Answers

Case Study 1.

1.1 C

1.2 B

1.3 A

1.4 C

1.5 D

1.6 The above question is based on decision of Delhi High Court in the case of Linde AG vs. Deputy Director of Income-tax and CBDT Circular No. 7 of 2016. In the said circular, it is stated that if the following conditions are cumulatively satisfied then a Joint Venture may not be treated as an Association of Persons:

1. Each of the member is independently responsible for executing its own part of work;
2. Each member earns profits or losses based on its own performance of work;
3. the men and materials are under control of respective consortium members;
4. The control and management are not unified;

In the given case, it is observed that the work of offshore supply and off shore service is to be the sole responsibility of Japco, work of onshore supply and onshore service is to be shared by HCB and Japco. Further, there is clarity on the basis on which onshore supply/service work would be divided as also about the basis on which the consideration in respect of such shared/allocated work

would be determined. The Role and responsibilities of each consortium member are separately and clearly identified. No one has the authority to bind the other except as specified.

Accordingly, on application of the above principles, it is clear that the consortium members would be assessed to tax separately based on their share of remuneration and not as AOP

[Marking scheme: 2 Marks for identifying CBDT conditions, 3 marks for correct answer]

1.7 The benefit of above CBDT circular is not applicable in case the consortium members are associated enterprises. However, even in absence of the CBDT circular, the assessee can rely on decision of Linde AG [supra] in which case, it can successfully argue that there is no AOP. However, the consortium members must be careful to demonstrate that the conditions are propounded in Linde AG case [based on which CBDT issued the circular] are satisfied in substance and not just in form.

[Marking scheme: Entire Marks for identifying correct answer]

1.8 Offshore supply:

As per Explanation 1(a) to Section 9(1)(i) of the Act which embodies the principle of apportionment, in cases where all the operations of business are not carried out in India, the income arising therefrom is required to be apportioned and only that portion of income i.e. reasonably attributable to operations carried on in India would fall within the net of tax in India under Section

9(1)(i) of the Act. In the facts of the present case, where the equipment and material is manufactured and procured outside India, the income attributable to the supply thereof could only be brought to tax if it is found that the said income therefrom arises through or from a business connection in India. However, when the supply is totally outside India [i.e. offshore] it cannot be concluded that the Contract provides a "business connection" in India and accordingly, the Offshore Supplies cannot be brought to tax under the Act.

Offshore Services:

The question is not clear as to what is the nature of services rendered. However, since it is stated that Japco is engaged in conducting high-rise infrastructure projects, it appears that the services may be in the nature of preparing drawings and designs. Accordingly, the same are in the nature of technical services. The fees for such services are taxable in India, in case corresponding services are utilised in India. However, if it is accepted that the services provided relating to design and drawings are inextricably linked with the manufacture and fabrication of offshore supplies and form an integral part of the said supplies, then the services rendered by Linde would not be amenable to tax under Section 9(1)(vii) of the Act.

Onshore supplies and services

Income from this component is definitely taxable in India since there is a business connection established in India;

[Marking scheme: Entire Marks for correct answers]

1.9 In relation to onshore supply, as stated above, the entire income is taxable in India. Accordingly, there is no tax avoidance. In absence of tax avoidance, there is no occasion to invoke GAAR;

[Marking scheme: Entire Marks for correct answers]

Case Study 2.

2.1 D

2.2 C

2.3 D

2.4 C

2.5 C

2.6 The given facts are based on decision of Bombay High Court in the case of Set Satellite (Singapore) Pte. Limited vs. DDIT. The Hon'ble High Court held that since the assessee paid service fee to Sab se Set Inc for marketing of airtime on an arm's length basis, such payment extinguishes tax liability of the assessee in India vis-à-vis the advertisement revenue. It is also further submitted that there is a finding that the assessee has no PE in India and the payment of service fee was accepted as 'arms length price'. Therefore, there is no requirement to withhold tax in India.

[Marking scheme: 2 Marks for identifying case, 3 marks for balance answer]

2.7 Yes, since the services are technical in nature and the same are proposed to be utilised in India, the fees would be taxable in India within the provisions of section 9(1)(vii) of the Act

[Marking scheme: 2 Marks for correct answer]

2.8 No, as clarified by CBDT in Q 3 of FAQs provided through Circular No 7 of 2017, GAAR will not interplay with the right of the taxpayer to select or choose method of implementing a transaction. Also, it may be noted that the transaction does have a commercial substance. Accordingly, GAAR cannot be invoked.

[Marking scheme: 1 Mark for identifying Circular, balance 2 marks for correct answer]

2.9 The services provided qualify as Technical in nature.

Under Income-tax Act, 1961

The services are clearly utilised in India and therefore, taxable in India

Under OECD Model Convention:

This convention does not have a clause for taxation of Fees for Technical Services. However, this convention has a clause on service PE. In case the stay of eRetail's employees exceeds the threshold, then proportionate income may be taxed in India;

Under UN Model Convention:

This convention has a clause to tax Fees for technical services i.e. Article 12A. Accordingly, the fees would be taxable on gross basis in India;

[Marking scheme: 1 Mark for identifying treatment under IT Act, balance 2 marks each for identification under OECD + UN Convention]

Case Study 3.

