

Income Tax return (ITR) and Filing of Form 3CEB for foreign Companies

Filing of Income Tax Return (ITR)

Provisions relating to filling of Income Tax Return is contained in Sec : 139 of Income tax Act.

Section 139(1)

Every Person, being a Company shall on or before the due date, furnish a return of its income in the prescribed form and verified in the prescribed manner.....

As per section 139(1) a company is mandatorily required to file its return of income irrespective of the fact whether the company earns any income or not.

Section 2(17)

Company means

- *any Indian Company or*
- *any body corporate incorporated by or under the laws of a country outside India.*
- *.....*

From above, it is evident that a company incorporated outside India, i.e. a foreign company, is also covered within the definition of a "company" as defined in section 2(17) of the Income-Tax Act. Thus, every foreign company is required to file its Income Tax Return in India, irrespective of the fact whether it earns any income or not.

Filing of Income Tax Return (ITR)

Further, the Indian Government has changed the Income Tax Rules, making it mandatory for certain classes of assessee, including those covered under bilateral tax treaties, to file their returns in India.

The new rules are effective from April 1, 2013 and require mandatory income tax return filing for Financial Year 2012-13 pertaining to assessment year 2013-14 and subsequent years, for all the assesses, who have earned income from India on which tax has been deducted or payable, in terms of the provisions of DTAA.

***Following new clause has been inserted in Rule 12 of the Indian Income Tax Rules 1962
(Amended w.e.f. 1st April 2013, notified on 1st May 2013 vide Notification No. 34/2013)***

“A person claiming any relief of tax under section 90 or 90A or deduction of tax under section 91 of the Income Tax Act, shall furnish the return for assessment year 2013-14 and subsequent assessment years”, the Central Board of Direct Taxes said in a notification.

Earlier, those who were not paying taxes in India, owing to the provisions under the double taxation avoidance agreement between India and the country of origin concerned, were not filing the Indian Tax Returns.

In view of above changes, all the foreign companies, having Indian PAN are mandatorily required to file their Income Tax Returns.

Filing of Transfer Pricing Certification (3CEB)

Provisions relating to Transfer pricing certification are contained in section 92E of the Income-Tax Act.

Section 92E- Transfer Pricing Certification

Every person who has entered into an international transaction (or specified domestic transaction) during a previous year shall obtain a report from an accountant and furnish such report on or before the specified date in the prescribed form duly signed and verified in the prescribed manner by such accountant and setting forth such particulars as may be prescribed.

Since, these provisions are also applicable to 'every person,' which includes foreign companies as well, the provisions are equally applicable to foreign entities having international transactions with their associated enterprise.

In view of this, all foreign entities having transactions with related Indian parties would have to comply with transfer Pricing regulations as well.

Precedents for Mandatory Filing of ITR

Authority for Advance Ruling (AAR) has issued a number of rulings on the filing obligations of non-residents with respect to income that is not taxable in India as a result of tax treaty relief.

Although these rulings are not binding on other taxpayers, they carry persuasive value. In fact, over the time, the AAR has changed its views on this issue.

In older rulings, the AAR took the position that a non-resident must file an income tax return only if the taxpayer was liable to tax in India (**e.g. *Veneburg Group, Dana Corporation, Amiantit International Holdings Limited***).

AAR subsequently held (***VNU International B.V.***) that a company (including a foreign company) is required to file a return regardless of whether it earns income or incurs a loss. In the VNU case, the AAR noted that Indian law specifically sets out instances in which a non-resident is not required to file a return and that this provision does not include the situation in which a non-resident is not taxable in India as a result of tax treaty protection. According to the AAR, if a state has the power to tax, the argument cannot be accepted that if the resulting income is nil, there is no liability to file a tax return

Precedents for Mandatory Filing of ITR

AAR issued two rulings in 2012 (*Castleton Investment Limited and Smithkline Beecham Port Louis Limited*) that addressed the tax return filing obligations of a non-resident. In both cases, the shares of an Indian company held by a Mauritius company were transferred to another non-resident outside India pursuant to a group restructuring.

The principal issue before the AAR was the taxability of the capital gains arising on the sale of the shares. The AAR held that the capital gains were taxable under Indian domestic tax law, but that relief from tax was available under the India-Mauritius tax treaty.

With respect to the tax return filing requirement, ***the AAR observed that Indian domestic tax law requires every person whose total taxable income exceeds the maximum amount not chargeable to tax to file a return.***

AAR also remarked that if a person intends to claim relief under the tax treaty, a claim must be made in the tax return or at the time of tax audit proceedings. ***The AAR held that the obligation to file a return does not vanish simply because a taxpayer is entitled to the benefits of a tax treaty and that the taxpayer must demonstrate to the tax authorities that it is eligible for treaty benefits, thus emphasizing the need to file a return.***

Government Initiatives

Indian government has been taking steps to target tax evasion and ensure that ITRs are filed.

