International Tax - Changing Landscapes

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TRADITIONAL NEXUS RULES UNDER INDIAN DOMESTIC LAW

INDIAN SOURCE RULE - SCOPE OF TOTAL INCOME

- Income is classified as
  - Incomes that accrue or arise or deemed to accrue or arise in India
  - Income that is received or is deemed to be received in India

Income Which		Resident & Ordinarily Resident (ROR)	Resident, Not Ordinarily Resident (RNOR)	Non Resident (NR)
Accrues & Arises In India		✓	✓	✓
Is Deemed to Accrue or Arise in India		✓	✓	✓
Does not Accrue or Arise In India	Is Received/ Deemed to be Received in India	✓	✓	✓
	Is Not Received/ Deemed to be Received in India	✓	✗	✗
Accrues & Arises In India		✓	✓	✓

INDIAN SOURCE RULE - SCOPE OF TOTAL INCOME

- ROR are taxed on worldwide income regardless of source
- RNOR are not taxed on income accrued or arising outside India other than income derived from a business controlled in or profession or vocation in India exception: unless it is received (or deemed to be received) in India
- NR are not taxed on income that accrue or arise outside India unless it is either received or deemed to be received in India, or deemed to accrue or arise in India

INDIAN DEEMED SOURCE RULE - OVERVIEW OF SECTION 9

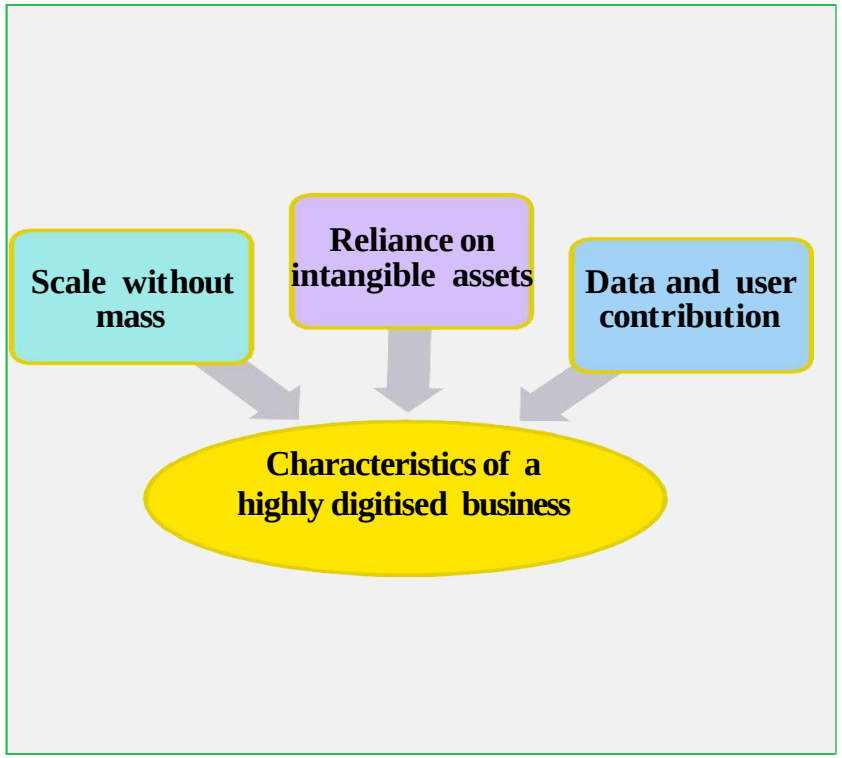
SECTION 9(1) - INCOME WHICH IS DEEMED TO ACCRUE OR ARISE IN INDIA	
9(1)(i)	Income from a business connection in India or through or from any property or capital asset or source of income or transfer of capital asset situated in India.
9(1)(ii)	Salaries for services rendered in India.
9(1)(iii)	Salaries by Govt. for services outside India.
9(1)(iv)	Dividend paid by an Indian company outside India.
9(1)(v)	Interest by Govt. or by a resident (unless for a business or source outside India) or by a non resident if used for business purpose in India.
9(1)(vi)	'Royalty' by Govt. or a resident (unless for a business or a source outside India) or by a non resident if used for business purpose in India or for earning any source of income in India.
9(1)(vii)	'Fees for Technical Services (FTS)' by Govt. or a resident (unless for a business or a source outside India) or by a non – resident if used for business purpose in India or for earning any source of income in India.
9(1)(viii)	Income arising outside India, being any sum of money paid by a person resident in India, without consideration, the aggregate value of which exceeds INR 50,000, to a non-resident, not being a company, or to a foreign company.

TAXATION OF DIGITAL ECONOMY

ISSUES ON TAXATION OF DIGITAL ECONOMY

- ***New business models*** enable non-residents to earn income from a country of market ***without physical presence***
- ***Domestic laws*** require a certain level of ***physical presence*** to subject a NR to tax
- ***Tax treaties*** grant the source country (market jurisdiction) taxing rights with respect to business profits only when an multi-national enterprise (MNE) has a ***PE in the source country***
- An MNE having ***digitalised business*** (e.g. online retailer of goods) without a PE would ***not be liable to tax*** in the market country on its business profits under traditional nexus rules
- Countries like India being ***consumer centric economies*** looked to expand scope of PE's to include ***virtual PE's***.
- Accordingly, ***BEPS Action Plan 1*** identifying the main difficulties that digital economy posed to application of existing international rules recommended options to ***counter the challenges of a digital economy*** (discussed in the subsequent slides).

