

Withholding Tax- Scope of Section 195



- Any person
- Responsible for paying to a
- Non-resident, not being a company or a foreign company
- Any interest or any other sum chargeable under the provisions of the act (not being income chargeable under the head salaries)
- Shall at the time of
- Credit of
- Such income to the account of payee
- Or at the time of payment of cash or by cheque or by any other mode, whichever is earlier
- Deduct income-tax thereon at the rates in force

Scope of Section 195



- Any person - Meaning
 - Section 195- refers to any person
 - The definition of “person” under section 2(31) includes
 - Individual, HUF, Company, firm, AOP, local authority, and every artificial judicial person
 - Payments from resident to non-residents – provisions applicable
 - Payments from non-residents to non-residents
 - SC in Electronics Corporation of India Limited (183 ITR 43)
 - AAR in P-13(228 ITR 487)
 - Payments from Branches of foreign company to non-resident
 - Circular no 740 dated 17-4-1996
 - Special Bench decision in ABN Amro Bank (98 TTJ 295)
 - Citi Bank vs CIT (259 ITR 377)
 - Does it apply in respect of payments by agents
 - Post 1-6-1987 it applies

Scope of Section 195



- Applies to Income
- Scope of the meaning "Income"
- **Status of RBI Approval**
 - United Breweries Limited vs ACIT (83 Taxmann 263)(Kar)
 - Pfizer Limited vs CIT (259 ITR 391)
- **Status of reimbursement of expenses**
 - Nature of reimbursement of expenses
 - What is the contractual responsibility
 - Difference between Administrative expenses and services
 - If it is towards service no reimbursement argument
 - The decision is always on facts
 - Calcutta High Court in Dunlop Limited
 - AAR rulings -Decta Limited, Danfoss Industries and Timken Limited

Scope of Section 195



- **Marketing fees/agency Commission**
 - Circular no 63 dated 23rd July 1969
 - CIT vs Toshoku Limited (125 ITR 525)
- **Payment of Salaries**
 - 195 is not applicable
 - HCL Infosystems Limited vs CIT (274 ITR 261) (Del)
- **Payment of Royalty and Technical Services**
 - 9 (1) (vii) vs DTAA
 - DTAA shall apply if it is beneficial
- **Responsibility of person paying**
 - SC in Transmission Corporation Case (293 ITR 587)
- **Rates in force**
 - DTAA rates vs Finance Act rates whichever is more beneficial

Refund of Tax withheld u/s 195



- Possible under limited circumstances:
 - (a) the contract is cancelled and no remittance is made to the non-resident;
 - (b) the remittance is duly made to the non-resident, but the contract is cancelled
- Circular No 769
- Circular No 790 dated 20/04/00

TAXABILITY OF REIMBURSEMENT OF EXPENSES (CONTD.)



Reimbursement of Expenses:

- Reimbursement of incidental expenses in addition to fees.
- Reimbursement of allocated / shared costs.
- Payment for services at cost or cost plus basis
- Reimbursement of cost of third party.
- Reimbursement of salaries & living allowance of deputies.

TAXABILITY OF REIMBURSEMENT OF EXPENSES (CONTD...)



Reimbursement of Expenses: (contd...)

- CIT Vs. TELCO (245 ITR 823 (Bombay))
- CIT Vs. Industrial Projects (202 ITR 1014-Delhi)
- Clifford Chance 82 ITD 106-Mumbai)
- Mahindra & Mahindra Ltd. (10 SOT 896 (Mum))

Against:

- Cochin Refineries (222 ITR 354 (Ker))
- Hindalco (278 ITR 125 (AT))

TAXABILITY OF REIMBURSEMENT OF EXPENSES (CONTD...)



Reimbursement of Expenses:

- CIT Vs. Dunlop (142 ITR 493 (Cal))
- Danfoss Ind. (268 ITR 1 (AAR))

Reimbursement of services at cost or cost plus basis

- Timkin (273 ITR 67 – AAR)

Reimbursement of cost of third party:

- Wallace Pharma (278 ITR 97 – AAR)

TAXABILITY OF REIMBURSEMENT OF EXPENSES (CONTD.)



Reimbursement of Expenses:

Reimbursement salaries & living allowances to deputies:

Held salaries of technicians:

- HCL Infosystems (274 ITR 261 – Delhi)
- CIT Vs. BHEL (252 ITR 218 – Delhi); (222 ITR 551 Tekniskil (Sendirian) Berhard)(AAR)

Held as FTS & salaries:

- 230 ITR 206 (AAR)– Steffen , Robertson & Kirsten Consulting Engineers & Scientists, IN RE-
- AT & S India (P) Ltd. (287 ITR 421 (AAR))

Secondment of Personnel



- **Cross charge of salary- Issues**
 - Withholding tax on the cross charge
 - Adverse AAR Ruling in the case of AT&S India Private Limited (287 ITR 421)
- **Service Tax on Secondment**

**Important consideration in secondment
Employer-Employee relationship**