# THE DOUBLE TAXATION AVOIDANCE AGREEMENT (DTA) BETWEEN INDIA AND SINGAPORE-A CAUSAL ANALYSIS FOR NON-RESIDENT INDIANS (NRIS's)

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## ABSTRACT

A well-designed regional tax treaty to which developing countries are signatories will include provisions securing minimum withholding taxes on investment income and technical service fees, a taxing right in respect of capital gains from indirect offshore transfers and guarding against-treaty shopping. A tax treaty policy framework—national or regional—that specifies the main policy outcomes to be achieved before negotiations commence would enable developing countries with more limited expertise and lower capacity for tax treaty negotiations to avoid concluding problematic tax treaties. This note provides guidance for members of regional economic communities in the developing world on what should and should not be included in a regional tax treaty and how to design on a common tax treaty policy framework for use in negotiations of bilateral tax treaties with non-members.


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## INTRODUCTION

India and Singapore have, on December 30th, 2016, entered into a protocol ("Protocol") amending the existing double taxation avoidance agreement ("Existing Treaty") between the two contracting states. While the Protocol was only notified in 2019, the Ministry of Finance of the government of India issued a press release to this effect on December 30, 2016. The two most significant matters of contention in the study of both corporate agreements and Joint Venture agreements are the jurisdiction of any dispute related to any disagreement whatsoever has been granted to the Courts of the Republic of India. Secondly, the Double Taxation Avoidance Agreement (DTA) between India and Singapore has been totally misconstrued in both the agreements.

In lieu of the Doctrine of Precedence, Section 3 of the RECIPROCAL ENFORCEMENT OF COMMONWEALTH JUDGMENTS ACT (CHAPTER 264) (Original Enactment: Ordinance 34 of 1921), the Republic of Singapore is bound by the Commonwealth rules and regulations to accommodate judgements promulgated in a court of law of the Republic of India. On 5th August 2019, two bills were introduced in the Singaporean Parliament: the Reciprocal Enforcement of Foreign Judgments (Amendment) Bill and the Reciprocal Enforcement of Commonwealth Judgments (Repeal) Bill.

The Reciprocal Enforcement of Foreign Judgments (Amendment) Bill was intended to:

1. Expand the scope of reciprocal recognition and enforcement of foreign judgments;
2. Boost Singapore's status as an international dispute resolution centre; and
3. Streamline the statutory regime for the enforcement of foreign judgments into a single statute.[i]

On 2 September 2019, the two bills were passed in Parliament. The Reciprocal Enforcement of Foreign Judgments (Amendment) Bill thus became the Reciprocal Enforcement of Foreign Judgments (Amendment) Act.

On 3 October 2019, The Reciprocal Enforcement of Foreign Judgments (Amendment) Act came into operation. The Reciprocal Enforcement of Commonwealth Judgments (Repeal) Act will provide for the repeal of RECJA on a date to be stipulated by the minister. Reciprocating countries currently recognized by the RECJA are expected to be transferred to the new regime. Indian Courts are included in the list, with the exception of the State of Jammu and Kashmir. Hence, in the jurisdiction of the Republic of Singapore, the scope of judgments which may be registered has been increased to include four further types of judgments:

1. Non-money judgments, which would include freezing orders, injunctions, and orders for specific performance.
2. Lower court judgments.
3. Interlocutory judgments.
4. Judicial settlements consent judgments and consent orders.

## LEGAL ANALYSIS

The more introvert discussion about the agreements is the exclusion of the provisions of the Double Taxation Avoidance Agreement (DTA) between India and Singapore is a tax treaty between two countries to avoid the double taxation of income that may flow between the two countries. Without the DTA, such income is liable to be double taxed i.e., two countries levy their own tax on the same income. This double taxation unfairly penalizes income flows between the countries and thereby discourages trade and commerce between the countries. To address this problem and to reduce the overall burden of a taxpayer, Singapore and India signed the DTA. Pursuant to the signing of the agreement, any income that is taxable in both the countries will be taxable only in one country according to the terms of the DTA. On such aspect is the inclusion for the ratio of proportion of royalties. Section 2 of the treaty clearly examines, elaborates, and indemnifies the contracting parties from a double taxation. Hence, without the application of the treaty, the withholding tax rate in Singapore for any royalties paid to non-residents is 10% whereas in India the withholding tax rate for any royalty paid to non-residents is 10% plus surcharge and cess.


