ACUTUS MANAGEMENT LTD

NEWS ALERT

24th February 2016

The Authority for Advanced Rulings upholds relief under Mauritius Treaty

Recently, the Authority for Advance Rulings ("AAR") reaffirmed in the case of Dow AgroSciences Agricultural Products Limited that capital gains earned by a Mauritius company from transfer of shares of an Indian company are not chargeable to tax in India in the absence of a permanent establishment in India.

Dow AgroSciences Agricultural Products Limited ("DAS Mauritius") is a company incorporated in Mauritius. DAS Mauritius is a subsidiary of Dow AgroSciences LLC ("DAS USA") and is part of the Dow Group ("Group"), which is a multi-national group with presence across the globe. DAS Mauritius set up a subsidiary in India Dow AgroSciences India Private Limited ("DAS India") and made investments in it since 1994. Consequently, it was proposed that the shares in DAS India be transferred by DAS Mauritius to a subsidiary of DAS Mauritius in Singapore, ("DAS Singapore") and in lieu of such transfer, DAS Singapore shall issue shares to DAS Mauritius.

The revenue authority of India raised a contention that DAS Mauritius was a shell company and shares in DAS India was acquired through DAS Mauritius merely to avoid paying tax on capital gains in India.

The AAR referred to precedents and held that an investment in India through a wholly owned company in Mauritius could not be considered as a device for tax evasion merely on the basis that the Mauritius entity was set up with an eye on the Double Tax Avoidance Agreement between Mauritius and India ("DTAA"). The AAR also noted that the Mauritius company had been holding Indian securities for about 20 years.

In addition to that, it is well prescribed at Article 5 of the DTAA that permanent establishment is a fixed place of business through which the business of the enterprise is wholly or partly carried on. As DAS Mauritius did not have a fixed base or agent in India, it was concluded by the AAR that factors such as the following are irrelevant in determining the existence of a permanent establishment of DAS Mauritius in India:

(a) Issue of employee stock options by DAS USA to the employees of DAS India;

(b) Huge royalty payment and services charges paid by DAS India to Group entities;

(c) Purchase of raw materials, intermediaries and finished goods from DAS USA;

(d) Sale of products branded and marketed by DAS USA; and

(e) Overall control and guidance of DAS India's operation by DAS USA.

In that respect, the Mauritius company was not liable to pay any tax in India and provisions dealing with withholding tax, transfer pricing and filing tax returns did not come into play.

This ruling provides re-assurance in the context of several doubts being raised on Mauritius structures, particularly, in light of ongoing discussion between the Indian and Mauritius government for amending the DTAA and the increasing focus globally against tax avoidance and on substance over form, especially with the ongoing Base Erosion and Profit Shifting ("BEPS") project.