The Institute of Chartered Accountants of India

Set up By an Act of Parliament

WICASA PIMPRI CHINCHWAD BRANCH (WIRC)

E-NEWSLETTER FEBRUARY 2024

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Managing Committee Members of Students Association

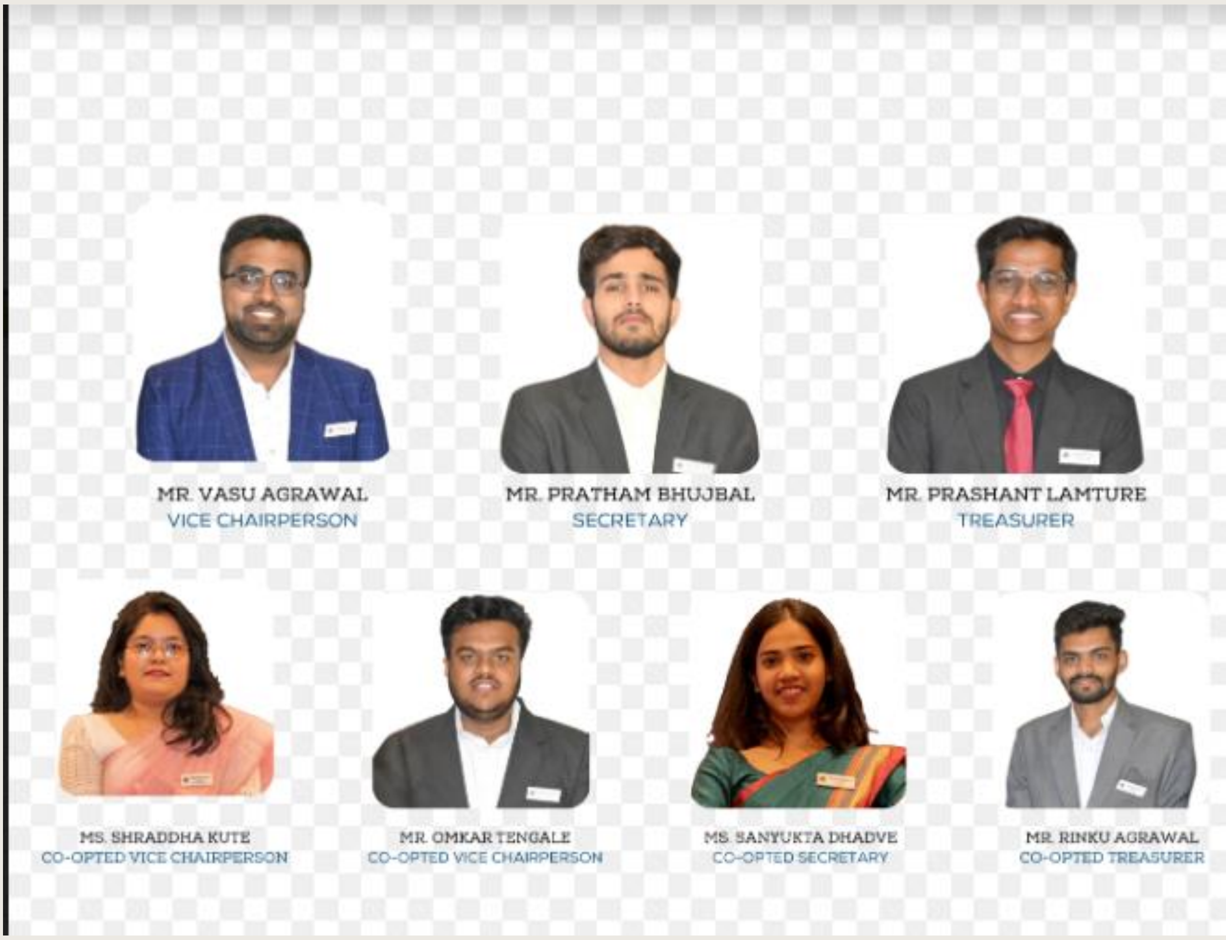
CA. Sachin Dherange
WICASA Chairman

Managing Committee Members of Students Association 2023-24

				
Mr. Siddhant Khandelwal Vice-Chairperson	Mr. Anurag Kawade Secretary	Ms. Shraddha Kute Treasurer	Ms. Vaishnavi Baban Dangale Co -Opted Vice Chairperson	Mr. Nidhish Potdar Co -Opted Secretary


