

TDS under section 195 of the Income-tax Act



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Overview of section 195

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195(1)

Any person paying to non-resident required to deduct tax if such sum is chargeable tax in India

195(2)

Lower or Nil tax deduction certificate – application by payer

195(3)

Lower or Nil tax deduction certificate – application by payee

195(4)

Validity of certificate u/s 195(3)

195(5)

Power of CBDT to issue notification related to grant of certificate

195(6)

Requirement of Form 15CA / Form 15CB

Section 195(1)

Section 195(1)

Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest (not being interest referred to in section 194LB or section 194LC) or section 194LD or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries") shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force:

Section 195(1) – an overview

- Provision for deduction of tax at source on sums paid to non-residents
- Section 195(1) covers:
 - interest payments
 - any other sum chargeable to tax
- Exclusions from section 195(1):
 - Salaries
 - Dividend payments which are subject to DDT
 - interest payments to specified infrastructure debt funds
 - interest payments by Indian companies / business trusts on specific borrowings
 - interest on certain bonds / government securities
- Tax to be deducted at the time of credit of income to the account of the payee or at the time of payment, whichever is earlier
- Tax to be deducted at the rates in force
- Explanation 2 inserted by Finance Act 2012 with retrospective effect from 1 April 1962

Section 195(1) – sum chargeable under the provisions of this Act

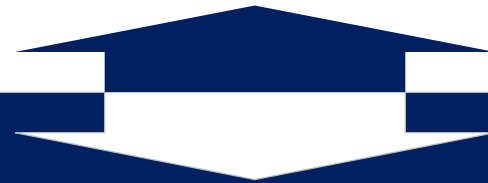
- In determining the sum chargeable under the provisions of the Act, the entire scheme of non-resident taxation would be relevant
- Key considerations in determining whether the payment made to non-resident is taxable in India in the hands of the non-resident:
 - Residential status as per section 6
 - Scope of total income in terms of section 5 and 9
 - Provisions applying to non-resident (e.g. 115A dealing with tax on dividends, royalty and technical service fees in case of non-residents)
 - Scheme of presumptive taxation (e.g. 44BB, .. etc.)
 - Section 90 permits a non-resident to opt between Income-tax Act and tax treaty, whichever is beneficial

Section 195(1) – sum chargeable under the provisions of this Act

Residential status

Earlier definition of residential status of company

- A company is said to be resident in India if:
 - it is an Indian company; or
 - during that year, the control and management of its affairs is situated wholly in India



Amended definition of residential status of company [section 6(3) – applicable from 1 April 2016 i.e. for FY 2016-17]

- A company is said to be resident in India if:
 - it is an Indian company; or
 - its *place of effective management* in that year is in India
- Place of effective management means a place where key management and commercial decisions that are necessary for the conduct of the business of an entity as a whole are, in substance made – Explanation to section 6(3) of Income-tax Act

Section 195(1) – sum chargeable under the provisions of this Act

Chargeability under the Income-tax Act

- As per section 5, total income of a non-resident includes:
 - Income received or deemed to be received in India; or
 - Income accrues or arises or deemed to accrue or arise to him in India
- As per section 9, income is said to be deemed to accrue or arise in India if the same is accruing or arising directly or indirectly, through:
 - A business connection in India or
 - from any property in India or
 - from any asset or source of income in India or
 - the transfer of a capital asset in India
- It also includes any share or interest in a company or entity registered or incorporated outside India, which derives its value substantially from assets in India

Section 195(1) – sum chargeable under the provisions of this Act

Provisions of section 195(1) are not attracted if payment is not chargeable to tax

- Illustrative payments to non-residents not chargeable under the Act:
 - Payments on capital account, for example, gifts, loans, repayment of loans etc.
 - Sums which are on revenue account and which are not chargeable to tax at all under the Act in the hands of the recipient
 - Sums which fall within the scope of Section 5 of the Act, but which are expressly exempt under the Act – for example: dividend income

Section 195(1) – sum chargeable under the provisions of this Act

Key points relating to tax treaty

- Tax resident of the country of which the tax treaty is sought to be applied – generally, it is Article 4 that deals with residential status and contains tie breaker rules
- Taxability of non-resident as per relevant Article(s) of tax treaty that specifically deal with income of the non-resident
- Evaluate if non-resident has a Permanent Establishment in India

Requirement of Tax residence certificate

Finance Act 2012	Non-residents to obtain TRC (in prescribed format) from resident tax authorities
Finance Act 2013	Did away with the format, stated that it would be enough if tax payer obtains TRC and maintains prescribed documents / information
Notification No. 57 of 2013	Additional documents and information – Form 10F

