

BHURTUN CHAMBERS

RESPONSE TO THE STATEMENT OF PRACTICE ISSUED BY THE DIRECTOR GENERAL OF THE MAURITIUS REVENUE AUTHORITY, DATED 24 AUGUST 2021, RELATING TO TRUSTS AND FOUNDATIONS

30 AUGUST 2021

Introduction

The Statement of Practice was issued presumably under section 159A of the Income Tax Act. For ease of reference, a copy is annexed.

A Practice Statement generally sets out the interpretation of a particular section of the Income Tax Act and the manner in which it is applied. A taxpayer may however have a different interpretation and he would be entitled to challenge the interpretation of the Director General of the Mauritius Revenue Authority before proper forum.

We must say right from the outset that the purpose of issuing the statement of practice remains quite unclear, coupled with the fact that it addressed a very important aspect of statutory interpretation without setting out a full reasoning, as will be illustrated below. After a thorough analysis of the Statement of Practice, I have come to identify some complex issues which are exacerbated by the Finance (Miscellaneous Provisions) Act 2021.

The concept of “company” under the Income Tax Act

The term “company” has a very specific meaning under section 2 of the Income Tax Act. However, one should be very careful to the fact that such definition is dependent on the context. This is so for two reasons. The first one being that the definition under section 2 starts by making reference to the context as follows:

In this Act, unless the context otherwise requires –

"company" -

(a) means a body corporate, other than a local authority, incorporated in Mauritius or elsewhere; and

(b) includes a non-resident société, a cell of a protected cell company, a foundation, a trust or a trustee of a unit trust scheme; but

(c) does not include a Land Area Management Unit;

The second reason being that the Interpretation and General Clauses Act provides in subsection 5(8) that:

Effect shall be given to each enactment according to its true intent, meaning and spirit.

Therefore, normally the term “company” in the Income Tax Act includes Trust and Foundation. However, the said term must be read in its context in sections 73 and 73A. We say so for the obvious reason that specific rules of residence are set out separately for “company”, “trust” and “foundation”. The term “company” obviously does not include Trust and Foundation and has to be given its ordinary meaning.

Similarly, section 73A, which contains a proviso to the residence of “company”, in the particular context, can only refer to company in the ordinary sense. This is firstly because section 73A is connected to section 73 which speaks only of company in its ordinary sense. Secondly, section 73 speaks of “incorporation” which cannot be linked to a Trust or Foundation. Thirdly, section 73A(2) refers to section 116, which upon a close reading, and for the same reason as mentioned earlier, refers to “company” in the ordinary sense only.

The rule of non-residence set out in section 73A can therefore only apply to “company” in its ordinary meaning and does not apply to “company” as defined in section 2 of the Income Tax Act.

The Concept of “central management and control”

Although as stated above, the “central management and control test” does not form part of the test of non-residence for Trusts and Foundations, it does remain an important concept in light of the residence test of Foundations and in connection with other matters, including the application of Article 4(3) of Double Taxation Agreements which follow the OECD or UN Model Convention in relation to the place of effective management.

Now the central management and control of a Trust is set out by the Director General as follows and I have also set out the definition of a resident trust for ease of reference:

Central management and control	Residence
<p>When</p> <p>(i) the trust is administered in Mauritius and a majority of the trustees are resident in Mauritius;</p> <p>(ii) the settlor of the trust was resident in Mauritius at the time the instrument creating the trust was executed or at such time as the settlor adds new property to the trust; and</p> <p>(iii) a majority of the beneficiaries or the class of beneficiaries appointed under the terms of the trust are resident in Mauritius.</p>	<p>(i) where the trust is administered in Mauritius and a majority of the trustees are resident in Mauritius; or</p> <p>(ii) where the settlor of the trust was resident in Mauritius at the time the instrument creating the trust was executed</p>

It appears that for the central management and control, all three criteria have to be met, including the residence of beneficiaries, whilst they normally are not involved in the management of a Trust.

