TAX MEMORANDUM

To To whom it may concern

(Any individual or corporate who is importing goods from overseas during the course of his business from a non-resident)

From EvoBreyta TaxFinTech LLP

Date July 22, 2023

Subject Applicability of Withholding Tax ('WHT') on import of goods under the Income- tax Act, 1961 ('the Act')

UNDERSTANDING THE FACTS AND BACKGROUND

The globalization of business has increased the quantum of export and import of goods and services in leaps and bounds during the last 2-3 decades. This has caused the revenue department of many developed and developing countries to introduce or amend provisions related to taxation on the movement of such goods and services. This enables them to have a control over such movement, so that these goods and services which are either produced or consumed in these countries can be taxed.

Tax deduction at source has been a crucial part of any tax related statute to control international transaction, so that the tax can be deducted on such incomes. These incomes are earned by the nationals of other countries, but the respective domestic country has a role to play in the generation of such income. Section 195 of the Income-tax Act, 1961 ('the Act') is an Indian provision which fulfils this purpose.

Section 195 stipulates that tax should be deducted from a non-resident on payment or incurrence of any income which is chargeable to tax in India. Now, the question arises whether a non-resident is liable to pay any tax in India in case he is exporting any goods to India. That is, whether an importer of goods is required to deduct any tax while making payment or incurring such expenses related to the import of goods by him? Can the transaction involving import of goods cause any income generating activity in India in the hands of the exporter?

Recent amendment in the definition of the Special Economic Presence (SEP) of a non-resident in India has significantly changed the taxability of transactions related to goods exported in India which has also further increased the responsibility of importer of goods to deduct tax while making payment in respect of such transactions, which is effective from April 1st 2021. In this opinion, we try to understand the provisions related to accrual of income when goods are imported to India.

ANALYSIS OF INCOME-TAX PROVISION RELATED IMPORT OF GOODS

Section 195 of the Act reads as under,

> *"**195.** (1) Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest (not being interest referred to in section 194LB or section*

*194LC) or section **194LD or any other sum chargeable under the provisions of this Act** (not being income chargeable under the head "Salaries") shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force……..."*

The above section says that it is mandatory for any transaction to be chargeable under the Income-tax Act for the applicability of withholding tax.

Further, while defining chargeability of income tax, Section 5 of the Income-tax Act, stipulates that,

"5. (1) ……

(2) Subject to the provisions of this Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which—

*(a) is received or **is deemed to be received in India** in such year by or on behalf of such person; or*

*(b) accrues or arises or **is deemed to accrue or arise to him** in India during such year. ….. (Emphasis applied)"*

Hence, any income which is deemed to be received or accrued or arisen to a non-resident in India is chargeable to Income-tax. Now, we will analyze the deeming provisions related to accrual of income.

Section 9 of the Act, reads as under:

*"**9.** (1) The following **incomes shall be deemed to accrue or arise in India**:*

(i) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India.

Explanation 1. For the purposes of this clause—

*(a) in the case of a business, other than the business having business connection in India on account of **significant economic presence**, of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India;*

(b) ……. (Emphasis applied)"

The definition of Special Economic Presence has been **amended with effect from April 1, 2021**. Explanation 2A of the Section 9, which defines Significance Economic Presence (SEP), reads as under:

> *"Explanation 2A.*—For the removal of doubts, it is hereby declared that the significant economic presence of a non-resident in India shall constitute "business connection" in India and **"significant economic presence" for this purpose, shall mean**—
>
> *(a)* transaction in **respect of any goods**, services or property carried out by a non-resident with any person in India including provision of download of data or software in India, if the aggregate of payments arising from such transaction or **transactions during the previous year exceeds such amount as may be prescribed**; or
>
> *(b)* systematic and continuous soliciting of business activities or engaging in interaction with **such number of users in India, as may be prescribed**:
>
> ..... (Emphasis applied)"

The amended provision explicitly mentions that any transaction of goods by a non-resident exceeding the amount as prescribed will constitute their special economic presence in India. Subsequently, the income from such transaction being SEP will be deemed to be accrued or arisen in India.

Thresholds Limit for the Purpose of SEP

> **"Thresholds for the purposes of significant economic presence.**
>
> **11UD**. *(1) For the purposes of clause (a) of* Explanation 2A *to clause (i) of sub-section (1) of section 9, the amount of aggregate of payments arising from transaction or transactions in **respect of any goods**, services or property carried out by a non-resident with any person in India, including provision of download of data or software in India during the previous year, **shall be two crore rupees**;*
>
> *(2) For the purposes of clause (b) of* Explanation 2A *to clause (i) of sub-section (1) of section 9, the number of users with whom systematic and continuous business activities are solicited or who are engaged in interaction shall be three lakhs." (Emphasis Applied)*

