

**TAX AVOIDANCE BY MULTINATIONAL ENTERPRISES IN
DEVELOPING COUNTRIES: ESSAYS WITH INDIA PERSPECTIVE**

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by

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*To the Canon of Equity*¹

¹ Adam Smith (1776)

CERTIFICATE

The thesis entitled, “**Tax Avoidance by Multinational Enterprises in Developing Countries: Essays with India Perspective**”, being submitted by **Ms. Kavita Pandey** to the Indian Institute of Technology Delhi, for the award of the degree of **Doctor of Philosophy** is a record of bonafide research work carried out by her. She has worked under our guidance and supervision and has fulfilled all the requirements for the submission of this thesis, which has attained the standard required for a Ph.D. degree at this institute. The results presented in this thesis have not been submitted elsewhere for the award of any degree or diploma.

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² Kafi – A form of folk ballad indigenous to the Indian Sub-Continent

³ Baba Bulleh Shah (1680-1757) was a philosopher and spiritual teacher of Punjabi Sufi Tradition

⁴ Socrates (470-399 BC)

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ABSTRACT

Tax avoidance has been described in the OECD glossary of tax terms as “*a term that is difficult to define, but which is generally used to describe the arrangement of a taxpayer’s affairs in a manner intended to reduce tax liability and that although the arrangement could be strictly legal, it is usually in contradiction with the intent of the law it purports to follow*”.

Empirical assessments find the magnitude of tax avoidance by MNEs to be wide-ranging between USD 35 billion and USD 160 billion per year (Cooper & Nguyen, 2020). A report released by US PIRG Education Fund and Institute on Taxation and Economic Policy reveals that 73% of the Fortune 500 companies operate one or more subsidiaries in tax haven countries, holding more than USD 2.6 trillion in accumulated profits in tax havens, with just 30 of them accounting for 68% of it.

The present structural design of the international taxation regime has been expressed by a section of scholars to be undermining the taxation rights of the developing countries. Historical factors, including dominance of certain developed countries in the politico-economic dynamics of international relationships, have been pivotal in building of present architecture of the tax treaties among countries. Even though, tax avoidance has taken considerable attention of the International Organizations (IOs) and Inter-Governmental Forums (IGFs), more specifically the OECD led BEPS project in the last one decade, the real issue preventing noteworthy success in the efforts of the countries and the IOs in preventing tax avoidance is the persistent adherence of the stakeholder countries, especially the developed ones to the old and cemented features of the international tax regime, aiding tax avoidance.

For such reasons, even while tax avoidance has severely impacted fiscal space of all the jurisdictions of economic activities- developed and developing, the blow is felt more severely by the developing countries. Scholars, therefore assert that the continuance of the existing international taxation rules would compromise the tenets of fairness, equity, neutrality, certainty, simplicity, efficiency, flexibility, effectiveness and enforcement.

The tax to GDP ratio of the developing countries (10-20 percent) is much lower as compared to the high-income countries (about 40 percent) and the OECD average (around 33 percent). With reference to India, the tax to GDP ratio is around 16 percent, of which the direct tax contributes

about 38 percent. Thus, the direct tax to GDP ratio of India comes to around 6 percent⁵. Scholars attribute this low-ratio for the developing countries to factors like- tax avoidance and tax evasion practices, weak institutions, fragmented polities, lack of transparency, poor norm for compliance among others. Role of the political factors has been expressed to be significant in the developing countries (Besley & Persson, 2014).

Competitive advantage of the MNEs is their ability to exploit the differences in corporate tax rules, as a form of regulatory arbitrage. This is further augmented by inadequate coordination of such rules by different tax administrations, abated and exploited through professional tax advisors. In addition, the tax havens are widely used for shifting income like business profits, capital gains, dividend, royalty, interest among others, out of the country of economic activities.

The digital features incorporated in the business structures by the MNEs, have supported tax avoidance by aiding to circumvent the legal threshold for exercise of taxation rights by countries through: avoidance of physical presence, royalty and Fees of Technical Services thresholds, creation of digital hybrid products, internet based remote functioning, storage, processing and communication among others.

The magnitude of the tax avoidance, particularly practiced by the foreign MNEs in the developing countries, has motivated us to investigate the issue of international tax avoidance practised by them. Our study is aimed at investigating different facets of tax avoidance, carried out by the MNEs in the developing countries with the help of evidences from financial data of Forbes 2000 MNE groups and macro-economic data in respect of 139 countries of the world. We apply significant focus on India in our research, considering it a leader of the developing countries in multiple aspects.

We find that the Indian IT sector is growing with a CAGR of 10.71%, with an output of over USD 180 Bn in FY 2019-20. In absence of data in respect of the international corporate tax revenue fetched under the IT Sector by India, we compared the growth rate of corporate tax with that of IT market. We find that the growth rate of IT market is much higher than that of the corporate taxation, thereby indicating inadequate tax collection from the profit generated by this sector. Further, the growth rate of international trade is also higher than that of corporate taxation. Such results, we consider, contradict the economic foundation through the benefit principle of taxation, where the countries are expected to collect taxes from the entities in accordance with the benefits they enjoy

⁵ Tax-to-GDP ratio <https://www.epw.in/journal/2023/25-26/commentary/tax-gdp-ratio.html>

from that nation (Musgrave, 1959). This loss of tax revenue to the countries facilitating benefits to the MNEs, has encouraged us to examine tax avoidance in the developing countries and also tax attribution to such countries out of the common tax base arising from the MNEs. Accordingly, we pursue our research through four broad objectives: (i) To identify the drivers of tax avoidance in the developing countries, especially exacerbated due to digital technology (economy) and examine the hierarchical relation between the extracted drivers of tax avoidance (ii) To investigate the international corporate tax revenue efficiency under the digital economy in India, arising from foreign MNEs (iii) To benchmark various approaches for re-distribution of taxation rights over the MNEs operating in the developing countries, with special focus on India and (iv) To investigate the effectiveness of the anti-avoidance provisions practiced under the taxation statute of India applicable to the MNEs, with special focus on the Arm's Length Principle of the transfer pricing and the Common Law tradition of Judicial precedence.

Investigation of the theoretical underpinnings of policies and practices associated with the MNEs explains the tax avoidance behaviour of the MNEs through: Internalization Theory of the MNEs, Dunning's eclectic and OLI theories to explicate tax-induced capital investment decisions, the theory of FDI Motivated Tax Competition Behaviour (TCB), the institution theory explaining the impact on tax avoidance of both government and private institutions, conflict of the Arm's Length Principle with the economic theories and also the transfer pricing rules facilitating profit shifting to tax havens through intra-group transactions and arrangements.

We first identify the drivers of tax avoidance in the developing countries, especially exacerbated through digital technology (economy) and examine the hierarchical relation between extracted drivers of tax avoidance. For this purpose, we use M-TISM methodology with the interpretive foundation of the knowledge base arising from literature as well as expert contribution. We find that out of the nine drivers of tax avoidance identified by us, four of them, namely: Information and Communication Technologies (ICTs), Economic and Political Dominance, Trade Bodies and the Historic Factors drive the other five drivers of tax avoidance i.e., Intellectual Properties (IPs), Tax Havens, Professional Enablers, International Organizations and Arbitrage Opportunities.

For investigating the international corporate tax revenue efficiency under the digital economy in India arising from foreign MNEs, we use Multiple Case Study of about 150 cases of judicial decisions in India on the broader theme of taxability of foreign MNEs, carrying out economic activities in India through the use of IT. In addition, we carry out an in-depth Case Study of the phenomenon of profit shifting for avoiding tax liability in India by a foreign digital MNE group,

namely the Uber Group representing e-platform economy for earning revenue from India. Our study reveals that in about 99% of the cases, the digital MNEs earning revenue from the Indian market have been declared non-taxable by Courts in India, assigning the reason of income not falling within the income characterization or the physical presence threshold of Permanent Establishment.

