BASICS OF TAXATION OF NON-RESIDENTS

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SCOPE OF TOTAL INCOME

- Section 5 provides the scope of total income and lays foundation for what income is liable to tax in India.
- Charge on the basis of residential status of an assessee:

i. Resident

ii. Resident but not ordinarily resident

iii. Non- resident.

The scope of total income of an assessee depends upon the following three important considerations:

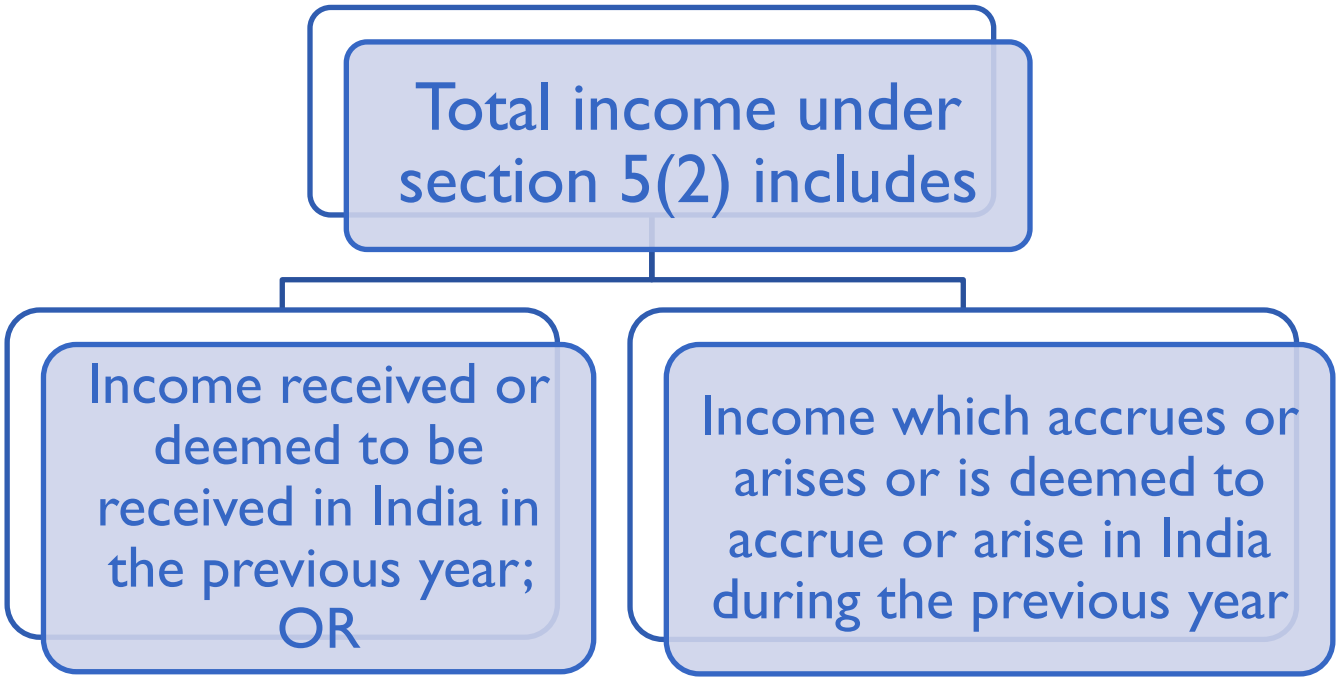
i. The residential status of the assessee.

ii. The place of accrual or receipt of income, whether accrual or deemed

iii. The point of time at which the income had accrued to or was received.

Scope of total income: Non-resident

- Section 5(2) provides the scope of total income in case of a non-resident.



- Income accruing or arising outside India is not liable for tax in India.

Scope of total income: Non-resident

- Income by way of salary, received by non-resident seafarers, for services rendered outside India on a foreign going ship (with Indian flag or foreign flag) and received into the NRE bank account maintained with an Indian Bank shall not be included in the total income.

[Circular No. 13/2017, dated 11.04.2017 and Circular No. 17/2017, dated 26.04.2017]

- The place of formation of the contract or the place where the contract is carried out are some of the criteria that have been/ are kept in perspective while determining where profits accrue.

- When the business comprises buying and selling goods, profits accrue as a general rule where the property in the goods passes to the purchaser. In a loan transaction, the decisive factor would be the place where the money is actually lent irrespective of where it came from or the actual place of use of the money.

Case Law 1 : Galileo International Inc. [2009] 180 taxman 357 (Delhi)

Facts of the Case:

- The assessee-company was incorporated under the laws of US and was, thus, a resident of USA.
- The assessee had entered into an agreement with various participants known as the Participating Carrier Agreement [PCA].
- It had also entered into a separate agreement known as distribution agreement with travel agent 'I'.
- For the services rendered by 'I' under the said agreement, the assessee was paying to 'I' 1 Euro for each booking from the airlines, etc. The assessee was, however, paid 3 Euro for each booking.
- The Assessing Officer held that the assessee's income generated in India was chargeable to tax in India under section 5(2), read with section 9(1).

Case Law 1 : Galileo International Inc. [2009] 180 taxman 357 (Delhi)

- The following is the one of the questions that arose during the course of proceedings:

Whether the assessee has any income chargeable to tax in India under section 5(2) of the Act and whether the assessee has any business connection in India as per section 9(1)(*i*) of the Act?

Conclusion:

HC opined with the Tribunal's decision that 15 per cent of the revenue accruing to the respondent in respect of bookings made in India should be treated as **Income accruing or assessed** in India and chargeable under section 5(2) read with section 9(1)(*i*) of the Act.

Case Law 2 : Sesa Goa Ltd. [2020] 117 Taxmann.com 96 (Delhi)

Facts of the case:

- Assessee-company was engaged in business of mining, production and export of iron ore, shipping and ship building
- The assessee paid demurrage to non-resident buyers of iron ore in terms of relevant sales.
- Demurrage charges paid by assessee to non-resident companies were disallowed by Assessing Officer for want of TDS.
- Assessee's contention was Whether demurrage paid to non-resident buyers of iron ore in terms of relevant sales contract was **not income accrued or arisen to said non-resident buyers in India** within meaning of section 5(2)(b) read with Explanation 1(b) to section 9(1)(i), and thus no disallowance was to be made under section 40(a)(i).
- **Conclusion:**
- The High Court of Bombay has passed the judgement in the favour of the assessee.

