

International Taxation: A Capsule for Quick Recap

Globalisation, capital mobility and increased trade and services have resulted in the whole world virtually becoming one market and consequently, international taxation has become a key concern area both for business enterprises engaged in cross border transactions as well as for tax administrations of the concerned States. Considering its significance, international taxation has been included as a dedicated part (i.e., Part-II) for 30 marks in Final (New) Paper 7: Direct Tax Laws & International Taxation in the New Scheme of Education and Training.

In this capsule, diagrams, tables and flow charts have been extensively used to help you recap the significant concepts, provisions and principles relating to international taxation, which have been discussed in detail in Module 4 [International Taxation] of September 2018 edition of Study Material of Final (New) Paper 7. The Capsule is divided into eight chapters in line with Module 4 of the Study Material. It may be noted that Chapters 1 to 5 of Module 4 is relevant for Final (Old) Paper 7: Direct Tax Laws also, and to that extent this capsule is relevant for Final (Old) course students also. As indicated in the title, remember that the capsule will only serve as a quick recap for May 2019 and Nov 2019 Examinations. For comprehensive study, read the Study Material and RTP.

CHAPTER 1: NON RESIDENT TAXATION

The residential status of a person determines the scope of income to be included in his/its total income (TI), which is subject to income-tax in India. The provisions for determining the residential status of a person are contained in section 6 and the scope of TI is defined u/s 5 of IT Act, 1961.

Fig 1.1

RESIDENCE IN INDIA [SECTION 6]

(I) INDIVIDUAL

The residential status of an individual is determined on the basis of the **period of his stay** in India.

Basic conditions:

- (i) He must be present in India for a period of **182 days or more** during the previous year (P.Y.); or
- (ii) He must be present in India for a period of **60 days or more** during the P.Y. and **365 days or more during the 4 years** immediately preceding the relevant P.Y.

Cases where condition (ii) is not applicable:

- (a) Where an Indian citizen leaves India during the P.Y. for the purpose of employment outside India or as a member of the crew of an Indian ship;
- (b) Where an Indian citizen or a person of Indian origin who, being outside India, comes on a visit to India during the P.Y.

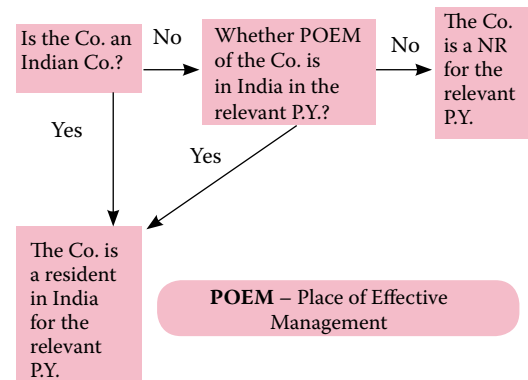
Additional conditions:

- (1) He is a **resident in at least 2 out of 10 PYs** preceding the relevant P.Y.;
- (2) His **stay in India in the last 7 years** preceding the relevant P.Y. is **730 days or more**.

Resident and ordinarily resident (ROR)	Resident but not ordinarily resident (RNOR)	Non-resident (NR)
Must satisfy at least one of the basic conditions [(i) or (ii)] and both the additional conditions [(1) & (2)].	Must satisfy at least one of the basic conditions [(i) or (ii)] and one or none of the additional conditions [(1) or (2) or neither].	Must not satisfy either of the basic conditions [Neither (i) nor (ii)].

(II) COMPANY

Determination of POEM on the basis of ABOI test



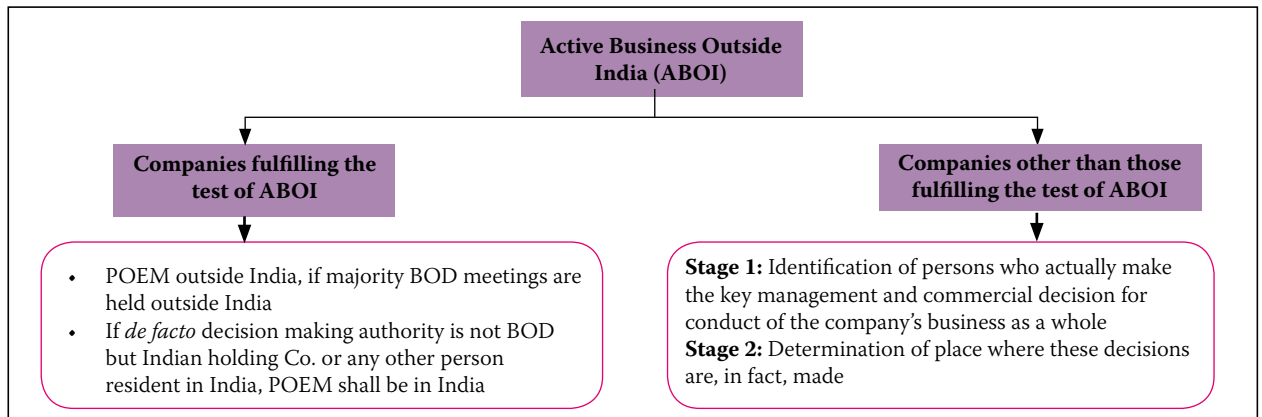
A company is said to be engaged in ABOI, if it fulfills the cumulative conditions:

Its passive income* (wherever earned) is 50% or less of its total income	Less than 50% of its total assets situated in India	Less than 50% of the total number of employees are situated in India or are residents in India	Payroll expenses incurred on such employees are less than 50% of its total payroll expenditure
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* Passive income of a company shall be aggregate of:

- (i) Income from the transactions where both the purchase and sale of goods is from/ to its AEs; and
- (ii) Income by way of royalty, dividend, capital gains, interest (except for banking Cos and public financial institutions) or rental income, whether or not involving AEs.

INTERNATIONAL TAXATION ||



SCOPE OF TOTAL INCOME [SECTION 5]: Whether the following incomes are to be included in TI?			
Particulars	ROR	RNOR	NR
Income received or deemed to be received in India during the relevant P.Y.	Yes	Yes	Yes
Income accruing or arising or deeming to accrue or arise in India during the relevant P.Y.	Yes	Yes	Yes
Income accruing or arising outside India during the relevant P.Y.	Yes, even if such income is not received or brought into India during the P.Y.	Yes, but only if such income is derived from a business controlled from or profn set up in India; Otherwise, No.	No

Fig 1.2

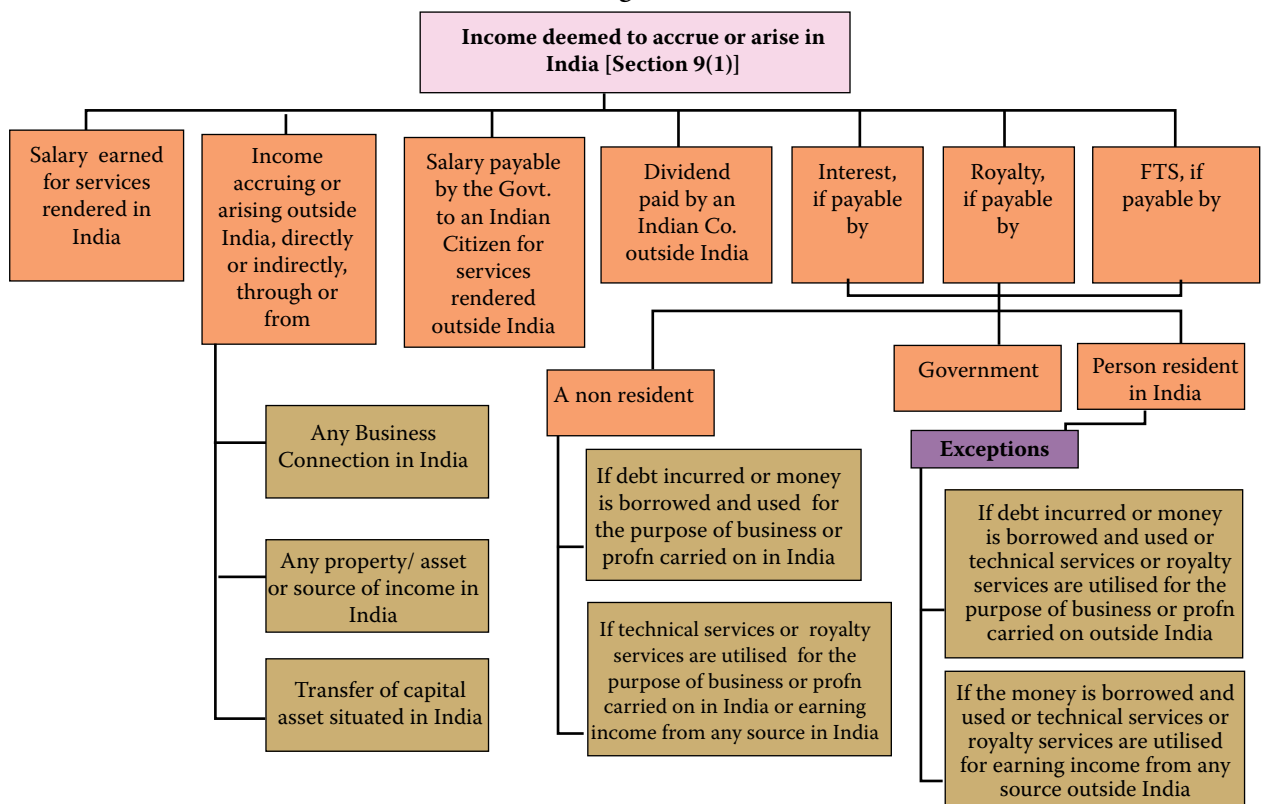


Fig 1.3

Income exempted specifically in the hands of Non-residents [Section 10]		
Section	Income	Available to
10(4)(ii)	Int on money standing to the credit in a NRE A/c of an individual (indvl) in any bank in India as per the FEMA Act, 1999	Indvl resident outside India (under FEMA Act) or an indvl who has been permitted to maintain said account by RBI
10(6)(ii)	Remuneration (Remn) recd by Foreign Diplomats/ Consulate and their staff Conditions: 1. The remn recd by our corresponding Govt. officials/member of staff resident in such foreign countries should be exempt. 2. The member of staff should be the subjects of the respective countries and should not be engaged in any other business or profn or employment in India.	Indvl (not being a citizen of India)
10(6)(vi)	Remn recd as an employee of a foreign enterprise(FE) for services rendered by him during his stay in India, if: a) FE is not engaged in any trade or business in India; b) His stay in India does not exceed 90 days in aggregate in such P.Y.; and c) Such remn is not liable to be deducted from the income of employer chargeable under IT Act	Indvl - Salaried Employee (not being a citizen of India) of a FE
10(6)(viii)	Salary recd by or due for services rendered in connection with his employment on a foreign ship if his total stay in India does not exceed 90 days in the P.Y.	Indvl - Salaried Employee (NR who is not a citizen of India) of a foreign ship
10(6)(xi)	Remn recd as an employee of the Govt. of a foreign State during his stay in India in connection with his training in any Govt. Office/ State Undertaking/ corporation/ registered society etc.	Indvl - Salaried Employee (not being a citizen of India) of Govt. of foreign State
10(6BB)	Tax paid by Indian Co., engaged in the business of operation of aircraft, which has acquired an aircraft or an aircraft engine on lease, under an approved (by CG) agrmt, on lease rental/income derived (other than payt for providing spares or services in connection with operation of leased aircraft) by the Govt. of a foreign State or FE.	Govt. of foreign State or FE (i.e., a person who is a NR)
10(6C)	Royalty income or FTS under an agrmt with the Central Government (CG) for providing services in or outside India in projects connected with security of India	Foreign Co. (notified by the CG)
10(6D)	Royalty income from or FTS rendered in or outside India to, the National Technical Research Organisation (NTRO)	Non-corporate NR and foreign Co.
10(15)(iii)(a)	Int on deposits made by a foreign bank with any scheduled bank with approval of RBI.	Bank incorporated outside India and authorised to perform Central Banking functions in that country.
10(15)(iv)(fa)	Int payable by scheduled bank on deposits in foreign currency (FC) where the acceptance of such deposits is duly approved by RBI. [Scheduled bank does not include co-operative bank]	a) NR or b) Indvl or HUF, being a resident but not ordinarily resident
10(15)(viii)	Int on deposit made on or after 01.04.2005 in an Offshore Banking Unit	
10(48)	Income received in India in Indian currency on a/c of sale of crude oil or any other goods or rendering of services as may be notified by the CG in this behalf. Foreign Co. and agreement (agrmnt) should be notified by the CG in national interest.	Foreign Co. on a/c of sale of crude oil, any other goods or rendering of service. It should not be engaged in any other activity in India.
10(48A)	Income accruing or arising on a/c of storage of crude oil in a facility in India and sale of crude oil therefrom to any person resident in India. Foreign Co. and agrmnt should be notified by the CG in national interest.	Foreign Co.
10(48B)	Income from sale of leftover stock of crude oil from facility in India after the expiry of agrmt ref u/s 10(48A) or on termination of the said agrmt	Foreign Co.

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Fig 1.4

Presumptive Income provisions applicable to NRs				
Particulars	Section 44B	Section 44BBA	Section 44BB	Section 44BBB
Nature of business	Shipping business	Operation of aircraft	Business of providing services or facilities in connection with, or supplying P & M on hire used, or to be used, in the prospecting for, or extraction or production of, mineral oils	Business of civil construction or the business of erection of P&M or testing or commissioning thereof, in connection with turnkey power projects approved by the CG.
Eligible assessee	NR	NR	NR	Only Foreign Co.
Presumptive income	7.5% of specified sum	5% of specified sum	10% of specified sum	10% of specified sum
Specified sum	(i) Amt paid or payable on a/c of carriage of passengers, livestock, mail or goods shipped at/ from any port/place in India; and (ii) Amt recd or deemed to be recd in India on a/c of the carriage of passengers, livestock mail or goods shipped at/ from any port/place outside India	(i) Amt paid or payable on a/c of the provn of such services or facilities for the aforesaid purposes in India; and (ii) Amt recd or deemed to be recd in India on a/c of the provn of services or facilities for the aforesaid purpose outside India.	(i) Amt paid or payable on a/c of the provn of such services or facilities for the aforesaid purposes in India; and (ii) Amt recd or deemed to be recd in India on a/c of the provn of services or facilities for the aforesaid purpose outside India.	Amt paid or payable on a/c of such civil construction, erection, testing or commissioning
Option to declare lower profits	Not available		Lower profits may be claimed u/s 44BB and u/s 44BBB provided the assessee maintains BOA u/s 44AA and gets them audited u/s 44AB.	

