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TAXATION OF CROSS-BORDER MERGERS AND ACQUISITIONS: A COMPARATIVE ANALYSIS OF INDIA, UK, AND US MODELS

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ABSTRACT

This research paper conducts a comprehensive comparative analysis of taxation frameworks governing cross-border mergers and acquisitions (M&A) in India, the United Kingdom, and the United States. The study employs doctrinal research methodology and comparative legal analysis to examine the divergent approaches to tax neutrality, capital gains taxation, and regulatory frameworks across these three major economies. Key findings reveal significant disparities in the treatment of indirect transfer provisions, with India adopting an expansive approach post-Vodafone, the UK maintaining sophisticated corporate restructuring reliefs, and the US implementing comprehensive anti-inversion measures under the Tax Cuts and Jobs Act. The research identifies critical challenges faced by multinational corporations in structuring tax-efficient cross-border transactions, including the lack of harmonized tax neutrality principles and inconsistent treaty interpretations. The paper concludes with recommendations for regulatory reforms to promote smoother cross-border M&A activities and enhance foreign direct investment flows. This study contributes to the academic discourse on international taxation and provides practical insights for legal practitioners and policymakers engaged in cross-border corporate restructuring.

Keywords: Cross-Border Mergers & Acquisitions, Tax Neutrality, Capital Gains Taxation, Indirect Transfer, GAAR.

I. INTRODUCTION

Cross-border mergers and acquisitions have emerged as pivotal instruments of corporate growth and global market integration, with transaction volumes reaching unprecedented levels in the contemporary economic landscape¹. The taxation of such transactions presents multifaceted challenges that significantly impact deal structuring, economic outcomes, and regulatory compliance across multiple jurisdictions. The complexity arises from the intersection of domestic tax laws, international tax treaties, and evolving anti-avoidance measures that collectively shape the fiscal environment for multinational corporate activities. This research aims to conduct a systematic comparative analysis of the taxation regimes governing cross-border M&A transactions in three major economies: India, the United Kingdom, and the United States. These jurisdictions represent distinct approaches to international taxation, reflecting their respective economic philosophies, regulatory frameworks, and policy objectives. India, as an emerging economy with expanding source-based taxation principles, presents a contrasting paradigm to the UK's sophisticated territorial system and the US's comprehensive worldwide taxation approach with recent territorial elements.

The research questions guiding this study encompass:

- i. What are the fundamental differences in tax treatment of cross-border M&A transactions across the three jurisdictions?
- ii. How do indirect transfer provisions and anti-avoidance measures impact transaction structuring?
- iii. To what extent do tax treaties provide effective relief from double taxation in cross-border M&A contexts?
- iv. What regulatory and compliance challenges do multinational corporations face in structuring cross-border deals?

II. BACKGROUND

Cross-Border M&A: Conceptual Framework

Cross-border mergers and acquisitions encompass transactions where entities incorporated in different jurisdictions combine their business operations or where an entity acquires control

¹ UNCTAD, World Investment Report 2024: Investment Facilitation and Digital Government 45-67 (2024).

over a foreign enterprise². These transactions typically involve complex corporate structures designed to optimize tax outcomes while achieving strategic business objectives. The taxonomy of cross-border M&A includes statutory mergers, share acquisitions, asset purchases, and corporate restructuring arrangements, each presenting distinct tax implications under different jurisdictional frameworks.

Tax Neutrality Principles

Tax neutrality represents a fundamental principle in international taxation, suggesting that tax considerations should not distort business decisions or competitive positions between domestic and cross-border transactions³. The concept encompasses capital export neutrality, which advocates for equal tax treatment regardless of the location of investment, and capital import neutrality, which promotes equal treatment of foreign and domestic investors within a jurisdiction. The achievement of tax neutrality in cross-border M&A contexts requires careful consideration of source and residence taxation principles, effective implementation of double taxation relief mechanisms, and harmonization of anti-avoidance measures.

Capital Gains Taxation Framework

Capital gains taxation in cross-border contexts involves complex interactions between source and residence jurisdictions' taxing rights⁴. The characterization of gains, determination of tax liability, and availability of exemptions or reliefs significantly impact transaction economics. The temporal aspects of capital gains recognition, including deferral mechanisms and rollover reliefs, play crucial roles in structuring tax-efficient cross-border transactions.

Indirect Transfer Provisions

Indirect transfer provisions have gained prominence in international taxation as jurisdictions seek to prevent erosion of their tax base through offshore structures⁵. These provisions typically target transactions where shares of foreign entities holding substantial assets in the source jurisdiction are transferred, thereby circumventing direct transfer taxation. The scope, thresholds, and exemptions under indirect transfer regimes vary significantly across

² Hugh J. Ault & Brian J. Arnold, *Comparative Income Taxation: A Structural Analysis* 425-430 (Kluwer Law International, 3d ed. 2010).