Coming to the central management of Foundations, it is set out in the Statement of Practice as follows and for ease of reference, the residence test is also set out:

Central management and control	Residence
<p>(iii) The Founder is resident in Mauritius; and</p> <p>(iv) A majority of the beneficiaries appointed under the terms of a charter or will are resident in Mauritius</p>	<p>(i) is registered in Mauritius; or</p> <p>(ii) has its central management and control in Mauritius</p>

It is here observed that, in relation to the central management and control, there is no requirement pertaining to the Council which administers the property of the Foundation and carries out its objects.

The tax treatment, in particular the exemption, of Trusts and Foundations prior to the amendments brought by the Finance (Miscellaneous Provisions) Act 2021.

Subsections 46(2) and (3) and 49A(2) and (3) read as follows:

<p>(2) A trust</p> <p>(a) of which the settlor is a non-resident or holds a Global Business Licence under the Financial Services Act 2007 or another trust which qualifies under this subsection; and</p> <p>(b) (i) of which all the beneficiaries appointed under the terms of the trust are, throughout an income year, nonresidents or holds a Global Business Licence under the Financial Services Act 2007; or</p> <p>(ii) which is a purpose trust under the Trusts Act 2001 and whose purpose is carried out outside Mauritius, shall be liable to income tax on its chargeable income at the rate specified in Part IV of the First Schedule.</p> <p>(3) Where a trust which qualifies under subsection (2) deposits a declaration of non-residence for any income year with the Director- General within 3 months after the expiry of the income year, it shall be exempt from income tax in respect of that income</p>	<p>(2) A Foundation of which -</p> <p>(a) the founder is a non-resident or holds a Global Business Licence under the Financial Services Act ; and</p> <p>(b) all the beneficiaries appointed under the terms of a charter or a will are, throughout an income year, non-resident or hold a Global Business Licence under the Financial Services Act, shall be exempt from income tax in respect of that year.</p> <p>(3) For the purpose of the exemption specified in subsection (2), any Foundation which qualifies under subsection (2) shall deposit a declaration of non-residence for any income year with the Director- General within 3 months from the expiry of the income year.</p>
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The rule relating to the exemption is quite different. It is worth noting that the concept of “Foundation” was introduced into the Mauritian Law in 2012 which the concept of “Trust” existed well before. Section 49A was added much after section 46, but it did not follow the same wording, and this gives rise to some important considerations.

Section 46(2) provides for a particular type of Trust, whilst section 49A (2) provides that a particular type of Foundation is exempt. This is a fundamental difference. Section 49A(2) is not subject to section 49A(3). It appears to be arguable whether section 49A(2) contains an implied rule of non-residence.

The amendments brought by the Finance (Miscellaneous Provisions) Act 2021.

Now the grandfathering rule set out in the new section 161A(71) provides as follows:

Notwithstanding the repeal of subsection 46(3), the exemption provided under that subsection shall continue to apply up to Year of Assessment 2024-2025 to any trust which – (i) is set up before 30 June 2021; (ii) qualifies under subsection 46(2); and (iii) deposits a declaration of non-residence for any of the income year covered by the grandfathering period with the Director-General within three months after the expiry of that income year.	Notwithstanding the repeal of subsections (2) and (3) of section 49A, the provisions of these subsections shall continue to apply up to Year of Assessment 2024-2025 to any Foundation which – (i) has been set up before 30 June 2021; (ii) qualified under the repealed subsection 49A(2); and (iii) deposits a declaration of non-residence for any of the income year covered by the grandfathering period with the Director-General within 3 months after the expiry of that income year.
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The grandfathering rule therefore not only provides that the repealed subsections will apply during a specific defined period, but goes further to set out further conditions that are comparable for Trusts and Foundations, whilst as seen above, subsections 46(2) and (3) and 49A(2) and (3) are not comparable. It is therefore reasonably foreseeable that the application of the grandfathering rule may, in some instances, not be straightforward.

Concluding note

Amendments are brought at least each year to the Revenue Laws. These amendments are made mainly by the Finance Acts and to a lesser extent by other enactments during the Financial Year.

These regular amendments pose a high risk to the coherence of the Revenue Laws and at times, give rise to complex issues of statutory interpretation. We should not lose sight of the principle that a good Tax Law should meet the criteria of simplicity, fairness and efficiency.

