



International Taxation - a perspective – *Nitin Karve*

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International tax in India

562 princely states not subject to Indian tax law

Extensive body of case law

Relied on Canadian and Australian cases on State taxation

Tax Treaties and other Indian Laws

Jurisdiction to tax seems to follow jurisdiction to sue

01

**Section 591 and 592 of the
Companies Act, 1956**

**Section 20 of the Civil
Procedure Code, 1908**

02

Relevant Extracts...

- **Section 591 of the Companies Act, 1956**

*Sections 592 to 602, both inclusive, shall apply to all foreign companies, that is to say ... companies incorporated outside India which, after the commencement of this Act, **establish a place of business** within India ...*

- **See *Lord Advocate v. Huron and Erie Loan & Savings Co.* [1911] Session Cases 612**

Held that a company which had not established a place of business in the UK under the Companies Act could not be sued in the UK

- **See *Adams v. Cape Industries plc* [1990] Ch 433**

Extensive discussion on 'fixed place of business' in the context of jurisdiction to sue

... Relevant Extracts

- **Section 20 of the Civil Procedure Code, 1908**

*... [E]very suit shall be instituted in the Court within the local limits of whose jurisdiction ... the defendant, ..., at the time of the commencement of the suit, actually and voluntarily resides, **or carries on business**, or personally works for gain...*

- **‘Special Agent’**

*“(1) The agent must be a special agent who **attends exclusively to the business of the principal** and carries it on in the name of the principal and **not a general agent who does business for any one that pays him**. Thus, a trader in the mufassil who habitually sends grain to Madras for sale by a firm of commission agents who have an independent business of selling goods for others on commission, cannot be said to "carry on business" in Madras.”*

Mulla on the Code of Civil Procedure Seventeenth Edition - Volume I, Page 446

Attribution of Profits

- **Explanation 1(a) to section 9(1)(i) of the Income-tax Act, 1961 (Act)**

In the case of a business of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India.

- **Article 7(2) of the India – US Tax Treaty**

Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and independent enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly at arm's length with the enterprise of which it is a permanent establishment and other enterprises controlling, controlled by or subject to the same common control as that enterprise.

Effects of a Tax Treaty – Judicial Precedents

CIT v. Vishakhapatnam Port Trust [1983] 144 ITR 146 (AP)

“39. It is true that under section 9(1) (i) of the Act all income accruing or arising whether directly or indirectly, through or from any "business connection" in India, or other income mentioned in that section shall be deemed to accrue or arise in India. But the charging provision, section 4, as well as section 5 of the Act defining the "total income" of either a resident or a non-resident are expressly made "subject to the provisions of the Act", including agreements made under section 90.”

UoI v. Azadi Bachao Andolan [2003] 263 ITR 706, 722 (SC)

“The provisions of sections 4 and 5 of the are expressly made "subject to the provisions of this Act", which would include section 90 of the Act.”

Effects of a Tax Treaty – Judicial Precedents

UoI v. Azadi Bachao Andolan [2003] 263 ITR 706, 725 (SC)

“[A] notification under section 90 towards implementation of the terms of the DTAC ... would automatically override the provisions of the Income-tax Act in the matter of ascertainment of chargeability to income-tax and ascertainment of total income, to the extent of inconsistency with the terms of the DTAC.”

Ostime (Inspector of Taxes) v. Australian Mutual Provident Society [1960] AC 459, 450-81; 39 ITR 210

Held: that if there was a conflict between the terms of the agreement and the taxation statute, the agreement alone would prevail

Effects of a Tax Treaty – Burden of Proof

- ***Motorola Inc v. DCIT [2005] 95 ITD 269 (Delhi SB)***

*“85.6 One word of caution was also administered by him [Mr. Dastur] to the effect that **the DTAA is not an exemption claimed by the assessee** from the tax liability and that **it was only an alternative scheme of taxation, alternative to the Income-tax Act** and the fact that the assessee relies on the provisions of the DTAA to mitigate its tax liability does not mean that it is claiming any exemption and, therefore, the burden is on it to show that it is entitled to the exemption. On the other hand **it is for the revenue**, according to Mr Dastur, **to demonstrate that even under the provisions of the DTAA the assessee is liable to tax.**”*

Effects of a Tax Treaty – Is it better than the Act?

