IFA Congress 2014

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Day 1 – October 12th 2014

The 68th Annual Congress of the International Fiscal Association (IFA) opened with a congregation of over 1500 tax delegates from across the world.

In his welcome address which made liberal use of India's national language - Hindi, IFA President, Porus Kaka promised "Achhe Din" (Good days) for the delegates over the next 5 days. In the same breath however, he joked about a 'hot and dry' Congress over the next week. The pun was not lost by anyone considering the ban on serving alcohol in the State due to elections. Mr. Kaka mentioned that India was now the largest branch of IFA in the world and added that over the next 10 years country is poised to have 400 million consumers, more than the entire population of USA. He condoled the demise of Senior IFA Members and office bearers who passed away recently.

In his key note address, India's Revenue Secretary, Shaktikanta Das, made a candid confession that 'home grown problems' were as responsible for the slow-down of country's growth and decline of investment sentiment. Stating that Revenue Dept. has an important role to play in reviving growth, Mr. Das called for a spirit of partnership between the tax-payers, tax Dept. & tax professionals.

He noted the prevailing ambiguity in Tax laws in India and added that "aggressive tax-planning by corporates have been met by aggressive assessments by the Dept." He promised greater clarity in tax laws and a stable regime for the tax-payers in India.

With respect to Transfer Pricing, Mr. Das stated that the Govt. was sincerely trying to adopt international best practices like range concept and multi-year data (measures announced recently). On the raging controversy of GARR, which is scheduled to come into force early next year, Mr. Das cautioned everyone to not rush into conclusions. He told the audience that the same is under review and that the Govt. would take a decision on its implementation well before the deadline.

Before concluding, Mr. Das did ask the Congress to ponder on whether non-tax bilateral investment treaties could be invoked by parties mired in tax litigations. This could be seen in the context of Vodafone and a few other MNCs serving notices on the Govt under bilateral treaties for resolution of their tax disputes.

The Indian flavour could not be missed as young boys and girls regaled the audience, dancing to the tunes of super-hit Bollywood numbers.

IFA Congress Organising Committee Co-Chairs, T. P. Ostwal & Pranav Sayta and IFA India Chairman Sushil Lakhani in their welcome speech, gave the audience a preview of what lay in store for them over the next few days.

Day 2 – October 13th 2014

Plenary Session: Cross-border Outsourcing – issues, strategies and solutions

Chair: Bruno Gibert (France)

Panel Members: Heinz-Klaus Kroppen (Germany), Lionel Nobre (Brazil), Harry Roodbeen (Netherlands) & Monique I.E. Van Herksen (Netherlands)

General Reporters: Shefali Goradia and Pinakin Desai (India)

Day 2 of IFA Congress 2014 began with the plenary session on "**Cross-border Outsourcing – issues, strategies and solutions**". The focus of the subject was to discuss how various jurisdictions are dealing with the concept of outsourcing from tax perspective and highlight key challenges faced by MNEs.

The General Reporters on the subject & the panelists, Shefali Goradia and Pinakin Desai (both from India) explained the key takeaways from 38 country reports received on the topic. Out of 38 countries covered in their analysis, 20 counties were from EMIA region, 9 from Americas and 9 from Asia-Pacific. Their analysis suggested that there are no common rules or framework specifically dealing with tax issues arising from cross border outsourcing.

Harry Roodbeen from Netherlands, dealing with PE related issues arising from outsourcing, highlighted the impact of Base Erosion & Profit Shifting (BEPS). BEPS Action Plan 7 dealing with artificial avoidance of permanent establishment (PE) status, includes commissionaire model that has impact on the cross border outsourcing, noted Mr Roodbeen. The panel also agreed that Action No 8, 9 and 10 dealing with transfer pricing would also be relevant in cross border outsourcing tax considerations.

Lionel Nobre (Tax Director at Dell, Inc. based in Brazil) shared his experiences from Dell on business consideration involved in outsourcing that play a vital role in the decision making. The panel discussed that usually tax incentives associated with outsourcing further add to the business case of outsourcing and not the other way round. However, the panel discussed an example of Switzerland, where tax savings (incentives) outweigh high business infrastructure costs.

The panelists Monique van Herksen (Netherlands) and Pinakin Desai then discussed withholding tax related issues associated in outsourcing. Highlighting withholding tax (WHT) rates in BRICS region on royalty and services, which range from 10% to 25%, the panel mentioned that credit of WHT paid in source country could be subject to limitations in the residence countries. This could result in additional costs and also result in blockage of significant working capital.

Harry Roodbeen then touched upon the issue of "exit taxes" associated with outsourcing decisions. He concluded that country where operations are being closed down operations

pursuant to outsourcing should not be entitled to receipt of the compensation. Heinz-Klaus Kroppen(Germany) added that German domestic tax law taxes business restructurings and could result into levy of exit taxes. He stated that classical outsourcing decisions where routine functions are outsourced and absent any transfer of intangible assets, "exit tax" is not justified.

Shefali Goradia discussing various aspects of PE, in the context of outsourcing, dealt with Service PE, which is present in the UN Model convention and hence is relevant in many developing economies which are source countries in the outsourcing. Citing example of India-USA treaty, she stated that there is no threshold in certain countries if services are rendered to related entity,. She added that there is a specific clarification contained in few Austrian treaties where service PE includes 'active' services and specifically excludes 'passive services'. Heinz-Klaus Kroppen raised a question on application of "significant people function" approach to the dependent agent PE (DAPE), being an artificial concept.

Monique I.E. Van Herksen however cautioned the audience with regard to a trend where Revenue authorities privy to BEPS discussions are applying 'dynamic interpretations' to past disputes. This is a cause of concern, added Ms Herksen. She then also discussed about an increasing trend wherein outsourcing fee (expense) is denied as a business deduction if paid to a low/no tax jurisdiction. One of the panelist also raised a concern that this trend may apply to purchases and therefore would give rise to constitutional issue of taxing income on a gross basis as against net basis.

The panel then discussed the issue of deductibility of head office charges paid by outsourced entities. The panel observed that the challenge is on two counts – high cost of head office charges in general and expensive currency involved in head office location. These "base eroding payments" have been a matter of concern especially in developing countries, noted the panelists. The panel also discussed Italian and Spanish rulings which have a significant impact on issues relating to outsourcing. The panel concluded that PE characterisation and attribution are significant issues and transfer pricing would be the best way to address them.

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After a brief introduction of the concept of outsourcing by the Chairman Mr. Bruno Gibert, the session began with a summary of the IFA General Report on this subject being presented by the General Reporters – Ms Shefali Goradia and Mr Pinakin Desai. The General Reporters provided an insight on the interplay of domestic tax provisions of various countries vis-à-vis the outsourcing models followed, with specific emphasis on the incentives and disincentives for outsourcing arrangements. They then highlighted the varied country positions on the constitution of different kinds of permanent establishments ('PEs') which may arise in an outsourcing scenario and principles of profit attribution for the same. They

also summarized the transfer pricing principles, tax withholding issues and anti-deferral regimes prevailing in specific countries, which were relevant for outsourcing.

Mr Harry Roodbeen then provided an overview of the BEPS Action Plans relevant to outsourcing structures; particularly Action Plan 7 on artificial avoidance of PE status (including commissionaire arrangements) and Action Plans 8-10 on transfer pricing intricacies which may impact outsourcing structures.

The panelists then discussed about the impact of business factors in implementing an outsourcing arrangement, such as lower labour and social security costs, HR aspects, reputational concerns etc. It was highlighted that the tax considerations may be a factor only in exceptional circumstances where the tax benefit is significant enough to bear a higher weightage compared to certain business aspects.

This was followed by a discussion on withholding tax issues impacting outsourcing. The key aspects discussed were denial or restrictions for credit of taxes withheld in the source state by some countries on account of classification conflicts or specific domestic law provisions. Anti-abuse rules prevalent in some countries were also cited, which seek to levy higher withholding tax in specified circumstances where the payee is located in a country with no tax treaty or no agreement for exchange of information or is not compensated at arm's length for the outsourced functions. The General Reporters drew attention to a unique provision in the Indian domestic tax law, which imposes withholding tax obligation on a non-resident making payment to an Indian resident, in respect of Indian taxes due on such Indian payee's income. The panelists also discussed the challenges in enforceability of such a provision.

