



Wednesday, September 5

Seminar E : IFA/OECD

Chair: Stef Van Weeghel (Netherlands)

Panel Speakers: Daniel Gutmann (France), Pam Olson (USA), Akhilesh Ranjan (India), Pascal Saint-Amans (OECD), David Bradbury (OECD)

Secretary: Erisa Nuku (Albania/Netherlands)

The eagerly awaited session at every IFA Congress was kick-started by **OECD Tax Policy Director Pascal Saint-Amans**, who wasted no time with niceties... his opening lines dwelled on the crisis of 'multilateralism' and the political atmosphere not being conducive to a multilateral dialogue. He acknowledged that the G-20 is certainly not at its best currently but quickly added that they are still interested in tax and that tax is an important agenda point at the G-20 Finance Ministers meeting.



On BEPS implementation, Mr. Amans struck a positive note, sharing with the delegates the progress made. He expressed satisfaction that 'harmful' practices are gradually being dismantled by countries, that there is a 'toll' to be paid and even went on to name Mauritius & Barbados as



examples of jurisdictions that have yet to dismantle certain practices/regimes. With the exchange of close to 2000 tax rulings, the practice of opacity of tax rulings is coming to an end, said Mr. Amans. He informed the audience of the 'massive' implementation of BEPS Action Plan 6, i.e. Prevention of Treaty Abuse. On CbCR, he quipped "*it is happening.*" He stated that CbCR is being broadly implemented across the world and admitted that some countries have an extended understanding of the scope which is

broader than what the OECD had conceived. Sharing statistics of 47 countries having provided



for compulsory filing and 10 countries for voluntary filing, Mr. Amans said that the OECD is working behind the curtains for CbCR exchange. He however did concede that there are some gaps with respect to use of CbCR information.



Mr. Pascal Saint-Amans made a strong case for testing out OECD's new experiment and pilot project - the ICAP (International Compliance Assurance Program), that he hoped, would be a platform that would usher in unprecedented co-operation among tax administrations and result in tax certainty through new measures. As per the OECD, ICAP is a voluntary program that seeks

to use CbC reports and other information to facilitate open and co-operative multilateral engagements between MNE groups and tax administrations, with an objective to provide early tax certainty. Senior Indian IRS officer **Mr. Akhilesh Ranjan**, while expressing agreement with Mr. Amans on the point that 'tax certainty' is a desired objective, however wondered if there are any differences between ICAP & a Multilateral APA. He opined that it would be better to address disputes via domestic law and treaty provisions.





On the MAP front, Mr. Amans stated that elimination of double taxation through MAP is working better than what is being said. Armed with statistics showing that in 80% of MAP resolutions there was a total elimination of double taxation, he remarked wryly that the figures are better than what we hear from practitioners and that the broad picture is not bad. He singled out China, which he said, had committed 2 years ago to significantly increase its MAP team. He also shared the country wise inventory of MAP cases pendency, that generally showed a decrease in inventory, with India & Germany being exceptions. Mr. Amans urged the focus to be on making MAPs work, considering the dramatic change in mindset of the Income tax Commissioners in light of the mandatory peer review of their work. *"It changes the dynamics... let us spend resources on that (MAP)..."*, quipped Mr. Amans. On suggestions that new techniques like mediation be tried out for resolving tax disputes, Mr. Amans advised that instead of focusing on multiple instruments that don't work, its better to focus on ones that work. He added in jest *"It is good to feed IFA panels (with these discussions) but i am not sure it will lead to elimination of double taxation."*

With regards to MLI implementation, Mr. Amans expressed satisfaction on the progress and re-assured the delegates that the Peer Reviews will focus on implementation of the Principal Purpose Test (PPT). He conceded that PPT has elements of uncertainty but also added that until now, tax treaties had been 'gamed' and there was no option but to fix it.



The panel then moved to discussion of the recently legislated US Tax Reforms, that sparked a spirited exchange of views over the future of the international tax landscape. Ms. Pam Olson presented the key highlights of the US Tax Cuts & Jobs Act, that has caused ripples outside America. The panel debated whether the controversial BEAT provision in the new US tax code is discriminatory against foreign companies and also if it is a treaty override or an anti-abuse provision. **Mr. Gutmann** firmly opined

that the discriminatory effect of BEAT is undisputable.

Mr. Amans butted in and posed a fundamental question as to whether BEAT is an expression of "No-Confidence" by US legislators on the Arm's Length Principle (ALP). He stated *"BEAT seems to be reflecting a view that there is an issue with the current ALP... it is going to have a massive impact on multilateral arena and BEPS."* He cautioned that the impact has not yet been grasped fully by the policymakers. *"It is like an earthquake..."*, remarked Mr. Amans. He was joined by Mr.



