IFA Asia Pacific Tax Conference 2017

Anti-avoidance and Transparency

Day 2: April 29, 2017

Plenary Session 4: ***Multi-lateral Instrument -Global Harmonization and Enforcement***

Chairman - Hon'ble Justice R.V. Easwar (India)

Moderator- Pranav Sayta, Partner, Ernst & Young (India)

Panelists: Maikel Evers, Advisor (OECD), **Shigeki Minami**, Partner, Nagashima Ohno & Tsunematsu (Japan)

Hon'ble Justice R.V. Easwar, opened the session with his valuable remarks. Thereafter, **Mr. Maikel Evers** gave a detailed presentation explaining rationale and mechanics of Multilateral Instrument (MLI). He explained how MLI provides element of flexibility as it allows countries to specify tax treaties covered, opt out of non-minimum standard provisions, opt out of provisions for treaties with specific characteristics and gives choices to apply optional and alternative provisions. He also pointed out that MLI addresses 4 actions - Action 2 (Hybrid mismatches), Action 6 (Prevention of treaty abuse) , Action 7 (Avoidance of PE status) and Action 14 (improving dispute resolution).

The presentation was followed by a Question and Answer session where questions relating to substantial issues were asked by **Mr. Pranav Sayta** while procedural questions were asked by Mr. **Shigeki Minami**. **Mr Pranv Sayta** pointed out that India has recently signed treaties with Singapore, Mauritius and Cyprus with grandfathering provision for existing investments. Noting that India as well as the treaty partners are likely to sign MLI without reservation considering prevention of treaty abuse is minimum standard, Mr Sayta questioned about impact of MLI on grandfathering provisions. **Mr Maikel Evers** remarked that it would depend upon the domestic laws of countries and the courts are the best forum to answer this question. **Mr Sayta** also highlighted various ambiguous terms used in Action 7 such as "cohesive business operation", "complementary activities", "playing principal role" which can lead to lot of dispute. **Mr Maikel Evers** stated that there is already some guidance available in Action 7 and further guidance if necessary would be included in 2017 version of OECD Commentary.

While answering question of **Mr. Shigeki Minami** regarding weight of OECD commentary in interpretation of tax laws, **Mr. Maikel Evers** remarked that it would depend upon the country's domestic law. He also drew attention to the fact that unlike OECD Convention and Commentary, inclusive framework is developed with participation on equal footing of number of countries and MLI is developed as a consequence of negotiation process.

In the concluding remarks, **Hon'ble Justice Easwar** referred to point made by **Mr Sayta** regarding impact on grandfathering clauses under Mauritius/Singapore/Cyprus treaty. He stated that it would be unfortunate if there is adverse impact which will erode the confidence of investors. **Mr. Easwar** recognized the persuasive value of OECD Commentary though it is not of binding nature. However, he also referred to recent apprehensions in judiciary about whether OECD Commentary should even be referred to. However, Mr Easwar remarked that "*light should be taken wherever it comes from, unless there is some contradictory view of equal weightage.*"

Mr. Satya concluded on a positive note expressing that, ***"Let us hope that more and more countries come together to join on June 7 to sign the MLI".***

Plenary Session 5: ***Introduction and Enhancement of GAARS in Asia and Effect and Consequences for Treaty Shopping/Treaty Abuse***

Chairman - Porus Kaka, President, IFA, India

Moderator- Peter Barnes, Caplin & Drysdale, USA

Panelists: Abu Tariq bin Jamaluddin, Inland Revenue Board, Malaysia **Willem Jan Hoogland**, HKWJ Tax Law, Hong Kong **Padam Khincha**, H C Khincha & Co., India **Rajat Bansal**, Ministry of Finance, India **Yuri Matsubara**, Meiji University, Japan

Mr Porus Kaka opened the discussion remarking that GAAR is "Mother of all bombs" and referring to the title of the session, he wondered what can be "enhancement" of GAAR.

Mr. Peter Barnes then posed a question- What is a general anti-avoidance rule? Is it a compilation of existing tax doctrines, such as substance-over-form, sham transaction, or, is it a rule/authority that goes beyond existing authority? And whether the answer to this question the same in all countries, or do countries view GAAR differently?

