

Tax Hotline

November 20, 2002

SUPREME COURT STAYS HIGH COURT ORDER, MAURITIUS TREATY CIRCULAR REVIVED

The Supreme Court of India granted a stay on the Delhi High Court order ("**Order**") dated May 31, 2002. This Order had quashed circular 789 of 2000 issued by the Central Board of Direct Taxes ("**CBDT**"). In the Order the Delhi High Court had *obiter* stated that Mauritius was being abused by third country residents by setting up post-box companies in Mauritius in order to qualify for the beneficial provisions under the India-Mauritius tax treaty.

The Circular had clarified that "*wherever a Certificate of Residence is issued by the Mauritian Authorities, such Certificate will constitute sufficient evidence for accepting the status of residence as well as beneficial ownership for applying the DTAC accordingly*". This circular merely reiterated the provisions of the Double Tax Avoidance Treaty between India and Mauritius, which states that where a Mauritius 'person' is found liable to tax in India, the determination of residence of such a person shall be made according to the laws of Mauritius. By quashing the Circular, the Order had raised uncertainty amongst foreign investors regarding their tax liability in relation to their investments in India.

Earlier, in the last week of September 2002, the Government of India and the CBDT, being respondents in the proceedings before the Delhi High Court, had jointly filed a Special Leave Petition ("**SLP**") before the apex court, challenging the Order. An independent SLP was also filed by Global Business Institute Ltd. ("**GBI**") a company incorporated under the laws of Mauritius, comprising of international investors, asset managers, management companies, banks, custodians, lawyers, accountants industry/professional associations and practitioners in the financial services sector.

Amongst other grounds, both SLPs challenge the power of the Indian income tax authorities to question residency of a Mauritius entity since determination of such residency is the sovereign right of the Mauritius government.

The SLPs filed by the Government of India and GBI were heard together on November 18, 2002. Although GBI was not a party before the Delhi High Court, the Supreme Court has allowed it to make the petition against the Order. The next hearing would be after a period of eight weeks. The Court has directed the respondents, Azadi Bachao Andolan and Shiva Kant Jha to file their replies within three weeks.

As a consequence of the stay of the Order, the circular shall remain in force till further orders are passed by the Supreme Court.

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