



Taxation of digital economy

January 2018
Private and confidential

Digital Economy

- An outlook
- Business models
- Tax challenges
- Options proposed by OECD and India response
- UK position paper
- Landmark Judicial rulings
- Google case

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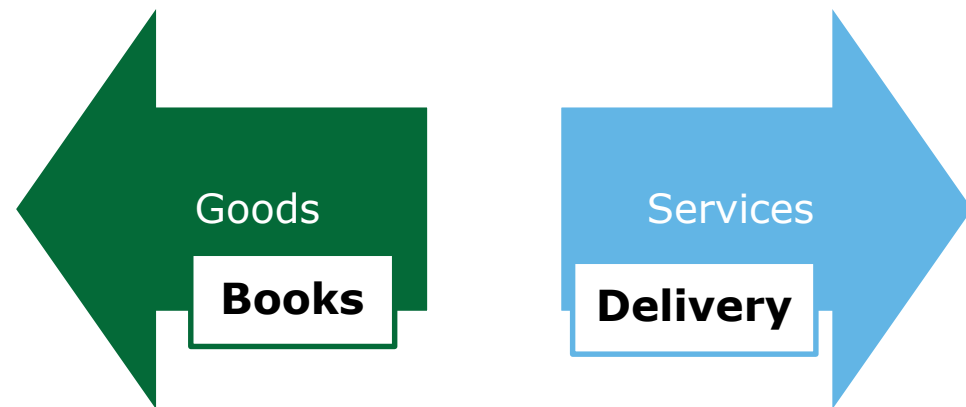
An Outlook

Digital Economy – An Outlook

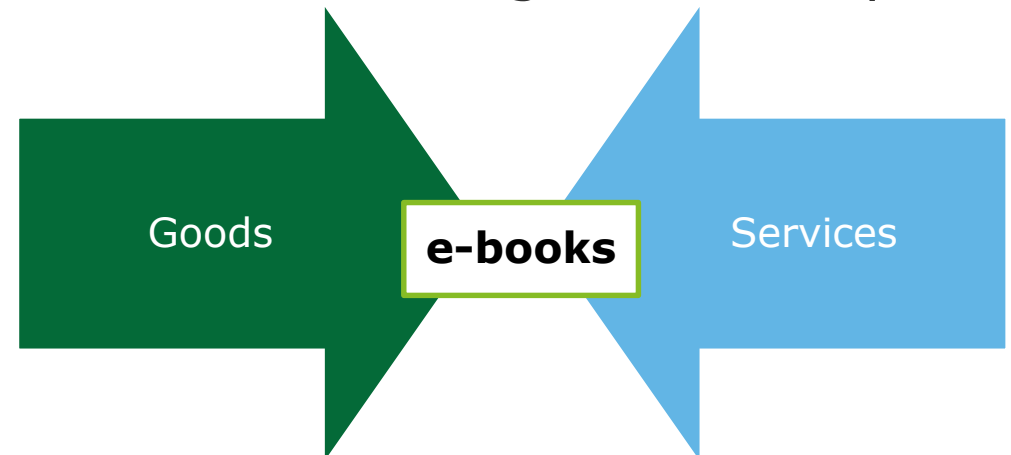
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Demarcation in traditional economy

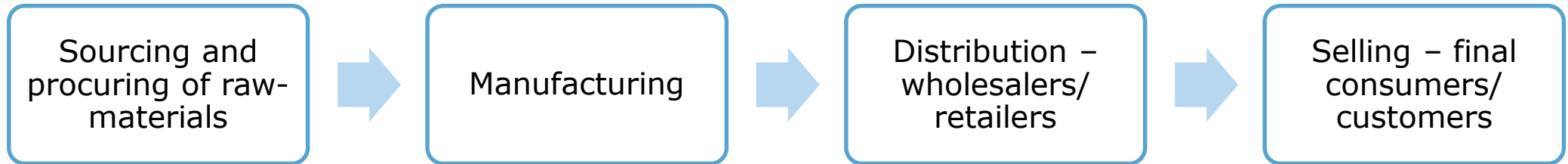


Scenario in digital economy

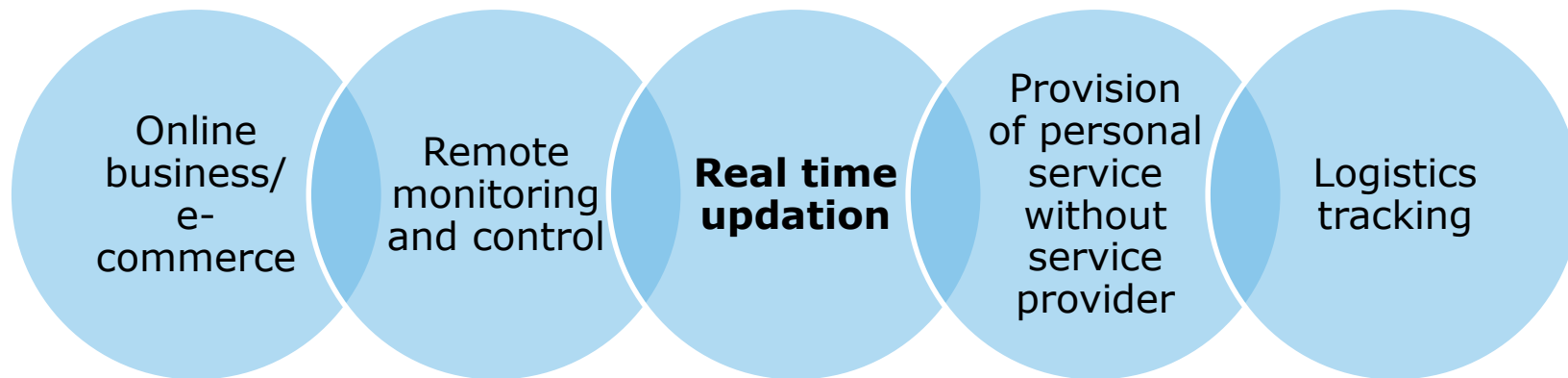


Digital Economy – An Outlook

Traditional supply chain – disappears in digital economy



New systems in digital world (illustrative)

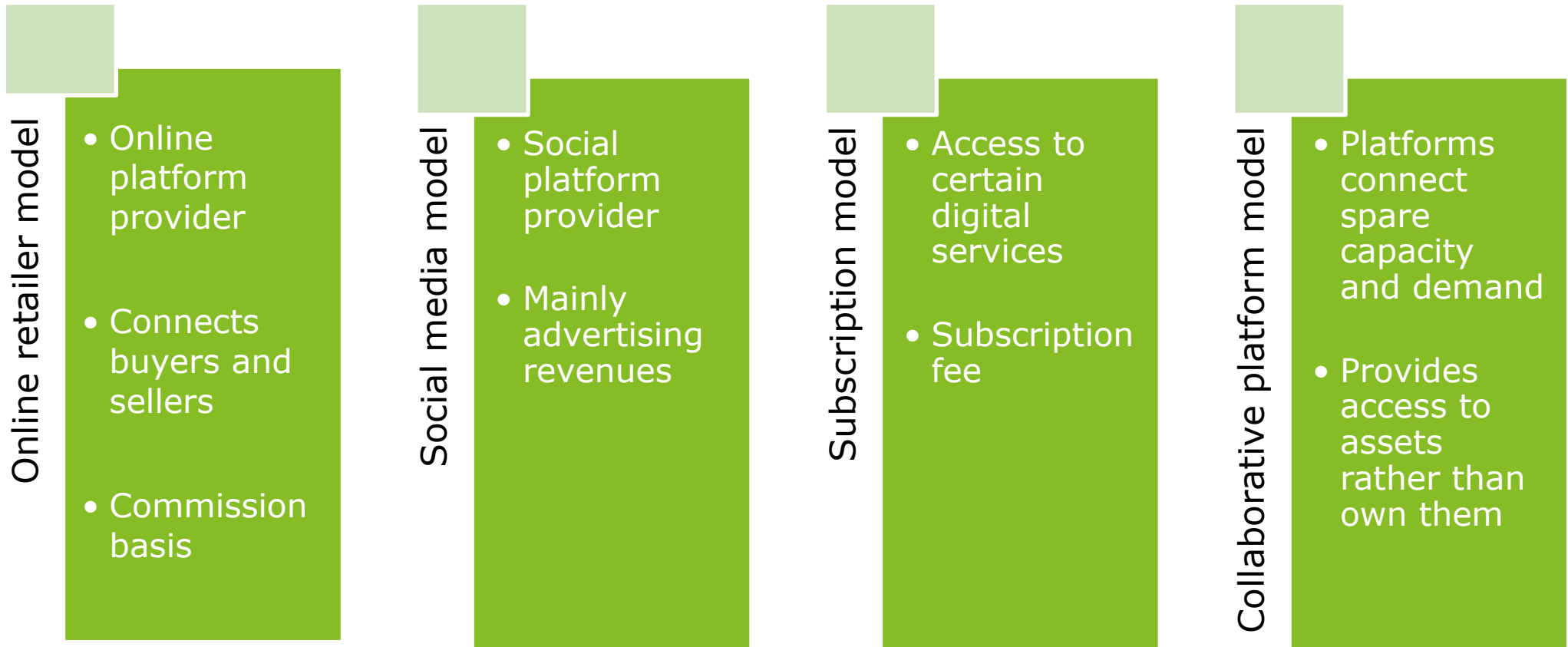


OECD prediction – future growth



Business models

Digital Economy – Business models*



**Page 124 and 125 of OECD Report on Action Point 1*

Source: European Commission Report- Communication from the Commission to the European Parliament and the Council- dated 21-09-2017

Digital Economy – New Business models**

B2B model

- Logistics services, Application service provider, outsourcing, content management, wholesale purchase, etc.

