


# BEPS IMPLEMENTATION IN INDIA

2020



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

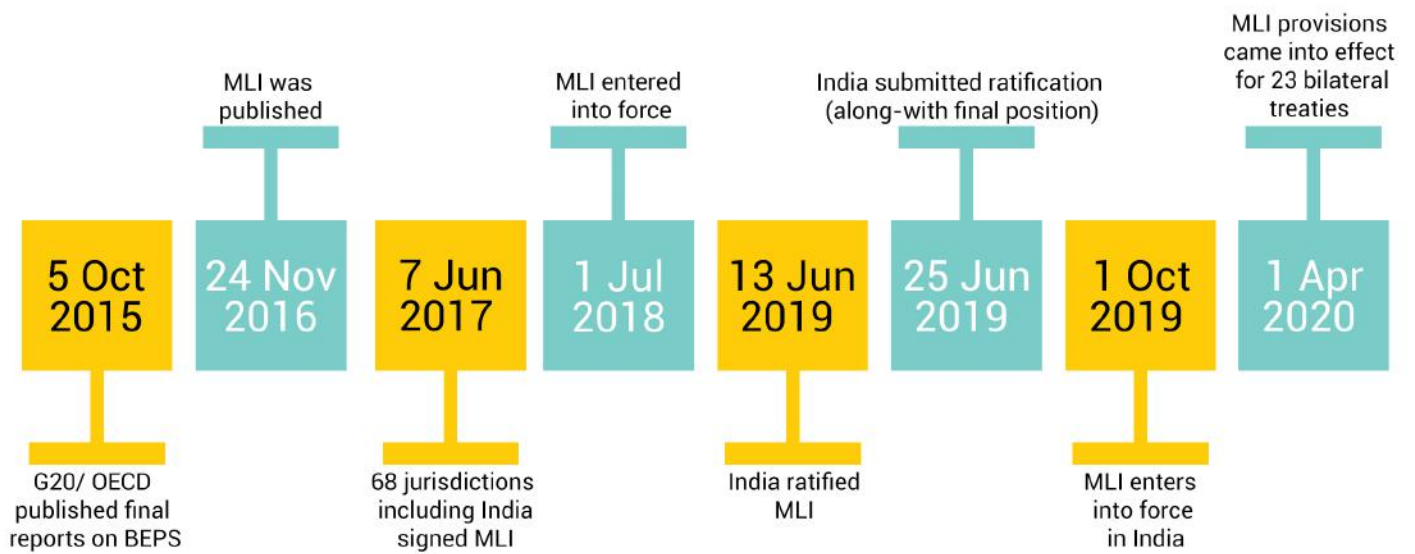


Countries now have the tools to ensure that profits are taxed where economic activities generating the profits are performed and where value is created

## 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 13 – Transfer Pricing Documentation and Country – by – Country Reporting**
- **Action Plan 14 – Making Dispute Resolution Mechanisms More Effective**
- **Action Plan 15 – Developing a Multilateral Instrument to Modify Bilateral Tax Treaties**

## INDIA AND BEPS



## EQUALIZATION LEVY ON DIGITAL ADVERTISEMENT

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 through 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

