

**Artificial avoidance of PE  
status Commissionaire and  
Agency PE, Amendment in  
Explanation 2 to Section  
9(1)(i) and its Analysis –  
Articles 12 and 15 of MLI  
(BEPS Action 7 report)**

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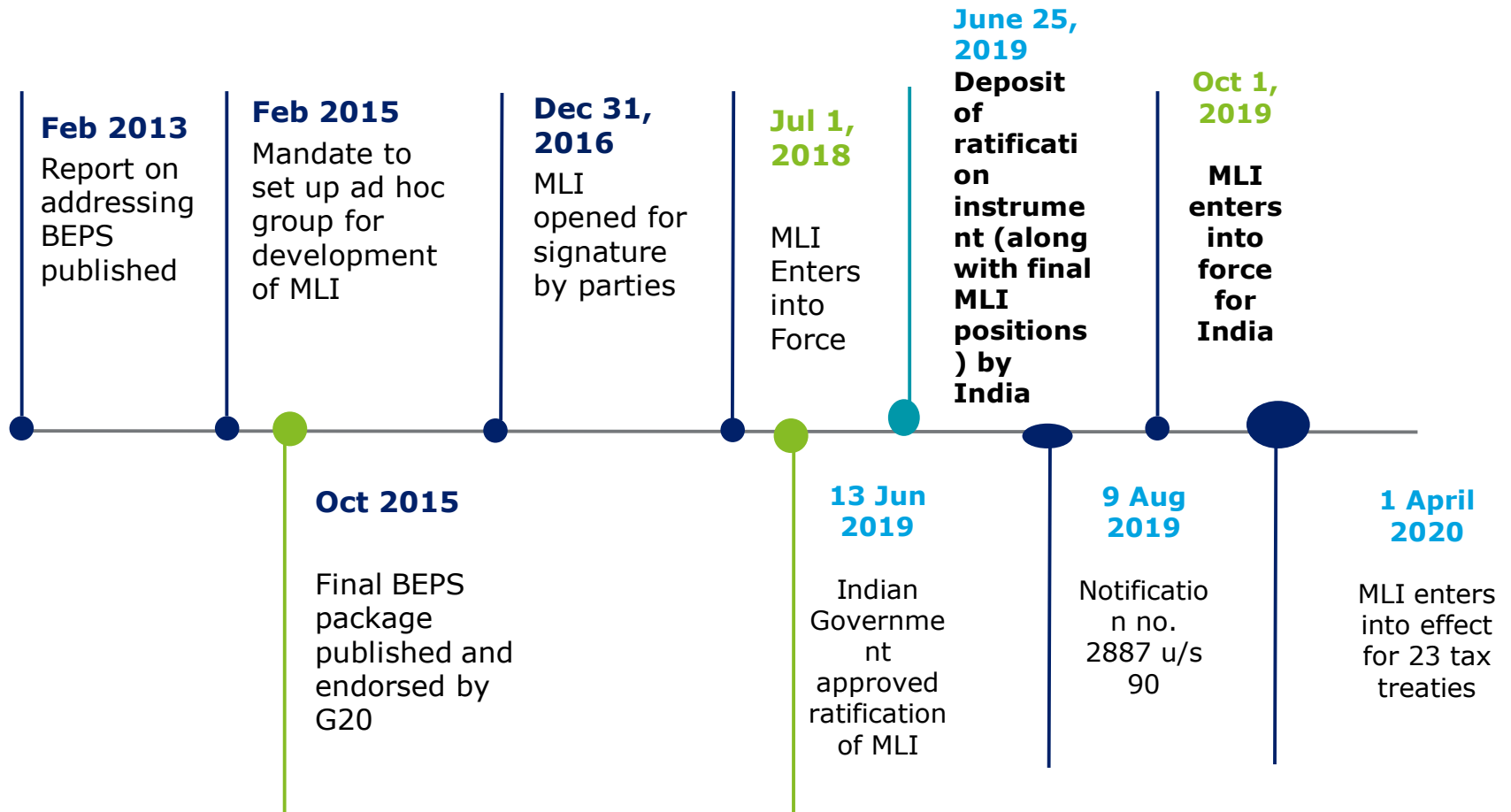
**October 12, 2019**

# ***Overview***

- Background
- BEPS Action 7 : What are the issues addressed
- How are these issues addressed [Article 12(1) & (2)]
- Machinery provisions [Article 12(3)-(6)]
- Analysis of new Agency PE provisions
- Other issues related to MLI
- Amendments to section 9(1)(i)
- Article 15: Persons closely related to the enterprise
- Questions