Akhilesh Ranjan, who minced no words while saying that the ALP standard is under 'tremendous strain' and that the US tax reforms was a big giveaway that the largest economy in the world doesn't believe in the efficacy of ALP. Ms. Olson gave a peek into the US mindset, stating that the American politicians are not sure if ALP will protect the country's tax base.

Mr. Ranjan opined that in the age of digital, ALP doesn't deliver and therefore made a pitch for moving towards broader standard of nexus and profit allocation rules. He suggested that the concept of 'Significant Economic Presence' (SEP) recently legislated by India, could be the basis for any new nexus rules. As in last year's Rio Congress, Mr. Ranjan once again pitched for profit allocation rules based on metrics like sales, consumption, user contribution, cost of assets & labour etc... He opined that all these factors should be combined and taken into account for profit allocation. He asserted that "*nothing can prevent the discussion from moving forward...*"

Mr. Stef Van Weegel termed the current international tax landscape as "incredibly complex" and wondered aloud if one ought to pay mere 'lip service' to ALP or does one end up with formulary apportionment? The answer from Mr. Amans - "*We just need a functioning system...*". He admitted that the situation is extremely complex and remarked that countries are taking positions



which are "upside down." He cited the USA example as that of a country which during the initial BEPS process, batted for the ALP standard but is now advocating residence taxation. He further stated that even the European nations are divided and acknowledged the 'urgency' of the situation, remarking that there is a need to find 'something.' In a moment of candour and reflection, Mr. Amans quipped "*... one day i am optimistic... one day am pessimistic... the next few years will be fascinating.*" He then defined the turf of the soon coming debate as "*How do we allocate taxing rights and how do we decide nexus?*" On ALP, Mr. Amans's final thoughts were - "*We are agnostic about ALP... USA, one of the world's largest economies, has voted no-*

confidence." His parting shot - "*Consensus is better than chaos.*"

The panel also discussed the hottest issue in the current international tax landscape - taxation of digital economy. **OECD's David Bradbury** outlined the tax challenges arising from digitalisation, including the analysis of business models and value creation, long term solutions, stock take of unilateral measures adopted by countries, impact of digitalisation on other aspects of the tax system. He neatly divided the divergent views of countries on this subject, into 3 distinct groups - the first group which believes that only targeted changes are needed and that while user participation may lead to misalignments between where profits are taxed and where value is



created, this does not undermine the principles of the existing international tax framework. The second group holds a view that digitalisation and globalisation of the economy present challenges to the existing international tax framework but these challenges are not specific or exclusive to highly digitalised business models. The third group is generally satisfied with the existing tax system and does not see the need

as of now for any significant reforms beyond what has been addressed by the BEPS package.

The focus then turned to the interim measures being legislated by several countries vis-a-vis digital tax. Mr. Ranjan defended India enacting the Equalisation Levy as a "unilateral, interim" measure as the need of the hour. He hoped for a consensus on certain transactions and how to tax them but in the absence of such a consensus, he asserted that countries would 'act.' Mr. Ranjan explained the concept of 'Significant Economic Presence' that had been recently legislated by India, which according to him, is broader than the concept of 'Significant Digital Presence.' He hastened to add that the concept needs to be defined carefully and that India is working on it. He expressed optimism that a solution will be found on digital economy. He made a special mention of the intangibles definition in the new US tax code, that includes things like running business concerns, workforce etc. He stated that these concepts have been there in Indian law and with the US adopting them, it is a major development in Transfer Pricing that will affect profit allocation.





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The OECD session has always been much anticipated session ever since the 2013 Copenhagen Congress, when the BEPS project was announced.

There was an important presentation by Mr. David Bradbury (OECD) especially on the concept of digital economy, on the overall progress and how we are going to get the desired consensus. And with that being said, I am really quite optimistic about the release of a final report in 2020. Everybody is having their own agenda ... the EU is proposing to do something and there are some 3 views within the EU itself. USA is also now trying to have their own version of BEPS which is 'BEAT' as they call it and also GILTI.

As for US tax reforms, it has been debated at all the public forums that what US is proposing to do is against its tax treaties obligations. This is completely against the WTO concept. It's going to be challenged even by the taxpayers in USA.

With respect to profit allocation, there are two important tests i.e. nexus and profit allocation. And as we have understood till now, first we have to establish nexus and then think about the profit allocation. But today we learned from Mr. Pascal Saint-Amans that there is a huge shift or a proposed shift in this process, you first talk about profit allocation and then try and find out what nexus it will establish in a source state which will give rise to a tax in a particular country. This is a huge huge change.

We must complement Mr. Akhilesh Ranjan for the way in which he articulated India's position. India is turning out to be a trendsetter. We started with the equalisation levy, then we are looking at SEP (Signifiant Economic Presence). So, are we shifting away from pre-agreed and pre-understood profit allocation? I think, there is very clear debate taking place that we should look at Profit Split Method or whether we should go into some other way of allocating the profit.