



The Implementation of BEPS- Perspective of capital Exporting and Importing Countries

Day 1: April 28, 2017

Welcome session

Chief Guest - Mr. Ravi Shankar Prasad, Union Minister holding Law and Justice and Ministry of Information Technology portfolio in the Government of India

Mr Porus Kaka, Worldwide President of the International Fiscal Association, **Mr Ajay Vohra**, Senior Advocate, **Mr Sushil Lakhani**, Chairman, IFA India and **Mr. Shigeki Minami**, President, of the Asia-Pacific Region Committee

Summary of the Session:

Mr. Ajay Vohra opened the session with a speck into the history of IFA, he informed that the first ever IFA conference was also held in New Delhi some 30 years ago, in 1988.

Following him, **Mr. Sushil Lakhani** delivered a welcome address underlining the importance of tax, he quoted, **"Tax world is the most happening place in the recent times"**. He remarked, **"It's easy to make substance in India"** considering low cost of highly skill manpower, Government's efforts regarding economic reform and focus on increasing economic activity and legal system gearing up for changes

Next, **Mr. Porus Kaka** inaugurated the conference. He spoke about upcoming amendments in tax field which will change the face of tax in India and abroad. He mentioned how **"accepted form of tax planning will change with GAAR"**. Interestingly, Mr. Kaka labelled the current period as a **'unique twilight zone'**, which he elaborated is a zone between dating and marriage, where marriage will be solemnized on June 6, 2017 in Paris where Multilateral Instrument (MLI) will be signed. Appraising the geographical prominence, he stated that Asia-Pacific conference is geographically the largest sector.

Union Minister **Mr. Ravi Shankar Prasad** took over the dais, and in context of Automatic Exchange of Information, stated that **"If the world has to run, it must run fairly"**. He affirmed the concept of sharing information which he said is designed to bring in transparency. He cautioned the tax practitioners, by stating that **"Tax practitioners need to understand the tempo of this change"**.

Explaining the Digital Size of India, he informed that out of the population of 1.25 billion people in India, there are 500 million internet connections! Interestingly, as told by Mr. Prasad, **"India has the biggest presence after the USA in social digital platforms in the likes of Facebook, twitter et al"**. Commending the expedient execution of Adhaar cards in the country as a parliamentary law, Mr. Kaka expressed how today, there are 1.13 billion Indians with Adhaar card. He termed the process of Adhaar as the one with **'minimum information and optimum utilization'** which authenticates identity. He called India **'a big ecosystem of technology'**. **Mr. Ravi Shankar Prasad** further appreciated the influx of GST and said **"in a country with diversity it will bring political consensus"**. He also said that **"GST will be a new ecosystem which is convenient, progressive and transparent"**.

Last but not the least, **Mr. Shigeki Minami** delivered a vote of thanks to the panelists, organizers and the audience.

Plenary Session 1: Transparency and Information Exchange- Focus on FATCA and CRS

Chairman: Stef van Weeghel, PwC Netherlands

Panellists: Michael Olesnicky, KPMG Hong Kong, **Robert Desax**, Walder Wyss Ltd., Switzerland, **T.P. Ostwal**, T.P. Ostwal & Associates, India, **Ted Tae-Gyung Kim**, Lee & Ko, Republic of Korea and **Maikel Evers**, OECD Centre for Tax Policy & Administration

Summary of the Session:

Mr. Stef van Weeghel commenced the session on a lighter remark on how diligently people follow transparency in today's world which is evident on Facebook where people want to show others even day to day trivial activities.

Mr. Michael Olesnicky remarked that transparency does not mean increase in tax liability, but it will result in more scrutiny. Commenting upon tax transparency in corporate, he stated under BEPS, corporate tax information that needs to be exchanged includes Country by Country Reporting (CbCR), tax rulings, Advance Pricing Agreements (transfer pricing) and aggressive tax positions. He informed that Hong Kong not being a state is not able to sign a MLI but it is considering requesting China to extend its treaty network to Hong Kong.

Mr. T.P Ostwal at the outset gave a brief overview of India's demonetisation drive which resulted in 85% of the money getting deposited in bank accounts. He said India is on an expeditious digital drive. He stated that cash transaction in more than INR 200, 000 will result in recipient paying fine equivalent to amount received in cash. He also explained that even before enactment of FATCA, the Income Tax Act had implemented disclosure requirements of foreign assets held by Indian residents.

Mr. Ted Tae-Gyung Kim, explained that USA facing Offshore tax evasion resulting in revenue loss of \$100 billion, led to the origin of FATCA. Further, he gave a detailed differentiation between Exchange of Information on Request (EOIR) and Automatic Exchange of Information (AEOI). He also stated that 139 member jurisdictions have committed to implement the international standards on EOIR whereas 100 countries and jurisdictions committed to implement the new standard on AEOI.

Mr. Robert Desax, gave a spectrum in Swiss context and its position on information exchange and said *“had this discussion taken place 10 years ago, my presentation would have been entirely different, that much have the times changed”*. He also explained that Swiss Federal Tax Administration must inform taxpayers about information requests that directly concern them. This is considered to be a general principle of Swiss law.