# ***Background***

# Relevant dates and events



# ***Implementation of BEPS Package***

- Amendment of domestic laws
- Amendment of OECD Model Convention
- Amendment of OECD Commentary
- Amendment of tax treaties (more than 3000 )

***MLI – An instrument to amend all tax treaties in one go!***

***One Negotiation, One Signature, One Ratification***

# ***BEPS – Action Plans to be implemented through treaties***

Action 2: Neutralizing the effects of hybrid mismatch arrangements

Action 6: Preventing treaty abuse

Action 7: Preventing the artificial avoidance of PE status

Action 14: Making dispute resolution mechanisms more effective

**Action 15: Multilateral instrument**

# *Indian perspective*

- India has notified 93 jurisdictions (out of 95 jurisdictions with whom India has tax treaty) to be covered by MLI. China and Marshall Island have been excluded by India
- The following jurisdictions have not notified tax treaty with India under MLI
  - China
  - Germany
  - Mauritius
  - Switzerland
- Indian tax treaties with the above jurisdictions shall not be impacted by the MLI
- USA, Taipei (specified association – Sec 90A)

Understanding  
MLI

Understanding  
the  
combined  
reading of  
MLI and DTAA  
– Identifying  
the law

Understanding  
revised text of  
tax treaties



# *Steps to apply MLI*

- Whether Country A has signed MLI?
- Whether Country B has signed MLI?
- Whether Country A has notified treaty between A and B as a CTA?
- Whether Country B has also notified the treaty between A and B as a CTA?
- Check the Notifications and reservations on each of the Article of both the Countries
- Is ratification, acceptance or approval process completed?

# MLI to enter into effect from 1 April 2020 (for withholding and other taxes)

## List of jurisdictions that have notified tax treaty with India as CTA and have deposited their ratification instruments with OECD Secretariat

Austria	Australia	<b>Belgium</b>
Finland	<b>France</b>	Georgia
Ireland	<b>Israel</b>	<b>Japan</b>
<b>Lithuania</b>	Luxembourg	Malta
Netherlands	<b>New Zealand</b>	Poland
<b>Russia</b>	<b>Serbia</b>	Singapore
<b>Slovak Republic</b>	<b>Slovenia</b>	Sweden
United Kingdom	UAE	

***BEPS Action 7 : What are the  
issues addressed?***

# BEPS Action 7

## Preventing Artificial Avoidance of PE Status

- A. Artificial avoidance of PE status through *commissionnaire* arrangements and similar strategies
- B. Artificial avoidance of PE status through the specific activity exemptions
- C. Other strategies for the artificial avoidance of PE status
  - 1. Splitting up of contracts
  - 2. *Strategies for selling insurance in a State without having a PE therein*

## ***Commissionnaire arrangement (Issue 1)***

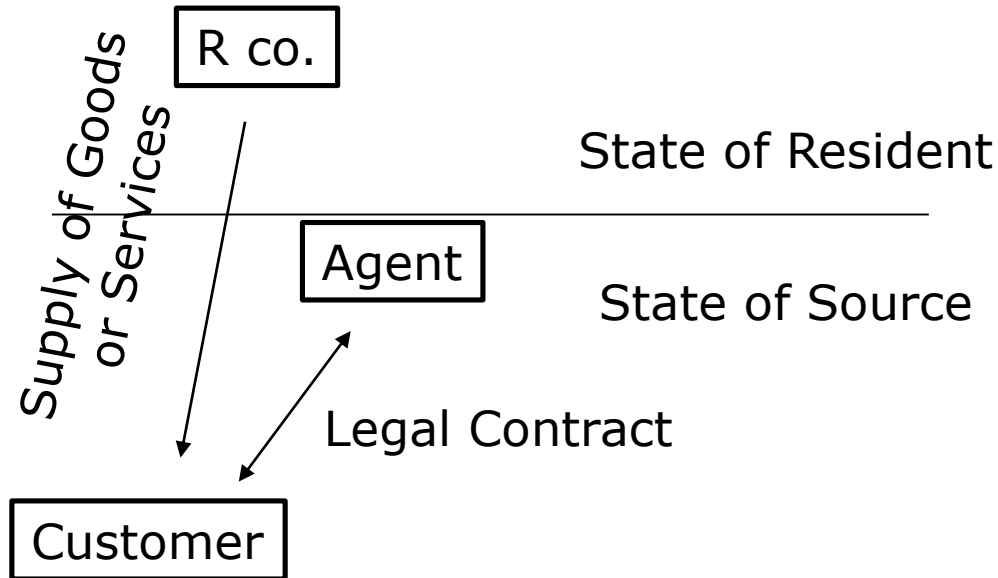
*“as an arrangement through which a person sells products in a State in its own name but on behalf of a foreign enterprise that is the owner of these products.”*



