EQUALISATION LEVY

03 September 2022

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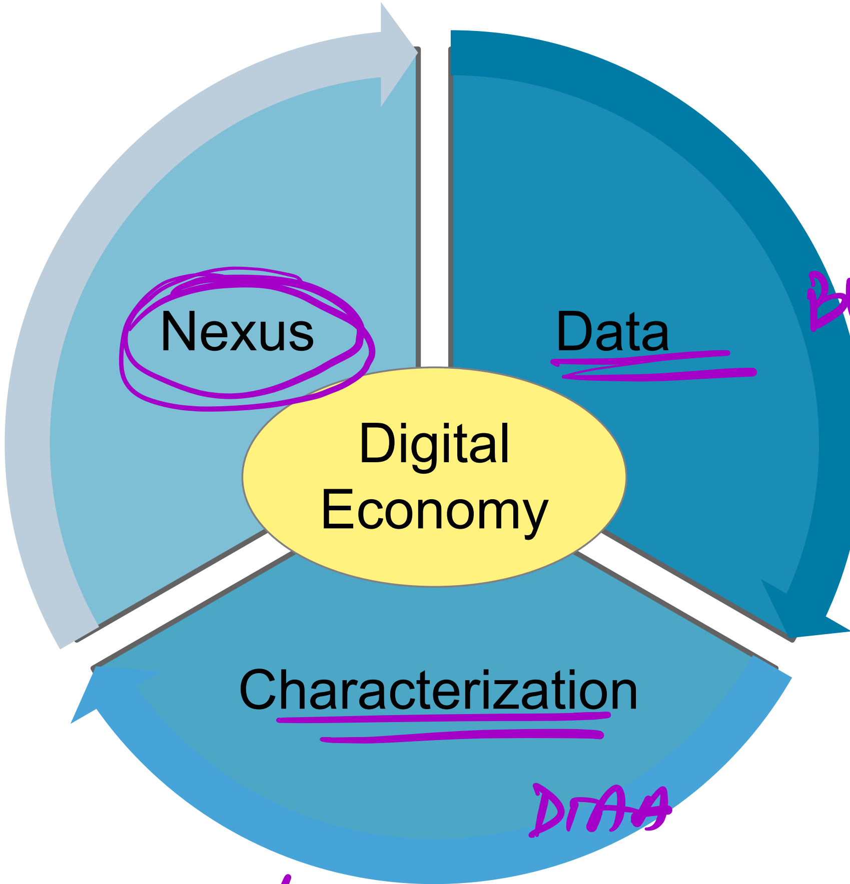
Evolution of the Desk

EQUALISATION LEVY.

Digital Economy – Broad Direct Tax Challenges

intangibles mobile.



BIG DATA is THE NEW OIL.

