



# Recent tax developments and International tax issues – Indian perspective

February 2011

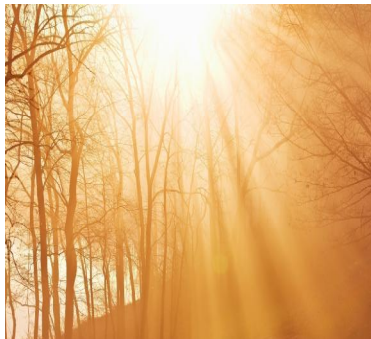
# Agenda

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## ▶ Recent tax developments – Direct Tax Code, 2010

- ▶ Snapshot of international tax proposals
- ▶ Approach towards tax avoidance
- ▶ Indirect transfer of shares
- ▶ Residence rule for foreign companies
- ▶ Branch Profit Tax



## ▶ International tax issues

- ▶ Benefits under the India-Mauritius Double Tax Avoidance Treaty
- ▶ Taxation of transfer of controlling interest in India – Vodafone ruling
- ▶ Tax challenges

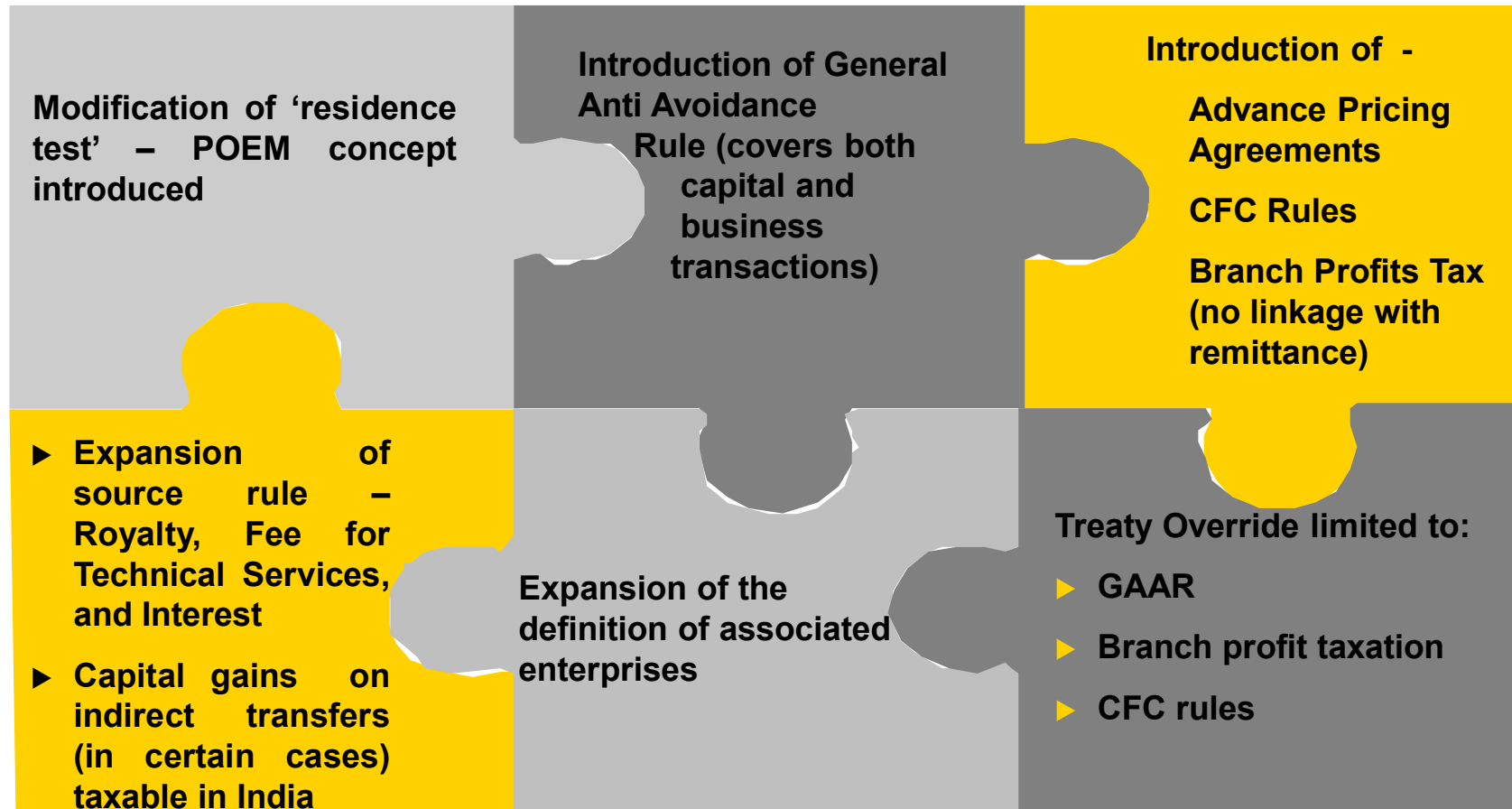
# Recent tax developments – Direct Tax Code, 2010



