



Equalisation Levy

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Agenda

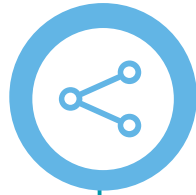
- Background
- BEPS Action Plan 1
- Taxing the digital economy
 - Global Trends
 - India's take
- Enactment of Equalisation Levy in India
- Equalisation levy – Online Advertisement
- Issues in Equalisation levy
- Equalisation levy on E-commerce Supply and Services
- Issues in Equalisation levy on E-commerce Supply and Services
- Procedural aspects



Background



Background



- The expansion of information and communication technology, the supply and procurement of digital goods and services have undergone exponential expansion everywhere, including India
- Currently in the digital domain, business are conducted without regard to national boundaries and may dissolve the link between an income-producing activity and a specific location
- Evolution of new business models in digital economy – results in tax challenges in terms of determining nexus, characterization of income etc., which needs to be addressed
- Ability of MNCs to avoid taxes in source jurisdiction - poses major concern for countries like India which follow source based taxation

Digital economy – Need for change

Emergence of new businesses such as e-commerce, social media, digital wallets, etc

Stores are replaced by website, interactions with customers are now possible remotely, people are replaced by software

Unparalleled reliance on intangibles, the massive use of data (notably personal data)

What are the issues and challenges created by digital economy?

01

Nexus: Ability to have significant digital presence in another country without being liable to tax due to lack of nexus under current international tax rules

03

Attribution of Profit to PE: Even if PE is constituted, in e-commerce transactions, it may be difficult to calculate functions performed and risk assumed by activities in India

02

Data: Growth in sophistication of information technologies has permitted companies in the digital economy to gather and use information across borders to an unprecedented degree

04

Characterization: Characterization of income derived from new business models / new kinds of products and services – whether royalty / FTS / FIS

BEPS Action Plan 1- **Addressing the Tax Challenges** **of the Digital Economy**



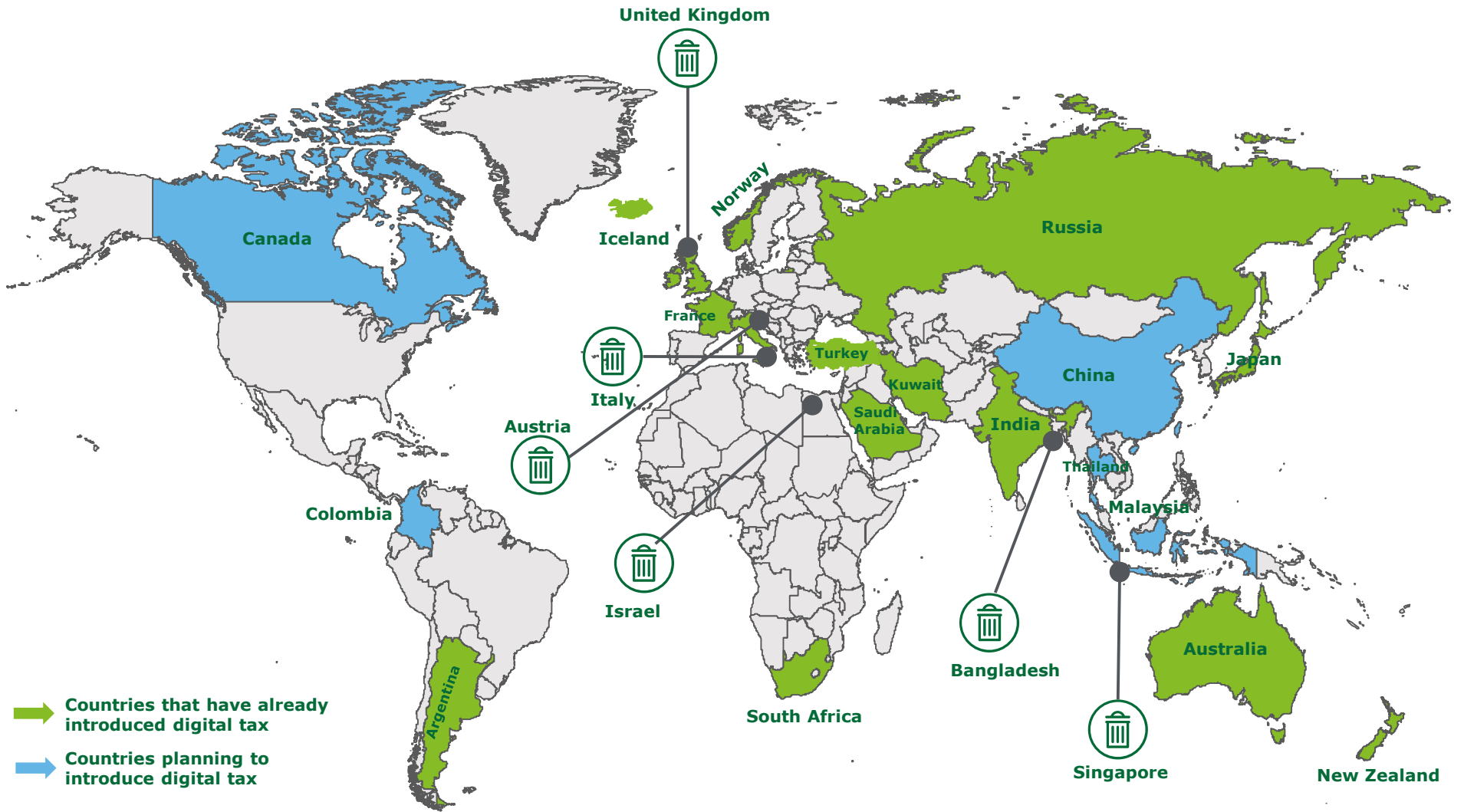
G20/OECD BEPS Action Plan 1- Addressing the Tax Challenges of the Digital Economy

