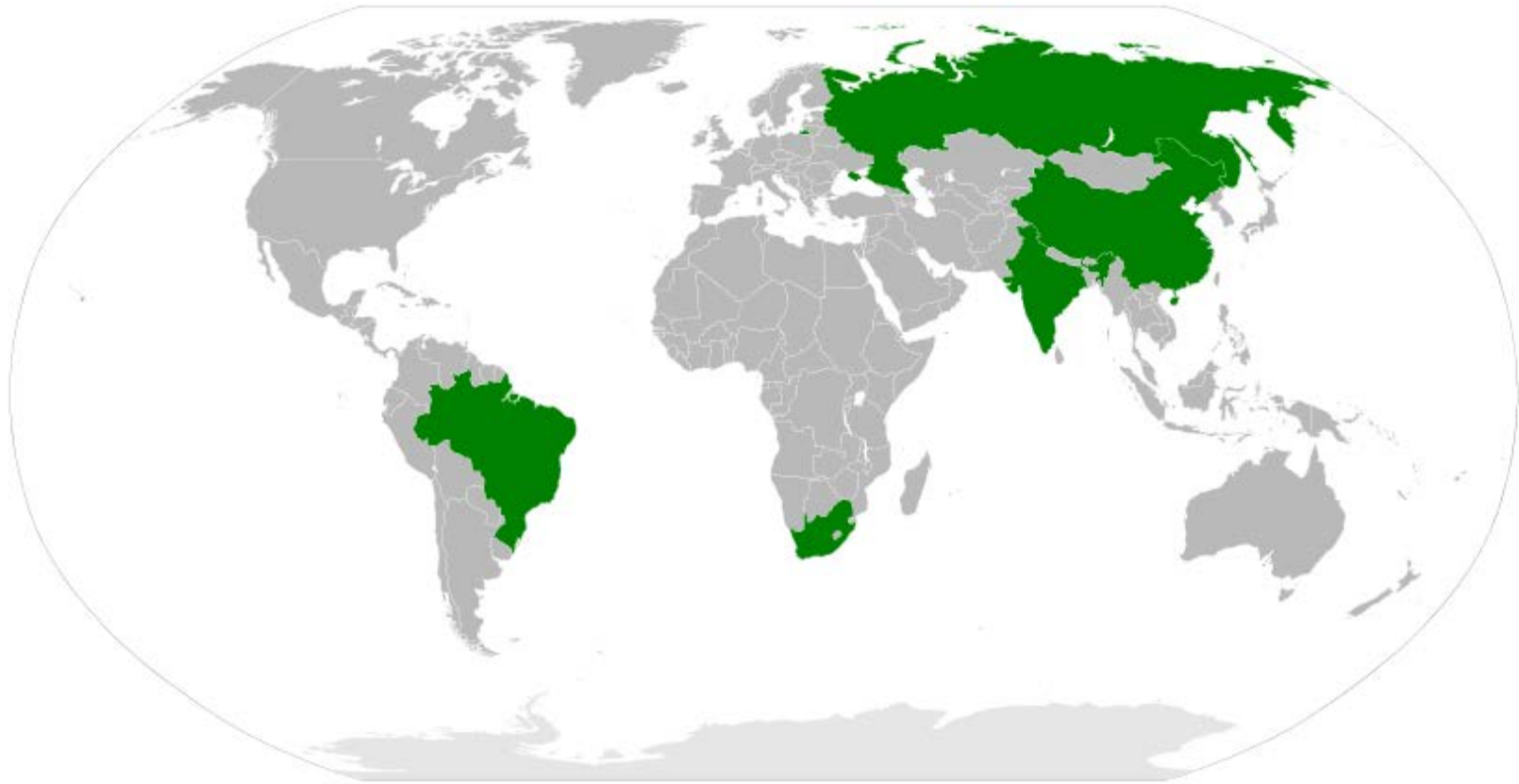


# Tax Residence of Natural Persons and Application of CFC Regime: BRICS Perspective



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# BRICS Background for CFC Regime Application

