WITHOLDING TAX PROVISONS ON FOREIGN REMITTANCES IN INDIA

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Why are Witholding Taxes Important?

- The objective of witholding tax (WHT) is to ensure, as far as possible, that the tax liability on the income element of the amount paid is deducted at source itself, so that the Revenue Department is not put through the task of recovering it from a non-resident whose connection with the payer country may be transient or whose assets in the payer country may not be sufficient to meet the tax liability.

The Indian context

- Amongst other sections in the Income-tax Act, 1961, which govern WHT in India, Sec 195 is considered the most important and debatable
- Sec 195 provides for WHT on “Any other sums” paid to “a non-resident” which are not governed by any other section of the Act.
- Sec 195 also offers limited remedies, but taking shelter under these remedies can itself be taxing (in terms of effort)

Section 195 – important words

- Section 195 (1)
  - *Any person* responsible for making payment to a non-resident shall withhold tax
  - Only in respect of *interest or other sum* chargeable under the Income Tax Act, 1961
  - *At the time of credit or payment* whichever is earlier
  - At the *rates in force*

Implications

- Any person – includes non-residents paying to non-residents if the income / payment is taxable in India
- At the time of credit or payment – includes provision for "accrued but not due" payments, credit to suspense account, or any other account
- Rates in force – the recent debate

Before we discuss … the process

- Obtain invoice / bill / agreement / documents from the Payee
- Obtain certificate from Payee that they do not have a Permanent Establishment (PE) in India
- Determine the section which governs WHT on that payment
- Check WHT rate as per Act and as per DTAA, beneficial rate to apply (but there is a problem here… to be discussed a little later)

Before we discuss … the process

- If the WHT rate is clear, obtain a certificate from an accountant in Form 15CB
- Fill Form 15CA online and print it
- Submit all documents with the forms to the bank for payment

SIMPLE ??? YOU MIGHT THINK SO !!!

Issue – No. 1

- If it is unclear whether the payment is liable to tax in India or not, the payer or the accountant do not have the powers to determine the WHT rate as “Nil”
- Even if a part of the payment is subject to tax, the payer or the accountant do not have the powers to determine the extent to which it is taxable in India.

Remedy

- An application has to be made to the Assessing Officer under Sec 195(2) – by the payer to determine the WHT rate or the extent to which the payment is taxable in India.
- Alternatively, the payee can also make an application under Sec 195 (3), subject to fulfillment of conditions as per Rule 29B *(which are almost impossible to fulfill)*

Issue – No. 2

- Sec 206AA w.e.f. 01/10/2009 states that if the Payee does not have a Permanent Account Number (PAN) in India, then the WHT will be :
  - WHT Rate as per the Act
  - WHT Rate as per the DTAA
  - WHT @ 20%

  Whichever is *higher*.
- Very few non-residents receiving money from India have PAN, thereby increasing the WHT to the highest rate of WHT @ 20%

Remedy

- Non-residents should obtain PAN in India, to ensure lower WHT than 20%
- Even if the WHT is to be borne by the payer in India, obtaining PAN will make the non-resident a better (cheaper) option than others (without PAN) with whom the payer deals
- Merely obtaining a PAN does not make the non-resident liable to tax in India, nor makes them liable to file tax returns in India, unless they want to claim a refund of the WHT

Issue – No. 3

- A certificate issued by the Assessing Officer for deduction of WHT at a lower rate or at ‘Nil’, is only valid for that particular payee and for that particular financial year in which it is issued
- Therefore companies with extensive payments to non-residents have to apply over and over again to obtain such certificates, every year and for each and every payee.

Remedy

- If certain payees are such where there is an Agreement for such payments to be made for more than a year or two years, and where the sum involved is substantial, an application can be made by the Payee to the “Authority for Advance Ruling” (AAR) before signing the agreement, which will fix this lower rate of WHT or Nil WHT throughout the agreement period.

ANY QUESTIONS ?

THANK YOU !

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