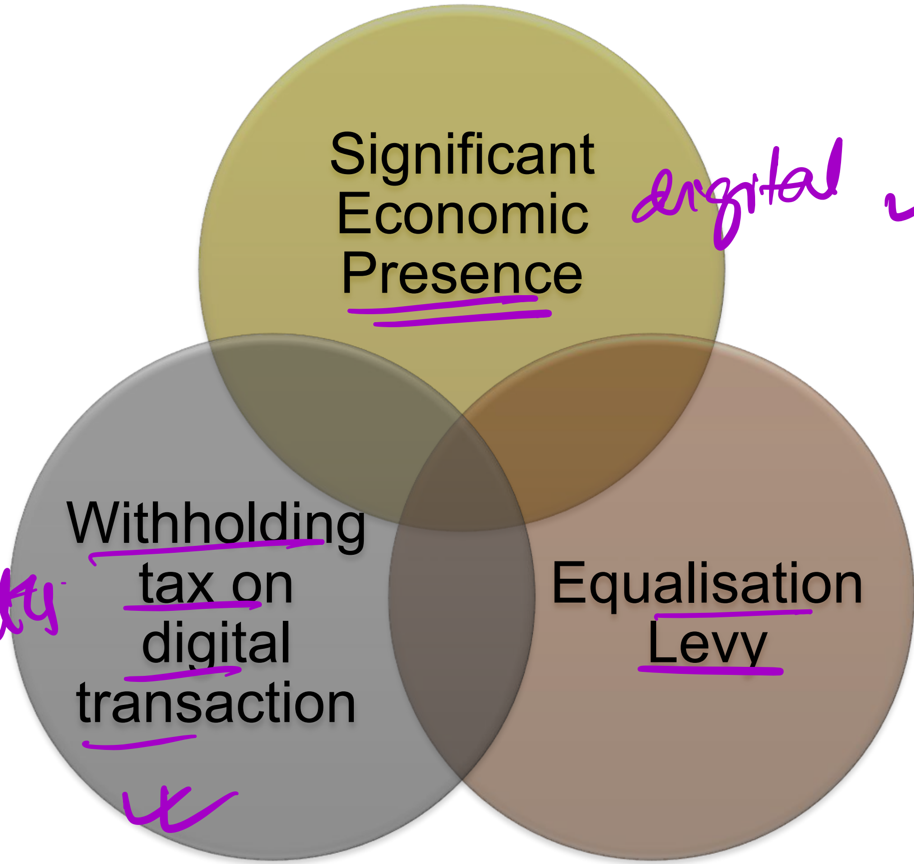
DTAA

OECD / G20

Addressing the Tax Challenges Arising from the Digitalisation of the Economy

July 2013	OECD/G20 FM launched an Action Plan on BEPS
October 2015	BEPS AP 1 – Addressing Tax Challenges of Digital Economy
2018-2019	Interim Reports, Policy Note, Public Consultation
May 2019	Programme of Work to Develop a Consensus Solution - Inclusive Framework on BEPS
January 2020	Inclusive Framework on BEPS on the Two-Pillar Approach
October 2020	Blueprints of Pillar One and Pillar Two, and the Economic Impact Assessment.
October 2021	Statement on a Two-Pillar Solution - over 135 countries and jurisdictions joined the Two-Pillar Solution to reform international taxation rules and ensure that MNEs pay a fair share of tax wherever they operate
December 2021	Global Anti-Base Erosion Model Rules (Pillar Two)

G20/ OECD BEPS AP 1 – Probable Solutions



digital

FTS | Royalty

India – Addressing digital economy tax challenges

February 2016	CBDT Committee - Report on Equalisation Levy
June 2016	Introduction of EL 1.0 and EL Rules in FA 2016
April 2019	Concept of SEP introduced in business connection vide FA 2018 Draft Profit Attribution Rules
April 2020	EL 2.0 introduced-on non-resident ECO for providing or facilitating e-commerce supply or services SEP provisions deferred Explanation on profits attributable to “operations carried out in India” Introduced in the Act* TDS u/s 194-O introduced on ECO on payments made for sales facilitated by them
April 2021	Certain amendments made to clarify and widen the scope of EL

**covers income from a) advertisements targeting customers in India; b) data collected from person in India; c) sale using data collected from person in India or from IP address located in India]*

Committee Report – Payments to be covered under EL

i. **online advertising or any services**, rights or use of software **for online advertising**, including advertising on radio & television;

ii. **digital advertising space;**

iii. designing, creating, hosting or maintenance of website;

iv. digital space for website, advertising, e-mails, online computing, blogs, online content, online data or any other online facility;

v. any provision, facility or service for uploading, storing or distribution of digital content;

vi. online **collection or processing of data related to online users in India**;

vii. **any facility or service for online sale of goods or services** or collecting online payments;

viii. development or maintenance of participative online networks;

ix. use or right to use or download online music, online movies, online games, online books or online software, without a right to make and distribute any copies thereof;

x. online news, online search, online maps or global positioning system applications;

xi. online software applications accessed or downloaded through internet or telecommunication networks;

xii. online software computing facility of any kind for any purpose; and

xiii. reimbursement of expenses of a nature that are included in any of the above.

