

# **Report on the Global Tax Policy Conference Amsterdam, 6 March 2014**

**MCT Premium Team**

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## **1 Introduction**

The first Global Tax Policy Conference of the Maastricht Centre for Taxation was held at The Royal Netherlands Academy of Arts and Sciences in Amsterdam, the Netherlands on 6 March 2014. The purpose of the day was to share the knowledge and views on global tax policy through interactive discussions about key issues and emerging challenges in the dynamic area of tax policy.

The conference was opened by Prof. Dr. Hans van den Hurk, who briefly introduced the most challenging issues of tax policy in current times. He stressed that it would take years to overcome all the current tax policy problems and it is still doubtful, whether these can ever be solved. With an illustration of the Google case, he presented the current loopholes of tax systems of different states that multinational enterprises (MNEs) use in order to profit from low effective tax rates. Moreover, it was explained that the focus of the conference would be on tax policy under the UN model, giving special consideration to the BRIC countries. It was emphasized that these countries face difficulties when dealing with certain matters of taxation, for example, due to insufficient expertise of the tax administrations. Although the OECD tries to support countries applying the UN model<sup>1</sup>, this is not the best approach because of the diverging interests of the respective countries. Therefore, together with companies, new approaches have to be developed. After the opening

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1 United Nations Model Double Taxation Convention between Developed and Developing Countries.

speech, Prof. Dr. Hans van den Hurk gave the floor to the keynote speaker, Mr Sanjeev Gupta.

## 2 Presentation and Discussions

### 2.1 Mr Sanjeev Gupta – Recent Economic Developments and challenges for Revenue Mobilization in Emerging Market and Developing Economies

In his presentation, Mr Gupta presented the context of the further discussion based on the global tax policy.<sup>2</sup> Mr Gupta discussed the fiscal developments, risks and policy challenges as well as the challenges, scope and incentives for revenue mobilization.

While the recent economic crisis led to increased debt ratios in most advanced economies, these ratios are expected to decline from 2015 onwards<sup>3</sup>. Nevertheless, some countries, with the United States as the most notable example, still face debt ratios over 100%. At the time the fiscal drag is waning in most advanced economies (AEs), the emerging market economies (EMEs) will have to start rebuilding their buffers and challenge the risks of high debt and deficit ratios. In addition, the EMEs are exposed to external risks like lower prices for commodities. In low-income countries (LICs), expenditures outpacing the revenue mobilization and reduced access to concessional funds emphasize the importance of stronger revenue mobilization.

Whereas the EMEs and LICs have a stronger need for revenue mobilization, they face many numerous tax challenges. These vary from common risks of non-compliance, VAT gaps, weak revenue administration and poor governance; to country-specific factors like dependence on natural resources and geographical matters. Mr Gupta illustrated the potential for further revenue mobilization and room for efficiency improvements<sup>4</sup>, especially in the terms of consumption taxes. At the same time, compliance and policy gaps in EMEs as well as extensive exemptions and zero rating in LICs undermine this potential.

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2 Dr. Sanjeev Gupta is the acting Director of the Fiscal Affairs Department of the International Monetary Fund (IMF)

3 IMF, Fiscal Monitor, October 2013

4 World Bank World Development Indicators

Mr Gupta also explained how development assistance and natural resources affect incentives and in turn the fiscal policy. There seems to be a negative relation between offshore development assistance (ODA) and (domestic) tax revenue: higher ODA results in lower tax revenue. Also an increase in resource revenues seems to result in a reduction of domestic (non-resource) revenues. This may lead to reduced quality of public services, distrust in government and increased dependence on volatile revenues.

Mr Gupta concluded his presentation once again emphasizing the importance of revenue mobilization in EMEs and LICs and stressing the specific challenges of countries relying on aid and natural resources.

