

# NEWSLETTER

IFA / INDIA BRANCH



Dear IFA members and friends,

Wishing you belated 2020 and welcome to a new decade which shall reshape tax canvas never experienced before.

I am pleased to present our first 2020 news letter, efficiently compiled by our team lead by Paresh. The main focus of this quarter's news letter is a case study on Tax consolidation, conceptualised and designed by CA PV Srinivasan, who incidentally has also authored a treatise on the same subject, released late last year. Experts who have contributed to the case study include CA KR Sekar and 2 international contributors - Mirna Srepanete from Vienna University & Daniel Sennewald, MAN Energy. Our experts take us through the journey & nuances associated with accomplishing tax consolidation, including in particular treatment of subsidiary losses in a cross-border situation. Sekar draws an interesting parallel with the Indian POEM regulations, Mirna compares such consolidation under Austrian tax rules and Daniel take the debate from a BEPS and EU's proposed CCTB tax consolidation rules perspective. Tax consolidation, in the domestic context has been a subject of debate in India's tax policy and the case makes an interesting area of research which IFA global Organization has debated in past Congresses.

Several events were held in past quarter and some notable ones include IFA, Chennai branch conference on November 15-16, which besides being widely attended by members, saw presence of ITAT President Hon. Justice PP Bhat and Vice Presidents, N V Vasudevan and GS Pannu. More recently, IFA was invited along with the ITAT Bar Associations in Mumbai & Delhi and All India Federation of Tax Practitioners, to support the ITAT foundation day in Delhi on January 24-

25. The event which was also supported by ICAI attracted over 800 participants which besides all members of the ITAT included the Chief Justice of India, Delhi high court and several members of the judiciary. Ajay Vohra, Senior Advocate participated in one of the panels.

I am pleased to inform you all that the EC has recommended following branch reporters for the 2021 Berlin Congress.

- PV Srinivasan for Subject 1 on Group approach & separate entity approach in domestic & international tax
- Kamlesh Varshney, IRS & CA Nilesh Kapadia as joint reporters for subject 2 on Big data & tax - domestic & international taxation of data driven business.

I wish to thank the technical committee comprising of CA Padam Khincha, CA Shefali Goradia & IFA's Gen.Secretary Vijay Goel to help us finalise the branch reporters for Berlin Congress.

The news letter contains an interesting list of IFA events being hosted by various branches and regions. I encourage you to consider planning your overseas work visits around the dates of the conferences. More importantly, kindly mark April 24 and 25 for the 2020 Annual IFA India branch conference at The LaLit in New Delhi. This conference is supported by IBFD. We hope to be able to make this annual feature an IFA event not worth missing.

With my best regards,

**MUKESH BUTANI**  
Chairman, India branch.



# NEWSLETTER

IFA / INDIA BRANCH



Dear Readers,

IFA India Newsletter Team wishes you a very Happy New Year 2020!

I am pleased and excited to present to you the very first edition of IFA Newsletter for year 2020!

This issue opens with a case study on 'Tax Consolidation Reporting' by Mr. PV Srinivisan. We are delighted to share the views of K.R. Sekar (Partner, Deloitte India), Mirna Solange Srepanete (Academic and tax professional Institute for Austrian and International Tax Law at Vienna University of Economics and Business) and Daniel Dennewald (Global Tax Head MAN Energy Solutions SE, Augsburg, Germany) covering several practical and technical aspects around this 'tax policy' topic.

This Newsletter also contains few of the key international updates and developments, and an update on the IFA conferences held in India and worldwide, and lists the upcoming IFA events for international tax professionals to choose from and register.

Again welcome back from your vacations and wish you Happy Reading!

Best regards,

**PARASH PAREKH**

*Editor-in-Chief*



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# TAX CONSOLIDATION: CASE STUDY, QUESTIONS AND EXPERTSPEAK

BY  
PV SRINIVASAN

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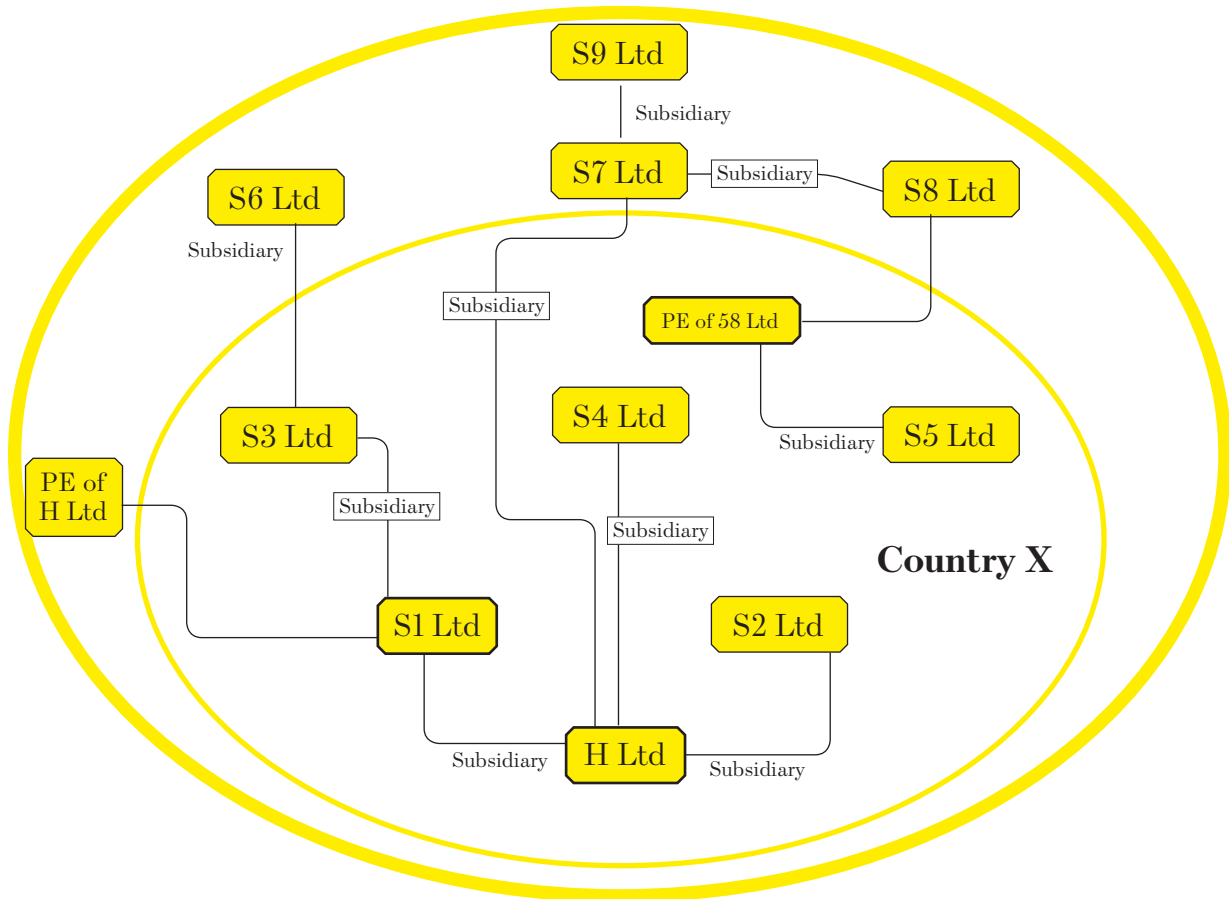
## CASE STUDY

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Country X observes that many of its large business houses have expanded their domestic and foreign businesses using wholly / substantially owned subsidiaries. It finds that on an average, each large corporate group has 50 subsidiaries, 70% of them incorporated outside Country X. Country X requires preparation of consolidated financial statements as per generally accepted accounting principles ('GAAP'). Following the BEPS Action Plans, large business houses headquartered in Country X find that other tax jurisdictions have started looking at Multinational Enterprises ('MNEs') based on their global operations.

