



Bombay Chartered Accountants' Society
Harnessing Talent and Providing Quality Service

7, Jolly Bhavan 2, Ground Floor, New Marine Lines, Mumbai - 400 020 • Tel. : + 91 22 6137 7600
Website : www.bcasonline.org • E-mail : bca@bcasonline.org



President
Manish Sampat
president@bcasonline.org
Vice President
Suhans Paranjpe
vp@bcasonline.org
Hon. Jt. Secretaries
Mihir Sheth
js@bcasonline.org
Samir Kapadia
js1@bcasonline.org
Hon. Treasurer
Abhay Mehta
treasurer@bcasonline.org

12th November 2019

To,

The Tax policy and statistics Division

Centre for Tax policy and Administration

OECD

Dear Sir,

Ref.: Comments and Suggestions for the Unified Approach under Pillar One – Secretariat proposal

Sub: REVISED Submission of representation

With reference to captioned Proposal inviting suggestions regarding public comments on policy, technical and administrative issues for specific questions raised in the public consultation document we submit as follows:

At the outset, the International Taxation Committee of the Bombay Chartered Accountants Society congratulates the Secretariat of TFDE, OECD for considering critical aspect of profit attribution, thereby setting an example that the law evolves with dynamic business models and consists of a set of rules that match the need of the hour.



Bombay Chartered Accountants' Society
Harnessing Talent and Providing Quality Service

7, Jolly Bhavan 2, Ground Floor, New Marine Lines, Mumbai - 400 020 • Tel. : + 91 22 6137 7600
Website : www.bcasonline.org • E-mail : bca@bcasonline.org



President
Manish Sampat
president@bcasonline.org

Vice President
Suhaz Paranjpe
vp@bcasonline.org

Hon. Jt. Secretaries
Mihir Sheth
js@bcasonline.org
Samir Kapadia
js1@bcasonline.org

Hon. Treasurer
Abhay Mehta
treasurer@bcasonline.org

Representation by BCAS on the proposal for a UNIFIED APPROACH UNDER PILLAR ONE by OECD Secretariat
(REVISED SUBMISSION)

OVERVIEW OF REPRESENTATION

Considering Secretariat's explicitly comment in para 2.1 that the proposal is at relatively general level subject to addressing on implementation and administration questions, we understand that objective of the public consultation is to invite inputs/suggestion on Principal factors and therefore we have restricted our comments to principles only which are as under:

1. NEW NEXUS – At the outset we appreciate the recognition of new approach by Secretariat apart from the traditional physical presence approach.

Our Comments on the New Nexus are as follows:

Defining threshold based on sales will not be ideal proposition considering fact that the digital service business does not have direct correlation with sales numbers. A Country with limited sales can generate multiple business opportunities from market jurisdictions, which will not be captured under sales formulae. E.g. data mining activity, research service has potential to generate business outside market jurisdiction base on virtual presence.



Bombay Chartered Accountants' Society
Harnessing Talent and Providing Quality Service

7, Jolly Bhavan 2, Ground Floor, New Marine Lines, Mumbai - 400 020 • Tel. : + 91 22 6137 7600
Website : www.bcasonline.org • E-mail : bca@bcasonline.org



President
Manish Sampat
president@bcasonline.org

Vice President
Suhans Paranjpe
vp@bcasonline.org

Hon. Jt. Secretaries
Mihir Sheth
js@bcasonline.org
Samir Kapadia
js1@bcasonline.org

Hon. Treasurer
Abhay Mehta
treasurer@bcasonline.org

Representation by BCAS on the proposal for a UNIFIED APPROACH UNDER PILLAR ONE by OECD Secretariat
(REVISED SUBMISSION)

Even under sales formulae a detailed guideline for determination of sales for different levels of Economy needs to be framed in order to benefit smaller Economies also.

Further, the problem with linking nexus with sales is that, there is no common barometer to identify the sales, especially in the world of internet. Thus, consumers of data can be located in any part of the world and payment for such consumption of data could be routed from a country other than the country of residence of the consumer.

Therefore, identifying sales or what constitutes sales needs to be addressed to give credence to the new Nexus norms.

2. CHALLENGES AND OPPUTUNITIES ARISING WHILE DETERMINATION

OF AMOUNT A – Para 56 of the proposal comments that the intention would not be to disturb the actual allocation of remuneration derived from actual routine activities under the current transfer pricing framework. Instead, the purpose of simplifying convention would be merely to simplify calculation of deemed non routine profit.

With high respect, it seems to have multiple implementing challenges considering different transfer pricing framework adopted by different



Bombay Chartered Accountants' Society
Harnessing Talent and Providing Quality Service

7, Jolly Bhavan 2, Ground Floor, New Marine Lines, Mumbai - 400 020 • Tel. : + 91 22 6137 7600
Website : www.bcasonline.org • E-mail : bca@bcasonline.org



President
Manish Sampat
president@bcasonline.org

Vice President
Suhas Paranjpe
vp@bcasonline.org

Hon. Jt. Secretaries
Mihir Sheth
js@bcasonline.org
Samir Kapadia
js1@bcasonline.org

Hon. Treasurer
Abhay Mehta
treasurer@bcasonline.org

Representation by BCAS on the proposal for a UNIFIED APPROACH UNDER PILLAR ONE by OECD Secretariat
(REVISED SUBMISSION)

Countries resulting into varied calculation of routine and non-routine profits for different Countries. Applying standard percentage for calculation of non-routine profit will discriminate taxing right which needs to be universally acceptable to all Countries.

