IFA News Letter
India Branch - Western Chapter

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Chairman Speaks

As we continue to see the unfolding of the debate on fair share of taxes across the world, work on the BEPS (Base Erosion & Profit Shifting) project of the OECD is progressing rapidly. More specific to India, developments continue at a rapid pace – while the APA programme continues to generate significant positivity, the safe harbour rules do not quite seem to be generating adequate interest amongst taxpayers the reasons for which are quite evident.

The 2013 IFA Congress in Copenhagen was a huge success. Several delegates from India, including tax professionals, industry representatives & senior revenue officials, attended the Congress. It was a matter of great pride & honour to witness Mr Porus Kaka formally take over the reins as president of IFA at the end of the Copenhagen Congress.

The preparations for the 2014 Congress in Mumbai are progressing rapidly. Indeed at the Copenhagen Congress, there was a lot of the discussion surrounding the upcoming Mumbai Congress which made it evident that there were huge expectations from the Mumbai Congress next year as delegates there were looking forward to it with considerable excitement & interest.

We in India are extremely fortunate to have this opportunity to host the 2014 Congress for the first time in Mumbai (there has been just one Congress hosted in India previously – the one in Delhi in 1997). This would be a wonderful opportunity for the International Tax fraternity in India to experience the coming together of some of the leading & most brilliant minds from across the world in the field of International Tax. IFA has the unique distinction of bringing together the entire suite of stakeholders in the international tax arena – Government officials, Revenue authorities, members of the Judiciary, Tax Practitioners, Tax Directors & Academicians, all from more than 100 countries. I would urge you all to block your diaries in advance for 12 to 16 October 2014 to take full advantage of this extraordinary opportunity.

Editor Speaks

This quarter has been very eventful with festivities and happenings!

To continue in the legal arena the most happening thing is our courts have been interpreting the old concept of Royalty with and without the existence of Agreement for Avoidance of Double Taxation (AADT). Existence of a specific Article on Royalty which encompasses within the Fees for Technical Services (FTS) has always been of concern for interpretation. If there is no Specific Article in an AADT dealing with FTS, such income will not fall for consideration within the Article dealing with residuary income. The taxability of FTS has done a full circle, having been considered as Business Profits not chargeable to tax in the absence of a Permanent Establishment. The Royalty has taken us to Horse Racing and sponsorships of sports events. The payments towards software not embedded in an equipment is held to be Royalty.

The new AsADT, and the Protocols will widen the international tax arena for times to come. The BEPS programme of OECD will hopefully help the multijurisdictional arrangements. The efforts of OECD on tax treatment of termination payments are welcome as these often cause concern to determine taxing rights with reference to Dependent Personal Services.

This News Letter gives insight to the above issues. This issue of News Letter is little too late to wish our readers Happy Diwali. However, in time to wish all our readers a Merry Christmas and a Very Happy and Prosperous New Year 2014!

Cheers,
Tara

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Courts Speak

I. Indian Rulings

Harshal Bhuta
CA, ADIT

1. Bangkok Glass Industry Co. Ltd. v. ACIT [1]

Fees for Technical Services cannot be taxed under Article 22 in absence of specific article dealing with FTS.

India-Thailand DTAA does not contain a specific article dealing with FTS. After taking into consideration the facts of the case, although Madras High Court upheld the order of the Tribunal that the entirety of the sum paid could not be regarded as Royalty and that part of the sum was to be considered as Fees for Technical Services, it held that the same has to be taxed under Article 7 of India-Thailand DTAA and that Article 22 would come into play only when an item of income did not fall for consideration under any of the express provisions of the DTAA.

2. Delhi Race Club (1940) Ltd. v. ACIT[2]

Amount paid by taxpayer to various clubs whose races were being displayed live at premises of taxpayer could not be termed as royalty.

Following the decision in the case of Neo Sports Broadcast (P.) Ltd [133 ITD 468], the Tribunal held that the payments made by taxpayer for display of live telecast could not be termed as royalty since telecast viewed by various persons could not be said to be a 'work' as defined u/s 2(y) of Copyright Act, 1957. While referring to the aforesaid decision, it observed that the Mumbai Tribunal had held that live telecast of a match or any other event could not be considered as transfer of copyright as in the case of live telecast of the match, no work could have been said to have come into existence. Further, it also observed that there could not be any infringement of any copyright since there was no copyright in live event.

3. DCIT v. Dr. Reddy's Laboratories Ltd.[3]

Payment received by Contract Research Organizations (CROs) for clinical test of drug is not Fees for Technical Services.

