Foreign Remittance -Sec 195

The Chamber of Tax Consultants
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Scheme of Taxation

- Section 4 – Charging Section
- Income chargeable at rates prescribed by Finance Act provided
  - It comes within Scope of Total Income U/s 5 and/ or deemed income U/s. 9
  - It is not exempt U/s 10 and
  - It is subject to the provisions of Double Tax Avoidance Agreement entered by India, in case of income arising from cross border transaction

Residential Status and Tax Liability

- **Resident & Ordinarily Resident**
  - World Income Taxable.
- **Resident But Not Ordinarily Resident**
  - Income accruing or arising in India OR
  - Received OR
  - Deemed to be received in India OR
  - Arising out of business controlled from India
- **Non Resident- Sec 5(2) read with Sec 9(1)**
  - Only Income accruing OR
  - Arising in India OR
  - Received in India OR
  - Accruing outside India but Deemed to Accrue in India

Explanation 2 to Sec 5

- *For the removal of doubts it is hereby declared that **income** which has been included in the **total income of a person on the basis that it has accrued** or arisen **or** is **deemed to have accrued** or arisen **shall not again be** so **included on the basis that it is received or deemed to be received** by him in India.*

Whether physical presence/territorial nexus of NR is necessary for Income to Accrue in India (Source Country)

- Physical presence as such not necessary for income to accrue or arise in India
- Accrual or taxability in India depends upon type of income or Characterization of income in the hands of Non Resident
- Sec 9 mandates certain incomes to be deemed to accrue in India even without physical presence of Non Resident in India
- Even under Tax Treaty certain incomes become taxable in source country even without physical presence of NR.
- Territorial nexus has a major relevance for "Business Income" (concept of "Business *with* source country" or "Business *in* source country")

Income Deemed to Accrue or Arise in India- Sec 9(1)

- Sec 9(1)(i) – Income arising from Business Connection *in India* or from any property in India or from any asset or source of income in India or through the transfer of a capital asset situated in India.
- Sec 9(1)(ii) – Salary Income – If ***earned in India***
- Sec 9(1)(iii) – Salary ***paid by Govt to a citizen of India*** for service outside India
- Sec 9(1)(iv) – Dividend ***paid by an Indian Company*** outside India
- Sec 9(1)(v) – Interest ***paid by Govt or a resident person*** including interest paid by resident branches to its head office or branches abroad
- Sec 9(1)(vi) – Royalty ***paid by Govt or resident and*** even non resident where royalty is payable in respect of any property utilised for the purpose of business or profession or making or earning any income from any source in India.
- Sec 9(1)(vii) - Fees for Technical Services ***paid by Govt or resident*** and even non resident where fees is payable in respect of any services utilised for the purpose of business or profession or making or earning any income from any source in India.

Summarizing Sec 9

Nature of Income	Taxability
Business Income Sec 9(1)(i)	Taxable if direct or indirect business connection in India or property or asset or source in India or transfer of a capital asset situated in India
Capital Gains Sec 9(1)(i)	Taxable if situs of Shares/Property in India or derives its value substantially from assets in India
Salary Income Sec 9(1)(ii)	If earned in India
Interest Income Sec 9(1)(iv)	If sourced in India (if payer is Resident)
Royalties 9(1)(vi)	If incurred for business in India irrespective of the residential status of the payer
FTS 9(1)(vii)	If incurred for business in India irrespective of the residential status of the payer

Double Taxation Avoidance Agreement

Shah & Modi

CHARTERED ACCOUNTANTS

The process of analyzing taxability of Cross Border Transaction

- **Step 1 :** Determine characterization of Income under the Act
- **Step 2 :** Check Source Rule for taxation under the Act, if found taxable under the Act, check whether DTAA exists with the contracting State
- **Step 3 :** If the Treaty exists follow the process of applying the Treaty.

Characterization of Income / Remittance

Nature of Income	IT Act	DTAA
Business or Profession	Sec. 9(1)(i)	Art. 5, 7 & 14
Salary	Sec. 9(1)(ii)	Art. 15
Dividend Income	Sec. 9(1)(iv) & Sec.115A	Art. 10
Interest Income	Sec. 9(1)(v) & Sec.115A	Art. 11
Royalty	Sec. 9(1)(vi) & Sec.115A	Art. 12
FTS	Sec. 9(1)(vii) & Sec.115A	Art. 12
Capital Gains	Sec. 9(1)(i) & Sec. 45	Art. 13

Taxation of Salary

- Payments in nature of '**Salary**' are liable for deduction of tax u/s 192 and are out of purview of S. 195.
- In case of non-resident, income by way of 'salaries' is deemed to accrue or arise in India , if it is **earned in India**.
- Therefore, if services are rendered by non-resident in India and the rest period or leave period which is preceded or succeeded by services rendered in India and forms part of service contract of employment, salary shall be regarded as income earned in India.
- The general rule under Article 15 of UN Model with respect to income from Dependent Personal Services (DPS) is that remuneration may primarily be taxed in the country where the employment is exercised.

Short Stay Exemption as per Act

- Section 10(6)(vi) – Remuneration received by an employee of foreign enterprise for services rendered by him during his stay in India is exempt if following conditions are satisfied:
  a. Employee is not citizen of India;
  b. Foreign enterprise is not engaged in any trade or business in India
  c. His stay in India does not exceed period of **90 days** in such financial year; and
  d. Such remuneration is not liable to be deducted from Income of employer chargeable in India.

Short Stay Exemption as per Treaty

- An exemption from source taxation applies if all of below conditions are satisfied:
  a. Employee is present in source country for 183 days or less in any 12 month period commencing or ending in the fiscal year concerned; and
  b. The remuneration is paid by a person who is non-resident of source country; and
  c. The remuneration is not borne by a Permanent Establishment or Fixed base of non-resident employer, which is situated in source country.

Thus, if a non-resident receives salary for employment exercised in India will be taxable in India if any one of the above conditions does not get satisfied, regardless of where he receives the same.

Per Diem Allowance – Section 10(14)

- At times employees also receive a per-diem allowance over and above normal home country salary.
- As per Section 10(14)(i) of the Act read with Rule 2BB(1)(b) of Income Tax Rules 1962, any allowance whether granted on tour or for the period of journey in connection with transfer, to meet the ordinary daily charges incurred by an employee on account of absence from his normal place of duty. It is to be noted that The exemption is available only to the extent to which the expense is actually incurred.
- The allowance must be granted as reimbursement and not as personal advantage.
- **CIT v Goslino Mario (2000) 241 ITR 312 (SC)** - In favour of assessee:

  it was held that where the employees were required to stay away from their homes, daily allowance given to them to incur expenditure, wholly, necessarily and exclusively for the purpose of duties and such expenditure was in nature of reimbursement, the same will be exempt under the Act.

Taxation of Salary received by NRIs from Indian Employer

- AAR in case of **Hewlett Packard India Software Operation (P) Ltd. [2018] 91 taxmann.com 473 (AAR-New Delhi)** held that, in case of employees sent on deputation abroad who are non-residents in India during relevant period and rendering services abroad, salary would accrue to them in foreign country and same would not be liable to tax in India.
- Similar view was held by AAR in case of **Texas Instruments (India) P. Ltd. [2018] 90 taxmann.com 353 (AAR – New Delhi)**
- **Place of rendering services is determining factor for accrual of salary income.**

Taxation of Salary received by NRIs from Indian Employer

- **Taxation of Salary received in India for NRIs working outside India**
  - Salary earned by NRI for services rendered outside India are not taxable in India merely since the receipt of salary is in India.
  - **ITAT in case of Pramod Kumar Sapra vs. IT Ward3, Panipat [2017] 87 taxmann.com 98 (Delhi – Trib)** held that since employee was deputed outside India for more than 182 days, even if salary was received in bank account in India the same could not be held to be taxable in India as employee was non-resident in India.

