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Equalisation levy – Unintended loss to Revenue in certain cases; reconsideration required



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Equalisation levy was introduced in India by the Finance Act, 2016. Initially, it was levied on online advertisement, provision for digital advertising space or any other facility or service for the purpose of online advertisement. The scope of Equalisation levy has been thoroughly increased by the Finance Act, 2020, notwithstanding its absence in the Finance Bill, 2020. The OECD's report issued in 2018 provides for Equalisation levy as an interim measure i.e. the consensus-based solution amongst countries pending finalization of the scheme for taxation of digital services.

The new Equalisation levy is applicable on non-resident "e-commerce operators" for "e-commerce supply or services". The provisions describe the 'e-commerce operator' 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. The term 'e-commerce supply or services' has been defined to mean:

- ◆ 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

The Equalization levy is leviable not only on the e-commerce supply or services provided to a person resident in India but also on certain specified e-commerce supply or services provided to a non-resident. The specified supply or services include sale of advertisement, which targets a customer resident in India, and sale of data, collected from a person who is resident in India. Unlike the earlier Equalisation levy, this time the non-resident has been made liable to discharge the liability at the rate of 2 percent of consideration received or receivable for e-commerce supply or services.

There are many disagreements and arguments on the levy on this tax. Perhaps, in certain circumstances, the implication of this levy can be such that it can result into reduction of taxes payable by non-resident in India. For instance, in case of a non-resident maintaining online facility or platform for providing technical

services, the income was already chargeable to tax in India as per section 9 of the Income-tax Act. Such services may now also attract Equalisation levy as per the new provisions as it includes the services provided online to a resident by a non-resident who owns, operates and manages a digital or electronic facility. Under the Income-tax Act, the rate of tax applicable would be a minimum 10% of gross revenue earned, whereas, the rate of Equalisation levy is only 2%.

There are certain exceptions which provide that Equalisation levy shall not be charged:

- where the e-commerce operator has a permanent establishment in India and such e-commerce supply or services is effectively connected with such permanent establishment;
- where the Equalisation levy is leviable on online advertisement and related activities; or
- Gross receipts of the e-commerce operator from the e-commerce supply or services made or provided or facilitated is less than INR 2 Crores during the financial year.

However, there is no exception which provides that Equalisation levy will not be applicable in cases where the income of the non-resident assessee is otherwise subject to tax in India. Infact, an amendment has been made by the Finance Act, 2020 in section 10(50) of the Income-tax Act to provide that income of non-resident which is subject to Equalisation levy would not be chargeable to Income tax. Reading both the laws simultaneously, clearly there seems to be an overlay i.e. the transactions which were already under the tax net also appears to be now covered by Equalisation levy and ensuing lower rate of taxation in India.

This will also implicate the compliances to be done by the payer of income to non-resident as section 195 of Income-tax Act obligates the payer to withhold appropriate income tax and deposit the same with the Government. Perhaps, in such circumstances, the resident payer will have no clarity on withholding of taxes as the service provider may come out of chargeability under income-tax Act and pay Equalisation levy.

Albeit the Industry is dazed about the scope and outreach of this levy, the Finance Act, 2020 is conspicuous about the due dates for payment of levy by an e-commerce operator to the credit of Central Government. The following table shows the quarterly due dates provided in the Act:

Date of ending of the quarter of financial year	Due date
30th June	7th July
30th September	7th October
31st December	7th January
31st March	31st March

It is pertinent to note that soon as the first quarter is going to conclude, due date for payment of Equalisation levy will be landing. The Government has not yet issued any clarification for the ambiguities involved in the scope of new Equalisation levy. The Government is expected to clarify the intent and appropriate changes should either be made in the definition of "e-commerce operators" and "e-commerce supply or services" or in the exclusions from the levy as contained in the Act.

While we are drilling the law, it would be interesting to know that in the month of March 2020, a group of seven top industry associates representing technology giants such as Google, Facebook, Amazon and Microsoft wrote a joint letter to the U.S. Trade Representative seeking "swift engagement with the Government of India" to raise "strong concerns" on the new levy, which they said was a "highly discriminatory new tax on foreign companies". Section 302(b)(1)(A) of the Trade Act of 1974, as amended

(Trade Act), authorizes the U.S. Trade Representative to initiate an investigation to determine whether an act, policy, or practice of a foreign country is actionable under section 301 of the Trade Act. Recently the office of the U.S. Trade Representative issued a notice for initiation of investigation under section 301. The investigation primarily focuses on the following concerns:

- ◆ Discrimination against the US companies
- ◆ Retroactivity
- ◆ Unreasonable tax policy

The Equalisation levy in India is leviable irrespective of the fact that the non-resident e-commerce operator is a resident of USA or of any other country. It is incidental that the biggest market players such as Amazon, Google, Facebook in the area of digital economy are from the USA. Moreover, the Equalisation levy is in line with the BEPS report released by the Organisation for Economic Cooperation and Development (OECD). If a consensus based decision can be arrived on the move of U.S. Trade Representative in form of Section 301 investigation against Digital Service Tax, it will definitely be a great step.

Undoubtedly, the wider and far reaching implications of new Equalisation levy have insisted the industry's forbearance. Regardless that the intent of Government behind the expansion of scope of Equalisation levy can be understood but while implementing the provisions of levy, its scope sets many challenges. Many representations have been made to the government by the industry seeking clarification on the issues aroused from the extended Equalisation levy. Section 180 of the Finance Act, 2016 provides power to the government to remove difficulties in the provisions of Equalisation levy. It is expected from Government to review the legislation and provide some clarifications to the industry with respect to applicability and simultaneously to look into unintended consequences resulting in loss of revenue to the Government.

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