Impact of MLI (Effective from 01/04/2020) on section 195 & on issuance of 15CA and/or 15CB

By CA NITIN KANWAR
FOR KNOWLEDGE TREE

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91-9810387163,
nitinkanwar@globalca.in

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ST1

Slide 2

ST1 Sunil Tiwari, 5/8/2020

Contents

Glossary

Act	Income-tax Act, 1961
AO	Assessing Officer
CBDT	Central Board of Direct Taxes
CG	Central Government
DTAA	Double Taxation Avoidance Agreement
FTS	Fees for Technical Services
Tax Period	Taxable Period
Cal Year	Calendar Year
CTA	Covered Tax Agreement
NR	Non Resident
PAN	Permanent Account Number
SC	Supreme Court
TRC	Tax Residency Certificate
u/s	Under Section
WHT	Withholding Tax

Overview

Why we are studying it?

Negative Outlook

- First of all penalty u/s 271 I for just Rs. 1 lac only for not complying sec 195 (6) w.e.f 01/06/2015 on assessee.
- Penalty of Rs. 10000/- u/s 271J on CA`s
- Cut & Paste.
- Cert. are cross chked after two years of issuance. Notices from international tax division and/or during assessment proceedings. Currently within 6 months notice are coming
- Disciplinary committee of ICAI.

Positive Outlook

- Benefits of DTAA over Income tax Act and helping the client or company with better compliances & save in working Capital, if possible.
- Agreement Drafting for both Inbound & outbound.
- More Earning opportunities & professional development

International-tax concepts and rationalization

Dealing with double taxation conflicts

• Forms of conflicts due to tax laws of 2 countries besides resident / source taxation:

Conflicts	Nature
Source	Resident State
	Source State
Residence	Resident test
Income	Characterization
Legal entity	Nature of entity

DOUBLE TAXATION

• Forms to eliminate double taxation considering income of taxpayer taxed in 2 countries:

- **Certainty of tax treatment**
- **Prevention of Fiscal evasion and tax discrimination**
- **Resolution of tax disputes**
- **Low compliance cost and standardization**
- **Limitation of cross border transactions**
- **Exception owing to income in the hands of different taxpayer**

Base Erosion & Base Protection:

BASE EROSION

To avoid the Indian Income-tax, a Non-Resident assessee may try several games (1) Try to show that the income has been earned outside India and hence India has no jurisdiction or (2) he may try to claim a categorisation / characterisation of income which attracts "NIL" or lower tax rate. (3) The person try to be non resident of india.

BASE PROTECTION

(1) To catch such incomes escaping Indian tax, there are deeming provisions. Income which under normal accounting practices would be considered as foreign income is deemed to be Indian Income under section 9. (2) Categorisation of income and few specific concepts are matters of huge litigation. (3) To bring Anti abuse provisions

The OECD BEPS Action Plan initiative

OECD BEPS Action Plan

B = Base

E = Erosion

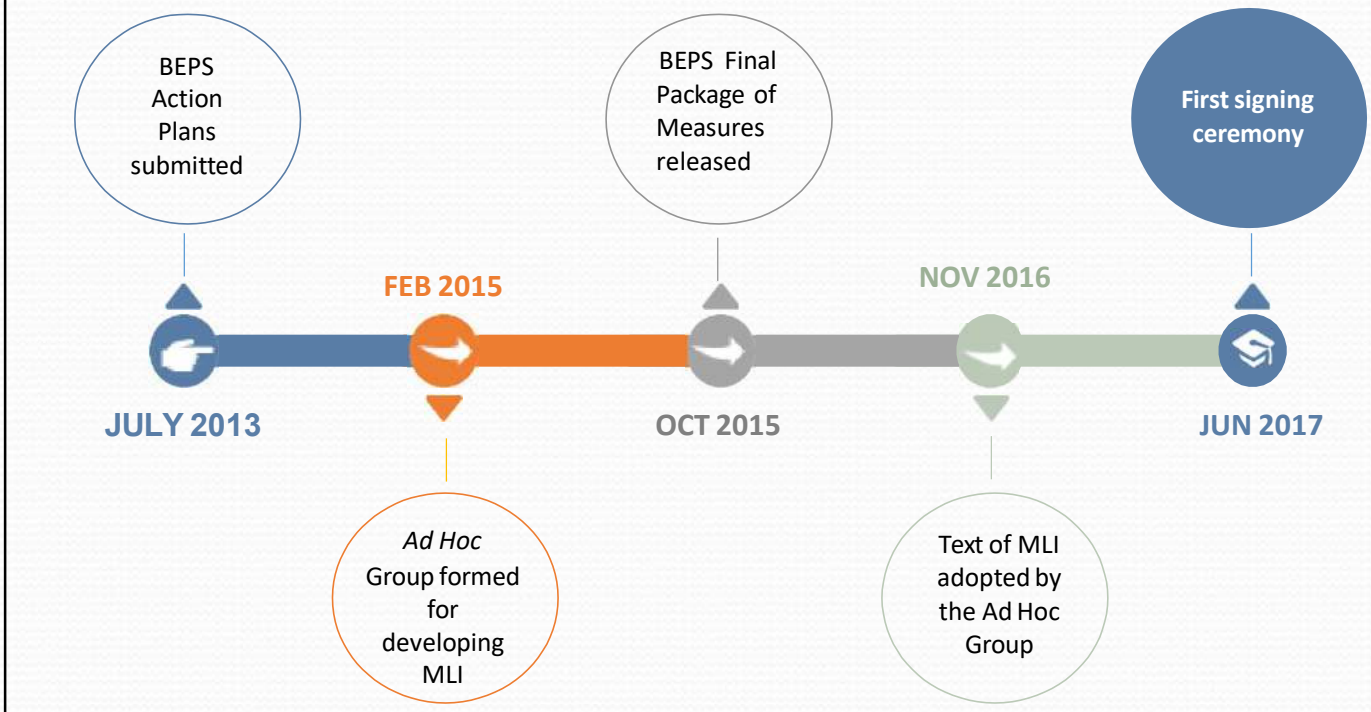
P = Profit

S = Shifting

- **aggressive tax planning strategies** that exploit gaps and mismatches in tax rules
- **artificial shifting of profits:**
  - to locations where there is little or **no real activity**;
  - but where they are **lightly taxed**
- resulting into **little or no corporate tax liability**

Multilateral Instrument

Timelines



Need for BEPS and MLI

- Advent of globalisation and advancement in technology led to opportunities to exploit gaps and mismatches in tax rules
- Public perception has become a key corporate social responsibility issue
- Developing and developed nations collaboratively through the BEPS / G20 project introduced 15 BEPS Action Plans in 2015. Intent of BEPS Action Plans:
  - Need for increased transparency of MNCs operations
  - Emphasis on substance
  - Updating international tax treaties and coherence in domestic rules affecting cross-border activities
  - Need for certainty of businesses and governments
- Changing tax landscape – government have also unilaterally implemented BEPS measures in their respective domestic laws
- MLI has been developed as a mechanism to implement BEPS measures in a synchronised and efficient manner and obviates the need to bilaterally re-negotiate 3500+ DTAA across the globe

Overview (1)

- Under the OECD/G20 Inclusive Framework on BEPS, more than 125 countries are collaborating through various BEPS Action Plans (**AP**s) to block tax avoidance strategies that exploit gaps and mismatches in tax rules
- The Multilateral Instrument (**MLI**) is an outcome of BEPS AP 15 of the OECD/G20 Inclusive Framework. It offers a mechanism/ common platform for governments to swiftly transpose results from the BEPS APs into their bilateral tax treaties worldwide
- MLI allows governments to modify the application of their own network of tax treaties in a synchronised manner in order to incorporate the agreed anti-avoidance provisions emanating from the BEPS APs (without renegotiating each of these treaties bilaterally)
- On 7 June 2017, 68 countries signed the MLI to modify a large number of bilateral tax treaties entered into by them. Till date 94 jurisdictions have signed the MLI. India signed the MLI on **7 June 2017**
- The MLI came into force on **1 July 2018***

**On deposit of 'fifth' instrument of ratification by Slovenia with the OECD Secretariat on 22 March 2018*

Overview (2)

- 41** signing jurisdictions have till date deposited their instruments of ratification, acceptance or approval ['ratification instrument'] to the OECD Secretariat along with their list of reservations and notifications ['MLI positions']
- Each party to the MLI must notify tax treaties to which the MLI provisions would apply. MLI provisions would apply to a tax treaty only if both parties to the tax treaty notify it as a Covered Tax Agreement [**CTA**]
- MLI will modify application of all CTAs at least to the extent of implementation of following minimum standards of BEPS:
  1. Counter treaty abuse (through Article 6 - purpose of CTA and Article 7 - prevention of treaty abuse)
  2. Improve dispute resolution (through Article 16 – mutual agreement procedure)
- Flexibility to implement other BEPS tax treaty measures in various ways:
  - **Choices** to apply optional and alternative provisions
  - **Reservations** to opt out of provisions or parts of provisions (either for all CTAs or a select CTAs) that are not minimum standards

***Status as of 29 January 2020. Additionally, certain jurisdictions have expressed their intent to sign MLI viz: Algeria, Eswatini, Lebanon, and Thailand*

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

The OECD BEPS Action Plan initiative

OECD BEPS Action Plan and India

Action Plan 1 – Digital Economy	• Introduction of equalization levy on online advertisements
Action Plan 2 – Hybrid mismatch & arrangements	• Part of MLI arrangement however, India has not included in its MLI commitment
Action Plan 3 – CFC rules	• Introduction of 'Place of Effective Management' Rules for tax residency
Action Plan 4 – Interest deduction	• Thin capitalisation regulations introduced under Transfer Pricing Regulations
Action Plan 5 – Harmful tax practices	• India not on the OECD harmful tax practices progress report list as update in May 2018
Action Plan 6 – Prevent tax treaty abuse	• Included in the MLI arrangement. India has accepted the simplified LOB and PPT rules under the MLI document
Action Plan 7 – Avoiding artificial PE status	• Forming part of its provisional MLI commitment

The OECD BEPS Action Plan initiative

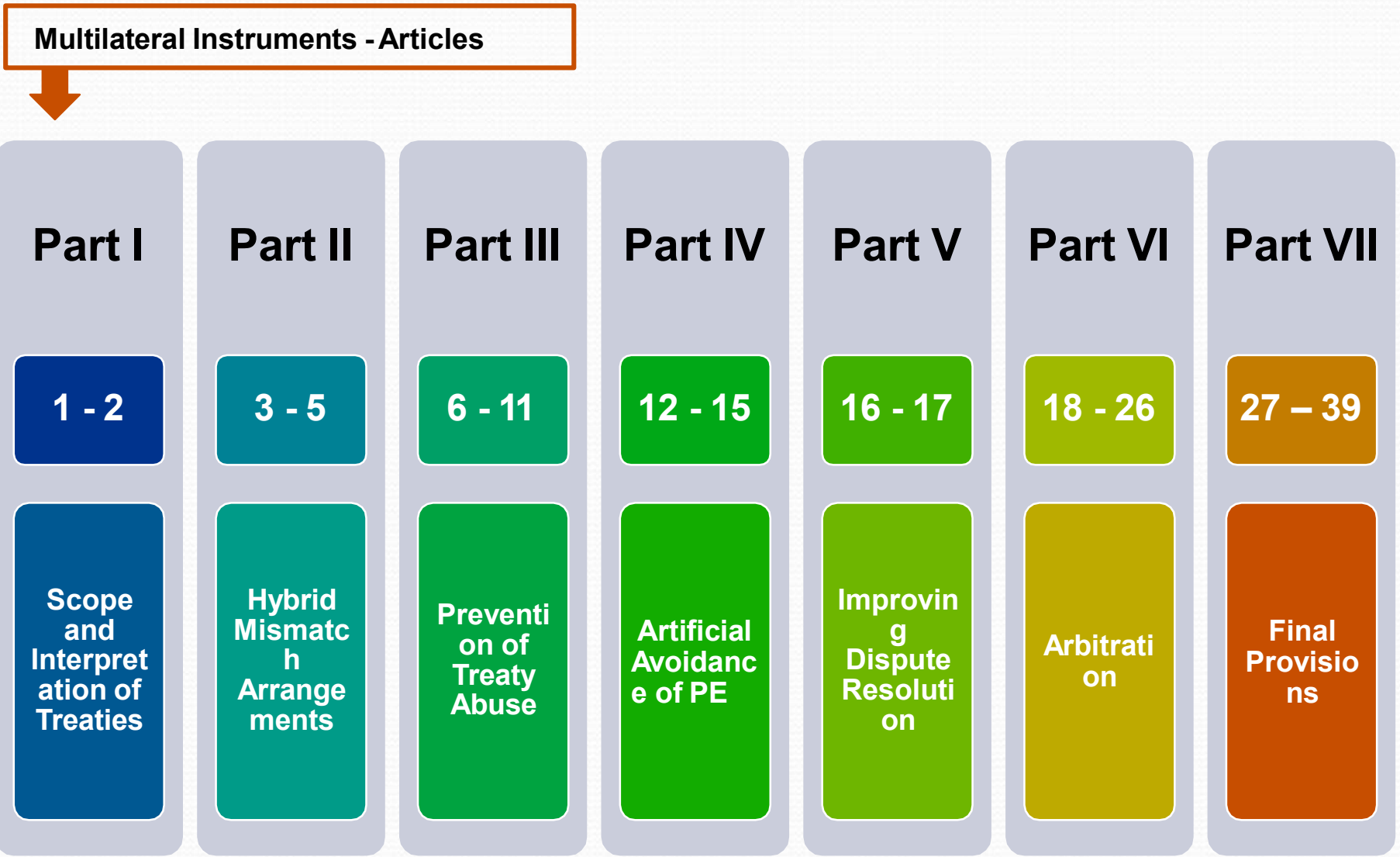
OECD BEPS Action Plan and India

Action Plan 8-10 – Transfer Pricing recommendations	• Revised OECD commentary incorporates the recommendations in the Action Plans for intangibles, Risk and Capital, etc.
Action Plan 11 – Measuring and monitoring BEPS	• No action taken yet
Action Plan 12 – Disclosure rules	• India yet to notify regulations for disclosure of aggressive tax positions
Action Plan 13 – Country-by-Country Reporting	• Introduction of CbC reporting as per OECD norms
Action Plan 14 – Dispute resolution	• Forming part of its provisional MLI commitment

Action Plan 15 - Multilateral instrument (MLI)

India adopted and notified 90 DTAAs to be covered as part of MLIs with express reservations

BEPS Action Plan 15 - Multilateral Instruments



Multilateral Instrument

What is covered?

- Deals with treaty related measures identified in the final BEPS Reports in relation to:

Hybrid Mismatch (Action 2)

Preventing Treaty Abuse (Action 6)

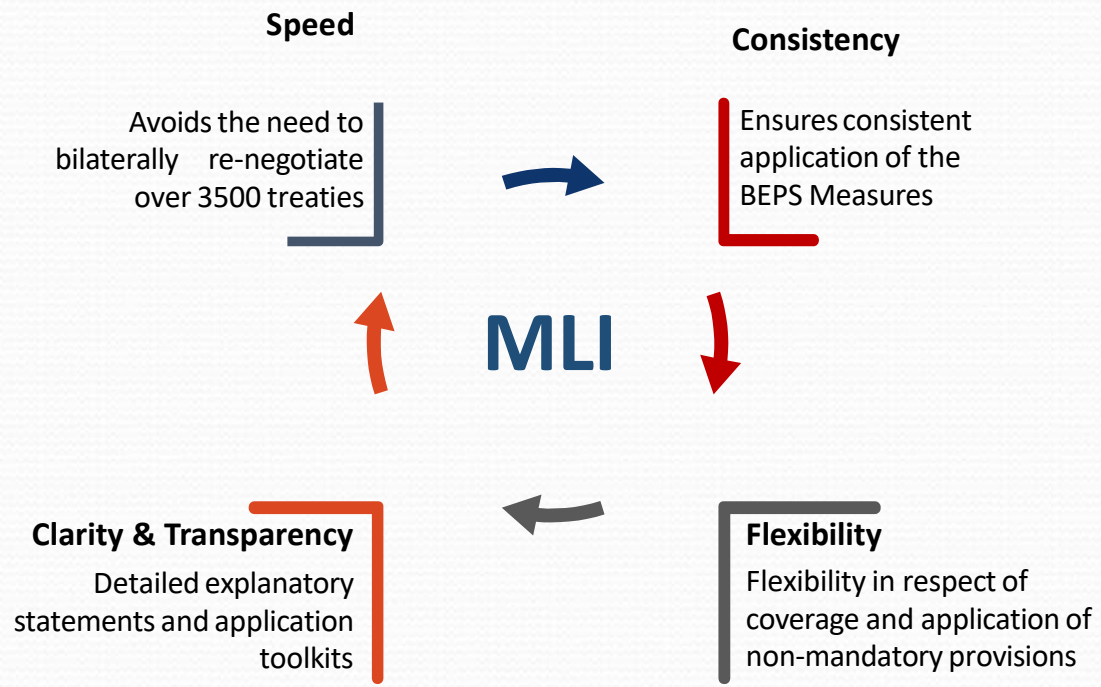
Artificial avoidance of PE (Action 7)

Effective Dispute Resolution (Action 14)

- Substantive measures already agreed to in the BEPS final package of measures

Multilateral Instrument

Rationale



Multilateral Instrument

Mechanics

Does the MLI apply at all?
• Have both countries signed the MLI?
• Has the MLI entered into force in both countries?
• Has the treaty been notified as a 'Covered Tax Agreement' by both countries?

Which provisions of the MLI apply?
• Has either country made a reservation on the application of the provision in the MLI?
• Have both countries chosen to apply an optional provision?
• Have both countries chosen to adopt the same option?

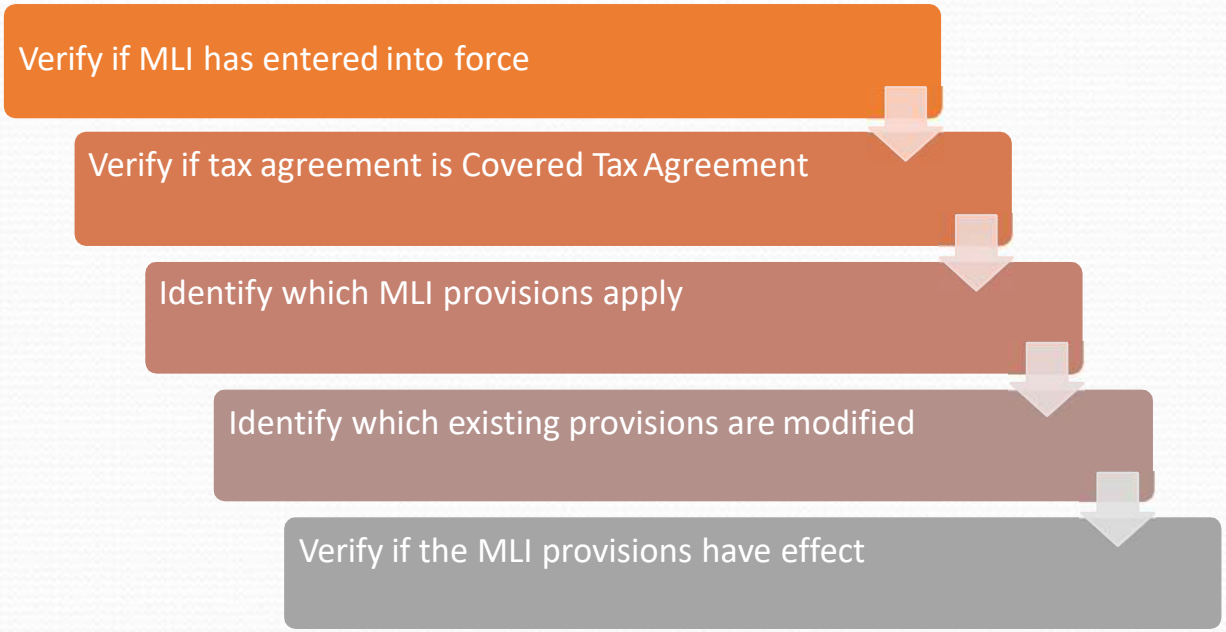
Significant built-in flexibility, but treaty-by-treaty choices not permitted

Multilateral Instrument

Mechanics - Interplay with bilateral treaties

- MLI 'sits' alongside existing treaties, modifying their operation
- Applies by virtue of '*later in time*' rule – Article 30(3) of the Vienna Convention
- Not static – countries can opt in to optional provisions or withdraw reservations
- Does not preclude subsequent bilateral modifications of treaties
- Countries may create synthesised text – Online matching tool prepared by OECD to facilitate impact analysis on existing treaties