- **Service PE**
- **Force of attraction**
- **Dependent Agent PE**

Effects of a Tax Treaty – Procedural law

- **Advance tax**

- form for computing advance tax under the Indian Income-tax Act, 1922, allowed for foreign tax credit since 1944 – *See [1944] 12 ITR 36 (St)*
- Explanation 1 to section 234B(1) amended by Finance Act, 2006 – *Amendment Clarificatory!*

- ***Tax Deducted at Source?***

- **Return of Income**

- *Dow Agro Sciences Agricultural Products Ltd., In re [2015] 65 taxmann.com 245 (AAR)*
- conflicting judgements

Interpretation of Tax Treaties...

- **Article 265 of the Constitution of India**
 - *no tax shall be levied or collected except by authority of law*
- **Plain meaning**
- **Vienna Convention on the Law of Treaties**
- **Commentary to OECD Model Convention**
 - *relevance?*
 - *Interested party?*
 - *Does the OECD Commentary have 'authority of law'?*
 - *Binding as between parties?*
 - *Binding to the extent favourable?*
- ***Intention of parties?***

...Interpretation of Tax Treaties...

In John N. Gladden v. Her Majesty the Queen 85 DTC 5188 at 5190, the principle of liberal interpretation of tax treaties was reiterated by the Federal Court, which observed :

*"Contrary to an ordinary taxing statute a tax treaty or convention must be given **a liberal interpretation** with a view to implementing **the true intentions** of the parties. A literal or legalistic interpretation must be avoided when the basic object of the treaty might be defeated or frustrated insofar as the particular item under consideration is concerned."*

– Extract from UoI v. Azadi Bachao Andolan [2003] 263 ITR 706 (SC), Page No 742, Para 4

...Interpretation of Tax Treaties

*The Federal Court emphasised that in interpreting and applying treaties the Courts should be prepared to extend "a liberal and extended construction" to avoid an anomaly which a contrary construction would lead to. The Court recognized that "we cannot expect to find the same nicety or strict definition as in modern documents, such as deeds, or Acts of Parliament; **it has never been the habit of those engaged in diplomacy to use legal accuracy but rather to adopt more liberal terms.**"*

*– Extract from UoI v. Azadi Bachao Andolan
[2003] 263 ITR 706 (SC), Page No 743, Para 1*