B2C model

- Manufacturers selling directly to customers through online platforms

C2C model

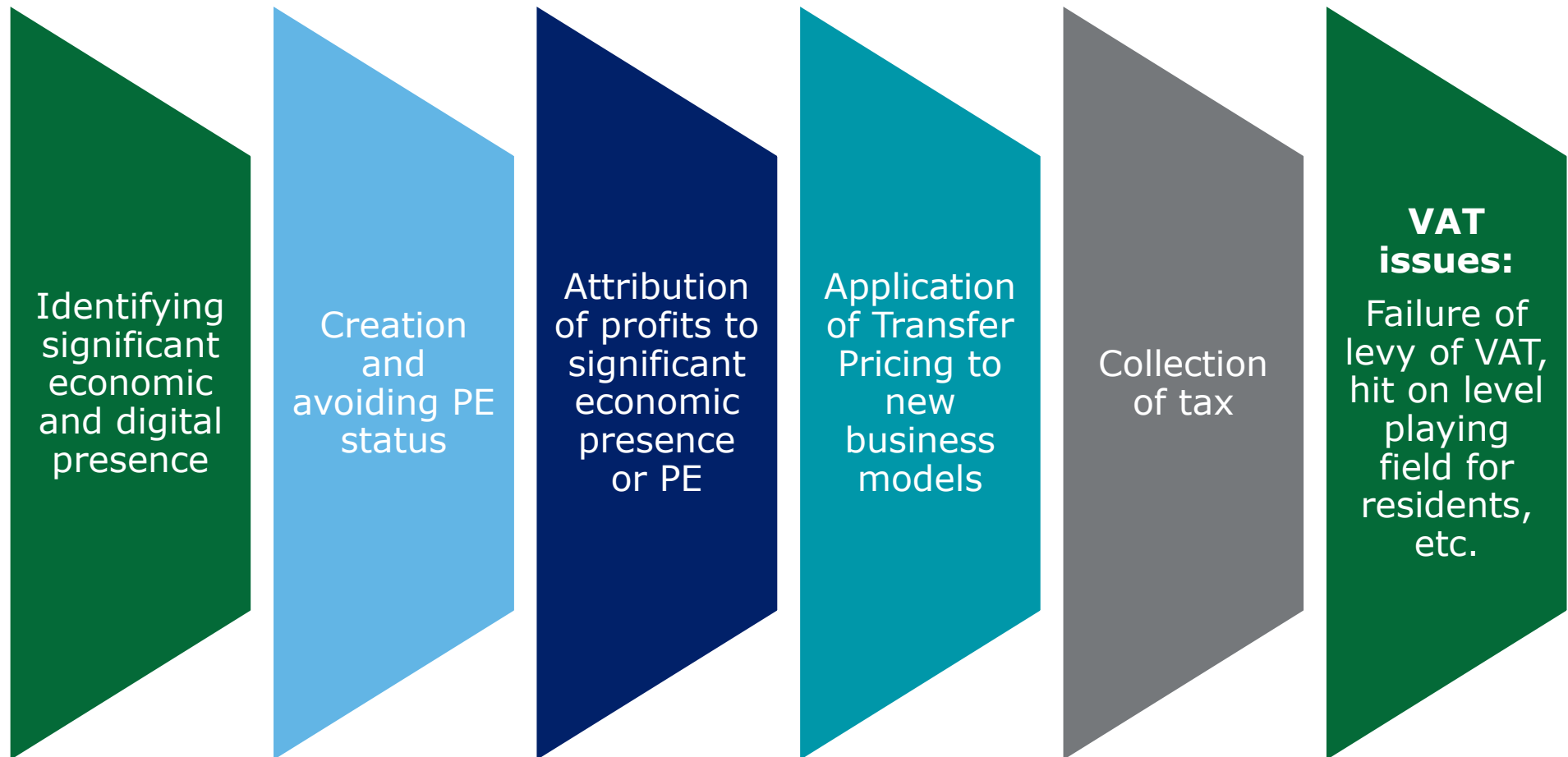
- Individual consumers sell or rent their assets to other individuals directly
- Platform providers may or may not charge for the platform depending on their revenue model (please refer note below)

Note: Some revenue models include advertising based revenue, digital content sale/ rentals, subscription based revenue, selling goods/ services, licensing content and technology, etc.

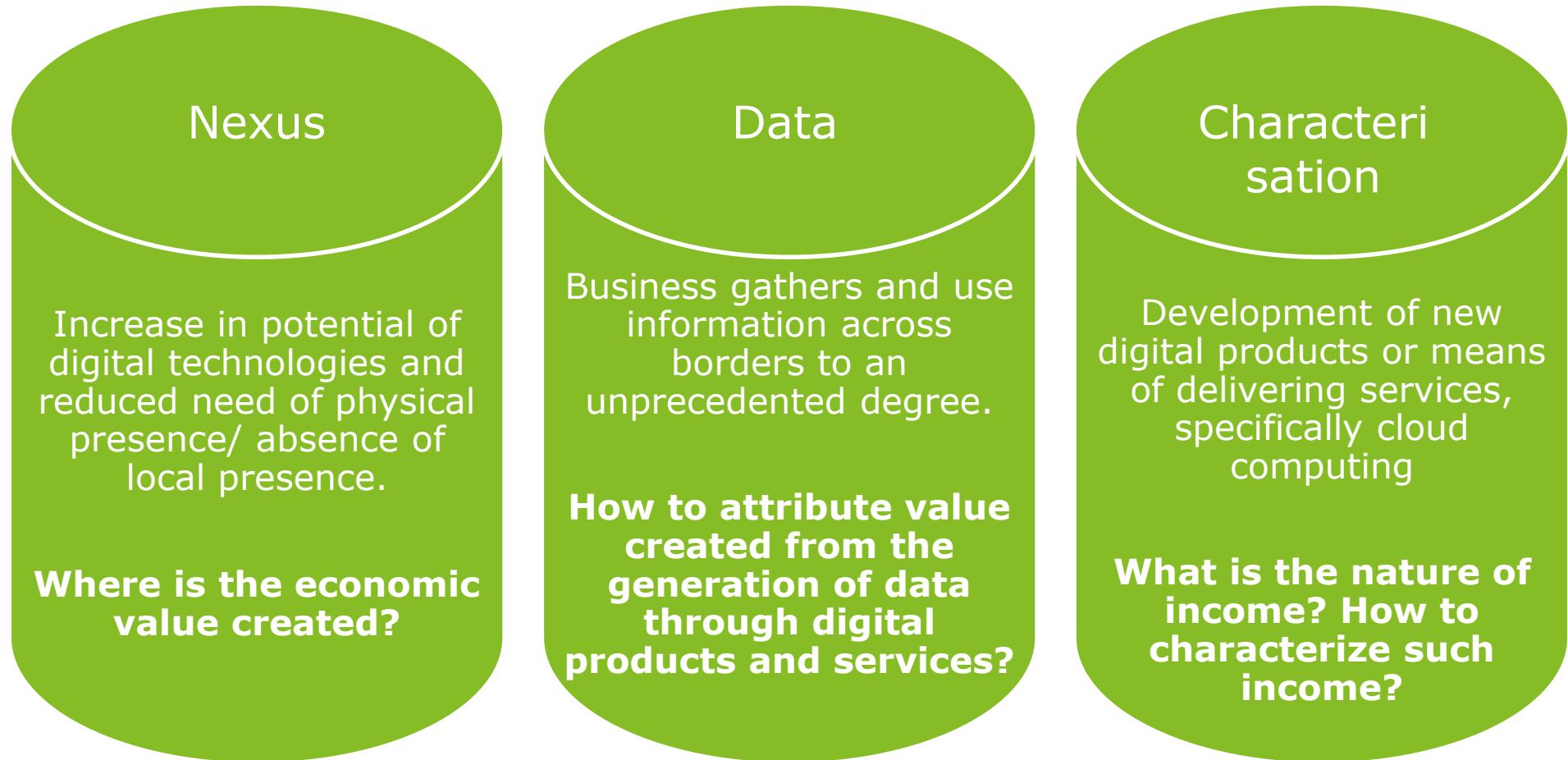
***OECD's report on Action Point 1 - Addressing the Tax Challenges of the Digital Economy - Page no 74 & 75.*

