Issues outside the scope of DTAA

- CA K Prasanna

Equalisation Levy

Equalisation Levy – Committee's recommendation

Objectives of EL

- To address the base erosion faced in digital economy from limitations of existing international taxation rules. Payments made for purpose of business is allowed as deduction and the income is not taxable due to existing tax rules;
- To reduce unfair advantage enjoyed by a multinational digital enterprise over its Indian competitors;
- To provide greater certainty and predictability with regard to taxation of payments for digital services by way of a stable tax regime;

Other aspects

- The EL should be limited to the payments made for intangible services, including for use or right to use intangible, access a digital, telecommunication or similar network (para 131)
- Committee had listed 13 categories of payments may be subjected to EL (para 135)

It will not be levied on goods imported	Not necessary to chargeable on all e-commerce transactions	Payments subject to EL shall be exempt from income-tax	Outside Income-tax – Not a tax on income
No FTC – India may have reciprocal agreement	Currently, some payment may be taxes Royalties and FTS	Broad categories would lead to greater uncertainty	EL will satisfy the test of constitutional validity

To the extent possible, the categories of payments that would be subjected to EL should be listed clearly. The Committee also took into account this possible overlap with taxation as royalty or fee for technical services it is the considered view of the Committee that bringing such payments under the purview of EL, as included in the list above, and the consequent exemption of income under the Act, will bring about more certainty, predictability and stability to the tax regime, reduce costs of compliance as well as administration, and could significantly contribute to reducing tax litigation

EL 1.0

Applicability

- Specified Service provided to
  - Indian resident carrying on business
  - NR having PE in India
- Aggregate value of consideration exceeding INR 100,000

Key Consideration

- Credit of consideration in home country?
- Compliance to be undertaken by Resident Payer

Specified Services

- Online Advertisement
- Any provision for digital advertising space
- Any other facility or service for the purpose of online advertisement
- Any other notified services

Exclusions

- NR Services having PE in India and such services are effectively connected with PE
- Services are utilized for a purpose other than business

Payer is required to deduct EL at 6% on amount paid/payable

Equalisation Levy – Version 2.0

Taxable event for EL

EL shall be levied @ **2%** on consideration received or receivable by **e-Commerce operator** from **e-Commerce supply or services** made or provided or facilitated to:

- a person resident in India

or

- a person who is non-resident in India and undertakes:
  - Sale of advertisement which targets a customer who is a resident in India or a customer who accesses the advertisement through Internet Protocol address located in India
  - Sale of data collected from a person who is resident in India or from a person who uses Internet Protocol address located in India

or

- A person who buys such goods/services/both using IP address in India

e-Commerce Operator

1. A non-resident who owns, operates or manages
2. a digital or electronic facility or platform
3. for online sale of goods or online provision of services or both

e-Commerce supply or services

Online sale of goods owned by the e-commerce operator (expanded further by FA 2021)

or

Online sale of provisions 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 other combination of the above

Exclusions to EL

a) Where e-Commerce operator making/providing/or facilitating e-Commerce supply or services has a Fixed place **PE in India & such e-Commerce supply or services is effectively connected with such fixed place PE in India.**

b) Where Equalisation levy is chargeable under Specified services – online advertisement or provision of digital advertising space

c) Sales or turnover or gross receipts from e-Commerce supply or services is less than INR 20 Million during the previous year.

'Online'

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

Exemption from Income-tax

Income arising from any e-commerce supply or services provided / facilitated is exempt from income-tax

Equalisation Levy 1.0 v. 2.0

Coverage	Introduced vide Finance Act 2016	Expanded vide Finance Act 2020
Scope of EL	NR providing online advertisement services/ digital space/facility or service for online advertisement	NR ECO providing E-com online supply of goods or provision of services or facilitation
Rate of EL	6%	2%
Obligation of EL	Resident/ NR (having PE in India) deduct while making payment to NR	NR ECO
Threshold for EL	Aggregate transaction value > INR 1 Lac in a FY (tested in the hands of the payer)	Aggregate transaction value >= INR 2 Crore, in a FY (tested in the hands of the NR ECO)
Exclusion	NR having PE in India and the specified services are effectively connected; Services not used for business or profession	NR Eco having PE in India and the specified services are effectively connected EL on online advertisement chargeable under EL (2016)

EL – Whether dual taxation?

