TAX DEDUCTION AT SOURCE

Chapter – XVII-B

TDS REFERENCER

Sections	Payment Covered	Deductor	Deductee	Exemption	Rate of TDS
192	Salary ***(including salary to a whole-time or managing director)***	Employer (whether carrying on business/profession or not)	Any employee (R/NR)	SSC (5 lakh)/ SC (3 lakh)/ Others (2.5 lakh)	NTR
193	Interest on securities	Any person responsible for paying such income.	Any ***resident*** security holder	***(Refer details ahead)***	10%
194	Dividend u/s 2(22)(e)	Domestic company	Any ***resident*** shareholder	₹ 2,500 if paid to an individual by account payee cheque	10%
194A	Interest other than interest on securities	Any person (except an individual or a HUF) responsible for paying such income ***(Refer Note 1)***	Any ***resident*** person	₹ 5,000 / ₹ 10,000	10%
194B	Winnings from lotteries /crossword puzzles/card games/other games	Any person responsible for paying such income	Any person (R/NR)	10,000	30%
194BB	Winnings from horse races	Any person responsible for paying such income	Any person (R/NR)	₹ 5,000	30%
194C	Consideration for any work contract ***(including supply of labour for carrying out any work)***	Any person (except an individual or a HUF) responsible for paying such income ***(Refer Note 1 and Note 2)***	Any ***resident*** contractor (contractor includes sub-contractor)	₹ 30,000 at one time or ₹ 75,000 in the aggregate	1% for individual/ HUF deductees & 2% for others
194D	Insurance commission	Any person responsible for paying such income	Any ***resident*** person	₹ 20,000	10%
194DA	Any sum paid under a life insurance policy (including bonus) which is not exempt u/s 10(10D) e.g. Keyman Insurance Plan, Section 80DD(3), etc.] ***- W.e.f. 01.10.2014***	Any person responsible for paying such income	Any ***resident*** person	No TDS if aggregate amount paid during the financial year is less than ₹ 1,00,000	2%
194E	Income referred to in Section 115BBA (e.g. participation in games, advertisement, contribution of articles in newspapers, magazines etc.)	Any person responsible for paying such income	Any NR Sportsman / Sports Association OR an entertainer who is not an Indian citizen	-	20%
194G	Commission on sale of lottery tickets	Any person responsible for paying such income	Any person (R/NR)	₹ 1,000	10%
194H	Commission or brokerage (not being insurance commission & commission on sale of lottery tickets)	Any person (except an individual or a HUF) responsible for paying such income ***(Refer Note 1)***	Any ***resident*** person	₹ 5,000	10%
194-I	Rent	Any person (except an individual or a HUF) responsible for paying such income ***(Refer Note 1)***	Any ***resident*** person	₹ 1,80,000	For use of : P&M - 2% & other assets - 10%
194-IA	Consideration for transfer of an immovable property (other than rural agricultural land in India) ***(w.e.f. 01.06.2013)***	Any person being transferee ***(other than the person referred to in section 194LA)***	Any ***resident*** transferor	Consideration paid/payable is less than ₹ 50,00,000	1%

Sections	Payment Covered	Deductor	Deductee	Exemption	Rate of TDS
194J	Fees for professional / technical services / royalty / sum referred to in Section 28(va) / ***Remuneration or fee or commission to a director which is not in nature of salary (w.e.f. 01.07.2012)***	Any person (except an individual or a HUF) responsible for paying such income ***(Refer Note 1 and Note 2)***	Any ***resident*** person	₹ 30,000 ***(No exemption in case of remuneration/ fee/commission to a director which is not in nature of salary)***	10%
194LA	Payment of compensation (original/enhanced) on compulsory acquisition of immovable property (except urban/rural agricultural land)	Any person responsible for paying such income	Any ***resident*** person	₹ 2,00,000 during a financial year.	10%
194LB	Interest by an infrastructure debt fund referred to in section 10(47)	Any person responsible for paying such income	NR & Foreign company	-	5%
194LC	Interest by a specified Indian company on long-term infrastructure bonds	Any person responsible for paying such income	NR & Foreign company	-	5%
194LD	Interest on rupee denominated bond of an Indian company or Government securities which is payable after May 31, 2013 but before June 1, 2015 ***(w.e.f. 01.06.2013)***	Any person responsible for paying such income	A foreign institutional investor or a qualified foreign investor	-	5%
195	All sums payable to NR and foreign companies except covered above	Any person responsible for paying such income	NR & Foreign company	An application can be made to A.O. for non-deduction of TDS where the sum payable is not taxable in India.	As per rates prescribed by the annual Finance Act.

Notes :

1. **For Section 194A, 194C, 194H, 194-I and 194J :**

   An individual or a HUF shall be liable to deduct TDS only if total sales, gross receipts or turnover from the business or profession carried on by him/it exceed the monetary limits specified under Section 44AB (i.e. One crore/25 lakhs) during the financial year immediately preceding the financial year in which such interest is credited or paid.

2. **For Section 194C and 194J :**

   An individual or HUF shall not be liable to deduct TDS if aforesaid payment is made for services availed for personal purposes.

3. Under Section 192, 194B, 194BB, 194DA & 194LA TDS is to be deducted at the time of payment.

4. In other cases TDS is to be deducted at the time of credit of such income to the account of the payee or at the time of payment, whichever is earlier.

Applicability of Surcharge, EC & SHEC for calculation of Effective rate of TDS

Effective rate of TDS = Rate of TDS + Surcharge (if applicable) + EC (if applicable) + SHEC (if applicable).

Basic rules for calculation of effective rate of TDS are enumerated as under :

- Where deductee is a **Non-resident/Foreign Company** : SC (if applicable), EC and SHEC are to be added with Rate of TDS.
- Where deductee is a **Resident** : SC, EC and SHEC are not to be added with Rate of TDS.

  However, in case of payment of salaries to **Resident** : SC (if applicable), EC and SHEC are to be added with Rate of TDS.

Table showing applicability of Surcharge, EC & SHEC for calculation of Effective rate of TDS

Payments	Person	R/S	Payment	SC	EC	SHEC
Salary	Individual	R/NR	Upto 1 crore	Nil	2%	1%
			More than 1 crore	10%	2%	1%
Other than salary	Foreign Co.	R/NR	Upto 1 crore	Nil	2%	1%
			More than 1 crore but upto 10 crores	2%	2%	1%
			More than 10 crore	5%	2%	1%
	Other than foreign company	R	Any amount	Nil	Nil	Nil
		NR	Upto 1 crore	Nil	2%	1%
			More than 1 crore	10%	2%	1%

Mode of payment of Income-tax to Central Government

1. TDS/TCS : Deducted/collected from income/purchase price by the payer/seller.
2. Advance tax : Paid during the previous year by the assessee himself.
3. Self-assessment tax : Paid before filing the ROI by the assessee himself.

TDS from salaries [Section 192]

- The employee may declare details of his other incomes (***including loss under the head "IHP" but not any other loss***) and tax deducted thereon by others. If the aforesaid information is not submitted by the employee to the employer, then employer cannot take into consideration other income of the employee (even if the other incomes are known to the employer).
- The total tax to be deducted, on the estimated income of the employee for the relevant financial year, is divided by the number of months of his employment during that financial year. The amount so arrived at is the monthly deduction of tax at source.

  Illustration :

  The estimated taxable salary of the employee for the financial year 2014-15 is ₹ 4,70,000. Determine the amount of tax to be deducted at source every month by the employer.

  Solution :

	₹
Tax on ₹ 4,70,000 (after deducting rebate u/s 87A)	20,000
Add : Education cess @ 2%	400
	20,400
Add : Secondary and higher education cess @ 1%	200
Estimated tax liability	20,600
Tax to be deducted every month (Tax liability/12)	1,717

- Where during the financial year, as assessee :

  (a) is employed simultaneously under more than one employer, or

  (b) has changed the employment from one employer to another

  he may furnish to the ***employer of his choice*** or the subsequent employer, as the case may be, such details of salaries due or received by him from other employer, the tax deducted at source therefrom etc. In this case, the employer, so chosen, shall take into account these details while making deduction of tax at source on the ***aggregate salary***.

Illustration :

During the P.Y. 2014-15, X is employed simultaneously by A Ltd. (Salary : ₹ 25,000 per month) and B Ltd. (Salary : ₹ 32,000 per month) on part-time basis. Determine the tax to be deducted at source every month by each company.

Solution :

X may select any of the two companies for deducting tax at source on ***aggregate salary***. Suppose X selects B Ltd., then tax will be deducted by both companies as follows :

	A Ltd.
Estimated taxable salary (₹ 25,000 x 12)	3,00,000
Tax on ₹ 3,00,000 (after deducting rebate u/s 87A)	3,000
Add : Education cess @ 2%	60
	3,060
Add : Secondary and higher education cess @ 1%	30
Estimated tax liability	3,090
Tax to be deducted every month (Tax liability/12)	257.50

The above information pertaining to A Ltd. will be submitted by X to B Ltd. in **Form No. 12B**. B Ltd. will deduct tax on the ***aggregate salary*** as follows :

	B Ltd.
Estimated taxable salary (₹ 25,000 x 12 + 32,000 x 12)	6,84,000
Tax on above	61,800
Add : Education cess @ 2%	1,236
	63,036
Add : Secondary and higher education cess @ 1%	618
Estimated tax liability (rounded-off)	63,654
Less : Tax to be deducted by A Ltd.	3,090
Tax to be deducted by B Ltd.	60,564
Tax to be deducted every month (Tax liability/12)	5,047

Illustration :

Y is employed by C Ltd. upto June 30, 2014 (salary being ₹ 50,000 per month). On July 1, 2014, he joins D Ltd. (salary being ₹ 55,000 per month). Determine the tax deducted by C Ltd. and to be deducted by D Ltd. at source every month.

Solution :

	C Ltd.
Estimated taxable salary (₹ 50,000 x 12)	6,00,000
Tax on above	45,000
Add : Education cess @ 2%	900
	45,900
Add : Secondary and higher education cess @ 1%	450
Estimated tax liability	46,350
Tax to be deducted every month (Tax liability/12)	3,862.50
Actual tax deducted from 1-4-2014 to 30-6-2014 (₹ 3,862.50 x 3)	11,587.50

The above information pertaining to C Ltd. will be submitted by Y to D Ltd. in Form No. 12B. D Ltd. will deduct tax on the ***aggregate salary*** as follows :

	D Ltd.
Estimated taxable salary (₹ 50,000 x 3 + 55,000 x 9)	6,45,000
Tax on above	54,000

Add : Education cess @ 2%	1,080
	55,080
Add : Secondary and higher education cess @ 1%	540
Estimated tax liability (rounded off)	55,620
Less : Tax deducted by C Ltd.	11,587.50
Tax to be deducted by D Ltd.	44,032.50
Tax to be deducted every month (Tax liability/9)	4,892.50

- Employer may, at the time of making deduction of tax from salaries, increase or reduce the amount to be deducted for the purpose of adjusting any excess or deficiency arising out of any previous deduction or failure to deduct during the financial year. In such a case interest u/s 201(1A) for failure to deduct tax at source or after deduction failure to deposit TDS shall not be levied .
- If the employer has deducted tax on salary but has not deposited the same to the credit of Central Government, then, according to section 205, the employee is not required to pay the tax again, if he has sufficient reason to prove that his TDS has been deducted by the employer (e.g. salary slip). A.O. shall recover the TDS from the employer.

Bar against direct demand on assessee [Section 205] :

Where tax is deductible at the source, the assessee (i.e. deductee) shall not be called upon to pay tax himself to the extent to which ***tax has been deducted*** from that income, whether or not the deductor has paid the same to the credit of the Central Government.

- Employer shall have an option to pay tax on behalf of an employee, without making any deduction from his income, on the income in nature of perquisites, which are ***not provided by way of monetary payment***. For the purpose of paying tax, tax shall be determined at the average of income-tax computed on the basis of the rates in force for the financial year, **on the income chargeable under the head "salaries"** ***including*** the value of non-monetary perquisites **[Section 192(1A)]**.

Note :

Income-tax paid by the employer in respect of non-monetary perquisites provided to its employees is exempt in the employee's hands u/s 10(10CC), and the same is not deductible while computing business income of the employer as per Section 40(a)(v).

Illustration :

During the P.Y. 2014-15, the income chargeable under the head "Salaries" of an employee of A Ltd. is ₹ 5,00,000 which includes taxable value of perquisite of ₹ 60,000 in respect of rent-free unfurnished house. The employee has invested ₹ 40,000 in NSC.

Determine the amount of monthly tax to be deducted by A Ltd. u/s 192. What will be the tax implications if A Ltd. exercises option u/s 192(1A)?

