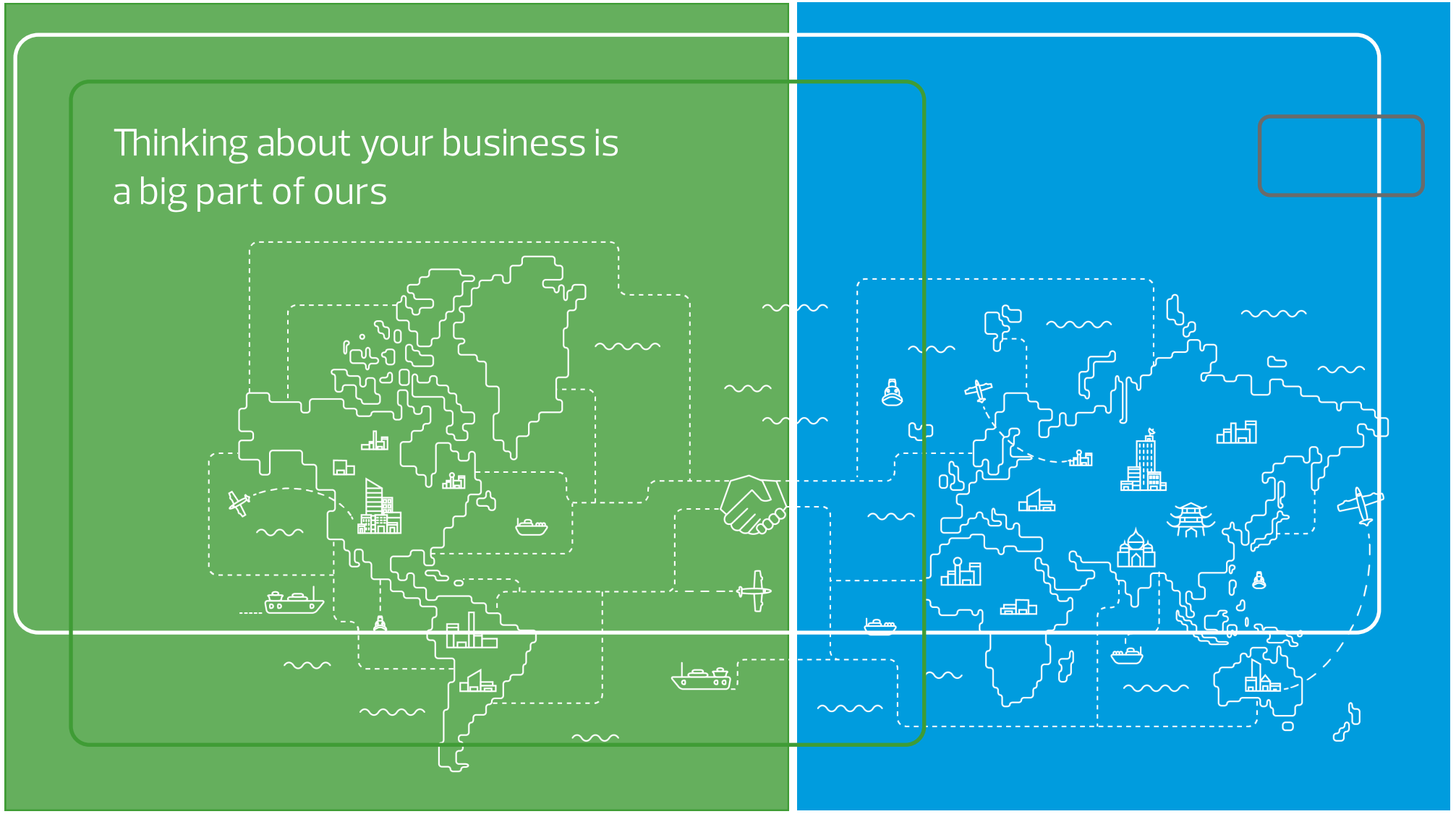

RSM INDIA WHITE PAPER - TAXATION OF BUSINESSES IN DIGITAL ERA

THE POWER OF BEING UNDERSTOOD

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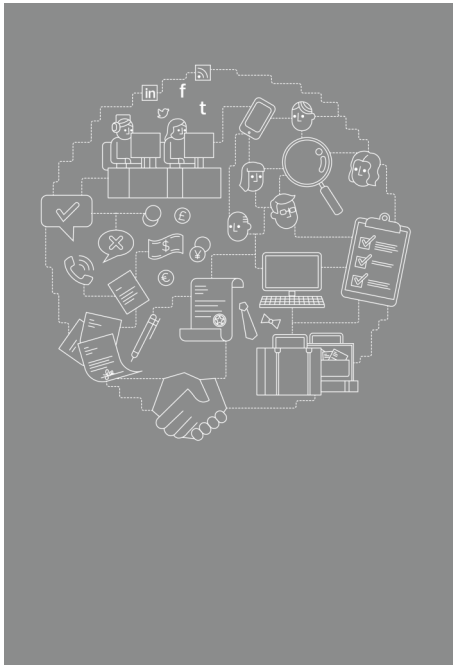
1.0 DIGITAL REVOLUTION AND EMERGENCE OF DIGITAL ERA



1.1 Digital technologies, Big Data, Cloud Computing and Internet of Things has changed lives in the 21st century altogether. Internet coupled with proliferation of hi-tech mobile phones and personal devices in this age has been “all-pervasive”. It has improved efficiencies, connectivity & data sharing, exponentially, leading to a disruptive “Digital Revolution”.

1.2 This Digital Revolution has resulted in emergence of 'Digital Economy'. Digital economy refers to an economy that is based on the internet, worldwide web, digital and cloud computing technologies. It is also referred to as the “Internet Economy” or “Web Economy”. This has resulted in emergence of new businesses altogether such as e-commerce companies (Amazon / Flipkart / Airbnb / Makemytrip / Uber / Ola etc.), social media companies (such as Facebook / Instagram), Internet based services and analytics companies (such as Google), Digital Vallets (Paytm) and so on. These businesses at times have completely disrupted conventional businesses and have challenged the manner in which conventional businesses are done.

1.3 In 2017, retail ecommerce sales worldwide reached US$ 2.304 trillion[2], a 24.8% increase over the previous year, as per eMarketer estimates. Mobile was a key factor, as m-commerce sales totalled US$1.357 trillion, making up 58.9% of digital sales—a large jump in share from 40.2% in 2015. These figures not only reflect the significant share of digital businesses in the overall economy but also the exponential rate at which they are growing.

2.0 DIGITAL ECONOMY BUSINESS MODELS

2.1 Digital economy can be broadly broken down into three parts

Particulars	Examples
e-business infrastructure	hardware, software, telecoms, networks, human capital, etc
e-business	how business is conducted, any process that an organization conducts over computer mediated networks
e-commerce	transfer of goods, for example when a book is sold online

