

INDIA INTERNATIONAL TAX CONFERENCE

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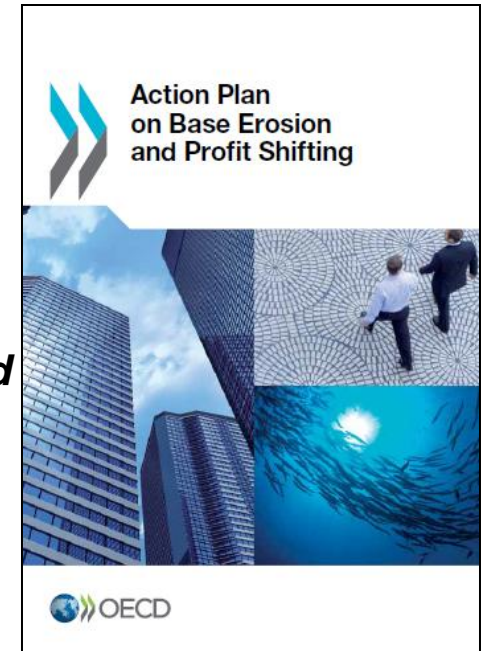
**SENIOR POLICY ADVISOR TO THE GLOBAL VICE-CHAIR OF TAX,
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THE OECD BEPS ACTION PLAN

- February issue paper
- 19 July: Publication of BEPS Action Plan
- 19-20 July G20 Finance Ministers:

“We fully endorse the ambitious and comprehensive Action Plan submitted at the request of the G-20 by the OECD aimed at addressing base erosion and profit shifting (BEPS) with a mechanism to enrich the Plan as appropriate . We welcome the establishment of the OECD/G20 BEPS project and encourage all interested countries to participate.”

- 5-6 September heads of Government approve



ACTION PLAN – KEY THEMES

Three BEPS themes

- 1. Coherence**
- 2. Realignment**
- 3. Transparency and predictability**

GROUPING THE 15 BEPS ACTIONS

1. **Address the Tax Challenges of the Digital Economy**
2. Neutralise the Effects of Hybrid Mismatch Arrangements
3. Strengthen Controlled Foreign Companies Rules
4. Limit Base Erosion via Interest Deductions and Other Financial Payments
5. Counter Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance
6. **Prevent Treaty Abuse**
7. **Prevent the Artificial Avoidance of PE Status**
8. **Assure that Transfer Pricing Outcomes are in Line With Value Creation / Intangibles**
9. **Assure that Transfer Pricing Outcomes are in Line With Value Creation / Risks and Capital**
10. **Assure that Transfer Pricing Outcomes are in Line With Value Creation / Other High-Risk Transactions**
11. **Establish Methodologies to Collect and Analyse Data on BEPS and the Actions to Address It**
12. **Require Taxpayers to Disclose Their Aggressive Tax Planning Arrangements**
13. **Re-examine Transfer Pricing Documentation**
14. **Make Dispute Resolution Mechanisms More Effective**
15. **Develop a Multilateral Instrument (NOT A CONVENTION)**

TIMELINE: OUTPUTS DUE BY SEPTEMBER 2014

Action	Expected Output
Address the Tax Challenges of the Digital Economy	Report identifying issues raised by the digital economy and possible actions to address them
Neutralise the Effects of Hybrid Mismatch Arrangements	Changes to the Model Tax Convention
	Recommendations regarding the design of domestic rules
Counter Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance – phase 1	Finalise review of member country regimes
Prevent Treaty Abuse	Changes to the Model Tax Convention
	Recommendations regarding the design of domestic rules
Assure that Transfer Pricing Outcomes are in Line With Value Creation / Intangibles - phase 1	Changes to the Transfer Pricing Guidelines and possibly to the Model Tax Convention
Re-examine Transfer Pricing Documentation	Changes to Transfer Pricing Guidelines and Recommendations regarding the design of domestic rules
Develop a Multilateral Instrument –phase 1	Report identifying relevant public international law and tax issues

