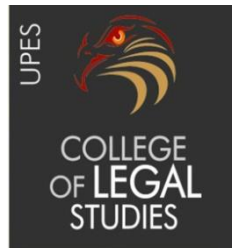


E-Commerce Taxation in India: Current Regime and Effect of GST

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**Submitted under the guidance of
Ms. Shipra Chauhan, Assistant Professor, COLS**

**This dissertation is submitted in partial fulfilment of the degree of
B.Tech. (CS), LL.B. (Hons.) with specialisation in Cyber Laws**



College of Legal Studies

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CERTIFICATE

This is to certify that the research work entitled “**E-Commerce Taxation in India : Current Regime and Effect of GST**” is the work done by Kunal Goyal under my guidance and supervision for the partial fulfilment of the requirement of B.Tech.(CS), LL.B. (Hons.) degree at College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

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DECLARATION

I declare that the dissertation entitled “**E-Commerce Taxation in India : Current Regime and Effect of GST**” is the outcome of my own work conducted under the supervision of Ms. Shipra Chauhan, at College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

I declare that the dissertation comprises only of my original work and due acknowledgement has been made in the text to all other material used.

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2011-2017

Date:

Abstract

The Internet has evolved from a network of computers to a global social phenomenon. Once a medium that offered access only to a few, the smartphone and mobile network revolution has thrown it open to a much wider and more varied audience. In the process it is transforming itself from a place where people exchange information to a place where people conduct business as well. The convenience provided by online business transactions – e-commerce – is the reason why more and more users are turning to the Internet for their buying and selling. This is not only changing the face of retailing and rewriting the rules of the game but also throwing up new challenges to the legal, policy-making and taxation fraternity at a pace that they are ill-equipped to deal with. This paper presents some of the major conceptual characteristics of e-commerce and the legal and taxation challenges that arise therefrom. It then suggests the approach that could be adopted for tackling these legal and taxation issues.

“If your business is not on the Internet, then your business will be out of business”

Bill Gates

Founder of Microsoft Corporation

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Chapter 1: Introduction

Introduction

Any business exchange which is done through the internet is known as Electronic business or Electronic Commerce. During recent times, business visionaries, both in India and in foreign countries are considering shifting their businesses to electronic and purchasers are inclining towards these E-Commerce websites for their requirements. The reason behind this is the successful results of present ecommerce giants like facebook.com, flipkart.com, amazon.in and many more ecommerce websites which are growing at a very high pace. The business income report which is generated every year of these ecommerce websites is clearly the factor why entrepreneurs these days are considering shifting their businesses to electronic medium.

During nineteenth century, a German jurist, Rudolf Von Ihering, stated: “While the States were fighting one another, trade found out and levelled the roads that lead from one nation to another, and established between them a relation of exchange of goods and ideas.”¹ This statement stated by Ihering in nineteenth century is more applicable in twenty first century. “Transnational activities are expanding at an unprecedented rate and it is expected that this trend will accelerate through the growth of ecommerce and computer networks.”²

E-Commerce has been defined by Roger Clarke as “conduct of commerce in goods and services with the assistance of telecommunications and telecommunications-based tools”³ A.R Lodder defines E-Commerce as “commercial activities concerning goods and services as well as any business, where the participants are not necessarily at the same physical location and therefore do apply communication means”⁴

Although there is no standard definition of E-Commerce but the term ecommerce is used to define a method of conducting business in electronic medium rather than in physical medium. It includes the whole process of delivery, payment facilitation and Supply chain and service management.

¹ Rudolf Von Ihering, “Law as a Means to an End” (Isaak Husik trans., 1913), quoted in Sidney Post Simpson & Julius Stone, Law and Society 313 (1948).

² Cited from “International Cooperation In The Enforcement Of Competition Policy”, Mitsuo Matsushita.

³ Cited from “Electronic Commerce Definitions”, Clarke.

⁴ Cited from “Legal Aspects of Electronic Commerce”, Lodder.

1.1 Research Methodology

1.1.1 Statement of Problem

The E-Commerce Industry has expanded with a pace like no Industry has ever grown. It has not stopped growing till now. Every day there comes a new branch in the field of E-commerce in various forms sometimes in form of new ecommerce model, some a new payment method and sometimes a whole new method such as M-commerce. It's a well establishment whenever there is a development, it comes with the set of difficulties which needs to be resolved. There are basically two challenges which are discussed in this thesis which are (i) the challenges related to Taxation of E-Commerce Transactions in India under the current tax regime that is Income Tax Act, 1961 and (ii) how the new coming GST law is going to effect this taxation process and challenges coming along with GST law.

1.1.2 Objective of Study

By observing the growth opportunities in Ecommerce sectors, many visionaries made a jump to try their hand in E-Commerce sector. With this there is a rapid growth of businesses in E-Commerce sector. With E-Commerce businesses comes the E-Commerce transactions and every transaction involves transfer the property in goods or services via E-commerce medium for a legal consideration as it is a sale and therefore there is need to tax these sales. But there was no statute present for taxing such transactions and that's why government started taxing the same using current tax regime, but as transactions on physical world are different than transactions in virtual world, so there were issues arising and the impact was on ecommerce operators and this becomes the objective of this thesis to identify issues faced by ecommerce operators due to current tax regime and to examine whether upcoming taxation framework is capable of resolving those issues.

1.1.3 Scope of Study

This thesis would deal with issues faced by ecommerce operators in India due to present tax regime and which are the areas of taxation of ecommerce transactions in which due to the absence of law these issues are arising. It would also be examined that how foreign countries such as European Union and United States are dealing with such issues and what provisions do those countries have in their tax regimes to tackle with those issues. Then the upcoming tax regime for taxation in India that is GST would be examined to check whether the issues faced by ecommerce operators under current regime would be resolved by the GST Law. A thorough study of provisions of GST with respect to ecommerce transactions and loopholes (if any) in GST law.

1.1.4 Hypothesis

At base level, this thesis deals with issues faced by ecommerce operators in current tax regime, and need of legal framework to deal with such issues. In the past years, ecommerce businesses rise with an exponential growth. Everything now a days is online and can be bought and even sold by anyone. So much ecommerce transactions with so much difference than physical transactions arises complexity in taxing such transactions. Henceforth, it is noteworthy that many of the issues such as jurisdictional issues, choice of law issue can arise while taxing ecommerce transactions. The traditional approach to tax these transactions is not that successful. This thesis will identify the issues faced by ecommerce operators following different models for conducting their businesses and will find the solutions to these in the present tax statute and in judgements passed by courts. Moreover this thesis will come up with some recommendations on the basis of present issues so that it can help the upcoming tax statute to come up with solutions to these issues.

1.1.5 Methodology

The methodology for research for the completion of this thesis would be mostly Doctrinal, analytical or descriptive, applied, comparative and some part would non doctrinal. The methodology would be doctrinal because the issues arise in this thesis

are due to absence of law on that issue and during this thesis various legal doctrines, legal frameworks and case will be closely examined and analysed in a logical, systematic and scientific way to come up with solutions to these issues. The methodology would also be descriptive because the provisions in existed framework, doctrines and established facts would be stated and mentioned in the paper as they are, as there is no control over the variables. The researcher shall also be using the applied research methodology as the researcher is attempting to reach probable solution for the taxation issues in the e-commerce business. And finally the comparative method of research would be to facilitate the descriptive method. The research methodology for this paper requires gathering relevant data from the various statutes, norms, regulations, scholarly articles of different authors, journals and books and compiling databases in order to analyse and compare the material and arrive at a more complete understanding of the concerned issues. This thesis will utilize the deductive method of research as the general findings have in the end been concluded to lay about a result summing up the entire research.

1.1.6 Literature Review

The main objective of this thesis is to analyse the various issues in taxation of E-commerce transactions due to the present tax regime. And for this purpose a number of article and books have been consulted. The general text of this thesis consists of text books, articles and publications and statutes. The below mentioned materials shall be scrutinized so as to reach a conclusion. The books and articles referred are discussed below, in short:

Articles and Publications:

1. E-Commerce in India: Drivers and Challenges, Article by Price Water House Coopers

This article is really PWC'S elucidation of E-trade business in India and the key drivers and difficulties that the E-business segment is confronting right now. The article examinations the different purposes for these difficulties. Consequently, the utilization of this article in this postulation is advocated as

this theory likewise concentrates fundamentally on specific difficulties confronted by the E-business part in India and also abroad.

2. E-Commerce in India: Legal, Tax and Regulatory Analysis, Research paper of Nishith Desai and Associates, International Legal and Tax Counsellors (July, 2015).

This article begins with characterizing E-trade and after that covering different parts of E-business, for example, contracts in E-trade, an industry shrewd investigation of E-business advancement in India and in particular this article examines the administrative and lawful system of E-trade in India. The different perspectives talked about inside this article identifying with protected innovation its requirement and risk in regards to it has additionally been managed in this article. Therefore this article is critical in the exploration of this proposition and has guided the examination in a right and positive way.

3. Vivek Sharma, *Impact of GST on Online Marketplaces*, PWC (September 29, 2016, 12.20AM), <http://www.pwc.in/assets/pdfs/publications/2016/pwc-iamai-impact-of-gst-on-online-marketplaces-may-2016.pdf>.

The writer in this article follows the suggestions that India's Trade Felicitation Policy of 1991 as the aftereffect of monetary changes and how E-business is presently a crucial piece of the economy of India. The article examines that the quick development of the E-business area in India is certainly ascribed to the steady increment in innovation. The writer additionally examines the opposition issue that perseveres in the market players and the counter focused arrangements of the officially settled organizations. Consequently, this article has been alluded to comprehend the development of E-business in India and the essential issue of rivalry in Indian market.

Books

1. 2, Kanika Seth, *Computer Internet And New Technology Laws* (2nd Edition, 2013)

The author in this book has made an endeavour to characterize E-business and has created a key examination for definition of approaches viewing E-trade as his recommendation and also the tax assessment administration of E-trade and web based business in connection to Taxation laws. The different parts of this book have turned out to be vital in the exploration of this proposal.

2. P.T Joseph, Ecommerce-An Indian Prospective (2015)

The thorough scope of this fourth version furnishes the understudies with the most recent data in internet business ideas, models, procedures, and methods that can be utilized to fabricate helpful web based business applications. The scope of points secured is wide, making this book a strong starting content for the quickly growing number of courses in online business for business understudies at the undergrad or postgraduate level, and furthermore for understudies seeking after courses in PC applications, data innovation and data science. The book includes a few complete and various contextual analyses and information on Indian enterprises, and in addition multinational organizations demonstrating achievement and disappointment of their Web-based electronic plans of action. New material on advancements in innovation and general business technique has been included every one of the parts.

3. David Whitley, E-Commerce : Strategy, Technology and Application (2014)

This book exhibits the innovation and procedures behind web based business and e-administration. It additionally underscores the significance of security of exchanges in the electronic condition. With such a broad scope, the book will be helpful to individuals in exchange and trade and to organizations which are attempting to grow utilizing Internet and intranet business. Understudies and instructors of web based business will find that the innovation and procedures that make web based business click have been tended to in detail. The book will likewise be of huge incentive to government authorities, money related organizations, open division and the private business quick to find out about 'The Cutting Edge of Business'.

1.1.7 Research Questions

The researcher has framed the following research question after analysing the literature on proposed thesis:

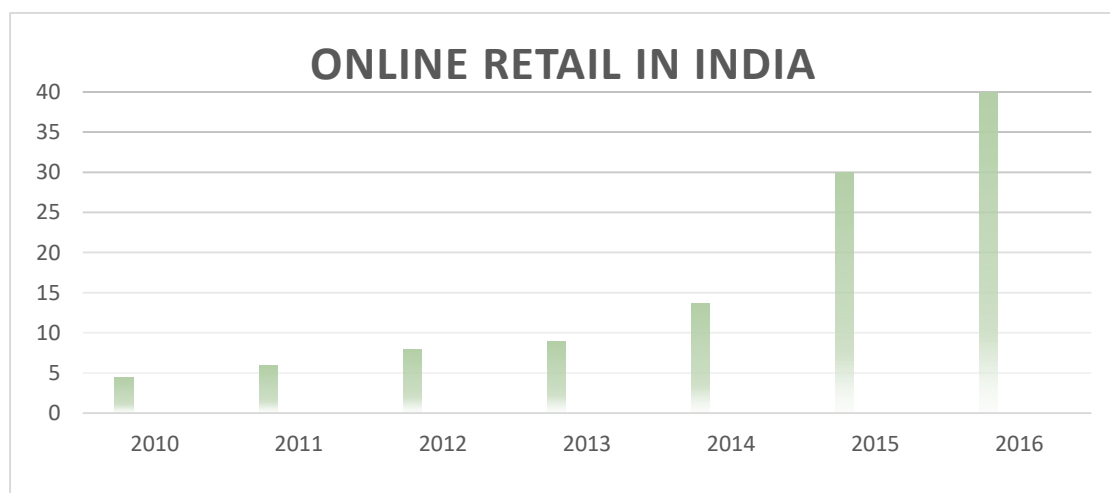
1. What are the issues prevailing in the taxation of Ecommerce transactions under current tax regime?
2. What is GST? How GST come up with the solutions to these issues?

Chapter 2-Electronic Commerce

2.1 Introduction

In the digital age, the conventional methods of transacting business has become extinct as E-Commerce using latest technologies has overcome the transactional manners of transacting business. The E-commerce sector with the help of advance technologies is becoming more reachable and efficient. *Use of computers and Information Technology to transact business by and between entities and individuals is termed as Electronic Commerce.*⁵ The markets have transformed from local markets to big shopping malls and now from big shopping malls to online market place where Business to Business (B2B) and Business to Consumer (B2C) transactions are done with the help of payment gateways and online wallets. The simplicity of accessing Information and Communication Technology (ICT) prompted internet based payment methods including net banking, and mobile payments has played a vital role in the development of E-Commerce.

Recent statistical reports has indicated phenomenal progress in the digital commerce market in India. The digital commerce market in India has grown steadily from \$4.4 billion in 2010 to \$17 billion in 2014 to \$30 billion in 2015 and was expected to touch \$38 billion by 2016 but the revenue has gone far beyond than \$38 billion. It is expected to reach \$120 billion by 2020.⁶



⁵Evolution of E-commerce in India, PWC (Feb. 22, 2017, 10:10 a.m.), <https://www.pwc.in/assets/pdfs/publications/2014/evolution-of-e-commerce-in-india.pdf>.

⁶ Statista Report, [Statistics and facts about e-commerce in India](http://www.statista.com/topics/2454/e-commerce-in-india/), Statista (Feb. 22, 2017, 10:21 a.m.)

2.2 Mobile Commerce – Accelerator of E-Commerce

The International Telecommunication Union in its *Trends in Telecommunications Report 2014* reported that there has been a tremendous growth in the ICT sector, especially in the demand of mobile services and mobile data services, use of 4G, international gateway services and increase of wireless usage in developing countries.⁷ The increase in the usage of mobile devices has added to the development of *digital commerce through mobile devices also known as Mobile Commerce or M-Commerce*. In a report by Google it was revealed that 67 percent of digital commerce is performed using mobile devices such as Mobile Phones and Tablets and as many as 40 percent of Google searches in India is performed using mobile devices.

According to a research conducted by PayPal in conjunction with Ipsos in 2015, it is indicated that global *Mobile Commerce growth should outpace Electronic Commerce by 3:1*.⁸ There are multiple reasons for the fast growth of M-Commerce as compared to Electronic Commerce. As per the PayPal's report, the escalation in smartphone shopping growth comes from young adults falling within the age of 18-34. Out of all the online shoppers surveyed, about one third of them have assented to the fact that they have used their smartphones for making an online purchase in the past twelve months.

PayPal reports that out of all the smartphones user surveyed, 64 percent users reported using mobile application for making online purchase as compared to the 52 percent users who used mobile browser for the same. There were two main reasons provided by the users for the use of Mobile App i.e. Convenience (by 35 percent users) and Speed (by 30 percent users). Two other major cited by those who were surveyed are Instant Payment Confirmation and having a reminder in the app to use discount vouchers and coupons.

As per the survey the only barrier in the growth of the mobile commerce is the size of the mobile screen. Although tablets are one of the solution to it but still users prefer using laptop or desktop because of website functionality. Another barrier was security.

⁷ ITU, *Trends in Telecommunication Reform 2014-2015: Enabling Tomorrow's Digital World, 14th Edition 2014-2015*, (Feb. 29, 2017, 10:30 AM) <http://www.itu.int/ITU-D/treg/publications/trends14.html>.

⁸ PayPal, *PayPal Mobile Research 2014-2015 Global Snapshot*, (Feb. 29, 2017, 11:30 AM) https://www.paypalobjects.com/webstatic/en_US/mktg/pages/stories/pdf/paypal_mobile_global_snaps_hot_2015_2.html.