Equalisation Levy in India - Addressing Tax Challenges of Digitalisation of Economy

EL 1.0 Ch VIII (sec 160 to 177)

separate tax

Equalisation Levy

- *Specified Services@6%*
- *E-Commerce Supply or Services @ 2%*

FA, 2016

Not a tax on income → transaction tax:

- **Section 10(50)** of the Act - Exemption from income-tax on income which is chargeable to EL
- **Section 40(a)(ib)** of the Act - Disallowing business expense on account of non deduction of EL 1.0
- **Section 9(1)(i)** – **Significant Economic Presence** of Non-Resident included in Business Connection

  (a) *Transaction or transactions of a non-resident with any person in India > Rs 2 Cr (in aggregate) during the PY; OR*

  (b) *systematic and continuous soliciting of business activities or engaging in interaction with > 3 Lakh users in India*

  whether or not—

  (i) the agreement 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:

TDS.

EL on Specified Services (EL 1.0) – Illustration

NR SP

Non - Resident

- In case of PE in India, specified service not effectively connected with such PE

Specified services

Sped serv

Deduct EL @ 6% on aggregate consideration > Rs. 1 lakh in PY

Person

Serv. Reci.

- Resident OR Non-resident having a PE in India

AND

- Service is not taken for personal use (i.e. for the purpose of business or profession)

Deduct the EL @ 6%

Govt.

- **Specified services** means:
  - a) **online** advertisement;
  - b) any provision for digital advertising space; or
  - c) any other facility or service for the purpose of online advertisement;
  - d) any other service notified by the Central Govt.
- Excludes the consideration, which are taxable as royalty or FTS in India under the Act or DTAA's of India
- "**online**" means a facility or service or right or benefit or access that is obtained through the internet **or any other form of digital or telecommunication network**.

EL – Compliances

Compliances

- Payment Due date - 7th day of the immediately following month (Quarterly payment for EI 2.0)
- Furnishing of Statement in Form 1 on or before 30th June of the next FY
- Processing of Statement within 1 year from end of FY in which Form 1 is furnished - Intimation in Form 2

Consequences of non-compliances/ Appeal

- Interest @ 1% p.m. for delayed payment
- Penalty for failure to deduct levy - Amount equivalent to EL
- Penalty for failure to pay the levy after deduction - Rs. 1,000 for every day (max. amt. = EL)
- Penalty for failure to furnish statement – Rs. 100 for each day
- If false statement furnished – Imprisonment of a term up to 3 years and with fine
- Appeals only in respect of penalty

Deductibility of expenditure

- Disallowance of expenses, if EL not deducted or after deduction, not paid upto ROI filing due date;
- Allowance in year in which EL deducted/ paid

ECO Supply or Services (EL 2.0) – Illustration

Govt as EL 2.0.

@ 2%.

Pay EL @ 2% of consideration if Sales, turnover or gross receipts > Rs. 2 Cr during the PY

Non – Resident ECO

SP

- In case of PE in India, e-commerce supply or services is not effectively connected with such PE
- Excludes consideration for goods owned or service provided by a person resident in India

Consideration received/ receivable

E-commerce supply or services made or provided or facilitated

Buyer of Goods / Service recipient

1 Person resident in India

2 Non-resident in **specified circumstances**

3 Person using IP address located in India

"specified circumstances" means—

(i) For advt. which targets a customer resident in India or a customer who accesses the advt. through IP address located in India; and

(ii) For data collected from a person who is resident in India or from a person who uses IP address located in India

EL on E-commerce supply or services (EL 2.0)

- **ECO** means a non-resident who owns, operates or manages *digital or electronic facility or platform* for online sale of goods or online provision of services or both.

- **E-commerce supply or services** – Means:
  - ✓ **online sale of goods** owned by the ECO; or
  - ✓ **online provision of services** by the ECO; or
  - ✓ online sale of goods or provision of services or both, facilitated by the ECO; or
  - ✓ any combination of the above activities.

