

Impact of MLI on Section 195 and Related Aspects

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The Chamber of Tax Consultants

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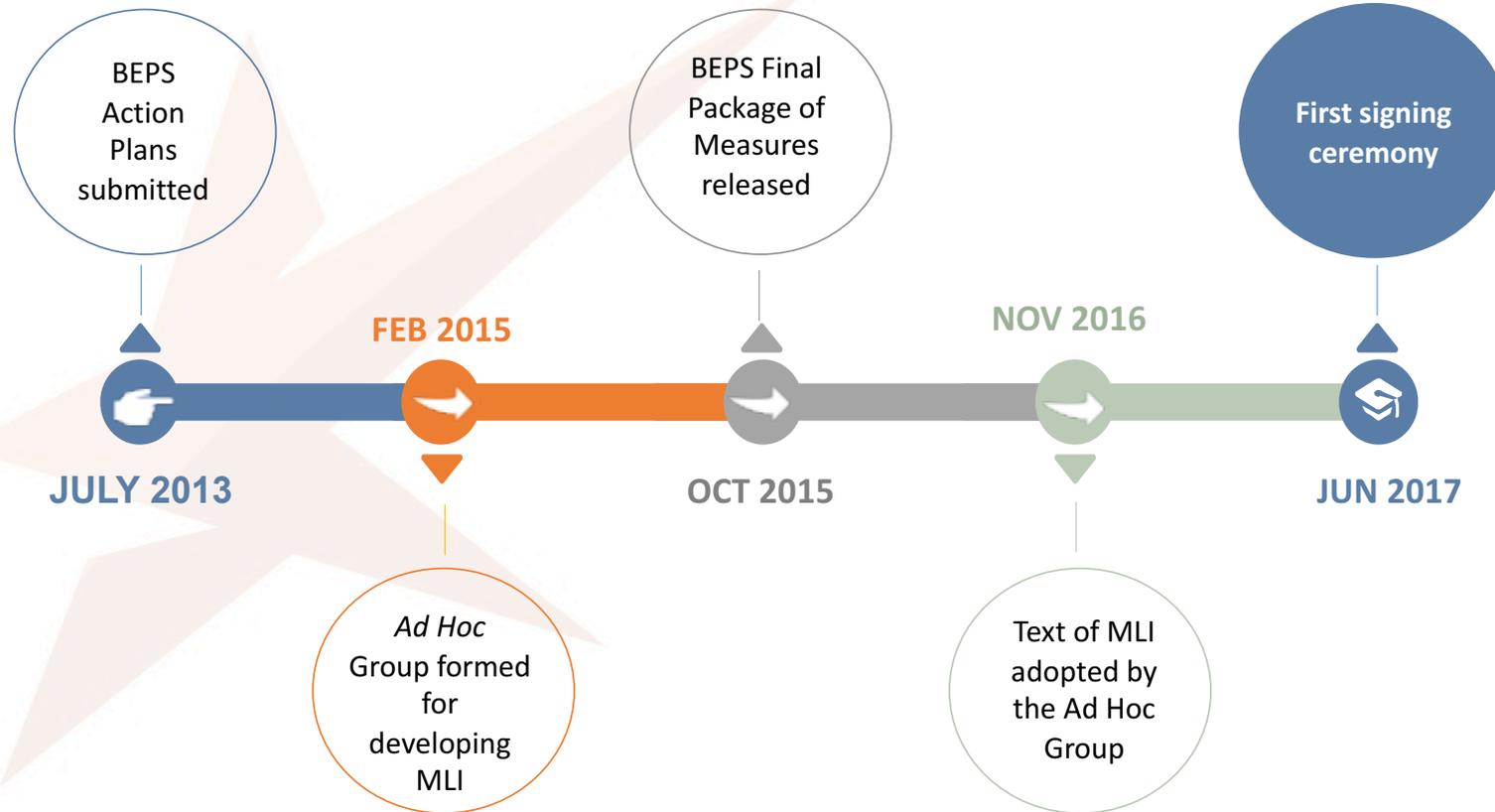


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Overview of MLI

Multilateral Instrument

Timelines



Multilateral Instrument

What is covered?

- Deals with treaty related measures identified in the final BEPS Reports in relation to:

**Hybrid Mismatch
(Action 2)**

**Preventing Treaty Abuse
(Action 6)**

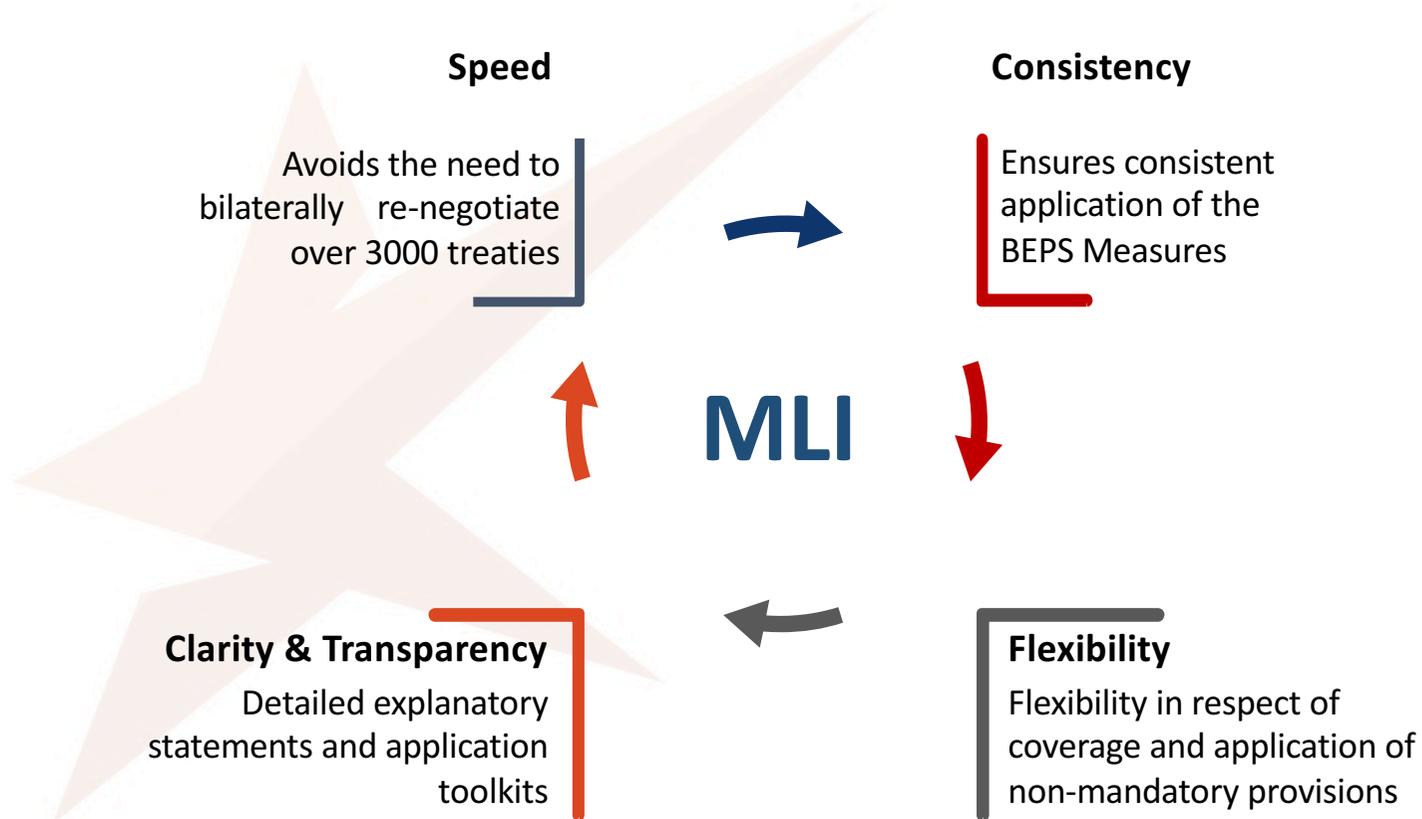
**Artificial avoidance of PE
(Action 7)**

**Effective Dispute
Resolution
(Action 14)**

- Substantive measures already agreed to in the BEPS final package of measures

Multilateral Instrument

Rationale



Multilateral Instrument *Mechanics*

Does the MLI apply at all?

- Have both countries signed the MLI?
- Has the MLI entered into force in both countries?
- Has the treaty been notified as a 'Covered Tax Agreement' by both countries?

Which provisions of the MLI apply?

- Has either country made a reservation on the application of the provision in the MLI?
- Have both countries chosen to apply an optional provision?
- Have both countries chosen to adopt the same option?

Significant built-in flexibility, but treaty-by-treaty choices not permitted

Multilateral Instrument

Mechanics - Interplay with bilateral treaties

MLI 'sits' alongside existing treaties, modifying their operation

Applies by virtue of '*later in time*' rule – Article 30(3) of the Vienna Convention

Not static – countries can opt in to optional provisions or withdraw reservations

Does not preclude subsequent bilateral modifications of treaties

Countries may create synthesised text – Online matching tool prepared by OECD to facilitate impact analysis on existing treaties

Steps for Application of MLI

Verify if MLI has entered into force

Verify if tax agreement is Covered Tax Agreement

Identify which MLI provisions apply

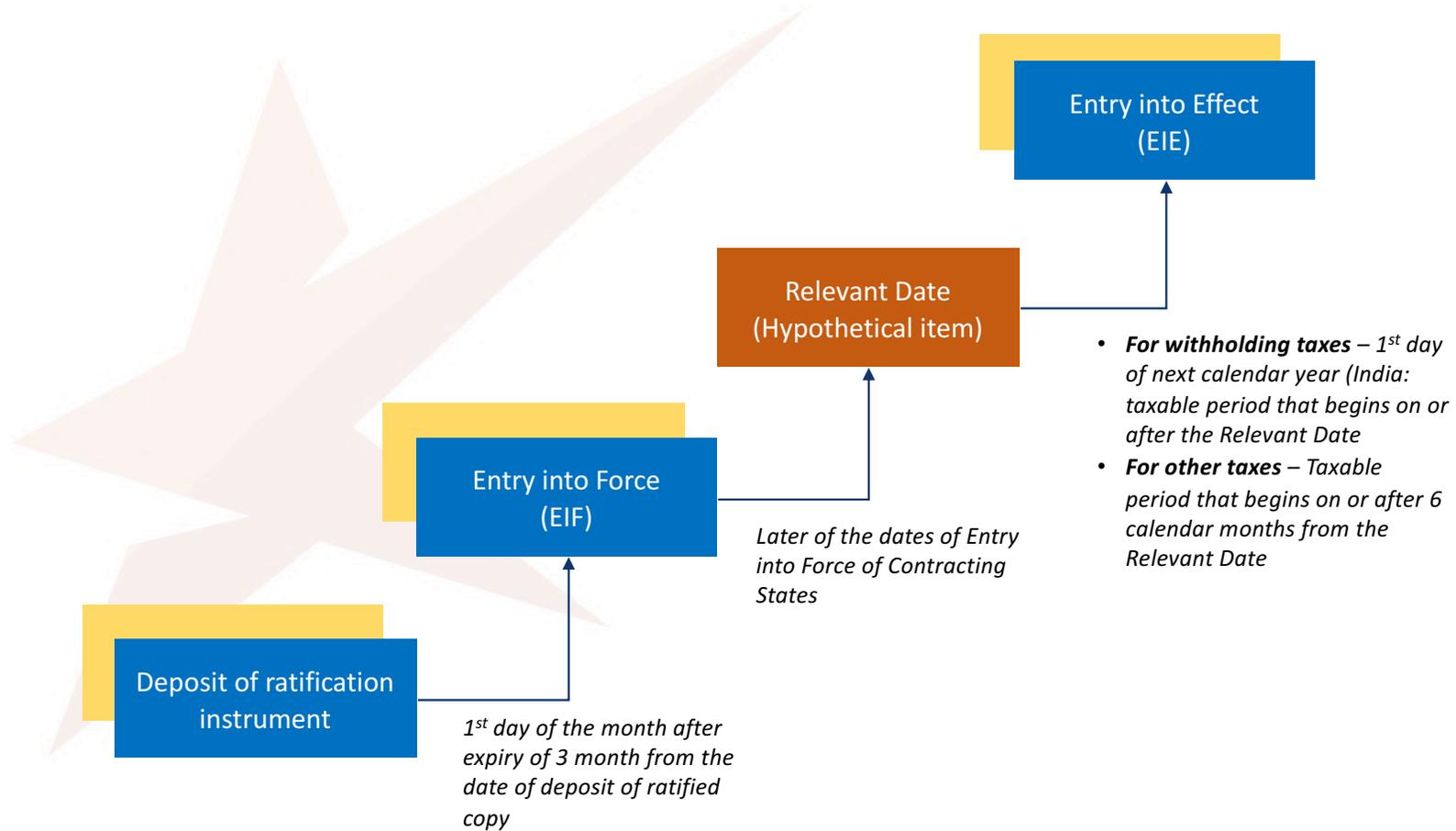
Identify which existing provisions are modified

