Digital Economy and Taxation

P.SELVAGANESH, IRS
PRINCIPAL COMMISSIONER
INCOME TAX

GRATEFUL ACKNOWLEDGEMENT TO

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Addl. Director of Income Tax (Inv),
Chennai

JAN 2021

ECOMMERCE ACTIVITY OVERVIEW

PERCENTAGE OF INTERNET USERS AGED 16 TO 64 WHO REPORT PERFORMING EACH ACTIVITY IN THE PAST MONTH

SEARCHED ONLINE FOR A PRODUCT OR SERVICE TO BUY (ANY DEVICE)	VISITED AN ONLINE RETAIL SITE OR STORE (ANY DEVICE)	USED A SHOPPING APP ON A MOBILE PHONE OR ON A TABLET	PURCHASED A PRODUCT ONLINE (ANY DEVICE)	PURCHASED A PRODUCT ONLINE VIA A MOBILE PHONE
81.5%	90.4%	69.4%	76.8%	55.4%

SOURCE: GWI (Q3 2020). FIGURES REPRESENT THE FINDINGS OF A BROAD SURVEY OF INTERNET USERS AGED 16 TO 64. SEE GLOBALWEBINDEX.COM FOR MORE DETAILS.

JAN 2021

GLOBAL ECOMMERCE SPEND BY CATEGORY

THE TOTAL AMOUNT SPENT IN CONSUMER ECOMMERCE CATEGORIES AROUND THE WORLD IN 2020, IN U.S. DOLLARS

CHANGES TO CATEGORY DEFINITIONS AND REVISIONS TO HISTORICAL FIGURES MEAN VALUES ARE NOT COMPARABLE WITH THOSE PUBLISHED IN PREVIOUS REPORTS

TRAVEL, MOBILITY, & ACCOMMODATION*	FASHION & BEAUTY	ELECTRONICS & PHYSICAL MEDIA	FOOD & PERSONAL CARE
$593.6 BILLION	$665.6 BILLION	$501.8 BILLION	$413.8 BILLION

FURNITURE & APPLIANCES	TOYS, DIY & HOBBIES	DIGITAL MUSIC	VIDEO GAMES
$330.9 BILLION	$525.6 BILLION	$21.73 BILLION	$135.8 BILLION

SOURCES: STATISTA MARKET OUTLOOKS FOR E-COMMERCE, TRAVEL, MOBILITY, AND DIGITAL MEDIA (ACCESSED JAN 2021). FIGURES BASED ON ESTIMATES OF FULL-YEAR ONLINE CONSUMER SPEND FOR 2020, EXCLUDING B2B SPEND. SEE STATISTA.COM/OUTLOOK/DIGITAL-MARKETS FOR MORE DETAILS. **NOTES:** DATA FOR DIGITAL MUSIC AND VIDEO GAMES INCLUDE STREAMING. **COMPARABILITY ADVISORY:** BASE CHANGES. DEFINITIONS FOR CATEGORIES DENOTED BY (*) HAVE ALSO CHANGED. DATA MAY NOT BE DIRECTLY COMPARABLE WITH PREVIOUS REPORTS.

