OECD BEPS (Base Erosion & Profit Shifting)

An introduction

By

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Let's start at the very beginning… Source vs. Residence

- Two models of international tax agreements exist - essentially, two ways to levy taxes in cross-border transactions.
  - One is to tax it at **source** – where the taxable income is generated.
  - The other way is to tax it on a **residence** basis - where the person who receives the income is based.
- **Countries, with all the capital (the rich ones) prefer the residence-based model of taxation**.
  - Say when one of their companies (let's say an American company) invests overseas, say in a developing country (India, for example). The Indian subsidiary of American company makes profits, and then the qn arises: who gets to tax the profits? The country that is the source of the profits -- India? Or country where the company has residence --America?

Let's start at the very beginning... Source vs. Residence

- Obviously its unfair to apply both kinds of tax so countries sign **bilateral tax treaties (DTAA's)** with each other -- to agree on how taxes are levied.

- These treaties are **based on two models: the OECD model treaty**, which emphasises residence taxation (preferred by capital-exporting rich countries); and the **UN model treaty**, which emphasises source-based taxation, more favourable to (capital-importing) developing countries.

What is OECD?

- **Who calls the shots in the global tax system?** One can say its the **OECD and the UN –** they are the “model” makers – the gold standards which individual countries follow!
- The **Organisation for Economic Co-operation and Development (OECD)** headquartered in Paris, France is an intergovernmental economic organisation with 35 member countries, founded in 1960 to stimulate economic progress and world trade.
- Global forum providing a platform to compare policy experiences, seeking answers to common problems, identify good practices and coordinate domestic and international policies of its members.

What is OECD?

- Most OECD members are high-income economies with high Human Development Index (HDI) and regarded as developed countries.

- **Bottomline:** OECD publishes, after detailed consensus among member nations and others via specific committees, <u>various guidelines, reports, policies, frameworks based on which individual countries implement both domestic laws as well as treaties!</u>

Why do we care about the OECD?

- India is considered a “source” country (like most developing countries) with OECD typically having “residence” countries (like most developed countries) as members
  - Hence, India tends follows the UN Model usually when it comes to treaties and in general the thinking of the Revenue Dept.
- **Indian Transfer Pricing law is “OECD-lite”!**
  - OECD TP Guidelines an important source for our TP provisions and jurisprudence in general for Courts

Why do we care about OECD?

- **Times have changed: this is an era where the G-20, including India, represents a huge economic force and so focus has shifted to mutual cooperation with OECD**
  - **OECD and G20 countries, including India, recently collaborated on a project called OECD BEPS** (Base Erosion and Profit Shifting) and came up with a set of practices to combat tax avoidance
  - **India is not an OECD member but is now designated a “Key Partner”** of the OECD along with Brazil, Indonesia, China and South Africa through “Enhanced Engagement”!
- <u>**Moving forward, lot of the OECD BEPS Action Plans will be implemented by India**</u>
  - **Equalization Levy, CbCR are already here!**

What is the BEPS project?

- **OECD Members and G20 countries got together** and decided to arrive at a consensus on how to counter tax base erosion and profit shifting i.e., *come up with broad measures to counter tax avoidance*
- In September 2013, G20 Leaders endorsed the ambitious and comprehensive **15 Action Plans on BEPS** with the five pillars or underlying themes of the BEPS project:
  - **Need for increased transparency** of multinational companies' (MNCs) operations
  - Emphasis on **substance**
  - **Alignment of taxation with location** of economic activity and **value creation**
  - **Updating of international tax treaties** and coherence in domestic rules that affect cross-border activities.
  - **Need for certainty** for businesses and governments.

What is the BEPS Project?

- In September 2014, 7 Action Plan reports were produced and endorsed by the G20
- **On 5 October 2015, the G20/OECD published all 13 final reports (comprising of all the 15 Action Plans) and an explanatory statement** outlining consensus actions under the base erosion and profit shifting (BEPS) project.
  - The output under each of the BEPS Action Plans is intended to form a **complete and cohesive approach covering domestic law recommendations and international principles** under the OECD model tax treaty and TP guidelines
- Historic, unprecedented co-operation among countries across the world INCLUDING many developing countries. India has been an important member of the BEPS effort!

