



**Thursday, September 6**

**Seminar H : Recent developments in International Taxation**

**Chair:** Chloe Burnett (Barrister, Australia)

**Panel Speakers:** Marlies de Ruiter (EY Netherlands), Joshua Odintz (Baker & McKenzie, USA), Hyejung Claire Byun (University of Seoul, Republic of Korea), Kees van Raad (ITC Leiden / Loyens & Loeff, Netherlands), Kuntal Dave (India), Mariana Miranda Lima (Brazil), Bob Stack (USA)

**Secretary:** Heidi Armin-Grimm (Deloitte Legal, Australia)

The Panel on the last day of 72nd IFA Congress at Seoul focussed on the recent developments in international tax on five themes viz. major shifts in the international tax order, increase in disputes, US tax reforms, cross border financing and transparency.

The first major trend observed by the Panel was convergence of tax policies on one hand and ‘unilateralism’ on the other hand. BEPS minimum standard, information exchange program, etc. were cited as examples leading to more convergence among the countries. While as different ways of translating BEPS standards into domestic legislation, wide variety of digital and IP tax measures, domestic anti-abuse provisions overriding arm’s length principle, geopolitics and ‘trade wars’, were noted as instances of unilateralism by the Panel.



**Ms. Marlies de Ruiter** noted that reduction in headline corporate income tax rates has been observed as a clear trend across countries coupled with introduction of minimum taxes. On the digital economy, she raised questions on “*how easy will it be to ring-fence it*”? Citing few examples, she stated that a company operating a digital platform would need to pay digital service tax in addition to the corporation tax and raised a question on whether it leads to discriminatory treatment.

The Panel thereafter noted major shifts in taxing digital economy. In this regard, the Panel observed different forms of quasi income taxes such as withholding tax, service PE, other specific anti avoidance rules (SAAR), diverted



profits tax, digital streaming taxes and digital PEs being applied to digital services. The Panel also noted widespread adoption of VAT on digital services especially with reference to B2C transactions.

**Prof. Kees van Raad** outlined major shifts in the concept of permanent establishment (PE). “PE is one of the oldest notions in international tax”, said Mr. Raad. He narrated an old example of a whether use of roads in another jurisdiction would create a PE for a trucking company because of the use of the infrastructure? He added that ways in which companies do business has changed. Mr. Raad also stated that PE has evolved into a highly artificial concept with almost 54 pages in 2017 OECD Commentary devoted to the concept of PE.

Continuing the discussion on trends in the PE concepts, the Panel noted US Supreme Court ruling in South Dakota versus Wayfair Inc which indicated diminishing importance of the physical presence and blurring concepts on ‘value creation’ between direct and indirect taxes.

**Mr. Kuntal Dave** then made an intervention with his analysis of two recent Indian rulings in case of E-funds and Master Card. Referring to the decisions, Mr. Dave added that sanctity of article on subsidiary PE would need to be examined. He also added that with respect to large technology companies, the decision raises a question on whether information hosted on servers outside of the country would be relevant for PE analysis.



Ms. Marlies de Ruiter commented that the issue of profit attribution is more important than the nexus question. She added that there are different perceptions about ‘value creation’ and these are not restricted to the digital economy but also apply to the traditional business models. She cited examples of marketing intangibles or market factors to buttress her point.

As regards the decreasing treaty protection, Prof Kees van Raad raised a question on “*Whether the balance within treaties has shifted from preventing double taxation to preventing evasion and avoidance?*” Tracing the history of anti-avoidance rules in treaties, Prof Kees van Raad gave an example of 1945 treaty between UK and USA which contained anti-avoidance rule.

On the second theme of the Panel i.e. increase in disputes, Ms. Marlies de Ruiter, quoting a recent survey, stated that most controversy is on the issue of transfer pricing and PEs. “*Another major issue is retrospective application of BEPS -measures particularly relating to the transfer pricing*”, remarked the former OECD Head of Transfer Pricing and Tax Treaty Unit. Increase in



disputes is also arising because of greater access to the data by the Revenue authorities and consequential change in the country practices, she added.

**Mr. Joshua Odintz** added that information exchange in the form of CRS, FATCA, CBCR and enhanced mandatory disclosure rules for taxpayers and advisors has resulted in data overload and resources required to process the data.

On the third theme of the Panel i.e. US tax reforms, Mr. Joshua Odintz explained the key features of tax measures introduced in the US tax reform such as GILTI, FDII and BEAT. Commenting on BEAT, Ms. Marlies de Ruiter stated that USA is not the only country which restricts arm's length principle through BEAT. She added that there are countries which criticize USA on BEAT, but which have deduction limitation rules in their own law.

The Panel then went on to discuss the fourth theme about the cross-border financing. The Panel noted OECD's Discussion Draft on Transfer Pricing of Financial Transactions released in July



2018. **Mr. Bob Stack**, making an intervention, provided a 'critique' on the proposals. He stated that the approach of 'accurate delineation of the actual transaction' was used in determining whether the related party contract should be respected and identify the 'real deal' involved. Mr. Stack said that the 'accurate delineation of the actual transaction' concept has now been proposed to be used to treat debt as equity. He raised the question on "*what problems are we trying to solve*" and "*whether the cure is more problematic than the disease itself!*".

Mr. Stack then pondered over whether contracts or entities should be respected or MNC Groups be treated as one unit and then transfer pricing be applied. Concurring with Mr. Stack, Ms. Marlies de Ruiter commented that the OECD discussion draft has 'hybrid messaging' in it. This led the panel to revisit the discussion on the fundamental point of relevance of arm's length principle. Ms. Mariana Miranda Lima then made a brief intervention with regards to the Brazilian approach on the statutory presumption of interest rates and pros and cons of the approach.

The Panel, at the end, briefly discussed about the trends in transparency including the disclosure obligations on tax advisers.



**D T S & Associates**  
Chartered Accountants

**DTS & Associates Take:**

Let's put the entire discussion at the Seoul Congress in 2 perspectives. Looking at the overall theme of the Congress, the areas where the discussion was concentrated and the kind of future trends we are looking at, the message is loud and clear that tax controversy and disputes over nexus and allocation of profits, is here to stay. It's going to take a lot of persuasion to reach to a consensus and I think we can see everywhere, whether it's EU or U.S. or the developing countries, everybody is trying to have their own right of tax.

What is coming out from all the panel discussions, be it an OECD Panel or a GAAR panel, is the recognition that the existing definition with regard to establishing the nexus to a source state especially for 'without physical presence', is ineffective. People are recognizing the need to have new definitions, new rules, so that we can create certainty because that's what ultimately the taxpayers and the advisors want. They want certainty and predictability on where it is going to be.

Transfer Pricing as such is not a perfect science, It is economics. It is subjective and leaves a lot of room for differences of opinions. Looking it in a very pragmatic and serious tone, the role of dispute resolution is going to be a very important feature for the international tax developments because unless there is quick redressal of the multilateral effect as well as the unilateral effect by all countries, at the end the industry, global trade is going to suffer. From that regard, I think, the minimum requirement, minimum action point which is on AP (BEPS Action Plan) 14 with regard to dispute resolution, is going to play a very important role. We will have to wait and see how every country gets aligned to it. Probably it's a time that we have a procedure or set of rules in place which ensure that we avoid disputes.