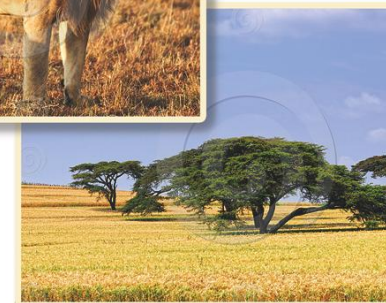
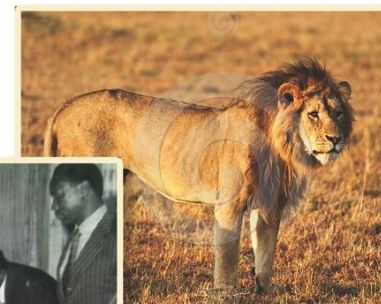
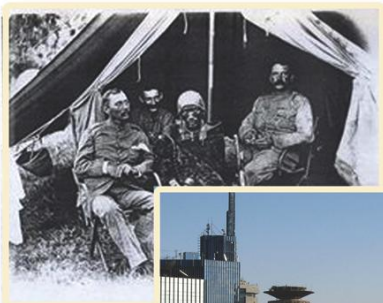


PKF Taxation Services Ltd

Emerging International Tax Trends



Presentation Scope

- 1) The Vodafone Case – India
 - 2) Tullow Oil Case - Uganda
 - 3) Kenya Finance Bill, 2014
 - 4) Tax Havens and the USA
 - 5) Swiss Banks Remittances to UK
 - 6) Shift from Direct to Indirect Taxes
 - 7) EU-ACP EPAs
 - 8) Chinese Tax Policy
 - 9) International Tax Arbitration
-



Primary Issue:

- Does India have jurisdiction to tax the indirect transfer of shares of an Indian company between two non-Indian companies?
 - Re-introduction of capital gains tax in Kenya- Impact of the Vodafone case?
-

Vodafone case cont...



Facts:

- In 2007, Vodafone's Dutch subsidiary acquired stock of a Cayman Islands company from a subsidiary of Hutchinson Telecommunications International Ltd (located in the Cayman Islands) at \$11.1 billion
 - The Cayman company acquired by Vodafone owned an indirect interest in Hutchinson Essar Ltd. (an Indian company) through several tiers of Mauritius and Indian companies
 - Vodafone had bought a controlling interest in Hutchinson Essar via its purchase of the Cayman entity
-

Vodafone case cont...



Facts:

- The Indian taxing authorities attempted to impose a \$2.5 billion withholding tax(Capital Gains Tax) liability on Vodafone
 - Indian tax law provided that India could subject a non-resident person to withholding tax on gain from the sale of a capital asset only if the asset was located in India.
 - Their argument was that, because the transfer of stock involved an indirect interest in the Indian company, India had jurisdiction to tax the gain from the transaction
-

Vodafone case cont...

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Held (Indian Supreme Court):

- India did not have jurisdiction to impose withholding tax on Vodafone for the purchase of Hutchinson Essar
-

Vodafone case cont...

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Reasons for Decision:

- Indian tax law - no provision for taxation of gains from sale of an **indirect interest** in an Indian company
 - Transaction **not a sham** – corporate structures (Vodafone and Hutchinson) were in place for a substantial period of time and were not implemented solely to effect the sale
 - **Substance over form** - The structure at issue was *bona fide* and had business substance. Not merely a device to deprive the Indian tax authority of revenue.
-

Vodafone case cont...



The Aftereffects:

- Indian legislature considering a Bill (with retrospective effect) permitting the taxation of capital gains on the indirect transfer of shares of an Indian company
 - With at least 50% of the assets of the transferor (directly or indirectly) consist of assets in India
 - Other countries' revenue departments expressed their support for India – global trend attempt to tax non-residents on indirect transfer of shares
-

Vodafone case cont...

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Implications:

- China issued notice that provides for a 10% withholding tax on capital gains derived by businesses outside China from the sale or exchange of shares in Chinese companies
 - Alert to investors doing business in India, China and other non-U.S. jurisdictions
-

Tullow Oil Case - Uganda

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- \$2.9bn sale of Tullow's 66% stake in three oil blocks in Uganda to Total, of France and CNOOC, in 2012
 - URA assessed approximately \$472m in CGT
 - Tullow paid 30% of the assessment (around \$142m/£82m)
 - TAT ruled that Tullow was liable to pay \$407m that an agreement for exemption from CGT was invalid
 - Held that Tullow could not rely on the principle of legitimate expectation relating to the CGT claim as 'their expectation was not legitimate'
-

Limitations to benefits under DTAs:

- Amendment to Section 41 of the ITA
- Benefits – preferential rates of tax, exemptions and exclusions
- Only applicable to an individual or individuals who are resident in the contracting state – underlying ownership 50% plus in the contracting state
- Listed companies not subject to this limitation
- Aim is to reduce instances of abuse of the incentives under the DTA e.g. individuals raising invoices from countries with DTAs but are not residents

Kenya Finance Act, 2014



Tax Disclosure Requirements :

Taxpayers required to inform the Commissioner within 30 days of the changes to the following:

- The place of business, trading name and contact address;
- In the case of:
 - ✓ An incorporated person, of the persons with shareholding of 10% or more of issued share capital;
 - ✓ A nominee ownership, to disclose the beneficial owner of shareholding;
 - ✓ A trust, full identity and address details of settlers and beneficiaries of the trust;
 - ✓ A partnership, the identity and address of all partners; or
 - ✓ Cessation or sale of business, all relevant information regarding liquidation or details of new ownership.