OECD BEPS Action Plans

Action 1	Addressing the tax challenges of **Digital Economy**	Common Approach
Action 2	Neutralising the effects of **Hybrid Mismatch Arrangements**	Common Approach
Action 3	Designing Effective **Controlled Foreign Company** Rules	Best practice
Action 4	Limiting base Erosion Involving **Interest Deductions** and Other Financial Payments	Common Approach
Action 5	Countering **Harmful Tax Practices** more effectively	Minimum Standard
Action 6	**Preventing Granting of Treaty Benefits** in Inappropriate Circumstances	Minimum Standard
Action 7	Preventing **Artificial Avoidance of PE**	Revision of existing standard

OECD BEPS Action Plans

Action 8-10	Aligning **Transfer Pricing with Value Creation**	Revision of existing standard
Action 11	Measuring and **Monitoring BEPS**	Best practice
Action 12	**Mandatory Disclosure** Rules	Best practice
Action 13	Guidance on **TP Documentation and Country-by-Country Reporting**	Common approach/Minimum Standard
Action 14	Making **Dispute Resolution Mechanisms** More Effective	Minimum standard/Best practice
Action 15	Developing **Multilateral Instrument**	-

OECD BEPS
Will this really be implemented?

OECD Categorization	Definition
Minimum Standard / Revision of Existing Standard	All G20/OECD members are committed to consistent implementation
Common Approach	Common approaches to facilitate convergence of national practices
Best practice	Guidance drawing on best practices

Action 1: Addressing the Tax Challenges of the Digital Economy

- **“Solving” the digital issue** — specifically identifying appropriate tax rules to deal with digital business — has been designated the number-one action in the BEPS Action Plan.
- **NEED FOR THE BEPS ACTION PLAN 1:**
  - Ability of a business established in one territory to use information and communication technology (ICT) to have a significant participation in the economic life of another territory without paying significant tax in that other territory
  - BEPS Action 1 calls for the identification of the **difficulties that the ‘digital economy’ poses for the application of existing international tax rules and to develop new approaches to address these difficulties**

Action 1: How to tax online payments?

- Under OECD’s original draft BEPS Action Plan 1, the **OECD had considered, a digital withholding tax or an equalisation levy as one option to tax digital transactions.**
- However, final Action Plan 1 report of Oct. 2015, did NOT recommend introducing such a levy, nonetheless it did state that countries could introduce one in their domestic laws as an additional safeguard against BEPS, **provided they respect existing treaty obligations, or include them in their bilateral tax treaties.**
- **THREE ALTERNATIVES IN THE BEPS ACTION PLAN 1:**
  - To change understanding of what constitutes nexus in determining whether source of income exists, esp. for a PE
  - To levy a withholding tax on certain transactions
  - To levy a tax called the Equalization Levy (EL)
- **The BEPS Action Plan recommended that the selection of any of the above options should not violate treaty obligations**

Action 1: India jumps the gun….! Equalization Levy – Finance Act 2016

- The Indian Govt. through the Central Board of Direct Taxes (CBDT) constituted a “Committee on Taxation of E-Commerce” which recommended in March 2016 the BEPS Action Plan proposal of an **Equalization Levy**
- Though the Indian Income Tax Act provisions do not mention the OECD and the Indian taxation regime is not bound by nor does it follow fully the OECD Guidelines, the Indian Govt accepted the Committee's recommendations with startling alacrity and introduced detailed “Equalization Levy” legislation in 2016 itself!

Article 1: India's Equalization Levy

- Finance Act, 2016 introduced a new tax in India called the ‘Equalisation Levy‘ at 6%. This tax will be levied on:
  - Payments for online advertisements,
  - provision of digital advertising space or any other facility or service for the purpose of online advertisements
- Received/receivable by a non-resident not having PE in India from a resident in India who carries out business or profession (or) from a non-resident having PE in India.
- The tax will have to be collected by the payer and deposited with the government.

Article 1: India's Equalization Levy

- The Equalization Levy has been defined as *“tax leviable on consideration received or receivable for* ***any specified service*** *under the provisions of this chapter.”*
- The levy would fall under a **separate, self-contained code and would not be part of the Income Tax Act, 1961** as it has been introduced through Chapter VIII of the Finance Act, 2016 **which does not become part of the income tax law**. Like STT, it will remain a separate tax. Hence, DTAA’s are not applicable to EL.
  - **EL is a tax levied without having to worry about the existing tax provisions or treaties!**
- The equalization levy would apply at a rate of **6%** on the gross consideration payable for a “specified service”
  - Specified service currently only 2 but expect a lot more!
- The levy is currently **applicable only on B2B transactions**, if the aggregate value of consideration in a year exceeds approximately Rs. 100,000/-

Action 1: Why did India chose to tax online ad payments?