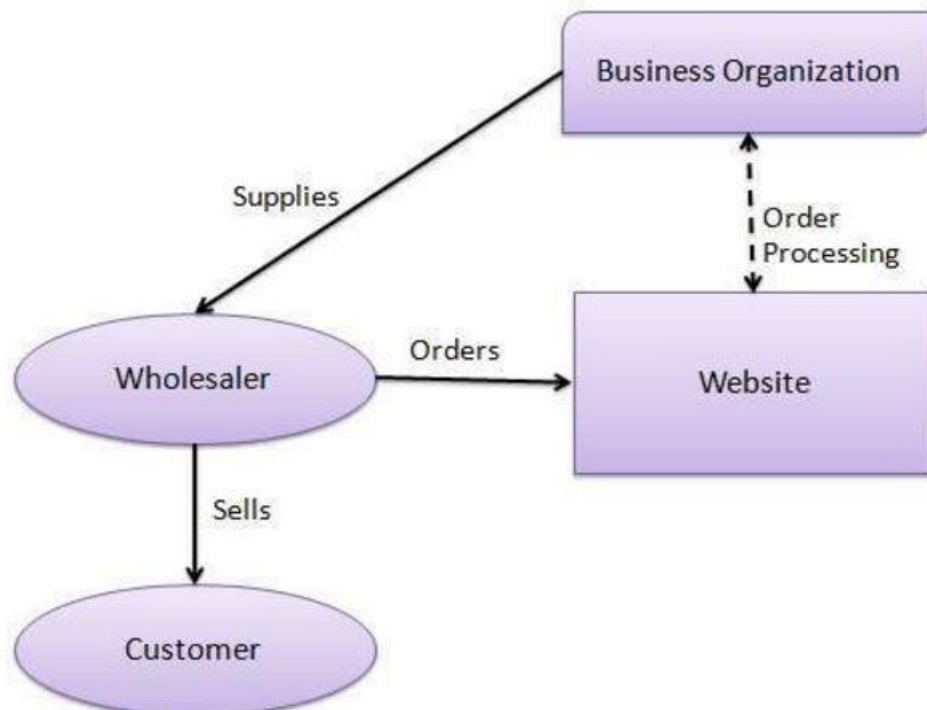
2.3 Models of E-Commerce

Electronic Commerce business models are generally categorized into following categories:

- Business to Business (B2B)
- Business to Consumer (B2C)
- Consumer to Consumer (C2C)
- Consumer to Business (C2B)
- Business to Government (B2G)
- Government to Business (G2B)
- Government to Citizen (G2C)

2.3.1 Business to Business (B2B)

A business transaction between two businesses is termed as B2B. The seller sells goods or services that are further used by buyer to conduct his business. E-Commerce websites which follow B2B business model sell its products (or goods) to an intermediary who further sells the product to final consumer. The E-Commerce websites who perform this type of business practices are Alibaba and IndiaMART.

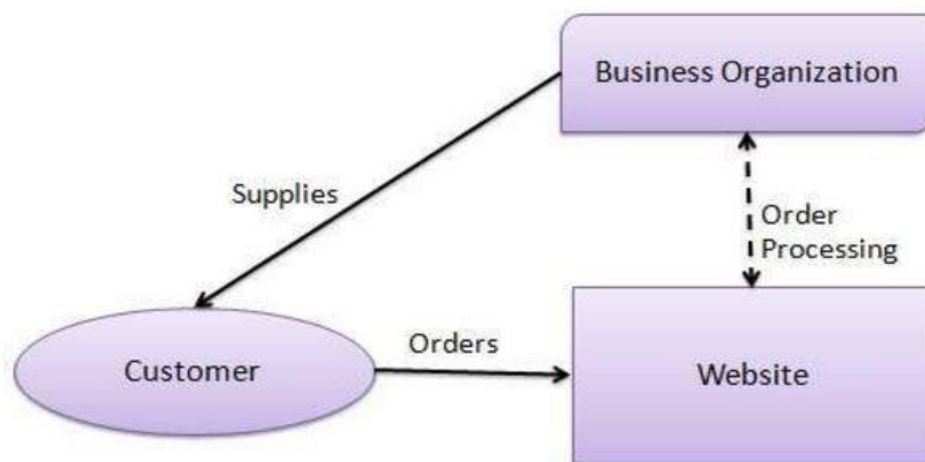


A wholesaler puts an order on company's website and after collecting the delivery, sells the final product to end consumer who comes to buy the goods at wholesaler's retail outlet.

2.3.2 Business to Consumer (B2C)

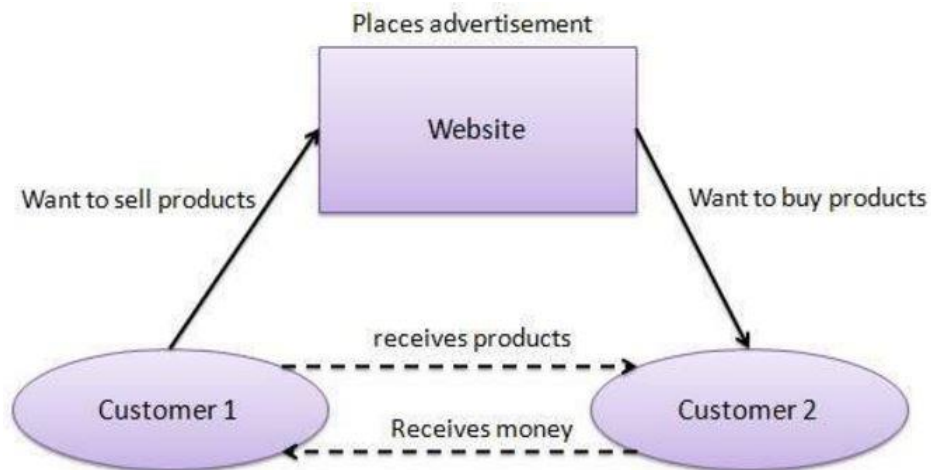
A business transaction between a business entity and a consumer. E-Commerce websites which follows B2C business model sell its products directly to consumer unlike B2B in which there was an intermediary present. The E-commerce websites which run on this business model are Flipkart, Amazon, Ebay etc.

A customer can view the products on the website of the business organisations. The website is continuously updated by business organisation with the latest products available with them. So a customer has a variety of products to choose from. The customer then choose the product and order the same. The website forwards the details of the chosen product to business organisation via email notification and organisation will dispatch the goods to customer.



2.3.3 Consumer to Consumer (C2C)

A business transaction between two different consumers. Websites which follows C2C business model offer classified auctions or even matrimonial advertisements wherein the interaction is that of consumer with another consumer. It entirely depends upon the website whether or not to charge the consumers for their services. The Ecommerce websites like Olx, Quikr (free of charge) offer classified auctions and like Shaadi.com (charge the consumer) offer matrimonial advertisement.

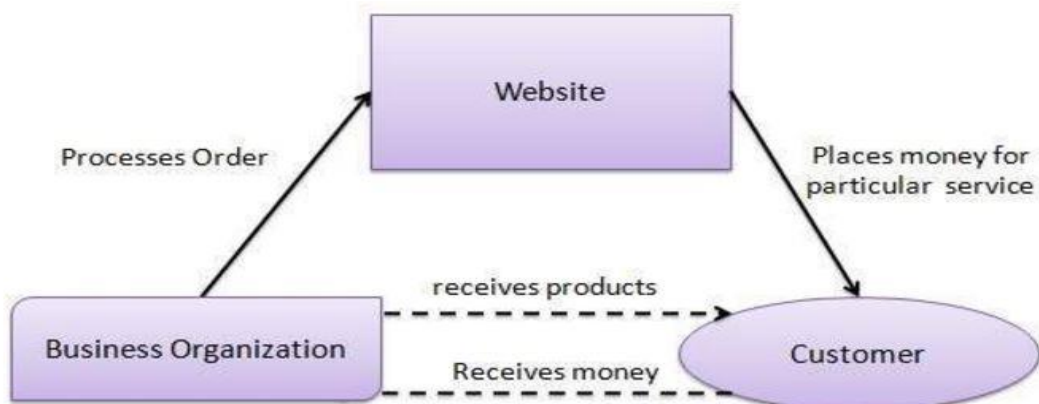


2.3.4 Consumer to Business (C2B)

In this model, a consumer sells products and services to businesses, instead of it being the other way around. A consumer approaches website demonstrating numerous business associations for a specific service. For instance Job Portals like Naukri.com where end user (the prospective employee) lists their product i.e. resume to attract businesses to hire them.

Another example could be of Ecommerce websites like Policybazaar.com where website lists the comparison of interest rates of loan provided by different banks and consumer puts his requirement for loan with and the banks contact him with best plans meeting his requirements.

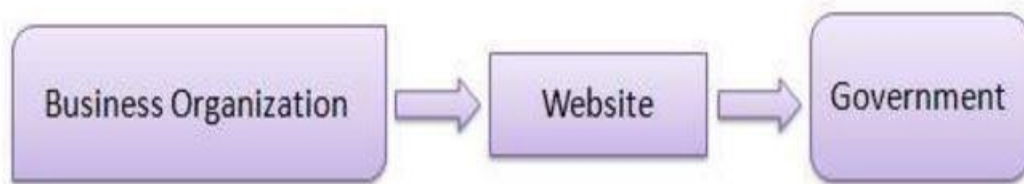
There are many examples like Shiksha.com where one puts requirement of certain course and institutes providing that course contact him.



2.3.5 Business to Government (B2G)

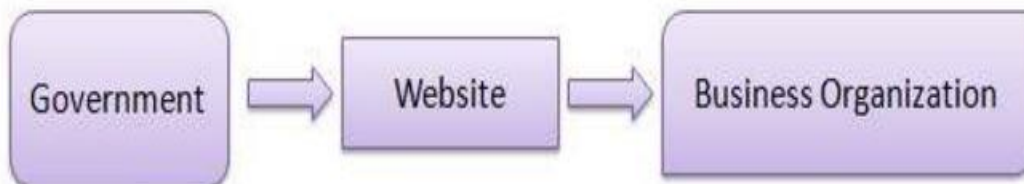
B2G business model is a variation of B2B business model. It's a transaction between business entity and government. Such websites are used by government to exchange and trade information with different business organisations. Such websites are certified by government and give a medium to the business organisations to submit any type of application form to government.

For instance MERX, it is an online portal where business entities are able to bid on government contracts.



2.3.6 Government to Business (G2B)

Government used G2B business model to approach and interact business organisations. This business model supports tenders, auctions and application submission facilities.



2.3.7 Government to Citizen (G2C)

It is transaction between government and citizen. Government uses this business model to approach and interact with citizens in general. Such websites provide services like registration of birth, death or marriage certificates. The websites which provide ease to register online for Aadhar card also lies in the purview of this model.

<https://uidai.gov.in>

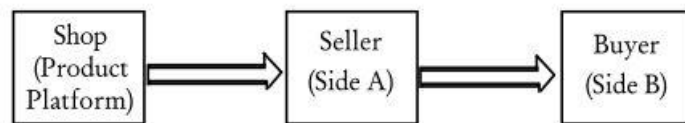


2.4 Platforms

A platform is defined as a product, service or system which provides an environment of technologies that permits various kind of users and complementary business partners to interact and benefit from the platform's masked functionality. These business partners are also called complementors.

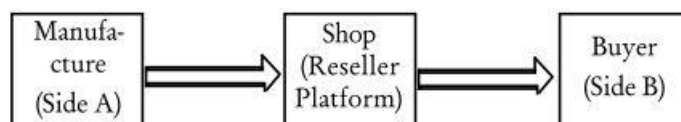
Traditional companies were engaged in production and selling of products or services. But with the coming of internet and advanced technologies like cloud computing, more and more application ideas are implemented by companies that permits business entities and consumers to interact and transact business. For the better understanding of concept of platform let us examine various types of platforms which are used in virtual space.

In the physical world, shops provide facility for consumers to purchase goods as shown in the figure:

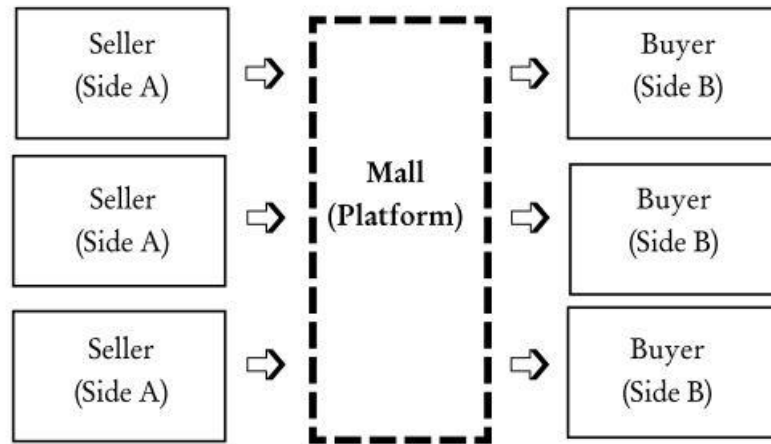


Here shops are providing a medium to the seller and buyer to conduct business between them. It is a one-is-to-one relationship and therefore traditional shops are said to be **One-Sided Platform or Product Platform** i.e. only one party (i.e. buyer) act as customer who transacts with other party (i.e. Seller) while the shop which is providing the platform only acts as facilitator.

Another way of conducting business on this same model is where retailer resells the goods or products manufactured by some other party. It is known as **Reseller Platform**. Note that there is only customer in this platform i.e. Side B (Buyer).



Shopping Malls in physical world facilitate the interaction process by providing different type of platform as shown in the figure:



Here mall provide a platform to multiple sellers by renting them space and are therefore customers for the mall. On the other side is the buyer who interact and transacts with sellers of his choice but is not the customer of the platform i.e. mall. Therefore this also one sided transaction because the platform is making money from one side i.e. from seller only.

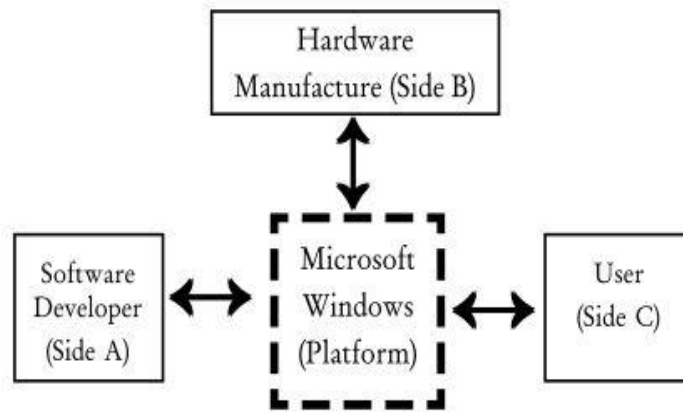
But that is not the case of Debit/Credit Card Companies like Visa or MasterCard or Games consoles (Gamers and game developers). In this the transaction flow is as follow:



Here VISA provides a medium and facilitate the transaction between merchant and buyer by providing them with a platform for making payments. But in this platform unlike above discussed platform both side have to pay to the Platform for the services it provides, the cardholder pays the card fees and merchant pay the commission on each sale to the platform. This is an example of **Two Sided Platform**. Even if the credit card company gives free service (i.e. does not charge any monthly or annual fee from credit card holder) to the cardholder but the holder still has customer relationship with the Company, by consuming the services provided by the company.

Another category of platform is **Multi-Sided platform**. It provide a medium for different users to interact and transact business that results in multiple revenue stream from

multiple players. The illustration of such platform can be Microsoft Windows, where users i.e. buyers can interact and transact with application or software developers (sellers) and hardware suppliers. Multiple players generate multiple revenue stream for platform there it has multiple customers.



The two main characteristics of Multi-Sided platform that differentiate it from other platforms are:

- It provides a direct interaction between two or more participants at a single time.
- Each side or group of participants is the customer of platform in a meaningful way irrespective of the fact whether it is paying to platform or not.

2.5 Laws on E-Commerce

There are multiple issues related to cyberspace such as need for high level security in online transactions so that trust of people can be built in order to encourage them to use more online methods of payment. This security can only be provided by an adequate legislative framework to govern E-Commerce. There is an E-Commerce model created by UNCITRAL which forms the basis of many legislations across the world relating to E-Commerce. India also has enacted IT Act, 2000 based on UNCITRAL Model Law of E-Commerce and created a legislative framework that governs not only E-Commerce but also Data Protection and Consumer Protection.

2.5.1 UNCITRAL Model Law on E-Commerce

The Model Law on E-Commerce was adopted on 12 June, 1996 by United Nation Commission on International Trade Law (UNCITRAL).⁹ The aim of Model Law on Electronic Commerce (MLEC) is to enable and facilitate electronic commerce by overcoming legal obstacles in international trade through internet. The MLEC was first legislation to adopt the fundamental principles of technological neutrality and non-discrimination. The principle of Technological neutrality ensures that such legislative provisions to be adopted which are neutral with respect to the technology being used. The neutral rule aims at accommodating any future technological development without further legislative framework. The principle of non-discrimination mandates that electronic document would not be denied legal validity or enforceability. The Model law is explained through a guide to enactment. The Guide to Enactment explains that Model Law adopts the functional “equivalent approach” and declares that electronic contracts and electronic documents are as legally valid as paper based contracts.

There are states which have adopted the principles illuminated by MLEC such as India, Mexico, and Australia but there are many states which are not ready to accept that traditional documents or signatures can be replaced by electronic documents or signatures. The UNCITRAL Model Law has setup uniform set of laws on E-Commerce that will continue to guide different legal systems to achieve a regime that adopts technological neutrality, non-discriminatory and functional equivalent approach.

⁹ UNCITRAL, *UNCITRAL Model Law on Electronic Commerce with Guide to Enactment*, (Mar. 04, 2017, 09:20 PM), http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html.

2.5.2 E-Commerce and India's Information Technology Act, 2000

In India, the IT Act, 2000 was enacted to facilitate E-Commerce and grant legal recognition to e-contracting as one of its main objective. The preamble to the IT Act, 2000 read as follows:

*“An Act to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as "**electronic commerce**", which involve the use of alternatives to paper-based methods of communication and storage of information, to facilitate electronic filing of documents with the Government agencies and further to amend the Indian Penal Code, the Indian Evidence Act, 1872, the Bankers' Books Evidence Act, 1891 and the Reserve Bank of India Act, 1934 and for matters connected therewith or incidental thereto.”¹⁰*

The basis of the Indian IT Act is Model Law on Electronic Commerce adopted by United Nation Commission on International Trade Law (UNCITRAL). The provisions of the IT Act which helped facilitating the Ecommerce in India are Section 3 which provides for the authentication of electronic records, Section 4 which provides for legal recognition of the electronic records, Section 5 which provides for the legal recognition of the digital signatures and Section 10 A which validates the contracts formed through electronic means giving validity to click accept methods.

