Workshop on Direct Tax Provisions of "Finance Bill, 2020"

Jointly organized by CTC and WIRC

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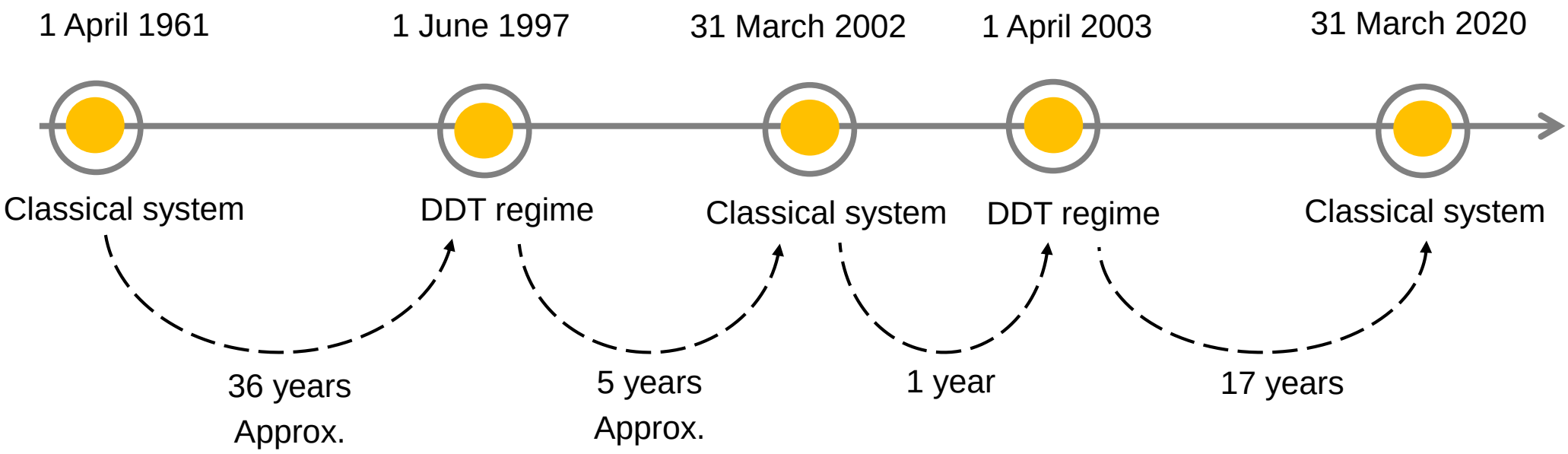
Views expressed are personal

Contents

- Abolition of dividend distribution tax (DDT) and consequential changes
- Residency of Individuals and Salary Taxation
- TDS and TCS related amendments
- Incentives & other rationalization measures
- Non-resident taxation

Abolition of DDT and consequential changes

Time lines on flip-flop of dividend taxation regime



Finance Act	Base DDT Rate
1997 to 1999	10%
2000	20%
2001	10%
2003 to 2006	12.5%
2007 to 2013	15%
2014 to 2019	17.65%

Snapshot view of existing and proposed taxation of dividend income

Particulars	DDT regime	Classical taxation system
Period	Dividend declared, distributed, received on or before 31 March 2020	Dividend received on or after 1 April 2020
Taxpayer bearing incidence	Company	Shareholder
ETR	• DDT – 20.56% • Super rich levy – 10% + SC + EC • No credit in foreign country	• Applicable tax rate • DTAA benefit available • Credit available in foreign country
Roll over exemption	Available to domestic companies receiving dividend from domestic subsidiary company and specified foreign companies	Available to domestic companies in respect of dividend received from domestic company irrespective of % of shareholding
Withholding on distribution	Not applicable	Applicable under s. 194 and 195
Deduction of expenditure in the hands of shareholders	Not available in view of section 14A and section 115BBD(2)	Available but constrained by s. 57 limitation
MAT	Exempt	To evaluate

Reaping classical' s benefits

- Shareholders falling in lower slab rate
- Liberal roll over deduction for companies including applicable time period
- Charitable Trust / MF receiving dividend whose income is totally exempt
- Shareholders enjoying lower tax rate of 5% to 15% under DTAA
- Ease of obtaining tax credit in home jurisdiction
- Coupled with CTR, company structure has better ETR if profits ploughed back
- S. 14A inapplicable
- F CO operating as branch with ETR ~ 44% will achieve efficiency by corporatizing

DDT a soother!

- Individual shareholders falling in the highest tax slab
- Taxability of dividend income in the hands of NR under s. 115A / 115AD where the DTAA benefit is not available (e.g. s. 115A rate could be ~ 28.5% for NR individuals)
- Business trust / investors enjoyed complete exemption, investor now trigger taxation
- Dividend from foreign company (where I Co held >50% equity) qualified for roll over exemption coupled with tax @15%

Case Study: Comparison of ETR on dividend in old regime vs new regime for dividend received by HNI*

Particulars		Pre-amendment	Post-amendment
		Amount (Rs)	Amount (Rs)
Total profits available for distribution **(a)**	**(a)**	120.56	120.56
DDT payable by ICo (b)	**(b)**	**20.56**	**-**
Dividend income received by Mr A		100.00	120.56
Super-rich levy under 115BBDA @14.25% [For highest tax bracket individual] (c)	**(c)**	**14.25**	**-**
Tax on dividend income received by resident HNI in proposed regime @ 42.74% (d)	**(d)**	**Nil**	**51.53**
Total tax outflow (e)	**(e)**	**34.81**	**51.53**

- Dividend declaration before 31 March 2020 likely in above cases.
- Going forward, buy-back route may also be evaluated

Roll over benefit proposed under s. 80M

- **S. 80M provides a deduction**
  - To a domestic company receiving income from another domestic company
  - Such dividend income is included in gross total income
  - Deduction is of an amount received by domestic company to the extent amount distributed by dividend receiving company
  - Dividend shall be distributed one month prior to furnishing of return of income under s. 139(1)
- Scope of s. 80M is wider compared to roll over benefit under s. 115-O(1A)
  - Deduction available regardless of percentage of shareholding
  - Roll over benefit to recipient company up to one month prior to due date of filing return of income
  - Roll over benefit available irrespective of whether receipt succeeds or precedes qualifying distribution
- No roll over benefit when domestic company has suffered current year loss or has unabsorbed depreciation
- No s. 80M benefit when income is taxable under MAT provisions
- No roll over benefit in respect of dividend income received from foreign company
  - POEM resident company is a foreign company and not domestic company

Case study: S. 80M roll over calculation – Ambiguity on "gross total income" under 80M and "total income" under s. 57

Sr. No.	Particulars	Alternative 1	Alternative 2
(a)	Dividend income	1000	1000
(b)	**Expenditure limitation** • Actual interest expenditure – 300 • Dividend income qualifying for deduction under s. 80 – 500 • Expenditure deduction	100	200
(c)	Gross Total Income	900	800
(d)	Deduction under s. 80M	500	500
(e)	Total income	400	300

- **In alternative 1,** deduction for interest is worked out on the basis that total income is net of deduction under s. 80M. Accordingly, deduction is restricted to 20% of 500 which is after considering 80M deduction.
- **In alternative 2**, 20% limitation is applied prior to 80M deduction basis entire gross amount of dividend

Case study : 80M and MAT impact

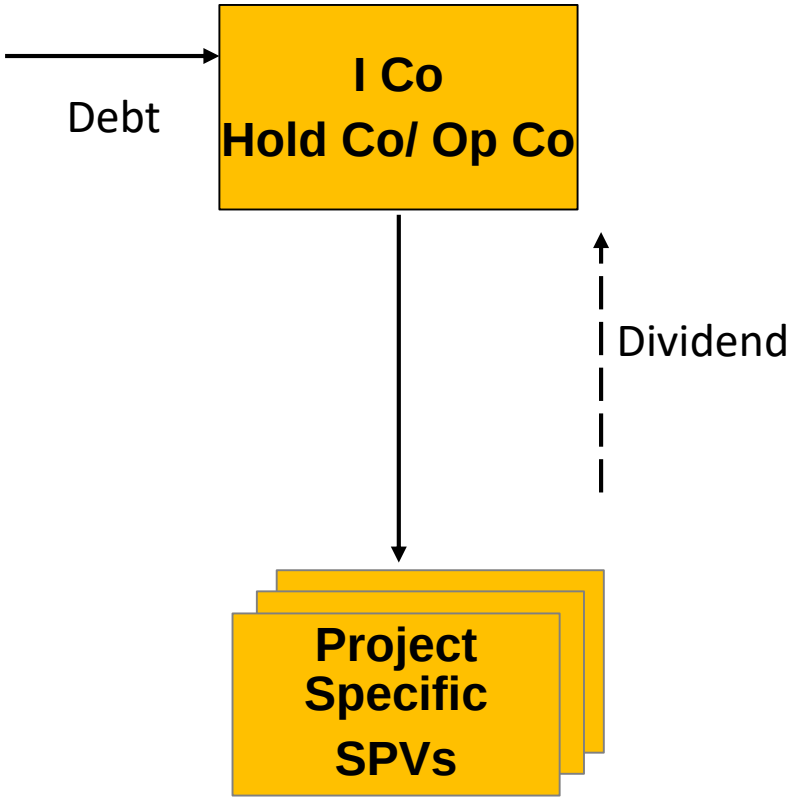
Profit & Loss A/c. (Extract)			
Dividend paid	10,000	Dividend	10,000

