

SEC 195-OTHER SUMS — NON|RESIDENT

SEC 195 - NONRESIDENT

Tax deducted at source (TDS) is a tax collection mechanism by the government wherein the payer responsible for making the payment must deduct tax from the amount paid to another person or entity.

In this regard, Section 195 of the Income Tax Act, 1961 specifies the TDS provision in the case of an individual making a payment by way of interest or any other amount other than salary to an NRI or a foreign company.

Non-resident Indians (NRIs) also need to file their tax returns for the income earned in India. Similarly, they also can claim the tax deducted at source (TDS) when filing tax returns.

NON RESIDENT

As per the said provisions, a person is said to be a non-resident in India if not a **resident in India**, as laid out in section 6 of the Act.

A person will be a **resident of India** in any financial year if they satisfy the following conditions:

If they stay in India for 182 days or more during the financial year, or

If they stay in India for 60 days or more during the financial year, and 365 days or more during the immediately preceding four financial years.

Exception for point (2)

In the case of an Indian citizen or a person of Indian origin (PIO) whose **total income, other than income from foreign sources:**

Exceeds Rs 15 lakhs during the relevant financial year – 60 days as mentioned in point (2) above will get substituted with 120 days.

Sec 6(1A) – DEEMED RESIDENT.

An Indian citizen or PIO earning a total income over Rs 15 lakhs (other than from foreign sources) is deemed a NOT ORDINARILY resident in India if they are not taxed in any other country.(DEEMED RESIDENT).

[1] [(1) Any person responsible for paying to a non-resident not being a company or to a foreign company [2] [any interest (not being interest referred to in section 194B or section 194C)] [3] [or section 194D] [4] [* * * *] or any other sum chargeable under the provisions of this Act (not being income chargeable under the head Salaries [5] [* * * *]) 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 :

[6] [Provided that in the case of interest payable by the Government or a public sector bank within the meaning of clause (23D) of section 10 or a public financial institution within the meaning of that clause, deduction of tax shall be made only at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode :]

Explanation [9] [1] . For the purposes of this section, where any interest or other sum as aforesaid is credited to any account, whether called Interest payable account or Suspense account or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.]

[10] [Explanation 2 --For the removal of doubts, it is hereby clarified that the obligation to comply with sub-section (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.]

(2) Where the person responsible for paying any such sum chargeable under this Act ^[11][(other than salary)] to a non-resident considers that the whole of such sum would not be income chargeable in the case of the recipient, he may make an application ^[12][in such form and manner to the Assessing Officer, to determine in such manner, as may be prescribed], the appropriate proportion of such sum so chargeable, and upon such determination, tax shall be deducted under sub-section (1) only on that proportion of the sum which is so chargeable :

[13][* * * *]

^[14][(3) Subject to rules^[15] made under sub-section (5), any person entitled to receive any interest or other sum on which income-tax has to be deducted under sub-section (1) may make an application in the prescribed form to the ^[16][Assessing] Officer for the grant of a certificate authorising him to receive such interest or other sum without deduction of tax under that sub-section, and where any such certificate is granted, every person responsible for paying such interest or other sum to the person to whom such certificate is granted shall, so long as the certificate is in force, make payment of such interest or other sum without deducting tax thereon under sub-section (1).


(4) A certificate granted under sub-section (3) shall remain in force till the expiry of period specified therein or, if it is cancelled by the ^[17][Assessing] Officer before the expiry of such period, till such cancellation.

(5) The Board may, having regard to the convenience of assesseees and the interests of revenue, by notification in the Official Gazette, make rules specifying the cases in which, and the circumstances under which, an application may be made for the grant of a certificate under sub-section (3) and the conditions subject to which such certificate may be granted and providing for all other matters connected therewith.]

^[18][(6) The person responsible for paying to a non-resident, (not being a company), or to a foreign company, any sum, whether or not chargeable under the provisions of this Act, shall furnish the information relating to payment of such sum, in such form and manner, as may be prescribed.][¹⁹

^[20][(7) Notwithstanding anything contained in sub-section (1) and sub-section (2), the Board may, by notification in the Official Gazette, specify a class of persons or cases, where the person responsible for paying to a non-resident, not being a company, or to a foreign company, any sum, whether or not chargeable under the provisions of this Act, shall make an application ^[21][in such form and manner to the Assessing Officer, to determine in such manner, as may be prescribed], the appropriate proportion of sum chargeable, and upon such determination, tax shall be deducted under sub-section (1) on that proportion of the sum which is so chargeable.

