INTERNATIONAL TAX STRUCTURING FOR INVESTING ADROAD

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INTERNATIONAL TAX CONFERENCE - 2009

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OVERSEAS INVESTMENT – KEY DRIVERS

- Access to Global Markets
- Inorganic Growth
- Fund Raising
- Global Brand Building
- Spreading / Hedging Risk
- Indian MNC

With the globalization, Indian companies are looking for business opportunities beyond their boundaries

OVERSEAS INVESTMENTS - KEY STATISTICS

- During 2008-09
  - 3,709 proposals amounting to US$ 22.01 billion cleared for investments abroad in JVs and WOSs
  - actual outward FDI in joint ventures (JVs) and wholly owned subsidiaries (WOSs) stood at US$ 15.9 billion
  - 82 per cent of investments was in Equity and 18 per cent was in loans
  - the total amount of proposal in each sector was
    - 43 per cent in manufacturing
    - 7 per cent in nonfinancial services
    - 4 per cent in trading
    - 1 per cent financial services, and
    - balance were ‘others’

Source: http://www.ibef.org/

OVERSEAS INVESTMENT – AUTOMATIC ROUTE

Automatic route

Companies/ Partnership firms

Upto 400 % of Net worth

(i) Contribution to the capital of overseas JV/ WOS
(ii) ECB
(iii) 100% guarantee issued to or on behalf of JV/ WOS
(IV) Capitalization of export proceeds / other dues

Resident Individuals

Upto USD 200,000 under Liberalized Remittance Scheme

Mutual Funds

Cap of USD $7 billion

Investments can be made in specified securities

Restrictions - Investment in Real Estate and Banking Business

OVERSEAS INVESTMENT – APPROVAL ROUTE

- Prior approval of the RBI is required in all other cases
- Portfolio investments permitted only by individuals and by listed Indian companies investing in overseas listed companies
- RBI considers the following factors while considering applications:
  - Prima facie viability of JV/WOS outside India
  - Contribution to external trade and other benefits which will accrue to India through such investment
  - Financial position and business track record of the Indian entity and the foreign entity
  - Expertise and experience of the Indian entity in the same or related line of activity of the JV/WOS outside India

OVERSEAS INVESTMENT - FUNDING

- Source of Investment:
  - Foreign exchange from an authorized dealer in India
  - Balances held in the EEFC account
  - Capitalization of exports
  - Swap of shares
  - Utilization of ECB / FCCB proceeds
  - In exchange of ADR / GDR
  - Utilization of proceeds raised through ADR / GDR
- The ceiling of 400 % of net worth does not apply to investment made out of funds held in EEFC account or out of proceeds of ADR / FCCB

STRUCTURING OUTBOUND INVESTMENTS

Key questions:

- Branch v. subsidiary
- Whether to invest directly or through a holding company?
- Where to locate the holding company?
- How to fund the investment?
- Whether a holding company required in the target jurisdiction?
- Debt push down possible?
- Desire to repatriate income
- Future expansion strategy