Tax challenges

Digital Economy – Tax challenges

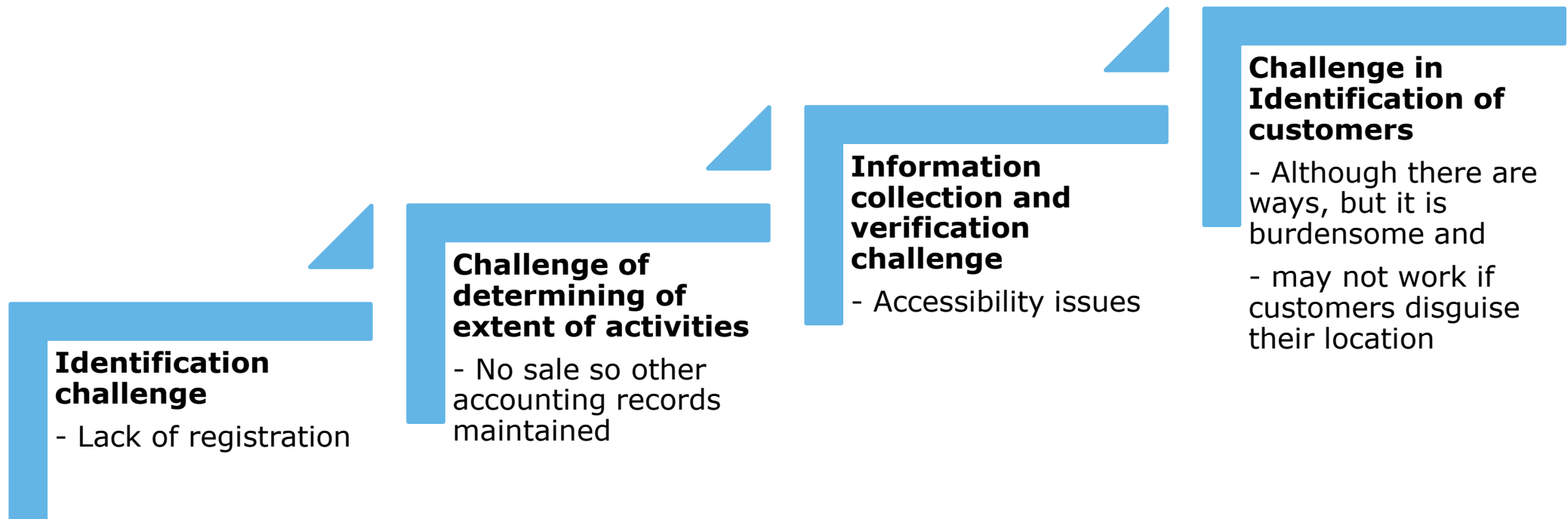


Digital Economy – Tax challenges*



**Challenges on policy aspect related to Taxation of Digital Economy - Page 125- OECD report on Action Point 1*

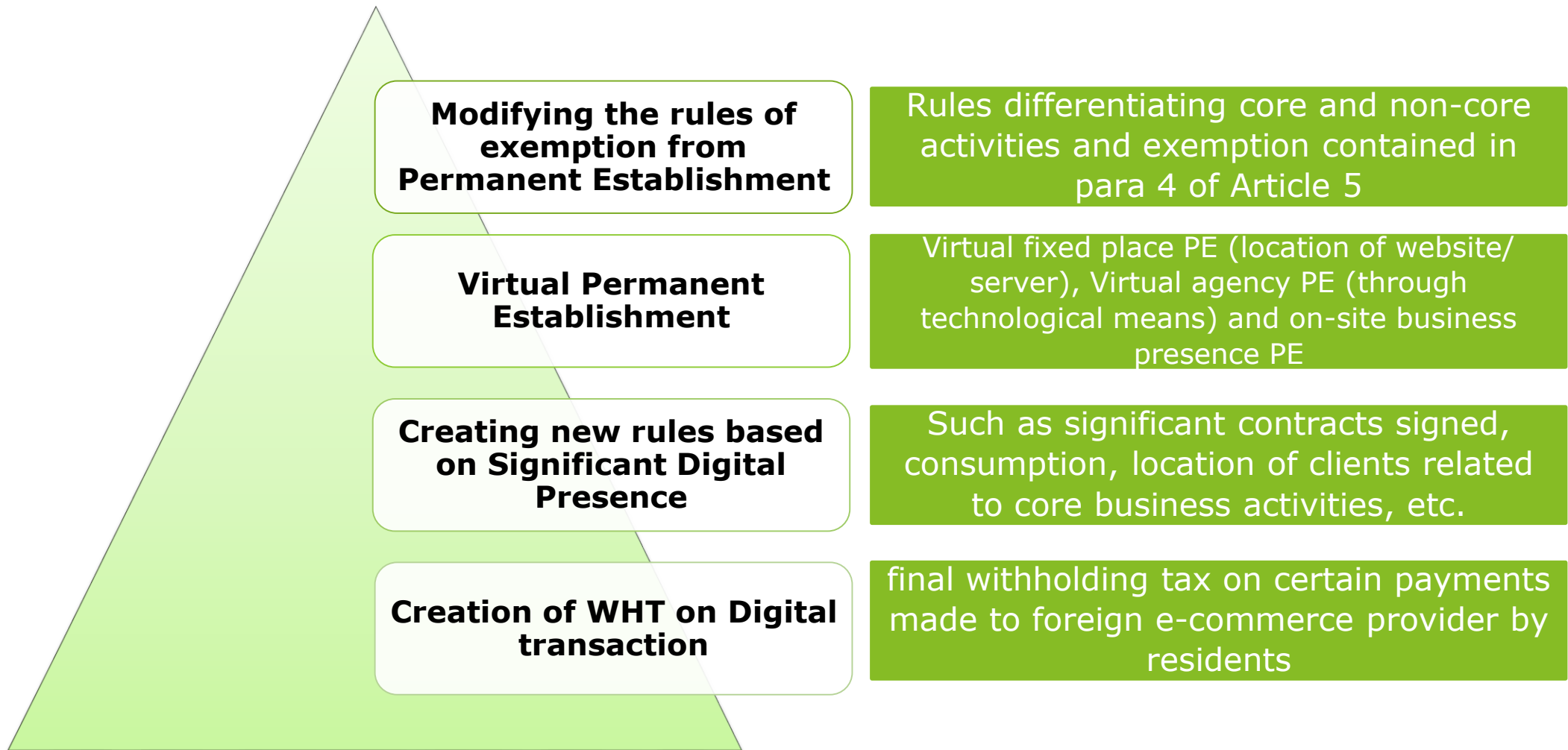
Digital Economy – Administrative tax challenges



Options proposed by OECD

Digital Economy – Options proposed by OECD

The task force on BEPS Action plan 1 identified the following options:



Digital Economy – Options proposed by OECD

Creating new rules based on significant Digital Presence

Pros	Cons
<ul style="list-style-type: none">• Taxation based on the “nexus” rule (significant economic presence)• “Attribution” principle limits taxation only to the amount that is attributable to a jurisdiction• Taxation on “net” basis – expense incurred for earning income would be deductible• Tax credit available to the foreign company• Onus would be on the Revenue to prove to a greater extent• Unlike equalisation levy, this would not trigger merely on making payment for specified services.	<ul style="list-style-type: none">• This would require amendment in the existing tax treaties• Attribution of profits is a huge challenge due to lack of clarity and universal consensus• This adds to compliance and administration cost• Unlike equalisation levy which applies only to B2B model, this may be attracted in other business models also

Digital Economy – Options proposed by OECD

Withholding tax on digital transactions

Pros	Cons
<ul style="list-style-type: none">• Relatively easier to execute• Can be combined with option 1 also• Can be planned and designed to take care of the compliance issues and gross amount taxation concerns• Tax credit available	<ul style="list-style-type: none">• This would require amendment in the existing tax treaties• Gross taxation adds to the costs

Equalization Levy

Pros	Cons
<ul style="list-style-type: none">• Changes in tax treaties not required• Relatively most simpler option to execute	<ul style="list-style-type: none">• Conceptualized as different from income-tax – Tax may not be creditable• Gross taxation adds to the costs• Additional compliance burden• Transactions may get taxed even in absence of sufficient nexus

Digital Economy – India response to BEPS Action 1

Taxation of e-commerce transactions in India

- The e-commerce transactions with non-residents were being triggered under section 195 of the Act requiring a withholding from the payments made to non-residents.
- However it was considered as taxable only when it satisfied the definition of royalties or technical services. Generally the judicial precedents in this regard held that the transactions were in the nature of business profits and in absence of PE / business connection was not taxable in India

Indian scenario to address digital economy challenges

- Ahead of BEPS Action Plan 1 release, Indian Government had set up an expert committee to address the challenges of digital economy and recommend a way forward.
- The expert committee made in-depth analysis of current scenario, challenges, possible consequences and recommended that a levy may be introduced on such services through separate chapter under Finance Act called as "Equalisation levy". This was one of the recommendations of OECD BEPS Action 1.
- In view of above, Equalisation levy has been introduced via Finance Act, 2016. The target of the levy largely seem to be corporates who have no presence in India and aid their customers advertise online, without suffering any taxes in India. However, practically, it might merely add to the cost of the Indian parties remitting the consideration.

Digital Economy – India response to BEPS Action 1

Some of the key provisions of the levy is summarized below:

Specified services

- Presently, the only specified services notified is online advertisement, any provision for digital advertising space or any other facility or service for the purpose of online advertisement.
- However, the definition could be broadened in scope over a period of time.

Liability to pay Equalisation Levy

- Equalisation levy is payable on the amount of consideration received or receivable by a non-resident from
 - a person resident in India and carrying on business or profession; or
 - a non-resident having a permanent establishment in India

Rate of levy

- 6% of the amount of consideration for any specified services

Mechanism to collect such levy

- Deduction from the payments to be made for specified services

Meaning of Permanent Establishment

- "permanent establishment" includes a fixed place of business through which the business of the enterprise is wholly or partly carried on

Digital Economy – India response to BEPS Action 1

Exemptions from applicability of Equalisation levy



Digital Economy – India response to BEPS Action 1

Other Implications

Since the levy has been introduced as a separate chapter in the Finance Act, it is not a part of the Income-tax laws of India. This has been introduced as a withholding against the remittance. Hence, the tax withheld is unlikely to be creditable against the income-tax levied in the country of the service provider.

Largely, the Indian legislation has been drafted on the basis of the BEPS recommendation. However, one significant point of deviation is the one on treating the levy as distinct from income-tax. Yet, it is closely linked to the income-tax laws in two aspects:

- As per the Income-tax Act, 1961, deduction shall not be allowed in computing income under the head 'profits and gains of business or profession' of any consideration paid or payable to a non-resident for a specified service on which equalisation levy is deductible and such levy has not been deducted or after deduction, has not been paid on or before the due date specified for filing income-tax returns.

It is also 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 for filing income-tax returns, such sum shall be allowed as a deduction in computing the income of the previous year in which such levy has been paid;

- The Income-tax Act, 1961 also provides that any income arising from any specified service provided on or after the date on which the Equalisation Levy comes into force, and is chargeable to the said levy, then, such income shall not form part of taxable income for the service provider.

Hence, while the legislation seems to charge on the value of the service consideration, which is akin to indirect tax, the administration aspects are under the direct tax legislation.

UK position paper – Nov 2017

Digital Economy – UK position paper snapshot

In November 2017, HMRC UK released position paper on Corporate Tax and Taxation of Digital Economy

Challenges to Current International framework

Transfer pricing rules	<ul style="list-style-type: none">• Application of ALP concept to intra-group arrangements in absence of comparable between unrelated parties• Changes made to TP guidelines which prevents residual profits being realised in low tax entities which actually own assets and risks• Tax charge on transfer of valuable assets to low tax entities• High attribution determined by location of small number of people taking decisions on deployment of capital or management of risk
Profit shifting	<ul style="list-style-type: none">• User generated value is not captured under existing framework which focuses exclusively on physical activities.• This leads to non-taxation of profits derived in market like UK where significant value is created

