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Tax Controversy 2023

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Mauritius: Law & Practice

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MAURITIUS



Law and Practice

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Prism Chambers specialises in all aspects of revenue law, including tax advisory, transactional tax and tax controversy matters, with a significant cross-border element. The team represents clients at all levels of the dispute resolution process, including before the Supreme Court of Mauritius and the Judicial Committee of the Privy Council. The firm's expertise is consistently sought out for high-profile tax litigation

on complex cross-border matters, including transfer pricing cases. In addition to domestic and international tax planning, the firm has a strong private wealth practice. It assists high net worth and ultra high net worth individuals, business owners and family offices in structuring their affairs in a tax-efficient and compliant manner.

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1. Tax Controversies

1.1 Tax Controversies in This Jurisdiction

Mauritius follows a self-assessment system whereby the taxpayer makes a self-assessment of their tax liability when filing their annual tax returns. Tax controversy usually arises when a taxpayer is audited by the Mauritius Revenue Authority (the MRA). Audits are usually conducted on a risk-based approach (see 2. Tax Audits).

Tax controversies may also arise when:

- a taxpayer asks for a refund of tax paid;
- the taxpayer files an amended tax return;
- the MRA is not satisfied with the returns submitted by a taxpayer; or
- a company files for deregistration from the Registrar of Companies in Mauritius or initiates liquidation proceedings.

More recently, following international developments, tax controversies also arise as a result of information obtained by the MRA pursuant to the international exchange of information between tax authorities.

When the MRA conducts an audit into the affairs of a taxpayer, said taxpayer's tax returns will typically be reviewed, and the MRA may ask for supporting documentation and explanations (which may include financial statements, copies of invoices, agreements, etc). If the MRA identifies any discrepancies or non-compliance, it may initiate further investigations or issue a "notice of assessment". The majority of assessments are issued under the Income Tax Act 1995 (ITA) and the Value Added Tax Act 1998 (VATA). Unless specified otherwise, this guide will therefore focus on tax controversy in these two areas.

1.2 Causes of Tax Controversies

The most frequent causes of tax disputes in Mauritius relate to personal and corporate income tax, as well as value added taxes.

In relation to personal income tax, the dispute may relate to underdeclared income, disallowable expenses or the denying of exemptions claimed by the taxpayer.

In relation to corporate income tax, the issues vary widely and include:

- underdeclared income;

- the disallowance of expenses (typically because they are not incurred exclusively in the gross production of income); and
- the denying of exemptions or tax holidays.

The MRA is increasingly applying targeted anti-avoidance provisions (such as Section 75 of the ITA – the arm’s length provision) and general anti-avoidance provisions (Section 90 of the ITA) in relation to arrangements such as interest-free loans and other intra-group arrangements.

In relation to value added tax, disputes arise around the non-registration of taxpayers for tax purposes, underdeclared taxable supplies and the disallowance of input VAT. Occasionally, the MRA also invokes anti-avoidance provisions – eg, in cases where the taxpayer enters into arrangements to artificially avoid the threshold for VAT registration purposes.

Although less common than corporate and VAT issues, disputes relating to the imposition of customs and excise duties are also regularly referred to the tax tribunal in Mauritius, particularly on the classification and value of imported items, the applicable duties and any upliftment of the value of a consignment.

Disputes with respect to transfer taxes are not uncommon, particularly regarding the valuation of immovable property.

1.3 Avoidance of Tax Controversies

Ways through which tax controversy can be mitigated include:

- having the proper documentation in support of the tax filings made (eg, invoices, contractual agreements, transfer pricing analysis if appropriate, legal or tax opinions);

- applying for a ruling from the MRA – rulings are binding on the MRA and provide the taxpayer with certainty on the particular issue in question (see **6.4 Avoiding Disputes by Means of Binding Advance Information and Ruling Requests**); and
- indicating an expression of doubt on an income tax return on any point of uncertainty – this will ensure that no penalty is levied on the taxpayer in respect of any eventual assessment raised on the relevant point.

Once an assessment is raised, there are ways of mitigating the amount of tax assessed (see **2.6 Strategic Points for Consideration During Tax Audits**).

1.4 Efforts to Combat Tax Avoidance

In addition to its existing bilateral exchange of information agreements, Mauritius has implemented the Common Reporting Standard in Automatic Exchange of financial account information since 2017. Through this mechanism, Mauritius is now able to obtain information on financial accounts held by non-residents abroad. In some cases, this has led to tax assessments being raised in Mauritius.

Mauritius has also been a member of the Inclusive Framework since November 2017, and has committed to implement the Base Erosion and Profit Shifting (BEPS) minimum standards. The tax legislation in Mauritius was overhauled in 2018 to achieve compliance with recommendations on BEPS Action 5 (Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance). The revamped fiscal legislation is now aligned with the recommendations of the Forum on Harmful Tax Practices. Certain regimes were considered to have potentially harmful tax features and were thus abolished, such as the deemed foreign tax credit

and the freeport regimes. Substance requirements have also been introduced for entities that intend to benefit from a partial exemption on certain sources of income. There has also been a considerable increase in tax controversy on the application of substance requirements and the eligibility of taxpayers to claim partial exemption.

Mauritius has also enacted the Multilateral Instrument (MLI) through the Income Tax (BEPS) Regulations 2019, which came into force on 1 February 2020; the amendments to the covered treaties with Mauritius have been in effect since August 2020. As far as is known, no tax controversies have yet been raised as a result of the application of the MLI. It will be particularly interesting to see whether any tax controversy arises as a result of treaty benefits being denied pursuant to the introduction of the “principal purpose test” (PPT).

