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OTHER ANTI AVOIDANCE MEASURES: ARTICLE 8 & 9 MLI

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Character, Competence & Commitment

Outline of this session

- Assess role of BEPS in tackling aggressive tax avoidance strategies
- Background to Action Plan 6 of BEPS
- Key features of Article 8 and Article 9 of MLI
- Interpretation of the MLI provisions
- Case Studies on application of Article 8 and Article 9 of MLI

BEPS

- Base Erosion and Profit Shifting (BEPS) the initiative which recognized erosion of tax base in the face of clever and creative tax planning structures
- Strategies of various multinationals across globe came to limelight when it was seen that they were not paying their ‘fair share of taxes’ in the countries where they had generated huge revenues from
- Both OECD and G-20 agreed that through treaty and international tax provisions, this practice of base erosion needs to be curbed. Hence the BEPS Action Plans were prepared
- Action Plan 6 deals with specific types of incomes, the structuring of which is purported to be addressed through its recommendations

Outline Action Plan 6

- Focused plan targeting treaty abuse scenarios to tackle BEPS
- Recommended approach under Action Plan 6 :
 - To include statement/preamble to tax treaties (Article 6 of MLI) to address avoidance of double non-taxation or reduced taxation through tax reduction strategies and treaty shopping
 - Inclusion of Specific Limitation of benefits clause in treaties to limit treaty benefits based on legal nature, ownership, and general activities of the entities
 - Treaty benefits to be denied if one of the principal purposes of arrangement is to obtain tax benefit (Article 7 of MLI) – Principal Purpose Test (PPT)
- Threshold for application of PPT more stringent than under GAAR as benefits under a covered tax agreement (CTA) can be negated if one of the purposes is tax benefit, as opposed to GAAR where the main purpose has to be tax benefit

Outline Action Plan 6

- Targets other anti avoidance measures including :
 - Dividend transfer transactions intended to artificially lower withholding tax on dividends (Article 8 of MLI)
 - Transactions aimed at circumventing source based taxation of shares of a company that derive their value primarily from immovable property (Article 9 of MLI)
 - Cases involving dual residency
 - Situation involving income of PE in third states (including debt claims, rights or property transferred to PE)

Article 8 MLI- Dividend Transfer Transactions...

- Focused on tackling transactions aimed at artificially lowering withholding tax on dividends
- Existing parameters applied for withholding rate at source under various tax treaties
 - Subjective application of beneficial ownership test
 - Objective beneficial ownership (BO) test based on the parent/shareholder holding certain percentage of shares in the company distributing dividend
- Both the parameters applied only on the date of distribution of dividends/ dividends becoming legally available to shareholders and not otherwise, leading to aggressive tax planning strategies, involving transfer of shares a few days prior to date of distribution of dividends, to countries having beneficial tax treatment
- Introduction of a look back/testing period for the beneficial ownership suggested by OECD in Para 16-17 of OECD Commentary, and Action Plan 6 to tackle the aggressive tax avoidance strategies
- Action Plan 6 also recommends GAAR to deny beneficial rate where holding (as objective BO test) acquired primarily for purpose of taking advantage of reduced tax rate in a treaty

Article 8 MLI-Text

- Article 8 (1)- Provisions of a Covered Tax Agreement that exempt dividends paid by a company which is a resident of a Contracting Jurisdiction from tax or that limit the rate at which such dividends may be taxed, provided that the beneficial owner or the recipient is a company which is a resident of the other Contracting Jurisdiction and which owns, holds or controls more than a certain amount of the capital, shares, stock, voting power, voting rights or similar ownership interests of the company paying the dividends, shall apply only if the ownership conditions described in those provisions are met throughout a 365 day period that includes the day of the payment of the dividends (for the purpose of computing that period, no account shall be taken of changes of ownership that would directly result from a corporate reorganisation, such as a merger or divisive reorganisation, of the company that holds the shares or that pays the dividends)
- Article 8 (2) The minimum holding period provided in paragraph 1 shall apply in place of or in the absence of a minimum holding period in provisions of a Covered Tax Agreement described in paragraph 1