Mr. Rajat Bansal said GAAR in its legalised form gives a legal authority to tax authorities to act in a certain manner. He further elucidated that doctrines are policy decisions the government has to make as opposed to a codified law. He also said that different countries view GAAR differently. **Mr Bansal** also quipped that this Bomb is not invented in India. While responding to GAAR vs. SAAR debate, **Mr Bansal** stated that it is practically difficult to address every tax avoidance situation through SAAR and thus, GAAR is necessary.

Giving an overview of position of GAAR in Hong Kong, **Mr. Willem Jan Hoogland** mentioned that Hong Kong has 2 GAARs, one under Rule 61 and the other under Rule 61A and both are not mutually exclusive. He also stated that Hong Kong has had only 7 cases in the last 17 years of GAAR provisions and they don't have specific transfer pricing regulation.

Mr. Padam Khincha said that ***Government, through GAAR is admitting the shortcomings of law*** and that GAAR kicks in when the conduct of a taxpayer surpasses accepted level of conduct.

Mr. Barnes posed a question to the panel, on whether client behaviour has changed after GAAR coming on horizon. To this, **Mr. Khincha** responded that Corporates aim to achieve commercial goals and tax is a cost to them. Thus, to retain competitiveness in the market, they must reduce the tax cost. A corporate's perspective is that nobody gives them a premium for compliance. With the advent of GAAR, he said that clients have become more apprehensive and look into more checks and balances and documentation and escrow requirement will increase. Thus, finally the dynamics of business models will change remarkably.

Thereafter **Mr. Abu Tariq bin Jamaluddin** discussed GAAR case from Malaysia and Ms Yuri Matsubara elaborated upon 2 Japanese GAAR cases. The Panel also discussed whether in similar circumstances GAAR would be invoked in India**.** The Panel noted that the jurisdictions where GAAR is already legislated, it has been invoked in very limited situations. But with respect to India, **Mr. Barnes** said that we must wait for two years to determine whether GAAR is a sword or a shield and how often it would be invoked. **Mr. Pranav Sayta** from the audience made a remarkable comment that attracted applause from the entire mass, he said that ***revenue collected from GAAR cases should not be counted towards the revenue targets of the tax officers.*** **Mr Bansal** said that the comment is noted and CBDT's central action plan for first quarter does not provide for GAAR targets.

On the issue whether GAAR would increase environment of distrust, **Mr Khincha** discussed India's experience related to transfer pricing where the concept was alright, but administration and dispute resolution was far from expectation. **Mr Barnes** remarked that more than 50% of the world transfer pricing judgments are from India and it would be interesting to see what would be situation on GAAR. **Mr Bansal** said that there is fundamental difference between GAAR and transfer pricing and though AO is entitled to raise alarm on impermissible tax avoidance situations, the decision as to GAAR invocation would be taken by Approving Panel. Only in those cases where the taxpayers do not question the GAAR applicability, the Principal CIT can initiate GAAR.

As a conclusion, Mr. Khincha mentioned that, "***GAAR is a reality now and we must aim at reducing pain point. It should be a tool to mould the behaviour of tax payer and not punish the taxpayer***".

Plenary Session 6: ***PE and Amendment to Article 5 of Model Convention and Regional Applications***

Chairman: Hon'ble Justice S. Ravindra Bhat, India

Moderator : Shefali Goradia, BMR & Associates LLP, India

Panellists : Amar Mehta, Indi-Genius Consulting, Canada, **Shih-Chou Huang**, National Taipei University of Business, Taiwan, **Maikel Evers**, OECD, France, **Piotr Klank**, Wentworth Chambers, Australia, **Thenesh Kannaa**, TraTax, Malaysia

Summary of the Session:

Ms. Shefali Goradia, the moderator for the session clarified that artificial avoidance of PE was a cornerstone reason for launch of OECD BEPS programme. Explaining important proposals of BEPS Action 7, she briefly touched upon changes relating to treatment of commissionaire arrangement, anti fragmentation rule, exclusions under Paragraph of Article 5, etc. She stated that under Commissionaire arrangement, threshold has come down to convincing the customers.

Panel also discussed the link up PE amendments to Article 12-14 of MLI. **Mr. Maikel Evers** clarified that BEPS Action 7 on PE is not a minimum standard provision and some countries may look at these provisions later while some countries may not want to execute these recommendations through MLI.

Mr. Piotr Klank stated that in Australia, multiple anti avoidance provisions have been introduced like Multinational anti-avoidance Law (MAAL), Diverted profit tax (DPT), strengthened transfer pricing rules providing for broader powers of reconstruction. He also elaborated on recent developments in Australia, Luxembourg and Netherlands.