The taxpayer was required to get its product clinically tested through "Bio-equivalence study" and for that, it had made payments to US and Canadian Contract Research Organizations (CROs) for conducting studies and obtaining reports from them in relation thereto. The Tribunal upheld the order of CIT(A) wherein the CIT(A) had taken the view that the taxpayer was conducting clinical trials through the CROs in USA to comply with the regulations therein and the CROs who are experts in this field were only conducting studies and submitting the reports in relation thereto. The reports were neither transfer of technical plan or technical design nor made available technical knowledge, experience or know how by the CROs to the taxpayer and therefore, payments were not in nature of FTS.

4. Hero MotoCorp Ltd. v. ACIT [4]

Payment for sponsorship of various sports events organized by ICC is not Royalty in nature.

The taxpayer had made payments to Global Cricket Corporation Pte Ltd, Singapore and Nimbus Sports International Pte Ltd, Singapore in relation to sponsorship of various sports events organized by ICC, whereby taxpayer was entitled to advertise on billboards at venue and advertisement space in official brochure/website of ICC etc.

Relying on Delhi High Court decisions in the case of Sheraton International Inc [313 ITR 267] and Sahara India Financial Corporation [189 Taxman 102], the Tribunal held that the agreement in question included sponsorship rights like advertising on billboards, advertisement in official brochure, website of ICC etc., which were purely incurred for the promotions, advertisement and publicity of the taxpayer's brand name and products. If incidentally, the proprietary trademark or logo of ICC was put alongside the taxpayer's logo, it was only incidental to the main services obtained by the taxpayer and therefore, payment was not in the nature of Royalty as defined in Article 12(3) of DTAA between India and Singapore.

5. Yoshio Kubo v. CIT [5]

Income tax paid by employer on behalf of employee is exempted non-monetary perquisite. Social security, pension and medical insurance contributions by foreign employer are not taxable as perquisites u/s 17(2)(v). Hypothetical tax cannot be taxed in the hands of the employee.

Delhi HC enumerated that so long as the benefit was not expressed in monetary terms in the hands of the employee, in the sense that it was not funded as part of the salary, but paid in discharge of the obligation, of any sort, either contractual (i.e. rent, services, etc. availed of by the employee) or legal (tax) directly by the employer, the benefit could not be treated as a monetary benefit. Thus, amounts paid directly by an employer to discharge its employees' income tax liability did not fall within the excluded category of monetary benefits payable to the employee; they were within the included category, u/s 10(10CC) as amounts paid directly as taxes.

Delhi HC observed that taxpayer did not get a vested right at the time of contribution to the fund by the employer. The amount

[1] [2013] 257 CTR 326 (Madras HC)
[2] [2013] 144 ITD 292 (Delhi - Trib.)
[3] [2013] 144 ITD 302 (Hyderabad - Trib.)
[4] [2013] 156 TTJ 139 (Delhi - Trib.)
[5] [2013] 36 taxmann.com 1 (Delhi HC)

standing to the credit of the pension fund account, social security or medical or health insurance would continue to remain invested till the taxpayer became entitled to receive it. It further stated that when the amount did not result in a direct present benefit to the employee, who did not enjoy it, but assured him a future benefit, in the event of contingency, the payment made by the employer, did not vest in the employee and therefore these payments were not perquisites u/s 17(2)(v).

Following the Bombay HC judgment in the case of Jaydev H. Raja [211 taxmann 188] and Delhi HC judgment in the case of Dr. Percy Batlivala, Delhi HC concluded that so long as the employee had paid tax on actual salary received, he could not be saddled with the hypothetical tax amount.

6. Hyosung Corporation, Korea [6]

Question raised in the application for advance ruling is pending adjudication before the assessing authority if notice has been issued to applicant u/s 143(2).

AAR held that mere filing of return before filing of the application under section 245Q(1) did not necessarily mean the question raised in the application was already pending before the Income-tax Authority. But in the applicant's case, notices under section 143(2) were already issued before filing of the application before the AAR. The transactions on which rulings of the AAR were sought, were admittedly shown in the return of income filed before the date of application. When notice u/s 143(2) would be issued, all the information available in the return and claims thereon were subject to adjudication by the Assessing Officer and several issues would emerge for adjudication by the Assessing Officer. With issue of notice u/s 143(2), claims of the applicant in the return were pending for adjudication before the Assessing Officer and therefore question raised in the application for advance ruling was pending adjudication before the assessing authority. Accordingly, the application for adjudication was rejected.

7. BIOCON Biopharmaceuticals (P.) Ltd. v. ITO(IT)[7]

Sec. 195(1) applies to issue of shares to non-resident. Application for non-deduction of tax at source cannot be made under section 195(2).