Taxation of Salary received by NRIs from Indian Employer

- **Arvind Singh Chauhan vs. Income Tax Officer Agra ITAT No. 310 and 320/Agr/2013 (Place of rendering services is the determining factor for accrual of Salary Income):**
  a) Salary accrued while working on merchant vessels and tankers plying on international routes. However, the same was credited to NRE account of the employee in India.
  b) ITAT held that the situs of accrual of salary is the situs of services and the right to receive the salary is earned by the virtue of the services performed and not by the receipt of appointment letter.
  c) Receipt of income refers to the first occasion where an assessee gets the money in his control. What is material is Receipt of income in its character as income and not what happens subsequently once the income is received by the employee. The lawful right to receive salary was overseas i.e. at place of employment at foreign location and salary was remitted to India only as a matter of convenience.

Taxation of Remuneration Payable to NRI Partners of Firm / LLP

- Firm / LLP shall deduct tax on remuneration payable to NRI Partners.
- If remuneration to NRI partners pertains to activities carried out by said partners outside India, it could be argued that remuneration does not accrue in India.
- Support can be taken from case of **CIT vs. Chunilal Mehta 6 ITR 521 (Privy Council).** In the instant case the taxpayer was resident in India. He made profits from the contracts relating to purchase and sale of commodities in various foreign markets. The instructions for the purchase/sale transactions where given from India to the overseas brokers, who executed the contracts outside India. It was held by the Privy Council that the profits did not accrue or arise in India and that the situation of the business, viz. in India was not decisive of the place of accrual of profits.

Taxation on Payment to NRI for purchase of Immovable Property

- In case of sale of Immovable Property in India by NRI, the resultant long terms capital gains is taxable under section 112(1)(c) (ii) @ 20%.
- Short Term Capital Gains is taxable as per applicable slab rates.
- Any person purchasing property from NRI and who is responsible **to pay NRI any sum chargeable to tax** is required to deduct income tax thereon at rates in force.
- All individuals/HUFs irrespective of whether they are covered by audit or not are under obligation to withhold tax while making payment to NRI.
- Bangalore Tribunal in the case of **Syed Aslam Hashmi vs. ITO [2013] 55 SOT 441 (Bang. Trib)** held that for purchase of flat, TDS is applicable on entire consideration unless application is made to AO u/s 195(2).

Taxation on Payment to NRI for purchase of Immovable Property

- However, Supreme Court in case of GE India has held that TDS is applicable only on sums chargeable to tax. Therefore, obligation to deduct tax is limited to appropriate proportion of income embedded in the gross sum of money payable to NRI.
- Department in their instruction No. 02/2014 dated 26.02.2014 (F. No. 500/33/2013-FTD-1) and Circular No. 3/2015 dated 12.02.2015 has stated that ***"...appropriate portion of the said sum will depend on the facts and circumstances of each case taking into account the nature of remittances, income component therein or any other fact to determine such appropriate proportion."***
- It is advisable to obtain 'NIL' deduction or 'Lower' deduction certificate from AO for property related transaction. However, there is no prohibition on issuance of CA Certificate in Form 15CB

Capital Gains on Shares & Debentures (Without STT)

Relevant Sections 48 & 112 :

- Section 48 - Mode of computation of LTCG
- Section 112 - Rate of tax

Benefit of capital gain 1st Proviso:

- Available to all Non residents (Including HUF)
- Capital assets being shares & debentures of Indian Companies
- Capital gain shall be computed by converting Cost of acquisition, Expenditure for transfer and also Sales proceeds into Foreign Currency
- Capital gain so computed shall be reconverted into Indian Rupees

Capital Gains
Provisions for NRIs

- On other assets normal provision will apply like indexed cost, cost of improvement etc
- Immovable properties – All benefits of Sec 54, 54F,54EC available
- Sec 112(1)(c)(ii) - LTCG on assets other than unlisted securities will be taxed @ 20%
- Sec 112(1)(c)(iii) - LTCG on unlisted securities will be taxed @ 10% without giving effect to first and second proviso to Section 48

Other Income Tax Provisions:

- Enhanced limit of Basic exemption available for Senior Citizens and Women assessee is Not available to Non Resident Senior Citizen and Women

Capital Gain on Shares & Securities (With STT)

- Long term capital gain – Exempt under Section 10(38) only if sold up to 31st March 2018. Any income arising from sale of equity share of company or unit of an equity oriented fund or unit of business trust on or after 1st April 2018 will be taxable in terms of Section 112A @ 10% on gains in excess of Rs.1 lakh.

- Short term capital gain – Tax @ 15%

  - No threshold limit deduction is available with respect to such STCG. (Proviso to Sec 111A)

Fees for Technical Services (FTS)

Definition of Fees for Technical Services as per the act:

- any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel)
- but does not include consideration for any construction , assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head “Salaries”.
- FTS is not defined in the Act, OECD, US or UN model

Technical Services

- As per Technical Explanation to India-US Tax Treaty, Technical Services means *"a service requiring expertise in technology". Technology as defined in Oxford Dictionary means the branch of knowledge dealing with engineering or applied sciences.*
- OECD TAG Report describes Technical Services as:
  - When special skills or knowledge related to a technical field are required for provision of such services.
  - Whilst provision of engineering services would be of a technical nature, the services of psychologist would not.
  - Use of technology in providing services is not indicative of whether the services are of technical nature.
  - Similarly delivery of services through via technological means doesn't make the services technical.

Technical Services

- Crucial to determine at what point the special skill or knowledge is used.
  - The fee for provision of service would not be technical fee, however, unless that special skill or knowledge is required when the service is provided to the customer.
  - For example, special knowledge or skill will be required to develop software and data used in computer game that would subsequently be used in carrying on the business of allowing customers to play this game on internet for a fee
  - Decision in the case of **Skycell communication vs. DCIT (2001) 251 ITR 53 (Mad)** – use of standard facility- doesn't result into provision of technical services i.e. once the facility is created (which may be very high tech in nature), the subsequent use of such standard facility is not 'Technical in nature'.

Managerial Services

- In general sense, managerial services refer to services used in context of running and management of business.
- OECD TAG Report describes managerial services as:
  - Services rendered in performing management functions.
  - It would involve functions related to how a business is run as opposed to functions involving in carrying on that business.
  - Functions of hiring and commercial agents would relate to management, the functions performed by these agents would not.

Managerial Services

- In case of **Raymond Ltd. V. Deputy Commissioner of Income Tax (2003) 86 ITD 791(MUM).** The term "Managerial Services" was interpreted as follows
  - Managerial services cover a larger field than one particular activity.
  - A person cannot be said to render managerial services if it is limited to a "one-off" transaction.
  - It is implied in the very nature of managerial services that there would be some continuity in the sense that the rendering of the services would cover a series of transactions or a series of projects or steps undertaken by the person engaging such services.

