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Post-negotiations of Indian tax treaties: Mauritius sizzles as the preferred jurisdiction for investment in India

Background

10th May 2016 was marked by the culmination of negotiations surrounding the India-Mauritius[1] Double Taxation Avoidance Agreement ("DTAA") when a protocol amending the DTAA was signed by both states. Shortly afterwards, the Indian authorities who have embarked on a crusade to overhaul their international tax treaty regime, wrapped up negotiations with Cyprus on 18th November 2016 when a revised India-Cyprus DTAA was signed, followed by the conclusion of a protocol amending the DTAA between India-Singapore on 30th December 2016.

Following the signing of the revised India-Cyprus DTAA in November 2016 and the rescission on 14th December 2016 of the notification that it previously served to Cyprus in November 2013 for being a non-cooperative jurisdiction for failure to provide information requested under the relevant provisions of the treaty, investor confidence in the use of treaty jurisdictions has been further enhanced.

It will be recalled that in 2005, the India-Singapore DTAA had been amended such that the benefits pertaining to capital gains would be co-terminus with the similar benefits proffered under the India-Mauritius DTAA. It therefore came as no surprise that the India-Singapore DTAA was subsequently revised in 2016.

Mauritius is now poised to regain its supremacy as the jurisdiction of choice for investors seeking to invest in India, as depicted in the table on the next page:

1. *If you missed the ITL newsletter on the India-Mauritius protocol that was signed in May 2016, you may wish to view it by clicking here.*

The advantages of India-Mauritius DTAA over India-Singapore DTAA and India-Cyprus DTAA

Clauses	Particulars	India-Mauritius DTAA	India-Singapore DTAA	India-Cyprus DTAA
Capital Gains	Grandfathering Provision - for shares acquired prior to 1st April 2017 Investments acquired in India before **1st April 2017** will be taxed in the investors' country of residence i.e. Mauritius/ Singapore/Cyprus where there is no capital gains tax.	**Yes** No limitation of Benefit (LOB) clause in DTAA	**Yes** LOB clause applies (see further below)	**Yes** No limitation of Benefit (LOB) clause in DTAA
	Transition Period – Capital gains on shares acquired after 1st April 2017 but disposed between 1st April 2017 and 31st March 2019 will benefit from **50% tax reduction** on the Indian domestic tax rate subject to the fulfillment of the LOB (see further below)	**Yes**	**Yes**	**No Transition Period**
Limitation of Benefits (LOB)	Applicability	**No** Except for capital gains arising during Transition period (01.04.17 – 31.03.19)	**Yes**	**No**
	Requirements	-Listed on a recognized stock exchange; or -Annual expenditure of INR 2.7m / Mauritian Rupees 1.5m **(circa USD 40k)**	-Listed on a recognized stock exchange; or - Annual expenditure of INR 5m / SGD 200,000 **(circa USD 74k)**	**N/A**
Interest	Indian withholding tax on interest arising on debt claims or loans contracted with Mauritian/Singaporean/Cyprus banks	**Exempt up to 31.03.2017** **7.5% thereafter**	**10%**	**10%**
	Indian withholding tax on other interest arising in India and payable to Mauritian/ Singaporean/ Cyprus residents	**7.5%**	**15%**	**10%**

Royalty	Indian withholding tax rate on royalties arising in India and paid to Mauritian/ Singaporean/ Cyprus residents	**15%** **(since domestic law has a rate of 10%, this can prevail)**	**10%**	**10%**
Fees for technical services	Indian withholding tax rate on fees for technical services arising in India and paid to Mauritian/ Singaporean/ Cyprus residents	**10%**	**10%**	**10%**
Applicability of the DTAA v/s Domestic laws (e.g. GAAR)	Prevalence of domestic laws over DTAA	**No**	**Yes**	**No**
PE: **- A Building site/ construction, installation/assembly projects or supervisory activities in connection therewith** **- Services including consultancy services by employees or other personnel**	Duration for which the activities are carried out in India to constitute PE in India	**>9 months** **>90 days within any 12 months period**	**>183 days** **>90 days in any fiscal year** **>30 days in any fiscal year (when services are performed for related enterprise)**	**>6 months** **>90 days within any 12 months period**

Concluding Remarks

The revised DTAA with Cyprus coupled with the rescission of the November 2013 notification and the latest protocol with Singapore have certainly appeased investors' qualms about using the Mauritius platform as the stage is now set for the latter to once again become the preferred jurisdiction for investment into India, especially through debt/interest-earning instruments.

