

Offshore Transfers of Assets

An Indian Perspective

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Offshore Transfers in India- the background

- **Historical position:** Gains from transfer of assets *situated in India* taxable
- **Vodafone case:** Gains on transfer of a share in a Cayman Islands company with downstream Indian subsidiaries sought to be taxed
 - Amendments made in China and Indonesia to tax indirect transfers during pendency of litigation in India
 - Revenue's stand rejected by the Supreme Court of India in 2012
- Law amended in 2012 with retrospective effect from 1961
 - Shares in foreign companies ***deriving value substantially*** from assets located in India ***deemed to be situated in India***
 - Intended to codify the 'source' rule of taxation – place of economic activity relevant and not mode of realisation of gains
 - Further amendments made in 2015 to provide clarity

Challenges & their resolution...

- **Identifying offshore transfers that should be taxed**

- When foreign shares derive value *substantially* from assets located in India
- Defining '*substantially*' - greater than 50% of total value
- Evolving guidelines for valuing India assets and foreign shares

- **How much of the gains should be taxable?**

- Pre-2015: Entire gains taxable if substantiality threshold breached?
- Post-2015: Pro-rata taxation

- **What transfers should be exempt?**

- Pre-2015: No exemptions
- Post-2015: Exemption for Small shareholding (less than 5%) and select group restructuring
- No exemption for transactions in listed securities

...Challenges & their resolution

- **How to collect / enforce the tax?**

- Withholding obligation in all cases on buyers
- No exclusion from withholding even in case of stock market transactions
- Other assets of the Seller in India can be proceeded against

- **Reporting mechanisms**

- Obligation on Indian target to report upstream changes in shareholding
- What if Indian target has no knowledge of up-tier shareholding changes?

- **Avoiding double taxation**

- Offshore transfers not covered by key treaties – significant risk of double taxation
- Availability of credits also a challenge

Lessons learned / takeaways

- Taxation of offshore transfers now seen as inevitable...
... however, disputes over its retrospective applicability continue
- Law on offshore transfers evolving slowly..
 - Levy introduced in 2012
 - ‘Substantially’ threshold defined in 2015
 - Pro-rata taxation, exclusions for small shareholders, group restructuring provided in 2015
 - Valuation norms not yet notified

... leading to uncertainty at the ground level
- Greater cohesion at a global level needed – treaty coverage and foreign tax credits



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