

# SATURDAY INTERNATIONAL TAX GYAN !!!

#taxmadeeasy



## Impact of new SEP provision for non resident including taxability of digital income

Date: 08.05.2021

Jain Shrima & Co.

# Introduction of SEP

- ❖ **Advised by OECD- BEPS Action plan 1-** Tax Challenges Arising from Digitalisation.
- ❖ SEP introduced in the Income-Tax Act, 1961 ('ITA') **from April 1, 2018** via explanation 2A to Sec 9(1)(i), however no rules were defined for the same until now.
- ❖ **Explanation 2A:-**
  - Applicability: FY 2021-22.
  - **It expands the scope of income of a non-resident which accrues or arises in India that results in a 'business connection' in India for that non-resident. The resulting income, attributable to the SEP, is taxable in India.**
  - Upto certain transaction undertaken with India.

# Whether applicable for digital transactions only?

## ❖ Intention- yes

- **BEPS Action plan 1-** To curb Tax Challenges Arising from Digitalisation.
- **Memorandum of FA 2018 also states that:** Introduction of SEP provision- *“Therefore, emerging business models such as digitized businesses, which do not require physical presence of itself or any agent in India, ....”*




## ❖ Law/provision- No

- SEP seeks to **cover all transactions** connected with India. As the provision language is **not restricted to digital transactions** only.

**new**

# Transactions Covered

Notification  
3rd May 2021

Threshold	Provision	Threshold limit prescribed
<b>Revenue Based</b>	<ul style="list-style-type: none"><li>○ <b>Transaction</b> in respect of <b>any goods, services or property</b> carried out by a non-resident <b>in India</b>,</li><li>○ including the provision of <b>download of data or software in India.</b></li><li>○ if the <b>aggregate of payments</b> arising from such transaction or transactions during the previous year <b>exceeds such amount as may be prescribed; or</b></li></ul>	<b>2 Crore</b>  <p>Commission Agent</p>
<b>User Based</b>	<ul style="list-style-type: none"><li>○ <b>Systematic and continuous soliciting</b> of business activities or engaging in <b>interaction</b></li><li>○ with such <b>number of users in India</b>, as may be prescribed:</li></ul>	<b>3 Lakhs</b>  <p>TikTok</p>  <p>Co.4</p>

# Proviso

**SEP to trigger irrespective of whether or not:**

The agreement for transaction or activity has been **entered in India**

The non-resident **has a residence or place of business in India**

The non-resident renders **services in India**

# Income Attribution

## Proviso to Explanation 2A to Sec 9(1)(i)

**Only so much of income as is attributable to the transactions or activities** referred above shall be deemed to accrue or arise in India.

## Explanation 3A to Sec 9(1)(i)

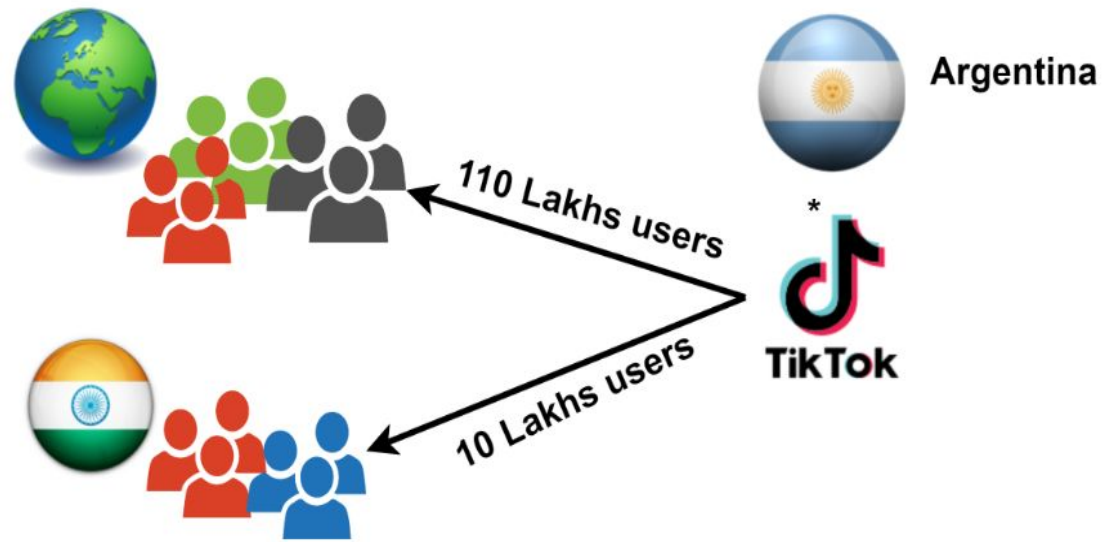
- a) Sale of **advertisement**
- b) Sale of **data**
- c) **Sale of goods or services using data**

