

SATURDAY INTERNATIONAL TAX GYAN !!!

#taxmadeeasy

MLI For Beginners PART- 15

SITG
No. 153

The Commissionaire Model
Taking Shape



SELL YOUR BUILDINGS LET YOUR SALES STAFF TELECOMMUTE.

ARTICLE – 12

**Artificial Avoidance of
Permanent Establishment
Status through
Commissionaire
Arrangements and Similar
Strategies**

Date : 13.05.2023

Commissionaire Arrangements



Company A
Situated in Country R

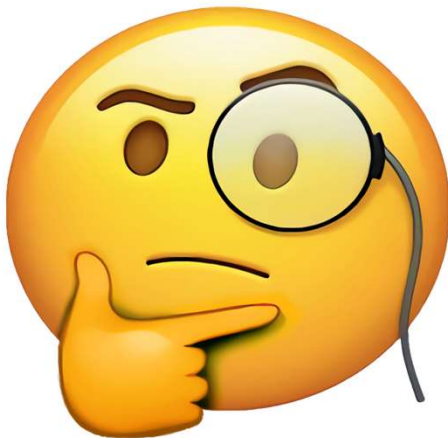
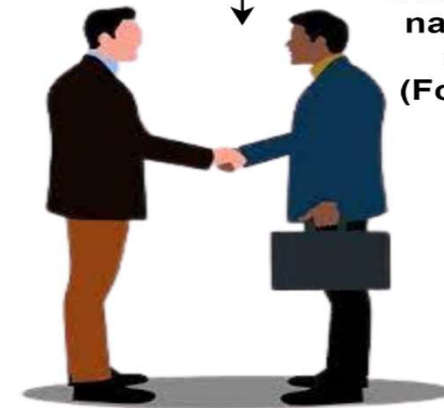
**Gives
Commission**



Company B
Situated in Country S

**Sell Goods in
Country S without
having PE in
Country S**

**Sell Goods in its own
name but on behalf
of Company A
(Foreign Company)**



How companies gets undue advantage of it.

Company A

- They can sell product in foreign country without having PE to which such sales may be attributed for tax purposes & without being taxable in that state on the profits derived from such sales.
- Returned profits are taxed in normal tax rates of place where company A is situated. Generally principal place has low tax rates.

Company B

- Company B does not own the products. So they don't have to pay tax in country R on sales, they have to pay tax only on remuneration they received.

Anti-abuse Rule

Para 1 of Article 12 states that -

Where a **Agent acting in behalf of Principal** and, in doing so , **habitually concludes contract** or habitually plays the principal role leading to the conclusion of the contracts that are routinely concluded without material modification by the enterprise, and **these contracts are:**

In the name of the enterprise

For transfer of ownership of or granting of right to use, property owned by that enterprise or that enterprise has the right to use

For the provision of service by that enterprise

then the enterprise shall be deemed to have a PE of contracting jurisdiction

The activities of the person (agent) undertaken through a fixed place will not become a PE, if they had been undertaken by the enterprise itself through a fixed place of business of that enterprise situated in that Contracting Jurisdiction, would not cause that fixed place of business to be deemed to constitute a permanent establishment under the definition of permanent establishment included in the Covered Tax Agreement.

Proviso

Article
12(2)
Exception:

Paragraph 1 shall **not apply where the person acting in a Contracting Jurisdiction** to a Covered Tax Agreement on behalf of an enterprise of the other Contracting Jurisdiction carries on business in the first mentioned Contracting Jurisdiction **as an independent agent and acts for the enterprise in the ordinary course of that business.**

Proviso
for Article
12(2):

If a person acts exclusively or almost exclusively on behalf of one or more enterprises to which it is closely related, that person shall not be considered to be an independent agent within the meaning of paragraph 2 with respect to any such enterprise.



India's position on Article 12 of MLI

Article 12(4) provides a Contracting Jurisdiction, a right to reserve from the applicability of the entire provisions of Article 12.

India has not opted for the Article 12(4). **Hence, the provisions of Article 12 shall be applicable if the other Contracting Jurisdictions has also opted for the same.**

Few Examples:

| Countries Notified by India | Positions of the Other Contracting Jurisdictions | Impact on India's CTA with the Country |
|----------------------------------|--|---|
| Japan, Netherlands and France | No specific reservation Notification for Para 1 and Para 2 | Article 12(1) and Article 12(2) would apply |
| Canada, Singapore, Sweden and UK | Opt out | No Impact |

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) | <u>Click here</u> |
| 2. | Introduction to MLI | <u>Click Here</u> |
| 3. | Structure and Framework of MLI | <u>Click here</u> |
| 4. | India's position on MLI | <u>Click Here</u> |
| 5. | Dual Residency of Entities (Article 4) | <u>Click Here</u> |
| 6. | Application of Methods for Elimination of Double Taxation (Article 5) | <u>Click here</u> |
| 7. | Purpose of CTA (Minimum Standard) (Article 6) | <u>Click here</u> |

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) | <u>Click here</u> |
| 9. | Incorporation of strict Anti-Treaty abuse Rules [Part-II] (Article 7) | <u>Click here</u> |
| 10. | GAAR v/s PPT [Part-III] (Article 7) | <u>Click here</u> |
| 11. | Dividend Transfer Transaction (Article 8) | <u>Click here</u> |
| 12 | Capital gain from alienation of shares (Article 9) | <u>Click here</u> |
| 13 | Anti-abuse Rule for PEs in Third Jurisdiction (Article 10) | <u>Click here</u> |
| 14 | Application of Tax Agreements to Restrict party's Right to Tax its own Residents | <u>Click here</u> |

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