NALSAR

Business Profits and PE - Scope of profits and allocation rule

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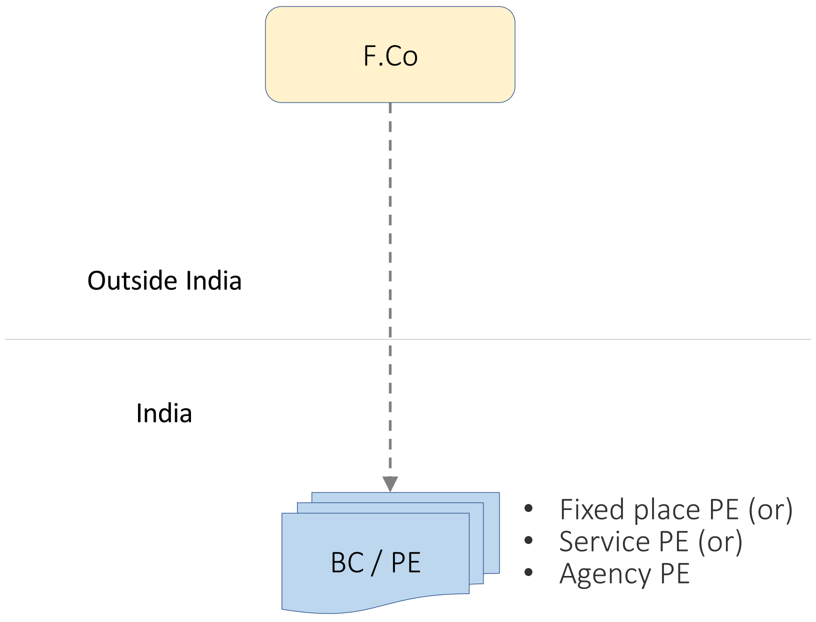
CONTENTS

Background

Background - Why to attribute profits ?

- Residence principle - Country of residence of taxpayer has right to tax on world-wide basis i.e., Residence Based Taxation
- Source principle - Country of source of income has right to tax based on source of income i.e., Source Based Taxation
- Only those profits which are attributable to PE in the source country are taxable
- <u>Taxation of Business profits of a foreign enterprise in India</u>:
  - Business connection (BC) under Income Tax Act, 1961 - Section 9(1)(i)
  - Permanent Establishment (PE) under treaty - Article 7 read with Article 5



Principles of Attribution - Domestic law & Treaty

Principles of Attribution - Domestic law

Rule 10.pdf

Section 9(1)(i)

- **<u>Direct and Indirect incomes</u>:** Section 9(1)(i) "all income accruing or arising, whether directly or indirectly through or from any business connection in India, or through……"

Explanation 1(a) and 3

- **<u>Restricted to activities carried in India</u>:**

  Explanation 1(a): "In the case of a business, other than the business having business connection in India on account of significant economic presence, of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India"

  Explanation 3: "Where a business is carried on in India through a person referred to in clause (a) or clause (b) or clause (c) of Explanation 2, only so much of income as is attributable to the operations carried out in India shall be deemed to accrue or arise in India."

Rule 10

- **<u>Attribution Methods</u>**: Where income of Business Connection cannot be ascertained, Rule 10 applies, which provides for the following methods:
  - % of turnover as considered reasonable by AO
  - Total PGBP X Receipts arising business connection / Total receipts of the business
  - Such other manner which AO may deem suitable

Principles of Attribution - Model conventions

Para	OECD MC	UN Model
7(1)	• Profits to be taxed to the extent attributable to PE	• Profits to be taxed to the extent attributable to PE. • In addition, there is an indirect attribution through Force of Attraction (FOA) Rule
7(2)	• Profits of PE taxable as if PE is a distinct and independent enterprise, taking into account the FAR. Also, referred to as Authorized OECD Approach (AOA) ❑ Step 1 - FAR analysis ❑ Step 2 - Comparability analysis to determine profit attribution based on FAR analysis (TP principles)	• Profits of PE taxable as if PE is a distinct and independent enterprise (engaged in same or similar activities under same or similar conditions)
7(3)	• Provisions concerning avoidance of double taxation i.e., making an appropriate adjustment	• Actual expense incurred including reasonable allocation of General & admin overheads allowable • No deduction for payments to HO viz., royalty, FTS or similar payments
7(4)	• Provisions of those Articles overrides Article 7	• Attribution based on customary apportionment approach of the contracting state (subject to the principles contained in this article)
7(5)		• Methodology applied consistently year on year
7(6)		• Provisions of those Articles overrides Article 7

Principles of Attribution - Model conventions

- Paragraph 7(1) of OCED Model
  - Profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the <u>profits that are attributable to the permanent establishment</u> in accordance with the provisions of paragraph 2 may be taxed in that other State.

- Paragraph 7(1) of UN Model
  - The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them <u>as is attributable to</u>:

    (a) that permanent establishment;

    (b) sales in that other State of goods or merchandise of the same or similar kind as those sold through that permanent establishment; or

    (c) other business activities carried on in that other State of the same or similar kind as those effected through that permanent establishment.

