E-commerce and Taxation

- Historically goods were physical, the production, distribution and consumption of these goods was easily traceable and therefore easily taxable.
- Physical goods were produced at a manufacturing plant, shipped off to wholesalers and boxed on to retailers—the final consumer walking away

What is electronic commerce?

- Electronic commerce is a process which enables sale or purchase of goods and services with designed methods for this purpose over computer networks

Definition

- According to Greenstein and Ferman "electronic commerce (e-commerce) is defined as the use of electronic transmission medium (telecommunication) to engage in the exchange, including buying and selling of products and services requiring transportation either physically or digitally from location to location

E-commerce can occur from

- business to business(B2B)- B2B is all kinds of commercial transactions, that purchase and sale of raw material, wholesale and retail, which made over internet among businesses.
- business to consumer(B2C)- B2C is to be sold a good or service by a business to consumer via internet. For instance: Amazon
- business to government(B2G) transactions of B2G have come up with beginning to rearranged public procurement system over internet
- consumer to business(C2G)
- consumer to consumer(C2C)-C2C is to be sold a good or service by a consumer to another consumer via internet Quikr, Clik.in, Olx.in
- consumer to government(C2G)
- government to business(G2B) and government to consumer(G2C) Technology is being used by government, for usage, receipt and transmission of information can be an example to G2C and G2B transactions

Challenges posed by e-commerce

- taxation policies of countries based on territory and jurisdiction has begun to fail after e-commerce.
- Concerns of governments centre on the impact of e-commerce on the state and local revenue.
- elimination of intermediaries, such as wholesalers or local retailers, who in the past have been critical for identifying taxpayers, especially private consumers
- discrepancies where foreign suppliers may be tax-exempted, whereas local suppliers would be required to charge value added tax (VAT) or sales taxes.

- The traditional concept of PE, which was conceived at a point of time when internet and e-commerce was not even on the radar, does not really fit into the modern day world in which virtual presence through internet , in certain respects, is as effective as physical presence for carrying on businesses.
- A search engine's presence in a location, other than the location of its effective place of management, is only on the internet or by way of a website, which is not a form of physical presence.

Tax implications

The "goods" vs. "services" vs. "intangibles" distinction

- The main issue for taxing e-commerce transactions is how to categorize certain e-commerce transactions in which the end-product is received in on-line (e.g., software, online information services, digitized images and film and video output).
- Organization for Economic Cooperation and Development (OECD) states that many goods once sold in physical format are now available on-line.
- The issues of classification are critical because of the possibility of a different tax impact, both under the United States and the E.U. tax laws.
- For example, a product imported into a country as a 'good' may be subject to the VAT, rather than withholding taxes or income taxes, as long as the destination country does not have a permanent establishment in the country. An 'intangible good', however, may be subject to withholding taxes if not to VAT on its royalty payments.
- Finally, a 'service´ may not be subjected to any taxes at all, as long as the services are provided by a foreign company and are performed outside the country.

Online market

- In online market model, a website operator typically hosts electronic catalogue of multiple merchants on computer servers. Users of website selects products online and place order.
- Normally, website operator do not have any contractual relation with the shoppers but merely transits orders to the registered merchants who fulfills orders.
- Such merchants pay user fee/commission/registration fee to the website.
- Whether income of website is business income or FTS?

eBay International AG v. DDIT **[2014] 61 SOT 62 (Mumbai - Trib.)**

- The assessee, a company incorporated under law of Switzerland operated in India specific websites that provided an online platform for facilitating the purchase and sale of goods and services to users based in India.
- For the purpose, the assessee had entered into marketing support agreements with eBay India and eBay motors, which were eBay group companies, for availing certain support services in connection with its websites.
- During the year, the assessee earned revenues from the operations of these websites. It was claimed that though the revenues were taxable as business profits as per article 7, but since assessee had no PE in India as per article 5, no amount would be taxable in respect of said income.

