DISSERTATION (FTX5032W)

MASTERS OF COMMERCE IN THE FIELD OF INTERNATIONAL TAX

WITHHOLDING TAX ON SERVICES: A SQUARE PEG IN A ROUND HOLE? – AN ANALYSIS OF INTRA-GROUP CROSS BORDER SERVICES IN THE CONTEXT OF SOURCE, RELATED TRANSFER PRICING PRINCIPLES AND WITHHOLDING TAXES

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Background

Various countries have extended the levying of withholding taxes beyond the traditional withholding taxes on royalties, dividends and interest. Withholding taxes are now often levied on services such as management services, professional services, technical services, financial services, insurance services, fees, commission, advisory services and digital services, amongst others.

The purpose of this paper is to consider the impact of these withholding taxes on certain services, in particularly intra-group cross border services in the context of source and related transfer pricing principles.

In order to achieve this the following is addressed:

1. The current environment of globalisation and the effect it has on the operations of Multi-National Enterprises is first considered in order to provide the context for the paper.

2. The circumstances leading up to the introduction of withholding taxes on services are analysed together with a review of the definition of services and the source of services as decided in case law, both in the traditional context and in the context of withholding taxes on services.

3. The implication of treaties in respect of withholding taxes on technical and other services is briefly reviewed.

4. In order to consider the impact of withholding taxes on services a review of transfer pricing developments and the application of current transfer pricing principles globally was undertaken in respect of intra-group cross border services. The relevance or effectiveness of the current transfer pricing principles is also briefly been dealt with.

5. Whilst not dealt with in detail, other related issues relevant to intra-group cross border services are also noted, such as the deductibility of intra-group cross border service costs as well as the ability of recipient entities to benefit from tax credits in respect of withholding taxes on services levied on their income, or claim deductions for such withholding taxes on services costs incurred should a tax credit not be available.

6. Finally conclusions are drawn as to the overall impact of withholding taxes on services in the related contexts.

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1. Introduction

It is common knowledge that globalisation has impaired the ability of countries to maintain their sovereignty in many respects. Thomas Friedman dealt with aspects of this issue in 1999 in his book, *The Lexus and the Olive Tree*[1] in which he states that globalisation since 1989, beginning with the fall of the Berlin Wall, represents "the inexorable integration of markets, nation-states and technologies to a degree never witnessed before. It is happening in a way that is enabling individuals, corporations and nation-states to reach around the world farther, faster, deeper and cheaper than ever before."[2] This is in effect the start of the so-called "free market".

Any country wishing to participate in the "free market" has to abide by certain rules, which Friedman refers to as the "Golden Straightjacket". The characteristics of the "Golden Straightjacket" are the decentralisation of government, the privatisation of industry, and the elimination of tariffs and other obstacles to foreign investment, adherence to internationally established standards in accounting and auditing, as well as the effective regulation of their financial market to protect the rights of shareholders, amongst others.[3]

Globalisation therefore created a wonderful opportunity for all people to raise their standards of living and increase personal freedoms, including access to information and economic options.

Interestingly though, tax was not included in this list, which, in my view correctly, gives recognition to the sovereignty of a country to determine its own tax rules dependent on its own particular needs and circumstances. Reality is however somewhat different in that globalisation has resulted in the reduction or loss of sovereignty in the determination of tax policy of various countries. Charles E. McLure, Jr. dealt with this aspect in some detail in an article published in August 2001, "*Globlization, Tax Rules and National Sovereignty*"[4]. McLure states that "*(T)his loss of sovereignty may take many forms, among them market-induced pressures to lower taxes and difficulty in applying existing tax rules. By making it difficult to sustain revenue yields without placing increased tax burdens on consumption and labour, such developments may*

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[1] Friedman, Thomas L., The Lexus and the Olive Tree: Understanding Globalization, Random House, 1999

[2] Lubeck, D., The Lexus and the Olive Tree, Issues in Global Education, Issue No. 157, 2000, http://www.globaled.org/issues/157/c.html, accessed on 16 February 2014

[3] Friedman, L., note 1, p. 105

[4] McLure, Charles E. Jr., *Globalization, Tax Rules and National Sovereignty*, Bulletin for International Fiscal Documentation, Volume 55, International Bureau of Fiscal Documentation ("IBFD"), August 2001, pp. 328 – 341

lead to calls for limits on the activities of tax havens, new rules governing the taxation of internatio

nal flows of income (generically a "GATT for taxes") or even a new institution (a "World Tax Organization") to enforce such rules, all of which, ironically, would also entail loss of national sovereignty."[5]

Currently, the world economies, through organisations such as the G8, G20 and the Organisation for Economic Co-operation and Development ("OECD"), have dealt with calls for limits on the activities of tax avoidance and are currently investigating new rules to govern the taxation of international flows of income following highly publicised cases involving alleged profit shifting and tax avoidance by prominent Multi-National Enterprises ("MNEs"). Various initiatives are underway to ensure tax compliance in developed and developing countries alike.

The OECD issued a report on Base Erosion and Profit Shifting ("BEPS")[6] which is regarded as the first step to review and analyse base erosion and profit shifting. One of the areas identified as requiring investigation is related party transactions, and more specifically in the context of transfer pricing where it relates to shifting of risks and intangibles, the artificial splitting of ownership of assets between legal entities and related party transactions which would rarely take place between independent entities.[7] The deadline for the reports dealing with actions 8 – 10 of the Action Plan on Base Erosion and Profit Shifting[8] which will cover these areas is September 2015.

In addition, initiatives to enable developing countries to develop processes and strategies which will enable them to collect the tax that is due to them are also in progress. There is no "World Tax Organisation" as yet but various "Regional Tax Organisations" have been formed, for example the "African Tax Administration Forum" ("ATAF").

The "market" has evolved beyond the so-called "old thinking" in terms of which international activities could be compartmentalised. The view in terms of the "old thinking" was that the political territory of a country represented a particular "market" where taxpayers performed certain activities, competed with other market participants using resources offered by that market and delivering goods and services to

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[5] McLure, C., note 4., p. 328

[6] OECD (2013), *Addressing Base Erosion and Profit Shifting,* OECD Publishing, http://dx.doi.org/10.1787/9789264192744-en, Date of issue: 12 February 2013

[7] Working Party No. 6 of the Committee on Fiscal Affairs of the OECD is dealing with the transfer pricing aspects of intangibles, including Multi-National Enterprise ("MNE") activities such as intra-group cross border services. See annexure 1 for an overview of the issues being considered by the OECD and Working Party No. 6.

[8] OECD (2013), *Action Plan on Base Erosion and Profit Shifting*, OECD Publishing, http://dx.doi.org/10.1787/9789264202719-en, Date of publication: 19 July 2013

customers in that market. The country where the activities took place was referred to as the country of source and the country where the taxpayer was physically located was known as the country of residence.[9]

The global market has evolved and cross-border trade in services[10] now exceeds trade in goods.[11] [12] The tax rules have not kept pace with global developments and consequently has resulted in the tax rules for services being less developed and uniform than the rules for trade in goods.[13]

MNEs with cross-border transactions find themselves confronted with a number of difficulties such as excessive documentation requirements, increased risk of penalties and economic double taxation, the costs of temporarily having to finance the same tax burden twice and increased auditing by the tax authorities. MNEs also operate in an uncertain environment as business structures which have been in place for a number of years and which were accepted by the tax authorities are no longer acceptable from a tax point of view. It is also not uncommon that a certain structure and/or transfer price (or the application of a specific method) might be acceptable in one jurisdiction but not in another.

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[9] Schön, W., International Tax Coordination for the Second-Best World (Part I), World Tax Journal, 2009 (Volume 1), No. 1, Published online: 1 October 2009

[10] Committee of Experts on International Cooperation in Tax Matters stated at the Ninth Session in its report, *Taxation of cross-border trade in service: A review of the current international tax landscape and the possible future of policy options*, the following:

"*As the transaction value of services increases so too does the need to accurately categorise the various types of services into meaningful sectors or divisions".*

The General Agreement of Trade on Services (GATS) employs the Services Sectoral Classification List ("W120 List") of the WTO, which includes the following 12 discrete service sectors:

- *Business services;*
- *Communication services;*
- *Construction and related engineering services;*
- *Distribution services;*
- *Educational services;*
- *Environmental services;*
- *Financial services;*
- *Health related and social services;*
- *Tourism and travel related services;*
- *Recreational, cultural and sporting services;*
- *Transport services;*
- *Other services not included elsewhere.*

(See The World Trade Organisation, "MTN.GNS/W/120", 1991)

[11] Refer to the comment made by General Reporter, Ariane Pickering, at the 66th Congress of the International Fiscal Association ("IFA") in Boston, 1 October 2012

[12] The service sector accounts for approximately 70% if the world's Gross Domestic Product. Refer to 2012 date, The World Bank, 2009 - 2013, http://data.worldbank.org/indicator/nv.srv.tetc.zs, accessed on 27 April 2014

[13] Pickering, A., note 11

2. Effects of globalisation

Globalisation has had a major impact not only on countries but on business as well. MNEs are obliged to align and coordinate local operations based in various jurisdictions with the global corporate strategy in order to operate effectively. As a result, the majority of MNEs incur significant general and administrative expenses related to headquarter services and other services[14] on behalf of their foreign affiliates.

Many developing countries have also suffered the consequences of erosion of their tax bases as a consequence of the increased openness of national economies in the new technological era. Countries are increasingly under pressure to reduce corporate tax rates as they compete as locations for foreign direct investment ("FDI"). Countries are equally required to take the necessary action to raise revenue in order to finance the required and much needed growth of their economies, the needs of an ever increasing population as well as failing of businesses such as banks and other financial institutions.

This issue is however not new. President John F. Kennedy said the following in a special message to congress on taxation on 20 April 1961:

"*Recently more and more enterprises organised abroad by American firms have arranged their corporate structures aided by artificial arrangements between parent and subsidiary regarding intercompany pricing, the transfer of patent licensing rights,* ***the shifting of management fees****, and similar practices[…] in order to reduce sharply or eliminate completely their tax liabilities both at home and abroad*."[15] (author's emphasis).

The International Monetary Fund ("IMF") published an article by Vito Tanzi in 2001 in Finance & Development, its quarterly magazine, dealing with some of the consequences in a tax context of globalisation[16]. It stated as follows:

"*Globalization and the consequent international integration, together with rapid technological progress, is likely to affect both the ability of countries to collect taxes and the distribution of the tax burden. Moreover, as time passes, globalization's*

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[14] Examples of these other services include accounting support services, tax support services, legal support services, human resource services, information technology services, engineering and technical services, as well as procurement and logistic support services, amongst others.

[15] http://www.presidency.ucsb.edu/ws/?pid=8074, accessed on 19 February 2014

[16] Tanzi, V., Globalization and the Work of Fiscal Termites, Finance & Development, International Monetary Fund, March 2001, Volume 38, Number 1, http://www.imf.org/external/pubs/ft/fandd/2001/03/tanzi.htm, accessed on 19 February 2014

impact on tax revenues appears likely to increase and to become evident in countries' revenue statistics."[17]

Tanzi also stated that "*(M)ost industrial countries are collecting more tax revenue today than they did two or three decades ago. On closer inspection, however, one can detect what may be called "fiscal termites" gnawing away at the foundations of their tax systems. These termites are part of the evolving "ecosystem" of globalization, and whether they will eventually severely damage the fiscal houses remains to be seen. It is possible that, in the future, globalization will lead to new, innovative ways to use technology and knowledge to raise tax revenues. This does not diminish the need to assess ways in which current developments are likely to affect the tax system. I discuss below the impact of eight termites*."[18] [19]

One of the so-called termites identified by Tanzi is intra-company trade. He states that intra-company trade "*creates problems for national tax authorities owing to the potential abuse of "transfer prices" by the multinationals, including on loans, the allocation of fixed costs, and the valuation of trademarks and patents. There is evidence that some enterprises manipulate prices to move profits from high-tax jurisdictions to those with low tax rates. Tax authorities are often at a loss on how to cope with this trend.*

A recent survey of the transfer-pricing policies of more than 600 multinationals (domiciled in 19 countries) found that these corporations saw a clear connection between the desire to avoid double taxation and the use of transfer pricing (Ernst & Young, 1999). Many countries also felt pressured to resolve the complex business and transfer-pricing issues arising from globalization, particularly given the growing attention the revenue authorities in several countries are paying to the practice.

Many multinationals now realize that a global approach to designing and documenting transfer-pricing policies is desirable. An increasing number of countries are beginning to apply such arrangements, under which the criteria for applying arm's-length principles are determined in advance. The OECD recently issued an annex to its previously released Transfer Pricing Guidelines suggesting how to conduct arrangements under the so-called mutual agreement procedure (Neighbour, 1999)."[20]

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[17] Tanzi, V., note 16

[18] Tanzi, V., note 16

[19] The eight termites are e-commerce and transactions, electronic money, intra-company trade, offshore financial centres, derivatives and hedge funds, inability to tax financial capital, growing foreign activities and foreign shopping. – Tanzi V., note 16

[20] European Union ("EU"), reference its 2012 consultation paper and July 5, 2012, summary report

Tanzi also considered various options to deal with the effects of these "termites". He suggested that a shift from global income taxation towards explicitly schedular taxes that tax different types of incomes (wages, rents, interest, dividends) differently, as an alternative tax collection process. He recognised though that this approach would make it possible to lower tax rates on mobile income tax bases and that it may raise questions about the fairness of the tax system. It would however, enable countries to minimize potential revenue losses from capital flight and emigration induced by high tax rates.[21]

Institutions such as ActionAid[22] and ChristianAid[23] have been quite vocal in their criticism of the so-called "tax dodging" practices of MNEs operating in developing countries, often accusing the MNEs of reporting false profits or manipulating the pricing of intra-group services to avoid paying tax in these developing countries, i.e. use "profit stripping"[24] practices to manipulate profits in developing countries. The issue also received attention in mainstream media.[25]

Profit stripping is however not only a problem affecting developing countries as is evident from a report submitted to the Department of Treasury of the United States of America during November 2007.[26] Countries such as France, Germany and the United Kingdom also expressed their concerns regarding profit stripping practices undertaken by MNEs operating in their jurisdictions.[27]

The objectives of some of the initiatives currently underway referred to above are directed at addressing issues such as the introduction of transfer pricing rules,

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[21] EU, note 20

[22] Reports issued by ActionAid include "*Clamping down on tax avoidance is fundamental to fighting world poverty, ActionAid tells the United Nation*" (24 September 2013) and "*Zambia Sugar dodges tax bill big enough to put 48 000 children in school a year*" (10 February 2013)

[23] Reports issued by ChristianAid include "*The Missing Millions: The Costs of Tax Dodging to Developing Countries supported by the Scottish Government*", September 2009, and "*False Profits: Robbing the Poor to Keep the Rich Tax-free*", March 2009

[24] The Tax Foundation describes "profit stripping", also referred to as "earnings stripping", as a process by which a firm reduces its overall tax liability by moving earnings from one taxing jurisdiction, typically a relatively high-tax jurisdiction, to another jurisdiction, typically a low-tax jurisdiction. http://taxfoundation.org/article/glossary-international-tax-terms, accessed 21 February 2014

[25] Bloomberg's "The Great Corporate Tax Dodge", the New York Times' "But Nobody Pays That", The Times' "Secrets of Tax Avoiders" and the Guardian's "Tax Gap"

[26] Report to The Congress on Earnings Stripping, Transfer Pricing and U.S. Income Tax Treaties, Department of the Treasury, November 2007, http://www.treasury.gov/resource-center/tax-policy/Documents/ajca2007.pdf, accessed on 21 February 2014

[27] The United Kingdom's Chancellor of the Exchequer, George Osborne, and Germany's Minister of Finance, Wolfgang Schäuble, issued a joint statement in November 2012 in which they called for co-ordinated action to strengthen international tax standards and urging their counterparts to back efforts by the OECD to identify possible gaps in tax laws issued. France's Economy and Finance Minister, Pierre Moscovici, also joined the call.

including the enforcement thereof, especially in regards to intangibles[28], the introduction of general anti-avoidance rules, consideration of the tax policy and compliance issues associated with so-called hybrid mismatches[29], scrutinisation of double non-taxation[30], to name but a few.

Following highly publicised cases involving alleged profit shifting and tax avoidance by prominent MNEs, various calls were made for co-ordinated action to strengthen international tax standards and to ensure tax compliance in developed and developing countries alike. This issue is not only an area of focus for the G8 and the G20 but also for other organisations such as the OECD and the United Nations ("UN"). Initiatives to enable developing countries to develop processes and strategies which will enable them to collect tax that is due to them are also underway.

Various politicians have issued statements regarding international tax evasion and tax avoidance. The British Prime Minister, David Cameron stated that "*(W)e want to use the G8 to drive a more serious debate on tax evasion and tax avoidance. This is an issue whose time has come. After years of abuse, people across the planet are rightly calling for more action, and most importantly there is gathering political will to actually do something about it*".[31]

The German Chancellor, Angela Merkel, stated that "*(I)t's not right that giant companies have huge sales here [in Germany], in all of Europe, and the United States and elsewhere and then only pay taxes somewhere in a tiny tax haven. That's why we're going to fight to finally put an end to tax havens at the G8 meeting this year in Great Britain*".[32]

Another consequence of globalisation is that it forced developing countries to introduce many reforms such as tax reforms in the form of reduced tariffs on importation or exportation of goods and exchange control reforms in order to attract FDI. This has a negative effect on tax revenues as the tax collected from the FDI

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[28] Working Party 6 of the OECD, namely the project to update Chapter VI of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, 2010 OECD, Transfer Pricing and Intangibles: Scope of the OECD Project, 25 January 2011. www.oecd.org/ctp/transfer-pricing/46987988.pdf

[29] OECD 2012, Hybrid Mismatch Arrangements: Tax Policy and Compliance Issues, March 2012, www.oecd.org/ctp/aggressive/HYBRID_ENG_Final_October2012.pdf

[30] EU, note 20. The OECD similarly is looking at this, witness a May 2012 meeting organised by the Canadian Revenue Authorities for OECD member countries. This issue is linked with hybrid mismatches, addressed in the above mentioned OECD report, issued in spring of 2012.

[31] Prime Minister David Cameron outlines his G8 priorities at Davos, 10 April 2013, https://www.gov.uk/government/news/prime-minister-david-cameron-outlines-his-g8-priorities-at-davos, accessed 4 May 2014

[32] Angela Merkel to launch tax haven fight from UK, 13 February 2013, http://www.telegraph.co.uk/finance/personalfinance/consumertips/tax/9868994/Angela-Merkel-to-launch-tax-haven-fight-from-UK.html, accessed on 4 May 2014

activities were (and still are) less than the tax revenues forgone in order to attract the FDI. Whilst this shortfall can in part be mitigated by a corresponding cut in fiscal expenditure, the countries need to increase revenue. To do this, they need to rely on alternative taxes such as value-added tax, income taxes, sales taxes, etc. which require significant investment in tax collection infrastructure and resources to monitor and enforce tax legislation.[33]

Most jurisdictions usually levy withholding taxes on passive income, i.e. dividends, interest and royalties and on active income, usually related to services, earned by non-residents which is from a source located in or deemed to be located in a jurisdiction and which is usually not connected to a permanent establishment located in that jurisdiction.

3. Withholding tax on services

3.1. General

There is a growing awareness on the part of developing countries of the risks posed by transfer pricing. Their goal in addressing these risks is identical to that of developed countries – to protect their tax bases while continuing to attract FDI and facilitate cross border trade. Add to that the fact that many developing countries are inexperienced in dealing with transfer pricing issues, and that the introduction and collection of withholding taxes are relatively easy to implement, it is clear why many developing countries have gone beyond levying withholding taxes on employment income and income from entertainment or sports activities by introducing withholding taxes on services, including technical services and management services (hereinafter collectively referred to as “services”), amongst others.[34]

Payments made by MNEs operating in those countries in respect of services rendered by their headquarter companies or other affiliates located in other jurisdictions, may therefore be subject to a withholding tax as a consequence of these initiatives. The withholding tax rates vary between 3% and 35%.[35] Different rates are often applied to technical fees

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[33] Aizenman, J. and Jinyarak, Y., Working Paper: Globalization and developing countries – a shrinking tax base?, Working Papers, UC Santa Cruz Economics Department, No. 615, p. 1

[34] Withholding tax on services are levied on a variety of services such as technical services, management services, other services, professional services, gross Income from production and distribution of films and television programs, insurance and reinsurance, commissions, personal transportation fares, telephone charges and internet charges paid, international news agencies, freight charges, assignment of the right to use containers, amongst others

[35] Refer to annexure 2 for country specific details

and fees for services, such as management services, amongst others.[36] The rates can be punitive and there are instances where the rate is 2 ½ times more than the corporate tax rate applicable in a country[37] and 2 times more than the withholding tax on royalties rate in the case of technical fees and 2 ⅓ times more than the withholding tax on royalties in the case of management/service fees.[38]

Whilst the reasons given by various countries do not specifically state base erosion as the reason for the introduction of the withholding tax on services, it is evident from the circumstances leading up to and surrounding the introduction of the withholding taxes that this could be the case.[39] Some countries take the position that income from these services is not income from carrying on business or income from professional or independent personal services but is other income which is taxable in the source country if the income arises in the source country in accordance with Article 21(3) of the United Nations Model Tax Convention ("UN Model DTA").[40] There is no limitation on the source country and accordingly such tax may be imposed as a flat rate withholding tax on the gross amount of payment.[41]

3.2. Definition of "services"

Notwithstanding that trade in services, and in particular cross-border trade in services, have increased significantly, few, if any, jurisdictions, have incorporated a definition of services in their tax legislation.[42] Some

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[36] Refer to annexure 2

[37] Refer to annexure 3 for a comparison of the withholding tax rates on technical fees and management fees to the corporate tax rate on a country-by-country basis

[38] Refer to annexure 12 for a comparison of the withholding tax rates on technical fees and management fees to the withholding tax on royalties rate on a country-by-country basis

[39] In this regard refer to Dunst, M.C., *Self-Help and Altruism: Exploring the Problem of Tax Base Erosion in Developing Countries*, 43 Tax Management International Journal 463, International Tax Centre, Bloomberg BNA, 8 August 2014, in which he states the following: "*Historically, tax policymakers and practitioners have not tended to view withholding taxes as enforcement tools restraining excessive deductions.*" and "*Over the years, withholding taxes have fallen from favour among tax policymakers. Because they are imposed on the gross amounts of payments rather than on the basis of the taxpayer's net income, withholding taxes are not correlated with a taxpayer's ability to pay and therefore depart from commonly held perceptions of a properly functioning income tax. Accordingly, withholding taxes sometimes are seen as impediments to international commerce, and in recent decades it has become common for countries to agree, in income tax treaties with one another, to reduce or (…) eliminate withholding taxes in cross-border transactions with one another.*"

[40] Article 21(3) provides that "*(N)otwithstanding the provisions of paragraphs 1 and 2, items of income of a resident of a Contracting State not dealt with in the foregoing Articles of this Convention and arising in the other Contracting State may also be taxed in that other State.*"

[41] Notes of the Taxation of Services under the United Nations Model Tax Convention, United Nations, E/C. 18/2010/CRP.7, 11 October 2010, para. 89, p. 27

[42] Russia has incorporated a definition of "services" in the Civil Code. "Services" is defined as actions with intangible results that are consumed in the course of action" (Russian Tax Code, article 38(4)(5)). The definition excludes "works", i.e. actions with tangible results which are handed over to the customer, financial, rental and ancillary

jurisdictions, usually countries which levy a withholding tax on services, have issued judicial or administrative guidance on the meaning of the term. These include countries such as Venezuela[43], Chile[44], Brazil[45], Kenya[46], Namibia[47], the Kingdom of Saudi Arabia[48], Sudan[49], Uganda, Zimbabwe[50] and the Republic of South Africa[51].

Definitions of the term used in a transfer pricing context are not helpful as these are often very broad.[52] For example, Australia has defined the terms

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arrangements, i.e. granting of loans, insurance, leases, granting rights to use intellectual property, warranties etc., as well as the assignment of rights. See Enterprise services – Russia, IFA Cahiers 2012 – Volume 97A, p. 582

[43] Venezuelan jurisprudence interprets "services" as meaning "any independent activity consisting of executing certain remunerated events, actions, contracts or works in favour of a third party who receives such services". See Enterprise services – Venezuela, IFA Cahiers 2012 – Volume 97A, p. 749

[44] The Chilean tax authorities take a similar approach to that of the Venezuelan tax authorities but added the requirement that the services have to be performed by a "person". See Enterprise services – Chile, IFA Cahiers 2012 – Volume 97A, p. 195. Also refer to Chilean VAT Law, article 2, para. 1, no. 2

[45] Brazilian case law (case no. 116, 121) suggests that the provision of services encompasses all obligations undertaken by one party to perform some activities for the benefit of the contractor. See Enterprise services – Brazil, IFA Cahiers 2012 – Volume 97A, p. 158

[46] A management or professional fee is defined as a "payment made to a person, other than a payment made to an employee by his employer, as consideration for managerial, technical, agency, contractual, professional or consultancy services, however calculated", Omondi, F., Kenya - Corporate Taxation, section 6, Country Surveys IBFD, accessed 30 April 2014

[47] A management or consultancy fee is defined as "any amount payable for administrative, managerial, technical or consultative services or any similar services, whether such services are of a professional nature of not", Amos J., Namibia - Corporate Taxation, section 6, Country Surveys IBFD, accessed 30 April 2014

[48] Management fees are defined by the regulations as "payments made for management services, such as payments made under contracts to run enterprises such as hotels, ships, etc. The fees are distinguished between headquarter company expenses etc. Technical services include payments for technical or scientific services, regardless of their nature, including studies and research in different fields, prospecting works of a scientific, geological or industrial nature, consulting services; supervisory activities and engineering services of all kinds including plans and design.", S. Gueydi, S., Saudi Arabia - Corporate Taxation, section 6, Country Surveys IBFD, accessed 30 April 2014

[49] Management fees are defined as "payments to a person in accordance with a contract performing managerial services to the taxpayer. Professional fees are defined as payments to another person in return for performing technical consulting services for the taxpayer." Namubiru, P. and Munyandi, K., Uganda - Corporate Taxation, section 6, Country Surveys IBFD, accessed 30 April 2014

[50] "Fees" means any amount from a source within Zimbabwe payable in respect of any services of a technical, managerial, administrative or consultative nature, but does not include any such amount payable in respect of:

- services rendered to an individual unconnected with his business affairs;
- education or technical training;
- the repair of goods outside Zimbabwe;
- any project which is specified for these purposes by the Minister by notice in a statutory instrument;
- any project which is the subject of any agreement entered into by the government of Zimbabwe with any other government or international organization in terms of which any person is entitled to exemption from tax in respect of such amount;
- services rendered to a licensed investor in respect of his operations in an export processing zone; or
- services rendered to an industrial park developer in respect of the operation of his industrial park.,

Munyandi, K., Zimbabwe - Corporate Taxation, section 6, Country Surveys IBFD, accessed 30 April 2014

[51] South Africa intends to introduce a withholding tax on service fees payable to any person that is not a resident with effect from 1 January 2016. The legislation includes a definition of service fees for this purpose which reads "*"service fees" means any amount that is received or accrued in respect of technical services, managerial services and consultancy fees but does not include services incidental to the imparting of or the undertaking to impart any scientific, technical, industrial or commercial knowledge or information, or the rendering of or undertaking to render any assistance or service in connection with the application or utilisation of such knowledge or information.*" Section 51A to be inserted into the Income Tax Act, No 58 of 1962, with effect from 1 January 2016

[52] Enterprise services – General Report, IFA Cahiers 2012 – Volume 97A, p. 26

"services" for purposes of its transfer pricing rules as including "*any rights, benefits, privileges or facilities that are, or are to be, provided, granted or conferred under any one of those agreements. The first category of agreement is one for or in relation to the performance of work including work of a professional nature; the provision of or the use or enjoyment of facilities for amusement entertainment recreation or instruction; the conferring of rights, benefits or privileges for which consideration is payable in the form of a royalty, tribute, levy or similar exactions; or the carriage, storage or packaging of any property or the doing of any other act in relation to property. The second category is agreements of insurance; the third, agreements between banks and customers, and the fourth, agreements for or in relation to the lending of moneys*."[53]

The OECD does not offer a definition of the term[54] but acknowledges that "*(N)early every MNE group must arrange for a wide scope of services to be available to its members, in particular administrative, technical, financial and commercial services. Such services may include management, coordination and control functions for the whole group. The cost of providing such services may be borne initially by the parent, by a specially designated group member ("a group service centre"), or by another group member. An independent enterprise in need of a service may acquire the services from a service provider who specialises in that type of service or may perform the service for itself (i.e. in house). In a similar way, a member of an MNE group in need of a service may acquire it directly or indirectly from independent enterprises, or from one or more associated enterprises in the same MNE group (i.e. intra-group), or may perform the service for itself. Intra-group services often include those that are typically available externally from independent enterprises (such as legal and accounting services), in addition to those that are ordinarily performed internally (e.g.*

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[53] Section 136AA of the Federal Income Tax Assessments Act of 1936

[54] Paragraphs 11.2, 11.3 and 11.4 of the Commentary on Article 12 of the OECD Model Tax Convention on Income and Capital distinguishes the provision of services from provision of know-how as follows:

"*11.2 This type of contract thus differs from contracts for the provision of services, in which one of the parties undertakes to use the customary skills of his calling to execute work for himself for the other party. Payments made under the latter contracts generally fall under Article 7.*" (i.e. the Business Profits Article). It continues in paragraph 11.3 as follows: "*… payments for the provision of services sometimes gives rise to practical difficulties. The following criteria are relevant for the purpose of making that distinction:*

- In the case of contracts for the provision of services, the supplier undertakes to perform services which may require the use, by that supplier, of special knowledge, skill and expertise but not the transfer of such special knowledge, skill or expertise to the other party.". Various examples of the provision of services are given in paragraph 11.4, which includes payments for pure technical assistance, opinions given by engineers, lawyers or accountants, amongst others. See OECD (2012), *Model Tax Convention on Income and on Capital 2010 (updated 2010)*, pp. C(12)-8 – C(12)-9, OECD Publishing. *http://dx.doi.org/10.1787/978926417517-en*

by an enterprise for itself, such as central auditing, financing advice, or training of personnel)."[55]

The OECD further acknowledges that "*(I)ntra-group service activities may vary considerably among MNE groups, as does the extent to which those activities provide a benefit, or expected benefit, to one or more group members. Each case is dependent upon its own facts and circumstances and the arrangements within the group. For example, in a decentralised group, the parent may limit its intragroup activity to monitoring its investments in its subsidiaries in its capacity as a shareholder. In contrast, in a centralised or integrated group, the board of directors and senior management of the parent company may make all important decisions concerning the affairs of its subsidiaries and the parent company may carry out all marketing, training and treasury functions*."[56]

The term "management fee" is used in the context of transfer pricing to describe compensation paid for intra-group services although the term is not defined in the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations ("OECD Guidelines").

The United Nations Practical Manual on Transfer Pricing for Developing Countries ("UN Transfer Pricing Manual") refers to both "service fees"[57] and "management fees"[58] but offers no definition of the terms.

The World Trade Organisation defines services broadly in Article 1(2) of its General Agreement on Trade in Services[59] as "*the supply of a service:*

(a) from the territory of one Member into the territory of any other Member;

(b) in the territory of one Member to the service consumer of any of the Member;

(c) by a service supplier of one Member, through commercial presence in the territory of any other Member;

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[55] OECD (2010), *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2010*, OECD Publishing, 2010, para. 7.2, p. 205, ("OECD Guidelines")

[56] OECD, note 55, para. 7.4, p. 206

[57] United Nations Practical Manual on Transfer Pricing for Developing Countries ("UN Transfer Pricing Manual"), United Nations ("UN"), para. 8.3.4.1., p. 297

[58] UN, note 57, para. 7.4.6.12., p. 281

[59] Article 1 of the General Agreement on Trade in Services, World Trade Organisation

(d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

(3) For the purposes of this Agreement:

(b) "services" include any service in any sector except services supplied in the exercise of governmental authority;"

The type of services considered in this paper would typically include the following:

- Financial consulting;
- Personnel strategy;
- Business advisory services;
- Corporate affairs;
- Marketing;
- Technical consulting;
- Computer advisory services and data processing;
- Intellectual property services but excluding royalties; and
- Such other services as parties may agree upon.[60]

One of the author's concerns is that the agreements referred to above often cover both technical services and other services whereas most countries distinguish between technical fees and services or management fees in order to determine whether withholding tax is due and/or which rate to apply.[61]

Activities typically excluded from the service agreements are services rendered that constitute shareholder services, i.e. any activity by a service provider merely because of its ownership interest (i.e. in its capacity as

[60]Detailed examples of the services typically included in these types of agreements can be found in annexure 4

[61] A detailed discussion of this issue is beyond the scope of this paper

shareholder) to meet its regulatory and governance obligations and those to its shareholders, or research and development services.[62]

MNEs often provide these services from a central point to a number of its affiliates and where appropriate charge the affiliates or subsidiaries for the services rendered. It is not unusual for the services to be provided by a centralised service-providing entity which is an affiliate of the headquarter company. This does however not mean that the functions are all performed from the centralised location. Specialist areas may be spread across the various entities based in various countries in which the group operates, depending on the specific needs of the group and location of its resources. This necessitate the need for tight controls over the service fees levied, not only from a tax perspective but also from a financial and accounting perspective, to ensure that the fees earned and expenditure incurred are reflected in the correct company.

It is also not uncommon for the centralised service entity of MNEs to enter into an agreement with an independent third party service provider to render services to the affiliates or subsidiaries in the group. These types of arrangements often benefit either the MNEs, as they are able to negotiate a reduced rate, or the third party service providers. This is especially relevant where services are to be provided to entities in developing countries, as the third party service providers are often small enterprises and any undue delay in settlement of their invoices may impact significantly on their businesses and ability to continue to operate in a sustainable manner.[63]

3.3. Source of services rendered

Whilst the source of income for services rendered usually determines which jurisdiction has the right to tax the income generated from the

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[62] Per the OECD, the following examples will constitute shareholder/stewardship activities: costs of activities relating to the juridical structure of the parent company itself, such as meetings of shareholders of the parent, issuing of shares in the parent company and costs of the supervisory board; costs relating to reporting requirements of the parent company including the consolidation of reports; and costs of raising funds for the acquisition of its participations. See OECD Guidelines, OECD, 2010, para. 7.10, pp. 207 – 208. The Canadians take a similar position in a Circular, IC 87-2R, in which it identifies the following costs as costs that should not be charged to other group members, i.e. costs incurred for the sole benefit of shareholders; costs relating to the legal structure of the general financial reporting requirements of the specific group; and costs pertaining to functions that are duplicated. The United States of America also provides guidance in a technical advice memorandum, TAM 8806002 in which it provides that the following services are regarded as stewardship activities: duplicative review or performance of activities already undertaken by a subsidiary; periodic visits and general review of a subsidiary's performance; complying with reporting requirements or other legal requirements of the parent shareholder; and financing re refinancing the parent's ownership participation in the subsidiary.

