



Content

Digital Economy

Equalisation Levy 1.0

- Key Takeaway of report by Committee on taxation of e-commerce
- Equalisation Levy 1.0 Finance Act 2016
- Interplay of SEP & Equalisation Levy

Equalisation Levy 2.0 – E-commerce

- Relevant Considerations on EQ Levy 2.0
- Relevant Case Studies
- Unresolved Issues on EQ Levy 2.0
- Bird's Eye View EQ Levy 1.0 vs 2.0

TDS on E-commerce – Section 194-0

Interplay between EQ Levy & Section 194-O





Have you heard about Digital Economy?

Digital economy is the result of a transformative process brought by information and communication technology making technologies cheaper, more powerful, and widely standardised, improving business processes and bolstering innovation across all sectors of the economy. There are four fundamental areas of digital transformation central to business success in the digital economy.

Working Style

Experience of connectivity
while working from home or
different office is now
similar to physical office.
Dynamic ecosystem of
talent and business
process distributed across
various locations



Internet of Things

Melding of physical and digital world brings every asset into a digital domain where software dominates and organisation can operate with precision, previously unimaginable

Customer Centric

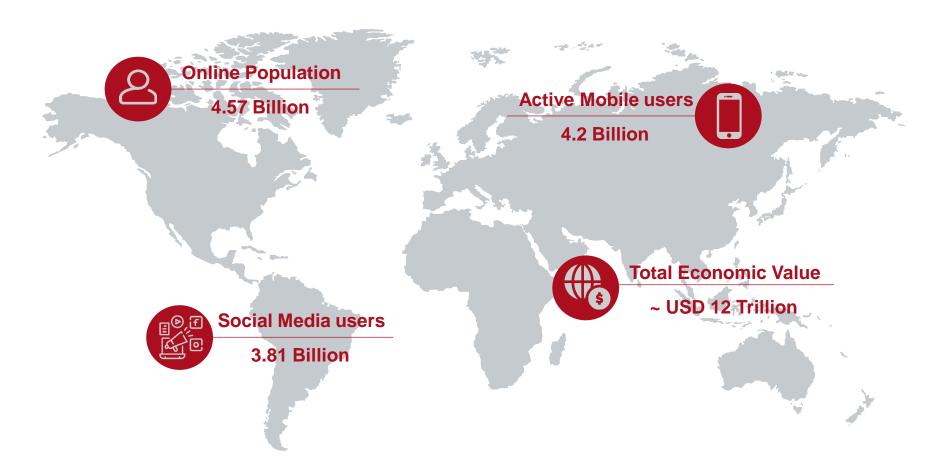
Customers desire experiences that are seamless, omni-channel, direct, contextual, and personalised. These are possible with the new age technologies

Supply Network

Sharing of data in real time to enable borderless business houses to thrive is one of the key of digital economy creating digital networks

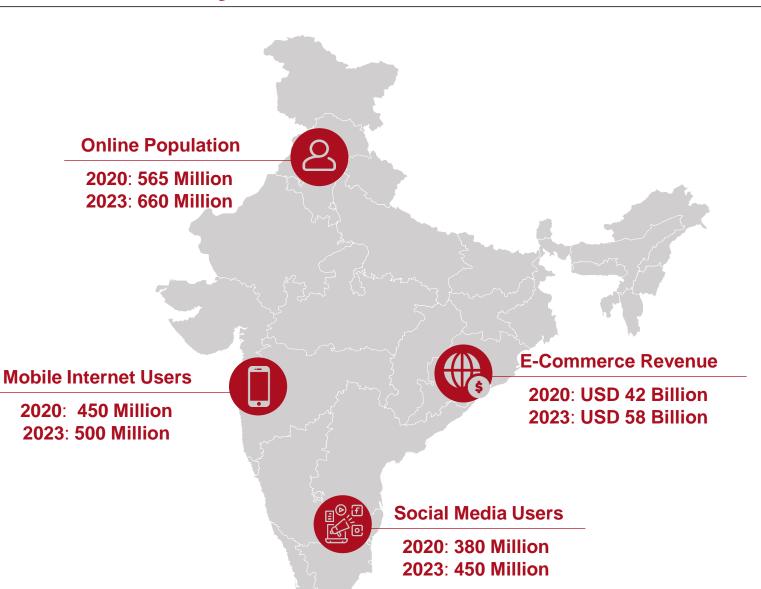
Digital Economy and its whereabouts

Economic activity resulting from billions of everyday online connections among people, businesses, devices, data, and processes. Hyper-connectivity between people, organisations and machines is the backbone of digital economy



^{*}Source: Estimates as per data available on public domain

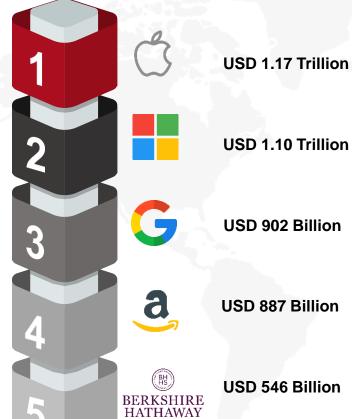
Digital Economy and its whereabouts



^{*}Source: Estimates as per data available on public domain

Digital Economy and its whereabouts (Cont.)







STREET 'LIKES' THE DEAL Reliance Ind (Price in ₹) Facebook (Price in \$) (As of 10:30 pm IST) 1,363.4 71.400 186.5 183,34 1,236.1 1.350 182.5 1,300 178.5 RIL's m-cap rose by 1,250 Chg% 174.5 ₹80,707 cr on Wednesday 170.80 1.200 170.5 Apr 21 Apr 22 Apr 21 Apr 22

Facebook plays Jio card in battle against Amazon, Google

Facebook's \$5.7-billion investment in Reliance Jio Platforms is being viewed as a powerful alliance to take on bigwigs Amazon, Flipkart, and Google in the e-commerce and payments space.