The above text means that a non-resident is deemed to have special economic presence (SEP) in India in a particular year if they engage in the transaction of goods in India whose aggregate value exceeds Rs. 2 crores in the previous year. The threshold limit of Rs. 2 crores seem

insignificant in the case of a non-resident who is supplying goods or services in pan-India during a whole year. We can derive that in most cases where a non-resident is supplying goods or services to a person in India, they should be considered having SEP. That is, unless **they provide a specific declaration that their total turnover in India in respect of any goods, services, or property does not exceed Rs. 2 crores.**

It can be summarized from the above discussion that a non-resident who is supplying any goods to India and has aggregate turnover in India more than Rs. 2 crores during the year will cause significance economic presence in India. The income from such a transaction will be deemed to be accrued or arisen to him under section 9(1) of the Income-tax Act, 1961.

SEP AND ITS INTERPLAY WITH RELIEF UNDER DTAA

It is a settled position that the provision of Double Tax Avoidance Agreement (DTAA) supersedes the provisions of the Income-tax Act, 1961, if they are more beneficial. The sub-section (2) of section 90 of the Act, reads as under,

> *"(2) Where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies,* ***the provisions of this Act shall apply to the extent they are more beneficial to that assessee."***

We have gone through the provisions related to the Income-Tax Act which explicitly mention the applicability of income-tax on import of goods from a non-resident. Now applying the provisions of DTAA, the profits of a business can taxable only if the business has a permanent establishment in India, unless any other article specifically provides otherwise.

In other words, a person or supplier of goods can have tax relief under the provisions of DTAA, if they don't have a PE in India. However, to avail the benefit of DTAA, the person is required to follow the procedure and should have complete documentation as described under sub-section (4) and (5) of the section 90, which are reproduced here for ease of reference,

> *90.*
>
> *"(1) .....*

(4) An assessee, not being a resident, to whom an agreement referred to in sub-section (1) applies, shall not be entitled to claim any relief under such agreement unless ***a certificate of his being a resident in any country outside India*** *or specified territory outside India, as the case may be, is obtained by him from the Government of that country or specified territory.*

(5) The assessee referred to in sub-section (4) shall also provide ***such other documents and information, as may be prescribed."***

(Please refer rule 21AB, enclosed herewith as **'Annexure – A'**)

It is specifically mentioned that the countries with whom India have not entered into a DTAA, the benefit of nil or lower tax rate will not be available to the resident of such a country.

APPLICABILITY OF WITHHOLDING TAX/TDS AND ITS INTERPLAY WITH DTAA

The section 195 read with section 9(1) of the Income-tax Act, 1961, explicitly interprets that any transaction involving import of goods will cause SEP of a non-resident in India, hence, any income from such transaction will be deemed to be accrued and arisen in India. In such a case, any person who is responsible of making payment to a non-resident is required to deduct tax.

Sub-section (6) of the section 195, describes that,

"The person responsible for paying to a non-resident, not being a company, or to a foreign company, any sum, whether or not chargeable under the provisions of this Act, shall furnish the information relating to payment of such sum, in such form and manner, as may be prescribed."

The Central Board of Direct Taxes (CBDT) has prescribed Rule 37BB **(Please refer 'Annexure – B')** u/s (6) as *supra*, which mentions that **every person is required to furnish the information in Form 15CA or Form 15CB while making any payment to a non-resident, if such sum is chargeable under the provisions of the Act subject to the threshold as described.**

Sub-Rule (1)(ii) of Rule 37BB further mentions that in case the payment to a non-resident exceeds Rs. 5 lakhs in a financial year, they are required to furnish the below information,

"(ii) for payments other than the payments referred in clause (i), the information,

(a) in Part B of Form No.15CA after obtaining,

(I) a certificate from the Assessing Officer under section 197; or

(II) an order from the Assessing Officer under sub-section (2) or sub-section (3) of section 195;

(b) ***in Part C of Form No.15CA after obtaining a certificate in Form No. 15CB from an accountant as defined in the* Explanation *below sub-section (2) of section 288."***

In other words, in case a person is making a payment to a non-resident which is chargeable to income-tax and the non-resident doesn't hold a certificate u/s 197 or an order from the AO u/s 195(2)/195(3), he is required to file the information in Part C of the Form no. 15CA and also a certificate in the form No. 15CB, certified by a Chartered Accountant.

However, as discussed in the above paragraph, if the non-resident has no PE in India, he can take the relief under the DTAA subject to complete documentation by following the complete procedure.

To remove any ambiguity, it is further clarified that the exemption from furnishing information in the case of import of goods, under the Specified List (S. No. 8) as per rule 37BB, is applicable only in the case where the sum is not chargeable to tax in India. However, after the amendment in the definition of SEP, the import of goods is considered a transaction from which any income gained is deemed to be accrued and arisen in India. Hence, income from such transaction is chargeable to tax in India and doesn't fall under the sub rule (3) of the rule 37BB which provides exemption from furnishing information.