2.5.3 Miscellaneous Laws on E-Commerce in India

Marketing or Retailing in India is controlled by state and central acts which differentiate the multiple shareholders in the supply chain and impose suitable charges on the exchanges or transactions. In 2013, the FDI was allowed by government in multi-brand retail but due to change in government in 2014, there is some ambiguity in this matter. The present position vis-à-vis FDI with respect to E-Commerce is contained in ***Consolidated FDI Policy Circular 2016*** which permits 100% FDI in Business to Business (B2B) E-Commerce but no FDI is permitted in Business to Consumer (B2C). But there are few exceptions where FDI in B2C E-Commerce is permitted:

- Where a manufacturer is manufacturing its products in India is permitted to sell through E-Commerce retail.

¹⁰ The IT(Amendment) Act, 2008, No. 21, Acts of Parliament, 2008 (India).

- Where a single brand retail trading business is operating through its stores on the grounds is permitted to undertake retail trading through E-Commerce.¹¹

Apart from FDI Policy, any other law which would apply to E-Commerce business are:

- The **Sales Tax Act** states all sales within a state attract Value Added Tax (VAT) and **Central Sales Tax, 1956** is applicable on inter-state sales. Upcoming Goods and Service Tax may supersede the present tax regime.
- The **Indian Contract Act, 1872** would apply to ensure valid enforceable arrangement between different stakeholders of an E-Commerce business i.e. buyers, sellers and marketplace platform itself. Because in case of any breach or dispute between seller and marketplace platform, the resolution to the dispute can be determined from the obligations mentioned in the contract between the parties. In addition the **Specific Relief Act, 1968** provides the additional remedy of specific performance.
- The laws related to intellectual property such as **Copyright Act, 1957** and **Trademark Act, 1999** can also be referred in order to determine the intellectual property rights of the stakeholders. For example if any seller is selling fake goods of a very well established brand via marketplace platform due to which there is damage to the reputation of brand, the seller may be sued by the legal brand owner under the said acts.
- The organisation operating an E-Commerce business would also need to fulfil the obligation of applicable local laws such as **Shops and Establishments Act** which are different in different states with respect to their physical establishments.
- Further to protect the rights of online consumers, the provisions of **Consumer Protection Act, 1986**¹² and **Sales of Goods Act, 1930** are also applicable.
- There are some special statutes applicable pertaining to specific goods such as **Food Safety and Standards Act, 2006** (for E-Commerce websites such as Box8 and Foodpanda.in) that require specific declarations such as vegetarian/non-vegetarian sign, best before date and nutritional facts amongst other information to made of every packaged food delivered and **Drugs and Cosmetic Act, 1940**

¹¹ Consolidated FDI Policy, 2016. *Department of Industrial Policy and Promotion. Ministry of Commerce and Industry, Government of India*, (Feb. 25, 2017, 12:40 AM), http://dipp.nic.in/English/policies/FDI_Circular_2016.pdf.

¹² CONSUMER PROTECTION ACT, 1986. Sec. 2, Cl. m.

for declarations to be made on products other than food such as medicines delivered online for websites like Apollo.com.

- With respect to B2B business model, the **Competition Act, 2002**¹³ puts a stop on any anti-competitive agreements, monopolistic and restrictive trade practices that involve abuse of dominant position by a party. It also regulates any kind of combinations of enterprises through mergers or amalgamations of enterprises. This is a general law and will apply in same manner on online businesses too.
- Criminal Liability for any kind of injury or damage caused by any defective product or services being delivered online is imposed by the provisions of **Indian Penal Code, 1860**. IPC contains punishment for certain offences such as false weights and measures,¹⁴ false property marks¹⁵ and adulteration of goods¹⁶ apart from the punishment for breach of trust¹⁷, impersonation and cheating¹⁸ besides other provisions to protect a customer's interest. In order to apply IPC party has to establish beyond reasonable doubt *mensrea* i.e. intention to cause harm and *actusrea* i.e. act to cause injury. This is a general law and will apply in same manner on online businesses too.

¹³ The Monopolies and Restrictive Trade Practices Act, 1969, No. 67, Acts of Parliament, 1969 (India).

¹⁴ INDIAN PENAL CODE, 1860. Sec. 265.

¹⁵ INDIAN PENAL CODE, 1860. Sec. 481.

¹⁶ INDIAN PENAL CODE, 1860. Sec. 272.

¹⁷ INDIAN PENAL CODE, 1860. Sec. 406.

¹⁸ INDIAN PENAL CODE, 1860. Sec. 419, Sec. 420.

Chapter 3-Taxation of E-Commerce under Current Tax Regime

3.1 Introduction

E-Commerce is not only the means of transacting business but for some businesses it is the business itself. E-Commerce includes various activities like sale, license or making of offers or supply of goods and services for consideration or otherwise and also includes services to provide internet connectivity. In cyberspace, various E-commerce models exist to transact business such as

- Brick-n-mortar model where no online business activity takes place;
- Click-n-mortar model and Click-n-brick model where some part of the business activity takes place online; and
- All-clicks model where the whole business takes place online. This model covers sale and purchase of intangible property such as sale or licensing of the software on the internet.

For applying tax provisions in online world various obstacles such as jurisdiction often puts a restriction and it becomes hard to enforce traditional statutory tax provisions to online activities or to implement these laws efficiently in cyberspace. In business models like brick-n-mortar, physical presence of business or substantial nexus factor is of material importance. Whereas in a click-n-mortar business model, the tax is being collected from the customer to whom the product is supplied as per jurisdiction of residence state of customer on the ground that their substantial nexus is the residence. The question of proving substantial nexus is an ambiguous point.

3.2 Issues in E-Commerce Taxation

In cyberspace, the issues related to taxation are very complex and due to this reason many E-Commerce companies in India are successful in evading tax. The complexities are:

1. VAT/CST ON E-COMMERCE TRANSACTIONS

In India, E-Commerce transactions faces a lot of hardships in regard to indirect taxation. Implementation of Value Added Tax (VAT) on online marketplace companies in some states is one of the major concern of E-Commerce operators. Further issue is related to the storage of goods acquired from various sellers by E-Commerce companies in their warehouses before the goods have been dispatched and delivered to the respective buyers. This confuses the tax authorities as they are unable to determine that whether

this movement of goods from sellers to warehouses would fall in the purview of sale of goods and would be chargeable to VAT/CST or not.

2. SERVICE TAX ON E-COMMERCE TRANSACTIONS

Service Tax is chargeable on any activity done by one entity for another for a legal consideration unless that activity is specifically exempted under any act. In Ecommerce businesses service tax can be charged on the online services provided. These services include development and supply of digital content and software, database access and retrieval services, access of online information and online advertisements. As per latest amendment in union budget 2015-16 which came into effect on 01-03-2015 service tax is also levied on aggregator model (restricted to aggregator of service only).

But being a digital transaction, the taxability of it is prone to various legislations of different territories. It faces double taxations and sometimes have to pay both VAT/CST (where ecommerce companies are treated as dealers for supplying and distributing goods) as well as service tax (where ecommerce companies are treated as service provide for providing platform to the multiple suppliers on their website) on a digital transaction.

3. ENTRY TAX ON E-COMMERCE TRANSACTIONS

Some states have amended their state tax legislations under which an additional tax is being charged from ecommerce companies for delivering products to their customers in their states. These states are Uttarakhand, West Bengal and Orissa.

This is an add-on to the already existing taxation problems of ecommerce companies.

4. ISSUE OF JURISDICTION

Even if it is determined that which tax is to be charged from ecommerce companies but it is still to be decided that on which state it will be charged. As goods travel from various states before reaching to the customer. Another issue is permanent establishment of ecommerce company is in different state in India and buyer is from different state, which makes it difficult to decide the jurisdiction to be applied on these transactions.

This issue gets worse when there is no Permanent establishment of E-Commerce Company in India.

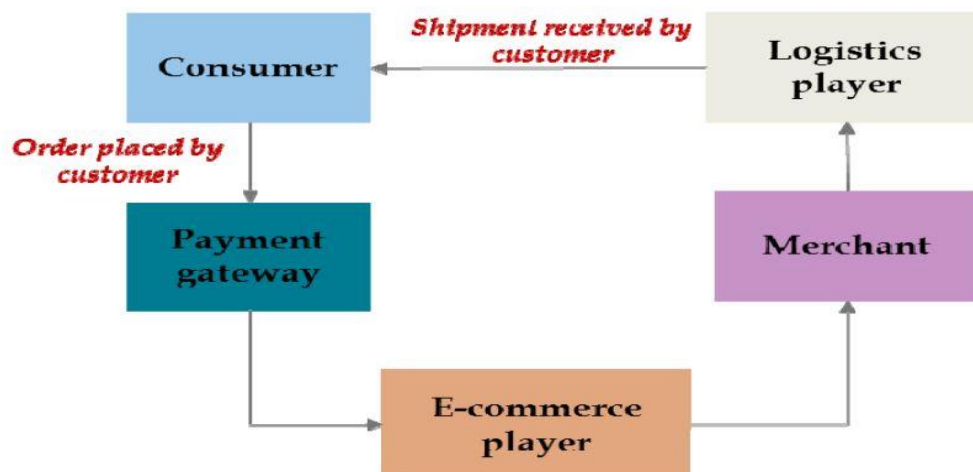
3.3 Transactions in E-Commerce Platforms

To determine how to tax an ecommerce transaction it is to be known how an ecommerce transaction takes place. There are various models each follow different mechanisms of transactions. The models are:

Open Market place Model

In this model, product is directly shipped by re-seller to customer. There is no influence on pricing. The Operator has no duty to maintain any inventory. It is prone to quality and delivery issues. Minimal capital investment is required for setting up this market place. This model is the most compliant model as from FDI point of view. This model is followed by Ebay.in.

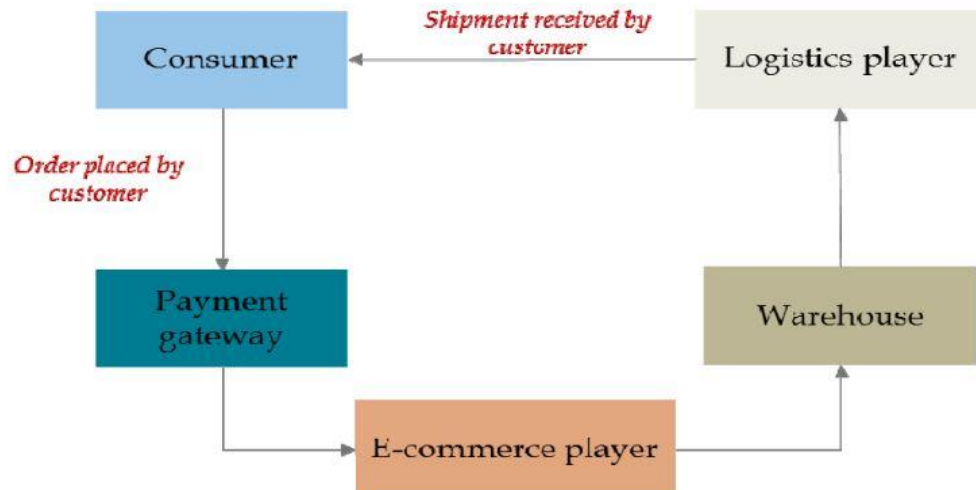
The customer chooses the product and places the order and make the payment. Operator by deducting its commission transfers the amount to the vendor. Vendor makes the delivery of the product to the customer.



Inventory Led Model

In this model inventory is maintained by operator. This model is better than open marketplace model because superior quality is assured to the customer and as the stocks are maintained and monitored so timely delivery is also assured. The only disadvantage is this model demands huge investment.

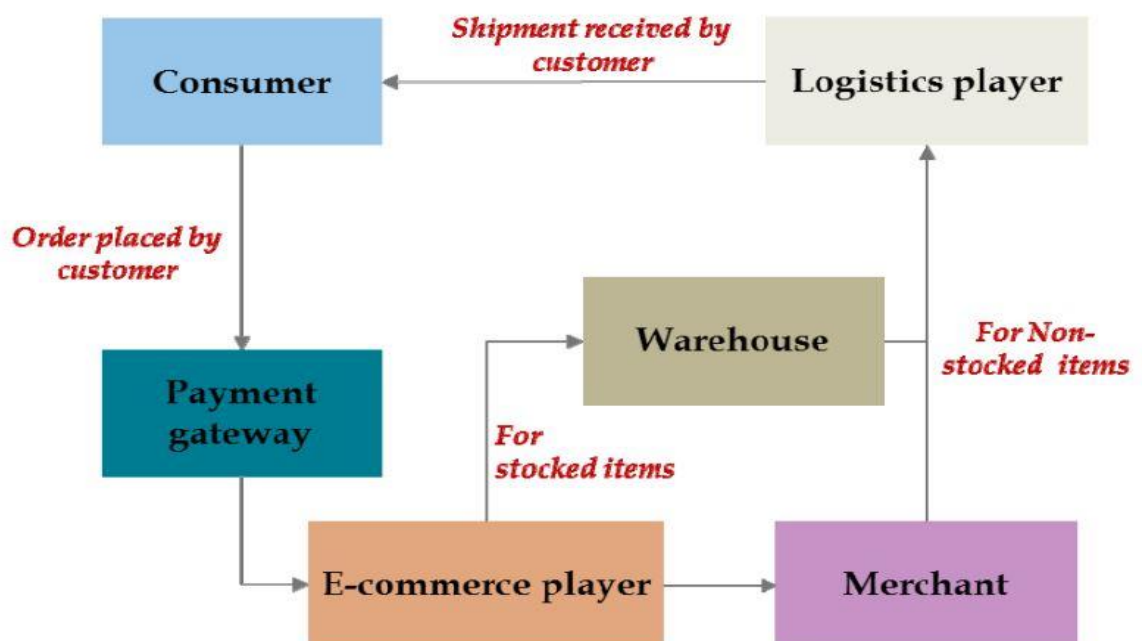
. The customer chooses the product and places the order and make the payment. Operator on receiving the payment makes the delivery of the product to the customer from its warehouse.



Managed Market Place

This is the best market place model followed by Ecommerce operators. It provides discounts and best prices as compared to other sellers in market. As some products are sold by directly sellers so the inventory and warehousing cost to be beard is less than inventory led model. Legally, this model is falling regulatory grey area due to its complex structure. Ecommerce companies like Amazon & Flipkart follows this model.

The customer chooses the product and places the order and make the payment. Operator on receiving the payment makes the delivery of the product to the customer from its warehouse and if it is not available in the warehouse, the payment is transferred to seller after deducting the commission and seller made the delivery of the goods.



3.4 Determining Tax Jurisdiction

Due to absence of any territorial borders, there are complexities in determining the jurisdiction in the matters of the internet or cyberspace. The organisation for Economic Cooperation and Development envisioned the tax jurisdiction to be of the country where the web server would be based where it forms necessary element of business.¹⁹ *The jurisdiction changes when a web server is shifted to a tax friendly state which leads to tax evasion practices. Another tax issue in deciding the amount of tax and manner of collection of custom duties in all click models.*

According to Professor Reuvan Avi-Yonah, tax jurisdiction lies in consumers' country i.e. in the country where products or services are availed by the consumers. He proposed that

“A gross withholding tax is imposed on sales (or services) provided through electronic means into the Demand Jurisdiction, at a rate equal to the corporate tax rate in the Demand Jurisdiction”²⁰

A careful application of the conventional tax principles is required in the online context. In determining tax jurisdiction, following are the facts which should be taken into consideration:

- Whether an entity having incorporation in X Jurisdiction regularly sells its goods online in Y jurisdiction?
- The other significant contacts its business has with state Y (to satisfy “business connection” requirement);
- The profits it derives from the state Y (purposeful availment);
- The number of running offices in state Y (fixed assets);
- Active orders or requests of business in state Y (targeting criteria);
- Location of Servers (fixed assets);
- Hired employees or agents in State Y and

¹⁹ Organisation for Economic and Co-operation Development (OECD), Taxation and Electronic Commerce: Implementing The Ottawa Taxation Framework Conditions (2001); OECD, Implementation of the Ottawa Taxation Framework Conditions: The 2003 Report (2003).

²⁰ Avi-Yonah Reuven S., “International Taxation of E-Commerce”, 52 TAX L. REV. 502 (1997).

- Part of business of the entity conducted in State Y (to determine the permanent establishment of entity).

3.4.1 Different types of Internet Taxation

As internet is accessed by users so an *access tax* is charged by internet service providers on its consumers. In India, *service tax* covers this access tax. Sale of software is taxed under *sales tax*. In US, the types of internet taxation is different from India. The forms of taxation in US are sales tax, service tax and telecommunication tax. There is also *franchise tax* which is charged on utilities and includes cable television service providers. There is another form of taxation which can be charged on Internet i.e. *Bit Tax* which is based on the amount of data transmitted by the use of internet. This tax can be levied in the form of fixed fee on the users or charged based on the amount of information downloaded, email communications and text messages. Bit Tax is banned in US as per Internet Tax Freedom Act, 1998 of US.

