



This bulletin provides an overview of the financial services industry and recent developments in Mauritius, including legal and regulatory amendments, important judgments and significant transactions. Please contact Craig Fulton or your usual Conyers Dill & Pearman contact with any questions you may have about these updates.

Mauritius: Gateway for GCC Investment

Mauritius has become a jurisdiction of choice for cross border investment structures involving most countries forming the Gulf Cooperation Council (GCC), due to its wide network of tax treaties, Islamic Banking capabilities, and favorable time zone.

Mauritius has tax treaties with Qatar, UAE, Kuwait and Oman, and is currently negotiating a tax treaty with Saudi Arabia. Each of these tax treaties offers distinct advantages to investors seeking to capitalise on economic opportunities arising from burgeoning bilateral partnerships between GCC countries and other nations.

Effective Tax Treaty Structuring

For cross border investment structures involving GCC countries, particularly those which impose withholding taxes on dividends, interest, royalties and certain other payments, tax treaties with Mauritius offer considerable advantages, including:

- 0% withholding tax on dividends and interest payments (under treaties with Qatar, UAE, Kuwait and Oman)
- 0% withholding tax on royalties (under treaties with UAE and Oman)
- 5% and 10% withholding tax on royalties (under treaties with Qatar and Kuwait, respectively)

As Mauritius does not impose tax on capital gains, and the Mauritius tax treaties provide for capital gains to be taxed only in the country of residence of the seller of the assets (excluding

immovable properties, gains from which are generally taxed in the country where the property is situated), a Mauritius company selling a GCC asset may also be wholly exempt from capital gains tax.

Islamic Banking

The availability of Islamic banking also makes Mauritius an excellent gateway for GCC investment. HSBC Mauritius launched its Islamic banking window a year ago, and Deen Banking Corporation Ltd, a fully fledged Islamic bank established as a Qatar-Mauritius joint venture, has obtained an Islamic banking licence from the Bank of Mauritius.

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Meanwhile, the Bank of Mauritius is a full member of the Islamic Financial Services Board (“IFSB”). The Financial Services Commission of Mauritius, which regulates non-banking financial services, is an associate member of IFSB.

Mauritius’ Islamic banking capability has led to a noticeable increase in Shari’ah compliant structures through the jurisdiction. Other investment structures remain popular, including private equity funds, master feeder funds, joint ventures and investment holding entities with underlying special purpose vehicles for investment in and from tax treaty jurisdictions, as well as non treaty jurisdictions including Cayman, BVI and Bermuda.



Redemptions of Shares and the Solvency Test

One of the areas we are often called upon to advise on, particularly in the context of collective investment schemes, is the redemption of shares under Mauritius law, which is governed by the Companies Act (of Mauritius) 2001 ("the Act").

According to section 68 (4) of the Act, the directors of the company must ensure that the company will, after the redemption, satisfy the solvency test. To satisfy the solvency test the company must be able to pay its debts as they become due in the normal course of business, and the value of the company's assets must be greater than the sum of both the value of its liabilities and the company's stated capital.

The "stated capital" criteria does not apply to an investment company, according to the Act. Accordingly, an investment company will satisfy the solvency test if it can pay its debts as they become due in the normal course of business, and if the value of the company's assets is greater than the value of its liabilities.

In determining whether the value of a company's assets is greater than the value of its liabilities, the Board may take into account:

- (a) the most recent financial statements of the company, which have been prepared in accordance with International Accounting Standards in the case of a public or private company, or, in the case of a small private company, the most recent financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances; and
- (b) a valuation of assets or estimates of liabilities that are reasonable in the circumstances.

A company is not permitted to acquire or redeem its own shares if this results in no other shares available for issue aside from convertible or redeemable shares.

A company acquiring or redeeming shares is generally required by the Act to immediately notify the Registrar of Companies ("ROC") of the number and class of such shares.

However, an open-ended fund is not required to notify the ROC when acquiring or redeeming its shares as it can obtain a dispensation to notify the ROC pursuant to section 52(5) of the Companies Act 2001.

Directors' Liabilities Under the Companies Act (of Mauritius) 2001

Like many jurisdictions, the business and affairs of Mauritius companies are either managed or supervised by the Board of Directors, aside from those decisions which have to be taken by the shareholders, in accordance with the Companies Act (of Mauritius) 2001 ("the Act"). Directors' duties are owed primarily to the company and in certain circumstances to shareholders, debenture holders and creditors of the company.

Directors of Mauritius companies have a general duty to act in good faith and in the best interests of the company, as set out in section 143 of the Act. If they breach this duty, they may be personally liable to compensate the company for any loss suffered by the company. They also have to account for any profit they have made as a result of the breach.