Article 8 MLI-Text

- Article 8 (3) A Party may reserve the right
 - a) for the entirety of this Article not to apply to its Covered Tax Agreements
 - b) for the entirety of this Article not to apply to its Covered Tax Agreements to the extent that the provisions described in paragraph 1 already include
 - i) a minimum holding period
 - ii) a minimum holding period shorter than a 365 day period
 - iii) a minimum holding period longer than a 365 day period
- Article 8 (4) Each Party that has not made a reservation described in subparagraph a) of paragraph 3 shall notify the Depository of whether each of its Covered Tax Agreements contains a provision described in paragraph 1 that is not subject to a reservation described in subparagraph b) of paragraph 3, and if so, the article and paragraph number of each such provision. Paragraph 1 shall apply with respect to a provision of a Covered Tax Agreement only where all Contracting Jurisdictions have made such a notification with respect to that provision

Article 8 MLI- Key Features

- Optional Provision- Bilateral Notification approach to be applied for each CTA to assess the impact of MLI on the particular CTA
- CTA with notification mismatch not to impact the treaty between India and such signatory
- Signatories free not to apply Article 8 to their CTAs in entirety or to retain provisions as is of CTAs with look back period different than 365 days
- Lookback or testing period of 365 days prior to the date of distribution of dividends, to be applied for beneficial ownership to avail the beneficial rate of tax on dividends in the source country, change in shareholding due to corporate reorganization to be excluded

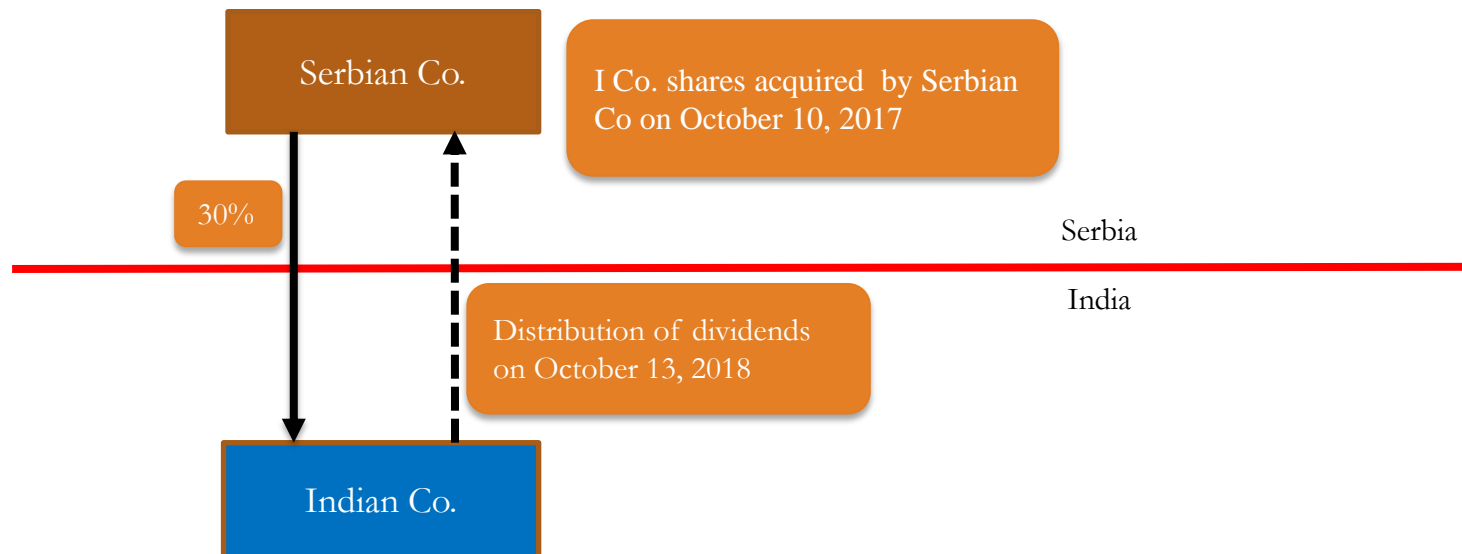
Indian Perspective

DDT applicable, shareholders not taxed again in respect of such dividends, India has anti avoidance provisions under sections 50CA and 56(2)(x) which would make transfer of shares for this purpose difficult without attracting CGT