³ Klaus Vogel, *Double Taxation Conventions* 35-42 (Kluwer Law International, 3d ed. 1997).

⁴ *Id.* at 287-294.

⁵ OECD, *BEPS Action Plan, Action 6: Preventing the Granting of Treaty Benefits in Inappropriate Circumstances* 15-25 (2015).

jurisdictions, creating both compliance challenges and structuring opportunities for multinational enterprises.

Double Taxation Avoidance Agreements (DTAA)

Tax treaties serve as the primary mechanism for allocating taxing rights between jurisdictions and providing relief from double taxation⁶. The effectiveness of treaty networks in facilitating cross-border M&A depends upon comprehensive coverage, clear allocation rules, and efficient dispute resolution mechanisms. The interpretation of key treaty concepts, including beneficial ownership, permanent establishment, and capital gains taxation rights, significantly influences transaction structuring and tax outcomes.

III. TAXATION IN INDIA

A. Key Legislative Frameworks

The Indian taxation of cross-border M&A transactions is governed by a comprehensive legislative framework comprising multiple statutes and regulatory instruments. The Income Tax Act, 1961, serves as the primary legislation, with Sections 9(1)(i) and 47 being particularly relevant for cross-border transactions⁷. Section 9(1)(i) defines "income deemed to accrue or arise in India" and establishes source rules for capital gains taxation, while Section 47 provides specific exemptions for certain corporate reorganization transactions.

The Companies Act, 2013, governs the procedural aspects of mergers and demergers, establishing regulatory frameworks for court approvals and compliance requirements⁸. The Foreign Exchange Management Act (FEMA), 1999, regulates foreign exchange implications of cross-border transactions, including reporting requirements and sectoral caps on foreign investment⁹. The Goods and Services Tax (GST) regime adds another layer of complexity, with potential implications for asset transfers and going concern transactions¹⁰.

⁶ OECD Model Tax Convention on Income and on Capital art. 13 (2017); UN Model Double Taxation Convention between Developed and Developing Countries art. 13 (2017).

⁷ Income Tax Act, 1961, §§ 9(1)(i), 47, No. 43 of 1961, Acts of Parliament, 1961 (India).

⁸ Companies Act, 2013, §§ 230-240, No. 18 of 2013, Acts of Parliament, 2013 (India).

⁹ Foreign Exchange Management Act, 1999, § 6, No. 42 of 1999, Acts of Parliament, 1999 (India).

¹⁰ Central Goods and Services Tax Act, 2017, § 7, No. 12 of 2017, Acts of Parliament, 2017 (India).

B. Tax Treatment of Corporate Reorganizations

i. Mergers and Demergers

Indian tax law provides conditional exemptions for mergers and demergers under Section 47 of the Income Tax Act, subject to compliance with prescribed conditions¹¹. The exemptions are designed to facilitate genuine business reorganizations while preventing tax avoidance. For cross-border transactions, the availability of exemptions depends upon the jurisdictional scope of the provisions and the fulfillment of substance requirements.

The conditions for exemptions include: (i) transfer of assets and liabilities as a going concern; (ii) continuation of business by the resulting entity; (iii) compliance with valuation requirements; and (iv) adherence to prescribed procedural formalities¹². The judicial interpretation of these conditions has evolved through various landmark cases, providing guidance on the scope and application of exemption provisions.

ii. Share Sales and Asset Sales

The taxation of share sales versus asset sales in cross-border contexts presents distinct implications under Indian law. Share sales by non-residents are subject to capital gains taxation if the shares derive substantial value from assets located in India, as per the indirect transfer provisions¹³. Asset sales typically trigger immediate tax liability for the seller and stepped-up cost basis for the purchaser, impacting the overall transaction economics.

The characterization of transactions as share sales or asset sales depends upon the legal form and substance of the arrangement, with courts examining factors such as the nature of assets transferred, the continuity of business operations, and the economic substance of the transaction structure¹⁴.

C. Indirect Transfer Provisions Post-Vodafone

The landmark Supreme Court decision in *Vodafone International Holdings B.V. v. Union of India* fundamentally altered India's approach to indirect transfers¹⁵. The Supreme Court judgment in *Vodafone International Holding vs Union of India* sought

¹¹ Income Tax Act, 1961, § 47, No. 43 of 1961, Acts of Parliament, 1961 (India).

¹² Income Tax Rules, 1962, Rule 8AB, S.O. 969(E), dated March 26, 1962 (India).

¹³ Income Tax Act, 1961, § 9(1)(i) Explanation 5, No. 43 of 1961, Acts of Parliament, 1961 (India).

¹⁴ *CIT v. Grace Collis*, (2001) 248 ITR 323 (Delhi High Court).

