

Tax Alert | Delivering clarity

3 September 2019

Protocol amending the India-Spain DTAA comes into effect in India

Limitation of Benefit clause inserted in India Spain DTAA

Background

- India has signed the Convention for Avoidance of Double Taxation with Spain dated 8 February 1993.
- A Protocol amending the Convention was signed on 26 October 2012 and the same entered into force on 29 December 2014.
- However notification under section 90 (1) of the Income-tax Act 1961 to give effect to the Protocol, was not issued.
- After nearly 5 years, the Ministry of Finance (Department of Revenue) has now issued a notification dated 27 August 2019 under section 90(1) of the Act, to bring the Protocol into effect in India.

Protocol amending the DTAA between India Spain

Summary of key changes provided in the Protocol are as follows:

Taxes Covered

Article 2 dealing with Taxes Covered has amended "Spanish Tax" to include "income tax on non-residents" in addition to the existing coverage of "income tax on individuals, corporation tax and capital tax".

Associated Enterprises - Article 10

Paragraph 2 inserted in Article 10 to provide for appropriate adjustment in the other contracting state if there is any transfer pricing adjustment to total income of the AE in one contracting state, so that there is no economic double taxation of the AEs in the both the contracting states.

Corresponding adjustments have been specifically provided to form part of the mutual agreement procedures, if need be.

Exchange of Information

- The existing Article 28 on Exchange of Information (EOI) is deleted and new Article substituted.
- The EOI Article has been expanded and is on the lines of Article 26 of the OECD Model Convention 2017.
- The salient features of the substituted Article are:
 - The competent authorities of the contracting states shall exchange such information as is foreseeably relevant for carrying out the provisions of the DTAA or domestic tax laws.
 - Information is to be treated as secret and to be disclosed only to concerned authorities. Disclosure is allowed in public court proceedings.

- Information received, may be used for other purposes if permissible under laws of both states
- The requested state is not required to carry out administrative practices beyond domestic laws; supply information of which is not available in normal course of administration; disclose trade secrets; or disclose information contrary to public policy.
- Requesting state not to restrict its ability to use its information gathering measures for information exchange purpose. Supply of information should not be declined merely because the supplying state has no domestic interest.
- The Article enables improving access to information available with banks / financial institutions and provides for overriding banking secrecy.
- The amending Protocol further provides for contracting states to use other techniques to obtain relevant information such as simultaneous examination, tax examination abroad and industry-wide exchange of information as per domestic laws and administrative procedures. Such procedure to be agreed upon by the competent authorities of both contracting states as per the Mutual Agreement Procedure.

Assistance in the collection of taxes

- New Article 28A inserted to provide that the contracting states shall lend assistance to each other in the collection of 'revenue claim'. This Article is on the lines of Article 27 of the OECD Model Convention 2017.
- This Article is aimed at ensuring that the states are able to collect their revenue with the help of the other state. The other state would assist in collecting the same in accordance with the provisions of laws applicable to the enforcement and collection of the other state's own taxes as if the same were a 'revenue claim' of that other state. The other state would also take relevant 'measures of conservancy' (e.g. freezing of assets) in respect of such 'revenue claim', at the request of the first-mentioned contracting state.
- Proceedings with respect to the existence, validity or the amount of a 'revenue claim' of a contracting state shall not be brought before the courts or administrative bodies of the other contracting state.

Limitation of Benefit (LOB)

- New Article 28B on LOB provides that domestic anti-abuse provisions may be applied by the contracting states.
- DTAA benefits to be granted only to beneficial owner of income derived from the other contracting state.
- The DTAA not to prevent application of domestic provisions of Controlled Foreign Corporation (CFC) rules.
- DTAA benefit not to be available if the main purpose or one of the main purposes of the creation, existence, incorporation, registration or presence of resident of a contracting state or of the "transaction" undertaken by him, was to obtain benefits under the DTAA that would not otherwise be available.
- The term "transaction" includes the transaction of the creation, assignment or alienation of any shares, debt-claims, assets or other rights where the main purpose or one of the main purposes of such creation, assignment or alienation was to take advantage of the DTAA.

Entry into force

- Each of the contracting states shall notify the other about the completion of the procedures required by its law for the bringing into force the amending Protocol. The amending Protocol shall enter into force on the date of the later of these notifications.
- The amending Protocol shall enter into force two months after receipt of the later of the notifications and shall have effect:
 - in the case of withholding taxes, in respect of amounts paid on or after the date the amending Protocol enters into force;
 - in the case of other taxes, in respect of taxes levied for taxable years beginning on or after the date the amending Protocol enters into force;
 - in all other cases, on or after the date on which the amending Protocol enters into force.
- Provisions of Article 28 (EOI) shall apply in respect of any information even if such matters pre-dates the entry into force of the amending Protocol or the effective date of any of its provisions.
- Provisions of Article 28A (assistance in the collection of taxes) shall not apply to revenue claims enforceable before the date of entry into force of the amending Protocol. With respect to revenue claims issued after the date of entry into force of the amending Protocol, it will apply only if the revenue claims are in respect of a tax year that commences after a date that is four years before the date of entry into force of the amending Protocol.

Observations

- One of the key amendments brought about by the Protocol is the introduction of LOB provisions in the India-Spain DTAA. The treaty provides for application of domestic General Anti-Avoidance Rule (GAAR) provisions to instances of tax abuses including treaty abuse. The LOB provisions are not similar to the Principal Purpose Test of the Multilateral Instrument (MLI) to which both India and Spain are signatories.
- With regard to MLI India has deposited its ratification instrument with the OECD on 25 June 2019 and will enter into force for India on 1 October 2019. Provisions of the MLI will have effect on India's DTAA's from 1 April 2020 onwards.
- Spain is yet to deposit its ratification instrument with the OECD. Until such time, the provisions of the India-Spain DTAA and the Protocol, as amended by the above notified Protocol, should apply.
- Would Spanish entities having a tax residence certificate be considered as beneficial owners of income derived from India, drawing support from the CBDT Circular No 789 dated 13 April 2000, issued in the context of India Mauritius DTAA?
- The Treaty comes into force from 29 December 2014. So, would the provisions of the Protocol including the Limitation of Benefit Rule apply retrospectively from the financial year beginning 1 April 2015?



Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee, and its network of member firms, each of which is Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee ("DTTL"), its network of member firms, and their related entities. DTTL and each of its member firms are legally separate and independent entities. DTTL (also referred to as "Deloitte Global") does not provide services to clients. Please see www.deloitte.com/about for a more detailed description of DTTL and its member firms.

This material and the information contained herein prepared by Deloitte Touche Tohmatsu India LLP (DTTI LLP) is intended to provide general information on a particular subject or subjects and is not an exhaustive treatment of such subject(s). This material contains information sourced from third party sites (external sites).

DTTI LLP is not responsible for any loss whatsoever caused due to reliance placed on information sourced from such external sites. None of DTTI LLP, Deloitte Touche Tohmatsu Limited, its member firms, or their related entities (collectively, the "Deloitte Network") is, by means of this material, rendering professional advice or services. This information is not intended to be relied upon as the sole basis for any decision which may affect you or your business. Before making any decision or taking any action that might affect your personal finances or business, you should consult a qualified professional adviser.

No entity in the Deloitte Network shall be responsible for any loss whatsoever sustained by any person who relies on this material.

©2019 Deloitte Touche Tohmatsu India LLP. Member of Deloitte Touche Tohmatsu Limited