



The Institute of Chartered Accountants of India –  
*Western India Regional Council (WIRC)*

# EQUALISATION LEVY & E-COMMERCE

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YOGESH A. THAR

JULY 4, 2020

BANSI S. MEHTA & CO.

# STATISTICAL FACTS

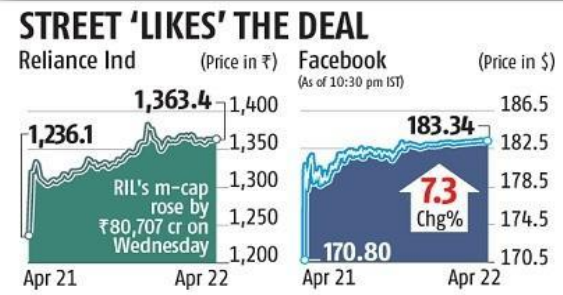
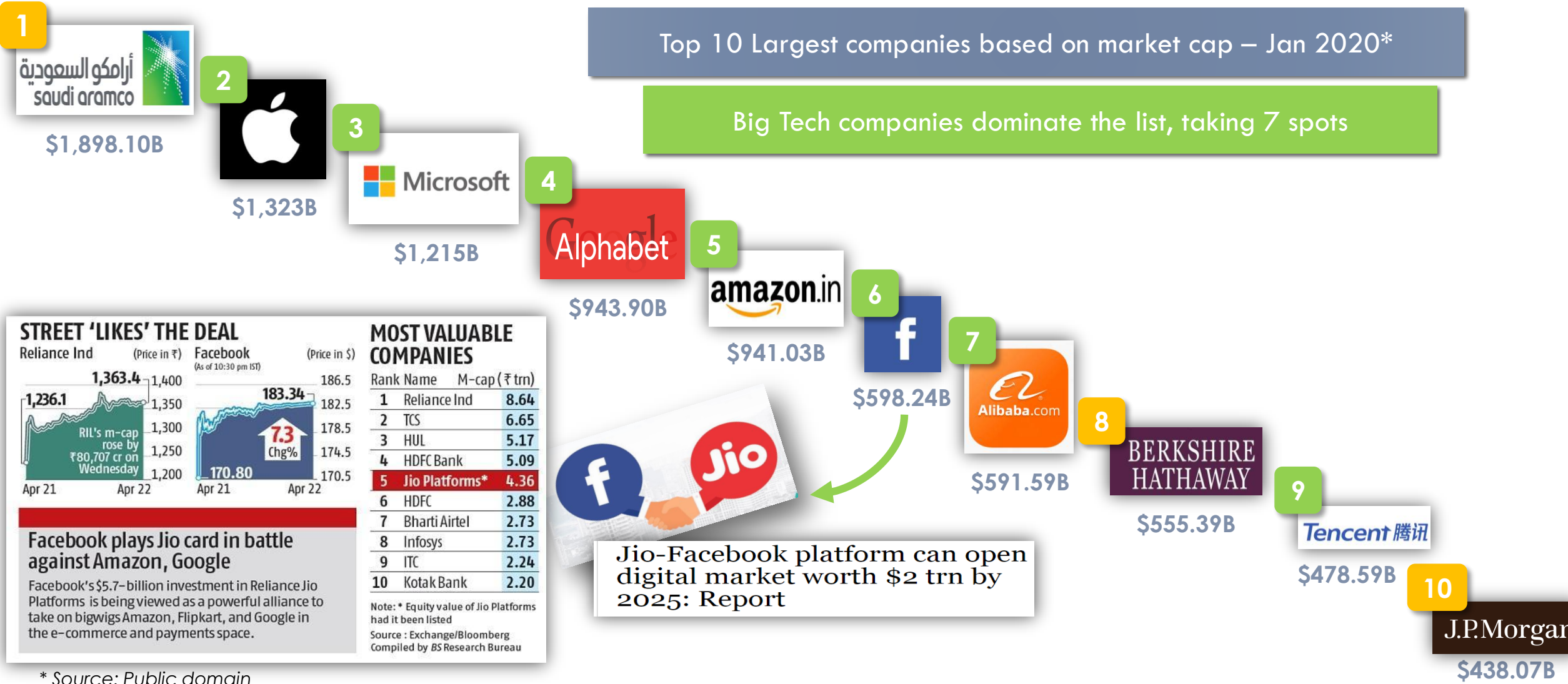
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*Digital Economy*

# Era of Big Tech Companies

Top 10 Largest companies based on market cap – Jan 2020\*

Big Tech companies dominate the list, taking 7 spots



### MOST VALUABLE COMPANIES

Rank	Name	M-cap (₹ trn)
1	Reliance Ind	8.64
2	TCS	6.65
3	HUL	5.17
4	HDFC Bank	5.09
5	Jio Platforms*	4.36
6	HDFC	2.88
7	Bharti Airtel	2.73
8	Infosys	2.73
9	ITC	2.24
10	Kotak Bank	2.20

Note: \* Equity value of Jio Platforms had it been listed  
 Source : Exchange/Bloomberg  
 Compiled by BS Research Bureau

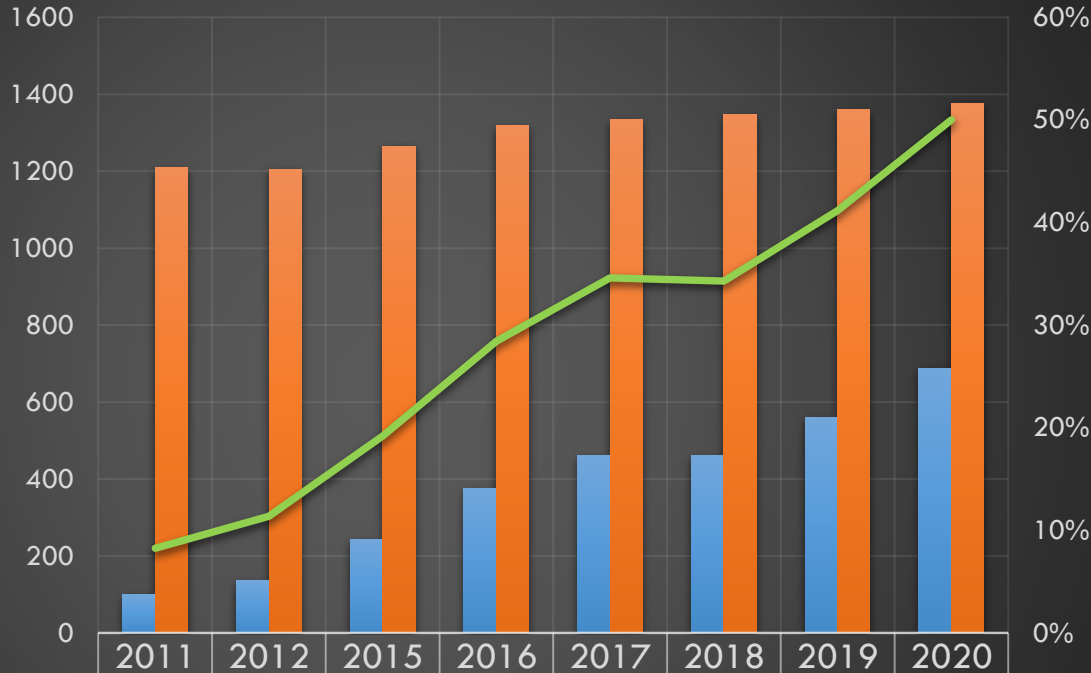
**Facebook plays Jio card in battle against Amazon, Google**  
 Facebook's \$5.7-billion investment in Reliance Jio Platforms is being viewed as a powerful alliance to take on bigwigs Amazon, Flipkart, and Google in the e-commerce and payments space.



Jio-Facebook platform can open digital market worth \$2 trn by 2025: Report

\* Source: Public domain

## Internet Users in India Over Time



In million

	2011	2012	2015	2016	2017	2018	2019	2020
Active Internet Users	100	137	243	375	462	462	560	688
Total Population	1210	1205	1265	1319	1335	1347	1361	1375
Penetration	8%	11%	19%	28%	35%	34%	41%	50%

SOURCES: ITU; GLOBALWEBINDEX; GSMA INTELLIGENCE; EUROSTAT; SOCIAL MEDIA PLATFORMS' SELF-SERVICE ADVERTISING TOOLS; LOCAL GOVERNMENT BODIES AND REGULATORY AUTHORITIES; APII; UNITED NATIONS (ALL LATEST AVAILABLE DATA IN JANUARY 2020). TIME SPENT DATA FROM GLOBALWEBINDEX (Q3 2019), BASED ON A BROAD SURVEY OF INTERNET USERS AGED 16 TO 64. SEE GLOBALWEBINDEX.COM FOR MORE DETAILS. **COMPARABILITY ADVISORY:** SOURCE CHANGES.



# INDIA 2ND LARGEST INTERNET MARKET IN THE WORLD



**3.8 bn**  
Total internet users in the world



India accounts for **12%** of the world's internet users

## TOP 10 COUNTRIES BY INTERNET USAGE



Source: Internet Trends by 2019

**TOI** FOR MORE INFOGRAPHICS DOWNLOAD **TIMES OF INDIA APP**

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# VALUE OF THE DIGITAL ADVERTISING MARKET

TOTAL SPEND (IN U.S. DOLLARS) ON DIGITAL ADVERTISING IN 2019, WITH DETAIL OF SPEND IN INDIVIDUAL SUB-CATEGORIES



INDIA

TOTAL DIGITAL AD  
SPEND IN 2019



**\$6.62**  
BILLION

we  
are  
social

SPEND ON DIGITAL  
SEARCH ADS IN 2019



**\$1.39**  
BILLION

statista

SPEND ON SOCIAL  
MEDIA ADS IN 2019



**\$3.28**  
BILLION

SPEND ON DIGITAL  
BANNER ADS IN 2019



**\$851.0**  
MILLION

statista

SPEND ON DIGITAL  
VIDEO ADS IN 2019



**\$612.0**  
MILLION



SPEND ON DIGITAL  
CLASSIFIED ADS IN 2019



**\$490.0**  
MILLION

75

**SOURCE:** STATISTA MARKET OUTLOOK FOR DIGITAL ADVERTISING (ACCESSED JANUARY 2020). FIGURES REPRESENT FULL-YEAR DIGITAL ADVERTISING SPEND FOR 2019. SEE [STATISTA.COM/OUTLOOK/DIGITAL-MARKETS](https://www.statista.com/outlook/digital-markets) FOR MORE DETAILS. **NOTES:** SPEND VALUES ARE IN U.S. DOLLARS. INCLUDES ADVERTISING ON MOBILE AND DESKTOP DEVICES. VALUES DO NOT INCLUDE SPEND ON E-MAIL MARKETING, AUDIO ADVERTS, INFLUENCER MARKETING, SPONSORSHIPS, PRODUCT PLACEMENT, OR COMMISSION-BASED AFFILIATE SYSTEMS.

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# DIGITAL ADVERTISING MARKET: VALUE GROWTH

YEAR-ON-YEAR CHANGE IN THE VALUE OF THE DIGITAL ADVERTISING MARKET BETWEEN 2018 AND 2019



INDIA

YEAR-ON-YEAR CHANGE  
IN TOTAL DIGITAL AD SPEND



+20%

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YEAR-ON-YEAR CHANGE IN  
DIGITAL SEARCH AD SPEND



+26%

statista

YEAR-ON-YEAR CHANGE IN  
SOCIAL MEDIA AD SPEND



+20%

YEAR-ON-YEAR CHANGE IN  
DIGITAL BANNER AD SPEND



+19%

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YEAR-ON-YEAR CHANGE IN  
DIGITAL VIDEO AD SPEND



+22%

statista

YEAR-ON-YEAR CHANGE IN  
DIGITAL CLASSIFIED AD SPEND



+5.8%

76

**SOURCE:** STATISTA MARKET OUTLOOK FOR DIGITAL ADVERTISING [ACCESSED JANUARY 2020]. FIGURES COMPARE FULL-YEAR DIGITAL ADVERTISING SPEND IN 2019 TO EQUIVALENT DATA FOR 2018. SEE [STATISTA.COM/OUTLOOK/DIGITAL-MARKETS](https://www.statista.com/outlook/digital-markets) FOR MORE DETAILS. **NOTES:** INCLUDES ADVERTISING ON MOBILE AND DESKTOP DEVICES. VALUES DO NOT INCLUDE SPEND ON E-MAIL MARKETING, AUDIO ADVERTS, INFLUENCER MARKETING, SPONSORSHIPS, PRODUCT PLACEMENT, OR COMMISSION-BASED AFFILIATE SYSTEMS.

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# ECOMMERCE ACTIVITIES

PERCENTAGE OF INTERNET USERS AGED 16 TO 64 WHO REPORT PERFORMING EACH ACTIVITY IN THE PAST MONTH



INDIA

SEARCHED ONLINE FOR  
A PRODUCT OR SERVICE  
TO BUY (ANY DEVICE)



digital  
web  
index

74%

VISITED AN ONLINE  
RETAIL STORE ON THE  
WEB (ANY DEVICE)



94%

PURCHASED A  
PRODUCT ONLINE  
(ANY DEVICE)



global  
web  
index

74%

MADE AN ONLINE  
PURCHASE VIA A LAPTOP  
OR DESKTOP COMPUTER



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29%

MADE AN ONLINE  
PURCHASE VIA A  
MOBILE DEVICE



55%

65

SOURCE: GLOBALWEBINDEX (Q3 2019). FIGURES REPRESENT THE FINDINGS OF A BROAD SURVEY OF INTERNET USERS, AGED 16 TO 64. SEE [GLOBALWEBINDEX.COM](http://GLOBALWEBINDEX.COM) FOR MORE DETAILS.

