



COMPARATIVE STUDY OF TAX TREATIES IN MAURITIUS

(Part II)

Comparative Study of Tax Treaties in Mauritius

Our second series on the Comparative Study of Tax Treaties in Mauritius will be centred around the scope of taxes covered by the tax treaties and the residency status set out under Articles 2 and 4 respectively of the Double Taxation Avoidance Agreements (DTAAs).

ARTICLE 2

Taxes Covered

This Article describes the terminology and nomenclature relating to the taxes covered by a particular treaty which are normally the taxes in force at the time of signing of the treaty and these taxes are specifically identified. Mention is also made in the Article of the bodies that impose those taxes. In Mauritius, taxes on income are levied only by the Government. There is no political subdivision in Mauritius and no local authority is authorised to collect taxes on income.

Apart from taxes on income imposed on behalf of the Contracting State, Mauritius tax treaties with Bangladesh, Barbados, China, Croatia, Estonia, Guernsey, Hong Kong and Monaco refer to taxes on income imposed by local authorities also in Article 2.

Mauritius tax treaties with Mozambique, Namibia, Seychelles, Singapore, South Africa and Uganda refer also to political subdivisions.

Mauritius tax treaties with Cyprus, Egypt, France, Germany, Ghana, Malta, Republic of Congo, Rwanda, Qatar, Sweden, Thailand, Tunisia and the UAE also mention local authorities and political subdivisions.

In the Mauritius- Belgium tax treaty, mention is made of political subdivision or local or territorial authorities.

The tax treaties Mauritius has with Cabo Verde and Italy also mention political or administrative subdivisions or local authorities.

The purpose of including these terms in a particular treaty is to accommodate treaty partner's requirement where local / territorial authorities or political/ administrative subdivisions may be responsible for the imposition of taxes on income and capital.

It is interesting to note that the article under the abridged Mauritius tax treaty with Australia shall not apply to taxes imposed by states, municipalities, local authorities or other political subdivisions, or possessions of a Contracting State.

In addition to the taxes specifically mentioned in the treaty , the treaty also applies to all identical or substantially similar taxes which are imposed by either Contracting States after the date of signing of the treaty. This provision allows changes in domestic law after the negotiation of tax treaties and prevent the treaties from becoming inoperative in case of changes to the taxation laws by one or both of the contracting states , provided that consequent to such changes, the taxes are identical or substantially similar to taxes on income and capital covered by that country.

The summary in the following pages have been drawn from our analysis of the Mauritius DTAA's:

Among the plethora of DTAA's signed with the different countries, the scope of the taxes covered include both income tax and capital gains tax coupled with additional provisions.

The additional provisions empower the Competent Authorities to inform the Contracting States of any changes in their respective domestic tax laws. If both Contracting States desire to amend any provisions of the Articles, without any consequential effect on the general principles of the agreement, such amendments may be mutually amended by way of Exchange of Notes.

In all DTAA's entered into by Mauritius ,with the exception of the DTAA's with Kuwait and UK, the Mauritius tax covered is the income tax. The DTAA signed between Mauritius and Kuwait defines the Mauritius Tax as Income Tax and Capital Gains (Morcellement Tax). Likewise, the DTAA signed between Mauritius and the United Kingdom also defines the Mauritius Tax as Income Tax and Capital Gains (Morcellement Tax).

Mauritius has not introduced any Capital Gains Tax Legislations. The Capital Gains (Morcellement Tax) has been repealed in 2006. It was payable by any person who was involved in land parcelling and was calculated on the profit. The seller had to pay the capital gains (morcellement) tax or land transfer tax , whichever was the higher. It is not understood why such a tax was included in the 2 treaties cited above in as much as this tax was administered by the Registrar General who has no jurisdiction on income tax matters.

The taxes covered by the countries with whom Mauritius has signed in Tax Treaties are as set out in the boxes below:

AFRICA

CABO VERDE

Taxes Covered

- Single Income Tax;
- Surcharge for fire brigade services

REPUBLIC OF CONGO

Taxes Covered

- Tax on Income from Individuals;
- Tax on income from companies

MADAGASCAR

Taxes Covered

- Tax on income from companies;
- General Tax on individuals;
- Tax on income from moveable property, including withholding taxes

MOZAMBIQUE

Taxes Covered

- Business Profits Tax;
- Labour Income Tax;
- Complementary Tax

EGYPT

Taxes Covered

- Income from salaries and wages;
- Income from commercial and industrial activities;
- Income from professional activities (independent personal services);
- Income derived from immovable property including income from agricultural land, building and furnished units;
- The tax on profits of legal entities (corporations and partnerships); the duty for the development of the financial resources of the State;
- Tax withheld at source; the supplementary taxes imposed as percentage of taxes mentioned above or otherwise

ESWATINI

Taxes Covered

- The normal tax;
- The non-resident shareholders' tax;
- The non-residents' tax on interest;
- The non-residents' tax on entertainments and sports.