India's digital consumer base is the second largest in the world

Size of India's digital economy

110,00,00,000

MOBILE PHONES

62,40,00,000

INTERNET SUBSCRIPTIONS

$ 200,000,000,000

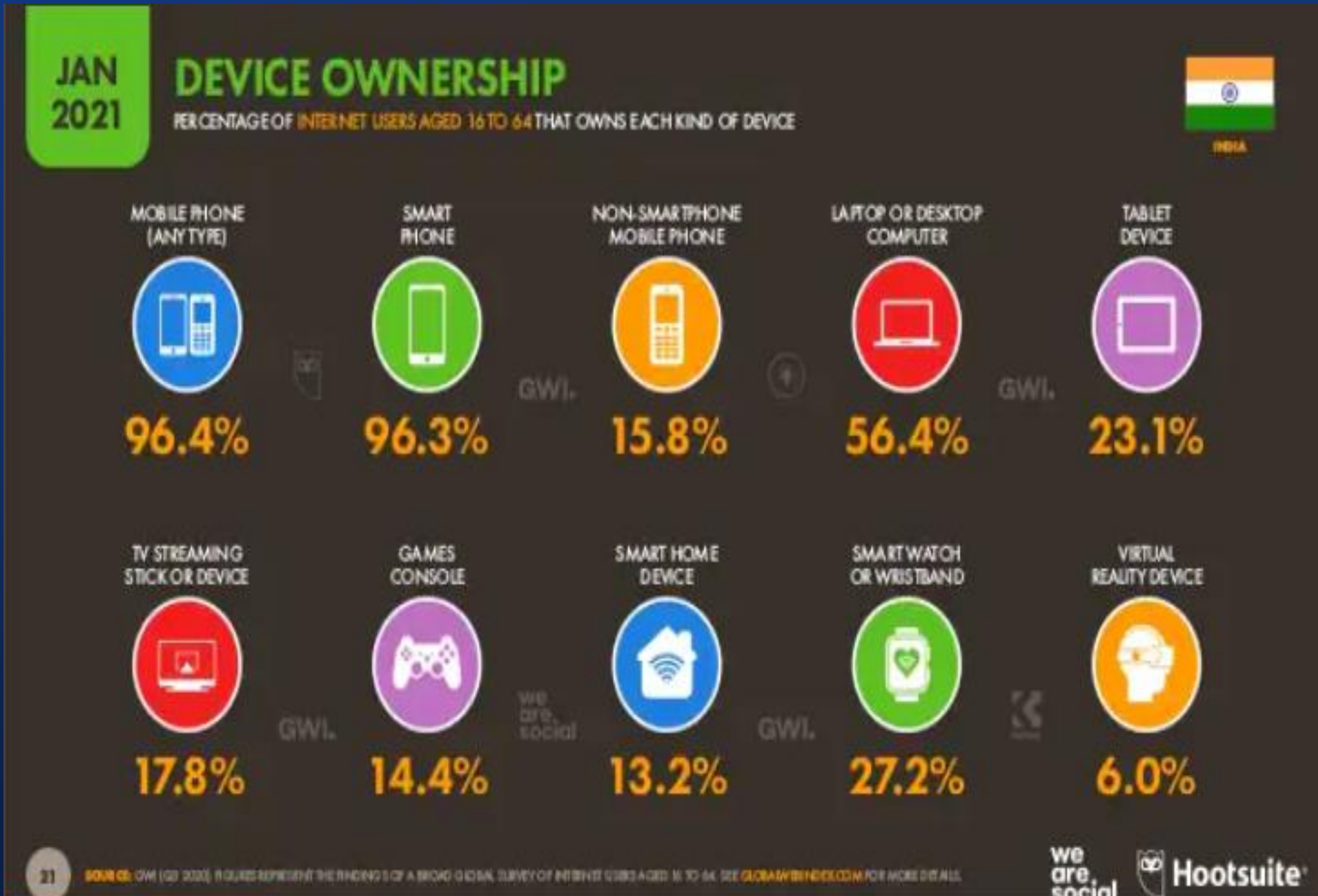
Economic value of Digital Economy

12.3 BILLION

APP DOWNLOADS IN 2018

448 MILLION

ACTIVE SOCIAL MEDIA USERS


JAN 2021
DEVICE OWNERSHIP
PERCENTAGE OF INTERNET USERS AGED 16 TO 64 THAT OWNS EACH KIND OF DEVICE
INDIA
MOBILE PHONE (ANY TYPE)
96.4%
SMART PHONE
96.3%
NON-SMARTPHONE MOBILE PHONE
15.8%
LAPTOP OR DESKTOP COMPUTER
56.4%
TABLET DEVICE
23.1%
TV STREAMING STICK OR DEVICE
17.8%
GAMES CONSOLE
14.4%
SMART HOME DEVICE
13.2%
SMARTWATCH OR WRISTBAND
27.2%
VIRTUAL REALITY DEVICE
6.0%
GWI.
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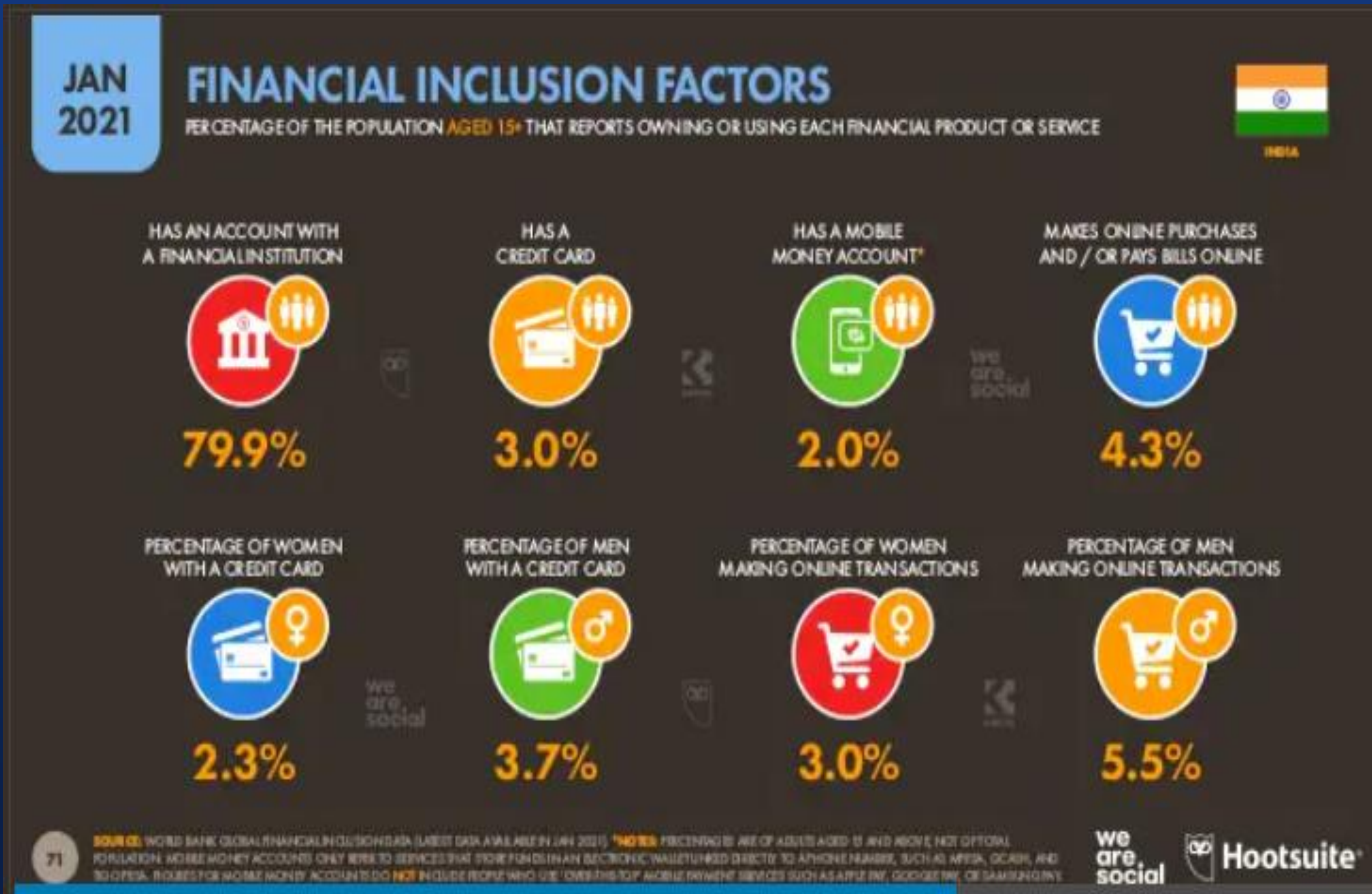
JAN 2021
FINANCIAL INCLUSION FACTORS
PERCENTAGE OF THE POPULATION AGED 15+ THAT REPORTS OWNING OR USING EACH FINANCIAL PRODUCT OR SERVICE
HAS AN ACCOUNT WITH A FINANCIAL INSTITUTION
79.9%
HAS A CREDIT CARD
3.0%
HAS A MOBILE MONEY ACCOUNT*
2.0%
MAKES ONLINE PURCHASES AND / OR PAYS BILLS ONLINE
4.3%
PERCENTAGE OF WOMEN WITH A CREDIT CARD
2.3%
PERCENTAGE OF MEN WITH A CREDIT CARD
3.7%
PERCENTAGE OF WOMEN MAKING ONLINE TRANSACTIONS
3.0%
PERCENTAGE OF MEN MAKING ONLINE TRANSACTIONS
5.5%
71
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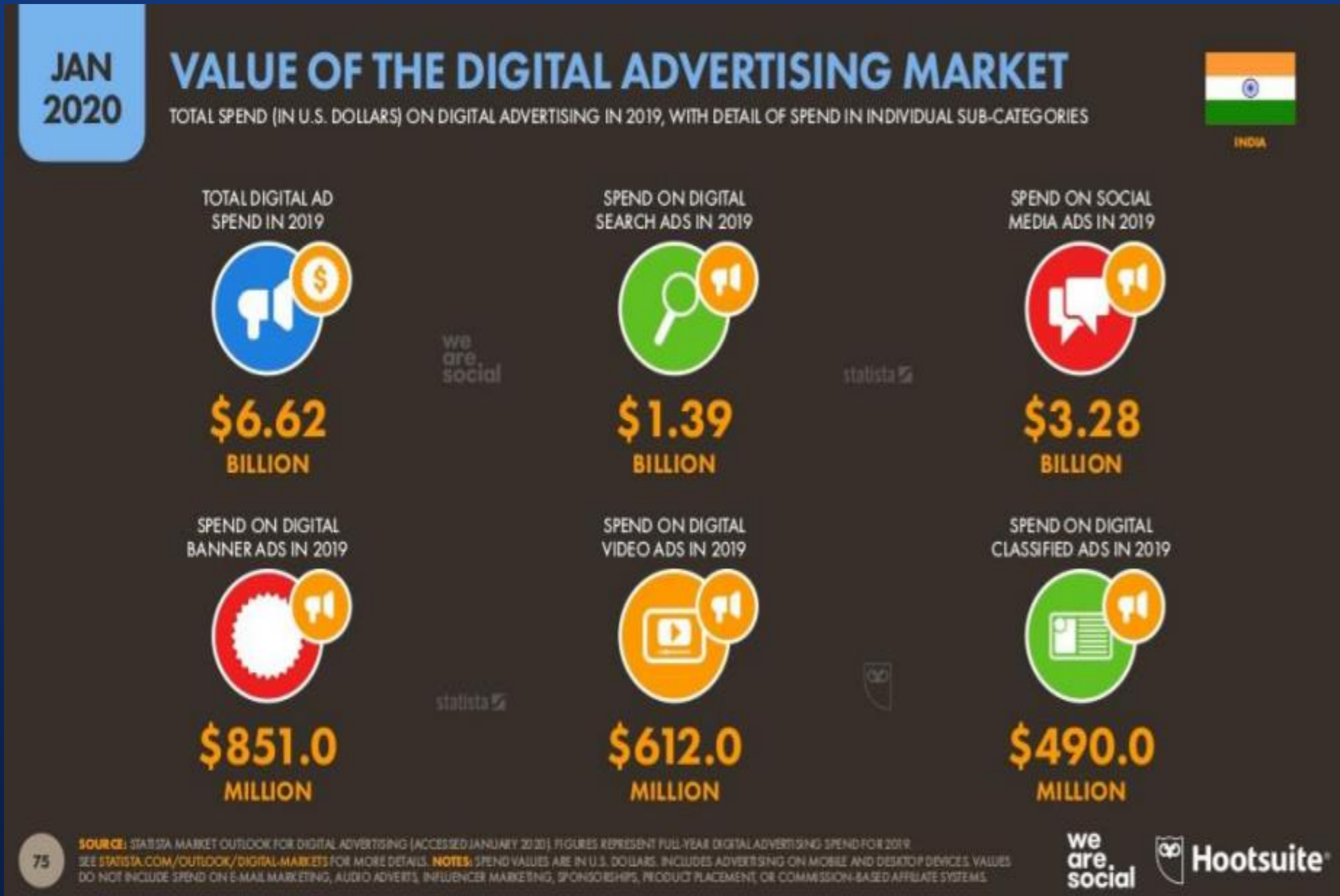
JAN 2020
VALUE OF THE DIGITAL ADVERTISING MARKET
TOTAL SPEND (IN U.S. DOLLARS) ON DIGITAL ADVERTISING IN 2019, WITH DETAIL OF SPEND IN INDIVIDUAL SUB-CATEGORIES
INDIA
TOTAL DIGITAL AD SPEND IN 2019
$6.62 BILLION
SPEND ON DIGITAL SEARCH ADS IN 2019
$1.39 BILLION
SPEND ON SOCIAL MEDIA ADS IN 2019
$3.28 BILLION
SPEND ON DIGITAL BANNER ADS IN 2019
$851.0 MILLION
SPEND ON DIGITAL VIDEO ADS IN 2019
$612.0 MILLION
SPEND ON DIGITAL CLASSIFIED ADS IN 2019
$490.0 MILLION
75
SOURCE: STATISTA MARKET OUTLOOK FOR DIGITAL ADVERTISING (ACCESSED JANUARY 2020). FIGURES REPRESENT FULL-YEAR DIGITAL ADVERTISING SPEND FOR 2019. SEE STATISTA.COM/OUTLOOK/DIGITAL-MARKETS FOR MORE DETAILS. NOTES: SPEND VALUES ARE IN U.S. DOLLARS. INCLUDES ADVERTISING ON MOBILE AND DESKTOP DEVICES. VALUES DO NOT INCLUDE SPEND ON E-MAIL MARKETING, AUDIO ADVERTS, INFLUENCER MARKETING, SPONSORSHIPS, PRODUCT PLACEMENT, OR COMMISSION-BASED AFFILIATE SYSTEMS.