Mr Amar Mehta explained developments in Canada, China, Columbia and New Zealand. He stated that New Zealand has released a consultation document on proposed Deemed PE rule. The Rule targets the large MNCs as a threshold for applicable is determined at Eur 850 Mn turnover. These rules are aimed at some aggressive transactions which can manage to circumvent treaty provisions and thus, they will override treaty provisions.

Mr. Thenesh Kannaa brought to the notice of delegates Malaysia's specific announcement that BEPS Action Plan may not be applicable in all instances for Malaysia given that its tax system and policy goals are different from any developed countries. He remarked that BEPS recommendation may be a today's solution to yesterday's problem and not problem of tomorrow.

The Panel thereafter discussed recent case laws from various jurisdictions, such as **Tech Mahindra case** in Australia, **Adobe System Inc case and Formula One case** in India, **Agoda and Uber VAT cases** in Taiwan. Mr. Mehta expressed his complete agreement with High Court and Supreme Court decision in Formula One case. He opined that there was complete control of UK entity on the international circuit premises so as to constitute PE in India.

In his closing remark, Hon'ble Delhi High Court judge, **Justice S. Ravindra Bhat** appreciated that Indian judgment are being referred even in foreign jurisdictions.

Plenary Session 7: ***Hot topics in Asia***

Chairman: **Hon'ble Justice A. K. Sikri, India**

Moderator : Sai Ree Yun, Yulchon, Republic of Korea

Panellists: Ajay Vohra, Senior Advocate, India, **Sophie Chou**, EY, Taiwan, **Emile Bongers,** Stibbe, UAE, **Sanjay Iyer**, Iyer Practice, Singapore, **Peter Barnes**, Caplin& Drysdale, USA

Summary of the Session:

The panel discussed 5 key topics viz. approaches for taxation of e-commerce transactions, future of place of effective management (POEM) rule, indirect transfer of shares, tax audits in Malaysia and US tax reform proposal of Trump administration.

Mr Sai ReeYun explained Korean VAT provisions regarding ecommerce transactions while Mr Ajay **Vohra** explained equalization levy in India. He also highlighted various issues regarding equalization levy such as whether it is income tax or VAT, whether it results in treaty override, availability of foreign tax credit, etc. **Ms Sophie Chou** explained Taiwan VAT provisions on ecommerce transactions. **Mr. Emile Bongers** stated that tax is becoming a hot topic in the UAE and there is a proposal to introduce 5% VAT from January 2018. The law is expected to be based on EU VAT concept and legislation.

Thereafter, the Panel discussed provisions relating to POEM in Korea, Taiwan and India. In Indian POEM context, **Mr Vohra** remarked that POEM would be the place where head and brain of the company reside. In the context of UAE, **Mr Emile Bongers** explained controversy around 'liable to tax' criterion for residence and its interpretation where no taxes are levied. He also stated that at the request of treaty partners UAE may revisit existing treaties in line with BEPS recommendation specifically regarding LOB clause. He further remarked that the UAE's strategic position, excellent infrastructure and tax treaty network make it an attractive location for setting up a regional hub or headquarters for international businesses, but from a BEPS perspective, low tax or no tax in the UAE has been highlighted as an area of concern. **Mr Sanjay Iyer** highlighted the control and management criterion in Singapore as against POEM. He also discussed other issues around treaty LOB clause, remittance based taxation of certain income, etc.

Mr Ajay Vohra explained recent development in India regarding indirect transfer provisions. He also explained recent Tribunal judgement in **Cairn UK** case. **Mr Sai Ree Yun** updated the delegates on recent Malaysia Supreme Court ruling holding duplicative tax audits as illegal.

Mr Peter Barnes explained proposals relating to US Tax reforms by Trump administration while remarking that future of the reforms is very uncertain. He also explained proposal regarding Destination-Based Cash Flow Tax (DBCFT) which can have huge impact on India. He explained that under the proposal, imports to the US of goods and services would not be deductible in determining taxable income and revenues from exports would be tax exempt. Thus, in some ways (but not all), the DBCFT resembles a value-added tax. However, he stated that fate on DBCFT is uncertain and its legality under trade laws is impossible to determine in advance.

In his closing remarks, **Hon'ble Justice A. K. Sikri** said that the session was very informative and fruitful.

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