CTC Study Group-Hyderabad

Case Studies on IT & ITES
and
Deemed International Transaction

02nd NOVEMBER -2019

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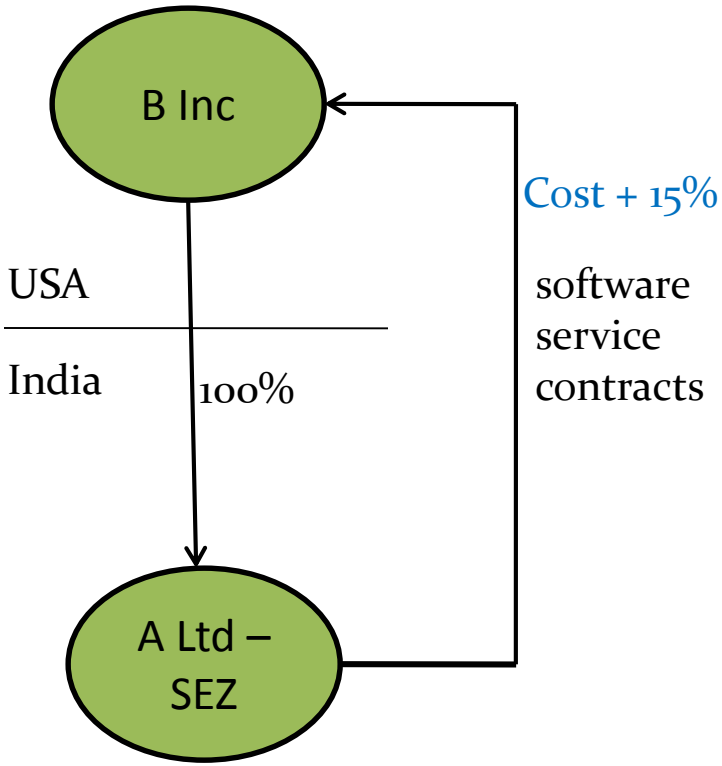
Case Studies on IT & ITES

Case Study – I



captive service provider

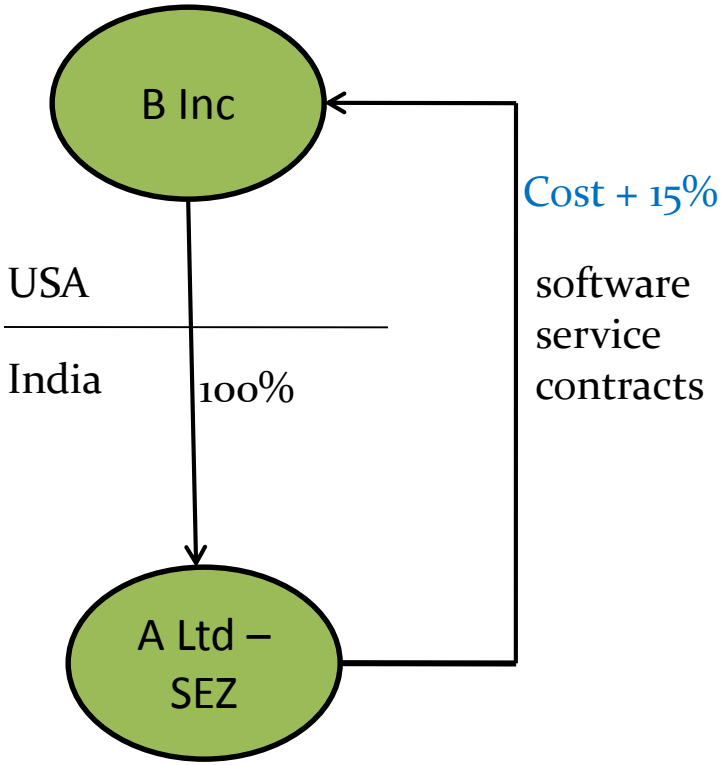
a) A Ltd is a WOS of B Inc USA.

b) B Inc USA obtains software service contracts mostly pertaining to software development services(SDS) which are assigned to A Ltd in India.

c) Software services includes software development, maintenance, application services, system integration, reengineering IT Infrastructure services and BPO services.

d) A Ltd is a captive service provider with minimum risk.

Case Study – I



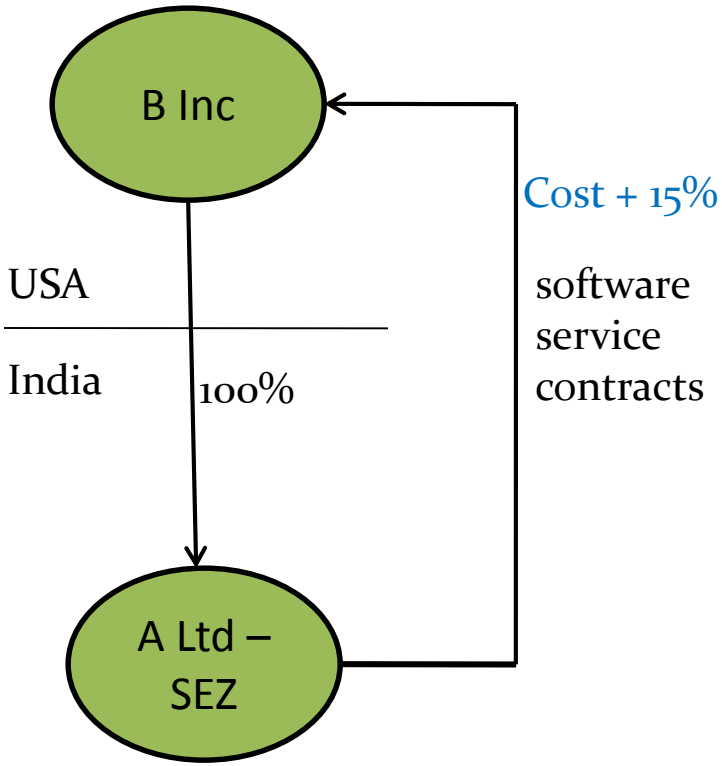
e) A Ltd follows cost plus 15% model in billing its parent B Inc.

f) A Ltd enjoys tax holiday u/s 10AA being located in SEZ.

g) A Ltd recorded a turnover of Rs.50Crores for the year under consideration and benchmarked the transactions under Software development services (SDS) as all the international transactions with its AE are into SDS.

h) TPO scrutinized A Ltd's TP study and rejected the comparables picked up by A Ltd and made a TP adjustment by taking the Arm's length margin say @29% with the following observations and conclusions