## **2.2 Mr Harry Roodbeen – International Tax Policy**

The second speaker Mr Roodbeen presented the opinion of the Dutch government on the issues regarding BEPS.<sup>5</sup> It was noted that the heated debates on the ethics of tax planning are taking place in many countries. The underlying argument is that companies, which benefit from public facilities, should pay their fair share of tax.

Each country has fiscal sovereignty to set up its own tax system. According to Mr Roodbeen, there is a lack of interaction between the domestic and international tax law, which gives rise to possibilities of tax avoidance. Therefore, international policy is highly needed.

Examples of initiatives that have taken place within the EU are improved administrative cooperation in direct taxes, liberalization of the Internal Market and the introduction of a Code of Conduct on tax matters. Although the last mentioned initiative takes only a soft law approach, it still helps to abolish harmful tax measures such as the Dutch ruling culture.<sup>6</sup>

In conclusion of the presentation it was emphasized that the Netherlands wants to keep its attractive tax system in place, but recognizes the need for more transparency. It is believed that only a

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5 Mr Harry Roodbeen is Director International Tax Policy and Legislation Directorate at the Dutch Ministry of Finance and Head of Delegation in tax treaty negotiations on behalf of the Netherlands.

6 In the Netherlands, it is possible to settle binding Advance Pricing Agreements or Advance Tax Rulings with the Dutch tax authorities that provide foreign companies with certainty in advance about fiscal matters.

multilateral agreement about harmful tax measures can create a level playing field for all countries.

### **2.3 Mr Ramon Dwarkasing – Transfer Pricing**

Transfer pricing (TP) between associated companies is a problem that is well known by the media, society and governments. However, in many countries transfer pricing rules still do not exist. In his presentation Mr Dwarkasing highlighted the importance of transfer pricing regulations in view of the fact that 80% of today's global trade takes place between multinational enterprises (MNEs).<sup>7</sup>

Due to the lack of capacity and awareness of TP in some countries, there is a growing need for more knowledge and capacity building on TP. The emergence of global value chains and the different interests of BRIC and Western countries add to the problem, for example with regard to 'location savings'. However, as Mr Dwarkasing pointed out, a decrease in investment in BRIC countries would have rather negative consequences for MNEs given the fact that since 2012 there is more foreign direct investment in developing countries than in developed countries.<sup>8</sup> As it was noted, however, one of the main issues for companies is the increased risk of double taxation.

It remains questionable whether the OECD is still able to deal with all the different interests involved, such as those of the MNEs, BRIC and Western countries. In his conclusion Mr Dwarkasing mentioned that there must be a more independent coordinating role for the UN, IMF and WBG.

### **2.4 Mr Roy Rohatgi – Tax and Treaty Policy in India and its Impact on Western Economies, "A Quick Overview"**

Mr Rohatgi started his presentation with a short introduction of the Indian direct tax system and its foundations.<sup>9</sup> Firstly he noted that

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7 LL.M., associate professor in transfer pricing at Maastricht University, Netherlands, and manager of the tax academy of Maastricht Centre for Taxation

8 UNCTAD, World Investment Report 2013 Global Value Chains (Geneva, 2013)

9 Prof. Roy Rohatgi is currently the settlor and managing trustee of the Foundation for International Taxation ([www.fitindia.org](http://www.fitindia.org)), a leading

Indian tax system is a well-established system that dates back to 1860. Further the speaker emphasized that Indian tax system has one very peculiar feature - it is a very strong source based system which wants to ensure that foreigners will not only take advantage of the domestic market but also pays taxes for the usage of domestic infrastructure and resources.

Further, the speaker detailed the six key influences on the Indian tax system which are the following: the national self-interest (fast developing democracy with growing demands), non-fiscal objectives, the impact of judiciary based on the rule of law, the tax administration and compliance, the treaties that override domestic law and the judicial interpretation of the latter. Having in mind all the mentioned, Mr Rohatgi takes the view that the Indian domestic law and practice tends to favour higher tax on non-residents as the current treaty allocation rules under the OECD (even UN) model is deemed to have a historical pro-residence bias. As a result, India follows its own model largely based on the UN Model and this is what makes the country different.

