
MLI - Articles 4, 10 and 11 (BEPS Action Plan 6 Report)

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CTC – Certificate Course on MLI
13 October 2018, Mumbai

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Impact of OECD BEPS Action Plans 2015

OECD BEPS Action Plans 2015

**OECD MC Update
2017 and
changes
Commentary**

**MLI for
amending
existing Tax
Treaties – 84
Countries have
signed so far**

**Other Global
Developments
E.g. UN MC
2017 and
commentary
changes, US
MC 2016, etc.**

**Changes to the
Domestic law by
Countries E.g. India
– Equalization levy**

Changes to Transfer Pricing Framework including in domestic laws

Work to further continue E.g. AP 1 Taxation of Digital Economy.....

India's Status qua MLI - India has notified 93 out of 94 Countries as CTAs of which 35 Countries have not signed MLI. Out of balance 58, two have not notified India and so 56 Tax Treaties need to be studied for potential MLI impact


Each Article of MLI - High Level Structure Matrix

- The modifications to be read into the CTA including optional choices
- The rules for applicability and compatibility to the CTA
 - In place of
 - In absence of
 - Applies to or modifies
 - In place of or in absence of ...
- Reservations of Contracting Jurisdictions for each CTA i.e. Rules for opt out and opt in
 - General : Qua each article and not qua each Country
- Rules for notifying the OECD Depository so that impact of MLI becomes clear
- Various other flexibilities

Multilateral Instrument Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting

Information Brochure

Article of MLI - Rules for opt in / opt out

Expression used in the MLI compatibility provisions	Scenarios	1	2	3	4	5	6
	Country A --→	Notified (opt in)	Notified (opt in)	Reserved (opt out)	Notified (opt in)	Silent	Silent
	Country B --→	Notified (opt in)	Reserved (opt out)	Reserved (opt out)	Silent	Reserved (opt out)	Silent
“in place of”		Yes	No	No	No	No	No
“applies to” or “modifies”		Yes	No	No	No	No	No
“in absence of”		Yes	No	No	No	No	No
“in place of or in absence of”		Yes	No	No	Generally yes*	No	Yes*

- *Exception Article 5 (elimination of double taxation) , Article 8 (Dividend Transfer Transaction). In absence of full matching, the MLI Article will apply and supersede the provision of CTA to the extent of incompatibility as against replacement of MLI Article in the CTA*

Article 4 - Resident

Resident = A person needs to be a resident of a Contracting State for the purpose of the relevant tax treaties and tie breaker rules exist in MC the and Tax Treaties for cases of dual residency

Erstwhile OECD MC Article 4(3) - Tie breaker rule for person other than Individuals – resident of a state where the place of effective management ('**POEM**') is situated

Evolution of the thought process of OECD – Dual Resident Entities ('DREs')

- 1963 Draft Convention – OECD Fiscal Committee expressed the view that it would be rare in practice for a company, etc. to be subject to tax as resident in more than one state
- 2008 update to the OECD MC – an alternative version of article 4(3) according to which CAs of Contracting state to determine by mutual agreement the State of which the DRE is resident for the purpose of the convention. The alternative was basis that DRE cases often involve tax avoidance arrangement

India's reservation to the OECD MC 2014

- India will refer to a MAP for determination of the Country of residence in case of a dual resident person other than an individual if the State in which its effective place of management is situated cannot be determined
- India does not adhere to the interpretation given in paragraph 24 that the place of effective management is the place where key management and commercial decisions that are necessary for the conduct of the entity's business as a whole are in substance made. It is of the view that the place where the main and substantial activity of the entity is carried on is also to be taken into account when determining the place of effective management.

OECD BEPS AP 6 and Developments

OECD BEPS AP 6 continues from the earlier thought process for DREs....

Though dual tax resident of companies is rare but there were cases of tax avoidance involving dual resident companies so OECD recommended a new Article 4(3)

Note: OECD BEPS AP 6 allows states to deal with cases of dual residence through POEM as was the case with earlier MC subject to interpretation in a way that prevents it from being abused.