The ITFA, 1998 defines *Discriminatory Tax* as any tax which is levied upon ecommerce companies by state for their activities conducted in state, which is not normally levied on activities such as sale of property, goods, service or information through non internet based means. So that is why ITFA, 1998 prohibits the levy of state and local tax in US on ecommerce companies. A new legislation named Internet Tax Non Discrimination Act, 2004 was passed which imposed further 2 years more prohibition on discriminatory taxes on activities of Ecommerce companies.²¹

In Europe, in the High Level Expert Group (HLEG) policy report²², the experts submitted the report stating that tax evasion practices are increasing in cyberspace. To overcome this it was suggested to levy tax on every byte transmitted through internet, otherwise known as *byte tax*. It was suggested that VAT (GST) or other taxes which are not yet collected online can be substituted by byte tax. But this recommendation of HLEG was not accepted by European Commission. *Bandwidth Tax* is imposed on the speed or bandwidth chosen by users for internet connectivity. This tax is also banned under ITFA, 1998 in US.

²¹ Effective till 1 November, 2003 as ITFA, 1998 was passed on 15th November, 2001. The ITFA bill was extended thrice by US Congress and was extended for seven years till 30th October, 2007.

²² *Caslon Analytics Taxation guide*, (Feb. 28, 2017, 03:50 PM), <http://www.caslon.com.au/taxationguide2.html>.

The ITFA, 1998 does not prohibit levy of sales tax and service tax which on goods and services which are otherwise imposed (on non-internet based entities) by state within its territory. The present practice in US is that a retailer on internet shall charge state sales tax if the company which is doing online business has permanent establishment within the same state as buyer and the tax is paid to the state by the seller only in which business entity is located. If business entity and consumer lies in different states, consumer has liability to pay use tax to the state in which he is residing, in case if retailer does not charge sales tax. This means consumer will be charged with tax in both the cases. This prevents any tax evasion practices. This approach is known as destination approach where tax is to be paid where services or goods are consumed and not where these originate from.

3.5 The OECD Model Treaty

The OECD Model Convention of 1992 which was related to taxes on income and capital was prepared by Organisation for Economic Co-operation and Development. The treaty has been amended on 15 July, 2014 by OECD.²³ India is guided by the principles laid down in OECD Model Tax Convention to elucidate policies for Ecommerce taxations in India. The OECD Model Tax Convention spread the idea of fairness, simplicity, easy implementation, clarity and easy amendability of tax system for online environment. According to the OECD Model Tax Convention, the tax system applicable to online transactions should be as effective as the tax system applicable to transactions in physical environment.

The OECD is of the belief that the same principles that government apply to the taxation of traditional commerce should apply equally to E-Commerce taxations. The principles are:

- ❖ *“Neutrality – Taxation should seek to be neutral and equitable between forms of e-commerce and between conventional and e-commerce, so avoiding double taxation or unintentional non-taxation.*

²³ OECD Model Tax Convention on Income and on Capital, (Feb. 28, 2017, 04:45 PM), http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/model-tax-convention-on-income-and-on-capital-2015-full-version_9789264239081-en#.WMP-jjt95PY.

- ❖ **Efficiency** – Compliance costs to business and administration costs for governments should be minimised as far as possible.
- ❖ **Certainty and Simplicity** – Tax rules should be clear and simple to understand, so that taxpayers know where they stand.
- ❖ **Effectiveness and Fairness** – Taxation should produce the right amount of tax at the right time, and the potential for evasion and avoidance should be minimised.
- ❖ **Flexibility** – Taxation systems should be flexible and dynamic to ensure they keep pace with technological and commercial developments.”²⁴

With respect to the applicability of these principles, it was proposed that using existing tax framework of laws these principles can be applied and administrative measures can be re-evaluated and adopted within present tax framework with no discriminatory tax treatment for Ecommerce. It suggested that technology can be used for betterment of tax payer services and government should utilize this potential for making a suitable tax payer regime. For the implementation of these principles it was recommended that all stakeholders should be actively involved in discussions “including government, business and non-business tax payers groups and non OECD member economies.”²⁵ OECD envisioned the application of traditional tax principles with some amendments for the online world. It also evidenced the equal treatment, ensuring that tax is not deterrent for the online world to the level that it become bad investment for the businesses to set up virtual offices.

According to the OECD Tax Model Convention, if online tax system becomes burdensome than offline tax system it would resist the growth of Ecommerce. In the online business, the sale and purchase of goods and services would be taxable at the point of destination of sale i.e. place where the product is being delivered even if the retailer don’t have permanent establishment in that state. The term “Permanent Establishment” is defined in OECD Model treaty as “a fixed place of business through which a business of an enterprise is wholly or partly carried on.”²⁶ The treaty makes it clear that establishment of an office or factory will qualify as permanent establishment for the purposes of taxation although setting up a place of business wherein business

²⁴ “Electronic Framework: Taxation Framework Conditions” (OECD, Paris, 1998) prepared by CFA for OECD Ministerial Conference held in Ottawa, Canada on 8th October, 1998.

²⁵ *Id.* at 23.

²⁶ OECD MODEL TREATY. Art. 5, Cl. 1.

activities are conducted which are of supplementary nature will not amount to permanent establishment as per article 5 (4) (e) of OECD Model treaty. Permanent establishment does not include engaging an independent agent by a business entity.²⁷ But if it's a dependant agent with authority of entering into contract on behalf of business entity, it will amount to permanent establishment.²⁸

On 22 December, 2000 the Committee on Fiscal Affairs made the clarification that a website alone would not constitute a permanent establishment. The place of hosting a website will not amount to permanent establishment. An internet service provider that operates the websites by default won't be considered as dependant agent of business entity unless proved otherwise. Ambiguity related to human role in a permanent establishment was also clarified by stating that human role is not necessary as online businesses can be represented through software based or automated business agents.

In a commentary issued by OECD on its model treaty on 28 January, 2003, OECD stated that due to absence of location which is an essential criteria to determine place of business, a website alone will not form a tangible property.²⁹ For a server to qualify as "fixed" place of business it has to be located at a particular place for a reasonable amount of time.³⁰ Reasonable time is still the ambiguity in this part as it varies from case to case. If there is a hosting contract between ISP and business entity, it will not imply that place of business can be used by the business entity as its place of business. But if a business entity operating website has its personal server, the location of server may amount to permanent establishment provided it fulfils the conditions mentioned under article 5.

Article 5 of OECD Model Treaty states that:

"Permanent Establishment

- 1. For the purposes of this convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.*

²⁷ OECD MODEL TREATY. Art. 5, Cl. 6.

²⁸ OECD MODEL TREATY. Art. 5, Cl. 5.

²⁹ OECD COMMENTARY ON OECD MODEL TREATY. Para. 42.2.

³⁰ OECD COMMENTARY ON OECD MODEL TREATY. Para. 42.4.

2. *The term “permanent establishment” includes especially:*
 - a) *A place of management;*
 - b) *A branch;*
 - c) *An office;*
 - d) *A factory;*
 - e) *A workshop, and*
 - f) *A mine, an oil or gas well, a quarry or any other place of extraction of natural resources.*
3. *And a building site or construction or installation project constitutes a permanent establishment only if it lasts more than twelve months.*
4. *Nothing withstanding the preceding provisions of this article, the term “permanent establishment” shall be deemed not to include:*
 - a) *The use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;*
 - b) *The maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;*
 - c) *The maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;*
 - d) *The maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;*
 - e) *The maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;*
 - f) *The maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) to e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.*

5. *Notwithstanding the provisions of paragraphs 1 and 2, where a person — other than an agent of an independent status to whom paragraph 6 applies — is acting on behalf of an enterprise and has, and habitually exercises, in a Contracting State an authority to conclude contracts in the name of the enterprise, that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph.*
6. *An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business.*
7. *The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.”³¹*

In case the business of an entity is conducted partially or completely from a place where machinery and equipment of the business entity is installed such as personal servers, whether or not such place will amount to permanent establishment will purely depend on the facts and circumstances of the case.³² If business entity is conducting the business in a particular place where presence of manpower is not a necessary requirement, then presence/absence of manpower will not become a deciding factor to infer whether such place is a permanent establishment or not.³³ A

³¹ OECD MODEL TREATY. Art. 5.

³² OECD COMMENTARY ON OECD MODEL TREATY. Para. 42.5.

³³ OECD COMMENTARY ON OECD MODEL TREATY. Para. 42.6.

place where the setup of computers and servers only supplementary activities takes place such as marketing and advertisement, research on any market and demand in it or setting out communication connectivity etc. such place will not amount to permanent establishment.³⁴ The place where core operations of business take place such as sale or receiving of payments using computers, servers or any machinery relevant to these core operations which are of fixed nature i.e. having a fixed place will be inferred as permanent establishment.³⁵ OECD refers to a website ‘as a combination of software and electronic data’ that does not amount to tangible property. But if such websites are modified with interactive panel for concluding automated payments and receiving payments it will be assumed as core function and if such website is hosted at a fixed place, it will be inferred as permanent establishment of that business and will be subjected to tax as per the jurisdiction of that place.

In 1999, the OECD Committee on Fiscal Affairs has constituted the Technical Advisory Group to monitor the application of existing norms of Model treaty for taxing the profits of business and to submit the report on ecommerce taxation and implementation of OECD Model Treaty.³⁶ TAG identified various areas for its analysis that are:

- The manner in which treaty’s rules for taxing business profits are being applied to electronic commerce by inferring the location of fixed place of Effective management;
- Server permanent establishment;
- Profits generated from a server permanent establishment;
- Transfer pricing issues.

The norms were examined by keeping in mind of expected evolution in electronic commerce. It was also decided to form a method by which the application of treaty’s rule to ecommerce activities can be checked and identify areas which are still

³⁴ OECD COMMENTARY ON OECD MODEL TREATY. Para. 42.7.

³⁵ OECD COMMENTARY ON OECD MODEL TREATY. Para. 42.8.

³⁶ OECD COMMENTARY ON OECD MODEL TREATY. Para. 42.9.

debateable and suggest options for betterment of exiting norms. These options should comply with the evolution in electronic commerce.

TAG's Findings:

1. TAG suggested that rules applicable to offline tax should be aligned to apply the same to online world and stated that internet has not resulted in any significant loss to government through Ecommerce. The necessary amendments in the offline tax rules should only be made if it assured that it will make the norm better than existing rules. This is to avoid drastic changes in tax norms.
2. TAG rejected the definition of *Permanent establishment which include any activity that do not involve manpower* under subsection 4A (a) because if tax authorities goes by this definition then any business entity who has maintained virtual offices in various foreign state will be subjected to tax levy in that state where it has customers. TAG stated that server per se do not constitute permanent establishment and remove subsection 4A (b) and 4A (c).
3. TAG suggested a regular study of practicality of these norms and to examine any obstacles faced and to upgrade with an alternate norm which is more suitable and advisable.
4. It was suggested to explain the commentary given in para 188 by OECD with more clarity.
5. The insertion of force of attraction rule vis-à-vis e-commerce was rejected by TAG group.³⁷ With respect to taxing profits on rendering of service as mentioned in subsection 4A (g), TAG stated that it need to be studied further.
6. These implication of recommended alternatives will be very vital in online world and requires a proper study of these implications across all ecommerce models.

The 2010 update introduces new article 7 on business profits which discusses attribution of profits. Various other amendments were made as per the recommendation of the TAG in update of 2010 of Model Tax Convention.

³⁷ OECD MODEL TREATY. Art.4A, Cl. f.

3.6 UN Model Tax Convention

In 1980, there is Model Tax Convention constituted by UN which is not very much different to OECD Model but the major difference in both models with respect to online taxation is under OECD Model the use of facilities or maintenance of stocks for purpose of delivery of goods will not amount to permanent establishment but that is not the case in UN Model Convention. Another difference it is easy to become dependent agent in UN Model than in OECD Model. Article 9 of UN Model have provisions of associated enterprises which narrows down the chances of Transfer pricing in Ecommerce taxation.³⁸

According to UN Model, the business entity will be charged both in the state of Permanent establishment as well as where the associated enterprise of the business entity is located. The UN Model is more accepted by most of the developing nations as it give easy approach and more options of levying tax on foreign entity conducting business in the state.

3.7 Transfer Pricing Laws

Transfer pricing law is a complex subject, especially when it is related with e-commerce taxation. This law is developed to monitor tax evasion practices where business entities transfer higher income to the jurisdictions where tax charges are low or show big expenditures and expenses in those countries where tax rates are high. The fundamental principal of Transfer pricing law is that costs and expenses should be paid by such foreign entity who saves their cost by outsourcing the work, which otherwise they would have paid to an independent vendor for executing the same work.

From the point of view of E-Commerce taxation, arm's length principle should be applied. Transfer pricing guidelines has been issued by OECD, for Multinational Enterprises and Tax Administrations which provide guidance on the application of

³⁸ UN MODEL DOUBLE TAXATION CONVENTION. Art 9, para. 1.

arm's length principle in order to consider tax valuation of cross border transactions between associated enterprises.

3.8 Tax Laws in India and E-Commerce

3.8.1 Tax on Ecommerce

In India, the tax on E-Commerce is imposed on the principles of 'Jurisdictional Nexus' and the source of 'income and status' principles. The principle of Jurisdictional Nexus helps in deciding that whether a tax is imposed in a particular jurisdiction or not. And the source of tax means clubbing of income in various classes and levying suitable taxes on them. A tax depends on person's nationality, domicile and residence.

Section 5 of Income Tax Act, 1961 states:

"Scope of total income.

(1) Subject to the provisions of this Act, the total income of any previous year of a person who is a resident includes all income from whatever source derived which—

(A) Is received or is deemed to be received in India in such year by or on behalf of such person; or

(B) Accrues or arises or is deemed to accrue or arise to him in India during such year; or

(C) Accrues or arises to him outside India during such year:

(2) Subject to the provisions of this Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which—

(A) Is received or is deemed to be received in India in such year by or on behalf of such person; or

(B) Accrues or arise or is deemed to accrue or arise to him in India during such year."³⁹

³⁹ INCOME TAX ACT, 1961. Sec 5.

The significance of ‘residence’ and ‘domicile’ is explained in the case of *Union of India v Dudh Nath Prasad*⁴⁰, the court held that both the terms ‘residence’ and ‘domicile’ have same meaning that is permanent home but as per the provisions of Private International Law both the terms ‘residence’ and ‘domicile’ have different meaning. For example a person may have permanent and yet have a different domicile for political, commercial or any personal purposes.

According to section 6 (3) of Income Tax Act, 1961:

“A company is said to be resident in India in any previous year, if—

(i) It is an Indian company; or

*(ii) During that year, the control and management of its affairs is situated wholly in India.”*⁴¹

Definition of Indian Company is given in section 2 (26) of the Income Tax Act, 1961 which states

“Indian company means a company formed and registered under the Companies Act, 1956 (1 of 1956), and includes—

(i) A company formed and registered under any law relating to companies formerly in force in any part of India (other than the State of Jammu and Kashmir [and the Union territories specified in sub-clause (iii) of this clause]);

[(ia) A corporation established by or under a Central, State or Provincial Act;

(ib) Any institution, association or body which is declared by the Board to be a company under clause (17);]

(ii) In the case of the State of Jammu and Kashmir, a company formed and registered under any law for the time being in force in that State; [(iii) In

⁴⁰ Union of India v Dudh Nath Prasad, (2000) 2 SCC 20, AIR 2000 SC 525 (India).

⁴¹ INCOME TAX ACT, 1961. Sec. 9, Cl. 6.

the case of any of the Union territories of Dadra and Nagar Haveli, Goa, Daman and Diu, and Pondicherry, a company formed and registered under any law for the time being in force in that Union territory;]”⁴²

For a company to be Indian, it is to be registered under Companies Act, 1956. The meaning of ‘Control and Management’ is described in the case of *DeBeers Consolidated Mines Limited v Sowe*⁴³, where the court held that the control and management lies in the core hands of person who has duty of managing the business of the company in the ordinary course of the business. The main business is carried out from the place where the central management and control exists and not from place where general business operations are conducted.

Section 2 (24) of the Income Tax Act, 1961 has defined income as actually received income that reaches the assessee⁴⁴.

Section 14 of Income Tax Act, 1961 states:

Heads of income.

Save as otherwise provided by this Act, all income shall, for the purposes of charge of income-tax and computation of total income, be classified under the following heads of income:

A. Salaries.

B. Income from house property.

C. Profits and gains of business or profession.

D. Capital gains.

*E. Income from other sources.*⁴⁵

⁴²INCOME TAX ACT, 1961. Sec. 2, Cl. 24.

⁴³ *DeBeers Consolidated Mines Limited v Sowe*, (1960) AC 455 (HL) (India), CIT v Nand Lal Gandalal AIR 1960 SC 1147 (India).

⁴⁴ CIT v Ashok Bhai Chiman Bhai, AIR 1865 SC 1343 (India).

⁴⁵ INCOME TAX ACT, 1961. Sec. 14.

According to Section 9 of the Income Tax Act, 1961 explains when an income is deemed to accrue or arise in India. It includes

1. *“All income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India.*
2. *Income which falls under the head “Salaries”, if it is earned in India.*
3. *Income chargeable under the head “Salaries” payable by the Government to a citizen of India for service outside India;*
4. *A dividend paid by an Indian company outside India;*
5. *Income by way of interest or royalty payable by—*

(a) The Government; or

(b) A person who is a resident, except where the interest is payable in respect of any debt incurred, or moneys borrowed and used, for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or

(c) A person who is a non-resident, where the interest is payable in respect of any debt incurred, or moneys borrowed and used, for the purposes of a business or profession carried on by such person in India;”⁴⁶

In the case of *VDO Tachometer v CIT*⁴⁷, Karnataka High Court laid down the criteria that of determining whether income of non-resident can be deemed to accrue or arise in India. The court held that income ought to have accrued or arisen irrespective of the fact whether it is direct or indirect from any business connection in India or any source mentioned in the explanation to Section 9 (1) (i) and *in respect of business entity, the non-resident in India ought to have been engaged in business activity in India.*

⁴⁶ INCOME TAX ACT, 1961. Sec. 9.