Further, the concept of 'deemed residual profit' and 'routine profits' could lead to arbitrary allocation of profit and would go against the first principles of transfer pricing, which have, to some extent reached a semblance of global consensus.

3. Suggestion:

Alternative to Unified Approach - Simplified "Withholding Approach"

3.1. Why Unified Approach is not desirable?

The proposed Unified Approach is not only extremely complex, it may be equally difficult to implement and may result in significant disputes. For this reason, even if there is a consensus amongst the inclusive framework members (which may be difficult to achieve), the Unified Approach needs to be avoided.



Bombay Chartered Accountants' Society
Harnessing Talent and Providing Quality Service

7, Jolly Bhavan 2, Ground Floor, New Marine Lines, Mumbai - 400 020 • Tel. : + 91 22 6137 7600
Website : www.bcasonline.org • E-mail : bca@bcasonline.org



President
Manish Sampat
president@bcasonline.org

Vice President
Suhaz Paranjpe
vp@bcasonline.org

Hon. Jt. Secretaries
Mihir Sheth
js@bcasonline.org
Samir Kapadia
js1@bcasonline.org

Hon. Treasurer
Abhay Mehta
treasurer@bcasonline.org

Representation by BCAS on the proposal for a UNIFIED APPROACH UNDER PILLAR ONE by OECD Secretariat
(REVISED SUBMISSION)

3.2. Withholding Approach

As against the complex Unified Approach, a simple withholding approach would be ideal to adopt. Nuances of the withholding approach could be on the lines of the following:

3.2.1. Monetary threshold – Consistent approach in tax treaties

The tax treaties predominantly “distribute taxing rights”. None of the articles of the tax treaty (be it Article 10-Dividend, Article 11-Interest, Article 12 – Royalties, Article 7 – Business profits or any other article) contain monetary threshold and historically the rule adopted is that there is no need for a monetary threshold for the distribution of taxing rights.

3.2.2. Giving taxing right to the source country to tax “digital payment”

A new Article may be inserted in the tax treaties on the lines of Article 10 or Article 11, enabling the source country to levy tax on the “digital payment”. Digital



Bombay Chartered Accountants' Society
Harnessing Talent and Providing Quality Service

7, Jolly Bhavan 2, Ground Floor, New Marine Lines, Mumbai - 400 020 • Tel. : + 91 22 6137 7600
Website : www.bcasonline.org • E-mail : bca@bcasonline.org



President
Manish Sampat
president@bcasonline.org

Vice President
Suhaz Paranjpe
vp@bcasonline.org

Hon. Jt. Secretaries
Mihir Sheth
js@bcasonline.org
Samir Kapadia
js1@bcasonline.org

Hon. Treasurer
Abhay Mehta
treasurer@bcasonline.org

Representation by BCAS on the proposal for a UNIFIED APPROACH UNDER PILLAR ONE by OECD Secretariat (REVISED SUBMISSION)

payments are made in respect of digital services. The term “digital services” can be defined on the basis of the following definition:

“online information and database access or retrieval services” means services whose delivery is mediated by information technology over the internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention and impossible to ensure in the absence of information technology and includes electronic services such as,--

(i) advertising on the internet;

(ii) providing cloud services;

(iii) provision of e-books, movie, music, software and other intangibles through telecommunication networks or internet;



Bombay Chartered Accountants' Society
Harnessing Talent and Providing Quality Service

7, Jolly Bhavan 2, Ground Floor, New Marine Lines, Mumbai - 400 020 • Tel. : + 91 22 6137 7600
Website : www.bcasonline.org • E-mail : bca@bcasonline.org



President
Manish Sampat
president@bcasonline.org

Vice President
Suhans Paranjpe
vp@bcasonline.org

Hon. Jt. Secretaries
Mihir Sheth
js@bcasonline.org
Samir Kapadia
js1@bcasonline.org

Hon. Treasurer
Abhay Mehta
treasurer@bcasonline.org

Representation by BCAS on the proposal for a UNIFIED APPROACH UNDER PILLAR ONE by OECD Secretariat
(REVISED SUBMISSION)

- (iv) providing data or information, retrievable or otherwise, to any person in electronic form through a computer network;*
- (v) online supplies of digital content (movies, television shows, music and the like);*
- (vi) digital data storage; and*
- (vii) online gaming;*

The concept of *online information and database access or retrieval services* – OIDAR has prevailed in the GST law¹ for some time.

This concept can be further improved for the purpose of levy of digital tax. Issues such as absences of payers for the services but presence of users in the source country etc. need to be further discussed.

