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India’s MLI Positions

Impact on Availing Treaty Benefits

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1. Introduction

The BEPS Project, launched during the 2008 financial crisis had the following goal: revising the international tax framework to align it with developments in the global economy, and ensure that profits are taxed where economic activities are carried out and value is created.

Recently in Paris, on June 7, 2017, 68 developed and developing countries signed the *"Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting"*, otherwise referred to as the Multilateral Instrument (**"MLI"**), to modify a large number of bilateral tax treaties entered into by over 68 countries. The signing of the MLI represents the dawn of a new era with respect to the taxation of cross-border businesses. It's entry into effect will have significant repercussions for Indian businesses with cross border operations and foreign investors keen on investing in India.

Presently, the signatories to the MLI include the United Kingdom, Canada, Germany, India, Italy and Russia, while more countries such as Mauritius have expressed their desire to do so. This has resulted in over 1100 treaties being potentially subject to change.[1] At the same time, significant jurisdictions such as the United States, and Brazil have not signed the MLI. Furthermore, significant treaty partners that account for a substantial amount of investments into India, such as Germany, while having signed the MLI, have not notified it as being applicable to their tax treaties with India, e.g., the India – Germany Double Tax Avoidance Agreement.

Nevertheless, the impact will be significant and will irreversibly change the manner in which future investments into India are structured. Specifically, the provisions of the MLI requiring the mandatory amendment of bilateral tax treaties to allow for certain minimum standards to be applied in respect of bilateral treaties. Importantly, the minimum standards include the denial of treaty benefits if obtaining those benefits was one of the purposes of a transaction resulting in that benefit. From a business point of view, this will lead to difficulties for businesses based on the manner of its subjective application. While these provisions raise the level of uncertainty when it comes to structuring business operations, their applicability alongside the recently introduced Indian General Anti Avoidance Rules may reduce ease of doing business due to the ambiguity on whether both provisions could potentially be applied at the same time or to the same transaction. Though the MLI in general provides much needed clarity in many respects from the perspective of the respective governments, it is clear that the lack of taxpayer involvement in the discussions has resulted in certain structural lacunae in the proposed MLI system from the taxpayer's perspective. For instance, the taxpayer has limited rights, visibility or involvement in the MAP proceedings between states, although an adverse decision is likely to affect them the most.

Further, with respect to missed opportunities, such as India refusing to clarify the availability of treaty benefits to fiscally transparent entities like trusts and partnerships or the unwillingness of India to sign up for mandatory arbitration, these are issues that can be addressed by signing up to those obligations under the MLI at a future date and to that extent, the MLI has simplified current state of affairs.

This paper analyses the provisions of the MLI, the provisional notifications issued by India and the choices of key treaty jurisdictions from an Indian inbound and outbound perspective to assess the impact that the MLI will have on business operations in India.

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1. OECD, *Information Brochure On Multilateral Convention To Implement Tax Treaty Related Measures To Prevent Base Erosion And Profit Shifting*, June 2017 (Last Visited' June 14 2017). Available at https://www.oecd.org/tax/treaties/multilateral-instrument-BEPS-tax-treaty-information-brochure.pdf

2. Background to Base Erosion and Profit Shifting

Base erosion and profit shifting (**"BEPS"**) is a phrase commonly used to refer to tax avoidance strategies that taxpayers use to shift their profits from high tax jurisdictions to low tax jurisdictions. Such strategies are aimed at minimizing the tax paid and are usually premised on the exploitation of mismatches between the tax rules of different countries. The 2008 financial crisis led to increased global focus on such practices and the OECD, in 2013, issued a report titled *"Addressing Base Erosion and Profit Shifting"*. Following the release of this report, members of the OECD and the G20 nations adopted a 15 point Action Plan to address the problem of BEPS (**"BEPS Action Plan"**). Over the course of the next two years, these countries (including India) came together to work on the BEPS Action Plan (**"BEPS Project"**), such work resulting in the release, in 2015 of the final reports on each of the 15 items identified in the BEPS Action Plan (**"BEPS Action Reports"**).

The BEPS Action Reports seek to eradicate double non-taxation, end treaty abuse and ensure that profits are taxed at the place of value creation. To this end, the BEPS Action Reports contain a number of tax treaty related measures, requiring the implementation of wholesale changes to the existing international tax treaty network.

Carrying out such large scale changes on a treaty-by-treaty basis would have been time consuming and may have led to inconsistencies across treaties due to the politics and vagaries of bilateral negotiations. Therefore, Action 15 of the BEPS Action Plan recognized the MLI, a multilateral treaty, as an innovative mechanism that would allow a more coordinated approach with immediate effect, while retaining the flexibility required to implement these changes in a broadly consensual framework to tackle base erosion. While the MLI attempts to retain flexibility by providing the countries a template of limited choices to choose from, it also mandates compliance with certain 'minimum standards'. Standardization of the choices within the MLI and obviating the need to individually re-negotiate each treaty bilaterally are the biggest gains in effecting a quick solution to BEPS.

3. Mechanism

Upon coming into effect, the MLI will not replace the existing treaties completely. Instead it will apply alongside existing treaties and either supplement, complement, supersede or modify their application so as to bring it in line with the measures set out in the BEPS Action Reports to address base erosion.

I.Signatories or Parties to the MLI

The MLI will apply only to those countries that have:

1. Signed the MLI
2. Ratified it in accordance with domestic law (where such ratification, acceptance or approval is required) and deposited such instrument of ratification with the OECD depositary (**"Depositary"**)
3. 3 months have passed from the date five instruments of ratification have been deposited with the Depositary, thereby bringing the MLI into force.

II.Notification of Covered Tax Agreements

After the MLI comes into force, it will not automatically apply to all the treaties of a country that is a party to the MLI (**"Party" / "Parties"**) but will apply only to those tax treaties where both Parties to such tax treaty have conveyed their intention (by way of a notification) for such treaty to be covered by the MLI, such treaties being referred to in the MLI as "Covered Tax Agreements" (**"CTA"**). In other words, the MLI will be applicable to a bilateral tax treaty only if both parties to such treaty notify it as a CTA.

III. Mandatory Minimum Standards under MLI

Upon qualifying as a CTA, a tax treaty will be required to meet certain prescribed minimum standards i.e., the minimum standard for the prevention of treaty abuse under BEPS Action 6 (Preventing the Granting of Treaty Benefits in Inappropriate Circumstances) and the minimum standard for the improvement of dispute resolution under BEPS Action 14 (Making Dispute Resolution More Effective). Signatories to the MLI will have little (almost none) leeway to opt out of adherence to the minimum standards.

Where an MLI provision reflects a BEPS minimum standard, Parties can opt out of such provision only in limited situations such as where the CTA already meets the minimum standards. Tax treaty partners (**"Treaty Partners" / "Contracting Jurisdictions"**) may also choose to opt out of a provision reflecting a minimum standard if they decide to reach a mutually satisfactory solution which is consistent with the minimum standard in some cases. Whether or not a CTA meets the minimum standard will be determined in the course of the review and monitoring process within the inclusive framework on BEPS.

However, signatories to the MLI have been afforded the flexibility to opt out (by way of reservations) of provisions that do not set a minimum standard.

IV. Reservations With Respect to Non-Mandatory or Optional Provisions

A party to the MLI may reserve the right for provisions of the MLI to not apply:

a. to its covered tax treaties in their entirety; or

b. a subset of its covered tax treaties.

Where one of the Parties reserves the right for provisions of the MLI to not apply to a CTA, the relevant provisions of the MLI will not apply to the CTA irrespective of whether or not the Treaty Partner has made a similar reservation.

Where a Party chooses to reserve the right for provisions of the MLI to not apply to a subset of its CTAs, such Party is required to provide a list of the existing provisions within the relevant sub–set which fall within the scope of the reservation. For example, Article 4(2) of the MLI provides Parties the option to reserve the right to not apply Article 4, which deals with "Dual Resident Entities", to those of its treaties which already provide that the tie-breaker test for residence of dual resident entities shall be decided by the competent authorities of both Treaty Partners through mutual agreement. Parties opting for this reservation would be required to notify its CTAs which already contain such a provision, in which case, Article 4 would not apply to such CTAs.

Further, the MLI also generally provides in most Articles that should a Treaty Partner:

a. Neither reserves the applicability of the particular MLI article, nor notifies the respective provisions; and

b. does not state that the Article is reserved in entirety;

then the respective MLI article will be added to the CTA and will prevail over the relevant provision of the CTA to the extent of inconsistency.

V. Optional provisions

In certain instances, the MLI permits a Party to choose among alternative provisions intended to address the same issue. A Party is required to notify the Depositary of its choice. Unlike in the case of reservations, both Treaty Partners are required to choose the same option in order for such option to apply.[2] In the event that a one Treaty Partner chooses a particular option, and the other Treaty Partner chooses to apply a different option or no option at all, then none of the options will apply to the relevant CTA. For Example, Article 13 of the MLI which deals with "Artificial Avoidance of Permanent Establishment Status through the Specific Activity Exemptions" provides for Parties to opt for either Option A or Option B to modify their CTAs. One of the options will apply to a CTA only when both Treaty Partners have elected that option.

VI. Notification clauses

Where an MLI provision supersedes or modifies an existing provision of a CTA, the Parties are generally required to make a notification specifying which CTAs contain such provisions and identify the provisions.

2. Article 5 (Application of Methods of Elimination of Double Taxation) and Article 23 (Type of Arbitration process) are exceptions to this.

While Parties are expected to identify and notify such provisions on a best efforts basis, it is possible that a relevant existing provision is not identified by a Party. Accordingly, the concept of provisional notifications has been introduced to deal with situations where a signatory to the MLI accidentally omits to notify a provision of a CTA, or Treaty Partners disagree regarding whether a particular provision is superseded or modified by the MLI, or where both Treaty Partners agree that there is a relevant provision but disagree about which one it is. In such a situation the exchange of provisional notifications with the other Treaty Partner will afford signatories an opportunity to discuss mismatches in the notifications and correct them prior to finalization of the lists.

The Parties to the MLI (India included) have filed provisional notifications with the Depositary as allowed by the MLI at the time of signing of the treaty. More Parties could submit their provisional or revised provisional notifications at the time of submission of the instrument of ratification, acceptance or approval with the Depository of the OECD. The provisional MLI Position of each signatory indicates the tax treaties it intends to cover, the options it has chosen within those provided by the MLI and the reservations it has made. Further, even after ratification, Parties can choose to opt in with respect to optional provisions or to withdraw reservations.

VII. Compatibility clauses

The 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. In other words, the compatibility clauses serve to determine whether the provisions of the MLI would replace or modify the provisions of the CTA. The MLI contains four types of compatibility clauses as follows:

Type of compatibility clause	When does it apply	What is the effect on existing provision	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	All 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	All 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	All 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

Therefore, while interpreting and applying the provisions of the MLI to India's bilateral treaties, the modifications introduced by the MLI will have to be assessed by reference to

a. the MLI;

b. the relevant CTAs as notified by India and its respective Treaty Partners;

c. the MLI positions adopted by India with respect to the various provisions within the MLI;

d. the MLI positions adopted by the relevant Parties to the MLI; and

e. the final result based on the reconciliations rules within the MLI that determine whether there would a symmetric application, an asymmetric application or a non-application of the chosen positions.

4. Timelines for MLI

I. Entry into force

The MLI enters into force on the first day of the month following the expiry of 3 calendar months from the date on which 5 signatories have deposited their instrument of ratification, acceptance or approval. Hence, for example, if the fifth instrument of ratification is deposited in July 2017, the MLI will come into force on November 1, 2017 and from that day, the 5 signatories shall become "Parties" to the MLI and shall be bound by it. For each country signing the MLI after the fifth instrument is deposited, the MLI shall come into force on the first day of the month following the expiry of three months from the date of such deposit. Referring to the same example as above, if a country signs the MLI in August 2017, the MLI shall come into force for that country on December 1, 2017.

II. Entry into effect

The timelines for the MLI to come into effect with respect to a CTA differ based on the type of taxation to which the modifications apply.

- *For taxes which are withheld at source on amounts paid to non-residents, such as royalties, interest, capital gains etc* - MLI will enter into effect where the event giving rise to such withholding tax occurs on or after the first day of the next calendar year that begins on the latter of the dates on which the MLI comes into force for each Treaty Partner (**"CTA Date"**).
- For example, in case of India and Singapore, if the MLI enters into force for India on September 2017 and for Singapore on September 2018, the CTA Date is September 2018 and the MLI will come into effect for all withholding taxes under the India-Singapore tax treaty which relate to an event occurring on or after January 2019.
- For the purpose of its own application of MLI to withholding taxes, India has chosen to replace "taxable period" for "calendar year". Accordingly, in the above example, MLI will cover a withholding tax payable in India if the event giving rise to such tax takes place on or after April 1, 2019, while it will cover a withholding tax payable in Singapore if such event takes place on or after January 1, 2019.
- *For all other taxes* - MLI will come into effect for taxable periods beginning on or after an expiry of 6 calendar months from the CTA Date.
- Hence, referring to the above example, for taxes such as tax on business profits attributable to a PE, the MLI shall apply to such taxes levied in India from financial year 2019-20, whereas it will apply for the purpose of such taxes levied in Singapore on or after January 1, 2020.[3]

3. This is because 6 months from September 2018, would be March 2019, and the taxable period for Singapore starting on or after that date is January 1, 2020

This is illustrated in the table below.

Types of taxes	Entry into effect	Application of MLI by India	
		CTA Date	**Entry into effect**
Taxes which are required to be withheld on overseas payments	Event giving rise to the withholding tax takes place on or after the 1st day of the next year (calendar year or tax year) that begins on or after the CTA Date.	September 2018	Event taking place on or after April 1, 2019
Other Taxes	Levied with respect to taxable periods beginning on or after an expiry of 6 calendar months from the CTA Date.	September 2018	Financial year 2019-20

III. Entry Into Force for Article 16 on Mutual Agreement Procedure

Further, there is a separate rule provided for entry into effect of Article 16 on Mutual Agreement Procedure (**"MAP"**). Article 16 shall come into effect with respect to a CTA for a case presented to the competent authority of a Contracting Jurisdiction on or after the CTA Date irrespective of the taxable period to which the case relates. However, an exception is provided for cases that were not eligible to be presented for MAP as of the CTA Date under the treaty prior to its modification by MLI. The exception is intended to ensure that the MLI would not revive earlier cases which had been ineligible for MAP prior to entry into force of the MLI.

Therefore, it remains to be seen how the entry into effect of MLI for different income streams would practically play out for India vis-à-vis it Treaty Partners. Developments relating to ratification of MLI by different Parties, entry into force of the MLI and entry into effect of MLI for each CTA should be closely followed and borne in mind while undertaking structuring exercises.

Below we have specifically analysed certain articles under MLI along with India's position on those articles and the implications of these positions on its various tax treaties.

5. Analysis of MLI Provision and India's Positions

I. Article 3 – Transparent Entities

Paragraph 1 of Article 3 provides that income derived by or through an entity or arrangement that is treated as wholly or partly fiscally transparent under the laws of either contracting jurisdiction to a bilateral tax treaty shall be considered to be income of a resident of either jurisdiction only to the extent that such jurisdiction treats the income as the income a resident of such jurisdiction.