## RUSSIA: FDI FLOWS (mIn. USD) – Central Bank

### OUTWARD FLOWS

	2013	2014	2015
<b>BAHAMAS</b>	<b>560</b>	<b>756</b>	<b>1 073</b>
BELIZE	100	552	2
<b>BERMUDA</b>	<b>571</b>	<b>2 997</b>	<b>-188</b>
BRAZIL	1	1	32
<b>BVI</b>	<b>62 223</b>	<b>718</b>	<b>3 441</b>
GIBRALTAR	206	411	0
JERSY	-16	-261	1 254
INDIA	1	-207	6
<b>CYPRUS</b>	<b>7 671</b>	<b>23 546</b>	<b>3 907</b>
CHINA	14	54	11
<b>LUXEMBURG</b>	<b>1 314</b>	<b>639</b>	<b>753</b>
CAYMAN	507	789	517
ZAF	1	-5	2
<b>TOTAL</b>	<b>-4 409</b>	<b>19 965</b>	<b>7 671</b>

### INWARD FLOWS

	2013	2014	2015
<b>BAHAMAS</b>	<b>2 791</b>	<b>3 638</b>	<b>5 201</b>
BELIZE	-406	-54	8
<b>BERMUDA</b>	<b>404</b>	<b>1 777</b>	<b>1 932</b>
BRAZIL	-9	0	0
<b>BVI</b>	<b>9 379</b>	<b>3 123</b>	<b>2 522</b>
GIBRALTAR	-185	1	-9
JERSY	509	-717	427
INDIA	25	6	-17
<b>CYPRUS</b>	<b>8 266</b>	<b>3 158</b>	<b>-7 176</b>
CHINA	597	1 271	571
<b>LUXEMBURG</b>	<b>11 638</b>	<b>-693</b>	<b>-5 757</b>
CAYMAN	-79	6	-79
ZAF	0	0	0
<b>TOTAL</b>	<b>69 219</b>	<b>22 031</b>	<b>4 839</b>

# BRICS Background for CFC Regime Application

## BRAZIL: FDI FLOWS (mln. USD) – Central Bank/UNCTAD

### OUTWARD FLOWS

	2010	2011	2012
<b>NETHERLANDS</b>	<b>3 283</b>	<b>7 346</b>	<b>-2 784</b>
SOUTH AFRICA	-	-	-
CHINA	-	-	-
<b>PANAMA</b>	<b>445</b>	<b>162</b>	<b>124</b>
<b>CARIBBEAN</b>	<b>7 303</b>	<b>49</b>	<b>-351</b>
RUSSIA	-	-	-
BRAZIL	-	-	-
<b>TOTAL</b>	<b>11 588</b>	<b>-1 015</b>	<b>-2 821</b>

### INWARD FLOWS

	2010	2011	2012
SOUTH AFRICA	0	196	109
CYPRUS	71	0	0
PANAMA	173	337	293
BERMUDA	387	566	175
CHINA	480	432	325
<b>CARIBBEAN</b>	<b>4 340</b>	<b>1 578</b>	<b>1 357</b>
<b>SWISS</b>	<b>6 547</b>	<b>1 415</b>	<b>5 017</b>
RUSSIA	-	-	-
INDIA	-	-	-
<b>TOTAL</b>	<b>48 506</b>	<b>66 660</b>	<b>65 272</b>

# BRICS Background for CFC Regime Application

## INDIA: FDI FLOWS (mln. USD) – Central Bank/UNCTAD

### OUTWARD FLOWS

	2010	2011	2012
CYP	552	110	86
NL	1 514	1 271	982
MAURIT	5 098	2 582	1 762
CHN	28	38	50
SNG	4 026	2 319	1 831
CARIBEAN	746	761	575
RUS	-	-	-
BRA	-	-	-
<b>TOTAL</b>	<b>18 337</b>	<b>11 405</b>	<b>10 973</b>

### INWARD FLOWS

	2010	2011	2012
<b>NL</b>	<b>1 418</b>	<b>1 301</b>	<b>1 713</b>
ZAF	0	2	9
CHN	2	73	148
<b>SNG</b>	<b>1 540</b>	<b>3 306</b>	<b>1 605</b>
BRA	2	11	5
CARIBEAN	63	64	46
RUS	4	1	0
<b>TOTAL</b>	<b>14 937</b>	<b>23 474</b>	<b>18 286</b>

