Base erosion and profit shifting (BEPS) refers to tax planning strategies used by MNCs that exploit gaps and mismatches in tax rules to avoid paying tax.

The OECD/G20 Inclusive Framework on BEPS brings together over 135 countries and jurisdictions to collaborate on the implementation of the BEPS Package.

The BEPS Package provides 15 Actions that equip governments with the domestic and international instruments needed to tackle tax avoidance.

Countries now have the tools to ensure that profits are taxed where economic activities generating the profits are performed and where value is created.
BEPS ACTION PLANS

► Action Plan 1 – Challenges of Digital Economy
► Action Plan 2 – Neutralizing the Effects of Hybrid Mismatch Arrangements
► Action Plan 3 – Designing Effective Controlled Foreign Company Rules
► Action Plan 4 – Limiting Base Erosion Involving Interest Deductions And Other Financial Payments
► Action Plan 5 – Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance
► Action Plan 6 – Preventing the Granting of Treaty Benefits in Inappropriate Circumstances
► Action Plan 7 – Preventing the Artificial Avoidance of Permanent Establishment Status
► Action Plan 8-10 – Aligning Transfer Pricing Outcomes with Value Creation
► Action Plan 11 – Measuring and Monitoring BEPS
► Action Plan 12 – Mandatory Disclosure Rules
► Action Plan 14 – Making Dispute Resolution Mechanisms More Effective
► Action Plan 15 – Developing a Multilateral Instrument to Modify Bilateral Tax Treaties
INDIA AND BEPS

- 5 Oct 2015: G20/OECD published final reports on BEPS
- 24 Nov 2016: 68 jurisdictions including India signed MLI
- 7 Jun 2017: MLI was published
- 1 Jul 2018: MLI entered into force in India
- 13 Jun 2019: India submitted ratification (along-with final position)
- 25 Jun 2019: MLI enters into force
- 1 Oct 2019: India ratified MLI
- 1 Apr 2020: MLI provisions came into effect for 23 bilateral treaties
With effect from 1st April 2016

Equalization Levy (EL) to be withheld @6%

On payments made to non-residents

For online advertisement, any provision for digital advertising space or any other facility or service for the purpose of online advertisement

On amounts exceeding INR 1,00,000 during the FY
EQUALIZATION LEVY ON ECOMMERCE TRANSACTIONS

Equalization levy @ 2% of amount receivable (to be deposited quarterly) by non-resident e-commerce operator for e-commerce supply or services* made or provided or facilitated by it

- to a person resident in India
- to a non-resident in relation to
- to a person who buys such goods or services or both using internet protocol address located in India

- sale of advertisement, which targets a customer, who is resident in India or a customer who accesses the advertisement though internet protocol address located in India
- sale of data, collected from a person who is resident in India or from a person who uses internet protocol address located in India

* Not taxable under the Income tax Act
**Definitions**

"E-commerce operator" means a **non-resident** who owns, operates or manages digital or electronic facility or platform for online sale of goods or online provision of services or both.

"E-commerce supply or services" means—
(i) online sale of goods owned by the e-commerce operator; or
(ii) online provision of services provided by the e-commerce operator; or
(iii) online sale of goods or provision of services or both, facilitated by the e-commerce operator; or
(iv) any combination of activities listed in clause (i), (ii) or clause (iii);"
EQUALIZATION LEVY ON ECOMMERCE TRANSACTIONS

Exceptions

- E-commerce operator making or providing or facilitating e-commerce supply or services has a **PE in India** and such supply or services are effectively connected with such **PE**
- Equalization levy is leviable under section 165 (online advertisement and related activities)
- Sales, turnover or gross receipts of the e-commerce operator from such supply or services is **less than 2 crore** during the previous year
VIRTUAL PE AND SEP

W.e.f. 1st April 2020

Advertisement which targets a customer who resides in India

Advertisement accessed by a customer through IP address located in India

Sale of data collected from a person who resides in India

Sale of data collected from a person who uses IP address located in India

Sale of goods using data collected from a person who resides in India

Sale of goods using data collected from a person who uses IP address located in India

Sale of services using data collected from a person who resides in India

Sale of services using data collected from a person who uses IP addresses located in India
W.e.f. 1st April 2021

Transaction in respect of any goods, services or property carried out by a non-resident in India including provision of download of data or software in India, if the aggregate of payments arising from such transaction or transactions during the previous year exceeds such amount as may be prescribed; or

