NALSAR

India - Mauritius / Singapore / Cyprus DTAAs

Key highlights

December 2023

CONTENTS

Background

DTAA vs CTA ?

Mauritius has not chosen India as a CTA. Thus, India-Mauritius DTAA would not undergo any change

India - Mauritius (DTAA)

India-Mauritius - Comprehensive DTAA.pdf

India - Singapore (Synthesised Text)

India-Singapore - Synthesised Text.pdf

India - Cyprus (Synthesised Text)

India-Cyprus - Synthesised Text.pdf

Comparison of Rates

- Comparison of Tax Rates under the Respective Tax Treaties:

Particulars	Dividend	Royalty	Interest	Other sources
India-Singapore	**10%** (Min 25% shareholding)	10%	15%*	Source country also
India-Mauritius	5% (Min 10% shareholding)	15%	7.5%	Source country also
India-Cyprus	**10%**	10%	10%	Resident country only

*10 per cent of the gross amount of the interest if such interest is paid on a loan granted by a bank carrying on a bona fide banking business or by a similar financial institution (including an insurance company)

Articles that differentiate these DTAAs

Interest Income

Article 11(4) of Mauritius DTAA

- **Article 11(4) of India-Mauritius DTAA:**

  "4. Interest arising in a Contracting State shall be exempt from tax in that Contracting State to the extent approved by the Government of that State if it is derived and beneficially owned by any person [other than a person referred to in paragraph (3)] who is a resident of the other Contracting State provided that the transaction giving rise to the debt-claim has been approved in this regard by the Government of the first mentioned Contracting State."

- **Section 194LC:**

  194LC. (1) Where any income by way of interest referred to in sub-section (2) is payable to a non-resident, not being a company or to a foreign company by a specified company or a business trust, the person responsible for making the payment, shall at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct the income-tax thereon at the rate of five per cent:

  ….

  (2) The interest referred to in sub-section (1) shall be the income by way of interest payable by the specified company or the business trust,—

  (i) in respect of monies borrowed by it in foreign currency from a source outside India,—

  (a) under a loan agreement at any time on or after the 1st day of July, 2012 but before the 1st day of July, 2023; or

  (b) ……; or

  (c) …….,

  as approved by the Central Government in this behalf; or

Circular No. 7 of 2012.pdf

Circular No. 15 of 2014.pdf

Other Income

Article 22 of Cyprus DTAA

<u>Article 22 of India-Cyprus DTAA</u>:

OTHER INCOME

1. Items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this Agreement shall be taxable only in that State.

2. The provisions of paragraph 1 shall not apply to income, other than income from immovable property as defined in paragraph 2 of Article 6, if the recipient of such income, being a resident of a Contracting State, carries on business in the other Contracting State through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right or property in respect of which the income is paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 or Article 14, as the case may be, shall apply.

3. Notwithstanding the provisions of paragraph 1, if a resident of a Contracting State derives income from sources within the other Contracting State in form of lotteries, crossword puzzles, races including horse races, card games and other games of any sort or gambling or betting of any nature whatsoever, such income may be taxed in the other Contracting State.

Permanent Establishment

Article 5 - Permanent Establishment (Mauritius)

Article 5 of India-Mauritius DTAA

- ***2.** The term "permanent establishment" shall include:*

  ……

  *the furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only where activities of that nature continue (for the same or connected project) for a period or periods aggregating more than **90 days** within any 12 month period.*

  ***4.** Notwithstanding the provisions of paragraphs (1) and (2) of this article, a person acting in a Contracting State for or on behalf of an enterprise of the other Contracting State [other than an agent of an independent status to whom the provisions of paragraph (5) apply] shall be deemed to be a permanent establishment of that enterprise in the first-mentioned State if :*

  (i) he has and habitually exercises in that first-mentioned State, an authority to conclude contracts in the name of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise ; or

  (ii) he habitually maintains in that first-mentioned State a stock of goods or merchandise belonging to the enterprise from which he regularly fulfils orders on behalf of the enterprise.

