



# Equalisation Levy – Taxing the Digital Economy

## Overview and Applicability

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# Background – Tax Challenges of Digital Economy

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The increase in potential of digital technologies and reduced need for extensive physical presence to carry out business raises questions as to **whether the current rules to determine nexus with a jurisdiction for tax purposes are appropriate**

The growth in sophistication of information technologies has permitted digital economies to gather and use information across borders. This creates issues of **how to attribute value created from generation of data through digital products and services.**

Limitation of traditional PE definition requiring physical presence; double non-taxation due to lack of taxation in source jurisdiction and residence jurisdiction pose threat on taxation of digital economy

# What is Equalisation Levy?

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- ✓ To address the tax challenges of digital economy, G20 / OECD BEPS Action Plan 1 has proposed introducing an equalisation levy to serve as a way to tax a non-resident enterprise's **Significant Economic Presence** in a country
- ✓ India has first introduced Equalisation levy (EL) in 2016 @ 6% on online advertising revenue earned by non-residents
- ✓ This scope is expanded in 2020 to levy EL on **E-commerce Transactions** w.e.f. 01 April 2020. EL on e-commerce was introduced by way of Amendment to Finance Bill, 2020
- ✓ The E-Commerce EL will apply at the **rate of 2%** on the gross consideration received or receivable by the non-resident e-commerce operator from specified transactions where such receipts exceed **INR 2 crores** during the FY

## Wide definition of E- commerce Operator & E- commerce Supply of services

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- ✓ **“E-commerce operator”** means a **non-resident** who owns, manages or operates **digital or electronic facility** or platform for **online sale of goods** or **online provision of services** or both
  
- ✓ **“E-commerce supply of services” (ESS)** means:
  - **Online sale** 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 activities listed above
  
- ✓ **“Online”** is defined as a 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 of ESS EL

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- ✓ As per the provisions, EL shall be applicable only where the e-commerce operator provides or facilitates ESS to any of the following persons:
- Person resident in India; or
  - Person who buys goods or services or both using IP address located in India; or
  - A non-resident in certain situations:
    - Sale of advertisement which targets a customer who is a resident in India or a customer who accesses the advertisement through IP address located in India
    - Sale of data collected from a person who is a resident in India or a person who uses IP address located in India

## Exclusions to ESS EL

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There are certain exemptions provided in the EL provisions. As per Section 165A(2) of FA 2016, ESS EL shall not be charged in the following situations:

- ✓ Where the e-commerce operator has a permanent establishment in India and such ESS is effectively connected with such permanent establishment;
- ✓ Where the equalisation levy is leviable on online advertisement and related activities;
- ✓ Sales, turnover or gross receipts, of the e-commerce operator from the ESS made or provided or facilitated is less than INR 2 crores during the FY

Income which is subject to EL will be **exempt from Income-tax** under the provisions of the Indian Income-tax **from FY 2021-22**

## Compliances under Income- tax Act

- ✓ The ESS EL @ 2% shall be paid by the e-commerce operator and not as a withholding tax by the payer.

Example – Where a US Company (a non-resident e-commerce operator) in a digital platform or facility, it will have to make payment of EL to the Government of India

- ✓ The EL is required to be deposited by the e-commerce operator to the credit of Govt of India on a quarterly basis as per the due dates mentioned in table below:

- ✓ Also, every person subjected to ESS EL is required to furnish an annual EL statement on or before 30<sup>th</sup> June of each year

| Quarter ending | Due date                 |
|----------------|--------------------------|
| 30 June        | 07 <sup>th</sup> July    |
| 30 September   | 07 <sup>th</sup> October |
| 31 December    | 07 <sup>th</sup> January |
| 31 March       | 31 <sup>st</sup> March   |



## Penal consequences under Income-tax Act

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### **Consequences on failure to pay EL:**

- ✓ Any delay in payment would be subjected to simple interest @ 1% pm for period of delay
- ✓ Any default in payment may result in a penalty equal to EL in default