- Assessing Officer noticed that the agreement with eBay India and eBay motors was for providing certain services which included giving inputs and facilitating marketing penetration strategies and giving inputs and facilitating advertising and promotion activities within India and forwarding appropriate contracts for review and conclusion to effectuate those strategies and activities.
- He concluded that the payments received by the assessee was mainly in the nature of **fees for technical services** (FTS) under section 9(1)(*vii*) and, accordingly, was to be taxed at 10 per cent as per article 12.
- Further, the Assessing Officer also held that the assessee had a **permanent establishment** in India in the form of its entities namely, eBay India and eBay motors.

Tribunal held

- After considering the *modus operandi* of the transactions undertaken through the websites operated by the assessee, had held that fees accruing to the assessee on successful completion of the transactions between the buyer and seller could not be described as FTS as the assessee **had no role** to play in effecting sales and that it was in nature of business profits.

- eBay India and eBay Motors conducted activities exclusively on behalf of the assessee and thus became its dependent agents, but they did not conduct any of the activities as mentioned in three clauses of para 5 of Article-5 of the DTA.
- Hence, there was no PE.

Subscription-based web service

- Under subscription-based web service model, the business provides subscribers with digital content like information, music, video, games and other activities.
- Subscribers pay a determined fees for accessing the website
- Whether fees paid will be business income or royalty?

CIT v. Wipro [2013] 355 ITR 284 (Karnataka)

- The assessee made certain payments to a non-resident Gartner Inc. USA/Ireland.
- Gartner Inc. granted to Wipro Ltd. a licence to have access to the database maintained by it.
- **Issue- whether payment amounted to royalty?**
- The assessee explained that payment was akin to making a subscription for a journal or magazine of a foreign publisher and though the journal contained information concerning commercial, industrial or technical knowledge, the payee made no attempt to impart the same to the payer. Thus, the payment fell outside the scope of royalty (sec.9(1)(vi) Explanation 2(ii)
- The assessee further submitted that the payment was not contingent on productivity, use or disposition of the information concerning industrial, commercial or scientific experience in order to be construed as royalty within the meaning of article 12 of Indo-US DTAA.

- Revenue department argued that the database maintained by Gartner is a scientific, technical service and there is transfer of copyright to the extent of having access to the database
- If there was no licence issued in favour of Wipro, it would have been an infringement of copyright
- copyright continued to be with Gartner Inc and therefore, payments made by Wipro amounts to royalty and the same cannot be considered akin to subscription made to journal or magazine

- Karnataka HC decided in favour of revenue

ITO v. Cross Tab Marketing Services (P.) Ltd. [2014] 149 ITD 678 (Bangalore - Trib.)

- The assessee was engaged in market research activity in India and abroad which involved processes like preparing questionnaire, collecting data from a sample representative of the population which used or had some experience with the desired product/service, analyzing the results and then preparing reports based on the results of the analysis.
- In order to carry out market research for its clients, the assessee approached specialist agencies located abroad that maintained records of online consumers and paid fee to them for allowing access to the record of online consumers maintained by them

- The Assessing Officer opined that fee paid to such specialists for allowing access to the data was in nature of royalty and, thus, chargeable to tax in India.
- Tribunal held in favour of revenue following Wipro case.

Online advertising

- Advertisers pay to have their advertisement for the users on the website.
- A fee is normally charged by the website operator based on the number of times the advertisement is seen by the user or based on the number of times the advertisement is clicked by the user.
- Whether income will be characterized as business or FTS?

