

## Preface

1. **Author has felt when he qualified as Chartered Accountant (CA) in Year 1985 that legal provisions' interpretations are big challenge for legal professionals, govts' officials and public at large in India and outside India.**
2. **Author has realized that something should be developed to resolve this challenge in India and outside India.**
3. **Author has started compiling Frequently Asked Questions (FAQs) on many subjects where his 100% answers are precisely based on Yes or No i.e. white or black nothing is grey**
4. **Author has compiled approximately 150 +(plus) research papers / books with 25 thousand +(plus) pages on many prevailing subjects / acts in India and outside India.**
5. **Author's 1<sup>st</sup> paper book is now being published under head FAQs on Enforcement Directorate (ED) where 571 FAQs are replied based on Yes or No i.e. white or black nothing is grey**
6. **This book is also containing**
  - (i) Foreign Exchange Management Act (FEMA) 1999 and rules / regulations
  - (ii) Prevention of Money Laundering Act (PMLA) 2002 and rules / regulations
  - (iii) Fugitive Economic Offenders Act (FEOA) 2018 and rules / regulations
7. **This book is published with Sai Kripa and dedicated to my father (late) Mr. M.R. Agarwal, Mother Mrs. R.D. Agarwal, wife Mrs. Snigdha Agarwal, daughter Ms. Soumya Agarwal, daughter Ms. Sanya Agarwal and dedicated team headed by Rajat Kumar**

● **I trust that you will be enriched by reading this book**

With best wishes,  
**CA. Satish Agarwal**  
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## ***Author's Profile***

***Mr. Satish Agarwal (FCA) is heading M/s Satish S Agarwal & Co. Chartered Accountants since 1985 with a team of dynamic young professionals serving clients from various business sectors including public listed companies and government undertakings. Firm was also registered with PCAOB (USA) for undertaking audits and other work of US GAAP.***

***He is regularly advising on several matters to Institute of Chartered Accountant of India (ICAI) and also to Ministry of Commerce (MoC) for Foreign Trade Agreements (FTAs) and World Trade Organization (WTO) for securing India's best interests.***

***He is continuously advising on Foreign Investments (FIs) in India and also on Overseas Direct Investments (ODIs) outside India.***

***He is known for his expertise in incorporating companies in most of countries across the world.***

***He has written around 150 +(plus) Research papers / books containing 25 thousand +(plus) pages available "freely" on certain portals like:***

[https://taxguru.in/author/satishagarwal307\\_1957](https://taxguru.in/author/satishagarwal307_1957)

Or

[www.femainindia.com](http://www.femainindia.com)

***Few out of abovementioned Research papers / books are as under:***

1. *Book on Enforcement Directorate (ED) in India- (Book with 617 pages)*
2. *Director of Revenue Intelligence (DRI) in India*
3. *Central Bureau of Investigation (CBI) in India*
4. *National Investigation Agency (NIA) in India*
5. *Serious Fraud Investigation Office (SFIO) in India*
6. *Financial Intelligence Unit (FIU-IND) in India*
7. *Central Vigilance Commission (CVC) in India*
8. *Narcotics Control Bureau (NCB) in India*
9. *Research & Analysis Wing (R&AW) in India*
10. *Economic Offence Wing (EOW) in India*
11. *Intelligence Bureau (IB) in India*
12. *Director General of Income Tax Criminal Investigation (DGITCI) in India*
13. *National Company Law Tribunal (NCLT) in India*
14. *Security Exchange Board of India (SEBI) in India*
15. *Prevention of Corruption (PC) Act,1988 in India*

