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Stumpers in Section 115A for Non-residents

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Non–residents' payment- a tight ropeprocedure

Those who have certain incomes in the nature of interest,dividends, royalties and fees for technical services and to earn them they do not have to set up a shop or establishment in India have something to rejoice for because in their case there is no return filing obligations if taxes as applicable u/s 115A of the Indian Income TaxAct, 1961 are being withheld on such amounts at the time of payments by the person responsible for making such payments. The primary duty is cast upon the deductor to follow due procedure as he is obliged under the law to follow in procuring set of documents comprising of agreements, invoices, TRC, NO PE declaration and Form 10F and thereupon also obtain a certificate from the practicing Chartered Accountant in Form 15CB of the rate applicable u/s 115A considering the relief available under the Double Taxation Avoidance Agreement. Besides the deductor is required to provide a self-declaration and undertaking to own up for any shortfalls etc. On top of it the deductor is required to provide information of each such payments at the income tax portal on real time basis. This large an exercise is required to make up for the relaxation given to the non-residents.

Income tax return filing rigmarole

Section 139 (1) of the Indian Income Tax Act, 1961 cast a tax filing burden upon a company or a firm as well as upon every other person if his total income in respect of which he is assessable under this Act during the previous year exceed the threshold or the maximum amount which is not chargeable to income-tax. And this compliance is required irrespective of the status of such persons whether resident or non-residents or not ordinarily residents.

Filing of income tax returns is like getting into a second courtship. It is a rigmarole and juggle-puzzle that can lead to great amount of stress upon foreign taxpayer and undue harassment due to faceless culture. Filing a return even when there is an exemption available under the Act can be both regretful and dreadful.

In *Nestle SA* v. *Asstt. (International Taxation)* [2019] 108 taxmann.com 237/417 ITR 213 (Delhi) as regards the non-filing of return of income by the foreign company it was stated that the assessee's income from India consisted only of dividend and interest on which tax had been deducted at source in accordance with the Act or the Double Taxation Avoidance Agreement between India and Switzerland and that the assessee was specifically exempted from filing the return under section 115A(5). The matter went to High Court where it claimed that that there was no obligation on the petitioner to file a return of income for the assessment year in question and his mere forced upon filing a return in response to S. 148 notice could not have been construed as an admission by it of a legal obligation to file a return.Noting this fact, the High Court ultimately quashed the notice u/s148 for reopening.

Thus it is better not to venture into filing like this unless there is a proper advice and opinion in hand. It is always better to say NO requirement than to file and regret later.

Section 115A (5) relaxation unplugged

Chapter XII of the Act provide for determination of tax in certain cases. Section 115A under this Chapter provide for determination of tax on dividends, interest, royalty and technical service fees in the case ofa non-resident (not being a company) or of a foreign company.It provides for the determination of tax for a non-resident whose total income consists of:

(*a*) certain dividend or interest income;

(*b*) royalty or fees for technical services (FTS) received from the Government or Indian concern in pursuance of an agreement made after 31st March 1976, and which is not effectively connected with a PE, if any, of the non-resident in India.

Section 115A when read along with section 90 affords twin relaxation. One on account of lower than prescribed rate of tax in sub-section (1) and in the second for exemption on account of legal obligation to file return of income u/s 139(1). It provides that

> a non-resident is not required to furnish its return of income under sub-section (1) of section 139 of the Act, if its total income, consists only of certain dividend or interest income, royalty or fees for technical services (FTS) and
>
> the TDS on such income has been deducted under the provisions of Chapter XVII-B of the Act at the rates which are not lower than the prescribed rates under sub-section (1) of section 115A.

In the context of cross border incomes India has Double Taxation Avoidance Agreement with other countries to regulate taxation of incomes of residents of such countries who meet the tests of non-residents under section 6 and section 90 of the Income Tax Act, 1961. Section 90 of the Income tax in this regard further provides that the provisions of Income Tax Act, 1961 shall come into application in the case of such non-residents only to the extent they are more beneficial to the double taxation avoidance agreements entered by India. Without a DTAA, they could face the double whammy of paying taxes in both countries on the same income.

Provisions of section 115A

When we look closely to sub-section (5) of section 115A it provides forexemption from the requirement of furnishing of return of income in case of non-residents who derive only dividend or interest income as referred to in clause (a) of sub-section (1) of said section, or royalty or FTS income of the nature specified in clause (b) of sub-section (1) of section 115A subject however to the fact that taxes are deducted thereon as per the applicable provisions of Part B of Chapter XVII of the Actwhich are not lower than the prescribed rates under sub-section (1) of section 115A. Section 195 proper provides for a requirement to deduct taxes

on payments to non-residents as per the rates in force. Rates in force is further defined in section 2 (37A) as under:

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

By this definition the rates mentioned in the relevant Finance Act would get substituted with rates given in the applicable DTAA in terms of the overriding section 90.