While only the company can bring an action for breach of this duty, shareholders or former shareholders have a limited right of recourse against directors for breach of a duty which is owed directly to them. The duties owed to shareholders are the duty to maintain proper share registers, disclose the director's interest in a transaction with the company and disclose any share dealing by the director to the shareholders.

Directors may also incur personal liability if they fail to take the proper steps regarding the insolvency of the company. If a director believes the company is unable to pay its debts as they fall due, and fails to either call a meeting of directors to consider whether a liquidator or administrator should be appointed, or vote in favour of such appointments at a board meeting at a time when the company is unable to pay its debts and the company is subsequently put in liquidation, the Court may, on the application of the liquidator or of a creditor of the company, make an order that the director shall be liable for the whole or part of any loss suffered by creditors as a result of the company continuing to trade.

Directors of Mauritius companies are criminally liable for failures by the company to comply with the statutory requirements of the Act. In addition to their personal liability with respect to matters which, under the Act, should be attended to by every director, directors are also personally liable for the defaults of the Board. Some of the more serious offences such as the fraudulent application of the company's property can render directors liable, upon conviction, to heavy fines and imprisonment for a term of up to 5 years.

However, if a director is charged with an offence under the Act in relation to a duty imposed on the Board or the company, it is a defence if the director proves that:



- (a) the Board or the company (as the case may be) took all reasonable and proper steps to ensure compliance with the requirements of the Act;
- (b) the director took all reasonable and proper steps to ensure that the Board or the company (as the case may be) complied with the requirements of the Act; or
- (c) in all the circumstances of the case, the director could not reasonably have been expected to take steps to ensure compliance with the requirements of the Act by the Board or the company (as the case may be).

Indemnity

The good news for directors is that, subject to its constitution, the company may indemnify a director with respect to proceedings for any act or omission in his capacity as director and in which he is not found liable. A director may also be indemnified by the company in respect to liability to any person, other than the company, for any act or omission in his capacity as director of the company, and costs incurred by that director in settling any claim or proceedings relating to that liability. This indemnification does not apply to criminal liability or liability in respect of a breach of the director's duties.

The South Africa-Mauritius Double Taxation Avoidance Treaty

While the benefits of Mauritius as a business platform for foreign direct investment into India through the India-Mauritius Double Taxation Avoidance Treaty are well known, Mauritius companies can be used to structure investments into a variety of other developing markets as a result of a large number of double taxation avoidance treaties it has entered into, particularly with developing African nations.

One of the more important of these treaties is the South Africa-Mauritius Double Taxation Avoidance Treaty ("the Treaty"). South Africa boasts one of Africa's largest and most developed economies. As a result, there is a significant market for investment into South Africa, as well as investment by South African institutions into other African countries.

General provisions

- if a resident of Mauritius derives profits or income from sources in South Africa, which are taxed or taxable in South Africa whether directly or by deduction, the amount paid in South Africa can be credited against the amount payable in Mauritius.
- if a resident of South Africa pays tax in Mauritius on income taxable in Mauritius, this amount shall be deducted from the amount payable under South African fiscal law.

As is typical with such treaties, there is a threshold for the deduction, which shall not exceed, in relation to the total amount of tax payable as a ratio, the same ratio as the Mauritian income bears to the total income of the resident.

Specific provisions

The specific provisions of the Treaty relating to dividends, interest and capital gains are important from a tax structuring perspective.

Dividends paid by an enterprise in South Africa to a resident in Mauritius may be taxed in Mauritius (the effective rate for a Mauritius global business company, or GBC, is 3%). Such dividends may also be taxed in South Africa, but only at a rate not exceeding 5%, if the resident of Mauritius owns at least 10% of the capital of the enterprise in South Africa, or at 15% if it owns less than 10%.

South Africa boasts one of Africa's largest and most developed economies and there is a significant market both for investment into South Africa and investment by South African institutions into other African countries.

Interest: if the interest arises in South Africa but it is paid to a resident of Mauritius, then it shall only be taxed in Mauritius. This provision does not apply where the lender also carries on business through a permanent establishment or provides personal services from a fixed base in South Africa, and the debt giving rise to the interest is connected to that business or provision of services.

Capital gains may be taxed in South Africa if they are derived by a resident of Mauritius from the alienation of immoveable property situated in South Africa. They may also be taxed if they are derived from the alienation of moveable property forming part of the business property of a permanent establishment that an enterprise of Mauritius has in South Africa, or moveable property pertaining to a fixed base available to a resident of Mauritius that is situated in South Africa for the purposes of providing independent personal services.

Any other form of gain from the alienation of property is only taxable in the state in which the alienator of the property is resident. Therefore, a GBC1 which does not have a permanent establishment or fixed base in South Africa, which disposes of shares in a South Africa company would only be subject to capital gains tax in Mauritius. Since Mauritius does not levy any capital gains tax, except on immoveable property transactions, no capital gains tax would be payable under the Treaty.



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