# Direct Tax Code, 2010

## Snapshot of international tax proposals

Objective of introducing the DTC with to revise, consolidate and simplify direct tax laws in India

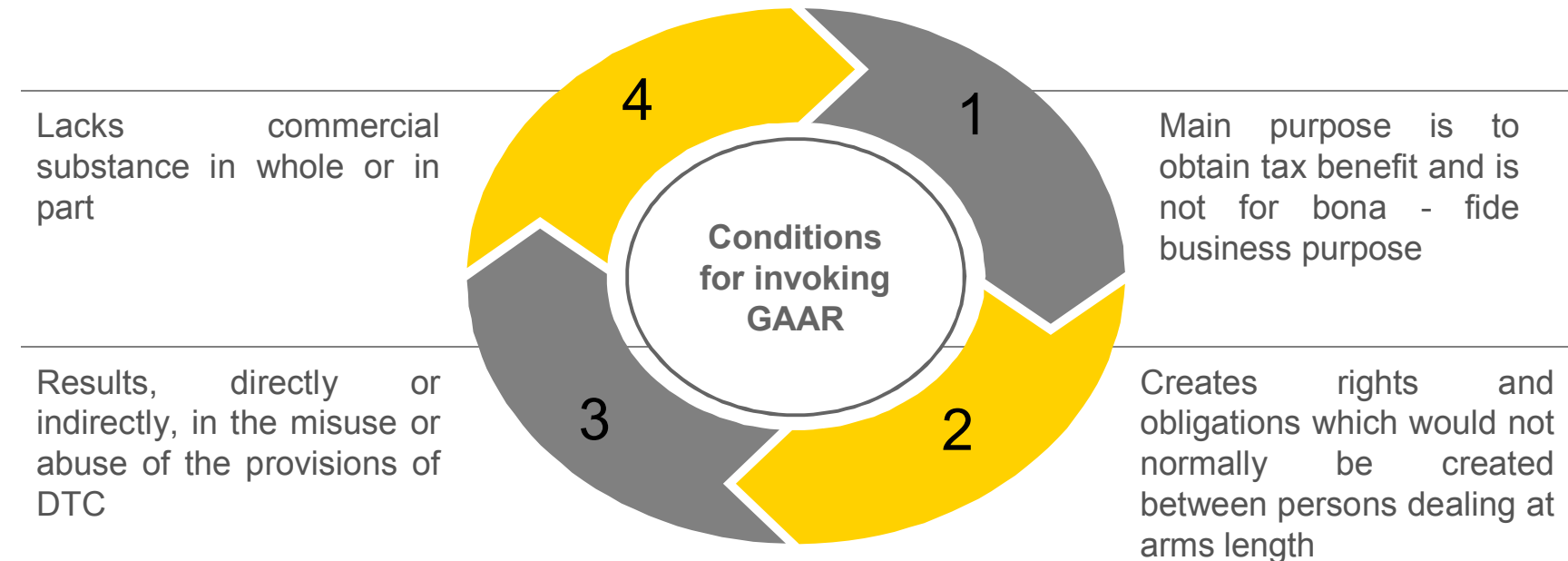


\* Proposed to be effective from April 1, 2012

