July 2017

YOUNG GLOBAL'S

GLOBAL TAXATION

A BI-MONTHLY JOURNAL ON INTERNATIONAL TAXATION, TRANSFER PRICING & BEPS

11th Asia/Africa IFA Conference

Total Number of Pages: 168 Price ₹750

SUBSCRIBE TODAY

Get your copy delivered by post or digital subscription

Call a Dealer
+91-11-23324142,
23324153,
41824268,
23319665

Pay Online
www.bookskhoj.com

Email
info@youngglobals.com

Post
YOUNG GLOBAL PUBLICATIONS
B-4, Basement, Vandhana Building,
11, Tolstoy Marg,
New Delhi - 110 001.

Subscription

April 2017 to March 2018 (6 issues)

	India	Abroad
Paper copy	Rs. 3995	USD 250
E-copy (Single user)	Rs. 2495	USD 75

FROM THE EDITOR'S DESK

Hari Om Jindal

IFA Mauritius Conference 2017

The IFA Asia/Africa annual conference in Mauritius is flagship event of the Mauritius IFA Branch in the field of international taxation. I get the opportunity to attend this conference. I would like to thank Mr Rajesh Ramloll who is also our Advisory Board member, and his team for organising year after year such a good conference. We have covered articles from the speakers of this conference, the details of which have been given in Guest Editorial. I am again grateful to Mr Ramloll for all his efforts and time devoted for this issue in coordinating, reviewing and editing.

Multilateral Instrument/Convention

Ministers and high-level officials from 68 countries and jurisdictions have signed on 7th June or formally expressed their intention to sign an innovative multilateral convention that will swiftly implement a series of tax treaty measures to update the existing network of bilateral tax treaties and reduce opportunities for tax avoidance by multinational enterprises. The new convention will also strengthen provisions to resolve treaty disputes, including through mandatory binding arbitration, thereby reducing double taxation and increasing tax certainty.

With the signing of MLI, one question which is perplexing every taxpayer and tax consultant is; what will happen to recently revised treaties with Mauritius and Singapore?

Mauritius has also now signed MLI but has favored bilateral negotiations with some treaty partners, like India. Therefore, India is missing in the covered tax agreements list of Mauritius. Singapore has also signed MLI and it covers India in the list of covered tax agreements list. In this issue we have covered articles on position taken by various countries under MLI. These articles are written by renowned international tax experts. Hope you would find it useful.

Tussle between the government and judiciary is not new but it can be harmful for the democratic structure of India

The Income-tax Appellate Tribunal was founded on 25th January, 1941, and has completed 76 years of purposive existence. It is considered as the Mother Tribunal of all Tribunals in the country. It is the final fact finding authority under the Income–tax Act, 1961. Both tax payers and the Revenue have placed utter faith on the functioning of the Tribunal due to the process of appointment of the Hon'ble Members, who administer justice.

Hon'ble RM Lodha, the former Chief Justice of India, has come down heavily on the action of the Government in enacting the Tribunal Members Rules 2017. The learned jurist is irked by the fact that the appointments of Members of the Tribunal would no longer be impartial and independent. Under the said Rules, the Central Government has abrogated to itself the right to appoint, extend the tenure, and remove, the Hon'ble Members of the various Tribunals, including the ITAT. "The government is one half of the parties contesting various cases in courts. So obviously, if the litigant appoints the adjudicator, then the decision making is seen to have been partial," Justice Lodha said. He added that the "Tribunals have immense power over high-value transactions and it is important that they remain impartial".

Similar sentiment has been expressed by Senior Advocate Arvind Datar, the leading tax expert. "Except the Chairperson of the National Company Law Appellate Tribunal (NCLAT), who can be removed by the Supreme Court, all other chairpersons can now be removed by the executive," he said, emphasizing that the Tribunals will not have any independence left.

There have been several instances in the past where the Government has tried to interfere in the working of the Tribunal. All of these attempts have been scuttled by a vigilant judiciary as is reflected by the judgments in ITAT v. V.K. Agarwal (1999) 235 ITR 175 (SC), Ajay Gandhi v. B. Singh (2004) 265 ITR 451 (SC), Madras Bar Association v. UOI (2014) 368 ITR 42 (SC) and UOI v. R. Gandhi /Madras Bar Association (2010) 156 Comp Cas 392 (SC)/ 11 SCC 1. New Rules are "roadblocks" to test the ability of the Member to stand by the oath "to decide without fear or favour": ITAT Bar. Few PILs have already been filed seeking an order restraining the government from enforcing the relevant provisions of the Finance Act.

Time and again the political masters have tried to amend even the Constitution of India to prove its supremacy but did not succeed wholly even though they succeed partly. Almost forty years ago, Chief Justice Sikri and 12 judges of the Supreme Court delivered the most important judgment in the case of Kesavananda Bharati v. State of Kerala by a wafer-thin majority of 7:6, wherein it was held that Parliament could amend any part of the Constitution so long as it did not alter or amend "the basic structure or essential features of the Constitution."

The continuing face-off between the Supreme Court and the government over the appointment of judges to the higher judiciary is reaching a flashpoint. The central government returned 43 of the 77 names recommended by the Supreme Court's collegium for appointment as high court judges. But within a week, the collegium reiterated 37 of the recommendations while six are pending consideration.

In the next issue, we would cover post BEPS developments apart from latest development on international taxation. I must request you all to share your views with us. Please do not hesitate to mail your suggestions and feedback to hojindal@yahoo.co.in

[Hari Om Jindal]

Guest Editorial

"The World has changed". These were the words of Mr. Pascal St Amans, the Director of the Centre for Tax Policy and Administration of the OECD, uttered during the 11th – IFA Asia/Africa Conference held in Mauritius on the 18th and 19th May 2017. He was alluding to the implementation phase of BEPs which will be the game changer in the way international taxation rules will henceforth operate in an entirely new international taxation environment.Mr Porus KaKa SA and Chairman of IFA worlwide (attending the conference for the 5th time in a row) had the following to say"The conference takes place less than 20 days from the largest tax treaty signing ceremony ever''.Porus KaKa was of course referring to the signing ceremony of the OECD Multilateral Instrument (MLI)in Paris.Indeed on 7 June 2017, 68 States signed the Multilateral Convention to implement Tax Treaty Related Measure to prevent BEPs (MLI) during a signing ceremony at the Chateau de la Muette in Paris. On that day 8 countries also committed to sign the Convention. The MLI was developed after negotiations involving more than 100 countries in 2016 to tackle inter alia tax treaty shopping and abuse(article 7).

Are there different approaches between the OECD and the UN in that respect? Part of the answer lies the article by Ingatius Mvula whose enlightening article, I invite subscribers to read. The author makes an article by article comparison of the BEPs updates to the UN Model Double Tax Convention (to be launched in October 2017). One of the significant departures the UN MTC from the OECD is in relation to Article 29 of the UN MTC . Ignatius Mvula recognizes that "probably one of the big departures from the OECD is that the Article on entitlement to benefits under the New UN MTC will incorporate a detailed limitation of Benefits (LOB) and a Principal Purpose Test (PPT) which is seen as a practical approach by UN Tax Committee. The detailed LOB, it would seem, is largely equivalent to the US Model LOB. Unlike the OECD Model which will incorporate both the simplified and detailed LOB, the UN does not have the simplified LOB. The UN commentary will recognize that countries could in their bilateral negotiations either follow the LOB alone, or LOB plus provision for conduit arrangements."

A number of concerns have been raised about the uncertainty that the Principal Purpose Test (PPT) will certainly pose. In the June 2016 issue of this journal, this vexed subject was broached by Rita Correia da Cunha in her article. The question is whether the PPT will give certainty or whether it will open up a boulevard of uncertainty with the manner the text has been drafted. At the end of the day, this will be a matter for the Courts to decide and it may be years before this matter is laid to rest juridically speaking.

There is in this issue a good handful of articles on the Multilateral Instrument (MLI). In her article on the position of Mauritius, Leena D. Brette points out that Mauritius has chosen to go for an interim PPT. Under article 7.17(a) of the MLI, it is provided that "A Party making a notification under this subparagraph may also include a statement that such party accepts the application of paragraph 1 alone as an interim measure, it intends where possible to adopt a limitation on benefits provision, in addition to or in replacement of paragraph 1, through bilateral negotiation". It would appear that it is open to a party to the MLI to adopt the PPT as an interim measure. One may resort to the explanatory statement to understand the implication of an interim PPT. Paragraph 115 of the "Explanatory statement to the Multilateral Convention to implement Tax Treaty measures to prevent Base Erosion and Profit Shifting" released on 24 November 2016 (at the same time as the MLI was adopted) attempts to explain this "interim" approach. It clarifies that "same parties may choose to apply the PPT provided in paragraph 1 [of Article 7] alone as an interim measure, with the intent where possible, of adopting other measures to satisfy the minimum standard through bilateral negotiations. The explanatory statement even goes on to ensure a Party that has opted for an interim PPT has 2 things to do –

1. make express such intent, and
2. seek through bilateral negotiations, to adopt a simplified or detailed LOB provision to supplement paragraph 1, or to replace paragraph 1 with a detailed LOB provision supplemented by rules to address conduit financing structures.

A Party may chose this approach whilst on the one hand ensuring compliance with the minimum standards and on the other leaving open its option to adopt on LOB through bilateral negotiations. Mauritius signed the MLI on the 5th of July in Paris. Twenty more countries have expressed their intention to sign the MLI.

Readers will also appreciate the article by Reuven Avi-Yonah on the MLI. Whilst he points out that the US has not signed the MLI, he holds the view that "if the MLI succeeds" even the US may see the wisdom of joining it one day, especially since the new US model already includes many of its innovations". The short piece of Shankar Iyer on the Singapore position points out that Singapore is one of the 25 signatories which have committed to Mandatory MAP arbitration. Arbitration in taxation is set to become the next buzz in international arbitration.The articles by Craig Cooper (Australia position) and those of S. P. Singh et al (India's position: majorly a balanced approach) are worth the read and reiterate that the success of the MLI will lie in its application by the Parties and SP Singh concludes that henceforth, the analysis of a cross border transaction would no longer be a straight forward case. In the future, one would also need to analyse the position of both jurisdictions along with the MLI provisions to understand the whole scheme of things. I would humbly add that negotiators would also have to carry with them (in hard copy in their suitcase or the soft version on their tablette) the explanatory memorandum. The weight to be given to the explanatory memorandum is thoroughly examined by David Salter in his article.

Beneficial owner registers! The OECD/Global Forum peer review on transparency and exchange of information has just started its second round of reviews with new terms of reference and under these new ToRs,the complexities underpinning the exchange of information of beneficial ownership issues behind all types of entities such as trusts, foundations etc.are dealt with. Will the solution come from block chain technology. The article by Jeffrey Owens aims at providing readers with an understanding of block chain properties and its underlying technology and how they may be useful in the area of taxation.Similarly, bitcoins and crypto-currencies are new buzzwords that usually would interest geeks but now have become relevant to the taxman. I invite readers to browse the article by Shikha Mehra et al .They ask the question whether the parameters set out under CBDT circular no/2007(in relation to shares held as investment or stock-in-trade) can also be applied to other assets such as bitcoins in order to determine whether such assets are being held as investment or trading assets.

Another article which is worth the read is Pasquale Pistone's who makes a plea for an effective cross border tax dispute settlement with the issue of legal certainty as a backdrop. He reflects that "after introduction of Article 25(5) in the OECD MTC, bilateral tax treaties have gradually included tax arbitration in order to settle cross border tax disputes, opening up the door to the use of effective mechanism for settling cross-border tax disputes. He opines that arbitration already operates as an effective tool to settle cross border disputes (such as in investment treaties). For this reason, he argues, the more recent blossoming of this type of mechanism in tax matters throughout the world should not be heralded as a surprise.

Sanjay Kumar et al reflect on the widening of the safety net under the revised safe harbour scheme.The author welcome the much awaited revised safe harbour rules issued by the CBDT last month.The article attempts to critically analyse the revised rules in view of the key differentiating factors as compares to earlier rules.

This issue will keep readers updated on the recent budget measures of the Mauritius government. The piece by Wasoudeo Balloo, a regular contributor explains therein the concept of ‘‘negative taxation’’.

Besides the above thought provoking articles,this issue contains usual features such as landmark court and tribunal decisions as well as world news.

I wish subscribers a happy read!

Rajesh Ramloll SC
IFA Mauritius Chairman

The Republic of Cameroon is the 70th country to have signed the MLI on 11th July 2017

YOUNG GLOBAL'S
GLOBAL TAXATION
A BI-MONTHLY JOURNAL ON INTERNATIONAL TAXATION, TRANSFER PRICING & BEPS

FOUNDING EDITOR: Hari Nath Rai
MANAGING EDITOR: Hari Om Jindal

Printed by Mayank Offset Process Published by Hari Nath Rai on behalf of Young Global Publications and Printed at 794-795, Guru Ram Dass Nagar Extn., Laxmi Nagar, Delhi-92 and published from D-22, Ganesh Nagar, Pandav Nagar Complex, Delhi - 110 092. Editor: **Hari Nath Rai**. Global Taxation annual subscription from April 2017 - March 2018 (6 Issues) is ₹3,995 (US $ 250) and E-Copy is ₹2,495 (US $ 75). Single copy ₹750 only.

Global Taxation is published on every 25th of the month. **Non-receipt of part must be notified within 60 days of the due date.**

MODE OF CITATION [2017] JULY GT. . .
TOTAL PAGES 168

Sales & Marketing: B-4, Basement, Vandhana Building,
11, Tolstoy Marg, New Delhi - 110 001.
Ph.: +91-11-41824268, 23324142
E-mail: info@youngglobals.com
Website: www.bookskhoj.com

CONTENTS

11th Asia / Africa IFA Conference 2017

CONTENTS


pwc
MCB
WARBURG PINCUS
itl
DTOS
An IBL Group company
ESSAR
ENERGY
FSPA
GLOBAL FINANCE
Rita Correia Da Cunha
David Salter


KPMG
GLOBEFIN
TAXMANN


pwc
itl
MCB
DTOS
An IBL Group company
ESSAR
ENERGY
FSPA
WARBURG PINCUS
Belema Obuoforibo
Mustupha Mosafeer

Opening Speech

*Porus F. Kaka**

I am honoured to inaugurate the 11th Asia Africa Conference in Mauritius.

IFA's commitment to this region is borne by the fact that this is the first time that President of IFA had visited Mauritius consecutively for five years especially this year when there was tremendous difficulty.

For Mauritius, challenges of BEPS are significantly coupled with dramatic changes to the tax treaty with India which is now in effect.

This Conference takes place less than 20 days from the largest tax treaty signing ceremony ever.

The treaty alone runs into 50 pages with 39 articles from definitions to depositories. The combinations it can have are probably greater than the ways to solve the Rubik's cube. So we await with anticipated breath as to what this document will look like.

A few words about IFA

As I come to the twilight of my role as President of IFA, I cannot tell you the satisfaction that has been conveyed to me lately. At our signature IFA 70th Congress at Madrid we had over 2200 persons and the reports so far indicate that it was truly spectacular both scientifically and socially. What was amazing to me personally was 100s if not 1000s of persons who during the course of the week met me personally and expressed their satisfaction about IFA globally. I had first timers from Canada to Asia who said that they were amazed at the quality of the IFA product. Such feedback is our greatest reward.

Now a few words about the 71st Congress in Rio. This will be the first time that both IFA Main Subjects will revolve and rotate on primarily BEPS related issues. They are :

1. International BEPS and Practical consequences in Domestic and Multilateral laws
2. The future of Transfer Pricing

Having just come from the Permanent Scientific Committee meeting in Lisbon, I want to tell you on behalf of the Executive Board of IFA that we truly expect an exceptional Scientific programme in Rio. Don't take my word for it, go and see the Subjects and Chairs for yourselves.

---

* *Mr. Porus F. Kaka, an eminent senior advocate in India, took charge as President of the International Fiscal Association (IFA) in 2014 and will hold office till 2017.*

IFA with its neutral and non-lobby position is in a unique and special place in the Tax World. Financially, activity-wise we are at our highest ever. This year not 1-2 but 5 Regional Conferences will take place in Buenos Aires 31st May-2nd June, New Delhi on 28-29 April, Mauritius and Sweden on 18th & 19th May. I hope to see many of you at our Regional or Annual Congress. It has taken a lot of effort and time and cost to myself but in my last year I thank you for your support to IFA and to myself as President.

Another first today for the 1st time IFA's Regional meetings are taking place simultaneously in the Northern and Southern Hemispheres.

The next game changer in 2017 will be the first country by country documents that will be available to the Revenue Authorities across the world.

These are exciting times for international tax because the law itself is in a flux. Changes are dramatic and yet to a certain extent uncertain.

I hope when I step down I feel my mission of leaving this organisation as a symbol of the highest platform of international tax debate, in its activities across the globe from South America to Asia Pacific, from Africa to the United States and the Nordic countries at the highest not only in number but also the quality of scientific content, financially stable and healthy and above all a place to learn and to make good friends is fulfilled. But of this you all will be the judge.

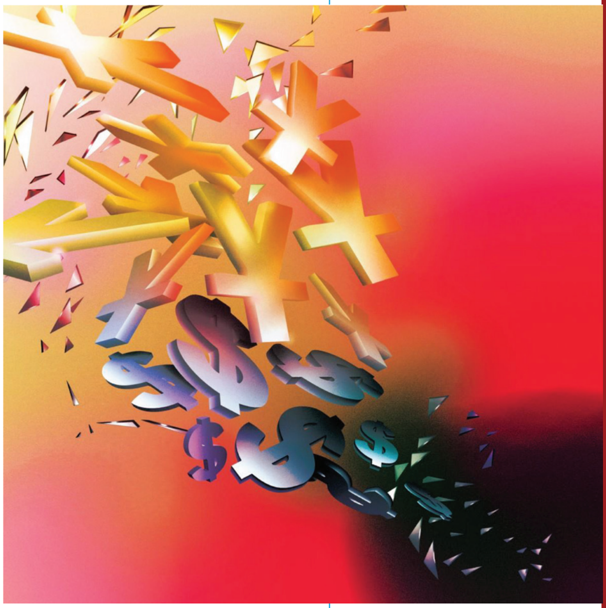
My Presidency has been easier due to the support I have received from the branch like Mauritius especially under the chairmanship of a good friend, Rajesh. Asia Africa occupies a special place in both IFA and my calendar.

I am sure the next 2 days will be an exciting opportunity to bring yourself up-to-date with the state of international tax law. I am proud to declare the 11th Asia Africa Conference open.

Blockchain: Challenges and Opportunities for Taxation

*Jeffrey Owens**

OUTLINE



Blockchain seems to be taking over the world. Having experienced a transformational power of the Internet in 1990s, many recognise that the nascent technology possesses equal measure of disruptive properties and is predestined to unsettle seemingly solid structures, revolutionise traditional process and deeply penetrate the very fabric of the society. The rise of the Blockchain technology is accompanied by an explosive mix of frenzy and panic. On one hand, the technology seems to provide solutions for just about everything, from public registries to health records to tax administration. In particular in relationship to latter, such properties as increased transparency and compliance and massively reduced transaction costs offer a very attractive value proposition to tax authorities that are often compelled to deliver higher returns at shrinking resources. On the other, blockchain struggles to provide clear answers on how it will ensure acceptable level of data privacy, guarantee secure storage and transfer of information and maintain robustness and immutability of databases at the current breath-taking speed of technological advancement. Despite evident risks, however, it is critical that the technology is approached with an open mind by the multi-stakeholder community and discussed in the setting of the neutral forum to ensure that the massively beneficial opportunities intrinsic to the Blockchain are extracted in at the optimal time with the maximum impact.

Vienna University of Business and Economics: Global Tax Policy Centre

The world is in the midst of the digital transformation. Technological advances in the last decade encompassed development in Big Data, Robotics and Artificial Intelligence, Internet of Things, Blockchain and Distributed Ledgers. All these trends carry a promise to spur

---

* *Director, Global Tax Policy Center, Wirtschafts University Wien,University of Economics and Business,Vienna former Director, Centre for Tax Policy and Administration, OECD - Organisation for Economic Co-operation and Development, Paris. The author wishes to thank Julia deJong for all of her input*

innovation and productivity growth, transform public services and improve social wellbeing. Opportunities are matched by heightened risks that affect data security and privacy, markets and fiscal systems and social interactions. It is important that the technological developments are assisted by the government with the relevant policy measures, aimed to achieve two critical goals: ensure realisation of intrinsic opportunities and adequately mitigate associated risks in order to close the policy gap between the Technology 4.0 and Policy 1.0.

One of the fastest-growing trends is blockchain technology and its components: Distributed Ledgers and Smart Contracts. Various blockchain-backed start-ups promise to deliver increased transparency and compliance at lower transaction costs. Modus operandi of blockchain allows it to be applied to a wide range of sectors and to modernise many traditional processes, including those performed by public sector, including tax administration. The transformational and disruptive power of technology invites closer analysis and an in-depth detailed understanding of its properties. One of the issues that public sector and tax officials face is often lack of technical capabilities and training to immediately grasp the intricacies and complexities of blockchain technology and retract in the face of such challenge. To bridge the knowledge gap and secure application of technology to its best use, Global Tax Policy Centre of Vienna University of Business and Economics (Wirtschaftsuniverisät Wien, WU GTPC), has launched a ground-breaking project aimed at studying the potential of blockchain in the context of tax services, by establishing a multi-disciplinary forum. A series of seminars are going to be conducted within the framework of the neutral dialogue held between the government officials, technologists, academics and business community representatives. The aim of the project is to produce a policy-relevant research and equip revenue authorities with the toolbox that would allow them to replace some of traditional processes with new blockchain-based solutions and to leapfrog into an era of advanced, efficient and effective tax administration that matches the demands of modern civil and corporate communities.

The project was launched by the WU GTPC on 15 March 2017 in Vienna, when the first-multidisciplinary meeting was held. The meeting succeeded in achieving a unanimous agreement that blockchain has a intrinsic potential to dramatically improve tax administration, including domestic tax, such as payroll and VAT or sales tax, as well as cross-border taxation, e.g. transfer pricing, as well as mitigate financial crime by creation of transparent and interoperable beneficial ownership registers. With the trade *becoming increasingly globalised and border-agnostic, blockchain can finally offer tax authorities the necessary tools to oversee compliance on the global scale. In sync with the universality of technology, WU GTPC project will be conducted across a range of jurisdiction, with upcoming sessions being held in Singapore (15-16 August 2017) and New York (May 2018). The research centre is also making domestic contributions in form of support and assistance provided to the Austrian government in modernisation and upgrade of its local Digital Road Map and helping establish Austria as a main European blockchain hub.*

This paper aims at providing readers with an understanding of the blockchain properties and its underlying technology. It also considers how technology can be applied to improve content and interoperability of beneficial owners registers. Concluding section summarises the efforts of the WU GTPC in the area of blockchain and taxation.

The term 'blockchain' has seen an unprecedented rise in popularity, being searched 70% more in June 2017 as in the previous year[1]. Since its emergence in 2008, the blockchain in its original pubic/permissionless form as well as the private/permissioned alternatives offered by rivals such as Ethereum[2], have been steadily gaining solid recognition of technologist, general public, government officials and academics alike[3]. The technology promises to remove intermediaries from transactions between unrelated untrusting parties and allow direct peer-to-peer exchange in value, thus slashing transaction costs. It also allows for recordkeeping on transparent, immutable ledgers accessible to everyone and immune to tampering. It also provides the means for generating self-executing transactions that follow a pre-designed algorithm if a certain set of criteria is satisfied, thus downsizing the associated transaction costs and embedding compliance and practically eliminating a scope for fraud. These properties resonate with needs of governments to ensure improvements in compliance and an increase in the efficiency of public sector operations both domestically and internationally.

Global focus has been on the cusp of the trend. Various initiatives mushroomed all over the world, involving applications developed within the private and public sector separately as well as some multi-stakeholder projects. In Asia, governments have been committing considerable resources into research of blockchain technology and competing for the leadership positions in for its implementation. China's The People's Bank of China is the first bank to announce an intended launch of the government-backed digital currency. In June 2017 Monetary Authority of Singapore reported that it conducted a post-trial analysis of 'Project Ubin', a digital token designed to replicate Singapore dollar and enable payments. Across Europe In 2016-2017 several countries have produced blockchain-based applications. Sweden has been introducing the technology for state land registries. Finland's Futurice, a private enterprise, has been using blockchain for calculation of bonus payment to employees within the payroll system. Austrian government has enrolled the help of the multi-stakeholder community, including Vienna University of Business and Economics (Wirtschaftsuniversität Wien) to further advance digital competitiveness of the country and transform it into the major European blockchain hub. Estonia assumed the rotating presidency of the Council of the European Union Council on July 1, 2017 with the clear agenda of 'promoting Digital Europe and the freedom of movement of data within the entire internal market'.

This intense blockchain research and building activity still concentrated within the financial sector. Governments should consider other non-financial sector areas that may be developed using the properties inherent in the blockchain that may yield direct benefit to the public sector and tax administration. What areas of taxation become relevant relevant in this regard and compatible with the framework of new technology? One good example that could undoubtedly benefit from the increased transparency and immutability is beneficial ownership register. After providing an induction into the main properties of the blockchain technology, this article considers a potential of its application to beneficial ownership registers. It also emphasises the need and encourages creation of a neutral multi-disciplinary dialogue involving government bodies, academics and business community that will promote cross-fertilisation of ideas to policy-relevant research and solutions. With technology still existing largely in nebulous state, this is the right time to approach it with an open mind recognising the transformative potential of the blockchain.

What is Blockchain?

In the not too distant past, the term 'blockchain' would not have been found in any dictionary. Nor was it coined in the 'début' Bitcoin white paper[4] released by the author(s) under the pseudo-name Satoshi Nakamoto in the wake of the financial crisis of 2008. After the release of the paper, it was almost exclusively the Bitcoin that stole the limelight. A virtual, or crypto-currency, permitted to use the Internet for exchange of electronic cash in direct peer-to-peer (i.e. no third intermediary party) transactions[5] under conditions where trust is lacking, via use of cryptographic tools as a replacement to the validation function supplied by independent authority. Since it removed intermediaries from transactions between unrelated parties, the Bitcoin quickly became a go-to mean of trade within the underworld, where owners of the currency wished to remain anonymous[6]. As a result, Bitcoin is often associated with illicit activities and this has diverted attention from the potential of open distributed ledgers and smart contracts, which lay behind blockchain.

Until the financial institutions themselves began to examine the underlying technology, namely the blockchain, that its true potential was discovered. Captivatingly simple and very complex at the same time, the technology resolves one of the most persistent challenges of the distributed network systems – the consensus problem, by allowing unrelated decision-makers with conflicting strategies to agree on a common value represented by the blockchain. The blockchain is essentially a continuous log of transactions that is synchronically updated across the distributed network, so that all parties store, control and access their copy of the database, but no control hub holds a master key, effectively eliminating a single point of failure. Transactions occurring on the network are bundled into blocks and each block contains new information as well as a validation, or hash, of the prior block and a time stamp. The new information must comply with a pre-defined set of rules, the fact of which must be attested to by a majority of special "mining" participants. As a result, not one single party can tamper with the database undetected, as inconsistencies will be identified elsewhere on the network.

It is in the core economic interests of the parties to maintain the robustness and reliability of the blockchain, as every addition of the block to the existing chain triggers an injection of the limited number of bitcoins onto the network. The 'miners' then have to discover or 'mine' these bitcoins[7]. Bitcoin, therefore, is simply an incentive meant to guarantee the parameters of the blockchain that primarily attribute to the appeal of this technology, namely decentralisation and distribution of data, the latter being kept on the transparent, permanent and immutable ledgers.

Another essential feature of the blockchain is the codification of the validation process that allows a transaction to be executed along the pre-defined algorithm. This is known as a 'smart contract', which is a misnomer, as it is neither smart nor a contract in a strict legal sense, but a piece of self-executing code. On the blockchain, the validation is embedded into a transaction by the miners enforcing adherence to the pre-defined rules in order to accept the transaction. For example, a common rule is not to allow more to be spent than is in the user's account. Another is to ensure the user trying to spend has the rights to the account, as represented by a password and a private encryption key. Smart contracts can be thought of as extensions from a foundational set of pre-define rules to situation-specific rules. These situation-specific rules, which are also enforced by miners, allow the logic, validation and workflow traditionally performed by third party intermediaries to be programmed into the blockchain.

Blockchain as a whole, and it component parts, Distributed Ledgers and Smart Contracts, are said to be the 'formative' technology in a sense that it is capable of replacing a wide range of traditional processes with faster and more efficient alternatives. Governments need to explore in what areas public services and tax administration can most benefit from blockchain? Some ideas are provided in the following section.

What is the potential of the blockchain for tax administration?

The principles underlying the operational mechanisms on which blockchain technology is based, such as transparency and decentralisation of control over data, or ability to program smart contracts to assume part of the function typically performed by a third independent party, demonstrate the potential of technology to produce a transformative or even disruptive effects on the way we execute processes today. Apart from the reductions in the clearly visible transaction costs, the additional benefit of embedded compliance (i.e. independently ensured trust that rules have been followed) is an outcome particularity suited to the tax domain. Although large-scale adoption of the blockchain and smart contract technology is likely to occur across numerous sectors of business and society, one needs to carefully examine the related limitations and risks in specific cases of implementation.

Blockchain can potentially provide solutions for the tax community through use either of distributed ledgers or smart contracts or applied as a whole. This short note focuses on the potential use of blockchain in the area of developing a global register of beneficial ownership since this is perhaps of the most immediate relevance to Mauritius[8].

Beneficial owner registers[9]

Opaque corporate vehicles are often exploited by money launderers to provide 'front' businesses through which the proceeds of crime are concealed and injected back into a financial stream. Opacity secured by the 'corporate veil' obstructs ready access of law authorities to the information regarding ultimate beneficial ownership of those legal vehicles and creates conditions where individuals can shield their assets from the tax officials, including proceeds of crime, such as bribery and corruptions.[10] Availability of information regarding the ownership structure, including identification of legal and ultimate beneficial owner, of companies, trusts, foundations and partnerships, can assist law enforcement agencies and tax administrations[11] in identifying those persons responsible for the activity of concern, or who may have relevant information to further an investigation.

Enhancing transparency of the beneficial ownership registers to fight financial crime has been a high-priority item on the agenda of many international organisations, including Organisation for Economic Co-operation and Development (OECD), the Financial Action Task Force (FATF) and the Member States of the Group of Twenty (G-20). In particular the latter has consolidated the findings under various international initiatives and reiterated the principles by adopting the 'High Level Principles of Beneficial Ownership' at the Brisbane Summit in November 2014. Despite these efforts, progress in actual implementation of reforms at a domestic level remains limited. Blockchain and Distributed Ledger technology, with its inherent feature of increased transparency, should be considered in the context of beneficial ownership problem, as it allows for the collection and distribution of data regarding the persons holding the ultimate control.

Current iterations of centralised companies' registries provide a passive snapshot of asset or account ownership at a given moment in time. These registries are generally unable—and the companies themselves, often unwilling—to provide dynamic updates on changes to ownership and/or control of a given customer or entity. The blockchain, however, allows for the ledger to be updated in close to real-time with changes to the asset holdings or control levels of multiple parties. This could, for instance, reduce the risk of related parties disaggregating their holdings (to below, for instance, 25%) in the immediate lead-up to a reporting period, and then subsequently resuming control.

Current legacy registries also lack adequate verification mechanisms. Although many jurisdictions apply criminal and/or civil sanctions for supplying false or misleading information, it is both highly resource-intensive to conduct random audit checks of information, and difficult, if not impossible, to distinguish in many cases between incidents of innocent mistake and criminal acts. However, utilising a permissioned version of the blockchain would allow for trusted third-party intermediaries (whether it be a government agency, financial institution, legal or accounting firm, or credit referencing agency) to authenticate documents or information and subsequently verify or 'stamp' the digital identity of the relevant individual or entity. Third parties could then rely upon the fact that the data has been co-stamped by a trusted validator as proof of authentication (though not necessarily of 'accuracy', as the blockchain mechanism does not in and of itself solve issues of reliability of beneficial ownership data arising from the use of nominees and corporate directors, etc. If incorrect or misleading data is used as an input, as long as the correct protocols are utilised, it will be accepted by the network and added to the blockchain).

The decentralised and distributed nature of the blockchain system architecture means that no single party retains control, and that there can be no single point of failure through which a hacker or insider could corrupt the ledger's contents. This means that an ownership register underpinned by blockchain technology could be deployed faster and with fewer resources, and with the added benefit of automatic reconciliation in real time.

Current academic initiatives of the Wirtschaftsuniversität Wien (WU) Global Tax Policy Center

With popularity of blockchain technology growing an unprecedented speed it is important that tax authorities do not ignore or misjudge a potentially revolutionary technology capable of solving some of the most resistant issues faced by the tax community today and consider possible application of technology to fiscal policy, such as in an example considered above. On the other hand, it Is just as important not to succumb to the frenzy generated by publicity which pronounces new technology as almost a 'panacea' against a broad variety of modern socio-economic ailments.

The research team of Global Tax Policy Centre at the Vienna University of Business and Economics has recognised the transformative potential of the nascent technology from its onset and initiated a ground-breaking study of the impact of technology on government and in particular its potential to offer increased opportunities to tax administration. They seek to develop confidence and competence needed to integrate the blockchain into the design of future government and to enable early-adopters to map out the steps and begin the process of adoption at both levels - regulatory and technical.

To foster relevance and applicability of the research findings under this initiative, the project assimilates inputs derived from neutral multi-stakeholder dialogues in order to produce an output in the form of the policy-relevant research. Academic research conducted on the premise of joined effort and close co-operation of the representatives from various disciplines will provide a more systematised conceptual foundation that would act as a bridge between conventional order of tax administration and compliance and emerging realm of technology. The research is also seeking to deliver arguments on the subject of the opportunities and challenges associated with the blockchain technology and to feed into an international debate, involving the United Nations, the World Bank, the International Monetary Fund and the OECD. Currently, the University is cooperating with the Austrian State Ministry of Science, Research and Economics to assist the Austrian government to develop its Digital Roadmap and to position Vienna as a major blockchain hub.

---

1 Statistics supplied by Google Trends, see https://trends.google.com/trends/explore?q=blockchain

2 Ethereum is an open-source platform, that allows for formulation of both public/permissionless as well as private/permissioned networks.

3 See for example: Kibum Kim and Taewong Kang, *Does Technology Against Corruption Always Lead to Benefit? The Potential Risks And Challemges of The Blockchain Technology*, OECD Global Anti-Corruption and Integrity Forum, 2107; Dong He, et al., *Fintech and Financial Services: Initial Consideations,* IMF Staff Discussion Note, IMF, June 2017; PwC 2017 Digital IQ Report, *https://www.pwc.com/us/en/advisory-services/digital-iq.html*; The Economist, *Blockchain: Land Grab,* June 3-9, 2017 Issue, p. 61.

4 Satoshi Nakamoto, Bitcoin: A Peer-to-Peer Electronic Cash System, https://bitcoin.org/bitcoin.pdf

5 Today, blockchain in likened by many to the emergence of the Internet in 1990s, and is called the Internet 2.0 as it allows for the use on Internet to exchange value in virtual realm, rather than traditional exchange of information only.

6 Pseudonymity rather than full anonymity is ensured for Bitcoin traders.

7 The bitcoins have real monetary value, which since the emergence of the cryptocurrency has fluctuated dramatically. The value of the bitcoins is a result of the economic principle known as a network effect. In words of David Perry: 'The network effect is a lovely piece of jargon that refers to the quite commonsense statement that networked products and services tend to have more value when more people use them. (…) Bitcoin creates value for the old investors and the new by splitting a finite currency supply in more ways. That's not trickery or theft, just good old fashioned supply and demand at work-a basic and ancient economic principle applied to the world's newest currency system.' (http://www.nasdaq.com/article/why-bitcoin-has-value-cm733313)

8 For debate on other areas of international and domestic taxation,, such as transfer pricing or payroll taxation see; TY Sim, Jeffrey Owens, Raffaele Petruzzi, Romero J. S. Tavares and Clement Migai, *Blockchain, Transfer Pricing, Custom Valuations and Indirect Taxes: the Potential of the "Trust Protocol" to Transform the Global Tax Environment*, Bloomberg BNA 15 June 2017; Richard T. Ainsworth and Ville Viitasaari, *Payroll Tax & The Blockchai*n*,* Tax Notes International, 13 March 2017.

9 Julia De Jong, Alex Meyer, Jeffrey Owens, *Using Blockchain for Transparent Beneficial Ownership Registers,* International Tax Review 30 May 2017.

10 OECD, '*Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes*,' (OECD Publication Service: Paris, 2001), at 3.

11 See FATF, '*Transparency and Beneficial Ownership*,' Guidance Paper, October 2014, at 3.

The Explanatory Statement: Legal Status and Interpretative Role

*David Salter**

1. Introduction

In furtherance of the BEPS Action 15 Report, the OECD established an *ad hoc* Group in 2015 whose mandate was to foster a multilateral instrument to modify existing bilateral tax treaties with a view to implementing tax treaty measures developed in the OECD/G20 BEPS project. Membership of the *ad hoc* Group was open to all interested countries and, in the event, 99 countries participated as members whilst 4 non-State jurisdictions and seven international or regional organisations took part as observers. Such multilateral instrument, the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the Convention), together with an accompanying Explanatory Statement (aspects of which comprise the subject matter of this short article) was adopted by the *ad hoc* Group on 24 November 2016.[1] Subsequently, on 7 June 2017, the Convention was signed by '67 countries and jurisdictions, covering 68 jurisdictions from all continents and all levels of development'.[2]

Within the context of the Convention, the parameters of this article are fairly narrow, namely to examine the Explanatory Statement with a particular focus on its legal status and its prospective role in the interpretation of the Convention. As will be seen, it is intended by the OECD that, generally, the Explanatory Statement should have a constricted role in the interpretation of the underlying BEPS measures with which the Convention is concerned.

2. Legal status and interpretative role

Explanatory statements which accompany international conventions (tax related or otherwise) may take various forms and enjoy for interpretative purposes binding or non-binding status.[3] An initial indication of the legal status that it is intended should be accorded to the Explanatory Statement lies in the following statement taken from paragraph 11 of that Statement:

> The text of this explanatory statement to accompany the Convention ("Explanatory Statement") was prepared by the participants in the *ad hoc* Group, and the Sub-Group on Arbitration, to provide clarification of the approach taken in the Convention and how each provision is intended to affect tax agreements covered by the Convention ("Covered Tax Agreements").[4] It

* *Emeritus Reader, University of Warwick*

> therefore reflects the agreed understanding of the negotiators with respect to the Convention. It includes descriptions of the types of treaty provisions which are intended to be covered and the ways in which they are intended to be modified. The members of the *ad hoc* Group adopted this Explanatory Statement on 24 November 2016 at the same time as adopting the text of the Convention.

The adoption of the Explanatory Statement contemporaneously with the Convention is indicative of an intention to treat it as comprising part of the *'context'* for the purposes of the general rule of interpretation in Article 31(2)(a) of the Vienna Convention on the Law of Treaties 1969 (the VCLT). This provides:

> The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> a. any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty.

In this respect, the Explanatory Statement may be regarded as constituting *'an agreement'* made in connection with the conclusion of the Convention. This construction, however, may not be without its difficulties, and, as Hattingh has pointed out, in view of the wording of paragraph 11 which, variously refers to 'participants in the *ad hoc* Group', 'the negotiators' and the 'members of the *ad hoc* Group' the Explanatory Statement may be regarded as '"an agreement" "made in connection with the conclusion" (in future) of the MLI by signatory States who were members of the ad hoc group'.[5] If this is accepted, it leaves open, for example, the question of the status of the Explanatory Statement in instances where the Convention is adopted, latterly, by signatory States which were not members of the *ad hoc* group. Here, it is conceivable that the Explanatory Statement may fall in a multilateral context within the ambit of *'context'* by virtue of Article 31(2)(b) of the VCLT as "any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty". In either of these instances, the Explanatory Statement *must* be considered as and when issues pertaining to the interpretation of the Convention arise. However, if the latter position under Article 31(2)(b) is not sustainable, the Explanatory Statement will amount in such cases to a supplementary means of interpretation to which resort *may* be had only within the following relatively narrow confines of Article 32 of the VCLT.

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> a. leaves the meaning ambiguous or obscure; or
>
> b. leads to a result which is manifestly absurd or unreasonable.

If, notwithstanding the above discussion, it is accepted that the Explanatory Statement, as was apparently intended, constitutes an agreement falling within *'context'* for the purposes of Article 31(2)(a) of the VCLT, what can be gleaned from the Explanatory Statement? As paragraph 11 of the Statement states '[i]t includes descriptions of the types of treaty provisions which are intended to be covered and the ways in which they are intended to be modified'. Its aim, therefore, is to provide guidance on the way(s) in which the Convention may be implemented and to ensure clarity in modifications made. This is amplified in paragraph 12 of the Statement which also, significantly, makes it clear that the Explanatory Statement is not intended, with one exception, to be used as an interpretative aid in ascertaining the meaning of the substantive provisions deployed in the Convention.

> While this Explanatory Statement is intended to clarify the operation of the Convention to modify Covered Tax Agreements, it is not intended to address the interpretation of the underlying BEPS measures (except with respect to the mandatory binding arbitration provision contained in Articles 18 through 26…).

This begs the question of where guidance might be sought on the interpretation of the substantive provisions in the Convention if it is not provided in the Explanatory Statement. In this regard, the Explanatory Statement suggests that, principally, the answer may lie in the respective BEPS Action Reports and, in due course, in the updates to the Commentary to the OECD Model Tax Convention. Such reliance upon the Commentary (rather than on an Explanatory Statement which provided guidance, generally, on the substantive meaning of Convention provisions) has been received by Hattingh with some concern 'as the intractable problems of the legal status of OECD Model Commentaries, changes to

the Commentaries that take place after signature date of a bilateral tax treaty, and the consequential inconsistent use by domestic courts will continue (and become more complex…)' – a position which, in time, may prove to be well founded.[6]

3. Conclusion

The rationale for the Explanatory Statement lies in its own wording. Principally, it is concerned with clarification of the working of an unfamiliar multilateral instrument, namely the Convention i.e. in the words of paragraph 12 of the Explanatory Statement, it is intended to clarify the operation of the Convention. Consequently, notwithstanding its likely status as binding context for interpretative purposes, reference to it, other than in respect of the mandatory arbitration provisions in the Convention, is likely to throw light on matters relating to the process(es) by which implementation of the Convention's purpose, namely 'to implement tax treaty related measures to prevent base erosion and profit shifting' may be achieved rather than on the meaning to be attributed to the substantive BEPS related tax treaty matters with which the Convention is concerned for which guidance, must be sought elsewhere, and, mainly, it would seem in the BEPS Action Reports and, advisably or otherwise, in pertinent updates to the Commentary to the OECD Model Tax Convention.

1 *http://www.oecd.org/ctp/beps/countries-adopt-multilateral-convention-to-close-tax-treaty-loopholes-and-improve-functioning-of-international-tax-system.htm* (accessed 21 April 2017). For the text of the Convention and the Explanatory Statement, see http//:www.oecd.org/ctp/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm

2 See, *http://www.oecd.org/tax/treaties/multilateral-instrument-BEPS-tax-treaty-information- brochure.pdf*, June 2017 (accessed 24 June 2017). An up-to-date list of signatories is available at oe.cd/mli

3 See, S.Austry et al., The Proposed OECD Multilateral Instrument Amending Tax Treaties, (2016) 70 Bulletin for International Taxation, 683, 685.

4 The term "Covered Tax Agreement" is defined in Article 2(1)(a) of the Convention. This provides:
'The term "Covered Tax Agreement" means an agreement for the avoidance of double taxation with respect to taxes on income (whether or not other taxes are also covered):
- i) that is in force between two or more:
  - A) Parties: and/or
  - B) jurisdictions or territories which are parties to an agreement described above and for whose international relations a Party is responsible; and
- ii) with respect to which each such Party has made a notification to the Depository listing the agreement as well as any amending or accompanying instruments thereto (identified by title, names of the parties, date of signature, and, if applicable at the time of the notification, date of entry into force) as an agreement which it wishes to be covered by this Convention.'

5 J.Hattingh, An initial assessment of the BEPS Multilateral Instrument from a legal perspective: What may be the challenges?, (2017) Global Taxation 27, 34.

6 Ibid., p.30.

Mauritius Budget 2017/18: Mauritius introduces a negative income tax

Wasoudeo Balloo

The Prime Minister and Minister of Finance and Economic Development recently delivered the Government's third and mid-term budget. Infrastructure projects and the fight against poverty continue to occupy centre stage. Government was handed yet another grant by India in the form of a credit line of USD500 Million (MUR18 Billion), which in addition to the MUR17 Billion previously secured, will finance much needed infrastructure projects and development programmes. In terms of budget outturn, GDP growth was scaled back slightly to 3.9% for the current year and is projected at 4.1% for 2017/2018. Government has projected a small budget deficit of 3.2%, down from an actual figure of 3.5% for the current year.

The Finance Bill, which contains the measures proposed in the Budget 2017/18, has been voted by Parliament. Below are the key tax measures which have been enacted:

1. Corporation Tax

A number of tax incentives have been introduced in order to boost certain sectors of the economy. In the export sector, profit derived by a Mauritius company on export of goods would henceforth be taxed at 3% rather than 15%. Tax incentives will be provided to companies carrying out research and development in Mauritius which include:

- 200% tax deduction for research and development costs for next 5 income tax years[1] starting 01 July 2017 provided the research and development is carried out in Mauritius.
- 200% tax deduction for expenditures incurred in relation to:
  - Deep water air conditioning
  - Acquisition and setting up of water desalination plants

Other fiscal measures to promote specific sectors include an 8-year tax holiday to companies incorporated after June 2017 engaged in:

- Innovation-driven activities for intellectual property
- Pharmaceutical products, medical devices and high tech products

* *Wasoudeo heads the tax practice of KPMG Mauritius and specializes in international corporate taxation. Wasoudeo is a founder member of the Mauritius Branch of the International Fiscal Association (IFA) and is currently the treasurer of the Mauritius Branch.*

- Existing companies engaged in exploitation and use of deep water for providing air conditioning installations, facilities and services.

2. Personal Tax

The Finance Act contains additional guidelines with respect to the Statement of Assets and Liabilities, a disclosure requirement introduced last year and which is applicable to individuals owning assets costing more than MUR50m or with income exceeding MUR15m in an income year. Such statement will not be applicable to non-citizens or citizens who are not resident for tax purposes in Mauritius.

- A negative income tax allowance will be granted to citizens of Mauritius in full time employment with low monthly earnings. Such allowance will be financed from a solidarity levy which will be imposed on resident individuals deriving chargeable income and dividend income in excess of MUR 3.5m in an income year. The levy will be applied at the rate of 5%.

3. Tax administration

- Companies distributing dividends exceeding MUR100,000 to an individual, societe or succession in an income year will be required to file a Return of Dividends by 15 August of every year.
- 100% waiver of penalties and interest for tax returns and VAT Returns submitted on or before 30 June 2015 if payment is made by 31 May 2018.
- All companies will be required to file their tax returns and PAYE returns electronically and make payments online.
- The Expeditious Dispute Resolution of Tax Scheme (EDRTS) will be re-introduced for an additional year to review assessments raised under the Income Tax Act or Value Added Tax Act . If a taxpayer agrees under EDRTS to the amount of tax as assessed, all penalties and interest will be waived provided he settles the tax due within one month as from the date of determination of his case by the EDRTS panel.

4. Regulatory

- The government will henceforth allow the MRA to request for Annual Statement of Financial Transactions from certain financial institutions such as banks, insurance companies and other non-bank deposit taking institutions where there has been large cash deposit, exchange of foreign currencies or payment of life insurance premium.
- Banks will be required to increase their minimum capital requirement from MUR200m to MUR 300m by 30 June 2018 and MUR 400m by 30 June 2019.
  - Amendments have been brought to criteria for obtaining occupation permit under the investor route. The cost of Hi-tech machines and equipment brought by investors will henceforth be considered as part of the minimum investment of USD100,000. Moreover, an Innovator Occupation Permit will be introduced for innovative start-ups with an initial investment of USD40,000 and a minimum operation expenditure of 20% for R&D purposes

The government reiterated its intention in building the Mauritius International Financial Centre as a jurisdiction of substance. Companies holding Global Business Licence 1 will henceforth be subject to additional substance requirements. In light of the challenges facing the Global Business sector, the government announced that a 10-year blueprint will be developed to ensure that Mauritius remains competitive on international level, while meeting all the international standards. To show its commitment to the best practices as set by leading globally recognised institutions such as the Organisation for Economic Co-operation and Development (OECD), Mauritius recently signed the Multilateral Instrument after being amongst the first countries in Africa to implement FATCA and CRS.

[1] Income Tax Year refers to the period 01 July to 30 June

The Legal and Related Challenges, and Emerging Solutions for Implementation of the BEPS Multilateral Instrument

Johann Hattingh*

A. Introduction

On 7 June 2017 in Paris, as has been widely reported, sixty eight countries signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (BEPS) - commonly referred to as the BEPS multilateral instrument, or MLI.[1] Several countries indicated their intention to sign later, including Mauritius, which signed on 5 July 2017.

Of equal significance was the publication on the same date of the preliminary reservations that signatory countries intend to enter on the MLI, as well as their lists of tax treaties designated for coverage by its terms.

This note takes stock of the above developments and reflect on earlier analysis of the legal challenges that might arise from implementation of the MLI's treaty related BEPS measures.

B. Legal Implementation Concerns

Readers of this journal will recall that in January 2017 this commentator opined in these pages that:

> "A surprising shortcoming of the amendment-through-notification procedure that a signatory State would need to follow is that the MLI does not provide for a formal process to achieve the actual redrafting of clauses in bilateral tax treaties. The MLI in its design does not regulate which State/s and/or other body's responsibility it will become to produce an official amended treaty text

* *Associate Professor, Faculty of Law and Tax Institute for Fiscal Research, University of Cape Town, South Africa; academic member of the IBFD's Centre for Studies in African Taxation and executive board member of the International Fiscal Association, South Africa. This note includes transcribed comment delivered during a panel discussion on occasion of the 11th Asia / Africa Conference hosted by the International Fiscal Association, Mauritius Branch, 18 to 19 May 2017.*
Account is taken of the position up to 5 July 2017.

> through, say, a consolidation and/or producing annotations for treaty clauses."[2]

as a basis for reaching this conclusion:

> "The cost of the much coveted speed with which the MLI is anticipated to implement treaty related BEPS measures may mainly arise in the long term from disputes about the precise textual changes brought about by the MLI."[3]

It appears from developments since the publication in November 2016 of the MLI that several signatory states of the MLI perhaps share these concerns (there is, of course, a difference between correlation and causation).

I. Reactions from the German speaking world and others

German speaking countries appear to be first to plan for formal mechanisms to re-draft wording in bilateral tax treaties covered by the MLI. No doubt some of the reason is to be found in constitutional requirements, for example the need to table German language versions of treaties as amended by the MLI before parliaments, but there are other considerations at play which appear to nudge countries and their treaty partners down the route of bilateral engagement.

Switzerland, upon signing the MLI announced in a press statement on 7 June 2017 that the country will only implement BEPS-related treaty measures if its treaty partners are willing to conclude "agreements on the technical implementation of the BEPS Convention", or otherwise "the BEPS minimum standards can also be agreed by means of a bilateral DTA amendment"[4].

Switzerland has apparently already obtained the agreement of Argentina, Chile, India, Iceland, Italy, Liechtenstein, Lithuania, Luxembourg, Austria, Poland, Portugal, South Africa, the Czech Republic and Turkey to conclude technical implementation agreements or other bilateral amendment measures (*e.g.* a protocol)[5]. This also means that the greater bulk of Switzerland's more than one hundred tax treaties will for the time remain unaffected by the MLI.

It is understood that Germany's constitutional procedures for law making necessitates German language versions of treaties as amended by the MLI to be tabled in the *Bundestag*.[6] Necessarily, this requires Germany to agree the wording, often in English first with a treaty partner that have designated its treaty with Germany for coverage by the MLI. This is because in a classic dualist constitutional dispensation only the approved version of a treaty by Parliament legally binds taxpayers and tax authorities, and the courts will first have regard to the domesticated text.

Unofficial translations of the MLI into German, Arabic, Spanish and Italian has since been published on the OECD's website, with further translation into Dutch, Greek, Swedish, and Russian planned.[7]

II. Effect on others and future treaty interpretation

What ought one to make of these occurrences that suggest an unravelling of the multilateral implementation project for some of its participants?

Most obviously, it will take time for countries being caught up in bilateral implementation mechanisms of their treaty partners to work out and develop new treaty language to bed down formal textual amendments. One may question whether this is a delay tactic, but eventually such changes will have to be agreed given the threatening cloud of peer review. The upshot is that taxpayers will benefit in the long run from a heightened degree of legal certainty. From this perspective, additional bilateral negotiation to implement MLI covered tax treaties is a positive development.

Further, countries who will be asked to bilaterally engage on one or several of their treaties to legally implement the MLI will have to ask what the ramifications may be for their other tax treaties covered by the MLI. For example, as mentioned fourteen countries, including India and South Africa, agreed to conclude technical BEPS implementation agreements with Switzerland. India, for instance, designated its treaties with Germany, Austria and Switzerland for coverage by the MLI, whilst Austria and Switzerland reciprocated by designating India but Germany did not. This implies that India will enter bilateral negotiations with both Switzerland and presumably Germany to agree on the BEPS-related changes to the respective tax treaties. What therefore, will be the interpretive value of these bilaterally negotiated treaties for India's other treaties covered by the MLI? Will, in future, wording in India's updated treaties with Switzerland and Germany be regarded as explaining, in India, the meaning of other MLI covered tax treaties? One thing appears certain, namely that such bilateral negotiations will not be conducted with the intention to serve as blue prints for other tax treaties, but they may nonetheless be viewed as evidence of how contracting states practically understood their obligations under the MLI.

South Africa faces similar questions as India, as Germany has not designed its 1973 tax treaty with South Africa for coverage by the MLI (neither has South Africa). A new treaty concluded in 2008 is not in force yet, and the inference is therefore that South Africa will also enter bilateral negotiations with Switzerland and Germany to agree BEPS-related changes to existing tax treaties. The agreements reached with Switzerland and Germany will need to go through the Parliamentary process for law making in South Africa.[8] It will be interesting whether legislators will question the absence of similar amending instruments for South Africa's other tax treaties that will be subject to the MLI; it is unclear what legal instrument, or suit of instruments they will be asked to approve in this regard since the text of the MLI alone is an incomplete instrument. This is because, as has been pointed out, there is "no core content at the time of signature" of the MLI.[9]

These selected developments underscore the point that signing the MLI alone without bedding down actual wording changes in existing tax treaties will most likely result in an incomprehensible muddle to all but the most experienced advisors and tax administrators. The response by a member of South Africa's Parliament, a qualified lawyer and chartered account no less, to a recent briefing about South Africa's reservations and positions on the MLI, speaks volumes:

> "[he] felt the presentation was 'a complete waste of time' as he failed to understand it"[10]

The response by the South African Ministry of Finance is even more telling:

> "[they] understood the complexity of the agreements and had informal discussions with international tax experts who also had difficulties in understanding the instruments. The complexity was a result of the instruments seeking to incorporate global concerns from both developed and developing countries."[11]

The only consolation to come from this lamentable exchange was an assurance that:

> "A consolidated tax framework would be produced <u>after</u> the ratification processes, for robust tax administration by SARS, as well as for taxpayers and advisors"[12] (underlining supplied)

In other words, there is very little hope that politicians who will be asked to ratify the MLI in the next months, at least in South Africa, will understand what they will pass into law.

III. Related developments at the OECD: Is artificial intelligence the answer?

It has been reported that the OECD is developing software to make the MLI more "readable".[13]

Presumably, this software will unravel the MLI's complexity and aid taxpayers and domestic legislators to understand what country representatives, in fact, agreed with each other in Paris during rounds of bulk renegotiation.

The use of a computer to establish the content of law is, of course, contrary to a classic Western understanding of the rule of law itself, since laws ought to be accessible and reasonably intelligible for all users (incl. their advisors).[14] Related concern has been raised by Schwarz about the use of software:

> "This raises fundamental questions about the nature of law and law making. Treaties, like other contracts require agreement to come into existence. What is the minimum content of the subject matter needed for the necessary consensus *ad idem* between the parties? Do domestic legislators really know what they are agreeing to when ratifying the MLI?"[15]

One must be careful to not anticipate the issue and it is best to wait and see what the software commissioned by the OECD will produce.

It is not excessively complex for a tax lawyer to read the MLI, together with the reservations of two countries to identify which clauses of a designated tax treaty are affected. Computer software may be useful to aid such a task of identification. However, the next step in the legal process is to establish the actual change in meaning of the existing treaty text because the MLI will coexist with a bilateral treaty. It is at this point, as has been discussed above, that real concern should arise because the MLI itself does not provide for the actual changed wording, nor a formal process or body to developed it later. Engaging a complex process of legal interpretation is therefore the only permissible avenue to establish revised treaty meaning[16] (assuming contracting states have not bilaterally agreed the textual amendments). It is of course otherworldly to anticipate that a computer would be able to perform legal interpretation since jurisprudentially speaking, interpretation is an art innate to human faculties. It would therefore be surprising if the OECD's software will be used to produce, say, consolidated versions of treaty texts.

C. Bulk Renegotiations via Speed Dating in Paris: The Aftermath

The first difficulty English speakers may encounter when studying the preliminary country positions released with the signature of the MLI on 7 June 2017, is that several are published in French only.[17] But that is only a minor issue.

One has to effectively re-cast the outcomes of matching exercises that took place in Paris in anticipation of the signature of the MLI to understand what a country actually agreed during the bulk renegotiation process. To do that, a deep breath is required to work through a big volume of documentation that sets out a great array of choices of the initial sixty-eight signatory countries. These countries made full use of the so-called flexibility features of the MLI.

From a limited review, some surprising results can already be identified. Most strikingly, there appears to be lower than anticipated uptake of some of the major BEPS related treaty changes that were not designated as compulsory minimum standards of reform.

I. Coverage of the MLI

The first significant choice for MLI signatories was which of their tax treaties to leave out of scope.

As has been discussed earlier in respect of India and South Africa, Germany did not designate its tax treaties with these countries.[18] It appears that Germany effectively prefers bilateral renegotiation with some treaty partners.

Switzerland, as discussed earlier, designated fourteen treaties for coverage by the MLI on the basis that the countries concerned agreed to a bilateral procedure to make BEPS related changes in their treaties with Switzerland. Switzerland has more than one hundred bilateral tax treaties and thus, the bulk of its treaty network, for now, will remain outside the scope of the BEPS project.

Neighbouring Austria has interestingly only designated approximately half of its tax treaty network for coverage by the MLI; it is unclear what the country intends to do about the other half of its treaty network.

On 7 July 2017, Mauritius signed the MLI. Like other smaller countries such as Switzerland and Austria, Mauritius only designated about half of its existing tax treaties for coverage by the MLI (twenty three out of more than fourty tax treaties). Among the tax treaties not designated for coverage by the MLI, is the treaty with India.[19] According to a press statement by the Ministry of Finance and Economic Development, Mauritius will engage on a bilateral basis with treaty partners to agree amendments to its tax treaties to comply with BEPS minimum standards by December 2018.[20]

The above developments will bring some solace to the tax planning community: jurisdictions that manage to keep chunks of their treaty networks out of reach of the MLI by wedging open some room for bilateral manoeuvre will be viewed as providing a competitive advantage over others. One must anticipate power play to be brought to bear on these smaller countries in the years to come, most obviously via peer review mechanisms driven by the OECD in the inclusive framework.

The USA, as was widely anticipated, did not sign the MLI although it participated in its negotiation. Several countries live in hope though, as they designated their tax treaties with the USA for coverage by the MLI.[21] Or is there more to this?

II. Opt in or opt out: What to make of preliminary country reservations?

It is beyond the scope of this note to comprehensively examine all the preliminary reservations entered by countries on the MLI.

It is possible though to make initial observations about emerging trends, based on a summary of reservations.[22]

i. BEPS minimum standards in the MLI

All signatory states have adopted the BEPS minimum standards for the lists of designated treaties.

A significant majority has opted for the Principle Purpose Test (PPT) alone to address treaty abuse. India has opted for a combination of the PPT and the simplified limitation on benefits (SLOB) clause. Even so, the SLOB will not become a reality in a clear majority of India's tax treaties, given the absence of the required matching with treaty partners.