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# ONLINE PURCHASES OF CONSUMER GOODS

OVERVIEW OF THE MARKET FOR ONLINE CONSUMER GOODS PURCHASES IN 2019



INDIA

TOTAL NUMBER OF PEOPLE  
PURCHASING CONSUMER  
GOODS ONLINE IN 2019



654.3  
MILLION

VALUE OF THE MARKET FOR  
ONLINE CONSUMER GOODS  
PURCHASES (IN U.S. DOLLARS)



\$32.33  
BILLION

AVERAGE ANNUAL REVENUE PER  
ONLINE CONSUMER GOODS  
SHOPPER (ARPU) IN U.S. DOLLARS



\$49

ONLINE CONSUMER GOODS  
ARPU AS A PERCENTAGE OF GDP  
PER CAPITA (BOTH U.S. DOLLARS)



2.5%

SOURCES: STATISTA MARKET OUTLOOK (ACCESSED JANUARY 2020). SEE [STATISTA.COM/OUTLOOK/DIGITAL-MARKETS](https://www.statista.com/outlook/digital-markets) FOR MORE DETAILS. \*NOTES: FIGURES INCLUDE ONLINE B2C SPEND ON CONSUMER GOODS CATEGORIES ONLY (FASHION & BEAUTY, ELECTRONICS & PHYSICAL MEDIA, FOOD & DRINK, FURNITURE & APPLIANCES, AND TOYS, HOBBIES, & DIY), AND DO NOT INCLUDE SPEND ON TRAVEL, ACCOMMODATION, DIGITAL CONTENT, OR ANY B2B PURCHASES. ♦ COMPARABILITY ADVISORY: BASE CHANGES. DATA ARE NOT COMPARABLE TO PREVIOUS REPORTS.

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# BACKGROUND

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# Economic Allegiance – Fundamental Basis for allocation of taxing rights

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- ❑ As global trade increased in early 20<sup>th</sup> century, **the League of Nations initiated study on the issue of double taxation in early 1920.**
- ❑ The study identified the concept of **'economic allegiance'** as a basis to design the international tax framework.
- ❑ Economic allegiance is based on factors aimed at measuring the existence and extent of the economic relationships between a particular state and the income or person to be taxed.
- ❑ Four factors comprising economic allegiance, namely
  - (i) origin of wealth or income,
  - (ii) situs of wealth or income,
  - (iii) enforcement of the rights to wealth or income, and
  - (iv) place of residence or domicile of the person entitled to dispose of the wealth or income.

# Economic Allegiance – Fundamental Basis for allocation of taxing rights

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- ❑ The study concluded that **greatest weight** should be given to **“the origin of the wealth [i.e. source] and the residence or domicile of the owner who consumes the wealth”**.
- ❑ The origin of wealth was defined for these purposes as all stages involved in the creation of wealth: “the original physical appearance of the wealth, its subsequent physical adaptations, its transport, its direction and its sale”.
- ❑ On the basis of this premise, it was concluded that in **allocating jurisdiction to tax** business profits derived from **bricks and mortar businesses**, greatest importance was attached to the **nexus between business income and the various physical places contributing to the production of the income**.
- ❑ The famous paragraph in the 1923 League of Nations Document on Double Taxation – “The oranges upon the trees in California are not acquired wealth until they are picked, and not even at that stage until they are packed, and not even at that stage until they are transported to the place where demand exists and until they are put where the consumer can use them. **These stages, upto the point where wealth reaches fruition, may be shared in by different territorial authorities”**

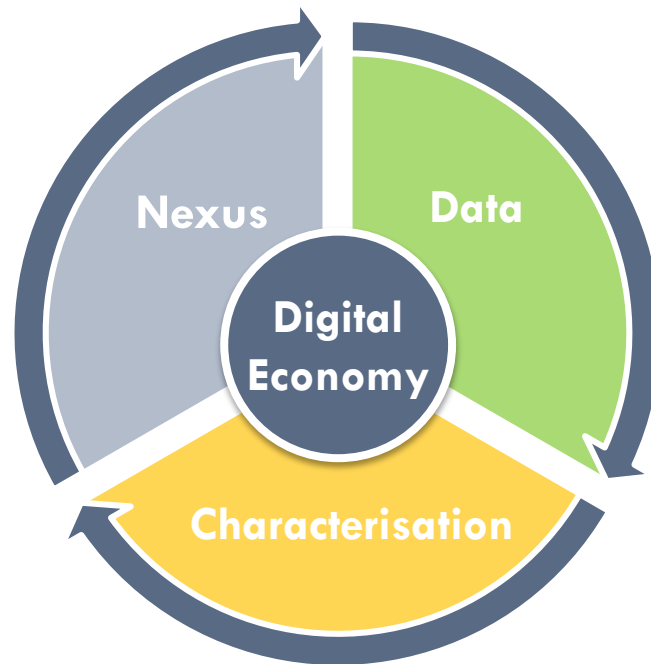
# G20/OECD BEPS Action Plan 1 – Digital Economy

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- ❑ Growing concern regarding tax planning by MNEs lead to the adoption of BEPS project wherein OECD published 15 Action Plans. **Action 1 deals with Digital Economy**
  
- ❑ **Characteristics of Digital Economy** –
  - Unparalleled reliance on intangibles (digital and telecommunication networks),
  - the massive use of data (notably personal data),
  - the widespread adoption of multi-sided business models capturing value from externalities generated by free products, and
  - the difficulty of determining the jurisdiction in which value creation occurs (requires no physical presence)
  
- ❑ New business models under Digital Economy have created **new tax challenges** w.r.t.
  - **nexus,**
  - **valuation of data & user contribution, and**
  - **characterisation of income**

# Digital Economy – Direct Tax Challenges

The continual increase in the potential of digital technologies and the reduced need in many cases for extensive physical presence in order to carry on business, combined with the increasing role of network effects generated by customer interactions, can raise questions as to **whether the current rules to determine nexus with a jurisdiction for tax purposes are appropriate.**



The growth in sophistication of information technologies has permitted companies in the digital economy to gather and use information across borders to an unprecedented degree. This raises the issues of **how to attribute value created from the generation of data through digital products and services**, and of how to characterise for tax purposes a person or entity's supply of data in a transaction, for example, as a free supply of a good, as a barter transaction, or some other way.

The development of new digital products or means of delivering services creates uncertainties in relation to the proper **characterisation of payments made in the context of new business models**, particularly in relation to cloud computing.

# G20/OECD BEPS Action Plan 1 – Proposal

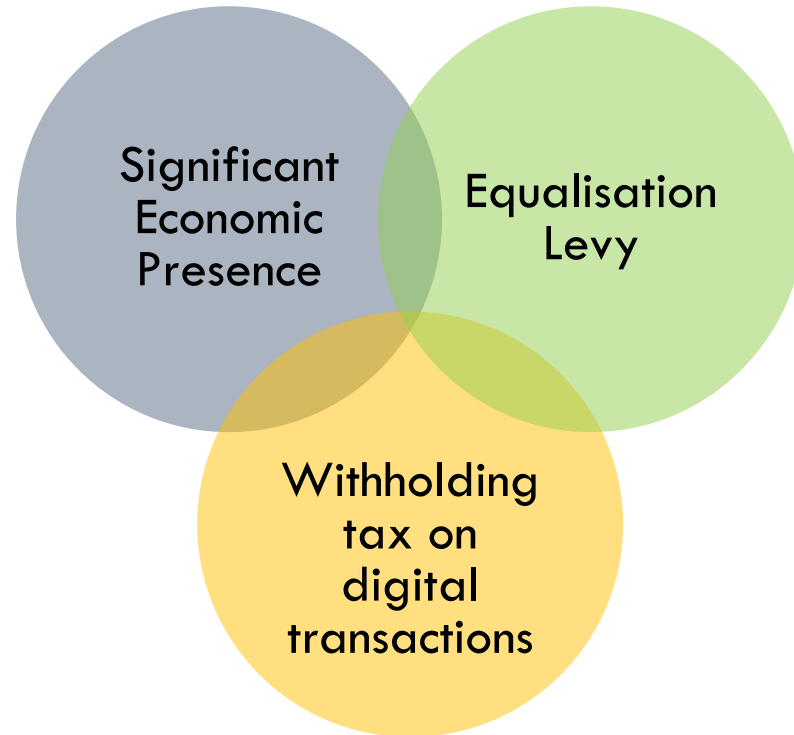
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- ❑ **Digital Economy is increasingly becoming the economy itself and cannot be ring fenced from the rest of the economy for tax purposes.**
  
- ❑ Limitations of traditional PE definition requiring physical presence; double non-taxation due to lack of taxation in source jurisdiction (following source based taxation) and residence jurisdiction, etc. pose threat on taxation of digital economy.
  
- ❑ **Action 1 Proposal** – Countries could introduce any of the below options in the domestic laws as an interim measure or additional safeguard against BEPS, **provided they respect existing treaty obligations:**
  - (i) a new nexus in the form of a **significant economic presence** (SEP),
  - (ii) a **withholding tax** on certain types of digital transactions,
  - (iii) an **equalisation levy** (EL)

# G20/OECD BEPS Action Plan 1 – Proposal (cont'd...)

**Create a taxable presence** in a country when a non-resident enterprise has a SEP in a country on the basis of factors that evidence a **purposeful and sustained interaction with the economy of that country via technology and other automated tools.**

- Revenue-based factors
- Digital factors
- User based factors



An equalisation levy could be structured in a variety of ways depending on the ultimate policy objective. **In general, an equalisation levy would be intended to serve as a way to tax a non-resident enterprise's SEP in a country.**

A withholding tax can be imposed as a **standalone gross-basis final withholding tax** on certain payments made to non-resident providers of **goods and services ordered online** or, alternatively, as a primary collection mechanism and enforcement tool to support the application of the nexus

# 2016 Committee Report on Equalisation Levy

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- ❑ Recognizing the significance of taxation issues relating to e-commerce transactions, CBDT constituted a Committee, which submitted its report in Feb, 2016. The Committee heavily relied on Action 1 Report.
- ❑ Amongst the three options suggested in Action 1, **Equalisation levy was considered to be the best alternative** –
  - *Significant Economic Presence* – Not sufficient, unless treaty amended by inserting new nexus rules
  - *Withholding Tax* – Ineffective, unless same option included in tax treaty
  - *Equalisation Levy* – As EL is imposed on gross amount of transaction and not income, it is not income-tax. The inherent concept of EL keeps it outside the purview of limitations imposed by tax treaties
- ❑ **Key Recommendations of the Committee**
  - Impose Equalisation Levy (EL) on digital transactions, by introducing a separate Chapter in Finance Act, 2016. This will not be a part of income-tax;
  - EL to be charged on any sum received by a non resident from a resident in India or a PE in India as a consideration for the specified digital services;
  - The rate of EL may be between 6-8% of the gross sum;
  - Listed 13 digital transactions to be covered under definition of 'Specified Services';
  - Threshold of ₹ 1 lacs from a person for specified services in a year, for non-levy of EL;
  - Payments subjected to Equalization Levy exempted from Income-tax;
  - Disallowance of expense if Equalization Levy has not been deducted



# Enactment of Equalisation Levy in India

- ❑ **Finance Act, 2016** – Introduced Equalisation Levy @ 6% w.e.f. June 1, 2016\* on **online advertisement**, provisions of advertising space and other related services. Famously known as **Google Tax**.
  - EL provision were enacted as a separate chapter (Chapter VIII) in Finance Act, 2016
  - S. 10(50) inserted under the Income-tax Act, granting exemption from income-tax on income which is chargeable to EL
  - S. 40(a)(ib) inserted under the Income-tax Act, disallowing expense on account of non-deduction of EL
  
- ❑ **Finance Act, 2020** – Introduced Equalisation Levy @ 2% on **E-commerce Transactions** w.e.f. April 1, 2020. Corresponding amendment made in S. 10(50) of the Income-tax Act
  - EL on E-commerce was introduced by way of **Amendments to Finance Bill, 2020**

In 2016, India became the first country to introduce Equalisation Levy in its Domestic Law

\*NOTIFICATION NO. SO 1904(E) [NO.37/2016 (F.NO.370142/12/2016-TPL)], DATED 27-5-2016.

# INDIAN JUDICIAL PRECEDENTS

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# Indian Judicial Precedents

Case Law	Nature of Service
<b>Existence of PE in India. Hence attribution of business profits</b>	
Galileo International Inc. vs. DCIT [2008] 114 TTJ 289 (Delhi Trib.); Amadeus Global Travel Distribution S.A. vs. DCIT [2008] 113 TTJ 767 (Delhi Trib.)	Computer Reservation Systems used by the travel industry
<b>Neither Royalty, No FTS. In the absence of PE in India, business income not taxable</b>	
ITO vs. Right Florists (P.) Ltd. [2013] 154 TTJ 142 (Kol - Trib.)	Online Advertisement
eBay International AG vs. DDIT [2014] 61 SOT 62 (Mum Trib.)	Online shopping
Millennium Infocom Technologies Ltd. vs. ACIT [2008] 117 TTJ 456 (Delhi Trib.); ITO vs. People Interactive (I) P Ltd ITA No. 2182/Mum/2009 (Mum Trib.)	Website Hosting
<b>Royalty income, Gross income taxable</b>	
Google India (P.) Ltd. vs. ACIT [2017] 190 TTJ 409 (Bang Trib.)	Online Advertisement – Adword program

# World Wrestling Entertainment (WWE) Inc. vs. M/s Reshma Collection FAO(OS) 506/2013 (Del HC)

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## FACTS:

- ❑ Appellant, a US based company was *inter alia* engaged in online sale of branded consumer products featuring the brand 'WWE'. Appellant alleged infringement of its trademark by the Defendant.
- ❑ The question before the HC was territorial jurisdiction of Appellant in Delhi.
- ❑ Appellant plea is that it 'carries on business' in Delhi because, its programmes are broadcast in Delhi; its merchandise and books are available for sale in Delhi; and its goods and services are sold to customers in Delhi through its website which can be accessed in Delhi over the internet.

