Section 195 – Certain issues & DAPE

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October 2019

Agenda for the session

1	Overview of section 195
2	Certain Issues
3	Other Procedural aspects
4	Certificates for lower or nil withholding tax- Practical challenges
5	Agency PE

1 Overview of section 195

Scope of section 195

Who are covered?

- **Any** person responsible for paying
- To a non-resident (other than a company) or foreign company – **what if the POEM of the foreign company is in India? Reference may be made to the Notification 29/2018 dated 22.06.2018 issued by CBDT**

What is covered?

- Any interest (other than those covered under section 194LB, 194LC, 194LD)
- Any other sum chargeable to tax under the provisions of the Act
- Incomes chargeable under the head ‘Salaries’ – Not included
- No threshold limit has been prescribed

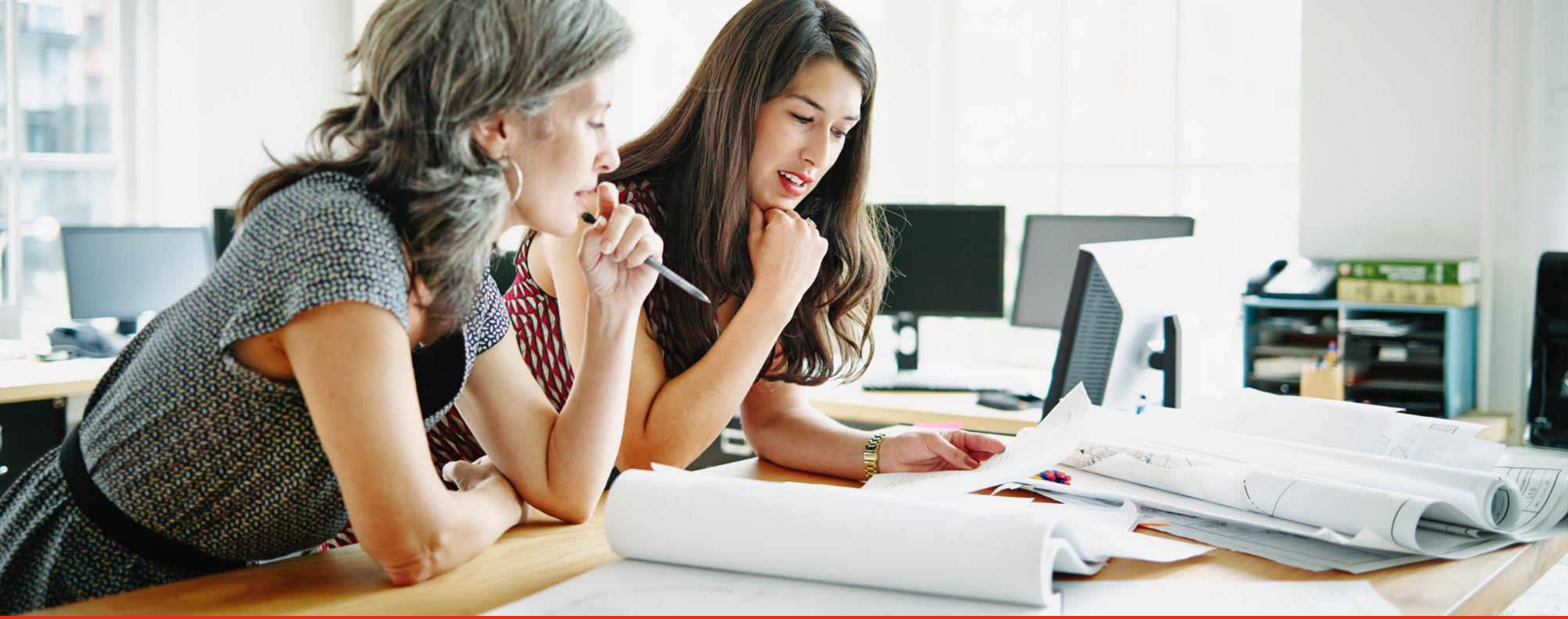
Scope of section 195 (continued)

When is it applicable?