Kenya Finance Bill, 2014



Permanent Establishment:

- Expanded definition – A fixed place of business and includes a place of management, branch, office, factory, workshop or mine, or oil/gas well/quarry or any place of extraction of natural resources or building site or a construction or installation project which has existed for six months or more where that person wholly or partly carries on business
 - Aim is to seal any loopholes and safeguard tax revenues from all sources – natural resource income & widening of transfer pricing scope
-

Tax havens and the USA

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Background:

- In 2010, earnings reported by U.S. subsidiaries in the Bahamas, Bermuda, the British Virgin Islands, the Cayman Islands and Luxembourg outpaced those countries' GDP by far!
 - 54% of US corporations' offshore profits were claimed in a dozen tax havens
 - Other notorious tax havens include Barbados, Cyprus, Ireland, the Netherlands, the Netherlands Antilles, Singapore and Switzerland
 - Study triggered by aftermath of USA/Europe Economic Meltdown 2008/2009
-

Tax havens and the USA



Recent Proposed Legislation:

- The Levin-Whitehouse-Begich- Shaheen Stop Tax Haven Abuse Act
- Sequester Delay And Stop Tax Haven Abuse Act
- The Stop Corporate Inversions Act

Aim of the proposed legislation is to significantly reduce tax loopholes that allow US companies that merge with foreign companies to reincorporate offshore in lower-tax jurisdictions

Tax Havens and the USA

Proposals:

- US Treasury measures to stop offshore tax abuse against foreign jurisdictions or financial institutions that impede US tax enforcement e.g. prohibiting U.S. banks from doing business with a designated foreign bank
- Strengthen Foreign Account Tax Compliance Act e.g. require foreign financial institutions and U.S. persons to report foreign financial accounts to the IRS
- Shifting of the burden of proof to US taxpayer to combat secrecy - who controls the offshore entity, when offshore accounts have enough cash to trigger a reporting obligation

Tax Havens and the USA

Proposals:

- Stop companies incorporated offshore but managed and controlled from the United States from claiming foreign status - Treat them as U.S. domestic corporations for tax purpose
 - Strengthen detection of offshore activities e.g. require U.S. financial institutions that open accounts for foreign entities controlled by U.S. clients or open foreign accounts in non-FATCA institutions for U.S. clients to report the accounts to the IRS
 - Close the offshore swap payments loophole e.g. treat swap payments that originate in the United States as taxable U.S. source income
-

Tax Havens and the USA

Proposals:

- Require annual country-by-country reporting e.g. disclose employees, gross revenues, and tax payments on a per country basis
 - Establish a penalty on corporate insiders who hide offshore holdings with a securities law fine of up to \$1 million per violation
 - Require anti-money laundering programs
 - Combat hidden foreign financial accounts by facilitating IRS use of Foreign Bank Account Reports and Suspicious Activity Reports, and simplifying penalties for unreported foreign accounts
-

Tax Havens and the USA

Proposals:

- Eliminate incentives for offshoring jobs and operations e.g. deferring corporate tax deductions for expenses related to deferred income so that, for example, a U.S. corporation could not take a tax deduction for building a plant offshore until it also declared and paid taxes on income produced by that plant
 - Stop foreign tax credit manipulation e.g. require foreign tax credits to be considered on a pooled basis
 - Limit incentives to move intellectual property and related marketing rights offshore
-

Tax Havens and the USA

Proposals:

- Stop offshore loan abuse e.g. Prevent multinationals from artificially repatriating offshore funds tax-free by treating them as short-term loans from their offshore subsidiaries to their U.S. operations

The Pfizer and AstraZeneca Case

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Facts:

- Pfizer Inc (US) bid to acquire British pharmaceutical company AstraZeneca
- Pfizer wanted to strike an overseas takeover to cut its tax rate

Issue:

- Corporate inversion - a U.S. company acquires a foreign firm, then reincorporates its headquarters overseas into a lower-tax jurisdiction
 - AstraZeneca rejected Pfizer's offer
-

Swiss Banks Remittances to UK

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- On 6 October 2011 the UK government signed the UK/Swiss Tax Co-Operation Agreement with Switzerland
 - Aims to tackle offshore tax evasion and resolve the long-standing abuse of Swiss banking secrecy
 - Ensures a bilateral cooperation between the UK and Switzerland to ensure effective taxation in the UK of individuals with financial assets in Switzerland
 - Accounts held by individuals including UK persons who are the beneficial owners of offshore companies, foundations, trusts and other establishments not trading or carrying on commercial activities.
-

