

Tax Hotline

June 01, 2004

WILL CHANGE IN GOVERNMENT IMPACT THE MAURITIUS TREATY ROUTE?

The new government has taken charge in India following general elections, 2004. The new government being a coalition government has drafted a Common Minimum Programme ("CMP"), which sets out the broad charter for governance to be followed during its tenure. One of the items listed in the CMP is to stop misuse of Double Tax Avoidance Agreements ("DTAAs"). This has led to a flurry of speculations that India would be reviewing / renegotiating certain DTAAs, such as the India-Mauritius DTAA. The international investors have raised concerns about this development.

The Finance Minister, Mr. P. Chidambaram, has categorically stated that there will not be an en-masse review of any DTAAs by India. However, his government would be interested in checking abuse of DTAAs by Indian residents floating offshore vehicles in treaty partner countries to avoid Indian taxes and launder money. This issue was thrown up in the 2002 securities scam following which India entered into an MoU (in December 2002) with Mauritius whereby the security market regulators of India and Mauritius have agreed to assist in discovery of and taking action against insider trading, market manipulation and other fraudulent practices in securities dealing by the residents of either country. Further, Circular 1 dated February 10, 2003 issued by the Central Board of Direct Taxes ("CBDT") would effectively address such cases of misuse as it clarifies that where a company is found to have its place of effective management in India, then notwithstanding the fact that it is incorporated in Mauritius, it would be taxed in India as per provisions of the India Mauritius DTAA.

India has entered into over 75 bilateral tax treaties. For a country, which has been traditionally regarded as a high tax jurisdiction, letting go of the right to tax is not easily acknowledged by the revenue department. Accordingly, tax officers at lower level ("IT authorities") have been reluctant to give effect to the beneficial provisions of the DTAA. This issue became more sensitive with regard to the India Mauritius DTAA. On account of certain tax concessions offered by the India Mauritius DTAA (similar benefits having being conferred under DTAAs with Cyprus, UAE, etc.), the IT authorities have been skeptical about the bona fide of the non-residents claiming benefits thereunder and attempted to deny the eligibility of the India Mauritius DTAA in certain cases. This created an atmosphere of uncertainty for the non-residents, intending to invest in India. In October 2003, the Supreme Court of India ("SC") unequivocally set to rest the debate that stigmatized investments into India via Mauritius by upholding the validity and applicability of the India Mauritius DTAA. In its ruling, the SC observed that international treaties, including DTAAs, are negotiated based on certain political and economic considerations which is clearly articulated in the preamble to the India Mauritius DTAA that states that the DTAA has been entered into for the 'encouragement of mutual trade and investment'. In fact, the tax-treaty relationship between India and Mauritius dates back to the pre independence period of India and Mauritius under the erstwhile Indian Income Tax Act of 1922. The SC has also held in the absence of an anti-treaty shopping clause under the India Mauritius DTAA, third country residents could not be denied the benefits of the India Mauritius DTAA. Coincidentally, the SC has in yet another case, reported yesterday, reiterated that provisions of a DTAA (in relation to India-Malaysia) would override the provisions of domestic income tax law.

To conclude, it is very unlikely that the new government would review the India-Mauritius DTAA, barring the initiatives that it wishes to embark on to check abuse of DTAAs by Indian resident to launder money out of India. A unilateral denial of DTAA benefits by India would be viewed as a digression by India from the public international law principle of "pacta sunt servanda" and embarrass the government in its international obligations.

It is also reported that the finance minister will be visiting Mumbai this week to meet with FIIL representatives, SEBI officials and captains of Indian industry. He proposes to carry the message of his government's commitment to economic reforms to Mumbai and remove "lingering doubts" on CMP.

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