# Direct Tax Code, 2010

## Approach towards tax avoidance

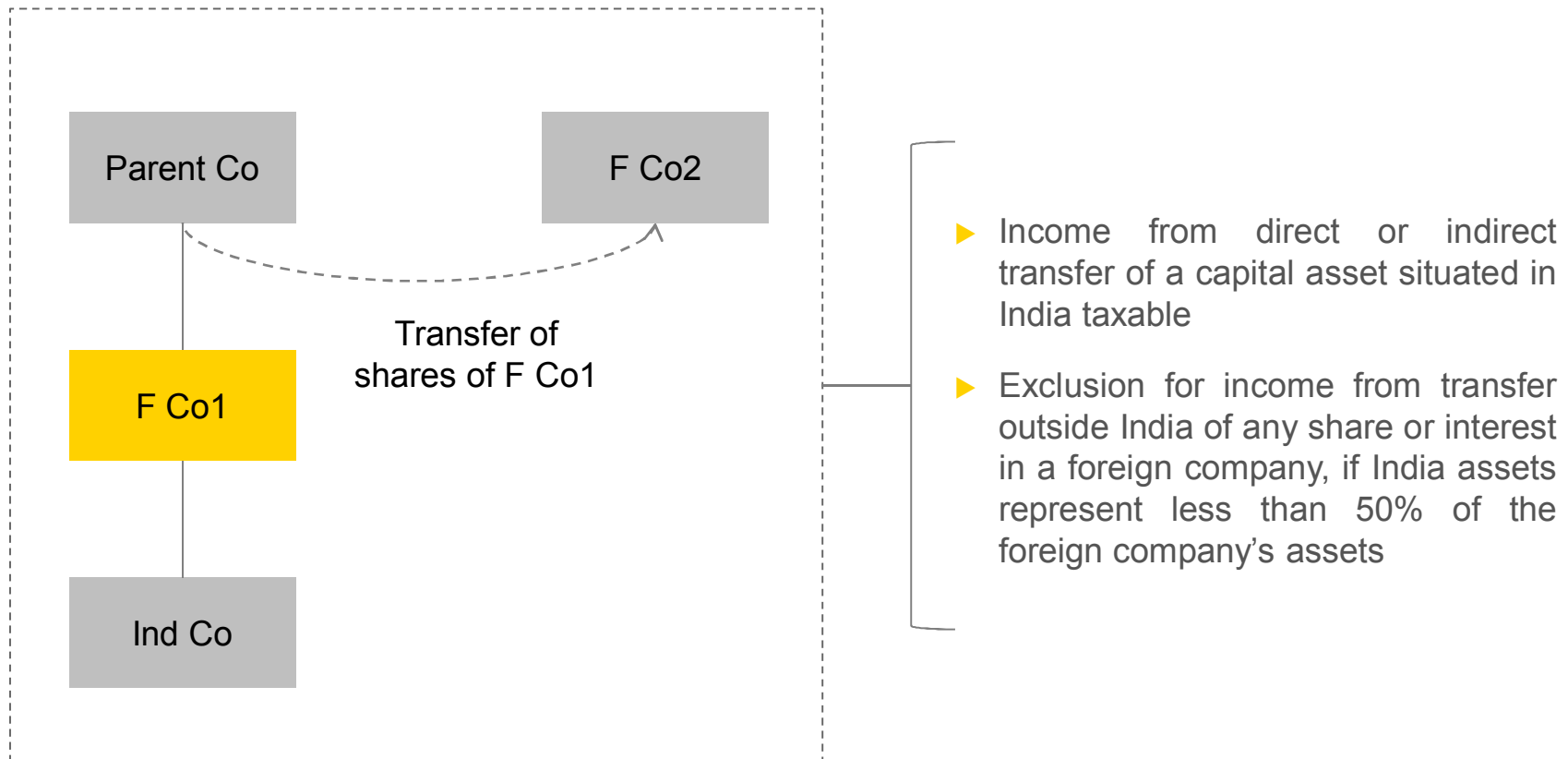
- ▶ GAAR are broad rules that provide the power to the Indian tax office to invalidate an arrangement, including disregarding the applicable tax treaties
- ▶ SAAR also introduced to supplement GAAR (TP, CFC etc)



