



Presentation for

Ernakulam Branch of SIRC of ICAI

**Topic : Recent Changes in
International Taxation**

E. Chaitanya, FCA, Tirupati

Date : 15th August 2020

Concept of Residence and changes made by Finance Act 2020

Scope of Total Income (Sec 5)



RESIDENT



Global Income is Taxable

RESIDENT NOT
ORDINARILY RESIDENT



- Income accruing or arising or
- Deemed to accrue or arise
- received or
- deemed to be received in India is taxable.

Accruing or arising outside India is not taxable unless B/P is setup or controlled from India

NON - RESIDENT



- Income accruing or arising or
- Deemed to accrue or arise
- received or
- deemed to be received in India is taxable.

Concept of Residence - Sections at a glance



Residence Rule for Individuals

Section 6(1) – Resident if, he is

- a) In India for 182 days or more
- b) In India for 60 days or more in Previous year AND

In India for 365 days or more in preceding 4 previous years

Period for purpose of (a) & (b) includes broken period also.

Exceptions to Residence Rule

60 days will get replaced by 182 days when

- a) Citizen of India leaving as member of Indian Ship
- b) Citizen of India leaving for the purpose of employment

c) **Citizen or P.I.O visiting India**

- If T.I < 15 Lakhs

- If T.I > 15 Lakhs (60 days will become 120 days only)

Exception to Sec 6(1)



Conditions to amended exception to apply :

- a) Must be Citizen of India or Person of Indian Origin
- b) He must visit India.
- c) His Total Income, for purpose of exception, must not include income from foreign sources
- d) Such Total Income must exceed Rs 15 Lakhs

Then instead of 60 days, for the purpose of second condition in Residence rule 120 days will be taken.

Not ordinarily Resident



Individual – Not Ordinarily Resident

- a) Must have been a Non-resident in 9 out of 10 preceding previous years.

(OR)

- b) Must have been in India for a period of 729 days or less in preceding 7 previous years

Amendments by Finance Act 2020

- a) Citizen of India or P.I.O having total income exceeding Rs 15 Lakhs from Indian Sources and staying in India for 120 days or more but less than 182 days.
- b) Citizen of India falling under Section 6(1A)

Examples on Residence



Example 1 – Going Out

- a) Mr A is a Citizen of India.
- b) He had rental income and interest on bank deposits as his source of income in India and his T.I from above 2 sources is 18 Lakhs
- c) He visits his brother in New Zealand for the first time. Till then he never travelled outside India.
- d) His period of stay in India in PY is 75 days

What is his Residential Status and Scope of T.I

Example 2 – Going Out

- a) Mr AK is a reputed Bollywood actor in India. He is a Citizen of Canada.
- b) His income from Indian sources is Rs 1 Crore.
- c) He went out of India for the purpose of shooting of films.
- d) His stay in India was 75 days. He satisfied the test of stay in India for 365 days or more in Preceding 4 PYs.

What is his Residential Status and Scope of T.I

Examples on Residence



Example 3 – Coming In

- a) Mr. A is a Citizen of India.
- b) He works as Manager in construction company in Dubai. His Salary in Dubai is 60 Lakhs
- c) He visits his parents and friends in India. His stay in India is 128 days
- d) His income in India is 30 Lakhs

What is his Residential Status and Scope of T.I

Will it make a difference if his Income in India was only 10 Lakhs ??

Example 4 – Coming In

- a) Mr. A is a Citizen of India.
- b) He worked as Manager in construction company in Dubai. His Salary in Dubai was 60 Lakhs. He resigned from his job in December 2020.
- c) He comes back to India permanently. His stay in India is 75 days. Assume 365 days criteria is met.
- d) His income in India is 30 Lakhs

What is his Residential Status and Scope of T.I

Example 5



- a) Mr. A is a Citizen of India.
- b) He worked as Manager in construction company in Dubai. His Salary in Dubai was 60 Lakhs. He resigned from his job in March 2020. He comes back to India permanently from Dubai.
- c) In July 2020, he gets a job in New Zealand. He leaves for immediately for joining in the employment.
- d) His stay in India is 125 days. Assume 365 days criteria is met.
- e) His income in India is 30 Lakhs