Solution :

Computation of amount of monthly tax to be deducted by A Ltd. u/s 192

Particulars	₹
Income chargeable under the head salaries (inclusive of perquisite in respect of rent-free unfurnished house)	5,00,000
Less : Deduction u/s 80C	40,000
Total Income/Taxable Income	4,60,000
Tax on above (after deducting rebate u/s 87A)	19,000
Add : Education cess @ 2%	380
	19,380
Add : Secondary and higher education cess @ 1%	190
Tax liability	19,570
Tax to be deducted every month (Tax liability/12)	1,631

Computation of amount of monthly tax to be deposited by A Ltd. u/s 192(1A)

Particulars	₹
Income chargeable under the head salaries (inclusive of perquisite in respect of rent-free unfurnished house)	5,00,000
Tax on ₹ 5,00,000 (after deducting rebate u/s 87A and including EC and SHEC)	23,690
Average rate of tax (23,690/5,00,000 x 100)	4.738%
Tax payable on non-monetary perquisites (₹ 60,000 x 4.738%)	2,843
Amount required to be deposited each month u/s 192(1A) (₹ 2,843/12)	237

Now following consequences shall follow :

- Employer shall deduct ₹ 16,727 (i.e. ₹ 19,570 - ₹ 2,843) from employee's salary u/s 192. Monthly deduction of tax shall be ₹ 1,394 (i.e. 16,727/12) from employee's salary.
- Employer shall deposit ₹ 2,843 (₹ 237 monthly) from his own pocket u/s 192(1A).
- In the hands of employee ₹ 2,843 is not taxable as salaries u/s 10(10CC).
- While calculating business income of A Ltd., ₹ 2,843 is not deductible as business expenditure as per Section 40(a)(v).
- The employee shall get credit of the following amounts of TDS (because employer shall issue TDS certificate to him) :

Particulars	₹
Tax deduction at source u/s 192	16,727
Tax deposited u/s 192(1A) on non-monetary perquisite	2,843
Total	**19,570**

- **CIT v. Eli Lilly & Co. (India) (P) Ltd. : (2009) 223 CTR 0020 (SC) :**

Assessee entered into a joint venture with a foreign company. Foreign company sent some employees for rendering service to joint venture in India. Home salary and special allowance (education allowance and retention allowance) was paid by foreign company abroad for rendering of services in India and no work is found to have been performed for foreign company by such employees.

Assessee failed to deduct TDS u/s 192 on home salary and special allowance paid outside India by the foreign company to its expatriated employees in India.

The Supreme Court held that assessee was duty bound to deduct tax at source u/s 192 particularly when no work is found to have been performed for foreign company by such employees and the total remuneration stood paid only on account of services rendered in India during the period in question.

- **CIT v. Larsen & Toubro Ltd. : (2009) 221 CTR 0620 (SC) :**

The point in issue was whether the assessee (i.e. employer) was under statutory obligation under Income Tax Act, 1961, and/or the Rules to collect evidence to show that its employees had actually utilized the amount paid towards leave travel concession/conveyance allowance.

It was held that the beneficiary of exemption under section 10(5) is an individual employee. There is no circular of Central Board of Direct Taxes (CBDT) requiring the employer under section 192 to collect and examine the supporting evidence to the declaration to be submitted by an employee.

For the above reason, it was held that assessee (i.e. employer) was under **no** statutory obligation to collect evidence to show that its employees had actually utilized the amount paid towards leave travel concession/conveyance allowance while deducting TDS.

TDS from interest on securities [Section 193]

No tax is to be deducted at source in respect of the following :

(a) ***any security*** of the Central Government or State Government;

Note : Person responsible for paying to a resident any interest on **8% Savings (Taxable) Bonds, 2003** shall deduct the income-tax if interest payable on such bonds exceeds ₹ 10,000 during a financial year.

(b) any interest payable on any security issued by a company, where such security is in dematerialised form and is listed on a recognised stock exchange in India.

Note : This exception has been provided in order to facilitate development of corporate bond market for improving the availability of finances for infrastructure development.

(c) any interest payable to an individual/HUF (who is resident in India), on any debenture (whether listed or unlisted) issued by a company (in which the public are substantially interested), if :

(i) the amount of interest (or the aggregate amount of interest) paid or payable during the financial year by the company to such individual/HUF does not exceed ₹ 5,000; and

(ii) such interest is paid by the company by an account payee cheque.

TDS from Dividends [Section 194]

- The principal officer of a domestic company (i.e. Indian company or a company which has made the prescribed arrangements for declaration and payment of dividend within India to a shareholder who is resident in India) is required, before making any payment for deemed dividend under Section 2(22)(e), to deduct tax at source from the amount of dividend at the rate of 10%.
- Dividend may be interim dividend OR normal (final) dividend OR deemed dividend [Sections 2(22)(a), 2(22)(b), 2(22)(c), 2(22)(d) and 2(22)(e)]. Section 194 is applicable only if the dividend is covered under Section 2(22)(e) because such dividend is taxable in the hands of the shareholder. No tax is required to be deducted from interim dividend or normal (final) dividend or deemed dividend covered under Sections 2(22)(a), 2(22)(b), 2(22)(c) and 2(22)(d) because these dividends are exempt in the hands of the shareholder as per Section 10(34).
- No tax shall be deductible in the case of a shareholder, being an individual if the following conditions are satisfied :

  (a) The dividend is paid by the company by an account payee cheque; and

  (b) The amount of dividend paid/payable during the financial year does not exceed ₹ 2,500.

TDS from interest other than interest on securities [Section 194A]

Following are the cases where tax is not required to be deducted u/s 194A :

1. where the ***aggregate*** amount of interest credited or paid during the financial year does not exceed :

- ₹ 10,000 where payer is a banking company/co-operative society carrying on business of banking/post-office
- ₹ 5,000 in any other case.

2. where interest is paid or credited to :

- any banking company, or any co-operative society engaged in carrying on the business of banking (including a co-operative land mortgage bank), or
- any financial corporation established by or under a Central, State or Provincial Act, or
- the Life Insurance Corporation of India, or
- the Unit Trust of India, or
- any company or co-operative society carrying on the business of insurance, or

3. where interest is credited or paid by the firm to its partners(s);
4. where interest is credited or paid by a co-operative society to its member(s) or to any other co-operative society;
5. where interest is credited or paid in respect of deposits under the schemes of Post Office (Time Deposits), Post Office (Recurring Deposits), Post Office Monthly Income Account, Kisan Vikas Patra, NSC VIII Issue and Indra Vikas Patra;
6. where interest is credited or paid on recurring deposits and saving account by banks/co-operative society engaged in business of banking. However tax shall be deducted on interest on time deposits i.e. FDRs with banks/co-operative society engaged in business of banking;
7. where interest is credited or paid in respect of deposits with a primary agricultural credit society or a primary credit society or a co-operative land mortgage bank or a co-operative land development bank;
8. where interest is credited or paid by the Central Government under any provision of Income-tax Act, 1961 or Wealth-tax Act, 1957. However, TDS shall be deducted u/s 195 where such interest is paid to a non-resident;
9. where interest is credited or paid on compensation awarded by the Motor Accidents Claims Tribunal if the amount of payment or the aggregate amount of such payment credited or paid during the financial year does not exceed ₹ 50,000;
10. where interest is credited or paid by an Infrastructure capital company/an infrastructure capital fund/a public sector company/a scheduled bank in relation to a zero coupon bond issued by it.

❖ Circular No. 3/2010, Dt. 2-3-2010

In case of banks using CBS software, interest payable on time deposits is calculated generally on daily basis or monthly basis and is swept & parked accordingly in the provisioning account for the purposes of macro-monitoring only. However, constructive credit is given to the depositor's/payee's account either at the end of the financial year or at periodic intervals as per practice of the bank or as per the depositor's/payee's requirement or on maturity or on encashment of time deposits; whichever is earlier.

Since no constructive credit to the depositor's/payee's account takes place while calculating interest on time deposits on daily or monthly basis in the CBS software used by banks, tax need not be deducted at source on such provisioning of interest by banks for the purposes of macro monitoring only. In such cases, tax shall be deducted at source on accrual of interest at the end of financial year or at periodic intervals as per practice of the bank or as per the depositor's/payee's requirement or on maturity or on encashment of time deposits; whichever event takes place earlier; whenever the aggregate of amounts of interest income credited or paid or likely to be credited or paid during the financial year by the banks exceeds the limits specified in section 194A.

❖ Circular No. 8/2011, Dt. 14-10-2011

TDS on deposits in banks in the name of the Registrar/ Prothonotary and Senior Master attached to the Supreme Court/ High Court etc. during the pendency of litigation of claim/compensation

Section 194A of Income-tax Act, 1961 ("the Act") stipulates deduction of tax at source (TDS) on interest other than interest on securities if the aggregate of amount of such interest credited or paid to the account of the payee during the financial year exceeds the specified amount.

2. The Board has received references expressing difficulties in implementation of provisions of section 194A of the Act in a situation where in the course of the proceedings before Supreme Court/High Court/ any other court or Tribunal (hereinafter "the court"), one or more than one litigant (hereinafter the depositor) is directed by the court that a specified amount (hereinafter "deposit") be deposited in the bank either directly or through the court in order to protect the interest of litigants. Such deposits (usually time deposits) are kept in the bank in the names of Registrar/Prothonotary and Senior Master or any other name as per the order of the court. Difficulties are faced in making TDS on the interest periodically accruing on such deposits/time deposits and about the person(s) as deductee who is entitled to TDS certificate in Form 16A.

3.1 The matter has been examined in the Board and it has been decided that, this circular shall be applicable to cases where one or more than one litigant is directed by the court that a specified amount be deposited in the bank directly or through the court. The bank shall in accordance with the provisions of the Act, deduct tax at source on the interest accruing on the above mentioned deposit(s) as per existing procedure and at the rates in force. The certificate of deduction of tax shall be issued by the bank in the name of the depositor. If more than one person has been directed to deposit any specified amount, the amount of TDS shall be corresponding to each such depositor for the portion of interest accrued in its respective share in the total amount deposited and TDS certificates shall be accordingly issued by the bank.

3.2 At the time of making deposit of the amount ordered by the court, the depositor(s) shall submit a prescribed declaration with the court for record purpose and to facilitate the administration of TDS. The Registrar/Prothonotary and Senior Master or any person authorized by the court will pass the information furnished therein to the bank concerned for TDS properly in the name of the depositor(s) in accordance with the provisions of the Act.

3.3 Some of the instances covered by this circular are :

(a) "In the course of appellate proceedings, the court directs an insurance company (the depositor) to deposit a part of compensation awarded by Motor Accident Claims Tribunal. This amount is deposited as Time Deposit in a bank in such name as per the directions of the court, the credit of TDS on interest accruing on such deposit will be allowed to the Insurance company which has made the said deposit.

(b) "The court while deciding the cases of land compensation directs the authority concerned (liable for making payment of compensation) to deposit any sum in time deposit in any bank, the TDS on time deposit shall be in the name of the authority making deposit, if such authority is an entity liable for charge to Income-tax on its income. In case the deposit in the bank is by Central or State Government no tax will be deducted.

(c) "The court adjudicating upon financial dispute during pendency of proceedings direct any party(ies) to deposit any amount as security in time deposit, the TDS on interest accruing on such deposit will be in name of the depositor irrespective of the fact that at the directions of the court such time deposit has been drawn in the name of the officer of the court or joint name or any other name.

***Rule 37BA(2)(i)* :**

Where under any provisions of the Act, the whole or any part of the income on which tax has been deducted at source is assessable in the hands of a person other than the deductee, credit for the whole or any part of the tax deducted at source, as the case may be, shall be given to the other person and not to the deductee provided that the deductee files a declaration with the deductor and the deductor reports the tax deduction in the name of the other person to the income-tax authority or the person authorised by such authority.

***Rule 37BA(2)(ii)* :**

The declaration filed by the deductee under Rule 37BA(2)(i) shall contain the name, address, permanent account number of the person to whom credit is to be given, payment or credit in relation to which credit is to be given and reasons for giving credit to such person.

TDS from winnings from any lottery or crossword puzzle or card game and other game of any sort [Section 194B]

- Where amount of winning is paid in instalments, the deduction of tax is to be made at the time of actual payment of each such instalment.
- Prizes won by an agent/trader in respect of prizes on unsold/unclaimed lottery tickets in possession of the agent/trader is IOS and not PGBP and therefore liable to tax u/s 115BB @ 30% in the hands of the agent/trader and TDS shall be deducted by the lottery company @ 30% u/s 194B while paying lottery prize to agent/trader.

❖ **CIT v. Manjoo & Co. : [2010] 195 Taxman 39 (Kerala HC)**

The assessee was a wholesale distributor of lotteries organized by the State of Kerala. Under the distribution agreement, it was entitled to certain discount on the purchase of lottery tickets. If the tickets purchased by it were not fully sold out before the draw date, then loss would be to the account of the assessee.

For the relevant assessment years, certain unsold tickets held by the assessee were the prize winning tickets and on production of those tickets the Lottery Directorate paid the prize money to the assessee after recovery of tax at source u/s 194B @ 30% treating the payments as 'winnings from lotteries'.

According to the assessee, it being engaged in the business of purchase and sale of lottery tickets as a wholesale distributor of lottery department of the State, the lottery tickets held on the date of draw were stock-in-trade and, so much so, prize won on such tickets was income from business. Therefore, in the return of income, it claimed the prize money as its business income. The Assessing Officer, however, rejected the claim holding that the prize money received in the lottery was assessable at the special rate provided under section 115BB and it could not be treated as its business income. On appeal, the CIT (Appeals) allowed the assessee's claim. The ITAT upheld the order of the CIT (Appeals).

On the revenue's appeal it was held by the Kerala High Court that :

"Of course, the purchase and sale of tickets by the assessee was a business. However, there was no business activity in claiming prize money from the Lotteries Department by producing the lottery ticket which got the prize. ***The entire lottery tickets ceased to be stock-in-trade on the date of draw, because after the draw those tickets were unsaleable and had no value except waste paper value that the assessee would get on sale of the same***.

At the time of draw the assessee was only a participant in the draw for all the tickets held by it and that did not involve any business activity and, so much so, the prize won by it was only in its capacity as the holder of the tickets. Therefore, income by way of winnings from lottery is always "income from other source".

