



ATLANTIC TREATY ORGANIZATION
RESOLUTE SUPPORT



DIPLOMATIC NOTE

DATE: 12 April 2021

TO: Ministries of the Government of the Islamic Republic of Afghanistan (GIROA)

SUBJECT: Diplomatic Note Regarding Definition of "Normally Resides," Exemption from Taxes, Dividend Taxes, Awards, and Relief for Named Contractors

1. References:

- a. Military Technical Agreement (MTA) between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan, signed 5 December 2001.
- b. Diplomatic Note 202 between the United States (U.S.) and the Islamic Transitional Government of Afghanistan, signed 26 September 2002.
- c. Agreement between the North Atlantic Treaty Organization (NATO) and GIROA on the Status of NATO Forces and NATO Personnel Conducting Mutually Agreed NATO-Led Activities in Afghanistan (SOFA), signed 30 September 2014.
- d. Security and Defense Cooperation Agreement (BSA) between GIROA and the U.S., signed 30 September 2014.
- e. Ministry of Finance "Private Ruling for Entities Mentioned in the Joint Committee Proposal of Ministry of Finance, Resolute Support, and the U.S. Embassy," dated 18/12/1395 (Aug 3, 2017).
- f. Supreme Court Interpretation and Analysis Directorate Letter 1880/727, dated 28 July 2015.
- g. Diplomatic Note 16-449, signed 8 March 2016.

2. This Diplomatic Note serves to emphasize that in accordance with the MTA (reference a.) Annex A, Section 3, paragraphs 8 and 9; Diplomatic Note 202 (reference b.) paragraphs 4 through 6; the NATO SOFA (reference c.) Article 15, paragraphs 3 through 5; and the U.S. Security and Defense Cooperation (BSA) (reference d.) Article 17, paragraphs 3 through 5, contractors that are non-Afghan entities, and their employees that do not "normally reside" in Afghanistan are not subject to taxation.

3. Prior to the signing of the NATO SOFA (reference c.) and the U.S. BSA (reference d.), the controlling agreements were the MTA (reference a.), and Diplomatic Note 202 (reference b.). Those agreements apply to contract activities after 26 September 2002 and prior to 1 January 2015. Reference e. serves as a resolution regarding conflicts in interpretation and implementation of tax issues regarding U.S. and NATO contractors that arose during that period. However, the same interpretations are applicable to current issues that are controlled by the SOFA and the BSA.