Our third objective benchmarks various approaches for re-distribution of taxation rights among countries over the MNEs. Broadly, there are four approaches to the distribution of taxation rights among the jurisdictions, over income arising out of international trade and commerce- the present approach of '*source*' and '*residence*' based attribution, the OECD led proposal of Pillar One, the Global Formulary Apportionment (GFA) under the Unified approach and the digital service tax/Equalization Levy (EL of India). The focal point of our research is on the taxation rights of the developing countries. Our findings are: (i) Through our correlation analysis, we demonstrate that the three macro-economic indicators i.e., Total Final Consumption, GDP and Imports used for the estimation of MNE taxbase allocation among countries, are suitable and alternative allocation keys for attribution of profit under OECD led Pillar One as well as Global Formulary Apportionment (GFA). (ii) We find that the taxbase attributable under Pillar One to 139 countries, in respect of the 62 Covered Group MNEs is only 3.09% of the total profit of the sample set of Forbes 2000 MNE groups. (iii) Similarly, the Pillar One taxbase attributable among market economies is only 11.82% of the total profit of 62 Covered Group MNEs. Our research infers that the balance of 88.18% profits of the Covered Group of 62 MNEs either goes to the country of residence or to various conduit tax haven countries. (iv) We find that the estimated taxbase allocable under the GFA, for BRICS and G24 countries regarded as representing the developing economies, to be 10.29 and 10.74 times respectively of the Pillar One taxbase allocated to these IGFs. Based on this inferential statistical analysis, from the developing country's perspective, our study rates $GFA > Pillar\ One$ profit. Our quantitative work on assessing the financial impact of attribution of the GFA taxbase to 139 countries, considering MNEs as a unitary entity, is a pioneering academic exploration with direct policy implications to the developing countries. The policy significance of this research is considered to be enormous in view of the estimation results suggesting significant increase to the existing corporate revenue stream sourced from the MNEs for the developing countries. (vi) Analysis of 219 MNE groups eligible for Equalization Levy, estimates the India EL to be USD 3.58 Bn which is much less than the estimated India GFA tax of USD 12.45 Bn. However, it is pertinent to mention that the India tax under Pillar One is only USD 1.14 Bn. Based on this analysis, we rank $GFA > EL > Pillar\ One$ from India's and consequently other developing country's

fiscal perspective. Equalization Levy has been criticized for two major reasons: it does not take into account the taxation rights of the partner countries contributing to the economic activities and is a regressive tax for the reason of its base being turnover instead of profit. Because of the low quantum of tax levy under the Equalization Levy approach (2 percent of country turnover in cases of specified e-Commerce activities and 6 percent of country turnover only in respect of advertisement business), this levy is considered by us fulfilling the tenet of equity (vii) From the t-test analysis of India tax on Pillar One profit, GFA profit and the India Equalization Levy over the extracted 23 MNE groups cumulatively fulfilling the criteria of all the three approaches from our sample data, we find that the GFA tax is significantly different from the EL, which in turn, is significantly different from the Pillar One profit. We consider this study pioneering in the field in so far as no such estimation or GFA allocation has been carried out to the best of our knowledge. The ongoing debate on OECD led Pillar One has been assessed in this study to be a tax revenue draining policy as compared to the GFA, especially for the developing market economies. The quantification and estimation of the same through our research, to be an insignificant portion of the profit earned by the MNEs, is a noteworthy policy contribution in view of the rapid global developments for implementation of Pillar One, involving around 140 countries of the Inclusive Framework.

We finally investigate the effectiveness of the anti-avoidance provisions, practiced under the taxation statute of India applicable to MNEs. For this purpose, we selected a set of four provisions: (i) Place of Effective Management (POEM) (ii) Provisions applicable to Indirect Transfer of Assets (iii) Transfer Pricing (iv) General Anti-Avoidance Rules (GAAR).

Our qualitative inferential analysis of the anti-avoidance provisions under Indian tax statute, has demonstrated that the subjectivity associated with them, has the propensity of being misused for the purpose of tax avoidance. Our research also assesses higher degree of litigation and thus, lower-tax revenue for India through these anti-avoidance provisions. The Case Study based research of the transfer pricing legislation, administration and adjudication in India have brought out evidences of enormous difficulties in administering and complying with the statutory provisions under the Arm's Length Principle. Past academic works have suggested that such difficulties are inevitable, considering the synergistic relationships among the group affiliates. Based on our study, we propose a case of policy consideration for constituting an international tax regime where the rejection of the Arm's Length Principle and introduction of global formulary apportionment under the unitary approach are principal tenets. Our investigation of the legal, economic and political aspects of investor-state arbitration brings to fore several weaknesses including the deficiency of

transparency under the arbitration proceedings. The issue of accountability and secrecy under the arbitration process has also been highlighted in our research. Finally, the study highlights the elasticity and unpredictability practised under the Indian judicial system in adjudicating the issues of taxability arising out of economic activities of the MNEs.

Our study takes into its fold several facets of the international tax governance under the developing countries namely: fiscal objectives, political choices, administrative capabilities, judicial consistency among others. Since, our recommendations are intended at three classes of focus groups: (i) governments of the developing countries including India (ii) international organizations and inter-governmental forums and (iii) the MNEs, the research findings serve as significant policy inputs to the developing countries and the International Organizations engaged in quest for a solution for the problem of tax avoidance, especially under the digital economy.

In addition, our analysis discovers a heavy crunch of data pertaining to Asian, African, and other developing countries and consequently the researches have limitations in terms of quality and numbers, even though tax avoidance in such countries has serious fiscal and social consequences. Discernment of such inadequacies is a significant insight to the policy domain for important regulatory improvements for data enablement.

Through this thesis, we seek the engagement of the policymakers of the developing countries to collaborate and strive for infusion of GFA in the international tax architecture which conforms to the tenets of good tax policy i.e., equity, certainty, simplicity and convenience. The G20 presidency has provided visibility to India's leadership in multiple aspects. Capitalizing this creditable position, it is called upon to drive the initiative.

सार

कर बचाव (टैक्स एव्वायडेंस) को ओईसीडी की कर शर्तों की शब्दावली में इस प्रकार वर्णित किया गया है, "एक ऐसा शब्द जिसे परिभाषित करना मुश्किल है लेकिन जिसका उपयोग आम तौर पर करदाता के कार्यों की उस व्यवस्था का वर्णन करने के लिए किया जाता है, जिसका उद्देश्य उसकी कर देनदारी को कम करना है और हालांकि यह व्यवस्था कानूनी मापदंडों के भीतर होती है, यह आमतौर पर कानून के इरादे के विपरीत होती है।"

एम्पिरिकल आकलन से पता चलता है कि बहुराष्ट्रीय उद्गम संस्थानों (एमएनई) द्वारा कर चोरी की मात्रा प्रति वर्ष 35 बिलियन अमेरिकी डॉलर और 160 बिलियन अमेरिकी डॉलर के बीच व्यापक है (कूपर और गुयेन, 2020)। यूएस पीआईआरजी एजुकेशन फंड और इंस्टीट्यूट ऑन टैक्सेशन एंड इकोनॉमिक पॉलिसी द्वारा जारी एक रिपोर्ट से पता चलता है कि फॉर्च्यून 500 कंपनियों में से 73% कंपनियां टैक्स हेवन देशों में एक या अधिक सहायक कंपनियों का संचालन करती हैं। इन कंपनियों के पास टैक्स हेवन देशों में 2.6 ट्रिलियन अमेरिकी डॉलर से अधिक का संचित लाभ है, जिसमें से केवल 30 कंपनियों का हिस्सा इस राशि का 68% है।

विद्वानों के एक वर्ग द्वारा अंतर्राष्ट्रीय कराधान व्यवस्था के वर्तमान संरचनात्मक डिजाइन को विकासशील देशों के कराधान अधिकारों को कमजोर करने वाला बताया गया है। अंतरराष्ट्रीय संबंधों की राजनीतिक-आर्थिक गतिशीलता में कुछ विकसित देशों के प्रभुत्व सहित ऐतिहासिक कारक, देशों के बीच कर संधियों की वर्तमान संरचना के निर्माण में महत्वपूर्ण रहे हैं। कर से बचाव ने अंतर्राष्ट्रीय संगठनों (आईओ) और अंतर-सरकारी मंचों (आईजीएफ) का काफी ध्यान आकर्षित किया है, विशेष रूप से पिछले एक दशक में ओईसीडी के नेतृत्व वाली बीईपीएस परियोजना। किन्तु वास्तविक मुद्दा जो देशों और अंतर्राष्ट्रीय संगठनों के प्रयासों में उल्लेखनीय सफलता को रोक रहा है, वह हितधारक देशों, विशेष रूप से विकसित देशों, द्वारा अंतरराष्ट्रीय कर व्यवस्था की पुरानी तंत्र का स्थायीकरण है।

ऐसे कारणों से, कर बचाव ने आर्थिक गतिविधियों के सभी क्षेत्राधिकारों- विकसित और विकासशील- के राजकोषीय स्थिति को गंभीर रूप से प्रभावित किया है। लेकिन विकासशील देशों में इसका परिणाम अधिक गंभीर रूप से महसूस किया जाता है। इसलिए, विद्वान इस बात पर जोर देते हैं कि मौजूदा अंतरराष्ट्रीय कराधान, कर-नियमों की निरंतरता, निष्पक्षता, समानता, तटस्थता, निश्चितता, सरलता, दक्षता, लचीलेपन, प्रभावशीलता और प्रवर्तन के सिद्धांतों से समझौता करती है।

