TDS on Payments to Non-residents u/s. 195

- CA Rutvik Sanghvi

Similar versions presented at Seminars of WIRC, Virar Branch, Dahisar & Matunga CPE Study Circles of the Institute of Chartered Accountants of India

Updated up to 9th March 2014
Why discuss Section 195?

- Scope expanded in recent times
  - Retrospectively
  - Extraterritorial Operation
- Stringent consequences for all parties to the transaction
- Tax Department’s eye on international payments
  - Nokia & Cairn Energy
- Revised Remittance Procedures
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LEGAL PROVISIONS - Scope & Methodology

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  • What, Who, When & How?
• Section 206AA
• Tax Residency Certificate
• Interplay of DTAA, PAN and TRC
• Grossing up of tax
• Deductibility vis-à-vis certain payments
Section 195(1)

- Any person responsible for paying
- To a non-resident
- Or a Foreign Company
- Any interest or any other sum
- **Chargeable to tax** under the provisions of this Act
- 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
## Scope of Section 195

| What is covered? | • Any interest or any other sum  
|                 | • Chargeable to tax under the provisions of this Act |
| Who are covered? | • Any person responsible for paying  
|                 | • To a non-resident or a Foreign Company |
| When is it applicable? | • At the time of credit or at the time of payment  
|                 | • Whichever is earlier |
| How is it to be applied? | • Deduct income-tax thereon at the rates in force |
Scope of Section 195 - What is covered?

- Sums chargeable to tax
  - Except for Salaries; Dividends; Interest u/s.s 194LB, 194LC & 194LD, Shipping income u/s. 172; Payments to sportsman, entertainer or sports association u/s. 194E; Payments u/s.s 196B, 196C & 196D.

- Without any threshold limit

- From pure incomes or composite payments where income is embedded
  - Transmission Corporation - 239 ITR 587 (SC)
  - GE India Technology Centre - 193 TAXMANN 234 (SC)
    - Karnataka High Court in Samsung Electronics overruled

- Section 195(7) – whether or not chargeable to tax
  - No cases/persons prescribed yet
Taxability – Steps

Section 5
- Received or Deemed to be received
- Accrues or arises

Section 9
- Is deemed to Accrue or Arise

DTAA
- Exempt from Tax
- Lower tax rate

Provisions of the Act or DTAA, whichever are more beneficial, prevail
## Taxability – Interplay between the Act & DTAA

<table>
<thead>
<tr>
<th>Income Type</th>
<th>Relevant Sections/Articles</th>
</tr>
</thead>
<tbody>
<tr>
<td>Business Income</td>
<td>Section 9(1)(i), Article 7 r.w. Article 5</td>
</tr>
<tr>
<td>Royalties/FTS</td>
<td>Section 9(1)(vi) &amp; (vii), Article 12</td>
</tr>
<tr>
<td>Capital Gains</td>
<td>Section 9(1)(i), Article 13</td>
</tr>
<tr>
<td>Interest</td>
<td>Section 9(1)(v), Article 10</td>
</tr>
</tbody>
</table>
Scope of Section 195 - Who are covered?

- **Payer - Any person**
  - Even if no income earned

- **Applicable to transactions between non-residents?**
  - Extraterritorial operation
    - “It extends to the whole of India” - Section 1(2)
  - GVK Industries
  - Vodafone

- **Retrospective amendment – Explanation 2 to S. 195(1)**
  - Obligation to deduct whether or not NR has any presence in any manner whatsoever in India!

- **Payee - Non-residents & Foreign Co. (whether or not NR)**
  - RNOR payee not covered, but RNOR payer covered
Scope of Section 195 - When is it applicable?

- On credit or payment whichever is earlier
  - From the point of view of payer
  - Exception for interest payable by Government, Public Sector Bank or Public Financial Institution

- Amount adjusted, not paid
  - Raymond Ltd. (80 TTJ 120)

- FEMA or RBI Approval
  - United Breweries Ltd. - [2002] 81 ITD 77 (Delhi)

- Govt. Approval
  - Pfizer Corpn. [2003] 129 TAXMAN 459 (BOM.)
Scope of Section 195 – How is it applicable?