ATLANTIC TREATY ORGANIZATION
RESOLUTE SUPPORT
DIPLOMATIC NOTE

4. The language describing the tax exemption for NATO and U.S. contractors is substantially the same in the Diplomatic Note 202 (reference b.), the NATO SOFA (reference c.), and the U.S. BSA (reference d.).
 - a. Diplomatic Note 202, paragraph 4, states: "The Government of the United States, its military and civilian personnel, contractors and contractor personnel shall not be liable for any tax or other similar fees assessed within Afghanistan."
 - b. The NATO SOFA, Article 15, paragraph 3, states: "NATO Contractors shall not be liable to pay any tax or similar or related charges assessed by the Government of Afghanistan within the territory of Afghanistan on their activities, and associated income, relating to or on behalf of NATO Forces under a contract or subcontract with or in support of NATO Forces."
 - c. The U.S. BSA, Article 17, paragraph 3: "United States contractors shall not be liable to pay any tax or similar or related charges assessed by the Government of Afghanistan within the territory of Afghanistan on their activities, and associated income, related to or on behalf of United States forces." (emphasis added)
5. The tax exemption in the MTA, Section 4, paragraph 14, is even more expansive as it also exempts Afghan companies and individuals from taxes. It states in relevant part, "ISAF will be allowed to contract direct with suppliers for services and supplies in Afghanistan without payment of tax or duties . . . local personnel hired by ISAF will . . . be exempt from taxation on the salaries and emoluments paid to them by ISAF".
6. While the issues addressed herein are limited to contract activities covered by the BSA and the SOFA, the historical agreements, and the resolution of disagreements over the terms of those agreements, show the intent by the U.S., NATO, and GIROA to exempt taxation under the most broad interpretation of terms.
7. As interpreted by the the Ministry of Finance ruling (reference e.) and the Supreme Court Letter of Interpretation (reference f.) this exemption includes all taxes including "business receipt taxes, annual *income taxes*, employee withholding taxes, legal and professional services taxes, insurance taxes, and *dividend taxes*." (emphasis added)
8. Given the similarity of the language between the NATO SOFA, the U.S. BSA, the MTA, and Diplomatic Note 202 defining what taxes are exempted, they all should be interpreted as exempting the same taxes, which are all taxes. This is consistent with the ruling of the Ministry of Finance (reference e) which held that U.S. and NATO contractors were not liable for any tax, including dividend taxes and income taxes. Therefore, the MoF's ruling should be extended to taxes covered by the NATO SOFA and the U.S. BSA.
9. The term "contractor" is defined in the U.S. BSA as "any persons and legal entities who are supplying goods and services in Afghanistan to or on behalf of the United States under a contract or subcontract, with or in support of United States Forces." This definition is the same as the definition under the NATO SOFA with the exception that under the SOFA contracts are "with or in support of NATO, NATO Member States, or Operational Partners." The term contractors includes prime contractors, subcontractors, and their employees. This is consistent with the interpretation of the term "contractors" as it was used in Diplomatic Note 202 (reference b.) and the Ruling of the Ministry of Finance (reference e.).

ATLANTIC TREATY ORGANIZATION
RESOLUTE SUPPORT

DIPLOMATIC NOTE

10. The Supreme Court Letter of Interpretation (reference f.) makes it clear Article 111, paragraph 2, of the Income Tax Law holds that when an international agreement is in conflict with the Tax Law, the international agreement prevails, and those contracts are excluded from Article 111, paragraph 1. This is consistent with international jurisprudence which holds that International Agreements supersede local and national law. Therefore, the Tax Law does not apply to contracts covered by references a., b. c., or d.

Scope of Audits

11. Recently, the Ministry of Finance conducted audits on several NATO and U.S. Contractors and determined they owed taxes on contracts in support of NATO and U.S. forces. While the Government of the Islamic Republic of Afghanistan may conduct audits to determine what if any taxes are owed, the audits conducted went beyond the scope of what has been agreed on by the NATO SOFA and the U.S. BSA, as well as procedures that have since been developed.

12. Only questions should be whether the contractor is an Afghan entity and whether the contracts were in support of NATO and U.S. activities. Those are the facts that determine whether there is any tax liability. Information gathering that goes beyond the scope of answering those two questions exceeds the scope of the SOFA and BSA agreement.

13. Information sought during an audit should be limited to the information contained in the NATO/U.S. Contractor Supplementary Information Form (NUCSIF). The NUCSIF serves to standardize and streamline the information required by Ministry of Finance (MoF)-Revenue Department to process RS and USFOR-A contractors' tax exemption request in accordance with the NATO SOFA and U.S. BSA. NUCSIF is the format that NATO, U.S., and GIROA implemented in 2018, and revised on 1 June 2020.

Definition of "Normally Resides"

14. As emphasized in Article 111, paragraph 2, of the Income Tax Law, as well as the Supreme Court Interpretation (reference f.) the provisions of the NATO SOFA and the U.S. BSA supersede Afghan Tax Law.

15. Given that "normally reside" is not defined in the SOFA and BSA, GIROA's Tax Dispute Resolution Board attempted to define "normally reside" in accordance with the Afghan Tax Law definition of "residency" under Article 2 of the Tax Law. That definition categorizes anyone who is in Afghanistan more than 183 days as a "resident." The NATO and U.S. object to the application of this definition to NATO and U.S. contractors. Under the Supreme Court Ruling and Tax Law Article 111, the Tax Law definition does not apply. The definition of "residency" under the Tax Law is not the same as "normally reside." Also, it does not follow international jurisprudence to attempt to define terms in an international agreement based on the laws of one country.