Key Assumption to this session

- India taxes dividends at source in the hands of the shareholders at the rate of 20% under IT Act
 - All shareholders in case studies hold shares beneficially

Case Study I



- Relevant information
 - India-Serbia are signatories to MLI, both have notified their treaty to be CTA, both have notified Article 10(2)(1) of their treaty (Article relevant for dividend)
 - Article 10(2)(1) of the Treaty reads- “However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the beneficial owner of the dividends is a resident of the other Contracting State, the tax so charged shall not exceed 5 per cent, of the gross amount of the dividends if the beneficial owner is a company (other than a partnership) which holds directly at least 25 per cent, of the capital of the company paying the dividends”
- Question
 - What would be the applicable rate of tax on dividends in the hands of Serbian Co, 5% or 20%?

Analysis on Case Study I

- Step-1- Signatory
 - India-Serbia Tax Treaty- CTA under MLI
- Step-2- Notification
 - Both have notified Article 10(2)(1) in notification under Article 8(4) of MLI
- Step-3- Effect on the CTA
 - **Article 10(2)(1) to be amended by Article 8 of MLI**
 - **Look back period applicable**
- Step 4- Application to facts
 - Serbian Co satisfies look back period, should work in its favor to get benefit of 5% withholding tax on dividends
 - Subject to satisfaction of Principal Purpose Test, and eligibility to claim relief under the India-Serbia Tax Treaty

Case Study II



- Relevant information
 - India-Sweden are signatories to MLI, both have notified their treaty to be CTA
 - Reservation on Article 8 in entirety by Sweden
 - Withholding under Swedish law @30% unless exemption under local law or parent subsidiary directive availed
 - Nil withholding/Exemption under Swedish law available if non-resident shareholder holds at least 10% voting power in Swedish co distributing dividends, and listed shares held as assets, lookback period of 365 days applicable under local law

Case Study II

- Article 10(2) of the India-Sweden Tax Treaty reads as under
 - 2. Notwithstanding the provisions of paragraph (1), such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the beneficial owner of the dividends is a resident of the other Contracting State, the tax so charged shall not exceed 10 per cent of the gross amount of the dividends
- Question
 - What would be the applicable rate of tax on dividends in the hands of Indian Co in Sweden, 10% or 30%?

