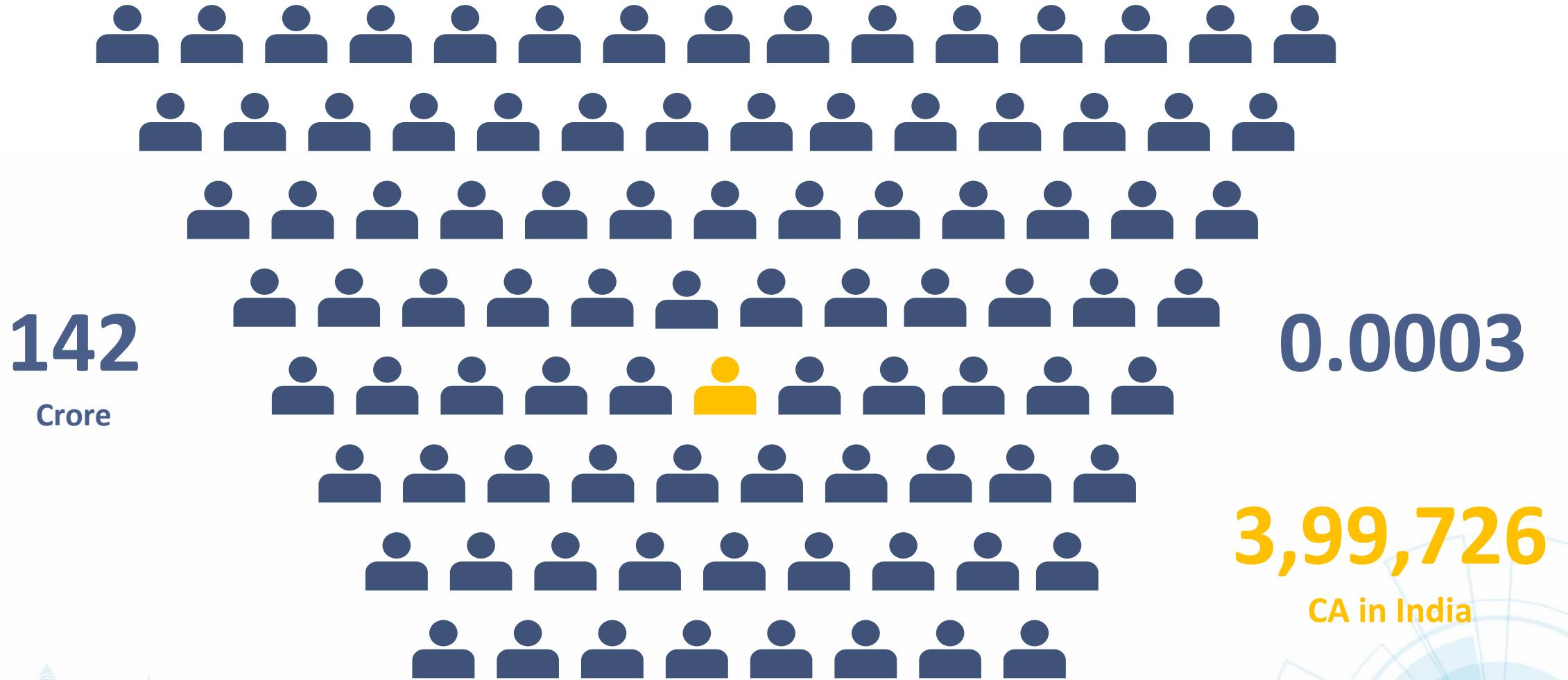


OPPORTUNITIES IN INTERNATIONAL TAXATION

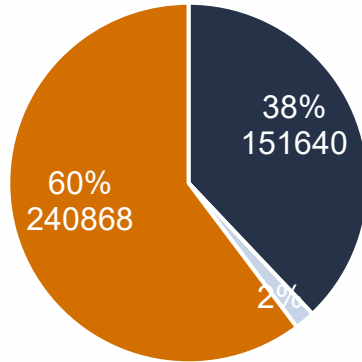
CA. PIYUSH .S. CHHAJED
FCA., DISA
piyush@cndindia.com
Mob : 98190 84820

YOU ARE A RARE SPECIE

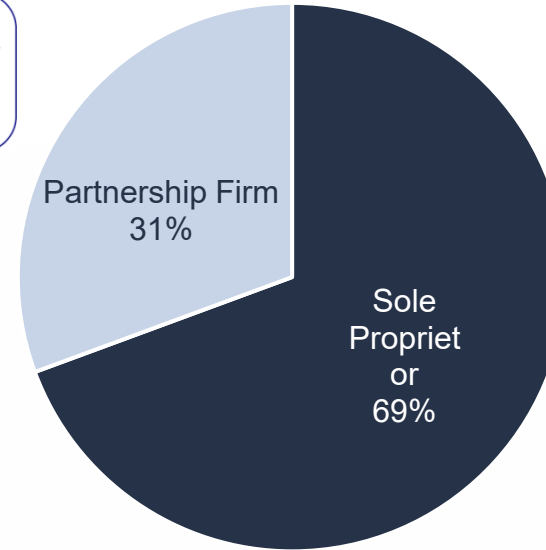


STATISTICS – THE KNOWN FACTS

Sales



- Practice - Full Time
- Practice - Part Time
- Not in Practice



- Sole Proprietor 49,392
- Partnership Firm 30,977

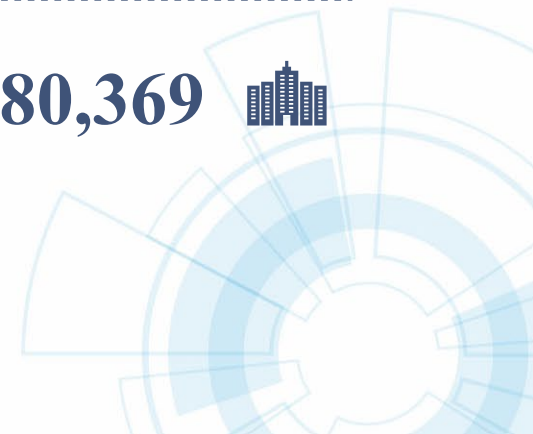


3,99,726

Total Chartered Accountants

Total Chartered Accountants Firms

80,369



Rs. 8,65,115 Cr

Direct Tax Net collections for the
FY 2023-24

Rs.39,578 Cr

Refund
FY 2023-24

7.85 Cr

ITR Filed

1,65,105 Cr

GST revenue collected for July 2023

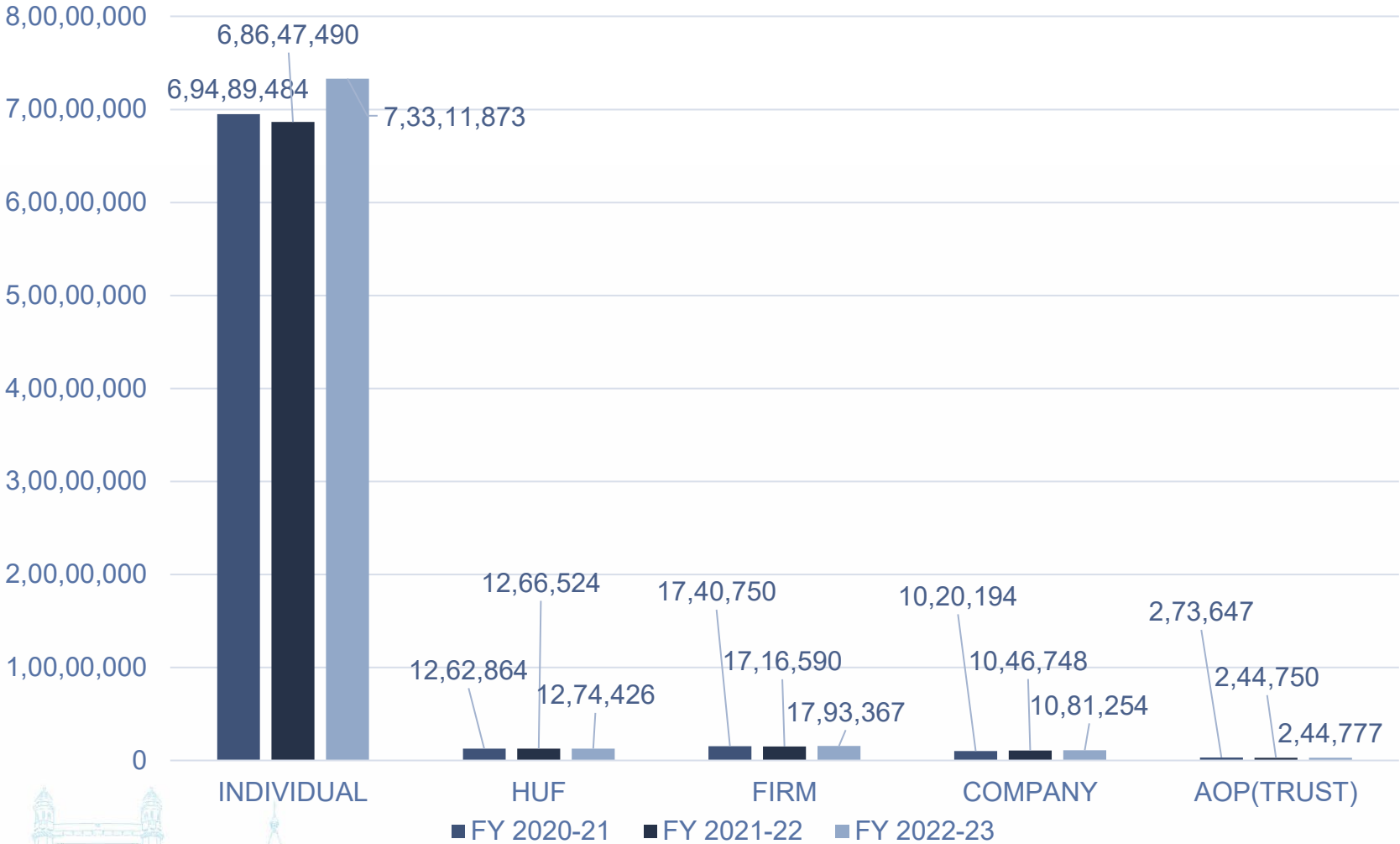
29 lakh +

Tax Audit Reports (TARs)



STATISTICS – THE KNOWN FACTS

Number of Income-Tax Returns Filed
(Including Revised Return)



	FY 2020-21	FY 2021-22	FY 2022-23
INDIVIDUAL	6,94,89,484	6,86,47,490	7,33,11,873
HUF	12,62,864	12,66,524	12,74,426
FIRM	17,40,750	17,16,590	17,93,367
COMPANY	10,20,194	10,46,748	10,81,254
AOP(TRUST)	2,73,647	2,44,750	2,44,777



TOP PROFESSIONALS IN DEMAND

1. Data Scientist
2. Data Analyst
3. Blockchain Engineer
4. UX Designer
5. Cyber Security Engineer
6. Cloud Developer
7. DevOps Engineer
8. Digital Marketing Specialist
9. Project Manager
10. Product Manager



TOP SKILLS IN DEMAND

1. Digital Literacy
- 2. Data Literacy**
- 3. Critical Thinking**
4. Emotional Intelligence
5. Creativity
6. Collaboration
7. Flexibility
8. Leadership Skills
- 9. Value Addition**
- 10. Curiosity and Continuous Learning**



Thinking
BOLD



and
BEYOND

Think Beyond Compliances

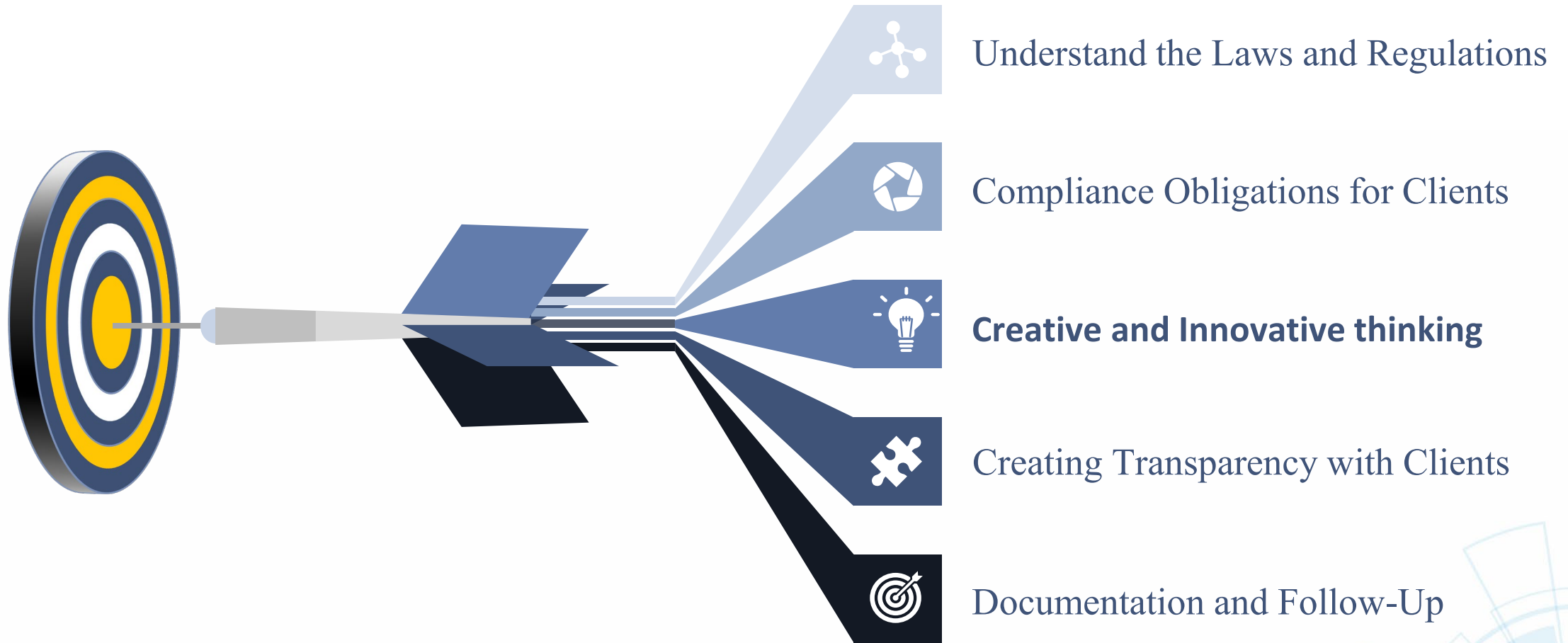


Chartered Accountants are not **“COMPLIANCE OFFICERS”**

We are **“STRATEGIC FINANCIAL ADVISORS”**



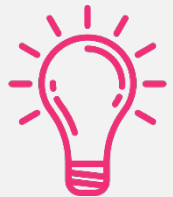
TAX PLANNING AND COMPLIANCE : **OUR SIGNIFICANT ROLE**



SERVICE

1

Tax Structuring



- Advisory on Entity Set from Tax Perspective
- Transaction Tax Advisory
- Tax-efficient group reorganization
- Strategic Tax Advisory



SERVICE

2

Tax Planning



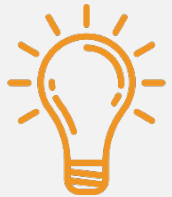
- A holistic Tax review of assessee.
- Tax-efficient investments.



SERVICE

3

M&A Tax Advisory



- M&A Deal Advisory and Support.
- Exchange Control & Regulatory Services.
- Promoter Restructuring & Succession Planning.
- Employee Stock Option Plan (ESOP) Services.



SERVICE

4

Tax Advisory



- Tax-efficient planning & structuring of cross border transactions.
- Restructuring of investments.
- Advising on transnational joint ventures and collaborations.
- Strategizing entry and exit from India.
- Analysis of Treaties & DTAA



SERVICE

5

REPRESENTA- TION



- Developing Tax Litigation Approach.
- Assistance in Filing Tax Appeals.
- Appearing Before Revenue / Appellate Authorities.
- Assisting Tax Counsels for Representation at Various Levels.



A MNC intends to incorporate entity in India and wish to avail professional services



Pre Entry Stage

- ☐ Market Research Report
- ☐ Tax Incentives Assessment
- ☐ Tax Due Diligence



A MNC intends to incorporate entity in India and wish to avail professional services



Set Up Stage

- ☐ Advising on the optimal tax structure
- ☐ Getting Approvals from RBI, SBI etc.
- ☐ Tax Opinion



A MNC intends to incorporate entity in India and wish to avail professional services



Operation Stage

- ☐ GST, Income Tax Compliances
- ☐ DTAA Advisory
- ☐ Transfer Pricing Audit & Advisory



A MNC intends to incorporate entity in India and wish to avail professional services



Fund Raising Stage

- ☐ Tax Planning for Fundraising
- ☐ Withholding Tax Compliance
- ☐ FDI /FPI Advisory



A MNC intends to incorporate entity in India and wish to avail professional services



Post Fund Raising Stage

- ☐ Exit Planning Advisory
- ☐ 15 CA – CB for foreign remittance
- ☐ Repatriation of Profits Advisory



A MNC intends to incorporate entity in India and wish to avail professional services



Other Advisory

- ☐ ITR Filling for NRI, MNC etc
- ☐ Litigation
- ☐ Dispute Resolution Panel



DISPUTE RESOLUTION PANEL

Section 144C - Dispute Resolution Panel

Assessing officer sends a copy of Draft Order to Assessee and assessee must within 30 days from receipt of Order

File acceptance to
A.O

OR

File Obligation to A.O &
DRP

A.O passes final order
within 1 month from end
of month of acceptance

DRP to issue direction with 9
months from end of month when
draft order is forwarded to
assessee

A.O shall pass final order
within 1 month from end of
directions received

If assessee is not satisfied with Final Order passed by A.O in pursuance of direction of DRP, he can file appeal to ITAT (Appellate Tribunal)

Addressing Corruption and Tax Evasion

1

Leveraging Technology

Using artificial intelligence and data analytics to detect tax fraud and evasion.

2

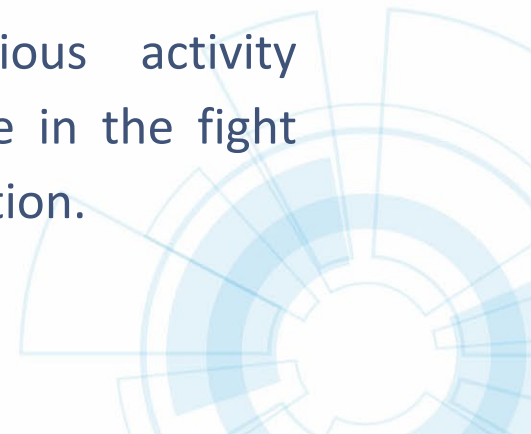
Strengthening Enforcement

Conducting rigorous audits and investigations to deter noncompliance and punish wrongdoers.

3

Promoting Civic Awareness

Encouraging citizens to report suspicious activity and participate in the fight against corruption.



KEY ETHICAL ISSUES IN TAXATION

1 Transparency

Ensuring that taxpayers are informed of their rights and obligations and that the tax authorities are accountable for their actions.

2 Integrity

Preventing corruption and ensuring that tax officials act ethically and impartially.

3 Equity

Maintaining fairness and equality in the distribution of the tax burden among different classes of taxpayers.



LETS GET **CONNECTED**





THANK YOU

CA. PIYUSH.S. CHHAJED

FCA., DISA

piyush@cndindia.com

Mob : 98190 84820



Deeming Provisions in Non-Resident & NRI Taxation

29th Nov, 2023,
Direct Taxes Committee – ICAI
Hyderabad

PVSS Prasad, FCA

pvsatya.prasad@gmail.com



SCOPE OF TOTAL INCOME – NON RESIDENT

Section 5

2) Subject to the provisions of this Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which—

(a) is received or is deemed to be received in India in such year by or on behalf of such person ; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year.

SOURCE

➤ Source means not a legal concept but something which a practical man would regard as a real source of income

- *Rhodesia Metal Ltd Vs CIT (1941) (9 ITR Supp 45)*

➤ “From whatever source derived” – to be included in the total income of Nonresident if such income accrues or arises in India during the relevant year

- *Performing Rights Society Ltd Vs. CIT (1977) (106 ITR 11) (SC)*

Income deemed to accrue or arise in India – S. 9

Section	Sources Of Income	Description
9(1)(i)	Business Income	Income from a business connection in India or through or from any property or capital asset or source of income or transfer of capital asset situated in India.
9(1)(ii)	Salaries	Salaries for services rendered in India.
9(1)(iii)	Salaries	Salaries by Govt. to an Indian citizen for services outside India.
9(1)(iv)	Dividend	Dividend paid by an Indian Company outside India.
9(1)(v)	Interest	Interest by Govt. or by a resident (unless for a business or source outside India)
9(1)(vi)	Royalty	‘Royalty’ by Govt. or a resident (unless for a business or a source outside India).
9(1)(vii)	FTS	‘Fees for Technical Services (FTS)’ by Govt. or a resident (unless for a business or a source outside India).