- ▶ Burden of proof on taxpayer to establish that tax benefit was not the main purpose
- ▶ “Safeguards” proposed include issuance of guidelines to provide circumstances when GAAR may be invoked and availability of Dispute Resolution Panel where GAAR is invoked
- ▶ Treaty benefits would not be available where the GAAR is invoked

# Direct Tax Code, 2010

## Indirect transfer of shares



**An overview of recent developments in India on taxation of indirect transfer of shares in the context of the Vodafone ruling is provided in slide 11**

# Direct Tax Code, 2010

## Residence rule for foreign companies

### Current position

A company incorporated outside India is regarded as an Indian tax resident only if the place of control and management of its affairs is situated 'wholly' in India during a tax year

### DTC position

DTC provides for a company to be treated as a tax resident of India if its Place of Effective Management (POEM), 'at any time', is in India

Place where the board of directors (BOD) of a company or its executive directors (EDs) make their decisions

In case where the BOD routinely approves the commercial and strategic decisions made by the EDs or officers of the company, the place where such EDs or officers of the company perform their functions.

**POEM**

If a foreign company is regarded resident in India by virtue of its POEM being in India at any time during the financial year, it would be taxed on its worldwide income, as well as be subject to dividend distribution tax

# Direct Tax Code, 2010

## Branch Profit Tax

Presently, a branch of a foreign company (FC) is taxed at the rate of 42.23%. There are also no provisions on branch profit / remittance tax. Thus on a net income of INR 100, the India income-tax would be INR 42.23.

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### Proposals

- ▶ FC liable to pay BPT of 15% on total income in addition to corporate tax
- ▶ BPT on total income directly or indirectly attributable to branch less corporate tax
- ▶ Liability not dependent on remittance of profits to head office



### Concerns

- ▶ “Branch” not defined even though terminology used is BPT
- ▶ FC taxed on a ‘gross basis’ on royalties, FTS income could also be subject to BPT liability
- ▶ BPT levy on all FC irrespective of branch / PE in India

On a net income of INR 100, FC would effectively pay India income-tax of INR 40.5.