Moreover, Mr Rohatgi explained the peculiarity of the extra - territorial taxation of Indian tax laws, which is a payment-based taxation under India's Base Erosion Principle that goes back to 1922. The rationale behind it is that it will be taxed if any base erosion occurs. This possibility is currently regulated in section 9 of the Income Tax Act from 1961 under the deemed source rules applicable to non-residents in case income (in)directly accrues or arises in India.

Lastly, Mr Rohatgi notes that the increased bargaining power and the fact that the Model Treaty allocation of tax revenue is unfair to India and other developing countries have raised their frustration. Mr Rohatgi takes a firm stand that there is a need to address this concern if the West countries wants to use the markets, the resources and capital of the largest BRICS countries. In addition to the expressed concern, Mr Rohatgi concluded his presentation with a view that a tax should be paid where profits are earned based on value created and that the current system is not sustainable in today's world.

## **2.5 Mr Mick Moore – The Politicisation of Global Tax Policy**

The last few decades, we have seen the economic globalization and harmful tax competition between countries, thereby encouraging the

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educational charity engaged in promoting knowledge of international taxation in India.

exploitation thereof by transnational companies. According to Mr Moore,<sup>10</sup> the result is that tax policy issues have become much more prominent. The impact of the current problems is very severe for the LICs, mostly situated in Africa. These countries largely depend on taxing transnational companies as the tax revenue generated by personal income taxation would not be sufficient.

The problem is that LICs have little influence on the current discussions. The OECD focuses on transparency and the exchange of information, but Mr Moore believes that this would not lead to a lasting benefit for LICs. As a result, he calls for regional actions by African countries because they lack individual bargaining power. Mr Moore states that there are four possibilities for coordinated regional action.

Firstly, the region should introduce a set of principles covering the criteria for granting tax exemptions to investors and the procedure through which those decisions would be taken. Mr Moore believes that tax incentives do not attract many additional investors. Secondly, countries should forego special arrangements for certain types of investments. Thirdly, the region should introduce a regional agreement to levy a minimum withholding tax on all dividend payments made by locally incorporated subsidiaries of transnational groups. Finally, the region should adopt the Brazilian-style presumptive of a minimum/normal profit margins or mark-ups when assessing subsidiaries of transnationals for the corporate income tax.

## **2.6 Mr Tom O'Shea – EU Fiscal Policy**

In his presentation Mr O'Shea discussed the EU's fiscal policy.<sup>11</sup> The regulatory framework for tax in the EU is complex. Mr O'Shea described it as a triangular, which includes the national tax laws of the EU Member States, international law and EU law (which is at the top of the triangular). In Mr O'Shea's opinion, the number of cases in tax matters before the European Court of Human Rights will increase in the future. EU fiscal policy was described to be linked to the Europe 2020

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10 Mr Mick Moore is a political economist and is the founding Chief Executive Officer of the International Centre for Tax and Development. He has taught at the Massachusetts Institute of Technology.

11 Professor Tom O'Shea is a member of the Centre for Commercial Law Studies (CCLS) in London and a Tax consultant. He teaches the courses of EU Tax Law, International Tax Law, and Tax Principles and Concepts at the Queen Mary LL.M. Programme. His special interests are EU and international tax law.

Strategy<sup>12</sup>, which aims at generating growth to deal with the financial crisis. In order to achieve an efficient functioning of the EU fiscal policy, increased coordination and harmonisation is needed. However, this is expected to be hardly achievable due to the fact that Member States are not willing to give up their sovereign rights in taxation matters.

Mr O'Shea took the view that it might be reasonable to introduce soft law measures. He believes that soft law will influence the Member States' thinking and could lead to a progress towards further harmonization. Furthermore, he believes that enhanced cooperation could be used to move certain ideas forward, especially for the Euro-area this is considered to be a good option.