The provisions of paragraph 1 of Article 3 mark the culmination of the OECD's study of the application of the OECD Model Tax Convention (**"Model Convention"**) to transparent entities such as partnerships, trusts and other non-corporate entities.[4] Paragraph 1 is intended to give effect to the recommendation in the Action 2 Report (Neutralising the Effect of Hybrid Mismatches) and ensure that the benefits of a tax treaty are granted only in appropriate cases but also that these benefits are not granted where neither contracting state treats, under its domestic law, the income of an entity as the income of its residents.

The Action 2 Report recommended the insertion of the following example in the Commentary to the OECD Model Convention to illustrate the manner in which paragraph 1 of Article 3 of the MLI is intended to apply:

State A and State B have concluded a treaty identical the Model Tax Convention. State A considers that an entity established in State B is a company and taxes that entity on interest it receives from a debtor resident in State A. Under the domestic law of State B, however, the entity is treated as a partnership and the two members in that entity, who share equally all its income, are each taxed on half its interest. One of the members is a resident of a State B and the other one is a resident of a country with which State A and B do not have a treaty. The paragraph provides that in such case, half of the interest shall be considered, for the purposes of Article 11, to be income of a resident of State B.

It is important to note that the provisions of paragraph 1 of Article 3 ensure that fiscally transparent entities are treated in accordance with principles reflected in the Partnership Report, and extends the application of these principles to entities other than partnerships. Therefore, while analysing India's position with regard to paragraph 1, it is necessary to analyse India's position in relation to the Partnership Report as explained below.

Paragraph 2 is intended to modify the manner in which provisions related to methods of elimination of double taxation (such as Article 23A and Article 23B of the OECD Model Tax Convention) are applied, and is intended to give effect to the recommendation in Action 6 Report 6 (Preventing the Granting of Treaty Benefits in Inappropriate Circumstances). Paragraph 2 of Article 3 provides that provisions in a bilateral tax treaty that require a contracting jurisdiction to exempt or provide a deduction or credit for taxes paid with respect to income derived by a resident of that contracting jurisdiction which may be taxed in the other

4. The 1993 OECD report on the *Application of the OECD Model Tax Convention to Partnerships* (the "Partnership Report") contained an exhaustive analysis of the application of treaty provisions to partnerships, including in situations where there is a mismatch with regard to the treatment of the partnership in the contracting states. The Partnership Report did not however expressly address the application of tax treaties to entities other than partnerships such as trusts and estates.

contracting jurisdiction in accordance with the provisions of the bilateral tax treaty shall not apply to the extent that such provisions allow taxation by the other contracting jurisdiction solely because the income is also income derived by a resident of that other contracting jurisdiction.

Paragraph 4 is the compatibility clause and states that paragraph 1 shall apply in place of or in the absence of provisions of a CTAs to the extent that they address whether income derived by or through entities or arrangements that are treated as fiscally transparent under the tax law of either contracting jurisdiction (whether through a general rule or by identifying in detail the treatment of specific fact patterns and types of entities or arrangements) shall be treated as income of a resident of a contracting jurisdiction.

India's MLI Position

India has reserved the right for the entirety of Article 3 to not apply to its CTAs. Accordingly, regardless of the positions adopted by India's bilateral tax treaty partners, Article 3 will not result in any amendments or modifications to India's bilateral tax treaties.

Other Countries' MLI Positions

It is interesting to note that countries such as Sweden, France and Singapore have reserved the right for the entirety of Article 3 to not apply to their CTAs.

On the other hand, the Netherlands has reserved the right for the provisions of paragraph 1 not to apply to its CTAs that already contain a provision described in paragraph 4 which describes in detail that treatment of specific fact patterns and types of entities or arrangements.[5] The Netherlands has also notified the list of CTAs containing a provision referred to in paragraph 6 of Article 3 that are not subject to a reservation under sub-paragraph (c) through (e) of paragraph 5 of Article 3, along with the article and paragraph number of such provisions.[6]

Countries such as Ireland, Japan and Luxembourg have reserved the right for paragraph 2 of Article 3 not to apply to its CTAs. They have also reserved the right for paragraph 1 not to apply to their CTAs that already contain a provision described in paragraph 4 of Article 3.

Similarly, Japan has also reserved the right for paragraph 2 of Article 3 not to apply to its CTAs. Japan has also reserved the right for paragraph 1 not to apply to its CTAs that already contain a provision described in paragraph 4 of Article 3, and has notified its treaties with Australia, France, Germany, the Netherlands, New Zealand, Portugal and the UK as containing such a provision.

The UK has reserved the right for paragraph 2 of Article 3 to not apply to its CTAs. However, the UK has made no reservations against paragraph 1, which would indicate that it intends for the paragraph 1 to apply to CTAs. As required under paragraph 6 of Article 3, the UK has also notified the list of CTAs containing a provision referred to in paragraph 3 of Article 3 that are not subject to a reservation under sub-paragraph (c) through (e) of paragraph 5 of Article 3, along with the article and paragraph number of such provisions. The United Kingdom has included Article 4(1)(b) of its bilateral tax treaty with India in the list.[7]

5. The Netherlands has notified its tax treaties with Japan, the USA and the UK containing such provisions.
6. The list includes the Netherlands tax treaties with Germany, Hong Kong, Indonesia, Norway, Oman, Panama and Kenya, among others.
7. The UK has also notified provisions in its Covered Tax Agreements with Argentina, Armenia, Chile, France, Japan, Macedonia, Moldova, Netherlands, Spain, Sweden, USA and Uruguay.

   Article 4(5) of the UK-France Tax Treaty provides:

   (A)that income that is (a) derived from a contracting state through a partnership or other similar entity established in the other contracting state, and (b) treated as income of the beneficiaries, members or participants of the partnership or other similar entity under the tax laws of that other contracting state, shall be eligible for the benefits of the UK-France Tax Treaty that would be granted if the income were directly

Article 4(1)(b) of the India-UK Tax Treaty provides that:

"in the case of income derived by a partnership, estate, or trust, this term applies only to the extent that the income derived by such partnership, estate, or trust is subject to tax in that State as the income of a resident, either in its hands or in the hands of its partners or beneficiaries".

In short, since the UK has not reserved the rights for the provisions of paragraph 1 of Article 3 to not apply to its CTAs, paragraph 1 will apply in the absence of or in place of similar provisions in all of its CTAs (to the extent that its treaty partners have not made a reservation).

derived by a beneficiary, member or participant of the partnership or other similar entity who is resident of that other contracting state, to the extent that such beneficiaries, members and participants are residents of that other contracting state, without regard to whether the income is treated as the income of such beneficiaries, members or participants under the laws of the first-mentioned state.

(B)that income that is (a) derived from a contracting state through a partnership or other similar entity established in the other contracting state, and (b) is treated as income of that partnership or other similar entity under the tax laws of that other contracting state, shall be eligible for the benefits of the UK-France Tax Treaty that would be granted to a resident of that other contracting state, without regard to whether the income is treated as the income of that partnership or other similar entity, under the laws of the first mentioned state, if such partnership or other similar entity is a resident of that other contracting state;

(C)that income that is (a) derived from a contracting state through a partnership or other similar entity established in that contracting state, (b) treated as income of beneficiaries, members or participants of that partnership or other similar entity under the tax laws of the other contracting state and, (c) treated as income of that partnership or other similar entity under the laws of the first-mentioned state, can be taxed under the laws of the first-mentioned state;

(D)that income that is (a) derived from a contracting state through a partnership or other similar entity that is established in that contracting state and (b) treated as income of that partnership or other similar entity under the tax laws of the other contracting state, shall not be eligible for benefits under the UK-France Tax Treaty.

(E)that income that is (a) derived from a contracting state through a partnership or other similar entity that is established in a state other than the contracting states, and (b) treated as income of the beneficiaries, members or participants of that partnership or other similar entity under the tax laws of the other contracting state and under the tax laws of the state where the entity is established, shall be eligible for the benefits of the UK-France Tax Treaty that would be granted if it were directly derived by a beneficiary, member or participant of that entity who is a resident of that other contracting state, to the extent such beneficiaries, members or participants, are residents of that other contracting state, without regard to whether the income is treated the income of the beneficiaries under the tax laws of the first mentioned contracting state, provided that the state where the entity is established has concluded an agreement for exchange of information with the first mentioned state for the prevention of fiscal evasion;

(F)that income that is (a) derived from a contracting state through a partnership or other entity that is established in a state other than the contracting states and (b) treated as income of that partnership or other similar entity under the tax laws of the other contracting state shall not be eligible for the benefits of the UK-France Tax Treaty.

Article 22(3) of the UK-Netherlands Tax Treaty provides that in the case of income derived through a person that is fiscally transparent under the laws of either state, such item shall be considered to be derived by a resident of a state to the extent that the item of income is treated for the purposes of the taxation laws of such state

Article 1(2) of the UK-Sweden Tax Treaty provides that:

For the purposes of the UK-Sweden Tax Treaty, income derived through an entity or arrangement that is treated as wholly or partly fiscally transparent under the tax laws of either contracting state shall be considered to be income of a resident of a contracting state but only to the extent that the income is treated, for purposes of taxation in that state, as the income of a resident of that state. In no cases shall the provisions of this paragraph be construed so as to restrict in any way a contracting states right to tax the income of a resident of that state.

Article 1(8) of the UK-USA Tax Treaty provides that:

An item of income, profit or gain derived through a person that is fiscally transparent under the laws of either Contracting State shall be considered to be derived by a resident of a Contracting State to the extent that the item is treated for the purposes of the taxation law of such Contracting State as the income, profit or gain of a resident.

Impact and Analysis

Analysis of India's position

According to the Commentary to the Model Convention (**"Commentary"**), to the extent that a partnership is treated as transparent in its jurisdiction of formation, and the income is not taxed in the hands of the partnership, then such partnership will not comply with the 'liable to tax' requirement to be eligible for treaty benefit.

However, to the extent the partners of such a fiscally transparent partnership are subject to tax on the same income, treaty benefits should be made available. While India agrees with the first part of this analysis, it disagrees with the second part. India's position is that such an outcome is possible only in situations where the language of the relevant tax treaty provides for it expressly.

Accordingly, some of India's bilateral tax treaties, like the India-UK Tax Treaty[8] (refer Article 4(1)(b) set out above) contain specific provisions allowing for the granting of treaty benefits where income derived by a fiscally transparent entity, such as a trust or partnership is subject to tax in its hands or in the hands of the partners or members of such transparent entity.

The courts in India have also had an opportunity to consider the eligibility of transparent entities to treaty benefits. In *Linklaters LLP vs. ITO* [9] and *Clifford Chance vs. DCIT* [10] it was held that a UK partnership was eligible to claim benefits of the India-UK Treaty,[11] where the partners were subject to tax in the UK. However, in the *Schellenberg Wittmer* [12] case the Authority for Advance Rulings took a contrary view and held that a Swiss general partnership was not entitled to treaty benefits since it is a fiscally transparent entity in Switzerland and does not qualify as a resident of Switzerland under the tax treaty (as it was not liable to tax being a transparent entity. The relevant DTAA also did not contain language along the lines of Article 4(1)(b) of the India-UK Tax Treaty that specifically provides for treaty benefit if the partners or beneficiaries are subject to tax). The AAR further held that the Swiss resident partners of the partnership could also not take advantage of the treaty since they were not direct recipients of the income.

In light of the *Schellenberg* ruling, partnerships and fiscally transparent entities established in jurisdiction such as Singapore, Netherlands, France and Mauritius may continue to face difficulties in claiming benefits under the bilateral tax treaty with India, in the absence of express provisions enabling the grant of treaty benefits.

While India could have adopted to align its approach to the treatment of fiscally transparent entities under its bilateral tax treaties with that of the OECD and a large number of developed nations, its decision to reserve the right to not have Article 3 of the MLI apply to its CTAs indicates that, for the time being, it is content to pursue an independent approach. India appears to have disregarded the need to safeguard the interests of its own transparent entities, such as domestic trusts and alternate investment funds (AIFs). While instances of overseas direct investments being made or services being rendered by entities that may be regarded as fiscally transparent under Indian tax laws are few and far between, India may want to reconsider its decision to not sign up to Article 3 of the MLI.

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8. India's treaties with Sweden and the USA contain provisions similar to Article 4(1)(b) of the India-UK Tax Treaty.
9. (132 TTJ 20)
10. (82 ITD 106)
11. In *Linklaters LLP*, the ITAT extended the benefits under the treaty to a UK Limited Liability Partnership and observed that where a partnership is taxable in respect of its profits in the hands of partners, as long as the entire income of the partnership firm is taxed in the country of residence (i.e. UK) treaty benefits could not be denied. In *Clifford Chance*, the ITAT granted benefits of the treaty to a UK partnership firm comprising lawyers but the issue whether a partnership was entitled to treaty benefits was not discussed at length.
12. [2012] 210 TAXMAN 319 (AAR).

II. Article 4 – Dual Resident Entities

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, the competent authorities of the contracting jurisdictions shall endeavour to determine by mutual agreement the residency of such person for the purposes of the CTA. In doing so, the competent authorities shall have regard to the place of effective management of the person, the place where it is incorporated or otherwise constituted and any other relevant factors. Most importantly, paragraph 1 further provides that 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 Covered Tax Treaty except to the extent and in the manner agreed upon by the competent authorities.

This article stems from the recommendation of the Action 6 Report to replace the place of effective management test with the requirement for mutual agreement between the contracting states. By way of background, the place of effective management rule was initially included in the 1963 OECD Draft Convention. The 2008 updated to the Model Convention introduced an alternative to the place of effective management test, according which the competent authorities of the contracting states are, having regard to a number of relevant factors, required to endeavour to determine by mutual agreement the contracting jurisdiction of which the person is a resident for purposes of the Model Convention. Now, the MLI provisions clearly signify a definite shift or preference towards resolving dual residency issues in a bilateral manner through MAP.

Paragraph 1 of Article 4 of the MLI is intended to address tax avoidance by dual resident entities by dealing with the issue of dual residence on a case by case basis.

Paragraph 2 of Article 4 of the MLI is the compatibility clause and provides that paragraph 1 shall apply in place of or in the absence of provisions of a CTA that provide rules for determining whether a person other than an individual shall be treated as a resident of one of the contracting jurisdictions in cases where that person would otherwise be treated as a resident of more than one contracting jurisdiction.

Since the provisions of Article 4 are not a minimum standard, parties to the MLI have the option of reserving the right to not allow article 4 to apply to their Covered Tax Treaties in their entirety. Parties also have the option of applying article 4 only to a sub-set of CTAs, where such sub-set of CTAs already contain provisions addressing cases of dual residence by (a) requiring the competent authorities of the contracting jurisdictions to endeavour to reach mutual agreement on a single contracting jurisdiction of residence, or (b) denying treaty benefits, without requiring the competent authorities of the contracting jurisdictions to endeavour to reach mutual agreement on a single contracting jurisdiction of residence.

India has not made any reservations with respect to Article 4 and has opted for Article 4 to apply to all its CTA. However, where another party to the MLI has made a reservation against Article 4, Article 4 will not apply with respect to the tax treaty between India and that party. Having chosen to not reserve against Article 4, India has provided a list of treaties and provisions therein which contain the place of effective management clauses which will stand replaced by the mutual agreement procedure. Where India's treaty partners' also notify the same clause, such clause will stand replaced by the provisions of Article 4. Where a treaty partner fails to notify the same clause in its bilateral tax treaty with India, then the provisions of such clause will apply to the extent that they are not incompatible with the provisions of Article 4.

