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Whether a Non-Resident is Liable to Deduct TDS under Section 194-IA of the Income-tax Act, 1961

This article examines the applicability of Tax Deduction at Source (TDS) under Section 194-IA of the Income-tax Act, 1961, in the context of immovable property transactions involving resident and non-resident parties. It clarifies the distinction between the obligations of resident and non-resident buyers, highlights judicial pronouncements regarding chargeability and extra-territorial application,

and addresses practical enforcement challenges. With increasing globalization and cross-border mobility, the taxability and withholding obligations for such transactions hinge on principles of territorial nexus, source of income, and residential status. The article further explores CBDT circulars, procedural compliance hurdles, and practical safeguards, aiming to guide practitioners and taxpayers in navigating TDS obligations in cross-border property deals under evolving Indian tax law.

Introduction

The Indian real estate sector has witnessed increasing participation from non-resident investors alongside resident investors, leading to significant cross-border property transactions. Such transactions inevitably raise important questions under Indian tax laws, particularly in relation to the mechanism of Tax Deduction at Source (TDS). Among these, one area of concern is the applicability of Section 194-IA of the Income-tax Act, 1961, which mandates TDS on payments made by the buyer to a resident transferor for the transfer of immovable property exceeding specified thresholds. While the provision appears straightforward, its interpretation becomes complex when non-residents are involved as buyers in Indian property transactions.

This issue has acquired greater significance in recent years due to increased global mobility, overseas Indians looking to invest in India, and foreign nationals seeking opportunities in the booming Indian property market. Non-resident

investors are often unfamiliar with the complex procedural and compliance requirements of Indian tax law, and the potential for unintended non-compliance can create significant anxiety. Moreover, cross-border property transactions touch upon multiple legal regimes simultaneously, including Indian income-tax law, foreign exchange laws, registration rules, and even international tax treaties, adding to the uncertainty. The implications of TDS obligations under Section 194-IA, therefore, are not merely academic but have real-world consequences for non-resident buyers, the property market, and tax administration alike.

TDS – A Statutory Collection Mechanism

TDS is a machinery provision designed to collect tax at the time when income either accrues, arises, or is paid. Under Indian tax law, the obligation to deduct tax at source is imposed upon the payer, i.e., the person responsible for making a payment, when it falls within the scope of relevant provisions of the Income-tax Act, 1961.

Section 1(2) of the Act stipulates that the Act extends to the whole of India. The application of the Act, including compliance mechanisms such as tax deduction at source, is territorially bounded. It cannot be enforced beyond Indian jurisdiction unless there is a specific legal nexus. Section 6 of the Act determines the residential status of individuals and entities, and Section 5 outlines the scope of total income for different classes of taxpayers. A non-resident is taxed only on income that accrues or arises, or is deemed to accrue or arise, in India. However, the act of making a payment from outside India by a non-resident for a transaction that occurs within Indian territory does not by itself constitute a sufficient legal or territorial nexus to fasten a TDS obligation, unless the non-resident has a presence in India through a permanent establishment or a business connection.

The Supreme Court in the case of *CIT v. Eli Lilly & Co. (India) Pvt. Ltd.* (2009) 312 ITR 225 (SC) has clarified the fundamental principle that the Indian Income-tax Act, 1961, does not have extra-territorial operation unless there

is a sufficient territorial nexus between India and the person or transaction sought to be taxed. Relevant extracts are reproduced below:

"On the question of extra-territorial operation of the 1961 Act the general concept as to scope of income tax is that, given a sufficient territorial connection or nexus between the person sought to be charged and the country seeking to tax him, income-tax may extend to that person in respect of his foreign income. The connection can be based on the residence of the person or business connection within the territory of the taxing state; and the situation within the state of money or property from which taxable income is derived (see The Law and Practice of Income Tax by Kanga and Palkhivala, seventh edition, at p. 10)"

The Supreme Court's decision in this matter affects the way TDS obligations are determined under Indian tax law. It reinforces that TDS obligations can only be imposed where there exists a sufficient territorial nexus between the payer or the transaction and India. Consequently, the Indian Income-tax Act has selectively imposed TDS obligations on non-residents only in clearly defined situations, where either the source of income lies in India or the payer has a presence in India.

The Act clearly identifies non-residents as liable for TDS compliance only in specific circumstances, for example:

- a. Section 195 (payments to non-residents)
- b. Section 194E (payments to non-resident sportsmen or entertainers)
- c. Sections 194LB, 194LC, and 194LD

In the aforementioned provisions, the statute explicitly brings non-residents within the purview of TDS for outbound payments. However, there is no express provision in the Act imposing a TDS obligation on a non-resident payer who is located outside

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India and who makes a payment to a resident in India, unless such non-resident has a physical or economic presence in India.

Further, CBDT has not allocated jurisdiction to any Commissioner of Income-tax to administer or enforce TDS provisions against non-residents making payments to Indian residents, as evidenced by Notification No. 55/2014/F.No.187/39/2014 and Notification No. 57/2014 /F. No.187/29/2014¹. This lack of administrative action clearly indicates that the legislature never intended to impose such an obligation.

Furthermore, under Section 203A of the Act, a person is generally required to obtain a TAN in order to deposit TDS, file statements, or issue TDS certificates as required under the Income-tax Rules. For non-resident buyers who have no business connection, assets, or permanent establishment in India, these compliance steps are not straightforward. Even where specific provisions (such as Section 194-IA) allow TDS payment without a TAN, a non-resident would still be required to obtain a PAN, register on the Income-tax portal, and complete the associated compliance formalities.