- Rate or rates in force - Section 2(37A)(iii)
  - Part II to the First Schedule of Finance Act
  - DTAA rates
- Surcharge to be added to DTAA Rate?
  - No
- Education Cess to be added to DTAA Rate?
  - No
- Presumptive provisions: 44B, 44BB, 44BBA, 44BBB
- Section 44DA r.w. Section 115A
Section 206AA – PAN requirement

- Non-obstante provision introduced from 1st April 2010
- Obligation to furnish PAN on NR receiving income
- In absence of PAN, higher of the following rates applicable:
  - Rate specified in the relevant provision of the Act;
  - Rate or rates in force; or
  - Rate of 20%
- Section applicable also when PAN incorrect or invalid
- Certificate u/s. 197 will not be issued without PAN
Section 206AA - Issues

- Treaty Override?
  - Credit in the other country may not be available for additional tax burden

- Applicable where no tax payable?
  - No, as provision applicable only on sum or income or amount on which tax is deductible

- Surcharge or educational cess not to be added to 20%

- Refund of higher tax deducted available

- Grossing up of tax under Section 206AA
  - Literal reading of Section 195A refers to ‘rates in force’
    - Bosch Ltd.
Tax Residency Certificate

- Section 90(4) & (5) – Introduced w.e.f 1.4.2013
- NR cannot avail benefit under Treaty without Tax Residency Certificate (TRC)
- Applies to all NRs without any threshold limit
- TRC will be necessary but not sufficient – past?
- Rule 21AB specifies prescribed particulars for S. 90(5)
  - Documents substantiating particulars to be maintained
    - By whom?
  - Details not covered in TRC be mentioned in Form 10F
    - Self-attestation
Tax Residency Certificate - issues

- TRC not required in case no treaty benefit availed
- LOB clause?
- The other country may not give all the details in their TRC. Will it be alright?
- TRC usually for the past year. Tax to be deducted for current year.
- TRC applied for, but not available on date of deduction
Interplay of DTAA, PAN & TRC

Is the Payment liable to tax under DTAA?

Is DTAA Rate Beneficial?

Is TRC Available?

No Tax Deductible, PAN not required

Tax as per ITA

Is Payee’s PAN Available?

Is Payee’s PAN Available?

S. 206AA applicable: Higher of 20% or Rate as per Rates in Force

S. 206AA not applicable: Rate as per Rates in Force

Section 206AA not applicable: Rate as per Rates in Force

Section 206AA applicable: Higher of 20% or Rate as per DTAA
Impact of Section 115A

- Rate @ 25% u/s 115A for royalty and FTS
- Foreign Co. ABC receives FTS from Indian concern
- Rates applicable:
  - As per DTA – 10%
  - As per 115A – 25%
  - As per 206AA – 20%
- What rate should tax be deducted at?
  - Higher of 20% rate or
  - At the “rate specified in the relevant provision of the Act”; or
  - At the “rate or rates in force”
Impact of Section 115A…contd.

- “Rate specified in the relevant provision of the Act”
  - Sec. 115A is not applicable here as it is not a deduction provision, it is a provision for income earners.
  - No rate specified in Sec. 195
    - Applicable for other provisions – 194J, 194C, 194I, etc.
- “Rate or rates in force”
  - Applicable to Section 195 as it refers to “rates in force”
  - Section 2(37A)(iii) "rates in force" means -
    - for the purposes of deduction of tax under section 195, the rate or rates of income-tax specified in this behalf in the Finance Act of the relevant year or the rate or rates of income-tax specified in an agreement entered into by the Central Government under section 90, whichever is applicable by virtue of the provisions of section 90
  - Tax to be deducted at lower of DTA rate or rate specified in Part II of First Schedule to Finance Act –
    - For NRIs refer clause 1(b)(i)(F), (G) or (H)
    - For other NRs refer clause 1(b)(ii)(B), (C) or (D)
Impact of Section 115A…contd.