1.5 Additional Tax Assessments

In Mauritius, the obligation to pay any additional tax considered due arises upon the issuance of a tax assessment. In relation to income tax and value added tax, the taxpayer has the right to contest the assessment by filing objections with a separate unit within the MRA called the Objections, Appeals and Dispute Resolution (OADR) department.

Lodging an objection with the OADR department requires the taxpayer to first pay 10% of the assessed amount. Alternatively, in case of financial difficulties, the Director General (DG) of the MRA may accept the taxpayer furnishing a bank guarantee instead of payment of the 10%.

In respect of transfer taxes, the transferor or transferee (as the case may be) is typically required to pay the full amount of assessed duty before they are able to contest the assessment.

Tax Interest and Penalties

Interest and penalties apply if the taxpayer fails to declare and/or pay the tax in due time. The sanctions for failing to file declarations correctly, pay taxes or fulfil other tax obligations can be divided into two broad categories:

- late payment interest and tax fines applied by the MRA, which may be subject to review by the Assessment Review Committee (the ARC); and
- criminal penalties, which may be imposed by courts.

Interest

Late payment interest is applicable at rates varying between 0.5% and 1% per month, depending on the nature of the tax and the cause of non-payment.

The late payment interest may be waived in whole or in part in certain circumstances, at the discretion of the DG or under specific schemes that may be introduced from time to time by the Minister of Finance, Economic Planning and Development (MOFED).

Penalties

Penalties may also be levied at a rate not exceeding 50%. The rate of penalty levied varies depending on the issue leading to the non-declaration of tax, the frequency of underdeclaration and the behaviour and co-operation of the taxpayer during the audit process. The MRA has issued a statement of practice (SP 13/16) providing broad guidelines on the rate of penalty applicable in different circumstances.

Criminal penalties

Tax laws, including the ITA and the VATA, provide for criminal offences that are punishable by imprisonment and fines (regardless of civil

interest and penalties). The amount of fines varies depending on the nature of the tax and the relevant issue.

2. Tax Audits

2.1 Main Rules Determining Tax Audits

No known publicly prescribed criteria are applied by the MRA for conducting audits. Therefore, taxpayers are audited on a discretionary basis and using a risk-based approach. Some entities (particularly large taxpayers) may be more likely than others to be subject to tax audits.

In addition, certain specific events may trigger a tax audit, including requests for tax refunds, requests for MRA approval prior to liquidation, requests for approval for deregistration for VAT purposes, and requests for approval for removal from the Registrar of Companies.

The MRA may also focus on specific strategic sectors (such as gambling) or issues (such as the application of the arm's length principle in intra-group arrangements or the eligibility for partial exemption on certain types of income).

2.2 Initiation and Duration of a Tax Audit

There is no specific time limit within which the tax audit must be initiated; however, in practice, tax authorities are limited by the statutory time limits for raising an assessment.

For personal and corporate income tax, the DG can require information or conduct its investigation pertaining to a period not beyond three years preceding the current year of assessment. However, if a tax return has not been filed or if fraud is involved, the DG may make an assessment beyond this time limit.

For VAT cases, the DG may not require any person to furnish or give any information, nor to produce any books or records, more than five years immediately following the last day of the taxable period in which any related transaction took place. However, this timeframe is not applicable in cases of wilful neglect, evasion or fraud.

There is no prescribed duration for audits, except for the time limitations explained above.

The statutory time limitations start anew if an amended tax return for a particular year of assessment or taxable period is submitted to the MRA.

2.3 Location and Procedure of Tax Audits

Generally, audits start remotely upon a request from the DG for certain information, books and records from the taxpayer. Information can be provided in printed format or sent electronically. Meetings usually take place at the headquarters of the MRA, where the taxpayer may choose to be accompanied by their tax adviser or counsel. The DG may also carry out field audits, whereby officers of the MRA may physically present themselves at the business premises of the taxpayer to check the books and records of the business and inspect its stock, machines or other equipment.

The DG also has broad powers to request information, including from third parties.

2.4 Areas of Special Attention in Tax Audits

Recently, tax auditors have focused on the following areas in relation to personal and corporate income tax:

- the application of the arm's length principle in intra-group transactions;
- claims of partial exemption on certain sources of income;
- the disallowance of expenses unrelated to the production of gross income; and
- cross-border transactions in general.

In relation to VAT, the focus continues to be on non-registration for VAT purposes, underdeclared taxable supplies or overdeclared input VAT.

2.5 Impact of Rules Concerning Cross-Border Exchanges of Information and Mutual Assistance Between Tax Authorities on Tax Audits

Some assessments have been raised by the MRA as a result of information obtained pursuant to the implementation of the Common Reporting Standard.

Requests have also been made to the MRA regarding Mauritian taxpayers by tax authorities of other jurisdictions, based on bilateral exchange of information agreements in the course of tax audits conducted in those jurisdictions.

2.6 Strategic Points for Consideration During Tax Audits

Tax audits can be challenging, costly and time-consuming for individuals and businesses. Being well prepared can help to minimise the impact of a tax assessment and ensure a more favourable outcome.

Key points to consider from a strategic perspective include the following.

- Conducting periodic reviews of all relevant documents, such as financial statements,

tax returns and contractual documentation, and ensuring that they are complete and accurate. It is also advisable to organise such documentation in a clear and logical manner, making it easy for the auditor to review and understand. If the taxpayer has a tax function, it is essential that the tax department does not limit its role to tax compliance but takes a proactive role in assessing and managing the taxpayer's tax risks.