### **Consequences on failure to file Annual EL Statement:**

- ✓ Failure to furnish statement as mentioned above shall attract a penalty of INR 100/- for each day of default
- ✓ Where a false statement has been filed, the e-commerce operator may be subjected to imprisonment of up to 3 years and fine

## Uncertainties in ESS EL

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### Consideration:

- ✓ Whether indirect taxes to be included in consideration?
- ✓ Discount / cash backs to be included in consideration?
- ✓ Sales Return adjustment (particularly in last month of quarter / year) – How to treat them?
- ✓ If EL on initial INR 2 crores is charged after crossing the threshold, can interest be levied for delay in payment of EL? And Penal consequences on the same?
- ✓ The threshold is qua e-commerce operator or qua each buyer or service recipient

## Uncertainties in ESS EL (contd)

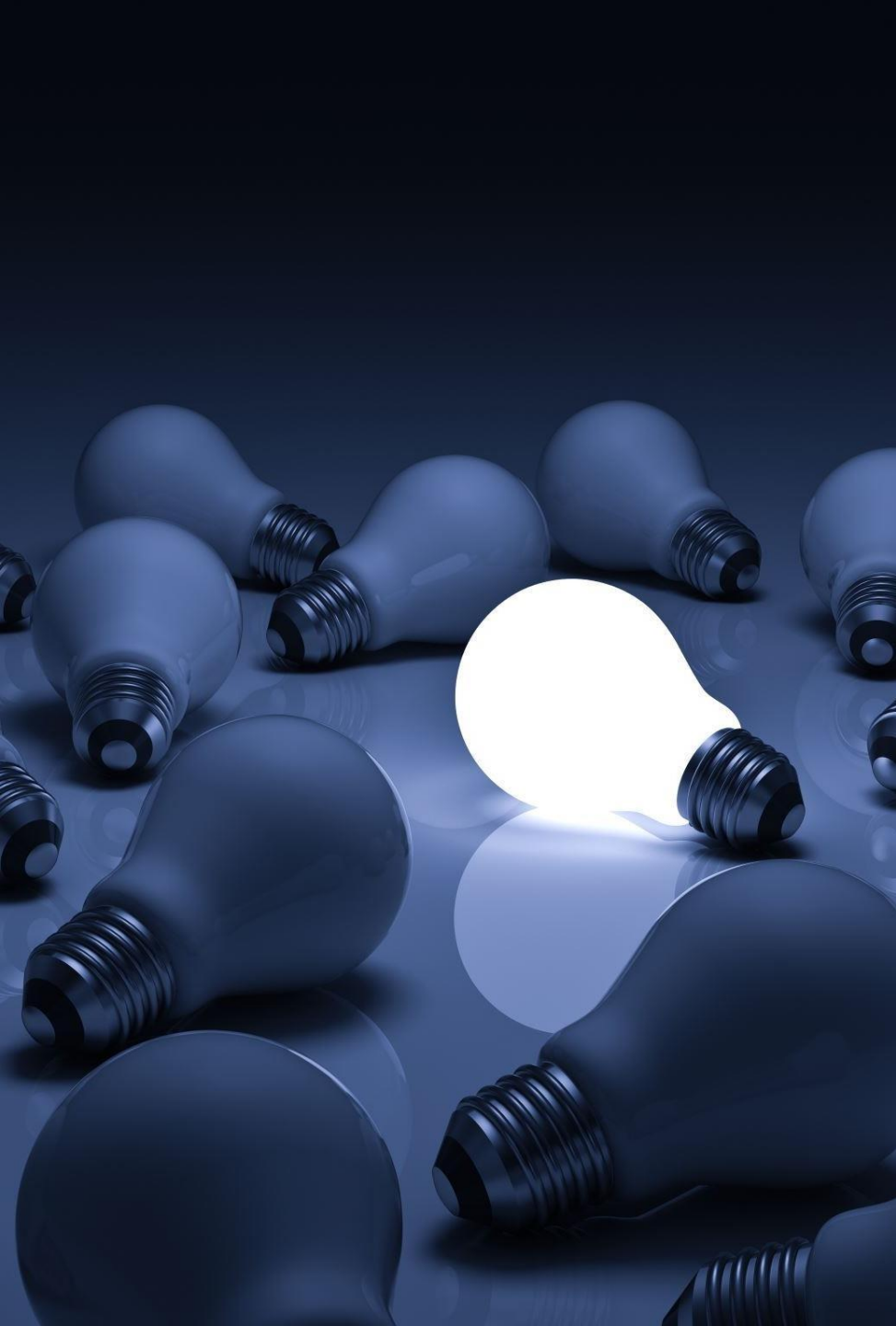
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### Exemption from Income-tax (Section 10(50)):

