

Protocol amending tax treaty between India and Spain has been notified

September 9, 2019

In brief

The Central Government *vide* notification¹ dated 27 August 2019 has notified the protocol between the Republic of India and the Kingdom of Spain amending the Double Taxation Avoidance Agreement (tax treaty) between the two countries.

The key changes in the India-Spain tax treaty include:

- Definition of 'taxes covered' in Spain is amended to include income-tax on non-residents;
- Article 10 [Associated Enterprises (AE)] is amended to include a new paragraph to provide for corresponding adjustment in one contracting state basis arm's length price (ALP) determined in the other contracting state;
- Article 28 [Exchange of Information (EoI)] is replaced by a new Article to facilitate the EoI, including through banking channels, even if such information lacks domestic interest of the contracting state;
- Introduction of Article 28A to provide assistance in the collection of taxes;
- Introduction of Article 28B for Limitation of Benefits (LOB) clause to deny the benefits of tax treaty in specific circumstances.

The protocol enters into force with retrospective effect from 29 December 2014.

In detail

The changes in the tax treaty read with the protocol are as follows:

Article of the India-Spain tax treaty	Highlights
Article 2 – Taxes covered	The definition of "Spanish tax" has been amended to cover "income-tax on non-residents" in addition to the existing coverage of "income-tax on individuals, corporation tax and capital tax."

¹ Notification No. S.O. 3079 (E) [NO. 58/2019 (F.NO. 503/ 02/ 1986-FTD-I)] The Protocol was signed on 26 October 2012 and the same was entered into force w.e.f. 29 December 2014 which has now been notified on 27 August 2019.

Article of the India-Spain tax treaty	Highlights
Article 10 – Associated Enterprises	<ul style="list-style-type: none"> The amended paragraph provides for corresponding adjustment in one state for ALP determined in the other state. The amendment is in line with Article 9(2) of Model Tax Convention to agree on corresponding adjustment through bilateral negotiations. Central Government² also clarified that bilateral negotiations are not possible if Indian tax treaties do not contain Article 9(2) on corresponding adjustments, as provided under the Model Tax Convention.
Article 28 – Exchange of Information	<ul style="list-style-type: none"> A new Article on “Exchange of Information” has been introduced in line with the tax treaties that India has entered with countries including Singapore and Norway. Articles 1 and 2 of the amended tax treaty does not restrict this Article and it would help the revenue authorities of both jurisdictions in exchanging taxpayer information as is foreseeably relevant for carrying out the provisions of this tax treaty. The amended protocol further provides for contracting states to use other techniques to obtain relevant information such as simultaneous examination, tax examination abroad and industry-wide EoI as per domestic laws and administrative procedures. Such procedure is to be agreed upon by the competent authorities of both contracting states as per the Mutual Agreement Procedure.
Article 28A – Assistance in collection of taxes	<ul style="list-style-type: none"> A new Article 28A has been introduced to provide for assistance by each contracting state to the other contracting state, in collection of “revenue claim.” Revenue claim has been widely defined to cover every kind of taxes, interest, penalties imposed by or on behalf of the contracting state. That revenue claim shall be collected by that other contracting state in accordance with the provisions of its laws applicable to the enforcement and collection of its own taxes as if the revenue claim were a revenue claim of that other contracting state. To provide such assistance, the other contracting state would also take relevant “measures of conservancy” by way of freezing of assets in respect of such “revenue claim,” at the request of the first-mentioned contracting state.
Article 28B – LOB	<ul style="list-style-type: none"> A new Article 28B on LOB has been introduced to provide for application of domestic anti-abuse provisions to the treatment of such abuse (including tax treaty abuse). Tax treaty benefits to be granted only to the beneficial owner of income. Domestic Controlled Foreign Corporation rules to remain prevalent, not prevented by tax treaty. Tax treaty benefits not to be available if the main purpose or one of the main purposes of the creation, existence, incorporation, registration or presence of such resident of a contracting state or of the “transaction” undertaken by him, is to obtain benefits under the tax treaty that would not be otherwise available. The term “transaction” includes the transaction of the creation, assignment or alienation of any shares, debt-claims, assets or other rights where the main purpose or one of the main purposes is to take advantage of the tax treaty.

² APA guidance with FAQ's (Taxpayers information Series-43)

The takeaways

- The LOB clause has been introduced to give force to anti-abuse measures. However, the interplay between Principal Purpose Test, as agreed by India under the Multilateral Instrument (MLI) and this amended LOB provisions needs to be seen.
- Introduction of Article 10(2) to provide a window for and

promote bilateral negotiations, is a welcome step and gateway to approach competent authority to obtain certainty on transactions.

- The treaty strengthens EoI, in order to promote easy access between the contracting states. However, poses a responsibility on each contracting state to maintain data secrecy.

- Spain has not yet deposited its instrument of ratification under MLI. Until such time, the provisions of the amended tax treaty would be applicable. Post ratification scenario would still need to be analysed.

Let's talk

For a deeper discussion of how this issue might affect your business, please contact your local PwC advisor

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