- Therefore, tax should be deducted at following rates:
  - Both TRC and PAN available
    - 10%
  - TRC not available, nor PAN
    - 25%
  - TRC available, but no PAN
    - 20%
### Grossing up of tax

#### Section 195A - Income payable “net of tax”

<table>
<thead>
<tr>
<th></th>
<th>Without Gross Up of Tax (A)</th>
<th>With Gross up of Tax (B)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Payment of Rs. 100, tax deductible @ 10%</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Invoice Amount</td>
<td>100</td>
<td>100</td>
</tr>
<tr>
<td>Tax Deductible @ Source</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>Net Amount payable</td>
<td>90</td>
<td>100</td>
</tr>
<tr>
<td><strong>Amount/Grossed up amount</strong></td>
<td>100</td>
<td>100+100/[ (100/10) - 1]</td>
</tr>
<tr>
<td></td>
<td></td>
<td>= 111.11</td>
</tr>
<tr>
<td><strong>Less: Tax deducted</strong></td>
<td>10</td>
<td>11.11</td>
</tr>
<tr>
<td><strong>Net Payment</strong></td>
<td>90</td>
<td>100</td>
</tr>
</tbody>
</table>

- Not applicable to Presumptive tax provisions?
  - CIT vs. ONGC (264 ITR 340)
Deductibility vis-à-vis certain payments

- On Business income or Professional fees
  - ‘Business Connection’
  - PE or Fixed Base
  - Offshore supply
  - Payment to Foreign Agents
  - Withdrawal of Circular 23 of 1969
  - ‘Force of Attraction’ clause in DTAA
  - Explanation 4 to Sec. 9(1)(i) – expansion?
Deductibility vis-à-vis certain payments…contd.

- On Royalties & Fees for Technical Services
  - Retrospective Expansion
  - Section 115A rate
  - Definition under Act vs. Treaty
  - Source Rule u/s. 9
  - ‘Most Favoured Nation’ Clause

Royalties
- Software Payments
  - E-commerce transactions?
- Transfer of know-how

FTS
- Rendering of service in India immaterial
  - “Make Available”
- Marketing services
Deductibility vis-à-vis certain payments…contd.

- **On Capital gains**
  - On sale of shares
    - Mauritius
    - Cyprus
  - On sale of property
    - Can CA give certificate?
    - Deduction on gross amount or capital gain?
    - Documents required to correctly compute gain
    - Deductions available for foreign properties?
- **On income earned by FIIs**
  - Section 196D(2)
- **On gains earned by NRIs**
  - On non-repatriable capital gains earned by NRIs from PIS
Deductibility vis-à-vis certain payments…contd.

- **On Reimbursement of expenses**
  - What is directly taxable is taxable even if reimbursed
  - Facts & supporting
  - Pure Reimbursement – no mark-up
  - Reimbursement with mark-up
  - Allocation of Shared Costs
  - Third-party services
  - Incidental expenses
  - Salary / Living Allowances
Deductibility vis-à-vis certain payments…contd.

- On payments to Agent of Non-resident as per Sec. 163
- On payment by a firm to NR partners
- Transfer of own funds
- On gifts to NR non-relatives
- On shipping income
- On payments made by a branch to its HO
- On payment in kind
- On payment without remittance
- On payments through credit cards
LEGAL ISSUES –
Consequences & Refunds

• Consequences
  • Disallowance
  • Default
  • Interest
  • Penalty
• Refund of TDS
Consequences under law

- Disallowance of expense u/s. 40(a)(i)
  - Disallowance of Interest u/s. 58(1)(a)(ii)
- Assessee in default u/s. 201(1)
  - Retrospective effect from 1.6.2002
- Penalties
  - For failure to pay tax deducted – S. 221
  - For failure to deduct tax – S. 271C
  - For failure to file TDS return – S. 272A
- Interest
  - U/s. 220
  - U/s. 201(1A)
Consequences…contd.

