



DEDUCTION OF TAX AT SOURCE ON TRANSFER OF CERTAIN IMMOVABLE PROPERTY – PROVISIONS AND OBLIGATIONS UNDER INCOME TAX ACT

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Acquisition of immovable property in particular the Flats/Buildings are the basic needs of all citizens. In my professional experience, many queries have been raised to me by friends regarding statutory obligations and compliance provisions under Income-tax act 1961 while making payment in due course of acquisition of any immovable property as a buyer or transfer of such property by the seller/developers. In view of above this article contributes the background of introduction of section 194IA, the related provisions and compliances as provided under income tax act & rules framed there under.

Back Ground of introduction of Section 194 IA

A new section 194-IA was inserted in the Income-tax Act, 1961 as a result of an amendment by the Finance Bill, 2013 which provides provisions for Tax Deduction at Source (TDS) on transfer of certain immovable properties (other than agricultural land). The objective of introduction is not only widening of tax base but also as an anti-tax avoidance measures. While introducing this section in the Finance Bill 2013, the substance of this provisions has provided were as follows.

“There is a statutory requirement under section 139A of the Income-tax Act read with rule 114B of the Income-tax Rules, 1962 to quote Permanent Account Number (PAN) in documents pertaining to purchase or sale of immovable property for value of ₹ 5 lakh or more. However, the information furnished to the department in Annual Information Returns by the Registrar or Sub Registrar indicate that a majority of the purchasers or sellers of immovable properties, valued at ₹ 30 lakh or more, during the financial year 2011-12 did not quote or quoted invalid PAN in the documents relating to transfer of the property. Under the existing provisions of the Income-tax Act, tax is required to be deducted at source on certain specified payments made to residents by way of salary, interest, commission, brokerage,

professional services, etc. On transfer of immovable property by a non-resident, tax is required to be deducted at source by the transferee. However, there is no such requirement on transfer of immovable property by a resident except in the case of compulsory acquisition of certain immovable properties. In order to have a reporting mechanism of transactions in the real estate sector and also to collect tax at the earliest point of time, it is proposed to insert a new section 194-IA to provide that every transferee, at the time of making payment or crediting of any sum as consideration for transfer of immovable property (other than agricultural land) to a resident transferor, shall deduct tax, at the rate of 1% of such sum. In order to reduce the compliance burden on the small taxpayers, it is further proposed that no deduction of tax under this provision shall be made where the total amount of consideration for the transfer of an immovable property is less than fifty lakh rupees”.

Finally section 194IA has effected from 1st June, 2013 which casted greater obligation on all persons who are purchasing immovable property having value ₹ 50 Lakhs or more. The payer/purchaser has following obligations under the provisions of this section.

- (i) To deduct income tax at source at the prescribe rate on payment related to transferor of immovable property.
- (ii) Deposit of such TDS, furnishing of the Challan-cum-statement in Form No. 26QB under Rule 31A of income tax rules and issue of certificate of deduction of tax at source in Form No. 16B to the payee within 30 days fifteen days from the due date of furnishing of return/Form 26QB.

Provisions and the obligations are provided below for better understanding

(1) Who is responsible for tax deduction at Source (TDS)

- Any person, being a transferee, responsible for paying (other than the person referred to in section 194LA) to a resident transferor any sum by way of consideration for transfer of any immovable property (other than agricultural land), shall liable to deduct tax at source.
 - "Immovable property" means any land (other than agricultural land) or any building or part of a building.
- Agricultural land means agricultural lands in India, not being a land situated in any area referred to in section 2(14)(iii)(a)/(b) of income tax act. A land shall not be treated as Agriculture Land, if:
- (i) *It is situated within jurisdiction of Municipality or Cantonment Board which has a population of not less than 10,000; or*
 - (ii) *It is situated in any area within below given distance measured aerially:*

Population of the Municipality	Distance from Municipal limit or Cantonment Board
<i>More than 10,000 but does not exceed 1,00,000</i>	<i>Within 2 KM</i>
<i>More than 1,00,000 but does not exceed 10,00,000</i>	<i>Within 6 KM</i>
<i>Exceeding 10,00,000</i>	<i>Within 8 KM</i>

