



CTC International Taxation Study Circle

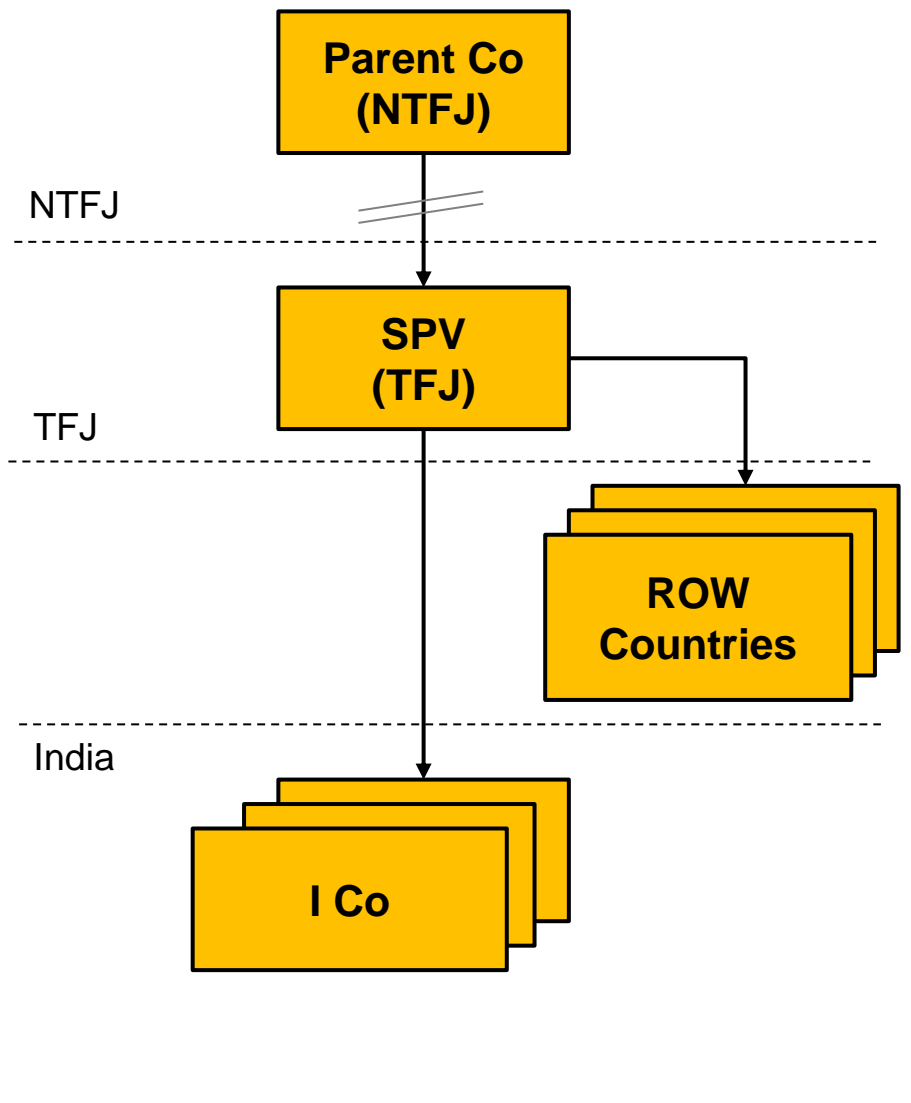
Case Studies on PPT and GAAR

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Inbound investment and PPT impact