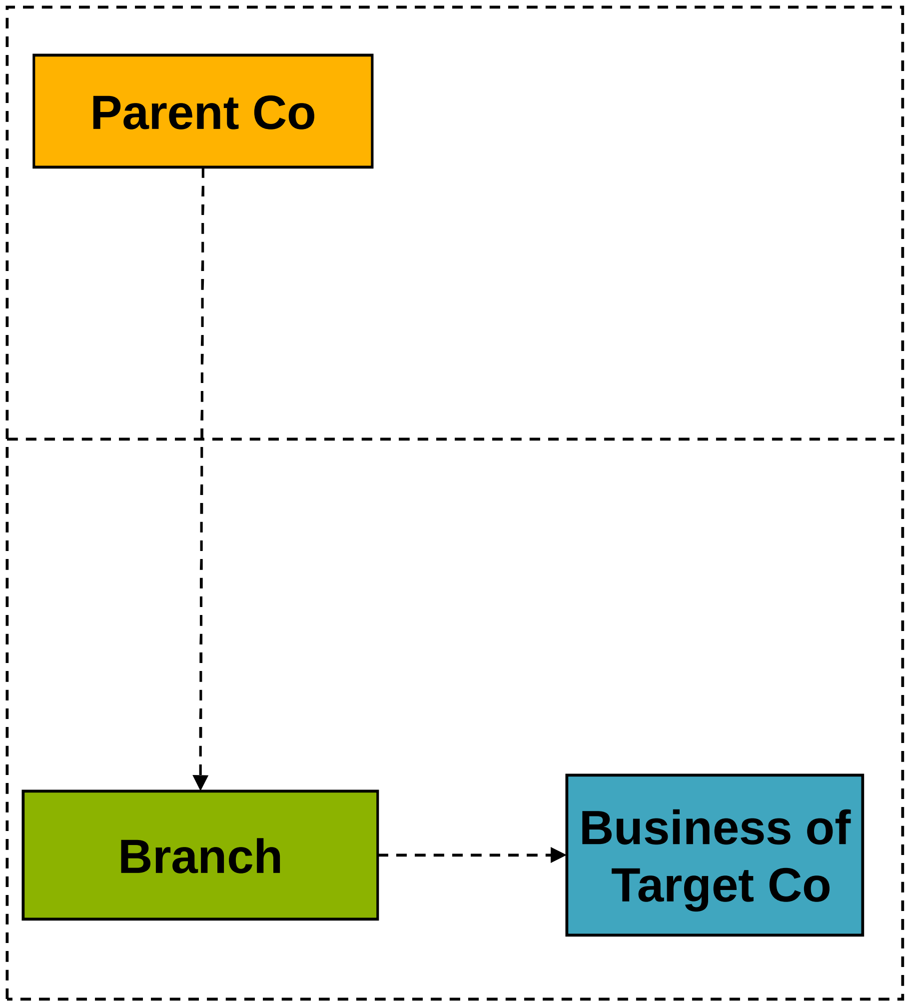
CHOICE OF JURISDICTION

- Choice of entities
- No exchange controls
- Low taxes, stamp duty
- Funding options
- IP protection
- Sound Legal system
- Good treaty network
- Professional infrastructure, telecommunications and banking

- **Conventional**
  - Netherlands
  - Mauritius
  - Singapore

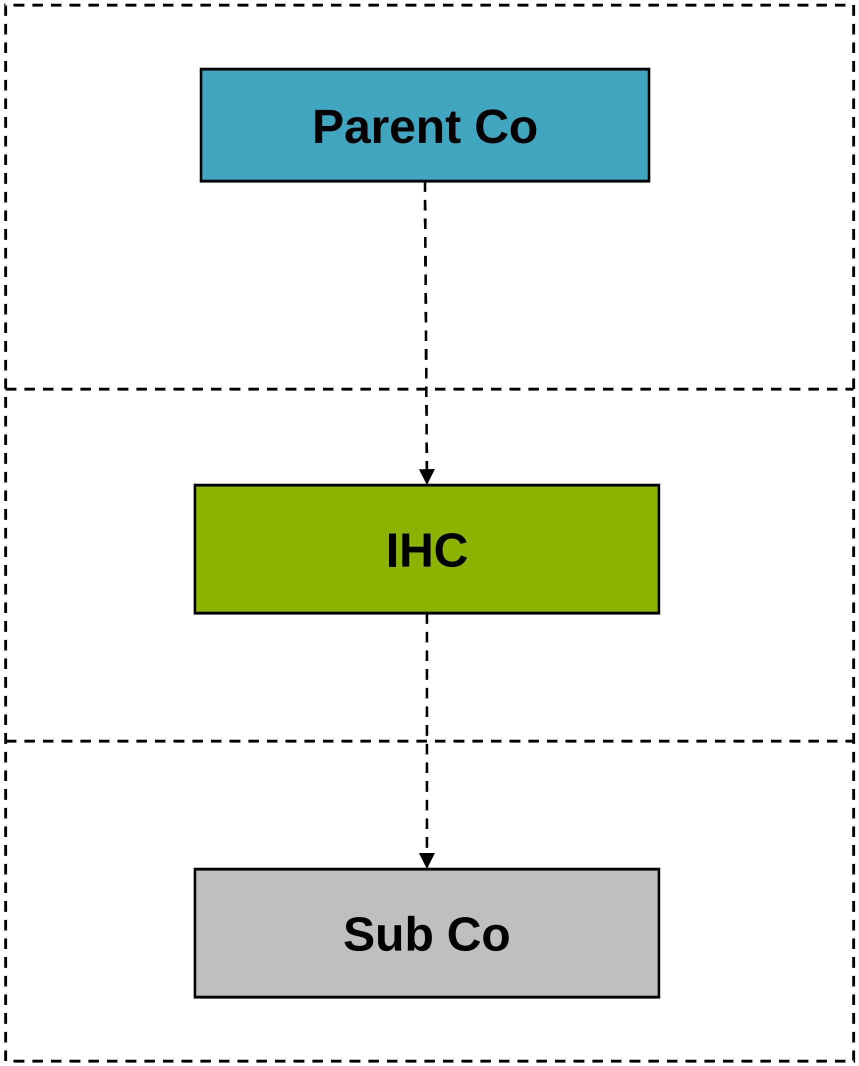
- **Unconventional**
  - Switzerland
  - Ireland
  - UK
  - Luxembourg
  - Cyprus

