

# BEPS AND OTHER THINGS WHAT THEY TELL YOU AND WHAT IS THE TRUTH

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# WHAT THE OECD SAID

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- TAX AVOIDANCE STRATEGIES TO EXPLOIT GAPS AND MISMATCHES TO ARTIFICIALLY SHIFT PROFITS TO LOW OR NO-TAX LOCATIONS
- MOST NOT ILLEGAL
- THEY UNDERMINE FAIRNESS AND INTEGRITY, CROSS BORDER ENTERPRISES HAVE ADVANTAGE OVER DOMESTIC ENTERPRISES
- IMPORTANT FOR DEVELOPING COUNTRIES BECAUSE OF RELIANCE ON CORPORATE TAX

# NOT ILLEGAL? THE EU CHANGED THAT

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- MANDATORY DISCLOSURE CAN MAKE IT ILLEGAL

# SUBSTANCE AND THE LEVEL PLAYING FIELD

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WHO IS BEST ABLE TO CREATE SUBSTANCE?

- MULTINATIONAL LIKE AMAZON AND STARBUCKS?

OR

- LOCAL MOM & POP SALES CO

# DEVELOPING COUNTRIES AND CORPORATE TAX?

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Government revenues			
	Tax	Social	Other
Global	56	23	21
Developed	56	25	19
Developing	60	10	30

SOURCE: UNCTAD 2015



SO WHAT TAX ARE THEY MISSING OUT ON?

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# DEVELOPING COUNTRIES AND CORPORATE TAX?

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Tax breakdown % total revenues			
	Corporate	Personal	GST
Global	7	19	21
Developed	6	22	20
Developing	13	7	29

SOURCE: UNCTAD 2015

# DEVELOPING COUNTRIES?

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- INCREASED REVENUES WITHIN THE EU OF OVER 3 BILLION (FROM VAT!!)
- “BEPS MEASURES DO NOT NECESSARILY RESOLVE THE ISSUE OF HOW RIGHTS TO TAX ARE SHARED BETWEEN JURISDICTIONS”



# DIGITAL ECONOMY

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NO FIRM PROPOSALS YET

- SOME SUGGEST INTERIM EXCISE TAX, OTHERWISE VALUE UNTAXED
- BIG DATA TO CHASE USERS OF ONLINE PLATFORMS

# DIGITAL ECONOMY 2

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## ISSUES:

- SCALE WITHOUT MASS
- RELIANCE ON INTANGIBLES
- DATA AND USER PARTICIPATION

BUT NO SIGN OF TAKING ACCOUNT OF THIS IN CbC OR CCCTB OR PE

# DUAL RESIDENCE – AUTOMATICALLY ABUSE?

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- MLI STATES THAT INCORPORATION CAN BE A DETERMINING FACTOR (WAS NOT QUITE CLEAR IN THE PAST)
- DUAL RESIDENCE: MUTUAL AGREEMENT, OTHERWISE NO TREATY
- REASONING: CASE BY CASE BECAUSE OF CASES OF ABUSE
- EFFECTIVE MANAGEMENT STILL ALLOWED

LACK OF RESOLUTION CAN ALSO BE A PROBLEM FOR EMPLOYEES (183 DAY RULE)

# INTELLECTUAL PROPERTY

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- IF CONDUCT OF ENTITIES DOES NOT SUPPORT CONTRACTUAL RELATIONSHIP, CONDUCT TAKES PRIORITY
- DECISION-MAKING AND CONTROL OF DEVELOPMENT, ETC
- LEGAL OWNER ENTITLED TO RISK-FREE RETURN
  
- YOU CAN BE TAXED IN A PLACE WHICH DOES NOT OWN THE IP
- AND NOT TAXED IN A PLACE WHICH DOES
- PLANNING?

# ARBITRATION I

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2 YEAR WAITING PERIOD

BINDING ON BOTH JURISDICTIONS EXCEPT IF:

- PARTY DOES NOT ACCEPT AGREEMENT TO IMPLEMENT (WITHDRAW ALL COURT CASES)
- COURT OF A JURISDICTION HOLDS THAT ARBITRATION INVALID
- A PARTY PURSUES LITIGATION



# ARBITRATION 2

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- ARBITRATOR SELECTS ONE OF THE PROPOSED RESOLUTIONS, WITHOUT GIVING RATIONALE
- COMPETENT AUTHORITIES STILL HAVE 3 MONTHS TO AGREE SOMETHING ELSE!

# PERMANENT ESTABLISHMENT NEW RULE

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IT IS NOT POSSIBLE TO SPLIT CONTRACTS BETWEEN DIFFERENT COMPANIES WHICH ARE CLOSELY RELATED.

“CLOSELY RELATED” MEANS A 50% BENEFICIAL INTEREST OR VOTES AND VALUE.

# WHAT IS NOT A PE?

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- FACILITIES FOR STORAGE, DISPLAY OR DELIVERY
- MAINTENANCE OF STOCK OF GOODS FOR STORAGE, DISPLAY OR DELIVERY
- MAINTENANCE OF STOCK OF GOODS FOR PROCESSING BY ANOTHER ENTERPRISE
- OFFICE FOR PURCHASING OR COLLECTING INFORMATION
- OFFICE FOR ACTIVITIES OF A PREPARATORY OR AUXILIARY NATURE
- COMBINATION OF ABOVE, PROVIDED TOTAL IS AUXILIARY OR PREPARATORY

# NEW RULE

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ACTIVITIES CARRIED OUT BY THE ENTERPRISE OR CLOSELY RELATED ENTERPRISES WILL BE COMBINED

AND THE OVERALL ACTIVITY WILL FORM A PERMANENT ESTABLISHMENT

IF THE ACTIVITIES ARE NOT PREPARATORY OR AUXILIARY PROVIDED THE ACTIVITIES ARE COMPLEMENTARY

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- AN INDEPENDENT AGENT ACTING EXCLUSIVELY OR ALMOST EXCLUSIVELY FOR AN ENTERPRISE WILL NOT BE CONSIDERED INDEPENDENT
  - HOW DOES AN AUDITOR DO HIS JOB?



# DEPENDENT AGENT

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- NOT INDEPENDENT
- HAS POWER TO CONCLUDE CONTRACTS
- HABITUALLY USES THAT POWER

# NEW RULE

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AGENT HABITUALLY PLAYS PRINCIPAL ROLE

AND

CONTRACTS ROUTINELY CONCLUDED WITHOUT MATERIAL MODIFICATION

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MORE COMPLICATED

BUT

OFTEN THIS WILL NOT LEAD TO A SIGNIFICANT CHANGE IN THE ALLOCATION  
OF TAX

DEPENDS ON ROLE OF AGENT

# WHY IMPORTANT?

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ACTIVITIES OF P.E. ARE TAXED IN COUNTRY OF P.E.

EMPLOYEES OF P.E. MAY BE TAXED DIFFERENTLY FROM EMPLOYEES OF A NON-P.E.

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BE CRITICAL AND DO NOT BELIEVE ALL THEY SAY