⁴⁷ *VDO Tachometer v CIT* (1979) 117 ITR 804 (Kar) (India).

Chapter IX of the Income Tax Act, 1961 prescribes provisions to provide relief in case of double taxation. Section 90 recognises Double Taxation Avoidance Agreements (DTAAs) with foreign countries. Section 91 applies in the case when DTAA is not applicable. As per DTAAs, the state rely on the source based taxation and do not tax non-residents unless they have permanent establishment or fixed base or place of effective business in the concerned state. The Central Board of Direct Taxes made clarification regarding DTAA that if there is DTAA signed between India and any foreign country, any income of resident of India may be taxed in foreign country, such income shall be counted in his total income chargeable to tax as per provisions of Income Tax Act and Tax relief shall be granted as per method for avoidance of double taxation stipulated in relevant agreement.⁴⁸

3.8.2 Business Connection

Business Connection is defined as business link between a resident and non-resident and tax is levied on such business income that accrues or arises, directly or indirectly as a result of business link.⁴⁹ The court observed establishment of business connections could be through any mean and agent appointed by principal for incidental operations of business will be considered as business connection.⁵⁰

Later Finance Act, 2003 explained the term business connection in the explanation to section 9 (1). According to Explanation 2

“Business Connection shall include any business activity carried out through a person who, acting on behalf of the non-resident,—

(a) Has and habitually exercises in India, an authority to conclude contracts on behalf of the non-resident, unless his activities are limited to the purchase of goods or merchandise for the non-resident; or

⁴⁸ H.P Aggarwal, *Foreign Companies to declare tax exempt income*, Foreign Enterprise, Business Standard, (Mar. 3, 2017, 08:30 AM), http://www.business-standard.com/article/economy-policy/foreign-companies-to-declare-tax-exempt-income-108100601045_1.html,

⁴⁹ THE INCOME TAX ACT, 1961. Sec. 9, Cl, 1, CL. i.

⁵⁰ TI&M Sales v CIT, (1985) 151 ITR 286 (Cal.) (India).

(b) Has no such authority, but habitually maintains in India a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the non-resident; or

(c) Habitually secures orders in India, mainly or wholly for the non-resident or for that non-resident and other non-residents controlling, controlled by, or subject to the same common control, as that non-resident.

Provided that such business connection shall not include any business activity carried out through a broker, general commission agent or any other agent having an independent status, if such broker, general commission agent or any other agent having an independent status is acting in the ordinary course of his business.

Provided further that where such broker, general commission agent or any other agent works mainly or wholly on behalf of a non-resident (hereafter in this proviso referred to as the principal non-resident) or on behalf of such non-resident and other non-residents which are controlled by the principal non-resident or have a controlling interest in the principal non-resident or are subject to the same common control as the principal non-resident, he shall not be deemed to be a broker, general commission agent or an agent of an independent status.”⁵¹

These provisions are evidencing the exact approach adopted in OECD Model Treaty where independent agent working for a foreign entity will not infer permanent establishment unless dependant agent.

Explanation 3 states that

“Where a business is carried on in India through a person referred to in clause (a) or clause (b) or clause (c) of Explanation 2, only so much of income as is attributable to the operations carried out in India shall be deemed to accrue or arise in India;”⁵²

⁵¹ FINANCE ACT, 2003. Sec. 9, Cl. 1, Exp. 2.

⁵² FINANCE ACT, 2003. Sec. 9, Cl. 1, Exp. 3.

Here, business connection lay emphasis on performance of business activity rather than permanent establishment. In this manner business association would incorporate exercises carried on electronically in India, if it ought to be ceaseless business movement between two business substances and will avoid exercises led as independent broker, agent or contractor that use online environment to transact business.

3.8.3 CBDT's Report on E-Commerce Taxation

A High Powered Committee of Ecommerce and taxation was set up CBDT in 1999 to examine the potential of Ecommerce. The committee found that there is vital role played by equity and ecommerce should not be put to disadvantage as compare to offline business by levying unnecessary taxes (discriminatory tax in UN Model) on them. It recommended that Ecommerce models needs continuous monitoring to examine advancement in technology. The committee decided not to define ecommerce in Income Tax Act, 1961 and rejected the concept of Permanent establishment defined in Article 5 of OECD Model Treaty.⁵³

Further it suggested to uphold the base erosion approach and stated not to amend Income Tax Act or DTAA till PE is discarded.

⁵³OECD MODEL TREATY. Art. 5.

3.8.4 Permanent Establishment and Finance Act, 2003

To explain the meaning of Permanent Establishment, a section 44DA was inserted by Finance Act, 2003 in Income Tax Act, 1961. The section 44 DA of Income Tax Act states that:

“The income by way of royalty or fees for technical services received from Government or an Indian concern in pursuance of an agreement made by a non-resident (not being a company) or a foreign company with Government or the Indian concern after the 31st day of March, 2003, where such non-resident (not being a company) or a foreign company carries on business in India through a permanent establishment situated therein, or performs professional services from a fixed place of profession situated therein, and the right, property or contract in respect of which the royalties or fees for technical services are paid is effectively connected with such permanent establishment or fixed place of profession, as the case may be, shall be computed under the head “Profits and gains of business or profession” in accordance with the provisions of this Act.

Provided that no deduction shall be allowed,

(i) In respect of any expenditure or allowance which is not wholly and exclusively incurred for the business of such permanent establishment or fixed place of profession in India; or

(ii) In respect of amounts, if any, paid (otherwise than towards reimbursement of actual expenses) by the permanent establishment to its head office or to any of its other offices.

(2) Every non-resident (not being a company) or a foreign company shall keep and maintain books of account and other documents in accordance with the provisions contained in section 44AA and get his accounts audited by an accountant.”⁵⁴

The Finance Act, 2003 also amended Section 163 of Income Tax Act, 1961 to explain the meaning of ‘business connection’ as explained in the Explanation 2 and Explanation 3 of Section 9 (1) (i). According to this amendment, an agent appointed in India by a

⁵⁴THE INCOME TAX ACT, 1961. Sec. 44 Cl. DA.

foreign company may fulfil business connection and may be considered to be a permanent establishment. According to a circular issued by income tax department,⁵⁵ the applicability of arm's length principle is to assess the profits of the foreign non-residents that are earned from the business activity through its permanent establishment in India. These profits are taxable in India. A dependant agent who regularly conduct business activities of a foreign company in India and have an authority of concluding contract and taking orders and delivering goods on behalf of foreign company will be inferred as permanent establishment and the profits earned by these permanent establishments are taxable in India. The dependant agents are also known as Captive Units.⁵⁶ In *Cargo Community Pte. Ltd.*,⁵⁷ the Authority for Advance Ruling passed a judgement on a case where access to its online cargo portal, which is hosted at a server based in Singapore was given by a company based in Singapore to Indian agents by charging single transaction fees, monthly charges and helpdesk fees. The Indian agents used this website to check flight schedules and use this information to decide the steps to transfer cargo. Through this portal, agents can communicate with airlines for deciding the schedules of transporting cargos. The agents were given a unique ID and password to access the portal. Now the question was whether the payment made by Indian agents for accessing this portal is taxable in India or not? AAR examined whether this payment would fall under the ambit of equipment royalty and payment for 'the use of or the right to use industrial, commercial or scientific equipment.'

Section 9 (1) (vi) of the Income Tax Act, 1961 defined royalty as:

"Income by way of royalty payable by—

(a) The Government; or

(b) A person who is a resident, except where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or

⁵⁵ Circular No. 5/2004 *Taxation of IT enabled Business Process Outsourcing Units in India*, (Mar. 10, 2017, 9:52 PM), <https://caknowledge.in/taxation-of-it-enabled-business-process-outsourcing-units-in-india/>.

⁵⁶ *Falt and Tarrant Mfg Co. v Gallagher*, 306 US 62 (1939) (US).

⁵⁷ *Cargo Community Pte. Ltd.*, 289 ITR 355 (US).

*(c) A person who is a non-resident, where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India.*⁵⁸

The TAG report provided a criteria to determine i.e. the customer should be having physical possession and control over the equipment and owner should not be using the same equipment simultaneously while rendering it to the customer. But contrary to it AAR observed that the subscription payment made by the agents in India for accessing the portal will amount to equipment royalty as per the provisions of Income Tax Act, 1961.⁵⁹

In *Dy. Cit, Non Resident Circle, New Delhi v Metapath Software International Ltd.*⁶⁰, the assessee was a UK based company which used to export hardware and software to India based telecom companies but it undertook no business activity in India. The assessee submitted that this income that assessee has accrued by selling hardware in India is not taxable under the provisions of Income Tax Act as this income is not accrued by assessee from any business connection in India. Assessee relied on Circular No. 23 issued by CBDT on 23 July, 1969 which clarified income derived by a non-resident by exporting goods to India will not be deemed to arise in India. Therefore the income earned by assessee by exporting goods won't be taxable as assessee did not carry any business operations in India. The assessee claimed that hardware were exported to Indian customers directly from overseas and title was transferred outside India and payment was made outside India only.

The assessee also claimed that although this income is not accrued from any business connection in India but if the court does not agree to it and is of the view that it is accrued in India then as per India-UK DTAA such income will not taxable in India unless business entity has permanent establishment in India and assessee do not have any permanent establishment in India. The court held that as from the facts no

⁵⁸ THE INCOME TAX ACT, 1961. Sec. 44 Cl. 1, Cl. VI.

⁵⁹ *Cargo Community Network Pte. Ltd. case, Authority for Advance Rulings*, (Mar. 6, 2017, 6:52 PM), http://aarrulings.in/it-rulings/uploads/pdf/1250755925_688.pdf.

⁶⁰ *Dy. Cit, Non Resident Circle, New Delhi v Metapath Software International Ltd.* (2006) 9 SOT 305 NULL (India).

permanent establishment was proved so no liability of the assessee to pay tax on income derived by exporting hardware.

With respect to Software, the issue was whether consideration received for sale of software will be taxable under royalty? The court held that as per provision of income tax act, 1961 which states “*consideration for license of software would be taxable in India only where the license of software involves transfer of all or any rights in the copyright relating to the software supplied*”⁶¹ and the software bought by the customer did not entitle the customer to reproduce and commercially distribute it. It was only permitted for use by the customer only. Therefore the payment for it does not fall in the ambit of “royalty” and is not taxable.

3.8.5 Taxation of Intangible Goods

Is Software intangible and subject to tax?

The Indian courts in the various judgements has ruled that software is tangible property and is subjected to levy of tax. In *Tata Consultancy Services v State of Andhra Pradesh*⁶² the issue was whether a software which is intangible intellectual property would be considered as goods and subject to levy of tax under AP sales of tax act. The court held that a software which is by default intangible when stored in physical media will be considered as tangible and will be subjected to tax.

In the case of *Commissioner of Income Tax v Oracle Software limited*⁶³ the court held that manufacture is a process that make an article fit for use and duplicating any content on CD will be termed as manufacturing. In the case of *Bharat Sanchar Nigam Limited v UOI*⁶⁴, the court by relying on *Tata Consultancy case* held that goods may be tangible or intangible property. It would be inferred as goods if it is satisfying the basic criteria for the goods such as ‘its utility’; ‘capable of being bought and sold’; ‘capable of being transferred, delivered, stored and possessed’. Software fulfils all the mentioned criteria of being a good and that is why will be considered as good.

⁶¹ THE INCOME TAX ACT, 1961. Sec. 9. Cl. 1. Cl. v.

⁶² *Tata Consultancy Services v State of Andhra Pradesh* AIR 2005, SC 371 (India).

⁶³ *Commissioner of Income Tax v Oracle Software limited* (2010) 2 SCC 677 (India).

⁶⁴ *Bharat Sanchar Nigam Limited v UOI* 2006 (3) SCC 1 (India).

So by relying on these judgements it can be said that software is both tangible and proved as good. And sale of good is subject to tax. That is why software is also subject to tax.

3.8.6 Taxing E-Goods in India

The term ‘good’ is defined by Article 366 (12) of Constitution of India in an inclusive manner that covers material, commodities and articles. And according to Sales of Goods Act, 1930, ‘goods’ is defined as

“Goods means every kind of moveable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.”⁶⁵

In *Quality Steel Tubes Pvt. Ltd. v CCE*⁶⁶, the Supreme Court held that in order to levy central excise tax on any goods, it should be well known in the market and be capable of being sold as goods. Article 286 (2) of Constitution of India provides the parliament the power to assess at what point sale and purchase of goods are taking place. Article 269 (3) of Constitution of India empowers parliament to decide when a sale or purchase transaction of goods takes place in interstate business. The Central Government has power to decide with respect to interstate sales and State Government has powers to decide with respect to sales within the state. Article 286 is prohibiting state government to impose tax on any sales outside state.

The state has power to impose tax on sale and purchase of goods under entry 54 of list II. According to Article 366 (29A) of Constitution of India.

“Tax on the sale or purchase of goods includes—

(a) A tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

(b) A tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

⁶⁵ SALES OF GOODS ACT, 1930. Sec. 2. Cl. 7.

⁶⁶ *Quality Steel Tubes Pvt. Ltd. v CCE* 1995 (2) SCC 372 (India).

(c) A tax on the delivery of goods on hire-purchase or any system of payment by instalments;

(d) A tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(e) A tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration.”⁶⁷

Place at Which Sale or Purchase Takes Place

For the offline world, section 3 of the Central Sales Tax Act, 1956 defines the principles to assess the point of time when sale or purchase of goods takes place in the course of interstate business. Section 4 of the Central Sales Tax Act, 1956 laid down the principles to decide sale and purchase of goods outside state. Section 5 of the Central Sales Tax Act, 1956 deals with the question when sale and purchase of goods takes place during import and export of goods.

In cases where both seller and consumer of goods belongs to same state in that case jurisdiction is easy to decide. *“But in situations where the delivery of goods takes place outside the state and the goods are received in the state where they are consumed, it shall not be the ground to fix the tax liability that the goods are situated within the state of consumption or use. Thus in India, to decide the issue of interstate sale, nature of sale, place of delivery is not deciding factor (As opposed to the destination approach of OECD Model).”⁶⁸*

In case of *Twentieth Century finance Corporation Limited v State of Maharashtra*⁶⁹, the court held that in situations where the parties has not determined or agreed to any place of sale by applying legal rules of statute, the place of sale will be considered a place where property in the goods transfers from seller to buyer that is place of contract formalisation and not the place where goods are consumed or used

⁶⁷ CONSTITUTION OF INDIA. Art. 366, Cl. 29A.

⁶⁸ 2, Kanika Seth, Computer Internet and New Technology Laws (2nd Edition, 2013).

⁶⁹ *Twentieth Century finance Corporation Limited v State of Maharashtra*, (2000) 6 SCC 12 (India).

(i.e. contrary to the destination based rule). So the taxation in India adopts origin based approach.

3.8.7 Taxing E-Services in India

With effect from 16th May, 2008 when there was amendment in Finance Act, 2003, any service which is provided in relation to Information Technology Software for use in course of business are liable to service tax in India. Finance Act, 2008 defines the Information Technology Software as:

*“Information technology software means any representation of instruction, data, sound or image, including source code and object code, recorded in a machine readable form, and capable of being manipulated or providing interactivity to a user, by means of a computer or an automatic data processing machine or any other device or equipment.”*⁷⁰

Scope of Service includes:

“Taxable Service means any service provided or to be provided to any person, by any other person in relation to information technology software, including-

- *Development of information technology software;*
- *Study, analysis, design and programming of information technology software;*
- *Adaptation, upgradation, enhancement, implementation and other similar services related to information technology software;*
- *Providing advice, consultancy and assistance on matters related to information technology software, including conducting feasibility studies on implementation of a system, specification for a database design, guidance and assistance during the start-up phase of a new system, specifications to secure a database, advice on proprietary information technology software;*
- *Providing the right to use information technology software for commercial exploitation including right to reproduce, distribute and sell information technology software and right to use software components for the creation of and inclusion in other information technology software products;*

⁷⁰FINANCE ACT, 2008. Sec. 65, Cl. 53a.

- *Providing the right to use information technology software supplied electronically.*⁷¹

Even the scope of ‘internet telephony service’ was broadened and given a new phrase i.e. ‘Internet Telecommunication Services’. It came into effect from 16th May, 2008. Service tax is also applicable on Internet café in India.⁷²

Generally service provider is liable to pay service tax. But when service provider is situated outside India and recipient of service is based in India, in that cases the recipient is liable to pay service tax. This approach is quite similar to the approach of ‘use tax’ followed by US. The service tax is applicable on the service of online advertisement, digital marketing, paid online games and lottery too.

⁷¹ FINANCE ACT, 2008. Sec. 65, Cl. 105, Cl. zzzze.

⁷² FINANCE ACT, 2008. Sec. 65, Cl. 105, Cl. 22f.

Chapter 4: E-Commerce and GST

4.1 Introduction of GST

Goods and Service Tax (GST) is a proposed system of Indirect Taxation in India. It encapsulates most of the current taxes into a single arrangement of tax collection. GST was introduced as The Constitution (156th Amendment) Act. GST council is responsible for the administration and governance of GST and Mr. Arun Jaitley who is Union Finance Minister of India is the chairman of GST Council.