BRANCH STRUCTURE



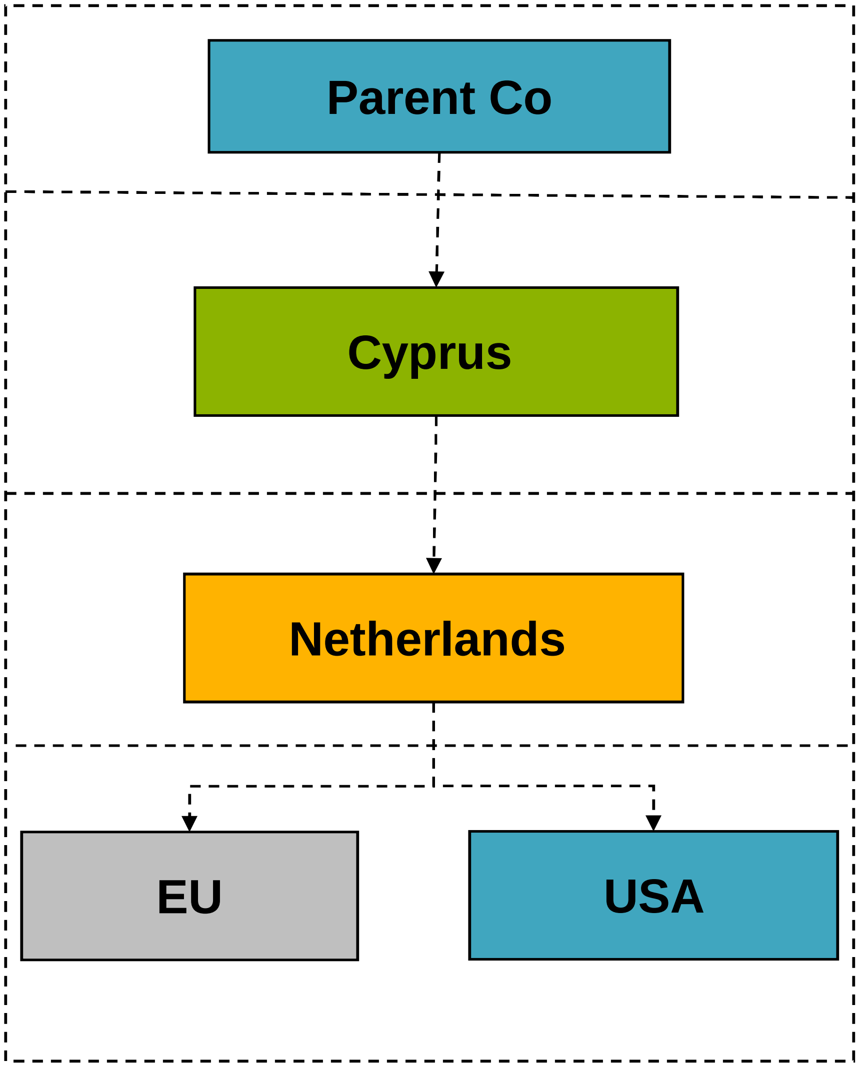
- Branch to acquire the business of the Target Co
  - Useful when regular remittance of surplus required for expansion in India
  - High upfront expenses
  - Subject to exchange controls
- Parent Co to get credit for taxes paid by branch abroad
- Inefficient structure, if Parent Co has losses to be carried forward
- Exemption of PE profits in the hands of Parent Co *(India – Poland Treaty)?*

IHC – SINGAPORE v. MAURITIUS



- Foreign sourced dividends exempt
- Capital gains earned by Singapore IHC
- No withholding tax on dividend
- Repatriation of funds by redemption of preference shares
- Capital gains taxable in India @ 22.66% as compared to dividend @ 33.99%
- Underlying tax credit in India for *taxes paid* in Singapore
- If IHC in Mauritius, underlying tax credit available in India for *taxes payable* in Mauritius