Systematic and continuous soliciting of business activities or engaging in interaction with such number of users as may be prescribed, in India through digital means

whether or not,—
(i) the agreement for such transactions or activities is entered in India; or
(ii) the non-resident has a residence or place of business in India; or
(iii) the non-resident renders services in India:
THIN CAPITALIZATION

INTEREST DEDUCTIONS

With effect from 1st April 2017

Introduction of Section 94B in Income Tax Act, 1961

Deduction for interest expense has been restricted

To maximum of 30% of Earnings Before Interest, Tax, Depreciation and Amortization (EBITDA)

If the expense on account of interest exceeds INR 10 million

And payment has been made to foreign associates of Indian persons

Balance unsettled interest can be carried forward for next 8 years
HARMFUL TAX PRACTICES

PATENT BOX SCHEME

- W.e.f. 1st April 2016
- Tax on royalty from patent @10%
- Where 75% of expenditure incurred for developing such patent has been incurred in India

INDIA HAS RECEIVED TEMPLATES IN RESPECT OF 6 CATEGORIES OF TAXPAYER-SPECIFIC RULINGS FROM OTHER JURISDICTIONS

- Rulings Related to Preferential Regime
- Unilateral APAs or Other Cross Border Unilateral Rulings in respect of Transfer Pricing
- Cross Border Rulings providing for a Downward Adjustment of Taxable Profits
- PE Rulings
- Related Party Conduit Rulings
- Miscellaneous rulings which may be included at a later date as decided by the Forum on Harmful Practices
- India agreed for the above transparency rules
PREVENT TREATY ABUSE

PPT + SIMPLIFIED LOB
- India has taken a position to apply PPT along with Simplified LOB across all its notified treaties. However, most of the other treaty partners of India have opted only PPT.
- Ultimately Simplified LOB may not be included in Indian tax treaties if the other parties do not agree for its inclusion.
- LOB clause is specially included in many bi-lateral treaties entered by India.

DIVIDEND TAXATION
- India has opted for additional criteria of “365 days minimum holding period” for the shareholder to avail concessional tax rates under the treaty (except for Portugal as similar provision already exists)

CAPITAL GAINS ON SHARES
- India has not made any reservation for additional criteria of “365 days minimum holding period” in case of gains arising from alienation of shares or other participation rights if such shares or rights derive more than 50% of their value from immovable property situated in the source jurisdiction. Thus, Source rule for taxation of immovable property is applicable.

60 PER CENT TEST
- India has not made any reservation on 60 per cent test, i.e. if the tax payable in third State is <60% of tax payable in country of residence, then treaty relief would not apply
RESTRICTION ON TAXING RESIDENTS

- MLI impairs rights of a country to tax its own residents.
- However, it also ensures that certain benefits granted to tax residents are not impacted.
- India has not made any reservation on this
PERMANENT ESTABLISHMENT (PE) STATUS

DOMESTIC INCOME TAX PROVISIONS HAVE BEEN AMENDED W.E.F. 1ST APRIL 2018 TO INCLUDE THE FOLLOWING:

Any business activity carried out through a person who, acting on behalf of the non-resident

And the contracts are

has and habitually exercises in India, an authority to conclude contracts on behalf of the non-resident or

in the name of the non-resident or

habitually concludes contracts or

for the transfer of the ownership of, or for the granting of the right to use, property owned by that non-resident or that non-resident has the right to use or

habitually plays the principal role leading to conclusion of contracts by that non-resident

for the provision of services by the non-resident
PERMANENT ESTABLISHMENT (PE) STATUS

ARTIFICIAL AVOIDANCE OF PE STATUS

PROVISIONS UNDER MLI

- Artificial avoidance of PE status through commissioner and other arrangements
- Specific activity exemptions
- Splitting up of contracts
- Closely related enterprise to include directly or indirectly >50% interest

INDIA'S STAND UNDER MLI
W.E.F. 1ST APRIL 2020

- No reservation
- Option A (no change but mandated characterization as preparatory and auxiliary)
- Silent
- No reservation
### COMPLIANCE REQUIREMENTS