16. NATO and the U.S. agree that Afghan contractors are subject to taxation by GIROA. Diplomatic Note 16-449 (reference g.), dated 8 March 2016 makes clear that the tax exempt provisions of Diplomatic Note 202 do not cover Afghan contractors. According to Diplomatic Note 16-449 (reference g.), an Afghan contractor is "a company incorporated under the laws of Afghanistan or companies established in foreign countries where the majority of shareholders are Afghan nationals or business interests."

ATLANTIC TREATY ORGANIZATION
RESOLUTE SUPPORT

DIPLOMATIC NOTE

17. The U.S. BSA, Article 17, paragraph 5 states: "United States contractor employees who do not normally reside in Afghanistan and United States contractor employees who are not Afghan nationals shall not be liable to pay any tax or similar or related charges assessed by the Government of Afghanistan within the territory of Afghanistan on their activities, and associated income, relating to a contract or subcontract with or in support of United States forces." Further, paragraph 3 states, "Afghan legal entities shall not be exempt from corporate profits tax . . ." Paragraph 4 states that Afghan law with regards to employer withholding of personal income tax will apply to "contractor employees who normally reside in Afghanistan . . . and Afghan nationals."

18. These provisions make it clear that the Government of Afghanistan may: (1) apply Afghan law on income tax withholding for Afghan local nationals, (2) apply Afghan law on income tax withholding for Afghan individuals that "normally reside," (3) apply Afghan law regarding corporate profits taxes to Afghan legal entities.

19. There are several factors that NATO and the U.S. recommend GIRoA consider to determine if a contractor "normally resides" in Afghanistan. These factors have been used by the international community for decades to answer the question of whether someone normally resides in a country, on a case-by-case basis.

- a. Was the employee living in Afghanistan when he or she was hired to work for NATO or the U.S. contractor in Afghanistan? If so, how long and what was he or she doing in the country? If the employee was not living in the country, had he or she lived in the country before?
- b. Has the person ever applied for residency, a driver's license, or taken advantage of local or social services?
- c. Does the employee have a legal relationship with a citizen of the country, like a wife/husband?
- d. Does the employee own real estate, a vehicle, other significant property, or have commercial interests in the country?

20. It is common for NATO and U.S. contractors to remain in Afghanistan for long periods of time, however, they do not "normally reside" in Afghanistan because at the end of the contract, they return to their place of normal residence outside Afghanistan. The only purpose for them being in the country of Afghanistan is the completion of the contract requirements. Just because these contractors are located in Afghanistan for an extended period of time, sometimes in excess of 183 days, does not cause them to abandon their normal place of residency. The place where they "normally reside" is the the place they return to after completion of their contract. On the other hand, individuals who are normally, regularly, and for reasons other than their employment with NATO or the U.S., present in Afghanistan, are subject to Afghan law regarding income withholding.

ATLANTIC TREATY ORGANIZATION
RESOLUTE SUPPORT

DIPLOMATIC NOTE

Dividend Taxes

21. A dividend tax is a tax on corporate profits that is dispensed to shareholders. As is evidenced by the decision by the Supreme Court (reference f.) and the resulting MoF ruling (reference e.), dividend taxes are specifically included in the types of taxes for which NATO and U.S. contractors are exempted from under the MTA and Diplomatic Note 202. The Supreme Court is clear that the Afghan Tax Law does not apply where an international agreement exists exempting taxes.

22. Given the similarity in language between Diplomatic Note 202, the BSA, and the SOFA, it is clear the drafters of those agreements intended the same exclusions to apply. Only Afghan corporate entities are subject to corporate profits taxes, including dividend taxes.