## SECTION 1

A MNE, which has its ultimate holding Company H Ltd ('Company H') in Country X (represented by inner circle), has the structure in Fig 1 below:



H Ltd in Country X is required to comply with detailed country by country reporting requirements, which requires documentation through Master File and Local File. It was earlier possible for the MNE to carry on many business activities without creating a PE in another country, but with anti-fragmentation rules coming into force, the business activities of closely connected entities of the MNE will be aggregated. Further, with market access in various countries using local intangibles and production inputs through users, the MNE is visited with the prospect of Formulator Apportionment of group profits amongst the entities in various countries in which the MNE has business operations or investments or both. The MNE also apprehends that the regional holding company (say S7 Ltd in the above illustration), which is an investment hub for enabling downstream investments in other country clusters, would be subject to the test of residency applying Place of Effective Management ('POEM'). The MNE is already subject to litigation on transfer pricing issues, largely in Country

X and but they are also emerging in other countries. It is expected that these global developments in the field of taxation will increase the cost of compliance for the MNE. Further, it is expected that the MNE will have to pursue arduous dispute resolution mechanism and even be subject to double taxation. The overall outlook of the MNE is that globalisation is reversing and its cross-border business is becoming more challenging.

Country X wants its MNEs to be globally competitive. With the rest of the world looking at the MNE itself as a single business unit, Country X also brings about parity in its tax administration by introducing a draft tax policy on group taxation i.e. treating each MNE as a single unit of assessment instead of each company of an MNE as a separate assessee. Country X is of the view that the risk rating of MNE could be done better and the tax administration of the MNEs could be centralised into a single expert group of the tax administration. However, there is an apprehension that Country X will face a significant revenue loss, atleast till the new regime settles well. Studying the case of H Ltd, Country X finds that its subsidiaries with odd number suffix (S1 Ltd, S3 Ltd, S5 Ltd, S7 Ltd and S9 Ltd) have incurred past losses. The subsidiaries with even number suffix (S2 Ltd, S4 Ltd, S6 Ltd and S8 Ltd) have profits. Also, the ownership / use of tangible and intangible assets of the MNE are transferred between group members. The MNE is known for its inorganic growth strategy and it is expected that new subsidiaries will be added through acquisitions. The MNE also di-vests its businesses, which means that the share of some of the existing subsidiaries will be sold to other unrelated acquirers.

Country X wants to decide on the following aspects relating to profits / losses:

1. Method of achieving tax consolidation of H Ltd and its subsidiaries, both resident in Country X (within the inner circle) and non-resident companies (outside the inner circle);
2. Treatment of past losses of a subsidiary resident in Country X (S1 Ltd, S3 Ltd and S5 Ltd);
3. Treatment of past losses of a subsidiary resident outside Country X (S7 Ltd and S9 Ltd);
4. Treatment of losses of a subsidiary resident in Country X during the consolidation term (S1 Ltd, S3 Ltd and S5 Ltd);
5. Treatment of losses of a subsidiary resident outside Country X during the consolidation term (S7 Ltd and S9 Ltd);
6. Treatment of profits of a subsidiary resident in Country X (S2 Ltd, S4 Ltd and PE of S8 Ltd);
7. Treatment of profits of a subsidiary resident outside Country X (S6 Ltd and S8 Ltd)

## SECTION 1

### QUESTIONS & EXPERT SPEAK:



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*Global Tax Head MAN  
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### Q.1 METHOD OF ACHIEVING TAX CONSOLIDATION OF H LTD AND ITS SUBSIDIARIES, BOTH RESIDENT IN COUNTRY X (WITHIN THE INNER CIRCLE) AND NON-RESIDENT COMPANIES (OUTSIDE THE INNER CIRCLE);

**KRS:** In my view the Country should follow the following approach:

#### Country having Subsidiaries in Country X- the Inner Circle

Since the Company is required to consolidate its subsidiaries under the applicable accounting standard, Country X should consider the Consolidated Profit/Loss of Company H Ltd as a Taxable Base. This would help the Country to measure the operating profit/loss of Company H, as a single unit and it would also help to have a consistent approach on measurement of profit.

Further Country X also has a PE of its Overseas Subsidiary and we need to examine the consolidation of PE. If Country X allows consolidation of its overseas subsidiaries, the PE will also be consolidated with Company H in Country X. On the contrary, if Country X does not allow consolidation of overseas subsidiaries and applies POEM to bring overseas subsidiaries into the tax net, the consolidation of PE as a part of Company H in Country X may not arise.

#### H Ltd having overseas Subsidiaries in the Outer Circle

With regard to Overseas Subsidiaries, though POEM can be applied to bring the overseas subsidiaries into the tax net in Country “X”, it depends on multiple factors including the maturity of Tax Administrators. Further, it is not necessary

that POEM always brings overseas subsidiary into the tax net of the home country. The author is of the view that POEM is not an effective tool and its implementation is not successful. Hence, the author believes that Tax Consolidation is an effective tool to bring profits/losses of 100% subsidiaries into tax.

The method of tax consolidation needs to be decided i.e. whether Country “X” should have Check the Box Regulations similar to US or simple Gross Tax Consolidation. The application of US “Check the Box” needs lot of maturity on the part of tax administrators as it leads to unintended or intended double dip/Interest benefits to the Holding Company leading to erosion of tax base. On the contrary UK or Australia do not have equivalent of “Check the Box regulations” but they follow Group Relief or Gross Consolidation through Pooling of Interest method. It is interesting to note that UK or Australia do not follow Global Consolidation.

Coming to Country “X”, though under consolidation, losses of the subsidiaries are to be allowed, the issue is whether Country X follows “Check the Box” regulations or follows group consolidation. In my assumption, Country X has POEM rules which brings the foreign subsidiary into Tax through POEM application. Though one can debate on

the efficacy of POEM and also whether POEM rules applies to subsidiaries on the facts, the first option before Country X is to leverage on POEM rules. As explained by me in earlier paragraphs the application of POEM is always fraught with controversies and leads to multiple challenges. Hence, in my view Country X should allow consolidation of overseas subsidiaries through consolidation method as Company H Ltd is required to comply with Accounting Regulations for Consolidation. Hence, the same consolidation should be followed for tax regulations too, allowing the company to claim depreciation/additional depreciation under tax regulations. In this route, the PE of S8 in Country X will also be part of Consolidation.