In view of the specific provision contained in section 115BB, the special rate of tax is applicable to all winnings from lotteries. What is provided in the said section is that where the total income includes any income by way of winnings from lotteries or crossword puzzle, etc., the income-tax payable shall be calculated at the rate of 30%. Special rate of tax, i.e., 30% provided u/s 115BB is applicable even if winnings from lotteries are in the nature of business income as claimed by the assessee".

⏩ In a case where the winnings are wholly in kind or partly in cash and partly in kind but the part in cash is not sufficient to meet the liability of deduction of tax in respect of whole of the winnings, the person responsible for paying shall, before releasing the winnings, ensure that tax has been paid in respect of the winnings.

Example 1 :

X, a resident individual, wins a motor car in a lucky draw held by Y Limited. The market price of the car is ₹ 3,00,000. Discuss the tax implication.

Answer :

In this case before giving car to X, Y Limited will recover ₹ 90,000 from X [30% of ₹ 3,00,000 + EC = Nil + SHEC = Nil]. If Y Limited cannot recover the tax as per terms of the draw, then Y Limited shall have to pay TDS itself calculated as under :

$$\text{Gross Winning} = \text{Net Winning x } \frac{100}{100 - \textit{Rate of TDS}}$$

$$= ₹\ 3,00,000 \text{ x } \frac{100}{100 - 30} = ₹\ 4,28,571/-$$

Therefore, the amount of TDS shall be = 4,28,571 x $\frac{30}{100}$ = 1,28,571/-

Y Limited shall deposit ₹ 1,28,571/- as TDS and the gross income of X shall be ₹ 4,28,571/- (₹ 3,00,000 + ₹ 1,28,571). Y limited will issue TDS Certificate of ₹ 1,28,571 to X.

Example 2 :

Suppose in Example 1 there was also cash prize of ₹ 1,00,000 in addition to motor car. Discuss the tax implications.

Answer :

In this case before giving car to X, Y Limited will recover ₹ 20,000 from X [30% of ₹ 4,00,000 + EC = Nil + SHEC = Nil - Cash Prize of ₹ 1,00,000]. If Y Limited cannot recover the tax as per terms of the draw, and it has to bear tax on entire winning of ₹ 4,00,000 then Y Limited shall have to pay TDS itself calculated as under :

$$\text{Gross Winning} = \text{Net Winning x } \frac{100}{100 - \textit{Rate of TDS}}$$

$$= ₹\ 4,00,000 \text{ x } \frac{100}{100 - 30} = ₹\ 5,71,429/-$$

Therefore, the amount of TDS shall be = $5,71,429 \text{ x } \frac{30}{100}$ = 1,71,429/-

Y Limited shall deposit ₹ 1,71,429/- as TDS and the gross income of X shall be ₹ 5,71,429/- (₹ 4,00,000 + ₹ 1,00,000 + ₹ 1,71,429). Y limited will issue TDS Certificate of ₹ 1,71,429 to X.

Example 3 :

Suppose in Example 1 there was also cash prize of ₹ 1,00,000 in addition to motor car. Discuss the tax implications if Y Limited cannot recover tax from winner but company can adjust cash prize of ₹ 1,00,000 towards tax.

Answer :

If Y Limited cannot recover tax from winner but company can adjust cash prize of ₹ 1,00,000 towards tax then Y Limited shall have to pay TDS calculated as under :

$$\text{Gross Winning} = \text{Net Winning x } \frac{100}{100 - \textit{Rate of TDS}}$$

$$= ₹\ 4,00,000 - ₹\ 1,00,000 \text{ x } \frac{100}{100 - 30} = ₹\ 4,28,571/-$$

Therefore, the amount of TDS shall be = $4,28,571 \text{ x } \frac{30}{100}$ = 1,28,571/-

Y Limited shall deposit ₹ 1,28,571 as TDS (₹ 1,00,000 from cash prize adjusted by it and ₹ 28,571 from its own pocket) and the gross income of X shall be ₹ 4,28,571 (₹ 3,00,000 + ₹ 1,00,000 + ₹ 28,571). Y limited will issue TDS Certificate of ₹ 1,28,571 to X.

TDS from payments to contractors or sub-contractors [Section 194C]

- **Tax is deductible on the entire consideration <u>including</u> Service Tax, if any.**
- The expression "contract"' shall include "sub-contract".
- The expression "'works contract" shall include :
  - (a) advertising;
  - (b) broadcasting and telecasting including production of programmes for such broadcasting or telecasting;
  - (c) carriage of goods and passengers by any mode of transport <u>other than by railways</u>;

(d) catering.

(e) manufacturing or supplying a product according to the requirement or specification of a customer by using material purchased from **such** customer.

Note : Section 194C(3) : Where any sum is paid or credited for carrying out any work mentioned in (e) above [i.e. Job work], tax shall be deducted at source :

(i) on the invoice value excluding the value of material, if such value is mentioned separately in the invoice; or

(ii) on the whole of the invoice value, if the value of material is not mentioned separately in the invoice.

- The expression "'works contract" does not include manufacturing or supplying a product according to the requirement or specification of a customer by using material purchased from a person, **other than such customer** because in that case it will be contract of ***sale***. Therefore, TDS is not required to be deducted.

Illustration : Mr. X entered into a contract with Khadim Shoes for making 5,000 shoes according to design provided by them. Mr. X will get ₹ 100 per shoes as making charges. Compute the amount of TDS, if any, to be deducted by Khadim Shoes under the following circumstances :

(a) Leather and other materials shall be provided by Khadim Shoes.

(b) Leather and other materials shall be purchased by Mr. X from Khadim Shoes at ₹ 15,00,000. Mr. X raises an invoice showing separately making charge : ₹ 5,00,000 and cost of material : ₹ 15,00,000.

(c) Leather and other materials shall be purchased by Mr. X from Khadim Shoes at ₹ 15,00,000. Mr. X raises a consolidated invoice of ₹ 20,00,000.

(d) Leather and other materials are purchased by Mr. X from market at ₹ 15,00,000. Mr. X raises an invoice showing separately making charge : ₹ 5,00,000 and cost of material : ₹ 15,00,000.

Answer :

(a) This is a works contract and TDS @ 1% shall be deducted by Khadim Shoes on making charges of ₹ 5,00,000.

(b) Since the value of material is separately mentioned in the invoice, TDS @ 1% shall be deducted by Khadim Shoes on making charges of ₹ 5,00,000.

(c) Since the value of material is not separately mentioned in the invoice, TDS @ 1% shall be deducted by Khadim Shoes on whole of the invoice value i.e. ₹ 20,00,000.

(d) This is a contract of sale and not a works contract because material has been purchased from a person other than customer i.e. Khadim Shoes. Therefore, TDS is not required to be deducted.

- **Section 194C(5) :**

No deduction shall be made under Section 194C from the amount of any sum credited or paid to the contractor or sub-contractor, if such sum does not exceed ₹ 30,000. However, if the ***aggregate*** of the amounts of such sums credited or paid during the financial year exceeds ₹ 75,000, the person responsible for paying such sum shall be liable to deduct income-tax. In other words, the tax will required to be deducted at source where the amount credited or paid to a contractor or sub-contractor exceeds ₹ 30,000 at one time or ₹ 75,000 in the aggregate during a financial year inspite of the fact that separate contracts are entered into with that person. This provision has been inserted to prevent the splitting up of the contract.

The aforesaid provision can be made more clear from the following table :

Situations	Whether TDS is to be deducted?
Single contract of ₹ 30,000 in a year	No
Two contracts of ₹ 30,000 each in a year	No
Three contracts of ₹ 30,000 each in a year	TDS is to be deducted on ₹ 90,000

Situations	Whether TDS is to be deducted?
Single contract of ₹ 31,000 in a year	TDS is to be deducted on ₹ 31,000
Five contracts of ₹ 15,000 each in a year	No
Six contracts of ₹ 15,000 each in a year	TDS is to be deducted on ₹ 90,000
Single contract of ₹ 75,000 in a year	TDS is to be deducted on ₹ 75,000

- **Section 194C(6) :**

No deduction shall be made from any sum credited or paid during the previous year to the account of a contractor during the course of business of plying, hiring or leasing goods carriages, on furnishing of his PAN, to the person paying or crediting such sum.

Note : If PAN is not furnished then 20% TDS shall be deducted as per Section 206AA.

- **Section 194C(7) :**

The person responsible for paying or crediting any sum to the person referred to in Section 194C(6) shall furnish, to the prescribed income-tax authority or the person authorised by it, such particulars, in such form and within such time as may be prescribed.

- **Rule 31A(4)(vi)** :

The deductor at the time of preparing ***statements of tax deducted*** (i.e. TDS return) shall furnish particulars of amount paid or credited on which tax was not deducted in view of the compliance of provisions of Section 194C(6) by the payee.

- **East India Hotels Ltd. v. CBDT : [2009] 179 Taxman 17 (Bombay HC)**

The petitioner-company operated a number of five star deluxe hotels all over India. It offered various facilities, apart from boarding and lodging, to its guests like house-keeping of highest standard, selected restaurants, bank counter, beauty saloon, etc. It filed the instant writ petition challenging the validity of the CBDT Circular No. 681, dated 8-3-1994, as a result whereof every customer of the petitioner-hotel, while making payment to the hotel for occupying its room and availing other facilities provided by the hotel, was required to deduct income-tax at the rate specified in section 194C.

Bombay HC held that the services rendered by a hotel to its customers by making available certain facilities/amenities like providing multi-lingual staff, 24 hours service for reception, telephones, bank counter, beauty saloon, barber shop, car rental, shopping centre, laundry, health club, etc., ***do not involve carrying out any work*** and, therefore, would be outside the purview of section 194C.

- **CIT (TDS) v. Shree Mahalaxmi Transport Co. : [2011] 339 ITR 484 (Gujarat HC)**

Where assessee-transporter had given sub-contracts to dumper owners for transportation of goods and dumpers were not taken on hire/rent, payments to sub-contractors would attract provisions of section 194C and not provisions of section 194-I.

The high court held that assessee has given contracts to the dumper owner for the transportation of goods and has not taken machineries and equipment on rent. Since the transactions in question being in the nature of contracts for shifting of goods from one place to another would be covered as works contracts and such payments could not be termed as rent paid for the use of machinery and the provisions of section 194-I would not be applicable.

- **Deduction of tax at source on payment of gas transportation charges by the purchaser of natural gas to the seller of gas (Circular No. 9/2012, dated 17.10.2012) :**

If the Owner/Seller of the gas sells as well as transports the gas to the purchaser till the point of delivery, where the ownership of gas to the purchaser is simultaneously transferred, the manner of raising the sale bill (whether the transportation charges are included in the cost of gas or shown separately) does not alter the basic nature of such contract which remains essentially a 'contract for sale' and not a 'works contract' as envisaged in Section 194C. Therefore, in such circumstances, TDS is not deductible on the component of Gas Transportation Charges paid by the purchaser to the Owner/Seller of the gas.

However, transportation charges paid to a third party transporter of gas, either by the Owner/Seller of the gas or purchaser of the gas, shall continue to be governed by the appropriate provisions of the Act and tax shall be deductible at source on such payment to the third party at the applicable rates.

TDS from Commission or brokerage [Section 194H]

- **Third Proviso to Section 194H :**

No deduction shall be made under this Section on any commission or brokerage by Bharat Sanchar Nigam Limited (BSNL) or Mahanagar Telephone Nigam Limited (MTNL) to their public call office franchisees.

- **Explanation (i) to Section 194H :**

"Commission or brokerage" includes any payment received or receivable, directly or indirectly, by ***a person acting on behalf of another person*** [1] :

(a) for services rendered (not being ***professional services*** [2]), or

(b) for any services in the course of buying or selling of goods, or

(c) in relation to any transaction relating to any asset, valuable article or thing, **not being securities**[3].

[1]The element of agency must be present in all services or transactions in order to fall within the expression ***"commission or brokerage"***. For example commission to employees and employee directors shall form part of salary income and is subject to TDS u/s 192 and not under this section.

[2]***"professional services"*** means services rendered by a person in the course of carrying on a legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or such other profession as is notified by the CBDT for the purposes of Section 44AA.

[3]The transactions relating to securities are not covered u/s 194H. Therefore, section 194H is not attracted on :

(a) Commission or brokerage paid to underwriters.

(b) Brokerage or sub-brokerage on public issue of securities.

(c) Brokerage on transaction of securities through stock exchange.

- **Letter F. No. 275/70/2009-IT(B) :**

Commission and supplementary commission received by the travel agents from Airlines are liable to TDS u/s 194H.

- **CBDT Circular No. 619, Dated 4-12-1991 : Commission and brokerage retained by the consignee/agent :**

A question may arise whether there would be deduction of tax at source under Section 194H where commission or brokerage is retained by the consignee/agent and not remitted to the consignor or principal while remitting the sale consideration. It may be clarified that since the retention of commission by the consignee/agent amounts to constructive payment of the same to him by the consignor/principal, deduction of tax at source is required to be made from the amount of commission. Therefore, the consignor/principal will have to deposit the tax deductible on the amount of commission income to the credit of Central Government, within the prescribed time.

- **CBDT Circular No. 6/2003, Dated 3-9-2003 : No TDS under Section 194H on Turnover Commission payable by RBI to Agency Banks :**

The work of receipt of tax payments and issue of refunds is conducted by banks authorized for such purpose by the RBI. As a compensation for the work so conducted, the Central Government pays to the banks, through RBI, commission termed as "Turnover Commission". The CBDT has decided that tax would not be required to be deducted by RBI on the amount of Turnover Commission paid or credited by it as the Agency Banks (Banks authorized for conducting Government business) are performing the general banking business of the Central and State Government on behalf of RBI.

