



## BEPS 2.0 development in TAIWAN

With regard to BEPS 2.0 actions and measures, TAAUCT would like to provide the following 3 official statements released by the government of Taiwan, the first of which is devised by the Office of International Fiscal Affairs, Ministry of Finance and the next two by the Organic Laws and Statutes Bureau, Legislative Yuan.

- a) Brief statement on introduction of multilateral conventions to implement tax treaties related measures to prevent base erosion and profit shifting
- b) Study Corresponding with Global Minimum Taxation Issues
- c) Study of OECD Two Pillar Related Issues

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# Implementation of the BEPS Tax Treaty Related Measures

Glance at Taiwan' s Position, explained by reference to the “Template Reservations and Notifications under the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting”

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## I. Introduction

A. The Organization for Economic Co-operation and Development (OECD) launched Action Plans on Base Erosion and Profit Shifting (BEPS) in July 2013, and subsequently released final reports relating to these Actions in October 2015. Among them, Action 2 (Neutralising the Effects of Hybrid Mismatch Arrangements), Action 6 (Preventing the Granting of Treaty Benefits in Inappropriate Circumstances), Action 7 (Preventing the Artificial Avoidance of Permanent Establishment Status), Action 14 (Making Dispute Resolution Mechanisms More Effective), and Action 15 (Developing a Multilateral Instrument to Modify Bilateral Tax Treaties) include tax treaty-related measures.

(For the related documents, please refer to the OECD website at <http://www.oecd.org/tax/beps/beps-actions.htm>.)

B. In response to the request of the Group of Twenty (G20), OECD established the Inclusive Framework on BEPS in June 2016 and developed standards on monitoring and peer review mechanisms to enable all members to the Framework to effectively implement suggestions under

these Actions. As the first move, some measures under Action 5 (Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance), Action 6, Action 13 (Transfer Pricing Documentation and Country-By-Country Reporting), and Action 14 were chosen as the “Minimum Standards,” and among them, Action 6 and Action 14 are in relation to tax treaties.

(For the related information, please refer to the OECD website at <http://www.oecd.org/tax/beps/beps-about.htm>.)

C. In order to mitigate the burdensome and time-consuming process that the amendment to the existing tax treaties may bring about, OECD released the “Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting” (hereinafter referred to as MLI) formulated under Action 15 in November 2016. By participating in the MLI, Jurisdictions may swiftly adopt the Minimum Standards and opt in other BEPS measures into their existing tax treaties rather than modifying them one after another.

(For the related documents, please refer to the OECD website at <http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf>.)

**II. A Glance at Taiwan’s Position, explained by reference to the “Template Reservations and Notifications under the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting”**

A. Taiwan, as a member of the global community, has committed itself to supporting and implementing international anti-avoidance tax measures despite the fact that Taiwan is neither a member of the Inclusive Framework on BEPS of the Organization for Economic Co-operation and Development (OECD), nor a party to the “Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting” (hereinafter referred to as MLI). With respect to its implementation of the final reports of Actions on Base Erosion and Profit Shifting (BEPS) in relation to tax treaty measures, the majority of Taiwan’s 32 Avoidance of Double Taxation Agreements (hereinafter referred to as ADTAs) meet the BEPS Minimum Standards after performing self-assessments.

B. In order to show its support for BEPS tax treaty-related measures, Taiwan releases preliminary positions toward provisions under the MLI by referencing to the common practice of Jurisdictions who have participated in the MLI as follows:

**1. The Minimum Standard on Action 6 (Preventing the Granting of Treaty Benefits in Inappropriate Circumstances) - Preamble**

By reference to Paragraph 2, Article 6 (Purpose of a Covered Tax Agreement) of the MLI, Taiwan would like the following provision, which is presented in Paragraph 1 of this Article, to be included in its existing ADTAs in place of or in the absence of the preamble language:

“Intending to eliminate double taxation with respect to the taxes covered by this agreement without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance

(including through treaty-shopping arrangements aimed at obtaining reliefs provided in this agreement for the indirect benefit of residents of third jurisdictions).”

## **2. The Minimum Standard on Action 6 – Principal Purpose Test**

By reference to Paragraph 2, Article 7 (Prevention of Treaty Abuse) of the MLI, Taiwan would like the following “Principal Purpose Test” provision, which is presented in Paragraph 1 of this Article, to apply in place of or in the absence of the corresponding provisions of its existing ADTAs:

“Notwithstanding any provisions of a Covered Tax Agreement, a benefit under the Covered Tax Agreement shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the Covered Tax Agreement.”