[63] These services are also affected by withholding tax on services as the withholding tax on services are often not limited to intra-group cross border transactions

provision of services, the determination of the source varies significantly. This is due to the fact that the term "source" is often not defined, or at best, vaguely defined. Some jurisdictions consider the source of income to be the place where the services were performed whereas others consider it to be the place where the contract has been entered into or even the place where payment is made.[64] It is not uncommon for the source to be prescribed to be that of a specific jurisdiction purely based on the type of services rendered.[65] Put differently, the term "source" is used for a motley collection of justifications for allocating tax jurisdiction and this often makes discussion burdensome because people use the same term to express different concepts.[66]

In the past, the majority of jurisdictions traditionally accepted that the origin or originating cause justifies the levying of tax on income generated or created within the territory of the taxing state. This can be described in various ways, such as "the place of income-generating activity"[67] or "the place where the economic activities creating the income occur". For example, the originating cause for income from services rendered in terms of South African law is the services rendered and the source is located where the particular services are rendered, irrespective of the place where the contract was entered into or the payment for the services are made.[68]

Whilst the meaning of source may be clear for domestic tax purposes within a jurisdiction, the situation is not clear from an international tax perspective as there are no international source rules that are of general application.

One would therefore expect that in the context of non-residents, the general justification for a source-based taxation is based on the premise that the jurisdiction which provided the public goods, i.e. infrastructure, and services offered which enabled a non-resident to undertake an economic activity which generated income, should be entitled to tax the income. This implies that the non-resident needs to have some sort of presence in the jurisdiction in order to take advantage of the public goods and services offered by the government of the jurisdiction wishing to tax the income.

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[64] Honiball, M. and Olivier, L., International Tax: A South African Perspective – 2011, SiberInk, Fifth Edition, p.15

[65] See annexure 2 for details of the various basis of levying withholding tax on services

[66] Kemmeren, E.C.C.M. Prof. Dr, Source of Income in Globalizing Economies: Overview of the Issues and a Plea for an Origin-Based Approach, International Tax Bulletin, IBFD, November 2006, p. 432

[67] Vogel, K., Worldwide vs source taxation of income – A review and re-evaluation of arguments (Part I), Intertax 216, Nos 8/9, 1988, p. 223

[68] *CIR v Lever Brothers & Unilever Ltd*, (1946) 14 SATC 1, 1946 AD 441

The mere export of goods or services by a non-resident from another jurisdiction to the domestic jurisdiction should not be liable for tax in the domestic jurisdiction on the income generated from that sale or provision of services as the simple export of goods or services by a non-resident to the domestic jurisdiction does not involve or create any presence in the domestic jurisdiction of the non-resident.[69]

"Source" needs to be determined by looking at where the income or wealth is produced, in a physical or economic sense, i.e. the origin of the income or wealth produced must be determined.[70]

However, as domestic source rules will determine the source of any income, it is possible that more than one jurisdiction can claim the right to tax an amount based on its interpretation of source. Juridical Double Taxation[71] can therefore occur as a so-called source-source conflict may arise. The existence of a double tax treaty between the affected jurisdictions is often not helpful in these situations as most double tax treaties also do not include source rules to overcome this problem.

The OECD's view on the right to tax in general and the right to tax income in respect of services rendered is that the country of residence should have the right to tax. This is due to the fact that the premise upon which the OECD Model Tax Convention on Income and Capital ("the OECD Model DTA") is written, and the interests of the members of the OECD which the OECD Model DTA serves, is appropriate for developed countries.

The OECD Model DTA does not serve the interests of developing countries as income is diverted from the developing countries to the developed countries where developing countries trade with developed countries. This is due to the fact that the OECD Model DTA is designed to minimize income that would be allocated to the source country whilst the majority of the income is allocated to the country of residence. The developing country, often the source country, is therefore a "net loser" of tax revenues. This

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[69] Holmes, K., International Tax Policy and Double Tax Treaties: An Introduction to Principles and Application, IBFD (2007), pp. 20 – 21

[70] Holmes, K., note 69, p. 21

[71] International Juridical Double Taxation is generally defined as the imposition of comparable taxes in two (or more) States on the same taxpayer in respect of the same subject matter and for identical periods. Its harmful effects on the exchange of goods and services and movements of capital, technology and persons are well known that it is scarcely necessary to stress the importance of removing the obstacles that double taxation presents to the development of economic relations between countries. (OECD Committee on Fiscal Affairs, Model Tax Convention on Income and Capital, Paris, OECD, 2007, p. 7)

resulted in the disenchantment of developing countries with the OECD Model DTA.

The developing countries sought recourse to the UN to develop a model double tax agreement ("DTA") which would reflect their interests. The United Nations Model Double Taxation Convention between Developed and Developing Countries ("the UN Model DTA") was introduced which aims to allocate a large portion of the income to the source country and a lesser portion to the country of residence which is in line with the objective of developing countries to levy tax on the basis of source.

The allocation of a source country's right to tax income from services under the provisions of the UN Model DTA is conditional on the satisfaction of a threshold requirement. The threshold is typically based on a quantitative and/or qualitative evaluation of a non-resident's involvement in the economic and commercial life of the source country. As regards income from services that are business profits, such as the services dealt with in this paper, the non-resident service provider should have a permanent establishment in the source country or furnish services in the source country for the same or a connected project for more than 6 months.[72]

The ultimate results sought by the OECD and the UN was essentially that the source countries would earn routine profits and the residence country would earn residual profits which are usually made up of "supply chain transaction costs", lease transfer payments, interest transfer payments, royalty transfer payments and service transactions between the MNEs holding company based in the residence country and the operating company based in the source country.[73] The existing provisions of the UN Model DTA dealing with services, generally does not entitle the source country to tax income from services performed outside the source country. The source country is therefore not entitled to tax income from services performed outside the country even if the services are consumed in the source country.[74]

Globalisation has had an impact on the "source" of income as it has resulted in the shift in the location of various sources of income. This is

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[72] Notes of the Taxation of Services under the United Nations Model Tax Convention, United Nations ("UN"), E/C. 18/2010/CRP.7, 11 October 2010, para. 26, pp. 9 – 10

[73] Lowell, C. H. and Wells, B., Tax Base Defence: History and Reality, International Transfer Pricing Journal, March/April 2013, p. 74

[74] UN, note 57, para. 29, p. 10

due to the fact that globalisation has made it possible to have production and distribution activities in different locations. As regards services, new technologies provide new methods of communication which means that services providers are no longer required to be in the same location as their service consumers. Physical presence is no longer required to conduct business or provide services.

Mr Brian Arnold stated in the Notes of the Taxation of Services under the United Nations Model Tax Convention that, in his view, "*the fixed-place-of-business threshold (i.e., PE or fixed base) that applies to the source country taxation of business profits is* ***clearly inappropriate for income from services****. That threshold was adopted at a time when most cross-border business activity involved the manufacture or production and sale of goods. In the modern economy cross-border services are much more important. Such services can usually be performed without the need for any fixed place of business and certainly without the need for a permanent (more than 6 months) fixed place of business.*"[75] (author's emphasis).

Paragraph 9 of the Commentary on Article 7 of the UN Model DTA states that "*it has come to be accepted in international fiscal matters that until an enterprise of one State sets up a permanent establishment in another State it should not properly be regarded as participating in the economic life of that other State's taxing rights*."[76] Base erosion considerations however seems to justify a lower or no threshold for source country tax, usually in the case of employment income and income from entertainment or sports activities.[77]

Many developing countries and some international institutions hold the view that source taxation is appropriate and justified but it creates problems where the developing countries rely on FDI. This is due to the fact that FDI tends to leave these countries with substantial net outflows of capital income which leads to a persistent deficit on current financial flows. Traditional withholding taxes, taxation of the subsidiaries located in their jurisdiction and permanent establishments of foreign enterprises provide these countries with the opportunity to obtain a substantial tax base from the outflows of income from capital. The concern however is that the shift in the location of economic activity as a result of globalisation will, and has,

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[75] UN, note 57, para. 53, p. 18

[76] UN, note 57, para. 57, p. 19

[77] UN, note 57, para. 58, p. 19

resulted in more goods and services being sold/consumed in developing countries without the seller needing to be physically present or having a physical presence in that country.[78]

In applying the principles to determine the source of income from services rendered, it used to be generally accepted that the source will be the jurisdiction in which the services are performed. However, as withholding tax on services is seen as an opportunity to expand the tax base of a country, traditional source rules are often not applied. An analysis of the conditions giving rise to a liability for withholding tax on technical fees and management or other services fees indicate that a significant number of countries levy withholding tax on services on payment, irrespective of the location from which the services were rendered, if the service was consumed in the country, if a local person or entity benefitted from the service rendered, if the service gave rise to income sourced in the jurisdiction, amongst various others.[79]

3.3.1. Recent court decisions dealing with source of management/ service fees

This principle was challenged in the courts of a number of countries, some of which are dealt with below. A major concern is that the varied outcomes of decisions reached by courts and varied views expressed in international commentaries and practices makes it difficult, if not impossible, to predict "source" and hence the treatment of cross-border services for tax purposes.

India

India has been the most active state in respect of litigation dealing with the source of cross-border services. On the whole, the courts apply very broad principles when interpreting the provisions of the treaties, with decisions usually favouring

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[78] Roxan, I., Limits to Globalisation: Some Implications for Taxation, Tax Policy, and the Developing World, LSE Law Society and Economy Working Papers 3/2012, London School of Economics and Political Science, Law Department, p. 40

[79] See annexure 2 for details of conditions giving rise to liability for or basis for levying withholding tax on technical fees and management fees or service fees,

the interpretation of the tax authorities. Some of the prominent cases[80] include

- *Ashapura Minichem Limited v. ADIT*[81] in which the court held that the utilization of the services in India is sufficient to warrant the taxability of the services in India. The court further held that the provision of article 12(6) of the treaty between India and China provides that the payment for the service fees determines the source of the services to be located in India irrespective of the location from which the service are rendered:

- *Linklaters LLP, UK v. ITO*[82] in which the court held that indirect attribution of the services rendered to the permanent establishment ("PE") incorporates the force of attraction principle.[83] This means that any services rendered by Linklaters to its clients in India by the taxpayer, even where they were not rendered by the PE, were to be regarded as indirectly attributable to the PE and thus taxable in India; and

- *Clifford Chance v. ADIT*[84] in which the ITAT held that the taxpayer's income attributable to the work performed outside India was exempt from tax in India under article 7(1) of the treaty.

Tanzania

The Revenue Appeals Tribunal ("the RAT") handed down a decision on 15 August 2013 in the case of *Tullow Tanzania BV v Commissioner General, Tanzania Revenue Authority*

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[80] See annexure 5 for details of the cases

[81] *Ashapura Minichem Limited v. ADIT*, Income Tax Appeal No. 2508/Mum/2008

[82] *Linklaters LLP, UK v. ITO*, Income Tax Appeal Nos 4896/Mum/03 and 5058/Mum/03

[83] Subsequent to this decision, the Special Bench of the Tribunal dealing with another case, *ADIT v. Clifford Chance*, Income Tax Appeal No 2060-61/Mum/2008, Income Tax Appellate Tribunal, Special Bench, Mumbai, held that article 7(1) of the tax treaty between UK and India is materially different from article 7(1) of the UN Model. The treaty between the UK and India did not incorporate the force of attraction principle. This means that the services rendered to clients in India not rendered in India should not be regarded as indirectly attributable to the PE in India and as such are not taxable in India.

[84] *Clifford Chance v. ADIT*, Income Tax Appeal No 2060-61/Mum/2008, Income Tax Appellate Tribunal, Special Bench, Mumbai

("*Tullow Tanzania* case").[85] [86] The facts of the case are as follows:

Tullow Tanzania BV ("Tullow") is a company registered in Tanzania and carries out offshore oil and gas exploration activities. In carrying out these activities, Tullow sent raw seismic data to contractors in Ireland (a separate legal entity) for processing and production of seismic sections. The seismic sections are sent to South Africa to another separate legal entity for interpretation and the results are sent back to Tullow for execution of the drilling programme. The Tanzania Revenue Authority ("the TRA") carried out an audit and raised an assessment for withholding tax due on the payments made to the contractors in Ireland and South Africa.

The Tanzania Income Tax Act provides that service fees are sourced in Tanzania if they are paid for services rendered in Tanzania.

The TRA argued that the location of consumption of the services is critical and not the location of performance of the services, i.e. in this instance Ireland and South Africa. RAT found in favour of TRA that payments made to Ireland and South Africa in respect of services are subject to withholding tax in Tanzania as the services were rendered to Tullow which is located in Tanzania. The decision has not been well-received as it disregards the Tanzanian source rules – in fact, it did not deal with it at all – which require the services to be rendered in Tanzania by a non-resident before the withholding tax can apply and the purpose of section 69 of the Tanzanian Tax Act which is to bring into the tax net non-residents who come into the country to provide services, and earn income as a result, and who then leave the country without paying any income tax. The decision is under appeal and is expected to be heard sometime during 2014.

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[85] *Tullow Tanzania BV – Appellant and Commissioner General, TRA – Respondent*, Appeal No. 7 of 2013 between the United Republic of Tanzania in the Revenue Appeals Tribunal, Dar Es Salaam.

[86] See annexure 5 for further details of this case

Neither the Tax Revenue Appeals Board ("TRAB")[87] nor the RAT dealt with one of the grounds of objection and in the appeal that the assessment of withholding tax on services performed by a South African entity contravenes the tax treaty between South Africa and Tanzania.

Brazil

The source of services rendered has been considered in a number of cases in Brazil such as *Inter Partner Assistance Prestadora de Seviços de Assistência 24 Horas Ltda.* ("*Inter Partner*")[88] and *Copesul – CIA/Petroquimica do Sul* ("*Copesul*")[89].[90] Following the decisions by the courts in these matters, the General Office of the National Treasury's Attorney (Procuradoria-Geral da Fazenda Nacional – PGFN) recently changed its position on the application of tax treaties for the avoidance of double taxation on outbound payments for the rendering of technical services without transfer of technology.

In the past, the PGFN and the Federal Revenue Office (Receita Federal do Brasil – RFB) published Normative Opinion 776/2011 and Declaratory Act 1/2000 providing, in a nutshell, that tax treaties signed by Brazil do not prevent the levying of withholding tax on these types of outbound payments. Accordingly, the amounts paid for the rendering of technical services without the transfer of technology would not fall within the concept of "business profits", as stated in article 7 of tax treaties signed by Brazil, since these amounts are defined as "revenue" of the foreign beneficiary under Brazilian domestic law. As a result, those payments would fall within the scope of the "other income" article, which in the case of tax treaties signed by Brazil generally diverges from the OECD Model DTA by allowing taxation at source.

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[87] *Tullow Tanzania BV – Appellant and Commissioner General – Respondent*, Income Tax Appeal Case No. 10 of 2011, Tax Revenue Appeals Board, Lindi

[88] *Inter Partner Assistance Prestadora de Seviços de Assistência 24 Horas Ltda. v. Federal Union (National Treasury)*, Case 0024461-74.2005.4.03.6100

[89] *Copesul – CIA/Petroquimica do Sul v. Federal Union (National Treaury)*, Case RE 1.161.467 – RS

[90] See annexure 5 for details of these cases

Normative Opinion 2,363/2013, recently made available by the PGFN, revisited the issue and established that, for the purposes of applying tax treaties, the definition of business profits of foreign enterprises should comprise the payments made by Brazilian sources for the rendering of technical services without transfer of technology. Thus, as a general rule, PGFN has recognized that article 7 of tax treaties signed by Brazil prevents the levying of withholding taxes on such payments, unless attributable to a permanent establishment situated in Brazil.

4. Treaties and fees for technical and other similar services

Both the OECD Model DTA and the UN Model DTA distinguish between business income and investment income. Income from business income, which should include services, is usually taxable on a net basis, i.e. provision is made for the deduction of expenditure incurred to produce the income whereas investment income, such as dividends, interest and royalties, is subject to a withholding tax which is a final tax and is determined on the gross amount before taking into account any expenditure incurred in the production of that income.

The distinction between business income and investment income has however become problematic in respect of technical and other similar fees for services. Jurisdictions which perceive that the payment of these fees create an erosion of their tax base have included specific provisions dealing with payments of this nature on their recently negotiated treaties or protocols to treaties in force.[91] [92] [93] These

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[91] Refer to details of countries which have either negotiated for the inclusion of certain fees in some of their treaties or consider the fees to be dealt with in the treaties in annexure 2

[92] At the eighth session of the Committee of Experts on International Cooperation in Tax Matters of the United Nations held in October 2012, it was decided to develop a new technical services article for inclusion within the Model Convention. Some of the issues to be addressed in the new technical services article will be:

- A definition or a framework of what could qualify as "technical services";
- Consideration of the modality of how the service is performed, including whether there is a need for physical presence in the source country. If that is the case, the threshold time for such presence must be determined; and
- Consideration whether the fact that payment for services is simply borne by the resident of the source country or a permanent establishment situated therein should warrant the allocation of taxing rights to the source country

(See United Nations, "Committee of Experts on International Cooperation in Tax Matters", Report on the eighth session (15 – 19 October 2012) at page 13)

[93] China has endorsed the addition of a new article on technical services to the United Nation's Model Tax Convention in order to achieve fairer taxation from services performed in source states. It is of the opinion that the approach has the advantage of being more relevant and appropriate and would assist developing countries to negotiate their treaties in a manner that will preserve their taxing rights. The new article should define technical services, address whether there is a need for physical presence in the source country and address whether the fact that a resident of a source country or PE located in that source country simply makes payment for the services rendered should warrant allocating taxing rights to that country. See article by Bell, K. A., *Chinese Tax Official*

provisions often allow them to tax these fees on a gross basis[94] or results in a reduction of the withholding tax rate applicable.[95]

However, some developing countries levy a withholding tax on services notwithstanding that a treaty may prevent them from doing so.[96]

As noted above, some jurisdictions deem the source of management fees to be in their jurisdictions if payment is made for such services by an entity located in that jurisdiction or if the entity which benefitted from the service is located in their jurisdiction. The location from which the services were rendered is ignored. This inevitably results in source v source conflicts if the jurisdiction from which the services were rendered also claims that it is the source from which the income was generated.[97]

Whilst these situations could be addressed in cases where there are treaties in place between the affected jurisdictions which deal with technical or other services, it may not always be the case as a significant number of treaties do not include an article which deals with these matters or there is a reluctance on the part of some jurisdictions to address these disputes with the other conflicting jurisdictions.[98]

What is clear is that a withholding tax on services is an easily managed tax suitable for many developing countries where the tax authorities have limited capacity. As such it is an effective avoidance measure which offers some protection of their tax base, albeit often applied in respect of deemed source rules which conflict with that of developed countries.[99]

Once it is established that services are being provided and having decided who has taxing rights, it must be determined whether the price charged for the service is appropriate.

Endorses Adding New Services Article to UN Model Treaty, Bloomberg BNA International Tax Centre, 22 Transfer Pricing Report, 914, published on 28 November 2013.

[94] UN, note 57, para. 88, p. 27

[95] See annexure 2

[96] For example Tanzania following the judgement delivered in the *Tullow Tanzania* case (note 81). Brazil does not grant relief notwithstanding any treaty which may provide otherwise

[97] See details provided in annexure 2

[98] Refer to note 96

[99] See annexure 6 for details of a situation which applies specifically in respect of the latest South Africa-Mozambique treaty as a result of textual differences contained in the definition of “permanent establishment” as it appears in the English and Portuguese versions of treaty.

5. Transfer pricing developments

Transfer pricing has been and is still used to some extent as a tax avoidance mechanism by MNEs to manipulate profits earned in the various jurisdictions in which they operate so as to minimise the overall tax liability of the group. This manipulation can only be achieved if the income and its source is effectively moved from one jurisdiction to another with a more favourable tax rate or tax regime than the first jurisdiction.

Transfer pricing became the focus of a small number of countries in the 1960s and 1970s and is currently considered to be the most important mechanism to achieve tax avoidance through the manipulation of profits. Almost all countries have domestic tax provisions, either general or specific, endorsing the arm's length principle and which allow the tax authorities to adjust prices which deviate from this principle.[100] Specific provisions are usually referred to as "transfer pricing provisions".[101]

Working Party No. 6 of the Committee on Fiscal Affairs of the OECD ("Working Party No. 6") is dealing with the transfer pricing aspects of intangibles, including MNE activities such as services. Issues being considered are how risk is actually distributed among members of an MNE, whether transfer pricing principles should recognise contractual allocations of risk, what level of economic substance is required in respect of contractual allocations of risk including managerial capacity to control the risks and to bear the costs associated with the risks identified as well as whether any indemnification payment is required where risk is allocated between member entities.[102]

6. Transfer pricing principles

6.1. General

The determination of appropriate charges for intra-group cross border service fees has recently become the focus of tax authorities performing tax investigations into the affairs of MNEs as it is alleged that service fees are often used by MNEs to manipulate profits in high-tax jurisdictions, i.e. services fees are used as a means of profit-stripping.

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[100] Cottani, G., *Transfer Pricing*, Topical Analyses IBFD, 4. The Arm's Length Principle and the Origin of the Transfer Pricing Guidelines, accessed 30 April 2014

[101] See annexure 7 for details of the application of the arm's length principle and transfer pricing in various countries

[102] Van den Brekel, R., *Global: Transfer Pricing and the OECD project on BEPS*, International Tax Review, 12 June 2013

Whilst scrutiny of the levels of service fees may be justified in circumstances where MNEs do not adhere to responsible tax governance principles and apply aggressive tax planning structures to exploit opportunities to extract profits from high-tax jurisdictions, general scepticism of the reasonability and "validity" of service fees are often unreasonable and unfounded.

The services provided vary significantly between non-connected taxpayers as well as the services provided within a group, which makes it difficult to find comparable prices for the services rendered or to satisfactorily evaluate the benefit received. Consequently many tax authorities regard service fees as particularly prone to potential abuse and therefore devote increasing resources to auditing these transactions.

The levels of service fees of tax responsible MNEs are usually justifiable in respect of the nature and quality of the services provided, after taking into account the tax implications of the transactions in all the affected jurisdictions. It is expected from these tax responsible MNEs to consider and have a comprehensive approach to identify and evaluate cross border intra-group services and develop bespoke transfer pricing policies applicable to the group forming part of a specific MNE which meet the expectations of the various tax authorities in the jurisdictions in which they operate.

It is generally accepted that two issues need to be considered in the transfer pricing analysis of cross-border intra-group services.[103] [104] The first issue is to determine whether or not a service has indeed been supplied and the second issue is to determine an arm's length consideration for economical or commercially valued services received which consideration should be related to the benefit or value received.[105] [106]

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[103] OECD, note 55, para. 7.5, p. 206

[104] Some jurisdictions such as Brazil have adopted transfer pricing policies applicable to services which are inconsistent with the arm's length principle. These ad hoc rules cause significant issues for MNEs which apply global transfer pricing policies which are consistent with the OECD Transfer Pricing Guidelines. MNEs operating in jurisdictions such as Brazil need to customise their global transfer pricing policies in order to align them with local rules in order to avoid or mitigate double taxation in respect of service fees.

[105] The United States of America has issued regulations under section 482 of the Internal Revenue Code which are also based on the same principles. In terms of the regulations, an important initial examination in performing a transfer pricing analysis for services is determining for whose benefit an expense is incurred. Where the expense was incurred for the benefit of more than one entity, the expense must be allocated.

[106] In Australia, Head Office services are chargeable if the activity related to the service conferred a benefit to a taxpayer. The Australian tax Office further takes the view that where a benefit is provided to an entity by way of a service and there is a real connection between the entity's operations and the associate, the entity would be expected to pay for the service.

Clearly if no service was supplied, or a service has been supplied but that service does not provide a respective group member with economic or commercial value to enhance its commercial position, i.e. an independent enterprise in comparable circumstances would not have been willing to pay for the activity if performed for it by an independent enterprise or would have performed the activity in-house for itself, then the service should not be considered as an intra-group service under the arm's length principle. The objective here however is not only to determine the value of the services rendered but also how direct or remote the benefits derived are in relation to the intra-group services rendered but also the relative proximity of the benefit derived to the intra-group services. No charge should be attributed if the benefit is so indirect or remote that an unrelated party would not have charged for similar services.[107]

These situations could be regarded as "profit stripping" activities and attempts to prevent these practices are justified. Most tax jurisdictions are empowered to deal with profit stripping activities of this nature as the tax legislation would usually include remedies such as denying a deduction of excess expenditure for corporate tax purposes on the basis that it was not incurred for the purpose of trade[108], levying interest and penalties on the entity paying the excessive management fees, amongst others.

The absence of provisions similar to the ones noted above does not limit jurisdictions from challenging these "profit stripping" activities. Common-law principles nullify some forms of tax evasion without the need to invoke statutory anti-avoidance provisions. Indeed, the first inquiry where a suspicion arises that a tax scheme is improper is whether it falls foul of common law principles, that is to say, whether it involved a sham[109] or

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[107] Mehta, N., Formulating an Intra-Group Management Fee Policy: An Analysis from a Transfer Pricing and International Tax Perspective, International Transfer Pricing Journal, IBFD, September/October 2005, para. 2.4.1., p. 255

[108] For example, section 23(g) of the Income Tax Act, No 58 of 1962 of South Africa specifically provides that expenditure cannot be claimed as a deduction to the extent it was not incurred for the purpose of trade. Section 8-1(1)(b) of the Income Tax Assessment Act, 1997 of Australia provides that only expenditure necessarily incurred in the carrying on of a business may be deducted. Also see note 100 regarding the allocation of expenses in the United States of America where more than one entity benefits from a service rendered.

[109] The term "sham" was defined by Lord Wilberforce in *WT Ramsay Ltd v IRC* ([1982] AC 300) and *Furniss v Dawson* ([1984] AC 474 (HL), 2 WLR 226) as "*to say that a document or transaction is a "sham" means that while professing to be one thing, it is in fact something different*.". Diplock, LJ. said in *Snook v London & West Riding Investments Ltd* ([1967] 2 QB 786 at 802) "*I apprehend that, if ["sham"] has any meaning in law, it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create*.". Diplock LJ then went on to make the important point that for an act or document to be a sham "*all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating*". In this regard, a contract may be a sham either in part or in whole. The suggestion is therefore that if one party does not know that the other party has no genuine intention to create the legal rights and obligations

disguised transaction. As always, the strength of the common law is that it finds expression in terms of broad principles whereas the reach of a statute is limited by the particular words in which it is couched.[110] The OECD also addressed the issue of substance over form of intra-group transactions in its Transfer Pricing Guidelines. It states that "*(A) tax administration's examination of a controlled transaction ordinarily should be based on the transaction actually undertaken by the associated enterprises as it has been structured by them, using the methods applied by the taxpayer insofar as these are consistent with the methods described in Chapter II. In other than exceptional cases, the tax administration should not disregard the actual transactions or substitute other transactions for them. Restructuring of legitimate business transactions would be a wholly arbitrary exercise the inequity of which could be compounded by double taxation created where the other tax administration does not share the same views as to how the transaction should be structured.*

However, there are two particular circumstances in which it may, exceptionally, be both appropriate and legitimate for a tax administration to consider disregarding the structure adopted by a taxpayer in entering into a controlled transaction. The first circumstance arises where the economic substance of a transaction differs from its form. In such a case the tax administration may disregard the parties' characterisation of the transaction and re-characterise it in accordance with its substance. … The second circumstance arises where, while the form and substance of the transaction are the same, the arrangements made in relation to the transaction, viewed in their totality, differ from those which would have been adopted by independent enterprises behaving in a commercially rational manner and the actual structure practically impedes the tax administration from determining an appropriate transfer price."[111]

The reasons for not attacking these transactions in terms of the provisions noted above may be due to lack of expertise and resources.[112]

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ostensibly brought into being, their bilateral transaction cannot be categorized as a sham. That said, there have been decisions in the United Kingdom in which a document was held to be a sham where there was no such common intention, but one of the parties simply went along with the shamming party, neither knowing nor caring.

[110] De Koker, A.P. and Williams, R.C., Silke on South African Income Tax, Lexisnexis (November 2013), para. 19.3

[111] OECD, note 55, paras. 1.64 – 1.65, pp. 51 – 52

[112] Refer to annexure 7 which deals with the arm's length principle and transfer pricing as well as the current status quo in developing countries

This paper does not deal with service fees which can be described as "profit stripping" activities, services that are not chargeable, being regarded as "non-beneficial"[113] or sham transactions.[114] It deals with activities performed for one or more group members by another group member which are of economic or commercial value to the respective independent enterprise and enhance their commercial position and competitiveness. These are activities which the independent enterprise would have been willing to pay for or perform for itself.[115] This issue is considered to be by far the most important factor that determines whether a related party recipient would pay for an intra-group service and as such can justify a charge for the provision of intra-group services.

The OECD also states in its Transfer Pricing Guidelines that "*(T)he fact that a payment was made to an associated enterprise for purported services can be useful in determining whether services were in fact provided, but the mere description of a payment as, for example, "management fees" should not be expected to be treated as prima facie evidence that such services have been rendered. At the same time, the absence of payments or contractual agreements does not automatically lead to the conclusion that no intra-group services have been rendered*."[116]

The OECD holds the view that arms' length pricing is the only way to combat transfer pricing. It claims that there is international consensus with this view although it has been said that this position has been deployed to thwart any debate about the matter elsewhere, specifically in the UN Tax Committee.[117]

The application of the OECD Guidelines and the arms' length principle has been challenged by the International Centre for Tax and Development ("ICTD") in the context of developing countries as being "*impossible to apply effectively or consistently, and demanding a very high level of*

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[113] These services would, in addition to shareholder activities, include duplicative services, services that provide incidental benefits, passive association benefits and on-call services. Also see OECD Transfer Pricing Guidelines, Chapter VII: Intra-group services, OECD, note 55

[114] Sham transactions relates to the substance-over-form doctrine, i.e., transactions that are deemed to have been set-up solely to obtain tax benefits, transactions that lack meaningful economic benefits independent of tax benefits.

[115] The OECD states at para. 7.6 in its Transfer Pricing Guidelines that "*(T)his can be determined by considering whether an independent enterprise in comparable circumstances would have been willing to pay for the activity if performed for it by an independent enterprise or would have performed the activity in-house for itself. If the activity is not one for which the independent enterprise would have been willing to pay or perform for itself, the activity ordinarily should not be considered as an intra-group service under the arm's length principle*."

[116] OECD, note, 55, para. 7.18, p. 210

[117] Picciotto, S., *Is the International Tax System Fit for Purpose, Especially for Developing Countries?*, ICTD Working Paper 13, September 2013, ICTD, para. 2.6, p. 22

resources."[118] The European Commission also acknowledged that the application of the OECD Guidelines as, notwithstanding that all Member States (of the European Union) apply and recognise the merits of the OECD Guidelines, the different interpretations given to these guidelines often give rise to cross-border disputes which are detrimental to the smooth functioning of the Internal Market and which create additional costs for businesses and national tax administrations.[119]

The United Nations Practical Manual on Transfer Pricing for Developing Countries ("UN Transfer Pricing Manual") was released in 2013. The guidelines offered in the UN Transfer Pricing Manual are consistent, although not identical, to the OECD Guidelines. Some commentators are of the opinion that the UN Transfer Pricing Manual is not an alternative to the OECD Guidelines although it can evolve in that manner.[120]

The "build-up" to the UN Transfer Pricing Manual included a number of sessions where certain aspects and challenges of transfer pricing in the developing world were discussed. One such session was held in Geneva from 18 – 22 October 2010. Mr Brian Arnold was tasked with the preparation of a note which was presented to the Committee of Experts on International Cooperation of Tax Matters. The note dealt with "Taxation of Services under the United Nations Model Tax Convention".[121]

MNEs face a multitude of challenges and additional costs in preparing documentation to demonstrate that they are compliant with transfer pricing rules in all jurisdictions in which they operate especially as the expectations of jurisdictions grow and the documentary requirements and supporting evidence needed vary significantly between jurisdictions and quite often the amount and type of documentation required are disproportionate in

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[118] Picciotto, S., note 117, para. 2.4, p. 17

[119] Euorpean Commissions, Transfer pricing in the EU context, See http://ec.europa.eu/taxation_customs/taxation/company_tax/transfer_pricing/index_en.htm, accessed on 27 April 2014.

[120] Hearson, M., The United Nations Practical Manual on Transfer Pricing: a bluffer's guide, 6 June 2013, http://martinhearson.wordpress.com/2013/06/06/the-united-nations-practical-manual-on-transfer-pricing-a-bluffers-guide/, accessed on 23 February 2014

[121] UN, note 57

relation to the service fees paid.[122] [123] [124] Non-compliance with these requirements may result in the disallowance of the expense and an effective double tax charge on the same service fees, i.e. a withholding tax on services as well as an increase in taxable income as a consequence of the disallowance of the service fees expense incurred.

Add to this the fact that transfer pricing, especially as regards intra-group services, is a controversial issue at present, MNEs need to also consider non-transfer pricing related issues when they evaluate any decision regarding transfer pricing against non-technical issues such as corporate reputation and public perception.[125]

As some tax authorities perceive service fees to be "low-hanging fruit", MNEs should give careful consideration to the documentation and other information which support the service fees charged.[126]

Notwithstanding that intra-group services are one of the major focus areas of tax authorities, international bodies and MNEs worldwide, very little, if any, has been said or written of intra-group services in the context of

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[122] The actual gathering of the information to prove compliance with deductibility requirements can pose a number of challenges for taxpayers. Examples of evidentiary requirements include flight tickets, correspondence and reports by headquarter experts which demonstrate that services were provided as well as clear examples of how the services generated profits for the taxpayer. However, as the assistance provided is in many cases of a fragmentary nature, for example a telephonic discussion between the a financial manager working in the group accounts department at the headquarter with the financial manager of the affiliate located in another jurisdiction, a multiparty conference call with an expert in the legal department or a four-hour assistance from engineers located at the headquarters when selecting a new supplier, collecting evidence or generating a file that extensively documents the benefits and relevance of the services rendered from aboard may be extremely difficult (if not impossible) and burdensome on the taxpayer, especially as such evidence is often widely dispersed across the organisation and even across various jurisdictions. In the case of some South American countries, documenting the benefits and nature of services received from foreign related parties is the first threshold that must be passed before documenting the basis for determination of the price paid for the services received.

