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“Not notifying the India-Mauritius treaty is a smart move”

Despite the amended India-Mauritius tax treaty, there are opportunities that still make Mauritius an attractive jurisdiction going forward. One of them is structuring debt investments, says Meyyappan Nagappan, senior member of the International Tax practice at Nishith Desai Associates, India. He was in Mauritius for a workshop organized by Parker Randall Business School. The latter also shares his comments about the Multi-Lateral Instrument (MLI) under the Organisation for Economic Co-operation and Development's Base Erosion Profit Shifting (BEPS) and affirms that Mauritius has "*made a smart move*" by not notifying the India-Mauritius treaty under the MLI. This makes Mauritius a less risky route

Herrsha Lutchman-Boodhun

What are some of the opportunities for Mauritius after the amended Protocol between India and Mauritius?

After the amended Protocol, and specifically since Mauritius has not notified India as one of the treaties that would be subject to the Multi-Lateral Instrument (MLI), there are lots of opportunities that make Mauritius an attractive jurisdiction going forward. Mostly it's on the debt side, as Mauritius still enjoys a comparative advantage with respect to other jurisdictions. For instance, the headline rate of tax in Mauritius is 3% whereas in Netherlands it is 25%, and in Singapore it's about 17%.

The withholding tax rates are also much lesser. It's only 7.5% in Mauritius as compared to 15% in other treaties. Therefore this makes Mauritius more attractive and that's probably where most of the action is going to be seen.

Additionally, because the tax treaty with India is not being notified under the MLI, it means that the benefits under the India-Mauritius treaty will not be qualified by the principal purpose test (PPT). It means that treaty benefits with respect to other jurisdictions will require satisfaction of additional conditions which are very subjective tests. So, it's relatively risk free to avail the 7.5% interest withholding cap under the India-Mauritius treaty, which can be subject to some litigation in the case of Netherlands or Singapore. These are the biggest advantages that Mauritius offers, which is a bigger scope and arbitrage for structuring debt investments, and more certainty because of lack of Limitation on Benefits (LoB) clauses under the India-Mauritius Treaty (except for the capital gains benefit till 2019).

With other countries having notified their treaties with India under the Multi-Lateral Instrument, does not this make Mauritius less competitive?

Not really. Mauritius has signed up to the MLI but it has chosen not to notify the India treaty alone. So, with respect to other countries' treaties, I think the MLI will apply. But as far as the most important India-Mauritius corridor is concerned, with respect to it, the MLI will not apply. It doesn't make Mauritius less competitive. In fact, it brings down the level of uncertainty compared to the other treaties because other jurisdictions that have notified India will be subject to subjective tests before any treaty benefit can be obtained, which would not be required in the case of Mauritius. From an investor perspective, for me, the Mauritius route is more certain or less risky in certain ways.

With the amended Protocol, many local operators have expressed their worries about losing business with regards to India. Do they really need to be worried?

One of the biggest changes of the Protocol is with respect to the capital gains exemptions. In that respect, maybe there is a little bit of a change because some of the funds may consider it equally convenient to shift to another jurisdiction which is comparable to Mauritius. Therefore, Mauritius does not have the clear cut advantage as it used to be before. But with respect to debt investments, I think today, competitively speaking, it enjoys the most competitive advantage. Obviously, compared to the previous situation where income may have been exempted, which is now taxable up to 7.5% in India, there may be an absolute increase in the cost involved; but in a competitive way, it is still a lot lesser than taxes on such income when investing into India through other jurisdictions.

If people are talking about loss of business, I think it is going to be compensated by an increase of work in other respects. It depends on the kind of work we are looking at.

Also, because of certain regulatory restrictions in India, there are certain spaces for banks and other entities to explore in terms of debt structuring when it comes to India.

You talked about *"income from other sources"* which apparently is quite confusing and complex when it comes to Mauritius. What should we really expect from it?

Most of the provisions I discussed during the workshop was introduced keeping black money in mind, especially those used by Indian residents for investments into shell companies. Unfortunately, because of the indirect transfer tax provisions – which deems the share of a foreign company to be situated in India – the likelihood of such income from other sources provisions being applied to a Mauritian share has become a reality. Although that was not the intention of the legislature, unfortunately that law today is worded in such a way that these questions may come up. That's not something that most investors may be aware of, unless you are directly investing or familiar with changes in the Indian local laws. In such situations, sometimes treaty benefits are available and sometimes they are not. I was just discussing the different possible safeguards that people can take to minimize their business risks accordingly.

What about the *"indirect transfer tax"*?

Indirect transfer tax basically concerns a foreign company, including a Mauritian company, that owns assets in India and the Mauritian company does not have any substantial assets outside India. In such a situation, the shares of the Mauritian company would basically derive its value from the assets in India. Parties could then either directly sell the Indian assets, in which case tax would have to be paid in India because the Indian assets are located in India or the alternative was to sell the shares to Mauritian company.

But normally, if a Mauritian company share was being sold, tax would not have had to be paid in India because the Mauritian company shares are situated in Mauritius. Therefore, tax would have had to be paid in Mauritius and not in India.

However, India has changed its laws some years back. Now, if a foreign company, like a Mauritian entity, derives substantial value from Indian assets then the Mauritian company's shares will be deemed to be situated in India and therefore even if the Mauritian company's shares are transferred, India will tax it.

Such transfers are called indirect transfers since the parties are not directly transferring Indian assets. This has resulted in a lot of complications including reactionary amendments by the Indian Government. The Indian Government has been introducing clarifications or amendments every year to fix it.

With the application of the MLI, are treaties still of relevance?

Yes. In fact it makes them very relevant because it increases subjective risks that may close certain opportunities as it becomes difficult to assess the tax cost on a certain transaction or in running a cross-border business.

The MLI has increased the subjectivity and riskiness in an investor's mind as to whether they can actually get the treaty benefit or not. By keeping India out of it, I think Mauritius has played a smart move, especially because the India-Mauritius treaty has just been recently negotiated. Therefore, arguably there is no reason to further amend the treaty or subject it to additional conditions under the MLI.