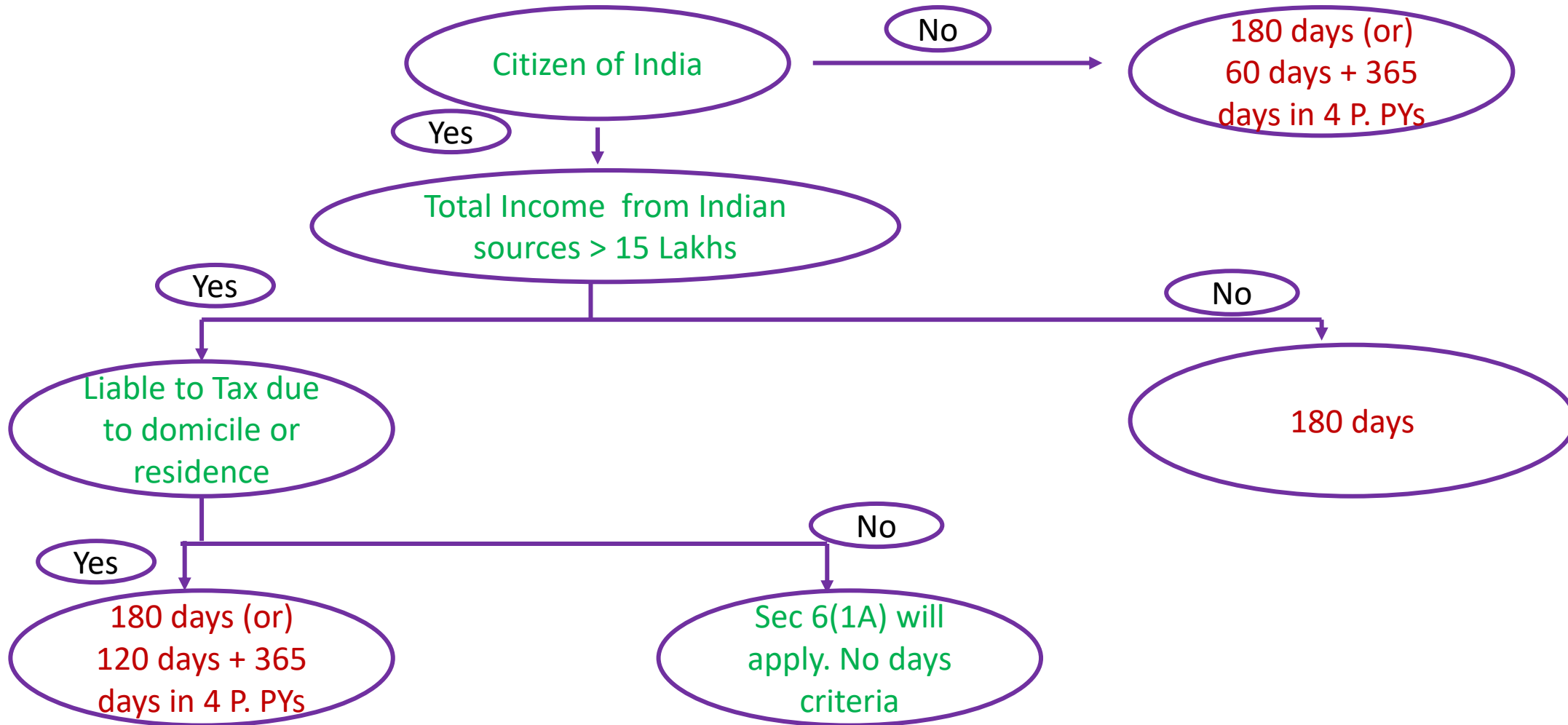
What is his Residential Status and Scope of T.I