विकासशील देशों का कर-जीडीपी अनुपात (10-20 प्रतिशत) उच्च आय वाले देशों (लगभग 40 प्रतिशत) और ओईसीडी देशों (लगभग 33 प्रतिशत) के औसत की तुलना में बहुत कम है। भारत के संदर्भ में, कर और सकल घरेलू उत्पाद का अनुपात

लगभग 16 प्रतिशत है जिसमें प्रत्यक्ष कर का योगदान लगभग 38 प्रतिशत है। इस प्रकार, भारत का प्रत्यक्ष कर-जीडीपी अनुपात लगभग 6 प्रतिशत बैठता है⁶। विद्वान, विकासशील देशों के लिए इस निम्न-अनुपात का कारण कर बचाव और कर चोरी प्रथाओं, कमजोर संस्थानों, खंडित राजनीति, पारदर्शिता की कमी, अनुपालन के लिए खराब मानदंड जैसे कारकों को मानते हैं। विकासशील देशों में राजनीतिक कारकों की भूमिका महत्वपूर्ण बताई गई है (बेस्ले एंड पर्सन, 2014)।

कॉर्पोरेट कर नियमों में आर्बिट्राज का फायदा उठाने की क्षमता बहुराष्ट्रीय उद्गम संस्थानों में है। विभिन्न कर प्रशासनों द्वारा ऐसे नियमों के अपर्याप्त समन्वय के कारण यह और भी बढ़ गया है तथा पेशेवर कर सलाहकारों के माध्यम से इसे और बढ़ावा मिलता है। इसके अलावा, टैक्स हेवन का उपयोग व्यापक रूप से व्यावसायिक लाभ, पूंजीगत लाभ, लाभांश, रॉयल्टी, ब्याज इत्यादि आय को देश से बाहर स्थानांतरित करने के लिए किया जाता है।

एमएनई की व्यावसायिक संरचनाओं में शामिल की गई डिजिटल सुविधायें, जैसे: डिजिटल हाइब्रिड उत्पादों का निर्माण, इंटरनेट आधारित दूरस्थ कामकाज, भंडारण, प्रसंस्करण और संचार आदि ने देशों द्वारा कराधान अधिकारों के प्रयोग के लिए कानूनी सीमा को दरकिनार करने में, कई तरह से मदद की है जैसे: भौतिक उपस्थिति से बचाव, रॉयल्टी और तकनीकी सेवाओं की फीस से बचाव।

विशेष रूप से, विकासशील देशों में विदेशी एमएनई द्वारा अपनाए जाने वाले कर बचाव के राजकोषीय परिणाम ने हमें इस मुद्दे का अन्वेषण करने के लिए प्रेरित किया है। हमारे शोध का केंद्र बिंदु विकासशील देशों के कराधान अधिकारों पर है। हमारे अध्ययन का उद्देश्य विकासशील देशों में एमएनई द्वारा किए गए कर बचाव के विभिन्न पहलुओं की जांच करना है। हम अपने शोध में भारत पर महत्वपूर्ण ध्यान केंद्रित कर रहे हैं क्योंकि इसे कई पहलुओं से विकासशील देशों में अग्रणी मानते हैं।

भारतीय आईटी क्षेत्र वित्त वर्ष 2019-20 में 180 बिलियन अमेरिकी डॉलर से अधिक के आउटपुट के साथ 10.71% की सीएजीआर के साथ बढ़ रहा है। भारत द्वारा आईटी क्षेत्र के तहत प्राप्त अंतरराष्ट्रीय कॉर्पोरेट कर राजस्व के संबंध में डेटा के अभाव में, हमने कॉर्पोरेट कर की वृद्धि दर की तुलना आईटी क्षेत्र की वृद्धि से की है। हमने पाया है कि आईटी क्षेत्र की वृद्धि दर कॉर्पोरेट कराधान की तुलना में बहुत अधिक है, जिससे इस क्षेत्र द्वारा उत्पन्न लाभ से अपर्याप्त कर संग्रह का संकेत मिलता है। इसके अलावा, अंतरराष्ट्रीय व्यापार की वृद्धि दर भी कॉर्पोरेट कराधान की तुलना में अधिक है। हम मानते हैं कि इस तरह के परिणाम कर के बेनिफिट सिद्धांत का खंडन करते हैं, जहां देशों से अपेक्षा की जाती है कि वे उस राष्ट्र से प्राप्त लाभों के अनुसार संस्थाओं से कर एकत्र करें (मस्ग्रेव, 1959)। इस पहलू ने हमें विकासशील देशों में एमएनई के कर बचाव उपायों एवं कराधान अधिकार के विभाजन के नियमों की जांच करने के लिए प्रोत्साहित किया है। तदनुसार, हम अपने शोध को चार

⁶ कर-से-जीडीपी अनुपात <https://www.epw.in/journal/2023/25-26/commentary/tax-gdp-ratio.html>

व्यापक उद्देश्यों के माध्यम से आगे बढ़ाते हैं: (i) विकासशील देशों में कर से बचने के चालकों की पहचान करना, जो विशेष रूप से डिजिटल प्रौद्योगिकी (अर्थव्यवस्था) के कारण बढ़ गए हैं और कर से बचने के निकाले गए चालकों के बीच अधिक्रम संबंध की जांच करना (ii) भारत में डिजिटल अर्थव्यवस्था के तहत विदेशी एमएनई से उत्पन्न अंतरराष्ट्रीय कॉर्पोरेट कर राजस्व दक्षता की जांच करना (iii) भारत पर विशेष ध्यान देने के साथ विकासशील देशों में संचालित एमएनई पर कराधान अधिकारों के पुनः वितरण के लिए विभिन्न दृष्टिकोणों को बेंचमार्क करना और (iv) अंतरण मूल्य निर्धारण के आर्म लेंथ सिद्धांत और न्यायिक परिपाटी की कॉमन लॉ परंपरा पर विशेष ध्यान देने के साथ, एमएनई पर लागू भारत के कराधान कानून के तहत प्रचलित बचाव विरोधी प्रावधानों की प्रभावशीलता की जांच करना।

हमने सबसे पहले विकासशील देशों में कर से बचने के चालकों की पहचान की हैं जिसे विशेष रूप से डिजिटल प्रौद्योगिकी के माध्यम से और बढ़ाया गया है। इसके अलावा इस शोध में उन चालकों के बीच अधिक्रम संबंध की जांच भी की गयी है। इस उद्देश्य के लिए हमने पूर्व शोध ज्ञान के साथ-साथ विशेषज्ञ योगदान से उत्पन्न ज्ञान आधार की व्याख्यात्मक नींव के साथ एम-टीआईएसएम पद्धति का उपयोग किया हैं। हमने पाया है कि हमारे द्वारा पहचाने गए कर बचाव के नौ चालकों में से चार- सूचना और संचार प्रौद्योगिकी (आईसीटी), आर्थिक और राजनीतिक प्रभुत्व, व्यापार निकाय और ऐतिहासिक कारक- कर बचाव के अन्य पांच चालकों- बौद्धिक संपदा (आईपी), टैक्स हेवन, पेशेवर सलाहकार, अंतरराष्ट्रीय संगठन और आर्बिट्राज के अवसर को भी दिशा दे रहे हैं।

भारत में डिजिटल अर्थव्यवस्था के तहत विदेशी एमएनई से उत्पन्न अंतरराष्ट्रीय कॉर्पोरेट कर राजस्व दक्षता की जांच के लिए, हमने भारत में आर्थिक उदय करने वाले विदेशी डिजिटल एमएनई की करदेयता विषय पर न्यायिक निर्णयों के लगभग 150 मामलों के मल्टीपल केस स्टडी का उपयोग किया है। आईटी के उपयोग के अलावा, हमने ई-प्लेटफॉर्म अर्थव्यवस्था का प्रतिनिधित्व करने वाले उबर समूह द्वारा भारत में कर देनदारी से बचने के लिए लाभ स्थानांतरण की घटना का गहन अध्ययन किया है। हमारे अध्ययन से पता चलता है कि लगभग 99% मामलों में, भारतीय बाजार से राजस्व अर्जित करने वाले डिजिटल एमएनई को भारत में न्यायालयों द्वारा गैर-कर योग्य घोषित किया गया है, जिसमें उनकी आय को इनकम कैरेक्टराइजेशन या स्थायी स्थापना की भौतिक उपस्थिति सीमा के भीतर नहीं आना, प्रमुख कारण बताया गया है।