MOST VALUABLE COMPANIES

Rank	Name	M-cap (₹ trn)
1	Relianc	e Ind	8.64
2	TCS		6.65
3	HUL		5.17
4	HDFC Ba	ank	5.09
5	Jio Plat	forms*	4.36
6	HDFC		2.88
7	Bharti A	\irtel	2.73
8	Infosys		2.73
9	ITC		2.24
10	Kotak B	ank	2.20

Note: * Equity value of Jio Platforms had it been listed

Source : Exchange/Bloomberg Compiled by BS Research Bureau

Jio Platforms is now more valuable than all other businesses of RIL put together, including refining, petrochemicals and retail. Facebook is buying 9.99% in Jio Platforms, a 100% subsidiary of RIL, for INR 43,574 crores. This translates into a market/ equity value of INR 4.36 trillion for Jio Platforms. Deal kick-started the monetisation of digital assets of RIL

^{*} Source: Public domain

Categories of Digital Transactions



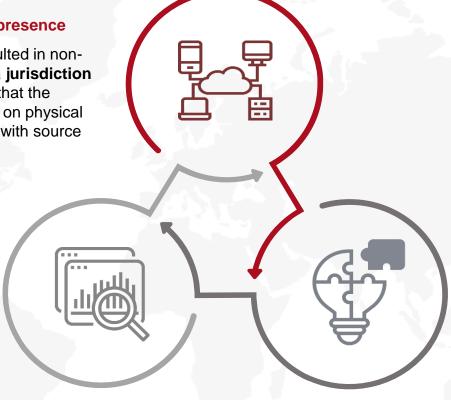
Challenges in taxing Digital Economy

Nexus without physical presence

Growth of digital economy has resulted in nonresident companies **operating in a jurisdiction without local presence.** The fact that the existing thresholds for taxation rely on physical presence is to ensure taxing rights with source jurisdictions

Data & attribution of value

Sophistication of information technology provided the way to gather & use information across borders resulting in issues of attribution of value created from generation, use and sale of data. Difficulty lies in identifying, for tax purposes, the source of data



Charaterisation of income

Dilemma in relation to the proper characterisation of payments made in the context of new digital products or means of delivering services (for instance, payments in relation to Cloud Computing)

Although distinct in nature, these challenges may overlap with each other

- Payment Characterisation may trigger taxation in the jurisdiction of residence
- Collection of data from users may trigger nexus with source jurisdictions

Digital Tax in other countries – Income Tax

Country	Effective date	Type	Rate	Applicable on
Austria	January 1, 2020	DST	5%	 Online advertisements Threshold limits: Global turnover- Euro 750M+ & Turnover in Austria- Euro 25M+
France	January 1, 2019 Collection delayed till end of 2020	DST	3%	 Apply "French digital presence" ratios on: Digital intermediary services Digital advertising services based on users' data
United Kingdom	April 1, 2020	DST	2%	Revenue in excess of 25 million pounds derived from UK users from – social media platforms – internet search engine – online market place
Italy	January 1, 2020	DST	3%	Digital advertisementsDigital intermediary servicesTransmission of user data

Countries such as Belgium, Indonesia, Israel, Nigeria have introduced Digital PE (ie SEP) based taxes in respect

Digital Tax in other countries – Income Tax

Country	Effective date	Туре	Rate	Applicable on
Malaysia	May 13, 2019	WHT	Variable	e-commerce transactions
Mexico	June 1, 2020	WHT	Variable	 Online entertainment services/contents Online clubs Dating websites e-learning
Turkey	January 1, 2019 March 1, 2020	WHT DST	15% 7.5%	 Digital advertisement service provider or intermediaries Online content/entertainment Revenue not exceeding TRY 20,000,000 in Turkey and Euro 750M worldwide is exempt
Vietnam	July 1, 2020	WHT	Variable	NR digital & e-commerce operations in Vietnam

In addition, most countries including USA, Australia, Brazil, China etc additionally levy VAT/ GST on digital transactions





Rationale for introduction

Distress regarding avoidance of taxes by MNCs in economies from where they derive profits – resulted in adoption of BEPS project

OECD published 15 action plans

Action Plan 1 specifically dealt with tax challenges of digital economy

Ability of MNCs to avoid taxes in source jurisdiction poses major concern for countries like India following source-based taxation

To address these issues, OECD in its final report on Action Plan 1 had identified 3 plausible options

Limitation of existing PE rules and lack of tax neutrality - put constraints in development of Indian digital industry

Evolution of new business models in digital economy results in tax challenges in terms of determining nexus, characterization of income etc

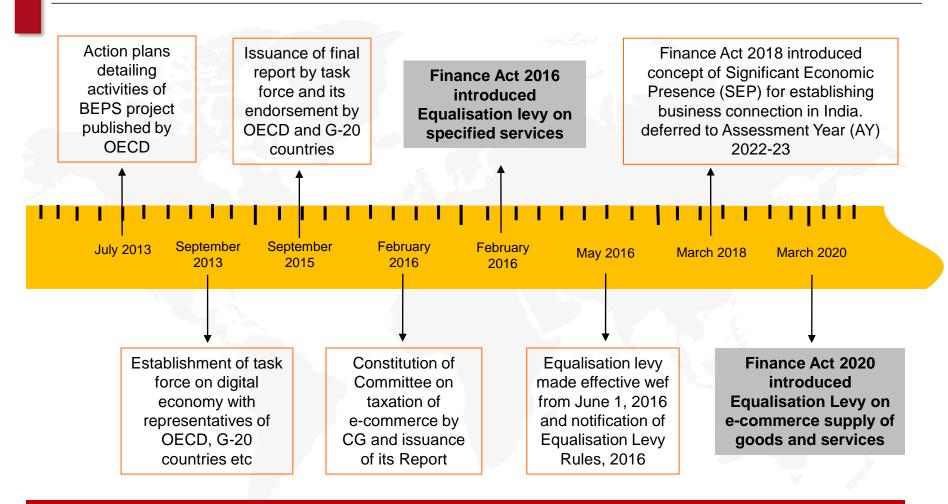
Option 1

Nexus based on Significant Economic Presence (SEP)

Option 2
Withholding tax
Option 3
Equalisation levy

First 2 options may be ineffective due to treaty override

Beginning Of The Google Tax Project

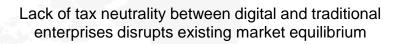


India was the first country to introduce an equalisation levy under its domestic tax legislation based on the recommendations of the committee formed by the Apex Tax body (CBDT). Globally, nations had attempted to tax the digital economy through a combination of anti-avoidance rules and the levy of consumption tax. The Indian approach, was, however, different as Equalisation Levy on specified services (introduced in 2016) was in the nature of final withholding tax without assuming the character of an income tax