- Charge on all the assets – S. 201(2)
- Prosecution for failure to pay tax deducted – S. 276B
- Payer Representative Assessee u/s. 161 r.w. S. 163
- Tax may be recovered from any assets which are or may at any time come within India – S. 173
Merilyn Shipping and its impact on Sec. 195

- Merilyn Shipping SB Vizag
- CBDT Circular dt.16-12-2013
- Gupta Overseas ITAT Agra
- Stay by AP HC
- Vector Shipping All. HC
- Non-discrimination
- Sikandarkhan & Tanwar Guj HC
- Crescent Export Syndicate Kol HC
- No disallowance u/s 40(a)(i)
- Short lived relief
Refund of TDS

- Recipient to file return and claim refund
- Deductor - CBDT Circulars 7 of 2007 & 2011
- Application to be made within 2 years from end of FY in which tax is deducted at source

Applicable to cases where:
- Contract is cancelled in whole or partially
- Change in law, or order, reducing tax liability
- Mistakes in deduction or payment of tax

- Rule 31A(3A) - Form 26B notified
PRACTICAL ISSUES – Certificates & Procedures

• Snapshot of Certification Provisions
• Sec. 195(2) vs. Sec. 197
• Sec. 197 – Rules & Form
• Application by the Payee - Sec. 195(3)
• Reporting u/s. 195(6)
• Revised Remittance Procedures
• Form 15CA
• Form 15CB - Analysis
• Mandatory application – Sec. 195(7)
Snapshot of Certification Provisions

- **195(7)**: Mandatory Application to AO
- **195(6)**: Reporting Requirements
- **195(3)**: Application by Payees having Indian Branches
- **195(2)**: Application by Payer
- **197**: Application by Payee in General
## Section 195(2) vs. Section 197

<table>
<thead>
<tr>
<th><strong>Section 195(2)</strong></th>
<th><strong>Section 197</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Application by Payer - mandatory?</strong></td>
<td>Application by assessee (Payee)</td>
</tr>
<tr>
<td>Application for appropriate proportion of the sum chargeable to tax – generally rate is prescribed.</td>
<td>Application for lower rate or nil rate for deduction of tax at source</td>
</tr>
<tr>
<td>Application to be made for each payment. Binding only for particular transaction.</td>
<td>Application can be for a particular period. Applicable to period for which issued.</td>
</tr>
<tr>
<td>Appealable u/s. 248</td>
<td>Not appealable – only writ petition</td>
</tr>
<tr>
<td>Doubts on grant of total exemption</td>
<td>Can provide certificate for deduction at nil rate of tax</td>
</tr>
<tr>
<td>Application to be made on plain paper</td>
<td>Application in Form 13</td>
</tr>
</tbody>
</table>
Section 197 – Rules and Form

- Rule 28A
  - Form 13

- Rule 28AA – Conditions applicable
  - Determination of existing and estimated tax liability based on
    - Tax payable on estimated income of previous year
    - Tax payable on assessed/returned income of past 3 years
    - Existing tax liability
    - Advance tax payment & Tax deducted at source
  - Certificate valid for such period of the previous year as specified
  - Will be issued direct to the person responsible for deduction of tax at source
Application by Payee -195(3)

- Payee eligible as per Rule 29B can only apply
  - Foreign Bank having Indian Branch
    - For interest or any other sum not being dividends
  - Foreign Company having Indian Branch
    - For any sum not being interest or dividends

- Conditions
  - Income receivable on its own account
  - Regularly assessed to tax
  - Not in default of any tax, interest, penalty or fine
  - Available for a non-banking company
    - Carrying on business since last five years
    - Value of fixed assets exceeds Rs. Fifty Lakhs

- Application in Form 15C for Banks & Form 15D for others
- No prescribed format for issue of certificate, valid for that FY
- Certificate not appealable
Reporting u/s. 195(6)

