

**WIRC of ICAI**

**Principles of International Taxation**

**Limitations & Possible Solutions**

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**Mumbai**

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## Initial Design of a Motor Car- Remix of a Horse Carriage



## **FEMA**

**Indian holding company –  
Foreign subsidiaries.**

**Have a fine corporate structure  
Plan for full flexibility & yet  
Zero tax on foreign income.  
No CFC.**

**India Mauritius treaty allows  
Underlying tax credit.**

**Unwelcome attention.**

# **I. Principles of International Taxation.**

**Building Blocks in Thought Process.**

**II.1 Treaty Shopping - Indo Mauritian Treaty.**

**II.2 Concept of Residential Status      Indo-UAE Treaty**

**II.3 E-Commerce      }      FII**

**Permanent Establishment      }      BPO**

**Television Companies**

**II.4 Source - Value Addition by the Assessee.**

**II.5 Categorisation of Income      COI**

**Royalty. FTS.**

**III. Solutions**

**That is true knowledge which liberates.  
Philosophical knowledge-which liberates;  
is infinite.**

**All other knowledges are finite.**

**They have limits.**

**Concepts (e.g. Ahimsa).  
Prof. Hamaekers.**

**Interpretation of Law. (, . “ ”)**

**Intention of Legislation.**

**Form Vs. Substance.**

**To be able to have a clear perception of a legal provision:**

**Have an Irreverent and non-cynical view of**

**The legislation;**

**The treaty; and**

**The OECD/U.N. models**

**We respect Parliament.**

**But don't have to revere the draftsman.**

**We respect OECD.**

**But don't have to revere OECD.**

## **Games People Play**

**One who makes the Rules  
Makes them in his favour.**

**World is ready to bow.  
Illustrations in practical life are plenty.**

**Assumed Status-OECD**



**Some Professionals and Media consider it a  
Birth Right to criticise the  
finance bill**

**and**

**Every tax law made by Indian Govt.**

**We don't criticise OECD.**

**Why?**

## **Intention of a Treaty**

- 1. India-U.S. Nuclear Treaty.  
Arun Shourie-  
Indian investment.**
- 2. Rocket launching Technology.  
\$400 mn. - \$ 100 mn.**

# **Intention of Legislation**

**5 years child accused of  
causing Sexual Harassment.**

**Double Tax Avoidance treaty.**

**India-Mauritius  
India-U.A.E.**

- 1. DTA - Allocation of tax collection Rights.**
- 2. Jurisdiction – to what steps will it extend!  
(Foreign advertiser on Foreign TV channels)**
- 3. Whole emphasis under existing rules is on  
COR. Article 7.**

4. **The target of the discussion is:  
“What should be the law”. Jurisprudence.  
Existing case law may not be a guidance.**
5. **Neutral – objective. Neither Pro-  
Government nor Pro – taxpayer**
6. **Offering a solution needs more work and  
courage.**
7. **There is nothing fundamental in  
International Taxation.**

# Nexus or Connecting Factors

Assessee

Residential Status

Income

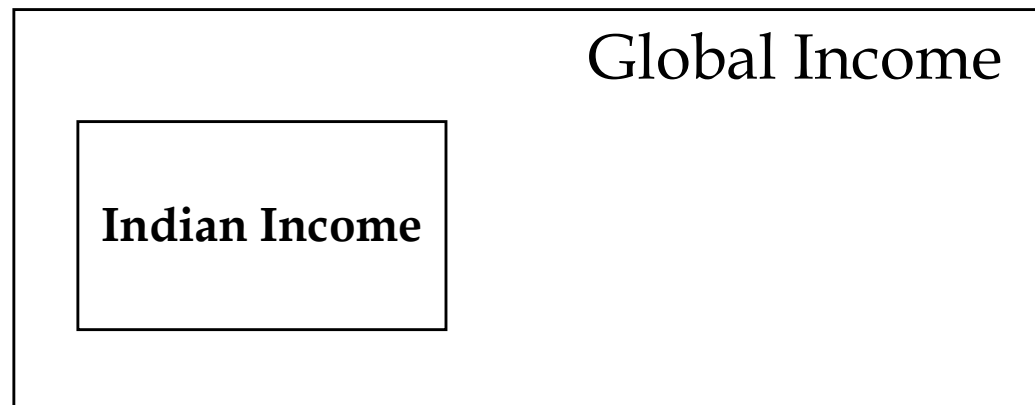
Source

## II Some Principles

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1. Resident liable to Indian tax fully on Indian Sourced income; subject to COS' prior right, on foreign income.

