Important Issues in TDS

CA N. C. Hegde,
Deloitte Haskins & Sells

21 August 2011

Vasai Branch of WIRC

Contents

- Overview of TDS provisions
  - Sections 192, 194A, 194C, 194C v 194I, 194H, 194I, 194J
- Sec 195 – Non-residents & TDS
- Sec 40(a)(i) – Consequences of failure to deduct TDS on payments to non residents
- Tax audit disclosures
- Other issues

Sec 192 – TDS on Salary

Extra-Territorial Jurisdiction of Provisions of the ITA

Facts:

- Expatriates seconded to Indian JV by foreign enterprise.
- JV had deducted tax at source on the salary payable in India u/s 192 but did not deduct tax on the home salary paid to expatriates
- The department held that JV should have deducted tax on the home salary as well .
- initiated penal proceedings for non-deduction of tax at source. T
- he tribunal and the High Court ruled in favour of the JV

Issue:

- Whether the JV is liable to deduct Indian tax on home salary
- whether provisions dealing with TDS which are in nature of machinery provisions for collection of taxes are independent of the charging provisions

Decision:

- Provisions relating to TDS, which are in nature of machinery provisions to **enable collection and recovery of tax** forms an integrated code with the charging provisions which determines **charge to tax in the hands of expatriates**.
- Indian company is responsible for withholding tax on remuneration paid to its expatriates by a foreign company outside India if the services are rendered solely in India.
- Section 192 has extra-territorial jurisdiction when salaries taxable u/s 9(1)(ii) are payable outside India.

CIT vs. M/s Eli Lilly & Co . (India) P. Ltd.[(312 ITR 225)(SC)]

Payment of tax deducted on salaries

Facts:

- Assessee paid salary to employees during the relevant assessment year ("AY") but did not deduct tax in each month
- The assessing officer ("AO") imposed interest under section 201(1A) of the Income-tax Act ("ITA")
- The CIT(A) upheld the order of the AO. However, the Tribunal held in favour of the assessee

Issue:

- Is the assessee an “assessee in default” u/s 201 because it did not deduct tax in each month?

Decision:

- Subsection (3) to section 195 of the ITA states that the person responsible for making payment under subsection (1), (1A), (2) , (2A) and (2B) may at the time of making any deduction, 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 tax during ***the financial year***
- Subsection (3) clarifies that if there is failure to deduct in a financial year, the same can be deducted by way of adjustment during the financial year
- Mandate to deduct tax u/s 192 stands extended to the end of the financial year.
- Assessee is not an assessee in default

CIT v. Enron Expat Services Inc. [2011] (330 ITR 496) (Uttarakhand)

Responsibility of correctness of employee claims

Facts:

- AO held that employer should check whether the amounts were actually spent and is responsible for not having deducted tax on the amount additionally liable on the savings, if any made by the employee

Decision:

- SC held that the employer is not under any statutory obligation to check that the employees had actually utilized the amount paid towards travel concession or conveyance allowance

CIT vs. Larsen & Toubro Ltd [2009] (313 ITR 1) (SC)

Sec 194A – TDS on Payments of Interest

Do discounting charges fall under the definition of "interest"?

Facts:

- The tax payer used to get its sales bills discounted from its Singapore associate companies
- These companies charge discounting charges for undertaking these transactions

Issue:

- Whether the discounting charges are to be disallowed under section 40(a)(ia) since they are in the nature of "interest‟ and tax is not withheld by the Indian taxpayer?

Decision:

- Interest is sum payable in respect of money borrowed or debt incurred.
- The bill discounting is a process in which the sale consideration receivable on sale of goods is discounted, which **is not** debt incurred or money borrowed.
- The Interest Tax Act, 1974 specifically includes discounting charges in the definition of "interest". However "interest" defined under ITA does not include discounting charges.
- Omission of these words in the definition provided under the ITA, enumerates the intention of the legislator to keep the same out of the ambit of "interest‟ under the ITA.
- The same rationale is also laid down in the Circular no. 65 issued by CDBT
- Therefore, discounting charges are not in the nature of interest. Hence in the absence of Singapore company's PE in India, the Indian payer is not under obligation to deduct tax at source u/s 195. The amount cannot be disallowed by invoking section 40(a)(i) of the ITA.

