

SATURDAY INTERNATIONAL TAX GYAN !!!

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MLI For Beginners PART- 15

SITG
No. 154

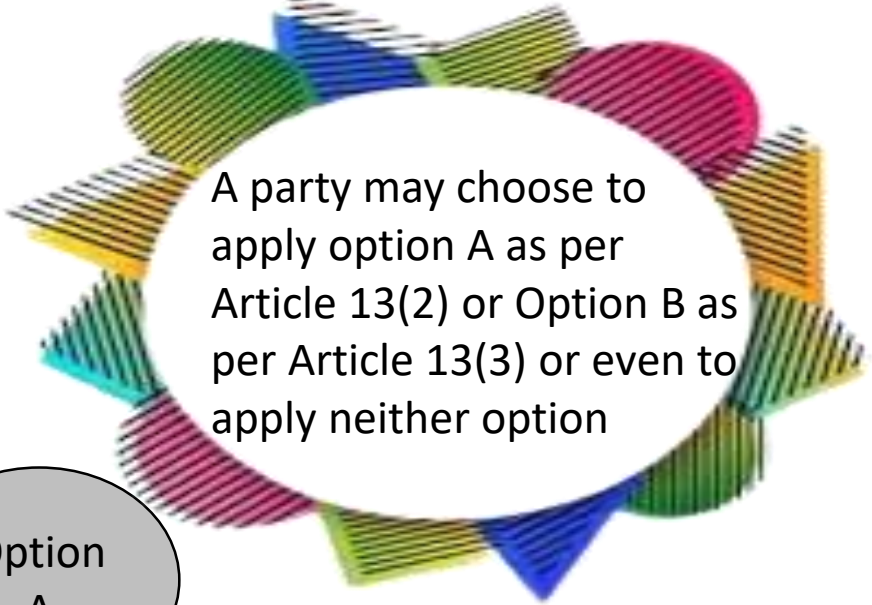
ARTICLE – 13

**Artificial Avoidance of
Permanent Establishment
Status through the
Specific Activity
Exemptions**



**PERMANENT
ESTABLISHMENT**

Date : 20.05.2023



A party may choose to apply option A as per Article 13(2) or Option B as per Article 13(3) or even to apply neither option

Option
A

All listed activities, must be of-

- preparatory, or
- auxiliary character,

in order for them to be exception to PE status.

This means that the activities must be supporting or helping nature, but should not be the main purpose of enterprise.

Enterprise carrying on activities listed in CTAs through a fixed place of business shall not be considered PE, even if the PE status is contingent to **preparatory and auxiliary** character activity.

Option
B

Under option B, being of a preparatory or auxiliary character is not required for an activity which are considered exception to PE status.

Such condition shall be irrespective of whether they are of preparatory or auxiliary character under CTA.



List of the specific activity exemptions that are included in both Option A and Option B of Article 13 of the MLI:

1

The use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;

2

The maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;

3

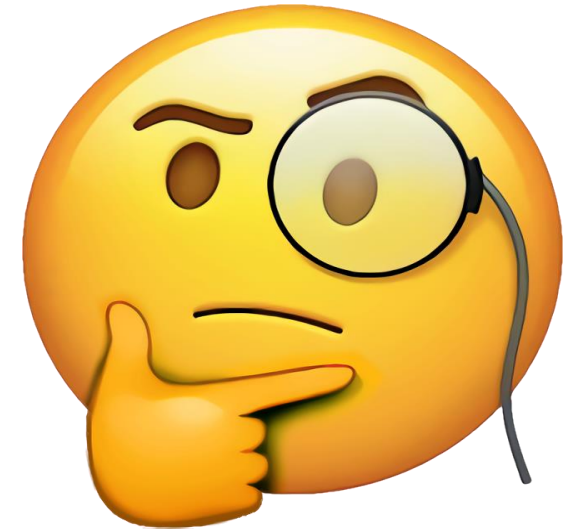
The maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

4

The maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;

5

The maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character.



