NALSAR

Taxation of Digital Economy

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Contents

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Background

Digital Economy - India Context

Sector-wise Breakdown of India's Overall Retail Market (2024)

Sector	Market Size (USD Bn)	% of Total
Food and Grocery	905	69.62
Apparel and Footwear	67	5.15
Consumer Electronics	65	5.0
Jewelry and Accessories	60	4.62
Health and Personal Care	45	3.46
Home and Living	40	3.08
Others	118	9.08
Total	**1300**	**100.00**

Sector-wise Breakdown of India's E-commerce Retail Market (2024)

Sector	Market Size (USD Bn)	% of Total
Electronics and Appliances	40.6	33.01
Fashion and Apparel	30.8	25.04
Beauty and Personal Care	12.3	10.0
Food and Grocery	8.6	6.99
Furniture and Home Décor	7.4	6.02
Others	23.3	18.94
Total	**123.0**	**100.00**

Source: https://www.statista.com/statistics/792047/india-e-commerce-market-size

Digital Economy - India Context

Established in 1844

Established in 2007

Established in 1945 and listed in 1994 (Market Cap - INR 2.16L Crores as on 23 Feb 2025)

Established in 2010 and listed in 2021 (Market Cap - INR 2.09L Crores as on 23 Feb 2025)

Digital Economy - Cross Border Scenario

Consolidated Trade Data (2023 and 2024)

Category	2022-23 (USD Bn)	2023-24 (USD Bn)	Growth (%)
Merchandise Exports	451.07	437.1	-3.10%
Service Exports	325.33	341.11	4.85%
Merchandise Imports	715.97	675.45	-5.66%
Service Imports	182.05	178.32	-2.04%
Merchandise Trade Deficit	-264.9	-238.35	Deficit reduced
Service Trade Surplus	143.28	162.78	Surplus increased
Overall Trade Deficit	**-121.62**	**-75.56**	Improved by 37.86%

Source: https://www.commerce.gov.in/wp-content/uploads/2024/12/Annual-Report-English-Lower-Resolution-1.pdf

Is the present law equipped to deal with the challenges?

- In a digital domain, business may be conducted without regard to national boundaries or physical presence
- Product or Service can be delivered to the Market jurisdiction without any physical presence
- Tax authorities facing challenges to rightly bring to tax the profits earned from a digital business
- Typical taxation issues relating to e-commerce are:
  - ✓ Difficulty in identifying the transactions, locating the taxpayer
  - ✓ Difficulty in characterizing the nature of payment and establishing a nexus or link between a taxable transaction, activity and a taxing jurisdiction

Section
2

Judicial Precedents

MasterCard Asia Pacific Pte. Ltd (AAR No.1573 of 2014)

Facts of the case:

- An advance ruling was sought by MasterCard Singapore, regional headquarters for the Asia Pacific, Middle East, and Africa regarding the taxability in India of fees received from Indian banks and other financial institutions for its payment processing services.
- MasterCard Singapore is a wholly owned indirect subsidiary of MasterCard USA. MasterCard India is a wholly owned direct subsidiary of MasterCard Singapore
- The service provided by MasterCard Singapore involved electronically processing payments between a cardholder's bank (Issuer Bank) and a merchant's bank (Acquirer Bank) using the MasterCard network.
- Each financial institution was provided with a MasterCard Interface Processor (MIP) to be placed in the institution's premises, which connected the financial institution to the MasterCard network.
- MasterCard India owned and maintained the MIPs placed in Indian financial institutions and also provided support services.
- The tax authorities contended that the MasterCard Singapore has a PE in India. Further, the processing fee received from Indian financial institutions also constituted royalty.

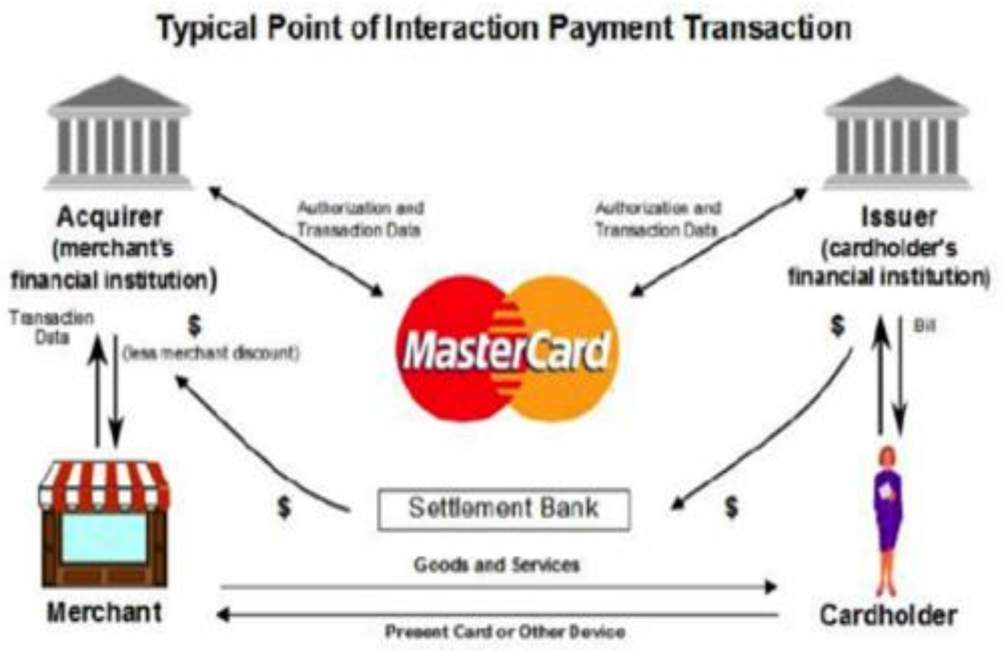


Image source: https://news.bloombergtax.com/daily-tax-report-international/insight-the-fault-lines-in-mastercardfor-everything-pe-there-is-mastercard

MasterCard Asia Pacific Pte. Ltd (AAR No.1573 of 2014)