OECD ACTION PLAN 1: TAXATION OF DIGITAL ECONOMY



BEPS Report on Action Plan 1 issued on 5 October 2015 identified 3 options and left it to countries to consider them, with the rider that existing treaties should be respected :

SEP/ Digital PE

- A new nexus rule for determining the taxable presence of a non-resident in a country based on following factors:
  - Revenue-based factors
  - Digital factors (such as local domain name, local payment options, etc)
- User-based factors (such as monthly active users, data collection, etc)
- Changes in profit attribution rules to determine income attributable to significant economic presence

Withholding Tax

- A WHT on payments by residents (and local PEs) of a country for goods and services purchased online from non-resident providers

India has adopted all three measures recommended by OECD under BEPS Report on Action Plan I which no other country has done

Equalisation levy

- An equalisation levy to avoid difficulties arising from creating new profit attribution rules for purposes of a nexus based on significant economic presence
- Approaches to the levy:
  - Apply only to situations in which income is otherwise untaxed or subject to a very low rate of tax; or
  - Credit the levy against corporate income-tax

TIMELINE: INDIA DEVELOPMENT

Equalisation Levy (EL)

- 6% levy on gross revenues from online advertisement services or connected services
- No credit available in home country - Additional cost

Significant Economic Presence (SEP)

- SEP means:
  - Transaction in respect of any goods, services or property carried out by a non-resident in India including provision of download of data or software in India, if the aggregate of payments arising from such transactions exceeds the prescribed threshold
  - Systematic and continuous soliciting of business activities or engaging in interaction with prescribed number of users, through digital means
- SEP can exist irrespective of residence or place of business in India
- DTAA override – existing PE rules prevail, until amended

Draft Profit Attribution Rules

- Profits attributable to operations in India is computed based on equally weighted factors - Sales, Employees and Assets
- In case of SEP, 10%-20% weightage to users (depending on the user intensity) to substitute assets or employees

October 2015

BEPS Action 1

Identified 3 options to tax digital economy transactions:

- A new nexus based on SEP
- A WHT on digital transactions
- Equalisation levy

June 2016

Service tax/ GST on OIDAR* Services

- Service tax/ GST on services whose delivery is mediated by information technology over internet or electronic network
  - 1 December 2016-30 June 2017 – 15% service tax
  - 1 July 2017 - 18% GST
- Supplier of such services required to register in India

December 2016 and July 2017

April 2018

October 2018

TCS on e-commerce operators

- Tax collection at source at 1% on taxable supplies made by a supplier through e-commerce operators (B2B)

March 2019

April 2020

Finance Act 2020

- Scope of income attribution in case of business connection expanded to cover (a) income from sale of advertisements targeted to Indian users; (b) sale of data collected from Indian users; and (c) sale of goods or provisions of services using data collected from Indian users (from 1 April 2020 onwards)
- WHT on e-commerce operators (being residents and non-residents) on payments to Indian e-commerce participants (from 1 October 2020 onwards)
- SEP deferred to 1 April 2021; definition amended:
  - First condition to apply if the non-resident carries out the transaction with any person in India
  - Second condition amended to delete "through digital means"
- EL at 2% on consideration received by e-commerce operators from e-commerce supply or services (from 1 April 2020 onwards)

** Online Information and Database Access Retrieval services – such as online supply of digital content, provision of e-books, movie, music, etc and digital storage*

AS PER G7, SUCH LEVIES NEEDS TO BE WITHDRAWN ONCE A GLOBAL CONSENSUS ON TAXATION OF DIGITAL ECONOMY IS REACHED

EQUALISATION LEVY

EQUALISATION LEVY – 1.0

- In 2016, India introduced a **6%** Equalization levy ('EL') in line with BEPS Action Plan 1 recommendations.
- This targeted mainly ***online advertising related services*** received or receivable ***by a non-resident*** from:
  - a person resident in India and carrying on business or profession; or
  - a NR having a permanent establishment in India
- The ***payer is obligated to deduct the EL*** from the amount paid or payable to NR.
- EL not applicable if the ***aggregate amount of consideration*** for the same in the previous year exceeds **INR 1,00,000.**
- S. 40(a)(ib) inserted under the ITA, for disallowing expense on account of non deduction of EL

EQUALISATION LEVY - 2.0

- An new EL **@ 2%** shall be levied [**w.e.f. 1 April 2020**] on the amount of consideration received or receivable by an ***e-commerce operator*** from ***e-commerce supply or services*** made or provided or facilitated by it—
  - to a person resident in India (i.e. both B2B and B2C transactions);
  - to a non-resident in respect of:
    - sale of advertisement, which targets a customer resident in India or who accesses the advertisement through IP address located in India, and
    - sale of data, collected from a person resident in India or who uses IP address located in India
  - to a person who buys such goods or services or both using IP address located in India
- "***E-commerce operator***" 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 operator is obligated to pay*** EL 2.0

