Answer-to-Question-_1_

Part a)

Any non resident person shall be taxed on income accruing or arising in India as per section 5 of the Income Tax Act("the Act"). Further As per section 9 of the Act, any income from directly or indirectly from business connection or from any asset or any source in India or from any property in India or from any capital asset situated in India shall be liable to tax on such income deemed to accrued or arised in India.

Business connection includes where the any person other than the independent status have authority to conclude or playing principle role in conclusion of contract will be deemed as agent of foreign company.

Section 90 of the Act provides that a person can claim the benefit under the relevant tax treaty or provisions of the Act which ever are more beneficial to him.

Article 5 of the India-France Double Tax Agreement("DTA")after incorporating the MLI provisions, provides that any person other than the status of an independent agent who is acting on behalf of the other enterprises and shall be deemed to have permanent establishment in other state if he has habitually exercises an authority to concludes contract on behalf the enterprises or plays a principle role in leading to the conclusion of contract and the contracts are routinely concluded then the enterprise will have the PE in the other state.

In the Instant case, I co. is agreeing with the delivery schedules and negotiating prices on behalf of the F co. Although the approval is taken from the F co. regarding the terms but F co. ordinarily approves the prices. This lead to the conclusion

that I co. is acting on behalf of the F co. and shall be considered as agent of F co. The signing of contract by F co. outside India will not be conclusive for determining the agency PE as I co. is playing principle role in conclusion of the contract.

As I co. is working exclusively to F co. therefore, it cannot be considered of an agent of an independent status.

In case of Daikin ruling, the court have held that where activities in relation to pricing and negotiation are performed from in India and the assessee have not produced any evidence against the same that no negotiation is performed by Indian co. then in such case, substance over form should be considered and the assessee have PE in India.

Accordingly, it is reasonably concluded that I Co. will be treated as the Agent of F co. and will have PE in India.

Part b)

The Courts have considered the fact in various ruling that standard price list which do not require any modification which quoted by the person in India to the customers in India on behalf of the foreign enterprise may treated as negotiation of pricing by the agent. However, where the Company in India which actually negotiates pricing terms as per standard for pricing fixed by the foreign enterprises need to evaluated with other factors for negotiation and pricing terms.

In the instant case, the I co's is actively negotiating the prices and other terms of the contacts along with the delivery schedules. Only performing them as per the operational guidelines and routine approval process by the F co. may not mitigate the risk of agency PE as all the main functions in relation to

finalization of contract with customers are performed by I Co. The ratio of Daikin ruling may be taken as reference.

Part c)

As per Section 9 read with DTA, only so much of the income which is attributable to the activities carried out in India shall be liable to tax in India.

Further, the supreme court in case of Morgan stanly has held that when transactions are at Arm's Length Price then there is no further attribution is required under the Act.

In Instant case, 10% commission is bench marked for the activities which are performed in relation to the agreement between I co and F co. However, negotiation of price and contract terms with customers. accordingly these functions are not covered in arms length price of 10% commission. therefore, the transaction between I co. and F co. can be said on the Arm's Length price and therefore, further attribution of income on account of permanent establishment in India shall be required.

---------DO-NOT-EDIT-THIS-DIVIDER----------

Answer-to-Question-___2

Part a)

As per section 9(1)(vi) of the Act, Any person payment made for royalty shall be deemed to accrued or arised in India.

The royalty is includes the payment made for right or right to use any copyright, literary, artistic or scientific work.

Further, explanation 4 of section 9(1)(vi)provides that the right to use computer software including grating of license will be considered as royalty. However, i understand that no such part explanation is In India US DTAA.

In a recent judgement of Supreme court in case of Engineering analysis has considered the following treating any transaction in relation to software:-

1. A non exclusive or non transferable licence granted to person for use of software should not be treated as license for making copies.

2. Making copy for internal use or for back up purposes will not be considered as infringement of copyright Act.

3. Restricted use of copyrighted article as per end user agreement license can not be treated as use of copyright or transfer of copyright under copyright Act in India.

4. Making copies or right of reproduction is at the heart of the right to use Copyright and without the same transfer of license or providing copyright to other can not be considered.

