

India extends Equalization Levy scope to cover e-commerce supplies or services

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Executive summary

The Union Budget of India 2020 introduced an amendment to expand the scope of the Equalization Levy (EL) to cover consideration received by nonresident e-commerce operators (e-com EL) from specified transactions. The e-com EL provisions are effective from tax years commencing on or after 1 April 2020 at the rate of 2% on consideration received or receivable by a nonresident e-commerce operator from specified transactions if such receipts exceed INR20 million (US\$265,000) during the relevant tax year. While the e-com EL provisions are applicable from 1 April 2020, income of a nonresident e-commerce operator arising from a transaction which is subject to e-com EL is only exempt from income tax from tax years commencing on or after 1 April 2021.

The wide scope of the e-com EL is likely to have an impact on a number of multinational enterprises (MNEs), irrespective of whether they are operating highly digitalized business models, given the increasingly pervasive nature of digitalization. The procedures relating to the collection and recovery of the e-com EL are expected to increase compliance obligations for nonresident e-commerce operators in India. Consequently, MNEs should undertake a detailed assessment of the implications of the impact of the e-com EL on their operating models and monitor their compliance obligations.

Detailed discussion

Background

Under Action 1 (*Addressing the Tax Challenges of the Digital Economy*) of the Organisation for Economic Co-operation and Development's (OECD) Base Erosion and Profit Shifting (BEPS) Project, the OECD had considered, inter alia, an EL (i.e., a tax to equalize the tax positions of remote and domestic suppliers of similar goods and services) as an option to taxing digital transactions. While the Action 1 Report¹ did not recommend introducing such a levy as an internationally agreed standard, it did state that countries could introduce a levy in their domestic laws as an additional safeguard against BEPS, provided existing treaty obligations were respected, or the levies were included in bilateral tax treaties. In India, the *Finance Act, 2016* (FA 2016) introduced an EL with effect from 1 June 2016. The EL, as introduced by the FA 2016, is collected from the payer at 6% on the consideration received by nonresidents for online advertisements and related services from specified persons (advertising EL).

The Union Budget 2020 expanded the scope of the EL to cover consideration received by nonresident e-commerce operators from specified transactions (the e-com EL), effective from tax years commencing on or after 1 April 2020. Whether the e-com EL is consistent with India's international obligations under existing tax treaties is not clear.

Key provisions of the e-com EL

The EL is levied on nonresident e-commerce operators at 2% of the consideration received or receivable for specified transactions.

An "e-commerce operator" is defined as a nonresident who owns, operates or manages digital or electronic facilities or platforms for the online sale of goods or online provision of services (or both).

"Specified transactions" are e-commerce supplies or services made or provided or facilitated by a nonresident e-commerce operator to any of the following:

- ▶ A person resident in India
- ▶ A nonresident to whom an advertisement which targets an Indian resident customer or a customer who accesses the advertisement through an internet protocol (IP) address located in India is sold
- ▶ A nonresident to whom data collected from an Indian resident or from a person who uses an Indian IP address is sold

- ▶ A person who buys such goods or services or both using an IP address located in India

Exclusions from the e-com EL

The e-com EL is not applicable if one of the following conditions is met:

- ▶ The nonresident e-commerce operator has a permanent establishment (PE) in India and the specified transaction is effectively connected to such a PE in India.
- ▶ The aggregate value of consideration for specified transactions does not exceed INR20 million.
- ▶ The advertising EL is levied.

Service or sales income of a nonresident which is otherwise taxable under the Indian tax laws (ITL) will be exempt from 1 April 2021 in the hands of the nonresident in India, if such income is subject to the e-com EL. Consequently, there appears to be a mismatch between the effective date of e-com EL provisions and the exemption provisions under the ITL.

Compliance obligations of the e-com EL

The e-com EL provisions introduce the following reporting and compliance obligations for nonresident e-commerce operators:

- ▶ Payment of the e-com EL on a quarterly basis by the applicable due dates.
- ▶ Requirement to maintain and furnish annual statements in respect of all e-com EL levies on or before 30 June of the following Indian financial year.

Failure to comply with the e-com EL provisions (such as the failure to deduct or pay the e-com EL) will attract interest, penalties and prosecution proceedings similar to the ITL.

Unlike the advertising EL, the new levy imposes collection and other compliance obligations on the nonresident e-commerce operator and not on the payer of the consideration.

Implications

Since the release of the OECD Final Report on Action 1 of the BEPS Project in October 2015, India has considered various unilateral measures to address the broader tax challenges posed by the digitalization of the economy. The expansion of the EL by the FA 2020 to cover e-commerce supplies or services provided or facilitated by nonresidents is another such measure.

The e-com EL amendment expands the scope of the EL significantly to cover a wide range of sale, service and facilitation transactions that are conducted online through a digital or electronic facility or platform by nonresident e-commerce operators, including advertisements targeting India or the sale of data collected from India. The provision is intended to target not only highly digitalized business

models, but also a number of other MNEs that use technology to carry out sales and/or services. Given the increasingly pervasive nature of digitalization, a wide scope was enacted in an effort to respond to the broader impact of the digitalization of the economy. MNEs should assess in detail the implications of the e-com EL on their operating models and monitor their compliance obligations.

Endnote

1. Released in October 2015.

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