available only to employee.
- Whether therefore TDS applicable, NO as PF Trusts is assessed as an Individual and Trust is not carrying on Business to attract provisions of Section 44AB.

[2007] **18 SOT 289 (DELHI)**
IN THE ITAT DELHI BENCH, 'D'
Food Corpn. of India* v. ITO

SEPTEMBER 14, 2007

Section 194A, read with sections 2(31) and 201, of the Income-tax Act, 1961 - Deduction of tax at source - Interest other than interest on securities - Assessment years 2001-02 to 2004-05 - Whether determination of status of an assessee-trust as a person in accordance with section 2(31) is a prerequisite before coming to a conclusion whether assessee has committed a default under section 194A - Held, yes - **Whether if assessee-trust is assessed as an individual, it would not be liable to deduct tax at source under section 194A - Held, yes**

[2009] 177 TAXMAN 224 (DELHI) 318 ITR 318 (Del)

HIGH COURT OF DELHI

CIT v. Food Corporation of India, Contributory Provident Fund Trust*

JULY 28, 2008

Whether before determining as to whether assessee is required to deduct tax at source under section 194A, its status has to be determined and if its status is that of an individual, then provisions of section 194A cannot be applicable to such an assessee - Held, yes - Assessee was a provident fund trust of employees created after seeking exemption under section 16 of the Employees Provident Fund Act, 1952 - Objects, for which trust was constituted, would show that sums contributed to fund by employees and employer in accordance with Food Corporation of India (Contributory Provident Fund) Regulations, 1967, together with income which accrued on investment held by trustees, constituted assets of fund which trustees were required to hold and apply in accordance with Regulations which were binding on members to fund - Whether in terms of section 161, **assessee had status of an individual and, thus, it was not required to deduct tax at source under section 194A in respect of payments of interest included in payments made by it to ex-employees after cessation of their employment - Held, yes**

SECTION 194C. PAYMENTS TO CONTRACTORS

Section 194C Payments to Contractors

43 SOT 215 (Mum.)

Tata AIG General Insurance Co. Ltd.*

Assessee entered into arrangements with various parties for hiring of cars - for transportation of employees and visitors for purpose of assessee's business - Assessee deducted tax at source from payments of car hire charges as per provisions of section 194C - Assessing Officer held assessee was liable to deduct tax at source as per provisions of section 194-I - Whether since contracts entered into by assessee with concerned vendors for hiring of cars clearly established that there were no specific cars identified and earmarked for assessee and it was only arrangement for providing cars of a particular category to facilitate transportation of employees and guests of assessee from one place to another, assessee had rightly deducted tax at source from payments of car hire charges as per provisions of **section 194C - Held, yes**

Section 194C – Payments to Contractors

“**work**” shall include:

(e) Manufacturing or supplying a product according to the requirement or specification of a customer by using material purchased from such customer, but does not include manufacturing or supplying a product to the requirement or specification of a customer by using material purchased from a person, other than such customer.

Glenmark Pharmaceuticals Ltd., 324 ITR 199 (Bom)

The assessee has an agreement with a third party for the manufacture of certain pharmaceutical products - **assessee provides the formulations and specifications. The manufacturer affixes the trademark of the assessee on the articles produced after purchase of raw materials. Property in the goods passes to the assessee only on delivery.** This agreement is on a principal to principal basis. The assessee contends that the contract is a **contract of sale**. The Revenue contends that the contract is a contract of 'work' and tax was deductible at source under Section 194C. HELD – 194C **not attracted**.

