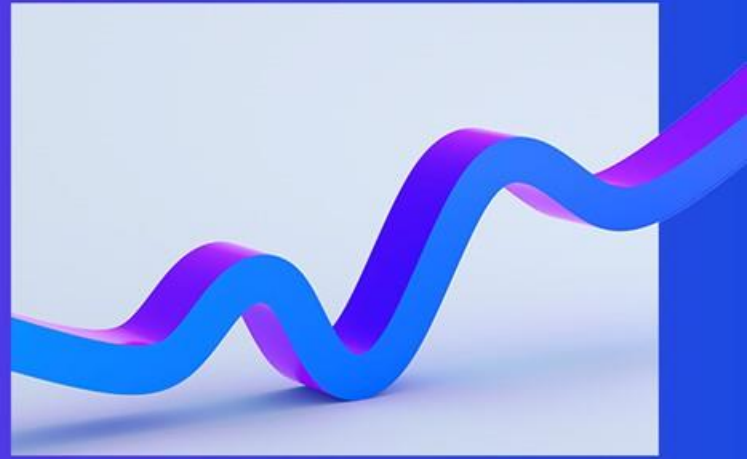




# Tax IRW Ops Insights Quick Tips & Updates

KPMG Information Reporting & Withholding  
Tax Services



## Validating Form W-8BEN and BEN-E Treaty Claims

By Kelli Wooten

Valid treaty claims on the Forms W-8BEN and BEN-E are the “unicorn” of the Information Reporting and Withholding world. With the significant increase in IRS examination activity, let’s review some common questions about treaty claims.

### What Constitutes a Valid Treaty Claim?

The challenge should be in determining whether treaty benefits apply; however, over the past several years with changes to Forms W-8, it has become equally as challenging to make a valid treaty claim. The bulk of Forms W-8 which are rejected during withholding agent validation processes are for failure to make a valid treaty claim, particularly for entities.

First, let’s discuss what a valid treaty claim on a Form W-8BEN-E looks like. Specifically, in order for a treaty claim to be valid, the following is required:

- Box 14a must be ticked
- Line 14a must be completed listing the country for which treaty benefits are being claimed
- Box 14b must be ticked
- Line 14b must indicate an appropriate limitation on benefits (“LOB”) provision

A valid Form W-8BEN treaty claim for an individual would require:

- Line 9 to be completed listing the country for which treaty benefits are being claimed

However, there are certain additional steps which must be met for payments other than interest or dividends from actively traded securities. Specifically, either a U.S. or foreign taxpayer identification number must be included on the Form W-8. In addition, if the treaty claim requires additional representations aside from just residency in the claimed treaty jurisdiction, the special rates and conditions line must be completed – e.g., Line 15 of the Form W-8BEN-E and Line 10 of the Form W-8BEN.

Perhaps the most common example of where Line 15 of the Form W-8BEN-E must be completed include business profits treaty claims – e.g., payments to an entity for services. While this issue had been long debated, the IRS resolved any confusion on this when updating the Form W-8 instructions in October 2021.

Specifically, the instructions provide that “[p]ersons claiming treaty benefits on business profits not attributable to a permanent establishment” must complete Line 15. Further, it is not enough just to indicate that the beneficial owner does not maintain a permanent establishment in the United States, the article and paragraph under which treaty benefits are claimed, the type of income, and the applicable rate of withholding must all be indicated.

Other common examples of where the special rates and conditions section must be completed include royalty claims where a treaty provides different rates for different types of royalties. For example, the United States – Canada tax treaty provides for 0% withholding on copyright royalties but requires 10% withholding on film and TV royalties. In this instance, the certification is required to indicate for which type of royalty treaty benefits are being claimed.

Another common example is lump sum pension or annuity payments. Certain countries like the Netherlands and Italy have established restrictions on treaty benefits for lump sum payments. For example, a Dutch individual making a claim for treaty benefits on a lump sum distribution would need to include a certification that he or she has not resided in the United States for the previous five years.

While providing some clarity on making a proper business profits treaty claim, the IRS has begun to scrutinize whether a business profits treaty claim is appropriate in certain scenarios. Of particular note is Article 12 of the US – India tax treaty which requires 15% withholding on royalties and “fees for included services.” Of late, the IRS has been taking the position that any information technology services provided to U.S. clients by Indian technology firms, even when payments are solely for loan staff, represent these technical assistance fees and are thus subject to 15% withholding, versus the 0% business profits treaty rate. Withholding agents making payments to Indian technology service providers should consider reviewing payments to any Indian technology service provider to ensure it is appropriately documented with a valid treaty claim, even considering obtaining two separate Forms W-8 with one including a business profits treaty claim and one including a royalty treaty claim.