हमारा तीसरा उद्देश्य एमएनई पर देशों के बीच कराधान अधिकारों के पुनः वितरण के लिए विभिन्न दृष्टिकोणों को बेंचमार्क करता है। मोटे तौर पर, अंतरराष्ट्रीय व्यापार और वाणिज्य से उत्पन्न होने वाली आय पर, कराधान अधिकारों के वितरण के लिए चार दृष्टिकोण हैं- 'स्रोत' और 'निवास' आधारित एट्रिब्यूशन का वर्तमान दृष्टिकोण, ओईसीडी के नेतृत्व वाले पिलर वन प्रस्ताव, एकीकृत दृष्टिकोण के अंतर्गत वैश्विक औपचारिक विभाजन (जीएफए) का प्रस्ताव एवं डिजिटल सेवा कर/समीकरण लेवी (भारत का ईएल)। हमारे निष्कर्ष हैं: (i) कोरिलेशन विश्लेषण के माध्यम से, हम प्रदर्शित करते हैं कि देशों के बीच

एमएनई कर आधार आवंटन के आकलन के लिए उपयोग किए जाने वाले तीन मैक्रो-इकोनॉमिक संकेतक, कुल अंतिम उपभोग, जीडीपी और आयात, उपयुक्त हैं तथा ओईसीडी के नेतृत्व वाले पिलर वन और वैश्विक औपचारिक विभाजन (जीएफए) के तहत लाभ के लिए योग्य वैकल्पिक आवंटन कुंजी भी है (ii) हमने पाया कि फोर्ब्स 2000 एमएनई समूहों के नमूना सेट से उपजे, 62 कवर ग्रुप एमएनई का पिलर वन लाभ, इन 2000 एमएनई समूहों के कुल लाभ का केवल 3.09% है (iii) इसी तरह, 62 कवर्ड ग्रुप के पिलर वन टैक्सबेस का केवल 11.82% बाज़ार अर्थव्यवस्था के बीच विभाज्य है। हमारा शोध यह अनुमान लगाता है कि 62 एमएनई कवर समूह के पिलर वन लाभ का शेष 88.18% या तो निवास के देशों या विभिन्न टैक्स हेवन देशों में जाता है (iv) हमने पाया कि ब्रिक्स और जी24 देशों के लिए, जिसे विकासशील अर्थव्यवस्थाओं का प्रतिनिधित्व करना माना जाता है, जीएफए के तहत आवंटित अनुमानित कर आधार इन आईजीएफ को आवंटित पिलर वन टैक्सबेस से 10.29 और 10.74 गुना है। इस अनुमानित सांख्यिकीय विश्लेषण के आधार पर, विकासशील देशों के परिप्रेक्ष्य से, हमारा अध्ययन जीएफए > पिलर वन लाभ का मूल्यांकन करता है। हमने मात्रात्मक विश्लेषण के द्वारा एमएनई को एकात्मक इकाई मानते हुए 139 देशों में जीएफए कर आधार के निर्धारण के वित्तीय प्रभाव का जो आकलन किया है, वह विकासशील देशों के टैक्स नीति पर प्रभाव डालने वाला एक अग्रणी शैक्षणिक अन्वेषण है। विकासशील देशों के लिए एमएनई से प्राप्त मौजूदा कॉर्पोरेट राजस्व स्ट्रीम में उल्लेखनीय वृद्धि का सुझाव देने वाले अनुमान परिणामों को देखते हुए इस शोध का नीतिगत महत्व बहुत बड़ा है (vi) इक्वलाइजेशन लेवी के लिए मात्र 219 एमएनई समूहों के विश्लेषण से अनुमान लगाया गया है कि भारत का ईएल 3.58 बिलियन अमेरिकी डॉलर होगा जो अनुमानित भारत जीएफए कर 12.45 बिलियन अमेरिकी डॉलर से बहुत कम है। यहाँ, यह उल्लेख करना उचित है कि पिलर वन के तहत भारत का कर केवल 1.14 बिलियन अमेरिकी डॉलर है। इस विश्लेषण के आधार पर, हम भारत और इसके परिणामस्वरूप अन्य विकासशील देशों के वित्तीय परिप्रेक्ष्य से जीएफए > ईएल > पिलर वन को रैंक करते हैं। विकसित देश, विशेषतः अमेरिका ने भारत के इक्वलाइजेशन लेवी का दो प्रमुख कारणों से आलोचना किया है: यह आर्थिक गतिविधियों में योगदान देने वाले भागीदार देशों के कराधान अधिकारों को ध्यान में नहीं रखता है और इसका आधार लाभ के बजाय टर्नओवर होने के कारण यह एक प्रतिगामी कर है। समकारी लेवी दृष्टिकोण (देश के टर्नओवर पर 2 प्रतिशत- केवल विज्ञापन व्यवसाय के संबंध में टर्नओवर का 6 प्रतिशत) के तहत कर लगाने की कम मात्रा के कारण, इस लेवी को हम इक्विटी के सिद्धांत को पूरा करने वाला मानते हैं (vii) टी टेस्ट - हमारे नमूना डेटा से सभी तीन दृष्टिकोणों के मानदंडों को एक साथ पूरा करने वाले 23 एमएनई समूहों पर पिलर वन लाभ, जीएफए लाभ और भारत समकारी लेवी पर भारत कर का टी-टेस्ट विश्लेषण करने पर हम पाते हैं कि जीएफए कर ईएल से काफी अलग है। इसके अतिरिक्त जीएफए कर, पिलर वन के लाभ कर से काफी अलग है। हम इस अध्ययन को इस क्षेत्र में अग्रणी मानते हैं क्योंकि जहां तक हमारी जानकारी है, ऐसा कोई अनुमान या जीएफए आवंटन नहीं किया गया है। इस अध्ययन में ओईसीडी के नेतृत्व वाले पिलर वन पर चल रही बहस को विकासशील बाजार अर्थव्यवस्थाओं के लिए विशेष रूप से प्रतिगामी नीति के रूप में

मूल्यांकन किया गया है। हमारे शोध के माध्यम से इसकी मात्रा का निर्धारण और अनुमान, एमएनई द्वारा अर्जित लाभ का एक नगण्य हिस्सा, आकलित किया गया है। इस दौरान, इंकलूसिव फ्रेमवर्क के लगभग 140 देश पिलर वन के कार्यान्वयन के लिए तेजी से कार्य कर रहे हैं। अतः वैश्विक विकास को देखते हुए हमारे शोध का एक महत्वपूर्ण नीतिगत योगदान है।

हमने अंततः एमएनई पर लागू भारत के करान कानून के तहत प्रचलित, बचाव विरोधी प्रावधानों की प्रभावशीलता की जांच की है। इस प्रयोजन के लिए, हमने चार प्रावधानों का एक सेट चुना: (i) प्रभावी मैनेजमेंट का स्थान (POEM) (ii) भारतीय आधारभूत कैपिटल एसेट्स के अप्रत्यक्ष हस्तांतरण पर लागू प्रावधान (iii) अंतरण मूल्य निर्धारण (ट्रान्सफर प्राइसिंग) एवं (iv) सामान्य बचाव विरोधी नियम (GAAR)।

हमारे गुणात्मक तथा अनुमानात्मक विश्लेषण ने दिखाया है कि भारतीय कर कानून के तहत, बचाव विरोधी प्रावधानों से जुड़ी व्यक्तिपरकता एमएनई के कर बचाव के उद्देश्य को बढ़ावा देती है। हमारा शोध, लिटीगेशन की अधिकता और बचाव विरोधी प्रावधानों की प्रभावशून्यता के कारण भारत के लिए राजस्व की कमी को भी दर्शाता है। भारत में अंतरण मूल्य निर्धारण कानून और न्यायनिर्णयन के केस स्टडी पर आधारित हमारे शोध ने आर्म लेंथ सिद्धांत के तहत वैधानिक प्रावधानों के प्रशासन और अनुपालन में भारी कठिनाइयों के प्रमाण सामने लाए हैं। पिछले शैक्षणिक कार्यों ने सुझाव दिया है कि एमएनई समूह के सहयोगियों के बीच सहक्रियात्मक संबंधों को देखते हुए ऐसे परिणाम अपरिहार्य हैं। हमारे अध्ययन के आधार पर, हम एक अंतरराष्ट्रीय कर व्यवस्था के गठन के लिए नीतिगत विचार का सुझाव प्रस्तावित करते हैं, जिसमें आर्म लेंथ सिद्धांत की अस्वीकृति और एकात्मक दृष्टिकोण के तहत वैश्विक फॉर्मूलरी विभाजन की शुरुआत शामिल है। निवेशक-राज्य मध्यस्थता के कानूनी, आर्थिक और राजनीतिक पहलुओं की हमारी जांच, मध्यस्थता कार्यवाही के तहत पारदर्शिता की कमी सहित कई कमजोरियों को सामने लाता है। हमारे शोध में मध्यस्थता प्रक्रिया के तहत जवाबदेही और गोपनीयता के मुद्दे पर भी प्रकाश डाला गया है। अंत में यह अध्ययन एमएनई की आर्थिक गतिविधियों से उत्पन्न, करदेयता (टैक्सबिलिटी) के मुद्दों पर निर्णय लेने में भारतीय न्यायिक प्रणाली के तहत प्रचलित लोच और अप्रत्याशितता पर प्रकाश डालता है। एमएनई से जुड़ी नीतियों और प्रथाओं के सैद्धांतिक आधारों की जांच से एमएनई के कर से बचने के व्यवहार की व्याख्या होती है: एमएनई का आंतरिककरण सिद्धांत, कर-प्रेरित पूंजी निवेश निर्णयों की व्याख्या करने के लिए डनिंग के उदार और ओएलआई सिद्धांत, एफडीआई प्रेरित कर प्रतिस्पर्धा का सिद्धांत (टीसीबी), सरकारी और निजी दोनों संस्थागत कारकों का कर बचाव पर प्रभाव का सिद्धांत, आर्थिक सिद्धांतों के साथ आर्म लेंथ सिद्धांत का टकराव और अंतर-समूह लेनदेन और व्यवस्थाओं के माध्यम से लाभ को टैक्स हेवन में स्थानांतरित करने की सुविधा प्रदान करने वाले अंतरण मूल्य निर्धारण नियम।