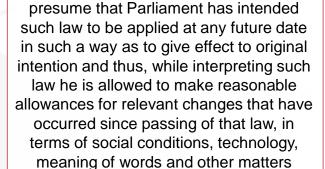




Key takeaway of Committee report



Distortions arising from violation of tax neutrality has adverse impact on business of these enterprises and on economy resulting in fiscal constraint for governments



In construing any law, interpreter is to

Fiscal shortfalls resulting from lack of tax neutrality compensated by local residents in the form of additional tax

Applicability of doctrine of updating Construction

Written declaration by non-resident in prescribed form including Indian PAN or tax identity number in country of residence is sufficient

Non-applicability of EL on nonresidents having PE in India Payee to file annual return of receipts for specified services, if such receipts exceed INR 100 million. Tax deducted by payers to be accepted as final payment

Reporting compliance on Payee

Justification for inserting Chapter VIII separately – due to inherent difference in nature 'Equalisation Levy' and income tax; wherein former is levied on gross consideration of digital transactions and latter is levied on income

Rationale for inserting Chapter VIII

Key takeaway of Committee report (Cont.)

Difference between withholding tax and Equalisation Levy

Withholding tax is only a mechanism of collecting taxes, whereas 'Equalisation Levy' is full and final tax

Constitutional validity of Equalisation Levy

Equalisation levy appears to be in accordance with Entries 92C and 97 of the Union List

Non-applicability of tax treaties on Equalisation Levy

Equalisation Levy is imposed on gross amount of transaction and not on income arising from such transaction

Equalisation Levy is applicable irrespective of whether or not any income arising from such transaction is taxable in India

Double taxation

- Concerns regarding double taxation were also acknowledged by Committee but it was clearly articulated that a
 resident country is not precluded from granting relief under its own domestic laws, to avoid such double
 taxation
- Possibility of reciprocal agreement could be explored in cases, where both India and resident country impose such levy
- Practical issues relating to availability of FTC especially in cases, where other countries impose GST or consumption tax on digital transactions and not income tax or Equalisation levy



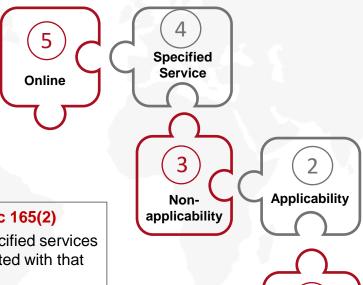
Equalisation Levy 1.0 – Finance Act 2016

Specified Service

Online advertisement, any provision for digital advertising space or any other facility or service for the purpose of online advertisement and includes any other service as may be notified by the Central Government in this behalf

Online

Facility or service or right or benefit or access that is obtained through the internet or any other form of digital or telecommunication network



Applicability - Sec 165(1)

6% on consideration received/ receivable by NR for specified services provided to

- Indian resident carrying on business or profession or
- NR having PE in India

Non-applicability – Sec 165(2)

- NR having PE providing specified services which are effectively connected with that PE; or
- Aggregate consideration for specified services in a FY is up to INR 100,000 (payer wise); or
- Payment by Indian resident or PE of NR not for purpose of carrying out business or profession (covered only B2B, not B2C)

Equalization levy

Tax leviable on consideration received or receivable for any specified service under the provisions of this Chapter

EQ Levy

Equalisation Levy 1.0 – Finance Act 2016 (Cont.)

- Deducted EQ levy to be deposited by 7th day of the following month
- Delay in payment Interest @ 1%/ month or part month
- **Penalty** for:
 - Failure to deduct EQ levy equal to EQ Levy
 - Failure to deposit after deducting INR 1,000/ day until the failure continues (max EQ Levy)

- Statement of 'specified services' in Form No 1 to be furnished by payer annually on or before 30th June of the following FY
- Belated/ Revised statement can be furnished within 2 years from the end of FY in which specified services are provided
- Failure to furnish statement- Penalty @ INR 100/day
- Punishment for false statement Imprisonment upto 3 years + Fine

Deduction & Deposit of EQ levy

Statement of specified services

- Appeal before CIT(A) only against penalty order passed by tax officer
- No right of appeal against intimation or rectification order – Writ could be the only remedy in such cases
- Powers vested on the CIT under Sec 263 or 264 of the Act cannot be exercised in respect of EQ Levy
- Prosecution proceedings not be instituted without the previous sanction of Chief CIT

- Section 10(50) Exemption for income on which EQ Levy is chargeable
- Section 40(a)(ib)- disallowance of expenditure, if payer fails to deduct and deposit EQ Levy on or before the due dates for filing ITR
- EQ levy deducted in subsequent year or deducted during the PY but paid after due dates for filing ITR, allowed as deduction in the year of payment
- Words not defined in Chapter VIII will take their meaning from the Act

Appeals

Income Tax Act

Significant Economic Presence (SEP)

- Expands the scope of income of a non-resident which accrues or arises in India that results in a "business connection" in India for that non-resident
- Resulting income, attributable to SEP, taxable in India
- Transactions/ activities to constitute SEP in India, whether or not the non-resident has a residence or place
 of business in India, or renders services in India, or the agreement for such transactions or activities is
 entered in India

Transaction in respect of any goods, services or property carried out by a foreign enterprise in India, including provision of download of data or software in India, if payment exceeds beyond a prescribed limit

Systematic and continuous soliciting of its business activities or engaging in interaction with such number of users as may be prescribed, in India through digital means

Threshold of "Revenue" and "Users" not prescribed yet Interplay with current 6 percent Equalization levy (EL) Cross border
business
profits to
continue to be
taxed as per
existing treaty
rules till
modified

Non-treaty jurisdictions to be most impacted Significant tax impact for overseas players in digital business space Terms such as Goods, Digital means etc needs clarity and Profit attribution rules to be notified

Interplay of SEP and Equalisation Levy

SEP is a concept under the IT Act and Equalisation Levy is a separate chapter outside IT Act

Is there a possibility of overlapping of the services covered under both the regime?

Purpose of both regimes is to tax digital economy.

