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The Institute of Chartered Accountants of India
(Set up by an Act of Parliament)

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on
Issuance of Form 15CB - Regulation & Procedure

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Foreword

Taxation is an imposition of compulsory levies on individuals or entities by governments. The purpose of taxation is to raise revenue for government expenditures and serve other purposes as well.

Sec-195 of the Income Tax Act, 1961 clearly explains about the need of tax deduction from payment made to non-resident whether in India or outside India or to non-Indian companies or a foreign company.

In order to procure the taxes from the non-resident or foreign company, the taxability on the amount paid is deducted at source itself so that the department does not need to get into the problems of recovering it from the non-resident whose presence in India is transient.

This E-Publication on Issuance of Form 15CB has been published to aware about regulation and procedure relating to Section 195, Form 15CB, taxability of non resident etc.

I congratulate CA.Gaurav Garg (Chairman, International Taxation Committee of NIRC of ICAI), CA.Nitin Kanwar (Vice Chairman, International Taxation Committee of NIRC of ICAI) for bringing out this useful e-publication which may be used as standard background material for all webinars/seminars/workshops on International Taxation.

Special thanks and appreciation to our contributors CA.Sachin Sinha, CA.Neha Gupta, CA.Sohil Rana and CA.Rishabh Agarwal who had been actively involved and has assisted NIRC in coming up with this E-Publication for the benefit of members and various stakeholder.

Best Regards

CA Avinash Gupta
Chairman, NIRC of ICAI

Place: New Delhi
Date: 31-08-2021

Preface

Taxation is crucial for the proper functioning of the modern country. Tax revenues are used for providing better facilities to the citizens which may include public services like roads, the courts, defense, welfare assistance, health care and education too.

In order to collect the taxes from non-residents at the earliest point in time, Section 195 was incorporated in the Income Tax Act, 1961 (the Act). As per Section 195(6) of the Act, the taxpayer or say remitter needs to furnish certain information to the tax authorities in Form 15CA and 15CB.

Compliance of Sec 195 is not only opportunity for Chartered Accountants but also helps the Government in collecting due taxes and providing the Assesse to know right liability of TDS payable on the transactions entered. Thus in this way, we, Chartered Accountants are serving the nation, as collection of due taxes at right time, is the key to development of our economy.

This publication is indeed, the need of the hour and has been developed keeping in mind background material required by our members while discussing the subject and related issues in the seminars/ webinars/ workshop or any other training program

We sincerely thank and congratulate CA. Sachin Sinha, CA. Neha Gupta, CA. Sohil Rana and CA. Rishabh Agarwal for investing their time and knowledge in to come-up with this publication. We would also like to express our gratitude towards Ms.Sunita Kackar for assisting us in bringing this publication. We wish to bring on record, special thanks to CA Avinash Gupta, Chairman, NIRC of ICAI for his timely guidance and support in this initiative.

We trust and believe that this publication would help our members in achieving the desired results.

Best Regards
CA. Gaurav Garg
Chairman

Best Regards
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Chapter 1

Introduction

Section 195 of the Income-tax Act, 1961 deals with deduction of tax from payment made to non-resident not being a company, whether in India or outside India or to non-domestic company or in other words, payment to a Foreign Company.

The objective of section 195 is to ensure, as far as possible, that the taxability on the income element of the amount paid is deducted at source itself so that the Department is not put into the hassles of recovering it from the non-resident whose connection with India may be transient or whose assets in India are not sufficient to recover the tax.

Provisions of 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:

Provided that in the case of interest payable by the Government or a public sector bank within the meaning of clause (23D) of section 10 or a public financial institution within the meaning of that clause, deduction of tax shall be made only at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode.

Explanation 1. —For the purpose of this section, when any interest or other sum as aforesaid is credited to any account, whether called "Interest payable account"

or "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be the credit of such income to the account of the payee and the provisions of this section shall apply accordingly.

Explanation 2 —For the removal of doubts, it is hereby clarified that the obligation to comply with sub-section (1) and to make deduction hereby applies and shall be deemed to have always applied and extended to all persons, resident or non-resident, whether or not the non-resident person has—

(i) a residence or place of business or business connection in India; or

(ii) any other presence in any manner whatsoever in India.

(2) Where the person responsible for paying any such sum chargeable under this Act (other than salary) to a non-resident considers that the whole of such sum would not be income chargeable in the case of the recipient, he may make an application in such form and manner to the Assessing Officer, to determine in such manner, as may be prescribed, the appropriate proportion of such sum so chargeable, and upon such determination, tax shall be deducted under sub-section (1) only on that proportion of the sum which is so chargeable:

(3) Subject to rules made under sub-section (5), any person entitled to receive any interest or other sum on which income-tax has to be deducted under sub-section (1) may make an application in the prescribed form to the Assessing Officer for the grant of a certificate authorising him to receive such interest or other sum without deduction of tax under that sub-section, and where any such certificate is granted, every person responsible for paying such interest or other sum to the person to whom such certificate is granted shall, as long as the certificate is in force, make payment of such interest or other sum without deducting tax thereon under sub-section (1).

(4) A certificate granted under sub-section (3) shall remain in force till the expiry of the period specified therein or, till the cancellation as done by the 3[Assessing Officer] before the expiry of such period.

(5) The Board may have regard to the convenience of assessee and the interests of revenue, by notification in the Official Gazette, make rules specifying the cases in which, and the circumstances under which, an application may be made for the grant of a certificate under sub section (3) and the conditions subject to

which such certificate may be granted and provided for all other matters connected therewith.

(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 under the provisions of this Act, shall furnish the information relating to payment of such sum, in such form and manner, as may be prescribed.

(7) Notwithstanding anything contained in sub-section (1) and sub-section (2), the Board may,by notification in the Official Gazette, specify a class of persons or cases, where the person responsible for paying to a non-resident, not being a company, or to a foreign company, any sum, whether or not chargeable under the provisions of this Act, shall make an application 6[in such form and manner to the Assessing Officer, to determine in such manner, as may be prescribed], the appropriate proportion of sum chargeable, and upon such determination, tax shall be deducted under sub-section (1) on that proportion of the sum which is so chargeable.

Snapshot of Section 195

- Section 195(1) – Scope and conditions for applicability.
- Section 195(2) – Application by payer to Assessing Officer for lower deduction of tax.
- Section 195(3) – Application by payee to Assessing Officer for Lower deduction of tax.
- Section 195(4) – Validity of certificate grated by assessing officer u/s 195(3).
- Section 195(5) – Power of CBDT to make Rules.
- Section 195(6) – Payer to furnish information in prescribed form.
- Section 195(7) – Power of CBDT to specify class of persons or cases where application to AO u/s 195(2) is compulsory.

To make section 195 applicable on any transaction, the following conditions must be satisfied:

a) the payee should be either a non-resident, not being a company, or a foreign company.

b) the amount payable should be interest, **excluding** interest referred to in section 194LB, 194LC or 194LD, or any other sum, **not being salaries**, chargeable under the provisions of this Act.

c) the sum payable shall pass the test of Section 5 "Scope of total Income".

According to section 5(2), a non-resident is chargeable to tax only on income which is:

a) received or deemed to be received in India, or

b) accrues or arises or is deemed to accrue or arise to him in India.

Refer Sec 6 to test the residency status of the payee and refer Sec 2(23A) read with Sec 2(22A) for Foreign Company. It is pertinent to note here that the definition of "Non-resident" u/s 2(30) provides that Non-resident means a person who is not a resident and for the purposes of sections 92, 93 and 168, includes a person who is not ordinarily resident within the meaning of section 6(6).

Income accrues or deemed to Accrue in India

The second limb of section 5(2) talks about the income that shall be deemed to accrue or arise in India for a non-resident. Section 9 deems the following income as accruing or arising in India in the hands of non-resident.

1. All income accruing or arising, directly or indirectly, through or from any business connection in India or through or from any property in India or through or from any asset or source of income in India or through the transfer of capital assets situated in India.
2. Income under the head salaries is chargeable if it is earned in India.
3. Salaries payable by the Government to a citizen of India for services outside India are also income deemed to accrue or arise in India.
4. Dividend paid by an Indian company outside India.

5. Interest payable by the Government or by a resident / non-resident in respect of any debt incurred, or money borrowed and used, for the purpose of business or profession carried on by such person in India.
6. All royalties payable by the Government and royalties' payable by a resident or a non-resident in respect of any right, property or information used for purpose of business or profession carried on by such person in India.
7. All fees for technical services payable by the Government and fees for technical services payable by a resident or a non-resident in respect of services used for business or profession carried on by such person in India.
8. Income arising outside India by virtue of any sum of money referred to in section 2(24)(xviia) paid by a person resident in India to a non-resident.

(for detailed text, refer section 9 of Income Tax Act, 1961)

Chapter 2

Responsibility to Deduct Tax

The deduction should be at the rate in force as defined in section 2(37A) i.e. the rate or rates of Income Tax specified on this behalf in Part II of Schedule 1, of the Finance Act of the relevant year or the rate or rates of Income Tax specified in an agreement entered into by the Central Government under section 90 or section 90A, whichever is applicable.

However, the rate or rates in force shall not be applicable in the following circumstances:

a) where the payer has obtained a determination of the portion of the sum chargeable under the Act, the tax shall be deducted only on the sum so determined by the Assessing Officer [section 195(2)].

b) where the certificate of lower deduction under section 197 has been obtained by the payer or the payee from the Assessing officer, the tax shall be deducted at the rate given by the Assessing officer on such certificate.

c) where the Assessing officer has issued a certificate authorising the person concerned to receive the income of interest or any sum without deduction of tax under sec 195(1), if he is satisfied that all the conditions prescribed in Rule 29B(2) are fulfilled.

With effect from 01-04-2008, sub-section (6) was inserted in sec 195 which read as under:

> "The person referred to in section 195(1) shall furnish the information relating to payment of any sum in such form and manner as may be prescribed by the Board".

Prior to 1.6.2015, the provisions of section 195(6), provided that the information shall be furnished by the payee to the department related to all payments which

are chargeable to tax. However, the Finance Act, 2015, amended the above sub-section (6) which now read as under:

> "(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 under the provisions of this Act, shall furnish the information related to payment of such sum and manner as may be prescribed."

The objective of this section is to ensure that the tax on the income of non-resident and foreign companies is deducted at source itself so that the department should not require to make any effort in recovering such tax from such non-resident. Where tax has been deducted by the person under section 195(1), such person has to furnish information related to payment in the prescribed Forms 15CA and 15CB as per Rule 37BB.

By virtue of sub-section (6), Form 15CA is to be furnished for all the remittances of foreign nature which is made to a Non-Resident. There are certain slabs and amount on which the applicable part of the Form shall be furnished. The person making a remittance has to furnish the Form 15CA online. Whereas, a certificate is required from a chartered accountant in Form 15CB.

Persons responsible to deduct tax

Any person making any payment, other than salaries, to any non-resident including a non-resident Indian or a foreign company is liable to deduct TDS under section 195. The legal or residential status of a taxpayer and the sources of his income does not in any way effect his liability under section 195.

Individuals and HUF, who are not liable for tax audit or whose sales, turnover or gross receipts, as the case may be, does not exceed the prescribed limit are also liable to deduct tax while making payment to a non-resident if such sum is chargeable to tax as per the provisions of Income Tax Act.

Chapter 3

Rates of tax Deduction

Rates for deduction of tax at source is given in Part II of the Finance Act, which says, in every case under the provisions of sections 193, 194A, 194B, 194BB, 194D, 194LBA, 194LBB, 194LBC and 195 of the Income-tax Act, tax is to be deducted at the rates in force, deduction shall be made from the income that shall be subject to the deduction at the following rate:

[For Assessment year 2022-23]

Particulars	**TDS Rates (in %)**
1. In the case of a person other than a company	
Payment of any other sum to a Non-resident	
a) Income in respect of investment made by a Non-resident Indian Citizen	20
b) Income by way of long-term capital gains referred to in Section 115E in case of a Non-resident Indian Citizen	10
d) Income by way of long-term capital gains as referred to in Section 112A	10
e) Income by way of short-term capital gains referred to in Section 111A	15
f) Any other income by way of long-term capital gains [not being long-term capital gains referred to in clauses 10(33), 10(36) and 112A	20

Particulars	**TDS Rates (in %)**
g) Income by way of interest payable by Government or an Indian concern on money borrowed or debt incurred by Government or the Indian concern in foreign currency (not being income by way of interest referred to in section 194LB or section 194LC)	20
h) Income by way of royalty payable by Government or an Indian concern in pursuance of an agreement made by it with the Government or the Indian concern where such royalty is in consideration for the transfer of all or any rights (including the granting of a licence) in respect of copyright in any book on a subject referred to in the first proviso to sub-section (1A) of section 115A of the Income-tax Act, to the Indian concern, or in respect of any computer software referred to in the second proviso to sub-section (1A) of section 115A of the Income-tax Act, to a person resident in India	10
i) Income by way of royalty [not being royalty of the nature referred to point h) above] payable by Government or an Indian concern in pursuance of an agreement made by it with the Government or the Indian concern and where such agreement is with an Indian concern, the agreement is approved by the Central Government or where it relates to a matter included in the industrial policy, for the time being in force, of the Government of India, the agreement is in accordance with that policy	10
j) Income by way of fees for technical services payable by Government or an Indian concern in pursuance of an agreement made by it with the Government or the Indian concern and where such	10