- Seeking the advice and support of a tax adviser, and from tax counsel on any grey areas or tricky issues in relation to any point of law.
- Establishing a clear, co-operative and continuous line of communication with the MRA auditor. It is essential that the taxpayer acts in good faith in their co-operation with the MRA and responds promptly and clearly to any requests for information or clarification. Being open to discussion can help to achieve a more favourable outcome, particularly where the issue is factual and is dependent on evidence as opposed to a point of law. The taxpayer should keep minutes of meetings held with the auditor and any correspondence exchanged with the auditor.
- Not ignoring any requests for information. If appropriate, the taxpayer should request extensions to respond to requests for information.

3. Administrative Litigation

3.1 Administrative Claim Phase

The notice of additional tax comes in the form of a "notice of assessment", which should include:

- any amount in whole or in part of any deduction claimed by the person that has been disallowed and the reason for the decision;

- the basis for the computation of the amount and its justification; and
- the reason for making the assessment or claim.

A taxpayer who is dissatisfied with such an assessment may object to the assessment with the OADR department (a department independent from the audit team within the MRA – see **1.5 Additional Tax Assessment**). The objection is not mandatory and is at the option of the taxpayer. Any objection has to be lodged within 28 days, together with the payment of 10% of the amount assessed. Any failure to object within the required time (subject to certain exemptions such as illness) will render the total assessed amount immediately due.

However, the objection phase is a necessary process prior to any judicial phase – ie, except in certain specific cases, the taxpayer cannot lodge representations with the ARC without having lodged objections with the OADR department first.

3.2 Deadline for Administrative Claims

The OADR department has four months from the receipt of the objections to either maintain, revise or set aside the assessment made.

When an objection is finalised, a notice of determination of objection is issued to the taxpayer by the MRA. Any tax payable specified in the notice of determination together with penalty/interest should be paid within 28 days of the date of determination. If the taxpayer is not satisfied with the decision of the MRA, they may lodge representations with the Assessment Review Committee (see **4. Judicial Litigation: First Instance**).

Any objections that have not been determined within the four-month period are deemed to have been allowed by the DG of the MRA (ie, the assessment is set aside).

4. Judicial Litigation: First Instance

4.1 Initiation of Judicial Tax Litigation

Judicial tax litigation is initiated through representations being filed with the clerk of the ARC, a quasi-judicial body, to contest any notice, decision or determination of the MRA (in the circumstances prescribed by the Mauritius Revenue Authority Act 2004).

In some limited circumstances (particularly where there is no possible recourse before the ARC), the taxpayer may also have recourse to the Supreme Court for the judicial review of a decision of the DG of the MRA.

4.2 Procedure of Judicial Tax Litigation

The judicial stage typically starts with the taxpayer filing representations with the ARC. Representations have to be filed with the clerk of the ARC within 28 days of the notice, decision, determination or claim of the MRA. The taxpayer is normally required to pay an additional 5% of the tax assessed to the MRA.

Where representations have been made at the ARC, the payment of tax determined on the objection is suspended. However, interest on any outstanding tax continues to accrue until payment is made. Conversely, interest at the prevailing repo rate also accrues on the 15% paid by the taxpayer, and this amount is refunded to the taxpayer if the ARC sets aside the notice of determination, claim or decision of the MRA.

When the case is called before the ARC, the parties are usually able to file and exchange statements of case, providing facts of the case, grounds of grievances, witness statements and submissions on any point of law to be raised.

Prior to the hearing being held, arguments may be heard on preliminary points of law or on procedural issues. A ruling will be issued by the ARC on the issue before the case can be heard on merits, if need be. Common preliminary issues include arguments on non-payment of 10% (or 5%, as the case may be), representations being filed with the ARC outside the statutory time limit or representations being vague or not addressing the MRA's notice of determination, claim or decision.

If the case proceeds to be heard on the merits, the ARC fixes the case for hearing (counsel for both parties usually have the opportunity to provide dates for the hearing). During the hearing, witnesses from both sides will usually be heard (examination in chief and cross-examination), to adduce evidence in support of their respective cases. On conclusion of the witness evidence, counsels will make their submissions orally and/or in writing. The ARC will then reserve its ruling. The law provides for the ARC ruling to be provided within four weeks from the end of the hearing but, in practice, this timeline is rarely respected; some cases have been awaiting an ARC ruling for over a year.

Alternatively, the taxpayer and the MRA have the possibility to mediate before the ARC where the ARC considers that the issues raised in the written representations can be resolved through mediation. The mediation option has been introduced recently and is therefore quite novel. The taxpayer may also apply to the Alternative Tax Dispute Resolution (ATDR) panel (subject to cer-

tain conditions being met) if it wishes to reach a settlement with the MRA on the tax dispute. An application to the ADTR panel may be made whilst an appeal is pending before the ARC, in which case the appeal is usually suspended whilst the application is heard before the ATDR panel. It should be noted that an application to the ATDR may also be made at the objection stage or where there is an appeal pending before the Supreme Court or Judicial Committee of the Privy Council (JCPC), although the MRA has taken the position that a taxpayer may only apply to the ATDR panel once. See also **6. Alternative Dispute Resolution (ADR) Mechanisms**.

