INTERCONTINENTAL TRUST NEWSLETTER
VOLUME 7 . ISSUE 09

INTERCONTINENTAL TRUST
Impeccable Service Intelligent Solutions

The new Double Taxation Agreement (DTA) between South Africa and Mauritius

Background

The existing Mauritius-South Africa Double Taxation Agreement ("the existing DTA") was signed by the two contracting states on 5th July 1996 and came into force in 1998. A new Double Taxation Agreement ("new DTA") was signed on 17th May 2013. It has been ratified by both countries and it is expected that the new DTA will enter in force with effect from 1st January 2016 in both Mauritius and in South Africa.

An important change in the new DTA is the amendment to Article 4(3) of the DTA which deals with the dual residence of a person other than an individual (Entity). The existing DTA provides that the person will be treated as resident in the country in which its place of effective management is situated. In terms of the new DTA, the tie-breaker test is replaced by a requirement that the competent authorities of the contracting states shall endeavor to settle the issue by mutual agreement. In the absence of such agreement, such entity shall be considered to be outside the scope of the new DTA. This possibility has created great uncertainty for entities relying on the new DTA.

On 22nd May 2015, a Memorandum of Understanding (MOU) was executed by the two contracting states in order to address the dual residence conundrum faced by entities.

Memorandum of Understanding

Article 4(3) of the new DTA provides that where a person other than an individual is regarded as resident in both contracting states under their respective domestic laws, the contracting states would mutually agree how to determine the place of residency of such a person.

However, in the absence of a mutual agreement, such entity shall be considered to be outside the scope of the new DTA, which implies that this entity loses its entitlement to the protection of the new DTA and the competent authorities of each contracting state can unilaterally impose tax on such entity, irrespective of the potential double taxation risk. This has given rise to uncertainty as to the place of residency and a potential risk of dual residency and as a result, double taxation.

It is important to note that this situation could only arise in a case where a company which is incorporated (and thus treated as a resident) in one of the contracting states, is effectively managed in the other contracting state. Where a company is incorporated in Mauritius and tax resident there under Mauritian law, it could only become a tax resident in South Africa under the South African Income Tax Act if the company was effectively managed in South Africa.

Therefore, the first test to be applied is the test outlined in the SARS Interpretation Note 6 on Effective Management, which is based on the OECD Guidelines on the meaning of the concept. If a company qualifies as effectively managed in South Africa under those criteria, it would not be necessary to further consider the test in the MOU. If it does not so qualify, the MOU could not apply as the company would not be dually resident.

The MOU addresses the above issues and in order to provide clarity, the Competent Authorities shall consider the following factors to determine the place of residency:

	As per MOU	Intercontinental Trust Ltd (ITL) comments from a Mauritius perspective
a b c d	Where the meetings of the person's board of directors or equivalent body are usually held. Where the Chief Executive Officer and other senior executives usually carry on their activities. Where the senior day to day management of the person is carried on. Where the person's headquarters are located.	• It is noted that most GBC1 are investment holding companies and have not elected a CEO. • It is advisable that offices are opened in Mauritius and employing senior executives. • The CEO or senior executives should avoid being in South Africa when taking decisions. • In addition to the current practice that board meetings are chaired from Mauritius, it is advisable that most directors are present in Mauritius for the board meetings.
e	Which country's law govern the legal status of the person.	• A GBC1 is governed by Mauritius law. • A South African company having a branch in Mauritius is now affected.
f	Where its accounting records are kept.	• In line with the current tax residency conditions in Mauritius.
g h	Any other factors listed in paragraph 24.1 of the 2014 OECD Commentary (Article 4, paragraph 3), as may be amended by the OECD/BEPS Action 6 final report; and Any such other factors that may be identified and agreed upon by the Competent Authorities in determining the residency of the person.	• The OECD commentary is not in its final form. The key aspect is the determination of the "place of effective management" i.e. where key management and commercial decisions are made.

