

Foundation for International Taxation

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Brief Presentation on A better & complete system of E-commerce Taxation

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Important Notes:

1. This presentation gives entirely **my own views**. The E-commerce Committee may or may not agree with my views.
2. In my views, Equalisation levy (EQL) is a **WIP**. This paper points directions at which a complete system can evolve. There are differences between Equalisation Levy & my presentation.
3. In my humble submission, when a new law is to be drafted, **past case law** has limited use. If we are making a new road map; past maps will be of indication value.
4. I am writing a **detailed paper** which will be published on my website. It will try to cover more issues in the paper. I will cover important queries raised today.

Short Forms

BEPS	:	Base Erosion & Profit Shifting.
CBCR	:	Country by Country Reporting
COS	:	Country of Source.
COR	:	Country of Residence.
E-commerce	=	Digital commerce
EQL	:	Equalisation Levy
ESP	:	E-commerce Service Provider
ITS	:	International Taxation System.
NRC	:	Non-Resident of COS.
PE	:	Permanent Establishment.
SEP	:	Significant Economic Presence
TFDE	:	Task Force on Digital Economy.

OECD Performance on E-Commerce Taxation

- Year 1997 – Published Ottawa report & said E-Commerce is very important.
- Year 2000 – Indian E-Commerce Committee published its report.
- Indian Committee said: Existing System of International Taxation is Inadequate to deal with E-Commerce taxation. World community needs to achieve consensus on the subject.

OECD Failure

- **India did not take any Unilateral step.**
- **Year 2005 OECD said E-Commerce is not important; and existing system of International Taxation was fine.**
- Year 2000 onwards, India was suffering tax loss as COS.
- World was not concerned.

US crisis - woke up the world

- Year 2008: World came to know that USA was insolvent.
 - Europe also came into serious troubles.
 - All other countries suffered consequential losses.
- Year 2008 to 2013: Europe became COS for Google, Apple & other US MNCs.
- (Mother-in-law became Daughter-in-law)
- Year 2013: OECD & G20 started BEPS groups to control Tax Planning.

OECD realised its failure in E Commerce Taxation

- Year 2013: OECD declared that existing system of E-Commerce taxation was inadequate. It needed urgent & serious attention. E-Commerce was now big.
- BEPS Task Force 1 was on Digital Commerce Taxation.
- US took dominant part in BEPS discussions.
- Action 1 report was frustrated.
- Actions 2 to 14 reports published in time.

India took action after 16 years

- Nov 2015: Action 1 Interim report gave three options for interim tax arrangements.
- Feb 2016: Indian Finance Act proposed EQL @ 6% flat rate on gross revenue as a **tax on the Non-resident service provider.**
- Global & Indian - media & profession criticised Indian Government.
- Nov 2017: Many countries want EQL with minor variations. US does not want it. Many nations are not concerned- their economies are small.

US Unilateral actions

- Year 2017: USA Unilaterally withdraws from Climate Agreement.
- June 2017: Many countries sign MLI. USA refuses to sign.
- November 2017: USA proposes changes in IRC.
- World leaders don't criticise USA for its **Unilateral actions.**
- World tax leaders are not worried about **consensus if USA breaks all rules.**

Existing System - Inadequate.

Reason

- **Reason** for the realisation of inadequacy is - under the Existing System of International Taxation:
 - (i) In the COS - a Non-Resident can be taxed only if there is a **Permanent Establishment (PE)** within the **geographical** boundaries of the COS.
 - (ii) E-commerce defies geography & national boundaries.

Inadequate System.

Think out of the System / Box.

- One can do business in several countries without establishing PE in those countries.
- Google, etc. are doing this; and avoiding, COS tax. They are also avoiding COR taxes through other means.
- Since the system itself is defective, a solution cannot be found unless we **think out of the existing system (Defective Box)**.

Inspiring Progress in Science

- Compare Technology Growth & International Taxation.
- Listen to Sunder Pichai of Google on Artificial Intelligence & Machine Learning.
- Listen to Elon Musk on Driver Less Cars.
- Listen to Dr. Stephen Hawking.
- Even 10 minutes talk by these people inspire us. We start looking forward to a better future.