16. *Foreign Assets Investigation Unit (FAIU) in India*
17. *Book on International Financial Services Center (IFSC) in India (Book with 290 pages)*
18. *Replacement of Indian Penal Code (IPC) Criminal Procedure (CP) & Evidence Act (EA) in India*
19. *Undisclosed Foreign Income & Asset (UFIA)-Black Money Act, 2015*
20. *Statutory provisions for General Anti Avoidance Rule (GAAR) in India*
21. *Reserve Bank of India (RBI) Act, 1934*
22. *Foreign Exchange Management Act (FEMA) 1999 in India*
23. *Benami Transactions (Prohibition) Amendment Act, 2016 in India*
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44. *Annual Information Statement (AIS) in India*
45. *Investments by Non-Residents (NRIs) in India*
46. *Guidance for Doing Business in United States of America (USA)*
47. *Corporate Tax (CT) Law in UAE*
48. *Acquisition & Transfer for Immovable Properties by Non-Residents (NRs) in India*
49. *Foreign Company's Registration in India*
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51. *Companies Auditor Report Order (CARO) 2020 in India*
52. *Tax Audit Report (TAR) + Accounting Standard (ASs) in India*
53. *World Trade Organisation (WTO) & Benefits for India*
54. *Deposits by Corporate in India*
55. *Expatriates + Foreign Citizens in India*
56. *Book on Foreign Investments (FIs) by Non-Residents of India (Non-RoI) (Book with 346 pages)*



## 25 FAQs on Significant Economic Presence for Non Residents Operating in India

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## 25 FAQs on Significant Economic Presence for Non Residents Operating in India

### (A) Introduction on Significant Economic Presence (SEP) on Non Residents (NRs)

#### 1. Reasons for SEP's application on NRs operating in India

- (i) Different models being used for business in last 10 year. Now digitization + E-commerce (both) become latest models for business around world.
- (ii) Physical presence not being considered benchmarks + also evidences for business around world (both).
- (iii) New business models emerging every day around world.
- (iv) 100% countries trying to re-align their tax laws to avoid obsolescence + also to cope up with latest changes around world (both)
- (v) Govt. of India (Govt.) re-aligning its tax laws to avoid revenue leakage through digital business + E-commerce business (both) by NRs with resident customers (buyers) in India.
- (vi) Govt. already introduced Equalization Levy (EL) in 2016 on NRs carrying business with resident buyers for reducing leakage of revenue by NRs till further avenues to be found for avoiding of leakage of revenue in India.
  - (a) EL @ 6% being levied on amount of payments (remittances) to NRs for online advertisements + also digital advertisements (both) provided by NRs to residents in India  
+ (plus)
  - (b) Also EL @ 2% being levied on amount of remittances to NRs for E-commerce supply of goods + also supply of services (both) by NRs to residents in India.  
+ (plus)
  - (c) Also EL @ 0% being levied on amount of remittances to NRs for E-commerce supply of goods + also supply of services (both) by NRs to residents in India when annual aggregate amount of remittances for supply of goods + also supply of services (both) not exceeding INR 1 lac in Previous Year (PY).



## 2. **Introduction for SEP's application on NRs operating in India in 2018**

- (i) *India already following source based income tax system for NRs when income tax being levied either at originating point or at source under section 9(1)(i) of Income Tax Act (ITA) 1961 in India*
- (ii) *Incomes accruing or arising to NRs through business connections originating point under section 9(1)(i) of ITA, 1961 in India*
- (iii)
  - (a) *Meaning of business connection considered restrictive for physical presence (only) for taxation of business incomes of NRs in India up to March 31<sup>st</sup> 2021 under section 9(1) (i) of ITA, 1961*  
+ (plus)
  - (b) *Meaning of business connection considered not restrictive for physical presence (only) for taxation of business incomes of NRs in India after March 31<sup>st</sup> 2021 under section 9(1) (i) of ITA, 1961 because advancements in Information Technology (IT) in last 10 year where new models being operated through digital medium emerged around world*  
+ (plus)
  - (c) *NRs interacting with customers without any physical presence under new business models being used by NRs in India*  
+ (plus)
  - (d) *New business models avoiding to levy income tax in India*  
+ (plus)
  - (e) *Existing rules based on physical presence not sufficient for taxation of business profits of NRs when NRs doing business through digital mode in India*
- (iv) *India already adopted SEP regulations introduced through Finance Act, 2018.*
- (v) *SEP's concept borrowed from Base Erosion and Profit Shifting (BEPS) Action Plan 1 of Organization for Economic Co-operation and Development (OECD).*
- (vi) *OECD known international forum of 38 countries founded in 1961 to stimulate economic progress + also world trade (both).*
- (vii) *BEPS referring tax planning strategies being used by NRs to exploit gaps + also mismatches in tax rules to avoid income tax in India (both).*