2. These estimates are drawn from eMarketer's report "Worldwide Retail and Ecommerce Sales: eMarketer's Updated Forecast and New Mcommerce Estimates for 2016-2021."

2.2 Though e-business and e-commerce are used interchangeably, e-business is different from e-commerce. E-business is comprised of several components and e-commerce is one amongst them. E-business does not generate revenue while e-commerce does. E-business includes supply chain management, customer relationship management, enterprise resource planning and collaboration.

2.3 E-commerce means e-marketing of goods and services. E-commerce can be of two types i.e. pure play or brick-and-click. Pure play e-commerce model does not have a physical presence and the entire business is conducted through the means of internet like eBay.com and yahoo.com. On the other hand, brick-and-click e-commerce firms combine physical presence with online presence in order to create new business opportunities. Examples of brick and click businesses include online ordering of food from Dominos or Pizza Hut, buying vegetables and groceries from Bigbasket.com etc. E-commerce can be further classified into seven models as follows:

Business-to- business (B2B) e-commerce E.g. Alibaba.com or Indiamart.com

Business-to-consumer (B2C) E.g. Amazon.com

Consumer-to-consumer (C2C) E.g. Olx.com

Business-to-government (B2G) e-commerce whereby business organization manages activities of the government through a website like online applications.

Consumer-to-business (C2B) e-commerce for example online bidding by companies for contract offered by a customer, freelancer.com.

Mobile commerce (m-commerce) means use of mobile phones for conducting commercial transactions.

Peer-to-peer (P2P) technology makes it possible to sell audios, videos, e-books online and also allows to share the same with peers. The buyer gets commission for referral to peers. Some examples of this model include airbnb, mobikwik, paypal, paytm, googlepay etc.

3.0 TAX ON TRANSACTIONS IN DIGITAL ECONOMY IN INDIA

3.1 Introduction

The digital domain would include apps, mobile computing technologies, e-commerce stores, online software based service providers, cloud computing technologies, crypto currencies etc. In the beginning of digital era, tax mechanisms failed to tax such transactions, especially in case of non- residents.