OECD AP 6 on Article 4(3) of OECD MC

Changes to OECD MC

- Update to the OECD MC in November 2017
- Revised Article 4(3) incorporated to MC in November 2017
- Replacement / edits to paragraphs 21 to 24 of the commentary

Article 4 of MLI

- Incorporate revised Article 4(3) of the OECD MC 2017 to earlier tax treaties which would be CTAs

Article 4 of MLI

- **Article 4(1) of MLI**

- *“Where by reason of the provisions of a Covered Tax Agreement a **person other than an individual** is a **resident of more than one Contracting Jurisdiction**, the **competent authorities of the Contracting Jurisdictions** shall endeavor to determine by mutual agreement the Contracting Jurisdiction of which such person shall be deemed to be a resident for the purposes of the Covered Tax Agreement, **having regard to its place of effective management, the place where it is incorporated or otherwise constituted and any other relevant factors.***
- *In the absence of such agreement, **such person shall not be entitled to any relief or exemption from tax provided by the Covered Tax Agreement except to the extent and in such manner as may be agreed upon by the competent authorities of the Contracting Jurisdictions” (the last sentence)***

Competent Authority has been referred to as CA(s) throughout this presentation

OECD BEPS AP 6 / OECD MC / Article 4 of MLI

- **Resolution plan envisaged between CAs**

- Under aforesaid Article, CAs of the Contracting Jurisdictions to resolve by mutual agreement cases of dual residence of entities other than individuals and consider factors / place where
 - Meeting of BoD or equivalent body?
 - CEO / other executives carry on business?
 - Senior day-to-day management operate?
- Determination under Article 25 – MAP
 - Invoke within three years of first notification wherein tax benefits denied due to dual tax residency
- CAs to deal with such request expeditiously and communicate response to tax payer including period covered by decision

Note: India's observation to OECD MC 2014 seem to have influenced some of the above!

Article 4 of MLI

Paragraph 2 – Applicability

- Paragraph 1 shall apply in **place of or in absence** of provisions of a CTA that provide for rules for determining whether a person other than an individual shall be treated as resident of one of the Contracting Jurisdictions in cases in which that person would otherwise be treated as resident of more than one Contracting Jurisdictions.
- Paragraph 1 shall not apply, however, to the provisions of CTA specifically addressing the residence of companies participating in dual listed-company

Paragraph 3 – Contracting Jurisdictions may reserve the right that :

- Paragraph 4(3)(a) – Entire Article not to apply to CTAs
- Paragraph 4(3)(b) – Entire Article not to apply to CTAs that already address cases of DREs through MAPs
- Paragraph 4(3)(c) – Entire Article not to apply to CTAs that already address cases of DREs by denying tax treaty benefits without requiring the CAs to endeavor to reach mutual agreement
- Paragraph 4(3)(d) – Entire Article not to apply to CTAs that already address cases of DREs through MAPs and also situation where MAP cannot be reached
- Paragraph 4(3)(e) - Last sentence in paragraph 1 to be replaced by - no relief or exemption under CTA if no Mutual Agreement is reached between the CAs
- Paragraph 4(3)(f) - Article not to apply to CTAs with Parties that have made above reservation under Article 4(3)(e)

Article 4 of MLI

Paragraph 4 - Notifying the OECD Depository

- Each contracting jurisdiction / party not making a reservation under 4(3)(a) to notify the depository of whether each of its CTA contains a provisions described in paragraph 2 that is not subject to reservation under paragraph 4(3)(b) to (d) with Article numbers and paragraph numbers
- Where all the Contracting Jurisdictions have made a such a notification with respect to a provisions of a CTA, that provisions shall be replaced by Paragraph 1
- In all other cases, paragraph 1 shall supersede the provisions of the CTA only to the extent that those provisions are incompatible with paragraph 1 (as applicable)

