

FOREIGN INVESTMENTS IN INDIA: TAX & REGULATORY DEVELOPMENTS



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Tax Amendments as per Finance Act 2015

PoEM

A company shall be considered to be resident in India if its Place of Effective management (POEM) is in India at any time during the relevant Financial Year.

Taxation on global income at the higher tax rate of 40% + additional surcharge as may be applicable.

Withholding of taxes continue under s.195 as a foreign company, w.r.t. chargeable amount.

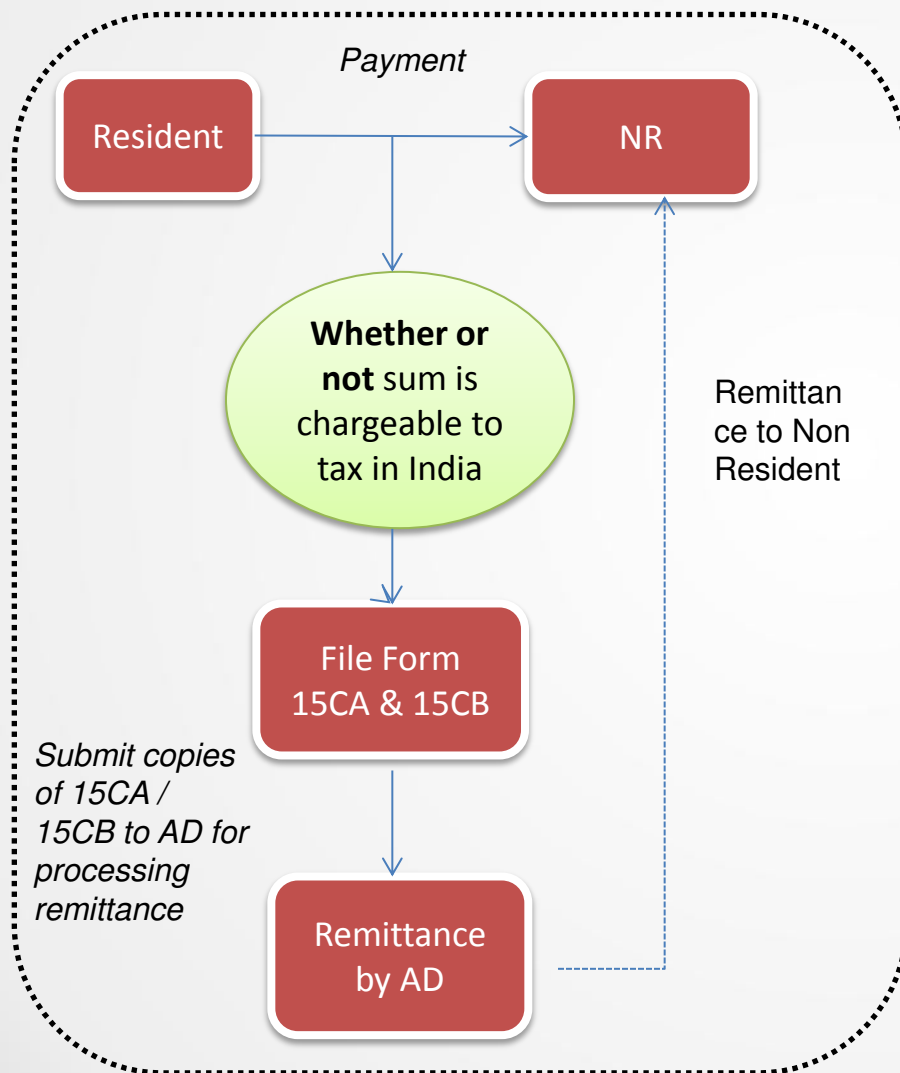
Trigger of TP provisions

Likely issues on tax credit in India, as also credit in the country of incorporation of Indian taxes paid

No treaty entitlement in case of certain countries, e.g. USA

Tax Amendments Cont'd...

Reporting requirement under the amended s.195(6)



- Finance Act 2015 w.e.f. 1st June 2015 requires reporting of all payments **whether or not chargeable to tax** u/s 195(6).
- Penalty on non disclosure is Rs 1 Lakh.
- Existing Rule 37BB continues to require compliance where the payment is **chargeable to tax in India**.
- CBDT yet to notify new Rule 37BB at par with Sec.195(6).

Tax Amendments Cont'd...

Presence of a fund manager in India would not constitute PE of the offshore funds resulting in adverse tax consequences. The fund management activity carried out through an eligible fund manager (EFM) acting on behalf of such eligible investment fund(EIF) shall not constitute business connection in India.