Digital Economy – UK position paper snapshot

Principles of tax reforms

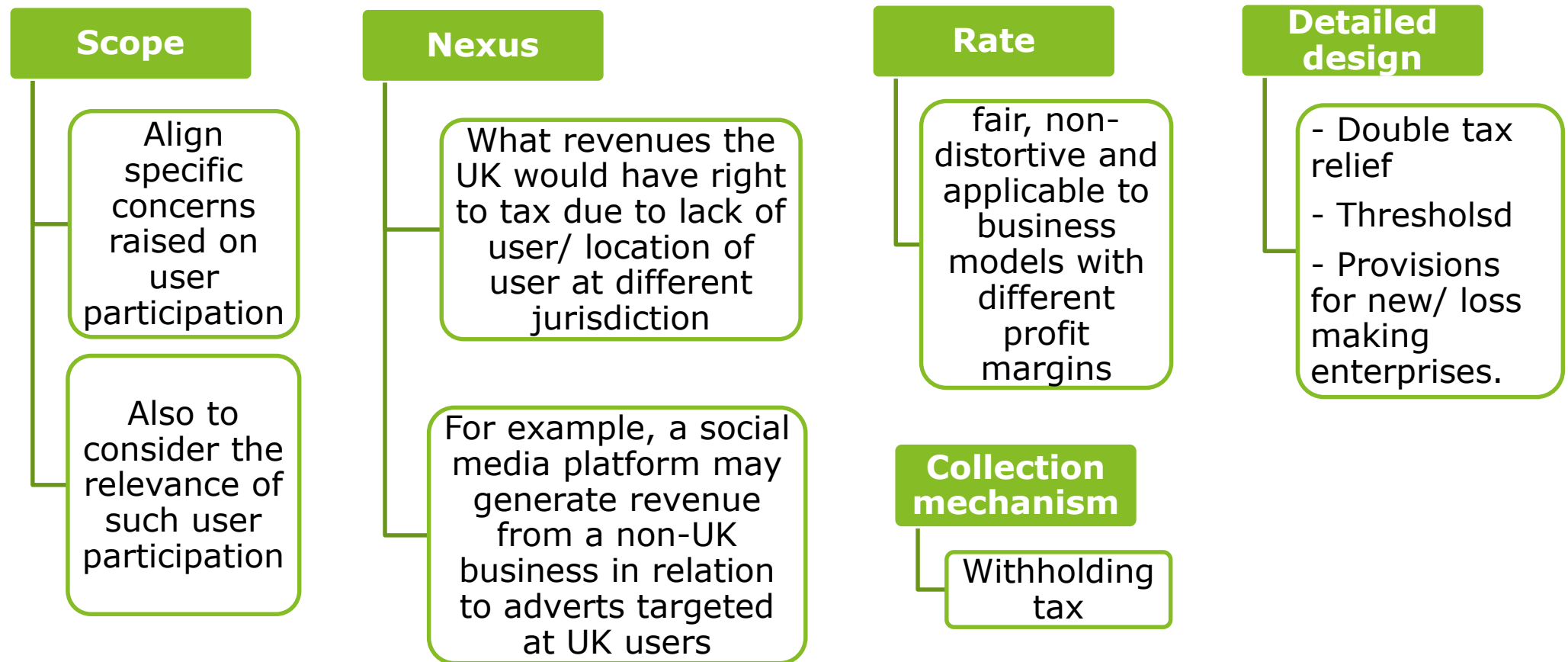
Rules to ensure that companies, having narrow activities, are brought under tax net for the value they might generate from user participation

Rules to give right to tax the profits of foreign companies that derive value from a material and active user base within their jurisdiction, even in the absence of those companies having a permanent establishment

Rules to allocate an amount of profit of those foreign companies to the countries in which they have such a user base, based on a metric that approximates the value that the user base generates e.g. monthly active users

Digital Economy – UK position paper snapshot

Proposed tax regime – tax on the revenue from the provision of digital services to the UK market



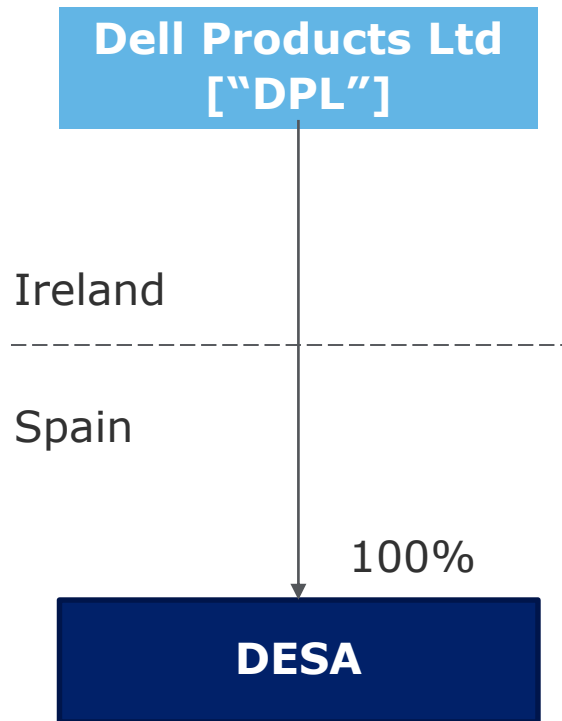
Further, extension of UK withholding tax proposed to cover royalties paid, in connection with sales to UK customers, to no or low-tax jurisdictions. The extension will be applied consistently with the UK's double tax treaties

Landmark judicial rulings

Dell Products Ltd – Spain Supreme Court ruling

Dell Products Ltd vs General State Administration

STS 2861/2016, recurso no 2555/2015



Facts:

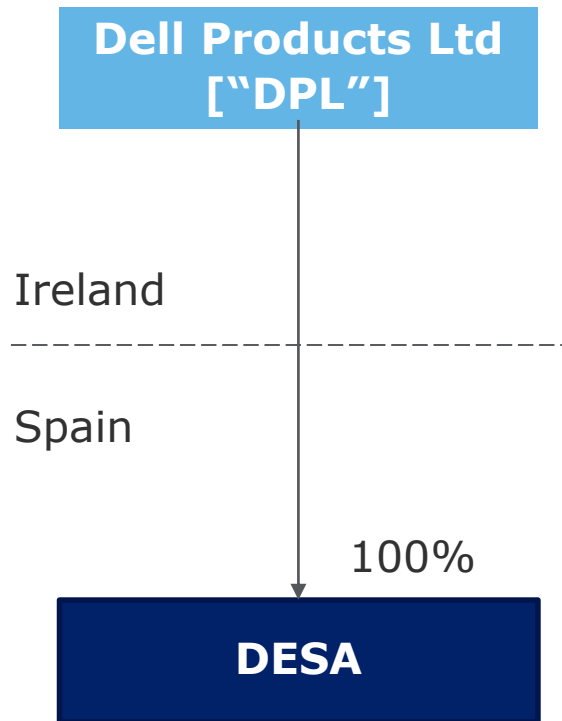
- DESA and its staff in Spain carried out a number of functions in relation to DPL's products; such as promotion, sale, order management, control of the receipt, distribution of products, marketing and advertising, logistics, etc.
- The Spanish Revenue assessed DPL for tax on profits attributable to DESA's activities on the ground that DESA constituted "permanent establishment" ["PE"] of DPL

Arguments of the Assessee:

- DESA was an independent agent carrying on business on behalf of DPL
- DPL did not have fixed place of business available to it as its staff did not work in Spain.

Dell Products Ltd vs General State Administration

STS 2861/2016, recurso no 2555/2015



Spain Supreme Court Ruling:

Fixed Place PE:

- **Meaning of “availability” for the purpose of fixed place PE:**
 - It means use of fixed place of business by the non-resident through another entity who carried out activities at its request and under its control and such activities form its core corporate aim.
 - DPL carried out substantial portion of its activities through DESA staff at its facilities which implied availability.
- **Irrelevant factors for determining whether there existed fixed place PE or not:**
 - Whether non-resident carries on business in Ireland or not
 - Number of people working – whether small or huge
 - Non-resident assuming risk of bad debts

Dell Products Ltd vs General State Administration

STS 2861/2016, recurso no 2555/2015

Spain Supreme Court Ruling:

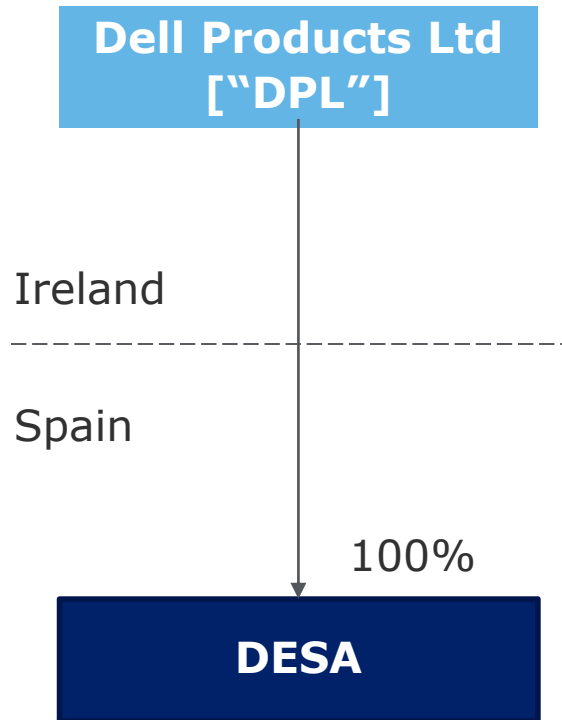
Independent agency:

- **Test of independent agency:**

In view of DPI's extensive powers of supervision and direction, DESA could not be said to operate as independent agent.

- **Indicators that DESA was not independent agent:**

- DESA followed DPI's instruction;
- DPI had to authorise prices and commissions;
- DPI accepted or rejected requests for delivery;
- DESA submitted periodic reports to DPI;
- DPI had right to inspect DESA's records and premises;
- DPI to authorise purchase of products; and
- DPI had control over intellectual property rights.