Particulars	**TDS Rates (in %)**
agreement is with an Indian concern, the agreement is approved by the Central Government or where it relates to a matter included in the industrial policy, for the time being in force, of the Government of India, the agreement is in accordance with that policy	
k) income by way of winning from lotteries, crossword puzzles, card games and other games of any sort.	30
l) income by way of winning from horse races.	30
m) income by way of dividend	20
n) Any other income.	30
2. In the case of a company-	
Where the company is not a domestic company.	
a) Income by way of long-term capital gains referred to in sub-clause (iii) of clause (c) of sub-section (1) of Section 112	10
b) Income by way of long-term capital gains as referred to in Section 112A exceeding one lakh rupees.	10
c) Income by way of short-term capital gains referred to in Section 111A	15
d) Any other income by way of long-term capital gains [not being long-term capital gains referred to in clauses 10(33) , 10(36) and 112A	20
e) Income by way of interest payable by Government or an Indian concern on money borrowed or debt incurred by Government or the Indian concern in	20

Particulars		**TDS Rates (in %)**
	foreign currency (not being income by way of interest referred to in section 194LB or section 194LC)	
f)	Income by way of royalty payable by Government or an Indian concern in pursuance of an agreement made by it with the Government or the Indian concern after the 31st day of March, 1976 where such royalty is in consideration for the transfer of all or any rights (including the granting of a licence) in respect of copyright in any book on a subject referred to in the first proviso to sub-section (1A) of Section 115A of the Income-tax Act, to the Indian concern, or in respect of any computer software referred to in the second proviso to sub-section (1A) of Section 115A of the Income-tax Act, to a person resident in India	10
g)	Income by way of royalty [not being royalty of the nature referred to in point f) above] payable by Government or an Indian concern in pursuance of an agreement made by it with the Government or the Indian concern and where such agreement is with an Indian concern, the agreement is approved by the Central Government or where it relates to a matter included in the industrial policy, for the time being in force, of the Government of India, the agreement is in accordance with that policy— A. where the agreement is made after the 31st day of March 1961 but before the 1st day of April, 1976 B. where the agreement is made after the 31st day of March, 1976	50 10

Particulars	TDS Rates (in %)
h) Income by way of fees for technical services payable by Government or an Indian concern in pursuance of an agreement made by it with the Government or the Indian concern and where such agreement is with an Indian concern, the agreement is approved by the Central Government or where it relates to a matter included in the industrial policy, for the time being in force, of the Government of India, the agreement is in accordance with that policy— A. where the agreement is made after the 29th day of February 1964 but before the 1st day of April 1976 B. where the agreement is made after the 31st day of March 1976	50 10
i) income by way of winning from lotteries, crossword puzzles, card games and other games of any sort.	30
j) income by way of winning from horse races.	30
k) income by way of dividend	20
l) Any other income	40

Surcharge and Education Cess

The above rates should be increased by applying the rate of surcharge, wherever applicable, and education cess as applicable as per the relevant Finance Act. The total amount of tax plus surcharge if applicable, and education cess would be the amount actually deductible from the payment made to the payee.

An issue arises as to surcharge should be added to the tax arrived at on applying the rates mentioned in the Treaty. Article 2 of OECD MC uses the phrase "all taxes imposed on total income" while defining the applicability of the treaty. In

view of this, the rates specified in the DTAA are all inclusive and they can charge unilaterally surcharge on them. Hence neither surcharge nor education cess is levied in a case where the treaty rates are applied. Where, however, the treaty does not prescribe any rate, the rates including applicable surcharge and education cess as prescribed by the Act will apply.

Amount on which tax should be deducted

The question often arises as to whether TDS is to be deducted on the gross amount or the income element in the amount?

In the case of ***Transmission Corporation of A.P Ltd***, **239 ITR 587 (SC)** the Apex Court affirmed the decision of HC in case of ***Superintending Engineer*** **152 ITR 753 (AP*)*** that the power of the Income Tax Officer to treat the person responsible for deducting tax under section 195 as being in default extends only to the income element which is chargeable under the Act and not to gross sum of money. However, the SC has observed that unless an order under section 195(2) has been obtained by the payer, tax is deductible under section 195 on the gross sum.

In the landmark judgement of GE India Technology Centre 234 CTR (SC) 153. The Supreme Court clarified that it was not correct to say that the moment a remittance was made to a foreign party then tax becomes deductible under the provisions of section 195 of the Income Tax Act. It further held that any payments made to a non-resident will be subject to withholding tax only when such payment is chargeable to tax in India. Further, section 195 not only covers amount which represents pure income payments but also covers composite payment which has an element of Income embedded in them. However, obligation to deduct tax on such composite payment would be limited to the appropriate proportion of income forming the part of gross sum.

Chapter 4

Grossing up of Income Payable Net of Tax [Section 195A]

Bare Provisions of Law

In a case other than that referred to in sub-section (1A) of section 192, where under an agreement or other arrangement, the tax chargeable on any income referred to in the foregoing provisions of this Chapter is to be borne by the person by whom the income is payable, then, for the purpose of deduction of tax under those provisions such income shall be increased to such amount as would, after deduction of tax thereon at the rates in force for the financial year in which such income is payable, be equal to the net amount payable under such agreement or arrangement.

Example:

Company X in UK provide services to Company A in India for a consideration of USD 10,000/- which falls under the category of Fee for technical services and as per agreement, Company X wants to receive the whole amount of USD 10,000/- and all the taxes or duties in India will be borne by the Indian Company.

As per section 195 of the Income Tax Act, 1961 read with section 115A of the Act the tax is deductible at 10 percent (assuming same rate in DTAA).

Particulars	**Amount (in USD)**
Consideration Payable (as per agreement)	10,000.00
Grossing-Up of Tax (10000*10/90)	1,111.11
Consideration Payable (to be reported) [A]	**11,111.11**

Particulars	**Amount (in USD)**
TDS to be Deducted (11,111.11 *10%) [B]	1,111.11
Net Amount to be Paid [A-B]	**10,000.00**

Timing of TDS and applicability of Foreign Exchange Rate

Tax to be deducted at source at the time of credit or payment whichever is earlier. Explanation 1 of Section 195(1) provides that the payer is liable to deduct tax although amount is credited to a payable account or suspense account.

In the case of ***Raymond Ltd*** **80 TTJ 120 (Mum)** the amount payable to the assessee was not actually paid but was deducted out of the sale proceeds; hence there is neither a payment nor a credit, so section 195 cannot be applied. However, the Court held that adjustments of this nature fall within the scope of "any other mode of payment" hence sec 195 shall be applicable.

The Karnataka High Court in the case of United Breweries Ltd 211 ITR 256 held that the time of deduction does not have any bearing on the requirement of obtaining approval under FEMA. Hence deduction has to be made at the time of credit to the payee's account irrespective of FEMA approval.

As per **Rule 26** for the purpose of TDS on any income payable in foreign currency, the exchange rate shall be the TT buying rate of such currency as on the date on which tax is required to be deducted.

TT buying rate means the rate adopted by State Bank of India for buying such currency.

Chapter 5

Beneficial Provisions of DTAA (DTAA Versus Income Tax Act)

Agreement with Foreign Countries or Specified Territories [Section 90/90A]

Bare Provisions of Law

(1) The Central Government may enter into an agreement with the Government of any country outside India or specified territory outside India—

(a) for the granting of relief in respect of—

(i) income on which income-tax have been paid under this Act or income-tax levied in that country or specified territory, as the case may be, or

(ii) income-tax chargeable under this Act and under the corresponding law in force in that country or specified territory, as the case may be, to promote mutual economic relations, trade and investment, or

(b) for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country or specified territory, as the case may be, 47[without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in the said agreement for the indirect benefit to residents of any other country or territory),] or

(c) for exchange of information for the prevention of evasion or avoidance of income-tax chargeable under this Act or under the corresponding law in force in that country or specified territory, as the case may be, or investigation of cases of such evasion or avoidance, or

(d) for recovery of income-tax under this Act and under the corresponding law in force in that country or specified territory, as the case may be,

and may, by notification in the Official Gazette, make such provisions as may be necessary for implementing the agreement.

(2) Where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the **provisions of this Act shall apply to the extent they are more beneficial to that assessee**.

(2A) Notwithstanding anything contained in sub-section (2), the provisions of Chapter X-A of the Act shall apply to the assessee even if such provisions are not beneficial to him.

(3) Any term used but not defined in this Act or in the agreement referred to in sub-section (1) shall, unless the context otherwise requires, and is not inconsistent with the provisions of this Act or the agreement, have the same meaning as assigned to it in the notification issued by the Central Government in the Official Gazette on this behalf.

(4) An assessee, **not being a resident**, to whom an agreement referred to in sub-section (1) applies, shall not be entitled to claim any relief under such agreement unless a **certificate of his being a resident** in any country outside India or specified territory outside India, as the case may be, is obtained by him from the Government of that country or specified territory.

(5) The assessee referred to in sub-section (4) shall also provide such **other documents and information**, **as may be prescribed**.

Explanation 1.—For the removal of doubts, it is hereby declared that the charge of tax in respect of a foreign company at a rate higher than the rate at which a domestic company is chargeable, shall not be regarded as less favorable charge or levy of tax in respect of such foreign company.

Explanation 2—For the purpose of this section, "specified territory" means any area outside India which may be notified as such by the Central Government.

Explanation 3.—For the removal of doubts, it is hereby declared that where any term is used in any agreement entered into under sub-section (1) and not defined under the said agreement or the Act, but is assigned a meaning to it in the notification issued under sub-section (3) and the notification issued thereunder being in force, then, the meaning assigned to such term shall be deemed to have effect from the date on which the said agreement came into force.

Explanation 4.—For the removal of doubts, it is hereby declared that any term used in an agreement entered into under sub-section (1) is defined under the said agreement, the said term shall have the same meaning as assigned to it in the agreement; and where the term is not defined in the said agreement, but defined in the Act, it shall have the same meaning as assigned to it in the Act and explanation, if any, given to it by the Central Government.

Notes:

- Similar provisions are contained in section 90A for relief from double taxation where any specified association in India enters into an agreement with a specified association in the specified territory outside India.
- "Specified Association" means any institution, association or body, whether incorporated or not, functioning under any law for the time being in force in India or the laws of the specified territory outside India and which may be notified as such by the Central Government for the purpose of this section
- "Specified Territory" means any area outside India which may be notified as such by the Central Government for the purpose of this section.

Analysis

Section 90(1) empowers the Central Government to enter into agreement with countries or specified territories outside India to eliminate the chances of double taxation of income or non-taxation of income with the aim of promoting fair trade, economic relations and investments between two countries or specified territories.

Further, it also facilitates exchange of information and recovery of tax between two countries or specified territories for the prevention of tax evasion or avoidance of chargeability of tax on income as per laws of either of or both countries or specified territories.

The purpose of such agreements is to avoid double taxation and sharing of tax revenues by two countries as per mutually agreed terms between two countries.

Section 90(2) explains that where Central Government enters into an agreement with any country or specified territory outside India, then the assessee can either use provisions of Income Tax Act or provisions of DTAA whichever are more beneficial to the assessee.

The assessee is immune from liability either wholly or partly to levy income tax in view of beneficial provisions of DTAA ***(Vishakhapatnam Port Trust 144 ITR 146 (AP))***. Further, this position is affirmed by the Supreme Court of India in ***Azadi Bachao Andolan 263 ITR 706***.

The assessee can take benefit of beneficial provisions for different sources or types of incomes separately, for example, for royalty income the assessee can follow provisions of Income Tax Act and for business income provisions of DTAA if they are beneficial to the assessee.

Further, the assessee can also switch to use different provisions in different years for same type of income, for example, the assessee can use provisions of DTAA in FY 2020-21 for Royalty income and can use provisions of Income Tax Act in FY 2021-22 for the same income, if they are beneficial to the assessee in respective years.

The summary of relevant provisions under the Act and corresponding Articles under OECD Model Convention is given in the below table:

Nature of Transaction	**Under the Act**	**Under OECD Model**
Business Income	Section 9(1)(i)	Article 5,7 & 14
Royalty and Fee for Technical Services	Section 9(1)(vi) & (vii) & 115A	Article 12
Capital Gains	Section 9(1)(i) & 45	Article 13

Nature of Transaction	Under the Act	Under OECD Model
Interest Income	Section 9(1)(v) & 115A	Article 11
Dividend Income	Section 9(1)(iv) & 115A	Article 10
Salary Income	Section 9(1)(ii)	Article 15

Section 90(2A) specifies that the provisions of Chapter X-A (General Anti Avoidance Rules) should be applied to the assessee whether these are beneficial to the assessee or not.

Section 90(3) specifies that any term mentioned in section 90(1) is neither defined in Income Tax Act nor in the agreement, then the meaning of the term will be taken from notification if any issued by the Central Government in this reference unless that meaning is inconsistent with the matter explained therein. Further, as per Explanation 3 to Section 90, if notification has been issued by the Central Government to explain the meaning of term not defined then such notification will be deemed to be effective from the date of agreement.

Section 90(4) specifies that any person who is not resident of India can take benefit of DTAA with India only, if he obtains the tax residency certificate (TRC) from the Government of the country or specified territory outside India of which he claims to be tax resident containing the prescribed particulars and submits the same with the remitter of payment.

Section 90(5) specifies that the non-resident specified in section 90(4) also need to submit other documents or information as may be prescribed. The CBDT notified Rule 21B prescribing the additional information which is required to be furnished by Non-Residents along with TRC in prescribed Form-10F. The particulars of Form 10F are as follows:

- → Status of the assessee (Individual, Company, Firm etc.)
- → Permanent Account Number or Aadhar Number, if any

- → Nationality or Country or specified territory of Incorporation or registration
- → Assessee's tax identification number in the country or specified territory of residence and if there is no such number, then, a unique number on the basis of which the person is identified by the Government of the country or the specified territory of which the assessee claims to be a resident
- → Period for which the residential status as mentioned in TRC, is applicable
- → Address of the assessee in the country or territory outside India during the period for which the TRC is applicable.

Further, the CBDT clarified that Form 10F will not be required if all the required details in Form 10F are already formed part of TRC.