The share or interest of a Foreign Company or entity shall be deemed to derive its value substantially from the assets located in India (if on the specified date) value of Indian Assets exceeds the amount of Rs 10 Crore (Approx USD 15,62,500) and represents at least 50% of the value of all assets owned by the company or entity

The payment of interest by a PE in India of a non-resident, where such non-resident is engaged in business of banking, to the head office or any PE or any other part of such non-resident outside India shall be chargeable to tax. Such PE in India shall be deemed to be a separate person and independent of the non-resident of which it is a PE and provision relating to the computation of total income, determination of tax, collection and recovery shall apply to such interest payments.

Withholding Tax Rate reduced from 25% to 10% on Income earned by way of Royalties & Fees for Technical Services. The amendment is to take effect from April 1, 2016, i.e. AY 2016- 17.


Minimum Alternate Taxes exempted for Income from transactions in securities (other than short term capital gains arising on transactions on which securities transaction tax is not chargeable) arising to a Foreign Institutional Investor.

Concessional rate of 5% WTR on interest earned by FIIs and QFIs investing in Rupee denominated corporate bonds and Government securities has been extended from June 30, 2015 to June 30, 2017.


The implementation of the provisions pertaining to GAAR, introduced by the Finance Act, 2013, has been deferred by two years and has been made applicable from FY 2017-18 (AY 2018-19) and subsequent years of the Act.

Regulatory Amendments as per Finance Act 2015

- 
- Foreign Investments allowed in AIF

- 
- Foreign Exchange Management Act (FEMA) to provide that control on capital flows as equity will be exercised by the government. This is to ensure that Capital Account Control is a policy, and not a regulatory, matter.

- 
- Setting up a Public Debt Management Agency (PDMA) which will have External Commercial Borrowings (ECB) and domestic debt under one roof to promote Investments in India.

- 
- Establishment of a mechanism to be known as SETU (Self-Employment and Talent Utilization). SETU will examine all aspects of start-up businesses, and other self-employment activities, that could also address to concerns such as a more liberal system of raising global capital and ease of doing business in India.

OVERVIEW OF IGA BETWEEN INDIA & USA

SIGNED ON 9TH JULY, 2015



INTENDED TO BE MADE EFFECTIVE BEFORE
30TH SEPTEMBER, 2015

Background of Foreign Account Tax Compliance Act

To prevent tax evasion by US citizens and residents through use of offshore accounts.

The FATCA provisions were included in the Hiring Incentives to Restore Employment Act ("HIRE Act), which was signed into US law on 18 March 2010.


Intended to increase transparency with respect to US taxpayers investing or earning income through non-US institutions and non-US investment entities.

Outline of FATCA

- FATCA requires *Foreign Financial Institution (FFI)* to enter into an agreement with the IRS under which such institution agrees-
 - ❖ to obtain information regarding the account holder of each account maintained by it for determining which of them are **United States accounts**,
 - ❖ to comply with verification and due diligence procedures with respect to the identification of United States accounts,
 - ❖ to report on an annual basis of the details of any United States account maintained by the FFI.
- FFIs that do not comply with the FATCA requirements will face a withholding of 30% of any “withholdable amounts” payable to the foreign financial institution by withholding agents
- The statutory provisions in FATCA are the default provisions that are applicable to FFIs. An FFI’s country of organization may enter into an Inter-governmental Agreement (“IGA”) with the IRS.

Overview of IGA Between India & USA


Foreign Financial institutions in India will be required to report tax related information relating to U.S. account holders directly to the Indian Government, which will, in turn, relay that information to the US Internal Revenue Service (IRS).



US IRS will provide similar information about Indian citizens having any accounts or assets in the US.



The exchange of information on an automatic basis is likely to begin by end of September 2015.



India is expected to start receiving information through bilateral and reciprocal exchange of information route under FATCA from the USA later in the year 2015 retrospectively w.e.f. 01st July 2014..

Obligations Under FATCA Regulations

Obligation of FFIs

Registration with IRS:

- The IRS portal will be the primary means for FFIs to interact with the IRS to complete and maintain their FATCA registrations and agreements. FFIs can register by submitting information on the IRS portal.
- Upon approval by IRS, the registering FIs will receive a notice of registration acceptance and subsequently will obtain a Global Intermediary Identification number (GIIN).
- An FFI will use its GIIN as the ID number for establishing its FATCA compliance status and informing withholding agents that it is a compliant FI and properly registered.

Reporting:

FFIs who enter into an agreement with the IRS must annually report the following information about each of its U.S. accounts:

- the name and address and tax identification number of the US account holder (in case of US owned foreign entity, such details of each of its US substantial owner)
- the account number
- the account balance and
- the gross receipts and gross withdrawals or payments from the account

Threshold for Reporting:

- The FATCA regulations set out specific thresholds with respect to individual accounts and entity accounts, and also for pre-existing accounts and new accounts.
- All US financial accounts of individuals with an aggregated value of US \$50,000 or more must be reported to the IRS.
- Preexisting entity accounts of US \$250,000 or less are exempt from review.
- Enhanced review is required for high value accounts as of US \$1,000,000.