- Growing concern regarding tax planning by MNEs led to the adoption of BEPS project wherein OECD published 15 Action Plans.
- The tax challenges associated with the digitalization of the economy were one of the main focus areas for the OECD Base Erosion and Profit Shifting Project, leading to the 2015 BEPS Action Plan 1 report. The report addresses the tax challenges facing the digital economy.
- The report evaluated certain options (but not recommended) including unilateral levy in the form Equalization Levy ('EL').
- **India was the first country to introduce EL in 2016.** It was introduced as a separate legislation not being part of the existing Income Tax Act, 1961.
- Other countries have also followed suit with similar taxes and decided to move ahead with unilateral measures to tax the digital economy.
- The OECD has also been simultaneously hosting negotiations with more than 130 countries that aim to adapt the international tax system. The current proposal would require multinational businesses to pay some income tax where their consumers or users are located. According to the OECD, an agreement is expected in 2020.
- As the outcome of these multilateral negotiations is pending and to protect its tax base, **India has decided to expand the scope of EL to cover e-commerce supply or services by a non resident ecommerce operator.**

Taxing Digital Economy - Global Trends



World Map - Digital Tax



Taxing the digital economy - Global Trends

ITALY

Italian 2018 Budget Law has introduced a new “**web tax**” – (a) levied at 3% on the value of each digital transaction (b) levied on both resident and non-residents on B2B digital transactions > 3,000 in a calendar year with Italian businesses or Italian PEs of non-resident, not creditable from the Italian income-tax and (c) withheld by the recipient of services. Domestic PE definition amended in line with BEPS Action Plan – “**significant economic presence**” may create a PE

ISRAEL

Israel has expanded the definition of PE. Foreign companies having ‘**significant digital presence**’ in Israel could be deemed to have a PE in Israel

ARGENTINA

Introduced a **turnover tax withholding for revenues derived by non-residents from rendition of online services**, wherein 3 percent of the net price is to be withheld at the time of remitting funds abroad

FRANCE

France introduced **GAFATax** on large internet and technology companies. However, they have deferred its implementation till end of the year in light of OECD developments. It would abandon the digital tax if an international agreement is reached.

SINGAPORE

Digital services imported by consumers based in Singapore will be subjected to a **GST** (at applicable rates) from Jan 1, 2020

AUSTRIA

Austria announces ‘**national digital tax**’ on **online advertising** revenue for all groups with worldwide revenues of at least Euro 750mn and Austrian revenues of Euro 10mn

RUSSIA

Introduced **new VAT law to tax digital transactions** at 18 percent from January 1, 2017. Applies to all foreign businesses selling digital products to Russia-based consumers, without any threshold

SAUDI ARABIA and KUWAIT

Saudi Arabia/ Kuwait has introduced concept of ‘**Virtual Service PE**’ which is deemed to exist when non-resident provides services to a person in Saudi Arabia / Kuwait over a period of time exceeding the threshold prescribed under the treaty

Taxing the digital economy - Global Trends

UNITED KINGDOM

Diverted profit tax on multinationals who conduct business in UK but pay miniscule tax, thereby seeks to counter artificial avoidance of PE and lack of economic substance

Introduction of **digital business tax** at the rate of 2 percent from April 2020 for social networks, search engines and online marketplaces with global revenues of at least £500 million. Further, effective April 6, 2019, new **UK income tax will be directly imposed on offshore IP owners in respect of any intangible income referable to UK sales.**

UK has however been told to "hold fire" on a new tax on big technology firms. The OECD said that there needs to be a global agreement on technology company tax