Key features of the new DTA

Dividends

	Old DTA	New DTA	SA Non-treaty rate	Mauritius Non-treaty rate	ITL comments
Beneficial owner holds >10%	5%	5%	15%	Nil	Under the new treaty, withholding tax on dividend has been capped at 5% / 10%. On the other hand, there is no withholding tax on dividends in Mauritius. This will be an incentive to inbound investors in South Africa.
Beneficial owner holds < 10%	15%	10%	15%	Nil	

In the protocol to the new Mauritius-South Africa DTA dated 17th May 2013, there is a most favoured nation clause (MFN) on dividends. This will ensure that the dividend tax rate negotiated under the new treaty remains at par with any lower dividend tax rates that South Africa may subsequently conclude in DTAs with other countries.

Interest

	Old DTA	New DTA	SA Non-treaty rate	Mauritius Non-treaty rate	ITL comments
Tax on interest in contracting state	Nil	Up to 10% [1]	15%	Nil [2]	There are exemptions * available for interest on debt instruments listed on the SEM or JSE. This will encourage the issue of debt instruments.

* Tax exemptions in contracting state if:
(a) Interest has been received from the Government, its subdivision or local authority
(b) Interest is paid to the Government of the other contracting state, its subdivision or local authority
(c) Interest paid by central bank of contracting state to the other contracting state
(d) Interest is paid to institution/body wholly owned (direct or indirect) by the other contracting state, its subdivision or local authority
(e) Interest arising on any debt instrument listed on a recognized stock exchange being the Stock Exchange of Mauritius (SEM) or the Johannesburg Stock Exchange (JSE)

1. Withholding tax will apply if beneficial owner of the interest is a resident of the other contracting state. Nevertheless, certain **exemptions** will be available in the other contracting state.
2. Withholding tax of 15% is applicable in Mauritius on interest payable by any person other than by a bank or non-bank deposit taking institution, to any person, other than a company resident in Mauritius.

   Withholding tax of an amount of the lower of 15% in Mauritius or the rate specified under the relevant DTA is applicable on Interest payable to non-residents.

   There is no withholding tax on interest payable by a GBC 1 to a non-resident.

Royalties

	Old DTA	New DTA	SA Non-treaty rate	Mauritius Non-treaty rate	ITL comments
Tax on royalties in contracting state	Nil	Up to 5% [1]	15%	Nil [2]	Under the Mauritius domestic law, withholding tax is not applicable on royalty payments by a global business company to a non-resident.

1. Tax will apply if beneficial owner of the royalties is a resident of the other contracting state.
2. Royalties payable to a non-resident by a GBC 1 or by a bank holding a banking licence under the Banking Act 2004 or a trust

   10% withholding tax is applicable in Mauritius to Royalties payable to a resident.

   Withholding tax of an amount of the lower of 15% or the rate specified under the relevant DTA is applicable in Mauritius on Royalties payable to a non-resident.

Capital Gains

	Old DTA	New DTA	SA Non-treaty rate	Mauritius Non-treaty rate	ITL comments
Tax on alienation of shares	Nil	Nil*	0% / 18.65% *	Nil for GBC1	There is no capital gains tax in Mauritius. The effective Capital gains tax rate in South Africa is 18.65% for companies.

* May be taxed in South Africa if at least 50% of the value of shares is derived either directly or indirectly from immovable property.