Way forward

The Indian Government has quickly come out with the rules for implementation of FATCA and has notified the reporting framework and due diligence requirements.

Other regulators such as RBI, SEBI and IRDA are expected to come out with specific guidelines for implementation of FATCA with reference to the notification issued by the CBDT.

Non-compliance with the FATCA requirements would attract penal provisions prescribed under the Income tax Act, 1961. Specific penalties will be levied for failure to provide a statement of financial transactions or reportable accounts. Inaccurate reporting will also attract penal provisions.

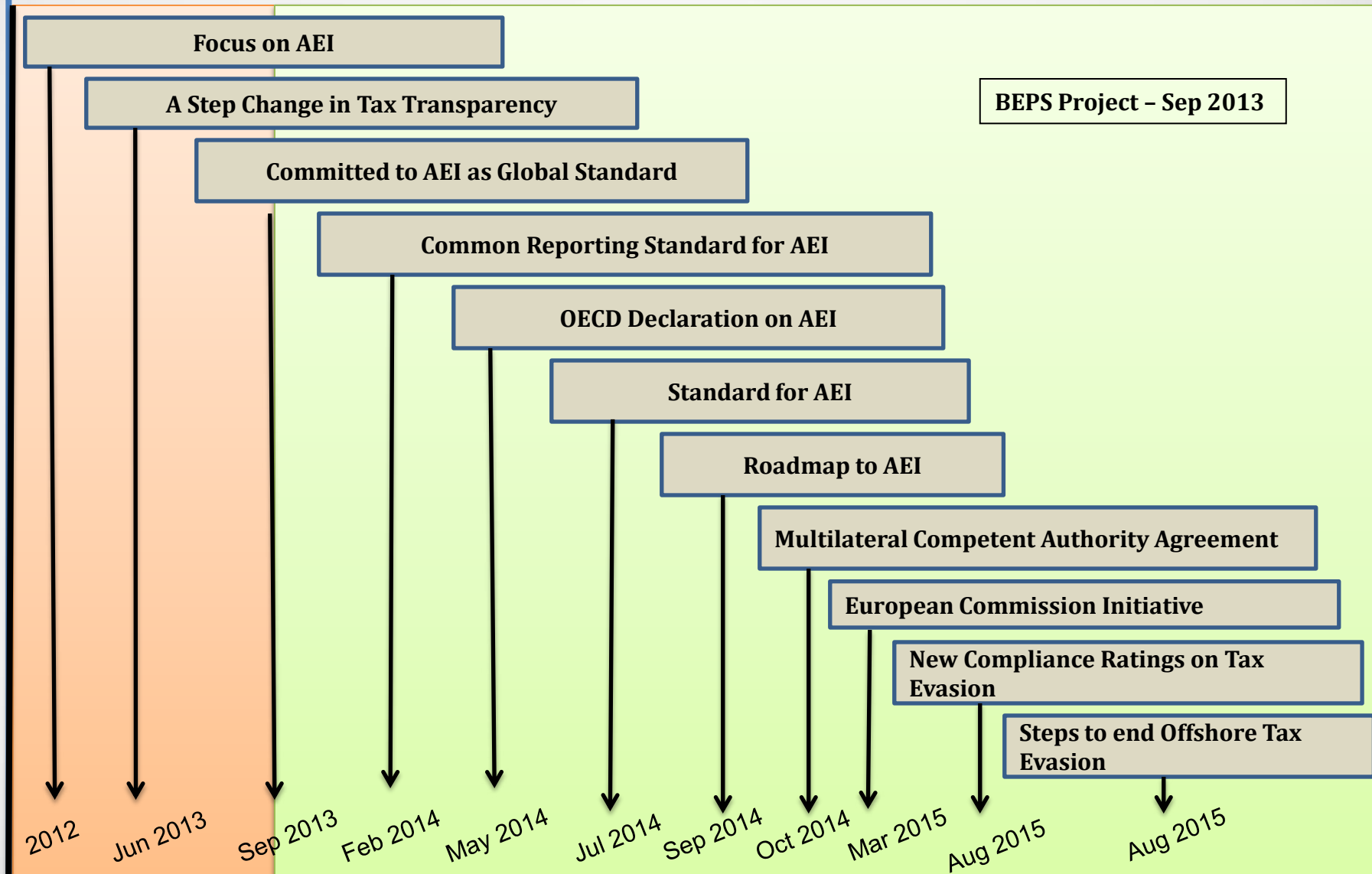
The information collated by India or the US or any other country is likely to be used by the respective Revenue authorities in initiating audits. They would like to map it with the disclosures and information furnished by the tax payer in his income-tax return. Follow on consequences about interest or penalties to the tax payer in either jurisdictions may arise in case of non-compliance. Accordingly, the implications of the above regime needs also be evaluated carefully from an individual perspective.