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JAN 2020
DIGITAL ADVERTISING MARKET: VALUE GROWTH
YEAR-ON-YEAR CHANGE IN THE VALUE OF THE DIGITAL ADVERTISING MARKET BETWEEN 2018 AND 2019
INDIA
YEAR-ON-YEAR CHANGE IN TOTAL DIGITAL AD SPEND
+20%
YEAR-ON-YEAR CHANGE IN DIGITAL SEARCH AD SPEND
+26%
YEAR-ON-YEAR CHANGE IN SOCIAL MEDIA AD SPEND
+20%
YEAR-ON-YEAR CHANGE IN DIGITAL BANNER AD SPEND
+19%
YEAR-ON-YEAR CHANGE IN DIGITAL VIDEO AD SPEND
+22%
YEAR-ON-YEAR CHANGE IN DIGITAL CLASSIFIED AD SPEND
+5.8%
SOURCE: STATISTA MARKET OUTLOOK FOR DIGITAL ADVERTISING (ACCESSED JANUARY 2020). FIGURES COMPARE FULL-YEAR DIGITAL ADVERTISING SPEND IN 2019 TO EQUIVALENT DATA FOR 2018. SEE STATISTA.COM/OUTLOOK/DIGITAL-MARKETS FOR MORE DETAILS. NOTES: INCLUDES ADVERTISING ON MOBILE AND DESKTOP DEVICES. VALUES DO NOT INCLUDE SPEND ON E-MAIL MARKETING, AUDIO ADVERTS, INFLUENCER MARKETING, SPONSORSHIPS, PRODUCT PLACEMENT, OR COMMISSION-BASED AFFILIATE SYSTEMS.
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JAN 2021
ECOMMERCE ACTIVITY OVERVIEW
PERCENTAGE OF INTERNET USERS AGED 16 TO 64 THAT HAS PERFORMED EACH ACTIVITY IN THE PAST MONTH
INDIA
SEARCHED ONLINE FOR A PRODUCT OR SERVICE TO BUY (ANY DEVICE)
79.3%
VISITED AN ONLINE RETAIL SITE OR STORE (ANY DEVICE)
95.3%
USED A SHOPPING APP ON A MOBILE PHONE OR ON A TABLET
72.2%
PURCHASED A PRODUCT ONLINE (ANY DEVICE)
76.7%
PURCHASED A PRODUCT ONLINE VIA A MOBILE PHONE
57.3%
72
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JAN 2021
ECOMMERCE SPEND BY CATEGORY
THE TOTAL AMOUNT SPENT IN CONSUMER ECOMMERCE CATEGORIES IN 2020, IN U.S. DOLLARS
INDIA
TRAVEL, MOBILITY, & ACCOMMODATION*
$35.18 BILLION
FASHION & BEAUTY
$13.16 BILLION
ELECTRONICS & PHYSICAL MEDIA
$14.85 BILLION
FOOD & PERSONAL CARE
$10.48 BILLION
FURNITURE & APPLIANCES
$2.62 BILLION
TOYS, DIY & HOBBIES
$4.89 BILLION
DIGITAL MUSIC
$557.8 MILLION
VIDEO GAMES
$4.14 BILLION
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Type of Digital Content people pay for