Ruling of the AAR:

- MasterCard Singapore has a fixed place PE in India:

  - <u>MIPs constituted a fixed place PE</u> [MIPs are at the disposal of MasterCard Singapore since it took material decisions relating to O&M. MIPs provided several key elements of the payment authorization process, such as PIN processing, validation of card codes, address and name verification, fraud alerts, and data encryption. These are not preparatory or auxiliary activities]

  - <u>MasterCard Network constituted a fixed place PE</u> [Network consists of application software, as well as transmission towers, leased lines, fibre optic cables, and transmission nodes (all owned by third parties). Indian entity was responsible for O&M of Network. Since the application software used to access the network is owned by MasterCard Singapore, the network is at its disposal]

  - <u>Settlement Banks constituted fixed place PE</u> [employees of Bank of India carried out their functions in accordance with the instructions of MasterCard Singapore, thus under the control and supervision of MasterCard Singapore. The space occupied is at the disposal of MasterCard Singapore]

  - <u>MasterCard India constituted a fixed place PE</u> [The fact that MasterCard India was carrying on the business of MasterCard Singapore, to the extent that all facilities, service, personnel, and personnel of MasterCard India were at the disposal of the MasterCard Singapore. Also the FAR analysis did not actually reflect the nature of activities performed.]

MasterCard Asia Pacific Pte. Ltd (AAR No.1573 of 2014)

Ruling of the AAR:

- MasterCard Singapore has a service PE in India on account of employees visiting India [taking customer feedback, providing information about new products, and monitoring the efficiency of operations were an integral part of the transaction processing services and cannot be construed as stewardship activity]
- MasterCard Singapore has a dependent agent PE in the form of MasterCard India [AAR observed that all agreements entered with Indian customers after the incorporation of MasterCard India were in fact routed through MasterCard India, thereby MasterCard India habitually secured orders for MasterCard Singapore]
- Payments received also qualify as Royalty: [US entity licensed the IP to Singapore entity, which was then sub-licensed to the financial institutions in India to use the IP for their payment card programs, and therefore constituted royalty payments. Since the payments are effectively connected to PE, taxed as Business profits]

Transaction processing fee is classified as royalty and business income.
MasterCard Singapore filed a writ against this ruling.

Some key aspects for consideration (EL 2.0):

- W.e.f 01 April 2020 - Equalisation Levy of 2% was made applicable on gross receipt of e-commerce operator from online supply of goods or services or both to Indian customers.
- MasterCard filed another writ to stay applicability of Equalisation Levy.
- ITD filed an Affidavit that since it is bound by ruling of AAR, there is no intent to levy EL (this is subject to the outcome of initial writ).
- The second writ acts as an immunity against EL penalty.
- W.e.f 01 August 2024 - EL 2.0 was abolished.

Netflix Inc. and existence of PE in India

Netflix under I-T scanner, facing tax liability in India for streaming services income: Report

- India is taking steps to impose a tax on the income generated by Netflix in the country, according to an Economic Times report. The tax authorities have reportedly attributed an income of approximately Rs 55.25 Crore ($6.73 million) to Netflix's permanent establishment in India in the assessment year 2021-22, citing a draft order.

- Indian tax authorities have alleged that Netflix Inc. has established a Permanent Establishment (PE) in India, leading to potential tax liabilities. The key reasons for this assertion include:
  - **Secondment of Employees:** Netflix has reportedly seconded employees from its parent company to India to support its streaming services. The presence of these employees is viewed by tax officials as creating a fixed place of business, thereby constituting a PE
  - **Infrastructure Deployment:** The company has installed infrastructure, such as servers and other equipment, within India to enhance streaming quality and user experience. This physical presence is considered by authorities as a significant factor in establishing a PE

https://www.businesstoday.in/technology/news/story/netflix-under-i-t-scanner-facing-tax-liability-in-india-for-streaming-services-income-report-380970-2023-05-12
https://openconnect.netflix.com/Open-Connect-Overview.pdf

eBay International AG v. ADIT (2013) 140 ITD 20 (Mum)

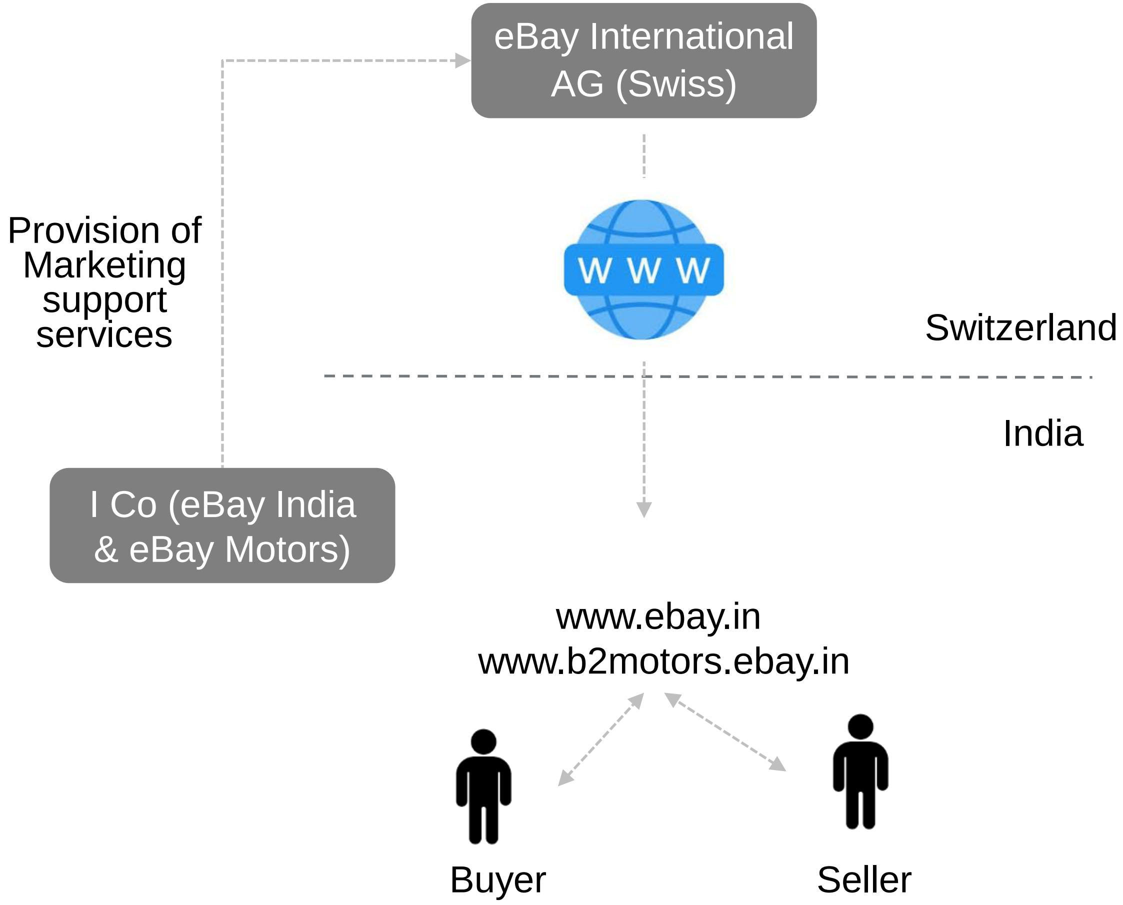
Facts of the case:

- eBay AG operated India specific websites (www.ebay.in and www.b2motors.ebay.in) that provides an online platform for facilitating the purchase and sale of goods and services to users based in India.

- eBay AG entered into marketing support agreements with its group companies (eBay India and eBay Motors), for availing certain support services in connection with its Indian specific websites.

  - facilitating marketing penetration strategies for eBay AG.
  - facilitating advertising and promotion activities within India for eBay AG.
  - Forwarding appropriate contracts for review and conclusion to eBay AG to effectuate those strategies and activities.
  - responsible for collecting the listing operations of eBay AG in relation to the Indian market, on behalf of eBay AG, from the sellers and the buyers respectively, and remitting the same to eBay AG.

- The tax authorities contended that the user fee charged by eBay AG constitutes business income and taxable in India since there exists a PE in India.



eBay International AG v. ADIT (2013) 140 ITD 20 (Mum)

Ruling of the Hon’ble Mumbai Tribunal:

- Indian entities are dependent agents but not DAPE.
  - Indian entities have no control over the website.
  - Transactions are finalized through website which is operated from outside India
  - Indian entities have not negotiated or entered into any contracts on behalf of eBay AG
  - No habitual maintaining stock for or on behalf of eBay AG since goods are delivered by the seller to buyer directly

- Indian entities do not constitute a place of management.
  - Indian entities are not taking any managerial decisions and only rendering support services
  - Indian entities have no role in operation of website.

User fee charged by eBay AG is not taxable as royalty or business income (in the absence of PE)

Google Ireland Ltd. v. DCIT [2023] 148 taxmann.com 106 (Bglr)

Facts of the case:

- Google Ireland was in the business of sale of online advertisement space to Google India under the amended Google AdWords Program Distribution Agreement dated 12-12-2005 and to direct advertisers.
- Google India has a distribution team which markets and distributes the AdWords program to the advertisers in India and Google India was remunerated at cost plus mark-up basis for the distribution services.
- The AdWords program is used by various business houses to promote their products and services via targeted advertising. Google Ireland has the exploitation rights for EMEA and APAC. Thus, Google Ireland has right to sell online ad space in India.
- Advertisers describe their product/service using key words and provide those to Google along with its web address for displaying the advertisement on its search engine web page when the user/querist searches for such keywords. Google Ireland facilitates display advertisement of the customer to the relevant User/searcher who is searching for such products/ services.
- Advertisers pay on a CPC (Cost-per-Click) basis.

Google Ireland Ltd. v. DCIT ITA Nos.191 to 194/Bang/2024

Ruling of the Hon’ble Mumbai Tribunal:

- Payments towards purchase of on-line advertisement space is held not taxable in India in the following judgements:
  - Yahoo India Pvt. Ltd.
  - Pinstorm Technologies (P.) Ltd. v. ITO
  - ITO v. Right Florists (P.) Ltd.
  - Inception Business Services
  - Urban Ladder Home Decor Solutions Pvt. Ltd.
  - Play Games 24X7 Pvt. Ltd.
  - Myntra Designs Pvt. Ltd.
  - Matrimony.com Ltd.
  - ESPN Digital Media (India) Pvt. Ltd.
  - Interactive Avenues Pvt. Ltd.

Online advertising fee charged by Google Ireland is not taxable as royalty or business income (in the absence of PE).

Some relevant observations from Google Ireland & Right Florists Judgements:

- A search engine, which has only its presence through its website, cannot, therefore, be a PE unless its web servers are also located in the same jurisdiction. That's not the situation here and it is not the case of the revenue that servers are located in India.
- OECD commentary is a necessary aid for the interpretation of DTAA - Hon’ble SC in Engineering Analysis.
- The HPC on electronic commerce and taxation, set up by the CBDT had also accepted the view taken by TAG of OECD and recommended taxing consideration flowing for online advertisement under Article 7, and not Article 12.
- The reservations expressed by India on OECD commentary only reserve a right to set out the circumstances in which a website per se can be treated as PE, even though these reservations do not really constitute actionable statements.

TVM Ltd. v. CIT [2023] 102 TAXMAN 578 (AAR)

Facts of the case:

- TVM, a Mauritius-based company, generates revenue through broadcasting advertisements. TVI, an Indian entity, assists TVM in securing advertisements.
- TVM and TVI are separate legal entities, and TVM does not exercise direct control over TVI.
- The tax authorities questioned whether TVI should be considered a Dependent Agent PE (DAPE) of TVM, thereby bringing TVM's profits under taxation in India.