DCIT v. Cargill Global Trading (I) (P) Limited [2009] 34 SOT 424

Sec 194C – TDS on Payments to Contractors

Is payment for hiring of vehicles a contractual payment or rent?

Issue:

- Is payment for hiring vehicles for transportation of employees liable to TDS under section 194C or 194I of the ITA?

Decision:

- The provisions of sec194C apply to contracts for carrying out work including transport contract, service contract etc.
- CBDT after examining the agreement between State Road Transport Corporation and the owners of the private buses only, clarified that in such cases the provisions of section 194C are applicable
- Provisions of sec194C do not apply to the payments made to the airline or the travel agents for purchase of tickets of individual.
- The provisions shall apply when the payments are made for chartering an aircraft
- Provisions of sec194I is confined to the payment for rent on hiring of land or building, furniture but not for the transport vehicle esp. when it is in the nature of providing transport services
- The expression plant and machinery does not include hiring of transport service
- **The Tribunal also held that there was a force in the alternative contention of the assessee that the AO cannot demand u/s 201(1) when the entire tax has been paid by the recipient of the amount by way of advance tax and TDS to the revenue (number of decisions relied on)**

ACIT (TDS) vs Accenture Services P Ltd.(2010-TIOL-618-ITAT-MUM)

194C v 194I - Payment of fixed vehicle charges for transportation of its employees

Facts:

- Assessee hired cars on **fixed** rent payments and deducted tax under section 194C
- The vehicles are owned and maintained by the contractor. All other expenses of diesel, repair and insurance etc. are paid by the contractor.

Issue:

- The AO relied upon Board Circular No. 715 dated 8-8-1995 which clarifies that section 194C of the ITA is applicable when a plane or bus or any other mode of transport is chartered. Hence, since the assessee **paid the rent for hiring out machinery** he has to deduct tax at sources u/s. 194-I of the ITA

Decision:

- Vehicle charges were paid in connection with plying of employees from one place to another. Thus passengers were transported by vehicles of the vehicle contractor in consideration for a fixed amount. Therefore, sub-clause (*c*) to Explanation (*iii*) of the provisions of section 194C of the ITA would apply - **Carriage of goods and passengers by any mode of transport other than railways**
- The definition of rent under section 194I does not provide any item for vehicle hire charges.
- The assessee relied upon the decision of the Ahmedabad ITAT in the case of ***M/s. Mukesh Travels Co***. in which the Tribunal considering Explanation (*iii*) to section 194C on the identical facts held that the payment of the same nature clearly falls within the scope of section 194C of the ITA

Ahmedabad Urban Development Authority v ACIT (10 taxmann.com 233) (Ahmbd Trib)

194C v 194I – transportation sub contract

Facts:

- Assessee took cranes/trailers on rent from various transport companies and handling agents.
- Tax deducted under sec 194C

Issue:

- Revenue held that tax should have been deducted under section 194I

Decision:

- The assessee has carried out freight and transportation works contracts with three transporters who transported the goods belonging to the assessee through their vehicles.
- The assessee **had not taken the trailers/cranes on hire or rent**. The assessee **has given sub-contracts** to the said parties for the transportation of goods.
- There is nothing to indicate that the assessee has taken trailers/cranes on rent

CIT(TDS) v Swayam Shipping Services (P) Ltd. (11 taxmann.com 137) (Guj)

Do facilities provided by hotels –fall under the term "carrying out work"

Facts:

- The assessee offers various facilities to its guest apart from boarding and lodging
- The question before the Bombay High Court was whether the same should be subject to TDS u/s 194C

Decision:

- The word "carrying out work" u/s 194C is limited to any work which on being carried out culminates into a product or result (reliance was placed on the decision of the SC in case of Associated Cements)
- Circular 681 dated 3 March 1994 to the extent it applies to a customer availing the services of a hotel, should be held contrary to section 194C
- The word work has to be understood in the limited sense and would extend only to the service contracts specifically included in (the then) Explanation III to section 194C

East India Hotels Ltd and another v. CBDT and another (320 ITR 526)

All service contracts do not automatically fall under the purview of section 194C.