On the question of applicability of Sec. 195(1) to issue of shares i.e. payment of consideration in kind, Tribunal held that payment in terms of money was not the only mode contemplated under the provisions of section 195(1). The use of the expression 'or by any other mode' in section 195(1) made the intention of the legislature clear that those provisions are to be attracted even to cases where payment was made otherwise than by money.

Further, Tribunal also held that Sec 195(2) presupposes that the person responsible for making the payment to a non-resident was in no doubt that tax was payable in respect of some part of the amount to be remitted to a non-resident, but was not sure as to what should be portion so taxable or was not sure as to the amount of tax to be deducted. It therefore concluded that the order passed by the Assessing Officer holding that no tax was deductible at source would be *non est* in law.

8. Reliance Infocom Ltd, Reliance Communications Infrastructure Ltd,Reliance Infostream Private Limited, Reliance Telecom Limited, Lucent Technologies GRL LLC[8]

Consideration for supply of software which is not embedded in equipment is taxable as 'royalty'.

While adjudicating on the nature of payments towards supply of software required for the telecom network, Tribunal held that there was distinction between a case where the software was supplied along with hardware as part of the equipment and there was no separate sale of the software and a case where the software was sold separately. Where the software was an integral part of the supply of equipment, the consideration for the same was not assessable as 'royalty'. However, in a case where the software was sold separately, the consideration for it was assessable as 'royalty'. Noting the fact that the taxpayer had acquired the software independent of the equipment, Tribunal stated that the taxpayer had received a license to use the copyright in the software belonging to the non-resident and that the non-resident supplier continued to be the owner of the copyright and all other intellectual property rights. It therefore concluded that since there was a transfer of 'right to use' the copyright, the payment made by taxpayer to the supplier was 'for the use of or the right to use copyright' and hence constituted 'royalty' under Sec. 9(1)(vi) of Income Tax Act, 1956 as well as Article 12(3) of the India-USA DTAA.

9. Vodafone India Service Pvt. Ltd v. UOI[9]

Sec.92CA(2A) applies to all proceedings pending on 1.6.2011. Sec.92CA(2B) applies even to cases where Form 3CEB is filed but the transaction is not reported. AO is bound by the TPO's determination of arm's length price.

Bombay High Court laid down many important principles of law on the subject of transfer pricing in this judgment.

It held that Sec. 92CA(2A) inserted w.e.f. 1.6.2011 applied to all proceedings that were pending as of 1.6.2011 and consequently, the TPO had jurisdiction to consider unreported and un-referred international transactions in proceedings that were pending before him on 1.6.2011. It further held that Sec. 92CA(2B) also applied to situations wherein the taxpayer had filed Form 3CEB but not included certain transactions therein, since there wouldn't be any cogent reason for Legislature to leave out such cases from the jurisdiction of the TPO when he had been given the jurisdiction to

[6] [2013] 36 taxmann.com 150 (AAR - NewDelhi)
[7] [2013] 36 taxmann.com 291 (Bangalore - Trib.)
[8] http://itatonline.org/archives/index.php/ddit-vs-reliance-infocom-ltd-lucent-technologies-itat-mumbai-consideration-for-supply-of-software-which-is-not-embedded-in-equipment-is-taxable-as-royalty/
[9] [2013] 37 taxmann.com 250 (Bombay HC)

consider unreported international transactions in cases where Form 3CEB had not been furnished at all.

With respect to powers of the AO after the TPO had passed an order u/s 92CA(3) determining the arm's length price, Bombay High Court held that the AO was bound by determination of such arm's length price and did not have the liberty to re-examine the transaction so as to adjudicate on its arm's length price afresh.

10. Eruditus Education (P.) Ltd.[10]

Payment to INSEAD towards cost of teaching in education programmes conducted by applicant is not FTS under India-Singapore DTAA.

The applicant entered into a Programme Partnership Agreement with INSEAD under which INSEAD was obliged to conduct teaching intervention for a period of 30 days that would consist of in-class teaching on INSEAD global campuses in Singapore and France, in-class teaching in India and teaching through telepresence in Singapore.

After examining the curriculum of the programme offered by INSEAD to the applicant, AAR held that the services rendered would involve expertise in or possession of special skill or knowledge that are technical in nature and therefore payment for the services would fall under the broad definition "Fees for Technical Services" both under the Indian Income-tax Act and under the India-Singapore DTAA. However, since the case of the applicant was within the exclusive clause of Article 12.5(c) of the India-Singapore DTAA which excluded payments for teaching in or by educational institutions from the ambit of FTS, payment by applicant was not FTS under India-Singapore DTAA.

11. General Motors India (P.)Ltd. v. DCIT [11]

Foreign AE can be selected as tested party.