## **3. Action 7 (Preventing the Artificial Avoidance of Permanent Establishment Status) - Activities Carried on by an Enterprise which Would be Deemed not to Constitute a Permanent Establishment (PE)**

By reference to Paragraphs 1 and 2, and Subparagraph a) of Paragraph 5 of Article 13 (Artificial Avoidance of Permanent Establishment Status through the Specific Activity Exemptions) of the MLI, Taiwan would like to choose the following provision concerning activities carried on by an

enterprise which would be deemed not to constitute a PE, which is presented in Paragraph 2 (Option A) of this Article, to apply in place of the relevant parts of provisions of its existing ADTAs:

“Notwithstanding the provisions of a Covered Tax Agreement that define the term “permanent establishment” , the term “permanent establishment” shall be deemed not to include:

a. the activities specifically listed in the Covered Tax Agreement (prior to modification by this Convention) as activities deemed not to constitute a permanent establishment, whether or not that exception from permanent establishment status is contingent on the activity being of a preparatory or auxiliary character;

b. the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any activity not described in subparagraph a);

c. the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) and b),

provided that such activity or, in the case of subparagraph c), the overall activity of the fixed place of business, is of a preparatory or auxiliary character.”

#### **4. The Minimum Standard on Action 14 (Making Dispute Resolution Mechanisms More Effective) - Mutual Agreement Procedure**

a. By reference to Subparagraph a), Paragraph 5, Article 16 (Mutual Agreement Procedure) of the MLI, Taiwan would like to reserve the right for the first sentence of Paragraph 1 of this Article, which is related to “permits a person to present a case to the competent authority of either Contracting Jurisdiction,” not to apply in place of the corresponding

provisions of its existing ADTAs. However, Taiwan ensures that its ADTAs contain the following provision, and, pursuant to the OECD BEPS-related standards, the competent authority of Taiwan implements “a bilateral notification or consultation process with the competent authority of the other Contracting Jurisdiction for cases in which the competent authority to which the mutual agreement procedure case was presented does not consider the taxpayer’s objection to be justified:”

“Where a person considers that the actions of one or both of the Contracting Jurisdictions result or will result for him in taxation not in accordance with the provisions of this Covered Tax Agreement, he may, irrespective of the remedies provided by the domestic law of those Jurisdictions, present his case to the competent authority of the Contracting Jurisdiction of which he is a resident or, if his case comes under paragraph 1 of Article 24, to that of the Contracting Jurisdiction of which he is a national.”

b. By reference to Item ii), Subparagraph a), Paragraph 4, Article 16 of the MLI, Taiwan would like the following provision, which is the second sentence of Paragraph 1 of this Article, to apply in place of provisions of its existing ADTAs that provide that a case must be presented within a specific time period that is shorter than three years from the first notification, or to apply in the absence of a provision of its existing ADTAs describing the time period within which such a case must be presented:

“The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Covered Tax Agreement.”

c. By reference to Item i), Subparagraph b), Paragraph 4, Article 16 of the MLI, Taiwan would like the following provision, which is the first sentence of Paragraph 2 of this Article, to apply in the absence of the corresponding provisions of its existing ADTAs:

“The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting Jurisdiction, with a view to the avoidance of taxation which is not in accordance with the Covered Tax Agreement.”

d. By reference to Item ii), Subparagraph b), Paragraph 4, Article 16 of the MLI, Taiwan would like the following provision, which is the second sentence of Paragraph 2 of this Article, to apply in the absence of the corresponding provisions of its existing ADTAs:

“Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting Jurisdictions.”

e. By reference to Item i), Subparagraph c), Paragraph 4, Article 16 of the MLI, Taiwan would like the following provision, which is the first sentence of Paragraph 3 of this Article, to apply in the absence of the corresponding provisions of its existing ADTAs:

“The competent authorities of the Contracting Jurisdictions shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Covered Tax Agreement.”

f. By reference to Item ii), Subparagraph c), Paragraph 4, Article 16 of the



MLI, Taiwan would like the following provision, which is the second sentence of Paragraph 3 of this Article, to apply in the absence of the corresponding provisions of its existing ADTAs:

“They may also consult together for the elimination of double taxation in cases not provided for in the Covered Tax Agreement.”

#### **5. Action 14 - Transfer Pricing Corresponding Adjustment**

By reference to Paragraph 2 and Subparagraph a), Paragraph 3, Article 17 (Corresponding Adjustments) of the MLI, Taiwan would like to reserve the right for the following “transfer pricing corresponding adjustment” provision, which is presented in Paragraph 1 of this Article, not to apply to its existing ADTAs already containing such a provision; however, Taiwan would like the following provision to apply in the absence of the corresponding provisions of its existing ADTAs:

“Where a Contracting Jurisdiction includes in the profits of an enterprise of that Contracting Jurisdiction - and taxes accordingly - profits on which an enterprise of the other Contracting Jurisdiction has been charged to tax in that other Contracting Jurisdiction and the profits so included are profits which would have accrued to the enterprise of the first-mentioned Contracting Jurisdiction if the conditions made between the two enterprises had been those which would have been made between independent enterprises, then that other Contracting Jurisdiction shall make an appropriate adjustment to the amount of the tax charged therein on those profits. In determining such adjustment, due regard shall be had to the other provisions of the Covered Tax Agreement and the competent authorities of the Contracting Jurisdictions shall if necessary consult each other.”

