TDS provisions – Recent Developments and Issues

May 2024





1

TDS provisions - Overview

Withholding tax compliance

Applicability



- Mechanism to collect taxes in advance at the time of transaction.
- Any person making specified payments to a resident/ non-resident to deduct tax at the time of making specified payment.
- **Obligation ordinarily arises at the time of credit or payment whichever is earlier**. The same is applicable even when **a credit is made to a suspense account.**
- Different withholding rates have been prescribed under the IT Act for different payments and different categories of recipients.

Consequences of non-compliance



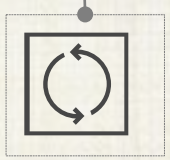
- **Disallowance of the expenditure** while computing the taxable income of the Company.
- **Withholding tax proceedings can be initiated** and the Company would be liable to pay the withholding tax amount which it failed to deduct along with consequential interest of 1% / 1.5% p.m
- **Levy of penalty** to the extent of the withholding tax.
- **Prosecution proceeding** under the IT Act
- Tax demand arising in TRACES

Other points for consideration



- Quarterly statements to be filed in the presecribed forms by specified due dates disclosing details of taxes withheld.
- Tax withholding certificate to be issued within specified time

Lower / Nil withholding



- Deduction at a rate lower than the prescribed rates if the income recipient has obtained a certificate for deduction at lower rate and produce with the deductor.
- **Certificate issued is valid for a period as specified by the tax officer**.



2

195 – TDS on payment to non-residents

TDS on payments made to non-residents [Section 195]

Applicability of Section 195

- Payment by any person responsible to pay to a non-resident
- **Interest or any other sum chargeable to tax**
- Deduct tax at the rates in force, at the time of credit or payment whichever is earlier
- Other than salary

Threshold and the rate of TDS

- No Minimum threshold limit.
- Tax needs to be withheld on the sum chargeable to tax at the rates in force or under the respective tax treaty, whichever is more beneficial
- % as per Income-tax act, as the case may be to be increased by a surcharge and health & education cess

Availability of Treaty benefits

- In case, the NR wishes to avail the benefit of lower rate of tax treaties, following documents needs to be obtained:
  - Copy of Tax Residency Certificate ('TRC') of respective country – ***Azadi Bachao Andolan [2003] 263 ITR 706*** & ***Circular no. 789 of 2000***
  - Copy of Form 10F (now electronically filed)
- Also, obtain No-PE declaration if non-resident contest that it does not have PE in India

Non-Furnishing of PAN

- Relaxation from deduction of tax at higher rate under section 206AA (20%) if non-resident furnishes following documents -Tax residency Certificate (TRC) ,Tax Identification number, Form 10F, Name, e-mail, contact number, address of country of his residence

Furnishing of Information/ CA Certificate

- Payer to furnish information in prescribed form viz. Form 15CA/15CB in respect of any sum whether chargeable to tax or not under the Act, subject to conditions specified under Rule 37BB.

Finance Act 2023 has revised the TDS rates on royalty/ FTS for non-residents to 20% under the Act and likely that non-residents will avail treaty benefits

Tax rates under the Income-tax vis-a vis DTAA

Payments made to Non-Residents

Section 115A – Tax on dividend, royalty and technical service fees in the case of foreign companies

- Tax on income of a non-resident/ foreign company by way of :
  - dividend, interest on monies borrowed by Indian government/ Indian concern in foreign currency at the rate of 20%. Whereas tax for interest referred in section 10(47) in relation to infrastructure debt fund at the rate of 5% and Interest income as defined in sections - 194 LC /194LD/194LBA – at the rates provided in the respective sections
  - Royalty or FTS at the rate of 20%
- Where taxes are withheld as per the rates provided above with respect to **dividend, interest, royalty, or FTS** and there is no other income chargeable to tax in the hands of the non-resident, **then compliance obligations relating to filing of return of income by such non-resident in India are not required.**
- However, relief may not be available to non-residents whose taxes will be deducted at the beneficial rates provided under the respective tax treaties.

Nature of Income	Tax rates as per section 115A	Tax rates as per respective DTAAs								
		USA	UK	Canada	Germany	Mauritius	Australia	Slovak Republic	Slovenia	Japan
Dividend	20	15 /25	10/15	15/25	10	5/15	15	15/25	5/15	10
Interest	5/10/20	10 /15	10 /15	15	10	7.5	15	15	10	10
Royalty	20	10 /15	10 /15	10/15	10	15	10/15	30	10	10
FTS	20	10 /15	10 /15	10/15	10	10	10/15	30	10	10

Case laws & Instructions

Payments made to Non-Residents

Case laws/ Instructions	Judgement
Vodafone International Holdings B.V. [2012] 204 Taxman 408 (SC)	- Section 195 would apply only if payments are made from **a resident to non-resident** and not between two non-residents situated outside India - Section 195 casts an obligation on payer to deduct tax at source from payments made to non-residents which payments are chargeable to tax.
Tata Chemicals Ltd. [2014] 43 taxmann.com 240 (SC)	An assessee is entitled to interest on refund of excess deduction or erroneous deduction of tax at source under section 195
• **Instruction No. 2/2014** ❖ *GE India Technology Private Limited Vs. CIT 327 (ITR) 4569 - **SC*** ❖ *Transmission Corporation of AP Limited and another Vs. CIT (1999) 299 (1TR) 587 – **Madras HC*** ❖ *CIT Vs. Chennai Metropolitan Water Tax Cases Appeals Nos.500-501 of 2005 – **Madras HC***	Whether the tax is to be deducted under sub-section (1) of section 195 on the whole sum being remitted to a non-resident or only the portion representing the sum chargeable to tax, particularly if no application has been made under sub-section (2) of section 195 of the Act to determine the sum? In a case where the assessee fails to deduct tax under section 195 of the Act, **the Assessing Officer shall determine the appropriate proportion of the sum chargeable to tax** as mentioned in sub-section (1) of section 195 to ascertain the tax liability on which the deductor shall be deemed to be an assessee in default under section 201 of the Act
Circular : No. 740/1996.	Branch of a foreign company/concern in India is a separate entity for the purposes of taxation. Interest paid/payable by such branch to its head office or any branch located abroad would be liable to tax in India and would be governed by the provisions of section 115A of the Act. Contrary ruling by ITAT Mumbai in the case of **BNP Paribas v. ACIT(IT) [2024] 162 taxmann.com 671 (Mumbai - Trib.)**
Circular No. 11/2016	If a resident deductor is entitled for the refund of tax deposited under section 195 of the Act, then it has to be refunded with interest under section 244A of the Act, from the date of payment of such tax



3

TDS on Payments made to resident - Overview

Types of payment subject to TDS

Payments made to Residents

Nature of payment	Section	Rate	Threshold
Salary	192	Applicable slab rates	Under old tax regime: Basic exemption limit of INR 250,000. Rebate u/s 87A. Under new tax regime: Basic exemption limit of INR 3,00,000. Rebate u/s 87A.
Interest on securities	193	10%	No threshold. TDS to be deducted on Interest payable on listed securities *(Amendment vide Finance Act 2023)*
Dividends	194	10%	INR 5,000 if the shareholder is an individual
Interest other than "Interest on securities	194A	10%	INR 5000
Winnings from lottery or crossword puzzle/horse race	194B/194BB	30%	INR 10,000
Winning from online games	**194BA**	**30%**	**No threshold**
Payment to contractors	194C	1% - HUF/Individual 2% - Others	Single payment > INR 30,000 Aggregate during FY > INR 100,000
Payment of commission or brokerage	194H	5%	INR 15,000
Payment of Rent	194I	2% - Plant & Machinery 10% - Land or building or furniture or fitting	Aggregate Paid / payable during FY > INR 240,000
Payment on transfer of certain immovable property other than agricultural land	194IA	1% of such sum or stamp duty value of property, whichever is higher	Consideration and stamp duty value both are more than INR 50,00,000
Fees for professional or technical service (this also includes payment for non-compete fees – section 28 (va))	194J	2% - For FTS (other than FPS) and Royalty for sale, distribution and exhibition of cinematographic films	Aggregate paid / payable during FY > INR 30,000