Chapter 6

Applicability of Section 206AA on TDS Under Section 195 (Read with Rule 37BC)

Section 206AA was introduced by the Finance Act 2009 and the provisions of the section are applicable w.e.f. 01.04.2010. This section prescribes that unless the payee of a chargeable income has a PAN, tax shall be deductible at minimum of 20%. A number of issues have arisen as a result of insertion of this provision. Some of these issues are whether this section overrides treaty rates, whether section 206AA applies even where otherwise the TDS was to be NIL, whether surcharge and education cess are required to be added to the prescribed rate of 20% in this section, etc.

The text of section 206AA read as under:

(1) Notwithstanding anything contained in any other provisions of this Act, any person entitled to receive any sum or income or amount, on which tax is deductible under Chapter XVIIB (hereafter referred to as deductee) shall furnish his Permanent Account Number to the person responsible for deducting such tax (hereafter referred to as deductor), failing which tax shall be deducted at the higher of the following rates, namely:—

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

(ii) at the rate or rates in force; or

(iii) at the rate of twenty per cent:

Provided that where the tax is required to be deducted under section 194-O, the provisions of clause (iii) shall apply as if for the words "twenty per cent", the words "five per cent" had been substituted.

(2) No declaration under sub-section (1) or sub-section (1A) or sub-section (1C) of section 197A shall be valid unless the person furnishes his Permanent Account Number in such declaration.

(3) In case any declaration becomes invalid under sub-section (2), the deductor shall deduct the tax at source in accordance with the provisions of sub-section (1).

(4) No certificate under section 197 shall be granted unless the application made under that section contains the Permanent Account Number of the applicant.

(5) The deductee shall furnish his Permanent Account Number to the deductor and both shall indicate the same in all the correspondence, bills, vouchers and other documents which are sent to each other.

(6) Where the Permanent Account Number provided to the deductor is invalid or does not belong to the deductee, it shall be deemed that the deductee has not furnished his Permanent Account Number to the deductor and the provisions of sub-section (1) shall apply accordingly.]

(7) The provisions of this section shall not apply to a non-resident, not being a company, or to a foreign company, in respect of—

(i) payment of interest on long-term bonds as referred to in section 194LC; and

(ii) any other payment subject to such conditions as may be prescribed.

Applicability of section 206AA on the Treaty Provisions

Section 206AA is a *non-obstante* clause which starts with *"notwithstanding anything contained in any other provisions of this Act"*. Section 90(2) talks about the provisions of the Act or provisions of the tax treaties, whichever is more beneficial, shall be applicable. Section 206AA requires PAN of the payee to claim the tax rate given in the treaty, if such tax rate is beneficial to the assessee. Section 206AA, being a non obstante clause, it seems that it will override the provisions of section 90(2). In this regard two views may be possible. One is the provision of section 206AA cannot override the treaty provisions and the second that the provisions of section 206AA covers payment to non-residents in absence of PAN.

Further, **Rule 37BC** inserted by the Income-tax (Seventeenth Amendment) Rules, 2016, w.e.f. 24-6-2016 which talks about the Relaxation from deduction of tax at higher rate under section 206AA. The provisions of rule 37BC shall be read as below:

(1) 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, dividend and payments on transfer of any capital asset, if the deductee furnishes the details and the documents specified in sub-rule (2) to the deductor.

(2) The deductee referred to in sub-rule (1), shall in respect of payments specified therein, furnish the following details and documents to the deductor, namely: —

i. name, e-mail id, contact number.

ii. address in the country or specified territory outside India of which the deductee is a resident.

iii. 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.

iv. Tax Identification Number of the deductee in the country or specified territory of his residence and in case no such number is available, then a unique number on the basis of which the deductee is identified by the Government of that country or the specified territory of which he claims to be a resident.

Note: Section 206AA does not apply where the tax is otherwise not deductible.

The question arises the rate given in 206AA shall be increased by the surcharge and education cess. As per the provisions of Part II of the Finance Act, 2020, in the case of every individual or HUF or AOP or BOI, whether or not incorporated, or every artificial juridical person, being a non-resident, the surcharge shall be calculated as below:

where the income or the aggregate of such incomes (including the income by way of dividend or income	10%

under the provisions of sections 111A and 112A of the Income-tax Act) paid or likely to be paid and subject to the deduction exceeds fifty lakh rupees but does not exceed one crore rupees;	
where the income or the aggregate of such incomes (including the income by way of dividend or income under the provisions of sections 111A and 112A of the Income-tax Act) paid or likely to be paid and subject to the deduction exceeds one crore rupees but does not exceed two crore rupees;	15%
where the income or the aggregate of such incomes (excluding the income by way of dividend or income under the provisions of sections 111A and 112A of the Income-tax Act) paid or likely to be paid and subject to the deduction exceeds two crore rupees but does not exceed five crore rupees;	25%
where the income or the aggregate of such incomes (excluding the income by way of dividend or income under the provisions of sections 111A and 112A of the Income-tax Act) paid or likely to be paid and subject to the deduction exceeds five crore rupees	37%
in case where the total income includes any income by way of dividend or income chargeable under sections 111A and 112A of the Income-tax Act,	15%

There is no reference of section 206AA in the Finance Act regarding the applicability of surcharge and education cess consequently the view can be drawn that the rate prescribed in section 206AA should not be increased by surcharge and education cess.

Chapter 7

Some Peculiar Transactions and Applicability of Section 195

1. Payment made by branch to Foreign Company Head Office

CBDT vide *circular No. 740 dated 17.04.1996* has clarified that for the purposes of taxation, the Branch of a foreign company in India and it's HO is a separate entity and that the Branch would be liable to deduct TDS from payment of Interest to the HO or any other Branch located outside India.

Circular No. 649 dated 31.03.1993 also states that technical fees received by the HO from the Branch in India shall be taxable in accordance with the provisions of section 115A read with section 44DA and tax will have to be deducted u/s 195.

The Calcutta High Court in the case of ***ABN Amro Bank N.V. 10 taxmann.com 8*** has held that there is no obligation on the part of Foreign Banks Indian branch to deduct TDS at source while making interest remittance to it's HO outside India.

Explanation (a) to section 9(1)(v) inserted by the Finance Act 2015 w.e.f 01.04.2016 which says, any interest payable by the Branch in India to HO or Branch outside India shall be deemed to accrue or arise in India and shall be chargeable to tax in India and for this purpose, the Branch in India shall be deemed to be a separate and independent entity and the provisions of Act relating to deduction of tax shall apply accordingly.

2. When payment made to Non-resident for sale of property situated in India

Payments in the nature of capital gain also covered under section 195 except the capital gain which is specifically exempt like gain arising from transfer of units

of the Unit Scheme 1964 on sale after 31.03.2002 or gain arising from transfer of Agricultural land provided prescribed conditions are fulfilled, etc. in view of this, even when the property is purchased from a non-resident (including an NRI), tax needs to be deducted at source despite the fact that purchaser is an individual not carrying on any business etc and deduct the tax on the gross amount without giving a deduction or exemption unless the lower deduction certificate has been obtained by the seller to deduct the tax on some lower rate.

3. TDS on business profit of Non-resident

Section 9(1)(i) deems income accruing or arising out of the business connection in India shall be taxable in India to the extent attributable to activities in India. Article 7 of the treaties correspondingly provide that such business income of a non-resident is taxable in the source country only if it has a permanent establishment, as per the provisions of Article 5 of the treaties, in India and the activities of such business are carried out through such permanent establishment.

4. TDS on professional fees to Non-resident

In the case of ***Bhupendra Prasad Ray 129 ITR 295*** the SC held that business connection in Section 9(1)(i) includes professional connection. Under the treaties such fees are covered under the Article "Independent Professional Services" and are taxable in India only if the Non-resident has physical presence in India more than the number of days prescribed in the treaties or has a fixed base in India.

5. TDS is required to be deducted if payment made in kind

In the case of ***Kanchanganga Sea Foods Ltd 265 ITR 664 (AP)***, the court has held that where a part of fish catch was given to the Non-resident company as hire charges for chartering fish vessels. TDS is to be deducted on the payment in kind also.

Reimbursement of expenses and applicability of Section 195

As per the provisions of section 195, all payments to a Non-resident, other than salaries, which are chargeable to tax under the Income Tax Act, are covered u/s 195. The situation may arise when the Indian company is making payment of reimbursement to the foreign company and in such reimbursement, it is seen that how to deduct the tax if the profit element is also embedded in such reimbursement.

In the case of ***Bovis Lend Lease (India) Pvt. Ltd. (2010) 127 TTJ 25***, the Bangalore ITAT said that it is pertinent to note that the meaning of the term 'reimbursement' for the purpose of chargeability is quite close to its dictionary meaning, viz., "to pay back money spent by someone else on one's own count". The Bangalore ITAT also laid down the essential conditions of reimbursement which is to be satisfied *cumulatively*:

a. The actual liability to pay should be of the person who reimburses the money to the original payer.

b. The liability ought to have clearly determined. It should not be an approximate or varying amount.

c. The liability is ought to have crystallized. In other words, payments which were never required to be done, but were done just to avoid a potential problem may not qualify.

d. There should be a clear ascertainable relationship between the paying and reimbursing parties. Thus, an alleged reimbursement by an unconnected person may not qualify.

e. The payment should be first made by somebody else whose liability was never, and the repayment should then follow to that person to square off the account.

f. There should be clearly three parties existing - the payer, the payee and the reimburser.

In many cases it has been argued solely on the ground that reimbursement does not have an income element and hence cannot be taxed at all. It depends upon the facts of the case, but it is important that only the repayment of money cannot be construed to be income of the recipient. However, the payer has to prove that the sum which he is liable to pay does not contain any element of profit and is pure reimbursement.

Generally, the following are the common reimbursement transactions and while issuing certificate in Form 15CB, the Chartered Accountants should be more careful about the taxability of such transactions:

a. Reimbursement of salaries to foreign technicians

Now a days, it can be commonly seen that the Indian companies are entering into agreements with Foreign Companies for technical

services and the foreign companies provides their employees who visit and stays in India to render services to the Indian companies and the Indian companies agrees to reimburse full or part of the salaries to such technical personnel. The question arises, whether the Indian company is liable to deduct TDS or not and if yes whether under section 195 or 192.

It clearly depends upon the facts of the case and on the finding that whether the Indian company is economic/real employer of the seconded employee. In other words, whether the employer-employee relationship would be determined under a formal or legal relationship?

In order to analyse the taxability of the payment and the consequential application of TDS, it is important to ascertain the nature of the payment. In the case of ***IDS Software Solutions (India) Private Limited 32 SOT 25 (ITAT Bangalore)*** and in the case of ***HCL Infosystem Limited 275 ITR 261 (Del)***, the decision went in favour of the assessee on the basis of the terms of secondment agreements and facts of the case.

On the other hand, in the case of ***Varizon Data Services (India) Private Limited 11 taxmann.com 177*** and ***Dolphin Drilling Ltd. 29 SOT 612 (Del)***, the decision was against the assessee based on the facts of the case.

b. Reimbursement of cost of third-party services

It generally happens that foreign company take some services from third party outside India and allocate such cost on subsidiaries or branch office situated in India. These services may be in the nature of accounting software charges or internal control development charges etc. while issuing certificate in Form 15CB in such type of transactions, it is important to analyse whether reimbursement of expenses to a third party incurred by the Foreign Company on behalf of Indian company are taxable in India. It should also see the transactions as if no third party was involved and the payment for such services is being made directly. If such direct payment would have been taxable in India, then the reimbursement for the same would also be liable to tax in India and hence subject to TDS.

c. Reimbursement of expenses along with mark up

In such type of transactions, it is important that whether the full amount of reimbursement is taxable or only mark-up amount will be taxable. In the case of ***Coca Cola India Inc 7 SOT 224,*** the Delhi tribunal took a view that it is only the mark-up which should be taxable and not the whole amount including reimbursement. The similar view was taken by the DHC in the case if Industrial Engineering Products Private Limited (202 ITR 1014) and held that the reimbursement of expenses cannot be considered as the assessee's income.

Chapter 8

Application for Certificate of Lower Deduction of Tax (Section 197)

Bare Provisions of Law

1. Subject to rules made under sub-section (2A), where, in the case of **any income** of **any person** or sum payable to **any person**, income-tax is required to be deducted at the time of credit or, as the case may be, at the time of payment at the rates in force under the provisions of **sections 192, 193, 194, 194A, 194C, 194D, 194G, 194H, 194I, 194J, 194K, 194LA, 194LBB, 194LBC, 194M, 194O and 195**, the Assessing Officer is satisfied that the total income of the recipient justifies the deduction of income-tax at any lower rates or no deduction of income-tax, as the case may be, the Assessing Officer shall, on an application made by the assessee on this behalf, gives him such certificate as may be appropriate.

2. Where any such certificate is given, the person responsible for paying the income shall, until such certificate is cancelled by the Assessing Officer, deduct income-tax at the rates specified in such certificate or deduct no tax, as the case may be.

2A. The Board may, having regard to the convenience of assessee' s and the interests of revenue, by notification in the Official Gazette, make rules specifying the cases in which, and the circumstances under which, an application may be made for the grant of a certificate under section 197(1) and the conditions subject to which such certificate may be granted and provided for all other matters connected therewith.

Analysis

Applicant - The recipient of payment (Resident or Non-Resident)

Form in which application to be made? - FORM 13 **(Rule 28)**

Where do we need to apply for certificate? – By making online application in Traces TDS Portal (tdscpc.gov.in)

Certificate issued to whom? – The certificate will be issued directly to the payer or person responsible to deduct the tax. However, the certificate of lower deduction can also be issued to the person making application for lower deduction of tax where person is responsible to make payments likely to exceed Rs. 100 and the details of such persons are not available at the time of making application with the person making such application. After receiving the certificate, the payer will deduct the tax at the rate specified in the certificate.