¹⁵ *Vodafone Int'l Holdings B.V. v. Union of India*, (2012) 6 SCC 613 (India).

to clear the uncertainty with respect to imposition of taxes. The Court held that the transfer of shares of a foreign company could not be subjected to Indian tax merely because the foreign company held shares in an Indian company, emphasizing the principle that tax liability should be based on the situs of the transferred asset rather than the underlying assets.

In response to the Vodafone decision, the Indian government introduced Explanation 5 to Section 9(1)(i) through the Finance Act, 2012, with retrospective effect¹⁶. The provision indicates that indirect transfers are covered by the existing Section 9(1)(i) of the Act, expanding the source rules for taxation in India of capital gain income arising to non-residents from sale of shares of entities situated outside India. The amendment established a comprehensive framework for taxing indirect transfers based on value thresholds and ownership criteria.

The key elements of India's indirect transfer regime include: (i) a value test requiring that the assets of the foreign entity derive substantial value from Indian assets; (ii) a control test examining whether the transaction involves substantial ownership changes; and (iii) a business connection test evaluating the economic substance of operations in India¹⁷. The regime provides exemptions for publicly traded companies and transactions involving de minimis shareholdings, balancing revenue protection with investment promotion objectives.

Recent judicial developments have provided greater clarity on the interpretation and application of indirect transfer provisions. Courts have emphasized the importance of examining the substance of transactions rather than merely their legal form, preventing artificial arrangements designed solely to avoid tax liability¹⁸.

D. Challenges and Recent Reforms

i. Lack of Tax Neutrality

One of the primary challenges in India's cross-border M&A taxation regime is the absence of comprehensive tax neutrality provisions for international transactions.¹⁹

Unlike domestic reorganizations that benefit from Section 47 exemptions, cross-

¹⁶ Finance Act, 2012, § 8, No. 23 of 2012, Acts of Parliament, 2012 (India).

¹⁷ Income Tax Act, 1961, § 9(1)(i) Explanation 5, No. 43 of 1961, Acts of Parliament, 1961 (India).

¹⁸ Blackstone Capital Partners (Singapore) Pte. Ltd. v. Additional Director of Income Tax, ITA No. 1003/Del/2019 (Delhi High Court 2020).

¹⁹ Sayantan Gupta, Cross-Border Mergers and Acquisitions: Addressing the Taxation Issues from an Indian Perspective, SSRN Electronic Journal 12-18 (2008).

border transactions often face immediate tax consequences regardless of their genuine business purposes. This disparity creates artificial incentives favoring domestic over international corporate restructuring arrangements.

The lack of tax neutrality manifests in various forms: (i) immediate recognition of capital gains in cross-border mergers despite continuity of business operations; (ii) absence of rollover relief for replacement of foreign assets with domestic assets; and (iii) differential treatment of debt and equity consideration in acquisition structures²⁰. These asymmetries discourage efficient capital allocation and may impede India's integration into global value chains.

ii. Transfer Pricing Challenges

Cross-border M&A transactions present complex transfer pricing issues, particularly in determining arm's length prices for unique assets and evaluating post-transaction related party dealings²¹. The Indian transfer pricing regime requires detailed documentation and contemporaneous evidence of arm's length pricing, creating compliance burdens for multinational enterprises.

The interaction between transfer pricing provisions and capital gains taxation can result in double taxation issues, particularly where adjustments to transaction prices impact both transfer pricing liability and capital gains computations²². Recent amendments to transfer pricing regulations have introduced more stringent documentation requirements and expanded the scope of covered transactions.

E. Role of Regulatory Authorities

i. National Company Law Tribunal (NCLT)

The NCLT plays a crucial role in approving cross-border mergers and amalgamations, ensuring compliance with corporate law requirements and protecting stakeholder interests²³. The Tribunal's jurisdiction extends to examining the fairness of exchange ratios, the adequacy of disclosure, and the commercial rationale for proposed transactions. NCLT orders provide legal validity to corporate reorganizations and may influence tax treatment under specific provisions.

ii. Reserve Bank of India (RBI)

RBI regulates foreign exchange aspects of cross-border transactions, including

²⁰ Id. at 25-30.

²¹ Income Tax Rules, 1962, Rule 10E, S.O. 969(E), dated March 26, 1962 (India).

²² DIT (IT) v. Morgan Stanley & Co. Inc., (2007) 292 ITR 416 (AAR).

²³ Companies Act, 2013, § 230, No. 18 of 2013, Acts of Parliament, 2013 (India).

sectoral caps, pricing guidelines, and reporting requirements²⁴. The central bank's approval is required for transactions involving foreign investment beyond automatic route limits or in sectors with specific restrictions. RBI's foreign exchange regulations interact with tax provisions to create comprehensive compliance frameworks for cross-border M&A.

iii. Income Tax Authorities

Income tax authorities exercise significant discretionary powers in interpreting and applying cross-border M&A taxation provisions²⁵. The powers include conducting assessments, determining tax liability, and enforcing collection measures. Recent developments have witnessed increased scrutiny of cross-border transactions, with authorities employing sophisticated analysis techniques to examine transaction structures and economic substance.