Steps for Application of MLI



Key terms and concepts

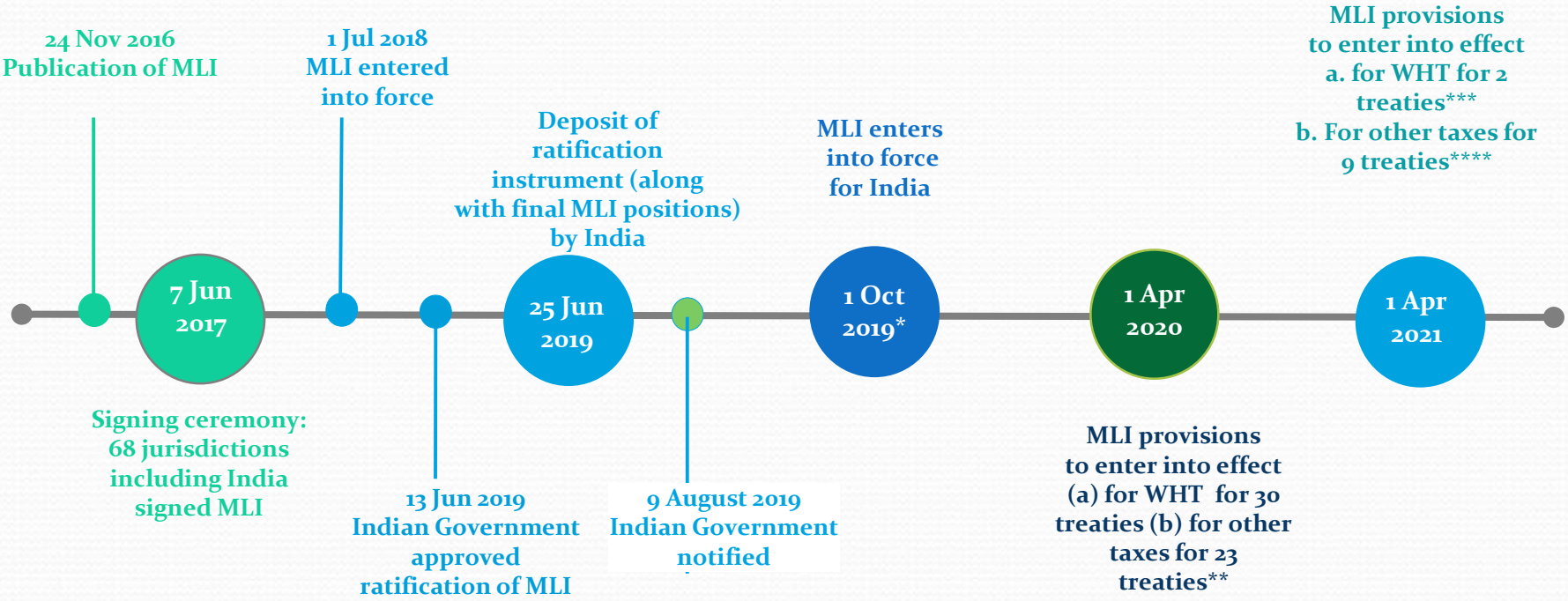
Key Concepts

- MLI does not apply automatically to all treaties entered into by a country. MLI will apply only on existing treaties that are notified by both parties
  - Such notified treaties are called Covered Tax Agreements (CTAs)
- CTAs are required to meet certain prescribed minimum standards which includes prevention of treaty abuse and improvement of dispute resolution – option to opt out available only if CTA already meets the minimum standard
- Not all provisions of MLI will apply to every CTA. MLI is a flexible instrument:
  - Provisions will apply according to a jurisdiction's policy preferences through notifications, selection of options and placing reserving (opting out)
  - Optional provisions will usually apply when both parties have elected for an option or both parties have selected the same option amongst alternatives (exception Article 5 – method selected by a country to apply for that particular country)
  - If a party does not want to apply a certain provision, it may reserve such provision
- MLI contains compatibility clauses that define the relationship between the MLI and the provisions of a CTA. These are intended to address overlap or conflicts between the provisions of the MLI and the provisions of a CTA
- The MLI contains four types of compatibility, which has been discussed in the subsequent slide

Compatibility clause

Compatibility clause	Applicability	Effect on existing provisions	Notification requirement
MLI provision applies "**in place of**" existing CTA provision	Only when there is an existing provision in the CTA	MLI provision replaces the existing CTA Provision	Both treaty partners have to notify existing CTA provision
MLI provision "**applies to**" or "**modifies**" existing CTA provision	Only when there is an existing provision in the CTA	MLI provision changes the application of an existing provision without replacing it	Both treaty partners have to notify existing CTA Provision
MLI provision applies "**in absence of**" existing CTA provision	Only when the provision is absent in the CTA	MLI provision is added to the CTA	Both treaty partners have to notify absence of provision in CTA
MLI provision applies "**in place of**" or "**in absence of**" existing CTA provision	Whether existing provision is present in CTA or absent	It replaces or supersedes existing provision, or is added to CTA in absence of existing provision.	Where both parties notify existing provision, the provision gets replaced. Where one party notifies and other does not, the MLI provision supersedes CTA provision to the extent of incompatibility (example – Addition of Article 6(1) in the existing preamble)

India's position – The Story so far



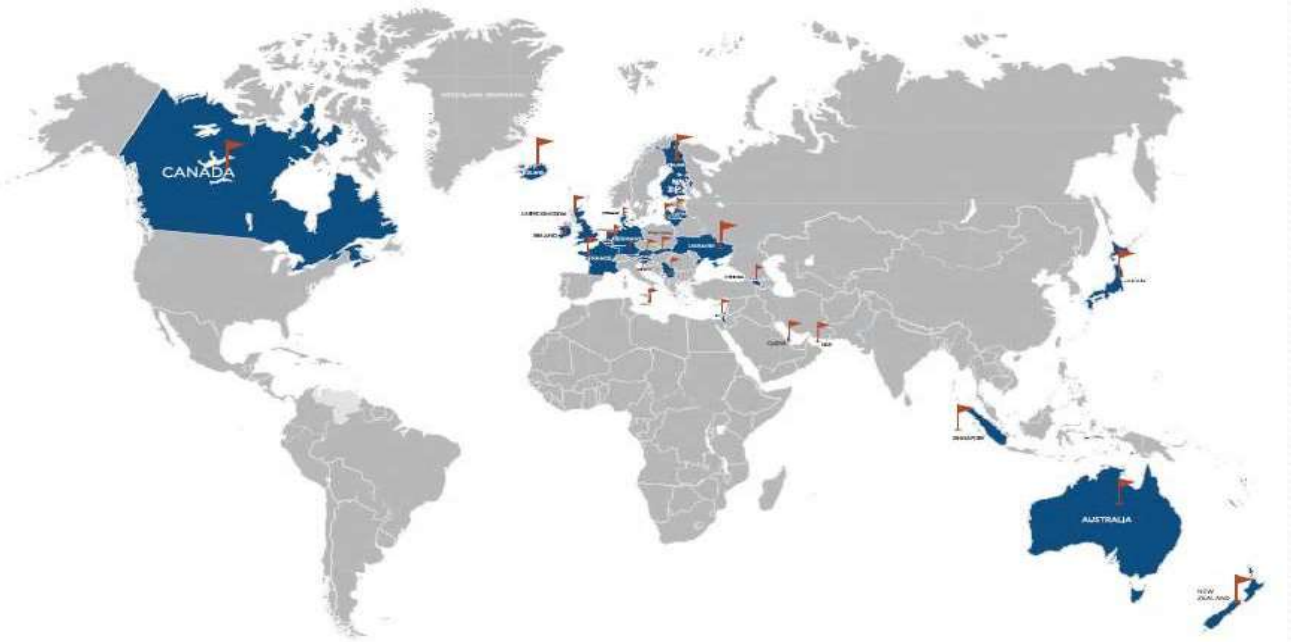
*That is, on the first day of the month following the expiration of three months beginning on the date of deposit of ratification instrument by India with the OECD Secretariat

**That is, Indian tax treaties with jurisdictions that have already deposited their ratification instrument with the OECD Secretariat latest by 29 January 2020 and have notified tax treaty with India as CTA

***That is, Indian tax treaties with jurisdictions that have already deposited their ratification instrument with the OECD Secretariat after 30 June 2019 but latest by 31 December 2019 and have notified tax treaty with India as CTA

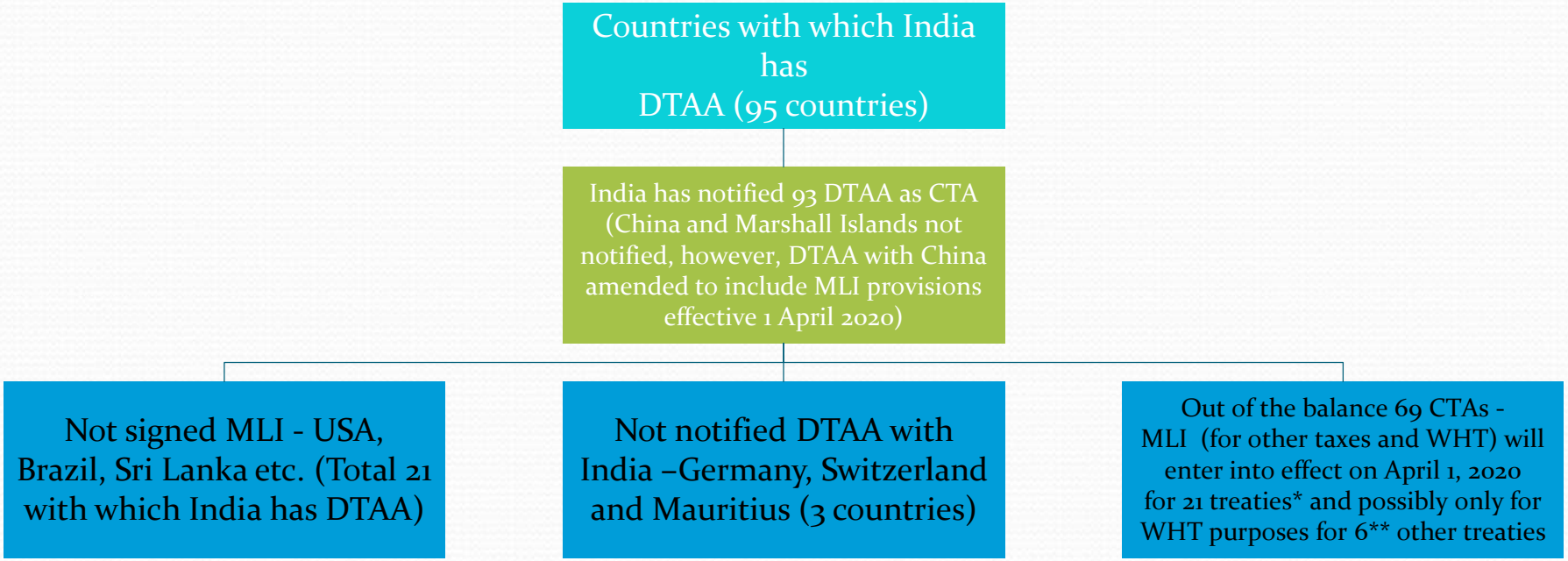
****That is, Indian tax treaties with jurisdictions that have already deposited their ratification instrument with the OECD Secretariat after 31 December 2019 but latest by 29 January 2020 (subject to further changes) and have notified tax treaty with India as CTA.

Indian Tax Treaties impacted by the MLI from 1 April 2020



1. Australia	7. France	13. Latvia	19. Norway	25. Slovenia
2. Austria	8. Georgia	14. Lithuania	20. Poland	26. Ukraine
3. Belgium	9. Iceland	15. Luxembourg	21. Qatar	27. United Kingdom
4. Canada	10. Ireland	16. Malta	22. Serbia	28. UAE
5. Denmark	11. Israel	17. Netherlands	23. Singapore	
6. Finland	12. Japan	18. New Zealand	24. Slovak Republic	

Current Status



*__Australia__, Austria, __Belgium__, __Finland, France__, Georgia, __Ireland__, __Israel__, __Japan__, Lithuania, __Luxembourg__, Malta, __Netherlands__, New Zealand, Poland, Serbia, __Singapore__, Slovak Republic, __Slovenia__, __United Arab Emirates and United Kingdom__

The MLI will be applicable on Russia and Sweden only after they internally notify it even though the two countries have deposited the MLI

**Canada, Denmark, Iceland, Latvia, Norway, Qatar and Ukraine

Entry into force and Entry into effect

Entry into Force ('EIF') (relevant for whether the MLI is in effect for any country)

- First day of the month succeeding three months after depositing its instrument of ratification

India deposits instrument of ratification	June 25, 2019
Expiry of 3 calendar months	September 25, 2019
EIF for India	October 01, 2019

Mismatch of entry into effect dates for different jurisdictions

Entry into Effect ('EIE') (relevant for MLI applicability on a specific CTA)

Particulars	Date of EIE
For withholding taxes	• Calendar year (Taxable period for India) beginning on or after the date in which the MLI enters into force for the last of the parties to CTA
For other taxes	• Taxable period beginning on or after six months from date in which the MLI enters into force for the last of the parties to CTA
For MAP provisions	• Latest date of EIF for the treaty partners

Different entry into effect dates for payer and recipient

Indian CTAs | MLI to enter into effect for WHT and other taxes from 1 April 2020

List of jurisdictions that have notified tax treaty with India as CTA and have deposited their ratification instruments with OECD Secretariat upto 30 June 2019

Austria	**Australia**	Belgium
Finland	**France**	Georgia
Ireland	Israel	**Japan**
Lithuania	Luxembourg	Malta
Netherlands	New Zealand	Poland
Russia	Serbia	**Singapore**
Slovak Republic	Slovenia	**Sweden**
United Kingdom	**UAE**	

"**Entry into effect**" with respect to CTA [Article 35]:

a) **For Withholding Tax (WHT)**: On or after the first day of the next calendar year following the latest of the dates on which MLI enters into force for each of the party to the CTA. India has chosen to substitute "calendar year" with "taxable period"

b) **For other taxes**: Taxable period beginning on or after the expiry of six calendar months following the latest of the dates on which MLI enters into force for each of the party to the CTA

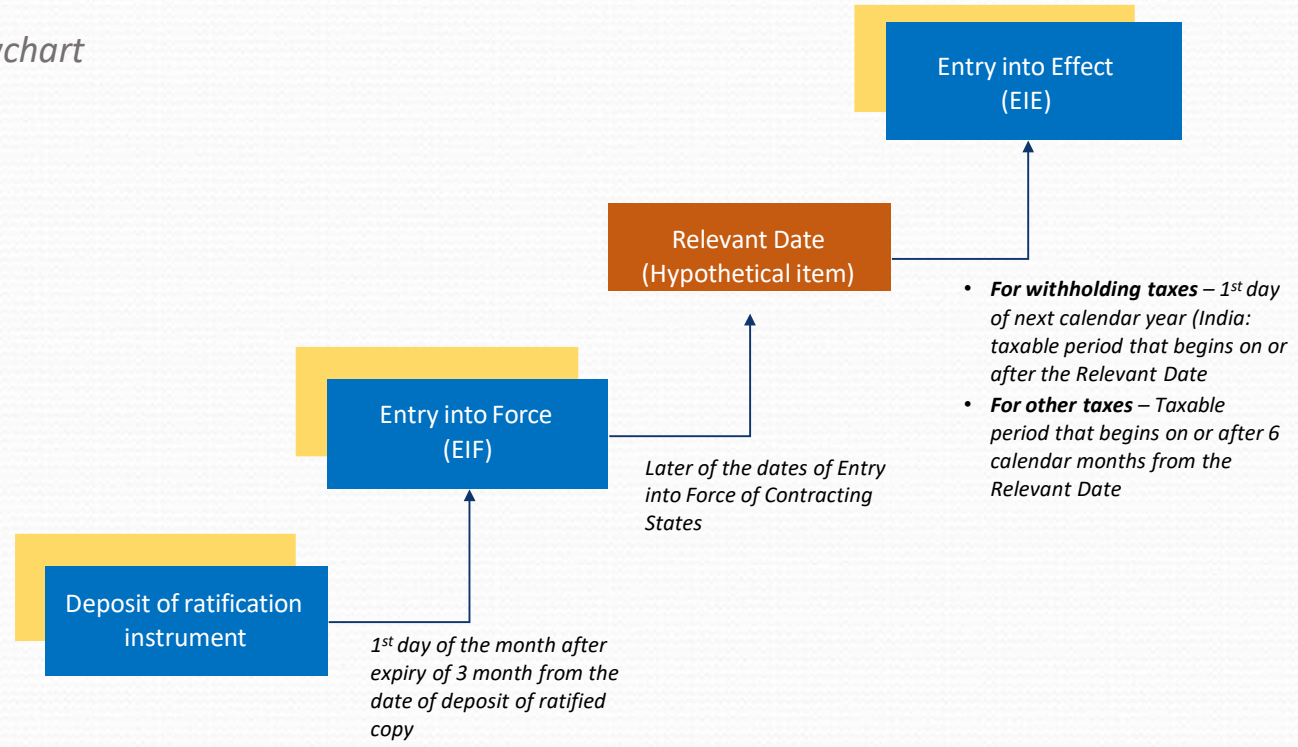
In relation to Indian bilateral tax treaties with jurisdictions tabulated (23), MLI to enter into effect for India from 1 April 2020 (for WHT and other taxes)

MLI will not impact a) India-USA tax treaty (since USA has not signed MLI) and b) India tax treaties with China* and Germany, Switzerland and Mauritius (since Indian tax treaties are not notified by said parties)

*India and China have recently amended its tax treaty through protocol signed on 26 November 2018. Amongst others, protocol incorporates changes required to implement treaty related minimum standards agreed under BEPS project

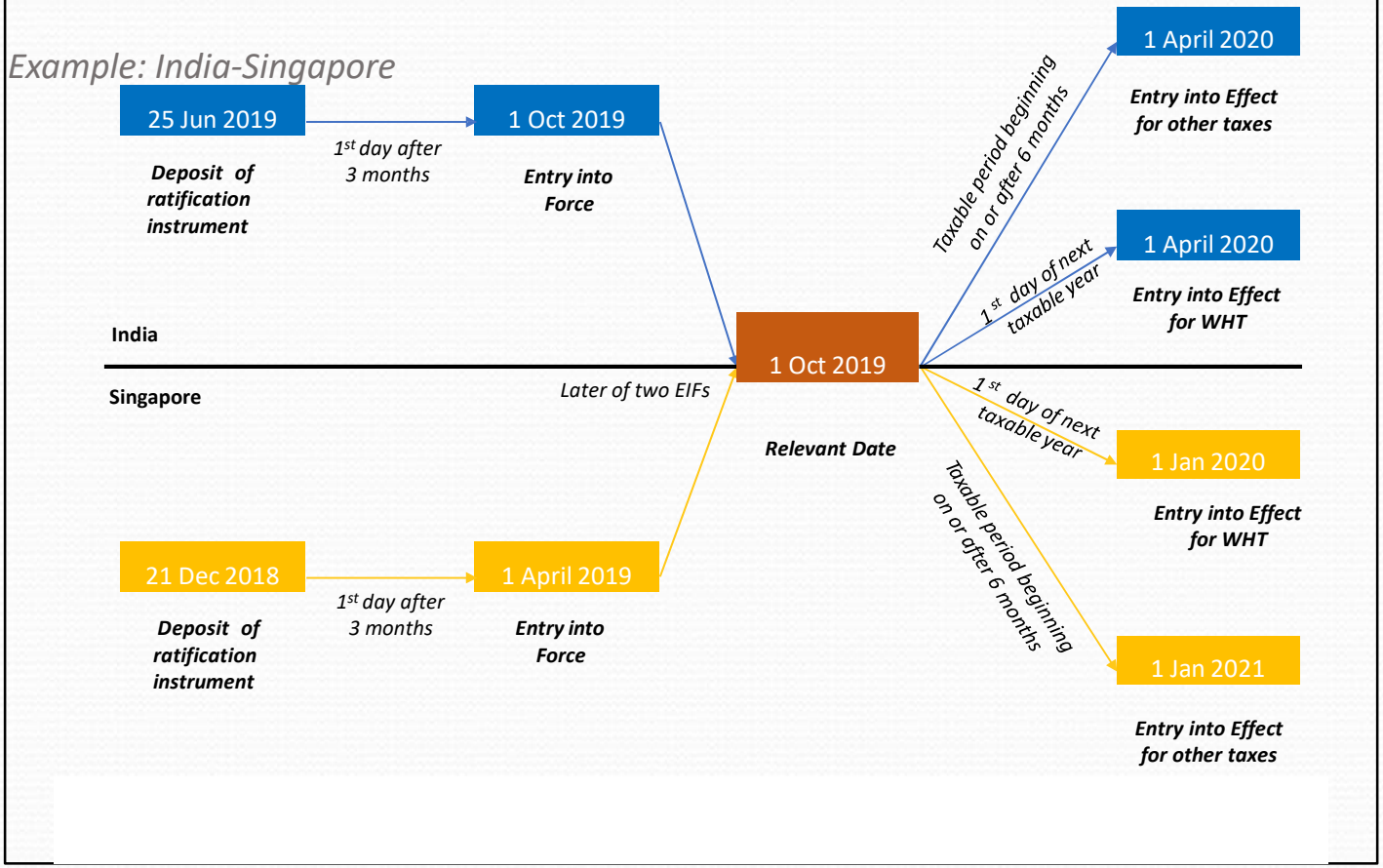
Determination of Effective Date for application of MLI

