HOT TOPICS DISCUSSED AT THE IFA 2014 ANNUAL CONGRESS HELD IN MUMBAI, INDIA

Presented by

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Congress overview

- Most of the topics and discussions revolved around BEPS
- Even non-BEPS topics would eventually lead to situations under BEPS.
- There is a concern about the wide ranging implications of BEPS, even when there is no intention to question or to be concerned about certain transactions
- Presenters and Delegates left with more questions and issues rather than more solutions or strategies
- But is anyone listening?

Subject 1 – Cross border outsourcing, issues, strategies, solutions

- Traditionally, outsourcing was driven by economic motivations rather than tax consideration, but has now become a part of tax planning strategies for MNC's
- Historically low value and back office / support functions were outsourced, but now even core activities are outsourced
- Issues include, TP adjustment, withholding tax, classification of whether payment is for FTS / Royalty, denial of tax credit etc.
- What about the economic ownership of IP / rights / assets generated by the service provider if R&D is outsourced?
- Is cost-plus a safe model?
- Does it carry a PE / Service PE / DAPE risk, especially if the activities relate to core business?

Subject 2 – Qualification of taxable entities and treaty protection

- An entity's qualification as taxable or non-taxable under domestic law, also determines its entitlement to treaty benefits
- Qualification as a taxable entity, also means that income will be taxed in the hands of the entity rather than its owners
- Issues arise on account of differential tax treatment of transparent and non-transparent entities especially when it differs between the two states.
- Where entity qualification differs, who is the appropriate recipient eligible to claim treaty benefits? Of which country?
- Qualification is also relevant to determine the classification of income, e.g. Business Income v/s. Dividend, Gains, Employment

VAT implications of outsourcing and cost-sharing arrangements

- Principle of neutrality in the application of VAT requires that the tax neither hinders nor promotes outsourcing
- It is achieved when the entity produces taxable supplies and claims full credit of VAT on outsourced services.
- However where the entity produces exempt supplies, denial of partial / full credit if VAT is a deterrent to outsourcing
- There are special challenges in achieving neutrality under cross border outsourcing activities.
- Hence certain arrangements may result in double taxation and certain arrangements offer planning opportunities to avoid disallowance of credit.

Indirect transfer of assets

- Does a jurisdiction have a right to tax cross border indirect transfer of assets?
- Does ‘asset’ include only physical assets? Or does it include intangibles, management control and other assets?
- Should treaty benefits override? E.g. Article on capital gains
- Valuation and computational challenges e.g. definition of substantial value, how should one conduct the valuation.
- Which situations should be exempted, e.g. restructuring
- Even if indirect transfers are taxed, how can a jurisdiction monitor the vast number of cross border transfers.

The taxable residence of Companies

- Domestic rules on tax residence define worldwide tax liability under domestic laws
- Place of incorporation v/s. place of effective management v/s. place of effective control v/s. any new criteria evolving
- Issues can arise when a foreign company is treated to be a tax resident in a particular year but the tax assessment is being conducted for several years
- Under international tax policies, should a tax residency certificate issued by a State, be considered as the final evidence? How much reliance should be placed on TRC while determining the tax residence of company?

Tax issues relating to Intangibles

- In the strict legal meaning, what is an "intangible" e.g. IP over which a non-owner can exercise control for the benefit of owners / others, is this an intangible of the non-owner
- Intangibles not defined or recognised by a State, can these intangibles create a taxable event?
- If cross border transfer of an intangible is a taxable event, hot to determine the "cost" of the intangible e.g. goodwill
- Issues arise where the intangible is bundled or embedded in trade of goods or complex projects.

Taxation and non-tax treaties

- Tax treaties are not the only international agreements that address tax issues, and hence is an area often over looked
- Bilateral Investment Treaties, Free Trade Agreements, Maritime and Air agreements, Treaties of Amity, etc.
- In some cases, a tax and a non tax treaty may apply to the same event, and in some cases, there may be no tax treaty, but a non tax treaty may apply to an event.
- Understanding terms like, national treatment, most favored nation, fair and equitable treatment from a tax perspective

An important thought

- One of the Chairs mentioned that in many jurisdictions around the world, tax officers are looking at on-going tax assessments / disputes of previous years with a BEPS lens which is not the intention of the OECD, hence it will be interesting (and highly recommended) that when the final BEPS framework is launched, it comes with an effective date, <u>**which is not retrospective!**</u>

- Do you have a similar experience in your country? Should a tax advisor object if the tax officer looks at a tax assessment for a previous or current year with a BEPS lens?

THANK YOU

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