JAPAN

Japan's '**consumption tax**' levied at 8 percent on digital services provided by foreign enterprises

Japan Court considers **E-commerce activities to constitute PE**, endorsing BEPS Action Plan 7

EUROPEAN UNION

EU council has recommended (Dec 2017) to its members - (a) to consider, as a short-term measure, either a **Equalisation levy, a withholding tax and/or distinct tax on profits generated by digital services/advertising activities** (b) as a long-term measure, to consider **changing the PE definition to capture digital value creation.** EU also has levy of VAT for last few years on digital supplies

AUSTRALIA

GST at 10 percent applicable on supply of digital services. Introduced "**Multinational Anti-Avoidance Law**" in lines with UK's DPT- (a) to tax transactions that make sales in Australia but book that revenue offshore and (b) CbCR reporting

**Above information is sourced from public domain updated as on Jan 31, 2020*



Taxing the digital economy - **India's Take**

Report of the Committee on Taxation of E-Commerce

- The Committee on taxation of E-Commerce examined the tax issues arising from the new business models employed in the digital economy like:
 - tax nexus rules under existing law and tax treaties,
 - characterization of payments made for services and facilities provided primarily through digital means and
 - issues related to valuation of data and user contribution in profits of digital enterprises.
- The Committee took cognizance of the Report on Action 1 of Base Erosion & Profit Shifting (BEPS) Project. The BEPS Report on Action 1 clearly highlights the need for modifying existing international taxation rules, and identifies three options, i.e.
 - Option 1 - a new nexus based on significant economic presence,
 - Option 2 - a withholding tax on digital transactions, and
 - Option 3 - Equalization Levy
- After examining the 3 options identified in the report, the Committee found that first 2 options would require changes in a number of tax treaties. However, the third option of 'Equalization Levy' provides a simpler option that can be adopted under domestic laws without needing amendment of a large number of tax treaties.
- Accordingly, the Committee recommended the adoption of this option to address the tax challenges of digital economy and provide greater certainty and predictability in its taxation.

