

Tax Wire



Relaxation for Non residents from obtaining PAN

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Background

The requirement to have a Permanent Account Number (PAN) for the purpose of Income Tax Act was first introduced in 1976. The objective of section 139A which required PAN was to provide identification of taxpayers so as to facilitate the linking of transactions relating to them. Even earlier to this, there were file numbers and other reference numbers being given, however introduction of PAN made the entire process legally valid and more structured.

The requirement for quoting PAN was enhanced and mandated for certain types of transactions and board was given power to notify categories of persons or transactions for which quoting of PAN could be made mandatory. The list of such persons and transactions were notified by board from time to time and its scope kept increasing.

In order to strengthen the PAN mechanism, a new section 206AA was inserted with effect from 1.4.2010 to provide that any person whose receipts are subject to deduction of tax at source shall mandatorily furnish a PAN to the deductor failing which the deductor shall deduct the tax at source at higher of 20%.

The said section 206AA contains a non-obstante clause by which it overrides the rest of the provisions of the Act. This provision would therefore also require **non-residents** who had non-recurring transactions or just one-time deals in India to furnish the PAN in order to ensure deduction of taxes at normal rates.

Controversies and the Dilemma

This resulted in varied interpretation of the provision and also a question was raised whether is this an attempt to override the tax treaty that has been entered into with various nations by bypassing the sovereignty of the treaty.

This issue came up before the Hon'ble Pune ITAT also in the case of **Dy.DIT v. Serum Institute of India Limited [TS-158-ITAT-2015(PUN)]**. It was held by the Tribunal that provisions made in the DTAA's would prevail over the general provisions contained in the Act; **to the extent they were more beneficial to the taxpayer**. It further went on to state that section 206AA of the Act is not a charging section, but is a part of the procedural provisions dealing with collection and deduction of tax at source, and it therefore cannot override the charging sections of the Act and essentially not the treaty provisions.

Amendment in Finance Act 2016 and the current notification

The Government realizing the impact of the above provision, the judicial interpretations that were emerging around that and in order to reduce the compliance burden, decided to amend the provision through Finance Act 2016 and introduced an exception to applicability of higher rate of tax if the recipient is a non resident and payment is towards interest on long term bonds and any other payment that was kept open for further notification.

The CBDT vide **notification no.53/2016 dated 24th June 2016** has notified **Rule 37BC** in connection with the above. The rules states as under:

If the payment is in the nature of interest, royalty, fees for technical services and payments on transfer of any capital asset to a non resident, there is no requirement to obtain PAN if, such nonresident furnishes the following details to the deductor in India:

- i. Name, e-mail ID and Contact number
- ii. Address in the country which the non-resident is a resident of

- iii. Tax residency certificate
- iv. Tax identification or any such equivalent number

Further the rule also requires that the deductee, while filing the e-TDS returns for foreign remittances in Form 27Q, wherever the non-resident does not have a PAN, has to mention as 'PAN NOT AVAILABLE' in place where PAN is required to be quoted and has to furnish the email ID, address, contact number, Tax Identification number and address in separate columns which have been provided for such purpose.

Conclusion

This is a very welcome step and a long due one from the Government and CBDT. It is important that the ease of doing business that the Government is repeatedly quoting does not merely remain rhetoric and moves like this, which is small but significant, is brought out to make doing business in India truly smooth.

Further, it is also important for the Government and tax administration to respect the business relationship that the non residents are trying to build with our country. This is to be ensured by not making adversarial tax moves that could

jeopardize the sovereignty of the tax treaty that India has entered into with those nations.

It is also crucial to understand that this rule and exception are only applicable to payment in the nature of Interest on long term bonds, other interest, royalty, fee for technical services and payment on transfer of any capital asset. This is not applicable for other payments falling under Other Income or Independent Personnel service articles of the tax treaty.

This rule per se is not dispensing off the requirement of obtaining PAN for the non residents. This is merely providing a relaxation from having a PAN to avail a favourable tax withholding rate. In case a non resident has taxable income sourced out of India, filing an Income Tax return is mandatory. To do so obtaining a PAN would become a requirement.

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