SCOPE OF SECTION 195



Who are covered?	<ul style="list-style-type: none">• Any person responsible for paying• To a non-resident or a Foreign Company
What is covered?	<ul style="list-style-type: none">• Any interest or any other sum• Chargeable to tax under the provisions of this Act
When is it applicable?	<ul style="list-style-type: none">• At the time of credit or at the time of payment• Whichever is earlier
How is it to be applied?	<ul style="list-style-type: none">• Deduct income-tax thereon at the rates in force

SUM CHARGEABLE TO TAX

- ▶ Tax is to be deducted not just from payments which are wholly incomes but also from payments where only a portion of the payment may be income [Income embedded in the payment.]
- ▶ Tax is deductible on “**sum chargeable to tax**”
 - ▶ This is the basis of determining whether tax is to be deducted or not.
 - ▶ **Transmission Corp. 239 ITR 587 (SC).**
 - ▶ **GE India Technology Cen. Pvt. Ltd. – (193 Taxman 234) 2010 SC -).** Not correct to say the moment a remittance was made to a foreign party tax became deductible under the provisions of Section 195 of the Income Tax Act.
- ▶ In other words, **tax is deductible only from income portion** of a payment and not the gross payment itself
 - ▶ Understanding clarified by CBDT:
 - ▶ **CBDT circular no. 02/2014 dated 26.2.2014** states that interest u/s. 201 will be on **portion representing income** (not the whole amount)
 - ▶ **CBDT circular no. 03/2015 dated 12.2.2015** states that disallowance u/s. 40(a)(i) will be on **sums chargeable to tax** (not the whole amount)

HOW IS TO BE DETERMINED?

Section 6

- *Residential Status*

Section 5

- *Received or Deemed to be received*
- *Accrues or arises*

Section 9

- *Is deemed to Accrue or Arise*

DTAA

- *As amended by MLI*
- *Exempt from Tax*
- *Lower tax rate*

Provisions of the Act or DTAA, whichever are more beneficial, prevail

▶ S. 90(4) – NR CANNOT AVAIL BENEFIT UNDER TREATY WITHOUT TAX RESIDENCY CERTIFICATE (TRC)

- ▶ Applies to all NRs without any threshold limit
 - ▶ FinMin proposed bringing in threshold in 2015, but no action till date

▶ S. 90(5) – The assessee has to provide such other details as may be prescribed

- ▶ R. 21AB specifies the information to be provided
- ▶ To be provided in Form 10F – if the same are not covered in the TRC
- ▶ Assessee should keep the relevant documents for the above information.
- ▶ TRC and Form 10F go together
- ▶ **Form 10F alone is not sufficient**
- ▶ Self-attestation

▶ **IF TRC IS NOT AVAILABLE AT THE TIME OF DEDUCTION?**

- ▶ Benefit of treaty provisions is not available
- ▶ Once the TRC is obtained, the treaty benefit would be available for the whole year it is obtained for
- ▶ **Ahmedabad ITAT in Skaps Industries India Private Limited held that TRC is not necessary. 90(4) does not override treaty.**
 - ▶ NR can claim treaty benefit if residential status substantiated by sufficient and reasonable documentary evidence
- ▶ **Sreenivasa Reddy Cheemalamarri vs. ITO [2020] TS-15 -ITAT-(Hyd.)**

▶ **If the TRC is available, but it is for a different period?**

- ▶ The deductor can rely on the TRC for the period during which the income is earned, not necessary to cover the tax period concerned

▶ **Is TRC required in case tax is not payable under the Act itself?**

- ▶ As DTAA provisions are not employed, provisions of Sections 90(4), 90(5) and the relevant rules will also not be applicable
- ▶ Helpful in cases where TRC is not available and NR does not have business connection in India – however now check SEP provisions too

WHO SHOULD DEDUCT TAX UNDER SECTION 195?

Any person who makes any payment (other than salary or interest referred to in sections 194LB, 194LC and 194LD) taxable in India **to a non-resident** must deduct tax under this section.

The payer, one who pays the NRI or remits the payment, can be a resident or a non-resident, an individual, Hindu Undivided Families (HUFs), partnership firms, other NRIs, foreign companies, or an artificial juridical person (for example, a corporation, government agency or non-profit organisation).

IS THERE A THRESHOLD LIMIT TO DEDUCT TDS U/S 195?

No, there is no threshold limit to deduct TDS under Section 195. However, the payer must deduct tax only when the payment made to a non-resident is taxable in India. Therefore, no tax is to be deducted in case of exempt income or any other income that is not taxable as per the Income Tax Act unless the government notifies explicitly.

AT WHAT RATE IS THE TAX DEDUCTED UNDER SECTION 195?

TDS is deducted at either of the following rates, whichever is more beneficial to the payee:

Rates as per the Finance Act of the given year

Rates contained in the Double Taxation Avoidance Agreement (DTAA) between India and the country of residence of such non-resident

Note that the rates given under the Finance Act are to be increased by the applicable surcharge and education cess of 4%. However, surcharge and cess are not required to be added to the rates given under DTAA.

