

How to Cite:

Ali, A., Agarwal, A., & Dixit, A. K. (2022). Abuse of double taxation avoidance agreement between India and Mauritius. *International Journal of Health Sciences*, 6(S5), 2783–2790.
<https://doi.org/10.53730/ijhs.v6nS5.9245>

Abuse of double taxation avoidance agreement between India and Mauritius

Arshad Ali

Student, BBA-LLB, Law College Dehradun, Uttarakhand University
Email: Malikarsh00786@gmail.com

Abhinav Agarwal

Student, BBA-LLB, Law College Dehradun, Uttarakhand University
Email: aa1211agarwa@gmail.com

Prof. (Dr.) Anil Kumar Dixit

Professor, Law College Dehradun, Uttarakhand University
Email: anil@uttarakhanduniversity.ac.in

Abstract--Double taxation Avoidance agreements are entered between two countries so that the income earned by the residents of both the countries is not taxed twice by the countries. It provides relief to the residents in form of either deduction of tax already paid or by giving credit regarding the tax paid. The objective of this paper is to find the ways in which India-Mauritius Treaty was misused by individuals by doing treaty shopping. The DTAA between India and Mauritius gives specific tax exemptions for individuals who are residents of India and Mauritius. The treaty provides that if a resident of Mauritius invests in shares of an Indian company the capital gains of that resident will not be taxed by the Indian government and would be taxed by the Mauritius government. But because of this treaty it has been seen that individuals from all around the world try to route their investments from Mauritius to India. In this paper the researcher will look into how the treaty was abused and what steps have been taken by Indian authorities in their domestic laws to ensure that individuals who are non-residents of the contracting state cannot avail benefits arising out of the DTAA. The use of treaty shopping by foreign nationals caused significant loss to the government of India and the researcher will look into the domestic laws of India and also analyze the judicial view with respect to the abuse of DTAA entered by India.

Keywords---Income, Tax Avoidance, DTAA, GAAR, Income Tax.

Introduction

Double Taxation Avoidance Agreement states that any income earned by an individual should not be taxed twice by the authorities for the same purpose. If a person who is a resident of Country "A" does business in Country "B", the income which is earned by the individual is taxed based on the rule followed by country "B". It can tax the individual on source basis or residence basis. Hence it is necessary that the individual is not taxed for the income generated by him in Country "A" and also in Country "B". This will lead to a situation where the individual will be discouraged to conduct business after being taxed twice for the same income (1).

The committee of world renowned economists had suggested that the countries should divide the rights of taxing a particular income by help of source rule and residence rule. The present Rules are no uncertainty the expansion of those suggestions (2). Double Taxation Avoidance Agreements are an understanding between two nations stating that the income earned by the resident of one country should not be taxed in the other country where the income has originated and also in the country where the individual is a resident of. In the year 1927 the committee constituted for the purpose of maintaining fiscal order in the League of Nations drafted the first model of such arrangement reflecting the circumstance when the income could be taxed by the source state and when the income could be taxed by the resident state of the individual. After the league of nation drafted its model convention UN as well drafted its model convention in Geneva in the year 1976. After which Fiscal Committee of the Organization for European Economic Co-operation OECC had distributed its model convention in 1963. In the mean time the Organization for Economic Co-activity and Development (OECD) was also established in the year 1961. The model convention of the Organization for European Economic Cooperation was adopted and named as OECD Model Tax Convention. There have been many amendments to the model tax convention in 1974, 1977 and also in 2019 it has been proposed to change further to oblige the most recent turns of events. The OECD gives its own discourses on the specialized articulations and the conditions stated in the said Model Convention (3).

Lord Radcliffe in Ostone v. Australian Mutual Provident Society(4) gave a judgment relating to the language used in the Double Taxation Avoidance Agreements and gave a view that is in more of an Internal tax language which is used by the DTAA's while drafting them.

The DTAA's are based on these following models (5):

1. UN Model tax Convention
2. OECD Model tax Convention
3. US Model tax Convention and
4. Andean Income and Capital Model tax Convention.

Procedure of DTAA's in India

To the extent of jurisdiction of India, its Agreements are drafted keeping in mind the UN model tax convention of Double taxation avoidance agreements. As earlier stated, these understandings use to designate purview between the sources just as residency. The Agreements itself recommends highest amount of tax assessment to be charged in the source nation which is for the most part lower than the amount of duty applicable in that nation. Chapter 9 of the income tax Act section 90 and 91 deals with agreements which provide relief from double

taxation. As needs be, India has been in DTAA agreements with 88 nations which incorporate all assortments, for example, Comprehensive agreements for better utilization of resources, Inter-governmental arrangements to help strengthen the issue complying with the international tax, Agreements for the exchange of information related to the individuals, agreements with more than one country simultaneously and many more for proper functioning of the tax structure.