Verify if the MLI provisions have effect

Effective Dates of MLI provisions

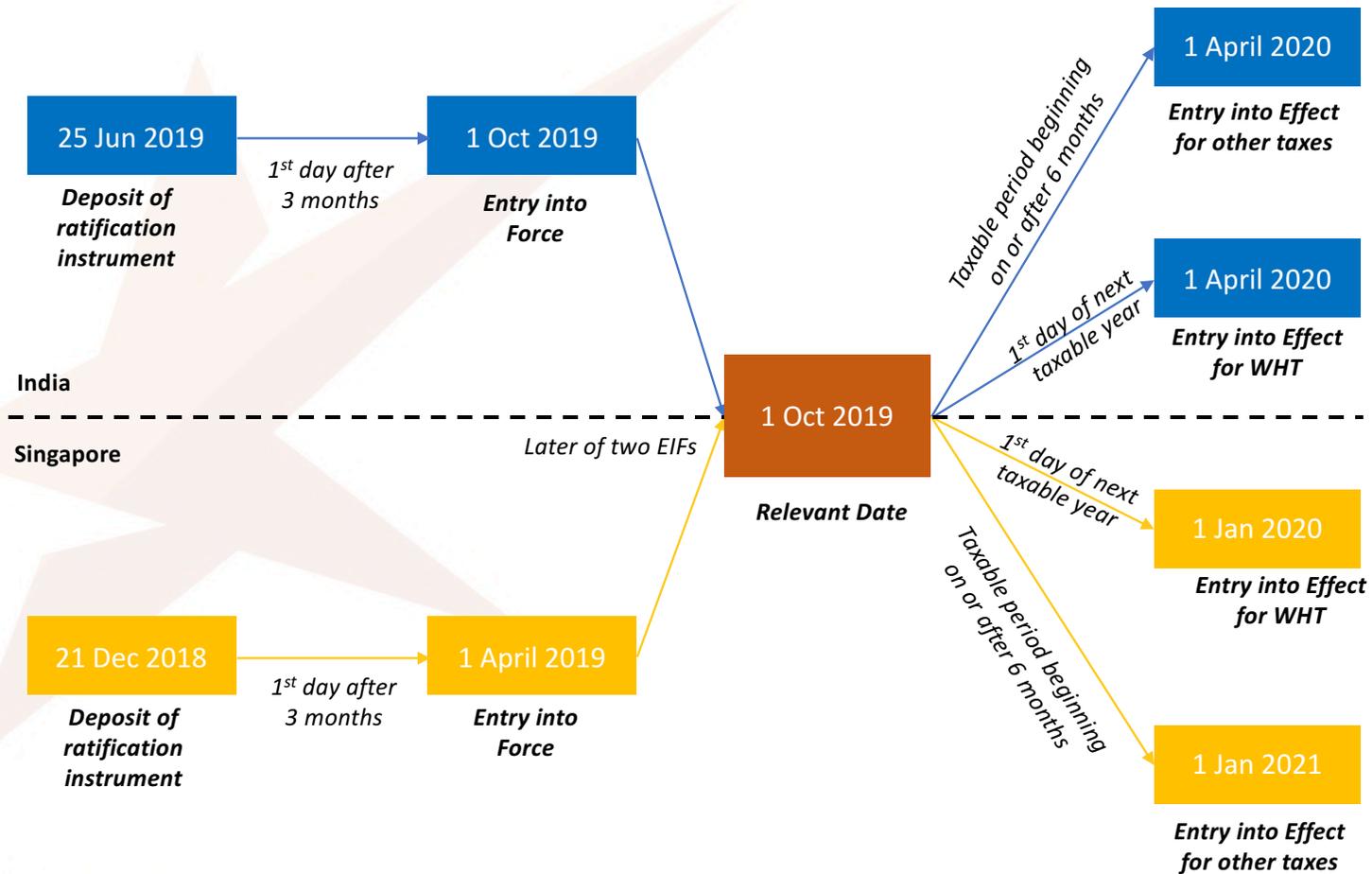
Determination of Effective Date for application of MLI

Flowchart



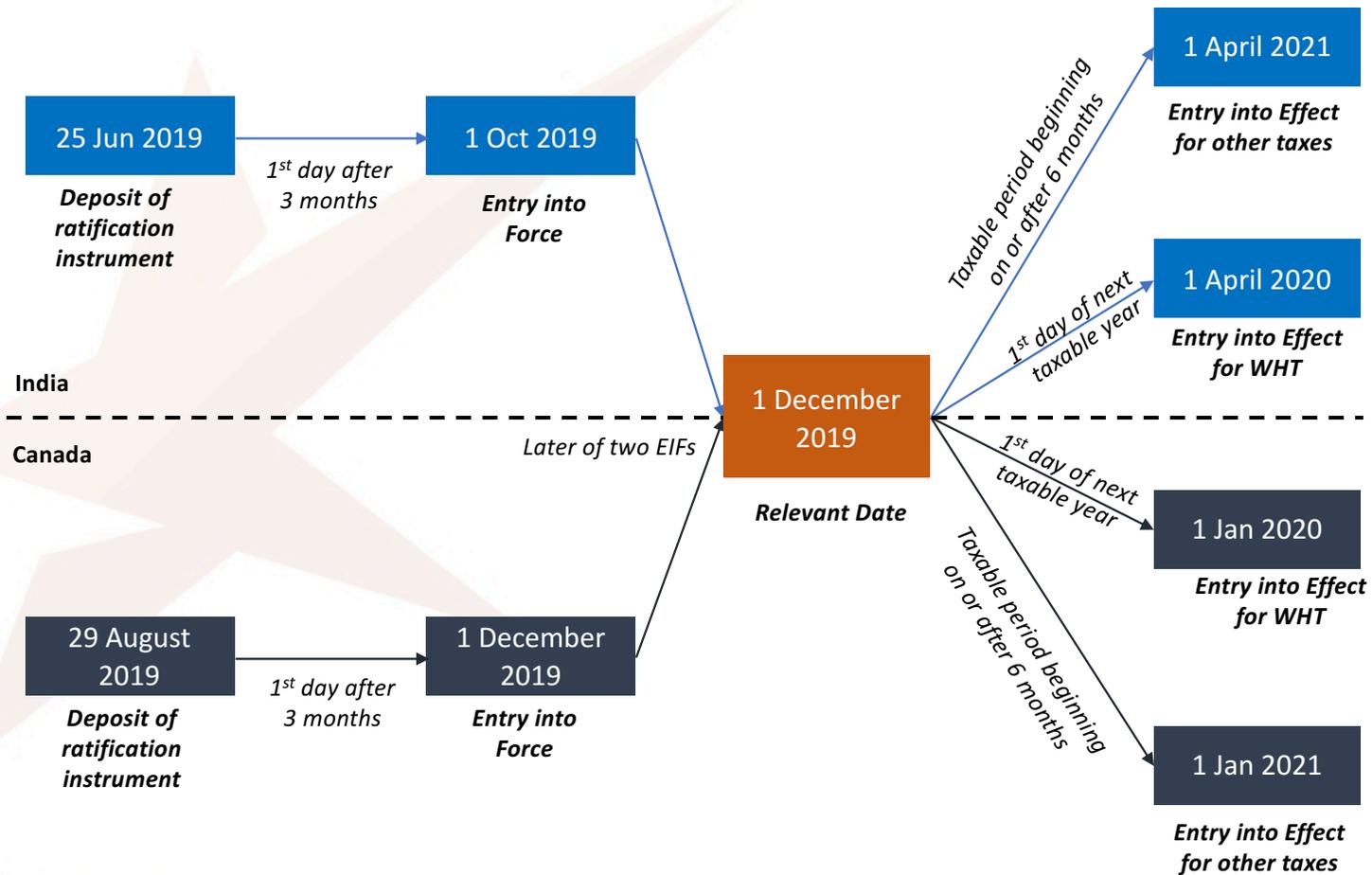
Determination of Effective Date for application of MLI

Example: India-Singapore



Determination of Effective Date for application of MLI

Example: India-Canada



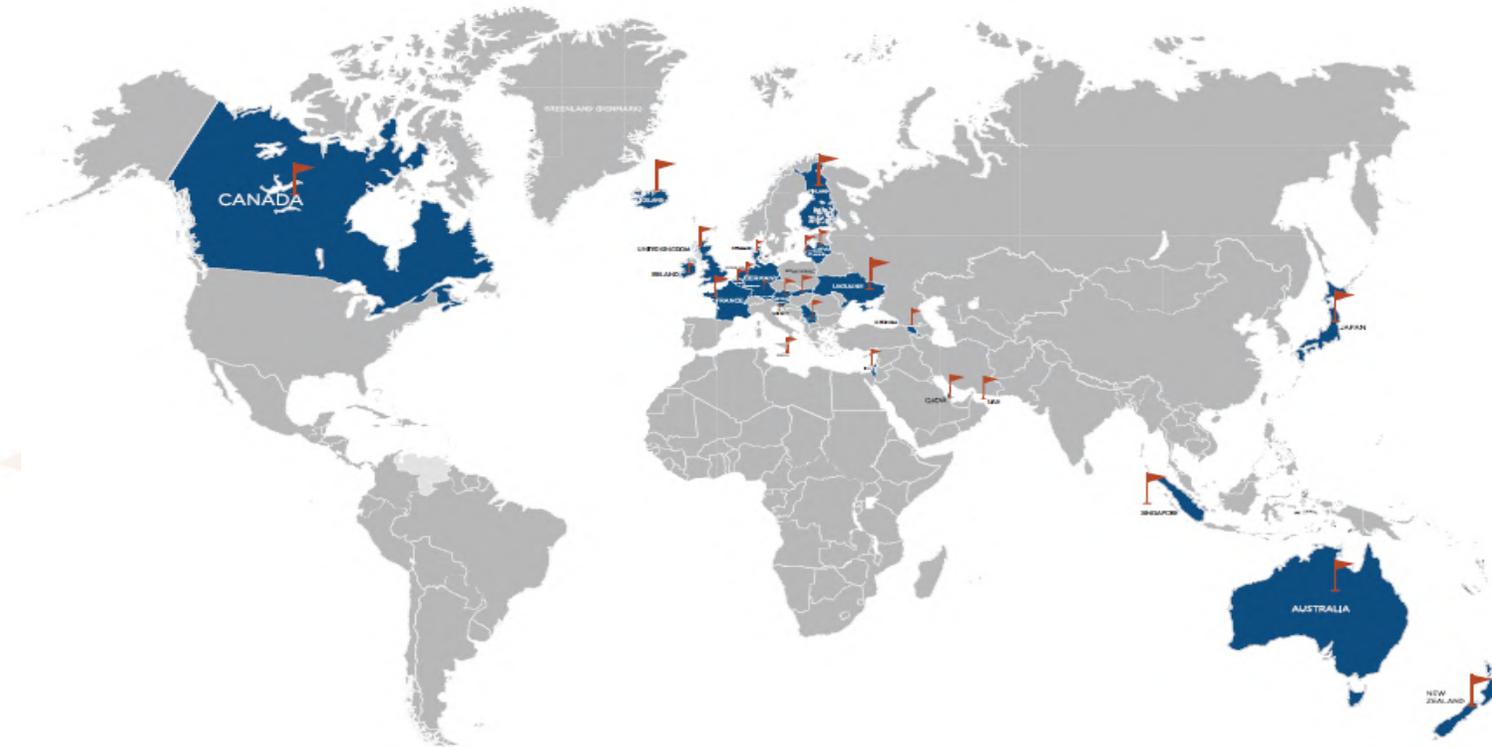
Determination of Effective Date for application of MLI

