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Technology and Tax Series

Indian Equalization Levy Expanded - A Surprise Move! | Bloomberg Publication

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> Bloomberg Tax International Forum
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> *For decades, the Bloomberg Tax International Forum has convened international tax experts from all over the globe. In this series, Forum members will regularly share their views on current and important topics. Read the full archive of the Bloomberg Tax International Forum articles here.*[1]

While the world has been brought to a standstill by the Covid-19 pandemic, the information and communication technology (ICT) sector is playing a paramount role in keeping people across the world digitally connected. The Organization for Economic Co-operation and Development (OECD), under the Action Plan 1 Report (AP 1 Report) on addressing the tax challenges raised by the digital economy, has recognized that digital economy is the result of a transformative process brought by ICT. ICT has made technologies cheaper, more powerful, and widely standardized, improving business processes and bolstering innovation across all sectors of the economy.

While digitalization has given birth to new business models and paved the way for economic growth, innovation and societal change, it has also created unique challenges for the international taxation system. These new businesses thrive on users, reliance on data, increased speed of processing information, decreased need for local personnel to perform certain functions, as well as the flexibility to choose the locations of servers and other resources.

I. Tax Treaties and Interplay with Digital Businesses

Bilateral tax treaties or double taxation avoidance agreements (DTAAs) are entered between governments to assign taxing rights in case of cross-border transactions, thereby encouraging cross-border relationships, preventing double taxation as well as strengthening political ties between partner countries. The tax treaties allocate taxing rights between countries on the basis of income source or residency-based rules, while recognizing the rights of both countries to levy tax on such income.

The existing tax rules that were developed by a group of economists appointed by the League of Nations in the 1920s provide for a threshold for taxation of business profits in the form of "permanent establishment" (PE). According to Article 7 of tax treaties, business profits of an enterprise are taxable in the country of residence of such enterprise. However, in case the enterprise carries on its business in another country through a PE situated there, such other country may also tax business profits of the enterprise to the extent attributable to the PE. The concept of PE is largely conceived as a fixed place of business through which business of an enterprise is wholly or partly carried on, thereby establishing taxable nexus based on physical presence.

Interestingly, over the years, while the concept of PE has evolved to include within its ambit, inter alia, provision of services and undertaking of construction activities beyond certain threshold duration, undertaking activities acting on behalf of an enterprise, and habitually exercising an authority to conclude contracts on its behalf, constitution of PE is still dependent on physical presence.

1. https://news.bloombergtax.com/daily-tax-report-international/search?query=%22international%20forum%22%0A%0A&type=INSIGHT

However, in the digital era, digitalized businesses can be heavily involved in the economic life of a jurisdiction without any, or any significant, physical presence in that country, thereby creating opportunities to avoid taxes completely in the source country. This fundamental challenge arises in the context of international tax rules which were designed a century ago, long before advent of the digital economy where businesses can be conducted remotely.

II. OECD Response

The OECD in its AP 1 Report acknowledges that the existing international tax rules need to be modified with evolving business models. The physical presence nexus rules developed in the brick and mortar era are no longer a useful indication of taxable nexus. The AP 1 Report discussed three options to tackle direct tax challenges arising from the digital economy:

- a new nexus rule based on significant economic presence (SEP);
- a withholding tax on certain types of digital transactions; and
- an equalization levy on certain specified services.

While none of these options were recommended, the AP 1 Report provides that countries could introduce any of them in their domestic laws or in their bilateral tax treaties as additional safeguards from base erosion and profit shifting (BEPS), provided they respect their existing tax treaty obligations. In May 2019, the OECD/G-20 Inclusive Framework on BEPS agreed a Programme of Work for addressing the tax challenges of the digitalization of the economy and arriving at a consensus-based solution by 2020.

The Programme of Work is divided into two pillars:

- Pillar One addresses the allocation of taxing rights between jurisdictions and considers various proposals for new profit allocation and nexus rules;
- Pillar Two focuses on the remaining BEPS issues and seeks to develop rules that would provide jurisdictions with a right to "tax back" where other jurisdictions have not exercised their primary taxing rights or the payment is otherwise subject to low levels of effective taxation.

III. India's Take on Tax Challenges in the Digital Era

Historically, e-commerce transactions—sale of software, provision of advertising services, subscription to online databases, etc.—have been a source of dispute in India.

The Bangalore bench of Income-tax Appellate Tribunal (ITAT) in the case of Google India Private Limited rendered a ruling classifying payments made by the company to Google Ireland for purchase of advertisement space on Google's AdWords program as royalties. The Bangalore ITAT distinguished this case from earlier Tribunal rulings in Right Florists, Pinstorm Technologies and Yahoo India, wherein the courts had held that payments made to a foreign company for banner advertisement hosting services would not constitute royalty.

In the case of Amadeus Global Travel Distribution, the Delhi ITAT held that nonresident companies supplying a computerized reservation system providing real time access to airline fares and enabling bookings are liable to be taxed in India to the extent of the booking fees received from Indian residents.

Recently, India has expressed several reservations in the commentary to the OECD Model Tax Convention on Income and on Capital relating to PE exposure, being inter alia reservations that a website may constitute a PE where it leads to SEP of an enterprise and that furnishing of services rather than performance of services is sufficient for constitution of service PE, etc. Thus, Indian tax authorities and taxpayers have litigated on the issues of characterization of income and establishment of taxable nexus in relation to e-commerce transactions.

India has incorporated several OECD recommendations arising from the BEPS project under the Income-tax Act, 1961 (ITA), being an active member of the G-20 and a Key Partner of the OECD.