Managerial Services

- **AAR No. 1055 of 2011 Steria (India) Limited** – services like corporate communications, financing, group marketing, internal audit, human resources etc. rendered to an Indian Company are characterized as managerial services.
- **Intertek Testing Services India (P.) Ltd. [2008] 175 Taxmann 375 AAR** – Managerial Service essentially involves controlling, directing or administering the business.
- **Kotak Securities – 206 Taxmann 86** - The transaction charges paid by the assessee were in the nature of 'fees for technical services' covered under Section 194J. CIT(A) upheld the order of the AO stating that the stock exchange is not merely a mute spectator providing only physical infrastructure to the members but the stock exchange was a supervisor, overseer, manager controller, settlor and arbitrator over the security trading done through the stock exchange and provides managerial services. Thus, section 194J was applicable.

Managerial Services

- In order to be characterized as "managerial services", the service should have an impact on the running of the business of the assessee and it is not sufficient [to attract section 9(1)(vii)] if the assessee ultimately gains by the result of such services.
- **J.K. (Bombay) Ltd. v. CBDT (1979)**

  Managerial service may be professional service like legal or medical service, but that would not be technical services like engineering service.
- **[2013] 35 taxmann.com 583 (Mumbai Trib) in case of Credit Lyonnais vs. ADIT –** Tribunal held that doing small parts of the overall activity independently cannot be considered as rendering of a managerial service in relation to such activity.

Consultancy Services

- A Consultancy service means an advisory service having element of expertise, professional knowledge and human intervention.
- However, advisory service merely involving discussion and advice of routine nature or exchange of information cannot be classified as 'consultancy services'.
- Consultancy involves only the advisory element and **excludes actual execution.**
- **CIT vs. Group ISM Pvt. Ltd. [2015] 57 taxmann.com 450 (Delhi)**

  Consultancy services are something akin to advisory services provided by the non-resident, pursuant to deliberation between parties.

Consultancy Services

- Consultancy and Technical services are to some extent overlapping because a consultancy service could also be a technical service. However, the category of consultancy services also includes an advisory service, whether or not expertise in a technology is required to perform it.

Commercial Services

- Fees for Commercial Service such as- Commission, Procurement Services, Liaison Services- cannot be characterized as FTS and hence not liable to tax in source country in the absence of PE or BC
- Commission- not taxable u/s. 9(1)(i)- CIT vs. Toshoku Ltd. 4 Taxmann 1 (SC- 1980), Ceat International v. CIT 237 ITR 859 & DCIT v. Divi's Laboratories Ltd [2011-TII-182-ITAT-HYD-INTL]
- **Eon Technology (P) Ltd v CIT [2011] 15 taxmann.com 391 (Delhi)**
  - income of a non-resident agent cannot be considered as (i) accruing or (ii) arising or (iii) deemed to be accruing or arising in India as the services of the non resident agents were rendered/utilized outside India and the commission was also payable/paid outside India.
  - When a non resident operates outside the country, no part of his income arises in India, and since the payment is remitted directly abroad, and merely because an entry in the books of accounts is made it does not mean that non resident has received any payment in India .

Commercial Services

- Commission payments were made to foreign agents for securing sales orders payments will not fall in category of 'Fee for Technical Services
  - 153 ITD 176 (Mumbai – Trib.) (08.10.2014)
  - CIT vs. Orient Express [2015] 56 taxmann.com 331 (Madras)
  - ACIT vs. Karmin International [2014] 52 taxmann.com 382 (Lucknow – Trib)
  - [2015] CIT Rajasthan v. Modern Insulators Ltd.*-
  - Welspring Universal Vs. Joint CIT
  - Fluidtherm Technology (P.) Ltd v. CIT, Chennai (2015) 57 taxmann.com 87 (Madras)

Commercial Services

- Payments to non-resident companies for commercial services rendered outside India are not liable to deduction of tax a source in India in absence of PE or BC
  - ACIT vs M/s Leap International Pvt. Ltd. 2011-TII-91-ITAT-MAD-INTL (providing clearing and forwarding services at foreign ports)- CTC Journal (August 2011- page no.114)
  - G.E. India Tech (2010) 327 ITR 456 (SC) was relied upon
  - 'Canvassing services' for the business of Non Resident Principal doesn't lead to taxability in India– Star Cruise India Travel Services Pvt. Ltd. (Mum Tribunal July 2011). However one should also bear in mind 'Scope of Services in canvassing or marketing' – Refer Rolls Royce [19 SOT 42 Del]
  - Referral Fees paid to overseas company was not FTS – CLSA Ltd vs. ITO [2013] 31 taxmann.com 5 (Mumbai – Trib) and Cushman & Wakefield (S) Pte. Ltd. [2008] 305 ITR 208

Fees for Technical Services

- Fees for Technical Services under Indian Treaties
  - No separate clause for FTS – Mauritius, Indonesia, UAE, Brazil, Greece, Philippines, Syria, Thailand, Bangladesh, Libya, Myanmar, Nepal, Saudi Arabia, Sri Lanka, United Arab Republic, Tajikistan
  - In case of no separate clause- such payment is classifiable as 'Business Profits'- Tekniskil (Sendirian) Berhard V. CIT [1996] 222 ITR 551 (AAR), Siemens Aktiengesellschaft V. ITO [1987] 22 ITD 87 (Mum), GUJ Jaeger GmbH V. ITO [1991] 37 ITD 64 (Mum), Christiani & Nielsen Copenhagen V. First ITO [1991] 39 ITD 355 (Mum)
  - Electrical material Center Co. Limited v. Deputy Director of Income Tax [TS-451-ITAT-2017] (Bang) – ITAT held that there are no provisions under the tax treaty addressing taxability of FTS and this should not be taxed as "other income" in India. Under the Tax Treaty, other income is taxable in Saudi Arabia.
  - Before concluding on taxability one should also check on existence of PE (specially, Service PE, Construction PE or Installation PE)

FTS- 'Make Available'

Fees for included services/Make Available clause –

- What is 'make available'- The Tribunal observed that 'make available' means to provide something to one, which is capable of use by other in future. Hence, to fit into the terminology 'make available', the technical knowledge, skill, know how etc. must remain with the person receiving such services even after the particular contract comes to an end.
- DDIT v. Scientific Atlanta Inc., (2009) 33 SOT 220 MUM and Karnataka HC in case of CIT & Ors. Vs. De Beers India Minerals [2012] 346 ITR 467
- Business support, marketing information technology support services and strategy support etc., does not amount to FTS within meaning of India – Singapore Tax Treaty- AAR – Bharti Axa Gen. Ins. Co. Ltd.

FTS- 'Make Available'

- Make Available clause found in treaties with - USA, UK, Australia, Canada, Cyprus, Malta, Netherlands, Portugal, & Singapore.
- Further 'Make Available' indirectly applicable due to existence of MFN clause in the protocol to the tax treaties with Belgium, France, Israel, Hungary, Kazakhstan, Spain, Switzerland and Sweden{ Sandvik AB (TS- 738 ITAT 2014(PUN)} & {[2016] 72 Taxmann.com 1 (Delhi HC) in case of Steria India Ltd.}
- FTS/ FIS not include managerial services – USA, UK, Spain

Scope of 'Make Available' in different Treaties

Article 12 : India Canada Treaty	Article 12 : India Singapore Treaty
4 (b) make available technical knowledge, experience, skill, know-how, or processes or consist of the development and transfer of a technical plan or technical design."	4 (b) make available technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the services to apply the technology contained therein ; or
SNC-Lavalin International Inc V/s Deputy Director Of Income Tax, International Taxation, [2008] 26 SOT 155 (DELHI)- Fees for Designing services held taxable	4 (c) consist of the development and transfer of a technical plan or technical design, but excludes any service that does not enable the person acquiring the service to apply the technology contained therein."