23. Further, the SOFA and BSA make clear that, "Afghan legal entities shall not be exempt from corporate profits tax. . ." This means that only corporations formed under the incorporation laws of Afghanistan may be taxed on dividends. Non-Afghan legal entities that are performing work under contract for the NATO and U.S. may not be charged taxes on their corporate profits.

24. Diplomatic Note 16-449 (reference g.), can be used to define what an Afghan legal entity is. An Afghan contractor is "a company incorporated under the laws of Afghanistan or companies established in foreign countries where the majority of shareholders are Afghan nationals or business interests."

25. Some members of the MoF have argued that a tax on dividends is not a tax on a corporate entity, but rather on individuals. However, this argument ignores the fact that a corporation is owned by the shareholders. Therefore, a tax on dividends is a tax on the owners of the corporation, which is a tax on the contracting company itself. Further, the SOFA and BSA are clear that the tax exclusion includes taxes on activities and associated income. A profit is income associated with the completion of the contract.

26. Additionally, Afghanistan has no jurisdiction over individual shareholders, particularly those who have never been in Afghanistan. Under the SOFA and BSA, the only taxes GIRoA can impose on NATO and U.S. contracts and contractors are (1) income tax withholding for Afghan local nationals, (2) income tax withholding for Afghan individuals that "normally reside," (3) corporate profits taxes on Afghan legal entities.

Awards and Bonuses

27. Some members of the MoF have argued that a tax on awards and bonuses is allowed because those words are not specifically included in the SOFA and BSA. Awards and bonuses are part of the salaries of individual contractor employees, typically tied to work they have performed in especially hazardous conditions or locations, or because they were required to be in Afghanistan and away from their normal residence for a long period of time. The taxes on these awards and bonuses is a tax on the income of employees, as is specifically excluded by the SOFA and BSA.

- a. The NATO SOFA, Article 15, paragraph 3, states: "NATO Contractors shall not be liable to pay any tax or similar or related charges assessed by the Government of Afghanistan within the territory of Afghanistan on their activities, and associated

ATLANTIC TREATY ORGANIZATION
RESOLUTE SUPPORT

DIPLOMATIC NOTE

income, relating to or on behalf of NATO Forces under a contract or subcontract with or in support of NATO Forces.”

- b. The U.S. BSA, Article 17, paragraph 3: “United States contractors shall not be liable to pay any tax or similar or related charges assessed by the Government of Afghanistan within the territory of Afghanistan on their activities, and associated income, related to or on behalf of United States forces.” (emphasis added)

Specific Contractor Issues

28. **Janus Global Operations must be refunded their 30% advance tax deposit from GIROA, amounting to \$913K USD.** Janus Global Operations was required to pay a 30% advance tax deposit based on improperly being assessed taxes on dividends and employee bonuses. Resolute Support and U.S. Forces-Afghanistan contracting personnel are prohibited from paying such taxes and fees, and will not be reimbursed by NATO and U.S. organizations. This tax collection was a direct violation of the SOFA and BSA.

Resolution of Disputes

29. In accordance with the SOFA and BSA, the Tax Dispute Resolution Board (TDRB) does not have authority to issue final decisions for contracts covered by the NATO SOFA and the U.S. BSA. All disputes must be handled by the Afghanistan-NATO Implementation Commission and the Joint Commission (ANIC/JC). The TDRB should immediately refer disputes of U.S. and NATO contractors to the ANIC/JC Finance Working Group for resolution.

30. In accordance with the above rulings and agreements, and the negotiations of the Finance Working Group, part of the ANIC/JC, NATO and the U.S. seek official concurrence and resolution of the above matters related to tax exemption, specifically those issues related to dividend taxes, awards and bonuses, the definition of “normally resides,” the scope of audits, and the violations specific to the named contractors.