Ruling of the Hon'ble Mumbai Tribunal:

- No Fixed Place PE: TVM does not have a physical place of business in India.
- TVI works exclusively for TVM, making it not an independent agent.
- However, an agent qualifies as a Dependent Agent PE (DAPE) only if it has the authority to conclude contracts on behalf of the foreign principal. In this case, TVI does not conclude contracts for TVM, as the final approval for advertisement broadcasting lies with TVM.
- No Attribution of Profits: Since TVM lacks a PE in India, its business profits cannot be taxed in India under Article 7 of the DTAA.

Payments received from sale of 'Air-time' is not taxable as business income (in the absence of PE).

ABB FZ-LLC v. DCIT (Bangalore ITAT - 83 taxmann.com 86) (2017)

Facts of the case:

- ABB FZ-LLC (Taxpayer), a UAE-based entity, provided regional service activities to its associated entities, including ABB Limited India.
- It entered into a Regional Headquarter Service Agreement and received payments from ABB Limited for rendering various technical and management services.
- ABB FZ-LLC claimed that
  - ✓ India-UAE DTAA does not contain a clause for FTS, the income should be taxed under Article 22 (Other Income)
  - ✓ It did not have a PE in India, and thus, the income was not taxable in India
- AO held that services would fall under FTS of domestic tax law or Royalty under DTAA. Taxpayer had a Service PE in India

Ruling of the Tribunal:

- In today's digital era, services can be provided remotely through emails, video conferencing, remote monitoring, and other virtual modes.
- The duration of service provision matters more than the physical presence of employees.
- Since ABB FZ-LLC was continuously rendering services for more than 9 months, it was deemed to have a Service PE in India, even though its employees were physically present only for 25 days.
- The services involved sharing technical knowledge, expertise, and confidential business information with ABB Limited providing access to industrial and commercial experience and hence Royalty.
- Since Taxpayer also failed to provide TRC, the Tribunal denied treaty benefits, making the income taxable under Indian tax law.

Clifford Chance Pte. Ltd vs. ACIT (SA No. 437/Del/2023) (Delhi Tribunal)

Facts of the case:

- Clifford Chance Pte. Ltd. (Taxpayer) is a Singapore based legal advisory firm and provides services to clients in India
- Taxpayer rendered services in FY 2019-20 and 2020-21
  - ✓ FY 2019-20 - [Business development 35 days, Vacation period 36 days, common days 5, Services rendered in India for 44 days.
  - ✓ FY 2020-21 - Services rendered remotely. No employees visited India
- The Assessing Officer (AO) held that the company constituted a Service Permanent Establishment (PE) in India due to the physical presence of its employees and virtual service PE based on OECD BEPS reports.
- 100% of the gross receipts were attributed to the PE and taxed in India

Ruling of the Tribunal:

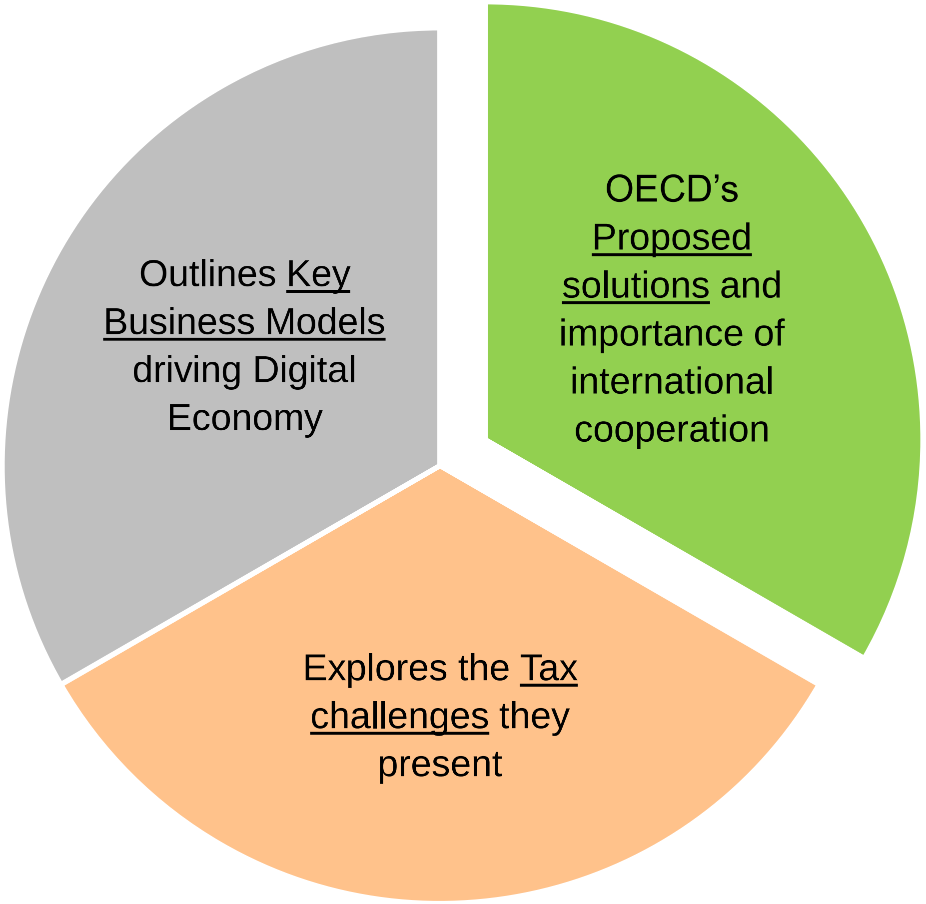
- Physical presence in India for rendering services is mandatory to constitute a Service PE. Article 5(6) of India-Singapore DTAA provides for a 90 day threshold (30 days for AEs)
- No PE for FY 2019-20 and 2020-21
  - ✓ The employees were in India only for 44 days (less than 90 day threshold).
  - ✓ FY 2020-21 - No employees visited India
- The India-Singapore DTAA does not recognize "Virtual Service PE".
- Reliance on OECD BEPS reports by the Assessing Officer was misplaced, as the DTAA has not been amended to include a Virtual Service PE concept.
- Relied on Apex Court ruling in the case of E-Funds and held that the requirement of Service PE is that services must be rendered in India

Section

3

OECD BEPS Action Plan 1

BEPS - AP 1



The Digital Economy: A Complex Landscape

Borderless Nature

Digital businesses operate across national borders, creating jurisdictional issues for taxation.