IPS prevails over FTS

- Certain treaties exclude from scope of FTS income covered in IPS. (China, France, Namibia, Oman, Tanzania, Vietnam)
- But where such specific exclusion is not there, in such cases, Article 14 of IPS should prevail (235 ITR 698- AAR- Eberhard Gustav Von Der Mark V CIT) - rationale being if a case fell under more beneficial provisions of a treaty, then it would be futile to stretch the interpretation to bring it under some other provisions of the treaty.
- For example: Say, an engineer renders services for testing of a machine. In such situation, even though the services relate to technical field, the services rendered by an individual will fall under within the scope of Article 14 – "Independent Personal Services".
- Special provision would prevail over general provision. Thus, one should first apply Article on Independent Personal Services and then Article 12 on FTS (MSEB Vs DCIT 270 ITR 36).

Fiscally transparent entities are eligible to avail Tax Treaties

- **Linklaters LLP v. ITO [2010-TII-80-ITAT-MUM-INTL]**
  - If the entire income of the enterprise or the person is subjected to tax in a tax jurisdiction, whether directly or indirectly, the taxability test must be held to have been satisfied
  - Even when a partnership firm is taxable in respect of its profits, not in its own right but in the hands of the partners, as long as entire income of the partnership firm is taxed in the residence country, the treaty benefits cannot be declined to the taxpayer.
  - The tribunal, in this case, has relied on the decision in the case of TD Securities (USA) LLC and held that treaty benefits are available to a partnership firm, even though it being a 'fiscally transparent entity'.

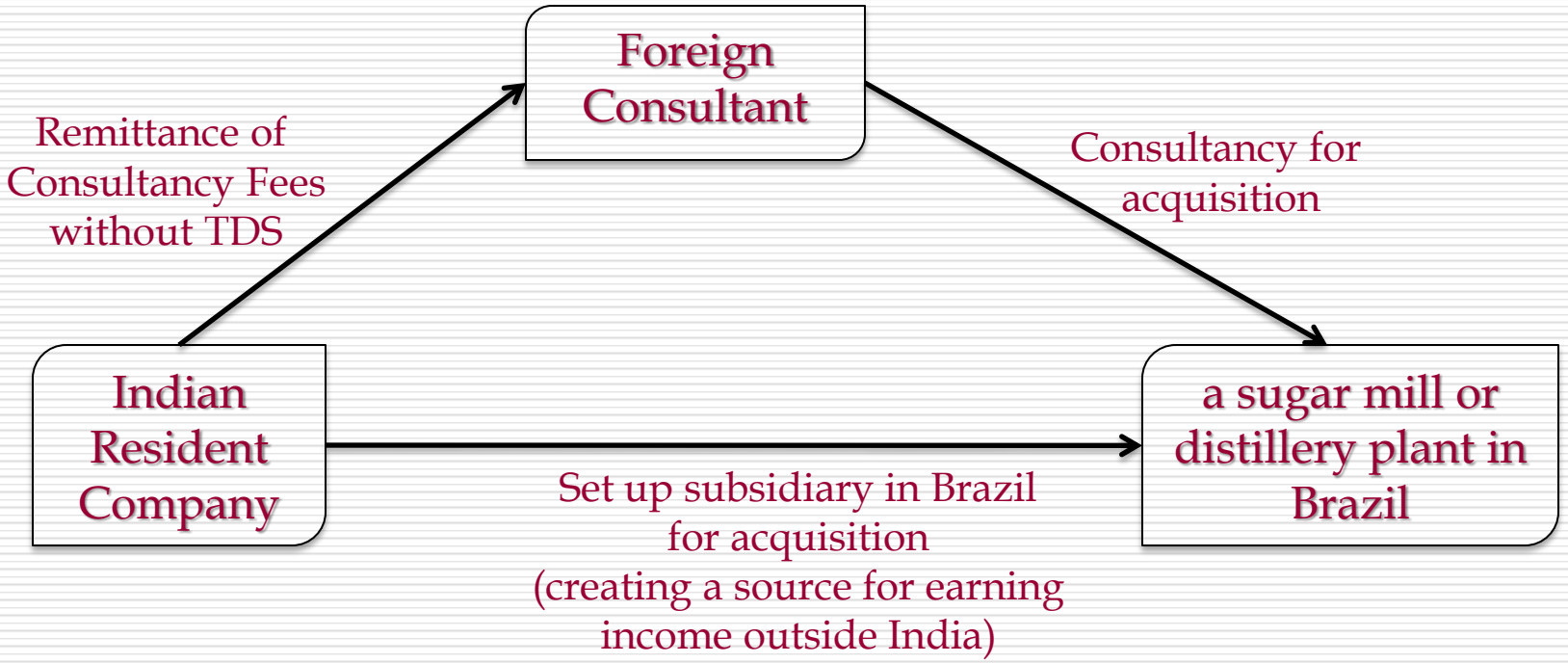
Exceptions to Section 9(1)(vii)

- Source Outside India
- Business Outside India
- Presumptive Taxation
- Construction, Assembly, Mining
- Salaries

Exceptions to Section 9(1)(vii)

'Source outside India'

ITO (International Taxation) vs. Bajaj Hindustan Ltd. 2011-TII-123-ITAT-MUM-INTL dated 12 August 2011



Exceptions

Source Outside India

If the fees are paid for making or earning any income from Source Outside India then it won't be regarded as accruing in India.

- Meaning of 'Source' need to be determined based on fact and interpretations from Judicial pronouncements as term 'Source' is not defined in the Act
- Need to distinguish between 'Source Vs. Receipt'

Case Laws on concept of "Source Outside India"

Kotak Mahindra Bank Ltd. vs. ITO (International Taxation [2016] 74 taxmann.com 246 (Mumbai – Trib)

Payments made to consultants with a view to carry on business outside India and create a new source of income outside India fell within the exceptions of Section 9(1)(vii).

Case Laws on concept of "Source Outside India"

CIT vs. Havells India Ltd. (2013) 352 ITR 376 (Delhi) (HC) – Indian company made payment to US company for 'KEMA' Certification necessary to enable to sell its products in overseas markets.

Export of Goods is not Source of Income outside India:

- Export of goods is based on contracts entered into between the parties.
- Export contracts are concluded in India. The entire manufacturing is done in India
- The source of income is that point when the export contract is concluded in India.

Case Laws on concept of "Source Outside India"

Source of Income v/s Source of monies received:

- *Commissioner of Income Tax Vs Havells India Ltd.* 21 Taxmann.com 476 (Delhi HC) has marked a difference between Source of Income and source of Monies received.
- In case of export sales it is concluded that it is just a source of monies received from outside India.
- This is because export contract is concluded in India. The income component of monies received from exports is situated in India.
- Thus the consideration received from exports outside India is only source of monies received and not source of Income.