UN Model has Force of Attraction (FOA)

Principles of Attribution - Model conventions

rized OECD
AOA) - Two step
rocess

- Paragraph 7(2) of OCED Model
  - For the purposes of this Article and Article [23 A] [23 B], the profits that are attributable in each Contracting State to the permanent establishment referred to in paragraph 1 are the profits it might be expected to make, in particular in its dealings with other parts of the enterprise, if it were a separate and independent enterprise engaged in the same or similar activities under the same or similar conditions, taking into account the functions performed, assets used and risks assumed by the enterprise through the permanent establishment and through the other parts of the enterprise.

- Paragraph 7(2) of UN Model
  - Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.

AOA Approach: Unlike the guidance prior to 2010, the AOA requires that attribution of the profits to a PE should be undertaken on the basis of the functions performed, the assets used and the risks assumed. With this approach, the AOA attempts to determine the amount of profits attributable to the PE based on the *OECD's Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (TP Guidelines), thereby equating the process of transfer pricing for the determination of arm's length price as analogous to the arm's length principle that is the basis of separate and independent entity approach.

The transfer pricing aims to determine the arm's length price, which is different from the profits derived by application of an arm's length principle between two entities. For instance, where a PE is controlled by the HO and made to act in a way that maximizes the profits of the enterprise as a whole but is detrimental to the profits of the PE as a supposedly separate entity, the conditions of arm's length principle enshrined in the separate entity approach would remain unsatisfied, even if all the transactions between the PE and the HO were priced at an arm's length.

Principles of Attribution - Domestic law vs OECD (Summary)

Attribute actual profits based on separate books of account. If profits cannot be ascertained	Authorized OECD Approach (AOA)

#	Domestic law (Rule 10)	OECD Model (AOA)
Attribution of Profits to PE	• Rule 10(i): Presumptive Method: Percentage of turnover as the Assessing Officer may consider reasonable (or) • Rule 10(ii): Proportionate Method: Applying global profitability per cent to Indian receipts (or) • Rule 10(iIi): Discretionary Method: Any other method deemed fit by Assessing Officer	• Step I - Undertake Functions, Assets and Risk (FAR) Analysis of the PE; **and** • Step II - Undertake comparability analysis to determine arm's length return for the FAR

Consequences of having a PE in India:

- Net Profits taxed at the rate of 40% (plus applicable surcharge and cess) on net basis
- Income-tax compliances to be undertaken viz., PAN, TAN etc., and depending on the type of PE, books of accounts may also have to be maintained
- Transfer pricing compliances to be undertaken for transactions between PE and Head office; and PE and other associated enterprises

Judicial Precedents

Judicial precedents

#	Name of the Ruling		Attribution %
1	Rolls Royce (Delhi Tribunal)	• The project office of Rolls Royce carried out marking activities (securing orders and solicit request for quotation/purchase orders for Rolls Royce Plc's products etc.). • Since no specific P&L provided, Rule 10 applied for income attribution. [Manufacturing - 50%, R&D - 15%; Marketing and others - 35%]. • Since only marketing done in India, 35% of profits attributed.	35% for Marketing activity
2	Galileo International Inc (Delhi High Court)	• Galileo US developed a global computerised reservation system (CRS). It maintained master computer system in US, which was connected to servers of participant hotels and airlines. • Galileo US engaged an Indian company as 'distribution agent' in India. Indian agent entered in 'subscriber's agreement' with travel agents to provide them computer, connectivity, access code and support service. Galileo US paid all expenses for installation of computer at premises of travel agents. • Assessee got 3 Euro for each bookings from Airlines and paid 1 Euro for each bookings to the distribution agent. • It was held that Galileo carried on business of partly operating the CRS system in India through the computers installed in the premises of subscribers in India and thus had a PE under article 5(1). • Tribunal held that only 15% of revenue accruing to assessee in respect of bookings made in India should be treated as income i.e., 0.45 Euro. Since commission of 1 Euro is the expense, no further income attributable	15% for Distribution activity

Judicial precedents

#	Name of the Ruling		Attribution %
3	Morgan Stanley (Supreme Court)	• Apex Court held that employees carrying out stewardship activities would not create a Service PE. • In relation to other services, where the employees are creating a Service PE, no further profits to be attributed where the PE is remunerated on arm's length basis considering all the risk-taking functions of the enterprise	0% if the PE is remunerated at ALP