A number of foreign companies have obtained a Permanent Account Number (PAN) in India to reduce the withholding tax burden on payments received from Indian customers. The domestic tax laws mandate that a company must furnish its PAN to the payer, or the withholding tax rate will be higher rather than the concessional DTAA rate that applies in most of tax treaties.

Press reports indicate that in February 2013, the Indian Finance Ministry initiated a business intelligence project to identify PAN holders that have not filed their tax returns. Information on PAN holders was collated from annual information return data, withholding tax returns and data received from the financial intelligence team.

As a result, the Finance Ministry issued letters to approximately 105,000 foreign companies that had not filed income tax returns.

Conclusion

Non-residents must file returns even if the income concerned is not taxable in India as a result of the application of a tax treaty and in case they have related party transactions, form 3CEB should also be filed.

Penalties

Failure to File Income Tax Return

A number of deterrents are built into India's tax law to discourage non-compliance with the return filing requirements

- Interest is chargeable at a rate of 1% for each month or part of a month for which a return is filed late
- Penalty is imposed (INR 5,000), if a return is not filed on or before the last day of the financial year in which the return filing due date falls
- Penalty is imposed at a rate of 100% to 300% of the tax sought to be evaded for concealment of income

In addition to the penalties described above, failure to file an income tax return also has ramifications for a taxpayer's ability to carry forward losses.

There is also a risk that the tax authorities will re-open tax assessments for the six years prior to the year in which the failure takes place.

Failure to File Transfer Pricing Certification and maintain Transfer Pricing Documentation

Failure to furnish report under section 92E – Minimum penalty of INR100,000 may be imposed.

Failure to furnish information or document pertaining to international transactions or specified domestic transactions under section 92D- Penalty equivalent to 2% of the value of transaction may be imposed.

Failure to keep and maintain information and document, failure to report or furnishing inaccurate information- Penalty equivalent to 2% of the value of transaction may be imposed

Due dates for filing of ITR and 3CEB

The due date for filing Income Tax Returns are given below:-

Different Situations	Due Date
Where the assessee is a company (Not having international and/or specified domestic transactions)	September 30 th
Where the assessee is required to furnish a report under section 92E pertaining to international and/or specified domestic transactions	November 30 th

For Assessment Year 2015-16, due date for filing of Income Tax Return for assessee not having international and/or specifies domestic transactions is extended to October 31, 2015.

The due date for filing of Form 3CEB is also November 30th.

However belated return can be filed at any time before the end of one year from the end of relevant assessment year

So, The return for FY 2013-14 (AY 2014-15) is belated but still it can be filed on or before March 31st, 2016

Information Required

Downloaded Form 26AS for the relevant assessment year from Indian Income Tax website. User-Id (PAN), Password of Indian Income Tax website to upload the return.

Date of incorporation of the foreign entity as per Indian PAN records.

In case, the above information is not available, please give us copy of Indian PAN, date of incorporation of foreign entity and foreign Address and we will create login and download information from Indian Income Tax website.

However, the following additional information would be required.

1. List of Shareholders, holding shares more than 10% at any time during the previous year.
2. List of Directors and their addresses, who have held the office during the previous year.
3. Following foreign bank account details of the foreign entity:
 1. Foreign Bank Name
 2. Bank Account Number
 3. Branch Address
 4. Swift Code and IBAN Code.
4. Details of Authorized Signatory such as Name, Date of Birth, Father's Name, and copy of his/her PAN card would also be required.
5. PAN based Digital Signature (DSC) of the Authorized Signatory for filing/ signing of Income Tax Return and approving Form 3CEB. *(Please note that an Indian Person having Indian PAN and PAN based DSC can also be authorized to be act as authorized signatory. A power of attorney may be given by foreign entity to authorized signatory.)*
6. Email Address and Phone No. of the foreign entity

Exactitude Advisors

www.xactitude.in

Our Office:

B-8, Ansal Chambers -1

Bhikaji Cama Place,

New Delhi - 110066

Contact: contact@xactitude.in

E-mail : [011-43036002](tel:011-43036002)



Disclaimer – This presentation does not represent any professional guidance. The information in this presentation has been gained from various available sources assumed to be correct and reliable by Exactitude. We do not symbolize that the information is absolute or exact. Person who reads this presentation are advised to hunt for their own expert guidance before taking any course of action or judgment. Exactitude neither accepts nor assumes any accountability or charge to any person who reads this snapshot in respect of the details contained within it or for any choice readers may take or chose not to or fail to take