## SEP Vs. EL:

- Above (a) &(b) points of explanation 3A to sec 9(1)(i) - already covered under Equalisation Levy (EL) (If applicable) and sec 10(50) exempts income which are taxable under EL.
- Therefore, where EL is applicable, provision of explanation 3A may not be applicable.

# #Taxinpic

## Impact of Explanation 2A



Business connection established in India due to **threshold limit exceeds 3 lakhs users in India- SEP**

If Tik tok charge consideration from users

Yes

Income attributable to the transaction would be taxable in India.

No

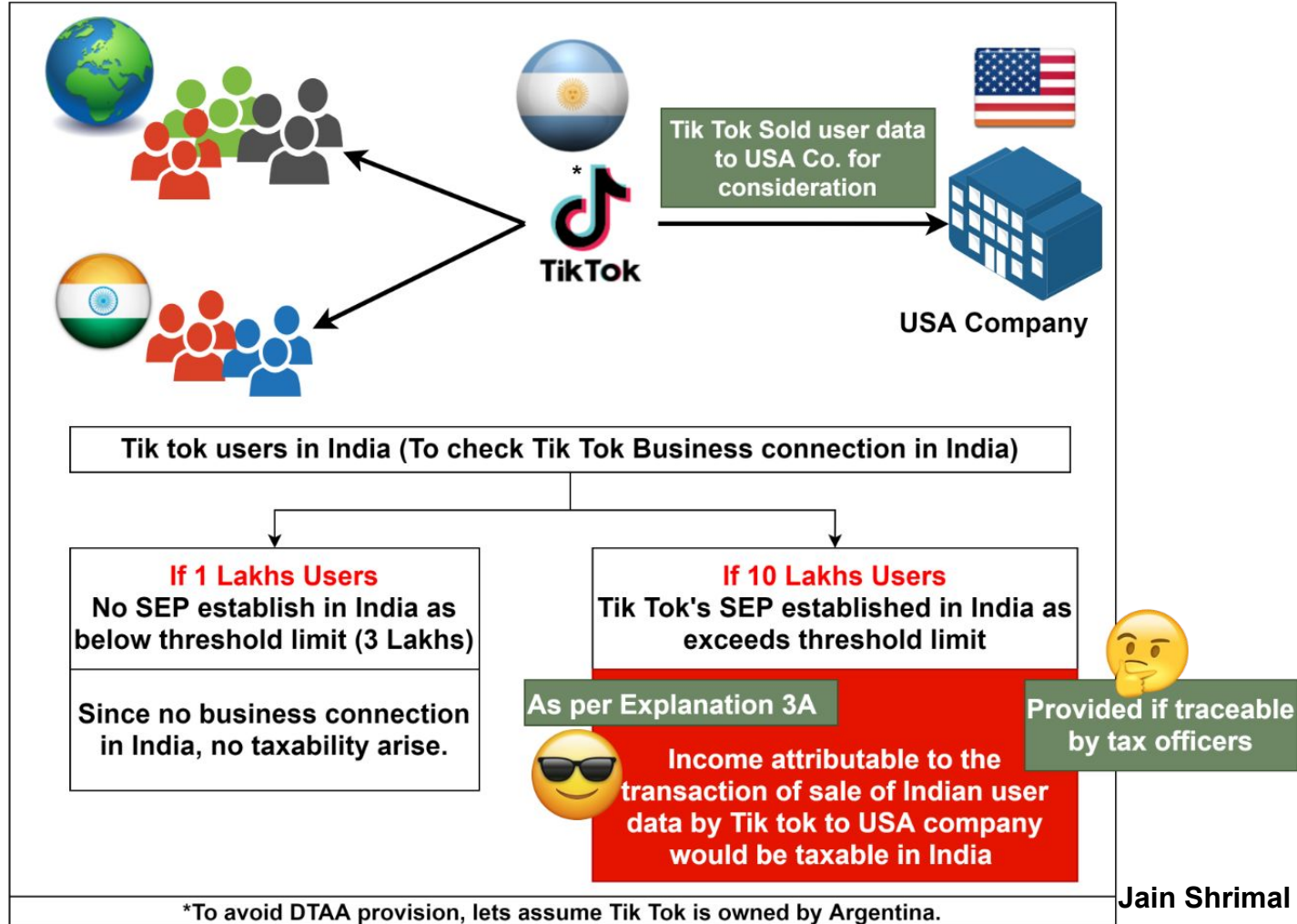
Since no income attributable to transaction arise, therefore no taxability in India.



