# Certification requirements u/s 195 in the light of the amendments by the Finance Act, 2015

**CA Puja Borar**

**1st January, 2015**

*pujaborar@sjaykishan.com*
***+91 9831304298***

**Section 195(6) prior to the amendment**

The existing provisions of sub-section (6) of section 195 of the Act provided that the person referred to in section 195(1) of the Act shall furnish prescribed information. Section 195(1) of the Act provides that any person responsible for paying any interest (other than interest referred to in sections 194LB or 194LC or 194LD of the Act) or any sum chargeable to tax (not being salary income) to a non-resident, not being a company, or to a foreign company, shall deduct tax at the rates in force. The mechanism of obtaining of information in respect of remittances fulfils twin objectives of ensuring deduction of tax at appropriate rate from taxable remittances as well as identifying the remittances on which the tax was deductible but the payer has failed to deduct the tax. Therefore, obtaining of information only in respect of remittances which the remitter declared as taxable defeats one of the main principles of obtaining information for foreign remittances i.e. to identify the taxable remittances on which tax was deductible but was not deducted.

**Amendments in the Finance Act, 2015**

In view of the above, the provisions of sub-section (6) of section 195 of the Act have been amended vide the Finance Act, 2015 w.e.f 1st April, 2016 (i.e. AY 2016-17) to provide that the person responsible for paying any sum, whether chargeable to tax or not, to a non-resident, not being a company, or to a foreign company, shall be required to furnish the information of the prescribed sum in such form and manner as may be prescribed.

Further, penalty of Rs. 1,00,000/- u/s 271-I of the Act has also been introduced in respect of non-furnishing of information or furnishing of inaccurate information in Form 15CA/15CB.

**Applicability of Rule 37BB**

The provisions of Section 195(6) are to be read harmoniously with the provisions of Rule 37BB prescribing the procedure to be followed at the time of making such remittances. Rule 37BB of Income Tax Rules require that *"any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest or salary or* ***any other sum chargeable to tax under the provisions of the Act****, shall furnish* Form 15CA and a Certificate from a Chartered Accountant in Form 15CB subject to the thresholds prescribed therein.

**Conflicting provisions of Sec. 195(6) and Rule 37BB**

Where it is established that a particular sum paid to a non-resident is not chargeable to tax, does there exist any requirement under Rule 37BB read with the revised provisions of Section 195(6) to submit the Form 15CA/CB?

Let us understand the situation in the context of remittance to non-residents towards import of goods. Whether such payments towards imports is chargeable to tax in India? If not, then whether 15CA / CB Form is required to be submitted in respect thereof?

**Whether such payments towards imports is chargeable to tax in India?**

As per the provisions contained in Section 5(2) of the Income Tax Act, the total income of previous year of a person, who is a non-resident, is chargeable to tax in India if it is received or is deemed to be received in

India or accrues or arises or is deemed to accrue or arise to him in India. Section 9(1)(i) of the Act, stipulates that income which accrues or arises directly or indirectly **through or from any business connection** in India in India, or through or from any property in India, or **through or from any asset or source of income** in India, or through the transfer of a capital asset situate in India, is deemed to accrue or arise in India. Explanation 2 to the Section defines the term Business connection to include specified activities carried out through a person acting on behalf of the non-resident.

Thus, in order to bring the business income of a non-resident within the ambit of taxation in India, it is essential to determine whether the transaction has been carried out by such non-resident in India directly or indirectly through or from any business connection in India. A declaration may be procured from the non-resident to confirm that he does not have any business connection in India within the meaning of Explanation (2) to Section 9(1)(i). In the absence of any business connection in India the same shall not be chargeable to tax in India.

Without prejudice to the above, even if it established that there exists any business connection in India, only such part of the income which is attributable to the operations carried out by such non-resident in India, can be taxed in India.

**If such payments are not chargeable to tax, then whether 15CA / CB Form is required to be submitted in respect thereof?**

Rule 37BB earlier prescribed a list of 39 payments wherein no form 15CA or certificate u/s 15CB is required. The list of items was reduced to 28 items vide Notification No. 67/2013, issued on 2nd September 2013, and which came into effect from 1st October 2013. The final list of 28 items inter-alia did not include Advance payment against imports and Payment towards imports-settlement of invoice.

In the absence of any specific exclusion being carved out for import payments, the provisions of Rule 37BB shall be triggered only where the sum is chargeable to tax in India. Where it is established that the payments towards imports of goods is not chargeable to tax in India, there does not exist any requirement under the existing provisions of Rule 37BB to submit Form 15CA/ CB.

However, it is to be noted that Rule 37BB is not in line with the amended provision of Section 195(6). In the light of the amended provisions of Section 195(6) and the penal consequences prescribed in Section 271I, until any further clarifications are made, a conservative view may be taken that irrespective of whether or not the remittance is chargeable to tax, Form 15CB be obtained mandatorily. Moreover, in a number of instances the authorised dealers insist for Form 15CB in all cases as per the amended Section 195(6). The payer in such situations is left with no choice but to obtain the same for all the remittances.

However, an aggressive stand may be taken in view of the *recent writ petition filed before the Delhi High Court challenging the validity of Para A20 of the Master Circular permitting remittances only upon production of Form 15CA/ CB and the provisions of Rule 37BB*. Furthermore, the provisions of Rule 37BB are machinery in nature. In the absence of any mechanism being prescribed in the Rules for remittances made to non-residents which are not chargeable to tax in India, the requirements contained therein shall not apply to it.

In case the tax authorities take penal action against the payer in respect of non-compliance with the amended provisions of Section 195(6) for remittances not chargeable to tax, the said position of the payer can be defended in view of conflict between Rule 37BB and Section 195(6). Reliance may also be placed on the decisions of the Supreme Court in the case of Vodafone International Holdings B.V. v. Union of India (2012) 204 Taxman 408 (SC) and GE Technology Cen (P) Ltd v. CIT (2010) 193 Taxman 234 (SC).