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Under the DTA, the tax rate for royalties is 10-15% depending on the kind of royalty paid to non-residents. This aspect is in the favour of the INDIAN INVESTORS, as the royalties demanded with the damages occurred by the Franchisor are in total disagreement with a signed treaty. The damages sought by the Franchisor are of a high scale as well, as they demand a royalty based upon a 12-year agreement, if terminated, they demand the royalties in full, if the corporate agreement does not include any Force Majeure which alludes to the occurrence of a pandemic.[ii]

Another gross discussion is of assignments, perks, and dividends distribution amongst the shareholders. Since April 1, 2020, India has abolished the DDT and the dividends will be taxed in the recipient's hands. Instead, India has introduced a dividend withholding tax. The rate will be 10% for dividends paid to shareholders resident in India and 20% if paid to foreign investors (the India-Singapore DTA reduces this rate to 10 or 15% as described below). In Singapore, dividend distributions by a company are tax-free. Additionally, the recipient shareholder is also exempt from tax on dividend income. Article 13 of The DTA specifies the state in which capital gains are subject to tax.[iii] Another important aspect of the India-Singapore DTA is the limitation of the benefits clause that was introduced in the protocol signed between the countries in 2005. [iv]The amendment provides that any capital gains that arise on the sale of property or shares are taxable only in the country where the investor resides. This amendment proves beneficial to Singapore since the country does not levy any tax on capital gains. For instance, if a resident of Singapore sells shares of an Indian company, it will be exempt from capital gains tax both in India and Singapore. This is a very significant tax benefit of the DTA that is designed to encourage investment in India from Singapore-based businesses and companies. Hitherto, to avoid the misuse of this exemption especially by third-country residents who establish holding companies in Singapore to avail the capital gains exemption, the treaty added a "Limitation of Benefits (LOB)" clause.[v] Under this clause, a Singapore incorporated company will not be entitled to the exemption from capital gains if the sole purpose of the establishment of the company was to avail of this benefit. Additionally, companies that have negligible business operations in Singapore, with no continuity in business activities will not be entitled to this benefit. Furthermore, the courts of the Republic of Singapore are accounting for profits looks on its face, albeit deceptively simple. The court will account for profits either by

deducting costs and expenses from receipts, or alternatively, if the profits are generated by a chain of activities and the infringing acts subsist within the chain, by apportioning profits. In examining the profits, the court will only examine the profits made in fact and will not examine counterfactuals.

## LIMITATION OF BENEFITS CLAUSE

Limited transitional provisions will be applicable. Disposal of such shares will be subject to a reduced tax of 50% of the domestic rate in India. This benefit will also be subject to the revised LOB clause. The LOB clause currently states that the capital gains exemptions will not be available if the affairs of the Singapore resident entity are arranged with the primary purpose to take advantage of such benefit.[vi] Similarly, shell or conduit companies, being legal entities with negligible or nil business operations or with no real and continuous business activities, will not be able to avail the benefits either. An entity is not deemed to be a shell or conduit company if:

- Its annual expenditure in Singapore is more than SGD 200,000 in Singapore during each of the two 12-month blocks in the immediately preceding period of 24 months from the date on which the capital gain arises
- It is listed on a recognized stock exchange of the country