Thus for the purpose of determination of applicable rate of tax on dividends, interest, royalty and FTS **we have to read**section 115A (1) along with section 90 and the applicable DTAA.Importantly it is to be understood that the rates of tax specified in the treaty is not part of the Income Tax Actand so are the rates of taxes provided in the Finance Act but the two supplements and complements the provisions of the Act. The treaty articles and the Finance Act have TO BE READ ALONG WITH the provisions of the Income Tax Act. Section 115A which prescribe the rates for taxation of royalty, interest, dividend, fees for technical services isfurther to be read with corresponding taxation of such incomes as given in the relevant treaty so that the ones that are beneficial are to be adapted for withholding purpose under Chapter XVII of the Act. If the non-resident is found eligible to the rates given under the treaty without any ambiguity,he shall meet the purpose test of relaxation given to him under sub-section (5) exempting him from the procedural or formal requirement of filing of return of income.

Legislative intent

The memorandum to the Finance Act 2020 in expressing the intent for amendment to section 115A nowhere draws a line of demarcation or aims to deny exemption from filing return of income where the tax rates as mentioned in sub-section (1) of section 115A are not applicable. It reads as under:

Exempting non-resident from filing of Income-tax return in certain conditions.

Section 115A of the Act provides for the determination of tax for a non-resident whose total income consists of:

(*a*) certain dividend or interest income;

(*b*) royalty or fees for technical services (FTS) received from the Government or Indian concern in pursuance of an agreement made after 31st March 1976, and which is not effectively connected with a PE, if any, of the non-resident in India.

Sub-section (5) of said section provides that a non-resident is not required to furnish its return of income under sub-section (1) of section 139 of the Act, if its total income, consists only of certain dividend or interest income and the TDS on such income has been deducted according to the provisions of Chapter XVII-B of the Act.

While, the current provisions of section 115A of the Act provide relief to non-residents from filing of return of income where the non-resident is not liable to pay tax other than the TDS which has been deducted on the dividend or interest income, the same relief has not been extended to non-residents whose total income consists only of the income by way of royalty or FTS of the nature as mentioned in point (b) above. Representations have been received to extend this benefit to royalty and FTS income as well.

Therefore, it is proposed to amend section 115A of the Act in order to provide that a non-resident, shall not be required to file return of income under sub-section (1) of section 139 of the Act if, -

(*i*) his or its total income consists of only dividend or interest income as referred to in clause (a) of sub-section (1) of said section, or royalty or FTS income of the nature specified in clause (b) of sub-section (1) of section 115A; and

(*ii*) the TDS on such income has been deducted under the provisions of Chapter XVII-B of the Act at the rates which are not lower than the prescribed rates under sub-section (1) of section 115A.

This amendment will take effect from 1st April, 2020 and will, accordingly, apply in relation to the assessment year 2020-21 and subsequent assessment years."

Palkhavala's Tax Treatise Statement

Kanga and Palkhivala's Commentary on the law and practice of income tax states that the tax rates as mentioned in sub-section (1) of section 115A are not applicable where a lower rate of tax is prescribed under an agreement for the avoidance of double taxation entered into by the Central Government under S. 90 with any other country.In this situation if wedecline the benefit of exemption to non-resident from filing of Income-tax return only because of their availing treaty rate over the rate prescribed u/s 115A(1) it would go as an absurd proposition.

It is settled law that a plain and grammatical construction should not lead to absurdity. Where the plain and literal interpretation of a statutory provision produces a manifestly unjust result which could never have been intended by the legislature, the Court might modify the language used by the legislature so as to achieve the intention of the legislature and produce a rational result. *CIT* v. *J H Gotla* [1985] 23 Taxman 14J/156 ITR 323 (SC).

Contentiously, it is a relief only to those non-residents who are based where the tax rate in case of 'royalty' prescribed in the respective Tax Treaties is higher than the rate prescribed in the Act.

Return filing may be inevitable if:

1. In a case where the Indian payer has withheld tax at source at a higher rate, for instance, where the non-resident has not obtained a Permanent Account Number ("PAN") in India, such person shall be required to file income tax return in case the excess tax withheld is sought to be claimed as refund.
2. they don't let go the benefit of nil or lower rate of taxation of such incomes as per the Double Taxation Avoidance Treaty ("the Treaty") which India has entered into with their country of residence.
3. There is non-application of surcharge and/ or education cess, which is otherwise leviable under the Act;

No automatic international treaty benefit, including a lower withholding tax, is available to foreign companies operating in India may lead to spate of tax demands. Hence itappears thatno legal obligation to file a return of income for certain incomes as referred to in section 115A (1) (a) and (b) after tax had been deducted at source in accordance with the Act or the Double Taxation Avoidance Agreement, as the case may be is just to dangle a carrot in front of Alien taxpayer which essentially is an inimitable matter based on unique facts. The non-residents in their best interests must seek a proper opinion and advice before either starting to file any income tax return in India or going for "No Requirement".