Certificate for deduction at lower rates or no deduction of tax from income other than dividends. [Rule 28AA]: Where the assessing officer is satisfied that existing and estimated tax liability of a person justifies the deduction of tax at lower rate or no deduction of tax, as the case may be, the Assessing Officer **shall** issue a certificate for deduction of tax at such lower rate or no deduction of tax. This means the assessing officer is bound to issue the appropriate certificate.

Validity of Certificate: The Certificate will be valid for the period specified in the certificate unless the same certificate has been cancelled by the Assessing officer before the expiry of the specified period.

Lower Deduction or No Tax Deduction Certificate for Dividend Income [Rule 29]:

The assessing officer shall issue certificate of lower or no deduction on being satisfied of the total income of the shareholder which justifies lower or no deduction of tax. The certificate shall be issued directly to the principal officer of the company under advice to the applicant shareholder.

Conditions

i. The shares in respect of which certificate is sought are in public company; &

ii. The shares are registered in the name of applicant and he is beneficial owner of shares; or registered in his name and held by him under trust wholly for charitable or religious purposes, and the dividends therefrom are exempt from tax under the provisions of sections 11 to 13.

The certificate for lower or no deduction shall be valid for period mentioned in certificate (not exceeding 3 years from the date of certificate, unless it is cancelled by the Assessing officer).

The certificate shall be valid only for the person named therein and shall cease to be operative from the date of notice to the company of the transfer of any of the shares mentioned therein to another person, in respect of the shares so transferred.

Cancellation of Certificate

i. The certificate issued under section 197 cannot be cancelled without valid and cogent reasons. ***(Mckinsey and Co. Inc 324 ITR 367)***

ii. The principle of natural justice have to be complied and an opportunity of being heard should be provided to the assessee.

Judicial Precedents

i. At the time of issuing certificate, the officer is not required to conduct a detailed enquiry in respect of taxability of Income under the Income Tax Act. ***(National Petroleum Construction Company v DCIT 421 ITR 24 [2020])***

ii. The assessing officer is required to provide cogent reason for fixing tax rate and the order issuing certificate should contain reasons for arriving at a particular rate. ***(Bentley Nevada LLC [2019] 107 taxmann.com 440)***

Application for Lower Deduction of Withholding Tax [Section 195]

The provision related to making an application for lower deduction certificate was inserted by the Income-tax (Fifth Amendment) Rules, 2021 which is applicable w.e.f. 1-4-2021.

Application for grant of certificate for determination of appropriate proportion of sum (other than Salary), payable to non-resident, chargeable in case of the recipients [Rule 29BA]

(1) An application by a person for determination of appropriate proportion of sum chargeable in the case of non-resident recipient under sub-section (2) or sub-section (7) of section 195 shall be made in Form 15E electronically, -

i. under digital signature; or

ii. through electronic verification code

(2) The Assessing Officer, in order to satisfy himself, shall examine whether the sum being paid or credited is chargeable to tax under the provisions of the Act read with the relevant Double Taxation Avoidance Agreement, if any, and if the sum is chargeable to tax, he shall proceed to determine the appropriate proportion of such sum chargeable to tax.

(3) The Assessing Officer shall examine the application and on being satisfied that the whole of such sum would not be the income chargeable in case of the recipient, may issue a certificate determining an appropriate proportion of such sum chargeable under the provision of this Act, for the purpose of tax deduction under sub-section (1) of section 195.

(4) While examining the application, the Assessing Officer shall also take into consideration, following information in relation to the recipient: -

i. tax payable on estimated income of the previous year relevant to the assessment year.

ii. tax payable on the assessed or returned or estimated income, as the case may be, of preceding four previous years.

iii. existing liability under the Income-tax Act, 1961(43 of 1961) and Wealth-tax Act, 1957(27 of 1957);

iv. advance tax payment, tax deducted at source and tax collected at source for the assessment year relevant to the previous year till the date of making application under sub-rule (1).

(5) The certificate shall be valid only for the payment to non-resident named therein and for such period of the previous year as may be specified in the

certificate, unless it is cancelled by the Assessing Officer at any time before the expiry of the specified period.

(6) An application for a fresh certificate may be made, if the assessee so desires, after the expiry of the period of validity of the earlier certificate or within three months before the expiry thereof.

(7) The Principal Director General of Income-tax (Systems) or the Director General of Income-tax (Systems), as the case may be, shall lay down procedures, formats and standards for ensuring secure capture and transmission of data and uploading of documents and the Principal Director General of Income-tax (Systems) or the Director General of Income-tax (Systems) shall also be responsible for evolving and implementing appropriate security, archival and retrieval policies in relation to the furnishing of Form No 15E and issuance of Certificate under sub-rule (3).*(For Form 15E Refer Appendix)*

Effect of MLI Provisions*

An important question arises, whether, due to applicability of MLI, is there any change in the regular provisions of issuing Form 15CA/CB certificate or whether Chartered Accountants has to look at the transactions with the provisions of MLI. The answer to this question is of course yes. In this segment, the author has tried to touch upon the relevant provisions of MLI which could broadly require to be looked into while issuing Form 15CA/CB.

The notable points in Notification no. 57/2019, dated 09.08.2019 are as below:

a. Whereas the Multilateral Convention to Implement Tax Treaty related Measures to Prevent Base Erosion and Profit Shifting (hereinafter referred to as the "the said Convention") was signed by India at Paris, France on the 7th day of June, 2017

b. Whereas the said Convention entered into force on the 01st day of July, 2018, being the first day of month following expiration of three calendar months beginning on the date of deposit of the fifth instrument of ratification, in accordance with para 1 of Article 34 of the said Convention

c. Whereas India had ratified the said Convention and had deposited the instrument of ratification along-with the list of Covered Tax Agreements, reservations and notifications (hereinafter referred to as

"India's Position under the said Convention") to the Depositary as in Article 39 of the said Convention, on the 25th day of June 2019.

d. Whereas the date of entry into force of the said Convention for India is the 01st day of October 2019, being the first day of the month following the expiration of a period of three calendar months beginning on the 25th day of June 2019 being the date of deposit by India of the instrument of ratification, in accordance with para 2 of Article 34 of the said Convention.

e. Whereas, the provisions of the said Convention shall have effect in India with respect to a Covered Tax Agreement in accordance with provisions of Article 35 of the said Convention; Now, therefore, in exercise of the powers conferred by sub-section (1) of section 90 of the Income-tax Act, 1961, the Central Government hereby notifies that the provisions of the said Convention shall be given effect to in the Union of India, in accordance with India's Position under the said Convention, as set out in the Annexure hereto.

**for more detail, please refer separate reading material on MLI.*

Chapter 9

Significant Economic Presence (SEP)

Explanation 2A inserted in clause (i) of sub-section (1) of Sec 9 by the Finance Act, 2020 which was earlier effective from 01.04.2021 i.e., applicable from financial year 2020-21 but proposed to defer for one year and now effective from 01.04.2022 i.e. applicable for the financial year 2021-22. In Explanation 2A it is said that significant economic presence of a non-resident in India shall constitute "business connection" in India and "significant economic presence" for this purpose, shall mean—

a. transaction in respect of any goods, services or property carried out by a non-resident in India including provision of download of data or software in India, if the aggregate of payments arising from such transaction or transactions during the previous year exceeds such amount as may be prescribed; or.

b. systematic and continuous soliciting of business activities or engaging in interaction with such number of users as may be prescribed, in India through digital means:

Provided that the transactions or activities shall constitute significant economic presence in India, whether or not,

(i) the agreement for such transactions or activities is entered in India; or

(ii) the non-resident has a residence or place of business in India; or

(iii) the non-resident render services in India:

Provided further that only as much income as is attributable to the transactions or activities referred to in clause (a) or clause (b) shall be deemed to accrue or arise in India.

While issuing Form 15CA/CB, it should be looked into by the professionals very carefully because the provisions of this section may change the taxability of the transactions. Before applying this provision, the facts of the transactions should be analysed very carefully. Once it is established that the SEP of the recipient entity is in India, i.e. the business connection of such entity is in India.

Once due to SEP, the business connection is established in India, the corresponding provisions in MLI and DTAA should be looked into and then the transaction should be taxed accordingly.

About Form 15CA

Form 15CA is a Declaration of Remitter and is considered as a tool for collecting information in lieu of payments which are, whether or not, chargeable to tax in the hands of non-resident recipient in India. This is an effective way of collecting Information by the department about the remitter and remittee which is utilized by the Income tax Department to freely track the foreign remittances and their source.

A. Importance of Form 15CA

As per the provisions of Sec 195(6) read with rule 37BB, the form is required to be filled by any person making payment to a non-resident. Authorised Dealers/ Banks are now becoming more vigilant in ensuring that such Forms are received by them before remittance is affected. Since now as per revised Rule 37BB a duty is cast on them to furnish Form 15CA, received from remitter to an income-tax authority for the purpose of any proceedings under the Income-tax Act.

B. Contents of Form 15CA

Form 15CA is segregated into sections based on different situations. The remitter needs to go through the form and fill in proper details in the relevant section which is applicable in respect of their transactions:

C. Parts of Form 15CA

- Part A – Section A of Form 15CA is filled in by the remitter when the payment or the total sum of the payment extended by the remitter to NR recipient during a particular Financial Year is Rs. 5 Lakhs or less.
- Part B – Section B of Form 15CA is in the role when such payments are more than Rs. 5 Lakhs. Information is entered by the payer in Section B after acquiring a certificate from Assessing Officer (valid under section 197) or the order from Assessing Officer (valid under sub-section (2) or sub-section (3) of section 195).
- Part C – If such payments made during a particular FY exceed Rs. 5 Lakhs and the payer or payee has not obtained the certificate as mentioned in Part B, the related information has to be entered in Section C of Form 15CA after acquiring the Certificate in Form 15CB from a Chartered Accountant (valid under sub-section (2) of section 288).
- Part D – Payments made by the remitter during a particular FY which is not referred to in Rule 37BB or in other words which is not taxable as per the provisions of Income Tax Law, the information related to such payments shall be reported in Section D of Form 15CA.

Note: *Form 15CB is required to be filled only when the remittance exceeds Rs 5 Lakh in the said fiscal under the income tax act 1961.*

D. Guidelines on How to file Form 15CA?

Form 15CA is available online on the government's official income tax e-filing portal. The form is electronically submitted to concerned authorities. Here is the stepwise guidance to file Form 15CA:

- **Step:1 -** Visit the official E-filing 'portal at https://incometaxindiaefiling.gov.in/ and log in by using the valid credentials.
- **Step: 2 -** Select" E-file" from the menu placed at the top of the page and then click on Income Tax Forms.
- **Step: 3 -** The PAN details of the taxpayer is pre-filled. Choose "Form 15CA" from the drop-down list named "Form Name".

- **Step: 4 -** Select your required section from "Select relevant part from the down "
- **Step: 5 -** Fill the selected part of Form 15CA and click on the "submit" button.
- **Step: 6 -** Fill the details in the verification portion of the respective part of Form 15CA.

Note: Form 15CB needs to be uploaded before you fill Part C of Form 15CA as the acknowledgment number of Form 15CB is required while filing the respective part.

Once the form is successfully filled, a notification "successfully submitted" will pop up on the screen along with a confirmation email sent to the registered email account.

E. What is Form 15CB?

The liability of withholding tax can be ascertained and certified by obtaining the Certificate from a Chartered Accountant in Form no. 15CB. This certificate has been prescribed under Section 195(6) of the Income-tax Act and is an alternate channel of obtaining Tax clearance apart from Certificate from Assessing Officer.

F. Filling Form 15CB: Information to be required from the client.

A. Details of Remitter

1. Remitter's Name
2. Remitter's Address
3. Remitter's PAN Number
4. Principal Place of Business of the Remitter
5. E-Mail Address and Phone No. Of Remitter
6. Status of the Remitter (Firm/Company/Other)

B. Details of Remittee

1. Name and Status of the Remittee
2. Remittee's Address

3. Nationality of the Remittee i.e. Place Where Remittance Is Made
4. Business Portfolio of the Remittee
5. Principal Place of the Remittance

C. Details of the Remittance

1. Country to Which Remittance Is Made
2. Currency in Which Remittance Is Made
3. Amount of Remittance in Indian Currency
4. Proposed Date of Remittance
5. Nature of Remittance as Per Agreement (Invoice Copy to Be Asked From Client)

D Bank Details of the Remitter

1. Name of Bank of the Remitter
2. Name of Branch of the Bank
3. BSR Code of the Bank

E. Others

1. Father's Name of the Signing Person
2. Designation of the Signing Person

G. Significance of Rule 37BB for filing Form 15CA & 15CB

A . Form 15CB is not required where "Part-A" of Form 15CA is to be filled in, i.e. in case payments does not exceed Rupees Five Lakhs during the financial year.

B. Form 15CB is not required where a certificate from the AO u/s 197 or 195(2) / (3) has been obtained.

C. Form 15CB is not required where sum payable is not chargeable to tax under the provisions of Income Tax Act.

D. No information is required to be furnished for any sum which is not chargeable under the provision of the Act, if the remittance is made by an individual as per the provision of Foreign Exchange Management

Act, 1999 read with schedule III to the Foreign Exchange (Current Account Transactions) Rules, 2000;

E. No information is required to be furnished for any remittance which is of the nature specified in the list given in Rule 37BB.

H. **Specified List**

Sl. No.	Purpose code as per RBI	Nature of Payment (3)
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	SO202	Payment for operating expenses of Indian shipping companies operating abroad
13	SO208	Operating expenses of Indian Airlines companies operating abroad

Sl. No.	Purpose code as per RBI	Nature of Payment (3)
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
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

Sl. No.	Purpose code as per RBI	Nature of Payment (3)
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.