Fig 1.5

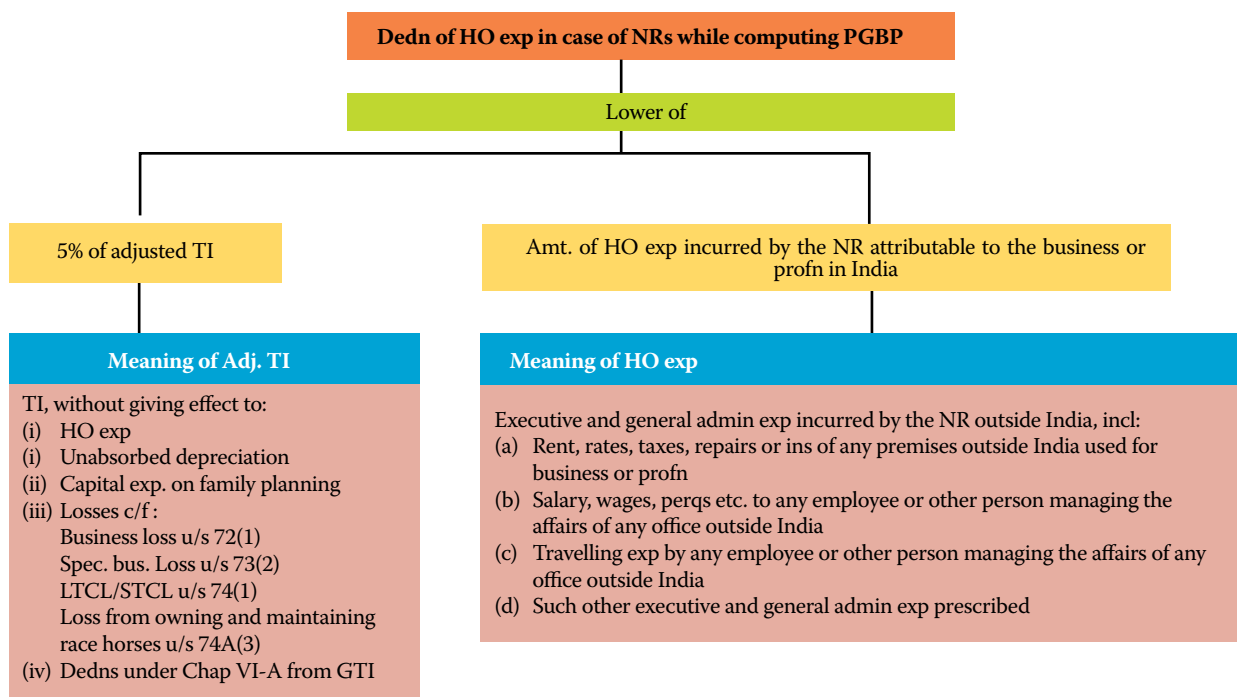
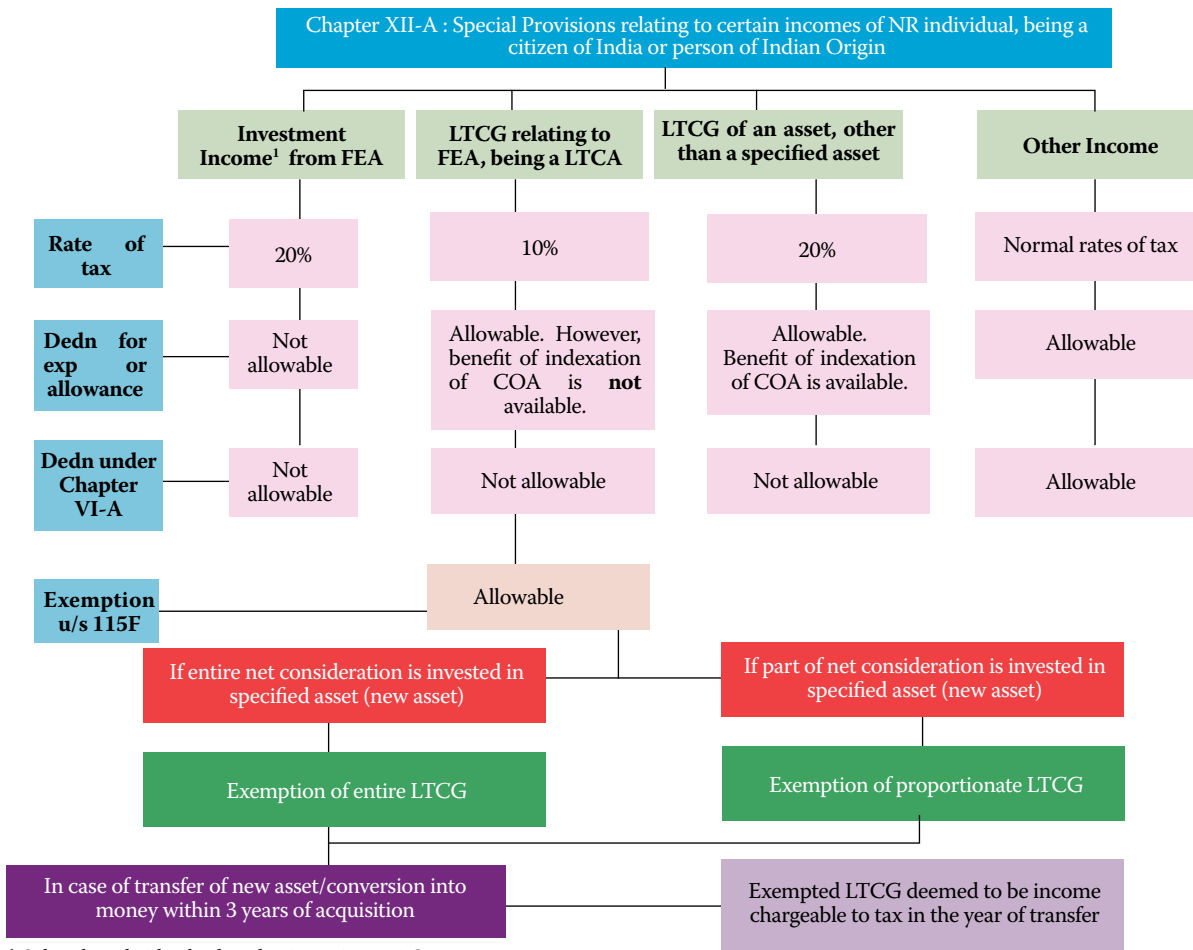


Fig 1.6



¹ Other than dividend referred to in section 115-O

Fig 1.6 (Contd.)

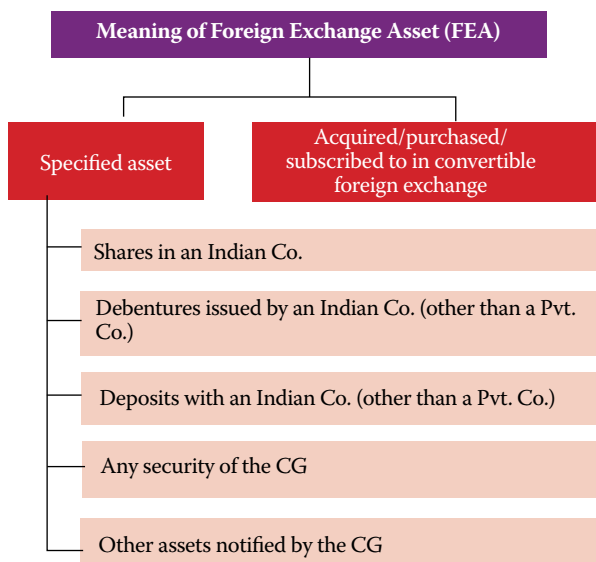


Fig 1.7

Special provisions for computing tax on income by way of interest and dividend [Section 115A]	
Where the total income of a NR includes any income by way of	Rate of Tax
(1) Dividends [other than dividend ref u/s 115-O]	20%
(2) Interest recd from the Govt. or an Indian concern on moneys borrowed or debt incurred by the Govt./ Indian concern in FC, other than (3), (4), (5) and (6) mentioned below	20%
(3) Interest received from an infrastructure debt fund ref u/s 10(47)	5%
(4) Interest ref u/s 194LC [Refer Fig. 1.11]	5%
(5) Interest ref u/s 194LD [Refer Fig. 1.11]	5%
(6) Interest ref u/s 194LBA(2) [Refer Fig. 1.11]	5%
(7) Income received in respect of units purchased in FC of a mutual fund (MF) specified u/s 10(23D) or UTI	20%
Notes:	
<ul style="list-style-type: none"> • No dedn in respect of any exp or allowance shall be allowed u/s 28 to 44C and 57. • Dedn under Chapter VI-A is not available. • The assessee is not required to furnish a return of his income (ROI) if the following conditions are satisfied: <ul style="list-style-type: none"> (a) The TI consists of only the abovementioned incomes and (b) TDS has been deducted from such income. 	

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Fig 1.8

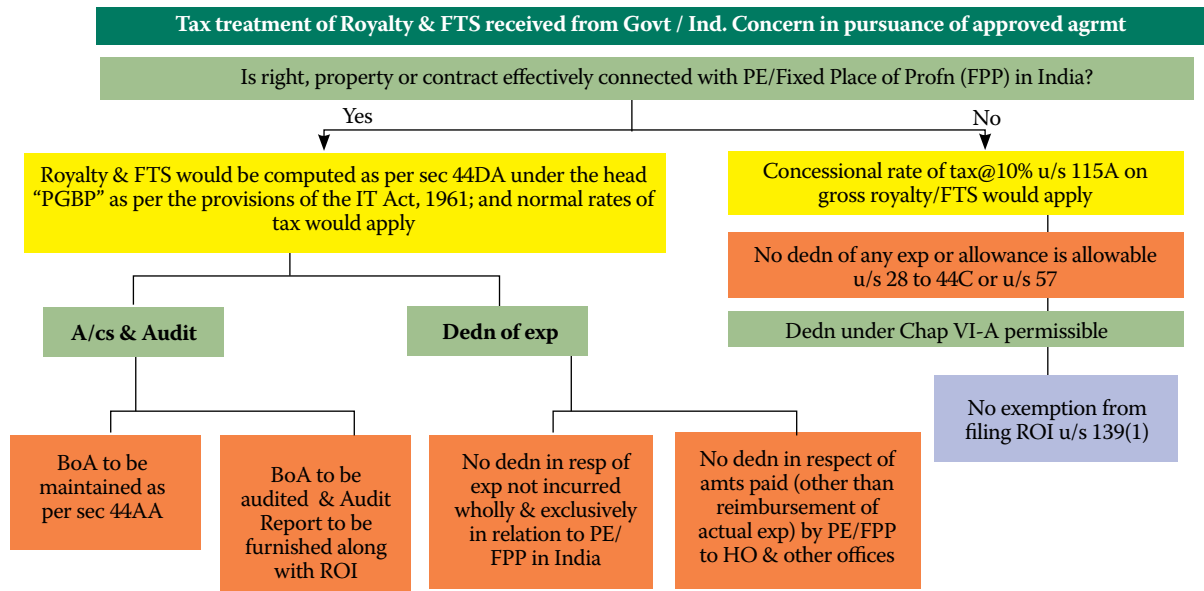


Fig 1.9

Special provisions for computing tax on income of FIIs from securities [Section 115AD]		
S. No.	Income	Rate of Tax
(a)	Income recd in respect of securities other than <ul style="list-style-type: none"> income by way of dividends ref u/s 115-O income on units ref u/s 115AB i.e., units of MF specified u/s 10(23D) or UTI Interest ref u/s 194LD 	20%
(b)	Interest referred u/s 194LD [Refer Fig 1.11]	5%
(c)	Income by way of STCG arising from the transfer of securities (other than STCG u/s 111A)	30%
(d)	Income by way of STCG u/s 111A	15%
(e)	Income by way of LTCG arising from the transfer of securities (other than LTCG u/s 112A)	10%
(f)	Income by way of LTCG u/s 112A exceeding ₹ 1 lakh	10%

Notes:

- No dedn for any exp or allowance shall be allowed u/s 28 to 44C and 57 from income from securities (ref. to in (a) and (b) above).
- Dedn under Chapter VI-A is not allowable in case of income from securities, STCG or LTCG arising from transfer of securities.
- Conversion to foreign currency and indexation benefit would not be available while computing capital gains on transfer of securities.