Intangible Assets

Digital companies rely heavily on intangible assets like user data and intellectual property, making traditional tax rules less effective.

BEPS - AP 1

Key Business Models in the Digital Economy

1. **Online Retailers**
   E-commerce giants like Amazon and Flipkart sell goods globally.

2. **Internet Advertising**
   Platforms like Google and Facebook monetize user data through targeted ads.

3. **Cloud Computing**
   Companies like AWS and Microsoft Azure offer data storage and computing services.

4. **Internet App Stores**
   Platforms like Apple App Store and Google Play Store distribute digital apps and services.

BEPS - AP 1 - Tax Challenges in the Digital Economy

Online Retailers

Physical Presence

Online retailers may lack physical presence in some markets where they generate significant revenue.

Transfer Pricing

The pricing of logistics and warehousing services can pose transfer pricing challenges.

VAT / GST Collection

Collecting value-added tax (VAT) or goods and services tax (GST) on cross-border sales can be complex.

BEPS - AP 1 - Tax Challenges in the Digital Economy

Internet Advertising

User Data

Advertising platforms collect user data without physical presence in many jurisdictions.

Source-Based Taxation

Taxing ad revenues in the source country, where users are located, can be challenging.

Data Monetization

Transfer pricing models for data monetization are complex and require careful analysis.

BEPS - AP 1 - Tax Challenges in the Digital Economy

Cloud Computing

Value Creation

Determining where value is created for cloud services, with data stored across jurisdictions, can be complex.

Profit Attribution

Attributing profits for tax purposes to the relevant jurisdictions can be difficult.

VAT / GST Compliance

Ensuring VAT / GST compliance for both business-to-business (B2B) and business-to-consumer (B2C) models is crucial.

BEPS - AP 1 - Tax Challenges in the Digital Economy

Internet App Stores

Nexus Determination

Determining whether an app store has sufficient nexus in a jurisdiction to be subject to taxation.

Revenue Recognition

Accurately recognizing revenue for in-app purchases, considering different payment models and currencies, can be complex.

VAT / GST Collection

Collecting VAT/GST for direct digital sales and in-app purchases can be challenging.

BEPS - AP 1 - Addressing Tax Challenges in the Digital Economy

Permanent Establishment	Equalisation Levy	Transfer Pricing	VAT / GST Reforms
Revising the definition of PE to include digital presence and introducing a "significant economic presence" test.	Imposing a tax directly on digital transactions in the source country.	Ensuring that profits are aligned with value creation in the relevant jurisdictions.	Standardizing digital services taxation across jurisdictions.

Section

4

UN Article 12B

Article 12B of UN Convention

Income from Automated Digital Services (ADS):

"1. Income from automated digital services arising in a Contracting State, underlying payments for which are made to a resident of the other Contracting State, may be taxed in that other State.

2. However, subject to the provisions of Article 8 and notwithstanding the provisions of Article 14, income from automated digital services arising in a Contracting State may also be taxed in the Contracting State in which it arises and according to the laws of that State, but if the beneficial owner of the income is a resident of the other Contracting State, the tax so charged shall not exceed ___ per cent [the percentage is to be established through bilateral negotiations] of the gross amount of the payments underlying the income from automated digital services.

….."

- ONLINE ADVERTISING SERVICES
- SUPPLY OF USER DATA
- ONLINE SEARCH ENGINES;
- ONLINE INTERMEDIATION PLATFORM SERVICES;
- SOCIAL MEDIA PLATFORMS (&) ON-LINE GAMING
- DIGITAL CONTENT SERVICES;
- STANDARDIZED ONLINE TEACHING SERVICES.
- CLOUD COMPUTING SERVICES; AND

Article 12B of UN Convention

No threshold proposed for applicability

Key aspects

Primary Right to Tax (Residence Country): The income from ADS is taxable in the resident country of the service provider.

Secondary Right to Tax (Source Country):

- ✓ The source country (where the income arises) can also tax the ADS income, subject to a withholding tax (determined by bilateral negotiations) on a gross basis.
- ✓ Alternative Option: The service provider can opt for taxation on a net profit basis, wherein 30% of the revenue from ADS is considered taxable profit, with tax applied at the source country's corporate tax rate.

- Alternative to OECD's Pillar One: Unlike the OECD's Unified Approach (Pillar One), which requires complex profit allocation rules, Article 12B provides a simpler withholding tax approach.
- More Favorable to Developing Countries: The UN Model is designed to favor source countries (developing nations), allowing them to tax ADS income that arises in their jurisdictions.
- Addresses BEPS Concerns: Article 12B ensures that multinational digital companies pay tax in markets where they generate revenue, reducing base erosion and profit shifting (BEPS) risks.

Section

5

Measures by GOI / CBDT

Measures by GOI or CBDT (At-a-glance)

EQ LEVY 1.0

EL on Advertisement services @ 6%

2016

April

OIDAR

Online Information Data Base Access and Retrieval Services covered under GST

2017

April

RULE 10D

CBDT Draft Rules on Profit Attribution. Still at draft stage.

2019

April

EQ LEVY 2.0

EL on E-commerce Transactions @ 2%. Discontinued from 01 Aug 2024

2020

April

SEC 194-O

Payments by e-commerce operator to e-commerce participant subject to WHT

2020

October

SEP

Thought introduced in FA 2018, was made applicable from 2021

2021

April

Equalisation Levy (Digital Service Tax)

Equalisation Levy 1.0 and 2.0

01 Apr 2016

EL on Advertisement Services (6%)

01 Apr 2020

EL on E-commerce Transactions (2%)

Abolished w.e.f. **01 Aug 2024**. This aligns with the country's global commitments under the OECD's Pillar Two framework.