- At the time of payment or credit – whichever is earlier
- At the time of payment – in case of interest payable by Government/Public sector bank/public financial institution

How is it to be applied?

- Deduct income-tax thereon at the ‘rates in force’
- Application may be made to the AO for lower/Nil withholding –
  - By the payer u/s 195(2)
  - By the payee u/s 195(3) /197 (Form 13)



2 Certain Issues

Meaning of ‘any other sums chargeable under the provisions of the Act’

- Taxability to be determined under **Section 5** and **Section 9**
- Nature of payment to be determined from **payee’s** point of view
- Subject to the beneficial provisions of the **DTAAs** with respective countries

Sums chargeable to tax……

- Tax is to be deducted not just from payments which are wholly incomes; but also from **payments where only an embedded portion is income**
  - ***Transmission Corpn of A.P. Limited - 239 ITR 587 (SC) [1999]***
    - *Tax is liable to be deducted by the payer on the gross amount if such payment included in it an amount which was exigible to tax in India. It was held that if the payer wanted to deduct tax not on the gross amount but on the lesser amount, on the footing that only a portion of the payment made represented "income chargeable to tax in India", then it was necessary for him to make an application under Section 195(2) of the Act to the AO and obtain his permission for deducting tax at lesser amount.*
  - ***GE India Technology Cen. Pvt. Ltd. – [2010] 193 Taxman 234 (SC)***
    - *A person making payment to a non-resident is liable to deduct tax under section 195 only if such sum is chargeable to tax in India and not otherwise;*
    - *"….the fact that the Revenue has not obtained any information per se cannot be a ground to construe Section 195 widely so as to require deduction of TAS even in a case where an amount paid is not chargeable to tax in India at all. We cannot read Section 195, as suggested by the Department, namely, that the moment there is remittance the obligation to deduct TAS arises….."*

Sums chargeable to tax……

- ***Google India Private Ltd. [2017] 86 taxmann.com 237***
  - *In our view, whether it is business profit or royalty, in both the circumstances, so far as the assessee is concerned, the assessee is duty-bound to deduct the TDS unless there is an adjudication by the AO to the contrary u/s.195(2).*
- ***CBDT Instruction No. 2/2014 dated 26 February 2014:***
  - *If no application is made u/s 195(2) and the payer failed to deduct tax, liability u/s 201 of the Act to be computed on the taxable portion and not on the whole sum remitted.*
- ***CBDT Circular No. 3/2015 dated 12 February 2015:***
  - *Disallowance u/s 40(a)(i) to be computed on the taxable portion and not on the whole sum remitted.*

Sums chargeable to tax……

Reimbursement of expenses on account of expatriate salary

- In the recent past, secondment arrangements have been under the scanner, primarily due to whether the presence of secondees triggers PE exposure for foreign companies and/or whether the foreign companies' receipts can be taxed as FTS.
- An important factor to consider in such cases is about which entity supervises and has control over such secondees. In a landmark judgement, in the case of Centrica India Offshore P Ltd. vs CIT, it was held by the Delhi High Court that reimbursement of salary costs to an overseas entity is liable to tax as 'FTS', since by seconding its employees it is providing technical knowledge and skills, and assisting the taxpayer in the latter's quality control and management functions.
- The court held that this payment is, in essence, compensation for managerial services provided. An SLP filed by the taxpayer before the Supreme Court against the High Court judgement was summarily dismissed.
- Technically, dismissal of the SLP by the Supreme Court, especially in a 'non-speaking manner' neither confirms the High Court's judgment nor makes it a law of the land; it only means that the Supreme Court has refrained from adjudicating this case.