Franchisee agreement

Decision:

- Under a franchisee the assessee was to provide study material, upgradation thereof, technical know-how and product details.
- The licensee is required to set up the premises, equipment and infrastructure at its cost. It is entitled to use the trade mark and trade name of the assessee
- The licensee is required to collect fees from the students and is required to pay fees at the rate of 25% of net value earned from operations to the assessee.
- From the above description it can be concluded that the licensee is not doing any work for the assessee even within the wider meaning of the term “work” as understood in common parlance. Hence the provisions of section 194C will not apply
- It is a case of running a study center and to apportion profits between the assessee and the licensee
- The agreement may be a franchisee agreement and the books of accounts were also maintained in that fashion. However, it is clear that no payment was made by the assessee to the licensee for “work” done. Accordingly, provisions of section 194C will not apply and no disallowance under section 40(a)(ia) was called for.

Career Launcher (India) Ltd. v ACIT (56 DTR 10) (Delhi ITAT)

Material and labour supply contract

- When parties enter into two separate contracts, one for material and one for labour, the transaction would not be 'one' and indivisible, but would fall into two separate agreements - one for **work/service** and the other for **sale**
- In such case the provisions of s. 194C could apply only to the labour contract and not to the materials contract
- There would be no TDS obligation on the part of assessee u/s. 194C for making payments towards supply of material portion of a divisible contract

Karnataka Power Transmission Corporation Ltd. 10 taxmann.com 237 (Bang. - ITAT)

Sec 194H - TDS on Commission, Brokerage, etc

Can discount on supply of SIM cards and recharge coupons be termed as “commission”?

Facts:

- Taxpayer appointed distributors for rendering services, such as, getting customers for the taxpayer, collection of documents, delivery of SIM cards, collection of charges, etc
- Under its prepaid scheme, the taxpayer supplied SIM cards and recharge coupons to distributors at a **discounted price**

Issues:

- Whether discount for supply of SIM cards and recharge coupons is “commission” liable to withholding of tax under the ITA?

Decision:

- SIM card has no intrinsic value or use to the customer
- Distributor acts as a middleman by arranging for customers, collecting documents, etc.
- The taxpayer renders services to the subscribers based on contracts entered into between subscribers and distributors. Thus, the distributor **is an agent** who canvasses business for the taxpayer
- In substance, discount given at the time of supply of SIM Cards is payment for services
- Terminology used is immaterial and payment received by the distributor is payment for services rendered, which falls within the purview of commission as per section 194H

Vodafone Essar Cellular Limited (332 ITR 255)

“Discount” may not paid but is reduced from the price paid to the distributor. This discount takes the form of brokerage and should be subject to TDS

Whether difference between commercial price and published price can be classified as commission?

Facts:

- Airlines had an agreement with agents to sell tickets at the minimum fixed commercial price which was lower than the published price
- However, agents could sell at a higher price subject to a maximum of published price at their discretion
- As per IATA rules, agents were entitled to commission at 9% on the published price
- Airlines deducted tax on the payment of this 9% commission. However, Revenue contended that the difference between commercial price and published price was also in the nature of commission and liable to TDS

Decision:

- The agents of the assessee (airline) were entitled to sell tickets at any price between the fixed commercial price and the published price. As a result the assessee would have no information regarding the final rates at which tickets were sold
- It would be impracticable and unreasonable to accept the assessee to collect feedback from its numerous agents on the prices at which tickets are sold
- Thus, it was held that the difference between the commercial price and the published price could neither be considered as commission or brokerage in the hands of the agents and hence was not liable to TDS

CIT v. Qatar Airways (332 ITR 253)

Commission and Supplementary Commission received by travel agents

- It was held that tax should be deducted at source under Section 194H on amount available to agents being difference between airfare fixed by Airlines and price at which agents are enabled to sell tickets

Around the World Travels & Tours Pvt. Ltd. vs. UOI (141 Taxman 53) (Mad.)