Sec 9(1)- Income deemed to accrue or arise in India

4

Income accruing/ arising whether directly/ indirectly, through/ from

Any Business
Connection in
India

Through or from
any property in India

Through or from
any asset/ source of
income in India

Through transfer of a
capital asset situate in
India

- Not confined to building/ land includes both movable/ immovable – tangible.
- *CIT Vs Metro 7 ITR 176.*

- Intangible property like a debt
- *CIT Vs Assam Tea 167 ITR 215* (Neutralised)

- Transfer of Shares of Indian Company between two non residents
- *GVK Industries Ltd 332 ITR 130 (SC)*
- Movable/Immovable

Explanation 1 to Sec 9(1)(i) – Accrual of Business Income

5

Business Activity	Deeming fiction
Business Connection other than Significant Economic Presence, where all activities are not carried out in India	Income reasonably attributable to operations carried out in India and Includes incomes referred in Explanation 3A
Purchase of goods in India for export	No Income - deemed to accrue/ arise in India if operations are confined to such activity
Business of running news agency/publishing newspapers, magazines, journals	No Income - deemed to accrue/ arise in India through/ from activities confined to collection of news and views in India for transmission outside India.
Shooting of any cinematograph film in India	No Income shall be deemed to accrue/ arise in India NR who is not Indian citizen (or) firm in which no partner (or) company in which no shareholder, is Indian citizen or Resident Indian, if operations are confined to such activity
Business of mining of diamond	No Income of Foreign company shall be deemed to accrue or arise in India through/ from activities confined to display of uncut and unassorted diamond in any special zone notified by Central Govt.

Sec 9(1)(i) - Business Connection

RD Aggarwal & Co 56 ITR 20(SC)

- There must be an element of continuity between the business of NR and the activity in the taxable territory.
- Stray or isolated transaction is normally not be regarded as BC
- BC is something more than a business
- BC is a relation that must be real and intimate through which income accrues or arises whether directly or indirectly to NR

Sec 9(1)(i) - Business Connection

- ***GVK Industries Ltd. Vs ITO (1997) 228 ITR 564 (AP)***
 - Whether there is a BC or not is a mixed question of fact and law which is to be determined on the facts and circumstances of each case.
- ***Ishika Wajima Harima 228 ITR 408 (SC)***
 - Every BC does not result in PE but every PE results in BC
- ***Barendra Prasad Ray 129 ITR 295 (SC)***
 - Business connection includes even professional connection.

Business connection includes business activity carried out through a person who, acting on behalf of NR

Has habitually

- **Exercises authority** on behalf of NR for conclusion of contracts
- **Concludes Contracts**
- **Plays principal role** leading to conclusion of contracts by NR

And Contracts are –

- In name of NR/
- For transfer of ownership of/ granting of Right to use,
 - ✓ property owned by that NR/ that
 - ✓ NR has Right to Use
- For Provision of Services by NR

Has no authority, but habitually maintains **stock in India** of goods/ merchandise and delivers on behalf of NR

Habitually secures **orders in India mainly or wholly** for the NR/ for that NR/ Other NR controlling/ controlled by /under common control as that of NR

Explanation 2 to Sec 9(1)(i) – Business Connection

- **Business connection does not include –**
 - Activity carried out through a broker/ general commission agent or
 - Agent having an independent status,
 - If Acting in the ordinary course of business

- The above referred agents would not be considered as having independent status, if they ***work mainly/ wholly***
 - on behalf of NR (Principal NR)/
 - On behalf of such NR and other NRs controlled by/
having controlling interest in/
under common control of Principal NR

Explanation 2A to Sec 9(1)(i) – Significant Economic Presence

Significant Economic Presence means –

- a) transaction in respect of goods, services or property carried out by non-resident with any person in India including provision of download of data or software in India,
 - if the aggregate of payments arising from such transaction or transactions during the *previous year exceeds 2 Crores*, or
- b) systematic and continuous soliciting of business activities or engaging in interaction with *three lakh users or more* in India,

Rule – 11UD w.e.f., 01/04/2022 - Thresholds for the purposes of significant economic presence

Significant Economic Presence

- Transactions/ Activities shall constitute Significant Economic Presence, whether or not
 - Agreement is entered in India
 - NR has residence/ place of business in India
 - NR renders services in India
- Income attributable to the transactions/activities referred shall be deemed to accrue/ arise in India
- In respect of Agency BC only so much of income as is attributable to the operations carried out in India shall be deemed to accrue or arise in India {Explanation – 3}
 - Rule 10 revision still pending.
 - CBDT report on profit attribution – not finalized
 - Attribution of profits – at OECD – still requires refinement
 - Hence an estimation in attribution of profits inevitable
 - ***Travelport case TS-218-SC-2023***

Explanation – 3A: Income attributable from Online Business in India

Income attributable as per Explanation – 3A of this section

- **Activities covered -**
 - Advertisement – targets customers residing/IP address in India
 - Sale of data collected from persons residing/ IP address in India
 - Sale of Goods/ Services using data collected from persons residing/ IP address in India
- **Activities targeted to –**
 - Persons resident in India
 - Persons using Internet Protocol address located in India
- **The provisions contained in this Explanation shall also apply to the income attributable to the transactions or activities referred to in Explanation 2A.**
 - This seems to be in contradiction with last part of the para –Explanation 3A

Significant Economic Presence

- SEP is an important concept proposed by BEPS AP 1 to address challenges of Digital Economy
- SEP is one of the dimensions of Business connection
- Explanation 2 and Explanation 2A are different ingredients and appear to be mutually exclusive.
- SEP impact is subject to treaty application which follows traditional PE definition
 - Hence SEP operates in Non treaty cases
- When SEP triggers a resident payer will have to withhold taxes – no guidance on attribution of profits
Payer has to approach AO u/s 195(2)

- In respect of revenue threshold INR 20million whether it is gross/ net of sales returns and discounts. Which figure is to be considered
- User Threshold – whether passive users are also counted ?
- EL Vs SEP – Any overlap
- Unintended consequence – provisions may impact old business models of selling goods/ services on principal to principal basis from abroad.
 - SEP goes beyond taxing digital business transactions
- Concept of Continuity and Regularity – Critical ingredients of Business Connection will be compromised – Contrary to RD Agarwal's Case
- SEP provisions likely to impact NR Business Models run on digital / Conventional modes

Indirect transfers –

As per S. 9(1)(i) income shall be deemed to accrue/ arise in India “through transfer of Capital assets situated in India”.

Here the expression “**through**” has been expanded clarifying that it includes “**by means of**”, “**in consequence of**” or “**by reason of**”, with retrospective effect.

It was further clarified that –

- an asset/ capital which is **share/ interest**
- in a company/ entity registered/ incorporated **outside India**,
- shall be **deemed to be situated in India**
- if it **derives** directly/ indirectly
- its **value substantially from assets located in India**.

➤ Exception

- If company/ entity directly owns the assets in India and transferor does not hold at any time during 12 months from transfer date “right to management/ control/ voting rights (or) share capital (or) interest > 5% of total voting power (or) share capital (or) total interest **EITHER individually (or) along with Associated Enterprises (as per S. 92A)**” &
- If company/ entity owns assets indirectly in India, then in addition to above transferor should not hold any right which entitle him to right to management/ control in company/ entity

➤ Applicability

- If on **Specified date**, value of such **assets exceeds 10 crores** and **represents at least 50% of value of all assets** owned by company/ entity
- **Specified date means** “date on which accounting period of entity ends preceding date of transfer” (or) date of transfer if “book value of assets exceeds 50% of book value of assets of company/ entity as on date of transfer”. If entity ceases to exist then, date on which it ceases to exist.
- Value shall be fair market value on specified date determined as per “*Rule 11UB*”

Attribution of Income -

If all assets are not located in India, then only such part reasonably attributable to assets located in India shall be such part of NR income

Exceptions to application of Indirect transfer -

- Foreign Institutional Investor as per S. 115AD from AY 2012-13 to AY 2014-15
- Category I or II Foreign Portfolio Investor
- For Assessments or Reassessments made, if transfer of share / interest is made before 28/05/2012
- ***Vodafone International Holdings 341 ITR 1 (SC) Case***
(Neutralized)

- Salary shall be deemed to accrue/ arise in India if, it is earned in India.
- **Income shall be regarded as income earned in India, if it is payable for –**
 - Services rendered in India &
 - Rest/ Leave period preceded and succeeded by services rendered in India which is included in employment contract
- Income shall be deemed to accrue/ arise in India, if it is payable by Government to citizen of India for services rendered outside India.
- **Case Laws –**
Eli Lilly & Co. (India) (P.) Ltd - [2009] 178 Taxman 505 (SC)

Sec 9(1)(iv) & Sec 9(1)(v)

Section 9(1)(iv) – Dividend Income

- Dividend paid by an Indian company outside India shall be deemed to accrue/ arise in India.

Sec 9(1)(v) - Interest Income

- Interest shall be deemed to accrue/ arise in India, if payable by –
 - the Government ; or
 - a person who is a resident,
except where interest is payable for any debt incurred/ moneys borrowed and used, for purposes of **business/ profession carried on outside India** or for purposes of **making or earning any income from any source outside India** ; or

Sec 9(1)(v) - Interest Income

- a person who is a non-resident,
where the interest is payable in respect of any debt incurred, or moneys borrowed and used, for the **purposes of a business or profession carried on by such person in India.**
- **Deeming fiction on NR in banking business –**
 - Interest payable by PE in India of non-resident to head office (or) any PE (or) any other part of such non-resident o/s India.
 - PE shall derive meaning as per S. 92F

S. 9(1)(vi) - Royalty

Consideration paid for –

- (i) includes lump sum
- (ii) excludes income chargeable as capital gains
- (iii) includes services in relation to any of the following

Government



All payments

S. 9(1)(vi) - Royalty

22

Resident

All payments, but excludes royalty payable

- i. for the purposes of a business or profession carried on by the payer outside India - in respect of any right, property or information used or services utilized; or
- ii. for the purposes of making or earning any income from any source outside India

Non resident

Payments Covered

- (i) for the purposes of a business or profession carried on by the payer in India - in respect of any right, property or information used or services utilized; or
- (ii) for the purposes of making or earning any income from any source in India

S. 9(1)(vi) - Royalty

23

Royalty means –

- consideration including lumpsum consideration
- Does not include consideration chargeable under Capital Gains

Transfer all/
including of
license



Patent, invention, model, design, secret formula or process or trade mark any rights or similar property (or) copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting

Imparting of
any
information
concerning



working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property (or) technical, industrial, commercial or scientific knowledge, experience or skill

S. 9(1)(vi) - Royalty

24

Use/ Right to Use

Patent, invention, model, design, secret formula or process or trade mark any rights or similar property (or)
any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB

➤ Rendering of any services in connection with above activities

Transfer of all/any
rights/ property/
Information

Transfer of all or any right for use or right to use a **computer software** (including granting of a license) **irrespective of the medium through which such right is transferred.**

S. 9(1)(vi) - Royalty

25

Royalty includes
Consideration in
respect of any
right, property or
Information



Whether/ not -

- a) Possession/ control is with the payer
- b) Used directly by the payer
- c) Location is in India

- **Computer software** - Computer programme recorded on any disc, tape, perforated media or other information storage device and includes any such programme or any customized electronic data
- **Process** – Includes transmission by satellite (including up-linking, amplification, conversion, for down-linking of any signal), cable, optic fibre or any other similar technology, whether or not such process is secret

S. 9(1)(vi) - Royalty

26

- No Royalty Income would be deemed to accrue/ arise in India
 - if it is derived from transfer or imparting any information outside India
 - in respect of any **data, documentation, drawing or specification** relating to
 - any patent, invention, model, design, secret formula or process or trade mark or similar property, if **payable in pursuance of an agreement made before 01/04/1976, and is approved by Central Government**
- No Royalty Income **paid by Resident**, would be deemed to accrue/ arise in India
 - in respect of **computer software** supplied by Non-resident manufacturer **along with computer (or) computer based equipment**
 - under **Scheme approved under Policy on Computer Software Export, Software Development and Training, 1986**

S. 9(1)(vii) – Fees for Technical Service

Government

All payments

Resident

All payments, but excludes fees payable

- i. for the purposes of a business or profession carried on by the payer outside India in respect of services utilized (or)
- ii. for the purposes of making or earning any income from any source outside India

**Non resident in
respect of any**

Payments Covered

- i. for the purposes of a business or profession carried on by the payer in India in respect of services utilized; (or)
- ii. for the purposes of making or earning any income from any source in India

S. 9(1)(vii) – Fees for Technical Service

Fees for Technical Service means –

- **Consideration including lumpsum consideration for rendering of –**
 - **any managerial, technical or consultancy services (including the provision of services of technical or other personnel)**
- **Consideration does not include –**
 - **construction, assembly, mining or like project undertaken by the recipient (or)**
 - **Income chargeable under the head "Salaries";**

Business income - Non residents

Special Provisions For NR Engaged In Certain Business:

	This section applies to	Deemed Income
Sec44B & Sec 172	<p>non-resident engaged in operation of ships</p> <p>Gross receipts – amount paid/ payable in India/ outside India (shipped to port in India) and received/ deemed to be received in India (shipped to any port outside India)</p>	7½ % of gross receipts
Sec44BB	<p>non-resident engaged in providing service/ facilities or supplying plant/ machinery for extraction or production of mineral oils (including petroleum and natural gas)</p> <p>Gross receipts – amount paid/ payable in India/ outside India (services & facility in India) and received/ deemed to be received in India (services & facility outside India)</p>	10% of gross receipts

Business income - Non residents

30

Special Provisions For NR Engaged In Certain Business:

	This section applies to	Deemed Income
Sec44BBA	non-resident engaged in operation of aircraft Gross receipts – amount paid/ payable in India/ outside India (carrying from India) and received/ deemed to be received in India (carrying from outside India)	5 % of gross receipts
Sec44BBB	foreign company engaged in civil construction or erection, testing or commissioning of plant or machinery in connection with turnkey power project approved by Central Government	10 % of gross receipts

Other Issues

➤ **Sec. 44C : Deduction of head office expenses-**

In case of NR, allowance for expenditure of head office shall be restricted to actual attributable expenditure in India or 5% of the adjusted total Income whichever is less.

➤ **Sec. 44DA:** Royalty or fees for Technical Services received from Govt. or Indian concern by a Non-Resident(not being a company) or a foreign company in pursuance of an agreement entered into after 31-3-2003

Where royalty or fees for technical services paid is effectively connected with PE in India or a fixed place of profession in India, then it shall be computed under the head Business Income (**Net basis**)

- The ambit of taxation in case of a non resident gets enlarged under provisions of Sec. 9 by deeming such income to accrue or arise in India in certain circumstances
 - ***Hira Mills Vs ITO (14 ITR 417)***
 - ***Anglo French Textiles Vs CIT (23 ITR 101) (SC)***
- Sec 9 gathers practically all types of income from all possible sources which a non resident may have in this country. If any income is left uncovered by this section the same is not taxable in India
 - ***CIT Vs Corborundum Co. (1973) (92 ITR 411) (Madras)***

- Sec 9 applies to both resident and non resident
 - ***CIT vs Bhogilal (25 ITR 50)***
- Non resident's income – accruing and received abroad – Chargeable u/s 5(2)(b) on the basis deemed to accrue in India by Sec 9
- Sec 9 has no application when income actually accrues in India
 - ***Performing Rights society Vs CIT (106 ITR 11) (SC)***
- If income of a non-resident is received in India then there would not be any requirement to examine whether the same is deemed to accrue in India
 - ***Anglo French Textile Vs CIT (25 ITR 27) (SC)***
 - ***Turner Morrison Vs CIT (23 ITR 152) (SC)***
 - ***Hira Mills Vs ITO (14 ITR 417)***

Sec 115A - Tax on Dividends, Royalty and Technical service fees in the case of Foreign companies

34

Incomes Covered under the section –

- Dividend Income
- Interest received from a govt or a Indian concern on moneys borrowed or debt incurred by the govt or Indian concern in foreign currency
- Income received in respect of units purchased in foreign currency of a mutual fund Specified in section 10(23D) or of the unit trust of India
- Income received from infra structure debt fund referred to section 10(47)
- Distributed income being Interest referred to in sub clause (a) and (b) of Clause (23FC) of section 10
- Royalty
- Fees for technical services

Under this section and the TDS is deducted, then Return of Income u/S. 139(1) is not required to be filed.

Sec 115A - Tax on Dividends, Royalty and Technical service fees in the case of Foreign companies

35

Special Points –

- Availability of Chapter VI-A deductions
- No deduction in respect of the expenditure is allowed to the assessee u/S. 28 to 44C and S. 57

DTAA Relief –

Benefit under DTAA or Income Tax Act, whichever is beneficial to the assessee as per section 90(2) or 90A

- Benefit under treaty can be claimed, if **FORM 10F** is furnished (**Notification No:03/2022** dated 16th July 2022 reiterates that Non-resident tax payers who were not having PAN And not required to have PAN may file FORM 10F in manual form until **30th September 2023**)
- Non-Resident or foreign company has to furnish **Tax Residency Certificate** to deductor for claiming treaty benefits

Tax on Dividends, Royalty and Technical service fees in the case of Foreign companies – Sec 115A

36

Rates at which the above incomes are charged –

S.no	Particulars of Income	Rate
1	Dividend income	
	-Dividend	20%
	-Dividend received from a unit in an IFSC	10%
2	Interest received from a govt or a Indian concern on moneys borrowed or debt incurred by the govt or Indian concern in foreign currency	20%
3	Income received in respect of units purchased in foreign currency of a mutual fund Specified in section 10(23D) or of the unit trust of India	20%
4	Income received from infra structure debt fund referred to section 10(47)	20%
5	Interest Income	
	-Interest referred to in section 194LC/ -Interest referred to in section 194LC received from Indian Company, in respect of monies borrowed from a source outside India, by issue of Long-term Bonds/Rupee denominated Bonds btw 1.4.2020 to 30.06.2023, which are listed only on a recognised stock exchange in any IFSC	5% 4%

Tax on Dividends, Royalty and Technical service fees in the case of Foreign companies – Sec 115A

37

Rates at which the above incomes are charged –

S.no	Particulars of Income	Rate
6	Interest referred to in section 194LD	5%
	Distributed income being interest referred to in sub-section (2) of section 194LBA	
	-Income Referred u/s 10(23FC) (a)	5%
7	-Income Referred u/s 10(23FC) (b)	10%
8	Royalty	20%*
9	Fees for technical services	20%*

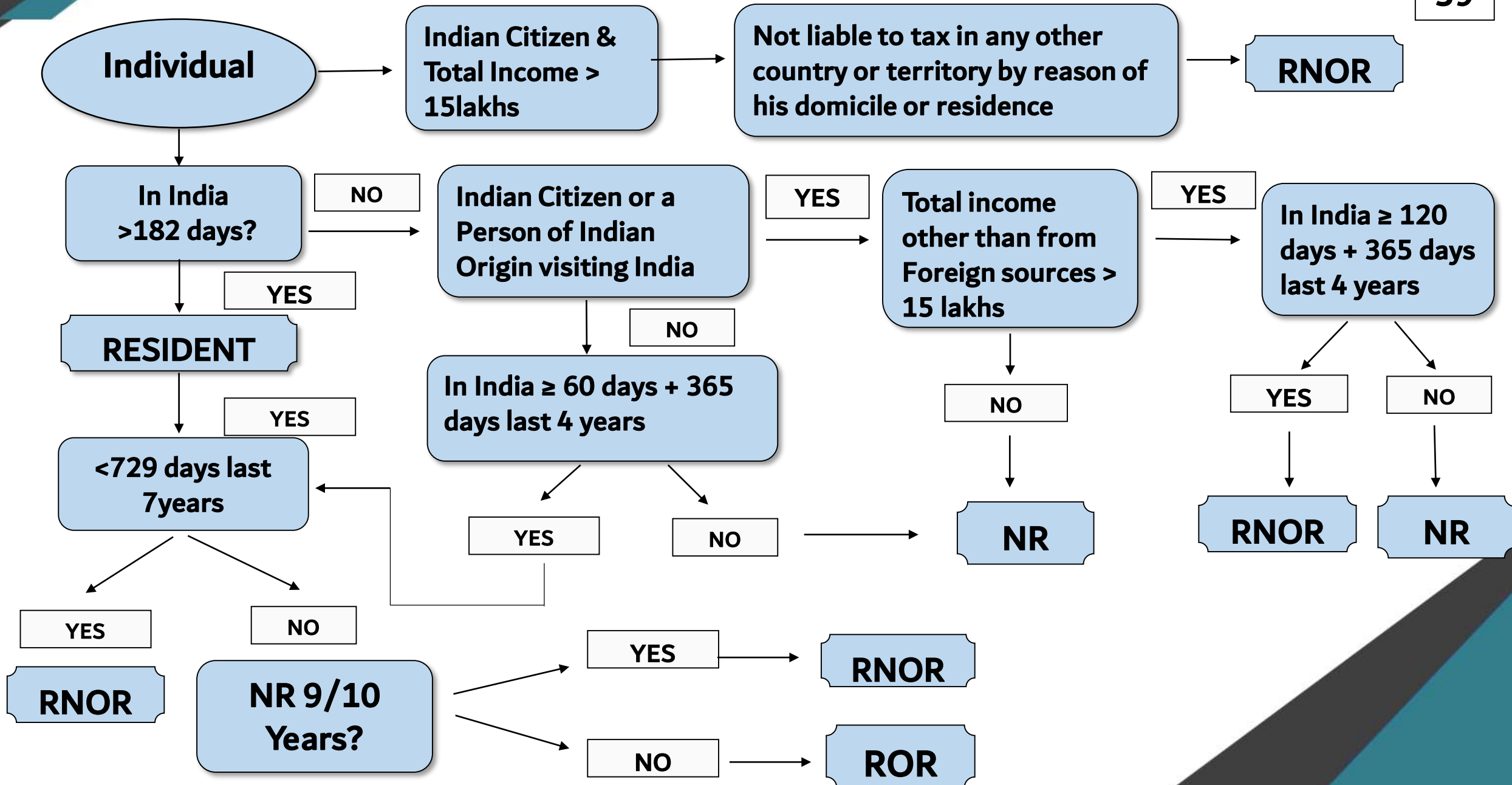
*Surcharge + Cess

➤ **Sec. 6**

- Resident
- Resident but not ordinarily resident (RNOR)
- Non-resident

➤ **Sec 5 Scope of income**

- Resident – Global income taxable
- Non-resident- only income sourced in India
- RNOR – taxable- only income sourced in India and such income derived outside India from a business controlled / profession setup in India



CHAPTER XIIA - Special provisions relating to certain incomes of Non-resident Indians (NRI)

40

- Investment income from Foreign Exchange Asset (FEA) taxable @ 20%
- LTCG from FEA taxable @ 10%
- LTCG on FEA would be Exempted if invested in “Specified Assets / Account as per S. 10(4A)/ (4B), i.e., New Asset
 - Full exemption if Cost \nless Net Sale if within 6 months net sale
 - Proportion exemption if Cost $<$ Net Sale Consideration
- LTCG would taxable if New Asset is transferred/ converted within 3 years from acquisition, in PY in which the said asset is transferred/ converted.