Flowchart



Determination of Effective Date for application of MLI

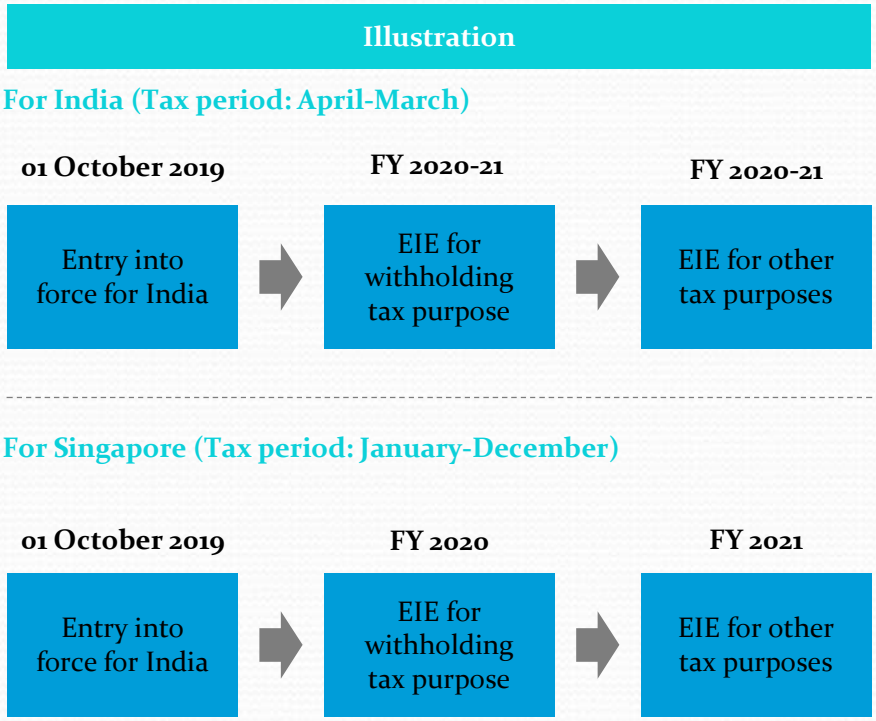
Example: India-Singapore



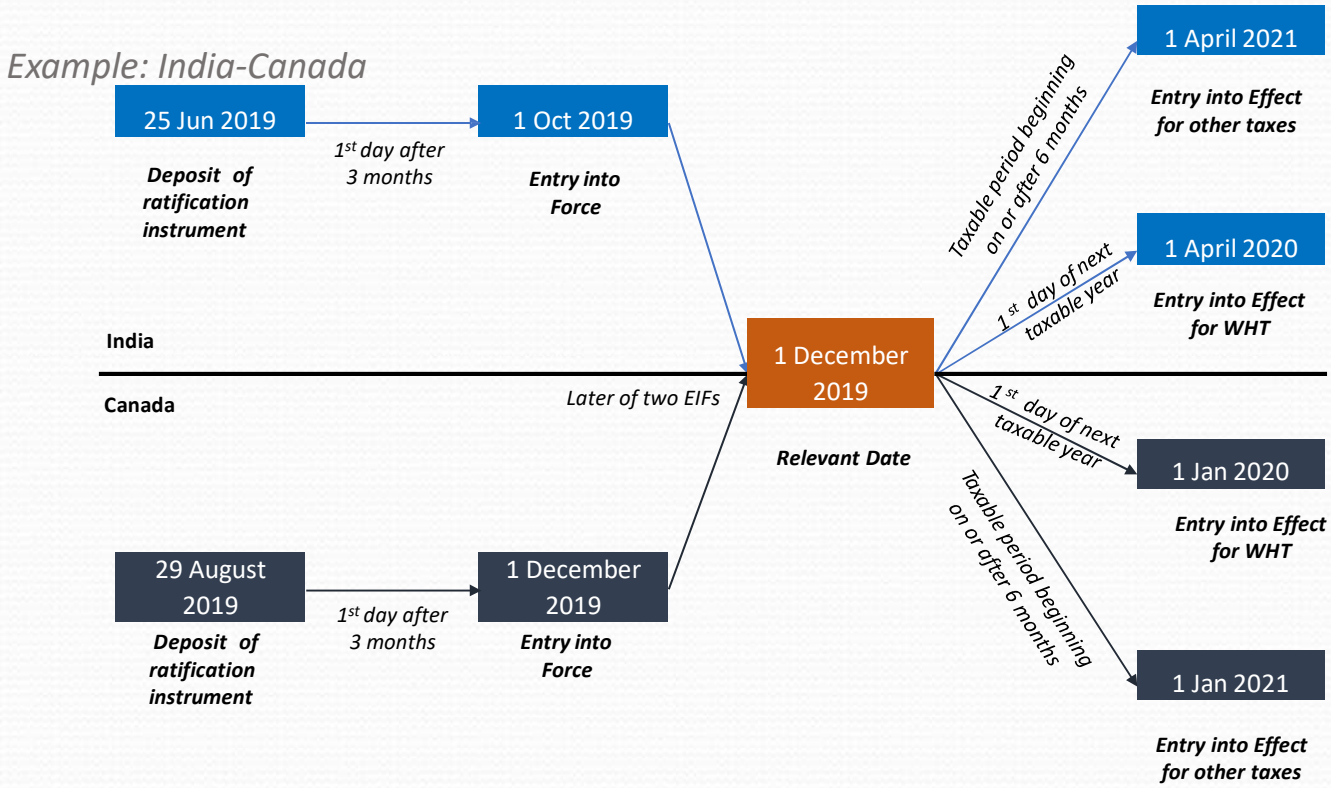
Annexure - Illustration of Entry into effect for deposit [Different tax period]

For illustration purposes let's take an example:

- **21 December 2018** - Singapore deposits its instrument of ratification
- **01 April 2019** - EIF for Singapore
- **25 June 2019** - India deposits its instrument of ratification
- **01 October 2019** - EIF for India



Determination of Effective Date for application of MLI

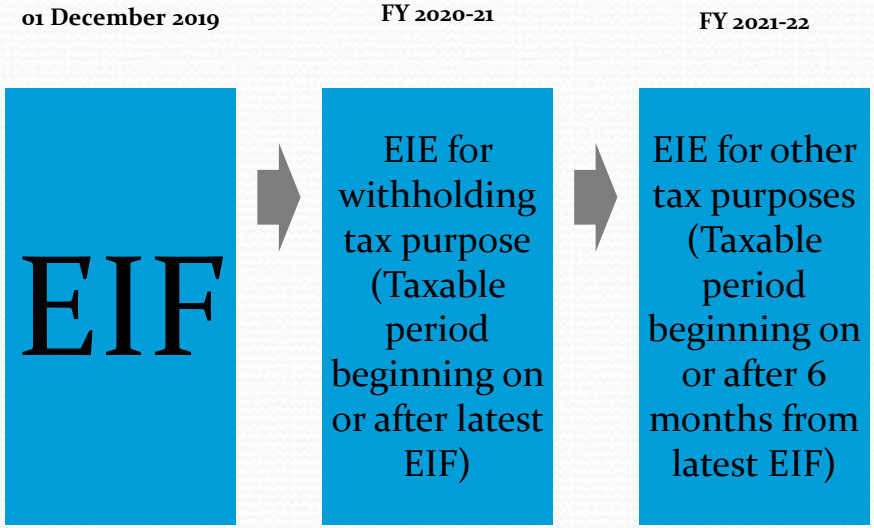


Annexure - Illustration of Entry into effect for deposit (Withholding tax and other taxes)

For illustration purposes let's take an example:

- **25 June 2019** - India deposits its instrument of ratification
- **01 October 2019** - EIF for India
- **29 August 2019** - Canada deposits its instrument of ratification
- **01 December 2019** - EIF for Canada

Illustration



Indian CTAs | MLI to enter into effect for WHT and other taxes

Indian CTAs | MLI to enter into effect from 1 April 2020 for WHT and from 1 April 2021 for other taxes

Jurisdictions that have notified tax treaty with India as CTA and have deposited their ratification instruments with OECD Secretariat after 30 June 2019 upto 31 December 2019

Canada	Latvia	Ukraine
Denmark	Norway	
Iceland	Qatar	

Indian CTAs | MLI to enter into effect from 1 April 2021 for WHT as well as other taxes

Jurisdictions that have notified tax treaty with India as CTA and have deposited their ratification instruments with OECD Secretariat after 31 December 2019 till 29 January 2020

Cyprus	Saudi Arabia

- **Where CTA party deposits ratification document latest by 31 December 2019, MLI to come into effect for Indian CTA with such party from 1 April 2020 for WHT and 1 April 2021 for other taxes. For example: Canada, Denmark, Iceland, Latvia, Norway, Qatar, and Ukraine, which deposited its ratification instrument between 1 July 2019 to 31 December 2019.**
- **MLI will not impact a) India-USA tax treaty (since USA has not signed MLI) and b) India tax treaties with China* and Germany, Switzerland and Mauritius (since Indian tax treaties are not notified by said parties)**

*India and China have recently amended its tax treaty through protocol signed on 26 November 2018. Amongst others, protocol incorporates changes required to implement treaty related minimum standards agreed under BEPS project

Applicability of MLI on WHT obligation

Determination of Effective Date for application of MLI

Example: India-Canada

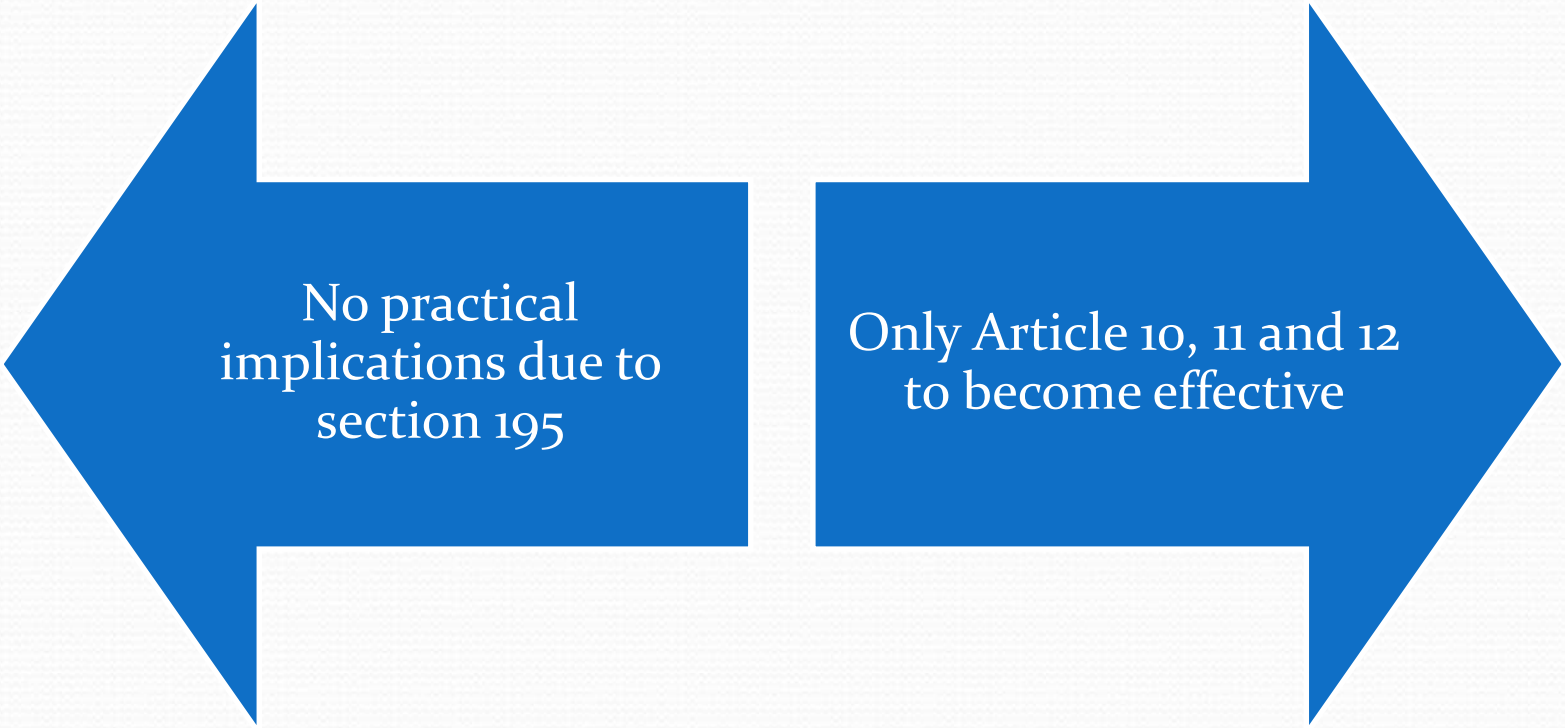
Different rates of EIF for withholding taxes and other taxes

In context of India – Canada DTAA, ***MLI provisions become applicable for withholding taxes ahead of its applicability to other provisions***

- Interesting question will arise whether restrictive effect of MLI will need to be considered by the payers while withholding tax though, from the perspective of primary taxpayer, such applicability of MLI provision is deferred
  - Can it be argued that since withholding tax liability is ***co-terminus*** with primary tax liability of a non-resident taxpayer, such withholding obligation should not arise before effective date for other taxes?
  - Alternatively, can it be argued that withholding tax is only a mechanism to collect tax by government and hence, where a payment is subject to tax, such withholding requirement should be triggered irrespective of effective for other taxes?
  - Considering the onerous provisions for non-compliance with withholding provisions in India, a conscious decision should be made by the payer

How are MLI / DTAAs provisions to be read

Entry into effect for Indian CTAs | Where dates for withholding taxes (WHT) and other taxes are different



Applicability of MLI on WHT obligation

Whether the impact of MLI provisions to be considered at the time of discharging withholding tax obligations?

Impact of MLI NOT to be considered

- ***No specific onus on payer to apply anti-abuse provisions*** at the time of discharging WHT obligation except TRC / Form 10F
- Practical challenges for payer in terms of access to documents of payee, extent of verification - ***impossibility of performance***
- ***Non-resident payee is not bound by the tax position / views of payer*** at the time of withholding taxes

Impact of MLI to be considered

- ***WHT obligation under section 195 is linked to taxability*** under section 5 and section 9 read with Section 90
- ***Potential consequences of WHT default*** i.e. disallowance of expenses, exposure of being treated as representative assessee, assessee-in-default, penalty
- Reference to ***Shome Committee Report on GAAR*** (Refer paragraph

Recommendations of Shome Committee on GAAR

Relevant Extract of Shome Committee's recommendations:

"In view of the above, the Committee recommends that, while processing an application under section 195(2) or 197 of the Act pertaining to the withholding of taxes,

*(a) the taxpayer should **submit a satisfactory undertaking** to pay tax along with interest in case it is found that GAAR provisions are applicable in relation to the remittance during the course of assessment proceedings; or*

*(b) in case the taxpayer is unwilling to submit a satisfactory undertaking as mentioned in (a) above, the Assessing Officer should have the authority with the prior approval of Commissioner, to **inform the taxpayer of his likely liability in case GAAR is to be invoked during assessment procedure**.*

*There is a responsibility cast on the payer of any sum to a non-resident under Indian tax laws in the form of a withholding agent of the Revenue as well as representative assessee of the non-resident payee. **The payer is required to undertake due diligence to ascertain the correct amount of tax payable in India and, in case of any default, it becomes the payer's liability to pay**…"*

Certain practical considerations on Indian tax treaties – India's MLI positions

Synthesised Text of DTAA

What is Synthesised Text of DTAA?

- Synthesised text is a single document or webpage that reproduce

  a) the ***text of each Covered Tax Agreement*** (including the texts of any amending protocols or similar instruments); and

  b) the ***provisions of the MLI*** that will modify that Covered Tax Agreement in the light of the interaction of the MLI positions the Parties have taken

- OECD issued *Guidance for the development of Synthesised Texts* to facilitate the interpretation and application of tax agreements modified by MLI provisions

- Guidance sets out a ***suggested approach*** for the development of Synthesised texts

OECD recommendations on Disclaimers in the Synthesised Text

Key Principles

- Parties to MLI have ***no legal obligation to develop Synthesised text***
  - However, where jurisdictions decide to produce Synthesised texts, ***OECD encourages them to consult each other*** in order to ensure a consistent interpretation and application of MLI provisions
- ***No official format to develop Synthesised texts*** on the MLI
  - However, the OECD encourages all stakeholders to take a consistent approach
- Synthesised texts to also include explanatory information in the form of ***a disclaimer***, including information on the ***date on which the provisions of the MLI enter into effect***

OECD recommendations on Disclaimers in the Synthesised Text

General Disclaimers

Before the text of CTA, a disclaimer based on the general sample disclaimer text should be included in the Per-Article-sample boxes section. Following are the key general disclaimers:

- Reference to the MLI, CTA and the latest MLI positions of the parities along with hyperlinks
- ***Synthesised text has no legal value***. The text of the MLI, applied alongside the CTA, would remain the only legal documents
- ***Stress that further modifications could be made to the MLI positions*** and that these modifications could change the effect of the MLI on the CTA

OECD recommendations on Disclaimers in the Synthesised Text

Disclaimer on the entry into effect

Synthesised texts should include the following ***specific disclaimer on the entry into effect*** of the provisions of the MLI:

- Clarification that the applicable MLI provisions will not have effect on the same dates as the original provisions of the CTA
- Statement that the ***MLI provisions could take effect on different dates***, depending on the provision in question, types of taxes involved (WHT or other taxes) and the choices made by each Contracting Jurisdiction
- ***Date of the deposit*** of the instruments of ratification, acceptance or approval for both Contracting Jurisdictions
- ***Date of the entry into force*** of the MLI for each Contracting Jurisdiction

List of Synthesised Texts

List of Countries for which the synthesised text of DTAA is published by India

1. Australia
2. Austria
3. Belgium
4. Finland
5. Georgia
6. Ireland
7. Japan
8. Latvia
9. Lithuania
10. Luxembourg
11. Malta
12. Poland
13. Serbia
14. Singapore
15. Slovak Republic
16. UAE
17. United Kingdom

Link to access Synthesised Texts of DTAAs:
https://www.incometaxindia.gov.in/Pages/international-taxation/dtaa.aspx

Extract of Disclaimer

India-Australia Synthesised DTAA

General disclaimers specifically clarifies the legality of Synthesised text while interpreting the provisions of MLI along with CTA

- **The relevant extract of the Synthesised Text of India-Australia DTAA:**

  *"The sole purpose of this document is to **facilitate the understanding of the application** of the MLI to the Agreement and **it does not constitute a source of law**. The authentic legal texts of the Agreement and the MLI take precedence and remain the legal texts applicable."*

Link to access Synthesised Texts of DTAAs:
https://www.incometaxindia.gov.in/Pages/international-taxation/dtaa.aspx

Extracts of Synthesised Texts

India – Australia DTAA

Preamble

AGREEMENT BETWEEN THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF THE REPUBLIC OF INDIA FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME AS AMENDED BY THE AMENDING PROTOCOL

THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF THE REPUBLIC OF INDIA,

DESIRING to conclude an Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income,

The following paragraph 1 of Article 6 of the MLI is included in the preamble of this Agreement:

ARTICLE 6 OF THE MLI – PURPOSE OF A COVERED TAX AGREEMENT

Intending to eliminate double taxation with respect to the taxes covered by the Agreement without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in the Agreement for the indirect benefit of residents of third jurisdictions),

Extracts of Synthesised Texts

India – Australia DTAA

Residence

ARTICLE 4

RESIDENCE

1. For the purposes of this Agreement, a person is a resident of one of the Contracting States if the person is a resident of that Contracting State for the purposes of its tax. However, a person is not a resident of a Contracting State for the purposes of this Agreement if the person is liable to tax in that State in respect only of income from sources in that State.

2. Where, by reason of the provisions of paragraph 1, an individual is a resident of both Contracting States, then the status of that person shall be determined in accordance with the following rules:

(*a*) the person shall be deemed to be a resident solely of the Contracting State in which a permanent home is available to the person;

(*b*) if a permanent home is available to the person in both Contracting States, or in neither of them, the person shall be deemed to be a resident solely of the Contracting State with which the person's personal and economic relations are closer (centre of vital interests).

For the purposes of this paragraph, an individual's citizenship of a Contracting State as well as that person's habitual abode shall be factors in determining the degree of the person's personal and economic relations with that Contracting State.

3. Where, by reason of the provisions of paragraph 1, a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident solely of the Contracting State in which its place of effective management is situated.

The following paragraph 1 of Article 4 and subparagraph e) of paragraph 3 of Article 4 of the MLI replace paragraph 3 of Article 4 of this Agreement:

ARTICLE 4 OF THE MLI – DUAL RESIDENT ENTITIES

Where by reason of the provisions of the Agreement a person other than an individual is a resident of both Contracting States, the competent authorities of the Contracting States shall endeavour to determine by mutual agreement the Contracting State of which such person shall be deemed to be a resident for the purposes of the Agreement, having regard to its place of effective management, the place where it is incorporated or otherwise constituted and any other relevant factors. In the absence of such agreement, such person shall not be entitled to any relief or exemption from tax provided by the Agreement.

Extracts of Synthesised Texts

India – Australia DTAA

Permanent Establishment…

ARTICLE 5

PERMANENT ESTABLISHMENT

1. For the purposes of this Agreement, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term "permanent establishment" shall include especially:

(*a*) a place of management;
(*b*) a branch;
(*c*) an office;
(*d*) a factory;
(*e*) a workshop;
(*f*) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources;
(*g*) a warehouse in relation to a person providing storage facilities for others;
(*h*) a farm, plantation or other place where agricultural, pastoral, forestry or plantation activities are carried on;
(*i*) premises used as a sales outlet or for receiving or soliciting orders;
(*j*) an installation or structure, or plant or equipment, used for the exploration for or exploitation of natural resources;
(*k*) a building site or construction, installation or assembly project, or supervisory activities in connection with such a site or project, where that site or project exists or those activities are carried on (whether separately or together with other sites, projects or activities) for more than 6 months.

