

## India's Finance Bill 2021 clarifies scope of e-commerce Equalization Levy

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India's *Finance Act 2020* (FA 2020) expanded the scope of the digital tax levy known as the Equalization Levy (EL) to cover "e-commerce supplies or services." EL covers a range of digital transactions including business-to-business (B2B) transactions, business-to-consumer (B2C) transactions, e-commerce marketplaces and digital services.

With effect from 1 April 2020, EL is chargeable at the rate of 2% on consideration received or receivable by nonresidents who operate digital businesses targeting, among others, the India market. EL exists as a separate levy alongside the Goods and Services Tax (GST) on cross-border transactions and hence it is an incremental cost of doing business.

Clarification was sought by various stakeholders on several aspects of the EL provisions as amended by FA 2020. In this regard, the Finance Bill 2021 (FB 2021), which was presented on 1 February 2021 by the Finance Minister of India, proposes certain clarifications **with retrospective effect from 1 April 2020**.

Presently the amendments are at the proposal stage and will become a part of the income tax law once enacted (this is expected sometime in March 2021). The amendments include:

1. Consideration in the nature of royalty and fees for technical services (FTS), which is taxable under the *Income Tax Act* read with Double Tax Avoidance Agreements, will not be subject to EL. Thus, royalty and FTS income will continue to be charged at 10% (plus applicable surcharge and cess) on a gross basis and will not be chargeable to EL.
2. The scope of the terms “online sale of goods” and “online provision of services” will cover **any** of the following activities if undertaken online:
  - ▶ Acceptance of an offer for sale
  - ▶ Placing a purchase order
  - ▶ Acceptance of a purchase order
  - ▶ Payment of the consideration
  - ▶ The supply of goods or provision of services, partly or wholly

This proposed amendment may broaden the applicability of EL provisions even to physical/offline supplies of goods and services if any one of the above activities has taken place online.

3. E-commerce operators are currently subject to EL at 2% on the amount of consideration “received or receivable.” A clarification has now been provided through an amendment that such consideration will include:

- ▶ Consideration for sales of goods irrespective of whether the e-commerce operator owns the goods
- ▶ Consideration for the provision of services irrespective of whether the service is provided or facilitated by the e-commerce operator

This amendment may raise a question on the position adopted by the nonresident aggregators/intermediaries that EL liability should be restricted only to the remuneration/fees earned by them for facilitation/intermediation, and not the entire consideration received in respect of sale of goods/ provision of services.

4. Income arising from transactions subject to EL were exempt from the income tax with effect from 1 April 2021. Thus, for FY 2020-21, there was a mismatch in the effective dates of EL and the corresponding income tax exemption. It has been proposed to remove this anomaly in order to grant the income tax exemption with retrospective effect to 1 April 2020.

Since these provisions will take effect retrospectively from 1 April 2020 (once they become part of the law), it may be advisable for nonresidents with business operations in India to examine and re-evaluate the implications of these changes, for example, whether changes should be made to the commercial arrangements and determining their compliance obligations.

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For additional information with respect to this Alert, please contact the following:

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