

International tax provisions of Finance Bill 2020

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Where Passion Delivers Value

Dividend Distribution Tax

New regime for taxation of dividend

- Pre amendment, Indian domestic company declaring, distributing or paying any dividend required to pay tax @ 20% in addition to normal corporate tax rate
- It is proposed to shift incidence of tax from Company to recipient. Now dividend or income from units will be taxable in hands of shareholders or unit holder at tax rate applicable to recipient
- Section 115BBDA not applicable to above dividend income. Tax payable by recipient at normal tax rate
- Limited expense deduction under section 57
- Deduction for interest expense capped at 20%
- Buy back tax continues
- Whether section 14A required ?

Legislative amendment

- Section 115-O not applicable to dividend, declared, distributed or paid on or after 31 March 2020
- Exemption under section 10(34) not applicable to dividend received on or after 1 April 2020
- Cautious Situation : Dividend declared by ICO before 31 March 2020 but paid after 1 April 2020
 - ICO required to pay DDT
 - Recipient shareholder required to pay tax on dividend
- MAT payable on dividend income without benefit of any roll over relief under section 80M

Tax impact on HNI promoters

Particulars	(Amount in Lakhs)					LLP
	Individuals					
	Existing provision	New Provisions				
Above 50 lakhs up to 1 crore		Above 1 crore up to 2 crore	Above 2 crore up to 5 crore	Above 5 crore		
	Tax rates as per slabs					
	11.44%	34.32%	35.88%	39.00%	42.74%	34.94%
Profit	100.00	100.00	100.00	100.00	100.00	100.00
Tax @ 25%	25.00	25.00	25.00	25.00	25.00	-
Tax @ 34.94%	-	-	-	-	-	34.94
Amount available with the company for distribution	75.00	75.00	75.00	75.00	75.00	65.06
Less : Dividend Distribution Tax @ 20.56%	15.42	-	-	-	-	-
Amount received by shareholder post dividend distribution	59.58	75.00	75.00	75.00	75.00	65.06
115BBD @ 10% in case of existing provision and at slab rate in case of new provisions	5.67	-	-	-	-	-
Tax in hands of shareholder	-	25.74	26.91	29.25	32.06	-
Amount in the hand of an individual	53.91	49.26	48.09	45.75	42.95	65.06
Total tax cost (in Rs.)	46.09	50.74	51.91	54.25	57.06	34.94
Increase in tax (in Rs.)		4.65	5.82	8.16	10.96	
Incremental tax (in %)		10.08%	12.62%	17.70%	23.79%	

Deduction of expenses

- Income assessed under Income from other sources on account of fiction of section 56(1)
- Section 57(1)(a) provides for deduction of any reasonable sum paid by way of commission or remuneration to a banker or other person realizing such dividend on behalf of assessee
- Overall deduction including interest income capped at 20%
- Even though dividend is assessed under IFOS it does not cease to be part of income from business if securities are part of trading assets [CIT v Cocanada Radhaswami Bank Ltd [1965] 57 ITR 306 (SC)]
- Thus, brought forward business losses can be set off against dividend income
- Interest income fully deductible if shares held as stock in trade [CIT v. Emerald Co. Ltd 2006] 284 ITR 586 (Bombay)]

Deduction of expenses

- Interest on funds used to purchase shares in company in which Taxpayer has business relationship
 - SA Builder [2007] 288 ITR 1 (SC)
 - PCIT v Concentrix Services (I) (P.) Ltd 2019] 267 Taxman 625 (Bombay)

Dividend income

- Allocation of common expenditure incurred for earning more than one source of income assessed under IFOS
 - Proviso to section 57 restricts maximum deduction of expenditure on dividend to 20%
 - Can assessee allocate common expenditure to non-dividend income and claim full deduction
 - Mumbai Tribunal in H.M. Mehta & Co. LTD [1986] 17 ITD 1007 (BOM.) held that such expenditure needs to be prorated based on income earned
 - Also refer CIT v Hero Cycles Ltd [2016] 74 taxmann.com 254 (Punjab & Haryana) dealing with similar issue
- Controversy similar to section 14A pre Rule 8D insertion

Dividend income

- Dividend stripping provisions contained in section 94(7) is applicable if conditions provided in said section are satisfied. One of the condition reads:
 - The dividend or income on such securities or unit received or receivable by such person is exempt from tax
- Since dividend is no longer exempt from tax, section 94(7) is not applicable
- Short term loss arising on account of dividend stripping can be set off against other capital gain income [CIT v Walfort Share & Stock Brokers (P.) Ltd [2010] 326 ITR 1 (SC)]

Treaty interplay

- Dividend income received by NR taxed in accordance with treaty
- NR may avail benefit of tax treaty and pay tax at the rate provided in tax treaty

Particular	Mauritius	Singapore	Luxembourg	France	US	UK
DDT Rate	5%*	10%*	10%	10%	15%	10%

- Treaty benefit subject to availability of TRC, Form 10F, satisfaction of beneficial ownership, PPT test
- In case NR is not eligible for treaty protection, dividend taxable at the rate of 20% in hands of NR under section 115A
- If dividend is received from AE, reporting under Form 3CEB and maintenance of TP documentation is required
- NR shareholder should be able to claim tax credit on dividend tax in its home country
- Significant amendment for companies proposing to repatriate accumulated profits

Impact of MFN clause

- Treaty entered by India with few of the countries, i.e, Netherlands, France, Sweden, Switzerland, Hungary provides for application of MFN clause for reducing the withholding tax rate on dividend income, if a more favourable rate is provided in tax treaty entered with another OECD country post signing of the treaty
- Post signing of India-Netherlands treaty, India has signed treaty with OECD countries, Slovenia and Lithuania which provides for withholding tax rate of 5% on payment of dividend
- Accordingly, applying the MFN clause, possible to reduce dividend tax rate from 10% as provided in above treaties to 5% as per the treaty rate provided in tax treaty entered with Slovenia and Lithuania

Netherland and France becomes favourable Investment jurisdiction from dividend and capital gains perspective

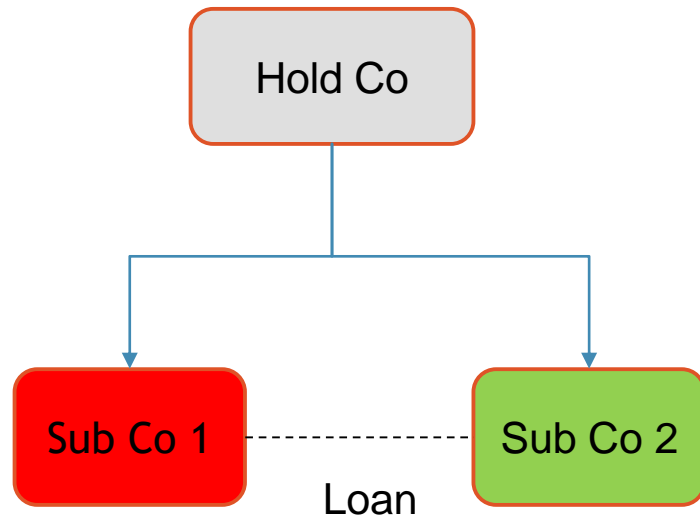
India Netherland treaty

Article 10

1. Dividends paid by a company which is a resident of one of the States to a resident of the other State may be taxed in that other State.
2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the recipient is the beneficial owner of the dividends, the tax so charged shall not exceed 10 per cent of the gross amount of the dividends.
3. The competent authorities of the States shall by mutual agreement settle the mode of application of paragraph 2.