*Original Article 5(5) – OECD Model, 2014*

*“.....other than an agent of independent status to whom paragraph 6 applies – is acting on behalf of an enterprise and has, and habitually exercises, in a Contracting State an authority to conclude contract in the name of the enterprise, .....*”

# ***Commissionnaire arrangement (Issue 1)***



- No legal arrangement between R co. & Customer
- Legal arrangement between Agent & Customer

## Other similar strategies

### ***Issue 2***

*"where contracts which are substantially negotiated in a State are not formally concluded in that State because they are finalised or authorised abroad"*

### ***Issue 3***

*"or where the person that habitually exercises an authority to conclude contracts constitutes an "independent agent" to which the exception of Art. 5(6) applies even though it is closely related to the foreign enterprise on behalf of which it is acting."*

***How are these issues addressed?***



# ***Article 12 of MLI***

**1.** Notwithstanding the provisions of a Covered Tax Agreement that define the term "permanent establishment", but subject to paragraph 2, where a person is acting in a Contracting Jurisdiction to a Covered Tax Agreement on behalf of an enterprise and, in doing so, habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise, and these contracts are:

- a) in the name of the enterprise; or
- b) for the transfer of the ownership of, or for the granting of the right to use, property owned by that enterprise or that the enterprise has the right to use; or
- c) for the provision of services by that enterprise,

that enterprise shall be deemed to have a permanent establishment in that Contracting Jurisdiction in respect of any activities which that person undertakes for the enterprise unless these activities, if they were exercised by the enterprise through a fixed place of business of that enterprise situated in that Contracting Jurisdiction, would not cause that fixed place of business to be deemed to constitute a permanent establishment under the definition of permanent establishment included in the Covered Tax Agreement (as it may be modified by this Convention).

## ***Article 12 of MLI***

**2.** Paragraph 1 shall not apply where the person acting in a Contracting Jurisdiction to a Covered Tax Agreement on behalf of an enterprise of the other Contracting Jurisdiction carries on business in the first-mentioned Contracting Jurisdiction as an independent agent and acts for the enterprise in the ordinary course of that business. Where, however, a person acts exclusively or almost exclusively on behalf of one or more enterprises to which it is closely related, that person shall not be considered to be an independent agent within the meaning of this paragraph with respect to any such enterprise.

## How are the issues addressed?

Sr. No.	Issue	Solution
1	Commissionnaire arrangements	Agency PE created even when the contracts are not in the name of the enterprise [Art 12(1) of MLI]
2	Substantial negotiation in the source country but actual conclusion of contract outside the source country	Introduction of concept of principal role leading to conclusion of contract that are routinely concluded without material modification by the enterprise [Art 12(1) of MLI]
3	<i>Exclusion of "independent agents" even though it is closely related to the foreign enterprise</i>	Denial of independent agent status to closely related persons. [Art 12(2) of MLI]

***Mechanics – Machinery provision***  
***[Article 12(3) – (6)]***

# Article 12(4) of MLI

*4. A party may reserve the right for the entirety of this Article not to apply to its Covered Tax Agreements.*

Indian treaty partners who have made reservation for not applying Article 12 to their Covered Tax Agreements:

Austria	Australia	Finland
Georgia	Ireland	Luxembourg
Malta	Netherlands	Poland
Singapore	Sweden	United Kingdom
UAE		

## Article 12(5)

**5.** Each Party that has not made a reservation described in paragraph 4 shall notify the Depositary of whether each of its Covered Tax Agreements contains a provision described in subparagraph a) of paragraph 3, as well as 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.

- All Contracting Jurisdiction / both Contracting Jurisdictions
- Asymmetrical application avoided

## Article 12(6)

**6.** Each Party that has not made a reservation described in paragraph 4 shall notify the Depository of whether each of its Covered Tax Agreements contains a provision described in sub-paragraph b) of paragraph 3, as well as the article and paragraph number of each such provision. Paragraph 2 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.