GST would replace the taxes charged by Central and State Governments and would be covering the indirect tax on manufacture, sale and consumption of goods through overall India. GST is consumption or utilization based tax which is charged on the supply of goods and services which means GST would be levied on every stage of sale of goods or services on the basis input tax credit method. This method allows the businesses which are GST Registered to claim tax credit to the amount of GST they paid while buying products or services as their general business activity. According to GST, there is no distinction between taxable goods and services, both are charged at equal rate in supply chain, till they reach the final consumer. There would be no taxes on exported goods or services but imported goods and services would be levied the taxes equal to the domestic goods and services in addition to the custom duty which will not be in the ambit of GST.

The introduction of GST would be an outstanding step for the betterment of indirect taxation in India. Merging various Central and State taxes into a uniform tax would lessen the chances of double taxation and will lead to common market at National level. An easier administration and enforcement would be possible if taxation system would be simple. A reduction of 25-30% of overall tax burden is estimated. Goods can be moved freely from one state to another without stopping at state borders for hours for payment of state tax and entry tax. This will lessen a lot of paper work.

GST will subsume various taxes including central excise duty, state level value added tax, service tax, entry tax, additional custom duty and many more taxes levied by State and Central government at various levels.⁷³ Goods and Services Network

⁷³ Which of the existing taxes are proposed to be subsumed under GST, (Mar. 6, 2017, 10:40 AM), <http://gstindia.net/topic/taxes-subsumed-merged-gst/>.

(GSTN) is a non-profit firm that would provide support to Governments, taxpayers and other stakeholders for the better implementation GST.

4.2 Laws Related to E-Commerce in Revised Model GST Law

1. Major Definitions (Section 2)

Definition of *Electronic Commerce*

“Electronic Commerce means supply of goods and/or services including digital products over digital or electronic network.”⁷⁴

Till now no statute provided the definition of Electronic Commerce. The HPC constituted by CBDT in 1999 denied to give any definition of Electronic Commerce in Income Tax Act, 1961. GST would be the first taxation statute providing the definition of Electronic Commerce.

Definition of *Electronic Commerce Operator*

“Electronic commerce operator means any person who owns, operates or manages digital or electronic facility or platform for electronic commerce.”⁷⁵

Any person owning and operating the electronic platform of any type and model will fall in the ambit of this definition.

Levy of Tax on E-Commerce Operators

“The Central or a State Government may, on the recommendation of the Council, by notification, specify categories of services the tax on which shall be paid by the electronic commerce operator if such services are supplied through it, and all the provisions of this Act shall apply to such electronic commerce operator as if he is the person liable for paying the tax in relation to the supply of such services.

Provided that where an electronic commerce operator does not have a physical presence in the taxable territory, any person representing such electronic commerce operator for any purpose in the taxable territory shall be liable to pay tax.

⁷⁴ THE REVISED MODEL GST LAW, Sec. 2, Cl, 41.

⁷⁵ THE REVISED MODEL GST LAW, Sec. 2, Cl, 42.

Provided further that where an electronic commerce operator does not have a physical presence in the taxable territory and also he does not have a representative in the said territory, such electronic commerce operator shall appoint a person in the taxable territory for the purpose of paying tax and such person shall be liable to pay tax.”⁷⁶

The important point to be noted here is that this provision clarified that ecommerce operator will only be liable to pay service tax for the services they provided and not for the supply of goods.

This provision would mandate the appointment of dependant agent by business entity in every taxable territory for the purposes of taxation. No E-Commerce operator would be able to operate in any taxable territory without presence of its agent in that territory.

As GST would create a common market place on a national level, so there would be no need of appointing agent in every state. This provision has room for amendment also. When Ecommerce operator will introduce any new service, law about that service can be notified immediately by government on notification from council.

Tax Collected at Source (Section 56)

1. Rate of Tax to be Collected

*“Notwithstanding anything to the contrary contained in the Act, every electronic commerce operator, not being an agent, shall collect an amount calculated at the **rate of one percent** of the net value of taxable supplies made through it where the consideration with respect to such supplies is to be collected by the operator.”⁷⁷*

The expression "net value of taxable supplies" shall mean the aggregate value of taxable supplies of goods or services.

There are few exception to collection of tax:

- ✓ If the services provided by ecommerce operator are notified in Section 8 (4);
- ✓ If operator is acting as agent;
- ✓ If the recipient had directly paid the consideration to the supplier (Example COD Transactions).

⁷⁶ THE REVISED MODEL GST LAW, Sec. 8, Cl, 4.

⁷⁷ THE REVISED MODEL GST LAW, Sec. 56, Cl, 1.

2. Time Limit for Collection of Tax

*“The amount collected under sub-section (1) shall be paid to the account of the appropriate Government by the operator **within ten days after the end of the month** in which such collection is made in the manner as may be prescribed.”⁷⁸*

3. Time Limit for Furnishing a Statement

*“Every operator who collects the amount specified in sub-section (1) shall furnish a statement, electronically, containing the details of outward supplies of goods or services effected through it, including the supplies of goods or services returned through it, and the amount collected under sub-section (1) during a month, in such form and manner as may be prescribed, **within ten days after the end of such month.**”⁷⁹*

1. Credit to be claim by Supplier

*“**The supplier** who has supplied the goods or services through the operator **shall claim credit**, in his electronic cash ledger, of the amount collected and reflected in the statement of the operator furnished under sub-section (4), in the manner prescribed.”⁸⁰*

2. Matching of Details

*“**The details of supplies furnished by every operator** under sub-section (4), shall, in the manner and within the period prescribed, **be matched** with the corresponding **details of outward supplies furnished by the concerned supplier** registered under the Act.”⁸¹*

3. Discrepancy to be Communicated to both parties

*“Where the **details of outward supplies furnished by the operator** under subsection (4) **do not match** with the corresponding **details furnished by the supplier** under*

⁷⁸ THE REVISED MODEL GST LAW, Sec. 56, Cl. 2.

⁷⁹ THE REVISED MODEL GST LAW, Sec. 56, Cl. 3.

⁸⁰ THE REVISED MODEL GST LAW, Sec. 56, Cl. 4.

⁸¹ THE REVISED MODEL GST LAW, Sec. 56, Cl. 5.

section 32, the **discrepancy shall be communicated to both persons** in the manner and within the time as may be prescribed.”⁸²

4. Consequences of Non-Rectification

“The amount in respect of which any discrepancy is communicated under subsection (6) and which is not rectified by the supplier in his valid return or the operator in his statement for the month in which discrepancy is communicated, shall be added to the output tax liability of the said supplier, where the value of outward supplies furnished by the operator is more than the value of outward supplies furnished by the supplier, in the manner as may be prescribed, in his return for the month succeeding the month in which the discrepancy is communicated.”⁸³

5. Tax Liability for Addition

“The concerned supplier shall, in whose output tax liability any amount has been added under sub-section (8), be **liable to pay the tax** payable in respect of such supply **along with interest**, at the rate specified under sub-section (1) of section 45 on the amount so added from the date such tax was due till the date of its payment.”⁸⁴

6. Issuance of Notice

“Any authority not below the rank of Joint Commissioner may serve a notice, either before or during the course of any proceeding under this Act, requiring the operator to furnish such details relating to:

- (a) Supplies of goods or services effected through such operator during any period,
- (b) Stock of goods held by the suppliers making supplies through such operator in the godowns or warehouses, by whatever name called, managed by such operators and declared as additional places of business by such suppliers - as may be specified in the notice.”⁸⁵

10. Time limit for furnishing details after service of Notice

⁸²THE REVISED MODEL GST LAW, Sec. 56, Cl, 6.

⁸³ THE REVISED MODEL GST LAW, Sec. 56, Cl, 7.

⁸⁴ THE REVISED MODEL GST LAW, Sec. 56, Cl, 8.

⁸⁵ THE REVISED MODEL GST LAW, Sec. 56, Cl, 9.

“Every operator on whom a notice has been served under sub-section (9) shall furnish the required information **within fifteen working days** of the date of service of such notice.”⁸⁶

11. Penalty for not serving details after furnishing of Notice

“Any person who fails to furnish the information required by the notice served under sub-section (10) shall, without prejudice to any action that is or may be taken under section 85, be liable to a penalty which **may extend to twenty-five thousand rupees.**”⁸⁷

Schedule V: Persons liable to be registered

“The following categories of persons shall be required to be registered under this Act:

- ✓ Persons who are required to collect tax under 56, whether or not separately registered under the Act; (Clause VII)
- ✓ Persons who supply goods and/or services, other than supplies specified under sub-section (4) of section 8 , through such electronic commerce operator who is required to collect tax at source under section 56, irrespective of the threshold specified in paragraph 1; (Clause X)
- ✓ Every electronic commerce operator, irrespective of the threshold specified in paragraph 1; (Clause XI)
- ✓ Every person supplying online information and database access or retrieval services from a place outside India to a person in India, other than a registered taxable person; (Clause XII)”⁸⁸

GST Rules applicable on E-Commerce Operators

Then there are GST Rules which are applicable to E-Commerce Operators.

1. **Rule 8: Form and Manner of Submission of Statement of Supplies effected through E-Commerce.**

Rule 8 (1): Ecommerce operator to file form GSTR-8

⁸⁶ THE REVISED MODEL GST LAW, Sec. 56, Cl, 10.

⁸⁷THE REVISED MODEL GST LAW, Sec. 56, Cl, 11.

⁸⁸ THE REVISED MODEL GST LAW, Schedule 5.

According to Rule 8 (1), every ecommerce operator has a duty to collect tax at source under section 56 and has a duty to furnish the statement of the same in form GSTR-8 electronically through a common portal, which the ecommerce operator can either do directly or from facilitation centre, notified by Board or Commissioner, containing details of supplies effected through such operator and the amount of tax to be collected under section 56 (1).⁸⁹

Rule 8 (2): Return filed by operator made available to Supplier

According to Rule 8 (2), the details which the operator has furnished under rule 8 (1) shall be made electronically available to each of the supplier in Part D of form GSTR-2A on the common portal after the date of filing of form GSTR-8 is due.⁹⁰

2. Rule 19: Matching of details furnished by Ecommerce operator with the details furnished by the supplier.

“According to Rule 19, the following details relating to the supply made by an ecommerce operator, as declared in form GSTR-8, shall be matched with the corresponding details of the declared by supplier in form GSTR-1:

- GSTIN of the supplier
- GSTIN/UIN of the recipient, if the recipient is a registered taxable person
- State of place of supply
- Date of invoice of the supplier
- Invoice Number of the supplier
- Tax rate
- Taxable value
- Tax amount

According to the proviso 1 of Rule 19, in some supplies where the supplier has to liability to furnish details separately for each supply, the following details relating to the supply made by an ecommerce operator, as declared in form GSTR-8, shall be matched with the corresponding details of the declared by supplier in form GSTR-1:

- GSTN of the supplier
- State of place of supply

⁸⁹ THE REVISED MODEL GST LAW, Rule. 8, Cl, 1.

⁹⁰ THE REVISED MODEL GST LAW, Rule. 8, Cl, 2.

- Tax rate
- Total taxable value of all supplies made in the State
- Tax amount on all supplies made in the State”⁹¹

According to proviso 2 of rule 19, in case where the time limit to furnish the form by supplier under section 32 (1) has been extended, the time limit for matching the details under section 56 (5) will be extended in same manner.

3. Rule 20: Communication and Rectification of discrepancy in details furnished by the Ecommerce operator and the supplier.

Rule 20 (1): Discrepancy to be communicated in Form ITC-1

According to Rule 20 (1),

“Any discrepancy in the details furnished by the operator and those declared by the supplier shall be made available to both electronically in FORM GST ITC-1 through the Common Portal on or before the last date of the month in which the matching has been carried out.”⁹²

Rule 20 (2): The discrepancy made should be rectified by the supplier.

Rule 20 (3): If discrepancy is made to operator, it should be rectified by the operator within the time period mentioned.

Rule 20 (4): If discrepancy is not rectified, addition to output tax liability

“According to Rule 20 (4), where the discrepancy is not rectified under rule 20(2) or rule 20(3), an amount to the extent of discrepancy shall be added to the output tax liability of the supplier in his return in Form GSTR-3 for the month succeeding the month in which the details of discrepancy are made available and such addition to the output tax liability and interest payable thereon shall be made available to the supplier electronically on the Common Portal in Form GST ITC-1.”⁹³

⁹¹ THE REVISED MODEL GST LAW, Rule. 19.

⁹²THE REVISED MODEL GST LAW, Rule. 20, Cl, 1.

⁹³THE REVISED MODEL GST LAW, Rule. 20, Cl, 4.

4.3 Effect of GST on the Current Issues in E-Commerce Taxation

Issue 1

In E-Commerce transactions it is very hard for the tax authorities to determine who the supplier is because of involvement of multiple dealers. Tax authorities often get puzzled that who the actual dealer is. Ecommerce operators provide the service of selling the goods, therefore generally the service provided by ecommerce operators fall in the ambit of 'sale' and tax authorities by declaring these operators as 'sellers' make them liable to pay both VAT/CST which leads to the issue of double taxation. There is a constant war going on between E-commerce operators and Tax authorities due to present Tax regime, because there is a dilemma that whether ecommerce operators have to pay VAT for selling the goods or CST for providing the service of selling the goods of the suppliers attached with ecommerce operators. And due to this dilemma the ecommerce operators are made to pay both taxes on a single transaction.

To make sure that E-commerce operators and Vendors associated with these operators are paying proper taxes, every state started making their own set of rules to levy taxes on these operators and vendors under State tax rules. For example according to the provisions of Delhi VAT rules and Kerela VAT rules, operators need to provide the full disclosure of information of the suppliers or vendors associated with them.⁹⁴ Further an additional tax of 10% in the name of "Entry Tax" was introduced by the states of Uttarakhand, Bihar and Assam on delivery of goods purchased via ecommerce online transactions.

There is no dispute till when the ecommerce operators are assuming themselves as sellers, the problem arise when ecommerce operators acts as market place.

The reason behind this dispute is the state legislations which has stated these ecommerce operators as agents of the vendors and due to this they are considered as dealers under state VAT acts. Whatever the reason is behind this dilemma but this dilemma is still existing and GST provides a solution to it.

⁹⁴ *Now Delhi dealers required to submit details of goods sold via e-commerce website*, (Mar. 8, 2017, 05:40 AM), <https://www.taxmann.com/topstories/10401000000047036/now-delhi-dealers-required-to-submit-details-of-goods-sold-via-each-e-commerce-website.aspx>

GST has defined two new concepts: Aggregator and E-Commerce Operators in its revised GST Model.

Aggregator is defined as:

“A person, who owns and manages an electronic platform, and by means of the application and a communication device, enables a potential customer to connect with the persons providing service of a particular kind under the brand name or trade name of the said aggregator.”⁹⁵

Ecommerce Operator is defined as:

“It include every person who, “directly or indirectly, owns, operates or manages an electronic platform that is engaged in facilitating the supply of any goods and/or services or in providing any information or any other services incidental to or in connection there with but shall not include persons engaged in supply of such goods and/or services on their own behalf.”⁹⁶

There is difference between the two, aggregator only facilitates the interaction of customers with the suppliers or service providers for example policybazaar.com, ecommerce operators facilitates the whole mechanism of supply of goods or provision of services for example Amazon.in.

For instance Flipkart.com is ecommerce operator because it is facilitating the vendors by providing them the platform for the supply of their goods. It is called Marketplace Model. Another instance Titan who is selling watched through its own website is falling under the Inventory model and won't be considered as E-commerce operator. Similarly flipkart.com also won't be considered as ecommerce operators for the selling of goods out of their own inventory and warehouses.

Ecommerce operator therefore will be liable to collect tax at source and deposit the same with the government.⁹⁷ Such deposition is to be done at the time of payment to the supplier. While aggregator is not liable to TCS under the provisions of the act. *While before GST, the vendor is liable to pay tax to the government for selling of goods*

⁹⁵ MODEL GST LAW. Sec. 43, Cl. B, Cl. a.

⁹⁶ MODEL GST LAW. Sec. 43, Cl. B, Cl. b.

⁹⁷ MODEL GST LAW. Sec. 43, Cl. C, Cl. 1.

(Compliance of all CST/VAT related issues was of seller), after GST it will be liability of operator to collect TCS and deposit it to the government (Compliance of TCS related issues is upon operator).

The issue of Entry tax will not be any more with coming of GST.

Issue 2

Another issue that the ecommerce faced due to current tax regime of India is of Credit Blockage. Tax Credit is vital part of indirect tax structure in India.

For the operation of any business, the entity has to first themselves buy the goods and products for further selling. These purchased goods and products are the inputs to the activity of the business. These input may include machinery, raw materials, capital goods and any other goods which is relevant and used directly or indirectly for the activity of the business. These input goods are also subject to tax which is known as *Input Tax*.

By working on these goods, a final good or product is made for selling in the market in the course of business activity. The tax levied on the sale of these final goods is known as *Output Tax*.

As tax is levied on the selling price of the goods, which means burden of tax keeps on rising as final product of one business is used as raw material for another business. And by the time the product reaches the final customer it has gone through many stages where an end product of one business is sold as raw material or input good of other business, where each buyer in this chain of sale has to discharge tax liability repeatedly on the goods which was taxed before. This is called *Cascading effect of Taxation*.

This was the situation before 2005, when the burden of tax was proving poisonous to the economy of the nation. In April 2005⁹⁸, there was introduction of concept of Input Tax Credit (ITC) in India through VAT.