- E-commerce companies are the new generation of business leaders and online advertisement revenue is the key growth engine
  - Google reported ~US$70 billion and Facebook ~US$20 billion ad revenue in 2015 alone!
- Some of the e-commerce companies are avoiding Income Tax in the country of source (COS) as well as Country of Residence(COR)
  - OECD et al, admit that under the present rules of international taxation, e-commerce companies can escape taxation.
- The main reason is that under the existing rules, COS can tax a non-resident providing e-commerce services only if the non-resident has PE in the COS. They can generally set up the companies in tax heavens and avoid COR tax also.
  - Yahoo India (P) Ltd Vs DCIT (2011140 TTJ 195 (Mum)
  - Pinstorm Technologies (P) Ltd Vs ITO (2013) 154 TTJ 173 (Mum)

Action 1: India's EL

- EL is so designed that there is no characterisation issue.
- One does not have to determine whether it is a business income, royalty or FTS or any other category of income.
- There is no need to determine PE or any other nexus to India.
- Simply because a non-resident earns revenue in India, it will be liable to EL

Action 2: Neutralizing effect of Hybrid Mismatch Arrangements

- This aims to help to prevent double non-taxation by eliminating the tax benefits of mismatches and to put an end to:
  - Costly multiple deductions for a single expense,
  - Deductions in one country without corres. taxation in another
  - Generation of multiple foreign tax credits for one amount of foreign tax paid.
- A common example of a hybrid financial instrument would be an instrument that is considered a debt in one country and equity in another so that a payment under the instrument is deductible when it is paid but is treated as a tax-exempt dividend in the country of receipt.
- By neutralising the mismatch in tax outcomes, but not otherwise interfering with the use of such instruments or entities, the rules will inhibit the use of these arrangements as a tool for BEPS without adversely impacting business

Action 3: Controlled Foreign Company (CFC) Rules

- Controlled foreign company (CFC) rules are rules which respond to the risk that taxpayers with a controlling interest in a foreign low-taxed subsidiary can shift income into it and avoid taxation.
- Groups can create low-taxed non-resident affiliates to which they shift income. Controlled foreign company rules can combat this CFC rules combat this by **enabling jurisdictions to tax income earned by foreign subsidiaries without waiting for an actual distribution of the income**, which may be postponed indefinitely.
- However, it was felt by G-20 & OECD Members that current CFC rules may not always capture all the types of income that gives rise to BEPS concerns.

Action 4: Interest deductions

- Idea is to evolve a common approach based on best practices for preventing base erosion through the use of interest expense;
  - For example through the use of related-party and third-party debt to achieve excessive interest deductions or to finance the production of exempt or deferred income.
- Base Erosion and Profit Shifting (BEPS) risks in this area may arise in three basic scenarios:
  - Groups placing higher levels of third party debt in high tax countries.
  - Groups using intragroup loans to generate interest deductions in excess of the group’s actual third party interest expense.
  - Groups using third party or intragroup financing to fund the generation of tax exempt income.

Action 5: Harmful tax practices

- This sets out a minimum standard to assess whether there is **substantial activity in a preferential regime**. In context of IP regimes (patent boxes), consensus was to use **“nexus” approach**.
  - This approach uses expenditures in the country as a proxy for substantial activity and ensures that taxpayers benefiting from these regimes did in fact engage in research and development and incurred actual expenditures on such activities.
- A framework has been agreed for **mandatory spontaneous exchange of information on rulings** that could give rise to BEPS concerns in the absence of such exchange.