The following paragraph 1 of Article 14 applies and supersedes the provisions of this Agreement:

ARTICLE 14 OF THE MLI – SPLITTING-UP OF CONTRACTS

For the sole purpose of determining whether the period referred to in [*subparagraph k) of paragraph 2 of Article 5 of the Agreement*] has been exceeded:

(*a*) where an enterprise of a Contracting State carries on activities in the other Contracting State at a place that constitutes a building site, construction project, installation project or other specific project identified in subparagraph k) of paragraph 2 of Article 5 of the Agreement or carries on supervisory activities in connection with such a place, and these activities are carried on during one or more periods of time that, in the aggregate exceed 30 days without exceeding the period referred to in subparagraph k) of paragraph 2 of Article 5 of the Agreement; and

(*b*) where connected activities are carried on in that other Contracting State at (or, where subparagraph k) of paragraph 2 of Article 5 of the Agreement applies to supervisory activities, in connection with) the same building site, construction project, installation project or other specific project identified in subparagraph k) of paragraph 2 of Article 5 of the Agreement during different periods of time, each exceeding 30 days, by one or more enterprises closely related to the first-mentioned enterprise, these different periods of time shall be added to the aggregate period of time during which the first-mentioned enterprise has carried on activities at that building site, construction project, installation project or other specific project identified in subparagraph k) of paragraph 2 of Article 5 of the Agreement.

Extracts of Synthesised Texts

India – Australia DTAA

…Permanent Establishment..

4. An enterprise shall not be deemed to have a permanent establishment merely by reason of:

(a) the use of facilities solely for the purpose of storage or display of goods or merchandise belonging to the enterprise;

(b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage or display;

(c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

(d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or of collecting information, for the enterprise; or

(e) the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research, or for similar activities which have a preparatory or auxiliary character, for the enterprise.

However, the preceding provisions of this paragraph shall not apply where an enterprise of one of the Contracting States maintains in the other Contracting State a fixed place of business for any purpose other than those specified in this paragraph.

The following paragraph 2 of Article 13 of the MLI modifies paragraph 4 of Article 5 of this Agreement:

ARTICLE 13 OF THE MLI – ARTIFICIAL AVOIDANCE OF PERMANENT ESTABLISHMENT STATUS THROUGH THE SPECIFIC ACTIVITY EXEMPTIONS

(Option A)

Notwithstanding Article 5 of the Agreement, the term "permanent establishment" shall be deemed not to include:

(a) the activities specifically listed in paragraph 4 of Article 5 of the Agreement as activities deemed not to constitute a permanent establishment, whether or not that exception from permanent establishment status is contingent on the activity being of a preparatory or auxiliary character;

(b) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any activity not described in subparagraph a);

(c) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) and b),

provided that such activity or, in the case of subparagraph c), the overall activity of the fixed place of business, is of a preparatory or auxiliary character.

The following paragraph 4 of Article 13 of the MLI applies to paragraph 4 of Article 5 of this Agreement as modified by paragraph 2 of Article 13 of the MLI:

Paragraph 4 of Article 5 of the Agreement, as modified by paragraph 2 of Article 13 of the MLI shall not apply to a fixed place of business that is used or maintained by an enterprise if the same enterprise or a closely related enterprise carries on business activities at the same place or at another place in the same Contracting State and:

(a) that place or other place constitutes a permanent establishment for the enterprise or the closely related enterprise under the provisions of Article 5 of the Agreement; or

(b) the overall activity resulting from the combination of the activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, is not of a preparatory or auxiliary character,

provided that the business activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, constitute complementary functions that are part of a cohesive business operation.

Extracts of Synthesised Texts

India – Australia DTAA

…Permanent Establishment

5. A person acting in one of the Contracting States on behalf of an enterprise of the other Contracting State - other than an agent of an independent status to whom paragraph (6) applies - shall be deemed to be a permanent establishment of that enterprise in the first mentioned State if:

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

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

(*c*) the person habitually secures orders in that State, wholly or principally for the enterprise itself or for the enterprise and other enterprises controlling, or controlled by or subject to the same common control as, that enterprise; or

(*d*) in so acting, the person manufactures or processes in that State for the enterprise goods or merchandise belonging to the enterprise.

6. An enterprise of one of the Contracting States shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status, where that person is acting in the ordinary course of the person's business as such a broker or agent. However, when the activities of such a broker or agent are carried on wholly or principally on behalf of that enterprise itself or on behalf of that enterprise and other enterprises controlling, or controlled by or subject to the same common control as, that enterprise, the person will not be considered a broker or agent of an independent status within the meaning of this paragraph.

7. The fact that a company which is a resident of one of the Contracting States controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself make either company a permanent establishment of the other.

8. The principles set forth in the preceding paragraphs of this Article shall be applied in determining for the purposes of paragraph (5) of Article 11 and paragraph (5) of Article 12 of this Agreement whether there is a permanent establishment outside both Contracting States, and whether an enterprise, not being an enterprise of one of the Contracting States, has a permanent establishment in one of the Contracting States.

The following paragraph 1 of Article 15 applies to this Agreement:

ARTICLE 15 OF THE MLI – DEFINITION OF A PERSON CLOSELY RELATED TO AN ENTERPRISE

For the purposes of Article 5 of the Agreement, 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 the control of the 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.

Extracts of Synthesised Texts

***India – Australia DTAA* Alienation of Property**

ARTICLE 13

ALIENATION OF PROPERTY

1. Income or gains derived by a resident of one of the Contracting States from the alienation of real property referred to in Article 6 and, as provided in that Article, situated in the other Contracting State may be taxed in that other State.

2. Income or gains derived from the alienation of property, other than real property referred to in Article 6, that forms part of the business property of a permanent establishment which an enterprise of one of the Contracting States has in the other Contracting State or pertains to a fixed base available to a resident of the firstmentioned State in that other State for the purpose of performing independent personal services, including income or gains from the alienation of such a permanent establishment (alone or with the whole enterprise) or of such a fixed base, may be taxed in that other State.

3. Income or gains derived from the alienation of ships or aircraft operated in international traffic, or of property other than real property referred to in Article 6 pertaining to the operation of those ships or aircraft, shall be taxable only in the Contracting State of which the enterprise which operated those ships or aircraft is a resident.

4. Income or gains derived from the alienation of shares or comparable interests in a company, the assets of which consist wholly or principally of real property referred to in Article 6 and, as provided in that Article, situated in one of the Contracting States, may be taxed in that State.

The following paragraph 1 of Article 9 of the MLI applies to paragraph 4 of Article 13 of this Agreement:

ARTICLE 9 OF THE MLI – CAPITAL GAINS FROM ALIENATION OF SHARES OR INTERESTS OF ENTITIES DERIVING THEIR VALUE PRINCIPALLY FROM IMMOVABLE PROPERTY

Paragraph 4 of Article 13 of the Agreement:

(a)	shall apply if the relevant value threshold is met at any time during the 365 days preceding the alienation; and
(b)	shall apply to shares or comparable interests, such as interests in a partnership or trust (to the extent that such shares or interests are not already covered) in addition to any shares or rights already covered by the provisions of the Agreement.

5. Income or gains derived from the alienation of shares or comparable interests in a company, other than those referred to in paragraph 4, may be taxed in the Contracting State of which the company is a resident.

6. Nothing in this Agreement affects the application of a law of a Contracting State relating to the taxation of gains of a capital nature derived from the alienation of property other than that to which any of paragraphs 1, 2, 3, 4 and 5 apply.

Extracts of Synthesised Texts

India – Australia DTAA

Mutual Agreement Procedure

ARTICLE 25

MUTUAL AGREEMENT PROCEDURE

1. Where a person who is a resident of one of the Contracting States considers that the actions of the taxation authority of one or both of the Contracting States result or will result for the person in taxation not in accordance with this Agreement, the person may, notwithstanding the remedies provided by the national laws of those States, present a case to the competent authority of the Contracting State of which the person is a resident. The case must be presented within three years from the first notification of the action giving rise to taxation not in accordance with this Agreement.

2. The competent authority shall endeavour, if the claim appears to it to be justified and if it is not itself able to arrive at an appropriate solution, to resolve the case with the competent authority of the other Contracting State, with a view to the avoidance of taxation not in accordance with this Agreement. The solution so reached shall be implemented notwithstanding any time limits in the national laws of the Contracting States.

3. The competent authorities of the Contracting States shall jointly endeavour to resolve any difficulties or doubts arising as to the application of this Agreement.

The following paragraph 3 of Article 16 of the MLI applies to this Agreement:

ARTICLE 16 OF THE MLI – MUTUAL AGREEMENT PROCEDURE

The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Agreement. They may also consult together for the elimination of double taxation in cases not provided for in the Agreement.

4. The competent authorities of the Contracting States may communicate with each other directly for the purpose of giving effect to the provisions of this Agreement.

Extracts of Synthesised Texts

India – Australia DTAA

Principal Purpose Test

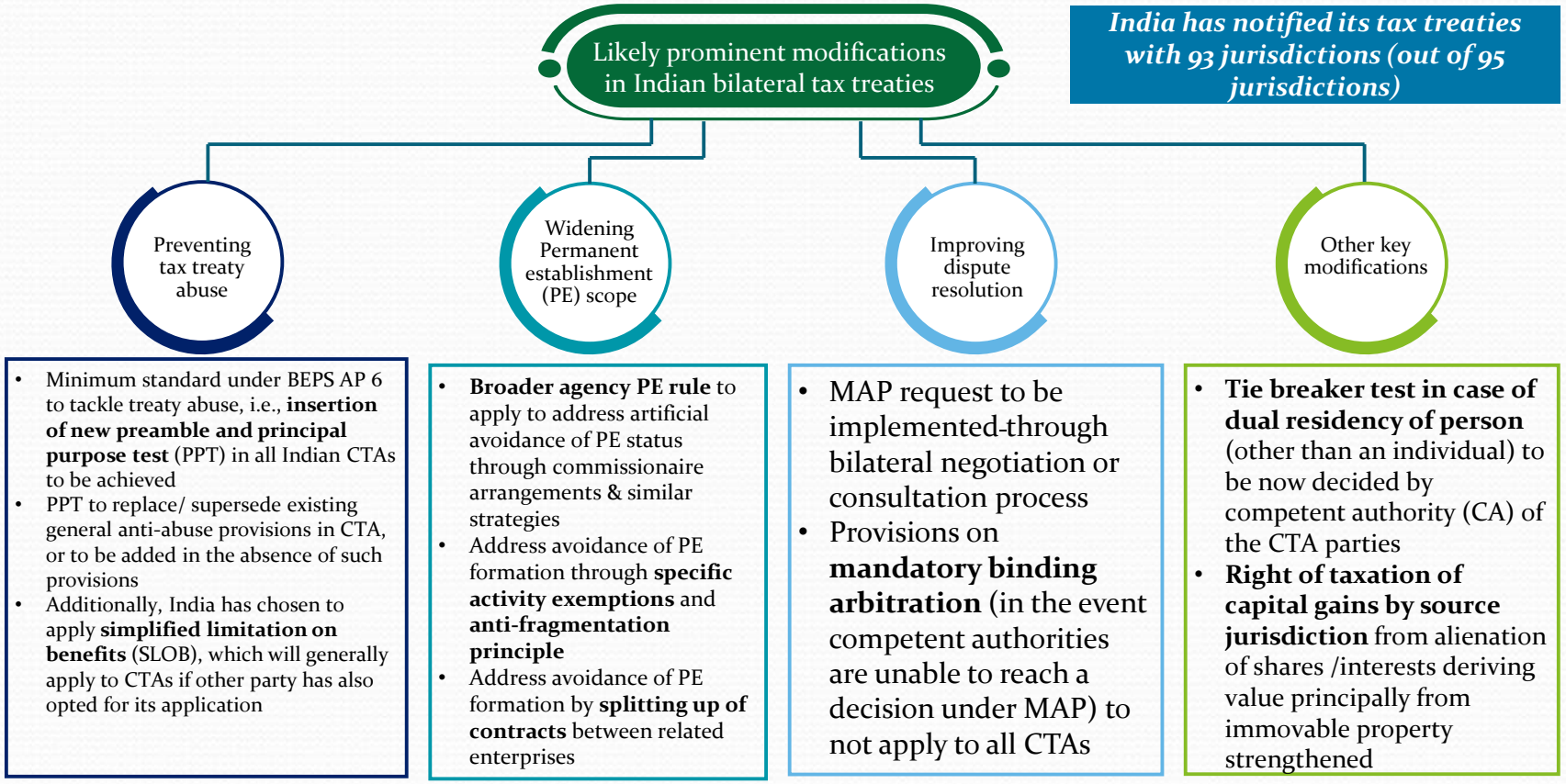
Nothing in this Agreement shall affect the fiscal privileges of diplomatic or consular officials under the general rules of international law or under the provisions of special international agreements.

The following paragraph 1 of Article 7 of the MLI applies and supersedes the provisions of this Agreement:

ARTICLE 7 OF THE MLI - ENTITLEMENT TO BENEFITS *(Principal purposes test provision)*

Notwithstanding any provisions of the Agreement, a benefit under the Agreement shall not be granted in respect of an item of income if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the Agreement.

Key impact areas vis-a-vis Indian CTAs



For evaluating extent of modification of the Indian tax treaty, India's MLI positions need to be compared with the MLI positions taken by its counterpart. Refer snapshot of these impact areas vis-à-vis select Indian tax treaties

Dual Resident Entities

Article 4 of MLI - Dual Resident Entities

Concept

Paragraph 1 of Article 4 of the MLI provides that

- where, under the provisions of a CTA, a person other than an individual (i.e., companies, LLP, other incorporated entities etc.) is considered to be a resident of more than one contracting jurisdiction, then
- the competent authorities of the contracting jurisdictions shall endeavor to determine by mutual agreement the residency of such person for the purposes of the CTA

Competent authorities shall give regard to the POEM of the person, the place where it is incorporated and any other relevant factors

If the competent authorities are unable to decide on the jurisdiction of residence	such person shall not be entitled to any relief or exemption from tax provided under the CTA
	such person shall be entitled to any relief or exemption from tax to the extent and in the manner agreed upon by the competent authorities

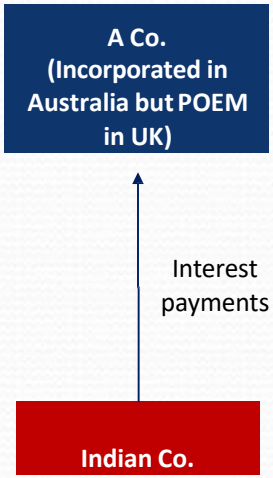
Article 4 of MLI - Dual Resident Entities

India's position on Article 4

- India has not made any reservations with respect to Article 4 and accordingly chosen to apply Article 4 to all its CTA, subject to reservations of treaty partners against Article 4
- Where India's treaty partners' also notify the same clause, such clause will stand replaced by the provisions of Article 4
  - In the absence of notification by such treaty partners, provisions of such clause will apply to the extent that they are not incompatible with the provisions of Article 4

Article 4 of MLI - Dual Resident Entities

Case Study 1 - Impact from withholding tax perspective



- A Co. is incorporated in Australia but POEM is in UK
- B Co. has earned interest income from an Indian Co.
- Competent Authorities of Australia and UK have not been able to determine residency of A Co.
- At what rate Indian Co. should withhold tax while making interest payment to A Co.?
- Australia, UK and India, all have notified Article 4 of MLI

Article 6: Purpose of CTA (minimum standard) & Article 7: Prevention of treaty abuse (minimum standard)

Article 6: Purpose of CTA & Article 7: Prevention of treaty abuse

Brief description of the Article 6	Rule for applicability	India's position
Mandatory provision Introduces preamble text in CTA stating that the jurisdictions intend to avoid creation of opportunities for non-taxation or reduced taxation through tax evasion or avoidance, and through treaty shopping. *Optional provision....*	**Mandatory provision** to apply to all CTAs of Country A Optional provision to apply only if notification made by both jurisdictions	India is **silent** on its position. Being minimum standard, such MLI provision to apply to all its CTAs

Brief description of the Article 7	Rule for applicability	India's position
Envisages following three anti-abuse measures to meet the minimum requirement: a) PPT b) PPT supplemented with either SLOB or detailed LOB clause c) Detailed LOB provision, supplemented by a mutually negotiated mechanism to deal with conduit arrangements not already dealt with in CTA	To apply to all CTAs of Country A *(Opting out of such is possible only in limited situations such as where the CTA already meets such standards)*	India has opted for **PPT** + **SLOB**. It has notified existing provisions, if any in CTAs (Article 28C and Article 29 of the CTA with UK and UAE respectively). India has accepted to apply PPT as an interim measure and intends where possible to adopt LOB provision, in addition or replacement of PPT, through bilateral negotiations *SLOB to be applicable only where other CTA partner has adopted it or allowed India to apply SLOB asymmetrically*

Article 6: Purpose of CTA

Impact on Bilateral tax treaties

- The revised Preamble would have an overarching impact on availability of treaty benefit to transactions where the effect is of overall no-taxation or reduced taxation, unless such result could be justified by the language of the existing Preamble

- Being minimum standard, mandatory provision to apply to all the CTAs.

- The preamble text described in Article 6(1) would be included in addition to the existing preamble language.

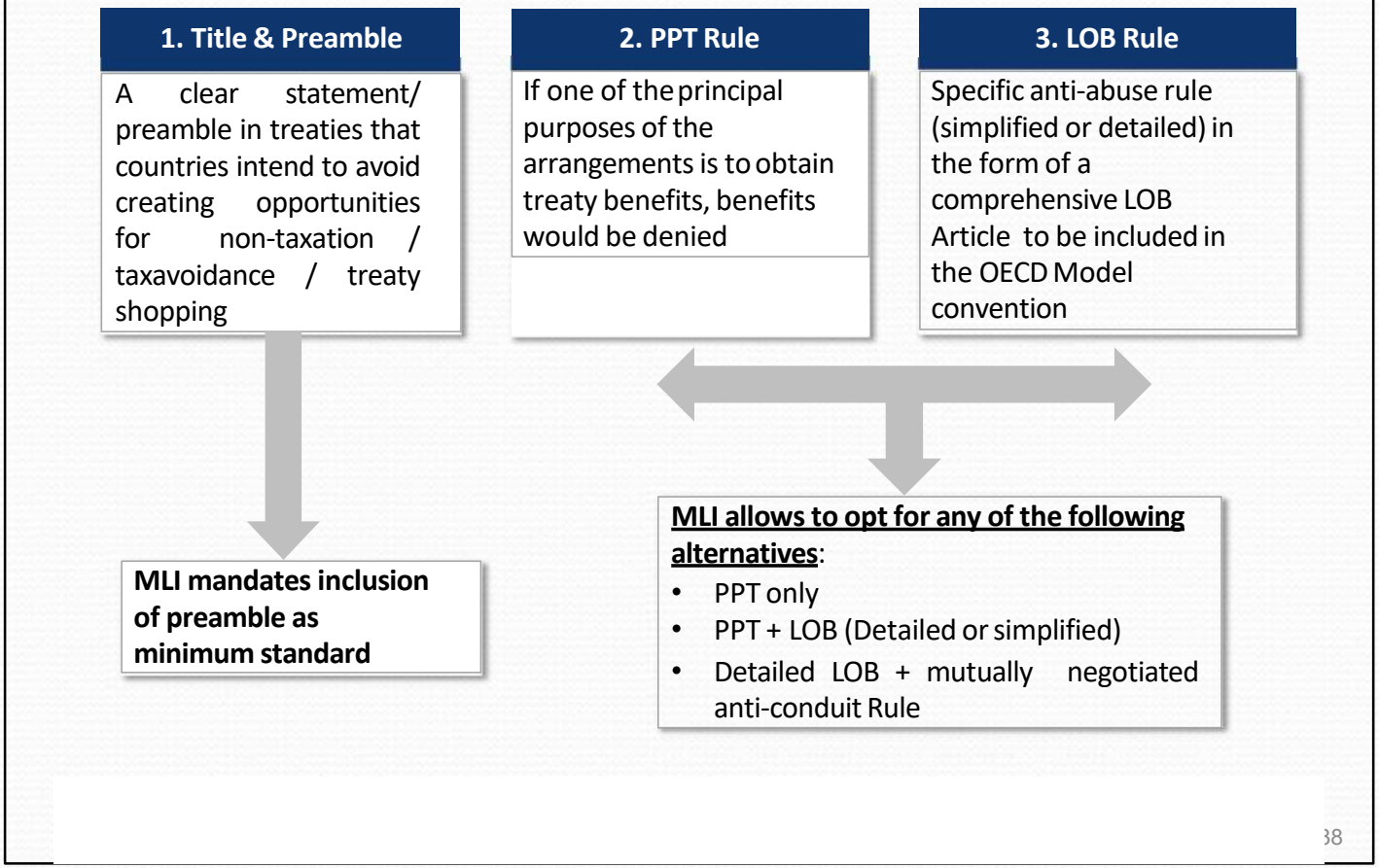
- Optional provision i.e. Article 6(3) regarding '**developing economic relation** and enhancing co-operation in tax matters' would not apply. Currently, only treaties with Sweden and Luxembourg its object as "promoting economic co-operation between the two countries".

- **India - China treaty:** The preamble is similar to the Article 6(1) and 6(3) of MLI. China has also signed MLI. However, both India and China have not notified the tax treaty between them as Covered Tax Agreement and accordingly, MLI provisions shall not apply to India-China tax treaty.