Mr. Vasu Agrawal Co -Opted Treasurer

Newly Elected Managing Committee Members of Students Association 2024-25



Events for the Month of February 2024

Date	Particulars	Speaker	Venue
1.2.2024	Workshop On English Speaking	Mr. Shivam Nirmale	ICAI Bhawan Pimpri Chinchwad Branch, Nigdi
2.2.2024	Half Day Programme Of Ethical Values	Mr. Shivam Nirmale	ICAI Bhawan Pimpri Chinchwad Branch, Nigdi

Topic: Double Taxation Avoidance Agreement

In the current epoch of cross-border transactions across the various countries, the effect of taxation is one of the important deliberations for any trade and investment decision in other countries. One of the most crucial results of globalisation is the detrimental impact of one country's domestic tax policies on the economy of another country. This has led to the need for constantly assessing the evolving tax regimes of various countries and bringing about necessary amelioration.

DTAAs lay down the earmarking rules for taxation of the income by the source country and the residence country. Such rules are laid for various categories of income, for example, interest, dividend, royalties, capital gains, business income etc. Each such category is dispensed with by separate article in the DTAA.

Why DTAA?

An individual who earned income has to pay income-tax in the country in which the income is earned (source country) and also in the country (residence country) in which such person is resident. As such, the liability to tax on the aforesaid income does trigger in the country of source and the country of residence. In order to avoid the hardship of double taxation, the Government of India has entered into DTAAs with around 88 countries[1]. DTAAs take care of technical know-how and service fees and reduce rates of tax on dividend, interest, and royalties received by residents of one country from other.

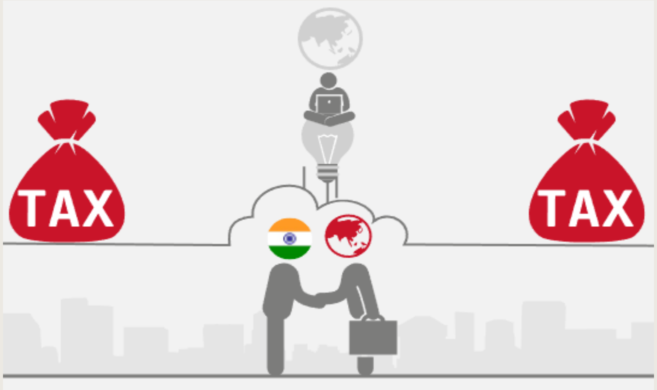


Figure 1 DTAA of India with other countries

When the rate of tax is higher in the Income-tax Act, 1961 than the rate prescribed in the DTAA, then the rate prescribed in the DTAA shall be applied, i.e., the rate which is better suited to the taxpayer would be applied. Generally, these agreements will continue indefinitely until officially discontinued by either Party of the Agreement.

Classification of DTAA

DTAAs may be classified into 'Comprehensive agreements' and 'Limited agreements' based on the scope of such agreements. Comprehensive DTAAs provide for taxes on income, capital gains and capital investments whereas limited DTAAs denote income from shipping and air transport or legacy and gifts. India has Comprehensive agreement with 88 countries and limited agreement[2] with 8 countries. Comprehensive agreements ensure that the taxpayers in both the countries would be treated on equitable manner in respect of the problems relating to double taxation.

Permanent Establishment

One of the important terms that transpires in all the DTAAs is the term 'Permanent Establishment.' It had not been defined in the

Income-tax Act. However, as per the DTAAs, PE includes a wide variety of arrangements. DTAAs usually restrict the jurisdiction of the Contracting States to taxing income of a foreign enterprise only if such enterprise carries on business in another country through PE. PE is a fixed place of business through which business activities of enterprise are wholly or partially conducted in that country for generation of income.