Whether the following incomes are to be included in Total income of a non-resident?

S.No	Particulars	Taxability
1.	Income accrued or deemed to be accrued and received or deemed to be received in India	Yes
2.	Income accrued outside India but received or deemed to be received in India	Yes
3.	Income accrued or deemed to be accrued in India but received outside India	Yes
4.	Income accrued and received outside India from a business controlled in or profession set-up in India	No

Whether the following incomes are to be included in Total income of a non-resident?

S.No	Particulars	Taxability
5.	Income accrued and received outside India a business controlled or profession set up outside India.	No
6.	Income accrued and received outside India in the previous year(it makes no difference if the same is later remitted to India)	No
7.	Income accrued and received outside India in any year preceding the previous year and later on remitted to India in current financial	No

Illustration

- Mr. Ram, **non-resident**, provides following details of income, calculate the income which is liable to be taxed in India for the A.Y. 2019-20.

Particulars	Amount (Rs.)
Salary received in India from a former employer of UK	1,40,000
Income from tea business in Nepal being controlled from India.	10,000
Interest on company deposit in Canada (1/3rd received in India)	30,000
Profit from a business in Mumbai controlled from UK	1,00,000

Illustration

Particulars	Amount (Rs.)
Profit for the year 2002-03 from a business in Tokyo remitted to India	2,00,000
Income from a property in India but received in USA	45,000
Income from a property in London but received in Delhi	1,50,000
Income from a property in London but received in Canada	2,50,000
Income from a business in Zambia but controlled from Turkey	10,000

Illustration - Discussion

Calculation of income liable to be taxed in India of Mr. Ram (NON-RESIDENT) for the A.Y. 2019-20:

Particulars	Taxability	Amount (Rs.)
Salary received in India from a former employer of UK	YES	1,40,000
Income from tea business in Nepal being controlled from India.	NO	Nil
Interest on company deposit in Canada - 1/3rd received in India - 2/3rd received outside India	 - YES - NO	 10,000 Nil
Profit from a business in Mumbai controlled from UK	YES	1,00,000

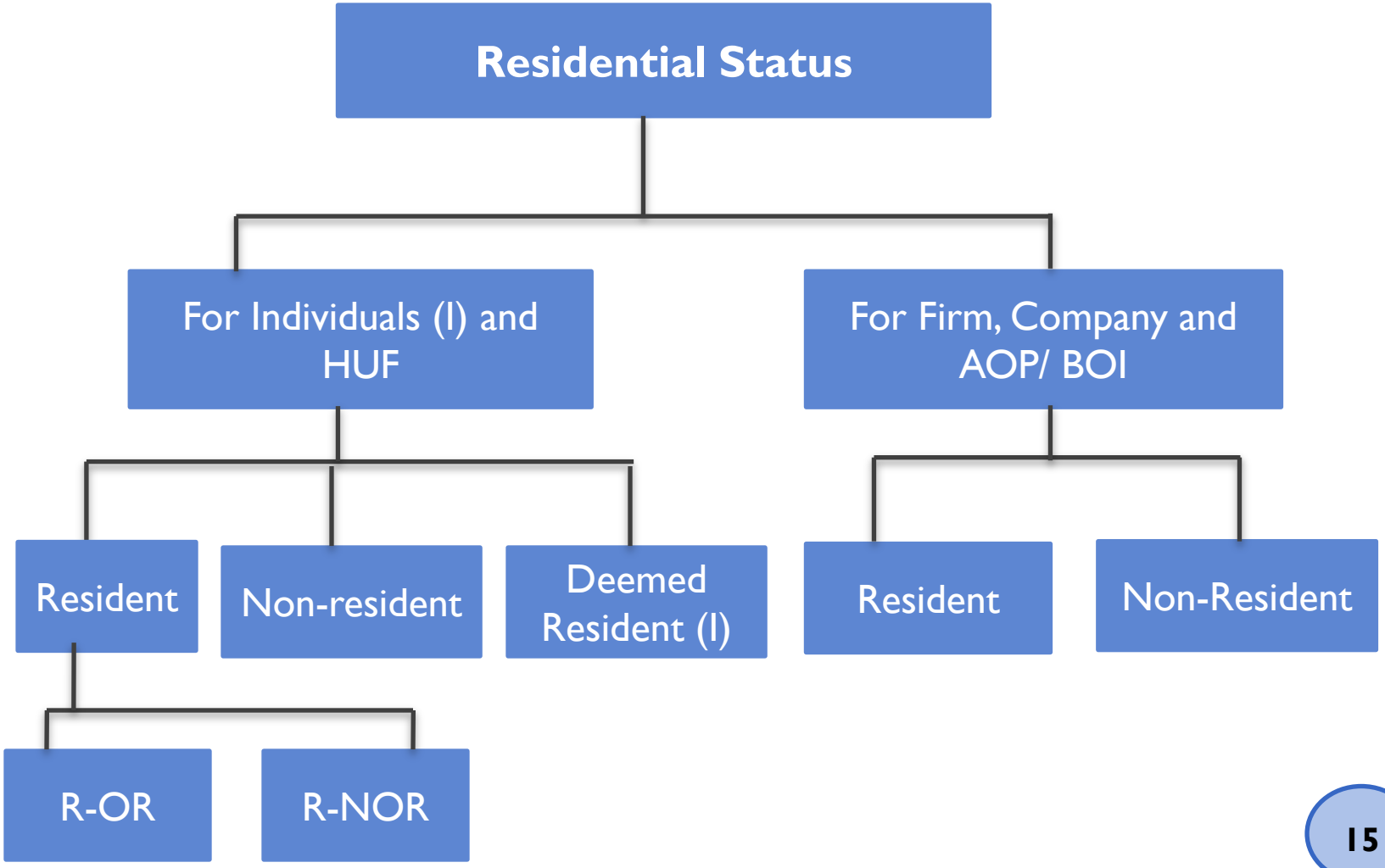
Illustration - Discussion

Particulars	Taxability	Amount (Rs.)
Past profit from a business in Tokyo remitted to India	NO	Nil
Income from a property in India but received in USA	YES	45,000
Income from a property in London but received in Delhi	YES	1,50,000
Income from a property in London but received in Canada	NO	Nil
Income from a business in Zambia but controlled from Turkey	NO	Nil
Income liable to tax in India		**4,45,000**

Residential Status

- Tax Residency is one of main decisive factors for establishing the category of taxpayer and devising nexus with a country's tax laws.
- Residential status of a person is a key factor in determining his or her taxability in a particular country which is different from citizenship.
- In India, Tax residency is determined u/s 6 of the Income-tax Act
- Indian Government introduced certain major amendments in Sec. 6 as anti-avoidance provisions that largely base its premise of 'citizenship'.

