TDS on Transfer of Certain Immovable Property other than Agricultural Land (Section 194-IA)

Tax Deducted at Source (TDS) is the easiest and biggest source of tax collection for the government. The government keeps on finding new avenues to bring more and more transactions under the TDS net. "TDS on immovable properties "is a new invention in the series. This section is applicable from 1st June 2013 for the property transactions above ₹50 lakh. This section has raised so many practical and legal issues, which are discussed here in this article. Read on…

CA. Dr. Rajendrakumar Jain and CA. Dhansukh Jain

(The authors are members of the Institute. They can be reached at info@tdswala.com)

Section 194IA reads as under,

1. "Any persons, being a transferee responsible for paying (other than the person referred to in sec 194-LA) to a resident transferor any sum by way of consideration for transfer of any immovable property (other than agricultural land), shall, at the time of credit of such sum to the account of the transferor or at the time of payment of such sum in cash or by issue of a cheque or draft or any other mode, which ever is earlier, deduct an amount equal to one per cent of such sum as income tax thereon "

2. no deduction under subSection (1) shall be made where the consideration for the transfer of an immovable property is less than ₹50 lakh.
3. Provisions of Section 203 A shall not apply to a person required to deduct tax in accordance with the provisions of this Section.

   Explanation – for the purpose of this section –

   a. "agricultural land" means agricultural land in India, not being a land situated in any area referred to in items (a) and (b) of sub-clause (iii) of clause (14) of section 2
   b. "immovable property " means any land (other than agricultural land) or any building or part of a building.

On an analysis of the Section, we find that the Section clearly states that when the seller is a "Resident" then this S ction will be applicable. This raises a few questions:

Q. What will happen if the seller is non-resident?

The seller is a resident but the property is situated out of India, then how will this Section be executed on a foreign resident?

Further, if India has tax treaty with the country where property is situated, in such situation whether treaty will supersede to Section 194 IA?

A. If the seller is a non-resident then Section 195 of the Income-tax Act will be in operation and accordingly tax will be deducted. In the case where the buyer is a foreign national and property is also situated abroad then, how the provisions of this Section will be imposed on them. But in the author's opinion, in case the property and buyer both are of foreign soil, then this Section will not be operative since the preamble of Income tax Section 1 says that the Indian Income-tax Act will be applicable all over India.

If the seller is non-resident then Section 195 of the Income-tax Act will be in operation and accordingly tax will be deducted. In case where the buyer is a foreign national and property is also situated abroad, then how provisions of this Section will be imposed on them. But in author's opinion, in case the property and buyer both are of foreign soil then this Section will not be operative since the preamble of Income-tax Section 1 says that the Indian Income-tax act will be applicable all over India .

Where as in case the buyer is Indian and property is located out of India, then this Section can be entrusted on buyer (and of course, a seller also being an Indian resident).

In case when property is situated out of India and the buyer and seller both are Indian residents and India has DTAA with the country where land will be situated, yet the buyer cannot take the benefit of treaty, since this Section has casted duty on the buyer to deduct the tax when the seller is an Indian resident. The buyer needs not to look into the taxability of the transaction.

Q. Whether transfer of immovable property includes any right like developmental right/exchange/ relinquishment … in immovable property ?

A. On plain reading, it seems that it covers every type of transfer. Further Section 2 (47) of the Income-tax Act defines what is a transfer. It says "transfer in relation to capital assets includes (i) sale, exchange or relinquishment of the assets or

(ii) extinguishment of any rights there in… this definition is inclusive definition and covers exchange and relinquishment, considering this analogy for this Section "transfer" will include any exchange, relinquishment of rights in immovable property.

Q. What is meant by payment of any sum for transfer of immovable property?

What will be the position of transaction like exchange of assets, family arrangement, and gift of property where actual cash or cheque is not exchanged?

A. Since the Section clearly says that "cash, draft or any other mode….. …." That means in addition to transactions made through cash, cheque transactions made through book entries will be also covered under this Section.

As far as exchange of assets are concerned since one asset is transferred in *lieu* of assets, that being the mode of payment, it will be subject to TDS. In such transactions at the same time, both parties are playing the role of buyer and sellers as well. According to the author, both seller and purchaser will need to deduct tax of each other.

In case of family arrangement, there is no sale, neither any consideration is being given, the assets are transferred for "peace in family" hence, in author's opinion, in that case this section will be not applicable

Since a gift is a transfer without consideration and this Section speaks about "any sum by way of

In view of saving citizens from the unwarranted exercise of deduction of tax then claiming refund from the Government, Section 197 was introduced. This section empowers assessee for obtaining lower deduction certificate from the assessing officer. When assessee produces this certificate to the deductor the deductor has to deduct the tax at the rates specified in the certificate. However, in Section 197 payments made under Section 194 IA is not covered, so the seller cannot apply for a lower deduction certificate.

consideration." Hence, gifts of the property will be not covered under this Section.

Q. Section 194IA has excluded "agricultural land" what does it mean by agricultural land?

A. There are two conditions to make land an agricultural land:

i. in government records, the use of land must be for agricultural purpose, and
ii. the criteria of distance from a town as per Section 2 (14) iii (a) and (b) the land in question must be situated away from certain distance from any municipality or cantonment board, the distance depending on the population of the town.