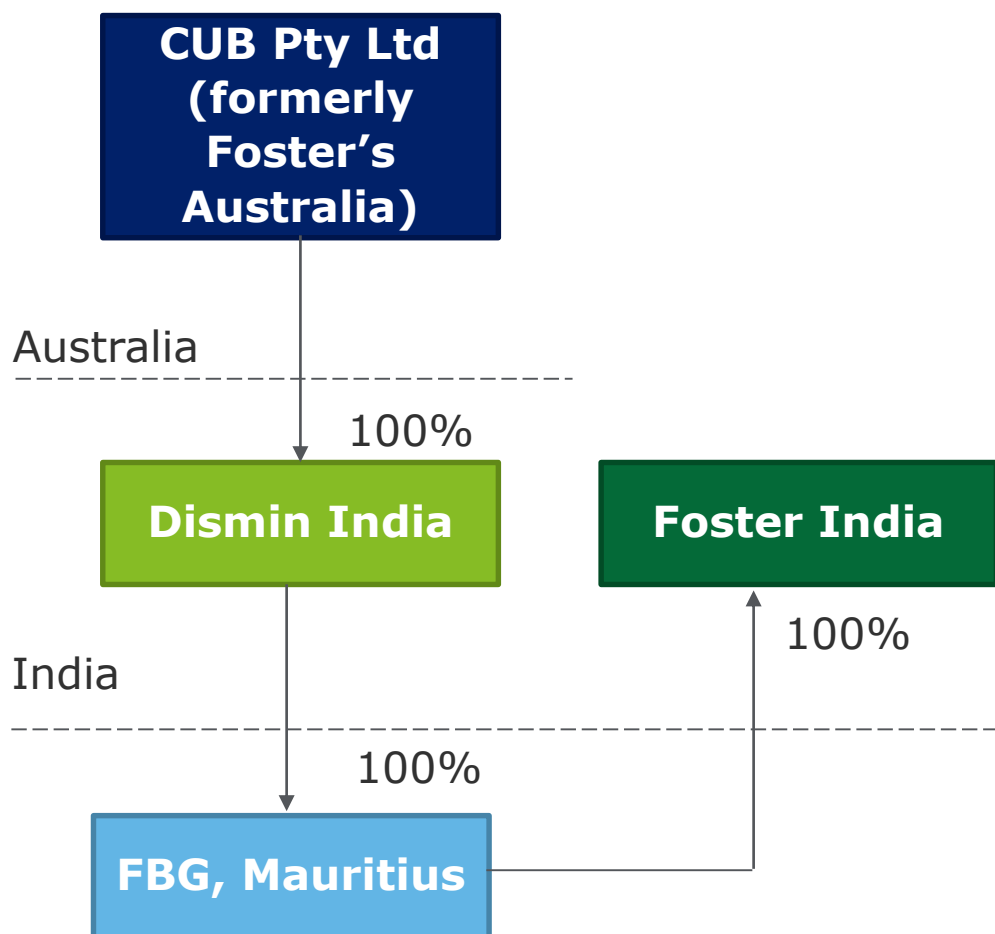


The Spanish Supreme Court ruled that DPI had dependent agent PE in Spain. This view differs from courts in France and Norway which have found that commissionaire arrangements do not give rise to a PE. Further, OCED-BEPS initiative realised the need for new wording in Article 5 to cover such arrangements, which suggest that the current treaties do not cover that, though interpreted so in above ruling.

CUB Pty Ltd – India Delhi High Court ruling

CUB Pty Ltd vs Union of India and others

WPC No 6902/2008



Facts:

- Foster's Australia ["the taxpayer"] owned certain trademarks which it licensed to Foster India, to use in India.
- An agreement was entered into by the taxpayer and various parties which inter-alia provide for the transfer of these intellectual property rights.
- The taxpayer sought an advance ruling on the tax implications of the above transfer.

AAR Ruling:

The AAR decided that the taxpayer was liable for tax on the profit from transfer of trademarks on the ground that:

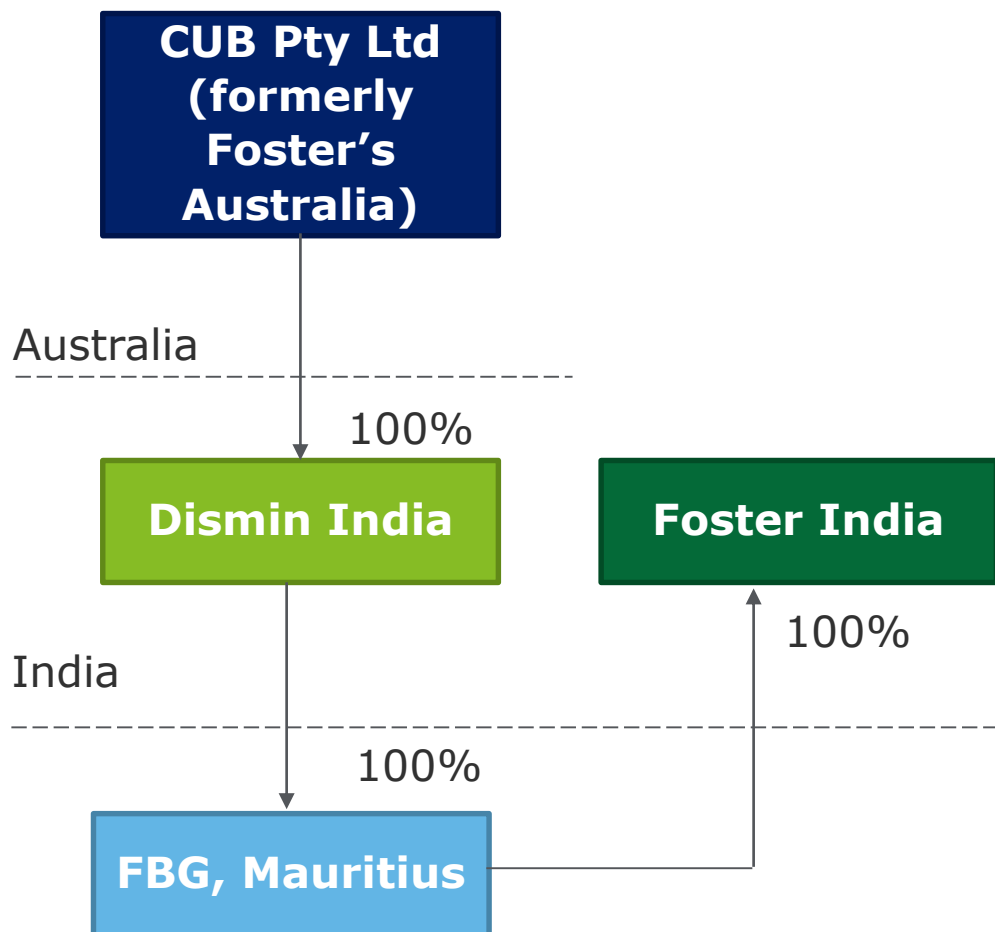
- It was registered in India; and
- It had generated considerable goodwill in India

Therefore, it was reasonable to hold that it had its abode in India on the date of transfer.

Aggrieved, the taxpayer appealed before the High Court.

CUB Pty Ltd vs Union of India and others

WPC No 6902/2008

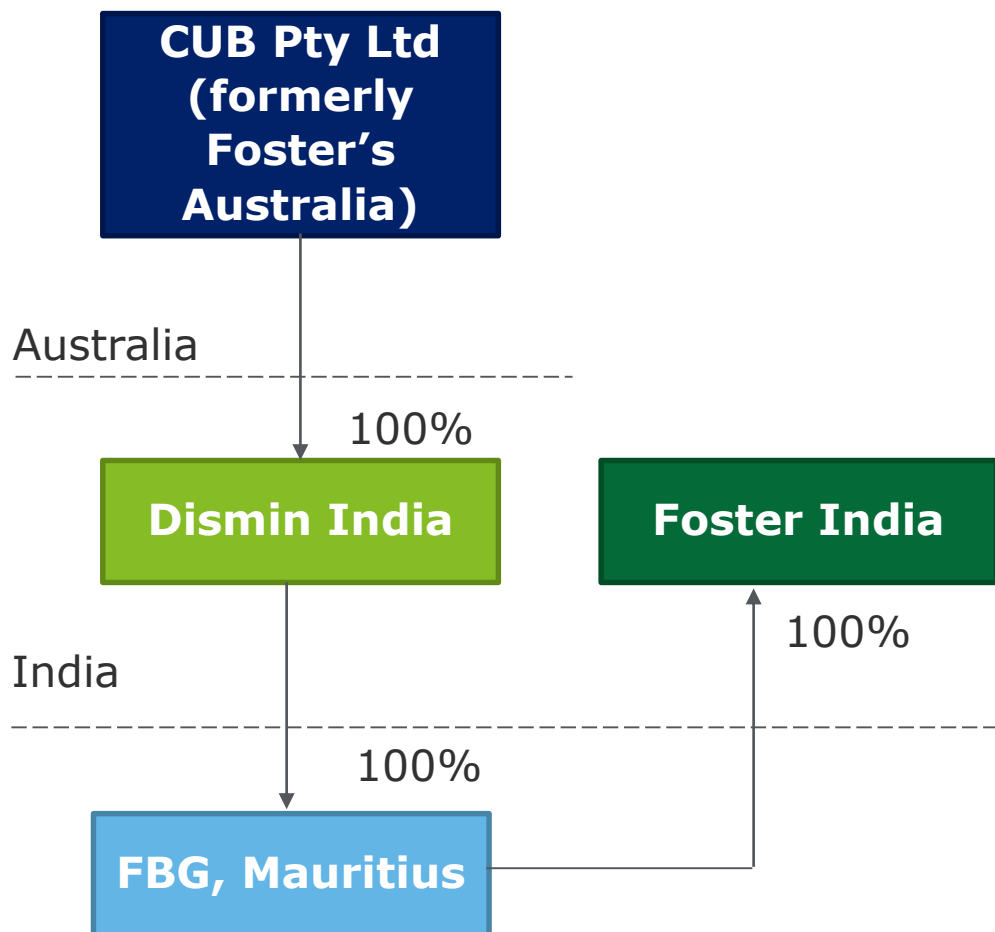


Arguments of the taxpayer:

- The origin of Foster's mark was in Australia and the taxpayer was its owner.
- Taxpayer granted license to various countries including India and there was no transfer of any proprietary rights.
- Mere registration of trademark in India did not imply that the trademark itself is migrated to India.
- The rights in a trademark are of common law origin and are protected even in absence of any statute thereof.
- Since, in India, the legislature has not specifically provided for the situs of trademarks, the common law rule of '***mobilia sequuntur personam***' would be applicable.
- According to this principle, the situs of intangible assets are to be determined on the basis of the situs of the owner of such intangible assets.