Yahoo India (P.) Ltd. v. *Dy. CIT* [2011] 46 SOT 105 (URO)

- The assessee, Yahoo India was uploading and displaying the banner advertisement on its portal
- However the responsibility was entirely that of Yahoo Holdings (Hong Kong) Ltd. and Yahoo India was only required to provide the banner advertisement to Yahoo Holdings (Hong Kong) Ltd. for uploading the same on its portal.
- Yahoo India, thus, had no right to access the portal of Yahoo Holdings (Hong Kong) Ltd. and there was nothing to show any positive act of utilization or employment of the portal of Yahoo Holdings (Hong Kong) Ltd. by the assessee company.
- Therefore, the payment made by assessee to Yahoo Holdings (Hong Kong) Ltd. was **not in the nature of royalty** but the same was in the nature of business profit, and in the absence of any PE of Yahoo Holdings (Hong Kong) Ltd. in India, it was not chargeable to tax in India.

Income tax Officer v. Right Florists P Ltd. [2013] 32 taxmann.com 99 (Kolkata - Trib.)

- The assessee-company used online advertising on search engines, *i.e.*, Google and Yahoo, but did not deduct tax at source on payments made for same.
- a search engine like Google or Yahoo can be said to have a PE, within its primary meaning, in India. The traditional concept of PE, which was conceived at a point of time when internet and e-commerce was not even on the radar, does not really fit into the modern day world in which virtual presence through internet , in certain respects, is as effective as physical presence for carrying on businesses. A search engine's presence in a location, other than the location of its effective place of management, is only on the internet or by way of a website, which is not a form of physical presence

- a website *per se*, which is the only form of Google's presence in India - so far as test of primary meaning i.e., basic rule PE is concerned, cannot be a permanent establishment under the domestic law

- Google was specialized in Internet search engines and related advertising services. Google maintains an index of websites and other online content which was made available through its search engine to anyone with an Internet connection. The assessee (Google India) was wholly subsidiary of Google International LLC, US. Google India was appointed as a non-exclusive authorized distributor of Adword programs to the advertisers in India by Google Ireland. Under the Google Adword Program Distribution agreement dated 12-12-2005, Google India was granted the marketing and distribution rights of Adword program to the advertisers in India

Google India (P.) Ltd. v. Joint Director of Income-tax (International Taxation)[2018] 194 TTJ 385 (Bangalore - Trib.)

- Google India P Ltd. (GIPL), was a wholly owned subsidiary of Google International LLC, US.
- GIPL was engaged in the business of providing Information Technology (IT) and Information Technology enabled Services (ITES) to its group companies.
- It also acted as a distributor for AdWord programmes in India.

- Under the Adword Programme, distribution agreement was entered into between GIPL and Google Ireland Ltd. (GIL).
- GIPL was granted the marketing and distribution rights of Adwords Programme.
  to advertisers in India and the GIPL was remunerated on cost plus market basis for the distribution services under Adword Programmes.
- GIPL had credited a sum of Rs. 1,115 crore to the account of foreign company, GIL without deduction of tax at source.

- In short, GIPL made payment to Irish company-GIL for purchasing of advertisement space under Google-USA's Adwords programme for resale to advertisers in India as also for post-sales services.
- Such services included usage of trademarks, IPRs, brand features, derivative works and other intangibles owned by Irish company GIL
- It was held that consideration so paid would be royalty liable to tax under section 9(1)(vi)

Equalisation Levy or Google Tax

- Equalisation levy has been introduced in Chapter of VIII of the Finance Act, 2016.
- (*i*) online advertisement; (*ii*) provision of digital advertising space or any other facility or service for the purpose of online advertisement; and (*iii*) any other service as may be notified by the Central Government in this behalf.
- The person receiving the service from non-resident must deduct 6% of the amount of consideration as equalization levy and remit the same like tax deduction at source by the 7th day of the month immediately following.
- threshold limit -it would apply only when the aggregate amount of consideration for specified service in a year exceeds Rs. 1 lakh
- is not applicable where the non-resident providing the service has a permanent establishment in India and the service is effectively connected to such permanent establishment. This is because of the reason that the PE in India would be chargeable to tax in respect of its income in India and, hence, equalization levy will not apply.