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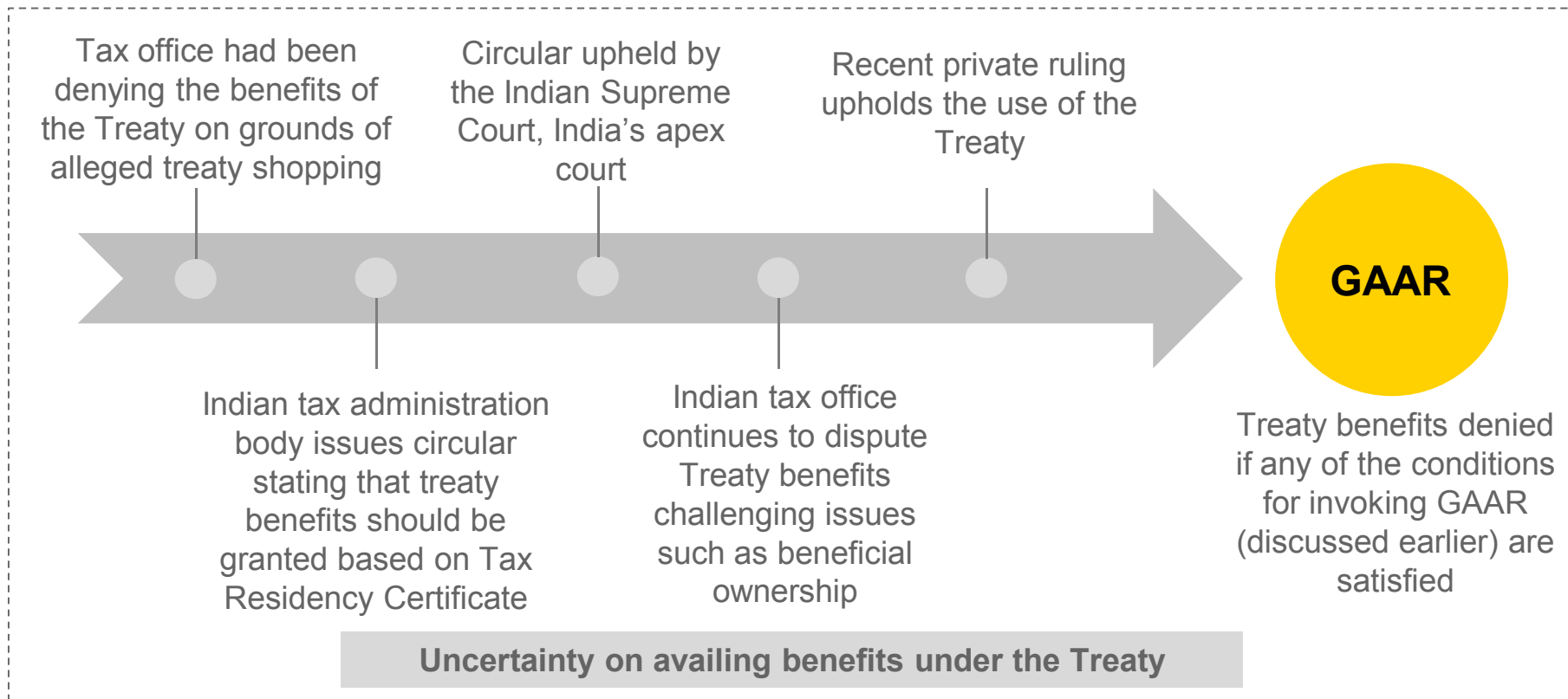
# International tax issues

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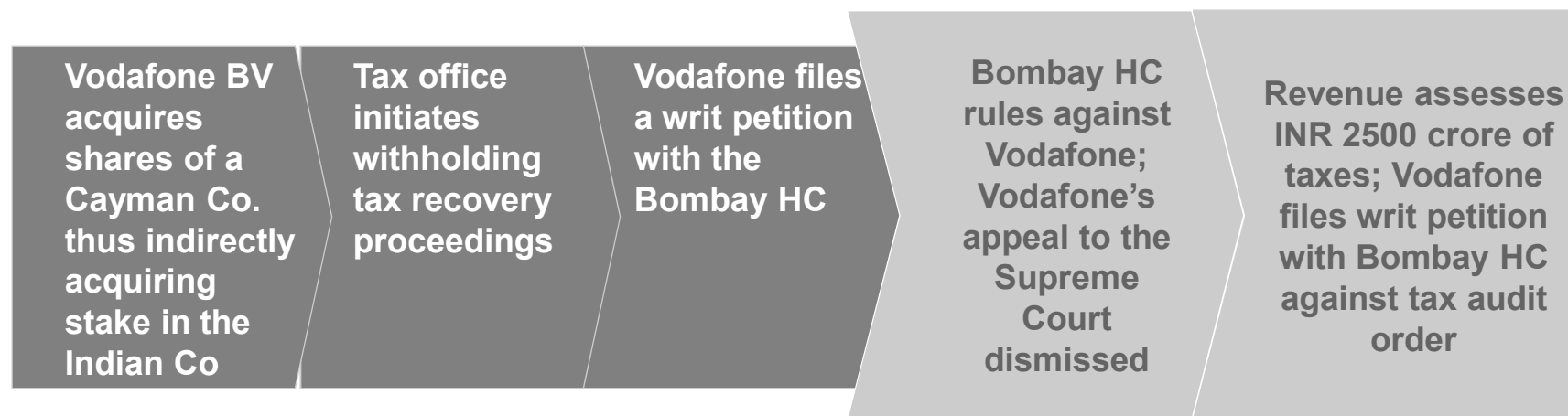
# Benefits under the India-Mauritius Treaty