- Held that supplementary commissions retained by the travel agents over and above the net fare made over to Airlines is liable to tax deduction at source under Section 194H as commission and interest under Section 201(1A) is leviable in case of default
- Air tickets sold by airlines company to the travel agent 'at a concessional rate' held to be a sale transaction on principal to principal basis, does not amount to commission, not liable to TDS

CIT vs. Singapore Airlines Ltd. & Other airlines (22 DTR 129) (Del.) (2009)

Sec 194I - TDS on Rent

Roaming costs – technical services/ rent?

Facts:

- Assessee failed to deduct tax on payments to other mobile service providers towards 'national roaming costs'

Issue:

- Should the payment by one service provider to another towards roaming charges be considered towards usage of services or equipment?

Decision:

- "Rent' means any payment by whatever name called under any lease, sub-lease or tenancy or 'any other agreement'. The emphasis of the provision is upon the 'use'.
- Assessee is placed in a position of a mere facilitator between its subscriber and the other service provider, facilitating a roaming call to be made by the subscriber.
- Assessee cannot be said to have used the equipment which is involved in providing the roaming facility.
- The assessee collects the roaming charges from its subscriber and passes it on to the other service provider.
- CBDT Circular No.715 dated 8th August 1995 clarifies that section 194I would not apply to rate-contract agreements.
- The Board itself has recognized that rent is something which is paid for earmarked premises, and in the case of roaming charges, a subscriber does not get any earmarked service provider and the assessee also does not commit itself to the subscriber to provide for any particular service provider. The choice of the service provider who will provide the roaming facility to the subscriber is left to the subscriber.

Vodafone Essar Ltd. (9 taxmann.com 31) (Mumbai ITAT)

Infrastructure claims paid to franchisees vs. 'Rent' u/s 194I

Facts:

- The assessee company is engaged in the business of providing computer education and training and for that purpose, it had entered into various agreements with the franchisees for running the education centres at various metro cities. The assessee company for the purpose of convenience, had categorised the fees shared (i) as marketing claim and (ii) as infrastructure claim
- AO treated the infrastructure claims paid to the franchisees as "rent paid" and held that the assessee company was liable to deduct tax u/s 194I

Decision:

- Held that the agreement was in fact a franchisee agreement and it could not be said that the rent was being paid by the assessee company to the licensee franchisee. There was no payment of rent by the assessee company to the licensees/franchisees and hence the provisions of section 194I cannot be made applicable

CIT vs. NIIT Ltd. (184 Taxman 472) (Del.)

Sec 194J - TDS on Fees for Professional or Technical Fees

Meaning of the term of ‘technical services’

Facts:

- Assessee - a shipping agent handling vessels at various Indian ports made payment to NSICT
- NSICT entered into an agreement with P&O Australia under which P&O was to provide technical know-how to the assessee

Issues:

- Whether the payment to NSCIT would be covered u/s. 194J and liable for TDS?

Decision:

- Payments were for container movement. No professional/technical services involved
- ***. AO has not pressed the later part of the Expl. 2, which deals with provision of services of technical or other personnel***
- The expression ‘other personnel’ in this provision must fall within the category of `services of technical personnel’. It cannot be considered as any personnel unrelated to the managerial, technical or consultancy services
- NSICT personnel, may not have possessed some technical expertise, and hence cannot be considered as `other personnel’
- Both the `managerial’ and `consultancy’ services are possible with human endeavor, the word `technical’ should also be seen in the same light.

Merchant Shipping Services Pvt. Ltd. [2011] (9 taxmann.com 17) (Mum.)

To qualify u/s.194J, payment for technical services should be a consideration for acquiring or using technical know-how, simpliciter provided or should be made available by human element

Payments to NSE towards leaseline/VSAT/transaction charges

Facts:

- While making the assessment, the AO made disallowance u/s 40(a)(ia) for non-deduction of tax on payment made to NSE for lease line charges, VSAT charges and transaction charges
- AO stated that the services rendered by the stock exchange are technical in nature and therefore section 194J is applicable
- In appeal, CIT (A) allowed the appeal of the assessee following the decision of the I.T.A.T Mumbai in the case of Kotak Securities Private Limited

Decision:

- CIT (A) has rightly deleted the addition applying the decision of Kotak Securities Private Limited and Angel Broking observing that transaction fees paid to the stock exchange could not be said to be fees paid in consideration of stock exchange rendering any technical services to the assessee. Therefore, provisions of section 9(1)(vii) and section 40(a)(ia) are not applicable

Vinod K Nevatia (2011-TIOL-65-ITAT-MUM)

Alchemy Share & Stock Brokers Pvt. Ltd. (2011-TIOL-49-ITAT-MUM)

Ashok Kumar Damani (2011-TIOL-10-ITAT-MUM)

Third Party Administrator’s(TPA’s) – Scope u/s 194J

Facts:

- The TPA provides services such as hospitalization services, cashless access services, processing and settlement of claims
- The TPA makes payment to hospitals for rendering medical services to the policy holders

Decision:

- Though a hospital by itself, being an artificial entity, is not a “medical professional”, it provides medical services by engaging the services of doctors and qualified medical professionals. These are services rendered in the course of the carrying on of the medical profession
- The TPA is required to deduct tax at source under section 194J
- Circular No. 8/2009 dated 24.11.2009 is applicable
- The circular is set aside to the extent it states that a failure to deduct tax on payments made by TPAs to hospitals u/s 194J will necessarily attract a penalty u/s 271C

Dedicated Health Care Services TPA vs. ACIT (324 ITR 345) (Bom.)

Sec 195 – Withholding Tax on Payments to Non Residents

Payments to non-residents would be subject to withholding tax only if the income is chargeable to tax

Issues before Supreme Court:

- Whether the HC was right in holding that the moment there is remittance the obligation to deduct tax at source arises
- Whether merely on account of remittance to the non-resident abroad by an Indian company, could it be said that income chargeable to tax under the ITA arises in India

Decision:

- Section 195 imposes a statutory obligation on any person responsible for paying to a non-resident, any sum chargeable under provisions of the ITA, to deduct income tax at the rates in force.
- Section 195 contemplates not merely pure income payments, but also covers composite payments which has an element of income embedded or incorporated in them
- A person paying interest or any other sum to a non-resident is not liable to deduct tax if such sum is not chargeable to tax under the ITA
- The application of Section 195(2) pre-supposes that the person responsible for making the payment to the non-resident considers that tax is payable in respect of some part of the amount to be remitted, but is not sure as to what should be the portion so taxable or amount of tax to be deducted
- The SC rejected the contention of the department, that the assessee make an application in every case of remittance even when the income has no territorial nexus with India or is not chargeable in India

GE India Technology Centre P.Ltd. v. CIT and another (327 ITR 456) (Supreme Court)

A payer making a remittance to a non-resident, could make an application to the tax officer, if he not sure as to what should be the portion so taxable or is not sure as to the amount of TDS

Payment made to overseas commission agent – whether fees for technical services or business income

Facts:

- The assessee was engaged in the business of manufacture of insulators and bushings.
- It made payments to non residents (in UK, UAE, Russia and South Africa) in foreign currency on account of “sales commission”, “subscription” “insulator testing”, “technical consultancy”, “advertising”

Decision:

- The non residents were earning commission for promoting the products of the assessee and for rendering incidental services on sales. The non residents were not required to render any technical services viz. arranging timely payment from customers, settlement of complaints between the principal and parties.
- Accordingly the income of the non residents will be taxable as “business profits” and not as “fees for technical services” and will be taxable in India only if the non resident operates through a permanent establishment in India.

ACIT v Modern Insulator Ltd. 10 ITR (Trib) 147 (Mumbai Tribunal)

Payment made to overseas commission agent – whether managerial fees

Facts:

- Assessee was engaged in the business of manufacturing and exporting of hand embroidery and handicraft items
- It made payments to non residents as commission for procuring order
- Tax was not withheld by placing reliance on CBDT Circular No. 23 dt. 23.7.1969, which clarified that no tax was deductible u/s. 195 for expenditure towards export commission payable to a non-resident for services rendered outside of India

Issues:

The AO noted that the overseas agent was not engaged in a one-time agency for merely solicitation but was also involved in client identification, soliciting, a constant feedback and ensuring timely payments. Hence, the payments made to the agent was were covered under managerial services.The commission was disallowed under section 40(a)(i)

Decision:

- The agent did not render services in India and also did not have a PE in India
- The payment made to overseas commission agent by the assessee was not for technical/managerial services
- In the absence of service been rendered in India, no part of the commission paid could be said to be chargeable in India under the ITA and hence section 195 of the ITA cannot be applied

Armayesh Global v ACIT (2011-TII-59-ITAT-MUM-INTL)

Payments to overseas agent

Facts:

- Assessee acted as an agent to coordinate with worldwide event management companied and offered artiste management services across the world
- Entered into an agreement with two proprietary concerns of C - a UK resident for engagement of international artistes
- Paid remuneration to international artistes for their services rendered in India and reimbursed expenses in connection with their visit
- Paid commission charges to C for services rendered by it in engaging various artistes
- Deducted tax at source in respect of remuneration of foreign artistes but not on reimbursements & commission payment to C

Issues:

- Are payment of commission charges to C and reimbursement of expenses of artistes were liable to TDS

Decision:

- C had authority to enter into an agreement with assessee on behalf of the artiste
- C was entitled to commission for his services. Nothing on record to prove that commission payable to C was payment for performance of artistes
- Payment of commission was not covered under article 18 of the India UK DTAA. Also, it was not liable to tax under article 7 of the DTAA as C had no PE in India
- Reimbursement of expenses to artistes was also not liable to have tax deducted at source

ADIT (International Taxation) v. Wizcraft International Entertainment P. Ltd. ([2011] 8 ITR (Trib) 334)

Applicability of section 40(a)(i) to payment towards off-the-shelf software

Facts:

- Assessee, a dealer of Microsoft products, purchased software from Microsoft and sold the same in the local market. The AO treated the payment as royalty and on failure to deduct tax from the same, disallowed the expenses in terms of section 40(a)(i)
- The CIT(A) confirmed the AO's order but the Tribunal deleted the addition

Decision:

- The High Court held that the ITAT dealt with the transaction of the assessee by examining the true nature of it. The assessee has been purchasing the software from Microsoft and sold it further in Indian market. By no stretch of imagination it would be termed as "royalty"
- The assessee acted as a dealer of Microsoft and hence Section 40 (a)(i) has no application at all

Dynamic Vertical Software (2011-TII-08-HC-DEL-INTL)

Applicability of section 40(a)(i) to overseas payments and provision for expenses

Facts:

- Assessee engaged in business of software development. During the year, the assessee claimed deductions for:
  - Bandwidth and subscription charges to foreign companies
  - Provision for warranty for post sales customer support
- AO disallowed the bandwidth and subscription on the grounds that they were covered u/s 40(a)(i) and the assessee was liable to deduct tax on the same.

.Issues:

- Are the payment in the nature of royalty/ FTS or relate to any item of expenditure covered u/s 40(a)(i)

Decision:

- Payments towards bandwidth charges are not in the nature of managerial, consultancy or technical services nor is it for the use of or right to use industrial, commercial or scientific equipment
- As regards the subscription charges, the Tribunal relied on its own decision in the assessee's case where it was held that the information was available on subscription to anyone willing to pay . There was no license granted to the assessee to use in any manner or quote to anyone else. The recipient did not have any PE in India. Further such an access to data base could not fall within the scope of Article 12(3)(a) of the DTAA with USA.

Infosys Technologies Ltd. v. DCIT (10 taxmann.com 1) (Bang ITAT)

Payments to foreign entities towards bandwidth and subscription charges are not covered under the purview of section 40(a)(i) of the ITA.