On the basis that the outsourcing arrangement would constitute a PE, the panelists then discussed the attribution principles which would be relevant for determining the profits attributable to the PE. In the context of Fixed Place of Business PE, the panelists highlighted that a factual and functional analysis must be undertaken to determine (i) the significant people functions performed, (ii) the asset owned and (iii) the risk assumed by the PE, which could be used as a basis to attribute profits. Likewise, similar principles could be applied in context of Dependent Agent PE. Additionally, the panelists also stressed on the relevance of the arm's length principle used in remunerating the agent which may help reduce an additional PE exposure.

The last part of the session focussed on disputes in the residence State with regard to anti outsourcing measures such as exit tax (in Germany), restructuring related tax controversies (in Spain and Italy) and CFC rules in various countries. Specifically, it was pointed out that only in cases where major intangibles and risks are transferred and where the recipient receives an entrepreneurial return, levy of an exit tax is justifiable and not in cases involving transfer of routine functions. Additionally, the intra group restructuring exercises involving establishing a group company in a low tax jurisdiction (not justified by economic reasons) to carry out outsourcing functions would attract CFC exposure. Such restructuring could also attract issues pertaining to denial of tax deductibility for payments made to group companies

located in such jurisdictions and restriction on applicability of tax treaty due to existence of limitation of benefits provisions in the tax treaty, General Anti Avoidance Rules, beneficial ownership tests etc.

In conclusion, the Chairman stated that different countries adopt different approach towards outsourcing structures. Some countries prefer to pursue cases under transfer pricing whereas others attempt to test cases under PE. Adopting a uniform approach and reducing restriction on deduction of cross-border payments would make outsourcing structures more efficient.

Click here to view the presentation as available on IFA Congress website.

Session: Indirect Transfer of Assets

Chair: Mukesh Butani (India)

Panel Members: Graeme S. Cooper (Australia), Stephen Nelson (USA/Hong Kong), Jessica Power (Chile) & Kees Van Raad (Netherlands)

The first of the afternoon scientific sessions involved the discussion on the hot topic of debate in India, **"Indirect Transfer of Assets**". The panel discussed tax policy in different countries on 'indirect transfer taxation' as well as the role of anti-abuse law to prevent non-taxation. The panel noted that indirect transfer concept is currently used in treaties mainly in the content of transfers involving immovable property.

The panel noted that Israel in 2009 introduced an expansive nature of indirect transfer legislation, covering not just immovable property but also various assets as well as rights in the assets. The panel interestingly noted the growing trend of GAAR and its interplay with indirect transfer law. The panelists noted that applying GAAR instead of indirect transfer law could be riskier as the treaty benefit may not be available in such situation. Mukesh Butani noted that such a situation would soon be relevant in Indian context once Indian GAAR comes into effect from April 1, 2015. The panel also added that this aspect will be dealt with in BEPS Action Plan 6.

The panel then discussed specific country practices from India, China (Circular 698), Australia and Chile. One of the panelists, analysing Chinese Circular 698, dealing with indirect transfer reporting, stated that even internal re-organisation needs to be reported to Chinese Revenue under this circular. Specially, in the context of shares, the panel concluded that controlling interest in a company is distinct from shareholding. The panel noted the observations of Indian Supreme Court ruling in Vodafone in this regard which have still not been overruled.

Prof Kees Van Raad highlighted the wide scope of "other income" article in the UN Model convention which uses the term "income arising". He believes that this article could be like "*Carte blanche*" for the developing countries. He however cautioned against the trend of applying Article 3(2) and importing domestic law meaning to tax indirect transfers.

The panel also noted the difference between the terms "principally" and "substantially" (in the context of holding threshold to tax indirect transfer), former being more qualitative in nature.

The panel then discussed three different categories of Indian tax treaties – 1) comprehensive capital gains clause covering direct and indirect transfers (eg Australia, China, UK, USA) 2) where India has a right to tax sale of shares of a company resident in India (eg France, Germany, Italy, Japan, Netherlands, New Zealand, Norway, Philippines, Russia, Switzerland & many others) and 3) Capital gains taxable only in the state of residence of the foreign seller. (eg Mauritius, Cyprus, Singapore)

Lastly the panel noted various enforcement-related challenges associated with indirect transfer law, wherein international law and multilateral instrument would be relevant. The panel however felt that reporting of such transactions under automatic exchange framework would not be practically possible.

Knowledge Partner – BMR Advisors' Take

The panel examined the key aspects concerning indirect transfer provisions, under following subjects –

Subject I: Tax policy concerns

In this subject, the panel debated on indirect transfer provisions in the backdrop of extra-territoriality and jurisdictional issues, citing principles of customary international law and whether such principles can be dispelled by merely placing an enabling provision for extra-territorial laws within source state's constitution. A reference in this regard was made to 'effects doctrine' administered by the US in context of the competition law. From an Indian standpoint, the Chairman shared useful insights on Article 245 of the Indian dealing with legislating/ enforcing extra territorial laws. In context of indirect transfer provisions enacted within the Indian domestic law with retroactive effect, the Chairman remarked that the law makers have 'boxed' themselves, as they have seemingly restricted their ability to issue subordinate guidance for introducing further clarifications to the provisions.

Subject II: National practices

From policy level issues, the panel moved on to discuss the 'Ex ante' and 'Ex post' approaches for seeking to tax indirect transfers, followed by a broad insight into the key

domestic law provisions incorporated by Chile, China, Australia and India to deal with situations of indirect transfer and relevant exemptions therefrom.

Subject III: Tax treaty provisions

Having discussed the domestic law provisions of various countries, the panel dived into an engaging debate on interpretation of treaty provisions. The panel discussed relevant paragraphs of the OECD MC and the UN MC, providing for taxability of capital gains derived by a resident (of the residence state) on indirect transfer of immovable property situated in the source state. The panel also highlighted deviations (regarding the threshold and the list of exclusions) appearing in the existing (relevant) paragraph of the OECD and UN MC. Mr Graeme Cooper referred to BEPS Action Point 6 and indicated that current wording of the said paragraph of the OECD MC may undergo a modification so as to encompass a larger set of indirect transfer situations.

Panel members representing India, Chile and China also contributed the respective country perspectives. Discussion on this subject was concluded with an interesting example highlighting various aspects of a multi-tier structure, such as valuation issues, quantum of gain realized in the residence state vis-à-vis gains computed by source state under respective country laws.

Subject IV: Enforcement

Lastly, the Panel presented the enforcement challenges embedded in indirect transfer provisions – securing compliance from non-residents, difficulty in monitoring the flow of funds, multiple reporting and the administrative cost attached thereto.

The panel articulated a few possible options for enforcing reporting obligations on the parties involved / affected by the indirect transfer. In this context, the panel highlighted the significance of multilateral / bilateral instruments to facilitate cross border dialogue between residence and source state(s) entailing exchange of information and assistance in tax administration. Further, the panel debated on the utility of common reporting standard in achieving effective enforcement of indirect transfer rules in cross border situation.

To conclude, the seminar covered the entire landscape relating to indirect transfers starting with Tax policy, national practices, treaty interplay and administrative and computational issues affecting enforcement. The Chairman closed the seminar stating that while the indirect transfer rules have increasingly been acknowledged round the globe, still, lot of ground needs to be covered to achieve streamlining of different approaches that residence and source states may adopt in relation to a single transaction resulting in indirect transfer of assets.

Click here to view the presentation as available on IFA Congress website.

Session: VAT / GST implications on cross-border outsourcing & cost-sharing arrangement

Chair: Satya Poddar (India)

Panel Members: Piet Battiau (OECD), Harun Can (Switzerland), Igor Mauler Santiago (Brazil), Rebecca M. Millar (Australia) & Andrea Parolini (Italy)

Day 2 of IFA Congress 2014 witnessed 2 hours of deliberation on indirect tax issue, viz. VAT / GST implication on cross border outsourcing and cost-sharing arrangements. The Panel, chaired by Mr. Satya Poddar, emphasized the need of achieving neutrality in treatment of cross-border outsourcing, to mitigate the cascading effect of input tax by way of set-offs / credits, as in the case of domestic transactions.