A person who is dissatisfied with an ARC ruling on a point of law may lodge a written representation with the ARC requiring it to state a "case" for the opinion of the Supreme Court of Mauritius within 21 days of that decision. The ARC has 28 days to state and sign a "case", which is communicated to the appellant and to the other party. Upon receipt of the case stated, the appellant has 14 days to cause the "appeal" to be lodged. The respondent in the appeal has two months after the date of service of the notice to serve on the appellant and file a notice of their intention to resist the appeal. The appeal case is normally fixed for hearing within a year of receipt of the notice to resist appeal from the respondent. Judgment from the Supreme Court may take several years.

As a final resort, where a taxpayer or the MRA is dissatisfied with a judgment of the Supreme Court on a point of law, an appeal may be lodged to the JCPC in the UK. The aggrieved party shall have to apply for leave to appeal within 21 days from the date of the Supreme Court judgment.

4.3 Relevance of Evidence in Judicial Tax Litigation

Any documentary evidence is generally annexed to the statement of case filed by either party (as further described in **4.2 Procedure of Judicial Tax Litigation**). Although the law allows for the production of witness statements to the statement of case, in practice all witnesses are heard at the hearing.

The hearing before the ARC remains a trial on the basis of evidence adduced. Direct and cross-examination of fact and expert witnesses are common in all civil tax litigation, but expert witness reports are more common in tax litigation involving complex issues such as transfer pricing.

One important point to highlight regarding evidence is that the ARC will usually not consider evidence that was not presented to the MRA at the audit or objection stage. This is because the role of the ARC is to review a notice of determination by the DG of the MRA in order to determine whether the MRA was right in its decision based on information that was available to it, and not to consider all evidence (including new evidence) anew where such evidence was never presented before the MRA by the taxpayer. This approach has been confirmed by case law. In exceptional cases, the ARC has allowed the production of evidence (eg, a transfer pricing report) where the evidence was deemed necessary and helpful in determining the outcome of the case (see **4.5 Strategic Options in Judicial Tax Litigation**).

Civil rules regarding evidence are otherwise generally applicable.

4.4 Burden of Proof in Judicial Tax Litigation

As a general rule, tax litigation adheres to the principle that the party who asserts must prove. A taxpayer appealing an assessment of the MRA bears the burden of proof (*Société Boodheea & Cie v ARC & Anor* [2017 SCJ 193]). There are exceptions to this rule, including where the MRA is alleging tax avoidance or fraud; the burden of proof then usually lies with the MRA.

In criminal tax litigation cases, it is usually the prosecutor's responsibility to prove that the taxpayer has committed a tax offence.

4.5 Strategic Options in Judicial Tax Litigation

The strategic options to consider during tax litigation depend heavily on the factual background of the case, but there are several general considerations to bear in mind regarding the conduct of a tax litigation case, as follows.

- The mandate of the ARC is to review the notice of determination issued by the OADR department or some other decision or claim of the MRA in the light of the representations filed with the ARC by the taxpayer. Once the representations are filed, no new representation may be added (except in rare cases, such as when the issue relates to a pure question in law). Taxpayers should hence ensure that all issues in dispute are set out in the representations filed with the ARC. This includes grounds of objections that were not addressed by the MRA in its determination.
- As indicated in **4.3 Relevance of Evidence in Judicial Tax Litigation**, documentation not produced by the taxpayer at the audit or objection stage will usually not be allowed before the ARC. It is therefore crucial that a taxpayer is properly advised (and supported)

by a tax adviser or tax counsel pre-litigation to avoid the possibility of an appeal failing due to the non-production of key documentation at the audit or objection stage.

- In complex cases (particularly on transfer pricing issues), taxpayers may choose to present any expert witness report, which may provide an independent assessment of the facts and evidence in the case. Any indication as to whether there will be an expert witness/reports should ideally be made prior to the fixing of the date of the hearing or, if possible, indicated in the statements of case. The ARC has previously admitted the use of expert reports even if they were not produced at the OADR department level, especially where the expert report pertains to a live issue and was produced at an early stage (see *Peak Trading Overseas Ltd v DG* (ARC/IT/337-19)). At the hearing, the expert should be present, in order for the other party to have the opportunity to cross-examine them.
- A variety of other factors may influence a taxpayer's choice of whether or not to litigate, including the presence (or absence) of judicial precedents on any relevant issue, whether it is able to pay the prescribed amount before commencing litigation, and the litigation costs involved in defending an assessment. Settlement (through the ATDR panel or otherwise) is to be envisaged by the taxpayer if it is more favourable to settle matters when taking into account the evidence, the prospects of success, and the strengths and weaknesses of the case.
- In cross-border cases where witnesses may be travelling from abroad, it is recommended that requests are made in advance to the ARC for the case to be heard on consecutive days, to mitigate the time and costs involved in the litigation of the matter.

4.6 Relevance of Jurisprudence and Guidelines to Judicial Tax Litigation

As a common law jurisdiction, jurisprudence is always relevant in litigation, including tax litigation. Supreme Court decisions are binding upon all lower courts and tribunals in Mauritius. The ARC regularly refers to decisions of the Supreme Court or the JCPC on Mauritian tax cases.

Although not binding in Mauritius, the ARC or the Supreme Court of Mauritius usually consider decisions from courts of other jurisdictions having similar provisions to the Mauritian equivalent provisions (such as the United Kingdom, New Zealand or Australia), in order to support their rulings or judgments.

In light of Mauritius implementing the BEPS minimum standards and joining the OECD's Inclusive Framework, it is hoped that the ARC and Supreme Court will now also consider OECD reports, commentaries and guidelines (such as the OECD Transfer Pricing Guidelines).

5. Judicial Litigation: Appeals

5.1 System for Appealing Judicial Tax Litigation

There are three tiers to the judicial tax litigation procedure in Mauritius, as referred to under 4.2 Procedure of Judicial Tax Litigation.