It is also important to bear in mind that Statements of Practice and Rulings of the Director General are not binding upon a taxpayer, the Assessment Review Committee and any other appellate body, although they do offer valuable guidance.

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STATEMENT OF PRACTICE (SP 24/21)

TRUSTS & FOUNDATIONS

(sections 46, 49A, 73A, 116 and 161A of the Income Tax Act)

1.0 Objective

This statement of practice seeks to provide clarification on the application of sections 73A and 116 of the Income Tax Act (ITA) pertaining to Trusts and Foundations in light of the amendments brought to sections 46 and 49A of the ITA by the Finance Act (FA) 2021.

2.0 Definition

2.1 Trusts and foundations fall within the definition of “*company*” which is defined in section 2 of the ITA as “*a body corporate, other than a local authority, incorporated in Mauritius or elsewhere; and includes a non-resident société, a cell of a protected cell company, a foundation, a trust or a trustee of a unit trust scheme;*”.

2.2 Trusts in Mauritius are governed by the Trusts Act and in accordance with section 2 of the ITA, a “trust” means a trust recognised under the laws of Mauritius. A foundation, on the other hand, has the same meaning as in the Foundations Act.

2.2.1 Parties in a trust

Basically there are 3 main parties involved in a trust namely, settlor, trustee and beneficiary. According to the Trusts Act:

(1) A Settlor means a person who provides trust property or makes a testamentary disposition on trust or to a trust.

(2) A Trustee means a person who holds or has vested in him, or is deemed to hold or have vested in him, property of which he is not the owner in his own right, with a fiduciary obligation to hold, use, deal or dispose of it -

(a) for the benefit of any person (a “beneficiary”), whether or not yet ascertained or in existence;

(b) for any purpose, including a charitable purpose, which is not for the benefit only of the trustee; or

(c) for such benefit as is mentioned in paragraph (a) and also for any such purpose as is mentioned in paragraph (b).

(3) A Beneficiary means a person, whether natural or corporate, entitled to benefit under a trust, or in whose favour a power to distribute trust property may be exercised.

2.2.2 Qualified number of trustees

As required under the Trusts Act, the number of trustees of a trust shall not exceed four of whom, at least one shall be a qualified trustee. A *'qualified trustee'* means a management company or such other person resident in Mauritius as may be authorised by the Financial Services Commission to provide trusteeship services.

2.3 Foundations in Mauritius are governed by the Foundations Act. Following registration with the Registrar of Foundations in Mauritius, a foundation is issued with a Certificate of registration and is thus deemed a body corporate.

2.3.1 Parties in a foundation

Basically there are 3 main parties involved in a foundation namely, founder, executor and beneficiary. According to the Foundations Act:

(1) A Founder / Testator means a person who endows a Foundation with its initial assets and one founder who shall be the testator.

(2) An Executor means a person named in a will, or nominated by the testator, to carry out the directions of the will; and includes, in the case of a foreign will, the executor's duly appointed lawful agent.

(3) A Beneficiary means a person -

(a) who is entitled to benefit under a Foundation; or

(b) in whose favour a power to distribute any Foundation property may be exercised.

3.0 Liability to Tax

3.1 As a general rule, the income of Mauritius Trusts and Foundations is subject to income tax at the rate specified in Part IV of the First Schedule to the ITA, that is 15%.

3.2 Prior to FA 2021 where, in an income year, a trust

- (i) of which the settlor is a non-resident or holds a Global Business Licence under the Financial Services Act;
- (ii) of which all the beneficiaries appointed under the trust are, throughout an income year, non-residents or holds a Global Business Licence under the Financial Services Act;
- (iii) which is a purpose trust under the Trusts Act and whose purpose is carried out outside of Mauritius;

it could file a declaration of non-residence with the Director-General within three months after the expiry of the income year and it was exempt from income tax in respect of that year.

