

IMPLEMENTATION OF
BEPS ACTION PLAN
UNDER INDIAN INCOME
TAX REGIME

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ABBREVIATIONS

the Act	Income-tax Act, 1961 (Indian Income Tax)	OECD	Organisation for Economic Cooperation and Development
the Rules	Income-tax Rules, 1962	BEPS	Base Erosion and Profit Shifting
AP	BEPS Action Plan	MLI	Multilateral Instrument
CTA	Covered Tax Agreement	POEM	Place of Effective Management
ALP	Arm's Length Principle	PE	Permanent Establishment
LOB	Limitation of Benefit	NR	Non-resident
AE	Associated Enterprise	PPT	Principle Purpose Test
TP	Transfer Price/ Pricing	FAR	Functions, Assets and Risks
w.e.f.	With effect from	GAAR	General Anti-Avoidance Rules

CRUX OF BEPS



IMPLEMENTATION BY INDIA OF BEPS AP

AP	AP DESCRIPTION	W.E.F.	IMPLEMENTATION IN INDIA
1	Tax Challenges of Digital Economy	FY 2016-17 and FY 2020-21	<ul style="list-style-type: none"> ➤ Significant Economic Presence - Amendment in Section 9 of the Act. ➤ Introduction of Equalization Levy vide Finance Acts in 2016 and 2020.
2	Neutralizing Hybrid Mismatches	April 01, 2020 read with DTAA	GAAR as well as Articles 3 to 5 of MLI: <ul style="list-style-type: none"> ➤ Article 3 - Transparent Entities ➤ Article 4 - Dual Resident Entities ➤ Article 5 - Application of Methods for Elimination of Double Taxation
3	Effective Controlled Foreign Company Rules	FY 2016-17	<ul style="list-style-type: none"> ➤ POEM - Amendment in Section 6 of the Act ➤ Concessional Tax Regime of 15% on profits repatriated from specified foreign company (Section 115BBD of the Act)
4	Limiting Base Erosion involving Interest Deductions and Other Financial Payments	FY 2017-18	Section 94B of the Act – Limitation of Interest to AEs restricted to actual paid or 30% of EBITDA of FY
5	Countering Harmful Tax Practices	FY 2016-17	Section 115BBF of the Act - Tax on income from patent @10% to patentee resident in India where $\geq 75\%$ R&D Expenditure incurred in India

IMPLEMENTATION BY INDIA OF BEPS AP

AP	AP DESCRIPTION	W.E.F.	IMPLEMENTATION IN INDIA
6	Prevent Treaty Abuse (Treaty Benefits in inappropriate circumstances)	April 01, 2020 read with DTAA	<p>GAAR as well as PPT with the SLOB across its treaties; covered in Articles 6 to 11 of MLI</p> <ul style="list-style-type: none"> ➤ Article 6 - Purpose of a Covered Tax Agreement (Preamble of CTA modified) ➤ Article 7 - Prevention of Treaty Abuse ➤ Article 8- Dividend Transfer Transactions ➤ Article 9 - Capital Gains from Alienation of Shares or Interests of Entities Deriving their Value Principally from Immovable Property ➤ Article 10 - Anti - abuse Rule for Permanent Establishments Situated in Third Jurisdictions ➤ Article 11 - Application of Tax Agreement to Restrict a party's Right to Tax its Own Residents
7	Preventing Artificial Avoidance of Permanent Establishment Status	April 01, 2020 read with DTAA	<p>Amendment in section 9 of the Act; and Articles 12 to 15 of MLI</p> <ul style="list-style-type: none"> ➤ Article 12 - Artificial Avoidance of Permanent Establishment Status through Commissionnaire Arrangements and Similar Strategies ➤ Article 13 - Artificial Avoidance of Permanent Establishment Status through the Specific Activity Exemptions ➤ Article 14 - Splitting -up of Contracts ➤ Article 15 - Definition of a Person Closely Related to an Enterprise

