

EQUALISATION LEVY: NEED FOR CLARITY

Relevant for: Indian Economy | Topic: Issues relating to Growth & Development - Public Finance, Taxation & Black Money incl. Government Budgeting

As equalisation levy provisions are not part of the income-tax law, tax treaty benefits may not be available; correspondingly credit for EQL may also not be available in the home country

It has been nearly a year since the scope of equalisation levy (EQL) was widened to include a 2% levy on consideration received or receivable by a non-resident e-commerce operator from e-commerce supply or services. Several questions have since cropped up, and various interpretational issues have arisen, pursuant to the widening of the EQL provisions. Although there was widespread expectation that the Central Board of Direct Taxes will clarify these issues, it has not happened so far. Some key issues that need clarity are discussed below.

Scope of the EQL provisions

The concept of EQL is not unique, and many countries have introduced a digital services tax. However, what sets the Indian EQL apart from other similar levies is the potential wide scope of its coverage.

The biggest challenge faced in the interpretation of the EQL law is the term 'online provision of services'. The language appears to suggest that the services have to be provided online (unlike sale of goods where the focus appears to be contracting online). This has created much uncertainty for service providers, especially where the contracting is online, but the actual provision of services is offline.

A related issue is the 'consideration' on which the EQL is to be levied. In case of e-commerce operators who facilitate online sale of goods/provision of services, the question arises whether EQL is applicable on the entire consideration received, or only on the facilitation fee earned by the e-commerce operator. Moreover, there is no clarity on whether indirect taxes are to be included or excluded for EQL, how does one deal with the reversal of income or bad debts, or whether the EQL is triggered at the time of raising invoice, provision of services/ transfer of goods, receipt of consideration, etc.

Another key issue is around the usage of the term 'digital or electronic facility or platform' – neither the EQL law nor the income-tax law defines or explains this term. In normal parlance, it could cover emails or calls (i.e. one-to-one communication). There is clearly a need to clarify that digital or electronic facility or platform refers to medium of mass communication or one-to-many communication with a large outreach.

One of the challenges facing multinational groups that have Indian entities, is that given the all-encompassing language of EQL, intra-group transactions that have an 'online' element may also be said to attract EQL – this may not be the legislative intent.

The wide scope of EQL 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 EQL. 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 EQL – 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 EQL net.

Potential double taxation

The expanded scope of EQL is applicable from 1 April 2020, and to avoid double taxation the income-tax law provides for tax exemption on income subject to EQL. The exemption is however applicable from 1 April 2021, leading to possible double taxation during financial year 2020-21.

Independent of the above, foreign companies may face challenges going forward in view of long-drawn litigation, as they may potentially be liable to EQL as well as suffer withholding tax on payments by Indian entities. One such taxpayer had to approach the High Court for relief from EQL, where the taxpayer was held by the Authority of Advance Rulings to have a permanent establishment (PE) in India.

The EQL law provides that the provisions will not be triggered if the e-commerce operator has a fixed place PE in India. However, there is no clarity if the operator has an agency PE or service PE in India – this may again result in double taxation.

Lastly, as EQL provisions are not part of the income-tax law, tax treaty benefits may not be available; correspondingly credit for EQL may also not be available in the home country.

Conclusion

The foregoing discussion clearly indicates that there are several areas on which clarity is needed from the government. To compound the problem, there is no option for a non-resident to obtain an advance ruling on the applicability or otherwise, of the EQL provisions, based on its specific fact pattern. There is clearly an urgent need for these issues to be addressed in the 2021 Budget.

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