- Any income arising from the specified service to a non-resident for which equalization levy is chargeable, is exempt from income-tax under section 10(*50*) of the Act.
- Thus, the non-resident providing specified service to the resident in India, is not liable to pay tax on the income, as the resident-recipient of service deducts tax at 6% and pays the same

- The code has been designed in such a way that there is no characterisation required.
- Equalisation tax shall be levied irrespective of its nature of business income, royalty or fees for technical services.
- Equalisation Levy is advocated to be different from Taxes on Income or Corporation Tax and thus may not necessarily be subjected to limitation of tax treaties

Significant Economic Presence

INCOME TAX ACT, 1961

Recently inserted

Sec.9(1)(i) Explanation 2A- the significant economic presence of a non-resident in India shall constitute "business connection" in India

"significant economic presence" for this purpose, shall mean—

(a) 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 transaction or transactions during the previous year exceeds such amount as may be prescribed; or

(b) 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:

SEP will be constituted 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:

Only income attributable to activities /transactions in India will be taxable

Indirect Tax

Online Information Data Access and Retrieval (OIDAR)

- OIDAR means services whose delivery is mediated by information technology over the internet or an electronic network, the nature of which renders their supply essentially automated and involves minimum human intervention and is impossible to ensure in the absence of information technology.
- Online Information Data Access and Retrieval (OIDAR) service is a term defined in section 2(*17*) of the IGST Act, 2017.

- Advertising on internet
- Providing cloud services (Google Drive)
- Provision of e-books, movie, music, software and other intangibles via internet (Hotstar, Amazon Prime Video)
- Providing data or information, retrievable or otherwise, to any person, in electronic form through a computer network;
- Online gaming (Steam)

Who pays the tax?

- Since OIDAR service can be provided online from a remote location outside India;
- If OIDAR service is provided by an Indian Service Provider, from India to recipients in India then such service would be taxable.
- If such services are received by a registered entity in India then GST will be payable under **reverse charge**.

- **when the service provider is located outside India, Who will register and pay GST for OIDAR services ?**
- In respect of import of online information and database access or retrieval services (OIDAR) by unregistered, non-taxable recipients, the supplier located outside India will be responsible for payment of taxes.
- The service provider (or intermediary as the case may be) will be required to take a single registration for paying IGST under the Simplified Registration Scheme to be notified by the Government.
- Either he will have to take registration or he will have to appoint a person in India to pay GST.

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Place of supply for OIDAR

- **Supply of online information and database access or retrieval services-** Location of the recipient of services
- **How to determine the location of the recipient?**
- For this service, the recipient will be deemed to be located in the taxable territory (i.e., in India) if **any two** of the following conditions are satisfied-
- Location of address presented by the recipient through internet is in India
- Credit card or debit card (or any other card such as store value card) which the recipient uses to pay is issued in India
- Billing address of the recipient of services is in India
- IP address of the device used by the recipient is in India
- Bank of the recipient's account used for payment is maintained is in India
- Country code of the subscriber identity module card used by the recipient of services is of India
- Location of the fixed land line through which the service is received by the recipient is in India.

- **What happens when a service provider outside India and recipient is a non-tax-payer in India?**
- For example, a student in India registers in Netflix (US) for watching movies. Netflix becomes liable to register in India and pay IGST.

- **What happens where the OIDAR service provider supplies services through an intermediary?**
- If an intermediary located in outside India, arranges or facilitates the supply of OIDAR services, from the service provider to the non-taxable online recipient.
- then the **intermediary will be deemed to be the recipient of such services**.

- Reverse charge
- The person receiving any such services i.e. OIDAR should pay the IGST to the government only if he is registered under GST as a taxable person.
- In respect of import of online information and database access or retrieval services (OIDAR) by unregistered, non-taxable recipients, the supplier located outside India will be responsible for payment of taxes.
- The service provider (or intermediary as the case may be) will be required to take a single registration for paying IGST under the Simplified Registration Scheme to be notified by the Government.
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- Either he will have to take registration or he will have to appoint a person in India to pay GST.