**MSS:** For the analysis of the case study, we assume that the tax consolidation falls under the Austrian tax rules, and therefore, for the purpose of the analysis Country X is considered to be Austria. Under the Austrian law since 2005 (§ 9 KStG) two or more companies can form a tax group, provided the parent company (capital company, limited liability, cooperative, insurance company or bank), directly or indirectly (through another group member or a partnership) owns more than 50% of the shares and the voting rights in a domestic or

foreign subsidiary (group member). The subsidiary must be a resident stock company (AG), limited liability company (GmbH) or cooperative, or a comparable non-resident company. It is mandatory that the stake of the major shareholder within the tax group amounts to at least 40% and that of each remaining group members have a minimum stake at least 15%. In addition, non-residents companies are only entitled to join an Austrian tax group if the foreign company is resident in (i) an EU Member State or (ii) in a third country with which Austria has concluded a comprehensive administrative assistance agreement regarding the exchange of information. However, only “first-tier” foreign subsidiaries may be included into the group, meaning that the required share exceeding 50% in a foreign group member needs to be held by one or more Austrian group members. Lastly, it must also be taken into account that if a group member withdraws from the group within a minimum commitment-period of three years, all tax effects derived from its group membership must be reversed.

**DS:** From the taxpayer’s perspective (H Ltd) it would certainly be beneficial if all subsidiaries both the resident as well as the non-resident companies (i.e., inner circle and outside the circle) could be included in one tax consolidation group. The same would be true for the existing PE’s. In an ideal scenario the administrative burden for H Ltd group could be heavily reduced if only the parent company has to file one tax return for the entire group. Furthermore, intra-group losses and profits could be set off and gains resulting from intra-group transactions would be eliminated (reduction of TP disputes). This approach however would bear the inherent risk of a significant revenue loss for Country X. Furthermore, a cross-border tax group would create complexities due to the interplay of the taxation rights and tax systems of other countries concerned without having implemented a synchronized taxation scheme.

In order to reduce such intricacies and as an approach to tackle base erosion

and profit shifting combined with an attempt to increase competitiveness the EU proposed a Common Consolidated Corporate Tax Base (CCCTB) in 2011 - a single set of rules to calculate companies’ taxable profits in the EU. According to the initial proposal cross-border companies would only have to comply with one, single EU system for computing their taxable income instead of multiple different tax systems. Consequently, the respective companies would be allowed to file only one tax return for all of their EU business activities and also to offset losses in one Member State against profits in another. As a final step the consolidated taxable profits will be shared between the Member States in which the group is active, using an apportionment formula<sup>1</sup>. Each Member State will then tax its share of the profits at its own national tax rate. As a consequence, the transfer pricing rules would be redundant and hence removed. The CCCTB was aimed on the one hand to boost the economy, to reduce administrative burden for both taxpayer and tax authorities and on the other hand to eliminate hidden tax rulings (e.g., Apple case in Ireland) and preferential tax regimes which deemed to be a root for base erosion. In order to avoid profit shifting to non-EU countries robust anti-avoidance regimes were to be included in the CCCTB. The CCCTB is still not in place as the same was seen as a too ambitious step due to the expected revenue shift between the EU member states as a consequence of the formulary approach. A simulation by the German Economic Institute (IW) in 2019 showed that particularly Ireland, Luxembourg and Malta would receive significantly less tax revenue as sales volume, number of employees and capital invested are relatively small in these countries compared to other countries like France and Italy. In 2016 the C(C) CTB initiative was re-launched with an adopted approach that should first focus on the work for a proposal to establish a common corporate tax base (CCTB) and only in a second phase on a proposal for a common consolidated corporate tax base.

As the C(C)CTB will remain theory for the time being it is worth to have a look into practical examples of already

existing tax consolidation schemes which will prove that there is still a big gap between the ideal world and reality.

Taking the example of Germany a tax group<sup>2</sup> for Corporate Income Tax (CIT) and Trade Tax is only possible if the subsidiary’s equity is held directly or indirectly to an extent of at least 50% by the parent and the two have concluded a formal court-registered profit and loss pooling agreement (PLPA) for a period of at least five years. Under the PLPA, the subsidiary surrenders its entire income to the parent. Conversely, the parent is obligated to compensate the losses incurred by the subsidiary throughout the term of the agreement. The conclusion of a PLPA is costly and may lead to the further disadvantage that the scope of losses for which a parent company assumes liability is enlarged beyond the subsidiary’s equity capital. As a precondition for forming the tax group, the parent must be an individual, a trading partnership, or a non-tax exempt corporation, association, or estate<sup>3</sup> and not a mere financial holding whereas the subsidiary must be a corporation having its place of management in Germany and at least its registered seat in an EU/EEA member state. Coming back to the case study consequently H Ltd would be treated as parent and only the subsidiaries of the inner circle (i.e., S1, S2, S3, S4 and S5 Ltd)<sup>4</sup> could be included in the tax group<sup>5</sup>.

The German group taxation regime results in a neutralisation of the subsidiaries’ income and consolidates the same on the parents level. As a result, the tax group’s losses and profits can be offset with immediate effect. Another advantage is that for the purposes of the German interest limitation rules (Zinsschranke) all interest expenses related to intra-tax group financing are not included in the assessment base and hence are not impacting the tax deductibility. The existence of a tax group does not provide for any relief from the general transfer pricing rules. The German domestic transfer pricing regulations still have to be considered (like hidden contribution or hidden profit distribution in case of e.g. inflated prices paid by the subsidiary for the supply of a generator to parent). Even

if the results of the tax group are taxed on the parents level, tax declarations have to be filed both for CIT and Trade Tax for all companies of the tax group as if the fiscal unity did not exist.

However, there are other countries providing for slightly more flexible tax consolidation regimes. In case of the UK operating taxable profits and losses arising in the same period can usually be offset between UK resident 75% affiliates within a worldwide group (group relief). This extends to offsetting the UK profits attributed to a UK PE of a non-UK resident group member (subject to additional requirements) like e.g. PE of S8 Ltd in Country X. Intra-group transfers of capital assets between UK companies (which includes UK PEs) are generally tax-free.<sup>6</sup> This treatment is also extended to intra-group transfers of loan relationships, derivatives, and intangibles. Even if there is no automatic offsetting mechanism for capital gains and losses where these arise in different group companies the same can be arranged either by actual transfer of the asset prior to disposal or by election.

The situation in Finland is different

as there is no group consolidation for CIT purposes per se. However, via group contributions (i.e., lump sum payments of cash based on annual taxable profits), group companies may even out their taxable profits and losses, which leads effectively to the same result as consolidation would. A group contribution is a deductible cost for the granting company and taxable income for the receiving company. Amongst others it must be noted that such contributions are only possible if both companies are Finnish resident for tax purposes and are limited liability companies or co-operatives with business activities (i.e. no financial, insurance, or pension institutions).