3.3 Similarly, prior to FA 2021, a foundation of which

- (i) the founder is a non-resident or holds a Global Business Licence under the Financial Services Act; and
- (ii) all the beneficiaries appointed under the terms of a charter or a will are, throughout an income year, non-resident or hold a Global Business Licence under the Financial Services Act,

it could deposit a declaration of non-residence for any income year with the Director-General within 3 months from the expiry of the income year and it was exempt from income tax in respect of that year.

4.0 Grandfathering

4.1 Following the repeal of subsection (3) of section 46 and subsections (2) and (3) of section 49A of the ITA, the above exemption will no longer be available except for trusts and foundations which were set up before 30 June 2021. These entities can avail of the exemption under section 161A (71) and (72) of the ITA. This provision is

applicable up to year of assessment 2024/2025. Therefore, trusts and foundations having an income year starting on or after 31 December 2024 will not benefit from this grandfathering provision.

4.2 During the grandfathering period, the grandfathered Trust/Foundation cannot benefit from the exemption in respect of new assets/activities such as intellectual property assets acquired and income from specific assets or projects started after 30 June 2021.

5.0 Trusts and Foundations resident in Mauritius

5.1 The definition of residence is set out in section 73 of the ITA. With regard to Trusts and Foundations, the relevant extract of section 73 is reproduced hereunder:

"73. Definition of residence

(1) For the purposes of this Act, "resident", in respect of an income year, when applied to –

(d) a trust, means a trust –

(i) where the trust is administered in Mauritius and a majority of the trustees are resident in Mauritius; or

(ii) where the settlor of the trust was resident in Mauritius at the time the instrument creating the trust was executed;

(da) a Foundation, means a Foundation which –

(i) is registered in Mauritius; or

(ii) has its central management and control in Mauritius;"

5.2 Trusts and foundations which are considered to be resident in accordance with the definition of residence set out in section 73 of the ITA will be liable to tax in Mauritius on their worldwide income at the rate specified in Part IV of the First Schedule to the ITA.

6.0 Non-resident Trusts and Foundations

6.1 A company incorporated in Mauritius is non-resident if it is centrally managed and controlled outside Mauritius in accordance with section 73A of the ITA which reads as follows:

'73A. Companies treated as non-resident in Mauritius

(1) Notwithstanding section 73, a company incorporated in Mauritius shall be treated as non-resident if it is centrally managed and controlled outside Mauritius.

(2) A company referred to in subsection (1) shall submit a return of income as required under section 116.'

On the basis that trusts and foundations fall within the definition of 'company' in accordance with section 2 of the ITA, they are deemed non-resident if their central management and control takes place outside Mauritius, in line with the provisions of section 73A of the ITA.

Accordingly, it is apposite to define what would constitute '*central management and control*' for a trust and a foundation.

6.2 Determination of Central Management and Control

(a) Trust:

A trust would have its central management and control in Mauritius when:

- (i) The trust is administered in Mauritius and a majority of the trustees are resident in Mauritius;
- (ii) The settlor of the trust was resident in Mauritius at the time the instrument creating the trust was executed or at such time as the settlor adds new property to the trust; and
- (iii) a majority of the beneficiaries or the class of beneficiaries appointed under the terms of the trust are resident in Mauritius.

(b) Foundation:

A foundation would have its central management and control in Mauritius if:

(i) the founder is resident in Mauritius; and

(ii) a majority of the beneficiaries appointed under the terms of a charter or will are resident in Mauritius.

7.0 Income derived from Mauritius

A Trust or Foundation which, throughout an income year, is non-resident, shall be liable to tax only on its chargeable income attributable to its Mauritian source income at the rate specified in Part IV of the First Schedule to the ITA.

8.0 Exempt Body

A foundation or trust whose exclusive purpose or object is of a charitable nature will be exempt from tax in Mauritius in accordance with Item 1 of Part I of the Second Schedule to the ITA.

9.0 Partial Exemption

Any foundation or trust may claim partial exemption on such categories of income specified under Sub Part B and Sub Part C of the Second Schedule to the ITA subject to satisfying the conditions prescribed relating to substance of their activities.

10. Annual Return of Income

Any foundation and trust shall in accordance with section 116 of the ITA submit an annual return of income.



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24 August 2021