- All Contracting Jurisdiction / both Contracting Jurisdictions
- Asymmetrical application avoided

## **Article 12(3)(a) of MLI**

**3.** (a) Paragraph 1 shall apply ***in place of*** provisions of a Covered Tax Agreement that describe the conditions under which an enterprise shall be deemed to have a permanent establishment in a Contracting Jurisdiction (*or a person shall be deemed to be a permanent establishment in a Contracting Jurisdiction*) in respect of an activity which a person other than an agent of an independent status undertakes for the enterprise, but only to the extent that such provisions address the situation in which such person has, and habitually exercises, in that Contracting Jurisdiction an authority to conclude contracts in the name of the enterprise.



## ***India-Israel Article 5(5)***

5. Notwithstanding the provisions of paragraphs 1 and 2, where a person - other than an agent of an independent status to whom paragraph 6 applies - is acting on behalf of an enterprise and has, and habitually exercises, in a Contracting State an authority to conclude contracts in the name of the enterprise, that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business, would not make this place of business a permanent establishment under the provisions of that paragraph.

***Does Article 12(3)(a) replace such a provision?***

# ***Article 5(5) of India-France***

5. Notwithstanding the provisions of paragraphs 1 and 2 where a person other than an agent of an independent status to whom paragraph 6 applies is acting in one of the Contracting States on behalf of an enterprise of the other Contracting State, that enterprise shall be deemed to have a permanent establishment in the first-mentioned Contracting State, if :

(a) he has and habitually exercises in that Contracting State an authority to conclude contracts on behalf of the enterprise, unless, his activities are limited to the purchase of goods or merchandise for the enterprise ; or

(b) he has no such authority, but habitually maintains in the first-mentioned Contracting State a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise.

***Does commissionaire arrangement get covered in this provision?***

***Does this provision deal with conclusion of contract in the name of enterprise as contemplated in Article 12(3)(a)?***

## India-Japan Article 5(7)

7. Notwithstanding the provisions of paragraphs 1 and 2, where a person other than an agent of an independent status to whom paragraph 8 applies - is acting in a Contracting State on behalf of an enterprise of the other Contracting State, that enterprise shall be deemed to have a permanent establishment in the first-mentioned Contracting State, if

(a) he has and habitually exercises in that Contracting State an authority to conclude contracts on behalf of the enterprise, unless his activities are limited to those mentioned in paragraph 6 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph ;

(b) he has no such authority, but habitually maintains in the first-mentioned Contracting State a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise ; or

(c ) he habitually secures orders in the first-mentioned Contracting State, wholly or almost wholly for the enterprise itself or for the enterprise and other enterprises controlling, controlled by, or subject to the same common control as that enterprise.

***Opening para for clause (b) and (c)?***

# ***Article 12(3)(b) of MLI***

**3.** (b) Paragraph 2 shall apply in place of provisions of a Covered Tax Agreement that provide that an enterprise shall not be deemed to have a permanent establishment in a Contracting Jurisdiction in respect of an activity which an agent of an independent status undertakes for the enterprise.

***No reference to "extent of" replacement***

# ***India-Israel Article 5(6)***

6. An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that State through a broker, general commission agent or any other of an independent status, provided that such persons are acting in the ordinary course of their business, and in their commercial and financial relations with the enterprise, no conditions are agreed or imposed which differ from those usually agreed between independent persons.

# ***India- France Article 5(6)***

6. An enterprise of one of the Contracting States shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other Contracting State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business. However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise, he will not be considered an agent of an independent status within the meaning of this paragraph if it is shown that the transactions between the agent and the enterprise were not made under at arm's length conditions.

# ***Analysis of new Agency PE provisions***

# ***Activities resulting in agency PE***

**1.** Notwithstanding the provisions of a Covered Tax Agreement that define the term "permanent establishment", but subject to paragraph 2, where a person is acting in a Contracting Jurisdiction to a Covered Tax Agreement on behalf of an enterprise and, in doing so, habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise, and these contracts are:

- a) in the name of the enterprise; or
- b) for the transfer of the ownership of, or for the granting of the right to use, property owned by that enterprise or that the enterprise has the right to use; or
- c) for the provision of services by that enterprise

**New provision overrides entire Article (except independent PE clause), as against para 1 and para 2.**

Acting on behalf + conclusion of contract: a), b), c)

