



## Global Business Tax Alert Sharp Insights

The Government of India and Mauritius release Protocol amending the Double Taxation Avoidance Agreement (“DTAA”) between India and Mauritius

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**In this issue:**

Comments

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The Government of India and Mauritius, on May 10, 2016, amended the Convention between the Government of the Republic of India and the Government of Mauritius, for the avoidance of double taxation and the prevention of fiscal evasion, with respect to taxes on income and capital gains, and for the encouragement of mutual trade and investment. On May 10, 2016, the Government of India had also issued a press release, which has separately been covered by Deloitte alert GBTA/26/2016 dated May 11, 2016.

### **Protocol introduces following changes:**

#### **Article 5 (Permanent Establishment)**

- The Protocol has amended the meaning of the term 'Permanent establishment' ("PE") to include "furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only where activities of that nature continue (for the same or connected project) for a period or periods aggregating more than 90 days within any 12-month period".
- Accordingly, Service PE would now come within the ambit of PE.

#### **Article 11 (Interest)**

- The Protocol has amended the interest article to tax interest payments arising in a Contracting State, which is derived and beneficially owned by any bank carrying on a bona fide banking business which is a resident of the other Contracting State, at a rate not exceeding 7.5%. The same was earlier exempt from tax in the Contracting State where it arose (i.e. the source State). The Protocol has 'grandfathered' interest arising from such debt-claims existing on or before March 31, 2017.
- Further, in cases where the interest was taxable in the Contracting State in which it arose, the tax rate applicable was based on the domestic law of the Contracting State. The Protocol has now been amended to tax such interest at a rate not exceeding 7.5% (if the beneficial owner is a resident of the other Contracting State).

#### **Article 12A (Fees for Technical Services)**

- The Protocol has inserted Article 12A to cover 'Fees for technical services' ("FTS") under its ambit. Previously, due to absence of any specific article, and the same being not taxable under 'Other income' article as well, there was a view that FTS was not taxable under the India Mauritius DTAA. FTS would now be taxable at a rate not exceeding 10% if the beneficial owner is resident of the other Contracting State.

- The term FTS has been defined to mean payment of any kind, other than those mentioned in Articles 14 (independent personal services) and 15 (dependent personal services), as consideration for managerial or technical or consultancy services, including the provision of services of technical or other personnel.
- If FTS is effectively connected with a PE / fixed base in the Contracting State (from which independent personal services are performed), then the same would be taxable under the provisions of Article 7 (business profits) / Article 14 respectively.

### **Article 13 (Capital Gains - shall be amended with effect from April 1, 2017)**

- Gains from the alienation of shares, acquired on or after April 1, 2017, in a company which is resident of a Contracting State may now be taxed in that State. Previously, these were taxable only in the Contracting State where the alienator was resident. However, protection to investments in shares acquired before April 1, 2017 has been provided.
- A transitional provision has been introduced in respect of such capital gains arising during the period from April 1, 2017 to March 31, 2019, wherein the tax rate will be limited to 50% of the domestic tax rate of the state of residence of the company whose shares are being alienated, subject to the fulfillment of the conditions in the 'Limitation of Benefits' ("LOB") Article (Article 27A). Full tax rate will be applicable after this period.

### **Article 22 (Other Income)**

- A new clause has been inserted, wherein income of a resident of a Contracting State not dealt with in other Articles of the India Mauritius DTAA, and arising in the other Contracting State, may also be taxable in the other Contracting State. This is a non-obstante clause and overwrites earlier provisions of this Article which provided for residence-based taxation.
- Accordingly, 'Other income' would now also be taxable in the Contracting State in which it arises.

### **Article 26 (Exchange of Information)**

- The Protocol has amended Article 26 of the India Mauritius DTAA to make it more descriptive and stimulate the flow of exchange of information. The competent authorities of the Contracting States shall now exchange information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States, insofar as the taxation thereunder is not contrary to the Convention.
- It has now been explicitly agreed that the information may be disclosed in public court proceedings or in judicial decisions. Further, the information received by a Contracting State

may now be used for other purposes, provided such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorizes such use.