Section 6(1A) – Resident

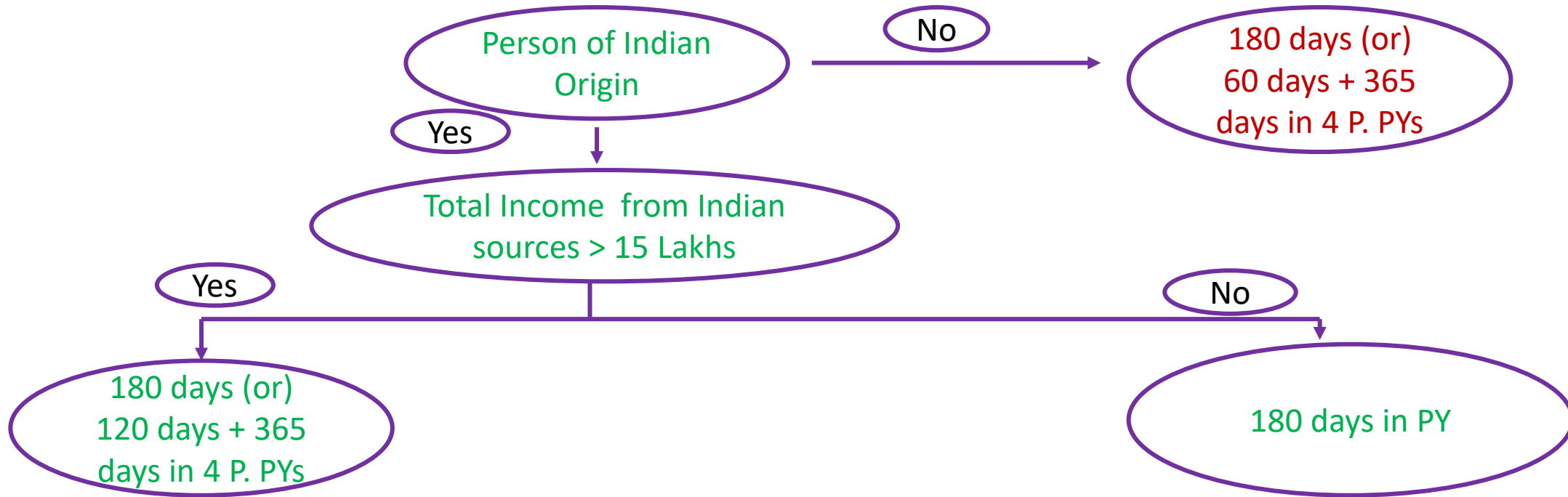


- a) Notwithstanding anything contained in clause (1),
- b) An Individual being a Citizen of India
- c) Having Total Income exceeding Rs 15 Lakhs (excluding income from foreign sources)
- d) Shall be deemed to be resident of India in that previous year,
- e) If he is not liable to tax in any other country or territory by reason of his domicile or residence or any other criteria of similar nature.
 - ADIT Vs Green Emirate Shipping & Travels 99 TTJ 988 (2006)
 - Mohsinally Ali Mohammed Rafik, In re 213 ITR 317 (1995)
 - Azadi Bachao Andolan – 263 ITR 706 (SC) (2003)

Section 6(1A) – Residence for a Citizen



Section 6(1) – Residence for a P.I.O



Examples on Residence under Sec 6(1A)



Example 1 – Going Out

- a) Mr. A is a Citizen of India.
- b) He is a partner in Chartered Accountants' firm and his T.I in India is 30 Lakhs
- c) He goes on tourist visa to his daughter in US and stays there for 180 days.
- d) After leaving US, he goes to UK directly from US to visit his son. He stays with his son for another 150 days.
- e) His stay in India is only 35 days.

What is his Residential Status and Scope of T.I

Will it make a difference if his Income in India was only 10 Lakhs ??

Example 2 – Coming In

- a) Mrs. S is a Citizen of India and a famous tennis player.
- b) After marriage, she settled in Dubai. She earns 10 crores annually from playing tournaments across the world.
- c) She has Indian income of Rs 1 crore from endorsements. She does not pay any tax in Dubai as Dubai does not have personal taxation of income.
- d) Due to corona virus, she comes and stays with her parents in India. Her stay in India is 110 days.

What is her Residential Status and Scope of T.I

Will it make a difference if her stay in India is 130 days.

Circular on “Residence” – Due to Covid-19



Circular No. 11 of 2020 : Clarification in respect of Residency during Previous year 2019-20

S.No	Particulars	Days removed for counting
1	Has been unable to leave India on or before 31 st March, 2020	his period of stay in India from 22 nd March, 2020 to 31 st March, 2020 shall not be taken into account
2	has been quarantined in India on account of Covid-19 on or after 1 st March, 2020 and has departed on an evacuation flight on or before 31 st March, 2020 or has been unable to leave India on or before 31 st March, 2020	his period of stay from the beginning of his quarantine to his date of departure or 31 st March, 2020, as the case may be, shall not be taken into account
3	has departed on an evacuation flight on or before 31 st March, 2020	his period of stay in India from 22 nd March, 2020 to his date of departure shall not be taken into account

Incidental Issues arising due to Covid-19 in FEMA

Permitted Accounts for Non-Resident Indians



Permitted Accounts for NRIs

- a) Non-resident (External) Account
- b) Foreign Currency (Non-resident) Bank Account
- c) Non-resident (Ordinary) Account

Above are covered by FEM (Deposit) Regulations, 2000

NRE Account – In case of change in residential status from NRI to Resident

- Due to Covid-19, NRIs have come to India, whether after loss of employment or any other condition. What's the status of such NRE accounts of those NRIs?
- If it's a short stay, What are the implications ??
- Is a clarification required from Finmin ??