- Person making payment to NR to furnish prescribed information online
  - Rule 37BB – recently amended
- Information & Undertaking – Form 15CA
- CA Certificate – Form 15CB
  - Separate certificate for each type of income
- Applicable for every remittance
Remittance Procedures

- RBI mandate for NOC from IT Department in case of remittance to NR
  - Objective of CBDT circular to dispense with NOC requirement
- Amendment in Rule 37BB mandating authorised dealer to furnish signed printout of Form 15CA
  - Existing CBDT circular not rescinded yet
- Is it a statutory provision or administrative?
- CA certificate not a substitute for 195(2) or 195(3)
  - Not required where order u/s.s 195(2) or 195(3) available
Revised Remittance Procedures

- Relaxations for non-taxable payments
- Furnishing of information by the payer only if “any other sum chargeable to tax”
  - No forms to be filed on Nil deduction of tax at source?
- Forms not be filed for ‘Specified list’ of transactions
  - 28 transactions from Form A2
- Rules amended on 5th August 2013 superseded
  - 11 transactions removed
## Specified Transactions

<table>
<thead>
<tr>
<th>Sr. No.</th>
<th>Purpose code</th>
<th>Nature of payment</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1)</td>
<td>(2)</td>
<td>(3)</td>
</tr>
<tr>
<td>1</td>
<td>S0001</td>
<td>Indian investment abroad -in equity capital (shares)</td>
</tr>
<tr>
<td>2</td>
<td>S0002</td>
<td>Indian investment abroad -in debt securities</td>
</tr>
<tr>
<td>3</td>
<td>S0003</td>
<td>Indian investment abroad -in branches and wholly owned subsidiaries</td>
</tr>
<tr>
<td>4</td>
<td>S0004</td>
<td>Indian investment abroad -in subsidiaries and associates</td>
</tr>
<tr>
<td>5</td>
<td>S0005</td>
<td>Indian investment abroad -in real estate</td>
</tr>
<tr>
<td>6</td>
<td>S0011</td>
<td>Loans extended to Non-Residents</td>
</tr>
<tr>
<td>7</td>
<td>S0202</td>
<td>Payment for operating expenses of Indian shipping companies operating abroad</td>
</tr>
<tr>
<td>8</td>
<td>S0208</td>
<td>Operating expenses of Indian Airlines companies operating abroad</td>
</tr>
<tr>
<td>9</td>
<td>S0212</td>
<td>Booking of passages abroad -Airlines companies</td>
</tr>
<tr>
<td>10</td>
<td>S0301</td>
<td>Remittance towards business travel.</td>
</tr>
<tr>
<td>11</td>
<td>S0302</td>
<td>Travel under basic travel quota (BTQ)</td>
</tr>
<tr>
<td>12</td>
<td>S0303</td>
<td>Travel for pilgrimage</td>
</tr>
<tr>
<td>13</td>
<td>S0304</td>
<td>Travel for medical treatment</td>
</tr>
<tr>
<td>14</td>
<td>S0305</td>
<td>Travel for education (including fees, hostel expenses etc.)</td>
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</tbody>
</table>
Specified Transactions...contd.