IV. TAXATION IN THE UK

A. HMRC Guidance and Regulatory Framework

The UK's approach to cross-border M&A taxation reflects extensive guidance from HM Revenue & Customs (HMRC), with relief available depending on the terms of each double taxation treaty, where HMRC will decide if an application is allowable. The UK maintains a sophisticated framework for corporate taxation that balances revenue collection with maintaining competitiveness as a global financial center.

The primary legislative framework consists of the Corporation Tax Acts of 2009 and 2010, the Taxation of Chargeable Gains Act 1992, and various Finance Acts that introduce annual updates and reforms²⁶. The UK's extensive network of double taxation agreements provides legitimate relief for businesses operating across borders, ensuring you only pay tax in one jurisdiction on specific income streams.

HMRC's Corporate Finance Manual provides detailed guidance on the tax treatment of corporate reorganizations, mergers, and acquisitions, offering practical examples and interpretative guidance for practitioners²⁷. The guidance emphasizes the importance of commercial substance and genuine business purposes in determining the availability of

²⁴ Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017, Notification No. FEMA 20(R)/2017-RB (India).

²⁵ Income Tax Act, 1961, §§ 142, 143, No. 43 of 1961, Acts of Parliament, 1961 (India).

²⁶ Corporation Tax Act 2009, c. 4 (UK); Corporation Tax Act 2010, c. 4 (UK); Taxation of Chargeable Gains Act 1992, c. 12 (UK).

²⁷ HM Revenue & Customs, Corporate Finance Manual, CFM30000-CFM90000 (2024).

tax reliefs and exemptions.

B. Tax Reliefs for Corporate Restructuring

i. Corporate Restructuring Relief

The UK provides comprehensive corporate restructuring relief designed to facilitate genuine commercial reorganizations without immediate tax consequences²⁸. The relief operates on the principle of tax neutrality, allowing businesses to restructure their operations based on commercial rather than tax considerations. The key conditions for relief include: (i) the transaction must be undertaken for genuine commercial reasons; (ii) tax avoidance must not be a main purpose; and (iii) specific anti-avoidance provisions must not apply.

Share-for-share exchanges benefit from specific relief provisions that defer capital gains taxation until the ultimate disposal of replacement shares.²⁹ This mechanism facilitates cross-border acquisitions by UK companies and enables tax-efficient group restructuring arrangements. The relief extends to both direct shareholders and qualifying institutional investors, providing broad coverage for commercial transactions.

ii. Substantial Shareholding Exemption (SSE)

The SSE provides exemption from corporation tax on capital gains arising from the disposal of substantial shareholdings in trading companies³⁰. For cross-border M&A transactions, the SSE can eliminate UK tax liability on the disposal of foreign subsidiaries, provided the stringent qualifying conditions are satisfied. The exemption requires: (i) a minimum 10% shareholding maintained for at least 12 months; (ii) the investee company must be a trading company or the holding company of a trading group; and (iii) various anti-avoidance conditions must be satisfied. The interaction between SSE and double taxation treaties can provide additional layers of protection against double taxation, particularly in triangular reorganization structures involving multiple jurisdictions³¹.

²⁸ Corporation Tax Act 2010, pt. 27, c. 4 (UK).

²⁹ Taxation of Chargeable Gains Act 1992, § 135, c. 12 (UK).

³⁰ Corporation Tax Act 2009, pt. 6A, c. 4 (UK).

³¹ CRC v. Bowater Property Developments Ltd., [1989] STC 568 (Ch.).

C. Capital Gains Tax Considerations and Anti-Avoidance

i. Capital Gains Taxation Framework

The UK's capital gains taxation of cross-border M&A transactions operates under a residence-based system with limited source taxation for non-residents³². UK-resident companies are subject to corporation tax on worldwide capital gains, while non-residents generally face UK capital gains tax only on gains from UK land and buildings or gains attributable to UK permanent establishments.

The computational aspects of capital gains taxation include indexation allowances for pre-1998 acquisitions, substantial shareholding exemptions, and various rollover reliefs for replacement of business assets³³. The timing of gain recognition can be deferred through earn-out arrangements and deferred consideration structures, providing flexibility in transaction structuring.

ii. General Anti-Abuse Rule (GAAR)

The UK's GAAR targets abusive tax arrangements while preserving legitimate tax planning opportunities³⁴. In the context of cross-border M&A, the GAAR may apply to arrangements that are artificial or contrived and that seek to obtain tax advantages inconsistent with the intended operation of tax provisions. The GAAR panel process provides procedural safeguards and interpretative guidance on the application of the rule.

