Equalisation Levy

Expansion in scope to cover e-commerce supply or services

July 2020
In the backdrop of the Organisation for Economic Co-operation and Development (‘OECD’) / G20 Base Erosion and Profit Shifting (‘BEPS’) Action 1 dealing with the digital economy, in 2016, India introduced an EL of 6% on non-residents engaged in online advertisement and related activities. Considering that Action 1 recommended continued work in relation to digital economy, OECD/ G20 Inclusive Framework on BEPS is developing a consensus-based solution under a Two-Pillar approach\(^1\) to address tax challenges arising from digitalisation of economy. While India awaits consensus to emerge, propelled by the ongoing discussions on BEPS 2.0 project, India has expanded the scope of EL effective 1 April 2020.

### Brief overview of expanded scope of EL

**Transactions covered**
- Online\(^2\) sale of goods owned by e-commerce operator\(^3\)
- Online provision of services provided by e-commerce operator
- Online sale of goods or provision of services or both, facilitated by e-commerce operator
- Sale of advertisement or data between non-residents

**Targeted recipients**
- Indian resident
- Non-resident in specified circumstances\(^4\)
- Buyer of goods or services or both, using internet protocol (‘IP’) address located in India

**Exclusions**
- E-commerce operator having a permanent establishment (‘PE’) in India if the e-commerce supply or services are effectively connected to such PE
- Sales, turnover, or gross receipts of e-commerce operator from e-commerce supply or services are less than INR 20 million
- If existing EL of 6% is leviable on such transaction

- Both, B2B and B2C transactions are covered
- Income of non-resident e-commerce operator exempt from income-tax with effect from 1 April 2021
- Creditability or deduction of EL in overseas jurisdiction to be evaluated
- Compliance obligation on the non-resident e-commerce operator

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1. ‘Two-Pillar approach’ of OECD:
   - Pillar One focuses on allocation of taxing rights and considers proposals for new profit allocation and nexus rules; and
   - Pillar Two envisages Global Anti-Base Erosion (‘GloBE’) proposal such that all internationally operating businesses pay a minimum level of tax
2. ‘Online’ means 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 operator’ means 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
4. ‘Specified circumstances’ mean:
   - sale of advertisement, which targets a customer, who is resident in India or a customer who accesses the advertisement through IP address located in India; and
   - sale of data, collected from a person who is resident in India or from a person who uses IP address located in India
Illustrative transactions requiring evaluation

<table>
<thead>
<tr>
<th>Retail</th>
<th>IT/ITeS</th>
<th>Hospitality</th>
<th>Communication</th>
<th>Entertainment and Visual Media</th>
<th>Education</th>
<th>Print Media</th>
<th>Financial Services</th>
<th>Professional Services</th>
<th>E-marketplace or aggregators</th>
<th>Travel</th>
<th>Others</th>
</tr>
</thead>
<tbody>
<tr>
<td>Online sale of goods</td>
<td>Cloud computing, Back-up/Server management solutions, Provision of API, SaaS/PaaS/IaaS</td>
<td>Hotel booking, Homestays</td>
<td>Video conferencing, Voice over IP, E-mail/ Instant Messaging service providers</td>
<td>Streaming of content</td>
<td>E-courses, E-books, Online tests</td>
<td>Subscription for e-journal, e-papers</td>
<td>Provision of financial products, Fund transfers, Payment service providers/gateways</td>
<td>Engineering, architectural, legal, management consultancy services</td>
<td>Facilitation of sale of goods or services</td>
<td>Online air tickets, E-tickets for activities/experiences</td>
<td>Online provision of managed services, Online sourcing, Advertisement space</td>
</tr>
</tbody>
</table>

EL applicability - Key areas for consideration

- Online ordering and offline delivery of goods
- Impact on re-seller models and intra-group cross-charges
- Composite contracts for supply of goods, provision of services and download of software
- One-off transaction involving Indian IP address
- Allocation of consideration in case of regional advertisements, including India
- Meaning of ‘consideration’ in the context of marketplace models/aggregators
- EL is applicable from 1 April 2020 while exemption from income-tax is from 1 April 2021
- Inter-play with indirect tax laws in India
- First installment due on 7 July 2020
- Online ordering through e-mail/ enterprise resource planning software
- Services provided by one non-resident entity and consideration received by another
- Classification of intellectual property/licenses as goods or services
- Orders placed using Indian IP address, for delivery outside India
- Advertisements targeted at non-residents accessed by an Indian resident or using an Indian IP address
- Reports, drawings, designs, etc. prepared offline but shared online with customer
- Risk of double taxation where royalty/fee for technical services subject to withholding tax
- Refund/credit of EL where transaction subsequently subject to income-tax during audit
- Guidance on tax registration requirement awaited

5. IT/ITeS – Information Technology/ Information Technology Enabled Services
6. API – Application Program Interface
7. SaaS/ PaaS/ IaaS – Software as a Service/ Platform as a Service/ Infrastructure as a Service
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