<table>
<thead>
<tr>
<th>Sr. No.</th>
<th>Purpose code</th>
<th>Nature of payment</th>
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</thead>
<tbody>
<tr>
<td>15</td>
<td>S0401</td>
<td>Postal services</td>
</tr>
<tr>
<td>16</td>
<td>S0501</td>
<td>Construction of projects abroad by Indian companies including import of goods at project site</td>
</tr>
<tr>
<td>17</td>
<td>S0602</td>
<td>Freight insurance - relating to import and export of goods</td>
</tr>
<tr>
<td>18</td>
<td>S1011</td>
<td>Payments for maintenance of offices abroad</td>
</tr>
<tr>
<td>19</td>
<td>S1201</td>
<td>Maintenance of Indian embassies abroad</td>
</tr>
<tr>
<td>20</td>
<td>S1202</td>
<td>Remittances by foreign embassies in India</td>
</tr>
<tr>
<td>21</td>
<td>S1301</td>
<td>Remittance by non-residents towards family maintenance and-savings</td>
</tr>
<tr>
<td>22</td>
<td>S1302</td>
<td>Remittance towards personal gifts and donations</td>
</tr>
<tr>
<td>23</td>
<td>S1303</td>
<td>Remittance towards donations to religious and charitable institutions abroad</td>
</tr>
<tr>
<td>24</td>
<td>S1304</td>
<td>Remittance towards grants and donations to other Governments and charitable institutions established by the Governments.</td>
</tr>
<tr>
<td>25</td>
<td>S1305</td>
<td>Contributions or donations by the Government to international institutions</td>
</tr>
<tr>
<td>26</td>
<td>S1306</td>
<td>Remittance towards payment or refund of taxes.</td>
</tr>
<tr>
<td>27</td>
<td>S1501</td>
<td>Refunds or rebates or reduction in invoice value on account of exports</td>
</tr>
<tr>
<td>28</td>
<td>S1503</td>
<td>Payments by residents for international bidding.</td>
</tr>
</tbody>
</table>
Revised Remittance Procedures...contd.

- Relaxations for small taxable payments
- If payment does not exceed Rs. 50,000 and aggregate does not exceed Rs. 2,50,000 in the FY
  - Form 15CA – Part A
  - Future payments to be estimated?
- Otherwise Form 15CA – Part B along with
  - CA certificate in Form 15CB; or
  - Order u/s. 197 or 195(3)
Revised Remittance Procedures – Flow Chart

1. Is the Payment liable to tax?
   - No
   - Yes

2. What is the Basis?
   - No
   - Yes

3. Interpretation not clear / controversial
4. From clear interpretation of law

5. Payment > Rs. 50,000 or Rs. 250,000 in a FY
   - Yes
   - No

6. Form 15CA – Part A
   - No Certificate required

7. Form 15CA - Part B & CA / ITO Certificate
8. Make remittance without forms, but maintain documents

9. Advisable to obtain Certificate before making remittance
Revised Remittance Procedures - Concerns

- Old Form 15CA now removed
  - Till 12\textsuperscript{th} February 2014?
- Form 15CA to be signed by person competent to sign tax return
- Digital Signature not mandatory
- Form 15CA now available for offline filling
  - Multiple xmls can be filed through offline utility
  - Option to save data available only offline
  - Recall option not available
  - Space for detailed notes not available
- Banks not complying with new rules
Form 15CA – Part A

- Remitter’s details
  - PAN if available
  - TAN if available
  - Status

- Recipient’s details
  - PAN – if available - S. 206AA?
  - Status no longer required
  - Country to which remittance is made

- Principal place of business no longer required
Remittance details
- Aggregate amount of remittance in FY
- Nature of Remittance
- Tax Deducted

Verification
- No information is concealed
- Undertake to submit requisite documents to determine nature and amount of income as well as to determine tax liability
- Undertaking to pay the amount of shortfall in TDS not present
Form 15CA – Part B

- **Section A** - same details as in Part A
  - PAN and TAN of Remitter Mandatory
  - PAN of Recipient – Sec. 206AA
  - Principal place of business required here

- **Section B** – as per certificate of the accountant

- **Verification Part**
  - Certify that Accountant’s certificate has been obtained
  - Undertake to pay shortfall of TDS along with interest
Form 15CB – Analysis

- CA certificate to be provided in physical form
  - Information to be uploaded online in Part B of Form 15CA

- Documents that should be reviewed
  - Certified copy of signed contract
  - Certified copy of signed/stamped invoice
  - Certified ledger account
  - Correspondence on which reliance is placed including emails
  - Supporting vouchers in case of reimbursements a must
  - Print out of website details of Payee

- Physical certificate should be amended for documents reviewed
Form 15CB…contd.