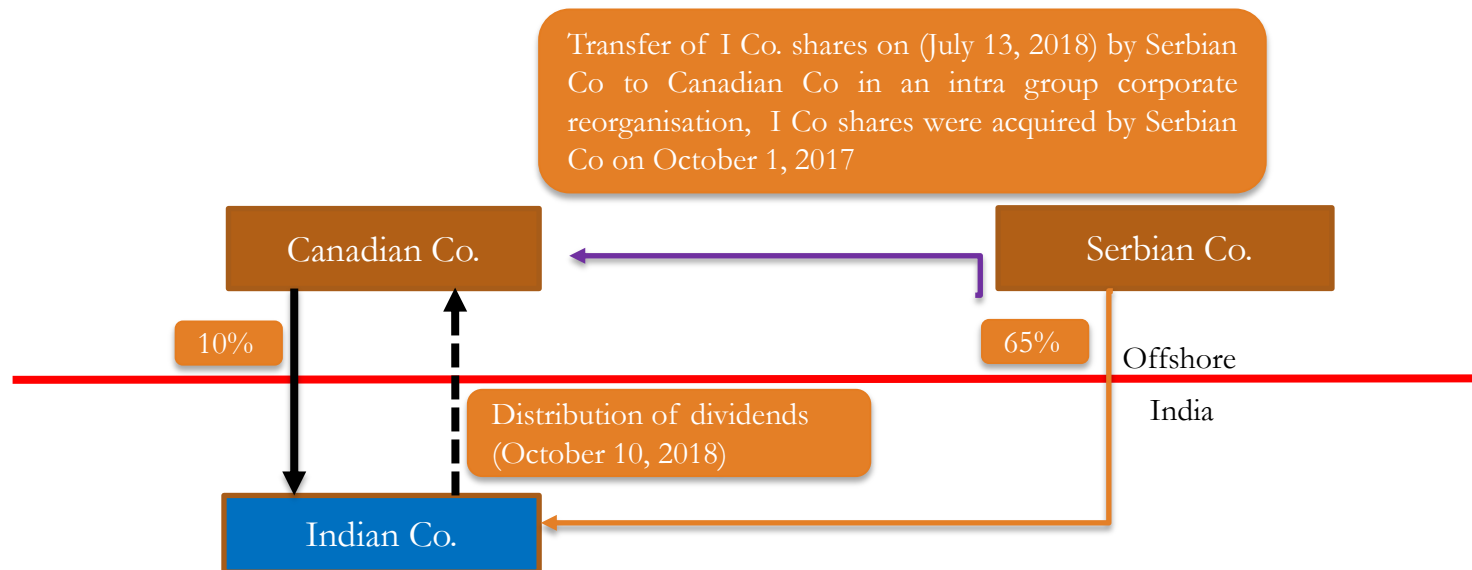
Analysis on Case Study II

- Step-1- Signatory
 - India-Sweden Tax Treaty- CTA under MLI
- Step-2- Notification
 - Sweden has reservation on Article 8 of MLI in its entirety
- Step-3- Effect on the CTA
 - **Article 10(2) not to be amended by Article 8 of MLI**
 - **Look back period not applicable under MLI but applicable due to Swedish domestic law**
- Step 4- Application to facts
 - As Indian Co is a non-resident shareholder which holds at least 10% voting power in Swedish co distributing dividends, Article 10(2) applicable to it, **HOWEVER**

Analysis on Case Study II

- Under the Swedish domestic law, Indian Co which satisfies look back period provided in the Swedish domestic law, should get the benefit of nil withholding tax on dividends under domestic law
- Subject to satisfaction of Principal Purpose Test, and eligibility to claim relief under the India-Sweden Tax Treaty

Case Study III



- Relevant information
 - India-Canada are signatories to MLI, both have notified their treaty to be CTA, reservation on Article 8 withdrawn by Canada
 - India-Canada Tax Treaty provides for 15% tax on dividends in the state of source, if the shareholder is a company holding more than 10% of voting power in company distributing dividends, otherwise at the rate of 25%
 - India-Serbia are signatories to MLI, both have notified their treaty to be CTA, both have notified Article 10(2)(1) of their treaty

Case Study III

- Article 10(2)(1) of the India-Serbia Tax Treaty provides dividends is a resident and according to the laws of that State, but if the beneficial owner of the dividends is a resident of the other Contracting State, the tax so charged shall not exceed 5 per cent, of the gross amount of the dividends if the beneficial owner is a company (other than a partnership) which holds directly at least 25 per cent, of the capital of the company paying the dividends”
- Question
 - What would be the applicable rate of tax on dividends in the hands of Canadian Co in India, 15% or 20% or 25%?