- Search engine- Premium web service
- Social media - Ads
- Online news and events
- Live streaming
- Watching movies, TV Shows and videos
- Accessing online utilities, ride hailing and food delivery
- Listening and downloading Music
- Education and study related activities
- Gaming
- Finance and trading
- Mobile App, in-App purchases

Digital Disruption induced by COVID pandemic

MAJOR MARKET SEGMENTS

- Business to business (B2B)
- Business to consumer(B2C)
- Consumer to consumer(C2C)
- Consumer to business(C2B)

ELEMENTS OF E-COMMERCE TRANSACTION

In an e-commerce transaction, all the traditional elements of commerce exist though with some differences. The following elements are ordinarily present in an e-commerce transaction:

- ✓ A product or service;
- ✓ a place, namely, a website, that displays the products/services and where a business transaction takes place;
- ✓ way for the people to visit the place (Web browser);
- ✓ a way to accept orders, e.g., an on-line form;
- ✓ a way to accept consideration for the transaction – e.g., through electronic mode of payment.

REVENUE RECOGNITION

The main sources of revenue of e-commerce companies presently include:

- Merchandising activities;
- Membership and subscription;
- Advertising services; and
- Other services like web-hosting, content selling, etc.

02

Domestic & International Tax Rules

Taxation of Non-residents

- Basis for allocation of taxing rights:
  - Origin of income/ wealth (source)
  - Situs of Income/wealth
  - Enforcement of rights to wealth or income; and
  - Place of residence or domicile of the person entitled to wealth or income.

Section 5 – scope of Total income

Income is classified as:

- Income accrue or arise or deemed to accrue or arise in India
- Income received or is deemed to be received in India

Income which	Resident	Resident, not Ordinarily Resident (RNOR)	Non Resident (NR)
Accrues or arises in India	✓	✓	✓
Is deemed to accrue or arise in India	✓	✓	✓
Does not Accrue or Arise in India but received/deemed received	✓	✓	✓
Does not Accrue or Arise in India and not received /deemed received	✓	✓ ⊗	⊗

RNOR* Whether derived from a business controlled in or a profession setup in India

S.9 Income deemed to accrue or arise in India

- Income arising, directly or indirectly, through or from a business connection in India, which is reasonably attributable to operations carried out by foreign company in India.
- Concept of "BUSINESS CONNECTION" in India is wider than the PE threshold in DTCs.
  - Includes Dependent Agents (who has authority to secure contracts; maintain stock; or secures orders)
- Royalty- whether or not the location of such right, property or information is in India
- Fees for Tech Services – whether or not the NR has a residence or place of business or business connection in India; or the services are rendered in India.

Double Taxation Avoidance Agreements

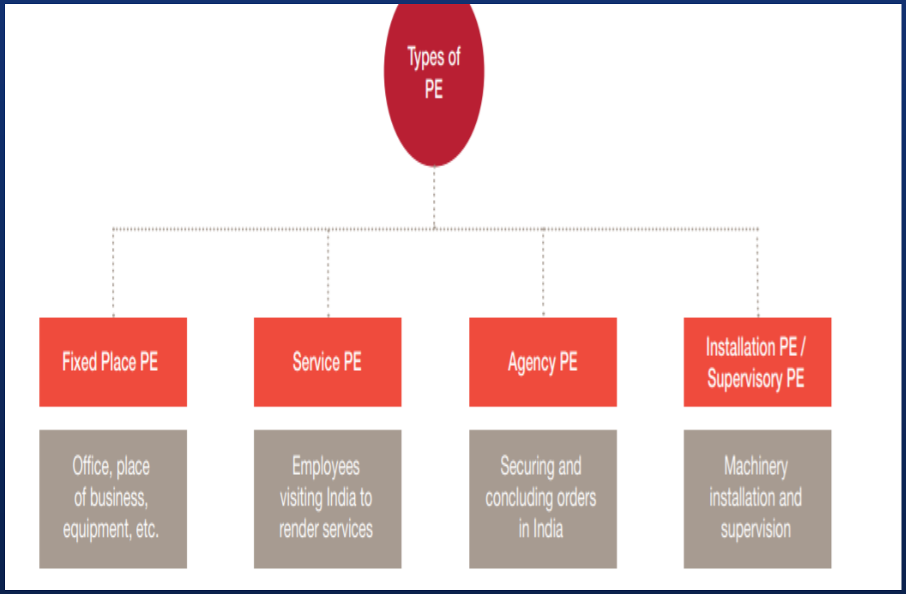
- On the source of income, physical nexus between business income and the place of activity is given prime importance (PE threshold).
- Fixed place of business mandatory to tax at source
- Best suited for brick and mortar businesses.
- Solely focussed on supply side factors for wealth creation
- Completely ignored demand side factors

Permanent Establishment

Both OECD and UN models are similar

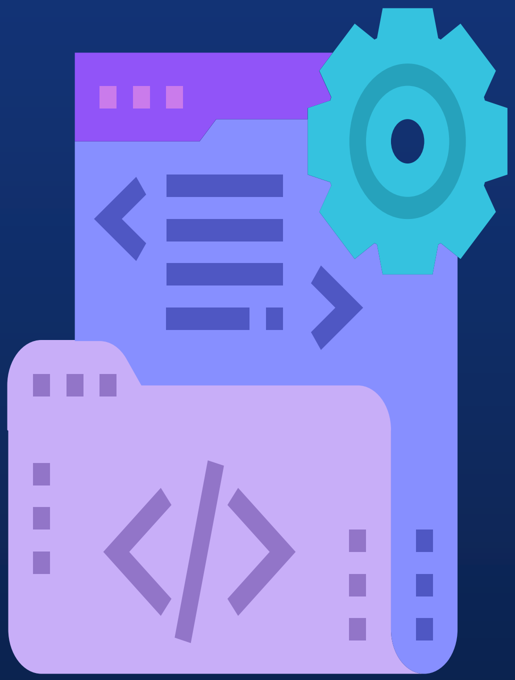
- Threshold on the level of economic presence
- Profits attributable to PE is taxed

- Is economic presence necessary to conduct substantial business activity in digital era?
- Does a fixed place of business in source country essential?



03

TAX CHALLENGES OF DIGITAL ECONOMY



Digital Economy

- Characterisation of digital economy:
  - Cross-jurisdictional scale without mass;
  - Mobility -Unparalleled reliance on intangibles (digital and telecommunication networks);
  - Massive use of data (esp. personal data) and user participation;
  - Network effects;
  - User generated content; and
  - Widespread adoption of multi-sided business models capturing value from externalities generated by free products
    - E-commerce, online advertising, cloud computing, IOT, robotics

Tax challenges

- Less or Zero Nexus;
- Valuation of data and user contribution; and
- Characterisation of income (business profits/FTS/ Royalty?)

Difficulty in determining the jurisdiction in which value creation occurs (no physical presence required)

Provision of free services financed via Big Data raises thornier issues for accounting and tax

Impossible to ring fence the digital economy as it has become mainstream.

Tax challenges

- Digital companies pay very low worldwide effective tax rate
- Business restructuring – significant presence in low tax jurisdictions – BEPS
- Value creation through remote activities but closely tied to the market and consumers.
- Currently international taxation and transfer pricing rules do not give any importance or weightage to new business models – are they "fit-to-purpose"?

Sharing and Gig economy

- Free market system
- Temporary positions – independent workers
- Short-term commitments

- Rapid rise of online platforms
- Paradigm shift in Consumer-Consumer transactions as well as B-C and B-B transactions
- Size – AirBnB is worth more than Hilton, Marriott and Intercontinental combined – same applies for Uber, Spotify….

Sharing and Gig economy - examples

- Short-term accommodation;
- transportation (taxi services, ride sharing, parking spaces);
- peer-to-peer e-commerce;
- on-demand household services (home-lunch, delivery) and on-demand professional services; and
- peer-to-peer lending and crowd-funding

Sharing and Gig economy – Tax challenges

- Issues:
  - effective taxation of platform sellers
  - No physical presence in each market
  - Identification of buyers/sellers of goods or services between individuals including self-employed

04

TAXING DIGITAL - Global Initiatives

BEPS and Taxation of digital economy

- Tax challenges of the digital economy were one of the main focus of the BEPS project of the OECD (Action Plan 1)
- Interim report (2015) partially addresses the tax challenges facing the digital economy.
- Several options were evaluated (but not recommended), including Unilateral levy in the form of Equalisation Levy (EL).