Tax treaties impose tax obligations on non-residents either on the basis of profits that could be attributable to permanent establishments as defined under the treaty or by characterization of income as royalty/ fees for technical services. However, taxation of online transactions, where for performance of service physical presence is not required, is still in early stages and not much jurisprudence is available.

In this context, it would be pertinent to consider one of the judgements rendered on digital taxation by the Bengaluru tribunal. In case of ABB FZ LLC [2017] 83 taxmann.com 86 (Bengaluru-Trib) wherein it was held that services of sharing or permitting to use special knowledge provided by assessee based in UAE, to ABB Limited in India would constitute 'royalty' as per article 12 of DTAA between India and UAE. It was also held that the said income if not characterized as royalty, could be attributable to 'service PE' as defined in article 5(2) of the treaty, as the services were rendered by the employees of the assessee through virtual modes without being physically present in the country where the services are being rendered. The residual clause of other income (article 22) which required existence of 'permanent establishment' could not be resorted to mitigate taxation in view of income being attributed as royalty pertaining to a specific clause in the treaty. Also, this judgement of the Bengaluru Tribunal brought in a conceptual shift in the way Service PE is interpreted in India.

Despite of the growing pace at which the digital economy is changing, there exists global movement towards bringing the digital economy to tax considering the varied facets and different operating models, which makes taxation a more complex global ballgame. In this context, the recent initiative of OECD to address taxation in digital economy (*para 3.2*) as well as relevant provisions of Income Tax Act, 1961 (*para 3.3*) are discussed hereunder:

3.2 OECD initiative to address Tax Challenges of digital Economy (BEPS Action Plan 1)

The Organisation for Economic Cooperation and Development (OECD) and the G20 nations constituted the Base Erosion and Profit Shifting (BEPS) project that typically targets tax strategies aimed at artificially shifting profits to low or no-tax locations. Action Plan 1 "**Addressing the Tax Challenges of the Digital Economy"** of this project deals with the tax aspects of the digital economy.

In the past few decades, new business models that run their business remotely through the digital medium have emerged which have no territorial nexus with the country in which they operate and earn revenue. The only physical presence of an e-commerce business is the location of server which itself cannot be the basis for determining "situs" or "territorial nexus". In addition to these complexities, a server can be conveniently placed in a tax haven. This has led to loss of revenue to the source country due to lack of physical presence.

The OECD had proposed several options to address the tax challenges of the digital economy under its BEPS (base erosion and profit shifting) action plan 1.

Recommendations under Action Plan 1 of BEPS

The Committee set up by the OECD under Action Plan 1 of Base Erosion and Profit Shifting (**BEPS**) has recommended a new nexus based on '**significant economic presence'**. The Committee has also recommended that an enterprise should be considered to have a significant economic presence on the basis of factors that have a purposeful and sustained interaction with the economy by the aid of technology and other automated tools. It further recommended that revenue factor may be used in combination with the aforesaid factors to determine 'significance economic presence'.

3.3 PE/ Significant Economic Presence under Income Tax Act 1961

In alignment with the recommendation of the OECD, the Finance Act, 2018 has amended the definition of 'Business Connection' contained in section 9 of the Income-tax Act, 1961 to provide that **significant economic presence** of a non-resident in India shall constitute business connection in India bringing income earned by way of such significant economic presence under the tax net in India.

3.3.1 The Finance Act 2018 defines "significant economic presence" as

a. transaction in respect of any goods, services or property carried out by a non-resident in India including provision of download of data or software in India, if the aggregate of payments arising from such transaction or transactions during the previous year exceeds such amount as may be prescribed; or

b. systematic and continuous soliciting of business activities or engaging in interaction with such number of users as may be prescribed, in India through digital means

The Act further postulates that even in case of non-existence of residence or place of business of a non- resident would still constitute a business connection if it falls within the definition of significant economic presence.

The threshold limits for qualifying as "significant economic presence" are yet to be notified by the government. The Digital PE provisions will come into force from 1st April 2019.

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3.3.2 Tax liability on account of Digital PE

In view of the existing provisions of Section 90(2) of IT Act which provides that the provisions of Income Tax Act, 1961 or DTAA, whichever is more beneficial to the taxpayer shall prevail, the amendment in the Finance Act 2018 is not expected to have any immediate impact on the digital economy transactions in India.