Particulars	Normal Computation	MAT
Income	10,000	10,000
Less: 80M	10,000	NIL
Total income / Book profit	**NIL**	**10,000**

Expenses deduction under s. 57 against dividend income

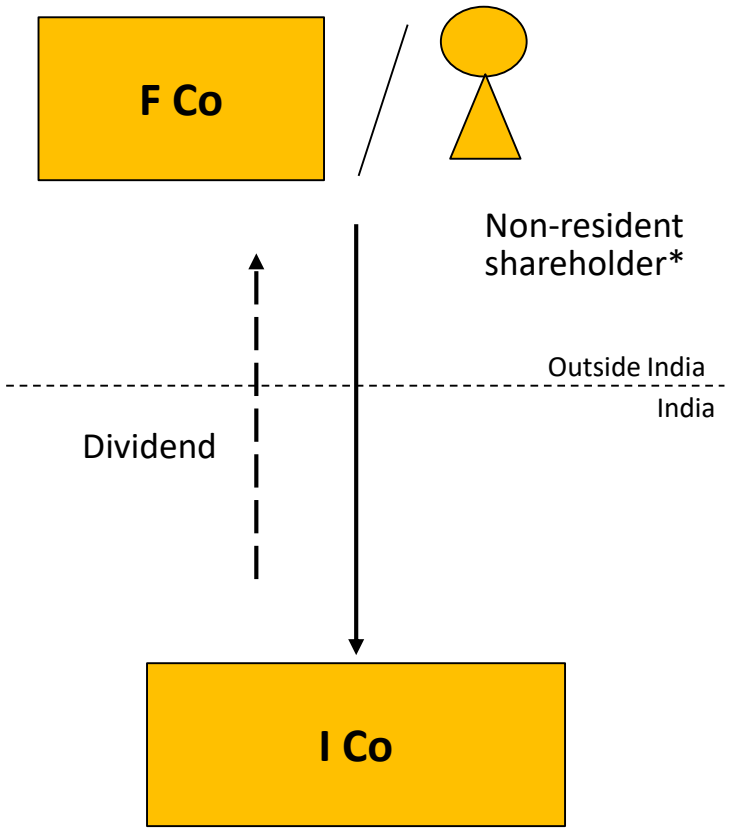
- 56(2)(i) of ITA covers dividend income even when earned during the course of business
  - May not cover income received from MF units
- Proviso to s. 57 limits deduction of expenses in respect of dividend income
  - Only interest expenditure incurred in earning dividend income allowable to the extent of 20% of specified income
  - Different from disallowance under s. 14A where disallowance is of expenditure incurred in respect of income which does not form part of total income
- Appears litigious to argue that interest expenditure allowable fully u/s. 57 as deduction in absence of dividend income
- In case of leveraged acquisition, it be desirable to evaluate amalgamation of underlying company

Case study – Investment in subsidiaries



- I Co is holding company of various SPVs apart from undertaking execution of certain projects.
- SPVs are engaged in infrastructure activities.
- In terms of regulatory requirement, each infrastructure facility needs to be housed in a separate SPV.
- For commercial reasons and for comfort of lenders, I Co raises debt and infuses also as equity in project specific SPVs.
- Till date, I Co claimed deduction in respect of interest expenditure under business chapter.
  - S. 14A was not applied during the years when no dividend was received from SPVs.
- Impact of amendment
  - Does s.57 debar deduction otherwise admissible u/s.36?
  - Is s. 57 limitation triggered even when no dividend is received?
  - Is s. 57 limitation applicable for entire SPV portfolio or requires granular or SPV specific evaluation?
  - Is beneficial allocation of funds a stronger defence against adverse impact of s. 57 which otherwise requires direct nexus with earning of income?

Case study - Dividend to NR shareholder/s



* Assuming taxability of individuals at highest slab rates

- **Dividend in the hands of NR shareholder taxable at following rates -**
  - S.115A contemplates taxability at 20% (plus SC and cess)-
    - 28.45% for HNIs (falling under highest tax slab having surcharge of 37% and cess of 4%)
    - 21.84% for foreign companies (income >10crs)

    Or
  - treaty rates (whichever is beneficial)
- **Dividend will be subject to WHT obligation in the hands of dividend distributing company**
  - For NR shareholders – u/s. 195 at rates in force i.e. Finance Act rates or treaty w.e. beneficial
    - Finance Bill 2020 schedule needs back up amendment
  - S. 206AA may be considered where NR does not have PAN
    - Rule 37BC needs back up amendment
- For F Co, MAT exclusion for dividend income may need to be provided under cl. (iid) of Expl 1 to S. 115JB.

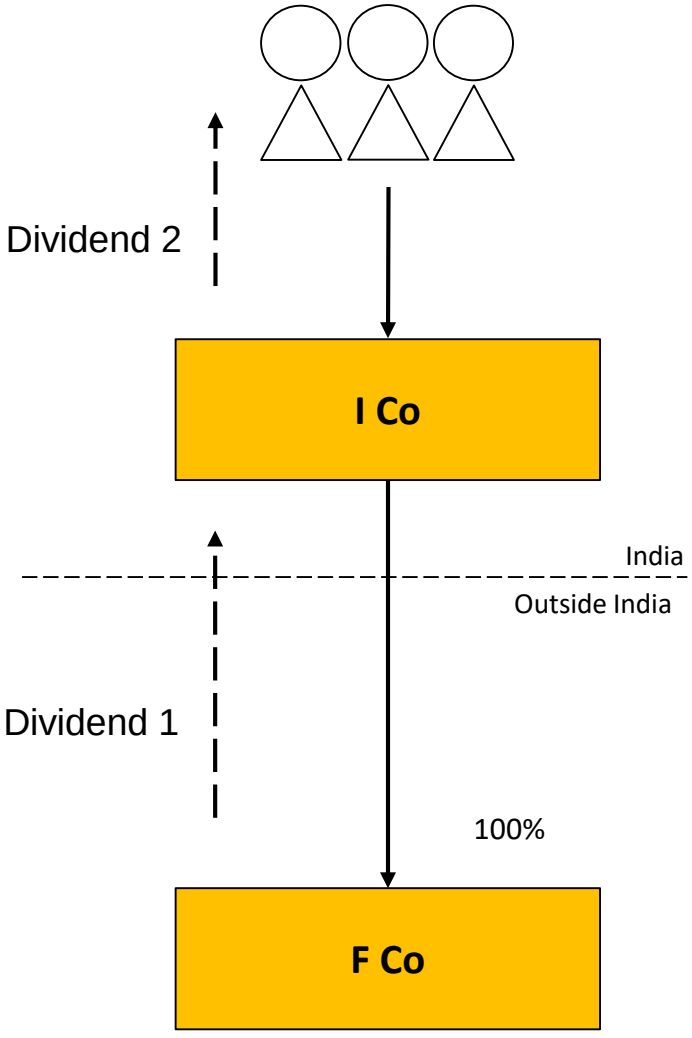
Treaty Considerations

- Treaty rates vary for substantial shareholders and other cases, provided the shareholder is beneficial owner of dividend.
  - Treaty benefit subject to compliance of GAAR, BO, PPT, SAAR, TRC, etc.
  - To evaluate TP and S. 163 risk
- Few key treaty country rates for dividend taxation:

Country	Rate	Rate applicable to	Minimum % of shareholding in I Co
Singapore	10%	Company	25%
	15%	Others	No
Mauritius	5%	Company	10%
	15%	Others	No
USA	15%	Company	10% of voting stock
	25%	Others	No
Netherlands	10%*	All	No
France	10%*	All	No

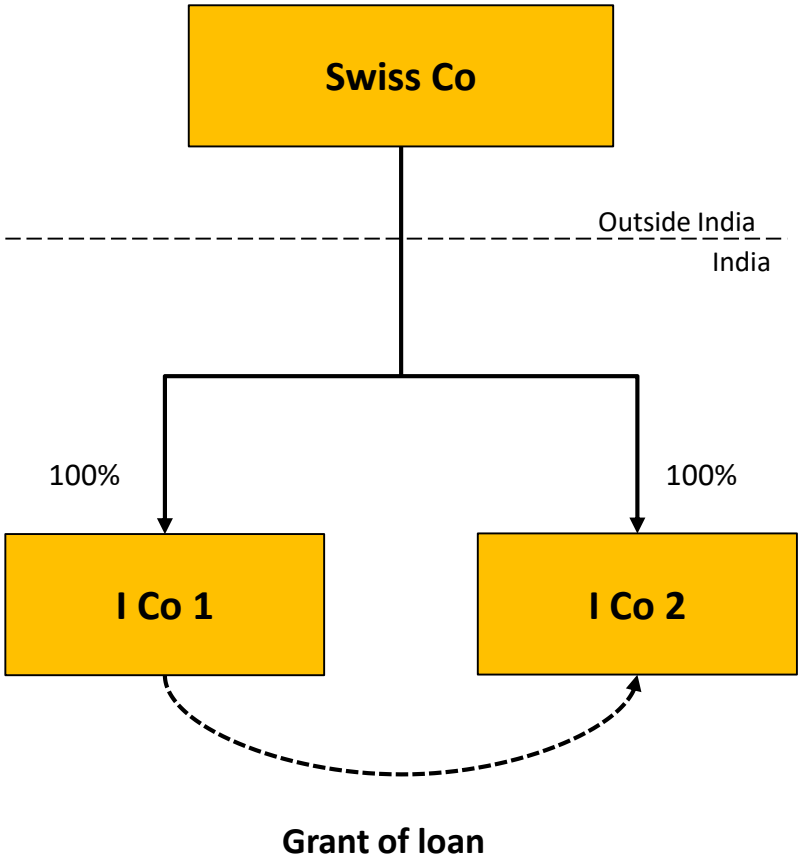
*Due to MFN interplay rate reduced from 15% to 10%: Does it get further reduced to 5% due to India/Slovenia/Lithuania DTAA?