In the first case of its type the High Court of Andhra Pradesh in the case of *CIT vs. Visakhapatnam Port Trust* (6) gave a decision that the arrangements of DTAA are as much as a major aspect of domestic law and that where something is assessable under the domestic law however subject to shirking of expense under these understandings, the specialists at whatever phase of procedures can and in relation to compelled by a sense of honor to give reason for the happening of the agreement.

In a case in front of the High Court of Karnataka in R.M. Muthiah the court stated the effect of DTAA's in the Indian Economy would be Later concerning impact of DTAA, the Hon'ble Karnataka High Court in *R.M. Muthiah*(7) revealed in held that the impact of an Agreement would be

1. No arrangement of the Double taxation avoidance agreement can force a duty where the obligation isn't forced by the domestic law of India such as the Income Tax act.
2. In the event that a duty obligation is forced by the Income Tax Act, 1961, the Double taxation avoidance agreement may try to reduce that duty imposed.

If there should be an occurrence of distinction between the Income Tax Act, 1961 and the the Double taxation avoidance agreements, the Provision of the Income Tax Act, 1961 will win. Afterward, Supreme Court of India gave a judgment in the case of *Union of India vs. Azadi Bachao Andolan* (8).

How Does One Take Benefit of the DTAA in Perspective of India?

With reference to the Double taxation avoidance agreements entered by India with other nations a tax payer who is not a resident of India has to give provide a Tax Residency Certificate to the tax authorities India this certificate is given by the tax authorities of the tax payers origin where he is a resident. By producing the TRC the income which is generated by the individual in India will either be fully exempted or will be tax at a rat which has been mutually decided by the countries in the DTAA' entered between them. The individual who is not a resident of India his liable to paytax in India for income weigh is generated with respect to Indian assets and then he can claim a refund of tax in his country of residence. The refund will be giving in a way that the total tax liability of the person in his resident country will be reduced by the amount which he has already paid in India in respect of income which argued or arise in India (9).

The Relation between Income Tax Act and the Double Taxation Avoidance Agreements

The reason for the enactment of the Income Tax Act is to determine the taxing liability of an individual and how it is to be calculated and collecting in India. The DTAA doesn't involve coming in existence of any tax and also does not define what income is. It anyway orders and measures in indicated cases. The DTAA does not have authority to create any tax liability which is not present in the domestic laws of the country such as in the income tax act. An agreement between the countries turns into a law the second it is rectified by the countries. DTAA's treaties as well become a piece of the Income Tax Act, under section 90. By coming in existence of this treaty, it is very well may be contended that, It has lost its better status and falls than be translated in its setting alongside the remainder of the law. If there should be an occurrence of contrast between the arrangements of the Double taxation avoidance agreement and the Income Tax Act under section 90, the arrangements of the Double taxation avoidance agreement will be upheld the arrangements of the Act and can be upheld by the courts in appeals and the income tax authorities. DTAA's are viewed as exceptional arrangements. They are the unique standards. They, in this way supersede the Income Tax Act on the principle developed by the court of *generalia specialibus non derogant* which states that if there is a conflict between a general law and a specific law the provisions of specific law will prevail over general law because of the reason that they are specifically made for the reason of giving benefit to a specific problem.

However, according to the law laid down under the Income Tax Act apply in the occasion these are increasingly valuable to the assesses. Where, there is no particular arrangement in the understanding, it is the essential law for which will oversee to tax collection from income (10).

Treaty Shopping

In request to acquire the advantage of DTAA between two nations it is essential that the individual must be the inhabitant of one of the nation. So that he can avail the benefit of either exemption or credit system for refund of the tax which is doubly taxed. At the point when the inhabitant of third nation exploit DTAA between two nations is called Treaty Shopping. Like shopping, the inhabitant of third nation, acquire the living arrangement of a nation so as to get the advantage of DTAA of that nation with the other nation (11).

