

Mandatory E-Filing of Form 10F - Challenges & Nuances

Oct 03, 2022



Bhavin Shah

Chartered Accountant



Hemlata Bhungare

Chartered Accountant



Mohammed Ali Memon

Chartered Accountant

1. Background:

While determining the taxability of any income received or accrued from India in hands of a non-resident, one may take a recourse to the beneficial provisions of a Double Taxation Avoidance Agreement ('DTAA') entered into between India and country of residence of such non-resident, subject to fulfilment of certain prescribed conditions under the Indian Tax Law. This approach has been enshrined in the provisions of section 90(2) of the Indian Income Tax Act, 1961 ('the Act') which conversely provides that provisions per the Act or DTAA whichever is more beneficial to a non-resident taxpayer shall apply.

Further, the provisions of section 90(4) of Act requires a non-resident (intending to avail benefit of DTAA provisions) to obtain a Tax Residency Certificate ('TRC') from the Government of the country of residence to be eligible to claim beneficial provisions of the DTAA. However, it was noticed that different countries had varied formats of issuing TRC to its residents, and thus it was causing undue hardship for the non-resident to obtain TRC in the format prescribed by the Indian tax authorities ('ITA') from their country of residence. Hence, in order to alleviate this hardship, streamline process and standardise information, section 90(5) was introduced along with rule 21AB of the Income Tax Rules, 1962 ('the Rules') which provided for furnishing a self-declaration of tax residency in Form 10F ('Form') by the non-resident, in case the TRC obtained from the Government of a resident country does not contain prescribed particulars like Status of taxpayer, Nationality, Tax identification number, Period for which residential status is mentioned in TRC and Address of the non-resident.

Until now, the Form was signed physically by the non-resident and furnished along with the TRC to the resident payers for the purpose of determining withholding tax liability, if any under section 195 of the

Act or to the ITA during scrutiny or any other proceedings, if required.

However, the Central Board of Direct Taxes ('CBDT') vide Notification no 03/2022 ('Notification') dated 16th July 2022 has now mandated that certain forms, including Form 10F, to be furnished electronically and e-verified on the Indian Income tax portal ('Portal') in a prescribed manner. The Notification has come into force with immediate effect from 16 July 2022. While complying with the requirement of e-filing of the Form which is now required to be furnished by non-residents on the Portal (along with TRC as an attachment), there are certain practical challenges that may require careful consideration. Further, on account of non-compliances there may be few potential exposures / risks which have been encapsulated below:

2. Practical Challenges Arising Out of e-filing Requirement of Form 10F :

Towards undertaking the new compliance requirement, some of the key issues emanating are as under:

a) E-filing of Form - Whether prospective or retrospective?

[The Notification is made effective from the date of its issuance i.e. 16 July 2022. However, clarification is required on the point whether the said e-filing requirement of the Form is prospective or retrospective and what effect it will have on the validity of Form physically furnished by non-resident prior to issue of said notification?](#)

In a scenario where non-residents have already furnished the Form to resident payers before the issue of the said Notification (for the purpose of determining withholding tax liability), are such non-residents again required to comply with e-filing requirement of the Form on the Portal, pursuant to the Notification?

Further, it is pertinent to note that Form is generally issued for the entire period (covered under the TRC) at the beginning of such the period. In a scenario where a non-resident has already furnished the Form physically to the resident payer before the issue of the Notification, would such physical Form be considered as valid compliance till the period mentioned in such physical Form or date of issue of Notification, whichever is later? Clarification on this aspect would ensure whether or not the Form issued physically (covering period up to March 2023) would be grandfathered.

Separately, in view of beneficial DTAA provisions, if a non-resident has obtained prior to the issue of the Notification, a certificate for lower or no deduction of tax at source on income received / receivable from a resident taxpayer (after due verification by tax officer on benefit sought under DTAA), whether such non-resident would still be required to e-file the Form on the Portal is another issue which requires consideration.

In this regard, one may place reliance on the Apex court ruling in the case of Hitendra Vishnu Thakur^[1] which principally culled out that a procedural statute should not generally be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties 'in respect of transactions already accomplished'. Also, one may refer to the Allahabad High Court ruling in the case of CIT v. Model Exims Kanpur^[2] wherein the court held that a circular effecting withholding tax obligation of resident payer while making payment to a non-resident cannot be made applicable retrospectively.

b) Requirement to obtain Permanent Account Number ('PAN') and Digital Signature Certificate ('DSC') is Mandatory?

In order to e-file the Form, as mandated by the Notification, it would be quintessential for the non-residents to register themselves on the Portal, for which they would have to obtain a PAN (i.e. Tax Identification number) in India. Further, to e-verify or electronically sign the Form, the non-resident individual or the authorised representative of the non-resident entity may also have to obtain DSC. Thus, in order to comply with the above e-filing requirement foremostly, non-resident would need to obtain PAN and DSC. It is to be noted that wherever a non-resident is not holding PAN or DSC then, they would need to go through the process of submitting apostilled documents to obtain PAN and DSC.