Typical structure of inbound investment

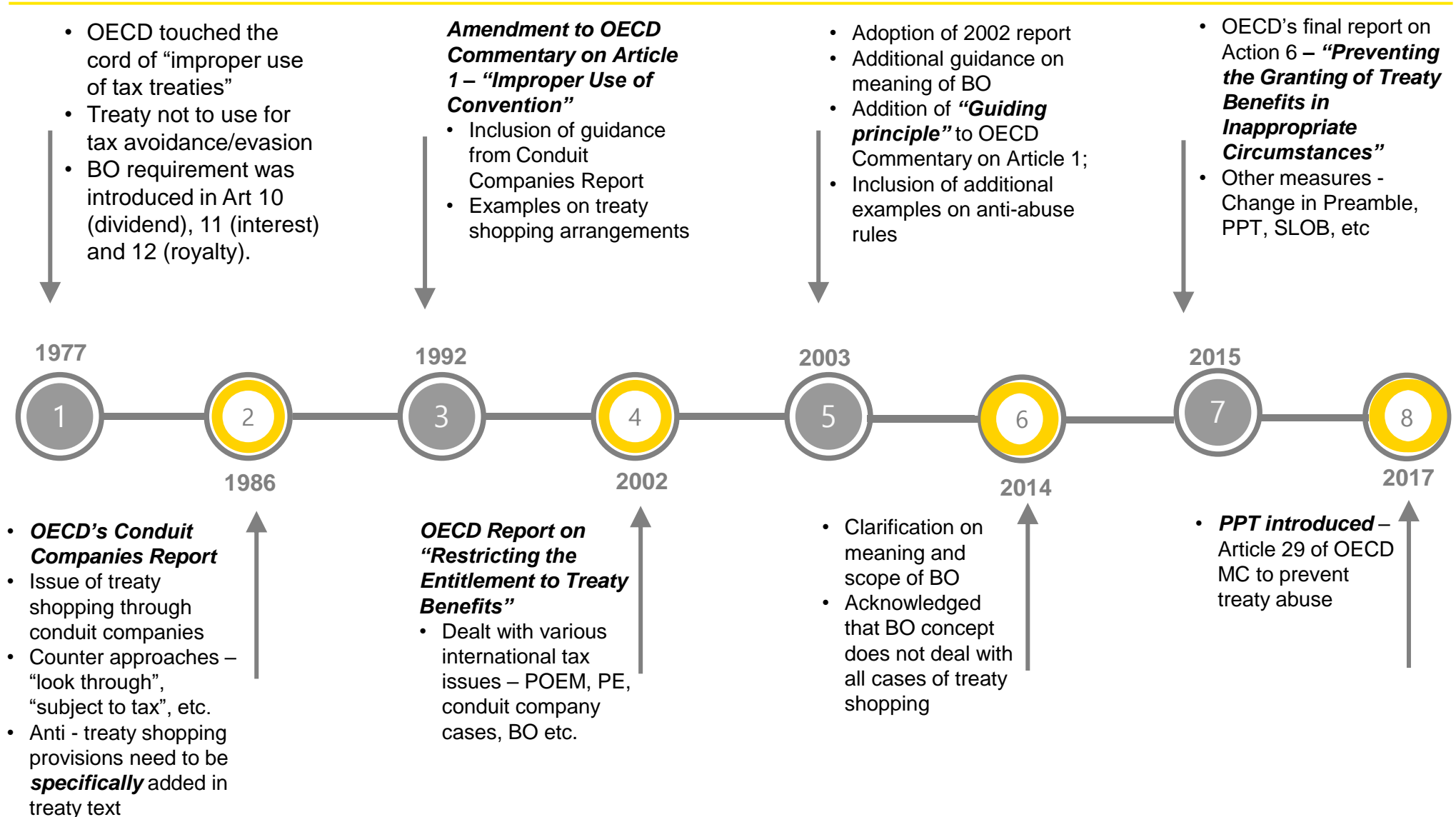


- ▶ Treaty relief (e.g., capital gain tax) to SPV on transfer of I Co shares
- ▶ Treaty shopping not the basis of denial of treaty unless dealt with specifically (Refer ABA, Vodafone SC rulings)
- ▶ Issues for consideration today
 - ▶ How far will MLI impact tax treaty benefit?
 - ▶ How far will GAAR impact tax treaty benefit?
 - ▶ To what extent PPT, LOB or other treaty oriented measures impact treaty entitlement?
 - ▶ Interplay amongst above

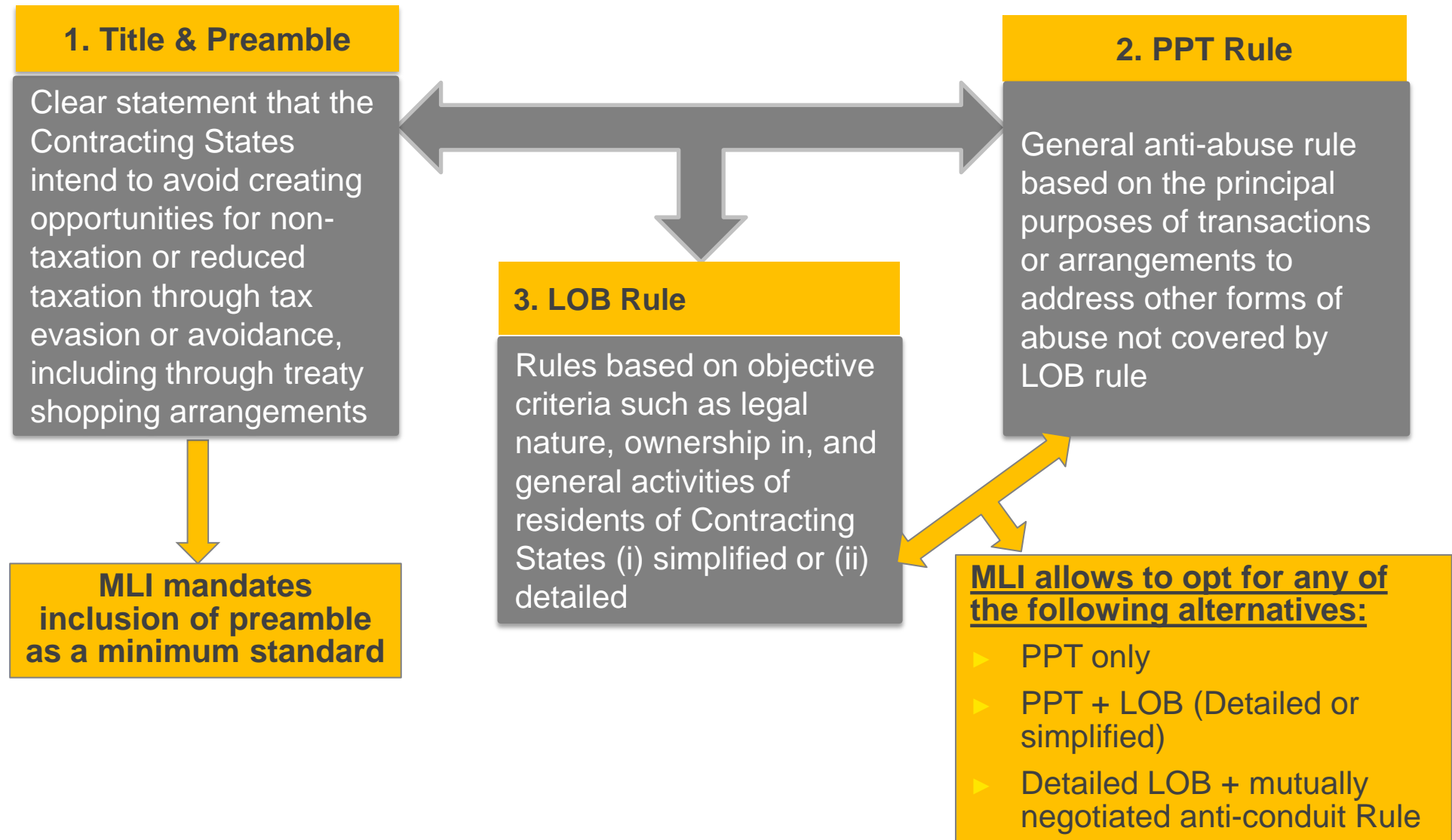
Access to treaty benefit



History and evolution of anti-abuse provision in OECD MC



Three-pronged approach of BEPS Action 6 for prevention of treaty abuse



MLI Article and India positions

MLI provisions		Art No.	Minimum standard?	India's positions	MLI positions of all 92 signatories
Article 6 of MLI	Preamble	6(1)	√	√	81 jurisdictions (including India) made no reservation on Article 6. It shall be added to existing preamble.
	Preamble (additional sentence)	6(3)	X	X	58 jurisdictions have chosen to include additional text
Article 7 of MLI	PPT Rule	7(1)	√	√ (but with reservation)	<ul style="list-style-type: none"> 92 jurisdictions to apply PPT From above, 10 jurisdictions (including India) applied with reservation
	PPT as an interim measure	7(1) r.w. 7(17)(a)	√	√	10 jurisdictions (including India) have opted for PPT as an interim measure
	Discretionary relief for PPT	7(4)	X	X	32 jurisdictions have chosen to allow discretionary relief for PPT
	SLOB Provision	7(8) to 7(13)	X	√	14 jurisdictions (including India) have chosen to apply SLOB 2 jurisdictions have opted to permit asymmetrical application of SLOB

