TransEdge Advisory LLP

Equalisation Levy 2.0

India's unilateral measure to tax digital economy

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Equalisation Levy - Background

- Base Erosion Profit Shifting (BEPS) Action Plan 1 on Digital Economy recommended following three measures that could be taken for combating double non-taxation on digital services –
  - Significant Economic Presence;
  - Withholding on certain types of digital transactions;
  - Equalisation levy
- The Central Board of Direct Taxes (CBDT) had also set up a Committee on Taxation of E-Commerce, which submitted its report on February 3, 2016. the Committee recommended –
  - 6-8% equalisation levy
  - on the gross payment made
  - for specified digital services and facilities
  - Such as 'online marketing and advertisements, cloud computing, website designing hosting and maintenance, digital space, digital platforms for sale of goods and services and online use or download of software and applications'
- In India, Equalisation Levy was finally introduced by Finance Act 2016 predominantly for B2B transactions

Quick recap of existing Equalisation Levy

- Equalisation levy to be charged @6% on the amount of consideration received by a non-resident (except NR maintaining PE in India) for providing specified services to
  - resident carrying on business or profession or
  - A non-resident having PE in India
- Equalisation levy to be charged only for following specified services –
  - Online advertisement;
  - Any provision for digital advertising space;
  - Any other facility or service for the purpose of online advertisement
- Equalisation levy not to be levied in following cases –
  - NR providing such services has PE in India & such income is effectively connected with the PE;
  - Specified services obtained for personal consumption (i.e. not for carrying business or profession);
  - Consideration does not exceed INR 1 lakh
- The responsibility for deduction & payment lies with recipient of service
- Collection by government from Equalisation Levy –
  - Jun-Dec 2016 – INR 146.50 crores;
  - Apr 2017 - Mar 2018 – INR 560-590 crores

Expansion of scope – Finance Act 2020

Extension of scope by weaving e-commerce operators within the ambit

Applicable & effective from 1 April 2020 **(no extension notified yet!)**

Levy to be payable @2% on the supply of good or services by e-commerce operator

Equalisation Levy 2.0

- Equalisation levy
  - to be charged @2%;
  - consideration received or receivable by an e-commerce operator;
  - on e-commerce supply or service provided to –
    - a person resident in India; or
    - a non-resident in specified circumstances *(see below)*; or
    - a person who buys goods or services using IP located in India
- Important terms –
  - <u>e-commerce operator</u> –
    means a **non-resident** who owns, operates or manages digital or electronic facility or platform for online sale of goods or online provision of service or both;
  - <u>e-commerce supply or service</u> –
    online sale of goods, online provision of services provided, online sale of goods or service facilitated by e-commerce operator
  - <u>Specified circumstances –</u>
    sale of advertisement targeting Indian residents / IP in India and sale of data from Indian resident / IP in India

Equalisation Levy 2.0 *contd…*

- Equalisation Levy not to be applicable if
  - such e-commerce operator has a Permanent Establishment (PE) in India & such supply is effectively connected with such PE;
  - sales, turnover or gross receipts of e-commerce operator < 2 crores INR ***(approx. USD 260,000)***
  - levy is applicable under existing regime (i.e. online / digital advertisement) @6%
- Income of such e-commerce operator from supply of these goods or services to be exempt in India
- Levy to be deposited in following manner –

Quarter ending	Due date
30th June	7th July
30th Sept	7th Oct
31st Dec	7th Jan
31st Mar	31st Mar

First impressions

- Levy to be applicable from 1 April 2020;
- Levy to be applied @2% on the amount of consideration;
- Responsibility on payment lies with e-commerce operator (as against existing levy which is on the recipient of service); all interest liability & penalty risks to lie with e-commerce operator;
- It doesn't matter even if e-commerce operator is only a facilitator (till the time it enables sale of goods or provision of service);
- No distinction between personal consumption & business consumption – all types of services / sale of goods to be exigible to levy;
- It doesn't matter where the service is consumed; Services obtained for business wholly outside India may also suffer this levy

Case Studies

Case Study 1

Amazon, UK *(not having PE in India, having turnover > 2 crores)*

Purchase of antique cosmetic product for personal consumption

Indian Resident

All conditions are satisfied with respect to levy –

- Supply by an e-commerce operator
- Supplying an e-commerce supply;
- To a person resident of India

Levy to be paid by Amazon, UK @2% in India

Case Study 2

PUBG, China (Tencent)

Purchase of items / upgradation of passes

Indian Residents

Whether supplies made by PUBG to Indian residents is also covered by Equalisation Levy @2%?