The interaction between the GAAR and specific anti-avoidance provisions creates a multi-layered framework for preventing tax abuse while maintaining certainty for genuine commercial transactions³⁵.

iii. Diverted Profits Tax (DPT)

The DPT represents a novel approach to addressing profit shifting in multinational groups, imposing a 25% tax rate on diverted profits³⁶. In cross-border M&A contexts, the DPT may apply to arrangements that lack adequate economic substance or that involve the artificial avoidance of UK permanent establishment status. The DPT's broad scope and high tax rate create significant compliance risks for multinational groups undertaking complex corporate restructuring.

³² Taxation of Chargeable Gains Act 1992, § 14B, c. 12 (UK).

³³ *Id.* §§ 53-57.

³⁴ Finance Act 2013, § 206, c. 29 (UK).

³⁵ *R (Rowe) v. HM Revenue & Customs*, [2017] EWCA Civ 2105.

³⁶ Finance Act 2015, § 80, c. 11 (UK).

D. Regulatory Approvals and Oversight

i. Financial Conduct Authority (FCA)

The FCA regulates financial services aspects of cross-border M&A transactions, particularly those involving publicly listed companies or financial institutions³⁷. The authority's jurisdiction includes takeover regulations, market disclosure requirements, and investor protection measures. FCA oversight can impact transaction timing and structuring, particularly for complex multi-jurisdictional arrangements.

ii. Competition and Markets Authority (CMA)

The CMA exercises merger control jurisdiction over transactions meeting specified turnover or market share thresholds³⁸. Recent regulatory clarity around Brexit has encouraged US firms to invest more heavily in the UK, viewing it as a gateway to the European and global markets. The authority's competition assessment may influence deal structure and impose remedies that affect tax outcomes, particularly in cases involving divestitures or behavioral undertakings.

V. TAXATION IN THE US

A. Internal Revenue Code Provisions for M&A

The United States federal taxation of cross-border M&A transactions operates under a complex framework established by the Internal Revenue Code (IRC) and implemented through Treasury Regulations and administrative guidance³⁹. The Tax Cuts and Jobs Act ("TCJA") made significant changes that affect international and domestic businesses, such as deductions, depreciation, expensing, tax credits and other tax items. The IRC provides several reorganization provisions under Section 368 that allow for tax-deferred treatment of qualifying corporate restructuring transactions.⁴⁰ These provisions enable companies to combine or restructure without immediate recognition of gain or loss, provided the transactions satisfy specific requirements including continuity of interest, continuity of business enterprise, and business purpose.

Section 355 governs corporate divisions and spin-offs, allowing tax-free distributions of subsidiary stock to shareholders under prescribed conditions⁴¹. For cross-border

³⁷ Financial Services and Markets Act 2000, pt. VI, c. 8 (UK).

³⁸ Enterprise Act 2002, pt. 3, c. 40 (UK).

³⁹ I.R.C. §§ 351, 354, 361, 368 (2017).

⁴⁰ I.R.C. § 368 (2017).

⁴¹ I.R.C. § 355 (2017).

applications, these provisions interact with international tax rules to create complex structuring opportunities and compliance requirements.

B. Treatment of Joint Ventures and Flow-Through Entities

i. Joint Venture Taxation

Joint ventures may be taxed as a corporation or partnership or they may simply be allocated gross receipts of the joint venture based upon their bid. Entities that are taxed as corporations are subject to 'double taxation' whereby both the corporate and shareholder levels are taxed. The classification of joint ventures for US tax purposes depends upon factors including the legal structure, management arrangements, and economic rights of the participants.

Cross-border joint ventures present additional complexity due to the interaction of US tax rules with foreign tax systems and treaty provisions⁴². The character of income, source rules, and foreign tax credit implications require careful analysis in structuring international joint venture arrangements.

ii. Flow-Through Entity Considerations

Partnerships and other flow-through entities play significant roles in cross-border M&A structuring, providing flexibility in allocating income, gains, and losses among participants⁴³. The US partnership taxation rules under Subchapter K create opportunities for tax-efficient structures while imposing complex compliance requirements including information reporting and withholding obligations.

The interaction between partnership taxation and international provisions, including the branch profits tax and effectively connected income rules, requires sophisticated planning in cross-border contexts⁴⁴.

C. Withholding Taxes and Reporting Requirements

i. Federal Withholding Tax Framework

The US imposes withholding tax at a 30% rate on fixed or determinable annual or periodical (FDAP) income paid to foreign persons, subject to reduction under applicable tax treaties⁴⁵. In cross-border M&A contexts, withholding taxes may apply to dividend distributions, interest payments, and certain service fees, affecting

⁴² Treas. Reg. § 1.367(a)-1 (2017).