हमारा अध्ययन विकासशील देशों के अंतर्गत अंतरराष्ट्रीय कर प्रशासन के कई पहलुओं को अपने दायरे में लेता है: राजकोषीय उद्देश्य, राजनीतिक समर्थन, प्रशासनिक क्षमताएं, न्यायिक स्थिरता आदि। हमारी सिफारिशें फोकस समूहों के तीन वर्गों के लिए

हैं: (i) भारत सहित विकासशील देशों की सरकारें (ii) अंतर्राष्ट्रीय संगठन और अंतर-सरकारी मंच और (iii) एमएनई। अतः हमारा शोध निष्कर्ष महत्वपूर्ण नीति इनपुट के रूप में काम करने की सम्भावना रखता है। हमारे कार्य का महत्व इसलिए भी बढ़ जाता है, क्योंकि विकासशील देश और अंतर्राष्ट्रीय संगठन, विशेष रूप से डिजिटल अर्थव्यवस्था के तहत, कर बचाव की समस्या के समाधान की खोज में लगे हुए हैं।

अपने शोध के माध्यम से, हम विकासशील देशों में कर बचाव से सम्बंधित कई मुद्दों पर प्रकाश डालते हैं: डिजिटल अर्थव्यवस्था के तहत विकासशील देशों में कर से बचने के प्रमुख चालक, एक प्रतिनिधि विकासशील देश यानी भारत द्वारा एमएनई के ऊपर कराधान अधिकारों का आकलन करना, अंतरराष्ट्रीय कराधान अधिकारों के वितरण के लिए विभिन्न प्रस्तावित दृष्टिकोणों को बेंचमार्क और प्रदर्शित करना। आर्म लेंथ सिद्धांतों सहित बचाव विरोधी प्रावधानों के न्यायिक परिणाम की अप्रत्याशितता स्थापित करना। इस थीसिस के माध्यम से, हम अंतरराष्ट्रीय कर संरचना में जीएफए के समावेश के लिए सहयोग और प्रयास करने के लिए विकासशील देशों के नीति निर्माताओं की भागीदारी चाहते हैं, जो अच्छी कर नीति यानी इक्विटी, निश्चितता, सरलता और सुविधा के सिद्धांतों के अनुरूप है। जी20 की अध्यक्षता ने कई पहलुओं में भारत की नेतृत्व क्षमता को दर्शाया है। इस विश्वसनीय स्थिति का लाभ उठाते हुए इस पहल को आगे बढ़ाने का आह्वान किया गया है।

TABLE OF CONTENTS

Certificate.....	i
Acknowledgements	ii
Abstract	vi
List of Figures.....	xxviii
List of Tables	xxx
Abbreviations	xxxii
Chapter 1: Introduction to Tax Avoidance by the MNEs in the Developing Countries.....	1
1.1 Introduction	1
1.1.1 <i>Historical Background of Taxation</i>	<i>1</i>
1.1.2 <i>Theoretical Background of Taxation</i>	<i>1</i>
1.1.3 <i>Historical Background of International Taxation</i>	<i>3</i>
1.1.4 <i>Theoretical Background of Tax Avoidance</i>	<i>5</i>
1.1.5 <i>Mechanisms of International Tax Avoidance</i>	<i>7</i>
1.1.6 <i>Extent of Tax Avoidance</i>	<i>8</i>
1.1.7 <i>Role of Tax Havens.....</i>	<i>10</i>
1.1.8 <i>Recent Global Endeavors to Control Tax Avoidance.....</i>	<i>11</i>
1.2 Motivation of the Study	12
1.3 Scope of the Study	14
1.4 Objectives of the Study	18
1.4.1 <i>Research Gap.....</i>	<i>18</i>
1.4.2 <i>Research Objectives.....</i>	<i>19</i>
1.5 Methodologies Applied.....	19
1.6 Significance of the Study.....	21
1.7 Scheme of the Study	21
1.8 Brief Summary of Essays.....	21
1.8.1 <i>Tax Avoidance by MNEs: A Systematic Content Analysis.....</i>	<i>22</i>
1.8.2 <i>Drivers of Tax Avoidance by MNEs in the Developing Countries under the Digital Economy: A Modified-TISM Approach</i>	<i>24</i>
1.8.3 <i>Investigating the International Corporate Tax Revenue Efficiency under the Digital Economy: Multiple Case Study of MNEs Operating in India.....</i>	<i>26</i>
1.8.4 <i>Benchmarking Various Approaches for Re-distribution of Taxation Rights Over the MNEs Operating in the Developing Countries, with Special Focus on India.....</i>	<i>31</i>

1.8.5	<i>Investigating the Effectiveness of the Anti-Avoidance Provisions Practiced under the Taxation Statute of India Applicable to MNEs</i>	34
1.8.6	<i>Investigating the Efficacy of Administrative and Judicial System of India in Controlling International Tax Avoidance by MNEs</i>	35
1.9	Significant Contributions of the Study	39
1.10	Organization of the Thesis	42
1.11	Concluding Observations.....	43
	Chapter 2: Tax Avoidance by MNEs: A Systematic Content Analysis.....	44
2.1	Introduction	44
2.2	Research Methodology	47
2.2.1	<i>Analysis Method.....</i>	47
2.2.2	<i>Database Formulation.....</i>	47
2.2.3	<i>Summary of Significant Academic Work on different facets of Tax Avoidance</i>	49
2.3	Analysis through Theoretical, Methodological and Context (TMC) Framework.....	49
2.3.1	<i>Methodologies Used under the Existing Literature.....</i>	50
2.3.2	<i>Theoretical Integration and Conflict.....</i>	53
2.3.3	<i>Thematic Analysis of Contents (TMC).....</i>	61
2.3.3.1	<i>Influence of Government Policy on Tax Avoidance</i>	62
2.3.3.2	<i>Impact of International Organization and Civil Society</i>	65
2.3.3.3	<i>Estimation of Tax Avoidance</i>	67
2.3.3.4	<i>Enablers Promoting Tax Avoidance.....</i>	68
2.3.3.5	<i>Strategies, Techniques and Mechanisms of Tax Avoidance</i>	70
2.3.3.6	<i>Ethical Foundation for Tax Compliance</i>	72
2.4	Insights and Theoretical Contribution	73
2.4.1	<i>Arm's Length Principles in Conflict with Economic Foundation of MNE Growth..</i>	73
2.4.2	<i>Preference for Unitary Proposition against the Separate Entity Practice.....</i>	74
2.4.3	<i>Dominance of Quantitative Empirical Methods</i>	74
2.4.4	<i>Highlighting Preference for the Qualitative Methodology for Comprehending the Phenomenon</i>	75
2.4.5	<i>Developing Country Research- A Distant Laggard.....</i>	75
2.4.6	<i>The BEPS Recommendations.....</i>	76
2.4.7	<i>Limited Use of ICT for Regulating Tax Avoidance</i>	76
2.4.8	<i>Limitations</i>	77
2.4.9	<i>Future Research Agenda</i>	77