I. Steps to be followed whiling filing Form 15CB:

1. Visit http://incometaxindiaefiling.gov.in/ and click on the "Downloads" tab.
2. Select the required "Forms (Other than ITR)" and then convert them either in Excel or Java Utility (whichever is suitable).
3. Create the XML file using your chosen utility.
4. Login to the account on the e-filing portal and click on the "e-File" tab. Select "Upload Form" from the drop-down menu.
5. Fill in the PAN/TAN details of the assessee, PAN of C.A., select "Form Name" as "15CB ", and "Filing Type" as "Original". Press 'submit'

As soon as you press the submit button you will receive a success notification along with an email sent to your registered email ID.

Note: *Digital Signature Certificate is the crucial document while filing Form 15CB.*

Miscellaneous Topics

1. Some of the important notable points while issuing certificate in Form 15CB

A. If the CA is applying a treaty to determine the tax rate, then he should possess the tax residency certificate of the receiver giving the prescribed particulars as mentioned above. It is only on the basis of such certificate that the CA would be in a position to give the benefit under the treaty to the non-resident**.**

B. CA is not required to make transfer pricing adjustment while issuing certificate. He is only required to certify the nature of payment and the amount of tax to be deducted thereon. Tax is required to be deducted on the amount as mentioned in the agreement and as agreed between the parties.

C. The role of the certificate is that when an assessee has to make a remittance of the withholding tax requirements and at his risk of consequence of short deduction of tax at source or non-deduction of tax at source, such remittance has to be supported by a CA certificate in support of assessee contention.

2. Refund of excess tax deducted u/s 195

Following are certain situations in which deductor of the TDS is entitled to make an application for the refund of excess TDS deducted:

A. The contract is cancelled, and no remittance is required to be made to the non-resident.

B. The payment made to the non-resident after deducting TDS, and by any reason the payment has been returned to the payer then now there is no obligation to make payment to such non-resident.

C. After deducting and depositing, such payment become exempt by the amendment in law and now such payment is not chargeable to tax.

D. The tax has been wrongly deducted and deposited twice.

E. The payment that has been made by grossing up is later on decided to make the payment on net basis.

F. The payment of tax has been made to the non-resident at a higher rate under the domestic law while a lower rate is prescribed under the DTAA.

Note: *These situations are only for reference and not exhaustive.*

Chapter 10

Penalties and Consequences

Where an assessee has paid any sum chargeable to tax under the Income Tax Act to non-resident on which tax has been deducted or after deduction it has not been paid, then he may face any of the following consequences:

Section	Nature of Default	Consequences
40(a)(i) & (iii)	Failure to deduct the whole or any part of tax	Disallowance of expense deduction
201(1A)	Failure to deduct, pay or pay after deducting	Payer will be considered as assessee in default and simple interest @ 1% or 1.5% for month or every part of the month
221	Default in making payment of tax in prescribed time	Simple interest @ 1% and penalty up to an amount equivalent to 100% of the tax arrears.
271C	Failure to deduct whole or any part of tax	Penalty equal to 100% of whole or part of tax, as applicable
271-I	Failure to furnish information or furnishing inaccurate under Section 195	Penalty of Rs. 1 Lakh

Section	Nature of Default	Consequences
272A	Failure to File TDS Return	Penalty of Rs. 100/- per day (maximum up to the tax deductible) for failure to file the TDS return within time.
276B	Failure to pay tax deducted	Rigorous imprisonment for 3 Months to 7 Years along with fine.

- Penalty u/s 271J amounting to Rs. 10,000 for each report or certificate, may also be levied upon the chartered accountant on furnishing of incorrect information in reports or certificates issued by him.

Chapter 11

Important Case Laws

1. Payment of sum other than cash

Non-resident company having received the charter fee of finishing vessels from the assessee in the shape of 85 percent of the fish catch in India as per the terms and condition of the agreement between them, income earned by the non–resident company was chargeable to tax under 5(2) and therefore, assessee was liable to deduct tax under section 195 on the payment made to that company. ***[Kanchanaganga Sea Foods Ltd.(192 taxman 187 (SC)]***

2. Non taxability of recipient

The Karnataka High Court in ***CIT v. Samsung Electronics Co. Ltd. (2009) 185 Taxman 313 (Kar.)***, held that liability cannot be avoided on ground of non-taxability of recipient. In a SLP filed against the judgment, the Supreme Court, by an interim order dated 18-12-2009 directed to issue the notice to the Respondents and also directed "Stay of Recovery till further orders". ***GE India Technology v. CIT (2010) 187 Taxman 110 (SC)***

3. TDS at the appropriate portion of income chargeable to tax

A person paying interest or any other sum to a non-resident is not liable to deduct tax if such sum is nor chargeable to tax under Act. Section - 195 contemplate not merely amounts, the whole of which are pure income payments; it also covers composite payments which have an element of income embedded or incorporated in them. The obligation to deduct tax at source is, however, limited to appropriate proportion of income chargeable under Act forming part of the gross sum of money payable to the non-resident.

As per the CBDT Circular No. 728 dated October 31, 1995, a tax deductor can take into consideration the effect of the DTAA in respect of payments of royalties and technical fees while deducting tax at source.

The expression "chargeable under the provision of the Act" in section 195(1) shows that the remittance has to be of trading receipt, the whole or a part of which is liable to tax in India. If tax is not assessable, there is no question of tax deduction at source.***GE Technology Center P. Ltd. 221 Taxman28 (SC)***.

4. Discounting charges is not interest

Discounting charges paid by assessee to a foreign company for discounting export sale bills is not "interest" as defined in section 2(28A), since foreign company has no permanent establishment in India, it is not liable to tax in respect of discounting charges and therefore, assessee is under no obligation to deduct tax at source under section 195 and the discounting could not be disallowed under section 40(a)(i). [***Cargill Global Trading (P) Ltd. (2011) 241 CTR 443 : 56 DTR 188 : 199 Taxman 320 : 335 ITR 94 (Delhi)]***

5. Import of business information report

The assessee had imported business information reports from Dun and Brand Street, USA and made remittances in respect to thereof without deducting tax at source. The Assessing Officer held that the assessee was liable to deduct tax at source. Tribunal had set aside the order of Assessing Officer. The Court held that the Authority for Advance Ruling had held that the sale of business information reports by the subsidiaries of Dun and Brand Street, USA in Spain, Europe and the U.K. to assessee did not attract the provision of the section 195. Since the decision of the authority was not binding on the present case, so the decision of the Authority related to the same business information reports imported by the assessee and no fault in the decision of the authority was pointed out, hence the decision of the tribunal was affirmed. [***Brand Street Information Services India P. Ltd. (2011) 338 ITR 95 (Bom.)]***.

6. Applicability of section 195 on Payment of daily allowance

The Assessee made payment of "daily allowance" to a Japanese company on account of the stay of Japanese engineers without deduction of tax at source. The Assessing Officer held that the payment was assessable to tax as "fees for technical services". It was held that Assessing Officer had issued a certificate under section 195(2) authorizing the remittance without deduction of tax at

source. As this, certificate was not cancelled under section 195(4), the assessee was not required to deduct tax at source and could not be treated as assessee in default. The issue whether the payments were taxable or not need not to be gone into. ***Swaraj Mazda Ltd. (2011) 62 DTR 205 / 198 Taxman 305 / 245 CTR 521 (P & H) (High Court).***

7. Deduction of tax at lower rate

Assessee cannot deduct tax at a Lower rate without getting an authorization or certificate under section 195(2). [***Chennai Metropolitan Water Supply & Sewerage Board (2011) 202 Taxman 454 : 64 DTR 395 : (2012) 246 CTR 402 (Mad.)]***

8. Reimbursement of Costs

Obligation to deduct tax at source under section 195 is attracted only when the payment is chargeable to tax in India. When tax authority have accepted that non-resident recipient is not liable to pay tax in India, the assessee payer is not liable to deduct tax at source under section 195(1), in respect of mobilization and demobilization costs reimbursed by it to the non-resident company.[***Van OordAcz India (P) Ltd. v. CIT (2010) 36 DTR 425 : 189 taxman 232: 323 ITR 130: 230 CTR 365 (Delhi)]***

9. Purchase of software

Remittances made by the assessee to the non-resident for purchase of software were in nature of trading receipt and price of goods purchased by it bear the character of income receipt in the hands of non-resident and therefore assessee is liable to deduct tax at source under section 195(1). [***Sonata Information Technology Ltd. (2010) 38 DTR 350 :192 Taxman 80 : 232 CTR 20 (Kar.)]***

10. Purchase of Plant is not Royalty

The assessee had purchased plant from foreign country which was of technical documents viz., design drawings, sketches, etc. The title to these documents was transferred to the assessee by the foreign company (vender). The payment made by the assessee to the foreign vendor was held to be for the purchase of plant and not royalty under the provision of section 9(1)(vi) of the Act. As such the assessee was not liable to deduct tax at source from the payment made to foreign

party. [***Maggronic Devices (P) Ltd. (2009) 31 DTR 65 : 228 CTR 241 : 329 ITR 442 (HP)]***

11. Order passed under section 195(2) are provisional

Order passed under section 195(2) are provisional and tentative which do not bind ITO in regular assessment proceeding. ***Dodsai (P.) Ltd. (2003) 131 Taxman 565 : 260 ITR 507 : 179 CTR 80 (Bom.)]***

12. Bandwidth charges paid for data communication

Assessing officer held that assessee was required to deduct tax at source in respect of payments made to AT&T and MCI Telecommunication was covered under section 195. Where payments are made to service providers such as AT&T and MCI Telecommunication for use of bandwidth provided for down linking signals in United States and such payments are not in the nature of managerial, consultancy or technical service nor for use or right to use industrial, commercial or scientific equipment. Then the said payment is not nature of royalty or fee for technical service assessee and thus not liable to deduct tax at *source.[* ***Infosys Technologies Ltd. v. Dy. CIT (2011) 45 SOT 157 : 139 TTJ 18 (UO)(Bang.)(Trib.)]***

13. Commission paid outside India

Commission was paid outside India for services rendered outside India, Tax was not deductible at source. The definition of "fee for Technical service" in Article 13 of the DTAA does not include managerial service. Hence, the definition of the technical service as given in the DTAA is to be applied and it was beneficial. Hence, the sales commission in respect of parties situated in the U.K. could not have been subjected to tax at source because it was business profit and not fees for technical service. [***Modern Insulator Ltd. (2011) 10 ITR 147 : 140 TTJ 715 : 56 DTR 362(Jp.) (Trib.)]***

14. Training of personnel

Assessee company during relevant assessment year made payment to non-resident party for training its personnel or customer to explain proposed buyers about the salient features of products imported by assessee in India and to impart training to customer for how to use equipment. The payment made could not be

said to be fee for technical services and thus, is not liable for deduction of tax at source. [***PCI Ltd. (2011) 46 SOT 183 (Delhi) (Trib)]***

15. Remittances of sale proceeds of shares by bank

Abu Dhabi Commercial Bank (ADCB) was engaged into the business of banking and operated through branch in India. ADCB had made remittance to UAE residents, in respect of sale proceeds of shares which resulted in short term capital gain in India. Remittance was made without deducting tax at source. Assessing Officer treated the ADCB as an assessee in Default, under section 201 and also levied interest under section 201(IA). On the appeal CIT(A) held that though ADCB could be regarded as payer under section 204, there was no withholding for tax obligation due to availability of treaty benefit. The tribunal held that Liability to deduct tax on remittance does not arise as bank is only acting as an authorized tax authority, the bank could not be treated as assessee in default. [***Abu Dhabi Commercial Bank (2011) TII 103 ITAT-Mum-ITNL dt. 12-05-2011 (Mum.)(Trib.)]***

16. Commission to Foreign agent

A Foreign Agent of an Indian exporter operates in his own Country and his commission is directly remitted to him. Such commission is not received by him or on his behalf in India, and such agent is not liable to income tax in India on commission received by him. As there was no right to receive income earned in India nor there was any business connection between assessee and ETUK, Therefore when Income was not chargeable to tax in India under section 4(1), there was no question of invoking provision of section 195 hence no disallowance can be made under section 40(a)(ia). [***Eon Technology P. Ltd. (2012) 343 ITR 366 : (2011) 203 Taxman 266 : 64 DTR 257 (Delhi)]***

17. Off the Shelf Software – Fee for user of software taxable as "Royalty"

While the license to use the "Shrink wrapped" or "Off the Shelf" software does not involve transfer of intellectual property, it constitutes "royalty" under section 9(1)(vi) and Article 12(3) of the DTAA because it is for "the use of and the right to use of intellectual property such as copyright of a literary, artistic or scientific work or any patent, Trademark, design or model, plan etc". Thus, the consideration received by oracle for use of its software constitutes "royalty" and

the assessee ought to have deducted tax at source. [***ING Vysya Bank Ltd. v. Dy. CIT (2011) 61 DTR 401 : (2012) 143 TTJ 249 (Bang.) (Trib.)]***

18. Payment of Royalty

Payments to non-resident for hire of transponders being royalty, tax has to be deducted at source.[***Asia net Communication Ltd. v. Dy. CIT (2010) 1 ITR 683 : 38 SOT 158 (Chennai)(Trib.)]***

19. Reimbursement of Expenses

Reimbursement of expenses incurred on travel does not involve the taxable income . Various sites cannot be considered together when contracts are not interconnected. Period need to be computed separately in respect of each activity. Activity once commenced continues till completion of contract. Intervening period cannot be excluded. Period of six months to be counted irrespective of years involved. [***Krupp UhdeGmbh (2010) 1 ITR 614 : 124 TTJ 219 : 28 SOT 254: 26 DTR 289(Mum.) (Trib.)]***

20. Reimbursement of Expenses

Provision of section 195 would be applicable to reimbursement of expenses related to fee for technical service, however, in view of fact that all services had been provided by "L" Off shore, assessee would not incur any liability to deduct tax towards payment in respect of services. (A.Ys. 2003 -04 to 2005-06).[***Bovis Lend Lease (India) (P) Ltd. v. ITO (2010) 36 SOT 166 : (2010) 127 TTJ 25 (UO) (Bang.) (Trib.)]***