- Equalisation Levy was introduced vide Chapter VIII of Finance Act, 2016 (Special levy not a part of Income-tax Act, 1961).
- Section 163 to 180 of Finance Act, 2016
- Section 10(50) was inserted in Income-tax Act, 1961 for exempting the income which was chargeable to Equalisation Levy

Equalisation Levy on Advertisement Services

Section 164 and 165 of Finance Act, 2016 (as amended by Finance Act, 2020):

164 (i) "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;

Charge of equalisation levy on specified services.

165. (1) On and from the date of commencement of this Chapter, 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 from--

(i) a person resident in India and carrying on business or profession; or

(ii) a non-resident having a permanent establishment in India.

(2) The equalisation levy under sub-section (1) shall not be charged, where—

(a) the non-resident providing the specified service has a permanent establishment in India and the specified service is effectively connected with such permanent establishment;

(b) the aggregate amount of consideration for specified service received or receivable in a previous year by the non-resident from a person resident in India and carrying on business or profession, or from a non-resident having a permanent establishment in India, does not exceed one lakh rupees; or

(c) where the payment for the specified service by the person resident in India, or the permanent establishment in India is not for the purposes of carrying out business or profession.

Note: Section 165A & 166A pertains to charge of equalisation levy on e-commerce services & Collection and recovery thereon

Equalisation Levy on Advertisement Services

Section 10(50) of Income-tax Act, 1961 as amended by Finance Act, 2024

(50) Any income arising from any -

(i) specified service provided on or after the date on which the provisions of Chapter VIII of the Finance Act, 2016 (28 of 2016) comes into force; or

(ii) e-commerce supply or services made or provided or facilitated on or after the 1st day of April, 2020 but before the 1st day of August, 2024,

and chargeable to equalisation levy under that Chapter.

Explanation 1.—For the removal of doubts it is hereby clarified that the income referred to in this clause shall not include and shall be deemed never to have been included any income which is chargeable to tax as royalty or fees for technical services in India under this Act read with the agreement notified by the Central Government under section 90 or section 90A.

Explanation 2.—For the purposes of this clause,—

(i) "e-commerce supply or services" shall have the meaning assigned to it in clause (cb) of section 164 of the Finance Act, 2016 (28 of 2016);

(ii) "specified service" shall have the meaning assigned to it in clause (i) of section 164 of the Finance Act, 2016 (28 of 2016).

Equalisation Levy on Advertisement Services

Charge of EL:

- 6% Ad EL is charged on non-resident service provider engaged in providing the following services to any person in India and carrying on business or profession or non-resident having a PE in India, where payments exceed threshold of INR 0.1m.

  a) Online advertisement

  b) Any provision for digital advertising space

  c) Any provision of facility or service for online advertisement

  d) Any other service which may be notified later by the Indian Government

Compliances:

- This is a special levy and would be in the same manner as TDS viz., the person making the payment for advertisement will require to deduct @ 6% on the total amount of consideration and deposit the same to the account of Central Govt.
- Statement has to be filed on 30th June of the following financial year

Defaults:

- In case of failure to pay, the expenditures will not be allowed to claim for Income Tax Purpose under Section 40(a)(ib).
- Interest is charged at 1% of the outstanding levy for every month or part thereof is delayed.
- In case failure to deduct, in addition to the payment of Equalisation Levy and interest, penalty equal to the amount of Equalisation levy shall be chargeable

Digital Service Tax (DST)

#	Name of the Country	DST Applicable From	Nature of Service	Threshold	Rate of DST
1	Argentina	01 Jan 2021	Digital services provided over the internet, including hosting, software, and online advertising.	Revenue thresholds vary by province.	2% (Buenos Aires and the City of Buenos Aires)
2	Australia	NA	Australia will adopt legislation to implement the OECD's Pillar Two rules, hence no DST. However, it imposes 10% GST on Digital services viz., streaming platform, software, cloud computing and online services		NA 10% (GST)
3	Brazil	NA	In the process of reforming its Indirect taxes	NA	NA
4	Canada	01 Jan 2022	Digital services related to online marketplaces, advertising, social media, and user data.	Global revenue ≥ €750m; Canadian revenue > CAD 20m.	3%
5	Denmark	01 Jan 2024	On-demand audio-visual media services.	Revenue ≥ 15 million DKK.	2% (base rate), up to 5% (with surcharge)
7	European Union	On hold	European Commission proposed a 3% DST, however, EU has not implemented a unified DST across all states due to lack of unanimous agreement among member states. Consequently several EU countries have introduced their own DSTs viz., France, Italy and Spain		
6	France	1 Jan 2019	Digital intermediation services, online advertising, and data sales.	Global revenue ≥ €750m; French revenue > €25m.	3%
7	Ghana	2022	Electronic commerce and telecommunication services.	No threshold specified.	15% (VAT)
8	India	01 Apr 2016 & 01 Apr 2020	EL on Advertisement services & E-commerce supply of services by non-residents.	Payments > INR 0.1m & Payments > INR 20m	6% (Advertisement EL) & 2% (e-commerce EL)*

* EL on e-commerce transactions is not applicable from 01 Aug 2024

Digital Service Tax (DST)

#	Name of the Country	DST Applicable From	Nature of Service	Threshold	Rate of DST
9	Indonesia	1 Jul 2020	Digital transactions and services provided by offshore entities.	Revenue > Rp 600m/year or traffic > 12,000/year.	11% (VAT)
10	Italy	01 Jan 2020	Digital advertising, intermediation, and data transmission services.	Global revenue ≥ €750m; Italian revenue > €5.5m.	3%
11	Kenya	01 Jan 2021	Digital services provided over the internet or electronic networks.	No threshold specified.	1.5%
12	Malaysia	01 Jan 2020	Digital services provided to consumers in Malaysia.	Revenue > RM 500,000/year.	6% (Service Tax on Digital Services - SToDS)
13	Nigeria	01 Jan 2020	Digital services provided by non-resident companies.	Revenue > NGN 25m.	30% (Corporate Income Tax)
14	Spain	16 Jan 2021	Online advertising, intermediation, and data transfer services.	Global revenue ≥ €750m; Spanish revenue > €3m.	3%
15	Tanzania	01 Jul 2022	Electronic services provided over the internet.	No threshold specified.	2% (Income Tax)
16	Turkey	01 Mar 2020	Digital advertising, content sales, and intermediation services.	Global revenue ≥ €750m; Turkish revenue > TRY 20m.	7.5%
17	Uganda	01 Jul 2023	Digital services provided over the internet or electronic networks.	No threshold specified.	5%