Article 5 - Permanent Establishment (Singapore)

Article 5 of India-Singapore DTAA

- ***6.*** *An enterprise shall be deemed to have a permanent establishment in a Contracting State if it furnishes services, other than services referred to in paragraphs 4 and 5 of this Article and technical services as defined in Article 12, within a Contracting State through employees or other personnel, but only if:*

  a) *activities of that nature continue within that Contracting State for a period or periods aggregating more than <u>90 days in any fiscal year</u>; or*

  b) *activities are performed for a <u>related enterprise</u> (within the meaning of Article 9 of this Agreement) for a period or periods aggregating more than <u>30 days in any fiscal year</u>.*

  8. *Notwithstanding the provisions of paragraphs 1 and 2, where a person - other than an agent of an independent status to whom paragraph 9 applies - is acting in a Contracting State on behalf of an enterprise of the other Contracting State that enterprise shall be deemed to have a permanent establishment in the first-mentioned State, if—*

  a) *he has and habitually exercises in that State an authority to conclude contracts on behalf of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise*

  b) *he has no such authority, but habitually maintains in the first-mentioned State a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise ;* ***or***

  c) *he habitually* ***<u>secures orders</u>*** *in the first-mentioned State, wholly or almost wholly for the enterprise itself or for the enterprise and other enterprises controlling, controlled by, or subject to the same common control, as that enterprise.*

Article 5 - Permanent Establishment (Cyprus)

Article 5 of India-Cyprus DTAA

- ***3(b)*** *The furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only where activities of that nature continue (for the same or connected project) within the country for a period or periods aggregating <u>more than 90 days</u> within any 12-month period.*
- ***5.*** *Notwithstanding the provisions of paragraphs 1 and 2, where a person- other than an agent of an independent status to whom paragraph 7 applies- is acting in a Contracting State on behalf of an enterprise of the other Contracting State, that enterprise shall be deemed to have a permanent establishment in the first mentioned Contracting State in respect of any activities which that person undertakes for the enterprise, if such a person:*

  a) *has and habitually exercises in that State an authority to conclude contracts in the name of the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph, or*

  b) *has no such authority, but habitually maintains in the first-mentioned State a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise;*

  c) *habitually **<u>secures orders</u>** in the first-mentioned State, wholly or almost wholly for the enterprise itself.*

Article 5 - Permanent Establishment

- **<u>Any 12 Month period vis-à-vis Fiscal year (or) Financial Year</u>**

Issue for consideration is whether the threshold has to be calculated on the basis of the entire period for which services have been furnished in a source state although such period span across various years. The **Supreme Administrative court of Austria** (IBFD Case No. 95/13/0137) held that such threshold has to be calculated on the basis of the 'entire period' of services rendered even though it may span across various years. However, the **Hon'ble Mumbai Tribunal** in the case of Linklaters LLP (2019-TII-172-ITAT-MUM-INTL) held that the expression 'any 12month period' has to be construed to mean previous year or financial year.

- **<u>Securing Orders vis-à-vis Habitually exercising authority to conclude contracts:</u>**

Habitually securing orders is defined in the India-US technical explanation as below

Diplomatic notes exchanged at the time of the signing of the Convention explain that in order for an agent to be treated as habitually securing orders wholly or almost wholly for the enterprise all of the following tests must be met:

1. The agent frequently accepts orders for (goods or merchandise on behalf of the enterprise.
2. Substantially all of the agent's sales-related activities in the other Contracting State consist of activities for the enterprise.
3. The agent habitually represents to persons offering to buy goods or merchandise that acceptance of an order by the agent constitutes the agreement of the enterprise to supply goods or merchandise under the terms or conditions specified in the order.
4. The enterprise takes actions that give purchasers the basis for a reasonable belief that such person has authority to bind the enterprise.

Capital Gains

Article 13 of Mauritius DTAA

India-Mauritius DTAA (Article 13):

- **3A.** Gains from the alienation of shares acquired on or after 1st April 2017 in a company which is resident of a Contracting State may be taxed in that State.
- **3B.** However, the tax rate on the gains referred to in paragraph 3A of this Article and arising during the period beginning on 1st April, 2017 and ending on 31st March, 2019 shall not exceed 50% of the tax rate applicable on such gains in the State of residence of the company whose shares are being alienated; [Subject to LOB]
- **4.** Gains from the alienation of any property other than that referred to in paragraphs 1, 2, 3 and 3A shall be taxable only in the Contracting State of which the alienator is a resident.
- **5.** For the purposes of this article, the term "alienation" means the sale, exchange, transfer, or relinquishment of the property or the extinguishment of any rights therein or the compulsory acquisition thereof under any law in force in the respective Contracting States.

India-Mauritius DTAA (Protocol):

Impact of MLI?