CHAPTER XI A - Special provisions relating to certain incomes of non-residents

41

- FEA means specified asset which was acquired/ purchased/ subscribed in convertible foreign currency
- Specified asset means –
 - shares of Indian company
 - Debentures of other than Private limited company
 - Deposits of other than Private limited company
 - Security of Central Government as per Public Debt Act, 1944
 - Other assets notified by Central Government
- No deduction/ allowance shall be allowed in computing investment income
- FEA – Foreign Exchange Asset

CHAPTER XIIA - Special provisions relating to certain incomes of non-residents

42

- NRI means an individual, being a citizen of India or a person of Indian origin who is not a "resident"
 - PIO means a person if he, or either of his parents or any of his grand-parents, was born in undivided India
- Worth noting that these provisions are OPTIONAL
- Return of Income filing is not mandatory if Income consists of only investment income & TDS has been deducted on the same.
- This chapter may be opted by NRI even after becoming RI in subsequent year, if he files declaration along with ROI. This chapter would be applicable for the AY & subsequent AY until such asset is transferred/ converted.

BASIC PRINCIPLES

Basic principles of Non-resident taxation

- Double Taxation Avoidance Agreement(DTAA) overrides domestic law
- Sec 90(2) provisions of the Act shall apply to the extent favorable
- Cir. 333 dt. 02.04.1982 clarifies
- DTAA – Promotes cross border trade & commerce while sharing taxing rights

DTAA

- Double taxation – cross border trade and commerce
 - Economic
 - Juridical
- Resident based taxation – OECD MC
- Source based taxation – UN MC
- Vienna Convention on Law Treaties (VCLT) 1969

DTAA (contd..)

- Elimination of double taxation
 - Exemption method
 - Credit method
 - Deduction method
- Underlying tax credit
- Tax sparing
- Limitation of Benefits clause

DTAA (contd..)

➤ Purpose of DTAA

➤ Avoidance of double taxation

- Certainty to tax payers
- Prevents tax evasion
- Eliminates discrimination between residents / non-residents
- Sharing the tax revenue (allocation of Taxing rights)
- Assisting tax collections

TAX RESIDENCY CERTIFICATE

- Sections 90(4)/A(4) provide that treaty benefit will not be available to any NR unless he furnishes TRC from Government of other country including therein particulars as may be prescribed
- The particulars required in such TRC have been prescribed by notification no 39 dated 17-9-2012
 - Rule 21AB modified prescribed TRC format and only now insists on specific particulars of non residents in any format whatsoever.
 - Finance Act, 2013 inserted sub. Sec(5) to sec 90 & 90A to provide that non resident assessee shall provide such other documents and information as may be prescribed.



THANK YOU



THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

*Seminar on International Taxation hosted by
Hyderabad Branch of SIRC of ICAI*

Overview and Recent Developments in International Taxation

*Presented by: **CA Siddharth Banwat***

Prepared by: Vitrag Singhi

29th November 2023

CONTENTS

Overview of International Taxation

Overview of DTAA

Types of Model Conventions

Overview of OECD's BEPS Project

Multilateral Instruments (MLI)

Two Pillar Solution

WHAT IS INTERNATIONAL TAXATION?



Overview - International Taxation

- ✓ ***Body of legal provisions of different countries that covers the taxation aspect of cross border transactions***
- ✓ ***Encompasses global tax rules that apply to transaction/s between two or more countries***
- ✓ ***Three basic rules of International Taxation***
 - ***Source rule***
 - ***Residence rule***
 - ***Citizenship rule***

Features - International Taxation



Allocation of taxing right - source and residence

Elimination of double taxation

Promoting economic relations between contracting states

Determination of residential status of taxpayers

Forming anti-avoidance measures

International law - Sources

Sources of International Tax Law

```
graph TD; A[Sources of International Tax Law] --> B[Double Taxation Avoidance Agreements]; A --> C[Customary International law and General Principles of law]; A --> D[Vienna Convention on Law of Treaties];
```

**Double Taxation
Avoidance
Agreements**

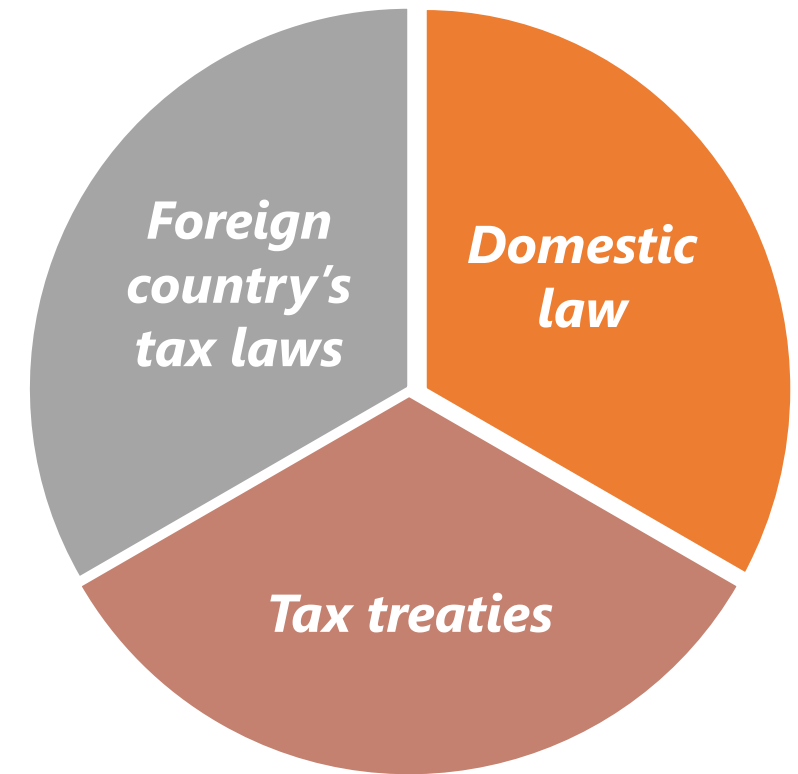
**Customary International
law and General Principles
of law**

**Vienna
Convention on
Law of Treaties**

International Taxation – a broader concept

Glossary of Tax Terms – OECD

Traditionally, international taxation refers to treaty provisions relieving international double taxation. In broader terms, it includes domestic legislation covering foreign income of residents (worldwide income) and domestic income of non-residents.



Double Taxation Avoidance Agreement (DTAA)



What is a tax treaty/DTAA?

(Article 2 of Vienna Convention on Law of Treaties, 1969)

“Treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its designation.

What is double taxation?

- ✓ ***Double taxation is the result of triggering the tax laws of multiple countries for carrying on one or more economic transaction(s)***
- ✓ ***Types:***
 - ***Economical***
 - ***Juridical***

Double Taxation - Types

Juridical double taxation

- **Same income taxed in two or more countries because of residence, PE etc.**

Economic double taxation

- **Income taxed twice in more than one country, in the hands of two different persons**

➤ **Most treaties aim to resolve Juridical double taxation since same person is taxed on the same income in more than one country.**

➤ **Juridical double taxation occurs due to**

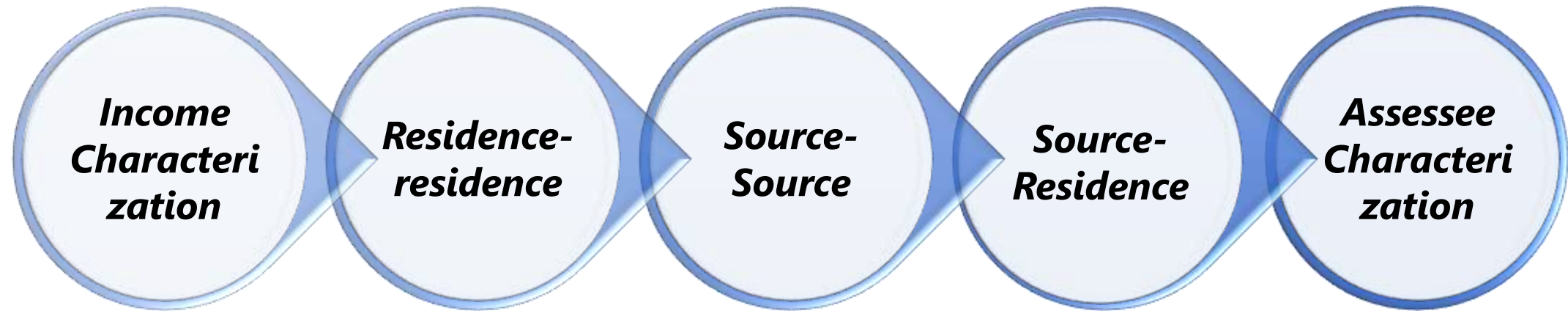
Residence-Residence conflict

Residence-Source conflict

Chapter IX provisions

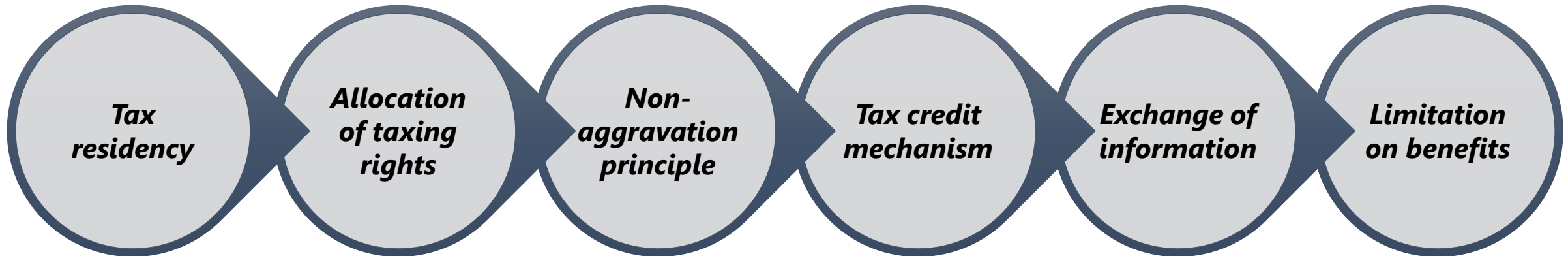
- ✓ ***Section 90(1)- Power to enter into DTAA***
- ✓ ***Section 90(2)- Treaty or domestic tax provisions, whichever beneficial to assessee will apply***
- ✓ ***Section 90(2A)- GAAR overrides Treaty***
- ✓ ***Section 90(4)- TRC***
- ✓ ***Rule 21AB- Certificate to claim relief under DTAA***
- ✓ ***Section 91- Procedure of relief from double taxation in cases where no Treaty exists***

Double Taxation – Conflicts



Double Taxation Avoidance Agreement (DTAA)

- ✓ ***Legally binding international agreements entered into between states, not being taxing statutes, describing imposition of taxes***
- ✓ ***Purpose of tax treaties:***



Objectives



Protect against double taxation

Encourage free flow of international trade and capital

Encourage transfer of technology

Prevent discrimination between tax payers

Arrive at an acceptable basis to share tax revenues between the two states

Legal and fiscal certainty to the investors and businessmen

Interpreting a tax treaty

- ✓ ***Vienna Convention***
- ✓ ***Commentaries***
- ✓ ***Supporting documents to the treaty***
- ✓ ***Protocol and Memorandum***
- ✓ ***Most Favoured Nation Clause (MFN)***
- ✓ ***Meaning of terms not defined in DTAA***

Interpreting a tax treaty - VCLT

- ✓ ***Codifies customary international law and practice on interpretation of international treaties***
- ✓ ***The 'Treaty of Treaties'***

Article 26: pacta sunt servanda

Article 31(1): good faith & ordinary meaning

Article 31(4): Special meaning

Article 32: Supplementary means

Article 34: No obligations/ right of 3rd state without consent

Interpreting a tax treaty - Principles

Golden Rule- Objective Interpretation

Subjective Interpretation

Purposive Interpretation

Principle of effectiveness

Principle of contemporanea expositio

Integrated approach

Reasonableness and consistency

Interpreting a tax treaty - Principles

Tax treaty should be read liberally

In case of conflict with domestic law, the treaty meaning prevails

Interpretation must take object and purpose of treaty into account

Words should be read in their natural or ordinary meaning

Undefined words in treaty should follow domestic tax law, unless context otherwise requires

Generally treaty cannot protect against subsequent changes in domestic law

Treaty as part of domestic tax law overrides other provisions in domestic law

Types of tax treaties

Comprehensive agreements

Limited agreements

Bilateral treaties

Multilateral treaties



Structure & application of tax treaties

Articles can be grouped into following categories:

Scope of the convention

Definitions

Taxation of Income

Taxation of Capital

Methods for elimination of double taxation

Special Provisions

Final Provisions

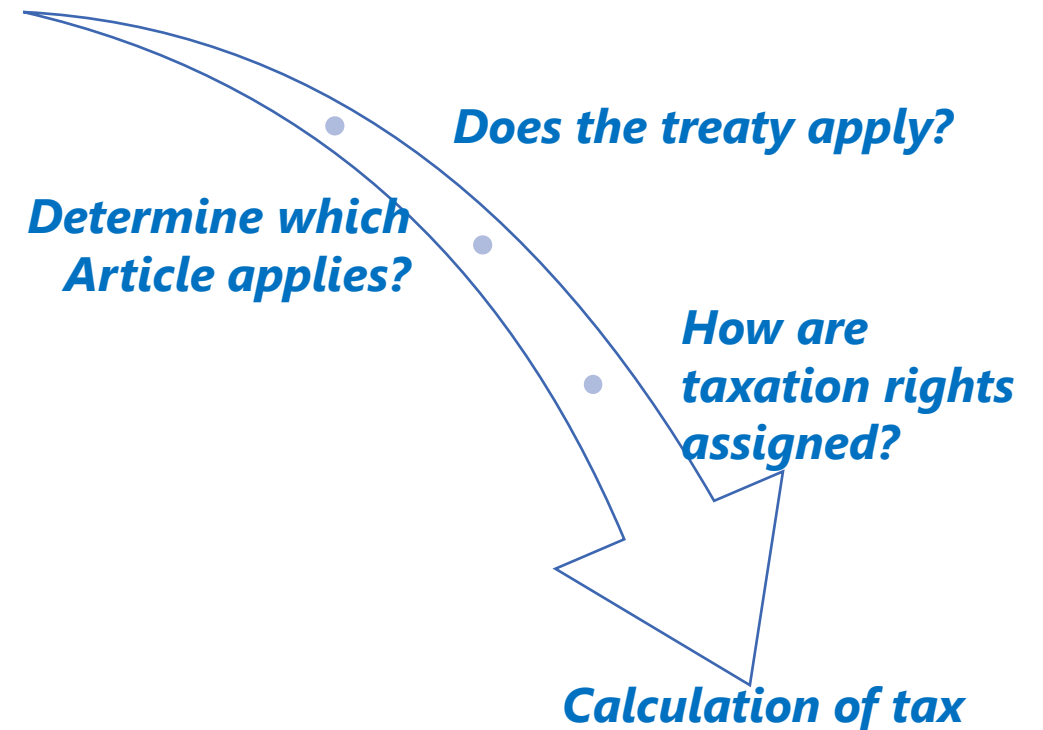
***What is the
nature of the
income***

***Determine which
Article applies?***

Does the treaty apply?