Types of payment subject to TDS

Payments made to Residents

Nature of payment	Section	Rate	Threshold
	194J	10% - In all other cases	Aggregate paid / payable during FY > INR 30,000
Income in respect of Units of a Mutual Funds/of a specified company (as defined in UTI Act,2002)/ from the administrator of a specified undertaking (as defined in UTI Act, 2002)	194K	10%	INR 5,000
Income by way of interest from Indian Company	194LC	5%/4%/9%	Loan/ long term or rupee bond before July 23
Payment of certain sums by e-commerce operator to e-commerce participant	**194O**	**1%/ 5% (Non- availability of PAN)**	**Gross amount during FY> INR 5,00,000 in case of the e-commerce participant is an individual or HUF and has furnished PAN and Aadhar number to e-commerce operator**
Deduction of Tax incase of Specified Senior citizen	194P	Rates in force	Only pension income and income of the nature of interest from any account maintained by such individual
Deduction of tax at source on payment of certain sum for purchase of goods	**194Q**	**0.1 per cent of such sum exceeding fifty lakh rupees / 5% (Non-availability of PAN)**	**Aggregate paid / payable during FY > INR 50,00,000**
Deduction of tax on benefit or perquisite in respect of business or profession	**194R**	**10%**	**Aggregate of value of the benefit or perquisite > INR 20,000**
Payment on transfer of virtual digital asset	**194S**	**1%**	**Sum Payable by specified person> INR 50,000 Sum Payable by other than specified person > INR 10,000**

Other relevant provisions

Section 206AA

- If PAN is not provided to the person making the payment, then TDS is required to be deducted at the higher of the following:
  - At the rate specified in the relevant provisions of the Act;
  - At the rates in force
  - Rate of 20%
- Exceptions of deduction under section **194-O and 194-Q – In the absence of PAN, TDS at 5%**

Section 206AB

- TDS to be deducted at the following rates where the payment is made to specified persons:
  - At twice the rate specified in the relevant provision of the Act;
  - At twice the rate or rates in force
  - At the rate of five per cent
- Excludes TDS under sections 192, 192A, 194B, 194BA, 194BB, 194IA, 194IB, 194LBC, 194M or 194N
- If the provisions of section 206AA is applicable to a specified person, in addition to the provision of this section, **the tax shall be deducted at higher of the two rates provided in this section and in section 206AA.**
- Specified Person is a person who has not filed its return of income for the year immediately preceding the financial year in which tax is required to be deducted, ***and the time limit for furnishing the return of income has expired*** *and aggregate of TDS and TCS in his case is INR 50,000 or more in the said previous year*
- Applicable to non-residents, except those who does not have a permanent establishment in India
- ***Budget 2023 Update:*** Relief from TDS/TCS at higher rates for persons who are not required to furnish return of income and is notified by Central government. *No notification yet has been issued.*



4

194BA – Winning from Online games

TDS on Winning from Online Games [Section 194 BA]

Applicability



- Notwithstanding any other provisions of the Act, any person responsible for paying any income to any person by way of winnings from online games during the FY shall deduct tax on the net winnings (NW) in his user a/c **at the end of the FY.**
  - **TDS rate :** at rates in force, i.e., 30%
  - In case of withdrawal from the user account during the FY, TDS is to be deducted on the NW in his user a/c comprised therein at the **time of withdrawal** as well as the on **the remaining amount of NW** at the **end of the FY**
  - Net winnings are in kind or partly in kind and cash is not sufficient to meet the TDS liability, the person responsible for paying has to ensure tax has been paid
  - Explanation.—For the purposes of this section—

    (a) "online gaming intermediary" means an intermediary that offers one or more online games;

    (b) "user" means any person who accesses or avails any computer resource of an online gaming intermediary;

    (c) "user account" means account of a user registered with an online gaming intermediary.

Rule 133, ITR 1962



- **NW during the FY** = (Agg. Withdrawal from user a/c + CB of user account for FY) – (Agg. amt of non-tax deposit made in FY + OB of user account for FY)
- **NW comprised in the first withdrawal during the financial year** = Agg. amount withdrawn from the user account – (Agg. Amount of non-taxable deposit made in the user account by the owner till such withdrawal + OB of user account for FY)
- **NW comprised in each subsequent withdrawal** = Agg. amount withdrawn from the user account till such subsequent withdrawal - (Agg. amount of non-taxable deposit made in the user account by the owner till such subsequent withdrawal + OB in the user account for FY + NW comprised in the earlier withdrawal or withdrawals)
- **NW comprised in the user account at the end of the financial year = (**Agg. amount withdrawn from the user account for FY + CB in the user account for the FY) – (Agg. Amount of non-taxable deposit made in the user account by the owner + OB in the user account for FY + NW comprised in the earlier withdrawal or withdrawals)

Note:

*- The net winnings in the above formula would be **zero** if the aggregate amount withdrawn is equal to or lesser than other amounts*

- Transfer from one user account to another user account, maintained with the same online gaming intermediary, of the same user shall not be considered as withdrawal or deposit, as the case may be.

CBDT Circular No.5 of 2023 [Section 194BA]

Questions	Guidelines
Q1. There are multiple wallets under one user. How "net winnings" is to be computed with respect to multiple wallets of one user	User account shall include ***every account of user in one platform***, which is registered with online gaming intermediary
Q2. If a user borrows some money and deposits in his user account, will it be considered taxable deposit ?	No, it shall be considered as non-taxable deposit.
Q3. How will bonus, referral bonus, incentives etc. be treated?	- Bonus, referral bonus, incentives, coins , coupons, vouchers, counters, etc. are given by the online game intermediary to the user. They are to be considered **as taxable deposit** and would form part of net winnings. - However, incentives/bonus which is credited only for the purposes of playing and cannot be withdrawn or used for any other purposes, shall be ignored for calculation of net winnings. - **They will become part of net winnings in the year of re-characterisation.**
Q4. At what point we consider that amount has been withdrawn?	- At the time of transfer to any other account or to any other platform/ at the time of issue of some coupon for purchase of goods or some item in kind in consideration for amount in user a/c - If the deductor is deducting tax for each platform separately, transfer to another user account under same online gaming intermediary across platform shall be considered as withdrawal or deposit
Q5. Relaxation on insignificant withdrawals	Yes, subject to NW in withdrawal is less than INR 100 in a month
Q6. Tax deduction in case of winnings in kind	- Deductor to obtain the proof of payment from deductee before releasing the net winnings. - As an option, the deductor may deduct tax under Section 194BA and pay to the government.
Q7. How will the valuation of winnings in kind required to be carried out?	- The valuation would be based on **FMV of the winnings in kind** except ▪ if the winnings has been purchased, **then the purchase price** shall be the value for winnings; ▪ if the item is manufactured, then **the price that it charges to its customers**. - It is further clarified **that GST will not be included** for the purposes of valuation of winnings for TDS

Applicability for a non-resident

- Section 194BA starts with non obstante clause. Hence this section will override the provisions of Section 195 and consequently, section 194BA is applicable for non-residents as well. Tax rate is 30% in all cases. Treaty benefits?

