



IDIOT OUTSIDE

EQUALISATION LEVY UNDER FA 2016



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Legal Provisions

- Chapter VIII of Finance Act 2016
- Intention not to allow treaty benefit
- 6% levy to be recovered and paid while paying to non residents for online advertisement services



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Threshold

- 1 lakh INR for remittances by a resident remitter to a particular payee
- For clarification: there are **two way thresholds**:
 - (i) If the **non-resident** service provider receives less than Rs. 1 lakh, he is not liable to EL – section 162 (2) (b).
 - (ii) If the **resident** payer is paying less than Rs. 1 lakh, he is not liable to deduct EL at source – Section 163 (1).



Other provisions

- No computation
- Monthly payments
- No characterisation e.g. Business income, royalty, FTS etc
- No question of examining PE presence
- Even PE of non residents covered while remitting to non residents
- Annual return to be filed electronically
- Disallowance u/s 40(a) (ib) if not paid
- Once EL is paid, income of NR exempt u/s 10(50)



Compliance of EL – few Practical issues

- "specified service" means online advertisement, any provision for digital advertising space or any other facility or service for the purpose of online advertisement and includes any other service as may be notified by the Central Government in this behalf;
- "online" means 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;
- 'advertisement" not defined



Definitions

- Black's Dictionary

Notice given in a manner designed to attract public attention; information communicated to the public, or to an individual concerned, **by means of handbills or the newspaper**. Montford v. Allen, 111 Ga. 18. 30 S. E. 305; Haffner v. Barnard, 123 Ind. 429. 24 N. E. 152; Com. v. Johnson, 3 Pa. Dist. R. 222. A sign-board, erected at a person's place of business, giving notice that lottery tickets are for sale there, is an "advertisement," within the meaning of a statute prohibiting the advertising of lotteries. In such connection the meaning of the **word is not confined to notices printed in newspapers**. Com. v. Hooper, 5 Pick. (Mass.) 42.



Issues

- Whether service tax payable on reverse charge basis needs to be included in value liable to EL?
- Is there need for grossing up if not deducted while remitting, but borne by resident remitter
- Are following advertisement:
 - Sales Promotion Expenses
 - Marketing Expenses
 - Selling Expenses



Example: Ad aggregator in Switzerland

- Switzerland CO identifies various sites on which the advertisements / links of I CO can be arranged by them
- I CO approves such sites, and provides the material for advertisement (ad banners) / URLs (links) to Switzerland CO
- Switzerland CO releases such advertisements on the sites as agreed
- Switzerland CO is paid on a “per click” basis, and the number of clicks during a period are aggregated and the payment made by I CO to Switzerland CO.
- The payment made by I CO to Switzerland CO is the complete payment for the transaction, and the payment to the ultimate media / site on which the advertisement /link is arranged is made by Switzerland CO itself, with no further liability on I Co.
- Switzerland CO operates from Switzerland, and is a tax resident of that Country.

Example: Ad aggregator in Switzerland

- The work of identifying the sites and coordinating with them is done by Switzerland CO from Switzerland.
- The sites where the advertisements / links are arranged are having their servers outside India, and the work is expected to be done by Switzerland CO outside India. They have also confirmed that they do not have any Permanent Establishment in India though which the related work is done.



EL payable?

- Payment is for online advertisement
- Assume that the aggregator pays 70% of its revenue to the media sties, and retains 30% for itself.
- Whether EL payable of 70% or 100%
- If the Swiss company had a PE (agency PE – due to conclusion of contracts in India) in India, what will be the position qua EL?
 - I Co still pays to Swiss company by remittance.
 - No EL, as there is PE in India.
 - If 20 % of 30% is profits attributed to PE, tax thereon @ 40% will be 2.40 % of gross, i.e. less than 6%. Tax is creditable in Switzerland



Example : Hire a Cloud



- I Co obtains following services from US Co
 - Space on server of US CO as may be required by I Co from time to time.
 - Random Access Memory (RAM) on server of US Co as may be required by I Co from time to time.
 - Incidental Operating systems for enabling I Co to use the above as per its requirements.
 - Connectivity for enabling I Co and/or its customers/vendors to use the above.
- I Co uses the services either (i) to provide a platform from which its customers (through intermediaries such as mobile phone companies) download games; or (ii) for usage as a social networking site where its games are available for free usage to users. – advertisements of customers published on the site



Example : Hire a Cloud



Assume I Co remits to US co \$ 100,000 for the server space.

Assume that 25% of that space is used by I Co for publishing ads of its customers, and realizes \$ 200,000 as ad revenue.

Is I Co required to pay EL? If yes on what amount.



Payment by I Co for foreign subs

- I Co is having gaming platform in India and 9 African countries.
- I Co pays for online advertisements to overseas vendor. For getting better rates and volume discounts, ads of all 10 entities contracted with I co, rather than each individual entity.
- I Co remits full amount, but recovers prorata from the 9 entities.
- Whether EL payable on I Co share alone, or full remittance.



Listing on E Commerce sites

- I Co lists its products on an overseas site
- It pays listing fees – fixed @ INR 10,000 per month
- It also pays transaction fees @ agreed % of sale value of each successful transaction.
Assume such fees amount to INR 50,000 per month
- Which of the two payments will attract EL
- From which month will I Co have to pay EL



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