Case study – Dividend from overseas subsidiaries



- I Co has overseas subsidiary
- **Under the existing law,**
  - I Co qualifies for 15% taxation under s. 115BBDA
  - Tax can be relieved by UTC in terms of DTAA
  - I Co qualifies for roll over exemption from payment of DDT if dividend received from F Co is distributed in the same year
- **Proposed amendment:**
  - Taxation of income continues to be as before
  - No roll over benefit under s. 80M in respect of dividend income received from F Co to I Co
  - Net tax effect is enhanced due to tax liability equal to tax rate applicable to shareholders of I Co visa vis erstwhile DDT in the hands of I Co

Case study: Trigger of S. 2(22)(e) where shareholder is a NR and lending and recipient company are situated in India



Facts:

- I Co 1 and I Co 2 are subsidiaries of French Co
- I Co1 has significant accumulated profits
- During the year, I Co1 grants loan to I Co2 which triggers applicability of S.2(22)(e)
- Swiss Co is eligible for India-Swiss treaty benefits

Issue:

- Taxability of deemed dividend u/s. 2(22)(e) in terms of present provisions of ITA
- Taxability of deemed dividend u/s. 2(22)(e) post proposed amendment

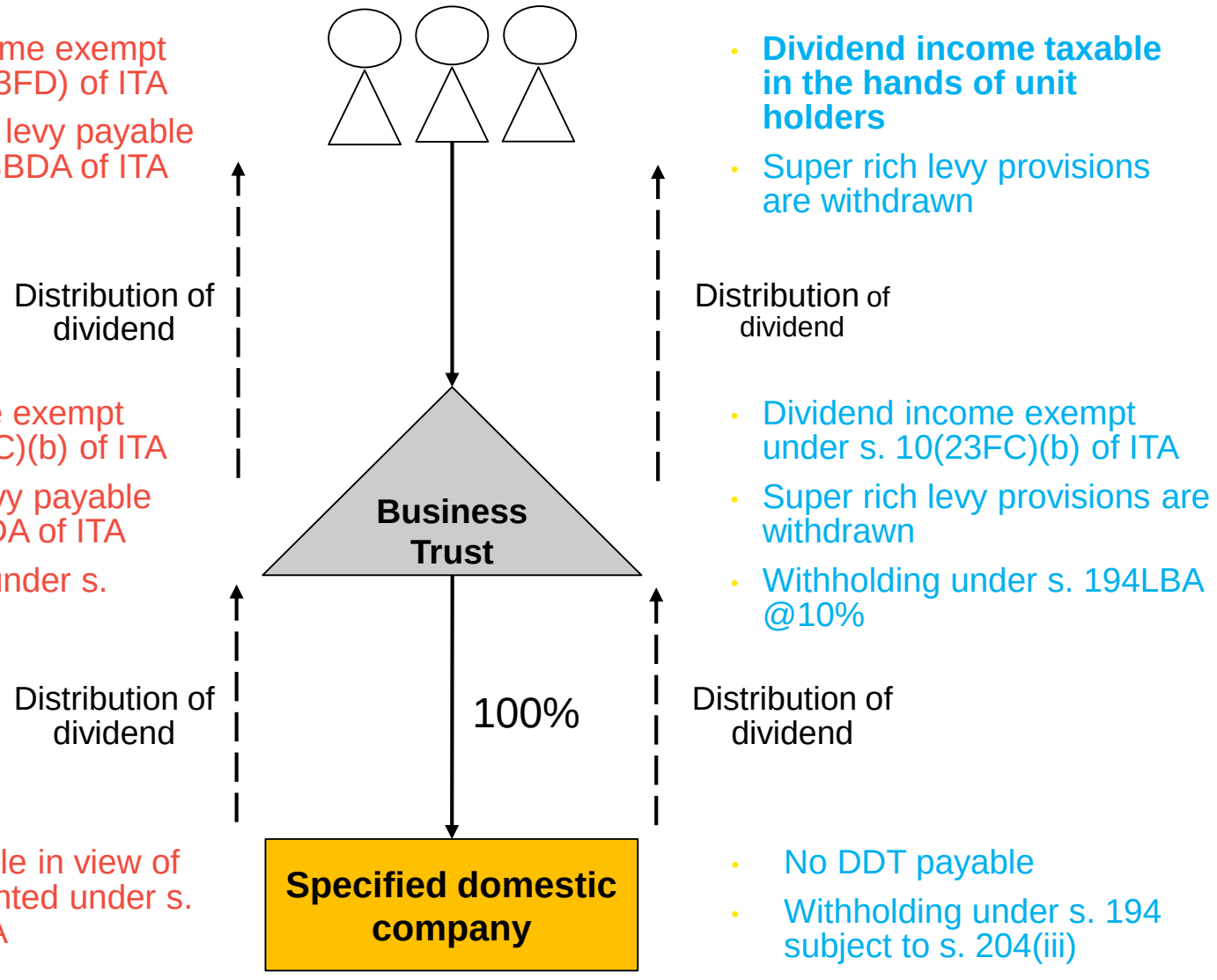
Amendment in taxation of dividend income in the hands of business trust [w.e.f 1 April 2021 i.e. AY 2021-22]

Pre amendment

- Dividend income exempt under s. 10(23FD) of ITA
- No super rich levy payable under s. 115BBDA of ITA

Post amendment

- **Dividend income taxable in the hands of unit holders**
- Super rich levy provisions are withdrawn



- Dividend income exempt under s. 10(23FC)(b) of ITA
- No super rich levy payable under s. 115BBDA of ITA
- No withholding under s. 194LBA of ITA

- Dividend income exempt under s. 10(23FC)(b) of ITA
- Super rich levy provisions are withdrawn
- Withholding under s. 194LBA @10%

- No DDT payable in view of exemption granted under s. 115-O(7) of ITA
- No withholding

- No DDT payable
- Withholding under s. 194 subject to s. 204(iii)

Impact of sunset clause in s. 10(35) and 115R and insertion of s. 194K [w.e.f. 1 April 2021]

Current provisions dealing with distribution of income by mutual fund to its unit holders

- Any income received by Mutual Fund is exempt under s. 10(23FD) of ITA
- Amount of income received by unit holders from MF is exempt under s. 10(35) of ITA. Arguably no super rich levy under s. 115BBDA of ITA
- S. 115R(2) of ITA provides that any income distributed by MF shall be liable for additional tax as under:

Type of MF units	Person to whom distributed	Base rate	Effective rate (including SC + EC)
Money market mutual fund / liquid fund	Individual and HUF	25%	38.83%
Money market mutual fund / liquid fund	Person other than Individual of HUF	30%	49.92%
Equity oriented mutual fund	Any person	10%	12.94%
Fund other than money market mutual fund or equity oriented fund	Individual and HUF	25%	38.83%
Fund other than money market mutual fund or equity oriented fund	Person other than Individual of HUF	30%	49.92%

Snapshot view of provisions (pre-amendment and post amendment)

Particulars	Pre amendment	Post amendment
Period of applicability of s. 115R of ITA	Income distribution tax payable for distribution made on or before 31 March 2020	Unit holder pay tax from FY 2020-21 (AY 2021-22)
Withholding obligation on MF when payment made to resident taxpayer	No provision	Yes, @ 10% under s. 194K of ITA
Withholding obligation on MF when payment made to non-resident taxpayer	No, in view of proviso to section 196A(1)	Yes, @ 20% + SC + EC under s. 196A of ITA
Whether investor can apply for lower withholding u/s 197	Not applicable	Yes. Investor can apply for lower rate of nil rate for deduction
Whether unit holders are required to pay tax	No. Income exempt u/s 10(35) of ITA	Yes, at applicable rates. In case of NR, subject to fulfilment of conditions u/s 115A of ITA, taxability @ 20% + SC + EC
Whether expenditure was allowable as deduction in computing income	No, in view of s. 14A	Yes, subject to proviso to s. 57

Impact of amendment proposed by FB 2020

- **Deduction of expenditure available in the unit holders**
  - Income received by unit holders taxable under other source head – proviso to s. 57 of ITA
  - Income received by unit holders taxable under business head – allowable fully
- **Applicability of section 194K to capital gains income:**
  - Circular No. 715 dated 8 Aug 1995 (1995) 215 ITR (St.) 12
  - Press release dated 4 February 2020
- **Applicability of section 194K on threshold of INR 5,000**
  - Applicable per scheme?
  - Applicable per PAN?
- Non-resident eligible to claim rates prescribed in s. 115A / 115AD of ITA – **20% + SC +EC**

Treaty interplay on taxation of income from MF

- Income in respect of mutual fund units unlikely to be covered by Article 10 (dividend income) on account of its limitation
- Income may be covered by other income Article unless the taxpayer is able to enjoy benefit of Article 7
- Following matrix may be relevant:

Sr. No.	Particulars	Taxation
1	Income is business income for the recipient and recipient does not have PE in India or income is not attributable to PE in India.	Arguable to take no PE no taxation position.
2	Income is not covered by Article 7 and the treaty is	
	(a) Other income Article is favourable and provides no source taxation to India (DTAA such as Switzerland, UAE, Germany etc.)	No taxable
	(b) Other income Article is absent or falls back on domestic tax law of India (DTAA such Netherlands, Singapore etc.)	Taxable @ 20% plus surcharge if condition of s. 115A(1)(a)(iii) read with s. 115A(1)(a)(C) is fulfilled. If not, taxation at full rate on net basis.
	(c) Other income Article provides taxation in respect of income accruing or arising or in India (DTAA such as UK, USA etc.)	Taxable @ 20% plus surcharge if condition of s. 115A(1)(a)(iii) read with s. 115A(1)(a)(C) is fulfilled. If not, taxation at full rate on net basis.

