

Compliance for filing income tax return by foreign Companies.



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Summary

- a. Foreign Companies who have taxable income in India are supposed to file the return of Income in India.
- b. The above requirement is applicable only if the tax is withheld at the rates prescribed as per DTAA and not applicable if the tax is withheld at the rates prescribed as per Indian Income Tax Act.
- c. The due date for filing the return of income for the Financial Year 2019-20 is 15th February 2021.

Detailed analysis

Non-resident foreign companies earning income which is within the scope of income under the Act (i.e. Section 5 or 9) from the Indian entities. In case of non-residents, India follows source based taxation. Sub-section (2) of section 5 of the Income Tax Act, 1961 ('IT Act') which provides for the scope of total income, states that following incomes shall be chargeable to tax in India in case of a non-resident.

- ✚ Income which is received or deemed to be received in India; and
- ✚ Income which accrues or arises or is deemed to accrue or arise in India.

Filing of Return of income:

- ✚ As per provisions of section 139(1) of the Income-tax Act, 1961 a foreign company is required to file a return of income in India for income earned by such non-resident within the scope of income under the Act (i.e. Section 5 or 9). Hence, particularly all the foreign companies who are earning interest, royalty and fees for technical/included services (FTS) are required to file the return of income in India. Further relief allowed as per DTAA by virtue of section 90 is in nature of exemption and such exemption must not be considered for determining the requirement for filing of return on income.
- ✚ In most of the cases, Non-resident foreign companies in general do not file return of Income in India as taxes were withheld on their income in India. Recently, based on information collated from withholding tax returns (Form 27Q) filed by Indian entities, etc., the Income Tax authorities have been issuing notices to foreign companies and asking them to file return of income in India.
- ✚ In addition to above, if the transactions are between associated enterprises, then the foreign company also is required to file Form 3CEB (Transfer Pricing Audit Report) in relation to the transactions being entered with its Indian associated enterprises. In furtherance to the same, any foreign company which is having permanent establishment in India, also has to file return of income in India and have to comply with the Indian tax compliances as may be applicable.

Note: The Income tax Act, 1961 also provides for the relaxation of not filing of Return of Income for foreign companies if:

- a. its total income in respect of which it is assessable under this Act during the previous year consisted only of income in the nature of dividend, royalty or FTS.

AND

- b. tax has been deducted as per the rate specified in Indian Income tax Act.

(Please note the above exemption is not applicable if the tax has been deducted at the rate specified in DTAA)

Non-Compliances:

Exposure to Penal and Prosecution provisions under the Act under sections 234F, 270A and 276CC.

- ✚ Sec.234F: Penalty will be levied for delay in filing return of income beyond the due date, if return is filed after 15th February 2021, the amount of penalty will be Rs. 10,000.
- ✚ Sec.270A: Non-filing of return of income may also be construed as under reporting of income, a penalty will be levied at 50% of the amount of tax payable on the under reported income
- ✚ Sec.276CC: Provides for prosecution, punishable with rigorous imprisonment of three months to seven years and a fine.
- ✚ Also if the Transfer Pricing Report in Form 3CEB is applicable to the said entities and if the same is not filed, then the tax authorities may levy penalty of Rs. 100,000 for non-filing of Form 3CEB (Sec.271BA) and penalty of 2% of value of international transactions for failure to report a transaction in Form 3CEB and for not maintaining of TP Study report (Sec. 271G)

OUR RECOMMENDATION

- ✚ It can be said that requirement of filing of return for non-residents arises when income earned by such non-resident comes within the scope of income under the Act (i.e. Section 5 or 9). Further relief allowed as per DTAA by virtue of section 90 is in nature of exemption and such exemption must not be considered for determining the requirement for filing of return on income.
- ✚ In furtherance to the same, any foreign company which is having permanent establishment in India, also has to file return of income in India and have to comply with the Indian tax compliances as may be applicable.
- ✚ Also the foreign entity has to file Form 3CEB in relation to international transactions with its Indian associated enterprises. Form 3CEB has to be certified by a Chartered Accountant.
- ✚ ***Due date for filing of return of income for the FY 2019-20 is 15th February 2021 However, if the return has not been filed within these due dates, one can still file within 31st March 2021 with the above Section 234F penalty.***

✚ Considering the aforesaid penal provisions, it is advisable to file return of income and claim the credit for taxes withheld in India.

Hope the above compliances are taken care. If not, kindly take care of the same at the earliest. Kindly let us know for any assistance in this regard.

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