

TDS ON IMMOVABLE PROPERTY



Neha Raheja
Partner - Tax

Withholding Tax on Purchase of Immovable Property

Background and Legislative Intent

s. 194-IA of the Income Tax Act 1961 ('ITA') was introduced by the Finance Act 2013. By virtue of this section, every transferee of an immovable property at the time of making payment or crediting of any sum as consideration for transfer of immovable property (other than agricultural land) to a resident transferor, shall deduct tax, at the rate of 1% of such sum. The provisions of this section would be applicable only to those cases where the total amount of consideration of the property exceed INR 50 lakhs.

The Memorandum to the Finance Bill 2013 stated that the object behind the introduction of this section was to **have a reporting mechanism of transactions in the real estate sector and also to collect tax at the earliest point of time.**

Accordingly, s. 194 – IA was made applicable effective 1st June 2013.

Summary & Procedural Aspects

A. Provisions of section 194-IA






- i Applicable when a resident transferor transfers any immovable property other than agricultural land / the immovable property is not being compulsorily acquired under any law by the Government.

- ii Applicable when the total value of consideration of the immovable property exceeds INR 50 lacs.
- iii The transferee is required deduct TDS at the time of credit to the account of the transferor or at the time of payment of such sum whichever is earlier at the rate of 1% if seller has a PAN. In case, the seller does not have a PAN, TDS shall be deducted at the rate of 20%.
- iv s. 194-IA states that TDS shall be deducted on consideration for transfer of immovable property. Consideration for transfer of immovable property equals all charges in the nature of club membership, car parking fees, electricity or water facility fee, maintenance fee, advance fee or any other charges of similar nature, which are incidental to the transfer of immovable property.

B. When to deduct TDS and how to pay it?

The buyer of the property has to deduct TDS at the time of credit to the account of the seller or at the time of payment of such sum whichever is earlier. The buyer shall deposit the TDS so deducted within 30 days from the end of the month in which the TDS is deducted. The buyer has to pay the TDS and furnish particulars in Form cum Challan – 26QB.

The payment of TDS on immovable property does not require the buyer to have a TAN (tax deduction account number). The buyer is required to furnish the following information :

1. Name & Address of the buyer and seller; 
2. Email ID & phone number of buyer & seller; 
3. PAN of the buyer & seller; 
4. Complete address of the property; 
5. Date of agreement; 
6. Total consideration for the transfer of immovable property; 
7. Date of payment. 

The buyer shall fill in Form 26QB using his PAN. It is mandatory for the seller to have a PAN too.

The buyer can choose to deposit the TDS online or offline. After the payment of TDS, the buyer shall issue to the seller Form 16B within 15 days.

The buyer of the property is required to register & login on the TRACES using PAN (<https://contents.tdscpc.gov.in/>) to download Form 16B.

C. Consequences of Non – Deduction of TDS

Incase the buyer fails to deduct TDS/ late deposits the TDS, fee under s. 234E of the ITA becomes applicable.

Penalties applicable:

Penalty/Interest	Calculation
<u>Non – Deduction of TDS</u>	1% per month from the date on which TDS is deductible to the date on which TDS is actually deducted
<u>Late Deposit of TDS</u>	1.5% per month from the date of deduction to date of payment
<u>Late filing Fees under s. 234E</u>	Incase of non – filing or late filing of Form 26QB, late filing fee of INR 200 is liable to be paid for every day such failure continues

D. Case Laws on provisions of s. 194-IA

i Hon'ble High Bombay High Court - Pushkar Prabhat Chandra Jain V/s Union of India [2019] 103 taxmann.com 106 (Bombay)

The taxpayer sold his property and the buyer deducted TDS under s. 194-IA on sales consideration. The buyer failed to deduct the TDS with the Government. As per the provisions of s. 205 of the ITA, the taxpayer (seller) could not be asked to pay the taxes again. The department could make coercive recovery of such unpaid tax from the buyer whose primary responsibility it was to deposit the same with the Government. If the buyer after deducting the tax fails to deposit the same with the Government, measures could be initiated against such taxpayers.

ii Prestige Estates Projects Ltd. V/s ACIT, Circle 18(1), Bangalore [2021] 125 taxmann.com 127 (Bangalore – Trib)