The preliminary reservation that Mauritius registered on 5 July 2017 on the MLI's treaty abuse measures, specifically the PPT, is as follows:

> "Mauritius hereby expresses a statement that while Mauritius accepts the application of Article 7(1) [the PPT] alone as an interim measure, it intends where possible to adopt a limitation on benefits provision, in replacement of Article 7(1), through bilateral negotiation."[23]

Article 17(a) of the MLI makes allowance for this option. It suggests that Mauritius will approach each of the twenty three tax treaty partners it listed for coverage by the MLI to agree a limitation on benefits provision (note, not necessarily the limitation on benefits clauses specified in the MLI). In other words, to be blunt, for Mauritius, signature of the MLI was not about bulk renegotiation to save time. Much more is at stake.

It was of course always going to be the case that smaller countries such as Mauritius would be on the receiving end of treaty partners invoking anti-abuse provisions such as the PPT to deny tax treaty benefits to residents of Mauritius. The PPT is a vague measure, perhaps by design, and appropriates discretionary power for tax administrators. The path chosen by Mauritius is therefore understandable if viewed from the perspective of securing its own interests.

As for others that will trod the path of the PPT, in earlier analysis I have set out the legal considerations under the MLI for countries such as India, South Africa and the United Kingdom that all enacted new statutory general anti-avoidance rules, accompanied by detailed procedural safeguards, clauses regulating the disclosure of presumed avoidance transactions and detailed practical application guidance.[24] It is now clear, after the great majority of countries indicated that the PPT will become the primary provision to deal with treaty tax avoidance, that much attention is required to synthesize the PPT with such domestic GAARs. Of concern to legislators should be the total absence in the OECD materials of procedural and disclosure aspects for application of the PPT. Countries plagued by capacity constraints and even worse, corruption, will be well-advised to be circumspect in awarding great swathes of discretionary power to public officials.

The PPT affords significant discretionary power to revenue administrators to deny the application of double tax relief under a tax treaty. It represents an appropriation of power by administrators. Who will guard these guards of treasuries? That responsibility rests squarely with domestic legislators, in the first instance, who must approve the award of the wide powers encapsulated in the PPT when they ratify the MLI, and later the judiciary, who may be called upon by taxpayers to scrutinise any abuse of the exercise of this power. The practical application of the PPT should be aligned to the *entire* legal framework governing application of a country's domestic GAAR to safeguard the jurisdiction's standards of just administrative action, and ensure equal treatment of resident taxpayers and non-residents such as foreign investors.[25]

MLI measures aimed at dispute resolution comprise of a minimum standard to improve the mutual agreement procedure and a complimentary optional clause in regard to corresponding transfer pricing adjustments. Acceptance of both measures was nearly unanimous, and should be hailed as a success.

ii. The MLI's optional BEPS treaty measures

A mixed bag, and some surprises are to be found in the preliminary uptake of the MLI's optional treaty related reform proposals (*e.g.* mandatory arbitration, reform of the Permanent Establishment concept and addressing hybrid mismatches).

About twenty five of the sixty nine MLI signatory states have opted for mandatory arbitration. If one considers the profile of these twenty-five countries, a general divide between developed Western countries and the rest immediately becomes apparent.[26] This divide echoes reluctance in developing countries about international commercial arbitration, which is often perceived (rightly or not) to be dominated by well-known arbitration centres in developed countries. It is of interest that smaller countries such as Switzerland and Mauritius opted for mandatory binding arbitration; from their perspective, given what is at stake, this is a critical measure to avoid unresolved and drawn out mutual agreement procedure disputes with their treaty partners.

A mixed and surprising set of results arise from the uptake of the reforms of the Permanent Establishment (PE) concept, which is as close as the BEPS project dared venture to the elephant in the room (the balance of allocation of taxing rights between countries, especially source taxation).

It appears that twenty eight of the sixty nine signatory states will opt in for the changes to the agency PE clause, which includes India, France, the Netherlands and Spain. A few surprises, at least to this author, are to be found among the larger group of countries who have reserved against the agency PE changes. This group of countries include fervent public champions of the BEPS project, such as Australia, Canada, Germany, Italy, South Africa and the United Kingdom. How should one understand this behaviour? It may to some degree be explained away in the case of countries such as Australia and the United Kingdom who have implemented unilateral anti-PE avoidance measures in their domestic laws in recent years.[27] However, these are unilateral measures that apply to inbound scenarios only; in other words, Australia and the United Kingdom are having their cake and will be eating it too, since opting out of the MLI agency PE clauses mean that these reforms will not apply to outbound PEs of Australian or UK residents in treaty partners.[28] This smacks of thinly veiled tax competition and evinces international dissonance about enlargement of source taxing rights, at least over agency PE profits. It also suggests that the antidote to unilateral BEPS type measures is simply more such measures, even retaliation by states that may be disadvantaged.

Twenty seven countries opted for the specific activity exemption reforms of the PE clause, and twenty eight for the reforms addressing splitting-up of contracts to avoid a PE.

Nineteen countries elected for all the BEPS PE reforms under the MLI. The countries in this class are nearly all source tax orientated, and most are low income or developing countries[29], with a tiny minority of residence countries[30].

Thus, in all, implementation of the BEPS reforms of the PE concept will likely be underwhelming as they cleave open the old fault line in international taxation between source and residence taxation.

The uptake of the BEPS hybrid mismatch clauses in the MLI is equally underwhelming; twenty one countries indicated that they will opt in for the clause aimed at transparent entities, twenty six will follow the new corporate tie-break rule based on mutual agreement instead of place of effective management, and fourteen will apply the rules refining relief for double taxation.

D. What to make of all of this?

As highlighted, the main legal challenge for the MLI is how to transpose the changes that countries in fact want to make to their bilateral tax treaties into intelligible legal text which legislators, administrators and taxpayers and their advisers can understand. Some country reactions indicate that failure to agree a formal mechanism in the MLI to do just that, is pushing countries down the path of bilateral engagement anyway, but there are other factors such as the self-interest of smaller countries at play too. The upshot of treaty negotiators retreating from bulk renegotiations and speed dating in Paris to more mundane bilateral fora, will be heightened legal certainty for taxpayers and administrators. Only time will tell whether smaller countries will be able to secure their interests through bilateral negotiation to implement BEPS minimum standards.

The country positions on implementation of the BEPS MLI measures published on 7 June 2017 are preliminary only, but it remains to be seen whether they will appreciably change. Two trends are observable from these positions.

- First, countries who have signed the MLI have converged around the use of discretion to address tax avoidance involving treaties, and to address tax disputes. The PPT and the mutual agreement procedure are not hard legal rules: the PPT is a vague measure appropriating discretionary power for tax administrators – both the PPT and the mutual agreement procedure are premised on the idea that legal rules have failed to secure an outcome acceptable by all stakeholders.
- Second, it is now apparent that at no point could more than about a third of the initial sixty nine MLI signatory countries reach consensus on hard legal rules to reform tax treaties. The unanimity about corresponding transfer pricing adjustments is a notable exception. The dissonance around changes to the Permanent Establishment definition stands out, as country behaviour appears to have divided along the old fault lines of residence versus source tax, or the spectre of tax competition and uncoordinated unilateral reaction. It remains to be seen if this outcome will change significantly as more countries sign up to the MLI.

The MLI may be seen as a pioneering experiment with multilateralism in international tax law. At this interim stage, it seems that incisive reform was not achieved in the short time allowed for the BEPS project, particularly given the fact that more than a century's embedded preferences and biases in the existing international tax law architecture was not acknowledged.[31] The initial uptake of the MLI by countries shows that at its core, it really deals with an appropriation of discretionary power by tax administrators to address abuse; it is not the much awaited instrument that will reform international tax law.

The speed with which the MLI was finalised was possible because the MLI is a bulk renegotiation mechanism and tax policy considerations was deliberately excluded from the BEPS project, hence the BEPS project could be drawn to a close. The symbolic value and political objective of finishing the 15 BEPS Actions in a short timeframe are significant achievements.

That said, considering the reaction to the MLI since 7 June 2017 by smaller countries, a legitimate question to pose is this: who has, and stands to benefit from the finalisation of the BEPS project? In its immediate origin, the BEPS project was provoked by behaviour of US multinationals based on permissive features of the US Internal Revenue Code. The US has not signed the MLI and is deeply in conversation with itself about tax reform. The BEPS project did not address the international allocation of taxing rights, so what was it all about? Ostensibly those in the driving seats sought to reinforce the current balance, with an emphasis on transfer pricing, information exchange about (large) taxpayers and treaty abuse. The latter really cloaks targeting of smaller countries positioned as low tax jurisdictions, since they perform an essential facilitating role for US (and other) multinationals. Transfer Pricing boils down to a battle of the experts, meaning countries with a greater force and superior information about taxpayers are better positioned to win those battles. At the institutional level, the pre-eminence of the OECD as a tax standard setter is strengthened, predominantly by obtaining wide-scale buy-in to police adherence to BEPS orthodoxy through peer-review mechanisms of the 100+ countries participating in the inclusive framework. Thus, in answer: It is unclear whether the BEPS project will translate into net revenue gain for countries who suffer negotiation deficiency and information asymmetry in the aforementioned settings, particularly those who are source tax focussed; smaller countries will almost certainly lose out.

---

1 http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf

2 J. Hattingh, An initial assessment of the BEPS Multilateral Instrument from a legal perspective: What may be the challenges?, (2017) 1 Global Taxation 27, 33. Also published as P.J. Hattingh, The Multilateral Instrument from a Legal Perspective: What May Be the Challenges?, 71 Bull. Intl. Taxn. 3/4 (2017), Journals IBFD; translated into Chinese Taxation Translation Journal, Issue Number 101, No 2, 77-88 (June, 2017);《税收译丛》第101期，2017年第2期，第77-88页.

3 Ibid, 36.

4 Press Release, Switzerland signs BEPS Convention, 7 June 2017, State Secretariat for International Financial Matters, Federal Department of Finance, Switzerland (available at: https://www.sif.admin.ch/sif/en/home/dokumentation/medienmitteilungen/medienmitteilungen.msg-id-66981.html).

5 Ibid.

6 R. Vann, Multilateral treaty - what does it mean? (available at: http://www.greenwoods.com.au/insights/riposte/15-june-2017-multilateral-treaty-what-does-it-mean/).

7 http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm

8 In terms of sec. 231(2) of the Constitution, 1996 of South Africa, an international agreement binds South Africa only when approved by Parliament.

9 J. Schwarz, The BEPS MLI – Artificial Intelligence Needed, Kluwer International Tax Blog, 22 June 2017 (http://kluwertaxblog.com/2017/06/22/beps-mli-artificial-intelligence-needed/).

10 Finance Standing Committee, Rates and Monetary Amounts Bill & sugary beverages tax; BEPS Multilateral Instrument: briefing, 23 May 2017, Parliament of South Africa (accessible by subscription at: https://pmg.org.za/committee-meeting/24430/).

11 Ibid.

12 Ibid.

13 "Multilateral Treaty Not Simple, But Clear: OECD's Saint-Amans", 30 November 2016, Bloomberg-BNA (https://www.bna.com/multilateral-treaty-not-n73014447884/).

14 Hattingh (n 2), 28; T. Bingham, The Ruel of Law, London 2010.

15 J. Schwarz, The BEPS MLI – Artificial Intelligence Needed, Kluwer International Tax Blog, 22 June 2017 (http://kluwertaxblog.com/2017/06/22/beps-mli-artificial-intelligence-needed/).

16 See Hattingh (n 2), 32 to 35 regarding the legal considerations and challenges for the process of interpretation under the MLI.

17 For example, France (http://www.oecd.org/tax/treaties/beps-mli-position-france.pdf), Switzerland (http://www.oecd.org/tax/treaties/beps-mli-position-switzerland.pdf) and Luxembourg (http://www.oecd.org/tax/treaties/beps-mli-position-luxembourg.pdf).

18 The same is true for Germany's tax treaty with Australia, but this is because of the view that the treaty is BEPS compliant; see Vann (n 6).

19 Mauritius' preliminary list of treaties and reservations may be accessed here: http://www.oecd.org/tax/treaties/beps-mli-position-mauritius.pdf. Other tax treaties concluded by Mauritius that will not, for the time, be covered by the MLI include, in addition to the treaty with India, the treaties with Australia, Bangladesh, Botswana, Egypt, Malaysia, Mozambique, Namibia, Nepal, Pakistan, Rwanda, Senegal, Singapore, Sri Lanka, Thailand, Tunisia, Uganda, Zambia and Zimbabwe.

20 Ministry of Finance and Economic Development of Mauritius, "Mauritius signs the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting today", 5 July 2017, at http://mof.govmu.org/English/DOCUMENTS/COMMUNIQUE%20-MULTILATERAL%20CONVENTION%2005%2007%202017%20REVISED.PDF.

21 For example, China, Germany, India, Italy, Germany, the Netherlands, South Africa and the United Kingdom.

22 See R. Danon and H. Salomé, MLI – Summary table, at http://danonsalome.com/wp-content/uploads/2017/06/Countries-table-140617.pdf.

23 Government of the Republic of Mauritius, Status of List of Reservations and Notifications at the Time of Signature, 5 July 2017, 8, at http://www.oecd.org/tax/treaties/beps-mli-position-mauritius.pdf.

24 Hattingh (n 2), 28 to 29.

25 Hattingh (n 2), 36.

26 The countries who have opted for mandatory arbitration include Australia, Austria, Belgium, Canada, Fidji, Finland, France, Germany, Greece, Ireland, Italy, Japan, Lichtenstein, Luxembourg, Malta, the Netherlands, New Zealand, Portugal, Singapore, Slovenia, Spain, Sweden, Switzerland and the United Kingdom.

27 Australia enacted the Tax Laws Amendment (Combating Multinational Tax Avoidance) Act 2015, and the United Kingdom enacted the Diverted Profits Tax, Finance Act, 2015.

28 See Vann (n 6).

29 Argentina, Armenia, Burkina Faso, Colombia, Egypt, France, Gabon, India, Indonesia, Israel, Lituania, Romania, Russia, Senegal, Serbia, Slovac Republic and Uruguay.

30 The Netherlands and New Zealand.

31 See further M. Herzfeld, The Case against BEPS – Lessons for Coordination (June 13, 2017). Available at SSRN: https://ssrn.com/abstract=2985752.

A plea for effective cross-border tax dispute settlement in developing countries

Pasquale Pistone[1]

1. Introduction[1]

Different interpretation and application of tax treaties may generate cross-border tax disputes, which undermine legal certainty and discourage economic relations. In line with the traditional function of double tax treaties, such disputes arise between Contracting States as to how they exercise their national tax sovereignty under the treaty with a view to preventing, limiting or relieving double taxation. However, they also affect taxpayers, who do not enjoy any standing or actual legal remedy under such treaties.

After the introduction of Article 25 (5) OECD MC, bilateral tax treaties have gradually included tax arbitration in order to settle cross-border tax disputes, opening up the door to the use of effective mechanisms for settling cross-border tax disputes. Arbitration already operates as an effective tool to settle cross-border disputes, such as for instance under investment treaties, which in some cases also cover tax matters. For this reason, the more recent blossoming of this type of mechanisms in tax matters throughout the world should not come as a surprise. It should be welcome as a potential improvement in the levels of effective protection of taxpayers' rights and, more in general, of legal certainty.

In particular, two important developments emblematically reflect this trend, namely concerning the introduction of arbitration in the BEPS Multilateral Instrument and in the tax arbitration directive of the European Union. Almost eighty countries (not including Brazil and the United States) have signed or expressed the intention to sign the former. The EU tax arbitration directive provides for an even stronger cooperation framework in this context.

One may therefore expect that effective mechanisms for cross-border tax dispute settlement become the standard (at least) within this group of countries (largely composed by OECD, BRICS and G20). This development is desirable, since the possible differences in the implementation of the BEPS project may increase the number of cases in which cross-border tax disputes arise and that this phenomenon

* *Academic Chairman of IBFD. Jean Monnet ad personam Professor of European Tax Law and Policy at WU Vienna. Professor of Tax Law at the University of Salerno. Email: "p.pistone@ibfd.org*

should not undermine legal certainty. Accordingly, on the one hand, tax authorities enjoy stronger powers in connection with the need to prevent and counter base erosion and profit shifting, while, on the other hand, they are also bound to frame such powers in a way that includes the right to an effective cross-border tax dispute settlement within the criteria that determine their good governance.

Yet, three important questions arise in connection with such developments.

First, one should wonder whether the commitment of a part of the world to secure cross-border tax dispute settlement might (or should) lead also other countries in the world to proceed in this direction.

Second, insofar the first question is to be answered affirmatively, another issue arises as to whether the implementation of such instruments or the adoption of similar ones in other countries and regions of the world is feasible.

Third, insofar as one (at least partly) affirmatively answers also the second question, it is important to understand whether their regulation should operate along similar or different lines from the ones that characterize the standard established by the BEPS project.

After providing an overview of how the BEPS multilateral instrument and the EU tax arbitration directives provide for cross-border tax dispute settlement, the author will try to answer the three questions indicated above and reach some conclusions on possible desirable goals to achieve in developing countries. In line with the goals of this contribution, such conclusions will in fact plea for effective cross-border tax dispute settlement as an instrument to secure legal certainty and preserve a correct development of economic relations under the rule of law.

2. Cross-border tax dispute settlement under the BEPS Multilateral Instrument

2.1 Mutual agreements and arbitration under the BEPS Multilateral Instrument

Tax treaties have included clauses on mutual agreement procedures for several decades. In essence, such clauses establish a common forum for a dialogue between tax authorities in order to overcome inconsistencies in tax treaty interpretation and application that can lead to the exercise of taxing powers not in conformity with the provisions, object and purpose of the treaty. Such clauses also facilitate mutual consultation between tax authorities of the Contracting States on cross-border matters, including on issues not covered by tax treaties.

Mutual agreement procedures have now come to constitute one of the three minimum standards of the BEPS project, thus calling upon a much closer cooperation worldwide on their implementation and application, except in the presence of specific reservations.

In particular, Article 16 of the BEPS Multilateral Instrument secures such goal and establishes notification requirements that clarify how States intend to comply with this minimum standard, allowing them to reserve the right to achieve an equivalent result by means of administrative measures that do not require actual changes to their tax treaties. Furthermore, Article 16 also contains compatibility clauses aimed to make mutual agreement procedure operating under the existing provisions of bilateral treaties in line with the BEPS minimum standard.

Part VI of the BEPS multilateral instrument characterizes mandatory binding arbitration as an optional tool for Contracting States to supplement the minimum standard based on the commonly established framework for mutual agreement procedure.

We intend hereby to shed some light on two points connected with arbitration under the multilateral instrument, respectively focusing on its effectiveness as instrument to settle cross-border tax disputes and impact on the persons affected by such disputes, i.e. the taxpayers.

2.2 The effectiveness of arbitration under the BEPS Multilateral Instrument

The actual strength of arbitration as mechanism for cross-border tax dispute settlement depends on how many States will effectively implement into their tax treaty rules. At present, the number of such States is rather limited, as shown by the numerous reservations on Part VI of the convention implementing the BEPS Multilateral Instrument.

Various reasons may have contributed to generate this situation. In general, signatory States of the multilateral instrument are aware that the process of international tax coordination does not allow steps back. Therefore, once agreed to use arbitration along the lines of Part VI of the Multilateral Instrument, a State may not move away from it. Furthermore, several signatory States hesitate to use arbitration as an instrument to settle cross-border tax disputes for the rules on the appointment of arbitrators, but also for its implications on the natural judge theory, the rule of law, and the lack of capacity to handle such procedures.

The first reason reflects a cautious approach to this new form of settling cross-border tax disputes.

The second reason can be justified in non-OECD countries, especially if one considers that, in case of difficulties concerning the appointment of arbitrators, Article 20 (3) and especially 20 (4) give significant powers to the Centre for Tax Policy and Administration of the OECD. In such circumstances, non-OECD countries could have the fear or perception that the arbitrator selected by the OECD would not necessarily have the objective credentials of impartiality to settle the dispute in a technically unbiased way. Although this may in fact not be the case, the issue remains as to the circumstance that a country would have little or no legal remedy to react to problems of this kind.

By contrast, the remaining three arguments could be at least partly criticised.

In particular, a conflict with the natural judge theory arises when arbitration can take a given dispute away from the judge established by law. This situation hardly ever occurs in cross-border tax disputes for the following two reasons. First, there is usually no court with jurisdiction to adjudicate the dispute between the Contracting States as to whether the exercise of taxing powers is in line with the conditions established by the convention. Second, if we look at the implications for the taxpayer affected by such dispute, there is usually not a single judge established by law that can state on them, but rather one in the domestic judicial procedures of each Contracting State involved in such dispute. Therefore, in the absence of a single judge with jurisdiction to adjudicate the dispute arbitration in fact constitute an instrument to secure justice, rather than to provide for an alternative one.

A potential clash with the rule of law is deemed to arise insofar as arbitrators deviate from the levying of taxes in conformity with the interpretation and application of rules in each Contracting States. In principle, this argument only affects disputes on legal interpretation, thus still permitting the use of arbitration as a tool to solve cross-border tax disputes arising on factual matters. Furthermore, insofar as arbitrators motivate their decisions on legal disputes in a way that takes into account the applicable law of each Contracting State and interprets the provision of the double tax convention on legal grounds, such decisions do not deviate in fact from the rule of law in each Contracting State. Rather, such decisions fulfil the object and purpose of the convention, by achieving justice despite the presence of interpretative conflicts.

The problems of capacity to handle tax arbitration procedures is especially perceived in developing countries. Such countries generally also lack capacity to run mutual agreement procedures, due to the lack of technical experience and specific knowledge of its competent authorities.

Capacity building can gradually overcome this type of problems in the medium-to-long term scenario. However, in the short-to-medium term perspective, this argument should possibly not serve to hide other reasons, namely to avoid losing control over the settlement of cross-border tax disputes or over the selection of arbitrators among the persons who are somehow more closely related to the State.

We submit that neither of such hidden reasons has merits. On the one hand, being in control of the settlement of cross-border tax disputes is a less valid reason than having an effective settlement of such disputes and, on the other hand, arbitrators should be selected among impartial persons with a technically unquestionable curriculum, no matter what their gender, nationality or colour of skin is.

2.3 The affected persons and arbitration under the BEPS Multilateral Instrument

In line with the traditional function of tax treaties, the wording and content of several provisions contained in Part VI of the BEPS Multilateral Instrument characterize arbitration as an instrument to settle cross-border tax disputes between persons of public international law, namely the Contracting States. Therefore, the affected persons enjoy very limited rights within such procedure.

Insofar as arbitration is applicable within a covered tax agreement, the person has the right to request its application along the lines provided by Article 25 (5) OECD MC. However, Article 18-26 of the BEPS Multilateral Instrument present a significantly more regulated framework, showing a considerable effort to establish a common set of rules that effectively secures the speedy settlement of cross-border tax disputes.

In particular, the appointment of arbitrators under Article 20 is a matter for the States only, which the affected persons cannot challenge and which the OECD Secretariat monitors, intervening under Article 20 (3) and (4) in order to overcome possible failures or inertia.

Similar conclusions can be reached in respect of how Article 21 protects confidentiality of information accessible to the arbitrators, the procedural rules governing arbitration, the types of arbitration enshrined in Article 23, the right of the Parties to reach an agreement on a different resolution under Article 24 and the rules of Article 25 on the cost of the proceedings.

Furthermore, Article 19 (5) to (9) establish several rights and obligations connected with notification and request for additional information during the mutual agreement procedure.[2] In our view, such rights and obligations are mainly instrumental to secure the effective and speedy functioning of the procedure. They give the affected persons no actual remedy in the framework of the arbitration procedure. However, they also do not prevent the activation of domestic administrative and judicial remedies.

This interpretation is compatible with how Article 19 (4) and (12) allow affected persons to preserve their rights under the domestic administrative and judicial legal remedies. In particular, Article 19 (4) gives the affected person the right to reject, also tacitly, the outcome of arbitration and Article 19 (12) allows the States to block or terminate arbitration in the presence of a judicial (even non-final) decision.

One may reasonably expect that the correct implementation of the BEPS multilateral instrument have a significant positive impact on cross-border tax dispute settlement in a large part of the world. The existence of common detailed minimum standard rules for mutual agreement procedure - especially in States that accept to apply the arbitration procedure regulated in Part VI - will not only allow tax authorities to speed up the formation of common grounds between the tax authorities involved, but also prevent the potential of unsettled disputes. This development may harmoniously fit within the framework of tighter international tax coordination required by the implementation of the BEPS project in that part of the world, generating positive repercussions for business in terms of protection of legal certainty in cross-border situations.

Yet, the potential global dimension of cross-border tax dispute settlement under the BEPS multilateral instrument essentially remains a matter of public international law that is now included in the goals of good tax governance. In such context, the protection of rights of affected persons remains at a purely national level in all cases in which they disagree with how tax authorities have settled the cross-border dispute.

3. The EU Tax Arbitration Directive

Pretty much at the same time of the signature of the BEPS Multilateral Instrument, the Member States of the European Union have reached a political compromise on the text of the so-called EU Tax Arbitration Directive.[3] Such Directive (whose signature is expected in October 2017) regulates the settlement of cross-border tax disputes within the European Union arising "from the interpretation and application of agreements and conventions that provide for the elimination of double taxation of income and, where applicable, capital".

After the entry into force of this directive on 1 July 2019, taxpayers affected by cross-border tax disputes between EU Member States will in fact have numerous forms of arbitration available in order to have such States settling this type of dispute. Besides this directive, Article 25 (5) OECD MC and Part VI of the BEPS multilateral instrument, taxpayers can also opt to activate the procedure of the 1990 EU Tax Arbitration Convention[4] when the disputes arises on transfer pricing matters, or even resort to arbitration under bilateral investment treaties, when existing and not carving tax disputes out of its scope.

The abundance of legal mechanisms for settling cross-border tax disputes shows an even stronger commitment of EU Member States for solving problems concerning the interpretation and application of tax treaties. It also witnesses how such States (and, more in general, States which have not put a reservation on Part VI of the BEPS Multilateral Instrument) pursue legal certainty at a moment in which cross-border tax disputes might increase in connection with the implementation of the BEPS project and the enhanced efforts to combat base erosion and profit shifting.

A comprehensive analysis of the EU Tax Arbitration Directive falls out of the scope of this work. However, some selected issues connected with its application are important for our purposes.

First, this directive constitutes secondary law of the European Union, thus contains supranational law that is subject to the interpretation of the Court of Justice of the European Union. Since the incorrect interpretation and application of its provisions exposes EU Member States to infringement procedures under supranational law of the European Union, one may reasonably expect that the directive will achieve an effective settlement of cross-border tax disputes.

This is even more likely to be the case insofar as - and here is the second selected relevant issue – Article 1 of the EU Tax Arbitration Directive includes within its scope also "the rights of the obligations of the affected persons when such disputes arise". Although the directive confirms the traditional view that cross-border tax disputes essentially affect the exercise of taxing sovereignty between two States, persons of public international law, we believe that the affected persons can activate EU legal remedies in respect of possible violations of the provisions contained in the directive. This means that they can obtain protection by activating the jurisdiction of the Court of Justice of the European Union in the framework of a preliminary ruling or infringement procedure. This can, for instance, occur in case of violation of provisions concerning the right to file a complaint under Article 3, or the ones connected with information, evidence and hearing under Article 12.

The need to interpret and apply this directive in line with the requirements and principles of European Union law, as reflected in the EU Charter of Fundamental Rights, confirms this vision. The decision by the Court of Justice of the European Union on the *Berlioz* case[5] shows the far-reaching implications of the right to an effective legal remedy under European Union law. In this case, the Court of Justice endorsed the right to a judicial review in respect of the levying of a tax penalty connected with the refusal of a third party holder of tax information, which this person did not consider as foreseeably relevant for the purposes of the exchange of information provision contained in the double taxation convention. By doing so, this judgment in fact allows questioning the foreseeable relevance of such information when the requested State fails to do so and the judiciary of such country believes that such failure in fact shows some manifest violations of the conditions established by the applicable legal instrument. Although the Court has clarified that the affected person does not enjoy an immediate protection of procedural rights in mutual assistance procedures, the decision on the *Berlioz* judgment shows the inclination of the Court to give affected persons an effective protection in cross-border tax procedures. This should also apply in connection with cross-border tax dispute settlement, especially under the EU tax directive, on the interpretation of whose provisions the Court of Justice has exclusive jurisdiction.

The directive prevails over national law - from both domestic and treaty source - for being a legal instrument of European Union law. Such hierarchically superior status does not set aside the provisions of the BEPS multilateral instrument on arbitration, leaving the affected persons the freedom to choose the legal instrument governing the settlement of the cross-border dispute. However, since the directive gives affected persons a significantly stronger protection of rights (also due to the direct applicability of European Union law), as compared to the one of arbitration under the BEPS Multilateral Instrument, it is expected to make the latter instrument rather unattractive for bi- and multilateral disputes only involving EU Member States.[6]

Likewise, it does not overrule the EU tax arbitration convention for the settlement of cross-border tax disputes on transfer pricing. Although the latter instrument *prima facie* secures a more intensive protection of the rights of affected persons for explicitly stating the obligation to eliminate double taxation arising in such context, a proper interpretation of the clauses contained in the EU tax arbitration directive can lead the Court of Justice to achieve an equivalent result. Taking into account such circumstances, the EU tax arbitration directive could therefore be preferable in the light of its more effective protection of a speedy procedure, the existence of alternative dispute mechanisms that reflects the advantages of mediation, or the supplementary function of national courts to secure the rights of affected persons.

4. Arbitration and cross-border tax dispute settlement in developing countries

The preceding sections have indicated a clear trend towards an increased number of cross-border tax disputes, mainly connected with a stronger fight against base erosion and profit shifting practices. OECD and EU countries intend to face such developments with a corresponding enhancement of their legal instruments for settling such disputes, which streamlines mutual agreement procedures, relies more heavily on arbitration, and includes alternative measures, including mediation.

The existence of numerous reservations on Part VI of the convention of the BEPS multilateral instrument shows a certain reluctance of several countries, including in particular non-OECD countries, towards for binding settlement of cross-border tax controversies.

The reasons for this attitude are manifold. First, many countries do not generally favour any surrender of sovereignty that deprives them of the right to have the last word on issues connected with its tax sovereignty. Second, developing countries may feel not ready yet for this legal instrument, for lacking technical capacity to handle its issues. Furthermore, such countries may also regard the BEPS arbitration framework as a tool developed under the rule of OECD countries to steer the convergence of international taxation.

Whether or not such perception is correct, that matter falls out of the scope of this work. By contrast, the enhanced coordination of international taxation requires a legal instrument that allows for a seamless and effective settlement of the cross-border tax disputes, whose number and complexity is expected to significantly increase over the next few years. The absence of this type of mechanisms or their inefficient functioning can undermine legal certainty and thus produce a significant negative bias against cross-border investment.

Especially when the developed world has made a sharp turn towards arbitration, we submit that developing countries may simply not afford to ignore the reasons for establishing a clear and effective legal framework for cross-border tax dispute settlement.

Time has come to put an end to the unlimited discretionary powers of tax authorities. Everybody is aware that tax authorities in developing countries hardly ever accept to engage in mutual agreement procedures and that when they do so the procedures are either endless or unsatisfactory.

Is this a good reason to ignore this plea for an effective cross-border tax dispute settlement?

We submit that a negative answer to such question is the best way to protect the interest of developing countries to receive inbound investment. Tax treaties have long constituted a legal instrument to deprive developing countries of their taxing rights as countries of source. Now the BEPS project opens up new frontiers for protecting the taxing sovereignty of the country of value creation. Therefore, it can also open up a new page in the history of international taxation of developing countries, by making their tax systems able to secure the effectiveness in settling cross-border tax disputes.

However, insofar as those countries are sceptical about having their cross-border tax disputes arbitrated in the framework of Part VI of the BEPS multilateral instrument, we submit that they should at least not lose the opportunity to explore equivalent paths to achieve the goal of securing legal certainty on cross-border taxation.

The failure to promote this historical development for international taxation would be a historical mistake for developing countries, which cannot be justified by the need to wait until their nationals acquire technical capacity to arbitrate cross-border tax disputes. As indicated earlier in this work, technically competent professional arbitrators can best reconcile the interest to legal certainty with that to secure an effective protection of the national tax sovereignty of developing countries.

Yet, in these circumstances, any progress by the UN on cross-border tax dispute settlement is highly welcomed, since the legitimacy of rules established by a much broader group of countries can be the best medicine to overcome the scepticism of developing countries.

In such context, we submit that arbitration should not represent the only mechanism for settling cross-border tax disputes involving developing countries. Arbitration works well for large disputes, but often is too burdensome for the smaller ones. Also, it should operate when cross-border tax disputes cannot be otherwise settled. Therefore, considering the problems of mutual agreement procedures in developing countries, we submit that a package for enhancing cross-border tax dispute settlement in such context should also include additional mechanisms, such as mediation and similar legal instruments, which facilitate the convergence of different positions and give such countries the opportunity to reach satisfactory agreements without necessarily recurring to arbitration. This means that a flexible package of measures should allow tax authorities to choose the most suitable one for their needs and the ones of the affected person, thus securing the settlement based on an à la carte menu.

Since the context of developing countries also frequently includes legal instruments in non-tax agreements that can apply to settle cross-border tax disputes, we envisage the option to build up centres that can build up a technical specialization for addressing the problems arising in developing countries. Such centres should show suitable knowledge of the cross-border tax problems of developing countries and enjoy sufficient credibility towards tax authorities of developing and developed countries. Furthermore, such centres could combine a regional or global focus with tax technical specialization and the awareness of the standards normally applied in settling cross-border disputes, such as the ones on investment.

5. Conclusions

The BEPS and tax transparency projects have started the era of international tax coordination, which brings the exercise of taxing powers closer worldwide. The higher number of occasions in which tax authorities more incisively exercise their powers is in our view likely to lead towards a dramatic increase of cross-border tax disputes.

Stronger powers to tax authorities should march along a stronger protection of the rights of the affected persons in cross-border tax disputes. Insofar as such disputes remain mainly a matter for two subject persons of public international law to regulate the exercise of taxing powers, the levels of protection of taxpayers' rights still leave significant room for improvement. However, the important developments concerning mutual agreement procedures and arbitration more effectively preserve legal certainty and prevent a possible inconsistent exercise of taxing powers by the tax authorities involved in cross-border situations.

Our plea for an effective cross-border tax dispute settlement is directed at the entire world in order to preserve and possibly enhance the rule of law as basic value of international taxation. Yet, for various reasons its homogeneous implementation may prove rather difficult in fact and rather require that countries gradually shift towards common standards by using different tools that share the substance and effectiveness of cross-border dispute settlement mechanisms and make progress through a flexible array of legal instruments, including mediation and conciliation.

Adapting to this global legal framework for the exercise of taxing powers in cross-border situations is the ultimate challenge for all, including developing, countries. Such countries should gradually build capacity and learn that a reduction in absolute discretionary tax powers coupled with high standards of protection of the rule of law is the right way to go. In such framework, new opportunities can arise for specialised regional and global centres on dispute settlement, which apply their technical knowledge to the specific problems connected with cross-border taxation in developing countries.

There is only one final point of this long march for global taxation. It is the establishment of an international tax court under the auspices of the United Nations. Such Court should pursue two main goals. First, it should secure a consistent exercise of taxing powers across the borders harmoniously with the standards set up by the OECD, EU, developing countries, including in specific regions of the world. Second, it should acknowledge that cross-border tax disputes are public international law controversies involving States, but also - from a private international tax law perspective – that adequate levels of protection should be secured to the affected persons in line with the principle *ubi ius, ibi remedium*.

---

1 Academic Chairman of IBFD. Jean Monnet *ad personam* Professor of European Tax Law and Policy at WU Vienna. Professor of Tax Law at the University of Salerno. Email: p.pistone@ibfd.org.

2 Such rights and obligations do not constitute part of the minimum standard for being included in a provision contained in Part VI.

3 The political compromise on the document 9420/17 was reached in the framework of the Ecofin Council on 23 May 2017.

4 Convention 90/436/EEC was signed on 23 July 1990 by EU Member States, then acceded by new EU Member States and extended for an unlimited duration. This convention is not a legal instrument of European Union law and therefore not subject to the interpretation of the Court of Justice of the European Union. However, it enjoys a special status in the legal system of the European Union for forming part of the *acquis communautaire*, which obliges EU Member States not to deviate from its clauses, providing with solutions to cross-border problems within the EU internal market.

5 Court of Justice of the European Union, judgment of 16 May 2017, Berlioz Investment Fund (C-682/15), ECLI:EU:C:2017:373.

6 Possible reasons to prefer arbitration under the BEPS Multilateral Instrument could be connected to the trustworthiness of the OECD Centre for Tax Policy and Administration or the possibility to have the dispute settled with an alternative resolution mechanism or the so-called baseball arbitration, as regulated by Article 23 of the Convention establishing the BEPS Multilateral Instrument.

Implementation of BEPS – The UN Approach

*Ignatius K Mvula**

1.0 The UN Committee of Experts on International Cooperation in Tax Matters

The UN Committee of Experts on International Cooperation in tax matters (the "Tax committee") has twenty five members nominated by their Governments and appointed by the Secretary General in consultation with Member States. The tax committee serves for a four year term, with the immediate past committee having served from 1 July 2013 to June 30th 2017.

The committee's work is largely undertaken through its sub-committees, with the committee being a body focused on discussing policy and administrative issues relevant to international cooperation and providing guidance on them and through this also approves the work of the sub-committees. This previous tax committee had a number of sub-committees which included sub-committees on; Royalties, Services, BEPS, Exchange of Information, Article 9 Associated Enterprises (Transfer Pricing), Extractives Industries 'Issues for Developing Countries, Mutual Agreement Procedure – Dispute Avoidance and Resolution among others.

Achievements of the Tax Committee

During its four year term the tax committee managed to finalise and produce the following –

- Revised UN Model Double Tax Convention between Developed and Developing Countries – with updates on BEPS issues relevant to developing countries, updated Article on Exchange of Information, to be launched in October 2017.
- Updated version of the UN Practical Manual on Transfer Pricing for Developing Countries which was launched in April 2017 in New York.

---

* Ignatius K Mvula is an Assistant Director at the Zambia Revenue Authority and was a Member of the UN Committee of Experts on International Cooperation in Tax Matters (2013 to 30th June 2017). This Article is based on his presentation at the International Fiscal Association, Mauritius 11th Asia/Africa Conference, 18th to 19th May 2017. It represents the personal views of the Author only and should not be taken as representing the views of the United Nations.
The work is largely drawn from references from the Conference Papers of the UN Committee on Experts on International Tax Cooperation in Tax Matters tabled during the 12th, 13th and 14th Sessions of the Committee. Available at http://www.un.org/esa/ffd/ffd-follow-up/tax-committee.html

- Handbook on Selected Issues on Taxation of Extractive Industries Issues for Developing Countries, to be launched in October 2017.
- Revised UN Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries, released in 2016.

2.0 Revisions to the UN Model Double Tax Convention

The updates made to the 2011 UN Model Double Tax Convention (UN MTC) include the following – (The focus in this article of this issue being on the updates aimed at countering Base Erosion and Profit Shifting.)

2.1 Title and Preamble

The title of the UN MTC has been revised to refer expressly to *"the prevention of tax avoidance and evasion."* Additionally, a new preamble has been added which makes it clear/confirms that tax conventions are not intended to create opportunities for tax avoidance or evasion including tax avoidance through treaty-shopping arrangements.

2.2 Article 1 (Commentary on Hybrid Entities and other OECD Changes)

Hybrid entities were originally covered under the Commentary to Article 4 and will now be covered under the Commentary of Article 1 and also covering other OECD changes as relates to BEPS such as paragraphs on fiscally transparent entities and the saving clause.

2.3 Article 4 (Residents)

The revised UN MTC reproduces the OECD change as regards amending paragraph three on the tie-breaker rule for dual-resident persons other than individuals were the place of effective management test has been replaced with a requirement that the Competent Authorities of the two Contracting States have to work on resolving the question of dual residence by mutual agreement. The new provision provides for denial of treaty benefits where there is no agreement between the Competent Authorities and this is intended to curb tax avoidance cases that sometimes emanate from dual resident entities. The new paragraph exists as alternative in the commentary of the 2011 UN MTC; similarly the current Article 4, place of effective management test ("POEM test") will be placed as an optional alternative in the Commentary of Article 4 of the new UN MTC.

2.4 Article 5 (Permanent Establishment)

Revisions to paragraph 3 (anti-contract splitting rule), 4 (preparatory and auxiliary activities), 4.1 (anti-fragmentation rule), 5 and 7 (dependent agents) are largely based on OECD BEPS changes though with alternatives which depart from OECD changes which will be in the commentary following strong minority views of the committee and include the following –

- Paragraph 3(b) – This paragraph provides for a Services Permanent Establishment (PE) which is not in the OECD Model and it currently states as follows;

  The furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only if activities of that nature continue (for the same or a connected project) within a Contracting State for a period or periods aggregating more than 183 days in any 12-month period commencing or ending in the fiscal year concerned.

  The updated UN MTC will provide as an alternative, the deletion of the reference to *"the same or a connected project"* which broadens the application of the Services PE. This is meant to address the view by some countries that the current provision of paragraph 3(b) may be abused by the avoidance of a PE by enterprise that may have several projects in a Country which are not connected despite substantial business activity over a long period.

  One of the underlying policy perspectives supporting this view is that if a non-resident provided services in a country for more than 183 days, the non-resident's involvement in that country's commercial life was justification for the country to tax income arising within its boundaries without regard to the project limitation provided in paragraph 3(b).

- Paragraph 5(5) – Commentary to provide for exclusion of the words *"contracts that are routinely concluded without material modification by the enterprise"* under the dependent agent paragraph for countries having a concern that the inclusion of this sentence may encourage enterprises to claim that the condition was not met for a dependent agent and hence avoid creation of a Permanent Establishment. The question is also to the interpretation of what factors constitute "material modification".

2.5 Article 10 (Dividends)

Paragraph two has been revised with an increased direct shareholding threshold from the current 10% to 25% of the capital of the company for the beneficial owner of the dividends to be entitled to a reduced tax rate, with an additional requirement for a 365 days shareholding period that includes the day of payment of the dividends.

2.6 Article 12A (Fees for Technical Services)

This is one of the biggest milestones for the committee, and a very significant difference from the OECD Model, which rejects source state taxation of services without physical presence. The Article is based on developing country practice and can be said to be a modern view of the sort of connection to a market justifying the granting of taxing rights under tax treaties, in an increasingly globalized and digitalized world. The article provides shared taxing rights between the two parties to the treaty with the source country having to impose a withholding tax on gross payments made to a resident of the other Contracting State in relation to services for *"managerial, consultancy and technical fees"* collectively termed as *"fees for technical services".* The introduction of this Article broadens the taxing rights of developing countries as most developing countries have often very large payments made by local enterprises which are deductible in computing corporate income tax and as such the contention has been that the non-taxation of these payments which are deductible in computing corporate income taxation is seen as eroding the tax base of most developing countries.

A Contracting State will have a right to impose taxation on payments for technical services where the fees are paid by a resident of that State or by a non-resident with a permanent establishment or fixed base in that State and the fees are borne by the permanent establishment or fixed base. It is not necessary for the technical services to be provided in that State.

The Article carves out certain payments from falling under this article such as the payments; *(a) to an employee of the person making the payment; (b) for teaching in an educational institution or for teaching by an educational institution; or (c) by an individual for services for the personal use of an individual.*

The commentary addresses the pros and cons of the Article and also provides alternatives. One of the cons is careful consideration for an appropriate tax rate as imposing a high tax rate on gross payments may have negative consequences on both local and foreign businesses and the economy at large, including spreading the latest expertise to the country and assisting international competitiveness. As always, there is a balance to be closely considered and struck.

Where Contracting States do not agree with the Scope of Article 12A but wish some coverage of fees for technical services, the commentary provides an Alternative Article to cover "fees for included Services" that can be included under the Scope of the Royalties Article. The definition of Royalties in Paragraph three has been expanded in this regard to include Fees of for Included Services. Other countries will resist any coverage of fees for technical in negotiations with developing countries, of course.

Fees for included Services are fees in relation to any technical or consultancy services (including through the provision of technical or other personnel) if such services:

(*a*) *are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 of Article is received; or*

(b) make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design.

2.7 Article 13 (Capital Gains)

The updated UN MTC will have a revised paragraph 3 and 4 which largely follows the OECD BEPS changes. The concept of Comparable interest which was not in the UN MTC has been included in paragraph 5.

2.8 Article 29 (New Article on Entitlement to Benefits)

Probably one of the big departures from the OECD is that the Article on entitlement to benefits under the New UN MTC will incorporate a detailed Limitation of Benefits (LOB) and a Principal Purpose Test (PPT) which is seen as a practical approach by UN Tax Committee. The detailed LOB is largely equivalent to the US Model LOB. Unlike the OECD Model which will incorporate both the simplified and detailed LOB, the UN does not have the simplified LOB.

The Commentary will recognize that countries could in their bilateral negotiations either follow the – LOB alone, PPT alone or LOB plus provision for conduit arrangements.

The detailed LOB will provide developing countries with more robust protection against treaty shopping abuses.

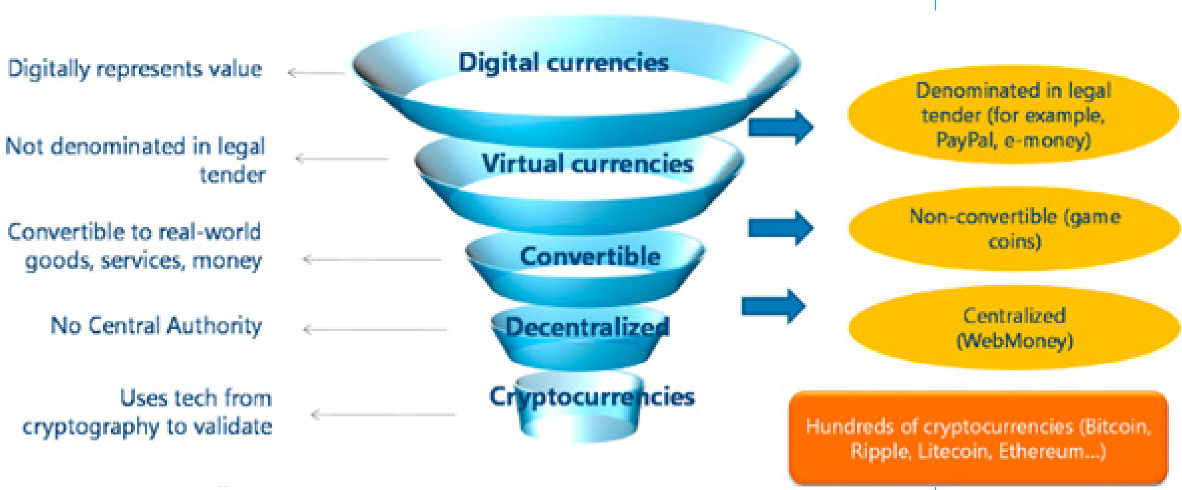
Bitcoin & Blockchain; Changing the rules of the game May 2017

Shikha Mehra

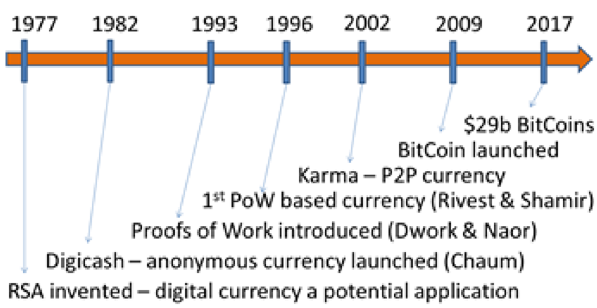
Ashish Sodhani

A. Introduction

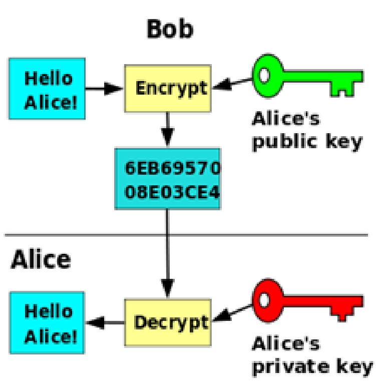
Bitcoins can best be understood from its taxonomy below as a specific subset of virtual currencies that work off a decentralized mechanism and are convertible to real world goods services, and other fiat currencies. Bitcoin is the world's first cryptocurrency and is the most widely used today. Bitcoins value is not backed by any central government like fiat currency neither is it backed by any private entity like Amazon or Microsoft. Bitcoin's value is driven by network effects and volatility in Bitcoin's price is a reflection of market sentiment on the current adoptability and use of Bitcoin as a medium of exchange and/or store of value. Advances in cryptography and computing power allow participants on the bitcoin blockchain network to a) manage issuance of Bitcoins b) implement and enforce rules of engagement for use and circulation of Bitcoin and finally c) carry out the settlement and clearing functions disintermediating the need for trusted third parties like Western Union, PayPal, Banks and other financial institutions.



B. Technology Timeline



The enabling technology for digital currencies, RSA algorithm, has been available for a long time since 1977. RSA is an asymmetric cryptographic algorithm, which uses a pair of public and private key to encrypt and decrypt electronic messages (Rivest, Shamir, & Adleman, 1978).



In the Bitcoin blockchain, public key cryptography is used to create a key pair that controls access to Bitcoins. The public key is known to everyone and is used to encrypt the message and functions very much like the beneficiary's name on a check. Public key is typically used to generate a Bitcoin address which is an alphanumeric string and contains no personally identifying information of the recipient or sender of Bitcoins. The private key is a set of random numbers, shares a unique mathematical relationship with the public key and is used to prove ownership of Bitcoins on the blockchain which is a pre-requisite to spending Bitcoins on the blockchain. Private keys are used to generate digital signatures which are appended on the transaction transferring Bitcoins amongst users/participants and function similarly to PINs and signatures on checks that prove ownership and usability of the account. These digital keys are not stored on the network, but are instead created and stored by users in a file or database called wallet. These wallets can be stored offline on one's computer hardware device and is the safer option to protect private keys from getting stolen rather than online storage.

The figures below depict the differences between a centralized payment system, the one that is in use today and a decentralized model based on the bitcoin blockchain network.

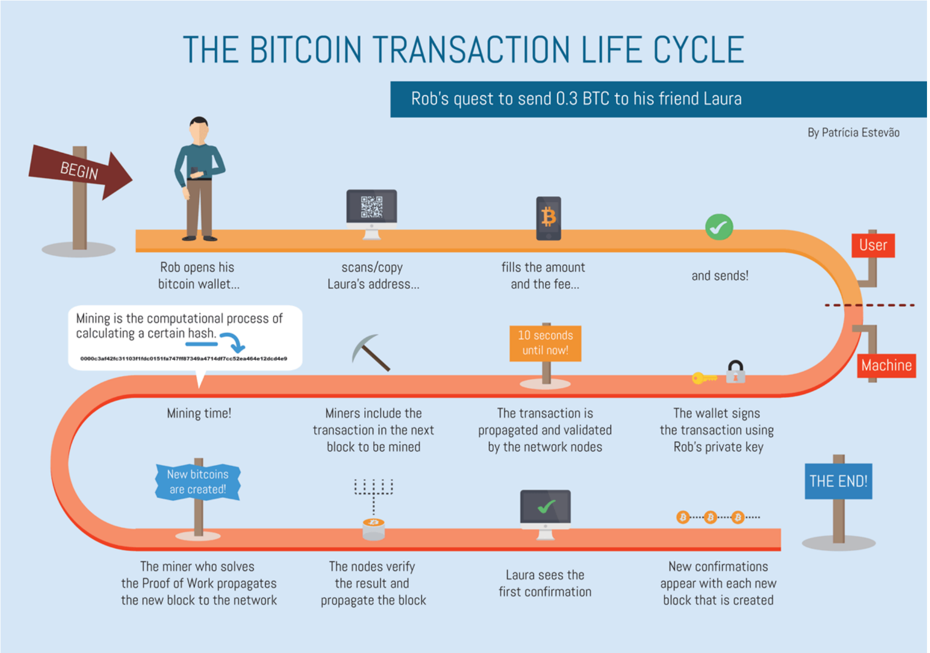
C. Why is Bitcoin such a big deal?

Until Bitcoin there was no way to certify that digital information sent across the internet was the original file or it was something that has been sent across to different people over the internet several times already. For example, a photo or song file can be sent multiple times to the same or different users. This is called double spending and has been a problem until Bitcoins came along. Mining is the main process of the decentralized clearinghouse, by which transactions exchanging value are settled and cleared. Mining secures the Bitcoin network and enables the emergence of the network-wide consensus without a central authority. (Antonopoulos, 2015) This further makes possible the creation of an immutable database, an absolutely verifiable and accurate history of every transaction that has ever occurred, and this database is unique in that it is maintained, updated and trusted by everyone on the network. It is like everyone in the world, across cultural and geographic borders coming together to agree on something. That's what Bitcoins and the underlying blockchain technology, essentially represent.

Bitcoin allows to send value across the internet in a cheap, fast and easy manner much the same way email allowed information to be sent across the internet. Email is to internet what Bitcoin is to blockchain. Bitcoin is the first application of an internet of value or the blockchain/Distributed Ledger Technology. And finally, it gives people the ability to separate money from state control. It allows people more power and allows for peer to peer exchange of value without the need for central banks and governments regulating its flow. In countries like Venezuela, Greece, Brazil, a majority of the African nations there are real threats to people losing their savings and/or their government intervening and devaluing their hard earned money.

D. How Bitcoin transaction works?

Let's say Rob wants to send Laura .25 Bitcoins. He does this by opening his Bitcoin e-wallet which contains his private key and scans Laura's address (this is her public key akin to her bank ac no), fills in the amount of .25 Bitcoins and hits on send. Now Rob's wallet creates a digital signature through the sign and hash paradigm, which entails hashing the message and applying the signing algorithm. Then this transaction which is encrypted and digitally signed is broadcasted all over the network. Till this point we are at 10 seconds! Now all the nodes (miners) on the network set about validating this transaction. What is being validated is that the message is coming from Rob, and more importantly checking the past transaction records to ensure that he has an unspent balance of .25 Bitcoins. This validation is done by solving the Proof of Work (PoW) puzzle. The miner that succeeds in solving it first gets rewarded with Bitcoins and the other miners verify that the solution to the puzzle is correct by consensus. That means 51% of the networked nodes verify the correctness of the solution and that completes the



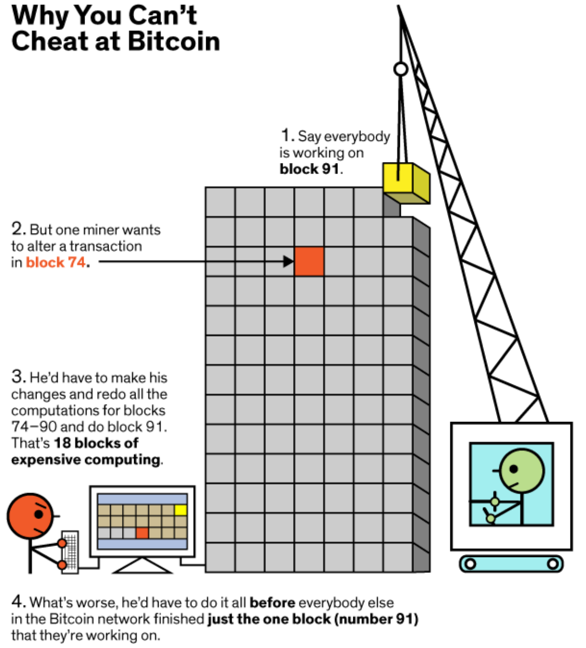
validation mechanism. The computational effort to verify a solution is negligible when compared to the CPU power that is utilised in mining through and finding the right solution. Once the transaction is validated, Laura gets a confirmation of .25 Bitcoins received and the new transaction gets chained to the transaction record thereby updating the public ledger.

E. Mining and POW protocol that solves the double spending problem

The POW is a very complex cryptographic puzzle that requires immense computational power and resources to solve. Miners compete with each other to find the solution to this puzzle. The puzzle is denoted by a C string (challenge string) and the solution is a complimentary string (the proof). The C string is nothing but the hash of all the transactions in the previous block. And the proof is to be such a mathematical relationship to the C string such that when both of them are hashed through a good cryptographic hash function like SHA 256 used in the Bitcoin blockchain network the resulting output is a 256 -bit string where the first 30 or 40 bits are all 0s. This means that the computer server would have to go through approximately one trillion iterations before coming up with the correct proof for the POW puzzle. The greater the hash power the lesser amount of time it takes for the computer to come up with the right solution. Hash power is proportional to the CPU horse power running these computer systems which are mining for solutions. For a better conceptual understanding, it may be easier to think of the cryptographic puzzle as a situation where one is given 40 coins and is asked to flip it in such a way that all 40 heads turn up. This would require approximately 2^40 ~one trillion flips on an average to ensure that at least one instance is such that all 40 coins show up as heads. When numerous miners are working concurrently to solve the POW puzzle it takes approximately 10 minutes for a miner to solve the puzzle. The main purpose of solving the puzzle or mining is twofold. Mining creates a decentralised mechanism for clearing transactions and issuance of newly minted Bitcoins.

In the fiat currency world, transactions are cleared ultimately by central banks which are responsible for the settlement and clearing functions of the various financial intermediaries within their jurisdiction. Central banks also print money which within the Bitcoin network is set up as a reward for successfully solving the POW puzzle and the reward gets halved every four years and there will only be a total of 21 million Bitcoins ever minted/rewarded through mining. Thus, ultimately Bitcoins are deflationary, unlike fiat currencies.

F. Security of the Bitcoin Blockchain Network



Each block contains information of all the previous transactions in the exact chronological order that they occurred. Each of these transactions were verified and validated solving complex POW puzzles. Attempting to cheat would mean that the one trying to cheat would have to re-write history. He would need to alter the chain from block 74 to 91 and create a new blockchain by re-computing the POW puzzles for blocks 74-91 so that everyone on the network accepts it and validates it. He, thus, has to secretly solve several POW puzzles faster than all the other honest miners working concurrently to solve one POW puzzle at a time. In other words, the one trying to cheat's computational power and resources have to be greater than 51% of the total network's mining computing power. Theoretically possible, but practically not. And even if he did invest all that money into computer power he might as well legitimately mine and earn Bitcoins for every POW puzzle (block validation) he solves and earn a transaction fee from each transaction too. Thus, there is an economic incentive not to cheat.

Contrasted with the double spending issue in fiat currency regime where a fake note can be printed at a mere 40% of the value of the genuine note, crypto currencies are much safer and to date there has been no known double spending or counterfeiting of Bitcoins.

In India for example, post demonetization, the new INR 2000 note has been embedded with 21 new security features and these can be copied for a cost of 400 rupees.

However, there have been numerous instances of Bitcoin exchanges getting hacked and people losing their money. One third of Bitcoin trading platforms have been hacked (2009-March 2015). Bitcoin exchange services pose the weakest link in this Internet-based economy. Many of them are run by programmers rather than experts in the domain of finance and security.

Pertinent to note that Bitcoin enthusiasts attribute thefts to 'centrality', since these exchanges function as gatekeepers between the fiat and crypto currency ecosystem they provide a single point of control and failure, becoming easily vulnerable to cyber-attacks.

Some of the hackings and security breaches that made the headlines were amongst others BitCoinica and BitFloor in 2012, Bitstamp in 2015, the largest loss was faced by the people who had bought Bitcoins from the Japanese Exchange Mt. Gox which suffered a total of $750m loss. In 2016, Bitfinex, an exchange based in Honk Kong lost $70m and more recently South Korean Yapizon lost $5m in April 2017. These facts and figures must be put in the context of the relentless cyber-attacks that the global banking system has been facing (Pagliery, 2017). And the value of Bitcoin's bockchain has proven essentially immune to hacking given the cryptographic and decentralized mechanism of trust, securing the network.

G. Bitcoin Price Volatility

Since hitting a record-low of $177 in January 2015, Bitcoin is up almost 600%.

On March 2, 2017, it reached a new high of $1,268 per unit—thus surpassing the *price of an ounce of gold* for the first time ever.[1] Since the beginning of last year, almost all Bitcoin trading has originated from China. This trend coincides with the introduction of *capital controls*. Since Beijing first enacted the controls in March 2016, over 90% of Bitcoin trading has been done through Yuan and thus it is no surprise that events in China have an enormous influence on the price of Bitcoin. Earlier this year Bitcoin price saw two huge downward swings both triggered by strengthening of the Yuan by the Chinese government and the regulatory warnings given by its central bank to domestic exchanges.

In its short history, Bitcoin's price has risen during similar episodes of government monetary interventions in Cyprus and Greece in 2013 and 2015, respectively when capital controls were introduced in these countries. Interestingly, a 2016 study found that 20% of Bitcoin users owned the currency because they "didn't want banks and governments controlling their money." This was the second-most cited reason for owning it behind "investment purposes."