CUB Pty Ltd vs Union of India and others

WPC No 6902/2008

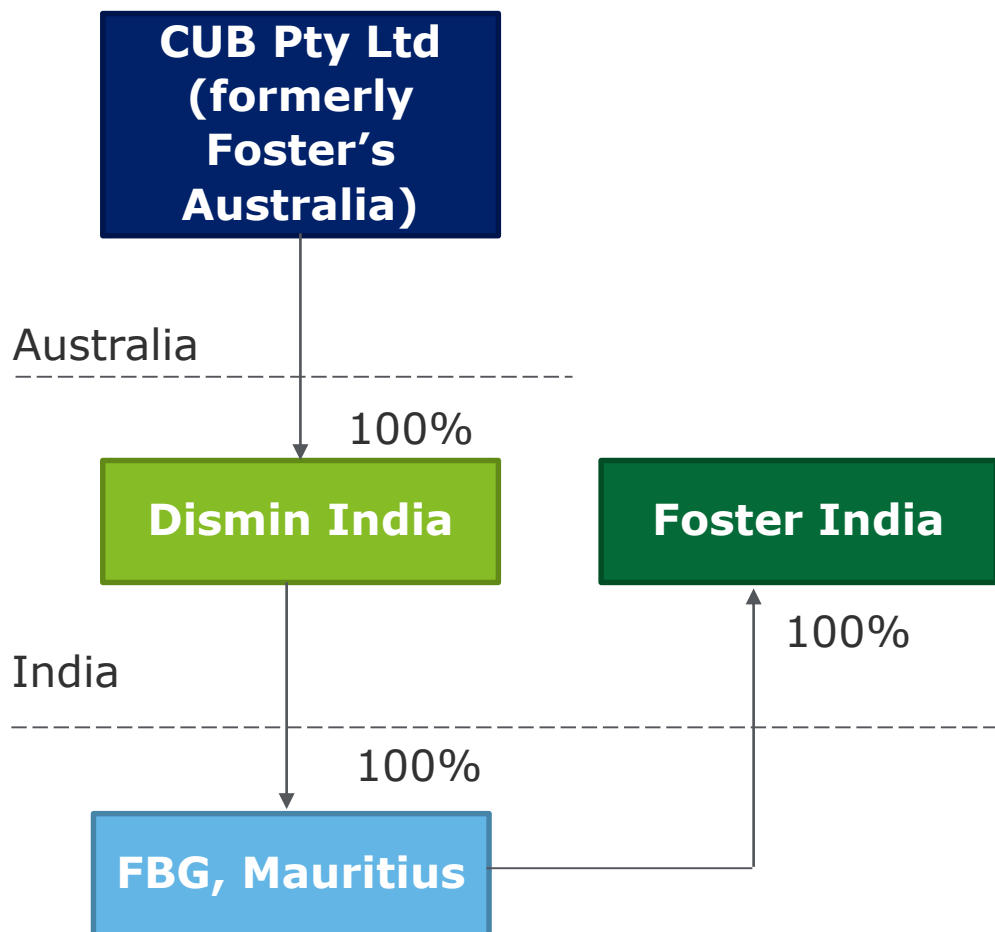


Arguments of the Revenue:

- Appreciable goodwill was generated in India.
- Trademarks had tangible presence and the same indicated by its registration in India.
- It is irrelevant that the agreement had taken place outside India.
- The maxim '*mobilia sequuntur personam*' would not be apply, as these are business intangibles and the situs of the same would be where the business is carried out and where the intangibles would be protected under the local law.
- The location of the owner is irrelevant.

CUB Pty Ltd vs Union of India and others

WPC No 6902/2008



Decision of the Delhi High Court:

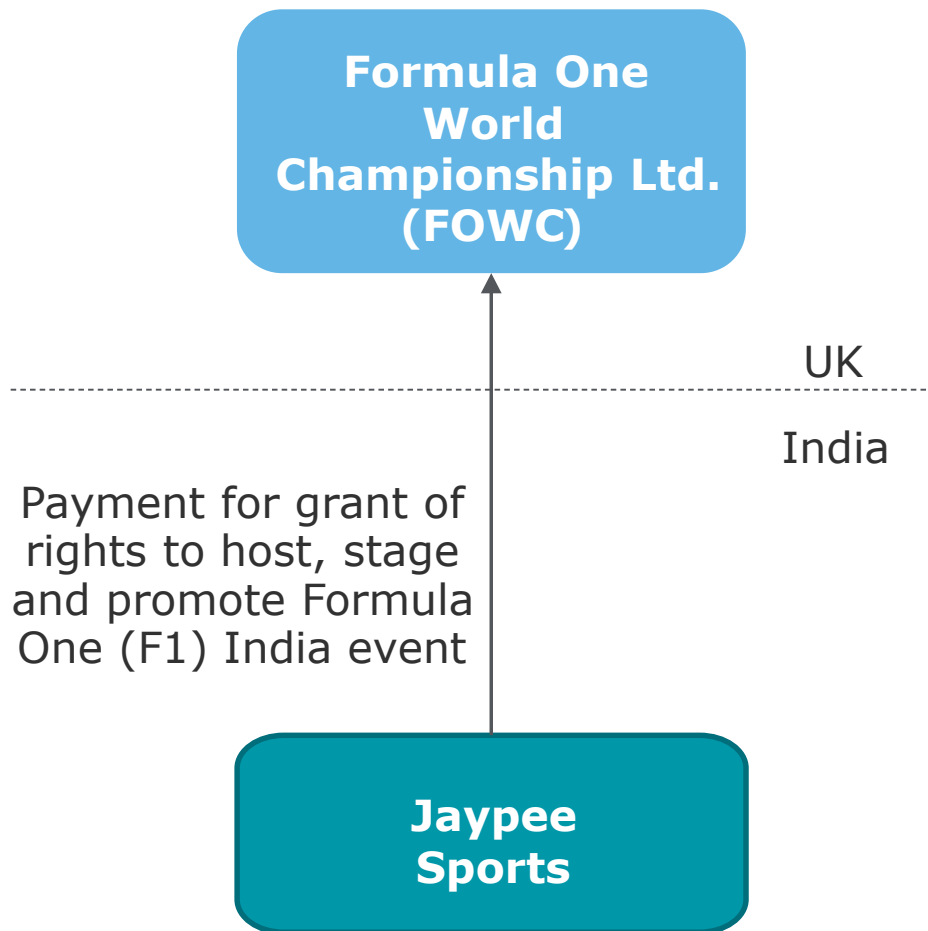
- The legislature could have, through a deeming fiction, provided for the location of an intangible capital asset (such as intellectual property rights) as it has provided for shares, but, it has not done so.
- Since, there is no such provision, the well accepted principle of '*mobilia sequuntur personam*' would apply.
- The situs of the owner of an intangible asset would be the closest approximation of the situs of an intangible asset. This is an internationally accepted rule, unless it is altered by local legislation.
- Therefore, situs of IP in this case would not be in India, as the owner thereof was not located in India at the time of the transaction.

At what point in time should the situs be seen? Whether at the time of creation of IP? Or at the time of transfer? Or is there another rule?

Formula One World Championship Ltd – India Supreme Court ruling

Formula One World Championship Ltd. vs CIT (Int. Tax.)

Civil Appeal Nos 3849, 3850 and 3851 of 2017



Facts:

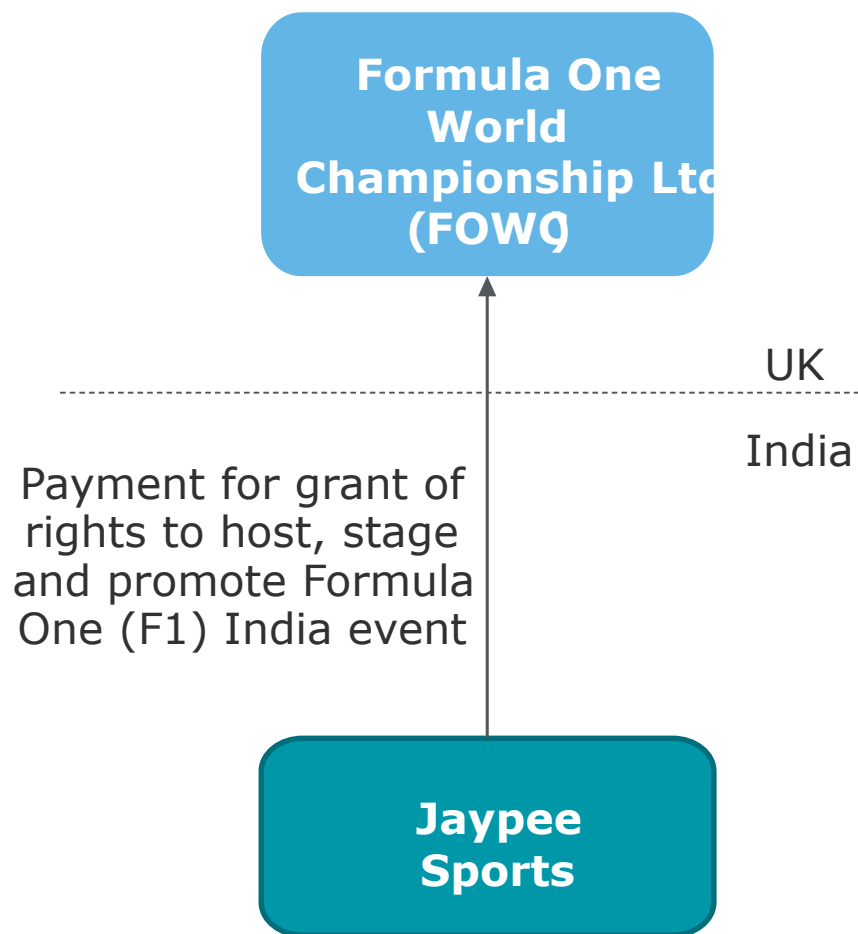
- FOWC is a UK tax resident company
- FOWC held license to the license for commercial rights in the FIA Formula One World Championship for 100-year term effective from 1-1-2011
- FOWC is the exclusive nominating body at whose instance the event promoter is permitted participation
- FOWC entered into a Race Promotion Contract (RPC) by which it granted to Jaypee Sports, the right to host, stage and promote F1 Grand Prix of India event for a consideration of USD 40 million
- FOWC had right of access (two weeks prior to race, one week post race) specified in the agreement

Issues:

- Whether FOWC had a PE in India?

Formula One World Championship Ltd. vs CIT (Int. Tax.)