A taxpayer must generally appeal to the ARC in relation to any assessment made by the MRA (generally after the administrative objection stage).

Decisions from the ARC decried as being erroneous in law can be appealed before the Supreme Court by way of case stated.

Any appeal of a Supreme Court judgment (where the value of assessment exceeds MUR10,000) normally lies with the JCPC.

5.2 Stages in the Tax Appeal Procedure

Please see 4.2 Procedure of Judicial Tax Litigation.

5.3 Judges and Decisions in Tax Appeals ARC

The ARC is the first instance of appeal, and operates as a quasi-judicial body. It consists of a Chairperson, three Vice-Chairpersons (barristers appointed by the Public Service Commission) and other members (who are not members, officers or employees of the MRA) who have different areas of expertise, such as economics, taxation or business administration. A panel of the ARC usually consists of the Chairperson or a Vice-Chairperson and two members.

Supreme Court

At second instance, appeals of tax cases are generally heard by two judges of the Supreme Court.

JCPC

The JCPC is the third and final appeal instance in tax matters, and is composed of judges who are appointed by the King of England, on the advice of the British Prime Minister. The panel of judges for Commonwealth matters is typically composed of five judges, and three judges for other matters.

6. Alternative Dispute Resolution (ADR) Mechanisms

6.1 Mechanisms for Tax-Related ADR in This Jurisdiction

The tax laws of Mauritius provide for two main ADR mechanisms:

- the referral of disputes to the ATDR panel; or
- the resolution of disputes by way of mediation.

The ATDR Panel

The ATDR panel was set up as a fast-track system to deal with applications for review made by any person who has objected to an assessment or lodged a case before the ARC, Supreme Court or JCPC, subject to certain conditions being met (see 6.5 Further Particulars Concerning Tax ADR Mechanisms). The taxpayer's case is referred to the ATDR panel within one month of receipt of their application. The ATDR panel is required to issue a decision within six months of being referred a case, leading the MRA to amend or maintain the assessment in conformity with the decision of the ATDR panel.

The ATDR panel is a useful route in cases where taxpayers wish to find an amicable settlement to the tax dispute. It is not a forum for the case to be heard on its merits and/or to present arguments in law. In practice, the ATDR panel would usually expect some tax to be payable (often no less than the amount – 10% or 15% – that has already been paid by the taxpayer when lodging their objections or representations with the OADR department or the ARC, as the case may be).

Mediation

The mediation of tax disputes has recently been introduced into the tax laws of Mauritius

in an attempt to encourage mutually acceptable agreements. A case's referral for mediation depends on the Chairperson of the ARC and the mutual agreement of both parties.

During mediation, the Chairperson or Vice-Chairperson act as mediator, facilitating a settlement between the parties in a fair and reasonable manner.

If no agreement is reached, the Chairperson or Vice-Chairperson shall proceed with the hearing of the representations.

6.2 Settlement of Tax Disputes by Means of ADR

The ATDR Panel

The ATDR panel consists of a director of one of the departments at the MRA serving as Chairperson, a senior officer of the MRA chosen by the DG and a law practitioner appointed by the MOFED; all three must not have been previously involved in the dispute.

The ATDR panel usually reviews the application enclosing information already available from the case of the applicant at the ARC, Supreme Court or the JCPC, but supplementary information may be requested from the taxpayer. In practice, discussions before the ATDR panel favour a negotiation of the assessed amount with a view to settling the claim, rather than an evaluation of the merits of the case per se.

Any settlement agreement drafted shall cover all items in dispute and contain the terms and conditions of the settlement of the tax liability. The settlement agreement is a full and final settlement of the tax dispute in question and is binding on both parties. However, it cannot serve as a precedent in other cases. Where a settlement is reached before the ATDR panel, the objection

or appeal is withdrawn before the OADR department, ARC or other courts (as the case may be).

Mediation

Generally over the span of one sitting, a tax mediation sees the parties collaborate to settle the dispute, with the assistance of the Chairperson or Vice-Chairperson of the ARC as mediator. If a settlement agreement is reached, it shall cover all issues in dispute and the terms of the settlement of the tax liability. The settlement agreement is final and binding on the parties, and must be signed by both parties in the presence of the mediator and filed with the ARC. The representations shall subsequently be withdrawn. If no agreement is reached, the Chairperson or Vice-chairperson shall proceed with the hearing of the representations.

6.3 Agreements to Reduce Tax Assessments, Interest or Penalties

Please see 6.1 Mechanisms for Tax-Related ADR in This Jurisdiction and 6.2 Settlement of Tax Disputes by Means of ADR regarding the framework and procedure for agreements to reduce tax assessments by way of mediation.

Outside formal mediation and the ATDR panel, the taxpayer may also reach a settlement with the OADR department, in which case a revised assessment will typically be issued by the MRA, with the taxpayer then agreeing to withdraw their case before the ARC.

A request may also be made to the DG of the MRA to waive part or all of the interest and penalties. The waiver decision is at the sole discretion of the DG of the MRA. In practice, the DG of the MRA may be more inclined to waive part or all of the interest and penalties where the taxpayer has co-operated in good faith with the MRA to reach an out-of-court settlement.