Case Study – I



captive service provider

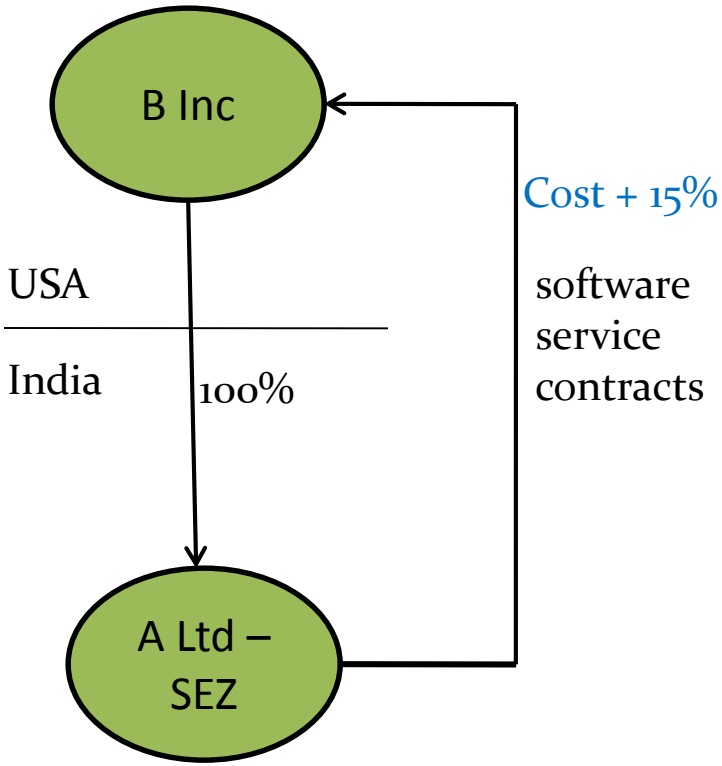
i. Companies involved in KPO services have been picked up as comparables by the TPO.

ii. TPO opined that turnover has no significance in benchmarking analysis and picked up giant companies like Infosys, Wipro, and Tata Elexi Ltd etc.

iii. A Ltd's argument that entrepreneurial companies cannot be benchmarked with risk free captive service providers is rejected.

iv. Alternative argument of A Ltd to provide for risk adjustments against comparable companies margins also not accepted.

Case Study – I



captive service provider

v. A Ltd's argument to apply turnover filter of 1Cr to 200Cr was rejected by the TPO.

vi. A Ltd's argument that as it is covered by tax holiday provisions, there is no motive to shift profits from India to USA.

i) AO issued a draft order adopting TP adjustment against which A Ltd objected the same before the DRP.

j) DRP endorsed TPO's action.

Now A Ltd approaches you to file its appeal before Hon'ble ITAT. What are your arguments to defend the case?

Case Study – I

1. It is now an accepted industry approach KPO services are high end compared to normal BPO services, thereby comparing software services company/BPO company with KPO services is economically not justified. This is supported by following case laws:

   a) Progressive Digital Media (P.) Ltd [2018] 92 taxmann.com 426 (Hyderabad - Trib.)
   b) XL Health Corporation India (P.) Ltd [2018] 91 taxmann.com 310 (Bangalore - Trib.)
   c) Misys Software Solutions (India) (P.) Ltd [2017] 87 taxmann.com 170 (Bangalore - Trib.)

2. Giant companies cannot be compared with pygmies. This ratio is originally held by Delhi HC in the case of ***Agnity India Technologies Pvt Ltd. [TS-189-HC-2013(DEL)-TP]*** and also by Delhi Tribunal in the recent case ***Smart Cube India (P.) Ltd [2018] 94 taxmann.com 408 (Delhi - Trib.)*** this is primarily on account of brand value and economy sub scale etc.
   Giant companies with their brand value can record higher profits.

Case Study – I

3. Risk adjustment is very critical in economic analysis, quantifying the risk adjustment is a statistical/mathematical challenge. However some guidance in this behalf is available originally in ***Philips Software Centre (P.) Ltd. [2008] 26 SOT 226 (Bangalore)*** which is recently endorsed by Hon'ble Karnata High Court in the case of ***Philips Software Centre (P.) Ltd. Vs [2018] 95 taxmann.com 214 (Karnataka)***

4. Turnover filter is largely supported and endorsed by various benches of ITAT we have contrary decisions also to quote a few which have supported this filter are as follows:

   a) Agile Software Enterprise (P.) Ltd Vs ITO [2014] 52 taxmann.com 517 (Bangalore - Trib.)
   b) Wissen Infotech (P.) Ltd. Vs DCIT [2017] 80 taxmann.com 43 (Hyderabad - Trib.)
   c) UCB India (P.) Ltd. Vs ACIT [2016] 73 taxmann.com 389 (Mumbai - Trib.)
   d) Invensys Development Centre India (P.) Ltd Vs ACIT [2014] 47 taxmann.com 81 (Hyderabad - Trib.)
   e) Patni Telecom Solutions (P.) Ltd Vs ACIT [2014] 44 taxmann.com 366 (Hyderabad - Trib.)

Case Study – I

f) FCG Software Services (India) (P.) Ltd. Vs ITO [2016] 66 taxmann.com 296 (Bangalore - Trib.)
g) ITO Vs Knoah Solutions (P.) Ltd [2016] 73 taxmann.com 79 (Hyderabad - Trib.)
h) Microchip Technology (India) (P.) Ltd. [2017] 81 taxmann.com 389 (Bangalore - Trib.)

5. Whether TP provisions can be applied in a case where the assessee is covered by a tax holiday provisions is a vexed issue and largely covered against the assessee by the courts holding a view that TP provisions would apply in such cases also. However it is interesting to watch the journey of this issue in the Indian courts as under:

Case Study – I

a) ***Aztec Software & Technology Services Ltd. [2007] 107 ITD 141 (BANG.)(SB)*** wherein the Hon'ble Bangalore Tribunal (Special Bench) held as under:

"16.The perusal of the above provisions reveals that these provisions can be invoked by the Assessing Officer and he can proceed to determine arm's length price where he either finds the existence of the circumstances mentioned in clauses (a) to (d) of sub-section (3) or where he considers it necessary and expedient to refer the determination of ALP to the TPO. There is no other requirement for invoking these provisions by the Assessing Officer. Besides as per mandate of section 92(1) income from international transaction between associated enterprises has to be computed having regard to arm's length price. Therefore, question of tax avoidance is not to be established by following mandatory provisions. Therefore, in our opinion, the language used by the legislature is plain and unambiguous and there is nothing in the language employed by the legislature on the basis of which it can be said that Assessing Officer must demonstrate the avoidance of tax before invoking these provisions. As per the settled legal position mentioned by us earlier, we are not required to find the intent of the legislature by referring to the Budget Speech of the Finance Minister, notes on clauses, circulars etc. when language of the statute is clear and unambiguous."

Case Study – I

b) ***Philips Software Centre (P.) Ltd. [2008] 26 SOT 226 (Bangalore)*** wherein the Hon'ble ITAT held that

"5.1 We have heard the rival contentions and we proceed to adjudicate on the issues in the sequence which has been argued by the rival parties before us. The learned counsel for the assessee has argued that the tax payable by it in India is lower than the tax rate applicable to its associated enterprise in the Netherlands. Since the assessee is availing the benefit under section 10A of the Act, one cannot take a simplistic view on the matter of tax avoidance. In this connection the learned Departmental Representative has drawn reference to the proviso to section 92C(4). Relying on OECD guidelines, the DR has mentioned that the consideration of transfer pricing should not be confused with the consideration of problems of tax avoidance, even though transfer pricing policies may be used for such purposes. In this connection, it was pointed out that by not declaring proper profits in India, the assessee is indirectly reducing its liability to Dividend Distribution Tax (in short 'DDT'). The Special Bench of the Tribunal, in the case of Aztec Software & Technology Services Ltd. (supra), has concluded that the Assessing Officer/TPO need not prove the motive of shifting of profits outside India for making a transfer pricing adjustment.