Relevance of PPT for major investors in India

Country	Existing treaty has PPT or similar clause?	Counterparty posture in MLI?	Emerging position today?
USA	No	USA has not signed the MLI	No impact of MLI on existing treaty. However, existing treaty has Limitation of Benefit Article, which is similar to SLOB of MLI.
Mauritius	No. LOB is limited to capital gains article	India has not been notified as CTA by Mauritius	Until bilateral negotiations take place, no change to the existing treaty.
Singapore	No. LOB is limited to capital gains article	Only PPT adopted	PPT likely to apply. Additionally, in relation to capital gains article, LOB of existing treaty will continue to apply.
UK	Yes	Only PPT adopted	PPT as modified by MLI will form part of CTA in place of existing PPT provision
France	No	Only PPT is adopted	Since India and France both have notified PPT, the PPT will form part of CTA
China	No	Neither India nor China have notified India-China treaty as CTA	No impact of MLI on existing treaty. India-China tax treaty recently amended wherein PPT has been incorporated in Article 27A
Hong Kong	PPT like clause is limited to Articles being Dividend, Interest, Royalties, FTS, Capital gains	India has not been notified as CTA by Hong Kong	No impact of MLI on existing treaty despite India having notified Hong Kong in final notification.

Article 6 of MLI – Purpose of CTA (Preamble)

Article 6 of MLI – Purpose of a CTA

▶ Text of the Preamble:

*“Intending to eliminate double taxation with respect to the taxes covered by this agreement **without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this agreement for the indirect benefit of residents of third jurisdictions)**”*

- ▶ Being a minimum standard; Opt out is highly conditional
- ▶ Existing treaties may have a preamble, however for CTAs, preamble shall either stand “replaced” or “added” to text of the CTA due to compatibility clause – “in place of” or “in absence of” preamble language [Article 6(2)]

Article 6 of MLI – Purpose of a CTA

▶ **Optional additional text [not opted by India]:**

“Desiring to further develop their economic relationship and to enhance their co-operation in tax matters”

- ▶ Optional provision is **not** a minimum standard;
- ▶ It will modify a CTA only if **both** the contracting jurisdictions agree to adopt and notify the choice for making the modification
- ▶ Illustrative list of countries which have opted for optional preamble text, include Australia, Belgium, Cyprus, France, Japan, Luxembourg, Netherlands, Singapore, South Africa, Switzerland, UK
- ▶ Impact of India not opting for additional text
 - ▶ Double non-taxation resulting from bona fide commercial activity is not an indicator of improper use of treaty – Example: Profits of Bangladesh PE of I Co
 - ▶ But, double non-taxation from tax avoidant transaction is not in line with object and purpose of treaty – Example: Letter-box company formed to claim treaty benefit

Article 7 of MLI - Principal purpose test (PPT)

Article 7 of MLI – Prevention of Treaty Abuse

*“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, (‘reasonable purpose test’)*

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.**” (‘object and purpose test’)*

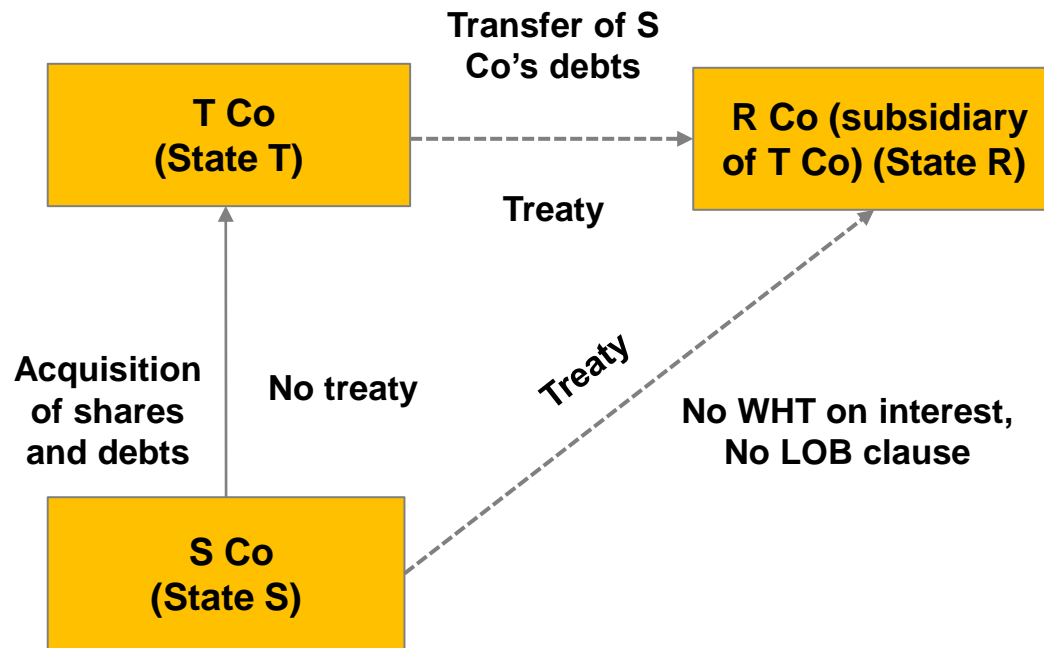


Tax benefit under PPT

- ▶ Non-obstante provision with mandate of denial of treaty benefit
- ▶ Extends to direct as also indirect benefit under CTA
- ▶ “Benefit” covers all limitations on taxation imposed on the COS
 - ▶ Example: tax reduction, exemption
- ▶ PPT can also be invoked by COR - In Indian context, UTC claimed under India
Singapore treaty can be subjected to PPT
- ▶ No impact on tax concessions admissible in domestic law (e.g. lower withholding rate admissible u/s 194LC/LD)

