



TAXING THE DIGITAL ECONOMY THROUGH SIGNIFICANT ECONOMIC PRESENCE

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ABSTRACT

The main motivation behind this paper is to discourse the current worldwide issues caused due to the digital economy, to examine about the different changes made in the Tax Model Convention by the OECD and to examine and breakdown its various provisos present in its execution. The extent of this paper is to bring an elementary understanding of the notion of Permanent Establishment and Business connections so as to draw the implication of the emergence of Digital taxation in the world and the interference of the concept of significant economic presence in the Indian Taxing regime, suggesting further improvements and effective implementation strategies.

To elucidate in nutshell, the author mainly concentrates on these five subdivisions; *Firstly* as to What Permanent Establishment is, *Secondly*, various proposals, approaches & principles of the OECD, *Thirdly*, the Two Pillar concept, *Fourthly* BEPS ACTION PLAN 15& 7 that discusses the different complications in taxation due to Digitalization, *Fifthly* Significant Economic Presence in India, Equalization Levy and the connection between the two.

In conclusion, the authors put forth the impact of bringing in the amendments that fit in the digitalized economy and the hitches in the execution thereby creating an attention to

make the taxing through SEP in an efficient way.

KEYWORDS:

Permanent Establishment, Significant Economic Presence, DTAA, Digital Economy, OECD Unified Approach, BEPS Action Plan, Equalisation Levy, India.

OVERVIEW OF THE PAPER:

Digital Business Taxation:

OECD and G-20 countries together acquainted BEPS Action Plans to curb tax evasion and double non taxation. BEPS Action Plan 1 deals with addressing challenges presented by taxation of Digital Economy. It discusses and analyses potential options to address the challenges posed by taxation of digital economy.

These Options are:

- ✓ “Equalization levy”
- ✓ New nexus rule in the form of a “significant economic presence”
- ✓ “Withholding tax” on certain types of digital transactions.

Taxation of Digital Business in India:

India being pro-active, introduced in its domestic tax law through Finance Act. The concept of “equalisation levy” with effect from 1st June 2016 and “significant economic presence (SEP)” acts as an additional safeguard against BEPS. It removes requirements for a fixed place of business to constitute a PE and relies on other measurable factors to bring a NR to tax. India duly acknowledges following challenges, while adopting measure:

- ✓ Possibility of over taxation,
- ✓ Compliance and admin costs,
- ✓ Uncertainty etc.



1. THE CONCEPT OF PERMANENT ESTABLISHMENT:

The concept of permanent establishment ("PE") has added noteworthy significance with the mounting trend of globalization. The concept of a PE is important for numerous Articles of the Convention and the idea or its related, likewise appears in the domestic laws of some countries. The PE concept denotes the dividing line for businesses between merely trading in a country and trading with that country.¹

1.1 Definition of the term PE:

From the definition given under the OECD Model Tax Convention, it can be seen that two types of PE can be contemplated. First, an establishment which is a part of the same enterprise and under common ownership and control- an office, branch, etc. This is covered by Article 5(1) to (4), which can be referred to as 'Associated PE'. The second type is an agent who is legally separate from the enterprise, but is nevertheless dependent on the enterprise to the point of forming a permanent establishment. This is covered by Article 5(5) and (6), which can be referred to as 'Unassociated PE'.²

If the non-resident has a PE in India, only then the Business profits, under Article 7 of the treaty are taxable. Concept of PE is used to determine the right of 'Source State' to tax business profits of the foreign enterprise. Existence of PE also enables the Source State to tax capital gains, dividends, interest and

royalties that are efficiently linked/attributable to such PE.³

2. SHIFT FROM THE CONCEPT OF BUSINESS CONNECTION TO SIGNIFICANT ECONOMIC PRESENCE IN INDIA:

Significant economic presence is global consensus regarding the need for a comprehensive mechanism to tax cross-border transactions in the digital economy and OECD, the UN and the EU are working on a resolution. The Indian income tax framework currently taxes income that accrues or arises through a business connection in India. The amendment widens the scope of 'business connection' and includes SEP within its ambit.