2. Non Resident liable to Indian tax Only on Indian Sourced income.



3. Non Resident's foreign sourced income is NOT a tax base for Indian Government.

**Article 7.                      Business Income to be  
taxed fully in COR.**

**Residence of                      Registered office.  
A co.**

**Global Company ?**

**Tax Havens**



**Permanent Establishment - Not Applicable to E-Commerce**

**Categorisation of Income - Purpose.**

**What is the definition of source ?**

**Treaty Shopping**  
**Azadi Bachao Andolan Case**  
**India Mauritian Treaty.**

**Pendulum**

**Dubai - Residence**

**India-UAE Treaty.**

**M.A.Rafik/Cyril Pereira /Abdul Razak Memon /  
Green Emirate**

**Share Valuation under Wealth-tax**

**Kusumben Mahadevia / Mahadeo Jalan /  
Bharat Hari Singhanian**

**Judicial decisions have moved  
from one side to another.**

**Which decision is right-is a separate issue.**

**Which decision is binding today-is another issue.**

Dubai - Residence

**1. "Liability to tax".**

**By reason of his domicile, residence.....etc.  
(Not by reason of the source of Income)**

**2. Potential Liability. Previous Year.****3. When there is no Double tax,  
Where is avoidance of Double-tax !****4. Agricultural Income S.10 Exempt  
Income below Rs. 1,00,000  
S. 10 A exemption-Reliefs.**

**Dubai - Residence**

**Can the Govt. leave**

**Contradictory situation to the judiciary &**

**Expect judiciary to resolve!**

**Green Emirates**

**ITAT decision.**

## PE

- **PE – By definition needs (i) a fixed place of business;  
or (ii) a dependent agent working in the COS.**
- **E-Commerce – By its very structure, needs neither.**
- **Can the concept of PE be applied to E-Commerce!**
  - **What is the alternative!**

**PE is nothing but a Threshold.**

**Develop another Threshold.**

**FIIIs**

**Zero tax is like a flood gate for frauds & manipulations  
& Litigation.**

**BPO - Contract of Sale**

**Television Companies - Foot Print**



## **'Source'**

**Can we equate 'Source' with 'Payment'?**

**Can we equate 'Source' with 'Market'?**

**Can we say that 'Source' is value addition made by  
the assessee who is sought to be taxed!**

**Illustrations-**

## **Source Illustrations.**

**Rent**

**Royalty**

**Dividend**

**Interest**

**Indian Software sales to USA**

**German Car sale to Indian Travel Agent**

**Foreign Television Broadcasting Company-Indian  
Footprint**

**Foreign TV Co. - Foreign Advertiser**

## COI

- **Categorisation of Income (COI) allocates rights of income-taxation to different countries in an arbitrary manner.**
- **This ensures litigation.**

## COI

- **Tax departments may try to categorise all payments from India as royalty or FTS – which attract T.D.S.**
- **Assesseees may try to categorise all receipts as business receipts without PE.**
- **How do we reduce litigation!**

**REFINE COI**  
**DEFINE SOURCE**

**OECD view.**

**E-Commerce business is too small**

**It does not necessitate any modifications in the existing rules.**

**Is it because -today- most of the servers & hence websites are situated within OECD member countries !**

**or**

**Most of the Internet related income belongs to OECD residents !**

**Rule maker makes rules that.....**

## Initial Design of a Motor Car- Remix of a Horse Carriage



## **Who Moved My Cheese!**

- **“Change Happens.**
- **Anticipate Change**
- **Change.**
- **Enjoy Change!**
- **Those who cannot accept change will loose their Cheese.**

**Tax professionals and with respect, Appellate Authorities are slow to change. OECD is slower to change.**



**Technologies change. That is their nature.**

**Business will be eager to use best technologies.**

**But laws don't change. They look to the past, the precedents.**

**Lawyers will use the latest mobile phones (men's toys)  
But will not welcome changes in the laws.**

**The distance between the law and the ground realities  
keep growing.**

**Until the critical mass gathers, the tipping point is crossed;**

**And the laws have to be scrapped.  
(e.g. FERA, Licensing controls)**

**We have reached the critical mass. The cheese has been moved. If OECD does not change its stand, it will become irrelevant. UN may fill in the gap.**

**If even U.N. does not fill in, Indian Government may have to take the lead.**

1. **No Treaty Shopping. (Mauritius)**
2. **DTA only for Double tax (Dubai)**
3. **E-Commerce - PE - Another Threshold**  
**BPO Signing of Contract - Immaterial**
4. **Television Companies** { **Source -COR & COS**  
**Income-tax**  
{ **COM & COC**  
**Indirect tax**
5. **COI Refine.**  
**Define Source Rules**

## **Base Erosion**

- **It is claimed that when an Indian resident tax payer pays to a non-resident for deductible expenses; Indian tax base is eroded.**
- **To Compensate, one must tax the non-resident recipient.**
  - **For income-tax, what is the tax base?**
    - **'Net Profit'; or 'Gross Revenue'?**

**Full Power Point Presentation**

**and**

**Detailed paper will be available on the web-site**

**[www.rashminsanghvi.com](http://www.rashminsanghvi.com)**

**MANY THANKS.**

**RASHMIN CHANDULAL SANGHVI.**