EQUALISATION LEVY - 2.0

- "***E-commerce supply or services***" 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 e-commerce operator
  - any combination of activities listed in clause (i), (ii) or clause (iii);]
- The EL 2.0 ***shall not be charged*** —
  - where the ***e-commerce operator has a permanent establishment in India*** and the e-commerce supply or services is effectively connected with such permanent establishment;
  - where the ***EL 1.0 (6%) is leviable***; or
  - ***sales, turnover or gross receipts*** of the e-commerce operator from the e-commerce supply or services is ***less than INR 2 crore*** during the previous year.

EQUALISATION LEVY - 1.0 & 2.0

- EL is a separate levy & **not part of the ITA**.
- **Foreign tax credit** of EL **not available** to NR in home country.
- Income chargeable to EL is **exempt from tax under section 10(50) of the ITA**.
- Exception to EL –

  Income chargeable to tax as **royalty or fees for technical services** under domestic law read with tax treaty. – Supreme Court of India in the case of ***Engineering Analysis Center of Excellence (P.) Ltd. [2021] 125 taxmann.com 42 (SC)*** has ruled that payment for software is not royalty, whether EL shall apply for such payments?

SIGNIFICANT ECONOMIC PRESENCE

SIGNIFICANT ECONOMIC PRESENCE

- The existing nexus rule in section 9(1)(i) of the ITA was found insufficient to tax the emerging business model of the digital economy.
- Significant Economic Presence ('SEP') is India's new nexus rule pursuant to ***BEPS Action 1 recommendation***.
- SEP provisions were originally intended to become applicable from tax year 2018-19 onwards, considering the ongoing international discussions regarding the taxation of the digital economy, the SEP provisions were deferred and subsequently made applicable from the tax year 2021-22 onwards.
- Thus, SEP applicable **w. e. f. 1st April 2022**.
- ***SEP provisions do not override tax treaty and in absence of PE in India, NR cannot be charged to tax.***
- ***Relevant to NR who are resident in a jurisdiction not having a bilateral or multilateral tax treaty with India or NR not eligible for tax treaty benefits.***

SIGNIFICANT ECONOMIC PRESENCE

- The significant economic presence of an NR in India would constitute a "business connection".
- Explanation 2A to Section 9(1)(i) - Under the SEP provisions, a "**business connection**" will be created in India based on either of the following conditions:
  - **Revenue-linked condition:** Any transaction in respect of any goods, services or property carried out by a non-resident with any person in India, including the provision of data or software downloads in India, if the aggregate payments arising from such transaction or transactions during the tax year exceeds the prescribed amount. Law will be applicable if it is carried out with person in India. [**INR 2 Crore]**
  - **User-linked condition:** Systematic and continuous soliciting of its business activities or engaging in interaction with users in India exceeds the prescribed amount. Law will be applicable if user is in India. [**300,000 users]**

SIGNIFICANT ECONOMIC PRESENCE

- **SEP will be determined independent of whether**:
  - Any agreement for such transactions or activities is entered into within India.
  - The NR has a residence or place of business in India.
  - The NR renders services in India.

- **Implication of Clause (a) of Explanation 2A**
  - NR need not be in India to carry out specified transaction
  - It is locale of person in India that creates Business Connection
  - Off-shore sales, offshore services will result in creation of SEP if customer is in India
  - Clause (a) of Explanation 2A to Section 9(1) is not restrictive to digital goods, download of data or software but also covers transaction of physical goods
  - Purchase of shrink wrapped software may not result in royalty but may result in SEP
  - Services which are not technical or consultancy – any service will result in SEP

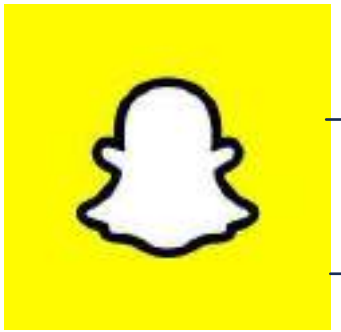
SIGNIFICANT ECONOMIC PRESENCE

- **Implication of Clause (b) of Explanation 2A**
  - User in India creates Business Connection for NR
  - NR need not be in India to carry out specified activity
  - Reference to ***'through digital means' deleted***.
    - irrespective of the medium – action of systematic and continuous soliciting of business activities or engaging in interaction results in SEP.
    - SEP provisions can apply not only to social media platform, marketplace aggregators, online gaming business, online streaming websites but may also apply to physical import of goods by Indian resident from a non-resident based in country with whom India does not have a tax treaty.
  - Even specified activity carried out by third party NR service provider or software may result in SEP for both NR service provider as also NR.
- In case of a business connection, only that income which is attributable to activities in India shall be deemed to accrue or arise in India. If no operations are carried out in India, no income can be deemed to accrue or arise in India even though there may be a "business connection" in India **[CIT v Toshoku Ltd. 125 ITR 525 (SC)]**