The section provides for deduction of tax at source where any sum is paid by way of consideration for transfer of any immovable property. On strict interpretation it can be said that tax is deductible only when payment of a sum is made either by way of cash, cheque or draft or by any other mode and the provision will not apply in case of exchange or payment of consideration in kind. An issue came before ITAT, Bangalore in case of Chief Accounts Officer Bruhat Bangalore MahanagarPalike v. ITO (2015) 113 DTR 209(Bang)(Trib) in the context of Section 194LA on deduction of tax at source in case of payment of compensation non-monetary terms. Hon'ble ITAT held that "where neither there is quantification of the sum payable in terms of money nor actual payment in monetary terms, it would be unfair to burden a person with the obligation of deducting tax at source and exposing him to the consequences of such default." This decision also equally applicable to section 194IA.

However there may be contrary view may come as exchange of capital asset is subject to capital gain and for computation of capital gain, the consideration is determined under provisions of income tax act. Besides above provision of section 194IA is also includes payment of consideration in any other mode.

The provisions of section 206AA is given below for reference.

- *Every person whose receipts are subject to deduction of tax at source (i.e., the deductee) shall furnish his PAN to the deductor.*
- *If such person does not furnish PAN to the deductor, the deductor will deduct tax at source at higher of the following rates:*
 - *the rate prescribed in the Act;*
 - *at the rate in force, i.e., the rate mentioned in the Finance Act; or*
 - *at the rate of 20 per cent.*
- *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 above provisions shall apply accordingly.*

(2) Who is the Payee and Payer

- The payee is resident transferor of any immovable property (other than agricultural land). The payer is any person (being a transferee) who is responsible for paying (other than the person referred to in section 194-LA) to a resident transferor any sum by way of consideration for transfer of any immovable property (other than agricultural land).
- It may be noted that section 194 LA is applicable for deduction of tax at source while any payment of compensation or enhanced compensation or consideration or enhanced consideration made to a person for compulsory acquisition of any immovable property (other than agricultural land).
- The Section will apply when the transferor as well as transferee are residents. Therefore, tax is to be deducted even in respect of transfer of property located outside India. Tax is to be deducted also for the reason that income of the transferor will be chargeable in India, being resident.

(3) Time of deduction of tax at Source

- Income tax at the prescribed rate of 1% of the amount shall be deducted in the earlier of the following situations
 - (i) *at the time of payment (maybe in cash, cheque, demand draft, bank transfer such as RTGS /NEFT or any other mode) or*
 - (ii) *at the time of credit to books of accounts of the transferor*

(4) Rate of TDS applicable on payments/credits

- Tax needs to be deducted at source @ one per cent (1%) of the amount credited to the account of the transferor or payment made to such transferor.
- The transferor of the immovable property is required to produce the PAN to the transferee/payee/purchaser of such property. When PAN is not furnished, the provisions of Section 206AA of income tax is applicable which will result in deduction of tax at source @ 20% of payment/credit instead of 1% as prescribed.

- The Buyer is required to quote his or her PAN and sellers PAN in the challan cum Form 26QB9 (discussed latter). So the Buyer or Purchaser of the property is not required to procure Tax Deduction Account Number (TAN).

(5) Threshold limit for deduction of tax at source

Any sum paid by way of consideration for transfer of any immovable property (other than agricultural land in rural area) is covered under section 194-IA, provided the consideration for transfer of an immovable property is not less than ₹ 50 lakhs.

(i) Tax needs to be deducted on the entire amount of credit or payment as the case may be once it is ₹ 50 lakhs or more. There is no basic exemption for deduction of tax at source. If the amount of immovable property which is subject matter of transfer is ₹ 65 Lakhs, then buyer is required to deduct tax at source on ₹ 65 lakhs and not on ₹ 15 lakhs. TDS is also required to be made at the time of payment of each instalment even if any instalment is less than ₹ 50 lakhs.