Permitted Accounts for Non-Resident Indians



FCNRB Account and NRO Account – Are the same benefits as available to NRE A/c holders available to FCNRB A/c holders in case of change in residential status from NRI to Resident

If NRI becomes Resident and if it is assumed that stay in India is permanent in nature, what are the implications ??

- Will NRE/FCNRB/NRO be converted as RFC Account ??
- Will NRE/FCNRB/NRO be converted as normal account available for residents ??

Above are covered by FEM (Foreign Currency Accounts by a person Resident in India) Regulations 2000.

Accounts available to residents to maintain foreign currency

- a) RFC A/c
- b) RFC (Domestic) A/c
- c) EEFC A/c

TDS Provisions and M.L.I

Sec 195 – Payments to Non-residents



(1) Section 195 – Other Sums

- Machinery Provision relating to collection of Tax
- Applies where payee is a Non-resident
- No minimum threshold
- Applies to all “Persons” making the payment

(2) Consequences of non-compliance

- Disallowance under Sec 40(a)(i)
- Recovery under Sec 201 and Interest under Sec 201(1A)
- Penalty under Sec 271C
- Prosecution under Sec 276B

Payments to Non-residents - Chargeability



- (1) Section 4 – Charging Section
- (2) Section 5 – Scope of Total Income
- (3) Section 6 – Determining the Residential Status
- (4) Section 7 – Deemed to be received in India
- (5) Section 8 – Dividend Accrual
- (6) Section 9 – Deemed to Accrue or Arise in India
 - Gift by Resident to Non-resident – Sec 9(1)(viii) r.w.s 56(2)(x) – Sum/Property being movable or immovable

Sec 195 – Bare Section



(1) Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest, or any other sum chargeable under the provisions of this Act shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force :

GE India Technology Centre Private Limited 327 ITR 456 (SC)

The Obligation to deduct tax at source arises only when there is a sum chargeable under the Act i.e, payment which has an element of “income” chargeable to tax in India.



UOI Vs Azadi Bachao Andolan 263 ITR 706 (SC)

If it were not the intention of the legislature to make a departure from the general principles of chargeability to under Sec 4 and general principles of ascertainment of total income under Sec 5 of the Income Tax Act 1961, then there was no purpose in making those provisions “subject to the provisions of the Act”. The very purpose of grafting the said two sections with such clause is to enable the Central Government to issue notification under Sec 90 towards implementation of the terms of DTAA, which would automatically override the provisions of the Income Tax Act, in the matters of ascertainment of chargeability to Income Tax and ascertainment of Total Income to the extent they are inconsistent with the terms of DTAA.

Kanchanganga Sea Foods Limited Vs CIT 325 ITR 540 (SC)

The word “Sum” would include both monetary and non-monetary consideration.

Other parts of Sec 195



For the purpose of deduction of tax under 195, Rates in Force, as per Sec 2(37A), would mean

- the rate or rates of income tax specified in this behalf in the Finance Act of the relevant year or
- the rate or rates of income tax specified in an agreement entered into by the Central Government under Sec 90 or an agreement notified by the Central Government under Sec 90A

whichever is applicable by virtue of Sec 90 or Section 90A, as the case may be.

195(6) :

The person responsible for paying to a non-resident, not being a company, or to a foreign company, any sum, whether or not chargeable under the provisions of this Act, shall furnish the information relating to payment of such sum, in such form and manner, as may be prescribed.

Rule 37BB prescribes the manner in which the form shall be submitted. Form 15CA is the notified form for furnishing of information. Form 15CB is the accountant's certificate.

Penalties that could arise



Section 271-I

If a person who is required to furnish information under sub-section (6) of Section 195, fails to furnish such information, or furnishes inaccurate information, the assessing officer may direct that such person shall pay, by way of penalty, a sum of one lakh rupees.