Thus, the success of concept of "significant economic presence" for determining permanent establishment depends upon cooperation by India's tax treaty partners and until such amendments are made in the treaties, this concept would remain domestic law. This clarification is also found in the memorandum to the Finance Bill 2018, which reads as under,

"Further, it is also clarified that unless corresponding modifications to PE rules are made in the DTAAs, the cross border business profits will continue to be taxed as per the existing treaty rules."

The existing treaty provisions being more beneficial to the non-residents and e-commerce firms would be applicable to them, subject to provisions of section 90(2). It would be possible to evidence the effect of this amendment only in case of those countries with which India currently does not have a tax treaty in force.

3.3.3 Emergence of the Concept of "Virtual Service PE"?

With the advent of technology it has become possible to render services without the physical presence of employees thus creating difficulties in taxation owing to absence of physical PE according to the present tax regimes. In order to overcome this issue, the concept of "Virtual Service PE" was discussed in 10th and 11th sessions of the U.N. Committee of Experts on International Cooperation in Tax Matters and which acknowledged the fact that 'furnishing of services did not require physical presence'.

Further, the concept of Service PE already exists in DTAAs India has entered into with UAE, Australia, US, UK, Singapore. However, these treaties do not recognise the concept of virtual service PE.

3.4 Taxation of Digital Transactions – Subscription Models / Internet Advertising / Cloud Computing Services / Domain registration / Web Hosting Services/ Live Coverage of Event/ Data link charges

3.4.1 Subscription Models

With the advancement of technology, any kind of industry specific information is readily available in the form of online subscriptions, E.g. access to standard databases and making available customized information online as compared to books, journals etc which people used to subscribe before the invent of digital era. Also digital content such as music, videos and games are available readily for download. Provision of online subscription services has emerged as a complex of business model from tax perspective especially when such businesses are carried by non-residents. Taxation of digital subscription models need to be carefully determined keeping in view the recent pronouncements which has been discussed hereunder:

- **Social media monitoring services amount to royalty:** In Thoughtbuzz (P) Ltd [2012] 21 taxmann.com (AAR – New Delhi), it was held that provision of social media monitoring services by applicant, a Singapore based entity to Indian companies on a subscription basis would partake the character of royalty as defined under clause (iv) of Explanation 2 to Section 9(1)(vi) and in terms of article 12 of DTAC between India and Singapore. It was held that "*consideration received from the business of gathering, collating and making available or imparting information concerning industrial and commercial knowledge, experience and skill amounts to royalty and requires tax deduction at source in terms of Section 195.*"

- **Subscription paid for research product to foreign entity amounts to royalty**: In Gartner Ireland Ltd. v/s Assistant Director of Income tax [2013] 37 taxmann.com 16 (Mumbai- Trib) it was held that amount received for subscription provided by Irish company for its research product to Indian customers through servers located outside India, would constitute royalty. Thus, Indian customers need to deduct TDS on the same under Section 195 as substantiated by the Karnataka High Court in case of CIT (IT) v. Wipro Ltd. [2011] 203 taxmann 621.

- **Subscription for dissemination of information of various money markets through use of hired equipments does not amount to royalty**: In case of TIS Two Administration (Singapore) Pte. Ltd. v DDIT [2010] 40 SOT 16 (MUM.) (URO) it was held that in view of existence of PE in India of the assessee, a Singaporean company, the subscription receipts would constitute business income according to the terms of DTAA between India and Singapore and the same could not be treated as royalty or fees for technical services on account of use of equipment like V- Sat, printer etc.

- **Subscription to compiled business information using reports available in public domain does not amount to royalty**: As was held in case of Dun & Bradstreet Espana S.A [2005] 142 taxmann 284. Such a transaction was held to be similar to that of sale of a book for a price and thus, there was no requirement for deduction of TDS while making payments for the same.

3. 10th and 11th session of U.N. Committee of Experts on International Cooperation in Tax Matters was held in October 2014 and October 2015 respectively in Geneva.