CBDT Draft rules on Profit Attribution

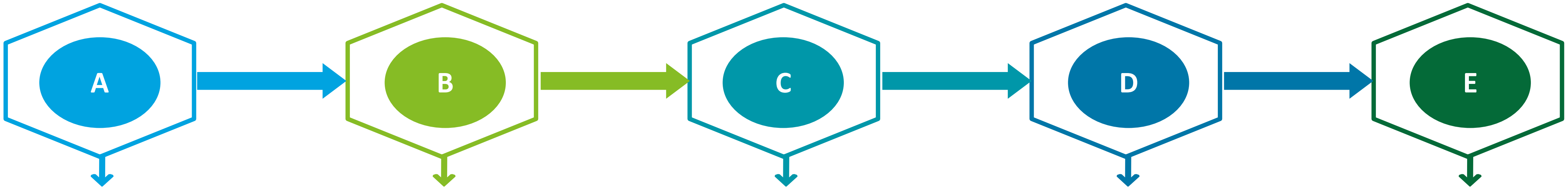
CBDT Draft Rules - Proposed approach

Report_of_the_Committee_on_Profit_Attribution_to_PE_in_India_18_4_19.pdf

On 18 April 2019, CBDT issued a press release inviting stakeholder comments on report pertaining to Profit Attribution to PE in India. Key aspects:

a) The report highlights India's reservation against the Authorized OECD Approach

b) Proposed fractional apportionment approach under the following circumstances: (i) where there are no India centric financial statements or (ii) where the books of accounts have been rejected by the tax officer, or (iii) where the tax officer records the reason that the accounts do not adequately reflect the profits (attributable to PE)



De-minimus profits to be attributable

'Profits derived from India' to be higher of:

a) amount arrived at by multiplying the ***revenue derived from India*** with Global operational profit margin (Earning before interest, depreciation and tax "EBIDTA") or

b) 2% of revenue derived from India

3-factor based fractional approach

- Equal weights (i.e., one-third) to be accorded to
  - 33.33% to sales,
  - 33.33% to employees (manpower and wages) and
  - 33.33% to assets.

Allocate profits derived from India operations among the above factors

4-factor based approach for digital businesses (SEP)

- Low and medium user intensity:
  - 10% to users
  - 30% to sales
  - 30% to employees
  - 30% to assets
- High user intensity:
  - 20% to users
  - 30% to sales
  - 25% to employees
  - 25% to assets

Reduction of profits taxed in the hands of AE

Attributable profits, profits earned by an AE in India and charged to tax (in its hands) shall be reduced.

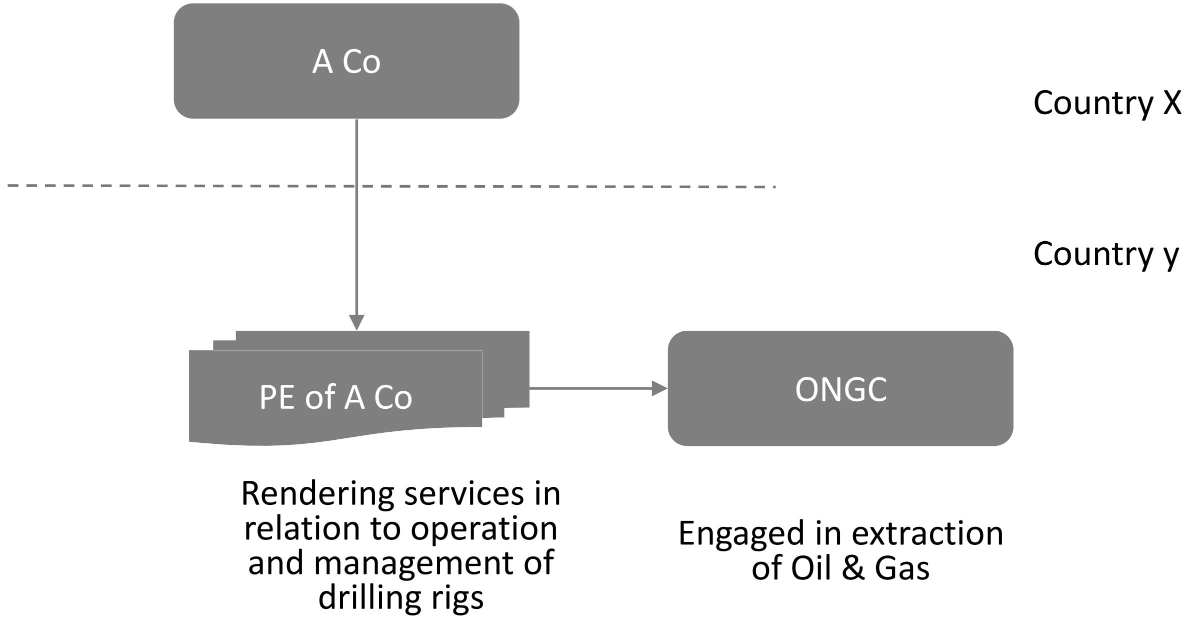
No attribution in specified cases

No attribution in cases where business connection is constituted by activities of AE resident in India, and

- Quantum of sales /services does not exceed INR 1 Mn or no payment is received; and
- activities of the AE are remunerated on an arm's length basis