Categorization of Residential Status



Residential Status of an individual

- **Section 6(1):** Individual is said to be resident of India if he:

  (a) stays in India for 182 days or more in the relevant year or;

  (c) stays in India for 60 days or more in the relevant year and 365 days or more in 4 years preceding to relevant year.

- Explanation 1:

  (a) In case of Indian Citizen leaving India for employment or as a member of crew, 60 days specified in basic criteria shall be replaced with 182 days.

  (b) In case of Indian Citizen or Person of Indian Origin (PIO) who being outside India, visits India, 60 days specified in basic criteria shall be replaced with 182 days

Residential Status of an individual

In case of Indian Citizen or Person of Indian Origin (PIO) having *Indian Income Exceeding Rs. 15 Lakhs*, 60 days shall be replaced with 120 days. *[Inserted by Finance Act 2020]*

Mischief targeted by this amendment

"Memorandum to Finance Bill, 2020 states that there are cases in which *individuals who are actually carrying out substantial economic activities from India manage their period of stay in India*, so as to remain a non-resident in perpetuity and therefore not required to declare their global income in India"

It is entirely possible for an individual to arrange his affairs in such a manner that he is not liable to tax in any country during a year.

Residential Status of an individual

- **Section 6(1A)** *[Inserted by Finance Act 2020]*

Notwithstanding anything contained in clause (1),

- an individual, being a citizen of India,
- having total income, other than the income from foreign sources, exceeding Rs. 15 Lakhs during the previous year
- shall be *deemed to be resident in India* in that previous year,

if he is not liable to tax in any other country or territory by reason of his domicile or residence or any other similar criteria.

Mischief targeted by this amendment

"Memorandum to Finance Bill, 2020 states that these amendments are aimed at stateless persons (Tax Nomads) who have been bothering the tax world."

Residential Status of an individual

Demystifying the Deemed Residence Doctrine

The intent of Deemed residency based on the 'Indian citizenship' may be to tax persons who are stateless mainly film stars, sportsmen or other similar persons

Say Mr. A, an Indian Citizen stayed 40 days in India, 130 days in Singapore, 110 days in England and 85 days in Dubai and having Income from India exceeding Rs. 15 Lakhs. He is not a Resident of any state due his lesser stay in all countries. He may be a deemed Resident as per Sec 6(1A).

A Citizen of India can normally be judged from the passport. If an Assessee is holding Indian Passport then he is said to be Indian Citizen.

CBDT vide its press release dated 02.02.2020 has clarified that the new provision is not aimed to include in tax net Indian citizens who are bonafide workers in other countries including Middle East.

Residential Status of an individual

- **Section 6(6): "Not - Ordinarily Resident"**

Individual resident shall be "Not - Ordinarily Resident if he:

(a) was non - resident for 9 out of 10 years preceding the relevant year (or)

stayed in India for less than 730 days during 7 years preceding the relevant year (or)

Finance Act 2020 has inserted (c) and (d) below:

(c) Indian Citizen or PIO who are classified as a resident due to reduction in limit of relaxation to 120 days from 182 days in clause (b) of explanation (1) (or)

(d) Indian Citizen who is deemed to be Resident u/s 6(1A)

Residential Status of an individual

Effect of the Amendments:

- Indian Citizen or PIO having Indian Income more than Rs. 15 Lakhs coming to India for a visit and getting classified as a resident because of the reduced limit of 120 days, shall be treated as resident but Not - Ordinarily Resident.

- Indian Citizen deemed to be resident of India by virtue of Section 6(1A) shall also be treated as "Not - Ordinarily Resident"

Persons falling in the above criteria will have to *pay tax in India* on their *foreign income derived from a business controlled in India or profession set up in India*, if any, in addition to their Indian Income

Residential Status of an individual

Note:

- The term "stay in India" includes stay in territorial waters of India.

  Stay in a ship or boat moored in territorial waters of India would be sufficient to make the individual resident in India.

- It is not necessary that the period of stay must be continuous or active nor it is essential that the stay should be at single place.

- For counting the number of days stayed in India, both the date of departure as well as the date of arrival are considered to be in India.

Residential Status – HUF

- **Section 6(2):** HUF is said to be Resident in India, if control and management of its affairs is wholly or partly situated in India.

- **Section 6(6)(b) :** HUF is Ordinarily resident in India if the karta or manager of the family business satisfies both the following conditions:

  a. He has been resident in India in at least 2 out of 10 previous years immediately preceding the relevant previous year.

  b. He has been in India for period of 730 days or more during 7 years immediately preceding the relevant previous year.

Residential Status – Firms, AOP/ BOI

- **Section 6(2):** A partnership firm and an Association of Persons are said to be:

➢ Resident in India if *control and management* of their affairs are *wholly or partly* situated within India during the relevant previous year.

➢ Non-resident in India if control and management of their affairs are situated wholly outside India.