# BRICS Background for CFC Regime Application

## CHINA: FDI FLOWS (mln. USD) – Central Bank/UNCTAD

### OUTWARD FLOWS

	2010	2011	2012
LUXEMBURG	3 207	1 265	1 133
UK	330	1 420	2 775
SOUTH AFRICA	411	-14	-815
HONG KONG	38 505	35 655	51 238
SINGAPORE	1 119	3 269	1 519
INDIA	48	180	277
BRAZL	487	126	194
CARIBEAN	9 609	11 259	3 098
RUSSIA	568	716	785
<b>TOTAL</b>	<b>68 811</b>	<b>74 654</b>	<b>87 804</b>

### INWARD FLOWS

	2010	2011	2012
NETHERLANDS	914	761	1 144
MAURITUS	929	1 139	959
HONG KONG	60 567	70 500	65 561
SINGAPORE	5 428	6 097	6 305
CARIBEAN	12 946	12 277	9 806
RUSSIA	-	-	-
INDIA	-	-	-
BRAZIL	-	-	-
<b>TOTAL</b>	<b>114 734</b>	<b>123 985</b>	<b>111 716</b>

# Impact of Tax Residence for CFC Regime Application

## 1. Determination of controlling persons' (CP) scope

- ❑ *De facto* and *de jure* only **tax resident** may be regarded as controlling person; non-resident is exempt from CFC compliance obligations (notifications, etc.).

## 2. Determination of CPs' CFC tax obligations

- ❑ *De jure* **tax residents** may be regarded as CPs in **one** tax year and be exempted from obligation to file tax returns and pay taxes as **non-residents** with regard to CFC income in **another** (subsequent) tax year.

# Tax Residence of Natural Persons: BRICS

## BRAZIL (*permanent abode, presence, citizenship*)

INSTRUÇÃO NORMATIVA SRF Nº 208, 27.09.2002

### ☐ **Tax Resident Status:**

- Has permanent abode available to natural person in Brazil;
- Holds permanent visa (entrance);
- Holds temporary visa (entrance/184-day);
- Brazilian citizen lost resident status and returned to Brazil on permanent basis (return);
- Person leaves Brazil and does not file the proper declarations with tax authorities.

# Tax Residence of Natural Persons: BRICS

## RUSSIA (*physical presence, state service*)

### Personal Income Tax (Ch. 23 of the Tax Code)

#### ❑ **Tax Resident Status:**

- Permanent physical presence at least 183 days in 12 consecutive months. The term will not be intercepted for:
  - Short-period (less 6 months) leave for education or treatment;
  - Employment at offshore hydrocarbon feedstock;
- Russian servicemen and state and municipal officers seconded abroad.



# Tax Residence of Natural Persons: BRICS

## INDIA (*physical presence*)

### Income Tax Act (1962)

#### **Tax resident (and ordinary resident):**

- is in India for an aggregate period of 182 days or more during the previous year;
- during the 4 years preceding the previous year, remained in India for an aggregate period of 365 days or more and is in India in that previous year for 60 days or more;

#### **Resident (not ordinary resident):**

- has been a non-resident in India in 9 out of 10 years preceding the previous year;
- has not during the 7 years preceding the previous year been in India for a total period of 730 days or more.

# Tax Residence of Natural Persons: BRICS

## CHINA (*domicile, physical presence, source*)

### Individual Income Tax Law

#### ❑ **Tax Resident Status:**

- Domicile in China;
  - Residence (physical presence) in China for a full year;
  - Derives income from Chinese sources.
- ❑ **Domicile** is defined as “habitually” residing based on the basis of household registration, family or economic interests.
- ❑ **Residence** (physical presence) - stay in China for 365 days in a tax year. Temporary absence (30/90) and absence for education, employment, work, family visit or tourism with obligation to return does not affect computation of the period of stay.

# Tax Residence of Natural Persons: BRICS

## SOUTH AFRICA (*physical presence, domicile*)

### Income Tax Act (1962)

#### **Tax resident:**

- ordinarily resident in South Africa; or
- physically present in South Africa for more than 91 days in the current tax year;
- physically present for an aggregate of more than 915 days in the preceding 5 tax years and physically present for more than 91 days in each of those preceding 5 tax years

#### **Ordinary resident:** the place to which the person would naturally return from his travels and which is his real home.