Section 271-J

Penalty for furnishing incorrect information in reports or certificates by accountant or a merchant banker or a registered valuer is Rs 10,000 for each of such report or certificate.

Traditional Method of deducting Tax



- a) TDS Rate as per Income Tax Act 1961
 - b) Rate as per Treaty
- } Whichever is lower

How to ACCESS the treaty

- a) Non-resident should hold a valid TRC (Tax Residency Certificate)
- b) Form 10F
- c) Documents to substantiate Status, Nationality, Tax Identification Number of Residence Country, Address in Residence Country etc.
- d) Now GAAR to be complied with also

Documents to be obtained under the Act



Sec 195 read with Sec 206AA and Rule 37BC

- a) Permanent Account Number
- b) Form 10F
- c) Tax Residency Certificate
 - a) **Skalps Industries Private Limited Vs ITO (Ahm ITAT)**
 - b) **Srinivas Reddy Vs ITO (Hyd ITAT)**
- d) If deductee does not have PAN
 - a) Name, email-id, contact number
 - b) Address of the deductee
 - c) Tax Identification Number in the country of Residence.

Traditional Method of deducting Tax



Once Access is granted, other conditions to be verified (in brief) are as follows,

- a) Permanent Establishment (PE)
- b) Force of Attraction Rule (FoA)
- c) Make Available Clause (if payment is a FTS)
- d) Beneficial ownership
- e) Most Favoured Nation Clause
- f) Limitation of Benefits (LOB) Clause
- g) Other Conditions

Situation Post 1st April 2020



TDS AS PER THE
RATES IN FORCE

(Mentioned either in
the Income Tax Act
1961 or the Finance
Act of each assessment
year)

