Section 197 & Section 197A : No Deduction / Lower Deduction of Tax at Source to be made in Certain Cases

Section 197 :- Certificate for Deduction of Tax at Lower Rate or for Non- Deduction

A. Legislative History

In view of saving citizens from the unwarranted exercise of deduction of tax, then claiming refund from the Government, Section 197 was introduced in the Finance Act, 1987 and subsequently amended from time to time. The scope of the said provision has been explained by CBDT from time to time through various circulars. Prior to June 1, 1992, an application for a certificate for lower rate or for no deduction under this section could be made only by a person other than a company. However from the said date, any person including a company is entitled to make such application.

B. Salient Features

- This section provides that, where tax is deductible at source in terms of sections 192, 193, 194, 194A, 194C, 194D, 194G, 194I, 194J, 194K, 194LA and 195 of the Income Tax Act, and the recipient justifies the deduction of tax at any lower rate or no deduction of tax, as the case may be, the Assessing Officer shall, on an application made by the assessee in Form 13 in this behalf, issue him such certificate as may be appropriate. Rule 28, 28AA, 28AB, 29, 29A, 29B, 29C and 29D contains relevant Form to be submitted and the procedural instructions for issue of certificate.

- No certificate under this section shall be granted unless it contains the Permanent Account Number (PAN) of the applicant.

- As per the Instruction No. 4/2010 dt. 25/05/2010, all certificates under this section are to be generated and issued by the A.O. mandatorily through ITD system only i.e. computer system of the department. Issue of manual certificate is not permitted.
As per instruction no. 1/2014 dt. 15/01/2014, the time line prescribed for the disposal of application for no deduction of tax or deduction of tax at lower rate is one month from the date of its application.

Certificate has to be issued individually to each deductor. Only a copy of the certificate is to be given to the applicant / assessee for information.

Once the certificate has been issued, the deduction shall be made in accordance with the certificate, until such certificate is cancelled by the Assessing Officer or on the expiry of the validity of the certificate, whichever is earlier.

As per CBDT circular no. 774 dt. 17/03/1999, certificate u/s. 197 is valid for payments made after the date of issue of certificate. In other words, certificate cannot be issued retrospectively.

C. Important Judgements:

1. Order passed by the A.O. rejecting the application under this section can be revised under section 264 of ITA.

Facts of the Case
- The assessee company was a joint venture consisting of an Indian Company and a Malaysian Company. It had been awarded a contract for Mumbai Monorail Project by MMRDA.
- It had filed an application u/s. 197 requesting the A.O. to issue a certificate to MMRDA to deduct tax at lower rate. But the A.O. rejected the application for two reasons:
  - the calculation mechanism provided in rule 28AA failed as figures for three previous years were unavailable;
  - no e-TDS returns were filed by the assessee.
- On rejection, the assessee moved to Commissioner(TDS) for revision under section 264. Commissioner rejected the application and the assessee once again sought a reconsideration of the rejection by the Commissioner. The Commissioner once again rejected and gave the following reasons:
  - that if the benefit of a lower rate for withholding tax is not granted under section 197 to the assessee, no hardship or prejudice would be caused to the assessee
because the assessee would be entitled to get a refund of excess tax paid, if any, together with interest; and

- that when the A.O. rejects an application under sec. 197, he does not pass an order as envisaged in section 264.

**Issue Involved**

- Whether the rejection of an application under section 197 by the A.O. can be revised by the Commissioner under section 264 of ITA?

**High Court’s Ruling**

- Rule 29B governs applications for certificates authorising receipt of interest and other sums without deduction of tax. Where the application is allowed, that application culminates in the grant of a certificate in accordance with the provisions of sub-section (1) of section 197. But, it would not be proper if the rejection of the application lies at the absolute discretion of the A.O. or the A.O. is not bound to give reasons for the basis of rejection.

- The Assessing Officer cannot urge that though an assessee fulfils all the requirements which are stipulated in rule 28AA or, as the case may be, in rule 29B, he possesses an unguided discretion to reject the application. Therefore, when the Assessing Officer rejects an application, he is bound to furnish reasons which would demonstrate an application of mind by him to the circumstances which are mandated both by the Statute and by the Rules to be taken into consideration.