While the scope of SEP is very wide covering every type of digital services, the ambit of equalisation levy is limited and services can certainly be unearthed to be taxed under both the regime. SEP was earlier proposed to be effective from Assessment year 2021-22, but has been deferred to Assessment Year 2022-23

Trepidation of double taxation where tax is levied under both the regime on the same services

In spite of the fact that the service might be covered under both the regime, there should not be a levy of double taxation:

- Concept of SEP does not form part of any of India's tax treaties or MLI
- Services on which Equalisation Levy is chargeable is specifically exempt from income tax under Sec 10(50) of the IT Act and therefore SEP should not be applicable on such services (please see subsequent slides for detailed discussions)

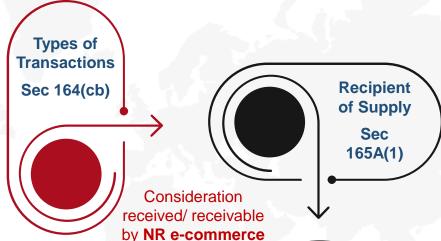


Equalisation Levy 2.0 – Finance Act 2020

Broadening the scope, provisions introduced by the Finance Act 2020 are in addition to the existing Equalisation Levy on specified services and are applicable from April 1, 2020

e-commerce supply of goods or services means –

- Online sale of goods owned by e-commerce operator or services provided by operator
- ii. Online sale of goods or provision of services facilitated by the operator
- iii. Any combination of the above



- . Person resident in India
- ii. NR in specified circumstances -Section 165A(3)
- iii. Person who buys goods or services or both using IP address located in India

Specified circumstances

Sale of advertisement, which targets customers, resident in India or customers who accesses the advertisement through IP address located in India

OR

Sale of data, collected from a person who is resident in India or from person who uses IP address located in India

Important Definitions

E-commerce operators

NR who owns, operates or manages digital or electronic facility or platform

- i. NR ECO has PE in India
- Where EQ levy 1.0 is leviable under Sec 165 of Finance Act 2016
- iii. Sales, Turnover or Gross Receipts of e-commerce operator, from such NR ECO supply is less than INR 20 million in previous year

for online sale of goods or online provision of services or both

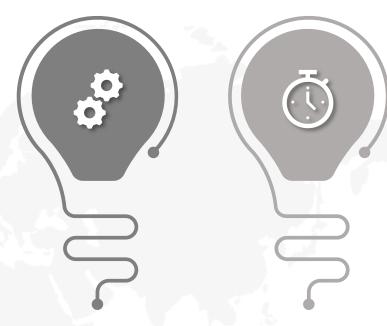
Equalisation Levy 2.0 – Finance Act 2020 (Cont.)



Rate: 6 percent for specified services (EQ Levy 1.0)
Rate: 2 percent for e-commerce supply (EQ Levy 2.0)



Section 10(50)
amended to exempt
income arising from
e-commerce supply
chargeable to EQ
levy. Exemption
available from April
1, 2021



EQ Levy is payable by NR ECO

Levy not in form of withholding tax

Payment due dates

١	Quarter ending	Due Date
	30 th June	7 th July
	30 th September	7 th October
	31st December	7 th January
_	31st March	→31st March
	<i>J</i>	

This will have practical challenges as the transactions would be undertaken till end of March 31 and ascertaining liability on same day and making remittance may not be feasible (could lead to a refund situation given sales return events as well)

Importance of Sec 10(50) of the IT Act

Section 10(50) of the IT Act is the only link between the Income-tax Act, 1961 and EQ Levy 2.0 and holds utmost importance

Avoidance of double taxation



Possibility of overlapping of both the IT Act and EQ Levy

- Services may be doubly taxed as FTS/ FIS/ Royalty along with EQ Levy 2.0
- Section 10(50) provides solace from such double levy
- Sec 10(50) provides for exemption from income tax to transactions on which EQ Levy is chargeable
- Existence of anomaly as Sec 10(50) for EQ Levy 2.0 is in force from April 1, 2021 leaving a room for one year of double taxation



Section 195 & 197 of IT Act

Sec 195 and Sec 197 available for determining taxability under IT Act and not capable of determining chargeability of EQ Levy

Mutual Agreement Procedure (MAP)

MAP is contingent on a prior administrative measure having been taken. Not clear if Competent Authorities would entertain applications under MAP, as Equalisation Levy is not an income tax. May be covered in US/ UK treaties as "identical or substantially similar taxes"

Seeking Advance Ruling (AAR)



Dilemma on characterisation of transaction as Royalty/ FTS / FIS or qualifies for EQ Levy 2.0

- AAR application cannot be moved as EQ Levy is a separate chapter outside IT Act
- AAR could be sought on availability of exemption under Sec 10(50) ie whether transaction is taxable under Sec 9 or exempt under Sec 10(50) of the IT Act, if EQ Levy is discharged by NR ECO





Taxable amount – Gross amount vs commission income

- Ambit of new EQ levy covers 'online sale of goods or provision of services facilitated by the operator'
- Ambiguity exists on taxable value of transaction (such as discounts, cash backs etc) + whether on full consideration or net commission income only

Cloud Computing

- EQ levy confronts front end services and does not intend to embrace back end digital support services
- However, they are still under the umbrella of online services provided
- Hence, cloud computing being a subjective issue is highly litigative

Sale Platform - not defined

- Digital Facility, Electronic facility or platform not defined under the chapter for EQ Levy
- What actually constitutes online sale?
 Does sale concluded on e-mail correspondences covered under EQ Levy?
- Common meaning is facilitation of commercial interactions between the buyer & seller

What if transaction assessed as Royalty / FTS

- Transactions may be assessed as Royalty /
 FTS by the tax officer in tax audit at a later
 point in time, during tax assessments (ie
 much after payment of EQ levy)
- Appropriate guidance concerning the matter is needed to clear the clouds whether the NR ECO will be refunded for EQ levy paid

Enforcement Mechanism

Representative assessee/ Agent route under Sec 163 of IT Act - though it will have limitations to apply only in select cases covering B2B transactions and where a business connection could be established with NR ECO or where NR has an Indian business presence

Equalisation Levy and GST

- EQ Levy and GST in India are two separate and independent levies
- No availability of credit under another regime when taxes paid under one

Appeal only against penalty order

- Appeal provisions exist only for penalty order
- No appeal mechanism for contesting EL and interest
- Filing of Writ Petition seems to be the only recourse

Person responsible for paying

- Finance Act 2020 consequentially amends Sec 204 to include NR ECO as "Person responsible for paying tax"
- Placement in the section unclear and could technically mean that NR may have to withhold tax on payments on service/ technical fees made to an Indian entity

Software subscriptions through online mode - EQ Levy 2.0 applicable?