***How are
taxation rights
assigned?***

Calculation of tax



Structure of a tax treaty

Scope

Article 1-
Personal Scope
Article 2 – Taxes
Covered
Article 30 –
Entry into Force
Article 31 -
Termination

Definition

Article 3 –
General
Provisions
Article 4 –
Residence
Article 5 –
Permanent
Establishment

Anti Avoidance

Article 9 –
Associated
Enterprises
Article 26 –
Exchange of
Information
Article 27 –
Assistance in
collection of
taxes

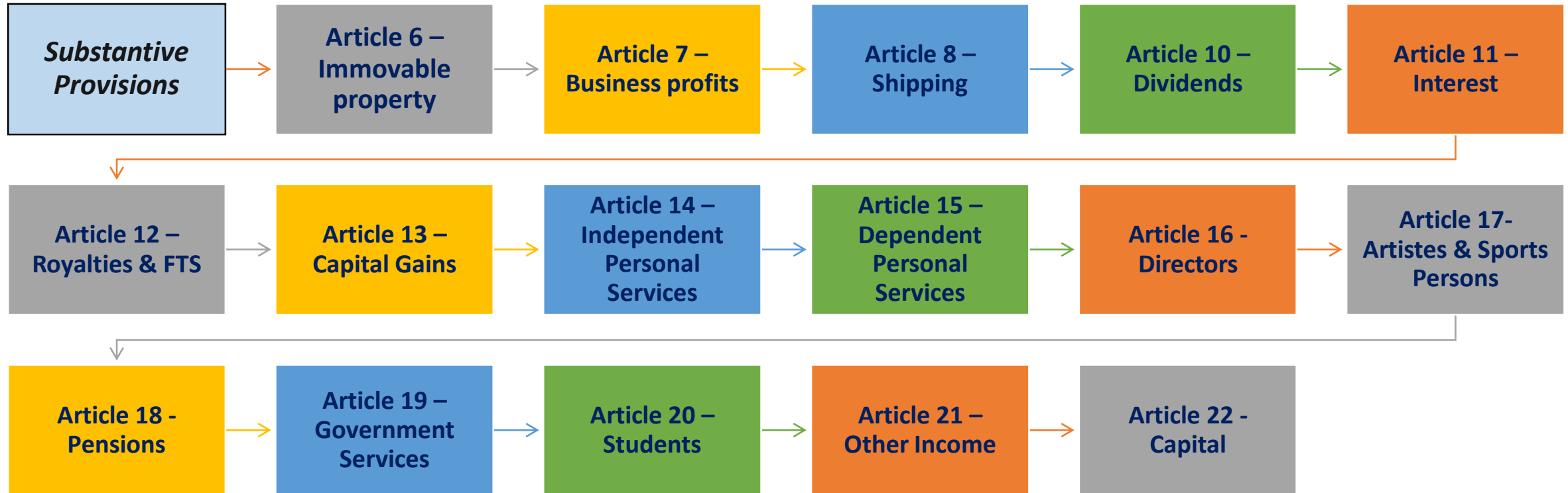
Elimination of Double Taxation

Article 23 –
Elimination of
Double Taxation
Article 25 –
Mutual
Agreement

Miscellaneous Provisions

Article 24 – Non-
discrimination
Article 28 –
Diplomats
Article 29 –
Territorial
Extension

Structure of a tax treaty



Treaty Models



OECD MODEL



UN MODEL



US MODEL

Treaty Models

- **Residence** principle
- *Emphasis on the right of state of residence to tax (e.g. excludes taxation on services in the name of service PE)*
- India - **Observer**

OECD



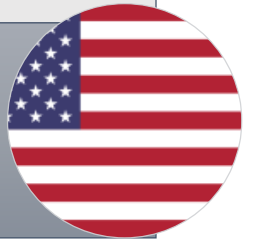
- *Between developing or less developed nations*
- *Encourage the flow of investments from the developed to developing countries*
- *More emphasis on **Source** principle i.e. income to be taxed where it arises*
- *Most of the India's tax treaties are based on this model*

UN



- *Seeks to align OECD model articles with US tax laws & policies*
- *Only model used by USA as a basis of negotiating treaties with other partners*

US



Recent Developments

BASE EROSION AND PROFIT SHIFTING (BEPS)

BEPS Action Plans

Coherence

Neutralising Hybrid
Mismatch Arrangements (2)

CFC Rules (3)

Limit base erosion via
Interest
Deductions (4)

Counter Harmful Tax
Practices (5)

Substance

Preventing Tax Treaty Abuse (6)

Prevent artificial avoidance of
PE Status (7)

TP Aspects of Intangibles (8)

TP/Risk and
Capital (9)

TP/High Risk
Transactions (10)

Transparency

Establish methodologies to
collect and analyse BEPS data
(11)

Require taxpayers to disclose
their aggressive tax planning
arrangements (12)

TP Documentation (13)

Making Dispute
Resolution more effective (14)

BEPS Action Plans

Action Plan 1:

Addresses the tax challenges of the digital economy and aims to identify and address the main challenges that the digital economy poses for the existing international tax rules.

Action Plan 3:

Develop recommendations regarding the design and strengthening of controlled foreign company rules, to address concerns over the possibility of creating affiliated non-resident taxpayers and routing income of a resident enterprise through the non-resident affiliate to reduce or avoid taxation.

Action Plan 2:

Aims to neutralize the effects of hybrid mismatch arrangements. The OECD intends to do this by making changes to the model tax convention and providing recommendations on the design of domestic rules to prevent hybrids from being a source of 'double non-taxation'.

BEPS Action Plans

Action Plan 4:

Limit base erosion via interest deductions and other financial payments. Recommendations are expected to be published for domestic law limitations on tax deductions for both related and unrelated party interest expense and economically equivalent payments.

Action Plan 6:

Aims to prevent treaty abuse, through developing model treaty provisions and recommendations regarding the design of domestic rules to prevent the granting of treaty benefits in inappropriate circumstances.

Action Plan 5:

Identify and counter harmful tax practices, taking into account transparency and substance. The Action Plan will look at developing recommendations on the definition of harmful tax practices, and developing a strategy to expand to non-OECD members.

BEPS Action Plans

Action Plan 7:

Prevent the artificial avoidance of Permanent Establishment ("PE") status, by redefining the threshold for creating a PE to prevent base erosion and profit shifting. The work includes a focus on the use of commissionaires and keeps some specific activity exemptions, including for warehousing.

Action Plan 11:

Establishes methodologies to collect and analyze data on the economic and fiscal effects of tax avoidance behaviours and on the impact of measures proposed under the BEPS project

Action Plans 8 to 10:

Objective is that transfer pricing outcomes are in line with value creation, by requiring that the attribution of value for tax purposes is consistent with economic activity generating that value. Provides guidance on value creation in relation to intangibles, including hard-to-value ones, risk and capital, and other high- risks transactions.

BEPS Action Plans

Action Plan 12:

Requires taxpayers to disclose their aggressive tax planning arrangements. Aims to develop recommendations regarding the design of mandatory disclosure rules for aggressive or abusive transactions, arrangements, or structures, taking into consideration the administrative costs for tax administrations and businesses and drawing on the experiences of the increasing number of countries that already have such rules.

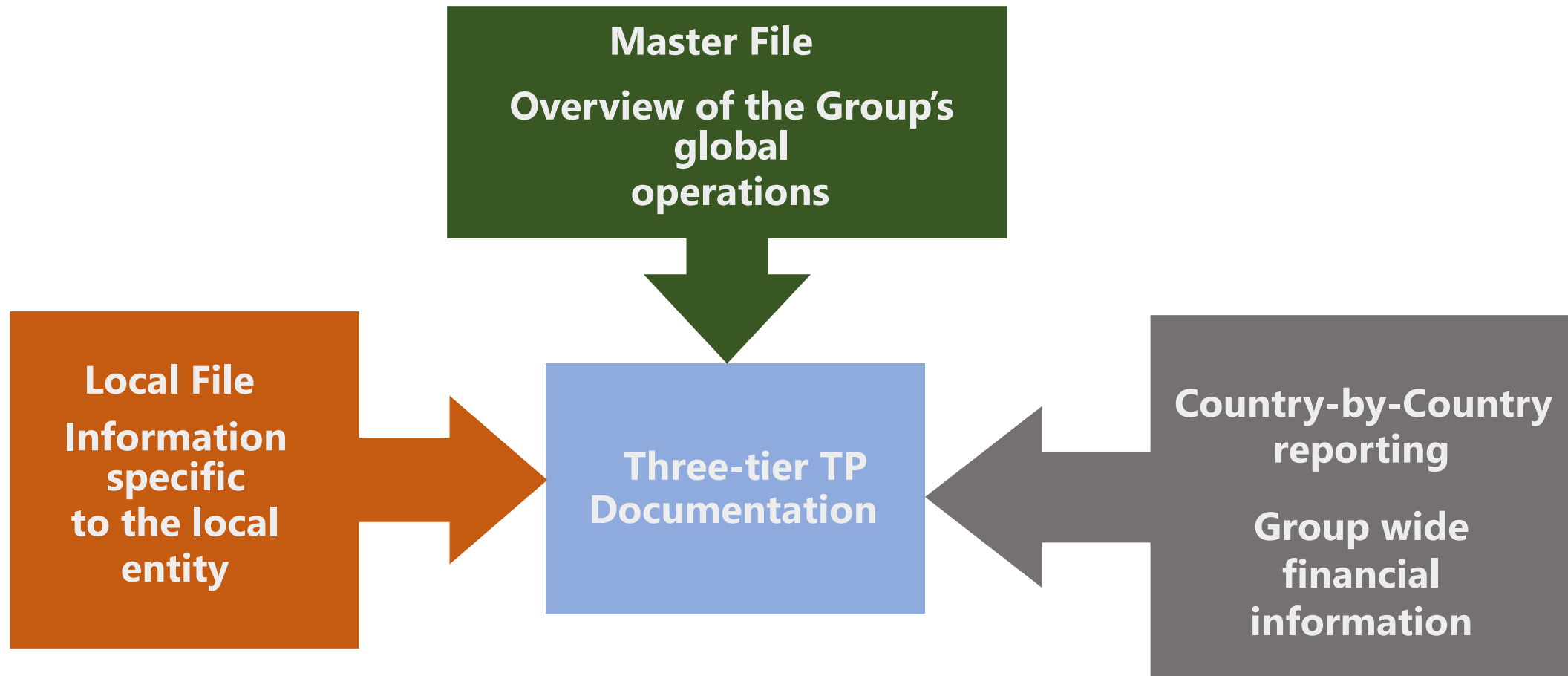
Action Plan 14:

Make dispute resolution mechanisms more effective, through developing solutions to address issues that prevent countries from resolving treaty-related disputes under mutual agreement procedures, as well as arbitration

Action Plan 13:

Provides revised guidance on transfer pricing documentation, including the template for country-by-country reporting to enhance transparency while taking into consideration, compliance costs for business. It has provided for a three-tier structure of TP documentation-
Master File,
Local documentation file, and
CbC reporting

3-tier documentation under Action Plan 13



BEPS Action Plans

Action Plan 15:

Developing MLI to modify bilateral tax treaties and analyze legal issues related to the development of MLI to enable countries to streamline the implementation of the BEPS treaty measures, as well as the mandate to carry out that work.

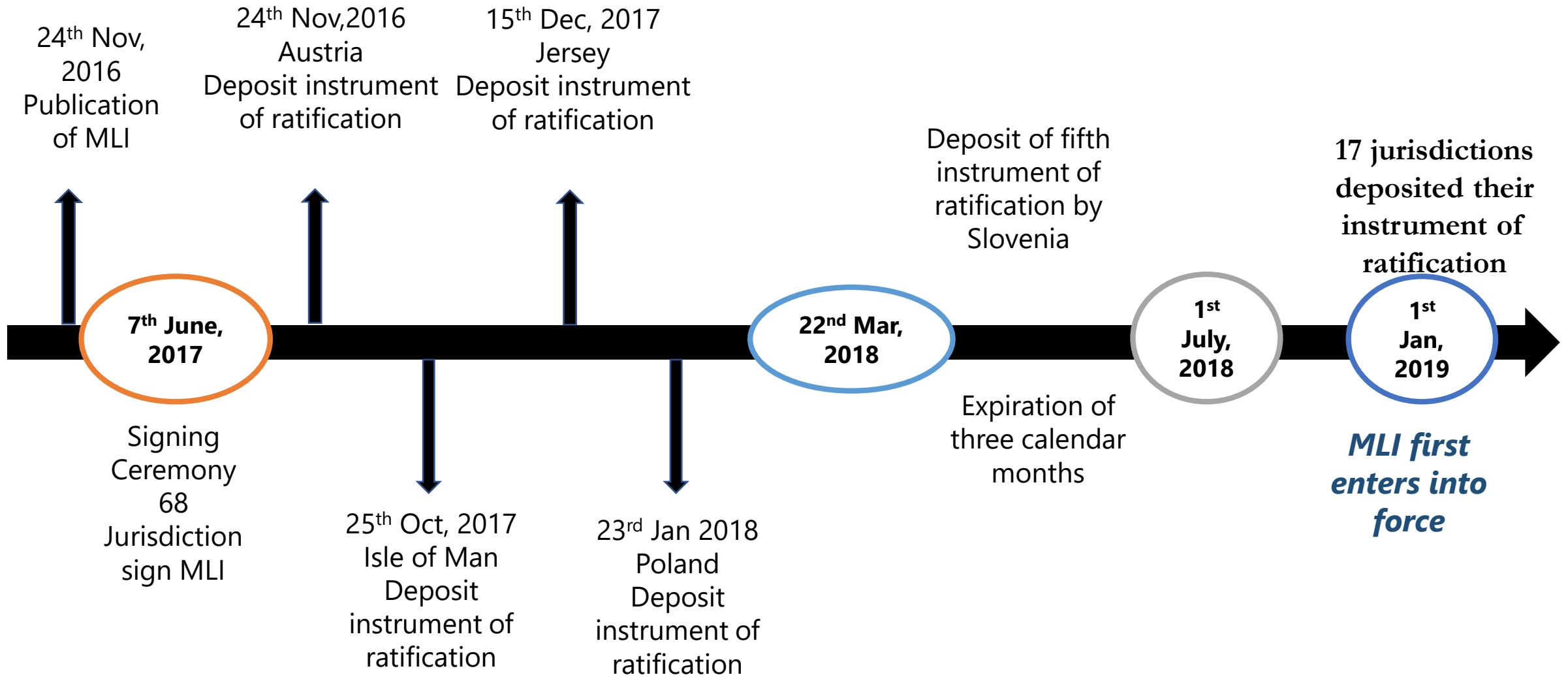


BEPS Action Plans – India position

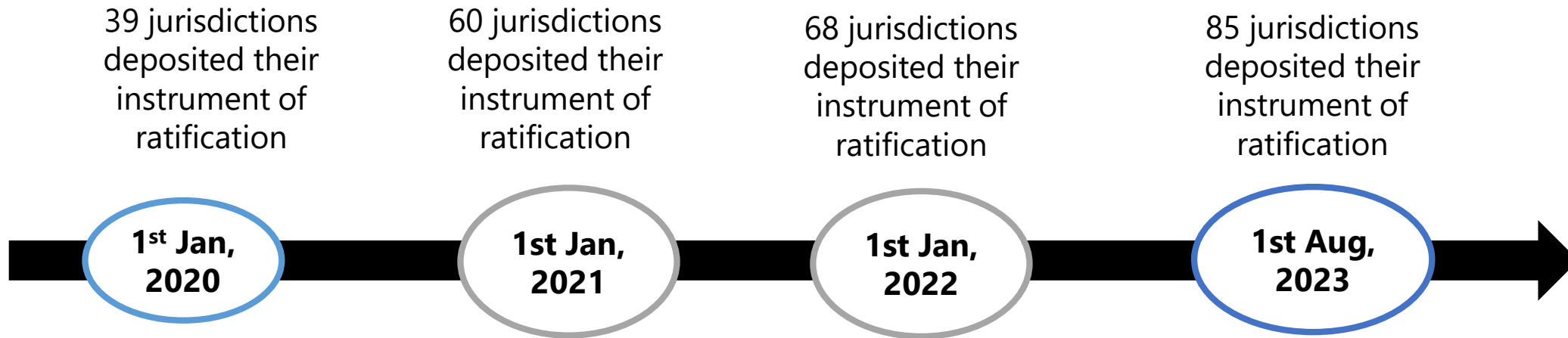
Action Plans	India position
Digital economy (1)	Introduced Equalisation Levy (1.0 & 2.0) as an unilateral measure
Hybrid instruments (2)	No specific measure
Controlled foreign corporations (3)	No specific measure, covered by POEM rules to some extent
Limiting interest deductions (4)	Introduced section 94B to limit deduction of interest
Prevent treaty abuse (6)	India has signed the MLI
Permanent establishment (7)	Proposal for amendment in attribution rules in progress
Transfer pricing (8-10)	Case-to-case basis. Recommendations on low value added services not adopted.
Documentation (13)	Introduced master file and CbCR rules
Multilateral instruments (15)	MLI has come into effect from April 1, 2020 for 23 tax treaties

MULTILATERAL INSTRUMENTS

MLI- Timeline



MLI- Timeline





7th June, 2017- Signing Ceremony for Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS

MLI- Key Features

- Jurisdiction Involved
 - ✓ Instrument developed by an Ad hoc Group of 100+ jurisdictions
 - ✓ Signed by developed and developing economies around the world
 - ✓ Instrument open for signature by any country
- Measures included
 - ✓ Includes measures against hybrid mismatch arrangements (Action 2) and treaty abuse (Action 6), strengthened definition of permanent establishment (Action 7) and measures to make mutual agreement procedures (MAP) more effective (Action 14), including provisions on MAP arbitration.
- Tax treaties covered
 - ✓ Parties can choose tax treaties to be modified by the MLI
 - ✓ Parties remain free to make subsequent amendments to their modified tax treaties through bilateral negotiations

MLI- Key Features

- Flexibility
 - ✓ Ways of meeting BEPS minimum standards on treaty abuse and dispute resolution
 - ✓ Opt out of provisions which do not reflect a BEPS minimum standard with the possibility to opt in later
 - ✓ Apply optional provisions and alternative provisions
- Clarity & Transparency
 - ✓ Explanatory Statement & additional materials
 - ✓ Notifications of Covered Tax Agreements, reservations, options and affected existing provisions (MLI Positions) to identify modifications
 - ✓ Interactive flowcharts, application toolkit
- Languages
 - ✓ English-and French text-authentic
 - ✓ Translations being developed by individual countries and published on the OECD website

MLI- Key Features

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MLI consists of 39 articles



Articles 1-2 set out the scope of the MLI and the interpretation of terms.



Articles 3-17 cover the various BEPS measures included in the MLI

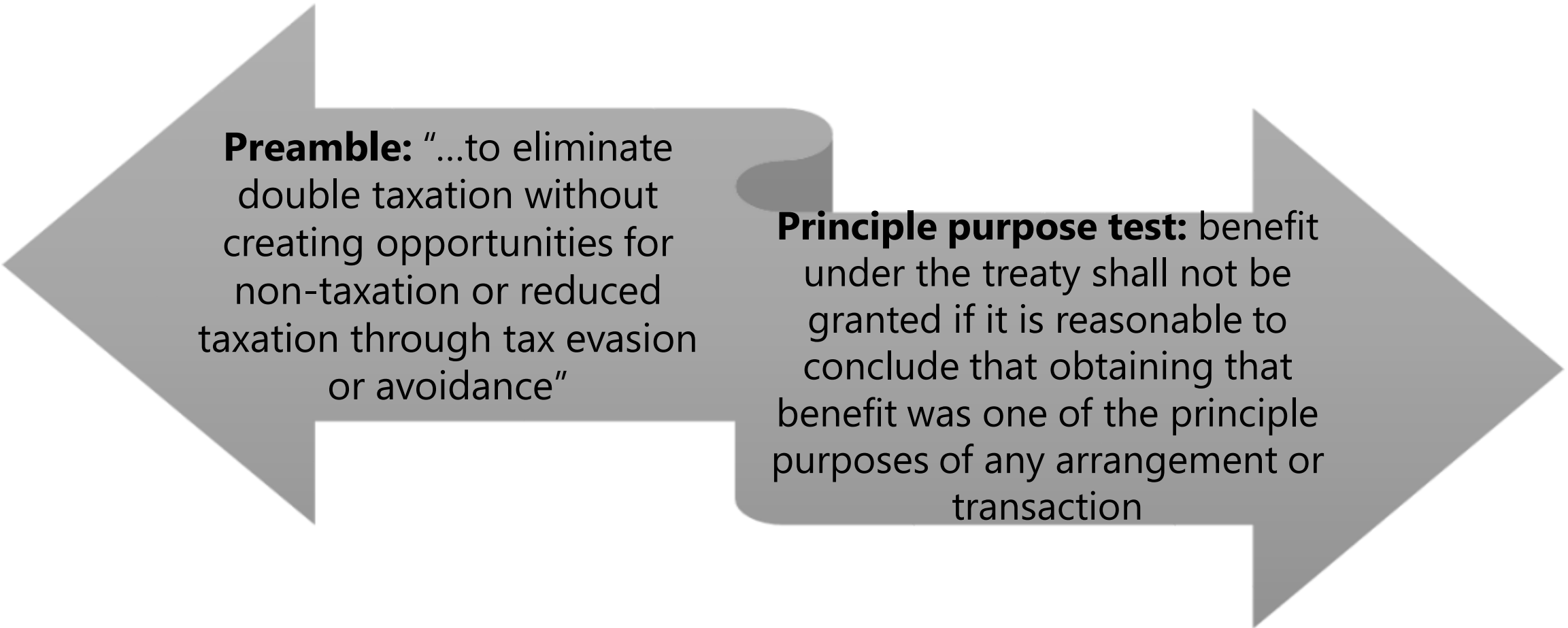


Articles 18-26 cover the provisions on arbitration including provisions relating to mandatory binding arbitration



Articles 27-39 cover provisions relevant to adoption and implementation of the MLI including ratification, entry into force and entry into effect dates, withdrawal, etc.

MLI- Minimum Standards



The diagram consists of two large, light gray arrows pointing in opposite directions, one to the left and one to the right. They are positioned horizontally and overlap slightly in the center. The left arrow contains text in its body, and the right arrow also contains text in its body. The text is black and centered within each arrow.