Tax Arrears Settlement Scheme (TASS)

From time to time, the MOFED may introduce a TASS, which is a scheme designed for the complete waiver of any penalties and interests applicable to any tax arrears due under the ITA, VATA or the Gambling Regulatory Authority Act 2007, after an assessment has been issued or a return submitted. The waiver of the interest is conditional upon the full payment of the tax arrears (existing for a prescribed period) by a prescribed date and the withdrawal of any case before the ARC, Supreme Court or JCPC. For instance, taxpayers who wanted to benefit from a 100% waiver of penalty and interest under the last TASS were required to make an application on or before 31 December 2022 and settle their tax arrears by 31 March 2023 at the latest.

6.4 Avoiding Disputes by Means of Binding Advance Information and Ruling Requests

Income Tax/VAT Ruling

A taxpayer deriving an income or taxable supplies may apply to the DG for a ruling on a tax issue under the ITA or VATA. The DG shall provide a ruling within 30 days of the receipt of an application. In practice, this timeline is rarely respected as the MRA frequently has requests for clarifications or requires additional documentation in order to consider the application for rulings. A ruling is binding on the MRA, except in cases where there is a material difference between the facts relating to the transaction and the details contained in the application.

The effectiveness of the ruling system in ensuring certainty and avoiding disputes in Mauritius is evidenced by the relatively low number of tax disputes that are brought before the ARC and the Supreme Court pertaining to matters that have been the subject of a MRA ruling. This suggests that taxpayers are able to obtain a

clear understanding of the tax treatment of their transactions and arrangements through the ruling system, and are able to plan their affairs accordingly to avoid potential disputes. However, it is important to note that a tax ruling is not binding on the taxpayer, who may choose to take a different position if it does not agree with the stance of the MRA.

6.5 Further Particulars Concerning Tax ADR Mechanisms

ATDR Panel

Taxpayers who have lodged objections or filed representations at the ARC or appealed to the Supreme Court or the JCPC in relation to cases of income tax, value added tax, environment protection fees, certain customs cases or gambling tax are eligible for review by the ATDR panel. The amount of tax payable under dispute should exceed MUR5 million and the applicant is precluded from having been convicted of any criminal offence under the Dangerous Drugs Act 2000, the Financial Intelligence and Anti-Money Laundering Act 2002, the Prevention of Terrorism Act 2002 and the Prevention of Corruption Act 2002. It should also be noted that the grounds specified in the application should not be different from those in the notice of objection or appeal.

The taxpayer shall be informed of the decision of the ATDR panel within six months of the date that the case was referred to the ATDR panel.

There is no specific cap on the value of claims that can be resolved through the ATDR panel in Mauritius, other than the threshold value of MUR5 million for eligibility to apply to the panel. The decision of the ATDR panel is not binding on the taxpayer, who may choose to pursue with their objection or appeal (as the case may be). As described in **6.1 Mechanisms for Tax-Relat-**

ed ADR in This Jurisdiction and 6.2 Settlement of Tax Disputes by Means of ADR, the objective of the ATDR panel is for parties to reach an amicable settlement, and not to assess a case on its merits nor to hear arguments in law.

Mediation

To be eligible for mediation, the taxpayer must have lodged representations at the ARC. Mauritian tax legislation provides no specific timeline and no limitation regarding the claim's value or type for the process of mediation.

Any settlement agreement reached shall be final and binding on both parties, without any chance of appeal. There shall be one mediator assisting the parties, namely the Chairperson or Vice-chairperson of the ARC. The Chairperson has the statutory power to make rules for the conduct of the mediation meeting. There is no statutory requirement for mediation "decisions" to be based on strict law. It is to be noted that the terms of a settlement agreement will not be considered as a binding precedent in relation to other cases.

6.6 Use of ADR in Transfer Pricing and Cases of Indirect Determination of Tax

There is no formal ADR mechanism for the settlement of transfer pricing disputes with the tax authorities in Mauritius. Mauritius has no transfer pricing regulations, although there is a broadly worded arm's length provision under the ITA (Section 75). Transfer pricing disputes are a fairly novel occurrence in Mauritius, with limited case law at both ARC and Supreme Court level.

However, taxpayers may opt for the mutual agreement procedure (MAP) under applicable treaties, or apply to the ATDR panel in order to reach a settlement with the MRA.

7. Administrative and Criminal Tax Offences

7.1 Interaction of Tax Assessments With Tax Infringements

In practice, most taxpayers' disputes with the MRA do not rise to the level of criminal offences. If the MRA believes that a taxpayer does not have sufficient proof of the position taken in its annual returns or has grossly understated its taxable income, it will generally impose a higher "assessing penalty" in the notice of assessment rather than initiate criminal proceedings. The MRA is guided by its own statement of practice (SP 12/16) on penalties, which usually carry a penalty of 50% of the assessed amount in suspected cases of tax fraud.

The prosecution of tax offence cases at the MRA is handled by its Legal Services Department (LSD). Enquiries are referred to the LSD by the DG where there is a suspected offence under Mauritian tax legislation. Enquiring officers of the LSD shall have the same powers as a police officer for the performance of duties, aside from any powers to arrest. Where an enquiring officer has grounds to reasonably suspect a person of having committed an offence under any revenue law, they shall lodge an information request with a Magistrate.

According to the latest annual integrated report of the MRA for 2020/2021, only 22 tax cases had been referred for prosecution (such as failures to pay income tax or VAT or submit returns). Only nine customs and excise offences were registered, such as false entries, failures to declare, wrong classification or possessing a false certificate.

7.2 Relationship Between Administrative and Criminal Processes

In practice (and although both civil and criminal cases may technically run concurrently), the prosecutor would wait for a civil case to be concluded before initiating a criminal case.