Taxation of digital economy

- India was the first country to introduce EL in 2016, through a separate legislation (not being part of the existing Income Tax Act, 1961).
- Other countries introduced similar taxes and decided to move ahead with unilateral measures to tax the digital economy
  - EU countries under the EU directive, Digital Service Tax of UK, Australia, Social Media Tax of Uganda, Digital tax of Kenya, etc.

UN sub-committee on Digital Tax

- India is a member of the sub-committee
- UN to adopt an approach independent of similar work pursued in other fora

Proposals:

- To issue guidance on
  - Tax treaty issues
  - Domestic law issues; and
  - VAT issues
- Key question: how to redefine PE, nexus rules or profit allocation

Proposals of the UN subcommittee

Conventional FAR analysis of profit attribution to a PE:

The functions performed, taking into account

- assets employed or to be employed and
- the risks assumed,

by the respective parties to the transactions;

Function of each enterprise of the group (Principal and AEs)

- contribution to the value chain

- assets – tangible and intangible

Fourth component: User Contribution

- generation of content, network effects, depth of engagement

UN sub committee - Profit attribution

- “Virtual” Permanent Establishment or SEP concept
- A new taxing right comparable to Royalty/ FTS – Article 12B
- Withholding tax regime for digital companies
- Residual profit split approach (non-routine profits)
    - Market, users, locational savings

Simplified mechanical formulary approach

SEP proposal – profit attribution based on demand side factors such as ability to pay, maintenance of markets, infrastructural networks, value creation by users, facilitation of economy, law and order, income support, etc.

Article 12 B – UN Model proposal

INCOME FROM AUTOMATED DIGITAL SERVICES

1. Income from automated digital services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. 2. However, income from automated digital services arising in a Contracting State may also be taxed in the Contracting State in which it arises but the tax so charged shall not exceed ____ percent (*the percentage is to be established through bilateral negotiations*) of the gross amount of the income.

Article 12 B – UN Model (April 2021)

INCOME FROM AUTOMATED DIGITAL SERVICES (contd..)

Qualified profits shall be 30% of gross annual revenue from automated digital business segment.

If PE exists, then Article 7 or 14 may apply

Taxation on gross basis

The following services are considered to be automated digital services: - Online advertising services; - Online intermediation platform services; - Social media services; - Digital content services; - Cloud computing services; - Sale or other alienation of user data; - Standardised online teaching services.

Redefined allocation of taxing rights

- OECD/G20 Inclusive Framework on BEPS with 132 countries as its members, agreed on a multilateral, consensus based solution – "Two pillar" approach

Pillar 1 and Pillar 2

- Both these options (for the first time) recognizes two key principles:
    - physical presence to business profits is not mandatory for allocation of taxing rights
    - to pay some tax in jurisdictions where consumers or users are located (demand side factors); and
    - Digital companies to pay a minimum tax globally

Redefined allocation of taxing rights

- Basic principles:
  - Modify rules of profit allocation and nexus based on
    - user contribution/participation;
    - marketing intangibles; or
    - Significant Economic presence
  - Rethinking of traditional nexus concept in different ways and different extents, but goes beyond the limitations on taxing rights determined by physical presence.

Redefined allocation of taxing rights

- Pillar One: expands taxing rights of Market Jurisdictions where active and sustained participation of a business in those jurisdictions.

Amount A: a new taxing right

- Scope: MNEs with turnover 20 billion euros and PBT above 10%
- Nexus: allocation to market country if MNE derives at least 1 million Euros from that country. A lesser threshold for smaller countries with GDP less than 40 Billion Euros.
- Quantum: 20-30% of residual profit in excess of 10% revenue (revenue based allocation key)

Pillar One (contd..)

Amount B: a fixed return for certain baseline marketing and distribution activities in line with Arm's Length Principle.

-Allocation simplified and streamlined

- Tax Certainty through effective dispute prevention and resolution is the key.
- All Digital Services Taxes to be removed.
- New international tax rules will align with the above package.
- To be incorporated in Multilateral Instrument in 2022 and will come into effect in 2023.
- Mechanism: Profit attribution based on a 3-tier mechanism and three types of taxable profit will be arrived at.

Profit attribution

User participation	Marketing Intangible	SEP
Social media platforms Search Engines Online marketplaces Online advertising Multimodal platforms	Brand and Trade name Customer Data Customer relationships Customer lists Derived from activities targeted at users	Main factor: Revenues generated Additional factors: -Existence of a user base -Volume of digital content -Billing and collection -Local language webpage
Residual Profit Split allocation: Non-routine profits after applying remuneration for routine activities on Arm's length basis; Attribute a portion to value created by Users.	Economic owner of intangibles: 1. Apply current transfer pricing rules 2. Deduce routine profit 3. Portion of residual profit to Marketing Intangibles 4. Agreed matric: sales, revenues	Fractional Apportionment method: Global profit rate to sales to divide tax base Determination of allocation keys to divide the base (sales, assets, employees and users) Weighting of allocation keys

Pillar Two

- focus on remaining BEPS issues
- Introduces global anti-base erosion rules to ensure minimum level of effective taxation.
- Domestic interlocking rules - Income Inclusion Rule (IIR) and the Undertaxed Payment Rule (UTPR) (together, the "GloBE" rules)
- Treaty-based subject-to-tax rule (STTR) which compliments the GloBE rules.
- Determine effective tax rate and impose tax on a coordinated basis

Pillar Two (Contd..)

- US' GILTI rule (Global Intangible Low Taxed Income Regime) – a Pillar Two compliant IIR.
- Scope: 750 Million Euros threshold, countries free to adopt a lesser threshold.
- Minimum rate: 15%
- International shipping regime and certain other exceptions
- STTR: minimum rate 7.5-9%
- Implementation: 2022/23
- MLI to give effect to.

Global Minimum tax and Digital Economy

- June 2021 - G-7 Finance Ministers meeting – Global Minimum Tax of at least 15%
- Proposal came from OECD in the report "Tax challenges arising from Digitalisation - Report on Pillar Two Blueprint" or "Pillar Two" report
- To end unfair tax competition (Race to the bottom)
- MNEs which are not currently subject to tax or taxed at a rate lower than the global minimum tax rate would be subject to 15%.
- Threshold: 750 Million Euros – consolidated group revenue
- Mechanism : Income Inclusion Rule (IIR) which is similar to CFC rules
- Ultimate Parent Company will include in the tax base and pay tax in that Jurisdiction

INDIA and Digital Taxation

- India introduced and expanded the scope of EL to cover e-commerce supply and services by a non-resident e-commerce operator.
- India has also introduced SEP in Article 9 and machinery provisions in Chapter XVII.
- India contributed to the UN sub-committee on digital taxation (Art.12B)

05

Equalisation Levy

Equalisation Levy 1.0

- E-commerce taxation - Finance Act, 2016 - equalization levy was introduced
- Out of Income Tax Act and is a levy. So, DTAA relief is not available.
- No tax credit on the payment of levy.
- Charge on equalization levy **@ 6 %** on the amount receivable by a **person being a non-resident from a person resident in India** carrying on business or profession or non-resident having a permanent establishment in India.
- Levy on gross basis (no deduction allowed)

Equalisation Levy 1.0 (contd...)

- Tax leviable on consideration receivable for any services specified, which means
  - online advertisement,
  - any provision for digital advertisement space or
  - any other facility of service for the purpose of online advertisement and
  - includes any other services as may be notified by the Central Government in this behalf.