Case Study – I

The assessee had generally argued that one of the factors driving any motive for shifting profits would be the difference in the tax rate in India and the tax rate applicable to the associated enterprise in the overseas jurisdiction. In the instant case, since the assessee was availing the benefit under section 10A of the Act, it would be devoid of logic to argue that the assessee had manipulated prices (and shifted profits) to an overseas jurisdiction for the purpose of avoiding tax in India. The reference by the DR to the proviso to section 92C(4) is completely out of context and irrelevant. The DR ought to have appreciated that the proviso comes into play only once a transfer pricing adjustment is made. By quoting OECD guidelines, the ld. DR does not get much help. The ld. DR ought to have appreciated that what is relevant in the Indian context are the specific provisions of the Circular No. 14/2001. As submitted above, at para 55.5 of the said Circular, the CBDT has clearly mentioned that the intention of the transfer pricing provisions is to curtail avoidance of taxes by shifting profits outside India."

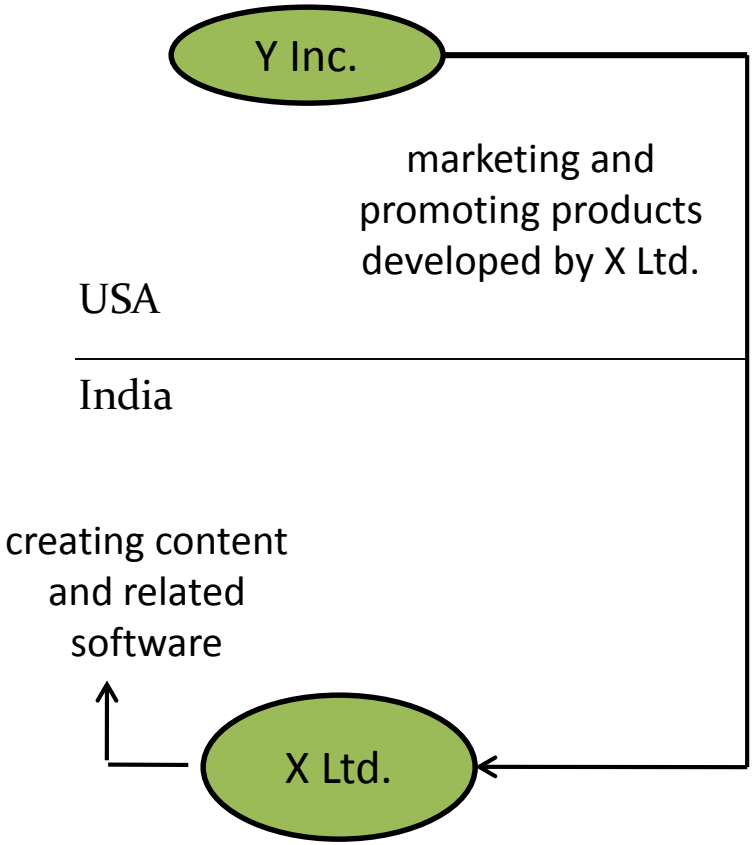
Case Study – I

c) ***Tata Consultancy Services Ltd [2015] 64 taxmann.com 369 (Mumbai - Trib.)***

"54. For the above discussion, the assessee's support to the impugned order on both counts is found to be correct. The AO erred in not himself examining the issue of TP and with the approval of the ld. CIT, made a reference to the TPO u/s 92CA(1) of the Act; that the AO as well as the ld. CIT(A) failed to apply their mind to the TP Report filed by the assessee, or to any other material or information or document furnished. The TPO made an adjustment which was incorporated by the AO in the assessment order. Thereby, the AO as well as the ld. CIT(A) did not discharge necessary respective judicial functions conferred on them under sections 92C and 92CA of the Act. Further, the assessee is also correct in contending that no TP adjustment can be made in a case like the present one, where the assessee enjoys u/s 10A or 80HHE of the Act, or where the tax rate in the country of the Associated Enterprises is higher than the rate of tax in India and where the establishment of tax avoidance or manipulation of prices or establishment of shifting of profits is not possible."

It is pertinent to note that an appeal is pending before Ahmedabad special bench in the case of Doshi Acocunting Services Pvt Limited ITA No.1285/12 & 1352/A/11

Case Study – II

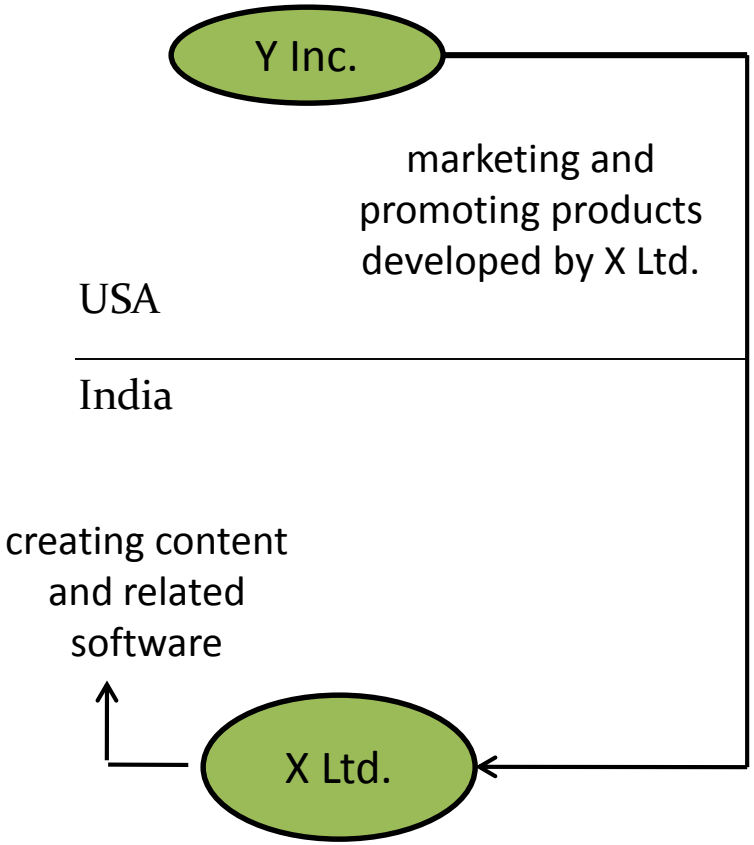


a) X Ltd is engaged in the business of creating content and related software for students, physicians and researchers involved in some medical licensing exams conducted in USA. It claims tax holiday u/s 10AA

b) Y Inc , USA is involved in marketing and promoting products developed by X Ltd and also provides end user assistance such as customer support web hosting and billing.

c) X Ltd in its TP study classifies itself as a high end BPO services which is otherwise termed as KPO and offers a profit margin of say 80%.