The taxpayer, a real estate development company entered into a Joint Development Agreement (JDA) with 54 landowners for construction of a superstructure. The taxpayer paid an 'interest free refundable security deposit' which was refundable after 18 months of commencement of construction. The Ld. Assessing Officer ('AO') held that the refundable security is 'consideration for

transfer of immovable property' in terms of s. 194-IA of the ITA and the taxpayer failed to have deducted TDS as per provisions of s. 194-IA. The taxpayer stated that since there was no transfer in terms of s. 2(47)(v) in relation to the JDA. The Revenue however submitted that since the deposit was recovered through sale of part of the owners constructed area, it was an advance payment. As visible from the terms of the JDA, the taxpayer was only permitted to develop scheduled property as residential apartment buildings and the same could not be construed as delivery or possession in terms of s. 53 of the Transfer of Property Act r.w.s 2(47)(v) of the ITA as legal possession of the property remained with the landowners. Even though, it was an advance payment, it was not linked to transfer of immovable property as per s. 194-IA, so as to deduct TDS by the taxpayer on said refundable security deposit. Therefore, the taxpayer is not an assessee in default in terms of s. 201(1) and s. 201(1A) of the ITA.

iii Oxcia Enterprises (P) Ltd V/s Dy. Commissioner of Income Tax [2019] 109 taxman.com 19 (Jodhpur – Trib)

The taxpayer had purchased an immovable property for a consideration of INR 60.12 lakhs. The said immovable property was jointly held by Mr. Anant Ram Kumawat & Mrs. Seema Kumawat. The sale was executed on behalf of joint owners Mr. Vijay Kumawat who held the Power of Attorney (POA). The entire sale consideration was received through banking channels in the account of Mr. Vijay Kumawat and the taxpayer deducted TDS of 1% in the name of Mr. Vijay Kumawat. The Ld. Assessing Officer (AO) held that TDS ought to be deducted in the name of the actual owners and not in the name of the POA holder and since, the taxpayer had not mentioned the PAN of the joint holders, TDS should have been deducted at 20% of the purchase consideration. Accordingly, he determined a demand under s. 201(1) along with interest under s. 201(1A) of the Income Tax Act 1961 ('ITA'). Even though the admitted position is

that the taxpayer has not deducted tax in the hands of Joint owners of the property, still s. 194-IA(2) provides an exception from deducting tax at 1% of sale consideration, when such sale consideration is less than INR 50 lacs. If the consideration for each transferor came to INR 30.06 lacs, which was below the prescribed limit of INR 50 lacs, provisions of s. 194-IA were not applicable and the taxpayer is not required to deduct tax at source while making such payment.

iv Cornerview Construction & Developers (P.) Ltd V/s ACIT, Circle – 9, (TDS)-CPC, Ghaziabad

The taxpayer, engaged in the business of real estate construction and development purchased 96 flats vide allotment for consideration of a certain amount. TDS under s. 194-IA was deducted at the time of making the payment. TDS amount was deposited in Challan cum Form 26QB. While processing such statements, the Ld. Assessing Officer ('AO') observed that the TDS statements in Form 26QB were not filed within the prescribed time limits and levied fee under s. 234E in respect of each TDS statement filed by the taxpayer in respect of every flat. The taxpayer stated that since transaction related to the purchase of flats was vide virtue of a single allotment letter, it should be treated as a single transaction and levy of fee under s. 234E should be restricted to one challan cum statement of TDS. However, it was observed that since the taxpayer had himself filed separate TDS statements, under s. 200(3) in Form 26QB in respect of TDS deducted in respect of every individual transaction relating to purchase of each flat, the AO was justified in levying fee under s. 234E taking into account delay in filing statements in respect of each flat.

The provisions of s. 194-IA apply to every buyer (resident or non – resident) when an immovable property is purchased from a resident seller. In case, the buyer is purchasing an immovable property from a non – resident seller, the provisions of s. 195 are applicable. It is advisable that a buyer adheres to the conditions as prescribed by s. 194-IA and timely deducts the TDS & also makes payment of the same. Further, the provisions of s. 194-IA are quite clear, but there are certain instances which may require the assistance of an expert which need interpretation in the light of various case laws. In such cases, it is always advisable to seek guidance to ensure adequate compliance.

Disclaimer

The information contained in this newsletter is general and purely informative in nature. This intent of this newsletter is not to provide any advice or address in concerns in particular. We take every effort and precaution to ensure that the contents of this newsletter are accurate. We however, suggest to take professional advice before acting on the information contained in this newsletter. Also, we cannot be held responsible or liable for any damage incurred due to reliance on the information contained in this newsletter.