Residential Status – Company

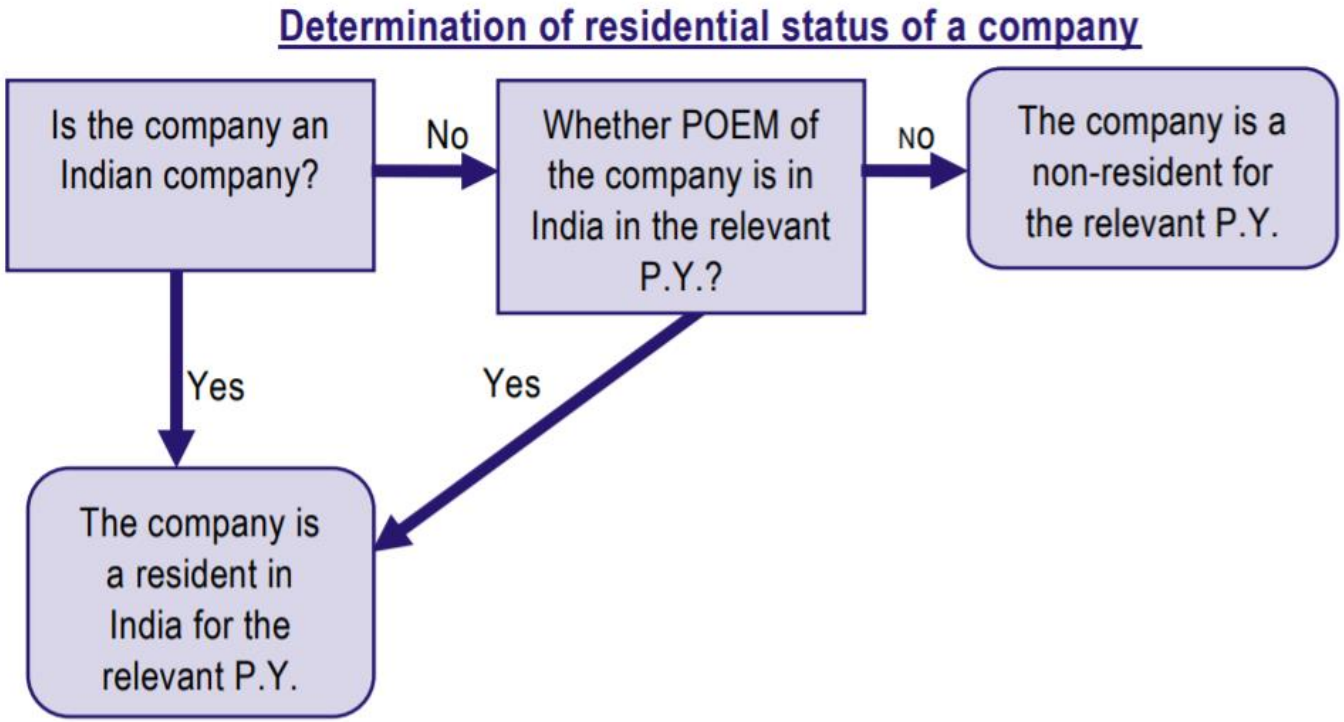
- **Section 6(3):** A company is said to be a resident in India in any previous year, if:
  - It is an Indian Company, or
  - Place of effective management (POEM), in that year, is in India.

- **Explanation:**

  POEM means a place where key management and commercial decisions that are necessary for the conduct of business of an entity as a whole are, in substance made.

Circular No.8 of 2017 clarifies that POEM guidelines shall not apply to companies having turnover or gross receipts of Rs. 50 crores or less in a financial year.

Residential Status – Company



Residential Status – Any other person

- **Section 6(4):** Every other person is said to be:

➢ Resident in India in any previous year if the control and management of his affairs is situated wholly or partly in India.

➢ Non-resident in any previous year if the control and management of its affairs is situated wholly outside India.

Section 6(5):

If a person is resident in India in a previous year in respect of any source of income, he shall be deemed to be resident in India in the previous year in respect of each of his other sources of income.

Importance of Sec 6 w.r.t DTAA

- As per Article 1 of Model DTAA, a treaty is applicable only to the person resident of either or both the contracting states.
- "Residential status" of a person has to be determined for the purpose of applicability of DTAA
- As per Article 4 of Model DTAA, "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax by reason of his domicile, residence, place of management etc.,
- In India, Residential status is determined by provisions of Sec 6.

Importance of Sec 6 w.r.t DTAA

If an Individual is resident of both contracting states in a year as per domestic law of respective countries, "tie breaker rule" applies.

The following criterion in that sequence shall be considered:

1. Place of permanent home;
2. Centre of vital interest - economic & personal interest;
3. Place of habitual abode (stay for business or leisure);
4. Nationality;
5. Mutual agreement between competent authorities of both the contracting States shall settle the question.

Importance of Tie Breaker Rule may increase as an individual is more likely to qualify as Resident of both countries pursuant to the Amendment

Business Connection

Section 9(1)(i) of the Act states that *"all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India"*.

Section 9(1)(i) – Business Connection

- The following two conditions should be satisfied:

i. The taxpayer has a '**business connection**' in **India**.

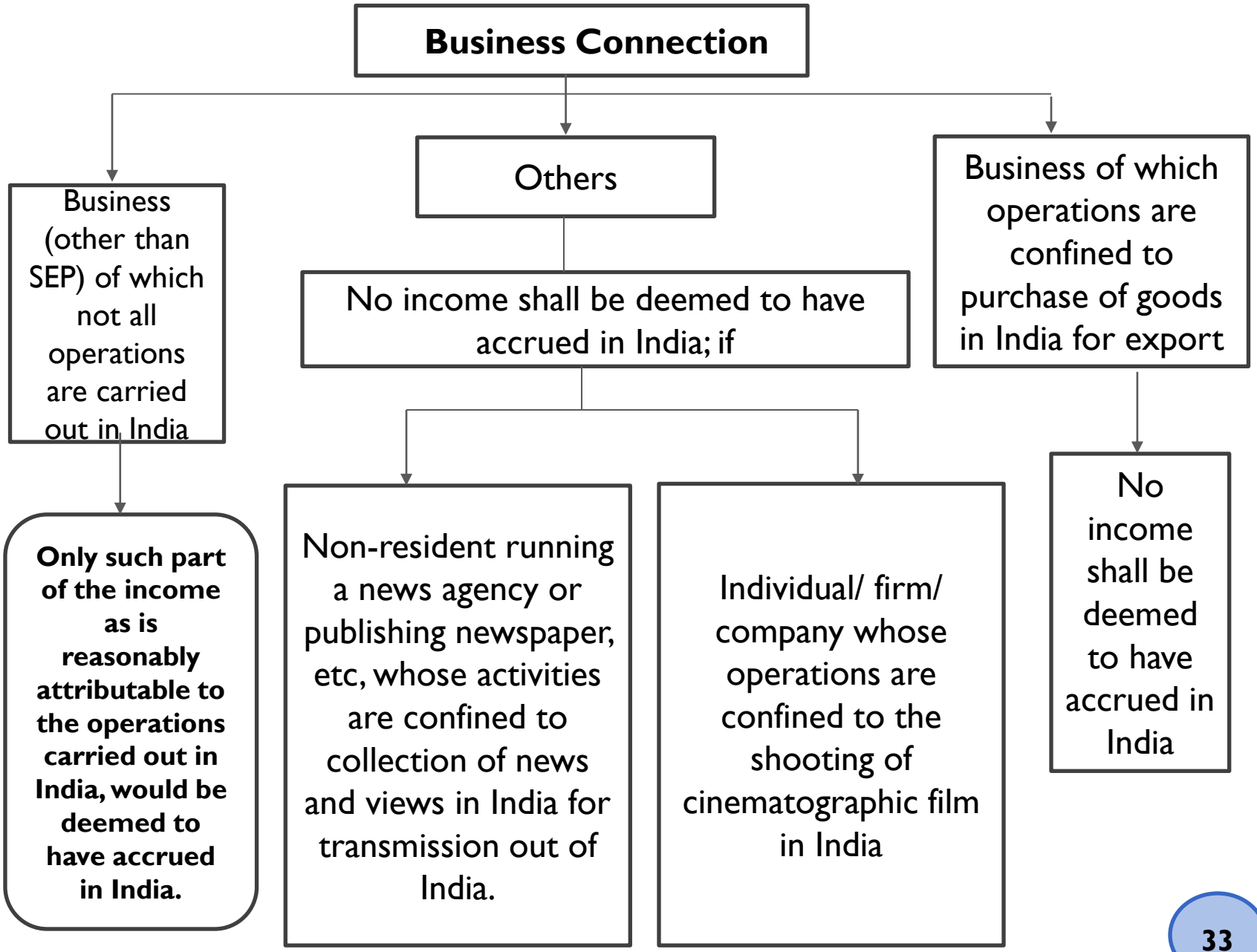
ii. By virtue of 'business connection' in India, **income** actually **arises outside India**.