Sums chargeable to tax……

Reimbursement of expenses on account of expatriate salary

- Recently, Pune Tribunal in the case of **M/s Faurecia Automotive Holding vs DCIT [TS-417-ITAT-2019 (PUN)]** held that the reimbursement of salary and other costs made by Faurecia India to the taxpayer for employee seconded to Indian entity does not constitute FTS under section 9(1)(vii) of the Act.
- Also, Hon'ble Delhi ITAT in case of **AT&T Communication Services (India) P. Ltd. [TS-644-ITAT-2018 (DEL)]** held that the reimbursement made to US company in respect of employees seconded to the taxpayer in India (for salary and other costs) does not constitute FIS / FTS either under India-USA tax treaty or under Section 9(1)(vii) of the Act.
- Interestingly, the Mumbai Tribunal in the case of **Morgan Stanley (Asia) Singapore Pte Ltd vs DDIT [2018] 95 taxmann.com 80** held that reimbursement of salary costs for seconded employees was not chargeable to tax in India.
- The Mumbai High Court in the case of **Marks & Spencer Reliance India Pvt. Ltd. [TS-178-HC-2017 (Bom)]**, held that the cost reimbursement made by the taxpayer to the overseas entity under a secondment agreement is not chargeable to tax in India.

Sums chargeable to tax

Reimbursement of expenses to non-resident

- Recently Mumbai ITAT in the case of **Braitrim UK Limited [TS-502-ITAT-2019(Mum)]** held receipts by assessee (a UK-based foreign company) to be in the nature of reimbursement of expenses, not taxable in India rejecting AO's treatment of the receipts as royalty. While doing so, Tribunal noted that reimbursements are in respect of specific and actual expenses incurred by the assessee and do not involve any mark-up and the assessee has furnished sufficient evidence to demonstrate the incurrence of expenses. ITAT further holds that “the payments qualify as a pure reimbursement of expenses and accordingly, not taxable in India”; Relies on SC decision in AP Moller and jurisdictional HC in Siemens Aktiongesellschaft.
- However, Delhi ITAT in the case of **H. J. Heinz Company [TS-505-ITAT-2019(DEL)]** rules that payment received by a US company [assessee, a leading manufacturer of foods products] during AY 2009-10 towards cost allocated for providing support services to its group affiliate in India, qualifies as FTS/FIS both u/s. 9(1)(vii) of the Act as well as Article 12 of India-USA DTAA.
- While deciding on the alleged taxability of reimbursement, Tribunals have gone ahead and analysed the nature of underlying expenses. And if underlying expenses were liable to WHT, which was not applied, the reimbursement was held to be subject to it. Interestingly, these principles have yet to be tested before the higher courts.

Basis of Taxability for Non-resident payee (considering DTAAs)

Nature of Income	Basis of Tax	Relevant Sections of the Act	Relevant Articles of general OECD Treaties
Business / Profession	Taxable if Business Connection in India or property or asset or source of income in India or transfer of a capital asset situated in India	Section 9(1)(i)	Articles 7 & 14 read with Article 5
Salary	Taxable if services are rendered in India (TDS u/s 192)	Section 9(1)(ii)	Article 15
Dividend	Exempt (if subject to DDT u/s 115-O)	Section 9(1)(iv) r.w.s. 10(34) / 10(35)	Article 10
Interest	Taxable, if source in India	Section 9(1)(v)	Article 11
Royalty		Section 9(1)(vi)	Article 12
Fees for Technical services		Section 9(1)(vii)	Article 12
Capital Gains	Taxable if situs of shares / property in India	Section 9(1)(i)	Article 13

3 Certain procedural aspects

Rigours of section 206AA

- **Section 206AA** – If the payee does not furnish PAN to deductor, TDS is higher of :
  - Rate specified under the relevant provision of the Act;
  - Rates in force;
  - **20%**

Scenarios where Section 206AA may pinch	Scenarios where Section 206AA may not apply
1. Payments to NRs where applicable tax < 20% 2. Cases where tax is borne by the payer (195A cases) 3. Income of recipient (NRI Individual) < taxable threshold, but payment is tax deductible	1. A transaction is not chargeable to tax under the Act [e.g. import of goods] 2. Sum is not at all chargeable to tax as per the tax treaty [e.g. FTS under India-Thailand tax treaty]

Whether section 206AA override the tax treaty rate?