Example: India-Canada

Different dates of EIE for withholding taxes and other taxes

- In context of India – Canada DTAA, *MLI provisions become applicable for withholding taxes ahead of its applicability to other provisions*
- Interesting question will arise whether restrictive effect of MLI will need to be considered by the payers while withholding tax though, from the perspective of primary taxpayer, such applicability of MLI provision is deferred
 - Can it be argued that since withholding tax liability is *co-terminus* with primary tax liability of a non-resident taxpayer, such withholding obligation should not arise before effective date for other taxes?
 - Alternatively, can it be argued that withholding tax is only a mechanism to collect tax by government and hence, where a payment is subject to tax, such withholding requirement should be triggered irrespective of effective date for other taxes?
 - Considering the onerous provisions for non-compliance with withholding provisions in India, a conscious decision should be made by the payer

Indian Tax Treaties impacted by the MLI from 1 April 2020



1. Australia
2. Austria
3. Belgium
4. Canada
5. Denmark
6. Finland
7. France
8. Georgia
9. Iceland
10. Ireland
11. Israel
12. Japan
13. Latvia
14. Lithuania
15. Luxembourg
16. Malta
17. Netherlands
18. New Zealand
19. Norway
20. Poland
21. Qatar
22. Serbia
23. Singapore
24. Slovak Republic
25. Slovenia
26. Ukraine
27. United Kingdom
28. UAE

**Synthesised Text of
DTAA**

What is Synthesised Text of DTAA?

- Synthesised text is a single document or webpage that reproduce
 - a) the **text of each Covered Tax Agreement** (including the texts of any amending protocols or similar instruments); and
 - b) the **provisions of the MLI** that will modify that Covered Tax Agreement in the light of the interaction of the MLI positions the Parties have taken
- OECD issued *Guidance for the development of Synthesised Texts* to facilitate the interpretation and application of tax agreements modified by MLI provisions
- Guidance sets out a **suggested approach** for the development of Synthesised texts

OECD recommendations on Disclaimers in the Synthesised Text

Key Principles

- Parties to MLI have ***no legal obligation to develop Synthesised text***
- However, where jurisdictions decide to produce Synthesised texts, ***OECD encourages them to consult each other*** in order to ensure a consistent interpretation and application of MLI provisions
- ***No official format to develop Synthesised texts*** on the MLI
 - However, the OECD encourages all stakeholders to take a consistent approach
- Synthesised texts to also include explanatory information in the form of ***a disclaimer***, including information on the ***date on which the provisions of the MLI enter into effect***

OECD recommendations on Disclaimers in the Synthesised Text

General Disclaimers

Before the text of CTA, a disclaimer based on the general sample disclaimer text should be included in the Per-Article-sample boxes section. Following are the key general disclaimers:

- Reference to the MLI, CTA and the latest MLI positions of the parties along with hyperlinks
- ***Synthesised text has no legal value.*** The text of the MLI, applied alongside the CTA, would remain the only legal documents
- ***Stress that further modifications could be made to the MLI positions*** and that these modifications could change the effect of the MLI on the CTA

OECD recommendations on Disclaimers in the Synthesised Text

Disclaimer on the entry into effect

Synthesised texts should include the following *specific disclaimer on the entry into effect* of the provisions of the MLI:

- Clarification that the applicable MLI provisions will not have effect on the same dates as the original provisions of the CTA
- Statement that the *MLI provisions could take effect on different dates*, depending on the provision in question, types of taxes involved (WHT or other taxes) and the choices made by each Contracting Jurisdiction
- *Date of the deposit* of the instruments of ratification, acceptance or approval for both Contracting Jurisdictions
- *Date of the entry into force* of the MLI for each Contracting Jurisdiction

List of Synthesised Texts

List of Countries for which the synthesised text of DTAA is published by India

1. Australia
2. Austria
3. Belgium
4. Finland
5. Georgia
6. Ireland
7. Japan
8. Latvia
9. Lithuania
10. Luxembourg
11. Malta
12. Poland
13. Serbia
14. Singapore
15. Slovak Republic
16. UAE
17. United Kingdom



Link to access Synthesised Texts of DTAA:

<https://www.incometaxindia.gov.in/Pages/international-taxation/dtaa.aspx>

Extract of Disclaimer

India-Australia Synthesised DTAA

General disclaimers specifically clarifies the legality of Synthesised text while interpreting the provisions of MLI along with CTA

- **The relevant extract of the Synthesised Text of India-Australia DTAA:**

*“The sole purpose of this document is to **facilitate the understanding of the application** of the MLI to the Agreement and **it does not constitute a source of law**. The authentic legal texts of the Agreement and the MLI take precedence and remain the legal texts applicable.”*

Link to access Synthesised Texts of DTAA:

<https://www.incometaxindia.gov.in/Pages/international-taxation/dtaa.aspx>

Extracts of Synthesised Texts

India – Australia DTAA

Preamble

AGREEMENT BETWEEN THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF THE REPUBLIC OF INDIA FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME AS AMENDED BY THE AMENDING PROTOCOL

THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF THE REPUBLIC OF INDIA,

DESIRING to conclude an Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income,

The following paragraph 1 of Article 6 of the MLI is included in the preamble of this Agreement:

ARTICLE 6 OF THE MLI – PURPOSE OF A COVERED TAX AGREEMENT

Intending to eliminate double taxation with respect to the taxes covered by the Agreement without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in the Agreement for the indirect benefit of residents of third jurisdictions),

Extracts of Synthesised Texts

India – Australia DTAA

Residence

ARTICLE 4

RESIDENCE

1. For the purposes of this Agreement, a person is a resident of one of the Contracting States if the person is a resident of that Contracting State for the purposes of its tax. However, a person is not a resident of a Contracting State for the purposes of this Agreement if the person is liable to tax in that State in respect only of income from sources in that State.

2. Where, by reason of the provisions of paragraph 1, an individual is a resident of both Contracting States, then the status of that person shall be determined in accordance with the following rules:

- (a) the person shall be deemed to be a resident solely of the Contracting State in which a permanent home is available to the person;
- (b) if a permanent home is available to the person in both Contracting States, or in neither of them, the person shall be deemed to be a resident solely of the Contracting State with which the person's personal and economic relations are closer (centre of vital interests).

For the purposes of this paragraph, an individual's citizenship of a Contracting State as well as that person's habitual abode shall be factors in determining the degree of the person's personal and economic relations with that Contracting State.

3. Where, by reason of the provisions of paragraph 1, a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident solely of the Contracting State in which its place of effective management is situated.

The following paragraph 1 of Article 4 and subparagraph e) of paragraph 3 of Article 4 of the MLI replace paragraph 3 of Article 4 of this Agreement:

ARTICLE 4 OF THE MLI – DUAL RESIDENT ENTITIES

Where by reason of the provisions of the Agreement a person other than an individual is a resident of both Contracting States, the competent authorities of the Contracting States shall endeavour to determine by mutual agreement the Contracting State of which such person shall be deemed to be a resident for the purposes of the Agreement, having regard to its place of effective management, the place where it is incorporated or otherwise constituted and any other relevant factors. In the absence of such agreement, such person shall not be entitled to any relief or exemption from tax provided by the Agreement.

Extracts of Synthesised Texts

India – Australia DTAA

Permanent Establishment...

ARTICLE 5

PERMANENT ESTABLISHMENT

1. For the purposes of this Agreement, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.
2. The term "permanent establishment" shall include especially:
 - (a) a place of management;
 - (b) a branch;
 - (c) an office;
 - (d) a factory;
 - (e) a workshop;
 - (f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources;
 - (g) a warehouse in relation to a person providing storage facilities for others;
 - (h) a farm, plantation or other place where agricultural, pastoral, forestry or plantation activities are carried on;
 - (i) premises used as a sales outlet or for receiving or soliciting orders;
 - (j) an installation or structure, or plant or equipment, used for the exploration for or exploitation of natural resources;
 - (k) a building site or construction, installation or assembly project, or supervisory activities in connection with such a site or project, where that site or project exists or those activities are carried on (whether separately or together with other sites, projects or activities) for more than 6 months.

The following paragraph 1 of Article 14 applies and supersedes the provisions of this Agreement:

ARTICLE 14 OF THE MLI – SPLITTING-UP OF CONTRACTS

For the sole purpose of determining whether the period referred to in [subparagraph k) of paragraph 2 of Article 5 of the Agreement] has been exceeded:

- | | |
|-----|--|
| (a) | where an enterprise of a Contracting State carries on activities in the other Contracting State at a place that constitutes a building site, construction project, installation project or other specific project identified in subparagraph k) of paragraph 2 of Article 5 of the Agreement or carries on supervisory activities in connection with such a place, and these activities are carried on during one or more periods of time that, in the aggregate exceed 30 days without exceeding the period referred to in subparagraph k) of paragraph 2 of Article 5 of the Agreement; and |
| (b) | where connected activities are carried on in that other Contracting State at (or, where subparagraph k) of paragraph 2 of Article 5 of the Agreement applies to supervisory activities, in connection with) the same building site, construction project, installation project or other specific project identified in subparagraph k) of paragraph 2 of Article 5 of the Agreement during different periods of time, each exceeding 30 days, by one or more enterprises closely related to the first-mentioned enterprise, these different periods of time shall be added to the aggregate period of time during which the first-mentioned enterprise has carried on activities at that building site, construction project, installation project or other specific project identified in subparagraph k) of paragraph 2 of Article 5 of the Agreement. |

Extracts of Synthesised Texts

India – Australia DTAA

...Permanent Establishment..

4. An enterprise shall not be deemed to have a permanent establishment merely by reason of:

- (a) the use of facilities solely for the purpose of storage or display of goods or merchandise belonging to the enterprise;
- (b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage or display;
- (c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
- (d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or of collecting information, for the enterprise; or
- (e) the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research, or for similar activities which have a preparatory or auxiliary character, for the enterprise.