Given that there's an immediate reporting deadline of 31 August 2015 for the calendar year 2014 to enable the Indian Government to meet the deadline for exchange of information with the US IRS, it is important that the Indian financial institutions start the implementation process to report the required information within the stipulated time period.

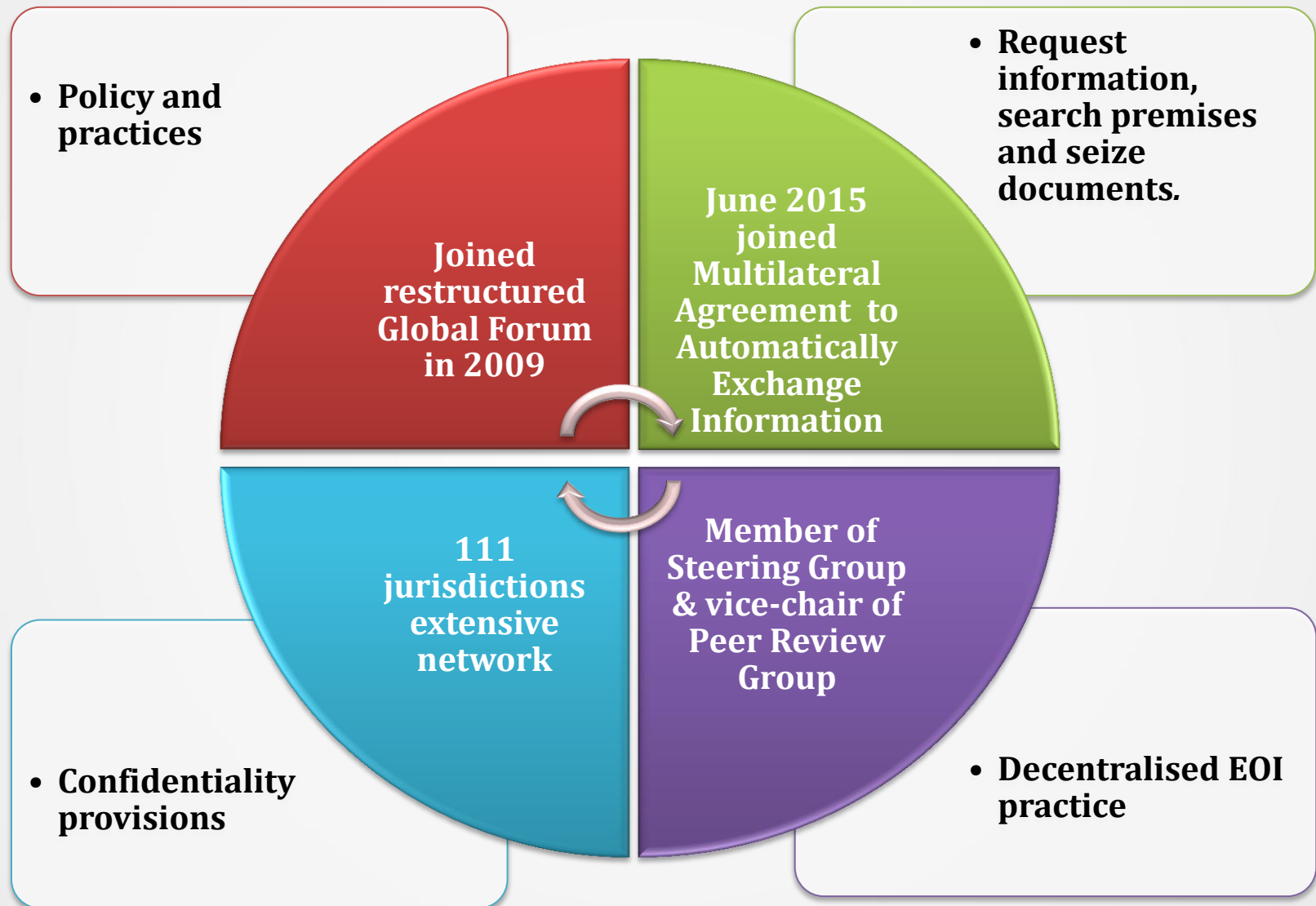
EXCHANGE OF INFORMATION



Recent Developments on EOI

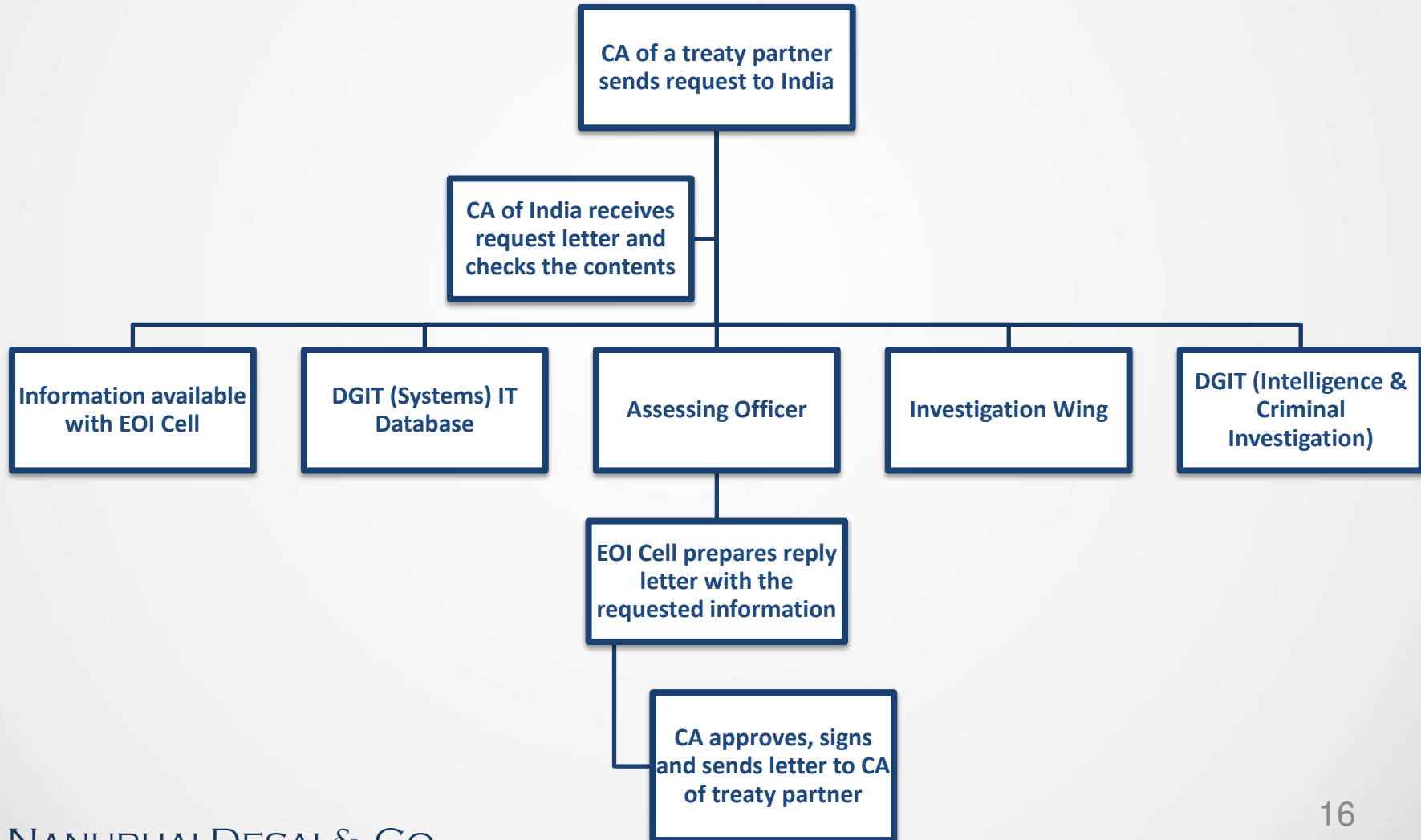


EOI on Global Forum – Role of India



EOI on Global Forum – Role of India Cont'd...

Handling Of Incoming Requests In India



EOI – Developments in India



- Initiated the process of renegotiation with 75 countries
- September 2014, completed negotiations/renegotiations with 40 countries



- Completed negotiation of Tax Information Exchange Agreements (TIEAs) with 17 tax havens.
- Section 94A inserted into Income tax Act, 1961



- Dedicated computerised cell
- Three pronged approach to tackle the black money issue



- Implementation of automatic exchange of information
- Protocols to existing DTAA's or new DTAA's



- India has also joined the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information
- Expected to start receiving information from other countries from 2017 onwards.

