

Global Tax Update

India

Deloitte Tohmatsu Tax Co.

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1. Tax treaty between India and Singapore revised

The Central Board of Direct Taxes (CBDT), has issued a press release¹ to notify amendments in the India-Singapore tax treaty².

Summary of important changes are as under:

(1) Mutual Agreement Procedure (MAP)

This amendment would enable taxpayers of both countries to get arm's length price determined through MAP. This is in line with India's commitments under Base Erosion and Profit Shifting (BEPS) Action Plan.

(2) Source-based taxation of capital gains on shares

From April 1, 2017 capital gains arising on transfer of shares in a company would be taxable in the source state. Earlier shares were taxable in country of residence.

However, there would be following exceptions:

- Capital gains arising on transfer of shares acquired before April 1, 2017 would not be taxable in the source state subject to fulfillment of conditions in Limitation of Benefits clause ("LoB").
- A two year transition period from April 1, 2017 to March 31, 2019 has been also provided during which capital gains arising on transfer of shares will be taxed in source state at half of

normal tax rate, subject to fulfillment of conditions in LoB clause.

- **Limitation of Benefits:** Following amendments are proposed in the new LoB clause:

1. The benefits will not be available if it fails the main purpose test and bonafide business test.
2. A resident would be deemed to be a shell/ conduit company, if its total expenditure on operations in the contracting state is less than INR 5,000,000 or Singapore Dollars 200,000–
 - for each of the 12 month periods in the immediately preceding 24 months from the date the gains arise, in the case of benefit of resident-based taxation for investments made before April 1, 2017.
 - for the immediately preceding 12 months from the date the gains arise, in the case of benefit of 50% reduction in tax rate during the transition period from April 1, 2017 to March 31, 2019.
3. A resident is deemed not to be a shell or Conduit Company if it is listed on the recognized stock exchange of the Contracting State or its annual expenditure on operation is equal to or more than the amounts specified above.

2. India Cyprus Tax Treaty

On 1 November 2013, the Government of India³ had notified ("2013 notification") Cyprus as a 'notified

1 Dated December 30, 2016, towards third Protocol for amendment of the tax treaty between India and Republic of Singapore

2 The Protocol shall come into force after completion of due procedural requirements in both the countries and is notified each other about the completion of the procedures. If this Protocol does not enter into force as at March 31, 2017 due to either of the aforesaid notifications remaining pending, this Protocol shall enter into force on April 1, 2017.

3 vide Notification No. 86/2013 published in Gazette of India vide S.O. 3307(E)

jurisdictional area⁴. Post the notification, there were onerous compliance requirements on the taxpayers dealing with residents of Cyprus like applicability of transfer pricing provisions on all transactions with Cyprus residents, withholding tax rate of 30% on all income chargeable to tax, etc.

Recently, the CBDT⁵ published a notification and rescinded the 2013 notification, except for things done or omitted to be done before such rescission. The recession to take effect from the date of publication of 2013 notification in the Official Gazette i.e. 1 November 2013.

3. PAN⁶ & TAN⁷ to be applied at the time of incorporation⁸

In a major move to reduce the time required to start a company in India, the Ministry of Corporate Affairs (“MCA”), Government of India has implemented an integrated technology driven approach to company formation.

As per the revamped process, the tax Permanent Account Number (“PAN”) and Tax Deduction and Collection Account Number (“TAN”) for the new company is to be simultaneously applied for along with the application for company formation.

PAN, as allotted by the Income Tax Department, will be printed on the Certificate of Incorporation issued by the Registrar of Companies under the Companies Act, 2013 and TAN will be separately communicated to stakeholders by email.

4. Clarifications on implementation of GAAR⁹ provisions under the Income Tax Act, 1961

Stakeholders and industry associations had requested for clarifications on implementation of GAAR provisions. CBDT has issued the clarifications on implementation of GAAR provisions on 27th January, 2017.

Amongst others, it has been clarified that

- If the jurisdiction of FPI is finalized based on non-tax commercial considerations and the main

purpose of the arrangement is not to obtain tax benefit, GAAR will not apply.

- GAAR will not interplay with the right of the taxpayer to select or choose method of implementing a transaction.
- Grandfathering as per rules will be available to compulsorily convertible instruments, bonus issuances or split / consolidation of holdings in respect of investments made prior to 1st April 2017 in the hands of same investor.
- Adoption of anti-abuse rules in tax treaties may not be sufficient to address all tax avoidance strategies and the same are required to be tackled through domestic anti-avoidance rules. However, if a case of avoidance is sufficiently addressed by Limitation of Benefits (LoB) provisions in the tax treaty, there shall not be an occasion to invoke GAAR.
- If at the time of sanctioning an arrangement, the Court has explicitly and adequately considered the tax implications, GAAR will not apply to such an arrangement.
- GAAR will not apply if an arrangement is held as permissible by the Authority for Advance Rulings.
- If an arrangement has been held to be permissible in one year by the PCIT/CIT¹⁰/Approving Panel and the facts and circumstances remain the same, GAAR will not be invoked for that arrangement in a subsequent year. The proposal to apply GAAR will be vetted first by the PCIT/ CIT and at the second stage by an Approving Panel headed by a judge of High Court.
- The stakeholders have been assured that adequate procedural safeguards are in place to ensure that GAAR is invoked in a uniform, fair and rational manner.

4 Under section 94A of the ITA. Section 94A was introduced into the Income Tax Act, 1961 ('ITA') in Finance Act 2011 in order to discourage transactions between taxpayers and persons located in countries or jurisdictions that do not engage in an adequate information exchange with India. Under this provision, countries or jurisdictions that lack an effective exchange of information process can be specified as “notified jurisdictions.”

5 vide Notification No. 114/2016 dated 14 December 2016

6 Permanent Account Number – Tax identification number of tax payer allotted by Indian tax authorities on an application being made

7 Tax Deduction and Collection Account Number – Tax identification number of person withholding taxes at source allotted by Indian tax authorities on an application being made

8 Draft Notification dated 25 January 2017 issued by Ministry of Corporate Affairs

9 General Anti Avoidance Rules that are proposed to be effective from FY 2017-18 under the Indian domestic tax laws

10 Principal Commissioner of Income-tax/ Commissioner of Income-tax

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