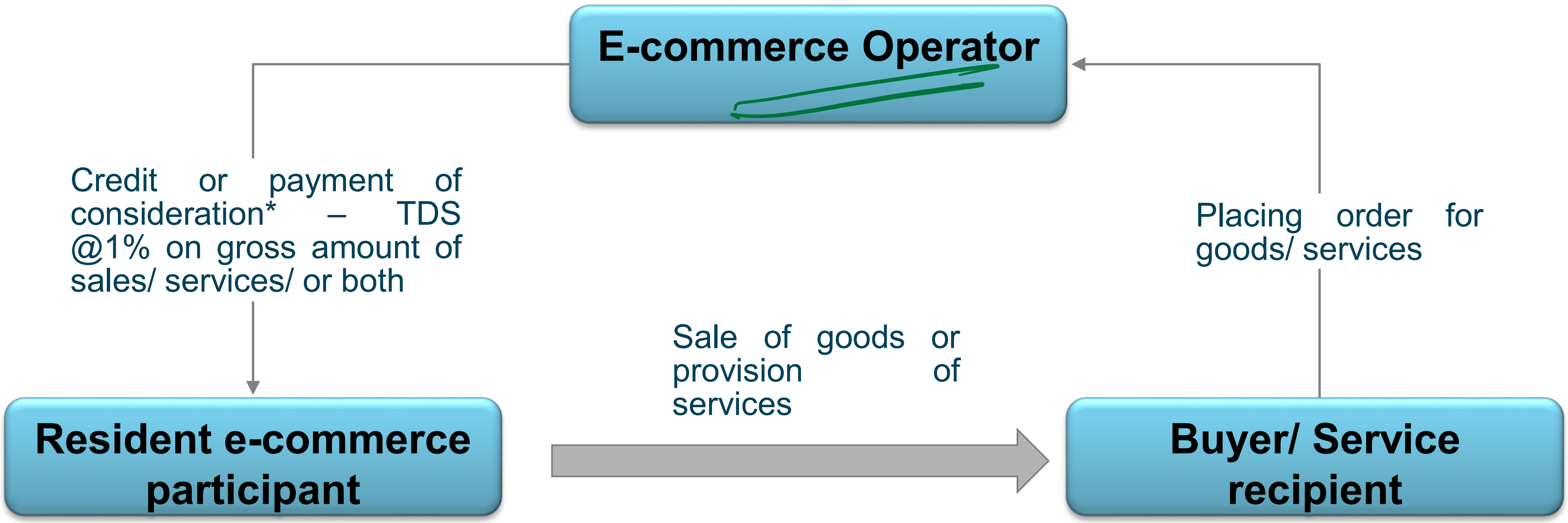
- '***online sale of goods***' and '***online provision of services***' shall include one or more of the following online activities:
  - ✓ acceptance of offer for sale; or
  - ✓ placing of purchase order; or
  - ✓ acceptance of the purchase order; or
  - ✓ payment of consideration; or
  - ✓ supply of goods or provision of services, partly or wholly.

- "**online**" means a facility or service or right or benefit or access that is obtained through the internet **or any other form of digital or telecommunication network**.

Interpretation Issues

- Different from Withholding Tax
- **Akin to "deemed profit" taxation (irrespective of actual profit or losses)**
- **Outside Income-tax Act** - It is not a tax on income, as it is levied on payments
- **Seeking refund of EL** paid when the consideration is later held to be taxable as royalty/ FTS in appeal
- **Non availability of FTC**
- Digital or electronic facility or platform not defined
- Technological challenges in locating IP address

TDS on e-commerce transactions w.e.f. 01 Oct 2020



No TDS where –

- ✓ E-commerce participant is an Individual or HUF, and furnishes PAN or Aadhaar card
- ✓ Gross amount of sale or services or both during the PY < 5 lakh

**Consideration – Includes any payment made by a purchaser of goods or recipient of services directly to an e-commerce participant*

In case e-commerce participant does not furnish his PAN/ Aadhaar card, TDS to be deducted at 5% (Section 206AA)

Services includes FTS and fees for "professional services", as defined in the Explanation to section 194J.