IHC - CYPRUS + NETHERLANDS



- Participation exemption benefits in Cyprus and Netherlands
- No withholding tax on dividends based on EU-parent subsidiary directive
- No capital gain tax on divestments
- 5%/15% WHT on dividend from US Sub Co to Netherlands
- Tax sparing credit under India – Cyprus DTAA may reduce dividend tax in India

CASE STUDY - CORUS

TSL, India

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TSAHL

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TS , UK

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Corus Plc, UK

Equity – USD 4,100 mn

- Internal generation	USD 1,257 mn
- ECB	USD 500 mn
--Rights issue proceeds	USD 1,888 mn
- Foreign equity offering	USD 445 mn

Quasi Equity – USD 2,662 mn

Bridge Finance	USD 2,662 mn

Debt Financing – USD 6,143 mn

5 year Amortizing loan	USD 3,236 mn
7 year Amortizing loan	USD 2,907 mn

Final Consideration – USD 12,905 mn

Total USD 13,751 mn less Debt USD 846 mn

Source: http://insightory.com

STRUCTURING IP TRANSACTIONS

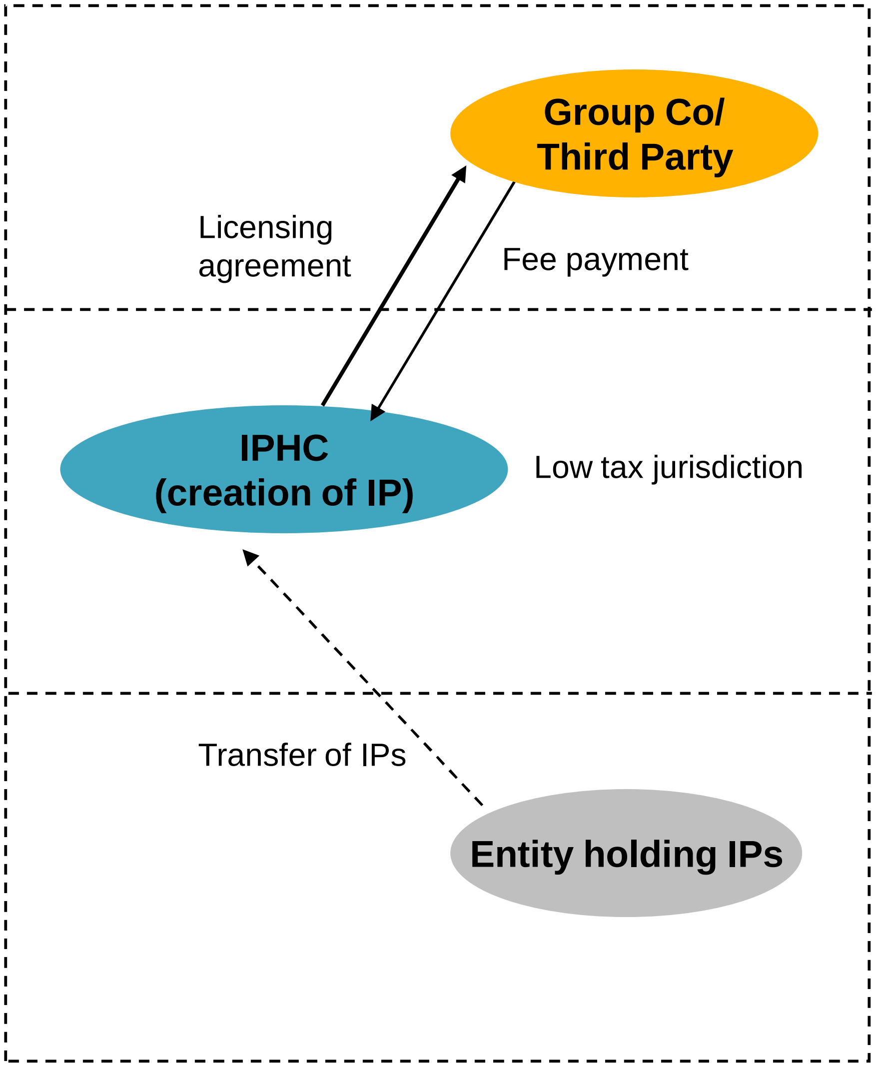
- IP origination and initial ownership within the Group
  - R&D Companies
  - Economic ownership
  - Risk and reward
  - Maintenance, protection and renewals
- Identification of entity owning IP
- Identification of users of the IP
- Structuring revenue models for economic benefits
- Transfer of IP:
  - Direct sale and assignment
  - Direct - end licensing
  - Strategic alliances with third parties
  - Cost sharing arrangements
  - Mergers and acquisitions