## Issue Study

### I. Topic: Study Corresponding with Global Minimum

#### Taxation Issues

### II. Laws Involved: Income Tax Act, Income Basic Tax Act

### III. Study

#### (1) Background

The newspaper<sup>1</sup> reported that the biggest global tax collection measure, the global minimum taxation is estimated to be launched in 2023. Ministry of Finance indicates that there are two major correspondent strategies. First, it is evaluated to possibility of raising the minimum enterprise tax rate in our country from current 12% to 15%. The second one is to carefully evaluate the schedule of CFC system. Although we are not the member of OECD inclusive framework, our tax system is bound to connect with the world. Therefore, it is necessary to study the content of global minimum taxation and its impact to our country.

#### (2) Introduction of global minimum taxation

On contrary to the digital service taxation promoted by EU, OECD/G20 proposed the “Two Pillar Approach” in March 2019. It is the second material change since the BEPS 1.0 and could be referred as BEPS 2.0. Pillar One: Re-allocation of taxing rights, which is also called “global digital tax”. Pillar Two: the Global Anti-Base Erosion (GloBE), which is

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<sup>1</sup> Global tax collection, Ministry of Finance plans to raise the minimum tax rate Two strategies connected with the world It is evaluated to raise from 12% to 15% and the CFC system will be launched in 2023. Economic Daily, November 18, 2021, version A4

also referred as the global minimum taxation. It is the supplementary system of Pillar One that empower other countries to collect taxes supplementary when the country entitled to the taxation fails to exercise primary taxing right or the substantial interest rate is lower than the minimum standards to ensure the minimum taxation paid by the enterprises. It is similar to the global minimum taxation to ensure that enterprises pay for the minimum taxes.

The purpose of global minimum taxation is to establish a set of “minimum taxation + controlled company taxation” as to reduce the motivation of multinational group from shifting profit to countries with lower tax rate as well as prevent the race to the bottom and measure violating taxation equality internationally. The major taxation methods are divided as: income inclusion rule, switch-over rule, undertaxed payment rule and subject to tax rule such four major principles. The applicable subjects shall meet two requirements. First, it must be a multinational group; second, its global annual income must be higher than EURO 750 million (equal to NT\$25.4 billion). At the beginning of June 2021, seven major industrial country organization (G7) London Summit agreed to mutually promote global minimum enterprise income tax rate 15%<sup>2</sup>.

#### **IV. Suggestions**

##### **(1) The article 43-3 and 43-4 of the Income Tax Act is better to be implemented ASAP**

There is already definition of multinational group in our country.

Though the amendment to regulations governing Controlled Foreign Corporation (CFC) and Place of Effective Management (PEM) were

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<sup>2</sup> Huang, Shih-Zhou, The overview of international digital service tax – EU project, Accounting Research Monthly, Vol. 403, June 2019, Page 99

passed in 2016, they are not yet implemented by now resulting in incomplete regulations and identification toward multinational group in our country. The articles abovementioned should be implemented ASAP to consolidate the taxation system.

**(2) The tax rate of minimum enterprise income tax is better to be raised as appropriate**

The purpose of minimum taxation system implemented in our country since 2006 is to have enterprises that pay lower taxes or are even exempted from tax payment due to tax credit regulations shall at least pay for the minimum tax in certain ratio. According to article 8 of Income Basic Tax Act, such tax rate shall not be lower than 12% and up to 15%. The collection rate shall be determined by the Executive Yuan depending on the economic environment, and current tax rate is 12%. To avoid surrendering the taxing right over our multinational group to other countries (if the tax rate remains at 12% while the tax rate of global minimum taxation is 15%, the 3% difference in taxing right may be taken by other countries), the tax rate of minimum enterprise income tax is better to be raised as appropriate.

Written by: Zhuang, Hong-Yu

## Issue Study

### I. Topic: Study of OECD Two Pillar Related Issues

### II. Laws Involved: income tax laws

### III. Study

#### (1) Background

The newspaper<sup>1</sup> reported that US Finance minister Yellen supports the global minimum taxation when she delivered speech in Chicago world affairs council and has attracted international attention. In fact, OECD and G20 have already paid attention to Base Erosion and the tax arbitrage from Profit Shifting (BEPS) and proposed various actions trying to solve the problem. Following the “Base Erosion and Profit Shifting, BEPS” action plan, the “Two-Pillar Approach” was further presented in March 2019.