Section 195(1) – any person responsible for paying

- The term ‘any person responsible for paying’ defined under section 204
 - Payer itself and in case of company, the company including the principal officer
 - Including an Individual and HUF (whether or not carrying business)
 - Agent also liable to deduct tax at source from payments to non-resident principal
 - Whether payer also 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

Section 195(1) – rates in force

- The term 'rates in force' is defined under section 2(37)
 - refers to the rates provided under the relevant Finance Act or the tax treaty
- Tax rates under the Finance Act:
 - Part II of Schedule to the Finance Act of a particular financial year will provide the rates for tax deduction for that year; for example, Finance Act 2017 will provide rates for TDS in FY 2017-18
 - Rate of deduction under the Finance Act is to be increased by applicable surcharge and education cess
- Tax rates under tax treaty:
 - Tax rate prescribed under the tax treaty of the jurisdiction of which the payee is tax resident for the particular type of income would be adopted
 - Surcharge and education cess would not be added to the tax rate (M Far Hotels (58 SOT 261) (Kochi Tribunal))

Section 206AA

Section 206AA

- In case of non-availability of PAN, tax is to be deducted at the higher of the following:
 - Rates specified in the Act
 - Rates in force
 - 20%
- The Finance Act 2016 has amended section 206AA so as to provide that effective 1 June 2016, tax shall not be deducted at a higher rate in case of non-residents not having PAN subject to prescribed conditions
- Prescribed conditions for relaxation of deduction of tax at higher rate in case of non-residents under section 206AA:
 - The deductee to furnish following details for non deduction of tax at higher rates:
 - Name, email ID, contact number
 - Address in the country or specified territory outside India of which deductee is a resident
 - A certificate of his being resident in any country or specified territory outside India from the Government of that country or specified territory if the law of that country or specified territory provides for issuance of such certificate

Section 206AA – applicability in case of tax treaty scenario

Supreme Court in the case of
Azadi Bachao Andolan

- It is upheld by the Supreme Court that the provision made in the DTAA's will prevail over the general provisions contained in the Act to the extent they are beneficial to the assessee

Serum Institute of India Ltd.
[2015] (56 taxmann.com 1)
Pune Tribunal

- It is held that where tax has been deducted on the strength of the beneficial provisions of the DTAA's, the provisions of section 206AA of the Act cannot be invoked to insist on tax deduction @ 20%, having regards to the overriding nature of provisions of section 90(2) of the Act

Bangalore Tribunal in the case
of Infosys BPO Ltd. (ITA No.
1143B / 2013)

- It is held that there is no scope of deduction of tax at the rate of 20% as per section 206AA (when the assessee does not have tax identification number – PAN) of the Act when the benefit of DTAA is available to the assessee
- The Bangalore ITAT has reiterated the view recently in Wipro Ltd. ITA 1544-47/Bang/13

Thus, based on the above decisions, one may take a position that section 90 shall override section 206AA

Grossing up under section
195A

Grossing up under section 195A

- If the payee bears the tax liability i.e. payment is “net of tax” then for computing TDS, income should be grossed up
- Example – Amount payable to non-resident is 100 and TDS rate is 10%; gross amount for TDS purpose would be 111.11 ($100 * 100 / 90$)
- Issues
 - Whether grossing up would be required to be done in case payment is made net of tax to a foreign company which does not have a PAN in India, considering the provisions of section 206AA
 - Income could be grossed up using the applicable rate; example 10% and tax could be withheld at 20%
 - For example: say total amount to be paid net of tax as per agreement be INR 100. Income increased to INR 111.11 (grossed by 10%). Tax needs to be withheld @ 20% on 111.11 = 22.22

Bosch Ltd. v. ITO (2013) 141 ITD 38 / 155 TTJ 354
(Bang.) (Trib.)