- **India- Mauritius Treaty:** The existing preamble in the Mauritius treaty provides its object as *"the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains* ***and for the encouragement of mutual trade and investment".***

  Would MLI, once in effect, modify the position taken by the Hon'ble Supreme Court Azadi Bachao Andolan [2003] 132 Taxman 373 (SC)? Currently, India- Mauritius treaty is not a CTA.

Approach of BEPS Action 6 & 7 for prevention of treaty abuse



Article 6 - Purpose of Covered Tax Agreement (Preamble)

Provisions of Article 6

- Article 6 is a minimum standard (India is silent and therefore, this modifies the existing preamble)
- MLI proposes to add the following language to the preamble of CTAs:
  - Intention of CTA is to **eliminate double taxation** with respect to taxes covered under the treaty
  - **without creating opportunities for non/reduced taxation** through **tax evasion / tax avoidance** including **treaty shopping** aimed at obtaining indirect benefit of residents of third jurisdictions (para 1 - mandatory)
- India has *opted not to apply* para which deals with '**intention to develop economic relationship and enhance co-operation in tax matters**' (para 3 - optional)
- Para 1 will be included *(and not replaced)* in the preamble of all the conventions notified by India (example in the ensuing slide)
- Inclusion of para 1 may expand the existing object and purpose mentioned in the preamble of tax treaties

Article 6 – India – UK treaty – Preamble after MLI in Synthesised Text

Preamble

The Government of the Republic of India and the Government of the United Kingdom of Great Britain and Northern Ireland;

Desiring to conclude a new convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains,

The following paragraph 1 of Article 6 of the MLI is included in the preamble of this Convention:

ARTICLE 6 OF THE MLI - Purpose of a Covered Tax Agreement

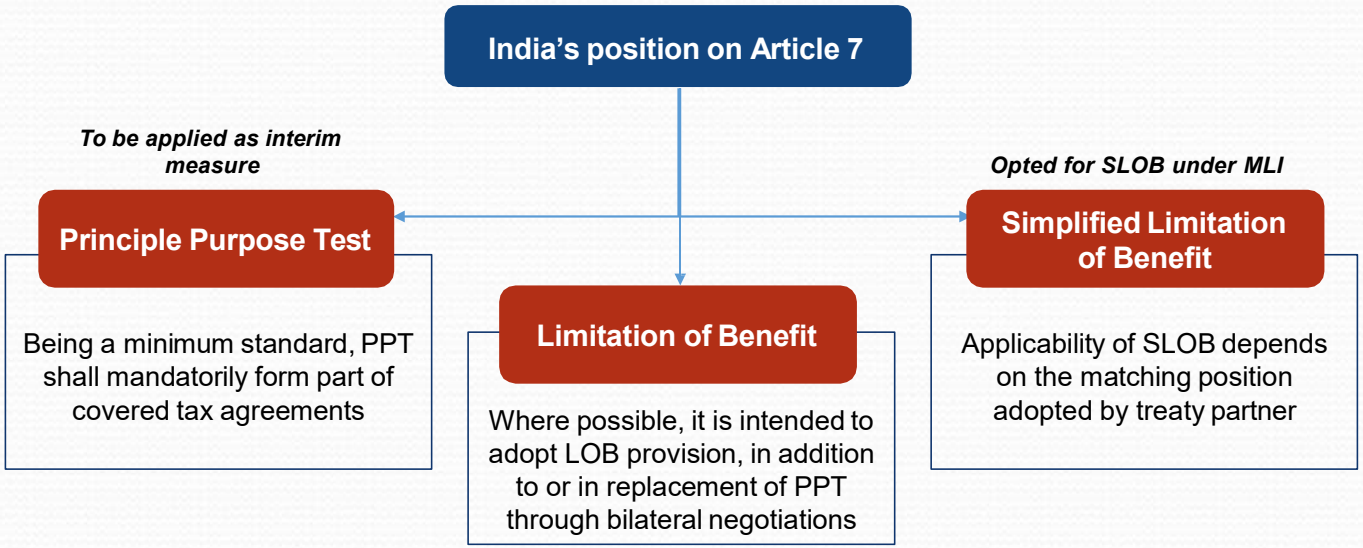
Intending to eliminate double taxation with respect to the taxes covered by this Agreement without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in the Agreement for the indirect benefit of residents of third jurisdictions),

Preamble impact on Tax Treaties

Countries with *"promoting economic cooperation between two countries"*	Impact
Sweden, Luxembourg, Malaysia, Russia and Serbia	• Currently provides – avoidance of double taxation and prevention of fiscal evasion and with a view *to promoting economic co-operation between the two countries* • Except Malaysia, the other 4 have notified India as a CTA - preamble language to be added • No fiscal evasion line in Russia and Serbia

Other countries	Impact
Singapore, France, UK, Netherland, Ireland, Australia and Japan (key countries that have deposited the MLI on or before 31 December 2019)	• The current preamble of these treaties provide for avoidance of double taxation and the prevention of fiscal evasion with respect to taxes • These countries have notified India as a CTA - preamble language to change

India's position on Article 7 of MLI



India has accepted to apply PPT as an interim measure and intends where possible to adopt LoB provision, in addition or replacement of PPT, through bilateral negotiations along with Simplified LoB

Article 7 of MLI - Principle Purpose Test

Concept

- *Notwithstanding any provisions of a Covered Tax Agreement, a benefit under the Covered Tax Agreement shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit* ***was one of the principal purposes*** *of any arrangement or transaction* ***that resulted directly or indirectly in that benefit*****, ('reasonable purpose test') – Question of fact**

Unless

- *it is established that granting that benefit in these circumstances would be* ***in accordance with the object and purpose*** *of the relevant provisions of the Covered Tax Agreement."*
  ('object and purpose test') – Question of law

Principal Purposes Test (PPT) – Key points

PPT TEST

- The phrase **"that resulted directly or indirectly in that benefit"** is deliberately broad and include situation where person claims treaty benefit indirectly, for e.g. transfer of loan to subsidiary in tax efficient jurisdiction to obtain tax treaty benefit
- **"Benefit" includes tax reduction, exemption, deferral or refund including limitation on taxing rights of source state for dividend, interest, royalties, capital gain, etc.**
- **Terms "arrangement or transaction"** to be interpreted broadly and include any agreement, understanding, scheme, transaction or series of transactions whether or not legally enforceable, for e.g. meetings of board of directors in particular state to claim residency is considered as an "arrangement".
- **Objective analysis of the aims and objects of all persons involved in a transaction/arrangement**
- Where an arrangement is **inextricably linked to a core commercial activity**, and its form has not been driven by considerations of obtaining a benefit, principal purpose is not to obtain that benefit
- **It is sufficient that at least one of the principal purposes was to obtain the benefit**, for e.g. if a person becomes resident of a particular contracting state to obtain treaty benefit before sale of property
- Purpose of the convention is to provide benefits in respect of bona fide exchanges of goods and services, and movements of capital and persons

PPT supplements and does not restrict scope of LOB

- For person **entitled to benefits under LOB rule, PPT can still be invoked**
- Public company whose shares are traded on stock exchange may satisfy LOB rule being qualified person but PPT can be invoked if it is bank that enters into conduit financing arrangement for granting tax treaty benefit to resident of third state

Article 7: Prevention of treaty abuse

Impact on Bilateral tax treaties

- **Opted to apply Simplified Limitation on Benefits (SLOB):** Russia, Slovak, Norway,

- **Opted to not apply SLOB:** Austria, **Australia**, **Belgium**, Finland, **France**, Georgia, Ireland, Israel, **Japan**, Lithuania, Luxembourg, Malta, **Netherlands**, New Zealand, Poland, Serbia, **Singapore**, Slovenia, **Sweden, United Kingdom, UAE**

- PPT, being minimum standard, is applicable to all CTAs

- Australia, UK, UAE, and Singapore have additionally opted for competent authority route under Article 7(4) for grant of treaty benefit. India has not opted for competent authority route under Article 7(4) of MLI and thus, Article 7(4) is not applicable.

- UK and UAE have notified anti abuse measures in existing provisions with India CTA.

Article 7 of MLI - Principle Purpose Test

Interplay between PPT and GAAR

Particulars	Domestic GAAR	PPT
Applicability	• Main purpose is tax benefit • One of the tainted element tests is satisfied	• One of the principal purpose is tax benefit • Not in accordance with objects and purpose of treaty
Consequences	Recharacterization of transaction, reallocation of income, denial of treaty benefits, etc.	Denial of treaty benefits
Onus	Primary onus is on tax authority	Primary onus is on tax authority and rebuttal assumption for carve out
Administrative safeguards	Approving Panel	To be determined by respective countries
Minimum threshold	Yes	No
Grandfathering of existing investments	Yes	No

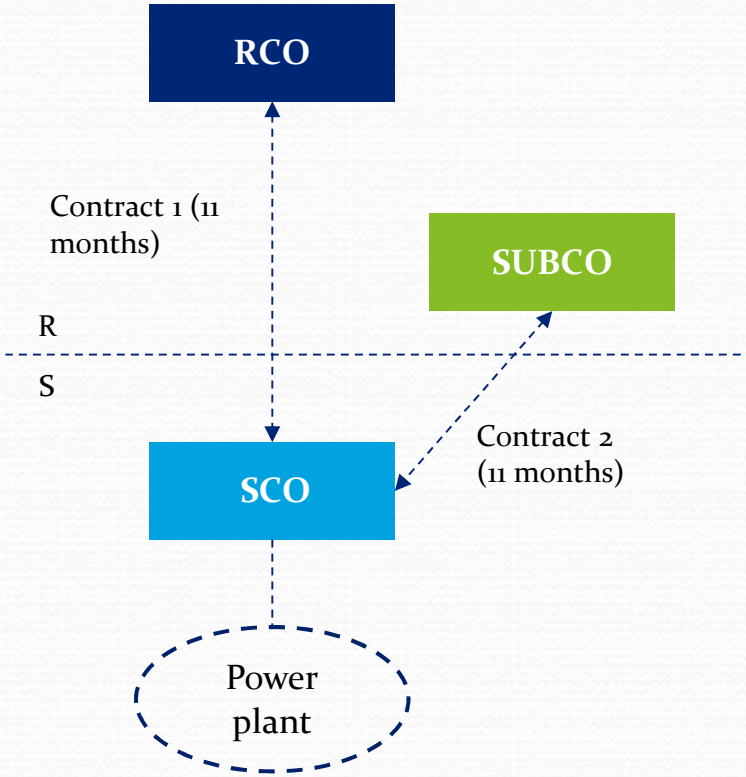
Article 7: Prevention of treaty abuse

Interplay between PPT and GAAR

PPT is applicable but GAAR not applicable	GAAR is applicable but PPT is not applicable	Both GAAR and PPT are applicable
Treaty benefit can be denied on the basis of PPT	Domestic GAAR can override PPT. However, benefit of treaty may or may not be denied as adoption of anti-abuse rules in tax treaties may not be sufficient to address all tax avoidance strategies [Circular 7/2017]	Treaty benefit could be denied
Application of PPT can be avoided in terms of section 90(2). Treaty benefit will not be available in that case		Application of GAAR could have consequences in addition to denial of treaty benefit
Benefit of grandfathering in terms of Rule 10U(1) would not help defending PPT	Benefit of grandfathering in terms of Rule 10U(1) would help defending GAAR	Benefit of grandfathering in terms of Rule 10U(1) would help defending GAAR but not PPT

Case Study

PPT – Case Study



- RCO: Resident of State R
  - Successfully submitted bid for construction of power plant
- SCO: Resident of State S
  - Independent company
- Construction project
  - Expected to last 22 months
  - During negotiation, project split into two contracts: 11 months each
  - **Contract 1**: concluded with RCO
  - **Contract 2**: concluded with SUBCO
- SUBCO: Resident of State R
  - Recently incorporated, 100% subsidiary of RCO
- RCO jointly and severally liable with SUBCO for performance of SUBCO's contractual obligations under Contract 2

PPT – Case Study

- Proposed Commentary: PPT failed

  "In this example, in the absence of other facts and circumstances showing otherwise, **it would be reasonable to conclude that one of the principal purposes for the conclusion of the separate contract** under which SUBCO agreed to perform part of the construction project **was for RCO and SUBCO to each obtain the benefit of the rule in paragraph 3 of Article 5** of the State R – State S tax convention. **Granting the benefit of that rule in these circumstances would be contrary to the object and purpose of that paragraph** as the time limitation of that paragraph would otherwise be meaningless."

Article 6: Purpose of CTA & Article 7: Prevention of treaty abuse

Practical considerations

- **Grandfathering available for investments made before 1 April 2017?**
  - Impact of revised Preamble and MLI PPT on the benefit provided under the Capital Gains article on grandfathering for investments
  - Impact on investments routed through **Singapore and Cyprus**
- **India Singapore - PPT as per MLI vs PPT as per Tax treaty – which supersedes the other?**
  - Article 7(1) specifies 'one of the principal purposes' under MLI vs. Article 24A specifies 'primary purpose' under tax treaty
  - Article 7(1) would apply and supersede the provisions of the tax treaty to the extent of incompatibility
  - Article 7(1) of MLI and Article 24A(1) of the tax treaty are not incompatible or compatible?
- **India Netherlands tax treaty - Article 13(5) Taxability of capital gains on sale of shares of I Co?**
  - Right to tax capital gains under residuary clause lies with Netherlands
  - Opportunities for double non-taxation as capital gains not taxable under domestic tax law
  - MLI PPT a solution to counter double non-taxation?
- **India Sweden tax treaty - Article 13(5) Taxability of capital gains on sale of shares of I Co?**
  - Right to tax capital gains under residuary clause lies with Sweden
  - Opportunities for double non-taxation as capital gains may not be taxable due to participation exemption – 'subject to tax' vs. 'liable to tax'

Article 12 to 14 – Artificial avoidance of PE - Widening PE scope

Article 12: Artificial avoidance of Agency PE

Brief description of the Article	Rule for applicability	India's position
• Widens definition of agency PE to include cases where a person habitually concludes contracts or **plays a principal role in conclusion of contracts that are routinely concluded without material modification by the enterprise** • Threshold to constitute independent agent also lowered to exclude a case where the agent **acts exclusively or almost exclusively** for one or more enterprises to which the agent is closely related	To apply to a CTA only when <u>both</u> the CTA parties have made notification to this effect	• India has **opted** to apply both the provision • The said provisions to apply to a CTA only if any other CTA partner has chosen to apply the said provision

Article 12: Artificial avoidance of Agency PE

Impact on Bilateral tax treaties

- **Opted to apply: France**, New Zealand, **Japan**, Belgium, Denmark, Russia, Norway, Slovak Republic,, Israel, Slovenia, Lithuania

- **Opted to not apply:** Canada, Cyprus, **Netherlands**, **Singapore**, **UK**, Luxembourg, **Australia**, **Sweden**, **UAE**, Austria, Finland, Georgia, Ireland, Poland, Iceland, etc.

Other considerations

- Independent Agent – Existing Tax Treaties with UK, Singapore, Australia, Austria, Poland already contain similar conditions.
- China - Expanded Agency PE provisions are already covered in the amended protocol
- Hong Kong, Kenya and Kazakhstan - Expanded Agency PE provisions are not adopted in the recent treaty negotiations

Largely to impact marketing support services and commission model - Change in business model to "Trading model" may be explored to mitigate Agency PE risk in India

Article 12 - Avoidance of PE status through Dependent Agent PE ('DAPE')

Existing provision:

- DAPE will trigger if a person (other than independent agent) habitually exercises an authority to conclude contracts on behalf of the enterprise - Arm's length price condition is provided for determining independent status in few treaties like France, Netherlands, etc.

MLI proposes to modify DAPE provisions as below:

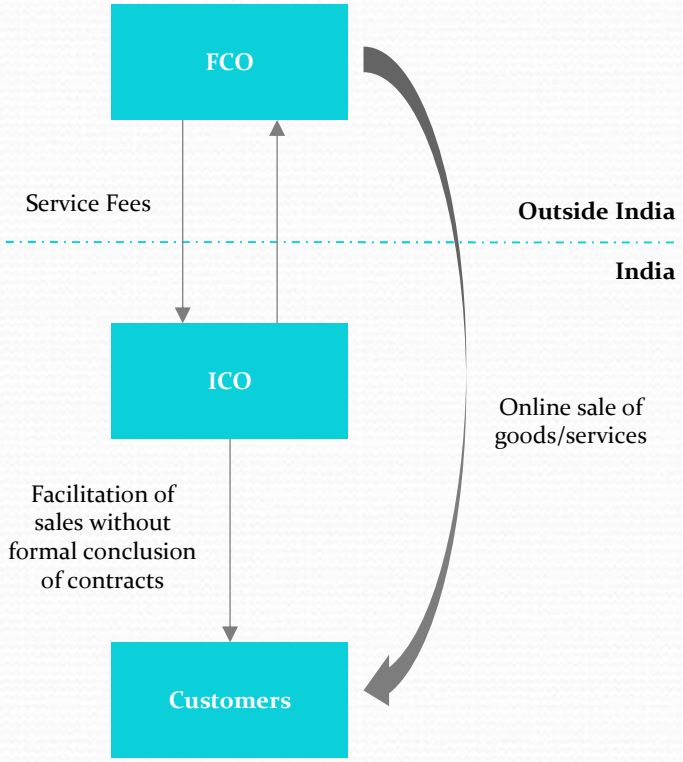
- 'Authority to conclude contract' replaced by 'habitually concludes contracts or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise'
- Agent not to be considered independent, if he acts exclusively or almost exclusively on behalf of one or more closely related enterprise
- The arm's length condition in case of closely related enterprise not provided in the MLI
- Amendment on commissionaire arrangements not applicable in India

- India Option: Chosen to apply Article 12 – will apply only when both the countries of a CTA notify each other and has not made any reservation
- Impact: Major CTAs impacted are France and Japan. (UK, Ireland, Singapore, Netherlands, Finland, Australia have expressed reservation)

Points to be considered

- Indian courts already interpret the phrase "authority to conclude a contract" widely – Recent judgments in Daikin, etc.
- Entities engaged in marketing activities for various group companies now considered to be dependent.
- No protection from dependency where agent is working for a closely related enterprise and is remunerated on arm's length condition.

Article 12 – Example



Source: BEPS ACTION 7: 2015 Final Report issued by OECD

AJKR & ASSOCIATES

Mechanics

Scenario 1

- FCO sells on its online portal various products and services worldwide. ICO is a related party exclusively working on behalf of FCO
- Employee's of ICO send emails, make calls or visit customers
- Remuneration of ICO's employees is partially based on the revenues of FCO
- Employees of ICO indicate the price that will be payable – however contract concluded online with FCO.
- ICO's employees provide customers with standard terms and conditions and convince customers without material modifications in terms

Scenario 2

- ICO who is an independent enterprise engaged in agency business.

Comments

Scenario 1

- The exemption for independence and ordinary course of business has been removed for related parties. Thus, ICO will be a PE
- Poses challenges for Indian companies only serving their group companies. Existence of a principal – agent relationship will needed to be checked.
- The aspect of further attribution is needed to be looked into

Scenario 2

- No change in PE position for unrelated parties.

CA. NITIN KANWAR

Article 13: Artificial avoidance of PE through specific activity exemptions

Brief description of the Article	Rule for applicability	India's position
Specific Activity exemption **Option A** - Specific activity exemption (for preparatory and auxiliary activities) narrowed by stating that all such activities shall fall within the specific activity exemption **only if each activity and the overall activity of the business is of a preparatory and auxiliary character.** **Option B** – provides flexibility it does not require all activities to be of a preparatory or auxiliary in nature.	To apply to a CTA only when both the CTA parties have made notification to this effect	India has **chosen to apply Option A**; the said option to apply to CTA only if other CTA partner has chosen same option

Article 13: Artificial avoidance of PE through specific activity exemptions

Brief description of the Article	Rule for applicability	India's position
Anti fragmentation rule Specific activity exemption to not apply where the enterprise /closely related enterprise carries on business activities (whether at the same place or other place) and such place/ other place constitutes a PE; or the overall activity resulting from the **combined/ cohesive business activities** of enterprises operating out of these places **is not of a preparatory or auxiliary character**	To apply to a CTA only when both the CTA parties have made notification to this effect	India has **chosen to apply anti-fragmentation rule;** the said rule to apply to a CTA only if other CTA partner has chosen to apply the said provision

Article 13 – List of preparatory and auxiliary activities

Activities listed in Article 5(4) of OECD Model Convention

a) the **use of facilities solely** for the purpose of **storage, display or delivery of goods** or merchandise belonging to the enterprise

b) the **maintenance of stock of goods** or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery

c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose **of processing by another enterprise**;

d) the maintenance of fixed place of business solely for the **purpose of purchasing goods** or merchandise or **of collecting information**, for the enterprise.

e) Activities not expressly listed in (a) to (d) as long as that activity has preparatory or auxiliary character [Other Activities]

f) the maintenance of a fixed place of business solely **for any combination of activities** mentioned in subparagraphs a) to e)

Preparatory and Auxiliary:
All activities would now need to be 'preparatory and auxiliary' in nature to qualify for PE exemption

Anti-Fragmentation rule:
Prevents an enterprise or a group of closely related enterprises from fragmenting a cohesive business operation into several small operations to argue that each is merely engaged in a preparatory or auxiliary activity.