[123] As regards the need for documentary evidence, the OECD states as follows in its guideline at para. 5.7: "*…, the taxpayer should not be expected to incur disproportionately high costs and burdens to obtain documents from foreign associated enterprises or to engage in an exhaustive search for comparable data from uncontrolled transactions if the taxpayer reasonably believes, having regard to the principles of these Guidelines, either that no comparable data exists or that the cost of locating the comparable data would be disproportionately high relative to the amounts at issue. Tax administrations should also recognise that they can avail themselves of the exchange of information articles in bilateral double tax conventions to obtain such information, where it can be expected to be produced in a timely and efficient manner*." It continues in para. 5.7: "*Thus, while some of the documents that might reasonably be used or relied upon in determining arm's length transfer pricing for tax purposes may be of the type that would not have been prepared or obtained other than for tax purposes, the taxpayer should be expected to have prepared or obtained such documents only if they are indispensable for a reasonable assessment of whether the transfer pricing satisfies the arm's length principle and can be obtained or prepared by the taxpayer without a disproportionately high cost being incurred. The taxpayer should not be expected to have prepared or obtained documents beyond the minimum needed to make a reasonable assessment of whether it has complied with the arm's length principle.*"

[124] There are currently 58 jurisdictions which specify varied documentary requirements in their transfer pricing rule/regulations. These are listed in annexure 8.

[125] pwc, International Transfer Pricing, 2013/14, pp. 4 – 5, http://www.pwc.com/internationaltp

[126] This is also evident from the excessive withholding tax rates levied by some jurisdictions on technical and management fees in comparison to their corporate tax rates as noted in annexure 3 and to the withholding tax on royalties rates in certain jurisdictions as noted in annexure 12.

withholding tax on services, the source of the services, transfer pricing principles as well as deductions of intra-group services or claiming of withholding tax credits or deductions.[127]

6.2. Methods prescribed by the OECD

The transfer pricing principles laid down in the OECD Guidelines are generally applied and have been adopted by the UN as well in its transfer pricing manual.[128] It is therefore necessary to consider the transfer pricing principles applicable to intra-group services as determined in the OECD Guidelines. The stated principles are:

- The arm's length price of intra-group services must be considered both from the perspective of the service provider and that of the recipient of the service. The value of the service to the recipient and how much a comparable independent enterprise would be prepared to pay for that service in comparable circumstances, as well as the costs to the service provider, must be considered.[129]

- The method to be used to determine arm's length transfer pricing for intra-group services should be determined according to the OECD Guidelines. The preferred methods for intra-group services are the comparable uncontrolled price method ("CUP method") or the cost plus method. The CUP method is regarded as the most appropriate method where there is a comparable service provided between independent enterprises in the recipient's market, or by the associated enterprise providing the services to an independent enterprise in comparable circumstances. A cost-plus method is regarded as the most appropriate method in the absence of a CUP method price where the nature of the activities involved, assets used, and risks assumed are comparable to those undertaken by independent enterprises. Transactional profit methods may be used where they are the most appropriate to the circumstances of the case. In exceptional cases, for example where it may be difficult

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[127] The only publication which deals with some of these issues was published by pwc. The publication is called "*Double jeopardy …*" and deals specifically with leading practices for managing double taxation risk in the oil and gas industry. This issue is however not unique to the oil and gas industry and applies to all types of multi-national business operations and industries. See http://www.pwc.com/gx/en/tax/publications/transfer-pricing/perspectives/taxrisk-oil-gas.jhtml, accessed on 30 April 2014

[128] Transfer pricing information often does not state explicitly that the OECD methods are applied but rather that a country uses the "arm's length principle". Deviations, some limited and other more extreme, are also noted. There are a number of countries that do not apply these methods to services. Details can be found in annexure 7.

[129] OECD, note 55, para. 7.29, p. 213

to apply the CUP method or the cost-plus method, it may be helpful to take account of more than one method in reaching a satisfactory determination of arm's length pricing.[130]

- It is important to consider whether the charge should result in a profit for the service provider. It is unlikely that an independent enterprise would provide services at cost without the expectation of realising a profit. However, there are circumstances in which an independent enterprise may not realise a profit from the performance of service activities alone, for example where a supplier's costs (anticipated or actual) exceed market price but the supplier agrees to provide the service to increase its profitability, perhaps by complementing its range of activities. Therefore, it need not always be the case that an arm's length price will result in a profit for an associated enterprise that is performing an intra-group service.[131] [132]

6.3. Methods prescribed by the UN

The UN Transfer Pricing Manual deals with intra-group services. It loosely defines an intra-group service as "*a service provided by one enterprise to another in the same MNE group. For a service to be considered an intra-group service it must be similar to a service which an independent enterprise in comparable circumstances would be willing to pay for in-house or else perform by itself. If not, the activity should not be considered as an intra-group service under the arm's length principle."*[133] *It further states that the "rationale is that if specific group members do not need the activity and would not be willing to pay for it if they were independent, the activity cannot justify a payment. Further, any incidental benefit gained solely by being a member of an MNE group, without any specific services provided or performed, should be ignored*."[134]

As is the case with the OECD Guidelines, the UN Transfer Pricing Manual gives preference to the determination of an arm's length price for intra-

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[130] OECD, note 55, para. 7.31, p. 214

[131] OECD, note 55, para. 7.33, pp. 214 – 215

[132] Working Party No. 6 of the Committee of Fiscal Affairs of the OECD issued a document for public consultation, the "Revised Discussion Draft on Transfer Pricing aspects of Intangibles" on 30 July 2013. A brief review of the findings of the working party can be found in annexure 1.

[133] UN, note 57, para. 1.6.8, p. 19

[134] UN, note 57, para. 1.6.8., p. 19

group services either directly by way of the CUP Method provided comparable services are available in the open market or, in the absence of comparable services, the Cost Plus Method or where a direct charge method is difficult to apply, an indirect charge method[135] may be used such as cost sharing. The indirect charge methods would usually be accepted by the tax authorities only if the charges are supported by foreseeable benefits for the recipients of the services, the methods are based on sound accounting and commercial principles and they are capable of producing charges or allocations that are commensurate with the reasonably expected benefits to the recipient. In addition, tax authorities might allow a fixed charge on intra-group services under safe harbour rules or a presumptive taxation regime, for instance where it is not practical to calculate an arm's length price for the performance of services and tax accordingly.[136]

6.4. Methods prescribed by other institutions or jurisdictions

The European Commission has also developed proposals on income allocation to members of MNEs active in the European Union ("EU"). Some of the approaches considered have included the possibility of a "common consolidated corporate tax base (CCTB)" and "home state taxation".[137] Under both options transfer pricing would be replaced by formulary apportionment, whereby taxing rights would be allocated between countries based upon the apportionment of the European business activity of an MNE conducted in those countries. Apportionment would be under an agreed formula, based upon some indicia of business activity such as some combination of sales, payroll, and assets.

A formulary apportionment approach is currently used by some states of the United States of America, cantons of Switzerland and provinces of Canada. The Brazilian and Kuwaiti transfer pricing rules specify a maximum ceiling on the expenses that may be deducted for tax purposes in respect of imports and sets a minimum level for the gross income in

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[135] An "indirect charge method" is defined as "*(A) method under which fees for intra-group services are computed on the basis of apportionment of costs using an allocation key, with an appropriate mark-up.*", UN, note 72, p. 484

[136] UN, note 57, paras. 1.6.9 – 1.6.10, pp. 19 - 20

[137] See http://ec.europa.eu/taxation_customs/taxation/company_tax/common_tax_base/index_en.htm, accessed on 30 April 2014

relation to exports, effectively using a set formula to allocate income to their jurisdictions.[138]

7. Practical application of transfer pricing methods to intra-group cross border service charges

7.1. Percentage of sales

The majority of tax authorities do not accept services fees which are charged as a percentage of sales. There are also instances where exchange control regulations do not permit the remittance of fees such as management fees which are based on a percentage of sales, turnover, purchases, etc.[139]

7.2. Comparable uncontrolled price method

Whilst the CUP method is regarded as the preferred method for the determination of intra-group charges in general[140] [141], it is not regarded as a preferred method in the case of management services as the service provider does not generally provide similar services to independent third parties or unrelated parties, and the services provided are usually unique to the group. This method requires a high degree of comparability in the services provided in the controlled and uncontrolled transactions. This level of comparability is extremely difficult to meet in practice.[142] [143]

However, there may be circumstances where comparable data may indeed be available for example where the MNE establishes its own banking, insurance, legal or financial services operations although great care must be exercised when the activities are compared with third party

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[138] Also refer to annexure 7 for other methods applied by other jurisdictions

[139] The South African exchange control regulations prohibit the remittance of management fees which are based on a percentage of sales, turnover, purchases etc. A detailed invoice specifying the services rendered and the basis for the fee must be submitted to the bankers of the remitting entity when payment is affected. An analysis of the exchange control requirements is not included in this paper.

[140] pwc, note 125, p. 82; OECD, note 51, para. 7.31, p. 214

[141] Mehta, N., note 107, para. 2.5.1.1., p. 261: While the OECD Guidelines provide that where it is possible to locate comparable uncontrolled transactions, the CUP method is the most direct and reliable way to apply the arms' length principle. However, it may be difficult to apply this method in practice for intra-group services because this method is ideally suited for commodities that are the subject of frequent trade in the open market. However, for intra-group dealings in services, the difficulty that may arise is the absence of an open-market price for similar services.

[142] Mehta, N., note 107, para. 2.5.1.1., p. 261.

[143] The CUP method is defined in the UN Transfer Pricing Manual as "*(A) transfer pricing method comparing the price of the property or service transferred in the controlled transaction with the price charged in comparable transactions in similar circumstances*", UN, note 72, p.482

businesses.[144] This is due to the fact that third parties need to deal with the challenges of real market conditions whereas group companies are often obliged to use the services provided within the group.

The CUP method is therefore not regarded as an appropriate method to determine an arm's length price in the context of intra-group services.[145]

7.3. Cost-plus method

The cost-plus method[146] is typically used in circumstances where services are rendered and no fee can be determined in terms of the CUP method. The costs incurred in providing the services must be analysed[147] and where services are provided to various beneficiaries in the group, the costs must be charged on a pro-rata basis.[148] With this method the gross mark-up[149] realised on a controlled transaction is compared with that of an uncontrolled transaction, i.e. the mark up achieved by the same supplier in a comparable dealing with an unconnected party. This method is usually used where the recipient is exposed to limited economic risk in respect of the transaction. This method is primarily dependent upon the similarity of the functions performed and the risks assumed by the controlled and uncontrolled service providers and less dependent on the similarity of the actual services rendered.

One of the practical problems associated with this method is that it is usually difficult to find transactions between independent parties which are sufficiently similar to the controlled transactions. The differences usually have a material impact on the price of the service and it is also difficult, if

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[144] OECD, note 55, para. 2.15, p. 63

[145] Refer to annexure 7 for details of countries which prescribe the CUP method for intra-group cross border services

[146] The Cost Plus Method is defined in the UN Transfer Pricing Manual as "*(T)he Cost Plus Method evaluates the arm's length nature of an inter-company charge for tangible property or services by reference to the gross-mark up on costs incurred by the supplier of the property or services. It compares the gross profit mark-up earned by the tested party with the gross mark-ups earned by comparable companies.*", UN, note 67, p.482. Gross profit mark-up is also commonly referred to as a profit margin.

[147] MNEs based in most OECD member nations put a great deal of effort into analysing the functions and services provided in order to determine an appropriate fee for them. The tax authorities of developing countries however have focussed on the deductibility of the fee itself rather than the transfer pricing policy and the determination of the price charged. See pwc publication, *South America: Dealing with local complexity when applying global transfer pricing policies*, http://www.pwc.com/gx/en/tax/publications/transfer-pricing/perspectives/south-america-tppolicies.jhtml, accessed on 30 April 2014

[148] A suitable basis for the allocation of the costs the various beneficiaries must be determined as this aspect is often challenged by tax authorities.

[149] The addition of a gross margin or gross mark-up to costs of sale will result in a gross profit being earned by the service provider. Gross profit is generally defined as the "*result of deducting from total sales the cost of sales, including all expenses directly incurred in relation to those sales.*"

not impossible, to determine reasonable adjustments to eliminate the effect of these differences on the price.

Determination of costs

MNEs need to analyse the costs associated with rendering the services which is determined by using an acceptable cost-accounting system which is developed according to generally accepted accounting principles. Most jurisdictions do not prescribe a specific cost-accounting method and will accept any suitable method provided the method is generally acceptable and applied consistently.

It is recognised that this method presents some difficulties in the determination of costs particularly as, although it is accepted that an enterprise must cover its costs over a period of time to remain in business, those costs may not be determinant of the appropriate profit in a specific case for any one year. Examples would be situations where a valuable discovery is made but the costs in making the discovery were insignificant.[150]

The full-cost basis can also be used to determine a suitable price provided it reflects all relevant costs – both direct and indirect costs. It is usually not acceptable to compute the costs on an incremental basis.

Direct costs are costs that are identifiable with the delivery of particular services, such as costs of employees directly engaged in performing the services and materials and supplies directly consumed in rendering the services.

Indirect costs are costs that are not specifically identifiable in relation to the specific activities but is related to the direct costs. These costs would include expenses such as office expenditure, telephone costs, supervisory services and clerical services and other overhead expenditure related to the department rendering the services. Indirect costs should be apportioned on a reasonable basis to the service rendered.[151]

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[150] OECD, note 55, para. 2.43, p. 72

[151]The United States of America requires the inclusion of stock-based compensation in the costs associated with a particular service. This inclusion is causing some controversy as transactions between third parties typically do not include these types of costs in their service costs and these costs are not considered in negotiations with third parties. MNEs operating from the United States of America are obliged to comply with this requirement.

Addition of profit margin/gross mark-up

Once the cost base has been identified and a basis for the allocation of service charges to various group companies is established, a mark-up, if any, needs to be determined. Whilst most tax authorities expect intra-group services will be charged based on the cost-plus method with an appropriate profit margin added to the costs determined, it should be noted that not all tax authorities allow the addition of a profit margin, especially if the profit margin is not adequately substantiated. Issues may also arise in the jurisdiction from which the service is rendered if no profit margin is added to the costs determined.

Most developed countries accept that a reasonable profit margin is acceptable although the economic alternatives available to the recipient of the service must also be taken into account in determining the profit margin, if any and it may well be that the price the recipient is willing to pay for the services does not exceed the cost of the supply of the service provider.

If found that a profit margin on the services is appropriate, the profit margin must be determined with reference to comparable transactions. In practice many tax authorities expect to see certain levels of profit margin as the norm, usually between 3% and 10%[152] of costs in respect of services unless the services are a crucial element in the operations of the recipient. This situation usually occurs where the value of the services to the recipient substantially exceeds the costs of providing the services. The profit margin on routine services where the value of the services does not exceed the costs of provision may be 0% or negligible.

Another consideration is the treatment of the profit margin by the tax authorities of the jurisdiction in which the recipient operates as disallowance of the profit margin. For instance, on routine services, this may result in a denial of the deduction of the profit margin whilst the services provider is subject to tax on the full amount charged, i.e. it may result in economical double taxation on the profit margin.

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[152] Some jurisdictions, such as India, may accept a profit margin range of between 5% and 20% of costs, depending on the nature of the services provided. Other, such as Brazil and Kuwait, will only accept a profit margin basis determined in terms of margins set by their tax authorities.

8. Is withholding tax on services a "cost"?

Whilst it is clear that withholding tax on services is an economic cost to a business, it would seem that it is not regarded as a "cost" in the context of transfer pricing.

No guidance is offered in the OECD Guidelines as, whilst it refers to costs in various contexts, it does not deal with withholding taxes in the context of costs. It states that "*(W)hile precise accounting standards and terms may vary, in general the costs and expenses of an enterprise are understood to be divisible into three broad categories. First, there are the* ***direct costs of producing a product or service****, such as the cost of raw materials. Second, there are* ***indirect costs of production****, which although closely related to the production process may be common to several products or services (e.g. the costs of a repair department that services equipment used to produce different products). Finally, there are the* ***operating expenses of the enterprise as a whole****, such as supervisory, general, and administrative expenses.*

The distinction between gross and net profit analyses may be understood in the following terms. In general, the cost plus method will use mark ups computed after direct and indirect costs of production, while a net profit method will use profits computed after operating expenses of the enterprise as well. It must be recognised that because of the variations in practice among countries, it is difficult to draw any precise lines between the three categories described above. Thus, for example, an application of the cost plus method may in a particular case include the consideration of some expenses that might be considered operating expenses. Nevertheless, the problems in delineating with mathematical precision the boundaries of the three categories described above do not alter the basic practical distinction between the gross and net profit approaches."[153] (author's emphasis).

The UN Transfer Pricing Manual does not deal with costs in great detail but states that "*(T)he costs and expenses of an entity normally fall into the following three groups: (1) direct cost of producing a product or service (e.g. cost of raw materials); (2) indirect costs of production (e.g. costs of a repair department that services equipment used to manufacture different products); and (3) operating expenses (e.g. SG&A expenses). The* ***gross profit*** *margin used in the Cost Plus Method is a profit*

[153] OECD, note 55, paras. 2.47 – 2.48, pp. 73 – 74

margin that is calculated by subtracting only the direct and indirect costs of production from the sales price." (author's emphasis)[154]

"Gross profit" is defined in the UN Transfer Pricing Manual as "*(T)he result of deducting from total sales the cost of sales including all expenses directly incurred in relation to those sales.*"[155]

The term "direct cost" is defined in the OECD Guidelines as "*costs that are incurred specifically for producing a product or rendering service, such as the cost of raw materials*"[156] and "indirect cost" is defined as "*costs of producing a product or service which, although closely related to the production process, may be common to several products or services (for example, the costs of a repair department that services equipment used to produce different products*".[157] The term "operating expenses" is not defined in the OECD Guidelines and is generally understood to refer to the on-going costs for running a product, business or system and relates to the day-to-day expenses such as sales and administration or research & development, as opposed to production, costs and pricing.[158]

The UN approach suggests that "*(D)ue to differences in accounting standards between countries, the boundaries between the three groups of costs and expenses are not the same in each and every case. Suitable adjustments may need to be made*."[159] The UN therefore supports the view that the costs to be taken into account therefore need to be classified in terms of general accounting standards and principles.

International Financial Reporting Standards ("IFRS") set out recognition, measurement, presentation and disclosure requirements dealing with transactions and events that are important in general purpose financial statements. They may also set out such requirements for transactions and events that arise mainly in specific industries. IFRSs are based on the conceptual framework, which addresses the concepts underlying the information presented in general purpose financial statements.[160] Accounting principles are generally based on these conceptual

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[154] UN, note 57, para. 6.2.15.3, p. 218

[155] UN, note 57, p. 484

[156] OECD, Note 55, p. 26

[157] OECD, Note 55, p. 27

[158] Operating expenses include accounting expenses, license fees, maintenance and repairs, such as snow removal, trash removal, janitorial service, pest control, and lawn care, advertising, office expenses, supplies, attorney fees and legal fees, utilities, such as telephone, insurance, property management, including a resident manager, property taxes, travel and vehicle expenses, leasing commissions, salary and wages, etc.

[159] UN, note 57, para. 6.2.15.3, p. 218

[160] IFRs, 2014 Blue Book, Preface to International Reporting Standard, para. 8,

frameworks. The conceptual frameworks are usually referred to as a IFRS or an International Accounting Standard ("IAS")

IAS 12 deals with "Income Taxes". It states that "*(F)or the purposes of this Standard, income taxes include all domestic and foreign taxes which are based on taxable profits.* ***Income taxes also include taxes, such as withholding taxes, which are payable by a subsidiary, associate or joint arrangement on distributions to the reporting entity***."[161] (author's emphasis).

Withholding taxes are therefore regarded as a payment on account of the recipient's final tax liability. In the context of general accepted accounting practices, it cannot be regarded as direct costs, indirect costs or operating expenses and it would appear that it would be the case for purposes of transfer pricing as well.

There are however instances where commentators have expressed the view that withholding taxes should be regarded as a cost for transfer pricing purposes. WTS Alliance issued its Global Transfer Pricing Survey and Country Guide dealing with intra-group/management services in 2013. It states that "*(W)hen charging (management) service charges, also withholding taxes need to be taken into account. In about 50% of the countries withholding taxes are/could be due on the service charge, ranging from 0.6% to 25%. Experience learns that in practise the withholding taxes are not always taken into account appropriately between the service recipient and the service provider*. (sic)"[162]

The author has some difficulty with the suggestion that the withholding tax on services should be included in costs for transfer pricing purposes as, whilst neither the OECD Guidelines nor the UN Transfer Pricing Manual explicitly refer to the treatment of withholding taxes on services, reference is made on a number of occasions to "accounting principles" in the respective documents.[163] [164]

This position is different from that of so-called transaction taxes, such as value-added taxes, customs duties, sales taxes, service taxes, to name but a few. These costs would normally be included in the determination of direct costs, indirect costs and even overheads where these transaction taxes were paid as part of the cost incurred in running the operations. Transaction taxes are usually not regarded as "income

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http://eifrs.ifrs.org/eifrs/stdcontent/2014_Blue_Book/Preface_to_IFRS.html#ffon1, Accessed on 9 March 2014

[161] International Accounting Standard 12, Income Taxes, para. 2, http://eifrs.ifrs.org/eifrs/stdcontent/2014_Blue_Book/Preface_to_IFRS.html#ffon1, Accessed on 9 March 2014

[162] WTS Alliance, Global Transfer Pricing Survey and Country Guide, 2013, p. 7, http://www.wts-alliance.com/en/img/TP_Survey_komplett.pdf, accessed 2 March 2014

[163] OECD, note 55, paras. 2.91, 7.23, 8.16 and 8.42.

[164] UN, note 57, paras. 5.3.4.18., 5.3.5.3., 5.3.5.4., 5.3.5.5., 6.2.7.2., 6.2.9.6., 6.2.15.2., 6.2.15.3. and 6.3.16.2.

taxes" and as such would require a different accounting treatment in terms of the generally accepted accounting practices applied across most jurisdictions.

Based on the fact that both the OECD Guidelines and the UN Transfer Pricing Manual both support the application of accounting standards to determine costs and the fact that the accounting standards as stated in IAS 12 state that withholding tax is an income tax, and needs to be taken into account after the determination of "net profit before tax", i.e. not as part of the costs to arrive at the "net profit before tax" results of an enterprise, the author is of the opinion that withholding tax cannot be taken into account as a cost to determine the transfer price of services rendered.

It may well be that the withholding taxes could be taken into account when the profit margin that needs to be added to the costs is determined, but this is not entirely clear at this stage and will most likely not be acceptable in the jurisdictions concerned especially as the transfer pricing aspects of intra-group service fees are currently highly contentious. The tax authorities of most jurisdictions apply the principles laid down in the OECD Guidelines or the UN Transfer Pricing Manual literally which do not support the inclusion of withholding taxes in the determination of costs. It is unlikely that the gross-up of costs to take account of the withholding tax or any other form of inclusion of the withholding tax in the determination of costs for transfer pricing purposes will be accepted.

This also appears to be the view and experience of a number of MNEs. Some MNEs include a reference to the basis used to determine the service fees in the service fee agreements. For example, the following types of provisions are often incorporated in the agreements:

"*The calculation of the Service Fees, including the cost computation method and cost allocation method used in this Agreement and the Mark-up are consistent with the OECD Transfer Pricing Guidelines.*

The Services Fees for the Services shall be calculated by adding (a) the Costs incurred by the Provider, which are attributable to the supply of the relevant Service(s) (calculated as set out below under Cost Computation Methodology), together with (b) the agreed Mark-up on the Non-Third Party Costs incurred by the Provider in providing the relevant Service(s).

The Provider shall determine the sum of all direct and indirect Costs incurred in rendering the Services to the Recipients, including without limitation all cost of personnel, travel and equipment, all expenses paid to third parties and all overhead expenses in accordance with the accepted full cost accounting method determined in terms of General Accepted Accounting Principles."

Other MNEs include a definition of "Costs" in their intra-group service agreements which often provide that Costs mean "*the sum of full employment costs including payroll taxes of staff, travel costs and communication costs involved in providing shared resources as well as a proportion of overheads costs such as office costs. For management accounting purposes all these Costs are accounted for separately and the Costs are therefore easily identifiable*." Provision is usually made for the addition of an arm's length margin, usually as determined by way of a comparable search undertaken by a reputable external service provider, to be added to the Costs to arrive at the total fee. The margin is usually between 5% and 10%.

9. **Does withholding tax comprise a cost related to economic circumstances to be taken into account?**

The OECD Guidelines provide for a number of issues and circumstances that need to be considered in the determination of a reasonable transfer price. One such consideration is the economic circumstances. It provides as follows:

"*Arm's length prices may vary across different markets even for transactions involving the same property or services; therefore, to achieve comparability requires that the markets in which the independent and associated enterprises operate do not have differences that have a material effect on price or that appropriate adjustments can be made. As a first step, it is essential to identify the relevant market or markets taking account of available substitute goods or services. Economic circumstances that may be relevant to determining market comparability include the geographic location; the size of the markets; the extent of competition in the markets and the relative competitive positions of the buyers and sellers; the availability (risk thereof) of substitute goods and services; the levels of supply and demand in the market as a whole and in particular regions, if relevant; consumer purchasing power; the nature and extent of government regulation of the market; costs of production, including the costs of land, labour, and capital; transport costs; the level of the market (e.g. retail or wholesale); the date and time of transactions; and so forth. The facts and circumstances of the particular case will determine whether differences in economic circumstances have a material effect on price and whether reasonably accurate adjustments can be made to eliminate the effects of such differences, ….*

The existence of a cycle (economic, business, or product cycle) is one of the economic circumstances that may affect comparability. ….

The geographic market is another economic circumstance that can affect comparability. The identification of the relevant market is a factual question. For a number of industries, large regional markets encompassing more than one country

may prove to be reasonably homogeneous, while for others, differences among domestic markets (or even within domestic markets) are very significant."[165]

At first glance the application of economic circumstances seems to be limited to the microeconomic[166] market conditions in the specific jurisdiction concerned and not the macroeconomic[167] market conditions created as a result of fiscal policy applied in the jurisdiction concerned. Such interpretation may result in withholding tax on services being disregarded when the economic circumstances are evaluated.

The Inland Revenue Board of Malaysia issued Transfer Pricing Guidelines in which it states that "*(E)conomic circumstances that may affect prices charged or profits earned in controlled and uncontrolled transactions include the geographic location of the market; the size of the market; the availability of substitute goods and services; the extent of government intervention e.g. whether goods compared are price controlled and the timing of the transactions*."[168]

Examples of economic circumstances noted by the Pacific Association of Tax Administrators ("PATA") include "*the geographic location, market size, competitive environment, availability of substitute goods and services, levels of supply and demand, nature and extent of government regulations, and costs of production, etc.*"[169]

The reference to "*extent of government intervention*" and "*extent of government regulations*" in both extracts noted above, could be interpreted to allow for adjustments related to withholding tax on services as economic circumstance adjustments.

As the cost-plus method is generally preferred to determine the transfer price for intra-group services, any adjustment for the withholding tax on services would require an adjustment to the margin which should be added to the costs. Further, as the withholding tax on services are usually levied on the gross amount paid, the adjusted transfer price could be calculated by calculating the "grossed-up" value of the service

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[165] OECD, note 7, paras 1.55 – 1.57. pp. 48 - 49

[166] Microeconomics is defined as "the analysis of the decisions made by individuals and groups, the factors that affect those decisions, and how those decisions affect others".

[167] Macroeconomics is defined as "the branch of economics concerned with aggregates, such as national income, consumption, and investment ".

[168] Inland Revenue Board, Malaysia, Transfer Pricing Guidelines, para. 6.3.1, p. 7

[169] The Pacific Association of Tax Administrators (PATA), Transfer Pricing Documentation Package, Comparability, functional and risk analysis, pp. 6 - 7

determined using the cost-plus method before adjusting for the withholding tax on services.

10. Effectiveness of current transfer pricing principles

It is clear from the above that the current transfer pricing principles and practices do not deal adequately with situations where withholding taxes are levied on intra-group cross border services. This is particularly relevant where there is a source v source conflict present between the jurisdiction from which the services are rendered and the jurisdiction which benefitted from the services rendered. The situation is further exacerbated in situations where MNEs apply group transfer pricing policies – which are consistent with the principles applied in the majority of jurisdictions – in order to ensure consistency throughout the group and these policies are in conflict with the approach adopted by a handful of jurisdictions in which they operate for example Brazil, Kuwait and Canada, which will require a country-specific policy for those jurisdictions, and the Philippines, which require that the policy must be consistently applied on a world-wide basis notwithstanding jurisdictions which may apply other principles.

11. Deduction of service fees

Globally there are currently two possible treatments of deductions for service fees. The tax legislation of most developed countries generally allows for the deduction of services fees provided they meet the general requirements for deductions as provided in the legislation and the arm's length principle, where applicable. There is however a trend amongst a large number of the developing countries that either do not allow deductions for such service fees or only allow for limited deductions.[170]

Some of the tax authorities have asserted that the disallowance of the service charge expense is a domestic issue and will not engage in any discussion related to this matter. It is also not uncommon for jurisdictions to deny the deduction of the service fees on the basis that the domestic substantive and form requirements are not met.[171] Others, such as the countries forming part of the Commonwealth of Independent States[172] will deny a deduction of cross border intra-group services if no invoices were

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[170] Examples include countries such as Turkey, Korea, Mexico, Spain and Ghana. Also refer to annexure 9 for further details.

[171] A report issued by pwc, *Double jeopardy* …, which deals with the managing of double taxation risk in the oil and gas industry, has noted that this practice is often followed in Mexico. http://www.pwc.com/gx/en/tax/publications/transfer-pricing/perspectives/taxrisk-oil-gas.jhtml, accessed on 30 April 2014

[172] The members of the Commonwealth of Independent ("CIS") states are Armenia, Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan and Uzbekistan. Turkmenistan and Ukraine participate in

produced and actual cash settlement took place, i.e. offsetting journals or accounting cross charges are not allowed. Albania, Latvia, Malaysia, Trinidad and Tobago and Venezuela only allow a deduction if the withholding tax on services have been withheld and remitted to the tax authority.[173]

12. Acceptable margins on services per transfer pricing rules vs withholding tax on services[174]

MNEs are facing major challenges in the current environment. If one accepts that withholding tax on services was introduced as the only anti-avoidance measure against profit shifting, then the rates determined for withholding tax on services which are equal to or exceed the corporate tax rates of the countries concerned in the majority of cases makes sense.

It is generally accepted that reasonable margins for services rendered vary between 3% and 10% for standard services whereas specialist services command margins of up to 20% of costs using the cost plus method.[175]

However, if one accepts that transfer pricing legislation and the enforcement of arm's length pricing principles for intra-group cross border fees are the only effective measures to prevent profit-shifting, then the current withholding tax rates on services, set at the same level or more than the corporate tax rates as well as withholding tax on royalties rates, are out of line and do not take into account any expenditure incurred by the service provider. The effect is no different had the countries concerned merely introduced legislation which denies any deduction of intra-group cross border service fees.[176]

13. Tax credits or deductions for withholding taxes paid

Income tax systems that tax residents on worldwide income, generally offer a foreign tax credit to mitigate the potential for double taxation. The credit may also be granted in those systems taxing residents on income that may have been taxed in another jurisdiction. The credit generally applies only to taxes of a nature similar to the tax being reduced by the credit, i.e. taxes based on income. This credit is often limited to

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the CIS although they are not member-states. Source: http://en.wikipedia.org/wiki/Commonwealth_of_Independent_States

[173] Details of the effective overall tax rate applicable to MNEs where withholding tax on services are levied in circumstances where deductions of the expenses are also disallowed can be found in annexure 9.

[174] Also see annexure 10 for a brief note on gross-up practices.

[175] Examples of acceptable ranges are 5% - 10% in Austria, 3% - 10% in Belgium, 3% - 8% in Bulgaria, 6% - 10% in France and 5% - 10% in Germany.

[176] See annexure 11 for examples of hypothetical group situations

the amount of tax attributable to foreign source income. Most income tax systems therefore contain rules defining source of income (domestic, foreign, or by country) and timing of recognition of income, deductions, and taxes, as well as rules for associating deductions with income.

Tax treaties usually provide for relief from double taxation by way of an exemption from tax or a tax credit. These provisions apply in respect of taxes levied by other jurisdictions in terms of tax treaties but does not extend to taxes levied not dealt with in the tax treaties or in contradiction of the terms of the tax treaties.

Countries such as Finland, Japan and Mauritius have also incorporated tax sparing provisions in their legislation which have limited application in specific circumstances. Tax sparing provisions are often used to encourage FDI.

14. Does the current status quo yield equitable results?

It is clear that the current status quo in the context of transfer pricing rules and its application to intra-group services does not yield equitable results in the context of international tax law. Sol Picciotto attributes part of the lack of possible success in the resolution to this situation to the lack of clear rules to apply the transfer pricing guidelines.[177]

Arnold acknowledges that the results from the imposition of a flat rate withholding tax on services on the basis that the income is from a source in the country making the payment in terms of article 21(3) of the UN Model DTA, is difficult to justify where the non-resident carries on a business in the source country as the fundamental scheme of the UN Model DTA is that business profits from services are taxable by the source country only if the non-resident has a permanent establishment or fixed base in the source country. Otherwise the profits are taxable exclusively by the residence country. Allowing unlimited source country taxation of fees or technical services as other income under article 21 is inappropriate. He acknowledges that earning fees from the performance of technical services involves significant expenses and suggests that any source country tax should be imposed on a net basis or should be limited if imposed on the gross amount of payments.[178]

The levying of withholding taxes on services together with the disallowance of deductions for these payments further exacerbates the situation.[179] Add to that the

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[177] Picciotto, S., note 117, para. 2.4, p. 17

[178] UN, note 41, para. 90, p. 28

[179] See annexure 9 for details of countries which levy withholding tax on services and may deny a deduction in the hands of the recipient of the services as well as an analysis of the impact of these practices on MNEs.

fact that most jurisdictions will only grant foreign tax credits in respect of foreign income included in the taxable income of the taxpayer concerned and will not grant a foreign tax credit paid on income from services where the withholding tax on services is levied either in contravention of a treaty or where the jurisdiction concerned regards the income from services not to be foreign income, then the situation is even worse and most definitely not equitable.

15. Conclusion

A withholding tax on services based on the gross amount payable to the non-resident service provider without taking into account the costs incurred by the non-resident service provider or within one or more of the entities forming part of an MNE is a rather punitive measure if its primary objective is the prevention of base erosion.[180]

Whatever the solution to this rather untenable situation, businesses like simple, easy to apply principles upon which to rely. Therefore, it is hoped that the various interested parties will be able to balance the needs of the source-country with an option that businesses can easily employ. An option that is too difficult or cumbersome to apply may only serve as a barrier to compliance and attraction of FDI.