- **CIT v. Director, Prasar Bharti : (2010) 189 TAXMAN 0315 (Ker-HC) :**

An agreement was entered into with telecasting channel (DD) and advertising agencies to procure advertisement from customers. Assessee (DD) did not deduct tax at source under section 194H on payment made to advertising agents by way of commission. It was held by the Kerala HC that there was principal and agent relationship between DD and advertising agents and, therefore, payment made to agents was clearly a commission payment and thus, assessee was required to deduct TDS at the rate of 15% of the payment made to the agent.

Advertising agencies procured advertisement on behalf of Doordarshan under agreement between them and the advertisement charges recovered from the customers were also in accordance with **tariff prescribed by Doordarshan** which was incorporated in the agreement. There was a provision in the agreement permitting advertising agencies to retain 15% of the advertising charges payable by them to Doordarshan towards commission from out of the charges received for advertising services from customers.

It was specifically stated in the agreement that **advertisement material should also conform to the discipline introduced by Doordarshan** because it cannot telecast all what is desired to be telecast by advertising agencies. Doordarshan was also bound by advertisement contract procured by advertising agencies and it was their **duty under the agreement between them and the advertising agencies to telecast advertisement material in terms of the contract which the agency signs with the customer**. Therfore court held that there was pure agency arrangement between the Doordarshan and the advertising agencies because one acts for the other and the act of the agent binds the Doordarshan in their capacity as principal of the agent.

Court also held that commission or brokerage defined under Explanation (i) to section 194H has a wide meaning and it covers any **payment received or receivable directly or *indirectly*** by a person acting on behalf of another person for services rendered. Advertisement charges collected by agents were for Doordarshan and agents were allowed to retain 15% of the commission by the respondent **only to avoid the hassle of deposit of full amount and repayment of 15% thereof towards commission**. It was also observed that when Doordarshan receives 85% of the advertising charges from the advertising agency concerned, Doordarshan accounts full amount as received from the customer for whom advertisement was undertaken, crediting 85% received in their account and simultaneously crediting 15% in the account of the advertising agency. In clause 2(e) of the agreement between Doordarshan and advertising agencies it was stated that agent will pay to the Doordarshan through DD or cheque the TDS amount payable on the commission retained by agents.

- **CIT v. Idea Cellular Ltd. : (2010) 230 CTR 0043 (Delhi HC) :**

Assessee-company, a cellular telephone network provider, offered discount to distributors known as prepaid market associates (PMAs) appointed by it to sale pre-paid cards or recharge coupons. The distributors appointed agents to provide SIM Cards and/or recharge coupons to ultimate consumers/subscribers. PMAs were required to pay in advance to assessee under agreement. Even though, advance payment was made, it could not be said ***sale*** as unsold SIM Cards and/or recharge coupons could be returned to assessee and amount received as advance was to be returned by assessee. Discount offered by assessee to distributors of SIM Cards/recharge coupons is commission and principal and agent relationship is established. Assessee did not deduct TDS on the discount/commission. It was held that Assessee was liable to deduct tax at source under section 194H and on non-deduction of TDS, assessee was defaulter under section 201.

- **Ahmedabad Stamp Vendors Association v. Union of India : [2002] 124 Taxman 628 (Gujarat HC)**

The petitioner was a registered association of the stamp vendors of Ahmedabad. The Income-tax Department asked the State Government to deduct tax at source under section 194H on the commission or brokerage paid to stamp vendors. The petitioner approached the Court for a declaration that section 194H was not applicable on the ground that the licenced vendor had to pay the price of the stamp papers less the discount which vary from 0.5% to 4%. Stamp vendor does not collect the stamp papers from the Government, sells them to the retail customers and then deposits the sale proceeds with the Government less the discount. It was further contended that the licenced vendor would not be entitled to get any compensation or refund of the price if the stamp papers were to be **lost or destroyed** and even when the stamp papers are returned, the Government pays the stamp vendors 10% less than the face value of the stamp paper as against hardly 0.5% to 4% of discount which the stamp vendor gets at the time of purchasing stamp papers.

The crucial question is whether ownership in the stamp papers passed to the stamp vendor when the Treasury Officer delivers stamp papers on payment of price less discount. Perusal of the Gujarat Stamps Supply and Sales Rules, 1987 indicates that the 'stamp vendors' are purchasers of stamp papers under contract of sale and there is no contract of agency between the Government and the stamp vendors. Treasury is neither paying commission nor brokerage to stamp vendors. Treasury only allows them discount. Discount is neither paid by cash nor by cheque but it is allowed as less payment.

Entry 84 in Schedule I to the Gujarat Sales-tax Act, 1969 specifically exempts sale of stamp papers by the licensed vendors. The very basis of enacting the provision by the State Legislature for giving exemption from sales-tax in respect of sale of stamp papers by the licensed vendors was the fact that the sale of stamp papers by the licensed vendors to the customers would have been otherwise liable to sales-tax. The question of levy of sales-tax would arise only because the licensed vendors themselves sell the stamp papers on their own and not as agents of the State Government. Had they been treated as agents of the State Government, the question of levy of sales-tax on sale of stamp papers by them would not arise and consequently there would have no necessity for any exemption provision in this regard.

When the licensed stamp vendors took delivery of stamp papers on payment of full price less discount and they sell such stamp papers to retail customers, neither of the two activities (buying from the Government and selling to the customers) can be termed as the ***service in the course of buying or selling of goods***.

In view of the above, Gujarat HC held that the discount made available to the licensed stamp vendors does not fall within the expression 'commission' or 'brokerage' under section 194H.

The Supreme Court also dismissed the appeal of the department against the aforesaid judgment of Gujarat HC and affirmed the decision of the Gujarat High Court holding that 0.50% to 4% discount given to the Stamp Vendors is for purchasing the stamps in bulk quantity and the said discount is in the nature of cash discount. Supreme Court also affirmed that the impugned transaction is a sale and consequently, section 194H of the Income-tax Act, 1961, has no application ***[CIT v. Ahmedabad Stamp Vendors Association : [2012] 348 ITR 378 (SC)]***.

- **CIT v. Hardarshan Singh : [2013] 350 ITR 0427 (Delhi HC) :**

Assessee carried on business of commission agent by arranging for transportation of goods through other transporters. The assessee used to collect freight charges from the clients who intended to transport their goods through separate transporters. The entire amount collected from the clients is paid to the transporters after deducting commission from the said amount.

Assessee claimed that contract was between clients and lorry owners/transporters; he acted only as a facilitator or intermediary and was not liable to deduct tax at source while making payments to transporters.

HC held that the contract was actually between the clients and lorry owners/transporters and the assessee was only an intermediary and, therefore, it was not the 'person responsible' for deduction of tax at source in terms of section 194C of the said Act.

TDS from rent [Section 194-I]

- Where there are various co-owners then the limit of ₹ 1,80,000 shall separately apply to each co-owner.
- Tax is to be deducted even on advance rent. No TDS is required to be deducted at the time of payment of security deposit since it cannot be treated as advance rent. However, tax is required to be deducted when the security deposit has been adjusted against rent.
- **Explanation (i) to Section 194-I :**

'rent' means any payment, by whatever name called, under any lease, sub-lease, tenancy or any other agreement or arrangement for the use of (either separately or together) any :

(a) land; or

(b) building (including factory building); or

(c) land appurtenant to a building (including factory building); or

(d) machinery; or

(e) plant; or

(f) equipment; or

(g) furniture; or

(h) fittings,

whether or not any or all of the above are owned by the payee.

Notes :

1. Where building is let-out along with furniture etc., tax is required to be deducted on entire rent @ 10%.

2. Section 194-I is applicable even if the person to whom rent is paid is not the owner of the building. In other words, tax is deductible even in case of sub-lease.

3. **Circular No. 718, Dt. 22-8-1995 :**

The Board received a number of queries from various persons regarding the application of the provision of Section 194-I. These queries were carefully considered by the Board and the following clarifications were issued for information and guidance of all concerned :

Query No. 1 : Whether tax is required to be deducted at source where a non-refundable deposit has been made by the tenant?

Answer : In cases where the tenant makes a non-refundable deposit tax would have to be deducted at source as such deposit represents the consideration for the use of the land or the building, etc., and, therefore, partakes of the nature of rent as defined in section 194-I. If, however, the deposit is refundable, no tax would be deductible at source. It is further clarified that if the deposit carries interest, the tax to be deducted on the amount of interest will be governed by section 194A of the Income-tax Act.

Query No. 2 : Whether the tax is to be deducted at source from warehousing charges?

Answer : The term 'rent' as defined in Explanation (i) of section 194-I means any payment by whatever name called, under any lease, sub-lease, tenancy or any other agreement or arrangement for the use of any building or land. Therefore, the warehousing charges will be subject to deduction of tax under section 194-I.

Query No. 3 : On what amount the tax is to be deducted at source if the rentals include municipal tax, ground rent, etc. ?

Answer : The basis of tax deduction at source under section 194-I is 'income by way of rent'. Rent has been defined, in the Explanation (i) of section 194-I, to mean any payment under any lease, tenancy, agreement, etc., for the use of any land or building. Thus, if the municipal taxes, ground rent, etc., are borne by the tenant, no tax will be deducted on such sum.

Query No. 4 : Whether section 194-I is applicable to rent paid for the use of only a part or a portion of any land or building ?

Answer : Yes, the definition of the term 'any land' or 'any building' would include a part or a portion of such land or building.

- **CIT v. Japan Airlines Co. Ltd. : (2009) 180 TAXMAN 0188 (Delhi HC) :**

Landing and parking charges paid to Airport Authority of India : The question that arose for consideration of High Court was whether landing/parking charges paid to the Airport Authority of India were payments, for a contract of work under section 194C or in the nature of rent as per section 194-I. The court observed that the word "rent" as defined in section 194-I had a wider meaning than "rent" in the common parlance. It included any agreement or arrangement for use of land. The court further observed that when the wheels of an aircraft coming into an airport touch the surface of the airfield, use of the land of the airport immediately begins. Similarly, for parking the aircraft in that airport, again, there is use of the land. Consequently, landing and parking fee are definitely "rent" within the meaning of the provisions of section 194-I as they are payments made for the use of the land of the airport.

- ~~**Circular No. 4/2008, Dt. 28th April, 2008 :**~~

~~Service tax paid by the tenant does not partake the nature of income of the landlord. The landlord only acts as a collecting agency for collection of service tax. Therefore, tax deducted at source u/s 194-I would be required to be made on the amount of rent only excluding the amount of service tax.~~

- ~~**Board Letter : F. No. 275/73/2007-IT(B), Dated June 30, 2008, addressed to Bombay Chamber of Commerce & Industry :**~~

~~The benefit of Circular No. 4/2008 dated 28th April, 2008 cannot be extended to Section 194J. In other words, tax is required to be deducted u/s 194J including the amount of service tax.~~

CIRCULAR NO. 1/2014 [F.NO.275/59/2012-IT(B)], DATED 13-1-2014

The Board had issued a Circular No. 4/2008, Dt. 28-04-2008 wherein it was clarified that tax is to be deducted at source under section 194-I of the Income-tax Act, 1961 (hereafter referred to as 'the Act'), on the amount of rent paid/payable without including the service tax component. Representations/letters has been received seeking clarification whether such principle can be extended to other provisions of the Act also.

2. Attention of CBDT has also been drawn to the judgement of the Hon'ble Rajasthan High Court dated 1-7-2013, in the case of *CIT (TDS) Jaipur* v. *Rajasthan Urban Infrastructure* (Income-tax Appeal No.235, 222, 238 and 239/2011), holding that if as per the terms of the agreement between the payer and the payee, the amount of service tax is to be paid separately and was not included in the fees for professional services or technical services, no TDS is required to be made on the service tax component u/s 194J of the Act.

3. The matter has been examined afresh. In exercise of the powers conferred under section 119 of the Act, the Board has decided that ***wherever in terms of the agreement/contract between the payer and the payee, the service tax component comprised in the amount payable to a resident is indicated separately, tax shall be deducted at source under Chapter XVII-B of the Act on the amount paid/payable without including such service tax component.***

4. This circular may be brought to the notice of all officer for compliance.

- **Circular No. 5/2001, Dt. 2-3-2001 :**

(a) Tax is required to be deducted even on advance rent pertaining to more than one financial year. Problem arises because such advance rent is taxable in more than one financial year while tax is deducted in the first year itself when such advance rent is received. It is to be noted that credit for entire amount of tax deducted at source is not allowed in terms of section 199 because the ***credit is to be given for the assessment year for which such income is assessable***. To remove practical difficulties it is clarified that where advance rent is spread over more than one financial year and tax is deducted thereon, credit shall be allowed in the same proportion in which such income is offered for taxation for different assessment years based on the single certificate furnished for tax so deducted on the entire advance rent. ii) Where tax has been deducted at source and paid to the Central Government and the income is assessable over a number of years, credit for tax deducted at source shall be allowed across those years in the same proportion in which the income is assessable to tax.

Rule 37BA(3)(ii) **:**

Where tax has been deducted at source and paid to the Central Government and the income is assessable over a number of years, credit for tax deducted at source shall be allowed across those years in the same proportion in which the income is assessable to tax.