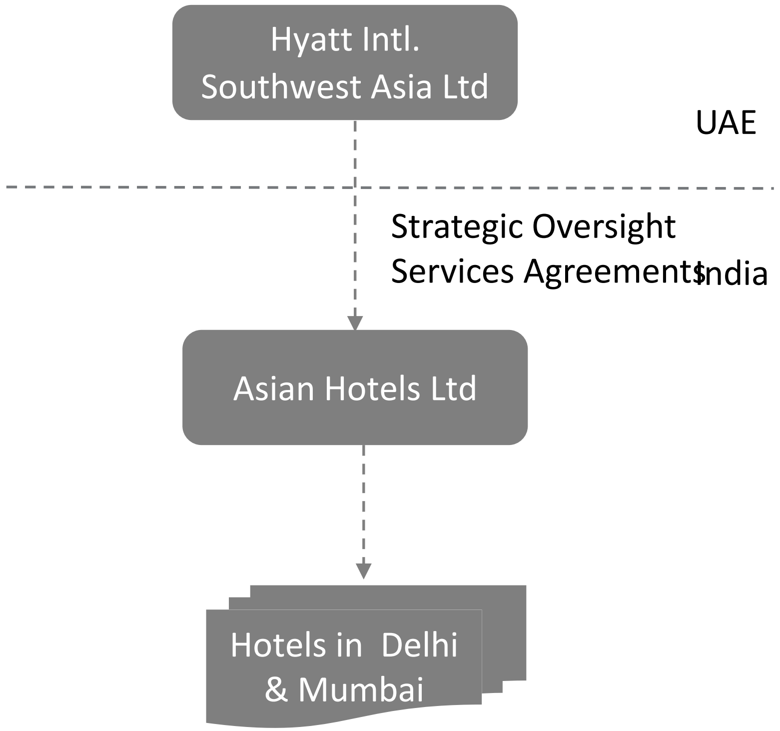
Case study - 1

- The Apex Court held that Payment for providing various services in connection with prospecting, extraction or production of mineral oil, would be assessed under section 44BB, and not under section 44D. Refer ONGC vs CIT [2015] 59 taxmann.com 1 (SC)
- What if A co has a PE in Country Y. Taxability of PE of A Co. under section 44BB vs 44DA ?
- Impact of Section 115JB under this scenario ?



Case study - 2

- Hyatt Intl. Southwest Asia Ltd. entered into a Strategic Oversight Service Agreement (SOSA) with Asian Hotels Limited to provide strategic planning services and Know-how to ensure the Hotels are developed and operated as an efficient and a high quality international full-service hotel
- Assessee's claim:
  - Service income is not taxable in the absence of FTS article; and
  - No PE since the presence of assessee's employees in India during the PY did not exceed 9 months (6 employees stayed for 158 days)
- Assessing Officer's claim:
  - Assessee provided its proprietary, written knowledge, skill, experience, operational and management information and associated technologies etc. and therefore receipts shall be taxable as 'royalties' u/s 9(1)(vi) of the Act and Article 12 of the DTAA.
  - Assessee had a fixed place at its disposal, hence constitutes fixed place PE in India. Assessee also provided Central Reservation System (CRS) which also constituted PE
  - In the absence of information, 25% of the receipts were considered as net profits, and



Case study - 2

- Ruling of the HC:

Royalty or Business Income:

- HC did not accept with the Revenue's contention that the fee received by the Assessee in terms of SOSA could be termed as consideration for use or for right to use any design, model, process and also for information concerning commercial and scientific experience since such access is only incidental to the services agreed to be provided by the Assessee.
- Merely because the extensive services rendered by the Assessee in terms of the SOSA also included access to written knowledge, processes, and commercial information in furtherance of the services, cannot lead to the conclusion that the fee received by the Assessee was in the nature of royalty as defined under Article 12 of the DTAA since the access to the same are in furtherance of the service provided.
- Therefore, concluded the income to be Business Income

Existence of PE:

- HC noted the observations of the Tribunal. The Tribunal held that the SOSA not only provided the Assessee with unrestricted right to access the Hotel premises but also complete control over such premises. The Tribunal accepted that in view of the length and duration of the use by the Assessee and the noninvasive activities being carried out from the Hotel, the Assessee had certain amount of physical space at its disposal in the form of the Hotel premises.
- The Assessee may be correct in its submission that it was not required to carry on day-to-day management of the Hotel. However, it would be erroneous to accept that the agreements entered into by the Assessee did not provide a pervasive control.
- SOSA was entered with assessee; simultaneously an agreement with Hyatt India (an affiliate of the assessee) was also entered for managing the day-to-day operations of the Hotel. There is no dispute that the day-to-day management of the Hotel was required to be conducted in the manner and in terms of the policy and guidelines laid down by the Assessee.

Case study - 2

- Ruling of the HC:

  Attribution of Profits to PE:

  - One of the principal contentions advanced by the Assessee is that even if it is assumed that the Assessee has a PE in India, there is no question of attributing any amount as income chargeable to tax under the Act to its PE, as it has incurred a loss on an entity level (global basis). According to the Assessee, income chargeable to tax under the Act could be attributed to its PE in India only if the Assessee had made profit on an entity level. Concededly, the said issue is covered in favour of the Assessee by a decision of the Coordinate Bench of this Court in Commissioner of Income Tax (International Taxation)-2 v. M/s Nokia Solutions and Networks OY . However, we have some reservations regarding the said view.
  - The profits attributable to the Assessee's PE in India are required to be determined on the footing that the PE is an independent taxable entity. It is, thus, possible that an Assessee makes a net loss at an entity level on account of losses suffered in other jurisdictions, which is partly offset by profits arising from India. In these circumstances, if it is held that the Assessee has a PE in India, prima facie the Assessee would be liable to pay tax on the income attributable to its PE in India notwithstanding the losses suffered in other jurisdictions.
  - This Court was of the view that the fourth question as raised by the Assessee ought to be referred to a larger Bench.