Case Laws on concept of "Source Outside India"

Suzlon Energy Ltd. vs. Assistant Commissioner of Income Tax, Circle 8 – Ahmedabad [2015] 64 taxmann.com 114 (Ahmedabad):

- FCCBs were issued by the assessee to non-residents and proceeds were used to acquire shares in overseas subsidiary.
- ITAT giving reference to case of Adani Enterprises Ltd. held that interest paid to non resident investors was specifically excluded from deeming provisions of Section 9(1)(v)(b) and therefore such payment cannot be covered in definition of 'income' deemed to accrue or arise in India.

Case Laws on concept of "Source Outside India"

Director of Income Tax vs. Lufthansa Cargo India [2015] 60 taxmann.com 187 (Delhi) – High Court of Delhi

- Assessee engaged in wet leasing of aircrafts to foreign companies on international routes only, entered into overhaul and maintenance agreement with German Company.
- High Court held that since operations were carried abroad and expenses towards maintenance and repairs were for purpose of earning abroad, payment made by the assessee for carrying out overhaul repair fell within exclusionary clause of Section 9(1)(vii) and thus not taxable in India.

Exceptions

- **Business Outside India**
- If fees are payable in respect of services utilised for such business or profession carried on outside India.

Exceptions

- **Presumptive Taxation**
- **ADIT vs. Valentine Maritime (Gulf) LLC (ITAT Mumbai) (I.T.A. No.700)**
- If the contract falls u/s 44BB, incidental technical services are not assessable as "fees for technical services" u/s 9(1)(vii).
- When a contract consists of a number of terms and conditions, each condition does not form a separate contract. The contract has to be read as a whole. The entire consideration is assessable only u/s 44BB and no part of it is assessable as fees for technical services u/s 9(1)(vii).

Exceptions

- **Construction, Mining, Assembly**
- The intention of the Legislature behind this exclusion is that such activity would virtually amount to carrying on business in India. Therefore, Consideration for any construction, assembly, mining or like project will therefore be chargeable to tax on net basis u/s 44D/ 44DA and not as FTS, i.e., after allowing deduction in respect of costs and expenditure incurred for earning the same.
- Exclusion from FTS was denied by the **Delhi Court in case Hotel Scopevista Ltd. vs. Assistant Commissioner of Income-tax ([2007] 18 SOT 183 (DELHI))**on the basis that-
  - the consideration was received for providing services in connection with construction project and not for actual construction activities.
  - the services had been provided from the foreign country without actually undertaking any activities in India in relation to the construction of the hotel.

Exceptions

- **R & B Falcon Offshore Ltd vs. ACIT Dehradun, ITAT Delhi (2011-TII-02-ITAT-DEL-INTL)**

  An installation or a structure could become a PE only if it was actually used for exploration or exploitation of natural resources for a period of more than 120 days. The time from its positioning at the appropriate place for exploitation of mineral oil only was to be considered and not when it was under repairs or being moved to the appointed place.

  Mere office address could not be said to considered as a PE, unless it has been established that activities (other than preparatory and auxiliary activities) need to be carried out from such place for it to be considered as a PE.

Installation, assembly or commissioning services – Business Profits prevail over FTS

- Consideration received for construction, assembly, mining or like projects must be excluded from FTS.
- Mumbai Tribunal in case of Bennett Coleman & Co. Ltd. (ITA No. 57/Mum/2009) – installation (akin to assembly) falls in exceptions. However, training to employees considered as FTS.
- For situations in which there are specific PE clauses for services that are de-facto in the nature of FTS or FIS, the taxability of consideration for such services is taxable as business profits.
- For Eg. Since there is a specific Installation PE, the taxability of installation, assembly or commissioning services fall under business profits although they are covered under Article 12.

Interplay between Section 44BB and Section 44DA

- **Section 44DA** provides for computing income of a non-resident, including a foreign company, by way of royalty or fee for technical services, in case the right, property or contract giving rise to such income are effectively connected with the permanent establishment of the said non-resident.

- **Section 44BB** deals with special provisions for computing profits and gains for non- residents engaged in the business of providing services or facilities in connection with exploration, etc. of mineral oils.

Interplay between Section 44BB and Section 44DA

- **Ohm Ltd. vs. DIT (2012) 28 taxmann.com 120 (Delhi)** - Revenues earned by the non-resident from rendering such specific services are covered by section 44BB whereas Section 44DA is broader and more general in nature. Thus in existence of a specific provision dealing with the income deriving from an activity in connection with prospection or extraction of mineral oils, Section 44DA cannot be invoked as specific prevails over general.

- **ADIT (International Taxation, Dehradun) vs. TDI Brooks Intl. Inc (ITA No. 749/Del/2013)** - The assessee also had PE in India and AO had already examined the effective connection of the revenue of the assessee with the PE in India. Therefore income of the assessee was assessable u/s 44BB of the Income Tax Act.

Interplay between Section 44BB and Section 44DA

- **Oil and Natural Gas Corporation Limited vs. CIT (Supreme Court) (FTS)**

  The "pith and substance" test has to be applied to determine the dominant purpose of each agreement. If the dominant purpose is mining, the income is assessable only u/s 44BB and not as "fees for technical services" u/s 9(1)(vii) & 44D

- **[2015] 59 taxmann.com 70 (Delhi - Trib.)/[2015] 37 ITR(T) 46 (Delhi - Trib.)**

  Where assessee, a tax resident of Norway, was engaged in activities relating to acquisition of 3D seismic data under contracts with 'RIL' and 'ONGC', assessee was entitled to declare its income under provision of section 44BB.

  Income arising from mobilisation and demobilisation of vessel outside india was taxable as fees from technical services under section 9(1)(vii)

Royalty under the Income-tax Act, 1961

- Consideration (incl. lumpsum consideration) for :

– Transfer of all or any rights (including license) in: • Patent, invention, model, design, secret formula or process or trademark, etc. (IP) • copyright, literary, artistic or scientific work including films or video tapes/tapes for use in TV/radio broadcasting	– Imparting of any information concerning • the working of or use of IP • technical, industrial, commercial or scientific knowledge, experience or skill	– Use of • any IP • or right to use any industrial, commercial or scientific equipment

- Rendering of any services in connection with above

Royalty

Factors affecting characterization of Royalty Income

- Remittance towards royalty presupposes the fact that "assets/property/rights are already in existence"
- It is then only, can be said that payment is towards either use or right to use, or transfer of all or any right or even imparting or information in connection with working or use
- Formula One World Championship Ltd. vs. CIT [2016] 390 ITR 199 (Delhi HC) – payment made was not for use of an IPR but for granting the right to host and stag Formula 1 Race and that use of trademark was merely incidental to the event hosted by it.
- A contract of service or work, which leads to creation or emergence of any right, property or information, should not lead to characterization of the transaction as Royalty - Marriott International Licensing Co BV [TS-621-ITAT-2013(Mum)] and Neo Sports Broadcast (P) Ltd. 15 Taxmann.com 175 (Mumbai Tribunal). It was a case of live telecast.

Amendment from the Finance Act 2013

The definition of "Royalty" has undergone a change after the amendment made by the Finance Act 2013, by inserting Explanations 4, 5 & 6.

[Explanation 4. – transfer of all or any rights in respect computer software

Explanation 5. – royalty includes and has always included consideration in respect of any right, property or information, whether or not –

(a) the possession or control is with the payer;

(b) such right, property or information is used directly by the payer;

(c) the location of such right, property or information is in India.

Explanation 6. – "process" includes and shall be deemed to have always included transmission by satellite.

