



Proposed Direct Tax Code Key Cross-Border Issues

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The way global investment is carried out

- Most FDI use an international financial center (IFC)

FDI via IFC	INBOUND %	OUTBOUND %
INDIA	66	76
CHINA	60	80

- 83 of US S+P co's operate in IFC's; Greater % of FTSE100 co's do so
- Rationale: Efficient structuring, pooling and management



Why Investors Structure via IFC

- **Tax is not main driver (Sharwan Commonwealth Report)**
- **Individual investors won't come directly:**
 - **Lack market knowledge / inability to monitor**
 - **Govt approvals, tax regulation/compliance**
- **Solution – pooled professionally managed funds in neutral domicile**
- **Result – reduced transaction costs**
- **Fund managers use well tried/tested jurisdiction with expertise like Mauritius**

DTC – Investor Concerns

- **Tax Treaty Override**
- **General Anti Avoidance Rules (“GAAR”)**
- **Controlled Foreign Company (“CFC”) provisions**
- **Tax Residency of Foreign Companies**
- **Non resident to non-resident share transfers where Indian assets >50% of total assets**

International Investor Concerns – Treaty override

- **DTC seeks to unilaterally supersede provisions of international conventions**
- **Creates uncertainty in Indian tax framework**
- **Provisions wide in scope, providing extensive powers to tax officers: Potential risk of multiple and subjective interpretations**
- **Proposition undermines the importance of treaty based OFCs in investment realisation**
- **Tax exempt entities may not wish to bear risk of tax burden**
- **S 291(5) seems to suggest that the tax residence certificate (“TRC”) is not a one-off document for an income year but is required for each transaction**

DTC – Treaty override recommendations

- **To provide clarity and certainty, DTC should not override international tax treaties**
- **Per international convention treaty commitments should be honoured**
- **Investors understand concerns of India on alleged abuses/misuses of treaties. These should be addressed by the competent authorities on a bilateral basis**
- **Safeharbour for treaty transactions, international funds etc provided**

Investor Concerns - GAAR

- **Complex and widely cast, open to misinterpretation**
- **Presumption or purpose: Taxpayer to prove not to obtain tax benefit**
- **Discretionary power to CIT to invoke threshold, esp for int'l transactions, guidelines/scope/safeharbour awaited**
- **Litigation/cost from scrutiny and disputes on genuine transactions**
- **Composition of and how Dispute Resolution Panel will operate**

Residency of Foreign Companies

Investor Concerns

- Shift from concept of central management to place of effective management (“POEM”)
- Company resident in India if POEM *“at any time in the year”* is in India
- Above definition open to misinterpretation. *“At any time in the year”* may incorrectly imply Indian residency even if only one strategic Board meeting (of many) held in India
- Suggest POEM determined by reference to “usual” place where executive directors make decisions
- Apart from strategic decision making, POEM should also include *“the place where the day-to-day affairs of the company is administered”*

Non resident to non-resident share transfers

Investor Concerns

- **Indirect transfers of capital assets where Indian assets >50% in value taxable in India**
- **Provision not in line with general international practice, and may create increased litigations**
- **Creates additional uncertainty and complexity in the conclusion of any deals**
- **Inherent tax on Indian assets reduce value and India's investment competitiveness.**

Impact of DTC

- There may be “unintended” consequences of DTC on international treaties
- Treaty override under DTC could raise concerns about the stability of treaties and affect India’s credibility as a treaty partner
- The grant of unilateral power to tax authorities may not be the best solution to deal with treaty abuse
- The vast and discretionary powers to the tax authorities on GAAR will result in significant uncertainty and lack of predictability
- It will affect FDI/FII flows to India and could divert them elsewhere
- GAAR/CFC will reduce competitiveness of India inbound/outbound investment



Thank You