However, the preceding provisions of this paragraph shall not apply where an enterprise of one of the Contracting States maintains in the other Contracting State a fixed place of business for any purpose other than those specified in this paragraph.

The following paragraph 2 of Article 13 of the MLI modifies paragraph 4 of Article 5 of this Agreement:

ARTICLE 13 OF THE MLI – ARTIFICIAL AVOIDANCE OF PERMANENT ESTABLISHMENT STATUS THROUGH THE SPECIFIC ACTIVITY EXEMPTIONS

(Option A)

Notwithstanding Article 5 of the Agreement, the term "permanent establishment" shall be deemed not to include:

- (a) the activities specifically listed in paragraph 4 of Article 5 of the Agreement as activities deemed not to constitute a permanent establishment, whether or not that exception from permanent establishment status is contingent on the activity being of a preparatory or auxiliary character;
 - (b) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any activity not described in subparagraph a);
 - (c) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) and b),
- provided that such activity or, in the case of subparagraph c), the overall activity of the fixed place of business, is of a preparatory or auxiliary character.

The following paragraph 4 of Article 13 of the MLI applies to paragraph 4 of Article 5 of this Agreement as modified by paragraph 2 of Article 13 of the MLI:

Paragraph 4 of Article 5 of the Agreement, as modified by paragraph 2 of Article 13 of the MLI shall not apply to a fixed place of business that is used or maintained by an enterprise if the same enterprise or a closely related enterprise carries on business activities at the same place or at another place in the same Contracting State and:

- (a) that place or other place constitutes a permanent establishment for the enterprise or the closely related enterprise under the provisions of Article 5 of the Agreement; or
- (b) the overall activity resulting from the combination of the activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, is not of a preparatory or auxiliary character,

provided that the business activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, constitute complementary functions that are part of a cohesive business operation.

Extracts of Synthesised Texts

India – Australia DTAA

...Permanent Establishment

5. A person acting in one of the Contracting States on behalf of an enterprise of the other Contracting State - other than an agent of an independent status to whom paragraph (6) applies - shall be deemed to be a permanent establishment of that enterprise in the first mentioned State if:

- (a) the person has, and habitually exercises in that State, an authority to conclude contracts on behalf of the enterprise, unless the person's activities are limited to the purchase of goods or merchandise for the enterprise;
- (b) the person has no such authority, but habitually maintains in that State a stock of goods or merchandise from which the person regularly delivers goods or merchandise on behalf of the enterprise;
- (c) the person habitually secures orders in that State, wholly or principally for the enterprise itself or for the enterprise and other enterprises controlling, or controlled by or subject to the same common control as, that enterprise; or
- (d) in so acting, the person manufactures or processes in that State for the enterprise goods or merchandise belonging to the enterprise.

6. An enterprise of one of the Contracting States shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status, where that person is acting in the ordinary course of the person's business as such a broker or agent. However, when the activities of such a broker or agent are carried on wholly or principally on behalf of that enterprise itself or on behalf of that enterprise and other enterprises controlling, or controlled by or subject to the same common control as, that enterprise, the person will not be considered a broker or agent of an independent status within the meaning of this paragraph.

7. The fact that a company which is a resident of one of the Contracting States controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself make either company a permanent establishment of the other.

8. The principles set forth in the preceding paragraphs of this Article shall be applied in determining for the purposes of paragraph (5) of Article 11 and paragraph (5) of Article 12 of this Agreement whether there is a permanent establishment outside both Contracting States, and whether an enterprise, not being an enterprise of one of the Contracting States, has a permanent establishment in one of the Contracting States.

The following paragraph 1 of Article 15 applies to this Agreement:

ARTICLE 15 OF THE MLI – DEFINITION OF A PERSON CLOSELY RELATED TO AN ENTERPRISE

For the purposes of Article 5 of the Agreement, a person is closely related to an enterprise if, based on all the relevant facts and circumstances, one has control of the other or both are under the control of the same persons or enterprises. In any case, a person shall be considered to be closely related to an enterprise if one possesses directly or indirectly more than 50 per cent of the beneficial interest in the other (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) or if another person possesses directly or indirectly more than 50 per cent of the beneficial interest (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) in the person and the enterprise.

Extracts of Synthesised Texts

India – Australia DTAA

Alienation of Property

ARTICLE 13

ALIENATION OF PROPERTY

1. Income or gains derived by a resident of one of the Contracting States from the alienation of real property referred to in Article 6 and, as provided in that Article, situated in the other Contracting State may be taxed in that other State.
2. Income or gains derived from the alienation of property, other than real property referred to in Article 6, that forms part of the business property of a permanent establishment which an enterprise of one of the Contracting States has in the other Contracting State or pertains to a fixed base available to a resident of the firstmentioned State in that other State for the purpose of performing independent personal services, including income or gains from the alienation of such a permanent establishment (alone or with the whole enterprise) or of such a fixed base, may be taxed in that other State.
3. Income or gains derived from the alienation of ships or aircraft operated in international traffic, or of property other than real property referred to in Article 6 pertaining to the operation of those ships or aircraft, shall be taxable only in the Contracting State of which the enterprise which operated those ships or aircraft is a resident.
4. Income or gains derived from the alienation of shares or comparable interests in a company, the assets of which consist wholly or principally of real property referred to in Article 6 and, as provided in that Article, situated in one of the Contracting States, may be taxed in that State.

The following paragraph 1 of Article 9 of the MLI applies to paragraph 4 of Article 13 of this Agreement:

ARTICLE 9 OF THE MLI – CAPITAL GAINS FROM ALIENATION OF SHARES OR INTERESTS OF ENTITIES DERIVING THEIR VALUE PRINCIPALLY FROM IMMOVABLE PROPERTY

Paragraph 4 of Article 13 of the Agreement:

- (a) shall apply if the relevant value threshold is met at any time during the 365 days preceding the alienation; and
- (b) shall apply to shares or comparable interests, such as interests in a partnership or trust (to the extent that such shares or interests are not already covered) in addition to any shares or rights already covered by the provisions of the Agreement.

5. Income or gains derived from the alienation of shares or comparable interests in a company, other than those referred to in paragraph 4, may be taxed in the Contracting State of which the company is a resident.
6. Nothing in this Agreement affects the application of a law of a Contracting State relating to the taxation of gains of a capital nature derived from the alienation of property other than that to which any of paragraphs 1, 2, 3, 4 and 5 apply.

Extracts of Synthesised Texts

India – Australia DTAA

Mutual Agreement Procedure

ARTICLE 25

MUTUAL AGREEMENT PROCEDURE

1. Where a person who is a resident of one of the Contracting States considers that the actions of the taxation authority of one or both of the Contracting States result or will result for the person in taxation not in accordance with this Agreement, the person may, notwithstanding the remedies provided by the national laws of those States, present a case to the competent authority of the Contracting State of which the person is a resident. The case must be presented within three years from the first notification of the action giving rise to taxation not in accordance with this Agreement.
2. The competent authority shall endeavour, if the claim appears to it to be justified and if it is not itself able to arrive at an appropriate solution, to resolve the case with the competent authority of the other Contracting State, with a view to the avoidance of taxation not in accordance with this Agreement. The solution so reached shall be implemented notwithstanding any time limits in the national laws of the Contracting States.
3. The competent authorities of the Contracting States shall jointly endeavour to resolve any difficulties or doubts arising as to the application of this Agreement.

The following paragraph 3 of Article 16 of the MLI applies to this Agreement:

ARTICLE 16 OF THE MLI – MUTUAL AGREEMENT PROCEDURE

The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Agreement. They may also consult together for the elimination of double taxation in cases not provided for in the Agreement.

4. The competent authorities of the Contracting States may communicate with each other directly for the purpose of giving effect to the provisions of this Agreement.

Extracts of Synthesised Texts

India – Australia DTAA

Principal Purpose Test

Nothing in this Agreement shall affect the fiscal privileges of diplomatic or consular officials under the general rules of international law or under the provisions of special international agreements.

The following paragraph 1 of Article 7 of the MLI applies and supersedes the provisions of this Agreement:

ARTICLE 7 OF THE MLI – ENTITLEMENT TO BENEFITS *(Principal purposes test provision)*

Notwithstanding any provisions of the Agreement, a benefit under the Agreement shall not be granted in respect of an item of income if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the Agreement.

Applicability of MLI on WHT obligation

Applicability of MLI on WHT obligation

Whether the impact of MLI provisions to be considered at the time of discharging withholding tax obligations?

Impact of MLI
NOT
to be
considered

- **No specific onus on payer to apply anti-abuse provisions** at the time of discharging WHT obligation except TRC / Form 10F
- Practical challenges for payer in terms of access to documents of payee, extent of verification - **impossibility of performance**
- **Non-resident payee is not bound by the tax position / views of payer** at the time of withholding taxes

Impact of MLI
to be
considered

- **WHT obligation under section 195 is linked to taxability** under section 5 and section 9 read with Section 90
- **Potential consequences of WHT default** i.e. disallowance of expenses, exposure of being treated as representative assessee, assessee-in-default, penalty
- Reference to **Shome Committee Report on GAAR** (Refer paragraph 3.23 of report)

Recommendations of Shome Committee on GAAR

Relevant Extract of Shome Committee's recommendations:

"In view of the above, the Committee recommends that, while processing an application under section 195(2) or 197 of the Act pertaining to the withholding of taxes,

- (a) the taxpayer should **submit a satisfactory undertaking** to pay tax along with interest in case it is found that GAAR provisions are applicable in relation to the remittance during the course of assessment proceedings; or*
- (b) in case the taxpayer is unwilling to submit a satisfactory undertaking as mentioned in (a) above, the Assessing Officer should have the authority with the prior approval of Commissioner, to **inform the taxpayer of his likely liability in case GAAR is to be invoked during assessment procedure.***

*There is a responsibility cast on the payer of any sum to a non-resident under Indian tax laws in the form of a withholding agent of the Revenue as well as representative assessee of the non-resident payee. **The payer is required to undertake due diligence to ascertain the correct amount of tax payable in India and, in case of any default, it becomes the payer's liability to pay...**"*

Dual Resident Entities

Article 4 of MLI - Dual Resident Entities

Concept

Paragraph 1 of Article 4 of the MLI provides that

- where, under the provisions of a CTA, a person other than an individual (i.e., companies, LLP, other incorporated entities etc.) is considered to be a resident of more than one contracting jurisdiction, then
- the competent authorities of the contracting jurisdictions shall endeavor to determine by mutual agreement the residency of such person for the purposes of the CTA

Competent authorities shall give regard to the POEM of the person, the place where it is incorporated and any other relevant factors

If the competent authorities are unable to decide on the jurisdiction of residence

such person shall not be entitled to any relief or exemption from tax provided under the CTA

such person shall be entitled to any relief or exemption from tax to the extent and in the manner agreed upon by the competent authorities

Article 4 of MLI - Dual Resident Entities

India's position on Article 4

- India has not made any reservations with respect to Article 4 and accordingly chosen to apply Article 4 to all its CTA, subject to reservations of treaty partners against Article 4
- Where India's treaty partners' also notify the same clause, such clause will stand replaced by the provisions of Article 4
 - In the absence of notification by such treaty partners, provisions of such clause will apply to the extent that they are not incompatible with the provisions of Article 4

Article 4 of MLI - Dual Resident Entities

Case Study 1 - Impact from withholding tax perspective

A Co.
(Incorporated in
Australia but POEM
in UK)