US Retaliation and Status on EL 2.0

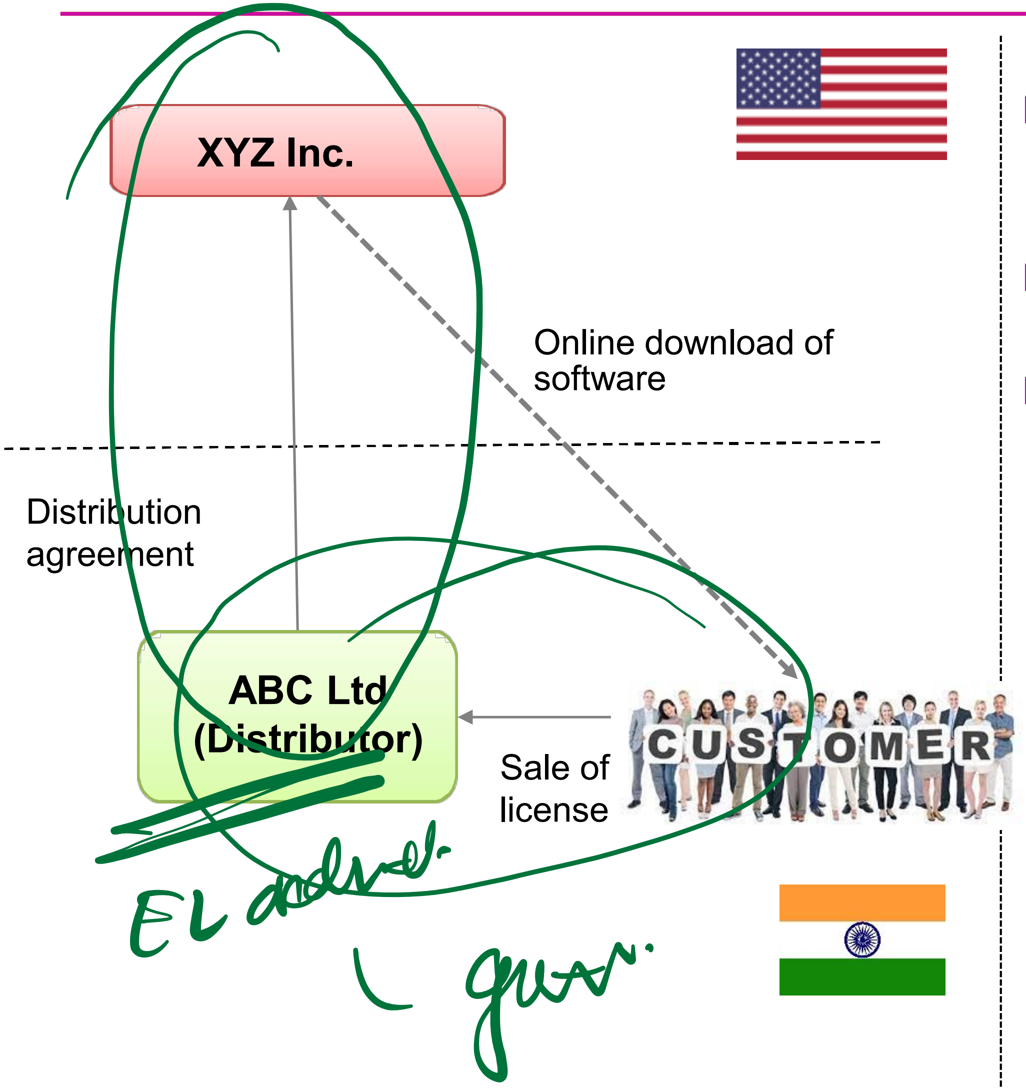
- Under Section 301 of Trade Act of 1974, USTR initiated investigations into digital service taxes charged by different countries (Austria, France, Italy, Spain, Turkey, UK) including India's EL more particularly EL 2.0.
- Post the investigations, it concluded that EL 2.0 was unreasonable, discriminatory, and restrictive – impacting predominantly US commerce.
- Consequently, the USTR announced it would levy tariff on certain imports from India (among other countries).
- Post signing of ***'Statement on a Two-Pillar Solution'*** a political compromise was reached between the countries and USA, and a joint statement (October 21 Joint Statement) was issued.
- The countries have agreed that as part of Pillar 1, they will withdraw all Unilateral Measures and refrain from imposing new Unilateral Measures.
- However, any excess taxes accrued to DST countries with respect to their existing Unilateral Measures during a defined period before Pillar 1 takes effect (i.e. exceed the tax due under Pillar 1) will be creditable against the portion of the corporate income tax liability under Pillar 1 in these countries, respectively.
- On November 24, 2021, India and USA concluded an agreement on the same terms (supra) on transitional approach to existing unilateral measures while implementing Pillar 1. In effect, India will continue to impose the EL 2.0 until the implementation of Pillar one or March 31, 2024, whichever is earlier.