 Software sale as a product/ service both should be covered under the ambit of EQ Levy 2.0, if contracting is done online Right to view content (and not download) such as video/ movie streaming websites

Cannot be considered as a sale of product

 "User Agreement" of websites generally states that content is not sold or transferred to user



 Software vendors generally retain rights on software, provide upgrades etc (online service position). Supply through tangible or intangible medium should be considered as online sale of goods (online sale of goods position)

 In absence of exemption under Sec 10(50) of the IT Act, exposure of double taxation under Royalty/ FTS income tax and EQ levy exists for payments made during FY 2020-21 (unless clarified by CBDT) However, the transaction can be well considered as online provision of service

 EQ Levy at the rate of 2 percent should apply on the subscription charges received by such service provider from the Indian customers



Can NR e-commerce operator claim any foreign tax credit for EQ levy 2.0 paid in India?

- Para 2 of Article 2 of tax treaties with countries such as USA, UK, Australia etc include "Identical or substantially similar taxes"
- EQ Levy is not a tax on income but on gross consideration
- Clarity is needed
- Claiming FTC also depends on the taxability on similar lines in the jurisdiction of residence

Order = Online
Delivery = Offline
Covered under EQ Levy?

- Targeting Technology driven/ centric business or Technology enabled business?
- Does sale concluded online, transfers risks and rewards?
- Reference to Sales of Goods Act, Transfer of Property Act, ICDS-IV (Revenue Recognition)
- Possible view emanating:
 - Online (Order + Delivery): EL applicable
 - Online Order + Offline delivery: EL applicable
 - Offline Order + Online delivery: No EL

Adjustments/ refunds of EQ levy for transactions subsequently reversed (sales returns, defective supplies)

- E-commerce operators generally provide a window of 2-3 weeks for returns. In certain categories, say, fashion merchandise, returns could be as high as 25% of sales
- EQ Levy 2.0 is paid quarterly rather than transaction wise and such subsequent returns are capable of being adjusted within a quarter
- Return to be filed is annual, ie by June of following year and hence all sales returns before year end could be adjusted

Unresolved Issues – EQ Levy 2.0

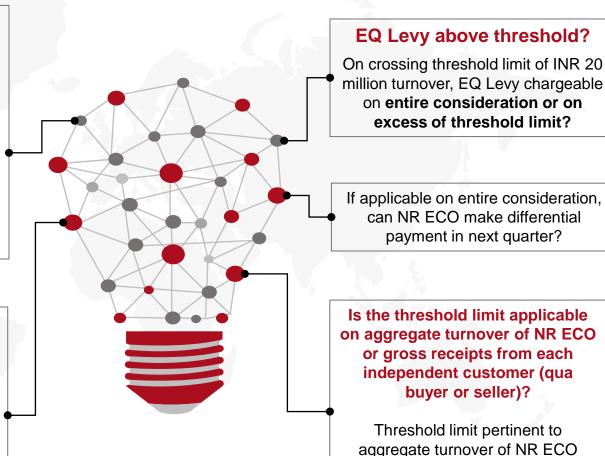
Requirement of PAN?

Sec 139A read with Rule 114 does not mandate PAN for NR discharging EQ Levy. However, Annual Return (Form-1) for such levy is to be filed online on Income Tax Portal and NR ECO wouldn't be able to login to portal without having PAN. Also, for quarterly payment of EQ PAN could be needed

Is PAN mandatory indirectly on account of these anomalies?

Consideration on which EQ Levy is charged – inclusive of taxes?

EQ Levy should be levied on the amount excluding any taxes.
Reference could be drawn from Circular No 1/2014 dated January 13, 2014 with respect to TDS and judicial precedents on this issue



should apply in respect of aggregate

of supply to recipients referred in Sec 165A(1)

Unresolved Issues – EQ Levy 2.0

Determination of Residency

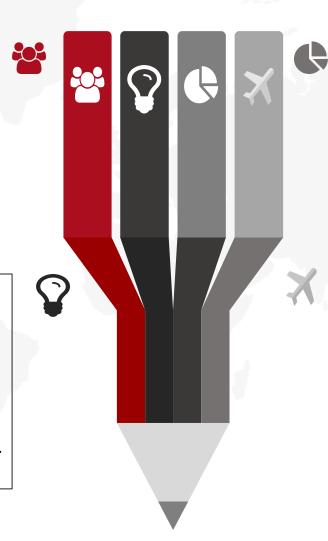
Since EQ Levy is not part of IT Act, What is the **method for determining** residency status of customers?

Brightline tests needed

Calendar vs Financial Year

Threshold limit of INR 20 million turnover to be considered on Indian FY basis and even annual return ie Form-1 is to be filed on FY basis

Does this increase the accounting complexities for NR ECO as most of such corporates follow calendar year in home country?



Use of VPNs

Companies would need to commit significant technical/ workforce resources and planning for purpose of building new systems or reengineer existing systems to track IP addresses, which may not be 100% accurate, due to presence of internet bots or use of VPNs for genuine privacy reasons (eg corporate networks)

International Visits

Whether services availed/ goods purchased online by an Indian resident during his/ her visit to a foreign country subject to EQ levy?

As the transaction is with an Indian resident, EQ levy should apply, irrespective of the fact that IP address used may not be Indian. If a foreign expat concludes sale using Indian IP address (say, hotel Wi-Fi), exposure exists too!

Equalisation Levy & Digital Service Tax

EQ levy @ 6 percent is levied on online advertisement services provided by NR to R advertiser irrespective of its target customers. In few countries such as Austria, France & UK, DST is charged based on the users in particular jurisdiction. This could lead to double taxation under EQ levy and DST, in addition to corporate tax paid in country of residence of the online advertisement service provider

Online advertisement service provider is in USA

Advertiser	Viewer/ Target of Ads	EQ Levy applicable?	DST applicable?
India	India	Yes - 6% [EL 1.0]	No
UK	India	Yes - 2% [EL 2.0]	No
India	UK	Yes - 6% [EL 1.0]	Yes*
UK	UK	No	Yes

