Analysis: Luxembourg – Mauritius Income and Capital Treaty

See treaty text

Type of treaty: Income and Capital
Based on the OECD Model Treaty
Signed: February 15, 1995
Entry into force: September 12, 1996
Retroactive effective date: January 1, 1996 (Luxembourg); July 1, 1997 (Mauritius)
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Article 1 Personal Scope

See treaty text

This article defines the personal scope of the Treaty: The persons that are resident of one or both States, not the nationals of these States. The nationality is irrelevant, unlike in article 26 (non-discrimination) where the residency is irrelevant. The term "persons" and "resident" are further defined in articles 3 and 4.

Article 2 Taxes Covered

See treaty text

Future identical or similar taxes which are levied together or in replacement of the taxes listed in the Treaty are covered by the Treaty. There is an obligation of both States to notify the other Contracting State of important legislative changes.
In detail, the taxes covered are:
Luxembourg
• Income tax on individuals (l'impot sur le revenu des personnes physiques)
• The corporation tax (l'impot sur le revenu des collectivites)
• The tax on fees of directors of companies (l'impot special sur les tantiemes)
• The capital tax (l'impot sur la fortune)
• The communal trade tax (l'impot commercial communal)
Mauritius
• Income tax

Article 3 General Definitions

See treaty text

Luxembourg: The territory of the Grand Duchy of Luxembourg.
Mauritius: All the territories including the islands forming the State of Mauritius, including the territorial sea of Mauritius and the Continental Shelf.
Person: an individual, a trust, a company or any other body of persons.
National: any individual possessing the nationality or citizenship (citoyennete) of a Contracting State or any entity deriving its status from the laws in force in a Contracting State.
Company: any legal entity or any entity which is treated as a legal entity for corporate tax purposes.
Enterprise of a Contracting State: enterprise carried on by a resident of a Contracting State.
International Traffic: transport by a ship or aircraft operated by an enterprise having its place of effective management in a Contracting State, but not when the ship or aircraft is operated solely between places in the other Contracting State.
For the application of the Treaty by a Contracting State, any expression not defined otherwise has the meaning given by the tax laws of that State, the tax laws prevailing over other laws.

Article 4 Resident

See treaty text

Resident is defined as any "person" who, according to the legislation of a Contracting State, is liable to tax in that State by reason of his domicile, residence, place of management or any other criterion of a similar nature. This includes any entity listed in article 159 L.I.R. which has its statutory seat or central administration in Luxembourg.
In case of dual residence of individuals, the usual tiebreaker tests apply in ranking order:
• The State where the individual has a permanent home available;
• The State where the individual has the closer personal and economic relations (center of vital interests);
• The State where the individual has the closer personal and economic relations (center of vital interests);
• The State where the individual has an habitual abode;

• The State of which the individual is a national;
• In case of dual nationality of the Contracting States or in the absence of such nationality, the issue will be settled by mutual agreement by the Competent Authorities of the Contracting States.
For a body corporate, the tiebreaker is the place of effective management.
The Protocol to the Treaty adds that the term resident excludes for:
Luxembourg: the holding companies under the 1929 and 1938 legislation and the investment funds (SICAV/SICAF) under the 1988 legislation.
Mauritius: a company not subject to a fixed income tax rate of at least 15% computed on a Luxembourg tax law basis.

Article 5 Permanent Establishment

See treaty text

For a Permanent Establishment to exist: Similar to the OECD MTC the Treaty first gives a general definition, then lists various forms of places and finally details the exclusions. It adds as a permanent establishment:
• a warehouse in relation to a person providing storage facilities for others;
• an installation or structure used for the exploration of natural resources;
• a farm or plantation.
A building site or a construction site or an assembly project, or supervisory activities in connection therewith becomes a permanent establishment only if it lasts for more than six months. It is worthwhile noting the extended definitions of such site provided by the 2010 OECD Commentary in its note 17 to article 5, paragraph 3.
The Treaty does address the exclusion of the maintenance of a fixed place of business solely for any combination of excluded activities as a permanent establishment.
The article also specifies that advertising, the supply of information, scientific research or similar activities have a preparatory or auxiliary character.
When a person acting on behalf of an enterprise of a Contracting State has, and habitually exercises, in a Contracting State an authority to conclude contracts in the name of the enterprise, that resident is deemed to have a permanent establishment in that other State, unless the activities of the person are limited to activities not constituting a permanent establishment. There is no definition of "habitually".
Where the agent is an independent agent (e.g. a broker, commissionaire or other independent agent acting in the ordinary course of his business) the presence of the agent will not give rise to a permanent establishment unless the agent acts exclusively or almost exclusively for the enterprise.
The fact that a company has a subsidiary or a parent in the other Contracting State does not mean that the subsidiary or parent is a permanent establishment of that company, even when it acts in the other Contracting State through a permanent establishment or otherwise.