Good tax governance was also stressed as an important factor for the EU's fiscal policy. The European Commission has already brought forward initiatives on transparency, exchange of information and fair tax competition. Furthermore, a platform for good tax governance was founded. Practitioners use this platform in order to promote good governance in tax matters, to tackle aggressive tax planning and address double taxation issues. The aim should be to reach harmonised EU-wide definitions of certain concepts, such as "subject-to-tax"-clauses or general anti-avoidance rules. In this context, Mr O'Shea stressed the importance of finding a balanced solution, also taking into account the right of EU taxpayers to make use of the fundamental freedoms within the EU internal market.

Mr O'Shea then discussed the problem of double taxation, which can either arise based on qualification conflicts or in situations in which no DTC is applicable. The prevention of double taxation is necessary to ensure that taxation is levied in a fair and transparent manner. The European Commission prefers the options to recommend Member States to re-negotiate their DTC in order to include an arbitration clause or propose an EU Directive which provides for an arbitration clause in order to tackle the problem of double taxation. Mr O'Shea believes that binding arbitration would be necessary in the process of avoiding double taxation and that it would be beneficial for the taxpayers.

The presentation of Mr O'Shea was concluded with a belief that the way forward seems to be cooperation and harmonization, supported by binding rules for the Member States. However, the doubt was expressed how and whether this can be achieved in the nearest future.

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12 Communication from the Commission Europe 2020 – A strategy for smart, sustainable and inclusive growth (COM (2010) 2020 final).

## 2.7 Mr Nishith Desai – One World, One Tax

Mr Desai shared his views on the future and the predominant challenges ahead.<sup>13</sup> According to him, the vision of '*One world, One tax*' is still in an early stage and subject to refinement, but at the same time it is something just around the corner. Mr Desai believes that technology is the new drive and geography is becoming history. The most relevant question raised was how to handle the mobile world we live in. Currently, the main focus is on global tax policy and, in particular, on BEPS and the upcoming issuance of the action points.

Mr Desai noted that one of the fundamental issues with BEPS concerns the definition of a tax base as no consensus regarding it exists.

A consequence of it is an expansion of the so-called ecosystem of distrust which results in the growing distrust between taxpayers and tax administration, the non-enforcement of taxpayer rights and the negative impact on growth of world trade, investment and welfare. Mr Desai thinks that morality can never go hand in hand with the taxation and for this reason CSR provides an adequate answer.

Mr Desai proposed an approach of "*One world, One tax*" as a solution. MNCs shall transfer the taxes due to a Global Tax Escrow Account under the supervision of UN, OECD and others. This shall be followed by an allocation based on pre-agreed formula/harmonized source rules to the States.

## 2.8 Mr Mike Lewis – Tackling Base Erosion in Developing Countries

Mr Lewis looked at some of the common behaviours of companies in the countries in which Action Aid is active.<sup>14</sup> He stated that the intention of Action Aid is not to single out any particular company. The companies which were mentioned in the presentation were doing anything unusual. The aim of the presentation was to think about BEPS in light of the

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13 Mr Nishith Desai is the founder of the multi-skilled, research-based international law firm, Nishith Desai Associates ([www.nishithdesai.com](http://www.nishithdesai.com)). He is an international tax and corporate law expert, researcher, published author and lecturer in leading academic institutions.

14 Mr Mike Lewis provides research and policy advice on tax and economic development for Action Aid. He has previously worked as a sanctions investigator for the UN Security Council and is a former member of the UN Panel of Experts on Sudan. Mr Lewis has also worked for Oxfam and Amnesty International

developing countries and what is necessary to really tackle the problems in the lowest income countries. According to the BEPS report, developing countries should build their capacity. Though Mr Lewis agreed on this point, he also believed two important elements were missing which are 'political will' and 'rules'.