^{*} UK DST applicable as users viewing advertisements are in UK

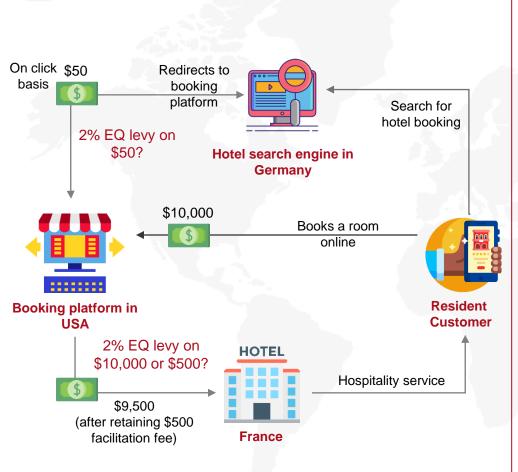


Case Study – Hospitality Services



- Booking is done by an Indian Resident (from India) on the website owned and operated by the US Hotel Chain
- Payments made by the Indian user using the website itself
- US hotel should be able to identify such payments chargeable to EQ Levy subject to turnover limits of INR 20 million
- Even if the property is situated outside India and all hospitality services are rendered outside India, this transaction would get covered under the new Equalisation Levy provisions
- It is also not clear if the term 'online' refers only to the contract of sales/ service being concluded through an online facility, or includes delivery/ provision of sale/ service through online means
- Online "provision" of service vis-à-vis online "rendition" of service – Whether principles from Sec 10AA be borrowed to determine if rendition of service online is a pre-requisite or only online contracting of service?

Case Study – Hospitality Services



Under GST laws, Hon'ble Maharashtra Authority of Advance Rulings has taken a view in case of Sadashiv Anajee Shete [Advance Ruling dated October 23, 2018] that GST in case of an e-commerce operator would be applicable only on amount of net commission

- Indian Resident customer searches for a hotel on a travel search engine
- Travel search engine redirects the customer to an online booking platform
- Customer books a room online on such platform and payment is also done via such platform

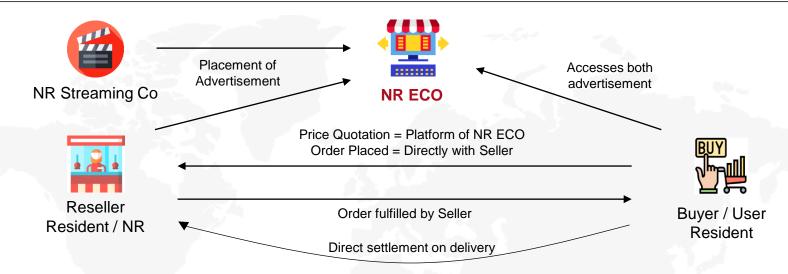
Leg 1- Transaction between customer & booking platform - EQ to apply on gross consideration, including hotel charges or only on listing fee?

 EQ is charged at a percentage lower than TDS rates as per IT Act. Drawing parallel from international tax levies such as DST of France and also from the recommendations of e-commerce committee, a fair view would be to apply 2 percent on full value (subject to turnover test of INR 20 million)#

Leg 2- Transaction between booking platform & search engine

 EQ levy should apply (subject to turnover limit of INR 20 million) - Covered under "specified circumstances" as sale of advertisements targeting Indian customers

Case Study – Facilitation and Advertisement



- NR ECO, primarily is a marketplace for resellers but also hosts "advertisement only" for others
- NR ECO provides Platform where reseller & buyer meet, ie first point of contact
- Primary price quotation for product is placed on platform of NR ECO
- Neither order is placed nor payment is settled via NR ECO

Reseller



NR ECO

- NR ECO Provides Facilitation
- No Consideration received by NR ECO from customer for facilitation
- Clarity on EQ Levy on such facilitation to be levied is needed
- EQ Levy on NR ECO as it earns advertisement revenue targeting Indian Customer
 - 6% Reseller is resident
 - 2% Reseller is NR

Reseller ←→



Buyer

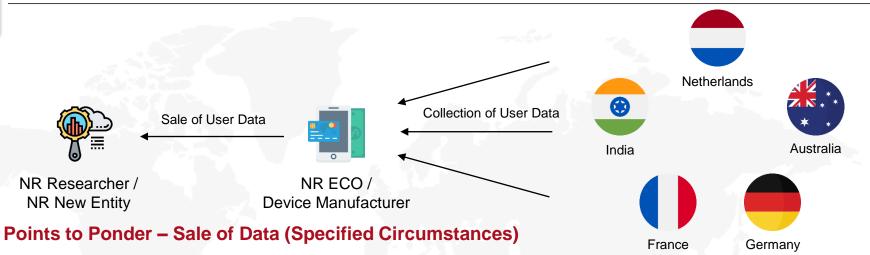
- Supply of goods / services by NR
- Is it an online supply?
- Is Digital Platform involved?
- Is Turnover INR 20 million crossed?

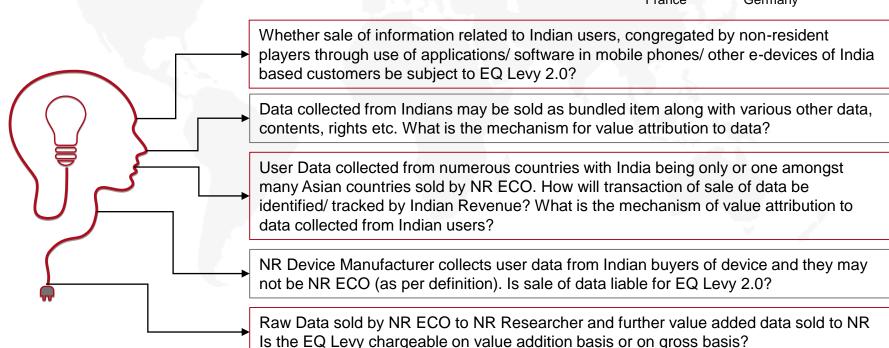
NR Streaming Co ← NR ECO

NR ECO – Hosts numerous advertisements targeting Indians

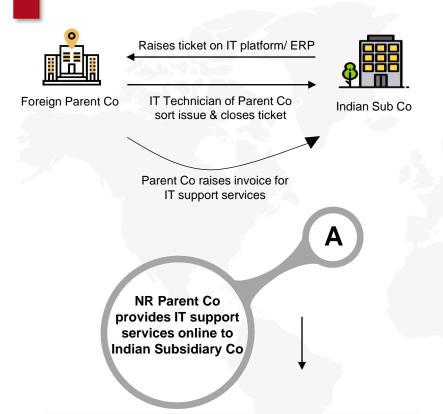
- 6% Reseller is resident
- 2% Reseller is NR