Preamble: "...to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance"

Principle purpose test: benefit under the treaty shall not be granted if it is reasonable to conclude that obtaining that benefit was one of the principle purposes of any arrangement or transaction

MLI- Optional Standards

**Treaty abuse (includes
LOB clause)**

Avoidance of PE status

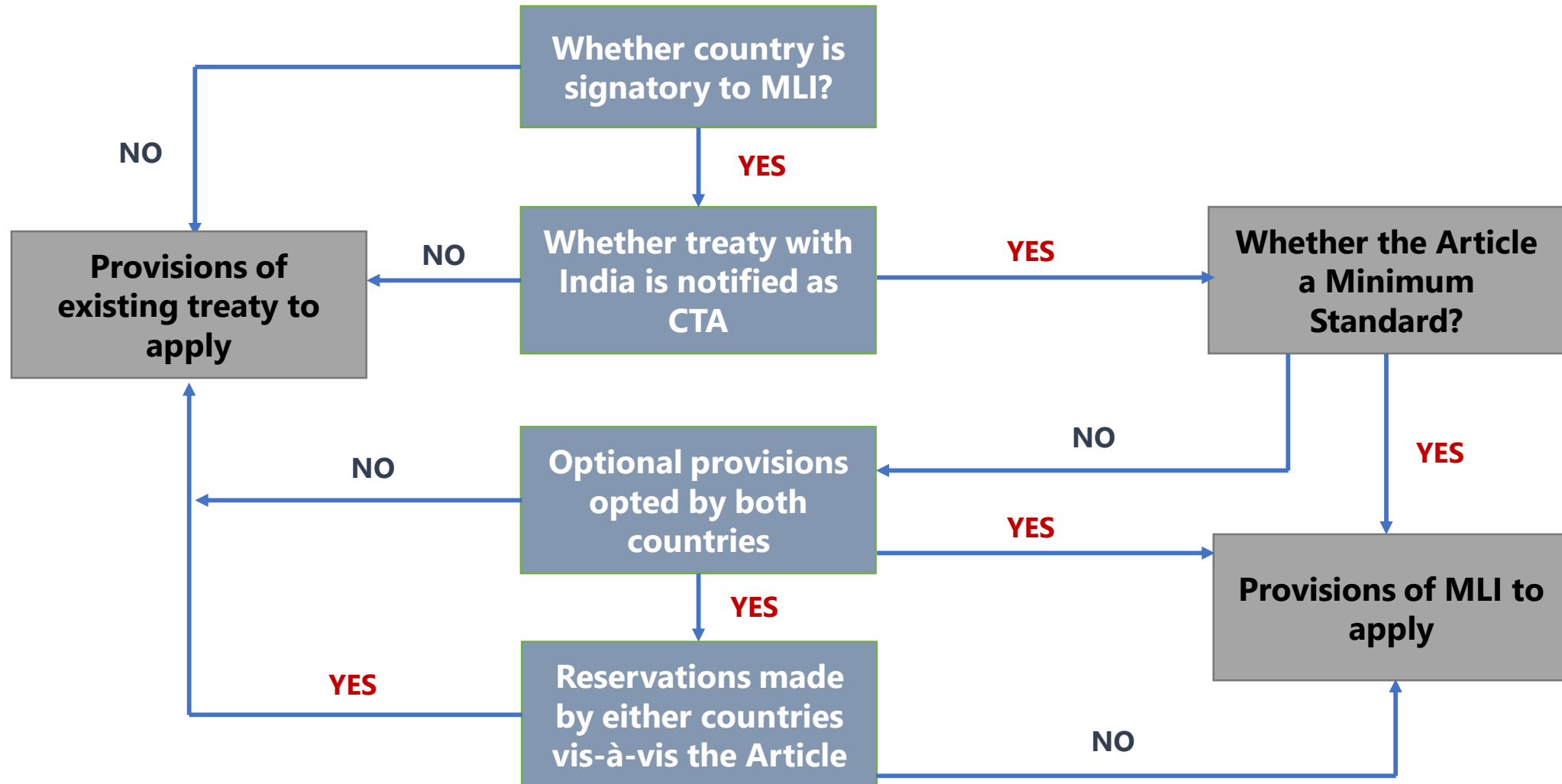
Hybrid mismatches

**Improving dispute
resolution (includes MAP,
Corresponding
adjustments)**

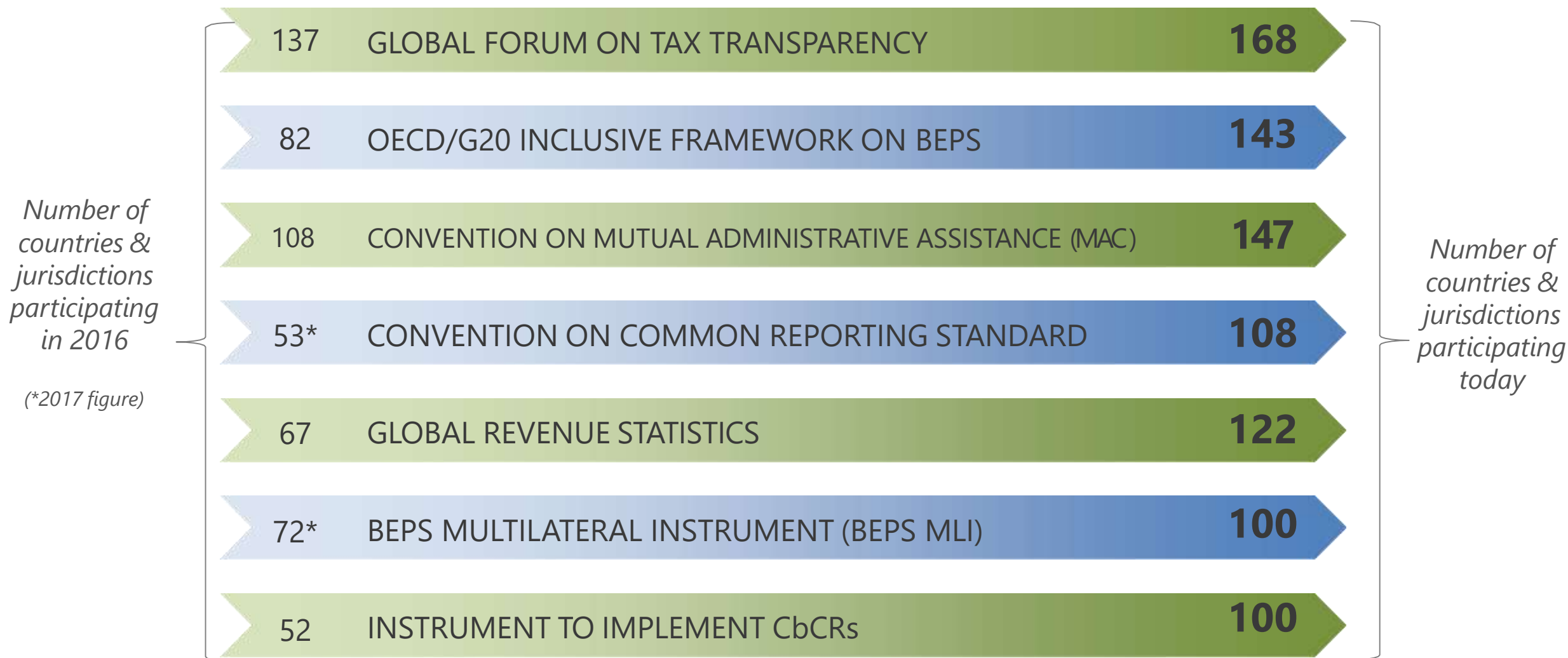
Arbitration

Applies to a treaty only if both jurisdictions opt for the same

MLI- Application



Increasing inclusivity & broad participation



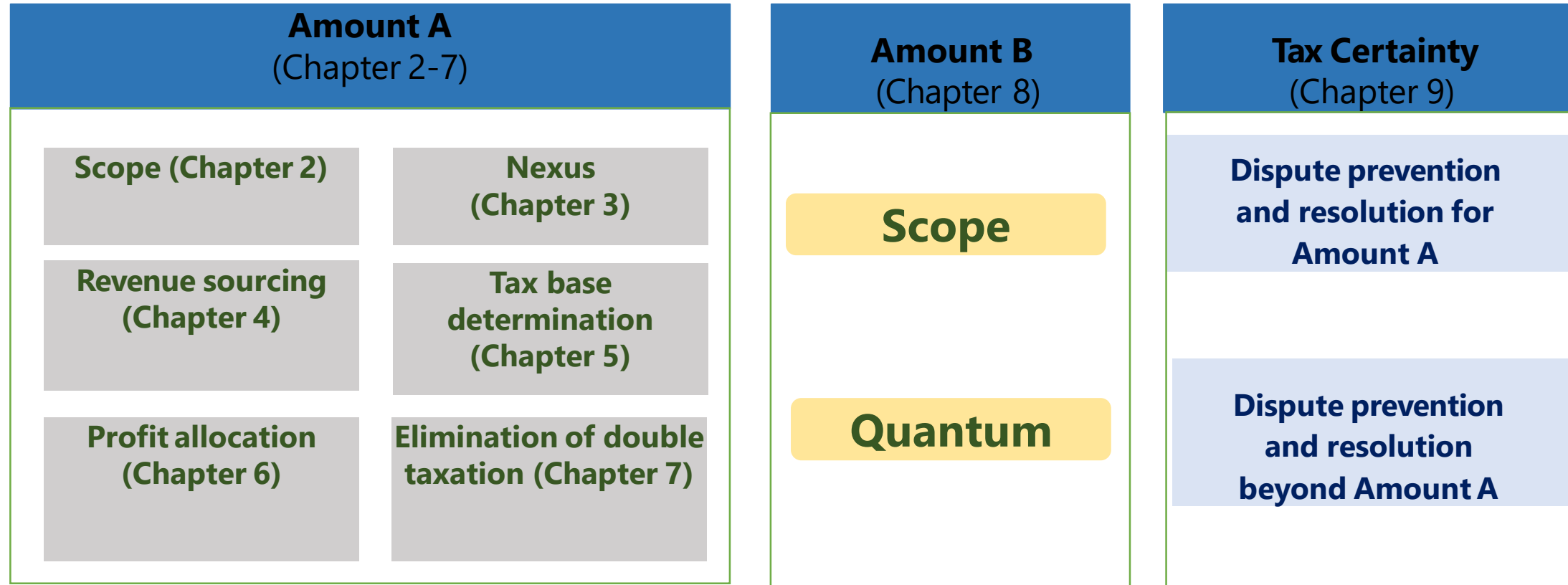
Pillar One

- A set of proposals to revisit tax allocation rules in a changed economy
- Intention - portion of multinationals' residual profit (likely to be generated by capital, risk management functions, and/or intellectual property) should be taxed in the jurisdiction where revenue is sourced
- Applies to **Automated Digital Services (ADS)** businesses and **Consumer-Facing Businesses (CFB)**. The scope is intended to be broad and covers businesses that are able to profit from significant and sustained interaction with customers and users in the market.
- Links taxing rights in respect of these businesses to their sources of revenue, which need not depend on physical presence in the jurisdiction.

Pillar One

- **“Amount A”:** New taxing right allocates high value profits based on a formula, not necessarily the arm’s length position.
- Covers profits earned from activities with an automated digital (mainly online) character or goods / services commonly sold to consumers (as well as associated IP licences). Specific inclusions and exclusions are proposed.
- Amount A allocated based on local revenues (determined via sourcing rules) with double taxation elimination measures.
- “Amount B”: Standard arm’s length remuneration for “baseline” routine marketing and distribution activities.
- Alternative Amount B methodologies may be adopted if supported by evidence.

Building Blocks of Pillar One



Implementation and Administration (Chapter 10)

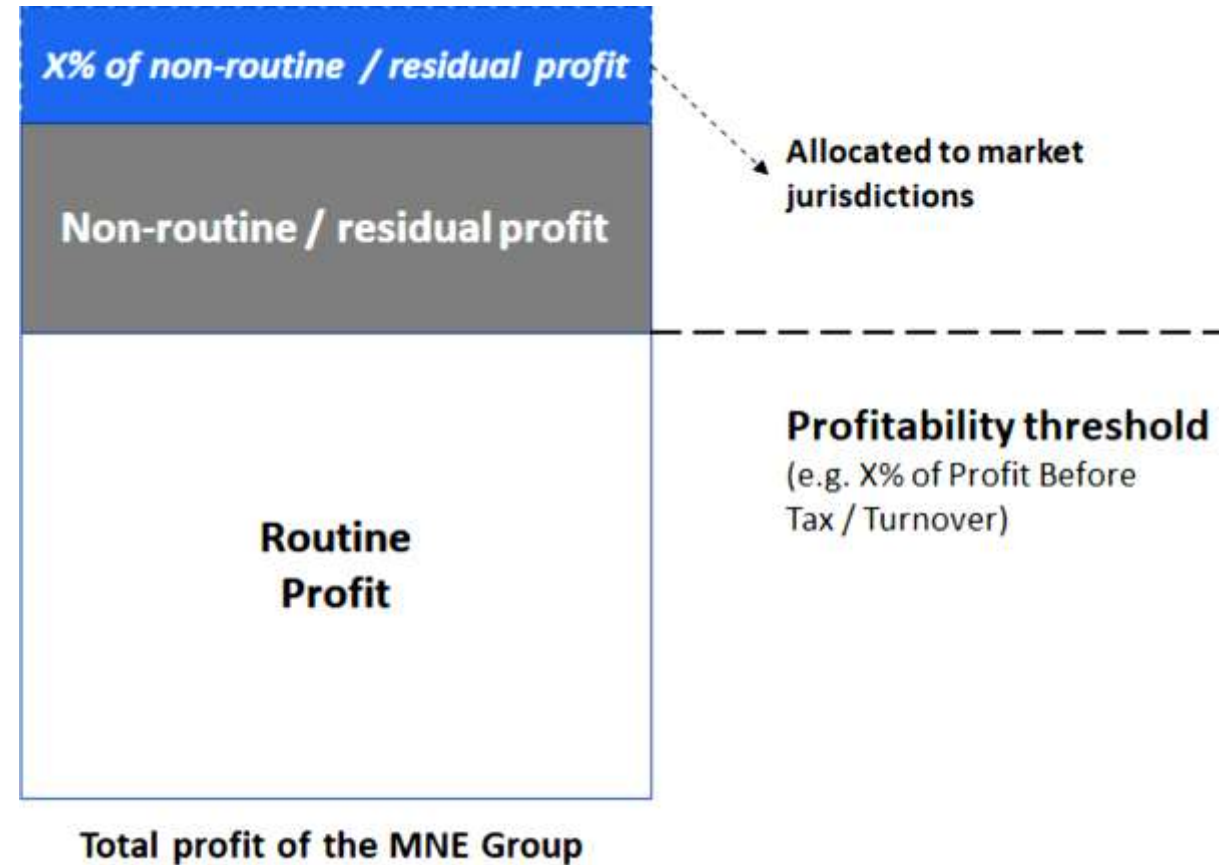
Pillar One- Amount A

Routine profit

- This bifurcation happens on the basis of profitability threshold to be agreed by the Inclusive Framework
- No new taxing right over any portion of this routine profit is given to the market jurisdictions.
- However, if such routine profits are taxable under the existing treaty rules, market jurisdiction will continue to tax such routine profits under the existing (tax treaty based) taxing rights.

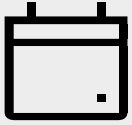
Non-routine profit

- A fraction of non-routine is treated as Amount A and is distributed amongst the market jurisdictions.
- This is the new taxing right under Pillar One.



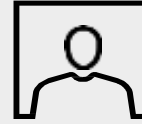
- **Earn-out mechanism:** Profit allocation to market to commence after setting off of past losses
- **Marketing / distribution profit safe harbour:** No Amount A allocation if MNE leaves residual profit in market jurisdiction

Amount A: Activity Test- Automated Digital Services



Positive List

- Online advertising services;
- Sale or other alienation of user data;
- Online search engines;
- Social media platforms;
- Online intermediation platforms; Digital content services;
- Online gaming;
- Standardised online teaching services; and Cloud computing services.



Negative List

- Customised professional services;
- Customised online teaching services;
- Online sale of goods and services other than automated digital services;
- Sale of a physical good, irrespective of network connectivity ("Internet of things"); and
- Services providing access to the Internet or another electronic network.

Automated : once the system is set up the provision of the service requires minimal human involvement

Digital : provided over the internet or an electronic network

Amount A: Activity Test- Consumer Facing Business

- “A business that generate revenue from sale of goods or services, of a **type commonly sold to consumers**, including those selling indirectly through intermediaries and by way of franchising and licensing is treated as Consumer Facing Business.”
- The scope of consumer facing businesses (CFB) is much larger and could include various physical goods and also services not directly linked to digitalization
- One of the important aspects of determination of consumer facing business is “facing the consumer”.

Amount A- Exclusions



**Extractive products
and natural
resources**



Construction



**Sale and leasing
of residential
property**

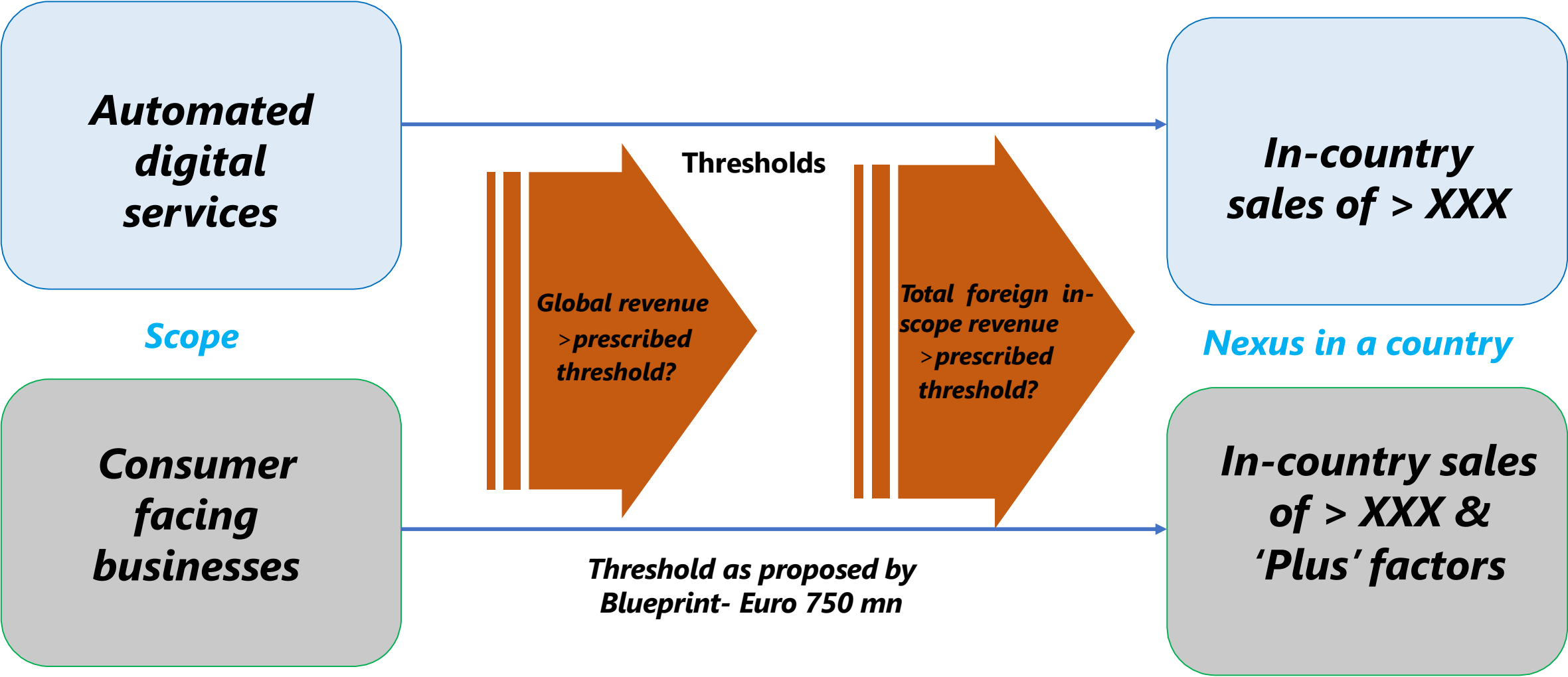


**International air
and shipping
business**



**Financial services:
banks, insurance
and asset
management**

Amount A- Revenue Test



Amount A – Multilateral Convention (MLC) release

2018

Interim Report on BEPS Action 1 – Tax Challenges Arising from Digitalisation

October 2021

139 Inclusive Framework members agreed on the **Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the digitalisation of the Economy**

October 2022

Public consultation:
Progress Report on the Administration and Tax Certainty Aspects of Amount A

July 2023

Outcome Statement – Inclusive Framework delivered a **text of a Multilateral Convention**

January 2019

Policy note proposing a two-pillar approach for a consensus-based solution

July 2022

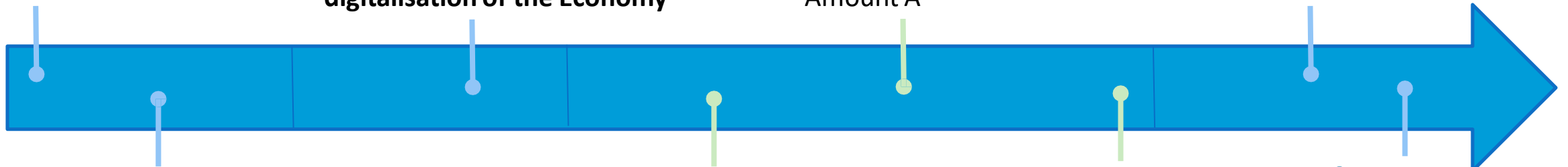
Public consultation:
Progress Report on Amount A substantive rules

December 2022

Public consultation:
MLC provisions on **Digital Services Taxes** and Relevant Similar Measures

October 2023

Publication of the MLC, the Explanatory Statement, and the Understanding on the Application of Certainty of Amount A



Preamble to MLC – Amount A

- Recognising the need to address the tax challenges arising from the digitalisation of the economy;
- **Parties to this Convention to exercise a taxing right with respect to a defined portion of the residual profits of multinational enterprises that meet certain revenue and profitability thresholds and that have a defined nexus to the markets of these Parties;**
- Notwithstanding any provisions of tax agreements that would otherwise limit the application of such a taxing right;
- Recognising the need to establish **dispute prevention and resolution**
- Noting the desire to withdraw existing **digital services taxes and relevant similar measures** with respect to all companies and their shared political commitment not to adopt new digital services taxes or relevant similar measures as of the beginning of the application of the new taxing right, including to use their best efforts, consistent with their constitutional order, to prevent such measures being adopted at the subnational level;

MLC – Amount A

Step 1. Determine if you are in scope

- 1.1 Group Revenue and Profitability Test
- 1.2 Exceptional Segmentation Rule
- 1.3 Limited Exclusions

Step 2. Identify eligible market jurisdictions

- 2.1 Revenue Sourcing rules
- 2.2 Nexus test based on sourced revenue

Step 3. Calculate and allocate a portion of your excess profit

- 3.1 Determine relevant group profit
- 3.2 Allocate a portion of excess profit to markets
- 3.3 Adjust for double counting

Step 4. Eliminate Double Taxation

- 4.1 Determine relevant Jurisdictional profit
- 4.2 Allocate obligation to relieve double taxation
- 4.3 Identify relief entities within a jurisdiction

Step 5. File, pay and Access to tax certainty

- 5.1 File with Lead Tax Administration
- 5.2 Payment from single group entity
- 5.3 Claim relief from double taxation
- 5.4 Access to Tax certainty

MLC – Tax certainty and DSTs

Tax Certainty

- “Amount A” – A **binding multilateral certainty process** over whether MNEs are in scope, and their application of MLC.
- “Related Issues” – Improved certainty process (**incl. mandatory and binding dispute resolution**) for disputes on existing tax rules, to the extent that they relate to Amount A (e.g. transfer pricing and PE).