Article 5: India's take

- New Indian 'patent box' regime introduced via **Section 115BBF** introduced in **Finance Act 2016** to provide that where royalties earned from patents developed in and registered in India were to be taxed on gross basis at 10%, as per option of taxpayer
  - Aim to encourage R&D in India so as to develop and register patents in India
  - Key question will be whether those who patent have enough confidence in our legal system to be able to protect said patents
- An eligible taxpayer can exercise this option within time allowed for filing return under S. 139(1). If the presumptive tax option is not opted for 5 years, then the option cannot be exercised for the next 5 years either.
- “Developed in India” means that **at least 75% of expenditure incurred for any invention with a granted patent is incurred in India**

Action 6: Preventing granting of treaty benefits in Inappropriate circumstances

- Action 6 of the OECD/G20 Base Erosion and Profit Shifting (BEPS) Project identifies treaty abuse, and in particular treaty shopping, as one of the most important sources of BEPS concerns.
- Taxpayers engaged in treaty shopping and other treaty abuse strategies undermine tax sovereignty by claiming treaty benefits in situations where these benefits were not intended to be granted, thereby depriving countries of tax revenues.
- **Countries have therefore agreed to include anti-abuse provisions in their tax treaties, including a minimum standard to counter treaty shopping.**

Action 6: Minimum standards agreed upon

- These new treaty anti-abuse rules first address treaty shopping, which involves strategies through which a person who is not a resident of a State attempts to obtain benefits that a tax treaty concluded by that State grants to residents of that State, for example by establishing a letterbox company in that State

Action 6: Minimum standards agreed upon

- Minimum standards agreed upon:
  - A **clear statement** that the States that enter into a tax treaty intend to avoid opportunities for non-taxation, including through treaty shopping, will be included in tax treaties
  - Specific anti-abuse rule, the **limitation-on-benefits (LOB) rule**, that limits the availability of treaty benefits to entities that meet certain conditions will be included in the OECD Model Tax Convention. These conditions, which are based on the legal nature, ownership in, and general activities of the entity, seek to ensure that there is a sufficient link between the entity and its State of residence
  - Third, in order to address other forms of treaty abuse, a more general anti-abuse rule based on the principal purposes of transactions or arrangements (**the principal purposes test or "PPT" rule**) will be included in the Treaties

Article 6: India's take

*"This is a minimum standard **which India fully endorses**. It is strongly committed to implementing measures recommended by this Action Plan. **India prefers to adopt a combination of the Action 6 limitation on benefits (LOB) test and the principal purpose test (PPT), in addition to its existing GAAR.** LOB clauses which lay down objective parameters may in many cases not capture situations of treaty abuse and in those situations the PPT will need to be applied"*

- *Competent Authority, India*

- India taking multi-pronged approach:
  - LoB clauses renegotiated in Treaties (Mauritius),
  - PPT rules in Treaties
  - GAAR rules to check treaty abuse

Action 7: Preventing the artificial avoidance of PE status

- Changes address techniques used to inappropriately avoid the existence of a PE
  - Including via replacement of distributors with commissionnaire arrangements (or)
  - Through strategies where contracts which are substantially negotiated in a State are not formally concluded in that State because they are finalised or authorised abroad, or where the person that habitually exercises an authority to conclude contracts in the name of a foreign enterprise claims to be an "independent agent" even though it is acting exclusively or almost exclusively for closely related enterprises.
- Plan also address strategies based on specific exceptions in Art. 5(4) of OECD Model by restricting these exceptions to preparatory or auxiliary activities and by addressing the fragmentation of business activities between closely related enterprises.

Action 8-10: Aligning Transfer Pricing Outcomes with Value Creation

- The work has focused on ensuring outcomes where profits are aligned with the value created through underlying economic activities. Key areas are:
  - **Transactions involving intangibles**, since misallocation of profits generated by valuable intangibles has contributed to BEPS;
  - **Contractual allocation of risks**, and the resulting allocation of profits to those risks;
  - **The level of returns to funding** provided by a capital-rich MNE group member, where those returns do not correspond to the level of activity undertaken by the funding company
  - **Recharacterisation of transactions not commercially rational;**
  - **Service fees and commodity transactions.**
- The work under Actions 8-10 are to ensure that **transfer pricing outcomes are aligned with value creation of the MNE group.**

Action 8-10: TP & Intangibles

Action Plan talks about following steps with respect to TP of Intangibles:

- Identifying intangibles
- Ownership of intangibles and transactions involving the Development, Enhancement, Maintenance, Protection and Exploitation (DEMPE) of intangibles
- Transactions involving the use or transfer of intangibles
- Guidance for determining arm's length conditions in cases involving intangibles

Action 8-10: TP & Intangibles

- **Mere legal ownership of an intangible does not by itself confer any right to the return from its exploitation.** Instead, the economic return from intangibles, and the costs and economic burdens associated with intangibles, will be allocated to entities that perform and control the important value-creating functions of developing, enhancing, maintaining, protecting and exploiting the intangibles (the **DEMPE** functions).