Article 6 Income from Immovable Property

See treaty text

The general rule is that income derived by a resident of a Contracting State from immovable property in the Other State may be taxed in that Source State. This includes income from agriculture and forestry.
The concept of "immovable property" is defined by the domestic laws of the State where the property is situated. Its definition follows the OECD MTC wording. It clarifies that fees paid for the exploitation of natural resources are always income from immovable property and that ships and aircraft are not considered to be immovable property.
This Article also applies to income from an immovable property of an enterprise or used for the performance of independent professional services.
Luxembourg extends the definition also to the capital gain and revenue from an ancillary agricultural and forestry activity.

Article 7 Business Profits

See treaty text

Business profits are taxable in the Residency State only. If income is derived through a permanent establishment in the other Contracting State, then that Source State can only tax the portion allocated to the permanent establishment located there.
Business profits should be allocated to a permanent establishment on an arm's length basis as if it were an independent entity.

In determining the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the permanent establishment, including executive and general administrative expenses so incurred.

Article 8 Shipping and Air Transport

See treaty text

The right to tax belongs to the Residency State of the effective management or the home harbor or the Residency State of the operator.

Article 9 Associated Enterprises

See treaty text

This article addresses the OECD standards on transfer pricing. Associated Enterprises must adopt the arm's length principle in their transactions with each other, and to the extent that they do not, a Contracting State may adjust the taxable profits accordingly.

There is a specific provision for the Other State make a corresponding (downwards) adjustment to the taxable profits of its enterprise after the Competent Authorities have agreed on the amount.

Article 10 Dividends

See treaty text

This article is similar to article 10 OECD MTC by providing a withholding tax of:

• 5% of the gross amount of the dividends if the beneficial owner is a company which owns at least 10% of the voting shares of the company; and

• 10% of the gross amount of the dividends in all other cases.

This article is not applicable to dividends received by a permanent establishment or a fixed base that owns the participation based on which the dividend is paid. In such cases, articles 7 or 14 of the Treaty apply.

Paragraph 3 defines the term “dividends” as income from shares, “jouissance” shares or “jouissance” rights, mining shares, founders' shares or other rights, not being debt-claims, participating in profits, as well as income from other corporate rights which is subjected to the same taxation treatment as income from shares by the domestic law of the Source State.

The article is silent about partnerships (societes de personnes) because they have a dual status in Mauritius: above a certain turnover they are considered as stock companies.

Luxembourg

The normal Luxembourg withholding tax rate is 15%.

Mauritius

Mauritius imposes no tax on dividend payments by Mauritius-resident companies.

Article 11 Interest

See treaty text

The Residency State of the recipient is the only one entitled to tax interest income if the recipient is the beneficial owner.

Interest is defined as income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures.

Penalty charges for late payment shall not be regarded as interest for the purpose of this article.

This article is not applicable to interest received by a permanent establishment or fixed place of business that owns the interest bearing instrument. In this case articles 7 and 14 of this Treaty apply.

Similar to the OECD MTC the Treaty goes beyond the arm's length principle among related entities and provides that when there is a special relationship between the debtor and the creditor of the interest or between them and a third party, and therefore the interest paid exceeds what the parties would have agreed without that special relationship, the treaty will apply only to this amount and the excess will be taxed according to domestic legislation of the Contracting States taking into account the other articles of this treaty.

Luxembourg

Luxembourg does not tax interest when the beneficial owner is not an EU resident.

Mauritius

Mauritius generally imposes a final withholding tax at the rate of 15% on interest payments to non-residents. However, according to the terms of this treaty, only Luxembourg may tax payments made to a Luxembourg resident who is the beneficial owner of the interest.

Article 12 Royalties

See treaty text

This article differs from the OECD MTC.
The Residency State of the beneficial owner of the royalties is the only one entitled to tax this income.
The definition of "royalties" is defined as payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.
In case the royalties are received by or capital gains are made through a permanent establishment or fixed base, the taxation right reverts to the State of the permanent establishment under articles 7 and 14.
Similar to the OECD MTC, the Treaty goes beyond the arm's length principle among related entities and provides that when there is a special relationship between the debtor and the creditor of the royalties or between them and a third party, and therefore the paid royalties exceed what the parties would have agreed without that special relationship, the treaty will apply only to this amount and the excess will be taxed according to domestic legislation of the Contracting States taking into account the other articles of this treaty.