## THE ADDUCED INFLUENCE ON FOREIGN DIRECT INVESTMENTS (FDI)'S IN INDIA

The Protocol does not affect the rate of tax applicable on interest income, which under the Existing Treaty may be as high as 15%. It is intriguing to observe that the tax treaty between India and Mauritius provides for a capped withholding tax rate of 7.5% on interest payments. Under the Protocol, only capital gains arising from an alienation of shares will be subject to source-based taxation. The Protocol does not impact capital gains arising from a disposal of debentures, partnership interests and other capital assets, including indirect transfers of Indian company shares effected by a two-tiered Singapore structure. The express provision on applicability of domestic law and measures concerning the prevention of tax avoidance or tax

evasion allows for the implementation of stringent domestic tax measures, such as the general anti-avoidance rules (GAAR) provisions set to be rolled out. Accordingly, while investments made through hybrid instruments including compulsory convertible debentures would continue to be exempt from tax in India, such transactions may be otherwise affected by GAAR provisions and other domestic measures that may be applicable. Indian companies intending to set up Singapore-based holding structures may be required to re-assess the implications post-transition period. While grandfathering provisions will continue to provide existing benefits to such cross-border structures, with the GAAR set to come into force, and ongoing efforts by the government of India to introduce source-based taxation in its tax treaties, offshore investors may be required to reconsider their transaction structures. In lieu of the aforementioned legal analysis, the investor is liable to offer a genuine respite to the Corporation, by allowing a smooth transition to the process of termination and the Corporation benefits from the post pandemic laws of grants, exercised in the Republic of Singapore.[vii]

## INCOME TYPES UNDER DTAA

Under the Double Tax Avoidance Agreement, NRIs don't have to pay tax twice on the following income earned from:

- Services provided in India.
- Salary received in India.
- House property located in India.
- Capital gains on transfer of assets in India.
- Fixed deposits in India.
- Savings bank account in India.

If income from these sources is taxable in the NRI's country of residence, they can avoid paying taxes on it in India by availing the benefits of DTAA.


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## DTAA METHODS

The benefit of DTAA can be used by two methods:

- Tax credit: Tax relief under this method can be claimed in the country of residence.
- Exemption: Tax relief under this method can be claimed in any one of the two countries.

Key provisions of India and Singapore DTA

The key provisions of the India-Singapore DTA include:

## BUSINESS PROFITS

According to the DTA, the profits of an enterprise are taxable only in the state where the business operations are carried out. If a Singapore-based business has a permanent establishment in India, the profits attributable to the permanent establishment will be taxed only in India.

In case Singapore and India did not have a DTA in force, the profits of the business could be taxed in Singapore as well as in India. The profits generated by the permanent establishment would bear the tax burden twice in such a case. This highlights the importance of the DTA and how it avoids double taxation of business profits.

## INTEREST, ROYALTY, AND DIVIDEND

The DTA specifies the rates applicable in the case of income from interest, royalties, dividend etc. Generally, the tax rates in the DTA are lower than the prevailing tax rates in the countries that are parties to the agreement.

***Interest***

Without the treaty, the withholding tax rate in Singapore for any interest paid to non-residents is 15% whereas in India the rate ranges from 5 – 20% (depending on the type of interest) plus surcharge and cess. Under the DTA the tax on interest is as follows:


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10% of the gross amount, if interest is paid on the loan which is granted by a bank carrying on banking business or any such financial institution.

15% of the gross amount in all other cases.

***Royalty***

Without the treaty, the withholding tax rate in Singapore for any royalties paid to non-residents is 10% whereas in India the withholding tax rate for any royalty paid to non-residents is 10% plus surcharge and cess. Under the DTA, the tax rate for royalties is 10-15% depending on the kind of royalty paid to non-residents.

***Dividends***

Prior to April 1, 2020, India did not levy any withholding tax for dividends. However, the company paying dividends bears a dividend distribution tax (DDT) of 15% (plus surcharge and cess) when paying the dividend to its shareholders. The recipient shareholder is exempt from paying any tax on dividend. Thus, in India, the shareholders today pay no tax on dividends but the company pays a tax.