3.4.2 Internet Advertising

Before the introduction of Equalisation Levy, there were several judgements which established that payment by Indian residents to non- resident companies for online advertisement or for uploading of banner advertisement on websites would be taxed as business income instead of royalty. In absence of PE of non –residents in India and relying on the provisions of tax treaties governing the non- residents, revenue from online advertisements escaped taxation as could be evidenced in cases of ITO v. Right Florists (P) Ltd.[2013] 32 taxmann.com 99 and Yahoo India (P) Ltd. v. Dy. CIT [2011] 46 SOT 105 (URO)

Though online advertisement is specifically covered by the provisions of equalisation levy in India, there exist certain types of online advertisements that are coloured as royalty payments. In Google India (P) Ltd v. JCIT [2018] 93 taxmann.com 183, payment made by Google India to Google Ireland for buying 'Google AdWord Space' was held to include payment for trademarks, IPRs, brand features, derivative works and other intangibles owned by Google Ireland. Thus payment for marketing and distribution rights acquired by Google India amounted to royalty according to Section 9(1)(vi) of IT Act and in absence of PE of Google Ireland, it required deduction of TDS under Section 195.

3.4.3 Cloud computing services

Cloud computing services are based on three types of software models:

i. Software as service (Saas)
ii. Platform as service (Paas)
iii. Infrastructure as service (Iaas)

In view of widened definition of royalty which covers the consideration paid for right to use computer software (explanation 4[4] to section 9(1)(vi)), the taxability of various cloud computing models based on recent judicial pronouncements has been discussed below.

With reference to Saas model, use of software without grant of exploitation of copyright would not give rise to royalty as was held in case of Microsoft Regional Sales Corpn. v. Asstt. DIT[2009] 32 SOT 116 (Delhi); Geoquest Systems B.V., In re[2010] 193 Taxman 81 (AAR - New Delhi); Samsung Electronics Co. Ltd. v. ITO (TDS)[2005] 94 ITD 91 (Bang) .

Also, computing facilities in case of Paas need to be examined so as to determine whether the payer is in exclusive ownership and custody of the equipment and rights related to it, along with dedicated service of computing facilities being provided to the payer coupled with positive act of use of the equipment by the payer in order to give rise to royalty. Mere sharing of equipment by many persons for a fee does not render it as royalty. (Dy. DIT v. Alcatel USA International Marketing Inc [2011] 43 SOT 31 (Mum) (URO); Dy. CIT v. Bombardier Transportation India (P) Ltd[2017] 77 taxmann.com 166;)

4. Explanation 4 to Section 9(1)(vi) clarifies that the transfer of all or any rights in respect of any right, property or information includes and has always included transfer of all or any right for use or right to use a computer software (including granting of a license) irrespective of the medium through which such right is transferred whereby "computer software" means any computer programme recorded on any disc, tape, perforated media or other information storage device and includes any such programme or any customized electronic data

3.4.4 Domain registration services

Domain name being valuable commercial rights, having characteristics similar to trademark property, services pertaining registration of domain name were held to be in connection with intangible property and payment for domain registration services received by non- resident in India was held to be royalty in GoDaddy.com LLC v. ACIT [2018] 92 taxmann.com 241 (Delhi – Trib)

3.4.5 Web-hosting services

Web hosting services allows the users to access websites via the internet. In order to provide such services, the web hosting service provider uses scientific equipment. However, consideration paid by service recipient cannot be said to be "consideration for use of, or right to use of, scientific equipment" thereby giving rise to royalty as the service recipient does not use the equipment per se, but it is only used by the service provider in providing web hosting services. (DDIT v. Savvis Communication Corporation [2016] 69 taxmann.com 106 (Mumbai – Trib))

However, there is a lot of litigation regarding characterization of income as royalty and it needs to be analysed on case to case basis.

3.4.5 Live coverage of an event

Payment to UK based company by BCCI for live audio and visual coverage of IPL cricket matches in the absence of acquisition of any technical expertise (explanation 2[5] to Section 9(1)(vii)) from the non- resident which would enable them to produce live coverage on their own after conclusion of IPL was not held to be FTS in case of IMG Media Ltd. v. DDIT [2015] 60 taxmann.com 432 (Mum - Trib). It was also held that in view of BCCI being owner of the program content and in the absence of transfer of any broadcasting rights to UK entity, the payments could not amount to royalty.

3.4.6 Data link charges

It was held in iGATE Computer Systems Ltd v. DCIT (TDS-2) [2015] 53 taxmann.com 431 that payment of data link charges by software company to various telecom service providers for use of its network element does not involve any human intervention apart from that required for maintenance purpose could not amount to FTS. It was observed that transmission of data through data link satellite link line did not involve any human intervention and thus payment of data link charges did not attract TDS provisions under Section 194J.