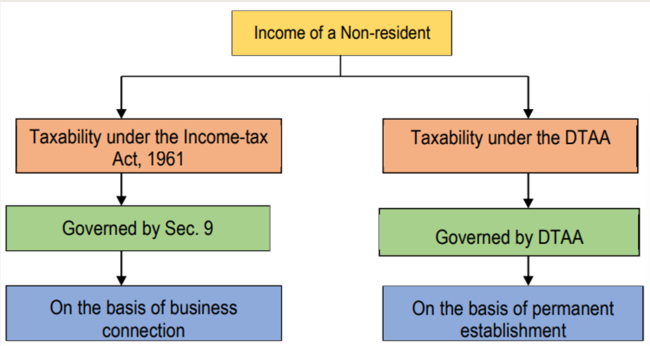


Figure 2 Income of Non-resident

Source: ICAI Module

Section 92F of the Income-tax Act[3] explains the term ‘Permanent Establishment’ as a fixed place of business through which the business of the enterprise is wholly or partly carried out. OECD and UN Model Conventions also provide for definition of the term ‘Permanent Establishment’ as it includes a place of management, a branch, an office, a factory, a workshop, etc. There is an international accord on the attribution of profits earned by PE on the basis of ‘Separate enterprises’ concept and the relevance of the ‘arm’s length principle’.

Most Favoured Nation (MFN) clause

The MFN Clause of an DTAA is whereby countries agree to allow a more beneficial treatment in tax matters to either a resident or a contracting state pursuant to one of the parties agreeing to a preferable regime to a third state. As by nature, MFN clauses can be incorporated as an integral part of the treaty on inception or can be entered into the treaty later subsequently by way of an amendment protocol.

Scope of MFN clause[6]

The scope of MFN clauses can be broadly categorised in the following patterns:

a) Granting lower tax rates/withholding tax rates for items of income or capital covered under the treaty
b) Limit the scope under specific items under the treaty (Royalty, Fees for technical services)
c) Liberty in extension of Relief
d) Any other benefits that the parties to the convention agree upon including and not restricted to EOI.

Borrowing MFN clause rate

Say for example, India has signed MFN clause with Argentina for remittance from India for Fees for Technical services (FTS) to Argentina, the rate of TDS as per DTAA is 7%. In the Income Tax Act, the rate of TDS for such remittance is 10%.

7% being more beneficial to assessee, the assessee will deduct TDS @7%. However, India has also signed MFN clause with Brazil for taxation of FTS @5%.

The 5% rate being beneficial to assessee, the 7% rate as per India-Argentina DTAA will be replaced by 5% as per India-Brazil DTAA. This is know as borrowing of MFN clause.

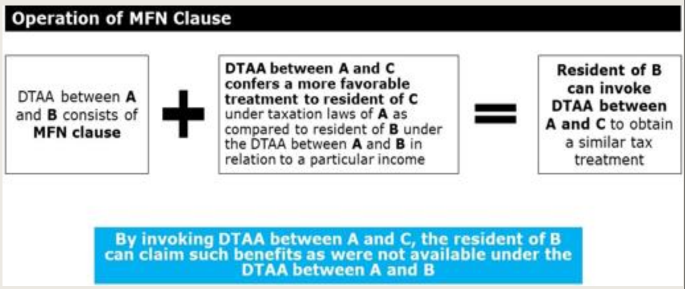


Figure 3 Borrowing MFN clause rate

Source: Taxsutra Database

The above image will bring more clarity.

Royalty and FTS under DTAA

Royalty and fees for technical services emerging in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State. However, such royalty and fees for technical services may also be taxed in the Contracting State in which they emerge and according to the laws of that State, but if the beneficial owner of the royalties or fees for technical services[4] is a resident of the other Contracting State the tax so charged shall not exceed 10% of the gross amount of the royalty and fees for technical services.

Make available clause

There has been a long-drawn dissension about the scope of expression 'make available' used in backing technical services.

The term 'make available' means that the person acquiring the technical service is allowed to independently apply the technology. The word 'enable' is used in the context that the technical services should be such that they make the recipient enriched in the subject matter. Thus, where the recipient of technical services[5] does not get accoutred with the knowledge or expertise and the recipient would not be able to apply it in future independently without any help from the service provider, it will not be a case of technical service having been 'made available'.

Relief under DTAA and ITA

There are primarily two types of relief available under DTAA and ITA. The same are explained with the following example:

1. Mr A is an Indian citizen and is sent to assignment in December 2022 to foreign subsidiary in USA. For A.Y 2023-24, Mr A would be a resident of India since his stay in India exceeds 182 days.