(b) Problem also arise when subsequent to the deduction of tax at source on advance rent pertaining to one or more financial years rent agreement gets terminated/cancelled (or rented property is transferred by way of sale etc.) resulting into refund of balance amount of advance rent to the tenant. To remove practical difficulties it is clarified that in such a case credit for the entire balance of tax deducted at source, which has not been given credit so far, shall be allowed in the assessment year relevant to the financial year during which the rent agreement gets terminated/cancelled or rented property is transferred and balance of advance rent is refunded.

- **Circular No. 5/2002, Dt. 30-7-2002 : TDS on payment made to hotels :**

Section 194-I do not cover any payment for rent made by an individual or HUF except in cases where the total sales, gross receipts or turnover from business and profession carried on by the individual or HUF exceed the monetary limits specified under section 44AB. Where an employee or an individual representing a company (like a consultant, auditor, etc.) makes a payment for hotel accommodation directly to the hotel as and when he stays there, the question of tax deduction at source would not normally arise (except where he is covered under section 44AB as mentioned above) since it is the employee or such individual who makes the payment and the company merely reimburses the expenditure.

The meaning of 'rent' in section 194-I is wide in its ambit and scope. For this reason, payment made to hotels for hotel accommodation, whether in the nature of lease or licence agreements are covered, so long as such accommodation has been taken on 'regular basis'. Where earmarked rooms are let out for a specified rate and specified period, they would be construed to be accommodation made available on 'regular basis'. Similar would be the case, where a room or set of rooms are not earmarked, but the hotel has a legal obligation to provide such types of rooms during the currency of the agreement.

However, often, there are instances, where corporate employers, tour operators and travel agents enter into agreements with hotels with a view to merely fix the room tariffs of hotel rooms for their executives/guests/customers. Such agreements, usually entered into for lower tariff rates, are in the nature of rate-contract agreements. A rate-contract, therefore, may be said to be a contract for providing specified types of hotel rooms at pre-determined rates during an agreed period. Where an agreement is merely in the nature of a rate contract, it cannot be said to be accommodation 'taken on regular basis', as there is no obligation on the part of the hotel to provide a room or specified set of rooms. The occupancy in such cases would be occasional or casual. In other words, a rate-contract is different for this reason from other agreements, where rooms are taken on regular basis. Consequently, the provisions of section 194-I while applying to hotel accommodation taken on regular basis would not apply to rate-contract agreements.

- **Circular No. 1/2008, Dt. 10-1-2008 : Applicability of the provisions of section 194-I to cooling charges paid by the various customers to the owners of cold storages :**

Representations have been received from various quarters regarding applicability of the provisions of section 194-I to cooling charges paid by the various customers to the owners of cold storages. It has been represented that the cold storage owners provide a composite service, which involves preservation of essential food items including perishable goods at various temperatures suitable for specific food items for required periods and storage of goods being incidental to the activity of preservation. The cooling of goods is controlled through mechanical process. The customer brings its packages for preservation for a required period and takes away its packages after paying cooling charges. The customer does not hire the building, plant/machinery, etc., in any manner and does not become a tenant of any kind.

2. The matter has been examined. The main function of the cold storage is to preserve perishable goods by means of a mechanical process, and storage of such goods is only incidental in nature. The customer is also not given any right to use any demarcated space/place or the machinery of the cold store and thus does not become a tenant. Therefore, the provision of 194-I is not applicable to the cooling charges paid by the customers of the cold storage.

3. However, since the arrangement between the customers and cold storage owners are basically contractual in nature, the provision of section 194C will be applicable to the amounts paid as cooling charges by the customers of the cold storage.

TDS from payment on transfer of certain immovable property other than agricultural land [Section 194-IA]

- The provisions of section 203A (i.e. requirement to obtain TAN) shall not apply to a person required to deduct tax in accordance with the provisions of this section. In other words purchaser is not required to obtain TAN.
- ***"Immovable property"*** means any land (other than rural agricultural land) or any building or part of a building.
- If 194-IA is also applicable in case of transfer of ***urban agricultural land***.
- TDS is deductible if asset is purchased **from** joint owners/co-owners and total consideration is ₹ 50 lakhs or more even though amount paid/payable **to** each joint owner/co-owner is less than ₹ 50 lakhs.

  Example : Mr. A purchased an immovable property for ₹ 60 lakhs on 01.08.2014 from Mr. X & Mr. Y who are co-owners of the immovable property having equal shares. In this case share of each co-owner is ₹ 30 lakhs but TDS is deductible because total consideration for transfer of an immovable property is 60 lakhs (i.e. 50 lakhs or more).

- TDS is deductible if asset is purchased **by** more than one person jointly and total consideration is ₹ 50 lakhs or more even though amount paid/payable **by** each purchaser (i.e. joint owner/co-owner) is less than ₹ 50 lakhs.

  Example : Mr. B sold an immovable property for ₹ 60 lakhs on 01.08.2014 to Mr. P & Mr. Q who purchased the property contributing ₹ 30 lakhs each. In this case consideration paid/payable by each co-owner (i.e. Mr. P & Mr. Q) is ₹ 30 lakhs but TDS is deductible because total consideration for transfer of an immovable property is 60 lakhs (i.e. 50 lakhs or more).

- TDS is deductible u/s 194-IA even if immovable property is purchased by a **non-resident** from a person **resident** in India.

  Example : Mr. M, a non-resident, purchased an immovable property from Mr. N, a resident for a consideration of ₹ 60 lakhs on 01.08.2014. In this case TDS is deductible by Mr. M u/s 194-IA.

- TDS is not deductible u/s 194-IA if immovable property is purchased from a **non-resident** but shall be deductible u/s 195.

  Example 1 : Mr. R purchased an immovable property from Mr. S, a non-resident for a consideration of ₹ 60 lakhs on 01.08.2014. In this case TDS is deductible by Mr. R u/s 195 and not u/s 194-IA. TDS will be 20.6% of LTCG generated by Mr. S.

Example 2 : Mr. R purchased an immovable property from Mr. S, a non-resident for a consideration of ₹ 60 lakhs on 01.***04***.2013. In this case TDS is deductible by Mr. R u/s 195 even though property was purchased before 01.06.2013. TDS will be 20.6% of LTCG generated by Mr. S.

- TDS is not deductible if consideration is less than ₹ 50 lakhs. Consideration indicates declared consideration and not Stamp Duty Value.

Example :

Mr. S purchased an immovable property from Mr. T for a consideration of ₹ 40 lakhs on 01.08.2014. Registrar valued the property at ₹ 52 lakhs for stamp duty purpose. In this case TDS is not deductible by Mr. S since declared consideration is only ₹ 40 lakhs even though SDV is ₹ 50 lakhs or more.

- TDS is deductible even if consideration is paid in instalments provided total consideration is ₹ 50 lakhs or more. TDS is required to be deducted at the time of payment of each instalment. TDS is required to be deducted even if immovable property is held by the seller as stock-in-trade or purchased by the buyer as stock-in-trade.

Example :

Mr. X, a salaries person, booked 1000 sq. ft. office space from X Limited, a resident construction company for a total consideration of ₹ 90 lakhs. The building is under construction and is likely to be completed in 2014. Consideration is payable in 9 instalments. 3 instalments have been paid before 01.06.2013. In this case TDS is deductible by Mr. X on instalments paid on or after 01.06.2013 (i.e. from 4th instalments and onwards) at the time of payment of each instalment. TDS u/s 194-IA will be deductible by Mr. X even if he is a salaried person. It is also immaterial that property is held by the X Limited as stock-in-trade.

- TDS is deductible at the time of credit or at the time of payment whichever is earlier. If account of the seller is credited before 01.06.2013 but payment is made on or after 01.06.2013, TDS is not required to be deducted u/s 194-IA.

TDS from fees for professional/technical services/royalty/sum referred to in Section 28(va)/remuneration to a director which is not in nature of salary [Section 194J]

- **Sum referred to in Section 28(va) :**

  Any sum (known as non-compete fee/compensation for restraint in trade) received/receivable in cash/kind under an agreement for [Section 28(va)]:

  (i) not carrying out any activity in relation to any business; or

  Example : X Limited enters into an agreement with Y Limited. As per agreement Y Limited pays ₹ 10 lakhs to X Limited and X Limited agrees for not selling its products within India for 5 years. ₹ 10 lakhs is taxable in the hands of X Limited as PGBP.

  (ii) not sharing any know-how, patent, copyright, trade-mark, licence, franchise or any other business or commercial right of similar nature or information or technique likely to assist in the manufacture or processing of goods or provision for services.

  Example : X Limited enters into an agreement with Y Limited. As per agreement Y Limited pays ₹ 10 lakhs to X Limited and X Limited agrees for not sharing its know-how to any other person within India for 5 years. ₹ 10 lakhs is taxable in the hands of X Limited as PGBP.

- W.e.f. 01.07.2012 any remuneration/fee (i.e. director's sitting fee)/commission paid to a director is subject to TDS @ 10%. No exemption is allowed whatever may be the amount paid. For example, even if ₹ 500 is paid to the director as commission/sitting fee shall be subject to TDS. Except payment of salary (which is covered u/s 192) all payments to a director are subject to TDS u/s 194J.

- Section 40(a)(ia) provides that deduction of any ***interest, commission or brokerage, rent, royalty, fee for professional or technical services, or any payment to a contractor or sub-contractor for carrying out any work (including supply of labour for carrying out any work)*** shall not be allowed as business expenditure, if :

  (i) the same is paid/payable to a **resident** in India and

  (ii) tax is deductible at source but has not deducted by the assessee ***or*** tax has been deducted at source but after the deduction it has not been paid to the Government.

  It is to be noted that section 40(a)(ia) does not cover :

  (a) non-compete fee referred to in section 28(va) and

  (b) sitting fee to directors

  In other words, in case of non-compete fee referred to in section 28(va) and sitting fee to directors, provision of section 40(a)(ia) is not applicable and can't be disallowed u/s 28(va) even in case of default in deduction/payment of TDS. However, penalty and interest for non-deduction/non-payment of TDS shall be levied.

- **Notification No. 21/2012, Dated 13-6-2012 :**

  No deduction of tax shall be made under section 194J if :

  1. Payment is made by a resident or non-resident person (i.e. transferee) for acquisition of software from another ***resident*** person (i.e. transferor).
  2. the software is acquired in a ***subsequent transfer*** and the transferor has transferred the software ***without any modification***,
  3. tax has been deducted under section 194J on payment for any ***previous transfer*** of such software;
  4. the transferee obtains a declaration from the transferor that the tax has been deducted under Section 194J along with the Permanent Account Number of the transferor.

  Examples :

  ❖ Y Limited India acquires a software from X Limited India for a consideration of ₹ 25 lakhs.

  Y Limited India shall be required to deduct TDS u/s 194J @ 10% on ₹ 25 lakhs paid to X Limited India.

  Y Limited India transfers this software to Z Limited India for a consideration of ₹ 30 lakhs.

  Z Limited India shall not be required to deduct TDS on payment of ₹ 30 lakhs to Y Limited India if :

  - Y Limited has not made any modification in software and
  - Z Limited India obtains a declaration from the Y Limited India that Y Limited India has deducted TDS u/s 194J on payment made to X Limited India.

  ❖ B Limited India acquires a software from A Limited France for a consideration of ₹ 25 lakhs.

  B Limited India shall be required to deduct TDS u/s 195 @ 25% (or rate given in DTAA, whichever is lower) on ₹ 25 lakhs paid to A Limited France.

  B Limited India transfers this software to C Limited India for a consideration of ₹ 30 lakhs.

  C Limited India shall not be required to deduct TDS on payment of ₹ 30 lakhs to B Limited India if :

  - B Limited has not made any modification in software and
  - C Limited India obtains a declaration from the B Limited India that B Limited India has deducted TDS u/s 195 on payment made to A Limited France.

Analysis :

Transferor	Transferee (i.e. transferor for subsequent transferee)	TDS deductible by transferee	Subsequent transferee	Whether transferee (i.e. transferor for subsequent transferee) has made any modification in the software	TDS deductible by subsequent transferee
Resident	Resident	194J	-	-	-
Resident	Non-resident	194J	-	-	-
Non-resident	Resident	195	-	-	-
Non-resident	Non-resident	195	-	-	-
Resident	**Resident**	194J	Resident	**No**	No TDS
Resident	**Resident**	194J	Resident	Yes	194J
Resident	**Resident**	194J	Non-resident	**No**	No TDS
Resident	**Resident**	194J	Non-resident	Yes	194J
Resident	Non-resident	194J	Resident	Yes/No	195
Resident	Non-resident	194J	Non-resident	Yes/No	195
Non-resident	**Resident**	195	Resident	**No**	No TDS
Non-resident	**Resident**	195	Resident	Yes	194J
Non-resident	**Resident**	195	Non-resident	**No**	No TDS
Non-resident	**Resident**	195	Non-resident	Yes	194J
Non-resident	Non-resident	195	Resident	Yes/No	195
Non-resident	Non-resident	195	Non-resident	Yes/No	195

- 'Royalty' shall have the same meaning as in ***Explanation 2 to Section 9(1)(vi)***.

Explanation 2 to Section 9(1)(vi) :

Royalty means any consideration for :

(i) the ***transfer*** of all or any rights in respect of any : patent, invention, model, design, secret formula or process or trade mark or similar property;

(ii) the ***use*** of any : patent, invention, model, design, secret formula or process or trade mark or similar property;

(iii) the giving any ***information*** concerning the working of any : patent, invention, model, design, secret formula or process or trade mark or similar property;

(iv) the rendering of any ***services*** in connection with the activities referred to in (i) to (iii) above.