An illuminating session on case studies also elaborated on the subject of exchange of information in a position where a jurisdiction (i.e. Panama, in this case) had not signed or agreed to share information. In the Q and A session, a keen listener gave an interesting observation that more exchange does not necessarily imply better exchange and lack of utility of information exchanged can pose a threat. Thus, **Mr. Stef** in affirmation stated that a fine balance needs to be achieved between privacy and exchange of information.

Giving OECD updates, **Mr. Maikel Evers** shared developments regarding common transmission system for exchange on information, mandatory requirement of EOI on tax ruling and not sharing of copy of rulings. He also stated that lot of follow up is happening on EOIR based on standardized exchange of information.

Plenary Session 2: Intangibles and Profit Split Method Applications in Practice

Chairman: Mr. Mukesh Butani (BMR Legal, India)

Panellists: Kyung Geun Lee, Yulchon, Republic of Korea, **Ichwan Sukardi**, KPMG, Indonesia, **Yushi Hegawa**, Nagashima Ohnu & Tsunematsu, Japan, **Paul Sokolowski**, Arnold Bloch Leibler, Australia

Summary of the Session:

Panel led by Session chairman **Mr. Mukesh Butani** discussed transfer pricing aspects of intangibles (definition, valuation and ownership) and application of profit split method (PSM) in this session.

Mr. Paul Sokolowski explained that Australia recently amended its transfer pricing law so as to incorporate 2015 OECD transfer pricing guidance pursuant to BEPS programme. **Mr. Kyung Geun Lee**, while discussing Korean country experience, pointed out that in Korea payments to foreign enterprises towards royalty are quite substantial. Therefore, Korean tax authorities carry out greater scrutiny of such payments.

In the context of application of PSM, **Mr. Yushi Hegawa** stated that PSM is frequently used method in Japan. The main challenge in using PSM is identification of allocation key to allocate profits between Japanese parent and local subsidiaries. In some cases, local subsidiaries can also own certain intangibles. Further, research and development (R&D) cost is generally used as allocation key, but there is a risk of disregarding marketing and other efforts of local subsidiaries.

Mr. Ichwan Sukardi remarked that in Indonesia intangible payments were used as mechanism to repatriate profits to foreign parent. This has prompted tax authorities to adopt aggressive approach and therefore, tax authorities require the Korean entity to demonstrate that there is commercial benefit accruing to Korean entity out of intangible payment. Importance is also given to legal ownership of intangibles.

In Indian context, **Mr Butani** stated that definition of intangible property under amended Sec. 92B is wider as compared to OECD definition. Referring to 2013 circular on R&D centres, he stated that the circular gives guidance on characterization of different kinds of R&D centres which is quite consistent with OECD guidance. Regarding marketing intangible adjustment, He stated that Indian Revenue has issued internal guidance to transfer pricing authorities on computation of ALP adjustment which has not been made public. The guidance recommends exploration of Comparable Uncontrolled Price (CUP) method for determining AMP adjustment. Further, it states that many taxpayers prefer Resale Price Method (RPM) for benchmarking distribution function. However, it may not be suitable when taxpayer is engaged in high density DEMPE functions. It further states that PSM may be suitable when there is sufficient evidence of interlacing, continuity and seamlessness of functions and control and there is evidence of creation of intangibles. However, Indian Revenue is awaiting final decision of the Supreme Court on the issue of existence of international transaction for AMP expenditure.

In closing remarks, **Mr Butani** stated that the tax fraternity is anxiously waiting for guidance on PSM.

Workshop A – Interest Deductions and Earnings-Stripping Rules: Impact on Debt-push-down Strategy and Interactions of Actions 2 & 7 and 4 & 9

Chairman: Dr. Amar Mehta, Indi-Genius Consulting Inc., Canada

Panellists: Nico Derksen, International Tax Management, Singapore, Chi Chung, Academia Sinica, Taiwan, Michael Olesnicky, KPMG, Hong Kong, Masao Yoshimura, Hitotsubashi University, Japan, Ted Tae-Gyung Kim, Lee & Ko, Republic of Korea, Rahul Garg, PricewaterhouseCoopers, India

Summary of the Session:

Panel led by Session chairman **Dr Amar Mehta** gave an overview of interest deduction, thin capitalization rule and earning stripping provisions for India, Singapore, Taiwan, Hong Kong, Japan and Republic of Korea. The panellist discussed whether the strategy of pushing down debt is workable and interaction of interest deduction restriction rule with transfer pricing provisions.

Nico Derksen explained Singapore tax provisions stating that expense deduction is allowable only if it incurred wholly and exclusively for production of Singapore taxable income. Further, Singapore follows novel transfer pricing approach whereby interest rates are not restricted, but deduction is limited. He stated that Singapore based Group Finance and Treasury Centers may be negatively impacted by Action 4 implementation in other jurisdictions.