## HELD:

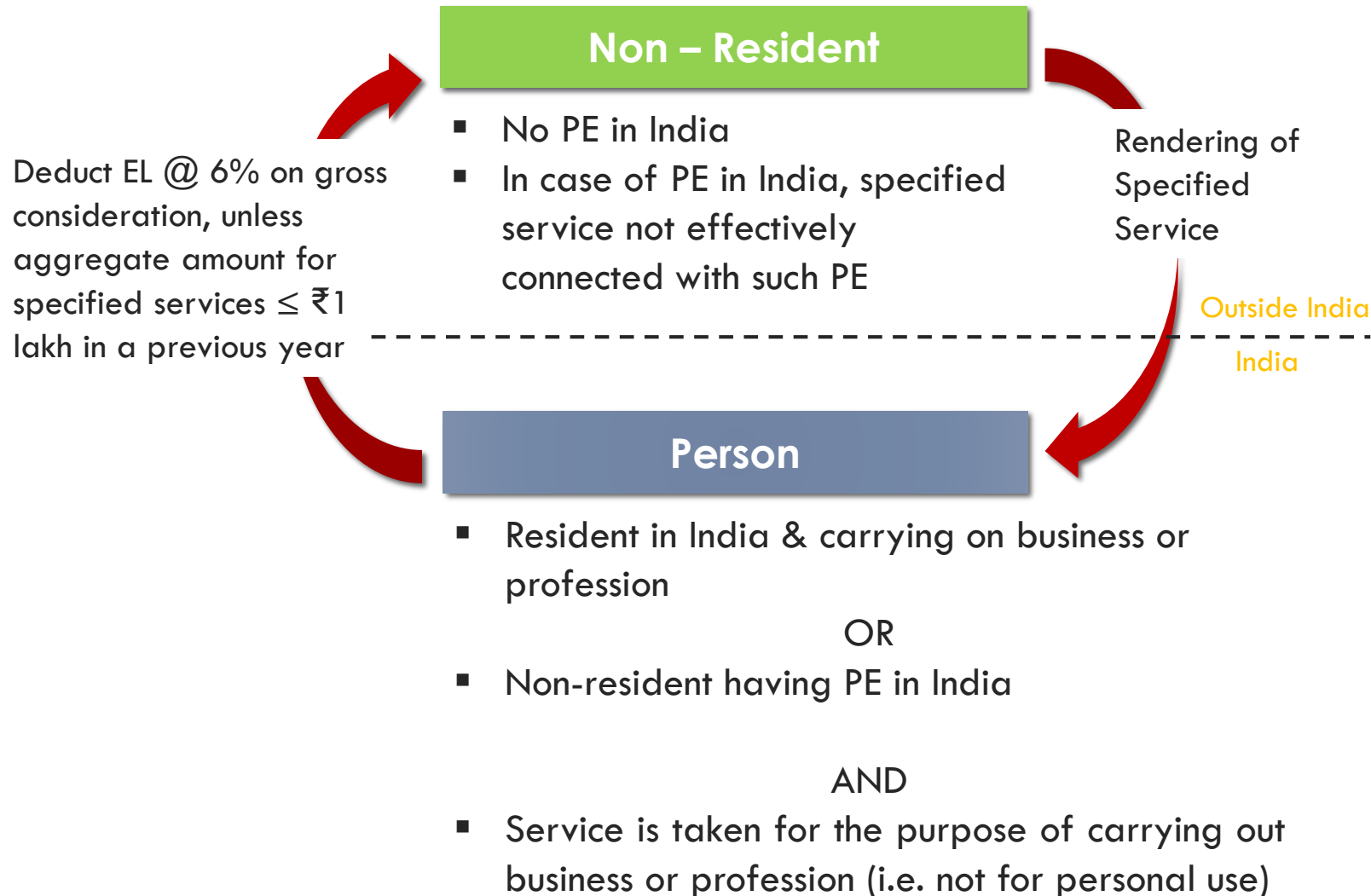
- ❑ Because of the advancements in technology and the rapid growth of new models of conducting business over the internet, it is possible for an entity to have a virtual presence in a place.
- ❑ The availability of transactions through the website at a particular place is virtually the same thing as a seller having shops in that place in the physical world.
- ❑ Let us assume for the sake of argument that the appellant/ plaintiff had a shop in Delhi from where it sold its various goods and services. In that case, it could not be denied that the plaintiff carried on business in Delhi.
- ❑ When the shop in the 'physical sense' is replaced by the 'virtual' shop because of the advancement of technology, in our view, it cannot be said that the appellant/ plaintiff would not carry on business in Delhi.

# EQUALISATION LEVY 1.0

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*Online Advertisement*

# Charging provision (S. 165) & Defn (S. 164)



- ❑ **"equalisation levy"** means the tax leviable on consideration received or receivable for any specified service ....under the provisions of this Chapter;
- ❑ **"specified service"** means online advertisement, any provision for digital advertising space or any other facility or service for the purpose of online advertisement and includes any other service as may be notified by the Central Government in this behalf;
- ❑ **"online"** means a facility or service or right or benefit or access that is obtained through the internet or any other form of digital or telecommunication network;
- ❑ **"PE"** includes a fixed place of business through which the business of the enterprise is wholly or partly carried on

# “PE” – inclusive definition

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## DIT (Intl. Taxn.) vs. Morgan Stanley & Co. [2007] 292 ITR 416 (SC)

“11. The concept of PE was introduced in 1961 Act as part of the statutory provisions of transfer pricing by the Finance Act of 2001. In Section 92-F (iii) the word "enterprise" is defined to mean "a person including a P.E. of such person who is proposed to be engaged in any activity relating to the production.... ". **Under the CBDT circular No. 14 of 2001 it has been clarified that the term PE has not been defined in the Act but its meaning may be understood with reference to the DTAA entered into by India.** Thus the intention was to rely on the concept and definition of PE in the DTAA. However, vide Finance Act, 2002 the definition of PE was inserted in the Income-tax Act, 1961 (for short, 'IT Act') vide section 92-F (iiia) which states that the PE shall include a fixed place of business through which the business of the MNE is wholly or partly carried on. This is where **the difference lies between the definition of the word PE in the inclusive sense under the Income-tax Act as against the definition of the word PE in the exhaustive sense under the DTAA.** This analysis is important **because it indicates the intention of the Parliament in adopting an inclusive definition of P.E. so as to cover service P.E., agency P.E., software P.E., Construction P.E. etc.**”

# Internet

- According to United States Code [21 USCS § 802 (50)], the term Internet means “**collectively the myriad of computer and telecommunications facilities**, including equipment and operating software, which comprise the interconnected worldwide network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocol to such protocol, **to communicate information of all kinds by wire or radio.**”





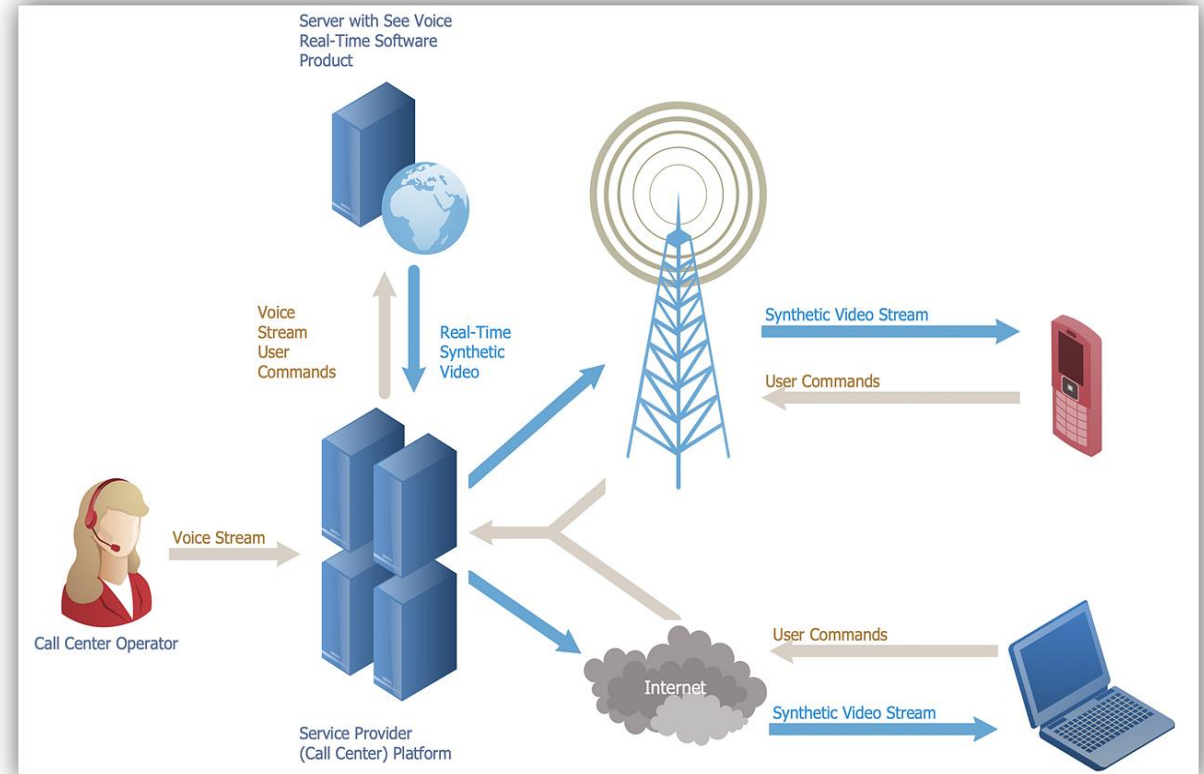
# Telecommunication Network

□ A telecommunications network **is a collection of terminal nodes, links and any intermediate nodes which are connected so as to enable telecommunication between the terminals.** The transmission links connect the nodes together. The nodes use circuit switching, message switching or packet switching to pass the signal through the correct links and nodes to reach the correct destination terminal. Each terminal in the network usually has a unique address so messages or connections can be routed to the correct recipients. The collection of addresses in the network is called the address space.

□ **Telecommunications Act, 1997 (Australia):** telecommunications network means **a system, or series of systems, that carries, or is capable of carrying, communications by means of guided and/or unguided electromagnetic energy.**

□ Examples of Telecommunication network

- Internet
- Computer Networks
- Telephone landline Network
- Mobile Network
- Cable TV Network



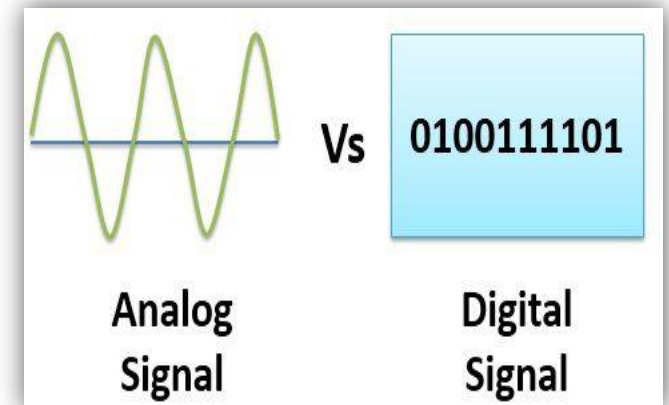
# Digital Network

## □ Digital

- **composed of data in the form of especially binary digits** – Merriam Webster
- A digital transmission is "a transmission in whole or in part in a digital or other non-analog format." [17 USCS § 101]
- (of signals or data) expressed as series of the digits 0 and 1, typically represented by values of a physical quantity such as voltage or magnetic polarization. 'The digital signal is converted back to an analog one when it reaches its destination.' – Lexico.com (UK Dictionary)

## □ Analog

- **of, relating to, or being a mechanism or device in which information is represented by continuously variable physical quantities** - Merriam Webster
- Relating to or using signals or information represented by a continuously variable physical quantity such as spatial position, voltage, etc. – Lexico.com (UK Dictionary)



# Switch over from analog to digital signal broadcast

- ❑ Pursuant to provisions in the **Telecommunications Act of 1996**, television in the United States must convert from analog signal broadcast to digital signal. *(source: uslegal.com)*
  
- ❑ **Television Networks (Regulation) Amendment Act, 2011** made it mandatory for switch-over of the existing analogue Cable TV networks in India to Digital Addressable System (DAS) in four phases. The fourth phase was completed on March 31, 2017.
  - “addressable system” means an electronic device (which includes hardware and its associated software) or more than one electronic device put in an integrated system through which transmission of programmes including re-transmission of signals of television channels can be done in encrypted form, which can be decoded by the device or devices at the premises of the subscriber within the limits of the authorization made, on the choice and request of such subscriber, by the distributor of television channels;
  - “set top box” or “STB” means a device, which is connected to or is part of a television receiver and which enables a subscriber to view subscribed channels;
  
- ❑ TRAI has set the deadlines for the completion of transition to Digital terrestrial TV in three phases by 31 December 2023.
  - Terrestrial TV broadcasting in India is under the exclusive domain of Doordarshan (Prasar Bharati), the Public Service Broadcaster and it is predominantly analog.

# Advertisement

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- ❑ **Black Law's Dictionary 8<sup>th</sup> Edition:**
  - Advertising: The **action of drawing the public's attention** to something to promote its sale.
  
- ❑ **Merriam – Webster:**
  - Advertisement: **a public notice**; the act or process of advertising something
  - Advertising: the action of calling something to the attention of the public especially by paid announcements
  
- ❑ **Cambridge Dictionary:**
  - Advertisement - a picture, short film, song, etc. that tries to **persuade people to buy a product or service**, or a piece of text that tells people about a job, etc.
  
- ❑ **Municipal Corporation of Greater Bombay v. Bharat Petroleum Corporation Ltd., (2002) 3 SCC 452:** **In common parlance, 'advertisement' means to make publicly known an information by some device and to draw or attract attention of public/individual concerned to such information.** It need not necessarily be to sell only or solely for commercial exploitation.