Rate at which TDS should be deduced?

Deem dividend and treaty



Facts

- Sub Co 1 is cash rich profitable company
- Sub Co 1 grants loan of USD 1 mn to Sub Co 2
- Sub Co 1 is not in money lending business

Issue

- Person in whose hand deem dividend will be taxable
- Whether 'dividend' definition in treaty covers section 2(22)(e)?
- Whether dividend can be said to be 'paid' to Hold Co?

Deem dividend and treaty

CIT v Madhur Development and Housing Society (2018) 401 ITR 0152 (SC)

- SC agrees with Delhi HC decision in case of C.I.T. vs. Ankitech Private Limited reported in [2012] 340 ITR 14 (Del)
- Delhi HC held that deemed dividend income can only be taxed in the hands of the shareholders of the lender company

National Travel Services v CIT (2018) 401 ITR 0154 (SC)

- Issue : to attract section 2(22)(e) whether shareholder should be registered and beneficial owner?
- Delhi HC decided the law incorrectly

Deem dividend and treaty

Sahir Sami Khatib & ANR v ITO (2019) 411 ITR 0637 (Bom)

- The question before the Supreme Court was whether the assessee - partnership firm could be saddled with an addition of deemed dividend under Section 2(22)(e) of the I.T.Act, 1961 when the assessee was admittedly not a shareholder of the borrowing company, whereas only its partners were the registered shareholders thereof. That is not the issue that is before us at all, and therefore, this Judgment is of no assistance to the appellant

Deem dividend and treaty

Article 10(3) of OECD MC 2017

- The term "dividends" as used in this Article means income from shares, "jouissance" shares or "jouissance" rights, mining shares, founders' shares or other rights, not being debt-claims, participating in profits, as well as income from other corporate rights which is subjected to the same taxation treatment **as income from shares by the laws of the State of which the company making the distribution is a resident.**

Deem dividend and treaty

OECD Commentary

- Payments regarded as dividends may include not only distributions of profits decided by annual general meetings of shareholders, **but also other benefits in money or money's worth, such as bonus shares, bonuses, profits on a liquidation or redemption of shares (see paragraph 31 of the Commentary on Article 13) and disguised distributions of profits.** The reliefs provided in the Article apply so long as the State of which the paying company is a resident taxes such benefits as dividends. It is immaterial whether any such benefits are paid out of current profits made by the company or are derived, for example, from reserves, i.e. profits of previous financial years. Normally, distributions by a company which have the effect of reducing the membership rights, for instance, payments constituting a reimbursement of capital in any form whatever, are not regarded as dividends.

Deem dividend and treaty

KIIC Investment Company [2019] 101 taxmann.com 19 (Mumbai - Trib.)

- the third facet stated in article 10(4) of the Treaty clearly suggests that even 'deemed dividend' as per section 2(22)(e) is to be understood to be a 'dividend' for the purpose of the treaty. The presence of the expression 'same taxation treatment as income from shares' in the country of distributor of dividend in article 10(4) of the treaty in the context of the third facet clearly leads to the inference that so long as the Indian tax laws consider 'deemed dividend' also as 'dividend', then the same is also to be understood as 'dividend' for the purpose of the treaty.

Deem dividend and treaty

Rajeev Makhija (ITA 3148/Del/2008)

- It is crystal clear from the plain reading of Article 10 that nowhere deemed income in the form of deemed dividend has been brought into tax net. Only the income from shares or other rights, not being debts claims, participating in profits, as well as income assimilated to income from shares by the taxation laws of the state of which the company making the distribution is resident falls within the term dividend. The amount of loan paid cannot be treated as dividend paid as defined in Article 10 of DTAA entered into with Canada.

Deem dividend and treaty

Article 10(2)

1. Dividends **paid by a company** which is a resident of a Contracting State **to a resident of the other Contracting State** may be taxed in that other State.
2. However, dividends **paid by** a company which is a resident of a Contracting State may also be taxed in that State according to the laws of that State

OECD Commentary

The term "paid" has a very wide meaning, since the concept of payment means the fulfilment of the obligation to put funds at the disposal of the shareholder in the manner required by contract or by custom.

Deem dividend and treaty

India Germany – Other Income

1. Items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this Agreement shall be taxable only in that State
3. Notwithstanding the provisions of paragraph 1, if a resident of a Contracting State derives income from sources within the other Contracting State in the form of lotteries, crossword puzzles, races including horse races, card games and other games of any sort or gambling or betting of any form or nature whatsoever, such income may be taxed in the other Contracting State.

India – US other income

Notwithstanding the provisions of paragraphs 1 and 2, items of income of a resident of a Contracting State not dealt with in the foregoing articles of this Convention and arising in the other Contracting State may also be taxed in that other State

Impact on Indian Company declaring dividend

- Indian Company required to withhold tax at the time of making dividend payment to NR shareholder
- Provisions applies equally to listed and unlisted companies.
- In case of payment to NR shareholder, benefit of lower treaty rate or rate provided under domestic law can be availed.
- Onerous obligation on deductor Company to accurately deduct tax in case of heterogenous group of shareholder
- Section 194 amended to provide TDS at the rate of 10% on payment of dividend to domestic shareholders

Impact on Indian Company declaring dividend

- Proviso to section 194 relieves Indian Company from TDS if dividend is paid to shareholder being Individual by any mode other than cash and amount of dividend does not exceed Rs. 5000
- Proviso restrictive to individual shareholder and not applicable to other categories of dividend recipient
 - Difficulty in case of Partner holding shares for Firm and Karta holding shares for HUF, trust is holding shares for beneficiary
- Failure to deduct TDS may attract AID proceedings, interest and in case of NR payments deem Indian Company as agent under section 163
- No parallel amendment in section 206AA and Rule 37BC
- Decisions supports that tax treaty override section 206AA

Impact on Indian Company receiving foreign dividend

- Dividend income received from Foreign Domestic Company taxable at 15% under section 115BBD
- Roll-over relief provision under section 115-O(1A) not available on deletion of section 115-O
- Scope of section 80M restrictive to dividend received from domestic company

Particulars	Pre-Amendment	Post-Amendment
Income from Foreign Subsidiary	1,00,000	1,00,000
Tax @ 15% u/s 115BBD	15,000	15,000
Amount received by I Co	85,000	85,000
Dividend declared by I Co to shareholder	1,00,000	1,00,000
Less:		
Amount of dividend taxed u/s 115BBD	1,00,000	-
Dividend taxable	-	1,00,000
Total Tax	15,000	25,000

Intercorporate dividend

- Section 80M mitigates double taxation of dividend received by domestic company from another domestic company
- Section 80M allows deduction of dividend income received from other domestic company from GTI of first domestic company distributes dividend one month prior to the due date of filing of return
- Thus, benefit of section 80M can be availed if dividend is distributed even after end of previous year but before one month prior to the due date of filing of return
- Distribution of dividend requires putting funds in hand of shareholder [Delhi Tourism & T.D.C. Ltd v CIT [2006] 155 TAXMAN 10 (DELHI)]. Thus, recipient company should ensure that dividend is paid one month prior to the due date of filing of return to avail benefit of section 80M.