#### Transfer Pricing Documentation w.e.f. 1st April 2016

<table>
<thead>
<tr>
<th>Type of compliance</th>
<th>Master File</th>
<th>Local File</th>
<th>CBC Reporting</th>
</tr>
</thead>
<tbody>
<tr>
<td>Applicability</td>
<td>Every constituent entity</td>
<td>International transactions &gt; INR 10 mn</td>
<td>Group Revenue &gt; INR 55 bn (USD 737 mn)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Form Name</th>
<th>Due Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Form 3CEAA</td>
<td>30th November</td>
</tr>
<tr>
<td>Form 3CEAB (intimation)</td>
<td>31st October</td>
</tr>
<tr>
<td>Prescribed information in a booklet</td>
<td>30th November</td>
</tr>
<tr>
<td>Form 3CEAC (intimation)</td>
<td>10 months from end of accounting year</td>
</tr>
<tr>
<td>Form 3CEAD</td>
<td>12 months from end of accounting year</td>
</tr>
<tr>
<td>Form 3CEAE (intimation)</td>
<td>12 months from end of accounting year</td>
</tr>
</tbody>
</table>

* There is an exemption from detailed master file (only an intimation needs to be filed) where the Group Revenue < INR 5 bn (USD 67 mn) (subject to other conditions).
* Accountant’s certificate in Form 3CEB is to be obtained on or before 31st October, where there is any international transaction with group entities.

---

### CBCR – PENALTIES

| MASTER FILE | INR 500,000 |
| LOCAL FILE | INR 100,000  |
|            | 2% of value of international transaction with group entities |
|            | INR 5,000 per day, if default continues for up to 1 month |
| CBC REPORTING | INR 15,000 per day, if the default continues beyond 1 month |
|            | INR 50,000 per day, if default continues even after levy of penalty in either of the two cases stated above |

www.akvg.com
MUTUAL AGREED PROCEDURE (MAP)

1. A resident may file an application in Form 34F with Indian Competent Authority (CA).
2. Where Indian CA receives a similar application filed with CA of other country, then Indian CA shall convey its acceptance or otherwise with such other country.
3. Indian CA may call for records to understand actions taken by respective authorities in India or outside, which are not in accordance with terms of agreement.

1. Indian CA shall endeavor to arrive at a mutually agreeable resolution within an average time of 24 months.
2. Where MAP has been invoked because of action taken by Indian tax authorities, resolution should ensure that it should not result in decreasing income or increasing loss.
3. Resolution shall be communicated in writing to Assessee.

1. Assessee shall communicate his acceptance or non-acceptance in writing to Indian CA within 20 days of receipt of communication.
2. Assessee’s acceptance shall be accompanied by proof of withdrawal of appeal, if any.
3. Indian CA shall communicate resolution to Principal Chief Commissioner / Chief Commissioner / Principal Director General/ Director General, who shall forward it to tax officer.

1. Tax officer shall give effect to resolution by an order in writing, within 1 month and intimate the tax payable.
2. Assessee will be under an obligation to pay the tax demanded within the timelines and manner provided. Upon receipt of proof of payment of tax demand, the Tax Officer to proceed to withdraw the pending appeal, if any.
3. A copy of the order giving effect shall be sent to Indian CA and to the concerned Assessee.

1. Amount of tax, interest or penalty already determined shall be adjusted in accordance with the resolution.
<table>
<thead>
<tr>
<th>Article of MLI</th>
<th>Name of Article</th>
<th>India’s Position</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 3</td>
<td>Transparent Entities</td>
<td>Reserved</td>
</tr>
<tr>
<td>Article 4</td>
<td>Dual Resident Entities</td>
<td>Adopted</td>
</tr>
<tr>
<td>Article 5</td>
<td>Method for Elimination of Double Taxation</td>
<td>Adopted-Option C (Tax Credit method)</td>
</tr>
<tr>
<td>Article 6</td>
<td>Purpose of Covered Tax Agreement</td>
<td>Silent</td>
</tr>
<tr>
<td>Article 7</td>
<td>Prevention of Treaty Abuse</td>
<td>Adopted-PPT along with SLOB</td>
</tr>
<tr>
<td>Article 8</td>
<td>Dividend Transfer Transaction</td>
<td>Adopted (Except India-Portugal Treaty)</td>
</tr>
<tr>
<td>Article 9</td>
<td>Capital Gain from alienation of Shares (Immovable property)</td>
<td>Adopted</td>
</tr>
<tr>
<td>Article 10</td>
<td>Anti Abuse Rule for PE in 3rd Jurisdiction (60% Test)</td>
<td>Adopted</td>
</tr>
<tr>
<td>Article 11</td>
<td>Restrict a Party's Right to Tax its Own Residents</td>
<td>Adopted</td>
</tr>
<tr>
<td>Article 12</td>
<td>Artificial Avoidance of PE through Commissioner Arrangements</td>
<td>Adopted</td>
</tr>
<tr>
<td>Article 13</td>
<td>Artificial Avoidance of PE through Specific Activity Exemptions</td>
<td>Adopted-Option A</td>
</tr>
<tr>
<td>Article 14</td>
<td>Splitting Up of Contracts (Site or Construction Contracts etc.)</td>
<td>Silent</td>
</tr>
<tr>
<td>Article 15</td>
<td>Definition of Person Closely Related</td>
<td>Adopted</td>
</tr>
<tr>
<td>Article 16</td>
<td>Mutual Agreement Procedure</td>
<td>Reserved Para (1): Only residents can approach</td>
</tr>
<tr>
<td>Article 17</td>
<td>Corresponding Adjustment (TP)</td>
<td>Reserved (Will Adopt)</td>
</tr>
<tr>
<td>Article 18-26</td>
<td>Mandatory Binding Arbitration</td>
<td>Reserved</td>
</tr>
</tbody>
</table>
## SUMMARY

