PRISM CHAMBERS

TAX ALERT

THE CURIOUS CASE OF MR DILLOO AND THE MAURITIUS REVENUE AUTHORITY (2024 SCJ 191)

On 8 May 2024, the Supreme Court of Mauritius delivered an insightful judgment on the interpretation and application of sections 5 (Derivation of income) and 73 (Definition of residence) of the Income Tax Act 1995 ("**ITA**").

This judgment has the peculiar backdrop of an appeal against a decision of the Assessment Review Committee ("**ARC**") by the taxpayer, Mr Dilloo, as well as a cross-appeal of the same decision by the Mauritius Revenue Authority ("**MRA**") (even though, in substance, the ARC had set aside the representations of the taxpayer and maintained the MRA's determination).

15 May 2024

SECTION 5 (3) OF THE ITA

The parties' common point of contention against the ARC's ruling was the latter's interpretation of section 5(3) of the ITA. By way of reminder, section 5(3) provides that "*Income derived by an individual from outside Mauritius shall be deemed to be derived by the individual when (a) it is received in Mauritius by him or on his behalf; or (b) it is dealt with in Mauritius in his interest or on his behalf*". The ARC had, at first instance, concluded that section 5(3) was a stand-alone provision, such that any remittance of income in Mauritius was taxable in Mauritius, regardless of the tax residence of the person deriving such income.

This interpretation was met with some consternation amongst tax practitioners in Mauritius: the interpretation of this section had - dare we add - always, been that section 5(3) of the ITA necessarily had to be read in conjunction with its preceding sub-sections, such that the following principles could be applied to an individual taxpayer:

(i) An individual taxpayer who is resident in Mauritius is taxed on his worldwide income. However, any foreign source income is only taxed when it is remitted to Mauritius (also referred to as the "remittance basis"); and

(ii) An individual taxpayer who is not resident in Mauritius is only taxed on Mauritius sourced income. Foreign source income is therefore not taxable in Mauritius, regardless of whether it is remitted or not in Mauritius.

As regards the definition of "residence", one would have regard to the provisions of section 73(1)(a) of the ITA.

Section 5 (3) of the ITA (Cont.)

For its part, the Supreme Court was adamant that section 5(3) of the ITA could not be construed as a stand-alone provision and held that "*it is abundantly clear from a reading of section 5 that only a resident of Mauritius is liable to tax on income derived from outside Mauritius, i.e foreign sourced income*" and that section 5(3) "*patently has to be read along with section 5(1)(b) which enunciates that a resident is taxable on all his income whatever his source*". The Supreme Court further admonished the ARC, stating that "*the ARC further erred when it stated that section 5(3) is not subject to any other provision of the law and does not provide for any requirement to establish that the "individual" "was resident in Mauritius"*"'.

The authors unreservedly agree with the interpretation of the Supreme Court which they believe to be the correct one. Indeed, as highlighted by counsel for the taxpayer (and reiterated with approval by the Supreme Court), a "stand-alone" interpretation of section 5(3) may well lead to absurd results whereby an individual who is not tax resident in Mauritius and derives all his income outside Mauritius, finds himself subject to tax in Mauritius on that income simply because he has remitted such income in Mauritius (for instance to purchase an immoveable property).

The authors also agree with the Supreme Court's conclusion that section 5(3) (when read together with section 5(1)(b)) necessarily had to be read in conjunction with section 73 of the ITA since section 5(1)(b) can only be properly interpreted in line with the definition of "residence" contained in section 73 of the ITA.

NATURE OF INCOME REMITTED

While the question of the proper interpretation of section 5(3) of the ITA was a central component of the judgment, it is worth highlighting other important principles considered by the Supreme Court.

One of the grounds of appeal of the taxpayer turned on whether the income remitted by the taxpayer to a Mauritius bank account was indeed income in nature. The taxpayer sought to argue that the money sent from Saudi Arabia was in fact capital in nature "*as the money had remained in his account before being remitted to his account in Mauritius*".

In setting aside the taxpayer's contention on that point, the ARC had previously referred to the UK HMRC International Manual on the remittance basis of taxation which states (broadly) that the investment of income abroad does not change its character as income. The Supreme Court agreed with the ARC's finding.

Whilst this approach may come as a surprise to laymen, the logic is that an amount that is "income" in nature cannot be transmuted into capital simply because it is "sitting" in a bank account for a period of time.

In practice however (and to mitigate the risk against double taxation), a taxpayer might be able to claim a credit in Mauritius for any foreign tax paid on such income such that no further tax is payable in Mauritius (assuming the foreign tax exceeds the tax that would otherwise be payable in Mauritius). However, the Dilloo case is a stark reminder of the importance of documentary evidence of such foreign tax paid. The taxpayer in this case had simply produced a letter from Microsoft Arabia (his then employer) stating the amount of tax paid in Saudi Arabia. This was considered unsatisfactory evidence of tax paid for the purposes of regulation 8 of the Income Tax (Foreign Tax Credit Regulations) 1996.

TAX RESIDENCE

Most people would be familiar with the definition of tax residence in Mauritius being pegged to the number of days spent on the territory, namely 183 days or more in a tax year, or 270 days or more in a tax year and the two preceding years. There is a lesser known limb of the definition of tax residence which provides that an individual is tax resident in Mauritius if he has his domicile in Mauritius, unless his permanent place of abode is outside Mauritius. This is the limb under which the ARC was satisfied that Mr Dilloo was resident in Mauritius based on a number of factors. An appeal on this aspect against the ARC's ruling could only lie if the taxpayer had been able to demonstrate that the ARC's finding was unreasonable or perverse based on facts proved or that it was unsustainable on the basis of the evidence which had been before the ARC.

It would appear that the taxpayer had failed to adduce any sufficiently strong evidence to counteract the MRA's position that he remained tax resident in Mauritius despite his employment in Saudi Arabia (and interestingly, despite the fact he rented a house there, his children were born there and he held a resident card in Saudi Arabia).

It is not known whether the taxpayer attempted at any point during the hearing before the ARC to demonstrate that "his permanent place of abode" was outside Mauritius.

This approach is in line with a recent tax ruling (TR 264) issued by the MRA in September last year which considered a taxpayer to still be tax resident in Mauritius, even if (on the face of it) the latter had moved to Singapore, since he had a permanent home available in Mauritius and the centre of his economic activity was in Mauritius.

In addition, it is worth noting that a different approach would have been taken had there been a double tax treaty in force between Mauritius and the country of the taxpayer's (albeit temporary) residence. Double tax treaties often contain a tie-breaker rule which determines a taxpayer's country of tax residence when, under domestic laws, they may have been tax resident in two countries in the same tax year.

Taxpayers are reminded of the importance of seeking professional advice when moving abroad as it does not automatically follow that they cease to be tax resident (and therefore subject to tax on their worldwide income) in Mauritius.

READ THE FULL JUDGMENT HERE

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