Arguments for

- Sec 206AA begins with a non-obstante clause
- The term **"rates in force"** includes the Tax treaty rates
- Hence rate of 20% to override beneficial tax treaty rates

Arguments against

- Sec 206AA not a charging section – does not override section 4 and 5 of the Act
- Sec 90(2) permits taxability & scope of total income to be determined as per the beneficial provisions of the treaty, which should not be interpreted to be over-ridden by Sec 206AA
- **Above principles upheld in:**
  - Danisco India (P.) Ltd. v. Union of India ([2018] 404 ITR 539 (Delhi))
  - DDIT vs Serum Institute of India Ltd ([2015] 40 ITR(T) 684 (Pune – Trib.))
  - DCIT vs Infosys BPO Ltd ([2015] 60 taxmann.com 465 (Bangalore – Trib.))

Relaxation of Sec. 206AA vide Rule 37BC

- Provisions of Sec 206AA , not to apply in case of a non-resident (not being a company) or a foreign company, in respect of payments in the nature of **Interest, royalty, fees for technical services and transfer of any capital asset if** the non-resident deductee furnishes the following details/ documents –
  - Name, e-mail id, contact number;
  - Address in the country/specified territory of its residence;
  - A **Tax Residency Certificate** from the Government of such country/specified territory if their law provides for issuance of such certificate;
  - **Tax Identification Number** (TIN) in the country of residence;
- The aforesaid provision is applicable with effect from **1 June 2016**.

Consequences of Default – deduction / deposit

Consequences	Section	Quantum
Assessee in Default ('AID')	201	Deductor considered as Assessee in default for non/short deduction or non-deposit of tax after deduction **No exception provided in case of non/short deduction of tax on payment made to non-residents even where non-resident files his return of income**
Interest	201(1A)	**1% p.m.** or part thereof from the date tax was deductible to the date tax was deducted; and **1.5% p.m.** or part thereof from the date on which tax was deducted to the date on which tax was actually paid.
Penalty	221/ 271C	Failure to deduct or pay without sufficient cause- **100% of tax in arrears**
Prosecution	276B	Failure to deposit tax deducted without sufficient cause - Rigorous imprisonment of **minimum 3 months may extend to 7 years** along with fine
Disallowance of Expense	40(a)(i)	• **100%** of the sum payable to **non-residents** • **Allowable** in the year of deposit

4 Certificates for lower/nil withholding tax

Section 195 (2) of the Act

- If a 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 to the Assessing Officer to determine, by general or special order**, 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
- Currently, the procedure for making application to the AO in order to obtain a certificate/order for lower or nil withholding-tax is a manual process with no prescribed format.
- This sub-section is amended by the Finance Act 2019 (No. 2) to prescribe the form and manner of application to the AO (*as on date nothing has been prescribed*).
- Once prescribed, the application under section 195(2) of the Act could be made electronically. Similar amendments have also been made in section 195(7) of the Act.

Section 195(3)

- Any person entitled to receive any interest or other sum on which income-tax has to be deducted under subsection (1) may make an application in the prescribed form to the Assessing Officer
- For the grant of a certificate authorizing him to receive such interest or other sum without deduction of tax
- 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, so long as the certificate is in force, make payment of such interest or other sum without deducting tax thereon under sub-section (1)