Acting on behalf + principal role: a), b), c)

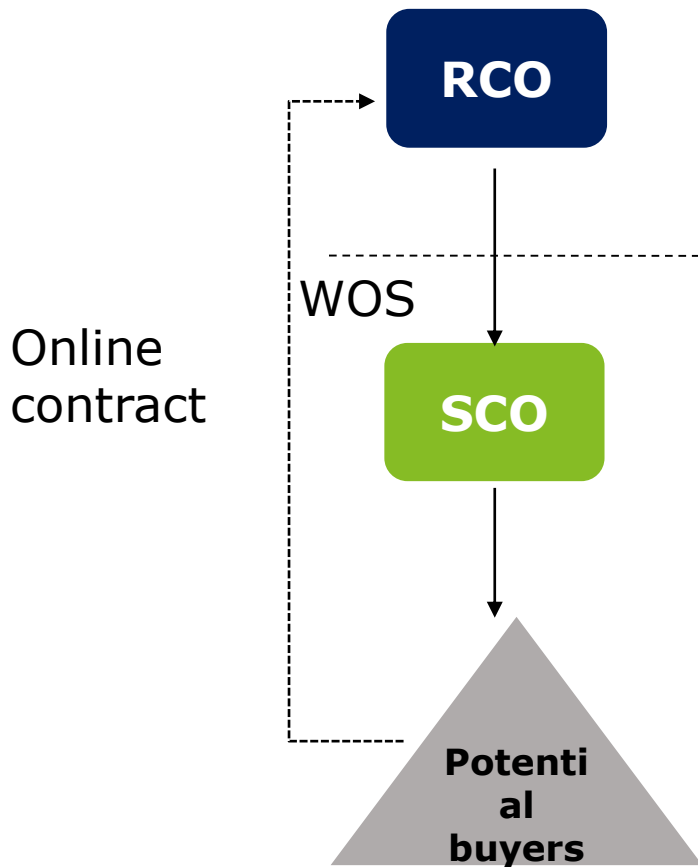
Services, property, right to use property

Short sales



# ***Analysis of Agency PE provision***

- *Principal role leading to conclusion of contract*
  - *Direct outcome of action*
  - *Relevance of law dealing with contracts*
  - *Principle role*
    - *Sales force*
    - *Convincing counter party*
    - *Example of online purchase [ para 90]*
- *When the contracts are not "routinely concluded without material modification"*
  - *Review and approval does not result in change in "key aspects"*



Resident of State R

Resident of State S

- Activities undertaken by SCO for sale of RCO's products:
- Emails, Telephone calls and personal visits
  - Anticipate the needs of account holders
  - Convince them to buy goods and services online
  - SCO cannot makes any changes to the pricing or other terms of the contract

.....that enterprise shall be deemed to have a permanent establishment in that Contracting Jurisdiction in respect of any activities which that person undertakes for the enterprise unless these activities, if they were exercised by the enterprise through a fixed place of business of that enterprise situated in that Contracting Jurisdiction, would not cause that fixed place of business to be deemed to constitute a permanent establishment under the definition of permanent establishment included in the Covered Tax Agreement (as it may be modified by this Convention).

### **Extent of PE – type of activities**

Absence of reference to para dealing with specific activity exemption [Art 5(4)]

# ***Some more guidance from OECD Commentary***

- *Isolated contracts*
- *Conclusion of Contracts*
  - *Relevance of law dealing with contracts*
  - *Relevance of actual signature outside the Contracting State (para 87)*
- *Limited Risk Distributor (LRD)*
- *Conclusion of contracts – business proper contracts*
- *Attendance or participation in meetings*
- *Habitually exercise*
  - *Permanence*
  - *Frequency / threshold?*

## ***India's position on Article 5 Commentary - LRD***

When agent sells goods on his behalf no agency PE.

".....This would still be the case if that distributor acted as a so-called "low-risk distributor" (and not, for example, as an agent) but only if the transfer of the title to property sold by that "low-risk" distributor passed from the enterprise to the distributor and from the distributor to the customer (regardless of how long the distributor would hold title in the product sold) so that the distributor would derive a profit from the sale as opposed to a remuneration in the form, for example, of a commission. [OECD Commentary para 96]

### India Position

52. *India* does not agree with the interpretation given in paragraph 96 because it considers that distribution of goods owned by an enterprise by an associated enterprise or a closely connected enterprise, particularly in a case where the risks are not born by such enterprise, such as the so called "low risk distributor", may give rise to permanent establishment of the enterprise, whose goods are being sold.