BEPS: New approach to International Taxation

Setting the context

Introduction

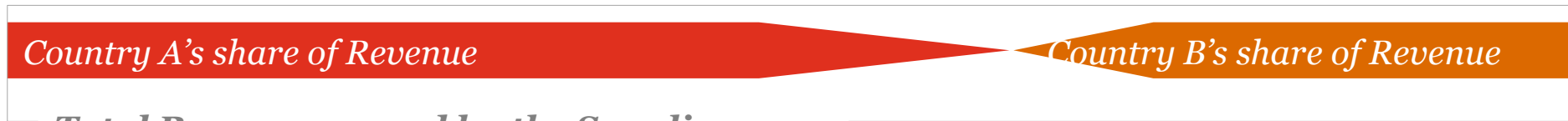
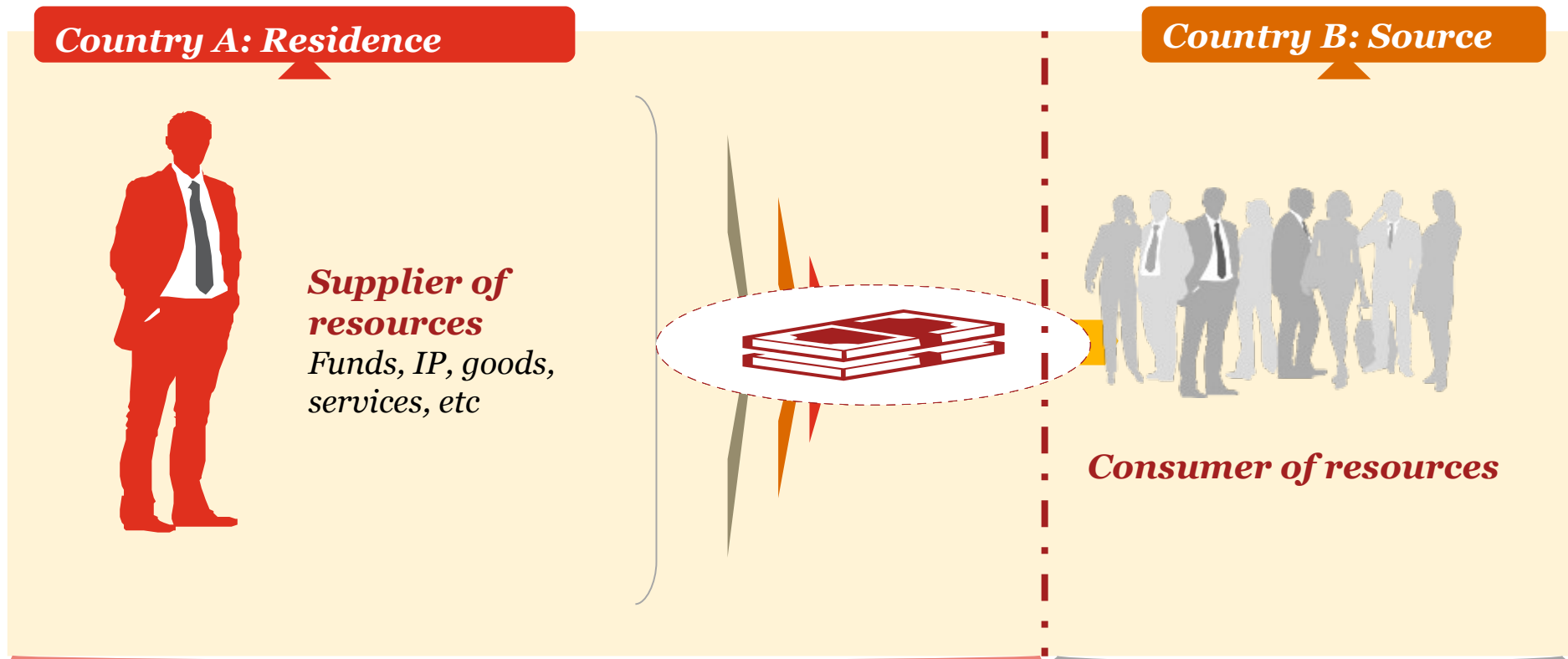
- *Financial crisis*
- *Deficits, Tax Morality, Public outrage*

BEPS Focus

- *Prevent double non-taxation / less than single taxation*
- *Shifting profits to no or low tax jurisdiction*