SIGNIFICANT ECONOMIC PRESENCE

- **Explanation 3A:** Explanation 3A [introduced by Finance Act, 2020] clarifies that the income attributable to operations carried out in India, as referred in Explanation 1 and Explanation 2A to section 9(1)(i) of ITA shall include:
  a. Income from ***advertising*** that targets customers who reside in India or a customer who accesses advertisement through internet protocol address located in India;
  b. Income from ***sale of data*** collected from person who resides in India or who accesses the data through internet protocol address located in India;
  c. Income from ***sale of goods and services*** using data collected from a person who resides in India or from a person who uses internet protocol addresses located in India.
- Transactions facilitating Virtual Asset transactions by exchanges, marketplaces, wallets, etc.
- ***SEP provisions do not override tax treaty and in absence of PE in India, NR cannot be charged to tax.***
- ***Relevant to NR who are resident in a jurisdiction not having a bilateral or multilateral tax treaty with India or NR not eligible for tax treaty benefits.***

SIGNIFICANT ECONOMIC PRESENCE- EXAMPLE



Social media app

Global Users → 90 crore

Indian Users → 50 Lakh

Business connection stablished in India due to the threshold limit exceeds 3 lac users in India- SEP

*Assuming application is owned by an entity of country with which India does not have a DTAA

If Application charges consideration from its users

Yes → Income attributable to the transaction would be taxable in India

No → Since, no income attributable transaction arise, no taxability will arise in India (proviso)

TDS ON E-COMMERCE TRANSACTIONS

TDS ON E-COMMERCE TRANSACTIONS (SECTION-194-O)

Applicability

- E-commerce operator (resident or non-resident of India) liable to **deduct TDS @ 1%** on gross amount of sales or services* or both paid or payable to a resident E-commerce participant
- Tax to be deducted at the time of credit or payment (whichever is earlier)
- TDS rate @ **5%** for non-PAN / non-Aadhaar cases

Non-Applicability

- E-commerce participant is a NR
- E-commerce participant is resident individual or HUF, where gross amount of sales through e-commerce operator during the PY does not exceed **INR 5 lakhs** (PAN / Aadhaar needed)
- On amounts received or receivable by an E-commerce operator for hosting advertisements

E-commerce operator **deemed to be person responsible for paying e-commerce participants**

*Services includes fees for technical services and fees for professional services as defined in Expl to Sec 194J

Electronic commerce
supply of goods or services or both, including digital products, over digital or electronic network

E-commerce participant
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

E-commerce operators
Any person who **owns, operates or manages** digital or electronic facility or platform for electronic commerce

ONGOING PROJECTS ON TAXATION OF DIGITAL ECONOMY WHERE INDIA CONTRIBUTES

OECD'S
PILLAR ONE & PILLAR TWO

PILLAR ONE – PROFIT ALLOCATION & NEXUS

- Broad objective to move away from the notion that taxation requires physical presence in a country
- Pillar One – 'Unified Approach' aligns taxing rights more closely with local market engagement. A portion of profits of the largest and most profitable groups is allocated to market jurisdictions where the businesses have an active and sustained participation without a physical presence.
- Largely focuses on taxation of automated digital services (ADS) and large consumer-faced business (CFB).
- The nexus rules under Pillar One would apply to market jurisdictions where specified MNEs derive revenues of at least 1 million euros in the market jurisdiction (0.25 million euros in case of smaller jurisdictions).
- Taxable profits allocable to market jurisdictions are based on summation of the following amounts:

Amount A	• Applicable to MNEs whose global turnover above 20 billion euros and profitability above 10%. • 25% of residual profits to be allocated to market jurisdictions • Threshold could reduce to EUR 10 billion after 7 years
Amount B	Fixed return for routine marketing and distribution activities in the market jurisdiction

TRANSITIONING FROM "FAR" to "FARM" ANALYSIS

- India & many developing countries have traditionally been strong advocates of "source" based taxation.
- OECD's guidelines in terms of FAR Analysis have been practiced and reliance thereon is also upheld by the Indian Courts in many rulings.
- Developing countries like China or India have been advocating expanding the scope of profit attribution in source jurisdiction, based on not just FAR analysis but also considering the 'market' analysis, also referred to as FARM analysis.
- A renewed focus on 'value creation' post BEPS is accompanied by even stronger consideration of demand side factors in the Transfer Pricing analysis in some of the developing jurisdictions.
- Applicable mainly for taxing digitalized businesses like Amazon, Netflix, eBay, Booking.com, Uber and Airbnb etc.
- With a global consensus for Pillar One allocating a new taxing right to market jurisdictions, whether there shall be a transition from "FAR" to "FARM" Analysis? Will 'profit attribution' considering demand side factors be an appropriate solution for digital as well as traditional economy business models?