Intercorporate dividend

Scope

- Covers one category of dividends – dividends received by a domestic company from another domestic company
- Does not cover dividend received from mutual fund
- Does not cover dividend received from foreign subsidiary company taxed at 15% under section 115BBD
- Does not cover dividend received by foreign company having POEM in India

Issues in 80M deduction

- Quantum of relief under 80M i.e. whether on gross basis or net off expenditure claimed on dividend
 - Erstwhile section 80AA explicitly provided that quantum of relief for the purpose of section 80M is net of expenditure. Said section is not reintroduced on introduction of section 80M
 - SC in Distributors (Baroda) P Ltd v UOI [1985] 155 ITR 120 (SC) held that section 80AA is clarificatory in nature and independent of said provision, quantum of deduction available should be on net basis
 - Kol HC after considering SC in Distributor (Baroda) held that when dividend income is assessed under business, deduction under section 80M should be allowed on gross basis [CIT v Carolina Investments Ltd [1996] 87 TAXMAN 238 (Cal)]
 - Deduction under section 80M need not be reduced by deduction on special reserve created by banking and financial company under section 36(1)(viii) [CIT v. Industrial Finance Corporation of India Ltd [2015] 53 taxmann.com 109 (Delhi)]

Issues in 80M deduction

- Whether loss (current or carried forward) or unabsorbed depreciation has to be set off first prior to grant of deduction under section 80M?
 - Section 80M forms part of Chapter VI-A and deduction is granted from Gross Total Income (GTI)
 - GTI is computed after set off of losses and unabsorbed depreciating as provided in Chapter VI. Thus, deduction under 80M can be availed only if there is positive income after GTI
 - Refer DCIT v Bajaj Auto Holding Ltd [2008] 23 SOT 493 (Mumbai) ; CIT v Mcleod & Co. Ltd [1982] 134 ITR 674 (Cal)

Issues in 80M deduction

- Can deduction be claimed by branch of foreign company (say Banking branch) receiving dividend from domestic company?
 - Section 80M is applicable only to domestic company
 - Domestic Company is defined in section 2(22A) to mean Indian Company or foreign company which has made prescribed arrangements for declaration of dividends
 - Branch of NR does not satisfy section 2(22A)
 - Mumbai Tribunal in BNP Paribas SA [2013] 33 taxmann.com 83 (Mumbai - Trib.) on invoking non-discrimination provision of treaty held that Branch should be eligible for deduction under section 80M

Issues in 80M deduction

- Deduction under section 80M in respect of dividend received by Trust with Company as beneficiary. Company thereafter declares dividend to shareholder?

Specific Trust

- Section 161 provides that tax on trustee shall be levied upon and recovered from him in like manner and to the same extent as it would be leviable upon and recoverable from the person represented by him. Thus, trustee would be entitled to take benefit of section 80M [CIT v. Trustees, T. Stanes and Co. Ltd., Staff Pension Fund [1993] 200 ITR 396]

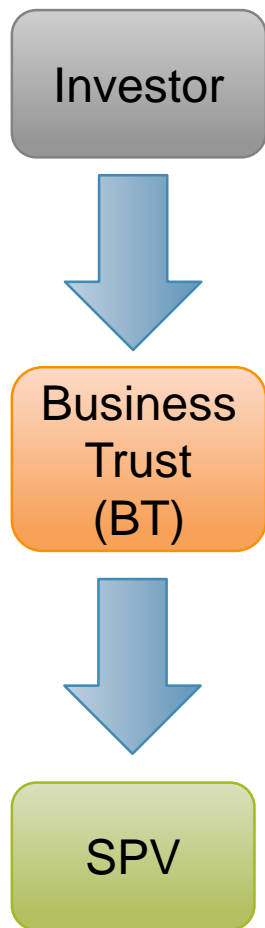
Issues in 80M deduction

- Deduction under section 80M in respect of dividend received by Trust with Company as beneficiary. Company thereafter declares dividend to shareholder?

Discretionary Trust

- Section 80M does not postulate that in order to become entitled to the deduction under the said section in respect of income by way of dividends earned from the shares, the assessee-company must be the registered holder of shares in respect of which income by way of dividend is earned. The condition precedent for granting exemption under section 80M is that there should be income by way of dividends from a domestic company [CIT v Indian Iron & Steel Co. Ltd [1986] 27 Taxman 201 (CAL)]
- When a trustee is assessed to tax upon the income of the trust it is "really the beneficiaries who are sought to be assessed in respect of their interest in the trust properties through the trustee" [Kamalini Khatau (1994) 209 ITR 101 (SC)]

Business Trust



Nature of income	Treatment in the hands of BT		Treatment in the hands of investor	
	Existing	Proposed	Existing	Proposed
Dividend out of profits generated after the date of acquisition of SPV by trust	Exempt u/s 10(34) subject to 115BBDA	Exempt u/s 10(23FC)	Exempt u/s 10(23FD)	Taxable as per 115UA at applicable rates
DDT on above	Relief u/s 115-O(7)	No DDT	-	-
Dividend out of profits accumulated up to the date of acquisition of SPV by trust	Exempt u/s 10(23FC)	Exempt u/s 10(23FC)	Exempt u/s 10(23FD)	Taxable as per 115UA at applicable rates
DDT on above	To be paid by SPV at 15%	No DDT	-	-
TDS on dividend distributed by BT	Nil as income is exempt	10% u/s 194LBA	-	-
Interest	Exempt u/s 10(23FC)	Exempt u/s 10(23FC)	Taxable as per 115UA at applicable rates	Taxable as per 115UA at applicable rates
Renting/ leasing/ letting of real estate property owned by trust	Exempt u/s 10(23FCA)	Exempt u/s 10(23FCA)	Taxable as per 115UA at applicable rates	Taxable as per 115UA at applicable rates

Corresponding changes in other sections

Section	Description	Existing	Proposed
115ACA	Dividend earned by resident individual from investment in GDR	Exempt u/s 10(34) subject to 115BBDA	Taxable u/s 115ACA @ 10%
115AC & 196C	Dividend earned by NR from investment in GDR	Exempt u/s 10(34); No TDS on distribution u/s 196C	Taxable u/s 115AC @ 10%; TDS @ 10% u/s 196C
115AD & 196D	Dividend income earned by FIIs	Exempt u/s 10(34); No TDS on distribution u/s 196D	Taxable u/s 115AD @ 20%; TDS @ of 10% u/s 196D
194	TDS on dividend to resident [as referred to in sec 2(22)-(a) to (e)]	No TDS liability on company	TDS to be deducted by company @ 10% if- (a) Paid in cash; or (b) Paid by any other mode & amount is INR 5K or more
115C	Dividend earned by NRI from investment in Indian Co. (shares purchased through FC)	Exempt u/s 10(34)	Taxable u/s 115C @ 20%
57	Deductions from income from other sources	No deduction for dividend referred to in 115-O; Sec 14A applicable for dividend	Deduction up to 20% of dividend/ income from MF specified in 10(23D) or 10(35) included in GTI; Sec 14A not applicable for dividend
195	TDS on payment to NR	No TDS on payment of dividend referred to in 115-O	TDS to be deducted by company on payment of dividend to NR at applicable rates