OECD's examples on PPT rule

“that resulted directly or indirectly in that benefit”



- ▶ Assignment of an existing debt carrying coupon rate of 4% by T Co in NTFJ to R Co in TFJ at 3.9% interest
- ▶ In this example, whilst R Co is claiming benefits of R-S treaty with respect to a loan that was entered into for valid commercial reasons, if the facts of the case show that one of the principal purposes of T Co in transferring its loan to R Co was for R Co to obtain the benefit of R-S treaty, then PPT would apply as **that benefit would result indirectly from the transfer of the loan** [para 176]

Reasonable purpose test

- ▶ Granular approach: Evaluate w.r.t. each arrangement, each stream of income; not qua entity as a whole
- ▶ Applies to an arrangement if its “one of the principal purpose” is treaty benefit
 - ▶ Obtaining treaty benefit need not be sole or dominant purpose
- ▶ Purpose of “arrangement” – an inanimate exercise
 - ▶ Self assertion by taxpayer not sufficient
 - ▶ Question of fact: Requires objective analysis of all facts and circumstances
- ▶ “Reasonable to conclude”: no conclusive evidence requirement
 - ▶ Having sound judgment, fair, sensible, logical (not unreasonable)
 - ▶ Alternative views need to be examined objectively
 - ▶ All evidences must be weighed
 - ▶ Looking merely at the ‘effect’ not sufficient – tax benefit purpose not to be assumed lightly

Is arrangement capable of being explained but for treaty benefit? **OR,**
Is treaty benefit in itself justifying the transaction?

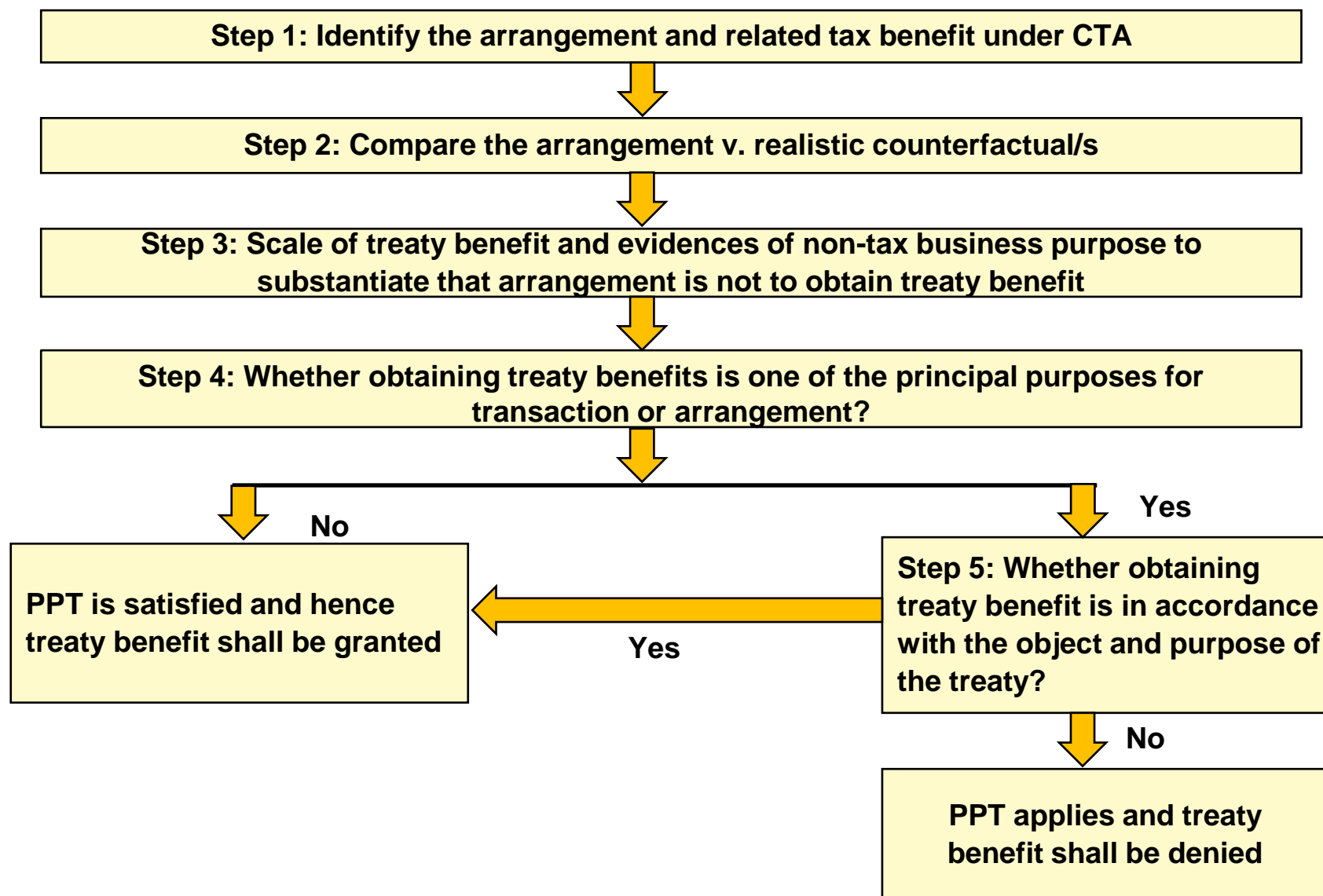
Object and purpose carve out

- ▶ Even if treaty benefit is one of the principal purpose, PPT carve out protects treaty benefit if *'it accords with object and purpose of relevant provisions of CTA'*
- ▶ Onus to “establish” applicability of carve out lies on taxpayer
- ▶ Reasonable purpose test = Question of fact;
Object and purpose carve out = Question of law
- ▶ Evaluate object and purpose of relevant treaty provisions (implicitly, in overall treaty context including modified preamble)
- ▶ Object and purpose of distributive articles based on quantitative criteria v/s other distributive rules v/s general anti-avoidance provision of the treaty