5. End User licences agreement restricting the right to use of copyright Article cannot be considered as transfer Copyright it can only be termed as transfer of Copyrighted Article.

6. Doctrine of First sale or Principle of Exhaustion is applicable in case of transfer or providing right to use of the Software to other for terming the same as royalty.

7. As the definition or concepts are adopted from the work of OECD. Then the OECD commentary has persuasive Value.

The court held that transfer of restrictive right copy righted article should not taxable as royalty. Moreover, the Hon'ble court has also held that the expanded definition of Royalty in the Act will not be imposed on the treaties and should not override the definition provided in the treaties.

In the instant case, where XYZ is providing software to ABC India Limited with limited purpose of making copies for internal purpose and can sell or make copies otherwise. Accordingly, as per the Hon'ble supreme court judgement the transaction should not be treated as royalty under the Act read with India USA DTAA.

The transaction shall be taxable only if XYZ as permanent Establishment in India by virtue of India USA tax Treaty. Assuming no other activity is carried out by XYZ inc. in India other than these transaction, it can be said that the XYZ do not have any fixed place in India from where the business of XYZ is carried on. In absence of PE in India the same of Software by XYZ Inc. is not taxable in India.

part b)

As per the PILCOM ruling, the Hon'ble supreme court has held that TDS is required to be deducted under section 194E without giving the effect to the provision of the relevant tax treaty. As per section 194E any payment made to any non resident sports association shall be liable for TDS deduction at the rate of 20% at the time of credit or at the time of payment which ever is earlier.

However, in case of Engineering analysis, the Hon'ble Supreme Court has considered the section 195 which provides that any person responsible for making payment to non resident for any sum chargeable under the Act other than salary and shall deduct at the time of payment or credit which ever is earlier as per the

rate in Force. The term rates in force provides the rate at which Non resident in India is taxable after considering the relevant tax treaty which is not the case in section 194E. Accordingly, the Hon'ble court has distinguished the ruling of PILCOM in applying section 195 of the Act.

Accordingly, since XYZ Inc. is not liable to tax in India as answer to the part a, section 195 is not applicable in this case and TDS is required to be deducted in this case.

XYZ or ABC may apply before the assessing officer in section 195 for determination of TDS liability.

Part c)

Equalisation levy is first introduced by the Finance Act 2016 in India. The BEPS Action plan 1 suggest the incorporation of an interim measure to curb the international tax practises to avoid the Tax.

As per section 165 of the Finance Act, 2016, An equalisation levy shall be charged at the rate of 6% on the consideration for online advertisement or digital space facility, if the transaction amount exceed Rs. 1 Lakh.

Further the scope of the same is increased as per recent provision in finance Act, 2020, a Equalisation Levy("EL") shall be charged at the rate of 2 % on the consideration received or receivable by the ecommerce operator from the ecommerce supply of services provided to the person resident in India or to non resident in specified circumstances or person who buys goods or services through a internet protocol located in India.

However, EL will not be charged in the following cases:
1. Where the Ecommerce operator has permanent establishment in

India and such sale of goods or services is effectively connected with such PE in India.
2. Equalisation levy is already deducted under section 165 of the Finance Act, 2016.
3. The sales turnover or gross receipts is less than 2 crore of the Ecommerce operator.

The ecommerce operator definition provides that the non resident who owns operate or manages an electronic facility or platform for online sale of goods or services will be termed as ecommerce operator.

In the instant case, ABC is downloading the software from a XYZ website's. the website may be considered as electronic platform and XYZ may be considered as ecommcerce operator. Accordingly, providing software as supply of service or goods through the electronic platform which owned or managed by XYZ Inc may covered with in the provisions of equalisation levy.

---------DO-NOT-EDIT-THIS-DIVIDER----------

Answer-to-Question-___4

Part a)

As per Section 37 of the Income Tax Act, 1961(the Act), any expenditure which is not in nature of capital or personal expenses and not covered under section 30 to 36 of the Act, which is incurred wholly and exclusively for the purpose of business shall be allowed as expenses for computation of income for business or profession.

Further, it is held in various rulings that any expense shall be allowed under section 37 if any liability for the same is crystallized or incurred during the previous year.

