FREQUENTLY ASKED TAX QUESTIONS BY QUALIFIED FOREIGN INVESTORS (QFIs)[1]

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Q.1. What is Permanent Account Number (PAN) Card?

Ans: Permanent Account Number (PAN) is a ten-digit alphanumeric number, issued by the Income Tax Department of India to any "person" to facilitate him in making tax payments filing, returns and claiming refunds. The number, along with other relevant details, is printed on a card called PAN card.

Q.2. Are QFIs required to obtain PAN Card to comply with tax norms in India?

Ans: Yes. Under the current provisions, QFIs would be required to obtain PAN card. The process of obtaining a PAN card is simple, and user friendly. An application can be filed by a foreign investor online and the process can be completed within 2 to 3 weeks.

Q.3. What are the benefits to QFIs of having a PAN Card?

Ans: QFIs who have a PAN card would be eligible for tax deduction at source (TDS) as per the rates applicable in the Double Taxation Avoidance Treaty (DTAA) of the country of which the QFI is a resident, if it is more beneficial than the rate prescribed under the domestic law. If a QFI has not obtained a PAN card it would be subject to a higher rate of tax deduction under Section 206 AA of Income Tax Act, 1961.

Q.4. How QFIs can apply for a PAN Card?

Ans: In order to facilitate QFIs in applying for a PAN as well as to comply with Know your Customer (KYC) norms of the Securities Exchange Board of India (SEBI), a combined form (FORM 49 AA) has been notified by the Central Board of Direct Tax (CBDT). Form 49 AA and detailed instructions regarding how it is to be filled up are available at :

http://law.incometaxindia.gov.in/DITTaxmann/IncomeTaxRules/pdf/itr62form49 aa.pdf

http://law.incometaxindia.gov.in/DITTaxmann/IncomeTaxRules/pdf/Not58_2011. pdf

Q.5. Can QFIs make an On-line application for PAN Card?

Ans: Yes, application for allotment of PAN can be made online through the Internet. Further, requests for changes or correction in PAN data or request for reprint of PAN card (for an existing PAN) may also be made through the Internet. Online application can be made either through the portal of National Securities Depository Limited (NSDL) (https://tin.tin.nsdl.com/pan/index.html)

or portal of UTI Infrastructure Technology and Services Limited (UTITSL) (http://www.utitsl.co.in/utitsl/uti/newapp/new-pan-application.jsp). Supporting documents required to be submitted by QFIs to obtain PAN card are listed at the following link:

http://law.incometaxindia.gov.in/DITTaxmann/IncomeTaxRules/pdf/Not58_2011. pdf

Q.6. What are the attestation requirements for a QFI for obtaining PAN card?

Ans: For a QFI who is an individual, Rule 114 of the Income Tax Rules, 1961 read with Form No. 49AA, requires a copy of the passport to be filed (without any attestation), this will be taken as both proof of identity and proof of residence. For QFIs other than individuals, the process requires filing of copy of certificate of registration duly attested by an "apostille" or at the Indian Embassy in that country.

In order to meet the know you client (KYC) requirements as prescribed by Securities Exchange Board of India (SEBI), the list of documents to be submitted by a QFI for KYC are available at:

http://www.sebi.gov.in/cms/sebi_data/attachdocs/1340167306959.pdf

Q.7. What are the tax related responsibilities of Qualified Depository Participants (QDPs)?

Ans: In order to facilitate investments by QFIs, the QDPs have been assigned the responsibility to act as a single point of contact for QFIs for all purposes including tax. For tax purposes, a QDP will facilitate the QFI to obtain a PAN card. QDPs will be responsible for any withholding tax in India before making remittance to QFIs. QDPs will also be treated as a representative assessee/agent of the QFI. For this purpose QDPs would be required to submit a declaration that they have no objection to being treated as a representative assessee/agent of QFI. A QDP may ensure that the broker engaged by it for undertaking QFI transactions deducts and deposits tax at source failing which the QDP should deduct and deposit the tax on such transactions.

Q.8. Can QFIs claim refund from Income Tax Department in India?

Ans: Yes. QFIs can claim refund from Income Tax Department for which the QFI would have to file its return of Income in India for that year.

Q.9. Can a QFI carry forward losses over the years?

Ans: Yes. QFIs are allowed to carry forward losses over years provided the QFI files its return of income declaring the loss for the relevant year within the stipulated time limits.

Q.10. Whether profits earned by QFI from their investments in Indian securities market would be treated as Capital Gain or business income?

Ans: As per the Income-Tax Act, 1961, whether the profits earned from transaction in securities would be capital gains or business income will depend on facts and circumstances of each case like the number and frequency of transactions etc. Please refer to circular No.4/2007 dated 15/6/2007 issued by the Central Board of Direct Taxes.