India's notification to OECD

Article 4 – Dual Resident Entities

Notification of Existing Provisions in Listed Agreements

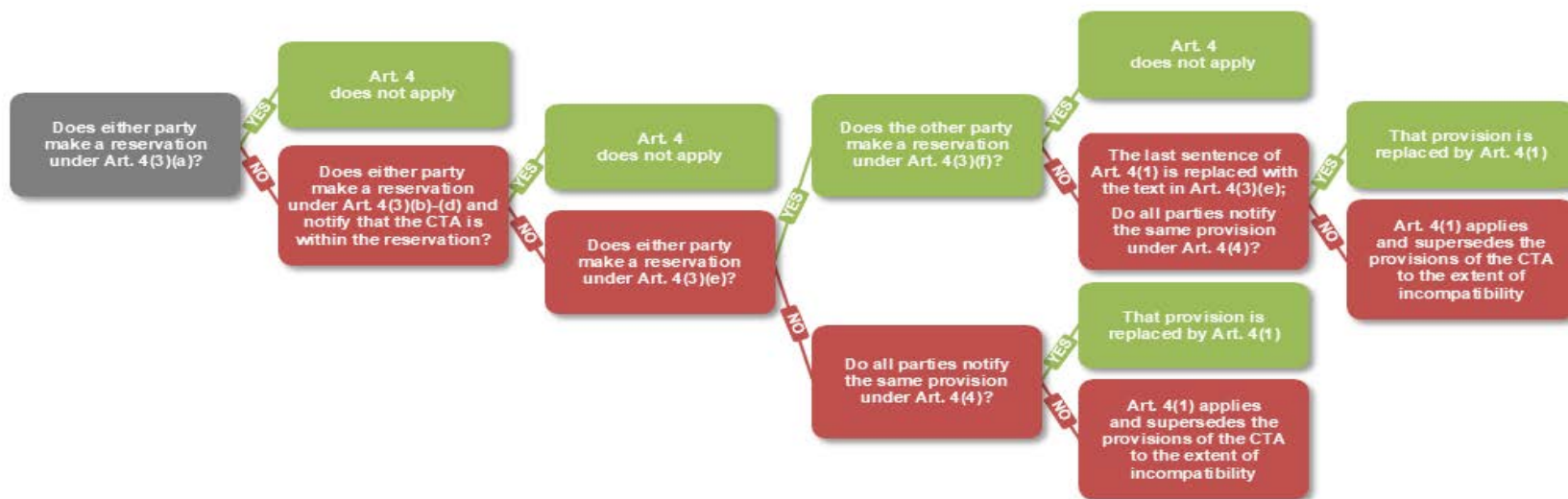
Pursuant to Article 4(4) of the Convention, India considers that the following agreements contain a provision described in Article 4(2) that is not subject to a reservation under Article 4(3)(b) through (d). The article and paragraph number of each such provision is identified below.

Listed Agreement Number	Other Contracting Jurisdiction	Provision
1	Albania	Article 4(3)
2	Armenia	Article 4(3)
3	Australia	Article 4(3)
4	Austria	Article 4(3)
5	Bangladesh	Article 4(3)

Article 4 of MLI – Process Flow



Article 4 Dual Resident Entities



MLI Article 4 – India CTA Examples

Sr.	Countries	Existing Article 4 in tax treaty with India	Options, Reservations and Notification opted by Countries	Impact on India's CTA with the Country
1	Cyprus	Article 4(3) - Where POEM is situated. If by POEM it cannot be determine, then CA to decide.	Reservation under Article 4(3)(a) of the MLI	Article 4 would not apply
2	Singapore	Article 4(3) - Where POEM is situated	Reservation under Article 4(3)(a) of the MLI	
3	Japan	Article 4(2) – Determine by the competent authorities	Article 4(3)(e) - Japan reserved the right to replace the last sentence of Article 4(1) : In the absence of such agreement, such person shall not be entitled to any relief or exemption from tax provided by the CTA	India has not opted for 4(3)(f) - Modified Article 4 of MLI will apply with last sentence replacement
4 - 6	Netherlands UK Russia	Article 4(3) - Where POEM is situated	Opt in without any reservations	Article 4(1) will apply without any modification of last sentence

Other MLI articles relevant for Article 4

Article 25

- DREs can now present MAP to CAs of any Contracting Jurisdictions
- Unresolved MAP case for two years to be subject to Arbitration on written request from the DREs if no decision rendered thereon by any domestic court or tribunal of either state
- DREs may not accept the MAPs decision implemented by Arbitration
- If DREs accepts then the decision to be implemented notwithstanding statutory time limits through mutual mode of settlement

Article 4 - Other developments post MLI

- **Revised Article 4(3) of UN MC (Dec 2017)**

- Erstwhile Article 4(3) of UN MC was in line with erstwhile OECD MC
- Post OECD BEPS / November 2017 Update to OECD MC / MLI – in the Dec 17 update to the UN MC
- The revised Article 4(3) of UN MC 2017 is in line with the revised Article 4(3) of OECD MC 2017 / MLI provisions

- **Article 4(4) of US MC 2016**

- Where by reason of the provisions of paragraph 1 of this Article a company is a resident of both Contracting States, such company shall not be treated as a resident of either Contracting State for purposes of its claiming the benefits provided by this Convention.
- Where by reason of the provisions of paragraph 1 of this Article a person other than an individual or a company is a resident of both Contracting States, the competent authorities of the Contracting States shall by mutual agreement **endeavor** to determine the mode of application of this Convention to that person.