The panelists referred to the OECD Neutrality Guidelines which envisage minimal impact of VAT on business decisions and equal treatment of economic operators. In this context, the Panel gave an overview of the tax mechanisms in place in different jurisdictions like European Union, Switzerland, Brazil, Australia, New Zealand, Canada and India.

In case of European Union, Mr. Andrea Parolini highlighted two conflicting rulings of European Court of Justice, viz. FCE [C-210/04] and Skandia Corporation [C-7/13] on taxability of cost sharing arrangement between Head Office and Fixed Establishment / subsidiary situated abroad. In Australia & New Zealand, Ms. Rebecca Miller stated GST is charged on reverse charge basis, but where the service is exempt / zero rated, no tax would apply. Mr. Igor Mauler Santiago pointed out that Brazil adopts a complex tax structure based on 'territoriality principle' instead of 'destination' principle, which in all likelihood could lead to double non-taxation if foreign supplier adopted destination principle. He, however, highlighted that there was no Court ruling on such scenario yet.

India, on the other hand, taxes all services imported under reverse charge mechanism (except exempt services), irrespective of the relationship between service provider and recipient. In this context, Mr. Poddar expressed his disappointment with the current taxation regime and felt a more liberal view should be adopted by Govt towards "outsourcing", considering the major role it plays in the economy. As regards Canada, Mr. Poddar pointed out that Canadian law recognised deeming fiction of Permanent Establishment and taxed on reverse charge basis for import of service. Also, pursuant to Canadian Court ruling in State Farm Mutual & Insurance Co. case (2003), special and complex rules for financial sector have been enacted.

To conclude, the panelists agreed that there ought to be uniformity in taxation laws in concerned jurisdictions, i.e. either tax all services so to allow input tax set-off, or zero rate all

such transactions. Tax on outsourcing is not a trivial issue and has a significant impact on business decisions, emphasized the Panel.

Click here to view the presentation as available on IFA Congress website.

Day 3 – October 14th 2014

Plenary Session: Qualification of Taxable entities and Treaty Protection

Chair: Carol Dunahoo (USA)

Panel Members: Clive M. Baxter (Denmark), Stephen Bowman (Canada), Pramod Kumar (India) & Jae-Ho Lee (Rep. of Korea)

General Reporters: Claus Staringer and Michael Lang (Austria)

The second scientific topic of plenary session on Day 3 of IFA Congress Mumbai 2014 was **"Qualification of Taxable entities and Treaty Protection".** The focus of the subject was to discuss how conflicts of entity qualification affected entitlement to treaty benefits and how these conflicts should be addressed.

The session saw a healthy debate on relevance of OECD's partnership report published in 1999 in addressing issues of fiscally transparent entities. Many of the panelists were of the belief that even after 15 years of the report being released, it had limited acceptance. One of the main reasons was that the proposals in the report were implemented through commentary and not included in the Model Convention itself.

Strongly defending OECD's report and its relevance, Mr. Jacques Sassaville (OECD) stated that the report provided a strict conceptual framework. He added that the report was relevant only in respect of partnerships. Addressing the criticism that many countries have not adopted the partnership report, he gave an example of software taxation report of 1990. He stressed that this report too was not accepted by many countries initially, but now is getting wider acceptance. He stated that full consensus is not possible in such situations.
The panel further discussed various approaches of addressing tax issues revolving around fiscally transparent entities - such as 'source state' approach or a 'modified source state' approach (followed in Korea).

Mr. Pramod Kumar (judge from Indian Income Tax Appellate Tribunal) suggested that mere "interpretational" approach has limitations and absent specific treaty provisions, judiciary is likely to view and interpret treaty relief to fiscally transparent entities differently. He cited Indian Revenue's reservations to the partnership report and its stand over the years on this issue, which eventually led to amendments through India - UK treaty protocol in 2012. He also discussed four rulings delivered by Indian Courts, wherein somewhat contrary views have been expressed.

He therefore felt that judicial view may not be the most appropriate solution and it has to be found via bilateral treaties. The panel noted that bilateral treaty resolution practically would not be easy to implement. As an alternative, Mr. Pramod Kumar suggested introduction of "Most Favored Nation (MFN)" clause in treaties as an approach to resolve tax treatment of fiscally transparent entities. This, according to him would allow countries to accommodate subsequent changes, if any, in the position on treatment of fiscally transparent entities through the treaty mechanism.

Professor Michael Lang (Austria) expressed scepticism with the MFN approach. He added that MFN has been adopted in over 600 treaties worldwide. He cautioned that certain aspects of this approach could be subject to constitutional challenges.

The panel also discussed "kill effect" of treaty changes to the past disputes. The panel opined that though this could be a concern, the situation will not present itself for the first time. Also, any such change usually should apply prospectively, felt the panelists.
Prof Lang, in the context of BEPS, stated that the term "fiscally transparent" was for the first time been regarded as a legal term. This according to him would therefore lead to interpretational issues.

International Chamber of Commerce representative, Mr. Christian Kaeser (from Siemens, speaking as an intervener) stressed on the commercial and business importance of hybrid entities and called for urgent and time bound solution to resolve the issue of treaty relief via bilateral agreements.

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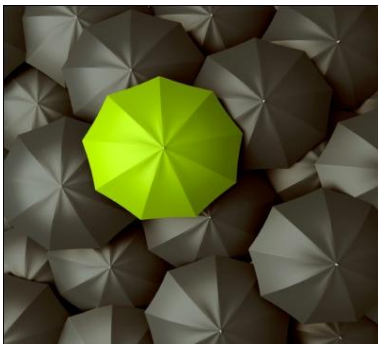

The session commenced with examining common approaches to applying treaty benefit to hybrid or fiscally transparent entities. There was a debate as to why hybrid entities are set up at all and why enterprises do not set up opaque entities in the first place given the controversy around qualification of taxable entities. It was discussed that business reasons including requirement of flexibility in compliance distributions effect the form of entity which is used to do business.

The general reporters examined the OECD partnership report. Major findings included the fact that there are not just conflicts in treatment of partnerships and companies but sources of conflicts are much more colourful. Many a times, Courts compare the foreign hybrid entity with a comparable entity in their jurisdiction to ascertain characterisation.

The general reporters observed that there is limited and certainly not a global acceptance of the OECD partnership report. Different reasons were laid down for the reluctance in acceptance. The general reporters concluded that while the partnership report is highly relevant, in real life practice there are other ways to mitigate effect of conflicts and the OECD approach may not be the only approach to resolve disputes.

Business concerns including procedural and financial were also discussed especially regarding loss of deductions and issues regarding fines and penalties for non compliance when a particular state requires a different entity to comply.

Country specific experience including India and Korea was also discussed, and a BEPS perspective provided.

To conclude, it was an interesting seminar which went beyond the OECD Partnership report and discussed some alternate ways to resolve the conflict situation. The intervention by Jacques Sassevile demonstrated that the OECD has endeavoured to think ahead of time. Nonetheless a clear and transparent solution is required to be provided. The intervention on behalf of ICC hinted to the fact that treaties are entered into to avoid juridical double taxation and not economic double taxation and that treaties need to be given a more contextual interpretation. The moot question which was debated at the Seminar was whether the solution is to interpret treaties purposively or rather a tax policy issue.

Click here to view the presentation as available on IFA Congress website.

Session: The Taxable Residence of Companies

Chair: Guglielmo Maisto (Italy)

Panel Members: Stéphane Austry (France), Nikhil V. Mehta (UK/India), Jens Schönfeld (Germany), Jeerson P. Vander Wolk (USA) & Michiel Van Kempen (Netherlands)

One of the afternoon seminar topics for the day dealt with the topic of **"The Taxable Residence of Companies"**. The panel discussed the review of criteria for tax residence of companies under Domestic Law, domestic tax audits on tax residence of companies, tax residence of companies under case laws and treaty issues relating to company tax residence. The panel discussed pros and cons of approaches in determining residence of companies – eg. place of incorporation (POI test) and place of effective management (POEM test) and the different country practices. The panelists then elaborated on the recent proposals announced in USA of adopting a "central management and control" test for inversions. The Obama Administration's 2015 Budget Proposals state that foreign acquiring corporation be treated as domestic corporation if (1) central management and control exercised in the US and (2) substantial business activities are in the US. Nikhil Mehta then explained the UK system of applying POI and POEM test and India approach of POI test and wholly managed company (as against POEM). The panel also discussed territorial based taxation system (such as the one followed in France).