PILLAR TWO – GLOBAL MINIMUM TAXATION

- Global Anti-Base Erosion (GloBE) rules under Pillar Two to introduce a ***global minimum corporate tax rate set at 15%.***
- The minimum tax will apply to MNEs with ***revenue above EUR 750 million*** and is estimated to generate around USD 150 billion in additional global tax revenues annually.
- Intension is to ensure that large MNE groups pay this minimum level of tax on income arising in each of the jurisdictions in which they operate.
- The rules create a "top-up tax" to be applied on profits in any jurisdiction whenever the effective tax rate, determined on a jurisdictional basis, is below the minimum 15% rate.
- This is an important step towards ***eliminating tax havens*** and addressing the issue of ***harmful tax competition***.

PILLAR TWO – GLOBAL MINIMUM TAXATION

- The GLoBE rules are to be applied as under:

Income Inclusion Rule ('IIR')	Parent company pays top-up tax (Amount of tax required to make the Effective Tax Rate ('ETR') at 15%) on its proportionate share of income of its group entity located in low-tax jurisdiction
Switch-Over Rule ('SOR')	Compliments the IIR by providing an enabling mechanism to overturn tax treaty obligations.
Undertaxed Payments Rule ('UTPR')	This rule kicks in especially in cases where IIR is inapplicable. As per UTPR, the MNE Group will allocate top-up tax to group entities in the ratio of deductible payments made by such companies to the entity located in low-tax jurisdiction. IIR has priority over UTPR.
Subject to tax Rule ('STTR')	This Rule triggers when the covered payment is subject to nominal rate of tax in payee jurisdiction. For example, if the payment is taxable at 5% in payee jurisdiction, as per STTR, additional withholding tax of 4% will apply in the payer jurisdiction (irrespective of the tax treaty rate).

UNITED NATIONS (UN) – NEW ARTICLE 12B

ARTICLE 12B – INCOME FROM AUTOMATED DIGITAL SERVICES

- A new 'Article 12B – Income from Automated Digital Services' inserted in the UN Model Taxation Convention.
- In April 2021, the United Nations Tax Committee approved the final text of a new Article 12B to be added to the UN Model Tax Convention and its commentary.
- Allocation of taxing rights in respect of Automated Digital Services (ADS)
- ADS - "any service provided on the internet or another electronic network, in either case requiring minimal human involvement from the service provider".
- Article 12B provides allows contracting state to tax income from certain digital services and ADS paid to a resident on a gross basis (taxing at the rate negotiated bilaterally) or on a net basis (at the option of the tax payer, to be taxed at the tax rate provided for in the domestic laws of the source state).

ARTICLE 12B – INCOME FROM AUTOMATED DIGITAL SERVICES

- The term "automated digital services" includes especially:
  - Online advertising services;
  - Supply of user data;
  - Online search engines;
  - Online intermediation platform services;
  - Social media platforms;
  - Digital content services;
  - Online gaming;
  - Cloud computing services; and
  - Standardized online teaching services.