TIMELINE: OUTPUTS DUE BY SEPTEMBER 2015

Action	Expected Output
Strengthen CFC Rules	Recommendations regarding the design of domestic rules
Limit Base Erosion via Interest Deductions and Other Financial Payments	Recommendations regarding the design of domestic rules
Counter Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance – phase 2	Strategy to expand participation to non-OECD members
Prevent the Artificial Avoidance of PE Status	Changes to the Model Tax Convention
Assure that Transfer Pricing Outcomes are in Line With Value Creation / Intangibles – phase 2	Changes to the Transfer Pricing Guidelines and possibly to the Model Tax Convention
Assure that Transfer Pricing Outcomes are in Line With Value Creation / Risks and Capital	Changes to the Transfer Pricing Guidelines and possibly to the Model Tax Convention
Assure that Transfer Pricing Outcomes are in Line With Value Creation / Other High-Risk Transactions	Changes to the Transfer Pricing Guidelines and possibly to the Model Tax Convention
Establish Methodologies to Collect and Analyse Data on BEPS and the Actions to Address It	Recommendations regarding data to be collected and methodologies to analyse them
Require Taxpayers to Disclose Their Aggressive Tax Planning Arrangements	Recommendations regarding the design of domestic rules
Make Dispute Resolution Mechanisms More Effective	Changes to the Model Tax Convention

RECENT DEVELOPMENTS (ACTION #13)

OECD PROPOSAL FOR GLOBAL TRANSFER PRICING DOCUMENTATION

On 30 July 2013, OECD released the white paper on transfer pricing documentation

- **Two-Tier System**
 - **Approach similar to that proposed by the European Commission, requiring taxpayers to prepare both a master file and a local file**
- **Purpose of transfer pricing documentation requirements:**
 - **Information that assists tax administrations in undertaking a transfer pricing risk analysis**
 - **And confirms a taxpayer's reasonable efforts to comply with the arm's length principle**

OECD PROPOSAL FOR GLOBAL TRANSFER PRICING DOCUMENTATION

In order to allow tax authority to identify whether risk factors are present documentation should focus on:

- **Significant transactions with low tax jurisdictions**
- **Business restructurings**
- **Transfers of intangibles**
- **Specific types of related party payments**
- **Year-on-year loss making**
- **Levels of corporate debt and interest expense in relevant countries**
- **Global transfer pricing policies, a description of where important intangibles are held and an identification of the MNE's existing APA and ruling arrangements**
- **Taxpayer's explanation of how its material transfer pricing arrangements comply with the arm's length principle and local transfer pricing**

ACTION #13: ALSO INCLUDES COUNTRY-BY-COUNTRY REPORTING REQUIREMENTS

- **Country by country reporting of high level information regarding MNC's activity in each country**
 - **Separate template to be created**
 - **Details still being considered by OECD, but will include some measure of income, taxes, headcount, and assets**
 - **May also include additional information not yet specified**
- **Ultimately may be part of the master file but is being developed by OECD as a separate work stream because of political urgency associated with it**
- **Will be required to be provided to all “relevant” tax authorities:
Not Publicly Disclosed**
- **There are existing country-based public reporting requirements for the extractive industry and a new country-based reporting requirement in the EU for banks is coming**

LATEST NEWS: OECD PUBLIC CONSULTATION, 12-13 NOVEMBER 2013

- **Work on transfer pricing for intangibles is quite far advanced**
- **Confirmation of the arm's length principle for transfer pricing.**
- **But the real debate is where do you want to be on a spectrum between arm's length and global formulary apportionment?**
- **What is role for the UN BEPS group?**

BEPS AND THE INDIAN TAX SYSTEM

General context

- **India is not a member of the OECD, but the courts rely on the OECD Commentary**
- **India (along with China and Russia) are observers at the CFA and all have an equal place in the joint OECD/BEPS group**
- **No official announcements by Indian legislative body / tax authorities. However, as part of the G-20, India has indirectly welcomed the BEPS report.**
- **There are wide source rules and these are subject to aggressive enforcement (ie indirect transfers of assets, royalties, services income , PE attribution).**
- **Source based taxation focus may drive concerns on digital economy issue**