DSTs and relevant similar measures

- A **list of existing measures** to be removed in Annex A.
- **Commitment not to impose digital service taxes (DSTs) and relevant similar measures on any company.**
- **Conference of the Parties will conduct reviews** to determine whether a measure is contrary to this commitment (in which case Amount A allocations will be denied).

MLC – Layout

PART I – General	Article 1 – Application and Personal Scope	
PART II – Definitions	Article 2 – General Definitions Article 3 – Covered Group	Annex B, Annex C
PART III – Allocation and Taxation of Profits	Article 4 – Taxation of Profits of a Covered Group Article 5 – Allocation of Profit Associated with Revenues in the Market Article 6 – Sources of Adjusted Revenues Article 7 – Sourcing Principles for Categories of Adjusted Revenues Article 8 – Nexus	Annex D

MLC – Layout

PART IV – Elimination of Double Taxation	<p>Article 9 – Relief for Amount A Taxation</p> <p>Article 10 – Identification of the Specified Jurisdiction for a Covered Group</p> <p>Article 11 – Allocation of the Obligation to Eliminate Double Taxation with Respect to the Amount A Relief Amount</p> <p>Article 12 – Provision of Relief for Amount A Taxation to Relief Entities</p> <p>Article 13 – Identification of Relief Entities Entitled to Elimination of Double Taxation</p>	
PART V – Administration and Certainty	<p>Section 1 – Administration (Article 14 - 21)</p> <p>Section 2 – Tax Certainty Framework for Parts II to IV (Amount A) (Articles 22 - 32)</p> <p>Section 3 – Tax Certainty for Issues Related to Amount A (Articles 33 - 36)</p> <p>Section 4 – Exchange of Information and International Cooperation (Article 37)</p>	Annex E, Annex F, Annex G

MLC – Layout

PART VI – Treatment of Specific Measures Enacted by Parties	<p>Article 38 – Removal and Standstill of Digital Services Taxes and Relevant Similar Measures</p> <p>Article 39 – Elimination of Amount A Allocations for Parties Imposing Digital Services Taxes and Relevant Similar Measures</p> <p>Article 40 – Treatment of Specific Measures in Scope of Tax Treaties</p>		<p><i>Annex A, Annex H</i></p>
PART VII – Final Provision	<p>Article 41 –Signature and Ratification, Acceptance or Approval</p> <p>Article 42 –Territorial Application</p> <p>Article 43 –Review Process to Lower the Adjusted Revenues Threshold</p> <p>Article 44 –Amendment</p> <p>Article 45 –Reservations</p> <p>Article 46 –Relationship between this Convention and Existing Tax Agreements</p>	<p>Article 47 –Conference of the Parties</p> <p>Article 48 –Entry into Force</p> <p>Article 49 –Entry into Effect</p> <p>Article 50 –Withdrawal</p> <p>Article 51 –Termination</p> <p>Article 52 –Relation with Protocols</p> <p>Article 53 –Depositary</p>	<p><i>Annex I</i></p>

Amount B – Baseline return

- Amount B is the remuneration of group enterprises resident in (or in the case of a permanent establishment located in) a market jurisdiction (either a subsidiary or a permanent establishments of a foreign party) that perform baseline marketing and distribution activities for the distribution of products for the MNE group (hereinafter, “distribution entity”).
- Based on **arm’s length principle**
- Further work to explore how to take account of:
 - ✓ **Different functionality levels**
 - ✓ Differentiation in treatment between **industries** and **regions**
 - ✓ Determining the fixed return

PILLAR TWO OVERVIEW

Two Pillar solution - a milestone in the BEPS & international tax reform journey

BEPS MLI

- **101 jurisdictions** have signed the MLI, which covers **1900 bilateral treaties**

Harmful Tax Practices & Preventing Treaty Abuse

- Almost **50000** exchanges of information have taken place on **23000** tax rulings (Action 5)
- Over **2,400 of the 2,500 tax agreements** concluded between Inclusive Framework members now becoming compliant (Action 6)

Transparency & Country-by-Country Reporting

- **EUR 126 billion** in additional tax revenues have been identified since 2009
- **110 countries** are involved in exchange of CbCRs and more than **3300 bilateral relationships** for CbC exchanges in place between 89 jurisdictions (Action 13)

Tax Policy and Statistics

- Revenue Statistics covers **122 economies** across Africa, Asia-Pacific, LAC & OECD

Indirect Tax

- **90 countries** implementing OECD International VAT/GST Guidelines
- Significant revenues raised by governments as a result

Capacity Building

- TIWB initiative has led to **USD 2.07 billion** in additional tax collected
- Over **2700 officials** from **170+** jurisdictions trained in the OECD Tax Crime Academy

Two-Pillar Solution

A global minimum tax at an effective rate of 15% (Pillar Two)

- The minimum tax puts a floor under harmful tax competition and protects country tax bases.
- Revenues are estimated at up to USD 200 billion per year.
- Around 55 countries and jurisdictions are now implementing or taking steps towards implementation; at least seven jurisdictions have introduced a corporate income tax regime for the first time.

Subject-to-Tax-Rule (Pillar Two)

- The STTR protects countries' tax bases where treaties tax MNE income at very low rates.
- Already agreed by the Inclusive Framework, the Multilateral Instrument to implement the STTR opened for signature on 2 October.
- Particularly important for developing countries; who significantly shaped the STTR during negotiations.

Final aspects of Pillar One nearing completion

- Work ongoing on Amount B.
- Text of a Multilateral Convention to implement Amount A, together with accompanying materials, released on 11 October.

Pillar Two in a nutshell

Subject to Tax Rule

9% nominal rate – applies on a transactional basis

Certain related party payments

All companies (subject to de minimis thresholds)

Treaty provision

Can be required by developing countries

GloBE rules and QDMTT

15% effective rate – applies on a jurisdictional basis

All income

Large MNEs – 750 million Euros

Domestic law provision

Common approach

The STTR multilateral instrument

Objective

- To facilitate the implementation of the STTR in bilateral tax treaties

When does it apply?

- Implementation either via bilateral amendments or the STTR MLI; the request of the developing country trigger the obligation to implement the STTR
- Bilateral route: developing country can request the Contracting Party for the inclusion of the STTR
 - No changes or negotiations
- MLI route: developing country can go to the MLI and identify the treaty
 - The MLI will effectively amend a treaty once its two treaty partners have signed it, and have "listed" their treaty as a treaty they wish to cover under the MLI

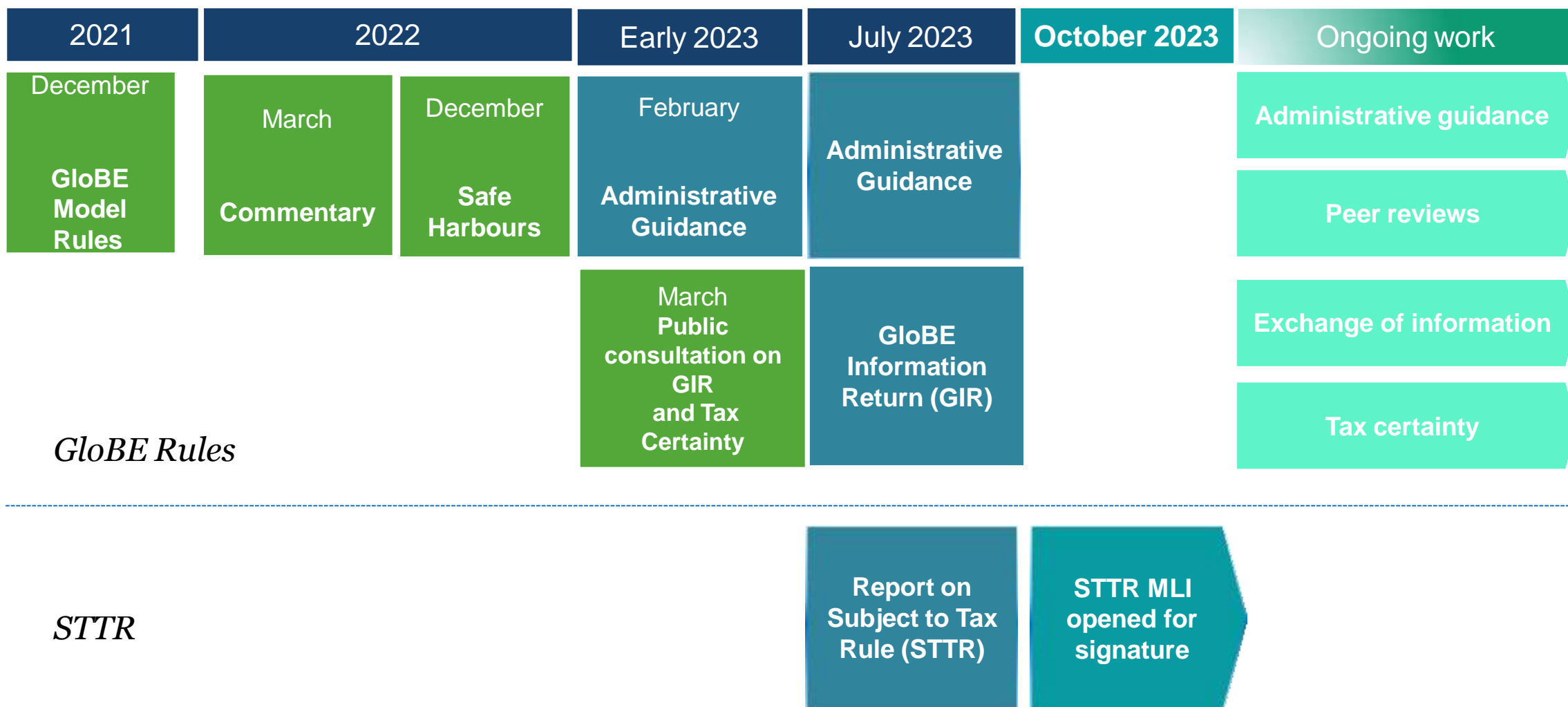
How does it apply?

- It amends covered treaties and includes the STTR and other accompanying provisions by "adding" annexes to the covered treaties

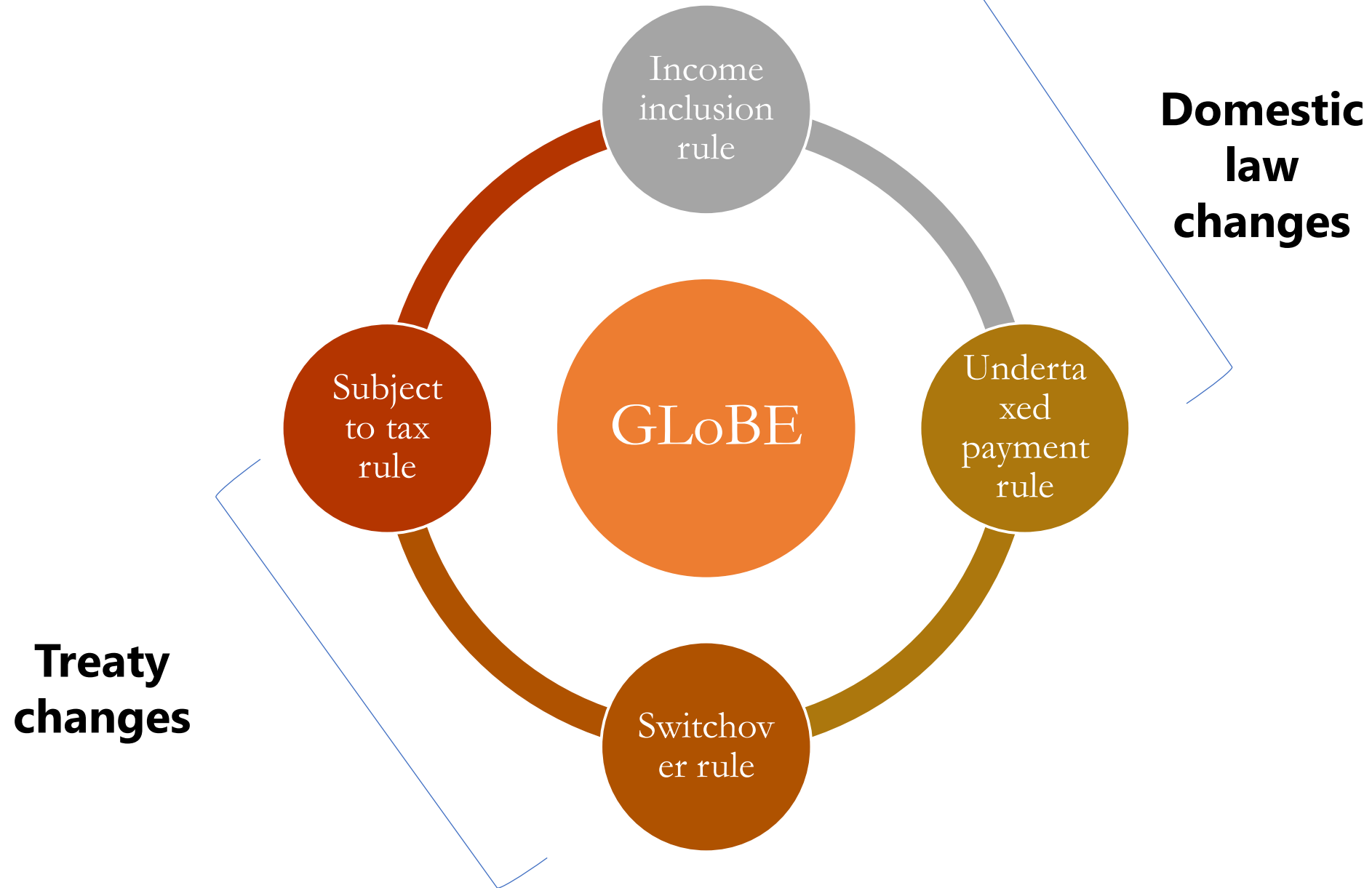
Is it a minimum standard?

- Yes: STTR as a rule; if a developing country requests, the Contracting Party should accept
- No: STTR MLI/or bilateral is optional

Current Progress



Pillar Two - Global Anti-Base Erosion



QUESTIONS?

THANK YOU

T. P. Ostwal & Associates LLP

Chartered Accountants

Suite# 1306-1307, Lodha Supremus, Senapati Bapat Marg, Lower Parel, Mumbai 400 013

Contact: +91 (22) 4945 4000 (Board) 4945 4010 (Fax)

Website: www.tpostwal.in

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Decorative elements in the background include two diagonal lines (one light orange, one white), two circles with diagonal hatching (one in the top-left, one in the bottom-right), and two pixelated circular patterns (one in the top-right, one in the bottom-left).

Welcome!!

And CHEERS to learning something new today!

~Seminar~

Cross Border Acquisitions

~CA Karthik Natarajan



Seminar on International Taxation, organized
by the Direct Taxes Committee for the
Hyderabad Branch of the SIRC of the ICAI -
November 29, 2023

A stylized world map in a light tan color serves as the background. Overlaid on the map are two circular radar-like patterns, each consisting of concentric circles and radial lines, one positioned in the upper right and the other in the lower left.

Whoa!

**Sooo..... What is
Cross-Border
Acquisition...**

Simply Put..



Purchase

it means any purchase of a Business across jurisdiction



Merger

It also means any merger, amalgamation or arrangement between an Indian company and foreign company in accordance with Companies (Compromises, Arrangements and Amalgamation) Rules, 2016 notified under the Companies Act, 2013.



Outside India

For the purposes of cross-border merger, a 'foreign company' as per Companies Act 2013 means any company or body corporate incorporated outside India whether having a place of business in India or not.

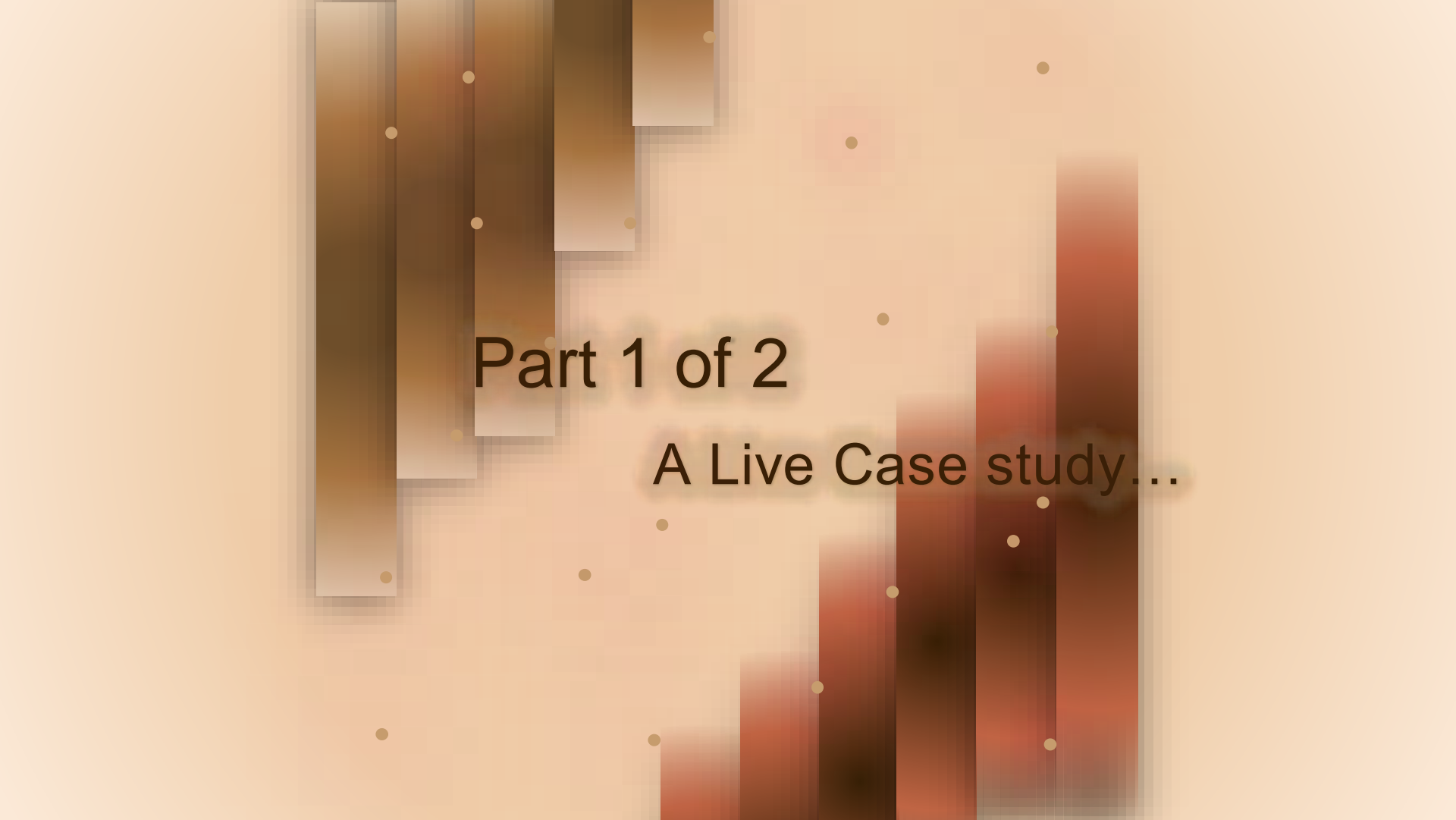
Types....?

