

Raymond Chin's initial views on the HP Committee Report. - Received October 18, 2001

Below are my initial comments/thoughts on the subject:

1.Revenue Sharing

Whilst the Committee's concern on the potential loss of revenue to India in e-commerce is relevant and shared by many developing countries like Singapore, Malaysia and Hong Kong who are net importers and users of e-commerce technologies, the approach suggested in the report may not necessarily increase India's revenue from such transaction. On the contrary, the approach as suggested by the Committee may risk the flow of FDIs into India in the long term, if foreign corporations were to be subjected to Indian tax in e-commerce transactions that are considered as having been generated in their home country. The incidence of double taxation on the same revenue source (with or without tax credit) would rise and ultimately, it could flow as a cycle through increased cost of doing business in India. On the other hand, it is understandable that countries would want to ensure that tax is collected where tax is due, particularly when transactions are concluded between its nationals and companies located in offshore centers which pay no tax. A pragmatic approach involving consultation with member states to solve the problem of double taxation and revenue sharing has to be adopted given that e-commerce has no borders and nationals of both countries could be doing businesses with each other simultaneously through electronic servers/web-sites. The use of the base erosion approach has to be considered carefully.

2. Concept of P.E.

The ever changing "landscape" of e-commerce has, no doubt, given rise to the question of whether the PE concept as defined in most DTAs (and as considered by the OECD) would continue to be relevant in determining whether the activities of a foreign corporation (or lack of it), fall into the country's tax net. Whilst, there may be a case to say that the old definition of PE under the OECD needs review, the concept, in my view should not be totally abandoned. Given that e-commerce transcends borders and are conducted via electronic and digitized forms, it cannot be ignored that many of today's businesses continue to be conducted under a mix of old economy style brick and mortar business and electronic means. There will still be physical delivery and/or manufacture of goods upon fulfillment of the e-commerce transactions while in other instances, e-commerce may be fulfilled via electronic means eg. electronic transfers or down loading of digitized software applications over the air.

In my view, a too rigid approach as to what constitutes a pe arising from e-commerce may not necessarily yield the desired result of collecting more revenue for the Indian government. It may hinder the flow of FDIs and the development of technologies in India.

3. Taking the cue from developing countries.

While the issue on how profits from e-commerce should be taxed is being debated in various jurisdictions with differing viewpoints, the Committee may wish to give consideration to guidelines already issued by some developing countries such as Singapore and Hong Kong. Both Singapore and Hong Kong have taken the lead to address the taxation of e-commerce. For instance, the location of the server itself would not be regarded as a PE of the foreign company in conducting business in these countries. More importantly, they look at the so-called 'operation or activity test' i.e. to what extent is the foreign company conducting its e-commerce business in the country?. Whether or not a foreign company is carrying on its e-commerce business in a country is a question of fact. In the case of Singapore, the authorities there adopted the operation test by ascertaining to what extent there has been activities undertaken in Singapore in the fulfillment of an e-commerce transaction and whether or not there were personnel stationed in Singapore whilst carrying out the transaction in Singapore. Hong Kong also subscribes to the 'operation' test. In the case of Singapore, they will continue to adopt the pe definition where there is a dta. In cases where a pe does not exist, then revenues may be collected via withholding taxes on royalties or technical fees which would be treated as final taxes. The Malaysian tax authorities is understood to be looking into e-commerce taxation as well and since both Singapore, Hong Kong and Malaysia tax systems are territorial in nature, it is envisaged that Malaysia will adopt the same approach.

4. Tax credit

The process of granting tax credit (bilateral or unilateral) may to some extent mitigate the effects of double taxation on the e-commerce supplier. However, this may not necessarily be accepted by some countries which permit the granting of tax credit only when the company concerned meets with the resident test. E.G. A company may be resident in its home country and its income derived from web-hosting or server in another country be considered as sourced both in its home country and the foreign country due to differing tax laws in each country. In such an event, the company may be doubly taxed without corresponding tax credit relief. Where there is a dta, it would be necessary for the competent authorities of both countries to invoke the mutual agreement procedure to determine which country should collect the tax and which country should give the credit. As this process usually takes time, the e-commerce provider and recipient of the revenue would suffer and ultimately this would push the cost of doing business to the detriment of the end users.

The above are my initial views and thoughts. I am sorry to have written such a long note to you but I hope my comments are useful.

Thank you and best regards,

Raymond.