<table>
<thead>
<tr>
<th>Action Plan</th>
<th>Name</th>
<th>Actioned by India</th>
<th>Details of provisions implemented</th>
<th>Effective Date</th>
</tr>
</thead>
</table>
| 1           | Digital taxation                 | Yes               | • Equalization levy on online advertisement  
• Equalization levy on ecommerce transactions  
• Virtual Permanent Establishment  
• Significant Economic Presence                                                                                                                                                                                                 | 1st April 2016  
1st April 2020  
1st April 2020  
1st April 2021 |
| 2           | Hybrid Mismatch Arrangements     | No                | -                                                                                                                                                                                                                                | -              |
| 3           | Controlled Foreign Company (CFC) | No                | -                                                                                                                                                                                                                                | -              |
| 4           | Interest deductions              | Yes               | • Thin capitalization u/s 94B                                                                                                                                                                                                    | 1st April 2017 |
| 5           | Harmful tax practices            | Yes               | • India agreed for the transparency rules  
• Patent box regime  
• India has received templates in respect of six categories of taxpayer-specific rulings from other jurisdictions                                                                                                                                 | 1st April 2016 |
| 6           | Prevent treaty abuse             | Yes               | • PPT + Simplified LOB  
• Minimum shareholding period for getting benefit of tax on Dividend under treaty  
• Source rule for taxation of immovable property  
• 60 per cent test                                                                                                                                                                                                               | 1st April 2020 |
<table>
<thead>
<tr>
<th>Action Plan</th>
<th>Name</th>
<th>Actioned by India</th>
<th>Details of provisions implemented</th>
<th>Effective Date</th>
</tr>
</thead>
</table>
| 7           | Permanent Establishment (PE) Status                    | Yes               | - Artificial avoidance of PE status through commissioner and other arrangements  
- Specific activity exemptions which are preparatory or auxiliary in character  
- India is silent on splitting up of contracts  
- Directly or indirectly >50 percent interest to be considered for closely related enterprise                                                                 | 1st April 2018       |
| 8-10        | Transfer Pricing Outcomes                             | No                | -                                                                                                                                                                                                                                | -                    |
| 11          | Measuring & Monitoring BEPS                           | No                | -                                                                                                                                                                                                                                | -                    |
| 12          | Mandatory Disclosure Rules                            | No                | -                                                                                                                                                                                                                                | -                    |
| 13          | Transfer Pricing Documentation & Country by Country reporting (CbCR) | Yes              | - Master file reporting requirements introduced  
- CbCR requirements introduced                                                                                                                                                                                                  | 1st April 2016       |
| 14          | Mutual Agreement Procedure (MAP)                      | Yes               | - India did not accept mandatory binding arbitration and assured that MAP cases would be resolved in a speedier manner  
- Amendments in the existing MAP introduced for expediting the process                                                                                                                                                    | 6th May 2020         |
| 15          | Multi-Lateral Instrument (MLI)                        | Yes               | - Signed MLI                                                                                                                                                                                                                 | 1st April 2020       |
• HEAD OFFICE •

E-1, 2nd floor Prashant Vihar, Delhi, 110085

• BRANCH OFFICES •

Gurgaon  Mumbai  Bangalore  Chennai

Ahmedabad  Lucknow

www.akvgv.com