- The expression “order” for the purposes of section 264 has a wide connotation. Sub-section (1) of section 264 provides that in the case of “any order” other than an order to which section 263 applies, passed by an authority subordinate to him, the Commissioner may either of his own motion or on application by the assessee for revision, call for the record of any proceeding under the Act in which any such order has been passed and after making an enquiry, pass such order thereon not being an order prejudicial to the assessee as he thinks fit. Hence, any order passed by an authority subordinate to the Commissioner, other than an order to which section 263 applies, is subject to the revisional jurisdiction under section 264.

- A determination on an application under section 197 requires an order to be passed by the Assessing Officer after application of mind to the circumstances which are germane under section 197 and the Rules framed under sub-section (2A).

- The Commissioner was, therefore, manifestly in error when he held that there was no order which would be subject to his revisional jurisdiction under section 264 of ITA.
• Hence the Revision Application that was filed by the assessee under section 264 of ITA to the Commissioner for a fresh determination was restored and to be carried out in accordance with law, after furnishing to the assessee an opportunity of being heard.

[Larsen & Toubro Ltd. v. Assistant Commissioner of Income Tax (TDS) [2010] 326 ITR 514 (Bom.)]

2. Certificate issued under section 197 for lower or no deduction is qua payer and not qua individual unit of the payer although payer would be having different TAN for different units.

Facts of the Case
• The assessee had two separate units, one at Mumbai and another at Bahadurgarh. These two units had two different TANs. Its Bahadurgarh unit had given contract of executing the work to various persons, making it liable to withhold tax at the rate prescribed under section 194C of ITA.
• The contractors had furnished lower withholding certificates under sec. 197(2) of the Act addressing the same to Mumbai’s Office. Accordingly, the assessee had withheld the taxes at the rates specified in the certificates.
• The A.O. held that there is short deduction of tax since the certificates were addressed to Mumbai Office which had separate TAN no. and not to Bahadurgarh Office. It implied that separate TANs of the units made them separate entities for the purpose of TDS. In view of that, A.O. passed an order raising demand against the assessee for the violations of section 194C.
• On Appeal, the CIT (Appeals) held that since the genuineness of the issue of certificate was not doubted by the A.O., there can be no justification to hold that the assessee was in default merely on the ground that the said certificate was not issued in the name of Bahadurgarh unit.
• On further appeal, ITAT upheld the order of the CIT(A).

Issue Involved
• Whether the certificate for lower deduction furnished by the deductee is applicable to all the units of the deductor even if the units of the deductor have different TANs?

High Court’s Ruling
• In terms of section 194C of the ITA, any person responsible for paying any sum for carrying out any work, is liable to deduct tax at the time of credit of such sum to the account of the contractor or at the time of payment thereof, whichever is earlier.
- Section 197 of the Act contemplates issuance of certificate to the person responsible for paying the income for deduction of tax at the rate lower than the prescribed under section 194C.

- Section 204(iii) of the ITA defines expression 'person responsible for paying' to mean the payer himself or, if the payer is a company, the company itself including the principal officer thereof, in case of credit, or payment of any other sum chargeable under the provisions of this act, as the case maybe.

- The procedure for obtaining certificate for deduction at lower rates or lower deduction of tax is prescribed in rule 28AA of the Income-tax Rules, 1962. Sub-clause (4) of the said rule contemplates that the said certificate issued in terms of section 197(1) of the ITA is valid only with regard to person responsible for deducting the tax and specified therein. Sub-clause (5) of the said rule contemplates that the certificate shall be directed to the person responsible for deducting the tax under advice to the person who made an application for issue of such certificate.

- In terms of the above said provisions, the A.O. has issued certificate under section 197 to the Principal Officer of the Mumbai unit. Such certificate in terms of section 204(iii) of ITA mandates the persons to whom such certificate is issued to deduct tax at a rate lower than the prescribed rate under section 194C of ITA.

- Merely because the assessee has got separate TAN for Bahadurgarh unit and for Mumbai unit, it will not render the certificate issued under section 197(2) as redundant. Such certificate is to be issued to the Principal Officer of the Company as the person responsible for deduction of tax and not to any other person or unit of the assessee.

- Therefore, the order passed by the CIT(Appeals) and affirmed by the Tribunal cannot be said to be suffering from any illegality in any manner.