The Tribunal rejected the revenue's argument that foreign AE should not be selected as a 'tested party' as the companies selected by the taxpayer did not fall within the ambit of TPO's jurisdiction and, thus, he could neither have called for any additional information nor scrutinized their books of account, as unacceptable. It further observed that the Revenue could get all the relevant particulars around the globe by using the latest technology under its thumb or could direct the taxpayer to furnish the same.

Thus, taking into consideration the various decisions on the subject and in particular United Nation's Practical Manual on Transfer Pricing, it allowed the Foreign AE to be selected as the tested party since it was the least complex party to the controlled transaction.

12. Essar Oil Limited[12]

Law on non-taxing foreign PE profits is no longer good law after insertion of Sec. 90(3) & CBDT Notification dt 28.08.2008.

The taxpayer claimed that net business profits of its Oman & Qatar Branch as well as long term capital gains earned on sale of assets of the aforesaid PEs in Oman and Qatar were not chargeable to tax by placing reliance on the judgment of the Tribunal and High Court in its own case. The aforesaid judgments stated that where the DTAA provided that the business profits & capital gains of the PE "may be taxed in the other Contracting State", the Country of residence i.e., India lost its right to tax if the Country of source had taxed the income. This view was based on the verdicts of the Supreme Court in P.V.A.L. Kulandagan Chettiar [267 ITR 654] and that of the High Courts in R.M. Muthaiah [202 ITR 508 (Kar)] & S.R.M. Firm [208 ITR 400 (Mad)].

Tribunal while reexamining the aforestated position for the appeals under consideration held that such interpretation of the expression "may be taxed" that once the tax was payable or paid in the country of source, then the country of residence would be denied of the right to levy tax on would no longer apply after the insertion of Sec. 90(3) w.e.f. 1.4.2004, i.e. AY 2004-05 pursuant to which CBDT Notification dt 28.08.2008 had been issued. Further, since Government of India, being one of the negotiating parties to the DTAAs had clearly specified its intent and the object of this phrase vide such notification, Tribunal held that such notification would prevail and it being clarificatory in nature, it would take effect from 1.4.2004.

II. Overseas Rulings

Pratikshit Misra
Chartered Accountant

1. River Hills Ranch Ltd v. Her Majesty The Queen[13] *(Canadian Tax Court)*

Surrounding circumstances to an agreement are relevant in determining whether a particular receipt is capital or revenue in nature

The Taxpayers had an agreement with a pharmaceutical corporation for the collection and supply of pregnant mare urine ('PMU') under PMU Collection Agreements. As per the PMU Collection Agreements, the Taxpayers could supply the PMU solely and exclusively to the pharmaceutical corporation. The Taxpayers incurred significant capital expenditure for their business under the PMU Collection Agreements. The pharmaceutical corporation terminated the PMU Collection Agreements and agreed to pay certain sums ('release amount') to the Taxpayers on account of such termination. The release amount was given the nomenclature of Feed & Herd Health Payments ('FHH'). The release amount was calculated with reference to the transaction amounts under the PMU Collection Agreements in the earlier years. The Taxpayers were required to continue to adhere to certain terms of the release to be entitled to such release amount. The termination of the PMU Collection Agreements resulted in complete cessation of this particular business of the Taxpayers.

[10] [2013] 37 taxmann.com 337 (AAR - New Delhi)
[11] [2013] 37 taxmann.com 403 (Ahmedabad - Trib.)
[12] Appeals nos. ITA no. 2428/Mum/2007, 2442/Mum/2007, 1000/Mum/2009 (Mum ITAT)
[13] 2013 TCC 248

The Taxpayers considered such release amounts as capital receipts. The Canadian tax authorities contended that the release amounts were revenue receipts which were taxable in Canada.

On appeal, the Tax Court of Canada was required to determine whether the surrounding circumstances ought to be examined in determining whether the release amount constitute revenue or capital receipt. The Tax Court relied upon various case laws to adjudicate that the nomenclature of FHH provided to the release amount did not seem suitable since the release amount would be paid irrespective of whether the FHH were continued to be made by the Taxpayers. The Tax Court of Canada thus chose to look at the surrounding circumstances such as cessation of business of taxpayers, rationale for the pharmaceutical corporation paying such release amount, etc to determine that the release amount was towards compensation for loss of business of the Taxpayers. Accordingly, the receipt of release amount was held to be capital in nature.