TDS AS PER THE
TREATY

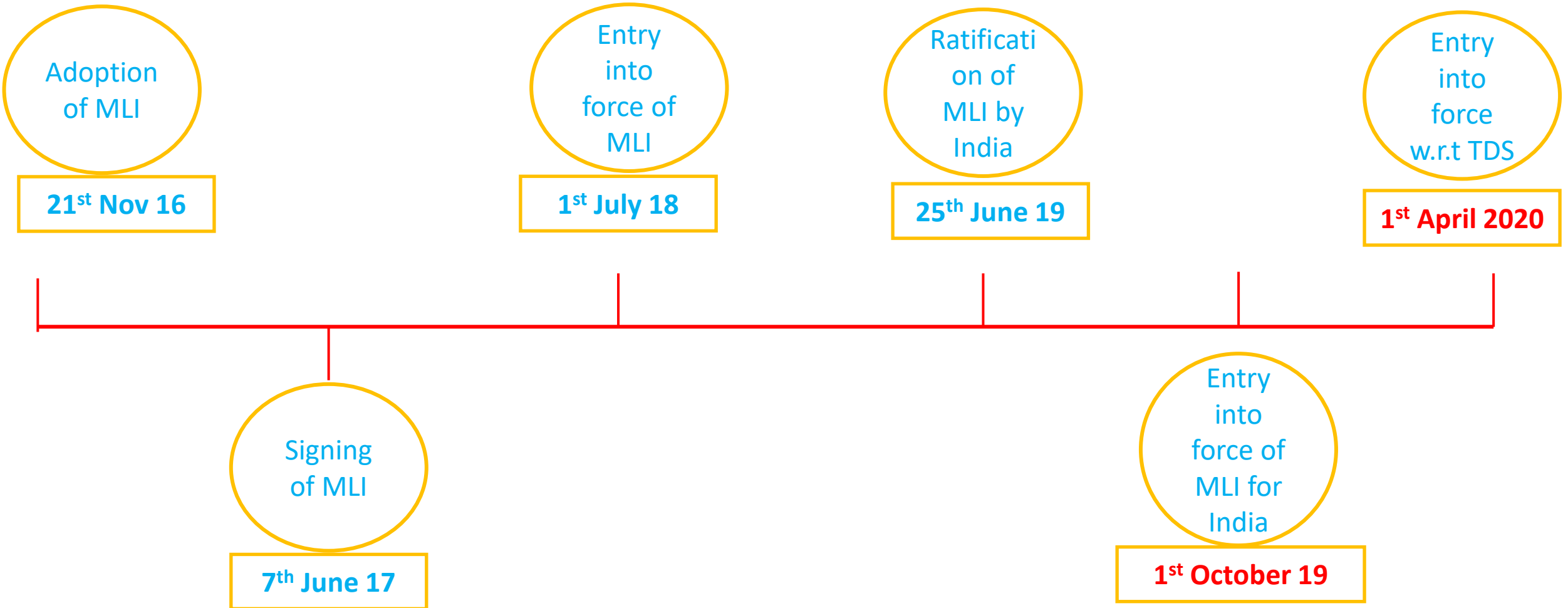
TOGETHER WITH

**MULTI-LATERAL
INSTRUMENT**

Whichever is beneficial

The diagram consists of a vertical red line that starts between the two columns of text and ends with an arrowhead pointing down towards the central text. From the base of this vertical line, two diagonal red arrows point outwards and downwards towards the left and right sides, respectively, pointing towards the two columns of text above.

MLI – Timeline w.r.t India



Notification of CBDT on 9th August 2019

M.L.I – Some facts



India has notified 93 DTAAS to be amended by M.L.I.

Out of the above, for 23 countries, M.L.I already entered into effect for both TDS and other taxes.

S.No	Name of the Country	S.No	Name of the Country	S.No	Name of the country
1	Austria	11	Luxembourg	21	Sweden
2	Australia	12	Malta	22	UAE
3	Belgium	13	Netherlands	23	United Kingdom
4	Finland	14	New Zealand		
5	France	15	Poland		
6	Georgia	16	Russia		
7	Ireland	17	Serbia		
8	Israel	18	Singapore		
9	Japan	19	Slovak Republic		
10	Lithuania	20	Slovenia		

M.L.I – Some facts



Treaties which got amended w.r.t TDS from 1st April 2020.

S.No	Name of the Country	S.No	Name of the Country
1	Canada	5	Norway
2	Denmark	6	Qatar
3	Iceland	7	Ukraine
4	Latvia		

Treaties which remain unaffected by M.L.I

- a) China
- b) U.S.A
- c) Hong Kong
- d) Mauritius
- e) Germany

Post M.L.I – Documents to be obtained from Payee



(Apart from all other documents relating to transactions)

- No Permanent Establishment declaration
- Tax residency certificate,
- Beneficial Owner Declaration;
- Qualified Person Declaration;
- PPT indemnification

(Illustrative only. For each stream of income, depending upon conditions, additional documents may be required.)

Pre M.L.I Vs Post M.L.I



Pre MLI

- a) Check Provisions of the Income Tax Act 1961 and related TDS rates given in Finance Act
- b) Check availability of TRC and PAN
- c) Go to respective Clause of the Treaty to check for
 - a) Reduced Scope of Income
 - b) Reduced TDS rate
 - c) MFN
- d) Lastly check for LOB

Post MLI

- a) Do all the things mentioned in Pre MLI
- b) Check ineligibility of Treaty due to GAAR
- c) Check ineligibility of Treaty due to PPT or SLOB
- d) Check other conditions prescribed in MLI for application of each stream of income