Case Study – II



d) TPO accepts the TP study and clears the assessment without any adjustments. The comparables picked up in the TP study provide an arm's length margin of say 55%.

e) AO while completing the assessment invokes sec.10AA(9) stating that Assessee made an excess claim of tax holiday profit and denied tax holiday benefit to the tune of (80-55=25%) and made an addition.

f) CIT(A) allowed assessee's appeal and held that AO encroached into TPO's arena in deciding the Arm's length margin.

Now the matter is before Hon'ble ITAT and X Ltd engages you to defend their case before ITAT. Please explain your approach of arguments in this case?

Case Study – II

1. This issue is decided in the case of ***Aquila Software Services Hyderabad Pvt Ltd ITA No. 423/Hyd/14***, dated 30/06/2015 the operation portion is as under

"*7. We have considered the submissions of the parties and perused the orders of revenue authorities as well as other materials on record. As far as the applicability of section 10A(7) is concerned, in our view, the issue has attained finality as the directions of ITAT in the earlier round of litigation has not been challenged by assessee or by revenue. Keeping this in view, we have to decide whether disallowance of deduction u/s 10A of the Act by applying the provisions of section 80IA(1) is valid. As can be seen, section 10A of the Act allows exemption at 100% of the profit earned by assessee from export of software. However, deduction u/s 10A is subject to 10A(7), which in turn refers to section 80IA(8) and 80IA(10) of the Act. Since 80IA(8) is not relevant for our purpose, there is no need to discuss the same. As far as the provisions contained u/s 80IA(10) is concerned, it reads as under:*

Case Study – II

"Where it appears to the AO that, owing to the close connection between the assessee carrying on the eligible business to which this section applies and any other person, or for any other reason, the course of business between them is so arranged that the business transacted between them produces to the assessee more than the ordinary profits which might be expected to arise in such eligible business, the AO shall, in computing the profits and gains of such eligible business for the purposes of the deduction under this section, take the amount of profits as may be reasonably deemed to have been derived therefrom."

On plain reading of the aforesaid provision, it is clear that as per the said provision three conditions have to be fulfilled.

- *Firstly, there must be close connection between assessee carrying on the eligible business and the other person.*
- *Secondly, the business between assessee and such other closely connected person should be so arranged that business transacted between them produces more than the ordinary profits to assessee carrying on eligible business.*
- *If AO is satisfied with the aforesaid two conditions, then, as per the third condition, he may take the amount of profits as may be reasonably deemed to have been derived from transactions of such business in computing profits of such eligible business for the purpose of deduction under the said section.*

Case Study – II

- *Considering the facts of the present case in the light of the aforesaid statutory provisions, it is to be seen that the first condition is fulfilled as assessee and its AE are related parties.*
- *However, as far as the second condition i.e. existence of arrangement between assessee and its related party by which these transactions so arranged has to produce more than the ordinary profits in the hands of assessee, whether has been fulfilled or not needs to be examined. On perusal of the assessment order, it is very much evident that only relying upon TP document of assessee wherein it is stated that average profit margin of comparable company is 15% as against 50% of assessee, AO has concluded that profit earned by assessee is not at arm's length. AO has not given a conclusive finding as to whether earning of such excess profit is as a result of business arrangement between the parties. Even, ld. CIT(A) has also not given any factual finding on the issue to conclusively prove that assessee and its related party has arranged their business affairs in such a manner that it will result in more than reasonable profit to assessee. Merely relying upon the fact that in the TP documentation the average margin of comparable companies are 15% where as the assessee has shown profit at 50%, the departmental authorities have reduced the deduction claimed u/s 10A by restricting the profit from the eligible business of assessee to 20% of the turnover. In our view, the Department having not fulfilled the conditions of section 80IA(10), disallowance in the present case is not justified.*

Case Study – II

- *At the cost of repetition, it needs to be stated that only relying upon TP documentation, AO has inferred that the profit earned by assessee at 50% is more than the arm's length profit.*
- *However, without bringing material on record that the profit earned by assessee at 50% is not the profit ordinarily earned in similar line of business, it cannot be said that it is not at arm's length. Moreover, excess profit may be due to various reasons. Therefore, without analysing those factors, it cannot be said that only because average profit earned by comparables is 15%, the profit earned by assessee at 50% is not reasonable.*

- *The Chennai Bench of the Tribunal in case of Tweezmen India (P.) Ltd. v. Addl. CIT [2010] 133 TTJ 308 while considering similar issue held that the provisions of section 80IA(10) do not give arbitrary power to AO to fix the profits of assessee. AO has to specify as to why he feels that profits of assessee are being shown at higher figure. AO has to further show as to how he has computed ordinary profits which he deems to be profit which assessee might be reasonably expected to generate. The Bench held that AO would be expected to use a comparable case to determine the possible ordinary profit which assessee could be expected to generate from his business.*

Case Study – II

- *In the absence of any other substantial evidence with him, when using a comparable, assessee's own past and future performance would obviously be the best comparable. Comparing assessee's modus operandi of conducting its business with another when the same are not of equal terms would be a travesty of justice in so far as the financial charges. The use of plant & machinery, depreciation thereon, the location which would affect the cost of transportation as also the cost of labour, cost of power and fuel would have to be seen. The ITAT, Delhi Bench in case of AT Keatney India Ltd. (supra), the facts of which are more or less identical to the facts of the present case, while deciding similar issue held as under:*

  "11. Adverting to the facts of the extant case, we find that the AO simply relied on the TP study report submitted by the assessee to form a bedrock for the disallowance of the part of the amount of deduction u/s 10A, without firstly showing that there existed any arrangement between the assessee and its overseas related party, by which the transactions were so arranged as to produce more than the ordinary profits in the hands of the assessee. The assessment year under consideration is 2009-10. Neither the proviso to sub-section (10) existed at that time, nor such a proviso can be applied as we are dealing with an international transaction and not specified domestic transaction.

Case Study – II

Under these circumstances, we are of the considered opinion that the impugned order upholding the invocation of sub-sec. (10) of sec. 80IA cannot be countenanced to this extent. Ergo, it is held that the ld. CIT(A) erred in sustaining the disallowance made by the Assessing Officer by restricting the amount of deduction u/s 10A of the Act to Rs. 2.63 crore as against Rs. 8.22 crore claimed by the assessee. The impugned order on this issue is overturned and it is directed to allow deduction as claimed."

Examining the facts of the present case in the light of the decisions referred to hereinabove, it is noticed that in the present case also AO has simply relied on the TP study report of assessee to conclude that the profit earned by assessee cannot be considered to be reasonable profit earned from eligible business and on that basis has disallowed part of the deduction u/s 10A. Therefore, since AO has not conclusively proved the fact that there is an arrangement between assessee and its AE by which the transactions were so arranged as to produce more than the ordinary profits in the hands of assessee, disallowance of part deduction claimed by applying the provisions of section 80IA(10), in our view is not justified.