Another major hit to its price was driven by a disagreement, among the core group of inventors of the Bitcoin blockchain technology and a new group known as Bitcoin Unlimited, on how to resolve scalability issues, resulting in a loss of $2bn to its market cap in 72 hours.

The proceeding paragraphs provide information suggesting that Bitcoin price volatility isn't as bad as one might think, and that volatility has actually come down in the past four years. What are some of the reasons for this and finally the fixed supply of Bitcoins and its impact on its price fluctuations.

Firstly, it is important to note that Bitcoin is not privately issued by any company or publicly issued by any government. Thus it neither has private or public backing and its value is solely driven by demand and supply interactions in an open market. It has no intrinsic value and its value is determined by network effects. Emails and fax machines grew in value as more and more people started using them. Same with Bitcoins. And thus, news affecting market sentiment drives its price either upwards or downwards. Bitcoins are their own unit of account and its equivalent value in fiat currencies around the world vary depending on the market dynamics operating in a particular economy.

A White paper[2] containing information until the end of 2016 analysed that volatility has been down by 28% one-year trailing (Jan 2016-2017) , its weekly volatility was 7% just one percentage point higher than that of oil, the returns per unit of risk were higher, trading volumes were higher and most important contributor to the increased stability of Bitcoin price in 2016 was the increase in transactional volume meaning number of people using Bitcoins to pay a merchant or friend or send family member a remittance more than doubled since 2015. The usage is many multiples higher than it was in 2013, there's a lot more development activity, a lot more application and the Bitcoin network is much healthier and more robust owing to the decrease in overall volatility in the past 4 years. Bitcoin's notorious volatility has lessened to less than that of Twitter stock. Its volatility is now same as the USO oil futures ETF and comparable to that of a small cap stock.[3]

For a better understanding of price fluctuations which will be witnessed going forward it is important to analyse the basic market dynamics spurring demand & supply of crypto currencies.

H. Demand Drivers for Bitcoin and other Crypto Currencies

Bitcoin enthusiasts are of the opinion that there is a growing attitudinal shift in society towards a trust-less system. More and more people around the world are wanting to have better control of their money as a 'store of value' without devaluation and confiscations from the governments and banks. Here are some recent examples from around the world:

- In 2008, Argentina nationalized $30B in private pensions.
- In 2013, Cyprus seized up to 40% of citizens money out of accounts.
- In 2016, Syrian refugees had their wealth confiscated by border guards.
- In 2016, Venezuela had 720% inflation and bolivar lost about 90% of it's value.

More recently, the Indian government withdrew 86% of banknotes in circulation. Ostensibly, it was to cut down on the black market economy and tax cheats, but it also wiped out a large percentage of the wealth of the poorest people, who hold their wealth in cash. During that week of demonetisation, INR/BTC trade volume doubled. A few weeks later, Venezuela followed with a similar measure.

Devaluation of Chinese Yuan has been the main driver for making the Yuan/BTC trading pair dominate the global trade in Bitcoins with a 90% share.

Bitcoins and crypto currencies are being hailed as 'Cyber Gold', a new asset class uncorrelated positively or negatively to any other asset class. In the year 2016, Bitcoins outperformed any other currency, index funds and commodities.

Demand is also driven by a growing user base, where in people are finding it more beneficial to transact in Bitcoins instead of fiat as a medium of exchange.

I. Commercial Advantages of Bitcoins

- *Transaction Cost*: The transaction cost of traditional payment systems for fiat currency vary considerably. The usage of debit and credit cards usually involves a joining and annual fee. The number of free transactions using an ATM generally have an upward limit and range from INR 25-30 per transaction after the limit is crossed (Vishwanathan, 2017). Fund transfer also involves a cost ranging from INR 5-50 per transaction depending on the amount. Payments through Bitcoins do not involve any mandatory transfer fee (Nagi, 2016). Therefore, for the purpose of micro transactions (crowdfunding, charity payments, downloading a song etc.) the use of Bitcoins is feasible as traditional payment methods are expensive. The sender may voluntarily include a transaction fee in order to incentivize a miner to process the transaction in the next few blocks. The amount of the transaction fee depends on the size of the transaction. However, it is anticipated that the transaction fee with respect to Bitcoins will increase as the payment to the miners for generation of a block is halved every four years.
- *Deflationary currency*: The units of Bitcoins which can ever be in circulation has been capped at 21 million. Therefore, the value of Bitcoins is determined by market forces. The security features of the bitcoin blockchain make forfeiting economically prohibitive, further adding to its deflationary characteristic. Whereas the value of fiat currencies is controlled by a designated central authority which may increase or decrease the supply of the currency to inflate its value relative to goods and services for a variety of reasons.
- *Customer Anonymity*: Any personal identifiable information is not linked to the public address at which a customer receives payment or from which payment is made.
- *Security*: Bitcoins can only be spent (consumed) by private keys and several security options that are available to prevent unauthorized access to such keys. Also, the blockchain records all transactions accurately on a public ledger which cannot be reversed unless control of the Bitcoin network is obtained.

J. Regulatory landscape

Each country regards Bitcoin differently and regulations are constantly evolving. Exchanges are gatekeepers that allow people to change their fiat currency into crypto currency and vice versa. There is growing international consensus that gatekeeper regulation can tackle legal and regulatory challenges faced by governments to a large extent.

- *Japan*

Japan has amended the Payment Services Act and the Act on Prevention of Transfer of Criminal Proceeds, for the recognition of virtual currency as legal tender with effect from April 1, 2017. Japan became the first country to notify Bitcoins as a legal method of payment, although it continues to be treated as an asset, and not as a currency. It notified Bitcoin as an "asset-like value" and thus gains made from it were made subject to capital gains tax.

Interestingly, the practice of levying 8% consumption tax on sale and purchase of Bitcoins and other cryptocurrencies would not be leviable in Japan from 1st of July, 2017. This is due to the efforts of the Japanese government to reform its tax laws (Helms, 2017).

The taxation of virtual currencies is undergoing many developments in Japan, and new accounting standards detailing the treatment of digital currencies for tax purposes are anticipated in the near future (Young, 2017). Trading of virtual currencies with a view to earn profits is considered as income from business activities or miscellaneous income for the purpose of taxation. The exchanges are required to comply with a strict KYC process and anti-money laundering rules and submit to annual audits for transparency (Totsuka, Kawai, & Hayashi, 2017).

- *United Kingdom*

Initially, Bitcoin in the UK was considered a tradable voucher, which was later reclassified as "private currency" which reduced the tax liability. Transactions involving purchase or exchange of Bitcoins for Pound Sterling are not taxed. There are taxes for goods and services sold for Bitcoin, based on the corresponding fiat currency value of the cryptocurrency at the time of transaction. Income generated by Bitcoin mining activity is exempted from tax (Revenue and Customs Brief 9 (2014): Bitcoin and other cryptocurrencies, 2014).

- *United States of America*

At the US federal level, the Treasury Department's Financial Crimes Enforcement Network (FinCEN) issued guidance in March of 2013 advising that Bitcoin exchanges and other related enterprises qualified as money transmitters under the Bank Secrecy Act. As a result, such businesses are obligated to register with FinCEN as money services businesses (MSBs) in each state in which they do business. They also must comply with "know your customer" rules, put in place robust anti-money-laundering programs, and file Suspicious Activity Reports. In the US, in order to describe how existing general tax principles, apply to transactions using virtual currency, the Internal Revenue Service (IRS) issued Notice 2014-21, Virtual Currency Guidance, in March 2014. The notice provides that virtual currencies should be treated as property for tax purposes (IRS Virtual Currency Guidance : Virtual Currency Is Treated as Property for U.S. Federal Tax Purposes; General Rules for Property Transactions Apply, 2014).

IRS requires a taxpayer who receives virtual currency (Bitcoins) as payment for goods or services to compute gross income using the fair market value of the virtual currency, measured in U.S. dollars, as of the date that the virtual currency is received. IRS Notice 2014-21 does not provide taxpayers with guidance on what records should be kept and how the records should be maintained. Due to the potential complexity of reporting otherwise simple retail purchase transactions related to virtual currencies, further guidance is needed to help taxpayers voluntarily comply with their tax obligations. Notice 2014-21 requires that when a taxpayer successfully "mines" virtual currency, the fair market value of the currency as of the date of receipt is includible in gross income (Aqui, 2014).

Further, the states in the US have enacted different laws for the regulation of virtual currencies within the state.

It is submitted that none of these positions are perfect; however, it is acknowledged that the effort made by the US in attempting to regulate virtual currencies proves their willingness to accept them and facilitate their legitimate growth.

- *Australia*

The Reserve Bank of Australia refers to cryptocurrencies as "digital currencies" and treats Bitcoin as property, similar to the regulations in the United States.

Australian Tax office (ATO) distinguishes the various uses of Bitcoins and only when they are used as a store of value i.e. held as assets then capital gains taxes apply but not when Bitcoins are used for everyday purchases in personal transactions. Therefore, in the case of use of Bitcoins only for the purpose of payment for goods and services is not taxable. Bitcoins received in exchange of goods or services are to be recorded in Australian dollars as part of income. Disposal of Bitcoins giving rise to capital gains as part of the business is subject to capital gains tax (Australian Taxation Office , 2014).

Bitcoin transactions themselves are regulated by the bank, or subject to regulatory oversight. Bitcoin trades are treated as barter trades. On May 9, 2017 the Australian government eliminated goods-and-services tax (GST) on Bitcoin purchases with effect from July 1, 2017 (Australia's Budget 2017-18 Removes GST on Bitcoin Purchases, 2017).

- *Canada*

Canada maintains a generally Bitcoin-friendly stance while also ensuring the cryptocurrency is not used for money laundering. Bill C-31 passed by the House of Commons to implement certain provisions of the budget tabled in the Parliament on February 11, 2014 made amendments to the Income Tax Act and the Proceeds of Crime (Money Laundering) and Terrorist Financing Act. The definition of "money services business" has been amended to include dealing in virtual currencies thereby subjecting persons rendering services with respect to virtual currencies to regulations governing money services business (Bill C-31, 2014). Bitcoin is viewed as a commodity by the Canada Revenue Agency (CRA).

The amendments are not in force because Bill C-31 has not defined dealers in 'virtual currency,' it is unclear what kinds of virtual currency-related businesses will be required to comply with Canada's virtual currency regulations. The Bill states that the definition will be included in the final amended version of the Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations.

- *Germany*

The Federal Financial Supervisory Authority (BaFin) considers Bitcoins to be financial instruments in the form of units of account with legally binding effect under Section 1 of the German Banking Act (KWG). They are qualified as a private means of payment in barter transactions. The use of Bitcoins as a substitute of fiat currency for payment of goods or services in an economy does not require authorization. Similarly, mining of virtual currencies and their sale thereof does not necessitate authorization. However, authorization is necessary in case of commercial handling of virtual currencies as an article of trade. This applies where the Bitcoins are not only mined, purchased or sold in an existing market but a special contribution is made to preserve such market, e.g., advertisement in the market about regular purchase and sale of Bitcoins. Therefore, rendering of principal broking services by exchanges with respect to purchase and sale of Bitcoins is subject to authorization (Virtual Currency, n.d.).

- *Russia*

It recently (Jan, 2017) announced that it will not ban cryptocurrencies like Bitcoin and is working on understanding the ecosystem and developing a suitable regulatory framework.

The following countries have banned trading in Bitcoins; Iceland, Vietnam, Bolivia, Khazakistan.

- *India*

The Reserve Bank of India (the country's central bank) has only issued precautionary statements underlining the risks associated with the usage of Bitcoins or other virtual currencies as a medium of payment as it is not authorized by any Central Bank or monetary authority.

In case of treatment of Bitcoin or crypto currency as "currency" as defined in FEMA (Foreign Exchange and Management Act), Bitcoins received as payment for goods or services and trading of Bitcoins regularly in furtherance of business would be treated as "business income" (Govind & Varanasi, 2014).

The Bitcoin exchanges in India have not been subject to any regulations so far. However, all major industry players are carrying out Know Your Customer (KYC) before allowing individuals to trade on their platform and self-regulating the trading of Bitcoins by complying with laws such as privacy principles. In most cases, such platforms do not accept cash for any transactions and are willing to disclose any information required by the government. Therefore, the transaction chain with respect to Bitcoins is more traceable than the government issues fiat currency.

If cryptocurrency is treated as "goods" under the Sale of Goods Act, 1930,[4] then payment for goods and services with crypto currency would amount to a barter transaction and not sale. In case of exchange of fiat currency for Bitcoins, the transaction would constitute a sale within the meaning of Section 4 of the Sale of Goods Act, 1930.

Income tax in India is governed by the provisions of the Income Tax Act, 1961 ("**ITA**"), under Section 2(14) of the ITA the purchase of Bitcoins should be treated as a capital asset in the event that the purchase has been made for the purpose of investments and therefore any gains arising on transfer should be characterized as capital gains. In fact, the CBDT in the year 1989 through instruction No. 1827 had recognized the difference between securities held as investment, and securities held as stock-in-trade. In furtherance to this, the CBDT issued Circular no. 4/2007 ("**Circular**") setting out various tests for determination of whether shares are held as investment or stock-in-trade. The Circular takes into account the AAR's decision in In re: Fidelity Northstar Fund[5], and judgments by the Supreme Court in Commissioner of Income Tax (Central), Calcutta v. Associated Industrial Development Company (P) Ltd.[6] and Commissioner of Income Tax, Bombay v. H. Holck Larsen.[7] Based on these judgments, the broad parameters set out under the Circular are as follows:

1. Where a company purchases and sells shares, it must be shown that they were held as stock-in-trade and that existence of the power to purchase and sell shares in the memorandum of association is not decisive of the nature of transaction;
2. Whether there are substantial transactions, their magnitude, maintenance of books of account and finding of the ratio between purchases and sales;
3. Whether the objective of purchase of shares is to derive income by way of dividends or realizing profits by sales.

The above parameters can also be applied to other assets such as Bitcoins, in order to determine whether such assets are held as investment or trading assets. For the purpose of tax, the period of holding should be like any other property and cannot be treated as shares. If they are held for 3 years or more should be considered long term and if less than short term. Such income should also be reported in the return of income of the Bitcoin holder in order for being compliant under the ITA.

K. Money Laundering

Bitcoins can be purchased with fiat currency on an exchange. However, popular exchanges in India verify the personal information of the customer before setting up an account for purchase and do not undertake cash transactions. Therefore, the money trail is traceable when a purchase of Bitcoins is made through an exchange in India.

Bitcoins obtained otherwise through an exchange cannot be easily traced. If a person, sells goods or services in exchange of Bitcoins, then such income would be taxable as 'business income' under the ITA. However, such income could be concealed from the taxman as the transfer of Bitcoins is made under pseudonymous addresses. Also, undisclosed income in the form of cash may be used to purchase Bitcoins which again becomes untraceable. Hence, Bitcoins obtained in such manner can be transferred with little cost across jurisdictions without being linked to an identifiable user.

The blockchain technology records all transactions without linking the transaction to the identity of the user however, the IP address can be associated with the transaction. But the use of dark net and anonymisers allows increased privacy to the users by obscuring the IP address. Hence, it is possible to use cryptocurrencies for money laundering and terrorist financing.

Going forward we can expect many other cryptocurrencies to come into the market, there are already quite a few of them. And the enabling blockchain technology will continually evolve to bring about further efficiencies in the way value is transacted on the internet. Smart contracts on the Ethereum platform are already gaining significant traction and is the next big thing to watch out for.

References

1. *Adopted Regulations* . (2015, June 3). Retrieved from Department of Financial Services : http://www.dfs.ny.gov/legal/regulations/adoptions/dfsp200t.pdf
2. Aqui, K. (2014, April 14). *Notice 2014-21*. Retrieved from IRS: https://www.irs.gov/irb/2014-16_IRB/ar12.html
3. Australian Taxation Office . (2014, December 18). *Tax Treatment of crypto-currencies in Australia-specifically Bitcoin*. Retrieved from Australian Taxation Office: https://www.ato.gov.au/General/Gen/Tax-treatment-of-crypto-currencies-in-Australia---specifically-Bitcoin/
4. *Australia's Budget 2017-18 Removes GST on Bitcoin Purchases*. (2017, May 10). Retrieved from EconoTimes: http://www.econotimes.com/Australias-budget-2017-18-removes-GST-on-Bitcoin-purchases-692064
5. *Bill C-31*. (2014, June 19). Retrieved from Parliament of Canada: http://www.parl.ca/DocumentViewer/en/41-2/bill/C-31/royal-assent
6. BitCoin.com. (2017, June 21). *Price*. Retrieved 2017, from Bitcoin.com: https://price.Bitcoin.com/
7. Bryans, D. (2014). Bitcoin and Money laundering: Mining for an Effective Solution. *Indiana Law Journal*, 441-472.

8. Chaum, D. (1983). Blind signatures for untraceable payments. *Advances in Cryptology Proceedings of Crypto*, *82 (3)*, pp. 199-203.
9. Committee on Payments and Market Infrastructures. (2015). *Digital currencies.* Bank for International Settlements.
10. Govind, S., & Varanasi, S. (2014, February 5). *Are Bitcoins currency or assets?* Retrieved from LiveMint: http://www.livemint.com/Money/3qcKrBcAMIisahVOyOygYK/Are-Bitcoins-currency-or-asset.html
11. Helms, K. (2017, April 1). *Japan Declares Sale of Bitcoin Exempt from Consumption Tax*. Retrieved from BitCoin.com: https://news.Bitcoin.com/japan-sale-Bitcoin-exempt-consumption-tax/
12. Hileman, G., & Rauchs, M. (2017). *Global Cryptocurrency Benchmarking Study.* Cambridge: Cambridge University.
13. *IRS Virtual Currency Guidance : Virtual Currency Is Treated as Property for U.S. Federal Tax Purposes; General Rules for Property Transactions Apply*. (2014, March 25). Retrieved from IRS: https://www.irs.gov/uac/newsroom/irs-virtual-currency-guidance
14. Nagi, T. (2016, December 26). *Post demonetisation, which digital payment method to use? Here's how to choose*. Retrieved from The Economic Times: http://economictimes.indiatimes.com/wealth/invest/post-demonetisation-which-digital-payment-method-to-use-heres-how-to-choose/articleshow/56173994.cms
15. Pagliery, J. (2017, April 4). *North Korea-linked hackers are attacking bankers worldwide* . Retrieved from CNN: http://edition.cnn.com/2017/04/03/world/north-korea-hackers-banks/
16. *Revenue and Customs Brief 9 (2014): Bitcoin and other cryptocurrencies*. (2014, March 3). Retrieved from GOV.UK: https://www.gov.uk/government/publications/revenue-and-customs-brief-9-2014-Bitcoin-and-other-cryptocurrencies/revenue-and-customs-brief-9-2014-Bitcoin-and-other-cryptocurrencies
17. Rivest, R., Shamir, A., & Adleman, L. (1978). A Method for Obtaining Digital Signatures and Public-Key Cryptosystems. *Communications of the ACM, 21*(2), 120–126.
18. Totsuka, T., Kawai, K., & Hayashi, T. (2017, February). *Publication of the Draft of Cabinet Office Ordinance concerning Virtual Currency Exchange Service Providers.* Retrieved from amt-law.com: https://www.amt-law.com/pdf/bulletins2_pdf/170207.pdf
19. *Virtual Currency*. (n.d.). Retrieved from Federal Financial Supervisory Authority: https://www.bafin.de/EN/Aufsicht/FinTech/VirtualCurrency/virtual_currency_node_en.html
20. Vishwanathan, V. (2017, March 27). *The Costs of Using Digital Payment Products*. Retrieved from LiveMint: http://www.livemint.com/Money/CVJj8V0WBvYfYR0RhOL72K/The-costs-of-using-digital-payment-products.html
21. Young, J. (2017, April 1). *Japan Officially Recognizes Bitcoin as Legal Payment Method* . Retrieved from BTCMANAGER.com: https://btcmanager.com/japan-officially-recognizes-Bitcoin-as-legal-payment-method/

1 *https://www.forbes.com/sites/oliviergarret/2017/03/26/Bitcoin-price-rises-higher-than-gold-but-its-value-is-a-different-story/#69099da*
2 *https://www.forbes.com/sites/laurashin/2017/01/09/Bitcoins-price-was-volatile-last-week-but-not-last-year/#76b21ecd126f*
3 *https://www.forbes.com/sites/laurashin/2017/01/05/the-2-factors-that-drove-Bitcoins-20-overnight-price-plunge/#6c1c3f837170*
4 Section 2(7), Sale of Goods Act, 1930
5 (2007) 207 CTR (AAR) 297
6 AIR 1972 SC 445
7 AIR 1986 SC 1695

The impact of international standards like BEPS on small island nations

*Malika Jivan**

Nice acronym but what exactly is it all about? Base erosion profit shifting.

About half a decade ago developed countries complained that their tax bases were getting eroded.

Globalisation made the world seamless and capital migrant. Large multinationals and high net worth individuals were moving their profits from high tax jurisdictions to lower tax jurisdictions.

This in effect resulted in the tax base of developed and large developing countries getting eroded.

So they put the OECD Global Tax Transparency Forum (forum) on the task to find a solution for the latest malaise "Base erosion profit shifting."

The first thing that the forum did is to give it a catchy name "BEPS".

The next thing they did was work a solution to ensure that profits were not shifted to avoid tax. Now this proved a challenge.

Tax is a county's sovereign right. Countries need to have good robust tax regimes to incentivize investments. Domestic and foreign direct investments fuel growth which creates employment.

So what the forum did is come up with a set of "15 Minimum Standards" that countries must adhere too.

The object of these standards is to prevent double non- taxation, treaty abuse and harmful practices which promote profit shifting.

The tax rate is the sovereign right of a country. So is its decision to choose source based taxation i.e. only tax income earned from sources in the country. However, BEPS insists on certain provisions in the double tax avoidance treaties, removal of preferential schemes.

Countries first need to agree to adopt the minimum standards. The risk of not agreeing is being deemed non- complaint.

---

* *The recent International Fiscal Association (IFA)conference in Mauritius was held in May 2017 on BEPS to discuss tax administration and its challenges in the 21st Century and reconciling fiscal incentives with BEPS substance requirements.*

In other words "You are a sovereign nation but you also need to be a good global citizen." Not complying will result in one being shunned by the world community.

At a recent International Fiscal Association – Mauritius on May 18 and May 19, the BEPS creators / founders sat around the table with tax practitioners, tax administrators, policy makers, leading lawyers and academia from across the globe including Africa.

Much heated discussion, passionate debate many different perspectives.

Professor. Johann Hattingh of the UCT Tax Institute from South Africa made a very good point - Africa's problem is not erosion of its tax base but broadening it".

This is even truer of small island countries where bases need to be broadened. A whole Government has to be run just like a big country but supported by a tiny base.

BEPS has many supporters; India and China being one of the largest out of fear that their tax base is eroding and making it lose much required income.

Different countries, different problems – does one solution fit all? How does one balance all of these? Prof Jennifer Roeleveld, of IFA South Africa put it very well when she recently read an initiative on alleviation of poverty in Switzerland. Am sure Swiss poverty would be welcome in Africa! Tax incentives and special economic zones in Africa brought growth in strategic areas and jobs.

Will BEPS really achieve the objective of ensuring the tax bases of developed and large developing countries are not eroded?

Will it help the new "frontier" and small island countries expand their bases?

Will it serve the purpose of some at the cost of others or will it be a true equalizer? Time will tell.

Many practical difficulties were pointed out. Dr Rama Sithanen, an ex-Minister of Finance in Mauritius posed a very valid question - how would a Minister of Finance make a budget? He would have to check if his budget complied with OECD initiatives like BEPS, IMF requirements, World Bank requirements!

Would a Minister of Finance ever get a budget out? Some tiny nations have gone the other extreme they amend their tax code every time an international agency create a new requirement without really understanding what they are doing - the result incoherent and uncertain tax law.

Prof. Dr Jeffrey Owens, the former Director and founder of the forum also named as one of the 21 most influential persons in tax today by the International Tax Review stated that uncertainty in tax law is a stumbling block for foreign and domestic direct investment and a breaker of growth.

As we move into this exciting new era of the revolution of taxation, Dr Owens stressed on three principles of a good tax system.

1. Tax certainty - He said that tax certainty is the key to domestic and foreign investment. Tax uncertainty is an impediment to growth which results in unemployment.
2. Simplify tax administration: for this tax administrators and tax policy makers need greater discussion
3. "Tax payer rights" and "co-operative compliance

The Director of the OECD Global Tax Transparency forum Pascal Saint-Annas went on to say that nations have been provided everything they have asked for in terms of information. Now the tax payers must not be harassed.

Porus Kaka, Senior Advocate and head of the International Fiscal Association globally informed the forum that one key standard was missing – one on tax payer rights and this need to be worked on with haste.

Many issues surrounding BEPS and the implementation is swift; It has to be done over 2017 and 2018. This includes ratifying double tax avoidance agreements to bring in certain standards, consistency and avoid double non-taxation. The Forum is advocating the signing of a multi-lateral document to do this. However, as Professor Johann Hatting pointed out in future this will give rise to many interpretation issues. The statement does not become party of the agreement but is in addition to it.

He also did raise a valid point on the feedback of African nations to OECD initiatives being ignored. Once again we ask will BEPS serve the purpose of African nations and island nations?

The global tax landscape is changing. Government of the new frontiers and small island states are left with many challenges - how do they attract FDI whilst complying with BEPS? A lot of work for small nations. What will be the benefits?

Whilst Mauritius is committed to transparency, AEOI and BEPS, BEPS will have a major impact on the financial services sector in its economy. The small island nation will have to transform itself. Being one of the easiest nations to do business in Africa, with a strong legal framework, skilled professionals, a strong capital and banking sector, it may well be on the way to becoming the investment hub of the region.

Like Pascal Saint-Amans said “I wish it was my job to restructure Mauritius, but it is not. Mauritians are smart people – they are trilingual. They will figure it out.”

UN Transfer Pricing Manual 2017 – A Summary

*Daniel N. Erasmus**

In addressing many developing countries on transfer pricing issues, the UN released a "Practice Manual on Transfer Pricing for Developing Countries" ("UN TP Manual 2013") in 2013. The UN TP Manual 2013 provided guidance on the aspects of policy and administration regarding various transfer pricing issues. The document covered the following aspects:

- the arm's length principle adopted in Article 9 of the UN Model Double Taxation Convention between Developed and Developing Countries, that is consistent with the OECD Model Tax Convention on Income and on Capital;
- the realities of developing countries, at their relevant stages of capacity development;
- the practical experience of developing countries; and
- work from other forums.

The UN TP Manual 2013 was consistent with the OECD Transfer Pricing Guidelines (1995 OECD Guidelines). The UN then appointed a new Committee which focussed on:

- revision of the Commentary on Article 9 of the UN Model Convention; and
- updating the UN TP Manual 2013 in light of BEPS developments.

The new Committee released its updated version of the 2013 Manual early May 2017 ("UN TP Manual 2017"), as the second edition.

A key highlight in the UN TP Manual 2017 is the revised and updated chapters on various countries: Brazil, China, India, Mexico and South Africa on various emerging TP issues such as intra-group services and marketing intangibles. These revised chapters give a more practical approach to emerging TP issues related to BEPS.

1. Intra-group Services

The UN TP Manual 2017 includes a new section on Intra-group Services. The guidance is "fundamentally parallel" to the OECD and BEPS guidance. It includes identification of chargeable services excluding certain non-chargeable services from its ambit (shareholder, incidental, passive and duplicative), justification of

---

* *Prof. Dr. Daniel N. Erasmus appears as lead tax counsel in various countries on tax issues, both domestic and international - USA, South Africa, Kenya, Tanzania, Uganda, Rwanda, Zambia and Zimbabwe. He lectures on Transfer Pricing, International Tax and Tax & Administrative and Constitutional law as an adjunct professor for Thomas Jefferson School of Law through www.IITF.net.*

a benefit test, providing appropriate transfer pricing methodology and the application of allocation keys. The UN TP Manual 2017 provides a non-exhaustive list of allocation keys commonly used by MNEs for certain types of services. A systematic application of a transfer pricing method for computing an arm's length charge for such services is also one of the factors that differentiate the UN TP Manual 2017 from the OECD guidelines.

The UN TP Manual 2017 recommends a safe harbor mechanism of two categories i.e. low-value added services and minor expenses. For low-value added services the guidance is aligned with the BEPS recommendations under Action 10, except that the UN TP Manual 2017 does not provide for a fixed percentage mark-up on such services (5%). For minor expenses, the UN TP Manual 2017 recognizes that where the charge for a service is insignificant to the extent that the related cost of compliance with the transfer pricing rules outweighs the revenue at stake, tax administrations can refrain from undertaking a transfer pricing adjustment in such cases, provided the services falls within a fixed threshold (based on cost) and a profit mark-up.

2. Intangibles

The UN TP Manual 2017 provides guidance on intangibles that principally aligns with the OECD BEPS recommendations. The new chapter highlights marketing intangibles and the different factors to be considered while analyzing a transaction involving intangibles, such as contractual rights that are granted for exclusive marketing of certain products, or the granting of government licenses. Transactions involving intangibles should be examined in detail and any value arising from the transactions irrespective of their nature (a benefit on account of goodwill, reputational value, etc) ought to be compensated on arm's length basis. The chapter also addresses intangibles created through group synergies in the form of a concerted action of one MNE member resulting in a benefit to other members. For instance, centralized procurement functions performed by one entity and developed expertise aiding in a cheaper source of material for other members. The guidance gives importance to the actual conduct of the parties, over contractual arrangements. It aligns an arm's length price with the functions and risks generated by real conduct. The risk of re-characterization of transactions involving intangibles by tax administrations that may lead to possible double taxation, has also been addressed.

The distinction between legal and economic ownership is dealt with and provides for an appropriate remuneration to the economic owner, recognizing the concept of de-facto control. The Development, Enhancement, Maintenance, Protection and Exploitation ("DEMPE") function has also been recognized and requires suitable remuneration to value such functions. However, the guidance provides that the intangible can be acquired by a MNE either through the development or acquisition from a third party, and hence DEMPE has been recognized as Development of Acquisition, Enhancement, Maintenance, Protection and Exploitation ("DAEMPE") in the UN TP Manual 2017. The UN TP Manual 2017 provides guidance on adopting valuation techniques (discounted cash flow approach) for determining the arm's length value of such intangibles.

3. Location Savings

The UN TP Manual 2017 aligns with the BEPS recommendation provided under Actions 8 – 10 by stating that if "good local comparables" are available, then location saving benefit can be considered in determining the resultant arm's length price.

4. Cost Contribution Agreement ("CCA")

The UN TP Manual 2017 provides guidance on cost contribution agreements. The core issue addressed is the justification of arm's length principle by aligning the contributions with the expected benefits under the CCA. Guidance is provided on other associated issues, such as, valuing each participant's contribution, possible expected benefits to be derived by participants from the CCA, which ideally should be consistent with the contribution made. The guidance also defines non-arm's length CCAs, where the share of contribution is inconsistent with the expected or real benefits, requiring adjustment thereto. As a remedy to non-arm's length CCAs, a requirement of balancing payments (buy-in or buy-out) has also been provided. A list of information to be documented by participants in respect of CCAs has been provided.

The chapter provides a tabular comparison of CCAs with intra-group services, giving a better understanding of correlated notions.

5. Business Restructuring

The UN TP Manual 2017 incorporates guidance on the arrangement of business restructuring. The objective is to test the arm's length principle on the terms of the business restructuring. The guidance gives three steps to be followed in reviewing transfer prices under business restructuring. This involves identification of the scope, type and nature of arrangements, through examination of a functional analysis (FAR analysis: functions performed, assets employed and risks assumed) of parties to arrangement, and ensuring consistency of the outcome with the actual contractual terms. The UN TP Manual 2017 also states that finding of uncontrolled data for such arrangements may be difficult, but that this should not automatically trigger non-compliance with the arm's length principle. The UN TP Manual 2017 also lists common types of business restructuring presently carried out by MNEs (such as conversion of full-fledged manufacturer into toll or contract, or converting a full-fledged distributor into limited risk or commissionaires).

6. Conclusion

One of the primary mandates of the new Committee formed in updating the UN TP Manual 2013 was to consider the OECD/G-20 BEPS guidance. The UN TP Manual 2017 thus follows the BEPS guidance. However, there are a few differences. For instance, while admitting the DEMPE contributions in marketing intangibles, the UN TP Manual 2017 also accepts acquisition of intangibles by MNES (the DAEMPE) in its guidance. On low value added intra-group services, the UN TP Manual 2017 does not admit a fixed profit mark-up (5 %) as under BEPS guidance, for such services. The UN TP Manual 2017 provides for an additional safe harbor pertaining to minor expenses, i.e. the tax administrations should refrain from undertaking adjustments if the charges fall within a fixed threshold and a profit mark-up.

The UN TP Manual 2017 will further assist developing economies in implementing the complex arena of TP. As most countries are members of the UN, the guidance will eventually develop into soft law (although this was not the intention at this point in time).

The MLI and the United States

*Reuven S. Avi-Yonah**

On June 7, 2017, sixty-eight countries met in Paris for the official signing ceremony for a new multilateral tax instrument (MLI).[1] The text and commentary of the MLI were published in November 2016 by the Organization for Economic Cooperation and Development (OECD). The OECD stated that –

> The **Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS** will implement minimum standards to counter treaty abuse and to improve dispute resolution mechanisms while providing flexibility to accommodate specific tax treaty policies. It will also allow governments to strengthen their tax treaties with other tax treaty measures developed in the OECD/G20 BEPS Project….
>
> The new instrument will transpose results from the OECD/G20 Base Erosion and Profit Shifting Project (BEPS) into more than 2 000 tax treaties worldwide. A signing ceremony will be held in June 2017 in Paris.[2]

The OECD went on to explain that--

> The multilateral convention was developed over the past year, via negotiations involving more than 100 jurisdictions including OECD member countries, G20 countries and other developed and developing countries, under a mandate delivered by G20 Finance Ministers and Central Bank Governors at their February 2015 meeting…
>
> The OECD will be the depositary of the multilateral instrument and will support governments in the process of its signature, ratification and implementation. A first high-level signing ceremony will take place in the week beginning 5 June 2017, with the expected participation of a significant group of countries during the annual OECD Ministerial Council meeting, which brings together ministers from OECD and partner countries to discuss issues of global relevance.[3]

There is no question that this event represents a milestone in the evolution of the international tax regime (ITR).[4] But it also raises important questions about the function of tax treaties in the 21st century, and whether other steps can be taken to improve the tax treaty network beyond the MLI.

To appreciate the importance of the MLI, it is useful to take a step back and consider its historical significance. Bilateral tax treaties were first negotiated in the 19th century,[5] but their importance grew after World War I because of increased income tax rates and the risk of double (residence/source) taxation.[6] The result was the publication of the first model bilateral tax treaty under the auspices of the

---

* *Irwin I. Cohn Professor of Law, the University of Michigan. The Author is also member of Advisory Board of this Journal*

League of Nations in 1928,[7] followed by the Mexico (1943)[8] and London (1946)[9] models. The OECD took over from the League after World War II and published its own bilateral model (based on the London model) in 1963,[10] while the UN published a bilateral model based on the Mexico model in 1980.[11] These models in turn inspired a network of over 2,500 bilateral tax treaties that form the bulwark of the ITR.[12] About 80% of the words of any two tax treaties are identical and stem from the OECD or UN models (which are themselves over 80% identical with each other).[13]

From the beginning, the League of Nations was interested in the possibility of negotiating a multilateral tax treaty, but concluded that the differences among the tax law of different states are too vast to allow for a successful negotiation.[14] Subsequent efforts to negotiate multilateral tax treaties also failed.[15] Most recently, the European Court of Justice refused to apply its freedom of movement of capital jurisprudence to force a harmonization of withholding tax rates among treaties within the EU.[16]

However, in the academic world as well as in practice, there has been increasing recognition of the need for a multilateral tax treaty.[17] There are three reasons why a multilateral tax treaty makes more sense than a network of bilateral tax treaties. First, the rise of the GATT and then the WTO after World War II has shown that multilateral treaties governing important areas of international economic law are feasible if space is allowed for reservations (i.e., allowing countries to opt out of specific provisions). Second, there has been increasing convergence in the language of the various tax treaties, and especially the OECD and UN models have become more similar to each other over time.[18] Third, with globalization and tax competition treaty shopping (using treaties to obtain advantages for non-treaty country residents)[19] and "triangular situations" (problems arising from treaty residents doing business in third countries in ways that affect the treaty but are not covered by it) have become far more common.[20]

In addition, the main obstacle to a multilateral tax treaty has always been that investment flows vary by each pair of countries and therefore appropriate withholding tax rates vary as well.[21] That is the main reason for the remaining differences between the OECD and UN models, because flows between developed countries are more reciprocal than flows between developed and developing countries. But even that situation is changing, as more developing countries become capital exporters as well as importers.[22] In addition, it has been realized for a while that it may be possible to negotiate a multilateral treaty but leave the withholding tax rates to be settled by bilateral negotiation, as the UN model does.[23]

The new OECD MLI represents the culmination of this line of thinking. It is not a full-fledged multilateral tax convention covering all the areas that are usually covered by bilateral tax treaties. Instead, it can be thought of as a global consensual treaty override designed to apply the results of BEPS simultaneously to all the tax treaties where the countries involved agree. The MLI is implemented by countries signing and ratifying it according to their usual constitutional norms and then depositing the ratification with the OECD.[24] Upon ratification, the provisions of the MLI apply to override the relevant provisions of all the bilateral treaties of a depositing country, unless there is a reservation (which is not allowed in some cases involving minimum BEPS standards).[25]

In addition, the new OECD MLI includes a wide-ranging dispute resolution mechanism including mandatory arbitration.[26] Mandatory arbitration has recently been introduced into the OECD and US models,[27] but it is still lacking in the UN model and most actual treaties. The effect of including it in the MLI can be to force binding arbitration on all existing treaties, which is likely to prove controversial.[28]

The MLI is an important innovation in international law. Hitherto, international economic law was built primarily on bilateral treaties (e.g., tax treaties and BITs) or multilateral treaties (the WTO agreements). The problem is that in some areas, like tax and investment, multilateral treaties proved hard to negotiate, but only a multilateral treaty can be amended simultaneously by all its signatories.

The MLI provides an ingenious solution: A multilateral instrument that automatically amends all the bilateral treaties of its signatories. If the MLI succeeds, it can be a useful model in other areas, such as investment, where a multilateral agreement was not successful, but there is a growing consensus about the need to adjust the terms of BITs to address investor responsibilities and the definition of investment comprehensively.

Whether the MLI will succeed remains to be seen. While ratification by 68 countries (with more to come) is an achievement, the absence of the US is important, and other OECD members have agreed to only a limited set of provisions. On the other hand, the MLI may prove more appealing to developing countries because it enhances source-based taxation and limits treaty shopping.

Even a limited MLI would be a step forward. The current tax reform proposals in the US pose a significant threat to the ITR, because they would sharply reduce the US corporate effective tax rate to attract investment from other jurisdictions.[29] Countries that wish to limit the damage would be wise to accede to the MLI this year and prevent a massive race to the bottom that could ensue if the US becomes (from the perspective of the rest of the world) a giant tax haven. On the other hand, if the MLI succeeds, even the US may see the wisdom of joining it one day, especially since the new US model already includes many of irs innovations.

---

1 http://www.oecd.org/tax/ground-breaking-multilateral-beps-convention-will-close-tax-treaty-loopholes.htm; see also http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf (listing the 68 countries, plus eight other countries that intend to sign soon). The signatories include the major OECD and EU members (except for the US), China and India, as well as many important treaty shopping jurisdictions (e.g., the Netherlands and Mauritius) and tax havens (e.g., Singapore and Hong Kong).

2 OECD, Countries adopt multilateral convention to close tax treaty loopholes and improve functioning of international tax system (Nov. 24, 2016). http://www.oecd.org/tax/countries-adopt-multilateral-convention-to-close-tax-treaty-loopholes-and-improve-functioning-of-international-tax-system.htm.

3 Id.

4 *See generally* Reuven Avi-Yonah, Advanced Introduction to International Tax Law (2015) (discussing the international tax regime).

5 For the history of the pre-World War I bilateral tax treaties, *see, e.g.* Sunita Jogarajan, Prelude to the International Tax Treaty Network: 1815–1914 Early Tax Treaties and the Conditions for Action, Oxford Journal of Legal Studies , Vol. 31, No. 4 (2011), pp. 679-707.

6 Bret Wells and Cym H. Lowell, Income Tax Treaty Policy in the 21st Century: Residence vs. Source, 5 Colum. J. Tax. L. 13 (2013).

7 The League of Nations Model Tax Treaties (1928); *See also* Report Presented by the General Meeting of Government Experts on Double Taxation and Tax Evasion, League of Nations Doc. C.562M.178 1928 II (1928).

8 Model bilateral conventions for the prevention of international double taxation and fiscal evasion, second Regional tax conference, Mexico, D.F., July 1943. OR Model Bilateral Conventions for the Prevention of International Double Taxation and Fiscal Evasion, Report of the Second Regional Tax Conference, League of Nations Doc. C.2.M.2. 1945 II A (1945).

9 Model Bilateral Conventions for the Prevention of International Double Taxation and Fiscal Evasion, League of Nations Doc. C.88.M.88. 1946 II A. (1946).

10 Draft double taxation convention on income and capital : report of the O.E.C.D. Fiscal Committee, 1963.

11 United Nations Model Double Taxation Convention between Developed and Developing Countries (United Nations, 1980).

12 Reuven S. Avi-Yonah, International Tax As International Law: An Analysis of the International Regine 5 (2007).

13 Reuven Avi-Yonah, *Double Tax Treaties: An Introduction*, *in* The Effect of Treaties on Foreign Direct Investment 99 (Karl P. Sauvant & Lisa E. Sachs, eds., 2009).

14 Eran Lempert, Crossing the Barrier: Towards a Multilateral Tax Treaty (2009) (unpublished J.S.D. dissertation, New York University, on file with authors).

15 Lempert, supra (Eran Lempert, Crossing the Barrier: Towards a Multilateral Tax Treaty (2009) (unpublished J.S.D. dissertation, New York University, on file with authors)). For an early appreciation of the need for a multilateral treaty see THOMAS S. ADAMS, INTERNATIONAL AND INTERSTATE ASPECTS OF DOUBLE TAXATION, Proceedings of the Annual Conference on Taxation under the Auspices of the National Tax Association, Vol. 22 (SEPTEMBER 9-13, 1929), pp. 192-199 ("Now, in the long run, whatever solutions are adopted by different pairs of nations, it is probable that Nation A in concluding a bi-lateral convention with Nation B will adopt some solution different from that which it might adopt in a similar treaty with Nation X. And if this piece-meal bargaining goes on for twenty years or more,, as it is likely to go on, it may possibly result in a tangle of conflicting solutions applicable to the nationals of different countries, which will be highly complicated and highly mysterious, and about as bad as the situation that now exists. In short, there is in my mind, looking to the ' longer future, the strongest reason for the adoption of one uniform solution, if we could get it, or the settlement of this problem by a multilateral convention, in which a large group of nations would adopt the same solutions for the detailed problems which have to be set").

16 Case C-376/03, D v. Inspecteur van Belastingdienst, 2005 E.C.R. I-05821.

17 *See, e.g.*, Kim Brooks, *The Potential of Multilateral Tax Treaties*, *in* Tax Treaties: Building Bridges Between Law and Economics (Michael Lang et al. eds., IBFD 2010); Jung-hong Kim, *A New Age of Multilateralism in International Taxation?*, 21(2) Seoul Tax L. Rev. 2015 (Korea Tax Law Ass'n); Richard L. Reinhold, *Some Things That Multilateral Tax Treaties Might Usefully Do*, 57 Tax Law. 3 (2004); Thomas Rixen, *Bilateralism or Multilateralism? The Political Economy of Avoiding International Double Taxation*, 16 Eur. J. of Int'l Rel. (2010); Victor Thuronyi, *International Tax Cooperation and a Multilateral Treaty*, 26 Brook. J. Int'l L. 1641 (2001).

18 Reuven Shlomo Avi-Yonah, Nicola Sartori, Omri Marian, Global Perspectives on Income Taxation Law 150 (2011)

19 Reuven Avi-Yonah with C. H. Panayi, *Rethinking Treaty Shopping: Lessons for the European Union*, *in* Tax Treaties, *supra* note 10 (Tax Treaties: Building Bridges Between Law and Economics (Michael Lang et al. eds., IBFD 2010)), at 21.

20 Emily Fett, Triangular Cases: The Application of Bilateral Income Tax Treaties in Multilateral Situations (IBFD 2014).

21 Withholding Tax Rates 2017 (Deloitte, 2017), available at *https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-withholding-tax-rates.pdf*

22 For an overview of the general trends of participation of developing countries in world trade, see Participation of developing countries in World Trade: Overview of major trends and underlying factors, Committee on Trade and Development (1996), available at *https://www.wto.org/english/tratop_e/devel_e/w15.htm*

23 *See supra* note 7 (Eran Lempert, Crossing the Barrier: Towards a Multilateral Tax Treaty (2009) (unpublished J.S.D. dissertation, New York University, on file with authors)).

24 Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS, Art. 27 (OECD, 2016) (for whoever checks citations below: available at http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf); Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS, par. 263, (for whoever checks citations below: available at *https://www.oecd.org/tax/treaties/explanatory-statement-multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf)*.

25 Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS, par. 280.

26 Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS, Art. 18 through 26 (OECD, 2016).

27 US Model Income Tax Convention 2016, Art. 25, par. 6 through 10, available at *https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Treaty-US%20Model-2016.pdf*; OECD Model Tax Convention on Income and on Capital, art. 25 (OECD, 2008).

28 Ehab Farah, *Mandatory Arbitration of International Tax Disputes: A Solution in Search of a Problem*, 9 Fla. Tax Rev. 703 (2008).

29 On these proposals see Avi-Yonah and Clausing, Problems with Destination-Based Corporate Taxes and the Ryan Blueprint, 8 Columbia J. Tax L. 229 (2017).

Australia and the BEPS Multilateral Instrument

*Craig Cooper**

Australia was amongst the 68 countries which signed the BEPS Action 15 Multilateral Instrument (MLI)[1]. This article considers the positions adopted by Australia in relation to the MLI's Articles.

Background

As readers will know well, the G20/OECD BEPS project faced two major challenges in repairing the treaty-based aspects of the international tax framework. The first was to achieve a range of consensus positions amongst participating States. Assuming success on the first point, there followed the second challenge - how to upgrade the existing 3,000 + operative bilateral tax agreements in quick time, and shortcut the normal treaty life cycle re-negotiation, which could defer change for 50 + years.

The achievable consensus positions were reflected in the Final BEPS Action Reports 1 to 14 issued in October 2015, and the solution to the second challenge was the MLI, being the recommendation arising from BEPS Action 15.

An ad hoc working group developed the MLI concept during 2015 and 2016, with an agreed text, together with an explanatory statement, being released by the OECD on 24 November 2016.

Australia issued a Consultation Paper in December 2016, which set out the preliminary proposed positions to be adopted by Australia in relation to each of the MLI Articles.

The MLI was signed in Paris, on 7 June 2017, by 68 countries, including Australia. A provisional list of reservations and notifications was lodged by Australia at the time of signature, running to 35 pages.

Australia signed its first BEPS-compliant double tax agreement – with Germany – on 12 November 2015. The Parliamentary process passing that treaty into domestic law was completed when the Bill received Royal Assent on 20 October 2016.

Overview

As may be anticipated for a State heavily involved in the OECD's tax work for many years, and the BEPS Project in particular, Australia's interim position was to adopt the MLI changes to the 'widest extent possible'. This was seen as a 'unique opportunity to safeguard Australia's treaty network by adopting internationally

* *International and corporate tax partner at RSM Australia (recently retired.)*

agreed integrity rules', and facilitated by the close alignment of Australia's current treaty practice with the MLI changes.

However, Australia's preliminary positions lodged at signing have included some Reservations which have surprised, and these are discussed below.

1. MLI Part I – Scope and interpretation of terms

1.1 MLI Art. 2 – Covered Tax Agreements

Australia has previously notified that 43 out of its current 44 in-force comprehensive double tax agreements are to be 'Covered Tax Agreements' for the purposes of the MLI.

The 2015 German agreement is the sole exclusion, and this is on the basis that its drafting reflects the BEPS treaty measures; accordingly, there is no need for the MLI changes to overlay the already BEPS compliant Australia German agreement.

2. MLI Part II – Hybrid mismatches

2.1 MLI Art. 3 – Transparent entities

Australia will generally adopt Art. 3 and grant treaty benefits to income derived through fiscally transparent entities (e.g partnerships, trusts and other disregarded entities) provided that income is treated by at least one of the Contracting Jurisdictions as income of one of its residents, according to the domestic tax law of that Jurisdiction.

[Note: Art. 3 operates to attribute income to a resident of a treaty party, with the intended consequence that the income would then qualify for any available treaty benefits. However, there may be other requirements to be met before some treaty benefits become available, e.g. under Art.10 Dividends of the OECD Model Tax Convention.]

Reservations

Australia has reserved is position regarding Art. 3 in relation to the Covered Tax Agreements with France and Japan as these agreements contain an equivalent provision to Art. 3(4).

Notifications

Australia has notified pursuant to Art. 3(6) that it's treaties with Mexico, New Zealand and the USA contain provisions similar to that of Art. 3(4), and that Reservations have not been entered in relation to those agreements. Art. 3(1) will apply to these agreements but only to the extent of any incompatibility between the wording of the existing provisions and the language of Art. 3(1).

2.2 MLI Art. 4 – Dual resident entities

Australia has adopted the BEPS approach to determining the State of residence of a non-individual dual resident entity: the Competent Authorities of the Contracting Jurisdictions shall 'endeavour to determine by Mutual Agreement' the State of residence of a non-individual dual resident entity, having regard to various matters including its place of effective management, its place of incorporation and any other relevant factors.

Reservations

Australia has reserved its position with respect to the treaty consequences where the Competent Authorities are not able to reach agreement regarding the resident status of a non-individual dual resident entity. The default position, in such a case, is that the entity will not be entitled to any treaty reliefs or exemptions.

Australia's reservation on Art. 4 applies to all its Covered Tax Agreements with the exception of the agreements with Turkey and the US. Neither of these two agreements contain a residence tie-break provisions for non-individual entities.

2.3 MLI Art. 5 – Application of methods for elimination of double taxation

Australia has chosen under Art. 5(1) to not apply any of Options A, B, or C. The three options provide for the use of the credit method to eliminate double taxation of income or capital, and as all Australia's double tax agreements already use the credit method rather than the exemption method, there is no work for Art. 5 to perform.

No reservations

In choosing not to apply Art. 5 in its entirety, Australia will not reserve the right under Art. 5(8) or (9) that the Article will not apply to identified Covered Tax Agreements. This action leaves other Contracting Jurisdictions free to approach Art. 5 in a manner best suiting their own circumstances.

3. MLI Part III – Treaty abuse

3.1 MLI Art. 6 – Purpose of a Covered Tax Agreement

Australia has adopted the mandatory modified preamble text, as set out in Art. 6(1), which conditions the objective of eliminating double taxation of income, so that the objective is achieved without creating opportunities for non-taxation or reduced taxation through the deployment of BEPS strategies.

Australia will also adopt the optional preamble language set out in Art. 6(3), viz, seeking to 'further develop the economic relationship between the Contracting Jurisdictions, and to enhance their co-operation in tax matters'.

Notifications

Notifications were made pursuant to Art. 6 (5) and (6), identifying the affected Covered Tax Agreements.

3.2 MLI Art. 7 – Prevention of treaty abuse

In satisfying the BEPS Action 6 minimum standard, Australia has chosen to adopt the Principal Purpose Test (PPT), rather than the Simplified Limitation on Benefits test (S-LOB). This is not surprising, as Australia is familiar with the concept of 'purpose' in anti-avoidance rules. The Australian domestic General Anti Avoidance Rule (GAAR) is found in Part IVA of the domestic tax law, and it is similar in structure and approach to the PPT. (There is a significant difference however – for Part IVA, the requisite purpose must be the sole or dominant purpose, rather than the lower principal purpose as contained in the PPT.)

Notifications

Australia has notified that it will adopt Art. 7(4). This item provides for a Competent Authority review and possible 'override', where treaty benefits have been denied by one of the Competent Authorities through an application of the PPT.

Australia has also notified the provision of a number of its Covered Tax Agreements which already incorporate a form of the PPT.

3.3 MLI Art. 8 – Dividend transfer transactions

Australia will adopt the 365 day minimum holding period requirement for shares, before any non-portfolio intercorporate dividends paid on those shares qualify for reduced treaty withholding tax rates.

Australia has adopted this Art. 8(1) without reservation.

Notifications

Australia has notified which of its Covered Tax Agreements contain a provision to which the Art. 8(1) 365 day minimum holding period will apply.

[Note: the 365 day minimum holding period will apply only where both Contracting Jurisdictions have lodged complementary notifications. In the event of a mismatch, the 365 day minimum holding requirement will not apply.]

3.4 MLI Art. 9 – Capital gains from the alienation of shares or interests of entities deriving their value principally from immovable property.

Australia has adopted Art. 9(1), so that any gain made on the disposal of any share or non-share interests in an entity, where more than 50% of the value is attributable either directly or indirectly to underlying immoveable property at any time during the 365 day period preceding the disposal, will be subject to source country tax in the hands of a resident of the other Contracting Jurisdiction.

Australia has not adopted Art. 9(4)

Reservation

Australia reserves the right for Art. 9(1)(b) not to apply to those Covered Tax Agreements which already have a similar provision which applies to non-share interests. There are 19 Covered Tax Agreements to which this Reservation applies.

Notification

Pursuant to Art. 9(7), Australia has notified that all 43 of its Covered Tax Agreements contain a provision described in Art. 9(1).

3.5 MLI Art.10 - Anti-abuse rule for permanent establishments situated in third jurisdictions

Art. 10 proposes an anti-avoidance rule that would allow one Contracting Jurisdiction (Residence Country) to apply its own domestic corporate tax rate to passive profits earned and attributable to a permanent establishment of an entity resident in the other Contracting Jurisdiction (Source Country) but where that PE is resident in a third country

Reservation

Australia has reserved the right under Art. 10(5)(a) for the entirety of Art. 10 to not apply to its Covered Tax Agreements.

Australia's provisional position at signing remains the same as that expressed in the December 2016 Consultation Paper. There it was noted that none of Australia's double tax agreements currently contain such a rule, so there is no experience with the rule, and by implication little perceived need to adopt it.

Australia will subject Art. 10 to further analysis, i.e. search for any instances of such treaty abuse which may warrant subsequent adoption of the rule.

3.6 MLI Art. 11 – Application of tax agreements to restrict a party's right to tax its own residents

This Article makes clear that a double tax agreement cannot operate to limit the right of a Contracting Jurisdiction to tax its own residents.

Australia has adopted Art. 11 without reservation.

4. MLI Part IV – Avoidance of permanent establishment (PE) status

4.1 Art. 12 – Artificial avoidance of PE status through Commissionnaire arrangements and similar strategies

This Article provides for the re-write of the (now superseded) Art. 5(5) and (6). In the December 2016 Consultation Paper, Australia's intended position was to adopt Art. 12 without reservation across all its Covered Tax Agreements. It was there noted that the intent of the Article was consistent with Australia's treaty practice; was consistent with the statutory objective of the Multinational Anti Avoidance Law (MAAL) – and post 1 July 2017, with the Diverted Profits Tax (DPT) – and was consistent with (the newly numbered) Arts. 5(8) and (9) of the 2015 German double tax agreement.

It was therefore somewhat of a surprise when Australia reserved its right not apply the entirety of Art. 12 to its Covered Tax Agreements.

Early speculation was to the effect that, as the US did not sign the MLI (so no double tax agreements to which the US was party would be upgraded) then the changes to be instituted by Art. 12 would be of limited value. That speculation went further, suggesting Australia's MAAL and DPT were stronger defences than the proposed Art. 12 PE changes, so what was the need in adopting Art. 12? It was also observed that the UK had indicated early on that it would not adopt the MLI Art. 12 changes, and of course the UK is the other jurisdiction with a domestic DPT capable of attacking such abuses.

However, it would seem such speculation was wide of the mark. Writing in the Australian Report for the IFA 2017 cahiers, vol 102A, the authors observe:

> *"At the time of the OECD/G20 work commencing, Australia had identified a particular arrangement that essentially involved avoiding the existence of a permanent establishment in Australia. While Australia is, and remains supportive of Action 7, and the focus on changing the permanent establishment definition, Australia has observed emerging arrangements that are designed to overcome any future changes contemplated by Action 7."* [2]

It would appear that innovative tax planning has not been killed by the BEPS Project.

4.2 MLI Art. 13 – Artificial avoidance of PE status through specific activity exemptions

Art. 13 addresses two of the Action 7 recommendations: the preparatory/auxiliary override to the specific activity exemptions in the PE definition, and the anti-fragmentation rule which aggregates the activities performed by 'closely related' enterprises and persons where those activities constitute complementary functions that are part of a cohesive business operation.

Specific activities exemption

Australia adopts Option A, in Art. 13(2), which introduces the override requirement that, before a listed specific activity will be held to not constitute a PE of an enterprise within a Source Country, that activity, or the sum of the relevant activities, must be of a preparatory or auxiliary character in the context of the particular enterprise.

Reservation

Australia reserves the right not to apply Option A in Art. 13(2) to those of its Covered Tax Agreements which already contain this preparatory/auxiliary override requirement. There are 3 such agreements: those treaties between Australia and Finland, New Zealand and South Africa.

Notification

Pursuant to Art. 13(7). Australia has notified that all 43 of its Covered Tax Agreements contain an Article which currently provides for specific activity exemptions. The new wording in Art. 13(2) will apply to Australia's Covered Tax Agreements only where the other Contracting Jurisdiction has chosen to apply the same Option.

Anti-fragmentation rule

The new rule is set out in Art. 13(4). Australia has adopted the rule, so no Reservation is necessary, and as it is a new rule, no Notification is required.

4.3 MLI Art. 14 – Splitting-up of contracts

This Article introduces an integrity rule to stop an economically integrated single contract from being artificially segmented into different components, with each component being performed by a different 'closely related' enterprise, with the objective that each separate enterprise is not physically present within the Source Country for more than the threshold number of days necessary to constitute a PE. Typically, such PE thresholds apply to contracts covering a building, construction or installation project, or contracts in connection with the provision of supervisory or consultancy services.

Australia has adopted the rule contained in Art. 14(1).

Reservation

Australia has entered a Reservation that Art. 14 will not apply to its existing Covered Tax Agreement with Norway, which has a specific deemed PE threshold (of 30 days) for offshore activities carried out in connection with the exploration and exploitation of natural resources. (This specific PE threshold applies in priority to the other PE definitions within the Australia Norway double tax agreement.)

Notification

Australia has entered a Notification that 10 of its Covered Tax Agreements already contain a rule against the artificial splitting-up of contracts to avoid PE creation. Where both Contracting Jurisdictions agree and enter a similar Notification, then Art. 14(1) will replace the existing rule within the relevant Covered Tax Agreement. If the two Contracting Jurisdictions do not agree, then the wording in Art. 14(1) will apply only to the extent it is incompatible with the existing wording in the relevant Covered Tax Agreement.

4.4 MLI Art. 15 - Definition of a person 'closely related' to an enterprise

Art. 15 defines the circumstances in which a person is taken to be 'closely related' to an enterprise. This 'closely related' concept is relevant to the application of changes to agents of independent status (Art. 12(2)), the anti-fragmentation rule (Art. 13(4)), and the rule against splitting-up contracts (Art. 14(1)).

A person will be 'closely related' to an enterprise if one controls the other, or both are controlled by the same third party or parties. This is a determination to be made based on a consideration of all the relevant facts and circumstances.

A greater than 50% beneficial interest in an entity, or a greater than 50% control of aggregate vote and value in the case of a company, either directly or indirectly, by a person in an enterprise will result in that person being considered as 'closely related' to the enterprise.

Australia has adopted Art. 15 without Reservation.

5. MLI Part V - Improving dispute resolution

Articles 16 and 17 implement recommendations from the BEPS Action 14 Report, and set out mandatory minimum standards.

5.1 MLI Art. 16 - Mutual agreement procedure (MAP)

Art. 16 will modify the language in Covered Tax Agreements to:

- give taxpayers the right to initiate a case with the Competent Authority of either Contracting Jurisdiction where the taxpayer believes it has not been taxed in accordance with the relevant treaty provisions;
- the case can be raised with the Competent Authority irrespective of any domestic tax law remedies (ie, the MAP does not have to be a remedy of last resort);
- initiate the case with the Competent Authority within 3 years of the occurrence of the action which gave rise to the MAP reference;
- require the first Competent Authority to consult with the second Competent Authority (where the first Competent Authority cannot unilaterally resolve the matter, and the matter appears to be justified) to endeavour to resolve the matter by mutual agreement, and if achieved, to implement the terms of the mutually agreed

position, irrespective of any time limitations in the domestic tax law of either Contracting Jurisdiction;

require the Competent Authorities to consult on any interpretive issues arising from a treaty and endeavour to reach a conclusion, and further to consult with a view to eliminating any double taxation which may arise in circumstances not provided for within the treaty.

