



# THE CHAMBER OF TAX CONSULTANTS

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## **CERTIFICATE COURSE ON THE MULTI LATERAL INSTRUMENT ON 13<sup>TH</sup> OCTOBER, 2018**

### **Panel Discussion**

#### **Case Studies by - CA Anish M. Thacker**

##### **CASE STUDY 1:**

Anxious Ltd. ('A' Ltd.) is an Indian company engaged in the manufacture of auto components. The shares of 'A' Ltd. are owned by Bechain Ltd. ('B' Ltd.), a Mauritius company. The shares of B Ltd. are owned by Contented Inc. ('C' Inc) a company that is incorporated in and a tax resident of the United States of America (USA).

'A' Ltd. has issued non-convertible debentures (NCD) to 'C' Inc to the tune of Rs. 100 million which has been used by 'A' Ltd. to set up different manufacturing plants throughout the country (India). 'A' Ltd pays interest on the NCDs to 'C' Inc which is more than 30 percent of its EBITDA. Consequently, a part of the interest paid by 'A' Ltd. is being subject to a disallowance under section 94B of the Act.

The group is concerned about the tax inefficiency this arrangement has resulted into after the enactment of section 94B in the Act. They have approached the following propositions: -

**Proposition 1:** Contest the disallowance of interest by invoking Article 27 of the Double Tax Avoidance Agreement ('DTAA') between India and USA.

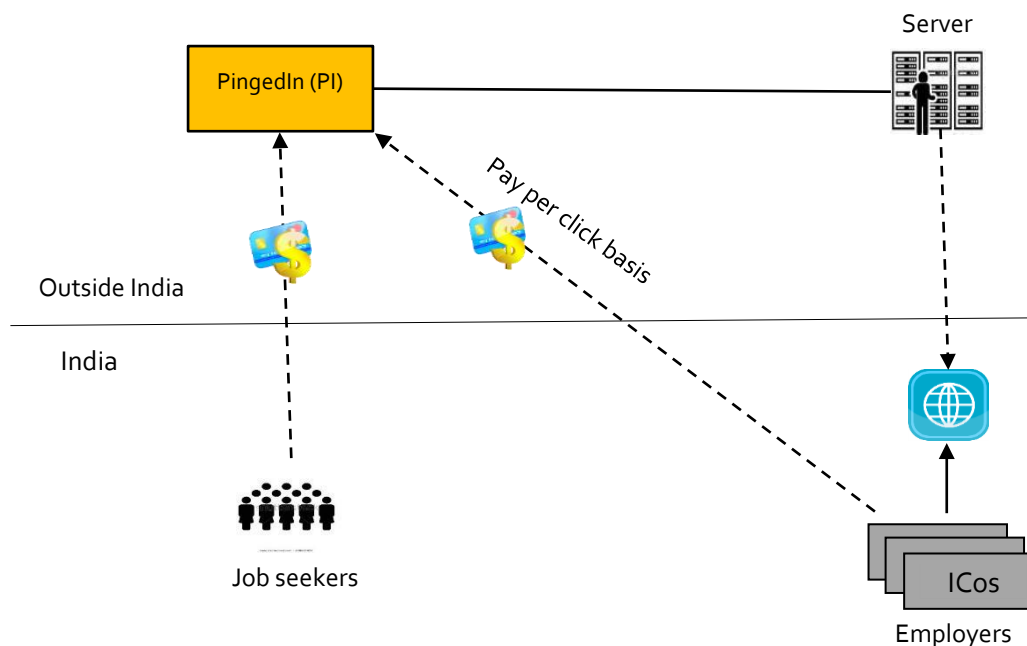
**Proposition 2:** 'C' Inc places a deposit with HSBC in London. Against this deposit, HSBC London opens a line of credit for HSBC Bank Mauritius Ltd., a *bona fide* bank and a separate Mauritius legal entity, to grant a loan to 'A' Ltd. for future expansion of its business (which was to be funded from internal accruals). 'A' Ltd. will now use these internal accruals to redeem about 65 to 70 percent of the debentures issued to 'C' Inc. Consequently, after such redemption the interest to be paid to 'C' Inc would reduce to below 30 percent of 'A' Ltd.'s EBITDA and 'A' Ltd. would not face any disallowance u/s 94B.

You are requested to advise 'A' Ltd. on the pros and cons of both of the above propositions.

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## **CASE STUDY 2:**

### **STRUCTURE:**



### **Facts:**

- PingedIn (PI) is a business and employment-oriented service that operates via websites and cellular applications. It is mainly used for professional networking, including employers posting jobs and job seekers posting their CVs.
- The entire physical infrastructure of PI is outside India. There are no employees/ any agency of PI in India.
- When employers post job on the website, PI charges them on a “per-click basis” (i.e. number of job seekers clicking the job profiles posted by companies) and a bill is raised on monthly basis.
- Similarly, job seekers need to pay a fixed monthly fee to get desired information about job openings that would be a great fit based on their skills, experience, salary requirements, and education.
- PI also provides other information or has additional features wherein recruiters are prompted about the suitable candidates. Even job seekers are informed if recruiters have looked at their job application, how many people have applied for the same job etc.
- Basis the user activity and preferences, PI regularly sends email updates /push notifications to its PI subscribers regarding latest jobs offers and company information.
- The number of users of PI in India exceed the prescribed user threshold<sup>1</sup>.