Swiss Banks Remittances to UK

- Enables Swiss banking secrecy to be preserved but, at the same time, removes the charge that this secrecy assists tax evasion
 - Beneficial owners of relevant assets either:
 - ✓ authorise the Swiss bank to disclose certain details to the UK Revenue, or
 - ✓ opt to preserve Swiss banking secrecy and accept that the bank will deduct a significant withholding tax and hand it direct to HMRC
 - Many UK persons with Swiss assets may prefer a disclosure as it is likely to be the most appropriate (and cheaper) route
-

Shift from Direct to Indirect Taxes

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Introduction:

- Gradual shift from direct to indirect taxes in the UK and the rest of the world
 - There is a spread in VAT and Goods and Services Tax and the design of these taxes is constantly under review where already in place
 - India and China are contemplating changes, with China moving rapidly to the transition from business tax to a full VAT system
 - The US is also considering VAT its main tax
-

Shift from Direct to Indirect Taxes

Indirect Tax:

- There is now increased focus on:
 - ✓ VAT
 - ✓ customs duties;
 - ✓ excise duties;
 - ✓ other trade charges/levies; and
 - ✓ environmental taxes among others
 - It is less easy to avoid and it can also affect people on low income – has a large tax base since it is consumption based
-

Definition:

- Economic Partnership Agreements (EPAs) – A scheme to create a Free Trade Area (FTA) between the European Union (EU) and the African, Caribbean and Pacific (ACP) countries
 - The seven ACP regions –
 - West Africa
 - Central Africa
 - ESA – Eastern & Southern Africa
 - EAC
 - SADC
 - Caribbean
 - Pacific
-

EU-ACP EPAs

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Aim:

- EPAs are changing this preferential access from non-reciprocal to reciprocal access, i.e., ACP countries will be required to open their markets to EU imports and furthermore, require liberalization in other areas such as investment and services
-

Contentious Issues:

- Regional integration - Economic integration with the EU while undermining regional integration in Africa (regional customs union) – local challenges e.g. EAC integration problems
 - 80% liberalisation vs home industrial development
 - Liberalisation of investment and services - In addition to liberalisation of trade in goods, the EU is trying to liberalise foreign investment, services and public procurement. This is to go beyond current WTO commitments
-

EU-ACP EPAs

Challenges:

- Will they support the regional integration of the ACP countries or lay these economies open to subsidised European exports?
 - EPAs are fraught with disagreements
 - Need for the EU to allow for greater flexibility in EPA negotiations
 - Least Developed Countries which currently benefit from preferential market access into the EU market for their products stand to gain nothing from signing an EPA - since they would receive the same preferences as now - but have much to lose as they would have to open their markets to EU imports and regulation
-

EU-ACP EPAs

Challenges:

- EPA negotiations are breaking existing regional alignments and forcing ACP countries to choose the body through which they will negotiate with the EU. Within each EPA regional body, there are problems of overlapping memberships
 - Africa has achieved much out of China's economic rise – will growth be curtailed by the EPA's????
-

International Tax Arbitration

- Cross-border tax disputes are usually channelled through the mutual agreement procedure, an informal negotiation between the tax authorities of the states involved
 - Arbitration has been suggested as an alternative and is starting to be instituted
 - The International Chamber of Commerce (ICC) is committed to encouraging governments to accept compulsory arbitration in international tax conflicts
-

International Tax Arbitration

- Most bilateral tax conventions provide for a mutual agreement procedure as a means of resolving disputes concerning the application of the convention to taxpayers
 - This procedure entails discussions between the competent authorities of the two signatory states
-

International Tax Arbitration

EU Practice (The EU Convention):

- A multilateral agreement and arbitration is compulsory
 - The result of the arbitration is not technically binding, but the Convention does ensure that a binding result is obtained
 - The Convention applies to permanent establishments as well as companies
 - Applies to both juridical and economic double taxation
 - The taxpayer has the right to initiate arbitration ("right of initiative")
 - No rules of procedure are prescribed. These are to be determined by the competent authorities
-

International Tax Arbitration

EU Practice (The EU Convention):

- The Convention establishes a timetable:
 - the enterprise has 3 years to present the case to arbitration;
 - the competent authorities have 2 years to resolve the matter under the mutual agreement procedure;
 - if this does not occur, the competent authorities have 6 months to establish an "advisory commission," which commission has 6 months to decide the case.
 - No judicial review is permitted
 - Arbitration is not applicable in cases of "serious penalty"
-

International Tax Arbitration

US Practice:

- Arbitration not compulsory - Occurs only with the consent of both competent authorities and the taxpayer
 - The arbitration is binding on all parties (including the taxpayer)
 - An exception is provided so that the competent authorities will not generally accede to arbitration concerning matters of tax policy or domestic law
 - Taxpayers are provided with the right to present their views
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