- ✓ The amended S.10(50) states that any income arising from ESS made or provided or facilitated **on or after 01 April 2021** and chargeable to EL shall be exempt from Income-tax
- ✓ However, ESS EL shall be applicable from **01 April 2020**
- ✓ In conclusion, while ESS EL is applicable from 01 April 2020, exemption is available from FY 2021-22? Chances of double taxation during FY 2020-21?

### Credit of EL:

- ✓ Whether credit of EL paid shall be available in the country of residence?



## Concluding Remarks

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- ✓ Top technology companies across the globe have expressed concerns over the new levy as the effective time for complying with the new levy is too short with many clarifications needed
- ✓ Even the existing systems may need overhaul as IP address need to be tracked while providing services
- ✓ Considering current COVID situation and the uncertainties discussed earlier, several representations have been made to defer the implementation of levy or provide clarifications
- ✓ However, the Government has recently in July 2020, modified the challan for payment of EL to include Non-resident ESS
- ✓ **Hence, Companies would need to evaluate in detail the implications of this amendment to be compliant and avoid penal consequences**



# How can SBC help

Our Value proposition

## How can we help

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### EL Applicability

- ✓ Analyze the transactions to see if EL would impact your current business transactions particularly where income is being received from Indian companies (viz., provision of software services, etc.)
- ✓ Review of agreements and documentation to evaluate the extent of applicability of EL and advise any mechanism to minimize tax leakage
- ✓ Evaluate business models, mode of contracting and delivery of goods / services

### COMPLIANCES

- ✓ Assisting in calculating quarterly EL to be paid by NR company
- ✓ Assisting in obtaining PAN in India
- ✓ Assisting in annual filing of EL returns

# CONTACT US

For more details please logon to <http://www.steadfastconsultants.in>



## HYDERABAD

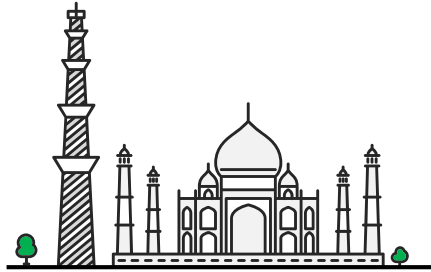
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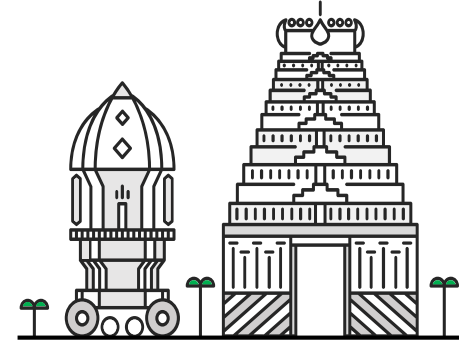
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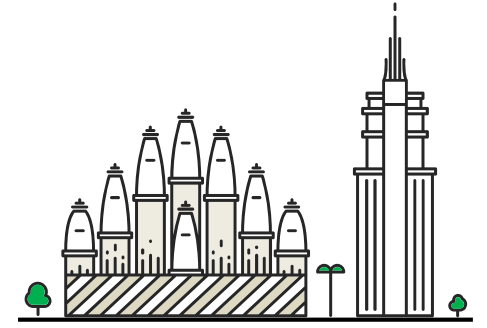
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# THANK YOU