BEPS - Pillar 1 and 2

BEPS 2.0 - Pillar 1

October 8, 2021 - The Inclusive Framework (IF) released an updated statement setting forth key components for an agreement on a two-pillar solution to address tax challenges arising from the digitalization of the economy.

Pillar One: Profit allocation and nexus

- Applies to groups with €20 billion in worldwide revenues and PBT of atleast 10 percent (i.e. profit before tax/revenue)
- Allocation of profits to market jurisdictions irrespective of any physical presence in those jurisdictions
- The initial objective was to tax highly digitalized business models. However, the scope covers all business models except few regulated financial services
- IF aims to finalize a new multilateral convention to implement Pillar One in early 2022, which would be open for signature in mid-2022 and take effect beginning in 2023. MLC would require the countries to repeal existing unilateral Digital services taxes or similar levies.
- Amount to be taxed in the market jurisdictions = **Amount A** + **Amount B**

Note: Turnover threshold to be reduced to 10 billion euros, contingent on successful implementation including of tax certainty on Amount A, with the relevant review beginning 7 years after the agreement comes into force

BEPS 2.0 - Pillar 1

- **Amount A** - Profits to be allocated to market jurisdictions.

  For in-scope MNEs (that derives at least 1 million euros in revenue from that jurisdiction), 25% of residual profit (residual profit is defined as profit in excess of 10% of revenue) will be allocated to market jurisdictions with nexus using a revenue-based allocation key.

  Where the residual profits of an in-scope MNE are already taxed in a market jurisdiction, a marketing and distribution profits safe harbour will cap the residual profits allocated to the market jurisdiction through Amount A.

- **Amount B** - Remuneration for baseline marketing and distribution activities.

  The OECD/G20 Inclusive Framework on BEPS (IF) released, on 19 February, the report on Amount B of Pillar One, which introduces two options for jurisdictions to elect the simplified and streamlined approach for the transfer pricing of certain baseline wholesale marketing and distribution activities.

  If a country adopts the simplified and streamlined approach, it has two options (i) make it binding on all taxpayers, or (ii) make it a taxpayer-elected safe harbour.

Note: Determination of Tax base - The relevant measure of profit or loss of the in-scope MNE will be determined by reference to financial accounting income, with a small number of adjustments. Losses will be carried forward.

BEPS 2.0 - Pillar 2

Pillar Two: Global Anti-Base Erosion Rules (‘Globe Rules’)

- Taxpayers that either have no foreign presence or that have less than EUR 750 million in consolidated revenues are not in scope of the Model Rules. Also, do not apply to government entities, international organisations and non-profit organisations, pension, investment or real estate funds
- Taxpayers in scope of the rules calculate their effective tax rate for each jurisdiction where they operate, and pay top-up tax for the difference between their effective tax rate per jurisdiction and the 15% minimum rate. Any resulting top-up tax is generally charged in the jurisdiction of the ultimate parent of the MNE. A de-minimis exclusion applies where there is a relatively small amount of revenue and income in a jurisdiction.
- The Pillar Two Model Rules also contemplate the possibility that jurisdictions introduce their own domestic minimum top-up tax based on the GloBE mechanics, which is then fully creditable against any liability under GloBE, thereby preserving a jurisdiction’s primary right of taxation over its own income.

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- The views expressed herein are the personal views of the Presenter and does not necessarily represent the views of the Firm
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Force of Attraction

Force of Attraction

IBFD International Tax Glossary

- "Principle under which a country may tax a foreign enterprise in respect of income it derives in that country if the enterprise maintains a PE there, irrespective of whether that income is derived through or otherwise economically connected with the PE"

Purpose

- Principle of force of attraction is primarily concerned with taxation of business profits in source country

Rationale

- Prevents tax evasion / avoidance through artificial contracts / business arrangements
- Identification of business transactions - source based taxation

Types of Force of Attraction

A Broad FoA Rule was used for the first time in Article III of 1945 US UK DTAA. Refer **<u>Annexure 1</u>**

Types of Force of Attraction

- <u>Full force of attraction</u>: All profits derived in source State taxable as profits of the PE whether or not through such PE (i.e., 100% attribution)
- <u>Limited force of attraction</u>: Profits derived through PE as well as profits from sale of goods / activities of same or similar to that of PE directly carried out by the HO in the source country taxable as profits of PE
- <u>No force of attraction</u>: Only profits derived through PE taxable

UN Model Convention. Refer **<u>Annexure 2</u>**

OECD Model Convention. Refer **<u>Annexure 3</u>**

Annexure 1

Full Force of Attraction

- *"(1) A United Kingdom enterprise shall not be subject to United States tax in respect of its industrial or commercial profits unless it is engaged in trade or business in the United States through a PE situated therein. If it is so engaged, United States tax may be imposed upon the entire income of such enterprise from sources within the United States.*

  (2) A united States enterprise shall not be subject to UK tax in respect of its industrial or commercial profits unless it is engaged in trade or business in the UK through a PE situated therein. If it is so engaged, UK tax may be imposed upon the entire income of such enterprise from sources within the UK:…."