- If the above two conditions are satisfied, income which arises outside India because of business connection in India is deemed to accrue or arise in India. However, only such part of the income as is reasonably attributable to the operations carried out in India would be subject to tax in India.

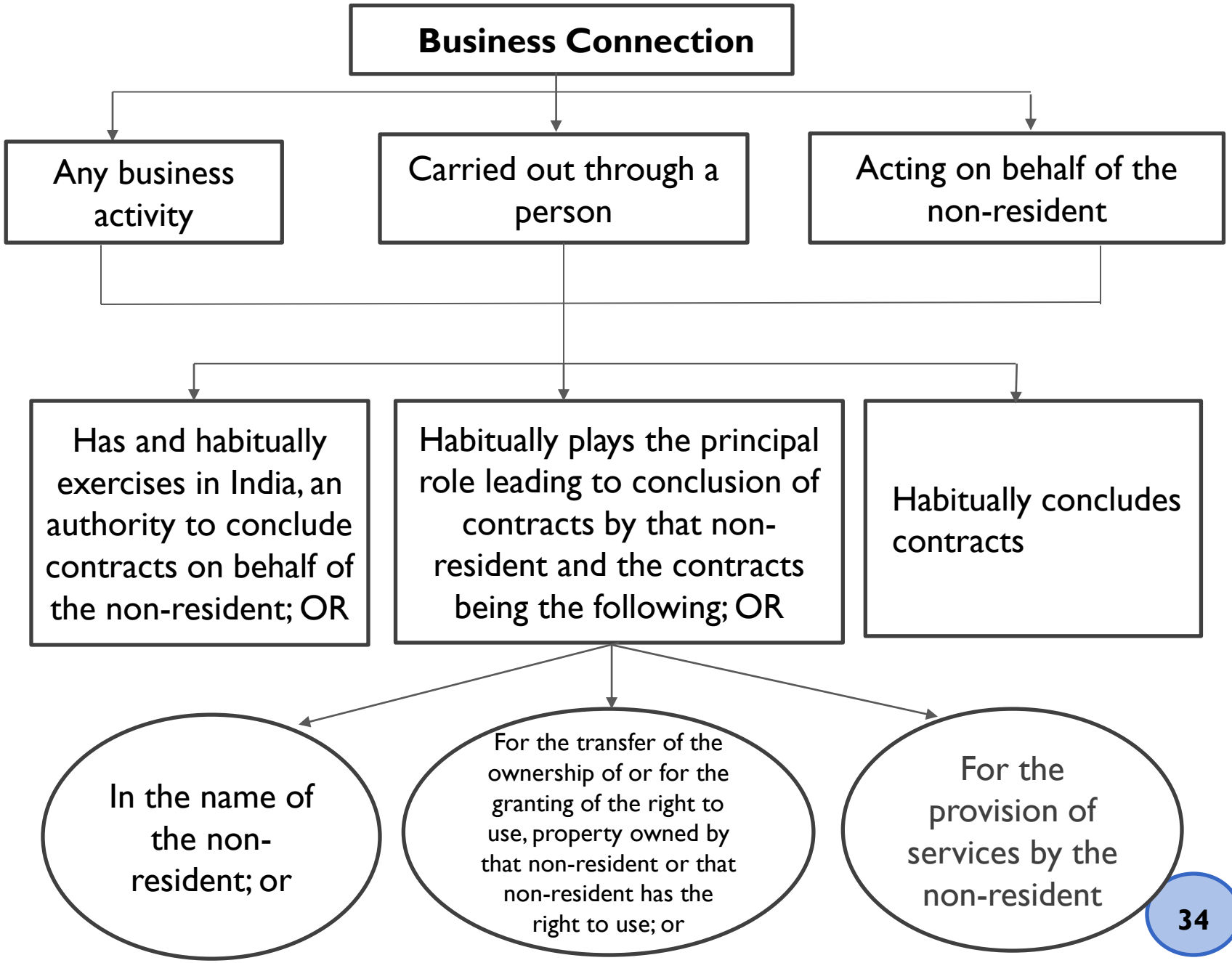
Section 9(1)(i) – Business Connection

- A business connection can arise between a non-resident and a resident if both of them carry on business and if the non-resident earns income through such a connection.
- The expression 'business connection' postulates a **real and intimate relation** between the trading activity carried on outside India and the trading activity within India.
- Further, relation between the two should contribute to the earning income by the non-resident in his trading activity.

Explanation 1 to section 9(1)(i)



Explanation 2 to section 9(1)(i)



Explanation 2 to section 9(1)(i)

- Has no such authority, but habitually maintains in India a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the non-resident; or

- Habitually secures orders in India, mainly or wholly for the non-resident or for that non-resident and other non-residents controlling, controlled by, or subject to the same common control, as that non-resident.