Note: No mention of what happens when no agreement is reached between CAs

Article 4 - Issues

Tax Treaties do not define POEM – so domestic tax law relevant as per Article 2

POEM test per CBDT Circular v. Model Conventions

Pending MAP how to deal with outstanding litigations, outstanding tax and interest demands and penalty proceedings

Where treaties which are not CTAs and contain POEM can still take recourse to MAP if both State conclude POEM in their respective jurisdiction

Absence of Article 4 of MLI v. PPT?

MAP decision / rationale are not made public by Tax Authorities?

AP 6: Anti-abuse rule for PE in Third State

OECD MC 2014 and abuses with respect to PE in Third State (Triangular situations)

- OECD MC deems PE to be a distinct and separate person and uses hypothesis of separate legal person (authorized OECD approach – AOA) including for transfer pricing
- Paragraph 32 of commentary on Article 10 – Transfer of shares to PE for dividend taxation benefits
- Paragraph 25 of commentary on Article 11 – Transfer of loans to PE interest taxation benefits
- Paragraph 21 of commentary on Article 12 – Transfer of property to PE for royalty taxation benefit
- State of Residence exempts or taxes at low rates profits of PEs in Third State
- Paragraph 74 of commentary on Article 24 stipulated anti-abuse provisions – DTAA benefits by a Contracting Jurisdictions only if income of PE situated in Third state is taxed normally in the State of PE
- OECD BEPS 2014 revealed issues with different aspects of the above provisions
- May 2015 – USA released a new version of similar provisions for public comments

Paragraph 1

- If Income of an enterprise of a contracting jurisdiction derived from other contracting jurisdiction treated by the first contracting jurisdiction as income of PE of the enterprise in the Third Jurisdiction and exempt in the first contracting jurisdiction, then the benefit of CTA not available if tax paid in the Third State is less than 60 percent of the tax that would be imposed in the first mentioned Contracting Jurisdictions if the PE were assumed to be situated in that Jurisdiction.
- In such cases, the Source Jurisdiction granted right to tax such income [gross basis if in the nature of dividend/ interest and royalties and other income as per domestic law of the source state]

Paragraph 2

- Exceptions to above rule in paragraph 1 if the income of PE in Third Jurisdiction is from:
 - Active conduct of business carried on through the PE other than the business of
 - ❖ Making / Managing / Simply holding investments for the enterprise unless activities are of banking / insurance / registered securities dealer

Paragraph 3

- Even if paragraph 1 and 2 above are not satisfied, in response to a request by the Resident, CAs may nevertheless grant CTA benefit if justified but to consult each other

MLI Article 10 - Anti-abuse rule for PE in Third State

Paragraph 4

- Paragraph 1 to 3 shall apply in place of or in absence of provisions in CTA that deny or limit benefits that would otherwise be granted to an enterprise of the contracting jurisdiction which derives income from the other contracting jurisdiction that is attributable to a PE of the enterprise in the third jurisdiction

Paragraph 5 - Parties may reserve the right that:

- Paragraph 10(5)(a) - For the entirety of the Article 10 of MLI not to apply to CTAs
- Paragraph 10(5)(b) - For the entirety of the Article 10 of MLI not to apply to CTAs which already contain the provisions described in paragraph 4
- Paragraph 10(5)(c) - For the Article to apply only to CTAs that already contain the provisions described in paragraph 4 of Article 10