Besides tax consolidation for Corporate Taxes, some countries like e.g., Australia implemented a cross-border group for indirect taxation (inter alia VAT or GST). As a result all intra-group transactions would be treated as non-taxable. If as an example S8 Ltd would provide a service in Country X being a subcontractor of H Ltd the transaction would not be subject to VAT. Only the transaction between H Ltd and its (end-)

customer could become VAT taxable.

<sup>1</sup> Potential parameters could be salaries, turnover, number of employees etc.

<sup>2</sup> Such a tax group is referred to in German tax law as an "Organschaft". For the convenience of the international reader the term "tax group" is used in the text.

<sup>3</sup> In case of a foreign parent company a (domestic) permanent establishment in Germany is required whereas the shares of the subsidiary must be allocated to the PE.

<sup>4</sup> The results of the PE of H Ltd. will be either exempt in Country X (in case exemption method applies) or in case the credit method applies the results will be taxed at the level of H Ltd. in Country X and tax credit for foreign taxes is available (subject to potential limitations).

<sup>5</sup> Based on the fact that all subsidiaries are wholly / substantially owned (i.e., >50% of the voting rights are directly or indirectly held by H Ltd) and assuming that a PLPA is concluded between the parent and the subsidiaries. Even S5 Ltd being a lower-tier subsidiary of H Ltd can be included as it is a tax resident of Country X. Hence, the fact that S7 and S8 Ltd are neither having its statutory seat nor the place of management in Country X will not have an adverse effect on the acceptance of the tax group from a German perspective.

<sup>6</sup> Please note that the definition of group for these purposes is not identical to the definition of group relief for losses.

## Q.2 TREATMENT OF PAST LOSSES OF A SUBSIDIARY RESIDENT IN COUNTRY X (S1 LTD, S3 LTD, S5 LTD)

**KRS:** The treatment of past losses are dependent on the following:

- Whether the losses of the Company were incurred when the company was a 100 % subsidiary of Company H
- What should be the position of losses if the Company ceases to be a Subsidiary?
- Whether Parent Company is automatically entitled for losses or there should be a surrender by Subsidiary.
- Whether Parent Company should compensate the Subsidiary for transfer of losses.

The answers to the above is dependent on the method of consolidation to be followed by the Country X. If Country X prefers POEM approach then the above questions becomes redundant as POEM does not have any consolidation approach.

In my view, normally Consolidation under Pooling Method leads to consolidation of not only P&L but also Balance Sheet.

Further, the ability to utilise pass losses is also dependent on the following:

- Treatment of Unabsorbed depreciation
- Treatment of Bookless and Book depreciation for Computation of MAT purposes.

On the assumption that Country X has similar regulations like India on the above, it becomes important to allow past losses and depreciation. One more point to be noted is that if Company H Ltd and its subsidiaries are assessed as one unit H Ltd and the losses were allowed in the domestic subsidiaries as a taxable unit, by consolidation, the subsidiaries ceases to be a tax unit and becomes part of Company H Ltd, which becomes single tax unit. Hence, in my view the past losses of the subsidiaries should be part of Company H Ltd as subsidiaries ceases to become Tax Unit once consolidation is introduced.

However, this would also reduce the

tax base of the Company H Ltd, which may go against revenue interest. Hence, Company H Ltd may be given an option of monetising the past losses by compensating its subsidiaries so that losses would always be with Company H Ltd even if subsidiaries ceases to be subsidiaries of Company H Ltd at any time in future.

**MSS:** Past losses of a subsidiary resident in Austria, e.g. S1 Ltd, S3 Ltd, can be offset up to the amount of the group member's own profit, e.g. S1 Ltd, S3 Ltd correspondingly. There are no limits of deduction, therefore it enables the deduction of 100% of the pre-existing loss carry-forward.

**DS:** From a German perspective, past losses of a subsidiary cannot be utilized for tax consolidation purposes. All past losses will be carried forward during the consolidation term.

### Q.3 3. TREATMENT OF PAST LOSSES OF A SUBSIDIARY RESIDENT OUTSIDE COUNTRY X (S7 LTD AND S9 LTD)

**KRS:** The overseas subsidiary losses may have different attributes compared to domestic subsidiaries. Further, the losses of the overseas subsidiary were not assessed by Country X and not in the purview of Country X. Hence, in my view, the past losses of the subsidiaries of Overseas Companies should not be brought within the purview of Country X. By the same analogy, the

PE of overseas subsidiary in Country X will also receive similar treatment.

**MSS:** Past losses of a subsidiary non-resident in Austria, e.g. S7 Ltd, S9 Ltd, can be offset up to the amount of the group member's own profit, e.g. S7 Ltd, S9 Ltd correspondingly. There are no limits of deduction, therefore it enables the deduction of 100% of the pre-existing loss carry-forward.

**DS:** Taking the German perspective, subsidiaries resident outside Country X cannot be part of the tax group (based on the assumption that its place of management is not in Country X). But even if the subsidiaries would be included in the tax group the treatment of past losses would be the same as outlined in question 2.

### Q.4 TREATMENT OF LOSSES OF A SUBSIDIARY RESIDENT IN COUNTRY X DURING THE CONSOLIDATION TERM (S1 LTD, S3 LTD AND S5 LTD)

**KRS:** During consolidation term as Company H Ltd is assessed as a single unit, the losses of Subsidiaries resident in Country X should be part of Company H Ltd. However, the challenge that arises is the limitation period and also the impact if subsidiaries cease to be subsidiaries of Company H Ltd. The law that applies to a subsidiary will also be applicable to Company H Ltd and the same cannot be different. On cessation of company becoming a subsidiary of Company H Ltd, and the losses have become losses of H Ltd, the same should continue. However, on cessation of subsidiary, Company H Ltd should compensate the subsidiary for taking over its losses, if it

wishes to enjoy those losses.

**MSS:** The losses of a resident group member (subsidiary), e.g. S1 Ltd, S3 Ltd, S5 Ltd, can be carried forward without any time limit. However, tax loss carryforwards generally can be offset against taxable income only up to a maximum of 75% of the taxable income for any given year. If the losses cannot be deducted in the current year, they must be deducted in the following years taking this limit into account.

**DS:** As per the German regulations a PLPA concluded between parent and its qualifying subsidiaries is a precondition

in order to allow for tax consolidation. The PLPA stipulates that the subsidiary surrenders its entire income to the parent. Conversely, the parent is obligated to compensate the losses incurred by the subsidiary throughout the term of the agreement. Hence, the respective subsidiaries will each end up with a nil result whereas the losses can be fully and immediately utilized / set off against any profits on the level of the parent incurred in the same Financial Year. If the parent is ending up with a total loss the same can be either carried back or (if that is not possible) carried forward. It must be considered that a minimum taxation regime exists in Germany.

### Q.5 TREATMENT OF LOSSES OF A SUBSIDIARY RESIDENT OUTSIDE COUNTRY X DURING THE CONSOLIDATION TERM (S7 LTD AND S9 LTD)

**KRS:** The same rules as explained in case 4 will apply here as Country X follows the concept of treating Company H Ltd as a single unit. However, on cessation of overseas subsidiary the issue is the treatment of past losses. The same position as explained in case 4 would be applicable.