- Agents having independent status are not included in Business connection.

Explanation 2A to section 9(1)(i)

- Significant economic presence (an alternative test of business connection) of a non-resident in India shall also constitute business connection in India.
- **Significant Economic Presence ("SEP") means:**

	Nature of transaction	**Condition**
(a)	In respect of any goods, services or property carried out by a non-resident in India with any person in India including provision of download of data or software in India,	Aggregate of payments arising from such transaction or transactions during the previous year exceeds such amount as may be prescribed
(b)	Systematic and continuous soliciting of business activities or engaging in interaction with users in India	The users should be of such number as may be prescribed

Explanation 2A to section 9(1)(i)

- Proviso to Explanation 2A

Nature of transaction	**Condition**
Transactions or activities shall constitute significant economic presence in India whether or not:	(i) The agreement for such transactions or activities is entered in India; or (ii) The non-resident has a residence or place of business in India; or (iii) The non-resident renders services in India:
Only so much of income as is attributable to the transactions or activities referred shall be deemed to accrue or arise in India	

Explanation 2A to section 9(1)(i)

- SEP is one of the options discussed by 2015 BEPS Action Plan 1 -- Addressing the Tax Challenges of the Digital Economy for taxing digital transactions having no physical nexus with the source country.
- It may also be noted that India has expressed a reservation to the 2017 OECD commentary by reserving the right to tax business not having physical presence, based on the concept of SEP discussed in BEPS Action Plan 1.
- India is possibly one of the first countries proposing to codify multiple options of the BEPS Action Plan 1 in the form of SEP and Equalisation Levy.
- The Government has clarified that the motive of codifying the concept of SEP which enables it to amend / re-negotiate its tax treaties based on similar principles.

Explanation 3A to section 9(1)(i)

- The income attributable to the operations carried out in India 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; and

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.

CBDT notification in relation to Explanation 2A

- The CBDT on 3rd May, 2021 vide Notification G.S.R 314 (E) finally notified the threshold for SEP. The same is applicable from AY 2022-2023. The said notification lays down the following dual thresholds:

(a) Revenue Threshold: Aggregate value of transactions of INR 20 million in a financial year, in respect of any goods, services or property carried out by a non-resident with any person in India, including provision of download of data or software in India; or

(b) User Threshold: The number of users with whom systematic and continuous business activities are solicited or who are engaged in interaction shall be 0.3 million.

- Thus, a non-resident which satisfies either of these thresholds would be considered to have SEP / Business Connection in India.

CBDT notification in relation to Explanation 2A

- Given that the thresholds prescribed are significantly lower, it is likely that most of the foreign businesses with Indian transactions would meet the threshold and be considered to have business connection in India specially for foreign businesses based in jurisdictions with which India does not have a tax treaty.
- It is pertinent to note that expansion of the **scope** of business connection through SEP may have **limited traction/impact** since the following transactions may not be practically impacted:

(i) **Non-residents** who are **eligible to claim tax treaty benefits** would be **taxable** in India **only if they have a 'permanent establishment'** (PE) in India - which generally requires physical presence in India. Thus, tax treaty eligibility and PE analysis would assume more importance pursuant to the amended provisions; and

(ii) Transactions which are subject to Equalisation Levy since they are specifically exempted from Indian income-tax.

CBDT notification in relation to Explanation 2A

- It would certainly impact those sectors which conduct business in India digitally without physical Indian presence that may not even earn direct revenue from the Indian customer base, however, even such businesses may have potential tax exposure since the tax law requires attribution of even certain indirect income related to the Indian customer base (such as advertising revenue).

- Aspects relating to characterisation of a payment as 'royalty', 'fees for technical services', share sale (whether capital asset or stock in trade) may now require deeper analysis due to possible overlap from a business connection perspective.

Explanation 5 & 6 to section 9(1)(i)

An asset or a capital asset being any share or interest in a company or entity registered or incorporated outside India

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Shall be deemed to be AND shall always be deemed to have been situated in India

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If the share or interest derives, directly or indirectly, its value substantially from the assets located in India and the same shall be deemed to derive its value substantially, on a specified date, if value of such assets

- Exceeds the amount of ten crore rupees; AND
- Represents at least 50% of value of the all the assets owned by the company or entity

Explanation 7(a) in relation to section 9(1)(i)

- Explanation 7(a) carves out the applicability of explanation 5 to small investors holding no right of management or control of such company or entity and holding less than 5% of the total voting power or share capital or interest of the company or entity that directly or indirectly owns the assets situated in India

Electronic Business Connection

- Digital economy is increasingly becoming the economy itself, making it very difficult, if not impossible, to ring-fence the digital world from the rest of the economy, including for tax purposes.

- With the advancement in information and communication technology in the last few decades, new business models operating remotely through digital medium have emerged.

- The significance increases further as ratio of inter-nation transaction to intra-nation transaction in case of digital economy is quite high and each country want an equitable share of tax revenues from cross border transactions.

Electronic Business Connection

- **OECD under its BEPS Action Plan I** addressed the tax challenges in a digital economy wherein it has discussed several options to tackle the direct tax challenges arising in digital businesses. One such option is a new nexus rule based on significant economic presence.

- The SEP meaning as discussed earlier, non-residents companies, who fall under the meaning, are established to have a SEP would be taxable in India irrespective of whether they have a place of business in India or not.

- Countries such as Austria, Italy and UK have also been recognizing the importance of digital economy and its taxation.

Electronic Business Connection

- The taxation of digital economy is being discussed at various international forums (OECD, Council of European Union, G20), as unilateral action of a single country cannot resolve tax challenges of the digital economy.

- Before proceeding to obtain consensus among the members, views on following aspects be framed at an international level:

a) Appropriate nexus of income to a virtual permanent establishment;
b) Profit attribution for digital economy;
c) Characterisation of income derived from digital business models;
d) Indirect taxes on digital transaction;
e) Amendments in the transfer pricing rules.