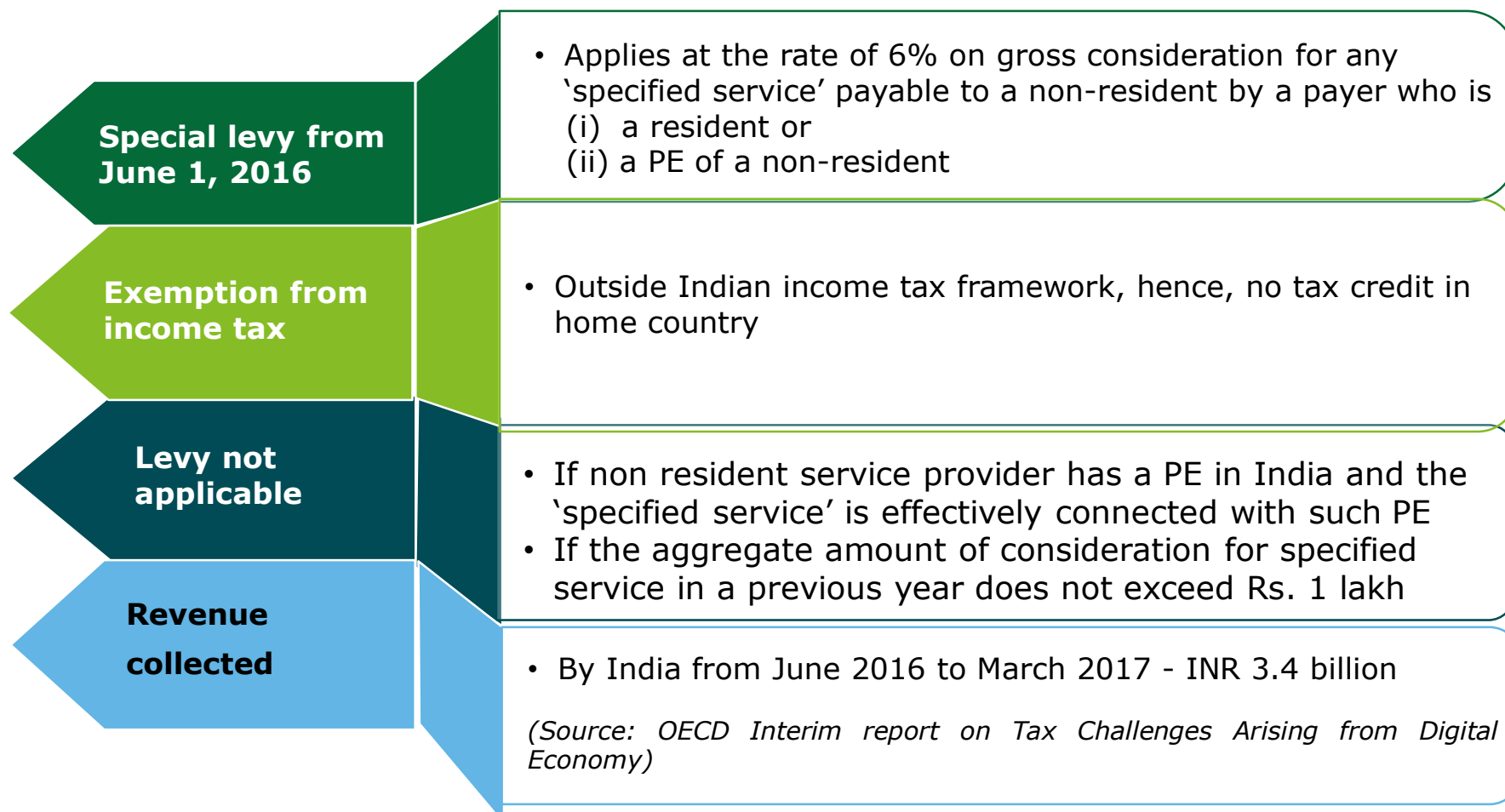
Enactment of Equalisation Levy in India



Equalisation Levy - "Online Advertisement"

[Introduced by Finance Act, 2016]

Finance Act, 2016 – Introduced Equalisation Levy @ 6% w.e.f. June 1, 2016 on "*online advertisement, provisions of advertising space and other related services*"



Equalisation Levy - “E-commerce Supply and Services”

[Scope expanded by **Finance Act, 2020**]

Introduced Equalisation Levy @ 2% on **E-Commerce Transactions**

- **w.e.f. April 1, 2020.**
- Corresponding amendment made in S. 10(50) of the Income-tax Act
- EL on E-commerce was introduced by way of Amendments to Finance Bill, 2020

Equalisation levy – “Online Advertisement”

-Introduced by Finance Act, 2016



Equalisation levy – Online Advertisement



Introduction

- Introduced as separate chapter in Finance Act, 2016 (Sec 163 to 180)- Not forming part of the IT Act
- Effective date – 1 June 2016 (Notification 37/2016 dated 27 May, 2016)

Chargeable

- Chargeable on consideration received / receivable by non-resident for specified services from:
 - Indian resident carrying on business or profession or
 - PE of non-resident

Deductor

- Every person, being a resident and carrying on business or profession or a non-resident having a permanent establishment in India from the amount paid or payable to a non-resident

Rate

- **6 percent** of the amount of consideration for any “**Specified service**”

Threshold

- If the aggregate amount of consideration for specified service in a previous year exceeds Rs. 1 lakh

Key definition:

- **Specified services** means “online advertisement, any provision for digital advertising space or any other facility or service for the purpose of online advertisement and includes any other service as may be notified by the Central Government in this behalf”
- Equalisation levy means the “tax leviable on consideration received or receivable for any specified service under the provisions of this Chapter”

Equalisation levy – Online Advertisement



Non-applicability

- Non-resident providing the specified service has a PE in India and such service is effectively connected with that PE;
- Aggregate consideration for specified service in a previous year is upto Rs. 1 lakh; or
- Payment by Indian resident or PE of non-resident is not for the purposes of carrying out business or profession

Exemption for income

- Section 10(50) of the IT Act provides exemption for income on which Equalization Levy is chargeable

Issues in relation to Equalisation levy



Issues in relation to Equalisation levy

Equalization levy- **Direct tax or Indirect tax?**

Jurisdiction of the AO – Whether it would be the TDS officer / International tax Officer / PAN based assessing officer

If Direct tax – Whether it is in the **nature of Income-tax?**

Whether benefit of as per relevant **tax treaty can be availed?**

Will the recipient be eligible or **tax credit** in respect of the levy as per tax treaty?



Equalisation levy on “E-commerce Supply and Services”

-Scope expanded by Finance Act, 2020

Equalisation levy on “E-commerce Supply and Services”

 **'E-commerce supply or services'** by non-resident **'E-Commerce operator'** to:

- A person resident in India
- A non- resident **in 'specified circumstances'**
- A person who buys goods or services using an IP address located in India

Rate of Levy

- **2 percent** imposed on consideration received or receivable by e-commerce operators from e-commerce supply or services

Effective date

- **1 April 2020**

Exclusions

- Non-resident e-commerce operators who have permanent establishments in India and e-commerce supply or services are effectively connected to those establishments
- Cases where EL is leviable on online advertisement and related activities
- Cases where sales, turnover or gross receipts of the non-resident e-commerce operators from online sale or services, are less than **INR 20 million** during the financial year

Equalisation levy on “E-commerce Supply and Services”

‘**E-commerce operator**’ a non-resident who owns, operates, or manages digital or electronic facility or platform for online sale of goods or provision of services or both.