STRUCTURING OPTIONS

- **IP Holding Companies –** Economic owner licensing out the IP to users within and outside the Group
- **Cost Sharing Arrangements –** sponsors of the R&D efforts who would make use of the IP generated and contribute proportionately to the benefits expected to be gained from exploitation
- **Buy-in arrangements –** New sponsors or entities interested in sharing the benefits of the IP generated
- **Buy-out arrangements –** Sponsor exiting a cost sharing arrangement – rights to use IP developed, limitations placed
- **Varying business models –**
  - Contract R&D and contract manufacturing
  - Limited risk distributors

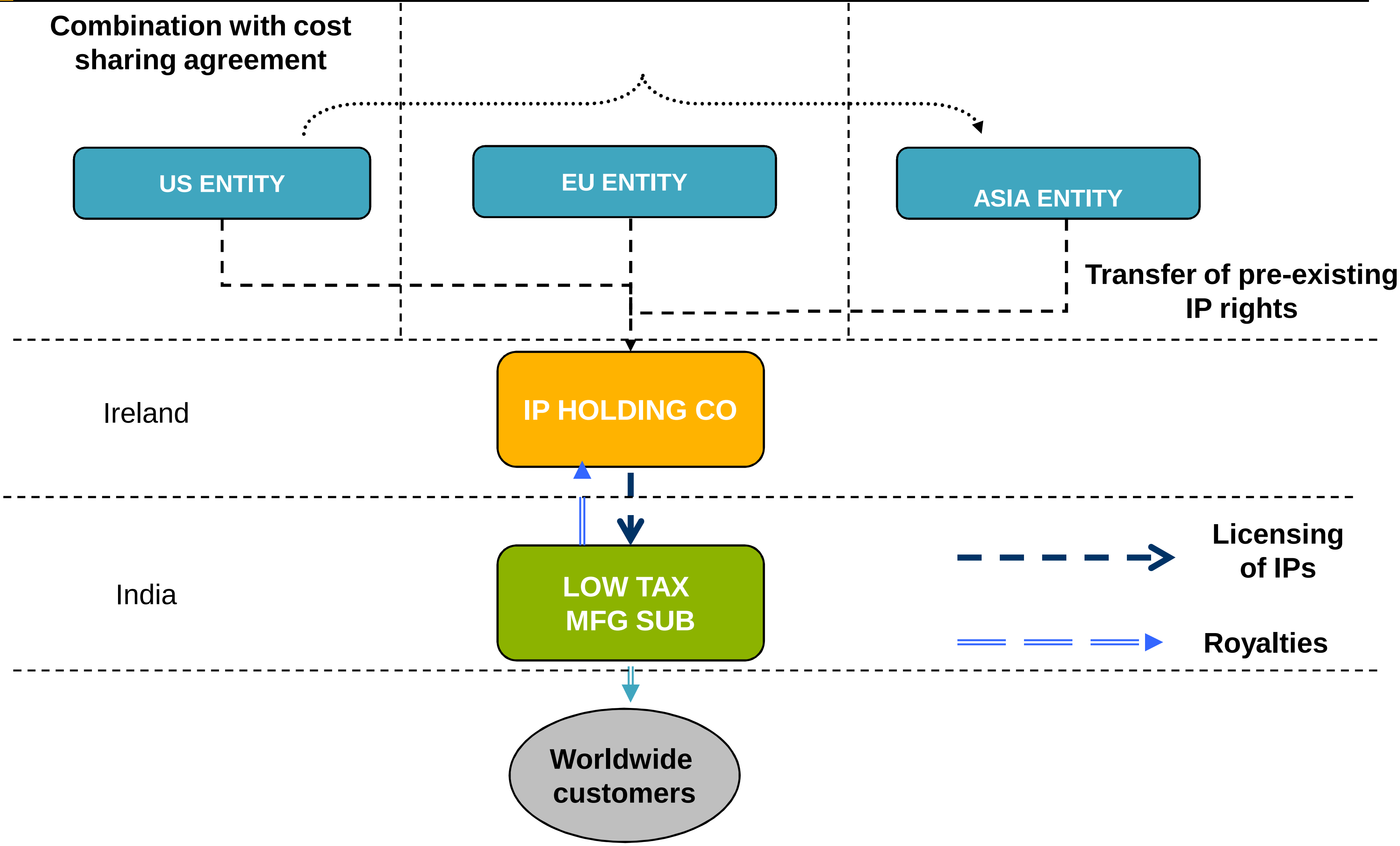
Underlying tax theme – Arm's Length Pricing