Section 194C – Payments to Contractors

3 SOT 16 (DELHI) National Panasonic India (P.) Ltd. v. DCIT 2-2-2005.

Section 194-I - Deduction of tax at source - Rent – A Y 2001-02 - Whether a payment is liable for tax deduction only under one section - Held, yes - Whether agreement or arrangement which gives rise to payment of rent must necessarily be an agreement or arrangement predominantly for use of land or building - Held, yes - Whether where **agreement is not predominantly for use of land or building, but for something else, then payment under that agreement will not constitute rent even if that 'something else' involves use of land or building as an integral part of or incidental to predominant objective of agreement - Held, yes** - Whether a C & F agent is a link between manufacturer and consumers and there is time gap between receipt of goods by C & F agent and their onward dispatch but merely because C & F agent stores goods of manufacturer in intervening period, character of payment made by manufacturer to agent does not undergo any change so as to call it rent either under general law or for purposes of section 194-I - Held, yes - Whether an **instant contract was a contract for carrying out a work between assessee and agent, and assessee had deducted tax at source under section 194C,** tax could not be deducted under section 194-I also - Held, yes

Section 194C:

S. 194C/ 194I: Deduction at source- Rent - In deciding whether a payment is for "**use of land**", **the substance of the transaction has to be seen**. If the payment is for a variety of services and the use of land is minor, the payment cannot be treated as "rent" - Charges for landing and take-off services as well as parking charges aircrafts paid by airlines to AAI are surcharges for various services and facilities hence such charges cannot be treated as rent-Not liable to deduct Tax at source.**[S.194C, 201(1)]**

Japan Airlines Co. Ltd. v. CIT (2015) 377 ITR 372/ 279 CTR 1(SC)
CIT v.Singapore Airlines (2015) 377 ITR 372 (SC)

Section 194C – Payments to Contractors

CIRCULAR : NO. 720, DATED 30-8-1995.

- Payment of any sum shall be liable for deduction of tax only under one section.
- It has been brought to the notice of the Board that in some cases persons responsible for deducting tax at source are deducting such tax by applying more than one provision for the same payment. In particular, it has been pointed out that the sums paid for carrying out work of advertising are being subjected to deduction of tax at source under section 194C as payment for work contract as also under section 194J as payments of fees for professional services.
- It is hereby clarified that each section, regarding TDS under Chapter XVII, deals with a particular kind of payment to the exclusion of all other sections in this Chapter. Thus, payment of any sum shall be liable for deduction of tax only under one section. Therefore, a payment is liable for tax deduction only under one section.

SECTION 194H
COMMISSION OR BROKERAGE

Section 194 H – Commission or Brokerage

“Commission or brokerage” defined – includes any payment received or receivable, directly or indirectly, by a person action **on behalf of another person** for services rendered (not being professional services) or for any services in the course of buying or selling of goods or in relation to any transaction relating to any asset, valuable article or thing, not being securities.

“Agency” is understood to be a pre-requisite.

SKOL Breweries Ltd. v ACIT - 29 taxmann.com 111 (Mumbai - Trib.)

“'commission or brokerage' by including any payment received or receivable directly or indirectly by a person acting on behalf of another person - Thus, it is clear that the provisions of section 194H do not require any formal contract of agency.

***Delhi International Airport (P.) Ltd. v.
Deputy Commissioner of Income-tax, Central Circle- 2 (2),
Bengaluru - [2018] 93 taxmann.com 228 (Bangalore - Trib.)***

**SECTION 194H - DEDUCTION OF TAX AT SOURCE -
COMMISSION, BROKERAGE, ETC.**

Scope of : Where assessee airport collected passengers service fee (PSF) from passengers through airlines operators at airport, an amount by way of collection charges retained by airlines operators for making such collection on assessee's behalf assumed character of commission paid by principal to its agents and, thus, assessee being a principal was required to deduct TDS on such payments to airlines operators under section 194H

**Section 194 H – Commission or Brokerage...
Mother Dairy India Ltd. v CIT 358ITR 218 (Del)**

Whether relationship between assessee-company (Dairy) and concessionaire, who sold milk and other products of assessee from booths owned by assessee, was principal-to-principal relationship inasmuch as milk and other products became property of concessionaire moment they took delivery of them and they were selling milk and other products in their own right as owners - Held, yes –

- Whether, therefore, difference between MRP and price which concessionaire paid to assessee was his income from business and it could not be categorized as commission within meaning of section 194H - Held, yes [In favour of assessee]

Section 194 H – Commission or Brokerage...