Case Study – II

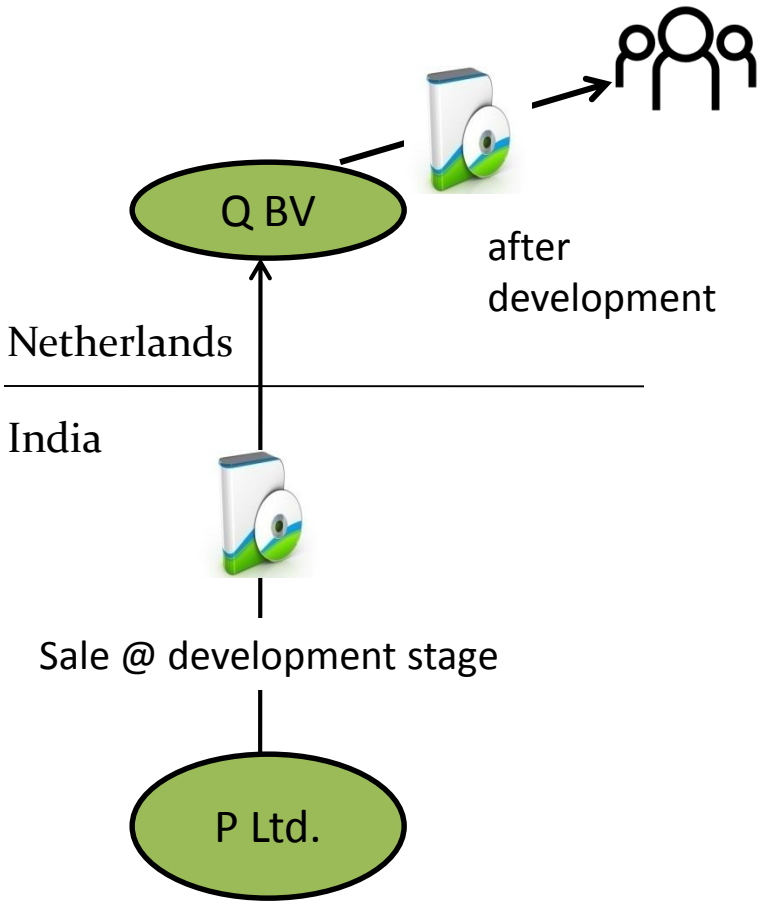
Since ld. CIT(A) upheld the disallowance without examining the aforesaid aspect, order of ld. CIT(A) deserves to be set aside. The conditions of section 80IA(1) having not been fully complied by AO, disallowance of deduction claimed u/s 80IA(10), in our view is not justified. Accordingly, we delete the addition made by AO in this regard."

2. The similar view has been upheld by the Hon'ble Hyderabad Tribunal in the case of ***Quick MD ITA No. 97/Hyd/2015*** by relying on the case of Aquila Software Services Hyderabad Pvt Ltd

   Wherein the Hon'ble Hyderabad Tribunal held as under

   "8.2 The principle decided as aforesaid by the coordinate bench clearly applies to the facts of the present case. Though, it may be a fact that ld. CIT(A)'s finding is cryptic and there is no discussion on the issue of assessee's claim of deduction u/s 10A, but, considering the fact that disallowance u/s 10A of the Act by AO is not valid in view of the reasons stated by us hereinbefore, no useful purpose would be served by setting aside the impugned order of ld. CIT(A). Accordingly, we dismiss the grounds raised by department."

Case Study – III



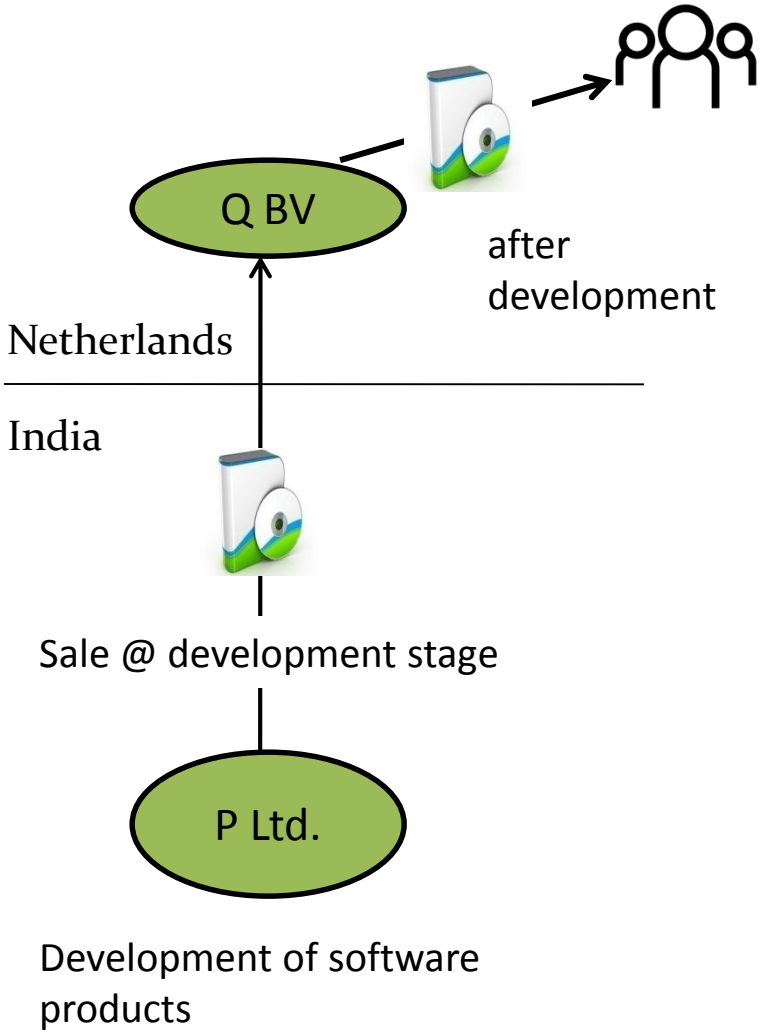
a) P Ltd in India is into development of software products. A particular product which is at the development stage was sold to its AE "Q BV" a company in Netherlands.

b) Q BV completed the development of the said product and started exploiting the same in European market.

c) The sale of semi-finished product by P Ltd to Q BV was priced on the basis of two valuation reports from two independent valuers.

d) The sale transaction was scrutinized by the TPO and opined that the price at which the product was sold was not at arm's length.