- **1.** Article 13(3B) benefits to be denied if the primary purpose is to take advantage of Article 13(3B).
- **2.** A shell/conduit company [negligible or nil business operations or with no real and continuous business activities carried out in that Contracting State] shall not be entitled to the benefits of Article 13(3B). Listed entity is deemed not to be shell / conduit
- **3. D**eemed to be a shell/conduit company if its expenditure on operations is < Mauritian Rs.1,500,000 or Indian Rs. 2,700,000 in the respective Contracting State as the case may be, in the immediately preceding period of 12 months from the date the gains arise. If incurred more than that, it is deemed not be a shell / conduit

Article 13 of Singapore DTAA

India-Singapore DTAA (Article 13):

- **4A.** Gains from the alienation of shares acquired before 1 April 2017 in a company which is a resident of a Contracting State shall be taxable only in the Contracting State in which the alienator is a resident.

- **4B.** Gains from the alienation of shares acquired on or after 1 April 2017 in a company which is a resident of a Contracting State may be taxed in that State.

- **4C.** However, the gains referred to in paragraph 4B of this Article which arise during the period beginning on 1 April 2017 and ending on 31 March 2019 may be taxed in the State of which the company whose shares are being alienated is a resident at a tax rate that shall not exceed 50% of the tax rate applicable on such gains in that State.

India-Singapore DTAA (Article 24A):

- **1.** Article 14(4A) and (4C) benefits to be denied if the primary purpose is to take advantage of said Articles.

Impact of MLI?

- **2.** A shell/conduit company [negligible or nil business operations or with no real and continuous business activities carried out in that Contracting State] shall not be entitled to the benefits of Article 14(4A) and (4C). Listed entity is deemed not to be shell / conduit

- **3. D**eemed to be a shell/conduit company if its expenditure on operations is < Singapore $. 200,000 or Indian Rs. 5,000,000 in the respective Contracting State as the case may be, in the immediately preceding period of 12 months from the date the gains arise for Article 14(4A) [in the case of paragraph 4A, for each of the 12 month periods in the immediately preceding period of 24 months from the date on which the gains arise]. If incurred more than that, it is deemed not be a shell / conduit

Article 13 of Cyprus DTAA

India-Cyprus DTAA (Article 13):

1. 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.

2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, 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.

3. Gains from the alienation of ships or aircraft operated in international traffic or movable property pertaining to the operation of such ships or aircraft shall be taxable only in the Contracting State of which the alienator is a resident.

4. Gains from the alienation of shares of the capital stock of a company the property of which consists directly or indirectly principally of <u>immovable property</u> situated in a Contracting State may be taxed in that State.

5. Gains from the alienation of shares other than those mentioned in paragraph 4 in a company which is a resident of a Contracting State may be taxed in that State.

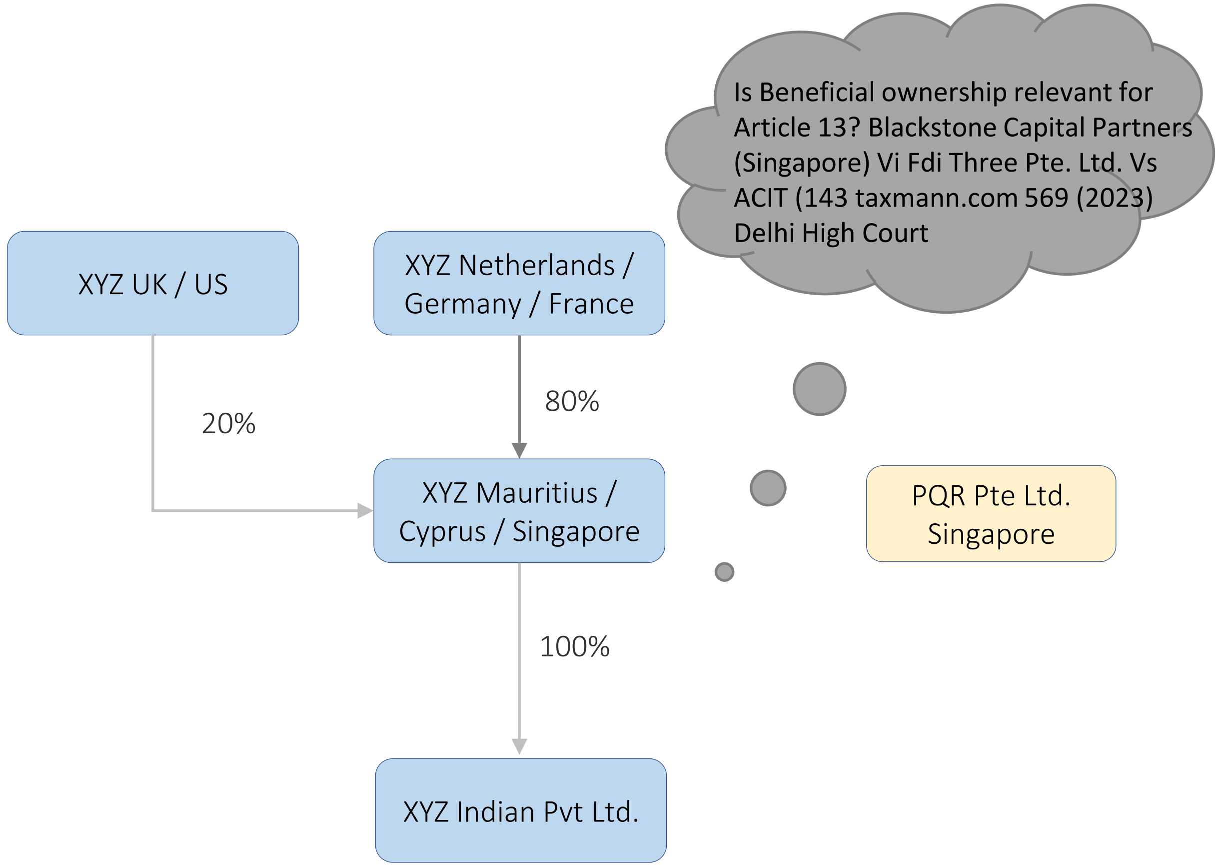
6. Gains from the alienation of any property other than that referred to in paragraphs 1, 2, 3, 4 and 5, shall be taxable only in the Contracting State of which the alienator is a resident.