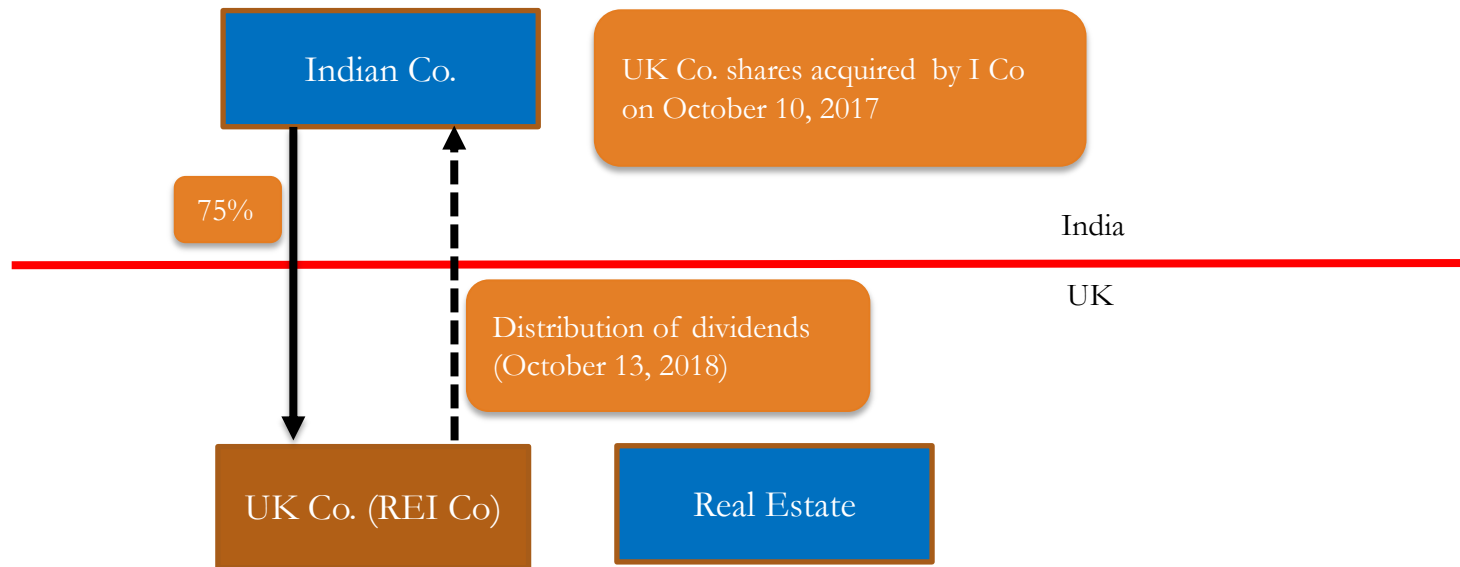
Analysis on Case Study III

- Step-1- Signatory
 - India-Canada Tax Treaty- CTA under MLI
- Step-2- Notification
 - Both have notified Article 10(2)(1) in notification under Article 8(4) of MLI
- Step-3- Effect on the CTA
 - **Article 10(2)(1) to be amended by Article 8 of MLI.**
 - **Look back period applicable under MLI**
- Step 4- Application to facts
 - Period for which shares held by Serbian Co to be included (correspondingly the voting power to be also clubbed for the whole of the Look back period) should enable the Canadian Co to satisfy look back period
 - Above factor to aid Canadian Co in claiming relief under India- Canada Tax Treaty in respect of the withholding rate of 15%

Analysis on Case Study III

- Taxability of direct transfer of shares of Indian Co also to be assessed under Article 13(4) of the India-Serbia Tax Treaty, could result in capital gains tax liability in the hands of Serbian Co
- The taxability of corporate reorganization in Serbia and Canada, also to be assessed
- Subject to satisfaction of Principal Purpose Test, and eligibility to claim relief under the India-Canada Tax Treaty for Canadian Co relevant

Case Study IV



- Relevant information
 - India-UK are signatories to MLI, both have notified their treaty to be CTA, reservation on Article 8 in entirety by UK
 - Withholding on dividends distributed by REIT under local law, partial pass through to company which opts to be taxed as a REIT

Case Study IV

- Article 10(2) of India-UK Tax Treaty reads as
 - 2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the beneficial owner of the dividends is a resident of the other Contracting State, the tax so charged shall not exceed
 - (a) 15 per cent of the gross amount of the dividends where those dividends are paid out of income (including gains) derived directly or indirectly from immovable property within the meaning of Article 6 by an investment vehicle which distributes most of this income annually and whose income from such immovable property is exempted from tax
 - (b) 10 per cent of the gross amount of the dividends, in all other cases
 - Question
 - What would be the applicable rate of tax on dividends in the hands of I Co in UK, 10% or 15% ?