What is clear is that sanity must prevail and that both an equitable and workable solution needs to be found to resolve the negative financial effects the current withholding tax on services has, as it is becoming a deterrent for much needed FDI in developing countries. This solution should be sought at a global level yet be acceptable at a domestic level and be enforceable not only at a domestic level but globally as well. Another issue that needs to be settled is which organisation will oversee the process, now and in the future, to ensure that just and equitable allocation of taxes are achieved and maintained. Put differently, given the magnitude of the global trade in services it is imperative that tax authorities ensure that trade in services is taxed efficiently, effectively and equitably.[181]

In fact, transfer pricing is not as much about a tension between developed and developing countries, as about a tension between high tax and low tax jurisdictions. Many OECD and non-OECD countries suffer in the same way from the artificial

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[180] If one accepts that a reasonable margin on cross-border intra-group services is 5% and that the country of residence of the payee is entitled to tax the service fee by way of a withholding tax, then a reasonable rate of withholding tax should not exceed 5% of the ruling corporate tax rate payable in the country of residence of the payee. Equally, the country of residence of the recipient entity should then also allow the recipient entity to claim a tax credit. The author however, acknowledges that this approach is simplistic and that it ignores the complexities associated with transactions of this nature and as such will not be an equitable and acceptable solution to the situation.

[181] United Nations Committee of Experts on International Cooperation in Tax Matters, Ninth session, Geneva, 21 – 25 October 2013, Taxation of services – including provision on taxation of fees for technical services, E/C.18/2013/CRP.16, p. 4

shifting of profits to low tax jurisdictions. The arm's length principle as applied in the OECD Guidelines and the UN Transfer Pricing Manual, were developed to establish a principled way to resolve disputes that arise among OECD countries related to the allocation of taxing rights over MNE profits. Developing and transitioning economies that are faced with the challenge of measuring the profits from MNEs that should be taxable in their jurisdiction can benefit from the arm's length principle and OECD Guidelines in the same way as OECD countries have.[182]

All the issues noted here are creating barriers to establishing service agreements where needed, much to the detriment of the affected entities and even possible future FDI in certain jurisdictions. As stated by Kevin Holmes, "*(A) country should not set its tax rates, including its non-resident withholding tax rates, applicable to foreign investors at a level so high as to deter foreign investment in the country to distort the cost of the capital structure in the country's economy*."[183] It is suggested that the OECD has not included withholding taxes as one of its recommendations to curtail so-called BEPS transactions as a reflection of its continuing discomfort with such taxes.[184]

The development of effective operating structures which serves the unique needs of MNEs is costly and is usually put in place after the inherent costs and benefits have been evaluated. The responsible MNEs have taken great care to ensure these structures are robust from a commercial perspective should these be challenged. The introduction of withholding tax on services, often at excessive rates, differing source rules and varied transfer pricing methods applied serves to frustrate and increase the complexity of normal and very basic commercial transactions within MNEs. The question is: Has the introduction of withholding tax on services resulted in a situation where responsible MNEs are now forced to allow "the tax tail to wag the business dog" in finding equitable solutions to this rather untenable situation?

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[182] Transfer Pricing Legislation – A Suggested Approach, OECD, June 2011, p.3

[183] Holmes, K., note 69, p.9

[184] Durst, M.C., note 39

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Annexures

Annexure 1

Working Party No. 6 of the Committee on Fiscal Affairs of the OECD

The OECD recognised in its report on Base Erosion and Profit Shifting ("BEPS") "*that individual companies operating within Multi-National Enterprises ("MNEs") undertake their activities within a framework of group policies and strategies which are set by the group as a whole. The separate legal entities forming part of the group therefore operates as a single integrated enterprise following an overall business strategy. Management person may therefore be geographically dispersed rather than located in a single central location with reporting lines and decisions making processes going beyond the legal structure of the MNE.*"[185]

Working Party No. 6 of the Committee of Fiscal Affairs of the OECD is tasked with dealing with the transfer pricing aspects of intangibles, amongst others. It issued a document for public consultation, the "Revised Discussion Draft on Transfer Pricing aspects of Intangibles" on 30 July 2013. A number of amendments to the current OECD Guidelines are recommended such as amendments dealing with

- Location savings and other local market features;
- Assembled workforce; and
- MNE Group Synergies.

It states that "*comparability issues can arise in connection with the consideration of local market advantages or disadvantages that may not be directly related to location savings*".[186] When dealing with other local market features it states that "*(F)eatures of the local market in which business operations occur may affect the arm's length price with respect to transactions between associated enterprises. While some such features may give rise to location savings, others may give rise to comparability concerns not directly related to cost savings. …. Similarly, the comparability and functional analysis conducted in connection with a particular matter may suggest that the relative availability of local country infrastructure, the relative availability of a pool of trained or educated workers, proximity to profitable markets, and similar features in a geographic market where business operations occur create market advantages or disadvantages that should be taken into account. Appropriate comparability adjustments*

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[185] Van den Brekel, R., *Global: Transfer pricing and the OECD project on BEPS*, International Tax Review, 12 June 2013

[186] OECD, *Public Consultation: Revised Discussion Draft on Transfer Pricing Aspects of Intangibles*, 30 July 2013, para. 1, p. 5

should be made to account for such factors where reliable adjustments that will improve comparability can be identified."[187]

It deals with intra-group services under the heading "MNE Group Synergies" and states the following:

"*Comparability issues, and the need for comparability adjustments, can also arise because of the existence of MNE group synergies. In some circumstances, MNE groups and the associated enterprises that comprise such groups may benefit from interactions or synergies amongst group members that would not generally be available to similarly situated independent enterprises. …. Such group synergies are often favourable to the group as a whole and therefore may heighten the aggregate profits earned by group members, depending on whether expected cost savings are, in fact, realised, and on competitive conditions. In other circumstances such synergies may be negative, as when the size and scope of corporate operations create bureaucratic barriers not faced by smaller and more nimble enterprises, or when one portion of the business is forced to work with computer or communication systems that are not the most efficient for its business because of group wide standards established by the MNE group*."[188] [189]

[187] OECD, note 186, para. 6, p. 6

[188] OECD, note 186, para. 18, p. 8

[189] Various responses were received, most of them welcoming the initiative undertaken but also raising concerns that issues related to MNE group synergies have not be adequately addressed. (Conclusion reached from having read the response documents prepared by International Tax Center Leiden, KPMG International, Ernst & Young Belastingadviseurs LLP, pwc and Deloitte.)

Summary of jurisdictions which levy withholding tax on tehcnical fees and management or service fees **Annexure 2(1)**

Legend:

P = payment
L = location of services rendered
C = location of consumption of services rendered
P + DS = payment and deemed source rules
P + DS - PE = payment and deemed source, but not linked to PE
L + DS = location of services or deemed source
P nws T = payment even if treaty
E = exempt if arm's length
N = Net taxable amount determined on same basis as residents
H = Applies if paid to preferential tax rate country
P - PE = payment but not linked to PE
L - PE = location but not linked to PE
L/C = either location of services rendered or consumption of services if not located in payee country
L/C - PE = either location of services rendered to consumption of services if not located in payee country, but not linked to PE
L - C = Location of services rendered provided not consumed in country
N/A = not applicable

Jurisdiction	Effective Withholding tax rate		Basis used to determine liability		Treaty relief	Additional comments
	Type of service		Type of service			
	Technical	Management	Technical	Management		
Albania	10%	10%	P	P	Yes	
Algeria	24%	24%	L	L		
American Samoa	30%	30%	P	P		
Andorra	10%	10%	L	L		
Angola	5.25%	5.25%	P	P		
Antiqua and Barbuda	25%	25%	P	P	Yes	
Argentina	35%	35%	P (*)	P	Yes	The technical services fees withholding tax rate is reduced to 21% if the technical assistance is not available in Argentina.
Armenia	10%	10%	L	L		
Austria	20%	N/A	P	N/A	Yes	The withholding tax is levied on technical and commercial consulting fees.
Azerbaijan	10%	10%	P - PE	P - PE	Yes	
Bangladesh	10%	10%	P	P		
Barbados	15%	15%	P - PE	P - PE	Yes	
Belarus	15%	15%	P + DS - PE	P + DS - PE		
Belize	25%	25%	P	P		
Berin	12%	12%	P	P		
Bhutan	3%	3%	P + DS	P + DS		
Bolivia	12.5%	12.5%	L	L		Withholding tax is levied on 50% of the fee at a rate of 25%.
Bosnia and Herzogovina	10%	10%	P + DS - PE	P + DS - PE	Yes	

Jurisdiction	Effective Withholding tax rate		Basis used to determine liability		Treaty relief	Additional comments
	Type of service		Type of service			
	Technical	Management	Technical	Management		
Botswana	15%	15%	L + DS	L + DS	Yes	
Brazil	15%	25%	P	L	No	Treaty relief is not available notwithstanding any provisions in a treaty which may provide for such relief.
Brunei Darussalam	20%	20%	L	L		
Bulgeria	10%	10%	P - PE	P - PE		
Burkina Faso	20%	20%	P - PE	P - PE		
Burundi	15%	15%	L	L		
Cambodia	14%	14%	P	P		
Cameroon	15%	15%	P	P		
Canada	20%	20%	E	E		
Cape Verde	20%	20%	L	L		The withholding tax is not levied if the fee is paid to a resident of Portugal.
Central Africa Republic	20%	20%	P	P		
Chad	25%	20%	P	P		
Chile	15%	15%	P	P		The rate increases to 20% if the recipient is in a tax haven.
People's Republic of China	20%	20%	P - PE	P - PE	Yes	The rate increases if paid to a connected party.
Colombia	10%	10%	P	P		
Comoros Islands	10%	10%	P	P		
Democratic Republic of Congo	14%	14%	P - PE	P - PE		
Republic of Congo	20%	20%	P	P		A reduced rate of 5.75% applies if the payment arises from contracts signed by business operating in special zones.
Cook Islands	15%	15%	P	P		
Costa Rica	25%	25%	P	P		
Croatia	15%	15%	P	P	Yes	
Cuba	4%	4%	L	L		
Czech Republic	15%	15%	L	L		
Djibouti	10%	10%	P - PE	P - PE	Yes	
Commonwealth of Dominica	15%	15%	P	P		
Dominican Republic	28%	28%	P - PE	P - PE	Yes	
Ecuador	22%	22%	P	P		
Egypt	20%	N/A	P + T	N/A	Yes	
El Salvador	20%	20%	P	P		The rate increases to 25% if the recipient is in a tax haven.
Equatorial Guinea	10%	10%	P - PE	P - PE		
Eritea	10%	10%	P	P		
Estonia	10%	10%	L	L	Yes	The rate increases to 21% if the recipient is in a tax haven.
Ethiopia	10%	10%	P	P		
Fiji	15%	15%	P	P	Yes	
France	33.3%	33.3%	P - PE	P - PE		The rate increases to 75% if the fee is paid to non-cooperative states or territories unless it can be shown that the transaction is not an avoidance transaction.

Jurisdiction	Effective Withholding tax rate		Basis used to determine liability		Treaty relief	Additional comments
	Type of service		Type of service			
	Technical	Management	Technical	Management		
French Guiana	33.3%	33.3%	P - PE	P - PE		The rate increases to 75% if the fee is paid to non-cooperative states or territories unless it can be shown that the transaction is not an avoidance transaction.
Gabon	10%	10%	P - PE	L/C - PE		Payments to non-resident group companies are exempt.
Gambia	15%	15%	P	P		
Georgia	10%	15%	L - PE	L - PE		The withholding tax is only levied if the fee is payable to an entity located in a tax haven.
Ghana	15%	15%	P - PE	P - PE	Yes	
Greece	25%	25%	L - PE	L - PE		
Guadeloupe	33.3%	N/A	P - PE	N/A		
Guatamala	15%	15%	P	P		
Guinea	15%	15%	P	P		
Guinea-Bissau	10%	N/A	P	N/A		
Guyana	20%	20%	P	P		
Honduras	25%	25%	P	P		
India	25%	25%	P	P	Yes	This is not a final tax.
Indonesia	20%	20%	P	P	Yes	
Iran	3%	3%	P	P		This is a provisional withholding tax.
Isle of Man	20%	20%	P	P		
Israel	30%	25%	P	P	Yes	
Ivory Coast	20%	20%	P - PE	P - PE		
Jamaica	33.3%	33.3%	P	P	Yes	
Japan	20%	0%	L	L	Yes	
Jordan	7%	7%	P	P		
Kazakhstan	20%	20%	P	P		The rate increases to XXX% if the recipient is in a tax haven.
Kenya	20%	20%	P - PE	P - PE		
Kiribati	30%	30%	P	P		
Deomocratic People's Republic of Korea (North Korea)	20%	20%	P	P		
Republic of Korea (South Korea)	20%	20%	P	P		If the payment represents business income, then the rate is 7%.
Kosovo	3%	3%	P - PE	P - PE		
Kuwait	15%	15%	P	P		The fee is assessed as business income with a deemed profit ranging between 98.5% and 100%. The fee may be subject to a retention tax of 5%.
Kyrgyzstan	10%	10%	L - PE	L - PE		The withholding tax is payable even if the fee is remitted from another jurisdiction.
Latvia	10%	10%	P	P		
Lebanon	7.5%	7.5%	L	L		
Lesotho	10%	25%	P	P		The withholding tax rate for management services is reduced to 15% if the services are used to earn manufacturing income.
Liberia	15%	15%	P	P		
Macedonia	10%	10%	P	P	Yes	

Jurisdiction	Effective Withholding tax rate		Basis used to determine liability		Treaty relief	Additional comments
	Type of service		Type of service			
	Technical	Management	Technical	Management		
Madagascar	10%	10%	P	P	Yes	
Malawi	15%	15%	P - PE	P - PE	Yes	
Malaysia	10%	10%	L	L	Yes	
Maldives	10%	10%	P	P		
Mali	15%	15%	P	P		
Martinique	33.3%	N/A	P - PE	N/A		Withholding tax rate increases to 75% if paid to entities located in NCST unless rate reduced in terms of a treaty.
Mauritania	25%	N/A	L - C	N/A		
Mexico	25%	25%	L and not C	P	Yes	Withholding tax rate increases to 40% if paid to a preferential tax regime jurisdiction.
Moldova	12%	12%	P	P	Yes	
Mongolia	20%	20%	P	P	Yes	
Republic of Montenegro	9%	9%	P	P		
Montserrat	20%	20%	P	P		
Morocco	10%	10%	P	P		
Mozambique	20%	20%	P	P		
Myanmar	3.5%	3.5%	P	P		
Republic of Namibia	25%	25%	P	P	Yes	
Nepal	15%	15%	P	P		
Nicaragua	15%	15%	P	P		
Niger	16%	16%	P	P		
Nigeria	10%	10%	P	P		
The Sultanate of Oman	10%	10%	P - PE	P - PE		Withholding tax on technical fees only applicable if paid for research and development.
Pakistan	15%	15%	P - PE	P - PE		
Palestinian Autonomous Areas	10%	10%	P	P		
Panama	12.5%	12.5%	P	P	Yes	The actual rate is determined on a progessive basis. The withholding tax is payable on 50% of the fee. The effective rate is calculated with reference to the highest rate, i.e. 25% (50% x 25% = 12.5%).
Papua New Guinea	12%	17%	P (*)	P (#)	Yes	(*) - This is not a final tax if the contractor so elects. Special deduction rules may then apply. (#) - This rate applies if the management fee is deductible as an expense.
Paraguay	15%	15%	P	P		The withholding tax is levied on 50% of the fee at a rate of 30% (50% x 30% = 15%). The effective withholding tax rate increases to 30% if paid to a headquarter company located abroad.
Peru	30%	30%	L (*)	P		(*) - The general withholding tax rate is 30%. The rate reduces to 15% of the services are performed in Peru or outside of Peru but consumed in Peru. The rate is 0% if performed abroad and not used in Peru.
Philippines	25%	25%	L	L		Technical fees may be classified as royalties.

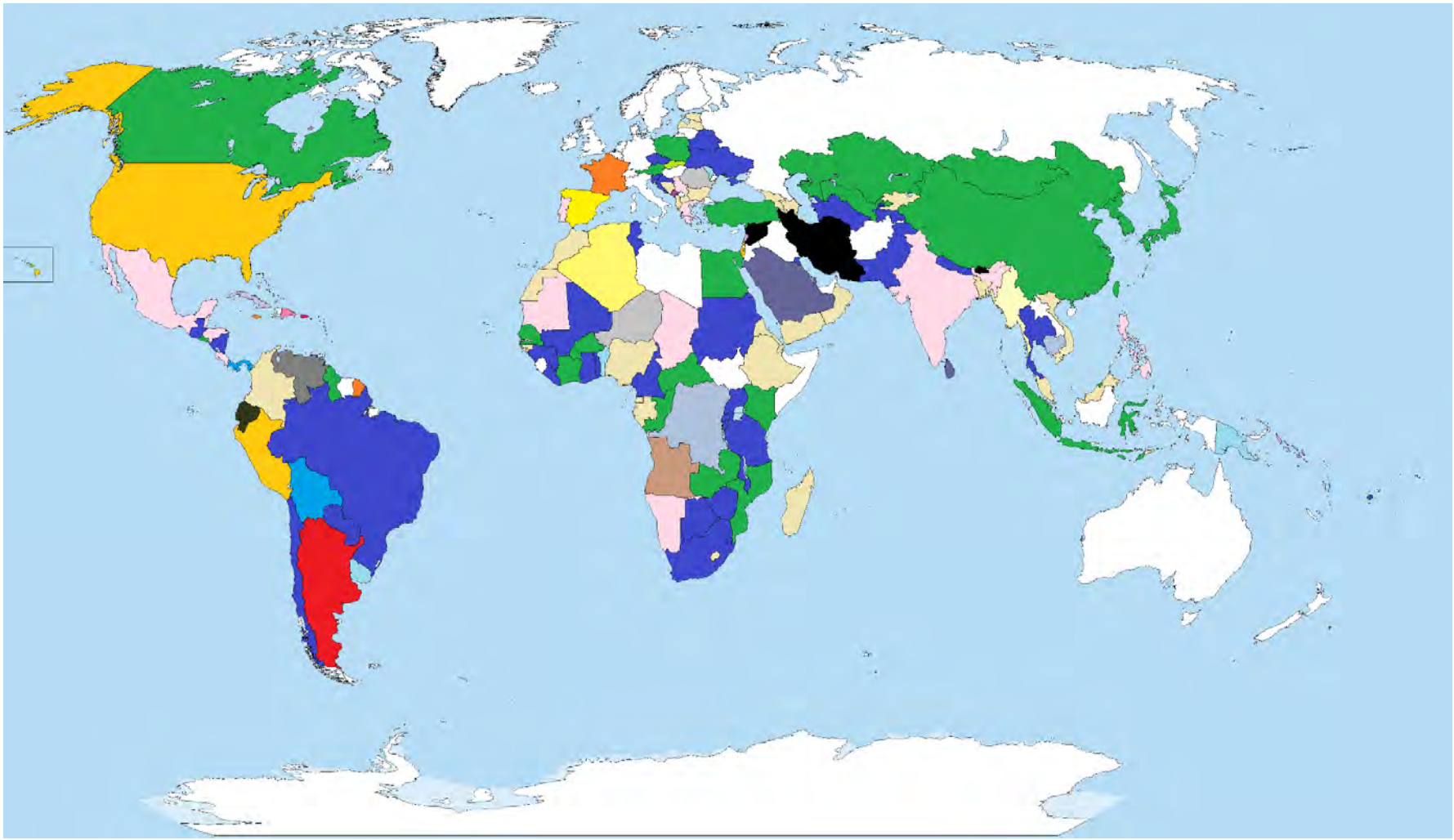
Jurisdiction	Effective Withholding tax rate		Basis used to determine liability		Treaty relief	Additional comments
	Type of service		Type of service			
	Technical	Management	Technical	Management		
Poland	20%	20%	P	P	Yes	A treaty country resident is only exempt if it submits a certificate of residence to the payee.
Portugal	25%	25%	L	L	Yes	
Puerto Rico	29%	29%	P - PE	P - PE		The rate is reduced to XXX% if paid to a resident of the United States of America.
Qatar	5%	7%	P	P		
Romania	16%	16%	L - PE	L - PE		The withholding tax rates increase to 50% if no exchange of information agreement is in place.
Rwanda	15%	15%	P	P		
San Marino	15%	15%	P	P		
Sao Tome and Principe	20%	20%	P - PE	P - PE		
Kingdom of Saudi Arabia	5%	20%	P	P		The withholding tax rate for management services is reduced to 15% if paid to a headquarter or associated company.
Senegal	20%	20%	P	P	Yes	the withholding tax is levied on 80% of the fee at a rate of 25% (80% x 25% = 20%). The withholding tax rate reduces to 15% if paid to French residents.
Republic of Serbia	25%	25%	H	H		
Seychelles	15%	15%	P	P		The withholding tax rate increases to 33% if the fee is payable by a financial institution.
Singapore	17%	17%	L	L		This is not a final tax.
Slovak Republic	19%	19%	P nws PE	P nws PE	Yes	The withholding tax rate increases to 35% if the fee is payable to an entity in a non-contracting state, i.e. a state not listed on the white list published by the Slovak Minster of Finance.
Slovenia	15%	15%	H	H	Yes	The rate applicable to other jurisdictions is 0%.
Solomon Islands	7.5%	35%	P	P		
Republic of South Africa	15%	15%	L	L	Yes	Will only be effective from 1 January 2016.
Spain	24.75%	24.75%	P - PE	P - PE		Payments to associated European Union entities are exempt.
Sri Lanka	5%	5%	P	P		
St Kitts and Nevis	10%	10%	P - PE	P - PE		
St Lucia	25%	25%	P - PE	P - PE		A reduced withholding tax rate of XXX% applies if payable to a CARICOM country.
St Vincent and the Grenadines	20%	20%	P	P		
Sudan	15%	15%	P	P		
Swaziland	15%	15%	P	P		
Syria	3%	3%	P	P		Withholding tax rate increases to 7% if paid by oil companies.
Taiwan	20%	20%	P - PE	P - PE		Technical services are regarded as royalties.
Tajikistan	15%	15%	P - PE	P - PE		

Jurisdiction	Effective Withholding tax rate		Basis used to determine liability		Treaty relief	Additional comments
	Type of service		Type of service			
	Technical	Management	Technical	Management		
Tanzania	15%	15%	C	C	Yes	The source of the fees are regarded to be the place of consumption in terms of a recent court case. Treaty relief, alhtough noted as a matter to be considered, was not addressed in the judgement delivered.
Thailand	15%	15%	P	P	Yes	
Timor-Leste	10%	10%	L - PE	L - PE		
Togo	15%	15%	L/C	L/C		
Tonga	15%	15%	P	P		
Trinidad and Tobago	15%	15%	P - PE	P - PE	Yes	
Tunisia	15%	15%	P	P		The rate increases to XXX% if the recipient is in a tax haven.
Turkey	20%	20%	P - PE	P - PE		The rate decreases to 5% if the payment is related to petroleum.
Turkmenistan	15%	15%	L - PE	L - PE	Yes	
Uganda	15%	15%	P (*)	P	Yes	(*) - The technical services fees withholding tax rate is reduced to XXX% if the recipient derives most of its income from telecommunication and internet services.
Ukraine	15%	15%	P - PE	P - PE	Yes	
United States of America	30%	30%	L	L		
Uruguay	12%	12%	P	L		
US Virgin Islands	10%	10%	P - PE	P - PE		The withholding tax rate increases to 11% if the surcharge is included.
Republic of Uzbekistan	20%	20%	P - PE	P - PE	Yes	
Venezuela	17%	34%	P (*)	P		(*) - The withholding tax is payable on 50% of the fee at 34% or on 30% of the the gross amount. Technical service fees may also be classified as a royalty.
Vietnam	10%	5%	P	P		
Yemen	10%	10%	P	P		
Zambia	20%	20%	P (*)	P		(*) - Technical services paid in respect of services rendered in multi-facility zones or industrial parks are exempt from the withholding tax on technical fees.
Zimbabwe	15%	15%	P - PE	P - PE		

Note: The rates noted, basis for levying the withholding tax, treaty relief and additional comments were obtained from the IBFD country analysis database, Worldwide corporate tax guide - 2013/14 issued by Ernst & Young, pwc Worldwide Tax Summaries Corporate - 2013-14, and Deloitte doing business in ... guides. Where discrepancies were noted, the IBFD database was taken as the most up to date version.

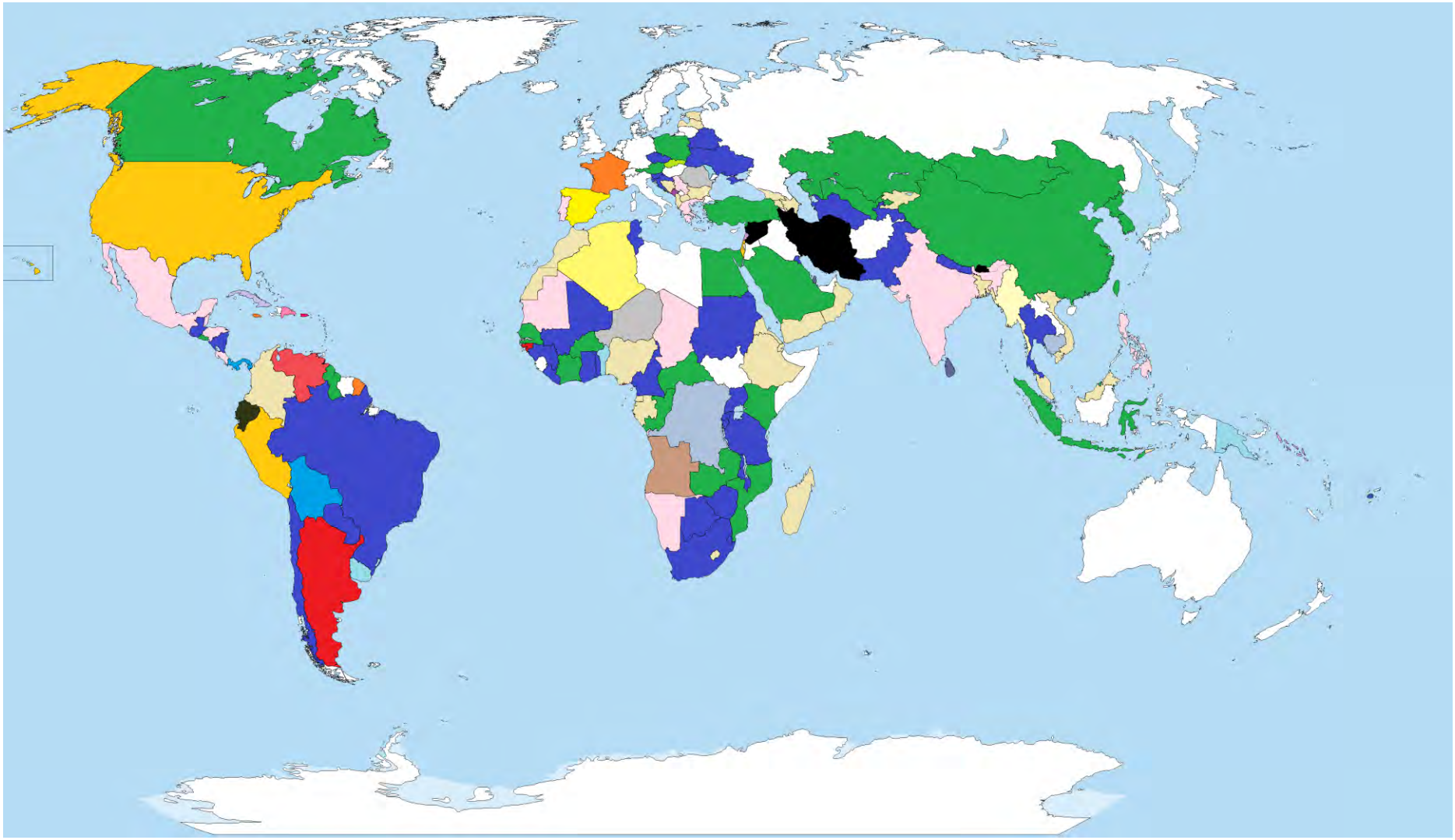
World map – countries which levy withholding tax on technical fees **Annexure 2(2)**

Note – the world map is a visual representation only and should not be used for interpretative purposes.
The different colours indicate the variances in rates at which the withholding tax on technical fees are levied.



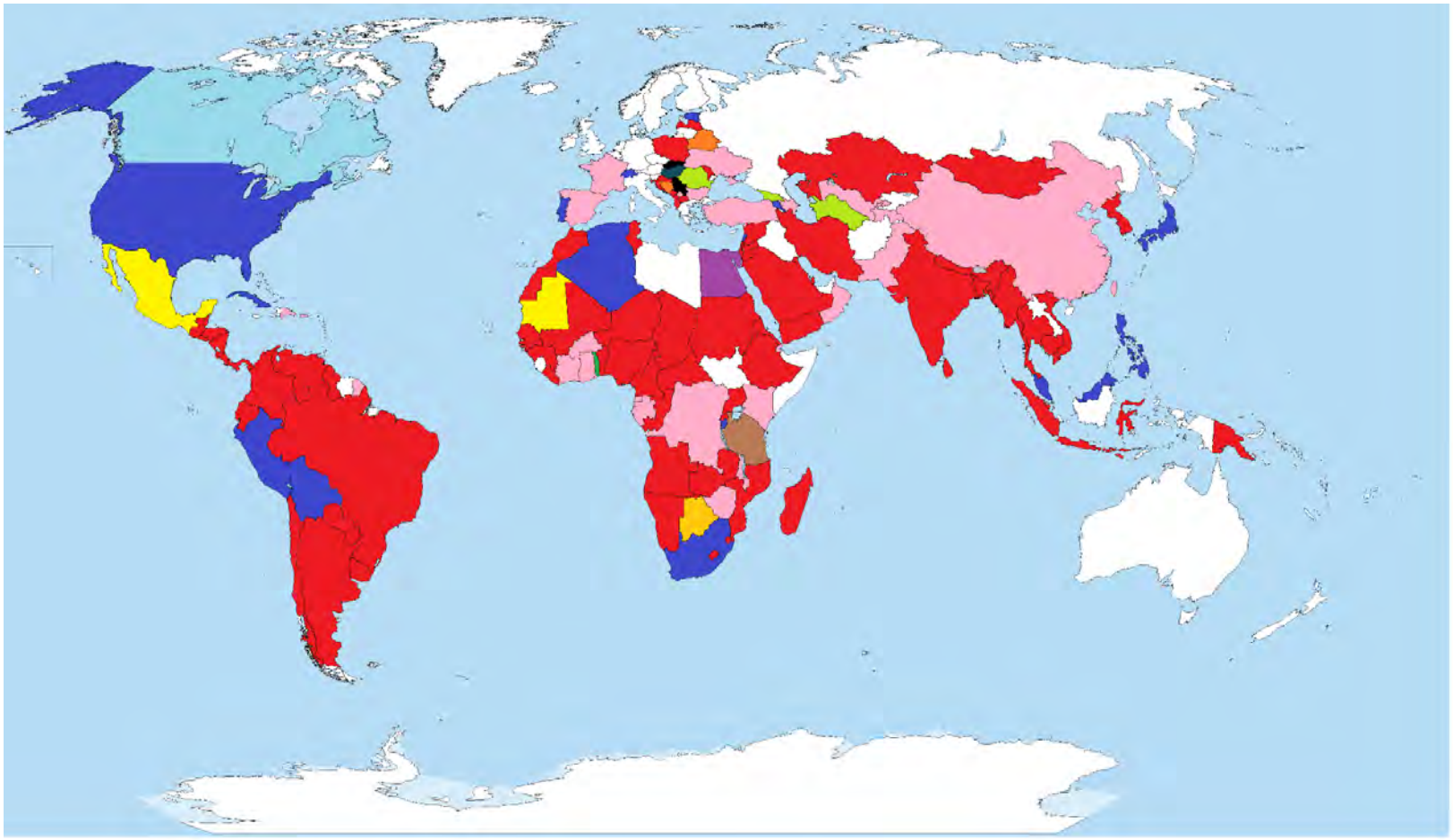
World map – countries which levy withholding tax on management fees **Annexure 2(3)**

Note – the world map is a visual representation only and should not be used for interpretative purposes.
The different colours indicate the variances in rates at which the withholding tax on management fees are levied.



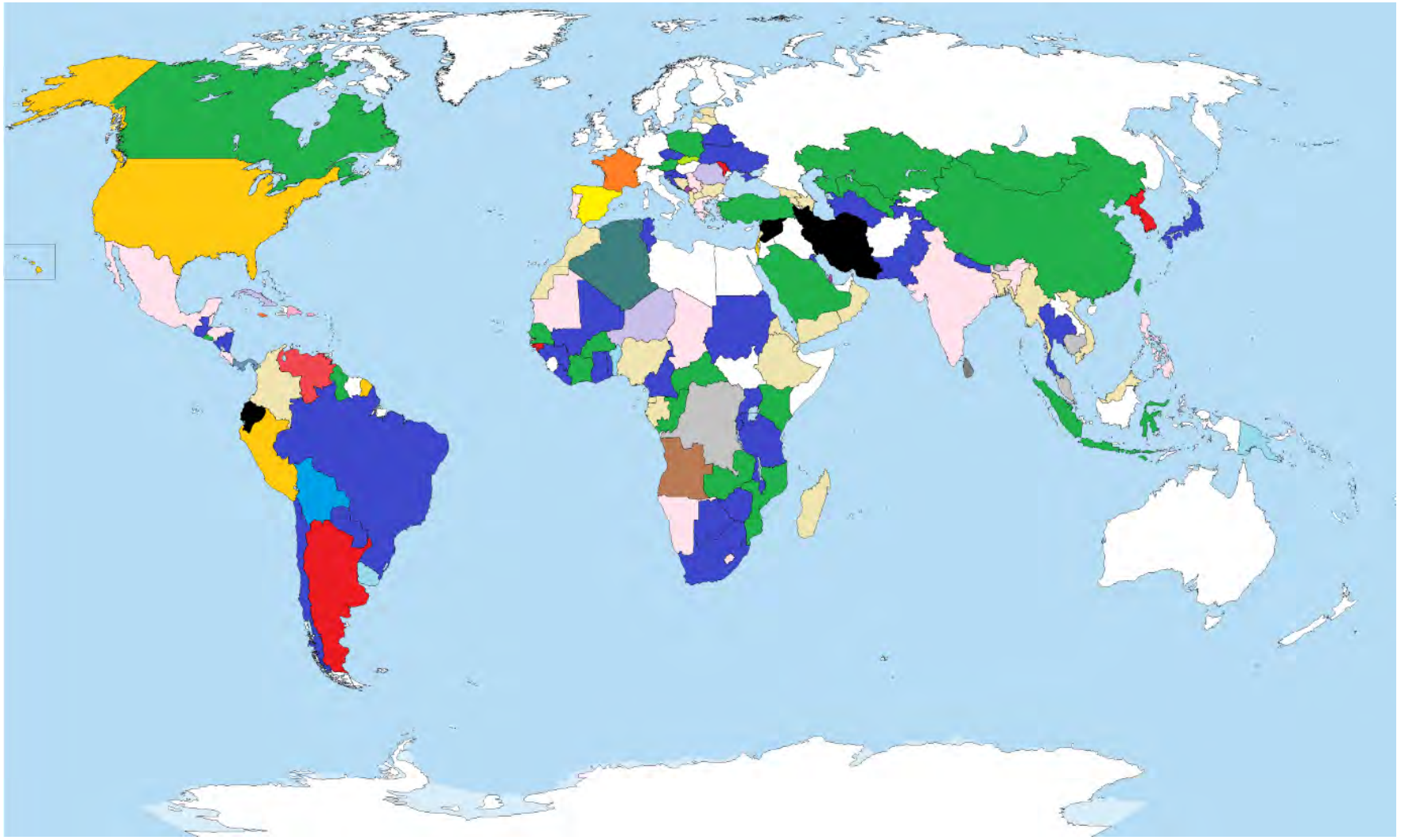
World map – basis for levying withholding tax on technical fees **Annexure 2(4)**

Note – the world map is a visual representation only and should not be used for interpretative purposes.
The different colours indicate the variances in basis used for levying the withholding tax on technical fees are levied.