Section 197

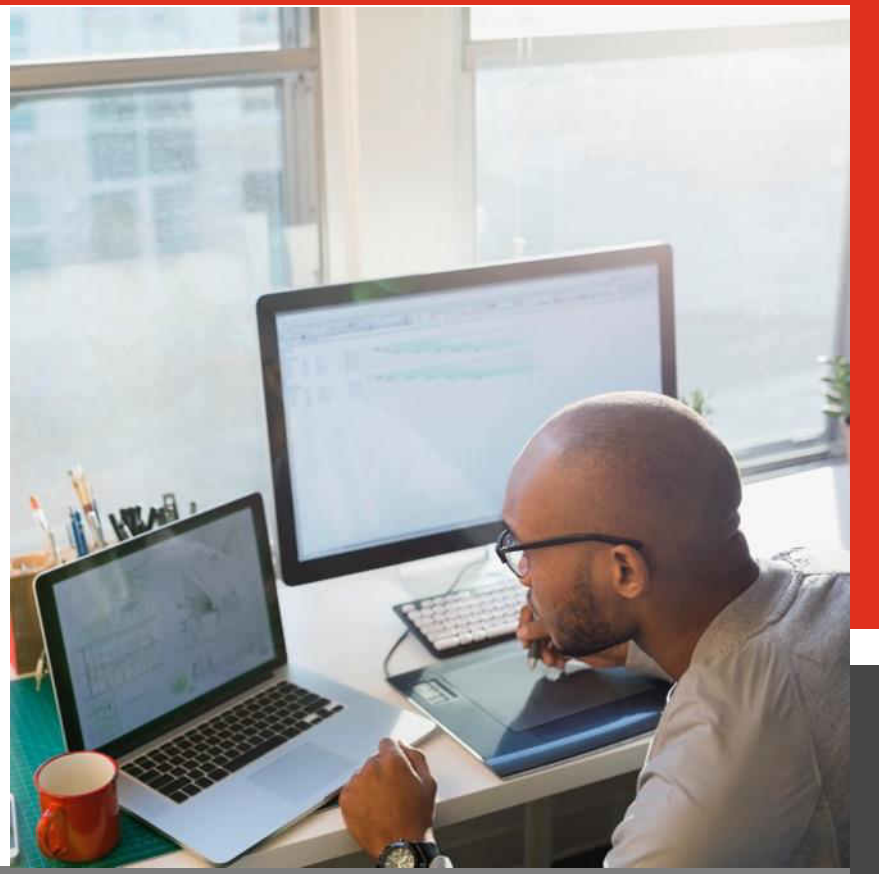
- The Income-tax law permits certain taxpayers to get relief from TDS at a lower or nil rate under Section 197 of the Income Tax Act.
- Normally, tax is deducted from salary and various other payments by deductor and remitted to the Government. In case excess tax is deducted, the taxpayer is allowed to apply and obtain an income tax refund by filing income tax return for the excess tax deducted.
- An Assessing Officer can grant relief from TDS provisions, if he is satisfied that the existing and estimated tax liability of a person will be lower than the amount of tax likely to be deducted and provide sufficient grounds for the same.
- Rule 28 of the Income-tax Rules, 1962 was amended vide Notification No. 74/2018 dated October 25, 2018 to prescribe electronic filing of application under section 197 of the Act.
- As per the procedures prescribed by the Director General of Income-tax (Systems) for electronic application under section 197 of the Act, the Commissioner of Income tax (CIT) shall grant administrative approval to the recommendations of the Assessing Officer using his / her credentials. In case the CIT requires any clarification, he may send the application back to the Range Head who shall resubmit the application along with the clarifications sought. Thereafter, based on the information available and report of the Range Head and the Assessing Officer, the CIT shall take a decision and the application shall be marked back electronically to the Assessing Officer for issuance / rejection of certificate under section 197 of the Act.
- The CBDT vide Office Memorandum dated 26 July 2018 further directed certificates under section 195 / 197 of the Act must be issued within 30 days.

Section 195 and 197 provisions – a comparison

Particulars	section 195(2)	section 195(3)	section 197
Application by	Payer	Payee	Payee
Purpose	To determine the taxable proportion of the remittance	To receive sums without deduction of tax	To receive sums without deduction of tax or on deduction of tax at a lower rate
Whether appealable?	Appealable u/s 248	No appeal, Writ Petition can be filed	No appeal, Writ Petition can be filed
Application Form	No prescribed form	Form No 15C or 15D	Form No 13
Whether a revision petition u/s 264 can be filed?	Yes	Yes	Yes
Applicability	Payments made u/s 195(1)	Receipts u/s 195(1)	All receipts

Practical challenges faced in online application

- In cases where different nature of income is expected to be received from one party (i.e., against single TAN) with different rates, there is no functionality in the online system to bifurcate such income with multiple rates against single TAN and one may need to fill in the entire receipts against such single TAN (may be by way of averaging the rate???);
- In case two certificates are required to be obtained by a taxpayer (i.e., w.r.t one PAN), online application for both the certificates cannot be filed together. In such a case, the first application has to be disposed off by the AO to enable the taxpayer to file the application for another certificate. This may delay the process and lead to additional time and effort);
- There is no tracking of the status of the online application filed and the applicant is unable to get the information on the exact status of pendency, if any;
- Practically, the certificates are not issued within a period of 30 days of filing the application as stipulated by the CBDT (may be due to administrative hassles / not being so well-versed with the online user interface).