Inbound Merger

A cross border merger where the resultant company is an Indian company; i.e., Foreign company merges with an Indian Company

Outbound Merger

A cross border merger where the resultant company is a foreign company. i.e., Indian company merges with a Foreign Company.

The background features several vertical bars of varying heights and widths, colored in shades of brown, tan, and beige. Scattered across the entire background are numerous small, solid-colored dots in matching tones. The overall aesthetic is modern and minimalist.

Part 1 of 2

A Live Case study...

Steps in a Merger...

1. **Identifying** the need for cross border mergers (Corporate Objectives)
2. **Merits & Demerits**
3. Identification and Appointment of **Local Legal Advisors**
4. Identification of **Prospective Entities** for Merger including understanding the national environment in which they operate
5. **Negotiation terms** & Convincing seller about being the correct prospect for cross merger.
6. **Payment Terms** (On milestone basis)
7. **Due Diligence**
8. **Share Purchase Agreement** and **Shareholders' Agreement**
9. **Integration** of the Acquired Business

I. Defining the Purpose

01 Objective

First and foremost, a Company needs to define what are the objective/s sought to be achieved by way of cross-border acquisition

02 Growth

Could be growth in sales volumes / financial valuation / entering newer technologies

03 Strategies

Then, put in place the necessary strategies i.e., how you will achieve the defined purpose/s

04 Resources

Last but certainly not the least, the Company needs to organize the requisite resources to implement those strategies – human, financial, management

Typical Corporate Objectives...



GROWTH



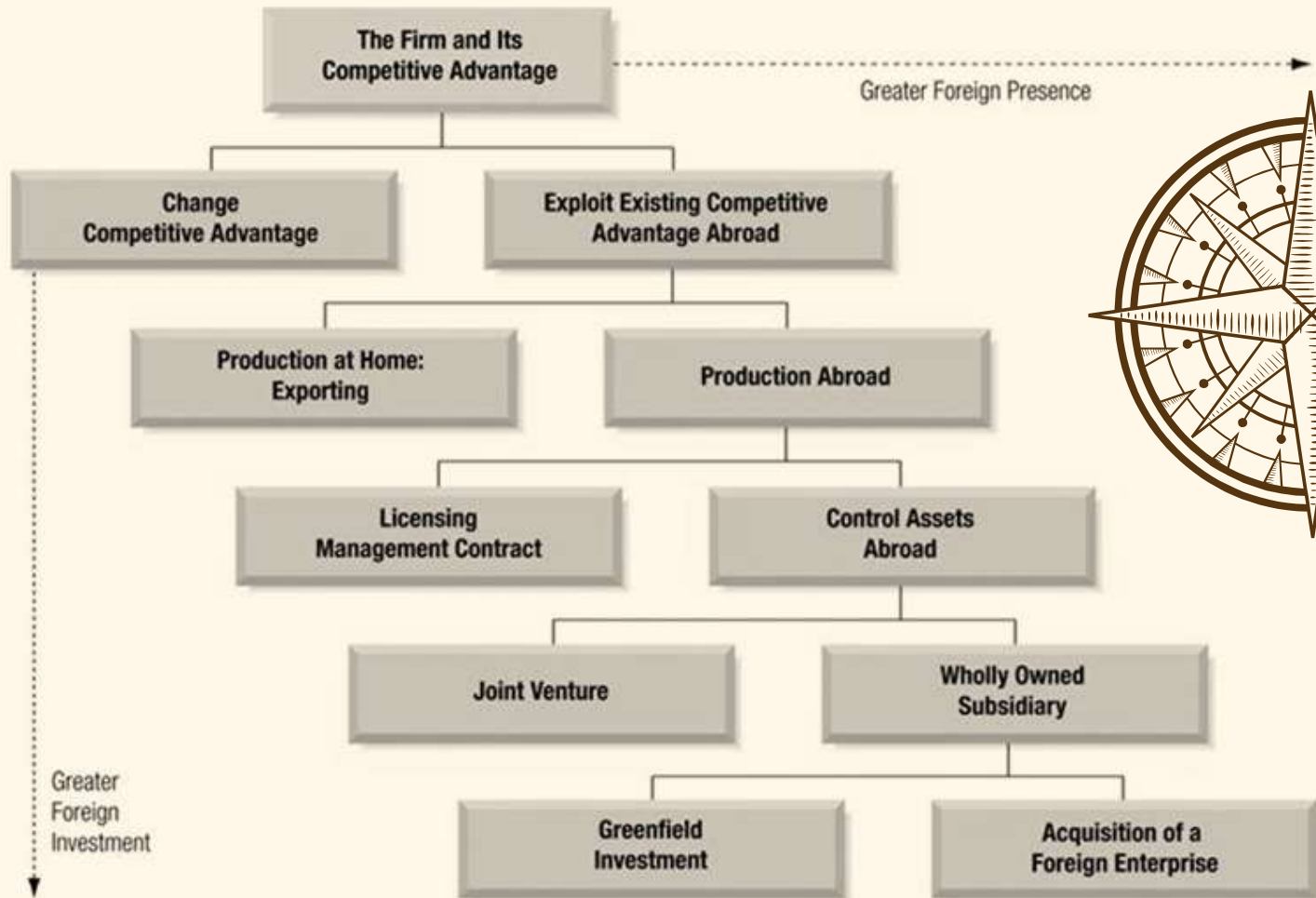
DIVERSIFICATION



**CORPORATE
OBJECTIVES**



PROFITABILITY



2. Merits & Demerits...

**Local
Presence**

**Economies of
Scale**

**Better
Efficiency**



For
Consideration

**Competitive
Advantage**

Outsourcing

**Expand Global
Footprint**

2. Merits & Demerits...

**Heavy
Investment**

**Fear of huge
losses**

**Change of
Political**



Demerits

**Environment
Economic
Factors**

**Uncertain
property
rights**

Capital Fight

3. Need for Local Legal Advisors



Negotiating local rules and regulations could be a tricky affair especially for new entrants to the jurisdiction



There will be many points which will emerge at each stage of the acquisition process, which will require legal interpretation and solution



Oftentimes, the Legal Advisors help in establishing connects with further local support teams such as Accountants, Auditors, Factory design and approval Consultants, HR agencies and so on

4. Structuring Terms of the Deal...

Milestone

Payment usually based on milestones and other continued, target achievements



Customary

It is customary to expect commitment from outgoing Promoters for certain post-sale actions

Mode

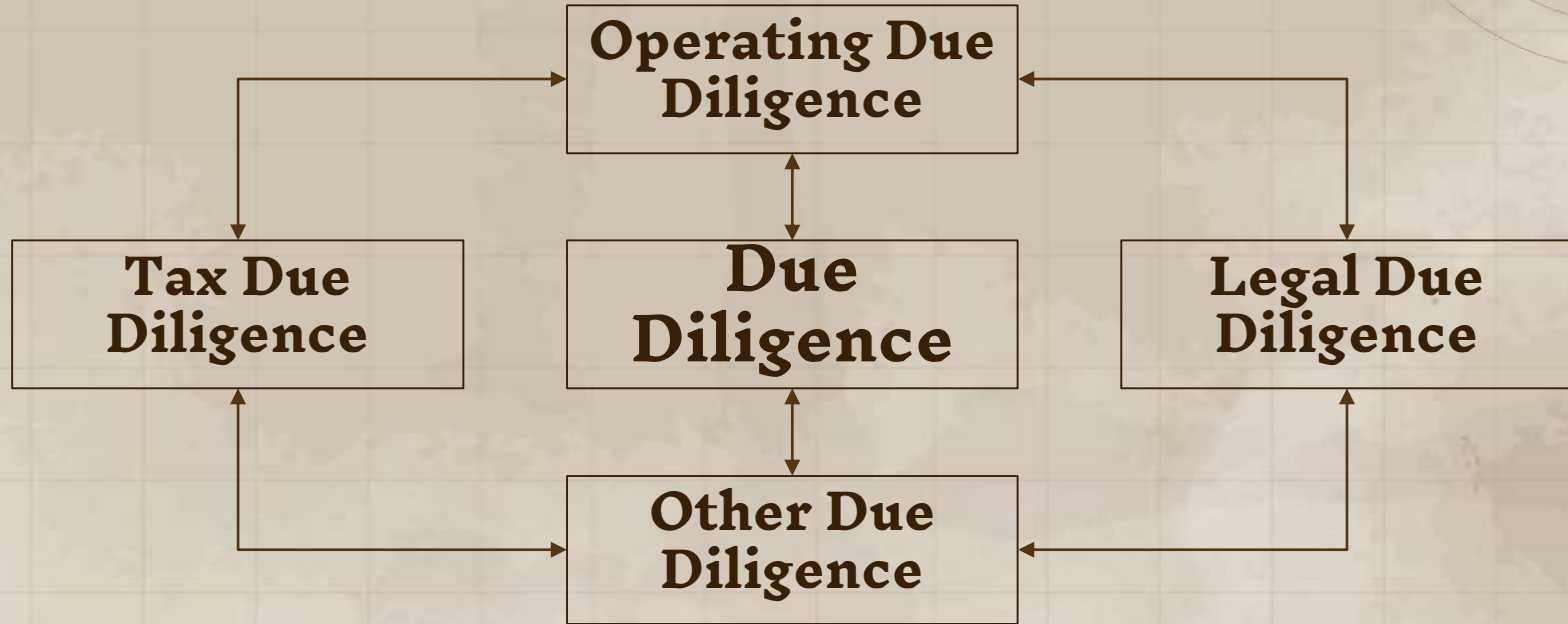
Payment could be made partly in Cash and partly by way of issuance of Instruments – Debt or Instruments.



Competition

Non-compete arrangements

5. Trust but Verify



6. Share Purchase Agreement...

To consummate the acquisition of shares, the Share Purchase Agreement is made

2. PURCHASE AND SALE

2.1 Purchase and Sale / Put and call options / Purchase Price.

2.1.1 Purchase and sale of 51% of the Securities

(a) Purchase and Sale

Upon the terms and subject to conditions set out in this Agreement, the Purchaser hereby purchases, and the Seller hereby sells to the Purchaser **xxxxxxxxxx Securities**, free and clear of all Liens, which represents 51% of the securities issued by the Company.

The initial purchase price for the **xxxxxxxxxx Securities** shall amount to **xxxxxxxxxx** (the "Closing Payment 1" or the "First Purchase Price").

(b) Closing Payment 1

The First Purchase Price will be paid by the Purchaser to the Seller on Closing Date by wire transfer in immediately available funds to the Seller's bank account (the details of which have been provided to the Purchaser no later than two (2) Business Days prior to Closing Date), it being provided that the Retained Amount shall be deducted from the Closing Payment 1.

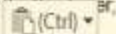
2. CLOSING 1

2.1 Closing Actions. Closing 1 shall take place by electronic means. At Closing Date each Party shall do, or procure to be done, those things respectively listed in relation to it in Sections 3.4 and 3.5.

2.2 Share Transfer Forms. The transfer of the **xxxxxxx** Securities with respect to Closing 1 shall be effected by (i) execution of share transfer form (*procès de mouvement*) by the Seller and (ii) written entries reflecting said transfer in the share transfer registry (*registre des mouvements de titres*) and individual shareholders' account (*compte individuel d'associé*) of the Company.

2.3 Payment of First Purchase Price. Upon execution of this Agreement and after satisfaction of the actions listed in Sections 3.4 and 3.5, the Purchaser will pay the First Purchase Price (less the Retained Amount) by wire transfer according to Article 2.1.1(b).

2.4 Closing Deliveries for the benefit of the Purchaser. At or prior to the Closing Date, the Seller will deliver to the Purchaser:

- (a) a copy of the Storage Device;
- (b) a copy of the share transfer form evidencing the transfer of the **xxxxxxx** Securities with respect to Closing 1, duly completed and executed by the Seller in favor of  er,
- (c) a copy of the CERFA form n°2759 per transfer for the purpose of filing before the tax authorities duly completed and executed by the Seller;
- (d) copies of the share transfer register (*registre des mouvements de titres*) and individual shareholders' accounts (*comptes d'actionnaires*) of the Company updated to take into account Closing 1;
- (e) a copy of the decisions of the sole shareholder of the Company approving the Purchaser as new shareholder of the Company;
- (f) a copy of the shareholders' agreement to be entered into by the Seller and Purchaser on Closing Date with respect to the Company;

7. Shareholders' Agreement...

This Agreement follows the SPA but is usually entered into coterminous with the SPA... defines the relation *inter-se* the Shareholders...

- C. As a result of the Transaction, the share capital of the Company is allocated as described in Schedule C attached thereto.
- D. According to the SPA the Majority Shareholder contemplates to acquire from the Minority Shareholder and the Minority Shareholder contemplates to sell the Majority Shareholder the remaining Shares (i.e., 49% of the share capital of the Company) within three (3) years as of the date hereof (the "**Final Completion**").
- E. The Parties have agreed to enter this shareholder's agreement in order to organize their relations as shareholders of the Company until the Final Completion (the "**Agreement**").

Article 2 - Purpose of the Agreement

The purpose of this Agreement is to set out the rights and obligations of the Parties and the terms and conditions they have agreed to comply with for the duration of this Agreement in pursuing their common objectives through the Company.

This Agreement replaces and supersedes all agreements or prior documents with an identical or similar purpose.

Article 5- Transfer of Securities

5.1 No Transfer

Each Party hereby undertakes not to Transfer (directly or indirectly) his Shares or other Securities until Final Completion, except if expressly agreed in writing by the other Party.

The Founders undertake not to transfer their shares or issue any shares in the Minority Shareholder until Second Closing. It being provided that in case of death of any of the Founders, the Parties hereby acknowledge and agree that the relevant Founder's shares shall be transferred to the legal heirs of such Founder.

5.2 No Encumbrances

The Parties further agree that, throughout the duration of this Agreement, no Encumbrance shall be granted by any of the Parties on their Securities of the Company without the prior consent of the other Party.

For the avoidance of doubt, it is specified that specified that the grant by a Party of any guarantee, security, endorsement, mortgage, lien, pledge or other charge with respect to its Securities will be deemed a Transfer for the purposes herein.

8. Key Factors for Success of Business Acquisition



Clarity in Business Purpose / Objective behind the Acquisition



Go for the right structure of the Deal
– All cash or milestone-based compensation



Trust but verify the statements, documents and facts stated by the Seller



Be objective and open-minded when choosing a Seller / Partner

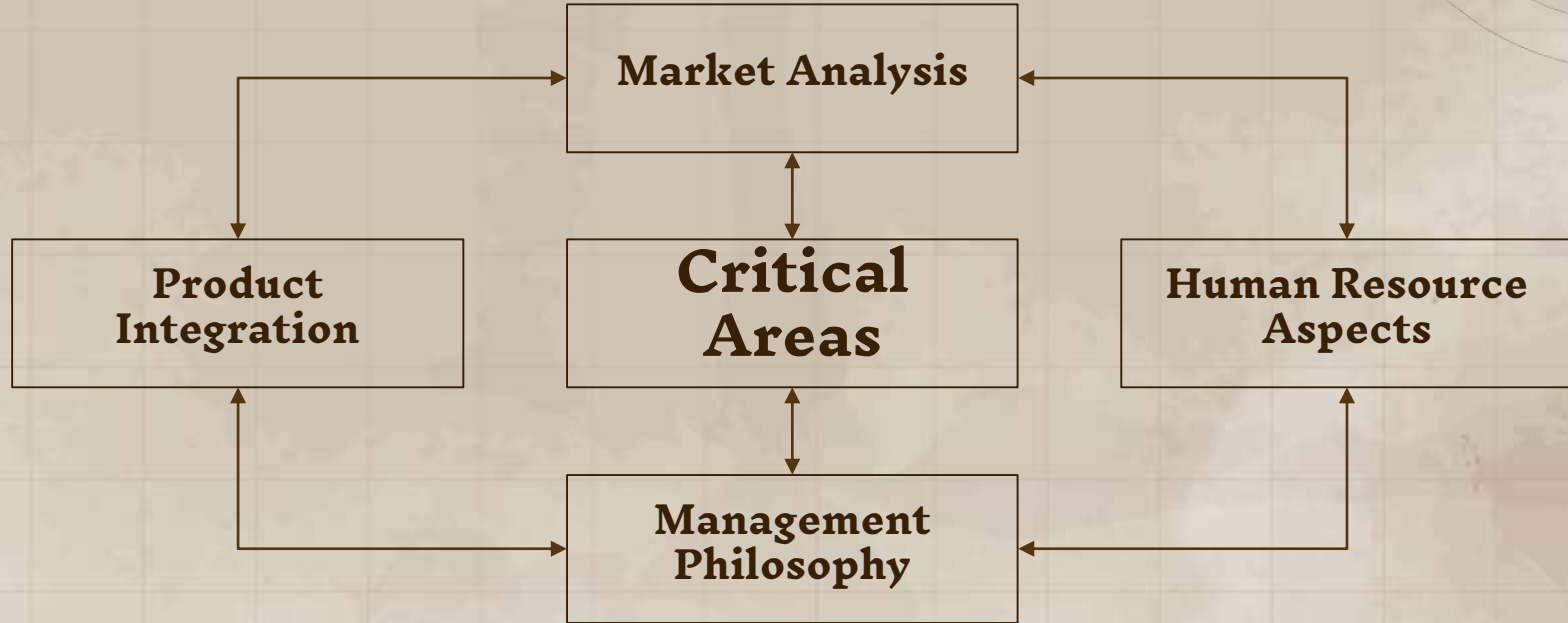



Integration - Cultural , Human, Management



Have a contingency plan

9. Successful Integration...

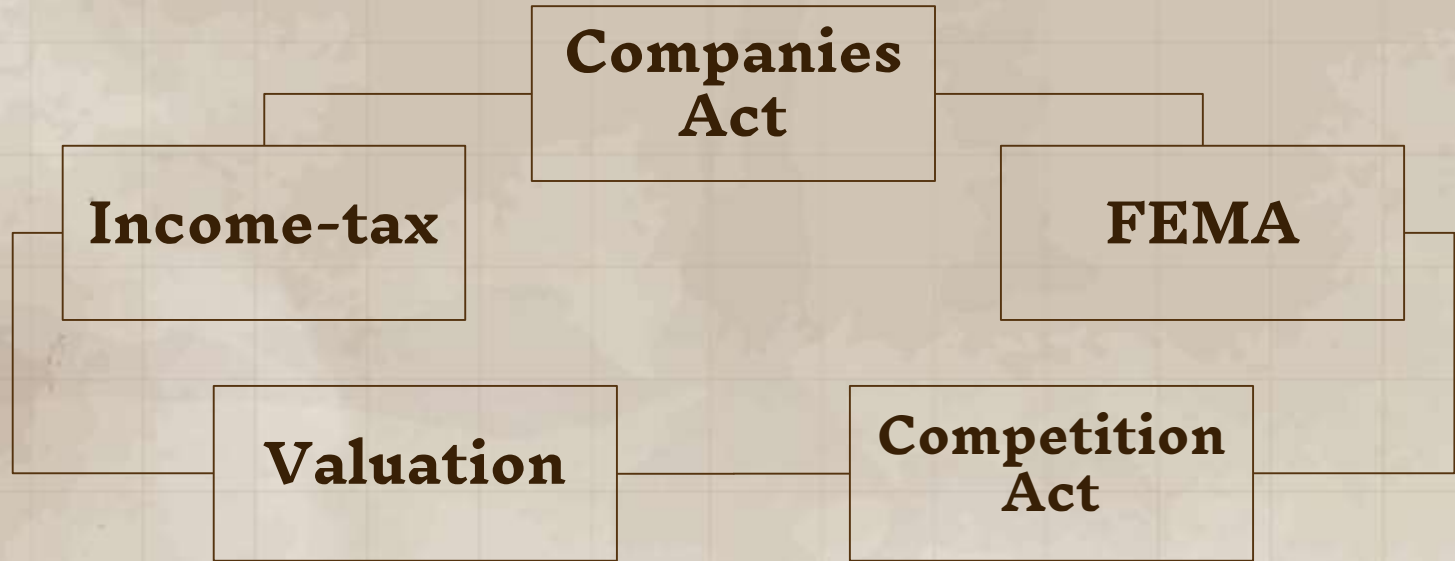


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Part 2 of 2

Regulatory Landscape...