- Accordingly, once a PE is constituted, the taxability of profits in the PE state is not restricted only to profits attributable to PE, but extends to all profits earned by the foreign enterprise from "within" the PE State – Full FoA Rule

Annexure 2

Limited Force of Attraction

- *(1) "The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to*

  a) that permanent establishment

  b) sales in that other state of goods or merchandise of the same or similar kind as those effected through permanent establishment; or

  c) other business activities carried on in that other State of the same or similar kind as those effected through that permanent establishment"

- *(2) Subject to the provisions of Para 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a PE situated therein, there shall in each Contracting State be attributed to that PE the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activity under the same or similar conditions and dealing wholly independently with the enterprise of which it is a PE*

Annexure 2

Limited Force of Attraction (Contd.)

The expression ‘same or similar’ has not been defined in any tax treaties. As per the Dictionary meaning:

- ‘Same’ - resembling in every aspect / identical
- ‘Similar’
  - of the same kind in appearance, character, or quantity, without being identical (Oxford)
  - Partial resemblances and may also denote same in all essential particulars (Law Lexicon)
  - “Although not like in all aspects, have like characteristics (Customs law)

- Items of comparison for ‘Same or Similar’
  - Computer and Copying machine ?
  - Copying machine and Scanners?

Annexure 3

No Force of Attraction

- *"The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a PE situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that PE."*

Force of Attraction - India Tax Treaties

#	Description	Countries
1	• Many DTAA adopts language of UN MC i.e., limited FoA (Around 25 plus)	• Canada, Belgium, Denmark, Italy, USA, France etc.
2	• Some DTAAs adopt only part of the Article 7(1) of the UN Model (sale of similar goods) - does not contain other business activities	• Indonesia and New Zealand
3	• Some DTAAs adopt the provisions of UN Model with a “Right to Prove Otherwise” - Enterprise can prove that profit from sale of same or similar goods / activities are not attributable to PE -	• Germany, Indonesia etc.
4	• Some DTAAs adopt OECD Model with a variation - Phrase “directly or indirectly attributable to that PE	• Japan, Singapore, United Kingdom, Malta, Oman, Switzerland, Vietnam etc. The term ’directly or indirectly’ defined in Singapore, Malta, UK etc.
5	• Force of attraction rule has been omitted subsequently	• Norway, Australia, China etc

Force of Attraction - India Tax Treaties

<u>Article 7(1) of India - USA DTAA</u>

"The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to (a) that permanent establishment ; (b) **<u>sales</u>** in the other State of goods or merchandise of the **<u>same or similar kind as those sold through</u>** that permanent establishment ; or (c) **<u>other business activities carried</u>** on in the other State of the **<u>same or similar kind as those effected through</u>** that permanent establishment."

<u>Article 7(1) of India - Germany DTAA</u>

(c) In respect of paragraph 1 of Article 7, profits derived from the sale of goods or merchandise of the same or similar kind as those sold, or from other business activities of the same or similar kind as those effected, through that permanent establishment, may be considered attributable to that permanent establishment **<u>if it is proved that:</u>**

- this transaction **<u>has been resorted to in order to avoid taxation</u>** in the Contracting State where the permanent establishment is situated, and
- the permanent establishment in **<u>any way involved in this transaction</u>**.

<u>Article 7(1) of India - UK DTAA</u>

1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a PE situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is **<u>directly or indirectly attributable</u>** to that PE.

3. Where a PE **<u>takes an active part in negotiating, concluding or fulfilling contracts</u>** entered into by the enterprise, then, notwithstanding that other parts of the enterprise have also participated in those transactions, that proportion of profits of the enterprise arising out of those contracts which the contribution of the PE to those transactions bears to that of the enterprise as a whole shall be treated for the purpose of paragraph 1 of this Article as being the profits indirectly attributable to that PE.

