

BRIEF NOTE ON EQUALIZATION LEVY IN INDIA EFFECTIVE FROM 1ST APRIL 2020

1. COMPLAINT OBLIGATIONS

- The responsibility for ensuring compliance with the 2% Equalization Levy ('EL') provisions (including payment) lies with the non-resident e-commerce operator. For the 6% EL on online advertising activities, the resident service recipient is responsible for all related compliances.
- The EL is required to be paid on a quarterly basis, and prescribed statements must be furnished annually.
- Accordingly, the EL on e-commerce supplies or services from the April-June quarter this year is payable by July 7.
- Non-compliance with payment of the EL would attract interest at 1% per month and a penalty equal to the amount of the EL. Also, it is noteworthy that the payer can also be treated as a representative assessee (essentially like an agent) in the case of non-compliance with the EL.

2. EXCLUSIONS FROM EL

- An "e-commerce operator" is specifically excluded from the 2% EL charge when the e-commerce operator has a permanent establishment (PE) in India and the e-commerce supply or service is effectively connected with this PE; the transaction is of online advertisement and related activities where EL is leviable at 6%; or if the turnover of the e-commerce operator (on which the 2% EL is otherwise leviable) is less

than INR 20 million (approx. USD 260,000) during the financial year.

3. SCOPE OF 2% EL

- The India EL provisions apply very broadly. Businesses within the scope of the 2% EL include, inter alia, online marketplaces; subscription-based platforms, including social media; cloud services; search engines; streaming services; and online gaming.
- The tax may also cover digital/online services provided by MNEs to their Indian group companies. Further, the EL is chargeable even on e-commerce transactions executed by non-residents if it is from an IP address located in India and on transactions between two non-residents for data collected from Indian customers.
[Note: EL is not a part of the domestic income-tax law and is also levied beyond tax treaty provisions.]

4. CHANGES BOUGHT IN EL THROUGH THE BUDGET OF 2021

- Explanation to Section 163 of Finance Act, 2016 was inserted to clarify that consideration received or receivable for specified services and consideration received or receivable for e-commerce supply or services shall not include consideration which are taxable as royalty or fees for technical services in India under the Income Tax Act read with agreement notified by Central Government under Section 90/90A of the Income Tax Act.
- An explanation to Clause (cb) of Section 164 of the Finance Act, 2016 was also inserted providing that for the

purposes of defining e-commerce supply or service, “online sale of goods” and “online provision of services” shall include one or more of the following activities taking place online:

- a. Acceptance of offer for sale;
 - b. Placing of purchase order;
 - c. Acceptance of the purchase order;
 - d. Payment of consideration;
 - e. Supply of goods or provision of services, partly or wholly.
- Further, an amendment to Section 165A of the Finance Act, 2016 was also made to clarify that the equalisation levy would apply to the gross amount of consideration for sale of goods or provision of services irrespective of whether such goods or services are owned, provided or facilitated by market-place/e-commerce operator.

5. OTHER ISSUES

- Software is provided online, clarity is needed regarding whether it should be subject to only EL at 2% or would it be taxed as royalty at 10% (excluding surcharge and cess) or both (at least until March 31, 2021).
- Clarification is required concerning the applicability of the EL to transactions wherein some part of the transaction is executed online, and the remaining part is executed offline. For instance, hotel booking.
- Clarity required as to whether services availed online by an Indian resident on his/her visit to a foreign country also be subject to EL?
- Clarification required on whether the EL is to be paid on the entire sales consideration or only the facilitation fees received by the non-resident e-commerce operator. As of now, it seems that EL is applicable to the

entire sales consideration and not limited to the facilitation fee.

- Guidance is required on the applicability of the EL to B2B arrangements that are modelled on a master service agreement or inter-service agreement in group companies.
- Compliance mechanisms when announced (as the forms are yet to be announced) should factor any adjustments/refunds of EL for transactions that are subsequently reversed (for instance, the sale of a product on an online marketplace that is subsequently returned after few days of purchase). There should also be provisions for Natural Justice in the system of EL administration

6. ACTION BY BUSINESS HOUSES

- Businesses based offshore and engaged in online supply of goods or services must swiftly evaluate the impact of the new EL provisions, including creating a PE.
- Obtain PAN number and start payment of EL.

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