From April 1, 2020, India has abolished the DDT and the dividends will be taxed in the recipient's hands. Instead, India has introduced a dividend withholding tax. The rate will be 10% for dividends paid to shareholders resident in India and 20% if paid to foreign investors (the India-Singapore DTA reduces this rate to 10 or 15% as described below).

In Singapore, dividend distributions by a company are tax-free. Additionally, the recipient shareholder is also exempt from tax on dividend income.

The India-Singapore DTA states that dividend income is taxed in the recipient’s state of residence as follows:

10% if the recipient company holds a minimum of 25% of the shares of the company paying dividend and

15% in all other cases.

The introduction of the new dividend tax regime by India creates an outstanding opportunity for substantial tax savings by making a Singapore company a shareholder of an Indian


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company. This can be very beneficial to both foreign and Indian shareholders. For more on this, see our blog post Singapore benefits from India's new dividend tax policy.

## CAPITAL GAINS

Article 13 of The DTA specifies the state in which capital gains are subject to tax. Another important aspect of the India-Singapore DTA is the limitation of the benefits clause that was introduced in the protocol signed between the countries in 2005.

### *The Singaporean Corporate terms*

1. The law of the Republic of Singapore makes it clear Termination of the Franchising Agreement As the franchising agreement is essentially a contract, the means of "getting out" of the franchising agreement is largely governed by contract law;
2. As a franchisor based in India, they will no longer be entitled to all your profits. You will only receive royalty which is a percentage of gross revenue. Instead of entitled to 100% of your revenue as the business owner, you will only be limited to only about 4 to 10% and probably some product sales, rebates, and advertising fees. Singapore Legal practice determines this matter though invariable articles, clauses, and codes;
3. Singapore law stipulates, A company can be wound up while it is still solvent, or after it has become insolvent.[viii] Solvent companies can voluntarily apply to be wound up through a **"members' voluntary winding up"**. On the other hand, there are 2 ways in which insolvent companies can be wound up:
    a) Voluntarily applying to be wound up through a **"creditors' voluntary winding up".**
    b) Being involuntarily wound up (e.g., upon application of a creditor) by an Order of Court through a **"compulsory winding up";** The Competition Act came into force in 2005 and has retrospective

effect, applying equally to all agreements made before the effective date of the Act or the relevant provisions. In general, the Competition Act prohibits any agreement that has the object or effect of preventing, restricting or distorting competition within Singapore. Therefore, a franchise agreement will be rendered void to the extent that the franchise agreement prevents, restricts, or distorts such competition. This paragraph is not in line with the Singaporean Act, but can be taken as Prima facie, as part of the doctrine of precedence;

4. Guarantees from individuals and companies to the franchisor are generally enforceable. Under such a guarantee, the guarantor's liability is defined as having to procure that the franchisee performs its obligations, as well as having to perform him or herself if the franchisee fails to do so; however, it is not common practice for local franchisors to require a guarantee, except for in exceptional cases where the franchisor may have reservations about the franchisee's finances or ability to operate the franchise.
5. The FLA, Singapore's national franchise association, has provided a Code of Ethics for franchising, binding only on FLA's members, and which contains provisions on disclosure requirements, contracts regarding existing franchisees, proper selection of franchisees, provision of proper training and business guidance, standards of conduct, notice of breach, rights of termination and dispute resolution, among others. [ix]
6. Non-solicitation clauses are part of a larger group of clauses known as restraint of trade clauses, which restrict the liberty of employees to carry on trade with parties in the future. Another example of a restraint of trade clause is the non-compete clause. A non-compete clause is however distinct from a non-solicitation clause. Non-compete clauses aim to prevent former employees from competing against their former company, usually by prohibiting them from plying their trade or skill or engaging in businesses in certain markets and geographies for a certain limited period of time. This is unlike non-solicitation clauses, which aim to prevent former employees from soliciting clients or employees of their previous company instead.[x]