- If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. Further, restrictions placed in paragraph 3 of this Article shall not be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information, or if the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

#### **Article 26A (Assistance in the Collection of Taxes)**

- The Protocol has inserted Article 26A to provide that the Contracting States shall lend assistance to each other in the collection of 'revenue claim'.
- The term 'revenue claim' as used in this Article means an amount owed in respect of taxes of every kind and description imposed on behalf of the Contracting States, or of their political sub-divisions or local authorities, insofar as the taxation thereunder is not contrary to this Convention or any other instrument to which the Contracting States are parties, as well as interest, administrative penalties and costs of collection or conservancy related to such amount.
- This Article is aimed at ensuring that the States are able to collect their revenue with the help of the other State (where they are unable to do so on their own). The other State would assist in collecting the same in accordance with the provisions of laws applicable to the enforcement and collection of the other State's own taxes as if the same were a 'revenue claim' of that other State. The other State would also take relevant 'measures of conservancy' in respect of such 'revenue claim', at the request of the first-mentioned Contracting State.
- Proceedings with respect to the existence, validity or the amount of a 'revenue claim' of a Contracting State shall only be brought before the courts or administrative bodies of that State. Nothing in this Article shall be construed as creating or providing any right to such proceedings before any court or administrative body of the other Contracting State.

## **Article 27A (LOB)**

- A resident of a Contracting State shall not be entitled to the benefits of Article 13(3B) inserted by this Protocol (i.e. in relation to applicability of 50% tax rate for sale of shares acquired on or after April 1, 2017 and sold on or before March 31, 2019, which has been discussed earlier) if its affairs have been arranged with the primary purpose of taking advantage of the benefits in Article 13(3B).
- Further, a 'shell/conduit company' that claims it is a resident of a Contracting State shall not be entitled to the benefits of Article 13(3B) of this Convention. A 'shell/ conduit company' is any legal entity falling within the definition of 'resident' with negligible or nil business operations or with no real and continuous business activities carried out in the Contracting State.
- A resident of a Contracting State is deemed to be a 'shell/conduit company' if its expenditure on operations in that Contracting State is less than Mauritian Rs.1,500,000 or Indian Rs. 2,700,000 in the respective Contracting State as the case may be, in the immediately preceding period of 12 months from the date the gains arise.
- A resident of a Contracting State is deemed not to be a 'shell/conduit company' if:
  - a) it is listed on a recognized stock exchange of the Contracting State; or
  - b) its expenditure on operations in that Contracting State is equal to or more than Mauritian Rs.1,500,000 or Indian Rs.2,700,000 in the respective Contracting State as the case may be, in the immediately preceding period of 12 months from the date the gains arise.
- The LOB provisions seem to be broadly in line with the India Singapore DTAA and Protocol.

## **Entry Into Force**

- Each of the Contracting States shall notify to the other the completion of the procedures required by its law for the bringing into force of this Protocol. This Protocol shall enter into force on the date of the later of these notifications.
- The provisions relating to Capital gains shall have effect in both Contracting States for assessment year 2018-19 and subsequent assessment years.
- The provisions relating to PE, Interest, FTS, Other income and LOB shall have effect:
  - in the case of India, in respect of income derived in any fiscal year beginning or after 1 April next following the date on which the Protocol enters into force;
  - in the case of Mauritius, in respect of income derived in any fiscal year beginning on or after 1 July next following the date on which the Protocol enters into force.

- The provisions relating to Exchange of Information and Assistance in the Collection of Taxes shall have effect from the date of entry into force of the Protocol, without regard to the date on which the taxes are levied or the taxable years to which the taxes relate.
- Notification by the Indian Government in the Official Gazette is awaited.

## Comments

It is clear that India has attempted to address long standing issues of treaty abuse and round tripping of funds by amending the India Mauritius DTAA. The biggest positive is that there will be no 'retroactive' impact as investments made prior to April 1, 2017 have been 'grandfathered' – this is in line with the Government's commitment to have a stable and predictable taxation regime.

