

India Widens Taxation of Cross Border E-Commerce Transactions

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The Finance Act, 2016 brought in the concept of equalisation levy called as google tax. Equalisation levy @ 6% is levied on the amount of consideration for any specified service received or receivable by a non-resident (not having Permanent Establishment - PE in India) from a person resident in India and carrying on business or profession or a non-resident having a PE in India, if such consideration exceeds Rs 1 lakh during the financial year. The Finance Act, 2020 which received assent from the President of India on 27 March 2020 has amended the provisions of Equalisation Levy and widened its scope to introduce levy on e-commerce supply or services @ 2% facilitated by a non-resident e-commerce operator. The learned author analyses the recent amendments.

1. Background

The Digital economy and e-commerce businesses are growing exponentially and impact all of us. This would cover within the ambit online subscription based services, online sale of goods/ services/ software, online gaming, hotel/ flight booking etc. such as Netflix, Amazon, Flipkart, Uber, Airbnb, MakeMyTrip and Nintendo. Taxation of cross border e-commerce transactions has been a challenge for the whole world, including India due to location of the supplier, absence of physical presence, characterizing the nature of transaction (goods or service), administrative challenges in tracking and collecting taxes and taxing jurisdiction. In order to bring such cross border e-commerce transactions into the tax net, India has recently vastly expanded the coverage of "Equalisation Levy" with effect from 1 April 2020. The Finance Act, 2020 which received assent from the President of India on 27 March 2020 has amended the provisions of Equalisation Levy and widened its scope to introduce levy on e-commerce supply or services @ 2% facilitated by a non-resident e-commerce operator.

2. Equalisation Levy on online advertisement introduced by Finance Act, 2016

Following the roadmap laid by BEPS Action Plan 1, India had introduced "Equalisation Levy" in the Finance Act, 2016 which provided for a levy @ 6% on the amount of consideration for any specified service received or receivable by a non-resident (not having Permanent Establishment - PE in India) from a person resident in India and carrying on business or profession or a non-resident having a PE in India, if such consideration exceeds Rs 1 lakh during the financial year. The said levy is applicable to specified services which cover online advertisement, any provision for digital advertising space or any other facility or service for the purpose of online advertisement under business-to business (B2B) transactions and hence had a very limited coverage. The responsibility of deducting and depositing the levy is on the Indian payer who is receiving the services.

3. Separate mechanism to charge Equalisation Levy on E-Commerce Supply or Services introduced by Finance Act 2020

The Finance Act, 2020 which received assent from the President of India on 27 March 2020 has amended the provisions of Equalisation Levy and widened its scope to introduce levy on e-commerce supply or services facilitated by a non-resident e-commerce operator. The said levy shall be applicable with effect from 1 April 2020, i.e., from financial year 2020-21.

4. Specified Rate and Applicability

An equalisation levy at the rate of 2% shall be charged on the amount of consideration received or receivable by a non-resident e-commerce operator from e-commerce supply or services made or provided or facilitated by it—

- to a person resident in India; or
- to a non-resident in case of
 - sale of advertisement, which targets an Indian customer, or a customer accessing the advertisement through Indian internet protocol address; and
 - sale of data, collected from a person who is resident in India or from a person using Indian internet protocol address; or
- to a person who buys such goods or services or both using Indian internet protocol address.

E-commerce operator has been defined as 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. Further, E-commerce supply or services means—

- online sale of goods owned by the e-commerce operator; or

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

5. Relief has been provided in certain cases and equalisation levy @ 2% shall not be charged:

- where the e-commerce operator has a Permanent Establishment (PE) in India and such e-commerce supply or services is effectively connected with such PE; or
- where the transaction relates to online advertisement and related activities and has been subject to Equalisation levy @ 6%; or
- sales, turnover or gross receipts of the e-commerce operator from the e-commerce supply or services made or provided or facilitated is less than Rs. 20 million (i.e. Rs. 2 crores) during the financial year.

6. Non-Resident E-commerce Operators required to make compliances in India

It is pertinent to note that unlike Equalisation Levy 2016 on online advertisements, the obligation to deposit the Equalisation Levy on e-commerce transactions is on the non-resident e-commerce operator only and not on the payer. The payment of the levy to the government is to be made on a quarterly basis and also an annual statement on Equalisation levy is to be filed by such non-resident e-commerce operators.

7. Exemption from Income-tax on Transactions Subjected to Equalisation Levy

Section 10(50) of the Income Tax Act, 1961 has been amended to provide an exemption from levy of Income tax to any income arising from any e-commerce supply or services on which is equalisation levy is chargeable. Notably, Equalisation levy is not part of Income Tax Act, 1961 hence, recourse to tax treaty may not be available. The foreign companies may not get tax credit / deduction in their home country for the equalization levy paid in India.

8. Comments

As one may observe, the definitions of the terms 'e-commerce operator' and 'e-commerce supply or services' are wide in scope and are likely to cover a wide gamut of digital transactions undertaken by non-resident e-commerce players. Not only, B2B, but also B2C transactions are likely to be covered under the new levy. Also, E-commerce supply or services by a non-resident to another non-resident could also attract equalisation levy in case of sale of advertisement targeted to an Indian customer and sale of data collected from a person who is resident in India.

There are lot of apprehension amongst the global E-commerce operators regarding the equalisation levy and its practical operations. Issues like meaning of consideration received or receivable, identifying revenue attributable to transactions with Indian customers/ data and applicability of levy on transactions already taxed as royalty / fees for technical services in India, credit for equalization levy under DTAA, etc. need to be further clarified by the Tax authorities.