Two-Pillar Solution

KEY ELEMENTS OF THE TWO-PILLAR SOLUTION

Pillar One	Pillar Two
Taxing rights over 25% of the residual profit of the largest and most profitable MNEs would be re-allocated to the jurisdictions where the customers and users of those MNEs are located	GloBE rules provide a global minimum tax of 15% on all MNEs with annual revenue over 750 million euros
Tax certainty through mandatory and binding dispute resolution, with an elective regime to accommodate certain low-capacity countries	Requirement for all jurisdictions that apply a nominal corporate income tax rate below 9% to interest, royalties and a defined set of other payments to implement the "Subject to Tax Rule" into their bilateral treaties with developing Inclusive Framework members when requested to, so that their tax treaties cannot be abused.
Removal and standstill of Digital Services Taxes and other relevant, similar measures	Carve-out to accommodate tax incentives for substantial business activities
The establishment of a simplified and streamlined approach to the application of the arm's length principle in specific circumstances, with a particular focus on the needs of low capacity countries.	

Case study – Software distribution



- Whether consideration paid constitutes Royalty?
- Applicability of EL
- Is TDS/WHT applicable in respect of payments made to XYZ Inc?

9(1)(vi) – Royalty.

Case study – Services

PQR Japan

Advisory services

a) Through emails

b) On zoom calls

c) Access to online database by payment of subscription fee

RST India

Assuming the turnover of PQR Japan from India is more than 2 cr

- Characterisation of payments
  - FTS
  - Royalty
  - EL
- EL applicability
  - Whether F.Co would qualify as a e-commerce operator
- Applicability of Section 195 on payments made by RST India