Analysis on Case Study IV

- Step-1- Signatory
 - India-UK Tax Treaty- CTA under MLI
- Step-2- Notification
 - UK has reservation on Article 8 of MLI in its entirety
- Step-3- Effect on the CTA
 - **Article 10(2)(1) not to be amended by Article 8 of MLI.**
 - **Look back period not applicable under MLI**
- Step 4- Application to facts
 - Indian Co should not need to satisfy look back period as Article 10(2) of India-UK Tax treaty to remain unimpacted by the MLI
 - As dividends paid by REIT out of its income, and it is exempt from tax in UK in its hands, Indian company should be eligible to claim relief under Article 10(2)(a) of the Treaty i.e. withholding should be at the rate of 15% of gross rentals /dividends
 - Satisfaction of Principal Purpose Test, and eligibility to claim relief under the India-UK Tax Treaty for the Indian Co relevant

Article 9 MLI- Shares deriving value from immovable property...

- Focused to tackle transactions aimed at artificially avoiding application of Article 13(4) of UN and OECD Models
- Threshold of 50% of the value of the shares being derived from immovable property applied for transfer of shares of a company deriving its value from immovable property situated in the state of source under various tax treaties (**Value/Threshold Test**)
- Value/Threshold Test applied only on the date of alienation of shares and not otherwise, leading to aggressive tax planning strategies, involving contribution of assets to dilute the threshold of 50% of value being derived from immovable property (**Para 28.5 OCED Commentary**)
- Suggestion for a lookback/testing period for the Value/Threshold Test suggested by OECD in and Action Plan 6 to tackle the aggressive tax avoidance strategies; and to include comparable interests such as interest in partnerships etc.

Article 9 MLI-Text

- Article 9 – Capital Gains from Alienation of Shares or Interests of Entities Deriving their Value Principally from Immovable Property
 - (1) Provisions of a Covered Tax Agreement providing that gains derived by a resident of a Contracting Jurisdiction from the alienation of shares or other rights of participation in an entity may be taxed in the other Contracting Jurisdiction provided that these shares or rights derived more than a certain part of their value from immovable property (real property) situated in that other Contracting Jurisdiction (or provided that more than a certain part of the property of the entity consists of such immovable property (real property))
 - a) shall apply if the relevant value threshold is met at any time during the 365 days preceding the alienation; and
 - b) shall apply to shares or comparable interests, such as interests in a partnership or trust (to the extent that such shares or interests are not already covered) in addition to any shares or rights already covered by the provisions
 - (2) The period provided in subparagraph a) of paragraph 1 shall apply in place of or in the absence of a time period for determining whether the relevant value threshold in provisions of a Covered Tax Agreement described in paragraph 1 was met

Article 9 MLI-Text

- 3. A Party may also choose to apply paragraph 4 with respect to its Covered Tax Agreements
- 4. **For purposes of a Covered Tax Agreement, gains derived by a resident of a Contracting Jurisdiction from the alienation of shares or comparable interests, such as interests in a partnership or trust, may be taxed in the other Contracting Jurisdiction if, at any time during the 365 days preceding the alienation, these shares or comparable interests derived more than 50 per cent of their value directly or indirectly from immovable property (real property) situated in that other Contracting Jurisdiction**
- 5. Paragraph 4 shall apply in place of or in the absence of provisions of a Covered Tax Agreement providing that gains derived by a resident of a Contracting Jurisdiction from the alienation of shares or other rights of participation in an entity may be taxed in the other Contracting Jurisdiction provided that these shares or rights derived more than a certain part of their value from immovable property (real property) situated in that other Contracting Jurisdiction, or provided that more than a certain part of the property of the entity consists of such immovable property (real property)

Article 9 MLI-Text

- 6. A Party may reserve the right
 - a) for paragraph 1 not to apply to its Covered Tax Agreements
 - b) for subparagraph a) of paragraph 1 not to apply to its Covered Tax Agreements
 - c) for subparagraph b) of paragraph 1 not to apply to its Covered Tax Agreements
 - d) for subparagraph a) of paragraph 1 not to apply to its Covered Tax Agreements that already contain a provision of the type described in paragraph 1 that includes a period for determining whether the relevant value threshold was met
 - e) for subparagraph b) of paragraph 1 not to apply to its Covered Tax Agreements that already contain a provision of the type described in paragraph 1 that applies to the alienation of interests other than shares
 - f) for paragraph 4 not to apply to its Covered Tax Agreements that already contain the provisions described in paragraph 5