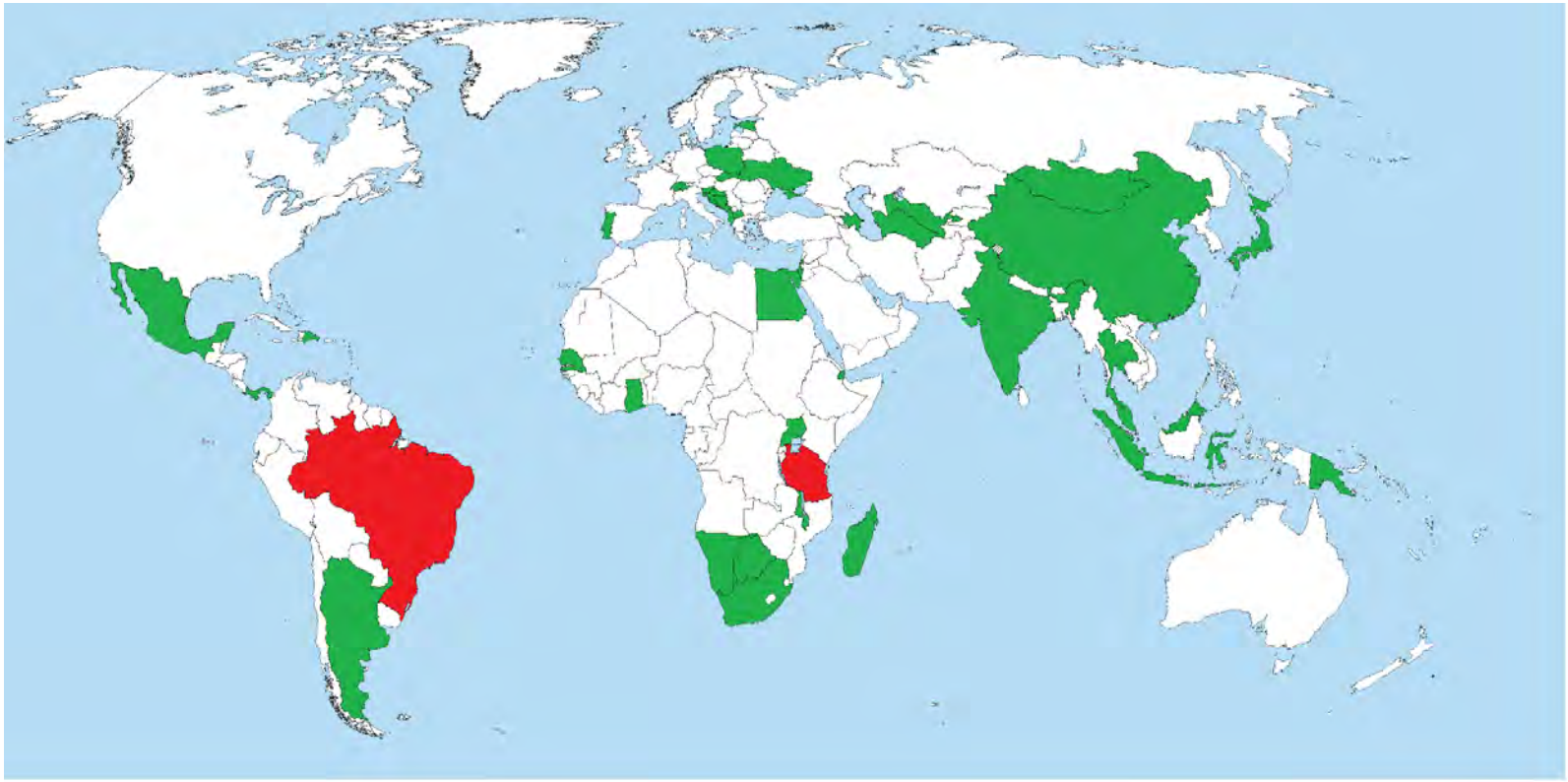


World map – basis for levying withholding tax on management fees **Annexure 2(5)**

Note – the world map is a visual representation only and should not be used for interpretative purposes.
The different colours indicate the variances in basis used for levying the withholding tax on management fees are levied



World map – explicit treaty relief noted in documentation **Annexure 2(6)**



Note – the world map is a visual representation only and should not be used for interpretative purposes.
Green – Treaty relief recognised;
Red – No relief notwithstanding any provision contained in a treaty.

Annexure 3(1)

Comparison of corporate tax rates to withholding tax rates on technical fees and management or service fees

Information sorted from highest percentage to lowest in respect of technical services

Country	Corporate Tax rate	Withholding tax rate		Withholding tax rate as % of corporate tax rate	
		Technical	Management	Technical	Management
Republic of Uzbekistan	8%	20%	20%	250%	250%
Turkmenistan	8%	15%	15%	188%	188%
Republic of Serbia	15%	25%	25%	167%	167%
Paraguay	10%	15%	15%	150%	150%
Puerto Rico	20%	29%	29%	145%	145%
Jamaica	25%	33.3%	33.3%	133%	133%
Greece	20%	25%	25%	125%	125%
Israel	25%	30%	25%	120%	100%
Taiwan	17%	20%	20%	118%	118%
Portugal	23%	25%	25%	109%	109%
Poland	19%	20%	20%	105%	105%
Andorra	10%	10%	10%	100%	100%
Antiqua and Barbuda	25%	25%	25%	100%	100%
Argentina	35%	35%	35%	100%	100%
Belize	25%	25%	25%	100%	100%
Bosnia and Herzegovina	10%	10%	10%	100%	100%
Brunei Darussalam	20%	20%	20%	100%	100%
Bulgaria	10%	10%	10%	100%	100%
Ecuador	22%	22%	22%	100%	100%
France	33.3%	33.3%	33.3%	100%	100%
French Guiana	33.3%	33.3%	33.3%	100%	100%

Country	Corporate Tax rate	Withholding tax rate		Withholding tax rate as % of corporate tax rate	
		Technical	Management	Technical	Management
Guadeloupe	33.3%	33.3%	N/A	100%	N/A
Honduras	25%	25%	25%	100%	100%
Kazakhstan	20%	20%	20%	100%	100%
Kuwait	15%	15%	15%	100%	100%
Kyrgyzstan	10%	10%	10%	100%	100%
Macedonia	10%	10%	10%	100%	100%
Martinique	33.3%	33.3%	N/A	100%	N/A
Mauritania	25%	25%	N/A	100%	N/A
Republic of Montenegro	9%	9%	9%	100%	100%
Montserrat	20%	20%	20%	100%	100%
Peru	30%	30%	30%	100%	100%
Romania	16%	16%	16%	100%	100%
Singapore	17%	17%	17%	100%	100%
Sudan	15%	15%	15%	100%	100%
Timor-Leste	10%	10%	10%	100%	100%
Turkey	20%	20%	20%	100%	100%
Dominican Republic	29%	28%	28%	97%	97%
Algeria	25%	24%	24%	96%	96%
Republic of Korea (South Korea)	22%	20%	20%	91%	91%
San Marino	17%	15%	15%	88%	88%
Slovenia	17%	15%	15%	88%	88%
Slovak Republic	22%	19%	19%	86%	86%
Kiribati	35%	30%	30%	86%	86%
United States of America	35%	30%	30%	86%	86%
Belarus	18%	15%	15%	83%	83%

Country	Corporate Tax rate	Withholding tax rate		Withholding tax rate as % of corporate tax rate	
		Technical	Management	Technical	Management
Chad	30%	25%	20%	83%	67%
Costa Rica	30%	25%	25%	83%	83%
India	30%	25%	25%	83%	83%
Mexico	30%	25%	25%	83%	83%
The Sultanate of Oman	12%	10%	10%	83%	83%
Philippines	30%	25%	25%	83%	83%
Ukraine	18%	15%	15%	83%	83%
Spain	30%	24.75%	24.75%	83%	83%
Austria	25%	20%	N/A	80%	N/A
Cape Verde	25%	20%	20%	80%	80%
People's Republic of China	25%	20%	20%	80%	80%
Egypt	25%	20%	N/A	80%	N/A
Indonesia	25%	20%	20%	80%	80%
Ivory Coast	25%	20%	20%	80%	80%
Democratic People's Republic of Korea (North Korea)	25%	20%	20%	80%	80%
Mongolia	25%	20%	20%	80%	80%
Sao Tome and Principe	25%	20%	20%	80%	80%
Czech Republic	19%	15%	15%	79%	79%
Japan	25.5%	20%	0%	78%	0%
Republic of Namibia	33%	25%	25%	76%	76%
St Lucia	33.33%	25%	25%	75%	75%
Chile	20%	15%	15%	75%	75%
Cook Islands	20%	15%	15%	75%	75%
Croatia	20%	15%	15%	75%	75%

Country	Corporate Tax rate	Withholding tax rate		Withholding tax rate as % of corporate tax rate	
		Technical	Management	Technical	Management
Thailand	20%	15%	15%	75%	75%
Burkina Faso	27.5%	20%	20%	73%	73%
Canada	28%	20%	20%	71%	71%
Cambodia	20%	14%	14%	70%	70%
American Samoa	44%	30%	30%	68%	68%
Botswana	22%	15%	15%	68%	68%
Albania	15%	10%	10%	67%	67%
El Salvador	30%	20%	20%	67%	67%
Kenya	30%	20%	20%	67%	67%
Latvia	15%	10%	10%	67%	67%
Maldives	15%	10%	10%	67%	67%
Senegal	30%	20%	20%	67%	67%
Mozambique	32%	20%	20%	63%	63%
St Vincent and the Grenadines	32.5%	20%	20%	62%	62%
Republic of Congo	33%	20%	20%	61%	61%
Barbados	25%	15%	15%	60%	60%
Ghana	25%	15%	15%	60%	60%
Liberia	25%	15%	15%	60%	60%
Moldova	20%	12%	12%	60%	60%
Nepal	25%	15%	15%	60%	60%
Tajikistan	25%	15%	15%	60%	60%
Tonga	25%	15%	15%	60%	60%
Trinidad and Tobago	25%	15%	15%	60%	60%
Zimbabwe	25%	15%	15%	60%	60%
Zambia	35%	20%	20%	57%	57%

Country	Corporate Tax rate	Withholding tax rate		Withholding tax rate as % of corporate tax rate	
		Technical	Management	Technical	Management
Swaziland	27.5%	15%	15%	55%	55%
Fiji	28%	15%	15%	54%	54%
Guatemala	28%	15%	15%	54%	54%
Republic of South Africa	28%	15%	15%	54%	54%
Niger	30%	16%	16%	53%	53%
Togo	29%	15%	15%	52%	52%
Armenia	20%	10%	10%	50%	50%
Azerbaijan	20%	10%	10%	50%	50%
Bolivia	25%	12.5%	12.5%	50%	50%
Burundi	30%	15%	15%	50%	50%
Central Africa Republic	40%	20%	20%	50%	50%
Commonwealth of Dominica	30%	15%	15%	50%	50%
Gambia	30%	15%	15%	50%	50%
Guyana	40%	20%	20%	50%	50%
Jordan	14%	7%	7%	50%	50%
Lebanon	15%	7.5%	7.5%	50%	50%
Madagascar	20%	10%	10%	50%	50%
Malawi	30%	15%	15%	50%	50%
Mali	30%	15%	15%	50%	50%
Nicaragua	30%	15%	15%	50%	50%
Palestinian Autonomous Areas	20%	10%	10%	50%	50%
Panama	25%	12.5%	12.5%	50%	50%
Qatar	10%	5%	7%	50%	70%
Rwanda	30%	15%	15%	50%	50%
Seychelles	30%	15%	15%	50%	50%

Country	Corporate Tax rate	Withholding tax rate		Withholding tax rate as % of corporate tax rate	
		Technical	Management	Technical	Management
Tanzania	30%	15%	15%	50%	50%
Tunisia	30%	15%	15%	50%	50%
Uganda	30%	15%	15%	50%	50%
Venezuela	34%	17%	34%	50%	100%
Yemen	20%	10%	10%	50%	50%
Uruguay	25%	12%	12%	48%	48%
Estonia	21%	10%	10%	48%	48%
Brazil	34%	15%	25%	44%	74%
Pakistan	34%	15%	15%	44%	44%
Guinea	35%	15%	15%	43%	43%
Democratic Republic of Congo	35%	14%	14%	40%	40%
Benin	30%	12%	12%	40%	40%
Colombia	25%	10%	10%	40%	40%
Djibouti	25%	10%	10%	40%	40%
Guinea-Bissau	25%	10%	N/A	40%	N/A
Lesotho	25%	10%	25%	40%	100%
Malaysia	25%	10%	10%	40%	40%
Papua New Guinea	30%	12%	17%	40%	57%
Vietnam	25%	10%	5%	40%	20%
Cameroon	38.5%	15%	15%	39%	39%
Bangladesh	27.5%	10%	10%	36%	36%
Ethiopia	30%	10%	10%	33%	33%
Gabon	30%	10%	10%	33%	33%
Georgia	30%	10%	15%	33%	50%
Morocco	30%	10%	10%	33%	33%

Country	Corporate Tax rate	Withholding tax rate		Withholding tax rate as % of corporate tax rate	
		Technical	Management	Technical	Management
Nigeria	30%	10%	10%	33%	33%
St Kitts and Nevis	33%	10%	10%	30%	30%
Kosovo	10%	3%	3%	30%	30%
Eritrea	34%	10%	10%	29%	29%
Comoros Islands	35%	10%	10%	29%	29%
Equatorial Guinea	35%	10%	10%	29%	29%
US Virgin Islands	35%	10%	10%	29%	29%
Kingdom of Saudi Arabia	20%	5%	20%	25%	100%
Solomon Islands	30%	7.5%	35%	25%	117%
Sri Lanka	28%	5%	5%	18%	18%
Angola	35%	5.25%	5.25%	15%	15%
Myanmar	25%	3.5%	3.5%	14%	14%
Iran	25%	3%	3%	12%	12%
Cuba	35%	4%	4%	11%	11%
Syria	28%	3%	3%	11%	11%
Bhutan	30%	3%	3%	10%	10%
Isle of Man	0%	20%	20%		

Annexure 3(2)

Comparison of corporate tax rates to withholding tax rates on technical fees and management or service fees

Information sorted from highest percentage to lowest in respect of management services

Country	Corporate Tax rate	Withholding tax rate		Withholding tax rate as % of corporate tax rate	
		Technical	Management	Technical	Management
Republic of Uzbekistan	8%	20%	20%	250%	250%
Turkmenistan	8%	15%	15%	188%	188%
Republic of Serbia	15%	25%	25%	167%	167%
Paraguay	10%	15%	15%	150%	150%
Puerto Rico	20%	29%	29%	145%	145%
Jamaica	25%	33.3%	33.3%	133%	133%
Greece	20%	25%	25%	125%	125%
Taiwan	17%	20%	20%	118%	118%
Solomon Islands	30%	7.5%	35%	25%	117%
Portugal	23%	25%	25%	109%	109%
Poland	19%	20%	20%	105%	105%
Andorra	10%	10%	10%	100%	100%
Antiqua and Barbuda	25%	25%	25%	100%	100%
Argentina	35%	35%	35%	100%	100%
Belize	25%	25%	25%	100%	100%
Bosnia and Herzegovina	10%	10%	10%	100%	100%
Brunei Darussalam	20%	20%	20%	100%	100%
Bulgaria	10%	10%	10%	100%	100%
Ecuador	22%	22%	22%	100%	100%

Country	Corporate Tax rate	Withholding tax rate		Withholding tax rate as % of corporate tax rate	
		Technical	Management	Technical	Management
France	33.3%	33.3%	33.3%	100%	100%
French Guiana	33.3%	33.3%	33.3%	100%	100%
Honduras	25%	25%	25%	100%	100%
Israel	25%	30%	25%	120%	100%
Kazakhstan	20%	20%	20%	100%	100%
Kuwait	15%	15%	15%	100%	100%
Kyrgyzstan	10%	10%	10%	100%	100%
Lesotho	25%	10%	25%	40%	100%
Macedonia	10%	10%	10%	100%	100%
Republic of Montenegro	9%	9%	9%	100%	100%
Montserrat	20%	20%	20%	100%	100%
Peru	30%	30%	30%	100%	100%
Romania	16%	16%	16%	100%	100%
Kingdom of Saudi Arabia	20%	5%	20%	25%	100%
Singapore	17%	17%	17%	100%	100%
Sudan	15%	15%	15%	100%	100%
Timor-Leste	10%	10%	10%	100%	100%
Turkey	20%	20%	20%	100%	100%
Venezuela	34%	17%	34%	50%	100%
Dominican Republic	29%	28%	28%	97%	97%
Algeria	25%	24%	24%	96%	96%
Republic of Korea (South Korea)	22%	20%	20%	91%	91%

Country	Corporate Tax rate	Withholding tax rate		Withholding tax rate as % of corporate tax rate	
		Technical	Management	Technical	Management
San Marino	17%	15%	15%	88%	88%
Slovenia	17%	15%	15%	88%	88%
Slovak Republic	22%	19%	19%	86%	86%
Kiribati	35%	30%	30%	86%	86%
United States of America	35%	30%	30%	86%	86%
Belarus	18%	15%	15%	83%	83%
Costa Rica	30%	25%	25%	83%	83%
India	30%	25%	25%	83%	83%
Mexico	30%	25%	25%	83%	83%
The Sultanate of Oman	12%	10%	10%	83%	83%
Philippines	30%	25%	25%	83%	83%
Ukraine	18%	15%	15%	83%	83%
Spain	30%	24.75%	24.75%	83%	83%
Cape Verde	25%	20%	20%	80%	80%
People's Republic of China	25%	20%	20%	80%	80%
Indonesia	25%	20%	20%	80%	80%
Ivory Coast	25%	20%	20%	80%	80%
Democratic People's Republic of Korea (North Korea)	25%	20%	20%	80%	80%
Mongolia	25%	20%	20%	80%	80%
Sao Tome and Principe	25%	20%	20%	80%	80%
Czech Republic	19%	15%	15%	79%	79%
Republic of Namibia	33%	25%	25%	76%	76%

Country	Corporate Tax rate	Withholding tax rate		Withholding tax rate as % of corporate tax rate	
		Technical	Management	Technical	Management
St Lucia	33.33%	25%	25%	75%	75%
Chile	20%	15%	15%	75%	75%
Cook Islands	20%	15%	15%	75%	75%
Croatia	20%	15%	15%	75%	75%
Thailand	20%	15%	15%	75%	75%
Brazil	34%	15%	25%	44%	74%
Burkina Faso	27.5%	20%	20%	73%	73%
Canada	28%	20%	20%	71%	71%
Cambodia	20%	14%	14%	70%	70%
Qatar	10%	5%	7%	50%	70%
American Samoa	44%	30%	30%	68%	68%
Botswana	22%	15%	15%	68%	68%
Albania	15%	10%	10%	67%	67%
Chad	30%	25%	20%	83%	67%
El Salvador	30%	20%	20%	67%	67%
Kenya	30%	20%	20%	67%	67%
Latvia	15%	10%	10%	67%	67%
Maldives	15%	10%	10%	67%	67%
Senegal	30%	20%	20%	67%	67%
Mozambique	32%	20%	20%	63%	63%
St Vincent and the Grenadines	32.5%	20%	20%	62%	62%
Republic of Congo	33%	20%	20%	61%	61%

Country	Corporate Tax rate	Withholding tax rate		Withholding as corporate tax rate % of	
		Technical	Management	Technical	Management
Barbados	25%	15%	15%	60%	60%
Ghana	25%	15%	15%	60%	60%
Liberia	25%	15%	15%	60%	60%
Moldova	20%	12%	12%	60%	60%
Nepal	25%	15%	15%	60%	60%
Tajikistan	25%	15%	15%	60%	60%
Tonga	25%	15%	15%	60%	60%
Trinidad and Tobago	25%	15%	15%	60%	60%
Zimbabwe	25%	15%	15%	60%	60%
Zambia	35%	20%	20%	57%	57%
Papua New Guinea	30%	12%	17%	40%	57%
Swaziland	27.5%	15%	15%	55%	55%
Fiji	28%	15%	15%	54%	54%
Guatemala	28%	15%	15%	54%	54%
Republic of South Africa	28%	15%	15%	54%	54%
Niger	30%	16%	16%	53%	53%
Togo	29%	15%	15%	52%	52%
Armenia	20%	10%	10%	50%	50%
Azerbaijan	20%	10%	10%	50%	50%
Bolivia	25%	12.5%	12.5%	50%	50%
Burundi	30%	15%	15%	50%	50%
Central Africa Republic	40%	20%	20%	50%	50%

Country	Corporate Tax rate	Withholding tax rate		Withholding tax rate as % of corporate tax rate	
		Technical	Management	Technical	Management
Commonwealth of Dominica	30%	15%	15%	50%	50%
Gambia	30%	15%	15%	50%	50%
Georgia	30%	10%	15%	33%	50%
Guyana	40%	20%	20%	50%	50%
Jordan	14%	7%	7%	50%	50%
Lebanon	15%	7.5%	7.5%	50%	50%
Madagascar	20%	10%	10%	50%	50%
Malawi	30%	15%	15%	50%	50%
Mali	30%	15%	15%	50%	50%
Nicaragua	30%	15%	15%	50%	50%
Palestinian Autonomous Areas	20%	10%	10%	50%	50%
Panama	25%	12.5%	12.5%	50%	50%
Rwanda	30%	15%	15%	50%	50%
Seychelles	30%	15%	15%	50%	50%
Tanzania	30%	15%	15%	50%	50%
Tunisia	30%	15%	15%	50%	50%
Uganda	30%	15%	15%	50%	50%
Yemen	20%	10%	10%	50%	50%
Uruguay	25%	12%	12%	48%	48%
Estonia	21%	10%	10%	48%	48%
Pakistan	34%	15%	15%	44%	44%
Guinea	35%	15%	15%	43%	43%

Country	Corporate Tax rate	Withholding tax rate		Withholding tax rate as % of corporate tax rate	
		Technical	Management	Technical	Management
Democratic Republic of Congo	35%	14%	14%	40%	40%
Benin	30%	12%	12%	40%	40%
Colombia	25%	10%	10%	40%	40%
Djibouti	25%	10%	10%	40%	40%
Malaysia	25%	10%	10%	40%	40%
Cameroon	38.5%	15%	15%	39%	39%
Bangladesh	27.5%	10%	10%	36%	36%
Ethiopia	30%	10%	10%	33%	33%
Gabon	30%	10%	10%	33%	33%
Morocco	30%	10%	10%	33%	33%
Nigeria	30%	10%	10%	33%	33%
St Kitts and Nevis	33%	10%	10%	30%	30%
Kosovo	10%	3%	3%	30%	30%
Eritrea	34%	10%	10%	29%	29%
Comoros Islands	35%	10%	10%	29%	29%
Equatorial Guinea	35%	10%	10%	29%	29%
US Virgin Islands	35%	10%	10%	29%	29%
Vietnam	25%	10%	5%	40%	20%
Sri Lanka	28%	5%	5%	18%	18%
Angola	35%	5.25%	5.25%	15%	15%
Myanmar	25%	3.5%	3.5%	14%	14%
Iran	25%	3%	3%	12%	12%

Country	Corporate Tax rate	Withholding tax rate		Withholding tax rate as % of corporate tax rate	
		Technical	Management	Technical	Management
Cuba	35%	4%	4%	11%	11%
Syria	28%	3%	3%	11%	11%
Bhutan	30%	3%	3%	10%	10%
Japan	25.5%	20%	0%	78%	0%
Isle of Man	0%	20%	20%		

Annexure 4

List of services typically included in a service agreement between group entities

The services agreements typically provide as follows:

Example 1:

This Agreement provides for the provision of services, including, but not limited to, the following:

1. Financial Consulting

Consultancy and advice on financial practices and procedures including but not limited to the following:

1.1. general accounting methods, cost accounting methods, preparing and monitoring periodic profitability analyses; budgeting and business planning methods and capital expenditure requirements and financial forecasts;

1.2. insurance, risk management and credit insurance services, including the provision of credit status reports;

1.3. best financial practices and procedures;

1.4. best internal audit practices and procedures;

1.5. tax compliance and planning matters;

1.6. treasury matters;

1.7. central purchasing and/or price negotiation; and

1.8. identification of areas of diversification, growth and added value through product, market and other reviews.

2. Improved Personnel Strategy

Consultancy and advice on maintaining and improving the XYZ's workforce (executive and other personnel) including but not limited to the following:

2.1. finding replacements and extra staff;

2.2. reallocation of responsibilities to enable employees to perform specified functions;

2.3. international developments in industrial relations;

2.4. evaluating salaries, incentives and fringe benefits;

2.5. competitive industrial relations policies and practices;

2.6. improving management organisation;

2.7. securing pension advice; and

2.8. reviewing organisation and reporting standards.

3. Business Advisory Services

Consultancy and advice in order to enable the XYZ to develop and protect its commercial interests, and to comply with the law, including but not limited to the following:

3.1. negotiating and drafting agreements, e.g. financial, purchase and sales, commercial agreements in respect of intellectual property, and service agreements;

3.2. advising on claims, disputes, litigation and governmental proceedings;

3.3. locating and evaluating outside consultants and experts for legal, production and other specialist services;

3.4. subscribing to bodies beneficial to the XYZ's business;

3.5. compliance with health, safety and product quality standards;

3.6. identifying and researching of new products;

3.7. business strategy, marketing strategy, production efficiency and controls, customer relations cost controls and sales co-ordination.

4. Corporate Affairs

Consultancy and advice with a view to promoting the XYZ's business, including but not limited to the following:

4.1. representing the business, political and local interest of the XYZ in international, national and regional industry business coalitions and trade associations.

4.2. overseeing media relations and corporate image campaigns.

5. Marketing

Consultancy and advice with a view to promoting XYZ's business, including but not limited to the following services:

5.1. preparation of group material for use by the XYZ to enhance product recognition and to promote greater awareness of overall product base within the group of companies;

5.2. preparation of group material for performance monitoring including market intelligence and brand health;

5.3. marketing programmes, packaging and channel marketing, pricing tactics;

5.4. product positioning, presentation and identity, communication and price positioning and

5.5. developing the XYZ business model, defining portfolio roles and priorities and import strategies.

6. Technical consulting

Consultancy and advice with a view to promoting the XYZ's business, including but not limited to the following services:

6.1. capital cost benchmarking for capacity investments;

6.2. technical standards for plant, equipment and operations, reviews of performance against technical standards;

6.3. technical performance measurement systems;

6.4. standards and support with the implementation of good business practices, including “world class manufacture”, BCP, modern plant maintenance techniques;

6.5. assist with the procurement of raw materials for the benefit ~~of XYZ's~~of XYZ's business.

7. Computer Advisory Services and Data Processing

7.1. Consultancy and advice on information technology including but not limited to the following:

7.1.1. operating and supporting of a suitable computer system to meet the XYZ's manufacturing and commercial needs;

7.1.2. evaluating of data processing results;

7.1.3. updating systems to meet the needs of the XYZ's business;

7.1.4. enterprise architecture and design, application technology, security and enterprise programs, information technology research and development, project management, network design, procurement and implementation; and

7.1.5. negotiating of contracts with major information technology vendors.

7.2. Such other Computer Advisory Services and Data Processing as the parties may agree upon.

8. Intellectual Property Services

Intellectual property services provided o brand owning companies, where not covered by a separate trademark services agreement, including but not limited to the following:

8.1. Pre-registration trademark activity, including availability of trademarks and clearances to use a specific mark;

8.2. Registration process for trademarks;

8.3. Maintenance and renewals of trademarks;

8.4. Protection and enforcement of trademarks;

8.5. Maintenance of intellectual property database; and

8.6. Intellectual Property reporting to brand owners.

9. Such other services as parties may agree upon.

Example 2:

Services to be provided by the provider to the participants include:

1. Legal, Insurance, Sustainability and Risk

1.1. Drafting legal agreements

1.2. Assisting in negotiations and claims

1.3. Advice on insurance coverage

1.4. Assisting in insurance premium allocation

1.5. Advice on insurance excesses

1.6. Consolidation of group insurance questionnaire for renewal

1.7. Assisting in roll out of BCP and risk compliance methodology

1.8. Assisting in updating risk register, ensuring compliance and follow up as well as monitoring actions to mitigate risk

1.9. Ensuring regulatory compliance

1.10. Secretarial services

1.11. Training on new developments

1.12. Attending global risk and sustainability meetings

1.13. Preparing board resolutions

2. Human Resources ("HR"):

2.1. Advising on global HR matters

2.2. Advising and drafting global HR policy and procedure

2.3. Providing wellness programme, where appropriate

2.4. Study assistance when required

2.5. EDP, LDP training

2.6. Individual Perception Monitor surveys

2.7. Talent management

2.8. Recruitment for senior positions

2.9. Managing international farm weekends

3. Finance, IT, Strategy and Administration:

3.1. Placing excess money on call where appropriate

3.2. Providing funding and facilities

3.3. Implementation of group tax processes, compliance and monitoring

3.4. Providing tax opinions and recommendations

3.5. Tax meetings and assistance

3.6. Providing tax planning strategies

3.7. Preparation and review of transfer pricing documentation

3.8. Financial Planning

3.9. Reviewing scenarios and plans/forecasts

3.10. Assisting with bookkeeping and accounting

3.11. Ad Hoc advice

3.12. IT internal control audits

3.13. Compliance with accounting standards

3.14. Liaising with Group Internal Audit and Audit planning process

3.15. Liaising with Group bankers and assisting with guarantees, letters of support for funding

3.16. Assisting with the strategic planning process

3.17. Performance measurement

3.18. Training

3.19. Preparation of valuations when investments made or disinvestments

3.20. Due diligence processes

3.21. Providing Group management information

3.22. Monitoring of internal controls

3.23. Ad hoc investigations

3.24. Video conferencing

3.25. Information technology – networking

3.26. IT assistance and call centre

3.27. Network availability

3.28. Retirement fund administration for expats

3.29. Setting up MPC structure

3.30. Group cash flow management

3.31. Setting finance policy and procedure and implementation assistance

3.32. Approval framework set up and maintenance

3.33. Group Internal Audit fee administration

3.34. Intercompany account administration

3.35. Arranging group calendar

3.36. Setting up Ethics Line, communication and awareness, distribution and management of reports

3.37. Internal control matrix reporting

3.38. Cross Company Review attendance, report writing and programme completion

3.39. Attending Board meetings

3.40. Liaising with consultants

4. Marketing and Advertising

4.1. Providing global marketing

4.2. Assisting in group buying of advertising

4.3. Global advertising

4.4. Developing and assisting in global communication strategy

4.5. Global newsletters

Example 3:

1. Executive Management

Including but not limited to:

1.1. Group Executive Management

1.2. Strategy

1.3. Financing

1.4. Public, Investor, Media and Analyst relations.

2. Finance

Including but not limited to:

2.1. Financial and Management Accounting including consolidated monthly and annual reporting, budgeting and forecasting.

2.2. Treasury Management

2.3. Corporate Finance

2.4. Internal Audit of XYZ to ensure compliance with Group policy and procedures

2.5. Management and maintenance of accounting and related systems.

3. Business and Finance Integration

Including but not limited to:

3.1. Integration projects relating to and benefiting all subsidiaries of the Group.

4. Human Resources

Including but not limited to:

4.1. Employee policies and procedures

4.2. Remuneration and incentives policy, procedures and administration

4.3. Employee annual review and ongoing performance measures and appraisal

4.4. Training

4.5. Benefits

4.6. HR database management.

4.7. Staff and Management counselling and disputes.

5. Legal

Including but not limited to:

5.1. Mergers and Acquisitions. General advice and assistance on M&A activity undertaken that direct or indirectly benefit the existing Subsidiaries.

5.2. Share, Debt or other capital issues and adjustments, and structured financing.

5.3. Sales Contracts

5.4. Employment Contracts

5.5. Leases

5.6. Stock Exchange filings and compliance.

6. Information Technology

Including but not limited to:

6.1. Group and subsidiary network operations

6.2. Group and subsidiary internal systems

6.3. Group and subsidiary internal and external websites.

7. Corporate Communications

Including but not limited to:

7.1. Group and subsidiary corporate events and conferences

7.2. Group and subsidiary press Releases

7.3. Group and subsidiary internal and external websites

7.4. Group and subsidiary corporate branding, trade and service marks etc.

8. Public Relations

Including but not limited to:

8.1. Group and subsidiary corporate events and conferences

8.2. Group and subsidiary press and other media relations

9. Administration

Including but not limited to:

9.1. All other administrative and sundry services provided for the benefit of the Group and its subsidiaries.

Annexure 5

Case law dealing with source of intra-group cross border services

1. India

1.1. *Ashapura Minichem Limited v. ADIT*

1.1.1. Background

The case of *Ashapura Minichem Limited v. ADIT*[190] involved an Indian company which entered into an agreement with a Chinese company in terms of which the Chinese company would provide bauxite testing services in its laboratory located in China and to provide test reports which would be used by the Indian company to define process parameters. The Indian company did not withhold any withholding tax on the payments made to the Chinese company as it was of the opinion that the services would only attract withholding tax in India has it been rendered in India.