# Scope of Specified Service recommended in Committee Report vis-à-vis enacted Scope

## “Specified services” may be defined as following:

- (i) **online advertising or any services**, rights or use of software **for online advertising**, including **advertising on radio & television**;
- (ii) **digital advertising space**
- (iii) designing, creating, hosting or maintenance of website
- (iv) digital space for website, advertising, e-mails, online computing, blogs, online content, online data or any other online facility
- (v) any provision, facility or service for uploading, storing or distribution of digital content
- (vi) online collection or processing of data related to online users in India
- (vii) any facility or service for online sale of goods or services or collecting online payments
- (viii) development or maintenance of participative online networks
- (ix) use or right to use or download online music, online movies, online games, online books or online software, without a right to make and distribute any copies thereof
- (x) online news, online search, online maps or global positioning system applications
- (xi) online software applications accessed or downloaded through internet or telecommunication networks
- (xii) online software computing facility of any kind for any purpose
- (xiii) reimbursement of expenses of a nature that are included in any of the above

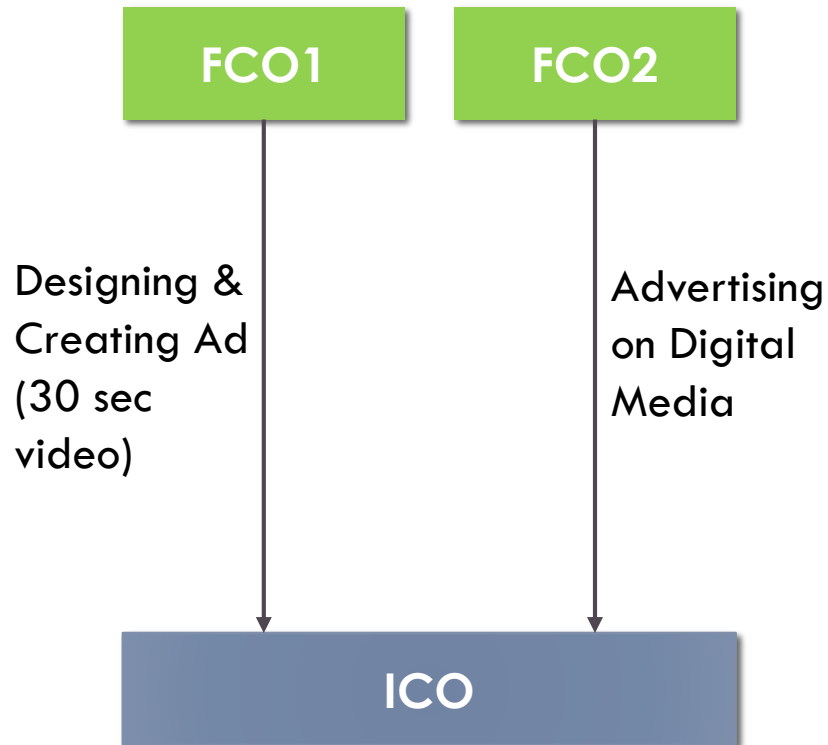
## “Online” means

**a facility or service or right or benefit or access that is obtained through the internet or any other form of digital or telecommunication network including radio & television, whether analog or digital.**



- Are other items in the recommended list excluded from scope of EL (specified services)?
- Is telecasting of ads on traditional TV covered in the scope of EL?
- Is hosting a website covered in the scope of EL?

# Case Study (1 / 2): Designing & Creating Ads



- ❑ FCO1 & FCO2 are tax residents of UAE and do not have PE in India.
- ❑ ICO has acquired advertising related services from FCO1 & FCO2 for the purpose of business.
- ❑ The fees charged by both the entities > ₹ 1 lakh.
- ❑ Indo-UAE DTAA does not have a FTS clause.
- ❑ FCO1 has not furnished TRC.



- Which provisions to be examined first (i.e. Income-tax or EL)?

Income-tax exemption – **S. 10 (50)** “any income arising from any specified service.....and chargeable to equalisation levy under that Chapter.”

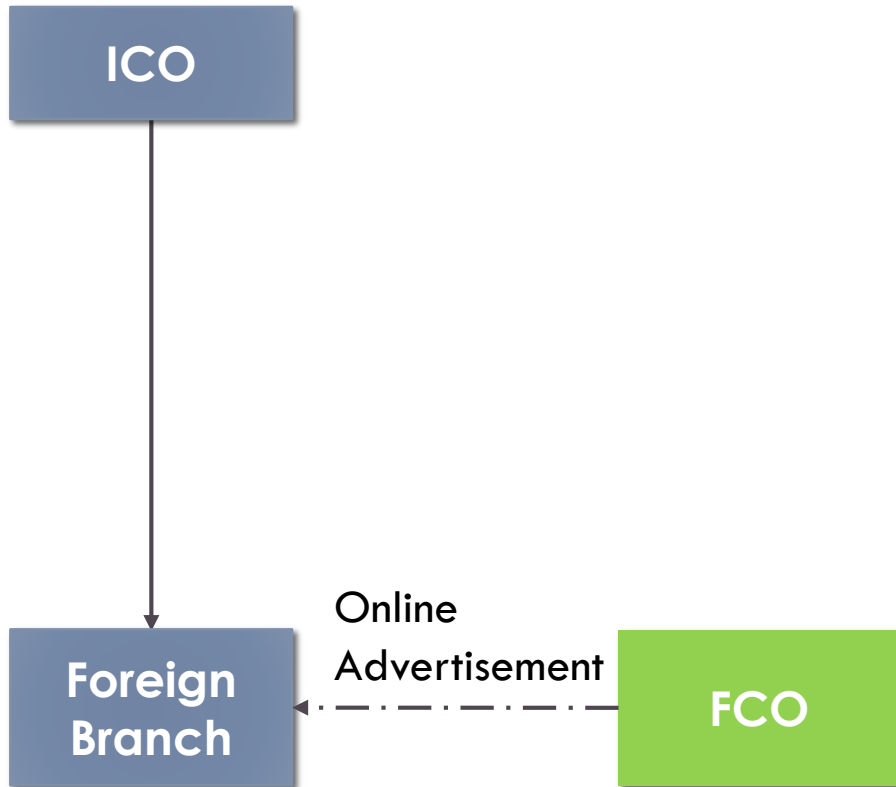
- Will service of designing & creating of Ad attract EL?

**“specified service”** means online advertisement,.... or **any other facility or service for the purpose of online advertisement** and includes any other service as may be notified by the Central Government in this behalf;

Judicial precedents on **‘for the purpose of’** –

- Ormerods (India) (P.) Ltd. vs. CIT [1959] 36 ITR 329 (Bom HC)
- Vijaya Laxmi Sugar Mills Ltd. vs. CIT [1991] 191 ITR 641 (SC)

# Case Study (2/2): Ads targeting foreign markets



- ❑ Foreign Branch of ICO has engaged FCO for the purpose of online advertisement in middle east countries only
- ❑ The ads will not be displayed on any digital or telecommunication network in India.

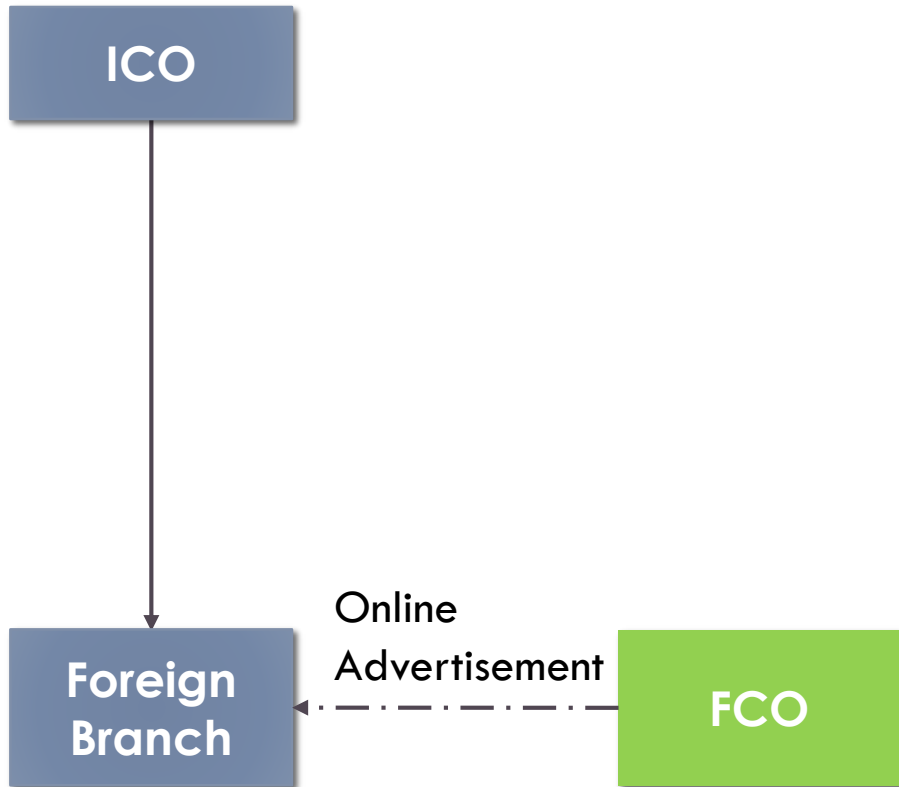
- ❓ Is EL required to be deducted on amount paid/payable to FCO for online advertisement?

**165. (1)**....., there shall be charged an EL @ 6% of the amount of consideration for any specified service **received or receivable by a person, being a non-resident** from—  
(i) **a person resident in India** and carrying on business or profession; or  
(ii) a non-resident having a permanent establishment in India

**163. (1)** This Chapter extends to the whole of India except the State of Jammu and Kashmir.

**Exclusion from scope Royalty/FTS [S. 9(1)(vi)/(vii)]:** Consideration payable for the purpose of business or profession outside India or for earning income from any source outside India

# Case Study (2/2): Ads targeting foreign markets (cont'd...)



**Extract of BEPS Action 1: 302.** In general, **an equalisation levy would be intended to serve as a way to tax a non-resident enterprise's significant economic presence in a country**....., the equalisation levy would be applied only in cases where it is determined that a non-resident enterprise has a significant economic presence.

**Extract of Committee Report: 131.** The Equalization Levy should be limited to the payments made for intangible services, including payments for use or right to use any intangible, access a digital, telecommunication or similar network, or avail any service or other benefit received from a foreign company or a person resident outside India, **provided the services are either received, utilized, provided or performed in India, and thus have a nexus with India**, irrespective of whether the payment is made by a resident or a non-resident person.....

**Footnote 65 (P.126):** In the proposed Equalization Levy, **the nexus between Indian jurisdiction and the taxpayer is proposed to be broadly similar to the nexus existing for royalty and FTS**, and **would consist of payment arising from India or the utilization of services of rights in India.**

## Judicial precedents on extra-territorial nexus:

- A.H. Wadia vs. CIT [1949] 17 ITR 63 (FDC)
- Electronics Corporation of India Ltd. v. CIT 1989 AIR 1707



# Burden of EL on Non-resident or Indian business?

- ❑ **S. 165(1):** .....there shall be **charged an equalisation levy** at the rate of six per cent of the amount of consideration for any specified service received or receivable by a person, being a non-resident.....
  - ❑ **S. 166(1):** Every person, being a resident.....or a non-resident having a PE in India ..... shall **deduct equalisation levy** referred to in sub-section (1) of section 165
  - ❑ **S. 166(3):** Any assessee who **fails to deduct** the levy in accordance with the provisions of sub-section (1) shall, **notwithstanding such failure, be liable to pay the levy** to the credit of the Central Government.....
  - ❑ **S. 195A of the Income-tax Act:** In a case....., where under an agreement or other arrangement, the tax chargeable on any income referred to in the foregoing provisions of this Chapter is to be borne by the person by whom the income is payable, then, for the purposes of deduction of tax under those provisions such income shall be increased to such amount as would, after deduction of tax thereon at the rates in force for the financial year in which such income is payable, be equal to the net amount payable under such agreement or arrangement.
- ❓
    - In absence of charge of EL by non-resident, is the Payer still under an obligation to deduct EL?
    - Is EL nothing but an additional cost for Indian businesses?
    - If EL is borne by Payer, is grossing-up required?