Australia has adopted Art. 16 without Reservation.

Notifications

Australia has entered a number of Notifications, regarding the proposed application of Art. 16 to its Covered Tax Agreements. These Notifications will govern the manner in which the Art. 16 changes are implemented. As a general comment, where both Contracting Jurisdictions agree to implement Art. 16 to a particular Covered Tax Agreement, the new wording will replace the existing treaty language.

Where only one Contracting Jurisdiction notifies the treaty, the Art. 16 wording will supersede the existing treaty language only to the extent the two are incompatible.

However, some of the changes will apply only where both Contracting Jurisdictions agree to implement the changes. (As these are minimum standards, non-adoption requires the Contracting Jurisdiction to satisfy the standard in some other way.)

5.2 MLI Art. 17 - Corresponding adjustments

Art. 17 introduces a requirement for the Competent Authority of one Contracting Jurisdiction to make a downward profit adjustment, where the Competent Authority of the other Contracting Jurisdiction has made an upward profit adjustment, provided always the upward adjustment properly reflects the arm's length principles.

Australia has adopted Art. 17 without Reservation.

Notification

Australia has entered a Notification that all of its Covered Tax Agreements contain a provision in the nature of that set out in Art. 17(2).

Where both Contracting Jurisdictions agree (by confirmatory Notifications), the wording in Art. 17(1) will replace the existing treaty wording. In the absence of joint agreement, the wording in Art. 17(1) will apply only to the extent it is incompatible with the existing treaty language.

6. MLI Part VI – Arbitration

Part VI provides taxpayers with the ability to refer a MAP dispute to a binding arbitration process, where the Competent Authorities have not reached agreement after 2 years.

6.1 MLI Art. 18 - Choice to apply Part VI

Australia has chosen to adopt Part VI.

There are no Reservations or Notifications required by Art. 18, per se, but Part VI will apply to a particular Covered Tax Agreement only where both Contracting Jurisdictions have chosen that it will apply.

6.2 MLI Art. 19 to Art. 26 - Procedural and jurisdictional matters

Articles 19 to 26 (inclusive) set out various procedural and jurisdictional matters for the conduct of the arbitration process.

Australia's adopted positions under these Articles are as follows:

- disputes which are referred to arbitration, or are within the arbitral process (up to and including the time immediately prior to the handing down of an arbitrator's decision) shall not proceed, or shall be terminated, where a court or administrative tribunal of either Contracting Jurisdiction renders a decision concerning the issue: Art. 19(12);
- a case referred to arbitration will be terminated if the taxpayer, or any of its advisers, 'materially' breach their confidentiality undertaking: Art. 23(5);
- cases involving disputes which engage Australia's domestic General Anti-Avoidance Rules (Part IVA for income tax, and section 67 for Fringe Benefits Tax), are not eligible for arbitration: Art. 28(2).

7. MLI Part VII - Final provisions

Part Vii contains machinery provisions common to all Contracting Jurisdictions, and with the exception of the Reservation made under Art. 28(2) - see above - there is nothing specific to Australia.

7.1 MLI Art. 35 - Entry into effect

It is expected that domestic legislation to give effect to the MLI will be introduced into the Australian Parliament during the first half of the 2018 calendar year. It is further anticipated that the domestic legislation will pass, and the necessary number of international ratifications will be lodged with the Depository, prior to 31 December 2018, so that the MLI will apply to Australia's Covered Tax Agreements:

- from 1 January 2019, with respect to withholding taxes; and
- from 1 July 2019, with respect to income tax.

1 Technically, the "Multilateral Convention to Implement Tax Treaty Related Measures to prevent Base Erosion and Profit Shifting". Throughout the BEPS process, and in the Action 15 Report, the putative treaty was referred to as the Multilateral Instrument – or MLI – and it seems, since the release of the text, and even in the OECD material issued in June in conjunction with its signing, the adopted term (thankfully) remains the 'MLI'. This acronym is used throughout this article.

2 Andrew Mills, Dale Pinto, Australian Branch Reporters 2017 Cahiers De Droit Fiscal International, Vol 102a, page 115.

SINGAPORE'S POSITION ON MLI

*Shanker Iyer**

On 7 June 2017, Singapore joined 67 other countries in becoming a signatory to the MLI.

Singapore has provisionally adopted provisions related to treaty abuse, dispute resolution and mandatory binding arbitration. Singapore has, however, reserved the right not to apply to its DTAs provisions relating to hybrid mismatches, as well as the majority of provisions relating to PE status avoidance.

Upon ratification of the MLI, Singapore's DTAs will be amended insofar as its treaty partners are also MLI signatories and have adopted the same positions on the MLI's provisions.

1. Minimum standards for protection against treaty abuse

Singapore has chosen to introduce the Principal Purpose Test (PPT) into its DTAs to protect against treaty abuse. Under the PPT, a taxpayer will be denied treaty benefits if one of the principal purposes of a transaction is to obtain the said treaty benefits. The PPT is presented as the default measure to protect against treaty abuse in the MLI, and will be introduced into all DTAs covered by the MLI.

2. Enhancing tax dispute resolution

2.1 Improving the effectiveness of Singapore's MAP

In order to improve the effectiveness of MAP, Singapore has adopted the following measures under the MLI:

Taking steps to enhance the availability and access

Making MAP more effective in resolving disputes by implementing MAP agreements regardless of statutory time limits; and

Providing for corresponding adjustments unilaterally where they find that the taxpayer's objection is justified

2.2 Mandatory binding MAP arbitration

Singapore is one of 25 signatories which have committed to mandatory binding MAP arbitration.

* *Shanker Iyer is Founder and Chairman of Iyer Practice Advisers, a specialist advisory firm with offices in Singapore and Hong Kong.*

Singapore has reserved the right not to submit to arbitration issues relating to its domestic general anti-avoidance rules.

While Singapore has made provisional commitments to the MLI (subject to ratification) the actual impact on a specific DTA would depend on the positions taken by its treaty partners.

Multilateral Instrument (MLI): The Mauritius position

Ms Leena Brette

68 Jurisdictions signed the MLI on 07 June 2017 in Paris. Whilst Mauritius did not sign on that day, Mauritius was in a list of countries that firmly committed to sign the MLI and the Ministry of Finance issued a communique on that same day.Mauritius joined signatory countries on the 5 July 2017 in a signing ceremony chaired by the Deputy Secretary General of the OECD. The MLI 's purpose is to modify existing bilateral tax treaties to prevent Base Erosion and Profit Shifting (BEPS) but basically it is to put an end to treaty abuse and treaty shopping.

BEPS refers to tax avoidance strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations where there is little or no economic activity, resulting in little or no overall corporate tax being paid.

The Implementation of the MLI is only the beginning of a potentially long process.

Mauritius has shown its commitment to all the international new norms and standards currently under implementation by the OECD as highliggted below. The MLI forms part of the OECD BEPS project under the Action Point 15. It will override the 3500 bilateral tax treaties giving effect to the double tax treaty-related proposals in the BEPS project.

The MLI is a multilateral treaty which will apply alongside existing bilateral tax treaties modifying their application in order to implement the tax treaty-related BEPS measures.It is not an amending protocol.

The MLI contains a compatibility clause defining the relationship between the provision of the MLI and the tax treaty. The MLI ultimately modifies a bilateral treaty in such a way that it replaces an existing provision, changes the Application of an existing provision without entirely replacing it, adds or replaces a provision to the treaty in the absence of an existing provision. In other words, the mli supersedes the existing provision to the extent of incompatibility.

At the time of signing or, at the latest when the instrument of ratification is deposited, each signatory country must provide the OECD with a list of the treaties modified by the MLI as well as the list of options and reservations made with respect to the various provisions of the convention.

'Minimum standard' concept will change the functioning of bilateral tax treaties in the area of treaty abuse, mutual agreement procedures (MAP), and treaty preambles will be implemented through the MLI.Mauritius is committed to implement the

---

* *Leena Doman-Brette FCCA, MBA – Chairperson of Technical Development Committee, IFA Mauritius Branch.*

''minimum standards of BEPS and in addition has opted for arbitration in tax matters under Action point 14(Make dispute resolution mechanisms more effective).It will be remembered that this action point has as objective to develop ''solutions to address obstacles that prevent countries from solving treaty -related disputes under MAP,including the absence of arbitration provisions in most treaties and the fact that access to MAP and arbitration may be denied in certain cases''.

Under Article 7 Mauritius has opted for an interim PPT under paragraph 17(a) .This leaves the window open for Mauritius to negotiate bilaterally with its treaty partners a Limitation of Benefits clause(LOB). Mauritius is not alone in adopting same.

As mentioned above,Mauritius has joined a number of OECD as well as non OECD initiatives to be up to scratch to international standards as elabotated hereunder.

Embracing Automatic Exchange of Information

In line with international developments in tax matters Mauritius has shown its commitment by signing the various new multilateral instruments:

- **US FATCA**

The negotiation of a Tax Information Exchange Agreement and a reciprocal Inter-Government Agreement (IGA) Model 1 with the US-IRS on the Foreign Account Tax Compliance Act (FATCA).

- **THE OECD COMMON REPORTING STANDARD**

Mauritius Financial Institutions will have to report annually to the MRA on the financial accounts held by non-residents for eventual exchange with relevant treaty partners.

The first reporting period ends on 31 December 2017 and will have to be made to the MRA by 31 July 2018 for eventual exchange with the relevant treaty partners by 30 September 2018.

- **CONVENTION ON MUTUAL ADMINISTRATIVE ASSISTANCE IN TAX MATTERS**

Mauritius welcomed the various efforts made in recent years to combat tax avoidance and tax evasion on an international level, whether bilaterally or multilaterally and considering that a co-ordinated effort between States is necessary in order to foster all forms of administrative assistance in matters concerning taxes of any kind whilst at the same time ensuring adequate protection of the rights of taxpayers. Mauritius also recognises that international co-operation can play an important part in facilitating the proper determination of tax liabilities and in helping the taxpayer to secure his rights.

- **MULTILATERAL COMPETENT AUTHORITY AGREEMENT (MCAA)**

Mauritius signed the MCAA on 29 October 2014, show-casing the jurisdiction's intent to improve international tax compliance by further building on their relationship with respect to mutual assistance in tax matters.

Impact on businesses

The signing of the MLI will without doubt impact on the manner multinationals have been doing business and on their business models. Tax treaty negotiations will never be the same again!

India's Positions on Multilateral Instrument – Majorly a Balanced Approach

S.P. Singh

Sharad Goyal

Gaurav Saxena[1]

While developing mechanism to discourage shifting of profits to a nil or low tax jurisdiction or adopting tax planning to reduce incidence of taxation without economic basis, it has been appreciated by the policy makers that the "Action Plan on Base Erosion and Profit Shifting (BEPS) should not lead to unnecessary uncertainty for compliant taxpayers and to unintended double taxation". To ensure this, improving dispute resolution mechanism was made an integral part of the BEPS issues. No doubt, the Mutual Agreement Procedure (MAP) under the existing Double Taxation Avoidance Agreements (DTAAs) has been found to be effective in resolving disputes arising due to improper application of the DTAA by the tax authorities, it has come to be recognized as slow and inadequate in several aspects, particularly due to emergence of e-commerce.

Another major issues has been the fact that there are more than 3,000 DTAAs in existence with unique features. To bring all DTAAs on the same platform, one option is to revisit all of them, which is an impossible task as revision of even a single DTAA would take several years. To overcome the above mentioned shortcomings, the Organisation for Economic Cooperation and Development (OECD) developed Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, in short, referred to as Multilateral Instrument (MLI) which would exist along with the present DTAAs and at the same time make necessary changes in the agreements.

Briefly speaking, MLI is an instrument which contains final recommendations, in the form of Articles, dealing with various BEPS action plans which relate to tax treaties. MLI provides multiple flexibilities to Countries regarding the applicability of MLI provisions to their tax treaties. However, the Countries are required to submit their reservations (i.e., to what extent MLI provisions will be applicable), notifications (i.e., relevant clause of the tax treaty to which MLI shall be applicable) including option chosen along with the list of tax treaties which that country wishes to be covered by MLI, before signing the MLI, known as MLI position of the respective country. On 7 June 2017, 68 countries signed MLI.

* *The authors are with Deloitte India. Views expressed in the article are the personal views of the authors.*

This article gives a high level view of India's position in respect of various provisions of the MLI.

1. Structure of MLI

MLI is broadly divided into 7 parts, consisting of 39 Articles as below:

Part	Title	Articles	Nature of provisions
I	Scope and interpretation of terms	1 & 2	Substantive provisions
II	Hybrid mismatches Transparent entities Dual resident entities Methods for elimination of double taxation	3 to 5	
III	Treaty abuse Purpose of tax treaties Prevention of treaty abuse Dividend income Capital gains from shares Others	6 to 11	
IV	Avoidance of PE status Avoidance of PE through Commissionaires and similar arrangements Avoidance of PE through specific activity exemptions Splitting-up of contracts	12 to 15	
V	Provisions related to dispute resolution	16 & 17	
VI	Arbitration	18 to 26	Arbitration provisions
VII	Procedural provisions (viz., signature, ratification, entry into force etc.)	27 to 39	Procedural

2. Provisions of MLI and India's position

2.1 Article 3 of MLI (Transparent Entities)

As per this article, income derived by or through an entity or arrangement that is treated as wholly or partly fiscally transparent under the tax law of either of the Contracting Jurisdictions shall be considered to be income of a resident of a Contracting Jurisdiction but only to the extent that the income is treated, for purposes of taxation by that Contracting Jurisdiction, as the income of a resident of that Contracting Jurisdiction.

Though India's tax treaties with US and UK contains similar provisions. However, as per the provisional reservation, India would not adopt this provision in its tax treaties.

It may be noted that the domestic income tax laws of India does not have fiscally transparent entities whereby the beneficiaries are liable to taxation and not the entity itself, such as partnership, trust etc. In other words, such entities are considered as separate entities for tax purpose, while income of the beneficiaries is not liable to taxation. While implementing the tax treaties, India is of the view that only those entities are covered under tax treaties which are resident of the other country in accordance with the article on "Resident". Since the said article requires the entity to be a taxable entity in the other country, transparent entities do not meet the basic requirement and hence not covered under the treaty. However, the Indian judiciary[1] has treated foreign partnerships as separate entities and granted the treaty benefits irrespective of the fact that such partnership is treated as fiscally transparent entities in State R (i.e. country of residence). The said position has been endorsed in recently concluded protocol[2] to India-UK tax treaty, whereby a partnership firm is allowed to claim treaty benefits in India, given the fact that they are treated as fiscally transparent entities in UK. Hence, unless specifically provided, treaty benefits would not be extended by India as a fiscally transparent entity would not be considered as a resident of the other contracting state. There has been criticism against this approach looking at the underlying concepts of DTAAs, which are meant to provide certainty. By expressing reservation, India desires to continue the existing approach.

2.2 Article 4 of MLI (Dual Resident Entities)

As per the OECD Model[3], Article 4 provides that if a person, other than an individual, is a resident of both contracting states, then it shall be deemed to be a resident of the state in which its place of effective management is situated.

The MLI expands the scope of resolution by providing that in a case of dual residency of a person other than an individual, the two Competent Authorities will determine that residential status, having regard to its place of effective management, the place of incorporation and any other relevant factor.

Indian DTAAs have a varied approach in this respect. Majority of these provide for determination of the residential status based on place of effective management (POEM), whereas some other treaties provide for determination by Competent Authorities under MAP. Further, a few recent tax treaties of India (viz., Cyprus, Korea, Thailand, Macedonia and Indonesia) has provisions similar to Article 4 of MLI.

As per the provisional notification, India would adopt such provision while some other countries (like Canada, Cyprus, France, Luxembourg, Singapore, etc.) would not adopt this provision in the tax treaties. Accordingly, this provision would get adopted in Indian treaties, subject to matching.

Thus, adoption of Article 4 by India appears to be a logical decision, which would provide amicable resolution especially in respect to those treaties wherein residential status could not be identified due to lack of clarity on POEM.

2.3 Article 5 of MLI (Application of Methods for Elimination of Double Taxation)

Article 5 provides for methods for elimination of double taxation. Three options have been laid down. In case of differences in approach adopted by the two authorities, the two states will apply the respective methods adopted by them.

Option 1: Instead of providing exemption, State R (i.e. country of residence) shall provide deduction of tax paid in State S (i.e. country of source)

Option 2: This option addresses the issue of hybrid mismatch instrument, whereby the income (say interest) paid on an instrument (say Compulsory Convertible Debenture) is allowed as deductible in State S and State R treats the same as exempt due to its characterization as dividend. In this scenario, instead of providing exemption, State R shall provide the deduction of taxes paid in State S.

Option 3: Credit method which is akin to Article 23B of the OECD Model.

As per provisional reservation, India would not adopt this provision in its tax treaties.

It may be mentioned that India does not use exemption method for eliminating the effect of double taxation. Instead, India's approach is to provide credit for the taxes paid in State S (i.e. credit method). Though India has opted out of Article 5 in entirety, however adoption of credit method would not have made much difference to its tax treaties. The probable reason for opting-out may be that Article 5 is not a minimum standard and India may not want to disturb its existing provisions in the tax treaties.

Further, Option 2 does not apply to India. Reason being, India does not exempt any foreign sourced income, for example as per section 115BBD of the Income-tax Act, 1961 (the Act), dividend received by Indian companies from foreign companies is subject to tax in India.

2.4 Article 6 of MLI (Purpose of a Covered Tax Agreement)

India has not made any reservation in respect of this article. Article 6 clarifies that apart from eliminating double taxation the intervention of the DTAA is not to create opportunities for non-taxation or reduced taxation through tax evasion or avoidance. The article also suggests that the preamble to tax treaties may also say that the states desire to develop their economic relationship and to enhance their co-operation in tax matters.

Generally, there is no reference of double non-taxation in the preamble of Indian tax treaties. However, reference of developing economic relationships can be found in the preamble of several Indian tax treaties.

It may be noted that preamble of India-Mauritius tax treaty was relied by Hon'ble Supreme Court in its landmark judgement in the case of Azadi Bachao Andolan[4], while addressing various interpretational issues in the tax treaty. Thus, insertion of above statement would only clarify the intent of entering into the tax treaty.

2.5 Article 7 of MLI (Prevention of Treaty Abuse)

This Article provides for a mechanism for prevention of tax abuse. Consequently, it is one of the core articles of the MLI.

Inter alia, it is suggested that as minimum standard, the countries should implement either of the following three options:

(a) Principal Purpose Test (PPT)

(b) PPT plus either simplified or detailed Limitations on Benefits (LOB)

(c) Detailed LOB supplemented by a mechanism that would deal with conduit arrangements not already dealt with in the tax treaties

It is to be noted that Article 7 of MLI deals with (a) and (b) above.

As per provisional reservation, India has adopted a combination of simplified LOB and PPT. However, generally, other countries have adopted PPT only and not adopted simplified LOB.

It may be noted that simplified LOB clause is present in India's tax treaty with Albania, Armenia, Iceland, Mexico, Sri Lanka, Tajikistan, Tanzania, Uruguay and USA. Further, pursuant to Article 7, the simplified LOB clause may become applicable in Indian tax treaties with Armenia, Bulgaria, Colombia, Indonesia, Mexico, Russia, Slovakia and Uruguay, since they have also adopted PPT and simplified LOB.

One probable reason for adopting simplified LOB clause (in addition of PPT) may be due to fact that PPT is subjective in nature, as opposed to LOB clause which is objective in nature. LOB clause lays down specific criteria so as to identify the "qualified person" who can avail treaty benefits.

Another probable reason for opting the combination of PPT and simplified LOB clause, may be that presence of simplified LOB clause alone does not prevent the treaty abuse by "qualified person". Thus, the presence of PPT would act as a check on abuses by qualified persons. Accordingly, the presence of both tests (i.e. PPT and simplified LOB) would ensure, to a larger extent that the treaty benefits are available to qualified person for their genuine transactions.

2.6 Article 8 of MLI (Dividend Transfer Transaction)

The OECD Model provides lower tax rate on dividend income if the beneficial owner holds minimum 25% shareholding in the payer company. However, the said condition of lower tax rate, is not subject to any threshold period. Article 8 of MLI inserts the threshold period of 365 days of retaining shareholding for availing reduced tax rate on dividends.

Though few Indian tax treaties prescribe the condition with respect to minimum shareholding, however except India-Portugal tax treaty, it does not prescribe the minimum time period for which such shareholding should maintained.

As per provisional reservation, India has adopted Article 8 of MLI. However, countries such as Singapore, Cyprus, UK, Luxembourg, etc. have not adopted the said Article 8.

There does not seems to be any BEPS concern from India perspective in relation to misuse of Dividend provision, since India levies additional tax in the form of Dividend Distribution Tax (DDT) in the hands of payer and exempts such dividend income in the hands of recipient. However, the probable reason for opting the Article 8, might be to address the BEPS concerns of treaty partner.

2.7 Article 9 of MLI (Capital Gains from Alienation of Shares or Interests of Entities Deriving their Value Principally from Immovable Property)

Per Article 13(4) of the OECD Model, the gains derived by a resident of a Contracting State from the alienation of shares deriving more than 50% of their value directly or indirectly from immovable property situated in the other Contracting State may be taxed in that other State.

To mitigate abuse of Article 13(4) of the OECD Model Article 9 of the MLI provides that the Source S (i.e., the country where the immovable property is situated) will get taxing right if the value threshold is met any time during the period of 365 days preceding the date of transfer. Article 9 also extends this provisions to interest in partnership or trusts.

Article 9(4) of the MLI provides that alienation of shares or comparable interest (such as interests in partnership or trust) may be taxed in other contracting jurisdiction, if these shares or comparable interest derives more than 50% value directly or indirectly from immovable property situated in other contracting jurisdiction at any time during preceding 365 days from the alienation date.

India has recently amended its treaty with Israel wherein comparable provisions were introduced.

As per provisional reservation, India has adopted Article 9 of the MLI. Though, as per provisional reservation, certain countries (such as Singapore, Cyprus, UK, Canada and Luxembourg, etc.) have not adopted the Article 9, however countries such France, Japan, Netherlands have adopted Article 9.

Generally, Indian tax treaties do not contain such provision wherein the minimum threshold value of immovable property is linked with the minimum time limit. Thus, adoption of Article 9 of MLI would work against possible abuse of Article 13(4) of the OECD Model.

Many DTAAs entered into by India have a residuary clause providing right of taxation to the country of residence. It is this provision which has been in limelight, particularly in respect of investments from countries such as Mauritius, Singapore etc. Recently, some of those articles have been amended restricting the benefit. In view of the fact that MLI would exist along with existing DTAAs, this clause will not be impacted by Article 9 of the MLI.

2.8 Article 10 of MLI (Anti abuse Rules for Permanent Establishments Situated in Third Jurisdiction)

This Article pertains to BEPS Action 6 – Preventing the Granting of Treaty Benefit in Inappropriate Circumstances. It deals with those cases wherein tax treaties have been abused in triangular situations. This Article addresses those abuse where the State R does not tax the foreign profits earned by its resident through its foreign PE.

Generally, Indian tax treaties do not grant exemption to foreign business profits earned by Indian residents from foreign PE. Thus, adoption of Article 10 of MLI may not make much difference from Indian perspective. However, in order to address the BEPS concern treaty partners, India would adopt Article 10.

It is interesting to note that there are very few Indian treaties (for instance, India-Bangladesh tax treaty), which provides that "*If the enterprise carries on business as aforesaid, then so much of the profits of the enterprise as is attributable to that permanent establishment shall be taxable only in that other Contracting State*". Thus, it transpires that where an Indian entity has PE in Bangladesh, the profits attributable to such Bangladesh PE shall be taxable only in Bangladesh and not in India. As India has accepted Article 10 of the MLI and Bangladesh has not signed the MLI in the first lot, a doubt arises whether Article 10 of the MLI will override the above mentioned position.

India has not made any reservation in respect of Article 10 as there is no provision on the similar lines in any DTAA. Thus, it is expected that Article 10 of the MLI would be adopted in Indian treaties, subject to matching. It will not operate where countries such as Singapore, Cyprus, Canada, etc. have made reservation.

2.9 Article 11 of MLI (Application of Tax Agreements to Restrict a Party's Right to Tax its Own Residents)

This Article pertains to BEPS Action 6 – Preventing the Granting of Treaty Benefit in Inappropriate Circumstances and intends to support the right of State R to tax its own residents. Additionally, Article 11 also provides safeguards to ensure uninterrupted supply of certain benefits granted to the tax residents under the tax treaty.

India-US tax treaty contains comparable provision in Article 1(3).

Understandably, India has not made any reservation in respect of Article 11. Thus, it is expected that Article 11 of the MLI would be adopted in Indian treaties, subject to matching. It may not be applicable to the countries which have made provisional reservation, such as Singapore, Cyprus, Canada, etc.

2.10 Article 12 of MLI (Artificial Avoidance of Permanent Establishment Status through Commissionaire Arrangements and Similar Strategies)

This article pertains to Action 7 (Preventing the Artificial Avoidance of Permanent Establishment Status) and endorses amendment in the definition of PE contained in Article 5 on following aspects:

(a) Scope of agency PE in commissionaire arrangement of foreign enterprise so as to avoid PE in the Source State.

(b) Creation of Dependent Agency PE when the agent habitually plays principal role leading to conclusion of contracts that are routinely concluded without material modification by foreign enterprise.

(c) Agent will not be considered as independent agent if he acts exclusively or almost exclusively on behalf of a closely related enterprises.

India has adopted Article 12 of MLI. However, several countries such as Japan, Singapore, Cyprus, UK, Luxembourg, etc., have not adopted this Article.

The probable reasons for accepting Article 12 by India may be as follows:

(a) Commissionaire arrangement is an arrangement wherein the agent sells goods in its own name, though on behalf of the foreign enterprise. In such scenario, constitution of agency PE is avoided since contracts are not concluded in the name of foreign enterprise. It is observed that such scenario generally arises in European countries with Civil Law. In order to deal with such situation, Article 12 of MLI provides that if a person habitually plays the principal role leading to conclusion of contract that are routinely concluded without material modification by foreign enterprise, such act would lead to constitution of dependent agent PE. Though, this type of situation does not practically arise in India, however, to address the BEPS concerns of treaty partners (especially European countries), India might have agreed to adopt this Article.

(b) Per Article 5(5) of the OECD Model, a dependent agency PE is said to be constituted if the dependent agent habitually exercises the authority to conclude contracts in the name of the foreign enterprise. In this regard, it would be relevant to refer to India's position on OECD commentary on Article 5 which provides that "*a person, who is authorised to negotiate the essential elements of the contract, and not necessarily all the elements and details of the contract, on behalf of a foreign resident, can be said to exercise the authority to conclude contracts*". It appears that India's position and Article 12 of MLI, both are laying stress on the role played by the agent in concluding a contract. Where such involvement of the agent in concluding the contract is essential in nature (as per India's reservation) or is principal in nature (as per Article 12), dependent agent PE would be constituted. In this sense, Article 12 and India's position appear to be on same page.

(c) Generally, Indian tax treaties contains conditions mentioned in (c) above, since India generally follows UN Model Tax Convention which contains similar condition for determination of dependency of an agent. Article 5(7) of UN Model provides that "*when the activities of such an agent are devoted <u>wholly or almost wholly</u> on behalf of that enterprise, and <u>conditions are made or imposed between that enterprise and the agent in their commercial and financial relations which differ from those which would have been made between independent enterprises, he will not be considered an agent of an independent status</u> within the meaning of this paragraph*". (emphasis added) It may be noted that, unlike Article 5(7) of UN Model, Article 12 of MLI does not refer the commercial and financial relationship between the agent and foreign enterprise. Thus, as per Article 12 of MLI, an agent may lose the independent status even when transactions with closely related enterprise are not influenced by relationships. In this sense, Article 12 appears to be stricter as compared to Article 5(7) of UN Model.

It is interesting to note that Article 12 has prescribed the condition of "exclusively or almost exclusively" for closely related enterprise only. Thus, it appears that where an agent acts exclusively or almost exclusively on behalf of a foreign enterprise which is not a closely related enterprise, the agent may not be considered as dependent agent. From this perspective, Article 12 appears to be more liberal.

2.11 Article 13 of MLI (Artificial Avoidance of Permanent Establishment Status through the Specific Activity Exemptions)

This Article deals with the mischief of avoiding constitution of PE by claiming the specific activity exemptions mentioned in Article 5(4) of the OECD Model, even though the said activity is the core business activity. In order to deal with such a situation, Article 13 of MLI recommends two options, namely:

Option A: No benefit of specific activity exemption under Article 5(4) of OECD Model Tax Convention would be available, unless the activities performed are of preparatory and auxiliary nature.

Option B: Article 5(4) shall not be amended, but would be supplemented by anti-fragmentation provision which deals with those situation wherein activities are segregated, so as to claim PE exemption with respect to preliminary or auxiliary activities. Article 13(4) of MLI provides that exemption from PE provided under the tax treaty shall not apply if:

- The foreign enterprise or closely related enterprise already has a PE in the Source State; or
- The overall activity conducted by the two enterprises (i.e., foreign enterprise and its closely related enterprise) is not of a preparatory and auxiliary character.

As per provisional reservation, India has adopted Option A under Article 13 of MLI. However, various countries (Singapore, Cyprus, Luxembourg, etc.) have not adopted the said Article resulting in continuation of exemption from PE if the activities are in the nature of preparatory and auxiliary.

In the Indian context, it is relevant to refer to litigation involving liaison office (LO) of a foreign enterprise. The issue was, whether the activities of LO is in the nature of preparatory and auxiliary (and accordingly fall in the exemption list of PE) or in the nature of core business activity (which constitutes PE). The decisions are based on facts requiring analysis of activities to determine whether the LO's activities are preparatory and auxiliary or core business activity. Thus, this Article is in line with India's position.

2.12 Article 14 of MLI (Splitting-up of Contracts)

Article 14 deals with a situation wherein the establishment of PE is avoided by splitting the contracts among related parties in such a manner that the threshold prescribed for the PE in the relevant DTAA is not breached.

Article 14 provides that in order to determine the period of time for projects (such as building site, construction project, installation project or other specific project), the period of time spent by the foreign enterprise will be aggregated with the period of time spent by the closely related enterprises in relation to connected activities carried out by such closely related enterprises in the other contracting state. However, it is to be noted that the said provision has been made subject to the conditions that the period(s) of time spent by foreign enterprise and the closely related enterprises, in aggregate exceeds 30 days.

Understandably, India has not made any reservation in respect of Article 14 as it is not only in line with India's position, but goes beyond in making the conditions stricter. Thus, it is expected that Article 14 of the MLI would be adopted in Indian treaties, subject to matching. On the other hand, certain countries such as Singapore, Cyprus, Canada, Japan, etc. have not accepted Article 14.

It is to be noted that the OECD commentary to the OECD Model has introduced the concept of commercial or geographical coherency in the context of PE, as per which if two or more contracts/projects are commercially as well as geographically coherent then those coherent contracts/projects are considered as single contract/project. Accordingly, their time period would be clubbed. Though the said concept of coherency is subjective in nature, Article 14 has provided an objective criteria for clubbing the two or more contracts.

Another probable reason for adoption of Article 14 by India appears to be judicial precedents[5] rendered in the context of aggregation of time limits of projects. The jurisprudence on this issue provides that the time limit for various construction or installation projects are not to be clubbed in the absence of aggregation provision[6] in the tax treaties. Thus, by virtue of adoption of Article 14, it appears that India wants to put the controversy regarding the aggregation of projects at rest.

2.13 Article 15 of MLI (Definition of a Person Closely Related to an Enterprise)

This Article provides for the meaning of the term 'closely related enterprise' used in Article 12 to Article 14 of the MLI. As per this, "*a person is closely related to an enterprise if, based on all the relevant facts and circumstances, one has control of the other or both are under control of same persons or enterprises. In any case, a person shall be considered to be closely related to an enterprise if one possesses directly or indirectly more than 50 per cent of the beneficial interest in the other (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) or if another person possesses directly or indirectly more than 50 per cent of the beneficial interest (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) in the person and the enterprise.*"

As India accepted Articles 12 to 14, consequently it accepted Article 15 also.

It may be clarified that the terms "closely related enterprise" and "associated enterprise" are not identical and neither replaces the other. The definition of the term "associated enterprise" under the transfer pricing regulations would remain unchanged.

2.14 Article 16 of MLI (Mutual Agreement Procedure)

This article pertains to BEPS Action 14 - Making Dispute Resolution Mechanisms More Effective. This Article provides an option to the taxpayer to resolve treaty related disputes through MAP, wherein the treaty related disputes are resolved between Competent Authorities of the Contracting States. This is one of the minimum standards recommended by the OECD. The objective of this

Article is to provide more effective access to MAP and seeks to resolve MAP cases in a timely manner.

Some of the salient features of Article 16 of the MLI are:

(a) The taxpayer can approach Competent Authority of either of the Contract States.

(b) The taxpayer needs to present his case to the Competent Authority within three years of the first notification of the action resulting in taxation not in accordance with the provisions of the treaty.

(c) The agreement reached between the Competent Authorities shall be implemented irrespective of the time limits in the domestic laws.

Most of the Indian tax treaties contain Article on MAP.

Per provisional reservation, India has not adopted Article 16 of the MLI according to which the taxpayer can present its MAP case before either of the competent authorities. However, since it is minimum standard, India has opted for bilateral notification and consultation process.

Broadly speaking, India is of the view that MAP should be resorted to only for international transactions which involves two jurisdictions. Further, as there is a robust dispute resolution mechanism to deal with domestic grievances of taxpayers, MAP should not be triggered by an Indian taxpayer for resolving tax disputes in India.

2.15 Article 17 of MLI (Corresponding Adjustments)

Article 17 pertains to Action 14 - Making Dispute Resolution Mechanisms More Effective. Though it is not a minimum standard but it is recommended as a best practice. Article 17 deals with the situation of double taxation arising on account of transfer pricing adjustment. The said Article allows the taxpayer in one country to claim corresponding relief of the taxes paid by its associated enterprise in other country on account of transfer pricing adjustments.

Under provisional reservation, India has adopted Article 17 of the MLI, except for those tax treaties wherein the said provision already exists.

It is to be noted that India has incorporated the provision of corresponding adjustment in its recently amended/signed treaties[7]. Further, few other Indian treaties[8] also contain such provision. It appears that India believes in the proposition of providing corresponding adjustment and has accordingly, adopted Article 17 for those treaties wherein such mechanism is not provided.

2.16 Article 18 to 26 of the MLI (Mandatory Arbitrations)

These provisions provides for mandatory arbitration for resolving tax disputes.

The mechanism of arbitration is being pushed by the OECD on the recognition that MAP, normally, takes a long time defeating the vary purpose of the procedure. In some of the recently concluded DTAAs arbitration has been incorporated.

India has been opposing this mechanism for dispute resolution. They feel that normal and alternative dispute resolution mechanism in India are quite well established. India, also feels that taxation is sovereign act for which arbitration is not the appropriate mechanism for dispute resolution.

3. Observation/comments

MLI would be instrumental, on the one hand, in fighting the menace of BEPS and, on the other hand in resolving tax disputes in an efficient and timely manner. However, its effectiveness will also be largely dependent on the following:

(a) Coverage of tax treaties – more the number of CTAs covered, better it would be.

(b) Matching of reservations and optional provisions – More the number of matching, higher the applicability of MLI provisions.

Further, from interpretation perspective, the applicability of a particular provision of a DTAA on a particular situation needs to be reviewed in conjunction with the impact of MLI. In other words, in order to understand the tax implication of a particular transaction or arrangement, one needs to refer the following documents:

(a) Provision of the underlying tax treaty

(b) Provisions of MLI

(c) MLI position of both Contracting Jurisdiction

Hence, the analysis of a cross border transaction would no longer be a straight forward case, whereby a tax expert need to refer to only to the relevant tax treaty and domestic tax laws. In future, one would also need to analyze the MLI position of both jurisdictions along with MLI provisions to understand the whole scheme of taxation law.

With the passage of time and considering the complexity involved in interpretation, it may be expected that the Indian Government will issue guidance for clarification and rectification of any anomalies.

1 Linklaters LLP (40 SOT 51 (Mum)) and P&O Nedlloyd Limited (52 taxmann.com 468 (Cal))
2 Notification no. 10/2014 dated 10-02-2014
3 Model Tax Convention on Income and Capital, OECD 2010
4 [2003] 263 ITR 706 (SC)
5 J. Ray McDermott Eastern Hemisphere Ltd. [2010] 39 SOT 240 (Mum.), Valentine Maritime (Mauritius) Ltd. [2011] 45 SOT 34 (Mum)
6 It is to be noted that there are few Indian treaties (viz., US, Denmark, Canada, Italy etc.) which specifically requires aggregation of time spent on different projects or sites.
7 Macedonia, Indonesia, Cyprus, Korea, Singapore
8 China, Finland, Japan, Malaysia, Netherlands, Saudi Arabia, South Africa, Spain, Switzerland, UK, USA etc.

Widening the Safety Net - Revised Safe Harbour Rules

Sanjay Kumar

Vani Arora

*Saurabh Majumdar**

1. Introduction

The Safe Harbour Scheme, introduced as a transfer pricing simplification measure in India in 2013, witnessed a largely subdued response from most taxpayers. The much anticipated success of the scheme was thwarted by certain inherent limitations that were discussed elaborately in our earlier article[1]. Ever since its introduction, several representations were made to the Central Board of Direct Taxes by industry associations, taxpayers and experts calling for a revision in the scheme, and more specifically, for a reduction in the Safe Harbour rates/ margins prescribed for the eligible taxpayers.

After much speculation by taxpayers and what is understood to be a detailed fact-finding exercise and analysis by government officials, the Safe Harbor rules were revised through a notification issued by the CBDT last month. The revised rules have substantially lowered the earlier prescribed rates/ profit margins and have also attempted to align the scheme with the global best practices by bringing low value adding intra group service transactions into the ambit of the Safe Harbour. However, there are certain unanswered questions that still linger, which may cause potential disputes in the future. This article attempts to critically analyze the revised Safe Harbour Rules in view of the key differentiating factors as compared to the earlier rules, and some of the key ambiguities resulting from the revised rules.

2. Revised Safe Harbour Rules

The following table provides an overview of the covered transactions and the applicable Safe Harbour rates/margins notified in the revised rules along with a comparative with the rates/margins prescribed in the earlier rules:

Eligible International Transaction	Earlier Safe Harbour Rules	Revised Safe Harbour Rules
Provision of Software Development Services	Operating Profit (OP)/ Operating Cost (OC) is (a) Not less than 20% where aggregate value of transaction does not exceed INR 500 crores; (b) Not less than 22% where aggregate value of transaction exceeds INR 500 crores.	OP/ OC is: (a) Not less than 17% where aggregate value of transaction does not exceed INR 100 crores; (b) Not less than 18% where aggregate value of transaction exceeds INR 100 crores but up to INR 200 crores.

* *Sanjay Kumar is Senior Director, Vani Arora is Director and Saurabh Majumdar is Deputy Manager in Deloitte Haskins & Sells LLP, India. These are their personal views and should not in any manner be attributed to be the firm's view.*

Eligible International Transaction	Earlier Safe Harbour Rules	Revised Safe Harbour Rules
Provision of Information Technology Enabled Services	OP /OC is: (a) Not less than 20% where aggregate value of transaction does not exceed INR 500 crore; (b) Not less than 22% where aggregate value of transaction exceeds INR 500 crore.	OP/OC is: (a) Not less than 17% where aggregate value of transaction does not exceed INR 100 crore; (b) Not less than 18% where aggregate value of transaction exceeds INR 100 crores but up to INR 200 crores.
Provision of Knowledge Process Outsourcing Services	OP /OC is Not less than 25%.	Aggregate value of transaction does not exceed INR 200 crores and OP/ OC is: (a) Not less than 24% and employee cost to OC is at least 60%; (b) Not less than 21% and employee cost to OC is 40% or more but less than 60%; (c) Not less than 18% and employee cost to OC does not exceed 40%.
Intra Group Loans Advanced	(a) If Loan amount does not exceed INR 50 crores - Not less than the base rate of SBI (as on 30th June) plus 150bps; (b) If Loan amount exceeds INR 50 crores - Not less than the base rate of SBI (as on 30th June) plus 300bps.	<u>Loan denominated in Indian Currency</u> - Not less than one year marginal cost of funds lending rate of SBI (as on 1st April) plus: (a) 175bps where AE's CRISIL credit rating is between AAA to A or its equivalent; (b) 325bps where AE's CRISIL credit rating is BBB-, BBB or BBB+ or its equivalent; (c) 475bps where AE's CRISIL credit rating is between BB to B or its equivalent; (d) 625bps where AE's CRISIL credit rating is between C to D or its equivalent; or (e) 425bps where AE's CRISIL credit rating is not available and amount of loan does not exceed 100 crores. <u>Loan denominated in Foreign Currency</u> - Not less than six month London Inter-Bank Offer Rate of the relevant currency (as on 30th September) plus: (a) 150bps where AE's CRISIL credit rating is between AAA to A or its equivalent; (b) 300bps where AE's CRISIL credit rating is BBB-, BBB or BBB+ or its equivalent; (c) 450bps where AE's CRISIL credit rating is between BB to B or its equivalent; (d) 600bps where AE's CRISIL credit rating is between C to D or its equivalent; or (e) 400bps where AE's CRISIL credit rating is not available and amount of loan does not exceed 100 crores.
Provision of Corporate Guarantee ('CG')	(a) If CG does not exceed INR 100 crores - Not less than 2% of amount guaranteed; (b) If CG exceeds INR 100 crores and credit rating obtained from SEBI authorized credit agency is of highest safety - Not less than the 1.75% of amount guaranteed.	Commission or fee rate not less than 1% per annum of the amount guaranteed.
Provision of Contract Research and Development Services	OP/OC is: (a) Not less than 30% in case of services wholly/partially relating to software development; (b) Not less than 29% in case of services wholly/partially relating to generic pharmaceutical drugs	OP /OC is: (a) Not less than 24% in case of services wholly/partially relating to software development where the transaction value does not exceed INR 200 crores; (b) Not less than 24% in case of services wholly/partially relating to generic pharmaceutical drugs where transaction value does not exceed INR 200 crores.

<table>
<tr><th>Eligible International Transaction</th><th>Earlier Safe Harbour Rules</th><th>Revised Safe Harbour Rules</th></tr>
<tr><td>Manufacture and export</td><td colspan="2">OP/OC is:
(a) Not less than 12% in case of manufacture and export of core auto components;
Not less than 8.5% in case of manufacture and export of non-core auto components</td></tr>
<tr><td>Receipt of low value adding intra-group services</td><td>No Safe Harbour prescribed.</td><td>Mark-up not exceeding 5% where the transaction value does not exceed INR 10 crores.</td></tr>
</table>

The salient features of the revised Safe Harbour rules are as follows:

- **Significant reduction in rates/ margins** - The revised Safe Harbour rules have addressed the most contentious issue with the existing rules, relating to the high rates/ margins prescribed to be maintained by eligible taxpayers for the covered transactions. The revised rules have reduced the rates/ margins significantly for most of the covered transactions such as provision of software development services, provision of information technology enabled services, provision of knowledge process outsourcing services, provision of corporate guarantee and provision of contract research & development services. The reduced rates align more closely with the rates that are reported to have been negotiated under the various Advance Pricing Agreements ("APAs") concluded in India and provide a greater incentive to eligible taxpayers to opt for the Safe Harbour scheme.

  A key differentiation in the revised rules from the earlier rules is with regard to the Safe Harbour margins prescribed for knowledge process outsourcing services, which vary depending on the ratio of employee cost to total operating expenses. Employee costs have been specified to include outsourcing expenses relating to employees wherever ascertainable, else to be taken as eighty percent of the total outsourcing expenses. The presumed rationale for application of this parameter is that a higher employee cost to total operating expenses ratio signifies more value adding functions performed by the taxpayer, hence warranting a higher profit mark-up. The robustness of this parameter can be questioned because salary costs may not be a true representative of the level of employee skills and instead, a detailed qualitative analysis of the functions performed by the taxpayer would be a better assessment of its position in the value chain. However, given that a Safe Harbour scheme's principal objective is to provide simplified tax compliance, such proxy approach may in fact be welcome by certain categories of taxpayers that would attract lower margins under the revised rules.

  The upper cap of INR 200 crores that has been set for determining the eligibility for Safe Harbours relating to the transactions of provision of software development/ information technology enabled/ knowledge process outsourcing/ contract research & development services signifies the government's intention to reserve the scheme for smaller taxpayers. Larger taxpayers with similar transactions have the option to file for an APA with the government to obtain a similar level of tax certainty or choose the litigation route to resolve their ongoing transfer pricing disputes. These forums would accord a better opportunity for such taxpayers to agree an outcome more suited to their specific facts and circumstances. The outcome achieved through either of these routes may also be more economically beneficial given the inherent premium embedded in the Safe Harbour rates/ margins by virtue of being a simplified dispute avoidance measure.

Alignment with internationally accepted transfer pricing principles - There were reservations with the earlier Safe Harbour methodology for financing transactions especially with respect to outbound loans (denominated in foreign currency). The prescribed Safe Harbour rate for such loans was based on the prevailing State Bank of India (SBI) base rates which is in direct contravention to internationally accepted transfer pricing principles and several Indian tax rulings on the subject. This shortcoming has been addressed in the revised rules which specify different rates for loans denominated in domestic currency versus loans denominated in foreign currency. Further, a staggered credit rating based approach has been stipulated whereby depending on the credit rating of the associated enterprise to whom loan has been advanced, different rates have been prescribed.

Albeit, it is not clearly evident from the rules whether the credit rating needs to be obtained for the year in which the loan is advanced or the years for which the Safe Harbour is being applied. It is also uncertain whether the credit rating needs to be renewed for every year in case of a long term loan.

- **Inclusion of low value adding intra-group services -** Availing of intra-group services has long been a major bone of contention between taxpayers and Indian Revenue Authorities. Often, failure to satisfy the "Need-Benefit" test has been found to be the main reason resulting in disallowances of service fees paid to group companies. The Organization for Economic Co-operation and Development ("OECD") in its report on Action Plans 8-10 of the Base Erosion and Profit Shifting ("BEPS") project, introduced the concept of low value adding intragroup services where it proposed a simplified regime for these services with minimized rigors of maintaining the benefit test documentation. Infact a study of the transfer pricing simplification measures prevailing in some developed/ advanced jurisdictions (such as Australia, Japan, Singapore US etc.)[2] shows that these tax jurisdictions provide a Safe Harbour for such low value adding services as the costs for establishing the rigors of a detailed Need-Benefit test in these transactions are often disproportionate to the underlying risks involved.
  In alignment with global best practices and in conformity with the OECD's recommendation, the revised rules include "receipt of low value adding intra-group services" as a covered transaction. This is a very welcome step and somewhat unanticipated since the Indian Government in the revised country chapter of the United Nations Transfer Pricing Manual indicated that India does not expressly endorse the concept of low value adding intra-group services[3].

  The Safe Harbour margin has been set at 5% and an upper cap of INR 10 crores has been prescribed for intra-group services to be eligible for the Safe Harbour. The definition of low value adding services has been kept largely consistent with the definition provided by the OECD in the BEPS Actions Plan 8-10 report, with few exceptions. The most notable difference is the exclusion of software development/ business process outsourcing from the definition of low value adding intra-group services.

  One of the pre-conditions for an intra-group service to qualify as low value adding is that no reliable external comparable services should be available for arm's length determination. OECD in the BEPS Actions Plan 8-10 report has recommended that a service would not be qualified as low value adding if it is provided to unrelated customers as in such cases, reliable internal comparables would be available. However, in the revised Safe Harbour rules, the term 'internal comparable' has been replaced by 'external comparable'. The term 'external comparable' has not been expressly clarified which can lead to subjective interpretations and potential disputes. External comparables can have a wide connotation and would typically refer to the vast number of unrelated companies providing similar services to their customers, financial information for which can be easily extracted from publicly available Indian databases. Taxpayers fear that the ambiguity associated with this term may lead to Revenue Authorities disregarding most of the services from being classified as low value adding intra group services, thus invalidating the applicability of the Safe Harbour.

  Coupled with the fact that software development/ business process outsourcing / knowledge process outsourcing services are expressly excluded from the definition of low value adding intra-group services implies that practically, a very limited section of services may fall under this bracket.

  The onus is on the taxpayer to prove that the services are not shareholder or duplicative in nature. The taxpayer also needs to demonstrate reasonableness of the allocation methodology used to determine the intra-group service fee. An independent accountant's certificate establishing the veracity of the cost pool (including exclusion of shareholder and duplicative costs) and allocation keys is required to support the charge received by the Indian taxpayer. While this seems to be a fair yardstick to assess the above parameters, some uncertainty remains on whether the robustness of the independent accountant's certificate itself may be challenged by Revenue Authorities to disregard the claim of Safe Harbour made by taxpayers, even though the definition of an accountant has been provided in the rules.

- **Applicable years** - The revised Safe Harbour rates/ margins are applicable for three years beginning Assessment Year 2017-18. The earlier rates/ margins were applicable for five years, from Assessment Year 2013-14 to 2017-18. There is an overlap between the old rates and new rates for Assessment Year 2017-18, and therefore both rates are applicable for this year, with the option granted to the taxpayer of choosing the more beneficial rate.

3. Concluding remarks

Needless to say, the revised Safe Harbour rules denote a marked improvement from the earlier rules and showcase a huge step in the right direction towards addressing the state of litigation in the country.

At the same time, the revised rules have once again, fallen short of addressing a major flaw in the earlier rules, with regard to maintenance of the annual transfer pricing documentation. The revised rules continue to deviate from established global practices on this requirement, and also contradict with the recommendations of the Rangachary Committee[4]. The subjective definition of the term "eligible assessee with insignificant risks" for provision of services also continues from the earlier rules.

Though the new Safe Harbour scheme is not completely devoid of ambiguities and limitations, it is still expected to receive a much larger reception from the taxpayer community than the earlier rules. The true success of the scheme would depend on the manner of its implementation and therefore, the Revenue Authorities should demonstrate a reasonable approach while determining the eligibility of taxpayers opting for the mechanism, especially on issues involving subjective interpretations.

The reduction in the rates/ margins under the new rules is also expected to favorably influence the outcomes for taxpayers in the APAs currently being negotiated with the CBDT to ensure continued attractiveness of India's APA program for multinational groups investing in the country.

1 Safe Harbour Scheme – "Make it Safe" – published in Global Taxation, in the November 2016 edition.
2 Refer article titled Safe Harbour Scheme – "Make it Safe" – published in Global Taxation, in the November 2016 edition.
3 Chapter X - United Nations Transfer Pricing Manual 2017.
4 Reports of the Committee to review taxation of development centres and the IT sector chaired by N. Rangachary.

Cruising toward safer harbours

Archana Choudhary*

Shivani Mehra*

Continuing its agenda of ushering in a non-adversarial tax regime in India, the Government of India recently added another feather to its cap by revising the Safe Harbour Rules first introduced in 2013. In order to assist our readers to stay updated, this column shall discuss the international guidance provided in respect of safe harbour rules and those prescribed in India.

1. Introduction

A safe harbour is a provision of a statute or a regulation which specifies that a certain conduct will be deemed to comply with a given rule. In the transfer pricing context, the safe harbour rules provide some respite to the taxpayers by prescribing defined circumstances wherein the income-tax authorities shall accept the transfer price declared by the taxpayer, provided the taxpayers maintain prescribed arm's length price/ margin. These provisions essentially offer benefits to taxpayers and tax administrators in terms of compliance relief, administrative simplicity and certainty.

2. OECD guidelines

The guidance issued by the Organisation for Economic Co-operation and Development ('OECD') in 1995 in relation to safe harbour rules focused on the problems related to implementation of safe harbour rules and recommended against their application in tax jurisdictions. However, on 16 May 2013, the OECD council approved the Revised Section E on Safe Harbours in Chapter IV of the transfer pricing guidelines which eliminated this generally negative view.

The previous draft issued by OECD focused on the negative impact of safe harbours on the pricing decisions of Multi National Enterprises ('MNE') and the tax revenues of the country using a safe harbour as well as the countries whose entities are involved in the subject safe harbour transactions. While the revised guidance continues to discuss these issues, it recognizes that in cases involving smaller taxpayers or less complex transactions, the benefits of a safe harbour may outweigh the problems raised by such provisions.

---

* *By Archana Choudhary, Senior Manager, International Tax & Transfer Pricing, EY and Shivani Mehra, Consultant, International Tax & Transfer Pricing, EY*
(The views expressed in the article are authors' personal views. In no way they should be interpreted to be views of author's employer or any professional organisation with which authors are associated.)

Further, the revised guidance explores the possible use of bilateral or multilateral safe harbours under the right circumstances to avoid any problem of double taxation or double nontaxation arising as a result of application of safe harbour rules. It has also appended formats for memorandum of understanding which may be undertaken between the competent authorities of two jurisdictions for certain low risk services for manufacturing, distribution and research and development.

3. Safe harbour rules in India

3.1 Safe harbour rules issued in 2013

Given that India had developed a notorious reputation among the MNEs for the increased transfer pricing audits and prolonged disputes, the Government felt the need to introduce dispute avoidance mechanisms for the taxpayers. One noteworthy development on this front was the introduction of the safe harbour rules in the Indian Finance (No 2) Act, 2009 which evinced significant interest from the taxpayers.

In August 2013, based on the suggestions of the Rangachary committee, the CBDT released a draft of the safe harbour rules for public comments which were later finalized in September 2013. The rules prescribed the minimum operating profit margins in relation to operating expenses that a taxpayer is expected to earn for certain categories of international transactions such as provision of software development services, information technology enabled services ('ITeS'), contract research and development ('R&D') services and the manufacture and export of automotive components which will be acceptable to the tax authorities. The rules also laid down acceptable norms for certain categories of financial transactions such as intra-group loans advanced or guarantees provided to AEs of an Indian taxpayer.

3.2 Safe harbour rules 2017

In its original form, the safe harbour scheme did not yield anticipated success primarily due to the wide gap between the high margins prescribed vis-à-vis the industry realities. Accordingly, most taxpayers considered opting for the Advance Pricing Agreement ('APA') route (originally introduced for evaluating complex inter-group arrangements) to achieve more certainty in respect of their intragroup transactions over the safe harbour rules, even for simpler cases. This led to an increased deployment of senior officers to the APA jurisdiction thereby diverting their expertise to simpler cases rather than the intended complex cases.

Taking feedback from taxpayers' tepid response to the safe harbour scheme and industry recommendations, the Government recognized the need for downward recalibration of the prescribed profit margins. Subsequently, the CBDT notified the revised safe harbour rules on 7 June 2017 with a view to align prescribed margins to industry standards and enlarge the scope of safe harbour transactions.

The revised rules are applicable for Assessment Year ('AY') 2017-18 and two immediately following AYs i.e. AY 2018-19 and AY 2019-20. Besides realigning the prescribed safe harbours closer to business realities, the scheme also provides for a tiered margin structure for Knowledge Process Outsourcing ('KPO') services, expands coverage to receipt of low value-adding services ('LVAS') and provides different interest rates for outbound loans denominated in domestic and foreign currencies. At this stage, it would be relevant to note that the revised safe harbour rules recommend a modification to only certain sections of existing rules while the rest of the existing rules with respect to the documentation procedure for adoption of the safe harbour remains the same.

We have discussed the changes brought out by the revised scheme and its likely impact on the taxpayers below.

- Service providers

➢ *Reduction in safe harbour margins*

There is a downward revision of safe harbour margins for software development, ITeS, contract R&D and KPO services. A comparative summary of the revised safe harbour margins vis-à-vis the prior provisions for the above mentioned transactions is as under:

These revised margins prescribed are far more realistic and aligned with outcomes achieved in the recently negotiated APAs. While the safe harbour margins prescribed for KPO services have also reduced in the amended rules, an intriguing feature of this change is the tiered approach adopted in

<table>
<tr><th rowspan="2">Eligible Transaction</th><th colspan="2">Up to FY 2016-17*</th><th colspan="3">From FY 2016-17 to FY 2018-19*</th></tr>
<tr><th>Threshold limit value</th><th>Safe harbour margin</th><th>Threshold limit value</th><th colspan="2">Safe harbour margin</th></tr>
<tr><td rowspan="2">Provision of software development services other than contract R&D services with insignificant risks</td><td>Up to INR 5 billion</td><td>20% or more on total operating costs</td><td>Up to INR 1 billion</td><td colspan="2">17% or more on total operating costs</td></tr>
<tr><td>Above INR 5 billion</td><td>22% or more on total operating costs</td><td>Above INR 1 billion up to INR 2 billion</td><td colspan="2">18% or more on total operating costs</td></tr>
<tr><td rowspan="2">Provision of ITES with insignificant risks</td><td>Up to INR 5 billion</td><td>20% or more on total operating costs</td><td>Up to INR 1 billion</td><td colspan="2">17% or more on total operating costs</td></tr>
<tr><td>Above INR 5 billion</td><td>22% or more on total operating costs</td><td>Above INR 1 billion up to INR 2 billion</td><td colspan="2">18% or more on total operating costs</td></tr>
<tr><td>Provision of specified contract R&D services wholly or partly relating to software development with insignificant risks</td><td>No threshold</td><td>30% or more on total operating costs</td><td>Up to INR 2 billion</td><td colspan="2">24% or more on total operating costs</td></tr>
<tr><td>Provision of specified contract R&D services wholly or partly relating to generic pharmaceutical drugs with insignificant risks</td><td>No threshold</td><td>29% or more on total operating costs</td><td>Up to INR 2 billion</td><td colspan="2">24% or more on total operating costs</td></tr>
<tr><td rowspan="4">Provision of KPO services with insignificant risks</td><td rowspan="4">No Threshold</td><td rowspan="4">25% or more on total operating costs</td><td rowspan="4">Up to INR 2 billion</td><td>Margin on total operating costs</td><td>Employee cost to operating costs</td></tr>
<tr><td>24% or more</td><td>60% or more</td></tr>
<tr><td>21% or more</td><td>40% or more but less than 60%</td></tr>
<tr><td>18% or more</td><td>40% or less</td></tr>
</table>

* For FY 2016-17, the taxpayer has the option to opt for the safe harbour under the old rules or the revised provisions, whichever is more beneficial.

respect of them. Given the significant involvement of the skilled resources in the KPO industry, the CBDT has interlinked the safe harbour margins to the level of employee costs in relation to the operating expenses of the service providers.

➢ *Change in the definition of operating cost and revenue*

The definition of operating cost and revenue have been amended to include costs pertaining to Employee Stock Option Plans or similar stock-based compensations, reimbursement of expenses incurred by AEs on behalf of the taxpayer and also recovery of expenses by the taxpayer incurred on behalf of its AEs. Therefore, the operating cost and resultant operating profit of the taxpayer will increase in the event the taxpayer opts for the safe harbours prescribed in the rules.

- **Financial transactions**

➢ *Segregation of safe harbour interest rates for inter-company loans*

Acknowledging the interplay of interest rates and the debt currency, the amended safe harbour rules have prescribed different safe harbour interest rates for intercompany loans denominated in foreign currencies and domestic currencies which have been captured as under:

CRISIL or its equivalent credit rating of AE	1 year SBI lending rate + basis points for loans denominated in Indian Rupees (INR)	6 months LIBOR + basis points for loans denominated in foreign currency
between AAA to A or its equivalent	175	150
BBB-, BBB or BBB+ or its equivalent	325	300
CRISIL or its equivalent credit rating of AE	**1 year SBI lending rate + basis points for loans denominated in Indian Rupees (INR)**	**6 months LIBOR + basis points for loans denominated in foreign currency**
between BB to B or its equivalent	475	450
between C to D or its equivalent	625	600
credit rating of AE is not available and the amount of loan advanced to the AE including loans to all AEs in INR does not exceed INR1 billion in aggregate as on 31 March of relevant previous year	425	400

It is expected that many companies, having significant intercompany loan transactions, would resort to this option for getting certainty on their intercompany dealings.

However, to avoid falling within a relatively higher bracket of basis points, the taxpayers opting for this safe harbour will be required to obtain a credit rating from CRISIL or a similar credit agency. As a result, the taxpayers may consider against opting for the scheme pursuant to undertaking a cost—benefit analysis for the same.

