

Representations on mandatory e-filing of Form 10F for non-residents (NRs) not having PAN/e-filing account

1. This has reference to Notification No. 03/2022 dated 16th July 2022 issued by Directorate of Income Tax (Systems) New Delhi in exercise of powers conferred under Rule 131(1)/(2) of the Income-tax Rules mandating, inter alia, furnishing of Form 10F electronically and verification through electronic verification code (EVC). This representation seeks to highlight practical challenge faced by non-resident (NR) taxpayers not having PAN in making compliance as per Notification.

Relevance of Form 10F for claiming treaty benefit for TDS purposes

2. Form 10F is required to be furnished by NR taxpayer along with Tax Residency Certificate (TRC) in terms of s.90(4)/(5) of the Income-tax Act (ITA) read with Rule 21AB in order to claim treaty benefit. This is relevant more particularly for the purposes of tax deduction at source u/s. 195 by the payers while making payment to such NR taxpayers. In absence of TRC and Form 10F (in cases where TRC does not contain details required in Form 10F), payers do not grant treaty benefit to the NR payees since it is a mandatory requirement as per s.90(4)/(5) r.w. Rule 21AB.
3. The current practice adopted by the payers is to obtain such TRC and Form 10F in hard copy or soft copy from NR payee and keep on its record to be furnished to the Tax Department as and when called upon either in s.201(1) proceedings or assessment proceedings. It is also shared with Chartered Accountant issuing certificate in Form 15CB u/s. 195(6) r.w. Rule 37BB for the purposes of remittance outside India and/or Tax Auditor verifying TDS compliance for the purposes of reporting in Form 3CD.

No linkage of Form 10F with obtaining PAN under current procedure in line with international practice

4. Currently, NR taxpayers who obtain PAN and file returns are not required to upload or furnish Form 10F separately as part of return filing compliance.
5. It may be noted that NRs are not required to mandatorily obtain PAN for seeking treaty benefit for TDS purposes. Reference, in this regard, is invited to s.206AA(7) where NR is exempted from applicability of higher TDS in absence of PAN in case of (i) payment of interest on long-term bonds as referred to in s.194LC and (ii) any other payment subject to compliance of conditions prescribed in Rule 37BC. The conditions prescribed in Rule 37BC are substantially similar to those in Rule 21AB like furnishing TRC, Tax Identification Number, etc. The payments covered by Rule 37BC are interest, royalty, fees for technical services, dividend and capital gains.
6. Even where tax is not required to be deducted (eg. business income in absence of PE in India), NR payees furnish TRC, Form 10F and no-PE declaration to the payers and they are not required to obtain PAN.
7. Hence, in majority of cases involving payments to NRs with treaty benefit, the NRs are not required to obtain PAN. This aligns with “ease of doing business” with India where NRs are not burdened with procedural requirement of obtaining PAN for claiming treaty benefit. It is also consistent with international practice followed in other countries. Indian taxpayers are not required to obtain Tax Identification Number in other jurisdictions like US, UK, Singapore, etc to avail the treaty benefit for incomes earned from those jurisdictions. For

instance, it is sufficient to furnish W8-BEN in hard/soft copy format in US to claim India-US treaty benefit and there is no requirement to obtain US Tax identification number.

8. The above procedure has been working well and it is well accepted by industry and Tax Department since many years. It is also important to note that the Tax Department gets most of the information contained in Form 10F as part of reporting by the payer/deductor in quarterly TDS statements in Form 27Q.

Practical challenge caused by Notification No. 3/2022 – Indirect insistence on PAN for furnishing Form 10F

9. However, with Notification No.03/2022, NR taxpayers not having PAN are facing practical challenge in complying with requirement of mandatory e-filing of Form 10F given the current system of e-filing on incometax.gov.in portal.
10. The Notification can be complied with by only those NR taxpayers who have PAN and hence can log in to their e-filing account on the above referred portal and furnish Form 10F electronically with EVC as required by the Notification. Currently, even for those NR taxpayers who have PAN, the e-filing portal does not permit furnishing of Form 10F for F.Y. 2022-23 (it permits only up to FY 2021-22 (AY 2022-23))
11. Furthermore, the e-filing portal creates further ambiguity and confusion on the scope of applicability of Form 10F by stating the following under “Things to know” tab in Form 10F
 - ***This Form is applicable to an assessee who is citizen of India living in another country and earning foreign income***
 - ***No deduction/relief shall be allowed unless the assessee furnishes a tax residency certificate in the prescribed form.***
 - ***No deduction/relief shall be allowed unless India and the country where the assessee is living have a tax treaty/DTAA in place.***