Fig 1.10

Special provisions for computing tax in case of NR sportsmen or sports associations [Section 115BBA]			
S. No.	Assessee	Income	Rate of Tax
(a)	A sportsman (including an athlete), who is not a citizen of India and is a NR	Any income recd or receivable by way of— <ul style="list-style-type: none"> (i) participation in India in any game (other than a game winnings wherefrom are taxable u/s 115BB) or sport; or (ii) advertisement; or (iii) contribution of articles relating to any game or sport in India in newspapers, magazines or journals; 	20%
(b)	A NR sports association or institution	Any amt guaranteed to be paid or payable to such association or institution in relation to any game (other than a game the winnings wherefrom are taxable u/s 115BB) or sport played in India	
(c)	An entertainer who is not a citizen of India and is a NR	Any income recd or receivable from his performance in India	

Notes:

- No dedn of any exp or allowance shall be allowed under the Act from the income referred above.
- The assessee is not required to furnish a return of his income if the following conditions are satisfied:
 - The TI consists of only above mentioned income and
 - TDS has been fully deducted from such income.
- "Match referee" does not fall within the meaning of "sportsmen" to attract the provisions of sec 115BBA. Therefore, although the payments made to NR 'match referee' are "income" which has accrued and arisen in India, the same are not taxable under the provisions of sec 115BBA. They are subject to the normal rates of tax [Calcutta High Court in Indcom v. CIT (TDS)(2011) 335 ITR 485]

Fig 1.11

WITHHOLDING TAX PROVISIONS IN RESPECT OF PAYTS TO NRs		
Section	Nature of payment	Rate of TDS
192	Salary	Normal Slab rates
192A	Premature withdrawals from EPF, aggregating to ₹50,000 or more	10%
194B	Income by way of winnings from lotteries, crossword puzzles, card games and other games of any sort, where pay to a person > ₹10,000	30%
194BB	Income by way of winnings from horse races, where pay to a person > ₹ 10,000	30%
194E	Specified payts referred u/s 115BBA to NR sportsmen/sports association or an entertainer	20%
194G	Commission etc. on the sale of lottery tickets, where pay > ₹15,000	5%
194LB	Payment of interest on infrastructure debt fund	5%
194LBA(2)	Distribution of any interest income, recd or receivable by a business trust (BT) from a SPV, to its unit holders.	5%
194LBA(3)	Distribution of any income received from renting or leasing or letting out any real estate asset directly owned by the BT, to its unit holders.	At the rates in force
194LBB	Investment fund paying income to a unit holder [other than income chargeable under PGBP which is exempted u/s 10(23FBB)].	
194LBC(2)	Income in respect of investment made in a securitisation trust (specified in <i>Explanation</i> to section 115TCA)	
194LC	Payment of interest by an Indian Co. or BT – <ul style="list-style-type: none"> - in respect of monies borrowed by an Indian Co. or BT in FC from sources outside India <ul style="list-style-type: none"> • Under a loan agrmt between 1.7.2012 and 30.6.2020 or • by way of issue of long-term infrastructure bonds (LTIB) between 1.7.2012 and 30.9.2014 or • by way of issue of long-term bonds including LTIB between 1.10.2014 and 30.6.2020 as approved by the CG - in respect of monies borrowed from sources outside India by way of rupee denominated bond (RDB) before 1.7.2020 	5
194LD	Interest payable between 1.6.2013 and 30.6.2020 to a FIIL or QFI on investment made in – <ul style="list-style-type: none"> - RDB of an Indian Co. - Govt. security 	5
195	Payment of any other sum to a Non-corporate non resident or Foreign Co.	At the rates in force
196B	Income from units of a MF or UTI purchased in FC (including LTCG on transfer of such units) payable to an Offshore Fund	10
196C	Income by way of interest on bonds of an Indian Co. or public sector Co. sold by the Govt. and purchased by a NR in FC or dividend on GDRs referred to u/s 115AC (including LTCG on transfer of such bonds or GDRs) payable to a NR	10
196D	Income of FIIL from securities referred u/s 115AD(1) (not being income by way of interest u/s 194LD, dividend u/s 115-O or capital gain arising from such securities)	20

Notes –

- (i) In all the above cases, the rate of tax would be increased by surcharge, wherever applicable, and health and education cess @4%.
- (ii) The rates in force are specified in the Finance Act, 2018 or in the DTAA entered into u/s 90 or 90A, as the case may be.

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CHAPTER 2: DOUBLE TAXATION RELIEF

Fig 2.1

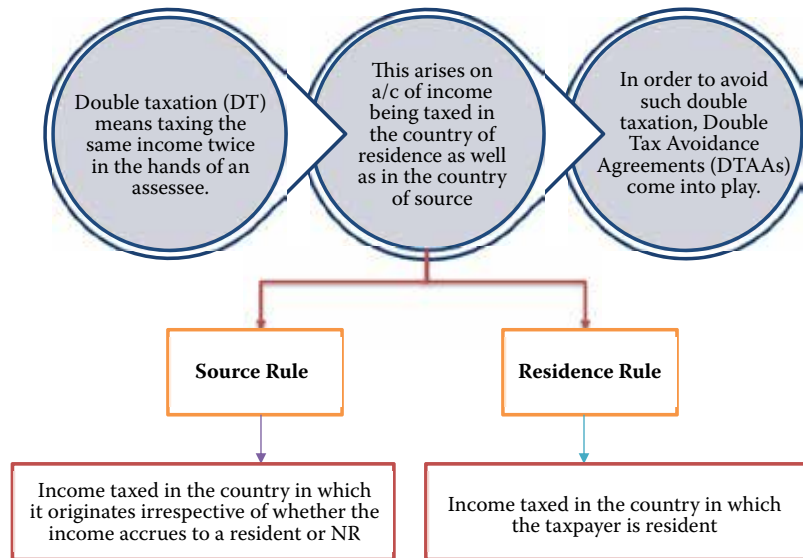
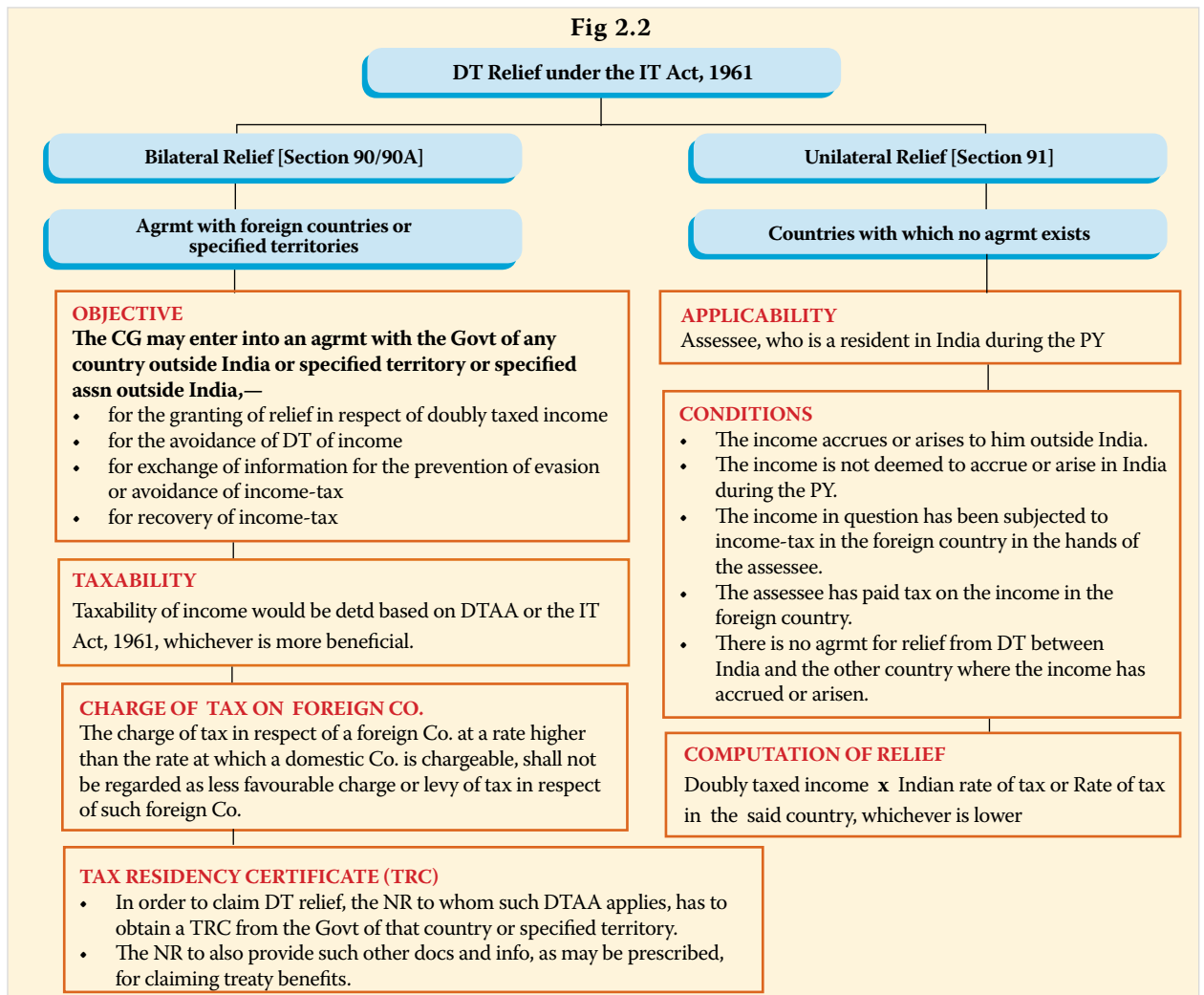


Fig 2.2

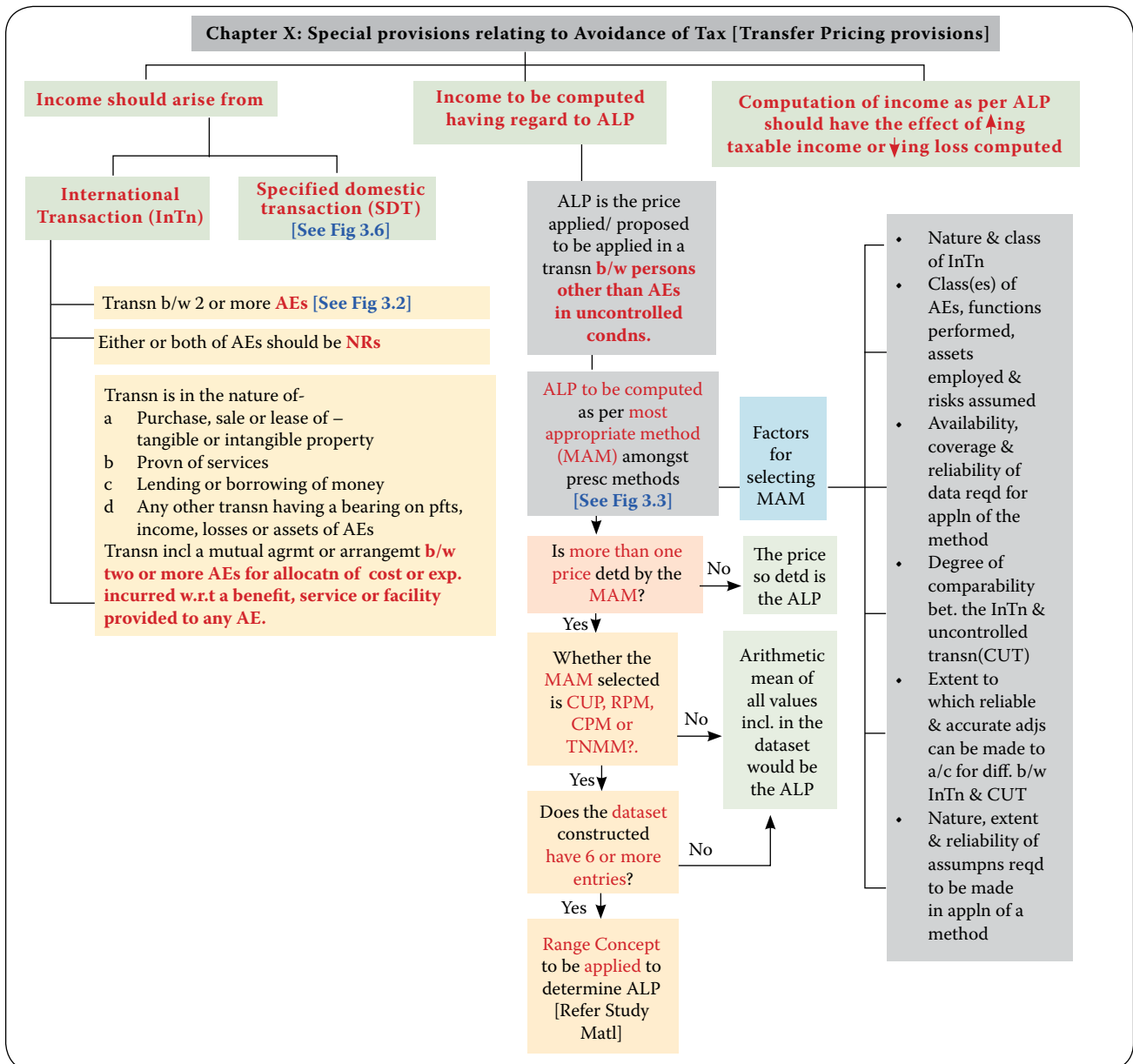


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CHAPTER 3 TRANSFER PRICING & OTHER ANTI-AVOIDANCE MEASURES

Multinational Companies (MNC) operating in more than one country transfer physical goods and intangible property or provides services to their associated enterprises (AEs) in another country. Two enterprises are “AEs” if one of the enterprises participates directly or indirectly in the management, control or capital of the other or if both enterprises are under common control. While doing so, the MNC concerned has in mind the goal of minimising tax burden and maximising profits but the two tax jurisdictions have also the consideration of maximising their revenue while making laws that govern such transactions (transns.) It is an internationally accepted practice that such ‘transfer pricing’ should be governed by the Arm’s Length Principle (ALP) and the transfer price should be the price applicable in case of a transaction of arm’s length. In other words, the transaction between associates should be priced in the same way as a transaction between independent enterprises to avoid loss of revenue to the concerned tax jurisdictions.