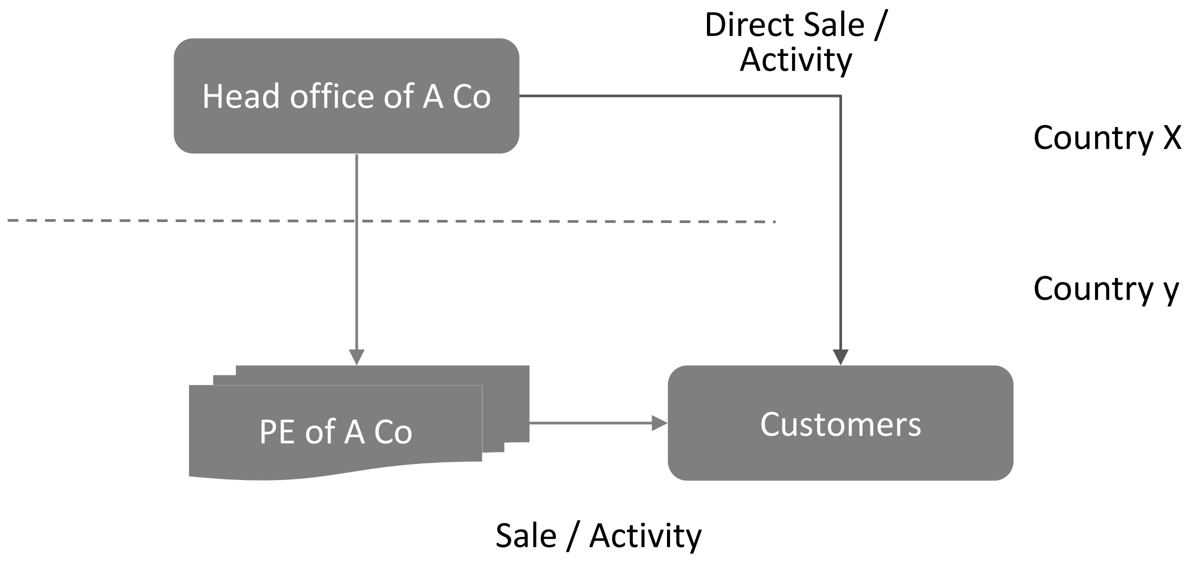
Directly and Indirectly attributable - Meaning

- The phrase ‘directly or indirectly’ attributable to PE’ is used in some of the tax treaties such as Malta, Vietnam, Oman, Switzerland etc.
- For example, Article 7(1) India – Uzbekistan treaty has clarified the phrase as follows:

“The words "directly or indirectly" mean, for the purposes of this Article, that where a PE takes an active part in negotiating, concluding or fulfilling contracts entered into by the enterprise, then notwithstanding that other parts of the enterprise have also participated in those transactions, there shall be attributed to the PE that proportion of profits of the enterprise arising out of those contracts as the contribution of the permanent establishment to those transactions bears to that of the enterprise as a whole.”