Refer Annexure
Impact of MLI?

India-Cyprus DTAA specifically provides that alienation of shares of the capital stock of a company the property of which consists directly or indirectly principally of immovable property situated in a Contracting State may be taxed in that State i.e., where the immovable property is situated. Similar clause is missing in India-Mauritius and India-Singapore DTAA.

Article 13 of India-Mauritius / Singapore / Cyprus DTAA

- XYZ Group has invested into India through Mauritius / Cyprus / Singapore in the year 2019
- The Indian company is engaged in the manufacture of API intermediaries and Bulk drugs
- XYZ Group intends to divest the India business to PQR Pte Ltd., Singapore
- XYZ group has approached you to evaluate the best possible option post factoring the (i) Amended treaty provisions of the respective treaties (ii) MLI
- XYZ Mauritius / Singapore / Cyprus satisfied the Limitation of Benefits (LOB) conditions mentioned in the treaties or the Substance test.



Tiger Global International II Holdings [2020] 116 taxmann.com 878 (AAR)

Elimination of Double Taxation

Article 25 - Elimination of Double Taxation (Singapore)

2. Where a resident of India derives income which, in accordance with the provisions of this Agreement, may be taxed in Singapore, India shall allow as a deduction from the tax on the income of that resident an amount equal to the Singapore tax paid, whether directly or by deduction. Where the income is a dividend paid by a company which is a resident of Singapore to a company which is a resident of India and which owns directly or indirectly not less than 25 per cent of the share capital of the company paying the dividend, the deduction shall take into account the Singapore tax paid in respect of the profits out of which the dividend is paid. Such deduction in either case shall not, however, exceed that part of the tax (as computed before the deduction is given) which is attributable to the income which may be taxed in Singapore.

……

4. Subject to the provisions of the laws of Singapore regarding the allowance as a credit against Singapore tax of tax paid in any country other than Singapore, Indian tax paid, whether directly or by deduction, in respect of income from sources within India shall be allowed as a credit against Singapore tax payable in respect of that income. Where such income is a dividend paid by a company which is a resident of India to a resident of Singapore which owns not less than 25 per cent of the share capital of the company paying the dividends, the credit shall take into account Indian tax paid in respect of its profits by the company paying the dividends.

India-Mauritius and India Singapore DTAA provides for an Underlying Tax Credit Mechanism. Impact of the same in Outbound structures ?

Article 23 - Elimination of Double Taxation (Mauritius)

2(b) In the case of a dividend paid by a company which is a resident of Mauritius to a company which is a resident of India and which owns at least 10 per cent of the shares of the company paying the dividend, the credit shall take into account [in addition to any Mauritius tax for which credit may be allowed under the provisions of sub-paragraph (a) of this paragraph] the Mauritius tax payable by the company in respect of the profits out of which such dividend is paid.