2. Her Majesty The Queen v. Bioartifical Gel technologies Inc[14] (Federal Court of Appeal – Canada)

A Canadian company is entitled to claim R&D credits even if more than 50% shares of its shares are held by non-residents as long as Canadian resident shareholders have the right to appoint majority of the directors

As per the Canadian tax laws, a Canadian controlled private corporation ('CCPC') can claim tax credits aggregating to approx 35% for scientific research & development activities. A CCPC is a corporation which is not controlled by inter alia (i) non-resident persons, (ii) public corporations and (iii) listed corporations. In determining the control, the shares / powers held by the above categories of persons would be aggregated as if it were held by one single hypothetical person.

In the present case, European shareholders held approx 60% of voting and participating shares in the Taxpayer. All the shareholders of the Taxpayer executed a Unanimous Shareholder Agreement ('USA'). The USA empowered Canadian resident shareholders to appoint the majority of the directors of the Taxpayer although the Canadian resident shareholders held less than 50% of shares in the Taxpayer.

The Canadian tax authorities held that the Taxpayer was not a CCPC and thus not eligible to claim the tax credits. On appeal, the Tax Court of Canada ruled in favour of the Taxpayer.

On second appeal, the Federal Court of Appeal ('FCA') ruled in favour of the Taxpayer. The FCA held that in a USA, the clauses regarding the election of the board of directors can have a crucial impact on a majority shareholder's ability to effectively control a corporation. In the present case, since the right to elect the majority of the board of directors vested with the Canadian resident shareholders, the Taxpayer would constitute a Canadian controlled private corporation. Consequently, the Taxpayer was eligible to claim the tax credits.

[14] 2013 FCA 164 (Price Waterhouse Coopers Inc. acting in the capacity of Trustee in bankruptcy of Bioartificial Gel Technologies (Bagtech) Inc.)

International Tax Updates - India and Global

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Chartered Accountants

I. India

1. Protocol amending the 1991 DTAA between India, Australia notified

A protocol amending the 1992 DTAA between the Government of India ('GoI') and the Government of Australia, which was signed on 16 December 2011, has been notified on 20 September 2013. The significant aspects of the protocol are insertion of Articles on *Non-Discrimination* and *Assistance in Collection of Tax* and amendments to Permanent Establishment Article and Royalty.

Source: Notification No.74/2013 [F.No.503/1/2009-Ftd-Ii]/So 2820(E), dated 20-9-2013

2. India signs DTAA with Uruguay - Effective from April 2014

The GoI has signed a tax treaty with Uruguay on 8 September 2011 and notified the same on 5 July 2013. It shall come into force on 1 April 2014.

Source: Notification No. 53/2013 [F.No.500/138/2002 - FTD-II]/SO 2081(E), dated 5-7-2013

3. India signs and Agreement and Agreed Note for DTAA with Latvia

The GoI has signed an Agreement and the Agreed Note for DTAA with Latvia on 18 September 2013.

Source: Press Release dated 18 September 2013: http://pib.nic.in/newsite/erelease.aspx?relid=99453

4. Protocol amending the 1997 DTAA between India, Sweden notified

A protocol amending the 1997 DTAA between the GoI and the Government of Kingdom of Sweden, which was signed on 7 February 2013, has been notified on 14 August 2013. The Protocol inserted *Exchange of Information* Article in the DTAA.

Source: Notification No. 63/2013 [F.No. 505/02/1981-FTD-I]/SO 2459(E), dated 14-8-2013

5. Protocol amending the 1991 DTAA between India, Bangladesh notified

A protocol amending the 1991 DTAA between the GoI and the Government of People's Republic of Bangladesh, which was signed on 16 February 2013, has been notified on 4 July 2013. The Protocol inserted *Exchange of Information* Article in the DTAA.

Source: Notification No.50/2013 [F.No.500/27/2007-Ftd-Ii]/So 2005(E), dated 4-7-2013

II. Global

1. OECD releases G8 report on automatic exchange of financial account information:

The Organization for Economic Cooperation and Development ('OECD'), on 18 June 2013, publicly released a report that it provided to members of the Group of Eight ('G8 group') of countries in advance of their recent summit in Lough Erne, Northern Ireland ('OECD report'). The OECD report, A step change in transparency: Delivering a standardised, secure and cost effective model of bilateral automatic exchange for the multilateral context, was prepared at the request of the Group of Eight (G8) Presidency. The OECD report focuses on the development of an efficient approach for implementing automatic exchange of information regarding financial accounts. The OECD report describes three key matters that would need to be addressed in developing a standard multilateral model for automatic exchange of financial account information - (1) the scope of coverage for information to be reported and exchanged; (2) the legal basis and confidentiality restrictions with respect to information exchange; and (3) the technical and IT requirements for information exchange

Source: http://www.oecd.org/ctp/exchange-of-tax-information/taxtransparency_G8report.pdf