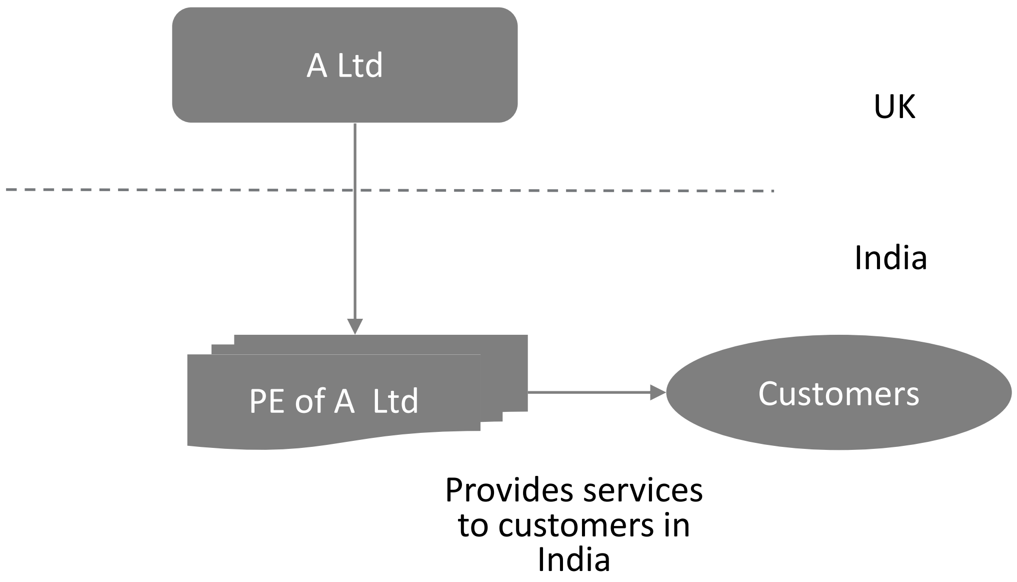
Illustration for FoA

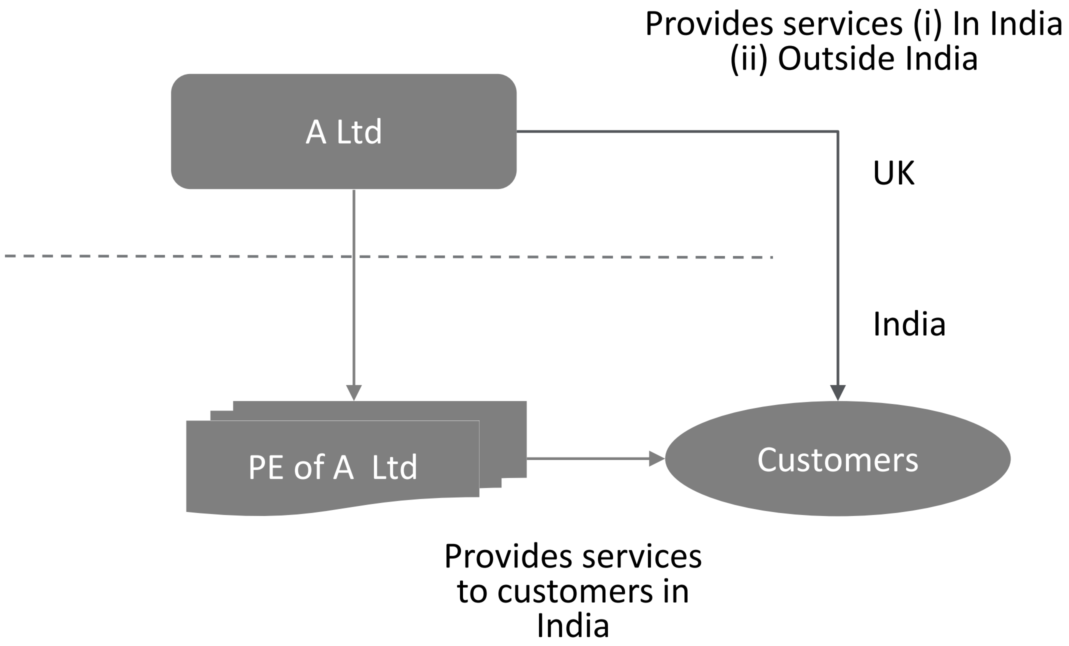
- A Co., resident of Country X, has Branch in Country Y
- Branch sells garments to customers in Country Y
- A Co. also sells garments directly to customers in Country Y
- Possible that business is being passed from branch to head office, thereby reducing profits of the branch.
- Force of attraction rule seeks to tax such profits derived by A Co.



- The Illustration can be extended to PE selling desktops and HO directly selling Laptops to the same customers

Illustration for FoA

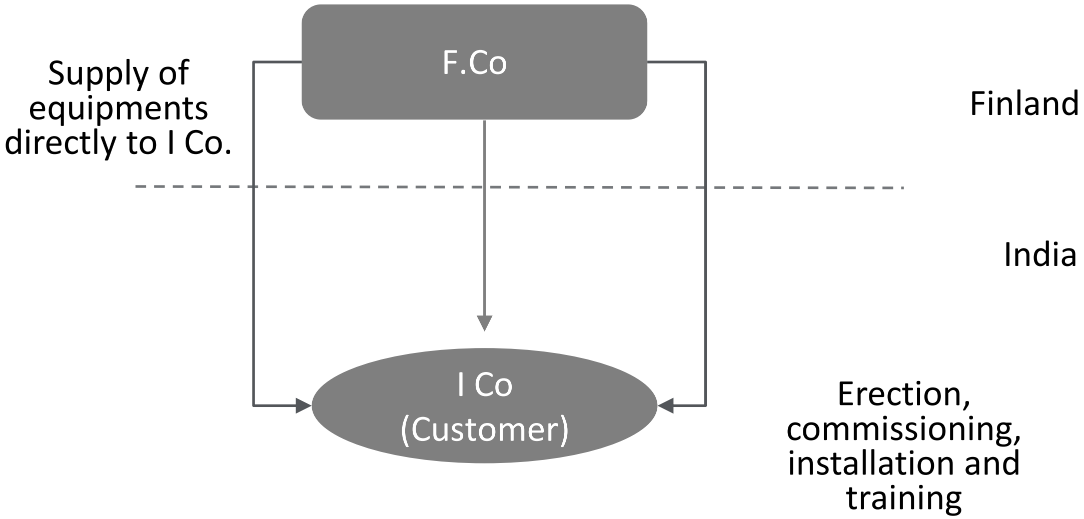




Linklaters LLP (Mumbai Tribunal): Linklaters LLP rendered services in India for more than 90 days and Service PE came into existence. Article 7(1) provides for the taxability of profits "directly or indirectly" attributable to the PE - The words profits attributable to the PE incorporate the 'force of attraction' principle. 100% profit relating to services rendered by the taxpayer whether in India or outside India in respect of Indian projects is taxable in India

Illustration for FoA

- F Co. was assigned turnkey contract for sale of equipments and erection, commissioning, installation and training by I Co.
- F Co. supplied equipment directly to I Co.
- F. Co. sent employees for erection, commissioning, installation and training which constituted installation PE in India
- Can the profits from supply of equipment be taxed using the Force of Attraction principle



Roxon OY (Mumbai Tribunal): Article 7 of India Finland DTAA based on UN Model Convention which envisages – Direct sales by an enterprise covered by 'force of attraction rule' only when enterprise has a PE for selling goods and direct sales by enterprise is same or similar kind of goods - Installation PE thus to be excluded. Also, installation PE comes into existence after supply of equipment. No part of equipment supply profit can be attributed to PE if supply is at arm's length