In our experience, we have seen the tax authorities (including call centre / TRACES helpline) very helpful and solution oriented in resolving the issues under the new online process

Section 197 – Recent developments…

The CBDT, vide Instruction No. 7/2009 dated 22 December 2009, required administrative approval for issuance of a certificate under section 197 of the Income tax Act, 1961 if the amount of tax foregone exceeded INR 5m in Delhi, Mumbai, Chennai, Kolkata, Bengaluru, Hyderabad, Ahmedabad and Pune stations, and INR 1m for other stations.

The above thresholds created various administrative and systemic difficulties under the newly introduced online application process. This led to significant challenges and delays in non-resident taxpayers obtaining withholding orders. The CBDT, vide **Office Memorandum F. No. 275/16/2019-IT(B) dated 02 September 2019**, has now increased the threshold of tax foregone that require prior approval of the Commissioner of Income-tax (International Taxation) [CIT-IT] to INR 100m.

Accordingly, the threshold of tax foregone for CIT-IT approval is now raised from the erstwhile INR 5 m/ INR 1m (as the case may be) to **INR 100m** for all the applications of non-resident taxpayers, across stations, either pending as on date of the issuance of office memorandum, or filed thereafter. The increased thresholds should expedite the issuance of Section 197/ 195 certificates to non-resident applicants.

Section 197 – Recent developments

Judicial pronouncements

Recently, the Delhi High Court (HC) held that there should be a separate written communication to the taxpayer giving reasons for fixing the withholding tax rate under section 197(1) of the Act even when the online portal does not allow it. Further, the withholding tax order, being quasi-judicial in nature, cannot be passed arbitrarily, and merely on basis of the instructions from superior authorities. Since the tax authorities have not recorded cogent reasons for arriving at the issued withholding tax rate, the HC quashed the lower withholding certificate and asked the authorities to reconsider the application. **Bently Nevada Llc vs Income Tax Officer TS-438-HC-2019(DEL)**

Delhi HC issues notice to Revenue pursuant to writ filed by assessee [a German cargo airline and a wholly owned subsidiary of Lufthansa] challenging denial of nil-withholding certificate, despite assessee being eligible for tax exemption under Indo-German DTAA; Taking cognizance of denial of 'nil' withholding certificate vide a non-speaking order, HC directs Revenue to produce records forming basis of such denial, also requires the Revenue to file an affidavit justifying such an action.

Further, Bombay HC in case of **Tata Teleservices (Maharashtra) Limited [TS-36-HC-2018(BOM)]** had quashed cancellation of 'Nil' TDS certificate u/s. 197 by non-speaking order.

Also, Karnataka HC in case of **Vodafone Cellular Ltd. [TS-567-HC-2013(KAR)]** had directed AO to reconsider Sec.197 application, as the original order was cryptic and non-speaking.

Equalization Levy – Overview

- Charged at 6% on 'specified services' provided by non-resident e-commerce companies not having a PE in India. 'Specified services' is defined as –
  - Online advertisement
  - Any provision for digital advertising space or facilities/service for the purpose of online advertisement
  - Any other service which may be notified
- No equalization levy in the following cases –
  - Non-resident having a PE in India
  - Payment does not exceed INR 1 lakhs during the financial year
  - Payment is not made for the purpose of business or profession
- Section 10(50) exempts the income on which equalization levy has been charged

5 Agency PE

Business Connection – Section 9(1)(i) – some issues

- The term has been defined by the courts – it is a subjective concept.
- Occasional activity is not covered – only regular activity would constitute business connection in India – ***R.D. Aggarwal and Co. [1965] 56 ITR 20 (SC)***
- Income attributable only to the operations carried out in India – deemed to accrue in India
- No income – if operations confined to ***purchase of goods for the purpose of export***. However, purchase of goods for sale in India is taxable in India.
- Income from the activities of a **Dependent agent** – deemed to accrue in India to the extent of operations carried out in India
- Income from the activities of a **Independent agent** – not deemed to accrue in India. *However, it may undergo revision due to Base Erosion Profit Shifting ('BEPS') Action plan.*
- FA 2018 has amended section 9(1)(i) in relation to the concept of 'business connection'