Civil Appeal Nos 3849, 3850 and 3851 of 2017



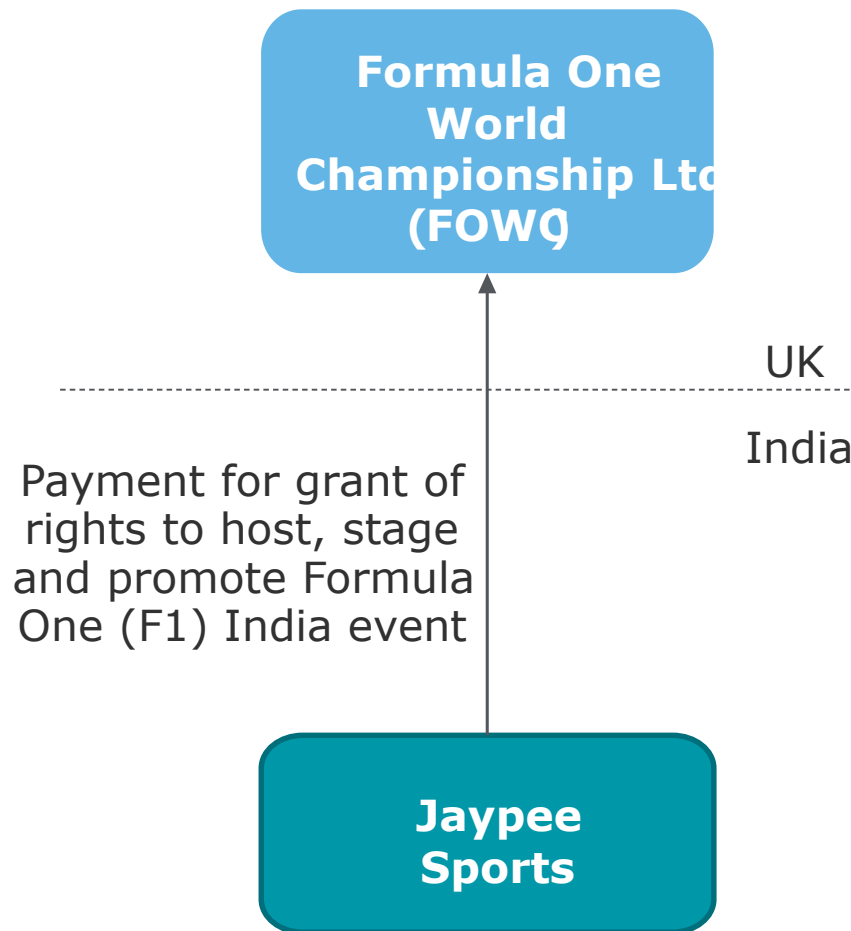
Decision of the Supreme Court:

Fixed place and permanency test:

- Buddh International Circuit is a fixed place.
- Various agreements cannot be looked into by isolating them from each other. Their wholesome reading would bring out real transaction between the parties.
- FOWC was authorised to exploit the commercial rights directly or through its affiliates only.
- FOWC signed first agreement with Jaypee. Under this agreement, right to host, stage and promote the event are given by FOWC to Jaypee. On the same day, another agreement is signed between Jaypee and three affiliates of FOWC whereby Jaypee gives back circuit rights, mainly, media and title sponsorship.
- All the revenues from the aforesaid activities are to go to affiliates of FOWC.
- Service agreement was signed between FOWC and Affiliate on the date of the race whereby Affiliate engaged FOWC to provide various services. The aforesaid arrangement clearly demonstrates that the entire event is taken over and controlled by FOWC and its affiliates.

Formula One World Championship Ltd. vs CIT (Int. Tax.)

Civil Appeal Nos 3849, 3850 and 3851 of 2017

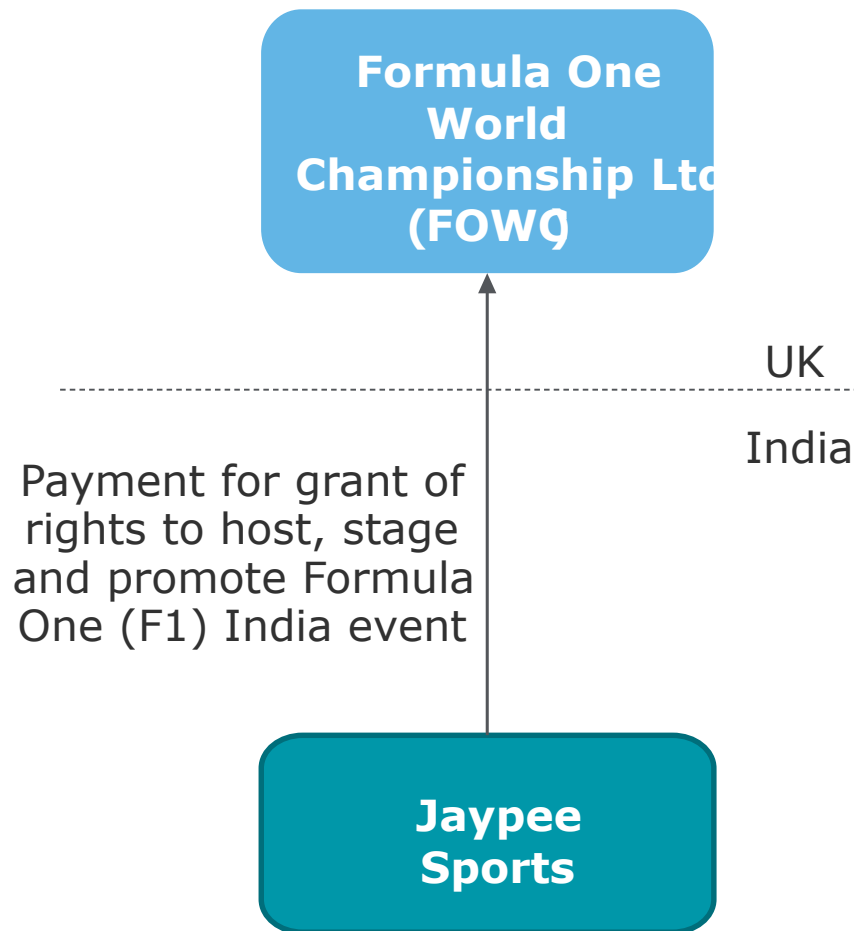


(contd...)

- The duration of the agreement was five years, which was extendable to another five years.
- The question of the PE has to be examined keeping in mind that the race was to be conducted only for three days in a year and for the entire period of race the control was with FOWC
- Although the duration of the event was for limited days, since for the entire duration FOWC had full access through its personnel, number of days for which the access was there would not make any difference.
- Though FOWC's access or right to access was not permanent, in the sense of its being everlasting, at the same time, the model of commercial transactions it chose is such that its exclusive circuit access to the team and its personnel or those contracted by it, was for up-to six weeks at a time during the F1 Championship season. With this kind of activity, although there may not be substantiality in an absolute sense with regard to the time period, both the exclusive nature of the access and the period for which it is accessed makes the presence of a kind contemplated under Article 5(1), i.e. it is fixed. In other words, the presence is neither ephemeral or fleeting, or sporadic.

Formula One World Championship Ltd. vs CIT (Int. Tax.)

Civil Appeal Nos 3849, 3850 and 3851 of 2017



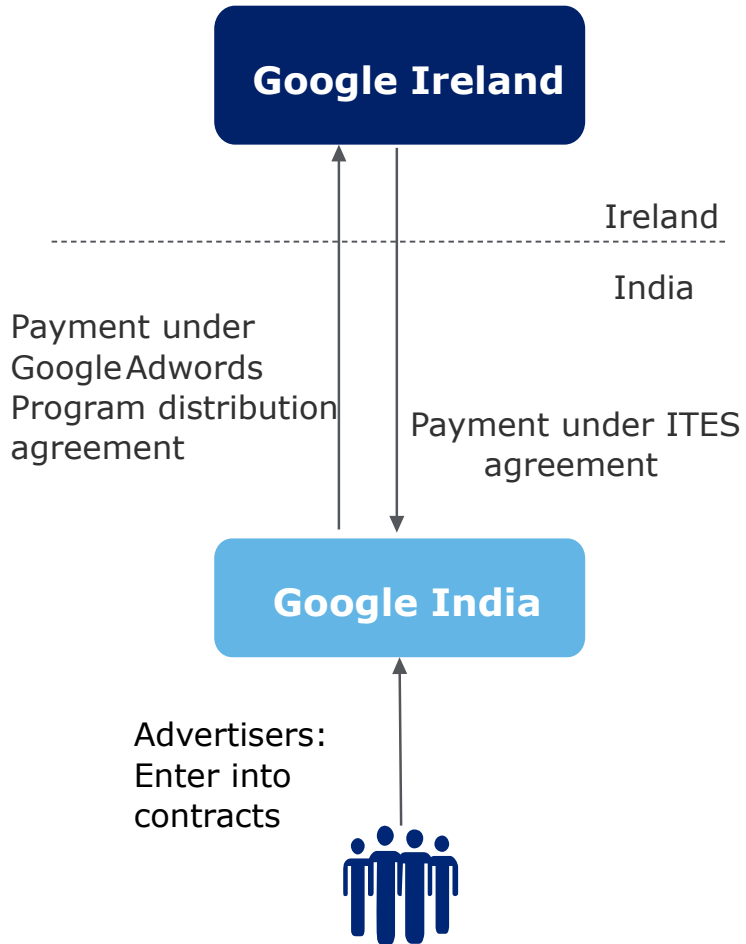
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- FOWC was entitled even in the event of a termination, to two years' payment of the assured consideration of US\$ 40 million.
- Having regard to the OECD commentary and Klaus Vogel's commentary on the general principles applicable, as long as the presence is in a physically defined geographical area, permanence in such fixed place could be relative having regard to the nature of the business.
- Held that the circuit itself constituted a fixed place of business.
- FOWC is the Commercial Right Holder (CRH).
- Save a limited class of rights, all commercial exploitation rights vest exclusively with FOWC.
- The entire event was organized and controlled in every sense of the term by FOWC.
- A PE must have three characteristics: **stability, productivity and dependence**. All characteristics are present in this case.
- Taxable event has taken place in India

Google India (P) Ltd. – Bangalore ITAT ruling

Google India (P) Ltd.