Fig 3.1



INTERNATIONAL TAXATION ||

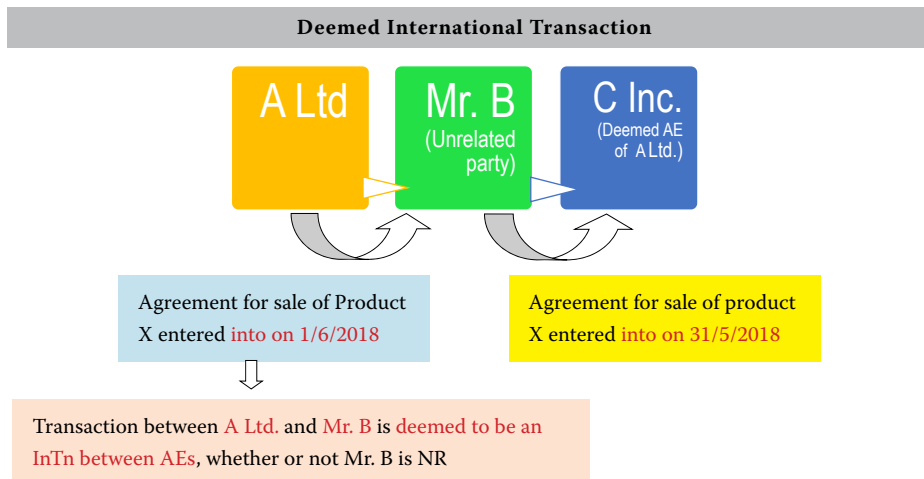


Fig 3.2

Associated Enterprises (AEs) [Section 92A(1)]		
Condition	Example	
(1) An enterprise (entr) which participates, directly (DP) or indirectly (IDP), or through one or more intermediaries, in: <ul style="list-style-type: none"> Management (mgt) of the other entr (OE), or control of OE, or capital of OE 	Where A Ltd. DP in mgt of B Ltd. and B Ltd. DP in mgt of C Ltd. In such situation, A Ltd. has DP in mgt of B Ltd. but has an IDP in mgt of C Ltd. <div style="text-align: center; margin: 10px 0;"> </div> In such scenario, both B Ltd. and C Ltd. would be AEs of A Ltd.	
(2) If one or more persons participates, directly or indirectly, or through one or more intermediaries in: <ul style="list-style-type: none"> mgt of the two different entr control of two different entr capital of two different entr Then, those two entr are AEs.	Mr. A directly has control in A Ltd. and B Ltd. In such a scenario, both A Ltd. & B Ltd. are AEs since they have a common person i.e. Mr. A, who controls both entities A Ltd. & B Ltd.	
Deemed Associated Enterprises [Section 92A(2)]		
Condition	Situation	Example
Substantial Voting Power (VP)	One entr holds 26% or more of the VP, directly or indirectly, in the other entr (OE).	A Ltd. holds 33% of VP in B Ltd. and B Ltd. holds 40% VP in C Ltd. <div style="text-align: center; margin: 10px 0;"> </div> In above situation, A Ltd. holds 33% of VP in B Ltd. directly and 40% of VP in C Ltd. indirectly (i.e. through B Ltd.). Therefore, both B Ltd. & C Ltd. are deemed AEs of A Ltd.
Substantial VP in two entities by common person	Any person or entr holds 26% or more of the VP power, directly or indirectly, in each of two different entr.	Mr. A holds 40% of shareholding in both X Ltd. and Y Ltd. where neither X Ltd. has any holding in Y Ltd. nor Y Ltd. has any holding in X Ltd. <div style="text-align: center; margin: 10px 0;"> </div> In this situation, since Mr. A directly holds 40% of shareholding in both X Ltd. and Y Ltd., X Ltd. & Y Ltd. will be deemed AEs.

Deemed Associated Enterprises [Section 92A(2)]		
Condition	Situation	Example
Advancing of substantial sum of money	One entr advances loan to the OE of an amount of 51% or more of the book value (BV) of the total assets of OE	<i>BV of total assets of Y Ltd. is ₹ 100 crores. X Ltd. advances loan of ₹ 60 crores to Y Ltd. Since, in this case, X Ltd. advances loan which is 60% of the BV of total assets of Y Ltd., X Ltd. & Y Ltd. are deemed AEs.</i>
Guaranteeing borrowings	One entr guarantees 10% or more of the total borrowings of the OE .	<i>P Inc. has total loan of 1 million dollars from XYZ Bank of America. Out of that, A Ltd., an Indian company, guarantees 20% of total borrowings. In such case, P Inc. and A Ltd. would be deemed AEs.</i>
Appointment of majority directors of OE	One Entr appoints more than half of the BoD or members of the governing board (GB), or one or more executive directors (EDs) or executive members (EMs) of the GB of OE .	<i>X Ltd. has 15 directors on its Board. Out of that, Y Ltd. has appointed 8 directors. In such case, X Ltd. and Y Ltd. would be deemed AEs.</i>
Appointment of majority directors of two different entr by same person(s)	More than half of the directors or members of the GB, or one or more of the EDs or members of the GB of each of the two entr s are appointed by the same person(s) .	<i>Mr. A appointed 9 directors out of 15 directors of X Ltd. and appointed 2 EDs on the board of Y Ltd. In such case, since a common person i.e. Mr. A appointed more than half of the directors in X Ltd. and appointed 2 EDs in Y Ltd., both X Ltd. and Y Ltd. are deemed AEs.</i>
Dependence on intangibles w.r.t which OE has exclusive rights	The manufacture (mfre) or processing of goods or articles or business carried out by one entr is wholly dependent (i.e. 100%) on the know-how , patents, copyrights etc., or any data, documentation, drawing or specification relating to any patent, invention, model etc., of which the OE is the owner or in respect of which the OE has exclusive rights.	
Dependence on RM supplied by OE	90% or more of RMs and consumables required for the mfre or processing of goods or articles or business carried out by one entr, are supplied by the OE , or by persons specified by the OE, where the prices and other conditions relating to the supply are influenced by such OE.	
Dependence on sale	The goods or articles mfrd or processed by one entr, are sold to the OE or to persons specified by the OE, and the prices and other conditions relating thereto are influenced by such OE .	
Control by common individual (indvl)	Where one entr is controlled by an indvl , the OE is also controlled by such indvl or his relative or jointly by such indvl and his relatives.	<i>Mr. A and Mr. B are relatives. Mr. A has control over X Ltd. and Mr. B has control over Y Ltd. In such a case, both X Ltd. and Y Ltd. would be deemed AEs.</i>
Control by HUF or member thereof	Where one entr is controlled by an HUF and the OE is controlled by a member of such HUF or by relative of a member of such HUF or jointly by such member and his relative.	<pre> graph TD HUF((HUF)) <--> Member((Member of HUF/ Relative of member of such HUF)) HUF -- Control --> ALtd((A Ltd.)) Member -- Control --> BLtd((B Ltd.)) ALtd <--> BLtd subgraph AEs ALtd BLtd end </pre>
Interest in a firm, AOPs or BOIs	Where one entr is a firm, AOPs or BOIs, the OE holds 10% or more interest in firm/HUF/BOI .	
Mutual interest relationship	There exists b/w the two entr s, any relationship of mutual interest , as may be prescribed .	

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Fig 3.3

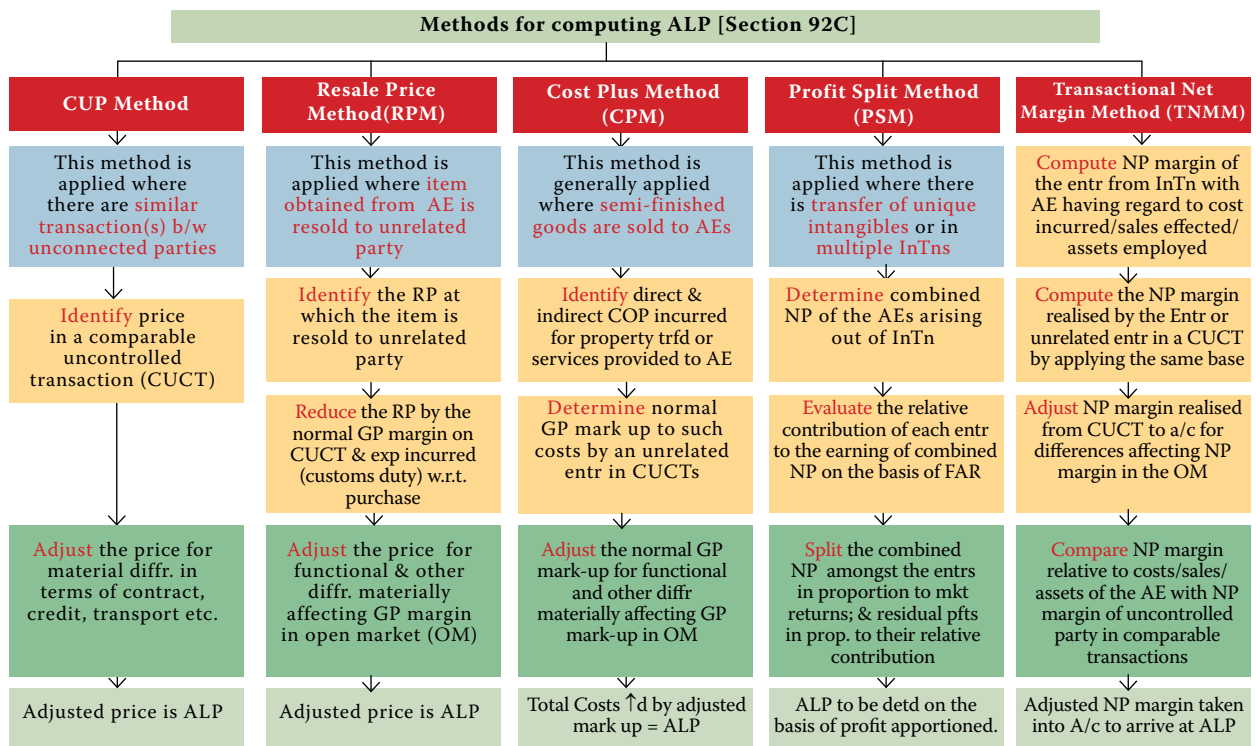


Fig 3.4

Advance Pricing Agreements [Section 92CC]

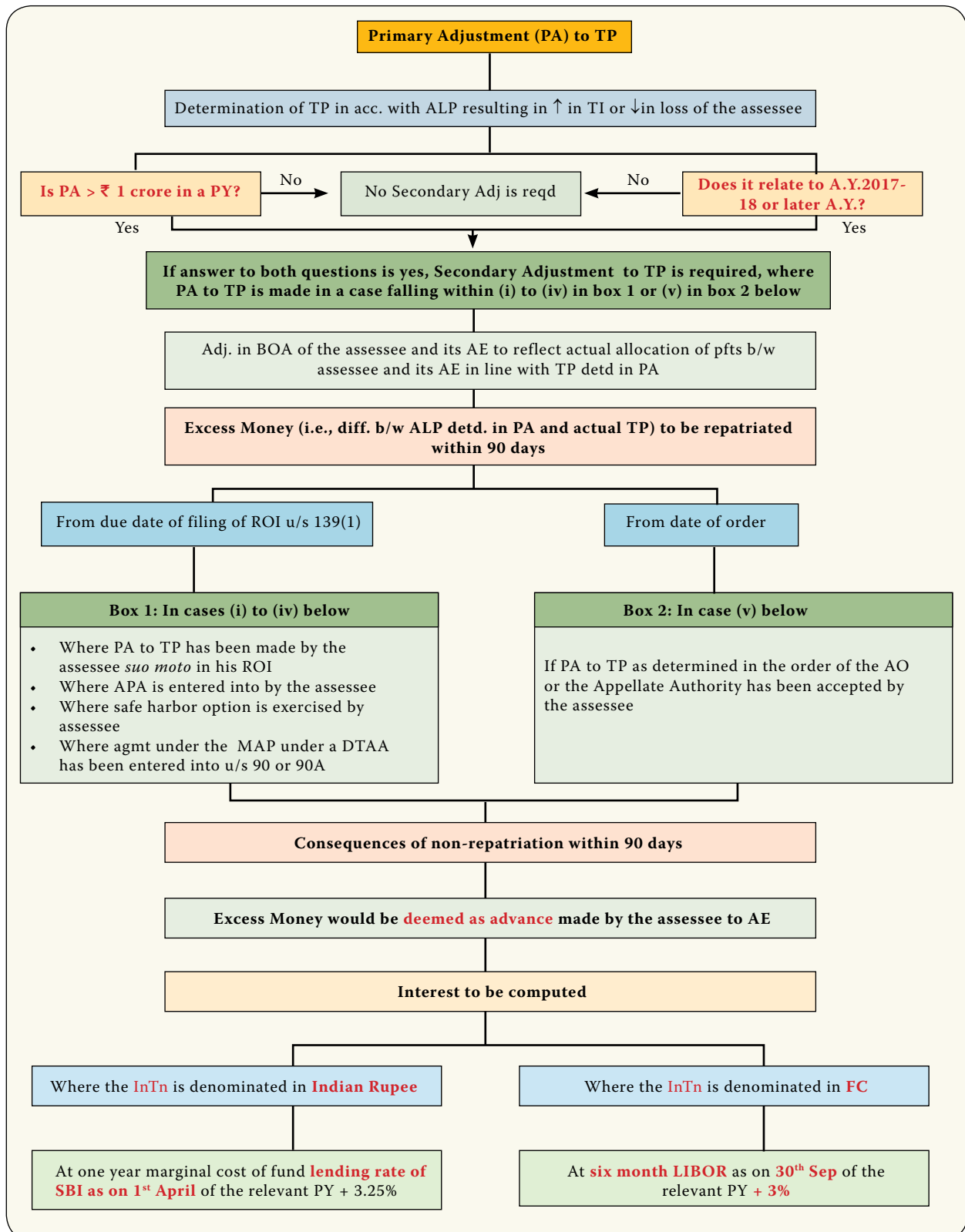
An Advance Pricing Agreement (APA) is an **agmt between a taxpayer and a taxing authority** on an appropriate **TP methodology** for a set of transns. **over a fixed period of time in future for not exceeding 5 consecutive PYs.**

APA may also provide for determination of ALP or for specifying the manner in which ALP is to be determined in relation to an InTn entered into by a person during the rollback year. **Rollback year is the PY, falling within the period not exceeding four PYs preceding the first of the PYs for which the APA applies** in respect of the InTn to be undertaken.