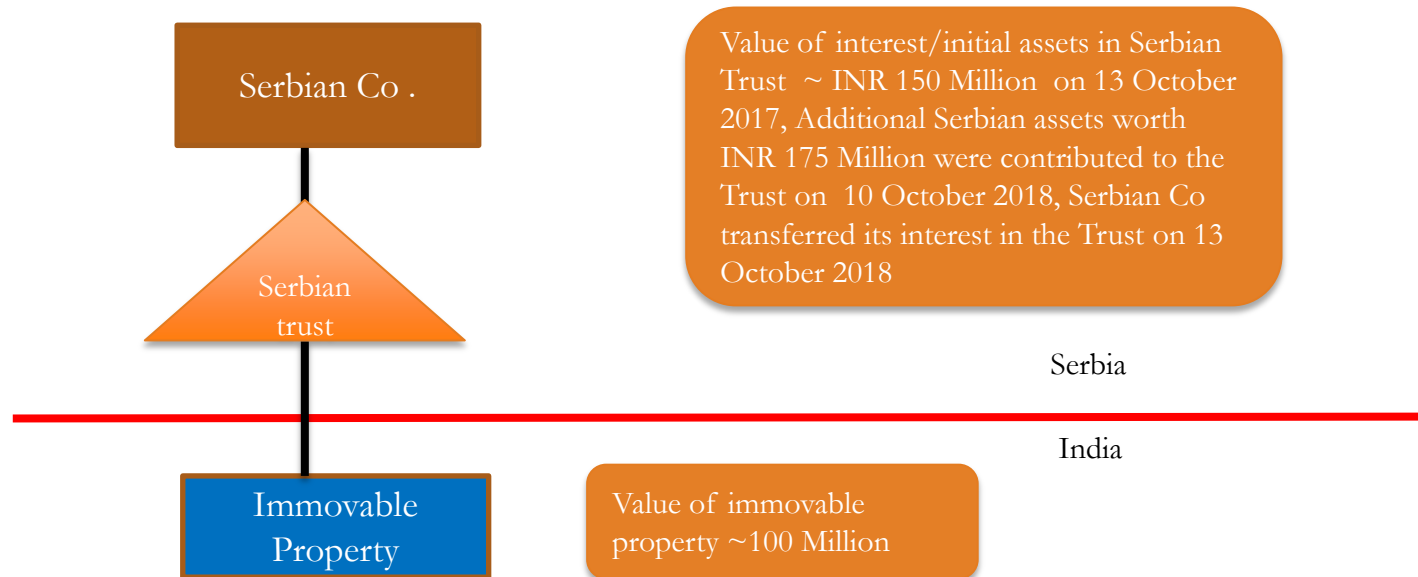
Article 9 MLI-Text

- 7. Each Party that has not made the reservation described in subparagraph a) of paragraph 6 shall notify the Depository of whether each of its Covered Tax Agreements contains a provision described in paragraph 1, and if so, the article and paragraph number of each such provision. Paragraph 1 shall apply with respect to a provision of a Covered Tax Agreement only where all Contracting Jurisdictions have made a notification with respect to that provision
- 8. Each Party that chooses to apply paragraph 4 shall notify the Depository of its choice. Paragraph 4 shall apply to a Covered Tax Agreement only where all Contracting Jurisdictions have made such a notification. In such case, paragraph 1 shall not apply with respect to that Covered Tax Agreement. In the case of a Party that has not made the reservation described in subparagraph f) of paragraph 6 and has made the reservation described in subparagraph a) of paragraph 6, such notification shall also include the list of its Covered Tax Agreements which contain a provision described in paragraph 5, as well as the article and paragraph number of each such provision. Where all Contracting Jurisdictions have made a notification with respect to a provision of a Covered Tax Agreement under this paragraph or paragraph 7, that provision shall be replaced by the provisions of paragraph 4. In other cases, paragraph 4 shall supersede the provisions of the Covered Tax Agreement only to the extent that those provisions are incompatible with paragraph 4