1.1.2. Judgment

The Court held that the retrospective amendment to section 9(1)(vii) of the Income Tax Act made in terms of the Finance Act, 2010, meant that the decisions of two prominent cases, *Ishikawajima Harima Heavy Industries Company Ltd v. DIT*[191] and *Clifford Chance v DCIT*[192] were no longer good law and accordingly it is no longer necessary that in order to attract taxability in India that the services must also be rendered in India. Utilization of the services in India is sufficient to warrant the taxability of the services in India. The Court further held that the provision of article 12(6) of the treaty between India and China provides that the payment for the service fees determines the source of the services to be located in India

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[190] *Ashapura Minichem Limited v. ADIT*, Income Tax Appeal No. 2508/Mum/2008

[191] *Ishikawajima Harima Heavy Industries Company Ltd v. DIT*, Income Tax Appeal No. 239 of 2011, High Court of Bombay, Mumbai

[192] *Clifford Chance v DCIT*, Cases Nos. 181 and 182 of 2002, Bombay High Court

irrespective of the location from which the service are rendered.[193] [194]

1.2. Linklaters LLP, UK v. ITO

1.2.1. Background

The case of *Linklaters LLP, UK v. ITO*[195], the taxpayer rendered professional services to some of its clients who were either based in India or were themselves providing services to clients in India. During the course of rending such services, lawyers from the United Kingdom ("UK") office were sent to India. The aggregate period of stay of such lawyers in India was more than 90 days. The taxpayer rendered services to the clients both in India and also from outside India. Invoices were issued in GBP, USD or HKD for the total services rendered, whether in India or outside India. The taxpayer filed a tax return in India and claimed that the entire income from these clients, including the income arising from work done in India, was not chargeable to tax in India. The taxpayer argued that the services rendered fell within the ambit of article 15 of the tax treaty between the UK and India, which only applied to individuals and not to a firm. Further, the taxpayer claimed that it did not have a permanent establishment ('PE") in India and in the absence of a PE, its income from Indian clients was not taxable in India.

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[193] Article 12 of the treaty between India and China deals with royalties and technical services. The source rules applicable in article 12(6) is however adopted from the source rules applicable to passive income. It is therefore doubtful whether these rules should be applied to active income as the rules applicable to active income differs significantly from that applicable to passive income. The source rules for active income generally provide that active income is only taxable in the source state if the income is derived from activities undertaken in that state. It is noted that the Court did not deal with this issue.

[194] IBFD, Summary of *Ashapura Minichem Limited v. ADIT*, Tax Treaty Case Law

[195] *Linklaters LLP, UK v. ITO*, Income Tax Appeal Nos 4896/Mum/03 and 5058/Mum/03

However, the Indian tax authorities took the view that as the taxpayer had furnished services in India for more than 90 days, it had a PE under article 5(2)(k) of the treaty.[196]

The entire amount of the invoices issued by the taxpayer was assessable in India. On appeal, the Commissioner of Income Tax (Appeals) ("CITA") upheld the order of the tax authorities. The taxpayer then approached the ITAT for adjudication and ruling.

1.2.2. Judgment

The ITAT held that the taxpayer was liable to tax in India on the fees that it received for services rendered to Indian clients. While delivering the ruling, it made references to the following queries raised by the taxpayer:

Applicability of the treaty

The ITAT referred to various Indian and international judicial precedents and the Commentaries of the OECD Model and concluded that the taxpayer was eligible to the benefits of the treaty, as long as the entire profits of the taxpayer are taxed in the United Kingdom, whether in the hands of the partnership firm or in the hands of individual partners.

Existence of Service PE

The taxpayer argued that in order for a PE to arise under article 5(2) of the treaty, the basic condition of article 5(1) (i.e. existence of a fixed place of business) must first be satisfied. It further argued that article 5(2) merely provides an illustrative

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[196] Article 5(2) of the treaty between the UK and India reads as follows: "*The term "permanent establishment" shall include especially:*

...

(k) the furnishing of services including managerial services, other than those taxable under Article 13 (Royalties and fees for technical services), within a Contracting State by an enterprise through employees or other personnel, but only if:

(i) activities of that nature continue within that State for a period or periods aggregating more than 90 days within any twelve-month period;"

list which can only be applied if there is a fixed place of business. Its activities in India were sporadic or isolated. There was no continuity of its activities in India, the partners and staff members visited India only as and when required. Thus, there was no fixed place of business in India and hence no PE under article 5(1).

The ITAT rejected this argument and in doing so, it placed reliance on the Commentaries on the **UN Model Convention (2001), which has a slightly different PE provision**. It held that while some of the items listed under article 5(2) were illustrative of article 5(1), the others, notably a PE due to building site or construction installation under article 5(2)(j) or a service PE under article 5(2)(k) were on a stand-alone basis, and they did not require a fixed place of business to exist for a PE to be created, provided the threshold time period prescribed was met. The ITAT held that since the taxpayer's partners and staff members were present in India for more than 90 days in a 12-month period, a service PE under article 5(2)(k) was indeed created in India.

The taxpayer further tried to differentiate between "furnishing" of services and "rendering" of services, and contended that since it rendered professional services it should not be regarded to be "furnishing" of services as required under the service PE provision. The ITAT, however, did not agree with this argument and held that the "rendering" of services satisfied the requirement of "furnishing" of services.

Service PE's income

The taxpayer relied on the PE's hypothetical independence for determination of the quantum of income of the PE as provided in Art. 7(2). Applying this independence and arm's length principle, the taxpayer argued that the profits attributable to a PE are not the actual profits of the PE but hypothetical profits which the PE was expected to make if the PE was wholly independent of the general enterprise of which it is a PE.

The ITAT disagreed with this interpretation of the arm's length principle and hypothetical independence of the PE. It held that the fictional independence does not reach beyond the transactions with entities other than the general enterprise of the taxpayer. Therefore, all the income earned by the PE are taxable and no adjustment was permissible.

Attribution to PE and force of attraction rule

The taxpayer relied on the law laid down by the Supreme Court in the case of *Ishikawajima Harima Heavy Industries Ltd*. and applied by the Bombay High Court in the case of *Clifford Chance*. It argued that if the services were not rendered in India, then the income was not taxable in India. The ITAT rejected this argument in view of a retrospective amendment in tax law that changed the provision of the source rule of taxation. The amended law provides that the income of the non-resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vii) of Sec. 9(1) of the Income Tax Act, 1961 (ITA), and shall be included in his total income, whether or not (i) the non-resident has a residence or place of business or business connection in India; or (ii) the non-resident has rendered services in India.

As regards application of the treaty to attribution of income to the service PE in India and the application of "force of attraction" rule, the ITAT referred to the language of article 7(1) of the treaty which deals with taxability of business profits and determination of such profits for attribution to a PE. Article 7(1), second sentence, of the treaty provides that "*the profits of the enterprise may be taxed in the other state but only so much of them as is directly or indirectly attributable to that permanent establishment*". The ITAT held that indirect attribution to the PE incorporates the force of attraction principle.[197] This means that any services rendered to its

[197] Subsequent to this decision, the Special Bench of the Tribunal dealing with another case, *ADIT v. Clifford Chance*, Income Tax Appeal No 2060-61/Mum/2008, Income Tax Appellate Tribunal, Special Bench, Mumbai, held

clients in India by the taxpayer, even where they were not rendered by the PE, were to be regarded as indirectly attributable to the PE and thus taxable in India.[198]

1.3. Clifford Chance v. ADIT

The most recent case is that of *Clifford Chance v. ADIT*[199] which was heard by the Income Tax Appellate Tribunal, Special Bench, in Mumbai.

1.3.1. Background

In this case the taxpayer was also a law firm (partnership firm) and tax resident of the United Kingdom. During the relevant tax years, it had provided certain legal consultancy services to its clients for projects in India.

The taxpayer did not have a branch office in India but, during the relevant tax years, its partners and employees had visited India for performing a part of the work.

For the tax year 1998/99, the taxpayer had offered, as taxable in India, the income attributable to the work performed in India. For the subsequent tax years, however, the taxpayer claimed that no part of its income was taxable in India since its partners' and employees' presence in India during the relevant tax years did not exceed 90 days. The taxpayer's claim was based on the applicability of Art. 15 (Independent personal services) of the treaty.

In the course of a tax audit, however, the tax authorities concluded that:

- article 15 of the treaty did not apply in the present case;

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that article 7(1) of the tax treaty between UK and India is materially different from article 7(1) of the UN Model. The treaty between the UK and India did not incorporate the force of attraction principle. This means that the services rendered to clients in India not rendered in India should not be regarded as indirectly attributable to the PE in India and as such are not taxable in India.

[198] IBFD, Summary of *Linklaters LLP, UK v. ITO*, Tax Treaty Case Law

[199] *Clifford Chance v. ADIT*, Income Tax Appeal No 2060-61/Mum/2008, Income Tax Appellate Tribunal, Special Bench, Mumbai

- at least during tax years 1998/99 and 1999/2000, the taxpayer's partners and employees were present in India for periods exceeding 90 days;

- the taxpayer had a permanent establishment (PE) in India under article 5(2)(k) of the treaty; and

- the taxpayer's entire income from the projects (i.e. even the income attributable to the work performed outside India) was taxable in India under article 7 (Business profits) of the treaty.

In first appeal, the Commissioner of Income Tax (Appeals) ("the CIT(A)") held that for all the relevant tax years except the tax year 1998/99, since the taxpayer's partners' and employees' presence in India did not exceed 90 days, the taxpayer did not have a fixed base in India. Therefore, the taxpayer's income for these tax years was not taxable in India under Art. 15 of the treaty. Further, with respect to the tax year 1998/99, the CIT(A) held that the taxpayer's income attributable to work performed outside India was not taxable in India, provided the taxpayer was able to prove that it had performed certain work outside India.

1.3.2. Judgment

The ITAT held that the taxpayer's income attributable to the work performed outside India was exempt from tax in India under article 7(1) of the treaty.

The ITAT reached this conclusion on the following basis:

- The counsel for the tax authorities submitted before the ITAT that the income (i.e. even the income attributable to the work performed outside India) was taxable in India in view of an amendment in respect of Sec. 9 of the Income Tax Act, 1961 ("the Act") with retrospective effect from 1 June 1976. The ITAT, however, rejected that proposition. In the ITAT's view, the amendment was not relevant in the

present case since it was related to clauses (v), (vi) and (vii) of Sec. 9(1) of the Act, whereas in the present case, clause (i) of Sec. 9(1) of the Act was the relevant provision.

- The counsel for the taxpayer company submitted before the ITAT that Art. 7(2) and Art. 7(3) of the treaty defined the phrase "profits directly or indirectly attributable to the PE".

- The ITAT opined that the income earned by the taxpayer through performance of activities outside India could not be treated as "profits directly attributable to the PE" in terms of article 7(2) and article 7(3) of the treaty. Further, the ITAT concurred with the counsel for the taxpayer company that the phrase "profits indirectly attributable to the PE" was specifically defined in article 7(3)200 of the treaty, which had limited scope.

The ITAT explained that this provision could not be equated with "the force of attraction rule" contained in the UN Model Convention. It also advised that article 7(1) of the treaty was not comparable with article 7(1) of the UN Model Convention.

In view of the above, the ITAT concluded that the taxpayer's income from performance of activities outside India was not taxable in India in view of article 7(1) of the treaty between India and the UK.

2. Tanzania

The only case dealing with source in this context in Tanzania is *Tullow Tanzania BV v Commissioner General, Tanzania Revenue Authority*[201]

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[200] Art. 7(3) of the treaty provided that "*where a PE takes an active part in negotiating, concluding or fulfilling contracts entered into by the enterprise, then, notwithstanding that other parts of the enterprise have also participated in those transactions, that proportion of profits of the enterprise arising out of those contracts which the contribution of the PE to those transactions bears that of the enterprise as a whole shall be treated for the purposes of para (1) of this Article as being the profits indirectly attributable to that PE*".

[201] *Tullow Tanzania BV – Appellant and Commissioner General, TRA – Respondent*, Appeal No. 7 of 2013 between the United Republic of Tanzania in the Revenue Appeals Tribunal, Dar Es Salaam.

2.1. Background

Tullow Tanzania BV ("Tullow") is a company registered in Tanzania and carries out offshore oil and gas exploration activities. In carrying out these activities, Tullow sent raw seismic data to contractors in Ireland (a separate legal entity) for processing and production of seismic sections. The seismic sections are sent to South Africa to another separate legal entity for interpretation and the results are sent back to Tullow for execution of the drilling programme. The Tanzania Revenue Authority ("the TRA") carried out an audit and raised an assessment for withholding tax due on the payments made to the contractors in Ireland and South Africa.

The Tanzania Income Tax Act provides that service fees are sourced in Tanzania if they are paid for services rendered in Tanzania.

The TRA argued that the location of consumption of the services is critical and not the location of performance of the services, i.e. in this instance Ireland and South Africa.

2.2. Judgment

The Revenue Appeals Tribunal ("RAT") found in favour of TRA that payments made to in respect of services are subject to withholding tax in Tanzania as the services were rendered to Tullow which is located in Tanzania. In reaching this conclusion, the RAT stated the following:

"*Withholding tax is a tax on income. Section 6 defines chargeable income of a person for a year of income from employment, business or investment shall be.*

"6(1)(b) in the case of a non resident person, the person's income from employment, business of Investment for the year of income, but only to the extent that the income has a source in the United Republic."

This section identifies income bases as employment, business and investment. In the case of employment the income can be in the form of wages and salaries or professional fees;" in the event of business the income takes the form of profits while investment will ordinarily generate dividend or interest income.

With due respect to the Appellant Counsel for income tax purposes the income will have a source in Tanzania if its base is in Tanzania; that is to say, if employer and employment are in Tanzania; business operations are in Tanzania and investment asset generating that income is in Tanzania. Once this is understood S69(i) is fairly straightforward:

Under section 69 the following payments have a source in the United Republic (i) payments, including service fees, of a type not mentioned in paragraphs (g) or (h) or attributable to employment exercised, service fees, of a type not mentioned in paragraphs (g) or (h) or attributable to employment exercised, service rendered or forebearance from exercising employment or rendering service – (i) in the United Republic, regardless of the place or payment; …".

In other words what matters is the location of the income base and not where the cheque is written or payment transfer was made. Once this interpretation is understood S83(1)(b) is easy and straightforward since it is a taxing provision.

Now section "83(1) provides a resident is a person who

(c) pays a service fee … with a source in the United Republic to a non resident person shall withhold income tax from the payment at the rate provided in paragraph 4(c) of the first schedule." (i.e. 15% of the value of the payment).

After what we have stated here and above we find that in a nutshell the law is clear on this in that Tullow Tanzania BV was the provider of employment to the professionals involved om the work for which payment was made and to the extent that the fee was generated by employment service in Tanzania it is therefore subject to withholding tax."

The Court also found support for its view in the Indian case, *Ashapura Minichem* discussed above. [202] The decision has not been well-received

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[202] The Indian tax authorities argued that the decision of the Bombay High Court in the case of *Clifford Chance* [2008] 318 ITR 237 Bom ("*Clifford Chance* decision"), was no longer relevant as the retrospective effect of an amendment to section 9(10(vii) of the Income Tax Act which was introduced in terms of the Finance Act, 2010, meant that this decision, amongst others were no longer good law. The Court supported this contention when it issued its judgement in *Ashapura Minichem Limited v. ADIT*. The *Clifford Chance* decision was overruled in the Income Tax Appellate Tribunal, Special Bench, Mumbai decision which was delivered on 13 May 2013. It is

as it disregards the Tanzanian source rules – in fact, it did not deal with it at all – which require the services to be rendered in Tanzania by a non-resident before the withholding tax can apply and the purpose of section 69 of the Tanzanian tax act which is to bring into the tax net non-residents who come into the country to provide services, and earn income as a result, and who then leave the country without paying any income tax. The decision is under appeal and is expected to be heard sometime during 2014.

2.3. Observations

Neither the Tax Revenue Appeals Board ("TRAB")[203] nor the RAT dealt with one of the grounds of objection and in the appeal that the assessment of withholding tax on services performed by a South African entity contravenes the tax treaty between South Africa and Tanzania.

Although nor specifically relevant to the case, it is interesting to note the following *obiter* comment made by the judge when the case was heard in the TRAB in 2012, i.e.:

"*There is yet another aspect of this case and we wish to point it out, though by passing. With our poor nation facing the might of powerful economic interests that have the full backing of their equally formidable governments in the oil and gas industry in which we have to enter, despite our inexperience, of which we are not sure of victory there are clear indications that we shall deliberately and unnecessarily setting up a David and Goliath contest, of which we are not sure of victory if we in the legal profession generally and in the administration of justice in particular saw the danger coming but decided to do nothing. It is in these challenging circumstances that our laws need to be interpreted so as to safeguard the interests of the nation and avoid leaving our nation at the mercy of the strong nations even where our natural resources allow us to put our country in the driver's seat. We think the law is capacious enough to*

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therefore possible that a Court could reach a different decision than what was reached in *Ashapura Minichem Limited*, i.e. that the fees for the services rendered in China was not subject to withholding tax in India, it not being from a source in India.

[203] *Tullow Tanzania BV – Appellant and Commissioner General – Respondent*, Income Tax Appeal Case No. 10 of 2011, Tax Revenue Appeals Board, Lindi

enable us respond with nimble and purposefully provide appropriate legal interpretation and solutions to the emerging legal issues in the oil and gas industry."

While one has empathy with this situation, good law and court decisions should not be based on emotions but rather on the facts of each case and by applying the law in the context as it stands as such actions will only cause uncertainty for investors with the resultant alienation of those investors who will favour regimes where laws and court decisions are not based on emotion.

A further concern with the judgement delivered in the case is that the Court did not address the issue raised by the taxpayer regarding the application of the double tax agreement in force between South Africa and Tanzania ("SA/Tanzania treaty") (there is no treaty in force between Ireland and Tanzania) and that the withholding tax on services by Tanzania is in contravention of the SA/Tanzania treaty. I understand that the South African tax authority has raised this with the TRA but no response has yet been forthcoming from the TRA.

3. Brazil

3.1. *Inter Partner Assistance Prestadora de Serviços de Assistência 24 Horas Ltda*[204]**("*Inter Partner*")**

3.1.1. Background

Inter Partner Assistance Prestadora de Serviços de Assistência 24 Horas Ltda. ("Inter Partner"), was a resident of Brazil and hired companies resident in Argentina, Austria, Belgium, Canada, Chile, Czech Republic, France, Germany, Italy, Japan, Portugal and Spain for the provision of services with no transfer of technology.

Inter Partner was requested by the tax authorities to withhold income tax on the payments for the services provided by those

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[204] *Inter Partner Assistance Prestadora de Serviços de Assistência 24 Horas Ltda. v. Federal Union (National Treasury)*, Case 0024461-74.2005.4.03.6100

foreign companies. This request was based on Ruling COSIT 1/2000 which allows the tax authorities to apply the other income article of the Brazilian tax treaties in respect of payments for technical assistance or technical services with no transfer of technology. In that case, there is no relation to royalties so that no tax may be levied under article 12 of the tax treaties. Furthermore, due to the lack of a definition in tax treaties of the term “profits”, taxation of these payments as business profits would not be possible because under domestic law such payments are classified as “revenue” and not as “profit”. Through the application of the other income article, Brazil could retain its taxation rights because in most Brazilian tax treaties this treaty article permits the country in which the income arises (source state) to tax such income.

Inter Partner argued that (i) although domestic legislation determines the taxation of such payments in Brazil, under the treaties with Argentina, Austria, Belgium, Canada, Chile, Czech Republic, France, Germany, Italy, Japan, Portugal and Spain such income is taxed exclusively in the residence state; (ii) tax treaties prevail over domestic legislation; (iii) Ruling COSIT 1/2000 is illegal and unconstitutional and (iv) even if the payments could not be directly defined as ‘profits’ under Brazilian law, they are considered to be a component of the business profits of the foreign companies and, therefore, are governed by the treaty provision on business profits.

The tax authorities argued that (i) the interpretation of the relevant treaties indicates that service income falls within the scope of the other income provision of the relevant treaties and, therefore, is subject to provisions of Ruling COSIT 1/2000 and (ii) there is no hierarchy between tax treaties and domestic law.

The lower Federal Court accepted all arguments brought by Inter Partner in its request. The tax authorities then appealed to the Federal Regional Court.

3.1.2. Legal background (treaty law)

Although the argument used by the tax authorities was based on the other income article, this provision does not actually exist in the case of the Brazil-France treaty. The other income provision in the relevant treaties permits the source state to tax the income.

3.1.3. Judgment

The Federal Regional Court decided that the service fees paid to the foreign companies are not subject to withholding tax in Brazil.

The Federal Regional Court held that Ruling COSIT 1/2000, as an administrative act, is not able to create a new taxable event or a new tax. In addition, this act only refers to technical services, which was not the type of service provided by the foreign companies.

The Federal Regional Court also held that, although there is no hierarchy between tax treaties and domestic legislation, the domestic law that allows withholding tax on service fees paid to non-resident persons did not revoke the tax treaties signed by Brazil. The Court explained that although a posterior law is able to revoke a previous one (l*ex posterior derogate priori*), the principle of *lex specialis derogate generalis* determines that a special law prevails over a general posterior law. Tax treaties are considered to be a special law under Brazilian legislation and, therefore, are not revoked by the general posterior law that allows withholding tax on the outbound payment of service fees.

The Federal Regional Court also observed that the word “profits” in tax treaties refers technically to the concept that, under domestic legislation, is equivalent to “revenue”. The Court further explained that what is intended to be excluded from taxation at source in tax treaties is not only the profit, but the whole income remitted to the non-resident person. This

because there would never be a remittance of profits to the foreign service provider, since such profits are only calculated by the foreign company at a second moment, through the deduction of costs and expenses in accordance with the legislation of its state of residence.

3.2. *Copesul – CIA/Petroquimica do Sul v. Federal Union (National Treasury)*[205]

3.2.1. Background

The plaintiff, Copesul – CIA / Petroquímica do Sul ("Copesul"), was a resident of Brazil. For the provision of technical services on its machines and equipment it had hired the Canadian company Surface Engineering Products and the German company Siemens Power Generation. During these activities no technical know-how was made available or transferred to the plaintiff.

Copesul was requested by the tax authorities to withhold income tax on the payments for these services. This request was based on the Ruling COSIT 1/2000 which allows the tax authorities to apply the other income article of the Brazilian tax treaties in respect of payments for technical assistance or technical services, if no technology is transferred during these activities. In that case there is no relation with royalties so that no tax can be levied under article 12 of the treaties. Furthermore, due to the lack of a definition in tax treaties of the term 'profits', taxation of these payments as business profits is not possible either because under domestic law such payments are classified as 'revenue' and not as 'profit'. Through the application of the other income article Brazil could retain its taxation rights because in most Brazilian tax treaties this treaty article permits the country in which the income arises (source state) to tax such income.

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[205] *Copesul – CIA/Petroquimica do Sul v. Federal Union (National Treasury)*, Case RE 1.161.467 – RS

Copesul argued that the Normative Ruling COSIT 1/2000 was not applicable because of the fact that the payments for technical services without the transfer of technology are governed by the treaty provisions on business profits, i.e. in the present case article 7 of the treaties with Canada and Germany.

The lower Federal Court rejected Copesul's appeal and Copesul then appealed to the Federal Regional Court.

3.2.2. Legal background (treaty law)

3.2.2.1. Article 21 of the Brazil-Canada tax treaty permits the source state to tax other income. Under article 22(2) [Elimination] of this treaty Canada grants a credit for the tax levied in Brazil on other income. Article 21 reads as follows:

"*Items of income of a resident of a Contracting State, arising in the other Contracting State and not dealt with in the foregoing Articles of this Convention, may be taxed in that other State*."

3.2.2.2. Article 22 of the Brazil-Germany tax treaty permits both states to levy tax on other income, but under Art. 24 [Elimination] of this treaty Germany does not grant relief for the tax levied in Brazil. Art. 22 of this treaty reads as follows:

"*Items of income of a resident of a Contracting State which are not expressly mentioned in the foregoing Articles of this Agreement, may be taxed in both Contracting States*."

3.2.3. Court decision

3.2.3.1. Federal Regional Court of the 4th Region

The Federal Regional Court held (not unanimously) in its decision of 4 July 2007 that the levying of withholding tax on the payments for technical services without the transfer of technology violates the provisions of article 7 of the treaties with Canada and Germany. The Court observed that although the payments could not be directly defined as “profits” under Brazilian law, they were considered by the Canadian and German companies as a component of their business profits. Consequently, as these services were not performed through a permanent establishment in Brazil, no taxation would be allowed in Brazil under article 7 of the pertinent treaties.

The Federal Regional Court then observed that the tax authorities’ interpretation of the term “profits” would make the provisions of article 7 of tax treaties never applicable. No payment of any remuneration abroad would be ever classified as "profit" under the Brazilian legislation and, therefore, taxable under article 7 because the tax adjustments (additions, deductions, etc.) required by domestic legislation for the classification of the income as "profit" are only made by the non-resident companies at a second moment, at the end of their assessment period.

Because this decision was not unanimous, the tax authorities appealed to the same Federal Regional Court.

The Federal Regional Court confirmed its earlier decision of 4 July 2007 in its decision of 4 June 2009, No. 2002.71.00.006530-5/RS. The court reiterated that the levying of withholding tax on the payments for technical services without the transfer of technology would violate the provision of article. 7 of the treaties with Canada and Germany. The Court re-affirmed all arguments presented in the previous decision and reiterated that the Normative Ruling COSIT 1/2000 is not applicable in this case.

3.2.3.2. Superior Court of Justice

In a unanimous decision, the Superior Court of Justice confirmed the Federal Regional Court decision and held that the pertinent fees for the technical services are encompassed by article 7 of the Brazilian treaties with Germany and Canada, according to which business profits of a company are taxable only in its residence state, unless a permanent establishment of such legal entity exists in the other contracting state. Based on this provision, the Court took the view that the payments made by Copesul in favour of the companies domiciled in Canada and Germany were business profits of these companies, which are subject to taxation only in the state of residence. Therefore, Brazil would not have taxing rights over such income.

The Superior Court of Justice also observed that the treaty term "business profits" is not limited to the domestic meaning of "real profit" (*lucro real*) - which reflects the difference between gross receipts from business transactions and deductible business

expenses, subject to any adjustments under Brazilian tax legislation (net profit) - otherwise receipts from business transactions would never be covered by article 7 as such receipts are always subject to adjustments later in the assessment process. According to the Court, the treaty term "business profits" should be interpreted rather as "operational profit" (*lucro operacional*), which is defined under domestic law as the remuneration received in respect of the activities performed, including the income paid as compensation for the provision of services.

The Superior Court of Justice also added that, although there is in Brazil no hierarchy between tax treaties and domestic law, a domestic law that contradicts tax treaties signed by Brazil, is not applicable due to the principle *lex specialis derogate generalis*. Tax treaties are considered to be special law under Brazilian legislation and, therefore, prevail over a general posterior domestic law.

Annexure 6

Conflicting Situation: Convention between the Republic of South Africa and the Republic of Mozambique for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income

The Convention between the Republic of South Africa and the Republic of Mozambique for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income ("the Treaty") came into force on 19 February 2009. Both an English version and a Portuguese version of the Treaty was signed and it was assumed that both versions contain the same provisions.

However, it has subsequently transpired that there are significant differences between the English version of article 5, which deals with Permanent Establishment and the Portuguese version thereof, in particular with respect to the furnishing of services. In terms of the English version of the Treaty, which is followed and accepted by South Africa as the correct version, a permanent establishment related to the furnishing of services will only be created "*where activities of that nature continue (for the same or a connected project) within the Contracting State for a period or periods exceeding in the aggregate 180 days in any twelve-month period commencing or ending in the fiscal year concerned*". This is however not the case in the Portuguese version of the Treaty, which is the version accepted by Mozambique. My understanding is that the Portuguese version of article 5 creates a permanent establishment for a non-Mozambican enterprise if that enterprise provides services to a related party/group entity resident in Mozambique. Therefore, based on the English version of the Treaty the mere provision of intra-group cross border services without being physically present in Mozambique for more than 180 days in aggregate does not create a permanent establishment for the South African resident in Mozambique (or vice versa), whereas a permanent establishment is created, notwithstanding any physical presence in Mozambique (or vice versa) in terms of the Portuguese version of the Treaty.

This situation is creating major issues for South African companies with subsidiary operations in Mozambique. The tax issues are as follows:

- The South African group services provider is regarded as a tax resident for Mozambican tax purposes and is subject to corporate tax on the service fees earned, after deducting the costs related to the provision of the service – first level of tax.

- The South African entity is also subject to South African income tax on the service fees, after taking into account the costs related to the provision of the service.

However, as South Africa regards the income to be from a South African source and not a Mozambican source (i.e. foreign source), the South African entity is not entitled to a foreign tax credit for the Mozambican corporate tax paid – second level of tax. This therefore results in a double tax situation.

- Further, should the Mozambican subsidiary wish to remit the funds for the services to South Africa, the fact that the fees have already been subject to Mozambican corporate tax is ignored and the Mozambican authorities will not allow the funds to be remitted before withholding tax on services are also paid – a third level of tax levied on the same amount.

For example, say a South African entity provided services to its Mozambican subsidiary for an amount of ZAR10 000. The service was provided from a location in South Africa. The costs associated with the provision of the service was ZAR7 500.

The after-tax effect of the situation described above is:

Description	**South Africa (tax rate = 28%)**	**Mozambique (tax rate + 32%)**
Service fee earned	10 000	10 000
Less Allowable costs	7 500	7 500
Taxable income	2 500	2 500
Less Tax due	700	800
Less Tax credit	0	0
Net amount after tax	1 800	1 700

The total corporate tax paid is therefore ZAR1 500 (ZAR700 + ZAR800).

Withholding tax on services is payable on the gross amount at a rate of 20%, i.e. the withholding tax payable is ZAR2 000.

Total tax paid will therefore be equal to ZAR3 500 (ZAR1 500 + ZAR2 000) in these circumstances. The net position of the South African entity will be an overall loss of ZAR1 000 (ZAR10 000 – ZAR7 500 – ZAR700 – ZAR800 – ZAR2 0000).

The author understands that all diplomatic avenues to resolve this issue have been exhausted.

Summary of jurisdictions which have transfer pricing provisions

Annexure 7(1)

Jurisdiction	Withholding tax on technical and/or management fees	Transfer pricing			
		Specific rules/ codes/regulations	Preferred methodology		
			OECD	Other	Description of "other" if not "arm's length"
Afghanistan		No			
Albania	Yes	No			
Algeria	Yes	No			
American Samoa	Yes	Yes		√	
Andorra	Yes	No			
Angola	Yes	Yes (Draft)		√	Generally follows OECD guidelines with some exceptions.
Anquila		No			
Antiqua and Barbuda	Yes	No			
Argentina	Yes	Yes		√	
Armenia	Yes	No			
Aruba		No			
Australia		Yes	√		
Austria	Yes	No			
Azerbaijan	Yes	Yes		√	
Bahamas		No			
Bahrain		No			
Bangladesh	Yes	No			
Barbados	Yes	No			
Belarus	Yes	No			
Belgium		No			
Belize	Yes	No			
Berin	Yes	No			
Bermuda		No			
Bhutan	Yes	No			
Bolivia	Yes	No			
Bonaire, Sint Eustatius, and Saba Islands (BES Islands)		Yes	√		
Bosnia and Herzogovina	Yes	No			
Botswana	Yes	No			
Brazil	Yes	Yes		√	Deviates significantly from arm's length principles. Fixed margins only are applied.
British Virgin Islands		No			
Brunei Darussalam	Yes	No			
Bulgeria	Yes	Yes	√		
Burkina Faso	Yes	Yes		√	
Burundi	Yes	Yes		√	
Cambodia	Yes	No			
Cameroon	Yes	No			

Jurisdiction	Withholding tax on technical and/or management fees	Transfer pricing			
		Specific rules/ codes/regulations	Preferred methodology		
			OECD	Other	Description of "other" if not "arm's length"
Canada	Yes	Yes	√		No mark-up allowed for service fees unless business is that of generally rendering services of the nature provided.
Cape Verde	Yes	No			
Cayman Islands		No			
Central Africa Republic	Yes	Yes		√	
Chad	Yes	Yes		√	
Chile	Yes	Yes	√		
People's Republic of China	Yes	Yes	√		Recognised methods listed similar to those noted in OECD guidelines.
Colombia	Yes	Yes	√		
Comoros Islands	Yes	Yes		√	
Democratic Republic of Congo	Yes	No			
Republic of Congo	Yes	Yes		√	
Cook Islands	Yes	Yes		√	
Costa Rica	Yes	No			
Croatia	Yes	Yes	√		
Cuba	Yes	No			
Curacao		No			
Cyprus		No			
Czech Republic	Yes	Yes	√		
Denmark		Yes	√		
Djibouti	Yes	Yes		√	
Commonwealth of Dominica	Yes	Yes		√	
Dominican Republic	Yes	Yes	√		
Ecuador	Yes	Yes	√		
Egypt	Yes	No			
El Salvador	Yes	Yes		√	Market price for similar transaction in similar circumstances.
Equatorial Guinea	Yes	No			
Eritea	Yes	No			
Estonia	Yes	No			
Ethiopia	Yes	Yes			
Fiji	Yes	Yes	√		
Finland		Yes		√	
France	Yes	Yes	√		
French Guiana	Yes	Yes	√		
Gabon	Yes	No			
Gambia	Yes	No			
Georgia	Yes	No			
Germany		Yes	√		
Ghana	Yes	No			
Gibraltar		No			

Jurisdiction	Withholding tax on technical and/or management fees	Transfer pricing			
		Specific rules/ codes/regulations	Preferred methodology		
			OECD	Other	Description of "other" if not "arm's length"
Greece	Yes	No			
Greenland		Yes		√	
Guadeloupe	Yes	Yes		√	
Guam		Yes		√	
Guatamala	Yes	Yes (January 2015)	√		
Guernsey		No			
Guinea	Yes	Yes		√	
Guinea-Bissau	Yes	No			
Guyana	Yes	No			
Honduras	Yes	Yes		√	
Hong Kong Special Administration Region of China		Yes		√	
Hungary		Yes	√		
Iceland		No			
India	Yes	Yes	√		Rules more stringent that general; Have introduced safe-harbour rules as well, although these are not generous.
Indonesia	Yes	Yes	√		Rules are not extensive.
Iran	Yes	No			
Iraq		No			
Ireland		Yes	√		
Isle of Man	Yes	No			
Israel	Yes	Yes	√		
Italy		Yes	√		
Ivory Coast	Yes	No			
Jamaica	Yes	No			
Japan	Yes	Yes	√		
Jersey		No			
Jordan	Yes	No			
Kazakhstan	Yes	Yes		√	Must use CUP method unless impossible to use.
Kenya	Yes	Yes	√		
Kiribati	Yes	Yes		√	
Deomocratic People's Republic of Korea (North Korea)	Yes	No			
Republic of Korea (South Korea)	Yes	Yes	√		There are a few exceptions to the general rules.
Kosovo	Yes	Yes		√	
Kuwait	Yes	No			
Kyrgyzstan	Yes	Yes		√	
Lao People's Democratic Republic		No			
Latvia	Yes	Yes		√	
Lebanon	Yes	No			
Lesotho	Yes	Yes		√	
Liberia	Yes	Yes		√	
Libya		No			
Liechtenstein		No			

Jurisdiction	Withholding tax on technical and/or management fees	Transfer pricing			
		Specific rules/ codes/regulations	Preferred methodology		
			OECD	Other	Description of "other" if not "arm's length"
Lithuania		Yes	√		
Luxembourg		No			
Macao		No			
Macedonia	Yes	No			
Madagascar	Yes	No			
Malawi	Yes	Yes	√		
Malaysia	Yes	Yes	√		
Maldives	Yes	Yes		√	
Mali	Yes	No			
Malta		No			
Marshall Islands		No			
Martinique	Yes	Yes		√	
Mauritania	Yes	No			
Mauritius		No			
Mexico	Yes	Yes		√	Preference is given to CUP method, followed by cost-plus and resale methods.
Micronesia		No			
Moldova	Yes	Yes		√	
Monaco		Yes		√	
Mongolia	Yes	No			
Republic of Montenegro	Yes	Yes		√	May only use CUP method, followed by cost-plus and resale methods.
Montserrat	Yes	No			
Morocco	Yes	No			
Mozambique	Yes	Yes		√	
Myanmar	Yes	No			
Republic of Namibia	Yes	No			
Nauru		No			
Nepal	Yes	No			
Netherlands		Yes	√		
New Caledonia		Yes		√	
New Zealand		Yes	√		
Nicaragua	Yes	Yes (from 2016)	√		
Niger	Yes	No			
Nigeria	Yes	No			
Niue		No			
Northern Mariana Islands		Yes		√	US rules apply.
Norway		Yes	√		
The Sultanate of Oman	Yes	No			
Pakistan	Yes	No			
Palau		No			
Palestinian Autonomous Areas	Yes	No			

Jurisdiction	Withholding tax on technical and/or management fees	Transfer pricing			
		Specific rules/ codes/regulations	Preferred methodology		
			OECD	Other	Description of "other" if not "arm's length"
Panama	Yes	Yes	√		
Papua New Guinea	Yes	Yes	√		
Paraguay	Yes	No			
Peru	Yes	Yes		√	Limited rules which provides that transactions with tax haven entities must be at arm's length.
Philippines	Yes	Yes	√		Transfer pricing policy must be applied consistently oon a worldwide basis.
Poland	Yes	Yes	√		
Portugal	Yes	Yes		√	
Puerto Rico	Yes	Yes		√	US rules apply.
Qatar	Yes	No			
Romania	Yes	Yes	√		
Russian Federation		Yes		√	Methods generally consistent with OECD guidelines.
Rwanda	Yes	Yes		√	
Samoa		Yes		√	
San Marino	Yes	Yes		√	
Sao Tome and Principe	Yes	Yes		√	
Kingdom of Saudi Arabia	Yes	No			
Senegal	Yes	Yes		√	
Republic of Serbia	Yes	Yes	√		
Seychelles	Yes	Yes		√	
Sierra Leone		No			
Singapore	Yes	Yes	√		
Sint Maarten		No			
Slovak Republic	Yes	Yes	√		
Slovenia	Yes	Yes	√		
Solomon Islands	Yes	Yes		√	
Republic of South Africa	Yes	Yes		√	Methods generally consistent with OECD guidelines.
South Sudan		No			
Spain	Yes	Yes	√		
Sri Lanka	Yes	Yes	√		
St Kitts and Nevis	Yes	No			
St Lucia	Yes	No			
St Vincent and the Grenadines	Yes	Yes		√	
Sudan	Yes	No			
Suriname		Yes	√		
Swaziland	Yes	No			
Sweden		Yes	√		
Switzerland		No			
Syria	Yes	No			
Taiwan	Yes	Yes	√		
Tajikistan	Yes	Yes		√	

Jurisdiction	Withholding tax on technical and/or management fees	Transfer pricing			
		Specific rules/ codes/regulations	Preferred methodology		
			OECD	Other	Description of "other" if not "arm's length"
Tanzania	Yes	Yes		√	
Thailand	Yes	No			
Timor-Leste	Yes	Yes		√	
Togo	Yes	Yes		√	
Tonga	Yes	Yes		√	
Trinidad and Tobago	Yes	No			
Tunisia	Yes	No			
Turkey	Yes	No			
Turkmenistan	Yes	No			
Turks and Caicos Islands		No			
Uganda	Yes	Yes	√		
Ukraine	Yes	Yes	√		
United Arab Emirates		No			
United Kingdom		Yes	√		
United States of America	Yes	Yes		√	US rules apply.
Uruguay	Yes	Yes		√	
US Virgin Islands	Yes	Yes		√	US rules apply.
Republic of Uzbekistan	Yes	No			
Vanautu		No			
Venezuela	Yes	Yes	√		
Vietnam	Yes	Yes	√		
Yemen	Yes	Yes		√	
Zambia	Yes	Yes		√	
Zimbabwe	Yes	No			

Note: The rates noted, basis for levying the withholding tax, treaty relief and additional comments were obtained from the IBFD country analysis database, Worldwide corporate tax guide - 2013/14 issued by Ernst & Young, pwc Worldwide Tax Summaries Corporate - 2013-14, and Deloitte doing business in … guides. Where discrepancies were noted, the IBFD database was taken as the most up to date version.