Object and purpose carve out

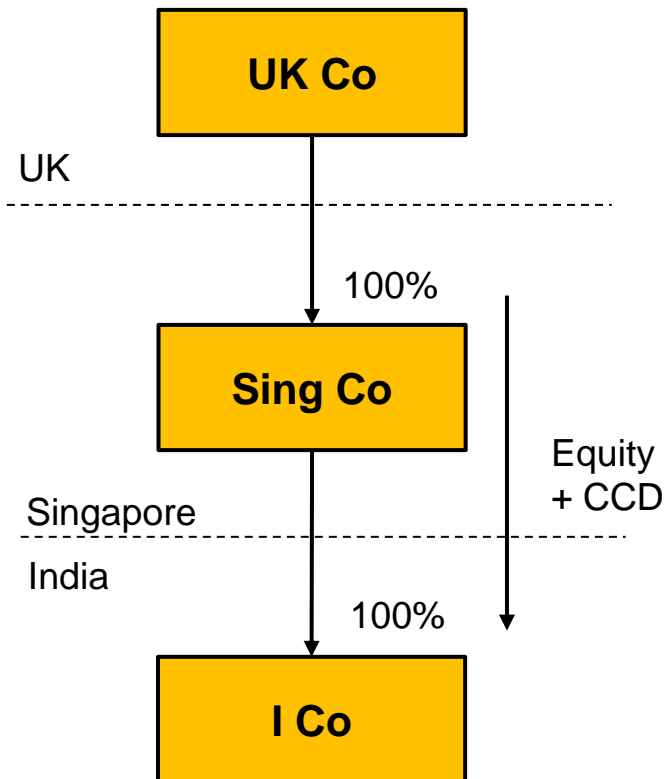
- ▶ Treaty objects?
 - ▶ Eliminate double taxation: promote (bona fide) exchange of goods and services, and movements of capital and persons
 - ▶ Prevent tax avoidance and evasion; exchange of information
 - ▶ Provide certainty to taxpayers
 - ▶ Strike a bargain between two treaty countries as to division of tax revenues
 - ▶ Foster economic relations, trade and investment
 - ▶ Eliminate certain formats of discrimination
- ▶ Language of Preamble (as modified by MLI) to aid determination of object and purpose

Step process for evaluation of PPT



Case Study 1 – Inbound investment; PPT/ GAAR impact

Case Study 1 - Inbound investment; PPT/ GAAR impact



- ▶ Sing Co's investments in shares of I Co were made before 1 April 2017
- ▶ Sing Co has invested in CCDs of I Co post 1 April 2017
- ▶ I-S protocol triggers **source taxation**, if gains arise from alienation of shares acquired **on or after 1 April 2017** [Article 13(4A)]
 - ▶ Residence based taxation for shares acquired **on or before 31 March 2017**
- ▶ Treaty benefit continues for gain on transfer of CCDs
- ▶ GAAR not to apply in respect of 'income from transfer' of investment made before 31 March 2017 [Rule 10U(1)(d)]
- ▶ Sing Co transfers certain shares before 31 March 2020 (**Tranche 1**)
- ▶ It is likely that balance shares along with CCDs will be transferred in 2021 (**Tranche 2**)
- ▶ Evaluate GAAR and PPT implications

Summary of tax implications

Assets of Sing Co	Acquisition	Disposal	GAAR applies?	PPT applies?
I Co Shares (Tranche 1)	Pre April 2017	Pre March 2020	No	No
I Co shares (Tranche 2)	Pre April 2017	In 2021	No	Yes (?)
CCDs of I Co (Tranche 2)	Post April 2017	In 2021	Yes	Yes

Impact of LOB (Article 24A) as applicable to capital gains article is to be evaluated separately

Disposal of ICo shares post PPT - Issues

Assets of Sing Co	Acquisition	Disposal	GAAR applies?	PPT applies?
I Co Shares (Tranche 1)	Pre April 2017	Pre March 2020	No	No
<i>I Co shares (Tranche 2)</i>	<i>Pre April 2017</i>	<i>In 2021</i>	<i>No</i>	<i>Yes (?)</i>
CCDs of I Co (Tranche 2)	Post April 2017	In 2021	Yes	Yes

As regard to transfer of I Co shares (Tranche 2):

- ▶ Applicability of PPT when the investments are GAAR grandfathered [Impact of s.90(2A) and interplay of PPT and GAAR]
- ▶ Does PPT apply for investments made prior to MLI developments? Do special considerations apply for treaty grandfathered investments?

PPT and GAAR interplay

Particulars	Domestic GAAR	Article 7 of MLI (PPT)
Applicability	<ul style="list-style-type: none"> Main purpose is tax benefit; and One of the tainted element tests is present 	<ul style="list-style-type: none"> One of the principal purposes is tax benefit Not in accordance with object and purpose of treaty
Consequences	Re-characterization of transaction, re-allocation of income (includes denial of treaty benefit)	Denial of treaty benefit
Onus	Primary onus on tax authority	Primary onus on tax authority and rebuttal assumption for carve out
Methodology	Involves analysis of 'counter factual'	Focus only on actual transaction?
Administrative safeguards	Approving Panel	To be determined by respective states. OECD and UN Model Commentaries suggests this
Grandfathering	Yes	No
De-minimis threshold	Yes	No

Para 22.1 of Article 1 of 2003 OECD Commentary (Para 79 of 2017 OECD Commentary) :

*“To the extent that the application of the (**domestic**) rules results in a re-characterization of income or in a redetermination of the taxpayer who is considered to derive such income, the provisions of the Convention will be applied taking into account these changes.....”*

PPT applicability to GAAR grandfathered investment

▶ S. 90(2)

“Where the Central Government has entered into an agreement with the Government of any country outside India.....under sub-section (1) for granting relief of tax,, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee”

▶ S. 90(2A)

“Notwithstanding anything contained in sub-section (2), the provisions of Chapter X-A of the Act shall apply to the assessee even if such provisions are not beneficial to him.”

- ▶ Is GAAR anchored into the treaty?
- ▶ Is PPT scope eclipsed by GAAR including the rules framed thereunder for GAAR?