As per Explanation 2A

\*To avoid DTAA provision, lets assume Tik Tok is owned by Argentina.

# Impact of Explanation 3A





# Impact of SEP

- **Assessee which can Avail benefit of DTAA with India -**

India's existing treaties contain the conventional concept of permanent establishment (PE) for taxing business profits of a non-resident and the inclusion of SEP in the ITA will not be read into the tax treaties unless they are amended.

- **No DTAA or Can't avail benefit of DTAA (MLI/LOB/TRC)-**

Non-residents who do not have tax treaty benefits are directly impacted.

# Examples of SEP

- Sale or purchase of goods, services or property **through digital or physical means**
- Any transaction involving **download of data or software in India** (like in-app purchases)
- Provision of **online training / gaming services**
- Provision of **services of streaming of e-content (audio / video)**
- Interaction with customers such as for **troubleshooting, etc**
- **Websites, online database, cloud storage and computing services, with significant user base in India**

# Provisions

Following *Explanation 2A* shall be inserted in clause (i) of sub-section (1) of section 9 by the Finance Act, 2020, w.e.f. 1-4-2022 :

Explanation 2A.—

- *For the removal of doubts, it is hereby **declared** that the **significant economic presence of a non-resident in India shall constitute "business connection" in India***
- *and "significant economic presence" for this purpose, shall mean—*
- *(a) transaction in respect of any **goods, services or property** carried out by a non-resident with any person in India including **provision of download of data** or software in India, if the **aggregate of payments** arising from such transaction or transactions during the previous year exceeds such amount as may be prescribed; or*
- *(b) **systematic and continuous soliciting** of business activities or engaging in interaction with such **number of users** in India, as may be prescribed:*

# Provisions

- *Provided that the transactions or activities shall constitute significant economic presence in India, **whether or not**—*
  - (i) the agreement for such transactions or activities is entered in India; or*
  - (ii) the non-resident has a residence or place of business in India; or*
  - (iii) the non-resident renders services in India:*
- *Provided further that only so much of **income as is attributable** to the transactions or activities referred to in clause (a) or clause (b) shall be deemed to accrue or arise in India.*

# Provisions

Explanation 3A to Sec 9(1)(i)- For the removal of doubts, it is hereby declared that the **income attributable to the operations carried out in India**, as referred to in Explanation 1, shall include income from—

- a) such **advertisement** which targets a customer who resides in India or a customer who accesses the advertisement through IP address located in India;
- b) sale of **data** collected from a person who resides in India or from a person who uses IP address located in India; and
- c) **sale of goods or services using data** collected from a person who resides in India or from a person who uses IP address located in India.

Following proviso shall be inserted in Explanation 3A to clause (i) of sub-section (1) of section 9 by the Finance Act, 2020, w.e.f. 1-4-2022 :

Provided that the provisions contained in this Explanation **shall also apply to the income attributable to the transactions or activities referred to in Explanation 2A.**

# Disclaimer

- ❑ This presentation has been prepared on the basis of information available in the public domain and is intended for guidance purposes only.
- ❑ Jain Shrimal & Co. has taken reasonable care to ensure that the information in this presentation is accurate. It however accepts no legal responsibility for any consequential incidents that may arise from errors or omissions contained in this presentation.
- ❑ This presentation is based on the information available with us at the time of preparing the same, all of which are subject to changes which may, directly or indirectly impact the information and statements given in this presentation.
- ❑ Neither Jain shrimal & co., nor any person associated with us will be responsible for any loss however sustained by any person or entity who relies on this presentation. Interested parties are strongly advised to examine their precise requirements for themselves, form their own judgments and seek appropriate professional advice.

**Visit our website blog- <https://jainshrimal.com/topic/saturday-international-tax-gyan/> for previous case laws.**