Case law 1 : Anglo- French Textile Co. Ltd. [2002] 121 Taxman 135 (Madras)

Facts of the case:

- In this case, the entire sourcing of raw material was done from British India, while manufacturing activity was carried out in French India (i.e. Pondicherry) and also sales were entirely outside British India.
- SC observed that the assessee had a business connection in India by the virtue of having sourcing operations in India, and, accordingly, income in respect of the same was deemed to accrue or arise in British India.
- SC further held that "An isolated transaction between a non-resident and a resident in British India without any course of dealings such as might fairly be described as a business connection does not attract the application of Section 42 of the Income-tax 1922,

Case law 1 : Anglo- French Textile Co. Ltd. [2002] 121 Taxman 135 (Madras)

but when there is a continuity of business relationship between the person in British India who helps to make the profits and the person outside British India who receives or realizes the profits, such relationship does constitute a business connection.

- **Conclusion:** Continuity of business relationship between non-resident and a resident of British India constitutes 'business connection' u/s 42 of the IT Act,1922.

Case law 2 – Barendra Prasad Ray

129 ITR 295

Facts of the case:

- Appellants were acting as solicitors of a German corporation - Solicitors of the same corporation in London, AM & CO., instructed appellants to retain BW, a UK resident - AM & CO., obtained briefs, etc., from appellants and handed the same over to BW - BW appeared in Indian courts to argue case of appellants' client
- During the proceedings, the question was raised whether there was any business connection between BW and appellants.

Conclusion:

- There was a correspondence between the appellants and AM & Co. who in turn engaged BW. Thus, there was a connection between the appellants and BW though it was an indirect one.
- Nevertheless, this connection was a real and intimate connection because (a) after BW's arrival, the appellants had made the necessary arrangements, (b) BW had appeared in the court on behalf of the appellants' client, (c) even though the appellants did not directly hand over the briefs to BW, the same was handed over to AM & Co., who in turn handed over the same to BW, and (d) under the Calcutta High Court, BW could appear in court only with the appellant's consent.

Case law 3 : CIT v. R.D. Aggarwal & Co [(1965) 56 ITR 20]

Facts of the case:

- The assessee was carrying on the business as commission agent for two non-resident exporters of worsted woollen yarn.
- The question which came up for consideration of the Supreme Court was whether the non-resident exporters could be said to have business connection in India, on account of their sale agency arrangements with the Indian concern, and, whether, on that basis, a part of income of the non-resident exporters could be brought to tax in India.
- SC held that the expression 'business connection' as used in section 42(1) of the 1922 Act postulates a real and intimate relation between trading activity carried on outside the taxable territories and trading activity within the territories, the relation between the two contributing to the earning of income by the non-resident in his trading activity.

Case law 4 : CIT v. R.D. Aggarwal & Co [(1965) 56 ITR 20]

- SC further held that there was the assessee had no business connection with the non-residents merely because some commercial activity was carried on by the assessee in the matter of procuring orders which resulted in contracts for sale by the non-residents of goods to merchants in India.

- **Conclusion:** Existence of 'real and intimate' relation, between trading activity outside and within taxable territories, necessary to constitute 'business connection' u/s 42 of 1922 Act.

Case law 5 :Cochin International Airport Ltd [TS-73-ITAT-2016(COCH)]

Facts of the case:

- The assessee, Cochin International Airport Ltd, is an Indian Company engaged in the business of operation and maintenance of Cochin International Airport.
- The assessee engaged the services of two non residents viz., M/s Alpha Airport Holdings (UK) Ltd ('Alpha') and Kreol Trading Est, UAE ('Kreol') in running the duty free retail outlets.
- For this purpose, the assessee entered into a tripartite agreement titled 'Exclusive procurement agreement' with Alpha and Kreol.
- In consideration of services rendered by Alpha and Kreol, the assessee agreed to pay 'commission fee' at 2% of gross sales from duty free retail outlet and out of this 1% each was agreed to be paid to Alpha and Kreol respectively.
- The assessee deducted tax at source under section 195 only in respect of payments made to Alpha. No tax was deducted at source u/s 195 in respect of payments made to Kreol.

Case law 5 :Cochin International Airport Ltd [TS-73-ITAT-2016(COCH)]

- AO held assessee liable to deduct TDS u/s 195 in respect of entire commission fees paid to Alpha and Kreol and accordingly held assessee in default u/s 201.
- Referring to the tripartite agreement, AO held that the commission fees should be considered as business income deemed to accrue or arise in India through a business connection in India u/s 9(1)(i) of the Act.
- Aggrieved, assessee preferred an appeal before Cochin ITAT.

Conclusion:

- The ITAT observed that :

i. Alpha does not determine and has no right to determine the retail prices on its own. The fact that the business of duty free retail outlets are managed and conducted by Alpha and Kreol and the fact thatRetail management services are provided by Alpha Kreol India Pvt. Ltd. (AKIL for short, hereafter), an Indian Company floated by Alpha Airport Holdings BV, Netherland and Kreol Trading Est, UAE does not in any way determine the existence of 'business connection' of Alpha and Kreol in India.

Case law 5 :Cochin International Airport Ltd [TS-73-ITAT-2016(COCH)]

ii. The fact that the General Manager and the Assistant General Manager who control and oversee the business activities of the duty free shops are directly appointed and controlled by AKIL only indicates the responsibility and the obligations of AKIL under the agreement and this does not mean that Alpha and Kreol have an indirect control over the business carried on in the duty free retail outlets.

iii. Merely because, a foreign entity is rendering services to an Indian entity, it cannot be said that there exists a 'business connection' in India. The fact that payment of commission fee is directly linked to the sales made at the duty free shops is not at all a relevant factor.

- On an overall consideration of the terms and conditions of the 'Exclusive procurement agreement', **ITAT opined that Revenue authorities erred in holding that Alpha and Kreol had 'business connection' in India on the basis of the aforesaid agreement.**

Case law 6 :Convergys Customer Management [TS-740-HC-2012(DEL)-TP]

Facts of the case:

- The assessee, Convergys Customers Management, is USA based company engaged in providing business process outsourcing services to its clients.
- It has a subsidiary in India, namely Convergys India Services Pvt. Ltd. (CISPL). CISPL renders back office services exclusively to the assessee. The assessee had not filed a return of income for AY 2002-03 and 2004-05.
- The AO issued a notice u/s 148 for reopening of assessment for following reasons:

  (i) Reimbursement received by the assessee from CISPL towards salary of employees taxable as fees for technical services (FTS) u/s 9(1)(vii).

Case law 6 :Convergys Customer Management [TS-740-HC-2012(DEL)-TP]

(ii) The assessee had advanced an interest free loan to CISPL, which was not at arm's length price. Further, AO observed that the interest was taxable u/s 9(1)(v)/ Article 11 of Indo-US DTAA.