IP HOLDING COMPANY



- IP Holding Companies ("IPHC") – to optimize taxes by separating IP assets from other corporate assets
- Parent company creates a corporate subsidiary in the same country or in a low tax jurisdiction
- IP assets are then created by or transferred to the subsidiary
- Subsidiary would then enter into license agreements with the parent corporation and non-related entities

ILLUSTRATIVE IP STRUCTURE



IRELAND

Country	Tax Attributes	Analysis
Ireland	Generic Overview	Member State of the EU and the OECD Double Taxation Treaties with 45 countries
	Tax Attributes	Corporate tax – 12.5% (25% on passive non trading income) No general transfer pricing regulations Generally no withholding tax on interest or dividend paid by Irish subsidiary to Foreign Parent Co Capital gains on sale of shares exempt provided at least 5% shares are held by a company either in the EU or in a country with which a tax treaty exists Patent royalty income is exempt on 'qualifying patents' where R&D work is carried out in Ireland Disposal of IP asset subject to 20% capital gains tax Dividend income of a patent company is tax exempt No stamp duty on sale, transfer and disposition of IPs 20% tax credit on R&D expenditure incurred by a trading Co

SINGAPORE

Country	Tax Attributes	Analysis
Singapore	Generic Overview	Territorial taxation with income being taxed in Singapore only on repatriation Wide treaty network with around 50 countries
	Tax Attributes	Corporate tax rate - 18% Dividends and capital gains earned from foreign subsidiaries /branches not liable to tax in Singapore No withholding tax on dividend distribution by Singapore Withholding tax on interest -15%; royalties -10% Regional headquarters which use Singapore as an international IP holding location may claim Written Down Allowance for the cost of acquisition of the IP up to 31 Oct 2013 Single tax deduction for patenting costs incurred Tax concession on royalties received for any literary dramatic, musical or artistic work or approved intellectual property or approved innovation Single tax deduction on expenses incurred on R&D that leads to ownership of IP

THE NETHERLANDS

Country	Attributes	Analysis
The Netherlands	Generic Overview	Member state of EU Very wide treaty network with more than 85 countries
	Tax Attributes	Corporate tax rate – 25.5% Participation exemption 5% duty on capital Dividend and capital gains exemption No withholding tax on interest and royalties Withholding tax on dividend -15% 10% tax on profits gained with the use of a patent Low foreign withholding tax on royalties Wide range of deductions such as royalties paid for licenses, R & D expenses, IP depreciation

LUXEMBOURG

Country	Tax Attributes	Analysis
Luxembourg	Generic Overview	Constitutional monarchy ; one of the founder members of EU Fairly wide network of tax treaties with number of countries
	Tax Attributes	Three types of taxes on business are Corporate Income Tax, Municipal Business Tax on Profits (MBTP) and Fortune Tax Corporate tax - 30.63% MBTP - 6 – 10.5% Fortune tax - 0.5% No withholding tax on dividend if parent owns > 25% No withholding tax on interest and royalties paid to associated enterprises No withholding tax on royalties paid to non-resident companies Holding companies are exempt from corporate tax, MBTP, Fortune tax as well as from withholding tax on distributions 80% tax exemption on the net positive income received as consideration for the use of, or the right to use, any copyright on software, any patent, trade mark, design or model 80% exemption also available on incomes and gains from IPs, including capital gains

CONCLUSION

- Distinction between inbound and outbound structuring
- While selecting a jurisdiction for IHC, need to check -
  - Anti treaty shopping provisions
  - CFC regulations
  - Domestic anti-avoidance rules
- India needs to negotiate tax treaties which brings more benefit for the Indian companies
- Tax credit provisions
- Exit tax on entities transferring IP on perceived value of future profitability given up
- Obama tax proposals in the US
- China clarifies ‘beneficial owners' status for treaty benefits - circular dated October 27, 2009