‘**E-commerce supply or services**’

- Online sale of goods owned by e-commerce operators

- Online provision of services provided by e-commerce operators

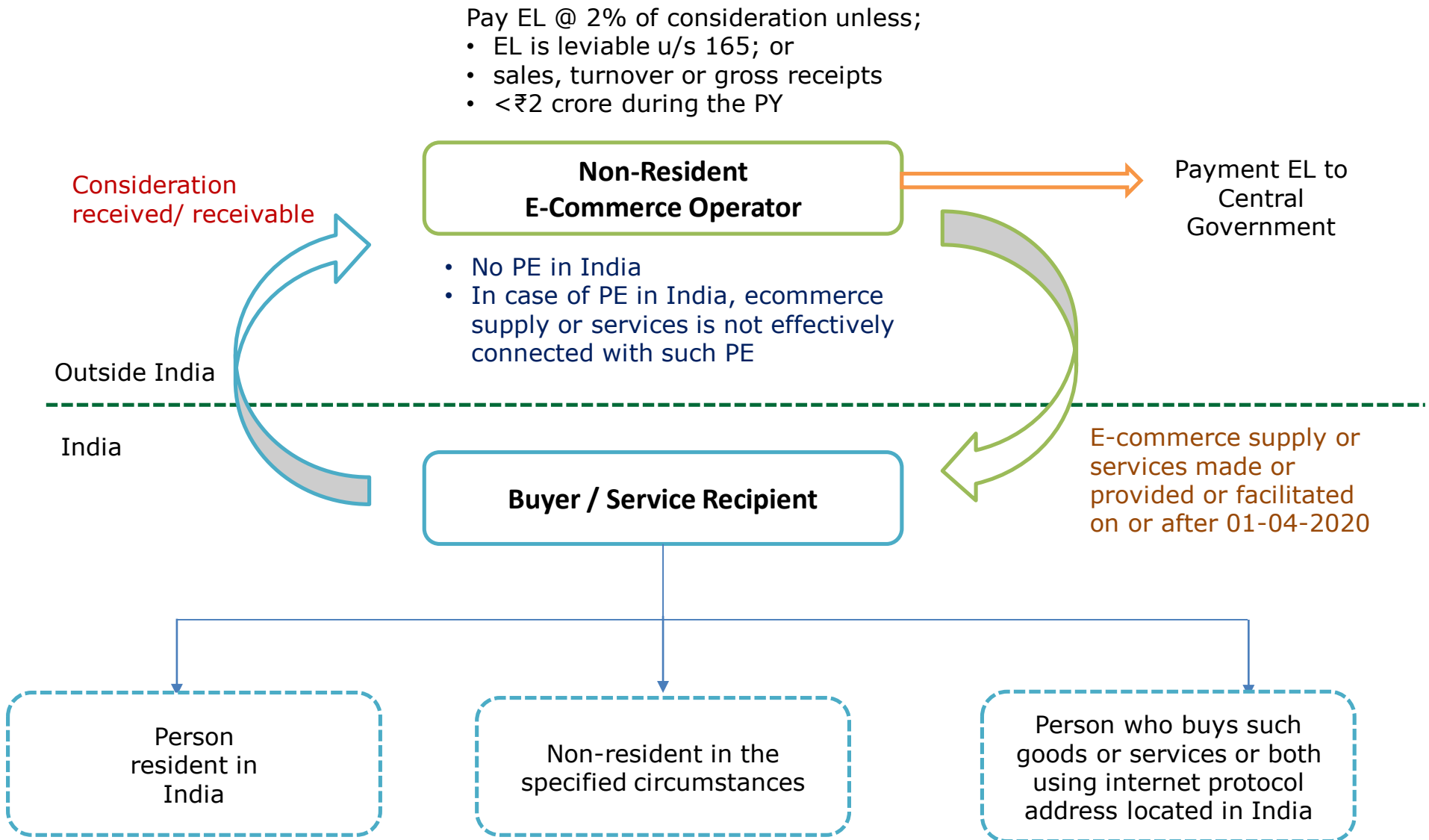
- Online sale of goods or provision of services or both, facilitated by e-commerce operators

- Any combination of the above mentioned activities

‘**Specified circumstances**’

- sale of advertisement, which targets a customer, who is resident in India or a customer who accesses the advertisement through internet protocol address located in India; and
- sale of data, collected from a person who is resident in India or from a person who uses internet protocol address located in India

Equalisation levy on “E-commerce Supply and Services”