Residency of Individuals / Salary Taxation

S. 6 - Tightening residency provisions [w.e.f 1 April 2021 AY 2021-22]

Particulars	Pre-amendment	Post-amendment
S. 6(1) – Residency rule		
▸ Normal residency rule	a) Is in India for ≥ 182 days in relevant PY; or b) Is in India for ≥ 60 days and ≥ 365 days in earlier 4 years preceding that PY	No change
Outbound Indian citizen ▸ Leaving India for employment purposes; or ▸ Crew member of Indian ship	182 days instead of 60 days in clause (b) above	No change
Inbound Indian citizen/PIO on visit to India	182 days instead of 60 days in clause (b) above	120 days instead of 182 days in clause (b)
S. 6(6) – Not Ordinary Resident rule		
Not ordinarily resident (NOR)	a) NR for 9 out of 10 preceding FYs; or b) Present in India for < 730 days during preceding 7 FYs	NR for 7 out of 10 preceding FYs

S. 6 - Tightening residency provisions [w.e.f 1 April 2021 AY 2021-22]

- For S. 6(1), under amended provision, to qualify as NR, required to stay outside India for 246 days (365-119)
- For impact of amendment to S. 6(6), consider the following:
  - If Mr. A returned for good after being NR for long, say he returned in PY 2021-22
    - As per current provisions, would remain NOR till PY 2022-23
    - As per amended provisions, would remain NOR till PY 2024-25
- If Mr. X came for good in PY 2017-18

Previous Year	Residential status	Comments
PY 2017-18	R – NOR	
PY 2018-19	R – NOR	
PY 2019-20	R – OR	Governed by erstwhile provisions, hence as NR for only 8 preceding years (instead of 9) out of 10 – OR status
PY 2020-21	R – NOR	Governed by amended provision, hence as NR for 7 preceding years out of 10 – NOR status

Insertion of new sub-clause (1A) to s.6 [w.e.f 1 April 2021 AY 2021-22]

- **Amendment proposed by FB 2020:**
  - FB 2020 proposes to expand the residency rules incorporated under section 6 of ITA by incorporation of new sub-clause (1A) in s. 6 of ITA
  - The new rule provides as under:
    - An Individual;
    - Being an Indian citizen;
    - Shall be ***deemed to be resident*** of India;
    - If the Individual is not ***liable to tax*** in any other country or territory by reason of his:
      - Domicile; or
      - Residence; or
      - Any other criteria of similar nature.
  - The sub-clause (1A) is operative "notwithstanding anything contained in clause (1)", thus, irrespective of the days of the physical presence of such an Individual in India, if the conditions of s. 6(1A) are met, then such Individual shall be deemed to be resident of India
  - Intended to be anti avoidance rule to target HNIs who are stateless for tax purposes

Insertion of new sub-clause (1A) to s.6 – Impact analysis

- S. 6(1A) will apply only to Indian citizens**,** hence if a person is a PIO but not an Indian citizen, S. 6(1A) not attracted
- Person should not be liable to tax in any other country or territory
  - If a person is taxed even in a single country/ territory apart from India, s. 6(1A) is not be attracted; Taxation, however, to be by the reason of domicile, residence or similar criteria.
  - Taxation limited to income sourced from a given jurisdiction may not meet *"liable to tax by reason of…"* requirement; It refers to comprehensive, global resident type taxation
  - Quantum of tax liability or minimum effective tax rate not prescribed. Condition is fulfilled even if global tax liability is @1%.
- Prof. Dr Roland Ismer and Katharina Riemer in "Prof. Alexander Rust, in Reimer & Rust (eds), Klaus Vogel on Double Taxation Conventions" 4th Edition (2015), Article 4 at m.n. 26/29

  In our view, tax exempt entities may be liable to tax in the sense of Article 4(1) OECD and UN MC. The wording requires that the person must be ***"liable to tax" rather than "subject to tax", where the first expression is commonly used to refer to potential and the latter to actual taxation.***

  *….**The terms 'subject to tax' and 'liable to tax' are not synonymous expressions: The actual accrual of an obligation to pay tax (subject to tax) is a fiscal fact with respect to certain income, unlike 'liable to tax' that describes the legal situation of a taxpayer."***

Insertion of new sub-clause (1A) to s.6 – Impact analysis

- Even if one were to consider that the deemed residency provisions of s. 6(1A) are attracted in case of individuals residing in jurisdictions having no tax regime, then if the individual is eligible for treaty benefit, deemed residency under ITL may not injure tie breaking in favour of the other jurisdiction*
- Procedural compliance just like submission of TRC or Form 10F is needed to be incorporated as a part of the provision to determine the sources of income of the person and their taxability in different countries
- Reporting obligation likely to be triggered as a resident: treaty tie-break in other jurisdiction may not obliviate the same
- Press Release of 2 February 2020 states that the intent is not to cover bonafide workers and also that of deemed residency is triggered, income earned outside India by individual will not be taxed in India, is not derived from Indian business or profession. ***Amended language of provision is awaited.***

**In this connection, one may refer news article - https://www.aninews.in/news/national/general-news/govt-explains-residency-criteria-for-nri-gives-example-of-tie-breaker-rule20200202164306/*

Relaxation from ESOP perquisite taxation to employees of start-ups [w.e.f 1 April 2020] - Proposed amendment

- S.17(2)(vi) provides for perquisite taxation in hands of the employees where shares or specified securities are allotted or transferred to the employees free of cost or at concessional rate
  - Perquisite value is difference between (a) FMV of the shares or specified securities as determined under Rule 3(8)/(9) and (b) the amount recovered from employee.
- In start-up industry, salary income of employees comprise majorly of ESOP component, taxation at time of ESOP allotment leads to early cash outflow for employee
- New sub-clause (1C) is added to s.192 which provides that the "eligible start-up" as referred in s.80-IAC shall deduct or pay tax on perquisite income covered u/s. 17(2)(vi) within 14 days of:
  - Completion of 48 months from the end of the relevant A.Y. in which ESOP shares are allotted or transferred
  - Date of sale of ESOP or sweat equity shares by the employee
  - Date of cessation of employment with the relevant start-up

  Whichever is the earliest.
- TDS is to be undertaken at rates in force for the financial year in which the ESOP shares or sweat equity shares are allotted or transferred and not as per the rates prevailing in the year of TDS compliance

Relaxation from ESOP perquisite taxation to employees of start-ups [w.e.f 1 April 2020] - Proposed amendment

- Proposed methodology of TDS in hands of eligible start-up is applicable for normal withholding under S.192(1) as well as withholding where tax is borne by the employer under S.192(1A) as per single stage grossing up
- If sale/ cessation is not trigger of tax payment, effective deferral by 5 years
  - If employee exercises in April 2020, payment triggers on 14 April 2026
  - If employee exercises in March 2021, payment triggers on 14 April 2026
- Consequential amendments to s.140A, s.156, s.191, s.192 of ITA also proposed

Relaxation from ESOP perquisite taxation to employees of start-ups - Impact analysis

- The proposed amendments shall take effect from 1 April 2020 i.e. for ESOPs allotted or transferred on or after 1 April 2020
- There is no change in substantive taxation provisions of S.17(2)(vi) which continue to treat ESOP perquisite as salary income in year of allotment or transfer.
  - Tax rates of year of allotment/ transfer continues to apply.
  - Merely collection is deferred to earlier of three specified events
- Deferral of ESOP perquisite taxation is available only to employees of eligible start-up as defined u/s. 80-IAC and may not necessarily extend to all start-ups defined under DPIIT Notification dated 19 February 2019 (2019 Notification)
  - For instance – employees of start-up company which is incorporated prior to 1 April 2016 will not qualify for deferral benefit even if the start-up is recognised under 2019 Notification of DPIIT
- Time limit of 14 days is provided from the earliest of the three specified events for purposes of TDS under S.192(1)/(1A).
- Breach of TDS payment by employee within time limit of s. 192(1C) triggers consequences u/s. 201(1A), s. 271C, s. 220(2) and s. 221

Amendment to s. 17(2) relating to employer's contribution to social security funds [w.e.f 1 April 2021 i.e. AY 2021-22]

- FB 2020 has substituted s. 17(2)(vii) and introduced s. 17(2)(viia) within the meaning of "perquisite"
- It is proposed that aggregate of employer's contribution to RPF, NPS and superannuation fund to the extent it exceeds Rs.7.5L in a tax year shall be treated as perquisite
- The annual accretion by way of dividend, interest or other accretions of similar nature to the balance of employee's account in the tax year to the extent it relates to excess employer's contribution shall be treated as perquisite
  - Mechanism for computing annual accretions attributable to employer's contribution shall be prescribed by the Government
- Will have corresponding consequential withholding obligation on employer u/s.192
- **Impact analysis**
  - Overall cap of Rs.7.5L in addition to individual caps on RPF (12%) and NPS (10%)
  - Individual cap on approved superannuation fund of Rs. 1.5L is withdrawn
  - S. 17(3)(ii) to be read as excluding contributions taxed in earlier years; hence arguably not taxable on withdrawal again

Illustration

Particulars		Existing provision	New provisions
		Amount (Rs)	**Amount (Rs)**
Base Salary	**(a)**	**27.25 L**	**27.25 L**
PF @12%		3.27 L	3.27 L
NPS @10%		2.73 L	2.73 L
SAF		1.50 L	1.50 L
	(b)	**7.50 L**	**7.50 L**
Exclusion from perquisite taxation		**7.50 L**	**7.50 L**

Amendment affects and is intended to affect employees in higher salary tax bracket

TDS, TCS, etc.