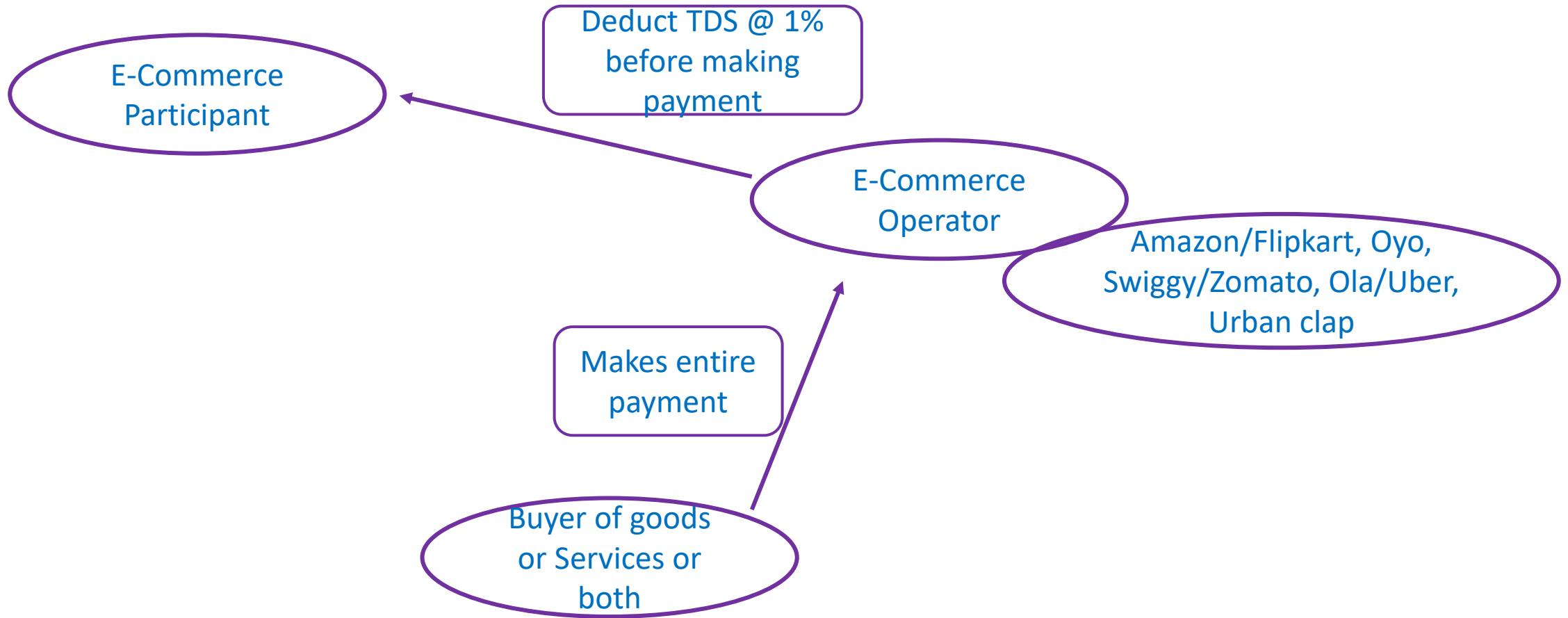
Sec 194-O – New TDS provision



(1) Notwithstanding anything to the contrary contained in any of the provisions of Part B of this Chapter, **where sale of goods or provision of services** of an **e-commerce participant** is **facilitated by** an **e-commerce operator** through its digital or electronic facility or platform (by whatever name called), such e-commerce operator shall, at the time of credit of amount of sale or services or both to the account of an e-commerce participant or at the time of payment thereof to such e-commerce participant by any mode, whichever is earlier, deduct income-tax at the rate of one per cent of the gross amount of such sales or services or both.

Explanation.—For the purposes of this sub-section, any payment made by a purchaser of goods or recipient of services directly to an e-commerce participant for the sale of goods or provision of services or both, facilitated by an e-commerce operator, shall be deemed to be the amount credited or paid by the e-commerce operator to the e-commerce participant and shall be included in the gross amount of such sale or services for the purpose of deduction of income-tax under this sub-section.

Example to Sec 194-O



Sec 194-O - Definitions



Explanation.—For the purposes of this section,—

- (a) "electronic commerce" means the supply of goods or services or both, including digital products, over digital or electronic network;
- (b) "e-commerce operator" means a person who owns, operates or manages digital or electronic facility or platform for electronic commerce;
- (c) "e-commerce participant" means a person resident in India selling goods or providing services or both, including digital products, through digital or electronic facility or platform for electronic commerce;
- (d) "services" includes "fees for technical services" and fees for "professional services", as defined in the Explanation to section 194J.



(2) No deduction under sub-section (1) shall be made from any sum credited or paid or likely to be credited or paid during the previous year to the account of an e-commerce participant, being an individual or Hindu undivided family, where the gross amount of such sale or services or both during the previous year does not exceed **five lakh rupees and** such e-commerce participant has furnished his **Permanent Account Number or Aadhaar number** to the e-commerce operator.

(3) Notwithstanding anything contained in Part B of this Chapter, a transaction in respect of which tax has been deducted by the e-commerce operator under sub-section (1), or which is not liable to deduction under sub-section (2), shall not be liable to tax deduction at source under any other provision of this Chapter:

Provided that the provisions of this sub-section shall not apply to any amount or aggregate of amounts received or receivable by an e-commerce operator for hosting advertisements or providing any other services which are not in connection with the sale or services referred to in sub-section (1).

Equalisation Levy and related provisions

Equalisation Levy 1.0



Section 165.