International tax proposal

Extending Source Rule

- Section 9 contains provisions in respect of income which are deemed to accrue or arise in India. Section 9(1) creates a legal fiction that certain incomes shall be deemed to accrue or arise in India
- Explanation 1 provides that in case where all the operations are not carried out in India the income of the business deemed to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India
- Memorandum refers to discussion ongoing on international forum and states that Countries generally agree that income from advertisement that targets Indian customers or income from sale of data collected from India or income from sale of goods and services using such data collected from India needs to be accounted for in Indian revenue

SEP deferred

- Finance Act 2018 introduced SEP without requiring physical presence of NR. Provisions were not effective as rules specifying threshold for trigger of transaction were yet to be specified
- In light of discussion in G20 on taxation of digital economy it is proposed to defer provision by one year to AY 2022-23.
 - No deferment of Equalisation Levy provisions even though part of Action Plan 1 of BEPS
- Following amendment made in SEP provisions proposed to be effective from AY 2022-23
 - Clause (a) to Explanation 2A amended wherein NR need not be in India to carry out transaction in respect of any goods, services or property. Law will be applicable if it is carried out with person in India
 - Similarly in clause (b) NR need not be in India for systematic and continuous soliciting of business activities or engaging in interaction with such number of user. Law will be applicable if user is in India. Also reference to 'through digital means' deleted

SEP deferred

Implication of amendment in Clause (a) of Explanation 2A

- NR need not be in India to carry out specified transaction
- It is locale of person in India that creates Business Connection (BC)
- Off-shore sales, offshore services will result in creation of SEP if customer is in India
- Clause (a) is not restrictive to digital goods, download of data or software but also covers transaction of physical goods
- Purchase of shrink wrapped software may not result in royalty but may result in SEP
- Services which are not technical or consultancy – any service will result in SEP

SEP provisions do not override tax treaty and in absence of PE in India, NR cannot be charged to tax

SEP deferred

Implication of amendment in Clause (b) of Explanation 2A

- User in India creates BC for NR
- NR need not be in India to carry out specified activity
- Reference to 'though digital means' deleted. Thus, irrespective of the medium – action of systematic and continuous soliciting of business activities or engaging in interaction results in SEP
- Even specified activity carried out by third party NR service provider or software may result in SEP for both NR service provider as also NR

Enlarged scope of profit attribution

- Explanation 3A added which states that 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;
 - (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
- Explanation 3A shall also apply to the income attributable to the transactions or activities referred in SEP from AY 2022-23
- **Explanation 3A extends attribution provided by Explanation 1. It does not create a separate category of deeming income**

Enlarged scope of profit attribution

- Section 9 contains provisions in respect of income which are deemed to accrue or arise in India. Section 9(1) creates a legal fiction that certain incomes shall be deemed to accrue or arise in India which includes Business Connection (BC)
- Explanation 1 provides that for profit attribution of BC in case where all the operations are not carried out in India the income of the business deemed to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India
- Memorandum refers to discussion ongoing in international forum and states that Countries generally agree that income from advertisement that targets Indian customers or income from sale of data collected from India or income from sale of goods and services using such data collected from India needs to be accounted for in Indian revenue

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 - 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

Enlarged scope of profit attribution

- Explanation 1 reads 'in case of business of which all operations are not carried out in India'. Thus, law requires some activities to be carried out in India for BC and Explanation 1 and Explanation 3A are triggered only when there is BC
- Once BC is triggered Explanation 3A comes to play
- Explanation 3A states 'income attributable to operation carried out in India shall include' specified activities
- It appears that Explanation 3A creates a attribution rule akin to force of attraction under treaty e.g. FCO has Branch in India for collecting and HO carries out specified activity mentioned in Exp 3A and earns income from it. Exp 3A will include income arising from specified activity to be taxed in hands of Branch even though Branch is not involved in any of the said activity

Enlarged scope of profit attribution

- such advertisement which targets a customer who resides in India or a customer who accesses the advertisement through internet protocol address located in India
 - Payment subject to Equalization Levy exempt in hands of NR
 - Irrelevant whether activity advertisement activity is taken note by customer in India
 - Meaning of 'resides in India' - whether Indian resident, presence in India, having Indian citizenship, NR visiting India ?
 - customer who accesses the advertisement through internet protocol address located in India – irrelevant whether advertisement is targeted to Indian customer

Enlarged scope of profit attribution

- Sale of data collected from a person who resides in India or from a person who uses internet protocol address located in India;
 - Data can be collected from person who resides in India by any mode – email, phone call, cell phone
 - Taxing Point is sale of data collected – thus, sale of data by NR1 to NR2 ; NR2 to NR3; NR3 to NR4 will bring all NRs to tax irrespective of the fact that same data is sold
 - Whether sale includes licensing arrangement/ Subscription arrangement wherein limited right is provided to user
 - How to attribute income in case of homogenous data i.e. data consists of multiple country and is sold in bundled manner
 - Whether sale Indian data collected from publicly available information in India triggers provision (e.g. Equity research report based on stock market in India)

Enlarged scope of profit attribution

- 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
 - Relative use of data in final sale of good or services?
 - Relative weightage to other factors like IP, market etc vis-à-vis data collected in entire value chain for profit attribution – Explanation 3A includes entire sale to tax
- CBDT empowered to make rules to provide for the manner in which and the procedure by which income shall be arrived at in the cases of
 - Operations carried out in India by a non-resident and
 - Transaction or activities of a non-resident

Section 94B

- Section 94B limits interest deduction to Indian Company or PE for interest expenditure incurred in respect of debt issued by non-resident, being AE of Borrower
- Proviso deems debt issued by lender which is not AE as being issued by AE, if AE provides implicit or explicit guarantee to such lender or deposits corresponding and matching amount of funds with such lender
- Explanatory Memorandum:

“Representations have been received to carve out interest paid or payable in respect of debt issued by a PE of a non-resident in India, being a person engaged in the business of banking for the reason that as per the existing provisions a branch of the foreign company in India is a non-resident in India. Further, the definition of the AE in section 92A, inter alia, deems two enterprises to be AE, if during the previous year a loan advanced by one enterprise to the other enterprise is at 50 per cent. or more of the book value of the total assets of the other enterprise. Thus, the interest paid or payable in respect of loan from the branch of a foreign bank may attract provisions of interest limitation provided for under this section.”

Section 94B

- Exclusion carved out vide insertion of section 94B(1) so as to provide that interest limitation would not apply to interest paid in respect of a debt issued by a lender which is a PE of NR being a person engaged in business of banking in India
- Exclusion is irrespective of quantum of debt lent by PE to specified borrowers. Thus, even if debt is issued by Indian PE bank based on implicit or explicit guarantee issued by NR AE of specified borrower, provisions shall not be applicable

ROI of flip side entity

- NR receiving income in the nature of royalty, fees for technical services was obligated to file ROI in India
- Section 115A(5) exempts NR to file ROI in India if income consists of interest and dividend and tax is deducted in accordance with the TDS provisions
- Memorandum reads:

*“the current provisions of section 115A of the Act provide relief to non-residents from filing of return of income where the non-resident is not liable to pay tax other than the TDS which has been deducted on the dividend or interest income, the same relief has not been extended to non-residents whose total income consists only of the income by way of royalty or FTS of the nature as mentioned in point (b) above. **Representations have been received to extend this benefit to royalty and FTS income as well**”*