3.1 B

3.2 B

3.3 B

3.4 A

3.5 B

3.6 As per section 285A, where any share of, or interest in, a company or an entity registered or incorporated outside India derives, directly or indirectly, its value substantially from the assets located in India, as referred to in Explanation 5 to clause (i) of sub-section (1) of section 9, and such company or, as the case may be, entity, holds, directly or indirectly, such assets in India through, or in, an Indian concern, then, such Indian concern shall, for the purposes of determination of any income accruing or arising in India under clause (i) of sub-section (1) of section 9, furnish within the prescribed period to the prescribed income-tax authority the information or documents, in such manner, as may be prescribed.

[Marking scheme: 1 mark for section, 3 Marks for the answer]

3.7 Since Fun Singapore is transferring shares of a company located outside India [Mauco] which is deriving its value substantially from assets located in India, hence, the capital gains is proportionately taxable in India. The same is computed as under:

Period of holding =	31.03.2007 to 27.02.2021
Nature of asset =	Long term
Full value of consideration	$ 1.50 crores
Cost of acquisition	$ 1.00 crores
Long term capital gains ($)	$ 0.50 crores
Long term capital gains (Rs.)	Rs. 36 crores
Tax on above @ 10%	Rs. 3.60 crores

[Marking scheme: 4 Marks for complete correct answer and tax amount]

3.8 1. Mickey Limited, Mauritius has to withhold tax at source under provisions of section 195 on payments made to Fun Singapore. As per the said section, it is immaterial whether the deductor has a place of business or permanent establishment in India for the purposes of withholding tax.

2. Mickey Limited, being a company has to furnish its return of income mandatorily in India.

3. Mickey Limited must also furnish quarterly TDS return and report the tax withheld at source from payment made to Fun Singapore

[Marking scheme: 1 Mark each for each of the points]

3.9 It is noticed that all major decisions of Fun Singapore are taken by its parent company in USA. However, it is not clear whether the decision making is resulting in shifting of its PoEM to USA. The tax officer can invoke GAAR / LoB in order to deny treaty benefit if it is found that main objective of situating the Fun Singapore in Singapore was to avail benefit of tax treaty.

However, it shall be good defence for Fun Singapore to argue that the transaction has a commercial substance and it had made investment in Mauco in 2007, which is now being liquidated in 2021. Accordingly, the main objective is not just tax benefit but even the commercial rationale behind the transaction

[Marking scheme: 11/2 Mark for each point]

Case Study 4.

4.1 A

4.2 A

4.3 B

4.4 D

4.5 D

4.6 The decisions made by shareholder on matters which are reserved for shareholder decision under the company laws are not relevant for determination of a company's place of effective management. Such decisions may include sale of all or substantially all of the company's assets, the dissolution, liquidation or deregistration of the company, the modification of the rights attaching to various

classes of shares or the issue of a new class of shares etc. These decisions typically affect the existence of the company itself or the rights of the shareholders as such, rather than the conduct of the company's business from a management or commercial perspective and are therefore, generally not relevant for the determination of a company's place of effective management.

However, the shareholder's involvement can, in certain situations, turn into that of effective management. This may happen through a formal arrangement by way of shareholder agreement etc. or may also happen by way of actual conduct. As an example if the shareholders limit the authority of board and senior managers of a company and thereby remove the company's real authority to make decision then the shareholder guidance transforms into usurpation and such undue influence may result in effective management being exercised by the shareholder.

Therefore, whether the shareholder involvement is crossing the line into that of effective management is one of fact and has to be determined on case-to-case basis only.

[Marking scheme: 4 Marks for correct answer]

4.7 It is provided in question that Mauco is a pure holding company and that its income is solely in the form of dividend received from SACo. This would result in a situation where its 100% income is passive. Accordingly, it cannot be said that the company has

Active Business outside India. In such case, PoEM has to be determined through two stages. In the first stage, we need to see the real decision making authority and then, the place where that authority is making the decision. Place of executing decisions is irrelevant. Also, it may be noted that generally Board of Directors is the real decision making authority. However, that may not be the case always. The concept to be followed is substance over form. In this case study, the following pointers are relevant:

- Mr. A actively participates in the decision making process of Mau Co / SA Co while being in India.
- At least one meeting of the BOD of Mau Co / SA Co takes place in India. However, the minutes of the meeting are signed in the respective jurisdiction.
- Fund requirements of Mau Co / SA Co are primarily sourced and solicited with the assistance of employees of Ind Co.
- Key agreements with the customers are agreed to in India, but, are formally executed outside India.