Explanation 5 to Sec 9(1)(vi) dealing with 'Control', 'Use' & 'Location'

- The intention of the legislature is to treat payment of hire charges of equipment (right/property/information) as 'Royalty' even where control and possession is not with the payer OR

- Even where use of equipment (right/property/information) is direct or indirect by the payer OR

- Whether the location of such equipment (right/property/information) is in India or not

There were judicial pronouncements characterizing payments as in the nature of Business Profits and not as Royalty and therefore to overcome such decisions, this amendment is introduced.

Explanation 5 to Sec 9(1)(vi) dealing with 'Control', 'Use' & 'Location'

- The issue therefore is whether such meaning ascribed to the term 'control' or the scope of the word 'control' can be imported into treaty which have been executed prior to such definition
- Article 3(2) of the OECD reads as follows:
- As regards the application of the Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of.....

Explanation 5 to Sec 9(1)(vi) dealing with 'Control', 'Use' & 'Location'

- It is quite likely that the understanding of the term 'control' would not be what Indian Income Tax Act is now trying to provide and further
- Due emphasis should be given to the phrase- 'unless context otherwise requires',
- The amendment in the domestic law in this manner could entirely vitiate the understanding that two sovereign countries had while signing the treaty

Case laws on Explanation 5 to Sec 9(1)(vi)

- In favour of tax payer- holding that enlarged scope of the term 'control' would not apply to treaty:
  - B4U Entertainment Ltd. 21 Taxmann.com 529 (Mumbai Tribunal)- Hire Charges of Transponder
  - Channel Guide India Ltd. 25 Taxmann.com 25 (Mumbai Tribunal)- use of satellite. Sec 40(a)(i) cannot be applied- legal maxim- 'lex non cogit ad impossiblia'
  - Retro tax amendments only change tax liability with retrospective effect and not tax withholding obligations - 42 taxmann.com 286 – Agra Tribunal. DCIT Vs. Virola International

Case laws on Explanation 5 to Sec 9(1)(vi)

CIT (TDS) Vs. Maharashtra State Electricity Distribution Co. Ltd. [2015] ITA No.336 of 2013

- Inherent in the meaning of 'right to use' is certain element of possessory control and therefore to fall under the character of Royalty, in terms of Sec 9(1)(vi), there has to be an element of possession with the user or payer.
- The decision also gives an interesting example of Toll Road as under-

  'An example is the use of a toll road (instead of highway). If use of a toll road could be characterised as use of land, it would be an extreme view if we held that toll to be paid for use of a toll road would be subject to deduction of tax at source only because it could also be characterised as rent for use of land. Such an extreme view will not be justified under any circumstances'.

Case laws on Explanation 5 to Sec 9(1)(vi)

- Though the legislature has every right to introduce deeming fiction, however, the creation of such deeming fiction should not lead to meaning which vitiates the comprehensible understanding. Deeming fiction should not make an 'apple' to be an 'orange'.

Royalty

Royalty under OECD model:

- Means payments of any kind received as a consideration for the use of, or the right to use-
- any copyright of literary, artistic or scientific work including cinematograph films,
- any patent, trade mark, design or model, plan, secret formula or process or for information concerning industrial, commercial or scientific experience

Copyright Law w.r.t. Software payments

- **Copyright – a form of intellectual property protected under the Copyright Act, 1957**
- **Refers to the exclusive right to do or authorize others to do certain acts in relation to:**

➢ Literary Works	➢ Artistic Works
➢ Dramatics Works	➢ Cinematograph Films
➢ Musical Works	➢ Sound Recordings

- **'Literary work'** includes computer programmes
- **Exclusive rights include the right to:**
  - ➢ Reproduce the work
  - ➢ Issue copies of the work to the public, not being copies already in circulation
  - ➢ Perform or communicate the work to the public
  - ➢ To make translations or adaptations of the work, etc.

Copyright Law w.r.t. Software Payments

- **Exclusive right are subject to 'fair use doctrine' i.e. following acts to not constitute infringement:**
  - → Private use, including research, review, criticism (of literary, dramatic, musical works, other than computer programmes)
  - → the making of copies or adaptation of a computer programme by the lawful possessor of a copy of such computer programme, from such copy:
    - (i) in order to utilize the computer programme for the purposes for which it was supplied; or
    - (ii) to make back-up copies
- **Exploitation of Copyright**
  - → Exploitation by owner
  - → "Assignment" to others for exploitation
  - → License of all or some of his rights for royalties

Software Payments

- Can it be regarded as payment towards- Royalty?
- **Scope under the Act [9(1)(vi)] & U.S. Treaty**
  - Transfer of all or any right (including the granting of a license) in respect of any copyright of literary, artistic…..
  - Payment of any kind recd as consideration for use of, or right to use any copyright of literary, artistic….

  Controversy is whether there is any transfer of 'Right in Copyright'

Software Payments

- **Software payment considered as Royalty:**
  - Millennium IT Software Ltd. (AAR- 28/09/2011),
  - ING Vyasa Bank Vs DDIT (ITAT B'lore-5/8/2011),
  - Gracemac Corporation, Microsoft Corporation Vs ADIT (ITAT Delhi- 26/10/2010)
  - Cosmic Circuits (P.) Ltd (2013) 58 SOT 364 (Bang.)(Trib.)- Payments made for downloading lisenced software is considered as royalty.
  - Reliance Infocom Ltd
  - Income-tax Officer (International Taxation)-II, Chennai v. F.L. Smidth Ltd. [2014] 51 taxmann.com 90 (Chennai - Trib.)

Software Payments

- **Software payment not considered as Royalty :**
  - DDIT vs. Reliance Communication Ltd. [2018] 90 taxmann.com 358 (Mumbai – Trib)
  - ADIT Vs TII Team Telecom International Pvt. Ltd. (ITAT Mumbai- 26/8/2011)
  - Dassault Systems (AAR- 29/1/2010)
  - Infrasoft Ltd. v Director of Income Tax [2013] 39 taxmann.com 88 (Delhi)
  - Director of Income-tax v. Nokia Networks OY [2012] 25 taxmann.com 225 (Delhi)
  - Financial Software & Systems (P.) Ltd. vs. ACIT [2014] 47 taxmann.com 410 (Chennai – Trib)
  - Infotech Enterprises Ltd. vs. ACIT [2014] 41 taxmann.com 364 (Hyd-Trib).
  - Bartronics India Ltd. [2014] 43 taxmann.com 16 (Hyderabad - Trib.)