[Commissioner of Income Tax, Chandigarh (TDS) vs. Parle Biscuits Ltd. [2013] 351 ITR 138 (P&H)]

D. Whether an application can be made under Sec 197 for lower/ non deduction of tax in relation to Sec 194-IA?
While introducing Finance Bill 2013, the Finance Minister P. Chidambaram had explained in the Budget Speech that, the transactions in immovable property are largely undervalued and underreported and also do not carry the Permanent Account Number (PAN) of the parties. Hence, to improve reporting of such transactions and taxation of capital gains, section 194-IA of the Income Tax Act, 1961 (‘the Act’) was introduced w.e.f. 01/06/2013.

This section provides that, every transferee, at the time of making payment or crediting of any sum as consideration for the transfer of immovable property (other than agricultural land) to a resident transferor, shall deduct tax, at the rate of 1% of such sum.

Let’s take an example wherein there does not arise any tax liability to the transferor on the sale of immovable property since the transferor would have invested a part of total amount of capital gains in purchasing a new residential house property and other part in acquiring NHAI bonds thereby making him eligible to claim exemption under sec. 54 and sec. 54EC of ITA respectively. Under normal circumstances, the transferee is duty-bound to deduct tax u/s 194-IA on the amount of sale consideration paid to the transferor. In this scenario, can the transferor make an application to the A.O. under sec. 197 for issuance of certificate for non-deduction of tax which is otherwise?

Section 197 has not been consequently amended to cover payments /credits under Section 194-IA after the introduction of Section 194-IA vide Finance Act, 2013. Therefore, an application u/s 197 cannot be made in such a scenario and the resident transferor will unreasonably have to face the hardship of claiming refund from the department for the TDS deducted in the above case.

It appears that this is a reverse case of discrimination wherein the non-resident transferor can make an application u/s 197 for receipt of consideration subject to lower deduction of tax or without any deduction of tax on the event of sale of immovable property whereas the resident transferor cannot make a similar application u/s 197.

E. Sample Checklist for Filing Application u/s. 197 for determination of capital gains on sale of immovable property by NRI

- Prescribed Form i.e. Form No. 13 duly filled;
- Copy of Passport;
- Copy of PAN;
- Present Indian and Foreign address of the assessee;
- Power of Attorney, in case of representing case by Attorney holder;
- Copy of purchase agreement along with valuation report as on 01/04/1981 from the Valuation Authority, if the property is purchased before 01/04/1981;
- Copy of sale deed of the property sold/draft sale agreement of the property proposed to be sold along with valuation report for sec. 50C from Valuation Authority;
- Proof of all expenses viz. stamp duty, registration, brokerage paid, etc.;
- Affidavit/Evidence regarding investment u/s. 54 in respect of purchase of New Residential Property or investment u/s. 54EC in respect of investing in Bonds;
- Copy of acknowledgement of Return filed along with Computation for last two years;
- Estimated Computation of Total Income along with working of Long Term Capital Gain;
- In case of Inherited Property:
  - Memorandum of Undertaking;
  - Copy of Will

**Section 197A :- Declaration to be filed in certain cases for non deduction of tax.**

**A. History**

In the Finance Act, 1982 various provisions with respect to deduction of tax at source from income were inserted. The responsibility was cast on the payer to deduct tax and deposit to the authorities and simultaneously to avoid hardships in genuine cases where income of the assessee was below the taxable limit, new section 197A was inserted.

**B. Salient Features**

- This section enables an individual who is resident in India and whose estimated total income of the previous year is less than the minimum liable to income-tax to receive interest on securities, dividends and other interest without deduction of tax at source under sections 193, 194 and 194A of the ITA on furnishing a declaration, in duplicate, in the prescribed form and verified in the prescribed manner.
- Rule 29C and Form Nos. 15F, 15G and 15H have been inserted in the Income-tax Rules, 1962 by the Income-tax (Fifth Amendment) Rules, 1982 prescribing the forms for the purposes of section 197A and laying down the procedure for furnishing the declaration form.