IMPLEMENTATION BY INDIA OF BEPS AP

AP	AP DESCRIPTION	W.E.F.	IMPLEMENTATION IN INDIA
8	TP – Intangibles		No specific amendments in Transfer Pricing provisions under the Act. The Tax Department and taxpayers are expected to give consideration while applying ALP and on basis of FAR analysis: CONDUCT OVER CONTRACT.
9	TP - Risk and Capital	FY 2016-17	
10	TP - High Risk Transactions	FY 2016-17	However, introduction like low-value-adding intra-group services Safe Harbour Rules are as per AP 10.
11	Measuring and Monitoring		(BEPS Data Collections)
12	Disclosure of Aggressive Tax Planning	FY 2017-18	GAAR: Sections 95 - 102 of the Act: Every Transaction to be justified through Commercial Lens else can be considered dummy/ bogus
13	TP Documentation and Country-by-Country Reporting	FY 2016-17	<ul style="list-style-type: none"> ➤ Country By Country Report (Section 286 of the Act r.w. Rule 10DB of the Income- Tax Rules, 1962); and ➤ Master File Documentation (Section 92D r.w. Rule 10DA of the Rules)
14	Effective Dispute Resolution	April 01, 2020 Read with DTAA	Articles 16 and 17 of MLI <ul style="list-style-type: none"> ➤ Article 16 - Mutual Agreement Procedure [where Art 9(2) not in treaty]; Bilateral APAs ➤ Article 17 - Corresponding Adjustments (Bilateral Notification or Consultation)
15	Multilateral Instrument	April 01, 2020 Read with DTAA	As explained/ summarised in the upcoming slides

OVERVIEW OF MLI PROVISIONS & INDIA'S POSITION

Part	Article	Title/Particulars	Brief Description	India's Position
I	1 & 2	Scope of MLI and Interpretation of terms		
II	Hybrid Mismatches (Action Plan 2 & 6)			
	3	Transparent Entities	Treaty benefit to be allowed to fiscally transparent entities subject to certain conditions.	India has made reservation in entirety and thus, does not apply to its CTAs.
	4	Dual Resident Entities	Determination of resident jurisdiction by mutual agreement procedure (MAP) in case of dual-resident non-individual persons .	India has adopted the said MLI provisions and hence, the said provision modifies relevant provision of CTA, unless reservation made by other Party to the CTA.
	5	Methods for elimination of double taxation	Recommends three options for elimination of double taxation inter-alia including " Option C " which provides for replacement of exemption method in existing treaties with credit method .	India has opted for Option C and has notified tax treaties with Bulgaria, Egypt, Greece, Slovak Republic which contain exemption method. ForFY2020-21, only Slovak Republic is a CTA and hence, will be modified.

OVERVIEW OF MLI PROVISIONS & INDIA'S POSITION

Part	Article	Title/Particulars	Brief Description	India's Position
III	Treaty Abuse (Action Plan 6)			
	6	Preamble (Minimum Standard) – Purpose of CTA	CTA to be modified to include preamble text providing for intention to eliminate double taxation without creating opportunities for double non-taxation (including treaty shopping).	India is silent on its position. Being a minimum standard , the said preamble text to be added to the existing preamble text in the CTA .
	7 (1)	Dual Residents	Denial of treaty benefit where it is reasonable to conclude that one of the principal purpose of any arrangement or transaction is to obtain treaty benefit .	India has accepted PPT as an interim measure. Being a minimum standard , it applies to all CTAs, unless other Party makes reservation in entirety of Article 7 not to apply.
	7 (8 to 13)	Simplified Limitation on Benefits (SLOB)	It is a subjective test to obtain treaty benefit and is based on type of person, ownership, equivalent beneficiary, active conduct of business, etc. It is an optional provision and supplements PPT .	India has chosen to apply SLOB . SLOB applies only where either other Party has also adopted SLOB, or that Party allows India to apply SLOB symmetrically or asymmetrically.

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III	Treaty Abuse (Action Plan 6)			
	8	Dividend transfer transactions	Additional criteria of “365 days minimum holding period” for the shareholder to avail concessional tax rates under CTA.	<p>India has opted to apply the said MLI provision (except in case of India-Portugal tax treaty, which already contains minimum holding period longer than 2 years).</p> <p>MLI provision to modify CTA provisions except India-Portugal treaty, unless reservation is made by other Party or in case of notification mismatch.</p>
	9	Capital Gains from Alienation of Shares or Interests of Entities Deriving their Value Principally from Immovable Property	<p>Introduces additional criteria of “365 days minimum holding period” in case of capital gains arising from alienation of shares or interests of entities deriving their value principally from immovable property.</p> <p>Optional provision of inserting a minimum value derivation criterion of 50% of their value directly or indirectly from immovable property.</p>	<p>India has opted to apply minimum holding period threshold along with minimum value derivation criterion of 50%, directly or indirectly, from immovable property situated in other contracting jurisdiction. The said provision to apply only if other Party to CTA has chosen to apply the said provision.</p>

