TDS ON PAYMENTS TO NON-RESIDENTS

(BASICS AND UPDATES)

Presented by :
CA SANDEEP CHALAPATHY
Partner,
MSSV & Co., Chartered Accountants
Bangalore

Flow of Discussion

- Section 195
- Section 9
- Relevant Rules under Income-Tax Rules, 1962
- Form 15CA and 15CB

SECTION 195 OF INCOME-TAX ACT, 1961

Section 195 (1)

- Tax has to be deducted at source on the payments made to Non-residents or a foreign company
- At the time of credit or at the time of payment, whichever is earlier.
- TDS has to be made if it is credited to any account Ex : Interest payable / Suspense account etc...

Section 195 (1)

- The deductor can be –
  - Any person
  - Resident
  - Non-Resident (Whether or not the non-resident person has residence or place of business or business connection in India or any other presence in India)

Section 195 (1)

- TDS has to be made on the -
  - Interest (Other than interest referred to in section 194LB / 194LC / 194 LD)
  - Any other sum chargeable under the provisions of this Act

Section 195 (1)

- Rate of TDS –
  - Rates in force – Part II of First Schedule to Finance Act.
  - Specific provisions of the Act Ex: Section 115A

Section 195 (2)

- The net income can be considered for TDS instead of gross receipts.
- The details provided to the AO should contain documentary evidence to show the portion of income alone is taxable in India.

Section 195 (2)

- If the deductor is of the opinion that the entire consideration being paid by him is not taxable in India in the hands of the deductee, he may make an application to assessing officer providing the details of such proportionate income taxable in India.
- On determination of such income by assessing officer, TDS can be made.

Section 195 (3)

- If the deductee feels that the amount receivable is not chargeable to tax in India, the deductor can make an application for "payment without deduction of tax at source" to the assessing officer. On receipt of such certificate, payment can be made without deduction of tax at source.

Section 195 (2) and (3)

- The Hon'ble Supreme Court in CIT v. Eli Lilly and Co (India) P Ltd 312 ITR 225 has held that the provisions of section 195(2) and 195 (3) are optional.

Section 195 (4)

- The certificate obtained by Non-resident deductee is valid for certain period as specified in the Certificate issued u/s. 195(3) of the Act.

Section 195 (5)

- The applications as specified u/s. 195(2) and 195(3) can be applied electronically.

Section 195 (6)

- The payments made to the non-residents have to be informed to the Income-Tax Department by the deductor in the form of Form 15CA and 15CB, wherever applicable.

Section 195 (6)

- The payments made to the non-residents have to be informed to the Income-Tax Department by the deductor by way of filing Form 15CA and 15CB, wherever applicable.

Section 9 of Income-tax Act, 1961

Section 9(1)

- Incomes deemed to accrue or arise in India
- This section is applicable for both residents and non-residents
- There are some relaxations and exclusions for non-residents

Section 9(1)

- Incomes deemed to accrue or arise in India whether directly or indirectly through or from any
  - Business connection in India
  - Property in India
  - Any asset or source of Income in India
  - Transfer of capital asset situated in India

Section 9(1)(i) – Business Connection

- Any business activity in India carried out by Non-Resident in India forms Business Connection
- The term "Business Connection" is defined in Explanation 2 to section 9(1)(i).
- The definition is an inclusive definition

Section 9(1)(i) – Business Connection

- The exclusion of income for Non-residents
  - Activity of operations in India confined to purchase of goods in India for the purpose of export
  - Non-resident news agency collecting news and information in India and telecasting outside India.
  - Shooting of Cinematographic film in India

Section 9(1)(i) – Business Connection

- Business connection – Through agents
  - Agents playing principal role to conclude contracts which are in the name of non-resident towards transfer of ownership or right to use of property owned by such non-resident
  - Agents playing principal role to conclude contracts which are in the name of non-resident towards rendering of services

Section 9(1)(i) – Business Connection

- Business connection – Through agents
  - Agents not having principal role but maintains stock of goods and delivers the goods on behalf of non-resident.
  - Secures orders for non-residents

Section 9(1)(i) – Business Connection

- Does not constitute Business connection – Through agents
- If the agents having independent status and their regular course of business is to secure orders, conclude the contracts, maintains stock of goods etc not only with one non-resident but many.

Section 9(1)(i) – Business Connection

- Explanation 2A defines Significant economic presence and such presence of Non-resident in India constitutes business connection.

Section 9(1)(i) – Business Connection

- Significant Economic presence means;
  - Transaction of any goods, services or property carried out by a non-resident with any person in India
  - Provision of download of any data or software in India

Subject to transaction value of non-resident during the previous year exceeds Rs. 2 crore.

Section 9(1)(i) – Business Connection

- Significant Economic presence means;
  - Systematic and continuous soliciting of business activities or engaging in interaction with such number of users in India, as may be prescribed.

Section 9(1)(i) – Business Connection

- Significant Economic presence is constituted even if;
  - Non-resident has no residence or place of business in India
  - Services are not rendered in India

Section 9(1)(i) – Business Connection

- The income is deemed to accrue or arise in India only to the extent of income attributable to the transactions or activities referred to in the section.

Section 9(1)(ii) – Salaries

- Salaries are deemed to accrue or arise in India for resident / non-resident of it is earned in India by way of rendering services in India.

Section 9(1)(iii) – Salaries paid by Government

- Salaries paid by Government are deemed to accrue or arise in India for a Citizen of India irrespective of the fact that he is a resident / non-resident and served outside India.

Section 9(1)(iv) – Dividends

- Income deemed to accrue or arise in India if the dividend is paid by an Indian company outside India.