Impact and Analysis

India's MLI Position

The benefits of a bilateral tax treaty are usually available only to persons who are residents of one or both of the contracting states. The residence of a person in a contracting jurisdiction, with some exceptions, is generally contingent on whether such person is liable to tax in that contracting jurisdiction by reason of its domicile, residence, place of management or any other criteria of a similar nature. Whether a person is 'liable to tax' is usually dependent on the domestic laws of States and it is not unusual for a person to qualify as a resident of one or more States for the purpose of a bilateral tax treaty. In order to avoid potential double taxation that may arise as a result of such dual residence, most treaties prescribe a place of effective management tie breaker test to determine a single treaty residence for a person.

India's position is likely to have significant ramifications for Indian MNCs with operations overseas. India has recently amended its domestic law to provide for a place of effective management (POEM) test to determine the residence of corporate entities. Until 2015, the only manner in which a foreign company could be deemed to be an Indian tax resident was if the control and management of its affairs were "wholly" situated in India during the relevant financial year. Therefore, it was only in very rare cases that a foreign company was deemed an Indian tax resident. This ensured that the likelihood of the tie-breaker test being relevant for foreign companies was low.

However, now, as a consequence of the introduction of the POEM test to determine residence under India's domestic tax, there is likely to be a higher incidence of the treaty tie-breaker provision being applied in practice e.g., where where a foreign company is rendered resident of India (as a result of POEM), and a resident of its country of establishment, since such country attaches importance to the place of incorporation of the company. It is unlikely that India will readily agree to the jurisdiction of residence of a dual resident entity being determined in favour of any country other than India. In such a scenario, it is likely that the competent authorities may be unable to reach an agreement on the residence of a dual resident entity, and accordingly, such entity would not be entitled to any benefits under the treaty. The Explanatory Statements to the MLI (**"Explanatory Statements"**) make clear that:

> *"where benefits are denied due to a failure of the competent authorities of the contracting jurisdictions to reach agreement, and such denial results in unrelieved double taxation taxation, such taxation would be in accordance with the provisions of the covered tax agreement."*

Further as stated earlier, the taxpayer is not involved in this process, nor is provided any visibility with respect to the MAP resolution despite the fact that the biggest impact of such an agreement would be on the taxpayer. The MAP resolution could take many years and remain unresolved resulting in unexpected tax costs. The uncertainty such procedures create are likely to be a cause of concern for the business community and may reduce the ease of doing business.

Another important aspect to consider is that while the default fall back to the treaty place of effective management test for determining a single residence in cases of dual residence may no longer be applicable, the place of effective management of a dual resident entity is still likely to be a relevant factor that the competent authorities will have to consider during the course of the mutual agreement procedure. In that context, it is important to note that while there may be some broad overlap, the treaty law interpretation of POEM is different from the domestic guidelines issued by India in relation to POEM.

For example, the OECD Commentary (as amended by Action Plan 6) states that countries should take into account:

a. the person's board of directors or equivalent body generally meet,

b. where the CEO and other senior executives usually carry on their activities,

c. where the senior day-today management of the person is carried out,

d. where the person's headquarters are located,

e. which countries laws govern the legal status of the person,

f. where its accounting records are kept,

g. whether determining that the legal person is a resident of one state but not of the other for the purpose of the treaty would carry the risk of improper use of the treaty etc.

On the other hand, India's domestic POEM test prescribes an active and passive income test that is usually applied only in the context of certain anti-avoidance measures like controlled foreign company (CFC) provisions. It is also unlikely that India's treaty partners will be agreeable to dual residence of a taxpayer being resolved in favour of India simply because it meets the criteria prescribed in India's domestic POEM test. The manner in which the competent authorities will address this divergence remains to be seen. Possibly, India may have to adopt different approaches to its concept of POEM for treaty purposes and domestic purposes, but it is more likely that a stalemate will occur resulting in treaty benefits being denied.

Other Countries' MLI Positions

India's tax treaties with France, Singapore, Mauritius, the Netherlands and the UK contain provisions similar to the language in Article 4(3) of the OECD Model Tax Convention. India's treaties with Sweden, Ireland and Luxembourg, in addition to the POEM test, also provide for the mutual agreement procedure where the POEM cannot be determined. India's treaties with the US and Japan provide only for the mutual agreement procedure.

Countries such as France, Sweden, Luxembourg and Singapore have reserved the right for Article 4 to not apply to their CTAs. Accordingly, the existing tie breaker in India's tax treaties with these countries remains unchanged. Therefore with regard to these jurisdictions, the treaty POEM test will continue to apply in cases of dual residence.

Ireland has reserved the right for Article 4 not to apply to its CTAs that already address cases of dual residency by requiring the competent authorities to come to a mutual agreement on a single jurisdiction of residence.[13] Ireland has chosen to apply Article 4 to the rest of its treaties and has notified India. Accordingly Article 4(3) of the India-Ireland Treaty will stand replaced with the text of paragraph 1 of Article 4 of the MLI.

The United Kingdom and the Netherlands have chosen to apply Article 4 to their CTAs and have notified India. Accordingly, Article 4(3) of the UK Treaty and article 4(3) of the Netherlands Treaty will also stand replaced with the text of paragraph 1 of Article 4 of the MLI, thereby applying the new MAP process to resolving dual residency disputes.

Japan has reserved the right to modify the language of paragraph 1 of Article 4 to provide that in the

13. Ireland has notified its provisions with the USA, Canada, Thailand, Vietnam, Bulgaria and Botswana as containing such a provision.

absence of agreement on a single state of residence, no benefits under its CTAs will be granted. There is therefore no scope for benefits under the treaty being granted except to the extent upon by the competent authorities. Since, Japan has notified its treaty with India, accordingly, Article 4(2) of the India-Japan Treaty will stand replaced with the the modified language of paragraph 1 of Article 4.

It remains to be seen what position Mauritius will adopt, while the USA, as mentioned earlier, is not a party to the MLI.

III. Article 5 – Application of Methods of Elimination of Double Taxation

Article 5 of the MLI contains provisions that provide three options, one of which countries may choose to address cases of double non-taxation that may where countries use the exemption method to prevent double taxation of income that is not taxed in the state of source.

Typically, treaties either adopt the exemption method or the credit method to ensure that the same item of income is not taxed twice in the hands of the same person in two different jurisdictions. While the exemption method generally exempts any income that is taxed in the other state from being taxed in its own state, under the credit method generally a tax credit is given equivalent or proportionate to the amount of tax paid in the other state, which can be set off against tax payable in its resident state.

However, double non-taxation may arise as as a result of disagreements between the state of residence and the state of source on the facts of a case or on the interpretation of the provisions of a bilateral tax treaty. Alternatively, while the income could be liable to tax in the other state/source state, it is however not subject to tax. In such a situation, use of the exemption method may result in an obligation on the state of residence to exempt such income, and therefore double non-taxation. To prevent such instances of double non-taxation the MLI has provided the following options for countries to choose from. Overall, these options show a marked shift or preference towards tax credit mechanisms over the exemption method.

Option A (paragraph 2 of Article 5 of the MLI) is based on Article 23A(4) of the OECD Model Convention and provides that provisions of a CTA, that would otherwise exempt income derived by a resident of a contracting jurisdiction (state of residence) from tax in that contracting jurisdiction for the purpose of eliminating double taxation, shall not apply where the other contracting jurisdiction (state of source) applies the provisions of the CTA to exempt such income from tax or to limit the rate at which such income may be taxed. Therefore, if an item of income is taxed in the source state, the residence state will not completely exempt it. Instead, the state of residence shall allow a deduction of an amount equal to the tax paid in the state of source against tax payable against the same income in the state of residence. Option A is not intended to apply in situations where the provisions of a Covered Tax Agreement grant exclusive taxing rights to the contracting jurisdiction of residence with respect to specific types of income, e.g., provisions that exempt dividends from source taxation.

Option B (paragraph 4) allows contracting states to not apply the exemption method with respect to dividends that are deductible in the contracting jurisdiction of the payer (state of source). This option reflects new drafting and is intended to address deduction / non-inclusion (D/NI) situations i.e., situations where dividends paid by an entity resident in the state of source are deductible from the taxable income of that entity (one reason being because such dividends are treated as interest payments in the state of source, due to the hybrid nature of the instrument) and are also not taxed by the recipient of such income in its state of residence (because dividends may be exempt under a participation exemption or similar provision).

Option C reflects the credit method for the elimination of double taxation and is based on Article 23B of the OECD Model Tax Convention.

Paragraphs 3, 5 and 7 are the compatibility clauses for Option A, Option B and Option C respectively. Option A and Option B are intended to change the application of the relevant existing provisions without replacing them. Option C is intended to apply in place of the relevant provisions.

A party to the MLI that does not choose to apply any of the options may reserve the right for the entirety of Article 5 to not apply to its Covered Tax Agreements. A party that does not choose to apply Option C may also reserve the right (with respect to one or more identified covered tax agreements), not to permit the other contracting jurisdiction to apply Option C. A party exercising an Option under the MLI is required to notify the depository of its choice of option and also to identify the list it's covered tax agreements that contain relevant provisions. Where one party to a bilateral tax treaty chooses to apply Option A, B or C to its bilateral tax treaties, and the other Party chooses a different Option, or does not choose an option, each Party's choice would apply with respect to its own residents. The Option shall apply with respect to a covered tax agreement only where the party choosing to apply that option has made a notification with respect to that provision.

Impact and Analysis

India's position

India has chosen to reserve the right for the entirety of Article 5 not to apply to its covered tax agreements. This is most likely because India generally does not employ the exemption method of eliminating double taxation in its bilateral tax treaties, preferring to use the credit method (Article 23B of the Model Convention) with some variations on a treaty specific basis.

Other Countries' MLI Positions

Countries such as Singapore, Sweden and France have also reserved the right for the entirety of Article 5 not to apply to its CTAs.

The Netherlands has chosen Option A. and notified Article 23(2) of the India-Netherlands Treaty.[14] However, in light of the fact that India has made a reservation, the choice of the Netherlands shall not change the provisions of Article 23(2), which provides that the Netherlands shall exempt items of income that may be taxed in India by allowing a reduction in its tax.

The provisional notification issued by the UK contains no reference to Article 5. The presumption therefore is that the UK has not selected any of the three Options, nor made any reservations. Accordingly, where another party to the MLI has selected an option (e.g., the Netherlands has also inter alia notified Article 21(2) of the UK-Netherlands Tax Treaty which contains a similar provision to Article 23(2) of the India-Netherlands Tax Treaty), then that option will apply to the residents of the party that has selected an option (in this example, residents of the Netherlands).

14. However, where a resident of the Netherlands derives items of income or owns items of capital which, according to Article 6, Article 7, paragraph 6 of Article 10, paragraph 7 of Article 11, paragraph 7 of Article 12, paragraphs 1, 2, 4 and 5 of Article 13, Article 14, paragraph 1 of Article 15, Article 16, paragraph 3 of Article 18, Article 19 and paragraphs 1 and 2 of Article 22 of this Convention may be taxed in India and are included in the basis referred to in paragraph 1, the *Netherlands shall exempt such items of income or capital by allowing a reduction in its tax*. These reductions shall be computed in conformity with the provisions of Netherlands law for the avoidance of double taxation. For that purpose the said items of income or capital shall be deemed to be included in the total amount of items of income or capital which are exempted from Netherlands tax under those provisions.

IV. Article 6 – Preamble of a Covered Tax Agreement

Prevention of treaty abuse is a minimum standard covered under Action 6 of the Final BEPS package. Pursuant to such minimum standard under Action 6, requiring express intent in tax treaties to exclude opportunities for treaty abuse, Article 6(1) of the MLI provides for introduction of the following preamble text in a CTA –

> *"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 under the agreement for the indirect benefit of residents in third jurisdictions)."* [Emphasis added]

This preamble text (**"MLI Preamble"**) is included in place of or in absence of existing preamble language of a CTA which expresses an intent to eliminate double taxation. However, a Party is permitted to make a reservation with respect to those CTAs which already satisfy the minimum standard and contain the requisite preamble language. In case of such reservation by one of the Treaty Partners to a CTA, the preamble of that CTA will remain unchanged.

Paragraph 5 of Article 6 requires Signatories to notify to the Depository which of its CTAs (not covered by the reservation) contain a preamble language referring to intent to eliminate double taxation. Where both the Treaty Partners have made such notification, the preamble of such CTA stands replaced by the MLI Preamble. If one or both of the Treaty Partners remain silent on such notification and none of them have made a reservation, then the MLI Preamble shall be included in addition to the existing preamble language.

Under Article 6(3), Parties have additionally also been given an option to include the following preamble language to those of their CTAs in which such language is absent –

> *"Desiring to further develop their economic relationship and to enhance their co-operation in tax matters" This preamble language shall be added in a CTA only where all Treaty Partners have notified the CTA for this purpose.*

This preamble language shall be added in a CTA only where all Treaty Partners have notified the CTA for this purpose.

Impact and Analysis

India's Position under Article 6

India has been silent on its position on Article 6. Therefore, in the absence of India notifying any treaty provisions/preamble language, the MLI Preamble will not replace the existing preamble language in India's CTAs but will only be added to the existing preamble text, irrespective of whether or not the other Treaty Partners notify India's treaty for this purpose. Notably, Section 90 of the ITA empowers the Central Government to enter into treaties with other countries, *inter-alia*, for granting relief in respect of income on which taxes have been paid in both countries, avoidance of double taxation or exchange of information.

While it is not expressly so stated in Section 90, the power to enter into treaties, with the object of preventing double non-taxation through tax avoidance or evasion, could potentially be read as being part of the power to enter into treaties for grant relief from double taxation.

The impact of India's choices under Article 6 vis-à-vis individual treaties is discussed below.

Mauritius[15] ; The MLI Preamble will be added to the Mauritius Treaty and included in addition to the existing preamble text if Mauritius signs the MLI and notifies the Mauritius Treaty as a CTA. 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"* [Emphasis added]. In the landmark judgment of *Union of India v. Azadi Bachao Andolan* [16], the Supreme Court referred to the text of the preamble of the Mauritius Treaty providing for "encouragement of mutual trade and investment" and legitimized treaty shopping as being consistent with India's intention at the time when the Mauritius Treaty was entered into. In the context of treaty shopping in a developing economy, the Supreme Court ruled as follows:

> *"125. There are many principles in fiscal economy which, though at first blush might appear to be evil, are tolerated in a developing economy, in the interest of long term development. Deficit financing, for example, is one; treaty shopping, in our view, is another. Despite the sound and fury of the respondents over the so called 'abuse' of 'treaty shopping', perhaps, it may have been intended at the time when Indo-Mauritius DTAC was entered into. Whether it should continue, and, if so, for how long, is a matter which is best left to the discretion of the executive as it is dependent upon several economic and political considerations. This Court cannot judge the legality of treaty shopping merely because one section of thought considers it improper. A holistic view has to be taken to adjudge what is perhaps regarded in contemporary thinking as a necessary evil in a developing economy."*

Even though the existing language of the preamble shall remain, the addition of MLI Preamble to the Mauritius Treaty is likely to significantly change the position established in *Azadi Bachao Andolan* as the MLI Preamble specifically provides for intent to prevent opportunities for tax avoidance evasion through treaty shopping. However, where an entity is set up in Mauritius primarily for the purposes of investment into India, the same could be argued to be within the overall object and purpose of the Mauritius Treaty by virtue of the existing preamble language of the treaty, thereby qualifying for treaty benefits.