Article 9 MLI- Key Features

- Optional Provision- Bilateral Notification approach to be assessed for each CTA to assess the impact on each CTA
- CTA with notification mismatch could still impact the treaty between India and such signatory, unless specific reservation made by the signatory, owing to the incompatibility clause. To the extent of incompatibility between MLI and the CTA, if no specific reservation made by the signatory treaty partner, the MLI to supersede to the extent the CTA is incompatible
- Signatories free to not apply the Article 9 to their CTAs in entirety or to not apply the lookback period of 365 days or to not expand scope to include comparable interests
- Lookback or testing period of 365 days prior to the date of alienation of shares or comparable interest applicable.
- Threshold of 50% value of the share or comparable interest to trigger for capital gains tax liability in the state where immovable property is situated

Case Study I



- Relevant information
 - India-Serbia are signatories to MLI, both have notified their treaty to be CTA, both have notified Article 14(4) of their treaty
 - Article 14(4) India-Serbia Tax Treaty reads as
 - 4. Gains from the alienation of shares of the capital stock of a company the property of which consists directly or indirectly principally of immovable property situated in a Contracting State may be taxed in that State

Case Study I

- Question
 - Whether transfer of interest in Serbian Trust as on 13 October 2018 would be taxable in India under the amended provisions after MLI comes into effect for the India-Serbia Treaty?

Analysis on Case Study I

- Step-1- Signatory
 - India-Serbia Tax Treaty- CTA under MLI
- Step-2- Notification
 - Both have notified Article 14(4)(1) in notification under Article 8(4) of MLI
- Step-3- Effect on the CTA
 - **Article 10(4) to be amended by Article 9(4) of MLI**
 - **Look back period applicable**
 - **Scope of Article 14 boarded to include comparable interest such interest in partnership, trust etc.**
 - **Threshold of 50% of the value of the share or interest transferred to be the trigger for capital gains tax liability**
- Step 4- Application to facts
 - Serbian Co likely to be taxed in India on gains from transfer of interest in Serbian Trust

Analysis on Case Study I

- Since Serbian Trust derived more than 50% of its value from immovable property in India (100 million out of 150 million) within look back period;
- Additional contribution not relevant for whole of the look back, more than 50% value of interest in the Serbian Trust derived from immovable property in India on days preceding the date of contribution (within the lookback period)

Case Study II



- Relevant information
 - India-Netherlands are signatories to MLI, both have notified their treaty to be CTA, both have notified Article 13(4) of their treaty
 - Article 13(4) of the India-Netherlands Tax Treaty reads as
 - 4. Gains derived by a resident of one of the States from the alienation of shares (other than shares quoted on an approved stock exchange) forming part of a substantial interest in the capital stock of a company which is a resident of the other State, the value of which shares is derived principally from immovable property situated in that other State other than property in which the business of the company was carried on, may be taxed in that other State

Case Study II

- A substantial interest exists when the resident owns 25 per cent or more of the shares of the capital stock of a company
- Question
 - Whether transfer of interest in Dutch LLP as on 13 October 2018 would be taxable in India under the amended provisions after MLI comes into effect for the India-Netherlands Treaty?

Analysis on Case Study II

- Step-1- Signatory
 - India-Netherlands Tax Treaty- CTA under MLI
- Step-2- Notification
 - Netherlands has notified existing provision sunder Article 13(4) of the India-Netherlands, while India has chosen to apply Optional Provision of Article 9(4) of MLI
- Step-3- Effect on the CTA
 - **Article 13(4) to be amended by Article 9 of MLI to the extent of incompatibility therefore**
 - **Scope of Article 13 broadened to include comparable interest such interest in partnership, trust etc.**
 - **Threshold of 50% of the value of the share or interest transferred to be the trigger for capital gains tax liability**
- Step 4- Application to facts
 - Immovable property represents only 100 million out of the 300 Million of value of the interest in the Indian LLP, the threshold test is not met

Analysis on Case Study II

- Transfer of interest in Dutch LLP not taxable in India, as on any day in the look back period (365 days) the threshold test is not met
- Satisfaction of Principal Purpose Test, and eligibility to claim relief under the India-Netherlands Tax Treaty for the Dutch Co relevant

THANK YOU