Article 13 of MLI - Artificial Avoidance of PE through Specific Activity Exemptions

Setting the context

- Various tax treaties allows entities to undertake specific exempted preparatory or auxiliary activities in the source state without creating a PE for the reason that -
  - preparatory or auxiliary activities were generally ***considered non-value adding activities*** and therefore little profit would be allocated thereto
- Specific activity exemptions open BEPS abuse - Activities performed in source state may in fact be value added for the taxpayer's business if -
  - ***Delivery of goods, Purchasing of goods or collecting information is core function***
  - ***Cohesive business activities are artificially fragmented***
- Profits that should be taxed in source state are instead taxed in resident state where the taxpayer is resident

Article 13 of MLI - Artificial Avoidance of PE through Specific Activity Exemptions

Specific Activity exemption

Article 13(1) of MLI provides 3 alternates to countries:

Option A	Specific Activity exemption available only if listed activities are preparatory and auxiliary in nature
Option B	Automatic exemption to listed activities is available irrespective of same being preparatory and auxiliary in nature
Not to choose any option	Provision as existing under covered tax agreement will remain in force

Article 13 of MLI - Artificial Avoidance of PE through Specific Activity Exemptions

New Anti-fragmentation Rule

Article 13(4) of MLI provides ***option to adopt*** for new anti-fragmentation rules (even if option A or B are not chosen) whereby specific activity exemption of the listed activities is not available where:

Condition 1		Condition 2		Condition 3
Same enterprise or closely related enterprise ***carries on business activities*** at the same place or another place in the state	+	• at least one of the places ***constitute a PE***, OR • overall activity resulting from the ***combination of the activities*** carried on by the two enterprises is ***not of a PoA nature***	+	Aggregate business activities constitute ***complementary functions*** that are part of ***cohesive business operation***

Article 13: Artificial avoidance of PE through specific activity exemptions and Anti-fragmentation

Impact on Bilateral tax treaties

Preparatory & auxiliary activities

- **Opted to apply : Option A - Netherlands**, New Zealand, **Australia, Japan**, Austria, Israel, Russia, Serbia, Slovak Republic, Slovenia, Norway, Denmark, Ukraine

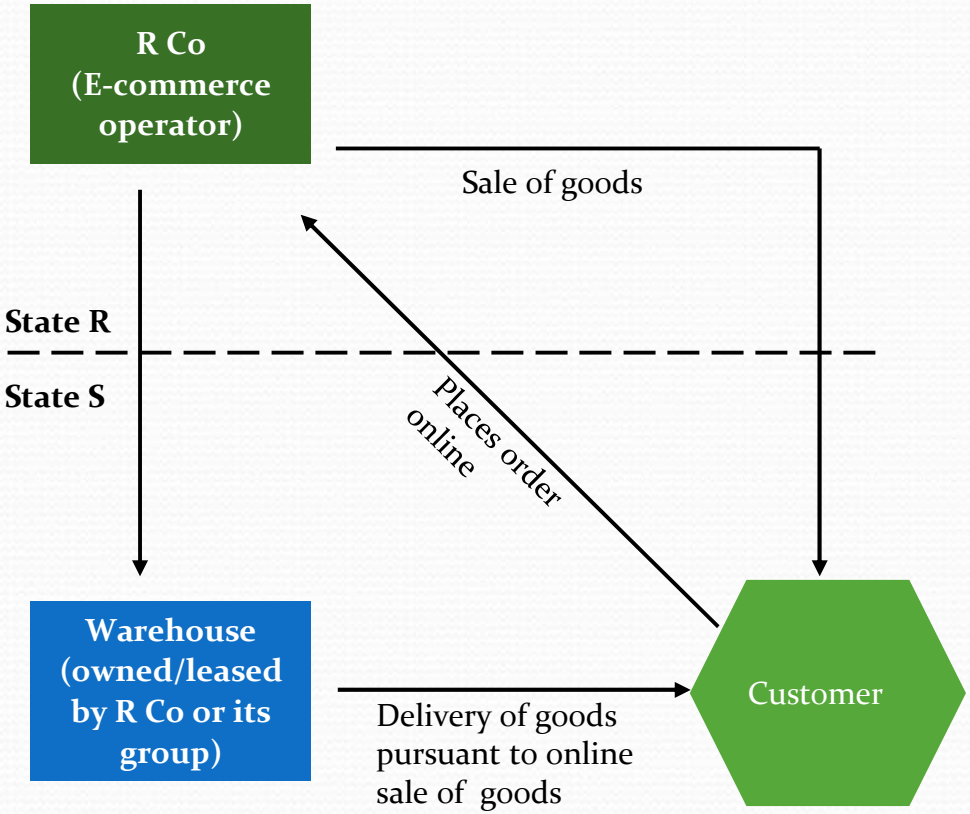
- **Opted to apply Option B/ Opted to not apply: Canada**, Cyprus, **France, Singapore**, Luxembourg, **Sweden, UK, UAE**, Belgium, Finland, Georgia, Ireland, Poland, etc.

Anti-fragmentation

- **Opted to apply: Netherlands**, New Zealand, **Australia, France, UK**, **Japan**, **Belgium**, Ireland, Israel, Russia, Serbia, Lithuania, Slovak Republic, Slovenia, Norway, Ukraine, Denmark

- **Opted not to apply: Singapore**, Luxembourg, **Sweden**, **UAE**, Iceland, **Canada**, Poland, Georgia, Finland, Austria

Impact on E-commerce companies



Analysis - whether R Co has a PE in India ?

- Storage and delivery functions performed through the warehouse which represents an important asset and requires large number of employees would be considered an essential part of enterprise's sale and distribution business
- The existing business model may attract the anti-fragmentation rule coupled with extended applicability of 'preparatory and auxiliary' clause inter alia to a facility maintained for storage and delivery of goods.

What if warehousing services are availed from an independent third party:
May not trigger PE risk if the warehouse is not at the disposal of R Co
(Further, it may be recommended to avoid finance lease of warehouse to mitigate PE risk)

Article 13 of MLI - Artificial Avoidance of PE through Specific Activity Exemptions

India's position

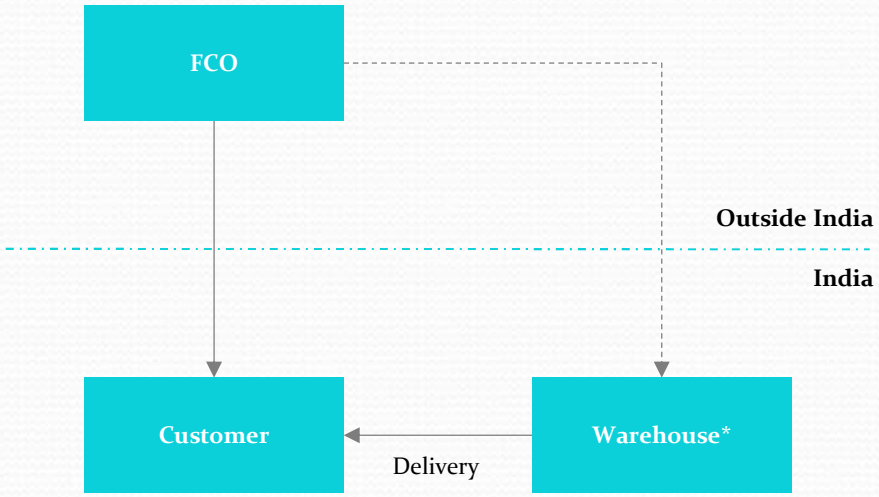
Specific Activities Exemption

- India has opted for ***option A***
  - Specified activities exemption to listed activities under Article 5(4) of the tax treaties shall be subject to activities being preparatory and auxiliary in nature

New Anti-fragmentation Rules

- New Anti-fragmentation Rules are automatically included where India has opted for Option A
- However, in tax treaty with following countries, India has neither opted for Option A nor for Option B but has only accepted Anti-fragmentation Rules
  - Belgium, France, Ireland, Kenya, Lithuania, Portugal, United Kingdom

Article 13 – Example 1



** Warehouse maintained by FCO or alternatively warehouse belongs to third party*

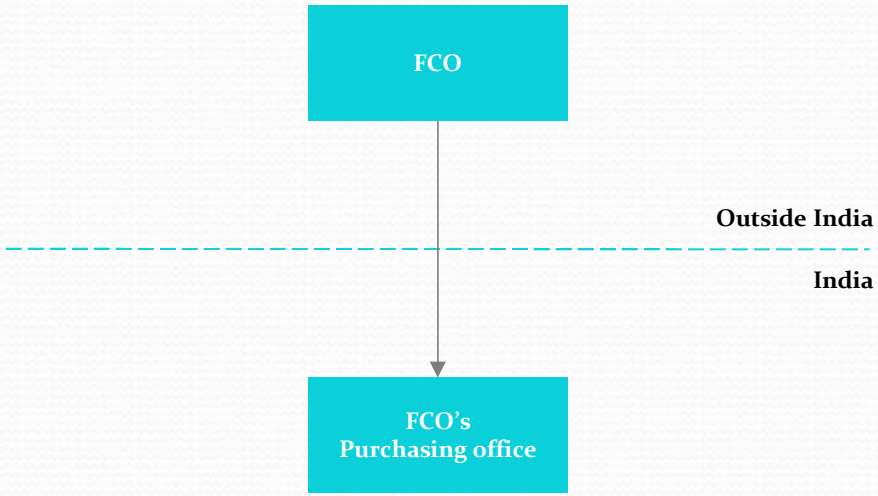
Mechanics

- FCO is engaged in selling of goods online and conclude contracts with customers online.
- FCO through its employees, maintains a warehouse in India for delivery purposes.
- There is no other business operations of FCO in India.

Comments

- Warehouse maintained by FCO's employees will not get the preparatory auxiliary exemption as this may deemed to be core function.
- This change will impact the ecommerce industries who are engaged in selling goods/services online and maintaining warehouses for delivery function.
- Where the warehouse belongs to third party and same is at disposal of FCO in India, then warehouse of third party may also be treated as fixed place PE of FCO.

Article 13 - Example 2



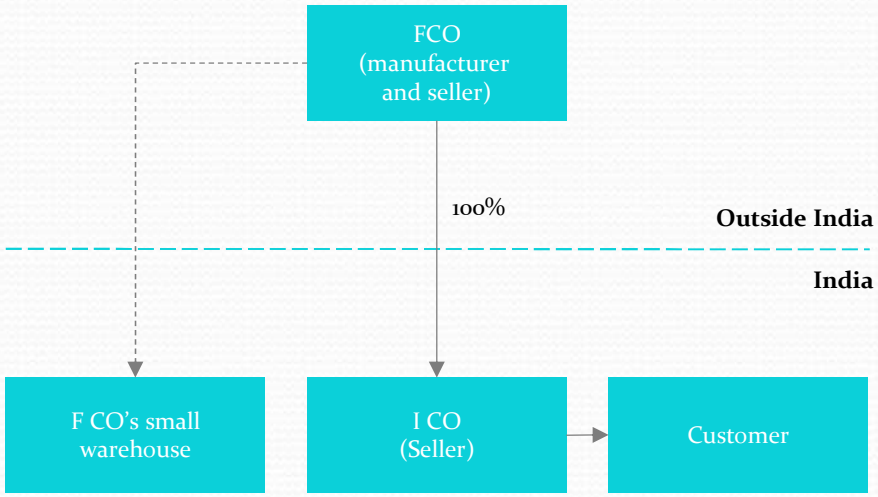
Mechanics

- FCO sells products in different parts of the world.
- FCO is the buyer of the product from India and maintains purchase office in India.
- The employees who work at purchase office have special knowledge of the product and visit producers in India to determine the type/quality of the products according to international standards.

Comments

- Purchasing function if treated as a core activity will not considered for preparatory and auxiliary exemption. Accordingly, FCO's purchasing office in India will be treated as PE of FCO in India.
- **Exemption u/s 9(1)(i) may still be available for sourcing from India as under the provisions of the Income Tax Act, 1961, there is no requirement for purchasing activity to be preparatory or auxiliary in nature.**

Article 13 - Example 3



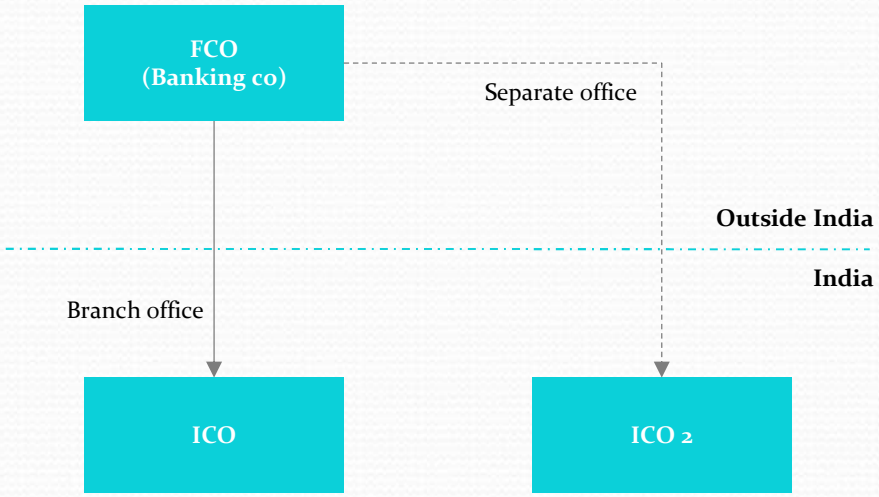
Mechanics

- FCO and ICO are closely related enterprises (assuming ICO is a PE of FCO)
- FCO maintains a small warehouse in India and performs delivery of goods sold by FCO to ICO.
- ICO is engaged in selling goods in India and ICO buy goods from FCO.
- Items stored in FCO's warehouse are identical to some of the items displayed in the store owned by ICO.

Comments

- ICO activities and FCO's activities in India would be seen as a whole for deciding the preparatory and auxiliary character.
- In instant case, FCO's warehouse function may not be considered as of preparatory and auxiliary character since delivery function performed by FCO and sale of same goods sold by ICO in India may be deemed to be construed as complementary function which form part of cohesive business operation.
- In this case, it would be seen as fragmenting of activities in India by maintaining a warehouse of FCO and store of ICO where same goods are being sold.

Article 13 - Example 4



Mechanics

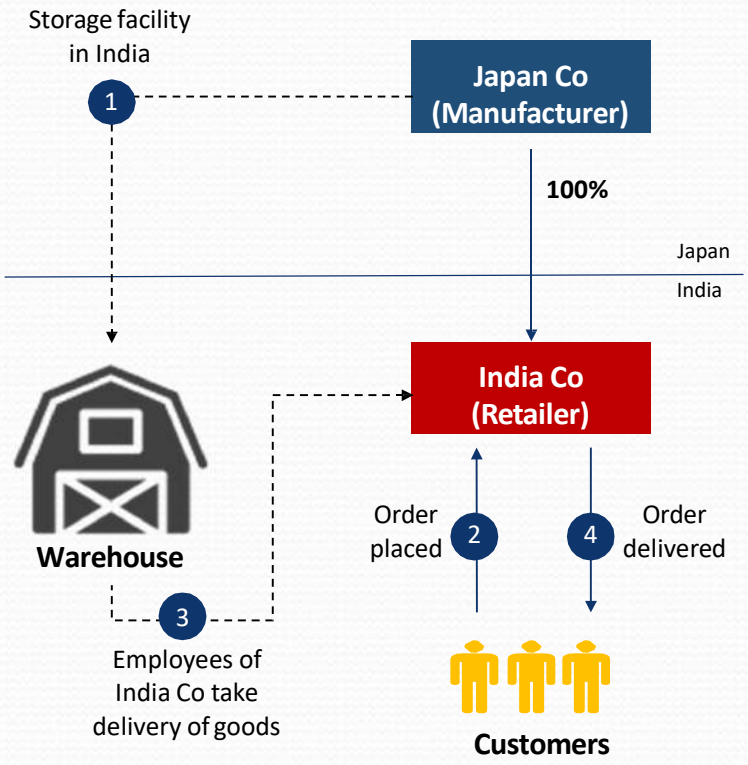
- FCO (a banking co) has a branch office in India (ICO) which is also a PE of FCO
- FCO also maintains a separate office in India (ICO 2) where few employees verify information provided by clients that have made loan applications at ICO
- The results of verification are forwarded to FCO, where FCOs employees analyze the information and provide report to ICO where decision to grant the loans are made

Comments

- ICO, ICO 2 and FCO's activities in India would be seen as a whole for deciding the preparatory and auxiliary character.
- In instant case, functions performed by ICO 2 may not be considered as of preparatory and auxiliary character since the branch office of FCO (i.e. ICO) constitute a PE and the business activities carried on by FCO and ICO constitute complementary function that are part of cohesive business operations
- **Thus working of Liasion office is to be relooked**

Article 13 of MLI - Article Artificial Avoidance of PE

Case Study 6 - Impact from withholding tax perspective



- Japan Co, resident of Japan, is a manufacturer of appliances
- India Co, a wholly owned subsidiary, owns a retail store in India for selling appliances
- Japan Co owns a warehouse in India where a few high-end appliances, identical to those sold by India Co, are stored
- When an Indian customer places large orders for such high-end appliances, employees of India Co take possession of appliances from the warehouse and delivers the same to its customers
- India and Japan MLI related changes become effective from 1 April 2020

Article 13 of MLI - Article Artificial Avoidance of PE

Case Study 6 - Impact from withholding tax perspective

Pre-MLI implications:

- Since independent activities were carried out by Japan Co through India Co and Warehouse in India

  – It was argued that the activities performed in India were covered under specific exemption list or overall activities were considered to be of preparatory and auxiliary nature (Article 5(6) of India-Japan DTAA), hence no fixed place PE in India

Article 13 of MLI - Article Artificial Avoidance of PE

Case Study 6 - Impact from withholding tax perspective

- Post MLI implications:
- Both India and Japan has opted for Option A specified under Article 13 of MLI
  - specified activities exemption to listed activities under Article 5(6) of India-Japan DTAA shall be subject to activities being preparatory and auxiliary in nature
- Activities carried out at warehouse will not qualify as preparatory and auxiliary activity, since:
  - Warehouse represents ***important asset and requires number of employees***
  - Constitute an ***essential part of sales and distribution function*** of Japan Co
- India Co would be required to withheld tax @ 40% (plus surcharge & cess) on net income of Japan Co attributable to India – Advisable to obtain certificate from Assessing Officer under Section 195(2) / 195(3) / 197 of the Act
- However, since effective date for withholding tax and other tax purpose is 1 April 2020 for India, withholding of tax while making payment to Japan Co. by Indian Co. would be subject to fulfilment of Principle Purpose Test

Article 13: Other potential impact areas

- **Delivery of spare parts through warehouse and provision of after-sales services through group entity to Indian customers**
  - After sales service would form an essential and significant part of the services of an enterprises
  - The arrangement may attract the anti-fragmentation rule where it may be alleged that delivery of spare parts and after sale service are complementary functions forming part of a cohesive business activity undertaken by connected enterprises.

- **Toll manufacturing model (Raw materials/semi-finished goods are supplied by the principal manufactured to the toll manufacturer for processing)**
  - Toll manufacturing activity may not be considered as 'preparatory and auxiliary' in the context of Article 5(4)(c) vis-à-vis a manufacturer
  - Enterprises may need to review the need to shift from a toll manufacturing model to a contract manufacturing model.