CIT Pune Vs. Intervet India Pvt.Ltd. Income tax appeal no.1616 of 2011

In implementation of the sales promotion schemes, the assessee passed on the incentives to the distributors / dealers / stockists through the consignment agent by way of sale credit notes; **Sales promotion expenditure bifurcated under the aforesaid two schemes viz. (i) the product discount scheme and (ii) the product campaign. The assessee contended that the expenditure under the said claims are only for promotion of sales and hence had no relation to payment of any commission on sales.**

Sales promotional expenditure in question, the provisions of explanation (i) below Section 194H of the Act are rightly held to be not applicable as the benefit which is availed of by the dealers / stockists of the Assessee is appropriately held to be not a payment of any commission

Section 194 H – Commission or Brokerage...
Tanna Agro Impex Pvt. Ltd Vs Addl. CIT

Income Tax - Sections 40(a)(ia), 194H – Whether when the hedging transactions of commodities are in the nature of derivatives transactions, any TDS obligation arises on brokerage charges paid.

*The meaning assigned to the expression ‘securities’ is, as stated in explanation (iii) to Section 194H, is the same as assigned to it in clause (h) of section 2 of the Securities contracts (Regulations) act, 1956. It is thus clear that **transactions of derivatives are also covered by the scope of expression “securities’ for the purpose of tax deduction requirements u/s.194H.** The hedging transactions of commodities, if in the nature of derivatives transactions, will, therefore, be outside the ambit of transactions on which TDS requirements come into play.*

Section 194 H – Commission or Brokerage...

Kotak Securities Limited [2012] 18 taxmann.com 48 (Mumbai - Trib.)
IT : Payment of **Bank Guarantee Commission not liable to TDS under section 194H**

- Principal agent relationship is a sine qua non for invoking the provisions of section 194H
- There is **no principal agent relationship between the bank issuing the bank guarantee and the assessee**; when bank issues the bank guarantee, on behalf of the assessee, all it does is to accept the commitment of making payment of a specified amount, on demand, to the beneficiary, and it is in consideration of this commitment, the bank charges a fees which is customarily termed as 'bank guarantee commission'; while it is termed as 'guarantee commission', it is not in the nature of 'commission' as is understood in common business parlance and in the context of section 194H; this transaction, is **not a transaction between principal and agent so as to attract the tax deduction requirements under section 194H**

Section 194 H – Commission or Brokerage...

Jet Airways (India) Ltd. v ITO I.T.A. No. 7439, 7440 and 7441/Mum/2010
Commission paid to the credit card companies cannot be considered as falling within the purview of S.194H. Even though the definition of the term “commission or brokerage” used in the said section is an inclusive definition, it is clear that the liability to make TDS under the said section arises only when a person acts on behalf of another person. In the case of commission retained by the credit card companies however, it cannot be said that the bank acts on behalf of the merchant establishment or that even the merchant establishment conducts the transaction for the bank. The sale made on the basis of a credit card is clearly a transaction of the merchant's establishment only and the credit card company only facilitates the electronic payment, for a certain charge. The commission retained by the credit card company is therefore in the nature of normal bank charges and not in the nature of commission/brokerage for acting on behalf of the merchant establishment. Accordingly, concluding that there was no requirement for making TDS on the ‘Commission retained by the credit card companies.

SECTION 194J

FEES FOR PROFESSIONAL OR TECHNICAL

SERVICES.

Section 194J Fees for professional or technical services.

(1) Any person, not being an individual or a Hindu undivided family, who is responsible for paying to a resident any sum by way of—

(a) fees for professional services, or

(b) fees for technical services, or

(ba) any remuneration or fees or commission by whatever name called, other than those on which tax is deductible under section 192, to a director of a company, or

(c) royalty, or

(d) any sum referred to in clause *(va)* of section 28,

shall, at the time of credit of such sum to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to ten per cent of such sum as income-tax on income comprised therein :

Provided that

Section 194J Fees for professional or technical services.

Explanation.—For the purposes of this section,—

(ba) **“royalty”** shall have the same meaning as in *Explanation 2* to clause (vi) of sub-section (1) of [section 9](#);

Explanation [2].—For the purposes of this clause, “royalty” means any consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head ‘Capital Gains’) for –

- (i) the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property;
- (ii) The imparting of any information concerning the working of , or the use of a patent, invention, model, design, secret formula or process or trade mark or similar property;
- (iii) The use of any patent, invention, model, design, secret formula or process or trade mark or similar property;

Section 194J Fees for professional or technical services. ...