2.5	Conclusion	79
Chapter 3: Drivers of Tax Avoidance by MNEs in the Developing Countries under the Digital Economy: A Modified-TISM Approach		
3.1	Introduction	80
3.2	Background of tax avoidance	83
3.2.1	<i>Features of International tax regime promoting tax avoidance</i>	83
3.2.2	<i>Tax avoidance under digital economy</i>	84
3.2.3	<i>Strategies under the traditional models exacerbating tax avoidance with the use of Information Communication and Technologies (ICTs)</i>	84
3.2.4	<i>Tax avoidance under exclusive digital business models</i>	85
3.3	Literature review	85
3.3.1	<i>Economic & political dominance of developed countries (F2)</i>	86
3.3.2	<i>Role of tax havens (F3)</i>	87
3.3.3	<i>Tax arbitrage (F4)</i>	88
3.3.4	<i>Role of ICTs (F5)</i>	88
3.3.5	<i>Intellectual Property (IP) (F6)</i>	89
3.3.6	<i>Role of trade bodies (F7)</i>	90
3.3.7	<i>Historical foundation of tax treaties (F8)</i>	90
3.3.8	<i>Professional consultant and enablers (F9)</i>	91
3.3.9	<i>Role of international organizations (F10)</i>	92
3.4	Research Methodology	94
3.4.1	<i>Development of M-TISM Model</i>	95
3.4.2	<i>Data</i>	96
3.4.3	<i>Analysis and results of TISM</i>	98
3.4.3.1	<i>Pairwise comparison</i>	99
3.4.3.2	<i>Reachability matrix and transitivity check</i>	100
3.4.3.3	<i>Level partitioning, binary matrix for significant transitivity and Hierarchical Levelling</i>	100
3.4.3.4	<i>Developing M-TISM Digraph</i>	101
3.4.3.5	<i>Development of Explanatory M-TISM of Tax Avoidance in Developing Countries under Digital Economy</i>	102
3.5	Key Findings and Discussions	104
3.6	Limitations and Future Research Options	108
3.7	Conclusion	109

Chapter 4: Investigating the International Corporate Tax Revenue Efficiency under the Digital Economy: Multiple Case Study of MNEs Operating in India	110
4.1 Introduction	110
4.2 Background.....	113
4.2.1 <i>Background of International Tax Regime in India</i>	<i>113</i>
4.2.2 <i>Digital Economy</i>	<i>114</i>
4.2.3 <i>Tax Challenges under the Digital Economy in India</i>	<i>116</i>
4.2.4 <i>New Initiative for taxation of Digital economy in India.....</i>	<i>116</i>
4.2.4.1 <i>Introduction of Equalization Levy outside the Income Tax Act (IT Act) .</i>	<i>116</i>
4.3 Review of Literature	117
4.3.1 <i>Impact of Digital Technology</i>	<i>117</i>
4.3.2 <i>Race for FDI.....</i>	<i>119</i>
4.3.3 <i>Role of Tax Havens in Augmenting Tax Avoidance.....</i>	<i>119</i>
4.3.4 <i>Research Gap.....</i>	<i>120</i>
4.4 Research Methodology	121
4.4.1 <i>Strategies, Techniques and Mechanisms of Tax Avoidance practiced in the Developing Countries identified from the Extant Literature.....</i>	<i>121</i>
4.4.2 <i>Introduction to the Methodology</i>	<i>121</i>
4.4.3 <i>Steps undertaken for investigation of tax avoidance by digital MNEs using Case Study methodology.....</i>	<i>122</i>
4.5 Analysis, Results and Discussion.....	124
4.5.1 <i>Classification of Judicial Decisions</i>	<i>124</i>
4.5.2 <i>Taxation of Telecom Services rendered by foreign MNE in India</i>	<i>125</i>
4.5.3 <i>Taxation of Supply of Software to India</i>	<i>125</i>
4.5.4 <i>Taxation of Income Earned through Business Process Outsourcing carried out in India.....</i>	<i>127</i>
4.5.5 <i>Tax Avoidance Specific to Platform Economy Run by Foreign MNEs in India</i>	<i>128</i>
4.5.5.1 <i>Taxation of Fees Received for e-Commerce Facilitation by Foreign MNE: Case Study of eBay Group.....</i>	<i>130</i>
4.5.5.2 <i>Taxation of Web-hosting Services rendered by Foreign MNE to Indian Entities: Case Study of Savvis Group</i>	<i>131</i>
4.5.5.3 <i>Taxation of e-Advertisement Services rendered by Foreign MNE in India: Case study of Google Group</i>	<i>132</i>
4.5.6 <i>Discussion of results.....</i>	<i>132</i>

4.5.6.1	<i>Salient findings</i>	132
4.5.6.2	<i>Generalized Structure for Tax Avoidance by Digital MNEs</i>	134
4.6	Investigation of Profit Shifting Mechanism for Tax Avoidance in India with the Aid of Tax Havens through Case Study of Uber Group.....	135
4.6.1	<i>Choice of Uber Group as a Case Study.....</i>	135
4.6.2	<i>Data and Information</i>	136
4.6.3	<i>Tax avoidance by Uber Group in India</i>	136
4.6.3.1	<i>Uber revenue growth in the Asia-Pacific region.</i>	137
4.6.3.2	<i>Intra-group Business Arrangement for Profit Shifting from India between FY 2013 to FY 2019.....</i>	138
4.6.3.3	<i>Steps for Execution of the Business Operations in India.....</i>	140
4.6.3.4	<i>Economic Activities carried out by Indian Affiliates.....</i>	142
4.6.3.5	<i>Structural Arrangement of Uber Group for Shifting Profit from India to Netherlands.....</i>	143
4.6.3.6	<i>India Tax Tribunal Findings.....</i>	144
4.6.4	<i>Global Avoidance Structure</i>	145
4.6.5	<i>Analysis of Netherlands as An Intermediary Tax Shelter</i>	148
4.7	Conclusion.....	149
Chapter 5:	Benchmarking the Recent Proposals for the Re-distribution of Taxation Rights over the MNEs: the Developing Country Perspective.....	152
5.1	Introduction	152
5.1.1	<i>Approaches of Attribution of Tax-bases Among Countries</i>	152
5.1.2	<i>Motivation of the Study.....</i>	154
5.1.3	<i>Scheme of the Study</i>	155
5.2	Background.....	157
5.3	Literature Review	160
5.3.1	<i>BEPS Recommendations and the Approach of the OECD Towards the Developing Countries.....</i>	161
5.3.2	<i>Two-Pillar Proposal led by OECD and the Interest of the Developed Countries..</i>	163
5.3.3	<i>Treat Global Formulary Apportionment (GFA) as An Equitable Solution to the Problem of MNE Taxation.....</i>	165
5.3.4	<i>Research Gap.....</i>	167
5.4	Research Methodology	168
5.4.1	<i>Research Approach.....</i>	168

5.4.1.1	<i>Pillar One Criteria</i>	168
5.4.1.2	<i>Global Formulary Apportionment (GFA) criteria</i>	169
5.4.1.3	<i>Equalization Levy (EL) Criteria</i>	171
5.4.2	<i>Research procedure</i>	172
5.4.3	<i>Research Steps</i>	173
5.4.4	<i>Research Data</i>	174
5.4.4.1	<i>Sample Data of MNE Groups</i>	174
5.4.4.2	<i>Macro-economic data for allocation of tax-base among countries</i>	175
5.4.5	<i>Estimation process</i>	176
5.4.5.1	Estimation of Pillar One Profit in respect of the Covered Group of Companies	176
5.4.5.2	Allocation of Profit estimated under GFA	177
5.4.5.3	India specific attribution of Pillar One profit and Pillar One tax	179
5.4.5.4	Estimation of Equalization Levy for India for EL eligible companies under the Indian Statute:	179
5.4.5.5	India specific GFA and EL estimation applied to 219 EL eligible MNE groups selected from the sample set:	181
5.4.5.6	Profit allocation under the three approaches in respect of the MNE groups cumulatively fulfilling criteria of such approaches	181
5.5	Results and discussion	181
5.5.1	<i>The direction of association of the estimated profit under Pillar One Amount A under different allocation keys and the GFA through Correlation analysis</i>	182
5.5.2	<i>Descriptive Statistical inferential analysis for benchmarking the different approaches to profit attribution</i>	184
5.5.2.1	<i>Financial Indicators of sample data:</i>	185
5.5.2.2	<i>Pillar One Amount A profit and GFA comparison for the developed and the developing countries:</i>	186
5.5.2.3	<i>India comparison of A1, A2, A3 and GFA Tax</i>	188
5.5.2.4	<i>India comparison of EL and GFA taxes</i>	189
5.5.2.5	<i>India comparison of Pillar One, EL and GFA taxes based on the set of 23 MNEs cumulatively fulfilling criteria for all the three approaches</i>	190
5.5.2.6	<i>Descriptive statistics for Constructs- Mean, Maxima, Minima, Standard Deviation in respect of 62 Pillar One Amount A covered MNE groups</i>	191
5.5.2.7	<i>Descriptive statistics in respect of 219 MNEs fulfilling EL criteria in India:</i>	