From the above mentioned analysis it can be observed that though some digital transactions could be characterized as royalty or FTS and brought within the tax net, certain payments such as payments for marketing support services rendered by foreign company to its Indian counterparts, web hosting services whereby no access is given to equipment/ machines, access to standardized database could not be considered as royalty or FTS and thereby escaped taxation. In order to tighten the tax net with respect to digital transactions where the foreign parties as such do not have a physical presence in the source country, equalization levy was introduced.

Explanation 5 to Section 9(1)(vi) states that royalty includes and has always included consideration in respect of any right, property or information, whether or not—

i. the possession or control of such right, property or information is with the payer;
ii. such right, property or information is used directly by the payer;
iii. the location of such right, property or information is in India.

Explanation 6 to Section 9(1)(vi) defines "process" which includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret.

5. The definition of FTS has been provided by explanation 2 to Section 9(1)(vii) of Income Tax Act, 1961 as follows:

"Fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries".

3.5 Equalisation Levy Introduced in India in 2016

It is notable that in the BEPS Action Plan 1, Equalisation levy was proposed as one of the modes of taxation of digital transactions however, the same was not covered in the Final BEPS Action Plan 1 released by OECD.

Nevertheless, India had introduced 'Equalisation Levy' through Finance Act of 2016. It is a recent levy introduced to bring to tax, payments made for online advertisement services. Section 162 of the Finance Bill of 2016 is the charging section which reads as under:

There shall be charged an equalisation levy at the rate of six percent of the amount of consideration for any specified service received or receivable by a person, being a non-resident from—

a. a person resident in India and carrying on business or profession; or

b. a non-resident having a permanent establishment in India.

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.

The term "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.

3.5.1 No Foreign Tax Credit Available on Equalisation Levy

Equalisation levy was introduced to collect taxes from certain specified digital services like online advertisements. It was introduced as a separate chapter in the Finance Act, administratively linking it to direct tax laws. But there is lack of clarity regarding whether equalisation levy is direct tax and thus non-resident online advertisement service provider is unable to claim foreign tax credit in respect of the equalization levy deducted and deposited by Indian payer. Consequently, the Indian payer might in some cases (where grossing up is required) have to bear the economic burden of equalization levy.

3.5.2 Certain issues pertaining to Equalisation Levy

a. Equalisation levy has been imposed on gross receipts and thus expenses incurred for providing such services cannot be claimed as deduction.

b. The person paying the consideration is under obligation to pay tax. The burden of payment of tax might get shifted towards the remitter as the non-resident payee might demand consideration net of tax.

c. Advertisement is a requisite in order to make new businesses profitable. As tax is imposed on online advertisement, new businesses might incur

4.0 IMPACT OF GST ON DIGITAL TRANSACTIONS

4.1 E-commerce stores earn by charging listing fees to suppliers for displaying their products online. They also charge commission to suppliers on each sale made through their websites. Currently, both listing fees and commission are subject to TCS mechanism under GST regime.

4.2 Pay per click advertisements like that of Google AdWords is governed by GST mechanisms at present. E-commerce operators have been specifically brought within the ambit of GST by introducing TCS (Tax collected at source) mechanism. Payments made by digital means are also subject to GST at present.

4.3 Online information and database access and retrieval services (OIDAR), online aggregators such as Ola and Uber have also been brought specifically within the purview of GST, leaving narrow scope for tax evasion.

5.0 CHALLENGES IN TAXATION OF DIGITAL ECONOMY UNDER INCOME TAX ACT

5.1 In case of companies engaged in the business of online advertisement the tax authorities have to wrangle with a lot of questions like the location of servers, the country where the ad is being displayed, the location of assets of the advertising company, the origin and consumption of the service, and the issue of actual value addition.

5.2 Valuation of digital products is another big challenge. If a country wants to charge value-added tax or VAT / GST, it has to prove that the value addition took place in that country which is a matter of debate as the factors for determining the place where maximum value addition took place are not defined. On the other hand, few companies file detailed information with the tax authorities, making it impossible for any single country to tax specific functions.

5.3 **Challenges in valuation and enforcement of the Digital PE rule:** As suggested by OECD, the calculation of the threshold based on interaction of number of users actually interacting with the non-resident could be cumbersome specially in cases where the users interact on a free or a trial basis as in such cases, though the threshold criteria of number of users might get surpassed, but the monetary limit for qualifying significant economic presence might remain unfulfilled.