➢ *Corporate guarantee*

Corporate guarantees have also been a highly debatable transfer pricing issue in India. While the taxpayers have contended in the past that corporate guarantee is not an international transaction subject to transfer pricing, tax authorities have adopted an aggressive stand on this front which has led to strenuous and protracted litigation in most cases. As a result, a safe harbour rate of 1.75 percent in cases where the amount guaranteed did not exceed INR 100 crore was prescribed. In cases where the amount guaranteed exceeded INR 100 crores, an additional condition with regard to the credit rating of the AE being adequate to highest as per an agency registered with the Securities and Exchange Board of India, was prescribed. However, this remedy introduced in the safe harbour rules did not have many takers.

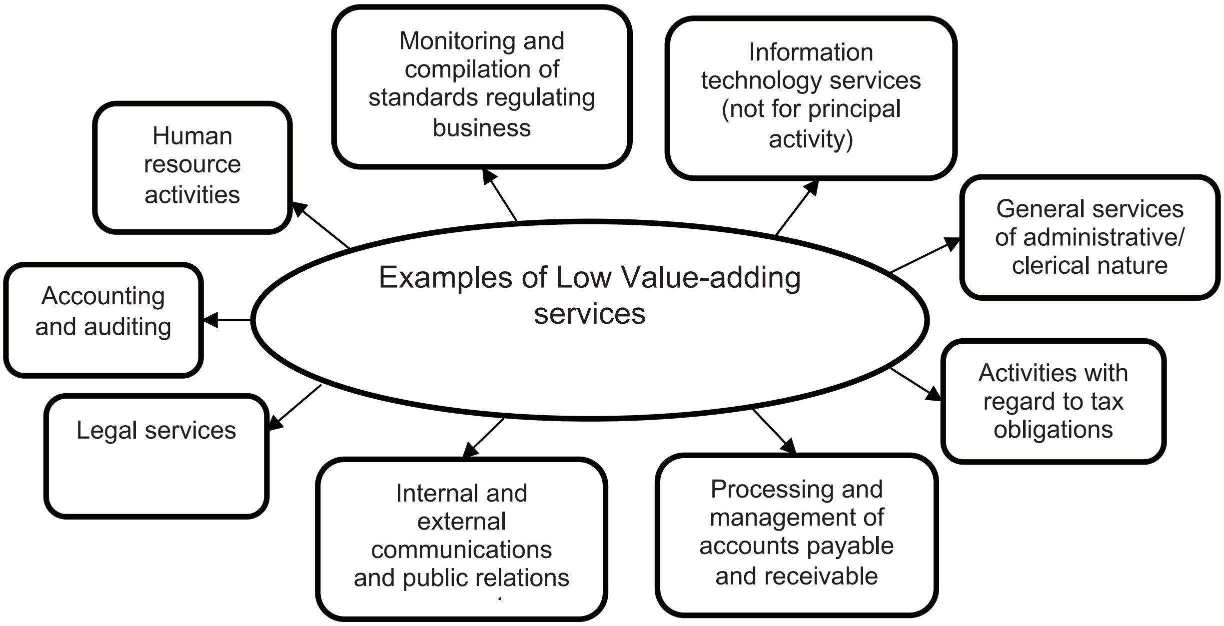
In view of the above, the reduction of the rate for corporate guarantee to 1 percent irrespective of the amount involved is considered another favourable move by the CBDT. However, even in the revised safe harbour rules, the transaction pertaining to provision of corporate guarantee has been restricted to explicit corporate guarantee. Letter of comfort, implicit corporate guarantee, performance guarantee or any other guarantee of similar nature have been kept out of ambit of safe harbour rules.

- ***Receipt of Low Value-adding Services***

Internationally, OECD in its guidance paper for LVAS had suggested that a 5 percent mark-up for such services may be considered as reasonable. In response to the same, many MNEs had adopted such mark-up for the services rendered from its global and regional service centers.

However, in India, the inability of MNEs to substantiate the benefits received and the costs allocated by the overseas AE has resulted in profound transfer pricing litigation on this subject. Therefore, the introduction of LVAS as an eligible transaction and prescribing a rate of 5 percent (aligned with the OECD guidelines) is a welcome move by the CBDT.

The definition of LVAS as provided in the revised safe harbour rules excludes a list of activities



stated therein. Having said that, such definition is essentially in line with the examples of LVAS cited in BEPS Action Plan 10 which have been diagrammatically represented as under:

Drawing a reference from the above, similar services could be received under LVAS except information technology (software development) services, business process outsourcing services and knowledge process outsourcing services. However, the definition of LVAS includes an additional condition regarding non-availability of external comparable data for arriving at the arm's length price for LVAS. As it can be rightly inferred that for MNEs, LVAS relate to the non-core activity and are a cost centre for the group. This being said, comparable service providers available in public domain will be rendering such services with a profit motive.

Further, the rules have also insisted that the method of cost pooling, exclusion of shareholder costs and duplicative costs from the cost pool and the reasonableness of the allocation keys used for allocation of costs to the taxpayer should be certified by an accountant as specifically defined in the revised safe harbour rules. From the said definition, it can be inferred that the company opting for the safe harbour scheme is required to engage an Indian chartered accountant with a fairly large practice or a multinational accountancy firm for certification of the costs. Accordingly, such company may have to undertake a cost benefit analysis to ensure that the cost of certification does not exceed the cost of maintenance of normal transfer pricing documentation. In any case, while these prerequisites laid down are expected to make the activity onerous, clarity provided on the documentation to be maintained from a transfer pricing perspective is a welcome move.

On an overall perspective, this move by the CBDT is expected to be highly appreciated by SMEs given the elimination of the burden to provide sufficient evidence to support the benefits derived by them from the intra-group services. Such provision intends to look beyond the benefits received from receipt of such LVAS from a transfer pricing perspective. It would definitely provide greater certainty to the taxpayers and would provide compliance relief at the time of transfer pricing audits. However, it remains to be seen whether such benefit can still be questioned by the Assessing Officer at the time of the transfer pricing audits leading to no relief for the taxpayer.

4. Concluding thoughts

While the Indian safe harbour rules have been fairly exhaustive with respect to its coverage of transactions, the CBDT in India may consider inclusion of low risk manufacturing and distribution services as suggested in the guidance provided by OECD. This development would enable the tax authorities to manage their transfer pricing resources more efficiently by remaining focused on more complicated cases and for the taxpayers to achieve more certainty in respect of its intra-group transactions.

Even in the revised form, the Indian safe harbour rules do not relieve the taxpayers from maintenance of the prescribed transfer pricing documentation as per the TP provisions. Relief can be provided by requiring maintenance of documentation only to satisfy eligibility criterion for safe harbor. This could contribute to administrative ease and reduction of costs for the taxpayers and tax authorities' alongwith facilitating the achievement of the simplification objective.

It may be relevant to note that a taxpayer opting for the safe harbour scheme is not entitled to invoke Mutual Agreement Procedure between the competent authorities of the countries of the transacting AEs. At the same time, India has introduced secondary adjustment provisions wherein taxpayers are required to receive the funds from AEs in the event of a primary adjustment being made *inter-alia* for the purpose of safe harbour rules. These reasons, increasingly mandate CBDT to evaluate undertaking bilateral memorandum of understanding with other jurisdictions.

Overall, the revised safe harbour rules evidently indicate the Government's attempt to reduce transfer pricing litigation on simpler low value issues, facilitate the ease of doing business and aligning the Indian regulations with globally followed practices. However, the response of the industry to the newly implemented safe harbour regime remains to be seen.

Catching the BEPS pulse – July 2017*

Priya Bubna

Sonam Aggarwal

With the ever evolving worldwide taxation landscape, the importance of being in sync with the world has moved to the forefront. In order to assist our readers to stay updated, this column shall provide a bird's eye view into some of the latest international developments in the Base Erosion and Profit Shifting ('BEPS') scenario.

As an update to the article published in May 2017, this article captures some key updates on the OECD BEPS programme and changes proposed/implemented by various countries.

Highlights - Action Plan 15 - Multilateral BEPS convention signed – A move closer to the goal of preventing BEPS

On 7 June 2017, in the signing ceremony held in Paris, 69 countries and jurisdictions have signed a revolutionary multilateral instrument/ convention ('MLI'). Jurisdictions and countries have provided their provisional list of reservations and notifications with respect to provisions of MLI. The MLI shall enable countries to implement treaty based OECD BEPS recommendations contained in final reports of Action Plan 2 (Hybrid Mismatch Arrangements), Action Plan 6 (Prevention of Treaty Abuse), Action Plan 7 (Prevention of Artificial Avoidance of Permanent Establishment ('PE') Status), and Action Plan 14 (Dispute Resolution Mechanism) in their tax treaties on the principles of matching of their choices. At this stage, it is expected that over 1,100 tax treaties will be modified based on matching the specific provisions that Signatories of MLI wish to add or change within the tax treaties nominated by them.

1. OECD global BEPS updates

1.1 Action Plan 13 – Country by Country Reporting ('CbCR') - Update on the exchange relationships for CbC reports and its implementation

On 4 May 2017, the OECD took a step ahead in implementation of CbC reporting through activation of automatic exchange relationships under the Multilateral Competent Authority Agreement ('CbC MCAA'). As of now, CbC MCAA has been signed by 57 jurisdictions. Though the first exchange of CbC reports will

* *By Priya Bubna, Manager, International Tax & Transfer Pricing, EY and Sonam Aggarwal, Senior Consultant, International Tax & Transfer Pricing, EY*
The views expressed in the article are authors' personal views. In no way they should be interpreted to be views of author's employer or any professional organisation with which authors are associated.

take place in 2018, more than 700 bilateral exchange relationships have been established among 30 jurisdictions [(out of 57 jurisdictions) (including between EU member states)].

Additionally, close to 45 countries/ jurisdictions have implemented an obligation for the filing of CbC Reports by resident ultimate parent entities ('UPEs'), 10 jurisdictions have confirmed that they will permit voluntary parent surrogate filing by the resident UPE of a multinational enterprise ('MNE') group, and around 45 countries will permit surrogate filing by constituent entities ('CEs').

On 22 June 2017, over 200 delegates from 83 countries and jurisdictions as well as 12 international and regional organisations met in the Netherlands for the third meeting of the Inclusive Framework on BEPS. During the meeting, the first monitoring report was discussed and approved, which will be submitted to G20 Leaders for their summit to be held on 7-8 July 2017 in Hamburg. The report highlights the progress that has been achieved since the Inclusive Framework team first met in Kyoto in June 2016. Additionally, as part of continuing efforts to boost transparency by MNEs, 7 more countries and jurisdictions have signed CbC MCAA, bringing the total number of signatories to 64. At present, over 800 bilateral exchange relationships have been put in place for the exchange of CbC Reports.

1.2 Action Plan 13 – CbCR - Update on CbC reporting implementation with focus on local filing in Brazil and China

On 4 May 2017, OECD clarified that the CEs resident in Brazil are required to notify its tax authorities by 31 July 2017, based on initial assessment of whether the conditions for local filing are expected to be met, identity and tax residence of the CbC reporting entity, by 31 December 2017. Where this notification subsequently proves to be incorrect, Brazilian CE may submit an amended notification by 31 December 2017, or comply with local filing. Brazil has introduced 'transitory rule' for year 2016.

Also, it was clarified that, in China, CEs that are not UPEs or surrogate parent entities ('SPEs') are not automatically required to file CbC Reports. China tax authorities will require the CbC reports in the event of an audit, when that MNE group meets the CbC reporting requirements in another country, the conditions for local filing have been met and the Chinese tax authorities failed to receive such report through the information exchange process. In case the UPE/SPE jurisdiction have a later filing deadline, the Chinese CE is required to submit written evidence to the same and an extension will be granted to meet the local filing requirement in China.

1.3 Action Plan 8 – Transfer Pricing - Discussion draft ('Draft') on implementation guidance on hard-to-value intangibles ('HTVI')

On 23 May 2017, the OECD released a draft on implementation guidance on pricing of transfers of HTVI. The Draft contains (i) the principles that should underlie the implementation of the HTVI approach, (ii) three examples to clarify the implementation of the HTVI approach in different scenarios, and (iii) the interaction between HTVI approach and the access to the mutual agreement procedure ('MAP') under the applicable treaty. Public comments on the same is to be submitted by 30 June 2017.

1.4 Action Plan 6 - Peer review document on Action Plan 6 - Preventing the granting of treaty benefits in inappropriate circumstances

On 29 May 2017, the OECD released the peer review document on BEPS Action Plan 6 (minimum standard). The said document sets forth the agreed terms of reference to set out the criteria for assessing the implementation of Action Plan 6, and the assessment methodology (i.e. the procedural mechanism) to conduct peer review.

1.5 More countries join as members of the BEPS Inclusive Framework

On 31 May 2017, Djibouti became a member of the BEPS inclusive framework and on 2 June 2017, OECD announced that Thailand has joined the BEPS inclusive framework. Later, on 7 June 2017, the updated list of BEPS members include Botswana, bringing the total Members in the inclusive framework to 99. On 22 June 2017, Vietnam joined the BEPS inclusive framework as its 100th member.

1.6 Action Plan 14 – Taxpayers inputs are invited on 3rd batch of Dispute Resolution peer reviews

On 9 June 2017, after the first two batches which are underway, OECD invited inputs from taxpayers in 8 jurisdictions (namely Czech Republic, Denmark, Finland, Korea, Norway, Poland, Singapore and Spain) on specific issues relating to access to MAP, clarity and availability of MAP guidance and the timely implementation of MAP agreements for each of the above jurisdictions using the taxpayer input questionnaire.

1.7 Action Plan 7 and 10 – Discussion drafts released on Attribution of Profits to PEs and Transactional Profit Splits

On 22 June 2017, OECD released the discussion draft titled BEPS Action 10: Revised Guidance on Profit Splits ('the Profit Split Discussion Draft'). It deals with clarifications and strengthening of guidance on transactional profit split method ('PSM') and sets out the text of the proposed revised guidance on the application of this method. The structure of the Profit Split Discussion Draft has been revised as compared to the 2016 Discussion Draft, including the following main contents: (i) general introductory statements; (ii) selection of the PSM as the most appropriate method; (iii) guidance on application of the PSM; (iv) guidance on determining the profit to be split; and (v) guidance on how the profits should be split. A set of 10 examples have also been provided. The proposed guidance in the Profit Split Discussion Draft does not represent a consensus view of the OECD's Committee on Fiscal Affairs nor of the Inclusive Framework on BEPS.

Further, the discussion draft titled BEPS Action 7: Additional Guidance on the Attribution of Profits to PEs ('the PE Discussion Draft') was released which provides additional guidance on the attribution of profits to PEs arising from Article 5(5) of the OECD Model Tax Convention ('the MTC'), including dependent agent structures and with respect to PEs arising from the changes in Article 5(4) of the MTC, including the anti- fragmentation rule. A set of four examples have been provided. The guidance provided in the PE Discussion Draft represents a consensus view of the OECD's Committee on Fiscal Affairs and the Inclusive Framework on BEPS.

2. Key worldwide updates (captured geography wise in alphabetical order)

2.1 Australia – Action Plan 2 – Neutralising Hybrid Mismatches

On 9 May 2017, the Australia Tax Office ('ATO') had released the 2017-18 Budget which included a number of BEPS related matters.

Among others were Announcements for negation of the interposition of partnerships that have any foreign resident partners, trusts that have any foreign resident trustees, and foreign trusts that temporarily have their central management and control in Australia, in corporate structures and accordingly, the application of multinational anti-avoidance law ('MAAL') has been extended to such structures. The amendments will apply retrospectively effective from 1 January 2016.

Further, the hybrid mismatch related rules under development are also proposed to be extended to apply to regulatory capital known as Additional Tier 1 ('AT1') issued by foreign branches of Australian financial institutions. Returns on AT1 capital which is treated as equity in Australia and debt in the jurisdiction of the foreign branch are not frankable in Australia to the extent these returns are also deductible to the foreign branch. The anti-hybrid measures will apply from the later of 1 January 2018 or six months after Royal Assent.

2.2 Brazil – Action Plan 13 – Guidance on CbCR

On 15 May 2017, the Brazilian revenue released a "Questions and Answers" paper on the Brazil CbC rules ('the Guidance'). The Guidance has been provided w.r.t. secondary CbC filing mechanism, the possibility of surrogate filing, questions related to the obligation to file the CbCR (in the e-corporate tax return), issues related to the data that must be included in the CbCR, and issues related to the entities that must be reported in the CbCR. Accordingly, when the fiscal year of the UPE of a MNE group does not end in 2016 or ends in 2016 but started in 2015, the MNE group is excluded from the obligation to file a CbC report. In this case, CEs must include a note on this in its e- corporate income tax return.

On 25 May 2017, Brazil, amended its CbC reporting rules to include a **"transitory rule"** for reporting fiscal year 2016. The said rule intends to exempt Brazilian CEs, whose UPEs are located in a foreign jurisdiction [with which Brazil does not have a qualifying CAA ('QCAA')], from filing MNE Group's CbC report. As a quick recap:

- In absence of a QCAA, CbC filing was required by the local CEs by 31 July 2017 for the year 2016
- The QCAA was anticipated to be concluded by 31 July 2017, now expected by 31 December 2017

The above change comes as a welcome relief, albeit as a transitory mechanism. It is pertinent to note that in a situation, post 31 July 2017, should there be no QCAA, the Brazilian CE shall have to (within 60 days), file an amended corporate tax report either containing the CbC report or details of SPE that shall file the CbC report on behalf of UPE.

2.3 Bulgaria – Action Plan 13 – Implement CbCR requirements

On 5 June 2017, the Bulgarian Council of Ministers proposed amendments regarding 1) implementation of EU Directive 2016/881, relating to CbC reporting in accordance to the OECD BEPS Action Plan 13 2) implementation of Directive on Automatic Exchange of Information (2015/2376/EU) with respect to cross-border advance tax rulings and Advance Pricing Agreements ('APAs') under the amended Mutual Assistance Directive.

The changes vis-à-vis draft bill published on 21 March 2017, include extension of deadline for submission of the relevant CbC reporting notifications for fiscal year 2016 to 31 December 2017. The Bulgarian tax authorities should issue an order outlining the CbC report template by 31 October 2017.

2.4 Colombia – Action Plan 13 – Clarification as regards to filing obligations

On 3 May 2017, the Colombia Tax Authority clarified the fiscal years for which the new transfer pricing obligations (i.e. filing of CbC report Master and local file) will apply.

Accordingly, the local file must be filed for fiscal year 2016 between 11 July and 25 July 2017 depending on the last number of the taxpayer's identification number. The master file for fiscal year 2017 should be filed in the year 2018, as per dates to be determined by the Government. Lastly, the CbC report should be filed for fiscal year 2016. While the Government has not established the filing dates, it cannot be filed earlier than 31 December 2017.

2.5 Costa Rica – Action Plan 13 – Implement CbCR requirements

Costa Rica has adopted CbC reporting requirements which is largely in accordance with OECD BEPS Action 13, vide a resolution, effective from the date of its publication (i.e. 21 April 2017), and shall apply to the current tax year (i.e. 2017). The master file and local files are required to be retained for four years. Upon request by the Costa Rica tax authorities, taxpayers will be required to submit this information within 10 business days.

2.6 Czech Republic – Action Plan 13 – Deadline for first CbC report postponed

As the draft legislation implementing a CbC reporting framework is currently under discussion, the budget committee has proposed to postpone the deadline for the first CbC reporting notification to 31 October 2017 (originally 30 September 2017).

2.7 Cyprus – Action Plan 13 – Identification of reporting entities

On 26 May 2017, the Cyprus Ministry of Finance issued a new Decree on CbCR, which replaces the previous decree dated 30 December 2016. Among other changes, the deadline for notification of identity and jurisdiction of CbC reporting entity, for year 2016, for CEs, has also been extended to 20 October 2017. It is also stated that the obligation of a Cyprus tax resident CE of a MNE Group, to file locally a CbC Report, under the secondary mechanism, will only apply with respect to fiscal years starting on or after 1 January 2017.

The CEs are also liable to make an 'equivalent CbC report', if the UPE for any reason has not provided, all information required for CE to make a CbC filing. The deadline for 'equivalent CbC report' has also been postponed for financial years starting on or after 1 January 2017. Also, notifications should be submitted electronically via the Government Gateway Portal (Ariadne).

2.8 Denmark – Action Plan 5 – Countering Harmful Tax Practices

On 17 May 2017, the Members of Danish Parliament reached an agreement according to which Denmark will adopt OECD and EU anti-tax avoidance ('ATAD') initiatives including ATAD 1 and ATAD 2, and support the creation of a beneficial ownership register in the EU, OECD and globally. Domestically, new tax center will be created with the sole purpose of focusing on international tax avoidance and evasion and the Government will consider whether new rules must be introduced regarding the role of tax advisors including reporting obligation along with OECD BEPS Action Plan 12. Also, the Minister of Taxation is considering whether anti-avoidance rules regarding the use of Danish limited partnerships in international tax planning must be introduced.

2.9 European Union Council – Action Plan 2 – Neutralising the effects of Hybrid Mismatches arrangements

On 23 May 2017, the Economic and Financial Affairs Council of the European Union ('ECOFIN') agreed on the Directive on Double Taxation Dispute Resolution Mechanisms in the EU ('the proposed Directive'). The proposed directive includes a reinforced mandatory binding dispute resolution mechanism in the EU, with clear time limits. Though the proposed Directive is built upon the EU Arbitration Convention, the scope is broadened to cover additional areas beyond transfer pricing and allocation of profits to PEs. Further, the proposed Directive provides features to address certain identified shortcomings of the existing process, to enhance the enforceability and the effectiveness of the mechanism. Member States will have until 30 June 2019 to transpose the proposed Directive into national laws and regulations.

On 29 May 2017, the EU Council adopted the ATAD 2 (amendment to the ATAD 1). This Directive (ATAD 2), extends the scope of ATAD to hybrid mismatches involving third countries (i.e., non-EU countries). In addition to expanding the territorial scope of the ATAD to third countries, the ATAD 2 also expands the scope to address hybrid PE mismatches, hybrid transfers, imported mismatches, reverse hybrid mismatches and dual resident mismatches. The content of ATAD 2 corresponds to that agreed by the ECOFIN on 21 February 2017.

2.10 Germany – Action Plan 5 – Countering Harmful Tax Practices

On 27 April 2017, the German Federal Parliament has adopted (subject to approval of the German State Council) the draft legislation, proposed in December 2016, to counter Harmful Tax Practices with regard to Licensing of Rights. In the initial draft, the rule included a definition of a preferential tax regime which was mainly based on the evidence of substantial business activities. Now, a direct reference to Action Plan 5 of the OECD BEPS Nexus Approach has been made and the definition has been replaced. Further, where the German entity pays royalties to a foreign entity which is subject to the German controlled foreign corporation rules, no limitation on the royalty deduction shall take place.

On 2 June 2017, the German State Council approved the Act (subject to signature by Federal president and publication in the German Federal Gazette) against Harmful Tax Practices with regard to Licensing of Rights. The rule will apply to all licensing payments made after 31 December 2017, if the preconditions of the rule are met.

2.13 Gibraltar – Action Plan 13 – Implementation of CbCR requirements

On 25 May 2017, HM Government of Gibraltar published a Bill to transpose the requirements of EU Council Directive 2016/881 into Gibraltar law. As provided in the Directive, it requires MNE groups which has total consolidated revenue of €750m or more in the fiscal year immediately preceding the reporting fiscal year, to file CbC report. MNEs are required to file such reports no later than 12 months after the end of the relevant fiscal years commencing on or after 1 January 2016 onwards. Local filing under secondary mechanism is only required for fiscal years commencing on or after 1 January 2017.

2.12 Greece – Action Plan 12 – Exchange of Information

On 7 June 2017, Greece published in the Official Gazette a bill regarding the implementation of the Directive on Automatic Exchange of Information (2015/2376/EU) with respect to cross-border advance tax rulings and APAs under the amended Mutual Assistance Directive.

2.13 Guernsey – Action Plan 12 – Exchange of Information

On 8 June 2017, the Guernsey Income Tax Office issued a circular providing clarifications on the exchange of information on tax rulings as per OECD BEPS Action Plan 5. The information on rulings must be exchanged electronically no later than three months after they become available. Information on rulings made between 1 January 2015 and 1 April 2017 will also be exchanged by 31 December 2017. In addition, rulings made between 1 January 2012 and 1 January 2015 will be exchanged by 31 December 2017 if the ruling was still in force on 1 January 2015.

2.14 Hong Kong – Action Plan 5 – Countering Harmful Tax Practices

During recent 2017-18 Budget announcements, Hong Kong has proposed a preferential tax regime for offshore aircraft leasing business. To prevent being perceived as a potentially harmful tax practice under OECD BEPS Action 5, the Government has proposed to extend the concession to onshore aircraft leasing, i.e. no more ring-fencing of the domestic market.

2.15 Hungary – Action Plan 13 – Implementation of CbCR requirements

On 15 May 2017, the law implementing CbCR became effective with any material changes to the earlier draft legislation.

2.16 Israel – Action Plan 5 – Countering Harmful Tax Practices

On 1 May 2017, the Israeli Finance Minister signed the Intellectual Property ('IP') regime (introduced in December 2016), followed by approval from the Israel's Parliament Finance Committee on 16 May 2017. Accordingly, the Israel's IP tax regime is effective retroactively as of 1 January 2017.

2.17 Italy – Action Plan 8-10 – Aligning Transfer Pricing Outcomes with Value Creation and Action Plan 5 - Countering harmful tax practices

On 24 April 2017, Italy Council of Ministers enacted a Law Decree (converted into law within 60 days) which includes the following OECD BEPS recommendations (i) a change in the definition of the arm's length principle for transfer pricing purposes in line with OECD guidelines and the introduction of new downward adjustment mechanisms and (ii) the exclusion of trademarks from IP, under the patent box regime, to align the rules with OECD BEPS Action Plan 5 recommendations.

2.18 Lithuania – Action Plan 13 – Guidance on CbCR

On 31 May 2017, the Lithuanian State Tax Inspectorate under the Ministry of Finance issued a Decree providing more guidance on CbC reporting, which was introduced by the Tax Administration Law and is in effect from 5 June 2017. The Decree is in accordance with OECD BEPS Action Plan 13 on CbC reporting and the EU Directive 2016/881.

2.19 Netherlands – Action Plan 6 – Treaty with Ghana includes Principal Purpose Test ('PPT') Bill to implement EU Directive regarding the automatic exchange of information

On 17 May 2017, the details with respect to the protocol to the income tax treaty between Ghana and The Netherlands (signed on 10 March 2017), became available. The protocol contains, among a modified exchange of information clause, a PPT rule. Also, the treaty gives due consideration to objective test also. Moreover, treaty benefits can still be granted in cases where those benefits would also have been granted in the absence of a transaction or arrangement. Additionally, a state is required to consult the competent authority of the other state before denying a benefit.

On 2 June 2017, the bill to implement EU Directive (2016/881) regarding the automatic exchange of information was published in the Dutch Official Gazette. The bill provides, among other things, for a penalty for failure to file, as well as non-timely, incomplete or incorrect filling of the necessary notifications (informing the tax authorities where the CbC reporting will be filed) due to an intentional act or gross negligence by a non-reporting group entity residing in the Netherlands for tax purposes. The bill retroactively applies to fiscal reporting years of the multinational group starting on or after 1 January 2016, and the above penalty is effective with regard to filing omissions from 5 June 2017.

2.20 Norway – Action Plan 4 – Interest deduction limitation

On 4 May 2017, the Norwegian Ministry of Finance issued a public consultation paper regarding amendments to the interest deduction limitation rules. It is proposed to extend the scope of the relevant rules to external loans/debts as well, with respect to group companies. Such companies can claim deduction of the net interest expenses (both internal and external) to the extent of 25% EBITDA based ratio. Interest that cannot be deducted during a fiscal year can be carried forward up to 10 years. Equity/group ratio based escape rules are foreseen to prevent ordinary loans (not linked to profit shifting arrangements) from being affected by interest deduction limitation.

Furthermore, the interest limitation rules will only apply if the total yearly net interest expenses exceed a threshold of NOK10 million (to be calculated at the level of the tax group). It is proposed that the changes shall enter into force with effect from 1 January 2018.

2.21 Portugal – Action Plan 13 – Deadline for notification extended

On 30 May 2017, the Portuguese Secretary of State for Tax Affairs' Office published Decree n. 170/2017-XXI which extended the deadline to submit the CbC reporting notification with respect to the fiscal year 2016 to 31 October 2017.

2.22 Romania – Action Plan 13 – Draft law for CbCR requirements

On 24 May 2017, the Romanian Ministry of Finance published on its website a draft law to transpose the legislation implementing CbC reporting. The draft law is in accordance with the EU Directive of 25 May 2016 requiring all EU Member States to implement a CbC reporting obligation in their national legislation.

2.23 Slovenia – Action Plan 13 – More specific CbCR requirements

On 19 April 2017, the Slovenia Ministry of Finance published a proposal for amendments to the Rules for implementation of the Tax Procedure Act. The proposal introduces more specific requirements for CbC reporting than provided so far. The proposal provides that a number of sources may be used for preparing a CbC report. However, the same should be consistently used over the years and any change should be disclosed to the Tax Authorities in the CbC report. The proposal also includes various aspects of disclosure of data on branches, CbC notification requirements, annexure which provides an overview of all items included in CbC report, their definitions and whether they are compulsory items or not etc.

2.24 South Africa – Action Plan 13 – Guidance on CbCR, Master file and Local file

On 23 June 2017, the South African Revenue Services ('SARS') released an external Business Requirements Specification document concerning CbC reporting (CbC01 Form designed by SARS), master file, local file and Financial Data reporting. The release also contains the draft public notice requiring the submission of CbC report, master file and local file returns in terms of section 25 of the Tax Administration Act, 2011 (TAA).

2.25 Sweden – Action Plan 12 – Guidance on exchange of tax rulings

On 19 May 2017, the Swedish tax authorities published more information/guidance on the exchange of tax rulings. Furthermore, a guidance is provided with respect to deadlines for the exchange.

2.26 Taiwan – Action Plan 3 – Controlled Foreign Corporation ('CFC') rules

On 21 April 2017, Taiwan Legislative Yuan passed rules w.r.t. CFC controlled or owned by Taiwanese individuals (the Individual's CFC Rules). If the taxpayer's total foreign sourced income does not reach the threshold of TWD1 million in a taxable year, the individuals are exempted from the obligation to include CFC income in calculating their Alternate Minimum Test. The detailed implementation rules will be issued by the Taiwan Ministry of Finance. The Individual's CFC Rules are expected to be effective alongside with the general CFC rules for Taiwanese corporations, which were passed by the Legislative Yuan earlier in July 2016

2.27 United Arab Emirates ('UAE') – Signs Multilateral Convention on Mutual Administrative Assistance in Tax Matters

On 21 April 2017, the UAE Ambassador to France signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters in Paris. The same shall assist in facilitating implementation of transparency measures of the OECD/ G20 BEPs project.

2.28 United Kingdom – BEPS Action Plans – Update

On 27 April 2017, UK enacted shorter version of its Finance Bill 2017, after dropping significant tax proposals. Among the removed proposals are the new rules on corporate loss relief and corporate interest deductibility along with the changes to the substantial shareholder exemption. Amendments to the anti-hybrid rules and the cost-sharing rules for the patent box regime were also omitted.

2.29 Vietnam – Action Plan 4 – Interest limitations deduction

With effect from 1 May 2017, Vietnam has introduced a fixed ratio rule for interest deduction restrictions to 20% of its EBITDA. The rule are generally in line with OECD BEPS Action Plan 4.

Landmark Decisions

Permanent Establishment & Business Profits

1. DIT v. Nortel Networks India International Inc. [2017] 81 taxmann.com 417 (SC)

Permanent Establishment & Business Profits - Supreme Court admitted SLP against the decision of Delhi High Court in the case of International Inc. v. Dy. DIT [2016] 386 ITR 353/241 Taxman 464/69 taxmann.com 47 (Delhi).

In this case, the High Court has held that where there is no material on record that would even remotely suggest that Indian LO or related parties, i.e. Indian AEs, had acted on behalf of assessee, a foreign company, in negotiating and concluding agreements on their behalf with Indian entity, it is not possible to accept that the Indian AEs could be considered as a fixed place of business of the Assessee as there is also no evidence that the offices of Indian AEs were at the disposal of the Assessee. Even if it is accepted that Indian AEs had acted on behalf of the Assessee, it does not necessarily follow that the Indian offices constituted a fixed place business PE of the Assessee. Nortel India, an AE, is an independent company and a separate taxable entity under the Act. There is no material on record which would indicate that its office was used as an office by the Assessee. Even if it is accepted that certain activities were carried on by Nortel India on behalf of the Assessee, unless the conditions of paragraph 5 of Article 7 of the Indo-US DTAA is satisfied, it cannot be held that Nortel India constituted a fixed place of business of the Assessee or Nortel Canada. The high court also disproved the claim of revenue that the offices of Indian AEs were used as a sales outlet or the assessee had installation PE or services PE in India. The high court, therefore, held that when the Assessee's income from supply of equipment was not chargeable to tax in India, the question relating to attribution of any part of such income to activities in India does not arise.

2. DIT v. Rolls Royce Industrial Power India Ltd. [2017] 82 taxmann.com 166 (Delhi)

Business profits v. Royalty & FTS - Reassessment - once an assessee has discharged the burden of not only producing the account books and other documents, but also the specific material relevant to the assessment, it is for the Income-tax Officer to draw the proper inferences of fact and law therefrom and the assessee cannot further be called upon to do so by initiating reassessment proceeding.

The Assessee, a company incorporated under the laws of the United Kingdom (U.K.), during the AYs in question, was engaged, *inter alia*, in the business of erection, commissioning, supervision, operation and maintenance of power plants. The business activities in India were carried out by the Assessee through various projects, offices, located in India. The Assessee's returns for the three AYs in question *i.e.*, AYs 1998-99, 1999-2000 and 2001-2002 were picked up for scrutiny and the assessments were completed by the Assessing Officer (AO) by passing assessment orders under Section 143(3) of the Act. The fact of the matter is that during the course of the original assessments under Section 143 (3), the AO did serve upon the Assessee a detailed questionnaire. The AO examined the nature of the transactions involving the Assessee and the payments received therefrom. By revisiting the same materials the successor AO concluded that the payments received by the Assessee should be treated as FTS. The reopening was not based on any fresh material.

Held that, in the circumstances, the view taken by a successor AO on the same material was indeed nothing but a mere change of opinion. It is a well-settled legal proposition, as explained in **Calcutta Discount Co. Ltd.** v. **ITO [1961] 41 ITR 191 (SC)** that once an Assessee has discharged the burden of not only producing the account books and other documents, but also the specific material relevant to the assessment, «it is for the Income-tax Officer to draw the proper inferences of fact and law therefrom and the Assessee cannot further be called upon to do so for him.» In **Indian Oil Corporation** v. **ITO [1986] 159 ITR 956/26 Taxman 336 (SC)**. the Court pertinently observed "it is for the taxing authority to draw inference. It is not necessary for the Assessee to draw inference." These observations apply on all fours to the case on hand. Here the Assessee had discharged its burden of disclosing fully and truly all the material facts before the AO during the original assessments. There was no basis for the successor AO to conclude that "no opinion with regard to taxation" of the payments received for the services rendered had been formed by the AO. It is plain that the precondition for invoking Section 147 did not exist. The assumption of jurisdiction under Section 148 of the Act was not valid. Consequently, the question framed by this Court on the above aspect is answered in the affirmative, i.e., in favour of the Assessee and against the Revenue. The appeals are dismissed, but with no order as to costs.

3. JP Morgan Sicav Investment Co. (Mauritius) Ltd. v. Assessment Review Committee [2017] 81 taxmann.com 386 (Supreme Court of Mauritius)

Mauritius Income Tax Act - Business Income - Expenditure in relation to exempt income - capital gain and exempt income are both excluded from the definition of gross income under section 10 and therefore expenses which are capital in nature and expenses attributable to exempt income, are not allowable under sections 18 and 26

The appellant company was incorporated on 9 August 1995 and holds a Category 1 Global Business Licence. Its activities are those of an investment company investing primarily in equity and equity related securities of Indian companies. It derives income from dividends paid by the Indian investee companies and from interest from bank. Such income is taxable under the Income Tax Act (ITA) (see sections 10 (1) (d) and 51). It also realises gains or losses on disposal of its investment. The net profit on the disposal of investment is accounted as capital gain and no tax is imposed upon capital gain under the ITA. In connection with its business, the company incurs expenditure. The main expenses of the company are fees paid to custodians and sub custodians for the holding of the investment and are incurred in relation to the production of the dividend income and of the profit, if any, on the disposal of the investment. The fees are incurred irrespective of whether the company makes a capital gain or loss and even if it does not dispose of its investments in any year.

Prior to the year of assessment 2004/2005, in computing the taxable income, the company claimed deduction of the total expenditure incurred in relation to fees paid to custodians and sub custodians. The Mauritius Revenue Authority (MRA) did not disallow such expenses. For the years of assessment 2004/2005, 2006/2007 and 2007/2008, in computing the taxable income, the company again claimed deduction from the gross income, its total expenditure on sundry expenses and custodian and sub custodian fees. The claim for deduction of such total expenditure was disallowed. Invoking section 18 of the ITA, the MRA disallowed the expenditure to the extent that it was not exclusively incurred in the production of gross income and raised assessments accordingly. In its assessments, the MRA proceeded to an apportionment of the expenses incurred and disallowed the portion of expenses incurred in the production of capital gain. The apportionment of the expenses incurred in the production of capital gain was done according to prescribed formula.

In this case, the ruling of the MRA in TR 50 was given on expenditure incurred in the production of dividend income or gains on disposal of securities and not on expenses in the production of both dividend income and capital gain. On the other hand, as submitted on behalf of the ARC, under section 26(1) (a) and (b), no deduction is to be made in respect of any expenditure to the extent to which it is capital or of a capital nature or is incurred in the production of exempt income. It is submitted that underlying section 26(1)(a) and (b), is the concept of apportionment in cases where the expenditure has also produced capital gain and exempt income. Furthermore, if the submission made on behalf of the appellant company to the effect that the total expenditure incurred in the production of dividend income and capital gain should be allowed, Mr Ramloll standing for the MRA submitted that the appellant company would not only have benefitted from non taxable capital gain but also from deduction of the expenditure which has produced such capital gain i.e "*a double benefit.*"

Held that the activities of the appellant company are those of an investment company. It can be safely deduced that securities held are in the normal course of things disposed of at the opportune moment with the objective of realizing a profit. The expenditure sought to be deducted i.e custodian and sub custodian fees, therefore produces two types of income, revenue income during such time when the company holds the securities and capital gain when the company decides that the time is right for disposal of the securities. The total custodian and sub custodian fees cannot therefore be "*exclusively*" or solely incurred for the production of gross income and are not allowable under section 18. Furthermore, section 18 requires that the expenditure is "*exclusively*" and not predominantly incurred for the production of gross income. It is also immaterial that the custodian and sub custodian fees remain the same whether capital gain is realized or not. Similarly, the submission made that the expenses are incurred with the intention of producing revenue income and that the capital gain is only an indirect outcome and on that basis should be totally deductible, cannot on the reasoning in **Mallalieu** v **Drummond (HM Inspector of Taxes)** [1983 2 AC 861], [1983] STC 665 HL, hold.

Associated Enterprise & Transfer Pricing

4. Pr. CIT v. Adani Enterprises Ltd. [2017] 81 taxmann.com 181 (SC)

Transfer Pricing - International Transaction - Supreme Court admitted SLP against the decision of Gujarat High Court in the case of Pr. CIT v. Adani Enterprises Ltd. [2016] 72 taxmann. com 285 (Gujarat) wherein the Gujarat High Court had held that where the assessee not having furnished the guarantee to the AE, there was no international transaction within the meaning of Section 92C of the Income Tax Act, the adjustment could not have been made.

In this case, the assessee contended that the assessee-company deed intend to provide a guarantee by pledging its shares. However, before the same could be done, permission of Reserve Bank of India was required to be obtained. RBI did not grant such approval and that therefore, the assessee never gave such guarantee. The CIT(Appeals) as well as the Tribunal held from materials on record that the assessee was correct in pointing out that though at one stage, the assessee had intended to pledge its shares for guarantee in favour of an AE, however, such transaction did not go through since the RBI permission, which was needed, was not granted. On these facts, the high court held that there is nothing on the record to suggest that despite refusal from RBI, assessee pledged the shares. The CIT (Appeals) as well as the Tribunal found that the RBI's letter, placed on record, concerns the same transaction. On both counts thus, there was evidence suggesting that the transaction of assessee pledging its shares fell through for want of RBI permission, no question of law arises.

5. Pr CIT v. M/s Veer Gems (TAX APPEAL NO. 338 of 2017) (Gujarat High Court)

Transfer Pricing - Associated Enterprise - if a form of participation in management, capital or control is not recognized by Section 92A(2), even if it ends up in de facto or even de jure participation in management, capital or control by one of the enterprise in the other enterprise, it does not result in the related enterprises being treated as 'associated enterprises'.

In this case, the assessee is engaged in the business of manufacture and sale, domestic as well as exports, of the polished diamonds. During the relevant previous year, the assessee had entered into certain international transactions with a Belgian entity by the name of Blue Gems BVBA. The Assessing Officer was of the considered view that this entity was an associated enterprises, for the purposes of Section 92A(2)*(j)* of the Act, of the assessee, and, accordingly, the matter regarding ascertainment of arm's length price of assessee's transactions with this entity was required to be referred to the Transfer Pricing Officer. The assessee, however, objected to the stand so taken by the Assessing Officer. It was submitted that even though Blue Gems BVBA was covered by the definition of a specified person, which are treated as related parties, under section 40A(2)*(b)*, this fact was irrelevant for the purposes of invoking transfer pricing provisions. It was submitted that Blue Gems BVBA was not an associated enterprise of the assessee company under section 92A, as the conditions specified in the said section were not satisfied. The assessee made elaborate submissions in this regard and also pointed out that so far as the immediately preceding assessment year, i.e. assessment year 2007-08, was concerned, the assessee was an associated enterprise of the Blue Gems BVBA because the conditions under section 92A(2)*(h)* were satisfied only for that particular period inasmuch in the said assessment year more than ninety per cent of the raw materials required by the assessee were supplied by the said concern. That was not the situation in the present case. The detailed submissions made by the assessee, however, did not find any favour with the Assessing Officer.

The tribunal held that, in this case, the case of the revenue hinges on application of clause *(j)* of Section 92A(2). That is the only clause invoked by the Assessing Officer, and if this clause does not apply to the facts of this case, that is end of the matter. This clause provides that "where one enterprise is controlled by an individual, the other enterprise is also controlled by such individual or his relative or jointly by such individual and relative of such individual". In the present case, the assessee is a partnership concern and the assessee firm, therefore, cannot be said to be controlled by "an individual" which is starting point for Section 92A(2)*(j)* being invoked.

While a certain degree of control may actually be exercised by these enterprises over each other, due to relationships of the persons owning these enterprises, that itself is not sufficient to hold the relationship between the two enterprises as 'associated enterprises'. That would at best satisfy the conditions under section 92A(1) but then, as have noted earlier in this order and as clarified in the Memorandum explaining the provisions of the Finance Bill 2002 which, while inserting the words "For the purpose of sub-section (1) of section 92A in Section 92A(2), had observed that "It is proposed to amend sub-section (2) of the said section to clarify that the mere fact of participation by one enterprise in the management or control or capital of the other enterprise, or the participation of one or more persons in the management or control or capital of both the enterprises shall not make them associated enterprises, unless the criteria specified in sub-section (2) are fulfilled". Therefore, the bench opined that the assessee and Blue Gems BVBA cannot be said to be associated enterprises. As these enterprises are not associated enterprises, the ALP adjustments in respect of the transactions between these enterprises were wholly unwarranted.

On further appeal, Gujarat high court held that the Tribunal examined the provisions of Clauses j, k and l of sub-section 2 of Section 92A of the Act to come to the conclusion that none of these provisions would apply in the present case and therefore the assessee M/s. Veer Gems and its supplier of rough diamonds M/s. Blue Gems are not associated enterprises. We have perused the detailed discussion by the Tribunal in this regard. Clause (i) would apply in a case where goods or articles are manufactured or transferred by one enterprise. In the present case, admittedly M/s. Blue Gems does not either manufacture or process any articles. It merely purchases rough diamonds from the international markets and supplies to the assessee. Clause (j) would apply when an enterprise is controlled by an individual. In the present case, both the enterprises are partnership firms. There is nothing to suggest that they are controlled by any individuals. Clause (l) would of course apply in a case where the enterprise is a partnership firm. However, for applicability of the said clause, there has to be an enterprise in the nature of a firm and another enterprise who holds not less than 10% interest in such firms. Such facts are also not applicable in the present case. The Tribunal in our opinion therefore committed no error in holding that the assessee and M/s. Blue Gems not being associate enterprises, the question of applying transfer pricing formula would not arise.

6. JRK Auto Parts (P.) Ltd. v. Asstt. CIT [2017] 82 taxmann.com 409 (Delhi - Trib.)

Transfer Pricing - Tested Party & Penalty - the TPO cannot made foreign A.E. as a 'tested party' and compare it with the Indian comparables who are operating under different geographical, economical and market environment. Further, the penalty cannot be levied on an addition which has not been made in the assessment or in quantum proceedings by any appellate authority.

In this case the TPO has proposed two TP adjustment; first, for sum of Rs. 63,85,158/- on account of import/purchase of capital goods from the A.E.; and secondly, for Rs. 60,23,024/- in respect of import/purchase of raw materials. However, the AO in his assessment order passed u/s. 143(3)/144C has made addition on account of TP adjustment of Rs. 63,85,158/- only which was in respect of import/purchase of capital goods. He did not make any addition in respect of other TP adjustment. Such an assessment/addition has attained finality as it has not been revised or rectified u/s. 263 or u/s. 154 or has been reopened u/s. 147/148. Further, the Assessing Officer had levied penalty of Rs. 23,20,000/- on an addition aggregating to Rs. 68,85,158/-, which was made on account of:-firstly, transfer pricing adjustment of Rs. 63,85,158/- in respect of purchase/import of capital goods from. However, the Ld. CIT (Appeals) has enhanced the penalty on further addition of Rs. 60,23,024/- which was on account of transfer pricing adjustment in respect of purchase/import of raw materials from AE, though proposed by TPO, but not made by the AO.

Held that once the addition has been made/ confirmed in the quantum proceedings, then subject matter of penalty proceedings u/s. 271(1)(c) is strictly circumscribed to such addition only. The penalty cannot be levied on an addition which has not been made in the assessment or in quantum proceedings by any appellate authority and hence if no such addition has been made in assessment, then same cannot be roped in penalty proceedings either by the Assessing Officer or by Ld. CIT (Appeals) in terms of power enshrined under section 251. Here the CIT (Appeals) is absolutely unjustified in law and on facts to levy or enhance a penalty on an addition which is not arising out of assessment order or any appellate order in the quantum proceedings or from the penalty order passed by the Assessing Officer.

Once the assessee had raised this issue before the CIT (Appeals), then the CIT (Appeals) should have given his elaborate reasons and justifications under the law as to how he can proceed to levy a penalty which was never a subject matter of addition by the Assessing Officer. If there was any bonafide mistake or omission of not making the addition, that mistake could only be rectified in the assessment proceedings or appellate proceedings in the quantum side or under any other provisions of the Act like, u/s. 263 or u/s. 148 or u/s. 154. It has not been brought on record that Assessing Officer has rectified his mistake and has revised his assessment and demand by taking into account the aforesaid adjustment. In absence of such rectification or revision of the assessment order, it is opined that the penalty levied u/s. 271(1)(c) on addition of Rs. 60,23,024/- as done by the Ld. CIT (Appeals), is beyond his jurisdiction and the same is directed to be quashed. As a passing remark we would like to add that, the CIT (Appeals) as a first appellate authority though has vast powers under section 251, but he should not transgress his jurisdiction or exercise power beyond the mandate of law and if any such action is being done then the same should be justified within the ambit of the law or by taking any support from any judicial precedence. Here no judicial precedence or any statutory provision has been brought to our notice that, CIT (A) can levy or enhance penalty u/s. 271(1)(c) when there is no addition in the quantum/ assessment proceedings.

Held further that the levy of penalty on transfer pricing adjustment of Rs. 63,85,154/- has been made in respect of purchase/import of capital goods by the assessee from its A.E. From the perusal of the TPO's order it is seen that he has rejected CPM method of the assessee on the ground that there is no proper bench marking exercise done by the assessee by comparing it from uncontrolled transaction with the third parties. Though such an observation of the TPO may be correct, but the manner in which he has proceeded to take A.E. (SAS Thailand) as "Tested Party" and then selecting the local comparables on Indian Data System to bench mark the margin of the A.E. which is a foreign entity cannot be appreciated or upheld at all. If A.E. has been taken as "Tested Party", then market and economic factors in which A.E. is operating has to be taken into consideration for bench marking any kind of profit margin of the said A.E for the purpose of determining the ALP and not the comparables which are working under Indian economic and market conditions. The TPO cannot made foreign A.E. as a 'tested party' and compare it with the Indian comparables who are operating under different geographical, economical and market environment. Such an exercise by the TPO vitiates the entire exercise of determining the ALP of the transaction and transfer pricing adjustment made by him. Thus, we hold that no penalty can be levied on such TP adjustment of Rs. 62,85,158/- made on account of purchase/import of capital goods and accordingly, same is directed to be deleted.

7. CIT v. Johnson & Johnson Ltd. [2017] 80 taxmann.com 269 (Bombay)

Transfer Pricing - Royalty payment - disallowing the payment on account of publicity and sales management as being excessive, without applying any prescribed methods, is completely *dehors* the provisions of transfer pricing adjustment found in chapter X of the Act.

In this case the Transfer Pricing Officer (TPO) has held that the parent company should share sales promotion and publicity expenses as it benefits therefrom, as higher sales result in higher royalty, but has not determined the Arms Length Price (ALP) by following any of the methods prescribed under Section 92C(1) of the Act read with Rule 10B of the Income Tax Rules, 1962. However, the Tribunal allowed the Assessee's appeal.

Held that the TPO is obliged under the law to determine the ALP by following any one of the prescribed methods of determining the ALP as detailed in Section 92C(1) of the Act. In this case, there is nothing on record to indicate that the TPO had applied any one of the prescribed methods in Section 92C(1) of the Act to determine the ALP before disallowing the payment of Rs.200.82 lakhs incurred by the Respondent on account of publicity and sales management as being excessive and/or payable by its parent, M/s. Johnson & Johnson, USA. The impugned order holds that transfer pricing adjustment done by disallowing the payment, on the basis of an assumption that it is excessive, is an action completely *dehors* the provisions of transfer pricing adjustment found in chapter X of the Act. The determination of the ALP has to be done only by following one of the methods prescribed under the Act. In view of the above, as the Revenue has not acted in accordance with the clear mandate of law, the questions as proposed does not give rise to any substantial question of law.

On the question; whether on the facts and in the circumstance of the case and in law, the Tribunal was justified in allowing the royalty payment @2% instead of 1% as done by the TPO, the court held in favour of assessee by following its earlier order in the case of same assessee vide **CIT v. Johnson & Johnson Ltd. [2017] 80 taxmann.com 337 (Bombay)**.

8. CIT v. Aurionpro Solutions Ltd (INCOME TAX APPEAL NO.1869 OF 2014) (Bombay High Court)

Transfer Pricing - Loans & Advance - where the advances were made to the company situated abroad, the LIBOR rate naturally will be considered to determine the Arms Length interest.

Held that it is not disputed that advances were made to the company situated abroad. The LIBOR rate naturally will be considered to determine the Arms Length interest, the same would be reasonable and proper in applying the commercial principle. The Tribunal has directed the appropriate rate would be LIBOR plus 2% instead of LIBOR plus 3% applied by the TPO. Considering the aforesaid, no substantial question of law arises for consideration. The Appeal is dismissed.

9. Taegu Tec India (P.) Ltd. v. Dy. CIT [2017] 83 taxmann.com 81 (Bangalore - Trib.)

Transfer Pricing - Management Fee - Burden of Proof - ALP of the management services fee cannot be determined at Nil by questioning the necessity or the benefits out of the expenditure incurred, but onus lies on the assessee to furnish the proof of actual receipt of the services from the AE.

In this case the only issue that arises for consideration was whether the TPO is justified in making ALP adjustment at Nil by holding that there was no necessity of incurring such expenditure on management services as no benefit was derived and there was no proof of actual rendition of services. The TPO treated the transaction of payment of management fee on standalone basis even the benchmarking was done by following TNM method by aggregating various transactions.

Held that the law is quite settled now. It is beyond the powers of AO/TPO to question the necessity of incurring expenditure or deny the deduction on the ground that no benefit out of such expenditure was incurred. The TPO/AO cannot determine the ALP in such transaction at Nil. The reliance in this regard can be placed on the decision of Delhi High Court in the case of Delhi High Court in the case of **CIT v. EKL Appliances Ltd. [2012] 345 ITR 241/209 Taxman 200/24 taxmann.com 199**. The Delhi High Court has reiterated the position laid down by the Supreme Court in the case of **Eastern Investments Ltd. v. CIT [1951] 20 ITR 1 and Sassoon J. David & Co. (P.) Ltd. v. CIT [1979] 118 ITR 261/1 Taxman 485**. The decision of Delhi High Court in the case of **EKL Appliances Ltd.** (supra) was followed by several coordinate benches of this Tribunal.

Therefore what follows from the above decision is that the ALP of the management services fee cannot be determined at Nil by questioning the necessity or the benefits out of the expenditure incurred. But onus lies on the assessee to furnish the proof of actual receipt of the services by the appellant from the AE. The Bombay High Court in the case of **Umakant B. Agarwal v. Dy. CIT [2014] 369 ITR 220/224 Taxman 264/46 taxmann.com 338** held that proof of rendition of services is a *sine qua none* for allowability of expenditure in the hands of the recipient of the services.

But in the present case, it is not discernible that the appellant made any attempt to furnish the proof of receipt of the services. The appellant also filed an application for admission of this additional evidence, in terms of provisions of Rule 29 of the ITAT Rules. No doubt the parties to the appeal are entitled to produce the additional evidence either on suo motto direction of the Tribunal on its own in terms of Rule 29 of ITAT Rules, 1964. Where the additional evidence is filed by the either party to the appeal, the additional evidence can be admitted by the Tribunal at its discretion only in the event that the party leading the additional evidence satisfied the Tribunal that it was prevented by sufficient cause from leading such evidence and this evidence would have material bearing on the issue which is to be decided by the Tribunal and ends of justice demands the admission of such evidence. The Tribunal can only admit this evidence after satisfying the above conditions and passing an order to that effect. In the present case, the appellant had not explained as to how it was prevented from furnishing evidences before lower authorities and also how this evidence would prove conclusively that AE had rendered the services for which management fee was paid by the appellant. In the circumstances, we do not find any valuable reason for admission of additional evidence as the additional evidence does not conclusively prove that the services were actually rendered by the AE. Therefore, following the decision of coordinate bench in the case of **Volvo India (P.) Ltd. v. CIT (Appeals) [2017] 77 taxmann.com 207** it is to be held that in the absence of proof of actual rendition of services on record, TPO was justified in making the ALP adjustment of Rs. 2,21,64,344/-.

As regards the other contention of the assessee that the transaction of management support fee should be aggregated with other transaction and be bench marked by adopting TNMM cannot be accepted for the simple reason that when there was no proof of actual rendition of services by AE, the very transaction is a sham transaction and in which event it cannot be said that the transaction can be bundled with other transactions.

10. Herbalife International India (P.) Ltd. v. ACIT [2017] 81 taxmann.com 178 (Bangalore - Trib.)

Transfer Pricing - Management Fee - Burden of Proof - The onus lies on the assessee to prove that the actual services for which the administrative services fees were paid are actually rendered or the use of technical knowhow @ 5% of the domestic sales and the question of the bench marking of transaction would arise only if the assessee proves that there was actual transfer of technical knowhow to the appellant and the technical knowhow was actually used by the assessee in the manufacturing activity of the appellant.

The assessee company sought to justify the consideration paid for the various international transactions entered with its AE to be at arm's length. The assessee company also submitted transfer pricing study report adopting Transactional Net Margin Method (TNMM) which is considered to be the most appropriate method for the purpose of bench marking the above international transactions. The assessee company also adopted profit before income tax to sales as a profit level indicator. The assessee company's profit margin was computed at 5%. The assessee company claimed that the same was comparable with other companies and claimed that the payment of management fees and royalty are at arm's length. For the purpose of transfer pricing study, the assessee company has chosen comparables whose profit margin was computed at 5%. Thus it was claimed that the payments of management fees and royalty is at arm's length.

The TPO by order passed under section 92CA(3) of the Act computed the transfer pricing adjustment of Rs.7,85,84,738/- by determining the arm's length price for administrative services paid to its AE Herbalife International Inc., of Rs.5,47,91,533/- and the royalty payment of Rs.2,37,93,205/-. The TPO had treated the payment of administrative service fee at Nil on the ground that the assessee company had failed to establish that the administrative services are actually received by the assessee company and the assessee had failed to establish the benefits accrued as a result of management services and also the necessity of such expenditure. Similarly the same reasons were given by the TPO for treating the payment of royalty of Rs.2,37,97,205/- at Rs.Nil. The TPO also not agreed to the submission of the assessee company that the transaction of payment of royalty and administrative service should be aggregated with the other transactions, by holding that the aggregation of transactions is permissible only in respect of series of closely linked transactions which cannot be analysed separately. The TPO also has not accepted the calculation of margin of the assessee company at 5% which was calculated by the assessee company after deducting a sum of Rs.3,64,20,069/- that is cost towards mega event of Rs.1,73,37,669/-, rent for vacant property, administrative fee of rs.1,50,00,000/- as exceptional cost. The TPO held that without including the above cost, the margin on sales should be worked out and accordingly the TPO worked out on the said basis the margins at -3.33% and whereas accordingly the TPO worked out the margins of the comparables at 10.36%. The learned TPO also disallowed a sum of Rs.59,48,301/- as being 25% royalty paid to Herbalife Inc., USA as capital in nature. Being aggrieved by the draft assessment order, the objections were filed before the Hon'ble DRP which upheld the TPO order. Pursuant to directions of Hon'ble DRP, the AO passed final assessment order dated 8.10.2010 incorporating the above addition.

Held that the law is quite settled that it is beyond the scope and powers of TPO/AO to question the necessity of incurring the expenditure or the benefits of the expenditure incurred. The Delhi High Court in the case of **CIT v. EKL Appliances [2012] 345 ITR 241/209 Taxman 200/24 taxmann.com 199 (Delhi)** held that the TPO cannot determine the ALP at Nil by holding that there was no need of incurring such expenditure. But the matter does not end there. The onus lies on the assessee to prove that the actual services for which the administrative services fees were paid are actually rendered or the use of technical knowhow @ 5% of the domestic sales. It may be mentioned that the question of the bench marking of transaction would arise only if the assessee proves that there was actual transfer of technical knowhow to the appellant and the technical knowhow was actually used by the assessee in the manufacturing activity of the appellant. It is a matter of fact that before the lower authorities as well as before us, the assessee company had only described the nature of technical knowhow and nature of administrative services received. It does not conclusively prove that the assessee company actually received the administrative services as well as the technical knowhow which are used in the manufacturing activity of the appellant. Further the appellant had not filed any additional evidences to prove the administrative services/technical knowhow are actually received by the appellant and thus the assessee company had failed to discharge this onus of proving this aspect. Therefore, even as per the provisions of Indian Evidence Act, the presumption can be drawn that the assessee has no evidence to prove this aspect. Therefore, the AO/ TPO was justified in adopting the ALP in respect of payment of administrative services and royalty at Nil. In respect of the other grounds of appeal, since we held that there was no proof of receipt of administrative services as well as technical knowhow which is used in the process of manufacturing activity, the question of bundling of transaction or aggregating all other transactions does not arise.

11. Nortel Networks India (P.) Ltd.v. ACIT [2017] 81 taxmann.com 238 (Delhi - Trib.)

Transfer Pricing - Comparable - if there is a change in functions carried out, assets employed and risk taken of the comparables in the year under consideration viz-a-viz earlier years, the comparables selected in earlier year might be rejected in the year under consideration, but the TPO should assign reasons.

Held that if there is a change in functions carried out, assets employed and risk taken (FAR analysis) of the comparables in the year under consideration viz-a-viz earlier years, the comparables selected in earlier year might be rejected in the year under consideration, but the TPO should assign reasons as what are the differences in the FAR analysis of the comparables as compared to the earlier years, which led to rejection of those in the current year. The departmental authorities (i.e. ld. TPO/DRP) are required to bring on record the salient feature of the year under consideration as compared to the facts of the earlier years, in absence of which, the departmental authorities cannot taken opposite view. This issue was taken up by the assessee before the DRP while challenging the approach of bifurcating single transaction of marketing and after sales support service into the separate transaction of marketing support service and technical support service, however, the issue of consistency was not addressed by the DRP.