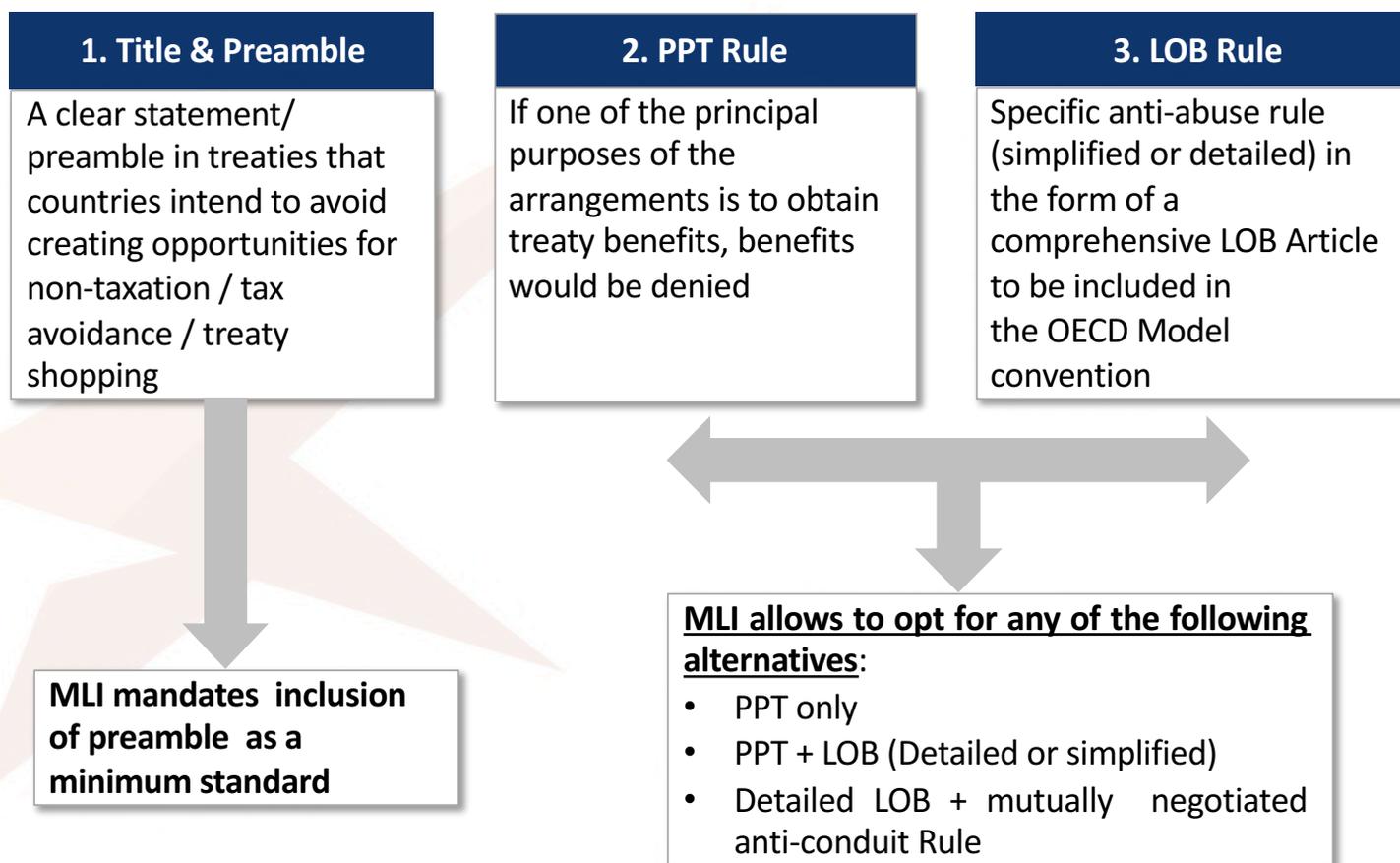
Interest
payments

Indian Co.

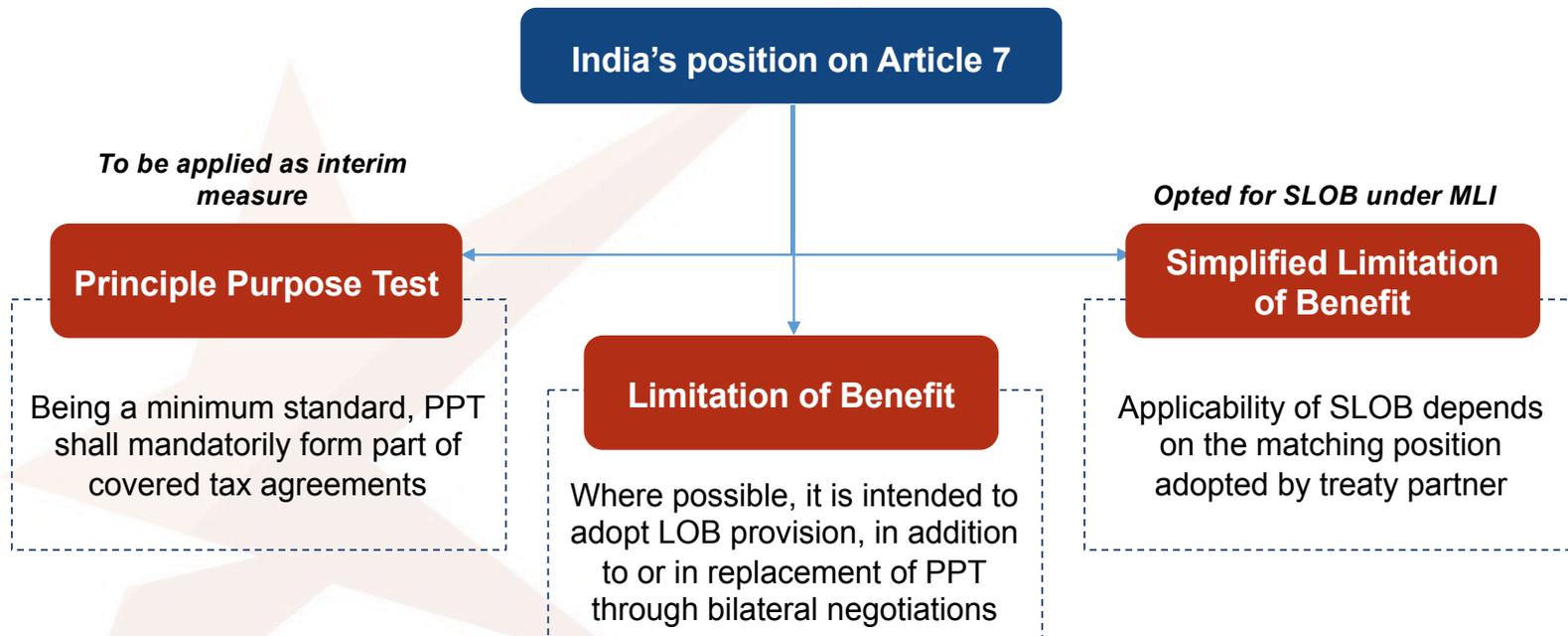
- A Co. is incorporated in Australia but POEM is in UK
- B Co. has earned interest income from an Indian Co.
- Competent Authorities of Australia and UK have not been able to determine residency of A Co.
- At what rate Indian Co. should withhold tax while making interest payment to A Co.?
- Australia, UK and India, all have notified Article 4 of MLI

**Prevention of treaty
abuse**

Approach of BEPS Action 6 for prevention of treaty abuse



India's position on Article 7 of MLI



India has accepted to apply PPT as an interim measure and intends where possible to adopt LoB provision, in addition or replacement of PPT, through bilateral negotiations along with Simplified LoB

Article 7 of MLI - Principle Purpose Test

Concept

- *Notwithstanding any provisions of a Covered Tax Agreement, a benefit under the Covered Tax Agreement shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit **was one of the principal purposes** of any arrangement or transaction that resulted directly or indirectly in that benefit, **(‘reasonable purpose test’) –***

Question of fact

Unless

- *it is established that granting that benefit in these circumstances would be **in accordance with the object and purpose** of the relevant provisions of the Covered Tax Agreement.”*

(‘object and purpose test’) – Question of law

Article 7 of MLI - Principle Purpose Test

Case Study 2

Netherland Co

Singapore Co

India Co

CCDs post 1 April 2017

Equity before 1 April 2017

Facts

- Singapore Co invested in shares of India Co were made before 1 April 2017
- Singapore Co has invested in CCDs of India Co post 1 April 2017
- Singapore Co transfers certain shares before 31 March 2020
- Singapore Co contemplates to transfer balance shares along with CCDs in 2021
- Evaluate GAAR and PPT implications

Article 7 of MLI - Principle Purpose Test

Case Study 2

Assets of Singapore Co	Acquisition	Disposal	GAAR applies	PPT applies
Shares of India Co	Pre April 2017	Pre March 2020	No	No
Shares of India Co	Pre April 2017	In 2021	No	Yes?
CCDs of India Co	Post April 2017	In 2021	Yes	Yes

Even if PPT is triggered, is there any way where one can contend non-taxability in India for disposal of shares post March 2020? *(refer ensuing slide)*

Article 7 of MLI - Principle Purpose Test

PPT impact on treaty grandfathered investments

Alt 1: PPT will not apply to Article 13(4A) which is introduced for grandfathering past investments

- Grandfathering ensures smooth transition and aligns with domestic GAAR
- Amended India-Singapore treaty was in light of BEPS project and grandfathering was a conscious decision

Alt 2: PPT applies to entire treaty including Article 13(4A) notwithstanding that acquisition of investment in India Co was on or before 31 March 2017

- PPT is a “non-obstante” provision and worded widely to cover all benefits
- PPT read with revised preamble will empower tax authority to deny tax benefit in treaty shopping arrangements

Alt 3: PPT applies to Article 13(4A). However, availing grandfathering benefit is in accordance with object and purpose

- Object and purpose of grandfathering provision is to avoid disruptive transition and provide certainty to the investors
- Providing certainty to taxpayers is one of the object and purpose of the treaty
- Grandfathering is an exception to the normal provision for applicability of treaty and its object may need to be respected

Article 7 of MLI - Principle Purpose Test

PPT impact on GAAR grandfathered investments

- Section 90(2) of the Act

“Where the Central Government has entered into an agreement with the Government of any country outside India.....under sub-section (1) for granting relief of tax,, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee”

- Section 90(2A) of the Act

“Notwithstanding anything contained in sub-section (2), the provisions of Chapter X-A of the Act shall apply to the assessee even if such provisions are not beneficial to him.”

- Article 28A of India-Singapore treaty:

*“This Agreement shall not prevent a Contracting State from **applying its domestic law and measures** concerning the prevention of tax avoidance or tax evasion.”*

- Can a taxpayer can seek to cover himself under domestic GAAR, rather than treaty GAAR (PPT), on the contention that provisions of GAAR are more beneficial?
- Whether as per Article 28A of India-Singapore treaty, arrangement needs to be evaluated only under GAAR?