Agreements with Foreign Countries

For EOI, prevention of evasion or avoidance of tax on undisclosed foreign income

For Investigation of cases of evasion or avoidance of tax on undisclosed foreign income

To Avoid double taxation

For Carrying out any other purpose of the proposed legislation

For Recovery of tax

EOI & BEPS

Tax planning - Use of gaps in the interaction of different tax systems

Artificially reduce taxable income or shift profits to low-tax jurisdictions

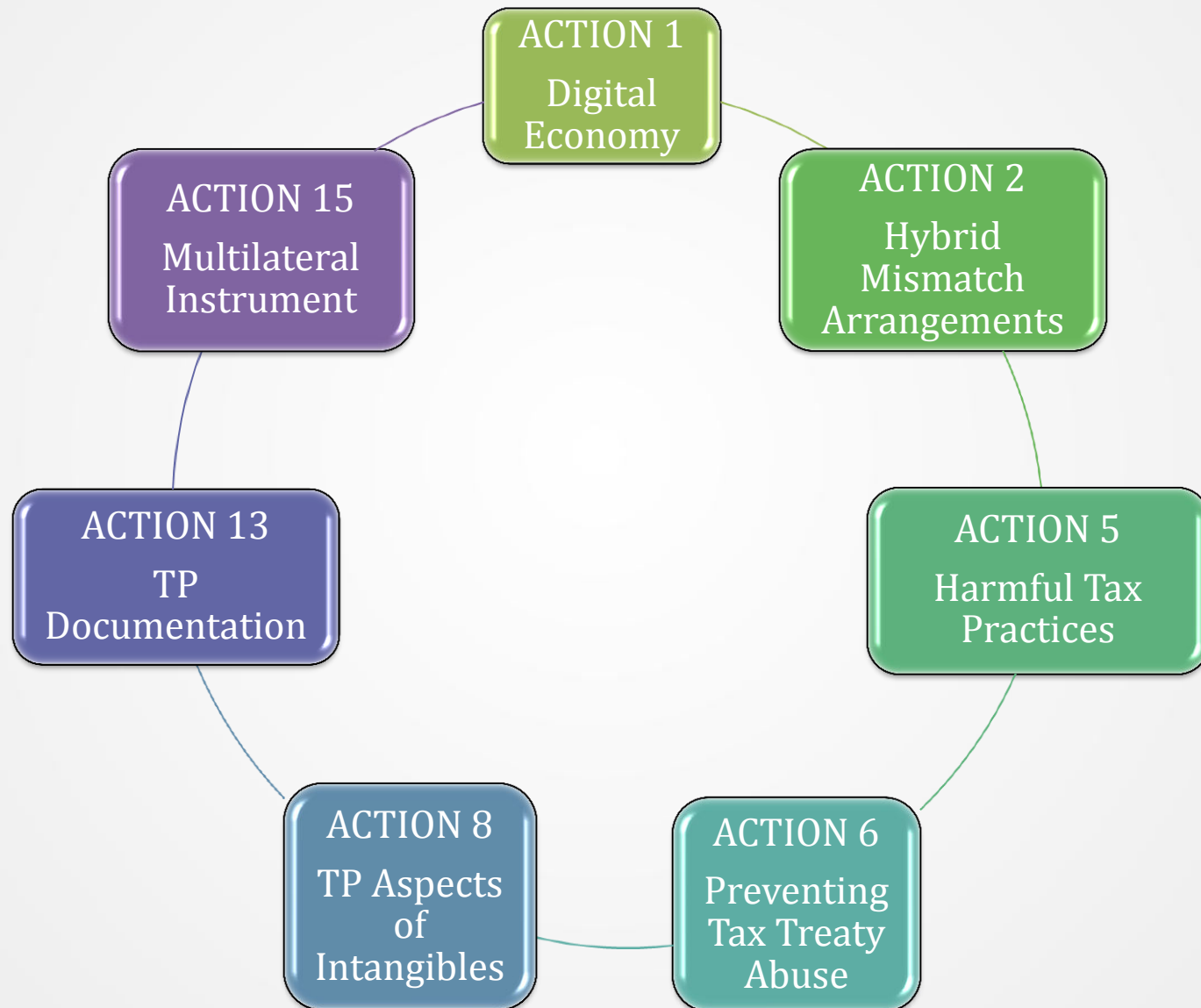
Minimising opportunities for double non-taxation

BEPS Project (Sep 2013) - 15-point Action Plan.