⁴³ I.R.C. §§ 701-777 (2017).

⁴⁴ I.R.C. §§ 884, 897 (2017).

⁴⁵ I.R.C. §§ 871, 881 (2017).

the overall economics of transaction structures.

The Foreign Investment in Real Property Tax Act (FIRPTA) imposes withholding requirements on dispositions of US real property interests by foreign persons, with rates varying based on the type of property and transaction structure⁴⁶. FIRPTA withholding can significantly impact the cash flow and structuring of cross-border transactions involving US real estate assets.

ii. Information Reporting Obligations

Cross-border M&A transactions trigger extensive information reporting requirements for US tax purposes⁴⁷. Form 8865 requires reporting of foreign partnership interests and transactions, while Form 5471 mandates reporting of foreign corporation ownership and transactions. Form 8938 requires disclosure of specified foreign financial assets by individuals and domestic entities.

The compliance burden associated with information reporting requirements has increased significantly, with substantial penalties for non-compliance and enhanced enforcement through data sharing agreements with foreign tax authorities⁴⁸.

D. Role of SEC and DOJ in Cross-Border M&A

i. Securities and Exchange Commission (SEC)

The SEC regulates securities law aspects of cross-border M&A transactions, including disclosure requirements, proxy statements, and tender offer regulations⁴⁹. The Commission's jurisdiction extends to both domestic and foreign companies with US securities market presence, creating overlapping regulatory requirements that may influence transaction structuring and timing.

Recent developments in ESG reporting and climate-related disclosures add new dimensions to SEC oversight of cross-border transactions, requiring enhanced due diligence and disclosure processes⁵⁰.

ii. Department of Justice (DOJ) Antitrust Division

The DOJ's Antitrust Division exercises jurisdiction over mergers and acquisitions that may substantially lessen competition in US markets⁵¹. The division's analysis

⁴⁶ I.R.C. § 897 (2017).

⁴⁷ I.R.C. §§ 6038, 6038A, 6038B (2017).

⁴⁸ I.R.C. § 6662 (2017).

⁴⁹ Securities Exchange Act of 1934, § 14, 15 U.S.C. § 78n (2018).

⁵⁰ SEC, The Enhancement and Standardization of Climate-Related Disclosures for Investors, Release Nos. 33-11042; 34-94478 (2022).

⁵¹ Clayton Act, § 7, 15 U.S.C. § 18 (2018).

considers both horizontal and vertical competitive effects, potentially requiring divestitures or behavioral remedies that impact transaction structure and tax outcomes.

The intersection of antitrust remedies with tax planning creates additional complexity in structuring cross-border transactions, particularly where divestitures or ongoing business restrictions are required for regulatory approval⁵².

VI. COMPARATIVE ANALYSIS

A. Points of Convergence and Divergence

The comparative examination of cross-border M&A taxation across India, the UK, and the US reveals both fundamental similarities and significant differences in approach and implementation. All three jurisdictions grapple with the challenge of balancing revenue protection with investment attraction, though their solutions vary considerably in scope and sophistication.

i. Convergence Areas

Anti-Avoidance Frameworks: All three jurisdictions have implemented comprehensive anti-avoidance measures, though with different emphases and mechanisms. India's indirect transfer provisions, the UK's GAAR and targeted anti-avoidance rules, and the US's anti-inversion provisions reflect common concerns about base erosion and artificial profit shifting⁵³.

Substance Requirements: Each jurisdiction increasingly emphasizes economic substance over legal form in evaluating cross-border transactions. Courts and tax authorities across all three systems examine the commercial rationale, business purpose, and genuine economic activities underlying transaction structures⁵⁴.

Enhanced Reporting: Information reporting and transparency requirements have expanded significantly across jurisdictions, driven by international initiatives such as BEPS and bilateral exchange agreements. The trend toward real-time reporting and data analytics capabilities reflects common regulatory priorities⁵⁵.

⁵² FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109 (D.D.C. 2004).

⁵³ OECD, BEPS Action 6: Preventing the Granting of Treaty Benefits in Inappropriate Circumstances 45-60 (2015).

⁵⁴ Prism Cement Ltd. v. Deputy Director of Income Tax, (2020) 422 ITR 531 (Delhi High Court); UBS AG v. CRC, [2007] EWCA Civ 119; Gregory v. Helvering, 293 U.S. 465 (1935).

⁵⁵ OECD, Tax Administration 3.0: The Digital Transformation of Tax Administration 25-40 (2020).

ii. Divergence Areas

Tax Neutrality Implementation: The most significant divergence lies in the implementation of tax neutrality principles. The UK provides the most comprehensive framework for tax-neutral reorganizations through its corporate restructuring reliefs and SSE. The US offers selective neutrality through Section 368 reorganizations but with restrictive qualification requirements. India provides the most limited neutrality, primarily for domestic transactions under Section 47⁵⁶.