ROI of flip side entity

- Section 115A(5) amended to include within its scope Royalty and FTS
- NR need not file ROI in India if following two conditions are satisfied
 - TDS is deducted under Chapter XVII; **and**
 - Rate of TDS is not less than rate specified under clause (a) or clause (b) of section 115A
- Section 115A(1) prescribes following rates for taxing different income
 - Dividend income – 20%
 - Interest income – 5% / 20%
 - Royalty / FTS – 10%
- The above rate needs to be increased by cess at the rate of 4% and surcharge at the rate of 2% / 5%* as provided in Schedule II to Finance Act 2020

ROI of flip side entity

- Issue arises whether NR entity offering income to tax at treaty rate – say 10% (India-Germany, India-Singapore) can avail benefit of amended provision.
- As per one view, Section 115A rate after considering surcharge is higher than 10% and since TDS is deducted at treaty rate, benefit of section 115A(5) cannot be availed.
- Other view of the matter is that Section 115A(5) states 'Rate of TDS is not less than rate specified under clause (a) or clause (b) of section 115A'. Surcharge and cess is not tax rate and accordingly tax deducted as per treaty is same as stated in Section 115A and thus benefit should be available
- NR availing benefit of NIL taxation under treaty (say software royalty, make available benefit, absence of Equipment royalty article etc) need to file tax return

ROI of flip side entity

Scenario	Nature of income	Rate at which TDS deducted	Requirement to file return of income
1	Royalty / FTS / Dividend / Interest	115A rate	No
2	Royalty / FTS / Dividend / Interest	Treaty rate	Yes
3	Royalty / FTS / Dividend / Interest	Not taxable under treaty	Yes

- Irrespective of ROI filing obligation, NR needs to comply with disclosure of TP transaction in Form 3CEB and TP documentation if transaction is between AEs
- Exemption from filing of ROI (Scenario 1) applies irrespective of method of accounting followed by NR (i.e. benefit can be availed if NR earlier offered income on cash basis)

ROI of flip side entity

Dividend

- Dividend from Indian companies is taxable in hands of NR
- Accordingly, if dividend income is taxable at lower rate of 5% / 10% as per treaty provisions, return of income would be required to be filed by NR

Assessment

- In case of transaction between AEs, it is possible that AO may be required to refer case to TPO under section 92CA
- Starting point of assessment under section 143 is ROI. Thus, it is possible that AO may require to file return under section 142(1)

TDS provisions

TDS on E-commerce transactions

- Section 194-O introduced for collecting of TDS on E-commerce transactions
- E-commerce operator to deduct TDS @ 1% on gross payment made by it to e-commerce participant (5% if e-commerce participant does not have PAN)
- E-commerce participant means a person resident in India selling goods or services, including digital products through electronic or digital platform;
- E-commerce operator means any person who owns, operates or manages electronic facility for e-commerce and responsible for paying to e-commerce participant. Hence, even non-resident e-commerce operator are also covered
- TDS to be deducted at the earlier of following two events:
 - A the time of payment to e-commerce participant or
 - At the time of credit of amount of sale or services to e-commerce participant;

Section 194O-TDS on E-commerce transactions

- Amount would be deemed to be paid to e-commerce participant by e-commerce operator when purchaser of goods or services makes payment to e-commerce participant
- TDS not applicable if following conditions are fulfilled:
 - E-commerce participant is individual or HUF; and
 - Their gross revenue during the year from sale of goods on e-commerce website does not exceed Rs. 5 lakhs; and
 - E-commerce participant has furnished PAN or Aadhar number to the e-commerce operator
 - Once TDS deducted under this section, no TDS required to be deducted under any other section
 - TDS not applicable on payment relating to hosting advertisements or providing any other services by e-commerce operator
 - TDS applicable irrespective whether recipient has income or not in India

Amazon



- Seller registers on Amazon and lists its product
- On sale to Customer, Amazon undertakes delivery of product
- Every 14 days, Amazon pays seller after deducting referral fees, shipping fee and closing fees
- Invoice of Seller along with GST No sent to buyer
- E-com participant – Seller selling goods on Amazon
- E-com operator – Amazon as it provides electronic facility and is responsible for paying Airlines
- Section 194-O triggered as Amazon provides e-commerce facility

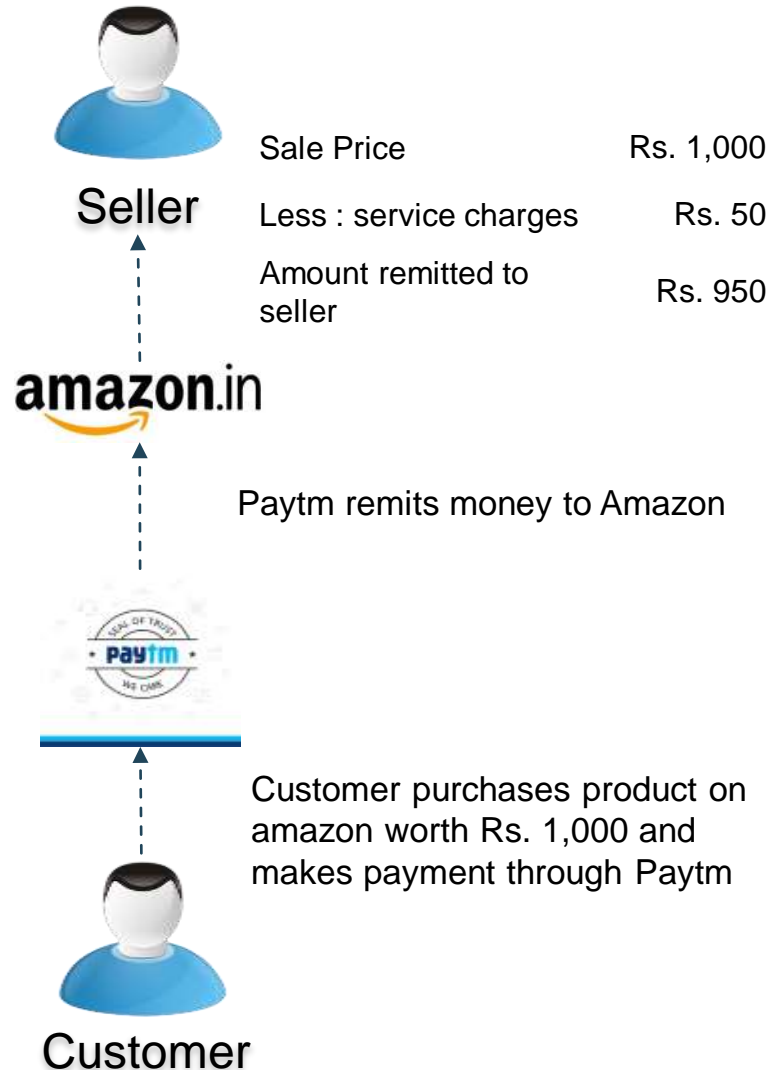
Amazon



- Amazon to deduct tax on entire gross sale i.e INR 1,000 even though net payment to seller is Rs 950
- Seller need not deduct tax on service fees retained by Amazon

