

India – USA Double Tax Avoidance Agreement

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General Observations

- **Treaty became effective in 1991**
- **Reflects the UN Model treaty balance of tax jurisdiction allocation**
- **US investment in India increased since 1998**
 - **Does this affect the treaty relationship?**
- **As a result, the investment income provisions provide for greater India withholding tax than under the OECD and US Models**
 - **For example, compare the treaty dividend withholding rate of 15/25% to the OECD/US Model rates of 5/15%**
 - **Interest withholding @10% compared to 0%**
- **The limitation of benefits article does not reflect the more recent provisions of the US Model**

Permanent Establishment Article

Fixed Places of Business

- **Although explicitly identified in the treaty, the US Model does not provide this detail**
- **The US Technical Explanation states that these places of business are implicit in the US Model PE definition**
 - **A warehouse that provides storage facilities to others**
 - **A farm, plantation or other place where agriculture, forestry, plantation, or related activities are carried on**
 - **A store or other sales outlet**
- **Installations/structures for natural resource exploitation/construction sites are PEs if in existence for more than 120 days**
 - **Compare to 12-months in the US Model**

Services PE/Included Services

- **Services PE provision not in the US Model or in most US treaties**
- **US-Canada treaty contains a services PE provision as does the pending US-Chile treaty**
- **Included services provision novel in US treaties**
 - **Even if the services do not constitute a PE, the source country may tax if the period of performance exceeds 90 days**
 - **Includes payments for technical and consultancy services if the services are ancillary and subsidiary to the right, property or information for which the payment is made**
 - **The MOU (agreed to by both governments) is helpful in illustrating the scope of the provision**

Fixed Place of Business

Exceptions

- **Similar exceptions in US and OECD Models**
- **However, the exception for “regular” delivery of goods was modified to apply to “occasional” delivery of goods**
- **Was this a compromise? The UN Model does not allow any delivery to be excepted**

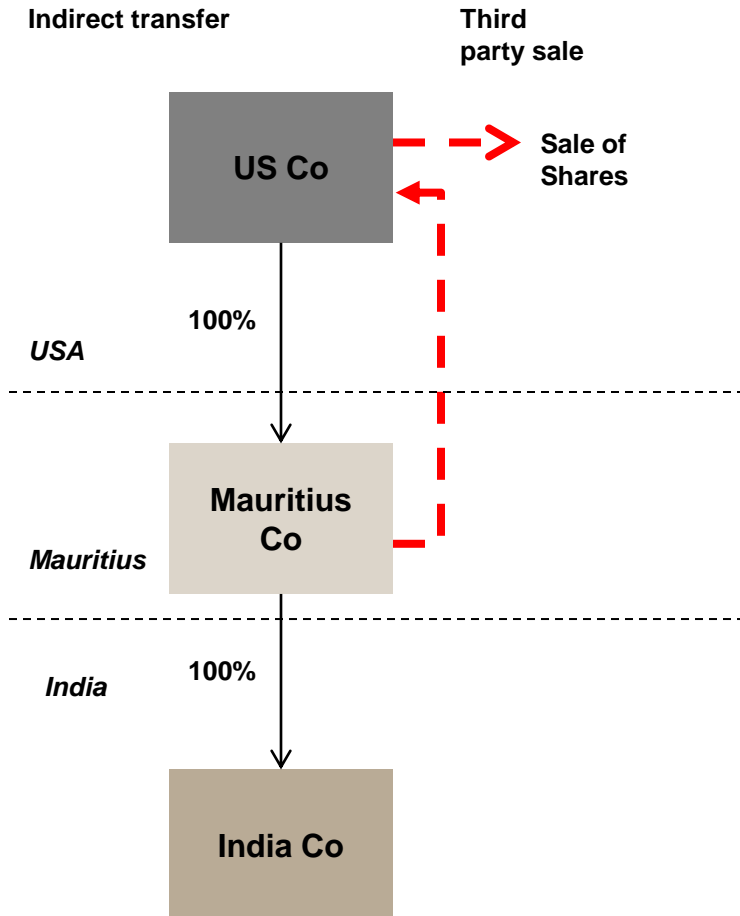
Dependent and Independent Agents

- ~~Dependent agent PE not limited to a person that has authority to conclude contracts and habitually does so if the dependent agent maintains a stock of goods in the other country and makes deliveries from that stock and other activities have been performed in that country that have contributed to the sale~~
- **Dependent agent PE also may be created if the dependent agent habitually obtains orders wholly (or almost wholly) for the company**
 - **Note that an independent agent may also create a PE under these circumstances if, in addition, the transactions between the agent and principal are not at arm's-length**
- **Some limitations provided in the accompanying Diplomatic Notes, notably that the dependent agent takes actions that provides the purchaser a basis for a reasonable belief that the dependent agent has authority to bind the company**

Business Profits

- **Unlike most US treaties, the treaty contains a limited force of attraction rule**
- **The US Internal Revenue Code retains a similar rule under section 864(c)(3)**
- **An unusual provision in the treaty permits a reasonable estimation of profits attributable to a PE if the actual amount cannot be determined or is exceptionally difficult to determine**
 - **Applied only to exceptional cases?**
- **Deductions for expenses are allowed, but limited to those allowed under local law**
 - **Protocol limits the extent of Indian law restrictions to no less than that allowed under Indian law at the time the treaty was signed**

Capital gains



- Both the countries have right to tax capital gains in accordance with the provisions of its domestic law
- Credit for taxes paid in India available in the US?
- Credit for taxes paid in India pursuant to recently introduced provisions pertaining to indirect transfers?

