

## EQUALISATION LEVY

### INTRODUCTION

Equalisation Levy was introduced in India in 2016 vide Chapter VIII of Finance Act, 2016. The intention behind introduction of Equalisation Levy was to tax e-commerce transactions in India. Equalisation Levy is imposed in Business to Business (B2B) transactions and not Business to Consumer (B2C) transactions.

### BACKGROUND

The rapid growth of information and communication technology has resulted in substantial expansion of the supply and procurement of digital goods and services globally, including India. At present in the digital domain, business may be conducted without regard to national boundaries and may dissolve the link between an income-producing activity and a specific location. Hence, business in digital domain doesn't actually occur in any physical location but instead takes place in "cyberspace".

#### *Direct tax challenges in taxing e-commerce transactions*

The typical issues relating to taxing e-commerce are

- i. The difficulty in characterising the nature of payment and establishing a nexus or link between taxable transaction, activity and a taxing jurisdiction
- ii. The difficulty of locating the transaction, activity and identifying the taxpayer for income tax purposes

The digital business, thus, challenges physical presence-based Permanent Establishment (PE) rules. If PE principles are to remain effective in the new economy operating in the digital domain, the fundamental PE rules developed for the old economy i.e. place of business, location, and permanency must be reconciled with the new digital reality.

#### *OECD Recommendations*

Organization for Economic Cooperation and Development (OECD) under the Action Plan 1 of Base Erosion and Profit Shifting (BEPS) has suggested the following options to tackle the direct tax challenges mentioned above relating to taxation of business in digital domain

- i. Modifying the existing definition of PE to provide for whether an enterprise engaged in fully de-materialised digital activities would constitute PE, if it maintained a significant digital presence in another country's economy
- ii. Introducing the concept of a virtual fixed place of business in the concept of PE i.e. creation of PE when the enterprises maintain a website on the server of another enterprise located in a jurisdiction and carries on business through that website
- iii. Imposition of a final withholding tax on gross basis in case of certain payments made for digital goods or services provided by a foreign e-commerce provider or imposition of an

Equalisation Levy on consideration for certain digital transactions received by a non-resident from a resident or from a non-resident having PE in other contracting state

### *India's position*

The committee on taxation of e-commerce formed by the Central Board of Direct Taxes (CBDT), after deliberating on all the options provided by OECD recommended **Equalisation Levy** in the form of final withholding tax option for taxation of digital transactions in India. India is the first Country to impose an equalisation levy on specified digital services. Many countries have followed the steps of India in various other forms similar to Equalisation Levy.

## LEGISLATION IN INDIA

### *Commencement of Equalisation Levy*

Equalisation Levy is not forming part of the Income tax Act, 1961 but still it is chargeable as it was introduced in the Finance Act, 2016. The CBDT issued a notification on 27<sup>th</sup> May, 2016 stating that the provisions of Chapter VIII relating to Equalisation Levy would come into effect from 01<sup>st</sup> June, 2016. CBDT also issued Equalisation Levy Rules, 2016 on 27<sup>th</sup> May, 2016.

### *Applicability*

Equalisation Levy applies to whole of India except the state of Jammu and Kashmir. It applies in respect of consideration received or receivable for specified services on or after 01<sup>st</sup> June, 2016.

Specified service means

- Online advertisement
- Any provision for digital advertising space or any other facility or service for the purpose of online advertisement
- Any other service as may be notified by the Central Government

Equalisation Levy is applicable only when a consideration for any specified service is received or receivable by a person being a non-resident from

- a. A person resident in India and carrying on business or profession
- b. A non-resident having PE in India

### *Non-applicability*

Equalisation Levy shall not be charged, where

- a. The non-resident providing the specified service has a PE in India and the specified service is effectively connected with such PE
- b. The aggregate amount of consideration for specified service received or receivable in a previous year by the non-resident from a person resident in India and carrying on business or profession, or from a non-resident having a PE in India, does not exceed Rs.1,00,000

- c. Where the payment for the specified service by the person resident in India, or the PE in India is not for the purposes of carrying out business or profession

#### *Rate of Equalisation Levy*

There shall be charged an equalisation levy at the rate of 6% of the amount of consideration. The amount paid as equalisation levy will not be allowed as credit of taxes paid for profits and gains of business or profession of the assessee.