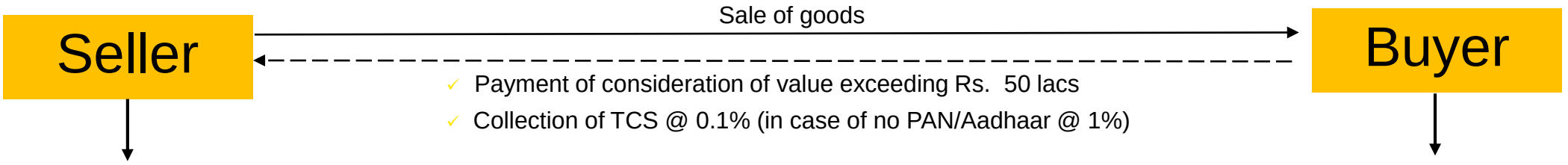
Widening scope of s. 206C (Tax collected at Source) [w.e.f. 1 April 2020]

Nature of transaction	Person who collects	Person from whom to be collected	Threshold limit	TCS rate	
				PAN/Aadhar available	PAN/Aadhar not available
Overseas remittance under LRS scheme	Authorised dealer	Remitter under LRS	Rs. 7 lakhs	5%	10%
Overseas tour package	Seller of overseas tour program package	Buyer	No threshold	5%	10%
Sale of goods*	Seller whose turnover exceeds Rs. 10 cr. in preceding financial year	Buyer	Rs. 50 lakhs	0.1%	1%

- No TCS on:
  - Transactions liable for withholding under any other provisions of ITA and it is complied therewith
  - Transactions with Government, Embassy, Consulate, High Commission, trade representation of foreign states, local authority etc.
  - Other notified buyer/s

*Section not to apply to following goods:
- S. 206C(1) i.e. business of trading in alcohol, liquor, forest produce, scrap, etc.
- S. 206C(1F) i.e. sale of motor vehicles exceeding value of Rs. 10L
- S. 206C(1G) i.e. remittances under LRS or overseas tour program package

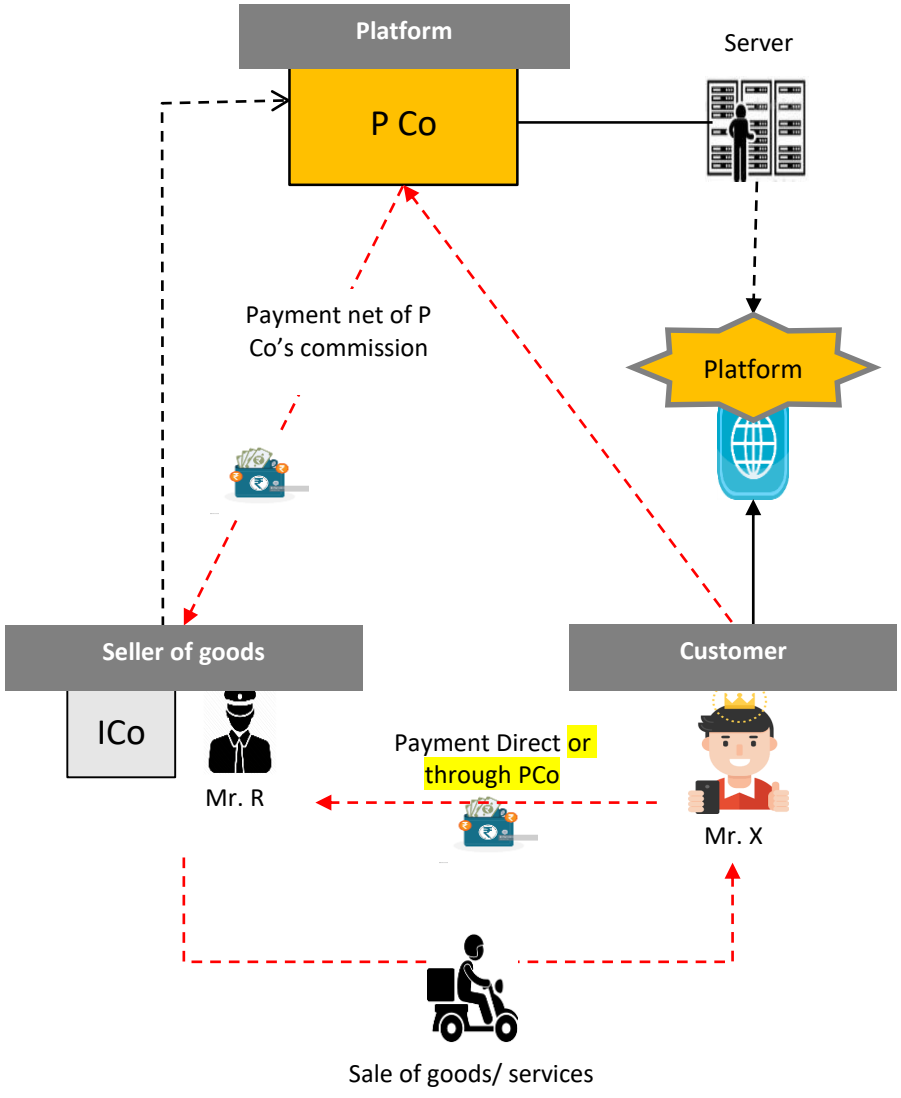
TCS on sale of goods– S. 206C(1H)



- Applies if its total sales, turnover or gross receipts from the business > Rs. 10 Cr in preceding FY
- All qualifying sellers in B2B and B2C transactions are covered
- Could have multiple TCS effect in chain transactions i.e. sale by A to B, B to C, C to D
- Power to CG to notify exclusion from "seller"
- Technically, NR seller included
- S. 204 amendment (extending net to NR/ agent) does not apply to TCS
- Supply of "service" not covered
- Sale of goods not defined. May also include shares but not bonds or debentures, as per definition under Sale of Goods Act
- Does not apply certain goods (motor cars, trader of forest items, etc.)

- Buyer = Person who purchases goods of INR 50L or more, in aggregate, in PY
- Applies even if buyer is regular taxpayer or even if he is not in to business
- NR purchasers (exports) likely to be excluded
- Would cover also (unless excluded by notification)
  - Agriculturists
  - Charity
  - Individuals – say, purchase of jewellery

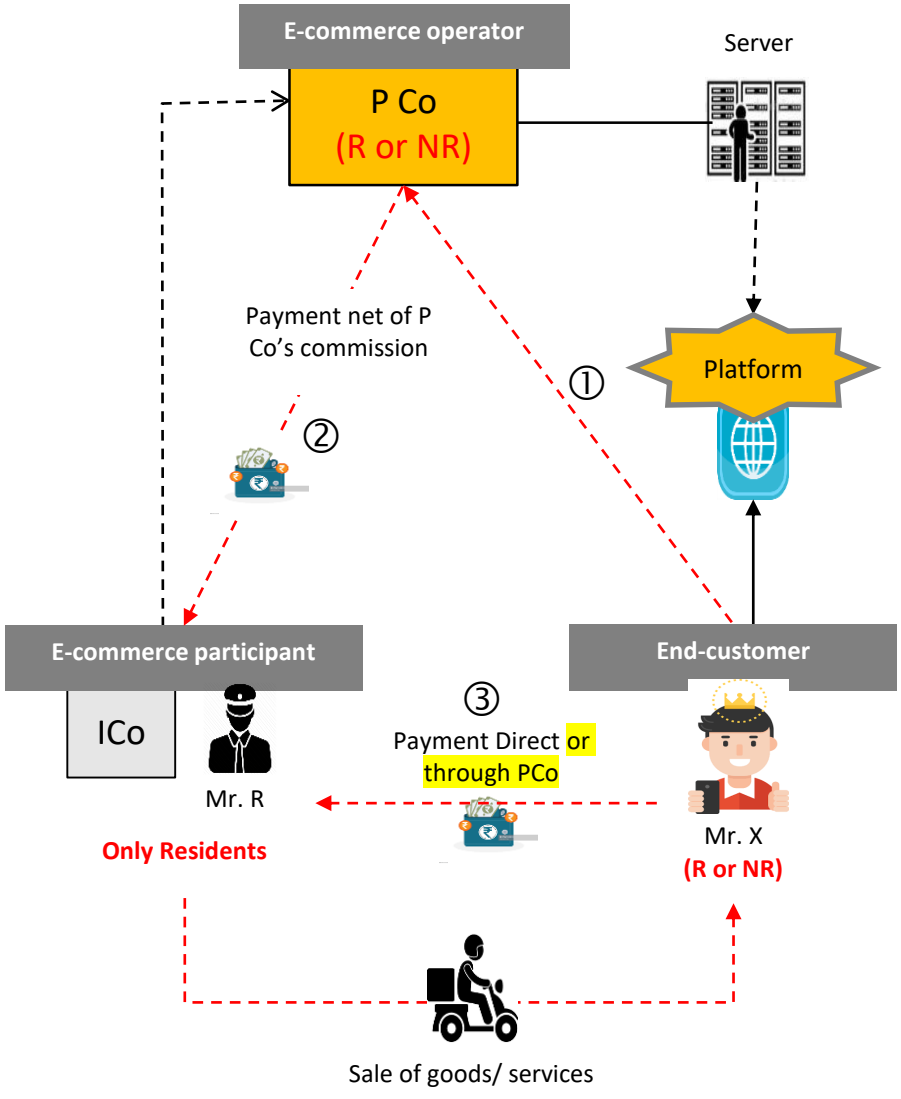
S.194-O: TDS on e-commerce transactions [w.e.f. 1 April 2020]