Language used by the section gives an indication that PUBG may also be required to pay Equalisation Levy @2%

Case Study 3

Airbnb, US

Booking of hotel for stay in Malaysia – booking happened through IP in India

Indian Resident, travelling abroad

All conditions are satisfied with respect to levy –

- Supply by an e-commerce operator
- Supplying an e-commerce supply;
- **To a person resident of India** *(irrespective of service consumption)*

Levy to be paid by Airbnb, US @2% in India

Whether Airbnb would still be liable to pay levy in India, if such resident Indian tourist, travelling to Malaysia, booked hotel using internet protocol of Malaysia?

Case Study 4

Uber, Canada

Booking of trips

Millions of Indian Residents, travelling to Canada as tourists

All conditions are satisfied with respect to levy –

- Supply by an e-commerce operator
- Supplying an e-commerce supply;
- **To a person resident of India;**
- Aggregated turnover would naturally exceed INR 2 crores

Levy should ideally be paid by Uber, Canada @2% in India

However, whether Indian Government has an extraterritorial right to enforce such levy?
(operational difficulty in obtaining such data would also be a concern)

Difficulties in implementation / clarifications required

Whether e-commerce operator can collect levy from their customer?

The regime does not provide a provision in respect of collection of levy from customer. It would be a cost for the e-commerce operator

Whether e-commerce operator can claim Equalisation Levy as a Foreign Tax Credit in their home country?

Equalisation Levy has been introduced by way of separate levy, which is different from Income-tax. Additionally, the levy is a unilateral measure from India perspective. The same may not be creditable as an FTC in home country of e-commerce operator

Whether threshold of 2 crores to be seen only with respect to India or worldwide?

Language used in the section gives an indication that if turnover in respect of India exceeds 2 crores, levy should be applied.

Whether levy to be exempt upto 2 crores and to be applied only on amount exceeding 2 crores?

Language used in the section gives an indication that once the limit is breached, entire amount would be exigible to levy. Considering that numerous small non-resident e-commerce operators shall be having Indian customer base, clarification on this is highly recommended

Difficulties in implementation / clarifications required

Interplay of royalty / FTS withholding vis-à-vis Equalisation Levy – Whether Equalisation Levy would override analysis of such payment being taxable as royalty / FTS?

There are controversies on certain payments to e-commerce operator chargeable as royalty / FTS. Generally, if it is taxable as royalty / FTS, withholding is grossed up & tax is a cost to Indian residents. Post this EL, Indian residents may continue withholding of tax, in order to mitigate risk of being classified as "assessee-in-default" upon non-deduction of tax. NR may be required to claim such tax withheld as refund, if such income qualifies for EL & exemption is applied. Interestingly, the exemption is applicable only from FY 2021-22 & not from FY 2020-21. Whether this is a drafting error or intentional, should be clarified.

Operational difficulties for e-commerce operators in collecting data

Non-resident e-commerce operators may be required to take a declaration of whether such person is resident in India, specifically in a case where order placing / booking has come from an IP address located outside India (refer case studies)

Whether e-commerce operator needs to obtain a tax registration of India for claiming exemption in India?

Income of such e-commerce operator would mainly consist of exempt income. Thus, clarification may be desirable in this case.

Does Government of India have a jurisdiction to enforce collection of such tax, if service consumption has happened outside India?

Refer Case Study 4

Are you an e-commerce operator, having Indian customer base?

Let’s Discuss!

Drop us an Email – Parag.Kiri@transedge.in