USA, UK, France, Sweden, Luxembourg, Japan, Ireland, Singapore and Netherlands: The preamble text in treaties between India and each of these countries, among others, refer to "prevention of double taxation and avoidance of fiscal evasion" as their intent. Sweden Treaty and Luxembourg Treaty additionally also mentions its object as "promoting economic co-operation between the two countries". In the absence of any commitment on part of USA to sign the MLI, the preamble language under the USA Treaty is likely to remain unchanged. In all other treaties, the MLI Preamble shall be added to the existing preamble text.

15. Please note that Mauritius is not yet a signatory or a party to the MLI. However Mauritius has signalled its intent to sign up to the MLI and this analysis is based on the assumption that Mauritius shall also notify the India-Mauritius DTAA as a CTA.

16. [2003] 132 Taxman 373 (SC)

V. Article 7 – Prevention of Treaty Abuse

The Action 6 Report provides three alternative rules to address treaty abuse. As a minimum standard, the Action 6 Report requires countries to implement at least one of the following anti-abuse measures in their treaties – (i) a principal purpose test (**"PPT"**) *only*, which is a general anti-abuse rule based on the principal purpose of transactions or arrangements (ii) a PPT supplemented with either a simplified or a detailed limitation on benefits (**"LOB"**) provision, or (iii) a detailed LOB provision, supplemented by a mutually negotiated mechanism to deal with conduit arrangements not already dealt with in tax treaties.

PPT has been introduced as a default test which provides that no benefit under the CTA shall be granted if it is reasonable to conclude that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit.[17] However, most importantly, there is a carve out for granting such treaty benefits if availing such benefits was is in accordance with the object and purpose of the relevant provisions of the CTA. The PPT supersedes existing general anti-abuse provisions of the CTA, or is added to the CTA in the absence of such provisions.

Existing PPTs in treaties may either be blanket PPTs which cover all treaty benefits, or PPTs which are targeted at benefits under specific articles such as capital gains, dividends, interest, royalties etc. In this regard under Article 7, reference to provisions that deny "all or part of benefits" is intended to ensure that such narrower provisions will be replaced with the broader PPT under Article 7(1). Further, existing PPTs which use similar terms such as "main purpose" or "primary purpose" will also be replaced by the phrase "one of the principal purposes" as used in Article 7(1) of the MLI reflecting a relaxation in the threshold for meeting this test compared to some of the existing PPT tests in CTAs.

Thus, in order to trigger a denial of treaty benefit under the PPT, obtaining the benefit need not be the sole or dominant principal purpose of the transaction or arrangement. It would suffice even if one of its principal purposes was to obtain such benefit.

Notably, Article 7(4) of the MLI also provides for a clause which allows for treaty benefits to be nevertheless granted to a person by the competent authority of the relevant Treaty Partner upon request by that person where the benefit has been denied under the PPT. The competent authority will have to consult its counterpart in the other Contracting Jurisdiction before rejecting such a request. This clause shall apply to the CTA only where all Treaty Partners have notified their choice to apply it. Since India has not notified this provision, it will not apply to any of its CTAs.

A. Simplified LOB

Parties to the MLI have an option to apply the simplified LOB (**"SLOB"**) as a supplement to the PPT by making a notification to that effect. The simplified LOB provision applies to a CTA only when all the Treaty Partners have chosen to apply it. Where one Treaty Partner chooses to apply the SLOB and the other does not, then the SLOB does not apply and only the PPT applies symmetrically. In such a situation, the Treaty Partner which chooses to apply the SLOB is permitted under paragraph 16 of Article 7 to opt out of the application of the whole Article 7 if the other Treaty Partner has chosen not to apply the SLOB. In order to avoid such a situation in a bilateral context, Parties which choose not to apply the SLOB have been provided with two options –

17. Article 7(1) of the MLI

a. They may agree that the SLOB would apply symmetrically under their CTAs only with Parties that have originally chosen to apply SLOB. For example, if State A has chosen not to apply SLOB, while State B, C, and D have opted for SLOB, then State A may opt for application of the SLOB symmetrically in its CTAs with all such Parties which have opted for a SLOB. Upon the State A so opting, both State A as well as the corresponding State, in this case B,C and D, which has opted for the SLOB would apply both PPT as well as the SLOB in determining whether to grant the treaty benefits.

b. They may agree that the SLOB would apply asymmetrically under their CTAs with Parties that have chosen to apply SLOB. Hence, under the above example, if State A exercises this option, the corresponding Parties which have opted for SLOB may deny benefits under their respective treaties with State A by applying both PPT as well as SLOB, while State A will apply only the PPT in determining whether to grant benefits under these treaties.

The above options have been incorporated to incentivize Parties to either opt for the SLOB, or to opt for the symmetric or asymmetric application of the SLOB under (a) and (b) above in treaties with Parties which have opted for applying SLOB. A failure on part of such Party to opt for either of the options in (a) and (b) will expose them to the risk of the other Party (which has opted for SLOB) to opt out of the application of the whole of Article 7.

B.What is the Simplified LOB test

The substantive elements of the SLOB provisions are contained in paragraphs 8 to 13 of Article 7 of the MLI. Both Treaty Partners would have to elect to apply the SLOB test for it to be applicable. The SLOB provisions limit the availability of tax benefits to *"Qualified Persons"* of a Contracting Jurisdiction. The term Qualified Person has been to include (without any additional conditions):-

a. Individuals;

b. The Contracting Jurisdiction; political sub-divisions and local authorities thereof; agency or instrumentality of the Contracting Jurisdiction / political subdivision or local authority;

c. Companies or other entities, if the principal class of its shares are regularly traded on one or more stock exchanges (the term "principal class of shares" has been defined as the class/ classes of shares which represent, in aggregate a majority of the vote and value in the entity);

d. Persons other than individuals that are:-

   i. Non-profit organizations (of the type agreed upon between the contracting states);

   ii. Entities or other arrangements that are treated as separate persons which have been:-

      A. Established and operate exclusively to provide retirement benefits and ancillary or incidental benefits. Such organizations need to be regulated as such by the Contracting Jurisdiction;

      B. Established and operate exclusively to invest funds for activities covered in (A) above.

e. Persons other than individuals, if on at least 50% of the days of the 12 month period during which the benefits were sought, at least 50% of the shares were owned, directly or indirectly by Qualified Persons.

C. Active Conduct of Business

Residents of a Treaty Partner involved in active conduct of business will not be required to fulfill the Qualified Person threshold to avail treaty benefits so long as the income earned from the other Treaty Partner emanates from or is incidental to such business. Further, if such person derives income through business activity conducted in the other state either by itself or through a connected person, the business activity in the residence state should be substantial in relation to the same or complementary business activity carried on in the other state. The following activities shall not be included in the term "active conduct of business":-

a. Operating as a holding company;

b. Providing overall supervision or administration of a group of companies;

c. Providing group companies (including cash pooling); or

d. Making or managing investments, unless these are activities are carried on by a bank, insurance company or registered securities dealer in the ordinary course of its business as such.

D. Flow through entities as Qualified Persons

Residents which are not 'Qualified Persons' should be able to claim benefits if, during the relevant 12 month period, 75% or more of the beneficial interests are owned by *"Equivalent Beneficiaries"*. The term Equivalent Beneficiaries is defined as persons who are otherwise entitled to benefits with respect to an item of income under the domestic laws of the other Treaty Partner, the CTA, or under any other international instrument which are equivalent or more favourable to the benefits accorded to that item of income under the CTA. This provision essentially provides for neutrality between direct investment and indirect investments through flow-through entities. As per the commentary on the OECD Model Tax Convention, the rationale of such a provision is to ensure that investors in a collective investment vehicle (**"CIV"**) who would have been entitled to benefits with respect to income derived from the source state had they received it directly are not put in a worse position by investing through a CIV located in a third country.

E. Detailed Limitation of Benefits Provision

As described earlier, this alternative allows the Contracting Jurisdictions to agree on a detailed LOB provision instead of incorporating the default PPT as the subjective threshold governing grant of treaty benefits to residents of two Treaty Partners engaged in cross border operations. Parties have the option to reserve the right for PPT under MLI to not apply to their CTAs if they intend to adopt a detailed LOB provision in combination with either rules to address conduit financing structures or a PPT thereby ensuring that the BEPS minimum standards are met. Treaty Partners who have chosen this option shall endeavour to reach a mutually satisfactory solution which meets the minimum standard.

Impact and Analysis

India's Position under Article 7

In its provisional notification, India has chosen to apply the PPT with the SLOB across all its Notified Treaties. So far as the PPT is concerned, being a default test, it should apply across the board in all of India's treaties irrespective of the other position adopted by the other countries. Since India is only one among 12 countries[18] to have chosen to apply the SLOB, only a PPT is likely to apply to India's CTAs since India has not chosen a reservation to negotiate a detailed LOB with those Treaty Partners who have not chosen the SLOB. Further, most of its other Treaty Partners (including several European countries) have chosen not to allow a one sided symmetric or asymmetric application of the SLOB, thereby resulting in application of only a PPT to those treaties.

A reading of the PPT test reveals a carve out which allows treaty benefits to a transaction if granting the benefit is in accordance with the object and purpose of the relevant provisions of the treaty. Most of India's treaties have anti-abuse tests which limit treaty benefits for specific items of income. For example, most treaties limit the right for the source state to tax royalty, interest and dividends to 5%, 10% or 15%, provided the recipient in the residence state is the beneficial owner of such income. Based on the above carve out, it could be potentially argued that the object and purpose of the relevant provision on royalty (or interest etc.) is to grant the treaty benefit where the recipient is the beneficial owner, irrespective of whether one of the principal purposes of the transaction was to obtain that benefit. Similar arguments could be made about availing benefits under CTAs with respect to capital gains as well where LOB has been prescribed or where the intent was for the grant of such benefit. Having said that, the recipient entity should not have been set up in that jurisdiction only to obtain that treaty benefit as that could be construed as treaty shopping which would be an unintended benefit under the CTA as a whole in light of the new MLI Preamble.

Further, any disputes relating to availability or denial of treaty benefits are to be resolved by MAP between the Contracting Jurisdictions. The fact that any treaty benefit availed by the taxpayer can be question based on a subjective threshold marks an extreme widening of the power of tax authorities to deny treaty benefits. Such widening of a discretionary power in conjunction with the fact that treaty benefits can be denied pending the mutual resolution of issues related to availability of treaty benefits through MAP, is going to be a major cause of concern for taxpayers involved with the Indian tax authorities. In such a situation, it is still possible to approach constitutional courts in India for relief, however, it is far more desirable for the OECD to develop a standard global framework within which taxpayers can be involved in such proceedings and be protected. If courts in each country were to develop their own jurisprudence with respect to taxpayers rights, it may lead to inconsistent and discordant outcomes.

Further, the PPT under the MLI in some cases could potentially be broader in ambit than the General Anti-Avoidance Rule (**"GAAR"**) under the Income Tax Act, 1961 (**"ITA"**) as the latter gets triggered only if the "main purpose" of the arrangement is to obtain a tax benefit. Further, in order for GAAR to get triggered, one of the other tainted elements also needs to be satisfied, i.e., creation of rights or obligations that are not at arm's length, abuse of ITA, lack of commercial substance, or lack of bona fides. Therefore, it may be unlikely for GAAR to get triggered if the PPT is met, except in situations where the PPT is avoided on the ground that the benefit was in accordance with the object and purpose of the treaty provision. GAAR may still get triggered in such situations as it does not provide for such a carve out.

Noticeably, the ITA provides for procedural safeguards for invocation of GAAR in the form of a necessary approval by an approving panel which is chaired by an existing or former High Court judge, accompanied by one Revenue official, and an academic or scholar. However, ironically no such safeguards are in place for triggering of the PPT, which is in fact a broader and a more subjective test. A regular income tax officer may refuse to provide treaty benefits on the ground that the PPT under the treaty is not met. Clearly, there is a need for domestic guidelines to provide a framework within which such a broad subjective power is intended to be exercised. Such guidelines could provide some much needed clarity and ease taxpayer or investor concerns.

18. Other countries being Argentina, Armenia, Bulgaria, Chile, Colombia, Indonesia, Mexico, Russia, Senegal, the Slovak Republic and Uruguay.

Other Countries' MLI Positions

Below we have discussed the impact of India's position with respect to Article 7 on some specific tax treaties -

<u>USA</u>

Since US has not signed the MLI, neither the PPT nor the SLOB will apply to the India-US treaty. The US Treaty has an existing LOB clause in Article 24 which limits treaty benefits available to a resident only if –

a. 50% of the beneficial interest in such person is directly or indirectly held either by individual residents, political sub-divisions or any other resident individuals taxable on their worldwide income in one of the contracting states; and

b. the income of such person is not used to meet liabilities to persons other than those described in (a).

The LOB under the US Treaty does not apply if the income derived from the source state is connected with or incidental to the active conduct of business in the residence state, or if such person is a company having its principal class of shares regularly and substantially trading on a recognized stock exchange. The treaty nonetheless gives an option to approach the competent authority of the source state to grant the benefit regardless of the LOB.

<u>Singapore</u>

With effect from April 1, 2017, Article 13 of the Singapore Treaty provides for taxation of capital gains only in the residence state if the shares were acquired before April 1, 2017, and in the source state at 50% of the applicable rate if the shares were acquired after this date and transferred on or before March 31, 2019. Both these benefits under the capital gains article are subject to an LOB test existing in the Singapore Treaty which provides for specific substance requirements to be satisfied in the residence state to avail capital gains tax benefits under the treaty (**"Singapore LOB"**). The Singapore LOB also has a general clause which denies the capital gains tax benefit if the affairs are arranged with the primary purpose of obtaining that benefit (**"Singapore PPT"**). The Singapore PPT shall be superseded by the PPT introduced by the MLI which would apply across the treaty and is broader in its purview as it also denies the benefits if one of the principal purposes is to obtain the benefit. The other specific tests under the Singapore LOB relating to shell / conduit companies not being entitled to benefits, minimum expenditure requirements etc. will continue to be applicable as they are not incompatible with the PPT.

<u>Mauritius</u>

Mauritius Treaty has similar provisions with respect to capital gains on shares as the Singapore Treaty. The Mauritius Treaty also has a similar LOB clause with a PPT for benefits under the capital gains article as present under the Singapore Treaty (**"Mauritius LOB"**). However, the Mauritius LOB only limits the capital gains benefits with regard to reduced tax rate in the source state where the shares were acquired on or after April 1, 2017 (but transferred on or before March 31, 2017). Unlike the Singapore LOB, the Mauritius LOB does not cover the exemption on capital gains in source state when the shares were acquired before April 1, 2017.

If Mauritius signs the MLI, notifies the Mauritius Treaty, and does not take a reservation on the PPT, the PPT will apply to the Mauritius Treaty. The discussion on the interplay between the PPT under MLI with the

Singapore LOB and Singapore PPT as discussed above will apply in a similar manner in case of Mauritius as well. However, it remains to be seen whether Mauritius will opt for a SLOB, in which case the SLOB provision as a whole will get added to the Mauritius Treaty.

UK

The UK Treaty has several anti-abuse clauses similar to a PPT which cover benefits under specific articles such as royalties, interest and dividends. The UK Treaty also has an overarching general anti-abuse provision under Article 28C which denies all treaty benefits if the main purpose or one of the main purposes of the creation of the resident or the transaction undertaken by him was to obtain benefits under the UK Treaty (**"UK PPT"**). The UK PPT does not provide for a carve out for cases where granting the benefit is in accordance with the object and purpose of the relevant treaty provision. Both India and UK have notified Article 28C of the UK Treaty for the purpose of applying the PPT under MLI. Therefore, the UK PPT shall stand replaced by the PPT under the MLI which is both broader and narrower than the original one with respect to different aspects.