2. OECD issues Action Plan on Base Erosion and Profit Shifting

On 19 July 2013, the OECD issued its Action Plan on Base Erosion and Profit Shifting ('BEPS'). The Plan reiterates the themes of the initial report on BEPS, Addressing Base Erosion and Profit Shifting, that, in the OECD's view, gaps in the interaction of domestic tax rules of various countries, the application of bilateral tax treaties to multijurisdictional arrangements, and the rise of different business models have led to weaknesses in the international tax

system. The Plan acknowledges that while generally, existing domestic law and treaties yield the correct result, without coordinated action in the areas that give rise to policy concerns, countries that wish to protect their tax base may resort to unilateral action that could result in a resurgence of double taxation as well as global tax uncertainty. Thus, the Plan concludes that fundamental, consensus-based changes are needed to address double non-taxation and cases of no or low taxation where taxable income is artificially separated from the activities that generate it. The Plan contains 15 actions, which are linked to specific outputs that are to be completed in 2014 or 2015.
Source:
http://www.oecd.org/ctp/BEPSActionPlan.pdf

3. **OECD issues discussion draft on Tax treaty treatment of termination payments**

The OECD Committee on Fiscal Affairs ('CFA') invited public comments on a discussion draft on the tax treaty treatment of various payments that are likely to be made following the termination of an employment. The analysis and suggestions were made by a subgroup of Working Party 1 on Tax Conventions and Related Questions. The OECD had sought public comments before 13 September 2013. The draft discusses treatment of various types of payments such as remuneration received for previous work, damages for unlawful dismissal, payment in lieu of notice of termination, payment for unused holiday and sick leave etc., and proposes certain amendments, mainly to Commentary on Article 15 of the OECD Model (2010).
Source:
http://www.oecd.org/ctp/treaties/Termination_Payments.pdf

4. **Global Forum on Tax Transparency: new reports review jurisdictions' information exchange**

The OECD Global Forum on Transparency and Exchange of Information for Tax Purposes has released peer review reports assessing the tax systems of 13 jurisdictions for information exchange. The new reports cover key players in a move toward increased tax co-operation. The 11 "Phase 2" reports review the exchange of information in practice in Austria, Bermuda, Brazil, British Virgin Islands, India, Luxembourg, Malta, Monaco, Qatar, San Marino and The Bahamas. The two "Phase 1" reports look at the legal and regulatory framework for transparency and exchange of information in Israel and Lithuania. All the reports assess the jurisdictions' commitment to the international standard for tax information exchange.

The review shows that India's exchange of information practice is in line with the international standard for transparency and exchange of information for tax purposes. India's legal framework and its practical implementation ensure that ownership, accounting and bank information is available and accessible by the tax administration in line with the standard. India now has in place appropriate organizational processes and resources to ensure effective exchange of information and considerably improved the timeliness of responses during 2011 and 2012. India's treaty partners consider it to be a very important and fully committed partner with long experience in exchange of information
Source:
http://www.oecd.org/tax/globalforumontaxtransparencynewreportsreviewjurisdictionsinformationexchange.htm

5. **Canada Launches consultation on measures to prevent treaty shopping**

On 12 August 2013, Canada's Department of Finance released a consultation paper titled Treaty shopping - the problem and possible solutions. In the accompanying documents, the Department requested that stakeholders submit their comments on any aspect of the paper by 13 December 2013. In addition, stakeholders were asked to consider seven questions.

The 2013 Federal Budget announced a consultation process to be undertaken with regard to "treaty shopping." The Government of Canada noted that it has "been largely unsuccessful in challenging treaty shopping cases in court," and signaled its openness to proceed perhaps with unilateral measures in this regard, as some other countries have done. The preamble to the consultation paper states that "the intention of this consultation process is to examine a range of possible approaches to address the practice of treaty shopping into Canada. The purpose of this paper is to serve as the basis for a discussion aimed at reaching a workable solution to the problem of treaty shopping. In finding a solution to treaty shopping, the main goals are to ensure that Canada remains an attractive destination for foreign investors and that all of the purposes of Canada's tax treaties are achieved."
Source : http://www.fin.gc.ca/activty/consult/ts-cf-eng.asp#a1

6. **China Clarifies implementation of preferential corporate income tax policies for software and integrated circuit (IC) industries**

On 25 July 2013, China's Ministry of Finance and the State Administration of Taxation (SAT) released SAT

Announcement [2013] No. 43 (Announcement 43) to provide clarifications related to the implementation of preferential corporate income tax policies for the software and IC sectors. Announcement 43 is retroactively effective from 1 January 2011.