   Till November 2022, Mr A used to receive salary from India entity. After December 2022, he is getting salary from USA entity.

   Since, he is resident of India, his global income including the salary received in USA would be taxed in India. However, he has already paid taxes on the income which has accrued / received in USA.

   Mr A can claim relief u/s 90/90A of the ITA of the taxes paid in USA while filing his return of income for A.Y 2023-24 in India. To claim relief u/s 90/90A, Form 67 is to be filed before filing the return of income.

   In the instant case, source country is USA and resident country is India. Source country will never grant credit of taxes paid in resident country as they have first right of taxing such income. However, resident country will grant credit of taxes paid in source country.

2. Mr A is an Indian citizen and is sent to assignment in May 2022 to foreign subsidiary in USA. For A.Y 2023-24, Mr A would be a non-resident resident of India since his stay in India does not exceeds 182 days.

   As per the terms of employment contract, Mr A would be rendering services to USA entity. However, some portion of the salary accruing in the USA would be paid in the bank account of India to meet any incidental expenses when he returns to India.

   While filing his return of income for A.Y 2023-24 in India, Mr A claimed the income received in India exempt as per Article 16 of the India-USA DTAA.

   In the instant case, the salary received in India is not taxable in India as the income has not accrued in India, it was accrued in USA. The same is taxable in USA. There are several judicial precedents in which the same stand has been taken. Few of them are as follows:

   a) C.I.T Vs. Avtar Singh Wadhwan
   b) Pramod Kumar Sapra Vs Income Tax Officer, Ward-3, Panipat

c) Arvind Singh Chauhan Vs Income-tax Officer, Ward 1(2), Gwalior

TRC not mandatory to resort DTAA benefit

Though section 90(4) mandates that the assessee shall not be entitled to claim any relief under DTAA unless TRC of country outside India or specified territory outside India as the case may be, is obtained from the Government of that country.

However, it has been held by several judicial precedents that TRC is not mandatory to resort DTAA benefit as it is settled preposition of law that wherever, there is a conflict between[3] DTAA and Income Tax Act, DTAA prevails over the Act. Few of the relevant case laws are as follows:

a) Ranjit Kumar Vuppu vs Income Tax Officer (International Taxation)-II
b) Vamsee Krishna Kundurthi Vs Income Tax Officer (International Taxation)-I
c) Sreenivasa Reddy Cheemalamarri vs Income-tax Officer, International Taxation – 1

Concluding remarks

DTAAs are obviously an interaction of two tax systems each belonging to different country, which intends to mitigate the effect of double taxation. Double taxation is still one of the major hurdle to the development of inter-country economic relations. Every country seeks to tax the income generated within its territory on the basis of one or more factors. By means of DTAAs, each country accommodates the claims of other nations within their fiscal arena to develop international trade and investments with minimal barriers.

Sources

1. Taxmann.com - Cross Border Tax Avoidance: Structuring Businesses and Treaty Abuse

2. Taxmann.com - All About Double Taxation Avoidance Agreement (DTAA)

3. Lakshmisri.com - Limitation of Benefits clause in the India Singapore DTAA

4. Taxmann.com – Monthly journal on International Taxation

5. Business-Standard.com - New Revised Double Taxation Avoidance Agreement

6. Taxmann.com - The Most-Favoured-Nation (MFN) Clause in DTAA

Forthcoming Events for the Month of March 2024

Date	Particulars	Speaker	Venue
4.3.2024	Intermediate & Final Course Mock Test 1	NA	ICAI Bhawan Pimpri Chinchwad Branch

Event Photo

Workshop On English Speaking on 1.2.2024

Mr. Shivam Nirmale Guiding Students

Lecture Meeting on Union Budget 2024 on 1.2.2024

Half Day Programme of Ethical Values on 2nd February 2024

WICASA PIMPRI CHINCHWAD BRANCH OF WIRC OF ICAI

ICAI Bhawan Plot No. 17/8 A, at Nigdi, Datta Nagar, Near Bhakti Shakti chowk, Dehuroad Cantonment Board, Behind Indian Oil Petrol Pump, Pune 411044.

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