(37A) "rate or rates in force" or "rates in force", in relation to an assessment year or financial year, means—

(*i*) for the purposes of calculating income-tax under the first proviso to sub-section (5) of section 132, or computing the income-tax chargeable under sub-section (4) of section 172 or sub-section (2) of section 174 or section 175 or sub-section (2) of section 176 or deducting income-tax under section 192 from income chargeable under the head "Salaries" or computation of the "advance tax" payable under Chapter XVII-C in a case not falling under section 115A or section 115B or section 115BB or section 115BBB or section 115E or section 164 or section 164A or section 167B, the rate or rates of income-tax specified in this behalf in the Finance Act of the relevant year, and for the purposes of computation of the "advance tax" payable under Chapter XVII-C in a case falling under section 115A or section 115B or section 115BB or section 115BBB or section 115E or section 164 or section 164A or section 167B, the rate or rates specified in section 115A or section 115B or section 115BB or section 115BBB or section 115E or section 164 or section 164A or section 167B, as the case may be, or the rate or rates of income-tax specified in this behalf in the Finance Act of the relevant year, whichever is applicable ;

(*ii*) for the purposes of deduction of tax under sections 193, 194, 194A, 194B, [19][*194BA*], 194BB and 194D, the rate or rates of income-tax specified in this behalf in the Finance Act of the relevant year ;

(*iii*) for the purposes of deduction of tax under section 194LBA or section 194LBB or section 194LBC or section 195, the rate or rates of income-tax specified in this behalf in the Finance Act of the relevant year or the rate or rates of income-tax specified in an agreement entered into by the Central Government under section 90, or an agreement notified by the Central Government under section 90A, whichever is applicable by virtue of the provisions of section 90, or section 90A, as the case may be;



5

194R - Deduction of tax on benefit or perquisite in respect of business or profession.

TDS on perquisites or Benefit [Section 194R]

Applicability



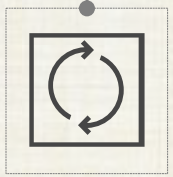
- Any person, on provision of any benefit or perquisite to a resident, whether convertible into money or not, arising from business or exercise of profession of that resident
  - **Deductee :** Resident
  - **TDS rate :** 10%
  - **Threshold :** INR 20,000 per person per year
  - **Time of deduction :** Deductor to ensure that tax is deducted or paid before releasing the benefit if the benefit or perquisite is wholly in kind or the cash part is insufficient
- w.e.f. **1 July 2022**
- TDS need not be deducted on perquisites provided by an individual or HUF not liable to tax audit in the preceding year

Key Aspects



- The same must arise from the business of the recipient and there must be a nexus or connection between the benefit/perquisite received and business of the recipient.
- Benefit or perquisite could be in cash, or in kind or partly in cash and partly in kind *(Clarified by Circular 12 of 2022 and amendment in Finance Act 2023 as explanation 2)*
- Also includes benefit or perquisite in the form of capital assets (need not check taxability in the hands of recipient)
- 194R not applicable to Benefits or perquisite to Govt. departments/units

Section vis a vis CBDT guidelines



- 194R (2) – empowers CBDT to issue guidelines to remove difficulty in implementing provisions of 194R(1)
- 194R(3) – guidelines binding on ITA and person providing benefit

Can the guidelines be challenged?

As long as guidelines are made following proper procedure and not declared invalid by competent court - guidelines are binding on taxpayer.

The taxpayer may challenge the guidelines in a Writ petition - genuine hardship to be proved. Grave hardship cannot be proved on the ground that TDS u/s 194R is required to be deducted in large cases.

Taxpayer not to plan assuming court will accept such a claim. If taxpayer decides to not deduct TDS - likely to face a long-lasting litigation including prosecution.

CBDT Circulars 12 and 18 of 2022 [194R(2)] (1/3)

Valuation

Based on the FMV of the benefit or perquisite except –
- For purchased benefit or perquisite – purchase price to be considered
- Provider manufactures the Item given as benefit or perquisite – price charged to its customers

[Note - GST not to be included for valuation of benefit or perquisite**]**

Sales or Cash discount & Rebates

- No requirement to deduct TDS u/s 194R even though these are benefits.
- In case of other incentives, TDS must be withheld u/s 194R. Illustrative list provided by CBDT which includes car, TV, computers, gold coin, cell phone, sponsored trip, free ticket, medicine samples.

Taxability in the hands of recipient

- The deductor is not required to check whether the amount of benefit or perquisite that he is providing would be taxable in the hands of the recipient under clause of section 28 of the Act. Even if the benefit is capital asset, it is covered.
- Unlike section 195, this section does not include the terms "any other sum chargeable under the provisions of the Act" at the "rates in force" and thus there is no requirement to know whether the payment is taxable in the hands of the recipient or the section under which it is taxable.
- Section 194R is applicable even if benefit or perquisite is used by director/owner/employee of the recipient or their relatives who in their individual capacity may not carry on business or profession.

Insignificant cash component

- The tax deductor may rely on a declaration along with a copy of the advance tax payment challan provided by the recipient confirming that the tax required to be deducted on the benefit/perquisite has been deposited.
- This would be then required to be reported in TDS return along with challan number - Form 26Q has included provisions for reporting such transactions.
- In the alternative, the benefit provider may deduct the tax under section 194R of the Act and pay to the Government. The tax should be deducted after taking into account the fact the tax paid by deductor as TDS is also a benefit under section 194R of the Act. In the Form 26Q, deductor will need to show it as tax deducted on benefit provided.

CBDT Circulars 12 and 18 of 2022 [194R(2)] (2/3)

Dealer or Business conference – 12 of 2022

Scenarios	Section 194R applicable?
Prime object to educate dealers/customers about any of the following or similar aspects: new product being launched discussion as to how the product is better than others obtaining orders from dealers/customers teaching sales techniques to dealers/customers addressing queries of the dealers/customers reconciliation of accounts with dealers/customers	No
Conference in the nature of incentives for select dealers/customers for achieving targets	Yes
Expense attributable to leisure trip or leisure component, even if it is incidental to the dealer/business conference.	Yes
Expenditure incurred for family members accompanying the person attending dealer/business conference	Yes
Expenditure on participants of dealer/business conference for days which are on account of prior stay or overstay beyond the dates of such conference.	Yes

Dealer or Business conference – 18 of 2022

- It is not necessary that all dealers should be compulsorily invited – for availing the exemption
- Expenditure incurred on account of overstay prior to and beyond the date of conference will be considered as benefit – **Exception:** 1 day prior to beginning and 1 day after ending of conference not over-stay
- If 194R is applicable but if it's a group activity (individual recipient not identifiable) - benefit provider may opt not to claim the benefit as expenditure. In such cases, 194R does not apply and no assessee-in-default u/s 201.

CBDT Circulars 12 and 18 of 2022 [194R(2)] (3/3)

Loan waivers

- One time settlement of loans or waiver of loans granted on reaching settlement provided by Banks, NBFCs, Public Companies and Public Financial Institutions **(as provided in circular 18)** to borrowers would not be subject to 194R.
- However, taxability in the hands of the borrower is not impacted.

Benefits provided by Embassy/High commission

- Provision of section 194R is not applicable on benefit/perquisite provided by, an organization in scope of The United Nations (Privileges and Immunity Act) 1947, an international organization whose income is exempt under specific Act of Parliament (such as the Asian Development Bank Act 1966), an embassy, a High Commission, legation, commission, consulate and the trade representation of a foreign state.

Bonus shares/ rights shares issue and car provided as benefit

- BS/ RS issued by company in which public are substantially interested – 194R N.A. if the issue is to all shareholders.