The First Proviso states that the said **transaction or activities would create a significant economic presence irrespective of whether or not the non-resident has a residence or place of business in India or renders services in India.** The inclusion of the first proviso seems to be confirming the principle applied in the decision of the Bangalore Tribunal in *ABB FZ LLC v. DCIT*.⁴

An amendment to the domestic law of a country will not have an impact on DTAAs as the latter override the former. However, if the amendment in question is, indeed, made applicable from April 1, 2019, its application will be limited to countries with which India

¹ Available Online At: http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Business_Connection_and_Permanent_Establishment.pdf (Last Accessed on 15.11.2020)

² Available Online At: http://www.nishithdesai.com/fileadmin/user_upload/

<https://www.slideserve.com/kelly-conner/the-concept-of-permanent-establishment-pe> (Last Accessed on 15.11.2020)

³ Available Online At: <https://www.slideserve.com/kelly-conner/the-concept-of-permanent-establishment-pe> (Last Accessed on 15.11.2020)

⁴ *ABB FZ LLC V. DCIT*, (2017) 166 ITD 329 (Bang).



does not have DTAA's viz. the Bahamas and Hong Kong.

India attempting to tackle the problem of taxing the digital economy is a welcome step, but the implementation of the SEP provision, in its current form, will create more problems.⁵

2.1 India before SEP:

India, like many other countries, did not have specific provisions for taxation of its digital economy prior to the introduction of the SEP and the Equalisation levy. Tax-related issues were decided by Indian courts, for instance, the Kolkata Tax Tribunal in the case of *ITO vs Right Florist Pvt. Ltd*⁶ held that an advertisement fee paid online to a non-resident web-based search company was not an FTS and was not taxable in India, since the enterprise did not have a PE in India. It observed that a website does not constitute a PE in India.

Similarly, in another matter, the Mumbai Tax Tribunal had held the case of *Pinstorm Technologies (P.) Ltd. vs. ITO*⁷ that payment made to a foreign company for uploading and display of banner advertisements on non-resident companies' portals was not taxable in India in the absence of it having a PE in India. Over time, as corporates have adopted digital means of doing business, Indian tax authorities have also implemented new ways of taxing transactions in the digital economy.

⁵ Vinti Agarwal & Vidushi Gupta, *Income Tax Act: Govt. Needs to clarify Significant Economic Presence*, FINANCIAL EXPRESS, Mar. 18, 2019 1.01 AM <https://www.financialexpress.com/opinion/income-tax-act-govt-needs-to-clarify-significant-economic-presence/1519319/>.

⁶ITO v. Right Florist Pvt. Ltd., TS-6658-ITAT-2013(Kolkata).

For instance, while holding that bandwidth-related payments made to a foreign company constituted royalty income, in the case of *Verizon Communications Singapore Pte Ltd vs ITO*⁸, the Madras High Court categorically stated that in a virtual world, the physical presence of an entity is insignificant.

2.2. Alterations in the Traditional Permanent Establishment Rule:

The scope of Business Connection was widened in the Budget 2018 by introducing a new Explanation 2A to section 9(1)(i) of the Act, according to which a non-resident shall be said to have a "business connection" in India if he has a *Significant Economic Presence* in India.

- In the case of *ABB FZ-LLC v. Deputy Commissioner of Income Tax*⁹, the Court held that application of a virtual PE does not require the non-resident company to have physical presence in India.
- In the case of *Formula One World Championship v. Commissioner of Income Tax*¹⁰, it was held that the principal test, in order to ascertain as to whether an establishment has a fixed place of business or not, is that such physically located premises have to be **at the disposal** of the enterprise. For this purpose, it is not necessary that the premises are owned or even rented by the enterprise. It will be sufficient if the premises are put at the disposal of the enterprise.

⁷Pinstorm Technologies (P.) Ltd. v. ITO, TS-536-ITAT-2012(Mum).

⁸Verizon Communications Singapore Pte Ltd v. ITO, TS-577-HC-2013(MAD).

⁹ABB FZ-LLC v. Deputy Commissioner of Income Tax (IT(TP)A.1103/Bang/2013 & 304/Bang/2015.

¹⁰Formula One World Championship v. Commissioner of Income Tax, (2017) 394 ITR 80 (SC).



- In the case of *DIT v. Morgan Stanley & Co.*¹¹, the court observed that the attribution of profit should be based on the principles of transfer pricing. However, there have been several decisions in India, where courts have attributed profits to PE in an ad hoc manner.¹²
- The court held unanimously that the availability of transactions through the website at a particular place is virtually the same thing as a seller having shops in that place in the physical world, in the case of *the World Wrestling Entertainment, Inc. (WWE) v. M/s Reshma Collection & Ors.*¹³

2.3 Origin of SEP:

The concept of **Significant Economic Presence** ("SEP") was introduced in the **Income-Tax Act, 1961** ("the Act") from April 1, 2018 via the Financial Bill 2018, to tax the income of the non-resident arising from transactions relating to any goods, services or property in India, including allowing download of data or software or carrying on business activities in India through digital means.