EL 1.0 → Recipient payment
2.0 → NR Co pay

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ONLINE

EL 2.0

EL 2.0

FTS / Royalty

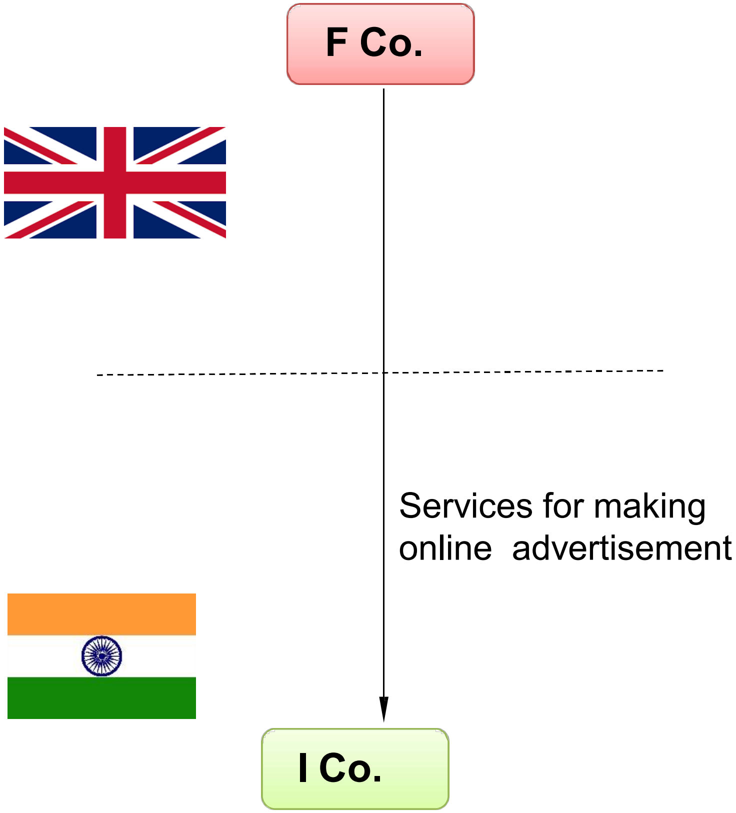
ITA

Overridden

DTAA

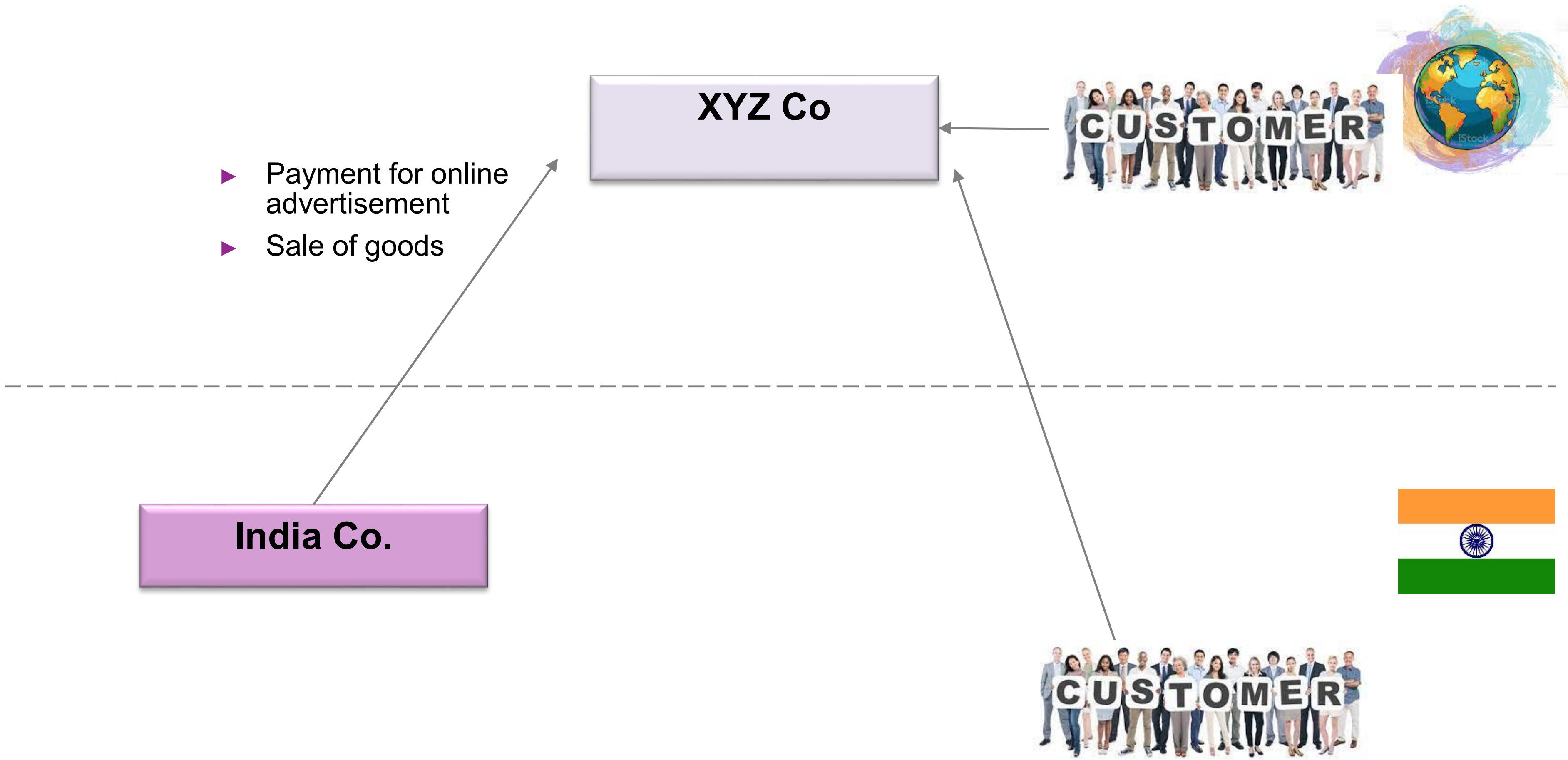
Sep.

Case study – Making Online advertisements



- Characterisation of payments
- Applicability of EL 1.0 on payment to F Co.?
- Applicability of EL 2.0
- Applicability of Section 195

Case Study – Market place & Inventory model



Case Study – Bundled services

- Creation of e-commerce platform for sale of goods
- Payment gateway services
- Transportation management services

Shopify Inc.

India Co.

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