Case Study – III

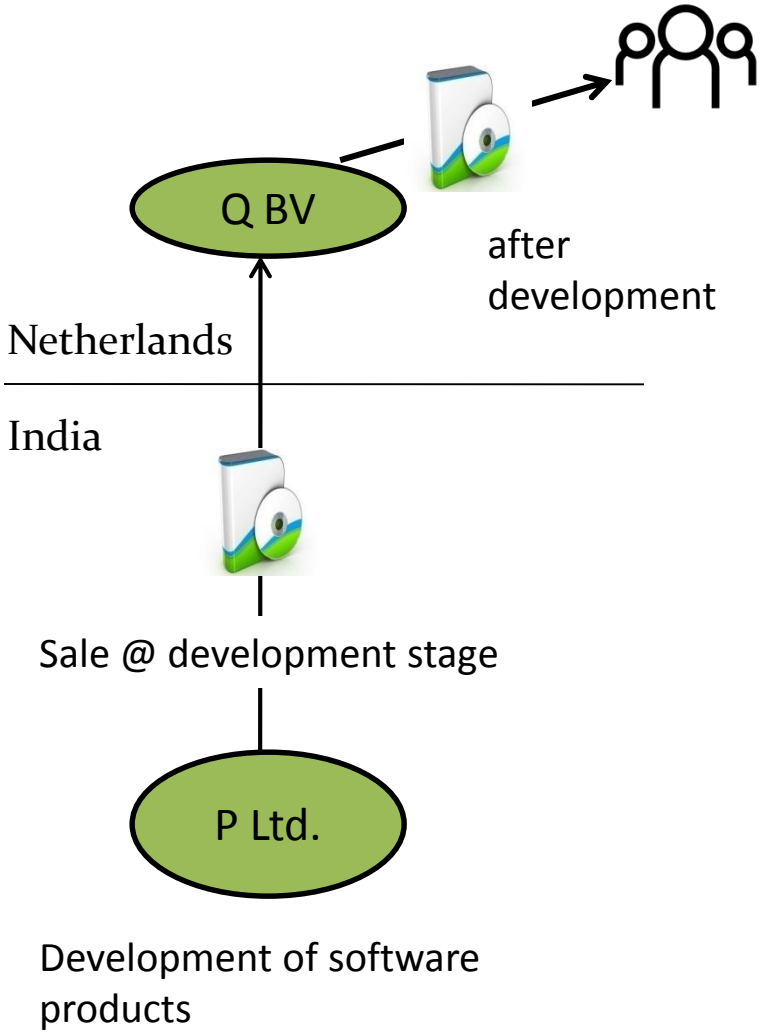


e) TPO tinkered with DCF methodology applied by one of the valuers and replaced the projections with actuals. Accordingly he arrived at an arm's length sale price at Rs.15Cr as against Rs.7Cr adopted by the assessee as per average price of valuation reports.

f) TPO further proceeded to attribute 80% of the profit generated out of the revenue raised by Q BV from its European operations as profit attributable to P Ltd India by applying Profit Split Method(PSM).

g) TPO rejected the following arguments of P Ltd in completing its TP assessment.

Case Study – III



i. When an IP is sold absolutely to its AE there cannot be any attribution of profits under PSM

ii. When the very sale price is disputed by TPO and made an adjustment of the same there cannot be an adjustment in respect of attribution of profits again. Both are contradicting in nature.

iii. After an absolute sale of IP, is there any international transaction at all to slap an adjustment?

Case Study – III

1. TPO's action of making an adjustment to the sale price and also attributing profits generated by AE in Netherlands to P Ltd in India is contradicting at the threshold, in other words if TO makes an adjustment in respect of sale price attribution of profits again to P Ltd is legally not tenable as they are contradicting to each other.

   This so held in **Tally Solutions (P.) LtdVs DCIT [2011] 14 taxmann.com 19 (Bang.)** and later followed by the Hyderabad Bench in the case of **DQ Entertainment (International) Ltd. v. ACIT [2016] 72 taxmann.com 142 (Hyderabad - Trib.)**

   Accordingly the similar adjustment made to the sale price was deleted in DQ's Case supra.

2. Attribution of profits generated by one AE to the other is accepted when both the companies continue as joint owners of an IP under a cost contribution agreement. When a sale of IP is happened in an absolute manner from one AE to other and the AE that has purchased the IP generates revenue by exploiting the said IP, there is no international transaction between the two AEs (DQ's case supra).

Case Study – III

3. Application of PSM in DQ's case is found inappropriate by Hon'ble Hyderabad ITAT

4. It is pertinent to note that OECD BEPS Action Plan 8 has been adopted in revised OECD Transfer Pricing Guidelines (OECD TPG) in July 2017, wherein it was provided that any sale of intangible at the developing stage to its AE needs to be examined from the overall perspective of functions performed, Assets employed and risks assumed by the group members mainly buyer as well as seller and the profit on exploitation of such IP should be apportioned to respective group members through transactional profit split method and *ex ante* valuation techniques. Please go through chapter 6, B vide Para's 6.32 - 6.87

DEMPE

1. Determination of arm's length transfer prices for transactions involving intangibles is one of the major topics in international taxation and at the focus of multinational enterprises, tax authorities and tax advisors worldwide.

2. As a part of the BEPS project of the OECD and G20 countries, the OECD significantly revised its guidance on intangibles in its 2017 Transfer Pricing Guidelines, with the introduction of the so-called DEMPE approach through its Action plan 8.

3. DEMPE is designed to ensure that allocation of the returns from the exploitation of intangibles, and also allocation of costs related to intangibles, is performed by compensating MNE group entities for functions performed, assets used, and risks assumed in the development, enhancement, maintenance, protection and exploitation of intangibles.

DEMPE

- **What is DEMPE:**

– **D**evelopment:
  - Everything associated with coming up with ideas for intangibles, and putting plans and strategies in place for their creation

– Enhancement:
  - Continuing to work on aspects of intangibles to make sure they can perform well at all times and continue to be improved

– Maintenance:
  - Actions that ensure intangibles continue to perform well and generate revenue

– Protection:
  - Ensuring that the value of the intangible remains strong

– Exploitation:
  - Refers to the way in which intangibles are used to generate profits

DEMPE

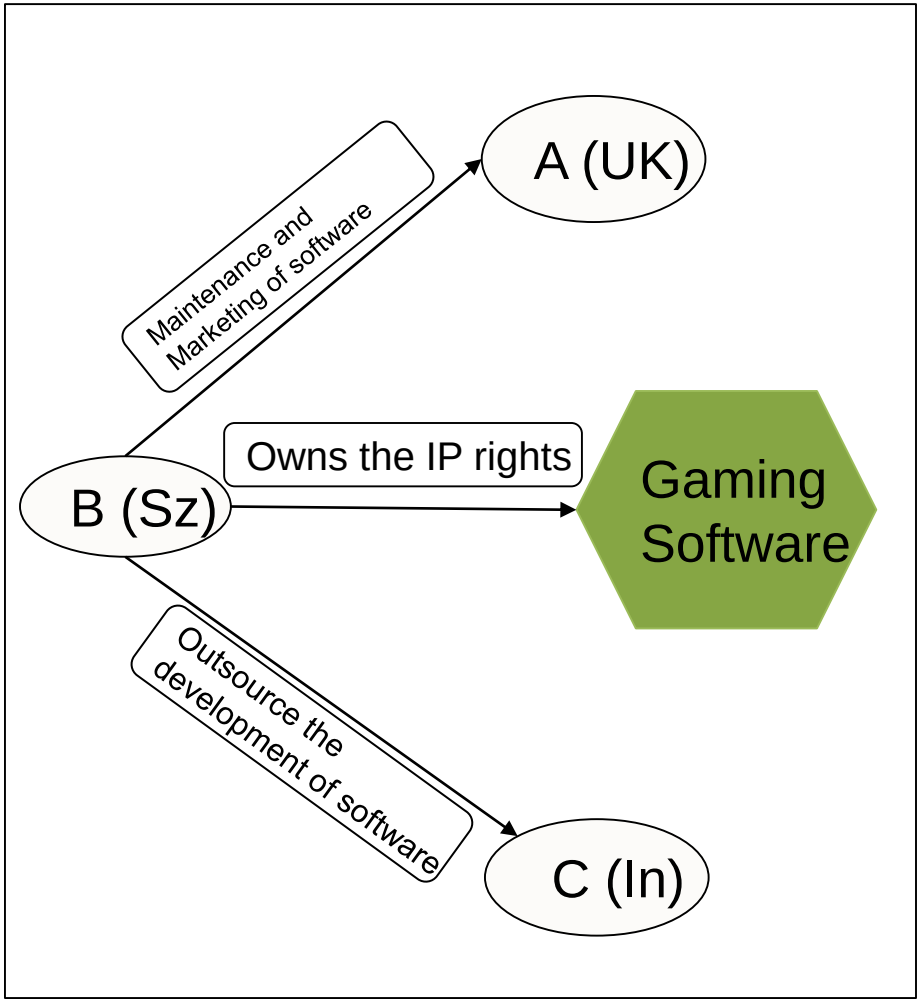
- **Before DEMPE:**
  - The legal owner of an intangible was entitled to essentially all the returns/income generated by that particular intangible.

