

# Tax Hotline

November 11, 2008

## "MAURITIUS IS OKAY" SAYS FIPB

After rejecting Foreign Direct Investment ("FDI") proposals from Mauritius for several months on the grounds of "treaty shopping" by following the Department of Revenue's ("DoR") reservations, the Foreign Investment Promotion Board ("FIPB") has finally laid to rest the controversy by rejecting the argument of treaty shopping, put forth strongly by the DoR for rejecting such FDI proposals.

This departure of the FIPB from the reservations cast by the DoR is evident from the clearance of a number of FDI proposals from Mauritius at its meeting held on October 24, 2008.<sup>1</sup>

The concept of 'treaty shopping' involves a case wherein a resident of a third country seeks to obtain the benefit of a double tax agreement between two other countries by interposing a company or other entity in one of the treaty countries.

Despite the fact that FDI from Mauritius accounts for nearly 43% of the total FDI into India<sup>2</sup>, FIPB, in the recent past, had rejected several of such investment proposals on the grounds of treaty shopping and other similar objections as were being advocated by the DoR.

The arguments put forth by the DoR were contradictory to the 'circular' issued by the Government of India, which clearly states that any company which has obtained a Mauritian certificate of residence would be entitled to the benefits of the India-Mauritius Double Taxation Avoidance Agreement ("Treaty").<sup>3</sup> The Supreme Court of India has also upheld the sanctity of the Treaty and the validity of investments made by companies resident in Mauritius into India.<sup>4</sup> Further, it also observed that there was no provision within the Treaty which excluded a third-country resident from setting up intermediate vehicles for availing Treaty benefits. The FIPB has rightly pointed out that the tax department can investigate such issues from a tax angle. This is a step in the right direction which clearly demonstrates that regulatory approvals for investment into India are separate from taxation issues. While FIPB may decide whether to permit investment into India based on the foreign investment policy, tax issues should not affect such decisions, and should be left open for the tax department to investigate into and litigate.

In a market already battered by turbulence and uncertainty, the new stance taken by the FIPB should provide significant relief to the India-focused investing community.

- Vivek Mimani & Parul Jain

1. <http://finmin.nic.in/fipbweb/downloadfile.asp?FileName=cases31102008.pdf>
2. [http://www.dipp.nic.in/fdi\\_statistics/india\\_fdi\\_July2008.pdf](http://www.dipp.nic.in/fdi_statistics/india_fdi_July2008.pdf)
3. Circular No. 789 dated April 13, 2000.
4. Union of India v. Azadi Bachao Andolan [2003] 132 Taxman 373/263 ITR 706 (SC). The following words of the Supreme Court are relevant: "There are many principles in fiscal economy which, though at first blush might appear to be evil, are tolerated in a developing economy, in the interest of long-term development. Deficit financing, for example, is one; treaty shopping, in our view, is another."

## DISCLAIMER

The contents of this hotline should not be construed as legal opinion. View detailed disclaimer.

This Hotline provides general information existing at the time of preparation. The Hotline is intended as a news update and Nishith Desai Associates neither assumes nor accepts any responsibility for any loss arising to any person acting or refraining from acting as a result of any material contained in this Hotline. It is recommended that professional advice be taken based on the specific facts and circumstances. This Hotline does not substitute the need to refer to the original pronouncements.

This is not a Spam mail. You have received this mail because you have either requested for it or someone must have suggested your name. Since India has no anti-spamming law, we refer to the US directive, which states that a mail cannot be considered Spam if it contains the sender's contact information, which this mail does. In case this mail doesn't concern you, please unsubscribe from mailing list.

## Research Papers

### FAQs on Setting Up of Offices in India

December 13, 2024

### FAQs on Downstream Investment

December 13, 2024

### Gaming Law 2024

December 12, 2024

## Research Articles

### The Revolution Realized: Bitcoin's Triumph

December 05, 2024

### The Bitcoin Effect

November 14, 2024

### Acquirers Beware: Indian Merger Control Regime Revamped!

September 15, 2024

## Audio

### Securities Market Regulator's Continued Quest Against "Unfiltered" Financial Advice

December 18, 2024

### Digital Lending - Part 1 - What's New with NBFC P2Ps

November 19, 2024

### Renewable Roadmap: Budget 2024 and Beyond - Part I

August 26, 2024

## NDA Connect

Connect with us at events, conferences and seminars.

## NDA Hotline

[Click here to view Hotline archives.](#)

## Video

### "Investment return is not enough" Nishith Desai with Nikunj Dalmia (ET Now) at FIH event in Riyadh

October 31, 2024

### Analysing SEBI's Consultation Paper on Simplification of registration for FPIs

**Scope of judicial interference and inquiry in an application for appointment of arbitrator under the (Indian) Arbitration and Conciliation Act, 1996**

September 22, 2024