Purpose of APA	Detrmination (dtrmn) of ALP or specifying the manner for dtrmn of ALP for an InTn to be entered into.
Manner of dtrmn of ALP in APA	The manner for dtrmn of ALP ref. above may include methods ref. to u/s 92C(1) or any other method with necessary adjustments or variations.
Non-applicability of sec 92C & sec 92CA	Where an APA has been entered for an InTn, then, computation of ALP as per the methods specified u/s 92C and reference to TPO would not apply for such InTn.
Validity of APA	For the period specified in the agrmt which shall not exceed five consecutive PYs . In case of rollback , the total period shall not exceed 9 PYs [4 PY + maximum 5 consecutive PY]
Binding nature of APA	APA will be binding on: <ul style="list-style-type: none"> the person and in respect of the transns. in relation to which, the APA has been entered into; and the PC or C and the ITAs subordinate to him, in respect of the said person and the said transns. The APA, however, would not be binding , if there is any change in law or facts having bearing on such APA.
Consq. where APA is obtained by fraud:	<ul style="list-style-type: none"> Where APA obtained by way of fraud or misrepresentation of facts, the Board with the approval of CG can declare APA void ab initio. All the prov of the Act shall apply to such person, as if such APA had never been entered into. The period beginning with the date of such APA and ending on the date of order declaring the APA as void ab initio, shall be excluded for the purpose of computing any period of limitation (POL) under this Act. In case the PoL after exclusion of the above period is less than 60 days, such remaining PoL shall be extended to 60 days.
Prescribed scheme for APA	The Board has prescribed rules 10F to 10T specifying an APA scheme. [For details, refer Study Material]

Fig 3.5

Secondary Adjustment [Section 92CE]



INTERNATIONAL TAXATION

Fig 3.6

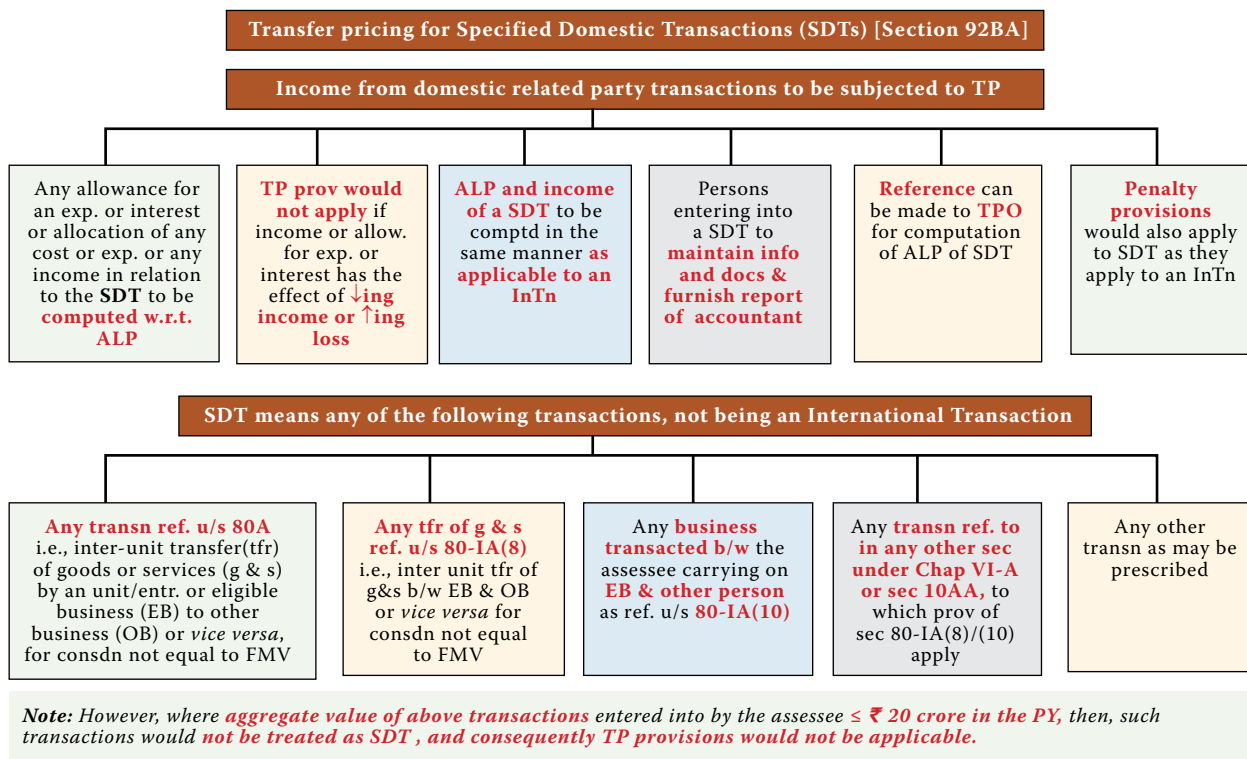


Fig 3.7

Penalty for failure to comply with TP provisions		
Section	Nature of default	Penalty
270A(9)	Failure to report any InTn or Deemed InTn or SDT to which the prov of Chap X applies would constitute 'misreporting of income'	200% of the tax payable on under-reported income
271BA	Failure to furnish a report from an accountant as required by sec 92E	₹ 1 lakh
271G	Failure to furnish info or doc as required by AO or CIT(A) u/s 92D(3) within 30 days from the date of receipt of notice or extended period not exceeding 30 days , as the case may be..	2% of the value of the InTn/SDT for each failure
271AA	(1) Failure to keep and maintain any such doc and info as required by sec 92D(1)/(2); (2) Failure to report such InTn or SDT which is required to be reported; or (3) Maintaining or furnishing any incorrect info or doc.	2% of the value of each such InTn/SDT

Notes:

- The penalty u/s 271AA shall be **in addition and not in substitution** of penalty u/s 270A(9) or 271BA.
- In all the above cases, if the assessee can show that there was **reasonable cause for the failure**, no penalty will be leviable.

CHAPTER 4: ADVANCE RULINGS

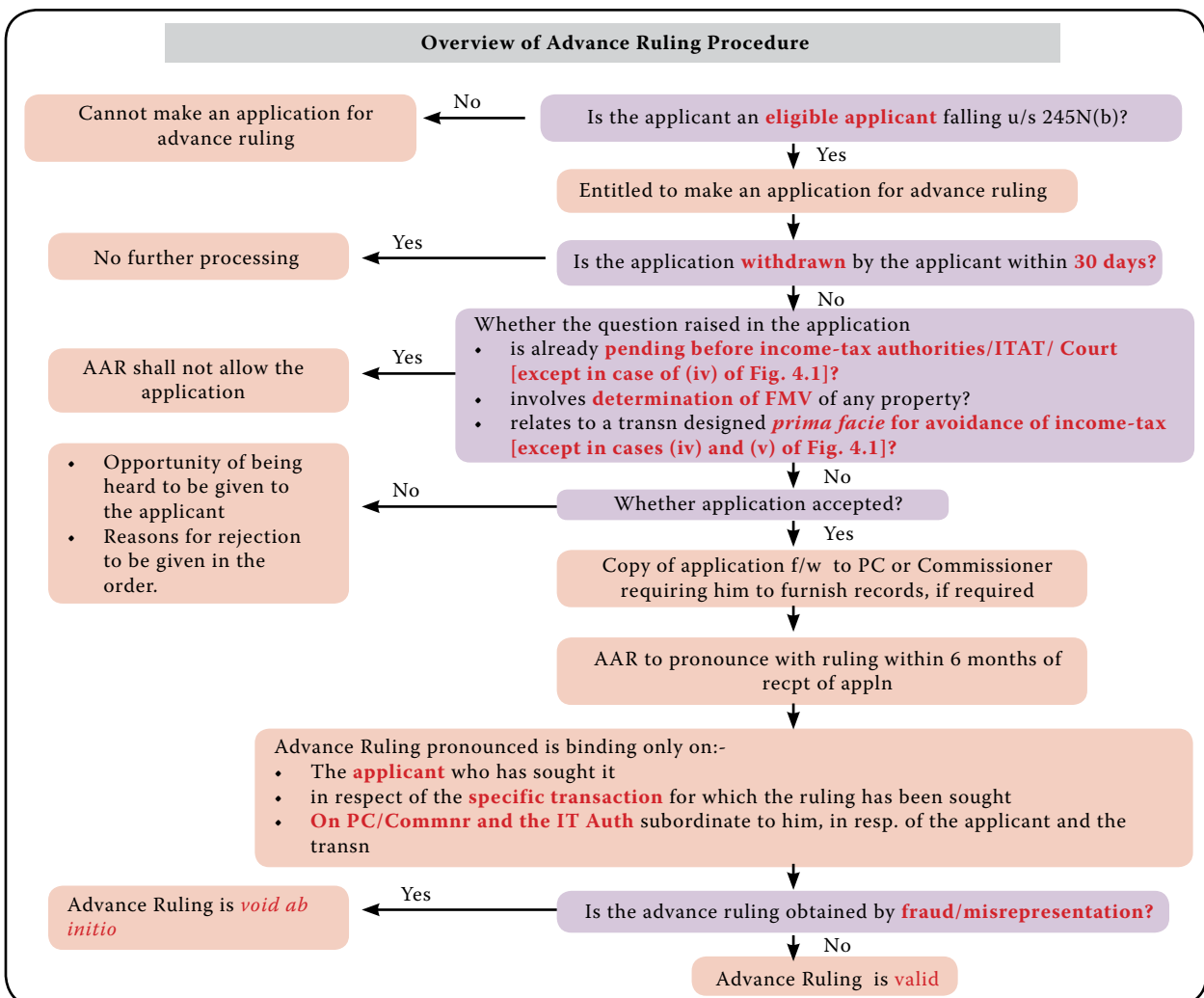
For the purpose of saving the high cost and significant time involved in extensive litigations relating to determination of tax liability of a non-resident or tax liability of a resident arising out of high value transactions, an independent quasi-judicial authority, namely, the Authority for Advance Rulings (AAR) has been given the power to pronounce advance ruling in respect thereof relating to a specific question of law or fact. This will help ensure certainty and at the same time will be expeditious and cost effective.

Fig 4.1

Applicant for Advance Ruling

S.No.	Applicant u/s 245N(b)	Advance Ruling u/s 245N(a) means determination by the AAR in relation to
(i)	NR	a transn which has been undertaken (u/t) or is proposed to be u/t by him .
(ii)	Resident	the tax liability of a NR arising out of a transn which has been u/t or is proposed to be u/t by him with such NR and such detmn (detmn) shall incl the detmn of any question of law or of fact specified in the application.
(iii)	Resident of class or category of persons notified by CG	the tax liability of a resident applicant, arising out of a transn which has been u/t or is proposed to be u/t by such applicant and such detmn shall incl the detmn of any question of law or of fact specified in the application.
<i>Note: CG has notified a resident, in relation to his tax liability arising out of one or more transns. valuing ≥ ₹ 100 crore in total.</i>		
(iv)	Resident of class or category of persons notified by CG	an issue relating to computation of TI which is pending before any IT Authority or the ITAT and such detmn or decision shall incl the detmn or decision of any question of law or fact w.r.t. such computation of TI specified in the application.
<i>Note: A Public sector undertaking has been notified by the CG</i>		
(v)	Resident or NR	whether an arrangement, which is proposed to be u/t by such applicant, is an impermissible avoidance arrangement as referred to in Chapter X-A or not.

Fig 4.2



CHAPTER 5: EQUALISATION LEVY

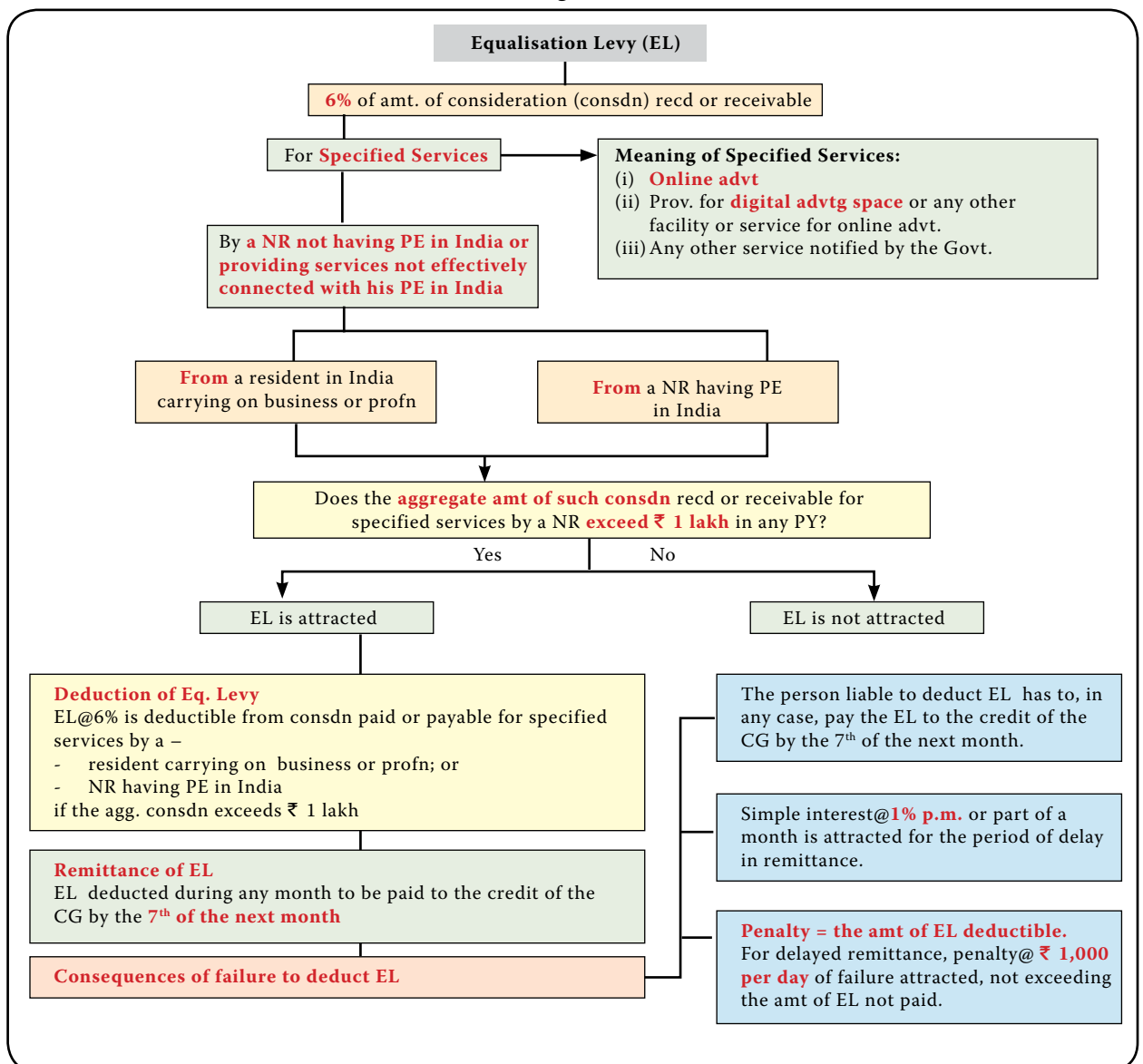
In the digital domain, business may be conducted without regard to national boundaries and may dissolve the link between an income-producing activity and a specific location. The typical taxation issues relating to e-commerce are:

- (i) the difficulty in characterising the nature of payment and establishing a nexus or link between taxable transaction, activity and a taxing jurisdiction,
- (ii) the difficulty of locating the transaction, activity and identifying the taxpayer for income tax purposes.

Taking into consideration the potential of new digital economy and the rapidly evolving nature of business operations, it becomes necessary to address the challenges in terms of taxation of such digital transactions.

Chapter VIII of the Finance Act, 2016 addresses these challenges by introducing "Equalisation Levy" on such transactions.