Treatment of Pass-through Entities

- Treaty does not contain a specific provision for pass-through entities
- U.S. internal tax law contains special provisions to address this issue that applies to all treaties
- US and OECD Models provide special provisions
- India position generally?
- Liable to tax v subject to tax
 - Liable to tax would mean *coming within the taxing net of the home country* and subject to tax would mean actually paying tax in the home country

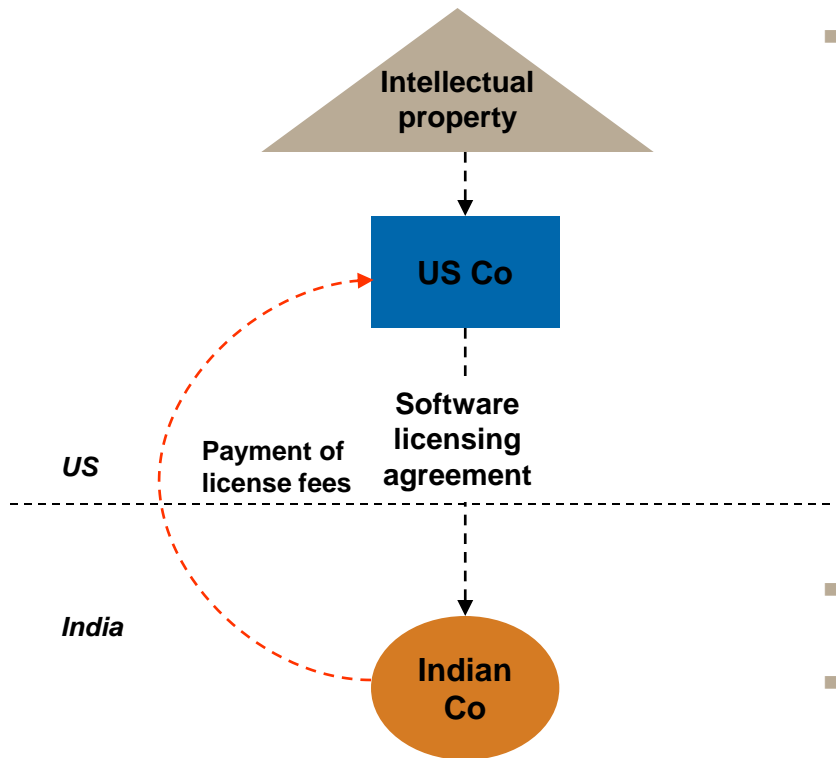
Treatment of Pass-through Entities

- **LLC**
 - **Status of LLC – *company or partnership***
 - **Company defined to mean body corporate or any entity which is treated as a body corporate for US tax purposes**
 - **If company or body corporate - Should be *liable to tax***
 - **If partnership – either the firm or partners should be subject to tax in the US**
- **LP/LLP**
 - **Characterization for US tax purposes – ie partnership or body corporate**
 - **Eligibility to tax treaty could be limited to the extent the partners are subject to tax in the US**
- **Trusts**

Characterization of Software Payments

- **US issued regulations in 1998 that characterize transactions and provide tax treatment**
- **Departs from the general model followed by USA – confers taxability in state of source**
- **Four categories of transactions**
 - **Transfer of a copyrighted article**
 - **Transfer of a copyright right**
 - **Services**
 - **Provision of know-how**
- **Key points**
 - **Transmission method not determinative, i.e., electronic transmission of a copyrighted article does not alter the tax treatment**

Treatment of Payments for Software



- **Characterization of income: Business income vs Royalties**
- **Typically, payments by end-users for certain categories of software (shrink-wrap software, site licenses, downloadable software, software bundled with hardware) are exempt if the payments do not entitle end-users to exploit the copyright in the software**
- **Beneficial ownership test**
- **Practically, WHT being paid in India**
- **Timing for claiming tax credit in the US**

MAP Process

- **Article 27**
 - **Stipulates a time limit of three years for all references**
 - **Elimination of double taxation in cases not provided for in DTAA**
 - **Provision for joint commissions or representatives**
- **India USA Competent Authority Agreement**
 - **Suspends tax assessment and collection for taxable years that are the subject of mutual agreement procedure**
 - **Security to be provided for the additional tax demand subject to mutual agreement procedure**
 - **Resolve or close the case within two years**
 - **Taxes covered include tax on assessment/reassessment, withholding tax, advance tax, interest and penalty.**

MAP Process

- **India USA Technical Explanation**
 - **Clarifies that remedies available under domestic laws need not be exhausted**
 - **Three years time limit runs from the receipt of formal notification**
 - **Recourse can be taken to US Model for list of examples**
 - **Competent Authorities entitled to consult each other**
 - **Communication between Competent Authorities can be direct or through representatives**

THANK YOU

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