Existing tax implications

- On income of P Co, if resident:
  - S.194C for advertisement on PCo's platform
  - S.194H on commission income paid by ICo
  - S.194I/ C on logistics or storage fees paid either by ICo/ P Co
  - S.194C on shipping/ delivery charges paid either by ICo/ P Co
- On income of P Co, if NR:
  - S.195 if income chargeable to tax under ITA, subject to treaty relief
  - EL on ad payments by residents
- No TDS implications on income of seller (i.e. ICo/ Mr. X) being payment for sale of goods

S.194-O: TDS on e-commerce transactions [w.e.f. 1 April 2020]



- **E-commerce operator** (P Co) to deduct tax @ 1%* on payment or credit, whichever is earlier, to **e-commerce participant** (Resident, viz. ICo/ Mr. R)
- For s.194-O to apply, P Co should be responsible for paying to Resident
  - Direct payment by Mr. X to Resident is deemed to be credited/ paid by P Co [Expl. to s.194-O(1)]
- Exemption to individual/ HUF participants if
  - gross receipts from P Co < INR 10 lakhs and
  - PAN/ Aadhaar is furnished to P Co
- Overrides other TDS provisions applicable to FTS, professional services fees, etc. paid to E-commerce participant
  - Ambiguity if Mr. X is relieved from TDS obligation

* TDS @ 5% if Resident participant does not furnish PAN or Aadhaar

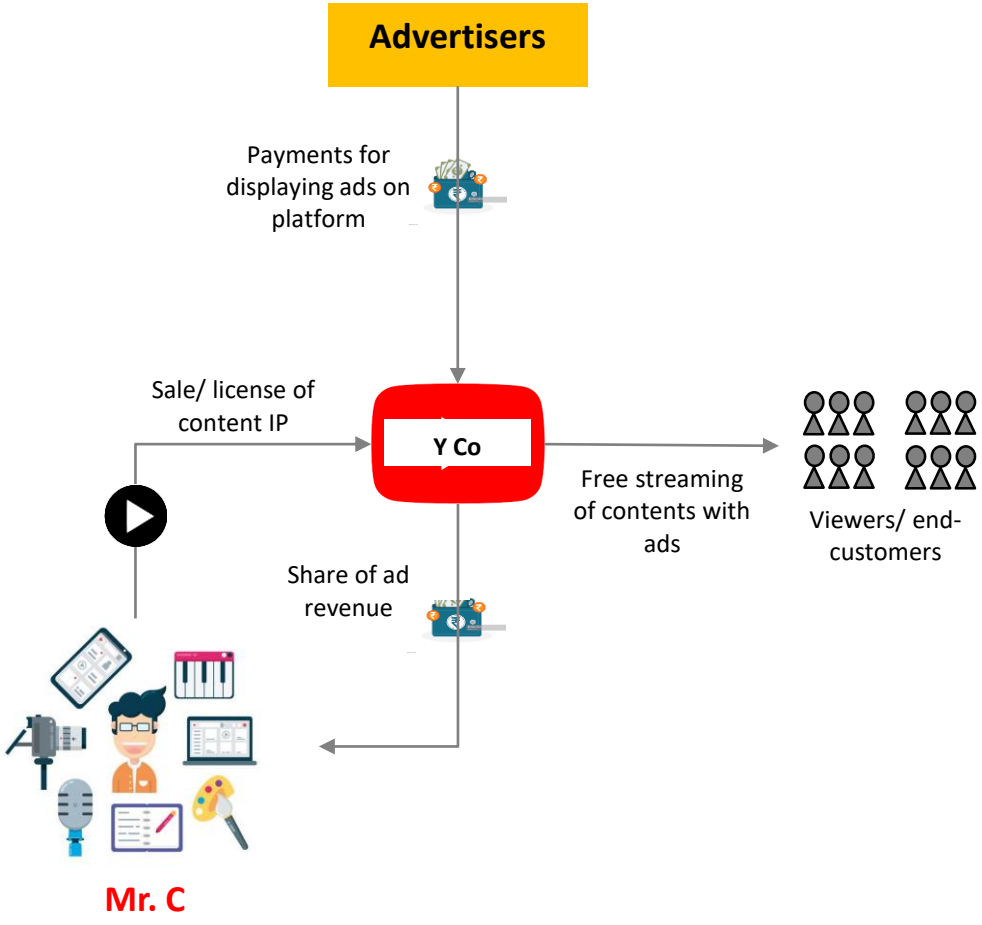
Various e-commerce models

- Online marketplace (e-tailors)
- Cab aggregators
- Online food delivery platforms
- Travel or hospitality service aggregators
- Online entertainment or event booking portals

Issues

- "Electronic commerce" means supply of goods or services or both, including digital products, ***over digital or electronic network***
  - Whether covers physical supply goods or services?
- Whether platform owner/ aggregator liable to TDS if contractually no obligation of collection and payment to participant?
  - Explanation to s.194-O(1) deems direct payment by customer to participant as amount paid/ credited by operator to participant
  - However, as per definition, "e-commerce operator" should be "a person responsible for paying" to e-commerce participant
- Whether NR operator with no India nexus is liable to deduct tax u/s. 194-O?
  - Amendment to s.204 to include NR himself, any person authorised by NR, agent of NR or any person who is deemed to be agent of NR u/s. 163
- Whether s.194-O applies when residents sell goods/ services on their own platform and not through e-commerce platform?
- Interplay with TCS provision u/s. 206C on sale of goods requires evaluation

Case study



Whether Y Co is obliged to deduct TDS u/s. 194-O on payments made to Mr. C?

- Y Co is online video-sharing platform and has a huge customer base primarily in India
- Y Co works on a *freemium* models
  - Free viewership with ads
- Mr. C is a content creator and regularly uploads his videos or v-logs on a platform owned by Y Co
- Considering the popularity of Y Co and its channels, various companies in consumer industry pay to Y Co for playing their ads during the video
- Mr. C is paid a fixed sum/share of such ad revenue by Y Co depending on number of likes to his channel and viewership
- **Evaluate implications u/s. 194-O:**
  - Is Mr. C providing services through a platform? Is he an “e-commerce participant”?
  - Is provision of Mr. C’s services facilitated by Y Co’s platform?

S.194J - Reduction in the withholding rate in case of FTS [w.e.f. 1 April 2020]

Existing provisions:

- S. 194J requires TDS at 10% on the payments made to residents for rendering, interalia, professional and technical services
- S. 194C requires TDS at 1%/ 2% on payment made to residents for carrying out any work in pursuance of a contract
- Litigation on the issue of short deduction arising out of characterisation dispute between s. 194C and s 194J. Possible illustrations could be:
  - Contract for design and construction of plant or building
  - Document management services [refer Tata Sky Ltd. (99 taxmann.com 272 (Mum Trib)]
  - AMC contract for repairs and maintenance of computers [refer Jagran Prakashan Ltd. (98 taxmann.com 459) (luck- Trib)]

Amendment proposed by FB 2020:

- **Reduction** of TDS rate u/s 194J **in case of FTS** (not being a professional service) **to 2%** (from existing 10%)

Impact analysis:

- Amendment resolves issues relating to short deduction of taxes arising out of characterisation dispute between “work” and “FTS”
- May result in fresh litigation on characterisation of a service as technical (2%) or professional (10%)

S.9(1)(vi) – Amendment to Royalty definition [w.e.f. 1 April 2021 i.e. AY 2021-22]

- Royalty definition under ITA excluded *"any consideration for sale, distribution or exhibition of cinematographic films"*
- The tax treaties did not provide for such specific exclusion from royalty definition
- Thus, in such cases, NR were taxable in India only if there existed business connection and income was attributable to such business connection
- FB 2020 proposes to amend royalty definition under ITA to delete the above exclusion
- EM states that such amendment is to avoid discrimination against Indian residents as the respective tax treaties did not provide such similar exclusion from royalty definition and India provided such benefit to NRs under its domestic laws
- Amendment applies with effect from AY 2021-22, hence any consideration paid to NR for sale, distribution or exhibition of cinematographic films post 1 April 2021 will be subject to royalty taxation in India
- S. 9(1)(vi) amendment also impacts the scope of TDS u/s. 194J when payment made is to a resident.
  - Unless relieved by s.197 certificate, TDS can impact cashflow of the business
- In certain tax treaties (e.g. Libya) which specifically exclude cinematographic films from royalty taxation, treaty benefit can be claimed

Amendments in other TDS provisions [w.e.f 1 April 2020]

Sec.	Amendment	Rationale

194A	• Earlier payments by co-operative society were excluded from scope [s. 194A(3)(v)/(viia)]
	• Proposed to withdraw the exemption, if:
	  • Sales, gross receipts or turnover exceed INR 50 Cr during preceding FY of payment
	  • Aggregate of interest, paid/ credited or likely to be paid/ credited during FY is more than INR 50,000/ INR 40,000
		Expansion of scope of WHT provision required to cover large co-operative societies