Summary of jurisdictions which have general provisions based on transfer pricing or similar principles

Annexure 7(2)

Jurisdiction	Withholding tax on technical and/or management fees	General provisions/rules/regulations which enable adjustments to be made			
		General rules/ codes/regulations	Preferred methodology		
			OECD	Other	Description of "other" if not "Arm's length"
Afghanistan		Yes	√		
Albania	Yes	Yes	√		
Algeria	Yes	Yes		√	
American Samoa	Yes				
Andorra	Yes	Yes		√	
Angola	Yes	Yes (Current)		√	
Anquila					
Antiqua and Barbuda	Yes				
Argentina	Yes				
Armenia	Yes	Yes		√	
Aruba		Yes		√	
Australia					
Austria	Yes	Yes	√		
Azerbaijan	Yes				
Bahamas					
Bahrain					
Bangladesh	Yes	Yes		√	
Barbados	Yes				
Belarus	Yes	Yes		√	Prices may be reviewed using methods such as CUP, resale price and cost plus.
Belgium		Yes	√		
Belize	Yes				
Berin	Yes				
Bermuda					
Bhutan	Yes				
Bolivia	Yes	Yes		√	
Bonaire, Sint Eustatius, and Saba Islands (BES Islands)					
Bosnia and Herzogovina	Yes	Yes		√	
Botswana	Yes	Yes		√	
Brazil	Yes				
British Virgin Islands					
Brunei Darussalam	Yes				
Bulgeria	Yes				
Burkina Faso	Yes				
Burundi	Yes				
Cambodia	Yes	Yes		√	"Aggresssive" related party transaction provisions.
Cameroon	Yes	Yes	√		
Canada	Yes				

Jurisdiction	Withholding tax on technical and/or management fees	General provisions/rules/regulations which enable adjustments to be made			
		General rules/ codes/regulations	Preferred methodology		
			OECD	Other	Description of "other" if not "Arm's length"
Cape Verde	Yes				
Cayman Islands					
Central Africa Republic	Yes				
Chad	Yes				
Chile	Yes				
People's Republic of China	Yes				
Colombia	Yes				
Comoros Islands	Yes				
Democratic Republic of Congo	Yes	Yes		√	
Republic of Congo	Yes				
Cook Islands	Yes				
Costa Rica	Yes	Yes	√		
Croatia	Yes				
Cuba	Yes	Yes		√	
Curacao		Yes		√	Respects internationally accepted guidelines.
Cyprus		Yes		√	Transaction must take place at market value and on normal commercial terms.
Czech Republic	Yes				
Denmark					
Djibouti	Yes				
Commonwealth of Dominica	Yes				
Dominican Republic	Yes				
Ecuador	Yes				
Egypt	Yes	Yes		√	Price may be reviewed. Preference is given to the CUP method if applied.
El Salvador	Yes				
Equatorial Guinea	Yes	Yes		√	Can compare transactions with similar transactions entered into by other entities in the same jurisdiction.
Eritea	Yes				
Estonia	Yes	Yes		√	Can compare transactions with similar transactions entered into by other entities in the same jurisdiction.
Ethiopia	Yes				
Fiji	Yes				
Finland					
France	Yes				
French Guiana	Yes				
Gabon	Yes	Yes		√	
Gambia	Yes	Yes		√	
Georgia	Yes	Yes	√		
Germany					
Ghana	Yes	Yes		√	
Gibraltar					

Jurisdiction	Withholding tax on technical and/or management fees	General provisions/rules/regulations which enable adjustments to be made			
		General rules/ codes/regulations	Preferred methodology		
			OECD	Other	Description of "other" if not "Arm's length"
Greece	Yes	Yes		√	
Greenland					
Guadeloupe	Yes				
Guam					
Guatamala	Yes				
Guernsey					
Guinea	Yes				
Guinea-Bissau	Yes				
Guyana	Yes	Yes		√	May assess non-resident as agent of resident if transactions considered to be arranged to reduce resident's income.
Honduras	Yes				
Hong Kong Special Administration Region of China					
Hungary					
Iceland		Yes	√		
India	Yes				
Indonesia	Yes				
Iran	Yes				
Iraq		Yes		√	Authorities reserve the right to adjust the transaction ifprice considered unreasonable.
Ireland					
Isle of Man	Yes				
Israel	Yes				
Italy					
Ivory Coast	Yes	Yes		√	May only use the CUP method.
Jamaica	Yes	Yes		√	May assess non-resident as agent of resident if transactions considered to be arranged to reduce resident's income.
Japan	Yes				
Jersey					
Jordan	Yes				
Kazakhstan	Yes				
Kenya	Yes				
Kiribati	Yes				
Deomocratic People's Republic of Korea (North Korea)	Yes				
Republic of Korea (South Korea)	Yes				
Kosovo	Yes				
Kuwait	Yes	Yes		√	Deviates significantly from arm's length principles. Fixed margins only are applied.
Kyrgyzstan	Yes				
Lao People's Democratic Republic		Yes	√		
Latvia	Yes				

Jurisdiction	Withholding tax on technical and/or management fees	General provisions/rules/regulations which enable adjustments to be made			
		General rules/ codes/regulations	Preferred methodology		
			OECD	Other	Description of "other" if not "Arm's length"
Lebanon	Yes	Yes		√	
Lesotho	Yes				
Liberia	Yes				
Libya		Yes		√	Has authority to assess in terms of general anti-avoidance rules.
Liechtenstein		Yes	√		
Lithuania					
Luxembourg		Yes		√	
Macao					
Macedonia	Yes	Yes	√		
Madagascar	Yes	Yes		√	Broad anti-avoidance rules apply to prevent related parties from pricing transactions in a manner that could manipulate profits.
Malawi	Yes				
Malaysia	Yes				
Maldives	Yes				
Mali	Yes	Yes		√	Entity claiming the expense must demonstrate that the transaction is real and justified and that the price is determined in terms of normal business conditions.
Malta					
Marshall Islands					
Martinique	Yes				
Mauritania	Yes	Yes		√	
Mauritius		Yes	√		
Mexico	Yes				
Micronesia					
Moldova	Yes				
Monaco					
Mongolia	Yes	Yes		√	Fair market value must be determined.
Republic of Montenegro	Yes				
Montserrat	Yes				
Morocco	Yes	Yes		√	May only use the CUP method or perform direct assessment.
Mozambique	Yes				
Myanmar	Yes				
Republic of Namibia	Yes	Yes	√		
Nauru					
Nepal	Yes				
Netherlands					
New Caledonia					
New Zealand					
Nicaragua	Yes				

Jurisdiction	Withholding tax on technical and/or management fees	General provisions/rules/regulations which enable adjustments to be made			
		General rules/ codes/regulations	Preferred methodology		
			OECD	Other	Description of "other" if not "Arm's length"
Niger	Yes	Yes		√	Entity claiming the expense must demonstrate that the transaction is real and justified and that the price is determined in terms of normal business conditions.
Nigeria	Yes	Yes		√	General anti-avoidance rules specifies that arm's length principle must be used.
Niue					
Northern Mariana Islands					
Norway					
The Sultanate of Oman	Yes	Yes		√	
Pakistan	Yes	Yes		√	Anti-avoidance rules authorise the tax authority to distribute, allocate or apportion income, deductions or tax credits between associated entities to reflect income that would have been reached had an arm's length transaction taken place.
Palau					
Palestinian Autonomous Areas	Yes				
Panama	Yes				
Papua New Guinea	Yes				
Paraguay	Yes				
Peru	Yes				
Philippines	Yes				
Poland	Yes				
Portugal	Yes				
Puerto Rico	Yes				
Qatar	Yes	Yes		√	General anti-avoidance rules specifies that arm's length principle must be used.
Romania	Yes				
Russian Federation					
Rwanda	Yes				
Samoa					
San Marino	Yes				
Sao Tome and Principe	Yes				
Kingdom of Saudi Arabia	Yes	Yes		√	
Senegal	Yes				
Republic of Serbia	Yes				
Seychelles	Yes				
Sierra Leone		Yes		√	
Singapore	Yes				
Sint Maarten		Yes		√	Respects international standards.
Slovak Republic	Yes				
Slovenia	Yes				
Solomon Islands	Yes				

Jurisdiction	Withholding tax on technical and/or management fees	General provisions/rules/regulations which enable adjustments to be made			
		General rules/ codes/regulations	Preferred methodology		
			OECD	Other	Description of "other" if not "Arm's length"
Republic of South Africa	Yes				
South Sudan		Yes	√	√	Preference given to the CUP method.
Spain	Yes				
Sri Lanka	Yes				
St Kitts and Nevis	Yes				
St Lucia	Yes				
St Vincent and the Grenadines	Yes				
Sudan	Yes	Yes		√	Tax authorities can adjust or alter tax consequences of any transaction if they have reasonable cause to believe it was arranged to result in the resident and the non-resident having no profit or less than ordinary profit.
Suriname					
Swaziland	Yes				
Sweden					
Switzerland		Yes	√		
Syria	Yes				
Taiwan	Yes				
Tajikistan	Yes				
Tanzania	Yes				
Thailand	Yes	Yes		√	Taxpayer must submit declaration stating whether transaction is based on market prices.
Timor-Leste	Yes				
Togo	Yes				
Tonga	Yes				
Trinidad and Tobago	Yes	Yes	√		
Tunisia	Yes	Yes		√	
Turkey	Yes	Yes		√	Preference is given to the CUP method, followed by cost-plus and resale methods.
Turkmenistan	Yes	Yes		√	Authorities can adjust price if it deviates from market price by 20% or more.
Turks and Caicos Islands					
Uganda	Yes				
Ukraine	Yes				
United Arab Emirates					
United Kingdom					
United States of America	Yes				
Uruguay	Yes				
US Virgin Islands	Yes				
Republic of Uzbekistan	Yes	Yes		√	Market value rate must be used.
Vanautu					
Venezuela	Yes				
Vietnam	Yes				

Jurisdiction	Withholding tax on technical and/or management fees	General provisions/rules/regulations which enable adjustments to be made			
		General rules/ codes/regulations	Preferred methodology		
			OECD	Other	Description of "other" if not "Arm's length"
Yemen	Yes				
Zambia	Yes				
Zimbabwe	Yes	Yes		√	

Note: The rates noted, basis for levying the withholding tax, treaty relief and additional comments were obtained from the IBFD country analysis database, Worldwide corporate tax guide - 2013/14 issued by Ernst & Young, pwc Worldwide Tax Summaries Corporate - 2013-14, and Deloitte doing business in … guides. Where discrepancies were noted, the IBFD database was taken as the most up to date version.

Annexure 7(3)

Brazil – fixed margin information

The following fixed margins apply in respect of various categories of intra-group cross border services, regardless of whether a productive process is performed in Brazil or not:

1. Forty per cent (40%), for the products of:

    1.1. Pharmaceutical products;

    1.2. Tobacco products;

    1.3. Optical, photographic and cinematographic equipment and instruments;

    1.4. Machines, devices and equipment for dental-medical-hospital use;

    1.5. Extraction of oil and natural gas; and

    1.6. Oil derived products;

2. Thirty per cent (30%, for the products of:

    2.1. Chemical products;

    2.2. Glass and glass products;

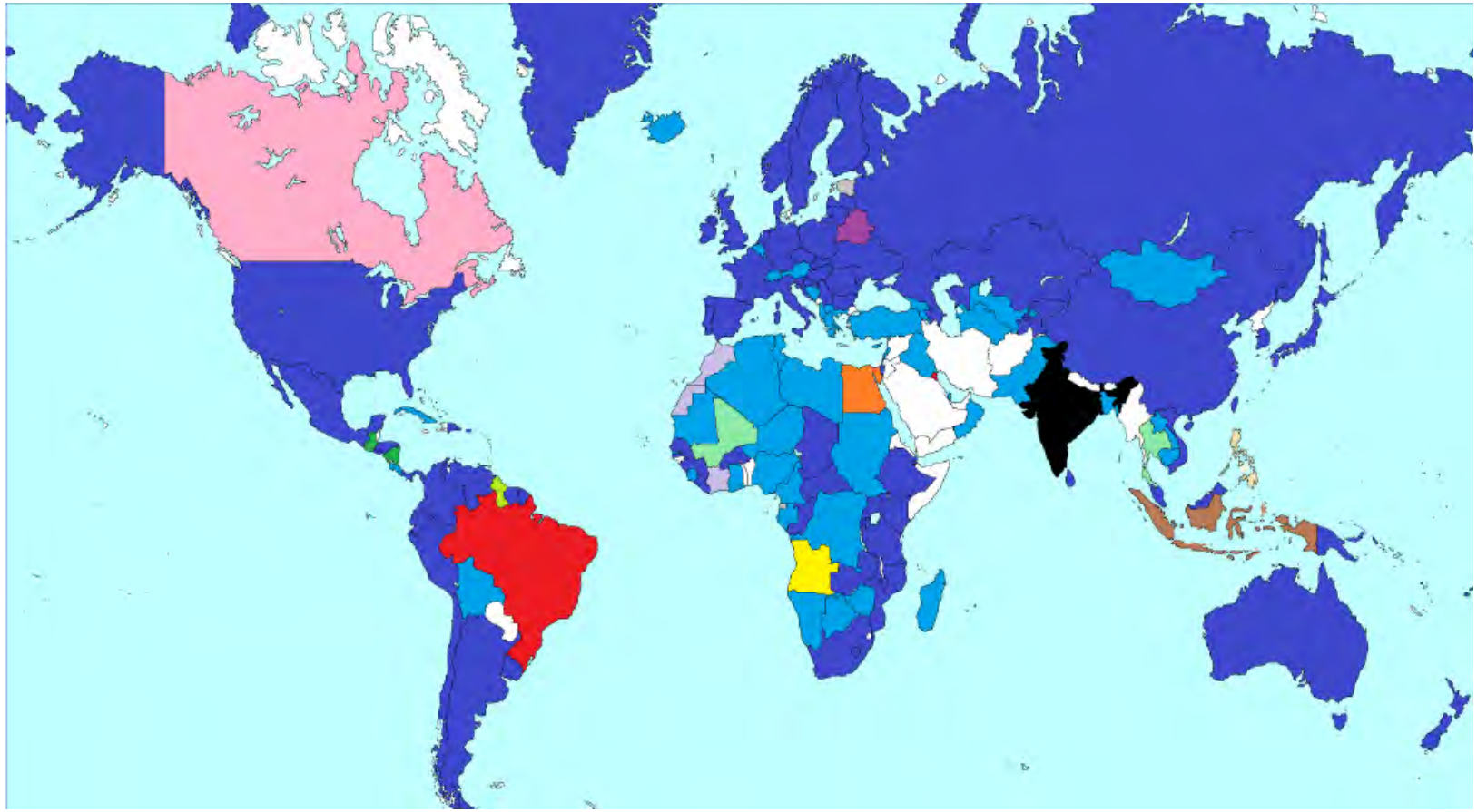
    2.3. Cellulose, paper and paper products; and

    2.4. Metallurgy; and

3. Twenty per cent (20%) for all other sectors.[206]

[206] Dias Musa, S. and Lagrasta, C., Brazil - Transfer Pricing, Topical Analyses IBFD, accessed on 30 April 2014

World map – Transfer pricing and general arm's length provision countries **Annexure 7(4)**



Note – the world map is a visual representation only and should not be used for interpretative purposes.
Dark blue – transfer pricing provisions apply
Light blue – no transfer pricing provisions but transfer pricing principles apply
Other colours – unique or transaction specific rules apply

Annexure 8

Countries with Transfer Pricing Documentation Guidelines

The following countries had transfer pricing documentation guidelines applicable to intra-group cross border fees as at 2011:[207]

Argentina	Australia	Austria
Belgium	Brazil	Canada
Chile	China	Colombia
Czech Republic	Denmark	Ecuador
Egypt	Finland	France
Germany	Greece	Hong Kong
Hungary	India	Indonesia
Ireland	Israel	Italy
Japan	Kazakhstan	Republic of Korea
Lithuania	Luxembourg	Malaysia
Mexico	Moldova	Netherlands
New Zealand	Norway	The Sultanate of Oman
Pakistan	Peru	Philippines
Poland	Portugal	Romania
Russia	Singapore	Slovak Republic
Slovenia	Republic of South Africa	Spain
Sri Lanka	Sweden	Switzerland
Thailand	Turkey	United Kingdom
United States of America	Uruguay	Venezuela
Vietnam		

[207] UN Transfer Pricing Manual on Transfer Pricing for Developing Countries, United Nations, p. 269

Summary of jurisdictions which limit deductions for intra-group cross border technical fees and/or management and other service fees **Annexure 9(1)**

Jurisdiction	Limitation	Details
Albania	Yes	No deduction if withholding tax not paid
Argentina	Yes	Expenditure must be necessary in order to obtain and maintain income of taxpayer. Must be fair and reasonble and duly documented. Must proof that taxpayer's enterprise benefitted from the service.
Australia	Yes	Must confer a benefit (not merely incidental) to be deductible
Belgium	Yes	Expense scrutinised before deduction allowed
Belize	Yes	If not arm's length. Burden of proof also shifted to taxpayer if paid to a low tax jurisdiction
Benin	Yes	Deduction limited to 20% of overheads
Bosnia and Herzogovina	Yes	Excessive expenditure disallowed
Botswana	Yes	Payments to low-tax regimes are not deductible
Brazil	Yes	Can only deduct payments to recipient in tax haven if idenity of recipient is disclosed
Burundi	Yes	Can only deduct if paid within 180 days
Canada	Yes	Must confer a benefit (not merely incidental) to be deductible
Cape Verde	Yes	Must confer a benefit (not merely incidental) to be deductible
Chad	Yes	Deduction limited to maximum of 10% of taxable profit before taking into account the expense
Chile	Yes	Deduction limited to 4% of turnover
People's Republic of China	Yes	Must confer a benefit (not merely incidental) to be deductible AND show that expense produced income
Colombia	Yes	Must confer a benefit (not merely incidental) to be deductible AND show that expense produced income
Democratic Republic of Congo	Yes	Expense can be deducted provided services clearly identifiable, no local person could render services and expense not overstated
Republic of Congo	Yes	Deduction limited to maximum of 9% of taxable profit before taking into account the expense
Costa Rica	Yes	Deduction limited to 10% of gross sales
Commonwealth of Dominica	Yes	Deduction limited to 5% of allowable deductions, excluding specific expense and allowances
Egypt	Yes	Deduction limited to maximum of 10% of taxable profit before taking into account the expense
El Salvador	Yes	Only deductible if proper contact is in place
Equatorial Guinea	Yes	Limited to 10% of tax result
Estonia	Yes	Must confer a benefit (not merely incidental) to be deductible BUT no deduction if paid to a recipient located in a low tax regime
Fiji	Yes	Deduction limited to maximum of 3% of taxable profit before taking into account the expense
Finland	Yes	Must confer a benefit (not merely incidental) to be deductible
France	Yes	Payments to low-tax regimes are not deductible unless proven to be bona fida and reasonable
Germany	Yes	Proper contract must be in place
Ghana	Yes	Expense must be necessarily incurred. Also refer to detals noted in annexure
Gibraltar	Yes	Transactions not at arm's length are restricted to lower of expense, 5% of turnover or 75% of net profits (pre-expense)
Guatemala	Yes	Expense limited to 5% of gross income
Guyana	Yes	Expense limited to 1% of gross income
Hungary	Yes	Must confer a benefit (not merely incidental) to be deductible
India	Yes	Deductions only allowable if certain conditions are complied with, especially if payment is made to a non-taxable entity
Indonesia	Yes	Excessive expenditure disallowed
Iraq	Yes	The legislation does not deal with intra-group service fee deductions
Ireland	Yes	Must be arm's length
Italy	Yes	Deductions only allowable if certain conditions are complied with, especially if payment is made to a non-taxable entity
Ivory Coast	Yes	Expense must not exceed 5% of turnover and 20% overheads
Japan	Yes	Only requirements are met - written agreement and services requested by company, amongst others
Korea	Yes	Various conditions must be met (refer to details provided in annexure)
Kosovo	Yes	No specific information is available in the resources used
Kuwait	Yes	Expense must not exceed 1.5% of revenue
Latvia	Yes	No deduction if withholding tax not paid
Lebanon	Yes	Expense determined in terms of a formula
Lithuania	Yes	Deductions only allowable if certain conditions are complied with, especially if payment is made to a non-taxable entity
Macao	Yes	Deductions only allowed if contracts are registered with the relevant authorities

Jurisdiction	Limitation	Details
Madagascar	Yes	Deductions limited to 1% of turnover in the case of branch operations
Malaysia	Yes	Must show that the expense is justified and that withholding tax was withheld
Mexico	Yes	No deduction if paid to a recipient located in a tax haven inless it can be shown that the fee was the same as other comparable transactions. Also refer to information provided in annexure
Moldova	Yes	Only deductible to the extent actually paid
Mozambique	Yes	Only deductible if business nature of transaction can be proven
Myanmar	Yes	Only deductible if the expense if commensurate with the volume of business undertaken
Nicaragua	Yes	Expense must be needed to generate income, duly supported with documentary evidence, incurred in the fiscal period and withholding tax paid
Norway	Yes	Must be arm's length
The Sultanate of Oman	Yes	Require proper documentary proof before deduction will be allowed
Paraguay	Yes	Documentary evidence is required before deduction will be allowed
Peru	Yes	No deductions for payments to recipients in low-tax jurisdictions
Portugal	Yes	Deductions only allowed if certain conditions are complied with
Sao Tome and Principe	Yes	No deduction to residents in low-tax jurisdictions
Kingdom of Saudi Arabia	Yes	No deductions are allowed
Senegal	Yes	Supporting documentation must be presented
Republic of Serbia	Yes	Must be incurred for business purposes and supported by documentary evidence
Singapore	Yes	Expense must be fair and reasonable, revenue in nature and relevant to earning the taxpayer's income
Spain	Yes	Must confer a benefit (not merely incidental) to be deductible and provide evidence that service was rendered if paid to a recipient located in a tax haven. Also refer to additional information provided in annexure
St Kitts and Nevis	Yes	Deduction restricted to 5% of turnover
St Lucia	Yes	Deduction restricted to 25% of aggregate of management, headquarter and royalty fees or 10% of allowable business expense excluding cost of sales and allowances
Swaziland	Yes	Only deductible if written agreement in place, expense is reasonable and exchange control approval is obtained
Sweden	Yes	Transfer pricing documentation must be presented to support payment and deduction
Thailand	Yes	Must show that the expense is wholly and exclusively incurred in the production of income
Timor-Leste	Yes	Excessive expenditure disallowed
Trinidad and Tobago	Yes	Withholding tax must be deducted and paid before a deduction can be claimed
Turkey	Yes	Refer to detailed discussion in annexure
Ukraine	Yes	Limited deduction if payment to residents in tax haven. Documentary evidence is also required for all other payments
United States of America	Yes	Deductible up to amount actually paid
Uruguay	Yes	Documentary evidence is required before deduction will be allowed
Venezuela	Yes	Deductible if certain conditions are met, such as registration of contract within 60 days with authorities, withholding tax withheld and paid, transfer pricing requirements met and services cannot otherwise be provided in Venezuela
Zimbabwe	Yes	Deductions in excess of certain limits are not allowed.

Note: The rates noted, basis for levying the withholding tax, treaty relief and additional comments were obtained from the IBFD country analysis database, Worldwide corporate tax guide - 2013/14 issued by Ernst & Young, pwc Worldwide Tax Summaries Corporate - 2013-14, and Deloitte doing business in … guides. Where discrepancies were noted, the IBFD database was taken as the most up to date version.

Annexure 9(2)

Limitations on deductions

Examples of countries or regions which limit deductions related to intra-group cross border technical and/or management and service charges are noted below. A more detailed list is also attached to this annexure.[208]

1. Turkey

Turkey will only allow the deduction of intra-group service fees if it satisfies certain prescribed conditions. The prescribed conditions are that the service must in fact be rendered, the intra-group charge for such services must be in accordance with the arm's length principle and the recipient company must need the service. Intra-group service fees which do not meet these prescribed conditions will be challenged in terms of the transfer pricing rules[209] and may be regarded as deemed profits which are non-deductible expenditure for income tax purposes.[210]

2. Republic of Korea

Intra-group service fees, amongst others, are only deductible if the following conditions are met:

- Presence of an advance agreement for provision of services together with proof of services actually rendered;
- Proof that the recipient benefited in the form of revenue increase or cost reduction; and
- In the case of the cost plus method or the transactional net margin method ("TNMM") method, costs used for the calculation included all direct and indirect costs incurred, except in the case of outsourced services where only direct costs may be used.

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[208] The list is prepared based in information obtained from various sources, i.e. the IBFD, Deloitte, Ernst & Young, KPMG and pwc where specific reference was made to the deductibility of intra-group cross border fees. The list serves merely as an example of countries or regions where deductions may be limited. A comprehensive study to determine whether specific rules exist which deal with the deductibility of these expenses on a country-by-country basis was not performed as such an exercise is beyond the scope of this paper.

[209] Turkey introduced formal transfer pricing rules under Article 13 of the Corporate Income Tax Law. The rules became effective from 1 January 2007.

[210] The deemed profits are regarded as dividends and will be subject to a withholding tax applicable to dividends.

3. Mexico

Mexican Income Tax Law does not allow resident taxpayers to deduct expenditures paid abroad to non-resident suppliers if the costs are determined using indirect-charge method arrangements, regardless of its arm's-length nature.

4. Spain

The deductibility of intra-group services in Spain was considered in a Supreme Court judgement.[211] The Spanish Tax Authority ("the STA") denied the deduction of intra-group service fees which related to general administration, accounting systems, and legal and financial services. The deduction was denied as the STA was of the opinion that the Spanish entity neither received the services, i.e. the services were not rendered nor required the services, i.e. it was not necessary to provide the services to the Spanish entity as the Spanish entity had the appropriate structure in place to carry out the services.

5. Ghana

The Ghanaian Tax Authority applies a general anti-avoidance rule contained in its current tax legislation in terms of which intra-group transactions are valued by reference to industry practice. Transactions are re-characterised if the transaction is deemed to be entered into as part of a tax-avoidance scheme and if the legal form of the transaction is not in line with the economic substance thereof. In addition, specific actions are also provided for in terms of the Technology Transfer Regulations ("TTR").[212] The TTR limit the amount of royalties and management and technical fees, amongst others, that can be paid to related parties outside of Ghana's jurisdiction. Payments are regarded as unacceptable if the cost it duplicated and the service performed is readily available in Ghana, the management agreements are not registered with the Ghana Investment Promotion Centre, which administers the TTR or if the management agreements are registered, the limitations on transferable amounts are exceeded (this usually results in the denial of a deduction of the total amount and not only of the excess transferred).

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[211] STS 3054/2013

[212] The Technology Transfer Regulations came into force in 1992.

6. South America

Most countries in the region will only allow a deduction for intra-group services if the following conditions are met:

- Services have actually been rendered;
- Services are related to the activity performed by the company and necessary to generate taxable income in the country;
- The charges must be proportional to the activity performed by the subsidiary, i.e. the amount must be reasonable in relation to the income or profit generated;
- In some instances both the service fee and the withholding tax must have been paid before it can be deducted (Argentina)

Whilst these requirement are similar to those noted in the OECD Transfer Pricing Guideline, the actual gathering of the information to prove compliance with deductibility requirements can pose a number of challenges for taxpayers located in these countries. Examples of evidentiary requirements include flight tickets, correspondence and reports by headquarter experts which demonstrate that services were provided as well as clear examples of how the services generated profits for the taxpayer. As the assistance provided is in many cases of a fragmentary nature, for example a multiparty conference call with an expert in the legal department or a four-hour assistance from engineers located at the headquarters when selecting a new supplier, generating a file that extensively documents the benefits and relevance of the services rendered from aboard may be extremely difficult and burdensome on the taxpayer, especially as such evidence is often widely dispersed across the organisation and even across various jurisdictions.

Another issue, in particular in countries which require payment for the services before it can be claimed as a deduction, relates to restrictions to currency outflows which causes delays or even prevents the payment for goods or services.