Explanation 2A.—*For the removal of doubts, it is hereby clarified that the significant economic presence of a non-resident in India shall constitute "business connection" in India and "significant economic presence."*

2.4 Introduction of SEP in Indian domestic tax laws:

Amendment made in the definition of 'business connection'

The Finance Act, 2018 introduced the concept of SEP in Section 9 of the Income-tax Act, 1961 (the Act). It provided that the SEP of a non-resident in India will constitute its business connection in India. For this purpose, SEP has been defined as the following:

(a) A transaction in respect of any goods, services or property, including provision of downloaded data or software, carried out by a non-resident in India if the aggregate of the payments arising from such transactions during the previous year exceeds the prescribed threshold

(b) Systematic and continuous soliciting of business activities or engagements involving interaction with the prescribed number of users in India using digital processes.

2.4.1 Latest Trends:

India pitches for 'significant economic presence' concept to tax global digital companies at G-20 meet –

India has made a sturdy case for the implementation of "significant economic presence" concept for taxing world-wide digital companies and close collaboration among the G-20 member nations to deal with elusive economic lawbreakers who flee their countries to escape concerns of the law. During her exchanges at the two-day G-20 meeting of finance ministers and central bank governors at Fukuoka in Japan, Finance Minister Nirmala Sitharaman also inclined for the development of a common defensive toolkit of measures to deal with non-compliant tax jurisdictions or nations which refuse to share tax-related information.

¹¹*DIT v. Morgan Stanley & Co.*, [2007] 162 Taxman 165 (SC).

¹²*Chand Mills Ltd v CIT* (1976) 103 ITR 548 (SC); *Motorola Inc v DCIT* (2005) 95 ITD 269 (Delhi) (SB);

Galileo International Inc v DCIT (2009) 116 ITD 1 (Delhi), etc.

¹³*World Wrestling Entertainment, Inc. (WWE) v. M/s Reshma Collection & Ors.*, 2014 (60) PTC 452 (Del).



Sitharaman also highlighted the need for the G-20 to keep a close watch on global current account disparities to ensure that they do not result in unwarranted global instability and tensions. She also urged the G-20 to remain aware of fluctuations in the international oil market and study measures that can bring benefits to both the oil exporting and importing countries.¹⁴

2.5 Overall scheme of SEP:

Once the concept of SEP is brought within the concept of Business Connection, Government of India will have a nexus / connection under ITA to tax a non-resident's business income in India. Thereafter Government of India has to amend the DTA to include E-commerce taxation; or in technical words, to add the concept of SEP to article 5 of the DTA which defines PE. India has signed around 80 DTAs with 80 different countries / jurisdictions. Hence Indian Government will have to try and negotiate the treaty with each country separately. Only when the other country accepts to add the concept of SEP, it will be added in the bilateral treaty. When it is added in the treaty, Government of India will be able to levy E-commerce taxation.

2.6 Need for SEP:

21st century has evolved into Digital Economy. Digital Economy is an Economy that covers its various activities with the help of web and other digital technologies. E-

buisness, E-Buisness infrastructure and E-commerce are the main components of this economy. As the economy evolved into a digitalized one, it also was started using as means to evade from payment of tax especially in the International Trade market. Ordinarily, Article 7 of the Direct Tax Avoidance Agreement postulate that only that much of profit as are arising due to assets and activities of the PE can be brought to tax and if the whole of the business activities are not apportioned between that arising in India and outside India. This has been a major drawback with respect to international tax mechanisms in the case of non-residents.

3. BEPS ACTION PLANS¹⁵

OECD/G20 BEPS PROJECT while addressing tax avoidance at domestic and international level developed 15 action plans in order to equip the government.¹⁶

3.1 PLAN NO. 1:

3.1.1. Tax challenges arising from digitalization: ISSUES

Technological advancement has enhanced the formation of digitalized economy. Excluding the advantages it provides, it has also created pathways for tax evasions at the global level. The issues created by digitalized economy are as follows;

1. Phenomenon

Three important phenomena facilitated by digitalization are **scale without mass¹⁷**,

¹⁴India pitches for 'significant economic presence' concept to tax global digital companies at G-20 meet, FIRSTPOST, June 10, 2019, 08:43:23 IST, <https://www.firstpost.com/business/india-pitches-for-significant-economic-presence-concept-to-tax-global-digital-companies-at-g-20-meet-6783071.html>.