7. Argentina introduces amendments to its rules on tax- havens

The Government of Argentina has issued Decree 589/2013, published in the Argentine Official Gazette on 30 May 2013, modifying the rules on low or nil tax jurisdictions (tax-havens). The Regulatory Decree to the Income Tax Law contained a list of 87 countries, jurisdictions and territories considered as tax-havens for tax purposes and the list has been eliminated and the Federal Tax Authorities (AFIP) have been empowered to establish a new list, which will include the countries, jurisdictions, territories and tax systems that will be considered as "cooperators for purposes of fiscal transparency." The new Decree establishes that any reference in the tax law to "tax-havens" now means jurisdictions that do not qualify as "cooperators for purposes of fiscal transparency".

8. Italy approves new non- resident forms for mitigation of withholding taxes

On 10 July 2013, the Italian Revenue Agency approved a set of new forms to be filed by nonresidents claiming an exemption, refund or reduction of Italian taxes on dividends, interest, royalties and other income sourced in Italy. The Revenue also approved a specific tax residence certificate to be used by Italian residents when applying for foreign tax mitigation under bilateral treaties.

9. EU commission requests Spain to amend its rules governing international double taxation relief

The EU Commission recently announced (MEMO/13/583 published on 20 June 2013) that it has formally requested Spain to amend its rules governing the methods that provide relief from double taxation applicable to income from foreign subsidiaries. The commission contends the Spanish rules are more burdensome than the rules, which apply to dividends received from Spanish tax resident subsidiaries.

Experts Speak

OECD's Action Plan on Base Erosion and Profit Shifting

Isha Sekhri and Saurabh Arora, Senior Tax Professionals

On 19 July 2013, the Organisation for Economic Cooperation and Development OECD issued its much-anticipated Action Plan on Base Erosion and Profit Shifting ('BEPS'). The Action Plan reiterates the themes of the initial report on BEPS (of February 2013) that, in the OECD's view, gaps in the interaction of domestic tax rules of various countries, the application of bilateral tax treaties to multijurisdictional arrangements, and the rise of the digital economy have led to weaknesses in the international tax system.

The Plans main concern is where taxable income is artificially separated from the activities that generate it. The Plan calls for fundamental changes to the current mechanisms and the adoption of new consensus-based approaches, including anti-abuse provisions, to prevent and counter BEPS. The Plan identifies 15 actions needed to address BEPS, sets time limit to implement these actions and identifies the resources needed and the methodology to implement these actions.

Action aimed at addressing concerns with respect to the digital economy

Action 1 - Address the challenges of the digital economy

The first action is to identify the main difficulties that the digital economy poses for the application of existing international tax rules and develop detailed options to address these difficulties, adopting a holistic approach and considering both direct and indirect taxation, interalia including the characterisation of income derived from new business models, the application of related source rules, and the manner of ensuring the effective collection of VAT/GST with respect to the cross-border supply of digital goods and services. The expected output of this action is a report identifying issues and possible actions. The target date is September 2014.

Actions aimed at establishing international coherence of corporate income taxation

Action 2 - Neutralize the effects of hybrid mismatch arrangements

This Action proposes to develop model treaty provisions and recommendations regarding the design of domestic rules to neutralise the effect of hybrid instruments and entities, including (i) appropriate changes to the OECD Model Tax Convention ('MC'); (ii) domestic law provisions that:

prevent exemption or non-recognition for payments that are deductible by the payor;

deny a deduction for a payment that is not includible in income by the recipient;

deny a deduction for a payment that is also deductible in another jurisdiction;

(iii) where necessary, guidance on co-ordination or tie-breaker rules if more than one country seeks to apply such rules to a transaction or structure. This work will be co-ordinated with the work on interest expense deduction limitations, CFC rules, and treaty shopping. The expected output of this action is changes to the OECD Model Tax Convention and recommendations on domestic rules. The target date is September 2014.

Action 3 - Strengthen CFC rules

The action proposes to develop recommendations regarding the design of controlled foreign company rules. The expected output of this action is recommendations to domestic law provisions. The target date is September 2015.

Action 4 - Limit base erosion via interest deductions and other financial payments

This action proposes to develop recommendations regarding best practices in the design of rules to prevent base erosion through the use of interest expense and other financial payments and providing Transfer Pricing ('TP') guidance on pricing of related party financial transactions. The work will be co-ordinated with the work on hybrids and CFC rules. The expected output of this action is recommendations on domestic provisions and changes to the OECD Transfer Pricing Guidelines. The respective target dates are September 2015 and December 2015.

Action 5 - Counter harmful tax practices more effectively, taking into account transparency and substance

This action proposes to refocus the work on harmful tax practices, on improving transparency and on requiring substantial activity for any preferential regime. It proposes engagement with non-OECD members on the basis of the existing frameworks and consider revisions or additions to the existing framework. The expected output of this Action is a report on the review of member country regimes, a report on strategy to expand participation to non-OECD member countries, and revision of existing criteria with respect to harmful tax practices. The target dates range from September 2014 to December 2015.

