



# STUDENTS' ECONOMIC FORUM

A monthly publication from South Indian Bank

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Student's Corner

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## EQUALISATION LEVY

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The "SIB Students' Economic forum" is designed to kindle interest in the minds of younger generation. We highlight one theme in every monthly publication. Topic of discussion for this month is "Equalisation Levy".

### Background

Over the last decade, Information Technology has gone through an exponential expansion phase in India and globally. This has led to an increase in the supply and procurement of digital services. Consequently, this has given rise to various new business models, where there is a heavy reliance on digital and telecommunication networks. As a result, the new business models have come with a set of new tax challenges in terms of nexus, characterization and valuation of data and user contribution. It has been felt that taxation laws which are based on the traditional business models have been struggling to keep pace with these changes. This has resulted in many transactions completely escaping the tax net. Hence, the need was felt to address the challenges posed by the digital economy. The combination of inadequacy of physical presence-based nexus rules in the existing tax treaties and the possibility of taxing such payments as royalty or fee for technical services creates a fertile ground for tax disputes.

In this backdrop, The Organization for Economic Co-operation and Development (OECD) and the G-20 group initiated the Base Erosion and Profit Shifting (BEPS) project, to inter alia, address the taxation issues of digital economy. The outcome was BEPS Action Plan 1, which was released in October 2015. It proposed three interim options to tackle the issues emerging from digital transactions:

1. Significant economic presence,
2. Withholding tax on digital transactions; and
3. Equalisation levy

Countries were at liberty to adopt any of

these options, till a global consensus emerged. Post this development, several countries such as Russia, UK, France, Italy and India have introduced digital tax or Equalisation levy in different formats, to suit their respective requirements.

### Equalisation Levy (EL 1.0)

India being one of the early movers, introduced Equalisation levy (EL 1.0) in 2016.

1. It is applicable on 'Specified Service', viz. 'online advertisement, provision for digital advertising space or any other facility or service for the purpose of online advertisement and other related services', provided by a non-resident not having any Permanent Establishment ('PE') in India.
2. Applicable on Business-to-Business ('B2B') payments made by an Indian resident carrying on business or profession or by a non-resident having a PE in India. It is charged at the rate of 6% on the amount of consideration received/receivable by the non-resident.
3. Also, EL is to be deposited by the 'Payer' and all related compliances viz. filing of EL return, etc. to be made by Payer.
4. Minimum threshold limit of INR 1 lakh for aggregate payments during the year by each payer, to attract charge of EL. Amount, which is subject to charge of EL, is exempt from income tax under section 10(50).
5. Tax must be deposited by 7th of the next month from the date of transaction & furnish the Equalisation Levy Statement on or before 30th June of Financial Year ended.

## **Due dates and Penalty for non-compliance**

If there is a delay in payment, interest is charged at 1% of the outstanding levy for every month or part thereof is delayed. If the levy is not deducted, penalty equal to amount of levy failed to be deducted (along with interest and depositing of the principal levy outstanding). If EL is deducted but not deposited, penalty will be Rs. 1,000 per day maximum to amount

of the levy (along with interest and depositing of the principal levy outstanding). Penalty for late filing of statement is Rs.100 per day till the non-compliance continues. If a false statement has been filed, then the person may be subjected to imprisonment of a term up to 3 years and a fine.

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## **Equalisation Levy (EL 2.0)**

The scope of EL was further expanded by the Finance Act, 2020 to the new stream of e-commerce transactions.

1. In such a new stream, the EL is levied at the rate of 2% on the amount of consideration received or receivable by an e-commerce operator from an e-commerce supply or services made or provided or facilitated by it to certain specified persons.
2. While EL1.0 was limited to B2B transactions and compliance was required to be carried out by the payer, in case of EL2.0, both B2B and B2C transactions are covered, and compliances are to be carried out by the non-resident e-commerce operator.
3. EL to be levied on online sale of goods or online provision of services or a combination of both, by non-resident (NR) e-commerce operators (ECO), when online sale is made by a non-resident to a:
  - a. Person resident in India, irrespective of the IP address used by him while ordering such goods or services.
  - b. Person who uses IP address located in India, while ordering such goods or services
  - c. Non-Resident, pursuant to:
    - Sale of advertisement, which targets a customer resident in India or a customer, who accesses the advertisement through IP address located in India
    - Sale of data collected from a person resident in India or a person who uses an IP address located in India.
4. Minimum threshold limit of INR 2 crores for aggregate consideration received or receivable by non-resident 'e-commerce operator' to attract charge of EL 2.0.
5. Following exceptions were carved out of EL 2.0:
  - When the NR e-commerce operator has PE in India, and such online sale of goods or services is effectively connected with PE in India.
  - The transactions already subject to 6% EL under the existing provisions.
  - Turnover or gross receipts of the NRE-Commerce operator, from such online sale of goods or services, for a financial year does not exceed INR 2 Crores.