- (iv) The imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill;
- (iva) The use or right to use any industrial, commercial or scientific equipment, but not including the amounts referred to in section 44BB;
- (v) The transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for sale, distribution or exhibition of cinematographic films; or
- (vi) The rendering of any services in connection with the activities referred to in (i) to (v) above

Section 194J Fees for professional or technical services.

Explanation.—For the purposes of this section,—

(b) "**fees for technical services**" shall have the same meaning as in *Explanation 2* to clause (vii) of sub-section (1) of [section 9](#);

Explanation [2].—For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries".

**[2016] 67 taxmann.com 356 (SC)
CIT Mumbai v. Kotak Securities Ltd.***

IT: Service made available by Bombay Stock Exchange [BSE Online Trading (BOLT) System] for which transaction charges are paid by members of BSE are **common services that every member of Stock Exchange is necessarily required to avail of to carry out trading in securities in Stock Exchange**; such services do not amount to 'technical services' provided by Stock Exchange, **not being services specifically sought for by user or consumer and, therefore, no TDS would be deductible under section 194J** on payments made for such services

■■■

SECTION 195

OTHER SUMS
(NON RESIDENT PAYMENTS)

Section 195 (6):

- The person responsible for paying to a non-resident, not being a company or to a foreign company, any sum, **whether or not chargeable to tax** under the provisions of the Act, shall furnish the information relating to the payment of sum, in such form and manner as may be prescribed.
- The prescribed forms are Form 15CA and 15CB
- Rule 37BB as amended provided that 33 type of transactions would not be required to file form 15CA or 15CB

Certificates u/s 197 / 195(2)/195(3)

- Certificates should be from TRACES only and bearing the Alphanumeric reference Number generated through the TDS module of ITD application.
- Instruction No. 6/2010 dated 9.8.2010
- To maintain centralized data of issue of such certificates and facilitate better processing of TDS/TCS returns filed by deductors, hence forth certificates shall be generated and issued **mandatorily** through ITD System only
- Instructions originally issued, with process flow and screenshots vide instruction no 36 dated 15-7-2009, 38 dt.15-2-2009 and 39 dt. 28-6-2010
- For Individuals NIL deduction certificates are not issued – the System is NOT so configured.
- There is no provision in the Act for such a restriction, but the system is so designed that no certificates are issued with Nil deduction, a small fraction may be mentioned like 0.01%.

SECTION 206AA
REQUIREMENT OF QUOTING PAN

Relaxation from deduction of tax at higher rate under section 206AA. Rule 37BC w.e.f. 24.6.2016

- In the case of a non-resident,
- not being a company, or
- a foreign company (hereafter referred to as 'deductee') and
- not having permanent account number,

the provisions of section 206AA shall not apply in respect of payments in the nature of:

- Interest,
- Royalty,
- Fees for technical services and
- Payments on transfer of any capital asset,

If the deductee furnishes the following details:

- Name, email id and contact number of the deductee,
- Address in country / territory of which he is resident.
- Certificate of residency, if that country provides one,
- Tax identification number / Unique Number of the country in which he is resident.

SECTION 279

PROSECUTION

S 279. Prosecution to be at instance of *Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner.*

- A person shall not be proceeded against for an offence except with the previous sanction of the *Principal Commissioner or Commissioner or Commissioner (Appeals)* or the appropriate authority.
- the *Principal Chief Commissioner or Chief Commissioner* or, as the case may be, *Principal Director General or Director General* may issue such instructions or directions to the aforesaid income-tax authorities as he may deem fit for institution of prosecution proceedings.
- No prosecution where penalty waived u/s 273A
- Compounding of offence either before or after institution of the proceedings.
- **Guidelines for compounding of offences under direct tax laws, 2014 - Letter [f.No.285/35/2013 it (inv.)/108, dated 23-12-2014**
- **PRECAUTIONS**
- **REPRESENTATIONS**

SECTION 244A
INTEREST ON REFUNDS

Section 244A : Interest on refunds:

- a new sub-section (1B)
- to provide that where **refund of any amount becomes due to the deductor, simple interest at the rate of one-half per cent for every month or part of a month**
- from the date on which claim for refund is made in the prescribed form or for giving effect to an order under section 250 or 254 or 260 or 262 from the date on which the tax is paid up to the date on which refund is granted.
- interest shall not be allowed for the period for which the delay in the proceedings resulting in the refund is attributable to the deductor.