12. Dover India (P.) Ltd. v. Dy.CIT [2017] 81 taxmann.com 245 (Pune - Trib.)

Transfer Pricing - Comparable Adjustments - where the assessee had not received any support payments towards its marketing expenses or the initial start-up overhead charges, as there was no agreement between the parties to pay any such support payments or to receive the same, in the absence of the same, addition made on the basis of non- existing agreement, by the TPO, does not stand.

The manufacturing unit of the assessee was established in the assessment year 2008-09 and operated for three months. The total sales of the goods manufactured were for domestic market, except to the extent of 10%. However, sourcing for the manufacturing was from the associate enterprises. The assessee was 100% captive service provider to its associate enterprises. During the year under consideration, in the manufacturing unit, the assessee had unadjusted margins of OP/sales at (-) 68.59%. While benchmarking its international transactions by using TNMM method as most appropriate method, the assessee in the TP study report worked out the adjustment on account of capacity under-utilization at Rs.1,61,09,646/-. Similar adjustment of under-utilization of capacity was carved out and allowed to the assessee by the Assessing Officer in the preceding year. Since this was the first complete year of operation and the manufacturing unit was in the nascent stage, the assessee incurred losses and asked for aforesaid adjustments. During the succeeding year i.e. assessment year 2010-11, there were also losses. The TPO noted that in the succeeding year, the associate enterprises had given compensation to the assessee for under-utilization. The TPO was of the view that similar adjustment should have been allowed by the associate enterprises for the year under consideration also. Rejecting the plea of assessee to allow capacity under-utilization adjustment, the TPO was of the view that on using extended CUP method for valuation of support payments, the assessee should have received sum of Rs.1,65,23,053/- on account of support payments towards marketing expenses and initial start-up overhead charges. Hence, TP adjustment on account of non-receipt of said support payments towards marketing expenses and initial start-up overhead charges at Rs.1.65 crores was made in the hands of assessee.

There are two issues arising in the present as to whether the assessee is entitled to the adjustment for capacity under-utilization and in the alternate, whether TP adjustment could be made on account of non- receipt of support payments from the associate enterprises i.e. adjustment made on account of an arrangement which does not exist.

Held that as per section 92B(1) of the Act, international transaction means a transaction between two or more associate enterprises, either or both of whom are non-resident, in the nature of purchase, sale or lease or tangible or intangible property or provision of services or lending or borrowing money or any other transactions having the bearing on profits, income, losses or assets of such enterprise. Further, it shall also include mutual agreement or an arrangement between two or more associate enterprises for the allocation or apportionment or any other contribution to, any cost or expense incurred or to be incurred in connection with the benefit, service or facility provided or to be provided to any one or more of such enterprises. In other words, the term international transaction includes an existing understanding or contract between two or more persons who are associate enterprises. Sub-section (2) to section 92B of the Act talks of transaction entered into by an enterprise with a person other than associate enterprises, which would be deemed to be an international transaction entered into between two associate enterprises, if there existed prior agreement in relation to relevant transactions, etc. Explanation under section 92B of the Act clarifies that the expression 'international transaction ' would include various transaction of purchase, sale, transfer or lease of tangible or intangible property, capital financing, borrowing, lending, etc. and provision of services including different types of services; and transaction of business restructuring or reorganization, etc.

In other words, section 92B of the Act covers such transactions which actually exist between two associate enterprises. None of the limbs of section 92B of the Act or Explanation defining the expression 'international transaction' talks of any hypothetical transaction and in the absence of the same, TPO cannot pre-suppose an international transaction between the assessee and its associate enterprises and the determination of TP adjustment on account thereof. Admittedly, during the year under consideration, the assessee had not received any support payments towards its marketing expenses or the initial start-up overhead charges. There was no agreement between the parties to pay any such support payments or to receive the same. In the absence of the same, addition made on the basis of non- existing agreement, by the TPO, does not stand. The TPO had pre-supposed the said transaction since such support payment was provided by the associate enterprises to the assessee in the succeeding year. However, in the instant assessment year, no such support payment was provided by the associate enterprises to the assessee. Accordingly, it is to be held that there is no merit in the order of TPO in making TP adjustment on account of non-receipt of support payment at Rs.1.65 crores.

Further, in this case, the unit of assessee was a captive service provider but it was in the initial stage of setting up of its manufacturing unit and had suffered losses. In the first year, when it operated only for three months, the assessee asked for adjustment on account of capacity under-utilization and the same was allowed by the Assessing Officer/TPO while applying the TNMM method, as applied by the assessee. However, similar exercise carried out by the assessee during the year under consideration i.e. after selecting the TNMM method as the most appropriate method, the assessee had made adjustment on account of capacity under- utilization, while benchmarking its international transaction vis-à-vis the margins earned by the comparables, which was rejected by the TPO. Therefore, there is merit in the claim of assessee as this was the first complete year of operation. Accordingly, the assessee is entitled to the adjustment on account of capacity under-utilization. The Pune Bench of Tribunal in **Tasty Bite Eatables Ltd. v. Asstt. CIT [2015] 59 taxmann.com 437 (Pune-Trib)** has already allowed similar adjustment and accordingly, it is to be held that the same is to be allowed in the hands of assessee.

13. KOB Medical Textiles (P.) Ltd. v. Dy. CIT [2017] 81 taxmann.com 223 (Chennai - Trib.)

Transfer Pricing - Comparable Adjustments - where the assessee is a contract manufacturer and the comparables are entrepreneur companies, considering the high degree of risk involved with the comparables, the tribunal allowed ad-hoc risk adjustments at 2%.

The assessee undertakes contract manufacturing for its Group Companies and is compensated for its activities on a cost plus model based on an intragroup Contract manufacturing agreement. It is submitted that the assessee applying Transactional Net Margin Method (TNMM) as the Most Appropriate Method (MAM) and the return on total operating cost (OP/TC) as the Profit Level Indicator (PLI) computed its margin at 1.92%. The Appellant in its TP analysis selected 4 comparables, whose arithmetic mean of margins came to 10.24% which after risk adjustment came to 2.59% and thus as per proviso to section 92C(2) the international transactions of the assessee were considered to be at Arm's Length by the assessee. According to the Appellant, Adjustment towards Risk Profile undertaken by the Appellant is different than that of the comparable companies and as such the margins of the comparables warrant adjustments. The assessee is a contract manufacturer and the comparables are entrepreneur companies. The Appellant does not bear any market risk, credit risk, R&D risk and foreign exchange risk. The risks borne by the entrepreneur companies are significantly higher when compared to a contract manufacturer.

Held that there is no thumb rule for risk adjustments in each and every cases, whenever the assessee claimed any risk adjustment in accordance with Rule 10C(2)(e). While arriving the ALP, the assessee has to identify and quantify the level of risk involved between the assessee and the comparables while undertaking for analyses in the transfer pricing documents. The risk adjustments could be given only to company to company basis considering level of risk involved between the assessee and the comparable companies. It is primary duty of the assessee to provide requisite information pertained to the claim. Since the assessee did not discharge its initial onus and in the absence of information to compute the reliable accurate risk adjustments, it is not possible to grant risk adjustments claimed by the assessee. However, considering high degree of risk involved with the comparables, we are inclined to grant risk adjustments at 2% on adhoc basis.

14. KOB Medical Textiles (P.) Ltd. v. Dy. CIT [2017] 81 taxmann.com 223 (Chennai - Trib.)

Transfer Pricing - Comparable Adjustments - where the assessee is a contract manufacturer and the assessee's pricing pattern is marking up of 7% on the cost of goods manufactured, the assessee cannot seek any further adjustments towards additional depreciation or abnormal cost.

The assessee is a contract Manufacturer. Vide contract manufacturer agreement; the assessee is entitled to compensation of cost plus 9.5% which was reduced to 7% w.e.f 1.1.2010. Cost includes cost of materials, manufacturing overheads and store-cost and Administration cost and other essential costs except Corporate taxes but including Fringe Benefit Tax. Further, the assessee submitted that the A.E is supposed to issue to the appellant within 60 days prior to the end of each calendar year a forecast of the contract manufacture containing the details and estimates of the contract manufacture required to next calendar year. The assessee in turn submits an operating plan giving estimates of the costs to it's A.E based on which the Selling Price is fixed and the Selling Price remains constant throughout the year. Considering the same, the assessee could not predict the abnormal costs it incurred during the year which could be factored in the Selling Price which affected its margins. According to the assessee, such abnormal costs deserve to be excluded while determining the ALP adjustments. The assessee has incurred the abnormal Wastage of materials amounting to Rs. 1,43,17,081/- and Depreciation.

Held that the assessee is a contract-manufacturer and having mark-up raised from 5% to 9.5% on the goods procured by it, later it was revised to 7%, so that the wastage suffered by the assessee taken care of by mark-up prices and manufactured goods. Once the price was marked up, there cannot be any loss to the assessee and the entire wastage is taken care by marked up price of sale price. Hence, there is no merit in the plea of the assessee with regard to claim of abnormal wastage. Next issue is with regard to abnormal depreciation. As discussed in earlier, the assessee's pricing pattern is marking up of 7% on the cost of goods manufactured. Being so, the increase in depreciation cost has also taken care of by mark up of sales price. Accordingly, the assessee cannot seek any further adjustments towards additional depreciation cost. This ground of appeal by assessee is also rejected.

15. Caterpillar India (P.) Ltd. v. ACIT [2017] 82 taxmann.com 94 (Chennai - Trib.)

Transfer Pricing - PLI - the interest on customer overdue is to be considered as part of the operating activities of the assessee, if it is relating to trade debtors.

Held that the interest on customer overdue is to be considered as part of the operating activities of the assessee, if it is relating to trade debtors. Hence, this ground raised by the assessee is remitted to AO for fresh consideration.

Further held that the 'liability no longer required written back' is a part of the operating activity of the assessee, if it is relating to the operating expenses of the assessee. According the issue is remitted to AO/TPO for fresh consideration.

16. i2 Technologies Software (P.) Ltd. v. CIT(A) [2017] 83 taxmann.com 143 (Bangalore - Trib.)

Transfer Pricing - PLI - the value of ESOP has to be excluded from cost

In this case, the AE provided certain fixed assets on free of cost basis and did not charge the assessee company for stock option granted to the employees of the company. The TPO proposed that the amount representing this expenditure should be included in the value of total cost for determining ALP. The assessee argued that this was notional expenditure which would not qualify for costs.

Held that when an assessee is receiving remuneration on cost plus basis from its AE then by reducing the cost the assessee, in fact, it reduces its income also and therefore, this aspect has to be examined and decided as to whether the allegation of the TPO is correct or not that the assessee has suppressed its cost by not including the cost to its AE on account of administrative and management support services and for user of various fixed assets received from its AE free of cost. The TPO had also alleged that the assessee had not accounted for its cost regarding stock option granted to the employees of the assessee company by its AE and no doubt, the amount of Rs. 2.00 Crores added by the AO also includes the value in respect of such ESOP as well as cost of administrative and management support services received by its AE and the amount payable for using assets of AE. Regarding the value of ESOP, it is held in various Tribunal orders that it is not a part of operating cost and therefore, the value of ESOP has to be excluded from the amount of Rs.2.00 Crores worked out by the TPO as cost of these benefits received by the assessee from its AE without paying anything. Since its working is not available on record, this matter has to go back to the file of AO/TPO for fresh decision in the light of above discussion after providing adequate opportunity of being heard to the assessee.

17. Dy. CIT v. Calance Software (P.) Ltd. [2017] 82 taxmann.com 390 (Delhi - Trib.)

Transfer Pricing - ALP - where the services rendered by the assessee to the AE are exactly the same as, in effect, rendered by the AE to the independent transaction, the price charged for the same service by the AE to the independent end customer is thus the best CUP input in respect of such a back to back transaction

Held that, so far as the back to back transactions are concerned, the services rendered by the assessee to the AE are exactly the same as, in effect, rendered by the AE to the independent transaction. The price charged for the same service by the AE to the independent end customer is thus the best CUP input in respect of such a back to back transaction. If a unit sells a product to its AE for INR 100 and the AE sells the same product to an independent enterprise for INR 100, the intra AE transaction cannot but be termed as the arm's length transaction. The stand of the revenue however is that, as evident from FAR analysis, the functions performed by the Calance US are far more comprehensive, the assets employed by Calance US are much more and risks assumed are much higher. What is, however, overlooked that this FAR analysis has to be with respect to the particular transaction, and when transaction is exactly the same, there cannot be any occasion for the FAR of the transaction being any different. In principle, thus, so far as back to back transactions at the same price are concerned-whether between the AEs or by the AE to the end customer independent enterprise, these are inherently arm's length transactions on the basis of CUP analysis. The distinction drawn by the TPO on the basis of FAR analysis of the enterprise rather than the transaction, which is sought to be justified before by the revenue, is a distinction without any difference.

It is also incorrect to proceed on the basis, as has been done by the TPO, that when TNMM inputs are available, the application of CUP can be rejected. CUP is not a residuary method. As a matter of fact, when perfect CUP inputs are available- as in this case in respect of back to back transaction, that is the best and inherently most suitable method, as it is a direct method and it hardly leaves any scope for distortion of results by extraneous factors.

18. Dr. Reddy's Laboratories Ltd. v. Addl.CIT [2017] 81 taxmann.com 398 (Hyderabad - Trib.)

Transfer Pricing - Profit Sharing - it is not necessary that decision taken by entrepreneur in the interests of business should always result in higher benefit to the assessee. If it is proved that payment is made in the interests of the business, though the benefit is not proximate, an assessee is entitled to claim deduction of expenditure.

Dr. Reddy's Laboratories Limited ('DRL India' or 'Appellant') is engaged in the manufacturing and trading of pharmaceutical products mainly generic drugs. Generic drugs are finished pharmaceutical products which are ready for consumption by the patient. These drugs are required to meet the United States Food and Drug Administration (U.S. FDA) standards for selling the product in USA. All the manufactures that sell products in United States are subjected to extensive regulation by U.S. Federal Government and U.S. FDA. DRL India filed an Abbreviated New Drug Application ('ANDA') for the drug namely "Sumatriptan" (which is used in the treatment of migraine headaches) before the U.S. FDA for selling the drug in United States. Subsequently, DRL India has got approval to manufacture the developed product in India and sell product in USA. However, GlaxoSmithKline (GSK) is already having patent rights as original Innovator for similar kind of product and marketing the drug under the brand name 'Imitrex' in USA. As the patent period has not expired, GSK has filed a patent infringement petition against DRL India before the US Federal Courts. Subsequently, GSK and DRL India and its group have entered into a settlement agreement to settle matter out of Court to avoid litigation in USA.

As per the settlement agreement, GSK, DRL India and Dr. Reddy's Laboratories Inc., US (DRL US) entered into supply and distribution agreement of the drug "Sumatriptan". Pursuant to this agreement GSK authorized DRL US to launch the product as an authorized generic agent during the unexpired patent period. Pursuant to the court settlement GSK will exclusively manufacture the drug for DRL India. Further, DRL India is required to undertake the product liability insurance for not less than USD 25 million and price fall risk as per the settlement agreement.

As DRL India does not have marketing network in USA, DRL India entered into agreement with DRL US which is having a strong distribution network in United States as Distributor, which in turn markets the product manufactured by GSK in United States. As per the said agreement, DRL US retain 50% of the profits earned on marking the product in USA and the balance 50% profit would be transferred to DRL India as a compensation for losing the manufacturing facility of the drug developed by DRL India, which would have been otherwise manufactured by DRL India.

Further DRL India has approached DRL Swiss to take product liability insurance and shelf-stock adjustment risk (i.e. risk of price fall after completion of exclusive period) because of its inability to take insurance from Indian Insurance Companies for an amount of USD 25 Million and entered into agreement with DRL Swiss. As against this agreement, DRL India paid compensation of 25% of the profits to DRL Swiss for undertaking the Insurance for product liability and shelf-stock adjustments ('SSA') risk.

During the Assessment Proceedings u/s. 143(3) for the AY 2009-10, the Assessing Officer ('AO') has not questioned the transaction of profit share transferred to DRL Swiss. However, the AO has requested the Disputes Resolution Panel ('DRP') requiring the DRP to look back into the transaction again. Accordingly, DRP issued a show cause notice u/s. 37(1) and made an addition of Rs. 159 crores towards disallowance u/s. 92CA and u/s. 37(1) of the Act on the amounts transferred to DRL Swiss.

Held that the main plea of the assessee is that it does not have any marketing net work in USA whereas DRL US has a strong distribution net work and therefore, they market the product manufactured by GSK. Therefore, DRL, USA was entitled to 50% share of profit. Assessee i.e., DRL, India was allowed to get a compensation of 50% profit for loosing the manufacturing facility of the drug developed by it. However, to protect itself from running into losses DRL, India approached DRL, Swiss to take product liability insurance and Shelf Stock Adjustment (in short "SSA") risk. It is not in dispute that assessee entered into an agreement with DRL Swiss whereby DRL Swiss had undertaken the insurance for product liability and SSA risks. It is also not in dispute that DRL Swiss paid an amount of 22 Million Dollars towards 50% of legal and development cost incurred by DRL, India. DRL, SA had also incurred expenditure to the extent of 13 Million dollars towards SSA. As rightly pointed out by the Assessee there are restrictions for an Indian Company to take any General Insurance Policy outside India unless there is specific approval from Central Government. Since DRL, SA had undertaking the product liability insurance as well as SSA risk of 50% it cannot be said that DRL SA had not rendered any service to earn 25% share out of profits.

The contention of the Revenue is that DRL, SA has come into existence in 2007 and there is no reason as to why it should reimburse 50% costs of R & D expenditure to DRL, India. It is also the case of the Revenue that the litigation with regard to who should manufacture the product and market in USA ended in a settlement in 2006 by which time DRL, USA was not even in existence and therefore, there was no need to share 50% of the costs by DRL SA, referrable to the litigation and R & D; Thus, it is a colourable device. However, it is not denied that DRL, SA made such payments.

R & D expenditure is ordinarily claimed by the assessee as a Revenue expenditure and as and when it is reimbursed the same would be treated as revenue expenditure in the hands of the assessee in the year of receipt; In the instant case, there is no dispute that DRL, SA has made the payment to the assessee apart from undertaking product liability insurance and liability of SSA. It is not necessary that decision taken by entrepreneur in the interests of business should always result in higher benefit to the assessee. If it is proved that payment is made in the interests of the business, though the benefit is not proximate, an assessee is entitled to claim deduction of expenditure. It is for the assessee to manage his affairs in a way which protects/shields it's business interests. Here is a case where the expenditure incurred by the assessee on R & D and obtaining manufacturing licence is nominal whereas there is a chance of making good profits during exclusivity period by marketing the product in USA. DRL SA had come forward to share 50% of R & D and legal expenses and was also prepared to undertake consideration. As a business entity assessee had taken a decision to enter into an agreement with DRL SA for sharing of profits. Such being the case, Revenue is not entitled to analyse the business decision from it's perspective.

It is not out of place to mention that the 'Tripartite Agreement' between DRL, US, GSK and DRL, India took place in 2006 but the need to enter into an agreement with DRL, SA arose only during the period of introduction of the drug i.e., before November/December, 2008. There is no dispute with regard to the fact that prior to that date the assessee already entered into an agreement with DRL, SA. It is thus seen that there is sufficient evidence to show that the assessee entered into an agreement with DRL, SA in the interests of business and once it is established that an expenditure is incurred for the purpose of business it is not always necessary to prove that assessee is assured of getting more profit than what is expended. In the instant case, assessee had not actually incurred any expenditure. On the contrary, DRL, SA come forward to share R & D expenditure and legal costs and also agreed to undertake the insurance liability and SSA risk. If there is no such arrangement, DRL, India would have borne the entire costs towards SSA which, in the instant case, was borne by DRL, SA in the A.Y. 2010-2011.

Having regard to the overall circumstances of the case, we are of the firm view that the sharing of profits between DRL, India and DRL SA is for bonafide business purposes and therefore, assessee is entitled to claim deduction on this count. It may not be out of place to mention that the A.O. was of the view that the assessee has a major role in product development and therefore, in the process of sharing profits between DRL US and DRL, India, assessee is entitled to larger share i.e., 60%. It is not in dispute that the DRL, US has undertaken the responsibility of warehousing and marketing the product in US territory which is the main role that requires to be played in selling a drug during the exclusivity period. Despite that assessee having initially done the Research and filed an abbreviated new drug application for the drug namely "Sumatripton" and got approval to manufacture and develop the product in India and to sell the same in USA, there was an agreement between DRL, US and DRL, India to share the profits equally. Under these circumstances, we are of the view that the DRP was justified in holding that the sharing of profits between India and US at 50%-50% cannot be questioned. As we have already stated herein above, out of 50% share that the assessee earned it had to part with a portion of the profit with the DRL SA for the detailed reasons set-out in the above paras. Having regard to the circumstances of the case, we are of the firm view that the agreement between DRL, India and DRL SA cannot be doubted.

19. Turner International India (P.) Ltd. v. Dy. CIT [2017] 82 taxmann.com 125 (Delhi)

Transfer Pricing - Assessment Order - where the AO fails to adhere to the mandatory requirement of Section 144C (1) of the Act and did not first pass a draft assessment order, it would result in invalidation of the final assessment order and the consequent demand notices and penalty proceedings.

The short ground on which final assessment orders and the consequent demand notices have been challenged by the assessee is that there was non-compliance with the mandatory provision contained in Section 144C(1) of the Act requiring the AO to first frame draft assessment orders. The contention of the revenue was that the failure to adhere to the mandatory requirement of issuing a draft assessment order under Section 144C (1) of the Act would, at best, be a curable defect. According to him the matter must be restored to the AO to pass a draft assessment order and for the Petitioner, thereafter, to pursue the matter before the DRP.

Held that the question whether the final assessment order stands vitiated for failure to adhere to the mandatory requirements of first passing draft assessment order in terms of Section 144C(1) of the Act is no longer *res intregra*. There is a long series of decisions [**International Air Transport Association v. Dy. CIT [2016] 241 Taxman 249/68 taxmann.com 246 (Bom.)**, **Vijay Television (P.) Ltd. v. Dispute Resolution Panel [2014] 369 ITR 113/225 Taxman 35/46 taxmann.com 100 (Mad.)**, **Zuari Cements Ltd. v. ACIT [WP No. 5557 of 2012, dated 21-2-2013], ESPN Star Sports Mauritius S.N.C. ET Compagnie v. Union of India [2016] 388 ITR 383/241 Taxman 38/68 taxmann.com 377 (Delhi) etc.]**. The legal position as explained in these decisions in unambiguous. The failure by the AO to adhere to the mandatory requirement of Section 144C (1) of the Act and first pass a draft assessment order would result in invalidation of the final assessment order and the consequent demand notices and penalty proceedings. For the aforementioned reasons, the final assessment orders dated 31st March, 2015 passed by the AO for AYs 2007-08 and 2008-09, the consequential demand notices issued by the AO and the initiation of penalty proceedings are hereby set aside.

20. Inno Estates (P.) Ltd. v. DRP [2017] 82 taxmann.com 477 (Madras)

Transfer Pricing - Assessment Order - Once the DRP has chosen to reject the objections either on merits or on the ground of delay, it goes without saying that resultant position of such rejection is nothing but confirmation of the draft order passed by the AO, as contemplated under Section 144C(8) of the said Act, and the petitioner is entitled to file an appeal before the Appellate Authority as contemplated under Section 246(1)(a) of the said Act and the Court is not inclined to entertain writ petition by going into the contentions raised on the merits of the matter by either parties.

The petitioner is a Private Limited Company engaged in the business of Real Estate Development of Residential Plots. The Transfer Pricing Officer, by order dated 27.01.2016, calculated the Arms Length Price as per the provisions of Section 92C (1) & (2) of the said Act and ordered adjustment in the income of the assessee amounting to Rs.3,67,55,978 towards excess interest paid on Compulsory Convertible Debentures. Adopting the said order passed by the Transfer Pricing Officer, the AO issued a draft assessment order under Section 144C (1) of the said Act on 29.03.2016. The draft assessment order was served on the authorised representative of the petitioner on 29.03.2016.

As per the provisions contained under Section 144C of the said Act, the petitioner has to file their objections before the Dispute Resolution Panel (DRP), if the petitioner is intended to object to the draft assessment order. Accordingly, the petitioner filed their objections before the DRP on 29.04.2016 as per Section 144C (2)(b) of the said Act. The AO is aware of the fact that such objections were filed before the DRP on 29.04.2016 i.e., after 30 days time limit. The DRP issued a hearing notice and during the course of hearing, the members of the DRP panel informed the petitioner that the draft assessment order was served on 29.03.2016 and the objection was filed beyond the period of 30 days. Since there was one day delay in filing the objections, the DRP, by order dated 10.11.2016, refused to condone the delay and thus, rejected the objections. The DRP had not issued any directions to the AO as contemplated under Section 144C (5) of the said Act. Pursuant to the above said order passed by the 1st respondent, a final assessment order under Section 144(3) r/w Section 144(C)(13) of the said Act was passed by the AO on 18.11.2016 by making the adjustment as proposed by the Transfer Pricing Officer. Thus, consequently a demand of Rs.1,76,32,760/- was made. As against the impugned proceedings, the petitioner has no other alternative remedy. Hence, this Writ petition is filed seeking for the relief as stated supra.

Held that a perusal of Section 144C(2) of the said Act would show that the assessee, on receipt of the draft order, shall file his objections within 30 days of the receipt of the draft order with Dispute resolution Panel and the Assessing officer. Only when no objections are received within the period specified under Sub- Section 2, the Assessing Officer shall complete the assessment on the basis of the draft order, as contemplated under Section 144(C) (3) of the said Act. In this case, by communication dated 27.04.2016, the petitioner, by attaching the entire set of documents filed before the DRP, asserted and made the Assessing Officer to believe that the objection was filed in time. Therefore, the AO is justified in deferring the matter till an order is passed by the DRP. At this juncture, it is to be noted that what is contemplated under Section 144C(2) is the filing of the objections by the assessee with the Dispute Resolution Panel, if he is not accepting the draft assessment order. Of course, the said provision also contemplates filing of such objection before the Assessing Officer as well. If such objection is filed in time, then the Dispute Resolution Panel alone shall proceed to decide the matter as provided under Section 144C(5)& (6) of the said Act. Therefore, the Assessing Officer cannot proceed to pass the final order till the Dispute Resolution Panel passes an order as stated supra. Once the objection is filed within the period of limitation, consideration of the same is vested only with the Dispute Resolution Panel as provided under Section 144C(5),(6),(7) & (8) of the said Act and as such the Assessing Officer cannot decide such objection. Therefore, filing of such objection before the Assessing Officer within time itself will not get over the period of limitation, if such filing before the Dispute Resolution Panel was after such period.

The next contention raised by the petitioner is that the order passed by the DRP does not contain any directions to the AO and therefore, the final order passed by th AO on 18.11.2016 cannot be treated as the one passed in accordance with Section 144C(13) of the said Act. I do not think the petitioner is justified in making such contention in view of sub-section 8 of Section 144C. A perusal of the above said provision of law would undoubtedly make it clear that the Dispute Resolution Panel may confirm, reduce or enhance the variation proposed in the draft order. It is not in dispute that the DRP rejected the objection filed by the petitioner on 10.11.2016, of course, on the ground that it is barred by limitation. Still it is an order rejecting the objections. Once, the DRP has chosen to reject the objections either on merits or on the ground of delay, it goes without saying that resultant position of such rejection is nothing but confirmation of the draft order passed by the AO respondent, as contemplated under Section 144C(8) of the said Act. Consequently, the final order passed by the AO on 18.11.2016 is certainly an order passed under Section 144C(13) of the said Act, more particularly, when the DRP in its order dated 10.11.2016 clearly stated that the directions are communication to the assessee and the departmental authorities as per the provision of Section 144C(5) of the said Act. Hence, the dismissal or rejection of the objection and communication of the same has to be treated and construed as a direction given to the Assessing Officer to complete the assessment as per draft order. Only when the panel chooses to reduce or enhance the variation proposed, it can give any specific directions. Therefore, I do not think that the petitioner is justified in contending that the final order is not an order passed under Section 144C(13) of the said Act.

The next question that would arise for consideration is as to what is the remedy available to the petitioner as against the order passed under Section 144C(13) of the said Act. I have already found that the final order passed by the AO dated 18.11.2016 is the one passed under Section 144C(13) of the said Act. I have also found that the said order was passed well within the period of limitation. In such a situation, the petitioner is entitled to file an appeal before the Appellate Authority as contemplated under Section 246(1)(a) of the said Act, which covers an order passed against the assessee under Section 144 of the said Act as well. When such statutory appellate remedy is available to the petitioner, this Court is not inclined to entertain this writ petition by going into the contentions raised on the merits of the matter by either parties. It is well settled that when a statutory appellate remedy is available, more particularly in fiscal matters, parties should not be permitted to resort to the remedy under Article 226 of the Constitution of India.

21. BNT Global (P.) Ltd. v. ITO [2017] 82 taxmann.com 459 (Mumbai - Trib.)

Transfer Pricing - Penalty for non furnishing of audit report - Transactions of share investment by the NRI Director of the assessee company falls within the ambit of section 92B of the Act and the failure on the part of the assessee to furnish the Audit Report in Form 3CEB from an Accountant in the prescribed proforma within the prescribed period, without reasonable cause, is a clear violation of the provisions of section 92E of the Act and therefore the levy of penalty under section 271BA of the Act is to be upheld

While competing the assessment, the Assessing Officer (AO) observed that since the assessee had entered into an international transaction receiving foreign inward remittance of Rs. 11,47,21,471/- from its Director as well as beneficial shareholder Shri Pawan Kumar Kaushik, an NRI, on account of share capital and share premium in the assessee company, it was required to file Audit Report in Form No. 3CEB in respect of the aforesaid international transactions. No adjustment/addition to the returned income was made. However, on account of the assessee's failure to file the Audit Report in Form 3CEB, the AO simultaneously initiated penalty proceedings and after considering the assessee's submissions, levied penalty of Rs. 1,00,000/- under section 271 BA of the Act. Aggrieved by the order levying penalty of Rs. 1,00,000/- under section 271BA of the Act, the assessee preferred an appeal before the CIT(A)-20, Mumbai, which was dismissed.

Held that in the case of international transactions, as laid out in section 92B of the Act, it is mandatory for a person entering into international transaction/transactions to furnish a report from an accountant setting forth the particulars of such international transaction(s). Section 92E of the Act mandates that every person who has entered into an international transaction/transactions during a previous year shall obtain a report from an accountant and furnish such report on or before the specified date in the prescribed proforma duly signed and verified in the prescribed manner by such accountant and setting forth such particulars as may be prescribed. As per the provisions of section 271BA of the Act, if any personal fails to furnish a report from an accountant as required by section 92E of the Act, the AO may direct that such person shall pay, by way of penalty a sum of Rs. 1,00,000/-.

Transactions of share investment, as entered into by the assessee in the case on hand, clearly fall within the ambit of the provisions of section 92E of the Act since the international transaction of investment in share capital of the assessee by the NRI Director of the assessee company falls within the ambit of section 92E of the Act. As laid out therein, it is mandatory for the person entering into an international transaction to file the Audit Report in Form 3CEB, duly prepared by an Accountant, setting out the particulars of such international transactions before the concerned authority within the time prescribed. The failure on the part of the assessee to furnish the Audit Report in Form 3CEB from an Accountant in the prescribed proforma within the prescribed period, without reasonable cause, is a clear violation of the provisions of section 92E of the Act and therefore the levy of penalty under section 271BA of the Act is to be upheld as it is clearly warranted in the factual and legal matrix of the case on hand. In coming to this view, the tribunal drawn support from the coordinate bench decision in case of **IL&FS Maritime Infrastructure Co. Ltd. v. Asstt. CIT [2013] 37 taxmann.com 297/144 ITD 559 (Mum.)** but distinguished decision of Bombay high court in the case of **Vodafone India Services (P.) Ltd. v. UOI [2014] 368 ITR 1/50 taxmann.com 300/[2015] 228 Taxman 25**.

Royalties & FTS

22. DIT v. A.P. Moller Maersk A/S [2017] 81 taxmann.com 479 (SC)

Indo-Danish DTAA - Fee for Technical Services - Supreme Court dismissed Special Leave Petition against the decision of Bombay High Court in the case of DIT (International Taxation) v. A.P. Moller Maersk A/S [2016] 76 taxmann.com 143 (Bom.) by following its earlier judgement given in the case of same assessee vide DIT v. A.P. Moller Maersk A S [2017] 78 taxmann.com 287 (SC).

In this case, the assessee is having its IT System, which is called the Maersk Net. As the assessee is in the business of shipping, chartering and related business, it has appointed agents in various countries for booking of cargo and servicing customers in those countries, preparing documentation etc. through these agents. Three agents are appointed in India for the said purpose. All these agents of the assessee, including the three agents in India, used the Maersk Net System. This system is a facility which enables the agents to access several information like tracking of cargo of a customer, transportation schedule, customer information, documentation system and several other informations. For the sake of convenience of all these agents, a centralised system is maintained so that agents are not required to have the same system at their places to avoid unnecessary cost. The system comprises of booking and communication software, hardware and a data communications network. The system is, thus, integral part of the international shipping business of the assessee and runs on a combination of mainframe and non-mainframe servers located in Denmark. Expenditure which is incurred for running this business is shared by all the agents. In this manner, the systems enable the agents to co-ordinate cargos and ports of call for its fleet. It is clearly held that no technical services are provided by the assessee to the agents. On these facts it was held that, by no stretch of imagination, payments made by the agents can be treated as fee for technical service. It is in the nature of reimbursement of cost whereby the three agents paid their proportionate share of the expenses incurred on these said systems and for maintaining those systems. It is reemphasised that neither the AO nor the CIT (A) has stated that there was any profit element embedded in the payments received by the assessee from its agents in India. Record shows that the assessee had given the calculations of the total costs and pro-rata division thereof among the agents for reimbursement. Not only that, the assessee have even submitted before the Transfer Pricing Officer that these payments were reimbursement in the hands of the assessee and the reimbursement was accepted as such at arm's length. Once the character of the payment is found to be in the nature of reimbursement of the expenses, it cannot be income chargeable to tax.

Capital Gain

23. DIT v. Vanenberg Facilities BV [2017] 82 taxmann.com 433 (Andhra Pradesh)

India Netherlands DTAA - Capital Gain - capital gain on alienation of shares by a foreign company to other foreign company, did not fall under Article 13(1) of the DTAA and the subject transaction are covered by the exemption afforded by Article 13(5) of the DTAA and the same would therefore not be taxable in India even the assessee was engaged in the business of providing infrastructure facilities for software development companies under the STP scheme and pursuant thereto, the value of its shares was derived principally from the said infrastructure facilities/ software park which were leased out to and used by the 100% EOU software companies.

The assessee company is incorporated in the Kingdom of Netherlands. The assessee company made investments in the equity share capital of an Indian company, Baan IT Park India Pvt Ltd., which was incorporated on 02.04.1997. The assessee company invested, in all, a sum of Rs.55,95,12,000/- in the said company from 14.08.1997 to 23.03.2000. During the financial year 2004-05, the assessee company sold all its shares in VITP Limited to Ascendas Property (Fund) India Pte Limited (hereinafter, Ascendas) for a consideration of Rs.224.50 crore in terms of the Share Purchase Agreement dated 17.12.2004. Before the payment of the entire sale consideration and during the pendency of the application of the assessee company under Section 197 of the Act, order dated 03.01.2005 was passed by the revenue under Section 195(2) of the Act directing Ascendas to deduct tax at source from the remittance of sale consideration and to deposit the same. Consequently, a sum of Rs.35.24 crore was withheld by Ascendas on 02.03.2005 from the payment of Rs.224.50 crore and deposited with the revenue. Further, as a sum of Rs.49,43,750/- was paid to the assessee company by Ascendas towards interest on delayed payment of sale consideration, a sum of Rs.20,67,476/- was deposited by Ascendas with the revenue on 22.03.2005 as tax deducted at source thereon. The assessee company filed its return of income claiming refund of the entire amount deducted towards tax at source and deposited into the Government account.

The case of the assessee company before the Assistant Director of Income Tax (International Taxation)-II, Hyderabad, the Assessing Officer (hereinafter, the AO), was that the transaction giving rise to the aforestated capital gains was not taxable in India as it was covered by Article 13 of the DTAA, which would override the local law, in terms of Section 90 of the Act. In the alternative, the assessee company claimed that as VITP Limited was registered under Section 10(23G) of the Act, the capital gains arising from transfer of its shares were exempt from taxation under the Act. As regards taxability of the interest paid to it by Ascendas, the assessee company claimed that payment and receipt thereof was in Netherlands and could not therefore be said to have accrued or arisen through or from any property in India or from any asset or source of income in India or through transfer of a capital asset situated in India.

By assessment order dated 25.02.2008 under Section 143(3) of the Act, the AO rejected all the three claims of the assessee company. As regards the first claim relating to the exemption claimed under the DTAA, the AO examined Article 13 thereof. The claim of the assessee company was that Article 13(4) and Article 13(5) of the DTAA dealt specifically with capital gains arising from transfer of shares and therefore, unless the transaction fell within the inclusive clauses therein, it could not be taxed in India. The assessee company claimed that in the light of the specific provisions made for capital gains arising out of transfer of shares in Articles 13(4) and 13(5), the same would override the general provisions in the other paragraphs of Article 13.

The assessee company stated that under Article 13(4) of the DTAA, capital gains arising from the sale of shares of an Indian company would be liable to tax in India only if the value of such shares is derived primarily from immovable property held by such Indian company, other than property in which its business is carried on. It pointed out that VITP Limited was engaged in the business of providing infrastructure facilities for software development companies under the STP scheme and pursuant thereto, the value of its shares was derived principally from the said infrastructure facilities/software park which were leased out to and used by the 100% EOU software companies. The assessee company therefore asserted that the immovable property owned by VITP Limited was used for the purpose of its business and therefore, the value of its shares was derived principally from the said immovable property. The capital gains arising from sale of such shares was therefore claimed to be exempt as per the exclusionary clause in Article 13(4) of the DTAA.

The assessment order dated 25.02.2008 reflects that this explanation of the assessee company found favour with the AO. This is evident from the fact that the AO observed, time and again, that there was no dispute regarding non-applicability of Article 13(4), which merely provided for taxation in India of capital gains in respect of transfer of shares whose value mainly comprised non-business immovable property located in India and that the provisions of Article 13(4) were therefore not applicable to the present facts. Having opined so, the AO went on to hold that such transfer of shares would fall within Article 13(1) of the DTAA as the shares partake the character of immovable property.

Held that, in the present case, it is fairly conceded by revenue that the finding of the AO, which was confirmed thereafter in appeal, that Article 13(1) of the DTAA would apply to the alienation of shares by the assessee company treating the same as sale of immovable property, was erroneous being contrary to the settled legal position, both as regards application of the definition of immovable property in the Act, as well as the legal status of a corporate entity when juxtaposed to its shareholders. That being so, it was well within the power of the Commissioner to exercise jurisdiction under Section 263 of the Act at the right time so as to set right this misconceived notion of the AO. However, no such exercise was undertaken within time. Notwithstanding the same, it was still open to the CIT(A) to exercise jurisdiction under the Explanation to Section 251(2) of the Act and set right this wrong. However, neither the AO, who did not choose to amend her blunder by raising this issue when called upon to submit a report, nor the CIT(A), who blindly accepted the finding of the AO that Article 13(1) of the DTAA would govern the transaction while approving her finding that Article 13(4) of the DTAA had no application, took remedial steps at the right time.

Even thereafter, it was open to the revenue to raise the issue before the Tribunal by filing cross-objections. Alas, at that stage also, the revenue did not choose to wake up. It is only before this Court that the issue as to whether the transaction in question would fall within Article 13(4) of the DTAA was raised, in the substantial questions of law framed in the grounds of appeal. In effect, the revenue now wants to fall back on the initial view taken by the AO in the show-cause notice dated 23.04.2007. Much water has flown under the bridge since that date as the AO, being satisfied with the reply of the assessee company under its letter dated 03.05.2007, accepted its plea that the exclusionary clause under Article 13(4) would apply to the transaction, contrary to her initial view and, thereupon, went on to arrive at the misconceived opinion that Article 13(1) of the DTAA would be applicable, by treating the sale of shares as equivalent to sale of immovable property. Therefore, notwithstanding the stray mention of Article 13(4) of the DTAA in the proceedings before the CIT(A) and thereafter, before the Tribunal, the irrefutable fact remains that the AO arrived at the considered conclusion that Article 13(4) would not apply to the transaction and that it would be taxable in India only under Article 13(1). This finding was confirmed in appeal and was never challenged before the Tribunal by way of cross-objections. It is therefore too late in the day for the revenue to introduce this new element in the third appeal before this Court.

Therefore, the Court is inclined to agree with the revenue that the question as to applicability of Article 13(4) of the DTAA would be a pure question of law. Whether immovable property from which the company's shares principally derived their value was property in which the business of the company was carried on or not is a question of fact. As rightly pointed out by assessee, this aspect of the matter was never put in issue, be it before the CIT(A) or before the Tribunal. The assessee company was therefore never put on notice that it had to tender evidence on this aspect. Without a factual finding as to whether the immovable property of VITP Limited was property in which its business was carried on, the question of applying one or the other parts of Article 13(4) at this stage would not arise. In consequence, the contention of the revenue that interpretation of Article 13(4) of the DTAA is purely a question of law does not merit acceptance. Therefore, the issue of applicability of Article 13(4) of the DTAA to the subject transaction, so as to make it taxable in India, cannot be permitted to be raised at this late stage.

Thus, the appeal would necessarily have to be restricted to the finding of the Tribunal that Article 13(1) of the DTAA had no application to the transaction. As we are not inclined to entertain the new issue as to applicability of Article 13(4) of the DTAA to the transaction, so as to make it taxable in India, the arguments advanced by both sides as well as the case law cited need no further discussion. That being so, as the Tribunal rightly held that alienation of shares by the assessee company to Ascendas did not fall under Article 13(1) of the DTAA and that the residuary clause in Article 13(5) thereof would have application, we confirm the finding of the Tribunal that the capital gains earned by the assessee company from the subject transaction are covered by the exemption afforded by Article 13(5) of the DTAA and the same would therefore not be taxable in India.

Withholding Tax

24. CIT v. Hero Motocorp Ltd. [2017] 81 taxmann.com 162 (Delhi)

Withholding of Tax - Export Commission v. Royalty - Where the export commission was in fact the monetisation of the negative covenant of the License and Technical Assistance Agreement viz., abstaining from exporting to territories outside India, the payment was not in the nature of payment of royalty or fee for technical services attracting disallowance under Section 40 (a) (i) of the Act.

Assessee is engaged in the business of manufacture and sale of motorcycles using technology licensed by Honda Motor Co.Ltd., Japan ('HMCL'). The Assessee set up its plant in the year 1984 to manufacture models of motorcycles by using know-how of HMCL through a Technical Collaboration Contract dated 24th January, 1984. Under the said agreement, the Assessee was provided with technical assistance not only for manufacture, assembly and service of the products but was also provided with information, drawings and designs for the setting up of the plant. The said agreement expired in 1994. On 2nd June, 1995 a License and Technical Assistance Agreement ('LTAA') was entered into between HMCL and the Assessee on fresh terms for a further period of ten years. By another LTAA dated 2nd June, 2004, the earlier LTAA was extended for an additional period of ten years. By the said LTAA, HMCL (described as Licensor) granted to the Assessee (described as Licensee) an "indivisible, non-transferable and exclusive right and license, without the right to grant sublicenses, to manufacture, assemble, sell and distribute the products and parts" during the term of the LTAA "within the Territory" (defined as India).

On 21st June, 2004 a separate Export Agreement ('EA') was entered into between HMCL and the Assessee whereby HMCL accorded consent to the Appellant to export specific models of two wheelers to certain countries on payment of export commission @ 5% of the FOB value of such exports. The Assessee explained that the payment of export commission was made by it to HMCL as consideration for HMCL according consent to the Assessee to export two wheelers in the specified overseas territories, which were earlier being supplied only by HMCL or its other affiliates.

As per revenue, there were two aspects to the payment by the Assessee of export commission. One was to treat it as an international transaction thereby entailing a transfer pricing ('TP') adjustment. The alternative approach of the Revenue was to disallow the payment of export commission under the general provisions of the Act. This was by construing the export commission as royalty which in turn would require the Assessee to deduct tax at source under Section 195 of the Act. The failure to do so would lead to the disallowance under Section 40 (a) (i) of the Act of the entire payment of the export commission as a deduction. The submissions on behalf of the Revenue hinge on having to treat the LTAA and EA as forming part of the same scheme of agreements, one in continuation of the other and which achieve the same result i.e., payments by the Assessee to the AE i.e., HMCL.

Held that, as rightly noted by the ITAT, the technical know-how was licensed by HMCL to the Assessee since 1984. This was continued in 1995 and then in 2004 by the LTAA dated 2nd June, 2004. The EA which was entered into on 21st June, 2004 could not therefore be said to be contemporaneous. Secondly, the specific clauses in the EA further bring out the nature of the transaction involved therein. The payment of the export commission was not without consideration. It permitted the Assessee to export specified two wheelers manufactured under the Hero Honda brand to the specified countries. Further, the Assessee did not have to pay for using the existing distribution and sales networks in those territories. The attempt at re-characterising the transaction as one involving payment of royalty overlooks the fact that the payment under the LTAA is treated by the Assessee itself as royalty. Such royalty is in effect paid even on the export consignments. Also, to view this as only benefitting the AE is to overlook the fact that not only has the Assessee benefitted in various ways as noted before, but it has also earned during the AY in question profits of Rs. 13.05 crores from exports.

In the above factual background and the specific wording of the clauses of both the LTAA and the EA, it is not possible to accept the contention that the export commission was in fact the monetisation of the negative covenant of the LTAA viz., abstaining from exporting to territories outside India. This argument at its best is ingenious but far removed from what the transaction in fact is. The consideration for the EA is clearly spelt out. Consequently, there was no question of there having to be an principal-agent relationship to justify the payment of the export commission. The amount spent on that score by the Assessee was for the benefit of its business and in fact resulted in a benefit. For all of the above reasons, the Court concluded that the payment of export commission by the Assessee to HMCL was not in the nature of payment of royalty or fee for technical services attracting disallowance under Section 40 (a) (i) of the Act. No substantial question of law arises from the said issue. The appeal is, accordingly, dismissed.

25. CIT v. Creative Infocity Ltd. [2017] 82 taxmann.com 356 (Gujarat)

Withholding of Tax - Royalty & FTS - where the payment made by the assessee towards supply of design and drawings to a non -resident architect firm was for outright purchase, it cannot be taxable as Royalty or FTS under Section 9(1) of the Income Tax Act.

In this case, the question before the Court was; whether in the facts and circumstances of the case, the payment made by the assessee towards supply of design and drawings to a non -resident architect firm (M/s. Naimisha Construction, USA) was outright purchase and not taxable as Royalty or FTS under Section 9(1) of the Income Tax Act ?

M/s. Naimisha got prepared the design and drawings through other non resident Architect- Bob Snow & Associates by way of outright sale and thereafter as per the agreement entered into with the assessee, M/s. Naimisha sold the design and drawings to the assessee. It was the contention of the revenue that the supply of design and drawings to the assessee was by way of Royalty and not was outright purchase by the assessee and therefore, the same was taxable under Section 9(1) of the Income Tax Act. It is the case on behalf of the revenue that transfer of such design and drawings to the assessee company was not an outright transfer towards sale, where all rights in the property were transferred by the non-resident to the assessee company. Even though M/s Naimisha Construction Inc USA, obtained the designs from M/s Bob Snow and Associates, Architect and in turn provided such designs to the assessee company, it is clear from clause 1.3 that the ownership rights were never transferred to the assessee company and hence it is not the case of outright sale.

Held that there are concurrent findings both by learned CIT(A) as well as learned Tribunal holding that (1) the assessee has purchased drawings from M/s. Naimisha Construction and not from Bob Snow & Associates; (2) that the payment made by the assessee towards supply of design and drawings to M/s. Naimisha was outright purchase and therefore, not taxable as Royalty. From the material on record, it appears that there was agreement between the assessee and M/s. Naimisha to provide detailed design and drawings for the project of - IT Park at Gandhinagar as per the agreement dated 5.6.2000. However, as per the requirement of the assessee, the said M/s. Naimisha Construction was required to supply the drawings and design prepared by Bob Snow & Associates. Even the payment has been made by assessee to M/s. Naimisha directly for supply of drawings and design. It is required to be noted that even "Bob Snow & Associates is not signatory to the agreement dated 5.6.2000 and agreement/contract is between the assessee and M/s. Naimisha only. Under the circumstances, the payment made by the assessee towards supply of design and drawings to M/s. Naimisha is rightly held to be outright purchase and not as a Royalty, therefore, not taxable as Royalty under Section 9(1) of the Income Tax Act.

Once it is held that the transaction between the assessee and M/s. Naimisha for supply of design and drawings was outright purchase, as held by the learned Tribunal in the case of **ITO vs. M/s. Heubach Colour Pvt Ltd in ITA No.489/AHD/2013**, the said transaction does not attract provision of Section 9 r/w Section 195 of the Act. At this stage, it is required to be noted that the decision of the Tribunal in the case of *Heubach Color Pvt Ltd* (*supra*) has attained the finality and revenue has not challenged the ratio laid down in the said decision. As observed and held by the Supreme Court in the case of *Union of India* v. *Kaumudini Narayan Dalal* reported in 249 ITR 375 (SC) as well as in the case of *Union of India* v. *Satish Panalal Shah* reported in 249 ITR 221 (SC), where the department has accepted the decision of the High Court in case of one assessee and no appeal has been filed against the said order, thereafter it would not be open for the department to challenge its correctness in case of other assessee without just cause. Therefore, once it is held that there is no income chargeable to tax in the hands of payee in India, the provision of Section 195 of the Act shall not be applicable.

World News

BRAZIL

1. Brazil Releases Guidance on Country-by-Country Reporting Obligations
May 15, 2017

Brazil released guidance on country-by-country (CbC) reporting. On December 29, 2016, Brazil published Normative Instruction No. 1681, requiring CbC reporting for fiscal years that begin on or after January 1, 2016, in compliance with BEPS Action 13.

Multinational groups with total consolidated revenue in the preceding fiscal year of at least R$2,260,000,000 (if the ultimate parent is tax resident in Brazil) or €750 million, or the local equivalent of the ultimate parent's resident tax jurisdiction as of January 31, 2015, are required to file a CbC report.

The first CbC report will apply for fiscal years beginning January 1, 2016 and ending December 31, 2016, and must be filed by July 31, 2017. If a group's ultimate parent has a fiscal period that either did not end in 2016 or has a closing date in 2016, but began in 2015, then this group is not required to file the CbC report in 2017.

Please see below for Brazil's guidance with respect to specific CbC reporting obligations.

- *In determining whether a group is exempt from filing the CbC report, should extraordinary revenues and gains from investment activities be included in the total consolidated revenue of the group?*
  - All revenue that is, or would be, reflected in the consolidated financial statements (e.g., depending on the applicable accounting standard) should be considered. For groups whose ultimate parent is resident in Brazil, which adopts the International Financial Reporting Standards (IFRS) as the accounting standard applicable to financial statements, these values should be taken into account for the calculation of the total consolidated revenue of the Brazilian multinational group and for determining its obligation to file the CbC report.
- *What are the requirements for an ultimate parent entity in fulfilling its CbC obligation?*
  - Inform the Brazilian Federal Revenue Service ("RFB") by completing the W100 Registry of the Fiscal Accounting Bookkeeping ("ECF").

* *This section is compiled by CA. Reetika Agarwal, who is working as an associate with Deepender Anil & Associates, Chartered Accountants, New Delhi.*

- File the CbC report by completing ECF W200, W250 and W300 Registers.
- *What are the obligations of a group entity that has been designated as a "substitute entity?"*
  - A Brazilian resident entity of the group, whose ultimate parent is resident outside Brazil, may be appointed by the group to deliver the CbC report to the Brazilian tax authorities if at least one of the following conditions is satisfied: (1) Ultimate parent is not required to deliver the CbC report in its resident tax jurisdiction; (2) ultimate parent's resident tax jurisdiction does not have a competent authority agreement with Brazil by the deadline for delivering the CbC report; (3) there has been a systemic failure of the ultimate parent's resident tax jurisdiction, and the RFB has notified the Brazilian tax resident entity of this failure.
- *What are the obligations for an entity that is neither the ultimate parent or the substitute entity?*
  - A Brazilian resident entity of the group must identify, upon completion of the ECF Registry W100, the ultimate parent and the reporting entity. The role of the reporting entity must be included.
- *What accounting standards should be adopted with respect to the CbC report?*
  - An ultimate parent that is a Brazilian tax resident should apply the IFRS accounting standard.

Source: https://tax.thomsonreuters.com/

EU

2. Understanding the OECD tax plan to address 'base erosion and profit shifting' – BEPS
June 29, 2017

Action to fight corporate tax avoidance has been deemed necessary in the OECD forum, with further impetus from the G20/OECD 'Base erosion and profit shifting' action plan (known as BEPS), initiated in 2013. The BEPS action plan has 15 actions, covering elements used in corporate tax-avoidance practices and aggressive tax-planning schemes and was endorsed in 2015. The 15 BEPS final reports are generally seen as a step in the fight against corporate tax avoidance. The action against BEPS is designed to be flexible, as a consequence of its adoption by consensus. Recommendations made in BEPS reports range from minimum standards to guidelines, and also putting in place an instrument to modify the provisions of tax treaties related to BEPS practices. Implementation is under way, and the follow-up and future of work to tackle BEPS is organised so as to provide a more inclusive framework able to involve more countries and build on cooperation between international organisations. Putting BEPS actions in place is progressing, in particular with the finalisation of the multilateral instrument aimed at implementing treaty changes envisaged in the BEPS actions. Similarly, progress is being made with regard to the implementation of the BEPS four minimum standards, and documents are being developed to support the implementation of measures addressing BEPS in lower capacity developing countries. A table noting the different fora and their participants is annexed to the briefing. This briefing updates an earlier edition, PE 580.911, of April 2016 (except the part on 'EU policy: How BEPS actions are translated' which is the subject of a forthcoming briefing).

Source: http://www.europarl.europa.eu/

3. Money laundering negotiations failed: Member States refuse to take consequences after Panama Papers
June 28, 2017

Today the last negotiation (trialogue) between the European Parliament, Council of Member States and European Commission failed to strike a deal for the 5th reform of the EU anti-money laundering directive (AMLD). The European Parliament voted in February 2017 an ambitious position to curb money laundering and financial crimes like tax evasion. The Parliament has been negotiating with the Maltese presidency in order to agree an improved legislative framework.

MEP Sven Giegold, financial and economic policy spokesperson of the Greens/EFA group commented:

"It is embarrassing to see the Member States putting national special interest above the fight against financial crimes. The loopholes in the enforcement of existing money laundering rules are a threat to European security and favours tax evasion.

It is unacceptable that member states want trusts to be regulated more lightly than companies even if they serve the same purposes to administer private wealth.

Lawyers, notaries and corporate service operators have to enforce anti-money laundering rules as strictly as banks. They have to be strictly and independently supervised.

The Council even demanded to weaken rules for politically exposed persons, so that the Maltese members of government would potentially no longer be subject to enhanced customer due diligence.

The Member States are even refusing to establish real estate registers which allow to find hidden wealth of *criminals. The UK, France, Italy and many other Member States have national land registers. The German government refuses to come to European standards although Italy has often complained that the German property market is a safe haven for Mafia money.*

We will put all our efforts into getting a better deal under the coming Estonian presidency. Member states should become serious to fight financial crime."

Please find below an overview of the state of the negotiations between European Parliament, Commission and Council after the latest trialogue of 28 June 2017:

Overview of the state of the negotiations as of 28 June 2017

Key Issue	European Parliament's position	State of the negotiation with Member states & Commission	Green assessment as of 28 June 2017
Public registers on the beneficial owners for companies (Art. 30)	Full public access to the information	Full public access achieved for profit-making companies through the company law directive. Information on beneficial owners of non-profit companies possibly publicly available under anti-money laundering directive	Well done if in the end also non-profit companies are covered
Public registers on the beneficial owners for trusts (Art. 31)	Equal treatment with companies – full registration of beneficial owners and public access to the information	Commission proposes to distinguish between trusts set up for commercial purposes (in public registers) through company law directive and "private" trusts (only legitimate interest access via anti-money laundering directive). European Parliament could agree with Commission. Council Presidency cannot accept this division and wants all sorts of trusts to be accessible only through legitimate interest – red line for them	Poor if in the end beneficial ownership information on trusts is kept non-public
Strawmen (Article 3)	Nominee directors shall not be accepted as beneficial owners. If the real beneficial owner of an entity cannot be identified, the business relationship has to be terminated	Council wants to allow that nominee directors can be identified as beneficial owners. No termination of business relationship in this case	Poor. Real beneficial owners shall not be allowed to hide behind strawmen
Politically exposed persons (PEPs) (Art. 20a)	Create public lists of national PEPs in all member states	Council suggests that PEPs from EU member states should not always be subject to enhanced customer due diligence (COM and EP disagree)	Not enough. Council proposal means that EU PEPs like the Maltese members of government found in the Panama Papers owning dodgy shell companies would not be subject to enhanced customer due diligence measures. This would mean a weakening of the existing law
National bank account registers (Article 32a)	Establish national registers and interconnect them including information about safe deposit boxes	Establish automated national mechanisms such as central registers or retrieval systems. Interconnect only registers. Inclusion of safe deposit boxes is agreed	Fail. Member States having only automated retrieval systems would not be included in a European centraly accessible bank account register

Key Issue	European Parliament's position	State of the negotiation with Member states & Commission	Green assessment as of 28 June 2017
Beneficial ownership information for securities, shares and other MifiD instruments (Article 32a – new)	Include information on beneficial owners for MiFID financial instruments in the bank account registers	Council wants to include beneficial ownership information only for PSD II payment services	Insufficient. Criminal money is not only stored in bank accounts but also in financial instruments administered in depots
Beneficial ownership information for real estate and land (Article 32b – new)	Creation of national registers for real estate and land with the perspective of interconnecting them	Council: connect only national registers which already exist	Not enough. Each Member State has to establish a national register. The EU register has to connect all member states' registers so that criminal money can be found accross borders
Threshold for identification of beneficial owners (Article 3)	Natural persons owning more than 10% of an entity shall be identified as beneficial owner	Commission proposal is to identify a natural person as beneficial owner if it owns more than 25% of an entity. The treshold shall be reduced to 10% only for passive non-financial entities. Member states insist that 25% remain in any case	No progress.
Enforcement of legislation in the member states (Art. 48a – new)	Audit power for Commission to assess Member States enforcement of the Directive and implementation of recommendations issued by the Commission	Commission suggests to include in the review clause (Article 65) the obligation for the Commission to report every three years on the actions taken by Member States. Council cannot accept audit rights for the Commission	Poor. A mere report done from the desk of the Commission is inappropriate to assess whether Member States fulfil their obligations in reality
Supervision of self-regulatory service providers such as lawyers, notaries, tax advisers (Article 48)	Member States shall ensure that all obliged entities are subject to independent and strict supervision	Commission proposal to draw up national lists of authorities that supervise obliged entities	Poor if this was the final result. Panama Papers have shown that self-supervision by lawyers and notaries is not effective at all
Golden Visas (Article 5a)	Third country nationals applying for citizenship or residence rights in a Member State (in exchange of capital transfers) should be subject to customer due diligence	Council is not keen to agree on the EP text. The Commission understands EP concerns but believes customer due diligence in AMLD is limited to obliged entities (and not to state authorities)	Not satisfying. Not discussed enough to find a compromise
High-risk third countries (Article 9)	Strengthen the criteria for identifying high-risk third countries and ask Commission to do an independent assessment despite solely relying on external information stemming from FATF	Commission proposal in line with demand from the Parliament. Council not willing to compromise	Insufficient. We need to improve the criteria to have a real European blacklist of countries with severe money laundering risks. As a minimum, the Commission should actively contribute to the work of FATF, Moneyval and IMF and make its input public

Key Issue	European Parliament's position	State of the negotiation with Member states & Commission	Green assessment as of 28 June 2017
Information on beneficial owners of life insurance contracts (Art. 32c – new)	Establish national registers for beneficial ownership information on life insurance contracts which can be used for tax avoidance and money laundering	Council not willing to compromise.	Unacceptable. We need at least an assessment by the Commission of the dimension of money laundering and tax evasion done through life insurance contracts including a legislative proposal to remedy the problem if needed
supranational money laundering risk assessments (Art. 6)	foresee consequences if a Member State does not comply with the recommendations of the Commission on deficiencies in addressing money laundering risk	Commission only proposes to require Member States to justify why they do not follow the Commission recommendations	Poor compromise proposal. If money laundern risks in Member States persist, the Commission has to have the right to take additional measures including to ask to terminate risky business

Source: http://www.sven-giegold.de/

4. Record penalty for Google: Europe proves its muscles against abuse of market power in the digital sector

June 27, 2017

EU Competition Commissioner Margrethe Vestager announced today that the EU Commission imposed a record penalty of 2.42 billion euro on Google. As the European competition authority, the EU Commission accuses Google, among other things, of preferring its own services in the shopping search engine and thus to discriminate against those of others. The EU Commission has been investigating allegations against the company since April 2015. The economic and financial policy spokesman for the Greens/EFA Group in the European Parliament, **Sven Giegold**, said:

„Europe proves its muscles against the abuse of market power in the digital economy . Strong action against the unfair practices of Google is the right path to fair competition in online shopping. EU Commissioner Vestager proves once again that she is not intimidated by excessive economic power. The EU Commission is the leading force in the fight against the abuse of dominant market positions in the digital sector. Google's case shows how important Europe is for the protection of small and medium-sized businesses.