Explanation 4 to Section 9(1)(vi) :

Transfer of all or any rights in respect of any right, property or information includes transfer of all or any right to use a computer software (including granting of a licence) irrespective of the medium through which such right is transferred.

Therefore, Explanation 4 makes it clear that consideration paid for transfer of all or any right to use a computer software (including granting of a licence) is a royalty.

Therefore :

- If a person (whether resident or NR) in India :
  - imports a software from outside India **OR**

- obtains a licence to use the software from outside India

❖ then payment made outside India is royalty and shall be subject to TDS :

- if payment is made to a NR : u/s 195 @ 25% (or rate given in DTAA whichever is lower)
- if payment is made to a resident : u/s 194J @ 10%.

Similarly :

❖ If a person (whether resident or NR) in India :

- Purchases a software within India **OR**
- obtains a licence to use the software within India

❖ then payment made within India is royalty and shall be subject to TDS :

- if payment is made to a NR : u/s 195 @ 25% (or rate given in DTAA whichever is lower)
- if payment is made to a resident : u/s 194J @ 10%.

❖ **Whether royalty is a revenue or capital expenditure?**

As per Income-tax Rules, 1962, block of computer ***including*** computer software is eligible for 60% depreciation. Therefore, computer software is depreciable asset/capital expenditure.

Section 40(a)(i)/40(a)(ia) of Income-tax Act, 1961 provides that deduction for any expenditure by way of royalty paid to non-resident/resident respectively, shall be allowed only if TDS is deducted/paid. Section 40(a)(i)/40(a)(ia) provide that royalty shall have the same meaning as given in section 9. As per Explanation 4 to Section 9(1)(vi) of Income-tax Act, 1961 consideration paid for transfer of all or any right to use a computer software (including granting of a licence) is a royalty.

Therefore, Section 40(a)(i)/40(a)(ia) read with Explanation 4 to Section 9(1)(vi) provides consideration paid for transfer of all or any right to use a computer software (including granting of a licence) is a royalty and deductible as expenditure if TDS is deducted/paid. In other words, it can be concluded that royalty is a revenue expenditure and deductible u/s 37(1).

Since Income-tax Rules can't override Income-tax Act, consideration paid for transfer of all or any right to use a computer software (including granting of a licence) shall be treated as revenue expenditure deductible u/s 37(1) subject to provisions of section 40(a)(i)/40(a)(ia) and shall not be treated as a depreciable asset/capital expenditure.

Explanation 5 to Section 9(1)(vi) :

Royalty includes consideration in respect of any right, property or information, whether or not :

(a) the ***possession*** or control of such right, property or information 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.

Example :

Indian banks make use of servers of foreigners for credit card transaction. For any credit card transaction where a swipe is made, the swipe transaction is verified by a server of foreigner which is located outside India. Indian banks make payment to this foreigner for all such swipes. Now, the foreigner argues that this income received by him is not taxable, because :

(a) possession of server is not with Indian bank.

(b) server is not used directly by Indian bank.

(c) the location of server is outside India.

Explanation 5 clarifies that the payment made to foreigner shall be treated as royalty even if :

(a) possession of server is not with Indian bank.

(b) server is not used directly by Indian bank.

(c) the location of server is outside India.

Therefore, on such payments, TDS shall be deducted u/s 195.

Explanation 6 to Section 9(1)(vi) :

The expression ***'process'*** includes transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret.

Example :

Indian Television Channels make use of satellite of foreigner to transmit their programs. Now the payment made to foreigner for transmission of programs by satellite is treated as royalty liable to tax deduction u/s 195.

- **Explanation (a) to Section 1945J :**

'Professional Services' means services rendered by a person in the course of carrying on legal, **medical***, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration **or advertising** or such other profession as is notified by the Board for the purposes of section 44AA or **of this section (i.e. Section 194J)**#.

***Circular No. 8/2009, Dt. 24-11-2009 : Applicability of section 194J on payments made by Third Party Administrators (TPAs) to hospitals on behalf of insurance companies for settling medical/insurance claims etc. with the hospitals**

The services rendered by hospitals to various patients are primarily **medical*** services and, therefore, provisions of section 194J are applicable on payments made by TPAs to hospitals etc. Further for invoking provisions of section 194J, there is no stipulation that the professional services have to be necessarily rendered to the person who makes payment to hospital. Therefore TPAs who are making payment on behalf of insurance companies to hospitals for settlement of medical/insurance claims etc. under various schemes including Cashless Schemes are liable to deduct tax at source under section 194J on all such payments to hospitals etc.

#Notification No. 88/2008 , Dt. 21-8-2008

In exercise of the powers conferred by Explanation (a) to section 194J, CBDT hereby notifies the services rendered by following persons in relation to the sports activities as 'Professional Services' for the purpose of the said section, namely :

- Sports Persons,
- Umpires and Referees,
- Coaches and Trainers,
- Team Physicians and Physiotherapists,
- Event Managers,
- Commentators,
- Anchors and
- Sports Columnists.

- **Circular No. 726, Dt. 18-10-1995 :**

Any fees paid through regular banking channels to any chartered accountant, lawyer, advocate or solicitor who is resident in India by the non-residents who do not have any agent or business connection or permanent establishment in India shall not be subject to the provisions of tax deduction at source u/s 194J.

TDS from payments made to non-residents [Section 195]

- **Section 195(1) :**

  Any person responsible for paying to a non-resident, not being a company, or to a foreign company, *any interest (not being interest referred to in section 194LB or section 194LC)* or 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.

- **Explanation 2 to Section 195(1) :**

  The obligation to comply with section 195(1) and to make deduction thereunder applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to all persons, resident or non-resident, whether or not the non-resident person has :

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

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

  This explanation has been inserted to overrule judgment of SC in case of Vodafone International Holdings B.V. v. Union of India.

Other provisions relating to TDS

No TDS from any sum payable to Government, RBI or certain corporation [Section 196]

No deduction of tax shall be made by any person from ***any sum*** payable to :

(a) the Government, or

(b) the RBI, or

(c) a corporation established under a **Central Act** which is exempt from income-tax on its income, or

(d) a Mutual Fund specified under Section 10(23D).

Obtaining a certificate for deduction at lower rate from A.O. [Section 197]

- Where, in the case of any income of any person, income-tax is required to be deducted under the provisions of Sections ***192, 193, 194, 194A, 194C, 194D, 194G, 194H, 194-I, 194J, 194LA and 195***, the Assessing Officer is satisfied that the ***total income*** of the recipient justifies the deduction of income-tax at a lower rate or no deduction of income-tax, as the case may be, the Assessing Officer shall, on an application (in **Form No. 13**) made by the assessee in this behalf, give to him such certificate as may be appropriate.
- Where any such certificate is given, the person responsible for paying the income shall, until such certificate is cancelled by the Assessing Officer, deduct income-tax at the rate specified in such certificate or deduct no tax, as the case may be.

No deduction to be made in certain cases [Section 197A]

Section 197A(1A) :

No tax will be deducted at source under Section 193 (i.e. Interest on securities) and 194A (i.e. Interest other than interest on securities), in case of a person (not being a company or a firm), if such person furnishes to the payer a declaration in writing in duplicate in new **Form No. 15G** to the effect that the tax on his ***estimated total income*** (including such income) will be nil.

Section 197A(1B) :

Self-declaration mentioned in Section 197A(1A) cannot be given by an assessee whose income from interest on securities and/or interest other than interest on securities exceeds the maximum amount not chargeable to tax. Therefore, even if the tax on an individual is NIL, still tax shall be deducted at source. For example, an individual receives ₹ 2,50,000 interest from a company and he has no other source of income. He has invested ₹ 70,000 in PPF which qualifies deduction u/s 80C and therefore the tax payable by him is NIL. Declaration cannot be given by such individual and tax shall be deducted. Such individual shall have to claim either refund of TDS or he can obtain certificate from A.O. u/s 197 that no TDS should be deducted. However, if the aforesaid individual is senior citizen, then he can give a self-declaration u/s 197A(1C) and tax shall not be deducted at source.

Section 197A(1C) :

No tax will be deducted under Section 193, 194 and 194A in the case of a resident individual who is of the age of 60 years or more at any time during the P.Y., if such individual furnishes to the person responsible for paying any income to the payer a declaration in writing in duplicate in new **Form No. 15H** to the effect that the tax on his ***estimated total income*** (including such income) will be nil.

Section 197A(1E) :

No deduction of tax shall be made from any payment to any person for, or on behalf of, the New Pension System Trust referred to in section 10(44).

<u>Section 197A(1F)</u> :

Notwithstanding anything contained in this Chapter, no deduction of tax shall be made from such specified payment to such institution, association or body or class of institutions, associations or bodies as may be notified by the Central Government in the Official Gazette, in this behalf* ***[Inserted by Finance Act, 2012]****.*

Notification No. 21/2012 has been issued by the CBDT [Refer Section 194J].

<u>Section 197A(2)</u> :

The person responsible for paying any income of the nature referred to in Section 197(1A)/197(1C) shall deliver to the CCIT/CIT one copy of the declaration referred to in Section 197(1A)/197(1C) on or before the seventh day of the month next following the month in which the declaration is furnished to him.

Income Payable "Net of Tax" [Section 195A]

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

In other words, when tax is to be borne by the payer, the TDS has to be calculated by grossing up the amount, since the tax itself (borne by the payer) represents the income of the assessee.

Tax deducted is income received [Section 198]

All sums deducted in accordance with the provisions of Chapter - XVII shall, for the purpose of computing the income of an assessee, be deemed to be income received. In other words, for the purpose of computation of total income of the payee amount actually received plus the amount of TDS will have to be considered. However, the tax paid by the employer under Section 192(1A) on the non-monetary perquisites of the employee shall not be deemed to be income received.

Credit for tax deducted [Section 199]

<u>Section 199(1)</u> :

Any deduction made in accordance with the provisions of Chapter - XVII and paid to the Central Government shall be treated as a payment of tax on behalf of the person from whose income the deduction was made.

<u>Section 199(2)</u> :

Any tax paid by the employer on non-monetary perquisites of the employee to the Central Government shall also be treated as tax paid on behalf of the employee and credit shall be given to such employee for the amount so paid.

<u>Section 199(2)</u> :

The Board may, for the purposes of giving credit in respect of tax deducted or tax paid by the employer on non-monetary perquisites of the employee, make such rules **[Rule 37BA]** as may be necessary, including the rules for the purposes of giving credit to a person other than those referred to in sub-section (1) and sub-section (2) and also the assessment year for which such credit may be given.

Credit for tax deducted at source for the purposes of Section 199 [Rule 37BA]

Rule 37BA(1) :

Credit for tax deducted at source and paid to the Central Government in accordance with the provisions of Chapter XVII, shall be given to the **deductee** on the basis of information relating to deduction of tax furnished by the deductor to the income-tax authority or the person authorised by such authority.

Rule 37BA(2) :

(i) where under any provisions of the Act, the whole or any part of the income on which tax has been deducted at source is assessable in the hands of a person other than the deductee, credit for the whole or any part of the tax deducted at source, as the case may be, shall be given to the other person and not to the deductee provided that the deductee files a declaration with the deductor and the deductor reports the tax deduction in the name of the other person in the information relating to deduction of tax to the income-tax authority or the person authorised by such authority.

(ii) The declaration filed by the deductee under clause (i) [i.e. Rule 37BA(2)(i)] shall contain the name, address, permanent account number of the person to whom credit is to be given, payment or credit in relation to which credit is to be given and reasons for giving credit to such person.

(iii) The deductor shall issue the TDS certificate in the name of the person in whose name credit is shown in the information relating to deduction of tax to the income-tax authority or the person authorised by such authority and shall keep the declaration in his safe custody.

Rule 37BA(3) :

(i) Credit for tax deducted at source and paid to the Central Government, shall be given for the assessment year ***for which such income is assessable***.

(ii) Where tax has been deducted at source and paid to the Central Government and the income is assessable over a number of years, credit for tax deducted at source shall be allowed across those years in the same proportion in which the income is assessable to tax.

Rule 37BA(4) :

Credit for tax deducted at source and paid to the account of the Central Government shall be granted on the basis of :

(i) the information relating to deduction of tax furnished by the deductor to the income-tax authority or the person authorized by such authority: and

(ii) the information in the return of income in respect of the claim for the credit,

subject to verification in accordance with the risk management strategy formulated by the CBDT from time to time.

Annual Tax Statement [Section 203AA]

- The prescribed income-tax authority* (or the person authorised by him)
- shall, within the prescribed time** after the end of each financial year
- prepare and deliver to every person from whose income the tax has been deducted
- an Annual Tax Statement in the prescribed Form*** specifying the amount of tax deducted during the financial year.

Rule 31AB(i) :

*The Director General of Income-tax (Systems)

**by the 31st July following the financial year

***Form 26AS

Bar against direct demand on assessee [Section 205]

Where tax is deductible at the source under the foregoing provisions of this Chapter, the assessee (i.e. deductee) shall not be called upon to pay tax himself to the extent to which ***tax has been deducted*** from that income, whether or not the deductor has paid the same to the credit of the Central Government.

Duty of person deducting tax [Section 200]

Section 200(1) :

Any person deducting any sum in accordance with provisions of Chapter - XVII shall pay within the prescribed time, the sum so deducted to the credit of the Central Government.