These amendments will take effect from 1st April, 2018.

The Legislature has now thought it fit to legislate what the Judiciary held and the Executive directed.

Refund of taxes paid u/s 195 and interest thereon

- Circular No 769 dated
- Circular No 790 dated 20th April 2000
- Circular No 7 of 2007 dated 23-10-2007
 - Circular No. 11 of 2016

CIT v Tata Chemicals Limited. 363 ITR 658 SC
Amendment to Section 244A(1A)

Section 244A (1A)

- genesis arising from three circulars:
 - 769 [1998] dated 6.8.1998 232 ITR (St.) 25 and
 - 790 [2000] dated 20.4.2000 243 ITR (St.) 58
 - 7/2007 dated 23.10.2007
 - which specifically provided that the benefit of interest under section 244A of the Act on such refunds would not be available to the deductor under specific circumstances.
 - However the refusal of interest was being made in all cases of such refunds.

The Hon. Supreme Court held in the case of **Union of India v Tata Chemicals Ltd 363 ITR 658** as under:

- *When the amount is refunded it should carry interest as a matter of course.*
- *The payment of tax made by the assessee was in excess and the Department chose to refund the excess tax to the depositor.*
- *Interest required to be paid on such refund.*
- *the opening words of clause (b) specifically refer to "in any other case",*
- *The assessee was entitled not only to the refund of tax deposited under section 195(2) of the Act, but to interest from the date of payment of such tax."*

CBDT issued a circular No. 11/2016 dated 26th April 2016, stating as under:

- *Supreme Court, in the case of Tata Chemical Limited, vide order dated 26-2-2014, held that, "Refund due and payable to the assessee is debt-owed and payable by the Revenue. The Government, there being no express statutory provision for payment of interest on the refund of excess amount/tax collected by the Revenue, cannot shrug off its apparent obligation to reimburse the deductors lawful monies with the accrued interest for the period of undue retention of such monies. The State having received the money without right, and having retained and used it, is bound to make the party good, just as an individual would be under like circumstances. The obligation to refund money received and retained without right implies and carries with it the right to interest. "*
- *if a resident deductor is entitled for the refund of tax deposited under section 195 of the Act, then it has to be refunded with interest under section 244A of the Act, from the date of payment of such tax.*

Accordingly, it is advised that no appeals may henceforth be filed on this ground by the officers of the department and appeals already filed on this issue may not be pressed upon."

SECTION 133A(2A)

TDS SURVEY

TDS SURVEY

- New sub-section (2A) to Section 133A – effective 1-10-2014
- For the purpose of verifying that tax has been deducted or collected at sources under Chapter XVIIB or Chapter XVIIBB
- An income tax authority may enter any office, or any place where business or place is carried on, within the limits of the area assigned to him
- Timing between sunrise and sunset
- Income Tax Authority may require the person attending such place to afford him necessary facility to inspect such books of account or other documents available at such place to furnish such information in relation to such matter.
- What is permitted is:
 - placing identification marks on books and documents
 - Recording of statement
- What is not permitted is to impound and retain in his custody any books, documents, or make inventory of stock or cash or valuables.

TDS Survey ..

- Misuse of power
- March month – meeting of targets of collection.
- Statistics of last year collection collated
- Notices sent for comparing current years deduction/ collection
- Explanation for mismatches
- Commitment sought for current payments and amounts.
- ELSE Survey!!
- Insistence on payment of March in March itself – no availing of time available under the law.
- WINDOW DRESSING by the department!!

Thank you for a patient hearing!