## India's position Commentary – Attendance in meetings

“.....The mere fact that a person has attended or even participated in negotiations in a State between an enterprise and a client will not be sufficient, by itself, to conclude that the person has concluded contracts or played the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise. The fact that a person has attended or even participated in such negotiations could, however, be a relevant factor in determining the exact functions performed by that person on behalf of the enterprise. [para 97]

### India Position

31. India ..... it is of the view that the mere fact that a person has attended or participated in negotiations in a State between an enterprise and a client, ***can in certain circumstances***, be sufficient, by itself, to conclude that the person has exercised in that State an authority to conclude contracts in the name of the enterprise. India is also of the view that a person, who is authorised to negotiate the essential elements of the contract, and not necessarily all the elements and details of the contract, on behalf of a foreign resident, can be said to exercise the authority to conclude contracts.

***Ratio in Right Florist – “certain situations”, “prospective”***

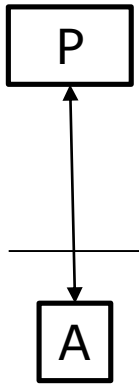
# ***Exclusion for independent agents***

## ***Article 12 of MLI***

**2.** Paragraph 1 shall not apply where the person acting in a Contracting Jurisdiction to a Covered Tax Agreement on behalf of an enterprise of the other Contracting Jurisdiction carries on business in the first-mentioned Contracting Jurisdiction as an independent agent and acts for the enterprise in the ordinary course of that business. Where, however, a person acts exclusively or almost exclusively on behalf of one or more enterprises to which it is closely related, that person shall not be considered to be an independent agent within the meaning of this paragraph with respect to any such enterprise.

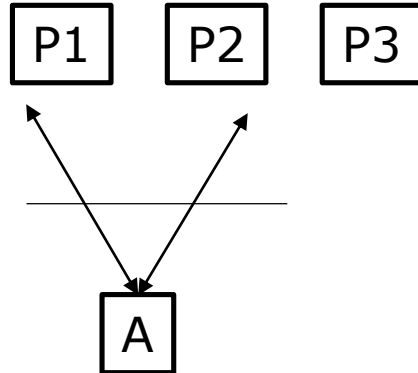
***"broker", "commission agent", "any other agent of independent status"***





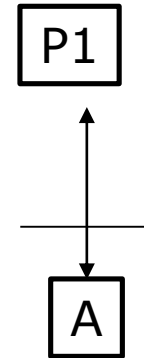
- Agent acts wholly or almost wholly on behalf of the enterprise.
- No agency PE if the transaction at ALP.

**Old provision**



- Agent acts wholly or almost wholly on behalf of one enterprise or more enterprise.
- Agent is “closely related” to the enterprise.
- Agency PE established.
- ALP diluted.

**New provision**



# ***Other issues related to MLI***

# ***Agency PE provision and Entry into effect***

## Article 35 – Entry into effect

<b>Taxes</b>	<b>Entry into effect</b>
With respect to taxes withheld at source on amount paid or credited to non-residents	April 1, 2020
With respect to all other taxes levied by the Contracting Jurisdiction	April 1, 2021

- Taxes withheld at source
- Effect of section 195

# *Application of PPT*

- Can PPT be applied when there is no Agency PE as per the modified PE article?
  - ❑ Special provision v. General provision
  - ❑ Special provision + General provision

*“**1.** Notwithstanding any provisions of a Covered Tax Agreement, a benefit under the Covered Tax Agreement shall not be granted in respect of an item of income or capital if it is reasonable to conclude having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the Covered Tax Agreement.”*

# ***Can MLI reduce / relax the scope of Agency PE?***

- Article 12(3)(a)

# ***What is possible after ratification?***

- Any party may propose an amendment to MLI and conference may be convened in accordance with Article 31 to consider the proposal (Art 33)
- A Party may at any time withdraw from MLI (Art 37)
  - Implications of “withdrawal”
    - If made before the MLI has entered into force in respect of a CTA
    - If made after the MLI has entered into force in respect of a CTA
- Withdrawal or replacement of reservation [Art 28(9)]
- Amendment of bilateral tax treaty (Art 30)