Tax authorities might also face a problem in deciding upon the applicability of the digital PE provision in case of a non-resident suddenly getting dramatic response from users at a particular point of time during the year.

6.0 RECENT GLOBAL DEVELOPMENTS TO TAX DIGITAL ECONOMY[6]

6.1 **US:** US Supreme Court on 21st June, 2018 ruled in case of South Dakota v. Wayfair that individual states could ask retailers that do not have physical presence to collect sales tax. This judgement was significant due to allegations from small businesses regarding competitive advantage being enjoyed by e-commerce vendors on account of sales tax not being charged by internet retailers.

At present, total of 45 states in the US have imposed obligation on online sellers to collect tax.

6.2 **UK:** As a part of UK Budget, digital services tax of 2% on tech giants was announced on 29th October, 2018. Advertising and streaming services have been specifically brought within the tax net. This levy would come into effect from 1st April, 2020 and would largely be levied on revenue generated by large social media platforms, search engines and online marketplaces pertaining to UK users.

6. Subject to revalidation of such regulations in local jurisdictions

6.3 **Italy:** The Italian 2018 Budget Law introduces a new "tax on digital transactions related to the performance of services carried out through electronic means" rendered by both resident and nonresident enterprises to Italian businesses and to Italian PEs of nonresidents with effect from 1st January, 2019. "Services carried out through electronic means" shall be those supplied through the Internet or an electronic network, the nature of which makes the performance completely automatic, with minimum human intervention and for which the information technology component is essential. The Tax would apply at a 3% rate on the amount of the consideration paid in exchange for the performance of the above services, net of value added tax if the supplier declares that it has surpassed the threshold of 3000 transactions in a year and regardless of where the transaction is concluded. This tax is not creditable against Italian income tax.

6.4 **Japan:** Japan has introduced Japanese consumption tax of 8% on revenue from cross border sales of e- services to Japanese consumers. E-services include e-books, cloud based services, online advertising, gaming and streaming etc. Voice and data telephony services have been excluded from the purview of tax. New tax regime has become effective on 1 October 2015. If the turnover during the tax base period does not exceed JPY 10 million, then there would be no requirement of levying tax. B2C transactions would be subject to forward charge where non-resident service providers would levy and collect tax whereas reverse charge would apply in case of B2B transactions.

6.5 **Israel**: The government of Israel, by way of circular 4/2016 laid down guidelines for attribution of income to a permanent establishment from supply of digital services. The said circular distinguishes tax treatment of depending upon whether the foreign supplier is resident of country with which Israel has entered into a treaty. Resident of treaty country may be taxed according to treaty provisions if significant digital presence exists and foreign supplier conducts auxiliary/ preparatory activities in Israel independently or through representatives or agents. However, in case of non-treaty residents there is no requirement of physical presence and tax would be levied according to Israeli domestic tax provisions solely on the basis of significant digital presence. The term 'Significant Digital Presence' has been defined as follows:

The ITA may determine that a foreign supplier has a significant digital presence in Israel based on the following:

- The foreign supplier has a significant number of contracts for online (internet-based) services with Israeli customers;
- The foreign suppliers online services are highly used by Israeli customers;
- The foreign supplier's website has been adapted for use by Israeli customers in terms of language, currency, etc.;
- A high volume of web traffic between Israel and the foreign supplier's website/services; and
- Other factors