Tax audit disclosures

Reporting under Form 3CD

A Chartered Accountant is required make the following disclosures under Form 3CD in connection with TDS provisions:

1. Under clause 17(f) of the Form 3CD details of amounts inadmissible under section 40(*a*) of the ITA are to be reported. At the time of examining the applicability of this clause one ought to:
   - Obtain details of payments referred to in section debited to P & L A/c
   - Verify legal opinions and CA certificate, on the basis of which tax has been withheld at a particular rate
   - Place reliance on judicial pronouncements to identify if a certain expenditure should be reported under this clause
   - Report an expenditure under this clause only if he/she holds different opinion vis-à-vis the stand taken by the deductors. In case of disagreement, both views may be reported under Form 3CD.
   - Report whether the entire expenses or proportionate expenses would be disallowed
2. Under clause 27 of the Form 3CD non compliance of withholding tax provisions are to be reported under the following:
   - Tax deductible and not deducted at all
   - shortfall on account of lesser deduction than required to be deducted **(includes deduction at a lower rate than prescribed, application of wrong rate of TDS, non-inclusion of SC and EC etc.)**
   - tax deducted late

Provisions of section 40(a)(i) and 40(a)(ia)

- Payments in the form royalties, fees for technical services and other amounts chargeable under ITA, made outside inside without deduction of tax at source are disallowed under section 40(a)(i) of the ITA
- Chapter XVII-B of the ITA specifies expenses payable to resident to which TDS provisions are applicable. If these payments are made without deduction of tax at source the same are disallowed under section 40(a)(ia) of the ITA
- No disallowance will be made under section 40(a)(ia) if after deduction of tax during the previous year, the tax has been paid on or before the due date of filing of return of income.
- Amendment is with effect from Assessment Year 2010-2011

Financial year 2009-10	Timeline for payment of TDS	
	Tax deductible during April to February	Tax deductible during March
2009-10 (Existing provision)	31 March 2010	30 September 2010
2009-10 (New provision)	30 September 2010	

Disallowance u/s 40(a) (ia)

- Whether 40 (a) (ia) attracted in case of short deduction / non-deductions on items capitalised:

Mumbai Bench of the ITAT	Delhi Bench of the ITAT
YES	NO
Spaco Carburetors (I) P. Ltd. v/s. ACIT (3 SOT 798) (2005)	SMS Demag (P.) Ltd. v/s. DCIT (38 SOT 496) (2010)

CBDT Circular No.4 of 2008 in respect of TDS u/s.194I – no TDS on service tax on rent as service tax is not income by way of rent – Landlord is collecting agency for Govt.

CBDT clarification dated 30.6.2008 to Bombay Chamber of Commerce 172 Taxman (St) 6 – TDS to be deducted also in respect of service tax on professional fees, because it is "sum payable as fees" - any income vs. any sum

Other issues

TDS on reimbursements

Amounts received towards reimbursement of expenses cannot be regarded as a revenue receipt and is not chargeable to income-tax (Reliance was placed on the decisions of the Kolkata HC in the case of **Dunlop Rubber Co. Ltd** and that of the Delhi HC in the case of **Industrial Engineering Projects**)

CIT v. Siemens AG (310 ITR 320)

In case of **Danfoss Industries** the AAR held that was held that payments to a foreign company under a cost sharing arrangement was tax deductible as the same was a consideration for rendering of service and not a reimbursement.

The AAR also held that an element of profit is not essential ingredients of receipt to be taxable as income and even assuming that fees charged by an overseas entity from the resident entity is equivalent to the expenses incurred by the resident entity in providing the services, it would then be a case of quid pro quo for the service fees and not a case of reimbursement of expenses.

Danfoss Industries Pvt.Ltd (268 ITR 1) and Timken India Limited (273 ITR 67)

Tax cannot be recovered from payer if already recovered from payee

- The assessee was held to be an “assessee in default” as it had withheld under section 194C instead of section 194I
- However, the payee had been assessed and the tax due on his income had been recovered from him
- Accordingly, the Supreme Court held that short deduction of tax need not be recovered from the payer since the payee had already paid complete tax on the income
- As per CBDT Circular No.275/201/95-IT(B) dated January 29, 1997 no demand under section 201(1) should be enforced after the tax deductor tax satisfied the officer that taxes due have been paid by the deductee
- However, it will not absolve the deductor from interest liability under section 201(1A) and penalty under section 271C of the ITA
- The deductor will be liable to interest under section 201(1A) upto the date of payment of tax by the deductee

Hindustan Coca-Cola Beverage P. Ltd. v CIT (293 ITR 226)

Thank you