# Extract of Committee Report on EL

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## 10.16 Possible Grounds of Criticism of Equalization Levy & Explanations of the Committee

The tax burden of Equalization Levy is likely to fall on the Indian businesses having to deduct it, and would therefore only be detrimental to them

**This burden is not different from the burden of withholding tax** under the Income-tax Act, 1961 and relevant tax treaties, and by having a rate lower than that applicable for withholding tax on royalty & fee for technical services, it actually reduces the burden both in terms of actual tax payable, as well as in terms of greater certainty and predictability. The burden is likely to be restricted in India due to the revenue threshold and since deduction is not required to be made in respect of a payment either to an Indian entity, or to a foreign entity having a permanent establishment in India, or if the payment being made is not part of business expenses. The incidence is intended to fall primarily on the payment being made by the Indian subsidiaries to their associated enterprises outside India, and payments made by Indian businesses to an entity outside India of an amount more than the threshold that are claimed as deductible business expenditure in India, without leading to any corresponding taxable income in India in the hands of the beneficial owner. **By having a clear and undisputable tax liability, the payer in India would be in a better situation to assess the tax impact and negotiate with the foreign beneficial owner. Lastly, even in cases where the economic burden of tax deducted falls on the Indian payer, the lower rate of 6 to 8% in respect of those payments that are potentially taxable as royalty or fee for technical services, would provide significant relief to them, and therefore should be seen as a relief and not additional burden.**

# Point of Deduction of EL

- ❑ **Point of TDS under Income-tax provisions:** Payment or credit, whichever is earlier
  
- ❑ **Point of deduction of EL [S. 166(1)]:** Every person, being a resident.....or a non-resident having a PE in India ..... shall **deduct equalisation levy** referred to in sub-section (1) of section 165 from the amount **paid or payable** to a non-resident.....
  - S. 166(2): EL deducted during any calendar month shall be paid to be Government by 7<sup>th</sup> of next month
  - S. 170: Delayed payment of EL shall be liable to simple interest @ 1% for every delayed month or part thereof
  - S. 40(a)(ib) of the Income-tax Act: Disallowance of any consideration paid or payable to a non-resident for a specified service on which EL is deductible and such levy has not been deducted or after deduction, has not been paid on or before the due date u/s 139(1). If paid after the said due date, expense allowed in year of payment of EL

**?** When can the amount be said to be 'payable'?

- Rendering of services by non-resident;
- Booking liability in the books of account by crediting the vendor's account or creating provision;
- Receipt of invoice;
- Payment of consideration

**?** Advance paid for specified services – When is EL chargeable?

# Point of Deduction of EL (cont'd...)

- ❑ A sum of money is said to be payable when a person is under an obligation to pay it. The word "payable" may therefore signify **an obligation to pay at a future time**. [A. P. Mariappa Mudaliar v. State of Madras, (1962) 13 STC 746 (Mad)]
- ❑ **The word "payable" connotes "a legally enforceable payment"**. [G. Lakshminarayana v. CTO, (1974) 33 STC 558 (AP)]
- ❑ Black's Law Dictionary (Sixth Edn.) defines Payable : **Capable of being paid**, suitable to be paid; admitting or demanding payment; **justly due; legally enforceable**. A sum of money is said to be payable when a person is under an obligation to pay it. [CIT v. Ms. Vasavi Pratap Chand (2002) 255 ITR 517 (Del)]
- ❑ The term "payable" has not been defined in Income-tax Act. The word "payable" has been described in Webster's Third New International Unabridged Dictionary as requiring to be paid: capable of being paid: specifying payment to a particular payee at a specified time or occasion or any specified manner. **In the context of section 40(a)(ia), the word "payable" would not include "paid". In other words, therefore, an amount which is already paid over ceases to be payable and conversely what is payable cannot be one that is already paid.** [CIT v. Sikandarkhan N. Tunva, (2013) 357 ITR 312 (Guj)]

# EQUALISATION LEVY 2.0

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*E-Commerce supply or services*

# Charging provision (S. 165A) & Defn (S. 164)

Pay EL @ 2% of consideration, unless

- EL is leviable u/s 165; or
- sales, turnover or gross receipts <₹2 crore during the PY

**Non – Resident E-commerce Operator**

- No PE in India
- In case of PE in India, e-commerce supply or services is not effectively connected with such PE



E-commerce supply or services made or provided or facilitated on or after 01-04-2020

**Buyer/Service Recipient**

- 1 Person resident in India
- 2 Non-resident in the specified circumstances
- 3 Person who buys such goods or services or both using internet protocol address located in India

Consideration received/receivable

Outside India  
India

- **“E-commerce operator” (ECO)** means a **non-resident** who owns, operates or manages **digital or electronic facility** or platform for **online sale of goods** or **online provision of services** or both
- **“E-commerce supply or services” (ESS)** means
  - online sale** of goods owned by the e-commerce operator; or
  - online provision of services** provided by the e-commerce operator; or
  - online sale of goods or provision of services or both, facilitated by the ecommerce operator; or
  - any combination of activities listed in clause (i), (ii) or clause (iii);
- **“Specified circumstances”** means
  - sale of advertisement**, which targets a customer, who is resident in India or a customer who accesses the advertisement through IP address located in India; and
  - sale of data**, collected from a person who is resident in India or from a person who uses IP address located in India

# Uncertainties in EL 2.0



## □ E-commerce operator & E-commerce supply or services:

- 'digital or electronic facility or platform'; 'online sale of goods' and 'online provision of services' **not defined**;
- **'digital or electronic facility or platform'**
  - (i) Will facility to place orders on the **'website'** of the enterprise be covered?
  - (ii) Will **'App'** created by an enterprise to sell its own products be covered?
- **Online sale of goods**
  - (i) Does mere placing of order online constitute 'online sale'?
    - Risk, rewards & title in goods is transferred to buyer on delivery.
  - (ii) Online order + **Physical Delivery**? (say, mobile phone booked on Amazon)
  - (iii) Online order + **Online Delivery**? (say, purchase of Kindle e-book from Amazon, delivered on Kindle cloud reader)
- **Online provision of service**
  - (i) Online booking + **Offline service**? (say, rent a flat on Airbnb)
  - (ii) Online booking + **Online service**? (say, subscription of Zoom for video telephony & online chat services)
  - (iii) Online conclusion of service contract, irrespective of provisions of service online or offline?
  - (iv) Only front-end services covered or back-end services also covered (say, Go Daddy gives web hosting service at monthly charges)

# Uncertainties in EL 2.0 (cont'd...)

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## ❑ Specified circumstances:

- What does one mean by 'sale of advertisement'?

## ❑ Consideration:

- Gross amount or only commission earned by ECO?
- Indirect taxes to be included in consideration?
  - **M/s. George Oakes (P.) Ltd. vs. State of Madras 196-(012)-STC-0476-SC:** *Where an article is taxed, whether by purchase tax, customs duty, or excise duty, the tax becomes part of the price which ordinarily the buyer will have to pay.*
  - *Can inference be drawn from **CBDT circulars:** No TDS on Service tax & GST (Circular 1/2014 dated January 13, 2014 & Circular 23/2017 dated July 19, 2017). Prior to be circulars, in practice, tax was being deducted at source on indirect-taxes as well*
- Discount/Cash backs to be included in consideration?
- Sales return adjustment, especially last month of the quarter or year (Generally e-commerce operator provide say 15 or 30 days return policy)



# Uncertainties in EL 2.0 (cont'd...)

## □ sales, turnover or gross receipts

- Is threshold of ₹2 crore to be determined based on estimates or no EL to be charged until amount crosses ₹2 crore?
- On exceeding the threshold, is EL to be charged only on excess or entire consideration?
- If EL on the initial ₹2 crore is charged after crossing the threshold, can interest be levied for delay in payment of EL? Can thereby be any penal consequences?
- The threshold is qua e-commerce operator or qua each buyer or service recipient?

## □ Exemption from income-tax u/s 10 (50)

- S. 10(50) of the Income-tax as amended by FA, 2020 w.e.f. 01-04-2021: "any income.....arising from any e-commerce supply or services made or provided or facilitated **on or after the 1st day of April, 2021** and chargeable to equalisation levy under that Chapter."
- EL 2.0 **S. 165A: On and from the 1st day of April, 2020**, there shall be charged an EL @ 2%....
- Exemption u/s 10(50) available from FY 2021-20 whereas EL 2.0 applies from FY 2020-21? Chances of double taxation.

# Uncertainties in EL 2.0 (cont'd...)

- **EL 'shall be paid' by every e-commerce operator**
  - Unlike EL 1.0 where the Indian businesses have to deduct and pay EL to the Govt., here the obligation is on the e-commerce operator?
  - Consequences on Failure to pay EL
    - **S. 170:** Simple interest @ 1% for period of delay
    - **S. 171:** In addition to EL, penalty equal to EL failed to be paid
  - Since the levy is on the non-resident ECO, larger concern is enforceability of EL 2.0?
    - **S. 163(1) of the Income-tax Act:** "agent", in relation to NR, includes any person in India....
      - (b) who has any business connection with the NR; or
      - (c) **from or through whom the NR is in receipt of any income, whether directly or indirectly;**...
  - **Extract from Committee Report:** 10.8 Restricting application on B2B transactions & Having a Revenue Threshold
    - **138.** The Committee considers that from a policy perspective, it would be preferable to avoid placing the burden of compliance and administration related to Equalization Levy in cases, where the revenue collected would not be commensurate with cost of compliance and administration. For this purpose, **it would be preferable to limit the application of Equalization Levy only to business-to business (B2B) transactions, and not apply it to the business-to-consumer (B2C) transactions, which are more frequent, but of smaller amounts, at this stage, or till that point of time when a mechanism becomes available, by which Equalization Levy can be seamlessly collected in B2C transactions, without burdening the consumer.**<sup>76</sup>
    - **Footnote 76:** Such a mechanism can be in the form of an obligation of the beneficial owner to pay the Equalization Levy, or the collection of Equalization Levy by the payment gateway through which the payment is made.

# Other Aspects of EL

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# Is Equalisation Levy an 'income-tax'?

- ❑ **BEPS Action 1:.....307.** Imposing an equalisation levy raises risks that the same income would be subject to both corporate income tax and the levy..... **In the case of a foreign entity, for example, if the income is subject to corporate income tax in the country of residence of the enterprise, the levy would be unlikely to be creditable against that tax.....**
- ❑ **Committee Report of EL:**
  - **10.2 Differences from Withholding Tax: 126....**If the tax collected by withholding mechanism is more than the tax determined under the Income-tax Act, the taxpayer becomes entitled to a refund, while, if the tax liability is more than the amount withheld, the difference needs to be paid by the tax payer. On the contrary, **an Equalization Levy would be determined with reference to the gross amount of the payment and the rate of Equalization Levy applicable on it, which would be a full and final tax.**
  - **10.3 Tax on Amount of Payment for Specified Services & Not on Income: 127.** As the Equalization Levy is **imposed on the gross amount of transaction**, and not on the income arising from such transaction, it **is applicable irrespective of whether any income arising from the transaction is taxable in India or not....**
  - **10.9 Rate of Equalization Levy: 142....**In a way this would make the Equalization Levy closer to the **"deemed profit" taxation**, except that unlike in a case of deemed profit taxation, there cannot be any rebuttal available, and the **tax would be imposed irrespective of what the profits of the subject enterprise may actually have been.**
  - **Appendix 2. 12.** The **Equalization Levy will be outside Income-tax Act.** It is not a tax on income, as it is levied on payments. It is therefore also payable by enterprises not making any net profits.

# Is Equalisation Levy an 'income-tax'?

- ❑ **BEPS Action 1: 302**.....an “equalisation levy” could be considered as an **alternative way to address the broader direct tax challenges** of the digital economy....
  
- ❑ **Committee Report of EL:**
  - **109**....In particular, **this levy seeks to bring the foreign enterprises that earn significant income from a jurisdiction that erodes its tax base**....
  
  - **10.9 Rate of Equalization Levy:** 142..... the Committee was of the view that **the rate of Equalization Levy needs to be fixed in a way that will lead to a tax incidence that is as close as possible, to the tax incidence that it might have faced had its income been taxable under the existing tax treaty rules.**
  
  - **10.10 Need to prevent double economic taxation:** 145..... it is important to ensure that Equalization Levy is not levied to transactions, where the resulting income is also taxed separately under the Income-tax Act, 1961.
  
  - **Appendix -2:** 11. All payments for specified services that are liable to Equalization Levy shall be exempt from Indian Income-tax in the hands of the non-resident beneficial owner.....

# Is Equalisation Levy an 'income-tax'?

- ❑ **FM Speech – FB, 2016: 151. In order to tap tax on income accruing to foreign e-commerce companies from India**, it is proposed that a person making payment to a non-resident, who does not have a PE..... withhold tax at 6% of gross amount paid, as Equalization levy.
- ❑ **Expl Notes to FA, 2016: 32.5 In order to avoid double taxation**, it is also further provided that **exemption u/s 10** of the Income-tax Act for any income arising from providing specified services on which EL is chargeable.
- ❑ **S. 164(d)**: "equalisation levy" means the **tax** leviable on consideration received or receivable for any specified service or e-commerce supply or services under the provisions of this Chapter;
- ❑ **S. 164(j)**: words and expressions used but not defined in this Chapter and defined in the Income-tax Act, or the rules made thereunder, shall have the meanings respectively assigned to them in that Act.
- ❑ **S. 2(43) of Income-tax Act**: "tax" in relation to the assessment year commencing on the 1st day of April, 1965, and any subsequent assessment year **means income-tax chargeable under the provisions of this Act**, and in relation to any other assessment year income-tax and super-tax chargeable under the provisions of this Act prior to the aforesaid date and in relation to the assessment year commencing on the 1st day of April, 2006, and any subsequent assessment year includes the fringe benefit tax payable under section 115WA;

# Is Equalisation Levy an 'income-tax'?

## Tax Challenges Arising from Digitisation – Interim Report, 2018

- ❑ **417**...it may not always be clear whether a tax is covered by tax treaties or not. What may help distinguish taxes on income,..... from other taxes is that, **on a conceptual level at least, taxes on income focus on the recipient of the income rather than on the consumer of a supply of specific goods or services.** Indeed, an income tax is usually explicitly imposed on the recipient of the income, and looks at the characteristics and the economic situation of the recipient of a payment.
- ❑ **418.** While the tax base of an income tax is generally the net income of a taxpayer, the lines can be blurred in practice in case of a tax on a gross amount of income.
- ❑ **419.** While an income tax is generally perceived as imposing the burden on the recipient in respect of its income, .... it makes no difference whether taxes are levied by way of withholding at source, or whether the tax is on a net or a gross amount.
- ❑ **421....a tax that is covered by tax treaties is generally one that is focusing on the supplier, rather than on the supply.**
- ❑ **422....The name of the tax is not determinative**, and Article 2 of the OECD Model Tax Convention could cover **taxes that are badged as excise taxes but which are, in substance, income taxes.** An excise tax on a particular type of payment may not be very different from a tax on the gross payment of royalties or fees for services under the domestic law of some states.