#### *Collection and Recovery of Equalisation Levy*

Every person, being a resident and carrying on business or profession or a non-resident having a PE in India (termed as assessee for the purpose of Equalisation Levy) shall deduct the equalisation levy from the amount paid or payable to a non-resident in respect of the specified service at the rate of 6% if the aggregate amount of consideration for specified service in a previous year exceeds Rs.1,00,000. If the aggregate amount of consideration for specified service in a previous year exceeds Rs.1,00,000 then the entire amount is chargeable to equalisation levy at the rate of 6%. The equalisation levy so deducted during any calendar month shall be paid by every assessee to the credit of the Central Government by the 7<sup>th</sup> day of the month immediately following the said calendar month.

Equalisation Levy deducted shall be paid to the credit of the Central Government by remitting it into the Reserve Bank of India or in any branch of the State Bank of India or of any authorised Bank accompanied by an equalisation levy challan.

#### *Consequences of failure to deduct Equalisation Levy*

Any assessee who fails to deduct the levy shall, notwithstanding such failure, be liable to pay the levy to the credit of the Central Government by the 7<sup>th</sup> day of the month immediately following the said calendar month in which he failed to deduct.

#### *Consequences of failure to remit the Equalisation Levy deducted*

Any assessee who fails to remit the equalisation levy deducted on or before 7<sup>th</sup> of the following month after deduction shall, notwithstanding such failure, be liable to pay the levy and interest along with penalty.

#### *Penalty*

<b>Nature of default</b>	<b>Penalty</b>
Failure to deduct whole or part of Equalisation Levy	In addition to payment of Equalisation Levy and interest, a penalty equal to the amount of Equalisation Levy that he failed to deduct
Failure to remit Equalisation Levy on or before 7 <sup>th</sup> of the following month after	In addition to payment of Equalisation Levy and interest, a penalty of Rs.1,000 for every day during which the failure

deduction	continues However, the penalty shall not exceed the amount of Equalisation Levy that he failed to pay
Failure to furnish statement in Form No.1 on or before 30 <sup>th</sup> June immediately following that financial year	Penalty of Rs.100 for each day during which the failure continues

No penalty shall be imposed for any failure, if the assessee proves to the satisfaction of the Assessing Officer that there was reasonable cause for the said failure and no order imposing a penalty shall be made unless the assessee has been given a reasonable opportunity of being heard.

#### *Interest on delayed payment of Equalisation Levy*

Every assessee, who fails to credit the Equalisation Levy or any part thereof, shall pay simple interest at the rate of 1% of such levy for every month or part of a month by which such crediting of the tax or any part thereof is delayed.

#### *Furnishing of statement*

Every assessee shall, after the end of each financial year, prepare and deliver or cause to be delivered to the Assessing Officer or to any other authority or agency authorised by the Board on this behalf, a statement in Form No.1, verified through either a digital signature or an electronic verification code on or before 30<sup>th</sup> June immediately following that financial year. Form No.1 shall contain details in respect of all specified services during such financial year.

An assessee who has not furnished the statement within the time prescribed or having furnished a statement, notices any omission or wrong particular therein, may furnish a statement or a revised statement, as the case may be, at any time before the expiry of 2 years from the end of the financial year in which the specified service was provided

Where any assessee fails to furnish the statement within the prescribed time, the Assessing Officer may serve a notice upon such assessee requiring him to furnish the statement. In such case, assessee must file within 30 days from the date of serving the notice.