Article 13 Capital Gains

See treaty text

The general rule is that capital gains are taxable in the Residency State of the alienator.
Gains derived by a resident of a Contracting State from the alienation of immovable property referred to in Article 6 and situated in the Other Contracting State may be taxed in that Other State. In other words, the Source State where the property is situated may tax the capital gain.
Also gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State or of the fixed base which a resident of a Contracting State has in the other Contracting State, including such gains from the alienation of such a permanent establishment (alone or with the whole enterprise) or of such fixed base may be taxed in that Other State.
Gains from the alienation of ships or aircraft operated in international traffic and movable property pertaining to the operation of such ships or aircraft shall be taxable only in the State where the place of effective management of the enterprise is situated.
Luxembourg domestic law taxes capital gains from the alienation of shares by a non-resident only when the shareholding exceeds 25% and the time between the acquisition and the sale is less than six months. To be exempt once the six months has passed, the non-resident seller has to be a former resident for at least 15 years and become non-resident less than five years before the alienation.
Capital gains are not taxed in Mauritius, thus making the provisions of the treaty on this issue of less practical relevance for non-residents realising such gains in Mauritius. As in the case of dividends, the treaty provisions are of greater importance to Mauritian residents realising taxable gains from the other State.

Article 14 Independent Personal Services

See treaty text

This Article provides that where a resident of a Contracting State has a fixed base in the other State, income in respect of professional services or from other personal activities attributable to that fixed base may only be taxed in the country in which it is situated.
This treatment applies to the independent scientific, artistic, literary, educational or teaching activities and independent activities of physicians, lawyers, engineers, architects, dentists and accountants. In case of a fixed base Luxembourg applies a 10% withholding tax.

Article 15 Dependent Personal Services

See treaty text

Following article 15 of the OECD MTC, salaries and wages and similar compensation from dependent work are taxable in the Residency State unless the activities are performed in the other State in which case the Source State taxes the compensation. Directors' fees, pensions, government services, students and professors are dealt with under articles 16, 18, 19, 20 and 21 of this Treaty.
There are exceptions to the Source State taxation:

- The recipient is present in the Source State for a period of no more than 183 days within any period of 12 months;
- The compensation is paid by or on behalf of an employer that is not a resident in the employee's Source State; and
- The compensation is not borne by a permanent establishment or a fixed base which the employer has in the Source State.

Compensation for services rendered on board of a ship or an aircraft operated in international traffic are taxed in the Residency State of the effective management of the company.

Article 16 Directors' Fee

See treaty text

These fees may be taxed in the Source State. Luxembourg applies a 20% withholding tax. In Mauritius, such fees are subject to pay-as-you-earn (PAYE) at a tax rate of 15%, which is not final but may be credited against the individual's final income tax liability.

Remuneration received in a non-supervisory capacity (daily general management, technical, commercial or financial) is taxable as income from employment (Article 15 of this Treaty). For example, the compensation received by the Managing Director for the day-to-day management falls under article 15.

For Luxembourg, this article is an exception to the domestic legislation which taxes these activities as income from independent services.

Article 17 Artists and Sportspersons

See treaty text

Income derived by or attributed to a resident of a Contracting State as an entertainer, such as a theatre, a motion picture, a radio or a television artiste and a musician, or as a sportsperson, from personal activities exercised in the other Contracting State, may be taxed in the Source State.

There is an exemption for activities sponsored by public funds of the Contracting States.

Luxembourg applies a 10% withholding tax.

Article 18 Pensions

See treaty text

Subject to the provisions of Article 19, pensions and other similar remuneration paid to a resident of a Contracting State in consideration of past employment and any annuity paid to a resident are taxable only in the Residency State.

The term “annuity” as used means a stated sum payable periodically at stated times during life or during a specified or ascertainable period of time under an obligation to effect payment of that stated sum in return for adequate and full consideration.

Pension payments based on social security legislation of a Contracting State are taxed in the Source State. This covers pensions paid under the Luxembourg Law of July 27, 1987 concerning pension insurance for old age, infirmity and survivor (Loi du 27 juillet 1987 concernant l'assurance pension en cas de vieillesse, d'invalidite et de survie) and any other law which may be introduced in Luxembourg.

In Mauritius, the legislation governing pensions is to be found in several laws and tax regulations which are yet to be consolidated into a single law.

This should also cover pensions and other similar remuneration (including lump sum payments) arising in Luxembourg and paid to a resident of Mauritius under the law of June 8, 1999.

Article 19 Governmental Functions

See treaty text

Salaries, other than pensions, paid to a resident by a Contracting State or its political subdivisions or its municipalities are taxable only in the Source State. However, such remuneration shall be taxable only in the Source State if the services are rendered in that State and the individual receiving the remuneration is a resident of that State who: (i) is a national of that State, or (ii) did not become a resident of that State solely for the purpose of rendering the services.

Any pension paid by, or out of funds created by, a Contracting State or its political subdivision or its local authority to an individual in respect of services rendered to that State or subdivision or authority shall be taxable only in the Source State. The same applies to pensions and other payments, whether periodic or not, made under the social security laws. However, such pensions are taxable only in the Source State if the beneficiary is a resident and a national of that State.

