

E-circular dated 12th Feb 2018 Directors Fees, from Abroad : Taxation in India ?

Integrated Association of Micro, Small & Medium Enterprises of India

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Proud to say
I am SME of India



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Dear Members,

EXECUTIVE SUMMARY

Executive Summary

As per DTAA's of almost all countries, with India,

1. The Directors Fee is taxable in the country in which that company is Resident.
2. Example: An Indian resident is getting a Directors Fees from a Company in Singapore.
 - a. In this case, the Singapore Government has the right to tax this income.
3. If he does not pay tax in Singapore, then, by default the Indian Govt has the right to tax his global income.
4. Even after this tax in India, the Singapore Government still has the right to tax him.



The Indian companies are growing in Size and Vision.
Even SME's are growing both in India and Abroad

We at the I am SME of India, consultancy cell have been receiving enquiries on this matter from time to time. So, this circular is dedicated on this matter.

Some of the member companies now have Joint Ventures abroad.
Some of you also have 100% Equity (Wholly Owned Subsidiaries)

Abroad.

And as the Director of that company, you may plan to take Directors Fees, for your personal services **from that subsidiary company**. This has benefit of

- a) Reduction of Taxable income in that country
- b) No need of Dividend Tax in that country (if applicable)
- c) Better income for you in your personal hands

So, the Question is

What is the taxability, of this "Directors Fees"

Let us take a Case Study for 5 countries

- a) **DTAA Countries, example**
 - a. Singapore
 - b. Thailand
 - c. USA
 - d. Japan
- b) **Non-DTAA Countries, example**
 - a. Hong Kong (work is in progress, Drafted, Signed, but not yet notified)
 - b. Panama

DTAA changes the treatment of taxation, Hence treatment is separate

Recommendation for DTAA Countries, like Japan, Singapore and Thailand

- 1) This income is taxable in that country (in which the subsidiary is situated). So, We recommend you to take an Income tax unique number / registration number / PAN in that country. If you get income there, then you must file the income tax return there on the income earned in that country.
- 2) Note : A good benefit is that all countries have a good minimum exemption limit . Hence, usually the income of yours in that country will be taxed at ZERO rate or, very low rate for the initial tax slabs.
- 3) And since it is a DTAA country, this directors fee is TAX EXEMPT in India.
- 4) There is no double tax (RELAX)

Recommendation for USA (Spl. Case)

Source 1 : USA : <https://www.irs.gov/businesses/taxation-of-nonresident-aliens-1>

Source 2 : <https://www.thetaxadviser.com/issues/2007/may/withholdingrequirementsfornonresidentdirectors-fees.html>

Case 1 : If you are a US Citizen, or a Green Card Holder, or have substantial presence, then you are a US Tax resident. And have to pay tax on your worldwide income, including the income you have in India.

Case 2: You are a Non-Resident Alien :

Nonresident aliens are generally subject to U.S. income tax only on their U.S. source income. So, as far as the Directors fee in job is concerned, it is a ECI income (Effectively Connected

income). And will be taxed for you at the same graduated rates as for a U.S. person. But, if this is a FDAP Income (Periodic Passive income), then usually it will be taxed at flat 30% with no exemptions.

And since India has a DTAA with USA, so that Directors fee earned from your subsidiary in USA, will be tax free in India. Again, There is no double tax (RELAX)

Note : US laws are tougher, ... since in same case the USA resident getting directors fees from a Indian Subsidiary still has to pay the balance tax in USA

Source 3 : See para 17 at link at <https://www.irs.gov/pub/irs-trty/inditech.pdf>

Recommendation for Hong Kong / . Panama

- 5) Since Hong Kong does not have any DTAA with India
- 6) So, section 91 of Indian Income tax applies.
- 7) In Hong Kong : Yes, register yourself, And, then, yes, pay the tax, if any.
- 8) In India, You have to compulsorily pay offer that income to tax in India, and then take the tax relief of the tax you have paid in Hong Kong. (if any)
 - a. If tax was paid in HK , all of it will be reduced from Indian tax
 - b. If tax was nil in HK, then normal, Indian tax rate of about 30% will apply for you.

Again, There is no double tax (RELAX again)

Note : Point to remember



Please remember, that this is to be “declared” as a Foreign income “already taxed” in India Income tax return (ITR) in the exempt income section, in case of countries like Thailand and Singapore (DTAA countries).

Additionally, as per the ITR Form, you must declare this fact in the relevant section of the ITR, with the name, address, Tax registration number etc of that company in your ITR in India.



Article 16 of the DTAA between India and Singapore

ARTICLE 16

DIRECTORS' FEES

Directors' fees and similar payments derived by a resident of a Contracting State in his capacity as a member of the board of directors of a company which is a resident of the other Contracting State **may be taxed in that other State**.

Article 16 of the DTAA between **India and Thailand**

[NOTIFICATION NO.88/2015 [F.NO.503/5/2005-FTD-II]/SO 3244(E), DATED 1-12-2015]

ARTICLE 16

DIRECTORS' FEES

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Article 16 of the DTAA **between India and UAE (incl Dubai , Sharjah etc)**

ARTICLE 16

DIRECTORS' FEES

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Article 17 of the DTAA **between India and UK**

Notification : No. GSR 91(E), dated 11-2-1994

ARTICLE 17

DIRECTORS' FEES

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Article 17 of the DTAA **between India and USA**// Notification: No. GSR 992(E), dated 20-12-1990 .