There is no requirement that a criminal case be suspended until the determination of the tax due under a civil case. The DG retains the discretion to stay any assessment or claim intended to be raised where proceedings have been initiated by the LSD in respect of certain offences under the revenue laws, or where a money laundering offence may have been committed in respect of these offences and the matter has been referred to the Independent Commission Against Corruption for investigation.

Cases that have previously been referred for criminal prosecution include customs and excise offences (including false entry, failure to declare, wrong classification, false certificate), failure to pay VAT or income tax, trading without a licence under the Excise Act 1994 and failure to keep or produce books and records.

7.3 Initiation of Administrative Processes and Criminal Cases

Criminal tax cases are usually initiated after the conclusion of a civil case, or after a finding of sufficient corroborating elements to prove a “realistic prospect of a conviction” of a charge.

While civil tax assessments usually carry interest and penalties until the payment of the tax due, criminal offences in general attract more stringent punishments, including fines and imprisonment.

7.4 Stages of Administrative Processes and Criminal Cases

Mauritian tax laws provide for a three-tiered appellate mechanism against assessments raised by the MRA. There is no prescribed procedure for criminal tax cases. Proceedings pertaining to criminal tax cases generally follow the Criminal Code, which does not prescribe any special procedure/treatment for tax evasion cases but follows the general procedure applicable in respect of criminal offences.

In practice, the DG refers a case to an enquiring officer of the LSD if there is a suspected offence under any revenue law, who then carries out the enquiry. Where a person is reasonably suspected of having committed an offence under Mauritian tax legislation, an information request may be lodged with a District Court, the Intermediate Court or the Supreme Court. The Director of Public Prosecutions has discretionary power to determine the right venue regarding certain offences.

7.5 Possibility of Fine Reductions

As a general rule, a taxpayer cannot benefit from any reduction in potential fines in criminal cases based on the upfront payment of civil additional tax assessments, subject to any offence compounding (see 7.6 Possibility of Agreements to Prevent Trial).

7.6 Possibility of Agreements to Prevent Trial

Offences committed by a person under certain revenue laws (including the ITA and VATA) may be compounded where that person agrees in writing to pay an amount acceptable to the DG representing any income tax unpaid and an amount of penalty not exceeding the maximum penalty imposed under the relevant revenue law for such offence.

If an offence is compounded, the amount paid by the person shall be deemed to be tax assessed and recoverable as income tax. No further proceedings shall be taken in respect of the offence so compounded against the person. However, the person shall not be relieved of their liability for payment of any income tax due.

7.7 Appeals Against Criminal Tax Decisions

Appeal lies to the Supreme Court if a person has been convicted before the District Court or the Intermediate Court, while a person convicted before the Supreme Court at first instance may appeal to the Court of Criminal Appeal against their conviction or sentence.

7.8 Rules Challenging Transactions and Operations in This Jurisdiction

There are no known criminal tax cases pertaining to any GAAR provisions in Mauritius. However, the MRA has issued assessments pursuant to arm's length and other tax avoidance provisions in a number of civil tax cases. Criminal procedure is rarely invoked, even in cases of tax avoidance.

8. Cross-Border Tax Disputes

8.1 Mechanisms to Deal With Double Taxation

Cases of double taxation are generally resolved through the mechanism provided by the relevant double tax treaty under the MAP mechanism. There have been a handful of cases where the MAP has been invoked by taxpayers who are engaged in litigation with the MRA.

It is difficult for a taxpayer to use domestic litigation for relief against double taxation, except where domestic legislation provides a specific

mechanism for relief, such as claiming credit for foreign tax paid.

At the time of publication, measures under the MLI have not yet been invoked or used in Mauritius.

8.2 Application of GAAR/SAAR to Cross-Border Situations

Mauritius has specific and general anti-avoidance provisions under certain revenue laws (including the ITA and the VATA). There is limited jurisprudence on those provisions generally, and even less so in relation to cross-border situations covered by bilateral tax treaties.

The existence of bilateral tax treaties has not prevented the MRA from applying GAAR provisions.

Given the novelty of the PPT in covered tax agreements with Mauritius under the MLI and the rapidly evolving trend of tax litigation in Mauritius, it is currently difficult to anticipate how the MRA will apply those amendments in practice.

8.3 Challenges to International Transfer Pricing Adjustments

The transfer pricing method used by a company could be challenged by the MRA based on both domestic provisions and double tax treaty provisions. At the date of publication, there are no published rulings or judgments challenging international transfer pricing adjustments, although it is understood that a number of cross-border cases are currently pending at the ARC.

8.4 Unilateral/Bilateral Advance Pricing Agreements

Mauritian tax legislation does not currently cater for advance pricing agreements.

8.5 Litigation Relating to Cross-Border Situations

The key areas and matters for tax auditors' special attention are intra-group transactions, claims for foreign tax credit and permanent establishment issues; these questions therefore generate the most litigation on cross-border situations.

Litigation could be mitigated by ensuring that the taxpayer has all supporting documentation in place when filing its tax returns. For instance, in claims for foreign tax credit, evidence of foreign tax paid is necessary. In relation to intra-group transactions, and although there are no transfer pricing regulations in Mauritius, robust documentation in support of a particular pricing has become essential in practice.

9. State Aid Disputes

9.1 State Aid Disputes Involving Taxes

This issue is not relevant in Mauritius, a non-EU jurisdiction.

9.2 Procedures Used to Recover Unlawful/Incompatible Fiscal State Aid

This issue is not relevant in Mauritius, a non-EU jurisdiction.

9.3 Challenges by Taxpayers

This issue is not relevant in Mauritius, a non-EU jurisdiction.