- It sets out a framework for analyzing transactions involving intangibles, identifying the commercial or financial relations between associated enterprises that is contained in.

Action 8-10: TP & Intangibles

- In essence, the application of this framework to transactions involving intangibles will have the following consequences:
  - **Where an enterprise that is not the legal owner of an intangible performs value-creating DEMPE functions in relation to the intangible, it can expect arm's length remuneration.**
  - **Where an associated enterprise contractually assumes the risk associated with the DEMPE functions (for example, where it takes on the financial risk associated with intangible development, or where it assumes the risk of defending an intangible against legal challenge) then the financial consequences of the risk will be allocated to that enterprise**, so long as it functionally exercises control over the risk.

Action Plan 8-10: India's take

IS FOREIGN AE’s BRAND ENHANCED BY INDIAN CO’S AMP SPEND?

- **India's take on Action 8-10 can be understood by studying the current hot-topic of TP discussion & litigation throughout India** which is about accretion to the **“brand” (i.e so called marketing intangible created in India) due to advertising spend of its branded products of foreign AE by Indian co/subsidiary in India:**
  - Common scenario is Indian subsidiary is established by big foreign brand for entering India; Indian sub. spends a lot on **advertising , marketing & sales promotion (AMP)** expenditure in India….
- Questions being asked by the Revenue Department
  - **Does the foreign company’s brand get enhanced by the advertising & marketing spend (AMP) of its Indian subsidiary?**
  - **Shouldn’t the foreign AE therefore compensate**

Action Plan 8-10: India's Take
Marketing Intangibles

- Reply in **Chapter X to UN TP Manual** spells **Indian Govt's** current view clearly:
  - Indian subsidiaries need to get additional returns in the form of reimbursement of AMP
  - "Bright-line test" for marketing intangibles may be used
  - Developer of marketing intangibles having economic ownership IS ENTITLED to ADDITIONAL RETURNS (i.e., the Indian company is entitled to additional returns!)

Action Plan 8-10: India's Take
Reading between the lines…

- Indian Govt’s take on economic vs legal ownership:
  - Economic owner (typically, Indian co) spends all the money creating “marketing intangibles” for the AE but does not get returns
  - Legal owner (typically, foreign AE) gets benefit of AMP spend
  - However such benefit is not being shared with Indian subsidiaries by the foreign AE
  - Only available & immediately taxable indicator of value accretion to marketing intangible is AMP spend
  - This AMP spend needs to be shared/reimbursed with Indian subsidiary by foreign AE

Action Plan 8-10: India's take Marketing Intangibles in Indian Judiciary

- For normal distributors as well as licensed manufacturers, Bright-Line Test (BLT) seems to have been discredited!
- For licensed manufacturers, the Courts seem to have gone one step further and held that *prima facie* there is no international transaction and BLT cannot be used to justify that there is one, so the TP machinery itself fails! (Maruti Suzuki, Delhi HC)
- If TNMM is used, separate benchmarking of AMP is now frowned upon

Action Plan 8-10: India's take
Marketing Intangibles in Indian Judiciary

- So, has BLT been buried for good? Have "excess" AMP assessments by Revenue authorities on international brands in India run their course?
  - Have the landmark *Maruti Suzuki* and *Sony Ericsson* judgments restored normalcy to the "brand" related high-pitched tax assessments?
- **Bottomline: The means to an end may have to change – not the end itself??**
  - Legal ownership vs. Economic ownership debate may take different form but ultimately Indian Govt. says India needs its share of the return as economic activity is carried on here!

Action 11: Measuring & Monitoring BEPS

- There is a large and growing body of evidence of the existence of BEPS and its effects. This evidence stems from hundreds of empirical analyses and an increasing amount of specific information relating to the tax affairs of certain MNEs that has emerged from numerous legislative and parliamentary enquiries.
- The Action 11 report estimates the annual global revenue losses from BEPS to be between **USD 100 billion and 240 billion at 2014** levels. This represents 4-10 percent of global corporate tax revenues.
- In addition, the empirical studies find that BEPS tilts the playing field in favour of tax-aggressive MNEs, exacerbates the corporate debt bias, misdirects foreign direct investment, and reduces the financing of needed public infrastructure.