¹⁵Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (7 June 2017).

¹⁶Inclusive framework on Base erosion and Profit Shifting, OECD, <http://www.oecd.org/tax/beps/beps-actions/>.

Tax and Digitalization, OECD, <https://www.oecd.org/tax/beps/tax-and-digitalisation-policy-note.pdf>.



reliance on intangible assets, and the centrality of data. The trio poses challenge to the basic foundation on the global tax system based on **Permanent Establishment and Arm's Length Principle.**

2. Business Models

Ordinarily, as per **Article 7 of the DTAAs**, business profits of a non-resident assessee shall be liable to tax in the country of sales only if he has a PE in that country itself. However due to technological advancements new business models have emerged. Under these new business models, the non-resident assessee operate remotely through digital medium in another country without having any physical presence in that country resulting in avoidance of taxation in the source country i.e. the country in which the said income has been earned.¹⁸

3. Low tax/ no tax Jurisdictions

Digitalized economy originated the development of new technologies have facilitated tax avoidance through the shifting of profits by multi-national enterprises (MNEs) to low or no tax jurisdictions. Overall, from an Asian perspective and context, the leading tax haven destinations are identified as Hong Kong, Singapore, Malaysia, Bahrain and Qatar, with Indonesia and Thailand as two other emerging destinations (Wall Street Journal 2016; ICO Services 2016).¹⁹

3.1.2 Why is it requires concern:

¹⁸Atishay Jain; *Significant Economic Presence: Game changer for International Taxation*, TAXGURU, Apr. 02, 2019,

<https://taxguru.in/income-tax/significant-economic-presence-game-changer-international-taxation.html>.

¹⁹ Vijay Pereira, Yama Temouri, Chris Jones & Ashish Malik; *Introduction, Identity of Asian Multinational Corporations: Influence of Tax Havens*, LINK

If the current issue is not addressed it could hamper the economic growth, investment, collection of revenues. It could also result in tax inequity at global level. Members of the OECD/G20 Inclusive Framework on BEPS (IF) have addressed the issue by creating awareness and emphasizing its importance through public consultations, economic analyses and impact assessments to keep the integrity of Global Tax Economy.

3.1.3 Measures taken:

The Government of India has set up the Committee on Taxation of e-Commerce to address such issues in the digital economy. The Committee presented its report in 2016, wherein, based on BEPS AP 1, it explored the introduction of three options²⁰:

- (a) SEP,
- (b) Withholding tax on digital transactions and
- (c) The Equalisation levy. It recommended implementation of the Equalisation Levy because provisions of India's tax treaties would override SEP and withholding tax-related provisions.

The report of Action Plan 1 recommends three measures, amongst which one of them may be implemented by the countries in order to address the tax challenges of digital economy.

4. An Equalization Levy: **Short Introduction -**

SPRINGER, Oct. 23, 2019, <https://link.springer.com/article/10.1057/s41291-019-00090-2>.

²⁰ Vishal Anand & Arjun Khandelwal, *Decoding India's 'Significant Economic Presence'*, TAXSUTRA DATABASE, Aug. 13, 2018, https://database.taxsutra.com/articles/231078bf4a156fb04e1d04147f5334/expert_article.



Based on changes made to the IT Act through the Finance Act, 2016, the Equalization Levy has already been introduced to collect taxes from certain specified digital services like online advertisements. It is also important to note that the Equalization Levy was not regarded as income tax and, hence, the non-resident online advertisement service provider is not able to claim foreign tax credit in respect of the Equalization Levy deposited by the Indian payer.

It is worth noting that for all those nations where the expanded scope of business connection would apply, the Equalization Levy would not be levied. The same would lead to another complication since it would be difficult for certain non-resident service providers to determine if it would constitute a business connection or a PE in view of the 'number of users' threshold limit prescribed under the 'significant economic presence test', while its customers may go ahead and deduct an Equalization Levy upon the payments exceeding 0.1 million unless the non-resident confirms that it constitutes a business connection or PE in India.