Exceptions to this article are remunerations and pensions for commercial activities of a Contracting State or its subdivisions or the above mentioned bodies to which articles 15, 16 and 18 apply.

Article 20 Students

See treaty text

Payments which students or business apprentices who are present in the visited State solely for the purpose of their education or training, receive for the purpose of their maintenance, education or training are not taxed in the visited State, provided the payments arise from sources outside that State.

Income from personal services rendered in that State, provided the income constitutes earnings reasonably necessary for his maintenance and education, is exempted from tax in the visited State.

Article 21 Professors and Teachers

See treaty text

Remuneration which professors and other teachers who are present in the visited State temporarily (not exceeding two years) for the purpose of teaching and scientific research at a university or other recognized teaching or research institute, receive are not taxed in the Source State. To benefit from such tax treatment, the visit must be at the invitation of the government or hosting institution.
This exemption is not available in case the research is for a private benefit.

Article 22 Income Not Expressly Mentioned

See treaty text

Any income not dealt with in the preceding articles is taxable in the Residency State.

Article 23 Capital Tax

See treaty text

As a rule elements of capital of a resident are taxed by the Residency State of the owner. They may be taxed by the Source State in three cases:

- Immovable property (article 6): location
- Business property of a permanent establishment or of a fixed base: location
- Ships and aircraft in international traffic: location of the effective management of the enterprise

Luxembourg has abolished the Capital Tax for individuals.

Article 24 Elimination of Double Taxation t

See treaty tex

This article sets the principle that double taxation should be avoided and that income or capital taxed in one State should not be taxed in the other State, even through a withholding tax. Because the tax laws of Luxembourg and Mauritius are so different, the treaty negotiators agreed to have a separate paragraph for each State.

Luxembourg

Luxembourg uses the exemption method with progression for the avoidance of double taxation, thus taking into account any exempted income or element of wealth under this Treaty in determining the rate of tax to be applied to the income or wealth remaining taxable in Luxembourg.
For taxes paid in Mauritius, Luxembourg applies the credit method, but limits the credit to the fraction that is allocated to these categories of income compared to the total taxable income and to the amount of tax that would be due if this income was paid in Luxembourg to a Luxembourg resident. The excess tax is deductible from income.

Mauritius

Mauritius uses the credit method but limits the credit to the amount of Mauritian tax proportionate to the Luxembourg income.
In case of a dividend from a Luxembourg entity owned for more than 10% Mauritius extends the credit to the income tax paid by the dividend paying entity.

Article 25 Non-Discrimination

See treaty text

This article follows the OECD MTC provisions that nationals of the Contracting States shall not be subjected in the Other State to any taxation or any requirement which is different or more burdensome than the taxation and connected requirements to which nationals of the Other State in the same circumstances are or may be subjected. For this article to be applicable residency is indifferent; the nationals of either State may not even be resident in Luxembourg or Mauritius.
The non-discrimination principle also applies to permanent establishments of the other Contracting State and to enterprises of the Contracting States that are subsidiaries of the Other Contracting State.
A Luxembourg resident taxable in Mauritius however is not treated as if a Mauritian resident. The personal allowances, reliefs and reductions based on civil status or family charges granted to its own residents can be denied by Mauritius. Luxembourg under its domestic legislation grants these allowances, reliefs and reductions to Mauritian residents.
"Taxation" in this article means all taxes.

Article 26 Mutual Agreement Procedure

See treaty text

Where a resident considers that the actions of one or both of the States result or will result in double taxation inconsistent with the provisions of this Treaty, it may present its case to the Competent Authority of the Residency State, irrespective of the remedies provided by domestic law.
The two Competent Authorities will try to resolve the double taxation by mutual agreement. They may communicate directly. This removes the need for the Competent Authorities in each State to go

through diplomatic channels: The mutual agreement procedure is commonly used to decide matters concerning income and expense allocations and transfer pricing.
The Competent Authorities may also try to resolve cases of double taxation not provided for in the Treaty.
There is a three year time limit set for the taxpayer to present the case.
No provision is made for the settlement of unresolved issues through arbitration.

Article 27 Exchange of Information

See treaty text

The article on the exchange of information is the traditional restrictive article applied in all the Treaties entered into by Luxembourg. A new Protocol is in negotiation to amend this article and bring it in line with the new OECD MTC article 26.

Article 28 Diplomats

See treaty text

The Treaty affirms the fiscal privileges of members of diplomatic missions or consular posts under the general rules of international law or under the provisions of special agreements.

Article 29 Entry into Force

See treaty text

The article relates to the entry into force.

Article 30 Termination

See treaty text

This Treaty remains in force for at least five years and thereafter as long as it is not terminated by one of the two States and its termination is subject to a notice period of at least six months before the end of a calendar year.