Although we are not the EU member country, our taxation certainly will be connected to the world and therefore it is necessary to study the impact of content to our country.

#### (2) OECD/G20 Two Pillar Approach

On contrary to the digital service taxation promoted by EU, OECD/G20 proposed the “Two Pillar Approach” in March 2019. It is the second material change since the BEPS 1.0 and could be referred as BEPS 2.0. The content of approach is explained as follows<sup>2</sup>:

##### 1. Pillar One

Pillar One is the redefinition of profit allocation rules of multinational enterprises (including digital economic enterprises and

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<sup>1</sup> The challenges of global minimum enterprises income tax , Economic Daily, April 22, 2021, version A2

<sup>2</sup> Tseng, Bo-Sheng, OECD Base Erosion and the tax arbitrage from Profit Shifting 2.0 proposal and analysis – rewrite the international profit allocation rules, Angle Review of Finance and Taxation Practices, vol. 5, May 2000, page 55-59; Huang, Shih-Zhou, Taiwan digital tax policy employment opportunities before relaunch of world, Accounting Research Monthly, May 2020, page 78-79 ; OECD (2020), Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges A rising from the Digitalisation of the Economy – January 2020, OECD/G20 Inclusive Framework on BEPS, OECD , <https://www.oecd.org/tax/beps/statement-by-the-oecd-g20-inclusive-framework-on-beps-january-2020.pdf> °

market enterprises), allowing “market region is entitled to the taxation on value created and produced by enterprises from such region. Specifically, it divides the taxable profit of multinational enterprises based on features of emerging operational model in: “global residual profit”, “routine functional profit” and “extra functional profit” three segments. The global residual profit is the balance of total profit deducted by routine functional profit and extra functional profit and then allocated to countries where the market is located based on the formula of “Agreed Allocation Metrics regardless whether the multinational enterprise has physical operation sites (aiming at digital e-commerce platform) to reflect the profit received by multinational enterprise from participating in the economic activities of market country via remote operation.

## 2. Pillar Two

Pillar Two is the supplementary system of Pillar One, i.e. the so called Global Anti-Base Erosion (GloBE), proposed to empower other countries to collect taxes supplementary when the country entitled to the taxation fails to exercise primary taxing right or the substantial interest rate is lower than the minimum standards. It is similar to the global minimum taxation to ensure that enterprises pay for the minimum taxes. The purpose is to promote the “minimum taxation + controlled company taxation” as to reduce the motivation of multinational group from shifting profit to countries with lower tax rate as well as prevent the race to the bottom and measure violating taxation equality internationally. The applicable subjects shall meet two requirements. First, it must be a multinational group; second, its global annual income must be higher than EURO 750 million (equal to NT\$25.4 billion).

## IV. Suggestions

### **(1) The article 43-3 and 43-4 of the Income Tax Act is better to be implemented ASAP**

There is already definition of multinational group in our country. Though the amendment to regulations governing Controlled Foreign

Corporation (CFC) and Place of Effective Management (PEM) were passed in 2016, they are not yet implemented by now resulting in incomplete regulations and identification toward multinational group in our country. The articles abovementioned should be implemented ASAP to consolidate the taxation system.

## **( 2 ) Pay attention to global minimum taxation development continuously to connect with the world**

Although we are not the member country of EU, we had been included in the “observation list (so called gray list)” for being suspected by EU as tax heaven on December 5, 2017 and continuously under strict supervision of EU. In order not to fall in “EU List of Non-Cooperative Jurisdictions (so called black list)” causing revenge measures of EU, we launched a series of anti-tax evasion reform and finally separated from the gray list<sup>3</sup>. The purpose of OECD two pillar approach is to establish a set of consistent profit allocation system worldwide. It is related with the seesaw battle of taxation rights among countries, the allocation indicator regarding global residual profit, how to establish the allocation formula, how to determine the routine functional profit and extra functional profit, how to identify minimum tax rate standards, how the taxpayers know if the minimum substantial tax rate threshold is passed and dispute settlement system etc. Although it is uneasy to get mutual consensus, we should be hard to keep out of the affair if the global minimum taxation proposed by OECD and agreed by America are passed by all countries. Therefore, we should continuously pay attention to get connected with the world.

Written by: Zhuang, Hong-Yu

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<sup>3</sup> Analysis of Two-Pillar Solution of OECD, Note3, The Execution of Global Minimum Corporate Tax Rate, Liao Yuan-Ching, Commercial Times, 20th April 2021, Version A6