(ii) Section 194-IA is applicable on total value of the immovable property and, not on the respective share of buyer and seller. If an immovable property purchased by two buyers or transfer by two sellers and property value is ₹ 90 Lakhs, then sale consideration of respective share of buyer / seller is ₹ 45 Lakhs each (below ₹ 50 Lakhs) but as per rule total value of the property will be considered for deduction of tax at source.

Example: Mr A & B are jointly buying a flat. Payment of consideration is ₹ 60 lacs. Which is to be paid by Mr A ₹ 30 lakh and Mr B is to be paid ₹ 30 lakhs. Whether TDS is applicable to payment of Mr A and Mr B u/s 194 IA?

Answer: As the consideration of the immovable property is more than the threshold limit of ₹ 50 lakhs the TDS provisions u/s 194 IA is applicable. So Mr A and Mr B are required to deduct tax at source @ 1% on payment of ₹ 30 lakhs.

(iii) In case the immovable property is partly financed by bank/lender then TDS will be required to be deducted by the transferee on the entire amount of consideration irrespective of the amount of financing. As per section 194IA "any person, being a transferee..." is liable to deduct tax at source. When any loan availed from bank, the Bank can't be said to be transferee even if it is providing funds to the buyer. Therefore, the whole TDS will be deducted by the buyer from the amount paid by him to seller and the bank will not be held responsible to deduct TDS on payment made by him on buyer's behalf.

Example: If A purchased an immovable property of ₹ 60 lakh which is financed by bank for ₹ 45 lakhs and he has contributed ₹ 15.00 lakh. The TDS is to be deducted and deposited by Mr A is ₹ 60 lakhs @ 1% = ₹ 60,000/-. So Bank will pay to the transferor ₹ 45 lakhs and Mr A will pay ₹ 14.40 lakhs (₹ 15 lakhs – ₹ 0.60 lakhs). If the payment is made in instalments then the amount shall be deductible in proportionate to the installment paid.

(6) Non applicability of Provisions for deductions of tax at source

Deductions of tax at source is not applicable in the following circumstances

- Where the consideration for the transfer of an immovable property is less than fifty lakh rupees.
- Where consideration is related to transfer of immovable property is agricultural land (in rural area as stated at 1 above)

(7) Few specific issues are discussed after making various provisions of income tax act which are given below

Sl. No.	Particulars of situation/ Issues	Applicability of TDS/ applicable of relevant provisions of section 194IA
1.	Whether provision of section 194IA will apply on transfer of booking/right in the builder's project?	Section 194IA provides for TDS on payment of consideration/credit for transfer of immovable property. Since the booking rights in any builder's project cannot be treated as immovable property, then such payment is not subject to TDS.
2.	Whether the Service tax and VAT/GST (from 1 st July 2017) are to be included in determination of threshold limit of ₹.50 lakhs for deduction of tax at source/or the TDS to be made on such on such Service Tax & VAT/ GST as the case may be.	In our view the Service Tax & VAT / GST should not be considered as part of consideration and tax thereon should not be deducted.
3.	While the builder allotted a Flat, the consideration includes payment for Car Parking, Permanent Membership of Club, Electricity metre & line laying charges and other incidental charges. Whether the consideration includes above payment for TDS.	In our view the TDS is applicable on these payments, since these payments are part of consideration and condition for transfer of immovable property. However if any refundable deposit is made for maintenance of Flat / club and other facilities, the same cannot be considered for TDS.
4.	Whether provision will apply in case of transfer of Share in a society resulting in transfer of rights in the property?	On reasonable interpretation of the provision, it should apply on transfer of Transfer of share in the society is effectively result in transfer of immovable property and such transfer for a consideration shall be interpreted and all the provisions of section 194IA is applicable.
5.	Whether provisions will apply to development	Usually in a case of development contracts, the

	contracts with the developer?	developer transfers a part of built up area to the land owner in exchange of transfer of proportionate land rights. Accordingly, land owner and also developer are the buyers as well as sellers and therefore, both are required to deduct tax at source under the section. If there is further sale made by developer/buyers will deduct tax on consideration paid to developer.
6.	Whether purchase of property in auction by a bank or financial institution pursuant to default in payment of loan by the owner of the property will be subject to TDS under Section 194IA?	This is a situation where, the sale of immovable property by the bank or financial institutions will be on behalf of the defaulter and the defaulter is the transferor. Under provisions of income tax act, such auction sale, the defaulter borrower shall be liable to pay capital gain tax on sale of the property. Therefore the provisions of section 194IA for deduction of tax at source shall be applicable.