Further, for the purpose of applying the PPT, UK has additionally also notified Articles 11(6), 12(11) and 13(9) which provide for denial of benefits with respect to taxation of dividends, interest and royalties (and fees for technical services), respectively, if the main or one of the main purposes of the transaction was to obtain a benefit under the concerned article. However, India has not notified these articles. Hence, the PPT will supersede these articles to the extent of incompatibility.

Luxembourg

The Luxembourg Treaty has a PPT (**"Luxembourg PPT"**) under paragraphs 2 and 3 of Article 29, which denies all benefits under the treaty if the main purpose or one of the main purposes of creation of the enterprises claiming the benefits was to obtain the benefits under the treaty. The PPT also covers cases of legal entities not having bona fide business activities. This PPT differs from the PPT under MLI as the latter covers cases where obtaining the treaty benefit was one of the principal purposes of the arrangement or the transaction. Further, unlike the PPT under the MLI, the Luxembourg PPT also does not provide a carve out for cases where the benefit was in accordance with the object and purpose of the relevant treaty provision and could therefore in some circumstances be potentially broader than the PPT under MLI to that extent. The Luxembourg PPT has been notified by both India and will therefore be replaced by the PPT under MLI.

Netherlands, Japan, Ireland, Sweden and France

These treaties neither have an LOB clause, nor a test similar to the PPT to cover benefits under specific articles. Further, no article from either of these treaties has been notified either by India or by any of these countries. Therefore, the PPT under MLI will be added to these treaties to cover all benefits under these treaties.

VI. Article 8 – Dividend Transfer Transactions

Article 8 seeks to modify provisions of a CTA which limit the rate of tax levied in the country of 'source' on payment of dividends (**"Treaty Relief"**). However, as per the existing provisions, such Treaty Relief can only be claimed if the recipient of dividend is a 'beneficial owner' (**"BO Test"**). In some treaties, the BO Test is a subjective one whereas in others, the objective criteria for BO Test is specified, for example, if the recipient holds a certain percentage of shares in the company paying the dividends etc. As is evident, the BO Test exists to prevent base erosion by ensuring that only in case of receipt of dividends by beneficial owners, can the dividends be exempt from tax in the country of 'source.' That said, manipulative measures led to a lot of taxpayers misusing this provision. In order to plug the loopholes and strengthen the BO Test, Article 8, which is based on Article 10(2) of the OECD Model Convention as amended by Action 6 Report [19] seeks to introduce a minimum holding period of 365 days throughout which the BO Test should have been satisfied for the Treaty Relief to apply (**"Testing Period"**). The Testing Period is sought to be introduced through the application of Para 1 of Article 8.

The intention of the provision is to merely introduce the Testing Period without modifying the substantial allocation of taxing rights and other conditions under existing provisions, such as tax rates, ownership thresholds, form of ownership etc. Further, considering the variations in existing provisions and to capture as many as possible, Para 1 (which introduces the Testing Period) has been given a wide scope. For example, the phrase 'more than a certain amount' has been used to cover existing provisions whether they use phrases like 'at least/more than/less than [x] percent.' The term 'recipient' has been added to cover treaties that use it instead of 'beneficial owners' etc.

The compatibility clause for Article 8, as is couched in Para 2, is *in place of or in absence of.'* This means that Para 1 gets added if there is no existing provision similar to Para 1 (**"Existing Provision"**). However, if there is an Existing Provision, then it will get replaced with Para 1 (subject to notifications). Considering that Article 8 is not a minimum standard, the scope of reservations (Para 3) is wide. The Parties have the following choices with regards to reservations – (i) reserve the entirety of Article 8 (Para 3(a)); (ii) reserve it only for a subset of CTAs that already contain provisions with a minimum holding period/ minimum holding period shorter (or longer) than a 365 day period (Para 3(b)).

As regards notifications, Para 4 specifies that the trigger point for notification is if no reservation in made under Para 3(a). For CTAs which do not contain an Existing Provision and hence not notified, it would constitute a situation of *'in absence of'* and Para 1 would get added to the relevant CTA. On the other hand, for CTAs which do contain an Existing Provision, it would constitute a situation of *'in place of'*, in which case, the Existing Provision would get replaced with Para 1 provided all the Contracting Jurisdictions to those CTAs notify the Existing Provision.

Impact and Analysis

India's MLI Position

India has made a reservation under Para 3(b) for Article 8 not to apply to a subset of CTAs that already contain provisions with a minimum holding period longer than a 365 days period (Para 3(b) (iii)). Further, since India has not reserved under Para 3(a), it has made the notifications as per Para 4.

Further, this article or the notification of India's MLI Position is unlikely to have a significant impact on the distribution of dividends. This is because of the imposition of Dividends Distribution Tax (**DDT**) on the corporate profits out of which dividends are distributed. Hence, any limitation on the availability of treaty benefits with respect to taxes on dividends in unlikely to have an impact on the DDT or the distributions made by Indian companies.

Other Countries' MLI Positions

Netherlands has not made any reservations under Article 8 and has made notifications regarding the treaties that contain Existing Provisions as per Para 4. Considering that both Netherlands and India have made the notifications and the Netherlands Treaty does not contain an Existing Provision, Para 1 will get

19. BEPS Actions Final Report 2015, Action 6, page 70 and 71, para 36. See *http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/preventing-the-granting-of-treaty-benefits-in-inappropriate-circumstances-action-6-2015-final-report_9789264241695-en#.WUjQyut94dU.*

added to the Article on dividends in the Netherlands Treaty. The same is the case with the France Treaty.

Singapore has reserved its right for the entirety of Article 8 to not apply. Hence Article 8 would not apply to the Singapore Treaty. Same is the case with Sweden Treaty, Singapore Treaty and the UK Treaty.

Based on the above, it is clear that not a lot of Parties have reserved Article 8 and hence are not interested in adding the Testing Period to the dividend article thereby implying that they consider the already existing BO Test to be enough to ensure that exemption from dividend taxation in the source state does not lead to base erosion.

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

Article 9 of the MLI is modelled after Article 13(4) of the OECD Model Convention as modified by Action 6 of the BEPS Action Plan (**"BEPS Provision"**).[20] Article 13(4) provides that capital gains arising from alienation of shares which derive their value principally from immovable property may be taxed in the country in which the immovable property is located thereby effectuating the 'source' principle of taxation. Generally most treaties provide a value threshold (**"Threshold"**) to determine whether the shares derive their value from immovable property.[21]

Several taxpayers started adopting aggressive methods to by- pass the applicability of Article 13(4) leading to base erosion. One such method was to contribute assets to an entity shortly before the alienation of shares/comparable interests so as to dilute the proportion of the value of the entity that is derived from immovable property. Article 9 seeks to curb this kind of mischief by providing that Article 13(4) should only apply to situations where shares/comparable interests derive their value substantially from immovable property at any time during a defined period as opposed to at the time of alienation (**"Testing Period"**). In addition, Article 9 seeks to expand the scope and applicability of Article 13(4) by bringing within its ambit other participation rights and comparable interests such as interests in a partnership or trust (**"Participation Interest"**). Broadly, Article 9 can be divided into two parts, the primary part (**"Primary Provision/Para 1"**) and the Optional provision (**"Optional Provision/Para 4"**). That said, while Article 9 seeks to add a Testing Period and extend its applicability to Participation Interest, it does not seek to amend the already existing Thresholds and the other specific features of the existing provisions, if any.[22]

A. Primary Provision

The modalities of the Primary Provision can be ascertained from a combined reading of Para 1, 2, 6 and 7 of Article 9. Para 1 introduces the Testing Period (Para (1a)) and the provision for Participation Interest (Para 1(b)). Para 1 captures the BEPS Provision with suitable amendments. The amendments are made to expand the applicability of it by way of bringing as many 'existing provisions' as possible within its ambit. For example, Para 1 replaces (a) 'comparable interest' with 'other rights of participation in the entity', (b) 'more than 50%' with 'more than a certain part', in order to capture other provisions such as 'the principal part', 'the greater part', 'mainly', 'wholly,' 'principally etc., (c) 'immovable property' with 'real property.'

20. BEPS Actions Final Report 2015, Action 6, page 72, para 44. See *http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/preventing-the-granting-of-treaty-benefits-in-inappropriate-circumstances-action-6-2015-final-report_9789264241695-en#.WUjQyut94dU.*

21. In most treatise, the Threshold is 50% (if the shares derive 50% of their value from immovable property), whereas other treatise use more subjective Thresholds such as the *principal part, the greater part, mainly, principally, primarily etc.*

22. Explanatory Statement to MLI, Para 131

The compatibility clause for Para 1(a) is *in place of or in absence of*, which means that if there is an existing provision similar to Para 1 (**"Existing Provision"**), it will get replaced with Para 1(a) (subject to the notifications) and if there is no Existing Provision, Para 1(a) will get added.[23] The compatibility clause for Para 1(b) is couched in the language of Para 1(b) itself, which provides that it will applicable to the extent not covered in the Existing Provision and in addition to the extent already covered.

Considering that Article 9 does not deal with minimum standards the scope for reservations is wide. Para 6 deals with reservations. The Contracting Jurisdictions have the following choices for reservations - (i) reserve the entirety of Para 1 (Para 6(a)); (ii) reserve either Para 1(a) or Para 1(b) (Para 6(b) and 6(c) respectively); (iii) reserve Para 1(a) for a subset of CTAs (Para 6(d)); (iv) reserve Para 1(b) for a different subset of CTAs (Para 6(e)).

If reservation is made under Para 6(a), then Article 9 would not apply unless a choice is made to apply the Optional Provision. However, if no reservation is made under 6(a), then there could be the following scenarios – (1) no reservation is made under Para 6(b) or 6(c), in which case the entirety of Para 1 applies. In this scenario, further reservations could be made for Para 1(a) *and/or* Para 1(b) to not apply to a subset of CTAs that already contain similar provisions (Para 6(d)[24] or 6(e)[25] as the case may be); (2) reservation is made under either 6(b) or 6(c), in which case either Para 1 (a) or Para 1(b), as the case may be, applies. In this scenario, further reservations could be made for Para 1(a) or Para 1(b), as the case may be, to not apply to a subset of CTAs that already contain similar provisions (Para 6(d) or 6(e)).

As regards notifying the Existing Provisions (**"Existing Provisions Notification"**), which is dealt with in Para 7, the trigger point is if no reservation is made under Para 6(a). This is owing to the fact that if no reservation is made under Para 6(a), despite reservations under other Paras (if any), some or the other part of Article 9 will continue to apply. For Para 1, if there are no Existing Provisions and hence no notification, it would constitute a situation of *'in absence of'* and Para 1 would get added to the relevant CTA provided it is not reserved. However, if there is an Existing Provision for Para 1, then it constitutes a situation of *'in place of'*, in which case, the Existing Provision would get replaced with Para 1 only if all the Contracting Jurisdictions to the relevant CTA notify the Existing Provisions.[26]

B. Optional Provision

Para 4 of Article 9 of the MLI provides that in the event a CTA does not have any provision with respect to the taxation of gains from alienation of shares that derive their value principally from immovable property, then Treaty Partners to such a CTA may adopt Para 4. Further, if a Treaty Partner adopts Para 4, then automatically it cannot apply Para 1 of Article 9 of the MLI. Furthermore, if a Treaty Partner opts for Para 4 and the other treaty partner opts for Para 1, then only Para 1 shall apply since Para 4 can apply only when both Treaty Partners opt for it. The modalities of the Optional Provision (Para 4) can be ascertained from a combined reading of Para 3, 4, 5, 6, 7 and 8 of Article 9. As opposed to the Primary Provision, which is constructed by making suitable amendments to the BEPS Provision, the Optional Provision is simply lifted from Action 6 of the BEPS Action Plans. Comparatively, it is a more convenient option and most countries are likely to adopt it. The compatibility clause for the Optional Provision is *in place of or in absence of*, same as the compatibility clause

23. Article 9, Para 2

24. Article 9, para 6(d) refers to similar provisions in the CTA that already provide for a period to determine whether the relevant value threshold was met.

25. Article 9,para 6(e) refers to similar provisions in the CTA that already provide for alienation of interests other than shares to be covered.

26. Article 9, Para 7.

for Para 1(a). Further, if a Contracting Jurisdiction makes a choice to apply the Optional Provision, it may reserve its applicability for a subset of CTAs that contain similar provisions (Para 6(f)).

If a Contracting Jurisdiction chooses to apply the Optional Provision, it shall notify the depository under Para 8 (**"Choice Notification"**). The Optional Provision will apply only if the Choice Notification is made by all the Contracting Jurisdictions to a CTA. Further, if the Optional Provision applies then the Primary Provision would not apply. On the other hand, if one Contracting Jurisdiction makes a *choice* to apply the Optional Provision, but other Contracting Jurisdiction(s) to that CTA do not, then the Primary Provision would apply provided that no Contracting Jurisdictions to that CTA makes a reservation under Para 6(a).[27]

As regards the Existing Provisions Notification, if a Contracting Jurisdiction does not reserve under 6(a) and makes a choice for the Optional Provision, then the requirement to make the Existing Provisions Notification would anyway get triggered under Para 7 and hence no separate Existing Provision Notification would be required to be made for the purposes of the Optional Provision. However, if a Contracting Jurisdiction makes a reservation under Para 6(a), then it would be required to notify the Existing Provisions under Para 8 as part of the Choice Notification for the purposes of the Optional Provision. For CTAs which do not contain an Existing Provision and hence not notified, it would constitute a situation of *'in absence of'* and the Optional Provision would just get added to the relevant CTA provided it is not reserved. On the other hand, for CTAs which do contain an Existing Provision, which constitutes a situation of *'in place of'*, it would get replaced with the Optional Provision only if all the Contracting Jurisdictions to those CTAs notify the Existing Provisions. However, for CTAs which do contain an Existing Provision, but are not notified by all the Contracting Jurisdictions to those CTA, then the Optional Provision shall supersede the Existing Provisions to the extent they contradict with the Optional Provision.

Impact and Analysis

India's MLI Position

India has made a choice to apply the Optional Provision by way of making the Choice Notification under Para 8. Further, India has not made any reservations and hence the Existing Provisions Notification is made under Para 7.

This implies that since India has chosen to apply the Optional Provision under Para 4, it would apply only in cases where the other Treaty Partner has also chosen to apply Para 4. In all other case, the provisions notified in the Existing Provisions Notification shall be modified in such a manner that Para 1 shall apply to the CTAs where the Treaty Partner has not reserved the applicability of this Article.

Hence, the applicability of this Article is dependent on the positions adopted by other Treaty Partners as seen below.

Other Countries' MLI Positions

While *Mauritius* is yet to release its list of reservations and notifications, *Singapore, United Kingdom of Great Britain and Northern Ireland* and *Sweden* have reserved the applicability of Article 9 in its entirety. This means that India's treaty provisions modelled after Article 13(4) with these three Contracting Jurisdictions would remain unchanged. *Netherland*s on the other hand has made an Existing Provisions Notification under Para 7 without making a choice to apply the Optional Provision. As a result, in the Netherlands Treaty, Para 1 of Article 9 would apply to Article 13(4) *France's* position on Article 9 is similar to that of India, in that, it has made a choice for Optional Provisions and has made Exiting Provisions Notification under Para 7.