# Tax Treaty Benefit

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- ❑ **Chohung Bank vs. DDIT(Int. Taxn.) [2006] 102 ITD 45 (Mum Trib):** the DTAA in general does not prevail over the Finance Act; hence, over the tax rates.
- ❑ **Extract of Article 2 – Taxes Covered (OECD MTC):** 4. The Convention shall apply also to any **identical or substantially similar taxes** that are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes.
- ❑ **Committee report on EL:**
  - **127.....**As the **Equalization Levy is not imposed on income**, it **does not fall within the scope of** “income-tax” or “tax on income” or “**any identical or substantially similar taxes**”, which typically define the scope of taxes covered within the tax treaties.
  - **Foot note 66:** Article 2 of the MTC and most of the tax treaties (DTAAs) defines the taxes that are covered by it. The provisions of the treaty are limited to these taxes and do not apply on other taxes, nor in any way affect the sovereign rights of either Contracting States to apply any other tax.
  - **10.9 Rate of Equalization Levy: 142....**In a way this would make the Equalization Levy closer to the “**deemed profit**” taxation,.....
- ❑ **Extract of Article 24 – Non-Discrimination (OECD MTC):** 6. The provisions of this Article shall, **notwithstanding the provisions of Article 2**, apply to taxes of every kind and description.
- ❑ **OECD Interim report, 2018:** 424. A tax that does not come within the scope of tax treaties would not be expected to be creditable against income tax imposed by the jurisdiction of residence of the taxpayer and would not be required to be credited under any tax treaty with that jurisdiction.



# Scheme of Assessment & Appeal

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- ❑ S. 167 – Furnishing of statement of deduction/payment of EL by assessee/ECO
- ❑ S. 168 – Processing of the statement to verify arithmetical accuracy [akin to S. 143(1) of Income-tax Act]. **There is no provision akin to 143(3) empowering the Assessing Officer (AO) to undertake assessment determining the Equalisation Levy.**
- ❑ S. 171 Penalty can be imposed for failure to deduct or pay equalisation levy. Penalty is imposed in addition to the equalisation levy and interest thereon
- ❑ S. 172 – Penalty can be imposed for failure to furnish statement
- ❑ S. 173 - Penalty not to be imposed if reasonable cause proved
- ❑ S. 174 – Appeal to CIT(A) can be filed only against order imposing penalty under Chapter VIII. **There is no remedy available to appeal against the imposition of the levy & interest thereon**
- ❑ S. 175 – Appeal to the Appellate Tribunal against order of CIT(A) u/s 174
- ❑ S. 178. Application of certain provisions of Income-tax Act. – **No reference to S. 143(3)**

- **Can the AO impose the levy & interest thereon, in the penalty order itself passed u/s 171?**
- **If penalty is dropped, can the levy be recovered, considering there is no independent order for the levy?**

# Advance Ruling for ascertaining charge of EL?

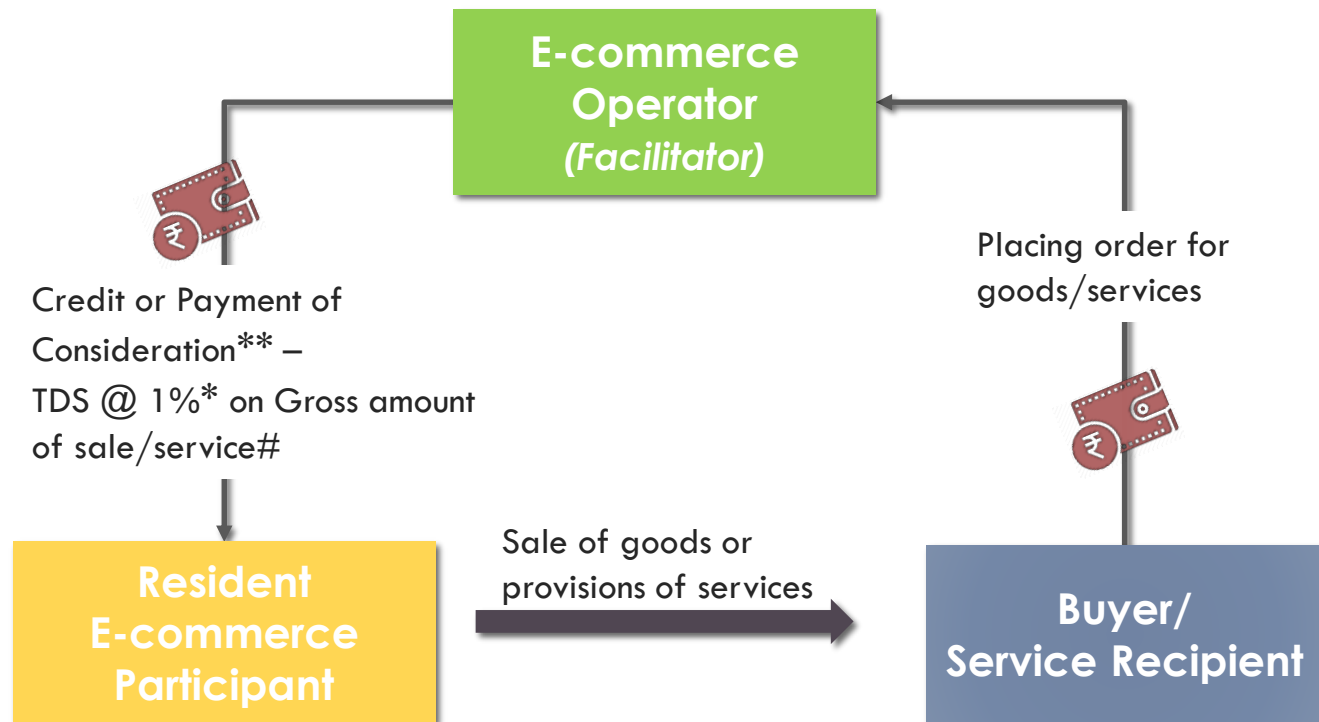
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- ❑ **S.245N (a)** "advance ruling" means—
  - (i) a determination by the Authority in relation to a transaction which has been undertaken or is proposed to be undertaken by a non-resident applicant; or
  - (ii) a determination by the Authority in relation to the tax liability of a non-resident arising out of] a transaction which has been undertaken or is proposed to be undertaken by a resident applicant with such non-resident; or.....
  
- ❑ **View 1: Ascertaining 'charge of EL' is outside the scope of Advance Ruling provisions:**
  - S. 178 Application of certain provisions of Income-tax Act – Advance Ruling provisions not covered
  - Since EL forms part of Finance Act & not Income-tax Act, Advance Ruling provisions not applicable.
  
- ❑ **View 2: Ascertaining 'charge of EL' is covered within the scope of Advance Ruling provisions:**
  - S. 10(50) – Exemption from income-tax where income is chargeable to EL
  - Application can be made to the AAR to determine the amount of income, which shall be treated as exempt under the Income-tax Act.

# TDS on E-Commerce

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# S. 194-O: TDS on E-commerce w.e.f. 1-10-2020



Credit or Payment of Consideration\*\* –  
TDS @ 1%\* on Gross amount of sale/service#

Placing order for goods/services

Sale of goods or provisions of services

Buyer/  
Service Recipient

# No TDS where –

- ECP is an individual or HUF, **and**
- Gross amount of sale or services or both during the previous year  $\leq$  ₹ 5 lakh, **and**
- ECP has furnished his PAN or Aadhaar number to the ECO.

\* No PAN of ECP – TDS @5%

\*\*Any payment made by a purchaser of goods or recipient of services directly to an ECP, shall be deemed to be the amount credited or paid by the ECO to ECP and shall be included in the gross amount.

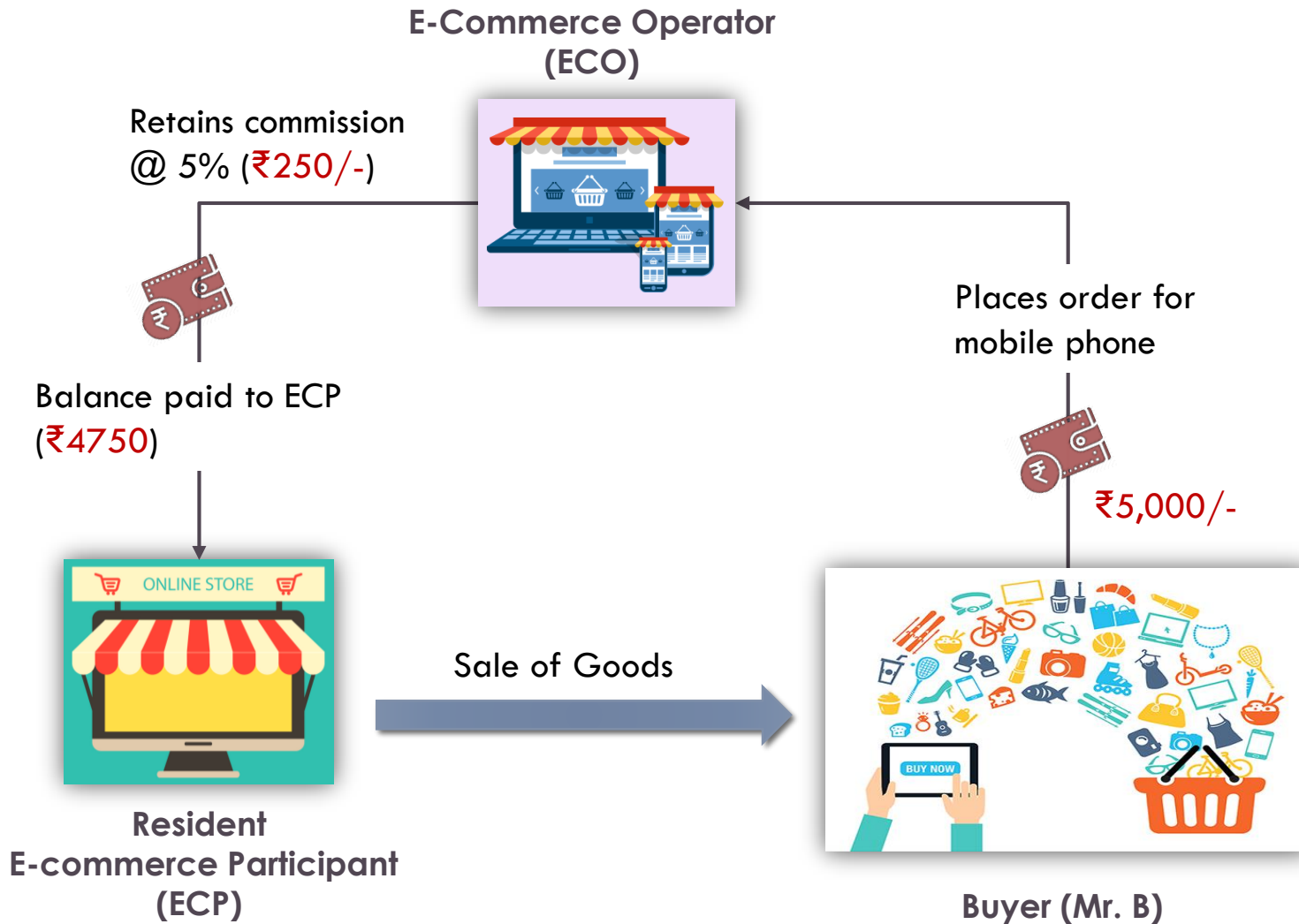
- ❑ **“E-commerce”** means the supply of goods or services or both, including digital products, over digital or electronic network;
- ❑ **“E-commerce operator” (ECO)** means a person who owns, operates or manages digital or electronic facility or platform for electronic commerce;
- ❑ **“e-commerce participant” (ECP)** means a person resident in India selling goods or providing services or both, including digital products, through digital or electronic facility or platform for electronic commerce
- ❑ **“services”** includes “FTS” or “professional services”, as defined in the Explanation to section 194J.
- ❑ ECO shall be deemed to be the person responsible for paying to ECP. **“person responsible for paying”** means in the case of a person not resident in India, the person himself or any person authorised by such person or the agent of such person in India including any person treated as an agent u/s 163 [S. 204(v)].
- ❑ No TDS under other provisions, if TDS u/s 194O(1) or not deductible u/s 194O(2). Not applicable for hosting advertisement by ECO or other services not in connection with e-commerce

# Uncertainties in S. 194-O

- ❑ 'digital or electronic facility or platform' not defined
- ❑ ECO means 'a person' – covers both 'R' & 'NR' –
  - overlap with EL 2.0?
  - Extra territorial application of Income-tax Act?
  - Additional compliance burden.
- ❑ Is sale of goods owned or services provided by ECO covered? – Can ECP and ECO be the same person?
- ❑ If tax deducted u/s 194-O on commission component, is ECP required to deduct tax u/s 194H?
- ❑ Supply of goods or services 'over digital or electronic network' – Only online delivery of Goods and online provisions of services covered?
- ❑ 'gross amount of such sales or services or both' -
  - Is commission paid to ECO included?
  - Can discounts/cashbacks be reduced?
  - Is GST on services to be included?
  - Is GST on goods to be included? – CBDT circular for No TDS on GST covers only 'GST on services'
- ❑ Buyer/Service Recipient can be 'R' or 'NR'?
- ❑ Sale of goods or provision of service by ECP outside India also covered?