Mr Lewis illustrated tax injustice with the help of a case in which a stallholder selling sugar has to pay 4.6% in income tax. As opposed to that, the worker on the sugar cane plantation pays less tax while earning more. And the company owning the plantation did not have to pay tax at all. He continues on to look at SAB Miller in order to determine how corporations avoid tax<sup>15</sup>. First many African brands, such as ACCRA Brewery, a company established in Ghana, are sold to a Dutch IP company which has a tax ruling allowing them to greatly reduce the tax on royalties. Then the procurement hub is shifted from Africa to Mauritius. The Mauritius company provides a loan to ACCRA Brewery, but the thin-capitalization rule is not applied in Ghana, which illustrates the lack of political will.

It is noted that the OECD does address these issues with their BEPS action plan. However, the latter is mainly focused on the parts where countries cannot tax, whereas a big part of the problem is based on the lack of political will and harmful tax incentives. According to Mr Lewis, the situation will likely continue on with debates between people and their governments about the tax policies.

## **2.9 Ms Belema Obuforibo – Tax Treaty Policy - the Nigerian Case**

The final presentation of the conference was given by Ms Obuforibo and dealt with Nigeria's tax treaty policy.<sup>16</sup> One of the questions raised by the speaker was whether Nigeria's tax treaty policy fulfilled its intended purpose and actually served the country. Nigeria's DTA Model generally follows the UN Model but - as is the case with many tax treaties and developing countries - one size does not fit all, deviates from it at certain points.

Nigeria has an extensive tax treaty network. The petroleum profits tax is very important to Nigeria and will always be included in the country's tax treaties. Besides the petroleum profits tax, other relevant cross-

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15 See full report at <http://www.actionaid.org.uk/tax-justice/calling-time-the-research>.

16 Ms Belema Obuforibo CTA is Director of the IBFD Knowledge Centre as well as the IBFD in-house tax specialist for the UK

border tax considerations are shipping and the taxation of artists and sportsmen (cultural performances) as a considerable number of Nigerian artists perform abroad. Nigeria believes in a uniform dividend tax treatment and thus always tries to include an article covering dividends in their tax treaties.

Ms Obuforibo mentioned some of the main deviations from the OECD and UN Model such as the attribution of business profits to a PE in Nigeria and provisions concerning independent personal services, director's fees and an extended definition of royalties. Moreover, Nigeria includes annuities in the definition of pensions.

An analysis of tax treaties concluded between Nigeria and two smaller European countries as well as two non-European countries revealed that Nigeria has not been able to include any of the deviations in its tax treaties. Only the taxation of shipping and aircraft is very consistent and Nigeria insists on a single rate of withholding tax. Ms Obuforibo pointed out that this can be related to poor treaty negotiation skills, which were also addressed in the subsequent discussion.

### 3 Discussion and Concluding Remarks

The conference was concluded with an open discussion about the presented topics. Mr Roodbeen opened the discussion with a question whether tax treaties are useful. He took the view that tax treaties do not only avoid double taxation, but also allocate profits to tax jurisdictions and ensure exchange of information and coordination between them. Thus, reducing the role of tax treaties would be an evident step backwards. Responding to the shared opinion Mr O'Shea noticed that tax treaties result in numerous spillover effects. However, these spill overs find their origin in the quality of domestic law. Therefore, Mr O'Shea concluded that we need tax treaties, but the quality of domestic law is even more important.

The next statement put forward was that within the G20 group, the focus should shift from securing taxing rights to increasing awareness of tax competition. Moreover, country leaders should accept tax competition. Mr Rohatgi emphasized that model tax conventions are not sufficiently tailored to specific country-related circumstances. He compared having one model tax treaty with having one religion, and then concluded that there is a need for more flexibility. In the given context, Mr Roodbeen explained the Dutch policy of using the OECD model tax convention only as a starting point, and also accepting the UN model tax convention as well as stressing the importance of treaty abuse.

The final question was that even from the tax lawyer's perspective, there are too many changes, so which lessons should be kept in mind? Mr Van den Hurk emphasized that we should not be afraid of changes; while Mr Desai concluded that only through changes we can get the world we want.