Issues on Equalisation levy on “E-commerce Supply and Services”



Equalisation Levy Issues – “Scope /Jurisdiction”

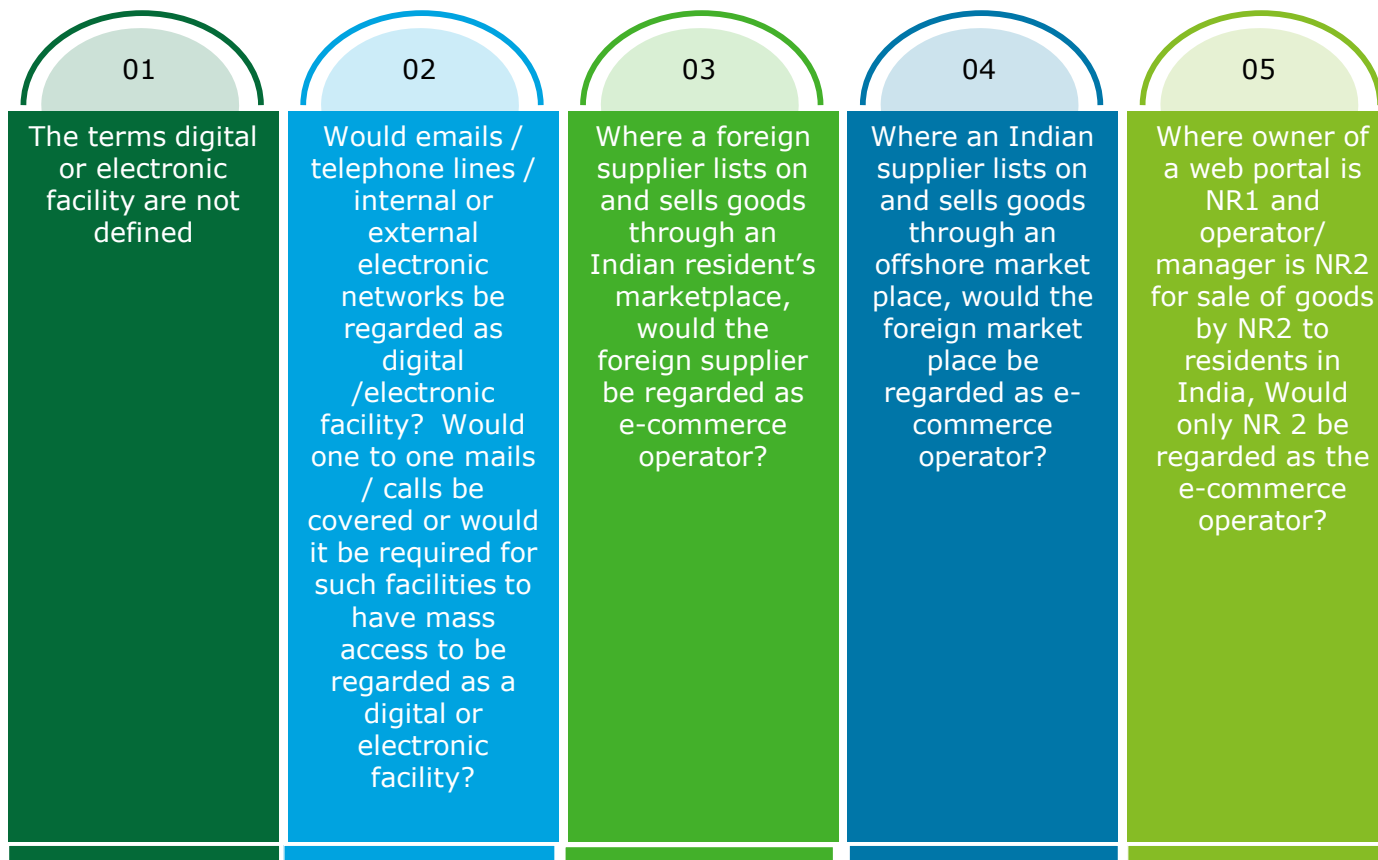


1. Scope /jurisdiction

1. Would taxpayers be required to **pay GST as well as EL** on Online Information Database Access and Retrieval services (OIDAR) services?
2. What **exclusions** can we expect? -
 - Intra-group payments?
 - Payment processors/gateways?
 - Regulated financial services

Equalisation Levy Issues – “E-commerce operator”

2. “E-commerce operator” is defined to mean a non-resident who owns, operates or manages digital or electronic facility or platform for online sale of goods or online provision of services or both



Equalisation Levy Issues – “E-commerce supply or services”