Article 7 of MLI - Principle Purpose Test

Interplay between PPT and GAAR

Particulars	Domestic GAAR	PPT
Applicability	<ul style="list-style-type: none">• Main purpose is tax benefit• One of the tainted element tests is satisfied	<ul style="list-style-type: none">• One of the principal purpose is tax benefit• Not in accordance with objects and purpose of treaty
Consequences	Recharacterization of transaction, reallocation of income, denial of treaty benefits, etc.	Denial of treaty benefits
Onus	Primary onus is on tax authority	Primary onus is on tax authority and rebuttal assumption for carve out
Administrative safeguards	Approving Panel	To be determined by respective countries
Minimum threshold	Yes	No
Grandfathering of existing investments	Yes	No

Article 7 of MLI - Principle Purpose Test

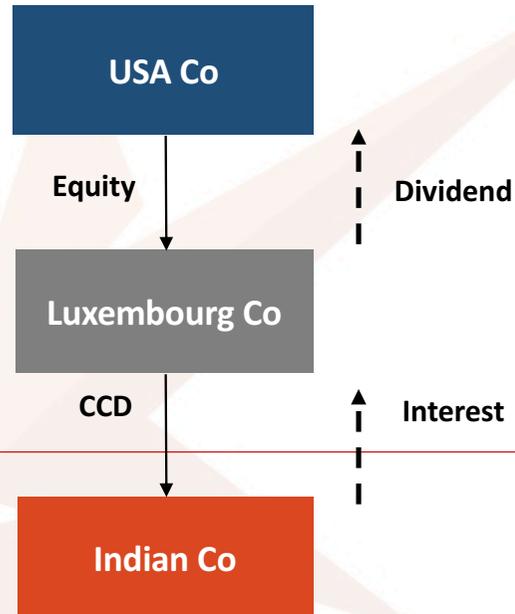
Disposal of CCDs post PPT

Consequences on transfer of CCDs of India Co

- Can **choice of funding** be questioned under GAAR/ PPT? i.e. whether CCDs can be recharacterized as shares?
 - Choice of CCD could be commercially-driven and its form reflects underlying substance of it being debt till the date of conversion
- Does **TP analysis** support that a debt funding is disproportionate, and the behavior is commercially irrational?
- Is “one of the principal purpose” test of PPT broader compared to “main purpose” test under GAAR?

Article 7 of MLI - Principle Purpose Test

Case Study 3 - Impact from withholding tax perspective



WHT on interest income

India-Luxembourg DTAA – 10%

India-USA DTAA – 15%

Indian Income-tax Act – 20% ++

- Lux Co is wholly-owned subsidiary of USA Co.
- Lux Co has subscribed to CCDs of Indian Co.
- Indian Co has paid interest to Lux Co by withholding tax @10% as per India-Luxembourg treaty
- Interest received by Lux Co is up-streamed up to USA Co by way of dividend
- India and Luxembourg MLI related changes become effective from 1 April 2020
- Lux Co holds valid TRC of Luxembourg

Article 7 of MLI - Principle Purpose Test

Case Study 3 - Impact from withholding tax perspective

Luxembourg Co alleged to be established for one of the principal purpose to obtain benefit of lower WHT rate on interest income

View I - Applicability of tax rates under Indian Income-tax Act

- *PPT is treaty centric* and does not permit look through approach
- PPT has an *absolute effect* of denial of treaty benefit on abusive transactions
- PPT *does not look beyond India-Luxembourg DTAA*
- Therefore, where treaty benefit is denied due to PPT, taxability of such payment would be governed by domestic tax laws of India

View II - Applicability of rates under India-USA DTAA

- *PPT is restricted only to 'benefit'*, quantified in comparison with alternatives – direct funding by USA Co
- PPT requires denial of the benefit from the conduit transaction and *does not envisage for harsher implications*
- Therefore, even where recourse to India – Luxembourg treaty is denied due to PPT, India – US treaty can still be applied



**Dividend Transfer
Transactions**

Article 8 of MLI - Dividend Transfer Transactions

Context of Article 8

- Following **existing anti-abuse provisions** are applied for withholding rate under various tax treaties
 - Subjective test - **Beneficial ownership test**
 - Objective Test - **Holding prescribed percentage of shares / voting power** in the company distributing dividend
- Both the tests are **applied only on the date of distribution of dividends**
- This **leads to aggressive tax planning strategies** i.e. transfer of shares of the dividend distributing company a few days prior to date of distribution of dividends, to the countries having beneficial tax treatment on dividend income
- Article 8 focuses on tackling transactions intended at artificially lowering of withholding tax on dividends

Article 8 of MLI - Dividend Transfer Transactions

Anti-Abuse Rule under Article 8

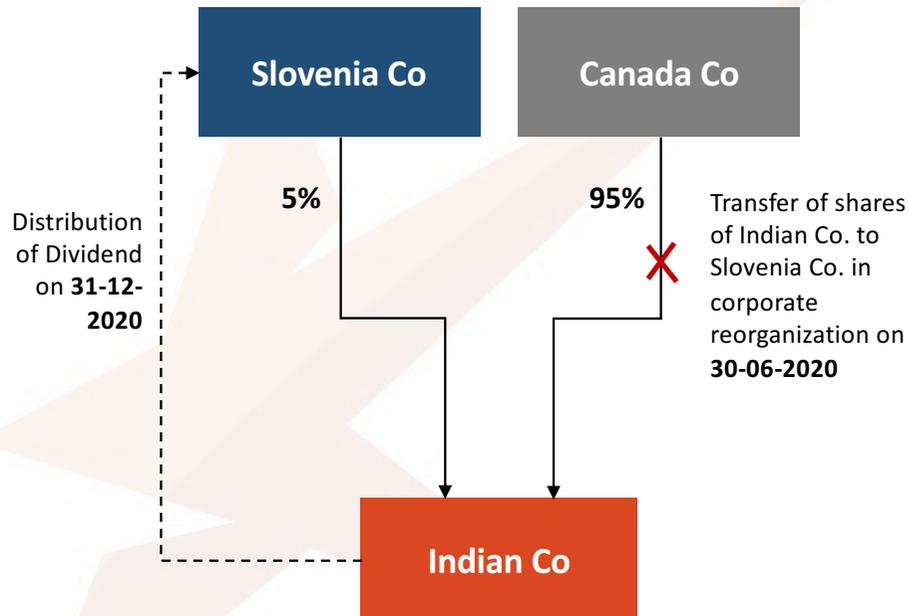
- Introduces additional criteria of '**365 days minimum holding period**' for the shareholder to avail concessional tax rates under the tax treaties

India's position on Article 8

- **India has opted to apply such provision** (except in case of India-Portugal tax treaty, which already contains similar provision) **and has notified 24 tax treaties**
- With the **recent amendments brought in Finance Act, 2020** abolishing Dividend Distribution Tax (DDT) payable by Indian companies and shifting the taxability of dividend income in the hands of shareholders, the anti-abuse provisions provided under Article 8 of MLI holds significant importance

Article 8 of MLI - Dividend Transfer Transactions

Case Study 4 - Impact from withholding tax perspective



WHT on dividend income

India-Slovenia DTAA – 5% (subject to 10% holding),
else 15% WHT

India-Canada DTAA – 15% (subject to 10% holding)

- Slovenia Co and Canada Co holds 5% and 95% shares in Indian Co respectively since **1-4-18**
- Indian Co is contemplating to distribute dividend on **31-12-20**
- Canada Co. transfers shares of Indian Co. to Slovenia Co. in an intra-group corporate reorganization on **30-06-2020**
- India and Slovenia MLI related changes become effective from 1 April 2020
- What rate do Indian Co need to WHT on dividend payments? – 5% or 15%?

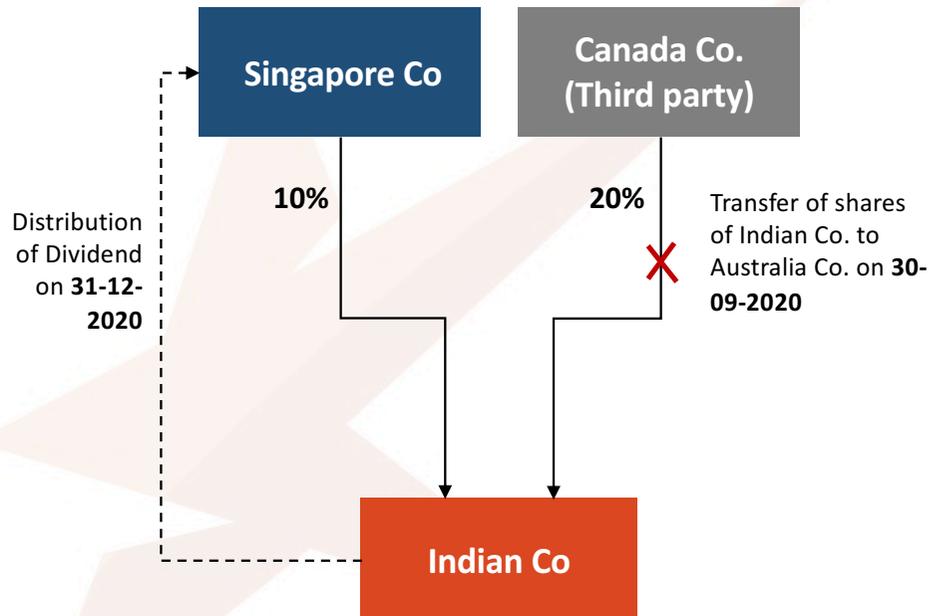
Article 8 of MLI - Dividend Transfer Transactions

Case Study 4 - Impact from withholding tax perspective

- Both India and Slovenia have notified Article 10(2)(a) in notification under Article 8(4)
- Article 10(2)(a) of India-Slovenia tax treaty is to be amended by Article 8 of MLI
 - Accordingly, additional criteria of '365 days holding period' is added to the India-Slovenia tax treaty
- **Article 8(1) of MLI, *inter alia* provides -**
*"...for the purpose of computing period, **no account shall be taken of change of ownership that would directly result from a corporate reorganisation, such as a merger or divisive reorganisation, of the company that holds the shares or that pays the dividends"***
- Accordingly, period of holding of shares held by Canada Co to be included to check the criteria of '365 days holding period' for shares acquired by Slovenia Co pursuant to corporate reorganization
- Therefore, Indian Co. to withhold tax @ 5% to Slovenia Co. while distribution of dividend
- However, since effective date for withholding tax and other tax purpose is 1 April 2020 for India, withholding of tax while distribution of dividend by Indian Co. on 31-12-2020 would be subject to fulfilment of Principle Purpose Test

Article 8 of MLI - Dividend Transfer Transactions

Case Study 5 - Impact from withholding tax perspective



WHT on dividend income

India-Singapore DTAA – 10% (subject to 25% holding), else 15% WHT

India-Canada DTAA – 15% (subject to 10% holding)

- Singapore Co and Canada Co. holds 10% and 20% shares in Indian Co respectively since **1-4-18**
- Indian Co is contemplating to distribute dividend on **31-12-20**
- Canada Co. transfers shares of Indian Co. to Singapore Co. on **30-09-2020**
- India and Singapore MLI related changes become effective from 1 April 2020 However, Article 8 of MLI does not apply
- What rate do Indian Co need to WHT on dividend?