Business connection – Amendments by FA 2018

- Dependent Agent' to include persons who will play a **leading role** in conclusion of contracts, even if contract is not concluded by them.
- Concept of '**Significant Economic Presence**' ('SEP') inserted in the definition of 'business connection'
- SEP means
  i. any 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 the amount as may be prescribed; or
  ii. 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***.
- Such transactions or activities to constitute SEP whether or not the non-resident has a ***residence or place of business in India or renders services in India***.

Concept: Agency PE

An Agency PE may arise if the following tests are cumulatively satisfied:

Agency Test

Local Entity is acting as an 'agent' of foreign entity

Agency exists where:

- Local entity is representing the foreign entity; and
- Foreign entity is accountable for the acts of Local entity

Dependence Test

Local Entity qualify as 'Dependent Agent'

Local entity would be considered as 'Dependent Agent' where:

- It is subject to detailed instructions/ comprehensive control of Foreign Entity; **or**
- It is financially dependent on foreign entity; **or**
- Its activities are not conducted in the ordinary course of business

Activity Test

Local Entity has 'authority to conclude contracts' on behalf of foreign entity

Activities performed by Local entity includes:

- Plays a principal role in conclusion of contracts
- Negotiates the essential elements of the contract;
- Identify customers and solicit/secures orders;

Impact of BEPS and MLI

- OECD under BEPS Action Plan 7 reviewed the definition of 'PE' with a view to preventing avoidance of payment of tax by circumventing the existing PE definition.
- Recommended modifications to Article 5 to provide that an agent would include not only a person who habitually concludes contracts on behalf of the non-resident, but also a person who **"habitually plays a principal role leading to the conclusion of contracts that are routinely concluded without material modification by the principal"**.
- The recommendations under BEPS Action Plan 7 have now been included in Article 12 of MLI, to which India is also a signatory. Consequently, these provisions will automatically modify India's bilateral tax treaties covered by MLI, where treaty partner has also opted for Article 12.
- The Action Plan 7, Preventing the Artificial Avoidance of PE, identifies two main problems in the current definition of PE which has been addressed by the above recommendation i.e.
  - use of commissionaire arrangement to avoid PE
  - use of exceptions under Art. 5(4) to avoid PE

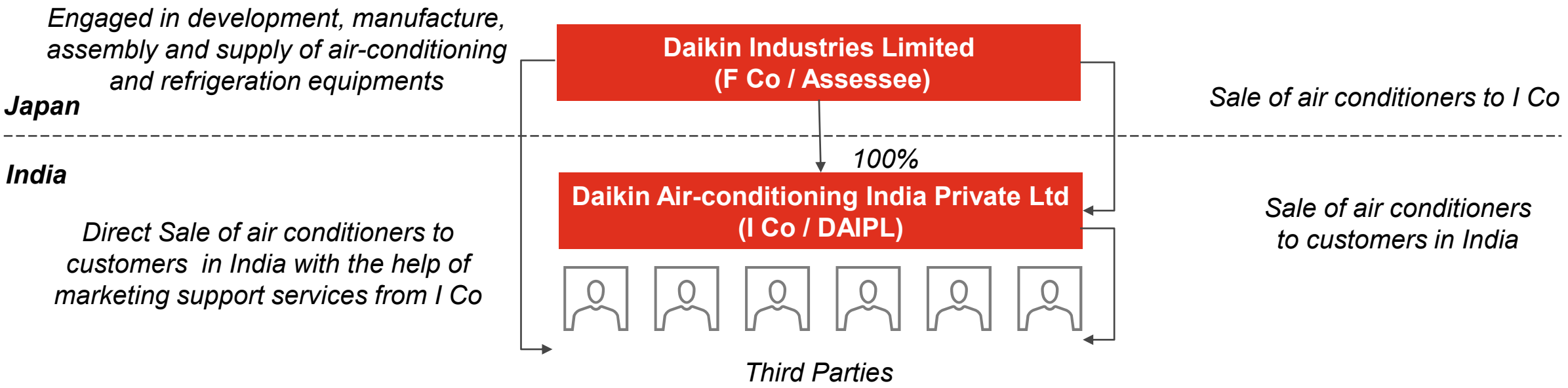
Impact of MLI to be factored in interpretation of tax treaties