In the instant case, F co is issuing its shares under an ESOP scheme to the Employees of its subsidiary Company and cross charging the amount of difference of confessional price and market value of shares from the I Co. I Co. recognising the same as expenses on a straight line basis in the Act. As the liability for the ESOP expense is not crystallized or incurred at the time of recognizing the same as expenses at the time of recording the same on straight line basis. however, the liability crystallizes at the point of excersising the option by the employee of I co. Accordingly, I co. is not allowed to claim expenses under section 37 on recording the same on cross charge basis but allowed to claim the same on exercising the option by the employee of I co.

Reference can be made from the case of PVP ventures, where the Madras High court has held that the difference between the exercise price and fair market value of the shares as on the date of exercise shall be allowed as expenses revenue expenditure in the hands of the assessee.

Part b)

The following are the compliance which I co need to adhere with regard to transfer pricing:-

1. need to obtain a certificate in form 3CEB from a chartered accountant that the transaction is at Arm's length price.
2. I co. need prepare a transfer pricing study report, if the transaction amount is more than Rs. 1 Crore.
3. I co. need to maintain documentation that the transaction is at Arm's Length price.

Issue of share capital may not be treated as international transaction by virtue of Vodafone case in Bombay High court.

However, in the instant case, F co. is charging for the shares issued to employees of the I co. which should be at the Arm length price for complying with the provisions of the Act. Since the F co. is listed on the Nasdaq stcok exchange , price of the shares is easily available for the shares. Accordingly, comparable uncontrolled price method prescribed under section 92C of the Act may be considered as most appropriate method for benchmarking the transaction.

---------DO-NOT-EDIT-THIS-DIVIDER----------

Answer-to-Question-___8

Part a)

Any non resident person shall be taxed on income accruing or arising in India as per section 5 of the Income Tax Act("the Act"). Further As per section 9 of the Act, any income from directly or indirectly from business connection or from any asset or any source in India or from any property in India or from any capital asset situated in India shall be liable to tax on such income deemed to accrued or arised in India.

India - Uk Treaty provides for fixed place permanent establishment (PE), service PE and Agency PE.

Further, it also provides the exemption for preparatory and auxiliary activites will not be treated as PE in the source state.

Article 5 provides that any fixed place of busniss through which

the activity of busniess are carried on by the enterprise either wholly or partially.

Article 5(2) includes an office as PE. it also includes services provided through employees or other personel for period of 90 days shall be contrued as PE how in case of associated enterprice the limit is for 30 Days.

Further, in case of Samsung Heavy Industries co. Ltd., the Supreme court has held that the project office which merely acting as communication channel with no employees having technical qualification will not be considered as PE in India. the activities of the employees will fall in the nature of preparatory or auxilliay in nature in India. Further, the offshore services which are provided outside India and the products is also delived outside India are not taxable in India.

In the Instant case, Fasttrain plc. is performing all its activities in UK before broughting the trains to India and appointed Mr Harry only acting as coommunication channel between Fasttrain Plc. and SSRC. Accordingly relying on the Judgement of Samsung Heavy Industries co. Ltd. it may be concluded that Fastrain do not have PE in India as Mr. Harry is only performing activities in nature of communication only which are in nature of preparatory and auxiliary in Nature. Further, I understand that the Korea-India DTAA is considered in the ruling, which i believe pre materia are same.

Part b)

As preparatory and Auxiliary activity is exempt from creating a PE under Article 5 (3) of the India - UK treaty which overides the Article (1) and (2) as it starts from the non-ostante clause. Accordinly there are no further implications of the same.

---------DO-NOT-EDIT-THIS-DIVIDER----------

Answer-to-Question-___7

Part a)

As the Happy co. is purchasing 80% of raw material from a associated enterprises and the transaction with associated enterprses are considered as passive income. Accordingly, Happy company's fails to meet to condition of more than 50% passive income fiter of active business outside India .

Part b)

more tha 50% of the employee cost filter is faied as the total salary of md , Finance controller and head of sales has pound 1.05 m out of 2 m pound. active business test fails of Happy co.

Part c)

Since the meetings are held outside India. it can be said that the key managerial decisions are taken outside India and POEM can not be said in India.

Part d)

Yes since the the key managerial decisions are taken in India and POEM will be said in India.

Part e)