EXAMPLE OF ADS - ONLINE INTERMEDIATION PLATFORM SERVICES

OWNS DIGITAL PLATFORM

PAYMENT TO STORE POST RETAINING COMMISSION

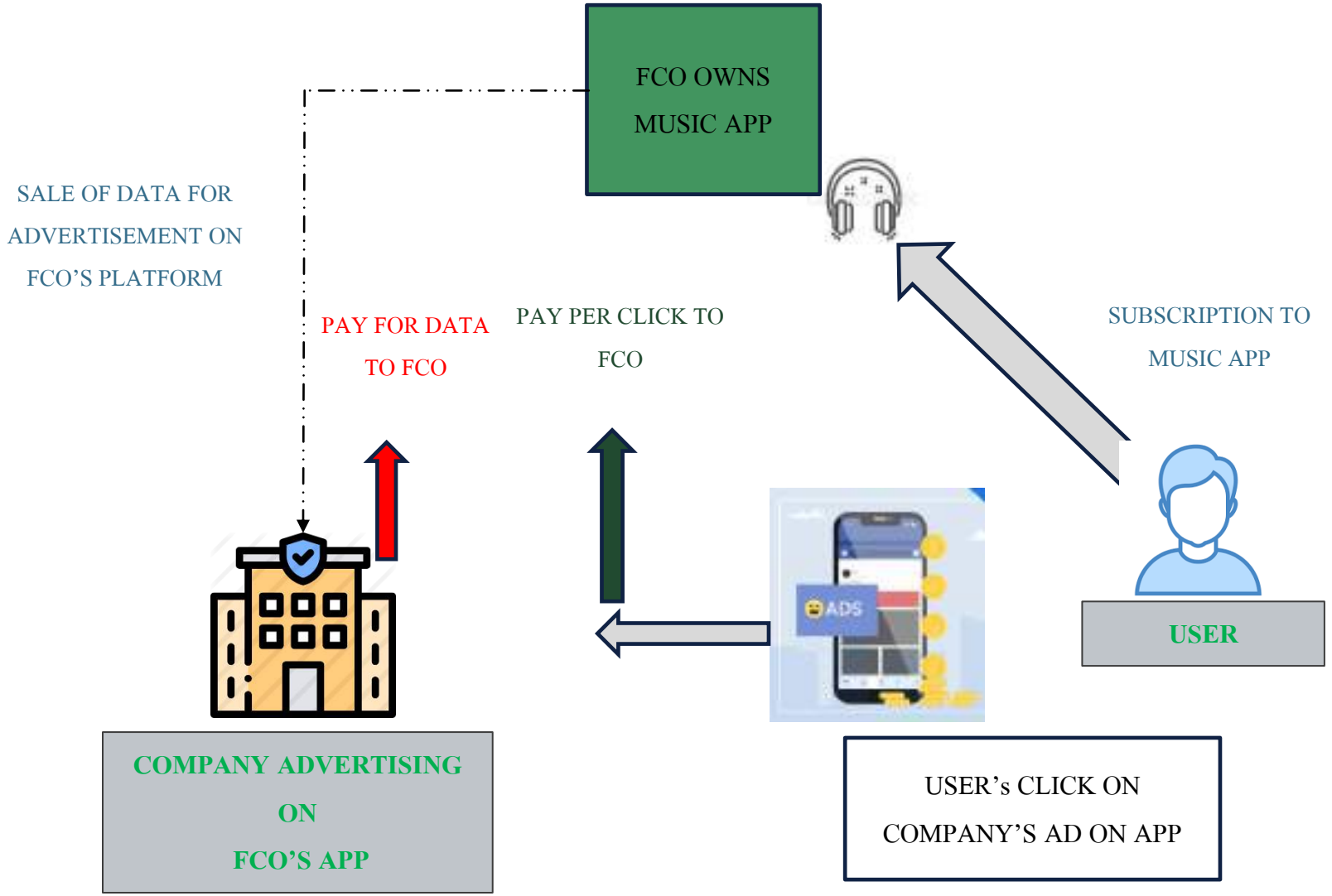
PLACES ORDER ONLINE OVER THE PLATFORM

ONLINE STORE

SALE OF GOODS

BUYER

EXAMPLE OF ADS - SALE OF ADVERTISEMENT AND DATA



IMPORTANCE OF SUBSTANCE

(Place of Effective Management & GAAR v. Principle Purpose Test)

FROM ‘CONTROL & MANAGEMENT’ TO ‘PLACE OF EFFECTIVE MANAGEMENT’

PLACE OF EFFECTIVE MANAGEMENT

- A company is said to be a resident in India in any previous year, if —

  i. it is an Indian company; or

  ii. its place of effective management (POEM), in that year, is in India.

- POEM means a ***place where key management and commercial decisions that are necessary for the conduct of business of an entity as a whole are, in substance made*.**

- It is a test used to determine the residential status of a foreign company, especially in cases where its operations and management take place largely from and in India.

- Provisions of PoEM are applicable to a company having turnover or gross receipts of **more than INR 50 Crores**.

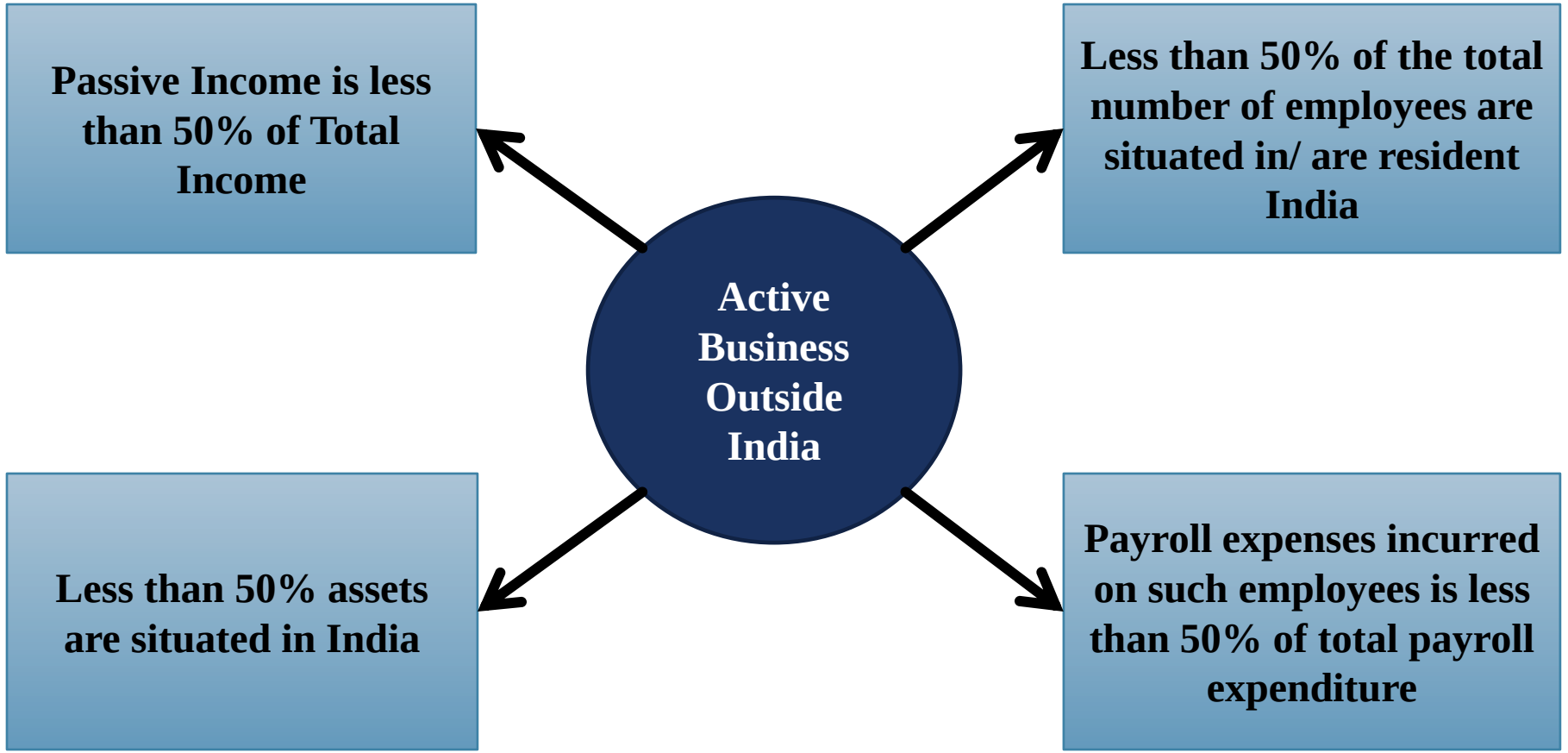
- On 24th January, 2017, the CBDT issued a circular containing Guiding Principles for determination of POEM of a Company. The Guidelines contain the manner in which a company's POEM has to be determined under different circumstances and situations, considering various factors.