27. Explanatory Statement to MLI, Para 131.

Further, both France and India have notified the Existing Provision with respect to the France Treaty. Hence the Optional Provision would apply to the India- France Tax Treaty wherein the current Article 14(4) would be *replaced* with the Optional Provision.

Conclusion:

While most of the treaties already contain provisions relating to Participation Interest, few contain provisions that have a Testing Period for the determination of the value Threshold. Further, Article 9 does not deal with minimum standards. It is due to these reason that most Contracting Jurisdictions are likely to, as is evident from the provisional list of notifications/reservations, either reserve the entirety of Article 9 or make a choice to apply the Optional Provision as it is more convenient. It can therefore be inferred that not a lot of Contracting Jurisdictions are willing to introduce a Testing Period for the value threshold thereby implying that while trying to reduce base erosion and profit shifting, they still want to continue making efforts to retain the balance between 'source' taxation and fostering foreign investment.

VIII. Article 10 – Triangular PE

Article 7 of the OECD Model Tax Convention provides that profits of an enterprise in a Contracting State shall only be taxed in its state of residence (**"Country of Residence"**) unless the enterprise carries on business in the other Contracting State (**"Country of Source"**) through a permanent establishment (**"PE"**). In case of latter, the profits that are attributable to the PE (**"Attributable Income"**) is taxed in the Country of Source i.e. where the PE is located. Further, the amount of tax paid in the Country of Source on the Attributable Income is entitled to credit in the Country of Residence by way of Article 23 of the OECD Model Convention (**"Credit/ Treaty Relief"**).

This provision was being misused by a lot of taxpayers by way of deliberately transferring the assets such as shares, bonds or Intellectual property (income/profit generating assets) from the PE in the original Country of Source to the PEs in other unrelated states (**"Third States"**) that offer a very favourable tax treatment.[28] This would result in a situation where no tax would be payable in the original Country of Source as the income generating assets are removed from that state. Nil/low tax would be payable on the Attributable Income in the Third States as they have a favourable tax regime. Further, no tax would be payable in the Country of Residence on the Attributable Income due to Credit under Article 23. Such structuring would therefore lead to effectively no tax being payable on the Attributable Income in any of the jurisdictions leading to a kind of abuse which is more commonly known as triangular cases in multilateral situations (**"Triangular Cases"**), wherein the jurisdiction which suffers the most is the Country of Source due to base erosion and profit shifting.

Article 10 of the MLI is based on the text of the OECD Model Convention produced in paragraph 52 (page 76) of the Action 6 Report as finalised in the course of follow up work by the Working Party 1.[29] It seeks to curb the mischief of Triangular Cases to prevent base erosion and profit shifting from the Country of Source. Para 1 of Article 10 provides that in a situation where – (a) an enterprise of a Contracting Jurisdiction to a CTA (in the Country of Residence) derives income from the other Contracting Jurisdiction (in the Country of Source) and treats such income as Attributable Income attributable to a PE in a Third State; and (b) the Attributable Income is exempt from tax in the Country of Residence due to Credit, Treaty Relief shall not apply if the tax payable on the Attributable Income in the Third State is less than 60% of the tax that would be imposed in the Country of Residence if the PE were situated in the Country of Residence

28. BEPS Actions Final Report 2015, Action 6, page 75, para 50. See *http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/preventing-the-granting-of-treaty-benefits-in-inappropriate-circumstances-action-6-2015-final-report_9789264241695-en#.WUjQyut94dU.*

29. *Ibid* at page 76, para 52.

(**"60% Test"**). Further, if the 60% Test gets satisfied, then the Attributable Income shall remain taxable in in the Country of Source as per its domestic laws thereby preventing base erosion and profit shifting from the Country of Source.

Para 2 of Article 10 provides that Para 1 shall not apply if the income derived from the Country of Source is derived in connection with or in incidental to the active conduct of business carried on through the PE (other than the business of making, managing or simply holding investments for the enterprise's own accounts, unless these activities are banking, insurance or securities activities carried on by a bank, insurance enterprise or registered securities dealer).

Para 3 provides that even if Treaty Relief is denied due to the satisfaction of the 60% Test under Para 1, the competent authority of Country of Source has the authority to grant the Treaty Relief as a response to a request by the Taxpayer in the Country of Residence on the basis of justified reasons for not meeting the 60% Test. In such situations, the competent authority of the Country of Source shall consult with the competent authority of the Country of Residence before arriving at a decision.

The compatibility clause for Para 1 through 3 is *in place of or in the absence of*. This means that if there is an existing provision in a CTA which denies/limits Treaty Relief in instances of Triangular Cases (**"Existing Provision"**), then such a provision would be replaced with Para 1 through 3 (subject to notification requirements analysed below). However, if there is no Existing Provision then Para 1 through 3 would be added to the CTAs.

Considering that Article 10 does not deal with minimum standards, the scope for reservations is wide. The Parties are entitled to the following reservations (Para 5) – (i) reserve the entirety of Article 10 (Para 5(a)); (ii) reserve Article 10 for a subset of CTAs which contain the Existing Provision (Para 5(b)); (iii) reserve the non-applicability of this Article to a subset of CTAs that contain the Existing Provision (Para 5(c)). The difference between the reservation in (ii) and (iii) is that (ii) envisages a situation where Article 10 is generally applicable to all CTAs except a subset of CTAs whereas (iii) envisages a situation where Article 10 is generally not applicable to all CTAs except a subset of CTAs.

The trigger point for notifications under Para 6 (of Existing Provisions) is if no reservation is made in Para 5(a). However, if reservations are made under 5(b), then no notifications would be required to be made for the subset of CTAs which are reserved. For CTAs which do not contain an Existing Provision and hence not notified, it would constitute a situation of *'in absence of'* and Para 1 through 3 would get added to the relevant CTA provided they are not reserved. On the other hand, for CTAs which do contain an Existing Provision, which constitutes a situation of *'in place of'*, it would get replaced with Para 1 through 3 only if all the Contracting Jurisdictions to those CTAs notify the Existing Provisions.[30] However, for CTAs which do contain an Existing Provision, but are not notified by all the Contracting Jurisdictions to those CTA, then Para 1 through 3 shall supersede the Existing Provisions to the extent they contradict with Para 1 through 3.[31]

Impact and Analysis

India' MLI Position

India has not reserved the applicability of this Article. However, it has also not notified any provisions in the CTA to which this Article should apply to. Therefore, this Article should apply to those CTA's and provisions as notified by the respective Treaty Partners who also do not reserve against the applicability of this Article.

30. Article 10, Para 6.

31. Ibid.

Other Countries' MLI Positions

As regards other jurisdictions, Sweden, UK, Singapore and France have reserved Article 10 and therefore it would not apply to India's treatises with these jurisdictions even if India notifies it in the final list of notifications. That said, Netherlands has not reserved Article 10 and has made the necessary notifications as per Para 6. As per Netherland's list of notifications, Existing Provisions appear only in Netherlands' tax treatises with the United Kingdom and the United States of America.

Given the fact that Triangular Cases has been a mischief since a long time now, Article 10 is an integral MLI provision aimed towards preventing base erosion and profit shifting. However, from the currently available information, it is clear that most countries have not been very forthcoming with respect to this Article as they have either reserved it in its entirety or have not taken a position yet. In any case, it is not usual to see such structures in the Indian context and therefore this provision is likely to have limited impact or relevance with respect to Indian operations.

IX. Article 11 – Application of Tax Agreements to Restrict a Party's Right to Tax its Own Residents

Paragraph 1 of Article 11 of the MLI provides that a CTA shall not affect the taxation by a contracting jurisdiction of its residents except with respect to the benefits granted under specific provisions of the CTA to non-residents e.g., those provisions which require the state of residence to make a corresponding adjustment in the context of a transfer pricing adjustment made by the state of source or, those provisions which otherwise expressly limit the state of residence's right to tax its own residents or provide expressly that the state of source shall have the exclusive right to tax an item of income that has arisen in the state of source, etc.

Paragraph 1 is intended to address concerns that some provisions in a covered tax agreement that are aimed at the taxation of non-residents could be interpreted as limiting a contracting jurisdiction's right to tax its own residents. The provision is based on the new Article 1(3) that was recommended to be added to the Model Convention by Action 6 Report. It is like provisions contained in the US Model Tax Convention which confirms a contracting state's right to tax its residents notwithstanding the provisions of the treaty except those, such as provisions dealing with the elimination, that are clearly intended to apply to residents.

Paragraph 2 of Article 11 is the compatibility clause that provides that paragraph 1 shall apply in place of or in the absence of provisions of a CTA that state that the covered tax agreement would not affect the taxation by a contracting jurisdiction of its residents.

Impact and Analysis

India Position

India has not expressly reserved the applicability of Article 11 in its provisional notification. However, in the absence of an express reservation, it is the provisions of Article 11 will apply to India's CTAs, irrespective of the choice made by other Treaty Partners. India is not required to notify any provisions of its covered tax agreements since such notifications are only required where India's CTAs contain provisions like that mentioned in paragraph 2.

Other Countries' MLI Positions

Countries such as France, Ireland, Japan, Luxembourg the Netherlands, Singapore and Sweden has reserved the right for the entirety of Article 11 not to apply to its covered tax agreements. Accordingly, Article 11 will not affect India's treaties with these jurisdictions. The UK has chosen not to reserve against Article 11, and accordingly the language of paragraph 1 of Article 11 will stand added to the India-UK Tax Treaty.

X. Articles 12 – Artificial Avoidance of PE

Article 12 of the MLI is based on the work of Action 7 of the BEPS Action Plan. It aims to address the artificial avoidance of PE's through commissionaire arrangement and similar strategies by widening the scope of the types of arrangements that may be deemed PE's. The 2014 version of the OECD Model Tax Convention already provides that a PE is deemed to be established in a Contracting Jurisdiction if an independent agent acting on behalf of an enterprise located in another Contracting Jurisdiction habitually exercises an authority to conclude contracts in the name of that enterprise in the first Contracting Jurisdiction. While countries, including India, have adopted various versions of this provision across their multiple treaty partners, the limited scope of these provisions continued to allow companies to enter into commissionaire agreements. Such agreements make it possible for a company to sell products in another country by having an agent conclude the transaction in his own name for a commission.[32] In such instances, the agent is not taxed on the sale itself as he does not own the goods (he may be taxed to the limited extent of the commission he receives for the services provided to the company), and the company avoids establishing a PE by ensuring that the transactions are not concluded in its name and therefore are not legally binding on it.[33]

The first paragraph of Article 12(1) of the MLI attempts to address the issue of commissionaire agreements and other similar arrangements by providing that a PE is deemed to be established where a person, on behalf of an enterprise, conducts certain activities in a Contracting Jurisdiction. These activities include (i) concluding contracts; or (ii) habitually playing the principal role leading to the conclusions of contracts that are routinely concluded without material modification by the enterprise; and such contracts are either (i) in the name of the enterprise; (ii) for the transfer of ownership or the right to use property belonging to the enterprise; or (iii) for providing services by the enterprise.

The second paragraph of Article 12(1) clarifies that paragraph 1 shall not apply if the person acting on behalf of the enterprise does so in an independent capacity and in the ordinary course of business. However, where such person acts exclusively or almost exclusively on behalf one or more enterprises to which is it closely related, that persons shall not be considered as acting as an independent agent. *(Please refer to section dealing with Article 15 of the MLI for a definition of the term "closely related.")*

Pursuant to the MLI, both paragraphs apply in place of existing provisions; however as Article 12 is not a minimum standard, Parties are permitted to reserve the right of this Article do not apply to their tax treaties.

Impact and Analysis

India's MLI Position

Keeping in mind that several of India's treaties already provide for some of the recommended provisions under Article 12 (or a similar version), it is no surprise that India has not chosen to exercise its right of

32. BEPS Action Plan 7 Final Report page 9.
33. BEPS Action Plan 7 Final Report page 9.

reservation and has accordingly notified all its treaties with respect to both paragraphs 1 and 2 of Article 12. By making this choice India has effectively sought to bring all its treaties in line with the MLI. However, it should be noted that these provisions will only apply to a particular tax treaty to the extent that India's relevant treaty partner has similarly not exercised its right of reservation, and notified India with respect to Article 12. Therefore, where both Treaty Partners have notified Article 12 as being applicable, instances where commissionaire arrangements exist would now constitute a PE. In addition to the formation of Agency PE before, business now have to ensure that the legal arrangements with persons located in India and the actual activities carried on by such person, whether employees or consultants or other individuals, do not fall foul of the expanded PE provisions. To that extent care needs to be taken and records may have to be maintained to prove that the individual in India was only undertaking activities independently and that substantial review or need based modification of the contract was undertaken by the parent entity.

Other Countries' MLI Positions

Significantly, countries like the Netherlands and France have also notified India with respect to both paragraphs under Article 12, thereby modifying India's tax treaties with these countries to replace existing Article 5(5)(a) with paragraph 1 and Article 5(6) with paragraph 2 outlined above. That being said, Singapore, Sweden, and the UK have chosen to reserve the right for the entirety of Article 12 not to apply. This may be in part due to the fact that the existing treaties of these countries already contain a provision whereby persons habitually securing orders in one Contracting Jurisdiction wholly or almost wholly for an enterprise or other closely related enterprises located in another Contracting Jurisdiction are deemed to have established a PE.

With respect to the tax treaties between these countries and India, such reservation. This may be due to the fact that these countries already have a provision in their tax treaties. Accordingly, the tax treaties between India and these countries shall remain unchanged with respect to provisions covered under Articles 12.

XI. Article 13 – Artificial Avoidance of PE Status through the Specific Activity Exemptions

Article 5(4) of the OECD Model Tax Convention carves out a list of activities (the "specific activity exemptions") that do not amount to a PE if a fixed place of business is used solely for such activities. BEPS Action Plan 7 confirms that when this list of specific activity exemptions was first introduced, the activities were generally considered to be of a preparatory or auxiliary nature.[34] However, with the introduction of the internet and advances in related technologies, more and more businesses are operating within the newly developing 'digital economy.' As such, activities that were once thought to be merely preparatory or auxiliary are becoming the core activities of certain businesses. For example, activities such as holding goods in a warehouse in India may have typically been considered an auxiliary activity to the foreign company's main activity of selling such goods through a brick and mortar storefront in India. Such storefront would have been sufficient to constitute a fixed place PE and allow the India to tax the foreign company. However, with the rise of e-commerce platforms the need for having brick and mortar stores has been eliminated. Foreign companies can easily sell their goods over the internet without having a physical presence in India. In such instances, the foreign company's activity in India is limited to the holding of goods in their Indian warehouse, which now becomes a core activity for their business. The provisions under Article 13 of the MLI

34. Action Plan 7 Final Report page 10

are intended to ensure that such businesses do not avoid having a PE in a Contracting Jurisdiction merely because their activities, which are actually core to their business, fall within the specific activity exemptions.

Article 13 states that Parties to the MLI may choose between two options. Option A replaces existing treaty provisions to the extent that (i) all activities currently included in the treaty (whether or not they are or a preparatory or auxiliary nature); (ii) any other activity not already mentioned in the treaty; and (iii) any combination of activities in (i) and (ii), shall fall within the specific activity exemptions only if all such activity (or the overall activity of the fixed place of business from a combination of activities) is of a preparatory or auxiliary character. While Option A does not change the list of activities already negotiated between the Parties, it does ensure that all such activities must be of a preparatory or auxiliary nature in order to qualify as an exemption to establishing a fixed place PE.