Paragraph 6 - Notifying the OECD Depository

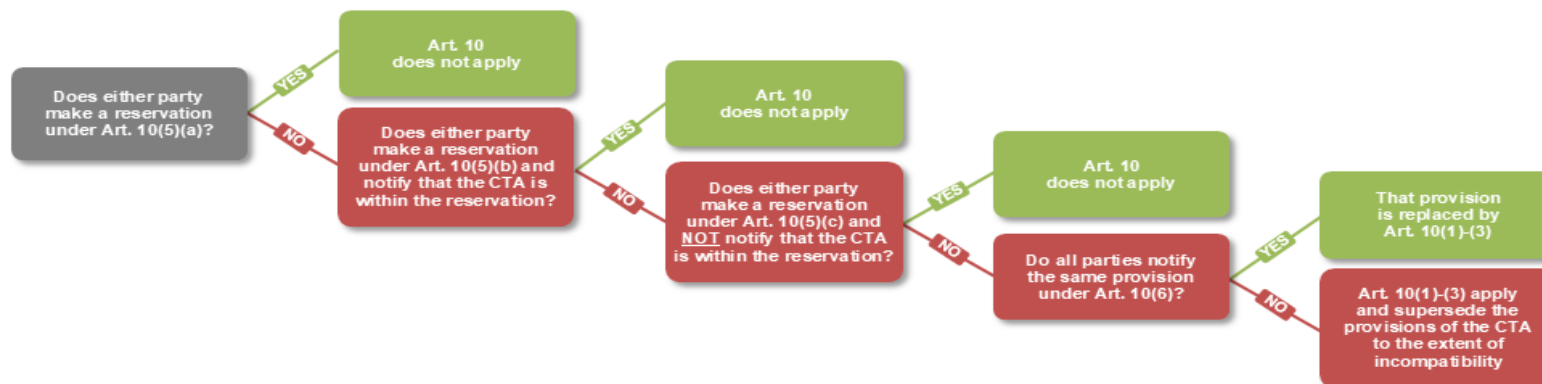
- Each party not making a reservation under 10(5)(a)/(b) to notify the depository of whether each of its CTA contains a provisions described in paragraph 4 with Article numbers and paragraph numbers
- Where all the Contracting Jurisdictions have made a such a notification with respect to a provisions of a CTA, that provisions shall be replaced by Paragraph 1 through 3
- In all other cases, paragraph 1 to 3 shall supersede the provisions of the CTC only to the extent that those provisions are incompatible with those paragraphs

Article 10 of MLI - Process Flow



Article 10

Anti-abuse Rule for Permanent Establishments Situated in Third Jurisdictions



MLI Article 10 – India CTA Examples

Sr	Countries	Existing DTAA	Options, Reservations and Notification by the Country	Impact on India's CTA with the Country
1	Cyprus	No existing provisions	Reserved the right under 5(a) for entirety of Article 10 to not to apply to its CTA	Article 10 would not apply
2	Singapore			
3	UK			
4	Netherlands		Netherlands is silent on the applicability of this Article	India is silent on applicability of this Article. Thus, paragraph 1 to 3 of Article 10 will apply to CTA to the extent of incompatibility since it is "in place of" or "in absence of" criteria Article
5	Japan		Japan is silent on the applicability of this Article.	
6	Russia		Russia is silent on the applicability of this Article.	

Article 10 of MLI - Developments

Developments post OECD AP 6 and Article 10 of MLI

OECD MC 2017 – new Article 29

- New Article 29 in OECD MC 2017
- Transfer of shares, debt-claims, rights or property to PE set-up in third state which do not tax such investment income of offer preferential tax regime (or) where state of residence exempts the investment income of the PE in the third state
- Above cases relevant only if PPT satisfied i.e. conduct of PE is not to obtain benefit of conventions
- More comprehensive solution – combined tax in state of PE and state of residence is 60 percent of the tax as applicable to State of Residence in absence of any such PE/ arrangement

UN MC 2017

- Similar provisions introduced

Article 10 - Issues and things to watch out for?

Taxpayers expected to know all the laws of Third jurisdictions and computation mechanism of first mentioned jurisdictions?

No minimum threshold

Active v. Passive income characterization?

Consulting between CA v. MAP?

What happens if income and tax and income increase due to disputes?

Dilemma at withholding tax stage?