(8) Obligations & Compliances under the act by Payer

(i) Obligations of the Payer under Income-tax act

(a) Deposit of tax to the credit of the Central Government:

- Any sum deducted under section 194-IA of Income-tax act by the payer shall be paid to the credit of the Central Government (by remitting it electronically to the Reserve Bank of India or the State Bank of India or to any authorised bank).
- After successfully providing details of transaction deductor can:
 - Either make the payment online (through e-tax payment option) immediately;
 - Or make the payment subsequently through e-tax payment option (net-banking account) or by visiting any of the authorized Bank branches. However, such bank branches will make e-payment without digitization of any challan. The bank will get the challan details from the online form filled on TIN website (www.tin-nsdl.com)
- The amount to be deposited within a period of 7 (seven) days from the end of the month in which the deduction is made and shall be accompanied by a challan-cum-statement in Form No. 26QB. As per the CBDT notification no. 30/2016 dated April 29, 2016, the due date of payment of

TDS on transfer of immovable property has been extended to thirty days from earlier seven days from the end of the month in which the deduction is made.

- Provision to enter Tax amount (comprising of basic tax, interest and fee) in Form 26QB is given in TIN website and Bank's site.

Example: *If a taxpayer has made payment of sale consideration in the month of February, then corresponding TDS should be deposited on or before (thirty days) March 30th.*

- The Buyer of the property (deductor of tax) has to furnish information regarding the transaction online on the TIN website i.e. www.tin-nsdl.com. Online statement cum challan Form/Form 26QB is to be filled in by each buyer for unique buyer-seller combination for respective share. If more than One Buyer or Seller for an immovable property which attract TDS under section 194IA, then the Challan and Form 26QB will be filled in by all the buyers for respective sellers for their respective share.

Example

➤ *in case of one buyer and two sellers, two challan and Form 26QB have to be filled in and*

➤ *in case two buyers and two sellers, four challan and Form 26QB have to be filled in for the respective property shares*

- E-payment of taxes at subsequent date will be linked to the FORM 26QB based on Acknowledgement number generated at the time of filing of Form 26QB. If the acknowledgement number generated at the time of filing of Form 26QB is forgot to save then
 - *Acknowledgment number for the Form 26QB furnished is available in the Form 26AS (Annual Tax Statement) of the Deductor (i.e. Purchaser/Buyer of property). The same can be viewed from the **TRACES website** (www.tdscpc.gov.in) or*
 - *Taxpayer can also click the option 'View Acknowledgment' hosted on the TIN website. Taxpayer needs to enter PAN of the Buyer and Seller, Total Payment and Assessment Year (as mentioned at the time of filing the Form 26QB) to retrieve the Acknowledgment Number.*
- In case the payer filled the Form 26QB but forgot to print, the he may access the link "**E-tax on subsequent date**" on the TIN website. On entering the details as per the acknowledgment slip, will be provided options to Print the Form 26QB.
- If any problem is encountered at the NSDL e-Gov website while entering details in the online form,

then contact the TIN Call Center at 020 - 27218080 or write to us at tininfo@nsdl.co.in (Please indicate the subject of the mail as Online Payment of Direct Tax_ TDS on sale of property).

(b) Certificate/statement for tax deducted at source

- Every person/Payer responsible for deduction of tax under section 194-IA shall furnish the certificate of deduction of tax at source in Form No.16B to the payee within fifteen days from the due date for furnishing the Challan-cum-statement in Form No. 26QB under Rule 31A of income tax rules. Form 16B will be available for download from the website of Centralized Processing Cell of TDS (CPC-TDS) www.tdscpc.gov.in.
- For generating certificate of deduction of tax at source in Form No.16B in the TRACES Website, The TDS amount as per Form 26QB should be entered in the field 'Basic Tax' (Income Tax) on the Bank's web-portal as TDS certificate (Form 16B) will be based on 'Basic Tax' (Income Tax) only.