……

4(b) In the case of a dividend paid by a company which is a resident of India to a company which is a resident of Mauritius and which owns at least 10 per cent of the shares of the company paying the dividend, the credit shall take into account [in addition to any Indian tax for which credit may be allowed under the provisions of sub-paragraph (a) of this paragraph] the Indian tax payable by the company in respect of the profits out of which such dividend is paid.

India-Mauritius and India Singapore DTAA provides for an Underlying Tax Credit Mechanism. Impact of the same in Outbound structures ?

Limitation of Relief

Article 24 - Limitation of Relief (Singapore)

Article 24(1) of India-Singapore DTAA restricts the availability of treaty benefit in the circumstances specified therein

1. Where this Agreement provides (with or without other conditions) that income from sources in a Contracting State shall be exempt from tax, or taxed at a reduced rate in that Contracting State and under the laws in force in the other Contracting State the said income is subject to tax by reference to the amount thereof which is remitted to or received in that other Contracting State and not by reference to the full amount thereof, then the exemption or reduction of tax to be allowed under this Agreement in the first-mentioned Contracting State shall apply to so much of the income as is remitted to or received in that other Contracting State.

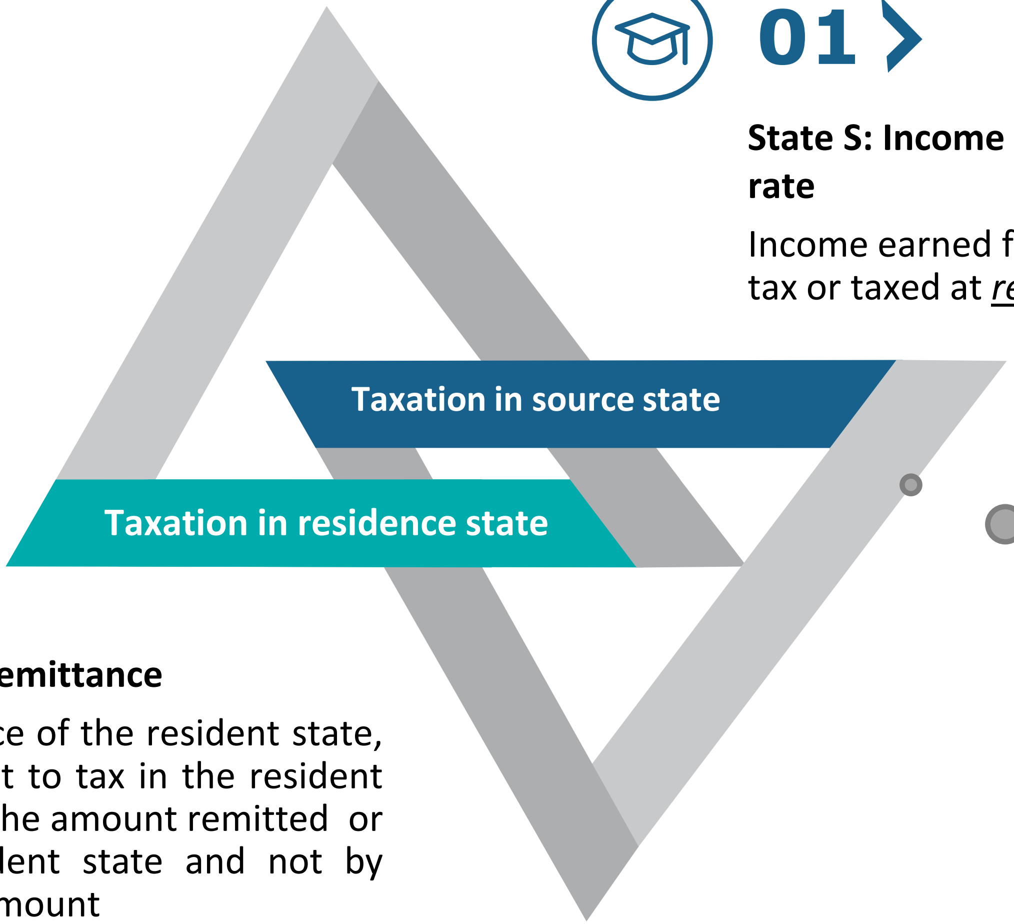
2. However, this limitation does not apply to income derived by the Government of a Contracting State or any person approved by the competent authority of that State for the purpose of this paragraph. The term "Government" includes its agencies and statutory bodies.