Case Study – Value attribution to data

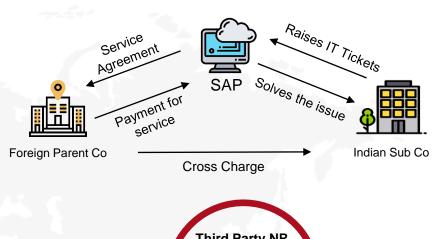


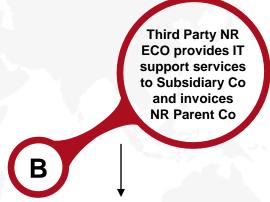


Case Study – Inter Co Support Services



- Services performed through electronic/ digital platform/ facility
- Online provision of services to Resident
- Consideration received from Indian Sub Co
- EQ Levy at 2 percent chargeable as parent Co could be considered satisfying the definition of NR ECO
- Same principles should apply for use of inhouse ERP or document management/ storage systems





- Agreement of service is between NR ECO and NR Parent Co
- Appropriate amount is cross charged by Parent Co to Indian Sub Co
- Underlying infrastructure is under the control of the third-party NR ECO
- Reimbursements received by Parent Co should not be liable for EQ Levy as Parent Co may not be considered as NR ECO

Case Study – Partnership with Indian ECO

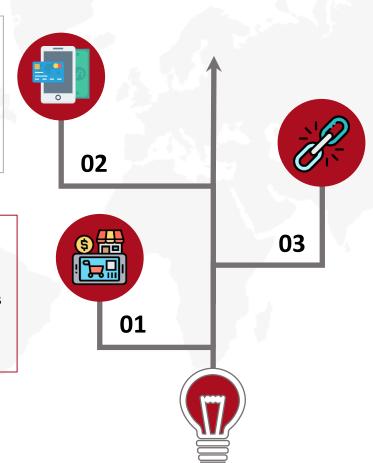
Amidst Covid-19 pandemic, India witnessed the largest FDI in country's tech sector apart from being the largest investment for minority holding by a technology company in the month of April 2020

NR Social Media

- Provides a platform for easy access to Indian ECO platforms
- High connectivity & reach up to last mile
- Faster approval of regular orders
- Easy tracking of order delivery

Indian ECO

- Provides only marketplace / facilitates the supply & does not own the goods or provide services
- However lack in connectivity & reach both in terms of local supplier and customers



EQ Levy??

- NR Social Media ECO
 - . Has digital platform
 - ii. Online supply of service
- Facilitation of supply is indirect as not provided to retailer but another ECO
- Regarded as online provision of service and not supply of goods
- EQ Levy should be chargeable for online provision of service
- Conclusive position could be taken only once transaction and business model is sealed (Integration or collaboration)
- RBI mandate that all data related to payments should be stored only in Indian systems, besides forthcoming Data Protection Law





Bird's eye view - Equalisation Levy 1.0 vs 2.0

Particulars	EQ Levy 1.0	EQ Levy 2.0
Trigger for levy in India	Non-resident service provider engaged in providing specified services	 Non-resident e-commerce operator who owns, operates or manages digital or electronic facility or platform in connection with India operations Non-resident who sells advertisement to another non-resident which targets an Indian resident customer or a customer who accesses the advertisement through internet protocol (IP) address located in India Non-resident who sells data, collected from an India resident person or from a person who uses IP address located in India
Specified services/ transactions on which levy is applicable	 Online advertisement Any provision for digital advertising space Any provision of facility or service for online advertisement Any other service which may be notified later by the central government 	 Online sale of goods owned by e-commerce operator or services provided by operator Online sale of goods or provision of services facilitated by the operator Any combination of the above
Rate of levy	6%	2%
Person responsible for compliance or person obligated to pay levy in India	Payer/ Buyer	Recipient/ Non-resident e-commerce operator

Bird's eye view - Equalisation Levy 1.0 vs 2.0

Particulars	EQ Levy 1.0	EQ Levy 2.0		
Specified persons / buyers to trigger levy	 Any person resident in India and carrying on business or profession Non-resident having a PE in India 	 Any person resident in India Any person who buys goods or services or both using IP address located in India Any non-resident in respect of offshore purchase of advertisement, data as mentioned above 		
Exemptions from levy obligation	 Non-resident has a PE in India and specified services (as above) are effectively connected to PE in India Aggregate value of consideration for specified transactions do not exceed INR 0.1 million in a FY Where payment is not for the purpose of carrying out business or profession 	 Non-resident e-commerce operator has a PE in India and e-commerce transaction is effectively connected to PE in India Aggregate value of consideration for specified transactions do not exceed INR 20 million Where EQ Levy 1.0 is levied on services 		
Exemption from levy of income tax in India if the income is subject to EQ levy in India	Yes, service income which is otherwise taxable under income tax would be exempt in the hands of non-residents in India			
Compliance Provisions from Sec 167 to Sec 180 of Finance Act 2016	Provisions relating to filing & processing of annual statement, interest and penalty for non-deduction or delay in remitting EQ Levy, refund of EQ Levy, rectification of mistakes, litigation proceedings and others are amended to include EQ Levy 2.0			





TDS on e-commerce transactions (Sec 194-O)

Finance Act 2020 has widen the scope of TDS on e-commerce transactions by inserting new provision (Section 194-O) to levy TDS at the rate of 1 percent, effective from October 1, 2020



Applicability

- e-commerce operator (resident or non-resident of India) liable to deduct TDS @ 1 percent on gross amount of sales or services or both paid or payable to a resident e-commerce participant
- Tax to be deducted at the time of credit or payment (whichever is earlier)
- TDS rate 5 percent for non-PAN/ non-Aadhaar cases



Non-Applicability

- e-commerce participant is a non-resident
- Individual/ HUF e-commerce participants, where gross amount of sales through e-commerce operator during the PY does not exceed INR 5 lakhs (PAN/ Aadhaar needed)
- On amounts received or receivable by an e-commerce operator for hosting advertisements

e-commerce operator deemed to be person responsible for paying e-commerce participants

Services includes fees for technical services and fees for professional services as defined in Expl to Sec 194J

Electronic commerce

supply of goods or services or both, including digital products, over digital or electronic network