Interestingly, if the land is situated within the periphery of gram panchayat, having population above the limit of population prescribed in Section 2 (14) iii (a) and (b) yet it be will treated as agricultural land. Section 2 (14) refers to distance from "municipal town and not from panchayat "though both municipality and panchayat are human habitant but the difference between panchayat and municipality is, panchayat is governed by the panchayat act and municipality is governed by a different act, considering this land is situated in proximity of any panchayat irrespective of population, will be treated as "agricultural land"

Refer the cases reported in 2 ITD 371 (Mad)

Q. After the sale transaction if there is no tax liability on seller, can he apply for lower deduction certificate?

A. In view of saving citizens from the unwarranted exercise of deduction of tax, then claiming refund from the Government, Section 197 was introduced. This section empowers assessee for obtaining lower deduction certificate from the assessing officer. When assessee produces this certificate to the deductor, the deductor has to deduct the tax at the rates specified in the certificate. However in Section 197 payments made under Section 194 IA is not covered, so the seller cannot apply for a lower deduction certificate.

Q. What will be the situation in case of lump sum sale of business, where it is difficult to find out exact price of immovable property?

A. For this, no guidance is available in the law. However as per ection 2(42C) "slump sale means transfer of one or more undertakings as a result of the sale for a lump sum consideration without values being assigned to individual assets & liabilities in such sales." So in case of slump sale, there is transfer of undertaking which includes sale of immovable property but there is no transfer of immovable property directly. Hence, in author's opinion provision of Section 194IA will not be applicable in case of slump sale.

One may take a practical approach by resorting to stamp duty value and deduct tax on that amount considering it as actual value of the property will be irrelevant in view of explanation 2 of Section 2 (42 C) which says that "for removal of doubt it is here by declared that, the determination of the value of an asset or liability for the sole purpose of payment of stamp duty, registration fees or other similar taxes or fees shall not be regarded as assignment of values to individual assets or liabilities"

Q. What are the consequences for non-deduction of tax? Will the answer be different if seller has no tax liability?

A. In case of failure to deduct the tax, the buyer will have to pay interest and penalty as per the provisions of the act. If the seller has failed to pay tax then to the extent of TDS amount can be recovered from the buyer, but if the seller has paid his tax liability then the buyer is liable to pay only interest and penalty for the delayed period. But a very interesting situation will arise when the seller will have no tax liability. Refer a case of *"Thomas Muthoot vs. Deputy Commissioner of Income-tax"*. In the said case, the tribunal has decided that when there is no tax payable by the deductee assessee, then there cannot be any interest or penalty to be charged to the deductor, but this is a very far-fetched decision, which may lead to unwarranted litigation.

Q. What will be consequences of cancellation of deal? Who will claim the refund?

A. In case of cancellation of deal, two situations are possible: either the seller will forfeit the advance or he will return the money to the buyer. If he forfeits the amount then it becomes "capital receipt" in the hands of the seller, so it will not be offered to tax as per Section 199 rwt rule 37BA(3)(i) of Income-tax Act, 1961 which specifies the procedure of giving credit of TDS states "Credit for tax deducted at source and paid to central government, shall be given for the assessment year for which such income is assessable", since the amount forfeited by the seller is capital receipt, which being not taxable in hands of seller, will be not offered for tax, in such situation how will the seller get credit of TDS will be the big question.

In case of failure to deduct the tax, the buyer will have to pay interest and penalty as per the provisions of the act. If the seller has failed to pay tax then to the extent of TDS amount can be recovered from the buyer, but if the seller has paid his tax liability then the buyer is liable to pay only interest and penalty for the delayed period.

In case the seller decides to return the advance, he has to return the entire advance money including TDS, since while paying advance the buyer has paid tax to the exchequer on behalf of the seller, and issued the TDS certificate to the seller, so only seller can claim the refund of the TDS .

Q. If seller does not have PAN can Section 206AA be applicable? And does the buyer need to deduct tax at the rate of 20%?

A. Theoretically we can say provisions of Section 206AA will apply but the form of payment of TDS is 27QB makes it mandatory to write both deductor's and deductees PAN no. Without that number, the assessee will be unable to upload the challan. So by default the deductee has to obtain the PAN and only then the deal can get through.

Q. In case of multiple buyers, the limit of ₹50 lakh will be considered qua buyer or qua agreement?

A. In the author's views, the limit of 50 lakh will be *qua* agreement, even multiple buyers are there.

Q. In case of multiple sellers, the limit of ₹50 lakh will be qua seller or will be qua agreement? And on what basis the consideration will be split amongst the sellers?

A. As stated in the above question, according to the author, the transaction should be considered *qua* agreement. Out of total consideration, how much amount is to be allocated to a particular seller. This choice has to be left to the seller and preferably to be mentioned in the agreement.

Q. In the challan, how will the consideration of property be shown? Does total consideration as per agreement or part payment relevant to each buyer and seller?

A. In the challan, there is a column for total consideration in which total consideration is to be mentioned and in payment column payment relevant to that particular challan has to be mentioned.

Q. Does it make any difference if property is purchased through builder?

A. It does not make any difference from whom you are purchasing the property; the buyer has to make TDS.

Q. Does the buyer need to give any certificate to the seller?

A. Yes. The buyer has to give tax deduction certificate to the seller within 15days in form 16B. ■