- **Premises used for purchasing of goods by a enterprise for trading activity**
  - Purchase of goods for an enterprise engaged in trading activity would be a principal activity
  - Anti-fragmentation rule may apply as purchase and sale may be regarded as complementary functions undertaken by the same or closely related enterprise.
  - Benefit of purchase exemption available under the Act may be explored (Explanation 1 to Section 9)

Article 13 - Avoidance of PE status through Specific Activity Exemptions

- Existing provisions provides certain specific activity exemptions to fixed place PE as per Article 5(1) and 5(2) such as storage, display, maintenance of stock etc. and provides that combination of such activities should be preparatory or auxiliary in nature
- Article 13 of the MLI deals with Artificial Avoidance of PE Status and proposes that:
  - Specific Activity Exemptions such as storage, display, maintenance of stock, purchasing, collection of information etc. are now required to be preparatory or auxiliary in nature on stand-alone and overall basis
  - MLI proposes to incorporate anti-fragmentation rule where complementary functions of an enterprise or closely related enterprises (that are a part of a cohesive business operation) can be considered together to determine whether such activities can be said to be "preparatory or auxiliary" in nature (different places and entities to be combined)
- **India Option**: First point on specific activity exemption will apply only if the other party to the CTA chooses the same option. Anti – fragmentation rule shall apply unless a country has made a reservation
- I**mpact**:
  - Major CTAs impacted in respect to Activity exemption modification are Australia, Netherlands, Japan.
  - Major CTAs impacted in respect to which anti-fragmentation rule are Australia, France, Israel, Japan, Netherlands and UK

Point to be considered

- Re-evaluation of activities if liaison office

Article 14 of MLI - Artificial splitting-up of contracts

Text of MLI

"1. For the sole purpose of determining whether the period (or periods) referred to in a provision of a Covered Tax Agreement that stipulates a period (or periods) of time after which specific projects or activities shall constitute a permanent establishment has been exceeded:

a) where an enterprise of a Contracting Jurisdiction carries on activities in the other Contracting Jurisdiction ***at a place that constitutes a building site, construction project, installation project or other specific project*** *identified in the relevant provision of the Covered Tax Agreement, or carries on supervisory or consultancy activities in connection with such a place, in the case of a provision of a Covered Tax Agreement that refers to such activities, and these activities are carried on during* ***one or more periods of time that, in the aggregate, exceed 30 days*** *without exceeding the period or periods referred to in the relevant provision of the Covered Tax Agreement;* ***and***

b) where ***connected activities*** *are carried on in that other Contracting Jurisdiction at (or, where the relevant provision of the Covered Tax Agreement applies to supervisory or consultancy activities, in connection with) the same building site, construction or installation project, or other place identified in the relevant provision of the Covered Tax Agreement during different periods of time,* ***each exceeding 30 days, by one or more enterprises closely related to the first-mentioned enterprise****,*

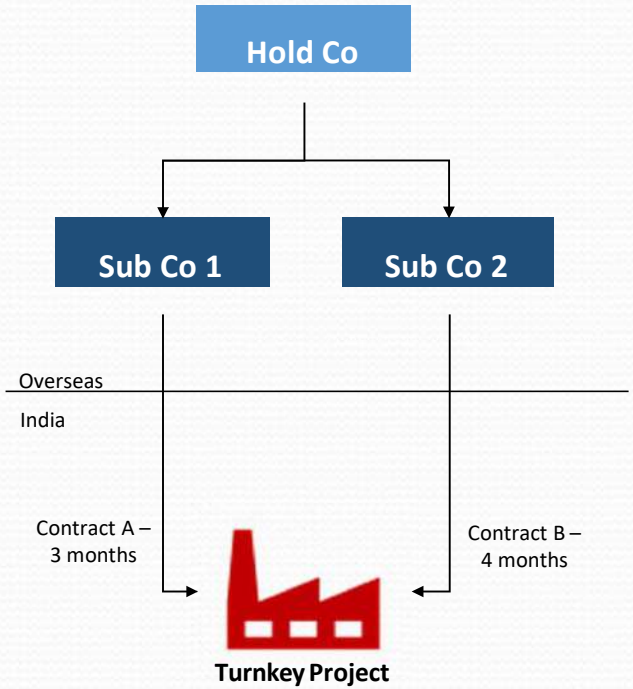
these different periods of time shall be added to the aggregate period of time *during which the first-mentioned enterprise has carried on activities at that building site, construction or installation project, or other place identified in the relevant provision of the Covered Tax Agreement."*

Article 14: Splitting up of contracts

Brief description of the Article	Rule for applicability	India's position
• Addresses 'avoidance of PE situations' undertaken by splitting the contracts between related enterprises in order to fall / come below the threshold period for PE creation • In case: (i) an enterprise's site /project (or supervisory /consultancy activity) carries on for a period exceeding 30 days-but is below the threshold period provided in the CTA; and (ii) it's closely related enterprises carry on connected activities at different times at the same site / project or any other place for a period exceeding 30 days, **then all the different periods shall be added to compute the threshold period for PE creation.**	To apply to CTA unless reservation is made by either of the CTA parties	India is **silent** on its position; the said provision to apply to all its CTA (unless reservation is made by any other CTA partner)

Article 14 of MLI - Artificial splitting-up of contracts

Context

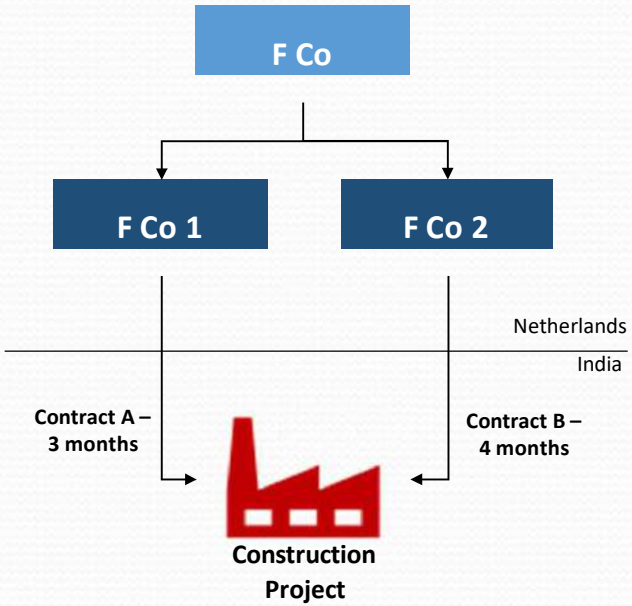


Typical splitting up of contract

- Turnkey or EPC contracts are typically divided amongst group companies in overseas jurisdiction –
  - In a manner that presence of none of the foreign companies in India exceeds the threshold prescribed in the tax treaty for determination of Construction / Installation PE
- One of the Foreign company is contractually liable for entire contract with Indian Party

Article 14 of MLI - Artificial splitting-up of contracts

Case Study 7 - Impact from withholding perspective



Under India-Netherland DTAA, construction activities constitutes a PE, if such activities last for a period exceeding **183 days**

- F Co. a tax resident of Netherlands is engaged in construction activities
- It has received a proposal for construction of a building in India
- Estimated duration for completion of the construction is approximately 6 months
- The construction activities have been split-up amongst the group entities i.e. F Co 1 and F Co 2
- Each entity has executed an independent contract for their respective activities
- India and Netherlands MLI related changes become effective from 1 April 2020 and have notified Article 14 of MLI

Article 14 of MLI - Artificial splitting-up of contracts

Case Study 7 - Impact from withholding perspective

- India and Netherlands have notified Article 14 of MLI
- Following different period of time to be added to determine threshold for constitution of construction / installation PE:
  - activities carried on in India during one /more periods of time which in aggregate, ***exceed 30 days*** without exceeding the threshold prescribed in the CTA; **AND**
  - ***connected activities*** are carried on ***same project*** site during different periods of time, each exceeding 30 days, ***by closely related enterprises***
- In the instant case, since activities carried out by F Co 1 and F Co 2 exceeds 30 days and both are closely related enterprises, activities carried out by them would be clubbed and splitting up of contracts would be disregarded to determine Installation / Construction PE in India
- Since total time period of activities carried out by both the entities is 7 months which exceeds the threshold of 183 days, their activities in India would create Installation / Construction PE in India and hence, profit attributable their activities in India would be taxable in India

Article 14 of MLI - Artificial splitting-up of contracts

Case Study 7 - Impact from withholding perspective

- Indian Co would be required to withhold tax @ 40% (plus surcharge & cess) on net income of F Co 1 and F Co 2 – Advisable to obtain withholding certificate from tax officer u/s 195(2) / 195(3) of the Act

- However, since effective date for withholding tax and other tax purpose is 1 April 2020 for India, withholding of tax while making payment to Netherlands Co. by Indian Co. would be subject to fulfilment of Principle Purpose Test

Article 14: Splitting up of contracts

Impact on Bilateral tax treaties

- **Opted to apply:** New Zealand, Slovak Republic, Ukraine and Denmark

- **Opted to apply with reservation** (Reservation made not to apply to exploration of / for natural resources)

  Netherlands, Australia, Norway, Russia, Serbia, Ireland and Lithuania

- **Opted not to apply: Canada**, Cyprus, **France, Singapore, UK**, Luxembourg, **Sweden**, **Japan, UAE**, Austria, Belgium, Finland, Georgia, Poland, Slovenia and Iceland

Largely to impact Construction and Engineering Procurement Construction ('EPC') contracts executed by Group entities

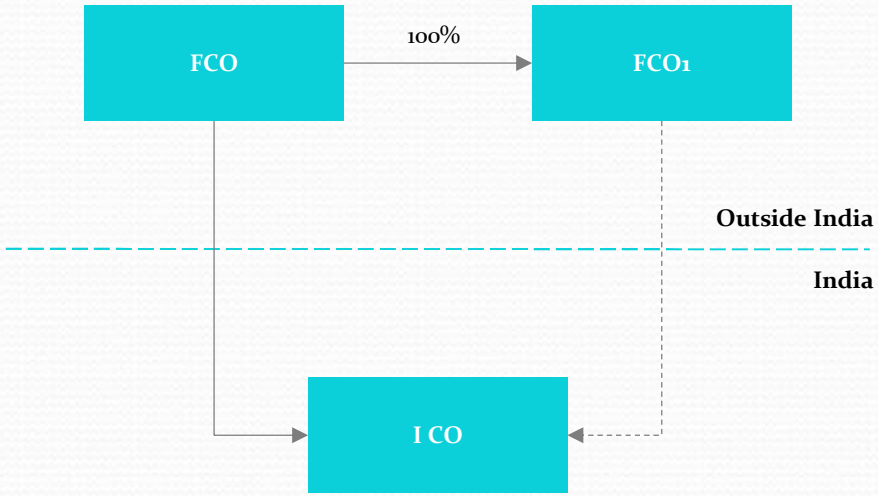
Article 14 - Splitting-up of contracts

- Existing provision provide that there will be an installation/service PE if building site or construction or installation project or furnishing of services continues for more than a prescribed period
- Article 14 of the MLI deals with artificial avoidance of PE status through Splitting-up of Contracts
- It provides for aggregation of time for determining threshold for building/construction/ installation/service PE if:
  - An enterprise carries on a building site or construction or installation project in a country that exceed 30 days (in aggregate) without exceeding the overall threshold; and
  - Connected activities carried out during different periods of time at the same building site, each exceeding 30 days, by one or more closely related enterprises
- **India Option**: Unless a country has made a reservation, the Article shall be inserted in the CTAs.
- **Impact:** Japan has placed reservation for the Article to not apply. Major CTAs it applies to are Australia, France, Ireland and Netherlands.

Points to be considered

- Relevant for the construction industry and entities involved in EPC activities, service activities etc.
- Existing thresholds/ period restrictions to continue

Article 14 - Example



Mechanics

- FCO and FCO1 are closely related enterprises.
- FCO is awarded contract for the construction of power plant for ICO. The contract period is 22 months.
- During the negotiation of the contract, the project is divided into 2 different contracts each lasting 11 months each and concluded with FCO and FCO1. (assuming threshold period of 12 months is provided in treaty)
- FCO would be contractually liable for the entire contract with ICO.

Comments

- Companies are needed to pass threshold test to avail period exemption.
- FCO and FCO1 will not get the exemption of 12 month threshold or period specified in respective tax treaties.
- Attribution would be required to be done for their respective activities.
- Whether Anti-fragmentation rule will apply where contracts are split into onshore and offshore activities?

Source: BEPS ACTION 7: 2015 Final Report issued by OECD

Impact of other key MLI Articles with Bilateral tax treaties

Article 8: Dividend transfer transactions

Brief description of the Article	Rule for applicability	India's position
• Introduces additional criteria of "**365 days minimum holding period**" for the shareholder to avail concessional tax rates under CTA ("**Testing Period**")	To apply to a CTA only when both the CTA parties have made notification to this effect	India has **opted to apply** such provision (except in case of India-Portugal tax treaty, which already contains similar provision) Thus, said MLI provision to apply to all its CTA except India-Portugal treaty (unless reservation is made by other CTA partner)

Cases of treaty abuse where the shareholder with a holding of less than 25 per cent would increase the shareholding to the prescribed threshold shortly before the dividends became payable to secure benefit of lower withholding tax

Article 8 of MLI - Dividend Transfer Transactions

Context of Article 8

- Following ***existing anti-abuse provisions*** are applied for withholding rate under various tax treaties
  - Subjective test - ***Beneficial ownership test***
  - Objective Test - ***Holding prescribed percentage of shares / voting power*** in the company distributing dividend
- Both the tests are ***applied only on the date of distribution of dividends***
- This ***leads to aggressive tax planning strategies*** i.e. transfer of shares of the dividend distributing company a few days prior to date of distribution of dividends, to the countries having beneficial tax treatment on dividend income
- Article 8 focuses on tackling transactions intended at artificially lowering of withholding tax on dividends

Article 8 of MLI - Dividend Transfer Transactions

Anti-Abuse Rule under Article 8

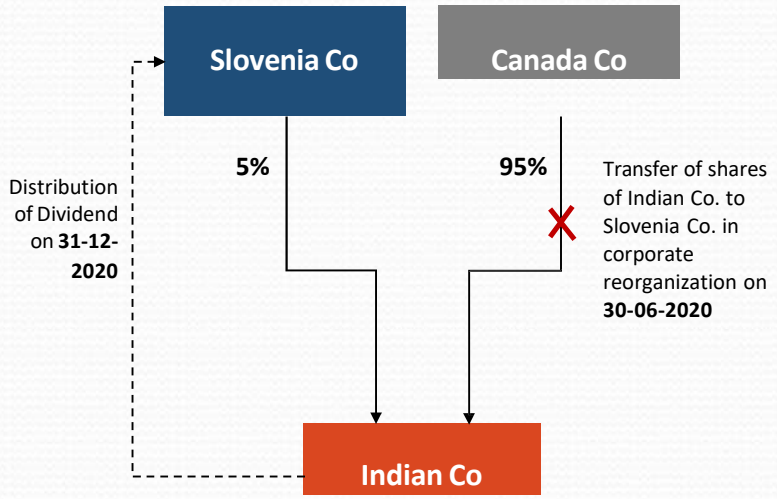
- Introduces additional criteria of '***365 days minimum holding period***' for the shareholder to avail concessional tax rates under the tax treaties

position on Article 8

- ***India has opted to apply such provision*** (except in case of India-Portugal tax treaty, which already contains similar provision) ***and thus, 24 tax treaties got notified***
- With the ***recent amendments brought in Finance Act, 2020*** abolishing Dividend Distribution Tax (DDT) payable by Indian companies and shifting the taxability of dividend income in the hands of shareholders, the anti-abuse provisions provided under Article 8 of MLI holds significant importance

Article 8 of MLI - Dividend Transfer Transactions

Case Study 4 - Impact from withholding tax perspective



WHT on dividend income

India-Slovenia DTAA – 5% (subject to 10% holding), else 15% WHT

India-Canada DTAA – 15% (subject to 10% holding)

- Slovenia Co and Canada Co holds 5% and 95% shares in Indian Co respectively since **1-4-18**
- Indian Co is contemplating to distribute dividend on **31-12-20**
- Canada Co. transfers shares of Indian Co. to Slovenia Co. in an intra-group corporate reorganization on **30-06-2020**
- India and Slovenia MLI related changes become effective from 1 April 2020
- What rate do Indian Co need to WHT on dividend payments? – 5% or 15%?

Article 8 of MLI - Dividend Transfer Transactions

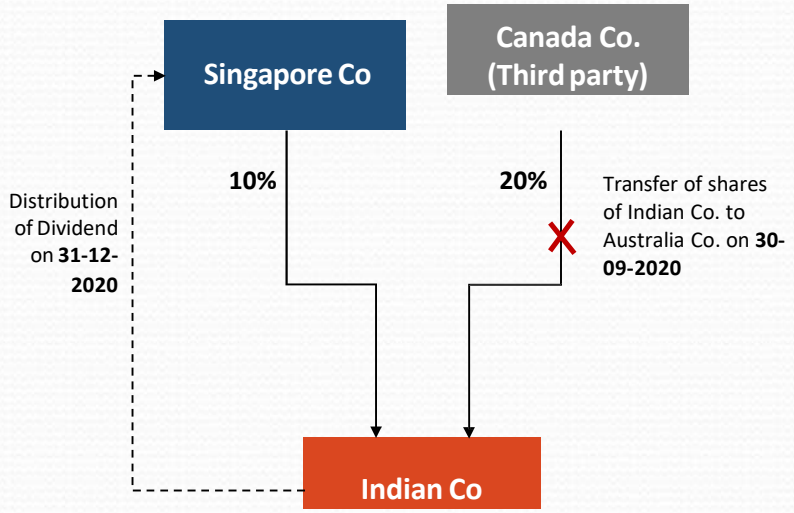
Case Study 4 - Impact from withholding tax perspective

- Both India and Slovenia have notified Article 10(2)(a) in notification under Article 8(4)
- Article 10(2)(a) of India-Slovenia tax treaty is to be amended by Article 8 of MLI
  - Accordingly, additional criteria of '365 days holding period' is added to the India- Slovenia tax treaty
- **Article 8(1) of MLI, *inter alia* provides -**

  "…for the purpose of computing period, ***no account shall be taken of change of ownership that would directly result from a corporate reorganisation****, such as a merger or divisive reorganisation, of the company that holds the shares or that pays the dividends"*
- Accordingly, period of holding of shares held by Canada Co to be included to check the criteria of '365 days holding period' for shares acquired by Slovenia Co pursuant to corporate reorganization
- Therefore, Indian Co. to withhold tax @ 5% to Slovania Co. while distribution of dividend
- However, since effective date for withholding tax and other tax purpose is 1 April 2020 for India, withholding of tax while distribution of dividend by Indian Co. on 31-12-2020 would be subject to fulfilment of Principle Purpose Test

Article 8 of MLI - Dividend Transfer Transactions

Case Study 5 - Impact from withholding tax perspective



WHT on dividend income

India-Singapore DTAA – 10% (subject to 25% holding), else 15% WHT

India-Canada DTAA – 15% (subject to 10% holding)

- Singapore Co and Canada Co. holds 10% and 20% shares in Indian Co respectively since **1-4-18**
- Indian Co is contemplating to distribute dividend on **31-12-20**
- Canada Co. transfers shares of Indian Co. to Singapore Co. on **30-09-2020**
- India and Singapore MLI related changes become effective from 1 April 2020 However, Article 8 of MLI does not apply
- What rate do Indian Co need to WHT on dividend?

Article 8 of MLI - Dividend Transfer Transactions

Case Study 5 - Impact from withholding tax perspective

- India has notified Article 10(2)(a) of tax treaty with Singapore in notification under Article 8(4) of MLI, however, Singapore has reserved its right for entirety of Article 8 of MLI not to apply to its tax treaty
- Hence, Article 10(2)(a) of India-Singapore tax treaty shall not be amended to include minimum holding period of 365 days to avail beneficial tax rate
- Accordingly, period of holding of shares of 365 days would not be required to be satisfied by Singapore Co.
- Since Singapore Co. would hold 25% shares of Indian Co. (post acquisition from Canada Co.), Indian Co. would be required to withhold tax @ 10% to Singapore Co. while distribution of dividend
- However, since effective date for withholding tax and other tax purpose is 1 April 2020 for India, withholding of tax while distribution of dividend by Indian Co. on 31-12-2020 would be subject to fulfilment of Principle Purpose Test

Article 8: Dividend transfer transactions

Impact on Bilateral tax treaties

- **Opted to apply: Netherlands**, **France, Canada,** Luxembourg, New Zealand, Poland, Russia, Belgium, Ireland, Israel, Lithuania, Malta, Slovak Republic, Slovenia

- **Opted not to apply: Singapore, Sweden**, **UK, UAE, Japan**, Austria, Norway, Ukraine, Iceland, Finland, Georgia

- **Other considerations:** Australia has notified countries but India-Australia Tax Treaty doesn't have beneficial rate for taxing dividend and so India is not notified. Thus Article 8 of MLI shall not be applicable.

In view of abolition of Dividend Distribution Tax (DDT) in the hands of Indian Company, dividend will now be taxable in the hands of Shareholder. Hence, provisions of the Tax Treaty shall be relevant to determine the tax liability on dividend income

Article 8 - Dividend Transfer Transaction

Provisions of Article 8

- Article 8 is not a minimum standard
- Applicable to provision of CTA which exempts / limits tax rate on dividend in source country
- Purpose is to introduce a minimum holding period of 365 days throughout which the ownership test should be satisfied for the Treaty Relief to apply ("**Testing Period**").:
- It does not seek to modify any other condition under the existing provisions like Ownership thresholds or Form of holding etc.
- Also, India has notified 21 treaties (which include countries such as Singapore, Canada, Denmark, Italy, Slovak Republic, Slovenia) where Article 8 will replace the existing provision only when the other treaty partner also notifies the same.
- India has made a reservation for India-Portugal treaty which provides for a threshold of longer than 365 days.
- **CTAs impacted are Serbia, Slovak Republic, Slovenia, Canada and Denmark**

Points to be considered

- Implications of this article post removal of DDT in India

Article 9: Capital gains from alienation of shares or interest of entities deriving their value principally from immovable property

Brief description of the Article	Rule for applicability	India's position
• Introduces "**additional criteria**" of "at any time during the **365 days preceding date of alienation**" in case of gains arising from alienation of shares or other participation rights if such shares or rights derive more than a specified percentage of their value from immovable property situated in the source jurisdiction (**"Look Back Period"**) • "**Optional criteria**" of inserting a minimum value derivation criterion of **50 percent** of their value directly or indirectly from immovable property	To apply to a CTA only when both the CTA parties have made notification to this effect	India has opted to apply minimum holding period threshold along with minimum value derivation criterion of 50 percent. The said provision to apply to CTA only if other CTA partner has chosen to apply the said provision

XYZ Co - Year 2020				XYZ Co - Year 2021 (three months prior to alienation of shares of land rich company)			
Liabilities	Amt (Rs.)	Assets	Amt (Rs.)	Liabilities	Amt (Rs.)	Assets	Amt (Rs.)
Share capital	100	Immovable property	51	Share capital	120	Shares in a land rich Co.	51
		Cash / Assets	49			Cash / Assets	69
Total	100		100	Total	120		120

In 2020 shares of XYZ Co. derived 51% of its value from immovable property. Post issue of shares in 2019, value of company from immovable property fell to 42.5%. This would avoid the provisions of Article 13(4) of OECD MC

Article 9: Capital gains from alienation of shares or interest of entities deriving their value principally from immovable property

Impact on Bilateral tax treaties

Opted to apply both additional and optional criteria: France, Japan, New Zealand, Russia, **Canada, Belgium**, Ireland, Israel, Malta, Poland, Serbia, Slovak Republic, Slovenia, Ukraine, Denmark

Opted to apply additional criteria only: Australia, Netherlands

Opted to not apply: Singapore, Sweden, UK, Luxembourg, Cyprus, UAE, Austria, Finland, Georgia, Lithuania, Norway, Iceland

Other key considerations

- **Look back provisions –** In case where MLI is effective from 1 April 2020 - Shares of land rich companies are alienated in July 2020, will the time period be tested from July 2019 i.e. prior to effective date of MLI?