Reimbursement of OPE

1. Circular 12 of 2022
- Section 194R N.A. if the invoice has the client's name, paid by the consultant and reimbursed by the client
- Section 194R applicable if the invoice is not in client's name and paid by client directly or reimbursed

2. Circular 18 of 2022
- If invoice is not in the name of the person reimbursing (i.e. Service recipient) – it is a benefit irrespective of the terms of agreement

  Exception *– Pure agent services as defined under GST laws*

3. **CBDT Circular No. 715, dated 8th August, 1995** clarifies that TDS us. 194C/ 194J has to be deducted on OPE reimbursements. If deducted under 194C/194J then 194R not applicable



6

194-O - Payment of certain sums by e-commerce operator to e-commerce participant

TDS on E-commerce participants [Section 194-O]

Applicability



- On sale of goods or provision of services of an e-commerce participant which is **facilitated by an e-commerce operator**, such e-commerce operator shall, at the time of credit of amount of sale or services or both or at the time of payment whichever is earlier, deduct income-tax.
  - **TDS rate :** the rate of **1 per cent** of the gross amount of such sales or services or both or 5% (in absence of valid PAN /non-filers of return)
  - w.e.f. **1 October 2020**
  - Explanation — Any payment made by a purchaser of goods or recipient of services directly to an e-commerce participant, shall be **deemed to be the amount credited or paid** by the e-commerce operator and shall be included in the gross amount of such sale or services for the purpose of deduction under this sub-section.

Key aspects



- TDS under this provisions shall not apply if:
  - If the participant is **individual or HUF who has furnished his PAN** / Aadhar no.
  - Gross amount of sales/services in a FY **does not exceed INR 5 Lakhs.**
- If tax has been deducted under this section, or not liable for deduction on account of above exemption, no TDS under any other provision shall apply on the same transaction.
- Amounts received or receivable by an ecommerce operator **for hosting advertisement or other services not in connection with sale** or services are not impacted by this provision.
- Explanations:

a) **"e-commerce operator"** means a person who owns, operates or manages digital or electronic facility or platform for electronic commerce;

(b) **"e-commerce participant"** means a person resident in India selling goods or providing services or both, including digital products, through digital or electronic facility or platform for electronic commerce;

(c) **"services"** includes "fees for technical services" and fees for "professional services", as defined in the Explanation to section 194J.]

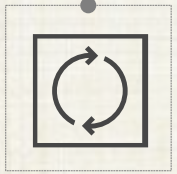
CBDT Circulars no. 17 of 2020 and 20 of 2021 [Section 194-O]

Circular no. 17 of 2020



- CBDT authorized to issue guidelines to remove difficulties under 194-O(4). CBDT ci**rcular no. 17 of 2020** issued to clarify certain issues as under:
  - The provision shall not apply on transactions in securities via recognized stock exchanges or clearing corporations and transaction handled through power exchanges.
  - No TDS deduction liability on the payment gateway if the e-commerce operator has already deducted TDS
  - No TDS deduction liability on the insurance agent or insurance aggregators in subsequent years, if no involvement of agent

Circular no. 20 of 2021



E-auction services carried out through electronic portal:

- Provisions of section 194-O of the Act shall not apply in relation to e-auction activities carried out by e-auctioneers if all the facts listed below are satisfied:
  (a) The e-auctioneer conducts e-auction services for its clients in its electronic portal and is responsible for the **price discovery only** which is reported to the client.
  (b) The price so discovered through e-auction process is not necessarily the price at which the transaction takes place, and it is up to the discretion of the client to accept the price or to directly negotiate with the counter-party.
  (c) The transaction of purchase/sale takes place directly between the buyer and the seller party outside the electronic portal maintained by the e-auctioneer and price discovery only acts as the starting point for negotiation and conclusion of purchase/sale.
  (d) The e-auctioneer is not responsible for facilitating the purchase and sale of goods for which e-auction was conducted on its electronic portal except to the extent of price discovery.
  (e) Payments for the transactions are carried out directly between the buyer and the seller outside the electronic portal and the e-auctioneer does not have any information about the quantum and the schedule of payment which is decided mutually by the client and the counterparty.
  (f) For payment made to e-auctioneer for providing e-auction services, the client deducts tax under the relevant provisions of the Act other than section 194-O of the Act.

- This clarification shall not apply if any of these facts are **not satisfied.**

CBDT Circular no. 20 of 2023 [Section 194-O]

Multiple E-Commerce Operators

- In case of multiple ECOs involved in a single online transaction, the seller side ECO who is responsible for making the payment to the final seller is responsible for deducting tax under Section 194-O.
- It is further clarified that the seller may itself be an ECO. In such case, the ECO who is making payment to such Seller ECO is responsible for TDS

Gross Amount

- Logistics fees and platform charges included in the invoice – Sell side ECO will deduct tax on the gross amount charged to buyer even though the ECOs will deduct their platform fees while making payment to the seller. Seller need not deduct tax under Section 194H
- GST and other levies/taxes – If tax is deducted at the time of crediting the account of the seller and tax is identifiable from the seller's invoice, tax shall be deducted on value without such taxes.
- Discount given by seller – Discount is mentioned in the invoice and hence, tax shall be deducted net of discount.
- Discount given by the ECOs – Tax shall be deducted on the invoice amount without considering the discount provided by the ECOs

Purchase returns

- Tax deducted can be adjusted against future transaction if amount is refunded.
- No adjustment is required, if another product is replaced.



7

194Q – Deduction of tax at source for purchase of goods & Interplay with 206C(1H)

TDS on sale of goods [Section 194Q]

Applicability



Every buyer, who pays any amount for purchase of any goods from a **resident of aggregate value exceeding INR 50 lakhs in a FY** shall, at the time of credit/payment (whichever is earlier) of such amount, deduct

- TDS rate : the rate of 0.1 per cent of the value exceeding INR 50 lakhs or 5% (in absence of valid PAN /non-filers of return)
- w.e.f. **1 July, 2021**

Buyer shall mean a person whose total sales, gross receipts or turnover from the business carried on by him exceed INR 10 crore during the FY immediately preceding the FY in which the purchase of goods is carried out

Key aspects



- TDS under this provisions shall not apply if:
  - Tax is deductible under any other provisions of the Act
  - TCS collectible under section 206C (except TCS on sale of goods under section 206C(1H)).
- CBDT authorized to issue guidelines to remove difficulties. CBDT **circular no 13 of 2021 and 20 of 2021** issued to clarify certain issues. Key clarifications are as under:

  - No TDS on transactions through Recognized Stock Exchange (RSE) and power exchanges (similar to TCS on goods)

  - No TDS on transactions through Recognized Stock Exchange (RSE) and power exchanges (similar to TCS on goods)

  - Non-resident who does not have a PE in India not considered as a buyer

  - TDS under section 194Q not to apply to a buyer in the year of incorporation

  - Turnover limit of INR 10 crores must be derived **from business** carried by such buyer

  - TDS to be deducted on advances payments

  - Where the amount is refunded by the seller, TDS to be adjusted against subsequent purchases from the seller. No adjustment required in case purchase return is replaced by the seller.

Section 194Q - Clarifications

Methodology for calculating the threshold and TDS in FY 2021-22:

- Since 194Q requires deduction of TDS at the time of credit/payment whichever is earlier, purchases where either credit or payment has happened before July 01, 2021, would not be subject to TDS
- Since the threshold is to be computed for a financial year, all credit or payment whichever is earlier, occurred from April 01, 2021, to June 30, 2021, would be taken into account for computing the threshold of INR 50 lakhs

Purchase from exempt instituions

- TDS under section 194Q need not be deducted on purchases made from a seller whose income is fully exempted under the Act (like a person exempt under section 10) or under any other Act passed by the Parliament (Like RBI, Act, ADB Act, etc.). However, these provisions would not apply if only a part of the income is exempt.

Adjustment of GST and other levies

- If tax is deducted on payment basis prior to booking the invoice, tax has to be deducted on whole of amount paid as tax portion is not identifiable on advance.
- If tax is deducted at the time of booking the invoice i.e., at the time of credit, tax can be deducted on the amount without including GST and other levies, if it is separately identifiable from the invoice.

