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Tax Alert

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Protocol amending the Singapore-India tax treaty

Shift from resident-based taxation to source-based taxation

On 30 December 2016, Singapore and India signed the third protocol (protocol) amending the Singapore-India bilateral avoidance of double taxation agreement (tax treaty). The key features of the protocol are summarised below.

CAPITAL GAINS

As per the protocol, the capital gains tax in India on disposal of shares in an Indian company by a Singapore tax resident would be as follows:

Disposal of shares in an Indian company by a Singapore tax resident	Capital gains tax in India
Shares acquired before 1 April 2017 and disposed anytime	Grandfathered and not taxable in India, subject to satisfaction of the Limitation of Benefit (LOB) clause
Shares acquired on or after 1 April 2017 and disposed before 1 April 2019	Taxable in India – tax rate will be limited to 50% of the domestic tax rate of India, subject to satisfaction of the LOB clause
Shares acquired on or after 1 April 2017 and disposed on or after 1 April 2019	Taxable in India – at full domestic tax rates

LOB CLAUSE

The benefits of capital gains under the tax treaty shall not be available if the affairs were arranged with the primary purpose to take advantage of such benefits.

A shell or conduit company shall not be entitled to the benefits of the tax treaty. A shell or conduit company is any legal entity falling within the definition of resident with negligible or nil business operations or with no real and continuous business activities carried out in that contracting state.

Where the shares are acquired before 1 April 2017, a resident of a state is deemed to be shell or conduit company if its annual expenditure on operations in that state is less than SGD 200,000 in Singapore or INR 5,000,000 in India, as the case may be, for each of the 12-month periods in the immediately preceding period of 24 months from the date on which the gains arise.

Where the shares are acquired on or after 1 April 2017, a resident of a state is deemed to be shell or conduit company if its annual expenditure on operations in that state is less than SGD 200,000 in Singapore or INR 5,000,000 in India, as the case may be, for the immediately preceding period of 12 months from the date on which the gains arise.

A resident of a contracting state is deemed not be a shell or conduit company if:

- It is listed on a recognised stock exchange of the contracting state; or
- Its annual expenditure on operations in that contracting state is equal to or more than SGD 200,000 in Singapore or INR 5,000,000 in India, as the case may be, for the period specified above.

ASSOCIATED ENTERPRISES

Article 9 on Associated Enterprises (AE) has been amended to provide that both countries shall enter into bilateral discussions for elimination of double taxation arising from transfer pricing or pricing of related party transactions. An appropriate adjustment may be made in the profits of AE in the other contracting state where an adjustment has been made by a country to profits of a resident, based on arm's length condition and taxes are levied on such profits adjusted. In addition, such profits are also taxed in the hands of AE in the other contracting state.

This amendment facilitates Mutual Agreement Procedure (MAP) in Transfer Pricing cases with Singapore, in line with the Base Erosion and Profit Shifting (BEPS) minimum standards.

OVERRIDING PROVISION

The tax treaty shall not prevent a contracting state from applying its domestic law and measures concerning the prevention of tax avoidance or tax evasion, like the provisions relating to General Anti Avoidance Rule (GAAR) and any other domestic anti avoidance rules.

OUR COMMENTS

The above amendment is in line with India's tax treaty policy to prevent double non-taxation, curb revenue loss and check the menace of black money through Automatic Exchange of Information (AEOI) as reflected in India's recently revised tax treaties with Mauritius and Cyprus and the joint declaration signed with Switzerland. Further, Singapore and India have also agreed on steps towards a set of new initiatives for joint promotion of bilateral investments with a view to enter into an agreement in the second half of 2017.[1]

Singapore was the largest foreign direct investor into India for the period April 2015 to March 2016. It is also one of the largest portfolio investors in India markets[2]. Investors intending to invest in India would now need to carefully evaluate the tax implications of investing in India through different jurisdictions.

1 Source: Press Release issued by the Singapore Ministry of Finance dated 30 December 2016

2 Source: Press Release issued by the Singapore Ministry of Finance dated 30 December 2016

Although the substance requirements under the Singapore – India tax treaty are comparatively higher than other jurisdictions, Singapore as a jurisdiction provides various other non-tax benefits, like ease of doing business, advantageous geographical location to move personnel, world class infrastructure, finance and treasury hub, etc. As such, Singapore (as compared to other jurisdictions) should continue to play an important role in terms of investments into India.

How we can help

As a committed tax advisor to our clients, we welcome any opportunity to discuss the relevance of the above matters to your business.

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