194C	Definition of "work" amended to include cases of contract manufacturing, where goods are supplied by tax payer's associate, i.e. a person covered u/s. 40A(2)(b)	Earlier applicability escaped by getting supplies from related parties

Incentives & other rationalization measures

Restricting cost-substitution as on 1 April 2001 to stamp duty value for land or building held as capital asset [w.e.f. 1 April 2021 i.e. AY 2021-22]

- S. 55 provides an option to take FMV of capital asset as on 1 April 2001 or actual cost as "cost of acquisition" for purpose of capital gain computation, where the asset was acquired before 1 April 2002
- FB 2020 proposes to insert a proviso in S. 55(2)(ii) whereby:
  - For capital asset, being land/ building/ both, FMV as on 1 April 2001 will not exceed the SDV as on 1 April 2001, wherever such SDV is available
  - SDV will mean value "adopted" or "assessed" or 'assessable" by CG or SG authority for the purpose of payment of stamp duty in respect of immoveable property
- EM states that the amendment is for "rationalisation" of the relevant provisions
- Illustration:

Particulars	Case 1	Case 2	Case 3
Actual cost of acquisition (a)	100	100	200
FMV as on 1 April 2001 (b)	200	150	150
SDV as on 1 April 2001 (c)	150	200	100
Cost of acquisition is higher of (a) and [lower of (b) and (c)]	**150**	**150**	**200**

Incentive provisions [w.e.f 1 April 2020 i.e. AY 2020-21]

Sec.	Amendment
35AD	• S.35AD grants 100% deduction of capital expenditure in case of specified businesses subject to specified conditions • There existed ambiguity as to whether s.35AD was mandatory or an optional provision • FB 2020 proposes to amend s. 35AD to provide that the deduction claim is optional in nature • EM states that such an amendment is to codify that investment linked incentive is optional and to ally the apprehension that opt out of s. 35AD does not injure taxpayer's depreciation claim

Incentive provisions [w.e.f 1 April 2021 i.e. AY 2021-22]

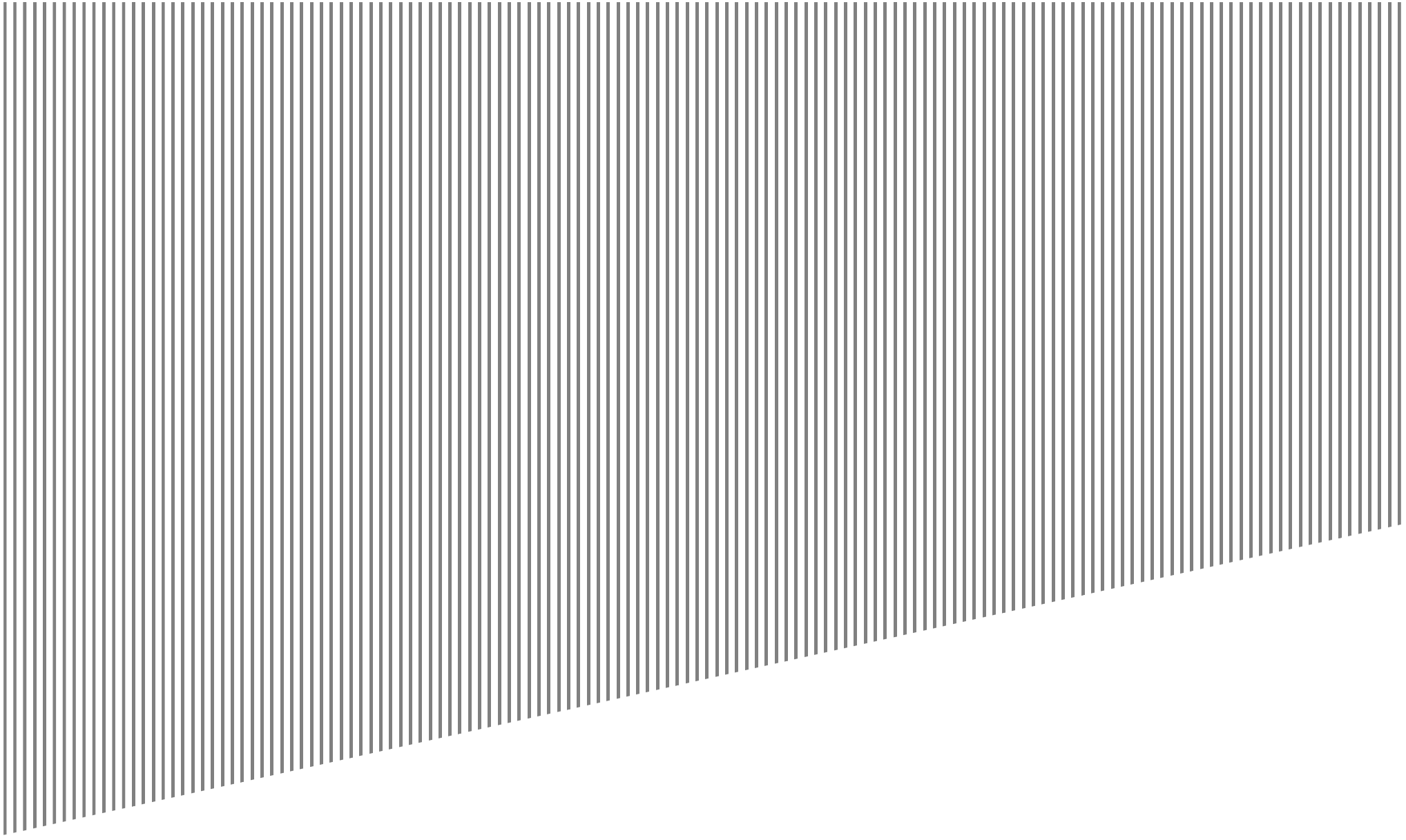
Sec.	Amendment
43CA, 50C, 56	• S. 43CA and s. 50C provide for notional taxation on transfer of land/ building/ both, where it is for consideration < SDV, then SDV is deemed to be full value of consideration for computing business income/capital gains • Where receipt of immovable property was without consideration/ inadequate consideration, where the difference between SDV and consideration > INR 50,000, S. 56(2)(x)(b) triggered • FA 2018 provided for a tolerance limit of 5% i.e. if difference between SDV and consideration was ≤ 5% of consideration, then SDV was not substituted. • **FB 2020 proposes to prospectively enhance the tolerance band to 10%**
80-IAC	• FB 2020 proposes to provide profit-linked deduction to eligible start ups for a period of 3 consecutive AYs (at the option of taxpayer) **out of 10 years (from existing 7 years)** from incorporation year • **Turnover condition** for eligible start up increased from **INR 25 Cr to INR 100 Cr**
80EEA and 80-IBA	• S. 80EEA – Interest deduction on loan taken for certain house property - Cut off date for **loan sanction** extended to **31 March 2021** • S. 80-IBA - Tax holiday for affordable housing project - Cut-off date for **approval of project** extended to **31 March 2021**

Incentive provisions [w.e.f 1 April 2020]

Sec.	Amendment
194LC	• Concessional WHT @ 5% on interest paid to NR/ foreign company in respect of certain foreign borrowings (loan, long term bonds, RDBs) entered/ issued before 1 July 2020 • FB 2020 proposes to extend benefit to loans, long term bonds and RDBs entered/ issued till **30 June 2023** • 4% WHT on interest on above bonds listed in IFSCs • No consequential change in S. 115A – Taxability @ 5% and TDS @ 4%
194LD	• Concessional WHT @ 5% on interest paid to FII or QFI from investment in RDB of Indian company or Government security • FB 2020 proposes to extend benefit to interest payments till 30 June 2023 (from existing 30 June 2020) and from municipal debt security (investment made during 1 April 2020 to 30 June 2023)
115BAB	• One of the condition for availment of 15% CTR was that company should not be engaged in any business *"other than the business of manufacture or production of any article or thing…"* • FB 2020 proposes to extend benefit of 15% CTR to **business of generation of electricity** by stating it as eligible business for s.115BAB • Benefit is extended to entities engaged in **generation and distribution of electricity**

Non-Resident Taxation

Amendments to S. 9(1)(i)- Business connection and Significant Economic Presence (SEP)



Amendment to SEP

- SEP deferred by a year- to become effective from FY 2021- 22
- To recollect, SEP of NR is created in India if:
  - NR carries out transactions in India exceeding specific revenue limit
    - FB 2020 requires such transaction needs to be carried out with "**any person"** in India
  - NR carries out systematic and continuous soliciting of business activities or engaged in interaction with specific no. of users in India **through digital means**
    - FB 2020 removes reference to "through digital means"
- Proposed Explanation 3A to be made applicable to SEP also
- Rule for determination of profits attributable to SEP to be specified
  - Under FB 2020, S. 295 is proposed to be amended to empower CDBT to make rules for the manner and procedure in which income shall be arrived in case of "transaction or activities of NR in India"
- APA and safe harbour rules can cover S. 9(1)(i) operations/ transactions/ activities

BEPS 2.0 "Unified Approach" to attribute profits to market jurisdiction on formulary apportionment basis

Introduction of Explanation 3A to S. 9(1)(i)- new nexus rule or new attribution rule?