Steps to Stop the Abuse with Respect to Treaty Shopping

The issue of Treaty shopping can be stopped by two different ways:

1. By enacting special articles relating to treaty shopping in the double taxation avoidance agreements which are entered by India with other countries. Some of the recent examples of enacting a special article in respect of treaty shopping can be seen in the treaties entered into by India with Singapore and U.S.A.
2. By means of developing the domestic laws in India to prevent the individuals from treaty shopping. These will not only help to curb the practice of treaty shopping but also will restrict individuals who are residents of third

countries to take advantage of the treaty entered between two contracting states. An of the same can be the GAAR provisions which are enacted by the Indian Government to stop entities from entering into business transactions the purpose of whose is to evade tax and lack commercial substance in them. If the domestic laws become strict it is likely that the foreign entities try to take advantage of the treaty shopping between DTAA's among the countries. Dixit, A. K. (2006). Press Laws and Media Ethics. Reference Press

The Mauritius Route

The Mauritius Route started the fury of the Indian income officials, as the business entities of other states which are not party to the double taxation avoidance agreement started to take undue profiting advantages of law laid down under Article 13(4) were not gainfully possessed from Mauritius. Accordingly, the Central Board of Direct Taxes authority established in India to oversee the tax matters in India informed the Mauritius government and the authority responsible to oversee tax aspects stating that such businesses ought to be burdened in India. The Mauritius specialists reacted that however the recipients of the assets putting into India were inhabitants of third nations, the ventures were made in the Indian capital markets in legal form and according to the regulation which are prescribed by the DTAA between the 2 countries. The specialists additionally featured that the speculations would have never been made in India because the risk factor and such investments were only done in India because of the reason that the DTAA existed between the nations (12).

The Amendment to the Indian Mauritius Treaty and Its Impact on the Indian Economy

This amendment was done by way of entering into a protocol agreement between the India and the Mauritius authorities on May 10, 2016. It altered numerous articles of the treaty between the contracting states which also included the change in article 13. The Treaty has been changed to join two new sections in Article 13. As a result, the option to burden capital additions from estrangement of offers procured on or after April 1, 2017 is vested with the source jurisdiction.

The income which is generated by the way of gains incurred from capital sales on or after April 2017 and which have been purchased in march 2019 can at this point take advantage of a slight relief given by the Indian authorities and the tax will be levied on a relieved rate of half of the expense rate pervasive in the source state-on the satisfaction of criteria laid down specified in a constraint of advantage provision laid down under the article 27A of the DTAA entered but as clarified later article 13(4) despite everything leaves burdening privileges of any property, other than that referenced in sections 1, 2, 3, and 3A, with the state in which the entity is resident in. Examining the Protocol and the limitation of benefits the Protocol limits only to the shares, proceeding with the pattern of notice 1 and notice 2 as discussed by the central board of direct tax."Offers" isn't characterized anywhere in the agreement and hence article 10(4) characterizes profits as money from shares or different rights, and compares it from obligation claims, taking an interest in benefits, and rights to corporate sector given subject to same duty treatment prescribed also for the investigation done in respect to

shares. The importance ascribed to offers would along these lines rely upon the law legislated by the parliament in India in respect of the taxation of interest in shares, except if setting recommends otherwise (13).

General anti-avoidance rule were implemented by the government of India on April 1, 2017, which concurs with the initiation of the Protocol in respect to the treaty India had with the Mauritius. The main feature of GAAR is that it is responsible for the restriction of agreements which lack commercial substance and are also impermissible under the Indian domestic law. If an exchange is delegated impermissible, the course of action might be ignored, money which is earned in respect of it might be re-described, and exchanges might be glanced through, among other actions. GAAR applies regardless of whether it is less advantageous to a tax payer consequently working as a one-sided arrangement supersede. The impact of GAAR on the Treaty and the Protocol which is between India and Mauritius must be analyzed and comprehended in two stages (14):

1. From the time period between 2017 April to 2019, March in which the limitation of benefit clause will be essentially and
2. From the time period after April, 2019 when the limitation of benefit clause stops to exist. In the main stage the important thing that is to be examined is that whether the limitation of benefit clause and General anti-avoidance agreements would apply at the same time or not. The Central Board Direct Tax has explained that in an instance of evasion is adequately tended to by the limitation of benefit clause in the settlement; there will not be an event to summon GAAR.

Maybe technically, income officials at present case that misuse isn't "adequately tended to" through the limitation of benefit clause and that GAAR also ought to be applied so that proper effectiveness of both the models can be used to help the curb the avoidance of tax done by the business entities. For instance, on account of capital gains on recorded value shares which despite everything appreciate twofold non-exclusion, income officials may conjure this as an opportunity for themselves (15).