Exempt goods under Section 206C(1A)

- TDS under Section 194Q will not apply if TCS is collectible under Section 206C [except 206C(1H)]
- If a buyer gives a declaration as per 206C(1A) and therefore, the seller is not liable to collect tax, then TDS under Section 194Q shall apply and the buyer is liable to deduct TDS.

Transactions with Government departments

- Government department shall comply with Section 194Q if they carry on any business / commercial activity and turnover from such activity exceeds INR 10 crores in the immediately preceding year.
- No TDS under Section 194Q if any other buyer makes payments to seller, being a government department.

Cross Applications

194Q and 206C(1H)

Buyer to deduct tax if his turnover in preceding FY exceeds INR 10 crores	Seller to collect tax if his turnover in preceding FY exceeds INR 10 crores

Payment only to resident sellers. Non-residents not having PE is exempt	Export of goods and import of goods exempt

5% TDS in case seller does not furnish PAN	1% TCS in case buyer does not furnish PAN

206C(1H) and 206C(1F) – Circular 17 of 2020

206C(1F) applies only to sale of motor vehicles to end customers. Hence, sale of motor vehicles to dealers will be subject to 206C(1H) if it exceeds INR 50 lakhs in a year, subject to applicability of 194Q

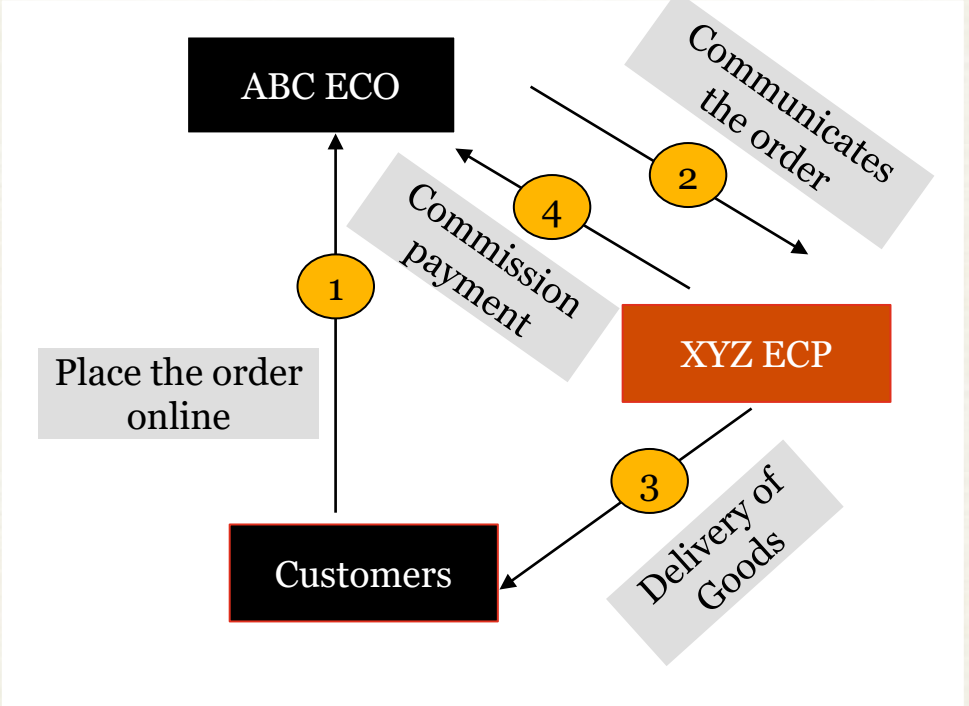
Sale to end consumer, being individual value less than INR 10 lakhs, will be subject to 206C(1H) if cumulatively exceed INR 50 lakhs in a year

Sale of motor vehicles, being INR 10 lakhs or more, will not be subject to 206C(1H), i.e., 0.1% if tax collected under 206C(1F) i.e., 1%

Interplay between e-commerce transaction and purchase of goods

Interplay with 194-O

- ABC ECO as per provisions of section 194-O
- XYZ is ECP as per provisions of section 194-O which is registered with ABC ECO
- Customers place the order of goods through a website of ABC ECO. ABC ECO communicates the order to XYZ ECP and XYZ ECP delivered the goods directly to customers
- TDS under section 194-O is on payment from ABC ECO to XYZ ECP? On what amount?
- How will TDS/TCS under Section 194Q/206C(1H) will be complied?



Impact on e-commerce operators (ECO) under section 194-O of the Act-

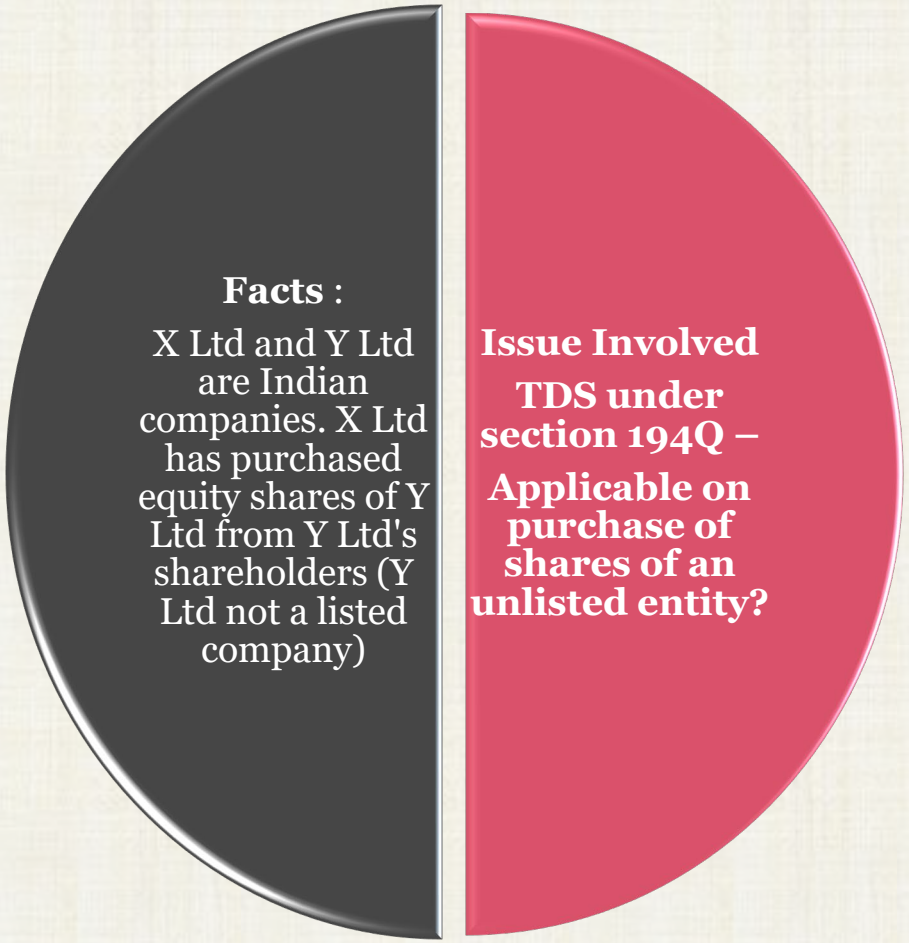
The primary responsibility to deduct tax is that of the ECO and accordingly, the following has been provided:

- Where tax is deducted under Section 194-O by the ECO, Section 194Q is not applicable.
- If a transaction falls under the purview of both Sections 194-O and Section 194Q, TDS to be done under Section 194-O.
- If a transaction falls both under 194-O and 206C(IH), the tax will be required to be deducted under section 194-O as the tax rate under section 194-O is higher.