Bound by which Regulations?





Companies Act, 2013

Provisions of Companies Act

– Sec 234



234. (1) The provisions of this Chapter unless otherwise provided under any other law for the time being in force, shall apply mutatis mutandis to schemes of mergers and amalgamations between companies registered under this Act and companies incorporated in the jurisdictions of such countries as may be notified from time to time by the Central Government:

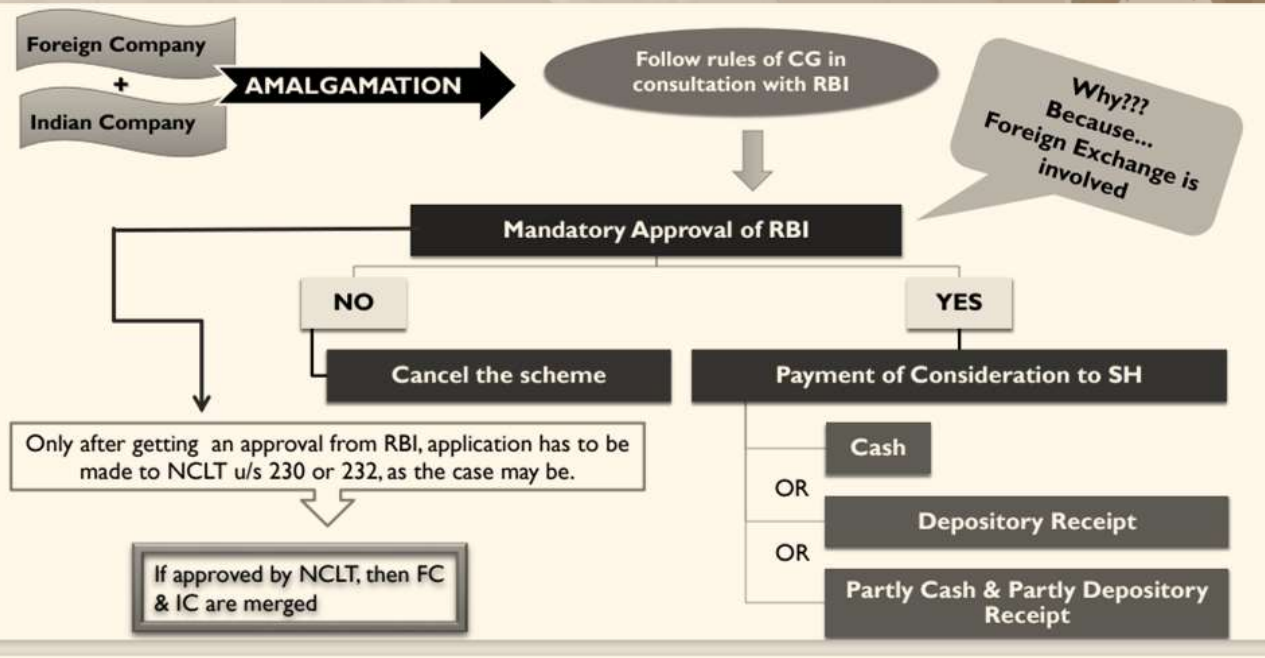
Provided that the Central Government may make rules, in consultation with the Reserve Bank of India, in connection with mergers and amalgamations provided under this section.

(2) Subject to the provisions of any other law for the time being in force, a foreign company, may with the prior approval of the Reserve Bank of India, merge into a company registered under this Act or vice versa and the terms and conditions of the scheme of merger may provide, among other things, for the payment of consideration to the shareholders of the merging company in cash, or in Depository Receipts, or partly in cash and partly in Depository Receipts, as the case may be, as per the scheme to be drawn up for the purpose.

Explanation.—For the purposes of sub-section (2), the expression "foreign company" means any company or body corporate incorporated outside India whether having a place of business in India or not.

Provisions of Companies Act

~Section 234



Provisions of Companies Act ~Section 234

Rule 25A of Companies (Compromises, Arrangements and Amalgamations) Rules, 2016

1[“25A. Merger or amalgamation of a foreign company with a Company and vice versa.

(1) A foreign company incorporated outside India may merge with an Indian company after obtaining prior approval of Reserve Bank of India and after complying with the provisions of sections 230 to 232 of the Act and these rules.

(2) (a) A company may merge with a foreign company incorporated in any of the jurisdictions specified in Annexure B after obtaining prior approval of the Reserve Bank of India and after complying with provisions of sections 230 to 232 of the Act and these rules.

(b) The transferee company shall ensure that valuation is conducted by valuers who are members of a recognised professional body in the jurisdiction of the transferee company and further that such valuation is in accordance with internationally accepted principles on accounting and valuation. A declaration to this effect shall be attached with the application made to Reserve Bank of India for obtaining its approval under clause (a) of this sub-rule.

(3) The concerned company shall file an application before the Tribunal as per provisions of section 230 to section 232 of the Act and these rules after obtaining approvals specified in sub-rule (1) and sub-rule (2), as the case may be.

Explanation 1. For the purposes of this rule the term “company” means a company as defined in clause (20) of section 2 of the Act and the term “foreign company” means a company or body corporate incorporated outside India whether having a place of business in India or not:

Explanation 2. For the purposes of this rule, it is clarified that no amendment shall be made in this rule without consultation of the Reserve Bank of India.”]

2(4) Notwithstanding anything contained in sub-rule (3), in case of a compromise or an arrangement or merger or demerger between an Indian company and a company or body corporate which has been incorporated in a country which shares land border with India, a declaration in Form No. CAA-16 shall be required at the stage of submission of application under section 230 of the Act.

Rule 25A of Companies (Compromises, Arrangements and Amalgamations) Rules, 2016

Inbound
Merger



Outbound
Merger



After obtaining the
prior approval of
the RBI and after
complying with
provisions of
Companies Act,
2013 relating to
Domestic Merger

Jurisdiction

SEBI

Or

Bank for International
Settlements

And

FATF



Valuation

Rule 25 continued...

Valuation

- The **transferee company shall ensure** that valuation is **conducted by valuers** who are members of a **recognized professional body in the jurisdiction of the transferee company** and further that such valuation is in accordance with intentionally accepted principles on accounting and valuation.
- A declaration to this effect shall be attached with the application made to RBI for obtaining its approval.

Internationally Accepted Principles on Accounting & Valuation

Income –based Approach

Discounted Cash Flow method
Price Earning Capacity Value Method

Market-based Approach

Market Price Method
Comparable Multiple Method
Comparable Transaction Method
Price of Recent Investment Method

Asset Based Approach

Net Book Value Method
Net Replaceable Value
Net Realizable Value

Procedure

- The concerned company shall file an application before the Hon'ble Tribunal [NCLT] as per provisions of **Sec 230 to Sec 232** of the Act and these rules after obtaining approval from RBI for the Inbound and Outbound merger as may be.

The background consists of several overlapping circles in various shades of orange and brown. The colors range from a light beige to a dark chocolate brown. The circles are of different sizes and are positioned in a way that they overlap each other, creating a layered effect. The text 'FEMA' is centered in the middle of the image, overlaid on the circles.

FEMA

FEMA (Cross Border Merger) Regulations, 2018



Cross Border Merger

‘Cross Border Merger’ means any merger, amalgamation or arrangement between an Indian company and Foreign company in accordance with the provisions of Companies Act, 2013 and rules made thereunder.



Indian Company

A Company incorporated under Companies Act, 2013 or under any previous company law.

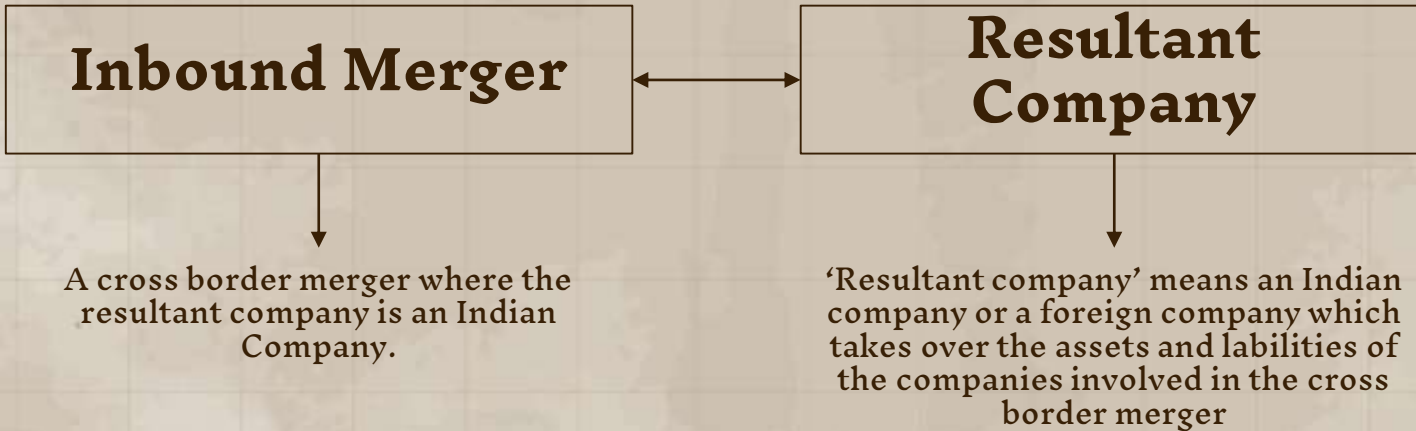


Foreign Company

Any Company or Body Corporate incorporated outside India whether having a place of business in India or not

Save as otherwise provided in the Act or rules or regulations framed thereunder or with the general or special permission of RBI, **no person resident in India shall acquire or transfer any security or debt or asset outside India and no person resident outside India shall acquire or transfer any security or debt or asset in India on account of cross border mergers**

Inbound Merger



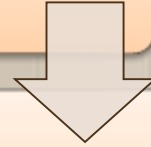
The resultant company may issue or transfer any security and / or a foreign security, to a person resident outside India in accordance with the pricing guidelines, entry routes, sectoral caps, attendant conditions and reporting requirements for foreign investment as per FEMA regulations.

Where the foreign company is a Joint Venture (JV) / Wholly Owned Subsidiary (WOS) of the Indian company, it shall comply with the conditions prescribed for transfer of shares of such JV / WOS by the Indian party as per FEMA regulations

Where the inbound merger of the JV / WOS results into acquisition of the Step down subsidiary of JV / WOS of the Indian party by the resultant company, then such acquisition should be in compliance with FEMA regulations

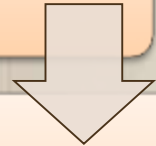
Inbound Merger

An office outside India of the foreign company, pursuant to the sanction of the Scheme of the cross border merger shall be deemed to be the branch / office outside India of the resultant company in accordance with the FEMA regulation and the resultant company may undertake any transaction as permitted to a branch / office.



The guarantees or outstanding borrowings of the foreign company from overseas sources which become the borrowing of the resultant company or any borrowing from overseas sources entering into the books of the resultant company shall conform, within a period of 2 years, to the ECB norms or Trade Credit norms or other foreign borrowing norms, as per FEMA regulations

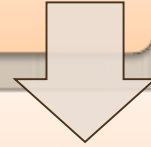
- No remittance for repayment of such liability is made from India within such period of 2 years
- Conditions mentioned above will not apply with respect to end use restrictions



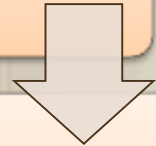
The resultant company may require and hold any asset outside India which an Indian company is permitted to acquire. Such assets can be transferred in any manner for undertaking a permissible transaction prescribed under FEMA

Inbound Merger

Where the asset or security outside India is not permitted to be acquired or held by the resultant company, the resultant company shall sell such an asset or security within a period of 2 years from the date of sanction of the Scheme by NCLT and the sale proceeds shall repatriated to India immediately through banking channels.



Where any liability outside India is not permitted to be held by the resultant company, the same shall be extinguished from the sale proceeds of such overseas assets within a period of 2 years.



The resultant company may open a Bank account in foreign currency in overseas jurisdiction for the purpose of putting through transactions incidental to the cross border merger for a maximum period of 2 years from the date of sanction of the Scheme by NCLT.

Outbound Merger

A person resident in India may acquire or hold securities of the resultant company as per FEMA regulations.

An Office in India of the Indian Company [IC], pursuant to sanction of the Scheme of cross border merger, may be deemed to be a branch office in India of the resultant company and the resultant company may undertake any transaction as permitted to a branch office



Resident Individual may acquire securities outside India provided that FMV of such securities is within the limits prescribed under the Liberalized Remittance Scheme (LRS) [USD 2,50,000 per person per FY]

The guarantees or outstanding borrowings of IC which become the liabilities of the resultant company shall be repaid as per the Scheme sanctioned by the NCLT

Outbound Merger

The **resultant company** may **require and hold any asset in India which a foreign company is permitted to acquire** and such assets can be transferred in any manner for undertaking a permissible transaction under FEMA.

Where the **asset or security in India cannot be acquired or held by the resultant company**, the resultant company **shall sell such asset or security within a period of 2 years from the date of sanction of the Scheme by the NCLT** and the sale proceeds shall be repatriated outside India immediately through banking channels.

Repayment of Indian Liabilities from the sale proceeds of such assets or securities **within the period of 2 years shall be permissible.**

The **resultant company** may open a **Special Non-Resident Rupee Account (SNRR Account)** in accordance with FEMA regulations for the purpose of **putting through transactions**

The account shall run for a maximum **period of 2 years** from the date of sanction of the Scheme by Hon'ble NCLT

Outbound Merger

RULE 9 : OVERSEAS INVESTMENT

(1) Save as otherwise provided in these rules or the Foreign Exchange Management (Overseas Investment) Regulations, 2022, Any investment made outside India by a person resident in India shall be made in a foreign entity engaged in a bona fide business activity, directly or through step down subsidiary or the special-purpose vehicle, subject to the limits and the conditions laid down in these rules and the said regulations:

Provided that the structure of such subsidiary or step down subsidiary of the foreign entity shall comply with the structural requirements of a foreign entity:

Provided further that Overseas Investment or transfer of such investment including swap of securities in a foreign entity formed, registered or incorporated in Pakistan or in any other jurisdiction as may be advised by the Central Government from time to time shall require prior approval of the Central Government.

Explanation: For the purposes of this sub rule "bonafide business activity" shall mean any business activity permissible under any law in force in India and the host country or host jurisdiction, as the case may be:

RULE 10: NO OBJECTION CERTIFICATE

(1) Any person resident in India who,–

(i) has an account appearing as a non-performing asset; or (ii) is classified as a wilful defaulter by any bank; or (iii) is under investigation by a financial service regulator or by investigative agencies in India, namely, the Central Bureau of Investigation or Directorate of Enforcement or Serious Frauds Investigation Office, shall, before making any financial commitment or undertaking disinvestment under these rules or the Foreign Exchange Management (Overseas Investment) Regulations, 2022, obtain a No Objection Certificate from the lender bank or regulatory body or investigative agency by making an application in writing to such bank or regulatory body or investigative agency concerned: Provided that where the lender bank or regulatory body or investigative agency concerned fails to furnish the certificate within sixty days from the date of receipt of such application, it may be presumed that there was no objection to the proposed transaction.

(2) The No Objection Certificate issued under sub-rule (1) shall be addressed by the lender bank or regulatory body or investigative agency concerned to the designated AD bank with an endorsement to the applicant.

Deemed Approval

Any transaction on account of a cross border merger undertaken in accordance with the FEMA regulations shall be deemed to have prior approval of the RBI as required under Rule 25A of the Companies (Compromises, Arrangement and Amalgamations) Rules, 2016

A certificate from the MD / WTD and CS, of the companies concerned ensuring compliance to the FEMA regulations shall be furnished along with the application made to the NCLT under the Companies (Compromises, Arrangement or Amalgamation) Rules, 2016



Income-Tax Implications

Income-tax Implications

Capital Gain

Transfer of Capital Asset is subject to Capital Gains Tax



Conditions

Exemptions granted, *inter-alia*, have a condition that a transferee company should be an Indian Company i.e. exemption shall be available only for Inbound Mergers

Tax Neutral

Specified types of mergers enjoy tax-neutrality with respect to capital gains taxes on transfer of assets pursuant to merger



Exemptions

Where Transferee company is a Foreign Company i.e. Outbound Mergers, exemption of capital gains shall not be allowed

Definitions

Sec 2(1B) of the Income-tax Act, 1962

Merger of 1 or more companies with another company or the merger of 2 or more companies to form 1 company in such a manner that:

All the property and liabilities of the amalgamating company or companies immediately before the amalgamation becomes the property and liabilities of the amalgamated company

Shareholders holding not less than 3/4th in value of the shares in the amalgamating company or companies (other than shares already held therein immediately before the amalgamation by the amalgamated company or its subsidiary or by their nominee) become shareholders of the amalgamated company

otherwise than normal purchase of property or distribution of property on account of winding-up.

Exempted Transfers

Section	Nature of transaction	Conditions to be fulfilled
47(vi)	Transfer of capital asset by an amalgamating company to amalgamated company	Amalgamated company should be an Indian Company
47(via)	Transfer of shares of an Indian company by amalgamating foreign company to amalgamated foreign company	<ul style="list-style-type: none">• At least 25% of the shareholders of the amalgamating foreign company continue to remain shareholders of the amalgamated foreign company; and• Such transfer is not liable to capital gains tax in the country of incorporation of the amalgamating company

Carry Forward & Set off in case of Amalgamation

Accumulated loss and unabsorbed depreciation of an amalgamated company can be carried forward and set off by the amalgamated company (for the unexpired period) if the following conditions are satisfied

Amalgamation is of an

- Industrial Undertaking
- Ship
- Hotel
- Public sector company/companies engaged in operation of aircrafts with one or more public sector companies engaged in similar businesses
- Banking company with a specified bank

Note: Industrial undertaking refers to an undertaking which is engaged in:

- Manufacture or processing of goods
- Manufacture of computer software
- Generation or distribution of electricity or any other form of power
- Providing telecommunication services
- Mining
- Construction of ships, aircrafts or rail systems

Carry Forward & Set off in case of Amalgamation

Conditions to be satisfied by the amalgamating company

- Should be **engaged in the business**, in which the accumulated loss/depreciation occurred, for **3 or more years**
- Has continuously held at least **75% of the book value of fixed assets** on the date of amalgamation, for a period of **2 years prior to amalgamation**

Conditions to be satisfied by the amalgamated company

- Holds for a **minimum period of 5 years**, at least **75% of the book value of fixed assets** of the amalgamating company on the date of amalgamation
- Continues the **business of the amalgamating company** for a period of **5 years** from the date of amalgamation
- Such other conditions as may be prescribed [Rule 9C]

Conditions as per Rule 9C

- The amalgamated company achieves **at least 50% of the installed capacity** of the amalgamating company **within 4 years** from the date of amalgamation and
- **maintains the capacity till the end of the 5th year** from the date of amalgamation
- CG may relax this condition on application made
- Amalgamated company shall furnish a report of a **Chartered Accountant in Form 62** for the confirmation of satisfaction of conditions mentioned in Rule 9C

In the event of any violation of the above conditions

- The losses already set off shall be **considered as income** of the amalgamated company in the year of violation
- Further the **remaining unadjusted** business loss and unabsorbed depreciation **cannot be carried forward**

The background features a light beige color with a pattern of various-sized orange circles. A large, thick orange frame is tilted at an angle, enclosing the central text. Inside the frame, there are several thin orange lines: two parallel lines in the upper right and two parallel lines in the lower left.

Thank You

For your precious time