View 1: S.90(2A) precludes applicability of PPT to treaty benefit

- ▶ S.90(2A) is a non-obstante provision making domestic GAAR applicable to treaty provisions in a non-negotiable manner, irrespective whether beneficial or not;
- ▶ PPT and domestic GAAR provisions – both are general anti-avoidance rules with common target area
- ▶ S. 90(2A) gives an independent status to domestic GAAR provisions and mandates its applicability even if the same is not beneficial to taxpayer; however s. 90(2A) only mandates domestic GAAR application if its not beneficial to taxpayer; if the same is beneficial than the corresponding treaty provision, then taxpayer may choose to be evaluated under domestic GAAR by virtue of s. 90(2)
- ▶ PPT is treaty specific; domestic GAAR is all pervasive – Hence, if domestic GAAR compliant, similar general anti-abuse rule may not be applied

View 2: Applicability of GAAR and PPT provisions is to be evaluated independently

- ▶ Treaty is a self contained code and treaty benefits are subject to satisfaction of all the stipulations provided under all the provisions of the treaty, including treaty SAARs and PPT;
- ▶ If PPT triggers, there is no treaty benefit available to even raise applicability of s.90(2);
- ▶ An agreement which grants relief has ability to put conditions subject to grant of relief
- ▶ S. 90(1) states that treaty can be entered for preventing tax evasion or avoidance, permitting insertion of limitations in treaty itself
- ▶ S. 90(2) states that treaty provisions can be applied if beneficial to the taxpayer; treaty can provide limits or conditions within which relief is agreed upon
- ▶ S. 90(2A) mandates domestic GAAR but does not negate treaty SAAR/ PPT operation
- ▶ Intent of s. 90(2A) was to ensure that domestic GAAR applies to treaty benefit; it is not meant to negate PPT
- ▶ Both PPT and GAAR are non-obstante provisions; both need to be simultaneously applied unless expressly stated otherwise

PPT and GAAR interplay - Concluding thoughts

- ▶ Qua treaty benefit, PPT fulfilment essential
- ▶ If arrangement/transaction is PPT tainted, treaty benefit is denied:
 - ▶ GAAR invocation may not be necessary for denying treaty benefit
 - ▶ GAAR may still re-characterise the transaction
- ▶ If arrangement passes PPT test, GAAR test also most likely gets fulfilled
 - ▶ S.97(1)(c) test likely to be passed as location/residence is likely to be for substantial commercial purposes

Impact of PPT on treaty grandfathered investments

①

Alt 1: PPT will not apply to Article 13(4A) which is introduced for grandfathering past investments

- Grandfathering ensure smooth transition and aligns with domestic GAAR
- Amended I-S treaty was in light of BEPS project and grandfathering was a conscious decision

②

Alt 2: PPT applies to entire treaty including Article 13(4A) notwithstanding that acquisition of investment in I Co was on or before 31 March 2017

- PPT is a “non-obstante” provision and worded widely to cover all benefits
- PPT read with revised preamble will empower tax authority to deny tax benefit in treaty shopping arrangements
- Object and purpose of treaty is not to encourage treaty shopping post MLI

③

Alt 3: PPT applies to Article 13(4A). However, availing grandfathering benefit is in accordance with **object and purpose**

- Object and purpose of grandfathering provision is to avoid disruptive transition and provide certainty to the investors
- Providing certainty to taxpayers is one of the object and purpose of the treaty
- Grandfathering is an exception to the normal provision for applicability of treaty and its object may need to be respected.

Disposal of CCD post PPT - Issues

Assets of Sing Co	Acquisition	Disposal	GAAR applies?	PPT applies?
I Co Shares (Tranche 1)	Pre April 2017	Pre March 2020	No	No
I Co shares (Tranche 2)	Pre April 2017	In 2021	No	Yes (?)
CCDs of I Co (Tranche 2)	Post April 2017	In 2021	Yes	Yes

As regard to transfer of CCDs of I Co (Tranche 2):

- ▶ What is the arrangement to which GAAR/ PPT can apply?
- ▶ Can choice of funding be questioned under GAAR/ PPT? i.e. whether CCDs can be recharacterized as shares?
- ▶ Is “one of the principal purpose” test of PPT broader compared to “main purpose” test under GAAR?

Evaluation of 'separate entity test' for PPT and GAAR

- ▶ Arrangement includes establishment, acquisition or maintenance of a person who derives the income (OECD Commentary 2017)
- ▶ Tainted element of GAAR: arrangement that involves location of an asset, transaction, place of residence, without any substantial commercial purpose

Illustrative commercial factors for SPV formation from Vodafone [2012] 341 ITR 1 (SC)

- ▶ Better corporate governance
- ▶ Hedging business risk (for instance, high-risk assets may be parked in a separate company so as to avoid legal and technical risks to the MNE group) and political risk;
- ▶ Protection from legal liabilities;
- ▶ Mobility of investment;
- ▶ Enable creditors to lend against specified investment or division; creditors may not have to monitor the performance of the whole group; to limit the information which creditor should have;
- ▶ Facilitate an exit route;
- ▶ Promoting specialization

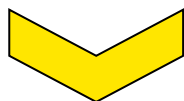
Evaluation of 'location test' for PPT and GAAR

- ▶ Illustrative commercials for selection for a location, being TFJ
 - ▶ Availability of skilled, multi-lingual work force and directors with knowledge of regional business practices and applicable regulations;
 - ▶ Membership of a regional grouping, or, of a common currency area
 - ▶ Favourable tax treaty network; especially within the targeted investment area
 - ▶ Favourable regulatory and legal framework
 - ▶ Developed international trade and financial markets
 - ▶ Political stability
 - ▶ Lender and investor familiarity
 - ▶ Difficulties/ limitations of home jurisdiction are ironed out in SPV jurisdiction [Example H of OECD Commentary 2017]

Can choice of funding be questioned under GAAR/PPT?