**MSS:** The losses of a non-resident, e.g. S7 Ltd ("first-tier"), can be attributed to

H Ltd provided it fulfils the requirement of more than 50% of capital and voting rights. Losses from S9 (non-resident) Ltd cannot be attributed to H Ltd because it is not a first-tier subsidiary. However, losses from non-resident companies are attributed to the tax group parent in the proportion of the shareholding quota. The foreign tax loss has to be calculated in accordance with Austrian tax law. However, since 2012 it is capped with

the amount actually suffered based on foreign tax law. In addition, the losses of a non-resident group member will be recaptured if the losses are utilized by way of a loss carry-back or forward or if this offset possibility exists in the state of the incorporation of the group member. The exit of a non-resident, e.g. S7 Ltd and S9, will trigger the recapture of group losses and taxation in Austria in subsequent years if they cannot be

offset against profits of the respective non-resident group member

Furthermore, with effect from 1 March 2014, the deductibility of non-resident losses is limited to the amount of 75% of the consolidated income of the group parent and

its resident group members. Foreign losses that cannot be deducted in the assessment year due to 75% limit (remaining losses) are included in the loss carry-forward of the parent company, subject to the same 75% limitation.

**DS:** Based on the assumption that the place of management of S7 and S9 Ltd is not in Germany both subsidiaries cannot be part of the tax group and hence the losses cannot be consolidated, accordingly.

## Q.6 TREATMENT OF PROFITS OF A SUBSIDIARY RESIDENT IN COUNTRY X (S2 LTD, S4 LTD AND PE OF S8 LTD)

**KRS:** In my proposal, Company H Ltd is treated as a single unit, the profits of its subsidiaries will be part of Company H Ltd including PE. Further, since Company H Ltd is treated as one unit the application of Dividend Distribution Tax, WHT on subsidiaries payment would become redundant.

**MSS:** Profits from subsidiary resident in Austria, i.e. S2 Ltd, S4 Ltd, PE of S8 Ltd, could be allocated 100% to the group parent also in Austria, in this case H Ltd, if more than 50% of the

capital and the majority of the voting rights in the subsidiary. In the case of the subsidiaries S2 Ltd and S4 Ltd the participation should be at least 40% of one of the two and the other at least 15% so profits can be allocated to H Ltd. In the case of the profits attributable to the PE of S8 Ltd could be allocated to H Ltd provided that there is an indirect participation of at least 15%.

**DS:** S2 and S4 Ltd both being part of the tax group surrender its entire income to the parent as per the PLPA. Consequently,

the subsidiaries will end up with a nil result whereas the profits are consolidated on the level of the parent (i.e., can be offset against other losses incurred by the parent or other subsidiaries of the tax group). Based on the assumption that the place of management of S8 Ltd is not in Country X the profits of its PE cannot be consolidated at the level of H Ltd. Instead, Country X has the right to tax profits attributable to the PE whereas the residence Country of S8 Ltd either has to exempt the PE profits from its tax base or allow for foreign tax credit of the PE taxes paid in Country X.

## Q.7 TREATMENT OF PROFITS OF A SUBSIDIARY RESIDENT OUTSIDE COUNTRY X (S6 LTD AND S8 LTD)

**KRS:** The position is no different from case 6. However, the application of TP to a 100% subsidiary is not required from tax perspective and TP regulations are required to be adhered to by Company H Ltd in Country X for the transaction of all associates including transactions of subsidiaries with associates. The main issue that needs to be discussed is allowability of FTC. Considering that Consolidation rules allow Company H Ltd as a separate unit, Company H Ltd is entitled for FTC on taxes paid by its

subsidiaries in the home country as the profits are doubly taxed. But it is important that Country X should have detailed FTC Regulations to allow and carry forward FTC.

**MSS:** Profits from subsidiaries non-resident in Austria, i.e. S6 Ltd and S8 Ltd, could be allocated 100% to H Ltd provided the 50% of indirect participation is reached. In this case, if more than 50% of the capital and the majority of the voting rights in the

subsidiary. In this case, H Ltd must have at least 40% in S1 Ltd or S7 Ltd and 15% in the other.

**DS:** Based on the assumption that the place of management of S6 Ltd and S8 Ltd would not be in Country X both subsidiaries could not be part of the tax group from a German viewpoint. The profits would not be consolidated and hence offered to tax by S6 Ltd and S8 Ltd in its residence Country.

# INTERNATIONAL TAX UPDATES

BY  
SAURAV BHATTACHARYA  
SUDARSHAN RANGAN

## 1. OECD

### i) OECD Update on Multilateral Instrument Ratification, MLI Signatory and Inclusive Framework

Leichtenstein, Denmark, Iceland, Latvia, Mauritius are some of the major countries that recently deposited their instruments for ratification for the MLI BEPS convention. The detailed list of countries that have ratified and deposited their instruments along with the effective date of entry into force can be tracked on the OECD website : <http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf>.

Further, Honduras, Montenegro and Jordan are the latest developing countries to join the OECD BEPS Inclusive Framework Committee. With the inclusion of these countries, the membership count of the BEPS Inclusive Framework is at 137 as at December 2019. The updated list of the members of the inclusive framework can be tracked on the OECD website : <http://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf>.

Further, Bosnia and Herzegovina, Kenya and Oman signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base

Erosion and Profit Shifting (the MLI) thereby becoming the 90<sup>th</sup>, 91<sup>st</sup> and 92<sup>nd</sup> jurisdictions to join the Convention. The updated list of the members of the parties who are signatory to the MLI can be tracked on the OECD website <http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf>

### ii) OECD BEPS Inclusive Framework issues Guidance on Country by Country Reporting

The OECD BEPS Inclusive Framework released a guidance note on certain aspects pertaining to operation of Country by Country Reporting (CbCR).<sup>1</sup> The CbCR is a result of BEPS Action 13 which worked on the development of “rules regarding transfer pricing documentation to enhance transparency for tax administration, taking into consideration the compliance costs for business. The implementation of CbCR is widespread and being a minimum standard has been implemented by all countries. However there have been practical and interpretative issues that is still causing confusion amongst the taxpayer community as well as the tax administration owing to which tax risk

assessment is becoming an impediment.

In order to address these issues, the BEPS inclusive framework released this guidance note covers inter alia issues pertaining to: the entities to be reported in the CbCR, certain definition of items reported in the template report, currency fluctuations, CbCR to investment funds, partnerships, issues relating to business reorganizations etc. The guidance note will continue to be updated on an ongoing basis.

<sup>1</sup> OECD (2019), *Guidance on the Implementation of Country-by-Country Reporting – BEPS Action 13*, OECD, Paris. [www.oecd.org/tax/guidance-on-the-implementation-of-country-by-country-reporting-beps-action13.pdf](http://www.oecd.org/tax/guidance-on-the-implementation-of-country-by-country-reporting-beps-action13.pdf)

### iii) European Union Blacklist of non-cooperative jurisdictions<sup>1</sup>

The European Union as part of its commitment to improve tax good governance on a global level. It publishes a list of non-cooperative jurisdictions, in order to maximise efforts against tax fraud, evasion and avoidance. As of 14 November 2019 (date of publication in the Official Journal), the EU list is composed

of: American Samoa, Fiji, Guam, Oman, Samoa, Trinidad and Tobago, US Virgin Islands and Vanuatu. The UAE and Marshall Islands were delisted recently after agreeing to comply with tax good governance and implement appropriate measures accordingly. Further the Code of Conduct Group which is responsible for monitoring and assessing the tax good governance measures concluded that the United States of America meets the 'two out of three' exception conditions and therefore does not warrant any blacklisting measures.