- (viii) *OECD under BEPS Action Plan 1 addressing challenges for digital economy when several options already discussed to tackle direct tax's collection challenges arising in digital business.*
- (ix) (a) *SEP's 1 option under BEPS Action Plan 1 + also new rules based on SEP in India*
  - (b) *Physical presence of NRs not needed for taxation of business incomes in India.*

### **3. *Income tax for SEP's application on NRs operating in India***

- *Income tax being levied in India on NRs based on location of source of incomes like:*
  - (i) *Incomes be taxed based on business connection through location of Permanent Establishment (PE) in India under section 9(1) (i) of ITA, 1961.*
  - (ii) *Incomes be taxed based on location of PE through physical presence + also SEP (both) in India under section 9(1) (i) of ITA, 1961.*
  - (iii) *Incomes be taxed based on location of PE through SEP in India when annual turnover + gross receipts (both) exceeding INR 200 Lac or users exceeding 3 Lac.*
  - (iv) *Incomes not to be taxed based on location of PE through SEP in India when annual turnover + gross receipts (both) not exceeding INR 200 Lac or users not exceeding 3 Lac*
  - (v) *Meaning to include certain kind of PE in India like :*
    - (a) *Fixed PE in India*
    - (b) *Service PE in India*
    - (c) *Agency PE in India*
    - (d) *Supervisory PE in India*
  - (vi) *NRs permitted to avail benefits already available through article in signed DTAA (treaty)*



## **(B) SEP's application for business connection of NRs operating in India**

### **4. Widening for Scope of Business Connection through introduction of SEP in India**

- (i) SEP to include extended definition of business connection in India under section 9(1)(i) of ITA, 1961 through finance Act 2018.
- (ii) SEP's extended definition of business connection in India applicable from Financial Year (FY) ending on March 31<sup>st</sup> 2022 like Assessment Year (AY) 2022-23 under section 9(1)(i) of ITA, 1961.

### **5. Income tax on PE for SEP's application on NRs operating in India**

- (i) 100% incomes attributable to SEP located in India be taxed to Income tax under section 9(1)(i) of ITA, 1961.
- (ii) Draft rules for profit attribution in India already released in April 2019
- (iii) 2 criteria's like revenue + user (both) inserted in India under Rule 11UD of Income Tax Rules (ITR), 1962 for SEP's application.

### **6. General Criteria's for SEP's application on NR's PE operating in India**

- (i) To include 100% transactions in India for goods + services + properties carried out by NRs with resident buyer + also related parties (all).  
+ (plus)
- (ii) Also to include 100% downloading of data's + also software's (both) in India when aggregate annual payments exceeding INR 200 Lac.

### **7. User's Criteria's for SEP's application on NR's PE operating in India**

- (i) To include systematic + also continuous soliciting of business (both) activities carried in India  
+ (plus)
- (ii) Also to include engaged in interaction with users for business activities in India when aggregate users exceeding INR 3 Lac

### **8. Additional Criteria's for SEP's application on NR's PE operating in India**

- (i) To include agreements for transactions + activities (both) entered in India  
+ (plus)
- (ii) Also to include residences + places of business of NRs located in India



+ (plus)