C) Practical Challenge on e-verification of Form by Non-resident Individuals

Rule 12 of the Rules, inter alia, specifies mechanism for verification of tax return filed by individual taxpayers, wherein verification through DSC is only mandated in case of individual taxpayers required to get their accounts audited under the Act based on specific criteria. In case of other individuals, verification is possible either by way of Electronic verification code (EVC) through Bank account in India; or through generation of Aadhar OTP based on Aadhar number linked on the portal; or Verification through physical signing of the ITR-V (Acknowledgement of Return filed) and posting the same to the address specified to Centralized Processing Centre (CPC), Bangalore.

In view of the above, a non-resident individual taxpayer (not required to get his accounts audited) could proceed to verify its tax return by physical signing of ITR-V and by posting it to CPC Bangalore without having the need to obtain DSC or have a bank account in India.

However, as per the Notification, the Form shall now be verified in the manner as per Rule 131 of Rules, which provides for verification in the following manner:

- a. Through DSC, if the tax return is required to be furnished via DSC; or
- b. Through electronic verification code (i.e. EVC through bank account) in a case not covered under in point (a) above.

Thus, it can be observed that the non-resident individual taxpayer would need to obtain a DSC or have a bank account registered in India for the purpose of e-verification of the Form. Hence, this may entail additional compliances in case of non-resident individual taxpayers not having DSC or Indian bank account.

3. Potential Exposure / Risk on Account Non-compliance:

On account on non-compliances of the new e-filing requirement of the Form, there may be few potential exposures / risks which are summarised as under:

a) Risk of Denial of DTAA Benefit

[It needs to be observed that whether ITA would proceed to disregard the beneficial provisions of DTAA to a non-resident on failure to e-file the Form \(along with TRC\) as per the Notification.](#)

One may refer to the Apex Court decision in case of Azadi Bachao Andolan^[3] which laid down the ratio that TRC would constitute sufficient evidence for accepting residential status of a non-resident. Further, Mumbai Tribunal in the case of Hareesh C Sheth^[4] has allowed the benefit of DTAA available to the non-resident where the TRC was furnished only at a later stage before first appellate authorities.

Also, several tribunals^[5] have ruled that in order to determine the residential status of a non-resident (as per Article 4 of relevant DTAA) all other factual documents and information would play pivotal role and merely on account of non-furnishing of TRC by the non-resident, DTAA benefit cannot be denied provided such other documents required to be furnished by the non-resident constitute sufficient and appropriate evidence of residential status to avail benefit of DTAA.

In the above backdrop, whether ITA would allow the beneficial provisions of DTAA in case of non-furnishing of Form on the portal (along with TRC) post issue of the Notification requires clarification to avoid litigation on this matter.

b) Exposure for the Resident Payer as a Representative Assessee:

A representative assessee is a person who acts or is by deeming fiction considered to act on behalf of and as a representative for another assessee in respect of income earned by such other assessee.

The provisions of Section 163 of the Act inter alia specify following categories of persons in India who may be treated as representative assessee of non-resident:

- Any person in India who has any business connection with the non-resident; or

- Any person in India from or through whom the non-resident is in receipt of any income, whether directly or indirectly;

Furthermore, the provision of Section 161 of the Act specifying the liability of a representative assessee states that such representative assessee shall be (i) subject to the same duties, responsibilities and liabilities as the non-resident represented by him; and (ii) be liable to assessment in his own name in representative capacity; and (iii) any tax shall be levied upon and recovered from him in like manner as the non-resident represented by him.

Hence, from the above, it can be observed that even a resident transacting with the non-resident in its normal course of business can be considered as a 'representative assessee' for such non-resident irrespective of whether it has been specifically appointed as such or not.

In the given context, in case a non-resident claims beneficial provisions of the DTAA but fails to e-file the Form (along with TRC as an attachment), whether the resident payer could be held as representative assessee and accountable for any liability or any demand arising to the non-resident on denial on DTAA benefit for failure to e-file the Form? This requires clarification, as undue burden would then be casted on the resident taxpayer transacting with non-residents in the normal course of business. It is pertinent to note that courts / tribunals^[6] in the past have held representative assessee were liable for any liability or demand arising to the non-resident and/ or to file income tax return of such non-resident in their representative capacity.

c) Interplay with Significant Economic Presence ('SEP') rule and Other benefits available under DTAA:

In order to levy tax on digital services and widen the scope of business connection in India, the Indian Government introduced Equalization Levy ('EQL') and Significant Economic Presence ('SEP'). The SEP provisions were introduced under the Act to expand the scope of business connection [similar to Permanent Establishment ('PE') as per DTAA] and thereby imposing tax on non-resident rendering digital services / sale of goods from anywhere to Indian customers / users. The ITA also prescribed threshold of minimum users (0.3 Mn) or aggregate value of goods/services (INR 20 Mn) for constituting SEP of non-residents in India.