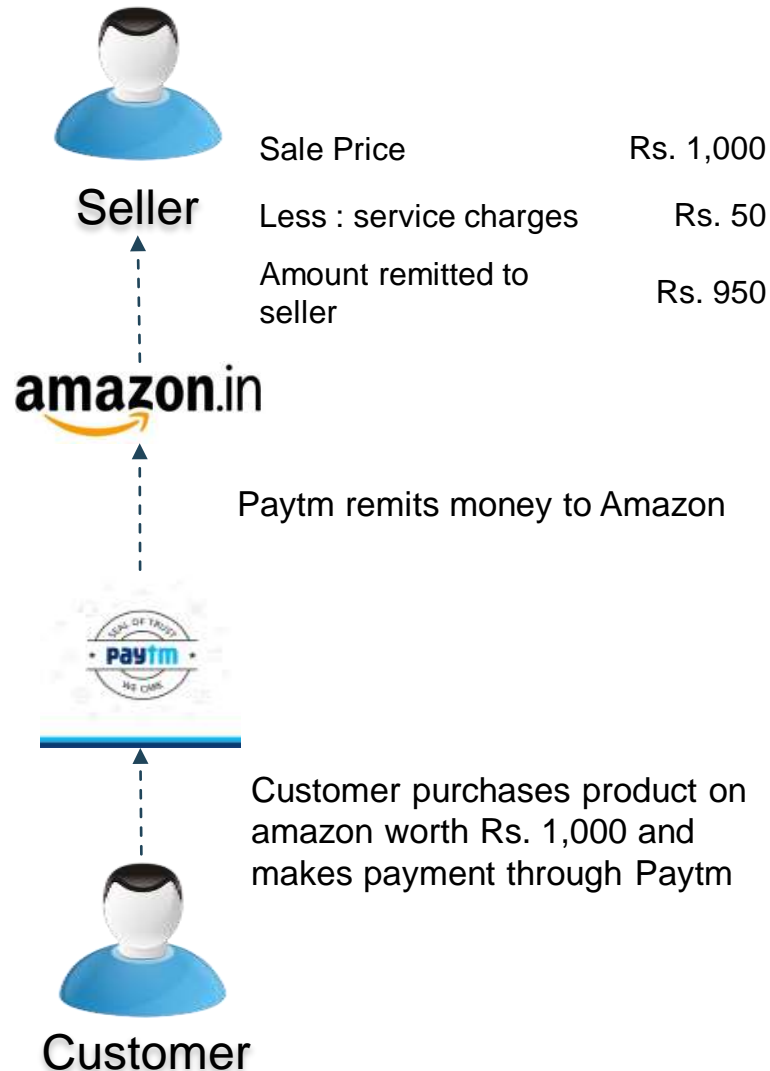
Similar mechanism for payment by Swiggy, Zomato, Flipkart, Book my show, Pharm Easy etc.

Amazon – payment by e-wallet



- Customer buys product on Amazon but makes payment through Paytm
- Seller merely registers itself with Paytm to receive payment
- Section 194-O applies only when sale of goods or services is facilitated by e-commerce operator
- Words 'facilitated' are of wide import and accordingly providing wallet facility may be covered by above words
- However for section 194-O to apply it is necessary that seller satisfies definition of e-commerce participant

Amazon – payment by e-wallet



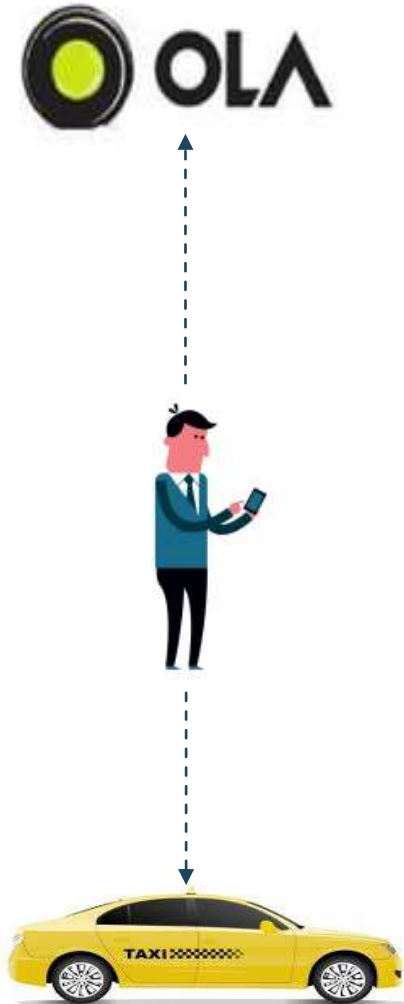
- E-commerce participant means a person resident in India selling goods or providing services or both through digital or electronic facility or platform for electronic commerce
- In instant case, seller is not selling goods or providing service through electronic commerce. Electronic commerce is defined supply of goods or services or both through digital means
- Since Paytm merely provides wallet service, payment made by Paytm to seller does not attract section 194-O
- Payment by Amazon to Seller attracts TDS

Ola



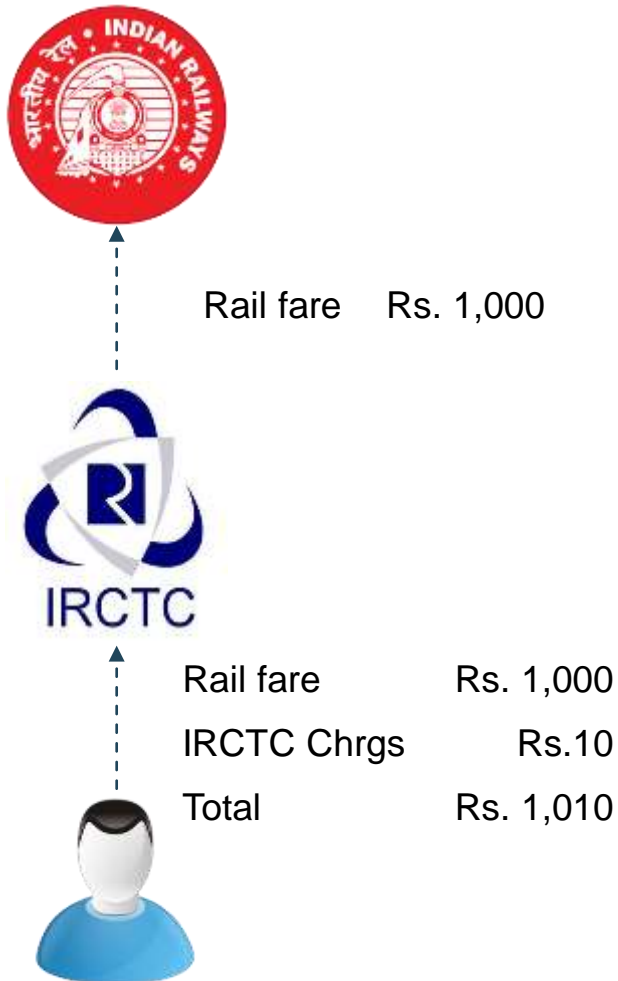
- Vehicle owner registers himself on Ola
- Ola allots ride based on its software
- Pricing is decided by Software. Invoice is issued by Driver for ride and Convenience fees for ride and waiting is charged by Ola
- In case of corporate account, entire invoice is issued by Ola
- Ola pays rate per km and incentives to Driver. Driver incurs cost of car, petrol, maintenance etc
- Some customers pay cash directly to driver