<sup>1</sup> <http://data.consilium.europa.eu/doc/document/ST-12284-2019-REV-1/en/pdf>

#### iv) Australian Tax Office releases draft guidance on approach to the arm's length debt test

The Australian Tax Office (ATO) released recently a draft Practical Compliance Guideline to entities in applying the arm's length debt test under its Thin Capitalization framework.<sup>1</sup> The arm's length debt test is one of the tests available to establish an entity's maximum allowable debt for thin capitalisation purposes. The test focuses on identifying an amount of debt a notional stand-alone Australian business would reasonably be expected to borrow, and what independent commercial lenders would reasonably be expected to lend on arm's length terms and conditions. An entity's debt deductions are reduced to the extent that its adjusted average debt exceeds its maximum allowable debt. In practice, the test is typically only used when an entity is unable to satisfy the safe harbour and worldwide gearing tests (as the compliance burden of applying these tests is generally lower). It is not common for Australian businesses to gear in excess of 60% of their net assets and historically relatively few entities have applied the arm's length debt test. The Guideline will have effect from 1 July 2019 and will apply where the arm's length debt test has been used to establish an entity's maximum allowable debt from this date.

<sup>1</sup> <https://www.ato.gov.au/law/view/document?docid=DPC/PCG2019D3/NAT/ATO/00001#PI>

#### v) Digital Tax – Unilateral Measures, Austrian Parliament approves Digital Tax Act 2020

On 10 October 2019, the Austrian Parliament's upper house passed the Digital Tax Act 2020.<sup>1</sup> With the ongoing discussions on the taxation of digitalized economy happening and awaiting for a consensus amongst the BEPS Inclusive Framework. Austria has decided to introduce an interim measure to levy a digital tax on online advertising services. **Online advertising services are subject to digital tax if, with effect from 1 January 2020, they are rendered by online advertising providers within Austria in return for payment.** An online advertising service is deemed as having been rendered within Austria if it is received on the device of a user with an Austrian IP address and, in terms of content and design, is (also) directed at Austrian users. The place at which an online advertising service is rendered can be established based on the IP address or with the aid of other technologies for geolocalisation of devices. The turnover threshold is similar to the EU's DST proposal.

The digital tax will be levied at 5% Austrian digital advertising revenue applies to companies with worldwide annual turnover of €750 million or more and annual turnover of €25 million or more in Austria. Similar unilateral measures have been initiated in Italy, Turkey, Zimbabwe, Czech Republic, Dominican Republic etc.

<sup>1</sup> [https://english.bmf.gv.at/taxation/Digital\\_Tax\\_Act\\_2020.html](https://english.bmf.gv.at/taxation/Digital_Tax_Act_2020.html)

#### vi) United Kingdom enters into Double Taxation Agreement with Gibraltar

Gibraltar which is a British Overseas Territory has signed its first ever double taxation agreement with its dependent territory the United Kingdom (UK).<sup>1</sup> The Agreement which is based on the OECD Model Tax Convention was signed in London on 1 October 2019 and in Gibraltar on 15 October 2019. The purpose of the Agreement is to eliminate double taxation with respect to taxes on income and capital and prevent tax evasion and avoidance. The

tax treaty is modelled in line with OECD Model Convention 2017 containing the preamble and limitation of benefits in line with the BEPS Action Plan. The treaty is currently not in force yet.

<sup>1</sup> <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Lords/2019-10-17/HLWS22/>

#### vii) Malaysia introduces additional Principal Hub tax incentives to encourage MNE's to set up Headquarters.

The Malaysian Government announced<sup>1</sup> revised tax incentives named as Principal Hub (PH) incentives to encourage Multinational Enterprises to consider Malaysia as a regional or global headquarters for their business. Effective 2019, companies approved with the enhanced Principal Hub incentive, also known as PH 2.0, will be able to enjoy a concessionary 10% tax rate for their operations in Malaysia. This is to replace the previous tax treatment whereby companies with existing Malaysian operations could only enjoy tax exemption on incremental income. New companies that have yet to establish a presence in Malaysia can enjoy up to 0% tax rate for 10 years based on their level of commitments. Malaysia hopes the PH tax incentives to create positive spillover effects for the Malaysian economy by increasing potential high value jobs, increase in R&D activities as well as transfer of technology and knowledge to the local industry ecosystems.

<sup>1</sup> <https://www.mida.gov.my/home/9483/news/principal-hub-incentive-2.0-malaysia%E2%80%99s-headquarters-hub-incentive-enhanced-/>

#### viii) Taiwan extends the tax incentives for Research & Development Activity

The Taiwan Government in order to optimize industrial innovation environment, and combines R&D, talents, technology, and capital to promote industrial upgrading and transformation. The tax incentive measure the "Statute for Industrial

Innovation “ which is to expire in 2019 has been extended for another 10 years.<sup>1</sup> Under the revised amendment to the statute, tax credits are being provided for investments in smart machinery and 5G investment. Under the said mechanism, expenditures on brand new hardware, software, technology or technical services related to smart machines, incurred from 1 January 2019 to 31 December 2021 and expenditures on brand new hardware, software, technology or technical services related to 5G networks incurred from 1 January 2019 to 31 December 2022 are eligible for tax credits to be set off against corporate tax liability.