- The tax treaties are undergoing change after ratification/notification of the MLI
- On July 25, 2019 India has deposited the instrument of ratification to OECD along with its final position as a result of which MLI entered into force for India on October 1, 2019 and its provisions will have effect on India's DTAAs from FY 2020-21 onwards.

Application of the MLI – Steps

1	Whether the MLI has come into force for both the parties?
2	Whether the tax treaty is a Covered Tax Agreement (‘CTA’)?
3	Identify specific article of the MLI that applies to the CTA
4	Identify which of the existing provisions of the CTA has been modified
5	Verify whether the MLI articles are effective

Judicial precedent - Daikin



- F Co sold air-conditioners directly in India to third parties as well as to I Co for resale in Indian territory.
- Price charged from direct sales to third parties was higher than that charged from I Co.
- F Co paid commission @ 10% to I Co for rendering marketing services in connection with direct sales made by it in India for which, it had entered into a Commission Agreement (Agreement) with I Co.

Judicial precedent - Daikin

- During the audit proceedings, the Assessing Officer (AO) inquired about the marketing role played by I Co with regard to the direct sales by F CO in India and also worked out an adjusted sales price for the sales made to third party customers by factoring the commission paid to I Co.
- The AO held that I Co was a dependent agent permanent establishment (DAPE) of the Assessee alleging that activities of I Co were not restricted to marketing services but also involved identifying customers, negotiating and finalizing prices etc.
- The AO had computed profits attributable to the PE in the following manner (assuming the price charged by the Assessee for the sale of particular product in case of direct sales was Rs. 100 while the price charged from I Co was Rs. 70) :-

Particulars	Amount (in Rs.)
Direct sales by the Assessee in India	100
Less: Commission paid to DAIPL	(10)
Net direct sales made by the Assessee in India	90
Value of net direct sales if they had been made to DAIPL instead (by comparing the price of products charged by the Assessee from DAIPL vis-a-vis that charged from direct customers)	70
Additional sales value	20
Less: Expenses @ 5% allowed to account for the costs incurred by the Assessee in making direct sales	1
Profits attributed to the PE in India	19

- Being aggrieved, F Co preferred an appeal before the Income-tax Appellate Tribunal (ITAT).

Judicial precedent - Daikin

- ITAT held I Co constituted a DAPE of F Co as per Article 5(7) of India-Japan tax treaty on the is of following:
  - No evidence was brought on record (such as copy of direct emails between F Co and its customers in India) showing F Co's direct involvement in making sales to customers from Japan and proving that the role of I Co was simply confined to a communication channel;
  - I Co. spent huge amount on selling & distribution for selling similar products in India. It is not clear as to how the F Co came in contact with the customers and made direct sales;
  - The copy of emails between I Co and F Co demonstrated that I Co was negotiating and finalizing prices, payment terms, delivery schedules and other contractual terms with customers in India;
  - Mere fact that F Co was formally signing the contracts of sale did not, in any manner, alter the position that I Co. is negotiating. There is no evidence showing F Co's direct interface from Japan with customers in India;
  - It was not the case that the I Co was an independent agent of F Co.
- On attribution, ITAT held that F Co's case fall within the exception laid down in the case of Morgan Stanley & Co. Inc. (2007) 292 ITR *416 (SC)* i.e. further attribution can be done as TP study does not adequately reflect the functions performed and risk assumed.

Key takeaways-PE

- PE issue still evolving – divergent rulings
- Besides legal principles, focus on facts of the case and conduct of parties
- Updates like BEPS/ MLI to be kept in mind while analysing PE
- India's reservation on OECD

Thank you