Article 8 of MLI - Dividend Transfer Transactions

Case Study 5 - Impact from withholding tax perspective

- India has notified Article 10(2)(a) of tax treaty with Singapore in notification under Article 8(4) of MLI, however, Singapore has reserved its right for entirety of Article 8 of MLI not to apply to its tax treaty
- Hence, Article 10(2)(a) of India-Singapore tax treaty shall not be amended to include minimum holding period of 365 days to avail beneficial tax rate
- Accordingly, period of holding of shares of 365 days would not be required to be satisfied by Singapore Co.
- Since Singapore Co. would hold 25% shares of Indian Co. (post acquisition from Canada Co.), Indian Co. would be required to withhold tax @ 10% to Singapore Co. while distribution of dividend
- However, since effective date for withholding tax and other tax purpose is 1 April 2020 for India, withholding of tax while distribution of dividend by Indian Co. on 31-12-2020 would be subject to fulfilment of Principle Purpose Test

**Artificial Avoidance of
PE Status - Specific
Activity Exemptions**

Article 13 of MLI - Artificial Avoidance of PE through Specific Activity Exemptions

Setting the context

- Various tax treaties allows entities to undertake specific exempted preparatory or auxiliary activities in the source state without creating a PE for the reason that -
 - preparatory or auxiliary activities were generally ***considered non-value adding activities*** and therefore little profit would be allocated thereto
- Specific activity exemptions open BEPS abuse - Activities performed in source state may in fact be value added for the taxpayer's business if -
 - ***Delivery of goods, Purchasing of goods or collecting information is core function***
 - ***Cohesive business activities are artificially fragmented***
- Profits that should be taxed in source state are instead taxed in resident state where the taxpayer is resident

Article 13 of MLI - Artificial Avoidance of PE through Specific Activity Exemptions

Specific Activity exemption

- Article 13(1) of MLI provides 3 alternates to countries:

Option A

Specific Activity exemption available only if listed activities are preparatory and auxiliary in nature

Option B

Automatic exemption to listed activities is available irrespective of same being preparatory and auxiliary in nature

Not to choose any option

Provision as existing under covered tax agreement will remain in force

Article 13 of MLI - Artificial Avoidance of PE through Specific Activity Exemptions

New Anti-fragmentation Rule

Article 13(4) of MLI provides *option to adopt* for new anti-fragmentation rules (even if option A or B are not chosen) whereby specific activity exemption of the listed activities is not available where:

Condition 1

Same enterprise or closely related enterprise *carries on business activities* at the same place or another place in the state



Condition 2

- at least one of the places *constitute a PE*, OR
- overall activity resulting from the *combination of the activities* carried on by the two enterprises is *not of a PoA nature*



Condition 3

Aggregate business activities constitute *complementary functions* that are part of *cohesive business operation*

Article 13 of MLI - Artificial Avoidance of PE through Specific Activity Exemptions

India's position

Specific Activities Exemption

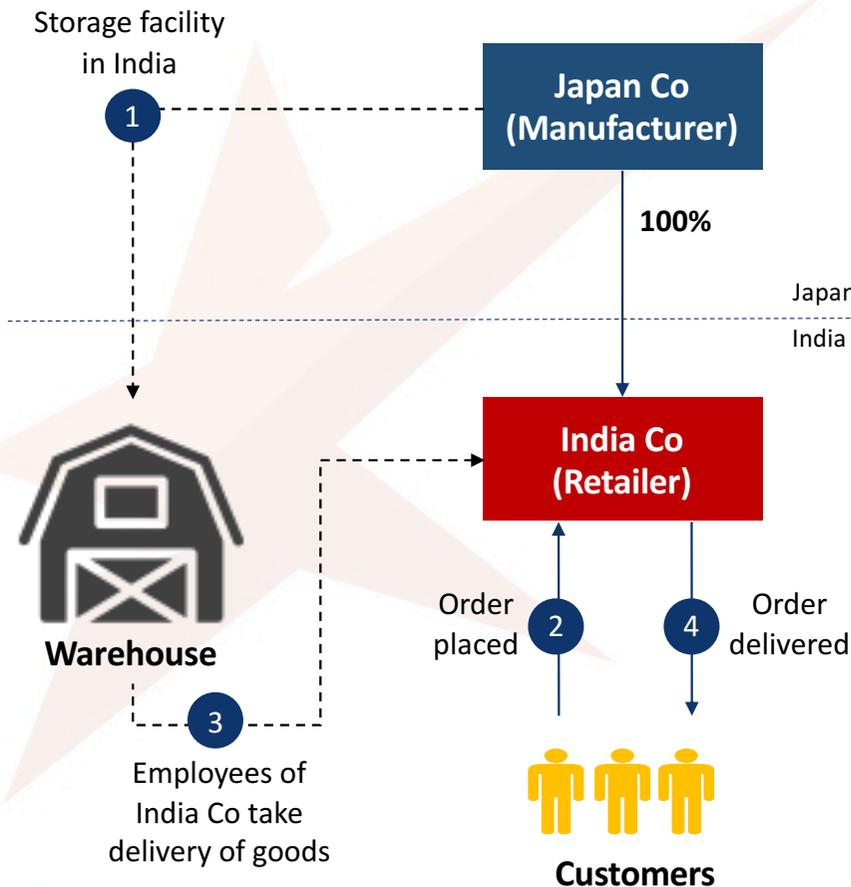
- India has opted for **option A**
 - Specified activities exemption to listed activities under Article 5(4) of the tax treaties shall be subject to activities being preparatory and auxiliary in nature

New Anti-fragmentation Rules

- New Anti-fragmentation Rules are automatically included where India has opted for Option A
- However, in tax treaty with following countries, India has neither opted for Option A nor for Option B but has only accepted Anti-fragmentation Rules
 - Belgium, France, Ireland, Kenya, Lithuania, Portugal, United Kingdom

Article 13 of MLI - Article Artificial Avoidance of PE

Case Study 6 - Impact from withholding tax perspective



- Japan Co, resident of Japan, is a manufacturer of appliances
- India Co, a wholly owned subsidiary, owns a retail store in India for selling appliances
- Japan Co owns a warehouse in India where a few high-end appliances, identical to those sold by India Co, are stored
- When an Indian customer places large orders for such high-end appliances, employees of India Co take possession of appliances from the warehouse and delivers the same to its customers
- India and Japan MLI related changes become effective from 1 April 2020

Article 13 of MLI - Article Artificial Avoidance of PE

Case Study 6 - Impact from withholding tax perspective

Pre-MLI implications:

- Since independent activities were carried out by Japan Co through India Co and Warehouse in India
 - It was argued that the activities performed in India were covered under specific exemption list or overall activities were considered to be of preparatory and auxiliary nature (Article 5(6) of India-Japan DTAA), hence no fixed place PE in India

Article 13 of MLI - Article Artificial Avoidance of PE

Case Study 6 - Impact from withholding tax perspective

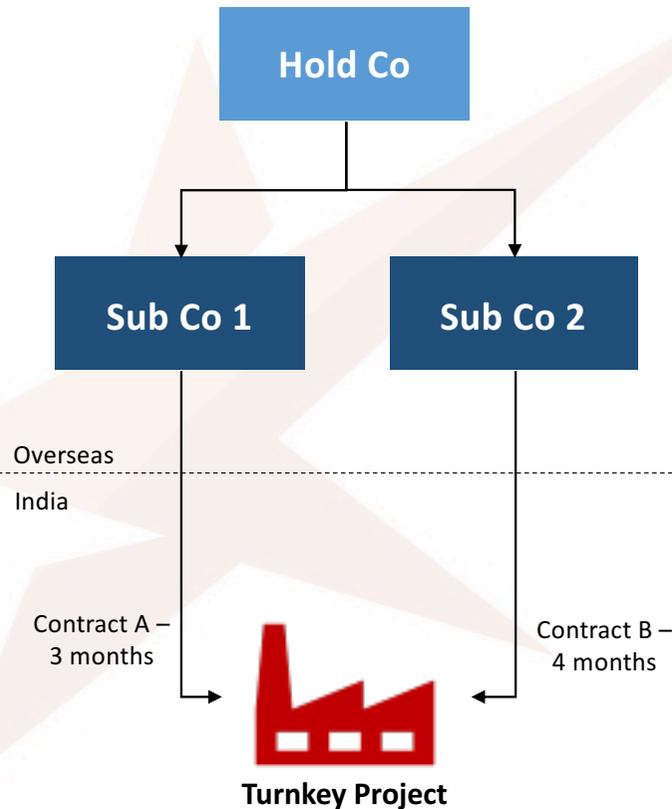
Post MLI implications:

- Both India and Japan has **opted for Option A** specified under Article 13 of MLI
 - specified activities exemption to listed activities under Article 5(6) of India-Japan DTAA shall be subject to activities being preparatory and auxiliary in nature
- Activities carried out at warehouse will not qualify as preparatory and auxiliary activity, since:
 - Warehouse represents **important asset and requires number of employees**
 - Constitute an **essential part of sales and distribution function** of Japan Co
- India Co would be required to withheld tax @ 40% (plus surcharge & cess) on net income of Japan Co attributable to India – Advisable to obtain certificate from Assessing Officer under Section 195(2) / 195(3) / 197 of the Act
- However, since effective date for withholding tax and other tax purpose is 1 April 2020 for India, withholding of tax while making payment to Japan Co. by Indian Co. would be subject to fulfilment of Principle Purpose Test

**Artificial splitting-up of
contracts**

Article 14 of MLI - Artificial splitting-up of contracts

Context



Typical splitting up of contract

- Turnkey or EPC contracts are typically divided amongst group companies in overseas jurisdiction –
- In a manner that presence of none of the foreign companies in India exceeds the threshold prescribed in the tax treaty for determination of Construction / Installation PE
- One of the Foreign company is contractually liable for entire contract with Indian Party

Article 14 of MLI - Artificial splitting-up of contracts

Text of MLI

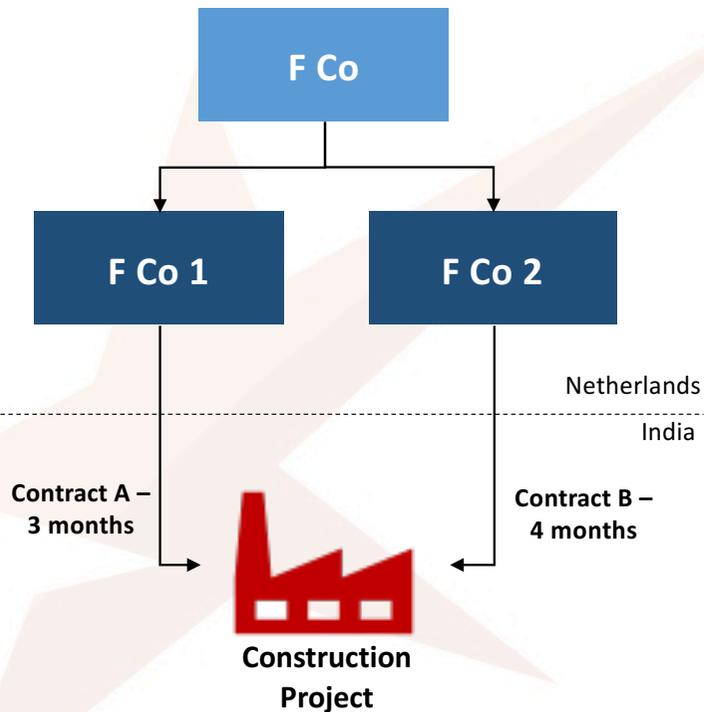
“1. For the sole purpose of determining whether the period (or periods) referred to in a provision of a Covered Tax Agreement that stipulates a period (or periods) of time after which specific projects or activities shall constitute a permanent establishment has been exceeded:

- a) where an enterprise of a Contracting Jurisdiction carries on activities in the other Contracting Jurisdiction **at a place that constitutes a building site, construction project, installation project or other specific project** identified in the relevant provision of the Covered Tax Agreement, or carries on supervisory or consultancy activities in connection with such a place, in the case of a provision of a Covered Tax Agreement that refers to such activities, and these activities are carried on during **one or more periods of time that, in the aggregate, exceed 30 days** without exceeding the period or periods referred to in the relevant provision of the Covered Tax Agreement; **and***
- b) where **connected activities** are carried on in that other Contracting Jurisdiction at (or, where the relevant provision of the Covered Tax Agreement applies to supervisory or consultancy activities, in connection with) the same building site, construction or installation project, or other place identified in the relevant provision of the Covered Tax Agreement during different periods of time, **each exceeding 30 days, by one or more enterprises closely related to the first-mentioned enterprise,***