Section 200(2) :

Any person being an employer, referred to in Section 192(1A) shall pay, within the prescribed time, the tax to the credit of the Central Government.

Rule 30 deals with the time limit for deposit of TDS as follows :

Tax Deductor	Time limit of deposit
Government [Rule 30(1)] : ⏩ TDS is deposited without Challan (i.e. through book entry) ⏩ TDS is deposited with Challan	 Same day of deduction On or before 7 days from the end of the month in which : (i) the deduction is made or (ii) income-tax is due u/s 192(1A).
Any other person [Rule 30(2)] : ⏩ Where the amount is paid or credited to the account of the payee in the month of March ⏩ In any other case	 On or before 30th April. On or before 7 days from the end of the month in which : (i) the deduction is made or (ii) income-tax is due u/s 192(1A).

Special cases where tax deducted at source can be deposited quarterly [Rule 30(3)] :

In the following cases, the Assessing Officer may with the prior approval of the Joint Commissioner, allow payment of TDS quarterly as follows :

192 : Salaries 194A : Interest other than interest on securities 194D : Insurance commission 194H : Commission or brokerage	Quarterly on July 7, October 7, January 7 and April 30

Section 200(3) :

Any person deducting any sum in accordance with provisions of Chapter - XVII or, as the case may be, any person being an employer referred to in Section 192(1A) shall, after paying the tax deducted to the credit of the Central Government within the prescribed time, prepare quarterly statements/return for the period ending on the 30th June, the 30th September, the 31st December and the 31st March in each financial year and deliver to the prescribed income-tax authority [DGIT (Systems)] within such time as may be prescribed.

Provided that the person may also deliver to the prescribed authority a correction statement for rectification of any mistake or to add, delete or update the information furnished in the statement delivered under this sub-section in such form and verified in such manner as may be specified by the authority - Inserted by the Finance (No. 2) Act, 2014.

The following forms for filing quarterly statement/return have been prescribed under **Rule 31A** :

Payments	Residential Status of Deductee	Return Form
Salary	Resident/Non-resident	Form No. 24Q
Others	Resident	Form No. 26Q
	Non-resident	Form No. 27Q

As per Rule 31A, these quarterly statements should be delivered to the prescribed income-tax authority on or before 15th July, 15th October, 15th January in respect of the first three quarters of the financial year and on or before the ***15th May*** following the last quarter of the financial year.

Notification No. 57/2011, Dated 24.10.2011

Relaxation of time limit for submission of quarterly statements in case of Government

Quarter ended	Due date of furnishing quarterly statement
30th June	31st July
30th September	31st October
31st December	31st January
31st March	15th May

Certificate for tax deducted [Rule 31]

The payer of income is suppose to issue a certificate of tax deduction (i.e. TDS certificate) in the following forms as per Rule 31 :

Payments	Form No.
Salary	Form No. 16
Others	Form No. 16A

The time limit for issue of TDS certificate as per Rule 31 :

Payments	Time Limit
Salary	**Annually** by 31st May of the financial year immediately following the financial year in which the income was paid and tax deducted
Others	**Quarterly** within 15 days from the due date for furnishing the statement of TDS under Rule 31A i.e. 30th July, 30th October, 30th January & 30th May.

Note :

All deductors (including government deductors who deposit TDS in the Central Government Account through book entry) shall Issue TDS certificate generated through **TRACES Portal** and which is downloaded from the TRACES Portal with a unique TDS certificate number. The deductor shall therefore, download such certificate from the TRACES Portal, verify the correctness of the contents mentioned therein and authenticate the correctness of the contents before issue of the said certificate either using digital signature or manual signature.

Processing of statements/return of TDS [Section 200A]

❖ **Section 200A(1)**

- Section 200A provide for computerized processing of statements of TDS ***or a correction statement*** so that liabilities on account of interest and other defaults in TDS payment are promptly calculated and intimated to the deductor.
- The following adjustments can be made during the computerized processing of statements of TDS ***or a correction statement*** :

  a) Any arithmetical error in the statement; or

b) An incorrect claim, if such ***incorrect claim is apparent from any information in the statement*** (i.e. where TDS rate is not in accordance with the provisions of the Act or an entry in the statement of an item, which is inconsistent with another entry of the same or some other item in such statement).

- After making adjustments, tax and interest would be calculated and sum payable by the deductor or refund due to the deductor will be determined.
- An intimation will be sent to the deductor informing him of his tax liability or granting him the refund due within one year from the end of the financial year in which the statement is filed.
- Further it is provided that the processing of these statements can be undertaken in a centralized processing centre.

Section 200A(2)

For the purposes of processing of statements u/s 200A(1), the Board may make a scheme* for centralised processing of statements of tax deducted at source to expeditiously determine the tax payable by, or the refund due to, the deductor.

Centralised Processing of Statements of Tax Deducted at Source Scheme, 2013

Amendments made by Finance Act, 2012

- Section 156 has been amended to provide that where any sum is determined to be payable by the assessee u/s 200A(1) [i.e. Intimation of TDS], the intimation sent u/s 200A(1) shall be deemed to be a notice of demand.
- Section 246A has been amended to provide that an appeal can be filed to CIT(A) against an intimation u/s 200A(1) where the deductor objects to making of adjustments u/s 200A(1).
- Section 154 has also been amended to provide that with a view to rectify any "mistake apparent from record", the Income-tax Authority referred to in Section 116 may Amend any TDS intimation passed under Section 200A(1).

Tax Deduction & Collection Account Number [Section 203A]

- Every person, deducting tax or collecting tax in accordance with the provisions of Chapter - XVII, who has not been allotted a Tax Deduction Account Number ***(i.e. TAN)*** or, as the case may be, a Tax Collection Account Number ***(i.e. TCN)***, shall, within one month from the end of the month in which tax is deducted or collected, apply to the Assessing Officer for the allotment of a "Tax Deduction And Collection Account Number" ***(i.e. TDCAN)***.
- Where a TAN/TCN/TDCAN has been allotted to a person, such person shall quote such number :
  (a) in all challans for the payment of TDS/TCS to the Government;
  (b) in all TDS/TCS certificates;
  (c) in all the TDS/TCS Return;
  (d) in all other documents pertaining to such transactions as may be prescribed.

Application for allotment of a tax deduction and collection account number [Rule 114A] :

- An application for the allotment of a TDCAN shall be made in duplicate in ***Form No. 49B***.
- The application in Form No. 49B shall be made :
  (a) in cases where the function of allotment of TDCAN has been assigned by the CCIT/CIT to any particular A.O., to that A.O.;
  (b) in any other case, to the A.O. having jurisdiction to assess the applicant.

Requirement to furnish Permanent Account Number (PAN) [Section 206AA]

- Every person whose receipts are subject to TDS (i.e. the Deductee) shall furnish his PAN to the Deductor. If the Deductee does not furnish PAN to the Deductor, the Deductor will deduct tax at source at higher of the following rates :

  (a) the rate prescribed in the Income Tax Act, 1961

  (b) the rate mentioned in the Finance Act

  (c) at the rate of 20%

  Notes :

  1. Section 206AA overrides entire Income-tax Act.

  2. Where the amount paid to the Payee is upto the limit on which tax is not required to be deducted then even if Payee does not furnish his PAN, provision of Section 206AA shall not apply.

- Where the PAN provided to the Deductor is invalid or does not belong to the Deductee, it shall be deemed that the Deductee has not furnished his PAN to the Deductor and accordingly TDS would be deductible at the above-mentioned rates.

- These provisions will also apply to non-residents where tax is deductible on payments or credits made to them.

  Note : w.e.f. 01.06.2013, in respect of payment of interest by a specified Indian company on long-term infrastructure bonds to NR & Foreign company as referred to in Section 194LC, tax will be deducted @ 5%, even if recipient does not furnish PAN. (Inserted by Finance Act, 2013).

- No certificate u/s 197 (i.e. obtaining a certificate for deduction at lower rate from A.O.) shall be granted unless the application made under that Section contains the PAN of the applicant.

- The provision that TDS would be deductible at the above-mentioned rates, will also apply in cases where the Deductee files a declaration under Section 197A in Form No. 15G or 15H but he does not provide his PAN.

- To ensure that the Deductor knows about the correct PAN of the Deductee, there is a provision for mandatory quoting of PAN of the Deductee by both the Deductor and Deductee in all correspondences, bills and vouchers exchanged between them.

- In the case of a ***transport operator engaged in the business of plying, hiring and leasing goods carriages***; tax will not be deducted u/s 194C if he furnishes his PAN to the Deductor. If PAN is not furnished, the rate will be 20%.

Illustration :

Y is required to pay ₹ 1,00,000 to X on which tax is required to deducted @ 10%. What will be the rate of TDS if :

(a) X does not furnish his PAN to Y

(b) X furnished incorrect/invalid PAN to Y

(c) X furnished PAN of Z to Y

(d) X gives a declaration in Form 15G/15H u/s 197A to the effect that the tax on his ***estimated total income*** (including such income) will be nil. Form 15G/15H does not contains PAN of X.

(e) X makes an application to the A.O. u/s 197 for obtaining a certificate for deduction at lower rate from A.O. Application does not bear PAN of X.

(f) X does not furnish his PAN to Y because he is NR and contends that as per DTAA TDS rate cannot be more than 10%.

Answer :

(a) Section 206AA is attracted. Rate of TDS shall be 20%.

(b) Section 206AA is attracted. Rate of TDS shall be 20%.

(c) Section 206AA is attracted. Rate of TDS shall be 20%.

(d) Section 206AA is attracted. Form 15G/15H shall not be valid and hence rate of TDS shall be 20%.

(e) Section 206AA is attracted. A.O. shall not entertain application u/s 197 and hence rate of TDS shall be 20%.

(f) Section 206AA overrides entire Income-tax Act. Therefore, 206AA also overrides provision of section 90 relating to DTAA. Section 206AA is also applicable to non-residents. Therefore, in the present case rate of TDS shall be 20%.

Consequences of failure to deduct or pay TDS [Section 201]

Section 201(1) :

- Where a person who is required to deduct tax at source :
  - does not deduct whole or any part of the tax **OR**
  - after deducting fails to pay, the whole or any part of the tax,
- then such person shall be deemed to be an assessee in default in respect of tax not so deducted or not so paid
- and consequently shall be liable for :
  - (i) interest under ***Section 220(2)*** (i.e. @ 1% per month or part thereof for the period of default) **and**
  - (ii) penalty under ***Section 221(1)*** (i.e. A.O. may impose penalty of an amount not exceeding the amount remaining unpaid).

Note : Besides interest and penalty as aforesaid disallowance u/s 40(a) will also be attracted.

First Proviso to Section 201(1) : Inserted by the Finance Act, 2012, w.e.f. 1-7-2012 :

- *any person who fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter - XVII on the sum paid to a **resident** or on the sum credited to the account of a **resident** shall not be deemed to be an assessee in default in respect of such tax if such resident (i.e. payee/deductee) :*
  - (i) *has furnished his return of income under Section 139 [i.e. on due date or belated];*
  - (ii) *has taken into account such sum for computing income in such return of income; and*
  - (iii) *has paid the tax due on the income declared by him in such return of income,*
- *and the person (i.e. Payer/deductor) furnishes a certificate to this effect from a chartered accountant in such form as may be prescribed.*

Section 201(1A) :

If a person fails to deduct tax at source or after deduction fails to deposit TDS, is liable to pay interest (Such interest shall be paid before furnishing quarterly return) as follows :

Section	Rate of interest (per month or part)	Period for which interest is payable
201(1A)(i)	1%	From the date on which tax was deductible to the date on which tax is actually deducted
201(1A)(ii)	1.5%	From the date on which tax is actually deducted to the date on which tax is actually paid

Illustration :

Date of payment/Credit	Tax actually deducted on	Tax actually paid on	Rate of interest	Period for which interest is payable
16-08-2014	31-03-2015	31-07-2015	1%	From 16-08-2014 to 31-03-2015 (i.e. for 8 months)
			1.5%	From 01-04-2015 to 31-07-2015 (i.e. for 4 months)
16-08-2014	16-08-2014	31-07-2015	1.5%	From 16-08-2014 to 31-07-2015 (i.e. for 12 months)
16-08-2014	30-04-2015	30-09-2015	1%	From 16-08-2014 to 30-04-2015 (i.e. for 9 months)
			1.5%	From 01-05-2015 to 30-09-2015 (i.e. for 5 months)
31-03-2015	31-03-2015	31-04-2015	N.A.	No interest is payable as tax has been deposited within the due date

Proviso to Section 201(1A) : Inserted by the Finance Act, 2012, w.e.f. 1-7-2012 :

*In case any person fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter - XVII on the sum paid to a **resident** or on the sum credited to the account of a **resident** but is not deemed to be an assessee in default under the first proviso of Section 201(1), the interest under Section 201(1A)(i) shall be payable from the date on which such tax was deductible **to the date of furnishing of return of income by such resident**.*

Section 201(3) :

No order shall be made u/s 201(1) deeming a person to be an assessee in default ***for failure to deduct the whole or any part of the tax**** from a person ***resident***** in India, at any time after the expiry of *7* ***years from the end of the financial year in which payment is made or credit is given***.

Note : Section 201(3) is not applicable (i.e. there is no time limit for passing the order u/s 201(1) and the order can be passed at any time) if :

- *The deductor has deducted but not deposited the TDS because this would be a case of defalcation of government dues.
- **The deductee is non-resident because it may not be administratively possible to recover the tax from the non-resident.
- If assessee agrees to bear TDS on non-monetary perquisites provided to its employee but fails to deposit the tax on same.