Annexure 9(3)

Summary of effective tax rate for jurisdictions which levy withholding tax on technical fees as well as disallow the expenditure incurred in certain circumstances

Assumptions to determine overall effective rate:

All the expenditure did not meet deduction criteria

Sorted from highest effective rate to lowest based on taxes on technical service fees

Jurisdiction	Withholding tax rates		Corporate Tax Rate	Overall effective tax rate	
	Technical	Management		Technical	Management
Argentina	35%	35%	35%	70%	70%
France	33.3%	33.3%	33.3%	66.6%	66.6%
Chad	25%	20%	40%	65%	60%
United States of America	30%	30%	35%	65%	65%
Guyana	20%	20%	40%	60%	60%
St Lucia	25%	25%	33.33%	58.33%	58.33%
Costa Rica	25%	25%	30%	55%	55%
India	25%	25%	30%	55%	55%
Mexico	25%	N/A	30%	55%	
Spain	24.75%	24.75%	30%	55%	55%
Republic of Congo	20%	20%	33%	53%	53%
Mozambique	20%	20%	32%	52%	52%
Venezuela	17%	17%	34%	51%	51%
Belize	25%	25%	25%	50%	50%
El Salvador	20%	20%	30%	50%	50%

Jurisdiction	Withholding tax rates		Corporate Tax Rate	Overall effective tax rate	
	Technical	Management		Technical	Management
Senegal	20%	20%	30%	50%	50%
Brazil	15%	25%	34%	49%	59%
Democratic Republic of Congo	14%	14%	35%	49%	49%
Canada	20%	20%	28%	48%	48%
Portugal	25%	25%	23%	48%	48%
Japan	20%	N/A	25.5%	45.5%	
Cape Verde	20%	20%	25%	45%	45%
People's Republic of China	20%	20%	25%	45%	45%
Egypt	20%	N/A	25%	45%	
Indonesia	20%	20%	25%	45%	45%
Ivory Coast	20%	20%	25%	45%	45%
Sao Tome and Principe	20%	20%	25%	45%	45%
Burundi	15%	15%	30%	45%	45%
Commonwealth of Dominica	15%	15%	30%	45%	45%
Equatorial Guinea	10%	10%	35%	45%	45%
Nicaragua	15%	15%	30%	45%	45%
Peru	15%	30%	30%	45%	60%
Fiji	15%	15%	28%	43%	43%

Jurisdiction	Withholding tax rates		Corporate Tax Rate	Overall effective tax rate	
	Technical	Management		Technical	Management
Guatemala	15%	15%	28%	43%	43%
St Kitts and Nevis	10%	10%	33%	43%	43%
Swaziland	15%	15%	27.5%	42.5%	42.5%
Benin	12%	12%	30%	42%	42%
Ghana	15%	15%	25%	40%	40%
Republic of Serbia	25%	25%	15%	40%	40%
Trinidad and Tobago	15%	15%	25%	40%	40%
Turkey	20%	20%	20%	40%	40%
Zimbabwe	15%	15%	25%	40%	40%
Botswana	15%	15%	22%	37%	37%
Uruguay	12%	12%	25%	37%	37%
Chile	15%	15%	20%	35%	35%
Colombia	10%	10%	25%	35%	35%
Malaysia	10%	10%	25%	35%	35%
Thailand	15%	15%	20%	35%	35%
Singapore	17%	17%	17%	34%	34%
Ukraine	15%	15%	18%	33%	33%
Estonia	10%	10%	21%	31%	31%
Madagascar	10%	10%	20%	30%	30%
Kuwait	15%	15%	15%	30%	30%

Jurisdiction	Withholding tax rates		Corporate Tax Rate	Overall effective tax rate	
	Technical	Management		Technical	Management
Myanmar	3.5%	3.5%	25%	28.5%	28.5%
Latvia	10%	10%	15%	25%	25%
Paraguay	15%	15%	10%	25%	25%
Kingdom of Saudi Arabia	5%	20%	20%	25%	40%
Moldova	12%	12%	12%	24%	24%
Lebanon	7.5%	7.5%	15%	22.5%	22.5%
The Sultanate of Oman	10%	10%	12%	22%	22%
Albania	10%	10%	10%	20%	20%
Bosnia and Herzegovina	10%	10%	10%	20%	20%
Timor-Leste	10%	10%	10%	20%	20%
Kosovo	3%	3%	10%	13%	13%

Annexure 9(4)

Summary of effective tax rate for jurisdictions which levy withholding tax on technical fees as well as disallow the expenditure incurred in certain circumstances

Assumptions to determine overall effective rate:

All the expenditure did not meet deduction criteria

Sorted from highest effective rate to lowest based on taxes on management fees

Jurisdiction	Withholding tax rates		Corporate Tax Rate	Overall effective tax rate	
	Technical	Management		Technical	Management
Argentina	35%	35%	35%	70%	70%
France	33.3%	33.3%	33.3%	66.6%	66.6%
United States of America	30%	30%	35%	65%	65%
Chad	25%	20%	40%	65%	60%
Guyana	20%	20%	40%	60%	60%
Peru	15%	30%	30%	45%	60%
Brazil	15%	25%	34%	49%	59%
St Lucia	25%	25%	33.33%	58.33%	58.33%
Costa Rica	25%	25%	30%	55%	55%
India	25%	25%	30%	55%	55%
Spain	24.75%	24.75%	30%	54.75%	54.75%
Republic of Congo	20%	20%	33%	53%	53%
Mozambique	20%	20%	32%	52%	52%
Venezuela	17%	17%	34%	51%	51%
Belize	25%	25%	25%	50%	50%

Jurisdiction	Withholding tax rates		Corporate Tax Rate	Overall effective tax rate	
	Technical	Management		Technical	Management
El Salvador	20%	20%	30%	50%	50%
Senegal	20%	20%	30%	50%	50%
Democratic Republic of Congo	14%	14%	35%	49%	49%
Canada	20%	20%	28%	48%	48%
Portugal	25%	25%	23%	48%	48%
Cape Verde	20%	20%	25%	45%	45%
People's Republic of China	20%	20%	25%	45%	45%
Indonesia	20%	20%	25%	45%	45%
Ivory Coast	20%	20%	25%	45%	45%
Sao Tome and Principe	20%	20%	25%	45%	45%
Burundi	15%	15%	30%	45%	45%
Commonwealth of Dominica	15%	15%	30%	45%	45%
Equatorial Guinea	10%	10%	35%	45%	45%
Nicaragua	15%	15%	30%	45%	45%
Fiji	15%	15%	28%	43%	43%
Guatemala	15%	15%	28%	43%	43%

Jurisdiction	Withholding tax rates		Corporate Tax Rate	Overall effective tax rate	
	Technical	Management		Technical	Management
St Kitts and Nevis	10%	10%	33%	43%	43%
Swaziland	15%	15%	27.5%	42.5%	42.5%
Benin	12%	12%	30%	42%	42%
Ghana	15%	15%	25%	40%	40%
Kingdom of Saudi Arabia	5%	20%	20%	25%	40%
Republic of Serbia	25%	25%	15%	40%	40%
Trinidad and Tobago	15%	15%	25%	40%	40%
Turkey	20%	20%	20%	40%	40%
Zimbabwe	15%	15%	25%	40%	40%
Botswana	15%	15%	22%	37%	37%
Uruguay	12%	12%	25%	37%	37%
Chile	15%	15%	20%	35%	35%
Colombia	10%	10%	25%	35%	35%
Malaysia	10%	10%	25%	35%	35%
Thailand	15%	15%	20%	35%	35%
Singapore	17%	17%	17%	34%	34%
Ukraine	15%	15%	18%	33%	33%
Estonia	10%	10%	21%	31%	31%
Madagascar	10%	10%	20%	30%	30%
Kuwait	15%	15%	15%	30%	30%

Jurisdiction	Withholding tax rates		Corporate Tax Rate	Overall effective tax rate	
	Technical	Management		Technical	Management
Myanmar	3.5%	3.5%	25%	28.5%	28.5%
Latvia	10%	10%	15%	25%	25%
Paraguay	15%	15%	10%	25%	25%
Moldova	12%	12%	12%	24%	24%
Lebanon	7.5%	7.5%	15%	22.5%	22.5%
The Sultanate of Oman	10%	10%	12%	22%	22%
Albania	10%	10%	10%	20%	20%
Bosnia and Herzegovina	10%	10%	10%	20%	20%
Timor-Leste	10%	10%	10%	20%	20%
Kosovo	3%	3%	10%	13%	13%

Summary of jurisdictions with no withholding tax on tehcnical fees and management or service fees but disallow the expenditure incurred in certain circumstances **Annexure 9(5)**

Assumptions to determine overall effective rate:

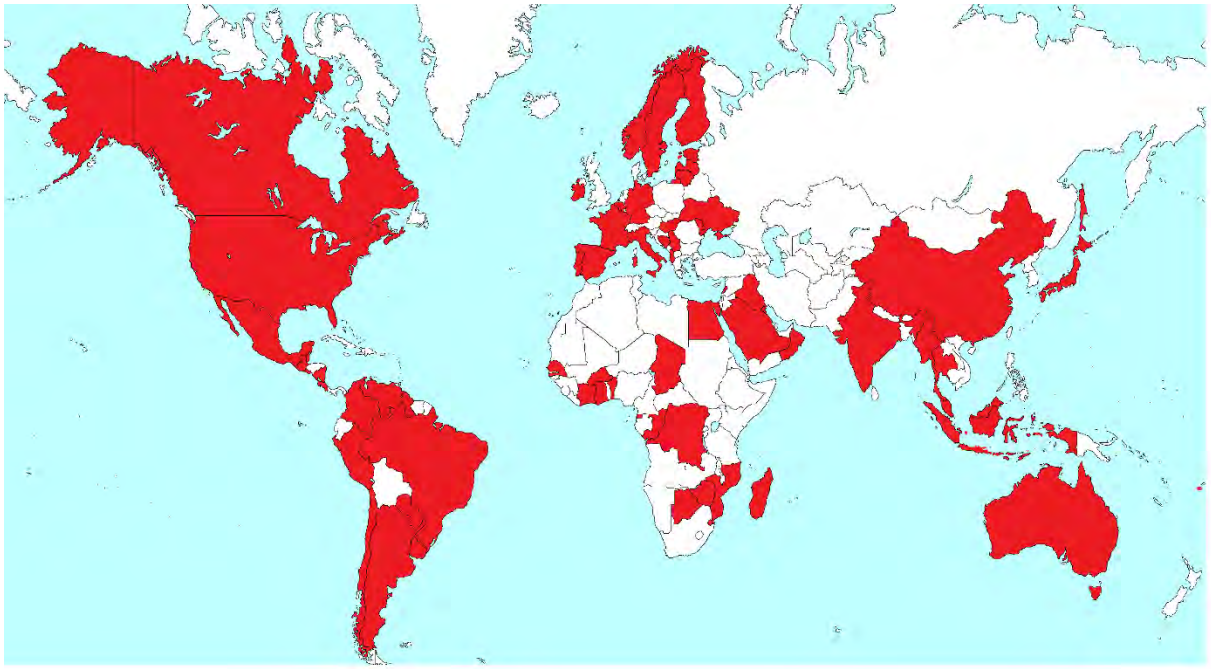
All the expenditure did not meet deduction criteria

Jurisdiction	Effective Withholding tax rate		Corporate tax rate	Effective overall tax rate	
	Type of service			Type of service	
	Technical	Management		Technical	Management
Belgium			33%	33%	33%
Australia			30%	30%	30%
Italy			27.5%	27.5%	27.5%
Norway			27%	27%	27%
Sweden			22%	22%	22%
Republic of Korea			22%	22%	22%
Finland			20%	20%	20%
Hungary			19%	19%	19%
Germany			15%	15%	15%
Iraq			15%	15%	15%
Lithuania			15%	15%	15%
Ireland			12.5%	12.5%	12.5%
Macao			12%	12%	12%
Gibraltar			10%	10%	10%

Note: The rates noted, basis for levying the withholding tax, treaty relief and additional comments were obtained from the IBFD country analysis database, Worldwide corporate tax guide - 2013/14 issued by Ernst & Young, pwc Worldwide Tax Summaries Corporate - 2013-14, and Deloitte doing business in … guides. Where discrepancies were noted, the IBFD database was taken as the most up to date version.

World map – Possible denial of deductions

Annexure 9(6)



Note – the world map is a visual representation only and should not be used for interpretative purposes.

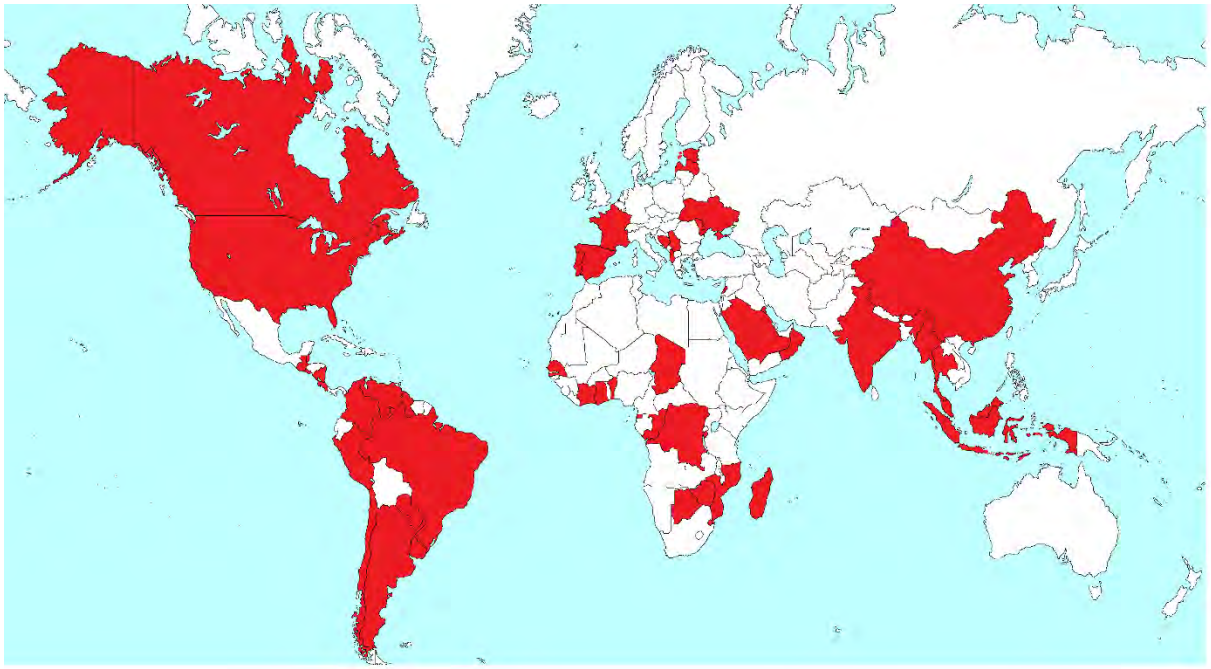
World map – Withholding tax on technical fees and no deductions

Annexure 9(7)

Note – the world map is a visual representation only and should not be used for interpretative purposes.

World map – Withholding tax on management fees and no deductions

Annexure 9(8)



Note – the world map is a visual representation only and should not be used for interpretative purposes.

Annexure 10

Gross-up practices to determine margins

There are some MNEs which have adopted “gross-up” practices to determine the quantum of the service fees to be charged where withholding taxes are payable in respect of services and no deduction or rebate can be claimed for the withholding taxes levied. The gross-up clause is often used to ensure that the non-resident group company obtains the necessary documentation from the tax authorities of the foreign jurisdiction within certain limited time frames in order to enable the domestic jurisdiction to claim a deduction or rebate of the withholding tax paid. The gross-up clause becomes effective in respect of future payments to the resident group company. Any limitations on the ability of the entity to claim a tax deduction or rebate is also passed on to the entity located in the foreign jurisdiction.

The gross-up clauses inevitably result in an increased cost for the entity located in the jurisdiction which benefitted from the services with a resultant reduction in the income tax collected by that jurisdiction. The withholding tax collected by that jurisdiction in respect of that transaction is however more than the reduction in the income tax collected.

The gross-up calculations will depend on whether the MNEs aims to be in a neutral position overall or whether the entity which rendered the services needs to be in a neutral position. The grossed up amount, if the MNE aims to be in a neutral position from a group perspective, is less than the gross up amount if the company which rendered the services need to be in a neutral position. The gross-up calculations may also be influenced by the presence or not of minority shareholders who may be compromised if a group view is adopted as opposed to an entity-specific view.

The margin that needs to be added in the context of gross-up practices is significantly more than the margin ranges of between 3% and 10% applied by MNEs for non-specialist services. For example, in order to achieve that same net after tax position if the acceptable margin is 5%, the gross-up margin needs to be at least 23.5% (assuming a withholding tax rate of 15% and a tax rate of 25%) if the group wishes to be neutral, and 31.3% if the company which rendered the services needs to be in a neutral position.

The author understands that there are jurisdictions that do not accept the grossing up of margin to compensate for withholding tax on services. The jurisdictions treat such services as excessive and usually denies a deduction of the expense in total. Specific details are however not available at present.

Annexure 11

Examples of effect of withholding tax on services on MNEs

Example 1:

UK Co is the holding company of a large international group. It provides intra-group management services to a number of its operations. The group policy requires that the cost-plus method be used to determine the relevant charge. A margin of 5% is considered reasonable and added to the actual costs determined. Services are rendered to entities located in the Republic of Uzbekistan, Argentina and Gambia, amongst others. The services are rendered from the head office located in the United Kingdom and is regarded as income from a domestic source for income tax purposes in the United Kingdom. A tax credit is therefore not available but there is no prohibition on claiming any withholding tax levied on domestic income as an expense for tax purposes. The entity located in the country which benefitted from the services rendered allowed a deduction for the service fee levied. All other income received and expenditure incurred are ignored for purposes of the example.

The tax consequences on a country-by-country basis are as follows:

Description	Uzbekistan	Argentina	Gambia	United Kingdom	Overall position
Service fee income				315 000	315 000
Costs incurred to provide services				-300 000	-300 000
Intra-group service fees incurred	-105 000	-105 000	-105 000		-315 000
Net profit/(loss) before taking into account withholding tax costs incurred	-105 000	-105 000	-105 000	15 000	-300 000
Corporate tax rate in recipient country	8%	35%	30%		
Reduction in corporate tax payable as deduction allowed	8 400	36 750	31 500		76 650
Withholding tax on management services	20%	35%	15%		
Withholding tax payable	-21 000	-36 750	-15 750	-73 500	-73 500
Net tax (collected)/foregone by country concerned	-12 600	-	15 750		
Net profit/(loss) after taking into account withholding tax costs incurred				-58 500	-296 850
Corporate tax rate in United Kingdom				22%	
Reduction in corporate tax payable if withholding tax allowed as a deduction in full				12 870	12 870
Net group loss position					-283 980

Example 2:

SA Co is the holding company of a large international group. It provides intra-group management services to a number of its operations. The group policy requires that the cost-plus method be used to determine the relevant charge. A margin of 5% is considered reasonable and added to the actual costs determined. Services are rendered to entities located in the Republic of Uzbekistan, Argentina and Gambia, amongst others. The services are rendered from the head office located in South Africa and is regarded as income from a domestic source for income tax purposes in South Africa. A tax credit is therefore not available and there is limitation on claiming a deduction for any withholding tax levied on domestic income as an expense for tax purposes. The entity located in the country which benefitted from the services rendered allowed a deduction for the service fee levied. All other income received and expenditure incurred are ignored for purposes of the example.

The tax consequences on a country-by-country basis are as follows:

Description	Uzbekistan	Argentina	Gambia	South Africa	Overall position
Service fee income				315 000	315 000
Costs incurred to provide services				-300 000	-300 000
Intra-group service fees incurred	-105 000	-105 000	-105 000		-315 000
Net profit/(loss) before taking into account withholding tax costs incurred	-105 000	-105 000	-105 000	15 000	-300 000
Corporate tax rate in recipient country	8%	35%	30%		
Reduction in corporate tax payable as deduction allowed	8 400	36 750	31 500		76 650
Withholding tax on management services	20%	35%	15%		
Withholding tax payable	-21 000	-36 750	-15 750	-15 000	-73 500
Net tax (collected)/foregone by country concerned	-12 600	-	15 750		
Net profit/(loss) after taking into account withholding tax costs incurred				NIL	-296 850
Corporate tax rate in United Kingdom				28%	
Reduction in corporate tax payable if withholding tax allowed as a deduction in full				NIL	NIL
Net group loss position					-296 850

Example 3:

Honduras Co is the holding company of a large international group. It provides intra-group management services to a number of its operations. The group policy requires that the cost-plus method be used to determine the relevant charge. A margin of 5% is considered reasonable and added to the actual costs determined. Services are rendered to entities located in the Republic of Uzbekistan, Argentina and Gambia, amongst others. The services are rendered from the head office located in the Honduras and is regarded as income from a domestic source for income tax purposes in South Africa. Neither a tax credit nor a deduction for any withholding tax paid is available. The entity located in the country which benefitted from the services rendered allowed a deduction for the service fee levied. All other income received and expenditure incurred are ignored for purposes of the example.

The tax consequences on a country-by-country basis are as follows:

Description	Uzbekistan	Argentina	Gambia	Honduras	Overall position
Service fee income				315 000	315 000
Costs incurred to provide services				-300 000	-300 000
Intra-group service fees incurred	-105 000	-105 000	-105 000		-315 000
Net profit/(loss) before taking into account withholding tax costs incurred	-105 000	-105 000	-105 000	15 000	-300 000
Corporate tax rate in recipient country	8%	35%	30%		
Reduction in corporate tax payable as deduction allowed	8 400	36 750	31 500		76 650
Withholding tax on management services	20%	35%	15%		
Withholding tax payable	-21 000	-36 750	-15 750	NIL	-73 500
Net tax (collected)/foregone by country concerned	-12 600	-	15 750		
Net profit/(loss) after taking into account withholding tax costs incurred				-58 500	-296 850
Corporate tax rate in United Kingdom				25%	
Reduction in corporate tax payable if withholding tax allowed as a deduction in full				-3 750	-3 750
Net group loss position					-300 600

Annexure 12(1)

Comparison of withholding tax on royalties to withholding tax on technical fees and management or service fees

Withholding tax on technical fees as percentage of withholding tax on royalties

Jurisdiction	Royalties	Technical	Percentage
Mauritania	0%	25%	
Brunei Darussalam	10%	20%	200%
Ethiopia	5%	10%	200%
Latvia	5%	10%	200%
Palestinian Autonomous Areas	5%	10%	200%
Singapore	10%	17%	170%
Belize	15%	25%	167%
Ghana	10%	15%	150%
Nicaragua	10%	15%	150%
Kazakhstan	15%	20%	133%
Republic of Serbia	20%	25%	125%
Israel	25%	30%	120%
Papua New Guinea	10%	12%	120%
Albania	10%	10%	100%
Algeria	24%	24%	100%
American Samoa	30%	30%	100%
Andorra	10%	10%	100%
Antiqua and Barbuda	25%	25%	100%
Argentina	35%	35%	100%
Armenia	10%	10%	100%
Austria	20%	20%	100%
Bangladesh	10%	10%	100%
Barbados	15%	15%	100%
Belarus	15%	15%	100%
Berin	12%	12%	100%
Bolivia	12.5%	12.5%	100%
Bosnia and Herzogovina	10%	10%	100%
Botswana	15%	15%	100%
Brazil	15%	15%	100%

Comparison of withholding tax on royalties to withholding tax on technical fees and management or service fees

Withholding tax on technical fees as percentage of withholding tax on royalties

Jurisdiction	Royalties	Technical	Percentage
Bulgeria	10%	10%	100%
Burkina Faso	20%	20%	100%
Burundi	15%	15%	100%
Cambodia	14%	14%	100%
Cameroon	15%	15%	100%
Canada	20%	20%	100%
Cape Verde	20%	20%	100%
Central Africa Republic	20%	20%	100%
Chad	25%	25%	100%
Chile	15%	15%	100%
Colombia	10%	10%	100%
Republic of Congo	20%	20%	100%
Cook Islands	15%	15%	100%
Costa Rica	25%	25%	100%
Croatia	15%	15%	100%
Cuba	4%	4%	100%
Czech Republic	15%	15%	100%
Djibouti	10%	10%	100%
Commonwealth of Dominica	15%	15%	100%
Dominican Republic	28%	28%	100%
Ecuador	22%	22%	100%
Egypt	20%	20%	100%
El Salvador	20%	20%	100%
Equatorial Guinea	10%	10%	100%
Eritea	10%	10%	100%
Estonia	10%	10%	100%
Fiji	15%	15%	100%
France	33.3%	33.3%	100%
French Guiana	33.3%	33.3%	100%
Gabon	10%	10%	100%
Gambia	15%	15%	100%
Georgia	10%	10%	100%

Comparison of withholding tax on royalties to withholding tax on technical fees and management or service fees

Withholding tax on technical fees as percentage of withholding tax on royalties

Jurisdiction	Royalties	Technical	Percentage
Greece	25%	25%	100%
Guadeloupe	33.3%	33.3%	100%
Guatamala	15%	15%	100%
Guinea	15%	15%	100%
Guinea-Bissau	10%	10%	100%
Guyana	20%	20%	100%
Honduras	25%	25%	100%
India	25%	25%	100%
Indonesia	20%	20%	100%
Isle of Man	20%	20%	100%
Ivory Coast	20%	20%	100%
Jamaica	33.3%	33.3%	100%
Japan	20%	20%	100%
Jordan	7%	7%	100%
Kenya	20%	20%	100%
Kiribati	30%	30%	100%
Deomocratic People's Republic of Korea (North Korea)	20%	20%	100%
Republic of Korea (South Korea)	20%	20%	100%
Kuwait	15%	15%	100%
Kyrgyzstan	10%	10%	100%
Lebanon	7.5%	7.5%	100%
Liberia	15%	15%	100%
Macedonia	10%	10%	100%
Madagascar	10%	10%	100%
Malawi	15%	15%	100%
Malaysia	10%	10%	100%
Maldives	10%	10%	100%
Martinique	33.3%	33.3%	100%
Mexico	25%	25%	100%
Moldova	12%	12%	100%
Mongolia	20%	20%	100%
Republic of Montenegro	9%	9%	100%

Comparison of withholding tax on royalties to withholding tax on technical fees and management or service fees

Withholding tax on technical fees as percentage of withholding tax on royalties

Jurisdiction	Royalties	Technical	Percentage
Montserrat	20%	20%	100%
Morocco	10%	10%	100%
Mozambique	20%	20%	100%
Republic of Namibia	25%	25%	100%
Nepal	15%	15%	100%
Niger	16%	16%	100%
Nigeria	10%	10%	100%
The Sultanate of Oman	10%	10%	100%
Pakistan	15%	15%	100%
Panama	12.5%	12.5%	100%
Paraguay	15%	15%	100%
Peru	30%	30%	100%
Philippines	25%	25%	100%
Poland	20%	20%	100%
Portugal	25%	25%	100%
Puerto Rico	29%	29%	100%
Qatar	5%	5%	100%
Romania	16%	16%	100%
Rwanda	15%	15%	100%
San Marino	15%	15%	100%
Sao Tome and Principe	20%	20%	100%
Senegal	20%	20%	100%
Seychelles	15%	15%	100%
Slovak Republic	19%	19%	100%
Slovenia	15%	15%	100%
Republic of South Africa	15%	15%	100%
Spain	24.75%	24.75%	100%
St Kitts and Nevis	10%	10%	100%
St Lucia	25%	25%	100%
St Vincent and the Grenadines	20%	20%	100%
Sudan	15%	15%	100%
Swaziland	15%	15%	100%

Comparison of withholding tax on royalties to withholding tax on technical fees and management or service fees

Withholding tax on technical fees as percentage of withholding tax on royalties

Jurisdiction	Royalties	Technical	Percentage
Taiwan	20%	20%	100%
Tajikistan	15%	15%	100%
Tanzania	15%	15%	100%
Thailand	15%	15%	100%
Timor-Leste	10%	10%	100%
Togo	15%	15%	100%
Tonga	15%	15%	100%
Trinidad and Tobago	15%	15%	100%
Tunisia	15%	15%	100%
Turkey	20%	20%	100%
Turkmenistan	15%	15%	100%
Uganda	15%	15%	100%
Ukraine	15%	15%	100%
United States of America	30%	30%	100%
Uruguay	12%	12%	100%
US Virgin Islands	10%	10%	100%
Republic of Uzbekistan	20%	20%	100%
Vietnam	10%	10%	100%
Yemen	10%	10%	100%
Zambia	20%	20%	100%
Zimbabwe	15%	15%	100%
Azerbaijan	14%	10%	71%
Democratic Republic of Congo	20%	14%	70%
People's Republic of China	30%	20%	67%
Bhutan	5%	3%	60%
Syria	5%	3%	60%
Venezuela	30.6%	17%	56%
Angola	10%	5.25%	53%
Mali	30%	15%	50%
Solomon Islands	15%	7.5%	50%
Lesotho	25%	10%	40%
Iran	8%	3%	38%

Comparison of withholding tax on royalties to withholding tax on technical fees and management or service fees

Withholding tax on technical fees as percentage of withholding tax on royalties

Jurisdiction	Royalties	Technical	Percentage
Comoros Islands	30%	10%	33%
Kingdom of Saudi Arabia	15%	5%	33%
Sri Lanka	15%	5%	33%
Kosovo	10%	3%	30%
Myanmar	20%	3.5%	18%

Annexure 12(2)

Comparison of withholding tax on royalties to withholding tax on technical fees and management or service fees

Withholding tax on management fees as percentage of withholding tax on royalties

Jurisdiction	Royalties	Management	Percentage
Solomon Islands	15%	35%	233%
Brunei Darussalam	10%	20%	200%
Ethiopia	5%	10%	200%
Latvia	5%	10%	200%
Palestinian Autonomous Areas	5%	10%	200%
Papua New Guinea	10%	17%	170%
Singapore	10%	17%	170%
Belize	15%	25%	167%
Brazil	15%	25%	167%
Georgia	10%	15%	150%
Ghana	10%	15%	150%
Nicaragua	10%	15%	150%
Qatar	5%	7%	140%
Kazakhstan	15%	20%	133%
Kingdom of Saudi Arabia	15%	20%	133%
Republic of Serbia	20%	25%	125%
Venezuela	30.6%	34%	111%
Albania	10%	10%	100%
Algeria	24%	24%	100%
American Samoa	30%	30%	100%
Andorra	10%	10%	100%
Antiqua and Barbuda	25%	25%	100%
Argentina	35%	35%	100%
Armenia	10%	10%	100%
Bangladesh	10%	10%	100%
Barbados	15%	15%	100%
Belarus	15%	15%	100%
Berin	12%	12%	100%
Bolivia	12.5%	12.5%	100%

Comparison of withholding tax on royalties to withholding tax on technical fees and management or service fees

Withholding tax on management fees as percentage of withholding tax on royalties

Jurisdiction	Royalties	Management	Percentage
Bosnia and Herzogovina	10%	10%	100%
Botswana	15%	15%	100%
Bulgeria	10%	10%	100%
Burkina Faso	20%	20%	100%
Burundi	15%	15%	100%
Cambodia	14%	14%	100%
Cameroon	15%	15%	100%
Canada	20%	20%	100%
Cape Verde	20%	20%	100%
Central Africa Republic	20%	20%	100%
Chile	15%	15%	100%
Colombia	10%	10%	100%
Republic of Congo	20%	20%	100%
Cook Islands	15%	15%	100%
Costa Rica	25%	25%	100%
Croatia	15%	15%	100%
Cuba	4%	4%	100%
Czech Republic	15%	15%	100%
Djibouti	10%	10%	100%
Commonwealth of Dominica	15%	15%	100%
Dominican Republic	28%	28%	100%
Ecuador	22%	22%	100%
El Salvador	20%	20%	100%
Equatorial Guinea	10%	10%	100%
Eritea	10%	10%	100%
Estonia	10%	10%	100%
Fiji	15%	15%	100%
France	33.3%	33.3%	100%
French Guiana	33.3%	33.3%	100%
Gabon	10%	10%	100%
Gambia	15%	15%	100%
Greece	25%	25%	100%

Comparison of withholding tax on royalties to withholding tax on technical fees and management or service fees

Withholding tax on management fees as percentage of withholding tax on royalties

Jurisdiction	Royalties	Management	Percentage
Guatamala	15%	15%	100%
Guinea	15%	15%	100%
Guyana	20%	20%	100%
Honduras	25%	25%	100%
India	25%	25%	100%
Indonesia	20%	20%	100%
Isle of Man	20%	20%	100%
Israel	25%	25%	100%
Ivory Coast	20%	20%	100%
Jamaica	33.3%	33.3%	100%
Jordan	7%	7%	100%
Kenya	20%	20%	100%
Kiribati	30%	30%	100%
Deomocratic People's Republic of Korea (North Korea)	20%	20%	100%
Republic of Korea (South Korea)	20%	20%	100%
Kuwait	15%	15%	100%
Kyrgyzstan	10%	10%	100%
Lebanon	7.5%	7.5%	100%
Lesotho	25%	25%	100%
Liberia	15%	15%	100%
Macedonia	10%	10%	100%
Madagascar	10%	10%	100%
Malawi	15%	15%	100%
Malaysia	10%	10%	100%
Maldives	10%	10%	100%
Mexico	25%	25%	100%
Moldova	12%	12%	100%
Mongolia	20%	20%	100%
Republic of Montenegro	9%	9%	100%
Montserrat	20%	20%	100%
Morocco	10%	10%	100%
Mozambique	20%	20%	100%

Comparison of withholding tax on royalties to withholding tax on technical fees and management or service fees

Withholding tax on management fees as percentage of withholding tax on royalties

Jurisdiction	Royalties	Management	Percentage
Republic of Namibia	25%	25%	100%
Nepal	15%	15%	100%
Niger	16%	16%	100%
Nigeria	10%	10%	100%
The Sultanate of Oman	10%	10%	100%
Pakistan	15%	15%	100%
Panama	12.5%	12.5%	100%
Paraguay	15%	15%	100%
Peru	30%	30%	100%
Philippines	25%	25%	100%
Poland	20%	20%	100%
Portugal	25%	25%	100%
Puerto Rico	29%	29%	100%
Romania	16%	16%	100%
Rwanda	15%	15%	100%
San Marino	15%	15%	100%
Sao Tome and Principe	20%	20%	100%
Senegal	20%	20%	100%
Seychelles	15%	15%	100%
Slovak Republic	19%	19%	100%
Slovenia	15%	15%	100%
Republic of South Africa	15%	15%	100%
Spain	24.75%	24.75%	100%
St Kitts and Nevis	10%	10%	100%
St Lucia	25%	25%	100%
St Vincent and the Grenadines	20%	20%	100%
Sudan	15%	15%	100%
Swaziland	15%	15%	100%
Taiwan	20%	20%	100%
Tajikistan	15%	15%	100%
Tanzania	15%	15%	100%
Thailand	15%	15%	100%

Comparison of withholding tax on royalties to withholding tax on technical fees and management or service fees

Withholding tax on management fees as percentage of withholding tax on royalties

Jurisdiction	Royalties	Management	Percentage
Timor-Leste	10%	10%	100%
Togo	15%	15%	100%
Tonga	15%	15%	100%
Trinidad and Tobago	15%	15%	100%
Tunisia	15%	15%	100%
Turkey	20%	20%	100%
Turkmenistan	15%	15%	100%
Uganda	15%	15%	100%
Ukraine	15%	15%	100%
United States of America	30%	30%	100%
Uruguay	12%	12%	100%
US Virgin Islands	10%	10%	100%
Republic of Uzbekistan	20%	20%	100%
Yemen	10%	10%	100%
Zambia	20%	20%	100%
Zimbabwe	15%	15%	100%
Chad	25%	20%	80%
Azerbaijan	14%	10%	71%
Democratic Republic of Congo	20%	14%	70%
People's Republic of China	30%	20%	67%
Bhutan	5%	3%	60%
Syria	5%	3%	60%
Angola	10%	5.25%	53%
Mali	30%	15%	50%
Vietnam	10%	5%	50%
Iran	8%	3%	38%
Comoros Islands	30%	10%	33%
Sri Lanka	15%	5%	33%
Kosovo	10%	3%	30%
Myanmar	20%	3.5%	18%
Japan	20%	0%	0%
Austria	20%	N/A	

Comparison of withholding tax on royalties to withholding tax on technical fees and management or service fees

Withholding tax on management fees as percentage of withholding tax on royalties

Jurisdiction	Royalties	Management	Percentage
Egypt	20%	N/A	
Guadeloupe	33.3%	N/A	
Guinea-Bissau	10%	N/A	
Martinique	33.3%	N/A	
Mauritania	0%	N/A	