.....	192
5.5.3 Paired t-test Analysis for Determining the Level of Significance in Estimating through different approaches	193
5.5.3.1 Paired t-test analysis in respect of 62 Pillar One Amount A covered MNE groups for testing the significance of Pillar One profit and GFA profit:..	194
5.5.3.2 Paired t-test: EL-GFA tax for India (data set of 219 MNEs with EL eligible economic activities in India):	195
5.5.3.3 Paired t-test upon the dataset of 23 MNEs carrying economic activities in India, cumulatively fulfilling Pillar One Amount A, EL and GFA criteria	196
5.6 Limitations of the Study.....	198
5.7 Conclusion.....	199
Chapter 6: Investigating the Effectiveness of the Anti-Avoidance Provisions Applicable to MNEs Practiced under the Taxation Statute of India	202
6.1 Introduction	202
6.1.1 Institutional Framework of Anti-tax Avoidance	202
6.1.2 Major Anti-avoidance provisions under the Indian Taxation Statute	205
6.2 Survey of Literature	207
6.2.1 Extant Literature on Efficacy of Tax Governance in Restraining Tax Avoidance through Anti-Avoidance Provisions.....	207
6.2.2 Research Gap.....	209
6.3 Research Methodology	209
6.4 Investigating the efficacy of POEM in India.....	210
6.4.1 Introduction of POEM	210
6.4.2 Test of “Central Management Control” for establishing Residential Status.....	213
6.4.3 Judicial history of Control and Management (C&M) Test of Corporate Residence in India Pre-2015 Amendment.....	216
6.4.4 Substitution of the ‘CMC test’ with ‘POEM test’, through 2015 Amendment and the Government’s Justification for the same	223
6.4.5 Analysis of the POEM legislation of 2015.....	226
6.4.6 Challenges of Digitalization.....	231
6.4.7 Conclusion on POEM.....	232
6.5 Investigating the efficacy of Anti-Avoidance Provisions regulating Indirect Transfer of Share Interest in India.....	233

6.5.1	<i>Introduction to Indirect Transfer</i>	233
6.5.2	<i>Legal History for Taxation of Indirect Transfers of Capital Assets Situated in India</i>	235
6.5.3	<i>Purposive Construction of Statutory Intent</i>	239
6.5.3.1	<i>Memorandum Explaining Provisions of Finance Bill 2012</i>	239
6.5.3.2	<i>Debate in the Indian parliament on Retrospective Explanation of Taxability of Indirect Transfer</i>	239
6.5.4	<i>Economic Aspects of Taxing Indirect Transfer through Case Study of Hutchison- Vodafone deal</i>	240
6.5.5	<i>BIPA Arbitral Award and its Contextual Suitability to Indian Tax and Investment Treaties</i>	247
6.5.5.1	<i>Background of the Arbitral Tribunal Awards</i>	247
6.5.5.2	<i>Award of the Arbitral Tribunal in Favour of Vodafone and Cairn</i>	248
6.5.6	<i>Conclusion</i>	250
6.6	Examining the effectiveness of Transfer Pricing under the Arm's Length Principle in India	252
6.6.1	<i>Introduction</i>	252
6.6.2	<i>Statutory evolution of the Anti-Avoidance provisions of Transfer Pricing in India</i>	253
6.6.3	<i>Transfer Pricing Benchmarking applied in cases of Intangibles</i>	257
6.6.4	<i>Transfer Pricing Adjustments through Re-characterization of Risks</i>	260
6.6.5	<i>Dispute of Profit Level Indicator under Transfer Pricing Benchmarking of Sogo- Shosha class of MNEs</i>	261
6.6.6	<i>Transfer Pricing Benchmarking of DEMPE/ AMP Functions</i>	265
6.6.6.1	<i>DEMPE/AMP Introduction</i>	265
6.6.6.2	<i>Variance in judicial approach in India on transfer pricing benchmarking of DEMPE/AMP functions</i>	269
6.6.6.3	<i>International Approach in Benchmarking the DEMPE Functions</i>	271
6.6.7	<i>Conclusion (Transfer Pricing)</i>	275
6.7	Efficacy of statutory GAAR in India	276
6.7.1	<i>Introduction- GAAR</i>	276
6.7.2	<i>Purpose of Statutory GAAR</i>	278
6.7.3	<i>Evolution of General Anti-Avoidance Rule (GAAR) in India</i>	287

6.7.4	<i>Political and Social Response to Introduction of GAAR: Parthasarathi Shome Committee Report</i>	290
6.7.5	<i>Government of India response to the Parthasarathi Shome Committee Report: Dilution of the limbs of GAAR</i>	291
6.7.6	<i>Benchmarking the Indian GAAR with International Counterparts</i>	294
6.7.6.1	<i>The UK GAAR</i>	295
6.7.6.2	<i>The US Codified Economic Substance Doctrine</i>	296
6.7.6.3	<i>South African GAAR.....</i>	296
6.7.6.4	<i>Australian GAAR</i>	297
6.7.6.5	<i>Chinese GAAR</i>	298
6.7.6.6	<i>Conclusion- International Benchmarking of GAAR.....</i>	299
6.7.7	<i>Indian GAAR and the anti-avoidance provisions under the tax treaties</i>	299
6.7.7.1	<i>UN Model Convention</i>	299
6.7.7.2	<i>Indian GAAR & Multilateral Instrument (MLI) created under BEPS Action Point 15.....</i>	300
6.7.8	<i>Discussion on efficacy of GAAR in the Present Form.....</i>	301
6.7.9	<i>Conclusion (GAAR)</i>	306
6.8	Conclusion.....	308
Chapter 7: Investigating the Efficacy of Administrative and Judicial System of India in Controlling International Tax Avoidance by MNEs		311
7.1	Introduction	311
7.2	Literature review	314
7.3	Evaluation of Administrative and Judicial System applicable to MNEs	318
7.4	Certainty of predicting the Judicial outcome for Taxing Digital Economy in India: A Case Study of Google	325
7.4.1	<i>Introduction</i>	325
7.4.2	<i>Research methodology.....</i>	328
7.4.3	<i>Results and Discussion</i>	329
7.4.4	<i>Conclusion- Judicial uncertainty in exercise of taxation rights over the digital MNEs in India.....</i>	333
7.5	Conclusion.....	333
Chapter 8: Conclusions and Recommendations		336
8.1	Introduction	336
8.2	Summary of the work done	338

8.3 Significant findings from the study	341
8.3.1 Significant Findings from SLR Study.....	341
8.3.2 Significant Drivers of Tax Avoidance.....	346
8.3.3 International Corporate Tax Revenue Efficiency under Digital Economy in India	348
8.3.4 Benchmarking Various Approaches of Re-distribution of Tax-base among Countries	353
8.3.5 Effectiveness of the Anti-Avoidance Provisions Applicable to MNEs.....	355
8.4 Recommendations of the study	358
8.5 Contributions of the study	364
8.6 Limitations of the study and the future scope of work	367
8.6.1 Limitations of the Study	367
8.6.2 Future Scope of work.....	368
8.7 Concluding observation:	370
References	372
Appendix 1	399
Appendix 1.1	399
Appendix 2	425
Appendix 2.1	425
Appendix 2.2	427
Appendix 3	428
Appendix 3.1	428
Appendix 4	432
Appendix 4.1	432
Appendix 4.2	436
Appendix 4.3	446
Appendix 4.4	461
Appendix 5	464
Curriculum Vitae	465

List of Figures

Figure 1.1 Boundaries of ATP Definition	6
Figure 1.2 Distribution of Worldwide Corporate Tax Rates, 2019	8
Figure 1.3 IT Market Size along with export.....	16
Figure 1.4 Direct Investment to India (Cumulative), Corporate Tax, Export, Import and Indian IT Market Size (in USD Bn)	17
Figure 1.5 Digital Economy- Structural model representing Creation of Intra-group market structure (internalization) through transfer pricing by foreign MNE for tax avoidance in India	27
Figure 2.1 Co-occurrence relationship model of keywords in the literature on Influence of Government Policy on Tax Avoidance.....	62
Figure 2.2 Co-occurrence relationship model of keywords in the literature on Impact of International Organization and Civil Society	65
Figure 2.3 Co-occurrence relationship model of keywords in the literature on Estimation of Tax Avoidance	67
Figure 2.4 Co-occurrence relationship model of keywords in the literature on Enablers Augmenting Tax Avoidance	68
Figure 2.5 Co-occurrence relationship model of keywords in the literature on Strategies, Techniques and Mechanisms of Tax Avoidance	71
Figure 2.6 Co-occurrence relationship model of keywords in the literature on Ethical Foundation for Tax Compliance	72
Figure 3.1 Process flow of the research methodology	98
Figure 3.2 Successive comparison digraph.....	99
Figure 3.3 Final M-TISM model	102
Figure 3.4 Final explanatory M-TISM model.....	103