PLACE OF EFFECTIVE MANAGEMENT

Few Important Aspects from the Guidelines

- Fact based, Year on Year determination of POEM.
- Intent not to target MNEs – shell / conduit overseas companies are target
- POEM of "active" business entity is outside India if majority Board meetings are held outside India
- Active & Passive Business Outside India – definition & guidelines
- Determination of POEM to be a two-staged process:
  - Identifying KMPs & decision makers
  - Determination of place where decisions are in fact made

PLACE OF EFFECTIVE MANAGEMENT



PLACE OF EFFECTIVE MANAGEMENT

Few Important Aspects from the Guidelines (Cont'd)

- Guiding principles to be taken into account
  - Location where Board meetings regularly take place & where decisions are taken/ exercised
  - Location of Executive Committee in cases where authority is delegated
  - Location of company's Head Office
  - Decisions by shareholders where required to be made by Company Law not relevant in determination of POEM
  - Day to day routine operational decisions are irrelevant
- If these factors don't lead to clear identification of location of POEM then following secondary factors to be considered

  (a) Place where main & substantial activity of company is carried out

  (b) Place where the accounting records of the company are kept

GAAR vs. PRINCIPLE PURPOSE TEST

PRINCIPAL PURPOSE TEST (PPT)

- **Article 7 (Para 1) of the Multilateral Instrument:**

*"**Notwithstanding any provisions of a Covered Tax Agreement**, a benefit under the Covered Tax Agreement shall not be granted in respect of an item of income or capital if it is **reasonable to conclude**, having regard to all relevant facts and circumstances, that obtaining that benefit was **one of the principal purposes** of any arrangement or transaction that resulted directly or indirectly in that benefit,*

unless

*it is established that granting that benefit in these circumstances would be **in accordance with the object and purpose** of the relevant provisions of the Covered Tax Agreement"*

GAAR vs. PRINCIPLE PURPOSE TEST

Particulars	GAAR	Article 7 of MLI (PPT)
Applicability	• ***Main purpose*** is tax benefit; and • One of the tainted element tests is present	• ***One of the principal purposes*** is tax benefit • Not in accordance with object and purpose of treaty
Consequences	Re-characterization of transaction, re-allocation of income (includes denial of treaty benefit)	Denial of treaty benefit
Onus	Primary onus on tax authority	Primary onus on tax authority and rebuttal assumption for carve out
Methodology	Involves analysis of 'counter factual'	Focus only on actual transaction
Grandfathering	Yes – 1 April 2017	No
De-minimis threshold	Yes – Tax benefit of Rs. 3 crores	No

LATEST TRENDS – OFFSHORE LEAKS & EXCHANGE OF INFORMATION

OFFSHORES LEAKS

EXCHANGE OF INFORMATION (EOI)

- Exchange of tax and financial information or EOI refers to a process whereby two or more countries engage in sharing relevant information related to the legal entities and citizens of partner countries, available within their own jurisdiction, with the respective government authorities of those individuals and entities. Exchange of information is institutionalised by 'Exchange of Information Agreements' between concerned authorities.
- There are three different ways for exchange of information:
  1. **Exchange of Information On Request (EOIR):** A jurisdiction which requires the information, requests another jurisdiction for the desired information. Such a request requires providing specific details regarding the individual or entity concerned, such as the name of the account holder, account number, bank or branch name, etc.
  2. **Spontaneous Exchange of Information (SEOI):** A jurisdiction may share some financial information with another country, if and when the former finds information within its jurisdiction deemed relevant for the latter, and there is a legal basis to do so.
  3. **Automatic Exchange of Information (AEOI):** Under this arrangement, jurisdictions exchange financial information automatically at regular intervals.