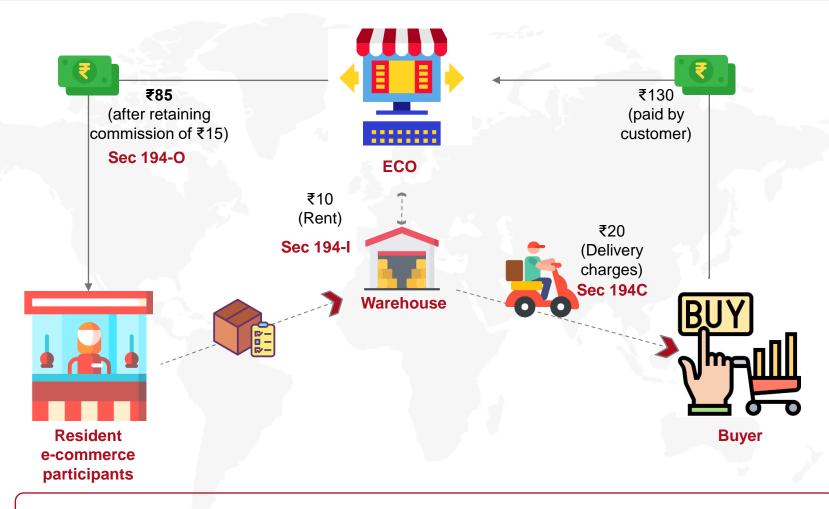
e-commerce participant

A person **resident** in India selling goods or providing services or both, including digital products, through digital or electronic facility or platform for electronic commerce

e-commerce operators

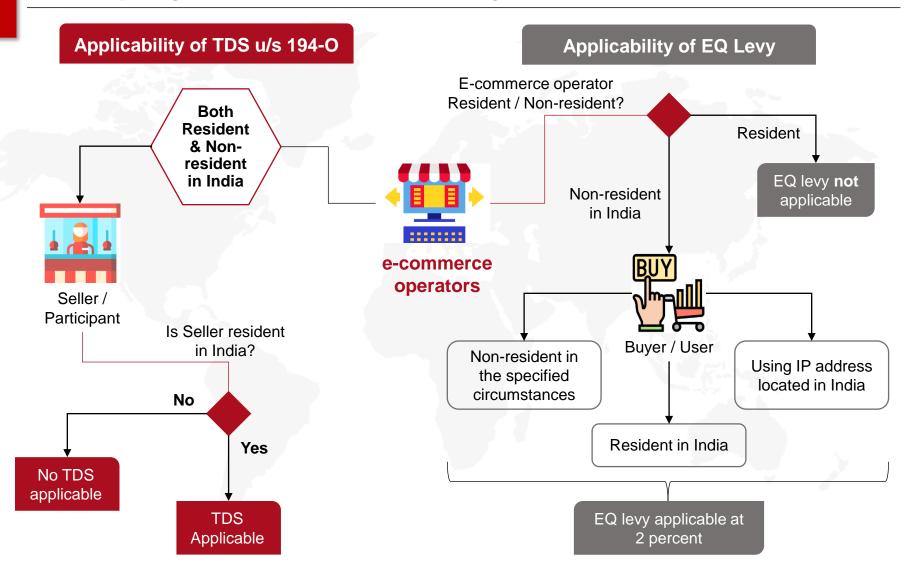
Any person who **owns**, **operates or manages** digital or electronic facility or platform for electronic commerce

Illustration for streams of revenue



Equalisation Levy and Section 194-O are new boys in the town!

Interplay between EQ Levy 2.0 and Sec 194-O



Interplay between EQ Levy 2.0 and Sec 194-O

		The second secon	
E-commerce Operator	Seller/ Participant	Withholding under Section 194-O	EQ Levy 2.0 applicable?
Resident	Non-resident	No	No
Resident	Resident	Yes	No
Non-resident	Resident	Yes	Yes
Non-resident	Non-resident	No	Yes

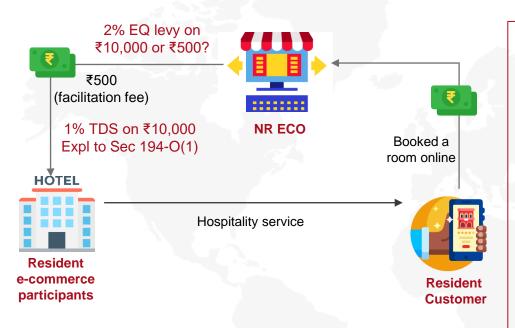
Specified circumstances

Sale of advertisement, which targets customers, resident in India or customers who accesses the advertisement through IP address located in India

Sale of data, collected from a person who is resident in India or from person who uses IP address located in India

It is not free from doubts whether transactions between two non-residents (pure offshore transactions) could create a nexus with India, merely because advertisements target Indian customers. Even under Goods and Services Tax when online services (Online Information Database Access and Retrieval) are provided to customers located in India, there are multiple criteria that needs to be satisfied for nexus to be established with India. Such criteria has not been mentioned for these new Equalisation levy provisions except for the mention of IP addresses or that the customer is a resident in India. Mere accessibility of a website or advertisement is internationally understood to be inadequate to create taxable nexus in a country and such a view is also supported by Indian jurisprudence as well. Also, even the sale of data, relating to a person resident in India, between non-residents should not be considered to having any nexus with India. To that extent, the constitutional validity of new Equalisation Levy provisions may need to be examined in detail.

Case Study



- Booking is done by an Indian Resident (from India) on a NR travel website for a hotel situated in India (Indian e-commerce participant)
- Payments made by the Indian user on website itself
- Would TDS under Section 194-O at the rate of 1% apply?
- Yes, TDS under Section 194-O at the rate of 1% would apply on gross amount
- EQ levy at the rate of 2 percent would separately apply on this consideration received by the NR travel website

Thank you

Sandeep Jhunjhunwala
Director
Nangia Andersen LLP
sandeep.jhunjhunwala@nangia-andersen.com
+91 80 2228 0999

The opinions and analyses expressed herein are subject to change at any time. Any suggestions contained herein are general, and do not take into account an individual's or entity's specific circumstances or applicable governing law, which may vary from jurisdiction to jurisdiction and be subject to change. No warranty or representation, express or implied, is made by us, nor does the Firm accept any liability with respect to the information and data set forth herein. Distribution hereof does not constitute legal, tax, accounting, investment or other professional advice. Recipients should consult their professional advisors prior to acting on the information set forth herein.

© 2020 Nangia Andersen LLP. All rights reserved.