These facts demonstrate that the effective management of MauCo lies in India and is in fact held by Mr. A. Accordingly, the tax officer may take a stand that the PoEM of MauCo is within India. In such a scenario, the global income of MauCo will be taxable in India, being a resident. Further, MauCo may take note of provisions of section 115JH for compliances to be followed in India once it becomes a resident Indian.

[2 marks for identifying Active Business Outside India, balance marks for analysis]

4.8 The question is based on decision of Calcutta High Court in the case of CIT vs. Dunlop Rubber Co Limited. In this case, it was held that payment made by Indian company is merely towards cost contribution for the research. There is "no service" provided by SACo to the Indian company. As such, there is no occasion to treat the payment as fees for technical service. Accordingly, the same is not liable to tax in India in the hands of SACo.

[5 marks for correct analysis]

Case Study 5.

5.1 C

5.2 B

5.3 D

5.4 A

5.5 B

5.6

Co	Remarks	Exposure
A	A is the immediate holding company of P. It is stated that A is an operating company. It has huge turnover. The only passive income is from P by way of dividend. Accordingly, A seems to have Active Business outside India	**Minimal**

B	This company is located in Belgium. The company does not have any transactions in India. Accordingly, the PoEM seems to be outside India	**Minimal**
C	Although shares of C are listed, but the company is an intermediate holding company whose main purpose is to plough back profits to its holding company. It has no other purpose. Accordingly, the company does have a risk exposure since it does not have any active business outside India. However, the question also does not provide any definite indicator towards the fact that the PoEM is exercised from India	**Medium**
P	Company P has got a patent in its name. The company is expected to earn from international customers. Hence, it can be safely concluded that P has an active business outside India. Further, there are no factors which point towards location of PoEM in India. The fact that ultimate holding company is located in India or its PoEM is in India is irrelevant	**Minimal**
Q	Q is an operating company with substantial profits. It does not have any transactions in India	**Minimal**
R	R is the cash cow of the group. Thereby	**Minimal**

	indicating that the company has active business outside India. Further, the fact that its holding company may have PoEM in India, is irrelevant for determination of PoEM of R	

[Marking scheme: 1 Mark for each correct answer]

5.7 The stand of Assessing Officer is not correct. Under BM law, “Assessee" means a person:-

(a) being a resident in India within the meaning of section 6 of the Income-tax Act, 1961 (43 of 1961) in the previous year or;

(b) being a non-resident or not ordinarily resident in India within the meaning of clause (6) of section 6 of the Income-tax Act, 1961 (43 of 1961) in the previous year, who was resident in India either in the previous year to which the income referred to in section 4 relates; or in the previous year in which the undisclosed asset located outside India was acquired:

Presumably, at the time when assets were acquired by Holdco outside India, it was a resident of Mauritius. In such scenario, holdco cannot be treated as assessee under BM law. Therefore, provisions of BM law cannot be invoked.

[Marking scheme: 2 Marks for identifying that officer is not correct and balance 2 marks for correct analysis]

5.8 No, the officer cannot invoke GAAR. This is because, SAAR is sufficient to take care of the situation i.e. PoEM. Further, there are no indications in the question with regard to any transaction conducted without commercial substance. The only hint of tax avoidance seems to be in the location of company "R" i.e. cash rich company in a tax haven i.e. Cayman Islands. But the case study does not delve into this aspect much. Hence, in absence of any indicators regarding lack of commercial substance, provisions of GAAR cannot be invoked.

[Full marks for correct answer]

5.9 **BEPS Action Plan -11**

Measuring and Monitoring BEPS

This action plan highlights the fiscal and economic impacts of BEPS. The impact is higher on developing countries than developed countries.

BEPS causes impacts in the following nature

- Tax revenue losses
- Favours tax –aggressive MNEs
- Worsening the corporate debt bias
- Misdirecting foreign direct investment and
- Reducing the financing of needed public infrastructure

Six Indicators of BEPS activity

By using different sources of data, employing different metrics and examining different BEPS channels, the existence of BEPS and its increase in scale in recent years has been confirmed.

The following are the indicators of BEPS activity:

- The Profits rates of MNE affiliates in lower-tax countries are higher than the average worldwide profit rate of their group.
- The effective tax rates paid by large MNE entities are estimated to be 4 to 8.5 percentage points lower than similar enterprises with domestic only operations.
- Foreign direct investment (FDI) is increasingly concentrated- For example, FDI in countries with net FDI to GDP rations of more than 200% increased from 38 times higher than all other countries in 2005 to 99 times higher in 2012.
- The separation of taxable profits from the location of the value creating activity is particularly clear with respect to intangible assets, and the phenomenon has grown rapidly- For example, the ratio of the value of royalties received to spending on R&D in a group of low tax countries was six times higher than the average ration for all other countries.
- Debt from both related and third –parties are more concentrated in MNE affiliates in higher statutory tax-rate countries.

[Marking scheme: 1 1/4 Marks for identifying impacts, balance 1 1/4 marks for identifying indicators of BEPS]