ARTICLE 17

DIRECTORS' FEES

Directors' fees and similar payments derived by a resident of a Contracting State in his capacity as a member of the board of directors of a company which is a resident of the other Contracting State may be taxed in that other State.



Article 16 of the DTAA **between India and Japan**

ARTICLE 16

Director's fees and other similar payments derived by a resident of a Contracting State in his capacity as a member of the board of directors of a company which is a resident of the other Contracting State may be taxed in that other Contracting State.

Article 16 of the DTAA **between India and Kuwait**

ARTICLE 16

DIRECTORS' FEES

Directors' fees and other similar payments derived by a resident of a Contracting State in his capacity as a member of the board of directors or other similar organ of a company which is a resident of the other Contracting State **shall be taxable only in that other State**.

>>Kuwait is different : It says, only in that other state .

So, no double tax at all. No Doubts.



**What if, you don't pay tax in both Countries...
Don't File return in that Country ?**

Govt has an answer for that
Source : words "May be taxed" vs "Shall be taxed"

CBDT Notification on Double tax

Notification No. 91 of 2008 dated 28-8-2008 issued by Central Government in respect of Double Taxation Relief says :

".....Central Government hereby notifies that where an agreement entered into by the Central Government with the Government of any country outside India for granting relief of tax or as the case may be, avoidance of double taxation, provides that any income of the resident of India **"may be taxed"** in the other country, **such income shall be included in his total income** chargeable to tax in India in accordance with the provisions of the Income-tax Act, 1961 (43 of 1961), **and relief shall be granted in accordance** with the method for elimination or avoidance of double taxation provided in such agreement."

Source : <http://incometaxindia.gov.in/Communications/Notification/92011000000000754.htm>

Source 2

<https://indiankanoon.org/doc/1258793/>

Authority Tribunal : Mr. S. Mohan vs Director Of Income-Tax ... on 24 August, 2007

Bench: P Reddi, A Sinha // : RULINGS INCOME TAX, NEW DELHI Decided On: 24.08.2007

Appellants: Mr. S. Mohan Vs. Respondent: Director of Income-tax (International Taxation)

NCOME TAX ACT, 1961 • Advance Ruling --Double taxation relief Agreement between India and Norway --Applicant received salary income in India in Indian rupees from employers in India for service rendered by him in Norway for a period exceeding 182 days during the financial year. He filed an application under Section 245Q stating that he was deputed on official duty to Norway by his employer Infosys Technology Ltd., and he worked there for more than 182 days and he was therefore a non-resident for tax purposes and thus the salary paid by Infosys Technology Ltd. to a non-resident employee for rendering services outside India was not taxable in India in view of the DTAA between India and Norway and, therefore, he was not legally liable to pay the tax.

Held: An analysis of [article 16\(1\)](#) of Double Taxation Avoidance Agreement between India and Norway makes it clear that unless employment is exercised in the other Contracting State, the remuneration derived shall be taxable only in the State of residence. However, if the employment is exercised outside the usual State of residence, the remuneration derived therefrom **"may be taxed"** in the State in which the employment was exercised.

Thus, **it was open to the State** in which the employment was exercised to subject the remuneration derived by a resident of a Contracting State. That means, **Norway could have taxed** the assessee, **but it was not the case** of the applicant that he had been so taxed or that he paid any tax voluntarily or otherwise, to the Norway Government.

In such a situation, no relief was available to assessee and his salary income was taxable in India.

I-am-SME-of-India Notes

May be taxed, means that country, Singapore/Thailand has the right to tax, if it wants to, or if the assessee files the ITR voluntarily there

- And if he does that voluntarily, then that income is exempt in India due to DTAA.
- Just declare that in the foreign income page of the ITR.
- And if you do not, then it will be taxed in India

It is apposite to note that the expression 'may be taxed' has been used in contradistinction to the expression 'shall be taxable' occurring in [article 16\(2\)](#).

That this distinction is not without significance is emphasized in the Commentary on the **OECD Model Convention**, which is a valuable aid to the interpretation of treaty provisions.

Going by the plain interpretation of the expression 'may be taxed' and the interpretation that has been placed in the said commentary, **right of taxation is available to both the Contracting States in regard** to the employment income of the applicant in accordance with the relevant domestic laws.

Shall be taxed, means only 1 country

But may be taxed, means, legally both countries have this option

Conclusion

Final conclusion

1. The Directors Fee is taxable in the country in which that company is Resident.
2. Declaration in that country = yes required
3. Declaration in India Income tax = yes required
4. Tax: as per the notes above.

For personalized advice , please contact the Association Consulting Board.

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For queries, suggestions and feedback , you can e-mail us

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For personalised suggestions, and solutions, contact our I am SME of India Team and Consultants

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Our member Finsys Participated in the Auto Expo Components Show 2018 at Pragati Maidan, New Delhi. The Show was a good Success. This is reportedly the Biggest Auto Show in Asia and The second Biggest in the whole World.

Our members like Finsys, Presto Standtest, Shivanshu Sintered, Cenlub Systems, Bony Polymers, Premier Indoplast Group, Mega Rubber-Sujan Industries, Vikas Altech, Sata Vikas, Technocrat Connectivity Systems, participated in the Show, amidst growing Business opportunities.

It was a pleasure to hand over the Government Financial Incentive of Rs.53,500/- to each member delegate of Hannover Fair, Germany, 2017. For this year's delegation also we are providing Rs.50,000 upfront support. Upon return, a similar incentive is expected from the Government also.



It's always heartening to be able to do something for our members. Join us, for such other benefits, mail us info@iamsmeofindia.com, +91-9711123111 (Executive Secretary)



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