Interplay with TCS provisions - Section 206C(1H):

- Section 194Q overrides TCS provisions under section 206C(1H) of the Act. Once TDS has been deducted on a sale transaction, TCS is not applicable.
- If for any reason, on a transaction, TCS [under section 206C(1H)] has been collected by the seller, before the buyer could deduct TDS under section 194Q, such transaction shall not be subject to tax deduction again by the buyer.

Case study – Section 194Q



Section 44 of Companies Act 2013 provides that **shares or debentures in a company is a movable property transferable** in a manner as provided in the articles of association.

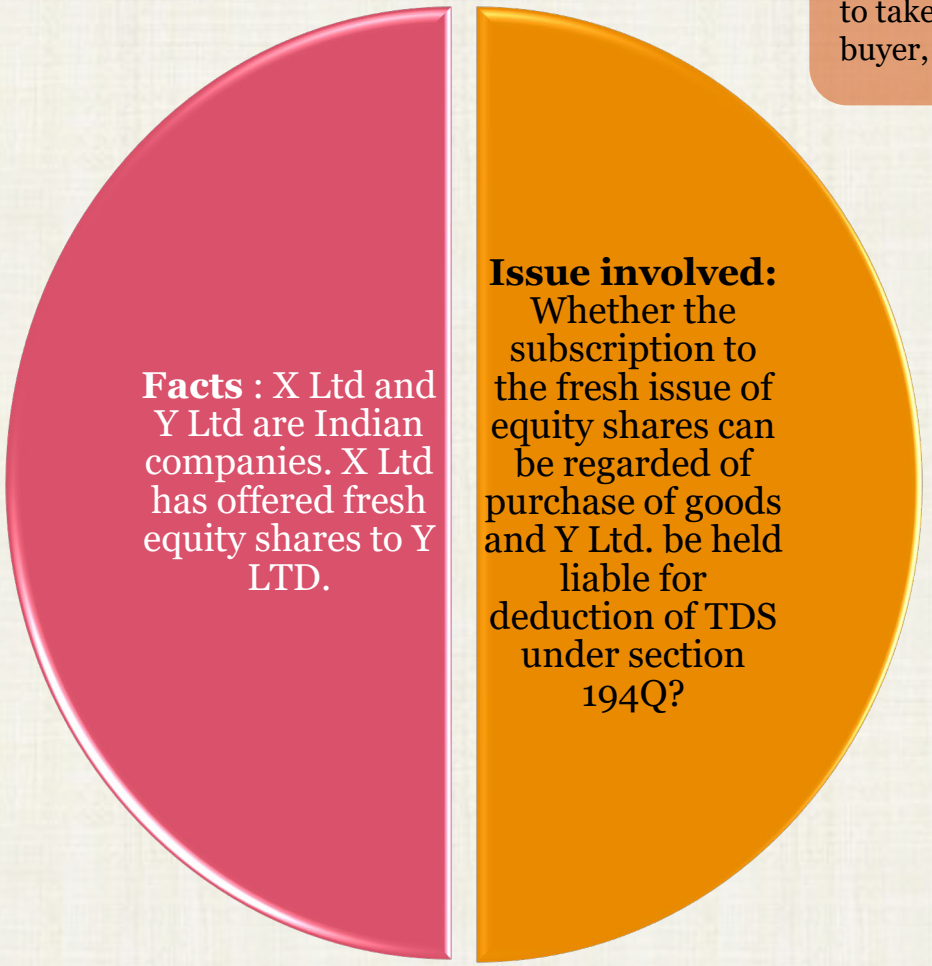
The term goods has not been defined under section 194Q. Goods defined under Sale of Goods Act 1930 to mean every kind of movable property including stock and shares

CBDT circular no 13 of 2021 provides guidelines on deduction of TDS under section 194Q. The guidelines are binding on the person liable for deduction of TDS.

The circular provides **exemption for transactions in securities and commodities traded through a recognized stock exchange.**

The above clarification can be indicative that shares not traded through a recognized stock exchange are otherwise covered under section 194Q and should be considered as goods

Case study – Section 194Q



The term purchase has not been defined under section 194Q. Dictionary meaning - "buying acquiring something by paying a price. There cannot be a purchase without a sale being made." Thus, for a sale to take place transfer of property in goods is essential. For property in goods to transfer from seller to buyer, the seller needs to own the property in such goods

In case of a fresh issue of shares, **the shares do not come into existence till the date of allotment.** This was observed by the Supreme Court in the case of **Gopal Jalan & Company Vs. Calcutta Stock Exchange Association Ltd (AIR 1964 SC 250)**

Under the companies Act 2013, the company **issuing shares cannot own its own shares.** Therefore, even at the time of issue of shares, the company does not possess any ownership rights in the shares at any point of time

Supreme Court in the case of **Khoday Distilleries Ltd Vs CIT (2008) 307 ITR 312 (SC)** relying on the decision of **Sn Gopal Jalan (supra**) and observed that there is a **vital difference between creation and transfer of shares.** Thus, in case of fresh issue of shares, there is no transfer of property from seller to buyer

Gujarat High Court in the case **of AMP Spinning & Weaving Mills Pvt Ltd. VS ITO [2017] 393 ITR 349 (Guj)** held that **allotment of shares cannot be regarded as a purchase**



8

194S – Payment on transfer of virtual digital asset

TDS on Virtual Digital Assets (VDA) [Section 194S]

Applicability



- Any person responsible for making payments to a resident for transfer of VDA shall at the time of credit or payment whichever is earlier deduct
  - **TDS rate :** the rate of **1 per cent** of the gross amount of such sum
  - w.e.f. **1 July 2022**
  - If consideration for transfer of VDA is in kind/partly in cash and partly in kind and cash not sufficient to discharge TDS, payer should ensure that tax required to be deducted has been paid before releasing the consideration.
- Provisions of section 203A and 206AB shall not apply to a specified person.
- Above exemption only applies for 206AB, if PAN of deductee is not available, TDS to be deducted at rates in 206AA.
- Further, in case a transaction involves both 194O and 194S, tax under section 194S will be deducted.

Key aspects



- The threshold amount triggering tax deduction at source (TDS) is an aggregate payment of INR 50,000 in case the **specified person** makes payment; otherwise, it is INR 10,000 in a financial year.
- Specified person means:
  - Individual/HUF carrying business/profession and having a turnover of **INR 1 crores (business)/50 lakhs (profession)** in the immediately preceding FY or
  - Individual/HUF not carrying out any business
- 1945(6) enables CBDT to provide guidelines to remove difficulties. Further, 194S(7) provides that such guidelines shall be binding on the income-tax authorities and on the person providing any such benefit or perquisite.
- It is clarified that where the buyer has deducted TDS under 194S, **TDS would not be required** to be deducted by the payment gateway.

TDS on Virtual Digital Assets (VDA) [Section 194S]

Taxability Framework of VDAs

- VDA has been defined in a wide manner to, inter-alia, include any information, code, number or token not being Indian or foreign currency, and generated through cryptographic means or others.
- Effective from 1 April 2022 onwards, any income from transfer of VDAs is taxable at the rate of 30% (plus surcharge and cess).
- No deduction with respect to any expenditure or allowance (other than the cost of acquisition) will be available. Loss from transfer of VDAs is neither eligible to be set off against any income nor permitted to be carried forward.
- In the event of gifting of VDAs, the tax payment would be made by the recipient.

Notification no.74 and 75 of 2022

Exclusions from the definition of VDA *[Notification no. 74 of 2022]*

- Gift cards or vouchers, being a record that may be used to obtain goods or services or a discount on goods or services
- Mileage points, reward points, loyalty cards, being a record

  (i) given without direct monetary consideration under an award, reward, benefit, loyalty, incentive, rebate or promotional programme

  (ii) that may be used or redeemed only to obtain goods or services or a discount on goods or services
- Subscriptions to websites or platforms or applications.