E-commerce supply or services has been defined to mean—

- i. online sale of goods owned by the e-commerce operator; or
- ii. online provision of services provided by the e-commerce operator; or
- iii. online sale of goods or provision of services or both, facilitated by the e-commerce operator; or
- iv. any combination of activities listed in clause (i), (ii) or (iii)'

The term 'online' has been defined to mean a facility or service or right or benefit or access that is obtained through the internet or any other form of digital or telecommunication network

3. E-commerce supply or services

- In relation to (i) above, what would 'online sale' mean? Would it mean where all terms of sale are concluded online? Does it require delivery and transfer of title to be online? Accordingly, will it cover Online sale, online supply and Online sale, offline supply?
- In relation to (ii) above, does 'online provision of service' require the services to be rendered online beyond being contracted online? Accordingly, will it cover Online sale, offline provision of service and Offline sale and online provision of services?

Equalisation Levy Issues – “Consideration’ for computing Equalisation Levy”

‘Consideration’ for computing Equalisation Levy –

Section 165A. (1) On and from the 1st day of April, 2020, there shall be charged an EL at the rate of two per cent of the amount of consideration received or receivable by an e-commerce operator from e-commerce supply or services made or provided or facilitated by it

4. ‘Consideration’ for computing Equalisation Levy

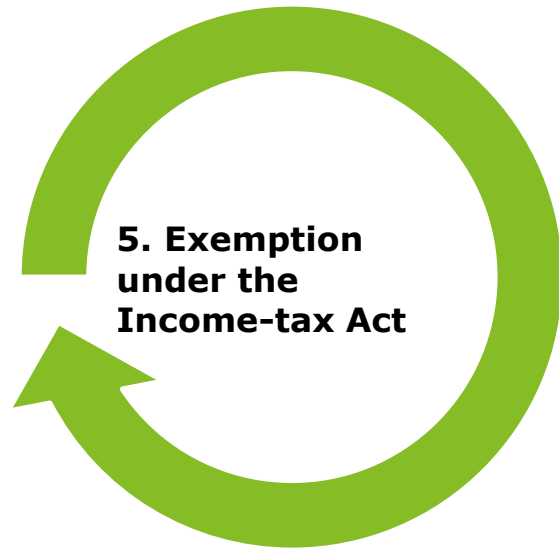
- Would the phrase ‘amount of consideration received or receivable by an e-commerce operator’ have to be read in conjunction with the clause applicable under the e-commerce supply or services made, i.e.
 - where an e-commerce operator is making an online sale, the entire consideration would be subject to EL
 - where an e-commerce operator is engaged in an online provision of service, the entire consideration for the service provided would be subject to EL

Question arises that,

- a. where an e-commerce operator is engaged in facilitation of online sale /service, the consideration attributable to the facilitation would be subject to the EL?
- b. How is the threshold of Rs 2 cr to be determined – computed based on fees of the ecommerce operator or including the value of sales facilitated?
- c. The 2 cr limit is to be computed with reference to which ‘previous year’?
- d. Whether consideration can be adjusted for cancellations, rejections, bad debts etc..?
- e. For NR to NR contracts for sale of advertisements targeted at or accessed by Indian residents, how will the consideration be apportioned?

Equalisation Levy Issues - “Exemption under the Income-tax Act”

Exemption under the Income-tax Act- Section 10(50) introduced by the Finance Act 2020 inter alia provides an exemption for e-commerce supply and services made or provided after **April 1, 2021**



- The exemption is from April 1, 2021, while the EL is applicable from April 1, 2020, how is it proposed to correct this anomaly
- Where EL is assumed to be payable on gross consideration in case of transactions facilitated for a supplier by an ecommerce operator, the exemption here would also apply to the supplier besides the ecommerce operator?

Clarification required on effective date of the exemption under section 10(50)

Equalisation Levy Issues – “Sequence for taxation of ‘royalty’ and ‘FTS’ or as ‘PE’ ”

6. Sequence for taxation of ‘royalty’ and ‘fees for technical services’ or as PE

- Will the levy cover all forms of sale of software (one time licenses, perpetual licenses, subscription models etc.)
- Where taxpayer has taken a no PE position and equalisation levy is deposited and the Department asserts taxation based on a PE, will equalisation levy payment be credited?
- Where a taxpayer has adopted a position on applicability of EL for a stream of income that could potentially be covered under royalty/FTS, can the department during assessment the transaction being in the nature of royalty /FTS and not subject to EL?
- In order to provide certainty, can the advance ruling provisions under the income-tax Act be made applicable to the EL provisions?

Equalisation Levy Issues - “Representative Assessee”

7. Whether payer can be held as representative assessee for defaults of E-commerce Operator???

The provisions of Chapter XV i.e. provisions related to representative assessee are also extended to the equalization levy provisions.