This amendment would have ramifications, for investments into India from Singapore, as the benefits of residence-based taxation of capital gains, on sale of shares under the India Singapore Protocol/ DTAA, are linked to the India Mauritius DTAA. However, to avoid any confusion, India may well move forward to renegotiate the India Singapore DTAA in line with the India Mauritius DTAA.

A strong framework has also been put in place to facilitate exchange of information and mutual assistance in collection of taxes.

All in all, the amendment is in line with India's commitment to the base erosion and profit shifting ("BEPS") initiative and strong intent to curb the menace of double non-taxation.

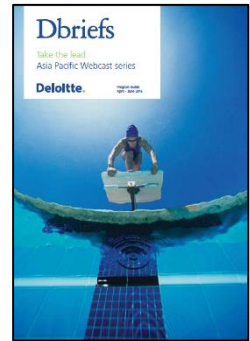
Also, it is interesting to note that the Protocol does not incorporate 'main purpose test' and 'bona fide business test' explicitly as mentioned in the press release issued by the Indian Government, but only says that the benefits of reduced capital gains taxation on sale of shares (available from April 2017 to March 2019) would not be available if the affairs were arranged with the primary purpose to take advantage of such benefits (or if it is a 'shell / conduit company'). This appears to be a subjective test and no criteria have been laid down to be fulfilled.

Further, the Protocol is not clear about the taxability of 'indirect transfers' as the amendment only includes taxability of alienation of such shares which are acquired in a company which is resident of a Contracting State. In 'indirect transfers', alienation of shares may be of an entity which is resident of the other Contracting State.

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# Contacts

## Ahmedabad

19th Floor, Shapath –V  
S.G.Highway  
Ahmedabad-380015  
Gujarat-India  
Tel: + 91 (079) 66827300  
Fax: + 91 (079) 66827400

## Bangalore

Deloitte Centre, Anchorage II,  
100/2, Richmond Road,  
Bangalore 560 025.  
Tel: +91 (080) 6627 6000  
Fax: +91 (080) 6627 6010

## Chennai

No.52, Venkatanarayana Road,  
7th Floor, ASV N Ramana Tower,  
T-Nagar,  
Chennai 600 017.  
Tel: +91 (044) 6688 5000  
Fax: +91 (044) 6688 5050

## Coimbatore

Shanmugha Manram  
41, Race Course,  
Coimbatore  
Tamil Nadu - 641018  
Tel: + 91 (0422) 439 2801  
Fax: +91 (0422) 222 3615

## Delhi/Gurgaon

Building 10,  
Tower B, 7th Floor,  
DLF Cyber City,  
Gurgaon 122 002  
Tel : +91 (0124) 679 2000  
Fax : + 91 (0124) 679 2012

## Hyderabad

1-8-384 and 385, 3rd Floor,  
Gowra Grand S.P.Road,  
Begumpet,  
Secunderabad – 500 003.  
Tel: +91 (040) 6603 2600  
Fax: +91 (040) 6603 2714

## Kolkata

Bengal Intelligent Park Building Alpha,  
1st floor, Block EP and GP Sector V,  
Salt Lake Electronics Complex,  
Kolkata - 700 091.  
Tel : + 91 (033) 6612 1000  
Fax : + 91 (033) 6612 1001

## Mumbai

Indiabulls Finance Centre,  
Tower 3, 28th Floor,  
Elphinstone Mill Compound,  
Senapati Bapat Marg, Elphinstone (W),  
Mumbai – 400013  
Tel: + 91 (022) 6185 4000  
Fax: + 91 (022) 6185 4101

## Pune

106, B-Wing, 7<sup>th</sup> Floor,  
ICC Trade Tower,  
Senapati Bapat Road,  
Pune – 411 016.  
Tel: + 91 (020) 6624 4600  
Fax: +91 (020) 6624 4605

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