- Explanation 1(a) to S. 9(1)(i) states where NR has business connection in India, he shall be taxable only on such part of the income as is reasonably attributable to "**operations carried out in India"**
- Proposed Explanation 3A states that "income attributable to the operations carried out in India" **shall include income from**:
  - Such advertisement which targets specified customer in India (Clause (i))
  - Sale of data collected from specified person in India (Clause (ii))
  - Sale of goods or services using data collected from specified person in India (Clause (iii))
- Specified customer/ person is customer/person who resides in India or from a person who uses IP address located in India

- No change to conventional business connection or conventional profit attribution rule
  - Does Explanation 3A fail in absence of trigger of conventional business connection?

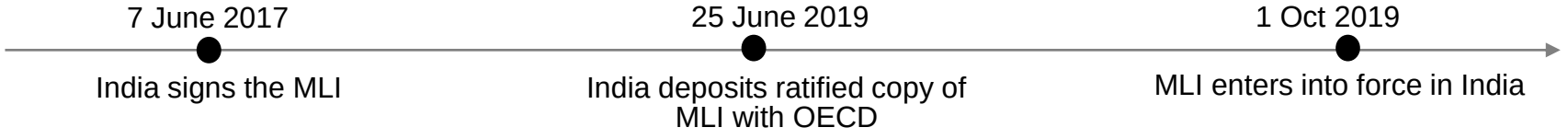
Examples of Explanation 3A

Explanation 3A	Whether following scenario is covered?
Clause (i) *Such advertisement which targets specified customer in India*	Ad revenue earned by NR platform for flashing advertisement of American hotel on its India webpage of Indian users?
	Sponsorship fees/ billboard advertisement fees received by cricket association during cricket matches held outside India which are telecasted in India and viewed by audience in India? Viewed by audience live at the stadium?
Clause (ii) *Sale of data collected from specified person in India*	Income earned by social media platforms by selling data related to Indian users to NRs (Data collected by platforms themselves)
	Income earned by NR e-commerce players on further selling data purchased from social media platforms to another NR?
Clause (iii) *Sale of goods or services using data collected from specified person in India*	Income earned by NR 1 from NR 2 for rendering market strategy service devised by NR 1 using data collected from Indian users?
	Sale of goods by NR 2 outside India by adopting above market strategy devised using data collected from Indian users?

Where EL applies, income not taxable in covered under ITA [S. 10(50)]

Amendment to S. 90 and S. 90A in line with BEPS Action 6 [w.e.f. 1 April 2021 i.e. AY 2021-22]

- S. 90(1)/ 90A enables GoI to enter into tax treaties with foreign countries/ specified associations in specified territory, for purposes of, avoid/ relief from double taxation, promote mutual economic relations, etc.
- Pursuant to power granted under S. 90 and Cabinet approval taken on 17 May 2017, India signed the MLI on 7 June 2017 and deposited ratified copy of the MLI with OECD on 25 June 2019
  - Consequently, the MLI enters into force in India from 1 October 2019



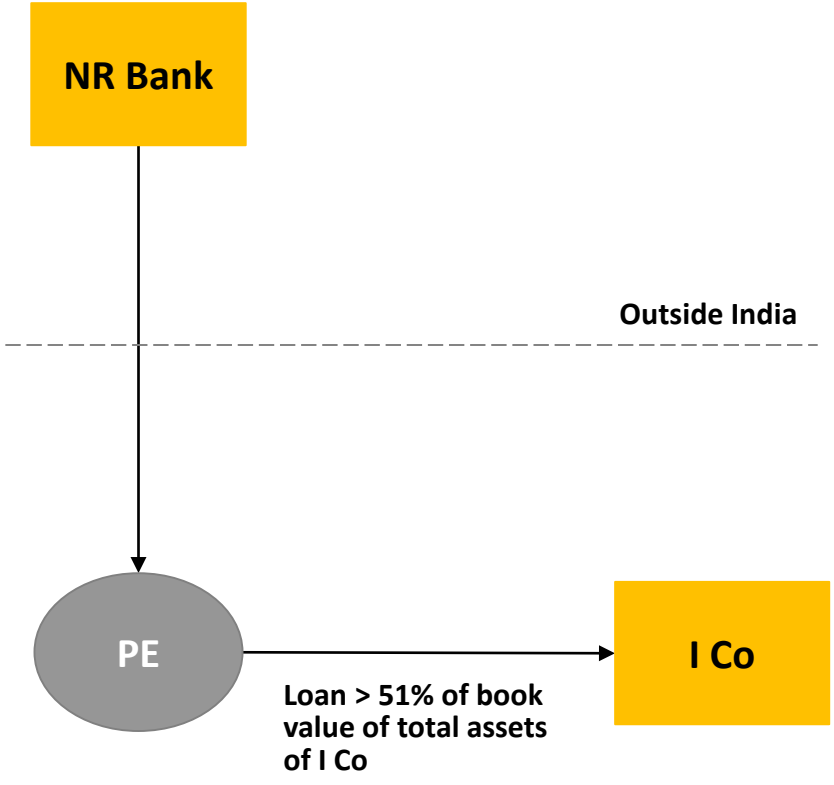
- The MLI is an instrument developed to implement BEPS recommended changes
- Accordingly, India has also adopted to modify the preamble of its tax treaties through MLI
- One of the key BEPS change, implemented through MLI, is modification of the text of preamble

"..purpose of treaties is to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this agreement for the indirect benefit of residents of third jurisdictions)"

Amendment to S. 90 and S. 90A in line with BEPS Action 6 [w.e.f. 1 April 2021 i.e. AY 2021-22]

- S. 90(1)(b)/ 90A(1)(b) of ITA allows GoI to enter into tax treaties, *interalia*, for avoidance of double taxation
- As per the EM to FB 2020, "**in order to achieve**" the MLI modification on preamble, S. 90(1)(b)/ 90A(1)(b) is proposed to be amended to include MLI preamble text
- The EM seems to suggest that the said amendment in domestic law was necessary to enable Government to have preamble added to the treaties
- Amendment is effective from FY 2020-21 – Does this impact legality of MLI in India since it was signed before the said amendment ?

S.94B: Interest to PE of NR Bank [w.e.f. 1 April 2021 i.e. AY 2021-22]



- **Existing provision:**
  - S.94B has been introduced vide Finance Act, 2017 pursuant to BEPS Action 4 limit interest deduction to non-resident AE to 30% of EBITDA
  - BEPS Action 4 was intended to address Base Erosion and Profit Shifting through use of intra-group financing arrangements by exploiting the tax rule that interest is allowed tax deduction whereas dividend is not allowed tax deduction
  - S.94B(3) exempts PE of NR bank (being a borrower) engaged in banking business from applicability of s.94B; taxpayer availing loan from such PE of NR bank (being a lender) is not exempted under existing provision if:
    - Bank itself triggers AE relationship u/s. 92A(2)(c) (due to loan > 51% of book value of total assets of I Co) or
    - Bank loan is guaranteed by AE of I Co even if such bank loan does not cross 51% threshold
- Issue sought to be addressed by proposed amendment:-
  - I Co avails loan from Indian PE of NR Bank which is not less than 51% of book value of total assets of I Co
    - NR Bank and I Co are regarded as deemed AE u/s. 92A(2)(c)
  - Interest expenditure on such loan gets covered by s.94B

S.94B: Interest to PE of NR Bank [w.e.f. 1 April 2021 i.e. AY 2021-22]

- **Proposed amendment:**
  - Proposed sub-s. (1A) to s. 94B states that s.94B shall not apply to interest paid in respect of a debt issued by a lender which is a PE in India of NR, being a person engaged in business of banking
  - Amendment applies prospectively from A.Y. 2021-22
  - As per EM, amendment is in deference to representations for carving out interest expenditure in respect of aforesaid loans
  - Arguably, exemption applies also when:
    - Loan by Indian PE of NR Bank is guaranteed by AE of I Co (whether such AE is resident or non resident)
      - Entirety of s.94B becomes inapplicable if conditions of amendment are met
    - Loan crosses 51% threshold to trigger AE relationship between Indian PE of NR Bank and I Co
  - Amendment only applicable from A.Y. 2021-22 – Whether amendment is curative and hence applicable to earlier A.Y.'s?
  - Does the ratio extend to other independent parties, such as Sovereign Wealth Funds?
  - Reorganizing loan in favour of PE from HO is likely to have commercial implications

Amendment to s. 115A(5) exemption from filing ROI to Non-residents [w.e.f 1 April 2020 i.e. AY 2020-21]

- Presently, NR (including foreign company irrespective of its residential status) is exempted from filing ROI, if
  - Earns income in the nature of interest/ dividend; and
  - Tax is deducted under Chapter XVII-B of the ITA
- FB 2020 proposes to amend s. 115A(5) extending the benefit of non filing of ROI to NRs, if
  - Income earned is not only by way of interest or dividend but also in is in the nature of royalty or FTS
  - Tax is withheld at, higher of:
    - rate as per Chapter XVII-B of the ITA; or
    - rate specified in s. 115A of ITA (which ranges from 5% to 20%)
- The amendment will take effect from 1 April 2020 i.e. AY 2020-21

Amendment to s. 115A(5) exemption from filing ROI to Non-residents [w.e.f 1 April 2020 i.e. AY 2020-21]

Impact Analysis:

- NR can be relieved from ROI filing obligation even when income is in the nature of FTS/ royalty
- NR will however have to file ROI and claim treaty benefit if actual tax liability is lower under treaty
- If taxes are deducted at a rate higher than the treaty rate, tax credit in resident country may not be available on the differential as the same will not be in accordance with the provisions of the treaty
- Is benefit of s. 115A(5) available, if treaty rate for FTS/ royalty is 10% adopted for TDS and such is also the rate specified in s. 115A?

Thank You!

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