On careful perusal of the SEP provisions and above thresholds, it can be observed that the scope of SEP is very wide and would cover many of the non-residents, thereby establishing their business connection in India. Further, even in a scenario where a non-resident does not actively receive any income from India but exceed the threshold of interacting with prescribed users, the business connection would still be established.

However, it is pertinent to note that definition of PE as contained in most of DTAA signed with India does not cover SEP. Therefore, SEP provisions will not get attracted to a non-resident, if such non-resident is a tax resident of country with which India has signed DTAA and such non-resident opts to avail the beneficial provisions of DTAA, subject to furnishing of prescribed documents and satisfactions of prescribed conditions.

Hence, claiming beneficial provisions of the respective DTAA would become quintessential for the non-residents to avoid any exposure of having business connection in India by way of SEP.

Similarly, claim of beneficial provisions of DTAA would be imperative in the following cases wherein non-residents earning specified income in / from India (given on illustrative basis and there are multiple other benefits available in various DTAA's signed by India and other countries):

- Restrictive scope / definition of the term 'fees for technical/ included services' (FTS/ FIS) in certain DTAA's which requires satisfaction of 'make available', for a payment to be categorised as FTS/ FIS. Also, restrictive scope / definition of terms such as 'Royalty' or 'Interest' under various DTAA's with India as compared to similar terms defined as per the provisions of Act;
- 'Most Favoured Nation' clause in respective DTAA's to avail reduced rate of withholding tax or avail restricted scope of taxation for specified income earned by a non-resident;
- Specific taxation of capital gains on transfer of capital assets held in India (including shares of an

- Indian company) by a non-resident; Income earned from leasing of aircraft or income from operation of ships in international waters;
- Lower rate of tax on certain incomes under various DTAA's with India as compared to the rate applicable as per the provisions of the Act

Hence if ITA adopts a view that DTAA benefit would have to be denied on account of non-filing of the Form (along with TRC) online then, the non-resident(to whom above SEP provision are applicable and threshold are breached or availed any other benefit as illustrated above may need to reconsider their position and approach from Indian compliance perspective.

4. Concluding Thoughts:

Digitisation of the Form appears to be thoughtful initiative by the ITA to capture the information with respect to non-residents availing beneficial provisions of DTAA. This will gather database for the ITA consisting of non-residents claiming beneficial provisions of the DTAA. Further it will ensuring a robust mechanism and audit trail enabling the ITA to validate whether such non-residents have filed their tax returns in India. In the recent past, many non-residents have received reassessment notice (basis the project insight, wherein data is obtained by way of withholding tax return filed by resident payer), whereby these non-residents have been asked to furnish tax return or justification for non-compliance, in case no tax return was filed. It is to be noted that the Finance Act 2021 exempted certain categories of non-resident taxpayers from filing of tax return in India to ease compliances thereby exempting such non-residents to obtain PAN and DSC. However, it is pertinent to note that the said exemption is available only wherever taxes on specified incomes have been withheld as per the provisions of the Act.

Further, lack of clarity on certain aspects such as whether the requirement to e-file the Form is prospective or retrospective, mechanism for verification of Form in case of non-resident individuals, etc seems to have practically opened a pandora's box which may be faced by the non-resident and therefore these issues need to be addressed in timely manner.

Furthermore, on account of non-compliance, the potential denial of DTAA benefit, liability or exposure of a resident payer in representative capacity, etc are some of the risk areas which needs to be weighed by both non-resident and resident taxpayers while dealing with each-other.

To summarise, digitisation of the Form, has now called upon the non-residents to carefully deliberate and cautiously tread further while undertaking Indian tax compliances to avoid any unfavourable or uninvited tax consequences.

The views expressed in this article are personal views of the authors and does not resemble any professional advice.

[1] Hitendra Vishnu Thakur v. State of Maharashtra [\[TS-5034-SC-1994-O\]](#)

[2] CIT v. Model Exims Kanpur [\[TS-574-HC-2013\(ALL\)\]](#)

[3] UOI v. Azadi Bachao Andolan [\[TS-5-SC-2003\]](#)

[4] Haresh C Sheth v. ITO [\[TS-769-ITAT-2021\(Mum\)\]](#)

[5] Skaps Industries India Private Limited v. ITO, International Tax [\[TS-330-ITAT-2018\(Ahd\)\]](#); Sreenivasa Reddy Cheemalamarri v. ITO, International Tax [\[TS-158-ITAT-2020\(HYD\)\]](#)

[6] National Aviation Co. of India v. DCIT [\[TS-5835-ITAT-2010\(MUMBAI\)-O\]](#); Birla Sunlife Asset Management Co. Ltd v. ITO [\[TS-5166-ITAT-2010\(MUMBAI\)-O\]](#); Dodsal (P.) Ltd. V. CIT [\[TS-27-HC-2002\(BOM\)-O\]](#); etc.