It is submitted that the first two bullets above are incorrect for the following reasons :-

- (i) Form 10F is not only applicable to Indian citizens claiming non-resident status and treaty benefit but all non-residents (like foreign citizens, foreign companies, foreign non-corporates, etc) claiming treaty benefit
 - (ii) There is no “prescribed form” for furnishing tax residency certificate (TRC) of foreign country/jurisdiction. Each country/jurisdiction provides TRC in the format prescribed in its domestic tax rules.
12. NR taxpayers who do not have PAN cannot log in to the e-filing portal to e-file Form 10F since e-filing account is available only for those taxpayers who have PAN. This has resulted in practical challenge and ambiguity for both NR payees and payers for complying with TDS u/s. 195.
 13. It has also raised an issue whether NR taxpayers having PAN and filing returns are required to mandatorily e-file Form 10F before filing their returns for F.Y. 2021-22 (A.Y. 2022-23). Furthermore, since the portal does not permit furnishing of Form 10F for F.Y. 2022-23, NR payees having PAN are also facing difficulty to comply with the Notification for the purposes of availing treaty benefit for TDS purposes.

14. The payers who have onerous TDS obligation are concerned whether hard/soft copy of Form 10F which was hitherto acceptable has become non-acceptable from 16 July 2022 for NR payees not having PAN. Even if they insist on e-filing compliance, it is not possible for the NR payees to make such compliance in absence of such PAN. If the payers deny treaty benefit on such technical ground, it will result in significant difficulty of higher TDS – more particularly, where payments are made on ‘net of tax’ basis. The higher TDS amounts will be stuck with Tax Department without any credit or grant of refund in absence of PAN. This will increase the cost of doing business with NRs and become a tax hurdle for import of goods and services.

No additional information to Tax Department by insisting on PAN for furnishing Form 10F

15. It may also be reiterated that the Tax Department gets the information contained in Form 10F as part of reporting by payers/deductors in quarterly TDS statements in Form 27Q. Hence, mandatory e-filing of Form 10F by the NR payees/deductees is merely a duplicated requirement which does not provide any additional information to the Tax Department but merely increases the compliance burden for the NR taxpayers of obtaining PAN for furnishing Form 10F. It contradicts the exemption provided in s.206AA read with Rule 37BC.
16. The Government has so far been very conscious of not imposing unnecessary procedural burden of obtaining PAN on NR taxpayers in the interests of projecting India as an attractive place to do business. The provisions like Rule 21AB or 37BC were issued pursuant to industry representations for seeking exemption from obtaining PAN by non-residents. The mandatory e-filing of Form 10F appears to be an unintended practical hurdle caused while moving most income tax forms to mandatory e-filing regime in line with digital tax agenda of the Government. NR investors (sovereign wealth funds) in specified funds eligible for exemption u/s. 10(4D) and NR investors selling securities listed in recognised stock exchange in IFSC are also exempted from obtaining PAN by s.139A read with Rule 114AAB to facilitate doing business in India without significant tax hurdles.

Representation to remove practical difficulty in mandatory e-filing of Form 10F

17. Hence, it is represented that the practical difficulty faced by NR taxpayers not having PAN in mandatory e-filing of Form 10F may be resolved by adopting one of the following alternatives :-
 - a. Modify Notification No. 03/2022 to make mandatory e-filing of Form 10F applicable only to NR taxpayers having PAN
 - b. Enable the payer/deductor to e-file Form 10F of the NR payee/deductee as part of Form 15CA compliance
18. Also, for NR taxpayers having PAN, the e-filing portal may be modified to enable furnishing of Form 10F for F.Y. 2022-23. The “Things to know” tab in the e-filing portal may also be appropriately modified to reflect the correct position in law. Clarity may also be provided of the manner in which a taxpayer is expected to comply in the interim.

We request the CBDT to consider the above representations favourably and resolve the practical difficulty faced by NR taxpayers on an expeditious basis. This is in view of the fact any hurdle on TDS compliance u/s. 195 impacts the day to day regular business transactions of the industry.