4.1 Analysis of it's purpose:

Equalization levy is a levy which was introduced by Chapter VIII of the Finance Act, 2016. Its purpose is to impose tax on the digitalized economy and to stop the circumvention in payment of taxes due to the incompetency of current rules of international tax's applicability in the digitalized economy thereby creating the loss of revenue.

4.2 Relevant provisions:

Equalization Levy has been imposed as an E-commerce tax by Chapter VIII, Sections 163 to 180 of The **Finance Act, 2016**. No change

has been proposed under Finance Bill, 2018 on Equalization Levy.

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.

4.3 Exceptions to its Application:

The equalization 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.

5. SEP AND EL - Connection between the two:

SEP (Significant economic Presence) and EL (Equalization Levy) are Homologous in nature. In other words, their origin i.e. from the BEPS Action Plan 1 due to digitalized



economy is the same but their scope and functions differ. While the former's scope is quite wide and includes every digital activity/service that generates income, the latter focuses only on specified e-commerce services w.r.t. to advertisement and related activities.

5.1 Does having those two create double taxation:

Since both EL and SEP may differ in their extent of scope, there are chances that subject matter they are concerned with may overlap. This gave birth to a perplexed situation as to whether or not it will lead to double taxation or not. This is when section 10(50) of the Income Tax Act, 1961, comes into play. This section helped in clearing out the confusion by stating that any income which has been derived out of such services which are subject to 'Equalization levy' will be exempt. Therefore, once 'Equalization levy' is charged on particular service, the income which would be ordinarily chargeable by virtue of concept of 'significant economic presence' will be exempt. It is thus becomes clear that both the concepts can harmoniously exist with each other.²¹

6. ACTION PLAN 7:

Permanent establishment status -

6.1 Root cause of the problem – definition of proper establishment:

In general, the tax treaties make a foreign enterprise liable to pay tax for the business profits generated in that jurisdiction only to the extent that enterprise has a permanent establishment in that jurisdiction. This made

the non-resident taxpayers to circumvent payment of tax under the cloak of "*No Permanent Establishment*" that is facilitated by the presence of current *digitalized economy*.

This defence of having no "Permanent Establishment" these non-resident taxpayers are pleading is legal now because there is a lack of proper and universal definition of permanent establishment that fits the digitalized economy and is not in its "*Brick and Mortar version*".

Henceforth this particular Action Plan specifically targets on amending the definition of Permanent Establishment in the OECD Model Tax Convention. This is done in order to arrive at solutions to those circumventing strategies used to not have a taxable presence.²²

6.2 Subject matter:

This Action plan made changes in the definition of "Permanent Establishment" in the OECD Tax Convention as discussed above in the following way;

1. CONDITIONS WHERE THE ACTIVITIES OF INTERMEDIARY WILL BE CONSIDERED AS TAXABLE PRESENCE

Background- This Action Plan ensures that those activities of an Intermediary in a particular jurisdiction are of such nature that the result intended is the performance of the *regularly concluded contracts* will be considered to have a taxable presence in that jurisdiction.

²¹AkashLoya; 'Equalization Levy' and taxation under 'Significant economic Presence' Regime: Do they overlap? TAXGURU, Dec. 25 2019, <https://taxguru.in/income-tax/equalization-levy->

[taxation-significant-economic-presence-regime-overlap.html](https://taxguru.in/income-tax/equalization-levy-).

²² Action 7 Permanent establishment Status, OECD, <http://www.oecd.org/tax/beps/beps-actions/action7/>.



Exception- However, it is pertinent to note that this will not apply to those Intermediaries who perform these activities or contracts in the course of an ***Independent Business***.

2. RESTRICTIONS IMPOSED TO THOSE ACTIVITIES THAT ARE PREPARATORY/ AUXILIARY IN NATURE

Background- There are certain exceptions to the definition of Permanent Establishment in the older model that makes preparatory/ auxiliary activities to not be treated as those having a separate Permanent establishment. This exception was misused and taken advantage of by Cohesive Operating Business by having the Unified operation fragmented into smaller operation to circumvent the taxable presence.

Subject Matter- To restrict the application of the above mentioned exceptions that are misused.

3. CONSTRUCTION SITES

Background- The building and construction projects are not “permanent” for the company and henceforth the test for Permanent Establishment becomes more time-based. Depending on the country or its tax treaties, the time period of construction activity may range from 6-12 months to trigger PE.