***these different periods of time shall be added to the aggregate period of time** during which the first-mentioned enterprise has carried on activities at that building site, construction or installation project, or other place identified in the relevant provision of the Covered Tax Agreement.”*

Article 14 of MLI - Artificial splitting-up of contracts

Case Study 7 - Impact from withholding perspective



Under India-Netherland DTAA, construction activities constitutes a PE, if such activities last for a period exceeding **183 days**

- F Co. a tax resident of Netherlands is engaged in construction activities
- It has received a proposal for construction of a building in India
- Estimated duration for completion of the construction is approximately 6 months
- The construction activities have been split-up amongst the group entities i.e. F Co 1 and F Co 2
- Each entity has executed an independent contract for their respective activities
- India and Netherlands MLI related changes become effective from 1 April 2020 and have notified Article 14 of MLI

Article 14 of MLI - Artificial splitting-up of contracts

Case Study 7 - Impact from withholding perspective

- India and Netherlands have notified Article 14 of MLI
- Following different period of time to be added to determine threshold for constitution of construction / installation PE:
 - activities carried on in India during one /more periods of time which in aggregate, **exceed 30 days** without exceeding the threshold prescribed in the CTA; **AND**
 - **connected activities** are carried on **same project** site during different periods of time, each exceeding 30 days, **by closely related enterprises**
- In the instant case, since activities carried out by F Co 1 and F Co 2 exceeds 30 days and both are closely related enterprises, activities carried out by them would be clubbed and splitting up of contracts would be disregarded to determine Installation / Construction PE in India
- Since total time period of activities carried out by both the entities is 7 months which exceeds the threshold of 183 days, their activities in India would create Installation / Construction PE in India and hence, profit attributable their activities in India would be taxable in India

Article 14 of MLI - Artificial splitting-up of contracts

Case Study 7 - Impact from withholding perspective

- Indian Co would be required to withhold tax @ 40% (plus surcharge & cess) on net income of F Co 1 and F Co 2 – Advisable to obtain withholding certificate from tax officer u/s 195(2) / 195(3) of the Act
- However, since effective date for withholding tax and other tax purpose is 1 April 2020 for India, withholding of tax while making payment to Netherlands Co. by Indian Co. would be subject to fulfilment of Principle Purpose Test



**Tax Residency
Certificates**

Tax Residency Certificates

Relevance of TRCs

- TRC of a non-resident is pertinent *for determining the tax residency* while withholding taxes under the treaty provisions
- With BEPS into action, it is now significant to determine, among other things, the *beneficial ownership and substance* that non-resident has in the country that it claims to be country of residence
 - Content of TRCs does not substantiate the aforesaid aspect of non-resident payee
- *Information and declarations sought, and aspects looked upon by tax authorities* before issuing a residency certificate may help the deductor to draw some inference on above aspects
- Even from India perspective, Section 90 mandates obtaining a TRC from the resident country to avail the treaty benefit – however, there are divergent views on whether merely obtaining a TRC is conclusive evidence to demonstrate that the non-resident is a ‘resident’ of that particular country to avail treaty benefits

Information sought by tax authorities in some countries are provided in ensuing slides

Tax Residency Certificates

India

Indian Tax Office seeks following information before issuing a Certificate of Residency

- Full Name and address of the applicant
- Status (whether individual, HUF, firm, BOI, company etc.)
- Nationality
- Country of incorporation/registration
- Address of the applicant during the period for which TRC is desired
- Email ID
- PAN or Aadhaar Number/TAN
- Basis on which the status of being resident in India is claimed
- Period for which the residence certificate is applicable
- Purpose of obtaining Tax Residency Certificate

Tax Residency Certificates

United Kingdom

HMRC seeks following information from its resident before issuing a Certificate of Residency

- **Why** you need a CoR
- **Double taxation agreement** you want to make a claim under
- **Type of income** you want to make a claim for and the relevant income article
- **Period** you need the CoR for, if different from the date of issue
- **If needed by the double taxation agreement**, confirmation that you're:
 - the **beneficial owner** of the income you want to make a claim for
 - **subject to UK tax** on all of the income you want to make a claim for
- Newly incorporated companies which have not yet filed a Corporation Tax Self Assessment return must tell HMRC the:
 - name and address of each director and shareholder
 - **reason the company believes it's a resident of the UK** (based on the guidance provided by HMRC)



Tax Residency Certificates

Singapore

- To obtain a COR, a company must be a tax resident of Singapore. The tax residency of a company is determined by the place in which the ***business is controlled and managed***
- ***Foreign-owned investment-holding companies*** with purely passive sources of income and receiving only foreign-sourced income are ***not eligible to apply for COR***
- However, IRAS may still issue a COR to foreign-owned investment-holding companies provided that:
 - ***Control and management*** of company's business is ***exercised in Singapore***; and
 - Company has ***valid reasons for setting up an office in Singapore***
- Besides this, the company must also:
 - Have related companies in Singapore that are tax residents of Singapore or ***have business activities*** in Singapore; or
 - Have ***at least 1 director*** based in Singapore who holds an executive position and is not a nominee director; or
 - Have ***at least one key employee*** (e.g. CEO, CFO, COO) based in Singapore



Tax Residency Certificates

Australia

Australian Tax Office seeks following information before issuing a Certificate of Residency

- Full name of the Australian resident
- Residential address of the Australian resident and postal address if different
- Date of birth (individuals only)
- Tax file number (TFN) or Australian business number (ABN) (or both)
- Country the certificate is for
- ***A statement whether the Australian resident is only a tax resident of Australia* or whether the Australian resident is also dual resident under the relevant tax treaty***
- Period the certificate is required for

**A company that is incorporated in Australia or which is controlled and managed from Australia is a tax resident of Australia*



Tax Residency Certificates

UAE

Tax Office in UAE seeks following information before issuing a Certificate of Residency

- Valid Trade License
- Certified Articles of establishment; incorporation; founding; institutionalizing or Memorandum of association
- Copy of identity card for the Company Owners or partners or directors
- Copy of passport for the Company Owners or partners or directors
- Copy of Residential Visa for the company owners or partners or directors
- Certified audited report
- Certified bank statement for at least 6 months during the required year



Tax Residency Certificates

Malaysia

Malaysian Tax Office seeks following information before issuing a Certificate of Residency

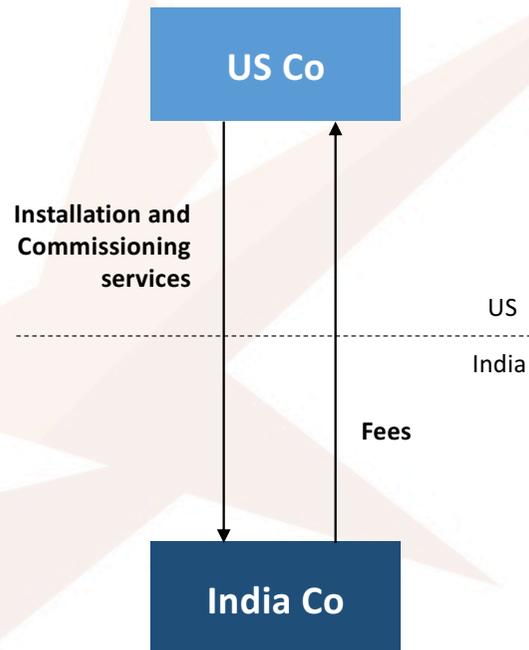
- A copy of the **Minutes of Board of Directors' Meeting**, or a letter signed by a director confirming the management and control of the company are exercised in Malaysia
- Particulars of company Director / Officer issued by Companies Commission of Malaysia (CCM)



**Are TRCs only
conclusive proof of Tax
Residency?**

Are TRCs only conclusive proof of tax residency?

Case Study 8



- India Co., resident of India, availed services for installation and commissioning from US Co.
- At the time of making payment by India Co, US Co could not furnish TRC
- India Co remitted payment for services availed from US Co. without deducting TDS taking recourse to beneficial provisions of India-US DTAA
- In the absence of TRC, whether India Co grant treaty benefits to US Co?

Are TRCs only conclusive proof of tax residency?

In the similar facts, Ahmedabad Tribunal in the case of Skaps Industries India (P.) Ltd [2018] 171 ITD 723 held as under:

- Section 90(4) requiring assessee to furnish TRC do **not start with a non-obstante clause**
 - Reference to section 90(2A) which provides that GAAR provisions shall override section 90(2)
 - Hence, mere **non-furnishing of TRC cannot be construed as a limitation** to Treaty benefits
- Various clarification on legislative intent
 - **CBDT Circular no 789** dated 13-04-2000 clarified that wherever a TRC is issued by Mauritius tax authorities, such certificate will constitute sufficient evidence for accepting the status of residence as well as beneficial ownership for applying the Treaty
 - Parliament being conscious of above circular, **dropped enactment of sub-section (5)** along with sub-section (4) which stated that TRC shall be necessary but not sufficient condition
- In absence of TRC, assessee will have to **substantiate its residential status** by way of **sufficient and reasonable documentary evidence**

Are TRCs only conclusive proof of tax residency?

Key Takeaways

- TRC will be **conclusive proof of tax residence** and tax authorities would not go beyond TRC to examine residential status
- In case, **TRC is not provided, burden of proof of assessee to substantiate** tax residency with supportive documents
- Recent decision : **Sreenivasa Reddy Cheemalamarri** (ITA No. 1463/Hyd/2018)
 - It has been held that despite best possible efforts, if assessee is not able to procure TRC from country of residence, then the situation may be treated as **“impossibility of performance”**

**Undertakings /
indemnities from non-
resident payee**

Undertakings / indemnities from non-resident payee

Relevance of undertaking / indemnity

- Practical challenges to obtain appropriate documentation from foreign third-party vendors or service providers
- Complexities involved in the structures incorporated by MNCs may leave room for uncertainty in the tax position even after comprehensive tax due diligence
- Certain anti-abuse provisions brought in by MLI are far subjective and unprecedented, thereby making it difficult to conclude on tax position

Undertakings / indemnities from non-resident payee

Pointers

- Eligible to qualify as 'person' under Article 3 of Treaty
- Resident of contracting jurisdiction and has obtained Tax Residency Certificate
- Does not have / Do not intend to have a Place of Effective Management in India
- Does not have / Do not intend create Permanent Establishment in India
- Eligible to claim Treaty benefits and satisfies 'Principle Purpose Test'
- Indemnity Clause
- Beneficial owner of the income

Way Forward

Way forward

- Payers would need to ***undertake a detailed and complex matching exercise*** to check the impact of MLI
- ***Maintaining robust documentation*** in place in order to safeguard position from a withholding tax perspective to avoid consequences under domestic laws
- ***Relook to the declarations*** to be obtained along with TRC and other documents to consider following points:
 - Beneficial ownership
 - Denial of treaty benefit on application of PPT/SLOB test
 - Residency Status
 - Permanent Establishment in third state
- ***Challenges to obtain appropriate documentation*** from its foreign third-party vendors or service providers
 - Obtaining indemnity from non-resident vendors / service providers
 - Suitable changes in the terms of the contract / agreement
- Considering the practical challenges from withholding tax perspective, clarifications from CBDT would be welcomed

Q&A



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