LEGAL FRAMWORK OF EOI

- The frameworks that provide the legal basis for EOI can be divided into the following categories:
  - **Double Tax Avoidance Agreements (DTAA):** DTAAs are bilateral agreements that focus on sharing of taxation rights between participating countries for entities which are domiciled in one jurisdiction while operating in other jurisdictions. Most DTAAs also have provisions for exchange of information. India has signed 97 DTAAs.
  - **Tax Information Exchange Agreements (TIEA):** These agreements are signed between countries for the specific purpose of exchange of information. India was successful in negotiating TIEAs with 21 countries including tax haven countries with whom India did not have DTAAs.
  - **Multilateral Convention on Mutual Administrative Assistance in Tax Matters (MCMAA):** MCMAA is an OECD multilateral tax convention, with different clauses regarding the nature of exchange (upon request / spontaneous / automatic). Under this agreement, each country can choose the particular clauses it wants to agree to, as well as decide which countries it wants to engage with for EOI, using those particular clauses. India has signed the MCMAA.

LEGAL FRAMWORK OF EOI

- The frameworks that provide the legal basis for EOI can be divided into the following categories (cont'd):
  - **Foreign Account Tax Compliance Act (FATCA):** FATCA is a United States federal law, signed between the USA and other countries. Under this agreement, financial institutions of other countries need to report the financial record of the US entities to the US authorities on an annual basis. It has partial reciprocity provisions from USA. India has implemented the regime of FATCA.
- Based on the statistics, India is one of the countries which has made a large number of requests to other countries. The Indian Revenue Authorities are aggressive and due to huge manpower in India, there is vigorous follow-up for information although other countries may face difficulties for recovery of information.
- In September 2019, India got the first set of Swiss bank account details of its nationals from Switzerland's Federal Tax Administration (SFTA) under a new AEOI pact which is a major milestone for India.

TAXATION OF DIGITAL ASSETS

Tax on Digital Assets

- The Finance Act, 2022 introduced provisions for taxation of Virtual digital assets.
- Section 2(47A) of the Income Tax Act, 1961 defines Virtual Digital Assets as

Any information, code, number or token (not being Indian or Foreign Currency) → Generated through cryptographic means or otherwise, by whatever name called

providing a **digital representation** of value exchanged with or without consideration, with the promise or representation of **having inherent value**, or functions as a store of value or a unit of account including its use in any financial transaction or investment, but not limited to investment scheme; **and can be transferred, stored or traded electronically**;

Including

- a non-fungible token (NFT)* or any other token of similar nature by whatever name called
- any other digital asset as the CG my by notification the official gazette specify**

*NFT means such digital asset as the CG may by notification the official gazette specify

** **Provided** that the Central Government may, by notification in the Official Gazette, exclude any digital asset from the definition of virtual digital asset subject to such conditions as may be specified therein.

Virtual Digital Asset does not include subscription to any OTT platform, mobile applications and e-commerce platforms.

Tax on Digital Assets

- Any gains arising from transfer of a Virtual Digital asset is taxed at the rate of 30% as Capital Gains - ***Section 115BBH***

- Period of holding –
  - Greater than 36 months → Long term Capital Gain/Loss
  - Less than 36 months → Short term Capital Gain/Loss

- Computation of Capital Gains:

Particulars	Amount
Full Value of Consideration	xxx
Less: Cost of acquisition*	(xxx)
LTCG/STCG	xxx

*No deduction shall be allowed in respect of any expenditure other than the cost of acquisition which computing the capital gains.
For eg: Following deduction are not allowed:
- Exp in connection with transfer of VDA
- Cost of improvement
- Indexation of COA
- Exemption u/s. 54F

Tax on Digital Assets

- ***Business Income :*** If the transactions in VDA's are frequent and substantial, the income arising from such sale of assets shall be taxable as business income at the rate of 30% plus surcharge and cess (without deduction of any expense or allowance).
- ***IFOS :*** If a person receives a VDA without consideration (gift) or for inadequate consideration and the value of such benefit exceeds Rs. 50,000, it shall be taxable in the hands of the recipient under Section 56(2)(x) as income from other sources.
- **Carry forward and set-off of loss –** No set off of loss on VDA and neither carry forward of loss on VDA is allowed as per Section 115BBH(2)(b). However loss from one VDA can be set-off against loss of another VDA.

TDS Provisions

Section 194S → **1% of consideration** → **No PAN – TDS @ 20%** → **Applicable from 1-7-2022**

No tax shall be deducted under if the consideration is payable by any person (other than a specified person) and its aggregate value does not exceed Rs. 10,000 during the FY.

No tax shall be deducted under this provision if the consideration is payable by the following specified persons and its aggregate value does not exceed Rs. 50,000 during the FY:

(*a*) An individual or a HUF, whose total sales, gross receipts or turnover does not exceed Rs. 1 crore in case of business or Rs. 50 lakh in case of a profession, during the FY immediately preceding the FY in which such VDA is transferred;

(*b*) An individual or a HUF who does not have any income under the head PGBP.

THANK YOU

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