21. Fees for include service

Assessee company having entered into a contract with a US company ACSC only for procuring software personnel for the projects of another foreign company in USA the primary services rendered by ACSC to the assessee under the contract is akin to recruitment and the placement service rather than making available any technology, plan, design, etc. and, therefore, the payments made to ACSC cannot come with purview of 'fee for include service' within the meaning of Article 12(4)(b) of Indo-US DTAA and the same are not chargeable to tax in India and no tax was deductible at source under section 195.[***IIC System (P) Ltd. (2010) 33DTR 422 : 127 TTJ 435 (Hyd. (Trib.)]***

22. Permanent Establishment

Personnel supplied by Malaysian company were supposed to function under direction, control and supervision of assessee, therefore it could be said that there was no PE of Malaysian company in terms of Article 5 of DTAA. Payment received by said company was not taxable in India, consequently provision of section 195, and 40(a)(i) could not be invoked. [***Stook Engineer & contractors B.V. (2010) 122 ITD 49 : (2009) 121 TTJ 320: 27 SOT 452: 32 SOT 249 :19 DTR 482 (Mum.)(Trib.)]***

23. Purchase of aircraft

Payment to foreign company for purchase of aircraft engines, could not be regarded as "fees for technical service" hence, provision of section of 195 cannot be applied. [***Hindustan Industries Ltd. v. ITO (2010) 123 ITD 575 : (2009) 121 TTJ 242 : 19 DTR 164 (Bang.) (Trib.)]***

24. Reimbursement of Expenses

As the reimbursement of expenses is not taxable in the hands of non-resident payee, assessee is not liable to deduct tax at source and so, he cannot be held assessee in default, consequently no disallowance under section 40(a)(i) could be called for.[***NathapaJhakri Joint Venture v. ACIT (2010) 41 DTR 233 : 37 SOT 160: 131 TTJ 702: 41 DTR 233 :5 ITR 75 (Mum.)(Trib.)]***

25. Payment of Legal Expenses

Payment of legal charges to the firm of solicitors in connection with the Assessee's GDR issue is covered with in the ambit of "fees for technical service" as per provision of section 9(1) (vi) and is liable to TDS under section 195. [***Dy. DIT v. Tata Iron and Steel Co. Ltd. (2010) 42 DTR 204 : 132 TTJ 566 :6 ITR 463 (Mum.)(Trib.)]***

26. Fees for technical Services

Payment made by the assessee to an Austrian company by way of fees for technical service was not taxable in India as per Art. 7 of the old DTAA of 1065 as applicable to the relevant assessment year 2002-03, in view of the fact that no portion of the activities were performed by the Austrian enterprises in India, provision of section 195 were not to be applicable to the payment made by the

assessee to the said enterprises and such fee or technical service is not hit by the provision of section 40(a)(ia). [***VA Tech Wabag Ltd. v. ACIT (2010) 133 TTJ 121 : 44 DTR 1 : 234 CTR 139 : 327 ITR 305 : 194 taxman 358 (Chennai) (Trib.)]***

27. Purchase of software

A computer software when put into a media and sold become goods and therefore, amount paid by the assessee to a Singapore company towards purchased of software cannot be treated as royalty taxable in India under Art. 12 of DTAA between India and Singapore therefore, assessee is not liable to deduct tax at source under section 195.[***Kansai Nerolac Paints Ltd. v. Addl. DIT (2010) 134 TTJ 342 / 43 DTR 385 (Mum.) (URO)(Trib.)]***

28. Fees for Technical service

Payments made by assessee to US company for technical services and start –up / turnkey responsibility service for setting up a power plant in India was fee for technical service and, therefore, the same was chargeable to tax in India, and the assessee was required to deduct tax as per the provision of section 195. [***Jindal Tractebal Power Co. Ltd. (2007) 106 TTJ 1011:106 ITD 227(Bang.)(Trib.)]***

29. Payment of Advance tax

Assessee Company being a non-resident, all payments made to it were subject to TDS under section 195 and assessee was not liable for paying advance tax and, therefore, interest under section 234B was not chargeable (A.Y.2001-02). [***Van Oord Dredging & Marine Contracts v. Dy. DIT (2007) 106 TTJ 889 105 ITD 97 (Mum.) (Trib.)]***

30. Import of Software

Payment for import of software does not amount to payment of royalty chargeable under section 9(1)(vi) and hence section 195 was not applicable to such payments. [***Sonata Software Ltd. v. ITO (2006) 6 SOT 700 (Bang.) (Trib.)]***

31. Purchase of software

Payments made for purchase of software amounts to 'royalty' within ambit of section 9(1)(vi) held , no – therefore, in such case assessee has no liability to deduct tax at source under section 195 and as such provision of section 40(a)(i)

cannot be applied – held, yes. Assessee Company imported some software packages from various overseas vendors under separate agreements for the purpose of distributing that software to its customer. Therefore, what did the assessee company acquire under agreement was copy-righted article which partook the character of purchase and sale of goods and therefore, in terms of the CBDT Circular No. 23 dated 23-7-69, no tax was required to be deducted under section 195.[***Sonata Information Technology Ltd. 103 ITD 324 : (2007) 106 TTJ 797 (Bang.)(Trib.)]***

32. Annual Surveillance Fee

Annual surveillance fee in respect of credit rating certificate falls within the category of ancillary service and accordingly, the assessee company is liable to deduct the tax under section 195. ***Essar Oil Ltd. V. Jt. CIT (2006) 102 TTJ 270 / (2005) 4 SOT 161 (Mum.) (Trib.)***

33. Credit rating fee

Credit rating fee paid to Australian company, who did not have permanent establishment in India, is not liable to be taxed as royalties under article 12(2)(b)(ii) of DTAA between India & Australia, and also since the payment of fees was not for any knowledge or information, but a payment for the professional services was to decide credit rating of a company. ***[Hindalco Ind. Ltd. v. ITO (2006) 152 Taxman 17 (Mag.) (Trib.)]***

34. Where assessee, engaged in the business of providing end to end communication facility to various Interest service agreement

companies, paid a sum to various foreign Companies under an agreement called as 'interest service agreement' as per which such international service providers provided assessee with necessary bandwidth along with a package of service in return for a consideration, in view of order tribunal in case of ***Wipro Ltd. v. ITO (2003) 133 Taxman 149 (Bang.) (Mag.)***, assessee was not required to deduct tax under section 195 in respect of payments made to various US-Based Companies. [***Software Technology Parks of India (2005) 3 SOT 529 : 84 TTJ 31 (Bang.) (Trib.)]***

35. Payment for Data base – Royalty

Payment made by assessee-Indian company to U.S. company for providing access to information available in database maintained by it was not 'royalty' for

purpose of deduction of tax at source under section 195 (A.Y. 1991-92). [***Software Technology Parks of India v. ITO (2005) 3 SOT 663 (Bang.) (Trib.)]***

36. Payment to Lead managers

Service rendered by lead managers in connection with GDR issue fell within definition of 'technical service' under section 9(1)(vii), read with exemption 2 and, therefore, management commission and selling commission were income of Lead Managers deemed to accrue or arise in India and as such, assessee was liable to deduct tax under section 195(1); however underwriting commission would not fall under section 9(1)(vii), therefore, no tax was deductible therefrom under section 195. (A.Y. 1999-2000). [***Gujrat Ambuja Cement Ltd. v. Dy. CIT (2005) 2 SOT 784 (Mum.) (Trib.)]***

37. Payment of Membership Fee

Where assessee was engaged into business of publishing newspapers, periodicals, etc., and was a member of International Press Institute (IPI) situated in Austria, Section 195 was not applicable to remittance by assessee of foreign currency as its membership fees, donation and advertisement charges to IPI as those payments could not be regarded as income chargeable to tax under the Act.[***MalayalaManorama Co. Ltd. (2005) 94 ITD 121 : 96 TTJ 442 : 1 SOT 739 (Cochin) (Trib.)]***

38. Fees for supply of Technical information

Where assessee deducted tax from fee paid to foreign companies for supply by these kind of technical information and also for sending technical skilled personnel to be put into commercial use, information supplied, but did not deduct tax on expenses incurred by it on airfare, hotel expenses and local travelling for foreign technicians visiting India on ground that none of them had permanent establishment in India, income was not taxable in India, and, Therefore, section 195 was not applicable, expenses in question could not be separated from fees because same were incurred during earning of that fee only and, therefore assessee's contention that section 195 was not applicable to these expense had no merit. [***Mahindra & Mahindra Ltd. CIT (2005) 1 SOT 896 (Mum.) (Trib.)]***

39. Payment for Technical design, Drawing and Information

Where assessee-company entered into agreement with US company for development of water feature at premises owned by it and under the agreement

US company was not only to provide Schematic ideas but also to provide technical design, drawings and Information, on basis of which assessee was to execute and install water feature, since US company was required to deliver technical design or plan for sole use by assessee-company in India, payments effected under agreement squarely fell within definition of 'fees for technical service' mentioned in article 12(4)(b) of India US DTAA, consequently, assessee was liable to deduct tax under section 195. [***Gentex Merchants (P.) Ltd. v. Dy. DIT (International Taxation) (2005) 94 ITD 211 : 95 TTJ 956 (Kol.)(Trib.)]***

40. Fees paid under an agreement for service rendered abroad

Payment by assessee-company to non-resident telecom companies for down linking and transmitting of data to the assessee's customer who were located outside India cannot be considered as fees for Technical service under section 9(1)(vii). Similarly, service offered by VSNL is not regarded as technical service. Hence, there is no question of applicability of S. 9(1)(vi). So, the amount paid is not taxable under the Act, the clause in the DTAA cannot bring the charged. Hence, there was no liability to deduct tax under section 195.[***Wipro Ltd. v, ITO (2003) 80 TTJ 191 : (2004) 1 SOT 758 (Bang.) (Trib.)]***

41. Payment for Data processing services

Services involving routine data entry, application sorting, document handling and data capturing service, not involving the use of sophisticated technology services renders non-managerial, technical or consultancy service. Fees based on invoice from non-resident and fees for technical services are not taxable in India. [***R. R. Donnelley India Outsource P. Ltd. (2011) 335 ITR 122 : 241 CTR 305 : 199 Taxman 255 / 56 DTR (AAR)]***

42. Payment towards Design Service – DTAA – India-USA

Basic design services provided by US entity which includes preparation of plan, concept design, design development and other related consultancy service during construction phase are part of architectural service provided by US entity. Payment received for such services are fee for included service as it involves development and transfer of technical plan and design. The agreement needs to be read with regard to the predominant feature of the contract and by taking into account crux and substance of the contract. Remittance made to the US entity for making payment to consultant and then directly to the taxpayer represents reimbursement of actual expenses and does not represent income chargeable to

tax. ***HMS real Estate (2010) 325 ITR 71 / 230 CTR 340 / 36 DTR 281 / 190 Taxman 22 (AAR)***

43. Business connection – Permanent Establishment – DTAA – India-USA

Consideration paid by Indian company to American company under assignment agreement was not capital gains but business profits; Since American Company did not have PE in India, so, consideration is not chargeable to tax in India and payer is not required to withhold the tax. [***Laired technologies India Pvt. Ltd. (2010) 232 ITR 598 : 188 Taxman 304 : 229 CTR 32 : 35 DTR 110 (AAR)]***

44. Payment towards cost contribution arrangement

Payment made towards the share of the cost incurred in respect of research and development activities pursuant to cost contribution arrangement is the payment towards fees for technical service or royalty. Such Contribution is not liable to tax in the hands of the co-coordinating agencies. ***[ABB limited (2010) 322 ITR 564 : 230 CTR 327 : 189 Taxman 422 : 36 DTR 262 (AAR)]***

45. Payment to Commission Agents

No Tax is required to be deducted from the commission paid to agents outside if no service is performed in India or there is no fixed place of business in India ***[Spahi Projects Pvt. Ltd. (2009) 225 CTR 133 : 315 ITR 374 :183 Taxman 92 :26 DTR 303(AAR)]***

46. Payment for Packed business software solution

Applicant is the purchaser of packaged business software solution from non-resident for supply to domestic clients – issue is whether there is an obligation on applicant to withhold tax when making payment for software purchase from non-resident. AAR observed that determines of royalty or PE in India of non-resident is beyond scope of consideration; only issue is with regard to "liability to withhold taxes" – held that revenue receipt of non-resident are some chargeable under the provision of this Act" and hence there exists a legal obligation on the part of applicant to withhold taxes. [***Headstart Business Solutions Pvt. Ltd. (2006) 204 CTR 519 / 285 ITR 530 / 155 Taxman 639 (AAR)***

47. Payment by Indian Subsidiary to Holding Co. under an agreement

Amount paid by Indian subsidiary of US Company for services rendered in US to Indian Subsidiary under an agreement, though not including any profit element as per agreement, will be subject to withholding tax under section 195. ***Timken India Ltd. In re (2005) 273 ITR 67 :43 Taxman 257 : 193 CTR 610 (AAR)]***

48. Payment of liability of foreign Lenders – DTAA India-Singapore [Art. 11]

Assessee has undertaken to pay tax liability of foreign lender to whom it is liable to pay interest and who has no permanent establishment in India, interest payable to such non-resident would constitute its income as per article 11 DTAA with Singapore and assessee would be liable to deduct tax at source under section 195 from such interest. [***Jay Shree tea & Industries Ltd. In re (2005) 274 ITR 97 : 145 Taxman 516: 194 CTR 401 (AAR)]***

49. Reimbursement of cost incurred by payee [Section 2(24)]

To apply section 195, amount in question should be income of payee and not mere reimbursement of cost incurred by payee. [***Danfoss Industries (P) Ltd. In re (2004) (138 Taxman 280) / (268 ITR 1) / (2004) (189 CTR 489) (AAR)]***