- (1) On and from the date of commencement of this Chapter, there shall be charged an equalisation levy at the rate of **6%** of the amount of consideration for any specified service received or receivable by a person, being a non-resident from—
- (i) a person resident in India and carrying on business or profession; or
 - (ii) a non-resident having a permanent establishment in India.
- (2) The equalisation levy under sub-section (1) shall not be charged, where—
- (a) the non-resident providing the specified service has a PE in India and the specified service is effectively connected with such PE ;
 - (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 PE 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 PE in India is not for the purposes of carrying out business or profession.

Equalisation Levy 1.0 - Definitions



Section 164

(f) “online” means a facility or service or right or benefit or access that is obtained through the internet or any other form of digital or telecommunication network;

(i) “specified service” means online advertisement, any provision for digital advertising space or any other facility or service for the purpose of online advertisement and includes any other service as may be notified by the Central Government in this behalf;

Equalisation Levy 2.0 - Definitions



Sec 164(ca) - "e-commerce operator" means a non-resident who owns, operates or manages digital or electronic facility or platform for **online sale of goods or online provision of services or both**;

Sec 164(cb) "e-commerce supply or services" means—

- (i) online sale of goods owned by the e-commerce operator; or
- (ii) online provision of services provided by the e-commerce operator; or
- (iii) online sale of goods or provision of services or both, facilitated by the e-commerce operator;
or
- (iv) any combination of activities listed in clause (i), (ii) or clause (iii);'

Equalisation Levy 2.0 – Charge – Sec 165A



- (1) On and from the 1st day of April, 2020, there shall be charged an equalisation levy at the rate of 2% of the amount of consideration received or receivable by an e-commerce operator from e-commerce supply or services made or provided or facilitated by it—
- (i) to a person resident in India; or
 - (ii) to a non-resident in the specified circumstances as referred to in sub-section (3); or
 - (iii) to a person who buys such goods or services or both using internet protocol address located in India
- (2) The equalisation levy under sub-section (1) shall not be charged—
- (i) where the e-commerce operator making or providing or facilitating e-commerce supply or services has a PE in India and such e-commerce supply or services is effectively connected with such PE;
 - (ii) where the equalisation levy is leviable under section 165; or
 - (iii) sales, turnover or gross receipts, as the case may be, of the e-commerce operator from the e-commerce supply or services made or provided or facilitated as referred to in sub-section (1) is less than two crore rupees during the previous year.



(3) For the purposes of this section, "specified circumstances" mean—

- (i) sale of advertisement, which targets a customer, who is resident in India or a customer who accesses the advertisement through internet protocol address located in India; and
- (ii) sale of data, collected from a person who is resident in India or from a person who uses internet protocol address located in India

Equalisation Levy 2.0 – Examples



- a) Amazon, Flipkart, Walmart
- b) Google Pay, Master Card, Visa
- c) Netflix, Hotstar, iTunes, Amazon Prime
- d) Payment by cable operator to foreign TV channels
- e) Urban Clap
- f) Zoom Cars, Oyo, Air BnB
- g) 99 Acres
- h) Biju's, Khan Academy
- i) Zoom Subscriptions
- j) Twitter payments to reach large audience

Equalisation Levy – Related Sections in ITA



a) Section 10(50) :

Any income arising from any specified service provided on or after the date on which the provisions of Chapter VIII of the Finance Act, 2016 comes into force or arising from any e-commerce supply or services made or provided or facilitated on or after the 1st day of April, 2021 and chargeable to equalisation levy under that Chapter.

Explanation.—For the purposes of this clause, "specified service" shall have the meaning assigned to it in clause (i) of section 164 of Chapter VIII of the Finance Act, 2016.

b) Section 40(a)(ib)

Any consideration paid or payable to a non-resident for a specified service on which equalisation levy is deductible under the provisions of Chapter VIII of the Finance Act, 2016, and such levy has not been deducted or after deduction, has not been paid on or before the due date specified in sub-section (1) of section 139 :

Provided that where in respect of any such consideration, the equalisation levy has been deducted in any subsequent year or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, such sum shall be allowed as a deduction in computing the income of the previous year in which such levy has been paid;

Thank you !!!

Disclaimer : The views expressed in the presentation is exclusively that of the author. The participant relying on the presentation is expected to take adequate professional care before implementing the ideas suggested during the presentation. The presenter is in no case liable for any damages incurred by relying on the ideas implemented without adequate consultation.