Digital Service Tax (DST)

#	Name of the Country	DST Applicable From	Nature of Service	Threshold	Rate of DST
18	United Kingdom	01 Apr 2020	Digital services including online marketplaces, advertising, and social media.	Global revenue ≥ £500m; UK revenue > £25m.	2%
19	Vietnam	01 Jan 2022	E-commerce and digital platform-based services.	No threshold specified.	VAT/Corporate Income Tax rates apply
20	Zimbabwe	01 Jan 2019	Satellite broadcasting and electronic commerce services.	Revenue > USD 500,000.	5% (Income Tax)

Source: Based on the information available in public domain. Also, while DST is currently in effect in many countries, but their future is subject to change due to international tax developments.

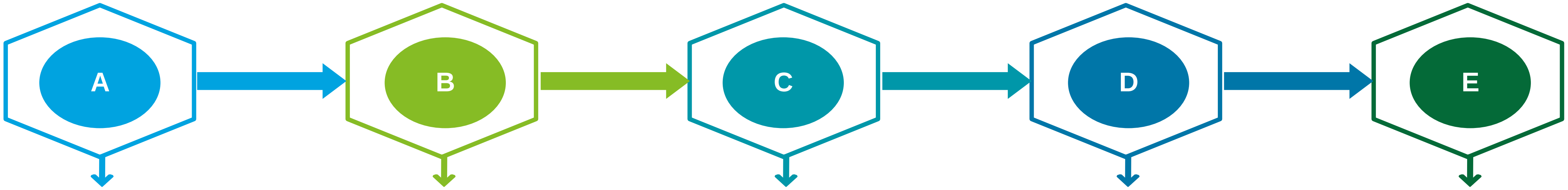
Profit Attribution Rules Issued by CBDT under Rule 10D

Profit Attribution Rules (Draft)

CBDT issued a press release (18 April 2019) inviting stakeholder comments on report pertaining to Profit Attribution to PE in India. Key features:

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)



A – 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

B – 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.

C – 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

D – 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.

E – 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

Profit Attribution Rules (Draft)

Some Key aspects:

- **Global Profit Attribution Rule (EBIDTA-based approach) :** This approach applies when reliable segmental accounts are not available. It serves as a simplified approach for cases where segmental financials do not allow precise allocation of profits.

- **3-Factor or 4-Factor Approach (Formulary Apportionment Model):** When segmental financials are available, the 3-factor approach or 4-factor approach is applied. The weightage of factors varies based on the nature of the business.
  - ✓ Manufacturing & Trading: A 3-factor approach is used
  - ✓ Digital & Highly Dematerialized Businesses: A 4-factor approach is used,.

- The 3-factor or 4-factor approach is the preferred method when segmental data is available. The Global Operational Profit Margin rule is a fallback method used where reliable segmental data is unavailable.

- If both methods yield results, the final profit attribution will be based on the method that provides the most realistic and fair representation of profit allocation to India.

Significant Economic Presence

Significant Economic Presence (SEP)

Finance Act 2018 (as amended by Finance Act 2020) – W.e.f AY 2022-23

Explanation 2A.—For the removal of doubts, it is hereby ~~clarified~~ declared that the significant economic presence of a non-resident in India shall constitute "business connection" in India and "significant economic presence" for this purpose, shall mean—

(a) transaction in respect of any goods, services or property carried out by a non-resident with any person 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 in India, as may be prescribed~~, in India through digital means~~:

Provided that the transactions or activities shall constitute significant economic presence 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:

Provided further that only so much of income as is attributable to the transactions or activities referred to in clause (a) or clause (b) shall be deemed to accrue or arise in India.

Significant Economic Presence (SEP)

Finance Act 2018 (as amended by Finance Act 2020) – W.e.f AY 2022-23

Explanation 3A.- For the removal of doubts, it is hereby declared that the income attributable to the operations carried out in India, as referred to in Explanation 1, shall include 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.

Provided that the provisions contained in this Explanation shall also apply to the income attributable to the transactions or activities referred to in Explanation 2A.

Significant Economic Presence (SEP)

Notification No. 41 of 2021 - W.e.f AY 2022-23

"11UD. Thresholds for the purposes of significant economic presence. –

(1) For the purposes of clause (a) of Explanation 2A to clause (i) of sub-section (1) of section 9, the amount of aggregate of payments arising from transaction or transactions in respect of any goods, services or property carried out by a nonresident with any person in India, including provision of download of data or software in India during the previous year, shall be two crore rupees;

(2) For the purposes of clause (b) of Explanation 2A to clause (i) of sub-section (1) of section 9, the number of users with whom systematic and continuous business activities are solicited or who are engaged in interaction shall be three lakhs. ".

Significant Economic Presence (SEP)

Points for consideration:

Overview of the Scope

- Applies in case of countries where there is no comprehensive DTAA viz., Cayman Islands, Argentina, Macau, Maldives etc.
- Applies when DTAA benefit is denied viz., GAAR, PPT etc.