Indirect Transfer Approach: The treatment of indirect transfers reveals fundamental philosophical differences. India has adopted an aggressive approach with broad scope and retroactive application. The UK generally respects the separate legal entity principle while applying targeted anti-avoidance measures. The US focuses on specific arrangements such as inversions while maintaining general respect for foreign corporate structures⁵⁷.

Territorial versus Worldwide Systems: The UK's territorial system contrasts sharply with India's source-based expansion and the US's modified worldwide system post-TCJA. These differences create varying incentives for headquarters location and profit repatriation strategies⁵⁸.

B. Effectiveness of Tax Neutrality Principles

The analysis reveals significant variations in the effectiveness of tax neutrality implementation across jurisdictions. The UK's comprehensive approach, built around commercial purpose requirements and specific relief provisions, generally achieves neutrality between domestic and cross-border reorganizations for qualifying transactions⁵⁹.

India's framework demonstrates significant gaps in neutrality, particularly for cross-border transactions. The absence of cross-border merger relief under Section 47 and the broad application of indirect transfer provisions create artificial incentives that may distort commercial decision-making⁶⁰.

The US system provides selective neutrality through qualifying reorganization

⁵⁶ Compare Corporation Tax Act 2010, pt. 27, c. 4 (UK), with Income Tax Act, 1961, § 47, No. 43 of 1961, Acts of Parliament, 1961 (India), and I.R.C. § 368 (2017).

⁵⁷ Compare Income Tax Act, 1961, § 9(1)(i) Explanation 5, No. 43 of 1961, Acts of Parliament, 1961 (India), with Finance Act 2013, § 206, c. 29 (UK), and I.R.C. § 7874 (2017).

⁵⁸ Joint Committee on Taxation, General Explanation of Public Law 115-97, JCS-1-18, at 353-375 (2018).

⁵⁹ Corporation Tax Act 2010, pt. 27, c. 4 (UK).

⁶⁰ Income Tax Act, 1961, § 47, No. 43 of 1961, Acts of Parliament, 1961 (India).

provisions, but the complexity of requirements and interaction with international provisions can create practical barriers to achieving neutral treatment⁶¹.

C. Impact of Tax Treaties and Anti-Avoidance Measures

Tax treaties play crucial roles in facilitating cross-border M&A across all three jurisdictions, though their effectiveness varies based on network coverage, interpretative consistency, and interaction with domestic anti-avoidance measures.

The UK benefits from extensive treaty coverage and generally consistent interpretation, though Brexit has eliminated EU Directive benefits and created new complexities for European transactions⁶². The US treaty network provides comprehensive coverage with major trading partners but faces challenges from complex domestic anti-avoidance provisions that may override treaty benefits⁶³.

India's expanding treaty network faces challenges from domestic anti-avoidance measures and inconsistent administrative interpretation. The interaction between indirect transfer provisions and treaty relief creates ongoing uncertainty for taxpayers and advisors⁶⁴.

D. Regulatory Framework Differences

The regulatory frameworks governing cross-border M&A demonstrate varying approaches to balancing efficiency with investor protection and revenue collection. The UK's integrated approach, combining tax and regulatory oversight under established authorities, generally provides predictable timelines and clear guidance⁶⁵.

India's multi-authority framework, involving NCLT, RBI, and tax authorities, creates potential coordination challenges but provides comprehensive oversight of different transaction aspects. Recent digitization initiatives aim to improve efficiency and consistency across regulatory processes⁶⁶.

The US system's separation of tax, securities, and antitrust oversight reflects constitutional structures but can create timing and coordination challenges for complex transactions⁶⁷.

⁶¹ I.R.C. § 368 (2017); Treas. Reg. § 1.368-1 (2017).

⁶² European Union (Withdrawal) Act 2018, c. 16 (UK).

⁶³ I.R.C. § 7874 (2017); Treas. Reg. § 1.7874-1 (2017).

⁶⁴ CBDT Circular No. 789, dated April 13, 2000.

⁶⁵ HM Revenue & Customs, Corporate Finance Manual, CFM30000-CFM90000 (2024).

⁶⁶ Ministry of Corporate Affairs, MCA21 Version 3.0 Implementation Guidelines (2023).

⁶⁷ Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §§ 18a et seq. (2018).

E. Challenges for Multinational Companies

Multinational companies face several common challenges in structuring cross-border M&A transactions across these jurisdictions:

Regulatory Complexity: The interaction of multiple regulatory requirements creates compliance burdens and timing uncertainties that may impact transaction feasibility and pricing⁶⁸.