MLI Article 11 (1 of 3)

Paragraph 1 - A CTA shall not affect the taxation by a contracting jurisdiction of its Residents except with respect to the benefits granted under the provisions of the CTA which :

- a) Require a correlative / corresponding adjustments following an initial adjustment made by the other contracting jurisdiction as per CTA on the profits of the PE of the enterprise or the profits of an associated enterprise [Article 7(3) / 9(2) of OECD MC]
- b) May affect how a contracting jurisdiction taxes an individual resident in respect of service rendered to the other contracting jurisdiction or a political subdivision or local authority or other comparable body thereof (Article 19 of OECD MC)
- c) May affect how a contracting jurisdiction taxes an individual resident if that individual is a student, business apprentice, trainee, teacher, professor, lecturer, instructor, research or research scholar who meets the conditions of the CTA (Article 20 of OECD MC with extensions as provided in commentary / CTAs)
- d) Require that contracting jurisdiction provide tax credit / tax exemption to residents with respect to the income that other contracting jurisdiction may tax in accordance with the CTA (including PE) (Article 23A / 23B of OECD MC)
- e) Which protects residents of the Contracting Jurisdiction against certain discriminatory taxation practices by that Contracting jurisdiction (Article 24 of OECD MC – E.g. Disallowing deduction for payments to Resident of other Contracting jurisdiction as stipulated, etc.)

MLI Article 11 (2 of 3)

Paragraph 1 (Cont'd)

A CTA shall not affect the taxation by a contracting jurisdiction of its Residents except with respect to the benefits granted under the provisions of the CTA which :

- f) Which allows residents of that contracting jurisdiction to request that the CA of that or either contracting jurisdiction to consider cases of taxation not in accordance with the CTA (Article 25 of OECD MC)
- g) Which may affect how that Contracting Jurisdiction taxes an individual who is a resident of that Contracting Jurisdiction when that individual is a member of a diplomatic mission, government mission or consular post of the other Contracting Jurisdiction; (Article 19 & 28 of OECD MC)
- h) Which provide that pensions or other payments made under the social security legislation of the other Contracting Jurisdiction shall be taxable only in that other Contracting Jurisdiction; (Article 19 & 28 of OECD MC)
- i) which provide that pensions and similar payments, annuities, alimony payments or other maintenance payments arising in the other Contracting Jurisdiction shall be taxable only in that other Contracting Jurisdiction (Article 18 of OECD MC); or
- j) which otherwise expressly limit a Contracting Jurisdiction's right to tax its own residents or provide expressly that the Contracting Jurisdiction in which an item of income arises has the exclusive right to tax that item of income.

MLI Article 11 (3 of 3)

Paragraph 2 – Rule for modifying CTA

- Paragraph 1 shall apply in place of or in absence of provisions of CTA stating that the CTA would not affect the taxation by contracting jurisdiction of its Residents

Paragraph 3 - Parties may reserve the right that:

- Sub-paragraph (a) - For the entirety of the Article 11 of MLI not to apply to its CTAs
- Sub-paragraph (b) - For the entirety of the Article not to apply to CTAs that already contain the provisions described in paragraph 2

Paragraph 4 – Notification to the OECD Depository

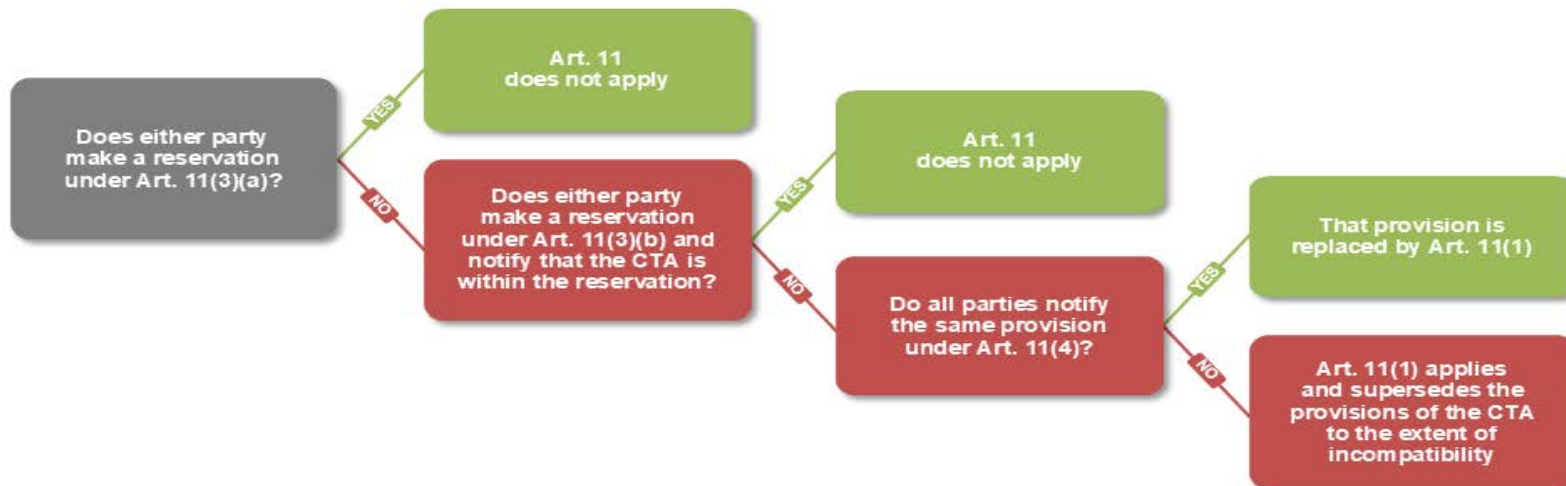
- Each party not making a reservation under 11(3)(a)/(b) to notify the depository of whether each of its CTA contains a provisions described in paragraph 2 with Article numbers and paragraph numbers
- Where all the Contracting Jurisdictions have made a such a notification with respect to a provisions of a CTA, that provisions shall be replaced by Paragraph 1
- In all other cases, paragraph 1 shall supersede the provisions of the CTA only to the extent that those provisions are incompatible with paragraph 1