CONCLUSION

After reading and analysing provisions related to chargeability of Income-tax, DTAA, and withholding tax, it can be concluded that:

1. A non-resident who is supplying goods to India and has aggregate more than Rs. 2 crores in the country during the financial year will cause his significance economic presence (SEP) in India. Any income accruing to him from such transactions will be considered as income deemed to be accrued or arisen to him in India under section 9(1) of the Income-tax Act, 1961.
2. A person who is responsible for paying any sum chargeable under the provisions of Income-

tax Act is liable to deduct tax under section 195 of the Act, and also required to furnish information/documentation as described under section 195(6) read with Rule 37BB.

3. The Rule 37BB of the Income-tax Rules, 1962 describes that in case a person is making a payment to a non-resident which is chargeable to income-tax, and the non-resident doesn't hold the certificate u/s 197 or an order from the AO u/s 195(2)/195(3), the person is required to file the information in Part C of the Form no. 15CA along with a certificate in the form No. 15CB, certified by a Chartered Accountant.
4. In case the non-resident belongs to a country with whom India has entered into a Double Taxation Avoidance Agreement (DTAA) and he doesn't have any permanent establishment (PE) in India, he can avail the relief under DTAA by following the procedure as described under section 90 of the Act read with rule 21AB.

DISCLAIMER

The opinion is limited to the applicability of withholding tax provision on import of goods under the Income-tax Act, 1961 and excludes the following:

a) Any advice relating to any other act, such as FEMA, Custom Act, GST or any other law.
b) Any advice related to analysis of any Double specific Tax Avoidance Agreement (DTAA) is not covered here.
c) This opinion is specifically provided in respect of import of goods and not services.
d) Advice will be based on the interpretation of current legislation, and there is no assurance that the tax authorities will agree with our conclusions.
e) Advice provided is general in nature and not related to any specific transaction of import of goods. The opinion can differ depending upon any specific transaction of import of goods, the country of residence of the exporter, place of delivery, etc.

Annexure - A

Certificate for claiming relief under an agreement referred to in sections 90 and 90A.

21AB. *(1) Subject to the provisions of sub-rule (2), for the purposes of sub-section (5) of section 90 and sub-section (5) of section 90A, the following information shall be provided by an assessee in Form No. 10F, namely:*

- *(i) Status (individual, company, firm etc.) of the assessee;*
- *(ii) Nationality (in case of an individual) or country or specified territory of incorporation or registration (in case of others);*
- *(iii) Assessee's tax identification number in the country or specified territory of residence and in case there is no such number, then, a unique number on the basis of which the person is identified by the Government of the country or the specified territory of which the asseessee claims to be a resident;*
- *(iv) Period for which the residential status, as mentioned in the certificate referred to in sub-section (4) of section 90 or sub-section (4) of section 90A, is applicable; and*
- *(v) Address of the assessee in the country or specified territory outside India, during the period for which the certificate, as mentioned in (iv) above, is applicable.*

(2) The assessee may not be required to provide the information or any part thereof referred to in sub-rule (1) if the information or the part thereof, as the case may be, is contained in the certificate referred to in sub-section (4) of section 90 or sub-section (4) of section 90A.

(2A) The assessee shall keep and maintain such documents as are necessary to substantiate the information provided under sub-rule (1) and an income-tax authority may require the assessee to provide the said documents in relation to a claim by the said assessee of any relief under an agreement referred to in sub-section (1) of section 90 or sub-section (1) of section 90A, as the case may be.

(3) An assessee, being a resident in India, shall, for obtaining a certificate of residence for the purposes of an agreement referred to in section 90 and section 90A, make an application in Form No. 10FA to the Assessing Officer.

(4) The Assessing Officer on receipt of an application referred to in sub-rule (3) and being satisfied in this behalf, shall issue a certificate of residence in respect of the assessee in Form No. 10FB.

Annexure - B

[Furnishing of information for payment to a non-resident, not being a company, or to a foreign company.

37BB. ***(1)*** ***The person responsible for paying to a non-resident, not being a company, or to a foreign company, any sum chargeable under the provisions of the Act, shall furnish the following, namely:***

(i) *the information in Part A of Form No.15CA, if the amount of payment or the aggregate of such payments, as the case may be, made during the financial year does not exceed five lakh rupees;*

(ii) *for payments other than the payments referred in clause (*i*), the information,*

(a) *in Part B of Form No.15CA after obtaining,*

(I) *a certificate from the Assessing Officer under section 197; or*

(II) *an order from the Assessing Officer under sub-section (2) or sub-section (3) of section 195;*

(b) *in Part C of Form No.15CA after obtaining a certificate in Form No. 15CB from an accountant as defined in the* Explanation *below sub-section (2) of section 288.*

(2) The person responsible for paying to a non-resident, not being a company, or to a foreign company, any sum which is not chargeable under the provisions of the Act, shall furnish the information in Part D of Form No.15CA.