1

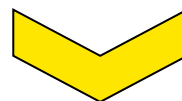
Terms of CCD and facts of the case support that rights, obligations of CCD holders are no different from that of equity shareholders



- Form is different from substance?
- If yes, form can be ignored under PPT
- GAAR too can recharacterize

2

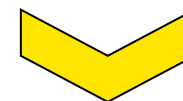
Choice of CCD is commercially driven and its form reflects underlying substance of it being debt till the date of conversion



Unlikely to get recharacterized as equity : skewed debt equity ratio may trigger s.94B

3

TP analysis support that a debt funding is disproportionate and the behaviour is exceptional / commercially irrational



Is TP analysis to be restricted to TP consequences?

Threshold under GAAR and PPT: Is PPT wider?

- ▶ **“One of the principal purposes” v “main purpose test”**: Threshold is practically same (View 1)
 - ▶ Dictionary meanings of ‘main’ and ‘principal’ suggest that both synonymously refer to something which is ‘chief’ or ‘primary’ or ‘most important’;
 - ▶ GAAR and PPT both require an objective analysis of all facts and circumstances to the arrangement or transaction;
 - ▶ 2017 Commentary on PPT (Para 181) - the object and purpose of the PPT is primarily to target treaty shopping arrangements in cases, where obtaining treaty benefit is considered to be a “principal consideration” of entering into a transaction or an arrangement
 - ▶ Various examples on PPT in OECD commentary 2017 give an impression that PPT applies only when treaty benefit is “the main” reason for the transaction

Threshold under GAAR and PPT: Is PPT wider?

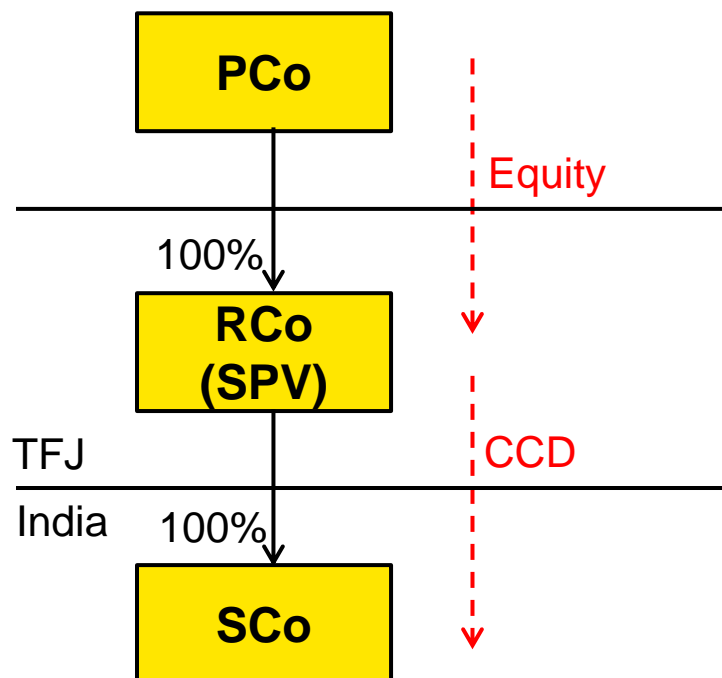
- ▶ **“One of the principal purposes” v “main purpose test”:** Threshold is not same, PPT has lower threshold (View 2)
 - ▶ Shome Committee, to allay concerns of taxpayers, recommended GAAR threshold to be reduced to ‘main purpose’ test from ‘one of the main purposes’ test
 - ▶ A plain reading itself indicates that ‘one of the principal purpose test’ has a lower threshold compared to ‘main purpose test’;
 - ▶ UN Commentary 2011 on Article 1 (para 36) suggests that ‘main purpose test’ may be interpreted restrictively in favour of taxpayers and has potential to render the provision ineffective;
 - ▶ UK HMRC guidance on GAAR states that ‘one of the main purposes test’ is wide enough to cover transactions which are implemented for commercial reasons as also for substantial tax advantage;
 - ▶ UN handbook suggests that ‘one of the main purposes test’ is relatively easily satisfied whereas ‘main purpose test’ is satisfied only when main or sole purpose of the transaction is tax benefit

Threshold under GAAR and PPT: Is PPT wider?

- ▶ **“One of the principal purposes” v “main purpose test” : similarities and differences**
 - ▶ GAAR in India, as also PPT of a treaty do factor the object and purpose of an arrangement
 - ▶ Both the tests require objective of quantitative analysis of all relevant facts and circumstances, but the conclusion needs to be drawn on ‘qualitative’ or ‘overall impression’ basis
 - ▶ PPT may likely have a threshold which is lower compared to ‘main purpose’ test
 - ▶ However, the significance of word ‘main’ as part of the requirement of ‘one of the main purposes’ should not be understated. The tax purpose should be of a threshold which is meaningful and not insignificant/ trivial/ secondary

Case Study 2 – Consequences of PPT

Inbound investment



- ▶ PCo has 100% subsidiary RCo; that has 100% subsidiary SCo
- ▶ RCo issues equity to PCo; SCo issues CCDs to RCo
- ▶ PCo and RCo hold valid TRC and are entitled to treaty benefit
- ▶ SCo pays interest on CCDs to RCo at ALP
- ▶ CCD is a valid debt instrument; CCD is not re-characterized as equity
- ▶ Interest is deductible in hands of SCo and is subject to WHT @ 7.5%

R-S Treaty Interest WHT	7.5%
P-S Treaty Interest WHT	15%
Domestic law WHT	40% + SC

Tax Authority contentions for applicability of domestic rate on PPT trigger

- ▶ PPT applicable as R Co has been established and maintained for one of the principal purpose to obtain lower WHT rate
- ▶ PPT has absolute effect of denial of treaty benefit on abusive transactions
- ▶ PPT works on 'all or none' approach; it does not look beyond R-S Treaty except under discretionary relief mechanism
 - ▶ India (as source state) has not opted for discretionary relief provision
- ▶ Deterrent effect of PPT will be diluted if taxpayer (R Co) is permitted to have consequential relief which he would have obtained but for such tainted arrangement
- ▶ As per OECD, this is called 'cliff effect' – hence, specific discretionary relief provision is recommended