⁹⁸ Ministry of Finance, *White Paper on State-Level Value Added Tax*, (Mar. 9, 2017, 6:08 AM), <http://finmin.nic.in/reports/whitepapervat.pdf>.

As per the method of Input Tax Credit, “a set-off will be given for input tax as well as tax paid on previous purchases”⁹⁹. In other words, Input tax is used as credit to pay output tax, which helps in keeping the overall price of any goods or products low. The dealer will be entitled to get credit of tax on goods which he has purchased for re-sale.¹⁰⁰

The following illustration will explain the whole concept of Input Tax Credit System:

Let’s assume tax on any commodity is 10% of its selling price.

Case 1: When there is no Input Tax Credit.

X sells his good to Y at price of 1000 Rs. That means Y get the good at the price of 1100Rs which is inclusive of Tax i.e. 10% (as assumed above).

Now Y carries out various processing activities on the good and when the final good was ready he further sells it to Z at selling price of 2000 Rs. Where Y has considered his initial sale at 1100 Rs and 900 Rs were the processing charges. That means Z will get the product at price of 2200 Rs which is including Tax of 10%.

Case 2: When there is Input Tax Credit.

X sells his good to Y at price of 1000 Rs. That means Y get the good at the price of 1100Rs which is inclusive of Tax i.e. 10% (as assumed above).

But in this case since Y is going to get credit of duty of Rs 100, he will not count this amount to this costing or investment. He will just charge the processing cost of 900 Rs and will further sell the product at the price of 1900 Rs to Z. Z will get the product for Rs 2090, because a tax of 10% will be levied on the selling price.

In the first case, where the product cost incurred by Y was 1100 so the final amount came out to 2200. But in second case when the product cost was 1000 and after processing final cost was 2090. That is an amount reduction of 110. Although it appears

⁹⁹ *Id. at 60.*

¹⁰⁰ *Id. at 60.*

very less reduction here but when a commodity passes through a chain of sale it makes a huge difference in the final amount which has to be beard by consumer.

The only disadvantage with Input Tax Credit is that it is only applicable to intra-state sales and not on inter-state sales. Para 2.6 of the “White Paper on State-Level Value Added Tax” specifically excluded credit for tax paid on inputs procured from other States through inter-State sale and stock transfer.¹⁰¹

ITC is not applicable on Inter-state sales because a particular state will have to suffer loss of revenue, where it will not be able to receive the charged tax in lieu of credit of tax received by dealer on the tax paid in any other state.

That means there is still the issue of Credit Blockage in inter-state sales and most of the ecommerce transactions are inter-state only, that’s why ecommerce operators have to face great difficulties. The purpose of utilising ecommerce market place platform was to expand the business in different states and as most of their sales are inter-state sales, they are unable to avail credit on the input tax. This is the problem of Credit Blockage.

And when there is a situation of Credit blockage, the prices of the goods effected badly because of no input credit available. In this case, a single commodity has to go through double taxation one is while buying and other is while selling and that why the price of the commodity increases. And due to this reason dealers selling via ecommerce platform have to face competition from local dealers, who avail input tax and can sell the same product at low price than dealers from outer states. So to be in competition the vendors on ecommerce platform has to lessen their margins and due to which they avail less profit on the commodity they sell via ecommerce.

After GST

GST takes off the restriction of input tax credit on inter-state sales and provided a new mechanism.

¹⁰¹ *Id. at 60.*

“The provisions of GST Act enable every registered taxable person to take input tax credit which is to be credited to him in an electronic credit ledger of the same person.”¹⁰²

“As the GST tax will comprise of three components i.e. CGST, SGST and IGST, the credit for each respective component shall be taken in the respective manner as follows:-

1. Amount of CGST available to a person shall be first discharged against CGST and if some amount still remains, against IGST.

2. Amount of SGST available to a person shall be first discharged against SGST and if some amount still remains, against IGST.

3. Amount of IGST available to a person shall be first discharged against IGST and if some amount still remains, against CGST and then SGST.

Further, tax credit can only be taken only after input tax is deposited by the registered person with the authorities and is credited in the electronic ledger.”¹⁰³

As per the provisions of the GST, the ecommerce operator has liability to collect taxes, depending on the nature of transaction, online marketplace would charge CGST + SGST or IGST. Such taxes would be available as credit to vendor. This will lead to efficiency in cost and removal of Credit blockage and cascading effect of taxation.

¹⁰² THE REVISED MODEL GST LAW, Sec. 16.

¹⁰³ THE REVISED MODEL GST LAW, Sec. 35.

4.4 Grey Areas in GST

1. The provisions related to TCS may be very complex to comply, because it would lead to the piling up of the unutilized credits with suppliers and the large number of refund cases would be difficult to manage. Moreover the time period of submitting TCS with government is within 10 days of end of the month and to furnish electronic statement within 10 days. But there are many issues with this because different sellers furnish their data at different times and in different manners.
2. There are various ecommerce models followed by Ecommerce operators, for example Flipkart, Amazon follows Managed Market place model, while Uber, Ola follows aggregator model and Facebook, Twitter works on different model. Each of the model is facing taxation problem with the current taxation system. Unless GST comes up proper solutions related to each model, it will be only a new problem in the basket of Ecommerce operators.
3. GST will have negative impact on cash flow because most of the transaction on these platforms are cash on delivery and TCS would lead to capital blockage for small suppliers who relies on these ecommerce operators for the expansion of business.
4. Mandatory registration under GST will lead to the compliance cost which is heavy burden for start-ups. This way GST is contradicting its principle of ease of doing business.
5. There are no provisions for return/ cancellation/ replacement policy which is offered by ecommerce operators and adjustment of excess tax that is already paid.
6. As per the provisions of GST, if supplier transfer the goods from one agent in each taxable territory to any other agent in other taxable territory to make it reach to a final consumer than at each transfer it will have to pay TCS. This means even the transportation of goods in between godowns is taxable.
7. There will no more mega sales or Free offers on ecommerce websites because even those will be taxable under GST.

Chapter 5-Case Laws on E-Commerce Taxation

1. Instakart Services Pvt. Ltd v State of UP¹⁰⁴

The present case is about the deposit of entry tax which has to be given by the petitioner who is engaged in courier business. The petitioner accuses various respondents. There have been many contentions that have been raised by the petitioner but one of the main contentions that have been advanced are related to compulsory imposition of tax on specified goods as per Section 4A of entry of goods into local areas (Amendment) Act, 2016 that has been notified on 16th Sept., 2016. It says that tax (Entry Tax) has to be imposed only on goods being brought from outside the state through e-commerce or online purchase. The petitioner says that it is wrongly imposed because mode of transaction cannot be the only base. In the judgment of *Jindal Stainless Ltd. v State of Haryana*¹⁰⁵. The same issue has been dealt such that this mere discrimination is practiced by State which is rendering Section 4A ultra-vires. It is violation of Article 14, 286 and 304A of Constitution of India. The second main contention was that the argument on constitutionality and validity for this tax imposition relies on the notification ground dated 16th Sept., 2016 and after such notification there was absence of legislative competence as Entry 52 of List II has already been deleted, thus, this is impermissible.

In the case of *Instakart Services Pvt. Ltd. Vs. State of Bihar*¹⁰⁶, contentions were raised by the same petitioner and interim order was passed on 16th March, 2016. But in this case there is a peculiar element where the issue of discrimination as the issue of legislative competence is also involved. Therefore, he prays for an interim relief. The same petition has been imposed by the State.

Contentions of Ld. Counsel: Ld. Additional Chief Standing Counsel since clause 19 of Constitution in 101st Amendment saves the existing provisions of Uttar Pradesh Tax on Entry of Goods into local areas Act 2007 for period of one year till the time it has not been amended or repealed by the competent legislature. Thus, legislature was

¹⁰⁴ Instakart Services Pvt. Ltd v State of UP (2016) SCC 1184 (India).

¹⁰⁵ Jindal Stainless Ltd. v State of Haryana, (2006) 7 SCC 241 (India).

¹⁰⁶ Instakart Services Pvt. Ltd. Vs. State of Bihar, (2016) SCC Pat 4685 (India).

competent to have brought Section 4A into existence by notification. Also state had to replenish its revenue and thus introduction of this provision cannot be unjustified.

Therefore, petitioner submits that the existence provision was only for one year and Section 4 of 2007 Act continues to exist and could have been amended by State and no fresh tax could have been introduced as it is done in this amendment. Thus, this creates pure discrimination and unlawful fiscal barriers and leading to price hike. Also this is delegation of powers on Commissioner under Section 4A which could not have been done without making provisions in enactment itself.

Judgment: Insertion of amendment was beyond authority for making imposition of heavy tax which was not existing in old Act and cannot be done now. Also clause 19 of Constitution in 101st Amendment does not saves imposition through online purchase for personal use. There is lack of legislative competence rendering unconstitutional. Thus, petitioner shall be entitled to trade through e-commerce and online purchase system.

2. Flipkart Internet Private Limited v State of Kerela¹⁰⁷

The two cases involved writ petitions on same issue thus these were disposed of by common judgment. As per the facts of the case, petitioner being online service provider under Finance Act 1994 which governed imposition of service tax was aggrieved as penalty was passed against them by the authorities under Kerala Valued Added Tax Act (KVAT) on the reasons that it has breached Section 20 & 40 of same Act for not getting registered as dealer and for failing to file returns and maintaining accounts.¹⁰⁸ The main contentions of the petitioner were that firstly it only facilitates transactions of sales and purchase but not engaged in business of sales and purchase of goods and further makes arrangement of delivery of products, thus, it cannot be sued under KVAT Act. Even if respondents claimed that it should have filed returns and paid tax, it should have afforded to it U/S 22 of KVAT Act before issuing notice under Section 67 of same Act. The claim on petitioner for defaulted sales is incorrect rather it should be against W.S retails and other sellers registered on the website. The second petitioner was also imposed penalty on the similar lines and difference being here petitioner is a person

¹⁰⁷ Flipkart Internet Private Limited v State of Kerela, (2015) 4 KLJ 691 (India).

¹⁰⁸ *Id.* at 64.

who is engaged in the business of sales and retail (through myntra.com) who was registered under same Act and was paying the tax who was sued for effecting local sales.

As per respondent's contention, there was agreement for sale and petitioner agreed to sell the product which was a local sale to the customers in Kerala. Thus, it was not inter-state sale and petitioners were liable to pay tax and they failed to do so and also they failed to file necessary returns and maintaining accounts and then penalty was quantified twice the amount to be paid. To all the contentions made by respondents the petitioners submitted that it was dealer and thus not liable for obligation to file returns and maintain records. However, the notice failed to explain that how sales could have been treated as intra state sales.

Judgment: There is no material that can be relied to suggest that petitioner had effected local sales in Kerala for being registered as dealer and thus complying with other provisions which were applicable to dealer. In the present cases, there was uncertainty regarding real nature of transactions being intra-state or inter-state. The intelligence officers referred the case to assessing officers for inspection regarding liability for tax and thus the case could proceed as per Section 22 to 25 of KVAT Act regarding determination of tax liability, if dealer is concerned. It has to be kept in mind that tax *administration is not about collecting revenue but a fundamental constitutional percept under Article 265 stating that no tax shall be levied or collected except by authority of law so that there is no miscarriage of justice.*

3. Instakart Services Pvt. Ltd. v State of West Bengal¹⁰⁹

As per the facts of the case, there were many contentions raised by the petitioner in the present case, mainly that the requirement of state which mandated petitioner to deposit entry tax generating way bills for bringing all the goods from outside that too on behalf of petitioner clients whereby petitioner was just engaged in courier business. State's obligation on petitioner is incorrect relying in the fact that as per Rule 110C of West Bengal value added tax rules permits unregistered dealers, casual dealers and persons other than dealers to generate way-bills electronically under some conditions but since

¹⁰⁹ Instakart Services Pvt. Ltd. v State of West Bengal, (2016) SCC 6109 (India).

this provision has been struck down by single bench court and order not being stayed, petitioner is not liable to pay the tax.

On this Respondents being State also rebutted stating that this facility extended to courier companies and the like under Rule 110C is a Privilege and this as such cannot be termed as a full-fledged right. According to the contentions of state, since the appeal is pending does not imply that deposition of tax will be termed as void. All states which are having same kind of matters have approached Supreme Court whereby state has intervened in the proceeding to get the result as soon as possible giving it highest priority.

Judgement: Judgement was given in the favour of petitioner stating that no matter that Rule 110C is a privilege; *it does not give right to state to insist on the payment of entry tax for obtaining the benefit under such Rule knowing that the rule has been struck down.* Thus petitioner is allowed to generate Way bills without payment of tax. Also if there is any change in the programme, state has obligation to do so as soon as possible without causing inconvenience to the petitioner so that it can generate electronic way bills without depositing the tax.

4. Flipkart Internet Private limited v State of Gujarat¹¹⁰

As per the facts of the case, there were many petitions in this present suit lying on common question of law and facts therefore these petitions were disposed of via same one judgement and order.

All these petitions were based on same contention being imposition of tax on entry that is Entry tax on all the goods which were purchased by Individual customers with the help of E-Commerce or commonly used M- commerce through online portals for their personal use and consumption and all this is laid under provisions of Gujarat tax on Entry of specified goods into Local areas (Amendment) 2016 which was published in Gujarat government gazette on 31st March which amended the mere provisions of Gujarat tax for entry of goods.

¹¹⁰ Flipkart Internet Private limited v State of Gujarat, (2016) SCC Online Guj 6171 (India).

As per the contentions of petitioner through the learned senior advocate, the challenge to vires of above provisions will not stand by abiding the judgement in *Jindal stainless limited v State of Haryana*¹¹¹. Also the importers and the petitioners have already paid the tax that is central sales tax to the concerned state and thus according the learned senior advocate they are entitled to receive benefit as per section 4(2) of Entry tax act, 2001 which clearly lays down that while the person is making payment of Entry tax, the central sales tax paid is to be given off subject to no conditions and also therefore entry tax imposed under entry tax act has to be reduced to the amount of tax or amount paid during the inter-state trade or simply commerce. Thus the learned counsel on the behalf of petitioner prays before the court to uphold the vires provisions and pass appropriate order for the same so that the benefit of reduction of levied tax can be availed by the petitioners or to set off the central tax. Thereby, they also reserve liberty for the petitioners to approach the state government for the same matter.

After the contentions made by petitioner, respondents rebutted the same by giving referring to the judgement of Hon'ble Supreme court in *Jindal stainless limited v state of Haryana* whereby issue is concluded. After hearing both the petitioners and respondents, the court was of view in this application that constitutional validity which was challenged is held valid and levy of tax is held intra vires. Thus present petitions failed and accordingly dismissed. Whole of the matter as such applies to concerned importers as well because they bring specified good into the state of Gujarat and suffered central sales tax. And thus sec 4(2) would thereby follow. The conditions in tax ability and rule 5 – reduction of tax liability has to be abided with proper conditions stated therein.

Thus for the same there is need for importers to make claim before appropriate authority to avail the benefit of section 4 sub clause 2 for reduction in levying of tax as required by Rule 5 under Entry tax Rules. On the basis of so claim, the appropriate authorities have to act with accordance to the above stated provisions and the rules.

Judgement: As per the First Civil application, the petition has been dismissed and upheld the constitutional validity of the same. According to the second civil application with respect to grant of benefit to the petitioners and the concerned importers, the court has emphasized to make appropriate claim before the appropriate authority so that

¹¹¹ *Id.* at 67.

benefit can be availed. After the claim is made, it is necessary to consider it according to the law. Thus notice is discharged with no separate costs.

5. EBay v ADIT¹¹²

Name of the Parties: - eBay International AG, C/o. S.R. Batli Boi & Co. (Appellant)

Versus

Assistant Director of Income Tax, Range 3(2), Schindia House. (Respondent)

Assistant Director of Income Tax, Range 3(2), Schindia House. (Appellant)

Versus

EBay International AG, C/o. S.R. Batli Boi & Co. (Respondent)

This is the case of two cross appeals, emanates from the order passed by CIT (A), taking into consideration the assessment year 2006-2007. The facts of the case states that the assessee i.e., eBay AG is a Company incorporated in as well as tax resident of Switzerland. eBay AG entered into a Marketing Support Agreement with eBay India Private Limited and eBay Motors India Private Limited for the purpose of providing an online platform through creating a website where purchase and sale of goods can be done easily. eBay India was earlier known as Baze.com and it was acquired by eBay AG and in this way eBay India as well as eBay Motors came into being and eBay AG came into existence in India. All the transactions were being operated through assessee's website the sellers would list their products by providing specifications for the purpose of selling them and at the same any buyer could also register themselves by providing their personal details.

The main issue in this case was that, eBay AG earned revenue amounting to Rs.4, 94, 27,530/- from the operations in India and it was claimed that it has Permanent Establishment in India and the revenue is taxable as business profit as per the provisions of Article 7 of the Double Taxation Avoidance Agreement between India and Switzerland and only if it has a Permanent Establishment as per the provisions of Article 5 of the same. At the same time eBay AG claimed that it has no Permanent Establishment and the revenue earned is not taxable.

¹¹² EBay v ADIT, (2012) ITAT 11310 (India).

Assessing officer, at the time of assessing noted several aspects and concluded that eBay India and eBay Motors are the group companies of eBay AG, rendering services in India. And as per Explanation 2 to section 9(1) (vii), Assessing Officer held that the amount received by the assessee is taxable as 'Fee for Technical services' and taxed the assessee @20%. The matter went to CIT (A) and several contentions were made from both the sides. CIT (A) upheld the remand report submitted by the Assessing officer and held that the assessee has Permanent Establishment in India and the revenue generated is taxable as per Double Taxation Agreement and charged the assessee with 10% of the amount computed.