Judicial Pronouncements on Royalty Transactions

- **'Use of electronic database'** treated as Royalty-Gartner V ADIT 37 Taxmann.com 16, Wipro Ltd. V ITO, 94 ITD 9 (B'lore), DCI T Vs. Infosys 263 ITR
- **Sale of 'Business Information Report'** not treated as Royalty- Dun & Bradstreet Vs. ADIT [2010-TII-59-MUM ITAT]. Here also, it was a case of access to database in central server located in the U.S.
- **Payment to non-resident for data processing** - Where the assessee transmitted raw data to SPL in Singapore which processed it with the help of application software provided by the assessee and hardware owned by SPL, then the payment made by the assessee to SPL cannot be termed as consideration for use of process so as to treat the same as royalty.-Vide Standard Chartered Bank & Anr. v. Dy. Director of IT & Anr. (2011) 39 (II) ITCL 508 (Mum 'L'-Trib) – contrary view- Cargo Community Network 289 ITR 355 (AAR)

Judicial Pronouncements on Royalty Transactions

- **Secret Process:**

D.C.M. Limited vs. CIT, [1989] 29 ITD 123 (DELHI)

- Consideration paid by the assessee for transfer of drawings, designs, etc., by an English company, to the assessee, outside India, did not constitute royalty under article 13 of the DTAA.
- In the absence of having a permanent establishment in India, the business profits could also not be taxed in India

Judicial Pronouncements on Royalty Transactions

Supply of Information

JCIT v. Telerate [2010-TII-72-ITAT-MUM-INTL]

- When the taxpayer chooses to be covered by provisions of an applicable tax treaty, the tax department cannot thrust provisions of the Act on the taxpayer. The tax treaty and the Act offer alternative but similar modes of taxation of FTS therefore, the provisions of tax treaty shall prevail if they are more beneficial to the taxpayer.
- The income from supply of information relating to various markets should be taxed as business profits under Article 7(3) of the tax treaty and accordingly, the expenses incurred for earning the income should be allowed as a deduction.

Bandwidth / Use of Standard Facilities

i. **Infosys Technologies Ltd [2011] 45 SOT 157 (Bang.)**

- Payments made to Service Providers for providing facilities for down linking signals in foreign country were neither in the nature of managerial, consultancy or technical services nor was it for the right to use industrial, commercial or scientific equipment.

ii. **Skycell Communications Ltd v Dy CIT [2001] (251 ITR 53), Madras**

- Payments for use of mobile phone services would not constitute royalties or fees for technical services

iii. **Wipro Ltd v ITO (2003) 80 TTJ Bang 191**

- Payment for Bandwith would constitute neither royalties nor fees for technical services either under the Act or under the agreement for Avoidance of Double Taxation with USA

Bandwidth / Use of Standard Facilities

However a contrary view is established in a case **Verizon Communications Singapore Pte Ltd. v. ITO [2013] 39 taxmann.com 70 (Mad)** where in it was held that :

- After the amendment was introduced [in Section 9(1)(vi) of the Act in the year 2012, irrespective of possession, control with the payer or use by the payer or the location in India, the consideration would nevertheless be treated as 'royalty' and therefore, the decisions cited4 by the taxpayer cannot be relied to understand the scope of the expression 'royalty'
- Thus the consideration received by the non-resident taxpayer from the Indian customers for provision of Bandwidth/Telecom Services outside India was for the 'use of, or the right to use equipment' and therefore, royalty under Section 9(1)(vi) of the Income-tax Act, 1961 (the Act).

Whether amendments to Royalty Provisions will prevail over Treaty?

- **CIT v. Visakhapatnam Port Trust [(1983) 144 ITR 146 (AP)]-** Provisions of Sections 4 and 5 of the Income-tax Act are expressly made "subject to the provisions of the Act" which means that they are subject to the provisions of Section 90. By necessary implication, they are subject to the terms of the Double Taxation Avoidance Agreement, if any, entered into by the Government of India. Therefore, the total income specified in Sections 4 and 5 chargeable to Income-tax is also subject to the provisions of the agreement to the contrary, if any.
- **CIT v. Davy Ashmore India Ltd. [(1991) 190 ITR 626 (Cal)]**-In case of inconsistency between the terms of the Agreement and the taxation statute, the Agreement alone would prevail.
- **B4U Holdings Ltd. (21 Taxmann.com 529)-**The treaty provisions not having undergone change, the clarification of Explanation 5 should not apply to treaty

Whether amendments to Royalty Provisions will prevail over Treaty?

- **Karnataka High Court in CIT v. R.M. Muthaiah [1993] 202 ITR 508 (Kar)**
- The effect of an 'agreement' entered into by virtue of Section 90 of the Act would be:
  - if no tax liability is imposed under this Act, the question of resorting to the agreement would not arise. No provision of the agreement can possibly fasten a tax liability where the liability is not imposed by this Act;
  - if a tax liability is imposed by this Act, the agreement may be resorted to for negativing or reducing it;
  - subject to above ,in case of difference between the provisions of the Act and of the agreement, the provisions of the agreement prevail over the provisions of this Act and can be enforced by the Appellate Authorities and the court.
- DIT v. Nokia Networks OY [TS- 700- HC- 2012 (Del)]-Retrospective amendment in domestic law cannot be read into tax treaty

Obligations on payers to deduct tax from any payments to NR

- Obligation is provided in Section 195
- The objective of section 195 is to ensure tax collection at source from payments to non-residents so that the Tax Authorities are not put to the hassles of recovering it from a non-resident, whose connection with India may be transient or whose assets in India may not be sufficient enough to meet the tax liability

Section 195(1)

"Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest 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."*

* *This was brought out in G.E. India Tech (2010) 327 ITR 456 (SC)-payer is bound to deduct tax only if sum is chargeable to tax in India read with Sec 4,5 & 9*

Section 195(1)

- 195 does not apply ***if sums are not chargeable to tax***

Section 195(1) does not apply w.rt. Payments exempt in hands of non-resident under Section 10 of the Act or which are outside the scope of "Income" of non-resident as defined u/s 5

- **GE India Technology Centre Pvt. Ltd. v. CIT [2010] 327 ITR 426**: If the payment does not contain the element of income, the payer cannot be made liable
- **Hyderabad Industries Ltd. vs. ITO & ANR (1991) 188 ITR - Karnataka HC**: when payments are "income" under the Act but do not form part of the total income of payee by virtue of any specific exemption under the Act, they should not be liable for deduction u/s 195.
- **AAR in case of Tekniskil (Sendirian) Bernhard vs. CIT (1996) 222 ITR 551**

Section 195(1)

- **Section 195(2) is based on the 'principle of proportionality'**. The said sub-section gets attracted in cases where the payment made is composite payment in which certain portion of the payment has an element of 'income' chargeable to tax in India.

Analysis of Sec 195 (1)

- All payments to non-resident, other than salaries, which are chargeable to tax under the Act, are covered
- There is no threshold limit
- Deduction at the time of credit or payment, whichever is earlier
- Deduction at the rates in force – As per Income Tax Act or DTAA, whichever is more beneficial
- If tax is deducted at a rate specified in DTAA, then no Surcharge or Education Cess should be levied thereon. **DIC Asia Pacific Pte. Ltd v. ADIT [2012] 22 taxmann.com 310 (Kol.)**
- Resident making payment even in INR has to consider Sec. 195

Analysis of Sec 195(1)

- Any person making payment to non-resident, including individual and HUF not liable for audit are covered
- Non-resident making payment to another non-resident is also covered, if payment is chargeable to tax in India – ABC, 228 ITR 487 (AAR)
- Sec.195 doesn't cover within its ambit RbNOR because of Sec 2(30) definition of NR includes RbNOR only for Sec 92, 93 & 168 and not for Sec.195

REFERENCE TO OTHER PROVISIONS OF THE ACT HAVING RELEVANCE TO SEC 195

Section 163 – Representative assessee

For the purposes of this Act, "agent", in relation to a non resident, includes any person in India—

(a) who is employed by or on behalf of the non-resident; or

(b) who has any business connection with the non-resident; or

(c) from or through whom the non-resident is in receipt of any income, whether directly or indirectly; or

(d) who is the trustee of the non-resident;

and includes also any other person who, whether a resident or non-resident, has acquired by means of a transfer, a capital asset in India