- **Clause A** - Name and address of the beneficiary of the remittance
  - ‘Beneficiary of Remittance’ not Beneficial Owner of Income

- **Clause B(6)** - Nature of remittance as per agreement/document
  - Important for determining classification of income
    - Documents reviewed must enable determination of nature of remittance – otherwise call for more documents
    - Declaration not enough
  - Reference to Specified List if necessary
Form 15CB...contd.

- Clause B(7) - In case the remittance is net of taxes, whether tax payable has been grossed up?
  - Provide computation on a separate sheet

- Clause B(8) – Taxability under the provisions of the Act without considering DTAA
  - To be filled even if no tax payable as per DTAA
  - Relevant Section in case payment not income?
  - Basis of determining taxable income
    - Short reasoning online – details in physical certificate
  - Liable to tax in India?
    - Obtain declaration for no ‘business connection’ in case DTAA not applicable

- Clause B(9) – DTAA details
  - TRC available
Form 15CB...contd.

- Clause B(9)(A) - If the remittance is for royalties, fee for technical services, interest, dividend
  - Not connected with PE
  - No space to provide reasons
    - Proper reasoning to form part of the physical certificate
    - Detailed reasoning if rate lower than DTAA rate applied

- Clause B(9)(B) - In case remittance is on account of business income
  - Obtain proper declaration from payee for no PE in India
    - Proper validation of facts, cross-checking
  - If PE in India, whether CA can issue certificate for profits attributable?
Clause B(9)(C) - In case remittance is on account of Capital Gains
  Can CA provide certificate for capital gains?

Clause B(D) - In case of other remittance
  Nature of remittance
  Provide reasons why classified as ‘other remittance’
  In case of remittance other than income – mention the exact nature
    Separate certificates for income and non-taxable capital receipts
Mandatory application - Section 195(7)

- New provision brought in by Finance Act 2012
- Mandatory application to AO for determination of sum chargeable to tax
- Even if sum is not chargeable to tax as per provisions of the Act
- Specify a class of persons or cases by notification
  - No notification yet
- General or special order of the AO
- Once order provided, deduction of tax from such sum
- No provision for appeal?
PRACTICAL ISSUES – Approach & Safeguards

- Objectives
- Checklist - Facts
- Checklist - Tax Treaty
- Some Practical Aspects
Objectives

- To determine taxability in India
- To know the actual overall tax cost
  - How would it be treated in the residence country
- To provide a complete and practical solution
- Am I safeguarding myself properly?
Checklist - Facts

- Details about the transaction
- Locking down the facts
- Residential status of the assessee
  - Tax Residency Certificate
  - PE?
- Identify the legal status of the tax payer
- Determining the Country of Residence of tax payer (CoR)
- Determining the Country of Source of income (CoS)
- Ascertaining the nature of income and its categorisation
- Declaration to be obtained for key facts
Checklist - Tax treaty

- Applicability of treaty
  - Residential status
  - Taxes covered
  - Persons covered

- Must check
  - Technical Explanation (US)
  - Protocols and Memorandum of Understandings
  - MFN clause
  - LOB clause

- References
  - OECD and UN Model Convention Commentary
  - Commentaries by learned authors
    - Klaus Vogel
    - Arvid Skaar
Some practical aspects

- Cost benefit analysis
  - Credit in the home country against tax paid in India
- Tax return has to be filed
  - Final Assessment only on filing of tax return
- Complex legal structures & Unresolved issues
  - LLPs / Partnerships
  - Triangular treaty situation
- Law is always trying to catch up to business
  - Eg - E-commerce
Some practical aspects…contd.

- Deemed anti-avoidance provisions
  - TP adjustments

- Foreign Exchange Rate
  - Rate as on the day on which tax is deducted at source as per Rule 26
  - Difference between forex rate on date of deduction and date of remittance
    - Forex gain or loss – no TDS required

- Consider for cross-checking
  - FEMA
  - Customs
  - Service tax
  - R & D cess
Thank you!

- **CA Rutvik Sanghvi**
  - rutvik@rashminsanghvi.com
  - www.rashminsanghvi.com