BEPS Action Plan – 7 outputs delivered within 12 months

44 countries working on an equal footing

BEPS 2014 DELIVERABLES



BEPS 2015 DELIVERABLES

Action 3
CFCs

Action 4
Interest

Action 5
Harmful Tax Practices

Action 7
PEs

Action 8
Transfer Pricing(TP):
Intangibles

Action 9
TP: Risks & Capital

Action 10
Other High Risk TP

Action 11
Analyse Data

Action 12
Disclosure of
Aggressive Tax
Planning

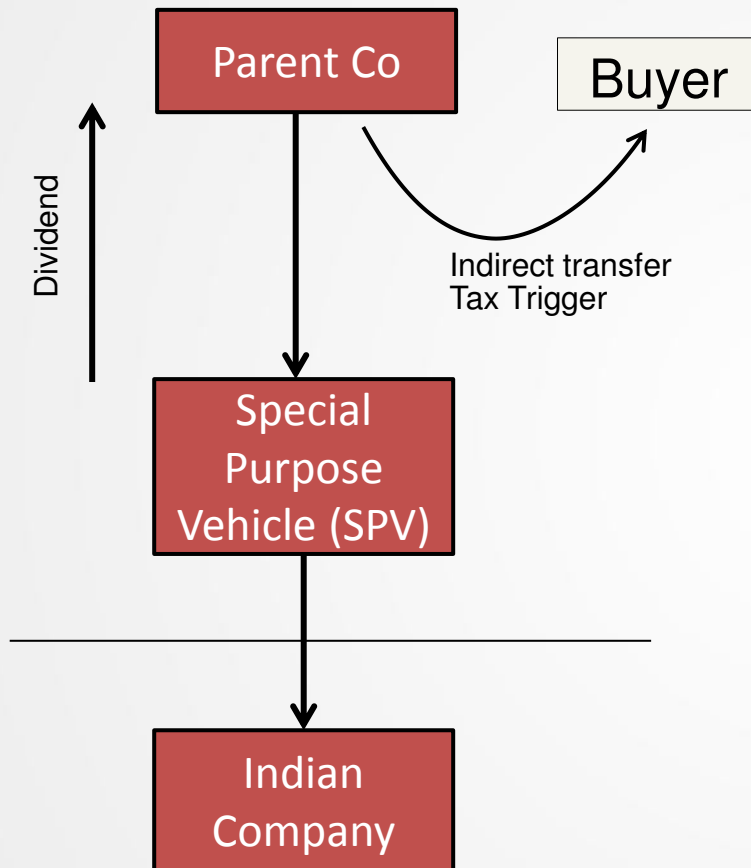
Action 14
Dispute Resolution

Action 15
Multilateral
Instrument

SOME ISSUES IN INTERNATIONAL TAXATION

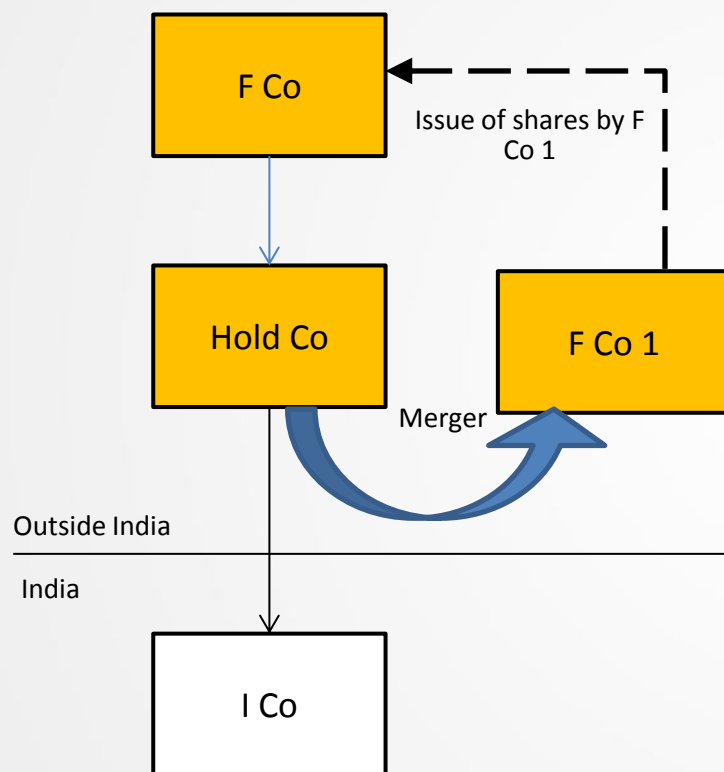


Indirect transfer: Capital Gain v. Dividend



- Indirect transfer by Parent Company attracts tax in India :
 - SPV (from no treaty jurisdiction), declares dividend to Parent Company
 - Controversy on taxability under Expl.5 of Section 9(1)
 - Declaration of dividend by SPV not taxable in India – Circular 4/2015
 - Cash extraction has impact on sale value of SPV shares
 - Can Tax Authority re-characterize the income dividend as part of sale proceeds?

