

Abstract of paper

“The India / Mauritius Double Taxation Treaty: - a salutary tale

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Background In 1983 India signed a double taxation treaty with Mauritius. It removed gains by Mauritius residents on disposals of assets in India, with some exceptions, from Indian taxation. A resident of a state was defined to mean: "any person who under the laws that state is liable to taxation therein.. " Mauritius enables a corporate entity to be resident by registration, and although they are thereby liable to taxation, it does not levy tax on offshore gains.

In a Circular dated 30.3.1994, the Government of India confirmed that capital gains of a resident of Mauritius on disposal of shares of an Indian company would be taxable only in Mauritius, and a flood of foreign institutional investors made investments through the person of a Mauritius company. Faced by the end of the decade with this blatant treaty shopping, Indian tax Inspectors issued notices requiring Mauritius companies to show why they should not be regarded as Indian resident. A flight of capital began or was threatened, and in April 2000, the Indian Government issued a further circular to the effect that wherever a Certificate of Residence is issued by the Mauritian Authorities, it would constitute sufficient evidence for accepting residence status as well as beneficial ownership.

The power of a DTA. A writ by an NGO asked the Delhi High Court to order the Government to resile from the Treaty, and that the circular determining what would count as evidence of Mauritian residence was *ultra vires*. The Court quashed the circular in a spectacular judgement, which we will examine. This was overturned in the Indian Supreme Court, on the grounds that it had no jurisdiction over what treaties were entered into, that they overrode domestic law, and that the circular was a proper exercise of management of the Treaty provision.

What happened next The Indians had no express power to abrogate the Treaty, and promptly tried to renegotiate the residence test, insert a "limitation of benefit" clause, and get Mauritius to revisit rates of withholding tax. Mauritius declined, but amended domestic law to stop registration of companies with an Indian parent - easy to sidestep, and this did not impress the Indians. So they tried stick and carrot. They offered economic aid, and threatened - and ultimately enacted - an agreement in Summer 2005 with Singapore, that removed much of the Mauritius tax market advantage - at the cost of further cutting off their tax footing. (Essentially they had already admitted defeat by emasculating their own CG charge.) The next week Saudi Arabia & Kuwait requested Singapore treatment! Mauritius had in the meantime signed tax advantageous treaties with China and other ASEAN countries.

Moral of the story

First World countries have, to the chagrin of their Tax Authorities, before and since signed treaties that enable Treaty shopping. "Round tripping" by Indian residents, the concern of the Indian Authorities, is not distinctively pernicious. OECD models of

treaties essentially enable uniform construction, rather than underlying wisdom of provisions with particular parties. India had sufficient lure to attract investment, which it could have encouraged solely by domestic tax breaks under its own control. It is to be hoped that low wage “tiger” economies, which require massive infrastructural spending that cannot be financed from taxing that labour force, will summon the political will to collectively abrogate disadvantageous treaties, rather than following the West in pursuit of the panacea of requiring exchanges of information with such territories.

They may have to do so by themselves giving aid to haven countries particular to their region. This should make sense to those countries; increasingly so for island chain locations as climate change takes hold. The domestic economic yield to countries from offering themselves as tax havens is confined by competition between themselves, and is itself a law of diminishing returns confined to a cadre of service employees. Only an impoverished genie can be put back in the bottle.