REFERENCE TO OTHER PROVISIONS OF THE ACT HAVING RELEVANCE TO SEC 195

Section 163 – Representative assessee

- Observations on Sec 163- Hindalco Ind. Ltd. V. DCIT [AIT 2010 211 (ITAT MUM)]
- Sec 163(1)(c)-applies to every Indian resident, who makes remittance of income to non resident
- The fact that, agent had withheld tax u/s. 195 cannot be a bar to pass order u/s. 163
- There is no time limit prescribed for initiating proceeding u/s. 163
- However, same income cannot be assessed simultaneously in the hands of non-resident as well as agent. [Saipem UK Ltd. V DDIT- (2008) 298 ITR (AT) 113 Mum)]

REFERENCE TO OTHER PROVISIONS OF THE ACT HAVING RELEVANCE TO SEC 195

- Sec 2(37A)(iii)- definition of Rates in Force for the purpose of Sec 195- Rates prescribed in Finance Act or DTAA
- Sec 90(2) of the Act provides for option to be governed by the provisions of DTAA
- Tax should be deducted either at the rate provided in the Finance Act or at the rate provided in DTAA whichever is more beneficial to the assessee (Circular no. 333 & 728)
- Deductor can claim refund of tax if the contract is cancelled & no remittance is made/remittance made is refunded back (Circular No.790)

REFERENCE TO OTHER PROVISIONS OF THE ACT HAVING RELEVANCE TO SEC 195

Disallowance u/s 40(a)(i):

- Section 40 (a)(i) is applicable in case of non-deduction of TDS or non-payment TDS after deduction.
- It is not applicable to short deduction of TDS.
- Therefore, there is no disallowance in case of difference in TDS at the 'time of credit' and TDS at the 'time of remittance' due to exchange rate fluctuation.
- Pune Tribunal in case **Sandvik Asia Ltd v. JCIT [TS-712-ITAT-2011(PUN)]** held that taxpayer (deductor) is not required to again deduct tax u/s 195 at the 'time of remittance' due to exchange rate fluctuations, when tax was duly deducted at the 'time of credit' in books of accounts.

Tax Residency Certificate

- Fin Act 2012, has introduced sub-section 4 to Sec 90 to provide that a NR will not be entitled to claim treaty benefits unless he obtains a TRC from the Govt., of his residence country/territory certifying that he is a tax resident of that country.

- All Non-Residents to submit TRC (Individual, Company, LLC, LLP– No threshold limit

Tax Residency Certificate

- Section 90(5) and Not.57/2013 dated 1st Aug 2013 mandates submission of following information in Form 10F if TRC doesn't contain these information:
  1) Status (individual, company etc) of assessee.
  2) Nationality or country or specified territory of incorporation or registration
  3) Assessee's tax identification number
  4) Period for which the residential status is applicable
  5) Address of the assessee in the country of specified territory outside India
- Self-Attestation of Form 10F by the assessee

Tax residency Certificate Sufficient Evidence to Claim beneficial Ownership

- **DIT v. Universal International Music B.V (2013) 214 Taxman 19 (Bom.)(HC)**
- The tribunal arrived at the fact that the assessee was a beneficial owner of the royalty received on the basis of Tax Residency Certificate submitted by the assessee.
- Reliance was placed by the tribunal on CBDT Circular No 789 dated 13/04/2000 that certificate from revenue authorities is sufficient evidence of beneficial ownership.

Rule 37BC – Relaxation from deduction at higher rate in the absence of PAN

- In case of payments in nature of Interest, Royalty, Fees for Technical Services and payments for transfer of Capital Assets, to NR not having PAN, provisions of Sec 206AA do not apply.
- Payments in nature of Salary are however not covered.
- NR not having PAN shall furnish following documents to deductor:
  - Name, Email id, Contact Number
  - Address in country of which NRI is resident
  - Certificate of his being resident of foreign country.
  - Tax Identification Number of NRI of such country.

Sec 195(6) – Form 15CA-CB

- A person responsible for paying any sum to a non-resident, **whether chargeable to tax or not,** shall be required to furnish the information of the prescribed sum in such form and manner as may be prescribed. (In Form 15CA-CB)
- Rule 37BB is amended vide Notification No. G.S.R 978(E) dated 16th December 2015 and will be come applicable from 01.04.2016.

Representation Letter

- At the time of issuing Certificate in Forms 15CA & CB, a Representation Letter to be taken from the foreign party regarding confirmation of facts in connection with the remittance.
- The following points to be included therein :
  1) Nature of Remittance.
  2) Confirmation that the beneficiary does not have any branch/liaison office/fixed place of business in India nor any agent working exclusively on their behalf in India.
  3) Confirmation that the foreign party is a Tax Resident of respective country along with the Tax ID No.
  4) Confirmation that the beneficiary is the beneficial owner of the service and the remittance shall be received by them for their own benefit and not as Trustee or Agent of Third Party.

Checklist while Issuing Form 15CB

- Go through Form 15 CB & 15CA before starting with the real work.
- Analysis of documents received from the client (Invoice, TRC, Representation Letter)
- Check if the foreign party has any PE in India.
- If any order u/s 195(2)/195(3)/197 is obtained from Assessing Officer?
- Characterization of the remittance and determining TDS implications as per Income Tax Act, 1961
- Analysis of the DTAA for determining withholding rate (Limitation of Benefit Clause, MFN Clause, Force of Attraction etc)
- Exchange rate as on the date of issue of certificate and distinct Certificate No. for each Certificate

Sec 271-I. Penalty for failure to furnish information or furnishing inaccurate information under section 195

- If a person, who is required to furnish information in Forms 15CA and 15CB, fails to furnish such information; or furnishes inaccurate information, the Assessing Officer may direct that such person shall pay, by way of penalty, **a sum of one lakh rupees."**

Transfer from NRO to NRE A/c

- NRI shall be eligible to transfer funds from NRO Account to NRE Account
- overall ceiling of *USD one million per financial year* subject to payment of taxes.
- {A. P. (DIR Series) Circular No.117 dated May 07, 2012}
- 15 CA is required

Rate of Deduction of Tax

Nature of Income	NRI/HUF/ AOP/BOI	Other Person	Foreign Company
Section 195: Payment/credit of Other Sum to Non-Resident			
a. On any investment income referred to in section 115E	20	-	-
b. On income by way of Long Term Capital gains referred to in section 115E or 112(1)(c)(iii)	10	10	10
c. On income by way of Long Term Capital Gains referred to in Section 112A	10	10	10
d. On income by way of short term capital gains referred to in section 111A	15	15	15

Rate of Deduction of Tax

Nature of Income	NRI/HUF/ AOP/BOI	Other Person	Foreign Company
e. On income by way of long term capital gains (not being long-term capital gains referred to in clauses (33), (36) and (38) of Sec 10)	20	20	20
f. On income by way of interest payable by Govt, or an Indian concern on moneys borrowed or debt incurred by Govt, or the Indian concern in foreign Currency (not being income by way of interest referred to in section 194LB or 194LC)	20	20	20
g. Royalty referred in Sec. 115 (1A)	10	10	10
h. Royalty not referred in Sec. 115 (1A)	10	10	10
i. Fees for Technical Services	10	10	10
j. On the whole of the other Income	30	30	40

Q &A…

Questions …

THANK YOU

FIRST DESERVE

AND

THEN DESIRE!!