- Difference between Form 15G & Form 15H

<table>
<thead>
<tr>
<th>Sr. No.</th>
<th>Form 15G</th>
<th>Sr. No.</th>
<th>Form 15H</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>To be submitted by individuals below 60 years.</td>
<td>1.</td>
<td>To be submitted by senior citizens only i.e. those who are above 60 years of age.</td>
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| 2.      | Must satisfy the following two conditions:-  
- the estimated taxable income for the financial year should be less than the basic exemption limit and  
- the total interest income from all sources should not exceed the basic exemption limit | 2.      | Must satisfy the following condition :-  
- the estimated taxable income for the financial year should be less than the basic exemption limit |

- Declaration u/s. 197A is valid for payments made after the date of issue of such declaration. In other words, declaration cannot be issued retrospectively.

- Where the assessee holds bank deposits in various branches, the assessee needs to submit this declaration to each and every branch independently. For example, an individual holds deposits in 3 different branches of SBI, then this declaration has to be given to each branch separately.

- Both the forms have validity of one financial year only which means if an individual wants to apply nil TDS in next year also then will have to refurnish these forms in fresh once again.

- Any person making a false statement in the declaration shall be liable to prosecution under section 277 of the Income-tax Act, 1961, and on conviction be punishable:
  - in case where tax sought to be evaded exceeds one lakh rupees, with rigorous imprisonment which shall not be less than six months but which may extend upto seven years with fine;
  - in any other case, with rigorous imprisonment which shall not be less than three months but which may extend upto three years and with fine.
C. **Important Judgement**

Non-filing or delayed filing of the declaration (i.e. Form 15G/15H) by the deductor to the A.O. will not lead to a disallowance under section 40(a)(ia).

**Facts of the Case**

- The assessee was engaged in the business of trading in iron and steel. It had claimed amount of Rs. 5.3 lakhs as deduction on account of interest expenditure and the A.O. noticed that on the same it had not deducted TDS.

- The assessee submitted that it had taken loans from various parties and TDS was deducted on interest paid to those parties on regular basis except from whom declaration under form 15G/15H were received.

- The Assessing Officer invoked provisions of section 40(a)(ia) of ITA and disallowed entire amount of Rs. 5.3 lakhs on ground that the assessee had not filed Form 15G/15H before Commissioner as prescribed under Rule 29C of the Income Tax Rules, 1962.

- On Appeal, CIT (A) upheld the disallowance made by the A.O. and assessee went for second appeal.

**Issue Involved**

- Whether non filing of the declaration in Form 15G/15H by the deductor to the A.O. would lead to disallowance of expenditure u/s. 40(a)(ia) of the ITA?

**ITAT's Ruling**

- In the said case, the assessee was to deduct tax under the provisions of section 194A of ITA. Section 194A of ITA is further qualified by the provisions of section 197A(1A) wherein if a person furnishes a declaration in writing in prescribed Form and verified in the prescribed manner to the effect that tax on his estimated total income is to be included in computing his total income will be nil, there is no need to deduct tax.

The assessee had received such forms as prescribed from those persons to whom interest was paid/being paid and, accordingly, the assessee was not required to deduct taxes u/s. 194A of ITA. But the assessee did not submit the declaration received to the Commissioner
as prescribed. Hence the default for non –furnishing of the said declaration results in invoking penalty provisions under section 272A(2)(i), for which separate provision/procedure was prescribed under the Act.

- However once the person responsible for deducting tax receives Form 15G/ 15H from the deductee, then there is no liability onto deductor to deduct tax. Once there is no liability to deduct tax, it cannot be said that tax is deductible at source under Chapter XVII-B as prescribed under section 40(a)(ia).

- The provisions of section 40(a)(ia) can only be invoked in a case where tax is deductible at source and such tax has not been deducted or after deduction has not been paid.

- Similar issue was considered by the co-ordinate bench in Vipin P. Mehta v. ITO [2011] 46 SOT 71 (Mum) wherein the ITAT held that, in absence of any direct evidence produced by revenue authorities relating to non filing of declaration, assessee's claim that he had declarations of payees in prescribed form before him at time when interest was paid, and, thus, he was not liable to deduct tax at source under section 194A, was accepted.

- No such default occurred in this case too. Accordingly, the provisions of section 40(a)(ia) are not applicable to the facts of the case.

- Therefore, both the A.O. and the CIT(Appeals) erred in disallowing the expenditure u/s. 40(i)(ia) of ITA on the basis of non-filing of Form 15G/15H. Hence the order passed by the A.O. needs to be modified accordingly.

[Karwat Steel Traders vs. Income Tax Officer (2013) 145 ITD 370(Mum.) (Trib.)]