Particulars	TDS Rates (%)
Income in respect of investment made by NR	20
Income by way of long-term capital gains in Section 115E, Section 112 and 112A	10
Income by way of short-term capital gains under Section 111A	15
Any other income by way of long-term capital gains	20
Interest payable on money borrowed in Foreign Currency	20
Income by way of royalty and/or fees for technical services	20
Winnings from card games, horse races and online games	30
Any other income – Other than Company – Company	30 40

The rate at which tax is to be withheld on payments made to a non-resident is dependent on whether the recipient of income is a non-resident individual or a non-resident company.

WITHHOLDING TAX RATE ON INCOME FROM IMMOVABLE PROPERTY

Type	Description	WHT Rate
Other Income (Eg.- rental income)	If payments are made to a Non-Resident COMPANY	40%
Other Income (Eg.- rental income)	If payments are made to a Non-Resident INDIVIDUAL	30%
Gain	Long term Capital Gain	12.5%
Gain	Short term Capital Gain	30% (highest as per slab rate)

Note - All the rates prescribed u/s 195 of the act would be applied after adding cess & surcharge.

SECTION 195(2)- APPLICATION TO AO BY PAYER

Where the person **responsible for paying** any such sum chargeable under this Act (other than salary) to a **non-resident** considers that the whole of such sum would not be income chargeable in the case of the recipient, he may **make an application** in such form and manner to the Assessing Officer, to determine in such manner, as may be prescribed, the appropriate proportion of such sum so chargeable, and upon such determination, tax shall be deducted under sub-section (1) **only on that proportion of the sum which is so chargeable.**

Section 195(3)- Application to AO by Recipient

Subject to rules made under sub-section (5), **any person entitled to receive** any interest or other sum on which income-tax has to be deducted under sub-section (1) may make an application in the prescribed form to the Assessing Officer for the **grant of a certificate** authorising him to receive such interest or other sum **without deduction of tax** under that sub-section, and where any such certificate is granted, every person responsible for paying such interest or other sum to the person to whom such certificate is granted shall, so long as the certificate is in force, make payment of such interest or other sum without deducting tax thereon under sub-section (1).

LOWER DEDUCTION CERTIFICATE



Normally section 195 talks about withholding 12.5%+surcharge +cess on long term capital gain income however, many a times the seller is not willing to share the gain amount and accordingly the buyer is required to calculate and pay tax at 12.5% on the sale amount. Hence, to save such huge withholding, seller takes an option to apply for LDC (Lower deduction certificate) with his Assessing officer which could take anywhere between 2-3 months, however if seller shares all documents of purchase and cost of property with buyer they can calculate long term capital gain and **withhold 12.5% tax on same rather than withholding 12.5% on sale value.**

DECLARATION OF INFORMATION IN RELATION TO FOREIGN PAYMENTS

The payer responsible for paying any amount to a non-resident or a foreign company is required to furnish complete and accurate information regarding such payment in Form 15CA and Form 15CB with the AO. Note that such information must be furnished even if the amount paid is not taxable under the Act. Failure to do such compliance shall attract a penalty of Rs 1 lakh under Section 271-I.

15 CA

Form 15CA is a Declaration of Remitter and is considered as a tool for collecting information in lieu of payments which are chargeable for tax in the hands of recipient non-resident of India. This is starting of an effective Information Processing System which may be utilized by the Income tax Department to freely track the foreign remittances and their source to determine tax liability.

Financial Institutions are now more vigilant in seeking such Forms before remittance is effected since now as per revised Rule 37BB a duty is implied on them to furnish Form 15CA received from remitter to an income-tax authority for the uses of any proceedings under the Income-tax Act.

Part A –Section A of Form 15CA is filled in by the remitter when the payment or the total sum of the payment extended by the remitter to NRI recipient during a particular Financial Year is Rs. 5 Lakhs or less.

Part B –Section B of Form 15CA is in the role when such payments are more than Rs. 5 Lakhs. Information is entered by the filer in Section B after acquiring a certificate from Assessing Officer (valid under section 197) or the order from Assessing Officer (valid under sub-section (2) or sub-section (3) of section 195).

Part C –If such payments made during a particular FY exceed Rs. 5 Lakhs, the related information has to be entered in Section C of Form 15CA after acquiring the Tax Determination Certificate or Form 15CB from authorized CA (valid under sub-section (2) of section 288).

Part D –Payments made by the remitter during a particular FY which is not referred to in sub-section 37BB or in other words is not taxable under law, the information related to such payments is to be entered in Section D of Form 15CA.

