



Investing into India through Mauritius

Mauritius Funds

Mauritius is well known as an excellent platform for structuring foreign direct investments into India. Not only does Mauritius benefit from a large network of double taxation avoidance agreements (“DTAA”), such as the India/Mauritius DTAA, it also has sophisticated legislation and regulations crafted with a view to establishing a well regulated and efficient investment funds industry. This is reflected in the burgeoning growth of the investment funds industry which now has in excess of 610 funds registered with the Financial Services Commission in Mauritius.

Investment funds in Mauritius are largely governed by The Securities Act 2005 (the “Act”) and The Securities (Collective Investment Schemes and Close-ended Funds) Regulations 2008 (the “Regulations”).

The Regulations divide Investment funds into Collective Investment Schemes (“CIS”) and Closed-end funds (“CEF”). To qualify as either, the sole purpose of the entity should be the collective investment of funds in a portfolio of securities or other financial assets, real property or non-financial assets approved by the FSC. Additionally, the operation of the entity must be based on the principle of the diversification of risk.

The main distinction between a CIS and a CEF is that a CIS allows investors to redeem their interests in the fund upon notice, while a CEF only allows redemptions at the discretion of the operators of the fund. A CIS is more suited towards hedge fund vehicles, while private equity/venture capital funds are generally structured as CEFs.

A variety of investment funds can be formed and licenced in Mauritius. The determination as to what type of fund should be formed is largely dependent on the type of investors that the fund is targeting and the nature of investments that the fund intends to make. The most common funds formed for investment into India are either Professional CIS, Specialised CIS, or Expert Funds.

- **Professional CIS** offer their interests either to sophisticated investors or as private placements.
- **Specialised CIS** funds invest in real estate, derivatives, commodities or other products authorised by the FSC
- **Expert Funds** are only available to investors who either make a minimum initial investment of over USD100,000 or qualify as a sophisticated investor, as defined by the Act.

All of these funds are subject to varying levels of supervision by the FSC. The more sophisticated the investor and the investment products, the lighter the level of regulation.

Hedge funds investing into India are commonly set up as either a Professional CIS or an Expert Fund. A limited number are being set up as a Specialised CIS.

Private equity/venture capital funds are generally licenced as CEFs and are regulated in the same way as a Professional CIS provided they meet certain criteria (i.e., they cannot make a public offering and they must have 100 or less investors).

While standalone structures are common, other frequently used structures include master-feeder hedge fund structures, side-by-side feeders with master funds formed in Mauritius, closed-end funds, and other investment holding structures with underlying special purpose vehicles. Often, the feeder funds are formed in jurisdictions outside of Mauritius, mainly in the United States, Cayman Islands, British Virgin Islands and Bermuda.

The Mauritius Advantage

Mauritius combines the traditional advantages of being an offshore financial center (no capital gains tax, no withholding tax, no capital duty on issued capital, confidentiality of company information, exchange liberalization and free repatriation of profits and capital) with the distinct advantages of being a treaty-based jurisdiction with a substantial network of treaties and DTAAAs.

While the fiscal advantages offered by its tax treaties play a major role in the choice of Mauritius for cross-border investment, there are additional advantages. Mauritius is a well regulated business jurisdiction with a proud record of adherence to international best practice standards and a favourable time zone. The jurisdiction enjoys a sophisticated international telecommunication service, an abundance of professional service providers at a relatively low cost, economic and political stability, and an educated and multilingual workforce, with English and French being the main business languages.

Mauritius has rapidly developed as a major financial services centre in recent years and, as a result, is well-positioned to provide high quality local services to investment funds. Each of the big four auditing firms have large offices in Mauritius, as do international banks, including HSBC, Barclays and Deutsche Bank. There are several large fund administrators who are also based in Mauritius and offer accounting, share registration and back office services.

Mauritius also has a hybrid legal system consisting of British common law practice and the French Law Codes (although the Privy Council in London is the final court of appeal). Forward-looking legislators have created modern and flexible company/commercial legislation.