¹ Section 2(17) of the Indian Integrated Goods and Services Tax Act, 2017



Bombay Chartered Accountants' Society
Harnessing Talent and Providing Quality Service

7, Jolly Bhavan 2, Ground Floor, New Marine Lines, Mumbai - 400 020 • Tel. : + 91 22 6137 7600
Website : www.bcasonline.org • E-mail : bca@bcasonline.org



President
Manish Sampat
president@bcasonline.org

Vice President
Suhaz Paranjpe
vp@bcasonline.org

Hon. Jt. Secretaries
Mihir Sheth
js@bcasonline.org
Samir Kapadia
js1@bcasonline.org

Hon. Treasurer
Abhay Mehta
treasurer@bcasonline.org

Representation by BCAS on the proposal for a UNIFIED APPROACH UNDER PILLAR ONE by OECD Secretariat (REVISED SUBMISSION)

(One also needs to consider how to balance the taxation of the digital economy and the burden of individuals who may consume data for entertainment/ personal purposes. Thus, a mechanism may have to be arrived at whereby the recipient of services provided should be made liable to pay the tax in a seamless manner, as they are in the business of digital services, while the individual is only consuming for personal purposes. One of the ways could be to cast the burden of withholding on the payment gateway company or an intermediary bank on behalf of the Foreign Service provider).

3.2.3. Rate of tax

The following approaches may be considered for the purpose of determining rate of tax (i.e. the maximum withholding which can be levied by the source country).



Bombay Chartered Accountants' Society
Harnessing Talent and Providing Quality Service

7, Jolly Bhavan 2, Ground Floor, New Marine Lines, Mumbai - 400 020 • Tel. : + 91 22 6137 7600
Website : www.bcasonline.org • E-mail : bca@bcasonline.org



President
Manish Sampat
president@bcasonline.org

Vice President
Suhans Paranjpe
vp@bcasonline.org

Hon. Jt. Secretaries
Mihir Sheth
js@bcasonline.org
Samir Kapadia
js1@bcasonline.org

Hon. Treasurer
Abhay Mehta
treasurer@bcasonline.org

Representation by BCAS on the proposal for a UNIFIED APPROACH UNDER PILLAR ONE by OECD Secretariat
(REVISED SUBMISSION)

Approach 1

Under this approach, the proposed Article may also prescribe the rate of tax in the text of the Article itself. It is understood that more than 20 countries already have / would soon have digital service tax (or comparable levy) in the domestic law. The rates adopted by these countries may be representative of the levels of revenues expected by the source countries.

The existing rates adopted by these countries may become basis for determining "rate of tax" or "range of rate of tax" to be adopted in the tax treaty.

Approach 2

Under this approach, the rate of tax is to be purely negotiated between the two parties to the tax treaty.

Approach 2 may take some time as it would involve bilateral negotiation, as against this Approach 1 may be easier as the proposed article would be simply inserted in the tax treaties through MLI.02.



Bombay Chartered Accountants' Society
Harnessing Talent and Providing Quality Service

7, Jolly Bhavan 2, Ground Floor, New Marine Lines, Mumbai - 400 020 • Tel. : + 91 22 6137 7600
Website : www.bcasonline.org • E-mail : bca@bcasonline.org



President
Manish Sampat
president@bcasonline.org

Vice President
Suhas Paranjpe
vp@bcasonline.org

Hon. Jt. Secretaries
Mihir Sheth
js@bcasonline.org
Samir Kapadia
js1@bcasonline.org

Hon. Treasurer
Abhay Mehta
treasurer@bcasonline.org

Representation by BCAS on the proposal for a UNIFIED APPROACH UNDER PILLAR ONE by OECD Secretariat
(REVISED SUBMISSION)

3.3. General

1. Comments on specific issues raised in the discussion draft on Unified Approach

Our following comments in response to the specific issues raised in the discussion draft are without prejudice to our suggestions in the preceding paragraphs.

The simplified approach suggested in the preceding paragraphs is not a complete solution and certainly requires significant improvements. The technical experts at OECD Secretariat may further improve this.

- 2.** Our representation in this letter is restricted to suggestions sought in the public consultation document for a Unified Approach under Pillar One only. We shall submit our considered comments on Pillar two at a later date.



Bombay Chartered Accountants' Society
Harnessing Talent and Providing Quality Service

7, Jolly Bhavan 2, Ground Floor, New Marine Lines, Mumbai - 400 020 • Tel. : + 91 22 6137 7600
Website : www.bcasonline.org • E-mail : bca@bcasonline.org



President
Manish Sampat
president@bcasonline.org

Vice President
Suhas Paranjpe
vp@bcasonline.org

Hon. Jt. Secretaries
Mihir Sheth
js@bcasonline.org
Samir Kapadia
js1@bcasonline.org

Hon. Treasurer
Abhay Mehta
treasurer@bcasonline.org

Representation by BCAS on the proposal for a UNIFIED APPROACH UNDER PILLAR ONE by OECD Secretariat
(REVISED SUBMISSION)

We Trust above comments will be helpful while finalising the rules to be issued.

Yours Faithfully,

For Bombay Chartered Accountants' Society

Manish Sampat

President – BCAS

Mayur Nayak

Chairman – International Tax

Committee – BCAS