More important than the penalty is that Google is adapting its business practices. Fair competition in the digital sector necessitates the same conditions for all actors. It is a serious abuse of market power when Google pushes its own products in the search results ahead of others. Google has to ensure now equal opportunities in its shopping search. The Google case also shows how much we need a joint supervision in Europe for digital mega companies, which is modeled on the Common European banking supervisor."

Source: http://www.sven-giegold.de/

Here are some of the largest fines dished out by the EU

As of June 21, the European Union Commission has imposed fines totalling 8.472 billion euros ($9.54 billion) on businesses between 2013 and 2017 for breaking competition rules.

The lowest year was 2015, when just 364 million euros in fines were imposed, while the most came in 2016 with 3.726 billion euros, according to statistics from the EU commission.

If you go back and include all years since 1990, the total amount of fines imposed increases to 26.75 billion euros.

On Tuesday, Margrethe Vestager, the EU's competition commissioner, announced a record 2.42 billion euro fine on Google's parent Alphabet for abusing its monopoly over internet searches.

CNBC looks back at some of the largest fines handed out by the EU Commission.

Truck producers – 2.93 billion euros

In July 2016, the Commission fined MAN, Volvo/Renault, Daimler, Iveco, and DAF a total of 2.93 billion euros for forming a cartel and colluding on truck prices for 14 years.

The largest individual fine was on Daimler for 1.008 billion euros. DAF was hit with a fine of 752 million euros, while Volvo/Renault was fined 670 million euros.

„It is not acceptable that MAN, Volvo/Renault, Daimler, Iveco and DAF, which together account for around 9 out of every 10 medium and heavy trucks produced in Europe, were part of a cartel instead of competing with each other," said Vestager in a press release.

„For 14 years they colluded on the pricing and on passing on the costs for meeting environmental standards to customers."

Car glass producers – 1.35 billion euros

In November 2008, several car glass producers were hit with a cartel fine for illegal market sharing and exchanging commercially sensitive information.

The Competition Commissioner Neelie Kroes said the companies Asahi, Pilkington, Saint-Gobain and Soliver „cheated the car industry and car buyers for five years in a market worth two billion euros in the last year of the cartel."

French firm Saint-Gobain received the largest fine of 880 million euros, while U.K. firm Pilkington was hit with a fine of 357 million euros. Japanese company Asahi's fine was reduced by 50 percent to 113.5 million due to leniency, while Blegium's Soliver received a fine of just 4.4 million euros.

Intel – 1.06 billion euros

Intel was imposed with a fine in May 2009, for abusing its market dominance on central processing units (CPUs). Between 2002 and 2007, the Commission said Intel committed antitrust practices in the x86 CPU market, by giving rebates to manufacturers on the condition they bought all their CPUs from Intel and by making direct payments to a major retailer so it would only stock computers with Intel's CPUs.

Microsoft – 899 million euros AND 561 million euros

Microsoft has been in trouble with the Commission on several occasions. In 2004, the Commission ruled that Microsoft had abused its market dominance and had to disclose documentation allowing non-Microsoft servers to work Windows computers and services.

However, in February 2008, the Commission fined Microsoft nearly 900 million euros for charging „unreasonable" royalty fees for this information between 2004 and 2007.

Then, in March 2013, another fine of 561 million euros was imposed on Microsoft, this time for failing to comply with the Commission's ruling that it had to allow users to more easily choose a preferred web browser.

Around 15 million Windows users in the EU between May 2011 and July 2012 were not offered this choice, leading to the fine, according to the Commission.

Telefonica – 151 million euros

Spanish telecom Telfonica received a fine of 151 million euros in July 2007 for setting unfair prices for five years in the Spanish broadband market, according to the Commission.

"Spanish consumers are paying far more than the average for high-speed Internet access and many have chosen not to pay that price," Competition Commissioner Neelie Kroes said in a press release at the time.

„The margin squeeze that Telefónica imposed on its competitors not only raised their costs, but also harmed customers significantly."

Facebook – 110 million euros

The European Commission fined Facebook for 110 million euros in May this year in relation to its takeover of WhatsApp.

Facebook acquired the messaging service in 2014 for $19 billion, but provided the Commission with misleading information about the acquisition, breaking EU merger rules. EU Commissioner Margrethe Vestager described the fine as „proportionate and (a) deterrent" in a statement.

Special mention: Apple – 13 billion euros (in unpaid taxes)

This wasn't a fine, but an order to pay taxes. In August 2016 the Commission ruled that tech giant Apple had received illegal tax benefits from Ireland worth up to 13 billion euros.

An investigation by the Commission into State aid found that favorable tax rulings issued by Ireland to Apple meant the company „paid an effective corporate tax rate that declined from 1 percent in 2003 to 0.005 percent in 2014 on the profits of Apple Sales International," according to the Commission.

Ireland was ordered to recover the unpaid tax from Apple, plus interest.

Source: http://www.cnbc.com/

5. **France: Congo President's Daughter Charged With Money Laundering**

June 26, 2017

French authorities charged the daughter and son-in-law of Congo's President with "money laundering and misuse of public funds," as part of a larger investigation into the assets of three African presidential families, media reported Sunday.

Neuilly-sur-Seine, Paris (Photo: AntonyB, CC BY-SA 3.0)Julienne Sassou Nguesso, 50, and her husband, Guy Johnson, 53, are under investigation for purchasing a three million euros (US$ 3.4 million) home in 2006 in the Neuilly-sur-Seine, a ritzy Paris suburb.

Investigators believe the money might have come through an offshore company in the Seychelles and with the proceeds of shares Julienne Sassou Nguesso owned in a telecommunications company tied to „corruption operations," judicial sources told AFP.

Between 2007 and 2011, the couple spent 5.34 million euros (US$ 5.97 million) to renovate the seven-bedroom house with an indoor pool. This raised the total investment into the property to nearly 10 million euros (US$ 11.2 million).

When the French finance ministry's intelligence unit first alerted authorities about possible misconduct, investigators found that millions of dollars of state money had been funneled since 2007 from Brazzaville, the capital of Congo, to offshore accounts.

The money is believed to have funded the lavish lifestyles of presidential families in Congo, Equatorial Guinea and Gabon.

„This affair that has been going on for 10 years will be dismissed through totally legal procedures," Jean-Marie Viala, Congo's President's lawyer, told AFP.

Johnson is also under investigation for a 19 million euro (US$ 21 million) mansion that was bought by a real estate company in 2007, in another posh area of Paris, when he was the asset manager.

Source: https://www.occrp.org/

6. **New UK Laws Combat Money Laundering Through Scottish Limited Partnerships**

June 26, 2017

New UK legislation goes into effect Monday regulating Scottish Limited Partnerships (SLPs), a unique corporate structure that has been increasingly abused by money launderers.

The laws announced Friday by the Department for Business, Energy and Industrial Strategy will force about 30,000 SLPs to disclose their beneficial owners within the next 28 days, or face daily fines of up to £500 ($US 636).

The UK government bypassed the typically required 21 days of parliamentary consideration for the new laws in order to meet the June 26 deadline to comply with the European Union's fourth anti-money laundering directive.

SLPs have their own "legal personality," which means that they can hold assets, borrow money from banks and enter into contracts, according to the government press release. SLPs have also not had to previously disclose their owners' identities, which makes them particularly appealing to organized criminal groups.

Investigators from Ukraine to Brussels say that SLPs have been routinely used to help hide the proceeds from organized crime ranging from arms deals to bribery and child pornography, iNews reported.

In 2016, 71 percent of all new SLPs registered were controlled by anonymous companies based in secrecy jurisdictions like Belize, Seychelles and Dominica, according to a new joint *report* by Transparency International UK and Bellingcat.

SLPs "can have corporate partners based in secrecy jurisdictions while maintaining the perceived respectability of a UK-incorporated legal entity," the report reads. "As a result, they are the UK's own home-grown secrecy vehicle, which have played a key role in some of the most audacious and shocking money laundering schemes in recent history."

Investigative reporting by the OCCRP found that 113 SLPs played critical roles in the massive Russian Laundromat money laundering scheme that moved $20.8 billion out of Russian banks between January 2011 and October 2014.

The number of SLPs registered in Scotland rose by 430 percent over the past 10 years, according to Transparency International's reaction to the new laws.

Scottish lawmakers have long called for tougher regulations on SLPs, which despite their name are controlled by the UK government in Westminster. SLPs have also been the subject of an ongoing *investigation* by The Herald Scotland.

Source: https://www.occrp.org/

7. **Ireland vulnerable due to over-reliance on corporate tax – TASC**

Think tank warns change in corporate tax in EU and US could cause multinationals to go elsewhere

Jun 28, 2017

The think tank for action on social change (TASC) has warned that Ireland is vulnerable to EU and US tax and corporate regulations changes as a result of its over-reliance on a low corporate tax regime.

David Jacobson, DCU emeritus professor of economics, advised that multinational corporations could leave Ireland in large swathes if any alterations to EU or US tax policy are made.

"This is why Ireland should be seeking to develop alternative, indigenous means of generating employment in the advanced technology sectors like pharmaceuticals, computing and electronics," Prof Jacobson added.

Associate professor at Trinity College Dublin Jim Stewart agreed that having a low corporate tax regime at the core of Ireland's economic policy is a risky strategy. With a likely reduction of the corporate tax rate in both the UK and the US, huge pressure could be put on Ireland, Prof Stewart added.

Paul Sweeney, chair of TASC's economist network said that inappropriate tax policies have contributed to three major crises in the country since independence and that because politicians have a poor understanding of taxation, it's important that governments follow fiscal rules. However, he also said the EU's stability and growth pact was not fit for purpose.

Clamp down

Addressing a TASC conference on Thursday, Mr Sweeney called for an EU tax agency that would clamp down on tax havens and avoidance schemes used by multinationals.

A report by Mr Sweeney states that the last available figures available show that the Republic's tax breaks cost €21.35 billion in 2014, more than half the €41.3 billion actually collected in tax that year.

"We do not know how much additional tax is lost thanks to tax avoidance schemes never intended by policymakers," the report adds.

His report argues that the Government's extensive use of tax incentives created a situation where there has never been a free market in property in the Republic since the mid 'nineties.

Source: https://www.irishtimes.com/

8. **Google Wins Tax Case in France, Avoiding $1.3 Billion Bill**

July 12, 2017

Google emerged on Wednesday as the victor in its latest legal battle in Europe, after a French court said the technology behemoth did not have to pay $1.3 billion in back taxes.

At issue was whether Google had avoided taxes in France by routing sales in the country through an Irish-based subsidiary over a five-year period ending in 2010. An administrative court in Paris ruled that the Irish unit was not taxable in France.

Google has faced a series of legal challenges across Europe, with many of them focused on the company's tax and competitive practices.

Last month, European regulators levied a record $2.7 billion fine against Google for favoring its products over those of its competitors on its powerful search engine. European Union officials also brought charges against Android, Google's mobile operating system, saying the company had forced cellphone manufacturers to install Google services, like mobile search, on the phones.

Advertisement

Continue reading the main story

Other technology companies based in the United States, including Apple, have faced heightened scrutiny in Europe. Last August, the European Union ordered Apple to pay $14.5 billion in taxes in Ireland, contending that its deals with the Irish government had allowed the technology giant to pay virtually nothing on its European business in some years. Apple disputed the ruling and is appealing it.

Google employs 700 people in France through its subsidiary there, but the company used a division based in Ireland to sell French customers digital services like its well-known advertising platform AdWords, according to court filings. The case hinged on whether Google owed various taxes in France, even though it sold services from Ireland.

French tax authorities argued that Google's French employees were instrumental in selling the ad space, even if the contracts were made with the Irish subsidiary.

In its rulings on Wednesday, the court agreed with Google. It found that the Irish unit did not have a "stable" presence in France, meaning that the French tax authorities could not collect corporate income and withholding taxes from it. The court also decided that other taxes, including a value-added tax, did not apply.

The office of the French budget minister, Gérald Darmanin, said in a statement that the country's tax authorities planned to appeal the court's decision, "given the important stakes in these cases, and, more broadly, the issue of fair taxation, in France, of profits derived from the digital economy."

Google said in a statement that the rulings confirmed that it "abides by French tax law and international standards." The company added, "We remain committed to France and the growth of its digital economy."

Ireland, with its low corporate tax rates, has emerged as a popular location for multinational companies to route their sales through. Companies have used tax-planning techniques with names like the "Double Irish with a Dutch Sandwich" to lower their tax bills in Europe.

Source: https://www.nytimes.com/

9. Could Cristiano Ronaldo go to jail? Understanding his complex tax case

July 8, 2017

On July 31, Real Madrid's Cristiano Ronaldo will appear in a Spanish court to testify in a case in which he is accused of evading taxes.

A Spanish state prosecutor claimed Ronaldo failed to pay €14.7 million on image rights earned between 2011 and 2014 and that he used a shell company in the Virgin Islands to "create a screen in order to hide his total income."

A judge will decide if there are grounds to charge him with a crime and, if there are, the possibility exists that Ronaldo could be sentenced to time in prison.

ESPN FC addresses the main questions pertaining to the case and also asked experts with knowledge of the situation and its context to explain further: Maeve Buckley is director and co-owner of Irish sports marketing agency Line Up Sports; Jorge Sanchez is director of the international tax department at Madrid-based Montero Aramburu.

Q. What is going on between Ronaldo and the Spanish taxman?

Spain's Hacienda tax authorities believe that Ronaldo used a network of companies in various countries, including Ireland and the British Virgin Islands (BVI), to hide at least €78m in image rights -- or the expression of a personality in the public domain -- income between 2011 and 2014.

The investigators also believe that Ronaldo formed another BVI company in late 2014, which now owns his image rights for 2015-2020; the new company pays the player €75m in return.

The prosecution maintain that these arrangements were deliberately created to avoid paying the correct amount of tax in Spain, where the Portugal captain lives and works. This all became public knowledge due to El Mundo reporting, based on Football Leaks documents that were published last December.

In June, Hacienda investigators formulated an official complaint saying Ronaldo had not paid €14.7m due in taxes on his 2011-14 image rights income. Judge Monica Gomez Ferrer accepted that there could be a case to answer and called Ronaldo to her court in the Madrid suburb of Pozuelo on July 31.

"Cristiano Ronaldo will give evidence as an investigado alleged to have committed four crimes against the Spanish tax authority [Hacienda Publica]," Sanchez told ESPN FC. "The proceedings are in the preliminary investigation phase, to allow the judge to determine whether a criminal act took place, the nature of that criminal act, the individuals who took part in it, and the court which should judge it."

Q. Why do Ronaldo and his advisors appear confident they did nothing wrong?

Ronaldo's camp claim that he has fulfilled all his tax obligations, hence his agents Gestifute have issued numerous strongly worded denials. Meanwhile, sources close to the player claim the 32-year-old was so upset that he vowed never to play in Spain again.

The Portugal captain's advisors maintain that the majority of his image-rights income is earned abroad and therefore not liable for Spanish tax. They argue that his 2014 declaration informed the authorities of these revenues (reportedly €5.6m to cover 2009-20). But the prosecutors feel the full amount of tax due is at least €14.7m more, and that for the 2011-14 period only.

Q. What has David Beckham got to do with all this?

The so-called "Beckham Law" was introduced by the Spanish government in 2005 and permits new Spanish residents the choice of paying a flat 24 percent in tax, rather than the variable rates applicable to natives of the country. It also ensured that new residents' offshore earnings were exempt from Spanish taxes. Although the law has been revised a few times since its introduction, it means that Ronaldo may not have to pay Spanish tax on income earned outside the country.

"If the exploitation of Ronaldo's image rights had been done by a company which undertakes real economic activity, with the staff and resources necessary to do so, the income earned by this beneficial company from companies other than Real Madrid would have not been subject to Spanish taxes," Sanchez says.

Authorities in Spain argue that Multisports & Image Management (MIM) -- an Irish company to which Ronaldo's commercial partners are said to pay him -- is just a "brass plate" (or phantom) entity used to move money around, and therefore the court may find it does not actually undertake "real economic activity." MIM's name features heavily in documents submitted to the court by the Hacienda investigators.

Buckley says the optics do not look good for the four-time Ballon d'Or winner: "As he is such a global figure, there is a debate around whether it is about interpretation rather than deliberate fraud. But the use of brass plate companies in BVI and Ireland makes it look like they were very deliberately trying to put his earnings out of the reach of tax authorities in any jurisdiction."

Q. How does Ronaldo's situation differ from Lionel Messi's tax case?

Barcelona star Lionel Messi and his father Jorge were found guilty of tax fraud in July 2016 after it was found they had hidden image-rights income from the Spanish authorities. Messi was fined €3.6m and sentenced to 21 months in prison (which was suspended) for defrauding €4.1m between 2007-09.

Spain's supreme court upheld the sentences in May 2017. The Messi family had previously paid over at least €10m in back taxes and charges, long before their case made it to court.

"With Messi, there was a total failure to fill his tax obligations [on image rights income], whereas with Ronaldo the argument is more technical," Sanchez says. "On the other hand, the sums involved in Ronaldo's case are almost four times higher than those attributed to Messi. So while there are differences, there are also big similarities, so much so that the prosecutors have used the Supreme Court judgement against Messi to support their case against Ronaldo."

Q. What about other Jorge Mendes clients who are in trouble?

Many other Gestifute clients who have spent time in La Liga, including Jose Mourinho, Fabio Coentrao, Pepe, Angel Di Maria and Radamel Falcao, have had questions raised about their use of offshore companies to manage image-rights income -- such as Dublin-based MIM and Polaris.

Mendes himself is not under investigation but was called as a witness in judge Gomez Ferrer's court on June 27, in a case where investigators claim Falcao did not declare €5.6m of image-rights income when he was at Atletico Madrid from 2012-13.

Mendes told the court that he had a personal ownership stake in Polaris but that neither he, nor any of his staff, have any involvement whatsoever in tax issues, rather they deal solely with contract negotiations and sponsorship agreements.

"The Supreme Court's judgement in the Messi case found it 'difficult to understand' how his tax and financial advisors could have not been accused neither by the public prosecutor nor by the state attorney as it has been evidenced that they advised the player on how to evade taxes," Sanchez says.

Q. What about the British angle?

Gestifute and Ronaldo's lawyers at Baker & McKenzie have both maintained that Ronaldo has kept the same tax structure accepted by the British authorities HMRC when he was at Manchester United, and therefore the issue with Hacienda is merely a misunderstanding.

However, Sanchez says the documents submitted to the court by the prosecution might not back up that stance: "It has been shown that the current structure was created when Cristiano moved to Spain, and did not exist previously."

Q. What about Ronaldo's reaction?

Reports say that Ronaldo does not intend to make any advanced payment or accept any wrongdoing ahead of his court appearance. Although sources close to the player have started to soften his initial stance toward definitely leaving Spain, there is no indication yet that he will follow the example set by Messi (and Di Maria and Coentrao) and just pay whatever the Hacienda prosecutors ask.

"If a client of mine were in a similar situation I would advise them to face up to the situation, accept the fine, try and minimise the situation, and move on," Buckley says. "Messi has more or less managed that. The risk here is that Ronaldo's strategy backfires, and people want to see him pay up, at least a fine, or perhaps more."

Q. Could Ronaldo go to jail?

Should Ronaldo admit to wrongdoing in court and hand over back taxes, interest and fines of approximately €50m, his offence would likely drop down the scale from "aggravated" to "general."

A guilty verdict for an aggravated tax crime means a mandatory jail time of two to six years, while conviction of the lesser offence brings a suspended sentence.

"Prison is a completely real possibility," Sanchez says. "If Cristiano admits to the details in front of the judge within two months after being accused, and pays over the amounts allegedly defrauded, his punishment could be reduced. This regularisation of the situation would probably be the most sensible way of starting the proceedings."

Source: http://www.espn.in/

10. Rangers tax case: supreme court rules in favour of HMRC

July 5, 2017

Court rules payments via employee benefit trusts are taxable income, with implications for many other tax avoidance cases

Companies that paid staff via "contrived" employee benefit trusts have been urged to come forward, after HM Revenue & Customs scored a landmark victory in a tax avoidance case against the former incarnation of Rangers football club.

Experts warned there were likely to be "dramatic" consequences for businesses that used the elaborate schemes, after a unanimous verdict handed down by five supreme court judges.

The case concerned the use by the Glasgow-based football club of employee benefit trusts (EBTs) to funnel £50m of payments to employees from 2001.

Payments made via EBTs were agreed in "side letters", which were separate agreements to employment contracts and were hidden from the taxman and the football authorities.

Lord Hodge and four fellow judges agreed with HMRC's contention that any payments made through EBTs should be considered taxable income rather than loans.

The verdict given by the highest court in Britain followed an appeal by BDO accountants, which acted as liquidator to Rangers when the club went bust over an unrelated tax debt in 2012.

Legislation was brought forward in 2010 to crack down on EBTs, with companies offered the chance to reach a settlement over unpaid taxes, but HMRC carried on pursuing firms that did not do so. Companies that still have not come forward have now been urged to do so after the binding ruling from the supreme court on the use of EBTs.

"This decision has wide-ranging implications for other avoidance cases and we encourage anyone who's tried to avoid tax on their earnings to now agree with us the tax owed," said David Richardson, director general of HMRC's customer compliance group.

"HMRC will always challenge contrived arrangements that try to deliver tax advantages never intended by parliament."

Andy Wood, technical director of Enterprise Tax Consultants, said HMRC's victory was likely to have dramatic implications for firms that used EBTs and also for football clubs' use of "image rights" to pay players.

"It gives HMRC the authority to pursue them for income tax without the need to embark on a further series of legal actions," he said.

"The process of issuing follower notices to recoup payment of what is expected to be tens of millions of pounds in income tax could begin almost immediately. In addition I have no doubt that HMRC will feel emboldened by the judgment as it expands its ongoing enquiries into football's use of image rights payments."

The news that Rangers were found to have used employee benefit trusts to pay players came hard on the heels of one of the Ibrox club's most humiliating nights

The ruling will not hit Rangers FC, already suffering one of the most embarrassing weeks in its history after being dumped out of the

Europa League by Luxembourg's fourth-best team Progrès Niederkorn.

This is because the case was brought against RFC2012, the rump entity left over from 2012, when Rangers went bust amid a separate tax dispute that saw its assets transferred to a new entity. But creditors of the former company are now likely to see any payouts they hoped to receive from its assets slashed.

Former Rangers chairman Sir David Murray said he was "hugely disappointed" with the verdict.

He said: "The decision will be greeted with dismay by the ordinary creditors of the club, many of which are small businesses, who will now receive a much lower distribution in the liquidation of the club [...] than would otherwise have been the case."

Source: https://www.theguardian.com/

JAPAN

10. Signing of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting

June 08, 2017

1. On June 7 (Paris time), Mr. Kentaro Sonoura, State Minister for Foreign Affairs attended the signing ceremony for the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (Convention to Implement Measures to Prevent BEPS) held in the Organisation for Economic Cooperation and Development (OECD) headquarters in Paris and signed the Convention.
2. The Convention is intended to introduce the tax treaty related measures, which are part of the measures developed under the base erosion and profit shifting (BEPS) project in order to prevent BEPS, into the existing tax treaties between the Parties to the Convention. The Convention enables the Parties to implement the tax treaty related measures to prevent BEPS with respect to a large number of their existing tax treaties at the same time and in an efficient manner.
3. The final reports of the BEPS project, published in October 2015, have recommended a wide variety of measures to tackle international tax avoidance conducted by multinational enterprises. Based on the recommendation under Action 15 of the BEPS project, the Convention was drafted through negotiations in which approximately 100 jurisdictions including Japan participated, was adopted at the negotiating meeting on November 24, 2016 and then was opened for signature for all countries and the specified territories on December 31, 2016. Since the true value of the BEPS project would be fully realized by being implemented in a globally coordinated way, the Government of Japan, as one of the countries which has taken the initiative in the BEPS project, has decided to sign the Convention at the signing ceremony held with the participation of 67 jurisdictions with a view to taking appropriate steps toward proper implementation of the achievement of the BEPS project.
4. The deposit of the instruments of ratification, acceptance or approval by five jurisdictions is required for the Convention to enter into force and the Convention will enter into force with respect to the five jurisdictions on the expiry of a specified period after the deposit of the fifth instrument. With respect to each of jurisdictions depositing the instrument of ratification, acceptance or approval thereafter, the Convention will enter into force on the expiry of a specified period after its deposit. The Convention will enter into effect with respect to a tax agreement covered by the Convention on the expiry of a specified period after the Convention has entered into force with respect to all of the parties to the tax agreement. In Japan, the approval of the Convention by the Diet is necessary in order for Japan to deposit such an instrument.

Source: http://www.mofa.go.jp

11. Agreement in principle on New Tax Convention between Japan and the Kingdom of Denmark

May 15, 2017

1. The representatives of the Government of Japan and the Government of the Kingdom of Denmark have agreed in principle on the new Convention replacing the Convention between Japan and the Kingdom of Denmark for the Avoidance of Double Taxation with respect to Taxes on Income which entered into force in 1968.

2. This new Convention reinforces or introduces provisions for the purposes of clarifying the scope of taxation in the two countries, eliminating international double taxation and preventing tax evasion and avoidance and is expected to promote further mutual investments and economic exchanges between the two countries.
3. This new Convention will be signed after the final text has been fixed and the necessary internal procedures have been completed by each of the two Governments. Thereafter, the new Convention will enter into force after the completion of the approval process in both countries (in the case of Japan, approval by the Diet is necessary).

Source: http://www.mofa.go.jp

12. Agreement in principle on Tax Convention between Japan and the Republic of Estonia

May 15, 2017

1. The representatives of the Government of Japan and the Government of the Republic of Estonia have agreed in principle on the tax convention between Japan and the Republic of Estonia.
2. The Convention includes provisions for the purposes of clarifying the scope of taxation in the two countries, eliminating international double taxation and preventing tax evasion and avoidance and is expected to promote further mutual investments and economic exchanges between the two countries.
3. The Convention will be signed after the final text has been fixed and the necessary internal procedures have been completed by each of the two Governments. Thereafter, the Convention will enter into force after the completion of the approval process in both countries (in the case of Japan, approval by the Diet).

Source: http://www.mofa.go.jp

INDIA

13. Ex Chief Justice & Eminent Legal Luminaries Slam Move By Govt To Curb Independence Of Tribunals

Hon'ble RM Lodha, the former Chief Justice of India, has come down heavily on the action of the Government in enacting the Tribunal Members Rules 2017.

The learned jurist is irked by the fact that the appointments of Members of the Tribunal would no longer be impartial and independent.

Under the said Rules, the Central Government has abrogated to itself the right to appoint, extend the tenure, and remove, the Hon'ble Members of the various Tribunals, including the ITAT.

"The government is one half of the parties contesting various cases in courts. So obviously, if the litigant appoints the adjudicator, then the decision making is seen to have been partial," Justice Lodha said.

He added that the "Tribunals have immense power over high-value transactions and it is important that they remain impartial".

A similar sentiment has been expressed by Senior Advocate Arvind Datar, the leading tax expert.

"Except the Chairperson of the National Company Law Appellate Tribunal (NCLAT), who can be removed by the Supreme Court, all other chairpersons can now be removed by the executive," he said, emphasizing that the Tribunals will not have any independence left.

Source: http://www.itatonline.org/

14. NDTV case: assessing officer was right in adding ₹642 crore, says ITAT

July 23, 2017

The Delhi Bench of the Income Tax Appellate Tribunal (ITAT) has upheld the Assessing Officer and the Dispute Resolution Panel's (DRP) order in the NDTV case, bringing to tax the ₹642 crore ($150 million) raised by the news broadcaster's Dutch subsidiary, followed by a series of restructuring transactions.

The AO and DRP order is related to assessment year 2009-10. The ITAT, has in its July 14 order, confirmed (endorsed) the AO move to add ₹642 crore to the income of NDTV by treating it as "unexplained money" under Section 69A of the income-tax law.

"We are of the opinion that the Assessing Officer has correctly made the addition of ₹642.54 crore by invoking Section 69A of the Act on account of money transferred by M/S Universal Studio International BV, which was routed to the coffers of the assessee (NDTV) by entering into a series of mergers and liquidation by payment of dividends, loans without any obligation for repayment," said the ITAT order, which was seen by BusinessLine. The Tribunal added in its order, running into 400 pages: "Hence, we do not find any infirmity in the order of the Assessing Officer as well as the Dispute Resolution Panel, and hence the addition of ₹642.54 crore in the hands of the assessee u/s 69 A is confirmed."

It also concluded, that the "amount of ₹642.54 crore represents the assessee's own taxable income, earned by it from undisclosed sources and the same is taxable.

The ITAT has also held that the transaction/ structuring has been used principally as a devise for the distribution or diversion of the sum to the Indian entity, and that the beneficial owner of the money is the assessee (NDTV).

Case details

The ITAT observed that share money was subscribed by a Bermuda-based group (investor company) in NDTV's Dutch subsidiary (investee company), and in the same year the investee company paid ₹643-crore dividend out of its securities premium account to another NDTV group company without payment of dividend to the investor company.

The Tribunal rejected NDTV's contention that since the money was received in the subsidiary, it cannot be taxed in the hands of the assesse (NDTV) as it was not party to the transaction. Also, the ITAT noted that in each and every agreement, the assessee was a party, and the subsidiary companies had almost the same set of directors.

Also, at that time, the Netherlands did not have any tax on distribution of dividends and there was no need of establishing substance in that jurisdiction, according to the ITAT order.

The order also noted that there was no business activity at the level of the investee company, which was in existence for less than a year.

Last week, in a BSE filing, NDTV said it will, "continue to fight this misguided case made by the ITD" and that it is exploring all the options available to it in accordance with law. While the company claimed there were numerous inconsistencies and contradictions in the ITAT order, it stated: "It is important to note that the ITAT has accepted that there was no round-tripping or money laundering, as was alleged by Income-Tax Department."

Source: http://www.thehindubusinessline.com/

15. Worst fears realised? Jersey shares 'old' records of trusts and foundations

June 28, 2017

Life's full of surprises, some pleasant, some not so much. Imagine you had undeclared offshore assets when the global financial crisis struck, and you've nervously watched the world move towards TJN 's proposal for multilateral, automatic information exchange. Until now you've probably felt ok, and that you had a choice between two moves. Either you could say 'Ok, the game's up – I'll use an amnesty or some kind of disclosure facility, and go straight'; or you could decide to keep hidden, using the new loopholes that are being actively promoted in Switzerland and elsewhere.

You probably weren't worrying too much about the past though. Information exchange will relate to existing holdings, so you just need to get things lined up before it kicks in (from September 2017 or after). But as India's Economic Times reports,

"The worst fear of those with secret offshore bank accounts and private trusts is coming true — some tax havens are ready to part with 'old' records and even details of trusts and foundations that no longer exist."

In this case some wealthy Indians may now be sleeping less peacefully. Just last month they might have thought they'd safely avoided scrutiny of their secret offshore bank accounts and trusts by shifting funds and assets out of Jersey before that jurisdiction signed an information sharing agreement with India, the India-Jersey Tax Information Exchange Agreement, which came into force in 2012.

Jersey has done something that will ring alarm bells among the world's wealthy wherever their accounts and assets may be. It's shared information with the Indian government on old, discretionary trusts with resident and non-resident Indians as beneficiaries. While we don't want to overhype these two examples where Jersey has shared information shared relating to just two families in Mumbai and Delhi, it demonstrates all too clearly for some that their belief was mistaken that the jurisdictions they quietly parked their money and assets in can't be pressured into sharing information on transactions entered into *before* the signing of information sharing agreements. And so those Indians that were advised to dismantle old offshore structures and move everything to jurisdictions like Dubai or Singapore may no longer be as safe as they thought.

While Jersey isn't the biggest offshore player for Indian wealth (Mauritius and Singapore have always been popular) it's long been a favourite as a conduit to London, particularly as a gateway to making property purchases. There's been a Bank of India branch in Jersey's Saint Helier for close to forty years, even though there is no Indian community on the island and Jersey is likely to be sitting on a huge backlog of dubious business stretching back many years. So kudos to Jersey, for going beyond the minimum necessary transparency.

What does this interesting development tell us? Well, the Common Reporting Standard is now in place. TJN's radical, utopian proposal has become the global standard. Secrecy is slowly being squeezed.

But does this signal a tidal wave of openness about past secrecy? Of course, India is politically very powerful. It represents a huge market from which the City of London and its satellite havens will not want to be excluded. Indian PM Modi was elected on an anti-corruption drive and it's possible that pressure was applied to the British government, which then applied pressure to Jersey. Would the same have been done for Malawi, or Ecuador?

As the article points out, this is the first time a tax haven has shared 'old' information. We'll see if this starts happening elsewhere. Meanwhile, the article points out that:

"Switzerland has been careful in ensuring compliance but at the same time maintaining client privacy. (It's another point that most Indians have moved money out of Switzerland to Dubai and elsewhere in the last few years)."

There's money to be made, and lost here. Tax to be paid, or not paid. It may be starting to become simpler for wealthy families to dispense with their wealth managers and lawyers and offshore intermediaries and just declare their assets like everyone else and be done with it – which among other things would tell us a great deal more about the true extent of inequality.

Source: http://www.taxjustice.net/

16. India's Advance Pricing Agreement regime Moves Forward with Signing of More APAs by CBDT

June 28, 2017

The Central Board of Direct Taxes (CBDT) entered into Five Unilateral Advance Pricing Agreement with Indian taxpayers during June, 2017. A Bilateral Advance Pricing Agreement (involving United Kingdom) was also signed during the month. The APA Scheme endeavours to provide certainty to taxpayers in the domain of transfer pricing by specifying the methods of pricing and determining the arm's length price of international transactions in advance for the maximum of five future years. Further, the taxpayer has the option to rollback the APA for four preceding years, as a result of which, tax certainty for a total period of nine years is provided. Since its inception, the APA scheme has attracted tremendous interest among Multi National Enterprises (MNEs). The APAs signed in June, 2017 pertain to healthcare, information technology and gaming/animation (media) sectors of the economy. The number of Unilateral APAs signed in the current financial year is now nine and the number of Bilateral APAs signed in the current financial year is one. With this, the total number of APAs signed since the commencement of the program till date stands at 162 (Unilateral-150 and Bilateral-12). The CBDT expects more APAs to be signed in the near future. The progress of the APA Scheme strengthens the Government's commitment to foster a non-adversarial tax regime.

Source: http://www.incometaxindia.gov.in/

17. Claiming foreign tax credit remains cumbersome

June 24, 2017

Indians working abroad are likely to pay taxes in both countries — where they are employed and back home, where they qualify to be a resident. One of the ways to eliminate such double taxation is by claiming credit for the taxes paid overseas. To avoid taxing an individual twice the government has entered into double taxation avoidance agreements (DTAA) with some countries. Even if a taxpayer is based in a country with which India has not signed a DTAA, the domestic tax laws do provide relief. While there have been provisions pertaining to claiming of foreign tax credit (FTC), practically it has been difficult to agree on credit claims with the tax department, as there are no uniform rules. This led to litigation. To standardise the norms on foreign income, the Central Board of Direct Taxes has recently notified norms

(Rule 128) and the documentation required to claim FTC. These provisions came into force from April 1, 2017. They would, therefore, be applicable from the financial year (FY) 2016-17 onwards. They provide guidance on various aspects of claiming FTC in India.

Claiming foreign tax credit

According to the new norms, FTC would be available only on income which is offered/ assessed to tax in the return of that particular year. In other words, if the income is offered in two different years, FTC will be allowed in respective years in the proportion of income offered to tax. For example, in case of countries where the tax year is a calendar year (say January 2017 to December 2017), the overseas income in India for such calendar year would be offered to tax in two different financial years. The income earned abroad between January and March and the FTC of taxes paid on such income would be available when filing returns of the financial year (FY) 2016-17 in India. Similarly, the remaining income (earned between April and December) and the FTC corresponding to such income would be available in FY18.

FTC will also be available only on the amount of income tax, surcharge and cess payable, and not against interest, fee or penalty, etc. If an individual has a tax dispute overseas, the tax credit will not be available on the disputed amount. But it would be allowed if the taxpayer provides evidence of the settlement and of discharge of liability and an undertaking that no refund has been claimed for such foreign taxes. Such evidence would have to be furnished within six months from the end of the month in which dispute are finally settled.

The FTC would be restricted to the extent of tax liability determined in India. The credit will be determined by converting the foreign currency at the telegraphic transfer buying rate on the last day of the month preceding the month in which such tax has been paid.

Submit proofs of taxes paid

Over the years, proof of taxes paid in the foreign country was required to be submitted only if the taxpayer's return is picked up for audit by the income tax authorities. Now, the taxpayer is required to provide documentary evidence on or before furnishing the return of income to claim FTC in his India tax return. It could be a certificate from tax authority or a certificate from a person responsible for deduction of such tax or a certificate by the taxpayer along with the proof of taxes deducted or paid.

An assessee also needs to furnish Form 67, which is a declaration by the taxpayer in respect of the FTC claimed (including income earned outside India and taxes paid there).

More clarity needed

The rules are in the right direction and attempt to bring uniformity in the documentation required for claiming FTC. They also bring consistency and uniformity in the process. However, certain practical issues still need to be addressed. Due to the difference in tax years of India and other countries, the details of actual overseas income and taxes paid are typically not available at the time of filing returns in India, as the overseas return has not been filed. It's not clear whether it is possible to file India tax return and submit Form 67 on the basis of estimated foreign income and taxes. Similarly, it's not mentioned whether the individual can revise Form 67 subsequently, based on the actual income and taxes paid once the foreign tax return is actually filed.

In many countries where the foreign taxes are paid as a whole (on all sources of income) and the break-up of the taxes paid against each source of income (such as dividend, capital gains, rental income etc.) is not available separately, it will be practically difficult to determine the amount of overseas taxes paid and compute foreign tax credit separately for each source of income. The rules also do not provide the mechanism to be followed if the certificate or foreign tax payment document is not in English. In addition, the tax department has recently notified the Income-tax return forms for FY 2016-17. However, there neither is no reference to Form 67 in the return forms nor is the Form 67 available online. Hence, at present, there is no clarity on submission of Form 67.

Source: http://www.business-standard.com

18. CBDT Notifies Rule 10CB for Secondary Adjustments under Section 92CE of IT Act, 1961

June 19, 2017

Rule 10CB for operationalsing the provisions of secondary adjustment has been notified by the Central Board of Direct Taxes on 15th June, 2017. It prescribes the time limit for repatriation of excess money and the rate of interest to be applied for computing the income in case of failure to repatriate the excess money within the prescribed time limit. Separate rates of interest have been provided for international transactions denominated in Indian currency and in foreign currency. The rates of interest are applicable on an annual basis.

The time limit of 90 days for repatriation of excess money shall begin only when the primary adjustments exceeding Rupees One Crore made in respect of Assessment Year 2017-18 or later, attains finality. Where the transfer pricing order is appealed against by the taxpayer, the time limit for repatriation shall commence only after the appeal is finalised by the appellate authority. The rule is available on the website of the Income-tax Department (www.incometaxindia.gov.in).

The Finance Act, 2017 inserted section 92CE in the Income-tax Act, 1961 with effect from 1st April, 2018 to provide for secondary adjustment by attributing income to the excess money lying in the hands of the associated enterprise, in order to make the actual allocation of funds consistent with that of the primary transfer pricing adjustment. The provision shall apply to primary adjustments exceeding Rupees One Crore made in respect of Assessment Year 2017-18 onwards.

Source: http://pib.nic.in/newsite

19. CBDT invites comments and suggestions on the Draft Notification in respect of foreign company said to be resident in India under Section 115JH of the Income-tax Act, 1961

June 19, 2017

Finance Act, 2016, inter alia, introduced special provisions in respect of foreign company said to be resident in India on account of Place of Effective Management (PoEM) by way of insertion of a new Chapter XII-BC consisting of Section 115JH in the Income-tax Act, 1961 (the Act) with effect from 1st April, 2017. Section 115JH of the Act, inter alia, provides that the Central Government may notify exception, modification and adaptation subject to which, provisions of the Act relating to computation of total income, treatment of unabsorbed depreciation, set off or carry forward and set off of losses, collection and recovery and special provisions relating to avoidance of tax shall apply in a case where a foreign company is said to be resident in India due to its PoEM being in India for the first time and the said company has never been resident in India before. It has been further provided that these transitional provisions would also cover any subsequent previous year upto the date of determination of POEM in an assessment proceedings. In this regard, draft notification providing for said exception, modification and adaptation has been framed and uploaded on the website of the Income-tax Department (www.incometaxindia.gov.in) for comments from stakeholders and general public. The comments and suggestion on the draft rules may be sent by 23rd June, 2017 electronically at the email address, dirtpl1@nic.in.

Source: http://www.incometaxindia.gov.in/

20. Black money: Switzerland ratifies automatic exchange of information with India

June 16, 2017

Switzerland on Friday ratified an automatic exchange of financial account information with India in order to facilitate immediate sharing of details about suspected black money, news agency PTI reported. Switzerland, who signed the agreement with 40 other jurisdictions, has however sought strict adherence to confidentiality and data security.

The Swiss Federal Council said that the implementation of the information exchange is planned for 2018 and that the first set of data exchange would happen in 2019. In this regard, the Council has reportedly adopted the dispatch on the introduction of the AEOI (Automatic Exchange of Information), a global convention for automatic information exchange on tax matters.

The Swiss Federal Council said it would soon notify the Indian government regarding the exact date from which the "automatic exchange" would begin. It added that it will prepare a situation report before the first exchange of data takes place somewhere around autumn 2019.

During a meeting on Friday, the council approved the draft notification adding that the decision was not subject to any referendum – meaning the implementation would not face any further bureaucratic delay.

For a long time, Switzerland has been considered a "safe haven" for black money stashed abroad by Indians. The decision by the Swiss Federal Council on the data exchange was reached after several rounds of negotiations between India and Switzerland. The decision was reportedly taken under the guidance of G20, OECD and other global organisations.

According to the council, the proposal to introduce AEOI was met with "widespread approval from the interested parties who voiced their opinions in the consultations". "In concrete terms, the AEOI will be activated with each individual state or territory by means of a specific federal decree within the framework of this dispatch," the council said.

The exchange of information will reportedly be carried out in accordance with the Multilateral Competent Authority Agreement (MCAA) on the Automatic Exchange of Financial Account Information.

"In the process, it will be checked whether the states and territories concerned effectively meet the requirements under the standard, especially those concerning confidentiality and data security. It is important for the Federal Council that a level playing field be created among states and that all major financial centres, in particular, be included. This year, Switzerland has introduced the AEOI with 38 states and territories, including all EU member states, and data will start to be exchanged with them in 2018," it added.

Source: http://indianexpress.com

21. Central Board of Direct Taxes notifies new Safe Harbour Regime [Notification No. 46/2017 [F. No. 370142/6/2017-TPL]

June 09, 2017

In order to reduce transfer pricing disputes, to provide certainty to taxpayers, to align safe harbour margins with industry standards and to enlarge the scope of safe harbour transactions, the Central Board of Direct Taxes has notified a new safe harbour regime based on the report of the Committee set up in this regard.

The salient features of the new Safe Harbour Regime are:

- It has come into effect from 1st of April, 2017, i.e. A.Y. 2017-18 and shall continue to remain in force for two immediately succeeding years thereafter, i.e. up to A.Y. 2019-2020.
- Assessees eligible under the present safe harbour regime up to AY 2017-18 shall also have the right to choose the safe harbour option most beneficial to them.
- A new category of transactions being "Receipt of Low Value-Adding Intra-Group Services" has been introduced.
- The new safe harbour regime is available for transactions limited to Rs. 200 crore in provision of software development services, provision of information technology-enabled services, provision of knowledge process outsourcing services, provision of contract research and development services wholly or partly relating to software development and provision of contract research and development services wholly or partly relating to generic pharmaceutical drugs.
- In respect of transactions involving provision of software development services and provision of information technology-enabled services, safe harbour margins have been reduced to peak rate of 18% from 22% in the previous regime. In respect of transactions involving provision of knowledge process outsourcing services, a graded structure of 3 different rates of 24%, 21% and 18% has been provided, based on employee cost to operating cost ratio, replacing the single rate of 25% in the previous regime.
- In respect of transactions involving provision of contract research and development services wholly or partly relating to software development and provision of contract research and development services wholly or partly relating to generic pharmaceutical drugs, safe harbour margins have been reduced to 24% from 30% and 29% respectively in the previous regime.
- Risk spreads on intra-group loans denominated in foreign currency will be benchmarked to the 6-month London Inter-Bank Offer Rate (LIBOR) as on 30th September of the relevant year and on loans denominated in Indian Rupees to the 1-year SBI MCLR as on 1st April of the relevant year.
- The safe harbour regime is optional to taxpayers.

22. Cairn moves London tribunal for stay on tax

June 09, 2017

Cairn moves London tribunal for stay on tax Three days ahead of a deadline to pay Rs 10,247 crore in tax, the international tribunal in London will on June 12 hear Cairn's plea for an interim measure to restrain the government from recovering its dues. The government in its submission has stated the tribunal does not have jurisdiction over its tax recovery powers. The Edinburgh-based oil company has till June 15 to pay tax dues, along with Rs 1,500 crore interest, after which the tax department will begin recovery proceedings.

Seeking an immediate intervention, Cairn argued that the India-UK bilateral investment protection treaty did not permit the government to impose capital gains tax retrospectively. The government's case is investment treaties do not cover tax disputes. "Tax recovery proceedings are a domestic issue and the tribunal has no role to play in that. With time running out for Cairn, it has sought an urgent intervention from the tribunal. Never before has such an interim order being passed," a source said. The Income Tax Appellate Tribunal had in March upheld the retrospective capital gains tax demand made under a controversial amendment to the law. The income tax department followed this up with a tax notice to Cairn, giving it three months to make the payment.

Cairn approached the international tribunal for an interim measure 70 days after the notice was sent to it. "They could have filed for the interim measure immediately after receiving the notice on March 14. But they waited 70 days to create a sense of urgency," the source added.

The tax demand is in respect of Cairn UK transferring shares of Cairn India Holdings to Cairn India as part of a group reorganisation in 2006-07. This gave rise to different interpretations on whether the Cairn UK made capital gains preceding an initial public offering of Cairn India.

The UK oil major may also to face a penalty of around 300 per cent. In a reminder notice, Cairn was asked why penalty should not be imposed. The tax department has six months since the ITAT order, which is September, to slap a penalty on Cairn. The company has not moved a high court in India to challenge the ITAT order. The tax department has filed a caveat with the high court against any demand for a stay by the oil company of the ITAT order. "If they move a high court seeking a stay, the court should not give any decision without asking the department," an official said.

The tax department will begin recovery proceedings on June 16. Generally, these include attaching assets and bank accounts and writing to debtors asking them to pay the tax department the money they owe the defaulting entity. Cairn had approached the Securities and Exchange Board of India (SEBI) last month Agarwal-led Vedanta group. If the international tribunal passes a restraining order against the government, domestic law will prevail. The tax department is bound by Section 119 of the Income Tax Act, which says "…no order is issued that require the tax officer to dispose of a particular case in a particular manner…." "No one has the power to direct us to dispose of a particular case. Only Parliament has that right," the official said.

Although the ITAT had provided Cairn relief over Rs 18,800 crore interest, the tax department has raised the demand for interest under another section of the income tax law.

"Interest on the outstanding demand has been imposed under Section 220(2) of the Income Tax Act. If you do not pay the demand, every month there is a one per cent interest. The assessment notice was sent on January 25 last year," the official said. Cairn has sought $5.6 billion compensation from the government over the alleged breach of the India-UK investment treaty.

Under a dispute resolution scheme, the government had last year offered a one-time settlement from June 1 till December 31, which was extended till January 31, to companies that agreed to withdraw pending cases. The scheme waived penalty and interest but Cairn did not use the settlement window. In 2006, Cairn India acquired the entire share capital of Cairn India Holdings from Cairn UK Holdings. In exchange, 69 per cent of shares in Cairn India were issued to Cairn UK Holdings. Later, in 2011, Cairn Energy sold Cairn India to mining billionaire Anil Agarwal's Vedanta group, barring a minor stake of 9.8 per cent. It wanted to sell the residual stake as well but was stopped by the tax department from doing so.

Source: http://www.business-standard.com/

23. India signs OECD pact to plug tax treaty loopholes

June 08, 2017

India has signed a ground-breaking multilateral BEPS convention that will close loopholes in thousands of tax treaties worldwide. The multilateral instrument was signed by Finance Minister Arun Jaitley at the OECD headquarters in Paris on Wednesday. The OECD multilateral convention aims to crack down on tax evasion around the world, be it companies or investors, anybody trying to create a structure primarily to avoid or evade taxes. The convention will modify India's treaties to curb revenue loss through treaty abuse and BEPS (Base Erosion and Profit Shifting) strategies by ensuring that

profits are taxed where substantive economic activities generating the profits are carried out.
It will swiftly implement a series of tax treaty measures to update the existing network of bilateral treaties and reduce opportunities for tax avoidance by multinational enterprises.

Resolving treaty rows

It will strengthen provisions to resolve treaty disputes, including mandatory binding arbitration, thereby reducing double taxation and increasing tax certainty. The new convention was developed through negotiations involving more than 100 countries and jurisdictions, under a mandate delivered by G20 Finance Ministers and Central Bank Governors at their February 2015 meeting. Ministers and high-level officials from 76 countries and jurisdictions have signed or formally expressed their intention to sign the multilateral convention.
According to OECD Secretary-General Angel Gurría: "We are moving towards rapid implementation of the far-reaching reforms agreed under the BEPS project in more than 1,100 tax treaties worldwide, and radically transforming the way that tax treaties are modified." Beyond saving signatories from the burden of re-negotiating these treaties bilaterally, the new convention will result in more certainty and predictability for businesses, and a better functioning international tax system "for the benefit of our citizens", according to Gurria.

Checking tax evasion

The OECD/G20 BEPS project delivers solutions for governments to close the gaps in existing international rules that allow corporate profits to "disappear" or be artificially shifted to low- or no-tax environments, where companies have little or no economic activity. Revenue losses from BEPS are conservatively estimated at $100-240 billion annually, or the equivalent of 4-10 per cent of global corporate income tax revenues.
Rakesh Nangia, Managing Partner, Nangia & Co LLP, said that governments worldwide have been patient with cross-border aggressive tax planning till now. However, with the signing of this multilateral instrument, corporates have been told that their game of funnelling income to low tax or no tax jurisdiction is up. "Though the implementation by each country would be subject to its reservations, the message is clear that treaty abuse is not acceptable and dispute resolution will become faster."

The Central Board of Direct Taxes said this will not function in the same way as an amending protocol to a single existing treaty, which would directly amend the text of the Covered Tax Agreement. Instead, it will be applied alongside existing tax treaties, modifying their application in order to implement the BEPS measures.

Source: http://www.thehindubusinessline.com

24. India Signs the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting at Paris

June 07, 2017

The Honourable Finance Minister Shri Arun Jaitley signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting at Paris on 7th June, 2017 on behalf of India. More than 65 countries, including India, signed the Convention. More countries are expected to sign the Convention in coming days.
The Multilateral Convention is an outcome of the OECD / G20 Project to tackle Base Erosion and Profit Shifting (the "BEPS Project") i.e., tax planning strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations where there is little or no economic activity, resulting in little or no overall corporate tax being paid. The BEPS Project identified 15 actions to address base erosion and profit shifting (BEPS) in a comprehensive manner.
India was part of the Ad Hoc Group of more than 100 countries and jurisdictions from G20, OECD, BEPS associates and other interested countries, which worked on an equal footing on the finalization of the text of the Multilateral Convention, starting May 2015. The text of the Convention and the accompanying Explanatory Statement was adopted by the Ad hoc Group on 24 November 2016.
The Convention enables all signatories, inter alia, to meet treaty-related minimum standards that were agreed as part of the Final BEPS package, including the minimum standard for the prevention of treaty abuse under Action 6. The Convention will operate to modify tax treaties between two or more Parties to the Convention. It will not function in the same way as an amending protocol to a single existing treaty, which would directly amend the text of

the Covered Tax Agreement. Instead, it will be applied alongside existing tax treaties, modifying their application in order to implement the BEPS measures.

The Convention will modify India's treaties in order to curb revenue loss through treaty abuse and base erosion and profit shifting strategies by ensuring that profits are taxed where substantive economic activities generating the profits are carried out and where value is created.

Source: http://www.incometaxindia.gov.in/

25. Income Tax Department Steps up Actions under Benami Transactions (Prohibition) Amendment Act, 2016

May 24, 2017

The Income-tax Department (ITD) has initiated actions under the new Benami Transactions (Prohibition) Amendment Act, 2016 (the Act) w.e.f. 1st November, 2016. The Prohibition of Benami Property Transactions Rules, 2016 have been framed in this regard. As per the Act, Benami property includes movable or immovable property, tangible or intangible property, corporeal or incorporeal property. It empowers provisional attachment and subsequent confiscation of benami properties. It also allows for prosecution of the beneficial owner, the benamidar, the abettor and the inducer to benami transactions, which may result in rigorous imprisonment up to 7 years and fine up to 25% of fair market value of the property.

The Income-tax Directorates of Investigation have identified more than 400 benami transactions up to 23 May, 2017. These include deposits in bank accounts, plots of land, flat and jewellery. Provisional attachment of properties under the Act has been done in more than 240 cases. The market value of properties under attachment is more than Rs. 600 crore. Immovable properties have been attached in 40 cases with total value of more than Rs. 530 crore in Kolkata, Mumbai, Delhi, Gujarat, Rajasthan and Madhya Pradesh.

In one case in Jabalpur, the benamidar, a driver, was found to be owner of land worth Rs 7.7 crore. The beneficial owner is a Madhya Pradesh based listed company, his employer. In Mumbai a professional was found to be holding several immovable properties in the name of shell companies which exist only on paper. In another case in Sanganer, Rajasthan a jeweller was found to be beneficial owner of nine immovable properties in the name of his former employee, a man of no means. Certain properties purchased through shell companies have also been attached by the Department in Kolkata.

The Government is keen to implement the new Benami Act in an effective manner with visible outcomes on the ground. For this purpose, 24 dedicated Benami Prohibition Units (BPUs) have been set up all over India in the last week. These units are under the overall supervision of the Principal Directors of Investigation in the Income-tax Department to enable swift action and follow up, especially in cases where criminality has been detected.

In addition, the Income-tax Department, has undertaken searches on 10 senior government officials during the past one month, keeping in view its policy to unearth black money earned through corrupt practices and introduce accountability and probity in public life. The crackdown on all forms of illicit wealth is being spearheaded by the ITD to ensure that any economic misdeed is immediately identified and actions as per law follows.

Source: http://www.incometaxindia.gov.in/

26. FPI holdings from Singapore, Mauritius surge 25% before DTAA implementation

May 20, 2017

Foreign portfolio investors (FPIs) based in Mauritius and Singapore had, it now appears, rushed to take advantage of the 'grandfathering' clause in the new Double Tax Avoidance Agreement signed between both the governments of the two countries and New Delhi. The treaties took effect from April 1. According to the data from Prime Database, 22 of the top 50 funds which invested in India through these two routes increased their India exposure to Rs 1.25 lakh crore by end-March, from Rs 1.04 lakh crore at end-December 2016 — a rise of around 25 per cent.

The other 28 FPIs' exposure to India saw a marginal decrease. The data cover FPI exposure to Indian companies in excess of one per cent. Grandfathering is the term that allows investment actions taken before a certain date to be subject to old rules. In the new tax arrangement with Mauritius and Singapore, all investments from these places will be subject to a short-term capital gains tax (if booked before

12 months). However, all investments prior to March 31, 2017, would be exempt from paying such capital gains tax, under the grandfathering clause.

In those three months, for instance, the market value of Morgan Stanley Mauritius jumped more than two-fold to Rs 6,719 crore in the three months. Similarly, the portfolio value of Government of Singapore funds, HSBC Mauritius, Ishares India and Cinnamon Capital saw their holdings' value rise a little more than a fifth. FPIs pumped a little more than $6 billion (Rs 38,500 crore) into Indian equities during the three months. In contrast, the total value of investments of these top 50 FPIs remained the same at around Rs 3.65 lakh crore.

As on April, the Singapore and Mauritius-based entities owned nearly 30 per cent of all FPI assets, showed data from depository NSDL. Said Pranav Sayta, senior tax partner at consultancy EY: "A number of other factors would have also contributed, including the outcome of the recent state elections and high potential growth for the Indian economy as a whole. Yet, the fact that investments made up to end-March are grandfathered under the tax treaties with both, and also under the newly-applicable General Anti-Avoidance Rule provisions (on taxes), encouraged investors to accelerate their investments, to be eligible for tax benefits upon a future exit."

Investments between April 2017 and end-March 2019 would attract 7.5 per cent tax. From April 1, 2019, all investments through these countries would attract 15 per cent short-term capital gains. Long-term capital gains (on holdings of more than one year) will be exempt for both domestic and foreign investors. Experts say all the major FPIs domiciled in Singapore and Mauritius are revaluating their strategies with the new tax regulations. While some of them are moving out of these jurisdictions to more tax-friendly countries like France and Netherlands, some others plan to reduce their short-term trades and concentrate on long positions.

"FPIs are coming to terms with the new reality, that there will be no tax havens. For a short span of time, they could think of shifting their base to other jurisdictions. But, from a long-term perspective, the government has already made its stance clear. If it is under the impression that any tax treaty is being misused, they would amend the treaty with that country," said Tejesh Chitlangi, partner, IC Legal.

Source: http://www.business-standard.com

OECD

27. OECD releases latest updates to the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations

July 10, 2017

Today, the OECD releases the 2017 edition of the *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*.

The *OECD Transfer Pricing Guidelines* provide guidance on the application of the "arm's length principle", which represents the international consensus on the valuation, for income tax purposes, of cross-border transactions between associated enterprises. In today's economy where multinational enterprises play an increasingly prominent role, transfer pricing continues to be high on the agenda of tax administrations and taxpayers alike. Governments need to ensure that the taxable profits of MNEs are not artificially shifted out of their jurisdiction and that the tax base reported by MNEs in their country reflects the economic activity undertaken therein and taxpayers need clear guidance on the proper application of the arm's length principle.

The 2017 edition of the Transfer Pricing Guidelines mainly reflects a consolidation of the changes resulting from the OECD/G20 Base Erosion and Profit Shifting (BEPS) Project. It incorporates the following revisions of the 2010 edition into a single publication:

- The substantial revisions introduced by the 2015 BEPS Reports on Actions 8-10 Aligning Transfer Pricing Outcomes with Value Creation and Action 13 Transfer Pricing Documentation and Country-by-Country Reporting. These amendments, which revised the guidance in Chapters I, II, V, VI, VII and VIII, were approved by the OECD Council and incorporated into the Transfer Pricing Guidelines in May 2016;
- The revisions to Chapter IX to conform the guidance on business restructurings to the revisions introduced by the 2015 BEPS Reports on Actions 8-10 and 13. These conforming changes were approved by the OECD Council in April 2017;

- The revised guidance on safe harbours in Chapter IV. These changes were approved by the OECD Council in May 2013; and
- Consistency changes that were needed in the rest of the OECD Transfer Pricing Guidelines to produce this consolidated version of the Guidelines. These consistency changes were approved by the OECD's Committee on Fiscal Affairs on 19 May 2017.

In addition, this edition of the Transfer Pricing Guidelines include the revised Recommendation of the OECD Council on the Determination of Transfer Pricing between Associated Enterprises [C(95)126/FINAL]. The revised Recommendation reflects the relevance to tackle BEPS and the establishments of the Inclusive Framework on BEPS. It also strengthens the impact and relevance of the Guidelines beyond the OECD by inviting non-OECD members to adhere to the Recommendation. Finally, it includes a delegation by the OECD Council to the Committee on Fiscal Affairs of the authority to approve by consensus future amendments to the Guidelines which are essentially of a technical nature.