Actions aimed at restoring full effects and benefits of international standards

Action 6 - Prevent treaty abuse

This action proposes to develop model treaty provisions and recommendations on the design of domestic rules that would prevent the granting of treaty benefits in inappropriate circumstances and identify tax policy considerations that countries should take into account when negotiating tax treaties. The Plan states that this work will be coordinated with the work on the Action on hybrids structures. The expected output of this Action is changes to the OECD Model Tax Convention and recommendations on domestic rules. The target date is September 2014.

Action 7 - Prevent the artificial avoidance of permanent establishment status

This action proposes to develop changes to the definition of PE to prevent the artificial avoidance of a PE status in relation to BEPS, citing in particular the agency-PE rules, commissionaire arrangements, and the PE exceptions for preparatory and auxillary activities. This Action also will address related profit attribution issues. The expected output of this Action is changes to the OECD Model Tax Convention. The target date is September 2015.

Actions aimed at assuring that transfer pricing outcomes are in line with value creation

Action 8 - Intangibles

This action proposes to develop rules to prevent BEPS by moving intangibles amongst group members. These include (i) adopting clearly delineated definition of intangibles; (ii) ensuring profits associated with the intangibles are appropriately allocated; (iii) develop special rules for transfers of hard-to-value intangibles; and (iv) updating the guidance on cost contribution arrangements. The expected output of this action is changes to the OECD Transfer Pricing Guidelines and possibly to the OECD Model Treaty. The respective target dates are September 2014 and September 2015.

Action 9 - Risks and capital

The action proposes to develop rules to prevent BEPS on transferring risks among, or allocating excessive capital to, group members. This will involve adopting TP rules or special measures to ensure that inappropriate returns will not accrue to an entity solely because it has contractually assumed risks or has provided capital. The plan states that this work will be co-ordinated with the work on interest expense deductions and other financial payments. The expected output of this Action is changes to the OECD Transfer Pricing Guidelines and possibly to the OECD Model Treaty. The target date is September 2015.

Action 10 - Other high-risk transactions

This action proposes to develop rules to prevent BEPS involving transactions which would not, or would only very rarely, occur between third parties. This will involve adopting rules to clarify the circumstances in which transactions can be recharacterized, clarifying the application of TP methods (profit splits in particular) in the global value chain context, and addressing common types of base-eroding payments such as management fees and head office expenses.

The expected output of this Action is changes to the OECD Transfer Pricing Guidelines and possibly to the OECD Model Treaty. The target date is September 2015.

Actions aimed at ensuring transparency while promoting increased certainty and predictability

Action 11 - Establish methodologies to collect and analyze data on BEPS and actions to address it

This action proposes to develop recommendations regarding indicators of the scale and economic impact of BEPS. The expected output of this Action is recommendations on what data to collect and methodologies for analyzing such data. The target date is September 2015.

Action 12 - Require taxpayers to disclose aggressive tax planning arrangements

This action proposes to develop recommendations on the design of mandatory disclosure rules for aggressive or abusive transactions, arrangements, or structures. The expected output of this Action is recommendations on domestic rules. The target date is September 2015.

Action 13 - Re-examine transfer pricing documentation

This action proposes to develop rules on transfer pricing documentation to enhance transparency for tax administrations, taking into consideration the compliance costs for business. The expected output of this Action is changes to the OECD Transfer Pricing Guidelines and recommendations on domestic rules. The target date is September 2014.

Action 14 - Making dispute resolution mechanisms more effective

The plan states that the uncertainties arising from the interpretation and application of this plan could be resolved by improving the effectiveness of MAP. The expected output of this action is changes to the OECD Model Tax Convention. The target date is September 2015.

Action aimed at addressing the need for swift implementation

Action 15 - Developing a multilateral instrument for amending bilateral treaties

This action proposes to analyse the tax and public international law issues related to the development of a multilateral instrument to enable jurisdictions to implement measures developed in the course of the work on BEPS in their bilateral tax treaties can do so on a timely basis. The expected output of this Action is a report on international law and tax issues and a multilateral instrument. The target dates are September 2014 and December 2015.

Way forward

The Plan is an ambitious document that reflects the concern about BEPS issues globally. The Plan proposes an extraordinary amount of work to be undertaken till December 2015. The expected outputs would change the OECD MC, TPG, recommendations for domestic law rules, and the development of novel approaches such as multilateral tax instruments.

The Plan indicates that the OECD's work on the Actions will “include a transparent and inclusive consultation process”.

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