Exclusion of the following NFTs from the definition of a 'VDA' [*Notification no. 75 of 2022*]

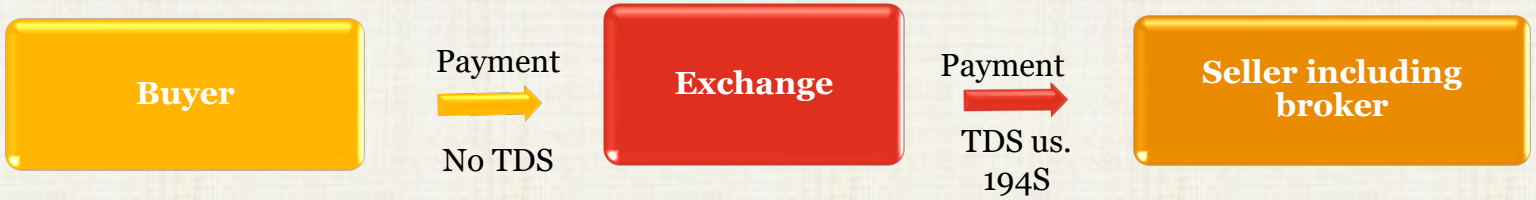
In relation to the Indian tax provisions, the Government, carves out the following NFTs :

"A non-fungible token whose transfer results in the transfer of ownership of the underlying tangible asset, and the transfer of ownership of such underlying asset is legally enforceable."

CBDT Circulars no.13 and 14 of 2022 (1/3)

1. How TDS under section 194S would apply when payment is made via exchange (fully cash):

In a case where the transfer of VDA takes place through an Exchange and the VDA is owned by a person other than the Exchange:



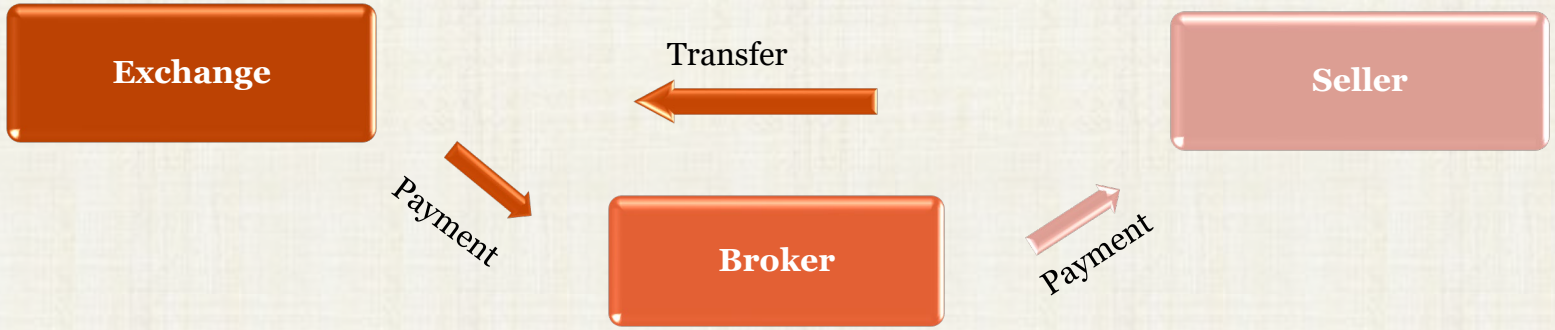
If the payment between Exchange and the seller is through a broker, the responsibility to deduct tax shall be on both. On a written agreement between exchange and the broker, the broker alone may deduct the tax.



Where the transfer of VDA takes place on or through an Exchange and the VDA being transferred is owned by such Exchange:

- In this case there are no multiple players. The buyer is required to deduct tax.
- **Practical issue** - as the buyer may not know whether the VDA being transferred is owned by the Exchange or not.
- Exchange may enter into a written agreement with the buyer or his broker that Exchange would be paying the tax

<u>Where the broker is not a seller</u>

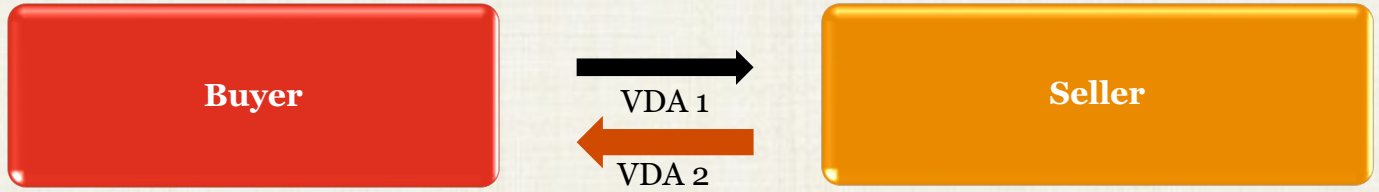


Where the payment is through broker, not being a seller, the responsibility is still on both. However, on a **written agreement** between the exchange and the broker, the **broker alone may deduct TDS**. The exchange to report the transaction in its TDS return

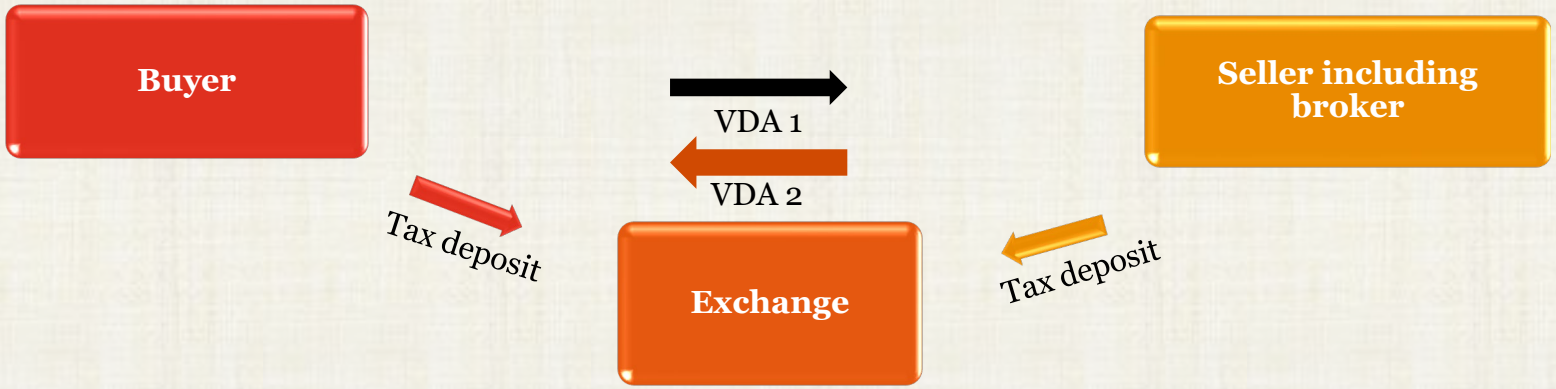
CBDT Circulars no.13 and 14 of 2022 (2/3)

2. How TDS under section 194S would apply in exchange of VDAs

a) If done, other than through an exchange - Both buyer and seller to show proof of tax deposit before **exchange**. Both shall report the details of tax payment in their TDS returns (Form 26Q/26QE)



b) If done through an exchange - Both buyer and seller to show proof of tax deposit before **exchange**. The above option is challenging if it is through an exchange. Therefor, option 2 is provided.



Option2 : Exchange responsible for TDS

- Exchange to deduct TDS on both legs of the transaction and report
- Exchange to deduct TDS in VDAs itself.
- Customer will be issued a contract note in email which includes amount of tax withheld in kind and INR realized from such tax withheld.