50. Payment of Commission – Retainership Fee

For Commission/retainer fee payable to non-resident having no office or business operation in India, no tax is required to be deducted at source. ***IndTelesoft P. Ltd., In re (2004) 267 ITR 725 : 140 Taxman 463 : 189 CTR 287 (AAR)]***

51. Purchase of software is not royalty

Taxability of sums received for supply of software as "royalty": Given the definition of royalties contained in Article 12 of the DTAAs, the amount paid by resident Indian end-users/ distributors to non-resident computer software manufacturers/suppliers, as consideration for the resale/use of the computer software through EULAs/distribution agreements is not the payment of royalty for the use of copyright in the computer software and that the same does not give rise to any income taxable in India, as a result of which the persons referred to in

section 195 of the Income Tax Act are not liable to deduct any TDS under section 195 of the Income Tax Act. The provisions contained in the Income Tax Act (section 9(1)(vi), along with explanations 2 and 4 thereof), which deal with royalty, not being more beneficial to the assessee, have no application. [**Engineering Analysis Centre Of Excellence Private Limited v. CIT (SC) 125 taxmann.com 42]**

52. TDS under section 194E is not affected with DTAA

As the payments to the Non-Resident Sports Associations represented their income which accrued or arose in India under section 115BBA, the assessee was liable to deduct Tax at Source under section 194E. The obligation to deduct Tax at Source under section 194E is not affected by the DTAA. In case the eligibility to tax is disputed by the recipient, the benefit of DTAA can be pleaded and the amount in question will be refunded with interest. But it cannot absolve the liability to deduct TDS under section 194E of the Act (**Eli Lilly (2009) 15 SCC 1 & G.E. India Technology Centre 327 ITR (SC)** referred. [**PILCOM vs CIT(SC) 271 Taxman 200]**

53. Whether payment made to professionals outside India is taxable

Professional charges paid to an offshore company of Chartered Accountants for filing of statutory returns and liaison with statutory authorities, although payment made to the said company is not covered under Article 14, but said payment is covered under Article 7 of DTAA between India and USA because the business profits of an enterprise of one Contracting State shall be taxable only in that State unless the enterprise carries on business in other Contracting State through a permanent establishment situated therein. In case of no PE in India, the said payment is outside the scope of provisions of section 195 of the Act, because it is neither in the nature of royalties as defined under section 9(1)(vi) of the Act nor in the nature of fees for technical services because the nature of services rendered by the company of accountants does not make available technical knowledge, expertise, skill, know-how or processes to the assessee. Therefore, the said payment is also outside the scope of provisions of section 195 of the Act and thus, the assessee is not liable to deduct tax at source under section 195 of the Act. [***Sundaram Business Vs Income Tax Officer (ITAT Chennai) ITA No. 771/CHNY/2019*****]**

Chapter 12

Case Studies

CASE STUDY 1: TRANSFER OF SHARES

Facts:

- A Singapore company acquired shares between March 2019 to June 2019 in an Indian company.
- Now on Nov 1, 2019, it would sell part of such shares to another non-resident (Cayman entity) for the same price at which shares were acquired. In other words, the same shall be classified as "short term" and taxable as per domestic law.
- Are taking an assumption that treaty benefit is unavailable. Accordingly, the same is taxable as per Domestic Tax law. As per the capital gain computation, the resultant figure will not result into any tax payable situation in India.

Query:

- Whether it is advisable to file Form 15CA/Form 15CB in view of provisions of section 195 read with Rule 37BB, even if the transaction is NOT taxable?
- If yes, does compliance needs to be done under Part C of 15CA, or alternatively under Part D of 15CA?

Resolution:

- Section 195(6) read with Rule 37BB requires reporting of any payment made to a Non – Resident irrespective of its chargeability to tax in India.

- While Part C of the form 15CA is a full-fledged format which requires elaborate details like provisions of the Act/DTAA under which payment is taxable, Part D applies where payments are not chargeable under the Act. Further Part D is a simple self-declaration format which requires bare minimum details like country to which remittance is made, amount and nature of remittance etc. There is no CA certification required.
- Technically compliance is required even if payments are not chargeable to tax in India.
- While in the current case, it is arguable that since there is no income taxable in India, as there is no capital gains tax liability in India, hence Part D should be applicable. However, considering the magnitude of transactions, it is advisable to comply with the reporting obligation under Part C of Form 15CA to avoid any litigation in future. Detailed reporting in Part C will thus be a better compliance for the taxpayer
- Furnishing of inaccurate information or non-furnishing of Form 15CA can trigger penalty of sum of INR 1 lakh rupees under section 271-I.

CASE STUDY 2: – PAYMENT TO FOREIGN BANK BRANCH OF AN INDIAN BANK

Facts:

- I CO imported goods from an entity in Hong Kong
- I CO obtained funding (i.e. trade/buyer's credit against imports) from "ABC Bank" India, Hong Kong Branch (ABC HK)
- In order to repay this credit, I Co has availed another buyers credit from a Singapore Bank
- The proceeds of buyer's credit availed from Singapore Bank, credited to I Co's Indian Bank will be utilised to repay the buyer's credit (includes Principal, Interest and Bank charges) availed from ABC HK

Query:

- Whether 15CA/CB compliance is required for the payment made by I Co to ABC HK?

Resolution:

- Where ABC HK is regarded to be a branch of ABC India, payment made to ABC HK will be treated at par with payments being made to an Indian Bank (resident in India)
- This is for the reason that a foreign branch of an Indian Bank is regarded to be an extension of the Indian Bank itself and not a separate foreign entity
- Once payment is made to a resident, no compliance under section 195(6) is required.

CASE STUDY 3: CONSIDERATION IN KIND

Facts:

- M Ltd., Mauritius holds 100% shareholding in XYZ Pvt. Ltd. (India) and PQR Pvt. Ltd. (India)
- Step 1 - ABC Pte Ltd. (Singapore) will acquire XYZ Pvt. Ltd. (India) and PQR Pvt. Ltd. (India) from its group company (M Ltd., Mauritius) on a fair value basis in cash
- Step 2 - ABC Pte. Ltd. (Singapore) will then transfer its shareholding in XYZ Pvt. Ltd. (India) and PQR Pvt. Ltd. (India) to its subsidiary in India (I Co Pvt. Ltd.) in consideration of the shares of I Co Pvt. Ltd. i.e. a swap of shares

Query:

- Whether the transfer of shares from Non-resident (M Ltd., Mauritius) to another Non-resident (ABC Pte. Ltd.) which is not taxable as per the provisions of India-Mauritius treaty would require compliances in Form 15CA and Form 15CB?
- Whether the transfer of shares, wherein consideration is discharged by issue of shares requires furnishing of information under Section 195(6) read with Rule 37BB (note that the transaction is also not taxable in India as per the provisions of India-Singapore treaty)?

Resolution:

- On the basis of Section 195 and 37BB the following can be inferred
- The provisions of Section 195 are wide enough to cover the transaction where consideration is discharged by way of issuance of shares (section uses the words - payment thereof in cash or by the issue of a cheque or draft or by any other mode)
- Where the transaction is not taxable in India, the self-declaration is required to be furnished in Part D of form 15CA, electronically
- Resident payer may need to comply with requirements of Rule 37BB r.w. Form 15CA/CB even though there is no actual remittance but the payment is in kind (in this case share swap).
- This is irrespective of its chargeability to tax.
- Supreme Court ruling in the case **Kanchanjanga Sea Foods (265 ITR 644)** held that WHT obligation under section 195 is triggered even in a case when payment is made in kind.
- It may be advisable to comply with under part D of the New Rule 37BB even in case of barter transaction like share swap with a NR
- It is possible that I Co Pvt. Ltd may face practical difficulties if the e-filing system does not recognises payment in kind and/or does not involve foreign remittance from India.
- In such circumstances, a taxpayer cannot be expected to do what is not possible as per the system in place.
- However, to demonstrate taxpayer's sincerity and bonafide intent, it is suggested that the payer should retain the evidence of having attempted to upload Form No. 15CA and send the physical copy of Form No. 15CA (as also Form 15CB, if payer decides to report in Part C with CA certificate) to the Tax Authority as physical record with proper explanation. This would be necessary considering that default in section 195(6) compliance attracts a penalty under section 271-I of INR 1 lakh.

CASE STUDY 4: DEFERRED CONSIDERATION

Facts:

- I Co. is in the process of acquiring the shares of Target Co
- I Co. is under an obligation to pay the purchase consideration to a Non-Resident Promoter to whom the consideration is paid in 2 parts i.e. Rs. 100 as upfront fee (remitted now) and Rs. 20 as deferred consideration (to be remitted after 12 months).
- The cost of acquisition is "NIL" and the entire INR 120 is capital gains subject to tax @ 10%.
- I Co have deducted entire tax of 12 and is planning to remit 88 now and remaining 20 at later date.

Query:

- What is the best possible way of disclosure in Form No. 15CB to fairly certify the remittance under consideration i.e. 88?

Resolution:

- From an accounting standpoint, I Co has taken a position to accrue the entire consideration including deferred considered in its books of accounts at closing (ie INR 120 would be accrued in its books at closing. As a result of this position, I Co is required to withhold taxes on the deferred consideration as well as at the time of accrual.
- I Co and the sellers have agreed that taxes payable on the entire consideration (including deferred consideration) would be withheld upfront at the time of payment of initial consideration and the remaining consideration would only be remitted to the sellers.
- Reporting requirement under section 195(6) arises at the time of payment, even if accrual of entire payment is done on an earlier date.

One may consider the following disclosure in clauses of Form 15CB:

Column No	**Particulars (as per Form 15CB)**	**On remittance of Upfront Fee of Rs. 100**	**On remittance of deferred consideration of Rs. 20**
B2.	Amount Payable	100	20
B8(b)	Amount of income chargeable to tax	120	120
B8(c)	Tax Liability	12	12
B8 (d)	Basis of determining taxable income and tax liability (To give the required remarks)	Amount payable as given in Col. B2. denotes the amount payable by I Co. as on the *date of remittance of upfront fee* • While the total income chargeable / accrued as on the date (as per Col B8 (b)) is Rs. 120, an amount of Rs. 20 shall be remitted only in future and therefore, the company has deducted tax on the entire Rs. 120 and remitted the same (i.e. 120 * 10% = Rs. 12 (Col B8 (c))	Amount payable as given in Col. B2. denotes the amount payable by I Co. as on the *date of remittance of deferred consideration* • While the total income chargeable accrued as on the date (as per Col B8 (b)) is Rs. 120, an amount of Rs. 100 (less TDS) was already remitted which was certified vide Form No. 15CB date _____ and the tax on the entire Rs. 120/- was appropriately deducted at that time. Therefore, the company has shown amount of TDS as

Column No	Particulars (as per Form 15CB)	On remittance of Upfront Fee of Rs. 100	On remittance of deferred consideration of Rs. 20
			Nil in Col. B10.
B10	Amount of TDS	12	Nil
B12	Actual amount of remittance after TDS	88	20

CASE STUDY 5: TRANSFER OF FUNDS BY A NON-RESIDENT FROM INDIAN BANK A/C TO HIS SINGAPORE BANK ACCOUNT

Facts:

- Mr. A is employed with ABC India Pvt. Ltd. (ABC). Mr. A is being sent on secondment to Singapore for 3 years by ABC to work with ABC Singapore.
- While Mr. A is on assignment to Singapore, he receives part salary in India and part in Singapore.
- Mr. A has received annual bonus along with salary in India. –

Case A: The salary and bonus are received in India and hence, taxable in India. Tax on this bonus and salary is duly deducted and deposited with the Indian Revenue Authorities.

Case B: The salary and bonus are received in India and hence, as per the domestic tax laws, they are taxable in India. However, the said income is eligible for exemption under the tax treaty (it has already been evaluated that Mr. A is eligible for treaty relief analysis). Tax on this bonus and salary is deducted from the assignee as hypothetical tax but not deposited with the Indian Revenue Authorities as ABC is claiming tax treaty relief at withholding stage itself for Mr. A

- In the year he received the payment, he qualified as a Non Resident of India as per the Income-tax Act, 1961
- He wants to remit the said amount to Singapore from his Indian bank account to his Singapore bank account for his family maintenance (approx. INR 16 lakh)

Query:

- Whether any certification in the form of Form 15CA / Form 15CB is required to be furnished for such remittance from Mr. A's Indian bank account to Mr. A's Singapore bank account?
- In case yes, which Form is required to be furnished (whether both Form 15CB and Form 15CA or only Form 15CA)? Further, which part of the Form 15CB is applicable (Part A/ Part B/ Part C / Part D) ?

Resolution:

- Mr. A (NR) wants to remit funds to Singapore from his Indian bank account to his Singapore bank account for family maintenance purposes
- Remittance from one account to another of the same person is a "payment to self" which is outside the scope of withholding under the Act.
- On similar lines, compliance under section 195(6) (read with Rule 37BB) is required in respect of payments made by any person to a non-resident (NR) i.e. when two persons are involved.
- Language of section 195(6) r.w Rule 37BB which reads as follows: "The person responsible for paying to a non-resident, not being a company, or to a foreign company……" supports that the compliance is arguably attracted when payment is made by one person to another. Consequently, it is not attracted when there is remittance from one account of individual to another account outside India of the same individual.

- Therefore, considering specific language of the provision, the payments under both the cases are not covered with the ambit of reporting in Form 15CA/B under Rule 37BB.
- However, there may arise some practical challenges since banks may nevertheless insist on compliance.