New Anti-fragmentation Rule

Article 13(4) of MLI provides option to adopt for new anti-fragmentation rules (even if option A or B not chosen) whereby specific activity exemption of the listed activities is not available.

Anti-fragmentation Rule

It **aims to prevent** multi-national enterprises from artificially avoiding the creation of a PE in a country by fragmenting their operations into multiple small parts.

The rule **applies** where an enterprise fragments its operations into multiple small parts to take advantage associated with claiming exemption from PE status.

If the fragmented activities taken together, **constituting a significant part** of enterprise's overall business, then the anti-fragmentation rule shall prevent from claiming such exemption.

Condition 1

Same or closely related enterprise carries on business activities at the same or another place in the contracting jurisdiction

Condition 2

at least one of the places constitute PE, **OR** overall activity resulting from combination of activities carried on by two enterprises at same place is **not of a Preparatory or auxiliary character**

Condition 3

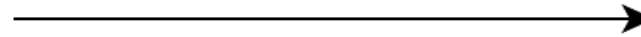
Aggregate business activities constitute complementary functions that are part of **cohesive business operation**

Let's understand with an example the para 4

Company A
Tax Resident of Germany



Provides installation services to
Company B and earns revenue of
Rs 1 Crore



Company B
Tax Resident of India



Pre MLI

Company has two fixed places in India
First place- Employees which provide the installation services
Second Place- Carries out the activity of gathering information with respect to installation

First Place constitute a **PE in India** but
second place falls under specific exemption
and **does not constitute a PE**

Post MLI

However after introduction of para 4 in the tax treaty both the places
would constitute a PE in India

India's Position

India has **selected option A of article 13** with respect to specific activity exemption. Therefore, w.r.t. Indian tax treaty ,where the other country has also selected option A, all the activities for purpose of exemption would be subjected to the fulfilment of the **condition of preparatory and auxiliary.**

Therefore, in the absence of specific reservation, **para 4 shall also apply** to Indian tax treaties, unless the other country has not reserved not to apply the same and has also notified provisions of the tax treaty.

Documents can be referred for Interpretation of MLI

Basic Documents:

- BEPS Action Plan 15
- Explanatory Statement to MLI
- MLI Positions adopted and deposited by Various MLI signatories with OECD
- Report on BEPS Action Plan 2,6,7,14
- Existing tax treaty
- OECD Model Convention of Tax treaty and OECD Commentaries
- Synthesized text of MLI between parties to CTA

Other Documents available on OECD website:

- [List of Signatories and parties to MLI](#)
- [Frequently Asked Questions \(FAQs\) on MLI](#)
- [Flow chart on matching of reservations and notifications of MLI](#)
- [Legal note on functioning on MLI under public international law](#)
- [Step by step on applying the MLI](#)
- [MLI Matching Database](#)

Link of OECD Website: <https://www.oecd.org/>

Reference of Previous SITG of MLI for beginners Series

S.No	Particulars	Link
1.	Basic (BEPS)	Click here
2.	Introduction to MLI	Click Here
3.	Structure and Framework of MLI	Click here
4.	India's position on MLI	Click Here
5.	Dual Residency of Entities (Article 4)	Click Here
6.	Application of Methods for Elimination of Double Taxation (Article 5)	Click here
7.	Purpose of CTA (Minimum Standard) (Article 6)	Click here

Reference of Previous SITG of MLI for beginners Series

S.No	Particulars	Link
8.	Incorporation of Strict Anti-Treaty abuse Rules [Part-I] (Article 7)	Click here
9.	Incorporation of strict Anti-Treaty abuse Rules [Part-II] (Article 7)	Click here
10.	GAAR v/s PPT [Part-III] (Article 7)	Click here
11.	Dividend Transfer Transaction (Article 8)	Click here
12	Capital gain from alienation of shares (Article 9)	Click here
13	Anti-abuse Rule for PEs in Third Jurisdiction (Article 10)	Click here
14	Application of Tax Agreements to Restrict party's Right to Tax its own Residents	Click here
15	Artificial Avoidance of Permanent Establishment Status through Commissionaire Arrangements and Similar Strategies	Click here

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