Source: http://www.oecd.org

28. OECD's Gurría reaffirms need for global cooperation amid progress at G20 Summit

July 8, 2017

International cooperation is now more critical than ever, OECD Secretary-General Angel Gurría said following a G20 Leader's Summit marked both by controversy but also advances on a range of policies to tackle global challenges. Speaking on the sidelines of the Hamburg Summit, Mr. Gurría said collaboration between nations was the key to sustainable and inclusive global growth. "How else can you address global issues such as trade, migration, climate change and the digital economy if it's not through closer international cooperation?"

Mr Gurría spoke to the Summit on issues reflecting just a part of the broad range of support on policy design, evidence-gathering, standard setting and monitoring undertaken by the OECD for the German Presidency of the G20, often in association with other international organisations.

The OECD contributed to progress achieved in the contentious discussions on climate change and energy. The Organisation's report Investing in Climate, Investing in Growth shows how integrating measures to tackle climate change into regular economic policy will have a positive impact on growth.

Despite the US decision to withdraw from the Paris Agreement, all 19 other G20 countries reaffirmed and stated as irreversible their commitment to fight climate change.

"Protecting the environment and fighting climate change can be a source of business, investment, technology and jobs. There is common ground to work together on this crucial endeavour," Mr Gurría said to the leaders.

The importance of ensuring a rules-based global economy that creates a level playing field for all participants was reaffirmed during the Hamburg discussions. The leaders called on the member countries of the Global Forum on Steel Excess Capacity to fulfil their information-sharing and cooperation commitments by August 2017. As facilitator of the Global Forum, the OECD said it will support it in producing a report with concrete policy solutions to tackle overcapacity by early November 2017.

This, along with the reaffirmation on commitments with due diligence and responsible business conduct, underpinned a key pillar of the German G20 Presidency.

In their final communiqué, the G20 leaders said they would fight protectionism, including all unfair trade practices, and promote a favourable environment for trade and investment. They called on the OECD, WTO, World Bank and IMF to continue their work to better understand trade impacts and report back to the G20 in 2018. They also recognize the need to ensure that trade and investment work for all and deliver inclusive growth.

With the Summit taking place against a backdrop of anti-globalisation demonstrations in Hamburg, OECD G20 Sherpa and Chief of Staff Gabriela Ramos said: "Global solutions should deliver for people and redress the increased inequalities of income and opportunities, as well as ensuring respect for global standards. If we want to rebuild trust in the global economy, inclusiveness and sustainability are key. The G20 is the place where the major economies can take action collectively - precisely to fix the system."

She also welcomed the Summit's outcomes related to gender, having been a strong promoter of the commitments made by G20 Leaders in Brisbane in 2014 to increase women's participation in the labour force by 25% by 2025.

Since then, the OECD has continued to contribute to, and encouraged implementation of, the range of initiatives agreed by the G20 to help women fulfill their full potential. They include the eSkills4Girls initiative to promote opportunities and equal participation in the digital economy, particularly in developing countries, and the Women Entrepreneurs Financing Initiative established by World Bank with US support.

The G20 reaffirmed its commitment to create a globally fair modern international tax system. The OECD's Secretary General's report to G20 leaders released just ahead of the Hamburg Summit updated progress in areas such as movement towards automatic exchange of information between tax authorities and implementation of key measures to address tax avoidance by multinationals.

Calling for improved governance of migration and comprehensive responses to challenges posed by refugees and forced displacement, the leaders asked the OECD in cooperation with the International Labour Organisation (ILO), International Organisation for Migration and(IOM) and the UNHCR, to provide annual updates on trends and policy challenges.

The G20 leaders also addressed health and how to tackle global challenges such as antimicrobial resistance which undermines the effectiveness of antibiotics. Working with the World Health Organisation (WHO), the Food and Agriculture Organisation (FAO) and World Organisation for Animal Health (OIE), the OECD drew up a report on ways to boost antimicrobial research and development, while ensuring better usage and affordability of antibiotics.

Source: http://www.oecd.org

29. OECD releases the draft contents of the 2017 update to the OECD Model Tax Convention

July 11, 2017

The OECD Committee on Fiscal Affairs has just released the draft contents of the 2017 update to the OECD Model Tax Convention prepared by the Committee's Working Party 1. The update has not yet been approved by the Committee on Fiscal Affairs or by the OECD Council, although, as noted below, significant parts of the 2017 update were previously approved as part of the BEPS Package. It will be submitted for the approval of the Committee on Fiscal Affairs and of the OECD Council later in 2017. This draft therefore does not necessarily reflect the final views of the OECD and its member countries.

Comments are requested at this time only with respect to certain parts of the 2017 update that have not previously been released for comments. These changes are as follows:

- Changes to paragraph 13 of the Commentary on Article 4 related to the issue whether a house rented to an unrelated person can be considered to be a "permanent home available to" the landlord for purposes of the tie-breaker rule in Article 4(2) *a*).
- Changes to paragraphs 17 and 19 of, and the addition of new paragraph 19.1 to, the Commentary on Article 4. These changes are intended to clarify the meaning of "habitual abode" in the tie-breaker rule in Article 4(2) *c*).
- The addition of new paragraph 1.1 to the Commentary on Article 5. That paragraph indicates that registration for the purposes of a value added tax or goods and services tax is, by itself, irrelevant for the purposes of the application and interpretation of the permanent establishment definition.
- Deletion of the parenthetical reference "(other than a partnership)" from subparagraph 2 *a*) of Article 10, which is intended to ensure that the reduced rate of source taxation on dividends provided by that subparagraph is applicable in the case where new Article 1(2) would have the effect that a dividend paid to a transparent entity would be considered to be income of a resident of a Contracting State because it is taxed either in the hands of the entity or in the hands of the members of that entity. That deletion is accompanied by new paragraphs 11 and 11.1 of the Commentary on Article 10.

Comments are not requested with respect to changes to the OECD Model Tax Convention that have been approved as part of the BEPS Package, were foreseen as part of the follow-up work on the treaty-related BEPS measures and/or were previously released for comments. These changes — which are released for information — include the following:

- Changes contained in the Report on Action 2 (*Neutralising the Effects of Hybrid Mismatch Arrangements*), the Report on Action 6 (*Preventing the Granting of Treaty Benefits in Inappropriate Circumstances*), the Report on Action 7 (*Preventing the Artificial Avoidance of Permanent Establishment Status)* and the Report on Action 14 (*Making Dispute Resolution Procedures More Effective*), as well as changes developed in the follow-up work on those Actions.

- Changes to the Commentary on Article 5 integrating the changes resulting from the work on BEPS Action 7 with previous work on the interpretation and application of Article 5. The proposals that resulted from that earlier work – which was based on the pre-2017 update version of Article 5 – were originally published in an October 2011 discussion draft, discussed at a 7 September 2012 public consultation and subsequently released in a revised October 2012 discussion draft.
- Changes to Article 8, related changes to subparagraph 1 *e*) of Article 3 (the definition of "international traffic") and paragraph 3 of Article 15 (concerning the taxation of the crews of ships and aircraft operated in international traffic), and consequential changes to Articles 6, 13 and 22. These changes also include related Commentary changes. These proposed changes were released in a November 2013 discussion draft.
- Changes to paragraph 5 of Article 25, related Commentary changes and amendments to the "Sample Mutual Agreement on Arbitration" contained in an Annex to that Commentary. These changes are intended to reflect the MAP arbitration provision developed in the negotiation of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the Multilateral Instrument or "MLI") adopted on 24 November 2016.
- Consequential changes required as a result of the contents of the 2017 update described above.

As part of the 2017 update, a number of changes and additions will also be made to the observations, reservations and positions of OECD member countries and non-member economies. These changes and additions are in the process of being formulated and will be included in the final version of the 2017 update.

Comments should be sent electronically in Word format by 10 August 2017 to *taxtreaties@oecd.org*. Comments should be addressed to the Tax Treaties, Transfer Pricing and Financial Transactions Division, OECD/CTPA.

Source: http://www.oecd.org

30. Mauritius signs the multilateral BEPS Convention to tackle tax avoidance by multinational enterprises

July 05, 2017

On 5th July, 2017 at the OECD Headquarters in Paris, Mahess Rawoteea of the Ministry of Finance and Economic Development of Mauritius, signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the MLI) in the presence of Douglas Frantz, OECD Deputy Secretary-General.

Based on expressed reservations at this point in time, 23 tax treaties would be impacted by this signing. We note that Mauritius issued a statement today, reaffirming its commitment to implement the minimum standards developed in the course of the OECD/G20 BEPS Project into its entire tax treaty network by the end of 2018. Mauritius has committed to modify its remaining tax treaties through bilateral negotiations.

The MLI is a legal instrument designed to prevent base erosion and profit shifting (BEPS) by multinational enterprises. BEPS refers to tax avoidance strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations. The MLI allows jurisdictions to transpose results from the OECD/G20 BEPS Project, including minimum standards to implement in tax treaties to prevent treaty abuse and "treaty shopping", into their existing networks of bilateral tax treaties in a quick and efficient manner. It was developed through inclusive negotiations involving more than 100 countries and jurisdictions, under a mandate delivered by G20 Finance Ministers and Central Bank Governors at their February 2015 meeting.

Source: http://www.oecd.org

31. OECD releases 42 comments on transfer pricing guidance for hard-to-value intangibles

July 05, 2017

The OECD today released 42 comment letters responding to draft guidance that seeks to create a common method for tax administrations to implement Chapter VI of the OECD Transfer Pricing Guidelines regarding pricing hard-to-value intangibles. The draft guidance, issued on May 23, allows tax administrations to consider ex post outcomes as evidence of the appropriateness of ex-ante pricing arrangements to revise the original value assigned to the hard-to-value intangible. The guidance is designed to protect tax administrations from the negative effects of information asymmetry.

In its letter, BIAC argues that the guidance is too broad and the examples are not comprehensive enough for taxpayers to determine whether they priced a transaction appropriately. BIAC wrote it may be helpful to provide a list of features that indicate what is not considered a hard-to-value intangible. BDI, representing German industries, said the guidance should define or narrow very important terms used, such a "satisfactory evidence," "unforeseeable events," and "extraordinary."

Keidanren wrote that although guidance is appreciated, it lacks adequate explanation of the exemptions. Further discussion is also required with regard to statute of limitations rules and the elimination of double taxation, the Japanese business group said. The BEPS Monitoring Group, which advocates on behalf of NGOs supporting developing nations, expressed concern that the guidance effectively legitimizes tax avoidance structuring. They said that an entity, such as the entity described in the guidance's examples, would virtually never transfer all or any portion partially developed intangible rights to unrelated persons.

"These are most typically core products that would be considered 'crown jewels,'" the group said. The group advocated that a statement be added at the end of paragraph 17 clarifying that a transfer of partially developed rights invites close tax authority scrutiny, in comments principally drafted by Jeffery Kadet. The BEPS Monitoring Group also said that the examples should note that the profit split method is an approach that should be considered given the risks posed by the high uncertainty in valuing intangible property.

Comment letters were also submitted by Andrew Hickman; Arthur Cox, Chiomenti, Cuatrecasas, GIDE, Gleiss Lutz, Homburger and Macfarlanes; AstraZeneca; BDO; Brigitte Baumgartner; Cajetan M. Fiedler; Chartered Institute of Taxation; Confederation of Swedish Entreprise; Contrabass; Copenhagen Economics; Deloitte LLP; Deloitte Tax LLP; Duff & Phelps; EY; Fieldfisher; Flick Gocke Schaumburg; FTI Consulting; Harris Consulting & Tax Ltd; International Chamber of Commerce; Japan Foreign Trade Council; Japan Machinery Center for Trade and Investment; Johann H. Müller; KPMG; ktMINE; Loyens & Loeff NV; Maisto e Associati; MDW Consulting Inc.; National Foreign Trade Council; NERA Economic Consulting; Pat Breslin; PwC; RELX Group; RSM; Silicon Valley Tax Directors Group; SwissHoldings; Tax Executives Institute, Inc.; Transfer Pricing & Controllling; and USCIB.

Source: http://www.oecd.org

32. Bahrain expands its capacity to fight international tax avoidance and evasion

June 29, 2017

On 29th June 2017, at the OECD Headquarters in Paris, H.E. Sheikh Ahmed bin Mohammed Al Khalifa, Minister of Finance of Bahrain signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters in the presence of OECD Deputy Secretary-General, Mr. Douglas Frantz, therewith becoming the 112th jurisdiction to join the Convention. The Convention is the most powerful instrument for international tax cooperation. It provides for all forms of administrative assistance in tax matters: exchange of information on request, spontaneous exchange, automatic exchange, tax examinations abroad, simultaneous tax examinations and assistance in tax collection. It guarantees extensive safeguards for the protection of taxpayers› rights.

The Convention's impact grows with each new signatory; it also serves as the premier instrument for implementing the Standard for Automatic Exchange of Financial Account Information in Tax Matters developed by the OECD and G20 countries. In this respect, Bahrain has today also signed the CRS Multilateral Competent Authority Agreement (CRS MCAA), re-confirming its commitment to implementing the automatic exchange of financial account information pursuant to the OECD/G20 Common Reporting Standard (CRS) in time to commence exchanges in 2018. Bahrain is the 93rd jurisdiction to sign the CRS MCAA.

The Convention can also be used to swiftly implement the transparency measures of the OECD/G20 Base Erosion and Profit Shifting (BEPS) Project such as the automatic exchange of Country-by-Country reports under Action 13 as well as the sharing of rulings under Action 5 of the BEPS Project. The Convention is also a powerful tool in the fight against illicit financial flows. The Convention was developed jointly by the OECD and the Council of Europe in 1988 and amended in 2010 to respond to the call by the G20 to align it to the international standard on exchange of information and to open it to all countries, thus ensuring that countries around the world could benefit from the new more transparent environment.

Source: http://www.oecd.org

33. OECD releases BEPS discussion drafts on attribution of profits to permanent establishments and transactional profit splits

June 22, 2017

Public comments are invited on the following discussion drafts:

- **Attribution of Profits to Permanent Establishments**, which deals with work in relation to Action 7 ("Preventing the Artificial Avoidance of Permanent Establishment Status") of the BEPS Action Plan;
- **Revised Guidance on Profit Splits**, which deals with work in relation to Actions 8-10 ("Assure that transfer pricing outcomes are in line with value creation") of the BEPS Action Plan.

Release of a discussion draft containing Additional Guidance on Attribution of Profits to Permanent Establishments

- The Report on Action 7 of the BEPS Action Plan (Preventing the Artificial Avoidance of Permanent Establishment Status) mandated the development of additional guidance on how the rules of Article 7 of the OECD Model Tax Convention would apply to PEs resulting from the changes in the Report, in particular for PEs outside the financial sector. The Report indicated that there is also a need to take account of the results of the work on other parts of the BEPS Action Plan dealing with transfer pricing, in particular the work related to intangibles, risk and capital. Importantly, the Report explicitly stated that the changes to Article 5 of the Model Tax Convention do not require substantive modifications to the existing rules and guidance on the attribution of profits to permanent establishments under Article 7 (see paragraph 19-20 of the Report).
- Under this mandate, this new discussion draft has been developed which replaces the discussion draft published for comments in July 2016. This new discussion draft sets out high-level general principles outlined in paragraph 1-21 and 36-42 for the attribution of profits to permanent establishments in the circumstances addressed by the Report on BEPS Action 7. Importantly, countries agree that these principles are relevant and applicable in attributing profits to permanent establishments. This discussion draft also includes examples illustrating the attribution of profits to permanent establishments arising under Article 5(5) and from the anti-fragmentation rules in Article 5(4.1) of the OECD Model Tax Convention.
- Please note that comments are not sought on the 2016 Discussion Draft or on the changes to the PE definitions that have been agreed under Action 7 and which were published in the 2015 Final Report, "Preventing the Artificial Avoidance of Permanent Establishment Status." Commentators should concentrate solely on the proposed guidance in this discussion draft on the application of Article 7 to determine the attribution of profits to permanent establishments.

Discussion Draft on the Revised Guidance on Profit Splits

- Action 10 of the BEPS Action Plan invited clarification of the application of transfer pricing methods, in particular the transactional profit split method, in the context of global value chains.
- Under this mandate, this revised discussion draft replaces the draft released for public comment in July 2016. Building on the existing guidance in the OECD Transfer Pricing Guidelines, as well as comments received on the July 2016 draft, this revised draft is intended to clarify the application of the transactional profit split method, in particular, by identifying indicators for its use as the most appropriate transfer pricing method, and providing additional guidance on determining the profits to be split. The revised draft also includes a number of examples illustrating these principles. While comments are invited on any aspect of the revised draft, the document also identifies a number of issues relating to the application of the profit split method on which feedback is particularly sought.

Deadline for submitting public comments on the discussion drafts

- Interested parties are invited to send their comments on these discussion drafts. Comments should be sent by **15 September** at the latest by e-mail to TransferPricing@oecd.org in Word format (in order to facilitate their distribution to government officials).

- All comments received on these discussion drafts will be made publicly available. Comments submitted in the name of a collective "grouping" or "coalition", or by any person submitting comments on behalf of another person or group of persons should identify all enterprises or individuals who are members of that collective group, or the person(s) on whose behalf the commentator(s) are acting.

Public Consultation

- The OECD intends to hold a public consultation on the additional guidance on the attribution of profits to permanent establishments and on the revised guidance on the transactional profit split method in **November 2017** at the OECD Conference Centre in Paris, France. Registration details for the public consultation will be published on the OECD website in September. Speakers and other participants at the public consultation will be selected from among those providing timely written comments on the respective discussion drafts.

Source: http://www.oecd.org

34. OECD welcomes Vietnam's commitment to implement the internationally agreed standards to tackle tax evasion and avoidance

June 21, 2017

Viet Nam has become the 100th jurisdiction to join the Inclusive Framework on BEPS («IF») on an equal footing with all other IF members, as announced by Mr. DANG NGOC Minh (Deputy General Director of the General Department of Taxation - GDT) at the third plenary meeting of the IF held on 21-22 June 2017 in Noordwijk, the Netherlands. The announcement represents another important step forward by Viet Nam in the international tax arena as well as in the Asia-Pacific region where Viet Nam's active leadership in its role of host and Chair of the APEC Finance Ministers' Process in 2017 has been widely recognised in the support of the BEPS Project and its consistent implementation throughout APEC Economies.

The IF was established in January 2016, after the G20 Leaders urged the timely implementation of the BEPS package released in October 2015 and called on the OECD to develop a more inclusive framework with the involvement of interested non-G20 countries and jurisdictions, including developing economies. Members of the IF have the opportunity to work together on an equal footing with other OECD and G20 countries on implementing the BEPS package consistently and on developing further standards to address remaining BEPS issues. Being part of the IF will facilitate the implementation of agreed minimum standards, as well as the peer review processes and will provide Vietnam with further support, including guidance under the Platform for Collaboration on Tax established among the IMF, the OECD, the UN and the WBG.

Viet Nam has also stated its commitment towards greater tax transparency by expressing its interest to join the Multilateral Convention on Mutual Administrative Assistance in Tax Matters («the Convention») and the Global Forum on Transparency and Exchange of Information for Tax Purposes (the Global Forum).

The Convention is the most comprehensive multilateral instrument available for a wide range of tax co-operation to tackle tax evasion and avoidance, and guarantees extensive safeguards for the protection of taxpayers' rights. The Convention was developed jointly by the OECD and the Council of Europe in 1988 and amended in 2010 to respond to the call by the G20 to align it to the international standard on exchange of information and to open it to all countries, thus ensuring that developing countries could benefit from the new more transparent environment. It is seen as the ideal instrument for swift implementation of the new Standard for Automatic Exchange of Financial Account Information in Tax Matters developed by the OECD and G20 countries as well as automatic exchange of country by country reports under the BEPS Project. Already 111 countries and jurisdictions have joined the Convention.

The Global Forum is the premier international body for ensuring the implementation of the internationally agreed standards of transparency and exchange of information in the tax area. Through an in-depth peer review process, the restructured Global Forum monitors that its members fully implement the standard of transparency and exchange of information they have committed to implement. It also works to establish a level playing field, even among countries that have not joined the Global Forum. The Global Forum now has 142 members on equal footing.

Source: http://www.oecd.org

35. Guatemala strengthens international tax co-operation – ratifies the Convention on Mutual Administrative Assistance in Tax Matters

June 09, 2017

The President of the Republic of Guatemala, Jimmy Morales, today deposited Guatemala's instrument of ratification for the Convention on Mutual Administrative Assistance in Tax Matters («the Convention») with the OECD's Secretary-General, Angel Gurría, therewith underlining his country's strong commitment to greater transparency and international co-operation in tax matters.

The Convention is the most powerful instrument for international tax co-operation. It provides for all forms of administrative assistance in tax matters: exchange of information on request, spontaneous exchange, automatic exchange, tax examinations abroad, simultaneous tax examinations and assistance in tax collection. It guarantees extensive safeguards for the protection of taxpayers' rights. The Convention was developed jointly by the OECD and the Council of Europe in 1988 and amended in 2010 to respond to the call by the G20 to align it to the international standard on exchange of information and to open it to all countries, thus ensuring that developing countries could benefit from the new more transparent environment. Today, with 111 participating jurisdictions, it is the world's leading instrument for boosting transparency and combating offshore tax evasion and avoidance.

The Convention's also serves as the premier instrument for implementing the new Standard for Automatic Exchange of Financial Account Information in Tax Matters developed by the OECD and G20 countries. It can also be used to swiftly implement the transparency measures of the OECD/G20 Base Erosion and Profit Shifting (BEPS) Project such as the automatic exchange of Country-by-Country reports under Action 13 as well as the sharing of rulings under Action 5 of the BEPS Project.

The Convention will enter into force for Guatemala on 1 October 2017.

Source: http://www.oecd.org

36. Ground-breaking multilateral BEPS convention signed at OECD will close loopholes in thousands of tax treaties worldwide

June 07, 2017

Ministers and high-level officials from 76 countries and jurisdictions have signed today or formally expressed their intention to sign an innovative multilateral convention that will swiftly implement a series of tax treaty measures to update the existing network of bilateral tax treaties and reduce opportunities for tax avoidance by multinational enterprises. The new convention will also strengthen provisions to resolve treaty disputes, including through mandatory binding arbitration, thereby reducing double taxation and increasing tax certainty.

The signing ceremony for the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS took place during the annual OECD Week, which brings together government officials and members of civil society from OECD and partner countries to debate the most pressing social and economic challenges confronting society. In addition to those signing today, a number of other jurisdictions are actively working towards signature of the convention and more are expected to follow by the end of 2017.

Today's signing ceremony marks an important milestone in the international tax agenda, which is moving closer to the goal of preventing base erosion and profit shifting (BEPS) by multinational enterprises. The new convention, which is the first multilateral treaty of its kind, allows jurisdictions to transpose results from the OECD/G20 BEPS Project into their existing networks of bilateral tax treaties. It was developed through inclusive negotiations involving more than 100 countries and jurisdictions, under a mandate delivered by G20 Finance Ministers and Central Bank Governors at their February 2015 meeting.

"The signing of this multilateral convention marks a turning point in tax treaty history," said OECD Secretary-General Angel Gurría. "We are moving towards rapid implementation of the far-reaching reforms agreed under the BEPS Project in more than 1,100 tax treaties worldwide, and radically transforming the way that tax treaties are modified. Beyond saving signatories from the burden of re-negotiating these treaties bilaterally, the new convention will result in more certainty and predictability for businesses, and a better functioning international tax system for the benefit of our citizens. Today's signing also shows that when the international community comes together there is no issue or challenge we cannot effectively tackle." Read the full speech.

The OECD/G20 BEPS Project delivers solutions for governments to close the gaps in existing international rules that allow corporate profits to « disappear » or be artificially shifted to low or no tax environments, where companies have little or no economic activity. Revenue losses from BEPS are conservatively estimated at USD 100-240 billion annually, or the equivalent of 4-10% of global corporate income tax revenues. Almost 100 countries and jurisdictions are currently working in the Inclusive Framework on BEPS to implement BEPS measures in their domestic legislation and bilateral tax treaties. The sheer number of bilateral treaties makes updates to the treaty network on a bilateral basis burdensome and time-consuming.

The new multilateral convention will solve this problem. It will modify existing bilateral tax treaties to swiftly implement the tax treaty measures developed in the course of the OECD/G20 BEPS Project. Treaty measures that are included in the new multilateral convention include those on hybrid mismatch arrangements, treaty abuse, permanent establishment, and mutual agreement procedures, including an optional provision on mandatory binding arbitration, which has been taken up by 25 signatories.

Source: http://www.oecd.org

37. OECD releases peer review document for assessment of the BEPS Action 6 minimum standard

May 29, 2017

On 29th May 2017, OECD released the key document, approved by the Inclusive Framework on BEPS, which will form the basis of the peer review of the Action 6 minimum standard on preventing the granting of treaty benefits in inappropriate circumstances.

The Action 6 minimum standard is one of the four BEPS minimum standards. Each of the four BEPS minimum standards is subject to peer review in order to ensure timely and accurate implementation and thus safeguard the level playing field. All members of the Inclusive Framework on BEPS commit to implementing the minimum standards and participating in the peer reviews.

The document released today forms the basis on which the peer review process will be undertaken. The document includes the **Terms of Reference** which sets out the criteria for assessing the implementation of the Action 6 minimum standard, and the **Methodology** which sets out the procedural mechanism by which the review will be conducted.

Source: http://www.oecd.org

38. Empty OECD 'tax haven' blacklist undermines progress

June 28, 2017

The OECD has today published a list of "non-cooperative jurisdictions" on tax ahead of the leaders G20 leaders summit in Hamburg, and hailed the "great progress" being made on international efforts to tackle tax evasion. The list only contains one country, Trinidad and Tobago.

The Tax Justice Network condemns the empty 'tax haven' blacklist. Far from the success which is being trumpeted, this meaningless gesture instead threatens the genuine progress that the OECD has in fact been making.

The report hails 'massive progress towards the exchange of information on request standard', despite the fact that this standard has been superseded by the superior alternative of automatic information exchange. Automatic exchange has been a key part of the Tax Justice Network's policy platform since our establishment in 2003, and although long dismissed as utopian, is now the basis for OECD's Common Reporting Standard which will come into action this year.

The key finding of the report is that: "As a result of the significant progress made since April 2016, only one jurisdiction (Trinidad and Tobago) still meets the current criteria to be considered not to have made sufficient progress towards satisfactory implementation of the agreed tax transparency standards."

The global standard, which is preferred by the OECD is now cooperation through automatic, multilateral exchange of tax information between tax authorities. Many jurisdictions taking part in this system have failed to commit to information sharing outside a small group of rich economies, so there are grave challenges to ensure lower-income countries benefit.

But most worryingly, the biggest financial centre in the world – and the biggest OECD member – has flatly refused to participate in automatic exchange. The USA demands automatic provision of information from all others, and provides only a few countries with anything in exchange under the skewed, bilateral arrangements agreed in support of the Foreign Account Tax Compliance Act (FATCA). The OECD report does note, in the FAQ, the USA's rejection of the CRS – but erroneously claims that " the US is automatically exchanging certain information under its many bilateral agreements implementing FATCA and that each of those agreements also includes a commitment to full reciprocity (which would deliver information similar to that exchanged under the CRS)."

Alex Cobham, chief executive of TJN, said:

Over the last few years, the OECD has indeed made great progress in some areas of tax transparency – but today's announcement is not a part of that, it actively undermines it. Since the financial crisis, the OECD and its members have finally embraced the Tax Justice Network's longstanding position that only multilateral, automatic exchange of information can support an effective antidote to financial secrecy, and all of the tax abuse, corruption and other crime that goes with it. It's disheartening then to see the OECD fall back into the old pattern of creating 'tax haven' blacklists on the basis of criteria that are so weak as to be near enough meaningless, and then declaring success when the list is empty.

It's a simple matter to look at the multilateral arrangements for automatic exchange of information that will kick in from this year, and to assess each jurisdiction in terms of the share of the world with which they intend to provide information. This reveals immediately that many of the usual suspects such as Switzerland, including many OECD members, are simply not going to extend transparency further than they absolutely have to. Inevitably, lower-income countries are systematically being excluded. And the elephant in the room? The OECD's biggest member, the United States, has positioned itself to demand information from everyone else, while refusing to reciprocate. If you were going to produce a tax haven blacklist with only one member, it wouldn't be a small Caribbean island – it would be tax haven USA.

Source: http://www.taxjustice.net/

SINGAPORE

39. Singapore signs Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information.

June 21, 2017

1. On 21 June 2017, Singapore will sign the Multilateral Competent Authority Agreements ("MCAAs") on:
   - the Automatic Exchange of Financial Account Information under the Common Reporting Standard ("CRS"); and
   - the Exchange of Country-by-Country ("CbC") Reports.

   Both agreements will be signed in the Netherlands by Mrs Chia-Tern Huey Min, Singapore's Deputy Commissioner for International, Investigation and Indirect Taxes Group of the Inland Revenue Authority of Singapore.
2. The signing of both MCAAs reaffirms Singapore's commitment to the international standards on tax cooperation. The MCAAs have gained recognition as multilateral framework agreements for bilateral cooperation on Automatic Exchange of Information ("AEOI"). Under the MCAAs, AEOI relationships remain bilateral – signatories to the MCAA enter into AEOI on a bilateral basis with another signatory on a mutual consent basis.
3. With the signing of the MCAAs, Singapore will continue to abide by the principles for establishing bilateral AEOI relationships for both CRS and CbCR. For both MCAAs, the principles are as follows:
   a. The AEOI partner has the safeguards needed to ensure the confidentiality of information exchanged and prevent its unauthorised use; and
   b. There is full reciprocity with the AEOI partner in terms of information exchanged.
4. In the case of CRS, Singapore will also want to ensure that there is a level playing field among all major financial centres. Singapore will consider engaging in automatic exchange of financial account information with regional jurisdictions which have the safeguards to ensure the confidentiality of information exchanged, and have similar agreements in place with relevant financial centres, including Hong Kong and Switzerland.
5. In the case of CbCR, signing the MCAA will enable Singapore to efficiently establish a wide

network of exchange relationships for the automatic exchange of CbC Reports.

6. Minister for Finance, Mr Heng Swee Keat, said: "As a business and financial hub, Singapore has earned a high level of trust and confidence. We take our commitment to international standards on tax cooperation seriously. Signing both MCAAs will allow Singapore to implement the international standards with our bilateral AEOI partners in an effective and efficient way

Source: https://www.iras.gov.sg/

40. Singapore to sign the multilateral convention to implement tax treaty related measures to prevent base erosion and profit shifting

June 07, 2017

1. Singapore will sign the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("the Multilateral Instrument") on 7 June 2017. The Multilateral Instrument will be signed in Paris by Ms Sim Ann, Senior Minister of State, Ministry of Culture, Community and Youth, and Trade and Industry. This will be the first signing ceremony for the Multilateral Instrument, with over 60 jurisdictions signing the Multilateral Instrument.
2. Singapore continues to build on its commitment to the principle behind the Base Erosion and Profit Shifting (BEPS) project, which is that profits should be attributable to the jurisdiction where the substantial economic activities giving rise to the profits are conducted. Singapore is among the earliest non-OECD, non-G20 jurisdictions to have joined the Inclusive Framework on BEPS in June 2016. The Multilateral Instrument represents another key component of our efforts.
3. Singapore had participated actively in the Ad Hoc Group formed under the aegis of the OECD and G20 to develop the Multilateral Instrument. The negotiation of the Multilateral Instrument was concluded on 24 November 2016 in Paris.
4. Commenting on Singapore's signing of the Multilateral Instrument, Minister for Finance, Mr Heng Swee Keat said, "Singapore strongly supports the principle that profits should be attributable to the jurisdiction where substantive economic activities generating the profits are based. Signing the Multilateral Instrument allows Singapore to swiftly update its wide network of Avoidance of Double Taxation Agreements to internationally agreed standards. Singapore's signing of the Multilateral Instrument reaffirms Singapore's commitment and support to the BEPS Project." Multilateral Instrument facilitates implementation of tax-treaty measures to counter BEPS
5. The Multilateral Instrument seeks to facilitate the implementation of tax-treaty-related measures to counter BEPS. Signatories to the Multilateral Instrument can efficiently update their DTAs to incorporate the measures, without the need to re-negotiate each DTA. These measures include BEPS minimum standards on preventing treaty abuse and enhancing dispute resolution.
6. Singapore does not condone the abuse of Avoidance of Double Taxation Agreements (DTAs). Some of our DTAs already contain anti-treaty shopping provisions to prevent possible abuse. In signing the Multilateral Instrument, Singapore will adopt the following provisions, amongst others:
   a. BEPS minimum standard for preventing treaty abuse: This consists of (i) a statement of intent that a DTA is to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance, and (ii) the adoption of a general anti-abuse rule, commonly known as the Principal Purpose Test.
   b. BEPS minimum standard for enhancing dispute resolution: When a Singapore resident taxpayer encounters taxation which is not in accordance with the intended application of the DTA provisions, the taxpayer can seek assistance from Inland Revenue Authority of Singapore to contact the treaty partner to resolve the dispute
   c. Providing more certainty and timeliness to taxpayers for cross-border disputes: Singapore has opted for the mandatory binding arbitration provisions to be included in our DTAs as they provide certainty to taxpayers that treaty-related disputes will be resolved within a specified timeframe.
7. Singapore intends for the Multilateral Instrument to apply to DTAs with treaty partners that are members of the Ad Hoc Group, and this would put our treaties in line with international standards and increase access to benefits such as certainty and efficient dispute resolution mechanisms. The agreed changes to each DTA will enter into force after the Multilateral Instrument has been ratified by Singapore and the treaty partner.

8. Singapore will work towards the ratification of the Multilateral Instrument at the earliest date. Clarification on the amendments to each DTA will be provided to taxpayers through the Inland Revenue Authority of Singapore's website.

Source: https://www.iras.gov.sg/

USA

41. Norway and U.S. Sign Competent Authority Agreement to Exchange Country-by-Country Reports

May 11, 2017

U.S. and Norway signed a competent authority agreement (CAA) to exchange country-by-country (CbC) reports. *See* BEPS Action 13.

Pursuant to the provisions of Article 28 of the 1971 *Convention between the United States of America and the Kingdom of Norway for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Property* (the "Convention"), Norway and the U.S. will exchange annually on an automatic basis the CbC report received from each reporting entity that is resident for tax purposes in its jurisdiction, provided that, on the basis of the CbC report, one or more constituent entities of the reporting entity's group are resident for tax purposes in the other jurisdiction, or are subject to tax with respect to the business carried out through a permanent establishment in the other jurisdiction. *See* the corresponding Protocol to the Convention.

The amounts included in the CbC report should be stated in a single currency. Norway and the U.S. intend to exchange CbC reports automatically through a common schema in Extensible Markup Language (XML). A group is not required to file a CbC report if its annual consolidated group revenue during the fiscal year immediately preceding the reporting fiscal year, as reflected in its consolidated financial statements, is below the threshold under the domestic law of the reporting entity's jurisdiction of tax residence.

The first CbC report should be exchanged for group fiscal years beginning on or after January 1, 2016. This report should be exchanged as soon as possible and no later than 18 months after the last day of the group's reporting fiscal year. CbC reports for group fiscal years beginning on or after January 1, 2017 should be exchanged as soon as possible and no later than 15 months after the last day of the group's reporting fiscal year.

Source: https://tax.thomsonreuters.com

42. US - Country-by-Country Reporting

23-Jun-2017

The United States is a member of the Organization for Economic Co-operation and Development (OECD). The OECD recommended country-by-country reporting requirements to address base erosion and profit shifting. The United States issued regulations to require country-by-country reporting by U.S. multinational enterprises (MNEs).

U.S. MNEs have to report certain financial information on a country-by-country basis. The Country-by-Country Report will be exchanged under bilateral Competent Authority Arrangements negotiated between the U.S. Competent Authority and Foreign Tax Administrations.

Source: https://www.irs.gov/

43. Madoff sons' estates settle with bankruptcy trustee

June 27, 2017

The estates of the deceased sons of fraudster Bernard Madoff have agreed to pay USD23 million to victims of his crimes. The deal settles eight years of litigation, brought by Madoff's trustee in bankruptcy to recover assets the two men accumulated from their father's fraudulent investment empire before its collapse. Bernard Madoff ran a successful investment trust for many years, making large sums for private clients and businesses who subscribed to his fund. However, after the financial crisis of 2008, which saw the collapse of Lehman Brothers and other prestige institutions, it was discovered that he had been running a so-called "Ponzi scheme," in which investments put into the business by new clients were used to pay profits to existing clients. This worked as long as markets held up, but the rapid fall in asset prices in 2008 forced the Madoff funds into liquidation, owing USD17.5 billion. Ever since then, his trustee in bankruptcy, Irving Picard of the New York law firm Baker & Hostetler LLP, has been trying to recover funds from investors who made a profit from the Madoff funds at the expense of those who lost out. Bernard Madoff's two sons Mark and Andrew Madoff, who worked with him at the firm and amassed large fortunes, were first on Picard's list of targets. Both denied any knowledge of their father's fraudulent practices, claiming that they ran the market-making side of the business and conducting genuine trading activity. However, Mark committed suicide in 2010 and Andrew died of cancer in 2014. So, for the last few years, Picard has been pursuing their estates, finally resulting in this week's settlement. Their estates will transfer all cash and business interests to the trustee. Mark Madoff's family will be left with USD1.75 million and Andrew's family with USD2 million. Further litigation against their mother – Bernard Madoff's widow – is pending. The settlement takes the amount recovered by Picard to over USD11.5 billion, much of it from banks and offshore "feeder funds" that subscribed heavily to Madoff's business, many of them in the Cayman Islands and British Virgin Islands.

Source: http://www.step.org/

44. Supreme Court tightens rules on where companies can be sued

May 30, 2017

The U.S. Supreme Court on Tuesday tightened rules on where injury lawsuits may be filed, handing a victory to corporations by undercutting the ability of plaintiffs to bring claims in friendly courts in a case involving Texas-based BNSF Railway Co.

The justices, in a 8-1 ruling, threw out a lower court decision in Montana allowing out-of-state residents to sue there over injuries that occurred anywhere in BNSF's nationwide network. State courts cannot hear claims against companies when they are not based in the state or the alleged injuries did not occur there, the justices ruled.

BNSF [BNISF.UL] is a subsidiary of Berkshire Hathaway Inc.

"BNSF is grateful to the Supreme Court for the clarification they provided in deciding this case," the company said in a statement.

Businesses and plaintiffs have been engaged in a fight over where lawsuits seeking financial compensation for injuries should be filed.

Companies typically can be sued in a state where they are headquartered or incorporated, as well as where they have significant ties. They want to curb plaintiffs' ability to "shop" for courts in states with laws conducive to such injury lawsuits.

Plaintiffs contend that corporations are trying to limit their access to compensation for injuries by denying them their day in state courts.

"Going forward, some injured rail workers may have to travel far from home just to reach a courthouse that can hear their claims. Workers already suffering from disabling injuries caused by their employers shouldn't have to bear that burden," said Julie Murray, a lawyer for the plaintiffs.

Her clients will still be able to press their claims in Montana state court, Murray added.

The case involves two lawsuits against BNSF brought under the Federal Employers' Liability Act, a U.S. law that allows injured railroad employees to sue for compensation from their companies.

BNSF fuel truck driver Robert Nelson sued in 2011 over a slip-and-fall accident in which he injured his knee. Kelli Tyrrell, the widow of railroad employee Brent Tyrrell, sued in 2014 alleging her husband was exposed to chemicals that caused him to die of kidney cancer.

Neither BNSF employee lived in Montana and their allegations did not occur in the state, according to court filings.

BNSF argued that the Montana courts did not have jurisdiction over the cases. The Montana Supreme Court in May, however, ruled that state courts there can hear cases against BNSF without violating due process rights guaranteed in the U.S. Constitution because the company does business in the state.

Writing for the majority on Tuesday, liberal Justice Ruth Bader Ginsburg said that even though BNSF has more than 2,000 miles (3,200 km) of track and 2,000 employees in Montana, it cannot be held liable for "claims like Nelson's and Tyrrell's that are unrelated to any activity occurring in Montana."

Liberal Justice Sonia Sotomayor dissented, calling the ruling a "jurisdictional windfall" for large multistate or multinational corporations.

"It is individual plaintiffs, harmed by the actions of a far-flung foreign corporation, who will bear the brunt of the majority's approach and be forced to sue in distant jurisdictions with which they have no contacts or connection," Sotomayor wrote.

The Supreme Court is also expected to rule before the end of June in a similar challenge brought by drug maker Bristol-Myers Squibb, which says it should not have to face injury suits filed by hundreds of out-of-state residents in California over its blood-thinning medication Plavix. The company is incorporated in Delaware and headquartered in New York.

Conservative Justice Neil Gorsuch joined the majority on Tuesday, the first ruling he has participated in since joining the court in April.

Source: https://www.reuters.com/

45. Goldman Sachs & News Corp tax tricks as Canberra claims battle won

June 26, 2017

Peering at the local accounts of Rupert Murdoch's News Corp and Goldman Sachs … is the government's claim to have sorted multinational tax avoidance correct? As they gaze down from their glass eyries, partners of the Big Four accounting firms must be chuckling.

The government took out newspaper ads earlier this month boasting of unequivocal victory in the fight against multinational tax avoidance.

It is no small irony that taxpayers have forked out for this bald-faced lie. "Multinational corporations earning Australian dollars now pay their fair share of Australian tax," decreed the Hardly. Fair share suggests a social licence to operate. It suggests they pay something like the huge chunk of tax from their income which ordinary Australians pay. While it is true that the Australian Tax Office (ATO) and the federal government have reaped more income tax from multinationals this year than they had earlier anticipated, this is a fight which has only just begun. I has not been won.

Were it not for increasing community awareness of multinational tax avoidance – the world's biggest rort – and rising concern over tax fairness, things would be worse. So the positive perspective is that, yes, inroads are being made via the diverted profits tax, the ATO's tax avoidance task-force and the Multinational Anti-Avoidance Law (MAAL) which was enacted late in 2015.

Tax Office people privately confide too that another $2 billion may drop this year, $2 billion on top of earlier expectations that is: $1 billion from tightened enforcement and another $1 billion from "behavioural" factors: better behaviour by some multinationals in other words. Meaning, instead of $2 billion being raised by enforcement, $4 billion may be raised.

As the swathe of December year financial reports have flowed through this month and last, it is evident that some companies such as Google and Facebook have been paying more tax, albeit slightly more and still well-short of reasonable amounts.

Others, such as oil giants Exxon, Shell and Chevron, digital players Booking.com, Airbnb, Expedia and eBay, and assorted others such as American Express are up to their same old tricks. We are presently analysing Big Pharma, a sector which is swimming in taxpayer subsidies thanks to the Pharmaceutical Benefits Scheme (PBS) – and then has another bite of the taxpayer cherry via transfer pricing shenanigans as well.

To a couple of serial multinational offenders, Goldman Sachs and News Corporation. The 2016 financial statements for "Goldies", as the Giant Vampire Squid is affectionately known in financial markets, are utterly inadequate.

For a start, they are not even consolidated so don't provide a true picture of the profitability of Wall Street's famous, or infamous as many would put it, investment bank. Its head entity in Australia, Goldman Sachs Holdings ANZ Pty Ltd, discloses revenues of just $US24 million, the same as the prior year and well shy of the $US45 million booked in finance costs. Then the profit and loss statement shows an income tax "benefit", yes benefit, of $US2.4 million, compared with last year's benefit of $US18.5 million. There was a bottom line loss in both years.

On this, it would appear that Goldman has paid zero tax in the past three years in Australia. Although, travelling along to the cashf-flow statement, they disclose $US286 million was paid in tax last year (down from tax-received of $US8.5 million). When you get to the notes to the accounts though it shows an income tax benefit of $US2.4 million.

All of this is meaningless of course. As the accounts are not consolidated so don't disclose what has been going on in the whole group. Further, tax may have been paid in Hong Kong, the domicile of the immediate parent, or elsewhere.

The usual feature of high finance charges and large related party loans are there, not to mention "service fee expenses" with related parties. Merchant banks such as Goldman Sachs, being banks, get away with a lot on the tax front.

Our very own Macquarie Bank had a keen reputation for tax structuring until it got pinged by authorities three years ago. In 2008 it even recorded a tax rate of 1.7 per cent after a jumbo "tax arb" transaction, a currency swap so successful that it delivered a profit of $850 million in Asia and a matching loss in Australia. So a billion dollar profit bore almost no tax.

At least Macquarie pays homage to financial accounting standards and doesn't file a piteable and arguably non-compliant set of accounts like Goldman. ASIC could issue an edict tomorrow if it had the courage and a burst of energy, decreeing that any multinational company operating in Australia had to file proper "General Purpose" accounts.

This brings us to the entity formerly identified as the nation's number one "tax risk", Rupert Murdoch's News Corporation. That mantle has probably gone to Chevron now. After being rapped over the knuckles by the Senate Inquiry into Corporate Tax Avoidance two years ago, News has begun to pay more tax: $110 million last year.

The main ruse was to create $7 billion in "goodwill" in 2004 via a string of related party transactions and then to rip out $4.5 billion in profits to the US.

News is still deploying this "repatriation of capital" subterfuge to this day.

This practice may be legal but it is unethical. The creation of "internally generated goodwill" could be described as suspect in the least. "A magic pudding" was the way former University of NSW accounting academic, Jeffrey Knapp, labelled it.

Over the ten years to 2015, Rupert Murdoch's companies paid income tax equivalent to a rate of 4.8 per cent on $6.8 billion in operating cash flows, or just 10 per cent of operating profits.

The basic numbers for the past two years are: $110.5 million tax on revenues of $3.1 billion and profit of $156 million. In 2015, it was $109 million tax paid on revenues of $2.95 billion and profit of $287 million.

They are still aggressively debt loading however, or giving themselves loans from overseas so they can rip out interest before paying tax. The critical numbers are $2.6 billion in related party borrowings on which they paid $130 million to themselves in related party interest charges offshore. Overall, debt jumped from $2.4B to $4.3B

A $411 million loan to Foxtel, which News owns with Telstra, remains. The interest rate on this loan is 10.5 per cent, more than double what the average wage earner pays on a mortgage. This is another ruse to avoid tax.

All in all, a better effort from News but the evidence on multinational tax avoiders is in. There is an improvement but a very long way to go.

This month GetUp and the Tax Justice Network have sponsored michaelwest.com.au to undertake a series of investigations into multinational tax avoidance.

Source: https://www.michaelwest.com.au/

46. Canada: An arrangement signed with U.S. regarding the exchange of CbC Reports

June 11, 2017 Updated on June 20, 2017

The competent authorities of Canada and the United States of America (U.S.), on 7th of June 2017, signed an arrangement on the exchange of Country-by-Country Reports. The information exchanged is subject to the privacy and other provisions of the Convention between the U.S. and Canada with respect to Income and on Capital taxes, signed on September 26, 1980.

The arrangement implements the Country-by-Country (CbC) reporting standard that the OECD developed in connection with the Base Erosion and Profit Shifting (BEPS) Action Plan adopted by the OECD and G20 countries. Country-by-country reports will be exchanged between the Canada Revenue Agency and the U.S. Internal Revenue Service on the global allocation of the income, the taxes paid, and certain pointers of the location of economic activity among tax jurisdictions that multinational enterprise groups operate in. This cooperation will give each tax administration with information to assess high-level transfer pricing and other risks regarding BEPS.

Under the arrangement, the information can be used only to assess high-level transfer pricing risks and risks related to BEPS. Where suitable, it can also be used for economic and statistical analysis. The data from the country-by-country report may be used to make further inquiries into the affairs of multinational enterprise groups in the course of a tax audit and, then, to make adjustments to taxable income.

Country-by country reports will first be exchanged for the fiscal years of multinational enterprise groups that start on or after January

1, 2016. The reports will be exchanged no later than fifteen months after the last day of the fiscal year of the group that the report relates to. However, reports for the 2016 year benefit from an extra three months and need only be exchanged within 18 months.

The information cannot be used as a auxiliary for a detailed transfer pricing analysis of individual transactions and prices based on a full functional and comparability analysis.

Additionally, its arrangement with the U.S., Canada has secured an extensive network of partners to exchange CbC reports with under the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports, signed by over 50 jurisdictions.

Source: https://regfollower.com/

INTERNATIONAL TAXATION CONFERENCE 2017

IN CO-OPERATION WITH
THE ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, PARIS

DECEMBER 7-9, 2017, ITC MARATHA HOTEL, MUMBAI
(As at April 14, 2017)

Former Honorary President: Professor Klaus Vogel | **Conference Director: Professor Roy Rohatgi**

Advisory Committee: **Mukesh Butani**, **Nishith Desai**, **Gautam Doshi**, **Shanker Iyer** (Singapore), **Dinesh Kanabar**, **Michael Lang** (Austria), **T P Ostwal**, **Belema Obuoforibo** (IBFD), **Jairaj Purandare**, **Pasquale Pistone** (IBFD), **Rajesh Ramloll** (Mauritius), **Pranav Sayta**, **Rohan Shah**, **Kiran Umrootkar**, **Victor van Kommer** (IBFD), **Caroline Silberztein** (France)

OUR ANNUAL CONFERENCE

Our 22nd Annual Conference in 2017 continues the BEPS theme with"**BEPS: SOME KEY RECENT DEVELOPMENTS**" from our 2016 conference with focus on "**MLI**" under Action 15. The keynote topic on Day One is "**MULTILATERAL INSTRUMENT (MLI) UNDER BEPS IN ACTION: IMPACT ON BILATERAL TREATIES**".

Our keynote ("**Klaus Vogel**") speaker this year is again **Pascal Saint-Amans**, Director of the OECD's Center for Tax Policy and Administration in Paris. He also heads the BEPS Project since its inception in 2013 and regularly reports to the G20 Finance Ministers on its progress.

In our plenary session on Day One we have an outstanding team of experts from **OECD** who will help us in understanding the practical issues and implementing **MLI**. **MLI** permits us to make simultaneous changes in several existing bilateral tax treaties multilaterally (i.e. at same time) to comply with the changes recommended in the BEPS Reports and ensure compliance with domestic constitutional rules. It is expected that many countries, which have signed the **OECD Inclusive Framework** on **MLI** to date, would have commenced making tax treaty changes under Action 15 by mid-2017 and would therefore offer us their experiences to discuss at the conference.

(I) **Pascal Saint-Amans**, Director, OECD - **"An Update of BEPS and Multilateral Instrument (MLI) in Action - Present & Future Challenges and Possible Responses"**
(ii) **Maikel Evers**, Advisor OECD - **"Impact of MLI to date on Bilateral Treaties under Inclusive Framework"**
(iii) **Gita Kothari**, Senior Legal Advisor, OECD - **"Some Legal and Operational Aspects of MLI, based on positions taken to date by signatories of Multilateral Instrument under Action 15"**
(iv) **Jefferson Vanderwolk**, Head of Tax Treaty, Transfer Pricing & Financial Transactions Division, OECD - **"Key Impact of BEPS on Transfer Pricing Rules and Practices (including OECD Transfer Pricing Guidelines)"**
(v) **Monica Bhatia**, Head of Global Forum Secretariat, OECD - **"International Financial Centres and Exchange of Information (including beneficial ownership) under the Global Forum"**
(vi) **Jeffrey Owens**, Professor & Director of Global Tax Policy Center, Vienna; former Director, OECD - **"The Role of Tax Certainty in Promoting Sustainable and Inclusive Economic Growth"**
(vii) **Michael Williams**, Director, Business & International Tax, HM Treasury, UK - **"A Single Multilateral Convention to Implement Tax Treaty Related Measures for Prevention of BEPS: Key Challenges and Solutions"**
(viii) **David Spencer**, International Tax Lawyer, USA and former Transfer Pricing Advisor, Tax Justice Network - **"BEPS and Allocation of Taxing Rights under Treaties: Shift towards Source Taxation"**
(ix) **Daniel Erasmus**, International Tax Lawyer, Africa and USA - **"Overview of Extraterritorial Tax Operation and Legislation (including Retrospective Legislation)"**
(x) **Akhilesh Ranjan**, Principal Chief Commissioner of Income Tax (International), India - **"BEPS and Indian Tax Policy, Practice and Compliance: Status and Future Plans"**
(xi) **Rajat Bansal,** Competent Authority, India - **"Multilateral Instrument - Indian Experience: Challenges and Opportunities"**
(xii) **Parthasarathi Shome**, former Advisor, Ministry of Finance, India and Chairman, International Tax Research and Analysis Foundation, India - **"Current and Future Developments in Indian Tax Laws, Policies and Practices under BEPS with Multilateral Instrument"**

Given below is the list of Speakers from IBFD who have consented to participate at the Conference.

(i) **Belema Obuoforibo**, Director of Knowledge Centre, IBFD, The Netherlands
(ii) **Victor van Kommer**, Tax Services Director, IBFD, The Netherlands
(iii) **Jan de Goede**, Senior Principal, Tax Knowledge Management, IBFD, The Netherlands
(iv) **Joao Nogueira**, Adjunct of IBFD's Academic Chairman, The Netherlands
(v) **Pasquale Pistone**, Academic Chairman of IBFD, The Netherlands
(vi) **Rachael Saw**, Head, Asia Pacific Office, IBFD, Malaysia

As last year, our conference this year is held jointly with **IBFD**, Amsterdam. **IBFD** is the sister organization of International Fiscal Association. It was set up as its publications, research and training arm in 1938. Set up as a charity, it is the largest institution of its kind in the world (FIT as a similar charity runs the leading conference on International taxation in India annually since 1995.) We welcome them to our conference.

Day One: We will continue the tradition set by the current IFA President (**Porus Kaka**, India) and invite the incoming President of International Fiscal Association (**Murray Clayson**, UK) to make the opening presentation at the conference along with him. **Porus** retires later this year at the end of his four-year term.

Day Two Morning: We have a half-day session on **BEPS and Indian Tax Policy, Practice and Compliance**. Our speakers include **Akhilesh Ranjan**, Principal Chief Commissioner of Income Tax (International) in India, **Rajat Bansal,** Competent Authority, India and **Professor Parthasarathi Shome**, former Advisor, Ministry of Finance, India.

Rest of the three-day Conference is devoted to presentations and panel discussions by global experts (and experienced delegates) on implementation issues affecting various BEPS Action Points in different jurisdictions. The speakers will include leading academics, professionals, and senior Revenue officials from India and abroad. We trust their joint involvement and debate will assist us in achieving a more balanced perspective of the BEPS issues and their possible resolution.

We look forward to your participation at our 22nd Conference to be held jointly with IBFD this year in co-operation with OECD Paris on December 7-9, 2017.

A JOINT CONFERENCE OF THE
FOUNDATION FOR INTERNATIONAL TAXATION (FIT) INDIA AND
INTERNATIONAL BUREAU OF FISCAL DOCUMENTATION (IBFD) AMSTERDAM

Provisional list of topics for Panel Discussion at the Conference will include some of the following:

Key Challenges in Drafting and Implementation of a single Multilateral Instrument

Legal Status of Multilateral Instrument for Global Tax Compliance and Enforcement

BEPS and Allocation of Taxing Rights: Shift towards Source Taxation

Tax Disputes and their Resolution under BEPS. Is Arbitration the only solution?

Profit Split Methods for Transfer Pricing under BEPS

Extraterritorial Operation and Tax Legislation (including Retrospective Legislation)

Goods and Services Tax in India: Its introduction in mid-2017 and Status

Role of Tax Certainty in Promoting Sustainable and Inclusive Growth

Impact of BEPS on MNCs in Developed, Emerging, Mid-shore and Developing Economies

Does PE Concept have a future? If not, what changes are needed

Should taxpayer pay tax only in the country where they have relevant business activities e.g. taxation in Source State- If yes, what are its consequences on State of Residence?

Recent OECD Advice on Comprehensive Tax Reforms in India to promote inclusive growth?

What constitutes Tax Evasion and Avoidance? Different Definitions in Different States !

Etc.

Note: We request you to email your suggestions of other topics which you wish us to include in our programme.

OUR SUPPORTERS IN 2016

PATRON

Nishith Desai Associates — LEGAL AND TAX COUNSELING WORLDWIDE

BDO

PLATINUM

dhruva advisors llp

BMR Advisors

Deloitte.

EY — Building a better working world

GOLD

TMF GROUP — Global reach Local knowledge

BUREAU VAN DIJK

SILVER

Bloomberg BNA

TRILEGAL

RELIANCE Commercial Finance

ASSOCIATE

ifs FINANCIAL & ADVISORY

BAKER & McKENZIE

Jersey Finance — Delivering Insight • Driving Innovation

TATA CONSULTANCY SERVICES — Experience certainty.

LexisNexis®

M & J Services

MAURITIUS INTERNATIONAL FINANCIAL CENTRE

In co-operation with

taxsutra.com

IFA

INTERNATIONAL TAX REVIEW™

TAX EXECUTIVES INSTITUTE, INC.

Tax Academy OF SINGAPORE

THE FIRM

TAXMANN® — Taxmann Publications Pvt. Ltd.

Organized by

FOUNDATION FOR INTERNATIONAL TAXATION

Registered Office : 622 Maker Chambers V, 221 Nariman Point, Mumbai - 400 021 India

For more information, please visit our website www.fitindia.org or contact

Ms. Anjali Advani (Co-ordinator, FIT) OR **Ms. Sorrel Hidding** (Co-Ordinator, IBFD)

Tel: 9122 2202 4259/61; Telefax: 9122 2202 4260 / Tel. : 0031 20 554 0142

E-mail: internationaltax.foundation@gmail.com/s.hidding@ibfd.org

A copy of this brochure and the registration form can be downloaded from our website www.fitindia.org

YOUNG GLOBAL PUBLICATIONS

B-4, Basement, Vandhana Building, 11, Tolstoy Marg,
New Delhi - 110 001.
+91-11-23324142, 23324153, 41824268, 23319665
info@youngglobals.com
www.bookskhoj.com

IFA 2017 IN RIO

71st CONGRESS OF THE INTERNATIONAL FISCAL ASSOCIATION

AUGUST 27 TO SEPTEMBER 01 | 2017
RIO DE JANEIRO | BRAZIL

WWW.IFA2017RIO.COM.BR

IFA 2017 – YOUR RIO EXPERIENCE

The International IFA Congress will be held from August 27 – September 1, 2017 in the Barra da Tijuca beachfront district in the Marvelous City of Rio de Janeiro.

Fair Weather for the Congress in Barra da Tijuca:
Bars and restaurants of all shapes and sizes facing a long swathe of safe ocean beach, backed by a robust security structure and regular transportation network, make Barra da Tijuca the perfect place for casual open-air activities, especially cycling, jogging and strolling along seafront sidewalks and paths. From tranquil wilderness to lively clubs, this fashionable neighborhood offers unforgettable options for all tastes and budgets right around the clock.

Warm Welcome: A Great Strategy for an Unforgettable Congress
The Local Organizing Committee is focusing its efforts on pursuing excellence for every step in the organization structure. Offering a special Brazilian warm welcome to all participants is a major topic of discussion, striving to ensure unforgettable take-home memories of the IFA 2017 Conference for everyone. Careful planning guarantees attendee comfort from airport arrivals to homebound takeoffs.

Windsor Hotel and Events Center
Ranked among the world's leading hotel chains, the Windsor Group has a well-established presence in Rio de Janeiro, renowned for its luxurious accommodation and efficient infrastructure.

Two of its hotels – the Windsor Oceânico and the Windsor Barra – share a newly-inaugurated Events Center that is strategically located between them, with brand-new facilities and an impressive array of foods and beverages.

Seeking the best possible venue for the Congress, this was an outstanding choice, and we hope you enjoy it to the full.

Opening Ceremony, Social Activities and Cultural Program
An integral part of every IFA Congress, these activities follow this tradition in Rio. Packed with surprises, this Program already features famous names from the music and dance world, showcasing Brazilian culture by bringing the samba beat of Carnival Parades right into the event.

Scientific Programme

CONGRESS SUBJECTS

The IFA Permanent Scientific Committee (PSC) selected the two subjects below for the IFA 2017 Congress.

Subject 1 – International BEPS and Practical Consequences in Domestic and Multilateral Laws

Subject 2 – The future of transfer pricing

SEMINAR PROGRAMME

1. Economic crisis and protection of taxpayers' rights – tax morality?
2. International indirect taxation of enterprise services. Multilateral, internal or bilateral approach?
3. Fragmentation of contracts and taxation
4. Automatic Exchange of Information: a new standard?
5. Recent Developments
6. IFA/EU
7. IFA/OECD
8. International Tax Impacts of Foreign Exchange Effects
9. Cost-sharing and Cost Contribution Agreements
10. Break out session on the APA