<sup>1</sup> Though the number of users to constitute SEP is not yet notified, participants may please presume that this number does indeed exceed the threshold prescribed.

**Issues:**

1. Is this transaction subject to equalisation levy?

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2. Can PI have / create a Significant Economic Presence (SEP) in India as per Explanation 2A to section 9(1)(i) of the Act and thereby a 'business connection' by virtue of clause (b) – “systematic and continuous soliciting of business activities”?

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3. Can income-tax and equalisation levy both be levied?

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4. Presuming the server is owned by another foreign company, based in a non-treaty country, can some part of the server usage charges received by the owner be brought to tax in India on account of the SEP of the server owner in India?

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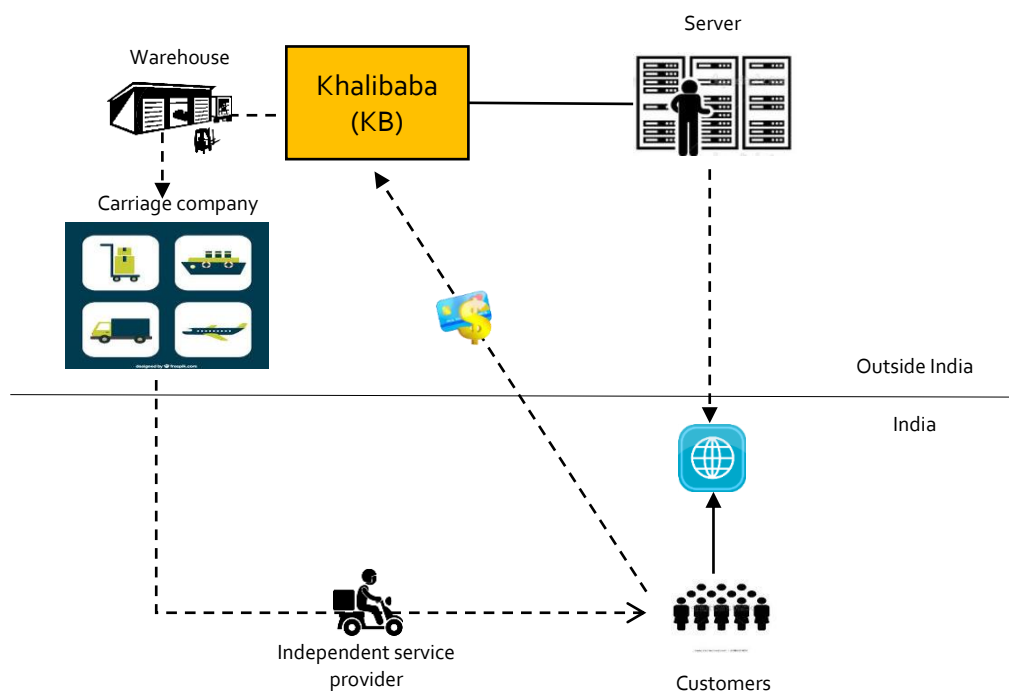
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### **CASE STUDY 3:**

#### ***STRUCTURE:***



#### **Facts:**

- (a) Khalibaba (KB), a Hong Kong based company, is a retail online store / portal for consumer goods and sells goods across the globe, including India.
- (b) Users in India can place an order online through the website which is stored on a server outside India. Payments are also made online and are received by KB outside India.
- (c) The goods are stored in a warehouse in China. If an order is placed, say by an Indian customer, the goods are shipped to India from the warehouse in China by an independent logistics provider.
- (d) Title and risk of goods is transferred to Indian customers outside India. The Indian customer is responsible for lawfully importing the product into the India and acts as the “importer on record” for customs purposes into the India and is solely responsible for paying import taxes and fees
- (e) Goods are delivered to customers in India via independent logistic service providers for a service fee. This Logistics agency merely acts as a carrier on behalf of the customer who gets title and ownership in the goods outside India.
- (f) Total payment arising pursuant to transactions aforesaid crosses the prescribed limit<sup>2</sup>.

<sup>2</sup> Though the monetary threshold for SEP is not yet notified, participants may presume that the same has been notified and that the limit is exceeded.

**Issues:**

1. Till date, the view taken by KB is that it has no taxable presence in India under s.9(1)(i) r.w. Explanation 1(a) thereto as no part of physical operations are carried out in India. Do you agree?

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2. If KB was not based in Hong Kong but in the UK would this have made any difference to the conclusion?

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3. Does KB now have a business connection in India in the form of SEP as its transactions in respect of goods have crossed the prescribed limit? If so, will it be better for KB to move to UK from Hong Kong (Presume the India Hong Kong treaty does not get notified for the foreseeable future)

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