(iii) Also to include *rendering of services* by NRs in India

**9. *Nature of transactions + activities for SEP's application on NRs operating in India***

- (i) To include *100% sales + purchases of goods + services + properties (all) in India through digital mode.*
- (ii) To include *100% downloading of data's + software's (both) like training modules + online games + in-app purchases + etc. (all) in India.*
- (iii) To include *100% websites + online databases + cloud storages + computing services + etc. (all) in India.*



## **(C) SEP's application + undesirable consequences (both) on NRs**

### **10. General challenges for SEP's application on NRs operating in India**

- (i) *100% transactions for goods + services + properties carried in India through digital + conventional (all) modes by NRs to be taxed under section 9(1)(i) of ITA, 1961 in India.*
- (ii) *Extended SEP's definition already widen + stretched in India for Income tax to be levied on digital business + traditional business + conventional business modes without involving e-commerce like high-seas sales + off-shore supplies (all) by NRs to resident buyers.*
- (iii) *SEP not applicable in India*
  - *Goods sold + services rendered from outside India not covered under SEP when NRs not undertaking any activity in India + also following traditional method without any substantial change through digital advancement (all).*
- (iv) (a) *Meaning of systematic + continuous soliciting of business + also engaging in interaction with user not clearly explained (all) by CBDT.*  
(b) *It's suggested that CBDT should issue circular for meaning of systematic + also continuous soliciting of business (both).*
- (v) *CBDT required to clarify through circular for royalty + fee for technical service + cost recharge already covered under EL + SEP + method of profit attribution (all) when SEP to be applicable in India*
- (vi) *NRs required in India for additional compliances under ITA, 1961 like:*
  - (a) *Proper determination of transaction's volume in India when SEP applicable*
  - (b) *Proper maintenance of books of accounts in India for Indian operations*
  - (c) *Required to obtain Permanent Account Number (PAN) in India*
  - (d) *Required to prepare + filing of income tax return (ITR) + facing income tax scrutiny assessment proceedings + tax + also statutory audits (all) in India*
- (vii) *NRs required to face significant challenges for implementation of SEP's regulations for interpretational differences + operations + administrations (all) in India.*
- (viii) *Resident of India required to withhold (TDS) + also to deposit TDS with govt. before making 100% payments towards across border transactions (both).*



## 11. *Specific challenges for SEP's application on high-seas sales + off-shore supplies*

- (i) *SEP applicable on high-seas sales + off-shore supplies by NRs to resident buyers when turnover + gross receipts exceeding INR 200 lac in financial year ending March 31, 2022 (Ay. 2022-23) + also onwards (all) under section 9(1)(i) of ITA, 1961 in India.*
- (ii) *SEP not applicable on high-seas sales + off-shore supplies by NRs to resident buyers when turnover + gross receipts (all) not exceeding INR 200 lac in financial year ending March 31, 2022 (Ay. 2022-23) + also onwards (all) under section 9(1)(i) of ITA, 1961 in India.*
- (iii) *SEP not applicable on high-seas sales + off-shore supplies by NRs to resident buyers in India up to financial year ending March 31, 2021 (Ay. 2021-22) under section 9(1)(i) of ITA, 1961 in India beside turnover + gross receipts (all) exceeding INR 200 lac in 1 financial year.*



## **(D) Immunity for SEP's application on NRs operating in India through DTAA**

### **12. Immunity for SEP's application through DTAA's beneficial provisions**

- (i) NRs permitted to avail protection against SEP's application through freshly executed + also amended (both) favourable DTAA with India
- (ii) NRs permitted to avail benefits of DTAA against adverse impact of SEP's regulations through freshly executed + also amended (both) favourable DTAA with India where India already have DTAA with more than 100 countries located outside India
- (iii) NRs permitted to avail benefits of DTAA when definition of PE under Article 5 of DTAA restricting scope of business connection through physical presence (only) under section 9(1)(i) of ITA, 1961 in India.
- (iv) NRs permitted to avail benefits under section 9(1)(i) of ITA, 1961 or provisions under DTAA whichever more beneficial for NRs be applied in India.
- (v) NRs permitted to avail provisions of DTAA overriding provisions for SEP's regulations under section 9(1)(i) of ITA, 1961 for doing business in India
- (vi) SEP's application automatically be applied when SEP's regulations already existed in DTAA with India beside DTAA's provisions to be override over SEP's application under section 9(1)(i) of ITA, 1961.