Compare BEPS

- Then read Multi-Lateral Instrument (MLI) & Country by Country Reporting (CBCR).
- If we understand it –
 We will be depressed.
- If we have to comply with the law,
 We will feel: “It is better to wind up the business.”
- Why this position?

BEPS - Difficult

- There are companies like Google, Apple – which will keep doing massive tax planning. To cover these MNCs, whole world will debate & draft MLI, CBCR & so on.
- These will mean every year's tax assessment may take 5 to 10 years to complete.
- Completely impractical in compliance & administration.

Better & complete system of Taxation

Tax system should be -

- 1. Fair** to the assessee & to the Government. To the COS & COR. If a tax system is based in favour of COR & against COS, it is an unfair system.
- 2. Simple** in compliance by the assessee & in administration by the department. The term “simple” includes clarity about the law. Language of law should be clear - avoiding litigation.

Better & complete system of Taxation

- 3. Dynamic.** The tax system should not be deterrent for international trade. It should be such that in times of needs, Government can increase the revenue; or incentivise trade by reducing tax.
- 4. No Double Tax.** When assessee pays tax in COS, he should get credit or exemption in COR. The COR credit system can work only when several countries together agree.

SEP as PE

- Significant Economic Presence (SEP) being added to PE definition is an option being considered.
- It will involve **FARM** – Attribution of Profits to the SEP.
- Between the Assessee (Head Quarters) and its PE (SEP), transfer pricing (**TP**) will apply.
- Hence Country by Country Reporting (**CBCR**) may come in.

SEP - Difficult

- **Application of BEPS - MLI & CBCR**
will mean - every year's tax assessment will take 5 to 10 years.
- In absence of Functions & Assets in COS, we don't have a system to **apportion profits based on market.**
- Drop SEP until we have consensus on apportionment by FARM.

OECD Model is Defective

- E-commerce .. To Digital Commerce.. To.. What next?
- Ignore definition of E-Commerce.
- OECD model has many **serious defects**:
- Goods & services are treated differently.
- COR gets max tax share. COS gets little.
- OECD reports are theoretical, removed from ground reality.
- Global tax system cannot depend upon instruments used for commerce – internet or mobile phone or any thing else.

Rashmin's Proposal for Full EQL- 'B to B' & 'B to C'.

- Include specified revenue by Non-residents as incomes liable to EQL.
- Collect a flat rate of tax from the Indian payer.
- No profit & loss a/c to be filed. No Transfer Pricing.
- For practical convenience, have thresholds for –
 - Non-resident's tax liability; &
 - For Indian payer's liability to deduct tax at source.
- Non-resident to file **audited EQL returns** in COS. Declare gross revenue. Reconcile assessee's tax return with payers' TDS returns. (Like 26AS)

Equalisation Levy in COS

- Pay tax at specified rate in COS. Claim credit for TDS.
- **Claim credit in COR.**
- Equalisation Levy to be charged as a part of the Income-tax Act on specified revenue payments in excess of thresholds.
- Indian residents & PEs not liable for EQL.
- They are liable to normal Income-tax.

EQI & Treaties

- Treaties to be amended to have a separate article on EQI.
- As long as Treaties don't get amended, existing Indian system should continue.
- COS payer will withhold the tax (TDS) at flat rate on gross payments &
- COR should give credit. (Beyond Indian control.)
- This will cover loss of revenue by COS.

B to C

- Develop tax law to cover B to C.
- Align with Revenue models.
- Business consumers have TDS liability.
- Home consumers till threshold (say, Rs. 1,00,000) no TDS liability.
- **Payment softwares** to be modified:
GST & EQL to be recovered from all payments to registered assesseees through payment gateways.
Assessee to file tax return & pay balance tax if any payable on reconciliation with TDS returns.

COS Revenue loss

- E-commerce MNCs avoid COS as well as COR taxes.
- For COS loss, bring in Equalisation Levy on B to B & B to C.
- For COR loss, bring in CFC which can deal with massive & complex tax planning.

- Many Thanks
- Rashmin Chandulal Sanghvi