Equalisation Levy 1.0

- S. 40(a)(ib) inserted into the IT Act, disallowing expense on account of non-deduction of EL.
- No requirement of a PE of the Non-resident in India (like Royalty/FTS)
- Any income which is chargeable to EQL is exempt from Indian Income-tax u/s. 10 (50). Hence there will be no double tax.
- Specified services threshold- 1 lakh in a previous year
- No levy on service received for personal use (character threshold)

Equalisation Levy 2.0

‘E-commerce supply or services’

- Online sale of goods owned by e-commerce operators
- Online provision of services provided by e-commerce operators
- Online sale of goods or provision of services or both, facilitated by e-commerce operators
- Any combination of the above mentioned activities

Equalisation Levy 2.0

E-commerce Operator – **a non-resident** who owns, operates or manages digital or electronic facility or platform for online sale of goods or provision of service or both

E-commerce supply or services rendered to:

- A person resident in India
- A non- resident in "specified circumstances"
- A person who buys goods or services using "an IP address" located in India

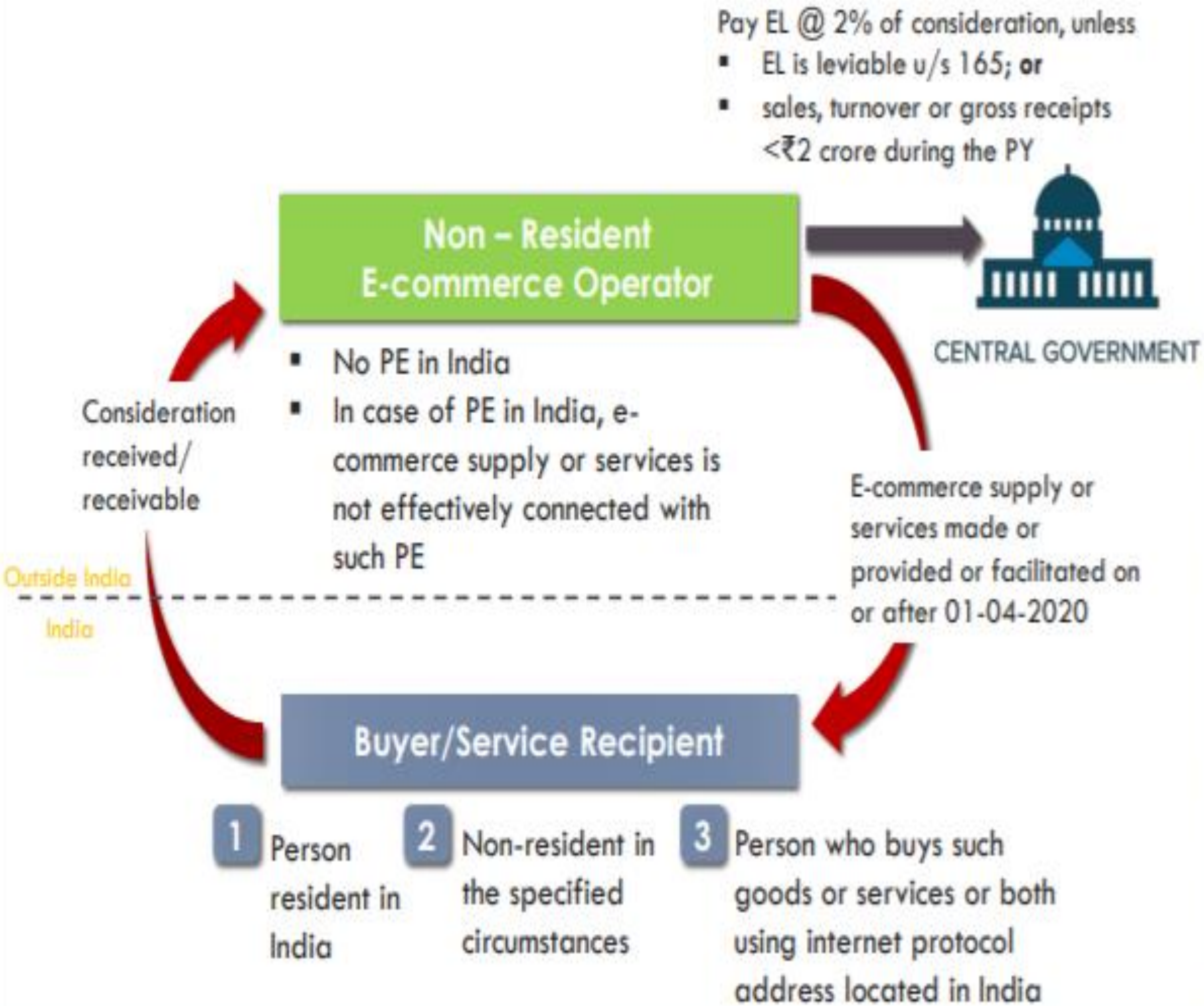
<u>Equalisation Levy 2.0 (contd..)</u>

- Specified circumstances:
  - sale of advertisement, which targets a customer, who is resident in India or a customer who accesses the advertisement through internet protocol address located in India; and
  - sale of data, collected from a person who is resident in India or from a person who uses internet protocol address located in India.’;
- Rate of Levy: **<u>2 %</u>**
- Effective date :**<u>1 April 2020</u>**

Equalisation Levy 2.0 (contd..)

- Exclusions
  - Non-resident e-commerce operators who have permanent establishments in India and ecommerce supply or services are effectively connected to those establishments
  - Cases where EL 1.0 is leviable on online advertisement and related activities
  - Cases where sales, turnover or gross receipts of the non-resident e-commerce operators from online sale or services, are less than INR 20 million during the financial year

Charging provision (S. 165A) & Defn (S. 164)



- ❑ **"E-commerce operator" (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" (ESS)** means
  - (i) **online sale** of goods owned by the e-commerce operator; or
  - (ii) **online provision of services** provided by the e-commerce operator; or
  - (iii) online sale of goods or provision of services or both, facilitated by the ecommerce operator; or
  - (iv) any combination of activities listed in clause (i), (ii) or clause (iii);

- ❑ **"Specified circumstances"** means
  - (i) **sale of advertisement**, which targets a customer, who is resident in India or a customer who accesses the advertisement through IP address located in India; and
  - (ii) **sale of data**, collected from a person who is resident in India or from a person who uses IP address located in India

Equalisation Levy 2.0 (contd…)

- Payment and compliance timelines
  - Non-resident e-commerce operators need to pay EL quarterly within the following due dates:

Quarter closing date	Due Date
30 June	7 July
30 September	7 October
31 December	7 January
31 March	31 March

  - Exemption from normal provisions of Income Tax Act, 1961.
  - Income tax provisions would not be applicable on income arising from e-commerce supply or services on or after the effective date (currently the exemption is applicable from 1 April 2021) (S.10(50) of the IT Act).