Illustration :

Date of payment/Credit	Tax actually deducted on	Tax actually paid on	Date of filing TDS return	R/S of deductee	Order u/s 201(1) can be passed upto
20-11-2014	Not deducted	Not paid	15-01-2015	Resident	31-03-2022
20-11-2014	Not deducted	Not paid	Not filed	Resident	31-03-2022
20-11-2014	20-11-2014	Not paid	15-01-2015	Resident	No time limit
20-11-2014	Not deducted	Not paid	15-01-2015	Non-resident	No time limit

Penal provisions relating to TDS

Section	Nature of default	Penalty
271C	Failure to deduct the whole or any part of TDS	Sum equal to the amount of tax which the assessee has failed to deduct
272BB(1)	Failure to obtain TDCAN and quoting the same in challans, certificates and return of TDS.	₹ 10,000/- for each failure/default
272BB(1A)	Quoting a false TDCAN in the challans or certificates or return of TDS or other documents	₹ 10,000/- for each failure/default
276B	Failure to pay the tax deducted at source to the credit of Central Government	Rigorous imprisonment for a term which shall not be less than 3 months but which may extend to 7 years and with fine
272A(2)(g)	Failure to issue TDS certificates as required by Section 203	₹ 100 for every day during which the failure continues but the penalty shall not exceed the amount of tax deducted

Note :

Where the assessee proves to the satisfaction of the Assessing Officer that the default was for good and sufficient reasons, no penalty shall be levied.

Fee for defaults in furnishing statements of TDS [Section 234E]

(1) Where a person fails to deliver a statement/return of TDS within the time prescribed in Section 200(3), he shall be liable to pay, by way of **fee**, a sum of ₹ 200 for every day during which the failure continues. This fee will be in addition to other consequences under the Income-tax Act, 1961.

(2) The amount of aforesaid fee shall not exceed the amount of tax deductible.

(3) The amount of aforesaid fee shall be paid before delivering a statement/return of TDS.

Penalty for failure to furnish statements of TDS [Section 271H]

(1) A person shall be liable to pay penalty, if, he :

(a) fails to deliver a statement/return of TDS within the time prescribed in Section 200(3); or

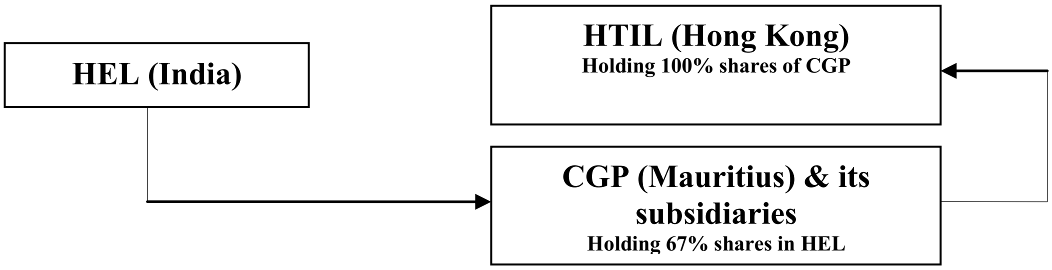
(b) furnishes incorrect information in the statement of TDS which is required to be delivered under Section 200(3).

(2) The amount of aforesaid penalty shall be a sum which shall not be less than ₹ 10,000 but which may extend to ₹ 1,00,000.

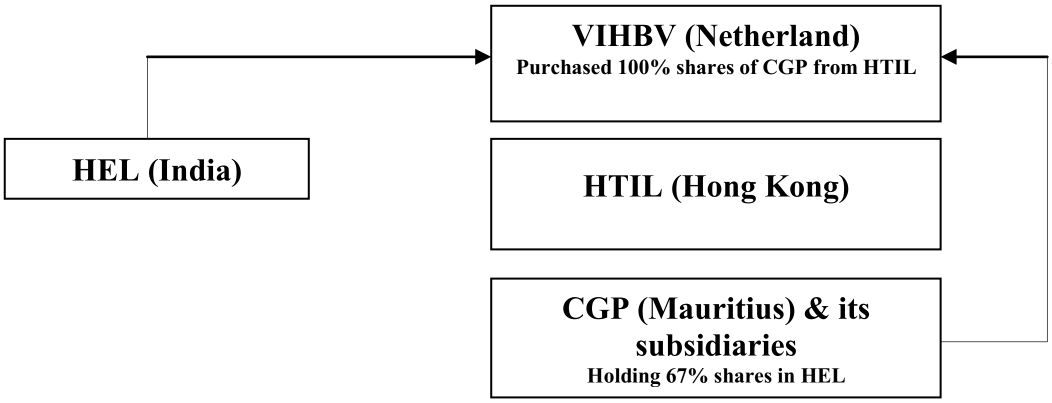
(3) No penalty shall be levied for the failure referred to in clause (a) of sub-section (1) [i.e. failure to deliver statement/return of TDS], if the person proves that after paying tax deducted along with the fee u/s 234E and interest u/s 201(1A), if any, to the credit of the Central Government, he had delivered the statement of TDS before the expiry of a period of one year from the time prescribed for delivering such statement. Therefore, if quarterly return of TDS which were to be filed on 15th July, 2014 is filed upto 15th July, 2015 and assessee has paid TDS along with the fee u/s 234E and interest u/s 201(1A), if any, to the credit of the Central Government, then penalty u/s 271H shall not be levied.

Vodafone International Holdings B.V. v. Union of India : [2008] 175 Taxman 399 (Bombay HC)

Stage I



Stage II



Hutchison Essar Limited (HEL) was an Indian company and a Joint Venture of foreign Hutchison group and Indian company Essar. HEL was providing telecommunication (cellular) service in India.

Name of shareholders of HEL and their shareholdings were as follows :

Shareholders	Shareholding
CGP Investments (Holdings) Ltd. [registered in Cayman Island, Mauritius] (CGP)	51.95%
Subsidiaries of CGP	15.05%
Indian company Essar	33%
Total	**100%**

Hutchison Telecommunications International Ltd. (HTIL) [a foreign company registered in Hong Kong] was holding 100% shares of CGP.

In other words, HTIL was holding 67% interest (i.e 51.95% + 15.05%) in HEL through its 100% subsidiary CGP & its subsidiaries, while Essar held 33% interest.

Vodafone International Holdings B.V. (VIHBV) [a foreign company registered in Netherland] with a view to acquire the controlling interest in HEL purchased 100% shares in CGP from HTIL.

Income-tax Department contended that :

1. HTIL has earned income in India as it has transferred its business/economic interest in HEL (by way of selling shares of CGP to VIHBV) and consequently liable to capital gain tax in India.
2. VIHBV was liable to deduct TDS u/s 195 from the sale consideration paid to HTIL.

Income-tax Department, therefore, issued show cause notice u/s 201 to VIHBV as to why it should not be treated as an assessee in default for not deducting TDS u/s 195 on the payment made to HTIL which is taxable in India in the hands of HTIL as capital gains.

VIHBV filed a writ petition in Bombay HC challenging the legal validity of the show cause notice.

VIHBV argued before Bomaby HC that u/s section 9(1)(i) (which is a deeming provision) income accruing or arising ***"through the transfer of a capital asset situate in India"*** is deemed to accrue or arise in India. The transaction in the present case is the transfer of share capital of a non-resident company and is not a transfer of a capital asset situated in India. Therefore no capital gain will arise on sale of shares in CGP.

The Bombay HC held that :

Shares in themselves may be an asset but in some cases like the instant one, shares may be merely a mode or a vehicle to transfer some other asset(s). In the instant case, the subject-matter of transfer as contracted between the parties (i.e. HTIL & VIHBV) was not actually the shares in CGP, but the assets situated in India. The very purpose of entering into agreements in the case between two foreigners (i.e. HTIL & VIHBV) was to acquire the controlling interest which one foreign company (i.e. HTIL) held in the Indian company (i.e. HEL), by other foreign company (i.e. VIHBV). This being the dominant purpose of the transaction, the transaction would certainly be subject to Indian Income-tax Act. VIHBV was, therefore, liable to deduct TDS u/s 195 from the sale consideration paid to HTIL and consequently show cause notice issued u/s 201 is a valid notice.

Bombay HC dismissed the writ petition of the VIHBV and held that section 9(1)(i) is attracted and income earned by HTIL is deemed to have accrued or arisen in India ***"through the transfer of a capital asset (i.e controlling interest) situate in India"*** and hence, chargeable to income-tax under the head Capital Gains.

On the basis of judgement of Bombay HC, the A.O. passed order u/s and levied penalty and interest on VIHBV for being assessee in default.

Vodafone International Holdings B.V. v. Union of India : [2009] 179 Taxman 129 (Supreme Court)

VIHBV filed a petition in Supreme Court for review of the case and Supreme Court reversed the judgement of Bombay HC holding that the A.O. in India has no jurisdiction to tax the transaction which took place outside India and what transferred was the shares of a foreign company (i.e. CGP) and not the controlling interest in Indian business. Supreme Court held that :

1. Transfer of shares of foreign company (i.e. CGP) which has an Indian company as its subsidiary does not amount to transfer of capital asset situated in India within the meaning of Section 9(1)(i). The legal fiction in Section 9(1)(i) does not mean that if foreign company has a subsidiary in India, then shares of a foreign company are deemed to be situated in India.

2. Section 9(1)(i) covers only the income arising from transfer of a capital asset situated in India and does not cover the income arising from ***indirect transfer*** of capital asset situated in India.

3. The source of income in relation to a transaction is construed to be where the transaction of sale takes place. Where a foreign holding company (i.e. HTIL) sells the shares of its foreign subsidiary company (i.e. CGP), then it can't result in extinguishment of foreign holding company's (i.e HTIL) right of controlling the Indian company (i.e. HEL) nor it can be said that it constitutes extinguishment and transfer of asset / management and control of property situated in India.

4. The Bombay HC had held that VIHBV on purchase of shares of CGP got indirect interest in HEL. VIHBV acquired controlling right of HTIL in HEL namely the right to appoint directors in HEL, the right to use Hutch Brand in India and non-compete agreement with Hutch Brand in India, which all constituted a capital asset as per Section 2(14). The Supreme Court reversing the judgement of Bombay HC held that controlling interest in not an identifiable or distinct capital asset independent of holding shares and therefore does not satisfy the definition of capital asset in Section 2(14).

Supreme Court held that the subsidiary company is not a puppet of holding company and it has a separate existence. The controlling interest of holding company in subsidiary company is not a capital asset.

Supreme Court held that since the capital gains was not taxable in India, VIHBV was not required to deduct TDS on the said capital asset (i.e. from the sale consideration paid to HTIL).

Therefore to nullify the aforesaid judgement of Supreme Court and affirm the judgement of Bombay HC, Finance Act, 2012 made following retrospective amendments w.e.f. 01.04.1962 :

1. Insertion of Explanation to Section 2(14) which defines "Capital Asset"

Explanation to Section 2(14) :

'Property' includes and shall be deemed to have always included any rights in or in relation to an Indian company, including rights of management or control or any other rights whatsoever.

Thus after the aforesaid amendment, capital asset shall include the right of HTIL in Indian company (i.e. HEL) including right of management and control, e.g., right to appoint directors in HEL, the right to use Hutch Brand in India and non-compete agreement with Hutch Brand in India. Therefore, HTIL has transferred to VIHBV a capital asset in India, being rights in an Indian company including right of management and control.

2. Insertion of Explanation 2 to in section 2(47) which defines "Transfer"

Explanation 2 to Section 2(47) :

- ***"transfer"*** includes and shall be deemed to have always included :
  - disposing of or parting with an asset or any interest therein, or
  - creating any interest in any asset in any manner whatsoever,
- directly or indirectly, absolutely or conditionally, voluntarily or involuntarily,
- by way of an agreement (whether entered into in India or outside India) or otherwise,
- notwithstanding that such transfer of rights has been characterized as being effected or dependent upon or flowing from the **transfer of a share (or shares) of a company registered or incorporated outside India**.

Therefore, as per amendment, HTIL has made transfer of its interest in HEL to VIHBV by **transfer of shares of a company registered or incorporated outside India (i.e. CGP)**.

3. Insertion of Explanation 5 to Section 9 which deals with "Income deemed to accrue or arise in India"

Explanation 5 to Section 9 :

- ***an asset (or a capital asset)***
- ***being any share/interest in a company/entity registered/incorporated outside India***
- ***shall be deemed to be situated in India,***
- ***if the share/interest derives, directly/indirectly,***
- ***its value substantially from the assets located in India.***

Therefore,

- shares of CGP
- being the share in a company registered/incorporated outside India (i.e. Mauritius)
- shall be deemed to be situated in India,
- as the shares of CGP derives, directly/indirectly,
- its value substantially from the assets (i.e. Business of Indian company) located in India.

4. Insertion of Explanation 2 to Section 195(1) which requires deduction of TDS from payments made to NR

- **Section 195(1) :**

Any person responsible for paying to a non-resident, not being a company, or to a foreign company, *any interest (not being interest referred to in section 194LB or section 194LC)* or 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.

- **Explanation 2 to Section 195(1) :**

the obligation to comply with section 195(1) and to make deduction thereunder applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to all persons, resident or non-resident, whether or not the non-resident person has :

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

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

Therefore, after the amendment VIHBV (non-resident company) is required to deduct TDS from the sale consideration paid to HTIL whether or not the HTIL has :

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

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