CASE STUDY 6: CAPITAL REDUCTION

Facts:

- Z Co is an Indian private company.
- A Co and B Co, both non-residents, holds shares of Z Co in the ratio of 99.99% and 0.01% respectively.
- Z Co is in the process of undertaking capital reduction for repatriating surplus cash to its shareholders wherein shares of A Co and B Co will be cancelled on proportionate basis.
- In the absence of accumulated profits in Z Co, there is no DDT liability. Further, due to higher cost base (as compared to current fair value of Z Co), A Co and B Co shall suffer significant capital losses.
- Since there are no capital gains in the hands of A Co and B Co, Z Co will not be liable to withhold any tax in India (under section 195) on repatriation of surplus cash.

Query:

- Given that A Co and B Co suffer capital loss in India pursuant to reduction of its shares held in Z Co, whether Z Co is required to file Part C (and obtain certificate 15CB as well) or Part D (and no requirement to obtain certificate 15CB)

Resolution:

- Assumed that on the capital reduction transaction there shall be no implications under section 2(22)(d), since no accumulated profits and the capital gains computation as per the Act, results in a capital loss.

- The issue to be considered is whether Z Co is required to File Part C/ Part D of Form 15CA
- Section 195(6) r.w. Rule 37BB requires reporting of any payment made to a NR irrespective of its chargeability to tax in India. Thus reporting in Form 15CA is triggered even if there is no tax liability arising for the NR on the impugned transaction.
- While Part C of Form 15CA is a full-fledged format which requires elaborate details like provisions of the Act/DTAA under which payment is taxable as also CA certificate in Form 15CB, Part D applies where payments are not chargeable under the Act. Further Part D is a simple self-declaration format which requires bare minimum details like country to which remittance is made, amount and nature of remittance etc. There is no CA certification required.
- Thus, technically compliance is required even if payments are not chargeable to tax in India. While in the current case, it could be argued that since the capital gains computation results in a loss, there is no tax liability in India, hence Part D should be applicable.

CASE STUDY 7: MISCELLANEOUS

Query 1:

Whether Form 15CA/CB will be required on sale of foreign currency, issuance of travel currency card or travellers cheque?

Resolutions:

Said question is relevant when such instruments are issued by the Bank to customers who are Non-Resident for tax purposes but resident for FEMA purposes. If these instruments are issued to customers who are Resident for both tax and FEMA purposes, section 195(6) does not apply and there is no requirement of reporting in Form 15CA/CB.

If the issue of above referred instruments are covered by Liberalised Remittance Scheme for Residents, there is no reporting requirement in Form 15CA/CB as per Rule 37BB(3)(i).

Similarly, if the issue of above referred instruments are covered by Sr. No. 15 to 19 (covering remittances for business travel, basic travel quota, pilgrimage, medical treatment, education) of List specified in Rule 37BB(3)(ii), there is no reporting requirement in Form 15CA/CB.

Query 2:

While filling Form no. 15CA Part A, Part B and Part C, limit of Rs. 5,00,000 needs to be computed. Whether the 33 exempted payments and the remittances made by individual where prior approval of RBI is not required as per Section 5 of FEMA, 1999 need to be considered while computing the limit of Rs. 5,00,000?

Resolution:

Rule 37BB(1) deal with payments chargeable to tax. Rule 37BB(2)/(3) deal with payments which are not chargeable to tax.

The limit of Rs. 5 lakhs is provided in Rule 37BB(1) which deal with payments chargeable to tax. Rule 37BB(i) provides that where such payments do not exceed Rs. 5 lakhs in a financial year, reporting may be made in Part A of Form 15CA. Else, the payments are required to be reported either in Part B (supported by AO‟s NIL/lower TDS certificate) or Part C (supported by CA certificate in Form 15CB).

Thus, the limit of Rs. 5 lakhs applies only to payments chargeable to tax to be reported in Part A/B/C of Form 15CA.

Headings of Part A/B/C clarify that the same is in relation with remittance which is taxable under the Act and limit of INR 5,00,000 is in relation with "the remittance" or aggregate of "such remittances". Refer extract of Part A below (similar wording in part B/C also) –

"Part A (To be filled up if the remittance is chargeable to tax under the provisions of the Income-tax Act,1961 and the remittance or the aggregate of such remittances, as the case may be, does not exceed five lakh rupees during the financial year)"

The reference to payments under Section 5 of FEMA 1999 does not require RBI approval (i.e Liberalised Remittance Scheme for residents) and 33 exempted payments that appear in Rule 37BB(3) deal with payments which are not

chargeable to tax. The threshold of Rs. 5 lakhs is not applicable to such payments.

Hence, these payments are not required to be considered for computing threshold limit of Rs. 5 lakhs.

Query 3:

Applicability of Rule 37BB on payment made by the customer through Debit/Credit card in foreign currency?

Resolution:

- If the payments made by customer through Debit/Credit card in foreign currency is covered by Liberalised Remittance Scheme, there is no reporting requirement as per Rule 37BB(3)(i).
- Reporting requirement will apply only if (a) the payments are chargeable to tax in India or (b) the payments are not covered by Liberalised Remittance Scheme and Specified list of 33 exempted payments. In such case, mode of payment whether by way of bank remittance or through International Credit/Debit card may not be relevant.

Query 4:

Whether the Bank needs to furnish the statement in "Form 15CC' for all outward remittances whether chargeable to tax or not including 33 exempt payments and exempt current account transactions as per FEMA?

Resolution:

Sub-rule (7) to new Rule 37BB requires an authorised dealer to furnish a quarterly statement electronically in the prescribed format. While Rule 37BB(7) is silent on the subject matter of particulars to be furnished in this form, Form 15CC makes it clear that the reporting is in respect of "remittances" made during relevant quarter. The following information is required to be furnished.

→ Name of the remitter

→ PAN of the remitter

→ Name of the remittee

- → PAN of the remittee, if available
- → Amount of remittance Date of remittance Country to which remittance is made
- → Purpose code as per RBI

From a bare reading of Rule 37BB and above referred format, the following points indicate that exempt payments may need to be reported by the Bank –

Sub-rule (7) as well as Form 15CC neither indicate the scope of the remittances to be reported, nor do they specifically exclude exempt payments

The exclusion for exempt payments occurring in Rule 37BB(3) is only for reporting by payers. There is no such exclusion provided for Authorised Dealers for quarterly reporting of remittances.

The prescribed Form 15CC requires general information regarding remitter/ remitee (name, PAN) and the remittance (amount date, country, RBI code etc.). If the format is based on what authorised dealers are, in any case, required to report to RBI, the case for inclusion of exempt payments is stronger. The rationale from Tax Authority's perspective may be to obtain information of exempt payments going out of India on real time basis since such information will not be forthcoming from the payers by virtue of exclusion provided in Rule 37BB(3).

Chapter 13

Frequently Asked Questions Related to Filing of Forms 15CA and 15CB

Q1. Whether Form 15CA has to be submitted in all cases since the Bankers demand it invariably?

A: In this regards the attention is invited to the Heading of the Form which provides as under:

FORM NO. 15CA (See rule 37BB) Information to be furnished for payments to a non -resident not being a company, or to a foreign company

Part A (To be filled up if the remittance is chargeable to tax under the provisions of the Income Tax Act,1961 and the remittance or the aggregate of such remittances, as the case may be, does not exceed five lakh rupees during the financial year

As can be seen from the above, Form clearly states that it needs to be filled only if the remittance is chargeable to tax in India. Therefore, Form 15CA is not required to be filled if the remittance/payment to non-resident are not chargeable to tax.

Q2. What stand can a customer take if Bank demands Form 15CA but service is not taxable?

A: In such cases, the possible recourse is to submit a declaration in form of a note to Bank stating the nature of remittance and reason as to why it is not chargeable to tax and consequently exempted from the submission of Form 15CA.

Q3. Can Form 15CA once filed be withdrawn?

A: There is an option to withdraw Form 15CA even after it is filed. "Withdraw Form 15CA" link will be available to users to withdraw the uploaded FORM 15CA. Users can withdraw the uploaded FORM 15CA within 7 days of submission of FORM by clicking on "Withdraw Form 15CA" link. .

In case of withdrawal of Form 15CA against which Form 15CA was consumed, then the status of Form 15CB will change from "Consumed" to "Withdrawn". One Form 15CB can be consumed for filing one Form 15CA only.

Q4. Who can sign form 15CA?

A: The Form 15CA shall be signed by the person authorised to sign the return of income of the remitter or the person so authorised by him in writing. For TAN Users DSC is Mandatory to file Form 15CA.

Q5. What will happen in case of invalid PAN and /or TAN No?

A: In case of invalid PAN and/or TAN No, the form shall not be generated.

Q6. If certificate u/s195(2)/ 195(3)/ 197 has been obtained, filing of both Form 15CA and 15CB is required?

A: If certificate u/s 195(2)/195(3)/197 has been obtained, only Form 15CA, Part B needs to be filed specifying section under which order/ certificate has been obtained, name and designation of Assessing Officer who issued the certificate, date of certificate and certificate number. Form 15CB is not required to be filed.

Q7. Which form is required to be filled first? Form 15CA or Form 15CB?

A: Upload of Form 15CB is mandatory prior to filling Part C of Form 15CA. To prefill the details in Part C of Form 15CA, the Acknowledgment number of e-Filed Form 15CB should be provided.

Q8. Is Form 15CB required in case of filling Part A of the form 15CA?

A: No. Form 15CB is required only when filling Part C of form 15 CA.

Q9. In case consular receipts are remitted abroad by diplomatic missions in India will they be required to obtain a certificate from Accountant i.e. Form 15CB

A: In case consular receipts are remitted abroad by diplomatic missions in India then they will be required to submit only a self – certified undertaking in Form 15CA to the remitter bank. In such a case, they are **not required to obtain a certificate** from an accountant/certificate of Assessing Officer (**Form 15CB**).

Q10. Is the CA certificate (Form 15CB) issued appealable?

A: The certificate issued by CA (Form 15CB) is not appealable. Refer Mahindra and Mahindra Ltd v Add. DIT (2007) 106 ITD 521 (Mumbai)

Q11. Applicability of Form 15CA and Form 15CB for remittance from NRO account by NRI

A: Non-resident who earns income in India through source of interest from Indian investments or rental income from his house property in India or sale proceeds of immovable properties in India or any other income and the same is lying credit to his NRO account then the non-resident may transfer such amount from NRO account to NRE account.

Before transferring the same from NRO to NRE Account, the non-resident has to electronically furnish information in Form 15CA on the e-filing portal of the income tax department. Almost in all cases, banks ask for a copy of furnished Form 15CA with the income tax department and also, he has to obtain a certificate from a Chartered Accountant in Form 15CB.

Further, when the nature of payment is covered in the Specified List, then no Form 15CA or Form 15CB is required. For example, in case of remittance by non-residents out of his savings or income in India towards family maintenance and savings (S1301) or remittance towards personal gifts and donations (S1302) is covered in the specified list then, there is no requirement to furnish Form 15CA or Form 15CB in terms of exemption granted under Rule 37BB(3)(ii) of Income Tax Rules 1962.

Q12. Whether Form 15CA/CB is applicable on remittance made using corporate credit card for purchase of data base from a foreign company?

A: Form 15CA/CB is required even if remittance has been made using corporate credit card for purchase of data base from foreign company.

Q13. Person "X" wants to send gift to his Brother "Y" residing in Canada, will Mr X be required to file Form 15CA/CB or the remittance can be made merely on the basis of gift deed?

A: In this case, the remittance cannot be made by Mr X merely on the basis of a gift deed. **Form 15CA is required in all cases**, where remittance is made to Non-Resident, irrespective of the fact that amount of remittance is taxable or not taxable in India, whereas **15CB** is required only when amount of remittance is taxable in India. Part D of Form 15CA needs to be filled when remittance is on account of nature specified in list under Rule 37BB. Rule 37BB Serial No 27 covers the head *"Remittance Towards personal gifts and donation"*, therefore the same being not subject to tax have to be mentioned under Part D of Form 15CA.

Q14. In case Form 15CB uploaded earlier by CA is found to be incorrect, however no 15CA was uploaded in respect of the earlier incorrect Form 15CB , what would be the validity of Form 15CB filed earlier?

A: As the incorrect Form 15CB previously issued has not been utilised against Form 15 CA, the 15CB so issued would remain unrealised and therefore ineffective.

Q15. Whether Form 15CA & 15CB are required to be filed for purchase of property by resident from a non-resident person and payment is being made by resident to NRO a/c of NRI?

A: If payment is made to NRO account of NRI then 15CA & 15CB are not required, since they are for remittance outside India only.

Q16. There are numerous incomes being paid to non-residents through their NRO accounts like interest, capital gains, rents etc. These are liable to TDS under section 195. However, it is not clear if furnishing of forms 15CA/ CB are also required under section 195(6) r.w. Rule

37BB. Banks are not insisting on these documents since payments are in INR and funds remain in NRO account only.

A: If payments are being made to NRO account then in that case Form 15CA and 15CB are not required.

Q17. There was some change in RBI Service Code in Form 15CB which was uploaded earlier. A fresh Form15CB has been uploaded with revised code, whether fresh UDIN needs to be generated or previous UDIN would suffice?

A: It would be suggested that the previous UDIN be revoked and a fresh UDIN be generated for the revised/fresh Form 15CB so issued. The UDIN once generated can be revoked or cancelled with narration. If any user had searched for that UDIN before revocation, an alert message will go to him about revocation of the UDIN. After revocation of the UDIN, if anybody searches for that UDIN, an appropriate narration indicated by Member with the date of revocation will be displayed for that revoked UDIN.

Q18. Is it mandatory to quote Unique Acknowledgement of the e-filed Form No. 15CA in Form 27Q (TDS Return)?

A: CBDT has vide **Notification No. 11/2013 dated 19.02.2013** mandated to quote the '**Unique Acknowledgement of the corresponding Form No. 15CA**' in the Form 27Q. Form 27Q is the quarterly e-TDS statement that has been furnished for TDS from payments of non-resident under section 200(3) read with Rule 31A.