It is equally important to recognize that the fundamental purpose of TDS is not simply tax collection but also ensuring timely reporting and traceability of transactions for tax administration purposes. However, this compliance mechanism presupposes the payer's ability to navigate the Indian tax infrastructure, including understanding

filing deadlines, obtaining a TAN, and remitting tax payments through Indian banking systems. For non-resident individuals or entities lacking business in India, fulfilling these compliance obligations could be an arduous task, often necessitating the engagement of professional advisors, thereby adding to transaction costs and complexity. Such practical challenges underscore why the territorial nexus principle plays a decisive role in determining whether TDS obligations under Indian law can be realistically imposed on persons entirely situated outside the country.

Another dimension relevant to the discussion is the interplay between Section 194-IA and the provisions for interest, penalty, and prosecution under the Act. For instance, under Section 201(1A), a person who fails to deduct or deposit TDS is liable to pay interest, while Section 271C imposes penalties for such defaults. However, imposing these consequences on non-resident buyers with no presence in India creates significant enforcement challenges. The absence of jurisdictional reach and administrative infrastructure to pursue recovery from non-residents further supports the view that Section 194-IA was not intended to cover non-resident purchasers lacking territorial nexus with India.

Section 194-IA

As stated in the Explanatory Memorandum to the Finance Bill, 2013, the purpose of Section 194-IA is to widen the tax base and curb evasion in real estate transactions, where sellers often underreport the actual consideration to reduce their tax liabilities. By introducing Section 194-IA, the Government aimed to create a tracing mechanism for real estate transactions and ensure that property transfers exceeding certain thresholds were reported to the tax authorities.

Section 194-IA provides that

(1) Any person, being a transferee, responsible for paying (other than the person referred to in section 194LA) to a resident transferor any sum by

¹ These notifications are issued under section 120 of the Income-tax Act, 1961 defining jurisdictions of Commissioners of Income Tax.



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 by any other mode, whichever is earlier, deduct an amount equal to one per cent of such sum or the stamp duty value of such property, whichever is higher, as income-tax thereon.

(2) No deduction under sub-section (1) shall be made where the consideration for the transfer of an immovable property and the stamp duty value of such property, are both, less than fifty lakh rupees:

This Section uses the word “any person, being a transferee” to define who is responsible for deducting tax at source. At first glance, this might appear to encompass both residents and non-residents. However, a closer reading of the Income-tax Act reveals that the term “person” under Section 2(31) merely defines the types of legal entities, such as individuals, HUFs, firms, companies, and others. It does not determine whether such persons are resident or non-resident or whether they have a sufficient territorial nexus with India.

A view may be taken that the residential status of the buyer is irrelevant for Section 194-IA, and that the provision applies so long as the seller is a resident. Some also suggest that where the buyer is a non-resident, Section 195 should apply. However, this interpretation is not consistent with the statutory language. Section 195 is triggered only when a payment is made to a non-resident. The provision begins with the

words “any person responsible for paying to a non-resident... any sum chargeable under the Act,” which makes it clear that it governs outbound payments made to non-residents. In the present case, the factual position is the opposite: the payment is made by a non-resident to a resident seller. Accordingly, section 195 has no application.

Once Section 195 is excluded on this basis, the only provision that could potentially impose a TDS obligation is Section 194-IA. The issue, therefore, is not whether Section 195 overrides Section 194-IA, but whether Section 194-IA either expressly or by necessary implication extends to non-resident transferees who have no presence or territorial nexus in India. This is a jurisdictional enquiry, not merely a definitional one, and requires examining whether the machinery of TDS can practically and legally operate against a payer situated entirely outside India.

The determination of whether a person is resident or non-resident falls under Section 6 of the Act, while the scope of their taxable income is governed by Section 5. Therefore, although the words “any person” in Section 194-IA appear broad, they cannot be interpreted in isolation to impose tax deduction obligations on non-residents lacking presence or business connections in India. Legislative clarity and territorial nexus remain fundamental principles in determining the extent of tax compliance obligations under the Act.

Since Section 194-IA was introduced primarily to trace high-value property transactions and to bring transparency into the real estate sector, its core objective is informational in nature. However, even in the absence of TDS compliance under Section 194-IA, such transactions remain traceable through the alternative reporting mechanism prescribed under Section 285BA of the Act, read with Rule 114E of the Income-tax Rules, which mandates sub-registrars to report transactions of ₹ 30 lakh or more. This ensures that the tax department

obtains visibility into significant property deals, reducing the necessity to impose TDS compliance obligations on non-resident buyers who lack any presence or business connection in India.

Role of DTAA

Since the purchase of property in India by a non-resident buyer does not result in any income in the hands of the buyer and given that TDS obligations are imposed purely under domestic tax law, there is no need to refer to Double Taxation Avoidance Agreements (DTAAs) for determining whether Section 194-IA applies to such transactions. The DTAA provisions allocate taxing rights over capital gains to India but do not impose any obligation on non-resident buyers to deduct tax at source. Therefore, the analysis of Section 194-IA's applicability to non-resident buyers remains solely within the realm of domestic Indian law.

Conclusion

In view of above, a non-resident buyer of immovable property located in India is not liable to deduct tax at source under Section 194-IA, unless such buyer has a Permanent Establishment or a Business Connection in India. Inbound transactions by non-residents situated wholly outside Indian territory are not intended to be subject to TDS under the Act.

Further, Rule 114B of the Income-tax Rules states that PAN must be quoted by both the seller and the buyer in case of sale or purchase of immovable property where the value exceeds ₹ 10 lakhs. This may create an obligation on the non-resident buyer to obtain a PAN in India, purely for the purpose of reporting the transaction, even though there is no TDS liability under Section 194-IA.

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