Fig 5.1



CHAPTER 6: OVERVIEW OF MODEL TAX CONVENTIONS

In order to enable various countries to enter into treaties, which are standardised to some extent, the Organisation for Economic Cooperation and Development (OECD) and the United Nations (UN) have developed certain Model Tax Conventions. These Conventions can be used by various countries as a starting point in their negotiations with other countries. While these Models are not legally binding, they have been extensively used by various countries as a reference point while entering into Tax Treaties.

Fig 6.1
Overview of Significant Articles of OECD and UN Model Conventions, 2017

Article	OECD MC <i>vis-à-vis</i> UN MC Common paras & Significant differences				
Chapter I : Scope of the Convention					
1	<p>Persons covered</p> <p>Resident of CS - For application of treaty, a person has to be a resident of one or both of the Contracting States (CSs). Fiscally transparent entity - Income derived by or through a fiscally transparent entity under the tax law of either CS to be considered to be income of a resident of a CS, to the extent such income is treated, for purposes of taxation by that State, as the income of a resident of that State.</p>				
2	<p>Taxes covered</p> <p>Taxes on income and capital - The MCs apply to taxes on income and on capital imposed on behalf of a CS or of its political subdivisions or local authorities, irrespective of the manner in which they are levied. Coverage of taxes - Taxes on income and on capital covers:</p> <table border="1" style="width: 100%; border-collapse: collapse; margin-top: 5px;"> <thead> <tr style="background-color: #ffcc00;"> <th style="width: 50%;">Taxes imposed</th> <th style="width: 50%;">Taxes included</th> </tr> </thead> <tbody> <tr> <td style="vertical-align: top;"> <ul style="list-style-type: none"> On total income On total capital On elements of income or of capital </td> <td style="vertical-align: top;"> <ul style="list-style-type: none"> taxes on gains from alienation of movable or immovable property taxes on total amts of wages or salaries paid by enterprises taxes on capital appreciation </td> </tr> </tbody> </table>	Taxes imposed	Taxes included	<ul style="list-style-type: none"> On total income On total capital On elements of income or of capital 	<ul style="list-style-type: none"> taxes on gains from alienation of movable or immovable property taxes on total amts of wages or salaries paid by enterprises taxes on capital appreciation
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Chapter II : Definitions					
4	<p>Resident</p> <p>Resident of either CS - A taxpayer has to demonstrate that he is a resident of one or both CSs to be able to gain access to a tax treaty and avail benefits thereunder. Meaning of "Resident of a Contracting State" - Any person who, under the laws of that State, is liable to tax therein by reason of his:</p> <div style="text-align: center; margin: 10px 0;"> <pre> graph TD Domicile --- Residence Residence --- AnyOther[Any other similar criterion] AnyOther --- PlaceMgmt[Place of Mgmt] PlaceMgmt --- POI[Place of incorporation (POI)] POI --- Domicile </pre> </div> <p>This term, however, does not include any person who is liable to tax in that State in respect of only income from sources in that State or capital situated therein. Note - OECD MC does not contain reference to place of incorporation.</p> <p>Tie-breaker Rule In case of individuals Where an individual is a resident of both CSs as per domestic tax laws of that CS, then, his residential status shall be determined by applying the tie-breaker rule in the foll sequence:</p> <div style="text-align: center; margin: 10px 0;"> <pre> graph LR A[Permanent Home] --> B[Centre of vital interests] B --> C[Habitual abode] C --> D[Nationality] D --> E[Mutual agrmt bet Competent Authorities of the CSs] </pre> </div> <p>In case of companies</p> <ul style="list-style-type: none"> Dual residence arises where one CS attaches importance to POI and the other CS to the POEM. The tie-breaker test involves a case by case approach considering the no. of tax avoidance cases involving dual resident Cos. Request has to be made by the tax payer through Article 25 (MAP). Competent Authorities will rely on range of factors to resolve the question of dual residency. 				

INTERNATIONAL TAXATION ||

5	<p>Permanent establishment (PE)</p>	<p>Meaning of PE [Article 5(1)]</p> <ul style="list-style-type: none"> • There should be an “enterprise” (Entr). • Such Entr should be carrying on a “business”; • There should be a “place of business (POB)”; • Such place of business (POB) should be at the disposal of the Entr (may be owned / rented but must be one which the Entr has the effective power to use); • The POB should be “fixed”, i.e., it must be established at a distinct place with a certain degree of permanence • The business of the enterprise is carried on wholly or partially through this fixed POB. <p>A PE does not exist unless all the aforesaid conditions are satisfied.</p> <p>Specific inclusions in the meaning of PE [Article 5(2)]</p> <div style="text-align: center;"> </div> <p>Expansion of scope of Agency PE</p> <ul style="list-style-type: none"> • Agency PE targets activities done by a dependent agent (DA) of the Entr in the Source State (SS). • DAPE now includes instances when an agent habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts routinely concluded without material modification by the enterprise. <p>PE of an Insurance Enterprise</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr style="background-color: #ffcc00;"> <th style="text-align: center;">UN MC</th> <th style="text-align: center;">OECD MC</th> </tr> </thead> <tbody> <tr> <td style="padding: 5px;">UN MC has an additional Article 5(6) relating to insurance. An insurance Entr of a CS is deemed to have a PE in the other CS if it collects premiums in the territory of that other CS or insures risks situated therein through a person.</td> <td style="padding: 5px;">In the absence of similar Article in the OECD MC, a PE of an insurance Entr is to be determined in accord with Article 5(1) or 5(2).</td> </tr> </tbody> </table>	UN MC	OECD MC	UN MC has an additional Article 5(6) relating to insurance. An insurance Entr of a CS is deemed to have a PE in the other CS if it collects premiums in the territory of that other CS or insures risks situated therein through a person.	In the absence of similar Article in the OECD MC, a PE of an insurance Entr is to be determined in accord with Article 5(1) or 5(2).
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Chapter III: Taxation of Income

7	<p>Business profits</p>	<p>Right of CS to tax business profits (BPs)</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr style="background-color: #ffcc00;"> <th style="text-align: center;">OECD MC</th> <th style="text-align: center;">UN MC</th> </tr> </thead> <tbody> <tr> <td colspan="2" style="padding: 5px;">BPs of an Entr can only be taxed by the Residence State (RS). Right of Source State (SS) to tax BPs of an enterprise only exists if a PE exists in its jurisdiction.</td> </tr> <tr> <td style="padding: 5px; vertical-align: top;">Once a PE is proven, the SS can tax only such profits as are attributable to the PE</td> <td style="padding: 5px; vertical-align: top;"> <ul style="list-style-type: none"> • The attribution principle is amplified by a limited Force of Attraction rule (FOA). • The FOA rule implies that when a foreign enterprise sets up a PE in SS, it brings itself within the fiscal jurisdiction of that State to such a degree that profits that the Entr derives therefrom, whether through the PE or not, can be taxed by it (i.e., the SS). • Accordingly, if the Entr carries on business in the other CS through a PE, the profits of the Entr may be taxed in the other CS but only so much of them as is attributable to: <ol style="list-style-type: none"> (a) that PE; (b) sales in that other CS of goods or merchandise of the same or similar kind as those sold through that PE; or (c) other business activities carried on in that other State of the same or similar kind as those effected through that PE. </td> </tr> </tbody> </table>	OECD MC	UN MC	BPs of an Entr can only be taxed by the Residence State (RS). Right of Source State (SS) to tax BPs of an enterprise only exists if a PE exists in its jurisdiction.		Once a PE is proven, the SS can tax only such profits as are attributable to the PE	<ul style="list-style-type: none"> • The attribution principle is amplified by a limited Force of Attraction rule (FOA). • The FOA rule implies that when a foreign enterprise sets up a PE in SS, it brings itself within the fiscal jurisdiction of that State to such a degree that profits that the Entr derives therefrom, whether through the PE or not, can be taxed by it (i.e., the SS). • Accordingly, if the Entr carries on business in the other CS through a PE, the profits of the Entr may be taxed in the other CS but only so much of them as is attributable to: <ol style="list-style-type: none"> (a) that PE; (b) sales in that other CS of goods or merchandise of the same or similar kind as those sold through that PE; or (c) other business activities carried on in that other State of the same or similar kind as those effected through that PE.
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11	Interest	<p>Right of CSs to tax interest</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr style="background-color: #FFD700;"> <th style="width: 15%;">Para of Article</th> <th style="width: 85%;">Right of CS to tax interest</th> </tr> </thead> <tbody> <tr> <td style="text-align: center;">1</td> <td>Confers the right to RS to tax interest</td> </tr> <tr> <td style="text-align: center;">2</td> <td>Confers right to the SS to tax interest. Generally, interest is taxed in the SS at a given rate on gross basis. However, if the beneficial owner of the interest is a resident of the other CS, the tax so charged \leq specified % of the gross interest. The specified % as per OECD MC is 10%, but the UN MC leaves this % to be established through bilateral negotiations.</td> </tr> </tbody> </table> <p>Defn of interest in OECD & UN MCs - Interest means income from debt claims of every kind,</p> <ul style="list-style-type: none"> • whether or not secured by mortgage and • whether or not carrying a right to participate in the debtor's profits. <p>Specific inclusions in the definition of interest as per OECD & UN MCs</p> <ul style="list-style-type: none"> • income from govt securities • income from bonds or debentures • premiums and prizes attaching to such securities, bonds or debentures. <p>Note - Interest does not include penalty charges for late payment.</p>	Para of Article	Right of CS to tax interest	1	Confers the right to RS to tax interest	2	Confers right to the SS to tax interest. Generally, interest is taxed in the SS at a given rate on gross basis. However, if the beneficial owner of the interest is a resident of the other CS, the tax so charged \leq specified % of the gross interest. The specified % as per OECD MC is 10%, but the UN MC leaves this % to be established through bilateral negotiations.			
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12A	FTS	<p>In its 2017 update, the UN MC has inserted a specific article pertaining to Fees for Technical Services (FTS). There is no specific reference to FTS in OECD MC.</p> <p>Right of CS to tax FTS [UN Model]</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr style="background-color: #FFD700;"> <th style="width: 15%;">Para of Article</th> <th style="width: 85%;">Right of CS to tax FTS</th> </tr> </thead> <tbody> <tr> <td style="text-align: center;">1</td> <td>Confers right to the RS to tax FTS. However, does not state that FTS is exclusively taxable in the RS.</td> </tr> <tr> <td style="text-align: center;">2</td> <td>Establishes the right of the SS to tax FTS in accordance with its domestic law, subject to limitation on the max. rate of tax, to be established thro bilateral negotiations, if the beneficial owner is a resident of the other CS.</td> </tr> </tbody> </table> <p>Meaning of FTS [UN Model]</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td> <p>FTS means payts for managerial, technical or consultancy services</p> <p>Exclusions from the meaning of FTS:</p> <ul style="list-style-type: none"> i payt to an employee ii payt for teaching in an or by an educational institution iii payt by an individual for services for personal use </td> </tr> </table>	Para of Article	Right of CS to tax FTS	1	Confers right to the RS to tax FTS. However, does not state that FTS is exclusively taxable in the RS.	2	Establishes the right of the SS to tax FTS in accordance with its domestic law, subject to limitation on the max. rate of tax, to be established thro bilateral negotiations, if the beneficial owner is a resident of the other CS.	<p>FTS means payts for managerial, technical or consultancy services</p> <p>Exclusions from the meaning of FTS:</p> <ul style="list-style-type: none"> i payt to an employee ii payt for teaching in an or by an educational institution iii payt by an individual for services for personal use 		
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13	Capital gains	<p>This Article provides for the taxation of income arising from transfer of a capital asset, including transfer of shares.</p> <p>Right of CS to tax income from Cap Gains</p> <ul style="list-style-type: none"> • The right to tax cap gains may be exclusively with the RS, or shared between the RS and SS. • The Article does not specify what is a cap gain and how it is to be computed, this being left to the applicable domestic law. • The Article contains rules for taxation of gains from alienation of dif. assets such as immovable prop., immovable prop. forming part of a PE, ships & aircrafts, etc. • In respect of shares, the 2017 OECD and UN MCs are identical. Rights are conferred to the SS if more than 50% of the value of shares during the preceding 365 days is derived from immovable property in such SS. 									