Ola



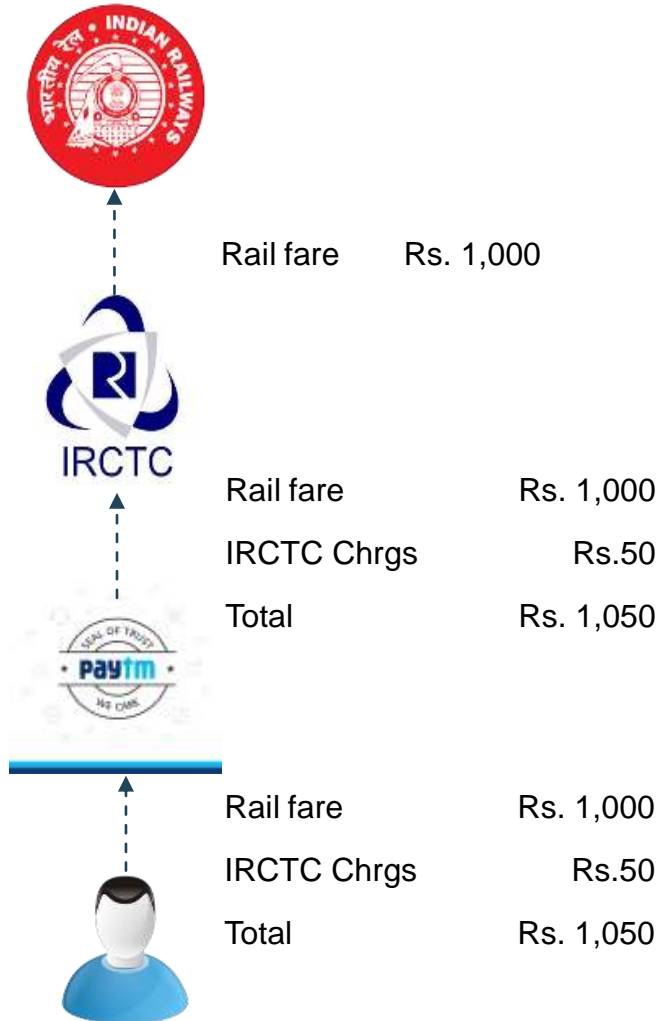
- E-com participant – Vehicle owner as he offers service on electronic platform
- E-com operator – Ola as it provides electronic facility and is responsible for paying Driver
- Section 194-O is triggered
- Ola will be required to deduct TDS on payments made to Vehicle Owner. Pursuant to Explanation to section 194-O, payment in cash made by customer to driver will be deemed to be payment made by Ola to vehicle owner
- Section 194-O not applicable if Ola otherwise deducts tax on payment to Vehicle owner say – under section 194C

IRCTC ticket



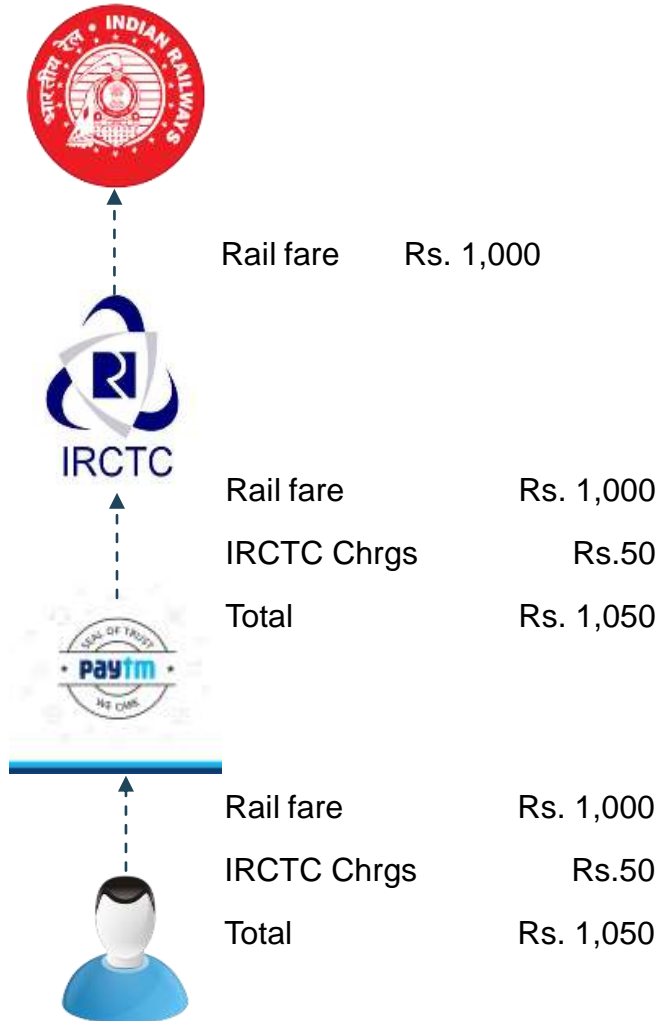
- IRCTC has sole rights to book railway tickets online
- E-com participant – Ministry of Railway as it sells ticket (goods) through IRCTC
- E-com operator – IRCTC as it provides electronic facility and is responsible for paying Railway
- IRCTC charges user for railway fare and IRCTC service charge & convenience charge.
- IRCTC remits railway fare to Ministry
- Even though section 194O is triggered, no TDS deductible as section 196 makes section 194N non applicable to payment to Government

IRCTC ticket booking through Paytm



- IRCTC has sole rights to book railway tickets online
- Paytm offers railway booking facility
- E-com participant – IRCTC as it provides service of offering tickets of railway
- E-com operator – Paytm as it provides electronic facility and is responsible for paying Railway
- Section 194-O triggered as IRCTC services are provided through Paytm
- Paytm will be required to deduct TDS under sec 194-O
- IRCTC is not government and hence exemption under section 196 is not available

IRCTC ticket booking through Paytm

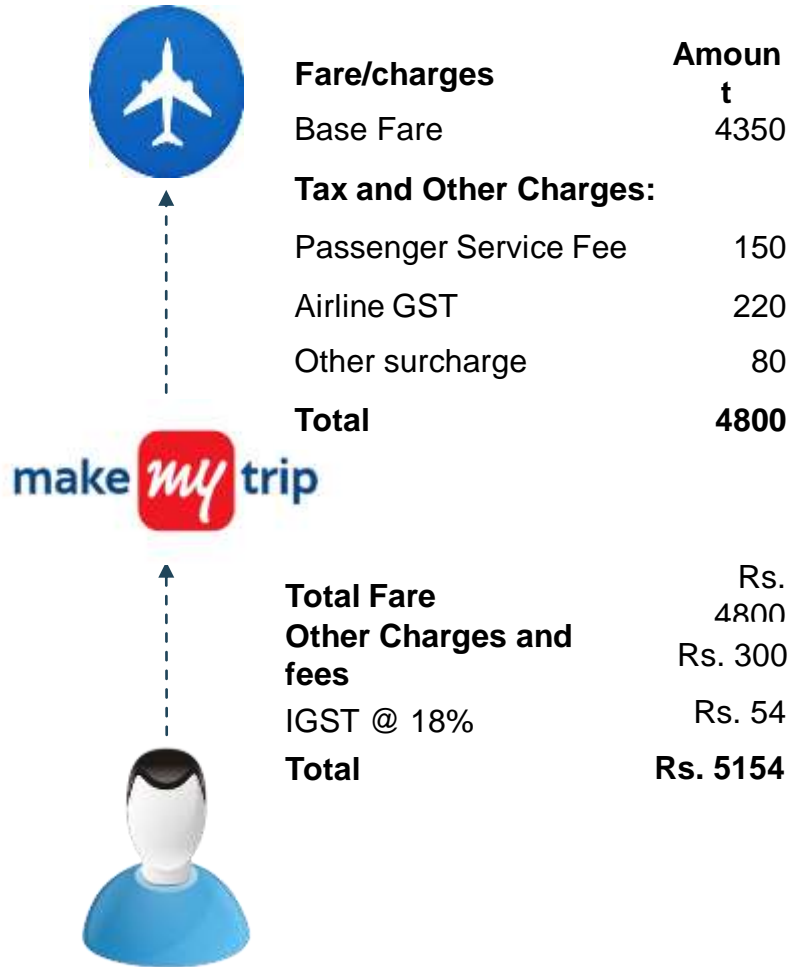


- Amount on which 194-O applies
 - Base Railway fare amount
 - Service charge
 - Or both