CBDT Circulars no.13 and 14 of 2022 (3/3)

194Q v. 194S

- No TDS under Section 194Q, is deducted under Section 194S.
- Silent on whether VDA is good or not

TDS on net basis

- TDS shall be deducted on 'net basis' after excluding GST and other charges like commission, etc.

Payment through gateway



In this case, if tax has been deducted by buyer, payment gateway can obtain a declaration from the buyer and not deduct tax again.



9

194J – Fees for professional or technical services

TDS on professional or technical service [Section 194J]

Amendment under Finance Act 2020

- Tax to be deducted on FPS, FTS, any remuneration or fees or commission to a director (other than deductible us. 192) or royalty or non compete fees us. 28(va) to residents.
- **W.e.f. 1 April 2020,** TDS rate on payment towards technical services (not being a professional services), or royalty where such royalty is in the nature of consideration for sale, distribution or exhibition of cinematographic films has been reduced **to 2%** and for other payments at **10%.**
- FPS has been defined to mean services rendered by a person in the course of carrying on the legal, medical, engineering, architecture, accountancy or **technical consultancy**, interior designer, or advertising **or other professions notified by the Board (IT/ ITeS, Sports persons, etc.)**
- The term FTS is defined as "consideration (including any lump sum consideration) for the rendering of **any managerial, technical or consultancy services**...";
- The Act *does not define* the term 'consultancy services' and hence, the term has to be interpreted in their commercial sense and on the basis of principles emerging from various judicial precedents, international commentaries, etc. The Indian courts on multiple occasions have held that consultation is an act of asking the advice or a professional opinion of someone with some degree of human intervention.
- Above analysis suggests an overlap for certain services which are consultancy in nature, could be covered under both professional and technical services.

Case Study – section 194J

Issue under consideration :

Applicable TDS rate under section 194J on payments made by B Ltd. to A Ltd. for IT Services / ITeS ?

Background

A Ltd. is in the business of providing IT and ITES

A Ltd. has entered into a service agreement with B Ltd. to inter alia provide services such as Software/ Platform development and Testing of software; Maintenance of computer system; etc.

B Ltd. makes payment for the services provided by A Ltd. based on SOW and consideration agreed between the parties, which can be fixed or based on the man hours spent by employees of A Ltd

CBDT vide Notification no 116 Notification No S.O..385(E) (NO. 116 (F No. 23-FB-2001-TFL)) dated 4 May 2001, has noted the profession of **"Information technology"** for the purposes of section 44AA(1)

Definition of information Technology as per dictionary - Dictionary meaning of the term **'professional"** suggests that to be regarded as a professional, a person should have the requisite skills, experience, competency and such other traits as are necessary for a person to render professional services

Explanation (a) to section 194J requires that professional services should be rendered by the person **in the course of carrying on the profession;**

Whether A Ltd is providing the services **in the course of carrying on the profession of information technology**?

Expression '**the course of carrying on profession'** does not mean that the person who renders service and is paid, must be a professional. The expression is used to include incidental, ancillary, adjunct, or allied services connected with specified services – Delhi HC in the case of **Vipul Medcorp TPA (P) Ltd.** and Bombay High court in the case of **Dedicated Health Care Services TPA (India) Pvt. Ltd, and Ors:**

Impact of amendment to Section 204

Issue – TDS obligations to a non-resident

Section 204 of the Act defines 'person responsible' to withhold and deposit tax with Indian tax authorities in respect of FTS payments.

Vide Union Budget 2020, the scope of 'person responsible' provided under section 204 of the Act was extended with effect from 1 April 2020, to include non-residents (along with their agents/deemed agents) to comply with Indian withholding tax obligations.

It is pertinent to note that the aforesaid amendment in section 204 of the Act was made in consequence to a new withholding tax provision introduced in respect of e-commerce operators (section 194-O of the Act). However, there is nothing in the provision of section 204 of the Act that restricts its applicability only to e-commerce operators.

The cardinal rule of interpretation of a statute is to read it literally, which means by giving to the words used by the legislature their ordinary, natural and grammatical meaning. A plain reading of the amended provisions of section 204 of the Act indicates that the provision is wide enough to trigger Indian withholding tax obligations for all payments by non-residents to a resident which are subject to withholding tax in India. The provision is not restricted to e-commerce operators only. In view of the above, a view is possible that even non-residents making payments to residents, which attracts withholding tax provisions in India, are liable to comply with such obligation.

However, we would like to highlight that it may be possible to take an argument of the extra-territorial application of the Indian tax laws. It is an established principle that legislation can legislate laws with extra territorial application operation only in certain circumstances. However, the legislature should specifically indicate its intention in the language for the extra-territorial operation of law and the same cannot be presumed.



10

206C(1G) – TCS on LRS

LRS – International Credit Cards and TCS

- TCS was first introduced on LRS remittances at 5% w.e.f. October 1, 2020
- It was proposed to increase the rate of TCS to 20% for remittances made for LRS remittances w.e.f. 1st July 2023
- Further, the threshold of INR 7,00,000 had been restricted only to cases where remittance is for the purpose of education or medical treatment. Consequently, the rate of TCS was 20% without any threshold for all purposes except education and medical treatment
- On May 16, 2023, notification issued by MoF omitting Rule 7 of the FEM (CAT) Rules. This resulted in payment for all permissible transactions (as provided under Schedule III) made by a person utilising an ICC while on a visit outside India would now form part of the LRS limit of USD 250,000 and thus subject to TCS. FAQs / press release were also issued by GoI
- Subsequently, a press release and DEA notification is issued on June 28, 2023 and June 30, 2023 respectively to defer the implementation of the May Notification. Thus, payment through ICC while on a visit outside India would not be considered as LRS and hence would not be subject to TCS
- CBDT also issued a circular clarifying various aspects of TCS

Sequence of events for TCS on LRS

October 1, 2020

TCS at 5% on remittances under LRS

Finance Act 2023

TCS to be increased from 5% to 20% for all remittances under LRS w.e.f. 1 July 2023

May 16, 2023

Rule 7 omitted from FEM (CAT) Rules

May 18, 2023

FAQs issued providing clarifications on TCS and LRS

May 19, 2023

Clarification on TCS to small card transactions under LRS

June 28, 2023

Press Release superseding the above amendments

June 30, 2023

Rule 7 inserted in FEM (CAT) Rules

CBDT circular providing clarifications on TCS

Changes with respect to TCS on LRS remittances and purchase of overseas tour program package

- The below table provides the summary of changes brought in over a period of time with respect to TCS provisions applicable to LRS remittances and purchase of overseas tour program:

Type of payment subject to TCS	Prior to amendment		Amendment as per FA, 2023 (w.e.f 1st July 2023)		Amendment as per FA, 2024 (w.e.f 1st October 2023)	
	Rate	Threshold for TCS	Rate	Threshold for TCS	Rate	Threshold for TCS
LRS remittance (other than covered below)	5%	above INR 7 lakh in a financial year	20%	Not Available	20%	above INR 7 lakh in a financial year
LRS for education financed by loan	0.5%	above INR 7 lakh in a financial year	0.5%	above INR 7 lakh in a financial year	0.5%	above INR 7 lakh in a financial year
LRS for medical purpose or education (other than financed by loan)	5%	above INR 7 lakh in a financial year	5%	above INR 7 lakh in a financial year	5%	above INR 7 lakh in a financial year
Purchase of overseas tour program package	5%	Not available	20%	Not Available	5% upto INR 7 lakh and thereafter 20%	

- Finance Act, 2024 added a proviso to state that TCS rates and threshold shall apply as per amendment brought in Finance Act, 2023 for the period between 1st July, 2023 and 30th September 2023.

Thank you

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