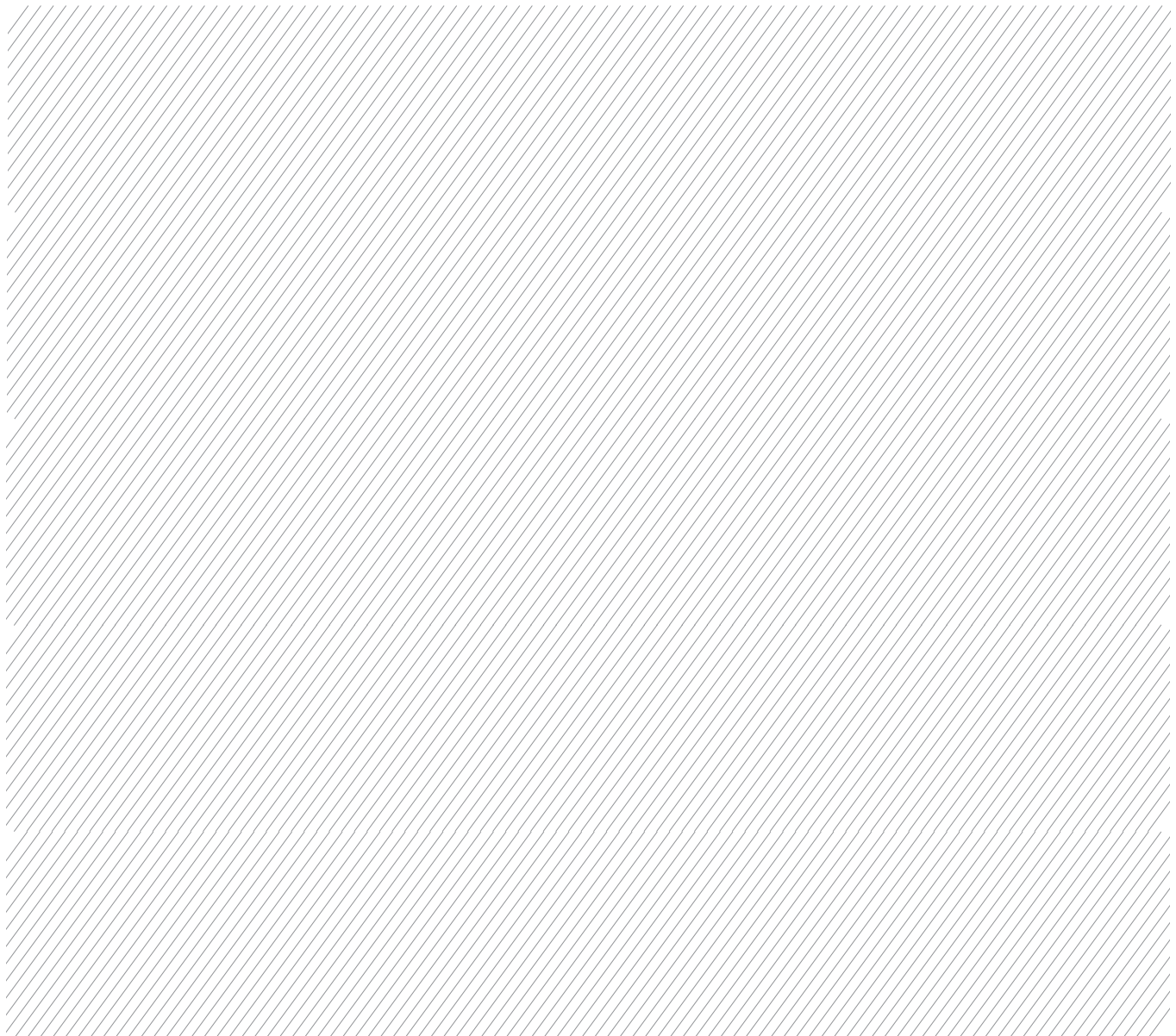
<sup>1</sup><https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=J0040051>

**2. Others**  
**Luxembourg sets deadlines to advance rulings issued before 1 January 2015**

The Luxembourg Government tabled before its Parliament the state draft budget for 2020<sup>1</sup>. Significant proposal from taxation perspective included a limitation period for all the Advanced Tax Agreements (ATA) issued by the Luxembourg Tax Authorities before 1 January 2015. In essence, the draft bill

proposes that the maximum validity period for such ATA shall be for a period of 5 years. Therefore all ATA executed before 1 January 2015 stands to expire on 31 December 2019. Hence taxpayers will have to apply for a fresh ruling and accordingly determine the taxable position for transactions to be executed pursuant to 1 January 2020. This provides an opportunity for the Luxembourg Tax Authorities to revisit the transactions and determine the taxability of the same in the post BEPS era.

<sup>1</sup><https://budget.public.lu/>



# IFA CONFERENCES EVENTS

BY  
SAGAR WAGH AND  
AMEYA KHARE

## IFA INDIA BRANCH

### FORTHCOMING EVENTS

**DATE:** 24-Apr-2020 -  
25-Apr-2020

**PLACE:** New Delhi, India  
**CONFERENCE:** “Emerging  
International Taxation  
Landscape 2020”

**WEBSITE:** [www.ifaindia.in](http://www.ifaindia.in)

**E-MAIL:** shelly.wadhwa@  
ifaindiaacademy.in, info@  
ifaindiaacademy.in, preeti.  
tyagi@ifaindiaacademy.in

### EARLIER HELD EVENTS:

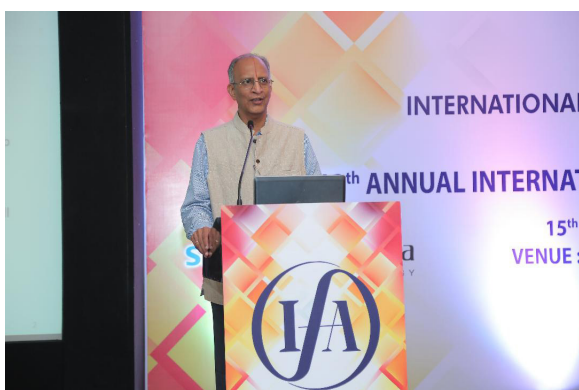
**DATE:** 15-November 2019-  
16-Nov-2019

**PLACE:** Chennai, India

**EVENT:** 13<sup>th</sup> IFA SRC Annual  
International Taxation



## SECTION 3



### Conference 2019

**WEBSITE:** [www.ifaindia.in](http://www.ifaindia.in)

**E-MAIL:** [admin@ifasrc.org](mailto:admin@ifasrc.org)

**DATE:** 15-November 2019

**PLACE:** Mumbai, India

**EVENT:** IFA WRC - AGM & Lecture Meeting on current issues in Transfer Pricing.

**WEBSITE:** [www.ifaindia.in](http://www.ifaindia.in)

**E-MAIL:** [ifaindiabranch@gmail.com](mailto:ifaindiabranch@gmail.com)

### IFA WORLDWIDE

#### FORTHCOMING EVENTS:

**DATE:** 26-May-2020 - 28-May-2020

**PLACE:** Hong Kong

**CONFERENCE:** Asia Pacific

### Regional Tax Conference 2020

**WEBSITE:** [www.ifahongkong2020.org](http://www.ifahongkong2020.org)

**E-MAIL:** [registerinterest@ifahongkong.org](mailto:registerinterest@ifahongkong.org)

**DATE:** 19-May-2020 - 22-May-2020

**PLACE:** Quito, Ecuador

**EVENT:** 12th Latin American Regional Meeting

**DATE:** 14-May-2020 - 15-May-2020

**PLACE:** Milan, Italy

**CONFERENCE:** 2nd European Regional Conference

**WEBSITE:** [www.ifa2020milan.com](http://www.ifa2020milan.com)

[ifa2020milan.com/general-information](http://ifa2020milan.com/general-information)

**E-MAIL:** [ifa2020milan@ega.it](mailto:ifa2020milan@ega.it)

**DATE:** 23-Apr-2020 - 24-Apr-2020

**PLACE:** Oslo, Norway

**EVENT:** Nordic IFA 2020

**WEBSITE:** [www.ccnorway.eventsair.com/ifa2020](http://www.ccnorway.eventsair.com/ifa2020)

**E-MAIL:** KariAlice.

[Fronsdal@skatteetaten.no](mailto:Fronsdal@skatteetaten.no), [ifa@ccnorway.no](mailto:ifa@ccnorway.no)