86 taxmann.com 237 (Bang ITAT)

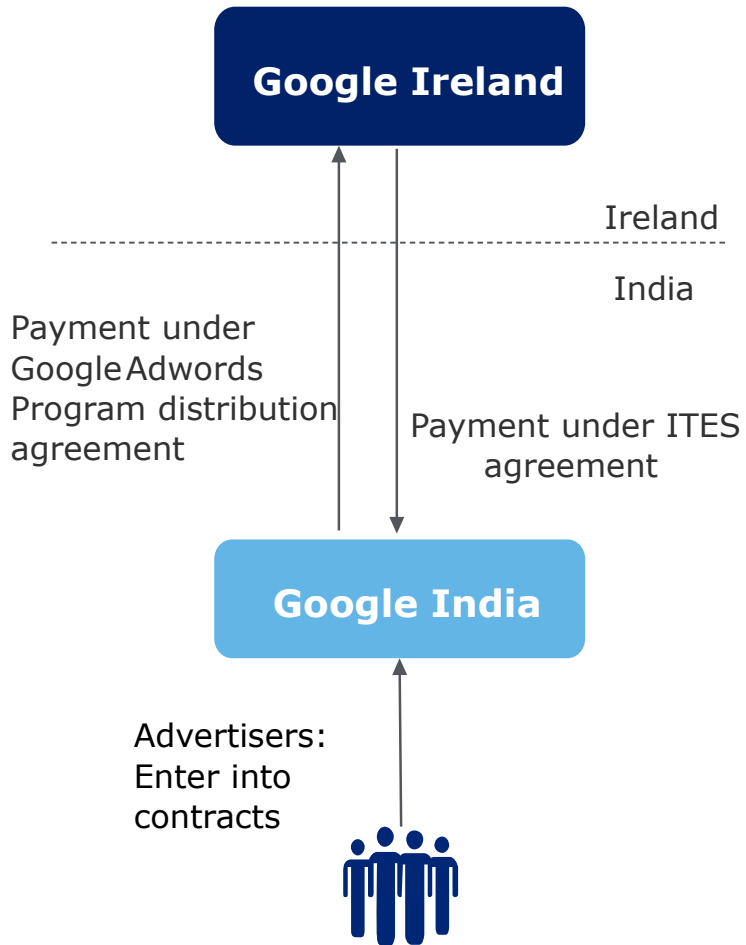


Facts:

- Google India had been appointed by Google Ireland Ltd. ["GIL"] as a non-exclusive authorized distributor of "Adwords Program" pursuant to a Distribution Agreement entered into in Dec 2005 for sale of advertisement space in India.
- During FY 2007-08, Google India credited distribution fee of Rs. 119 crores to GIL, without deducting tax at source.
- Proceedings were initiated against Google India under section 201.
- Separately, Google India had also entered into an ITES agreement with GIL in 2004 for ad review and other services for which fees are paid to Google India.

Issues:

- Characterisation of amount payable by Google India to Google Ireland under the distributorship agreement



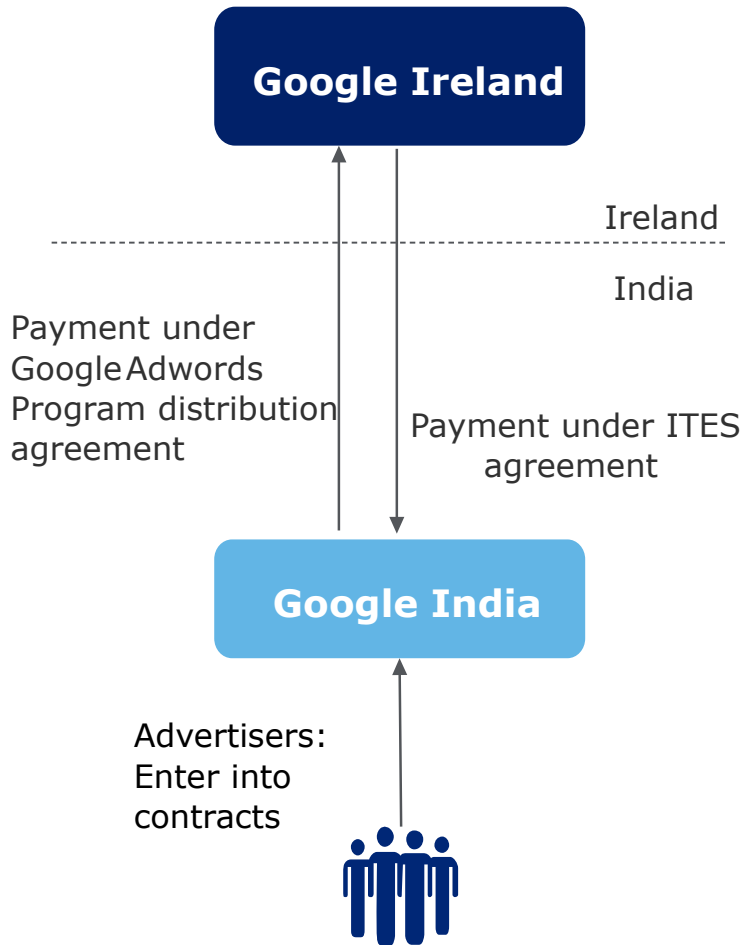
Decision of the Tribunal:

Sale of ad space

- The distributorship agreement is not merely an agreement to provide advertisement space but is an agreement that uses Google's user database as well the content of more than 2 million websites to provide a targeted marketing facility.
- The IP of Google vests in the search engine, technology, associated software and other features ~ Use of these tools for performing various activities, including accepting advertisements, providing before / after sales services, falls within the ambit of royalty.

Use of confidential data

- The entire Adwords program works around customer data. Therefore assessee's argument that it was using customer data only for ITES agreement is not correct.



Decision of the Tribunal:

Payment for trademarks

- Use of trademarks and brand features of GIL by Google India as a marketing tool for promoting and advertising the advertisement space, which is the main activity of Google India

Secret process

- The process employed by the Google Adwords program is not in public domain and is therefore a secret process.

Taxability under India-Ireland tax treaty

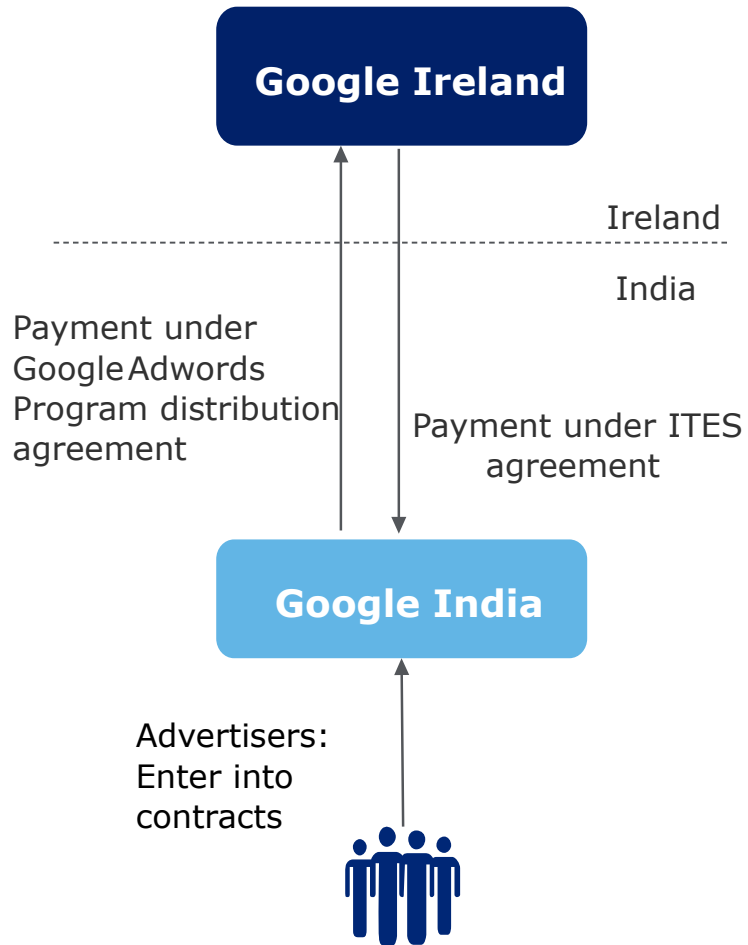
- The Tribunal did not give any finding on the assessee's contention that the definition of 'royalty' under the tax treaty is narrower than the domestic tax law.

Joint reading of both agreements

- The Distribution agreement and ITES agreement are interlinked and should be read together.

Google India (P) Ltd.

86 taxmann.com 237 (Bang ITAT)



Issues not discussed:

Domestic tax laws

- Distributor vs agent
- Payment for services?
- Business income – section 5 and 9(1)(i)

India-Ireland tax treaty

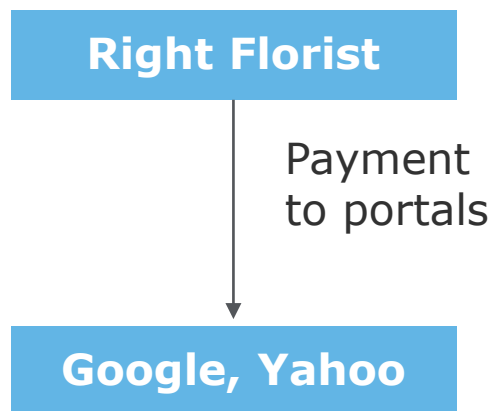
- Analysis of PE exposure e.g. website
- Fees for technical services

Situation post introduction of Equalisation levy

Right Florist (P.) Ltd. – Kolkata ITAT ruling

Right Florist (P) Ltd.

[2013] 32 taxmann.com 99 (Kolkata - Trib.)



Facts:

- The Assessee paid foreign search engine portals (Google and Yahoo) for online advertising services but did not deduct taxes at source on payments.

Decision:

- The tribunal observed that working of the online advertising process through the search engine portal, commentary of OECD and High Powered Committee Report.
- **Permanent establishment:**
A search engine, which has only its presence through its website, cannot, therefore, be a permanent establishment unless its web servers are also located in the same jurisdiction..
- **Royalty:**
It followed the decisions in the case of *Yahoo* and *Pinstorm*, and held that payments are not royalties, since it amounts to standard facility.
- **FTS:**
As the service is wholly automated and does not involve human intervention, the same is not technical service. Further, under the India-USA tax treaty, make available clause is not satisfied in the case of Yahoo.

No TDS liability attracts in above case, as there is no taxable income.

Google case – abuse of dominant position

Google case – abuse of dominant position

European Commission press release 2016



The European Commission has fined Google €2.42 billion for breaching EU antitrust rules. Google has abused its market dominance as a search engine by giving an illegal advantage to another Google product, its comparison shopping service.

Google's flagship product is the Google search engine, which provides search results to consumers, who pay for the service with their data. Almost 90% of Google's revenues stem from adverts, such as those it shows consumers in response to a search query

Google has abused its market dominance in general internet search by giving a separate Google product (initially called "Froogle", re-named "Google Product Search" in 2008 and "Google Shopping" in 2013) an illegal advantage in the separate comparison shopping market

Google's practices amount to an abuse of Google's dominant position in general internet search thereby stifling competition in comparison shopping markets

The Commission has already come to the preliminary conclusion that Google has abused a dominant position in two other cases, which are still being investigated. Those are 1. Android operating system (Statement of objections sent to google) and 2. AdSense (Commission takes further steps in investigations alleging Google's comparison shopping and advertising-related practices breach EU rules)

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