Article 11 of MLI – Process Flow



Article 11

Application of Tax Agreements to Restrict a Party's Right to Tax its Own Residents



NOTE: Where either party makes a reservation under Art. 11(3)(a), the provisions of Art. 3(1) will be modified under Art. 3(3) to ensure that its application will not interfere with the taxation by a Contracting Jurisdiction of its residents.

MLI Article 11 – India CTA Examples

Sr.	Countries	Existing Provision in DTAA	Options, Reservations and Notification opted by the Country	Impact on India's CTA with that Country
1	Cyprus	No existing provision	Reserved the right under Article 11(3)(a) for entirety of Article 11 to not to apply to its CTA	Article 11 would not apply
2	Netherlands			
3	Singapore			
4	Japan			
5	UK		Not reserved the right to applicability of this article. Further, they have provided a list of CTA's where similar provision already exists	India is silent on the applicability of this article and UK has not reserved the applicability of this article, paragraph 1 of Article 11 will get added to India-UK CTA since it is "in place of" or "in absence of" criteria article
6	Russia		Russia is silent on the applicability of this Article.	Since India and Russia both are silent on the applicability of this article, paragraph 1 of Article 11 will apply to CTA to the extent of incompatibility since it is "in place of" or "in absence of" criteria Article

Article 11 - Issues and things to watch out for?

Indian income-tax provisions to tax Resident on global income?

Correlative adjustments for Income of PE of Indian Resident outside India?

Whether Indian Resident can approach competent Authority of other Countries?

Things to do

- Self-study each MLI provisions
- Check your results with the OECD Depository so that impact of MLI becomes clear (refer <http://www.oecd.org/tax/treaties/mli-matching-database.htm>)
- MLI v. OECD MC commentary
- Study of UN MC 2017 and US MC 2016
- Update of OECD Developments

The screenshot shows the OECD MLI Matching Database (beta) interface. The browser address bar displays the URL www.oecd.org/tax/treaties/mli-matching-database.htm. The page title is "MLI Matching Database (beta)".

The main content area displays a comparison between India and Russia for the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI). The table below summarizes the key information:

Select jurisdictions	India	Russia	Read the disclaimer
Status as of 23 September 2018	India	Russia	
Signature MLI	6/7/2007	6/7/2007	
Notification instrument deposited			
Status of List	Provisional	Provisional	
Article 2 Covered Tax Agreement	The agreement would be a 'Covered Tax Agreement'.		
Article 3 Transparent Entities	Article 3 would not apply.		
Article 4 Dual Resident Entities	A.4(B) would be replaced by Article 4(A).		
Article 5 Application for methods for Elimination of Double Taxation	Article 5 would not apply.		
	The preamble text described in Article 6(1) would be included		

Q&A



Questions

&



Answers

THANK YOU ALL FOR YOUR ATTENTION !

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