### **13. Immunity for SEP's application through DTAA's amended PE's provisions**

- (i) Govt. required to amend 100% DTAs to incorporate (to include) SEP's provisions for imposing income tax under section 9(1)(i) of ITA, 1961 on NRs doing business in India.
- (ii) Govt. not permitted to include SEP's provisions under section 9(1)(i) of ITA, 1961 on NRs doing business in India without amending DTAs with countries located outside India.
- (iii) Allocation for taxing against business profits of NRs to be taxed in resident's country under article no. 7 of DTAs with countries located outside India when business being carried through PE located in India through having fixed place of business in physical presence (only)
- (iv) Physical presence to be replaced with SEP's provisions under Article no. 7 of DTAs with countries located outside India against business profits of NRs be



*taxed in resident's country under allocation of taxing against business profit of non-resident based on SEP's provisions on NRs doing business in India*

#### **14. Immunity for SEP's application though DTAA's beneficial entitlements**

- NRs required to prove treaty's residency to avail DTAA benefits through certain documents to avoid withholding income tax (TDS) by resident buyers located in India like:-
  - (i) Tax Residency Certificate (TRC) issued by Home Ministry of NR's country + (plus)
  - (ii) Self-declaration in form 10F in substitution to TRC when issue of TRC not feasible + (plus)
  - (iii) Self-declaration for PE (physical presence) not located in India + (plus)
  - (iv) Self-declaration for SEP not located in India



## **(E) Legal Obligations for SEP's application on NRs operating in India**

### **15. Obligations for SEP's application on NRs operating in India**

- (i) India already executed DTAAs with more than 100 countries + also not executed DTAAs with around 100 countries (both).
- (ii) SEP's regulations applicable on DTAAs countries + non DTAAs countries when annual turnover + also gross receipts in aggregate exceeding INR 200 lac or users exceeding 3 lac (all).

### **16. Obligations for filing of declaration by NRs in ITR in India from AY 2022-23**

- (i) NRs required to file ITR + also to declare in ITR for having SEP or not having SEP in India (both).
- (ii) NRs required to mention aggregate amount for payments already received from India + number of users in ITR to enable tax authorities to check threshold limit for SEP's application like turnover + also gross receipts exceeding INR 200 lac or users exceeding 3 lac (all).
- (iii) NRs required to compile necessary information's + also to analyse transactions to be reported in ITR under SEP's regulations (both).

### **17. Obligations for Filing of ITR by NRs in India from AY 2022-23**

- NRs required to file ITR when SEP's regulations applicable to disclose necessary details like:
  - (i) Up to Oct 31<sup>st</sup> 2022 when Transfer Pricing (TP) regulations not applicable  
Or
  - (ii) Up to Nov 30<sup>th</sup> 2022 when Transfer Pricing (TP) regulations applicable

### **18. Obligations for penalty for failure to file ITR + implementation SEP's regulations**

- ITA, 1961 providing several types of penalties + imprisonment for failure to file ITR + also to implement SEP's regulations by NRs in India (all)
- (i) Penal Interest + also late filing fee (both) on NRs in India
- Penal Interest + late filing fee for failure to file ITR + also to implement SEP's regulations by NRs like @1% per month under section 234A + 234B + 234C (all) to be levied in India.