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14	Independent personal services (IPS)	<p>This Article present only in the UN MC deals with the taxation of income derived by a person for professional or specified services which are offered in the SS through some presence.</p> <p>Right of CS to tax income from professional services [UN MC]</p> <table border="1" data-bbox="442 285 1391 623"> <tr> <td data-bbox="442 285 560 348">Right of RS</td> <td colspan="2" data-bbox="565 285 1391 348">Income derived by a resident of a CS in respect of prof. services or other activities of an independent character is taxable only in the RS.</td> </tr> <tr> <td data-bbox="442 354 560 385">Right of SS</td> <td colspan="2" data-bbox="565 354 1391 385">In the foll circumstances, however, IPS may also be taxed in the other CS (i.e., the SS):</td> </tr> <tr> <td data-bbox="442 391 560 422"></td> <td data-bbox="565 391 970 422" style="text-align: center;">Circumstance</td> <td data-bbox="974 391 1391 422" style="text-align: center;">Extent of income taxable in SS</td> </tr> <tr> <td data-bbox="442 428 560 520"></td> <td data-bbox="565 428 970 520">If he has a fixed base regularly available to him in the SS for the purpose of performing his activities.</td> <td data-bbox="974 428 1391 520">Only so much of the income as is attributable to that fixed base may be taxed in the SS.</td> </tr> <tr> <td data-bbox="442 526 560 617"></td> <td data-bbox="565 526 970 617">If his stay in the SS is for a prd \geq 183 days in any 12 month prd commencing or ending in the fiscal year concerned.</td> <td data-bbox="974 526 1391 617">Only so much of the income as is derived from his activities performed in the SS may be taxed in that State.</td> </tr> </table> <p>Definition of "Professional Services" [UN MC] The term "professional services" includes especially independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, lawyers, engineers, architects, dentists and accountants.</p> <p>Note – OECD MC does not contain a separate article on IPS. The same is dealt with as "Business Profits (Article 7)" under the OECD MC.</p>	Right of RS	Income derived by a resident of a CS in respect of prof. services or other activities of an independent character is taxable only in the RS.		Right of SS	In the foll circumstances, however, IPS may also be taxed in the other CS (i.e., the SS):			Circumstance	Extent of income taxable in SS		If he has a fixed base regularly available to him in the SS for the purpose of performing his activities.	Only so much of the income as is attributable to that fixed base may be taxed in the SS.		If his stay in the SS is for a prd \geq 183 days in any 12 month prd commencing or ending in the fiscal year concerned.	Only so much of the income as is derived from his activities performed in the SS may be taxed in that State.	
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	If he has a fixed base regularly available to him in the SS for the purpose of performing his activities.	Only so much of the income as is attributable to that fixed base may be taxed in the SS.																
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21	Other income (OI)	<p>This Article deals with taxation of items of income which are not specifically taxable under any other specific Article [i.e., upto Article 20].</p> <table border="1" data-bbox="442 866 1391 1141"> <thead> <tr> <th data-bbox="442 866 629 897"></th> <th data-bbox="633 866 862 897" style="text-align: center;">OECD MC</th> <th data-bbox="866 866 1391 897" style="text-align: center;">UN MC</th> </tr> </thead> <tbody> <tr> <td data-bbox="442 903 629 944">Right to tax OI</td> <td data-bbox="633 903 862 944">Right to tax is ordinarily with the RS.</td> <td data-bbox="866 903 1391 944">Contains an additional para, Article 21(3), which provides that SS may also tax other income</td> </tr> <tr> <td data-bbox="442 951 629 1141">Right to tax income [other than income from immovable property] effectively conn. with PE</td> <td data-bbox="633 951 862 1141">Article 21(2) of both OECD and UN MC provides that for income effectively connected with a PE maintained in a CS by a resident of the other CS, taxation is governed by the provns of Art 7 (Business Profits).</td> <td data-bbox="866 951 1391 1141">Additionally, UN Model provides that if the aforesaid income is effectively connected with a fixed base situated in a CS by a resident of the other CS, taxation would be governed by the provns of Article 14 (IPS).</td> </tr> </tbody> </table>		OECD MC	UN MC	Right to tax OI	Right to tax is ordinarily with the RS.	Contains an additional para, Article 21(3), which provides that SS may also tax other income	Right to tax income [other than income from immovable property] effectively conn. with PE	Article 21(2) of both OECD and UN MC provides that for income effectively connected with a PE maintained in a CS by a resident of the other CS, taxation is governed by the provns of Art 7 (Business Profits).	Additionally, UN Model provides that if the aforesaid income is effectively connected with a fixed base situated in a CS by a resident of the other CS, taxation would be governed by the provns of Article 14 (IPS).							
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Chapter V : Methods for the Elimination of Double Taxation																		
23A/ 23B	Exemption method/ Credit method	<p>In many cases, the application of tax treaty may result into double taxation (DT) for tax payers. In such a case, Articles 23A and 23B provide for the mechanism through which tax credit/exemption may be available in the RS for taxes deducted in the SS.</p> <p>Two approaches for elimination of DT under MCs:</p> <table border="1" data-bbox="442 1301 1391 1400"> <thead> <tr> <th data-bbox="442 1301 926 1332" style="text-align: center;">Exemption method (Article 23A)</th> <th data-bbox="930 1301 1391 1332" style="text-align: center;">Credit method (Article 23B)</th> </tr> </thead> <tbody> <tr> <td data-bbox="442 1338 926 1400">Tax exemption may be available in the RS for taxes deducted in the SS.</td> <td data-bbox="930 1338 1391 1400">Tax credit may be available in the RS for taxes deducted in the SS.</td> </tr> </tbody> </table> <p>These methods are not mutually exclusive and there may be cases where a treaty may adopt exemption method for certain types of income and credit method for other incomes.</p> <p>Juridical DT and Economic DT:</p> <table border="1" data-bbox="442 1514 1391 1875"> <thead> <tr> <th data-bbox="442 1514 629 1545"></th> <th data-bbox="633 1514 961 1545" style="text-align: center;">Juridical DT</th> <th data-bbox="966 1514 1391 1545" style="text-align: center;">Economic DT</th> </tr> </thead> <tbody> <tr> <td data-bbox="442 1551 629 1618">Meaning</td> <td data-bbox="633 1551 961 1618">The same income or capital is taxable in the hands of the same person by more than one State</td> <td data-bbox="966 1551 1391 1618">Two different persons are taxable in respect of the same income or capital</td> </tr> <tr> <td data-bbox="442 1624 629 1757">Example</td> <td data-bbox="633 1624 961 1757">FTS may be taxable in the hands of the recipient both in the RS as well as in SS, based on the domestic laws of the CSs.</td> <td data-bbox="966 1624 1391 1757">In respect of dividend distributed by a Co., DDT may be payable by the Co. in SS, whereas the dividend may be taxable in the hands of the shareholder of the other CS, on the basis of his residence.</td> </tr> <tr> <td data-bbox="442 1763 629 1875">Type of DT addressed by Art 23A & 23B</td> <td data-bbox="633 1763 961 1875">Articles 23A & 23B address Juridical DT.</td> <td data-bbox="966 1763 1391 1875">The Articles do not address Economic DT. If two States wish to solve problems of economic DT, they must do so in bilateral negotiations.</td> </tr> </tbody> </table>	Exemption method (Article 23A)	Credit method (Article 23B)	Tax exemption may be available in the RS for taxes deducted in the SS.	Tax credit may be available in the RS for taxes deducted in the SS.		Juridical DT	Economic DT	Meaning	The same income or capital is taxable in the hands of the same person by more than one State	Two different persons are taxable in respect of the same income or capital	Example	FTS may be taxable in the hands of the recipient both in the RS as well as in SS, based on the domestic laws of the CSs.	In respect of dividend distributed by a Co., DDT may be payable by the Co. in SS, whereas the dividend may be taxable in the hands of the shareholder of the other CS, on the basis of his residence.	Type of DT addressed by Art 23A & 23B	Articles 23A & 23B address Juridical DT.	The Articles do not address Economic DT. If two States wish to solve problems of economic DT, they must do so in bilateral negotiations.
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Chapter VI : Special Provisions																	
25	Mutual agreement procedure (MAP)	Where a tax payer believes that the treatment accorded by either or both CSs is not in accord with the provns of the tax treaty, this Article provides for dispute resolution through bilateral negotiations between competent authorities (CAS) of both CSs.															
		<table border="1" style="width: 100%;"> <thead> <tr> <th style="width: 20%;"></th> <th style="width: 40%; text-align: center;">OECD MC</th> <th style="width: 40%; text-align: center;">UN MC</th> </tr> </thead> <tbody> <tr> <td style="text-align: center;">Request for MAP</td> <td>The taxpayer may make a request to either CS</td> <td>Alt A - Taxpayer has to approach RS or the country of his nationality Alt B - Reference to an arbitration process as part of MAP. The decision arrived at through the process is binding unless a <u>person directly affected does not accept it.</u></td> </tr> <tr> <td style="text-align: center;">Time limit</td> <td>Stipulates a time limit of 2 years from the date when all the info reqd by the CAS in order to address the case need to be provided to both CAS.</td> <td>An arbitration may be initiated if the competent authorities (CAS) are unable to reach an agrmt on a case within 3 years from presentation of that case [Alt B]</td> </tr> <tr> <td style="text-align: center;">Who can request for Arbitration?</td> <td>Arbitration must be requested in writing by the person who initiated the case</td> <td>Arbitration must be requested by the CAS of one of the CS. Once such a request is made, the taxpayer will be notified [Alt B]</td> </tr> <tr> <td style="text-align: center;">Departure from arbitration by CAS</td> <td>No specific provision for departure from arbitration.</td> <td>The CAS may depart from the arbitration decision if they agree to do so within 6 months after the decision has been communicated to them [Alt B]</td> </tr> </tbody> </table>		OECD MC	UN MC	Request for MAP	The taxpayer may make a request to either CS	Alt A - Taxpayer has to approach RS or the country of his nationality Alt B - Reference to an arbitration process as part of MAP. The decision arrived at through the process is binding unless a <u>person directly affected does not accept it.</u>	Time limit	Stipulates a time limit of 2 years from the date when all the info reqd by the CAS in order to address the case need to be provided to both CAS.	An arbitration may be initiated if the competent authorities (CAS) are unable to reach an agrmt on a case within 3 years from presentation of that case [Alt B]	Who can request for Arbitration?	Arbitration must be requested in writing by the person who initiated the case	Arbitration must be requested by the CAS of one of the CS. Once such a request is made, the taxpayer will be notified [Alt B]	Departure from arbitration by CAS	No specific provision for departure from arbitration.	The CAS may depart from the arbitration decision if they agree to do so within 6 months after the decision has been communicated to them [Alt B]
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26	Exchange of information (EOI)	<p>Purpose of Article 26</p> <p>In order to complete tax cases, a country may require certain info which may be available with the treaty partner.</p> <p>Article 26 provides for:</p> <ul style="list-style-type: none"> the info which may be exchanged the manner in which such a request has to be made. <p>Importance of Article 26:</p> <ul style="list-style-type: none"> facilitates effective exchange of information between CSs. curtails cross-border tax evasion and avoidance, curtails the capital flight that is often accomplished thro tax evasion & avoidance. This is particularly relevant in the perspective of developing countries. <p>Similar provisions contained in OECD and UN MCs</p> <ul style="list-style-type: none"> A CS cannot be expected to provide confidential financial info to another CS unless it has confidence that the info will not be disclosed to unauthorised persons. A CS can avoid the EOI obligations by showing that the info pertains to communication between an attorney and his client which is protected from disclosure under domestic law. Lack of interest or use in such info cannot, however, form the basis for a CS to not co-operate with the EOI obligations. 															

CHAPTER 7: APPLICATION AND INTERPRETATION OF TAX TREATIES

Fig 7.1

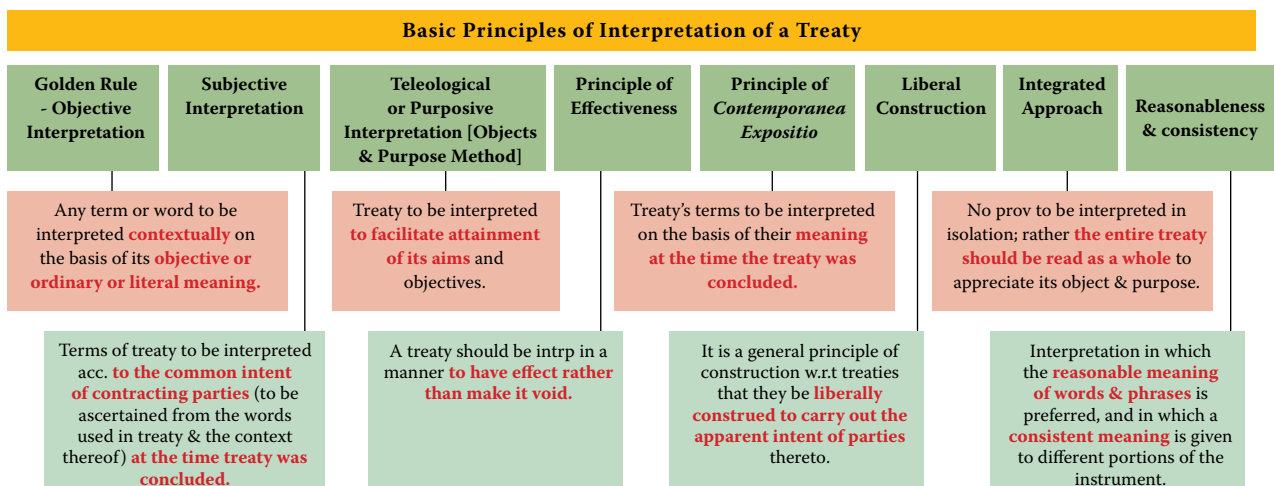


Fig 7.2



Fig 7.3

Principles enunciated in the Vienna Convention on Law of Treaties		
Article No.	Article Heading	Principle enunciated
26	<i>Pacta Sunt Servanda</i> (in good faith)	Every treaty in force is binding upon the parties and must be followed by them in good faith .
28	Non-retroactivity of treaties	Unless otherwise provided, treaties cannot have retrospective application .
29	Territorial Scope of Treaties	Unless a different intention appears from the treaty, a treaty is binding upon each party in respect of its entire territory .
31	General Rule of Interpretation (intrptn)	<ul style="list-style-type: none"> A treaty shall be intrptd in good faith in accordance with the ordinary meaning to be given to the terms in the light of its object and purpose. A special meaning shall be given to a term if the parties so intended.
32	Supplementary means of intrp	Recourse may be had to supplementary means of intrptn incl. the preparatory work of the treaty and the circum. of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the intrp according to Article 31: <ul style="list-style-type: none"> (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.
33	Intrp of Treaties Authenticated in two or more languages	When a treaty has been authn. in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
34	General Rule reg. third states	A treaty does not create either obligations or rights for a third State without its consent.
60	Termination or Suspension of operatn of treaty as conseq. of breach	A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.
61	Supervening impossibility of performance	<div style="text-align: center; border: 1px solid black; padding: 5px;"> <p>Impossibility of performance</p> <div style="display: flex; justify-content: space-around;"> <div style="border: 1px solid black; padding: 5px; width: 45%;"> <p>May be invoked</p> </div> <div style="border: 1px solid black; padding: 5px; width: 45%;"> <p>May not be invoked</p> </div> </div> <p style="text-align: center; background-color: #FFD700; padding: 5px;">as a ground terminating, withdrawing from or suspending the operation of a treaty</p> <div style="display: flex; justify-content: space-between; margin-top: 10px;"> <div style="border: 1px solid black; padding: 5px; width: 45%;"> <p>if impossibility results from permanent disappearance or destruction of an object indispensable for execution of the treaty. If impossibility is temporary, it may be invoked only as a ground for suspending its operation.</p> </div> <div style="border: 1px solid black; padding: 5px; width: 45%;"> <p>if impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party thereto</p> </div> </div> </div>
62	Fundamental change (Fund. chg) of circumstances (circum.)	<div style="text-align: center; border: 1px solid black; padding: 5px;"> <p>A fund.chg of circum. which has occurred with regard to those existing at the time of the concl. of a treaty, and which was not foreseen by the parties</p> <div style="display: flex; justify-content: space-around;"> <div style="border: 1px solid black; padding: 5px; width: 45%;"> <p>May be invoked</p> </div> <div style="border: 1px solid black; padding: 5px; width: 45%;"> <p>May not be invoked</p> </div> </div> <p style="text-align: center; background-color: #FFD700; padding: 5px;">as a ground terminating, withdrawing of a treaty</p> <div style="display: flex; justify-content: space-between; margin-top: 10px;"> <div style="border: 1px solid black; padding: 5px; width: 45%;"> <ul style="list-style-type: none"> If existence of those circum constituted an essential basis of the consent of the parties to be bound by the treaty; and the effect of the change is radically to transform the extent of obligations still to be performed under the treaty </div> <div style="border: 1px solid black; padding: 5px; width: 45%;"> <ul style="list-style-type: none"> if the treaty establishes a boundary; or if fund. chg is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty </div> </div> </div>
64	Emergence of new peremptory norm of general international law	If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and stands terminated

CHAPTER 8 : FUNDAMENTALS OF BEPS

Base Erosion and Profit Shifting (BEPS) refers to tax planning strategies that exploit gaps and mismatches in tax rules to make profits 'disappear' for tax purposes or to shift profits to locations where there is little or no real activity but the taxes are low, resulting in little or no overall corporate tax being paid. This has become a critical issue since governments have to cope with less revenue and a higher cost to ensure compliance. In February 2013, the OECD published a report on "Addressing BEPS" iterating the need for analysing the issue of tax base erosion and profit shifting by global corporation, followed by a draft BEPS Action Plan in July 2013 which came to final fruition in October 2015. The BEPS action plan identifies fifteen actions to address BEPS in a comprehensive manner. Provisions have been incorporated in Indian Tax Laws in line with many of the action plans of BEPS.