- It seems section 194-O applies to entire amount consisting of base fair and service charge as section 194-O uses words 'gross amount' as against income used in section 194J leaving no scope of reimbursement

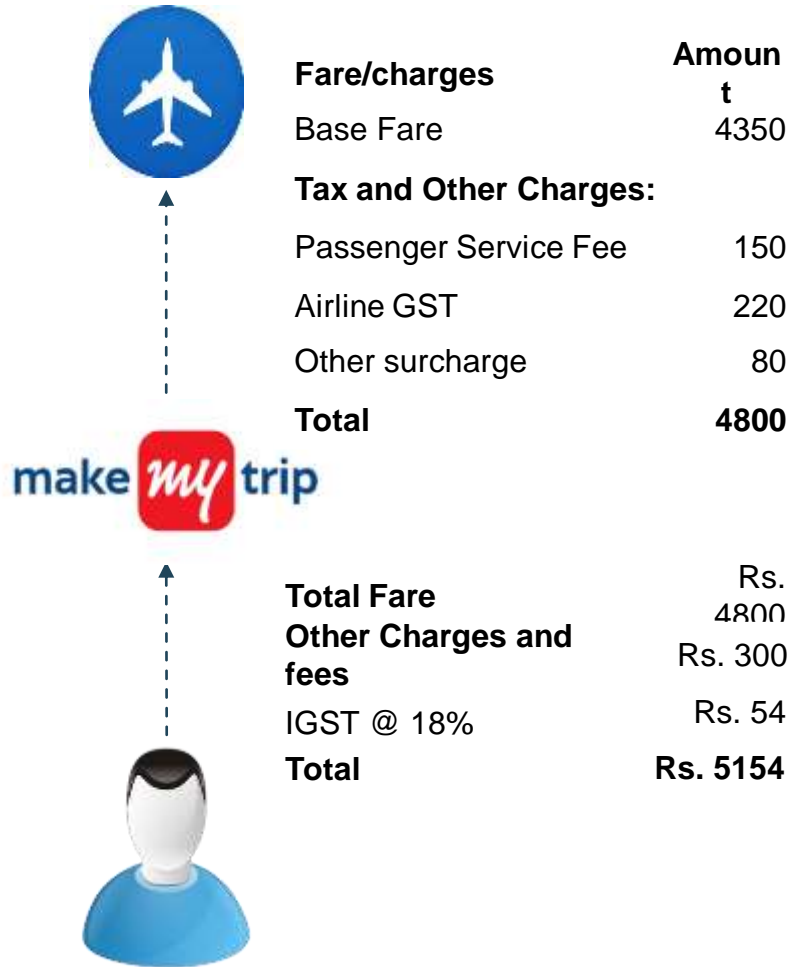
- Section 194-O not applicable on payment made by IRCTC to railway

Make my trip



- User books ticket online
- MTM charges user air fare (which includes airline GST) and MTM service charge
- Invoice provides details of air fare charged by airline along with airline GST and MTM charges are stated separately
- Credit for GST charged by Airline can be claimed by user based on separate invoice issued by Airline which can be obtained from its website

Make my trip



- E-com participant – Airline Companies as it is selling goods through digital or electronic facility for electronic commerce
- E-com operator – MMT as it provides electronic facility and is responsible for paying Airlines
- Section 194-O triggered as MMT provides e-commerce facility
- TDS to be deducted by MMT on Total Fare payable to airline
- Airline need not deduct TDS on service provided by MMT

Residential status of Individual

Residential status of Individual

Reduction in number of days for determining residential status for visiting NRI

- Existing provision states that an Indian citizen or person of Indian origin who visits India would be resident in India if he
 - a) is in India for 182 days or more during the year;
 - or**
 - b) is in India for 182 days or more during the year AND present for 365 days or more in preceding 4 previous years
- Criteria of 182 days as appearing in (b) above has now been reduced to 120 days
- Thus, NRIs planning their visit in India should take into consideration above reduction in days while determining their residential status

Residential status of Individual

Change in criteria for determining Resident but not ordinary resident

- The existing criteria for determining resident but not ordinary resident for individual and HUF is as under:

- Individual / HUF Manager has been non-resident in India in 9 out of 10 previous years

OR

- Has been in India for 729 days or less in 7 previous years
- The above criteria is now intended to be relaxed and an individual / HUF would be considered to be resident but not ordinary resident if he is non-resident in India in 7 out of 10 previous years
- Further, the second criteria of 729 days or less in 7 previous years has been deleted

Residential status of Individual

Deemed to be resident – Section 6(1A)

- The bill has proposed a new section 6(1A) to deem a person to be resident in India if he fulfills following conditions:
 - is a citizen of India; and
 - is not liable to tax in any other country or territory by reason of his residence or domicile or any other criteria of similar nature.

Residential status of Individual

Deemed to be resident – Section 6(1A)

- The phrase “liable to tax” has been interpreted to mean a person who is subjected to tax by the taxation laws of that State because of a nexus existing between him and the State*
- There is a distinction between “liability to tax” and “exemption from tax”.
- In the case of Emirates Shipping Line [23 taxmann.com 400], Delhi High Court held that phrase 'liable to taxation' is not the same as 'payment of tax'.
- Accordingly, if a person is staying outside India in a country for the purpose of his employment, where the country does not levy income tax, provisions of section 6(1A) should not be attracted as individual would still be considered to be liable to tax

*Mohsinally Alimohammed Rafik v. CIT [1995] 79 Taxmann 75 (Delhi) – AAR

Residential status of Individual

Deemed to be resident – Section 6(1A)

- To allay fears regarding taxability of overseas employees who are Indian citizens, CBDT has issued press release dated 2 February 2020
- Said press release clarifies that the section does not include those Indians who are bona fide workers in other countries, including in Middle East, and who are not liable to tax in these countries.
- Also, it clarifies that income earned outside India by a deemed resident under this section shall not be taxable in India unless it is derived from an Indian business or profession.
- However, Indian income of non-resident would anyways be subject to taxation under existing provisions and hence, intention to introduce section 6(1A) is not clear

Consequences of Indian Residence

- Worldwide Income taxable in India
- Applicability of TP provision including reporting of international transaction and maintenance of TP documentation
- Denial of treaty benefit in India-US treaty on account of dual residency
- Applicability of withholding provisions – unless payment falls within source rule exclusions under domestic law
- Compliance in form of filing of ROI, TDS etc
- Disclosure of asset outside India
- Black Money Act becomes applicable

Thank You

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