As per section 161 of the Income-tax Act, 1961 ('ITA'), the payer could be liable to pay E-com EL if the e-commerce operator fails to make payment of the same.

Therefore, whether a payer would qualify as an 'agent' under section 163 (1) of the ITA and may be regarded as 'representative assessee' under section 160 of the ITA?

Other issues

1

Requirement of PAN

The Non-resident ecommerce operator would mandatorily be required to obtain a PAN

2

Appointment of agent

Can the non-resident ecommerce operator appoint an agent in India for undertaking the necessary compliances?

3

Transition Provisions

Whether the levy would apply to the consideration for e-commerce supply or sale (before 1 April 2020) which is received on or after 1 April 2020

4

Timing of levy

What is the timing for levy of the EL (raising of invoice, provision of the service, receipt of consideration, recognition of revenue in the books of accounts etc.)

5

Self Certification vs Audit

The government has not yet prescribed any rules / mechanism for audit of the equalisation levy which would be paid by the non-resident ecommerce operator

Procedural aspects – Online advertisement and E-commerce



Key Compliances

Sn	Particulars	Online Advertisement	Ecommerce
1	Who has to pay	Resident carrying business or profession or non-resident having PE in India	Non resident E-commerce operator
2	Due date for payment	Monthly payment - 7th day of the month following the month in which the equalisation levy is deducted	Quarterly payment <ul style="list-style-type: none"> • Quarter ending 30 June - due date 7 July • Quarter ending 30 September - due date 7 October • Quarter ending 31 December - due date 7 January • Quarter ending 31 March - due date 31 March
3	Rate levy	6%	2%
4	Exemption u/s 10	With effect from 1 June 2016	With effect from 1 April 2021
5	Requirement for annual return filling	Yes	Yes
5	Return filing form	Form 1	Not yet notified
6	Requirement of Form 15CA	Yes	Not applicable
7	Issues in payment of levy	As the payer is a resident, there are no practical challenges	The non-resident may not have a/c with the prescribed banks and would have to make alternative arrangements for the payment of the levy

Equalisation levy - Procedural aspects

Failure to deduct and deposit

- Consequences for delay in payment – Interest at the rate of 1% for every month or part of a month
- Section 40(a)(ib) provides for disallowance of expenditure, if payer fails to deduct and deposit Equalization Levy on or before the due date specified under section 139(1) of the Act
- Equalization levy deducted in subsequent year or deducted during the PY but paid after due date specified under section 139(1)- allowed as deduction in the year of payment

Other timelines

- Statement of specified services to be filed by payer annually by June 30 of succeeding FY in accordance with the Equalization Levy Rules
- Belated / Revised statement can be filed within 2 years from the end of FY in which specified services are provided
- Processing of statement through intimation – not later than 1 year from the end of FY in which such statement is filed
- Intimation can be amended by AO to rectify mistake apparent from record –within 1 year from end of FY in which such statement was issued

Penal & Prosecution consequences

- Failure to deduct Equalization levy – Penalty equivalent to amount of Equalization levy
- Failure to pay equalization levy after deducting – Penalty @ 1000/day till the failure continues (maximum penalty equivalent to amount of Equalization levy]
- Penalty @ Rs. 100/day for failure in filing such statement
- Punishment for false statement – Imprisonment of upto 3 years+ Fine

Equalisation levy – Appeal mechanism

- Appeal mechanism provided to payer against penalty imposed under Chapter VIII:
 - CIT(A)* – Within 30 days from the receipt of AO's order imposing penalty
 - Tribunal* – Within 60 days from the receipt of CIT(A)'s order imposing penalty
- Appeal before the CIT(A) only against an order imposing penalty
- No right of appeal against intimation or rectification order – Writ could be the only remedy in such cases
- Powers vested on the Commissioner of Income-tax under Section 263 or Section 264 of IT Act cannot be exercised in respect of Equalization Levy
- Prosecution proceedings not be instituted – without the previous sanction of Chief Commissioner of Income-Tax

**Form of appeal before the CIT(A) and ITAT prescribed under Equalization Levy Rules, 2016*

Equalisation levy – Relevant Rules

Rule No

3

Rounding off consideration for specified services, Equalization Levy, interest, etc. – Nearest multiple of INR 10 (Rule 3)

5

Statement of specified services to be filed in Form No. 1; Due date for statement of specified services – on or before June 30 immediately following the FY (Rule 5)

6

Payer to file statement of specified services within 30 days of service of notice, if no statement filed within due date (Rule 6)

7

Intimation under section 168(1) of Finance Act, 2016 to be deemed to be notice of demand (Rule 7)

8

Form of appeal to Commissioner of Income-tax (Appeals) (Rule 8)

9

Form of appeal to Appellate Tribunal (Rule 9)

Questions



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