The absence of a Transition Period in the revised Cyprus treaty alongside less favorable interest withholding tax rates in both the Cyprus and Singapore treaties are anticipated to curb investors' appetite for routing investment into India through these jurisdictions.

One of the most significant investor fears following the ratification of the latest India-Singapore Protocol by adding Article 28A which states that "*the DTAA shall not prevent a Contracting state from applying its domestic law and measures concerning the prevention of tax avoidance or tax evasion*", is that this could be interpreted in a manner such that the beneficial provisions in the India- Singapore DTAA can be overridden by domestic laws of India including the GAAR. Inevitably, these will be ruffling a few feathers amongst the investor community and create uncertainties around the India- Singapore DTAA.

Investors are therefore strongly recommended to seek expert advice on their existing structures as well as their forthcoming investment projects in India to carefully assess the jurisdiction that will cater for their business needs and be more beneficial to them.

About Intercontinental Trust Limited (ITL)

ITL is licensed by the Mauritius Financial Services Commission to provide a plethora of financial and fiduciary services such as structuring, formation and administration of companies, trusts, limited partnerships, foundations and funds; accounting and tax services; FATCA and Common Reporting Standards services; expatriate/relocation services.

ITL has a proven track-record that spans over more than 15 years and is located in Ebene, the financial centre of Mauritius. Over the years, ITL expanded its global presence and has opened offices in Singapore, Seychelles and representative offices in South Africa and Kenya.

Its innovative approach coupled with its ability to provide viable tailor-made solutions to the ever-evolving needs of the sophisticated financial market have played a pivotal role in its success.

Throughout the years, ITL's expertise gained international recognition and it has been made the recipient of several prestigious awards. Most recently, ITL won the accolade for the Best Corporate Finance Advisor of the Year 2016 by Private Equity Africa for the second year in a row.

For more information on the above or on how we can assist you in your endeavours, please do not hesitate to write to us on info@intercontinentaltrust.com or liaise with your usual contact person at ITL.

About ALMT Legal, Advocates & Solicitors

ALMT Legal is a dynamic and progressive full service Indian law firm that provides high quality Indian expertise with an international capability. With about 100 lawyers and 23 partners across offices in strategic commercial centres like Mumbai and Bangalore, ALMT has an established reputation as one of India's top bracket firms.

ALMT's practice areas encompass all aspects of Indian law and regulations ranging from corporate, commercial to tax, employment, dispute resolution, telecom, shipping, aviation and even immigration laws.

ALMT has been consistently recognized for its work in the field of M&A and Private Equity and has been ranked fifteenth in the list of most active PE Advisors and ninth most active M&A Advisors for Q1 2015 compiled by Venture Intelligence. IFLR1000 highly recommends ALMT for Banking, Energy & Infrastructure, Project Finance, M&A and Private Equity practices for 2015. Corporate Intl has just named ALMT Legal as the employment law firm of the year for 2016. Asia Law Profiles 2015 recommends ALMT for its Intellectual Property, Investment Funds, Private Equity, Shipping, Maritime & Aviation and Tax practices. India Business Law Journal has awarded ALMT Legal as the Law Firm of the Year 2014 in Aviation and Employment & Industrial Relations practice. Acquisition International 2014 has named us Corporate Tax Law Firm of the Year, India. Legal 500 2015 has recommended ALMT Legal in areas of Aviation, Banking & Finance, Capital Markets, Corporate/M&A, Dispute Resolution, Investment Funds, Technology- Media-Telecom (TMT), Real Estate, Shipping and Tax. Chambers Asia Pacific 2015 has recommended ALMT Legal as a leading firm in Corporate/M&A, Employment, Private Equity, Real Estate and Tax. We would be happy to provide specific deal lists, client feedback and preferences on request and subject to confidentiality.

For more information, please see www.almtlegal.com or send an e-mail to the attention of Mr. Aliff Fazelbhoy (afazelbhoy@almtlegal.com).