Q.11. Whether QDPs should compute tax deduction at source (withholding tax) on QFI income for one settlement period on settlement basis or on transaction basis?

Ans: Currently, settlement on Indian stock exchanges is done at the end of every trading day. Tax deducted at source under the Income-tax Act, 1961 is to be deposited by the seventh day succeeding the end of each month. The withholding tax on QFI income will be computed on settlement basis and not on transaction basis since the stock broker would credit the net proceeds of all transactions to QFIs on settlement basis for one settlement period.

Q.12. For determining the tax deducted at source (withholding tax) liability, can QDPs set off losses of QFIs against profits earned on monthly basis in a given year?

Ans: As per TDS provisions, the deductor has to deduct tax either at time of payment of the amount or at time of credit of such amount (whichever is earlier). Therefore, any loss of current year available at such time of deducting tax would be eligible to be set off against the sum payable and the TDS shall be effected on net basis. However, TDS once effected cannot reduced by the deductor even if there is loss in subsequent transaction.

Example, in a given year, a QFI makes three settlements, it earns profit of Rs. 200 on day one settlement, incurs a loss of Rs. 250 on day two settlement and earns profit of Rs. 100 on day three settlement. The TDS would be deducted on credit of net profit of Rs 200 whereas, no TDS shall be effected against profit of Rs. 100 as at time of credit of Rs. 100 a loss of Rs. 250 is available for set off and net basis there is no amount chargeable to tax.

Q.13. For the purpose of computing tax deducted at source (withholding tax) Can QDPs set off in the case of QFIs, the profits earned in one security against losses earned in another security during a given year?

Ans: Yes. For computing tax deducted at source (withholding tax) QDPs can set off profits earned by the QFI in one security against losses earned in another security as long as these securities are subject to Securities Transaction Tax (STT). Therefore, this would not be applicable in case of QFI investments in bonds as bond transaction are not subject to Securities Transaction Tax Such setting off for computing tax deduction at source would therefore be permissible only in the case of listed securities and mutual fund Units and redemption by mutual funds as these are subject to STT. The set off would again be subject to the general principle that an earlier loss of current year can be set off against subsequent profit which is credited or paid to the QFI. However, if tax deduction at source (TDS) has already been effected for a particular credit or payment, it cannot be reduced by subsequent loss. A QFI is, however, eligible to claim refund of excess amount of tax deducted at source (withholding) by filing a return of income for the relevant year.

Q.14. For the purpose of computing tax deducted at source (TDS), can QFIs Set off of profits earned by a QFI in the current year against losses incurred in previous years?

Ans: No, A QDP cannot set off losses of a previous year of a QFI against profits earned in the current year by the QFI while computing the tax liability for deduction at source, which would therefore be based only on the profits of the year. However, QFIs can themselves set off their profits earned in the current year against losses incurred in previous years. For the purpose, the QFI would need to file its return of income within the time limits stipulated in the Income-tax Act, 1961. For this purpose, QFIs need to file return for the relevant year within the time limits stipulated in the Income-tax Act, 1961.

Q.15. What would be the applicable rates of taxation if a QFI comes from a jurisdiction with which India has a Double Taxation Avoidance Agreement (DTAA) as against one which comes from a non-DTAA Jurisdiction?

Ans: The applicable rates of taxation in the case of investment from a country will be at the rate provided in the Income-tax Act or the rate provided in the Double Taxation Avoidance Agreement, whichever is more beneficial to the investors.

Q.16. Whether the capital gains arising on sale of shares are computed in Indian currency or in other currency?

Ans: The capital gains arising on sale of shares shall be computed by converting the cost of acquisition, expenditure incurred and full value of consideration in the same currency, as was initially utilized for purchase of shares and the gains so computed shall be reconverted in India currency.

Q.17. Whether DTAA provisions will apply while deducting tax at source?

Ans: Yes. Also see answer to question No. 15.

Q.18. Will the QDPs be held responsible for withholding taxes against profits on mutual fund investments by QFI's?

Ans: Income from investment from mutual fund may arise by way of distribution of profits by the fund or by way of redemption by the fund or by way of sale of units of the fund. In case of distribution of profits by the mutual fund, the mutual fund itself pays tax on distribution of profits. In case of sale of units of the fund, the QDP would be required to withhold tax if the buyer of the mutual fund units has not deducted tax. In case of redemption of units by the fund or sale of units of the fund, the QDP would be required to withhold the tax.

Q.19. If the QFI is no longer the client of the QDP, then can the QDP be called upon to make good the shortfall in tax and liable to interest and penalty having acted in bonafide and good faith?

Ans: QDP, being a deductor, shall be liable for any short deduction or non-deduction of tax even after the QFI ceases to be the client of QDP.