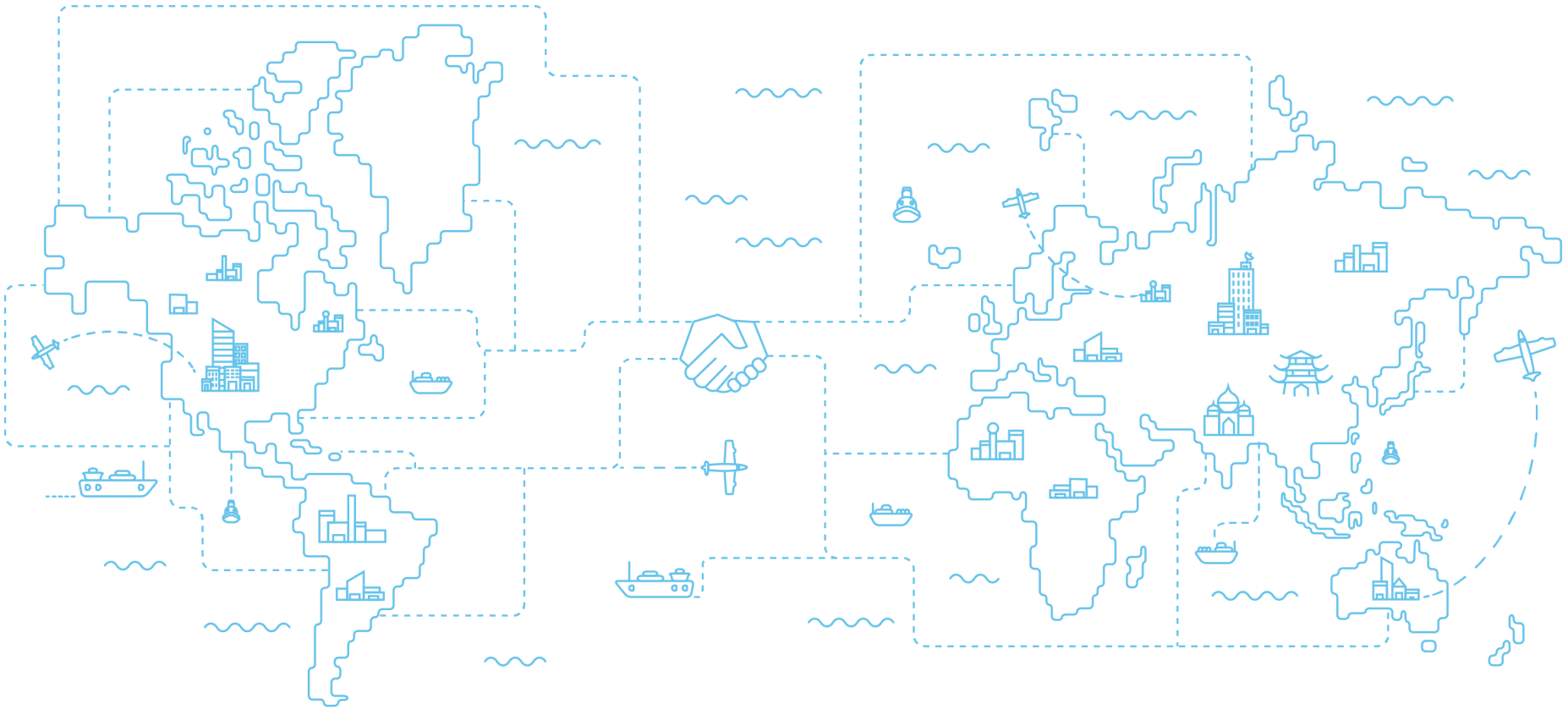
6.6 **Spain:** On 12 October 2018 the Spanish Budget proposed to introduce digital tax @ 3% on digital services like revenue from sale of online advertisements, digital intermediary and brokerage services etc. Companies operating globally that derive revenue from digital services exceeding EUR 750 million and those operating within Spain and deriving revenue more than EUR 3 million are required to pay digital tax. This levy could affect companies like Amazon, Homeaway, Uber and JustEat in Spain.

6.7 **EU:** On 21st March, 2018, the EU proposed 3% interim digital services tax on supply of digital services that result into user value creation which include online advertisement, sale of data collected from users and exchange of goods and services via digital platform that facilitate interaction with users (online marketplaces). However, provision of digital content, online payment services and certain other services have been specifically excluded from this levy. Digital companies having annual global revenues exceeding EUR 750 million and companies operating within EU with annual revenues from taxable digital services in excess of EUR 50 million are required to pay digital services tax.

7.0 COMMENTS

7.1 Currently, E-commerce operators are liable to deduct TCS @ 1% on net value of supplies made through their portal before making payment to the suppliers. On the other hand, equalisation levy@ 6% is to be deducted on payment made for online advertising to non-residents. Thus, looking from the supplier point of view, tax compliances under different regimes might prove to be burdensome and ultimately lead to reduction of profits specially in case of grossing of equalisation levy is done and tax burden is borne by the payer itself.

7.2 India has wide treaty network with more than 90 countries and as such the provisions of the IT Act, 1961 provide that in case the terms of the treaty provide more beneficial tax treatment to the non- resident then treaty provisions shall prevail over the provisions of IT Act, 1961. The concept of 'Significant Economic Presence' introduced by Finance Act 2018 to tax digital transactions would not be invoked in case beneficial treatment is available to non-resident under the applicable treaties which seems to be a relief for non-resident tech giant companies in India.



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