Fig 8.1

BEPS Action Plan 1 : Addressing the challenges of the digital economy					
OECD Recommendation	Provision incorporated in Indian Tax Laws				
<p>i Modifying existing PE rule to provide whether an enterprise engaged in fully de-materialised digital activities would constitute a PE if it maintained significant digital presence in another country's economy</p>	<p style="text-align: center;">"Significant economic presence" (SEP) to constitute "business connection"</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr style="background-color: #FFD700;"> <th style="width: 50%;">Upto A.Y.2018-19</th> <th style="width: 50%;">From A.Y.2019-20</th> </tr> </thead> <tbody> <tr> <td>As per sec 9(1)(i) of the IT Act, 1961, as it stood prior to amendment by the FA, 2018, physical presence in India was necessary to fall within the scope of "business connection" to attract deemed accrual provisions for income of NR to be subject to tax in India.</td> <td>The FA, 2018 has amended section 9(1)(i) to provide that significant economic presence of NR in India would also constitute business connection from A.Y.2019-20.</td> </tr> </tbody> </table> <p>Equalisation Levy [Ref. Fig. 5.1] Chapter VIII of the Finance Act, 2016 provides for Equalisation levy@6% of the amt of consdn for specified services recd or receivable by a NR not having PE in India or providing services not effectively connected with PE in India, from:</p> <ul style="list-style-type: none"> • a resident in India who carries on business or profn or • from a NR having PE in India. <p>The Resident or NR having PE in India has to deduct EL@6% from consdn for specified services paid to NR and remit the same to the Central Govt. within the prescribed time.</p>	Upto A.Y.2018-19	From A.Y.2019-20	As per sec 9(1)(i) of the IT Act, 1961, as it stood prior to amendment by the FA, 2018, physical presence in India was necessary to fall within the scope of "business connection" to attract deemed accrual provisions for income of NR to be subject to tax in India.	The FA, 2018 has amended section 9(1)(i) to provide that significant economic presence of NR in India would also constitute business connection from A.Y.2019-20.
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<p>ii A virtual fixed place of business PE when the enterprise maintains a website on a server of another enterprise located in a jurisdiction & carries on business thro that website.</p>					
<p>iii Imposition of a final withholding tax on certain payts for digital goods or services provided by a foreign e-commerce provider</p>					
<p>iv Imposition of a EL on consideration for certain digital transactions received by a NR from a resident or NR having PE in the other CS</p>					

Fig 8.2

BEPS Action Plan 3: Strengthen CFC rules	
OECD Recommendation	Provisions incorporated in the Income-tax Act, 1961
<p>CFCs are foreign subsidiaries in tax havens in which the taxpayer has controlling interest. Since tax is generally levied on distributed dividend, tax in parent country could be avoided until the tax haven country actually paid dividend to the shareholders. The OECD regards CFC Rules as important in tackling BEPS and has made a series of best practice recommendations in relation to the building blocks of an effective CFC regime.</p> <div style="text-align: center;"> </div>	<p>There are no CFC Rules in the IT Act, 1961. However, Sec 115BBD has been inserted in IT Act, 1961 to encourage repatriation of profits by IndCos which have significant voting power in foreign Cos.</p> <div style="text-align: center;"> </div>

INTERNATIONAL TAXATION

Fig 8.3

BEPS Action Plan 4: Interest deductions and other financial payments														
Common Approach in 2015 Report	Provisions incorporated in the Income-tax Act, 1961													
<p>The common approach which directly links an entity's net interest dedns to its level of economic activity, based on taxable EBITDA includes three elements:</p> <table border="1"> <thead> <tr> <th></th> <th>Rule</th> <th>Basis</th> </tr> </thead> <tbody> <tr> <td>i</td> <td>Fixed Ratio Rule</td> <td>based on benchmark net interest/EBITDA Ratio</td> </tr> <tr> <td>ii</td> <td>Group Ratio Rule</td> <td>allows an entity to deduct more interest exp based on the position of its world wide group</td> </tr> <tr> <td>iii</td> <td>Targeted Rules</td> <td>address specific risks</td> </tr> </tbody> </table>		Rule	Basis	i	Fixed Ratio Rule	based on benchmark net interest/EBITDA Ratio	ii	Group Ratio Rule	allows an entity to deduct more interest exp based on the position of its world wide group	iii	Targeted Rules	address specific risks	<p>Sec 94B – Limitation of interest deduction [based on Fixed Ratio Rule]</p> <p>Is the borrower an IndCo or a PE of a Foreign Co?</p> <p>Yes No</p> <p>Is the borrower a bank or Ins. Co.?</p> <p>Yes → Sec 94B would not apply</p> <p>No → Does the int pd to NR AE exceed Rs.1 crore?</p> <p>Yes → Excess Interest not allowable as deduction</p> <p>No → Sec 94B would not apply</p> <p>Excess interest: Total interest paid or payable* in excess of 30% of EBITDA or int paid or payable to AE for that P.Y., whichever is less.</p> <p>*Total interest paid or payable may also be interpreted to mean interest paid or payable to NR AE.</p> <p>Disallowed interest can be c/f for 8 A.Y.s for dedn against PGBP income to the extent of max. allowable interest exp.</p>	
	Rule	Basis												
i	Fixed Ratio Rule	based on benchmark net interest/EBITDA Ratio												
ii	Group Ratio Rule	allows an entity to deduct more interest exp based on the position of its world wide group												
iii	Targeted Rules	address specific risks												

Fig 8.4

BEPS Action Plan 5: Counter harmful tax practices	
OECD BEPS Action 5 Report	Provisions incorporated in the Income-tax Act, 1961
<p>Action 5 report identifies factors for determining a potential harmful tax practice that results in low or no effective tax rate, lack of transparency, negotiable tax rate or base etc.</p> <p>For instance, in case of R&D activities, the nexus approach recommended by the OECD under BEPS Action 5 requires attribution and taxation of income arising from exploitation of IP in the jurisdiction where substantial R &D activities are undertaken instead of the jurisdiction of legal ownership.</p>	<p>Sec 115BBF of the IT Act, 1961 – Tax on income from patent</p> <p>Where the TI of the eligible assessee includes any income by way of royalty in respect of a patent developed & regd in India, then, such royalty is taxable @ 10% (plus app. surcharge & cess @4%).</p> <p>Applicability of concessional rate of 10% u/s 115BBF</p> <ul style="list-style-type: none"> Assessee should be a person resident in India, who is a patentee Income must be from a patent developed & registered in India Option for taxation of income u/s 115BBF to be exercised by assessee on or before due date u/s 139(1) for filing ROI <p>Meaning of developed</p> <ul style="list-style-type: none"> The invention should be one for which patent is granted under the Patents Act, 1970 At least 75% of the exp for such invention must be incurred in India

Fig 8.5

BEPS Action Plan 6: Preventing treaty abuse	
OECD Minimum Standard	LoB clause incorporated in Indian Tax Treaties
<p>Given the risk to revenues posed by treaty shopping, countries have committed to ensure a minimum level of protection against treaty shopping by including in their treaties:</p> <p>(i) the combined approach of Limitation of Benefits (LOB) and Principal Purpose Test (PPT) rule,</p> <p>(ii) the PPT rule alone, or</p> <p>(iii) the LOB rule supplemented by a mechanism that would deal with conduit financing arrangements not already dealt with in tax treaties</p>	<p>LoB clause in India-Mauritius Tax Treaty</p> <ul style="list-style-type: none"> On 10.5.2016, the India-Mauritius tax treaty was amended and for the first time, it has been provided that gains from the alienation of shares acquired on or after 1.4.2017 in a Co. which is a resident of India may be taxed in India. The tax rate on such capital gains arising from 1.4.2017-31.3.2019 should, however, not exceed 50% of the applicable tax rate on capital gains in India. LOB Clause provides that a resident of a CS shall not be entitled to the benefits of 50% of the tax rate app. in transition period if its affairs are arranged with the primary purpose of taking advantage of concessional rate of tax. A shell or a conduit Co. claiming to be a resident of a CS shall not be entitled to this benefit. A shell or conduit Co. is any legal entity falling within the meaning of resident with negligible or nil business operations or with no real and continuous business activities carried out in that CS. <p>LoB clause in India-Singapore Tax Treaty</p> <ul style="list-style-type: none"> The India-Singapore tax treaty has been amended to provide that capital gains on alienation of shares would be taxable in a similar manner as laid out in India-Mauritius tax treaty, subject to LoB clause. The transition period benefit is also similar to that contained in India-Mauritius Tax Treaty.

Fig 8.6

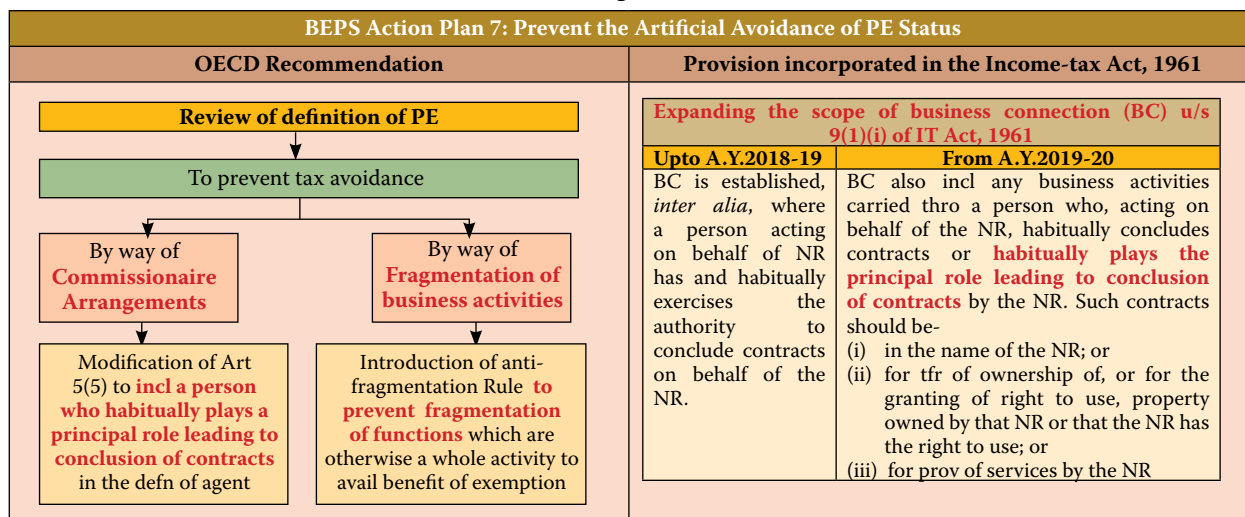


Fig 8.7

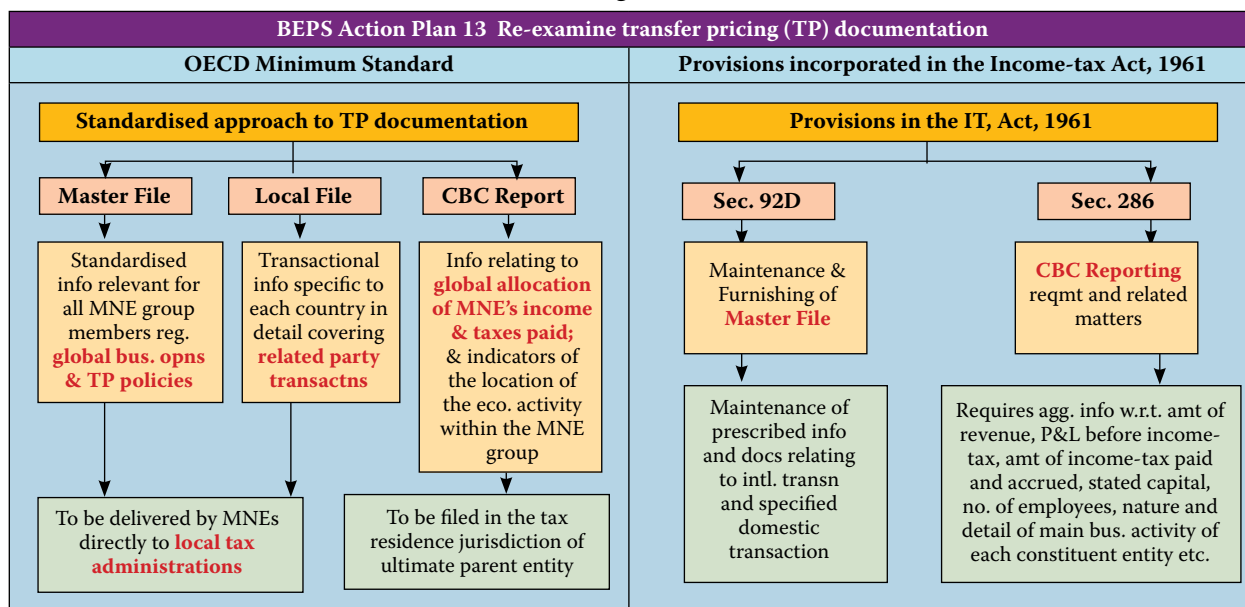


Fig 8.8