9.4 Refunds Invoking Extra-Contractual Civil Liability

This issue is not relevant in Mauritius, a non-EU jurisdiction.

10. International Tax Arbitration Options and Procedures

10.1 Application of Part VI of the Multilateral Instrument (MLI) to Covered Tax Agreements (CTAs)

Mauritius has opted for the "final offer" arbitration in its covered tax agreements, unless the competent authorities mutually agree on different rules or other contracting jurisdictions have reserved their right to adopt the "independent opinion" approach as the default type of arbitration process, pursuant to Article 23(2) of the MLI.

10.2 Types of Matters That Can Be Submitted to Arbitration

Under the MLI, Mauritius has reserved the right to exclude cases involving the application of Section 90 of the ITA (GAAR) or cases involving criminal offences.

10.3 Application of the Baseball Arbitration or the Independent Opinion Procedure

Mauritius has opted for the baseball arbitration method (also known as final offer arbitration or last best offer arbitration). The reason for this option is unknown.

10.4 Implementation of the EU Directive on Arbitration

It is too early to comment on the application of the arbitration option under the MLI with respect to Mauritius.

10.5 Existing Use of Recent International and EU Legal Instruments

Other than a handful of MAPs, the use of international instruments to settle tax disputes in Mauritius is a fairly novel occurrence.

10.6 New Procedures for New Developments Under Pillar One and Two

As an engaged member of the OECD Inclusive Framework, Mauritius is committed to implementing Pillars One and Two.

Given the complexity of the subject matter of Pillars One and Two and ongoing discussion at an international level, the extent to which the implementation of those two pillars will prevent and resolve tax disputes in Mauritius is currently unclear.

10.7 Publication of Decisions

In principle, information given and received during arbitration is treated as confidential.

10.8 Most Common Legal Instruments to Settle Tax Disputes

Taxpayers may choose the most suitable legal instrument in order to settle their cross-border tax disputes, depending on the matter at stake. This may include:

- double tax treaties that include an arbitration clause (eg, the double tax treaty with the Congo and Monaco in relation to unresolved issues under the MAP mechanism); or
- double tax treaties impacted by the MLI.

10.9 Involvements of Lawyers, Barristers and Practitioners in International Tax Arbitration to Settle Tax Disputes

In principle, taxpayers are allowed to hire independent professionals to represent them during arbitration proceedings.

11. Costs/Fees

11.1 Costs/Fees Relating to Administrative Litigation

Other than the 10% of the assessed amount to be paid in order to lodge objections with the OADR department (see 3.1 **Administrative Claim Phase**), there are no costs to litigate at the administrative level.

11.2 Judicial Court Fees

The taxpayer may choose to be represented by counsel at the ARC. If the ARC gives a favourable ruling, the taxpayer is not able to recoup any legal fees incurred (however, it will be refunded any initial amounts paid to the MRA together with interest at the repo rate).

Any appeal before the Supreme Court requires the appointment of an attorney and counsel.

As a general rule, costs are borne by the losing party and would include all reasonably necessary expenses incurred by the winning party. However, the Supreme Court has the discretionary power to award costs as it sees fit by way of a costs order, in accordance with established principles and in relation to the facts of the case and any relevant grounds connected with the case (*Pokun Ismael v Kwong Soon Ten Sing* [1998 SCJ 85]).

11.3 Indemnities

No indemnities are provided for under Mauritian tax legislation if the court decides that the tax assessment is to be set aside. The MRA and any of its members or employees enjoy a statutory immunity from civil and criminal liability in the performance of their duties in good faith. A civil suit against the MRA shall only be possible for any acts done in bad faith or for any *faute lourde*

(Dooboree K. v The State of Mauritius & Anor [2020 SCJ 207]).

11.4 Costs of ADR

There are no court fees to be paid for the ADR mechanisms at the ARC or MRA.

12. Statistics

12.1 Pending Tax Court Cases

The latest report from the Director of Audits on the accounts of the government of Mauritius for the year 2021–2022 states the following.

- The OADR department reviewed 1,859 assessments in the financial year 2021–22. Assessments in respect of 120 cases were reviewed from MUR260 million to nil and, in 557 cases, the total assessed amount was reviewed downward from MUR590 million to MUR272 million.
- As of 30 June 2022, 1,925 cases with a total assessed amount of MUR22.6 billion were pending at the ARC. Of these, 818 cases with a total assessed amount of MUR15.3 billion, representing 68% of the total assessed amount, related to cases lodged prior to the year 2020.
- Thirty cases with a total assessed amount of MUR191.8 million were pending at the Supreme Court as of 30 June 2022, of which an amount of MUR139.8 million related to 15 cases lodged prior to the year 2016.
- As of 30 June 2022, 33 cases for assessment totalling MUR657.2 million were pending at the ATDR panel.
- One case was pending at the JCPC, for an assessed amount of MUR63.9 million.

12.2 Cases Relating to Different Taxes

There are no official statistics regarding the number of cases initiated and terminated relating to the different types of taxes in Mauritius.

12.3 Parties Succeeding in Litigation

For the financial year ending 30 June 2021, ten cases (out of 1299 cases) were ruled in favour of the MRA by the ARC, and the Supreme Court ruled in favour of the MRA in three cases (out of five cases determined during the year).

13. Strategies

13.1 Strategic Guidelines in Tax Controversies

As mentioned in 2.6 Strategic Points for Consideration During Tax Audits and 4.5 Strategic Options in Judicial Tax Litigation, having robust documentation in place and the support of an experienced tax adviser or counsel have become essential in a tax controversy in Mauritius.

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