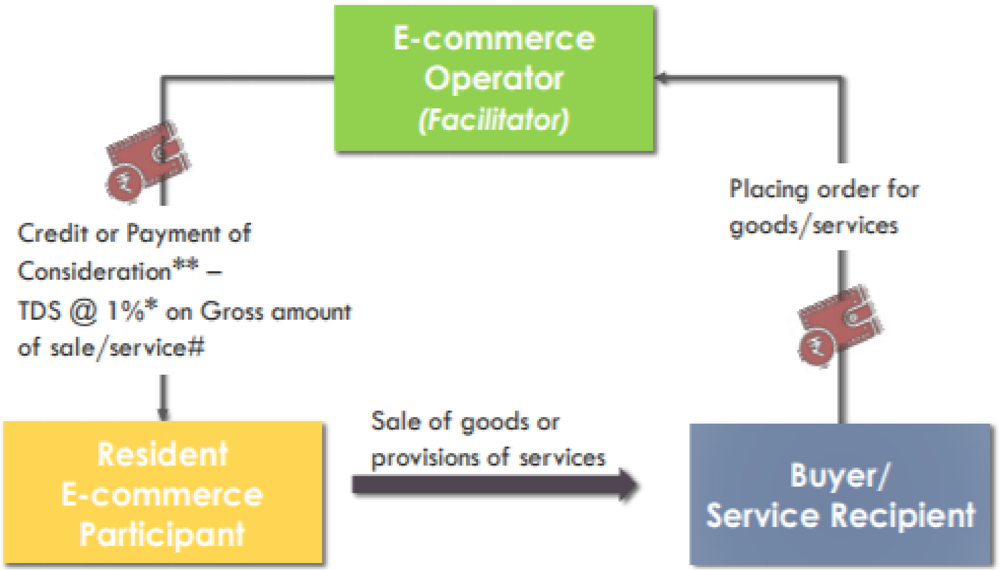
Complexity / uncertainties in EQL 2.0

- Levy is on the non-resident operator
  - How to monitor/enforce?
  - extra-territorial?
- Specified circumstances- ambiguity?
- Levy is on gross amount or commission earned by operators (esp. for facilitation of goods or services)?
- Impact of Non-discrimination article of respective DTAAs on the levy
- USTR has claimed India’s EL is discriminatory – Trade disputes?

194-O – withholding tax on specific Digital payments

- Finance Act-2020
- On what? Selling goods or services online or through an electronic facility owned, operated or managed by an ECO
- 1 % TDS
- Threshold- 5 lakhs (only for Individual and HUF)
- E-Commerce Participant must be an Indian Resident
- ECO – R or NR
- ECO to deduct

S. 194-O: TDS on E-commerce w.e.f. 1-10-2020



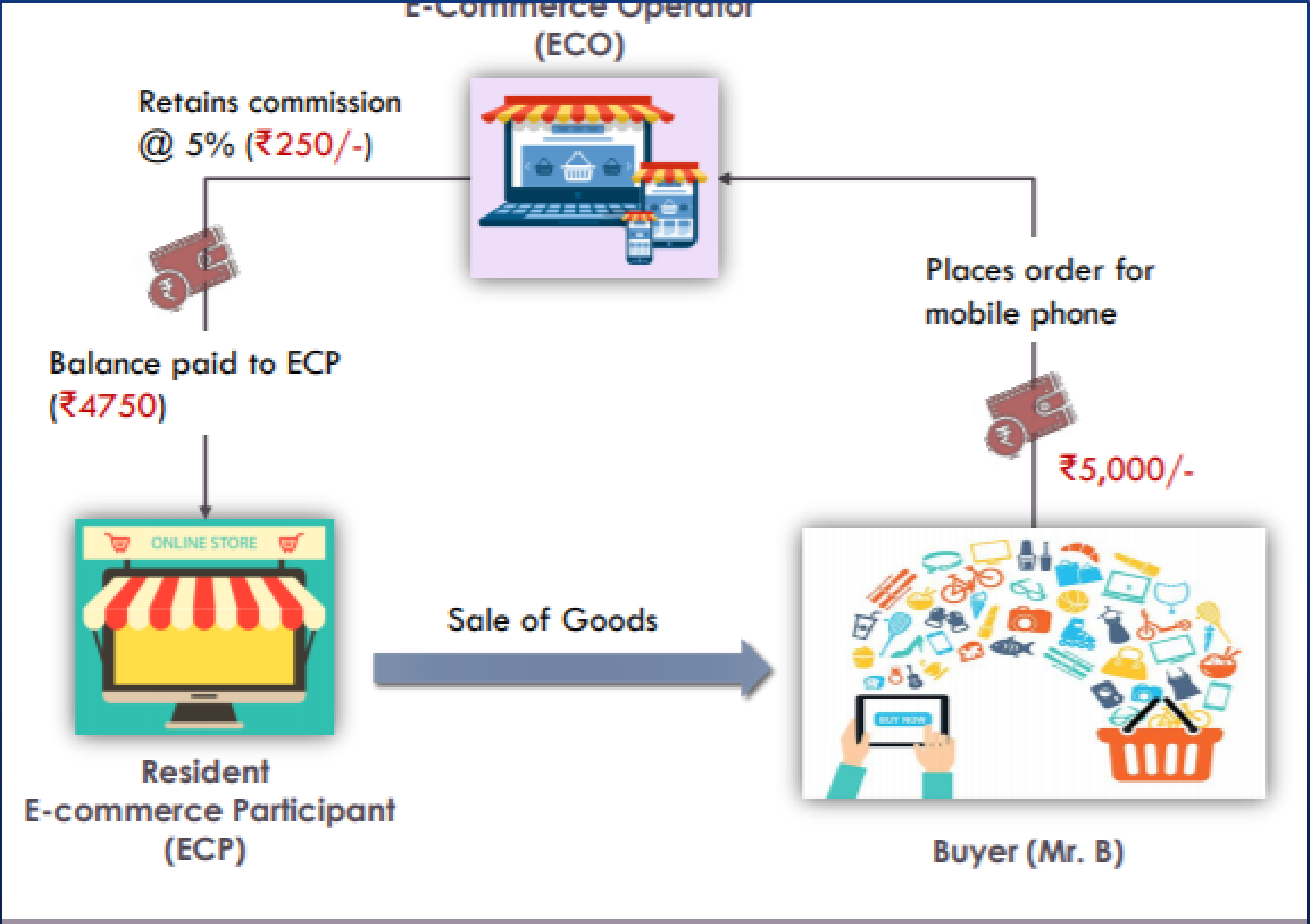
\# No TDS where –

- ECP is an individual or HUF, **and**
- Gross amount of sale or services or both during the previous year ≤ ₹ 5 lakh, **and**
- ECP has furnished his PAN or Aadhaar number to the ECO.

* No PAN of ECP – TDS @5%

**Any payment made by a purchaser of goods or recipient of services directly to an ECP, shall be deemed to be the amount credited or paid by the ECO to ECP and shall be included in the gross amount.

- **"E-commerce"** means the supply of goods or services or both, including digital products, over digital or electronic network;
- **"E-commerce operator" (ECO)** means a person who owns, operates or manages digital or electronic facility or platform for electronic commerce;
- **"e-commerce participant" (ECP)** 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 "FTS" or "professional services", as defined in the Explanation to section 194J.
- ECO shall be deemed to be the person responsible for paying to ECP. **"person responsible for paying"** means in the case of a person not resident in India, the person himself or any person authorised by such person or the agent of such person in India including any person treated as an agent u/s 163 [S. 204(v)].
- No TDS under other provisions, if TDS u/s 194O(1) or not deductible u/s 194O(2). Not applicable for hosting advertisement by ECO or other services not in connection



Who pays the tax under S. 194-O?
How much is the withholding to be done? Will S.195A apply?
Who will get the tax credit?