The panel also discussed strategies adopted by Revenue authorities for testing the residence of companies. These include - CFC test, PoEM test, Look-through approach (GAAR or substance over form), PE test (e.g. PoM) and transfer pricing. One of the key takeaways from the session especially from Indian perspective included the discussion on practical tests to be considered for POEM criteria. These include shareholder & director roles, matters to be observed during the day-to-day management of the companies.

Lastly, the panel discussed, approaches in resolving dual residence status. The panel noted that OECD Model currently uses PoEM to break a tie. However, USA Model tiebreaker rule for dual resident companies gives precedence to PoI.

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Session: Judges' Seminar

Chair: Soli E. Dastur

Panel Members: James S. Halpern (USA), Vineet Kothari (India), Philippe Martin (France) & Eugene Rossiter (Canada)

Day 3 of the IFA Mumbai Congress 2014 witnessed a seminar of Judges (sitting & retired), after a gap of 10 years. The Panel chaired by eminent tax jurist - Mr. Soli. E. Dastur, gave its perspective on approach of Courts in interpreting Tax policies and issues arising therefrom. The panelists comprising of Justice James S. Halpern (USA), President Phillippe Martin (France), Associate Chief Justice Eugene Rossiter (Canada) and Justice Dr. Vineet Kothari, apprised the audience with judicial hierarchy in respective nations and touched upon the most litigated issues in tax.

They discussed general issues in interpretation of Tax treaties, viz., whether a Treaty would override domestic Income Tax Act if more favourable; the effect of introduction of a subsequent adverse provision in the domestic Act on the Treaty; the concept of "Cherry Picking" between the domestic law and Treaty by a tax-payer, in case of different incomes in the same year / same type of income from different countries / year-wise adoption of provisions; and the impact of Vienna Convention on interpretation of tax treaties.

The panelists had interesting perspectives on the above issues, for eg. in USA, a tax-payer can opt to be governed either by treaty or domestic tax law, but cannot further choose the applicability of provisions therein. In France and Canada, however, "cherry picking" is not allowed. While in India, though technically it would be possible, Courts have interpreted it otherwise.

There was a general consensus among the panelists that a treaty would override the domestic law provisions. Although in USA, tax treaties and domestic law are treated equally and whichever is later, would prevail.

The panelists discussed the impact of Vienna Convention on interpretation of treaties. Though a signatory to the Convention, the US Senate has not ratified it and hence, has no force of law. India considers the same as a tool of interpretation and only has persuasive value. Canada, on the other hand, is a signatory to the Convention and thus, is obligated to apply the same.

The panelists further agreed that Commentaries on Model Conventions only have persuasive value and are not binding on Govt / tax-payers. In fact, Mr. Phillippe Martin pointed out that OECD itself recognises no

obligation to follow the commentaries on Model Conventions, but added that they do play some role in treaty interpretation.

On whether 'Protocol' in a treaty with particular country could be applied to another country, only India seemed to allow such application. The Panel also discussed the current hot topic in India – GAAR! While India is likely to introduce GAAR in 2016, the same is in place in Canada and France since a very long time. However, both nations admitted that its influence has deteriorated over the recent years.

As a concluding remark, Mr. Dastur suggested consideration of impact of Art 9 that provides for application of Transfer Pricing provisions to Associated Enterprises in most tax treaties vis-à-vis wider definition under a domestic law, in the next Judge's seminar.

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The Judges seminar did an interesting comparison of the tax administration and judicial hierarchy in different countries. It also discussed different positions adopted by courts on interpretation of tax treaties and their interplay with domestic law. US gives equal precedence to tax treaties and domestic law but whichever is later in time, prevails. In Canada tax treaties override national tax act unless there is a notwithstanding clause. In India, treaties have an overriding effect.

On whether a taxpayer can cherry pick between a treaty and domestic law and change positions from year to year or for different heads of income, most panelists said that while there is no express restriction on the same, the courts may not look at such a practice favorably.

The impact of Vienna Convention on interpretation of tax treaties was considered. Canada has an obligation to apply treaties in good faith as it is signatory to the Vienna convention. France is not a signatory but courts rule that international law must be accepted. US is a signatory however since it has not been ratified by Senate, it does have force of law. India is not a signatory but the Convention being a source of customary international law, it is applied as a tool of interpretation and has persuasive value.

On relevance of OECD model and subsequent commentaries, Indian position is that it is not a member of OECD and hence the model and commentaries are not binding but they have persuasive value. India applies contemporaneous exposition and would apply the commentary at the time of entering into the treaty. To adopt the subsequent changes in commentary, the countries should bilaterally agree under the mutual agreement procedure. In Canada and USA, Supreme Court considers only the commentaries at the time of signing the treaty as relevant for interpretation.

As per French view, there is no obligation for member countries to follow commentaries. The comments are only on model conventions. Commentaries are relied upon for clarification. Prior commentaries are acceptable as evidence as they lay down intention of parties.

The panel also considered the use of protocols to interpret a tax treaty as well overriding effect of a GAAR provision.

To conclude, the seminar provided a very interesting insight into a judge's perspective including how they approach tax cases and what aids of interpretation they rely upon to reach their conclusions.

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Day 4 – October 15th 2014

Session: Update on BEPS work - Preventing Treaty Abuse

Chair: Prof. Richard Vann (Australia)

Panel Members: Peter Blessing (USA), Carmel Peters (New Zealand), Jacques Sasseville (OECD)&Martin Zogg (Switzerland)

The first panel on Day 4 of the IFA Congress discussed the work done so far under OECD's Base Erosion and Profit Shifting (BEPS) project. While the focus of the panel was the action plan on "Preventing Treaty Abuse", the panelists briefly touched upon other recommendations issued under BEPS and the next steps.

In the context of transfer pricing – country – by – country (CbC) reporting, Paresh Parekh from India felt that essence of BEPS may be diluted by agreeing to CbC template that excludes reporting of royalty and similar transactions. Whether CbC template is merely restricted to prima facie evidence (as envisaged under BEPS) is another concern, explained Mr Parekh. The Panel Chairman Prof. Richard Vann felt that 'transfer pricing' is getting more and more complicated and greater discretion is being given to the Revenue officers, contrary to the objective of bringing more simplification.

The panel extensively discussed various aspects of OECD report on preventing treaty abuse. Ms Carmel Peters from New Zealand Revenue, who is also involved in BEPS' preventing treaty abuse report, explained various recommendations of recently released report.

Reacting to the discussion on treaty abuse, Paresh Parekh stated that considering the current trend, Limitation of Benefits (LOB) clause is likely be included in India – Mauritius and India – Cyprus tax treaties. He also added that if the preamble to the tax treaty (as being proposed under BEPS) had been present at the time when Indian Supreme Court delivered Azadi Bachao verdict (under India-Mauritius DTAA), some of the conclusions by the Court could have been different. Another panelist added that Australia too is re-examining two of its treaties from an LOB perspective. The Swiss representative on the panel added that base erosion debate should not be merely about "lower tax rates".

Jacques Sasseville from OECD explained the twin approaches in preventing treaty abuse – one where treaty abuse arises using treaty provisions and another one where the abuse arises using domestic tax law provisions (for example thin capitalization rules). He also elaborated on 'Principal Purpose Test' (PPT) in applying LOB provisions. He cited an example of recent Chinese Investment Protection Treaty, where a combination of LOB and PPP principles is being used to grant treaty benefit. The panelists however expressed a view that PPT could allow

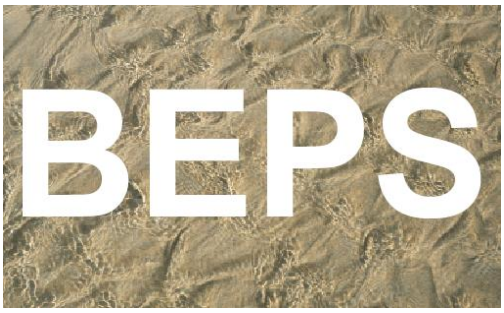
greater *exercise of discretion* to the tax administration. Jacques Sasseville defended OECD position and stated that PPT principles were already present in the Commentary and are now being included in the OCED Model Convention itself. On the "exist taxes" upon change in residence, he added that it is more an issue of domestic tax as long as it is being levied before change of residence and hence not included in OECD's work.

