Equalisation Levy

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INTRODUCTION

Business in today's digital age is to a significant extent agnostic to geographical boundaries. New and innovative business models have the taxman grappling with numerous challenges regarding the taxing provisions of such transaction. The conventional approach of taxation based on physical presence of a business in a particular jurisdiction seems out dated.

The last decade has seen rapid influx of e-commerce and businesses based on digital models. Globally, the governments have constantly been exploring ways and means to tax such businesses. OECD is working on delivering a global tax overhaul to determine how much multinationals—especially tech giants—are taxed in the countries where they have users or consumers.

In the year 2016, the government of India, unilaterally and unequivocally, introduced "Equalisation Levy" through the Finance Act 2016, whereby it aimed to tax the revenue earned by non-residents (having no physical presence in India) from India by providing online advertisement services, digital advertising space or any other facility or service for the purpose of online advertisements.

The Government had deliberately not introduced the new levy through the Income Tax Act, 1961 as it would have been of no practical consequence as all the non-resident companies would have claimed treaty benefits and avoided the Equalisation Levy. This means that the non-resident will not be able to claim treaty benefits against the Equalisation Levy. The consequence of the same is double taxation of non-resident's income both in India (in the form of equalisation levy) as well as in the country of permanent establishment (as income tax).

LEVY OTHER THAN E-COMMERCE TRANSACTION

Levy	Levy is on consideration received or receivable by a non-resident for aforesaid transactions from- • A resident in India and carrying on business or professional • A non resident but having PE in India
Rate	6%
Person Liable to Pay Tax	The person paying the consideration is requiring the deduct the equalisation levy from the amount paid or payable and pay the tax. (However verbally grossing up is done).
Exemptions	• The non-resident providing specified service has PE in India and the services provided can be connected to PE • The aggregate consideration paid does not exceed Rs. 1 lakh • The transaction is not for the purpose of business or profession
Date of payment	• 7th of Next month for other
Interest	Interest at 1% p.m. or part thereof for delayed payment
Return	Form 1 is to be filed by 30th June for the entire financial year
Penalty on failure to deduct	100% of the levy
Penalty on deducted but not paid	1000 per day but restricted upto the levy payable

LEVY ON E-COMMERCE TRANSACTION

Levy	Equalisation levy is now levied online sale of goods or online provision of services or a combination of both, by a non resident e-commerce operators. Levy is on consideration received by a e-commerce operator for e-commerce supply or services made by a non-resident to a:
	• To a person resident in India
	• To a non-resident who
	  ▸ Advertises to a target customer who is either resident in India or a target customer who access the ad via IP address located in India
	  ▸ Sale of data collected form a person who is resident in India or uses IP located in India
	• To a person who buys goods and/or services using Indian IP address

Rate	2%
Person Liable to Pay Tax	E-commerce operator
Exemptions	• The e-commerce operator providing specified service has PE in India and the services provided can be connected to PE • The aggregate consideration paid does not exceed Rs. 2 cores • The transaction is already subject to equalisation levy (other than e-commerce) i.e. at 6%
Date of payment	• 7th of month immediate to the end of quarter and for quarter ending on 31st March- 31st march
Interest	Interest at 1% p.m. or part thereof for delayed payment
Return	Form 1 is to be filed by 30th June for the entire financial year
Penalty on failure to deduct	100% of the levy
Penalty on deducted but not paid	1000 per day but restricted upto the levy payable

CHALLENGES

The “Google tax” or “Equalisation Levy” has received its backlash as it seem to an unilateral attempt of treaty override through amendments made in the domestic tax laws, The validity of same may be susceptible to a challenge under the authority granted by the Constitution.

Further, the payments made towards online purchase of services are taxable under the domestic tax laws of India, either as “Royalty” or “Fees for Technical Services”, (assuming foreign service provider doesn't have PE in India), depending upon the facts and circumstances of the case. Thereafter, foreign service providers claim treaty benefits on such payments as per the application of provisions of the respective bilateral tax treaties. With the introduction of equalisation levy on electronic sale of goods or services by non-resident e-commerce operators, a lot of confusion may erupt because of the different positions which may be adopted by the payer and payee. The payer, in order to safeguard its position under the domestic tax laws of India, may want to withhold tax as per the applicable tax rates while the payee may argue that the subject payment is liable to equalisation levy.