7. Regarding the relationship between a Franchisor and a Guarantor, whereas the law clearly stipulates that the resident Singaporean NRI, who is not the financial guarantor in any ways whatsoever. The Guarantor needs to be defined. Also, the damages cannot only be related or dictated by the Franchisor but is distributed evenly across the board. Any written legal Agreement shall be governed by the rules and regulations of the Republic of Singapore and cannot be construed as an independent agreement;
8. For any legal contract, the Paid-Up Capital, it must be defined in the beginning. The assignment of shares and their distributions will follow. Hence there can be no assignment whatsoever based upon this clause. This Statement cannot be construed as part of a Singaporean legal document;
9. Sale of Goods Act (Cap. 393)[xi] which applies to any contract for the sale of goods in Singapore. In most instances, the failure to set out the purchase price of the goods would be fatal to an agreement between the parties. However, section 8 of the Sale of Goods Act provides that the Singapore courts are entitled to look to the course of dealings between parties or failing which, the buyer must pay a reasonable price for the goods.
10. Section 188 of the CA requires that minutes of all board meetings are to be kept in books within 1 month of the meeting. Minutes are to be recorded by the company secretary and signed by the chairman of that meeting or the chairman of the subsequent board meeting. Under section 156 of the CA[xii], directors who have an interest in any transaction or proposed transaction with the company have a duty to disclose the nature of this interest during board meetings. Regarding Merger and acquisitions, Private **M&A** transactions in **Singapore** are largely unregulated by statutory **law**, and parties are generally free to negotiate the terms and conditions of the sale and purchase.[xiii]
11. The Supreme Court of Singapore holds that: "If at any time for any reason any **Event of Default** (as defined in the Loan Agreement) has occurred and is continuing, the [Defendant] shall have sixty (60) days from the date of occurrence of the **Event of Default** to remedy such default insofar as such default is capable of being remedied."[xiv] Time limitation is equally

important in such a clause. Hence please be advised that the event of default cannot be done unilaterally, as Nothing can be done immediately in a JVA.

12. As per the limitation of Liability is concerned, Please be advised that the laws of Republic of Singapore distinctively propose Unfair Contract Terms Act, in which Section 2 of UCTA holds: "UCTA prohibits a person from using a contract term or notice to exclude his own liability for negligent acts causing death or personal injury on another."[xv]
13. The legal jargon to accommodate this matter is known as the "Simulated contract". Under **Singapore law**, a **contract** is only formed if:
    a) a party makes an "offer" of some good or service,
    b) the other party or parties "accepts" that offer, and
    c) some consideration passes between the parties. ... The acceptance must be unqualified and can be expressed through words or conduct. Hence a voluntarily liquidation of either assets, products, premises, accounts, cannot be taken unilaterally;[xvi]
14. The Model Constitution with the Accounting and Corporate Regulatory Authority (ACRA), inculcates that board meetings are to be conducted according to paragraphs 83 to 94 of the Model Constitution. Salient features of the two clauses for the board meetings that are set out in the Model Constitution include:

a) Any director may request the company secretary to summon a board meeting

b) A quorum of 2 directors is required unless another number is decided upon

c) If the quorum requirement is not met, the director(s) can only act in order to increase the number of directors or summon a general shareholders' meeting. (All other actions taken by the director(s) will be considered invalid and have no effect)

d) Directors may elect a chairman for their meetings and decide how long the chairman will remain in office

e) If a director has an interest in any transaction or proposed transaction which is discussed during a board meeting, he must not vote in respect of this transaction (explained below)

f) If there is no consensus on issues that arise during a meeting, a vote will be held and the majority of directors will decide on the course of action that the company shall take

g) If votes are split equally between opposing sides, the chairman of the meeting shall cast the final and deciding vote

h) If there is only one director, he may pass a resolution by making a record of the resolution (e.g., writing or typing it) and signing the record[xvii];