Peter Blessing (USA) explained various perspectives of USA and Canadian tax policy and his areas of differences vis-à-vis OECD's recommendation. He felt that PPT approach is extremely difficult to administer and implement. He however agreed that BEPS has been successful in raising the consciousness of politicians, taxpayers, administration and people at large.

BMR Advisors

Knowledge Partner – BMR Advisors' Take

At the onset, the panelists presented their views on the likelihood of implementation of various BEPS Action Plans. Given the complexity surrounding BEPS Action Plan 2 – Hybrid Mismatch Arrangements, concerns were expressed that this action plan would be difficult to implement and further work was required in this area. The panelists seemed more optimistic on the implementation of BEPS Action Plan 5 - Harmful Tax Practices and concurred with the nexus approach coupled with the substantial activities test advocated by the action plan but were of the view that a multilateral treaty would be key to its successful implementation. On BEPS Action Plan 13 dealing with Transfer Pricing Documentation, discussions were focused on the aspect whether the proposed documentation would be required to be filed with the tax authorities of the local country or the home country.



The discussion then shifted to BEPS Action Plan 6 – Preventing Treaty Abuse. It was observed that with the advent of time, there had been a shift in the primary objective sought to be achieved by Tax Treaties. Though Tax Treaties were introduced primarily to mitigate double taxation, the proposed framework outlined in Action Plan 6 aimed at eliminating double non-taxation. The panelists evaluated the challenges associated with the introduction of Limitation of Benefits ('LoB'), Principal Purpose Test ('PPT') and Specific Anti-Abuse Provisions advocated by Action Plan 6. Concerns were expressed that implementation of PPT would result in ambiguity giving rise to litigation. It was observed that developing countries like India were negotiating new treaties with LoB clause and the ongoing negotiations for amendment of treaties with countries such as Cyprus and Mauritius are likely to be influenced by the proposed LoB clause in the BEPS Action plan.

An interesting insight was provided on the proposal to amend the preamble to the treaties and whether this could alter the conclusions reached by the Courts in the past rulings such as the Azadi Bachao Andalon, where the Apex Court of India had observed that perhaps the draftsmen of the India-Mauritius Treaty intended to encourage treaty shopping.

Click here to view the presentation as available on IFA Congress website.

Session: UN Matters – UN and OECD differences in Model, TP etc.

Chair: Jan De Goede (Netherlands)

Panel Members: Andrew Dawson (United Kingdom), Tianlong L. Hu (PRC), Christian Kaeser (Germany), Liselott Kana (Chile), Anita Kapur (India), Michael A. Lennard (UN), Toshio Miyatake (Japan)&Stig Sollund (Norway)

The panel on the afternoon technical session on UN matters discussed evolution of United Nation's tax work over the years, its relevance and the challenges faced by the committee. Michael Lennard (from United Nations) briefed the audience about UN Tax Committee which comprises of 25 members nominated by the Government, with 15 representatives currently from (developing economies that include BRICS countries) and 10 from developed countries (such as USA, Germany, UK etc). The panel also discussed in detail about differences between provisions of UN Model versus OECD Model.

One of the key highlights of the session was the update on work proposed by UN Sub-committee on taxation of services. Ms Liselott Kana from Ministry of Finance, Chile and also member of UN Tax Committee elaborated on new separate article on taxation of services proposed to be introduced in UN Model Convention. The scope of this proposed new article will be discussed at the Geneva meeting scheduled to take place in the next 2 weeks.

Ms Anita Kapur (Member, CBDT India) stated her points of view on the approach in taxation of services under UN convention. She strongly advocated giving more taxing rights to the "source state" and specifically stated that 'nexus' does not require physical presence in the source state. This is particularly relevant in the context of digital economy, where value is created by 'user market', added Ms Kapur. She justified such taxation on the basis that it otherwise would result in base erosion (by only allowing expense deduction in source state without corresponding income taxation) and access to the benefits of the source state. She therefore suggested a wide scope of definition of technical service under the new article in UN Model Convention. She also opined that taxation of such service payments should be on a gross basis and without any monetary threshold on business to business transactions. She also believes that the rate of taxation for royalty and fees for technical services article should be kept at the same level, which would avoid classification disputes.

Mr Christian Kaeser (from Siemens Germany and also representing International Chamber of Commerce) agreed with UN's proposal to introduce a new article to tax services and also with the suggestion to tax such services on a gross basis. He however strongly suggested that services should be taxed only when they are actually performed in the source state and called for a narrower definition of taxable services. He also added that gross basis of tax rate must not be too high and advocated a rate of upto 3%. He however specifically added that system of taxation (whichever one finally chosen) should be consistently applied and must not result in double taxation.

Mr Stig Sollund from Norway Revenue and Member of UN Tax Committee elaborated on efforts made on UN transfer pricing manual. He updated on the current revision work on Article 9 of the Commentary and stated that by 2016 the work on updation of TP Model Commentary would be completed.

The Chinese representative on the panel suggested that the economic position of China has resulted into the country being a discourse driver than being a norm taker. He also explained Chinese perspective on 'location saving advantage' (LSA) and raised questions on characterization of Chinese local entities as being simply contract manufacturers. He also added a perspective that special consideration be given to "unpaid pollution", as being one of the basis to attribute LSA to China. Reacting to the transfer pricing changes, Mr Kaeser reiterated his view that a strong and working dispute resolution mechanism must be necessary to address disputes arising from any changes to the model.

BMR Advisors

Knowledge Partner – BMR Advisors' Take

The Seminar on UN matters gave an overview of the main differences between the UN and the OECD Model. There was a discussion on the options being considered to include new provision on taxation of services. The proposed provisions are likely to give right to the source country to collect a withholding tax on gross basis, regardless of the place of rendition of services.

Click here to view the presentation as available on IFA Congress website.

Session: Tax issues relating to intangibles

Chair: Ricardo Escobar (Chile)

Panel Members: Jesper Barenfeld (Volvo Group, Sweden), Antonio C.F. De Abreu E Silva (Brazil), Manfred Naumann (Germany), Sanjay Puri (Director of Income Tax - Vigilance, CBDT, India), Caroline Silberztein (France) & Andrew P. Solomon (USA)

On Day 4 of IFA Congress 2014, we had a panel discussion on "tax issues relating to intangibles" chaired by Mr. Ricardo Escobar (Chile).

The discussion commenced with Mr. Barenfeld (Volvo Group) sharing an MNC's perspective on the need to move / transfer intangibles / intellectual property across the globe. The panelists focused on the definition of 'intangibles' for transfer pricing purpose laid down in OECD Report on Action 8 of BEPS (September 16,

2014). They felt that the same was too broad based, as compared to the exhaustive definitions in domestic tax laws of different countries (like India) / UN Manual on Transfer Pricing, leaving it open to interpretation.

The panelists further deliberated upon 'location saving advantages', its treatment under OECD vis-à-vis the UN Manual and the concerns raised by countries like India, China and Brazil. Mr. Puri apprised the audience on India's position, viz. that 'location savings' must be allocated / shared by both parties; in other words, both parties should benefit from participating in the transaction. It was pointed out that OECD is still working on these aspects and is likely to complete the same by 2015, but the panelists were quite sceptical about the timeline.

Issues with ownership and challenges on valuation of intangibles for transfer pricing purpose were discussed – whether 'discounted cash flow' / CUP method could be relied upon, which is yet to be finalized by OECD.

To conclude, there was a consensus amongst all panelists that the policy should be simplified. Ms Silberztein admitted that policy oriented guidance was relatively for OECD and that its report must be read in the context of BEPS.