    - However, if the maintenance and protection of the IP is taken care by any other group entity then that will be considered as a separate services and would charge an appropriate margin on cost.

- **After DEMPE:**
  - Any income that is generated as a result of that IP is owned by all the parties that perform the DEMPE functions.

    - Rather than the IP owner receiving the full amount of the returns/income generated by the intangible, the returns instead have to be divided among the group parties in line with each entity's contribution to the value of the IP.

DEMPE



Facts of the Case:

1. Company A (UK resident) holds 100% shares in Company B (Switzerland resident) and in turn Company B holds 75% shares in Company C (Indian resident).

2. Company B wants to develop a gaming software for which development work has been outsourced to Company C.

3. Marketing and Maintenance of the software is being taken care by Company A.

Issue:

1. What should be the policy for the transfer pricing.
2. Is there any relevance of DEMPE as specified in OECD TPG 2017 based on BEPS Action Plan 8.

Deemed International Transaction

Deemed International transaction (Sec 92B(2))

Section 92B(2) of the Act creates a deeming fiction which extends the ambit of the term international transaction to include the transactions with Non-AEs (unrelated third parties) provided either of the two conditions mentioned below are fulfilled:

1) There exists a prior agreement in relation to the subject transaction between the third party and the AE of the entity. (or)
2) Terms of the relevant transaction are determined in substance between AE of Indian taxpayer and such third party

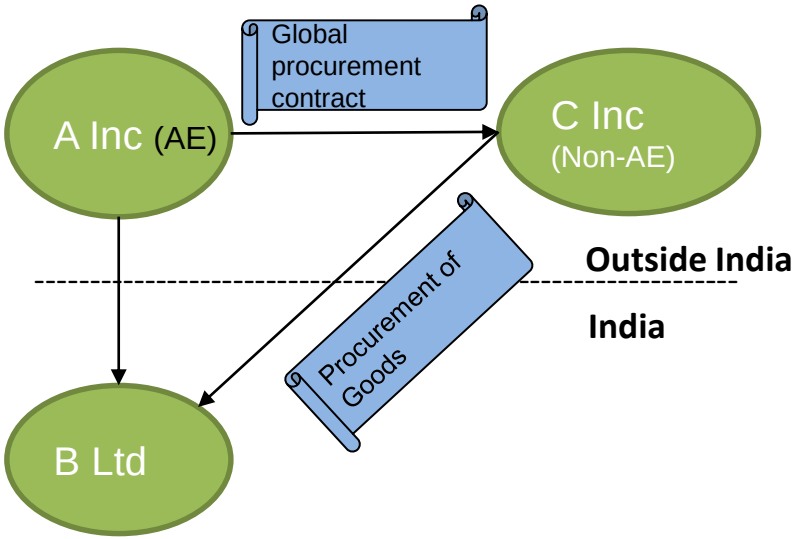
Note: The residential status of the 'third party' is not relevant to invoke the deeming fiction under clause (2) of section 92B of the Act. – (included by Finance Act 2014)

Circular 14 of 2001 dated 22-11-2001

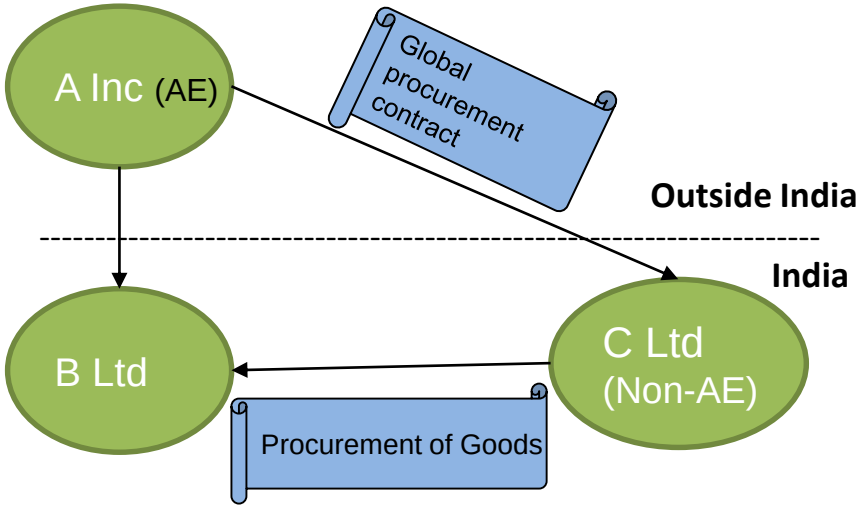
Deemed International transaction (Sec 92B(2))

Position prior to Finance Act 2014 amendment

Unlike section 92B(1), which makes it clear that at least one of the parties to a transaction must be a non-resident. Section 92B(2) does not mention whether or not the unrelated party in the transaction is required to be a non-resident.