Action 12: Mandatory Disclosure Rules

- Requires promoters and/or taxpayers to disclose upfront to the tax administration the use of schemes presenting certain features or hallmarks.
- Provides a modular framework of guidance drawn from best practices for use by countries without mandatory disclosure rules which seeks to design a regime that fits those countries' need to obtain early information on aggressive or abusive tax planning schemes and their users.
- Not a minimum standard and countries are free to choose whether or not to introduce mandatory disclosure regimes.
  - Example is Indian GAAR regulation wherein tax audit report to include reporting of tax avoidance scheme in excess of certain limits

Action 13: Transfer Pricing Documentation & Country-by-Country Reporting

- Suggests that taxpayers should maintain documents in three parts:
  - Country-by-Country Reports (CbCR),
  - Master File and
  - Local File
- This is a Minimum Standard agreed by countries to implement in their laws

Action 13: India's take

- India introduced 3-layered TP documentation in Finance Act, 2016!
  - Includes the Master File and Country-by-Country Reporting (CbCR)
  - Will apply for FY 2016-17 and first filing will be due Nov. 30, 2017
  - CbCr applies to international groups having consolidated annual revenue greater than EUR750 million (~Rs.5395 crores)
  - Detailed rules will be prescribed for Master File (and CbCr)
  - Penalties prescribed for not maintaing/filing these documents

Action 13: India's take

- **Master File** as per OECD BEPS Action Plan 13 – Indian Govt. yet to prescribe details:
  - Introduced by Finance Act, 2016; effective from FY16-17
  - High-level blue print of MNE group's global operations:
    - Group org structure, Overview of MNE group business, MNE's main intangibles, Important intercompany financial activities, Financial & tax positions, Overall TP policies
  - Ideally prepared by ultimate parent for consolidation; submitted by Indian entity to local tax authorities
  - No monetary threshold prescribed (as of now)
- *"The master file shall contain information which may not be restricted to transaction undertaken by a particular entity situated in particular country.* ***In that aspect, information in master file would be more comprehensive than the existing regular transfer pricing documentation." -*** *Budget Memorandum 2016*

Action 13: India's take

- Local file
  - Local country TP documentation
  - To be prepared by each local entity; and submitted to local tax authority
  - In place in India since 2001
  - Local file shall comprise functional and economic analysis of international transactions undertaken by the local entity.

Action 13: India's take
CbCR – Section 286

*S. 286. ....***(3) For the purposes of sub-section (2), the report in respect of an international group shall include,—**

(a) **the aggregate information** in respect of the amount of revenue, profit or loss before income-tax, amount of income-tax paid, amount of income-tax accrued, stated capital, accumulated earnings, number of employees and tangible assets not being cash or cash equivalents, **with regard to each country or territory in which the group operates;**

(b) **the details of each constituent entity of the group** including the country or territory in which such constituent entity is incorporated or organised or established and the country or territory where it is resident;

(c) the nature and details of the main business activity or activities of each constituent entity; and

(d) any other information as may be prescribed

Action 13: India's take CbC Report

- **Requires aggregate tax jurisdiction-wise information relating to the global allocation of the income, the taxes paid, and indicators of the location of economic activity among tax jurisdictions in which the MNE group operates.**
- Introduced by Finance Act, 2016; effective from FY16-17
- **MNEs having consolidated annual revenue greater than EUR750 million**
- Prepared by ultimate parent entity for consolidation purposes
- Submitted to the tax authority of the ultimate parent entity
- Shared with other tax authorities through official channels (if such official channels don't exist or there is 'systemic failure' to obtain report, the local entity has to provide the CbC report)
- **Summary data and economic activity in each country**
- Though Revenue assures CbCR confidentiality, it is a matter of additional worry for the Indian taxpayers/MNE's

Action 14: Making Dispute Resolution Mechanisms more effective

- Many OECD BEPS countries have agreed on a minimum standard and a number of best practices in relation to dispute resolution. It will ensure that treaty obligations related to the MAP are fully implemented in good faith and administrative processes promote prevention and timely resolution of treaty-related disputes.
  - The minimum standard provides that Countries commit to seek to resolve MAP cases within an average timeframe of 24 months.
- A large group of countries committed to adopt and implement mandatory binding arbitration as a way to resolve disputes that otherwise prevent the resolution of cases through MAP
  - A **mandatory binding MAP arbitration provision will be developed** as part of negotiation of the multilateral instrument and included in there for countries willing to sign to it.