## ***MLI as an "Open Offer"***

*24. ....Indeed, this is the standard approach for multilateral treaties which remain open for signature in the future, since a government does not know at the time of ratification which other jurisdictions will become parties to the treaty and what position they will take under the treaty. It is also part of the inherent design of the MLI: there is an "open offer" by a jurisdiction to its listed treaty partners to modify bilateral tax treaties in line with its MLI Position.*

# ***Amendments to section 9(1)(i)***



# Concept of "business connection"

- Section 42 of Income Tax Act, 1922
- CIT v. R.D. Agarwal [1965] 56 ITR 20 (SC)
  - *"The expression "business connection" undoubtedly means something more than "business". It predicates an element of continuity between the business of the non-resident and the activity in the taxable territories: a stray or isolated transaction is normally not to be regarded as a business connection. Business connection may take several forms: it may include carrying on a part of the main business or activity incidental to the main business of the nonresident through an agent, or it may merely be a relation between the business of the non-resident and the activity in the taxable territories, which facilitates or assists the carrying on of that business. A relation to be a "business connection" must be real and intimate, and through or from which income must accrue or arise whether directly or indirectly to the non-resident."*

**"business connection" > "permanent establishment"**

## ***Concept of “business connection”***

- Explanation 2 to section 9(1)(i) – Finance Act, 2003
  - Did this reduce scope of business connection concept?
- Finance Act, 2018 amendment
  - “Aligning the scope of business connection with modified PE rule as per MLI” – Explanatory Memorandum
  - Scope of treaty provision becoming wider than the domestic law provisions

# Does MLI become ineffective?

## Example 1

F Ltd. is a company incorporated outside India and has appointed A Ltd. as its agent in India. A Ltd. gets involved in the negotiation of the contracts on behalf of F Ltd., plays a principal role but the contracts are signed by F Ltd. outside India.

Is there a business connection / PE?

Under the MLI modified tax treaty	Under the domestic law	
	Amended provision	Un-amended provision
Yes	Yes	??

# Alignment of Explanation 2 to MLI provision

Sr. No.	Provision of Explanation 2	Provision of MLI	Remarks
1	Explanation 2 contains words “has and habitually exercises in India, an authority to conclude contracts”	Article 12 of the MLI does not have these words	Scope of Explanation 2 is wider. The words “has and habitually exercise authority to conclude contract” represents the old text of agency PE provision of the OECD and UN Model.
2	Explanation 2 does not contain exclusions for preparatory and auxiliary activities.	Article 12 of MLI contains exclusions for preparatory and auxiliary activities.	Scope of Explanation 2 is wider.

	Explan 2	Provision of MLI	Remarks
3	Explanation 2 does not make reference to routine conclusion of contracts and it does not contain these words.	Article 12 of MLI requires that when the agent has played a principal role leading to conclusion of contract, the contracts are routinely concluded without material modification by the enterprise.	Scope of Explanation 2 is wider. The provision of Article 12 is narrower. If it can be established that in cases where the agent has played a principal role, the contracts are not routinely concluded by the principal (i.e. the enterprise), the agency PE does not get created. Also in situation where the principal (i.e. the enterprise) makes material modification in the terms of the contract, the agency PE does not get created.
4	Explanation 2 does not require that in all the situations the agent's activities must be carried on in India.	Article 12 of MLI requires the agent to carry out his activities in the source country.	Scope of Explanation 2 is wider.

## Business Connection for activities performed outside India

....has and habitually exercises ***in India***, an authority to conclude contracts on behalf of the non-resident or habitually concludes contracts or habitually plays the principal role leading to conclusion of contracts by that non-resident and the contracts are—.....(i)....(ii)....(iii)

**..has and habitually exercises in India authority to conclude contracts...and the contracts are**

**...habitually plays principal role leading to conclusion of contracts by the non-resident and the contracts are.....**

In the name of non-resident

In the name of non-resident

For transfer of property owned by non-resident

For transfer of property owned by non-resident

For provision of services by the non-resident

For provision of services by the non-resident

***"business connection in India"***

# Implications under various situations

Sr. No.	Facts	Implications of amended Explanation 2 to section 9(1)(i)
1	India does not have a tax treaty with the country in which F Ltd. is tax resident.	F Ltd, has a business connection in India. Income earned by F Ltd. would be subject to tax in India, in terms of the provisions of section 9(1)(i), as a result of business connection in India.
2	India has signed a tax treaty with the country in which F Ltd. is a tax resident. However, this country has not notified its tax treaty with India for the purpose of MLI.	F Ltd, has a business connection in India. The existing tax treaty will continue to apply and the Indian agent will not constitute agency PE in India for F Ltd.