(ii) The AO also observed that assessee had a business connection/ Permanent Establishment (PE) in India in the form of CISPL.

- The assessee had challenged the issue of re-assessment notice.
- Ruling against the assessee, a division bench of Delhi HC held the reopening of assessment proceedings.
- HC noted that CISPL is a subsidiary of the assessee and it rendered services exclusively to the assessee.
- HC observed, "This prima facie indicates that there is business connection. The role of the subsidiary is to provide customer management services in fulfillment of contracts negotiated by the petitioner for its US based clients."

Case law 6 :Convergys Customer Management [TS-740-HC-2012(DEL)-TP]

- The AO's conclusion were supported by HC and noted that the core business of the assessee was outsourced to CISPL and CISPL's office would constitute a fixed place of business, which was at disposal of the assessee.
- Hence, HC observed, "This would also mean that apart from the prima facie existence of a **business connection** there is also material to entertain the belief that CISPL is a permanent establishment of the petitioner in India."
- **Conclusion:** Tentative belief about existence of business connection / PE sufficient for re-opening of assessment; AO need not conclusively prove escapement at the stage of initiation of reassessment.

Case law 7: Volkswagen Finance Pvt. Ltd. [2020] 115 taxmann.com 386 (Mumbai Trib.)

Facts of the case:

1. Volkswagen Finance (P.) Ltd. (the taxpayer)1 is an Indian company.T
2. The taxpayer and Audi India (a division of Volkswagen Group Sales India Ltd) jointly planned an event in Dubai for launch of Audi A-8L facelift model. While the event was held in Dubai, the purpose of the event was the launch of a new model of Audi car, Audi A-8L facelift model for the Indian market.
3. The taxpayer had flown in about 150 people mostly prospective buyers and some journalists to the launch ceremony.
4. Kim Productions Inc., a company incorporated in the USA, agreed to facilitate the appearance of Nicholas Cage (celebrity) for three consecutive hours. In exchange, the taxpayer paid consideration of US$ 440,000 and other incidental costs.

Case law 7: Volkswagen Finance Pvt. Ltd. [2020] 115 taxmann.com 386 (Mumbai Trib.)

5. The taxpayer and Audi India, as a part of the arrangement, received full rights of the launch event capturing the celebrity's presence across all platforms for a period of 6 months from the date of launch event, and for an unlimited period of time only for internal usage within the Volkswagen Group.
6. The taxpayer claimed that since the event took place in Dubai, UAE, appearance fee was not taxable in India (as the fee did not accrue or arise in India, or deem to accrue or arise in India). Accordingly, the taxpayer did not withhold tax from the payment in relation to the celebrity appearance fee.
7. The Assessing Officer (AO) held that the payment was taxable in India as royalty under Section 9(1)(vi) of the Income-tax Act, 1961 (Act) as well as under Article 12 of the India-USA tax treaty. Accordingly, the taxpayer was required to withhold tax.

Case law 7: Volkswagen Finance Pvt. Ltd. [2020] 115 taxmann.com 386 (Mumbai Trib.)

8. The on appeal, the Commissioner of Income-tax Appeals [CIT(A)], confirmed the action of the AO and also held that the whole purpose of organizing an India-centric event at Dubai was to avoid "attraction of clause regarding income accruing or arising in India".
9. Aggrieved by the order passed by the CIT(A), the taxpayer filed an appeal with the Mumbai Bench of the Income-tax Appellate Tribunal (ITAT).

- **Conclusion:**

ITAT held that, **income embedded in payment to international celebrity, for participation in the event in Dubai was taxable in India as it was an India centric event and the target audience was in India and therefore, there was a business connection** . Consequently, VFPL had the liability to withhold taxes on such payment.

Case law 8:Vertex Customer Management Ltd. [2016] 67 taxmann.com 105 (Delhi – Trib.)

Facts of the case:

1. The taxpayer, a UK based company, is engaged in outsourcing services for its clients in finance, utility and the public sector. The main services provided by the taxpayer are customer management outsourcing business, service outsourcing and transfer of technology.
2. Vertex Customer Service India Pvt. Ltd. Is an Indian entity in the group, which also carries out outsourced work from the taxpayer. This outsource work is in relation to contracts of the taxpayer with PowerGen Retail Ltd. and Last minute Networks Ltd.
3. The taxpayer allowed Vertex India, the right to use certain equipment located outside India and claimed reimbursement of expense incurred on behalf of Vertex India

Case law 8:Vertex Customer Management Ltd. [2016] 67 taxmann.com 105 (Delhi – Trib.)

4. The taxpayer offered the payment received from vertex India for the right to use equipment outside India as royalty under Article 13(3)(b) of the tax treaty.

5. Regarding the reimbursement, it was claimed that the same was not taxable as it was on a cost-to-cost basis.

6. The AO held that the taxpayer has a PE in India under the tax treaty as well as a business connection under the Act and hence computed profit attributable to such a PE.

7. Regarding reimbursement as it has the effect of reducing the service fee payable to the Indian company was also considered as business profits of the PE in India. Further, royalty was also taxed as a business profit of the PE in India.

Case law 8:Vertex Customer Management Ltd. [2016] 67 taxmann.com 105 (Delhi – Trib.)

- **Conclusion:**

- Where the Indian and non-resident entity are both held by the same person or have common control, then the non-resident would be regarded as having a business connection in India. In this case, the taxpayer secures orders on behalf of the Indian company and outsources the job to the Indian Company.
- There is a continuous relationship between the taxpayer and its affiliates and its subsidiary company in India.
- The contact entered into by the taxpayer and its affiliates outside India is carried out in India.
- The responsibility of the taxpayer cannot be segregated and will not be complete unless the Indian company provides services tot its customers.
- **Accordingly, the taxpayer had a business connection in India u/s 9(1)(i) of the Act.**

Case law 9 – Hind energy & Coal Benefication (India) Ltd. Vs. ITO
(2019) 179 ITD 388 (Indore – ITAT)

- The assessee company availed the services of an Indian agent to import coal from 4 different suppliers.
- The ITAT held that the agent was engaged in providing similar services to various parties in and outside India.
- As per section 9(1), the agent cannot be termed as wholly and exclusively associated to any particular non-resident supplier. Hence, it does not constitute business connection of the non-resident supplier.


Thank you