06

Way Forward

-Significant Economic Presence

Significant Economic Presence

- Business connection constitutes SEP (w.e.f AY 2019-20)
- i. Any 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 the amount as may be prescribed; or
- ii. Systematic and continuous soliciting of its business activities or engaging in interaction with such number of users 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,—
- the agreement for such transactions or activities is entered in India; or
- the non-resident has a residence or place of business in India; or
- the non-resident renders services in India
- SEP versus PE? DTAA relief?

Significant Economic Presence (SEP)

- SEP – an umbrella provision but certain rules not prescribed so far.
- Not sufficient, unless treaty provisions are amended by inserting new nexus rules
- Currently, applicable to residents of non-DTAA jurisdictions (Bahrain, Cayman Islands, Bermuda, Bahamas, BVI, Monaco, San Marino, etc.)
- Expands the scope of income of a non-resident
- Business connection is established by transaction not by the physical nexus and PE threshold

SEP implementation

- Revenue threshold of Rs. 2 crore and a minimum of 300,000 users with whom systematic and continuous business activities are solicited by non-resident technology firms - notified
- W.e.f 1.04.2022
- May not get effect as Pillar 1 and GloBE rules are expected to be implemented by then.
- Scope of EL 2.0 expanded in Finance Act - to include acceptance to offer for sale, placing the purchase order, acceptance of purchase order, supply of goods and provision of services, partly or wholly payment of consideration, takes place online.

SEP Provisions – S. 9(1)(i) r.w. Exp 2A, 3, 3A

- SEP **expands the scope of income** deemed to accrue or arise in India to a non-resident from **'business connection'** in India

SEP shall mean

1 transaction in respect of any **goods, services or property,** incl. **provision of download of data or software in India**

Non Resident → Person 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

2 **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**

- transactions or activities shall constitute SEP 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:

- Income attributable to business connection includes 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.

- Threshold for 'Revenue' & Users, not yet prescribed

SEP provisions have been deferred to AY 2022-23

How to implement SEP in treaties?
Bilateral negotiations? MLI?

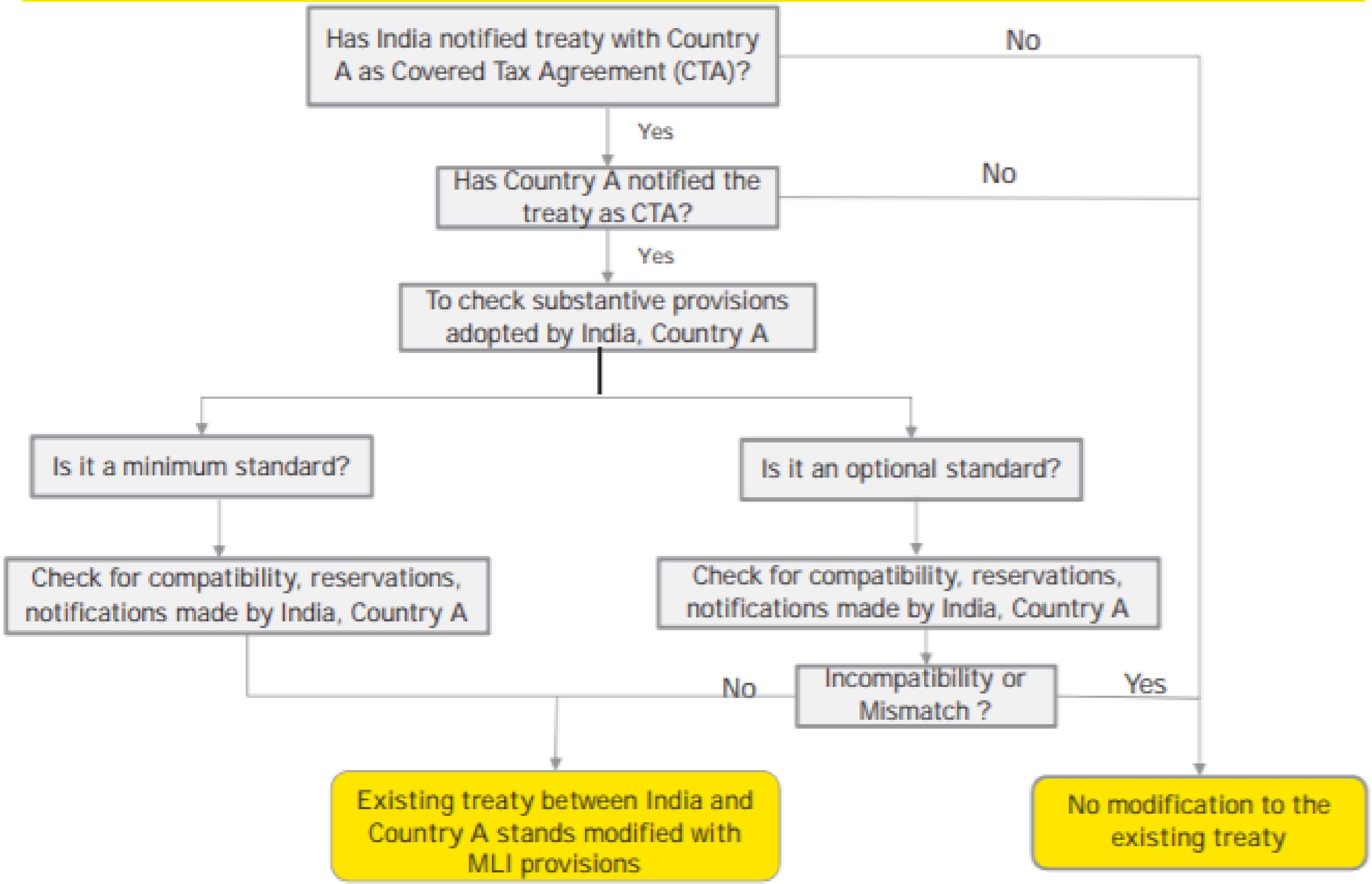
Implementation of BEPS Action Plan in India

Action 1 Measures impacting digital economy	• Introduction of Equalization Levy on certain digital advertising transactions • Introduction of 'significant economic presence'	Action 8-10 Aligning Transfer Pricing (TP)	Tax administration and taxpayers expected to give consideration while applying arm's length principles
Action 4 Limiting Interest Deductions	Introduction of the interest deduction limitation rule	Action 13 TP documentation	Introduction of Country by Country Reporting (CbCR) and Master File TP documentation
Action 6 Treaty Abuse	Minimum standard in MIL-India has adopted PPT + Simplified LOB	Action 14 Dispute Resolution	Committed to minimum standards for improving effectiveness on Mutual Agreement Procedures (MAP)
Action 7 Preventing the artificial avoidance of PE status	Extended agency definition included in business connection	Action 15 MLI	On 7 June 2017, India along with 67 other countries signed the Multilateral Instrument (MLI) to modify existing tax treaties.

MLI
Features

What is MLI, its objective	• Single instrument that modifies bilateral tax treaties in a synchronised, fast and consistent manner • One negotiation, one signature, one ratification
Impact	• To modify 1200+ tax treaties in first signing; intended to cover 3000+ tax treaties
Actions implemented	• Action 2 (Hybrid mismatches) • Action 6 (Treaty abuse) Minimum standard • Action 7 (Permanent Establishment) • Action 14 (Dispute resolution) Minimum standard
Legal status	• MLI does not function as protocol, needs to be read with existing tax treaties • Does not replace existing tax treaties but modifies them

How to apply MLI to check impact of India-Country A treaty?



THANK YOU

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