Article 24 - Limitation of Relief (Singapore)

01

State S: Income exempt or taxed at reduced rate

Income earned from source state is ***exempt*** from tax or taxed at ***reduced rate*** in the source state



02

State R: Taxation on remittance

Under the laws in force of the resident state, such income is subject to tax in the resident state by reference of the amount remitted or received in the resident state and not by reference to the full amount

Tax authorities may apply provisions of Article 24(1) of DTAA to deny treaty benefit to Singapore residents whenever income is not remitted to / received in Singapore

Article 24 - Limitation of Relief (Singapore)

- Singapore follows territorial taxation and categories of income taxed in Singapore could be categorized into:
  A. sourced/ accrued in Singapore and taxed in Singapore;
  B. sourced outside Singapore and taxed on the basis of remittance to Singapore/ received in Singapore;
  C. exempt from tax in Singapore, wherever sourced
- Language of Article 24(1) suggests that it could cover only the second category of income (B) and not other categories of income
- Gujarat High Court in the case **of M. T. Maersk Mikage v. DIT [2016] 72 taxmann.com 359 (Mumbai)** observed that if the income was taxable in Singapore on remittance basis then Article 24 would apply; Relying on this it can be argued that if under Singapore law, income is not taxable even on remittance basis then Article 24 should not apply
- In cases where the treaty provides that income is taxable only in the resident state (Singapore) under the treaty, it can be further argued that income is neither exempt nor taxed at reduced rate in the source state which is the first requisite for applicability of Article 24(1)
- "Not taxable" in the source state is not always tantamount to income being exempt from tax in the source state
- Mumbai Tribunal in the case of **APL Co. Pte. Ltd. [2017] 78 taxmann.com 240]** accepted this argument and held that shipping income dealt with in Article 8 of the treaty cannot be reckoned to be exempt from tax
- In respect of article 13(4), this argument was accepted in the case of **Citicorp Investment Bank (Singapore) Ltd vs DCIT [2017] 81 taxmann.com 368 (Mumbai - Trib.)**

Application of GAAR

Article 28A - Miscellaneous (Singapore)

ARTICLE 28A MISCELLANEOUS

- *This Agreement shall not prevent a Contracting State from applying its domestic law and measures concerning the prevention of tax avoidance or tax evasion.*

GAAR vs Treaty benefit ?

Annexures

Annexure 1 - Article 9 - Impact of India’s position on MLI

Article 9 - Capital Gains from Alienation of Shares or Interests of Entities Deriving their Value Principally from Immovable Property

1. Provisions of a CTA providing that gains derived by a resident of a Contracting Jurisdiction from the alienation of shares or other rights of participation in an entity may be taxed in the other Contracting Jurisdiction provided that these shares or rights derived more than a <u>certain part of their value</u> from immovable property (real property) situated in that other Contracting Jurisdiction (or provided that more than a certain part of the property of the entity consists of such immovable property (real property)):
a) shall apply if the relevant value threshold is met at any time during the 365 days preceding the alienation; and
b) shall apply to shares or comparable interests, such as interests in a partnership or trust (to the extent that such shares or interests are not already covered) in addition to any shares or rights already covered by the provisions.

2. The period provided in subparagraph a) of paragraph 1 shall apply ‘<u>in place of</u>’ or ‘<u>in the absence of</u>’ a time period for determining whether the relevant value threshold in provisions of a Covered Tax Agreement described in paragraph 1 was met.

3. A Party may also choose to apply paragraph 4 with respect to its CTAs.

4. For purposes of a CTA, gains derived by a resident of a Contracting Jurisdiction from the alienation of shares or comparable interests, such as interests in a partnership or trust, may be taxed in the other Contracting Jurisdiction if, at any time during the 365 days preceding the alienation, these shares or comparable interests derived more than <u>50 per cent of their value</u> directly or indirectly from immovable property (real property) situated in that other Contracting Jurisdiction.

India has opted for Para 4 of Article 9 of MLI

Annexure 1 - Article 9 - Impact of India's position on MLI

#	Country	Position adopted by India	Position adopted by other country	Impact
1	Netherlands, Australia	Para 4	Para 1	Para 1 to apply
2	France, Ireland, Israel, Italy, Japan, New Zealand, Slovak Republic	Para 4	Para 4	Para 4 to apply
3	Canada, Korea Singapore, UK	No	Opt out	No impact
4	Cyprus	Para 4	Opt out	No impact

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