BMR Advisors

Knowledge Partner – BMR Advisors' Take

The seminar on 'Tax Issues relating to Intangibles' focused on BEPS Action Plan 8 and the differences emanating between the OECD and non-OECD countries. The panelists noted that though significant progress had been made and the OECD had attempted to define intangibles – the issue was far from resolved, since, developing countries such as China and India considered location specific advantages ('LSAs') within the ambit of intangibles and were propagating an additional return in the form of location rent derived by MNEs. This was in sharp contrast to the OECD's view as per which, use of local comparables would factor a return for location savings and eliminate the need for a separate return being attributed on account of location savings. The panelists also observed that significant parts of Action Plan 8 were still work in progress and the OECD had deferred its view on these aspects to 2015. Given the scope of work involved, the panelists were circumspect on whether the OECD would be able to achieve any significant progress by the anticipated timeline. The panelists also discussed issues associated with ownership and challenges associated with the valuation of intangibles.

The discussions concluded with the remark that an attempt should be made to simplify the policy rather than complicating it and making it virtually difficult to comply with.

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Day 5 – October 16th 2014

Session: Recent Developments in International Taxation

Chair: Daniel Gutmann (France)

Panel Members: Monica Bhatia (OECD), Manish Kanth (India), Yoshi Masui (Japan), Manfred Naumann (Germany), Jacques Sasseville (OECD), Carol Tello (USA), Geraldo Valentim (Brazil)& Scott Wilkie (Canada)

Day 5 of IFA Congress Mumbai 2014 began with the plenary session on **"Recent Developments in International Taxation"**. The panel discussed range of updates including impact of OECD Model 2014 Update and its impact on domestic systems. The focus of the panel was to discuss the OECD Model 2014 Update, impact of OECD Authorised Economic Approach on domestic tax systems, Exchange of information, FATCA etc.

The panel discussed the 2014 OECD Model Update which was approved by the Council of the OECD on July 15, 2014. The main parts of the Update included i) Changes to Article 26 and its Commentary, ii) Changes concerning the meaning of "beneficial ownership" iii) Changes to Article 17 and its Commentary, iv) Changes related to emissions permits/credits and v) Changes on termination payments.

The panel discussed the autonomous versus domestic law meaning of the concept of "beneficial owner". Stating that no changes were made to the term "'beneficial owner", it was clarified that the term should not be used in a narrow technical sense as currently found in the Commentary.

Further, the panel discussed the impact of the OECD model on domestic systems with special focus on the impact of the Authorized OECD Approach ('AOA'). Discussing the principles of the AOA, it was explained that profits attributable to a PE are those that the PE would have earned under the application of OECD TP Guidelines, if it were a separate and independent enterprise. The panel explained that this approach creates a fiction and holds PE as a separate and independent entity. The starting point for the hypothesis is "significant people function" test.

Mr. Manfred NAUMANN, (Germany) stated that following the OECD Model Update, Germany has recently implemented the AOA into its tax laws by introducing new domestic legal rules for PE profit allocation. These rules thus attempt to define "significant people functions". It provides a practical guidance to the PE attribution issue. Amendments were also made by Germany to existing Articles 7 in line with the new Article 7 OECD Model. Mr. NAUMANN further stated that AOA was transformed into German Tax Law in a consistent way and that it was widely accepted by the business community after long consultations. He mentioned that the practice would start with the taxable year 2013. One of the panelists

stated that in March 2014, Japanese domestic tax law adopted "attribution income principle".

Ms Monica Bhatia explained the significant progress made by OECD Forum for Information Exchange. She called the developments during the period from 2009 to 2014 as achievement to end the bank secrecy for taxation purposes. She added that the global forum has 123 members on an equal footing. Out of 105 phase 1 reviews carried out so far on various jurisdictions, she stated that 4 countries have been identified as non-compliant. These include countries like BVI and Cyprus. She also briefly mentioned about new automatic exchange of information standard which is expected to become operational by 2018 with commitment of over 70 countries.

The panel announced that on October 14, 2014, the EU Council had agreed at a meeting of the Economic and Financial Affairs on extension of the scope of automatic exchange of information. Also, the Swiss Federal Council on October 8, 2014, has adopted definitive negotiation mandates for introducing new global for the automatic exchange of information.

The panelists believe that there is a greater thrust on transparency at multiple levels and cited following examples

i) Treaty-based information exchange.

ii) OECD Standard for Automatic Exchange of Financial Information which is a common reporting standard

iii) Convention on Mutual Administrative Assistance in Tax Matters

iv) BEPS “country-by-country” reporting (Action 13)

v) Informal interactions / collaborations among tax authorities: OECD, Leeds Castle, JITSIC, PATA, Global Forum.

On FATCA, one of the panelists shared that currently there is an ambiguity in many of the implementation matters. USA has so far entered into 37 IGA- 1 and 5 IGA - 2 agreements.

Next, the Panel discussed the legislative proposals on US “Inversions” law.

The panel lastly informed that Switzerland has recently announced a proposal to review its cantonal preferential tax regime.

Click here to view the presentation as available on IFA Congress website.

Session: Impact of EU law on the BEPS initiative

Chair: Prof Dr Pasquale Pistone (IBFD/Italy)

Panel Members: John Connors (United Kingdom), Prof Dr Robert Danon (Switzerland), Martin Kreienbaum (Germany)&Ioanna Mitroyanni (EU Commission)

One of the afternoon technical sessions was on **"Impact of EU law on the BEPS initiative"**. The focus of the discussion was on ongoing EU developments. The panel discussed the issues of "Controlled Foreign Companies" (CFC). Stronger CFC rules targeting artificially diverted income were potentially in line with Union law and core principles of BEPS. Further, EU law constraints on CFC legislation had to be seen against the backdrop of stronger coordination in the framework of BEPS, felt the panel.

The panel then discussed the EU initiatives to promote transparent tax competition. The panel stated that the prohibition of harmful tax practices and State aids can be the soft and hard law approach to achieve transparent tax competition as both were in line with BEPS. However, one was prospective and the other was retrospective.

Discussing the problems faced by the EU on "Treaty/Directive Abuse", the panel opined that BEPS actions would imply erosion of national sovereignty as to how abusive practices could be countered. The panel expressed that the EU internal market required a degree of integration of national tax regimes beyond countering abusive practices. Also, panel stated that countering aggressive tax planning and abusive practices in line with EU and BEPS standards would create a level playing field within the EU and in relation with third countries. The evolution of the concept of abuse within the internal market would potentially affect the relations between the EU and Switzerland. Further, clarification of the concept of artificiality was crucial to achieve legal certainty and better coordination.

On the issue of "Hybrid Mismatch Arrangements", the Panel stated that conceptually, the linking rules provided the best mechanism to neutralize hybrid mismatch effects. The panel cautioned that a degree of care needs to be taken when the BEPS focus goes beyond abusive hybrid mismatches. Further, the panel expressed that BEPS action on hybrid mismatches corresponded to the core concept of double dips under ECJ case law.

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Session: Taxation and Non-Tax Treaties

Chair: Peter Barnes (USA)

Panel Members: Liselott Kana (Chile), Krister Andersson (Sweden), Alberto Benshimol (Venezuela), Hafiz Choudhury (USA) & Alexia Kardachaki (Netherlands)

The second session in the afternoon saw a discussion on **"Taxation and Non-Tax Treaties"**. Discussing the background of Taxation and Non-Tax Treaties, the panel stated that the increase in cross-border trade and investment had also led to growth in tax treaties and non-tax agreements. While, tax treaties were the primary source of rights and obligations for both nations and taxpayers with respect to tax matters, the panel opined that other international treaties/agreements also have an effect on the taxation.

According to the panel, the tax professionals were often not aware of these other agreements or failed to focus on their impact. The panel explained that in a significant number of cases, there was no bilateral tax treaty between two countries, but a trade or other agreement did exist. E.g. US has only BITs with Ecuador, Panama and Uruguay.

The panel also discussed the Trade and Investment Agreements and stated that multilateral, regional and bilateral were key categories of non-tax treaties that affect tax matters.

The panel then briefly touched upon the various world organizations that impact tax matters.