BEPS AND THE INDIAN TAX SYSTEM

Action 1 - Address the tax challenges of the digital economy

- **No specific provisions concerning digital economy.**
- **However, definition of the term royalty (after its amendment by the Finance Act, 2012) is perceived to be wide enough to capture most technology/ digital economy transactions.**
- **Characterization of payment (i.e. business income v. royalty) is the subject of current litigation.**

Action 2 - Neutralize the effects of hybrid mismatch arrangements

- **No rules currently in Indian domestic tax law.**
- **Tax Authorities could possibly consider tax treatment in another jurisdiction, even though the impact of such consideration could be limited under prevalent law.**
- **GAAR, which will be effective from 1 April 2015, may have an impact.**

Action 3 - Strengthen CFC rules

- **No CFC rules present in the domestic tax law.**
- **CFC rules contemplated to be introduced as part of Direct Taxes Code.**

BEPS AND THE INDIAN TAX SYSTEM

Action 4 - Limit base erosion via interest deductions and other financial payments

- **Deduction subject to arm's length principle and business purpose test.**
- **Rules limiting deduction for interest relating to exempt income exist.**
- **Interest defined widely to cover guarantee fees, factoring, hedging etc.**
- **Provision introduced to notify jurisdictional areas (NJA) which do not effectively exchange information with India, that could inter-alia result in limiting deductions of payments made to persons located in such areas (e.g. Cyprus).**

Action 6 - Prevent treaty abuse

- **Increased focus on claim of treaty benefits by tax authorities.**
- **Provisions requiring tax residency certificates and self declarations containing prescribed information, introduced in the tax law.**
- **Seeking to renegotiate certain treaties. GAAR provisions are being introduced in recently negotiated treaties. Also, trend of entering into agreements to exchange information with other jurisdictions.**
- **GAAR provisions are proposed to be effective from 1 April 2015 and contain a clause to override the treaty.**

BEPS AND THE INDIAN TAX SYSTEM

Action 7 - Prevent artificial avoidance of PE status

- **Wide definition of agency PE under the domestic tax law (includes maintenance of stock of goods for merchandising purposes and securing of orders).**
- **Commissionaire models are not common in India.**
- **Aggressive enforcement of PEs including review of companies seeking to rely on the exemption of preparatory or auxiliary activities.**

Action 12 - Require taxpayers to disclose their aggressive tax planning arrangements

- **No current focused disclosure regime.**
- **Specific reporting requirements (primarily post-facto) do apply e.g. taxpayers opting for certain incentive regimes, or those undertaking certain corporate actions (such as business sale).**

BEPS AND THE INDIAN TAX SYSTEM

Country-by-country reporting and publication rules

- **Domestic tax authorities cannot request the information in the OECD's "country-by-country reporting" project based on existing law.**
- **Tax authorities do not communicate taxpayer's information to foreign authorities except within the frame of an appropriate tax treaty provision or under EU law.**
- **The confidentiality of taxpayer information is protected indefinitely (subject to sharing amongst certain government bodies or the comments above); under applicable law, this would also cover information gathered under a potential "country-by-country reporting".**

WHAT COMES NEXT?

- **Very tight deadlines: Full participation of all parties is imperative**
- **Possible outcomes**
 - **A real consensus on real outcomes**
 - **A “fudge”**
 - **Failure**
- **A once in a generation opportunity**

WHAT COMES NEXT? (CONTINUED)

But are we focusing on the right tax?

- **Few economists support the current corporate income tax.**
- **Corporate tax revenues account for approximately 8% of total tax**
- **The revenue gained from BEPS might be less than 1% of total tax revenue**
- **VAT is where the real money is:**
 - **A BEPS-VAT project**