Sec. 92B(2) applicable

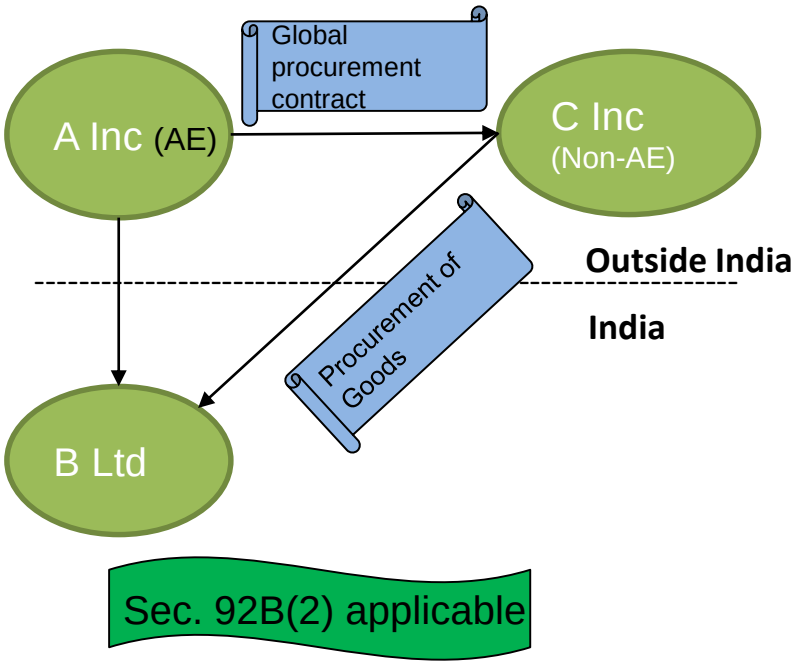


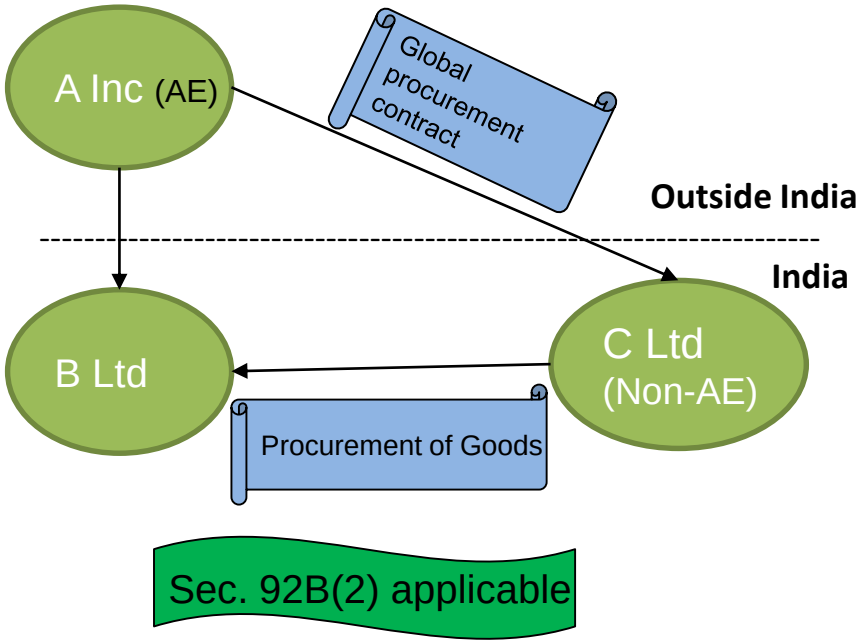
Sec. 92B(2) not applicable

Deemed International transaction (Sec 92B(2))

Position post amendment by Finance Act 2014

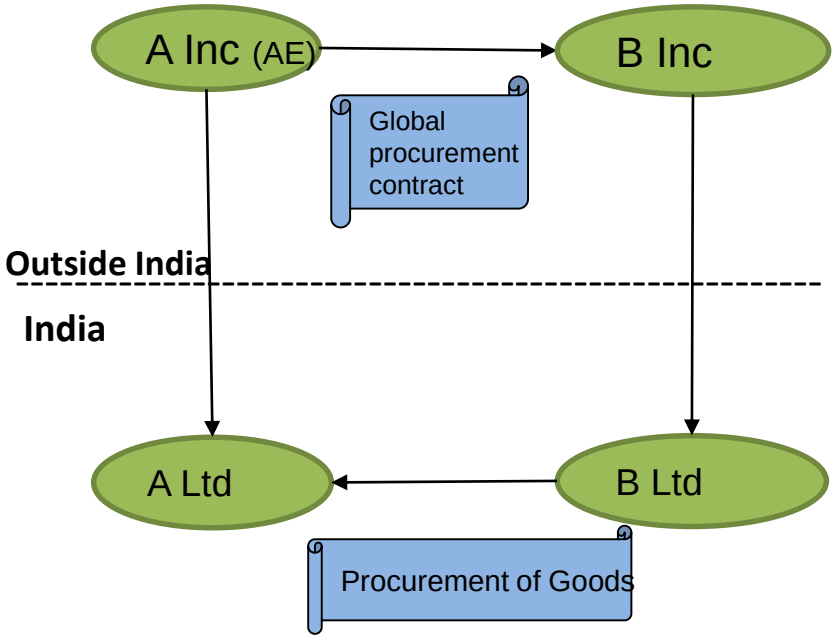
Now, section 92B(2) applies even if third party to the transaction are residents.





Deemed International transaction (Sec 92B(2))

CASE Study- 1 on Quadrangular Transactions

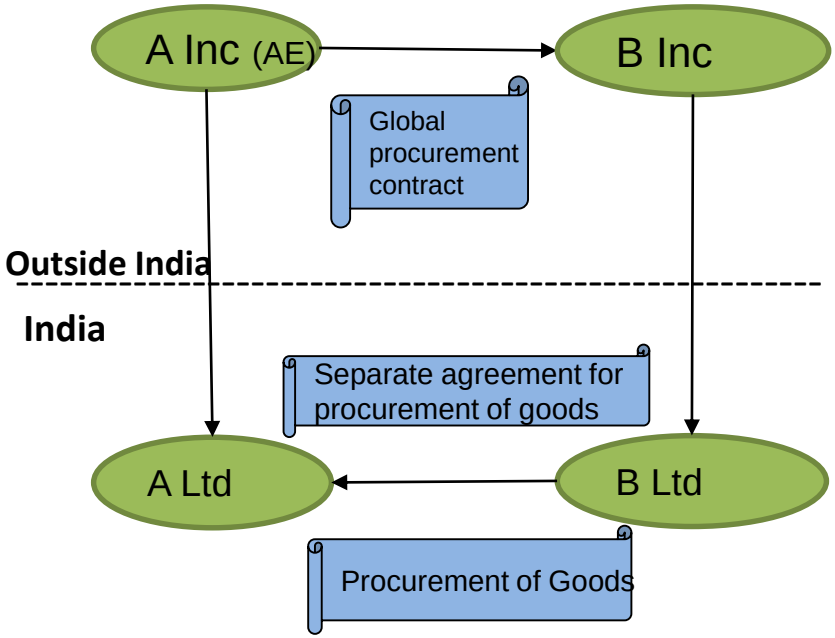


Facts of the Case:

1. Global procurement contract ("GPC") has been entered into by 'A Inc' with 'B Inc' to supply goods to its group entities.
2. As per GPC 'B Ltd' has supplied goods to 'A ltd'
3. There is **no separate agreement** between 'A Ltd' and 'B Ltd' for the procurement of goods.

Deemed International transaction (Sec 92B(2))

CASE Study- 1 on Quadrangular Transactions



Facts of the Case:

1. Global procurement contract ("GPC") has been entered into by 'A Inc' with 'B Inc' to supply goods to its group entities.
2. As per GPC 'B Ltd' has supplied goods to 'A ltd'
3. As per the above agreement 'B Ltd' has supplied goods to 'A ltd'


Thank
you