(ii) *Penalty for unreported incomes + tax sought to be evaded through concealment of incomes + also for furnishing inaccurate particulars of incomes (all)*

(a) *Penalty to be levied for unreported incomes like minimum @50% or maximum @200% on amount of tax liability*

*Or*

(b) *Penalty to be levied for tax sought to be evaded through concealment of incomes + also for furnishing inaccurate particulars of incomes like minimum @100% or maximum @300% on amount of tax liability*

*+ (plus)*

(c) *Also penalty to be levied for late furnishing + also for not furnishing ITRs (both) @ INR 5000 per return under section 234F of ITA, 1961*

*+ (plus)*

(d) *Also penalty to be levied for failure to withhold income tax at source (TDS) for remittances outside India by resident buyers.*

*+ (plus)*

(iii) *Imprisonment to be executed for wilful evasion of income tax when serious tax default occurred like minimum 3 month or maximum 7 years*



## **(F) SEP's application by countries located outside India**

### **19. Best practices adopted by countries located outside India**

- Several countries already adopted Digital Services Tax (DST) under OECD's guidelines
- Remaining countries already started to implement measures for taxing digital + e-commerce businesses + services + properties (all)
  - (i) In European Union (EU)
    - EU already proposed to tax Significant Digital Presence (SDP) based on revenue + number of users + also number of contracts for digital services (all)
  - (ii) In Israel
    - Israel already prescribed SEP's regulations for digital e-commerce + also online services (both)
  - (iii) In United State of America (USA)
    - USA already passed Amazon Tax Laws (ATL)
  - (iv) In Japan
    - Japan already introduced Consumption Tax (CT) for digital services on supplies to customers



**(G) Special roles for professionals for SEP's application on NRs + Residents in India**

**20. Special roles for professionals for NRs located in India**

- (i) To analyse for impact of SEP's regulations for cross-border transactions with resident buyers through digital + also conventional (both) modes in India
- (ii) To analyse + to determine for volume of transactions to be affected by SEP's regulations + also to assist in quantification of income tax liability (all) in India
- (iii) To analyse for PE exposure in India
- (iv) To analyse for obtaining PAN in India
- (v) To analyse for preparing + also filing ITR (both) in India

**21. Special roles for professionals for Resident buyers (customers) located in India**

- (i) To analyse for withholding of tax at source (TDS) on transactions with NRs
- (ii) To advise for documentation to be obtained from NRs
- (iii) To assist for obtaining order from Assessing officer (AO) for 0% or lower withholding tax at source (TDS)
- (iv) To assist for issuing certificate in form 15CB under Income Tax Rules, 1962 for remittances outside India to NRs



## **(H) Conclusion on SEP's application on NRs operating in India**

**22. NRs located in DTAAs countries + non DTAAs countries operating in India**

- (i) *NRs from non DTAAs country*
- *SEP's regulations affecting business by NRs with resident buyers when NRs located in countries which not having DTAAs with India*
- (ii) *NRs from DTAAs country*
  - (a) *SEP's regulations not effecting business by NRs with resident buyers when NRs located in countries which having DTAAs with India*  
+ (plus)
  - (b) *NRs located in countries which having DTAAs with India permitted to avail benefits + immunities available under DTAAs beside income tax deptt. not permitted to challenge benefits + immunities already availed by NRs in India (all)*

**23. Legal obligations for resident buyers (customers) located in India**

- (i) *Resident buyers + users required to withhold income tax at source (TDS) + also to deposit with income tax deptt. (all) for remittances outside India to NRs when SEP's regulations applicable.*  
+ (plus)
- (ii) *Resident buyers + users required to withhold income tax at source (TDS) + also to deposit with income tax deptt. (all) for remittances outside India to NR's related parties when SEP's regulations applicable in India.*

**24. Legal obligations for tax auditors auditing in India**

- *Tax auditor required to report for non-fulfilment of provisions for withholding income tax at source (TDS) + also for depositing (both) with income tax deptt. by resident buyers for remittances outside India to NRs.*

**25. Govt.'s challenge for leakages of Income tax under digital + E-commerce**

- (i) *India's govt. facing challenges for implementing SEP's regulations on NRs for doing digital + also e-commerce (both) businesses in India.*
- (ii) *India's govt. required to clarify several interpretational legal issues*



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