Article 16: Mutual Agreement Procedure

Brief description of the Article	Rule for applicability	India's position
• Requires MAP request to be made to either state, or implement a bilateral notification or consultation process	To apply to CTA of Country A only when both Country A and other CTA party have made notification to this effect	India has reserved its right for not adopting the modified MLI provisions on the basis that it will meet the minimum standard by allowing MAP access in the resident state and implementing bilateral notification or consultation process

Article 16 - Mutual Agreement procedures

Provisions of Article 16

- Para 1 (Sentence 1) – Approaching Competent Authorities of either countries
- Para 1 (Sentence 2) - *case must be presented within 3 years of the first notification of the action resulting in taxation*
- Other paragraphs broadly provide
  - implementation of MAP resolution notwithstanding domestic time limits and

India's position

- India has place reservation on Sentence 1 of Para 1
- Sentence 2 of Para 1 will apply - will apply only in cases where there is a period of less of than three years or where there is no time limit

Points to be considered

- Impact on treaties like Canada or UK, where the time period is shorter than 3 years or no time period has been provided

AJKR & ASSOCIATES

Article 17: Corresponding adjustments

Brief description of the Article	Rule for applicability	India's position
• Requires jurisdictions to make appropriate corresponding adjustments in transfer pricing cases	To apply to CTA of Country A only when both Country A and other CTA party have made notification to this effect	India has **chosen to apply the said provision** except for CTAs where the provisions already exist ***Bilateral APA and MAP allowed even in absence of Article 9(2) – clarified by CBDT vide press release dated 27 November 2017***

Impact on Bilateral tax treaties

- **Opted to apply:** Belgium, France, Japan, Lithuania, Russia, Slovakia, Sweden, UAE
- **Opted in general however not applicable with India as provisions already exist in CTA:** Australia, Austria, Israel, Luxemburg, Malta, Netherland, New-Zealand, Singapore, UK
- **Opted not to apply:** Finland, Georgia, Ireland, Poland, Serbia, Slovenia

MLI – Key impact on select Tax Treaties

MLI Impact on key Indian Tax Treaties

India-UK tax treaty

- Date of entry into effect
  i. 1 April 2020 for WHT
  ii. 1 April 2020 for other taxes
- **PPT to apply** but not SLOB
- Broader agency PE rule - not applicable
- Avoidance of PE status through specific activity (preparatory and auxiliary services) exemptions - provision not applicable
- **Anti-fragmentation rule to counter avoidance of PE status - applicable**
- Splitting up of contracts related provision - not applicable

India-Singapore tax treaty

- Date of entry into effect
  i. 1 April 2020 for WHT
  ii. 1 April 2020 for other taxes
- **PPT to apply** but not SLOB
- Broader agency PE rule - not applicable
- Avoidance of PE status through specific activity exemptions (preparatory and auxiliary services) - provision not applicable
- Anti-fragmentation rule to counter avoidance of PE status - not applicable
- Splitting up of contracts related provision - not applicable

India-France tax treaty

- Date of entry into effect
  i. 1 April 2020 for WHT
  ii. 1 April 2020 for other taxes
- **PPT to apply** but not SLOB
- **Broader agency PE rule - applicable**
- Avoidance of PE status by narrowing the specific activity (preparatory and auxiliary services) exemptions - provision not applicable
- **Anti-fragmentation rule to counter avoidance of PE status – applicable**
- Splitting up of contracts related provision - not applicable

MLI Impact on key Indian Tax Treaties

India-Australia tax treaty

- Date of entry into effect

i. 1 April 2020 for WHT

ii. 1 April 2020 for other taxes

- **PPT to apply** but not SLOB
- Broader agency PE rule - not applicable
- **Avoidance of PE status through specific activity (preparatory and auxiliary services) exemptions - provision applicable**
- **Anti-fragmentation rule to counter avoidance of PE status - applicable**
- **Splitting up of contracts provision - applicable**

India-Japan tax treaty

- Date of entry into effect

i. 1 April 2020 for WHT

ii. 1 April 2020 for other taxes

- **PPT to apply** but not SLOB
- **Broader agency PE rule - applicable**
- **Avoidance of PE status through specific activity (preparatory and auxiliary services) exemptions - applicable**
- **Anti-fragmentation rule to counter avoidance of PE status - applicable**
- Splitting up of contracts related provision - not applicable

India-Netherlands tax treaty

- Date of entry into effect

i. 1 April 2020 for WHT

ii. 1 April 2020 for other taxes

- **PPT to apply** but not SLOB
- Broader agency PE rule - not applicable
- **Avoidance of PE status through specific activity exemptions (preparatory and auxiliary services) - applicable**
- **Anti-fragmentation rule to counter avoidance of PE status - applicable**
- **Splitting up of contracts related provision - applicable**

Tax Residency Certificates

Tax Residency Certificates

Relevance of TRCs

- TRC of a non-resident is pertinent ***for determining the tax residency*** while withholding taxes under the treaty provisions
- With BEPS into action, it is now significant to determine, among other things, the ***beneficial ownership and substance*** that non-resident has in the country that it claims to be country of residence
    - Content of TRCs does not substantiate the aforesaid aspect of non-resident payee
- ***Information and declarations sought, and aspects looked upon by tax authorities*** before issuing a residency certificate may help the deductor to draw some inference on above aspects
- Even from India perspective, Section 90 mandates obtaining a TRC from the resident country to avail the treaty benefit – however, there are divergent views on whether merely obtaining a TRC is conclusive evidence to demonstrate that the non-resident is a 'resident' of that particular country to avail treaty benefits

Information sought by tax authorities in some countries are provided in ensuing slides

Tax Residency Certificates

India

Indian Tax Office seeks following information before issuing a Certificate of Residency

- Full Name and address of the applicant
- Status (whether individual, HUF, firm, BOI, company etc.)
- Nationality
- Country of incorporation/registration
- Address of the applicant during the period for which TRC is desired
- Email ID
- PAN or Aadhaar Number/TAN
- Basis on which the status of being resident in India is claimed
- Period for which the residence certificate is applicable
- Purpose of obtaining Tax Residency Certificate

Tax Residency Certificates

United Kingdom

HMRC seeks following information from its resident before issuing a Certificate of Residency

- ***Why*** you need a CoR
- ***Double taxation agreement*** you want to make a claim under
- ***Type of income*** you want to make a claim for and the relevant income article
- ***Period*** you need the CoR for, if different from the date of issue
  - ***If needed by the double taxation agreement***, confirmation that you're: the ***beneficial owner*** of the income you want to make a claim for
  - ***subject to UK tax*** on all of the income you want to make a claim for
- Newly incorporated companies which have not yet filed a Corporation Tax Self Assessment return must tell HMRC the:
  - name and address of each director and shareholder
  - ***reason the company believes it's a resident of the UK*** (based on the guidance provided by HMRC)

Tax Residency Certificates

Singapore

- To obtain a COR, a company must be a tax resident of Singapore. The tax residency of a company is determined by the place in which the business is controlled and managed
- Foreign-owned investment-holding companies with purely passive sources of income and receiving only foreign-sourced income are not eligible to apply for COR
- However, IRAS may still issue a COR to foreign-owned investment-holding companies provided that:
  - ***Control and management*** of company's business is ***exercised in Singapore***; and
  - Company has ***valid reasons for setting up an office in Singapore***
- Besides this, the company must also:
  - Have related companies in Singapore that are tax residents of Singapore or ***have business activities*** in Singapore; or
  - Have ***at least 1 director*** based in Singapore who holds an executive position and is not a nominee director; or
  - Have ***at least one key employee*** (e.g. CEO, CFO, COO) based in Singapore

Tax Residency Certificates

Australia

Australian Tax Office seeks following information before issuing a Certificate of Residency

- Full name of the Australian resident
- Residential address of the Australian resident and postal address if different
- Date of birth (individuals only)
- Tax file number (TFN) or Australian business number (ABN) (or both)
- Country the certificate is for
- ***A statement whether the Australian resident is only a tax resident of Australia* or whether the Australian resident is also dual resident under the relevant tax treaty***
- Period the certificate is required for

**A company that is incorporated in Australia or which is controlled and managed from Australia is a tax resident of Australia*

Tax Residency Certificates

UAE

Tax Office in UAE seeks following information before issuing a Certificate of Residency

- Valid Trade License
- Certified Articles of establishment; incorporation; founding; institutionalizing or Memorandum of association
- Copy of identity card for the Company Owners or partners or directors
- Copy of passport for the Company Owners or partners or directors
- Copy of Residential Visa for the company owners or partners or directors
- Certified audited report
- Certified bank statement for at least 6 months during the required year

Tax Residency Certificates

Malaysia

Malaysian Tax Office seeks following information before issuing a Certificate of Residency

- A copy of the ***Minutes of Board of Directors' Meeting***, or a letter signed by a director confirming the management and control of the company are exercised in Malaysia
- Particulars of company Director / Officer issued by Companies Commission of Malaysia (CCM)

Are TRCs only conclusive proof of Tax Residency?

Recommendations of Shome Committee on GAAR

Relevant Extract of Shome Committee's recommendations:

"In view of the above, the Committee recommends that, while processing an application under section 195(2) or 197 of the Act pertaining to the withholding of taxes,

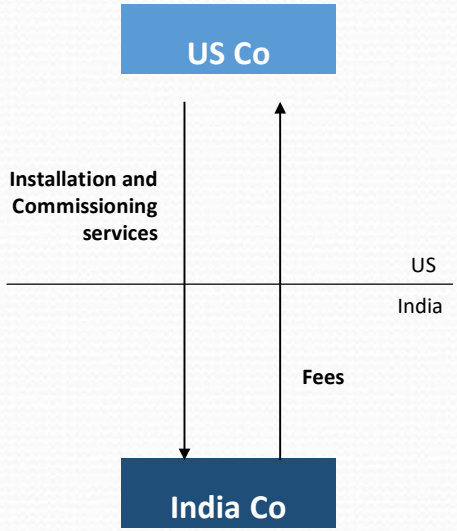
*(a) the taxpayer should **submit a satisfactory undertaking** to pay tax along with interest in case it is found that GAAR provisions are applicable in relation to the remittance during the course of assessment proceedings; or*

*(b) in case the taxpayer is unwilling to submit a satisfactory undertaking as mentioned in (a) above, the Assessing Officer should have the authority with the prior approval of Commissioner, to **inform the taxpayer of his likely liability in case GAAR is to be invoked during assessment procedure**.*

*There is a responsibility cast on the payer of any sum to a non-resident under Indian tax laws in the form of a withholding agent of the Revenue as well as representative assessee of the non-resident payee. **The payer is required to undertake due diligence to ascertain the correct amount of tax payable in India and, in case of any default, it becomes the payer's liability to pay**…"*

Are TRCs only conclusive proof of tax residency?

Case Study 8



- India Co., resident of India, availed
- availed Services for installation and commissioning from US Co.
- At the time of making payment by India Co, US Co could not furnish TRC
- India Co remitted payment for services availed from US Co. without

Deducting TDS taking recourse to beneficial provision of India - US DTAA.

- In the absence of TRC, whether India Co grant treaty benefits to US Co?

Are TRCs only conclusive proof of tax residency?

In the similar facts, Ahmedabad Tribunal in the case of Skaps Industries India (P.) Ltd [2018] 171 ITD 723 held as under:

- Section 90(4) requiring assessee to furnish TRC do ***not start with a non-obstante clause***
  - Reference to section 90(2A) which provides that GAAR provisions shall override section 90(2)
  - Hence, mere ***non-furnishing of TRC cannot be construed as a limitation*** to Treaty benefits

- Various clarification on legislative intent
  - ***CBDT Circular no 789*** dated 13-04-2000 clarified that wherever a TRC is issued by Mauritius tax authorities, such certificate will constitute sufficient evidence for accepting the status of residence as well as beneficial ownership for applying the Treaty
  - Parliament being conscious of above circular, ***dropped enactment of sub-section (5)*** along with sub-section (4) which stated that TRC shall be necessary but not sufficient condition

- In absence of TRC, assessee will have to ***substantiate its residential status*** by way of ***sufficient and reasonable documentary evidence***

Are TRCs only conclusive proof of tax residency?

Key Takeaways

- TRC will be ***conclusive proof of tax residence*** and tax authorities would not go beyond TRC to examine residential status
- In case, ***TRC is not provided***, ***burden of proof of assessee to substantiate*** tax residency with supportive documents
- Recent decision : ***Sreenivasa Reddy Cheemalamarri*** (ITA No. 1463/Hyd/2018)
  - It has been held that despite best possible efforts, if assessee is not able to procure TRC from country of residence, then the situation may be treated as ***"impossibility of performance"***

Undertakings / indemnities from non- resident payee

Undertakings / indemnities from non-resident payee

Relevance of undertaking / indemnity

- Practical challenges to obtain appropriate documentation from foreign third-party vendors or service providers
- Complexities involved in the structures incorporated by MNCs may leave room for uncertainty in the tax position even after comprehensive tax due diligence
- Certain anti-abuse provisions brought in by MLI are far subjective and unprecedented, thereby making it difficult to conclude on tax position

Undertakings / indemnities from non-resident payee

Pointers

- Eligible to qualify as ‘person’ under Article 3 of Treaty
- Resident of contracting jurisdiction and has obtained Tax Residency Certificate
- Does not have / Do not intend to have a Place of Effective Management in India
- Does not have / Do not intend create Permanent Establishment in India
- Eligible to claim Treaty benefits and satisfies ‘Principle Purpose Test’
- Indemnity Clause
- Beneficial owner of the income

Key Talking Points

Key Talking points

- Impact of different entry into effect date for withholding taxes and other taxes for certain treaties
- Review of current organisational structure and transactions to analyse the impact of Principle Purpose Test
- Review of current business model and transactions to analyse the impact of broadened ambit of PE exposure
- Impact of MLI on grand fathered investments e.g. Singapore and Cyprus treaty
- Impact on capital gains taxation (double non-taxation) on holding company structure e.g. Netherlands and Sweden treaty

Broad points for consideration

- Re-evaluating existing investment structures in India to ensure that one of the principal purpose of such arrangement is not to obtain tax benefit
- Building robust documentation to demonstrate that the arrangement is inextricably linked to core commercial activity
- Foreign remittances – Payer now to consider PPT provisions in relevant tax treaties
  - Payer needs to exercise basic due diligence and obtained necessary representations
  - Consequences on payer if PPT is invoked and treaty benefits denied to payee?
    i. Whether lower withholding certificate to be obtained?
    ii. Whether indemnity bond to be obtained?
- Where PPT is invoked and treaty benefit is denied, then domestic provisions to apply:
  - Wider definition of dependent agent PE of the Act
  - Business connection / Significant Economic Presence (albeit deferred as of now)
  - Wider definition of Royalty such as for software and equipment
  - Wider definition of Fee for technical service (no make available)
  - Indirect transfer provisions may apply
  - Higher rate for interest income in domestic law
- Entities engage in marketing activities for various group companies need to be re-evaluated
- Re-evaluation of activities if liaison office
- Re-evaluation of activities of entities involved in EPC activities, service activities etc.

Way forward

- Payers would need to ***undertake a detailed and complex matching exercise*** to check the impact of MLI
- ***Maintaining robust documentation*** in place in order to safeguard position from a withholding tax perspective to avoid consequences under domestic laws
- ***Relook to the declarations*** to be obtained along with TRC and other documents to consider following points:
  - Beneficial ownership
  - Denial of treaty benefit on application of PPT/SLOB test
  - Residency Status
  - Permanent Establishment in third state
- ***Challenges to obtain appropriate documentation*** from its foreign third-party vendors or service providers
  - Obtaining indemnity from non-resident vendors / service providers
  - Suitable changes in the terms of the contract / agreement
- Considering the practical challenges from withholding tax perspective, clarifications from CBDT would be welcomed

Key takeaways

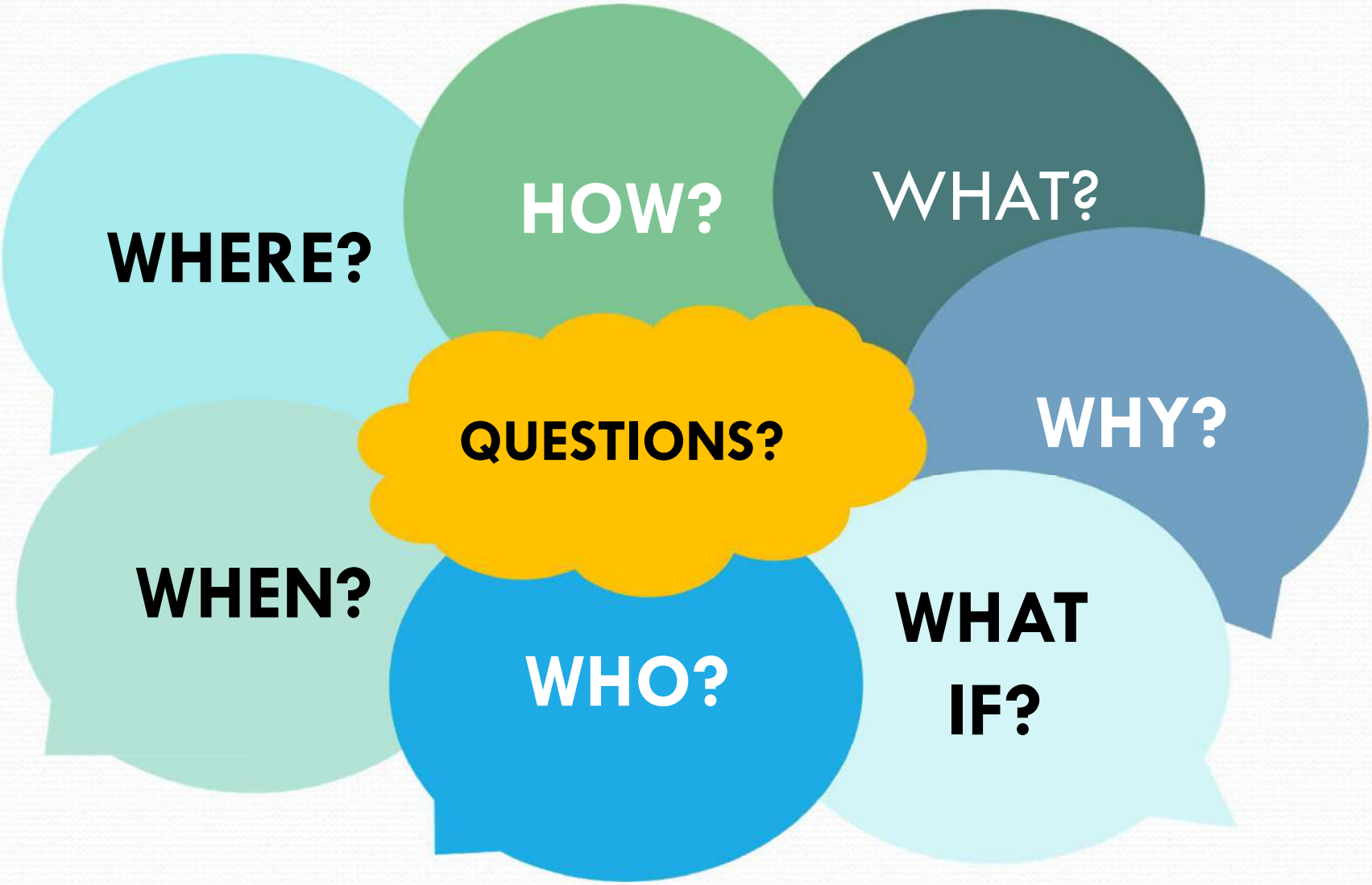
Concluding Thoughts

- Payment to non-residents should be thoroughly examined from tax withholding perspective
- Payments can be remitted under the alternate mechanism (with CA Certificate) if the case is strongly supported by judicial precedents
- In case of doubt coupled with substantial amount - Advisable to obtain tax withholding order u/s 195(2)
- Mitigate grave consequences of non compliance with S.195

Tax Withholding from cross-border transactions is critical

Open house

Questions…


WHERE?
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Any Feedback

Your feedback is valuable and will help me improvise my skill-sets

Disclaimer note: The views / opinions explicit or implicit expressed during the presentation of the tax technical paper, is exclusively that of the author being personal in nature, based on his professional practical experience. The content of the tax technical paper are general in nature and does not reflect / resemble any client advice delivered directly / indirectly. The participant relying on the tax technical paper is expected to consult his / her tax advisors before implementing the ideas suggested during the presentation. The presenter is in no case liable for any damages incurred by relying on the ideas implemented without adequate consultation with the competent tax professional on the instant facts and legal arguments

THANK YOU

Contact details

CA. Nitin Kanwar
Tel (Direct): +91-11-42486489
Cell: +91 9810387163; 91 9891048641
e-mail: nitinkanwar@globalca.in,
sumeetkanwar@globalca.in

Delhi Office :
DA-18, IInd Floor, Near Metro
Pillar No.-51, Main Vikas Marg, Shakarpur, Delhi-110092
Telefax : 011-42486489

Gurgaon Office at :- Unit No. 410, 4th Floor, Tower-A, Spazedge, Sector-47, Sohna Road, Gurgaon Road, Gurgaon, Haryana-122002
Ph. No. 0124-4067641