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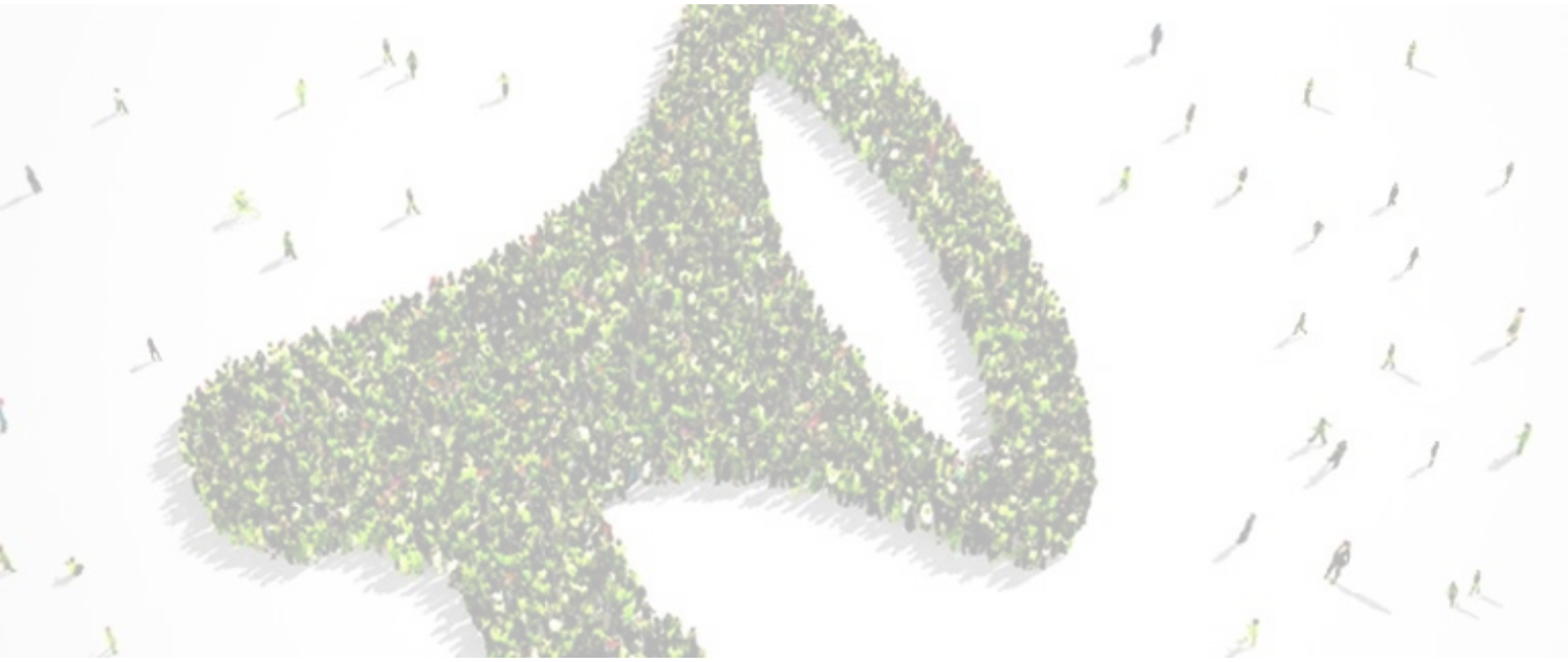

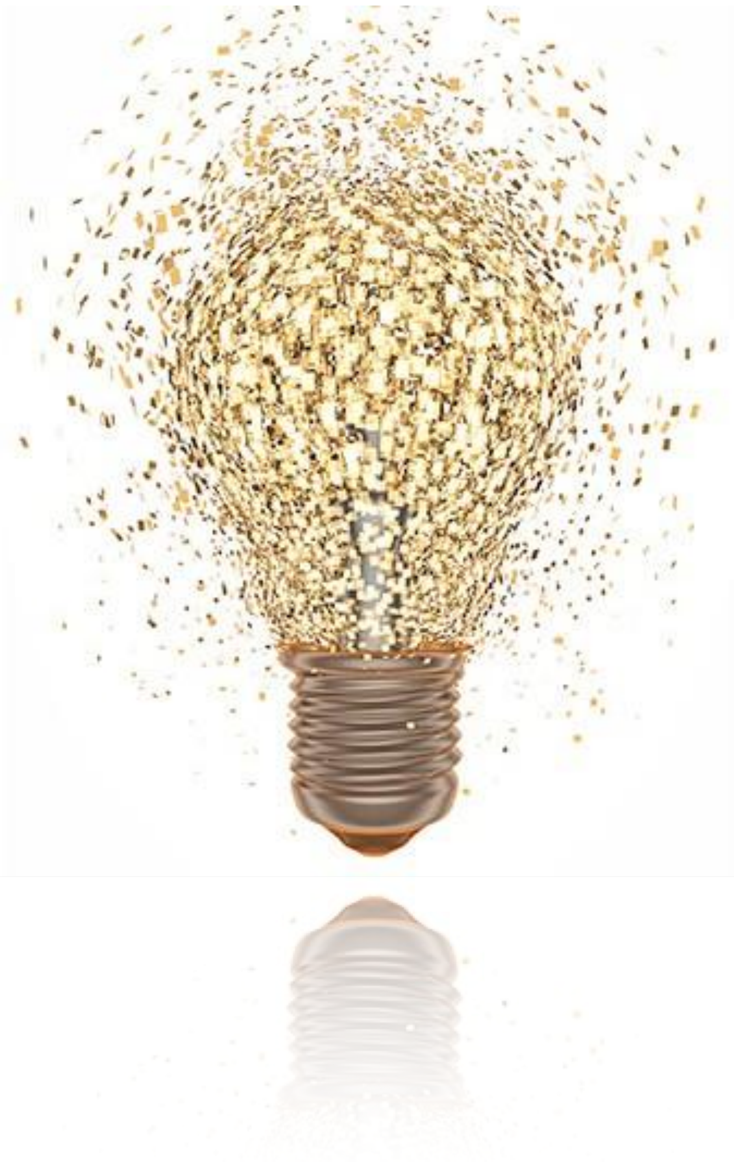

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