

Tax Hotline

July 14, 2023

OECD OUTCOME STATEMENT - THE BEGINNING OF THE END FOR INDIA'S EQUALISATION LEVY?

The OECD issued an Outcome Statement on the 2-Pillar solution,¹ which was approved by 138 countries on 11 July 2023. The agreement is in line with India's position that it would strive to reach a solution for Pillar One and Pillar Two as a package.²

The outcome statement anticipates the following 4-part package for the foreseeable future:

- The text for Multilateral Convention ("MLC") covering Amount A of Pillar One, which is anticipated to come into force during 2025. Although not publicly available, a draft of the MLC has been provided to the members of the Inclusive Framework, which is likely to be opened in the second half of 2023, followed by a signing ceremony by year end. In anticipation of the MLC, members of the Inclusive Framework have agreed not to impose any new Digital Services Taxes ("DSTs") in the interim. However, this agreement is subject to at least 30 jurisdictions from the Inclusive Framework, accounting for at least 60% of the Ultimate Parent Entities of in-scope MNEs, signing the MLC before the end of 2023.
- A framework for streamlined application of Amount B of Pillar One, which is expected to be launched next week. Input from stakeholders is sought until 1 September 2023. Content of the final report on Amount B will be incorporated in the OECD Transfer Pricing guidelines by January 2024.
- The model provision and the commentary for the Subject-to-Tax Rule will be published next week, and the Multilateral Instrument implementing the STTR will be opened for signature from 2 October 2023.
- A comprehensive action plan to support the implementation of the Two Pillar solution.

NDA COMMENTS

The outcome statement announces an agreement amongst its 138 signatories to refrain from imposing any new DSTs. The outcome statement, however, does not reflect any intention of removing any DSTs currently imposed by the signatories before the entry into force of the MLC. Whilst it may be presumed that the MLC, if and when it does come into force, will restrict the imposition of DST's,³ it seems improbable that countries would roll them back before the MLC's entry into force.

From an Indian perspective, the Equalisation Levy ("EL") could be expected to be restricted with effect from 1 April 2026. In the meantime, however, the question whether the EL is already excluded by India's tax treaties remains unanswered. It is the Indian government's stance that the EL falls outside the scope of India's tax treaties. This, they argue, is because the EL is not imposed by the Income-tax Act, 1961, but through the Finance Acts of 2016 and 2020. It is also argued that it is not a "substantially similar tax" because it is levied on the gross consideration for digital supplies and digital services, and not only on the "income" component of a payment. These arguments do not seem entirely convincing, as the EL is but a direct tax, not dissimilar to withholding taxes under the Income-tax Act, 1961, which are also levied on gross considerations. We are of the view that the EL could be argued to be covered by India's existing tax treaties, should the service provider be a resident of a contracting state. So far, however, the EL does not appear to have been challenged before any judicial or quasi-judicial authority in India.

We shall continue to provide updates regarding the 2-pillar solution as and when the imminent developments occur.

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You can direct your queries or comments to the authors.

¹<https://www.oecd.org/tax/beps/outcome-statement-on-the-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-july-2023.pdf>

²Times of India article titled "Expectation from Union Budget 2023 and implications to MNEs" dated 30.01.2023.

³Article 37 of "Pillar One – Amount A: Draft Multilateral Convention Provisions on Digital Services Taxes and other Relevant Similar Measures" 20 December 2022 - 20 January 2023

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