In the subsequent stage, the provisions lay down in the treaty between India and Mauritius under the article 13 alongside outstanding arrangements of the DTAA would be dependent upon the more prominent examination under GAAR. The Central Board of Direct Tax has given a guarantee that provisions of GAAR will be summoned seldom and consistently and not only on the grounds that an expense unbiased locale has been chosen by the entity and it will not be presumed beforehand that such transaction is impermissible and lacks commercial substance in it. Although it is still very early to describe and comment on whether or not the state how this would happen for the Mauritius Route. A noteworthy push forward in the space of assessment settlements of multilateralism of tax treaties for the purpose of BEPS ACTION PLAN in which India has already given its ratification (16). Each signatory can pick the amount of which of its arrangement accomplices is to be secured under the MLI. India has been always wanting to come under the scope of While India planned to bring the Treaty inside the ambit of Multilateral Convention to Implement Tax Treaty the Mauritius authorities have been declining to come under its ambit citing that it would result in huge business

loss to the Mauritius economy and because of which any plans made under the MLI does not help India and do not affect in any way the treaty entered between India and Mauritius (17).

Conclusion

The Mauritius Route gives a fascinating contextual analysis to a tax assessment and relocation investigation. At the point when the movement of elements to Mauritius for charge exchange openings was found, people will be of the view that the Treaty would be corrected to curb such practices which try to escape tax assessment causing the twofold non-tax collection opportunity. In any case, the Indian governments reply suggests that this was not the way to tackle such a grave issue. At the core of the Indian reaction is the conviction of the SC, the Indian official, and the Central Board of Direct Taxes that the Treaty has assumed a crucial job by boosting the Indian economy, exchange, outside speculation, and reciprocal relations of India with other countries. The Mauritius Route disclosed problems related to the difference between income officials from of India with one prospective and, and the Indian official and Central board of direct tax then again. This situation has been featured; the official and board of direct tax started their exchange with an overhead objective to guarantee the burdening rights however in the end changed their position in the wake of the non-charge factors. Notice 2 which was issued by the board of direct tax authorized and legitimized the Mauritius Route to such an extent that later, when there was a proposition to revise the Act in regards to the adequacy of the TRC, it couldn't be passed as they had already agreed that tax residency certificate was enough to come under the ambit of the treaty and it was not relevant whether or not the business has any commercial substance or not. Notwithstanding the Mauritius Route accepting assertion from the most noteworthy authority it has been the subject of much case maybe in light of the fact that the income officials were not persuaded of the authenticity of the provisions laid down in the treaty between India and Mauritius under article 13(4). The Protocol has its own inadequacies and one presently can't seem to perceive how the Indian experience will be molded considering the GAAR. Considering the improvements identifying with the MLI, if any progressions made to the agreement between the 2 countries it would only take place if both the countries agree to negotiate the terms of the treaty again after addressing the issue at hand. Given how intently the reciprocal relations have been watched, this may mean a long hold up before any further discovery can be made. Until then yes India has been able to plug the loophole which existed earlier in the treaty and also with the coming in existence of GAAR and the limitation of benefits clause it can be said that to the time being this issue is settled until the entities try to device loopholes to launder money in back of this treaty.

References

1. Girish Ahuja & Ravi Gupta, (2012), "Professional Approach to Direct Taxes Law and Practices including tax planning", Bharat, New Delhi, p-1398.
2. Report on *International tax assessment rules concerning distributing Taxing rights under Double Taxation* by League of Nations, 1920.
3. Available at: All About Double Taxation Avoidance Agreement (DTAA) - Taxmann Blog (Visited on March 3rd 2022).

4. (1960) AC 459 (HL) 480 (Eng)
5. AIR (1983) 144 ITR 146 (AP).
6. (1993) 202 ITR 508
7. AIR (2003) 263 ITR 706 (SC)
8. AIR (2003) 263 ITR 706 (SC).
9. D.P.Mittal, (2011),“Indian Double Taxation Agreements and Tax Laws”, Taxmann’s, New Delhi.
10. Dr. Sanjay Kumar Yadav, Abuse of Double Taxation Avoidance Agreement by Treaty Shopping in India,(IOSR-JHSS)
11. Rinarcha, K., Suryasa, W., & Kartika, L. G. S. (2018). Comparative Analysis of String Similarity on Dynamic Query Suggestions. In *2018 Electrical Power, Electronics, Communications, Controls and Informatics Seminar (EECCIS)* (pp. 399-404). IEEE.
12. *Supra note 2.*
13. Available at: <http://itatonline.org/archives/in-re-ettrade-mauritius> (Visited on March 29th 2022)
14. Dixit, A. K. (2006). Press Laws and Media Ethics. Reference Press
15. E-Trade Mauritius Ltd. In re(2010) 190 Taxmann 232 (AAR)
16. *Ibid*
17. Available at: <https://taxguru.in/income-tax/general-anti-avoidance-rules-gaar.html> (Visited on March 29th2022).
18. *Supra note3*
19. Available at: <https://www.oecd.org/tax/beps/beps-actions> (Visited in April 1st 2022).