## EQUALIZATION LEVY ON ECOMMERCE TRANSACTIONS

### 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

### VIRTUAL PE

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

## SEP

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

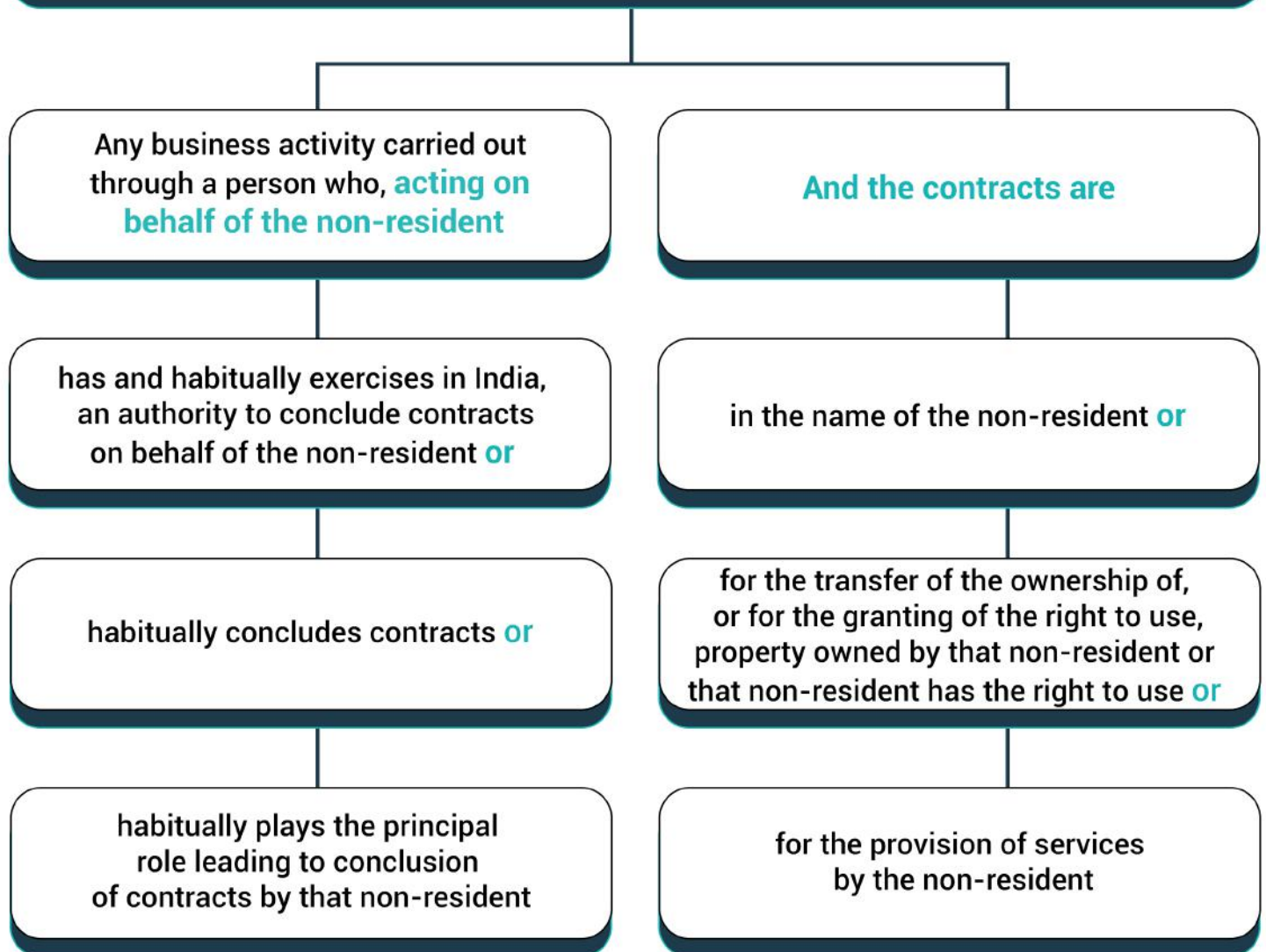


## RESTRICTION ON TAXING RESIDENTS

- 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:



## PERMANENT ESTABLISHMENT (PE) STATUS

### ARTIFICIAL AVOIDANCE OF PE STATUS

#### PROVISIONS UNDER MLI

Artificial avoidance of PE status through commissionaire 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