Cross Border Double Taxation

- Taxation of specified transactions in India
- Denial of FTC in resident jurisdiction leading to jurisdictional double taxation

Dual Tax on transaction

- Equalization of levy on specified services
- IGST on OIDAR

Key aspects from BEPS AP 1

- OECD had recommended several measures to address challenges from Digital tax:
  - (i) Significant Economic Presence (Revenue and Digital Factor),
  - (ii) Withholding tax on certain digital transactions and
  - (iii) Equalization Levy

- Also discussed the aspect of Virtual Fixed PE through maintaining website/servers located in a source jurisdiction and earns income

- Para 302 – avoid difficulty arising from creating new profit allocation rules for the purpose of nexus based on SEP, an equalization levy could be considered as an alternative levy

- Para 307 and 308 – Conundrum between Corporate Tax and Equalization Levy and credit for taxes in resident state

- Respect treaty obligations when implementing any of the options

Whether EL is similar to income tax?

EL is income tax

- It is pursuant to measures addressed in AP 1 – issues arising from challenges from digital economy
- AP 1 as well as interim report suggest that the levies are interim measure. Even the recent commitment from inclusive framework group suggests that all interim measure will be rescinded post implementation of Pillar 1 and 2.
- Section 10(50) provides exemption in the hands of NR if the consideration is subject to EL
- EL is not applied in a situation where the NR has PE in India
- Royalty or FTS is also taxed on Gross basis of taxation in India and TDS is a final tax – similar to the structure of the EL
- EL could be regarded as surrogate to income-tax
- Committee report suggests that the purpose of EL is to maintain parity/neutrality between resident and non resident
- Disallowance for non-deduction of EL under Section 40(a)(ib)
- Section 161(d) of Finance Act – means 'tax' on transaction – Section 2(43) defined under the Income-tax Act

Whether EL is similar to income tax?

EL is income tax

- Budget Speech Finance Bill 2016 – to tap tax on income accruing to foreign e-commerce operator
- Committee Report – Para 125 – Profit not appropriately taxed; Page 101 – Possibility of reciprocal agreement

EL is not income tax

- It is not part of income-tax Act and levied through Finance Act
- As per the report of CBDT – it is not an income tax – Para 117 and 126
- Tax is levied on a transaction and not on person.
- Introduced to tackles transaction that are not subject to income-tax

Dividend Distribution Tax – 115-O vs DTAA

Dividend Distribution Tax – Whose liability

DDT is a tax on shareholder's dividend income but only paid by the Company

- Certain features of DDT may show that DDT is not a tax on income of dividend paying entity but on income
    - No relevance to assessment year but when dividend is declared;
    - Dividend is payable by the declaring company even there is no tax payable on total income (e.g. capital reduction, interim dividend)

- Supreme Court decision in Tata Tea Co. Ltd [398 ITR 260] (SC)

- Dividend is essentially a tax on shareholder collected from the distribution company on account of administrative convenience

- SSKI Investor Service (P) Ltd vs. DCIT (2009) (30 SOT 412) – DDT is a surrogate tax on dividend income received by the shareholder

DDT is a tax on the Company

- Language of Section 115-O – It is an additional tax on the distribution company

- Consequence of non-remittance of tax is on the Company and not on shareholders

- Supreme Court decision in the case of Godrej & Boyce (2017) 81 Taxmann.com 111

DDT vs DTAA

DDT rate can be reduced by the DTAA

- Manner of levy is impacted for application of the DTAA
- Taxation of income is pre-requisite and it does not depend on whose hand such income is taxed
- DDT levy is a tax on dividend income
- Views of Learned Author – Klaus Vogel. Impact of India-Hungary DTAA and MFN

DDT rate cannot be reduced by the DTAA

- Language of Art 10(2) does not support taxation in the hands of company
- 10(2) refers to dividend levied in the form of withholding taxes
- DTAA does not relieve ‘economic double taxation’
- Other countries position on dividend – Netherlands, Singapore, Mauritius etc

ITAT rulings (illustrative)

Favourable

- Giesecke & Devrient (India)Pvt Ltd vs ACIT – (2020) 120 taxmann.com 338 (Delhi ITAT)
- Indian Oil Petronas Pvt. Ltd [TS-324-ITAT-2021(Kol)]

Unfavourable

- Total Oil India Pvt Ltd [TS-473-ITAT-2021(Mum)] – Referred to Special Bench
- Volkswagen of South Africa (Pty) Ltd

Q & A