The assessee further appealed against the decision of CIT (A) and again the contentions were made. The appellate tribunal held that as per section 9(i) (vii) of the Act, the 'fee for technical services' are paid when services like managerial, technical or consultancy services are rendered. In this case, the services provided by the assessee was not of any of these kinds. The assessee is providing only a platform or the market place where the sellers and the buyers come together to sell or purchase the products through its website for which the assessee is entitled to receive a fee when the transaction is complete. There is no technical assistance or consultancy services are provided as the products are listed upon the website and it is upon the discretion of the buyer to purchase or not. The assessee is no way responsible for any disputes that arose between the seller and the buyer and is not providing any kind of managerial or technical assistance or consultancy services and is entitled to fees which does not mean the fee for technical services. The CIT (A) also referred the matter to High Powered Committee on "Electronic Commerce Taxation" constituted by CBDT, which opined that the fees may not be 'fee for technical services' but may be termed as 'Business Profits' as per Article 7 of the DTA, which was earned through the Permanent Establishment in India. In this case, Id Dr referred to few cases as well the clauses of the agreement that was entered between the eBay India and eBay Motor with eBay AG which even stated that the costs incurred by eBay India were reimbursed by the assessee with 8% mark-up. Even the travelling expenses, rent of the premises including marketing expenses were reimburse by the assessee which showed that eBay India and eBay Motor were Permanent Establishment of eBay AG.¹¹³

¹¹³ *Id.* at 69.

Later on, it was observed that eBay India or eBay Motor does not have direct involvement in the finances and transactions taking place on assessee's website as their major role was to provide assistance in the activities related to business, provide market data, discuss budget as well as furnish reports as per requirements which clearly states that these have no roles as PE of eBay AG. As these two entities exclusively assisted the assessee in carrying on business in India, they were termed as dependent agents and not PE. The clauses of Article 5 of DTA does not apply to these two entities as they fail to satisfy the requirements of 'Dependent Agent Permanent Establishment' of the assessee. The second issue to be addressed was that the business profits made are taxable in India, so as per Article 7 of DTA states that the PE of the assessee must be taxed. In this case the eBay India and eBay Motors are not the PE of the assessee and has no involvement in the managerial task of the assessee's website. The amount received by them is in lieu of services provided to the assessee and not to the sellers and the buyers. Therefore, there will be no liability for the payment of tax as the revenue generated is by the assessee independently and not by these two entities. Hence, the impugned order of CIT (A) was overturned.

6. Income Tax Officer V Right Florist Pvt. Ltd.¹¹⁴

Name of the Parties: - Income Tax Officer- Appellant

Versus

Right Florist Pvt. Ltd. - Respondent

In this case, the assessee is the florist and for the purpose of advertising he uses the search engines like Google and Yahoo to run his business. The way these search engines works is whenever anyone searches for a particular thing by typing certain keywords, then the advertisement of the assessee is displayed on it. For the purpose of displaying the advertisement on their website, the assessee has paid the aggregate amount of Rs. 30,44,166 to both the US based entities Google Ireland Limited also known as Google Ireland and Overture Services Inc USA which is also known as Yahoo, USA. The assessee did not had to pay any taxes but at the time of filing of tax return by the assess, the assessing officer sent a show cause to the assessee as to why these payments may be disallowed as the deduction in computation of its income as per Section 40(a)(i). This

¹¹⁴ Income Tax Officer V Right Florist Pvt. Ltd. (2013) SCC ITAT 6870 (India).

particular section provides that when the assessee fails to discharge his tax liabilities in respect of the amount paid to foreign entity then no deduction is allowed in respect of the expenditure occurred. At the same time, the assessee claimed that he had made payment to the foreign entities who does not have permanent establishment in India and therefore he is not liable to pay for the taxes. The assessing officer rejected the contentions of the assessee and held him liable to pay for the taxes and stated that the income will be taxable in India. The assessing Officer disallowed Rs.30, 44,166 under section 40 (a) (i) of the Act and therefore aggrieved by this, the assessee appealed to the CIT (A).

The main issue in this case is that the assessee claimed that he is not liable to pay the tax in India as the amount he is paying is to the two foreign entities i.e., Google Ireland and Yahoo USA who does not have any permanent establishment in India for the purpose of posting his advertisements on their websites. At the same time the Assessing Officer claimed that the assessee is liable to pay the tax in India as per 40(a) (i) as well as section 195 referring to Deduction of Tax at Source of the Income Tax Act, 1961.¹¹⁵

The CIT (A) held that the assessee had paid the aggregate amount to the two foreign entities i.e. Google Ireland and the Yahoo USA for the purpose of advertisement on their website and as there exist the double taxation avoidance agreement between India and USA as well as India and Ireland and these two entities does not have any permanent establishment in India for the considered financial year. The CIT (A) held that because of the existence of Double Taxation Avoidance Agreement, for the payment made to these entities, no portion is taxable in India and therefore the assessee was not under obligation of for the deduction of tax at source under section 195 of the Income Tax Act, 1961. And therefore the contentions of Assessing Officer was rejected. Further appeal was made by the aggrieved assessing Officer. The appellate tribunal then further described the detail nature of the work and services provided by the Google as well as Yahoo as an efficient search engines. The tribunal also further analysed on the basis of whether these foreign entities have any permanent establishment in the India so as to make the income be taxed at source in India.

Referring to certain case laws as well as sections of the act and the DTAA, the tribunal gave its judgment in favour of the assessee and held that there is

¹¹⁵ *Id.* at 71.

no business profit made by the *Google Ireland and the Overture Services Inc. USA* i.e., Google and Yahoo and even they do not have any permanent establishment in India, therefore the assessee is not liable to pay tax deducted at source for the payment made to Google and Yahoo. Certain important terms like 'income accruing or arising out of India' and 'Income deemed to accrue or arise in India' has been discussed in detail by referring to certain cases in this particular case.

It was therefore held that the CIT (A) has erred himself in deleting the addition of Rs.30, 44,166 and the assessee is not in the obligation to pay taxes or the tax deducted at source under the provision of Income Tax act, 1961 and even according to the Double Taxation Avoidance Agreement no portion of the payments made to the foreign companies is taxable in India.

7. WS Retail Private Limited v Union of India¹¹⁶

Name of the Parties: - M/s. Ws Retail Services Private Limited

Versus

1. Union of India,
2. The commissioner of Commercial Taxes,
3. The Commercial Tax Officer-I,
4. The Deputy Commercial Tax Officer (Intelligence Wing),
5. The Assistant Commissioner of Commercial Taxes,
6. The Sales Tax Officer,
7. The Value added Tax Officer,
8. The Excise and Taxation Officer,
9. The Joint Commissioner (Sales Tax),
10. The Deputy Commissioner.

In this case, the petitioner is a dealer who deals in products through online website ww.flipkart.com with the brand name E-Kart. The petitioner has his warehouse in different states and cities. Those warehouse are used to store the goods for the purpose of dealing and are located in Mumbai, Kolkata, Bangalore, Delhi and Noida. The

¹¹⁶ WS Retail Private Limited v Union of India, (2016) SCC Mad 3442 (India).

present controversy is regarding Puducherry. The main issue in this case is that whether the goods such as retail sale of mobile phones, computer spare parts, personal healthcare products, car accessories, cameras etc., which is done by the petitioner online via flipkart.com under the brand name of E-Kart would be termed as an inter-state sale or the local sale within the Union Territory of Puducherry.

In this case the controversy is that when the order is placed through online portal on the website, the customer located anywhere in the country or from Puducherry, corresponding to the order placed, the goods will be transferred from one warehouse situated anywhere in the country to the desired place of the order being placed. By way of inter- state transaction and sale between the petitioner and the customer on which the Central Sales Tax is being paid by the petitioner in the state from where the goods originate from, for the purpose of being sold to the customer situated in different state as per the provisions of Central Sales Tax Act, 1956.¹¹⁷

Especially for the purpose of transfer and sale of goods at Puducherry, the petitioner has installed a delivery hub in Puducherry with the name E-Kart Logistics as a division of petitioner. An inspection was being conducted by the Intelligence Wing of the Commercial Tax Department of Puducherry in the business premises of the petitioner based on which a notice was issued to the petitioner stating that the petitioner needs to register himself under the Puducherry Value Added Tax Act (PVAT) and have to furnish the details of the total callus of sales done for a particular financial year and taxes will be imposed accordingly for which the petitioner will be liable to pay those taxes as per the provisions of PVAT Act. The petitioner was also directed to furnish all the details of the sales in the Union Territory of Puducherry and also furnish the purchase ledger, sales ledger, cash book, income tax etc., for the immediate preceding three years of the particular financial year.

The allegations were also made against the petitioner that he is not the registered dealer and it was found from the copies of the E- Sugam Forms that was utilized by the petitioner and they have also used the duplicate and non-existing TIN number for the purpose of transporting the goods from one of the warehouse to the delivery hub located at Puducherry. According to these allegations the movement of goods from box to the end customer was being taxable as per the provisions within the territory of Puducherry.

¹¹⁷ *Id.* at 74.

At the same time the petitioner also contented that he is not liable to pay the taxes as he is providing the logistic services under his brand name by moving goods from one state to another state and is also paying the Central Sales Tax at full rate from those warehouses. And with regard to the allegations for the non-existing TIN number, the petitioner stated that the form in the State of Karnataka has a provision that this is not relevant for the purpose of moving goods to the Union Territory of Puducherry. The petitioner also stated that with respect to the transaction which is an inter-state sale, the tax invoice is being raised by the seller from where the goods are generally dispatched and the discharge of applicable Central State Tax¹¹⁸ to the concerned State Government and also declares the same in their periodical returns.

Therefore, it is also submitted that the transaction is an inter-state sale and with regard to the establishment of the delivery hub in Puducherry and the hub providing the facilities of delivery of goods based on the areas or the streets to deliver them to the customers suffice no sale or inventory holding transactions that takes place from the delivery hubs of the Union Territory of Puducherry and are also not the part of VAT regime for the purpose of taxes as they are only the part of logistics also known as carrier business. Another summon was also issues regarding the flow chart of the transactions done by them and was sought to substantiate the same. The petitioner in respond submitted the flow chart of the transactions done by them and even reflecting the interstate sale performed by them through their hubs and substantiated the same.

In this case several other case laws and Judge-made laws were referred to give the final judgment. Here, the petitioner was not held liable for the purpose of imposition of taxes across the border and in the Union Territory of India. Previously it was contented that the ingredients of all the factual aspects have not been considered and thus the impugned order was passed by the respondents. It was also mentioned that the contracts entered between the buyers and the petitioner were only implied contracts as the contracts between them were being entered online and no direct conversations of transaction took place until the payment of money or the consideration for the contract and the actual delivery of goods to the customer by the petitioner. The buyer who wanted to buy the product had to log on to the website www.flipkart.com and no direct communication was made for the purpose of entering into the contract and the

¹¹⁸ *Id.* at 75.

transaction would occur through the online portal. Even for the purpose of return of the goods the same procedure was being followed. All these showed that the buyer and the seller/petitioner were not in direct contact and the delivery hubs were only the mode of transaction and so the tax liability for the Union Territory of Puducherry does not arise upon the petitioner.

In the transactions where the products are delivered at the doorstep of the buyer even on the cash on delivery basis does mean that the movement of the goods from one state to another is the result of any contract of sale and purchase between the actual buyer and the actual seller. Therefore, the learned counsel realized that according to the registration made and TIN number the petitioner is the registered dealer under Kerala VAT Act and is conceded Nil taxable according to the Kerala VAT Act and the entire sale is meant to be the interstate sale among the buyer and the seller and the petitioner is only liable to pay the Central State Tax as per the Act and no other tax is to be paid. Hence the impugned order was quashed.¹¹⁹

¹¹⁹ *Id.* at 76.

Chapter 6 – Conclusion and Recommendations

6.1 Conclusion

In present countries have not agreed to adopt and follow a single taxation framework for taxing ecommerce transactions between the countries. A separate legal and taxation framework is following by each country for governing ecommerce in their respective nations. Some states like United States have retail taxation structure, India have VAT (in present and soon going to be replaced by GST) and EU already have GST framework in action. Therefore till now ecommerce taxations are being taxed by amending and extending current tax laws only. There is still a need of evolution of extensive framework for ecommerce transactions.

E-Commerce is changing and growing by branching itself into newer forms. Even M-commerce is expanding at a faster pace than e-commerce. Therefore, not only there is need to strengthen the legal and statutory framework, but also an exhaustive and efficient infrastructure need to assembled to supervise all ecommerce transactions. The skills of the commercial tax department's officer need to be upgraded. Administration need to be improved by educating the consumer of their rights and by increasing the cooperation among different states. Tools and techniques for assisting taxpayers in their dealings with tax department need to be designed. Betterment of authorization controls and audit trails needs to be done. The IT infrastructure needs to be so much efficient that it can cover all transactions among states and even among nations.

Although some of the issues in Current Tax Regime has been addressed by the Model GST Law, but there are still number of issues remaining in the present tax regime that are prevailing. For instance, there has been no provision that how combo offers provided by e-commerce business entity are going to be taxed, another ambiguity is that what will be the amount that is going to be taxed in the cases where discount amount is bore by these business entities, which is also known as 'Burn Cost'.

Although provision of TCS in GST would help in providing the solution to double taxation but will also lead to the piling up of cases of refund of Tax Credits. The mandatory registration required by GST would lead to the rise in compliance cost of E-Commerce start-ups and existing E-Commerce operators. As for complying with the

provision of TCS, they will have to set up new divisions which will only dealing with collection of tax from the consumers and depositing the same to the tax department at regular intervals of each month. Also they need to appoint agents in every taxable territory to conduct business in that territory. As there is no provision on Cancellation/ Refund policy, so operators has to pay the tax from their capital and later on request return or adjustment from government. Due to which ecommerce operators need to maintain higher working capital because the cases of Cancellation/refund in ecommerce business are greater in number.

While the new law has brought up more complications than the reforms in the taxation framework of the nation, but there complications are for short time only and can be removed with the amendments in time. In the long time, GST will prove to be very valuable to ecommerce sector as it is going to end the quarrel between tax department and e-commerce operators like Amazon and Flipkart.com, which have most of pending cases in the court. Not only GST clarifies the tax imposition provisions but also by taking Input Tax Credit to a national will add to the expansion of ecommerce sector.

6.2 Recommendations

Recently, due to lack of understanding of ecommerce business models, a lot of problems are emerging under indirect tax laws. That is why there is a need of provisions specifically related to ecommerce in the upcoming GST Regime. GST should ensure that taxes are properly and legally levied on the ecommerce transactions. GST is the most crucial step towards the growth of ecommerce sector in India, which should ensure that ecommerce industry would not face the same issues as it is facing in the current tax regime. There are few recommendations:

1. A Committee specific to E-commerce should set up, which should have representatives from both government and ecommerce industry side. The committee should understand the various business models present in the market and issues related to ecommerce industry. ¹²⁰

¹²⁰ IAMAI, *Impact of GST on Online Marketplaces*, Pwc (Mar. 13, 2017, 10:04 PM), <http://www.pwc.in/assets/pdfs/publications/2016/pwc-iamai-impact-of-gst-on-online-marketplaces-may-2016.html>.

2. There is no clear definition of ecommerce transactions in current tax regime. Instead of this topics like aggregator or intermediary has been defined and due to the way these topics have been defined there is an ambiguity regarding the taxation of ecommerce transactions. It is highly recommended to define appropriately the ecommerce transactions.
3. Under the present taxation framework, ecommerce operators are facing problems from VAT authorities of states as they are asking for VAT from them. This issue has arisen because of lack of understanding about ecommerce business models work. It is recommended to add provisions which should clearly state for which transaction ecommerce operators or suppliers on ecommerce platforms are liable to pay tax. This should be clarified with respect to all basic ecommerce business models existing in cyberspace.¹²¹
4. In case of goods there has been clarification when the selling is inter-state and intra-state, but in case of services there are no such provisions. Because in case of services there can be the case where service provider is located in one state and are actually performed in some other state to the person residing in third state. Then which state jurisdiction will prevail? Or whether SGST, CGST or IGST would be applicable in these cases.
5. A clear point of taxation should be mentioned, i.e. when taxes has to be discharged for a particular ecommerce transaction. This point of taxation should be mentioned with respect to every stakeholder in a business transaction.
6. The applicable rate of tax in case of overall GST should be uniform throughout the nation and should not go beyond 18%. The concept of 'one market one tax' should be applied.
7. Under GST, the ecommerce company has requirement to get itself registered in every state, which removes the concept of centralised registration present in current tax regime. Centralised recommendations should be allowed. There should be introduction of one stop registration to make the registration process easy, contrary to the difficult it is being made by GST. One tax office should be auditing one company to lessen the chances of mistakes made by different tax offices.

¹²¹ *Id.* at 79.

8. Under current tax regime stock transfer are not taxable but with GST stock transfer will be made taxable with additional tax of 1% which is going to have severe impact. It is recommended not to levy 1% tax on these stock transfers.
9. There is an ambiguity going on whether digital supplies such as e-books would fall in ambit of goods or services. It is recommended that digital supplies to be treated as services.¹²²
10. In cases of Cancellation/refund there should be clear provisions for adjustments of any tax paid in those cases. There should be no limit for claiming tax adjustment in those cases.
11. Transition provisions needs to be structured to avoid any disputes between government and assessee, because as GST is new there will be these cases so a proper back up to handle such cases needs to be there.

¹²² *Id.* at 79.

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