Foreign exchange rates

Foreign exchange rates

- As per Rule 26, SBI TT Buying rate on the date on which tax is required to be deducted is to be adopted to convert the foreign currency payment amount to INR to determine TDS
- As per Rule 115, where tax has been deducted at source as per Rule 26, the exchange rate as per Rule 26 would be applicable for determining income in the hands of the non-resident as well
 - Accordingly, exchange rate prescriptions under Rule 115 for specific types of income would not apply if tax has been deducted at source following Rule 26
- On account of provision 1 to section 48 read with Rule 115A, capital gains arising to a non-resident on transfer of shares or debentures in an Indian company are computed by converting amounts in INR into foreign currency and back into INR in the following manner:

Cost of acquisition	Average TT rate on date of acquisition of the asset
Expenditure in relation to transfer	Average TT rate on date of transfer of the asset
Consideration	Average TT rate on date of transfer of the asset
Reconverting capital gains to INR	TT buying rate on date of transfer of the asset

Long-term gains on sale of closely held shares are an exception since proviso 1 to section 48 is not applicable to them

Foreign exchange rates

Type of remittance	Date
Salaries (not subject to section 195)	last day of the month immediately preceding the month in which the salary is due, or is paid in advance or in arrears
Interest on securities	last day of the month immediately preceding the month in which the income is due
<ol style="list-style-type: none">1. Income from house property2. Business profits3. Other sources (other than dividend / interest on securities)4. Remittance or aggregate of remittance exceeds INR 5 lakh in a financial year	Last day of previous year

Disallowance u/s 40(a)

Disallowance u/s 40(a)(i) is on the same lines as section 40(a)(ia)

Particulars	Pre-amendment	Post amendment
Tax deducted but not deposited within due date for paying TDS but deposited before due date of filing return of income	Allowed only in the financial year in which the tax is deposited	Allowed in the financial year in which the tax is deducted
Tax not deducted in the financial year but deposited before due date of filing return of income	Allowed only in the financial year in which the tax is deposited	Allowed only in the financial year in which the tax is deposited
Tax deducted in the financial year but deposited after due date of filing return of income	Allowed only in the financial year in which the tax is deposited	Allowed only in the financial year in which the tax is deposited

TDS compliance

TDS compliance

Tax deduction on payments to non-residents

- Payer to deduct tax and to deposit it within prescribed timelines
- Due dates of depositing tax deducted

Amount paid / credited	Due dates of deposit tax deducted
In the month of March	30 April
In other months	7th day of the following month

- Consequences of non-compliance

Defaults	Consequences
Failure to withhold tax	<ul style="list-style-type: none">• Recovery of the amount of TDS• Payment will be disallowed
Delay in withholding tax	<ul style="list-style-type: none">• 1% per month from date on which tax was due to be deducted to date on the tax is deducted
Delay in depositing tax	<ul style="list-style-type: none">• 1.5% per month from date on which tax was deducted to date on the tax is deposited

TDS compliance

TDS returns

- Payer to file TDS return in Form 27Q
- Due dates of depositing tax deducted

Quarter ended	Due dates for filing TDS return
30 June	31 July
30 September	31 October
31 December	31 January
31 March	31 May

- Consequences of non-compliance

Defaults	Consequences
Delay in filing TDS return	Rs. 200 late filing fee per day from due date to date of furnishing TDS return (restricted to tax deductible during the quarter)

TDS compliance

TDS certificates

- Payer to issue TDS certificates in Form 16A
- Due dates of depositing tax deducted

Form	Due dates for issuing Form16A
Form 16A	Within 15 days from due date for furnishing quarterly TDS return

- Consequences of non-compliance

Defaults	Consequences
Delay in furnishing the WHT certificate	Penalty of INR 100 per day from due date of furnishing the withholding certificate to date of furnishing it

Remittance procedure

Remittance procedure – Section
195(6) read with Rule 37BB

Scheme of foreign remittance procedure

- As per section 195(6), information has to be furnished for all payments to non-residents, whether taxable or not
- If remittance is not taxable, reporting will not be required in the following cases:
 - Payment is made by an individual under the Liberalised Remittance Scheme (LRS) of the RB; or
 - It falls in any of the 33 exempt categories primarily pertaining to overseas investments, loans, imports, tax payments, travel
- As per section 271-I, penalty of INR 1 lakh can be levied for failure to report or for inaccurate reporting
- Payer would have to determine taxability of the remittance under both Act and tax treaty which may entail the following:
 - Characterisation of the income for purpose of Act and tax treaty
 - Obtain tax residency certificate and no PE certificate (if required)
 - Be updated with latest updates to tax law such as amendments, departmental releases, judicial precedents etc.
 - Comply with withholding tax timelines and requirements

Steps for remittance

Obtain Form 15CB if:
1. remittance is taxable; and
2. aggregate remittances exceed INR 500,000 during the financial year



Upload the remittance details in Form 15CA through the income-tax e-filing portal



Submit signed print-out of Form 15CA along with copy of Form 15CB with the bankers for remittance