(3) Notwithstanding anything contained in sub-rule (2), no information is required to be furnished for any sum which is not chargeable under the provisions of the Act*, if,*

(i) *the remittance is made by an individual and it does not require prior approval of Reserve Bank of India as per the provisions of section 5 of the Foreign Exchange Management Act, 1999 (42 of 1999) read with Schedule III to the Foreign Exchange (Current Account Transaction) Rules, 2000; or*

(ii) *the remittance is of the nature specified in column (3) of the specified list below:*

SPECIFIED LIST

Sl. No.	*Purpose code as per RBI*	*Nature of payment*
(1)	*(2)*	*(3)*
1	*S0001*	*Indian investment abroad - in equity capital (shares)*
2	*S0002*	*Indian investment abroad - in debt securities*
3	*S0003*	*Indian investment abroad - in branches and wholly owned subsidiaries*
4	*S0004*	*Indian investment abroad - in subsidiaries and associates*
5	*S0005*	*Indian investment abroad - in real estate*
6	*S0011*	*Loans extended to Non-Residents*
7	*S0101*	*Advance payment against imports*
8	***S0102***	***Payment towards imports - settlement of invoice***
9	*S0103*	*Imports by diplomatic missions*
10	*S0104*	*Intermediary trade*
11	*S0190*	*Imports below Rs.5,00,000 - (For use by ECD offices)*
12	*SO202*	*Payment for operating expenses of Indian shipping companies operating abroad*
13	*SO208*	*Operating expenses of Indian Airlines companies operating abroad*
14	*S0212*	*Booking of passages abroad - Airlines companies*
15	*S0301*	*Remittance towards business travel*
16	*S0302*	*Travel under basic travel quota (BTQ)*
17	*S0303*	*Travel for pilgrimage*
18	*S0304*	*Travel for medical treatment*
19	*S0305*	*Travel for education (including fees, hostel expenses etc.)*
20	*S0401*	*Postal services*

21	S0501	Construction of projects abroad by Indian companies including import of goods at project site
22	S0602	Freight insurance - relating to import and export of goods
23	S1011	Payments for maintenance of offices abroad
24	S1201	Maintenance of Indian embassies abroad
25	S1202	Remittances by foreign embassies in India
26	S1301	Remittance by non-residents towards family maintenance and savings
27	S1302	Remittance towards personal gifts and donations
28	S1303	Remittance towards donations to religious and charitable institutions abroad
29	S1304	Remittance towards grants and donations to other Governments and charitable institutions established by the Governments
30	S1305	Contributions or donations by the Government to international institutions
31	S1306	Remittance towards payment or refund of taxes
32	S1501	Refunds or rebates or reduction in invoice value on account of exports
33	S1503	Payments by residents for international bidding.

(4) The information in Form No. 15CA shall be furnished,—

(i) electronically under digital signature in accordance with the procedures, formats and standards specified by the Principal Director General of Income-tax (Systems) under sub-rule (8) and thereafter printout of the said form shall be submitted to the authorised dealer, prior to remitting the payment; or

(ii) electronically in accordance with the procedures, formats and standards specified by the Principal Director General of Income-tax (Systems) under sub-rule (8) and thereafter signed printout of the said form shall be submitted to the authorised dealer, prior to remitting the payment.

(5) An income-tax authority may require the authorised dealer to furnish the signed printout of Form No.15CA referred to in clause (ii) of sub-rule (4) for the purposes of any proceedings under the Act.

(6) The certificate in Form No. 15CB shall be furnished and verified electronically in accordance with the procedures, formats and standards specified by the Principal Director-General of Income-tax (Systems) under sub-rule (8).

(7) The authorised dealer shall furnish a quarterly statement for each quarter of the financial year in Form No.15CC to the Principal Director General of Income-tax (Systems) or the person authorised by the Principal Director General of Income-tax (Systems) electronically under digital signature within fifteen days from the end of the quarter of the financial year to which such statement relates in accordance with the procedures, formats and standards specified by the Principal Director General of Income-tax (Systems) under sub-rule (8).

(8) The Principal Director General of Income-tax (Systems) shall specify the procedures, formats and standards for the purposes of furnishing and verification of Form 15CA, Form 15CB and Form 15CC and shall be responsible for the day-to-day administration in relation to the furnishing and verification of information, certificate and quarterly statement in accordance with the provisions of sub-rules (4), (6) and (7).

Explanation. *For the purposes of this rule 'authorised dealer' means a person authorised as an authorised dealer under sub-section (1) of section 10 of the Foreign Exchange Management Act, 1999 (42 of 1999).***]**