BIZCOMMUNITY

South Africa renegotiates double tax agreement with Mauritius

By Ernest Mazansky

12 Jun 2013

The much-anticipated renegotiated double tax treaty with Mauritius was recently signed and disclosed to the public. The new treaty, which is expected to come into effect in 2015, will impact on several existing tax structures.

Worth noting is the following:

- The treaty tie-breaker for companies with dual residence will no longer be the company's place of effective management (POEM). Rather, the company's treaty residence will be determined by mutual agreement between the South African and Mauritian Revenue Authorities (MAP). By doing this, the certainty of a legislated provision is being substituted for the uncertainty of a negotiation between revenue authorities and in which the taxpayer will play no direct part. The dispute can also not be determined by an independent court, which is currently the case. Under the new treaty, if the two revenue authorities cannot reach consensus, the treaty simply ceases to apply to the company concerned. This is hardly acceptable. At the very least, the treaty should have bound the revenue authorities to submit themselves to a binding arbitration process (something which is provided for in the Organisation for Economic Co-operation and Development (OECD) rules).
- Companies that are incorporated in Mauritius and that have structured their affairs properly so that they truly have their effective management in Mauritius, or at least not in South Africa, would not be impacted on by the new treaty. By not having their POEM in South Africa, they would not be dual residents and the question for dispute/mutual agreement simply does not arise.
- For these companies (incorporated in Mauritius), the challenge is to ensure that there is no effective management in South Africa, and often this is more easily said than done, which is why so many Mauritian structures are at risk. But then, they were always at risk, as the tie-breaker under the existing treaty breaks in favour of the country where the POEM is located.
- For companies incorporated in South Africa, but with Mauritian tax resident status (which will require their being managed and controlled in Mauritius), the MAP creates real uncertainty, as they would be dual residents. We would, however, like to believe that it would be fairly easy for the revenue authorities to agree that treaty residence should be located in Mauritius, when both the management and control and the POEM are located in Mauritius.
- So, to summarise: on the one hand, when the Mauritian company is properly set up, incorporated in Mauritius and run as an independent company with substance and effectively managed in Mauritius, there is nothing to fear. On the other hand, in any other cases, there is no doubt that the new treaty deprives a taxpayer of legal rights to obtain a more certain outcome.
- The new treaty is unattractive for at least three other reasons as well. Under the current treaty, interest and royalties payable to a Mauritian company are free from SA withholding tax. In addition, under the existing treaty, it is fairly easy to escape South African capital gains tax on capital gains generated by a Mauritian treaty resident from an interest in fixed property situated in South Africa and held through a company (and, of course, Mauritius does not levy capital gains tax).

Under the new treaty:

- Interest payable to a Mauritian company will, generally, be subject to a 10% South African withholding tax;
- Royalties paid to a Mauritian company will, generally, be subject to a 5% South African withholding tax; and
- Capital gains generated by a Mauritian tax resident will be subject to South African capital gains tax if the gain results from a disposal of shares deriving more than half of their value from fixed property in South Africa.

ABOUT ERNEST MAZANSKY

Ernest Mazansky is tax director of Werksmans Attorneys. He was previously the chairman of the Taxation Committee of the South African Institute of Chartered Accountants. Ernest is a member of the Institute's Exchange Control Committee, the South African correspondent of the Bulletin for International Taxation published by the International Bureau of Fiscal Documentation (IBFD).

- Review of 2015 tax amendments - 17 Dec 2015
- South Africa renegotiates double tax agreement with Mauritius - 12 Jun 2013

View my profile and articles...