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III	Treaty Abuse (Action Plan 6)			
	10	Third Jurisdiction PEs	Tax treaty benefit cannot be granted in case of any item of income on which the tax rate in the third jurisdiction in which an exempt PE is located, is less than 60% of tax that would be imposed in the country of residence (COR).	India is silent on its position. The MLI provision modifies CTA , unless reservations by other Party.
	11	Taxing rights for own residents	Preserves the right of jurisdiction to tax its own residents , except w.r.t. benefits granted under CTA provisions listed under Article 11.	India is silent on its position. The MLI provision modifies CTA , unless reservations by other Party.
IV	Avoidance of PE Status (Action Plan 7)			
	12	Commissionaire and similar arrangements	Expands the scope of dependent agency PE to include cases where a person habitually concludes contracts or plays a principal role in conclusion of contracts of another enterprise. Meaning of independent agent also modified.	India has opted to apply the said MLI provision. It applies only where both Parties have opted for the said provision. Accordingly, this provision does not apply in case of notification mismatch or reservations by other Party to the CTA.

OVERVIEW OF MLI PROVISIONS & INDIA'S POSITION

Part	Article	Title/Particulars	Brief Description	India's Position
IV	Avoidance of PE Status (Action Plan 7)			
	13	Specific Activity Exemptions	Provides two options to counter artificial avoidance of PE status through specific activity exemptions. "Option A" provides that exemption from PE is available if <i>inter alia</i> the overall activity of the fixed place of business is of preparatory and auxiliary character.	India has opted for Option A . Option A applies only where other Party has also opted for the same option. Hence, Option A will not modify the CTA provisions in case of Option Mismatch or reservations by other Party.
	13(4)	Anti-fragmentation Rules	Specific activity exemption (as modified by MLI) shall be denied if the fragmented activities constitute complementary functions that are part of a cohesive business operation .	India has adopted anti-fragmentation rules . The said rule applies only where other jurisdiction has also opted for the same.
	14	Splitting-up of Contracts	Anti-abuse provisions to avoid artificial avoidance of PE status through splitting up of contracts dealing with building site, construction project, installation project, other specific project & supervisory or consultation activities in connection with these contracts.	India is silent on its position. MLI provision modifies CTA provisions, unless reservations by other Party.

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Part	Article	Title/Particulars	Brief Description	India's Position
IV	Avoidance of PE Status (Action Plan 7)			
	15	Definition of a Person Closely related to an enterprise	Relevant for Article 12 ,13 &14.	India is silent on its position. Applies, if any of the Articles 12,13 or 14 are applicable.
V	Improving Dispute Resolution (Action Plan 14)			
	16	Mutual Agreement Procedure (Minimum Standard)	MAP request can be presented to the competent authority of either of the Contracting Jurisdictions. Case must be presented within 3 years from the date of notification of dispute (applies if CTA provides no period or shorter period).	India has adopted MAP with certain reservations . India has made reservation to apply 1st sentence of Article 16(1) and intends to meet the minimum standard through bilateral negotiation. (If CTA mentions longer period that is acceptable but minimum is 3 years.)
	17	Corresponding Adjustments (Minimum Standard)	Based on Article9(2) of the OECD Model Tax Convention, which requires appropriate corresponding relief in computing profits in transfer pricing cases	India reserves the right for the entirety of Art. 17 not to apply to the notified treaties which already contain a provision relating to corresponding adjustments . In other words, India has chosen to apply the said provision, except where the provisions already exist in the CTA.

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Part	Article	Title/ Particulars	Brief Description	India's Position
VI	18 to 26	Arbitration	Mandatory binding arbitration in cases where competent authorities are unable to reach an agreement to resolve a case under MAP.	India has not opted to apply arbitration provisions and hence, will not apply.
VII	27 to 39	Final Provisions	Procedural articles to make MLI provisions operational. For instance, signature, ratification, reservations, notifications, entry into force, entry into effect, etc.	

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