Sr. No.	Facts	Implications of amended Explanation 2 to section 9(1)(i)
3	<p>India has signed a tax treaty with the country in which F Ltd. is a tax resident.</p> <p>This country has also notified its tax treaty with India for the purpose of MLI.</p>	<p>F Ltd, has a business connection in India. In terms of the treaty provisions, F Ltd. would not have a PE in India, if the contracts are not routinely signed by F Ltd. The Indian agent will not constitute not agency PE in India for F Ltd. In absence of F Ltd's PE in India, its income will not be subject to tax in India.</p>
4	<p>India has signed a tax treaty with the country in which F Ltd. is a tax resident.</p> <p>This country has also notified its tax treaty with India for the purpose of MLI.</p>	<p>F Ltd, has a business connection in India. In terms of the treaty provisions F Ltd. has a PE in India if the contracts are signed by F Ltd routinely and without any modification.</p> <p>India will get taxing rights over the income attributable to such PE.</p>



# **Article 15**

## **Persons Closely Related to the Enterprise**

## Article 15(1) of MLI [Art 5(8) of OECD Model 2017]

**1.** For the purposes of the provisions of a Covered Tax Agreement that are modified by paragraph 2 of Article 12 (Artificial Avoidance of Permanent Establishment Status through Commissionnaire Arrangements and Similar Strategies), paragraph 4 of Article 13 (Artificial Avoidance of Permanent Establishment Status through the Specific Activity Exemptions), or paragraph 1 of Article 14 (Splitting-up of Contracts), *a person is closely related to an enterprise if, based on all the relevant facts and circumstances, one has control of the other or both are under the control of the same persons or enterprises.* In any case, a person shall be considered to be closely related to an enterprise if one possesses directly or indirectly more than 50 per cent of the beneficial interest in the other (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) or if another person possesses directly or indirectly more than 50 per cent of the beneficial interest (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) in the person and the enterprise.

# Article 15(1) of MLI [ Art 5(8) of OECD Model 2017]

- Applicability of definition of “closely connected”
  - Article 12(2) [commissionaire and similar strategies]
  - Article 13(4) [Specific Activity Exemption]
  - Article 14(1) [Splitting up of contracts]
- “person”, “enterprise”, “directly or indirectly”
- “Closely related” and “associated enterprise” are not intended to be equivalent.
- General Rule
  - Based on “all the facts and circumstances”
  - Special arrangement that allows the person or enterprise to exercise rights similar to those arising from holding of more than 50% of beneficial interest in the enterprise.
  - Usage of plural (persons or enterprises)
- Specific rule (more than 50% parameter)

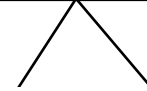
Person or enterprise



Enterprise

Determination of control on the basis of "all the relevant facts and circumstances"

Another  
Persons or enterprises



Person

Enterprise

### **General definition**

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Person or enterprise



More than 50%  
beneficial interest

Enterprise

Another  
Persons or enterprises



More than 50%  
beneficial interest in both

Person

Enterprise

### **Specific rule**

## Article 15(2)

**2.** *A Party that has made the reservations described in paragraph 4 of Article 12 (Artificial Avoidance of Permanent Establishment Status through Commissionnaire Arrangements and Similar Strategies), sub-paragraph (a) or (c) of paragraph 6 of Article 13 (Artificial Avoidance of Permanent Establishment Status through the Specific Activity Exemptions), and sub-paragraph (a) of paragraph 3 of Article 14 (Splitting-up of Contracts) may reserve the right for the entirety of this Article not to apply to the Covered Tax Agreements to which those reservations apply.*

- Matching?

Article of MLI	Applicable?	Article of MLI	Applicable?	Article of MLI	Applicable?
Art 12(2)	N	Art 12(2)	N	Art 12(2)	Y
Art 13(4)	N	Art 13(4)	N	Art 13(4)	N
Art 14(1)	N	Art 14(1)	Y	Art 14(1)	N

# ***Questions***

# ***Reference Material***

- MLI
- Explanatory Statement to MLI
- Provisional / Final Notifications by the countries
- Other guidance from OECD
  - Presentation Explaining Matching of reservations and Notifications
  - Note by OECD Directorate of Legal Affairs
  - FAQ on MLI
  - OECD MLI Tool kit
  - Others

# Thank You

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