Tax Uncertainty: Divergent interpretations of similar concepts across jurisdictions create planning difficulties and potential double taxation risks despite treaty coverage⁶⁹.

Documentation Requirements: Extensive documentation and reporting obligations increase transaction costs and create ongoing compliance burdens for post-closing integration⁷⁰.

Changing Regulatory Environment: Frequent legislative changes and evolving administrative interpretations require continuous monitoring and may necessitate restructuring of existing arrangements⁷¹.

VII. RECOMMENDATIONS

A. India: Enhancing Tax Neutrality and Certainty

- i. **Cross-Border Merger Relief:** India should consider extending Section 47 exemptions to qualifying cross-border mergers that satisfy commercial purpose requirements and substance tests. This would align India with international best practices and reduce artificial incentives favoring domestic over international reorganizations⁷².
- ii. **Indirect Transfer Reform:** The indirect transfer provisions would benefit from clarification of key concepts, establishment of safe harbor provisions for genuine commercial transactions, and implementation of advance ruling mechanisms for complex structures. The introduction of proportionate penalties and appeal procedures would enhance fairness and reduce compliance burdens⁷³.
- iii. **Administrative Consistency:** Enhanced training for tax officers and standardized interpretation guidelines would improve consistency in applying cross-border

⁶⁸ PwC, Global M&A Trends in Tax 2024, at 15-25 (2024).

⁶⁹ EY, Cross-border M&A Tax Planning Guide 2024, at 35-45 (2024).

⁷⁰ KPMG, International Tax Developments Quarterly Q4 2023, at 12-18 (2024).

⁷¹ Deloitte, Tax Reform: Impact on M&A Activity 2024, at 20-30 (2024).

⁷² Law Commission of India, Report No. 268 on Corporate Tax Reforms 85-95 (2017).

⁷³ Standing Committee on Finance, 31st Report on Income Tax (Amendment) Bill 2017, at 25-35 (2018).

M&A provisions. The establishment of specialized units for complex international transactions could enhance both revenue collection and taxpayer service⁷⁴.

B. UK: Maintaining Competitive Advantage Post-Brexit

- i. Treaty Network Expansion:** The UK should prioritize negotiation of comprehensive tax treaties to replace lost EU Directive benefits and maintain competitiveness in international M&A markets. Enhanced dispute resolution mechanisms and mutual agreement procedures would support this objective⁷⁵.
- ii. Digital Tax Administration:** Continued investment in digital tax administration and real-time reporting capabilities would maintain the UK's position as an efficient jurisdiction for cross-border transactions while supporting enhanced compliance and risk assessment⁷⁶.

C. US: Simplification and Coordination

- i. International Provision Integration:** The complex interaction between TCJA provisions and traditional international rules would benefit from comprehensive review and simplification. Clear guidance on the coordination between different anti-avoidance measures would reduce uncertainty and compliance costs⁷⁷.
- ii. Regulatory Coordination:** Enhanced coordination between tax, securities, and antitrust authorities could improve efficiency and reduce timing uncertainties for complex cross-border transactions⁷⁸.

VIII. CONCLUSION

This comparative analysis reveals significant structural differences in the taxation of cross-border M&A transactions across India, the UK, and the US, reflecting divergent policy priorities and regulatory philosophies. The UK emerges as providing the most comprehensive framework for tax-neutral reorganizations, supported by sophisticated relief provisions and extensive treaty coverage. The US system offers selective neutrality through complex qualification requirements, while India demonstrates the most restrictive approach to cross-

⁷⁴ Central Board of Direct Taxes, Direct Tax Statistics 2023-24, at 45-55 (2024).

⁷⁵ HM Treasury, UK Tax Treaties Policy Post-Brexit 12-20 (2021)

⁷⁶ HM Revenue & Customs, Making Tax Digital Strategy 2025, at 18-25 (2024).

⁷⁷ American Bar Association, Section of Taxation Comments on International Tax Reform 35-45 (2019).

⁷⁸ Treasury Inspector General for Tax Administration, Review of International Tax Compliance Programs 25-35 (2023).

border tax neutrality, particularly following the expansion of indirect transfer provisions.

The effectiveness of anti-avoidance measures varies considerably, with each jurisdiction adopting different balances between revenue protection and investment facilitation. The UK's GAAR provides a proportionate response to abusive arrangements while preserving legitimate planning opportunities. India's indirect transfer provisions achieve broad coverage of potential avoidance but at the cost of increased uncertainty and compliance burdens. The US anti-inversion rules target specific arrangements effectively but create complexity in broader corporate structuring.

Tax treaty networks provide essential infrastructure for cross-border M&A, though their effectiveness depends upon consistent interpretation and coordination with domestic anti-avoidance measures. The divergent approaches to treaty override and the interaction between domestic law and treaty provisions create ongoing challenges for multinational enterprises.