Clauses (a) and (b)

- They operate independently, thus thresholds have to be applied separately
- Words used are ‘Person in India / Users in India’ unlike EL which uses the word ‘Resident in India’
- Clause (a) does not make any distinction between digital goods and physical goods
- Clause (b) does not make any distinction between interaction through digital means or any other means

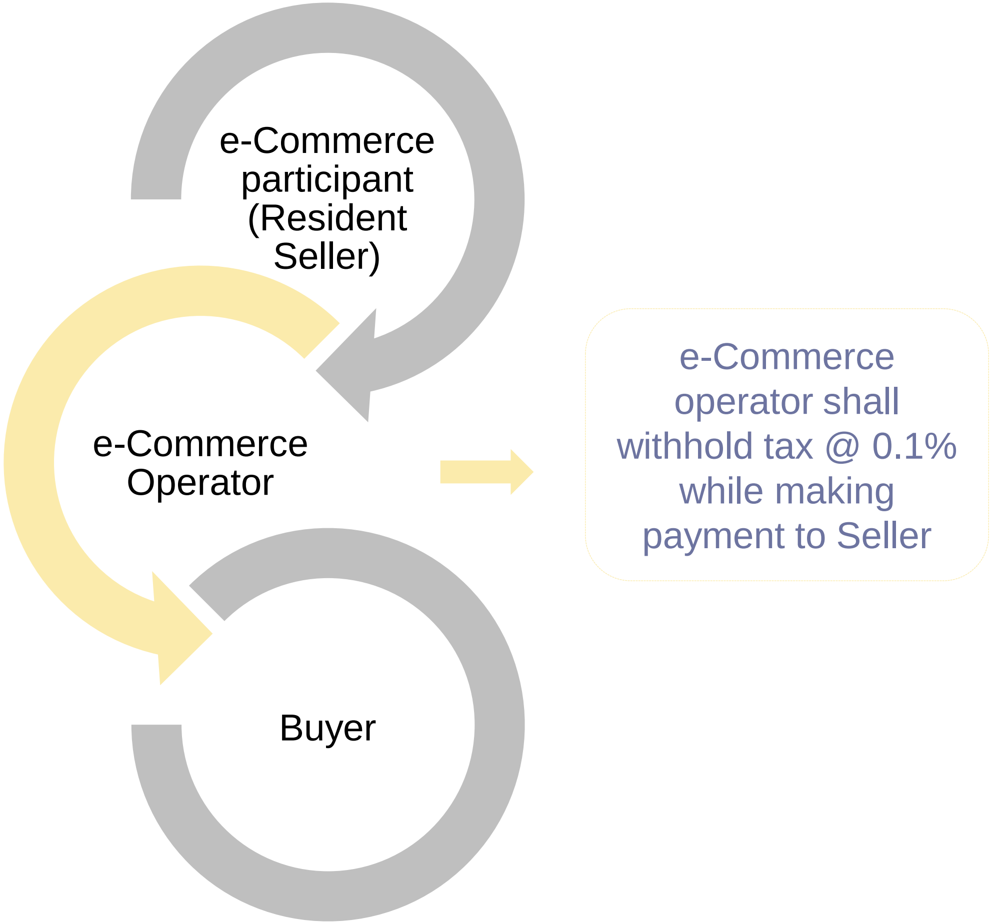
Overlap between EL and SEP

- Overlap of EL 1.0 or 2.0 with SEP in case of non-treaty countries ?

Section 194-O - WHT Obligation on E-Commerce Operators

Sec 194-O

WHT by e-Commerce Operator:



Definitions:

- ✓ "electronic commerce" means the supply of goods or services or both, including digital products, over digital or electronic network;
- ✓ "e-commerce operator" means a person who owns, operates or manages digital or electronic facility or platform for electronic commerce;
- ✓ "e-commerce participant" 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 "fees for technical services" and fees for "professional services", as defined in the Explanation to section 194J.

Sec 194-O

Clarifications provided:

- Exception: e-Commerce participant is Individual or HUF and the gross amount transacted in a year does not exceed INR 5 lakhs, no WHT on submission of PAN.
- Deemed obligation: Obligation for WHT exists even if the Buyer remits the amount to the Seller directly.
- Other services: Other amounts received by the e-Commerce operator (viz., for advertisement services etc.) does not fall under the ambit of this section.
- WHT on GST: No WHT required on GST component. However, other charges viz., convenience fee, shipping and packaging cost etc. shall form part of the gross consideration
- WHT on Discount: Discount shall be removed from the gross component only if such discount was given by Seller (not by Seller e-Co or Buyer e-Co)
- If two e-Commerce operators involved: In case of multiple e-Commerce operators in a transaction like the case of ONDC, seller e-Commerce operator is responsible for WHT and shall file Form 26Q and issue Form 16A.

Issues for consideration:

- ✓ Sellers often use multiple e-Commerce platforms, so difficult to track the INR 5 lakhs threshold
- ✓ Many small Sellers do not furnish PAN, leading to a higher WHT obligation of 5% as per 206AA(6)
- ✓ NR e-Commerce operator compliance obligations - EL 2.0 & 194-O

OIDAR Services

OIDAR

Points for consideration:

- OIDAR (Online Information and Database Access or Retrieval) services refer to services delivered over the internet with minimal human intervention. Examples include software downloads, cloud services, and online advertisements etc.
- The place of supply for OIDAR services is determined as per Section 13(12) of the IGST Act, which states that if the recipient is in India, the supply is deemed to be in India.
- If an Indian OIDAR provider supplies services to customers outside India (export), the transaction is zero-rated under GST (no GST is charged).
- If a foreign OIDAR provider supplies services to customers in India (import), general rate applicable for OIDAR services is 18%.

B2B Import:

- If an OIDAR service is supplied to a registered business (B2B transaction) in India, the recipient (Indian business) must pay GST under the reverse charge mechanism (RCM).
- The foreign supplier does not need GST registration, and the Indian recipient must self-assess and pay tax under RCM.
- The recipient can claim Input Tax Credit (ITC) if the service is used for business purposes.

B2C Import:

- If an OIDAR service is supplied to an unregistered individual (B2C transaction) in India, the foreign service provider must register for GST in India and pay tax.
- The supplier can either register under normal GST registration or opt for simplified registration (Form GST REG-10).
- Thus, the responsibility lies with the foreign OIDAR provider

Thank You

Disclaimer: The contents mentioned in the slide is only for training purposes and should not be considered as an advice or opinion