#### *Processing of statement furnished*

Where a statement in Form No.1 has been made by the assessee, such statement shall be processed and an intimation shall be prepared or generated and sent to the assessee specifying the sum determined to be payable by, or the amount of refund due to him/her.

- ✓ Where any levy, interest or penalty is payable in consequence of any order passed, the Assessing Officer shall serve upon the assessee a notice of demand in Form No. 2 specifying the sum so payable and the intimation issued upon processing of the statement of specified service shall be deemed to be a notice of demand.

- ✓ The amount of refund due to the assessee shall be granted to him.

No intimation shall be sent after the expiry of 1 year from the end of the financial year in which the statement is furnished.

#### *Rectification of mistake*

Any mistake apparent from the record can be rectified within 1 year from the end of the financial year in which the intimation was issued by the Assessing Officer.

#### *Appeal to Commissioner of Income-tax (Appeals)*

An assessee aggrieved by an order imposing penalty may appeal to the Commissioner of Income-tax (Appeals) within a period of 30 days from the date of receipt of the order of the Assessing Officer. An appeal shall be made in Form No.3 accompanied by a fee of Rs.1,000 and such form must be verified through either a digital signature or an electronic verification code. The provisions of Income-tax Act, 1961 will be applicable.

#### *Appeal to Appellate Tribunal*

An assessee aggrieved by an order made by the Commissioner of Income-tax (Appeals) may appeal to the Appellate Tribunal against such order or if the Commissioner of Income-tax directs the Assessing Officer to appeal to the Appellate Tribunal against such order. An appeal shall be filed within 60 days from the date on which the order sought to be appealed against is received by the assessee or by the Commissioner of Income-tax, as the case may be. An appeal shall be made in Form No.4 accompanied by a fee of Rs.1,000 and such form must be verified through either a digital signature or an electronic verification code. The provisions of Income-tax Act, 1961 will be applicable.

#### *Punishment for false statement*

If a person

- Makes a false statement in any verification
- Delivers an account or statement, which is false, and which he either knows or believes to be false, or does not believe to be true

He shall be punishable with imprisonment for a term which may extend to 3 years and with fine. An offence so punishable shall be deemed to be a non-cognizable offence and no prosecution shall be instituted against any person for any offence except with the previous sanction of the Chief Commissioner of Income-tax.

#### *Consequential provisions in Income-tax Act, 1961*

Section	Provision
10(50)	In order to avoid double taxation, section 10(50) provides to exempt any income in the hands of non-residents arising from any specified service provided on or after the date on which the provisions of Chapter VIII of the Finance Act, 2016 comes into force and

	chargeable to Equalisation Levy under that Chapter
40(a)(ib)	In order to ensure compliance, Section 40(a)(ib) provides that if any consideration is paid or payable to a non-resident for a specified service on which Equalisation Levy is deductible under the provisions of Chapter VIII of the Finance Act, 2016, and such levy has not been deducted or after deduction, has not been paid on or before the due date specified in section 139(1). However, where in respect of any such consideration, the Equalisation Levy has been deducted in any subsequent year or has been deducted during the previous year but paid after the due date specified in Sec 139(1), such sum shall be allowed as a deduction in computing the income of the previous year in which such levy has been paid

### CONCLUSION

Equalisation Levy is implemented to equalise the tax component of a resident e-commerce company as well as a non-resident e-commerce company. In the past, there was a lot of hue and cry about the negligible amount of taxes paid by big companies such as Google, Facebook and Amazon. With the introduction of Equalisation Levy such companies will come under the purview of taxation in India in the form of Equalisation Levy. The imposition of Equalization Levy has led to increase in tax collection, which exceeded Rs. 550 crores for FY 2017-18.

India is the first country to introduce Equalisation Levy; however, many other countries have introduced similar unilateral measures to curb the controlled non-taxation viz. introduction of Diverted Profit Tax by United Kingdom, rules for Controlled Foreign Corporation by United States, OECD recommendation on Thin Capitalisation, etc.