Option B, on the other hand, allows for a little more flexibility as it does not require that all activities conducted from a fixed place of business be of a preparatory or auxiliary nature. While Option B provides that all activities (or combinations of activities) not already mentioned in the existing tax treaty must be of a preparatory or auxiliary nature to qualify under the specific activity exemption, this option also provides a carve out for any activity already existing in the tax treaty which is not specifically required to be of a preparatory or auxiliary nature. Such activity may continue to fall within the specific activity exemptions under Option B. Accordingly to the Explanatory Statement to the MLI, Option B was included in the MLI to address the concerns of some countries that argue that certain activities are intrinsically of a preparatory and auxiliary nature and accordingly should not be subject to the additional condition in order to provide greater clarity and tax certainty.[35] These countries also argue that any additional concerns that this view may lead to abuse of the specific activity exemption may be curbed by the 'anti-fragmentation' rule provided in paragraph 4 of Article 13.[36]

Paragraph 4 of Article 13 addresses the issue of large multinational enterprises (**"MNE's**) splitting up their business activities or altering their structures in order to fall within the specific activity exemptions. Paragraph 4 states that the specific activity exemptions that deem a fixed place of business to not amount to a PE shall not apply where the relevant enterprise, or a closely related enterprise, carries on business activities at the same fixed place or a different place in the same Contracting Jurisdiction and (i) such place constitutes a PE; or (ii) the overall activity resulting from the combined business activities of either a) one enterprise or two closely related enterprises operating in two fixed places or b) two enterprises operating in one fixed place, is not of a preparatory or auxiliary character. The business activities conducted by the enterprise or the two closely related enterprises must constitute complementary functions that are part of a cohesive business operation.

Impact Analysis

India's MLI Positions

While Parties to the MLI have been given the right to reserve the applicability of Article 13 in its entirely, or reserve against only paragraph 2 or paragraph 4, India has chosen to notify Option A and not exercise its right to reservation with respect to paragraph 4. This essentially means that India's tax treaties will be modified to replace existing provisions with respect to specific activity exemptions with the language of Option A, but only to the extent that India' treaty partner has also notified Option A. In the event that a treaty partner reserves Article 13 or chooses to notify Option B, the tax treaty between India and such country will

35. Explanatory memo page 41
36. Explanatory memo page 41

remain unchanged. Further, by not actively exercising its right to reserve the applicability of paragraph 4, India has agreed to apply the provision to its treaties. However, the change will only take place between India and its treaty partners if such treaty partner also refrains from exercising its right to reserve.

Other Countries' Positions

Countries such as Sweden have reserved their rights for the entirety of Article 13 to not apply to their tax treaty. This would imply that India's treaty with Sweden will remain unchanged with respect to the relevant provisions. On the other hand, the Netherlands has also chosen Option A and not reserved against paragraph 4 thereby ensuring that the tax treaty between India and the Netherlands is modified to replace Article 5(4) with the language provided in Option A and include the language of paragraph 4. Unlike India and the Netherlands, France and Singapore have chosen Option B and both do not have a reservation with respect to paragraph 4, therefore its treaty with India should remain unchanged with respect to the list of specific activity exemptions; however, paragraph 4 should be applicable. The UK is unique in its choice among the countries being analyzed here as the UK has not opted to choose either of the options under Article 13 nor has it made any particular reservation; however, it has notified India with respect to paragraph 4. However, as India has not specifically notified the UK in the same manner, no part of Article 13 should be applicable to the treaty between India and the UK.

XII. Article 14 – Splitting-up of Contracts

Article 5(3) of the OECD Model Tax Convention states that building sites or construction or installation projects shall constitute a PE only if such projects last for longer than 12 months. Various countries, including India have negotiated this provision with their treaty partners and modified it according to their commercial / political realities. For example certain tax treaties, like the one between India and Sweden specify that in addition to building sites or construction or installation projects even supervisory activities in connection with such sites and projects shall also amount to a PE only if lasting longer than a specified period. Further, many of India's tax treaties have a reduced threshold of 6 months instead of the prescribed 12 months.[37] However, even with the reduced thresholds, it was found that many enterprises were able to abuse the exemption provided under this provision by splitting their projects. While the BEPS Action Plan 7 noted that such abuse may be addressed through the PPT rules recommended under Action Plan 6, it still provided for a measure that could be applicable to those treaties that do not include the PPT or as an alternative provision for those countries looking to specifically address the issue.[38]

Article 14(1) provides a mechanism by which to determine whether the threshold referred to under the relevant provision of the tax treaty with respect to the constitution of a PE through building sites or construction or installation projects (or supervisory or consultancy activities in connect with the same, as the case may be) has been reached. Specifically it states that where (i) an enterprise's site / project (or activity, as the case may be) carries on for a period exceeding 30 days without crossing the threshold already provided for in the treaty; and (ii) connected activities are carried on at different times by one or more of such enterprise's closely related enterprises at the same site / project (or in connection to the supervisory or consultancy activity, as the case may be) or any other place identified in the existing relevant provision of the tax treaty for a period exceeding 30 days, then all the different periods of time shall be added to the aggregate period of time the enterprise carried on activities at the site / project (or in connection with supervisory or consultancy services, as the case may be).

37. Sweden, UK, Netherlands, France, Singapore (183 days)

38. BEPS Action Plan 7 Final Report page 11.

Article 14 further states that the above provision shall apply in place of or in the absence of any existing provision dealing with the division of contracts into multiple parts to avoid crossing the relevant threshold applicable to the establishment of PE for specific projects / activities. However, as this provision is not a minimum standard, the MLI also allows Parties to reserve the right for the entirety of this Article to not apply to its treaties, or for the entirety of this Article to not apply with respect to provisions dealing with the exploitation of natural resources.

Impact Analysis

India's MLI Positions

As India has neither stated its reservation with respect to Article 14, nor do any of its treaties have existing language with respect to the splitting up on contracts, Article 14 should be applicable to all of India's tax treaties where it's relevant treaty partner has also not specified a reservation. This is likely to have an impact on works contracts and the formation of service PEs in India. It would be far more difficult for businesses to fragment their operations and avoid the formation of a PE. While the new provisions applying this expanded PE concept is unlikely to apply in this Financial Year, it will affect works contracts being performed in the future. Businesses that operate through related parties are the most at risk. However, in the near future this should not adversely affect works contracts that are already in progress unless their performance extends further into the future.

Other Countries' MLI Positions

As the UK, Singapore and Sweden have all exercised their rights to reservation of the Article in its entirety, India's treaties with these countries should not be modified with respect to the splitting up of contracts. However, the provision should be applicable with respect to India's treaties with the Netherlands and France.

XIII. Article 15 – Definition of a Person Closely Related to an Enterprise

Keeping in mind that Articles 12, 13 and 14 of the MLI all rely on the concept of persons 'closely related' to an enterprise, Article 15 provides a definition of the same based on the recommendations found in the BEPS Action Plan 7.[39] For the purposes of Articles 12(1), 13(4) and 14(1) alone, *"a person shall be considered closely related to an enterprise if based on the 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 a shall be considered to be closely related to an enterprise if one possesses directly or indirectly more than 50% of the beneficial interest in the other (or, in the case of a company, more than 50% 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% of the beneficial interest (or, in the case of a company, more than 50% 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."*[40]

A Party is only permitted to have a reservation for Article 15 if such Party has also reserved Articles 12(1), 13(4) and 14(1).

39. BEPS Action Plan 7 Final Report pages 16 and 17
40. MLI Article 15(1)

India's MLI Position

Accordingly, India has not exercised its right of reservation with respect to Article 15, and all its treaties stand modified to include this provision to the extent that its relevant treaty partner has also not made such reservation.

Other Countries' MLI Positions

As Singapore and Sweden have made reservations with respect to Articles 12, 13, and 14, they have also made a reservation with respect to this Article 15. However, the UK, Netherlands, and France have not made similar reservations and accordingly, India's tax treaties with these Treaty Partners will stand modified.

Impact Analysis (Articles 12,13,14 and 15)

Keeping in mind that over the past few years India has introduced several measures in line with OECD recommendations,[41] it should not be a surprise that India has not made reservations with respect to any of the MLI provisions dealing with the artificial avoidance of PE's. By lowering the PE threshold, India has effectively made it more difficult for foreign companies to avoid constituting PE's in India.[42] While this may be a welcomed step from an anti-tax avoidance perspective, it also highlights some of the issues with respect to the implementation of these PE provisions. For example, India's decision to adopt Option A of Article 13 of the MLI ensures that all activities falling within the specific activity exemption must be of a preparatory or auxiliary nature. Unfortunately, the innate ambiguity with respect to the terms "preparatory" and" auxiliary" has led to much debate and has often hinged on judicial interpretation varying based on the facts and circumstances of each individual case. In *Motorola Inc. v DCIT* the Delhi Tribunal held that activities such as market survey, industry analysis, economy evaluation, furnishing of product information, ensuring distributorship and their warranty obligation, ensuring technical presentations to potential users, development of market opportunities, providing services and support information, procurement of raw materials and accounting and finance services, for one year by employees of a foreign company through an office located at the Indian subsidiary's office qualified as preparatory or auxiliary in nature.[43] However, in *Brown and Sharpe Inc. v. Commissioner of Income Tax*, the Allahabad High Court found that though the activities of a foreign company's liaison office ('LO') in India included preparatory or auxiliary services, the marketing services conducted from the LO could not be treated as preparatory or auxiliary and accordingly a PE was established.[44]

Another important and widely debated issue with respect to PE's is that once a PE is constituted, to what extent should it be taxed. Article 7 of the OECD Model Convention provides that only 'profits attributable' to the PE should be taxable by the jurisdiction in which the PE is located. However, the mechanism by which to calculate such attributable profits have always remained a bit uncertain. The BEPS Action Plan 7 acknowledged that additional guidance would be required with respect to how the rules provided in Article 7 of the OECD Model Convention would apply to PE's resulting from changes made applicable to tax treaties through the MLI, especially with respect to PE's outside the financial sector. While a draft discussion paper with respect to the same was released on July 4, 2016 and a public consultation was held in October 2016,

41. For example, India has adopted BEPS compliant measure such as (i) the Equalization Levy which was first proposed by the OECD under Action 1 for addressing the tax challenges of the digital economy; (ii) country by country reporting, recommended under Action 13; and secondary adjustments, recommended under the OECD's Transfer Pricing Guidelines.
42. As discussed previous, the lower threshold will only be applicable to tax treaties where India's treaty partner also chooses to notify India and abstains from exercising their right to reserve.
43. [2005] 95 ITD 269
44. [2014]369ITR704(All)

no final report has yet been issued. As the application of the MLI lowers the threshold for the constitution of foreign PEs in India (and Indian PEs abroad), it becomes even more important that uncertainty with respect to the taxation of such PE's be eliminated.

XIV. Article 16 – Mutual Agreement Procedure

Article 16 of the MLI is based on the minimum standards and best practices recommended under the BEPS Action Plan 14 for improving dispute resolution. It is important to note that the entirety of Article 16 is not a minimum standard and Parties are permitted to make reservations against specific provisions pursuant to conditions.

The first sentence of Article 16(1) provides that if a person considers that the actions of one or both of the Contracting Jurisdictions results in taxation not in compliance with the provisions of the relevant tax treaty, then such person may approach the *competent authority of either Contracting Jurisdiction* regardless of any remedy provided under domestic law. Although this provision is applicable in place or in the absence of an existing provision under the relevant tax treaty, Parties are permitted to exercise their right to reserve this provision on the basis that they intend to comply with the minimum standard for improving dispute resolution under BEPS Action Plan 14. This minimum standard requires that a tax treaty between two Contracting Jurisdictions allow a person who considers that the actions of one or both of the Contracting Jurisdictions results in taxation not in compliance with the provisions of the relevant tax treaty to approach the competent authority of the Contracting Jurisdiction of which he is a resident (or of which he is a national in the event that the dispute involves a breach of the tax treaty's non-discrimination clause). In the event that such competent authority does not believe the taxpayer's objections to be justified, he is required to implement a bilateral notification / consultation process with the competent authority of the other Contracting Jurisdiction. BEPS Action Plan 14 makes it clear that such notification or consultation process is not with the aim of resolving the matter, but rather to allow the other competent authority to provide their views on whether the MAP request should be accepted or rejected for consideration.[45]

The second sentence of Article 16(1) simply provides that the case must be presented to the competent authority within three years from the first notification (**"Notification"**) of the action alleged to have resulted in taxation not in compliance with the tax treaty. This provision is to apply in place of any existing provision providing for a time period shorter than three years, and in the absence of a provision describing such a time period. Similar to the right of reservation provided with respect to the first sentence of Article 16(1), the MLI allows Parties to reserve their right for the second sentence to not apply to their treaties if they intend to comply with the minimum standard prescribed under BEPS Action Plan 14, namely – that the person described in the first sentence is permitted to present his case to the competent authority within a period of at least three years from the first Notification. Accordingly, if an existing treaty allows a person to approach the competent authority even after three years have lapsed from the Notification, such provision would remain unchanged.

The first sentence of Article 16(2) provides that if the competent authority finds the MAP request to be justified, and if it cannot by itself arrive at a satisfactory resolution, that it will approach the competent authority of the other Contracting Jurisdiction in an effort to resolve the case through mutual agreement with a view to the avoidance of taxation which is not in line with the provisions of the CTA. The fact that this language only applies if the relevant CTA does not already contain such a provision, and that Parties are not permitted to make a reservation against the first sentence of Article 16(2) effectively means that all CTAs

45. BEPS Action Plan 14 Final Report page 22.

subject to the MLI will have this language (either because it already exists, or because the first sentence of Article 16(2) has been added where such provision did not exist before).

The second sentence of Article 16(2) states that an agreement reached shall be implemented notwithstanding any time limits under the domestic laws of the Contracting Jurisdictions. This sentence is also to apply only in the absence of the same provision already existing in the; however, Parties may reserve their right to not have the provision apply only on the basis that for the purposes of their CTAs (a) any agreement reached via MAP shall be implemented notwithstanding any time limits set out under the domestic laws of the Contracting Jurisdictions; or (b) the Party intends to comply with the minimum standard prescribed under the BEPS Action Plan 14, by accepting in its bilateral negotiations a provision that states:

i. *the Contracting Jurisdictions shall make no adjustment to the profits that are attributable to a permanent establishment of an enterprise of one of the Contracting Jurisdictions after a period that is mutually agreed between both Contracting Jurisdictions from the end of the taxable year in which the profits would have been attributable to the permanent establishment (this provision shall not apply in the case of fraud, gross negligence or wilful default); and*

ii. *the Contracting Jurisdictions shall not include in the profits of an enterprise, and tax accordingly, profits that would have accrued to the enterprise but that by reason of the conditions referred to in a provision in the Covered Tax Agreement relating to associated enterprises have not so accrued, after a period that is mutually agreed between both Contracting Jurisdictions from the end of the taxable year in which the profits would have accrued to the enterprise (this provision shall not apply in the case of fraud, gross negligence or wilful default).*

The first sentence of Article 16(3) clarifies that the competent authorities of both Contracting Jurisdictions shall endeavor to resolve any difficulties or doubts with respect to the interpretation or applications of the provisions of the CTA through mutual agreement. The second sentence of Article 16(3) empowers the competent authorities to also consult each other for the elimination of double taxation in cases not already provided for under the CTA. Both these sentences are to be applied only in instances where the relevant CTA does not already provide for the same. Importantly, Parties are not allowed the right to reserve either of these provisions.