(c) Furnishing of Challan cum Statement (Form No. 26QB) statements by tax deductor to department

Every person responsible for deduction of tax under section 194-IA shall furnish to the Director General of Income-tax (System) or the person authorized by him a challan-cum-statement in Form No. 26QB electronically within thirty days from the end of the month in which the deduction is made. CPC-TDS has also enabled the online functionality for correction in Form 26QB.

Procedures to be followed for payment of e-tax payment option, the readers are advised to refer the link "<https://www.tin-nsdl.com/faqs/tds-on-sale-of-property/TDS-FAQ.html>"

(ii) Consequences for noncompliance by the payer of immovable property

(a) Applicability of penalties or interest if there is a non-deduction or late deposit after deduction of tax

Section 201 of Income Tax Act provides for payment of interest if TDS is not paid to the credit of the Central Government within a period of seven days from the end of the month in which the deduction is made. It is clearly specified that any person liable to deduct TDS on the income distributed, makes default in deduction and/or payment of TDS shall be treated "assessee in default". Such interest shall be paid before furnishing the Form 26QB as prescribed under income tax rules

In case, where the TDS is not paid to the Govt. account by the due date then under section 201

of IT Act 1961 interest will be levied and the deductor (buyer of the immovable property) is to be deemed as an assessee in default for failure to pay or for late payment of any TDS including TDS on immovable property.

There are two scenarios:

Scenario	Consequences
(a) If tax deducted is not deposited by the 7th of next month of the month of deduction, but is paid at a later date	Interest is payable @ 1.5% for every month or part of a month on the amount of such tax, from the date on which such tax was deducted to the date on which such tax is actually paid.
(b) If tax is not deducted at all and not paid.	Interest is payable @ 1% for every month or part of a month on the amount of such tax, from the date on which such tax was deductible to the date on which such tax is deducted. In addition to interest the payer will be treated as assessee in default and liable to pay TDS that not deducted

Example: Payment made by purchaser of an immovable property is ₹ 55.00 lakhs to the Developer of such property. TDS @ 1% on ₹ 55 lakhs that is ₹ 55,000 was deducted on June 25, 2017, which required to be deposited with the government account by July 7, 2017, but if the same is paid on August 7, 2017 then interest calculations will be as follows:

In the present case the default period is 3 (three) months (part of June will be counted as one month, full July month as one month & part of August is one month)

Interest Rate: $1.5\% \times 3 = 4.5\%$ then Amount of Interest: $₹ 55,000 \times (3 \times 1.5\%) = ₹ 2,475$

However the payer who is in default in deduction of tax at source may take shelter of the amended provisions of section 201 of Income tax act which is applicable with effect from 1st July 2012 which is given below for reference.

As per section 201, a payer who fails to deduct whole or any part of the tax at source is treated as an assessee-in-default. However, by virtue of proviso inserted to section 201 by the Finance Act, 2012 with effect from 1-7-2012, the payer who fails to deduct the whole or any part of the tax on the payment made to a resident payee shall not be deemed to be an assessee-in-default in respect of tax not deducted by him, if the following conditions are satisfied:

- The resident recipient has furnished his return of income under section 139.
- The resident recipient has taken into account the above income in its return of income.
- The resident recipient has paid the taxes due on the income declared in such return of income.
- The resident payee furnishes a certificate to this effect from an accountant in Form No. 26A.

However, even if the payer is not treated as an assessee-in-default, he will be liable to pay interest under section 201(1A) of income tax act. In this case, interest shall be payable from the date on which such tax was deductible to the date of furnishing of return of income by such resident payee. Interest in such a case will be levied at 1% for every month or part of the month as stated in above table.