NAMIBIA

Taxes Covered

- Income Tax;
- The non-resident shareholders' tax;
- The petroleum income tax

RWANDA

Taxes Covered

- Personal Income Tax;
- Corporate Income Tax;
- Withholding Taxes;
- Tax on rent of immoveable property

SOUTH ARICA

Taxes Covered

- The Normal Tax;
- The Secondary Tax on companies;
- The Withholding Tax on royalties;
- The Tax on foreign entertainers and sportspersons

SEYCHELLES

Taxes Covered

- Business Tax;
- Petroleum Income Tax

BOTSWANA, GHANA, LESOTHO & UGANDA

Taxes Covered

- Income Tax

TUNISIA

Taxes Covered

- Tax on Income from Individuals;
- Tax on income from companies

ZIMBABWE

Taxes Covered

- Income Tax;
- Branch Profits Tax;
- The non-resident shareholders' tax;
- The non-residents' tax on interest;
- The non-residents' tax on fees;
- The non-residents' tax on royalties;
- The Capital Gains Tax

AMERICA

BARBADOS

Taxes Covered

- The Income Tax (including premium income tax);
- The Corporation Tax (including the tax on branch profits);
- The petroleum winning operations tax

AUSTRALIA

AUSTRALIA

Taxes Covered

- Income Tax

ASIA

HONG KONG

Taxes Covered

- Profits Tax;
- Salaries Tax;
- Property Tax

INDIA

Taxes Covered

- Income Tax, including surcharge;
- Surtax

MALAYSIA

Taxes Covered

- The Income Tax;
- The Supplementary Income tax, that is, development tax;
- The Petroleum Income Tax

PAKISTAN

Taxes Covered

- The Income Tax;
- The Super tax;
- The Surcharge

PEOPLE'S REPUBLIC OF CHINA

Taxes Covered

- The Individual Income Tax;
- The Income Tax for enterprises with foreign investment and foreign enterprises;
- The Local Income Tax

THAILAND

Taxes Covered

- The Income Tax;
- The Petroleum Income Tax

NEPAL, PEOPLE'S REPUBLIC OF BANGLADESH, SINGAPORE & SRI LANKA

Taxes Covered

- The Income Tax

EUROPE

CROATIA

Taxes Covered

- Profit Tax;
- Income Tax;
- Local Income Tax

CYPRUS

Taxes Covered

- The Income Tax;
- The Corporate Income Tax;
- Special Contribution for the defence of the Republic;
- The Immovable Property Tax;
- The Capital Gains Tax

FRANCE

Taxes Covered

- The Income Tax;
- The Corporation Tax, including any withholding tax, prepayment (précompte) or advance payment with respect to the aforesaid taxes

BELGIUM

Taxes Covered

- The Individual Income Tax;
- The Corporate Income Tax;
- The Income Tax on legal entities;
- The Income Tax on non-residents;
- The Special Levy assimilated to the individual income tax;
- The Supplementary Crisis Contribution, including the prepayments, the surcharges on these taxes and prepayments, and the supplements to the individual income tax

GERMANY

Taxes Covered

- Income Tax;
- Corporation Tax;
- Trade Tax

LUXEMBOURG

Taxes Covered

- The Income Tax on individuals;
- The Corporation Tax;
- The Capital Tax;
- The Communal Trade Tax

ITALY

Taxes Covered

- Personal Income Tax;
- Corporate Income Tax

SWEDEN

Taxes Covered

- The National Income Tax;
- The Withholding Tax on dividends;
- The Income Tax on non-residents;
- The Income Tax on non-resident artistes and athletes;
- The Municipal Income Tax;
- The Net Wealth Tax

ESTONIA, GUERNSEY, JERSEY, MALTA & MONACO

Taxes Covered

- Income Tax

UNITED KINGDOM

Taxes Covered

- Income Tax;
- Corporation Tax;
- Trade Tax

MIDDLE EAST

OMAN

Taxes Covered

- The Company Income Tax;
- The Profit Tax on Commercial & Industrial Establishments

STATE OF QATAR

Taxes Covered

- Taxes on Income

UNITED ARAB EMIRATES

Taxes Covered

- Income Tax;
- Corporate Tax

KUWAIT

Taxes Covered

- The Corporate Income Tax;
- The Contribution from the net profits of the Kuwaiti shareholding companies payable to the Kuwait Foundation for the Advancement of Science (KFAS);
- The Zakat

It is uncommon in practice for treaty partners to notify about changes in their domestic laws due to the constant revision of the local legislations and the availability of such information on the website of the Revenue Authorities.