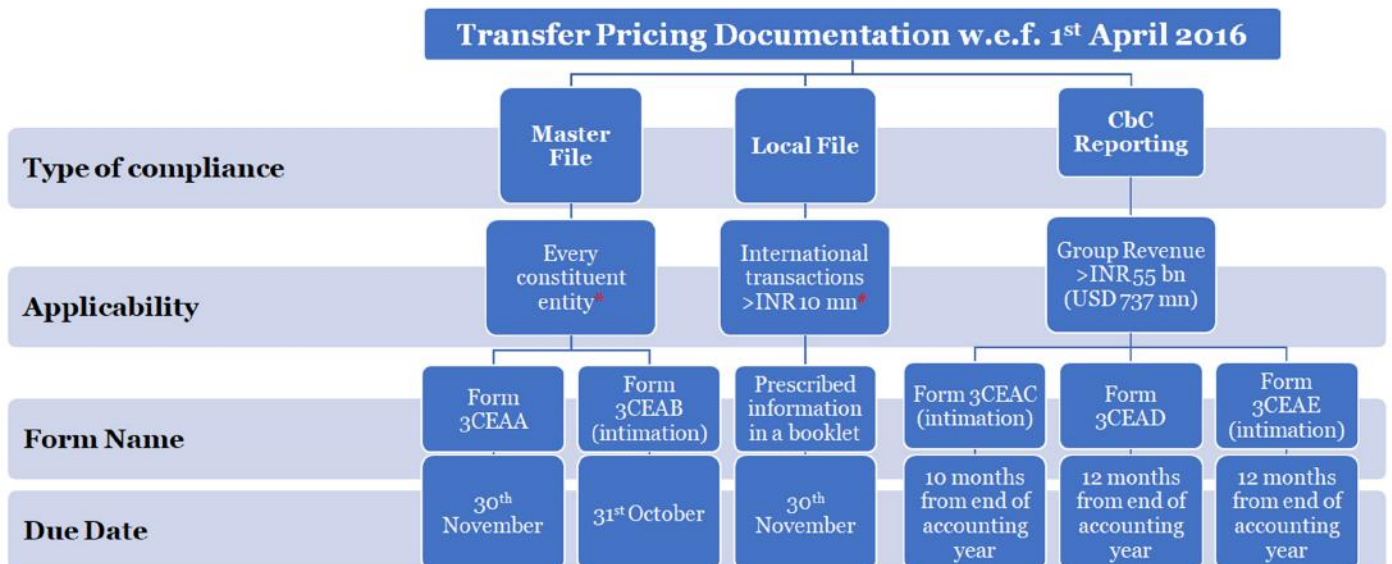
No reservation

Option A (no change but mandated characterization as preparatory and auxiliary)

Silent

No reservation

## COMPLIANCE REQUIREMENTS



\* 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 31<sup>st</sup> 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

CBC REPORTING — { INR 5,000 per day, if default continues for upto 1 month  
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

## MUTUAL AGREED PROCEDURE (MAP)





## PERMANENT ESTABLISHMENT (PE) STATUS

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

## SUMMARY

Action Plan	Name	Actioned by India	Details of provisions implemented	Effective Date
1	Digital taxation	Yes	<ul style="list-style-type: none"> <li>Equalization levy on online advertisement</li> <li>Equalization levy on ecommerce transactions</li> <li>Virtual Permanent Establishment</li> <li>Significant Economic Presence</li> </ul>	<ul style="list-style-type: none"> <li>1<sup>st</sup> April 2016</li> <li>1<sup>st</sup> April 2020</li> <li>1<sup>st</sup> April 2020</li> <li>1<sup>st</sup> April 2021</li> </ul>
2	Hybrid Mismatch Arrangements	No	-	-
3	Controlled Foreign Company (CFC)	No	-	-
4	Interest deductions	Yes	<ul style="list-style-type: none"> <li>Thin capitalization u/s 94B</li> </ul>	<ul style="list-style-type: none"> <li>1<sup>st</sup> April 2017</li> </ul>
5	Harmful tax practices	Yes	<ul style="list-style-type: none"> <li>India agreed for the transparency rules</li> <li>Patent box regime</li> <li>India has received templates in respect of six categories of taxpayer-specific rulings from other jurisdictions</li> </ul>	<ul style="list-style-type: none"> <li>1<sup>st</sup> April 2016</li> </ul>
6	Prevent treaty abuse	Yes	<ul style="list-style-type: none"> <li>PPT + Simplified LOB</li> <li>Minimum shareholding period for getting benefit of tax on Dividend under treaty</li> <li>Source rule for taxation of immovable property</li> <li>60 per cent test</li> </ul>	<ul style="list-style-type: none"> <li>1<sup>st</sup> April 2020</li> </ul>

## SUMMARY (CONT..)

Action Plan	Name	Actioned by India	Details of provisions implemented	Effective Date
7	Permanent Establishment (PE) Status	Yes	<ul style="list-style-type: none"> <li>Artificial avoidance of PE status through commissionaire and other arrangements</li> <li>Specific activity exemptions which are preparatory or auxiliary in character</li> <li>India is silent on splitting up of contracts</li> <li>Directly or indirectly &gt;50 percent interest to be considered for closely related enterprise</li> </ul>	1 <sup>st</sup> 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	<ul style="list-style-type: none"> <li>Master file reporting requirements introduced</li> <li>CbCR requirements introduced</li> </ul>	1 <sup>st</sup> April 2016
14	Mutual Agreement Procedure (MAP)	Yes	<ul style="list-style-type: none"> <li>India did not accept mandatory binding arbitration and assured that MAP cases would be resolved in a speedier manner</li> <li>Amendments in the existing MAP introduced for expediting the process</li> </ul>	6 <sup>th</sup> May 2020
15	Multi-Lateral Instrument (MLI)	Yes	<ul style="list-style-type: none"> <li>Signed MLI</li> </ul>	1 <sup>st</sup> April 2020



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