## CONCLUSION

The income of an NRI may sometimes be liable to tax in India as well as in the foreign country. To avoid such double taxation, the Government of India has entered into Double Taxation Avoidance (DTA) Agreements with over 70 countries as per Section 90. Hence, an NRI should refer to such DTA Agreement, if necessary. If there is no DTA Agreement of India with Singapore and the income becomes taxable in India as well as in Singapore, then it is provided by Section 91 that unilateral relief at the lower of the two rates of tax will be given in India to a resident in India. Nonetheless, due to the close proximity of the both the countries due to commonalities in history, culture, business, arts, and laws, NRIS'S do possess tactical advantages due to the DTA. Hence due to the overwhelming presence of NRI's in Singapore, on work passes, Permanent Residence status and the Long-Term Visit Passes (LTVP's), Indians have prevailed as a common work force in Singapore. The DTA is certainly a great help for businessmen and working class alike.

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## ENDNOTES

[i] Damian Taylor, The Dispute Resolution Review *Law reviews*. (New York: Law Business Research Limited, 2020), 333.

[ii] This cause alludes to a simulated Contract in the Contract aw of Singapore, but cannot be applied the way it is mentioned, as the Pandemic Force Majeure are in place in the Republic of Singapore. Consideration Contract Law

Singapore. **Consideration** is something of value (as defined by the **law**), requested for by the party making the promise (the 'promisor') and provided by the party who receives it (the 'promisee'), in exchange for the promise that the promisee is seeking to enforce

[iii] https://www.iras.gov.sg/media/docs/default-source/e-tax/etaxguide_cit_tax-exemption-under-section-13(12)_(8th-edition).pdf?sfvrsn=58e31470_0

[iv] Prevention of Treaty Abuse: Peer Review Report on Treaty Shopping, Inclusive Framework on BEPs, Action 6 *OECD/G20 Base Erosion and Profit Shifting Project*. (Paris:OECD, 2019), 45.

[v] Kiyoshi Nakayama, How to Design a Regional Tax Treaty and Tax Treaty Policy Framework in a Developing Country- *IMF How To Notes*. (New York: International Monetary Fund, 2021), 15.

[vi] Dezan Shira & Associates, Chris Devonshire-Ellis, Doing Business in India. (New York: Springer Science & Business Media, 2012), 33.

[vii] Eduardo Baistrocchi, A Global Analysis of Tax Treaty Disputes-Cambridge Tax Law Series. (Cambridge: Cambridge University Press, 2017), 77.

[viii] https://singaporelegaladvice.com/law-articles/winding-up-company-singapore/#:~:text=A%20company%20can%20be%20wound,members'%20voluntary%20winding%20up%E2%80%9D.

[ix] http://www.flasingapore.org/

[x] https://singaporelegaladvice.com/law-articles/non-compete-clauses-in-employment-contracts/

[xi] The Sale of Goods Act 1979 is an Act of the Parliament of the United Kingdom which regulated English contract law and UK commercial law in respect of goods that are sold and bought. The Act consolidated the original Sale of Goods Act 1893 and subsequent legislation, which in turn had codified and consolidated the law

[xii] https://sso.agc.gov.sg/Act/CoA1967

[xiii] https://thelawreviews.co.uk/title/the-energy-mergers-and-acquisitions-review/singapore

[xiv] IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE [2017] SGHC 181. Originating Summons No 81 of 2017. In the Matter of the Deed of Addendum dated 24 September 2014 between S I2I LIMITED and GLOBALROAM GROUP LTD. https://www.elitigation.sg/gdviewer/SUPCT/gd/2017_SGHC_181

[xv] https://singaporelegaladvice.com/law-articles/unfair-contract-terms-act-ucta-in-singapore/

[xvi] https://www.corporateservices.com/singapore/contract-law-of-singapore/

[xvii] https://www.acra.gov.sg/how-to-guides/setting-up-a-local-company/constitution


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