(b) Late Fee Applicable under section 234E

As per section 234E of the income tax act 1961 read with Rule 31A (4A) of IT rules, 1962, failure on the part of taxpayer to furnish challan-cum-statement in Form No. 26QB electronically within 30 days from the end of the month in which the tax deduction is made will attract levy of fee to be paid by the buyer/transferee/payer. This penalty is in addition to interests applicable under section 201 of income tax act. The late fee of ₹.200 per day under section 234E will be levied subject to the amount of tax (that is the maximum) is to be levied for late filing of TDS statement i.e. form 26QB. Since form 26QB is treated as a statement (which generates TDS certificate as form 16B) prescribed under section 200(3) of income tax act, therefore late filing of the same will attract late fee of ₹. 200/-per day.

Example: Referring to the example taken for calculation of interest as above at (a), the late fee amount is arrived as follows:

₹ 55,000 tax was deducted on June 25, 2017, which requires to be deposited on or before July 7, 2017. But the same was paid on August 7, 2017 then, late fee will be calculated as follows:

No. of days from July 8, 2017 to August 7, 2017 = 31 days.

Late fee= ₹ 200 per day × 31 days = ₹ 6,200 or ₹ 55,000 (that is the amount of TDS) whichever is lower i.e. ₹ 6,200

(c) Penalty for default in furnishing statement of TDS (26QB) under section 271H

As per section 271H, failure to submit or furnishing incorrect statement as required will attract penalty which will be levied by the Assessing Officer at his discretion. This section is applicable when a statement as required by the tax laws is not submitted timely. Minimum and maximum penalty under this section is ₹. 1 lakh. However, if TDS is deposited with fee & interest and statement is submitted within one year of the time prescribed, no penalty shall be levied.

Analysis of Case laws

An issue was came up for hearing before Hon'ble High Court of Kerala in case of M.C. Thomasv. District Collector reported in (2014) 49 Taxmann.Com 109 (Keral)/(2014) 264 CTR 437 (Keral), Whether, tax would liable to be deducted on sale consideration under section 194-IA or 194 LA, where assessee transferred its land to Government at agreed/negotiated price exceeding ₹ 50 lakh?

Hon'ble High Court held that

"Section 194-IA, read with section 194LA, of the Income-tax Act, 1961 contains provision regarding deduction of tax at source on Payment on transfer of certain immovable property other than agricultural land. The Petitioner transferred his land to Government and received agreed/negotiated sale consideration. He filed writ petition for a direction to disburse whole of sale consideration without deduction of tax under section 194LA or 194-IA. The issue was whether, since there was no land acquisition, tax at rate of 10 per cent was not liable to be deducted on sale consideration under section 194LA. The petitioner concedes that he has agreed to receive sale consideration at the rate of ₹.17 lakhs per cent and the total sale consideration for 3.98 cents comes to about ₹.67, 66,000/-. The petitioner is fully justified in his contention that tax is not liable to be deducted at the rate of 10% of the sum as consideration under Section 194-IA of the Act since there is no land acquisition. But tax is certainly liable to be deducted from the sale consideration payable to the petitioner at 1% of the sum under Section 194-IA of the Act since the total sale consideration exceeds ₹.50 lakhs. The obligation to deduct tax under Section 194-IA of the Act arises when consideration is payable to a resident transferor on the transfer of immovable property otherwise than by land acquisition. It is upto the petitioner to submit his return before the jurisdictional assessing officer and take the proceedings to a logical end in the determination of his tax liability. The dictum in Infopark Kerala v. Asst. CIT reported in [2010] 187 Taxman 1 (Ker.) case reported W.A.No.2243 of 2008 is clearly distinguishable in as much as the same dealt with the deduction of tax under Section 194 LA of the Act in the absence of a compulsory acquisition. The District Collector and the Special Tahsildar (Land Acquisition) are therefore directed to disburse the sale consideration to the petitioner after deducting income tax at 1% of the sum under section 194 IA of the Act".

Conclusion

After introduction of this provisions, has increased in transparency in real estate transactions leads to proper track on all high value property transactions in the country and will give the taxing authorities the details in a systematic way. However, the buyers of immovable property are under obligation to comply the provisions which will put more additional burden with them. It is a fact that many buyers/ transferees are not acquainted with provisions of Income Tax Act and the procedural compliances and therefore, compliance of the provisions results in undue burden and botheration to them.