



2 April 2025

## ‘Guarantee commission’ not taxable as ‘other income’ under Article 22 of the India-Mauritius DTAA for a period prior to FY 2017–18 – Mumbai bench of the Tribunal

### In brief

The Mumbai bench of the Income-tax Appellate Tribunal (Tribunal)<sup>1</sup> has concluded that guarantee commission will not be taxable during financial year (FY) 2016–17 under Article 22 of the India-Mauritius Double Taxation Avoidance Agreement (DTAA), as sub-clause (3) of Article 22 of the DTAA came into effect only on 1 April 2017.

### In detail

#### Facts

- The taxpayer, a Mauritius-based company, provided a corporate guarantee to a bank consortium on behalf of its Indian Associated Enterprise (AE). The taxpayer did not charge any amount from its Indian AE, considering that the corporate guarantee provided by the taxpayer was a shareholder activity.
- Accordingly, the taxpayer filed its return of income for FY 2016–17, declaring ‘nil’ income.
- The case was referred to the Transfer Pricing Officer who determined the arm’s length price (ALP) for the corporate guarantee commission at 1.16% of the guarantee amount resulting in an adjustment.
- The taxpayer argued in vain that the guarantee commission was not taxable in India under the DTAA. The taxpayer filed its objection before the Dispute Resolution Panel which erred in not adjudicating on the taxpayer’s objection. Accordingly, the taxpayer filed its appeal before the Tribunal.

#### Taxpayer’s contentions

- The taxpayer argued in its appeal to the Tribunal that the corporate guarantee commission was not covered under any specific income article under the DTAA. At most, it ought to be considered as ‘other income’ under Article 22 of the DTAA and be taxed only in the resident country, i.e. Mauritius.
- The amendment to Article 22(3) inserted by Notification No. 68/2016 (F.No.500/3/2012-FTD-II) dated 10 August 2016 which allowed taxation in the source country, i.e. India, came into effect from 1 April 2017. Accordingly, the said amendment applied only from FY 2017–18 onwards and did not affect the year under consideration. The taxpayer also relied on decisions supporting the aforesaid view<sup>2</sup>.

#### Tribunal decision

- The Tribunal, after carefully analysing Article 22 of the DTAA prior to and post amendment, concluded that

<sup>1</sup> ITA No. 603/Mum/2022

<sup>2</sup> Morgan Stanley Mauritius Co. Limited v. DCIT(IT) [2021] 191 ITD 88 (Mum) & Barclays Capital Mauritius Limited v. Assistant Commissioner of Income-tax, (IT) [2023] 146 taxmann.com 134 (Mum)

residuary income or other income can only be taxed in the resident state, i.e. Mauritius, for the period prior to 1 April 2017. It is only post 1 April 2017 that the right of taxation has been given to the source state, i.e. India, provided such income is covered under Article 22 of the DTAA.

- Since the relevant FY under consideration was before the amendment was made effective, the guarantee commission will not be taxed in India in the hands of the taxpayer.
- Accordingly, the Tribunal deleted the transfer pricing adjustment, and the appeal was allowed in favour of the taxpayer.

## The takeaways

- While the primary reason stated by the taxpayer for not charging any corporate guarantee commission from the Indian AE was that it forms part of the shareholder activity, this was not contested before the Tribunal. Neither is there any discussion in the order on the principle of base erosion, the correctness of the Special Bench ruling in the case of Instrumentarium Corporation<sup>3</sup>, nor has any without prejudice plea been raised on the deduction to be granted to the Indian AE.
- The taxpayer only argued about the non-taxability of the guarantee commission based on Article 22 of the DTAA, which was also supported by two Tribunal rulings. However, the Tribunal has categorically mentioned that the guarantee commission will be taxable for any transaction post 1 April 2017 and not for the subject year. Accordingly, for transactions post 1 April 2017, the tax authorities may proceed to compute the ALP for such transactions, as these qualify as international transactions.
- Clients are advised to review their corporate guarantee arrangements to evaluate the impact of this ruling.

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<sup>3</sup> Instrumentarium Corporation Limited v. Asstt. DIT [2016] 71 taxmann.com 193 (Kol) (SB)



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