**DATE:** 08-Apr-2020 - 09-Apr-2020

**PLACE:** Cape Town, South Africa

**CONFERENCE:** David R. Tillinghast Conference

## SECTION 3

**WEBSITE:** [www.http://www.tax.uct.ac.za](http://www.tax.uct.ac.za), [www.ifa.nl/media/5911/20191212-drt-conference-programme.pdf](http://www.ifa.nl/media/5911/20191212-drt-conference-programme.pdf)  
**E-MAIL:** [tax@uct.ac.za](mailto:tax@uct.ac.za)

**DATE:** 31-Mar-2020 - 01-Apr-2020  
**PLACE:** Singapore  
**CONFERENCE:** IFA David R. Tillinghast Conference  
**WEBSITE:** [www.ifa.nl/media/5682/drt-conference-singapore-and-call-for-papers.pdf](http://www.ifa.nl/media/5682/drt-conference-singapore-and-call-for-papers.pdf)  
**E-MAIL:** [scloi.2018@law.smu.edu.sg](mailto:scloi.2018@law.smu.edu.sg)

**DATE:** 26-Feb-2020 - 28-Feb-2020  
**PLACE:** Boston, USA  
**EVENT:** Joint meeting of the USA and Ireland Branches  
**WEBSITE:** [www.ifausa.org](http://www.ifausa.org)  
**E-MAIL:** [info@ifausa.org](mailto:info@ifausa.org)

**DATE:** 10-Feb-2020 - 14-Feb-2020  
**PLACE:** Canada  
**EVENT:** 2020 Travelling Lectureship Series “From Arm’s Length to Value Creation to Markets”  
**WEBSITE:** [www.ifacanada.org/en/events/2019-lectureship-series.html](http://www.ifacanada.org/en/events/2019-lectureship-series.html)  
**E-MAIL:** [canada@ctf.ca](mailto:canada@ctf.ca)

**EARLIER HELD EVENTS:**

**DATE:** 11-Dec-2019  
**PLACE:** Jakarta, Indonesia  
**EVENT:** The 7th IFA Indonesia Annual International Tax Seminar  
**WEBSITE:** [www.ifa.nl/media/5901/the-7th-ifa-indonesia-annual-international-tax-seminar271119.pdf](http://www.ifa.nl/media/5901/the-7th-ifa-indonesia-annual-international-tax-seminar271119.pdf)  
**EMAIL:** [indah.ratnaningati@rsm.id](mailto:indah.ratnaningati@rsm.id), [info@ifa-indonesia.com](mailto:info@ifa-indonesia.com)

**DATE:** 10-Dec-2019  
**PLACE:** Lisbon, Portugal  
**EVENT:** Taxation of religious collective persons  
**WEBSITE:** [www.afp.pt](http://www.afp.pt)  
**EMAIL:** [afp@afp.pt](mailto:afp@afp.pt)

**DATE:** 4-Dec-2019  
**PLACE:** Buenos Aires, Argentina  
**EVENT:** The resolution of international tax disputes and the application of arbitration: critical issues and development perspectives  
**WEBSITE:** [www.afp.pt](http://www.afp.pt)  
**EMAIL:** [teresa@aaef.org.ar](mailto:teresa@aaef.org.ar)

**DATE:** 28-Nov-2019  
**PLACE:** Lisbon, Portugal  
**EVENT:** New VAT rules for E-commerce: The role of digital platforms  
**WEBSITE:** [www.afp.pt](http://www.afp.pt)

**EMAIL:** [afp@afp.pt](mailto:afp@afp.pt)

**DATE:** 21-Nov-2019  
**PLACE:** Porto, Portugal  
**EVENT:** The role of the accountant in a fair and efficient tax system  
**WEBSITE:** [www.afp.pt](http://www.afp.pt)  
**EMAIL:** [afp@afp.pt](mailto:afp@afp.pt)

**DATE:** 05-Nov-2019  
**PLACE:** Vienna, Austria  
**EVENT:** Seminar on “Recent Developments in State Aid”  
**WEBSITE:** [www.ifa-austria.at](http://www.ifa-austria.at)  
**EMAIL:** [merita.kuku@wu.ac.at](mailto:merita.kuku@wu.ac.at)

**DATE:** 12-Nov-2019  
**PLACE:** Lisbon, Portugal  
**EVENT:** Environmental taxation and its mistakes  
**WEBSITE:** [www.ifa-austria.at](http://www.ifa-austria.at)  
**EMAIL:** [merita.kuku@wu.ac.at](mailto:merita.kuku@wu.ac.at)

**DATE:** 11-Nov-2019  
**PLACE:** Lisbon, Portugal  
**EVENT:** Equality in tax law. After 100 years of women in tax  
**WEBSITE:** [www.aaef.org.ar](http://www.aaef.org.ar)  
**EMAIL:** [teresa@aaef.org.ar](mailto:teresa@aaef.org.ar)

**DATE:** 07-Nov-2019  
**PLACE:** Schaan, Liechtenstein  
**EVENT:** The Family Office in Liechtenstein  
**WEBSITE:** [www.ifa-fl.li](http://www.ifa-fl.li)  
**EMAIL:** [info@ifa-fl.li](mailto:info@ifa-fl.li)

# NEWSLETTER

## IFA / INDIA BRANCH

### IFA-INDIA

International Fiscal Association - India (IFA-India) is a society registered in Delhi (India) under the Societies Registration Act, 1860. It operates in India through its Head Office in the National Capital Region (NCR) and four regional chapters in North, South, East and West. IFA-India is governed by an executive committee which presently has 26 members with 6 elected office bearers out of that. IFA-India is engaged in promoting better understanding on the subject of international tax and the related fiscal laws. It organises conferences, seminars, workshops, training courses and encourages discussions and conversations through various other modes like webinars and social media. The membership includes tax administrators, tax policy experts, tax court judges, and tax professionals from corporates and from consultancy. It has set up an international tax Academy at Noida where regular learning and knowledge sharing programs are held on the theme subject.

### IFA

IFA-India is a part of International Fiscal Association headquartered in the Netherlands (IFA). Established in the year 1938 as a non-profit organisation, IFA provides a neutral and independent platform where representatives of all professions and interests can meet and discuss international tax issues at the highest level. IFA has played an essential role in both, the development of certain principles of international taxation and in providing possible solutions to problems arising in their practical implementation. Its objects are the study and advancement of international and comparative law in regard to public finance, specifically international and comparative fiscal law and the financial and economic aspects of taxation. IFA seeks to achieve these objects through its Annual Congresses and the scientific publications relating thereto as well as through scientific research. Although the operations of IFA are essentially scientific in character, the subjects selected take account of current fiscal developments and changes in local legislation.

The membership of IFA now stands at more than 12,000 from 106 countries. In 62 countries, including India, IFA members have established IFA branches and IFA-India is one of those 62 branches world over. IFA-India has also taken initiatives to encourage young IFA members and Women IFA members to participate in its initiatives through YIN (Young IFA Network) and WIN (Women IFA Network).

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