- *Case-by-case basis*

# Tax Residence of Natural Persons: Challenges for BRICS CFC Regimes

- ❑ Collision of national residence criteria for BRICS' natural persons;
- ❑ Avoidance of Tax Resident Status;

# Collision of Tax Residence for Natural Persons: BRICS

- ❑ Collision of national residence criteria for BRICS' natural persons:
  - ✓ Domicile vs. Physical presence;
  - ✓ Permanent abode vs. Domicile;
  - ✓ Physical presence vs. Physical presence (different terms);
  - ✓ Citizenship vs. Physical presence, etc...
- ❑ Application of “tie breaker rule” (Art. 4(2)):
  - ✓ Mutual agreement procedure;
  - ✓ MAP failure → non-resident in both states (RUS – CHN)

# Collision of Tax Residence for Natural Persons: BRICS

## □ Application of BRICS' DTCs “Tie breaker rule” (Art. 4(2)):

- ✓ a) (1) permanent home available (PH); (2) centre of vital interests;
- ✓ b) habitual abode (HA);
- ✓ c) national (N);
- ✓ d) mutual agreement (MAP); (if MAP fails → non-resident of the both Contracting States – see RUS – CHN DTC 2014)

# Collision of Tax Residence for Natural Persons: BRICS

## □ BRICS' DTC "Tie breaker rule" (Art. 4(2)):

	<b>BRA</b>	<b>RUS</b>	<b>IND</b>	<b>CHN</b>	<b>ZAF</b>
<b>BRA</b>	-	(a) (1) PH - (2) CVI; (b) HA; (c) N; (d) MAP	(a) (1) PH - (2) CVI; (b) HA; (c) N; (d) MAP	(a) (1) PH - (2) CVI; (b) HA; (c) N; (d) MAP	(a) (1) PH - (2) CVI; (b) HA; (c) N; (d) MAP
<b>RUS</b>	(a) (1) PH - (2) CVI; (b) HA; (c) N; (d) MAP	-	(a) (1) PH - (2) CVI; (b) HA; (c) N; (d) MAP	(a) (1) PH - (2) CVI; (b) HA; (c) N; (d) (1) MAP - (2) Non-resident	(a) (1) D - (2) CVI; (b) HA; (c) N; (d) MAP
<b>IND</b>	(a) (1) PH - (2) CVI; (b) HA; (c) N; (d) MAP	(a) (1) PH - (2) CVI; (b) HA; (c) N; (d) MAP	-	(a) (1) PH - (2) CVI; (b) HA; (c) N; (d) MAP	(a) (1) PH - (2) CVI; (b) HA; (c) N; (d) MAP
<b>CHN</b>	(a) (1) PH - (2) CVI; (b) HA; (c) N; (d) MAP	(a) (1) PH - (2) CVI; (b) HA; (c) N; (d) (1) MAP - (2) Non-resident	(a) (1) PH - (2) CVI; (b) HA; (c) N; (d) MAP	-	(a) (1) PH - (2) CVI; (b) HA; (c) N; (d) MAP
<b>ZAF</b>	(a) (1) PH - (2) CVI; (b) HA; (c) N; (d) MAP	(a) (1) D - (2) CVI; (b) HA; (c) N; (d) MAP	(a) (1) PH - (2) CVI; (b) HA; (c) N; (d) MAP	(a) (1) PH - (2) CVI; (b) HA; (c) N; (d) MAP	-

# Artificial Transfer of Tax Residence

## BRAZIL: Anti-abusive Measures

Currently, as per Law 12,249/2010, the transfer of the tax residence of a former Brazilian resident to a country or jurisdiction considered a **low-tax jurisdiction** or as granting **privileged tax regimes**, only becomes effective after the individual evidences that:

- he/she resides, in fact, in such country or jurisdiction. Such evidence is made via (i) the proof that the individual remained in such country or jurisdiction for over 183 days, consecutive or not, in a 12-month period or (ii) proves that his/her habitual dwelling and the majority of his/her wealth is located in such country or jurisdiction; or
- he/she is subject, in such country or jurisdiction, to tax in connection with the totality of his/her earnings and capital gains, substantiating this circumstance with documentation evidencing the payment of the tax.



# CFC Regime in BRICS: the Way Ahead

- ❑ Exchange of best practice;
- ❑ Common approaches to combat artificial transfer of tax residence;
- ❑ Enhanced exchange of tax information;
- ❑ Effective assistance in collection of taxes;
- ❑ Multilateral instruments

**Obrigado pela sua atenção!**

**Спасибо за внимание!**

**ध्यान देने के लिए धन्यवाद!**

**感謝您的關注！**

**Ngiyabonga ukulalela kwenu!**