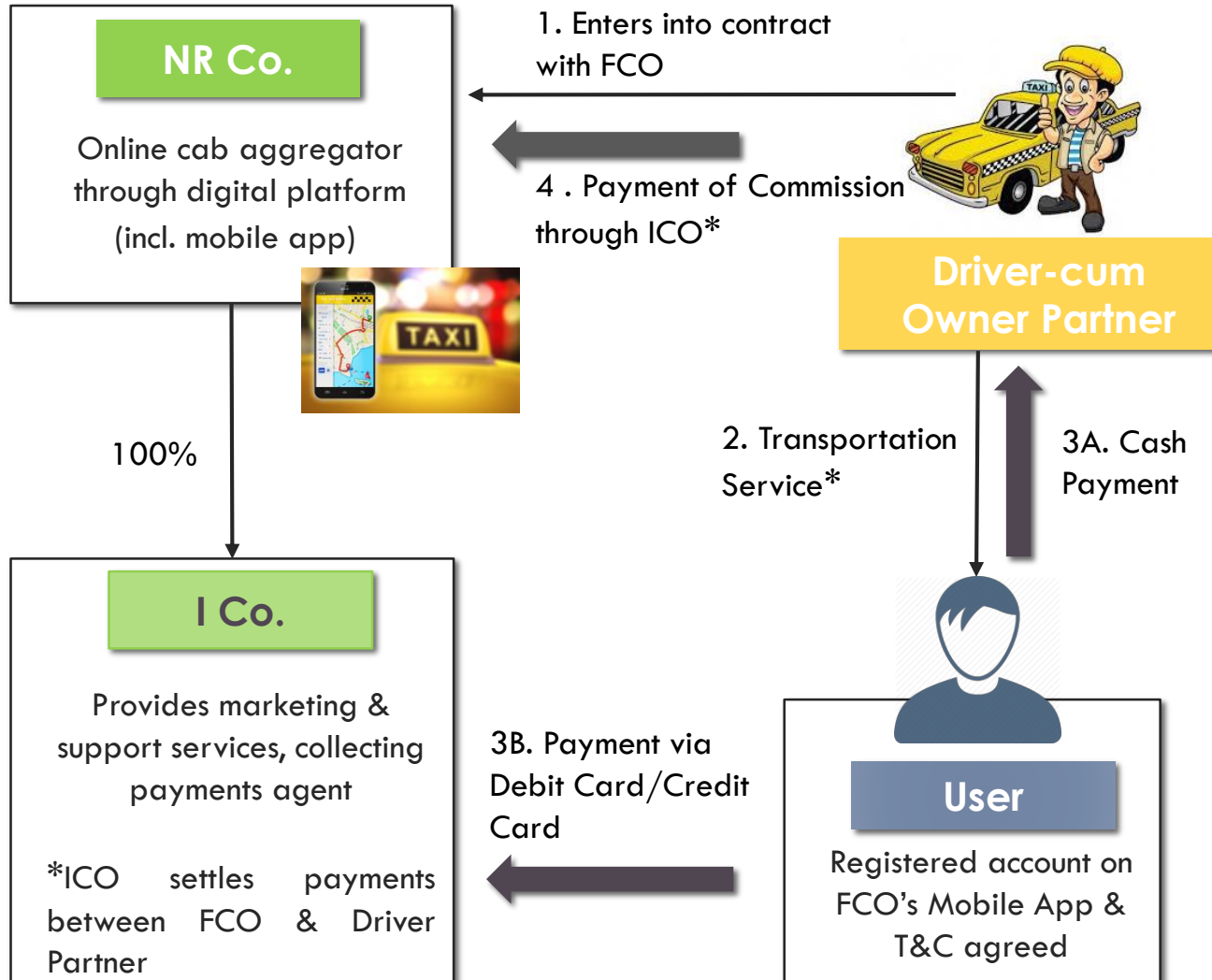
# Case Study (1/4): Online Shopping



- ECO owns, operates and manages a digital platform to facilitate sale of goods;
- Buyer (Mr. B), is a person resident in India;
- Mr. B places an order on ECO's mobile application purchase of mobile phone at ₹5,000/-;
- Mr. B makes the payment using Credit Card;
- ECP sells the mobile phone to Mr. B;
- ECO earns a commission of 5% (₹250) for facilitating the sale

**What is the consideration for charge of EL 2.0 & TDS u/s 194 – O?**

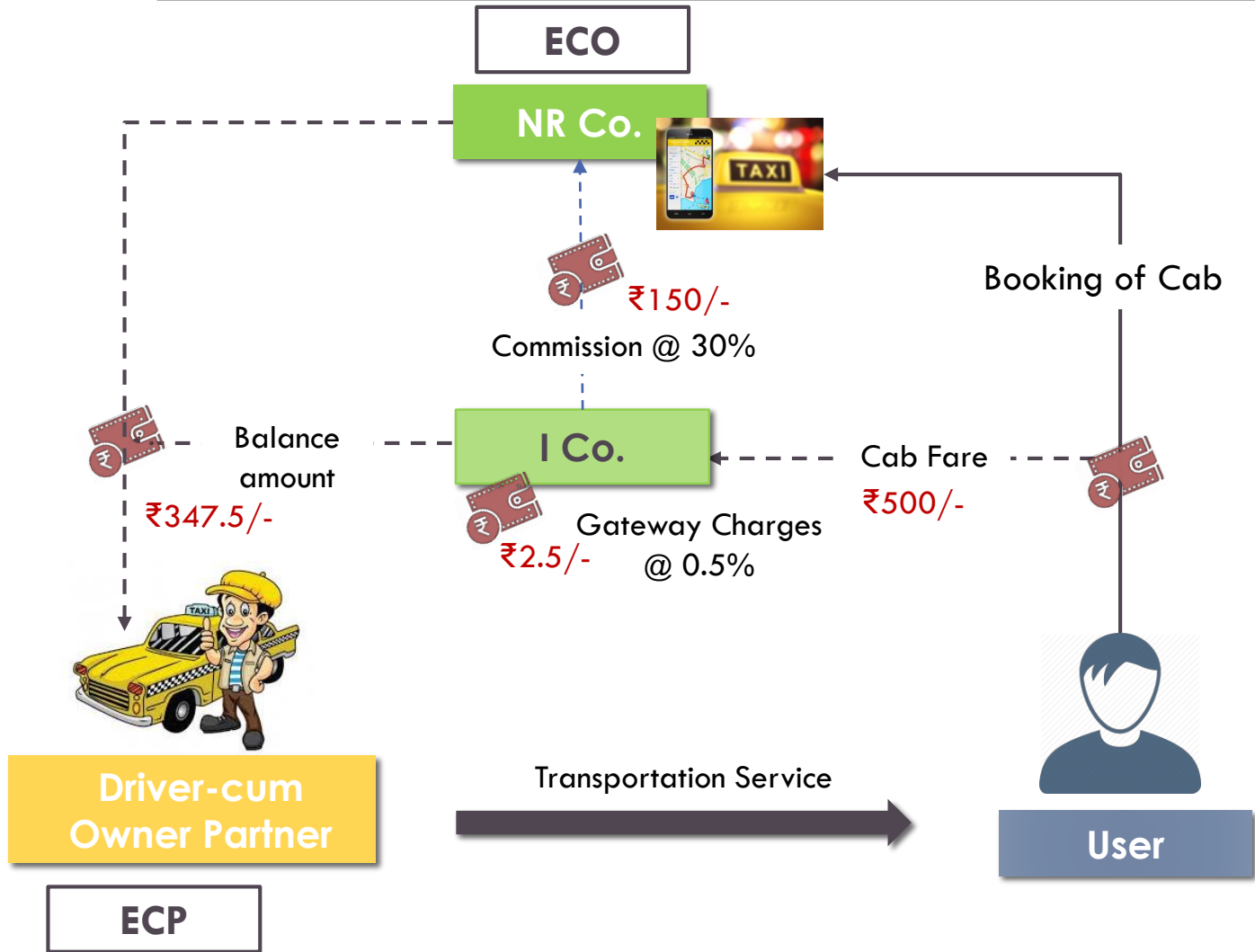
# Case Study (2/4): Cab Aggregator



## Relevant T&C of the Mobile App

- The Services by NR CO constitutes a technology platform that enables users of the NR CO's application to arrange and schedule transportations with independent third party transportation providers.
- NR CO does not provide Transportation Services as a Transportation Carrier and all such services are provided by independent third party contractors who are not employed by NR CO.
- After User has received Transportation Services, NR CO shall facilitate payment of applicable transportation charges on behalf of the third party provider as such provider's limited payment collecting agent.

# Case Study (2/4): Cab Aggregator (cont'd...)



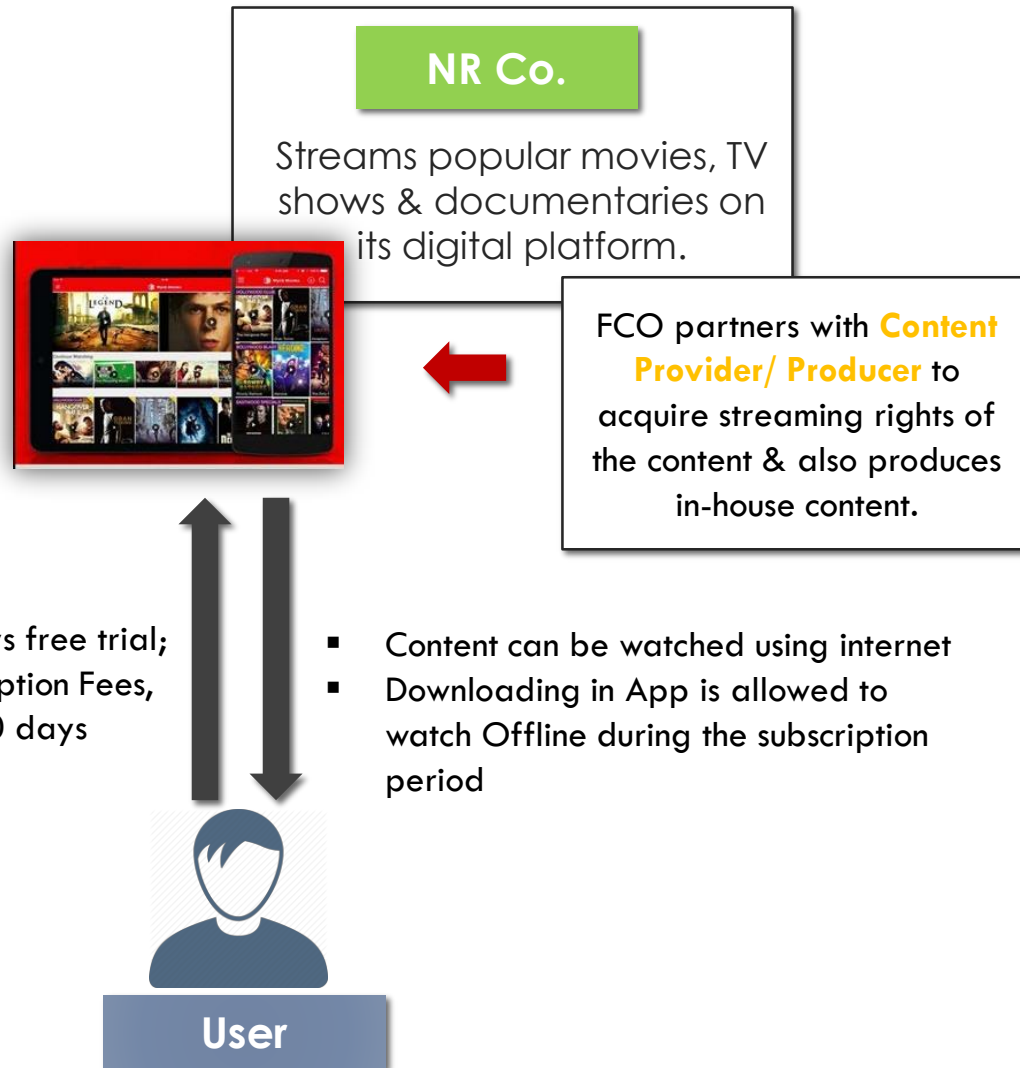
- NR Co. owns, operates and manages a digital platform to facilitate transportation services;
- User books a cab in India using NR Co.'s mobile application;
- Cab fare is ₹ 500/- which is shared between ECO, ECP & I Co. as under:

<b>ECO</b>	Commission (30%)	150.00
<b>I Co.</b>	Gateway Charges (0.5%)	2.50
<b>ECP</b>	Balance	347.50
<b>Total</b>		500.00

**Examine implications under EL 2.0 & 194-O?**

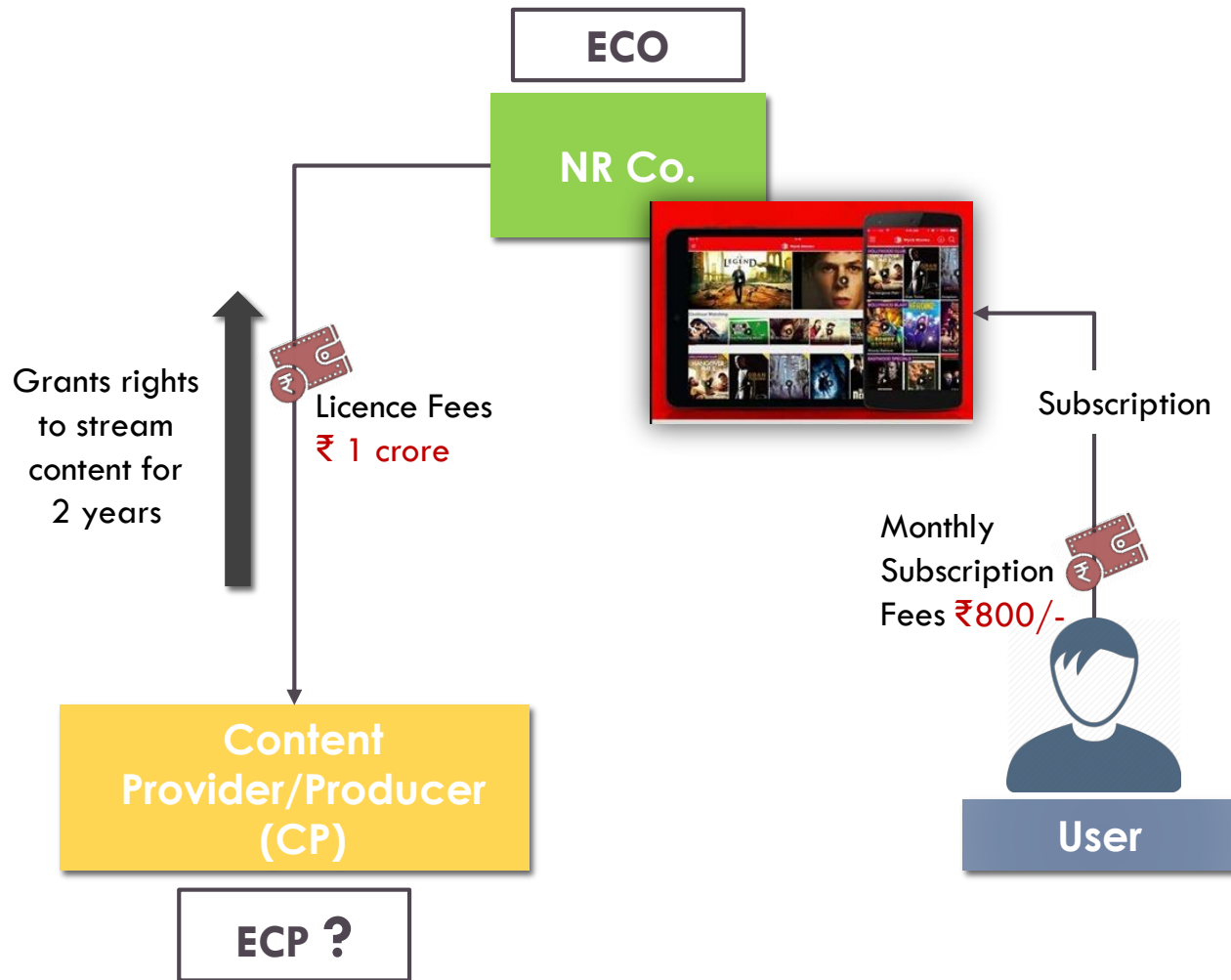


# Case Study (3/4): Online Streaming



- NR Co. is a subscription based **streaming service** that allows user to watch unlimited TV shows and movies on laptops to TVs, phones, tablets and more.
- The streaming service can be accessed on the website as well as mobile application of NR Co.
- NR Co. acquires rights from Content Provider/Producer to stream their content on its platform and pays licence fees in lieu thereof.
- NR Co. also produces in-house content.
- As a marketing strategy, NR Co. gives a 30 day free trial access to the digital platform.
- User has to pay a subscription fees to NR Co. for access of the platform after the free trial expires.