Action 14: India's take

- **Indian Revenue's sore point : Mandatory Binding Arbitration**
  - India continues to be **unwilling to accept mandatory arbitration, since it believes that this will impinge on its national sovereignty**
  - India's stance is that it is already strengthening the effectiveness and efficiency of its MAP process under tax treaties – and does not think mandatory arbitration is warranted in its case. It has settled 98 cases under MAP since January 2015
  - India may implement recommended best practices that facilitate effective implementation of MAP, including suspension of collection of taxes during pendency of MAP proceedings, which are already included in its tax treaties with the US, the UK, Denmark and now Korea

Action 15: Multilateral Instrument

- The goal of a **multilateral instrument** is to expedite and streamline the implementation of the measures developed to address BEPS, in particular by modifying bilateral tax treaties.
- There are several precedents in various other areas of public international law where bilateral treaties have been modified via a multilateral instrument.
- The multilateral instrument will modify existing bilateral tax treaties in order to swiftly implement the tax treaty measures developed in the course of the OECD-G20 BEPS Project. Treaty measures that will be included in the multilateral include those on hybrid mismatch arrangements, treaty abuse, permanent establishment, and mutual agreement procedures.
  - Indian Govt. has participated in the work towards multilateral instrument

India's take on OECD BEPS

Action 1	Addressing the tax challenges of Digital Economy	EL : 1^{st} June 2016
Action 2	Neutralising the effects of Hybrid Mismatch Arrangements	Not yet known
Action 3	Designing Effective **Controlled Foreign Company** Rules	Not yet known
Action 4	Limiting base Erosion Involving Interest Deductions and Other Financial Payments	Not yet known
Action 5	Countering Harmful Tax Practices more effectively	S.115BBF: 1^{st} April 2016
Action 6	Preventing Granting of Treaty Benefits in Inappropriate Circumstances	GAAR : 1^{st} April 2016
Action 7	Preventing Artificial Avoidance of PE	Not yet known

India's take on OECD BEPS

Action 8-10	Aligning Transfer Pricing with Value Creation	Not yet known
Action 11	Measuring and Monitoring BEPS	Not yet known
Action 12	Mandatory Disclosure Rules	Not yet known
Action 13	Guidance on TP Documentation and Country-by-Country Reporting	Effective FY2016-17
Action 14	Making Dispute Resolution Mechanisms More Effective	Not yet known
Action 15	Developing Multilateral Instrument	India Participating

Indian Revenue on BEPS

Former chairperson of the Central Board of Direct Taxes (CBDT)

“OECD’s BEPS project is an expression of virtually every stand India has taken on taxation”

“BEPS deliverables reflect what India has been saying for 20 years, and have transformed India from a minority to a majority voice”

*”The Indian Government is pleased that global thinking on **international tax policies is moving in the “source-based” direction –**something which India has been advocating as a lone, minority voice”*

“India’s taxation principles are based on the concept of fairness — that if a corporation works in a country or earns income from it, if it is adding value in that country, if the economic activity is carried out in that country, and if it is using the public goods of that country — it is only fair that the corporation pays tax in that country. This is the view of the Indian Government, which has now been recognized by the OECD”

Indian Revenue on BEPS

Former Competent Authority, India

"BEPS deliverables are the outcome of two years of intense discussions and deliberations to which India has been an active participant. Actions will be taken in India – either legislative or administrative"

"Implementation will be crucial. Industry will have concerns about the regulations and laws that will be introduced. Every country will need to develop specific legislation with a focus on minimising subjectivity in them in order to reduce disputes. It will be a difficult task for policy makers in India, but at least countries will be sharing their experiences as they draft the new rules and laws"

"India will ***certainly implement minimum standards****,* ***and will abide by updating existing standards****. As for recommendations on best practices, India will study and analyse these to decide on when and to what extent they will be implemented"*

Bottomline: If the Revenue Department is happy............you should be _______ ?? :)

Thank you!

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