## Validating the Treaty Claim

Withholding agents validating a treaty claim must ensure all data referenced above is included; however, there are also additional validation requirements. In addition to the above, withholding agents must screen for treaty mismatches. Essentially, the Internal Revenue Service (“IRS”) requires that if there is a permanent address, mailing address, or standing instructions to make payment to an address outside the claimed treaty jurisdiction, that the withholding agent collect curing documentation. Remember, this includes both on the Form W-8 itself as well as in the withholding agent’s books and records.

What constitutes curing documentation? Specifically, this includes a reasonable explanation for the address outside the treaty country (this could be included on a withholding agent’s reasonable written explanation checklist), or the withholding agent has in its possession or obtains documentary evidence that establishes residency in a treaty country. It is important to note the specific language here – e.g., documentary evidence establishing *residency* in a treaty country. A majority of non-U.S. individuals providing documentary evidence provide a passport; however, a passport only establishes citizenship. Documentary evidence establishing residency would need to be something like a driver’s license, residency permit, government issued health card, etc.

One of the most common questions clients pose regarding treaty claims relates to reviewing the LOB claim. At the time the requirement to specifically identify the applicable LOB provision was added to the Form W-8BEN-E, IRS counsel explained that it was not to complicate withholding agent validation processes, but rather to ensure beneficial owners were actively reviewing and ensuring they are entitled to treaty benefits. Therefore, a withholding agent may rely on a valid Form W-8BEN-E that includes an LOB provision unless it has actual knowledge that the information provided with respect to the LOB is unreliable or incorrect. The IRS then provides that if the income tax treaty that the referenced on the form does not exist or is not in force, a

withholding agent will have reason to know that the information provided on the Form W-8BEN-E is incorrect and the form is therefore not valid for purposes of claiming treaty benefits.

## Other Common Questions

There are a number of common questions that we receive regarding treaty claims. Let's take a look.

- A client or vendor has an address in a treaty country. Can we just provide treaty benefits to them even if the Treaty Benefits section is not completed? It is just an oversight on their part.
  - No. In order to be eligible for treaty benefits, a valid treaty claim must be included on either the Form W-8BEN or Form W-8BEN-E. For instance, the account holder or vendor may not be eligible for treaty benefits for a variety of reasons. Applying a reduced rate of withholding under a treaty when a treaty claim has not been made exposes the withholding agent to underwithholding, penalties, and interest.  
  
Note, there are certain specific exceptions for Qualified Intermediaries, Withholding Foreign Trusts, and Withholding Foreign Partnerships; however, these would not be applicable for accounts maintained onshore in the United States.
- Can a Form W-8BEN or BEN-E be eligible for indefinite validity when it includes a treaty claim?
  - The IRS does not allow for indefinite validity for treaty claims. However, a Form W-8 that includes a treaty claim could otherwise be eligible for indefinite validity (assuming all other requirements are met) to establish foreign status only.
- The treaty claim on a Form W-8 is not valid. Does this mean the whole Form W-8 is invalid?
  - No. A Form W-8 that includes a failed treaty claim may otherwise still be valid for establishing foreign status assuming all other validation requirements are met. This could come in handy for the portfolio interest exemption, exempting a payee from backup withholding, etc.
- Can an individual claim treaty benefit for independent personal services using the Form W-8BEN?
  - No. An individual making a claim of treaty benefits for independent personal services performed in the United States must provide a valid Form 8233.

Some or all of the services described herein may not be permissible for KPMG audit clients and their affiliates or related entities.

[kpmg.com/socialmedia](https://kpmg.com/socialmedia)



The information contained herein is not intended to be "written advice concerning one or more Federal tax matters" subject to the requirements of section 10.37(a)(2) of Treasury Department Circular 230.

The information contained herein is of a general nature and based on authorities that are subject to change. Applicability of the information to specific situations should be determined through consultation with your tax adviser.

© 2023 KPMG LLP, a Delaware limited liability partnership and a member firm of the KPMG global organization of independent member firms affiliated with KPMG International Limited, a private English company limited by guarantee. All rights reserved. NDP378103

The KPMG name and logo are trademarks used under license by the independent member firms of the KPMG global organization.