Figure 4.1 Sectoral analysis of e-Commerce market in India for Financial Year 2020-21 and the projected value in FY 2025-26	115
Figure 4.2 Digital Economy- Structural model representing Creation of Intra-group market structure (internalization) through transfer pricing by foreign MNE for tax avoidance in India	135
Figure 4.3 Uber's Revenue Breakup (in USD Bn).....	138
Figure 4.4 Uber India Systems Pvt. Ltd. (UISPL) data – in USD	139
Figure 4.5 Structural arrangement of Uber Group for shifting profit from business operations in India to Netherlands (Up to 30.09.2019)	144
Figure 4.6 A diagrammatic representation of the Holding and Revenue structure of Uber group for earning revenue from Indian market post September 2019 (Case Study analysis including facts from Federatie Nederlandse Vakbeweging (FNV), CICAR, 2021).....	147
Figure 5.1 Profit attribution through Pillar One and GFA approach among BRICS, G7, G20, G24 & OECD countries.....	188
Figure 5.2 India Comparison of Tax on Pillar One Amount A1, A2, A3 and GFA Tax	189
Figure 5.3 Comparison of India tax- EL & GFA in respect of 219 digital companies.....	190
Figure 5.4 Comparison of India tax in respect of 23 MNE groups extracted out of 62 Covered Groups under Pillar One- Amount A1, A2, A3, EL & GFA	191
Figure 6.1 Ownership Structure Chart as at 11 February 2007.....	246
Figure 7.1 Cost to Collection Ratio to Direct Tax Collected for the Period of 2000-01 to 2021-22	323
Figure 7.2 Comparison of Total Direct Tax Collection to Total Cost of Collection	324

List of Tables

Table 1.1 Payment on account of fees arising from use of Google AdWords programme.....	36
Table 2.1 The Methodological Orientation of the Existing Literature on Tax Avoidance.....	50
Table 2.2 Future Research Agenda	78
Table 3.1 Interpretive foundation of contextual relationships	97
Table 3.2 Reachability matrix with transitivity	100
Table 3.3 Hierarchical Levels of Factors of Tax Avoidance	101
Table 4.1 Uber India Systems Private Limited (UISPL) data – in USD	139
Table 5.1 Correlation Matrix for A1, A2, A3 and GFA for 62 Pillar One Covered MNE Groups	183
Table 5.2 Descriptive quantitative values	185
Table 5.3 Comparison of Pillar One and GFA tax-bases- BRICS, G24, G7, G20 & OECD	187
Table 5.4 Summary of Mean, Maxima, Minima, Standard Deviation (Values of Mean, Std. Dev., Min & Max are in USD Bn).....	192
Table 5.5 219 MNEs fulfilling EL criteria in India out of the 2000 Forbes data for the year 2021 (Values of Mean, Std. Err., Std. Dev., Conf. & Interval are in USD Bn)	193
Table 5.6 Paired t-test matrix for A1 and GFA (Values of Mean, Std. Err., Std. Dev., Conf. & Interval are in USD Bn).....	194
Table 5.7 Paired t-test matrix for A2 and GFA (Values of Mean, Std. Err., Std. Dev., Conf. & Interval are in USD Bn).....	195
Table 5.8 Paired t-test matrix for A3 and GFA (Values of Mean, Std. Err., Std. Dev., Conf. & Interval are in USD Bn).....	195

Table 5.9 Paired t-test matrix of 219 MNEs fulfilling EL criteria in India out of the 2000 Forbes data for the year 2021 (Values of Mean, Std. Err., Std. Dev., Conf. & Interval are in USD Bn)	195
Table 5.10 Paired t-test matrix for A1 tax and EL of 23 Pillar One and EL eligible MNE groups	197
Table 5.11 Paired t-test matrix for A2 tax and EL of 23 Pillar One and EL eligible MNE groups	197
Table 5.12 Paired t-test matrix for A3 tax and EL of 23 Pillar One and EL eligible MNE groups	197
Table 5.13 Correlation Matrix for A1, A2, A3, GFA and EL of 23 Pillar One and EL eligible MNE groups	197
Table 6.1 Institutional Framework of Anti Avoidance in India- Statutory Provisions (Domestic Statute)	206
Table 6.2 Tests laid down by various courts for determination of Central Management Control	222
Table 6.3 Salient Aspects of the Arbitration Tribunal Award in Favour of MNEs- Vodafone & Cairn UK	248
Table 6.4 Subjectivity at various stages of application of the Transfer Pricing Rules	255
Table 6.5 Court Decisions Expounding upon Various Facets of Doctrine of Substance Over Form	279
Table 7.1 Payment on account of fees arising from use of Google AdWords Programme	330
Table 8.1 Further Research Agenda	369

ABBREVIATIONS

AAR	Authority for Advance Rulings
ABOI	Active Business Outside India
ALP	Arm's Length Principle
AMP	Advertisement and Marketing Promotion
APA	Advance Pricing Agreement
ATAF	African Tax Administration Forum
BEA	Bureau of Economic Analysis
BEPS	Base Erosion and Profit Shifting
BIT	Bilateral Investment Treaty
BLT	Brightline Test
BPO	Business Process Outsourcing
BPTAG	Business Profit Technical Advisory Group
C&M	Control & Management
CBC	Country-By-Country
CFA	Committee on Fiscal Affairs
CMC	Central Management Control
CPM	Cost Plus Method
CUP	Comparable Uncontrolled Price
DEMPE	Development, Enhancement, Maintenance, Protection and Exploitation
DTAA	Double Taxation Avoidance Agreement
DTC	Direct Tax Code
EL	Equalization Levy
EMEA	Europe, the Middle East and Africa
ETR	Effective Tax Rates
EU	European Union
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FNV	Federatie Nederlandse Vakbeweging
FPI	Foreign Portfolio Investment
FTS	Fees for Technical Services
FTT	First-Tier Tribunal
GAAR	General Anti-Avoidance Rules

GFA	Global Formulary Apportionment
GOI	Government of India
HEL	Hutchison Essar Limited
HUF	Hindu Undivided Family
ICT	Information and Communications Technologies
IF	Inclusive Frameworks
IGF	Inter-Governmental Forum
IGS	Intra Group Service
IMF	International Monetary Fund
IO	International Organization
IP	Intellectual Property
IPLC	International Private Leased Circle
IPRI	International Property Right Index
ISM	Interpretive Structural Model
JV	Joint Venture
LTCG	Long Term Capital Gains
MDR	Mandatory Disclosure Rules
MLC	Multilateral Convention
MNE	Multinational Enterprise
M-TISM	Modified-Total Interpretive Structural Modelling
MTC	Model Tax Convention
MTP	Multinational Tax Planning
NFD	Net Financial Deduction
OECD	Organization of Economic Cooperation and Development
OFC	Offshore Finance Centre
OIT	Offshore Indirect Transfer
OLI	Ownership, Location, Internalization
OP/VAE	Operating Profit to Value Added Expenditure
PAC	Public Accounts Committee
PE	Permanent Establishment
PLI	Profit Level Indicator
POEM	Place of Effective Management
POI	Place of Incorporation
PPT	Principal Purpose Test

PRA	Property Rights Alliance
PSM	Profit Split Method
R&D	Research & Development
RPM	Resale Price Method
RTB	Race to the Bottom
SAAR	Specific Anti-Avoidance Rules
SEBI	Security and Exchange Board of India
SEC	Security Exchange Commission
SEP	Significant Economic Presence
SLR	Systematic Literature Review
SPA	Share Purchase Agreement
SPV	Special Purpose Vehicle
STARS	Structured Trust Advantaged Repackaged Securities
TCB	Tax Competition Behaviour
TCR	Thin Capitalization Rules
TISM	Total Interpretive Structural Model
TJN	Tax Justice Network
TMC	Theories, Methodologies and Context
TNA	Trans-National Associations
TNMM	Transactional Net Margin Method
TP	Transfer Pricing
TRC	Tax Residency Certificate
UISPL	Uber India Services Pvt. Ltd.
UN	United Nations
UNCTAD	United Nation Centre for Trade and Development
UNMC	United Nations Model Convention
UPE	Ultimate Parent Entities
USTR	U.S. Trade Representative Act
VVN	Virtual Voice Network
WDC	Worldwide Debt Cap
WOIL	Whirlpool of India Limited
WOS	Wholly Owned Subsidiaries