Indirect Transfer vs Merger of Foreign Companies

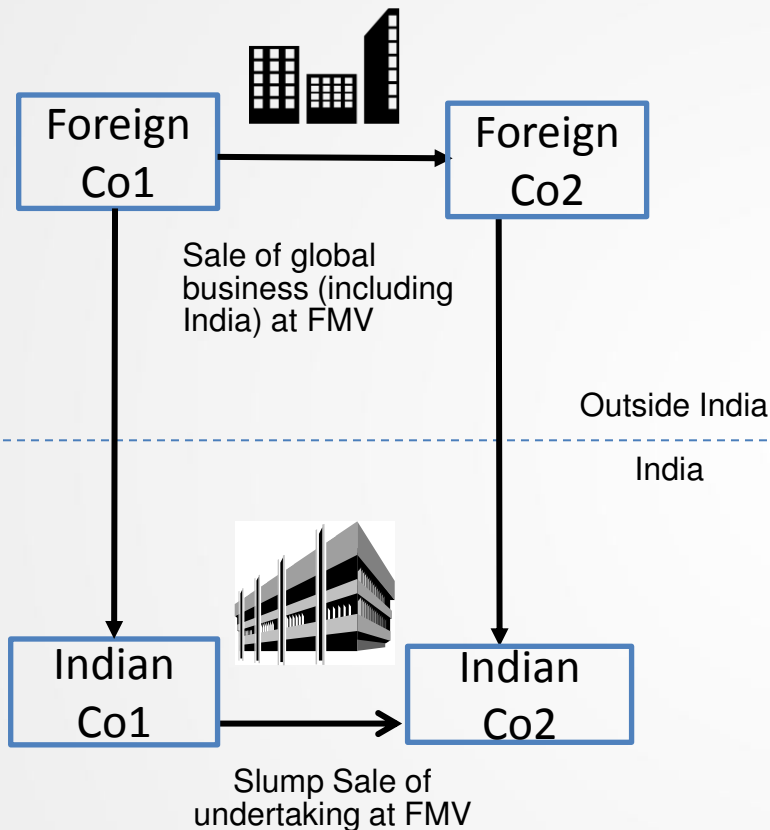


- Hold Co, a foreign entity, holds investment in Indian Company ('I Co')
- Hold Co merges into F Co 1 and F Co 1 issues shares as consideration to F Co
- Hold Co derives 75% of its value from I Co

Tax implications:

- **F Co (shareholder):**
 - 47(vii) operative only if amalgamated company is I Co
 - Extinguishment of shares – results in transfer – Grace Collis (SC)
- **Hold Co** – specifically exempt (section 47(via))
 - S. 47(viab)/(vicc) inserted by FA 2015 protects merging / demerging foreign company holding India assets indirectly
 - Shareholders still not neutralized?
- Shome committee recommendation
- Reporting requirements under s.285A on prescription

Deemed International Transaction U/s. 92B(2)



- Pursuant to global deal, there is sale of undertaking effected by Indian Co1 to Indian Co2 at FMV
- Sale was concluded as per terms agreed as part of global deal. Price was determined as per formula defined in the global deal
- Transaction between Indian Co1 and Indian Co2 may not be IT u/s. 92B(2) since neither Foreign Co1 has understanding with Indian Co2 nor Foreign Co2 has understanding with Indian Co1
- S.92B(1) impact to be independently examined

BLACK MONEY ACT

Background

A significant landmark in the governments efforts to tackle the menace of black money held overseas.

It has the potential to severely curtail the tendency to hold undisclosed income in the form of overseas assets.

The significant penalties and prosecution for offences under this law necessitates a thorough understanding of the law so there is proper compliances without such penalties or prosecution for inadvertent mistakes.

Black Money Act

- Act came into force on 1st day of July, 2015
- Compliance Window from 1st July, 2015 to 30th September, 2015
- Taxes and penalty on undisclosed foreign asset under compliance period have to be paid on or before 31st December, 2015
- Tax at the rate of 30% of total undisclosed foreign income and asset of the previous year

- Tax at the rate of 30% plus penalty (equal to tax), if self declaration made in one time compliance window
- Tax at the fair market value of an undisclosed asset located outside India
- Penalty 3 times the amount of tax evaded or 90% of the undisclosed income or value of asset
- Punishment of jail for 3-10 years for wilful evasion of tax

- Undisclosed holdings of less than Rs 5 lakh will not entail penalty or prosecution
- Second and subsequent offence will be punishable with 3-10 years imprisonment and fine upto 1 crore
- Empowers Center to enter into agreements with other countries for EOI, recovery of tax and avoidance of double tax
- Contents of declaration cannot be used as evidence for imposing penalty/prosecution under Income Tax Act or Wealth Tax Act, 1957 or FEMA 1999 or Companies Act, 2013 or Customs Act, 1962

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