Reporting requirement as per rule 37BB

Type of remittance	Part of Form 15CA	Requirement of CA certificate in Form 15CB
<ol style="list-style-type: none">1. Remittance is taxable; and2. Remittance or aggregate of remittance does not exceed INR 5 lakh in a financial year	A	No
<ol style="list-style-type: none">1. Remittance is taxable;2. Remittance or aggregate of remittance exceeds INR 5 lakh in a financial year3. Order/ certificate is obtained under section 195(2)/ 195(3)/ 197	B	No
<ol style="list-style-type: none">1. Remittance is taxable;2. Remittance or aggregate of remittance exceeds INR 5 lakh in a financial year	C	Yes
<ol style="list-style-type: none">1. Remittance is not taxable	D	No

CA certificate in Form 15CB

- Contains following important details of amount to be remitted:
 - Taxability under the Act
 - Taxability under the relevant tax treaty providing details of tax residency certificate (TRC), applicable tax treaty and articles, nature of income
- Factors to be considered to be obtained before issuing Form 15CB:
 - Taxability of the payment along with documentary evidence such as agreements
 - Obtaining TRC from the payee issued by tax authority of the relevant jurisdiction stating that the payee is a tax resident as per Article governing tax residency of the relevant tax treaty (usually Article 4)
 - Obtain declaration in Form 10F certified by the payee's with following details
 - Name
 - Status (company, partnership etc.)
 - Address
 - Nationality
 - TIN in home country
 - Period of residential status
 - PAN (if allotted)
 - No PE certificate if the payee does not have a PE

Application u/s 195(2)

Snapshot of remedies for nil or lower TDS under section 195

Particulars	Application u/s 195(2)	Application u/s 195(3)	Application u/s 197
Application by	Payer	Payee	Payee
Purpose	Determination of proportion of income that is taxable in situations where whole of income is not taxable	To secure nil TDS	To secure nil TDS or TDS at lower rates
Appeal	Not applicable	Not applicable	Not applicable
Revision under section 264 by the jurisdictional CIT	Yes	Yes	Yes

Application by the payer to the Assessing Officer under section 195(2) (1/2)

Step 1

Application to the Assessing Officer to determine of proportion of income that is taxable in situations where whole of income is not taxable

Step 2

Assessing Officer issues an order determining proportion of income that is taxable

Step 3

Payer deducts tax based on the order issues by the AO

- Conflicting decisions on whether application u/s 195(2) is mandatory
 - 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
 - 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
- CBDT Instruction No 2/2014 - 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.

Application by the payer to the Assessing Officer under section 195(2) (2/2)

- The Mumbai Tribunal in its judgement of Mangalore Refinery & Petrochemicals Ltd. (113 ITD 85) held that payer cannot be treated in default u/s 201 because it has applied u/s 195(2) before the AO prior to remitting the payment
- An order issued u/s 195(2) should not be treated as conclusive in the determination of income of the non resident payee
 - TELCO (245 ITR 823) (Bom)
 - Elbee Services P.Ltd. (247 ITR 109) (Bom)
 - Dodsai Pvt. Ltd (260 ITR 507) (Bom)
 - Arthur Andersen (ITA No. 9125/Mum/1995 dated 29-07-2003) (Mum Tribunal)
- The order u/s 195(2) is tentative in nature and does not have any effect beyond providing immunity u/s 201 and does not preclude the assessing officer to either re examine the chargeability of income in regular assessment proceedings or to recover the taxes from the payer in his representative capacity (Aditya Birla Nuvo (342ITR308) (Bom)

Application u/s 195(3)

Application by the payee under section 195(3)

Application to secure nil TDS

- **Branches of foreign banks** - income other than interest on securities and dividend
- **Branches of other non-resident assessee carrying on business or profession in India:** all income other than interest and dividend

Branches of other non-resident assessee carrying on business or profession in India:
all income other than interest and dividend

- Assessee needs to satisfy the following conditions:
 - Regularly assessed to income-tax in India and furnished the requisite income-tax returns
 - No default of payment of any tax or other sums
 - Additional conditions for non-banking assessee
 - Carried out business or profession in India for at least 5 years
 - Value of fixed assets in India at the end of the financial year immediately preceding the application is at least INR 50 lac
- Application is made in Form 15C for banks and Form 15D for other assessee
- Certificate is issued online and is valid for the financial year mentioned in the certificate

Application u/s 197

Application by the payee under section 195(3) and section 197

Application u/s 197

- Application is made to the Assessing Officer to secure nil TDS or TDS at lower rates
- Application can be made by any assessee in Form 13
- Each certificate is valid only in respect of the deductor mentioned in the certificate
- The certificate is applicable for the financial year mentioned in the certificate

Thank you