Tax treaty protocol between India & Mauritius amended

UP NORTH ADVISORS

Executive summary

- On March 13, 2024, the President of India, Smt Droupadi Murmu and Prime Minister Pravind Jugnauth of Mauritius witnessed the exchange of 4 agreements. One of which was Protocol to amend the India-Mauritius Double Tax Avoidance Agreement (‘DTAA’ or ‘tax treaty’) to make it compliant with Base Erosion and Profit Shifting (BEPS) Minimum Standards.
- The Preamble of DTAA has been amended to include that the intention of the tax treaty is to eliminate double taxation without creating opportunities for non-taxation through tax avoidance/ evasion including through treaty shopping arrangements.
- Article 27B has been inserted to incorporate Principle Purpose Test (PPT) rule in line with Article 7(1) of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (‘MLI’).
- The provisions of this Protocol will come into force from the date of entry into force of the Protocol without having regard to the date on which the taxes are levied or the taxable years to which the taxes relate.

In Detail

- As per the new Protocol, the tax treaty with India will be amended to alter the preamble, ensuring compliance with one of the four requirements of the BEPS Minimum Standards.
- The Action 6 Report outlines one of four BEPS minimum standards, where members of the BEPS Inclusive Framework agree to incorporate provisions in their tax treaties to address treaty shopping and prevent potential abuse, ensuring minimum level of protection against treaty abuse.
- The report also states that countries, at a minimum, should implement:
  - a Principal Purpose Test (PPT) together with either a simplified or detailed Limitation on Benefits(LOB) provision (or)
  - a PPT only (or)
  - a detailed version of LOB rule together with a mechanism that would deal with conduit arrangements not already dealt with in tax treaties.

- Mauritius signed the MLI in 2017 to prevent BEPS. MLI only applies to tax treaties categorised as 'Covered Tax Agreements' (CTA). India incorporated India-Mauritius tax treaty under the MLI, however, Mauritius opted not to list its treaty with India as CTA. Thus, the MLI would not apply to the India-Mauritius tax treaty. Mauritius has instead chosen to meet the Minimum Standard requirement by amending its DTAA with India.
- The amended Protocol provides that treaty benefits would not be available where it is reasonable to conclude that the principal purpose of any arrangement was to claim tax benefits. The protocol will come into force once both countries notify its implementation.

Key Takeaways

- It is pertinent to note the interplay between the Protocol and Circular 789 which states that Tax Residency Certificate (TRC) would constitute sufficient evidence for claiming treaty benefits under India Mauritius tax treaty which was also upheld by Hon'ble Apex Court in ***Union of India v. Azadi Bachao Andolan***;
- Considering the wording/ literature of the protocol with regards to date of entry into force, it appears that PPT can be applied to all existing investments and to investments made before April 1, 2017 which have been grandfathered under Article 13 of the DTAA.
- Therefore, a comprehensive analysis of Circular 789 alongside the Protocol might necessitate a deeper examination of the underlying structures (beyond the TRC) to ascertain if providing the benefit aligns with the treaty's objectives and intentions.
- Further, the Indian Revenue authorities also clarified in social media yesterday that the Protocol is yet to be ratified/ notified & and when the Protocol comes into force, queries, if any, will be addressed, wherever necessary.
- Considering the significant exposure of foreign overseas investments into the Indian market via Mauritius jurisdiction, it is important that there is clarity from the Indian revenue authorities in terms of applicability of this protocol especially in the context of grandfathered investments.
- There have been timely developments in India in the context of PPT test from a cross border tax treaty perspective. This only emphasises the importance placed by the Indian revenue authorities to assess the commercial rationale for any holding structure in place/ transactions where a tax treaty benefit is availed.

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