Q.20. What are the deductible expenses that may be incurred by QFI for purchase & sale of shares and Mutual Funds?

Ans: The deductibility of expenses would depend on the fact that whether the income on the sale of shares is treated as business income or capital gains. In general if the income is treated as capital gains expenses like brokerage fees would be allowed.

Q.21. Whether QDP should treat residence certificate as a sufficient proof of residence and beneficial ownership of the shares in India by the QFI?

Ans: Prima facie, the Tax Residency Certificate is evidence of residence in a particular country and the QDP may rely on such a certificate. However, as per Explanatory Memorandum to the Finance Bill, 2012, the amended section 90 and 90A of the Income-tax Act makes submission of Tax Residency Certificate containing prescribed particular, as a necessary but not sufficient condition for availing benefits of the tax treaties.

Q.22. Whether the QDP is required to obtain an Income Tax Order under Section 195(2) of the Act for determining the income component (capital gains) on the sale of shares?

Ans: Central Board of Direct Taxes (CBDT) Circular No. 4/2009 dated 29/06/2009, clarifies that the term 'payer' also means a remitter. As the QDP is making the payment of the income to the QFI, the QDP could be considered as a 'payer' Under Section 195(2) of the Act, if any person responsible for paying any sum chargeable under the Act to a non-resident, considers that the whole of such sum would not be income chargeable in the case of the recipient, he may make an application to the Assessing Officer(AO) to determine the appropriate proportion to such sum on which tax is to be deducted (TDS).

The requirement of obtaining CA Certificate is only in the context of remittance of money outside India. It is not in the context of TDS liability. The QDP is custodian of all data in respect of transactions on which income has arisen to a QFI. It will also maintain the QFI account, wherein the QFIs' income is determined. Therefore, the QDP is supposed to deduct tax on the basis of sum chargeable to tax. In normal situations such as working out the capital gains on a transaction, there would not be any difficulty and QDP can itself determine the amount chargeable to tax and deduct tax thereon or take help of Chartered Accountant in this behalf. However, in case there is complexity in determining such income the QDP should approach the Assessing Officer for determination u/s 195(2). Even for other deductees, it is not mandatory that in each and every case, they should obtain 195(2) order before deducting TDS. However, in case a complex issue, it is advisable to do so. This is because the liability to deduct proper taxes remains on the deductor (i.e. QDP).

Q.23. For the purpose of computing tax deduction at source (withholding tax), what is the proof and declaration that the QDP can rely upon for allowing the full time benefit of a DTAA to a QFI?

Ans: There is no standard set of documents on the basis of which the DTAA treaty benefit can be said to have been rightly allowed. It depends on the facts of each case. The treaty benefit is to be claimed by the person concerned before it can be allowed. For this purpose, the QDP should obtain the Tax Residency Certificate from the QFI.

Q.24. Having relied on the documentations and given the treaty benefits, if later the same is held not allowable by the tax officer, can the QDP be held responsible and called upon to pay for any shortfall in tax, interest and penalties?

Ans: The liability to deduct and pay proper taxes remains that of the QDP as a deductor. Therefore, for any shortfall in tax QDP can be held responsible. The responsibility remains both for non-deduction or short deduction of tax if it is found that the treaty benefit have been incorrectly claimed or considered.

Q.25. What is the maximum number of years in which an assessment can be done or reopened in case of TDS returns filed by the QDP?

Ans: As the payment would be made to QFIs, who are non-residents, the Act does not prescribe any time limit for scrutiny of transaction for TDS purposes under section 201 of the Act.

Q.26. Can the QDP be held responsible for withholding of tax at source in case of a QFI on sale considerations received under an open offer or buy back of shares where the purchaser of the shares is responsible for withholding tax and complying with the TDS filings under the Act?

Ans: Under the Income-tax Act, any person responsible for paying to a non-resident (not being a company) or to a foreign company, any sum chargeable under the provisions of the Act, has to deduct tax at the time of credit of such income to the account of the payee or at the time of payment, whichever is earlier. The responsibility of tax deducted at source by the QDP in the case of sale consideration received by a QFI on account of an open offer or a buyback of shares would depend upon the facts of the case. In case the purchaser of shares is crediting the sum to the account of the QFIs or making payment to QFIs, the purchaser would be required to deduct the tax. However, if the QDP is crediting the sum to the account of the QFIs or making payment to the QFIs, the QDP would be required to deduct the tax. Please also refer to question no. 7.

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1. Disclaimer: These FAQs are prepared with a view to help QFI applicants to get generic understanding of the tax framework. These FAQs cannot be used in a court of law to interpret any circular, rules, regulations, statutes etc., one way or the other.