Investment protection

Mauritius has signed an Investment Promotion and Protection Agreements (an "IPPA") with India which provides for free repatriation of investment capital and returns, guarantee against expropriation, a most favoured nation rule regarding treatment of investors, and compensation for losses in case of war, armed conflict or riot, as well as arrangements for the settlement of disputes between investors and the contracting states.

Current Tax Regime

Generally the income and capital gains of a Mauritius company derived from Indian based investments are taxable in Mauritius and not India according to the India/Mauritius DTAA. As far as income taxes are concerned, Investment funds in Mauritius are normally formed as companies, and Mauritius companies, which are resident in Mauritius for tax purposes, are generally subject to tax on income at a flat rate of 15%. However, under Mauritius law, entities which hold a category 1 global business license (GBL 1) and which are regulated by the Financial Services Commission of Mauritius may claim a credit for foreign tax on income not derived

from Mauritius against the Mauritius tax payable. If no written evidence is provided to the Mauritius Revenue Authority showing the amount of foreign tax charged, the amount of foreign tax paid is deemed to be equal to 80% of the Mauritius tax chargeable with respect to that income. Consequently, the effective tax rate will be between 3% and nil, depending on the circumstances. There is also no capital gains tax and no withholding tax on dividends and/ or interest paid to non-residents by Mauritius entities.

Potential changes to Tax Treatment

In August 2009, the Indian Government released a Direct Tax Code (the “Code”) and Discussion Paper. We understand that the Code initially provided that its terms may override the terms of any DTAA, which would include the India/Mauritius DTAA. A revised Discussion Paper was released in June 2010 and it is now proposed that where the tax treatment under a DTAA is more beneficial to a tax payer than the treatment under the Code, the terms of the DTAA will prevail. However, in terms of the Code, the Commissioner of Income Tax may declare the tax treatment of a tax payer under a DTAA to be not applicable under general anti-avoidance rules.

While these proposed changes create uncertainty as to the exact nature of the tax treatment of foreign entities investing in India, the Code is still in draft form and is therefore still subject to further comment and amendment. Further, we are advised that there are some issues as a matter of Indian Law regarding the enforceability of the provisions of the Code that seek to unilaterally amend the terms of any bilaterally negotiated and agreed DTAA. There is also the possibility of a negotiated amended India/Mauritius DTAA. However, regardless of the ultimate outcome of the Code and any amendment to the India/Mauritius DTAA, there will still be significant tax advantages to investing into India through a Mauritius domiciled vehicle.

The Limited Partnerships Bill, 2009

The Limited Partnerships Bill, 2009 (the “Bill”) is of particular interest to managers in the private equity/venture capital world. Limited Partnerships are a vehicle of choice for private equity/venture capital funds due to their flexible structures that still offer limited liability for investors. Conscious of this, Mauritius has taken steps to facilitate the creation of such vehicles in Mauritius. After extensive consultation with the financial services industry over previous drafts of the Bill, it is now finalized and is likely to be presented to the Parliament of Mauritius for enactment shortly.



Craig T. Fulton

Head of Mauritius office

+230 464 9090

craig.fulton@conyersdill.com

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.

About Conyers Dill & Pearman

Conyers Dill & Pearman advises on the laws of Bermuda, British Virgin Islands, Cayman Islands, Cyprus and Mauritius. Conyers' lawyers specialise in company and commercial law, commercial litigation and private client matters. Conyers' structure, culture and expertise enable responsive, timely and thorough service. Conyers provides clients with the highest quality legal advice from strategic global locations including offices in the world's leading financial centres in Europe, Asia, the Middle East and South America. Founded in 1928, Conyers comprises 600 staff including more than 150 lawyers. Affiliated companies (Codan) provide a range of trust, corporate secretarial, accounting and management services.

For more information please contact:

Naomi Little

+1 (441) 298 7828

naomi.little@conyersdill.com

www.conyersdill.com