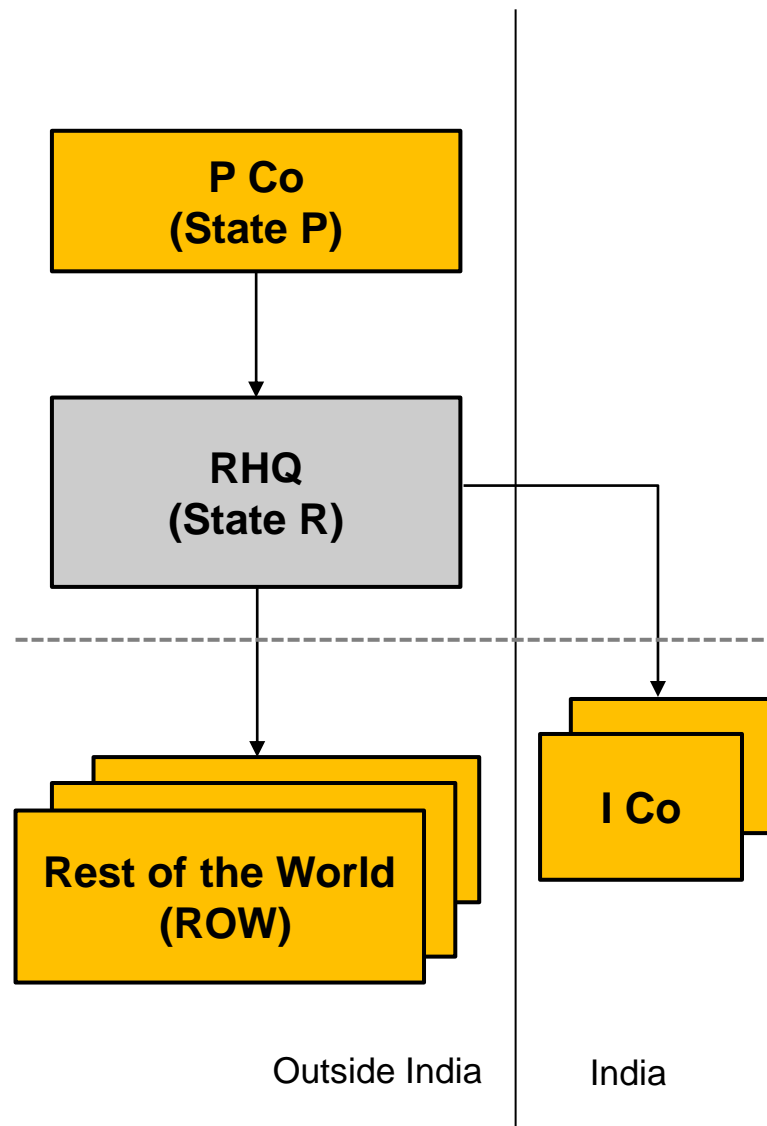


Taxpayer's contentions on applicability of concessional rate of P-S treaty

- ▶ PPT leads to denial of 'benefit' from tainted arrangement
 - ▶ PPT trigger happens only post identification of tax benefit
 - ▶ Dictionary meaning of 'benefit' suggests some improvement in condition
 - ▶ By implication suggests denial of "incremental favourable position" obtained due to tainted arrangement
- ▶ PPT consequences cannot be harsher than domestic GAAR
 - ▶ Identification of tax benefit happens by comparison with 'counterfactual'
 - ▶ Consequences should also be based on realistic counterfactual
 - ▶ A fair "counterfactual" in the case is to relate funding in S Co directly by P Co
 - ▶ If treaty consequence for domestic GAAR invocation is based on reattributed/ re-characterised arrangement, PPT as a treaty GAAR, no different
- ▶ Discretionary relief (which can grant same or different benefit) is an inbuilt good practice and indicator of fair play
 - ▶ Indicative of righteous and reasonable course of action that should be followed
- ▶ A.A.R. No. P of 2010 dated 22 March 2012 permitted reference to Article 10(2) where capital gains income was re-characterised as dividend (before BBT regime)

Other Issues governing PPT

Effect of multiple treaties benefit



- ▶ RHQ holds multiple investment across globe/regions
- ▶ RHQ investment in Indian entities is miniscule compared to Rest of the World (ROW)
- ▶ RHQ is not able to explain commercial reasons for its presence in State R
- ▶ RHQ to take benefit of treaty network of country of its incorporation
- ▶ RHQ's claim: India cannot invoke PPT as tax benefit in India is not "one of the principal purposes" of its existence in State R
- ▶ OECD's take on impact of benefit arising from multiple treaties

*".....If the facts and circumstances reveal that the arrangement has been entered into for the principal purpose of obtaining the benefits of these (multiple) tax treaties, it should **not** be considered that obtaining a benefit under one specific treaty was not one of the principal purposes for that arrangement."*

Miscellaneous issues

- ▶ Evaluation of PPT/ GAAR where each investment in source jurisdiction is through different SPVs (i.e. halo effect)
- ▶ Significance of PPT being a mirroring of guiding principle

As we begin towards the end.....

- ▶ **P. Baker, The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, British Tax Review 3, 2017, p. 283**

“There is every reason to fear that, once the MLI is in force and a large number of countries (including ones with tax authorities that do not have a reputation for predictable interpretation of tax treaties) begin to apply the PPT, this will undermine the whole system of tax treaty benefits. Put simply, no taxpayer who has given any consideration to the impact of a tax treaty on its transactions or arrangements will be able to rely with any certainty on obtaining the benefits of the tax treaty”

Protocol amending India-Spain treaty

- ▶ Indian government recently notified protocol signed on 26 October 2012 to introduce a unique LOB clause to India-Spain DTAA
- ▶ While the Protocol was notified by the Indian government on 27 August 2019, the date of entry into force is 29 December 2014
 - ▶ PPT of MLI is to apply from 2020 onwards as both India and Spain have opted for PPT
 - ▶ GAAR is to apply from 2017 but investments made before 1 April 2017 are grandfathered
 - ▶ Portfolio investments made by Spanish entity before 1 April 2017
 - ▶ Can protocol be applied retrospectively from 29 December 2014 for transfers that have taken place till 27 August 2019?
 - ▶ Can main purpose or one of the main purpose test in Protocol be applied to deny capital gains exemption?

Thank You!

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