With respect to the first and second sentences in Article 16(2) and 16(3), the MLI requires Parties to notify the Depositary of all the CTAs which do not contain the relevant provisions. Only where both parties to a particular CTA have notified accordingly will the corresponding provision(s) apply.

Impact Analysis

India's MLI Positions

India has made a specific reservation against the first sentence of Article 16(1) on the basis that it intends to meet the minimum standard required under the BEPS Action Plan 14. India has not made any additional reservations, and has notified the relevant CTAs with respect to the remaining provisions under Article 16.

Keeping in mind that India does not have a reservation against the second sentence of Article 16(1) and that the provision is applicable in the in place of or in the absence of the relevant provision, all of India's CTA should be modified to the extent that the relevant treaty party has not made a reservation with respect to the same.

Other Countries' MLI Positions

As the UK, Singapore, Sweden, the Netherlands and France have not made a reservation with respect to the second sentence of Article 16(1), the CTA's between these countries and India should stand modified to include the language under the second sentence of Article 16(1).

It is also interesting to note that with respect to the first and second sentences of Article 16(2) and 16(3), that India's CTAs are already largely in compliance with the provisions of the MLI. The number of CTAs notified as not having the relevant provisions are limited and only such notified CTA's should be modified. Specifically, both the UK and India have notified their CTA under the second sentences of Article 16(2) and 16(3) and therefore the CTA will be modified to add these provisions. India's CTA's with Singapore, Sweden, the Netherlands and France already contain such provisions. No modifications should be made with respect to the first sentences of Articles 16(2) and 16(3) for India's CTA's with the UK, Singapore, Sweden, the Netherlands and France as such treaties already contain the relevant language.

While Article 19 of the MLI provides for mandatory binding arbitration in the event that Competent Authorities are unable to reach a decision under MAP within two years, India has not accepted such provision taking a position that such binding arbitration would adversely impact its sovereignty. Accordingly, the fact that no timeline has been provided for how long Competent Authorities may take to resolve a MAP dispute, coupled with the fact that India's CTA's will not contain an arbitration clause poses an additional burden on the taxpayers and is likely to lead to excessive litigation in domestic courts.

XV. Article 17– Corresponding Adjustments

The Action 14 Report also recommended that jurisdictions should provide access to the mutual agreement procedure in transfer pricing cases and should implement the resulting mutual agreements (e.g., by making appropriate adjustments to the tax assessed. The Action 14 Report also noted that it would be more efficient if jurisdictions also had the ability to provide for corresponding adjustments unilaterally in cases in which they find the objection of the taxpayer to be justified. In this regard, Action 14 Report recommended the inclusion of Article 9(2) [46] of the Model Convention in their tax treaties as a best practice. Article 17 of the MLI provides a mechanism for parties to implement this best practice.

Transfer pricing adjustments carried out in the context of transactions between associated enterprises may give rise to economic double taxation, insofar as an enterprise in a contracting state whose profits are revised upwards will be liable to tax on an amount of profit which has already been taxed in the hands of its associated enterprise in the other contracting state. Article 9(2) of the OECD Model Convention provides that the other contracting state shall make an appropriate adjustment to relieve such double taxation.

Paragraph 2 of Article 17 is the compatibility clause which provides that paragraph 1 shall apply in place of or in the absence of a provision requiring that a contracting jurisdiction make an adjustment where the other contracting jurisdiction makes an adjustment that reflects the arm's length profits of an enterprise. Such existing provision would include those modelled on Article 9(2) of the Model Convention or the UN Model Tax Convention and also would include provisions which require agreement by the competent authority of

46. Where a contracting state includes in the profits of an enterprise of that state, and taxes accordingly – profits on which an enterprise of the other contracting state has been charged to tax in that other state, and the profits so included are profits which would have accrued to the enterprise of the first mentioned state if the conditions made between the two enterprises had been those which would have been made between independent enterprises, then that other state shall make an appropriate adjustment to the amount of the tax charged therein on those profits. In determining such adjustment, due regard shall be had to the other provisions of this convention and the competent authorities of the contracting states shall if necessary consult each other.

a contracting jurisdiction as a condition for making corresponding adjustment on the taxation by the other contracting jurisdiction.

While Article 17 is a best practice, Action Plan 14 required that, as a minimum standard, countries should provide access to the mutual agreement procedure in transfer pricing cases and implement the resulting mutual agreements regardless of whether the relevant bilateral tax treaty contains a provision modelled after Article 9(2) of the OECD Model Tax Convention. Accordingly, a reservation against Article 17 may be made only on the basis that in the absence of the provisions described in Article 17(2) in Covered Tax Agreements, either (i) the party making the reservation will make adjustment referred to in Article 1 or, (ii) its competent authority will endeavour to resolve a transfer pricing case under the mutual agreement procedure provision of its tax treaty. Where on contracting jurisdiction makes such a reservation, and the other does not, Article 17 will not apply to the covered tax agreement and there is no expectation created that the contracting jurisdiction that has made the reservation will make a corresponding adjustment. A party may make a reservation for the provisions of Article 17 to not apply to its treaties that contain a provision modelled on Article 9(2) of the OECD Model Convention.

Impact Analysis

India's MLI Positions

India has reserved the right for the entirety of Article 17 not to apply to its Covered Tax Agreements that already contain a provision described in paragraph 2 of Article 17 of the MLI. It has notified its treaties with *inter alia*, Netherlands, Ireland, Japan, Luxembourg USA, UK and Singapore as containing such a provision. Accordingly the provisions of Article 17 will not apply to the treaties with these countries. It should be noted however that the Netherlands, Singapore, Japan, Luxembourg and the UK have both not made any reservations and have also notified the treaty with India, indicating their intention to have paragraph 1 of article 17 replace article 9(2), article 9(2), article 9(2), article 9(2) and article 10(2) of the India-Netherlands Tax Treaty, the India-Singapore Tax Treaty, the India-Japan Tax Treaty, the India-Luxembourg Tax Treaty and India-UK Tax Treaty, respectively.

However, India has not notified its treaties with Mauritius, France and Sweden. France has not made a reservation under Article 17, but has also not notified India. Therefore, paragraph 1 of Article 17 will superseded the provisions of the India-France Tax Treaty only to the extent that those provisions are incompatible with paragraph 1. Sweden has also reserved the right for the entirety of Article 17 not to apply to its Covered Tax Agreements that already contain a provision described in paragraph 2 of Article 17 of the MLI. It has not notified its treaty with India as containing such a provision. Accordingly, the India-Sweden Treaty will stand amended, and paragraph 1 of Article 17 will apply to the India-Sweden Tax Treaty.

6. Conclusion

From a broader perspective, the BEPS project provides a lot more rights for the source countries to tax different streams of income. This is a positive development for most developing nations that can then use this tax to continue their own growth and development. However, India has traditionally taken a highly tax centric approach that has focused on increasing the tax base and reducing the treaty benefits. India also has had many tax disputes which are widely contested due to the fact that tax payers rights are given a low priority by the Government. The Courts have generally been the stabilising force in the tax field and it needs to be seen the manner in which the MLI provisions, including MAP, will be applied in practice. With the Supreme Court laying down recently that Courts need to take decisions that are in the interests of the development of the nation may signify the beginning of an econometric approach to resolving disputes, which would be greatly welcomed in the tax space. However, in the short and medium term, the MLI is likely to increase the complexity of doing business before the dust settles and stability is established. With the introduction of the GST and MLI around the same time, businesses are likely to have their hands full in understanding the tax implications and business risks due to the combined impact of both.

About NDA

Nishith Desai Associates (NDA) is a research based international law firm with offices in Mumbai, Bangalore, Palo Alto (Silicon Valley), Singapore, New Delhi, Munich and New York. We provide strategic legal, regulatory, and tax advice coupled with industry expertise in an integrated manner.

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We specialize in Globalization, International Tax, Fund Formation, Corporate & M&A, Private Equity & Venture Capital, Intellectual Property, International Litigation and Dispute Resolution; Employment and HR, Intellectual Property, International Commercial Law and Private Client. Our industry expertise spans Automobile, Funds, Financial Services, IT and Telecom, Pharma and Healthcare, Media and Entertainment, Real Estate, Infrastructure and Education. Our key clientele comprise marquee Fortune 500 corporations.

Our ability to innovate is endorsed through the numerous accolades gained over the years and we are also commended by industry peers for our inventive excellence that inspires others.

NDA was ranked the 'Most Innovative Asia Pacific Law Firm in 2016' by the *Financial Times - RSG Consulting Group* in its prestigious FT Innovative Lawyers Asia-Pacific 2016 Awards. While this recognition marks NDA's ingress as an innovator among the globe's best law firms, NDA has previously won the award for the 'Most Innovative Indian Law Firm' for two consecutive years in 2014 and 2015.

As a research-centric firm, we strongly believe in constant knowledge expansion enabled through our dynamic Knowledge Management ('KM') and Continuing Education ('CE') programs. Our constant output through Webinars, Nishith.TV and 'Hotlines' also serves as effective platforms for cross pollination of ideas and latest trends.

Our trust-based, non-hierarchical, democratically managed organization that leverages research and knowledge to deliver premium services, high value, and a unique employer proposition has been developed into a global case study and published by John Wiley & Sons, USA in a feature titled 'Management by Trust in a Democratic Enterprise: A Law Firm Shapes Organizational Behavior to Create Competitive Advantage' in the September 2009 issue of Global Business and Organizational Excellence (GBOE).

A brief below chronicles our firm's global acclaim for its achievements and prowess through the years.

- IDEX Legal Awards: In 2015, NDA won the "M&A Deal of the year", "Best Dispute Management lawyer", "Best Use of Innovation and Technology in a law firm" and "Best Dispute Management Firm<http://idexlegalawards.in/ArticlePage.aspx?aid=6>". Nishith Desai was also recognized as the 'Managing Partner of the Year' in 2014.

- Merger Market: has recognized NDA as the fastest growing M&A law firm in India for the year 2015.

- Legal 500 has ranked us in tier 1 for Investment Funds, Tax and Technology-Media-Telecom (TMT) practices (2011, 2012, 2013, 2014, 2017)

- International Financial Law Review (a Euromoney publication) in its IFLR1000 has placed Nishith Desai Associates in Tier 1 for Private Equity (2014, 2017). For three consecutive years, IFLR recognized us as the Indian "Firm of the Year" (2010-2013) for our Technology - Media - Telecom (TMT) practice.
- Chambers and Partners has ranked us # 1 for Tax and Technology-Media-Telecom (2014, 2015, 2017); #1 in Employment Law (2015 & 2017); # 1 in Tax, TMT and Private Equity (2013, 2017); and # 1 for Tax, TMT and Real Estate – FDI (2011).
- India Business Law Journal (IBLJ) has awarded Nishith Desai Associates for Private Equity, Structured Finance & Securitization, TMT, and Taxation in 2015 & 2014; for Employment Law in 2015
- Legal Era recognized Nishith Desai Associates as the Best Tax Law Firm of the Year (2013).

Please see the last page of this paper for the most recent research papers by our experts.

Disclaimer

Contact

For any help or assistance please email us on concierge@nishithdesai.com or
visit us at www.nishithdesai.com

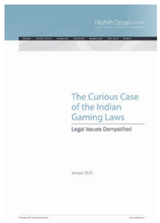
The following research papers and much more are available on our Knowledge Site: **www.nishithdesai.com**

Fund Structuring and Operations

June 2017

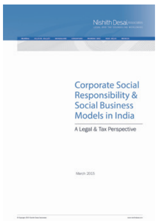
Social Impact Investing in India

May 2017



The Curious Case of the Indian Gaming Laws

January 2017



Corporate Social Responsibility & Social Business Models in India

May 2017

Incorporation of Company LLP in India

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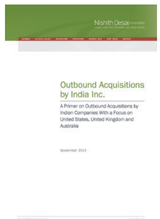

Outbound Acquisitions by India-Inc

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Internet of Things

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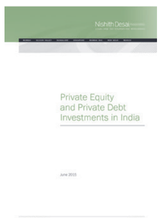
Doing Business in India

June 2016



Private Equity and Private Debt Investments in India

June 2015

NDA Insights

TITLE	TYPE	DATE
Blackstone's Boldest Bet in India	M&A Lab	January 2017
Foreign Investment Into Indian Special Situation Assets	M&A Lab	November 2016
Recent Learnings from Deal Making in India	M&A Lab	June 2016
ING Vysya - Kotak Bank : Rising M&As in Banking Sector	M&A Lab	January 2016
Cairn – Vedanta : 'Fair' or Socializing Vedanta's Debt?	M&A Lab	January 2016
Reliance – Pipavav : Anil Ambani scoops Pipavav Defence	M&A Lab	January 2016
Sun Pharma – Ranbaxy: A Panacea for Ranbaxy's ills?	M&A Lab	January 2015
Reliance – Network18: Reliance tunes into Network18!	M&A Lab	January 2015
Thomas Cook – Sterling Holiday: Let's Holiday Together!	M&A Lab	January 2015
Jet Etihad Jet Gets a Co-Pilot	M&A Lab	May 2014
Apollo's Bumpy Ride in Pursuit of Cooper	M&A Lab	May 2014
Diageo-USL- 'King of Good Times; Hands over Crown Jewel to Diageo	M&A Lab	May 2014
Copyright Amendment Bill 2012 receives Indian Parliament's assent	IP Lab	September 2013
Public M&A's in India: Takeover Code Dissected	M&A Lab	August 2013
File Foreign Application Prosecution History With Indian Patent Office	IP Lab	April 2013
Warburg - Future Capital - Deal Dissected	M&A Lab	January 2013
Real Financing - Onshore and Offshore Debt Funding Realty in India	Realty Check	May 2012

Research @ NDA

Research is the DNA of NDA. In early 1980s, our firm emerged from an extensive, and then pioneering, research by Nishith M. Desai on the taxation of cross-border transactions. The research book written by him provided the foundation for our international tax practice. Since then, we have relied upon research to be the cornerstone of our practice development. Today, research is fully ingrained in the firm's culture.

Research has offered us the way to create thought leadership in various areas of law and public policy. Through research, we discover new thinking, approaches, skills, reflections on jurisprudence, and ultimately deliver superior value to our clients.

Over the years, we have produced some outstanding research papers, reports and articles. Almost on a daily basis, we analyze and offer our perspective on latest legal developments through our "Hotlines". These Hotlines provide immediate awareness and quick reference, and have been eagerly received. We also provide expanded commentary on issues through detailed articles for publication in newspapers and periodicals for dissemination to wider audience. Our NDA Insights dissect and analyze a published, distinctive legal transaction using multiple lenses and offer various perspectives, including some even overlooked by the executors of the transaction.

We regularly write extensive research papers and disseminate them through our website. Although we invest heavily in terms of associates' time and expenses in our research activities, we are happy to provide unlimited access to our research to our clients and the community for greater good.

Our research has also contributed to public policy discourse, helped state and central governments in drafting statutes, and provided regulators with a much needed comparative base for rule making. Our ThinkTank discourses on Taxation of eCommerce, Arbitration, and Direct Tax Code have been widely acknowledged.

As we continue to grow through our research-based approach, we are now in the second phase of establishing a four-acre, state-of-the-art research center, just a 45-minute ferry ride from Mumbai but in the middle of verdant hills of reclusive Alibaug-Raigadh district. The center will become the hub for research activities involving our own associates as well as legal and tax researchers from world over. It will also provide the platform to internationally renowned professionals to share their expertise and experience with our associates and select clients.

We would love to hear from you about any suggestions you may have on our research reports.

Please feel free to contact us at
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