- ▶ Mauritius is a popular jurisdiction for investments into India with more than 40% of all foreign direct investment into India being from Mauritius
- ▶ As per Article 13 of the India-Mauritius Treaty, capital gains on alienation of shares are taxable only in Mauritius



# Taxation of transfer of controlling interest in India

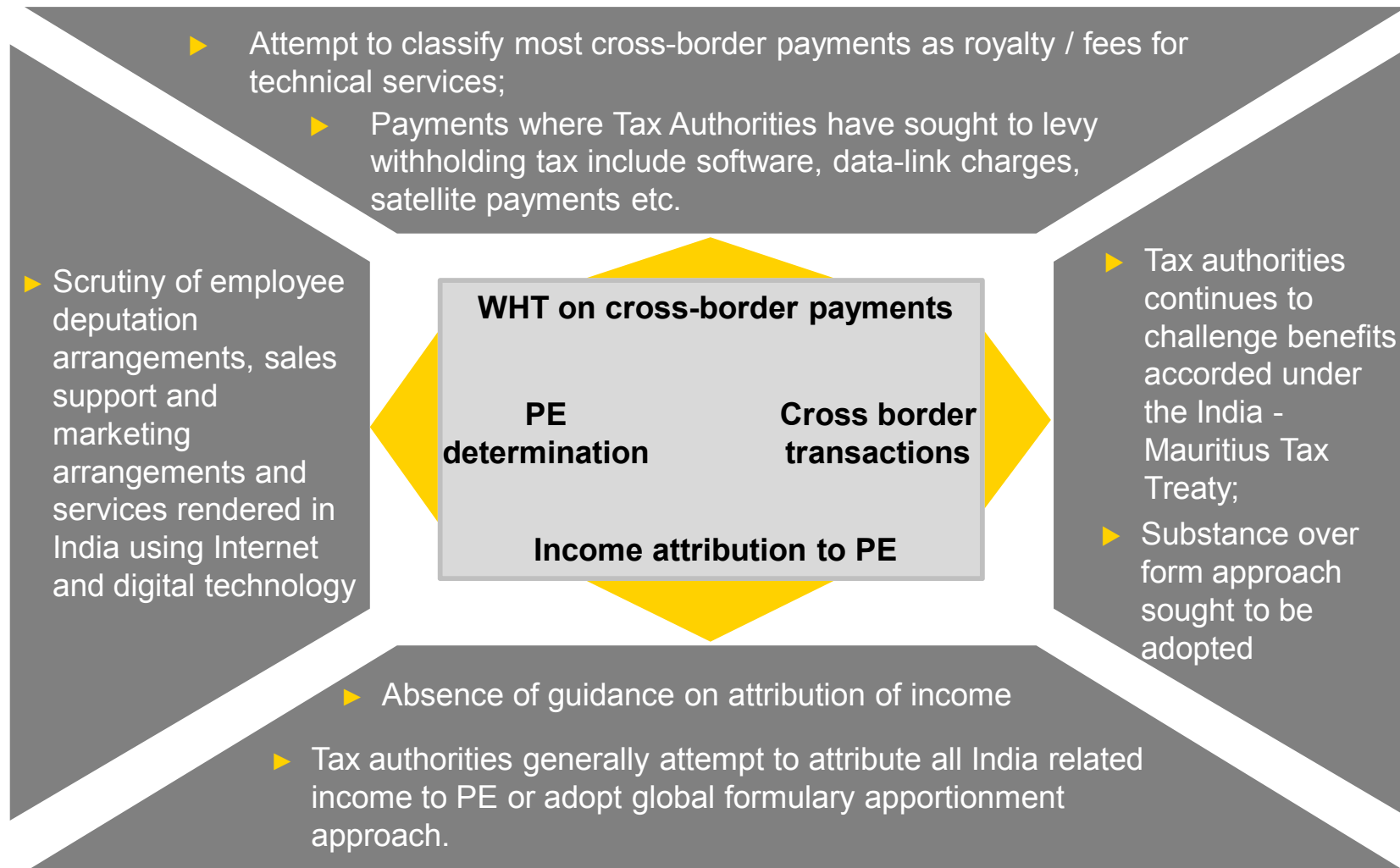
## Vodafone Ruling

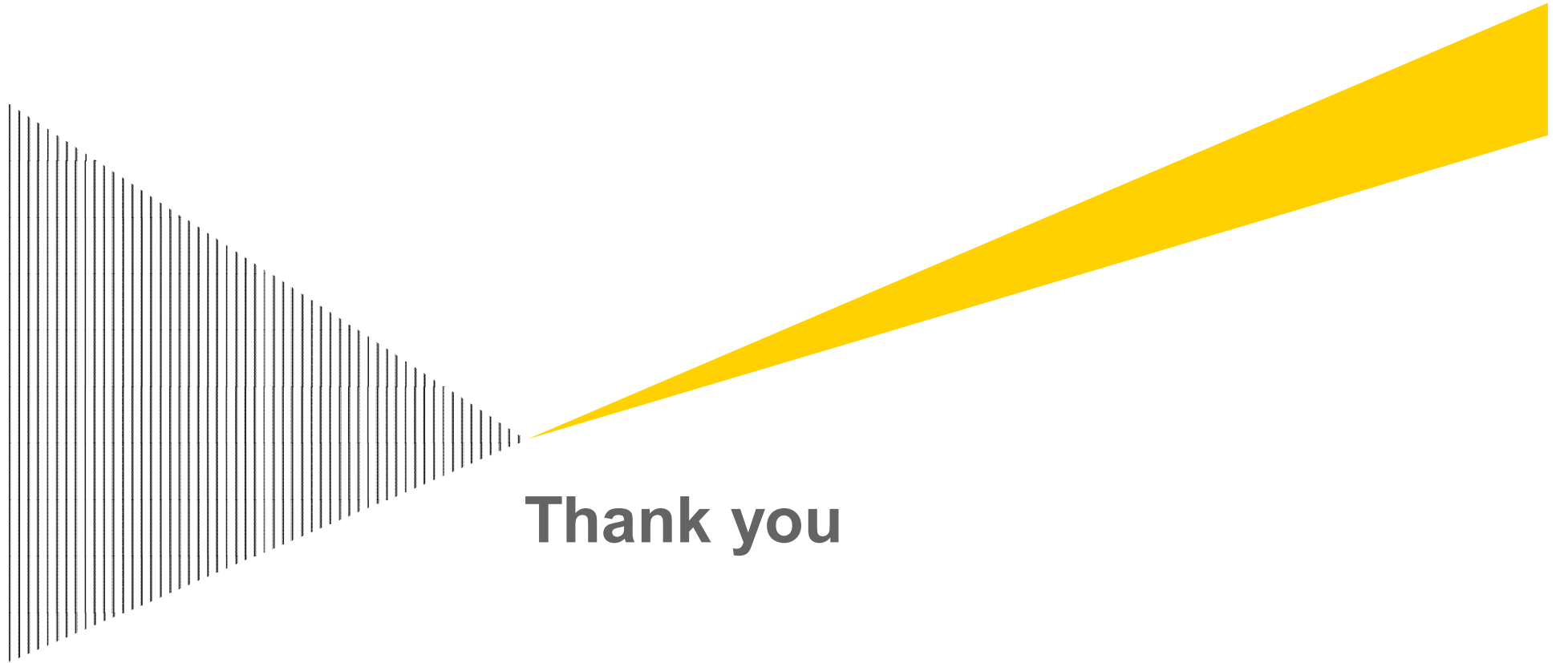


- ▶ Bombay HC rules that the divestment of seller's interests comprised in itself various facets or components [such as control premium, use and rights to the brand in India, a non- compete agreement], and, hence, the tax office has jurisdiction to tax the transaction
- ▶ Bombay HC holds that there should be an apportionment of the income between the part which has a nexus with India and that which does not

- ▶ Bombay HC ruling does not seem to propose a general principle for taxing all offshore share transactions which indirectly involve Indian assets
- ▶ New angle to the controversy by proposing that the income would need to be apportioned between those parts that have a nexus with India and those that do not
- ▶ The impact on prior transactions to be examined

# Tax challenges





**Thank you**