



# Digital Taxation-Indian Perspective

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As part of the measures to address the tax challenges posed by the increased digitalisation of the economy, in the Finance Act, 2020 the Government of India has introduced Digital Service Tax by expanding the scope of Equalisation Levy and by expanding such scope the Indian government has joined the other countries like Italy, UK, Malaysia, France, Israel, Bangladesh in introduction of Digital Service Tax.

According to a report of Ministry of Electronics & IT - "India's trillion-dollar digital opportunity", the size of India's digital economy is about \$ 200 billion annually and India is also the second fastest digital adopter among the major digital economies. At this pace of growth in digital space, India could create a digital economy of \$ 1 trillion by 2025. Since the consensus were not being reached between OECD and G20 members in respect of taxation of digital transactions i.e. How to tax those transaction based on

- (i) Significant economic presence
- (ii) Withholding tax on certain type of digital transactions
- (iii) Equalization levy

Indian Government had enlarged the scope of Equalization Levy.

### Equalisation Levy - erstwhile provisions:

EQL was introduced in 2016 to tax certain specified online services (under Chapter VIII of the Finance Act, 2016). EQL was levied at **6 percent on consideration**; for specified services such as online advertisement, provision for digital advertising space, or any other facility or service for the purpose of online advertisement received or receivable by a non-resident from a person resident in India and carrying on business or profession, or from

a non-resident having a permanent establishment ('PE') in India.

The obligation for compliance in this regard was on **payers (Indian Business)** to pay the amount of EQL apart from the payments made for such specified services and deposit the same with the government. In case of failure of such compliances, there is a disallowance of the expenditure under section 40(a)(ib) of the Income-tax Act.

Further, the payer was liable for interest for delay in payment of EQL to the government, and penalty for any delay in filing the statements

### Equalisation Levy – Road Ahead:

As per the Newly inserted provisions of Finance Act 2020,

EQL shall be chargeable at the rate of 2% on consideration received or receivable by an 'e-commerce operator' from 'e-commerce supply or services' made or provided or facilitated by it to the following:

- a person resident in India; or
- a non-resident, in below mentioned specified circumstances:
- sale of advertisement which targets customers resident in India or a customer who access the advertisement through internet address protocol located in India; and
- sale of data, collected from a person resident in India or from a person who uses internet protocol address located in India;
- a person who buys such goods or services or both using internet protocol address located in India.

**e-commerce operator'** has been defined to mean a non-resident who owns, operates or manages digital or electronic

facility or platform for online sale of goods/provision of services or both.

**e-commerce supply or services means:**

- online sales 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; or
- any combination of the above.

**EQL shall not be charged in the following cases:**

- e-commerce operator has a PE in India and the e-commerce supply and services is effectively connected with such PE;
- already covered under the existing provisions relating to EQL; or
- sales, turnover or gross receipts of e-commerce operator from e-commerce supply or services is **less than INR 2 crore during the previous year.**

Every non-resident e-commerce operator who collects the equalization levy shall pay to the credit of the central government on quarterly basis and such non-resident operator also require to file a quarterly statement of such transaction.

Further as per as per the provision of section 10(50) of the Income Tax Act 1960, any income arising from any specified service on which EQL is chargeable is exempt from tax however such exemption is available from financial year 2021-22 whereas EQL is applicable from 2020-21. Hence a clarification from the government in this regard will be a welcome move.

The scope of EQL is wide enough and may include most of the digital service providers such as online gaming and entertainment platforms, e-ticking portals, marketplaces, etc and hence it will cover B to C transaction also. The source rule has also been extended in respect of income from advertisement and sale/use of data of Indian consumers/users with effect from 1 April 2020, whereby income attributable to the operations carried out in India shall include income from:

- advertisement which targets a customer who resides in India or a customer who accesses the advertisement through internet protocol address located in India;
- sale of data collected from a person who resides in India or from a person who uses internet protocol address located in India; and
- sale of goods or services using data collected from a person who resides in India or from a person who uses internet protocol address located in India.

There also may be some overlap between existing provisions in respect of Fees for Technical Services and Royalties also weather such services would attract WHT under existing provisions or would be subject to EQL any clarification from government in this regard would be very welcome till then the controversy would continue.

## Equalisation Levy vis-à-vis OIDAR Services Under Goods and Services Tax

### Online Information Database Access and Retrieval services- OIDAR Services:

As per Section 2(17) of IGST Act the following condition must be satisfied in order to consider service as an OIDAR Service:

- Service whose delivery is facilitated by use of information technology.
- Delivery may be through internet or any other electronic network (Say intranet).
- It must be completely automated.
- Very minimal or no human intervention and the nature of which renders their supply essentially.
- Essence shall be information technology without which it is not possible to be executed.

The definition has a very wide base and is not an exhaustive definition. In this juncture some services which is just an illustrative list is provided in the said definition reinstated herewith along with some

- Advertising on the internet;**(E.g. Ads visible on Facebook, YouTube, Instagram, etc. which vary from customer to customer based on their search preference using artificial intelligence with complete automation)
- Providing cloud services;**(E.g.: Building one's own website using the facility extended on such platforms)
- Provision of e-books, movie, music, software** and other intangibles through telecommunication networks or internet;(E.g.: Auto downloadable book or software requiring no human intervention)
- Providing data or information, retrievable** or otherwise, to any

person in electronic form through a computer network;

- Online supplies of digital content** (E.g.: Movies, television shows, web series, music and the like);
- Digital data storage;**(E.g.: Renting additional space on say Gmail which gets auto renewed monthly or yearly basis based on type of subscriptions)
- Online gaming;** (E.g.: Surfing varied games online or through apps be it on laptop or mobile wherein a common interface developed for playing)

If the OIDAR Service is provided by Non-Resident Supplier to Business Entities Registered under the GST Act in India then in such a scenario by virtue of section 5(3) of the IGST Act 2016 the said Business Entity will be required to pay GST on the said transaction as a recipient of service under an exception to the rule that service provider is liable to pay GST.

If the said services being provided by Non-Resident Entities to Non-Registered person under GST in India then in such a situation Non-Resident Service Provider will be required to appoint authorised representative in India and would be liable to discharge the tax liability under special provision defined in section 14 of the IGST Act 2016.

**Now in an interesting scenario if the services provided by the Non-Resident Supplier, satisfy the condition provided by both the Direct Tax i.e. Income Tax Act 1961 and Goods and Service Tax Act it may have to register itself under both the statutes and would be required to discharge the tax liability. For example, a Non-Resident service provider providing cloud storage services to individual user located in India; will have to comply under both the Act.**