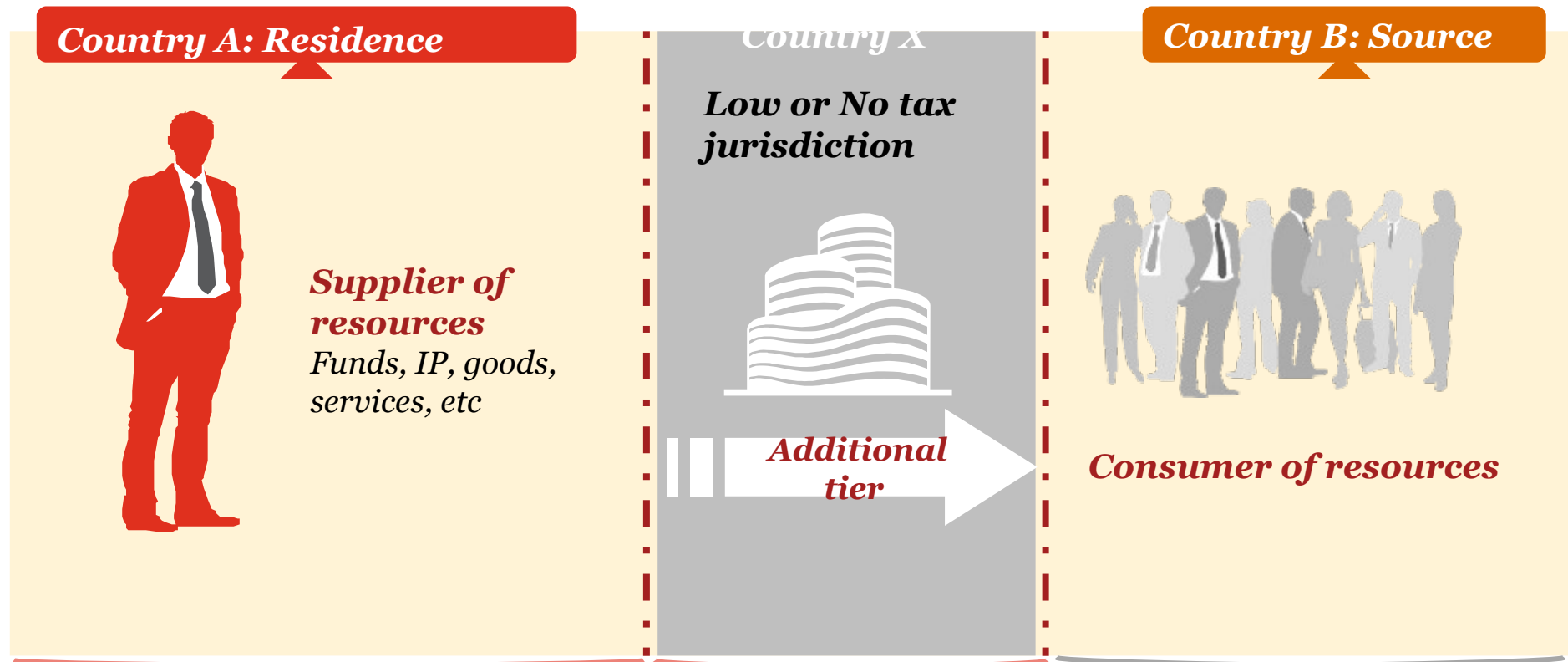
Triggering the BEPS debate...

One-to-one transaction flow



...Triggering the BEPS debate

Added tier to the transaction flow



Country A's share of Revenue

Country B's share of Revenue

Total Revenue earned by the Supplier

Non-residents – Business taxation

- **Doing business with India *versus* Doing business in India**
- **“Water’s edge” principle?**

Non-residents – Attribution of Business profits

- **Compute profits first and then spread them**
- **Split the income first and then compute**
- **Rule 10(ii)**
 - see method in *Hukam Chand Mills Ltd. v CIT* [1976] 103 ITR 548 (SC)
- **Residual profits?**
- **Does Transfer Pricing apply to attribution of profits?**

NOTE: The words ‘apportion’ and ‘apportionment’ are words of business and not of the law. The law uses the term ‘attributable’

Attribution in various contexts

- *Dooars Tea Co. Ltd. v CA*IT [1962] 44 ITR 6 (SC)
- *CIR v Maxse* 12 TC 41 (CA)
- *CIT v Bai Shirinbai Kooka* [1962] 46 ITR 86 (SC)
- Definition of ‘total income’
 - Income referred to in section 5
 - Computed in the manner laid down in the Act
- *Anil Starch Products v CIT* [1966] 59 ITR 514 (Guj)
- *CIT v Hantapara Tea Co. Ltd.* [1973] 89 ITR 259 (SC)
- Section 80-IA(8)
- Rule 7(2)(a)
- Change in Explanation 1(a) from ‘profits’ in section 42(3) of the old Act to ‘income’

Non-residents – Source-based taxation

- **Reasons**
- **Effects**
 - ✓ **Related parties**
 - ✓ **Unrelated parties**
- **The victim mindset**
- **Our vision for the future**

Non-resident taxation

- **Should non-residents be taxed at all?**
 - ✓ **Nil tax revenues for equivalent countries**
 - ✓ **Compliance costs**
 - ✓ **Uncertainties**
 - ✓ **Customs duty on services**
- **Ability to pay?**
- **Duty to fellow-citizens?**

Thank you

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