Because the nature of construction work involves site preparation phases, periods of work stoppage and sub-contracting, this can be a complex area to determine when exactly

PE taxing rights will arise in the host country.²³

Complications- There is exceptions available to Construction Sites due to their complex nature. However, it is misused by separating/splitting the contracts between closely related enterprises.

Hence this Action Plan ensures that this issue is addressed as well.

6.3 Implementation process of defining permanent establishment:

The Multilateral Instrument (MLI) is a flexible instrument that allows jurisdictions to adopt BEPS treaty-related measures to counter BEPS and strengthen their treaty network. Through the negotiation of a Multilateral Instrument²⁴ (which is the prime focus of BEPS ACTION PLAN 15) by various jurisdictions at the global level, the implementation process has been made easier and also has facilitated the modification of existing Bilateral Treaties in 2016. The changes to the permanent establishment definitions were integrated in the 2017 OECD Model Tax Convention²⁵ and in Part IV of the MLI (Articles 12 to 15). It is pertinent to note that India is one such jurisdiction that is a part of that Multilateral Instrument.²⁶

CONCLUSION:

IMPORTANCE OF HAVING SEP

1. Impact of Globalization:

tax-convention-on-income-and-on-capital-condensed-version-2017_mtc_cond-2017-en#page1.

²⁶*Signatories and Parties to the Multilateral Convention To Implement Tax Treaty Related Measures To Prevent Base Erosion And Profit Shifting*, <http://www.oecd.org/tax/treaties/beps-ml-signatories-and-parties.pdf>.

²³ *The Ultimate Guide to Permanent Establishment*, SHIELDGEO, <https://shieldgeo.com/ultimate-guide-permanent-establishment/>.

²⁴ Action 15 Multilateral Instrument, OECD, (<http://www.oecd.org/tax/beps/beps-actions/action15/>).

²⁵*Model Tax Convention on Income and on Capital*, OECD, <https://read.oecd-ilibrary.org/taxation/model->



Increasing growth of International connections between the nations has nurtured digital market thereby creating digital economy. Due to this, a lot of transactions are possible at a global level without the requirement of having a physical presence of the business in the host country. This is one of the reasons the recent Tax conventions focussed on “Significant Economic Presence.”

2. Scope of unified approach:

SEP has helped in broadening focus on the digital economy than the one that was prevalent before. Therefore, this could impact any consumer facing business.

3. New nexus role:

As per this rule, the taxation is based on significant involvement in the economy of market jurisdiction rather than the physical presence.

4. Check mechanism:

It serves as a check mechanism on those countries that have low or no tax jurisdictions which unfairly gets benefitted by creating a tax haven that puts the other countries that have fair tax Jurisdiction at a disadvantage.

COMPLICATIONS:

However, there remain complications in the scope of the applicability of the concept of such Significant Economic Presence in India. India has Double Taxation Avoidance Agreements (DTAA) with 88 countries out of which 86 are in force. For transactions involving persons having interest between countries with which India has a DTAA, there are agreed rates of tax and jurisdiction

on specified types of income. Therefore, through Section 90 of the Double Tax Avoidance Agreement, tax relief is provided for those person residents of a country with which India has signed DTAA.²⁷

Under circumstances where Bilateral Agreement has been entered into with reference to Section 90 with a foreign country, then the assessee has an opportunity either to be taxed according to the Double Taxation Avoidance Agreement or according to the normal provisions of Income Tax Act 1961, whichever is more favorable to the concerned assessee.

Henceforth, this gives the assessee the “**Power to Choose**” the manner in which they will pay tax.

This brings our attention to another undisputable fact; the BEPS Action Plans have efficiently made changes to the Tax Model Convention however, that neither directly nor indirectly brings changes to the **Section 90** of the DTAA agreement that legally permits the non-resident assessee to circumvent the tough path and choose the one that is completely favourable to him, whereby completely creating a loss of revenue to the host country.

It is pertinent to note that though the plan is strategically done, its practical application becomes questionable because of a presence of loophole that has helped in the its circumvention thereby making it inapplicable.

The objective and plans of the OECD and other tax conventions are clear and very

²⁷ *Guide to Double Taxation Treaty in India*, INDIA FILINGS, <https://www.indiafilings.com/learn/guide-to-double-taxation-treaty-in-india/>.



much effective theoretically. To make it practical, there is a requirement to make changes or create strategies or mechanisms that help in effective implementation of the SEP. When this is done effectively, it can be said that SEP indeed would help in taxing the digital economy in a just and fair manner.