- GATT - World Trade Organization's General Agreement on Tariffs and Trade (GATT) which ensures rights relating to trade in goods.
- TRIMs - The Agreement on Trade-Related Investment Measures (TRIMs) which sets limits on how countries treat foreign investors, and thus may impact domestic tax incentives
- SCM Agreement - The Agreement on Subsidies and Countervailing Measures (SCM Agreement) which prevents tax subsidies
- GATS - General Agreement on Trade in Services

The panel also recognised the importance of Regional Trade Agreements. The panel opined that with difficulty in negotiating global trade agreements, regional agreements may increase in number and importance. Some of the examples cited were i) North American Free Trade Agreement (NAFTA), ii) ASEAN Free Trade Area, iii) Multiple EU agreements. The panel also mentioned that the additional major regional agreements (Asia Pacific; EU-US) were on the horizon.

The panel then discussed the "Energy Charter Treaty" which according to them had taken new prominence with "Yukos" case. The treaty was effectively a trade agreement for energy businesses and although tax was generally carved out, treaty could be invoked if there was effectively an expropriation. Yukos arbitration decision in July 2014 was cited as an example to illustrate the importance of non-tax treaties. In the Yukos case, former shareholders had

claimed that tax assessments amounted to expropriation. The Permanent Court of Arbitration agreed and awarded $50 billion, to be paid by January 2015. Thus, the Panel opined that Tax treaties could never effectively grant this level of relief.

Click here to view the presentation as available on IFA Congress website.

Special interview with Mr. Michael Lennard, Chief of International Tax Co-operation, UN & Mr. Philip Baker, Queen's Counsel


Transcript:

Arun Giri (Taxsutra) : On BEPS, are you happy with the progress made over past 12 months?

Michael Lennard : We are very supportive of BEPS but looking from the developing country's perspective, we have always said that there are issues which are not within the BEPS action plan which are important to developing countries. So I thought it was very good that in this conference, we not only had the BEPS action plan discussed but also other issues including the UN panel such as the emphasis is on UN is on reserving/ withholding tax rights and general source vs. residency country issues which are not within the BEPS action plan. So I thought BEPS is going as expected, it's on time, still a lot of discussion about what particular approaches will mean, and I think it is always wise for developing countries we have to be careful that they are involved in the design and the complexity and the administrative issues are covered for them so that they can actually get the benefit of BEPS and not just the detriments in terms of their costs.

Arun Giri : There needs to be a political agreement at the end of the day between 45-50 countries atleast. And there are already emerging some voices of concern on the interplay between developing countries and the developed countries. Are the priorities different? For example the Indian Minister of State for Finance made an intervention at the G-20 meeting recently and said that the voices of developing countries must be taken into consideration a lot more while developing consensus. So what role does the UN have to play here?

Michael Lennard : I mean this is a very important point. Even when you talk about developing countries, there are G-20 developing countries and there are non-G-20 developing countries, and the word of OECD in G-20 is 44 countries, we have almost 150 other countries in the UN family. So I guess it's inevitable, as we have already said there will be issues which are not in the BEPS action plan which are important for a lot of those countries and there are issues even within the BEPS action plan where the outcome will not be a priority for them or would be something say not easily administered. So I think it's difficult because of the timeline to engage as much as we would like and the IMF and the World Bank. The OECD is very aware of this issue and to my mind it's very important to have a really global outcome to ensure that there is voice on participation of developing countries.

Arun Giri : Are we going to see a multilateral instrument/ agreement? Since we don't have a multilateral agreement, how is this work going to be reflected at the ground level and how are the countries going to implement it?

Michael Lennard : Multilateral agreement will be very difficult to achieve and very difficult to achieve in a way that it works properly with the existing universe of treaties which are all different. One thing I would say and ultimately that's an issue for OECD in G-20

which is taking the lead. But it needs to be one which has wider acceptability and I think it is important For example that even though the source residency issue is said not to be in the BEPS action plan that any multilateral treaty will not by default charter countries which will seek source country solutions and preserving the withholding tax rights for example move them more to a resident approach. Because I think that wouldn't succeed.

Arun Giri : But overall are you impressed with the outcome so far?

Michael Lennard : We are supportive. I am probably not close enough to all the debates as to decide whether I am happy

Arun Giri : You want to be more involved?

Michael Lennard : Well I think it is always important that the UN be closely involved and that the OECD is aware of that, the IMF and the World bank are also very important and at the moment we are still trying to work out as to how can we work together and essentially in the interest of our client which Is developing countries. That is something which we all have to address.

Ameya Kunte (Taxsutra) : One of the key changes that is going to happen is the proposed new article on taxation of services, a project initiated by UN. There is a discussion lined up in the coming weeks. We heard yesterday views from Indian representatives on how the article should be worded and there are clearly contrary views from the business side. How do you propose to achieve consensus on such wide ranging options?

Michael Lennard : On the point of fees for technical services, you can never get absolute consensus, but remember fees for technical services articles are already out there, this is a way of saying, let's have a disciplined approach to those. And I think there could be a consensus that having a certainty in this area is actually good for businesses as well as government even if it doesn't like such a clause, if a country is going to have one, it's probably better to have one that is being discussed and debated and to some regularity as to how it is being done in different countries.

Ameya Kunte : Do you propose to include discussion on digital economy in the new article on taxation of services?

Michael Lennard : This is probably an area where, because it's such a broad issue and apparently due to UN resources also, it is under discussion in a group which involves a lot of interested buyers including some from the more interested developing countries where I think for the moment, it's a discussion for the committee and not me that the UN is likely to keep an eye on those developments. But I think it does merge with the issue which is not technically in the BEPS action plan which is source vs. residence taxation, which is of intimate concern to the UN tax committee and the UN family. So I think we will keep an eye on it with that focus. For a lot of smaller developing country this is not the biggest issue. They have a lot more issue in front of it. But we were surprised when we spoke to developing countries that a lot more of them saw it as a priority issue than we expected, including some smaller developing countries.

Arun Giri : Michael last question. Do you enjoy a good working equation with India?

Michael Lennard : Yes, I do! I love coming to India, it's very hard I am sweating not because I am concerned but because it is hot in Mumbai. Now India is a very important UN country and a country where I have actually learned a lot. And in the Tax world, it's incredibly important because of the discussion, the quality of discussions, the cases and so

forth. So important part of the UN family and a country that I love being in India, I love everything about it and I love the fact that I learn so much every time I come here.

Arun Giri : Philip, world over everyone is thinking as "How to reduce tax disputes?" India is at top of the ladder when it comes to litigation. In the last six months, since the new government has taken over, do you see a change in the mind set, change in the approach? Anything different you have seen in last 12 months?

Philip Baker : By the way, being on top of the ladder on tax disputes is not a good place to be, you probably want to be near the bottom of the ladder on that. I have not been following up closely enough to see new dispute arising. I have been seeing the same no. of judgments coming out. But of course those are disputes that arose potentially years ago and are now coming to be resolved. What I want to impart is try to make certain that disagreements have a method of resolution before they have to be referred to tribunals or to courts. And that means education, training and control over tax officials, So that officials cannot take totally unjustifiable positions. Part of the reason why cases are going to the courts is because officials are simply having no control, just encouraged almost to take positions that eventually will be lost in courts .But only after a no. of years and great deal of time and efforts are spend on them.

Arun Giri : Your take on inversion? It's the hot topic. The US is looking to pass a retrospective legislation on tax inversion. Do you think the US concerns are justified?

Philip Baker :I think one point that comes out very clearly from this conference is that US international taxation is overdue for a reform. And the Rule about residence which imparts to inversion issue is an element which needs to be considered within the overall context of US tax reform. It is unfortunate that political position in US makes it unlikely that reform will be carried out in near future. Even though it is really quiet an urgent matter.

Ameya Kunte : Last year at Copenhagen Congress, you were part of a panel which did a crystal ball gazing on how tax will look like after 25 years.And one of the key points / issue that was raised is whether Arms Length Principle will stay and one of the view was that yes it will stay but the Formulary approach will be called as ALP. Do you still subscribe to that view?

Arun Giri : Before you answer that, I must tell you Pascal Amans (OECD) in an interview to Taxsutra, opined that arms length vs formulary apportionment is a 'theoretical' debate. Is the debate academic?

Philip Baker : No. I don't think it is an academic debate. I wasn't on the panel but if I had been, I would have expressed the same view that ALP will gradually merge and become effectively formulary apportionment under another name.