Mr Chi Chung stated that interest is deductible if incurred to earn taxable income. Further, Taiwan has group consolidation regime and thin capitalization rule. Taiwan has not enacted earnings stripping rules. **Mr Ted Tae-Gyung Kim** observed that Republic of Korea does not have interest deduction restriction rule, but it has thin capitalization rule.

Mr. **Michael Olesnicky** stated that Hong Kong does not have withholding tax rule, thin capitalization rule, interest deduction restriction rule. But, it has specific rule regarding deductibility which is quite difficult to comply with. Thus, Implementation of BEPS Action 4 would liberalise the scope for interest deductions. Further, he stated that China has thin capitalization rule, but no interest limitation rule. **Mr. Masao Yoshimura** explained that Japan has thin capitalization rule as well as interest deduction restriction rules from period before BEPS guidance. Where both the thin cap rules and the earning stripping rules are applicable, the larger of the two potential disallowances is applicable.

Mr Rahul Garg stated that though India has strict interest deduction rule, it does not have thin capitalization rule. He explained that interest deduction restriction provisions introduced by Finance Act, 2017. He raised certain questions in the context of this provision, such as whether debt raising cost would be considered as interest; whether forex loss can constitute interest and whether swap cost could be considered as interest. He stated that these items would not constitute interest in terms of definition u/s 2(28), but the language of Sec. 94B uses the phrase ‘interest and similar consideration’ which may cover these payments. Regarding interaction with transfer pricing rule, **Dr Amar Mehta** remarked that interest restriction deduction is specific provision while transfer pricing provision is general provisions. Thus it may be possible to argue that transfer pricing provisions will not apply on interest transactions. However, **Mr Rahul Garg** stated that these provisions should be read as twin condition for grant of deduction and thus, both need to be fulfilled.

Plenary Session 3: Panel of Revenue Officers of the Asia Pacific Countries (BEPS Implementation

- Status and Initial Experiences)

Chairman: Akhilesh Ranjan, Ministry of Finance, India

Moderator: Kuntal Dave, Nanubhai Desai & Co., India

Panellists: **Yoshinori Ikeda**, National Tax Agency, Japan, **Wahyu K. Tumakaka**, Central Jakarta Regional Tax Office, Indonesia, **Chang Mok Han**, National Tax Service, Republic of Korea, **Abu Tariq Bin Jamaluddin**, Inland Revenue Board, Malaysia

Summary of the Session:

Mr. Kuntal Dave welcomed the audience and elaborated the agenda for the panel to be in the lines of trade and tax Competitiveness, MLI, transparency & EOI and Transfer Pricing. He mentioned that panellists would provide an overview of countries' response to BEPS at a macro level.

Mr. Akhilesh Ranjan expressed how "*BEPS has seized the minds of people as no other tax topic could*". He observed that perspective of different countries participating in BEPS were different. India's concern is not about tax revenue leakage for Indian companies, but foreign countries exploiting Indian assets without paying fair share of taxes.

Mr. Yoshinori Ikeda said that "*Japan government supports BEPS project*" with an aim to prevent double taxation situations. He also highlighted on Japan's commitment to arbitration. He mentioned that necessary conditions underpinning the obtaining and the use of the CbC reporting to be; confidentiality, consistency and appropriate use.

Mr. Chang expressed that Japan and Korea have a lot in common when it comes to BEPS project. He said Korea is concerned about increasing tax disputes and that even prior to BEPS, Korea cooperated with other jurisdictions for exchange of information. Korea follows "Substance over form" principle. He stated that Korea's Ministry of Finance is currently reviewing MLI test and not yet taken the final decision.

Mr. Wahyu K. Tumakaka stated that Indonesia is capital importing country. It is currently facing a contradictory situation where tax administration is trying to become aggressive to increase tax collection while Government is also trying to attract more FDI. He further remarked that Indonesia is very keen about new PE clause, however not many treaty partners would be willing to have PE clause renegotiated.

Mr. Abu Tariq Bin Jamaluddin stated that Malaysia is more agreeable to PPT than LOB clause it is similar to GAAR provisions.

Explaining Indian position, **Mr Ranjan** stated that India also has preferential tax regimes, however none of the tax regimes in India found to be harmful tax practice in review. He mentioned that India is extremely satisfied when it comes to transparency and he specifically stated that it is usually overlooked that increase in tax transparency doesn't only mean tax compliance by tax payers but also more tax transparency in tax administration. He pointed out that exchange of tax rulings is compliance to be done by tax administration which has relevance in the context of harmful tax practices. He stated that India finds BEPS Action 7 (Artificial avoidance of PE) as extremely important. But he expressed



apprehension about importance given by other countries for its implementation as it is not part of minimum standards. Regarding Action 8 to 10, he stated that India is eagerly awaiting guidance on PSM. Regarding MLI, he stated that it has to be read either along with the treaties while in some cases it will supersede the treaties. He gave example of treaty where LOB clause is in existence; however MLI is signed for more elaborate LOB clause. He said in that case MLI provision will supersede the treaty. However, when a particular provision is not existent in treaty, but accepted in MLI, then MLI has to be read along with the treaty.

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