Notable changes in the new DTA

Articles		Salient Changes
Article 2	Taxes Covered	Scope of taxes to which revised DTA applies in South Africa has been widened to include the following: - Withholding tax on companies - Tax on foreign entertainers and sportsperson
Article 4	Resident	Previously residency of a company would be determined through Place of Effective Management (POEM) but now this will be mutually decided upon by the Contracting States. In addition, the MOU has listed out the factors to be considered in determining the place of residency.
Article 5	Permanent Establishment	Paragraph 3 now provides more clarity on Permanent establishment (PE) for: - *Building site/projects:* PE if site/project lasts more than 12 months (compared to 9 months under old treaty). - *Provision of services by a company through employees:* PE if activities continue for a period(s) exceeding in the aggregate 183 days in any 12-months period commencing or ending in the fiscal year concerned. - *Provision of professional services by an individual:* if activities continue for a period(s) exceeding in the aggregate 183 days in any 12-months period commencing or ending in the fiscal year concerned.
Article 8	Shipping and Air Transport	Determination of POEM for shipping enterprise has been withdrawn but a new paragraph has been included on the definition of "Profits from the operation of ships or aircraft in international traffic".
Article 10	Dividends	Tax that may be charged in a contracting state on dividend(s) to beneficial owner(s) holding less than 10% of the company has been reduced from 15% to a 10%.
Article 11	Interest	Interest arising in a contracting state and paid to a resident of the other state may now be taxed in the other state irrespective of whether or not the resident is a beneficial owner of the interest. Interest may also be taxed in the contracting state at a maximum rate of 10%. Previously this was exempted under the old treaty. Certain exemptions have been provided on interest arising in a contracting state.
Article 12	Royalties	Royalties arising in a contracting state and paid to a resident of the other state may now be taxed in the other state irrespective of whether or not the resident is a beneficial owner of the royalties. Royalties may also be taxed in the contracting state at a maximum rate of 5%. Previously this was exempted under the old treaty. New paragraph inserted on the determination of PE for royalties (Paragraph 5).
Article 13	Capital Gains	Gains on disposal of shares in a contracting state may be taxed in the other state if its value is at least 50% derived directly or indirectly from immovable property situated in other state.
Article 14	Income from Employment	The provisions of Articles 14 & 15 of the old DTA have been combined and reflected under Article 14 of the new DTA.
Article 17	Pensions and Annuities	Previously Article 18 Pension and other similar remuneration and annuity may be taxed in Contracting state. Under the old treaty these were exempted from tax in the contracting state to the extent that they are subjected to tax in other state.
Article 21	Other Income	Previously Article 22 Other income received by a resident in a Contracting state but arising in another state may also be taxed in other state. Previously this was exempted under old treaty.
Article 22	Elimination of Double Taxation	Previously Article 23 Paragraph 3 of old treaty removed – Tax exemption on grant given by the contracting state or a political subdivision thereof to a resident of the other state (for the purpose of promoting economic development) is no longer available under the new treaty. However this will not affect Mauritius companies as our domestic law provides for a tax sparing credit in relation to grants from other contracting state.

Intercontinental Trust
Impeccable Service Intelligent Solutions

Concluding remarks

The MOU has now cleared the uncertainties around the dual residency. The new DTA will be favourable to inbound investors in South Africa whilst adding some burden to South African residents considering the use of Mauritius for cross-border investments. It is strongly advised that investors from Mauritius and South Africa seek guidance from their respective tax advisers to evaluate the impact of the new DTA on their existing and/or future structures.

With the recent amendments made to the Guide to Global Business relating to "Control and Management of Conduct of Business", Mauritius has reinvented itself as a jurisdiction of substance and this will assist Mauritius companies in demonstrating residency in Mauritius in line with the guidelines of the MOU.

South Africans, having a structure in Mauritius, need to be careful where they are located at the time decisions are being taken. South Africans multinationals, should consider segregating their domestic and non-domestic operations, and seriously consider the setting up of a regional headquarter in Mauritius for their non-South African operations.

With the forthcoming introduction of the BEPS (Base Erosion Profit Shifting) concept by the OECD and the increased pressure of NGOs on International Financial Centres (IFCs), it is inevitable that IFCs will have to adapt, thus enhancing substance to address the global tax issues.

To conclude, we believe that all the benefits that Mauritius offers largely compensate for any of the shortcomings of the new DTA and this will in turn ensure that Mauritius remains one of the most successful financial centres in the region in the long term.

For any additional information please contact us.

Mauritius Office
Email: mauritius@intercontinentaltrust.com
Website: www.intercontinentaltrust.com

Seychelles Office
Email: seychelles@intercontinentaltrust.sc
Website: www.intercontinentaltrust.sc

South Africa Office
Email: sa@intercontinentaltrust.com

Singapore Office
Email: singapore@intercontinentaltrust.com.sg
Website: www.intercontinentaltrust.com.sg

Kenya Office
Email: ke@intercontinentaltrust.com