# Case Study (3/4): Online Streaming (cont'd...)

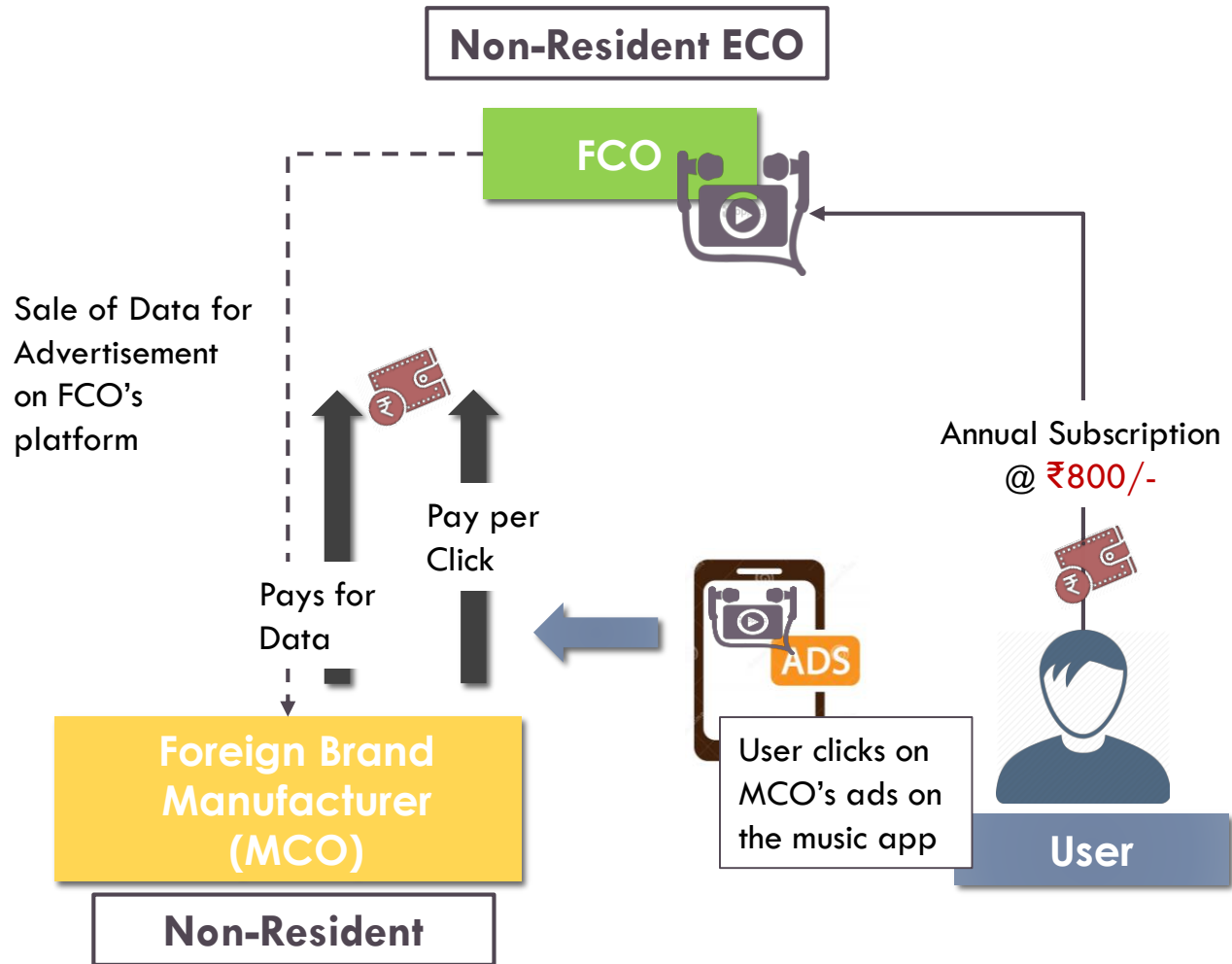


- NR Co. owns, operates and manages a digital platform to provide prepaid online streaming service.
- NR Co. acquires rights from CP to stream its program/series on NR Co.'s platform. NR Co. pays ₹ 1 crore for streaming rights for 2 years.
- User utilises the 30 day trial version and thereafter subscribes to the platform paying a monthly subscription fees of ₹ 800/-.

## Examine implications under EL 2.0 & 194-O (assuming ECO is resident)?

- Is EL chargeable for 30 days free trial?
- Is the content provider an ECP?
- TDS on license fees u/s 194-O or u/s 194J?
- Will S. 194-O cover streaming of original content produced in-house?

# Case Study (4/4): Sale of Advertisement & Data



- FCO is into subscription based music streaming service & owns, operates and manages a Music App.
- FCO also provides advertisement space on its platform under pay per click model. For effective advertisement, it also sells relevant data of subscribers based on target markets.
- MCO, a foreign brand manufacturer has purchased data of India subscribers from FCO for advertising on FCO's music app, targeting Indian markets.
- User subscribes to FCO's music app for an annual fees of ₹800.
  - While using the app, user clicks on MCO's Ad.
- MCO has to pay to FCO for (a) Sale of Data & (b) Advertisement on the Music App

**Examine implications under EL 2.0?**

**SIGNIFICANT ECONOMIC PRESENCE**

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# SEP Provisions – S. 9(1)(i) r.w. Exp 2A, 3, 3A

- SEP **expands the scope of income** deemed to accrue or arise in India to a non-resident from **'business connection'** in India

## SEP shall mean

1 transaction in respect of any **goods, services or property**, incl. **provision of download of data or software in India**

Non Resident

Person in India

if the aggregate of payments arising from such transaction or transactions during the previous year exceeds such amount as may be prescribed;

OR

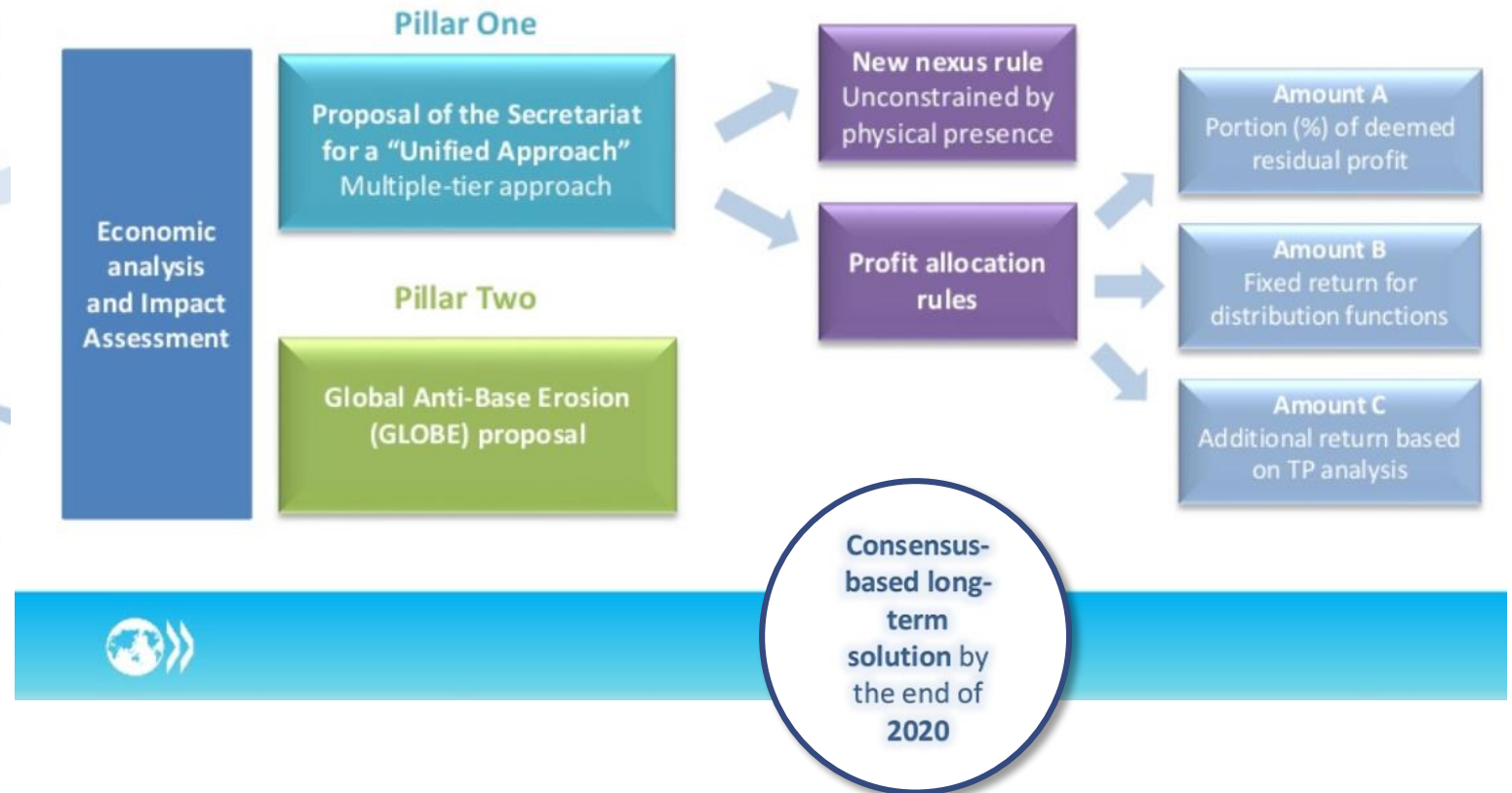
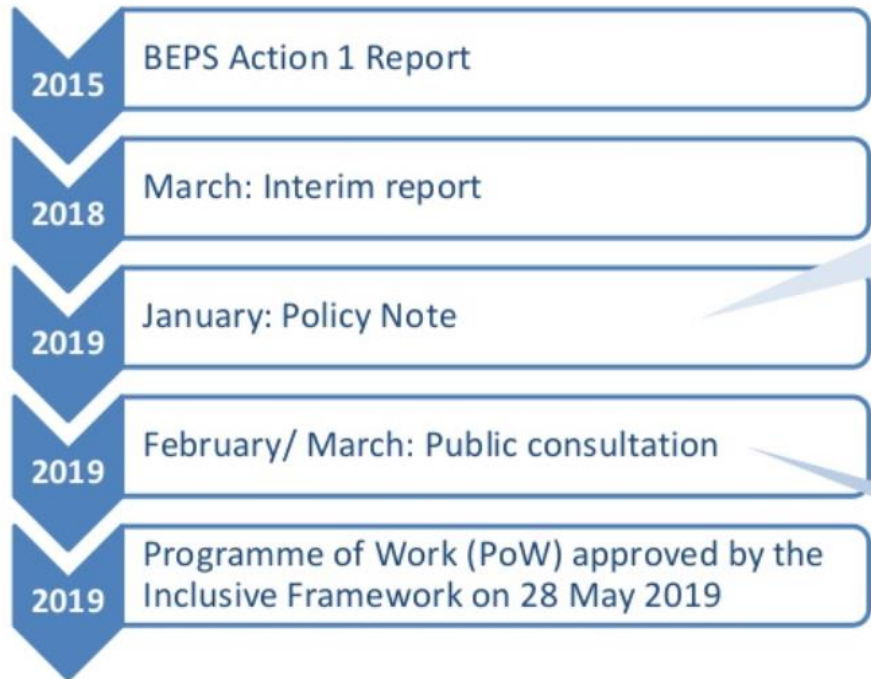
2 **systematic and continuous soliciting** of business activities or engaging in interaction with such number of users as may be prescribed, in India **through digital means**

- transactions or activities shall constitute SEP in India, whether or not,—
  - (i) the agreement for such transactions or activities is entered in India; or
  - (ii) the non-resident has a residence or place of business in India; or
  - (iii) the non-resident renders services in India:
- Income attributable to business connection includes income from—
  - (i) such **advertisement** which targets a customer who resides in India or a customer who accesses the advertisement through internet protocol address located in India;
  - (ii) **sale of data** collected from a person who resides in India or from a person who uses internet protocol address located in India; and
  - (iii) **sale of goods or services** using data collected from a person who resides in India or from a person who uses internet protocol address located in India.
- Threshold for 'Revenue' & Users, not yet prescribed

**SEP provisions have been deferred to AY 2022-23**

# Work-in-Progress on Digital Economy – OECD BEPS Project

## Secretariat Proposal



# THANK YOU!

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