Arun Giri : Before we let you go. Crystal ball gazing for 12 months before we meet you at the Switzerland Congress - How will the next 12 months shape up in tax policy, tax administration and tax payers?

Philip Baker : The most important topic for discussion in Switzerland next year is practical protection of Taxpayer's rights, which is one of the key topics. And I think there will be a greater realization over the next 12 months that with all of the developments on BEPS and exchange of information in Transfer pricing and the settlement of dispute, taxpayer's right and their practical protection have to be put absolutely at the centre of the focus of attention.

Click here to watch the full video.

Interview with Mr. Porus Kaka, IFA President

Transcript:

Taxsutra : 12 months back you were little sceptical about BEPS. Are you still?

Porus Kaka : I think all of us were at that time. But now I have seen first-hand the work that is happening at the OECD level, and I think there is a level of sincerity that cannot be doubted. How that will be converted into a political agreement will be a critical implementation issue that they will have to take up. I would still say, we are not out of the woods as far as scepticism goes.

Taxsutra : OECD believes that they have the political mandate to go and achieve, and implement the BEPS project, then why this scepticism?

Porus Kaka : There are two issues. As far as the work that is going on at the OECD is concerned, I am fully confident that they will deliver the report. But, at the political level, that level of agreement to achieve whether it's the G-20 or OECD or at the UN will be much more difficult. At that point in time, when countries have particular interest, you may find that consensus so far is slipping away. There may be consensus at about 50% or 60%, but the question is as to how much consensus we get at the political level? There will be things like the Exchange of Information, where the pressure is more or less consistent even at the political level and therefore, that will happen. I think Exchange of Information by itself will be a game changer.

Taxsutra : But digital economy has been tougher!

Porus Kaka : Of course, the issues such as whether there could be any dilution of the PE threshold will certainly test the political pressure.

Taxsutra : You often talked about tax morality. Do you see a mind-set change in corporate board rooms/tax professionals and therefore, a little more acceptability of tax morality? Post Starbucks, Google and Apple, do you see the balance shifting?

Porus Kaka: I think the corporates, tax practitioners and those who are advisors have to see a changed landscape. There has to be a change because today, certainly the venues where you are going to be judged are far outside the courts, and therefore all persons have to look at the changed landscape, whether they practice or sit in the board rooms. So, I don't think the situation where there will be a complete non-taxability or places where you have to artificial structures, so you ought to be extremely careful and carrying out what is beyond the pale, beyond the four corners of what is accepted. I think what is accepted itself is changing and therefore we will also have to change with it.

Taxsutra : Which one of the 15 BEPS Action Plans do you think, will have the biggest impact?

Porus Kaka : I think country by country reporting (CbC) is going to be a huge issue and information is going to be the key. And as the Revenue departments across the world get more and more information, they will be in a position to make their case more forcefully in the forums, and they need to defend their position more carefully.

Taxsutra : Indian Minster of State for Finance has, at recently held G-20 meeting, stated that arbitration impinges on India's sovereignty. Even India's Revenue Secretary echoed

similar sentiments andasked the delegates to ponder if a bilateral treaty could be invoked in case of tax litigations. Do you think India's reservations are bad?

Porus Kaka : I don't agree with India's reservations on the sovereignty issue. You must remember that, as far as indirect taxes are concerned, all countries including India, have given sovereignty to WTO as far as rates, levies, customs duties go. I don't see what this great holy cow is that we are trying to preserve, as far as direct tax is concerned. This issue of sovereignty is a bogie. I believe arbitration will be good. I can see the hesitation that comes from India, only because its position is different in interpretation of commentary, rules and perhaps there is a fear that if it accepts arbitration, there will be a risk on some of its positions. How will BEPS move, since dispute resolution is one of the key items of BEPS; so when you accommodate some of the concerns of the developing world, the developed world equally has its issues, like forcing arbitration to ensure that disputes are settled.

Taxsutra : The issue upper most in the minds of policy makers, tax-payers & investors in India is the ever growing tax disputes. With the new Government coming in, do you think we are making some progress or are seeing a change in the mind-set atleast?

Porus Kaka : I haven't seen anything so far, but I think the pressure to not take frivolous matters in appeals, is more from the orders of the courts lately than the Government. On dispute resolution mechanism, I have personally advised them to rapidly analyse the AAR, because that is one forum which is practically dead as of now. On the issue of litigation in India, I see that India is different and you should not view the fact that litigation by itself is a negative and realise that we have an independent court system, which should be valued.

Click here to watch the full video.

Also watch **Prof. Dr. Jeffery Owens**, (Former Director, Centre for Tax Policy and Administration, OECD) discuss the progress of BEPS, with **Mukesh Butani** (Managing Partner, BMR Legal)

Quotable Quotes from Mumbai Congress

Peters A. Barnes (Former Senior International Tax Counsel, USA)

"The burden is on the tax professionals, to understand other non-tax agreements, to think about these other agreements not only for dispute resolution but for planning purposes, because a lot of times if we just think about tax principles we might make one decision. But if we understand the investment and trade agreements are available, we might counsel our clients to make different decisions."

Monica Bhatia (OECD)

"Cyprus was categorised as non compliant, that its exchange of information practices are not effective, so the next step for Cyprus is to make the changes that it's been asked to make by the Global Forum and come back and ask for a supplementary report, we are awaiting that."

Rajesh Ramloll (IFA Mauritius)

"Mauritius is going to be one of the countries affected by or concerned by the BEPS project."

Porus Kaka (President, IFA)

"I don't agree with India's reservations on the sovereignty issue you must remember that as far as indirect taxes are concerned all countries including India have given sovereignty to WTO as far as rates, levies, customs duties. I don't see what this great holy cow is that we are trying to preserve as far as direct tax is concerned."

Prof. Dr. Jeffery Owens (Former Director, Centre for Tax Policy and Administration, OECD)

"The United States needs to get serious about tax reforms."

See you next year!!

About Taxsutra

Launched in 2011, B2B portal - Taxsutra.com is a trusted online resource for corporate tax directors, policymakers and practitioners. Taxsutra's instant news alerts & incisive analysis on both domestic and international tax, coupled with unique features like tax ring, Taxsutra Insight, Litigation Tracker, Taxsutra TV and blogs make it a "must-have" for every tax professional.

Given the increasing focus of tax administrations on Transfer Pricing, www.tp.taxsutra.com was launched in October 2011, as India's first exclusive portal on TP. Apart from a comprehensive database of over 1000 Indian TP cases, the portal offers several new editorial features including Case Tracker, International Rulings, APA Space, TP Talk, Expert Corner, TP Personalities and 'Around the World.' Taxsutra's thought leadership and continuous engagement with tax professionals has been on display through several unique initiatives/microsites/special coverage on burning tax issues, controversies and important developments, be it APA, the $2bn Vodafone tax case, BEPS, our road-blocked coverage of Union Budget and even some light tax banter with our microsite on Soccer World Cup & tax! Taxsutra has also championed various niche events and workshops. In 2013, Taxsutra also launched the portal on Central Indirect Taxes – www.idt.taxsutra.com

For details relating to subscription and pricing to Taxsutra's 3 quality portals, contact sales@taxsutra.com .

About BMR

BMR is a professional services organisation offering a range of Tax, Risk, M&A advisory for businesses of all sizes, at the local, national and international levels. We enhance value for clients by focusing on solutions that are innovative, yet practical and that can be implemented. We do this by blending domain expertise with analytical rigour, while maintaining an uncompromising focus on quality - and by hiring and nurturing high quality professionals with a passion for excellence. We are committed to making a difference to our clients and to our people, and we deliver this difference through the integrity of our efforts and by living our core values.

The firm, since its formation in 2004, has won the confidence of several Fortune 500 companies, medium and large Indian business houses and is their partner of choice. Our team of over 600 professionals has extensive functional and industry experience across service areas and is well-equipped to deliver world-class services to our clients. Our vision is to be the most admired professional services Firm serving clients globally. Our mission is to enhance our client's competitiveness, help people realise their aspirations and contribute to the community through innovation and entrepreneurship.

BMR and Community

The firm has a strong commitment to good citizenship and community service. We are as devoted to community work as we are to our client work.

BMR has offices across several locations in India.

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