

DIGITAL TAXATION : EQUALISATION LEVY EXTENDED TO E-COMMERCE ACTIVITIES



With over half of the world population under lockdown, the digital world keeps us going. From simply googling to actual e-commerce transactions, from streaming services to e-learning portals, we have embraced it all. Digital is the new normal and so will be the tax structure around it!

Taxing a digital business has its own challenges. As a part of the measures to address these, an Equalisation Levy ('EQL') was introduced at 6% in respect of non-resident businesses engaged in online / digital advertisement services and related activities. On March 27, 2020, the scope of such EQL has been extended to a larger set of digital activities undertaken by non-resident e-commerce operators ('e-commerce operators'). The existing 6% EQL on non-resident online advertisement & related activities shall continue.

What has changed?

Effective April 1, 2020, 'e-commerce supply and services' by an e-commerce operator shall be subjected to EQL at 2%. An e-commerce operator is a business that owns, operates or manages a digital or electronic facility or platform for online sale of goods and services. Unlike the 6% levy, payment

on quarterly basis, is the responsibility of the e-commerce operator and not the person availing such services. Also, where the income is subjected to EQL, the same is considered exempt for tax purposes.

What constitutes e-commerce supply or services?

For the purpose of this levy, 'e-commerce supply or services' means

- online sale of goods owned by the e-commerce operator;
- online provision of services provided by the e-commerce operator;
- online sale of goods or provisions of goods facilitated by the e-commerce operator;
- any combination of aforesaid activities.

The levy is applicable when such sale/ services are provided/ facilitated to

- a resident of India;
- a non-resident, in respect of sale of advertisements/data targeted at residents of India or person using IP address in India;

2%
equalisation
levy for
e-commerce
companies
from April 1,
2020

- those buying goods or services through an IP address located in India.

Exceptions to 2% EQL

There are some situations where the 2% EQL shall not apply i.e. where

- Such activities are connected with a PE of such e-commerce operator in India;
- The activities are already covered under the 6% EQL regime;
- The turnover of the e-commerce operator, from e-commerce supply or services made or provided or facilitated, is less than INR 20mn (\$267k approx.) during the financial year.

Issues to ponder

This extended levy opens up a new dimension for subjecting e-commerce operators to tax in India.

- For starters, given that the income shall be considered exempt for tax purposes, this should put to rest any disputes citing source based taxation, unless of course, there exists a PE of the non-resident e-commerce operator.
- It is interesting to note that while the 6% EQL applies only to B2B transactions (as recommended by OECD BEPS Action Plan-1), the 2% EQL, when charged on an offshore e-commerce operator in respect of the consideration that it earns for India business, is an indirect charge even considering a B2C transactions. This clearly goes beyond the intent and recommendations of the OECD.
- Assimilation of information relating to IP addresses, whether the transaction is undertaken offshore or onshore, would pose challenges. The extent and the manner in which the e-commerce operators are expected to maintain such information, would need to be seen and reviewed closely from a practical standpoint.

- The compliance burden (estimation & payment of EQL) is on the non-resident e-commerce operator which could lead to potential issues on compliance with added costs.
- The customer, in order to determine their liability to withhold u/s 195 of the Income tax Act 1961, would need clarity whether the income paid to the non-resident e-commerce operator (towards e-commerce supply or services) has been subjected to EQL or not. Where taxes are withheld on transactions that have been subjected to EQL, the e-commerce operator would need to seek refund of taxes withheld through the annual tax return.
- EQL is not a part of Indian Income-tax Act and thus would not be subjected to provisions of the India's tax treaties. In that sense, it is being perceived as a unilateral taxation treaty override.

EQL is a wild card entry into the Finance Act 2020 and has obviously taken the industry by surprise. Almost all leading digital players would need to evaluate the impact on their bottom line besides putting in place, an infrastructure to assimilate IP related information. It would also be interesting to see what tools are used by the authorities to examine and verify the information provided by the e-commerce operator. The gap in understanding digital territories may open up a new dimension to disputes.

Authored by

Sunil Arora, Partner

and

Ameet Baid, Senior Manager

ASA & Associates LLP

www.asa.in