At the time of writing this article, a recent judgement delivered by the High Court of India in the case of Telstra caught our attention and has been quite illuminous.

The 'Orbiter Dictum' of the case was around amendments brought into the domestic legislations which, as per the Court, cannot substantially alter or override the treaty provisions. The basic and fundamental concepts of a treaty, per se, lay the foundation of entering into the agreement and treaty partners cannot broaden the scope of taxes covered for the sake of interpretation or clarity, which in this context refers to the definition of royalties.



The Court adjudicated as follows:

"The changes in domestic legislation cannot override the treaty provisions and unilateral amendments in the royalty provisions under the Act cannot overcome the treaty provisions.

The theory of ambulatory approach may apply to treaty interpretation. However, the same cannot empower a treaty country to undertake an amendment to basic and fundamental concepts of the treaty. The unilateral amendments which travel beyond explaining an obscure or doubtful expression appearing in a treaty and which enlarge or broaden the scope of taxation itself would clearly not fall within the permissible scope of the ambulatory approach."

The mere fact that the domestic laws are subject to amendments does not automatically imply that the scope of taxes should be reviewed, without having regard to the provisions made at the time of negotiation. The scope of taxes covered is key to hamper any outliers.

ARTICLE 4

Residency Status

The article on residency status is of paramount importance in the face of emerging cross-border transactions and employment.

Several case laws have stemmed from various controversial disputes revolving around the residency status on an international front. The treaty provisions facilitate the determination of the residence status of a company or an individual in cases of dual residency.

Individual

The residence status of an individual is principally determined by way of domicile and residence.

In several instances, an individual may be resident in both Contracting States. It is therefore crucial to determine the country of tax residence for allocation of the taxing rights to the Competent Authorities.

The provisions construed under Article 4 of the DTAA set out the different residency tests that should be applied to resolve the complexities of dual residency and arbitrate the residency status revolving around the Tie Breaker Rules.

Test 1: Permanent home

The individual shall be deemed to be a resident only at his state in which he has a permanent home available to him.

Test 2: Centre of vital interests

If the individual has a permanent home in both Contracting States, his centre of vital interests in terms of his personal and economic relations are assessed.

The centre of vital interests involves the family ties, employment, investments, place of conduct of operations, political reach and any activities related to the individual's personal and economic relations.

Test 3: Habitual abode

If neither the place of permanent home nor the centre of vital interests can be determined, the second test will rely on the place of habitual abode.

The frequent visit and time spent in any foreign jurisdictions may count towards the place of habitual abode.

Test 4: Nationality

If the individual has an habitual abode in both states or in neither of them, he shall be deemed to be a resident only of the state in which he is a national.

Test 5: Mutual agreement

If the individual is a national of both contracting states or neither of them, then the residency status will be mutually agreed by the Competent Authorities.

Important: Note that the above tests must be applied successively until residence for the purposes of the treaty is allocated to one state or the other. In other words, once a test is conclusive, it is unnecessary to apply subsequent tests.

Company

The residency status of a company is established in view of its place of incorporation or place of management.

A company may be incorporated in one jurisdiction but its place of effective management and controlled is found to be in another jurisdiction. The latter will be conferred the rights to tax the profits of the company under the norms of the treaty.

In the absence of any tax treaty between two jurisdictions, the domestic laws of the respective countries will prevail, and may result in potential double taxation, with the possibility of any unilateral relief which may be provided in the domestic legislations to mitigate the tax impact.

The tax treaties under the UN Model largely conform to the OECD Model with similar Tie Breaker Rules surrounding the residency tests.

The DTAAs which Mauritius have signed so far, 46 in total, include the above rules inextricably.




Generally, in the DTAAs signed by Mauritius, the tie-breaker rule to established tax residence in the case of dual residence is the place of effective management. The only exception is the Mauritius-South Africa DTAA which provides that in the case of dual resident companies, the residence status has to be settled between the tax authorities of Mauritius and South Africa by mutual agreement. In the absence of such an agreement, the person concerned is not entitled to any treaty benefits.

Of note, the articles on the "Taxes Covered" and "Resident" play a pivotal role in the comprehension and benchmarking of taxes covered by the DTAAs and in establishing the residency status of an individual alongside a company.




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