Section 9(1)(vi) – Royalty

- Transfer
- Granting License
- Imparting
  - Of intangibles

Section 9(1)(vii) – Fees for Technical services

- Managerial
- Technical
- Consultancy

DOUBLE TAXATION AVOIDANCE AGREEMENTS

Double Taxation Avoidance Agreements

- DTAA prevails over Income Tax Act for the purpose of beneficial interests to the assessee
- This is a provision provided under the Income-tax Act, 1961

FORM 15CA AND 15CB
(Rule 37BB of Income-tax Rules, 1962)

FORM NO. 15 CB

(*See* rule 37BB)

Certificate of an accountant

We have examined the agreement between **M/s. ABC Limited,** C/o ….., Mauritius and **M/s. XYZ Ltd**, ……., Bangalore , India requiring the above remittance as well as the relevant documents and books of account required for ascertaining the nature of remittance and for determining the rate of deduction of tax at source as per provisions of sub-section (6) of Section 195.

We hereby certify the following: -

A		**Name and address of the beneficiary of the remittance**	**M/s. ABC Limited,** C/o….., Mauritius.	
B	**1.**	**Country to which remittance is made**	**Country:** Mauritius	**Currency:** Mauritian Rup
	2.	**Amount Payable**	**In foreign currency:** MUR Rs. 2,64,80,112	**In Indian** Rs. 4,58,10,59 [1 MUR = INI as on 16.07.20
	3.	**Name of the Bank:** Kotak Mahindra Bank	**Branch of the bank:**	
	4.	**BSR Code of the bank branch (7digit)**		
	5.	**Proposed Date of Remittance**	1 9 0 7 2 0 2 1 (DD/MM/YYYY)	
	6.	**Nature of remittance as per agreement/ document**	Purchase of equity shares	
	7.	**Please furnish the relevant purpose code as per RBI**	Capital Account S0099 – Other capital payments not included elsewhere	

FORM NO. 15 CB

(*See* rule 37BB)

Certificate of an accountant

We have examined the agreement between **M/s. WWW Inc**……, USA and **Mr. Z,** Bangalore, India requiring the above remittance as well as the relevant documents and books of account required for ascertaining the nature of remittance and for determining the rate of deduction of tax at source as per provisions of sub-section (6) of Section 195.

We hereby certify the following: -

A		**Name and address of the beneficiary of the remittance**	**M/s. WWW Inc,** , USA	
B	**1.**	**Country to which remittance is made**	**Country:** United States of America	**Currency:** USD ($)
	2.	**Amount Payable**	**In foreign currency:** $3,12,884/-	**In Indian** Rs. 2,37,88,60 [1$ = Rs. 76.0 on 16.07.2021
	3.	**Name of the Bank:** Kotak Mahindra Bank	**Branch of the bank:**	
	4.	**BSR Code of the bank branch (7digit)**		
	5.	**Proposed Date of Remittance**	1 9 0 7 2 0 2 1 (DD/MM/YYYY)	
	6.	**Nature of remittance as per agreement/ document**	Purchase of equity shares	
	7.	**Please furnish the relevant purpose code as per RBI**	Capital Account S0099 – Other capital payments not included elsewhere	
		In case the remittance is net of taxes, whether tax payable has been grossed up?	Yes No ✓	

Applicability- Form 15CA

- The applicability of filing Form 15CA and 15CB is dealt in Rule 37BB of the Income Tax Rules, 1962 for furnishing of information regarding payment to a non-resident or a foreign entity. Under the said rule, payment to a non-resident is to be reported in either of the 4 parts in FORM 15CA i.e, Part A,B,C or D.

Rule 37BB(1)(i) - Part A

- If any payment or aggregate of payments in a financial year to any non-resident or a foreign company does not exceed Rs. 5 lakh.

Rule 37BB(1)(i) – Part B

- If any certificate from assessing officer is obtained as specified u/s. 195(2) and 195(3) of the Act.

Rule 37BB(1)(i) – Part C

- If any certificate in Form 15CB is obtained from a Chartered Accountant.

Rule 37BB(1)(i) – Part D

- If any payment or aggregate of payments in a financial year to any non-resident or a foreign company is not chargeable to tax.

Exemptions – Form 15CB

- Even though it is applicable for remittance made to any place outside India it is not applicable in all cases. As per the Rule 37BB following are the exemptions to :

Form 15CB (Certificate from a Chartered Accountant):

- In case, the payment is less than Rs. 5 Lacs; (Rule 37BB(1)(i)) or
- In case, certificates u/s. 195(2) and 195(3) are obtained; Rule 37BB(1)(ii) or
- In case, the payment is not chargeable to tax (As per Rule 37BB(1)(iv))

Therefore, only Form 15CA is sufficient.

Exemptions – Form 15CA

- As per Rule 37BB(3)(i) in case the remittance of any sum is :

a. Made by an Individual;

b. Not chargeable to tax under the provisions of the Income Tax Act; and

c. Does not require the approval of RBI as per the provisions mentioned under section 5 of the Foreign Exchange Management Act, 1999 read with section Schedule III to the Foreign Exchange (Current Account Transaction) Rules, 2000 or remittance of such sum is being covered under the specified list as per rule 37BB(3)(i).

Then Form 15CA is also not required.

Exemptions – Form 15CA

- As per section 5 of the FEMA, any person may make the payment if such payment is a current account transaction. Further, the Central Government has imposed certain restrictions for such current account transactions which are specified under Rule 5 of Foreign Exchange (Current Account Transaction) Rules, 2000 (FEMA Rules).

- As per rule 5 of FEMA Rules, the approval of the Central Government / RBI is required for certain current account transactions. The transactions are listed in 3 schedules.
- a. First Schedule - Transactions which are prohibited
- b. Second Schedule - Transactions require approval of the Central Government
- c. Third Schedule - Transactions does not require approval of Central Government up to certain limits

Thank you