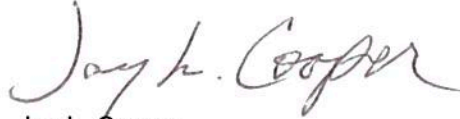
31. **Immediate notification to all Afghan Ministries and their subordinate organizations is required to ensure implementation and full adherence to the steps outlined in this Diplomatic Note, MTA, Diplomatic Note 202, NATO SOFA, and the U.S. BSA.**

32. This Diplomatic Note is signed and endorsed by the Afghanistan and NATO/U.S. Co-Leads for the Finance Working Group of the ANIC and the JC. The ANIC oversees the adherence to the Afghanistan-NATO SOFA, and the JC oversees the adherence to the United States-Afghanistan BSA. The points of contact for the Diplomatic Note are Ms. Jennifer Allen, JC Secretariat, at 070-414-7519, jennifer.i.allen3.civ@mail.mil, or Ms. Nivia Butler, ANIC Secretariat, at 070-309-3649, cj4iachead@hq.rs.nato.int.

ATLANTIC TREATY ORGANIZATION
RESOLUTE SUPPORT

DIPLOMATIC NOTE

This letter is prepared in both English and Dari. Both texts are equally authentic, the texts are in conformity with each other, and have the same meaning in all substantive respects.



Jay L. Cooper
Senior Executive Service, U.S. Navy
Chief of Resource Management, CSTC-A
& Co-Lead, Finance Working Group
Afghanistan-NATO Implementation Commission
& Joint Commission

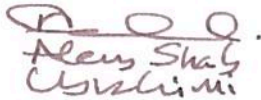
Endorsements:



Ms. Amina Ahmady
Director General - Customs
Ministry of Finance
& Co-Lead, Finance Working Group
Afghanistan-NATO Implementation Commission
& Joint Commission

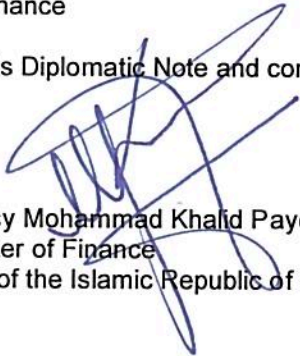


Mr. Nasrullah Durrani
Director General - Revenue
Ministry of Finance

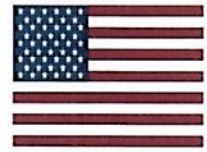


Mr. Alem Shah Ibrahim
Deputy Minister - Customs and Revenue
Ministry of Finance

I reviewed this Diplomatic Note and concur with the contents.



His Excellency Mohammad Khalid Payenda
Acting, Minister of Finance
Government of the Islamic Republic of Afghanistan



ANIC/JC EXECUTIVE STEERING COMMITTEE CONCURRENCE

In accordance with the Implementing Arrangement of the Agreement between the North Atlantic Treaty Organization (NATO) and the Islamic Republic of Afghanistan on the Status of NATO Forces and NATO Personnel Conducting Mutually Agreed NATO-led Activities in Afghanistan, dated 30 September 2014 (NATO SOFA), and the Security and Defense Cooperation Agreement between the United States of America and the Islamic Republic of Afghanistan, dated 30 September 2014 (U.S. BSA), NATO and U.S. acting in our capacity as co-chairs of the Afghanistan-NATO Implementation Commission (ANIC) and the Joint Commission (JC) Executive Steering Committees, agree that the following are approved and should be signed by their respective governmental agency: Diplomatic Note Regarding Definition of "Normally Resides," Exemption from Taxes, Dividend Taxes, Awards, and Relief for Named Contractors, dated 12 April 2021.

This text is prepared in both English and Dari. Both texts are equally authentic; the texts are in conformity with each other, and have the same meaning in all substantive respects.

Executed 5 May 2021 in Kabul, Afghanistan.

Thorsten Poschwatta
Lieutenant General, German Air Force
Chief of Staff, Headquarters Resolute
Support & Co-Chair, Afghanistan-NATO
Implementation Commission, Executive
Steering Committee

Mr. Abdullah Raqeebi
Government of the Islamic Republic of Afghanistan
Assistant Minister of Defense, Acquisition Technology & Logistics
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