## **Interpretation and Challenges**

1. The Equalisation levy as introduced through Finance Act 2020 has remain a hot topic for everyone as the levy aims to tax the digital transactions undertaken by foreign e-commerce companies at a notional percentage of 2% of the gross value of supplies

without granting the credit of the same in the home country of the respective countries and has also been called as discriminatory and unilateral by United States Trade Representative (USTR).

2. The concept of EL is not unique, and many countries have introduced a digital services tax. However, what sets the Indian EL apart from other similar levies is the potential wide scope of its coverage.
3. The wide scope of EL may have unintended consequences. For example, if a regulated financial services entity is providing services electronically to a person who uses an Indian IP address for availing the services when the person is travelling to India, the corresponding service charge may potentially attract EL. In a different scenario, it may be impractical for a non-resident e-commerce operator to identify the residential status of each customer to determine the applicability of EL – for example, an Indian resident may travel to another country on holiday and avail a service online, whilst in that country – such a transaction may potentially be covered within the EL net.
4. Currently, the way EL 2.0 provisions are worded, there is ambiguity as regards its scope and there are numerous interpretational issues leading to practical challenges in compliance. Words like 'online provision of services', 'consideration' on which the EL is to be levied, 'digital or electronic facility or platform' etc. needed clarity.
5. Adding to the confusion is the fact that the law provides that if a transaction is covered by EL 2.0 provisions, it would not be subjected to withholding tax. However, it seems due to some drafting anomaly this is applicable from 1 April 2021. So, the issue being that during this initial year of operation of EL 2.0, one transaction could be subjected to both this 2% levy and withholding tax.
6. From a practical perspective, there is a concern that as the due date for payment for the last quarter is 31 March itself, compliance within the stipulated time would become very cumbersome. Any delay would involve interest costs.
7. There are time and cost challenges in building or modifying the IT infrastructure required to enable the non-resident e-commerce operators to track transactions that may have targeted Indian residents or any person using Indian IP address.

The anomaly in the law in relation to the definition and its interpretation has resulted in chaos leading to the government amending the provisions of Equalisation levy in the budget.

### **Clarifications in the Budget 2021**

Hon'ble Finance Minister Nirmala Sitharaman on Feb 01, 2021 vide Finance Bill, 2021 In order to provide certainty, has expressly clarified that transaction taxable under income-tax are not liable for Equalisation levy. Further, it is also proposed to clarify regarding applicability of Equalisation levy on physical/offline supply of goods and services. Therefore, amended section 163 of the Finance Act, 2016, as proposed, clarifies that consideration received or receivable for specified services and for e-commerce supply or services shall not include the consideration, which are taxable as royalty or fees for technical services in India.

Further, an explanation has been added to the definition of "e-commerce supply or services", wherein, "online sale of goods" and "online provision of services" shall include one or more of the below mentioned parameters to be identified as an e-commerce supply or service:

- Acceptance of offer for sale; or
- Placing of purchase order; or
- Acceptance of the purchase order; or
- Payment of consideration; or
- Supply of goods or provision of services, partly or wholly.

With regard to applicability of EL 2.0 it has been further clarified that irrespective of the fact whether an e-commerce operator owns the goods, provides online services or facilitates

said online services, the consideration received or to be received shall include the consideration as per the mentioned clarification.

Another anomaly removed by the government is through the corresponding amendment in Section 10(50) to provide for exemption of income on which Equalisation levy was levied with retrospective effect from April 01, 2020. Thus, all the transactions on which Equalisation levy was introduced are exempt from any charge of Income tax.

### What is in the news?

- Equalisation levy is not applicable on consideration for goods which are owned by Indian residents,” Finance Minister Nirmala Sitharaman had said while replying to a debate Finance Bill 2021 in Lok Sabha. She also mentioned that Equalisation levy is a tax which has been imposed to give level playing field between Indian businesses who pay tax in India and foreign e-commerce companies who do business in India but do not pay any income tax here.
- In retaliation to India’s digital tax (2 per cent) on foreign technology majors, the United States has proposed additional tariffs on a slew of Indian imports including basmati rice, sea food, jewelry, bamboo, semi-precious stones and pearls, among others. A tariff of up to 25 per cent ad valorem on aggregate level of trade has been proposed, with an aim to mop up around \$55 million, which is as much as what India will collect from US companies through the 2 per cent Equalisation levy.
- The office of the US Trade Representative (USTR) concluded that India’s Equalisation levy, was “actionable” under Section 301 of the Trade Act for being unreasonable, burdensome, and discriminatory against American companies like Amazon, Google, and Facebook, and inconsistent with international tax principles.
- Defending its stand, India had said that the objective of the levy is to provide greater clarity, certainty and predictability in respect of characterization of payments for digital services and consequent tax liabilities to all stakeholders, to minimize costs of compliance and administration as also tax disputes in these matters.

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