WORKING PAPER ON PERMANENT ESTABLISHMENT AND PROFIT ATTRIBUTION IN INDIA BY NITI AYOG

Background:

- Foreign Investments are extremely important for country's growth
- There is a need for providing stable tax regime to utilize India's full potential
- Issue surrounding Permanent Establishment (PE) is complex and require simplification

Issue identified:

- Challenges with respect to Permanent Establishment in India are two-fold; interpretation of PE and attribution of income

Niti Ayog is a premier policy think-tank of the Government of India

Proposals by Niti Ayog

- Introduce presumptive scheme for PE – taxpayer can choose to apply a deemed profit percentage set by government determined scientifically for various different sector/ business

- Compliances for such cases should be minimal and simple

- To implement this, safe harbor rules should be expanded

- Advance Pricing Agreement should be promoted for PE cases

- Optional - taxpayer can disclose lower profit if beneficial by following regular approach; will have to prepared detailed books of accounts

- **Treaty eligibility should be explicitly extended to fiscally transparent US LLC**

- No PE determination exercise required in case taxpayer disclosed tax under presumptive scheme

Presumptive Tax Rates

Source : Niti Ayog Working Paper Enhancing Certainty, Transparency and Uniformity in PERMANENT ESTABLISHMENT and Profit Attribution for Foreign Investors in India

Industry / Sector	Proposed Presumptive Profit Rate (on gross receipts)	Rationale
Infrastructure Construction/EPC	10%	Aligned with existing Section 44BBB (10% for power project construction). Provides certainty for long-term projects, balancing revenue protection with administrative ease.
Engineering Services/Oilfield Services	10%	Aligned with Section 44BB (10% for oil/gas services). Extends similar workable treatment to other engineering services.
Telecom/Technology Equipment Supply with Installation	5% (supply portion), 20% (services portion)	Recognizes lower profit margins on offshore equipment supply (5%) and higher margins for onshore services/installation (20%). Aims to avoid litigation over contract splitting.
Digital / E-commerce (Online platforms, Streaming, etc.)	30% of gross revenue from Indian users	Reflects generally high profit ratios in digital businesses. Ensures India receives a fair share of digital economy profits without endless nexus debates.
General Services (Consultancy, Management, Software)	20% of gross fees	Mirrors new Section 44BBD (25% for specific electronics services). Offers a broader safe harbour, making it attractive to opt in while ensuring corporate tax contribution.
Marketing and Distribution Support	15% of gross revenue from India	A moderate rate between extremes, acknowledging the critical role of Indian marketing operations. Provides certainty to avoid larger attribution risks in audits.

Comments

- Issue identified are relevant and requires simplification
- Even though rates are illustrative; there are some prima-facie issues highlighted below. The idea of presumptive scheme is welcoming however deemed profit rates must be carefully fixed to make it attractive and workable (keeping in mind global business scenarios and double taxation challenges)

    a) Digital services presumptive profit rate is proposed at 30% of gross revenue. With tax rate of 38% (approx.) of foreign company; effective tax rate will come to 11.4%. This is way higher than earlier digital tax applied (Equalisation Levy) of 2% which is also taken back amidst geo-political and Inclusive framework discussion.

    b) General Service presumptive rate of 20% of gross revenue would lead to effective tax rate of 7.6% which is again lesser than FTS of 10% as per most of tax treaty.

    a) Marketing and distribution support rates are excessively high.

- Working paper is silent on the issue of offshore supply taxation; simply attribute 5% of telecom / technology equipment.
- Government should also provide clarity on the set-up requirement (Project Office, etc.) for carrying out a large or small EPC projects in India
- Comments on tax treaty availability for tax transparent entities is very critical. Even though it talks about US LLC, impact various jurisdictions. Government should clarify this irrespective of PE

Niti Ayog is an important body in India and in the past Indian government has accepted many of its policy suggestions in the area of medical institutions, infrastructure, farming and education sectors.

This paper appears to be a good start; discussion with stakeholders must be done before implementation.