Recognizing the work undertaken by the OECD in the AP 1 Report, the Ministry of Finance directed the establishment of a Committee on Taxation of E-commerce (Committee) to take note of the digital economy in the Indian context and identify a simple, predictable and certain solution for taxation of e-commerce transactions. The Committee recommended adoption of the equalization levy (EL) with the objective of providing greater clarity, certainty and predictability in respect of characterization of payments for digital transactions and consequent tax liabilities to all stakeholders, so as to minimize costs of compliance and administration and minimize tax disputes.

The Committee Report stated that the levy of the EL is intended to be an interim measure that may not be required once the DTAAs are modified to address the broad tax challenges that are imposed by the limitations of the existing international taxation rules. Notably, the Committee, after consideration of the OECD reports and recommendations, chose to recommend an EL only on online services and not on the sale of tangible goods through online means. Further, the focus was only on business-to-business (B2B) transactions, and business-to-consumer (B2C) transactions were not recommended until such time as an effective mechanism for collection of such taxes which did not burden consumers could be developed.

In the Union Budget for the year 2016, India introduced the EL with effect from June 1, 2016 under Chapter VIII of the Finance Act, 2016 (FA, 2016), as a separate, self-contained code, not forming part of the ITA. The EL as introduced by the FA, 2016 (Ad EL) was levied at a rate of 6% on the amount of gross consideration received by nonresidents for online advertisement and related services provided to (i) a person resident in India and carrying on a business or profession; or (ii) a nonresident having a PE in India. Income arising from provision of online advertisement services which is subject to Ad EL is exempt from income tax under the ITA. The Ad EL is applicable on payments made to nonresident service providers in excess of Indian rupees 1 lakh ($1,300) and is essentially a levy on B2B transactions, thereby covering only a small segment of e-commerce transactions.

Further, in the Union Budget for the year 2018, India introduced the SEP test to expand the definition of "business connection" under the ITA. The explanatory memorandum to the Finance Bill, 2018 stated that the inclusion of an SEP test under domestic law would enable India to negotiate for inclusion of a new nexus rule based on SEP in DTAAs.

The Finance Bill, 2020 (FB, 2020) was tabled by the Finance Minister in the parliament on February 1, 2020. While the FB, 2020 contained proposals in relation to expansion of the SEP regime, interestingly it did not contain any proposal to expand the scope of the EL. However, at the enactment stage, the scope of the EL was expanded to apply the EL on e-commerce operators (E-com EL) by way of amendment to the FA, 2016. The FB, 2020 received the assent of the President of India on March 27, 2020 and came into force from April 1, 2020. Accordingly, the provisions in relation to the E-com EL also come into effect from April 1, 2020. This came as a surprise to the industry at large, considering the unusual manner of the introduction of E-com EL directly in the Finance Act, 2020 (FA, 2020) without any prior discussion/debate during the proposal stage.

IV. Overview of EL on E-Commerce Operators

A. Applicability

The E-com EL is applicable at rate of 2% on the amount of consideration received or receivable by "e-commerce operators" from "e-commerce supply or services" made or provided or facilitated by it to:

- a person resident in India; or

- a nonresident under certain specified circumstances; or
- a person who buys such goods or services or both using an internet protocol (IP) address located in India.

The term "e-commerce operators" has been defined to mean a nonresident who owns, operates or manages a digital or electronic facility or platform for online sale of goods or online provision of services or both. Further, the term "e-commerce supply or services" is defined to mean:

- online sale of goods owned by the e-commerce operator; or
- online provision of services 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 combination of the above.

B. Exclusions

E-com EL will not be applicable where:

- the e-commerce operator has a PE in India and e-commerce supply or services is effectively connected with such PE; or
- Ad EL is leviable on such transaction; or
- where sales/turnover/gross receipts of the e-commerce operator from e-commerce supply or services is less than Indian rupees 2 crores ($263,000) in the previous year.

V. Compliance Obligations

The e-commerce operator is liable to pay E-com EL within the applicable due dates on a quarterly basis. According to the provisions, the first due date of payment of E-com EL for the quarter ended June 30, 2020 is July 7, 2020. Apart from payment of E-com EL, the e-commerce operator is also required to furnish an annual statement in such form as may be prescribed, in respect of all e-commerce supplies or services made during the financial year.

VI. Other Provisions

If the e-commerce operator fails to pay the whole or any part of the EL, it will be liable to interest at a rate of 12% per annum and a penalty equivalent to the amount of EL it failed to pay. Further, the provisions of the E-com EL rely on the ITA in relation to the collection or recovery mechanism of the EL and initiation of prosecution proceedings in certain circumstances.

VII. Exemption from Income Tax

Any income arising from any e-commerce supply or services made or provided or facilitated on or after April 1, 2021 is exempt from income tax under the ITA.

The introduction of the E-com EL will have far-reaching consequences for the players in the e-commerce sector. Unlike the Ad EL, the E-com EL envisages levying tax also on B2C transactions. As mentioned above, the burden to comply with the provisions of the E-com EL is on the e-commerce operators. Accordingly, e-commerce operators will have to check applicability of these provisions, track transactions with Indian customers, and ensure timely deduction of E-com EL and filing of statements with the Indian tax authorities to avoid any punitive action.

VIII. E-Com EL—Key Challenges

At the outset, it is imperative to note that in the absence of mention of the proposal for introduction of E-com EL in the explanatory memorandum to the FB, 2020 and any prior debate/discussion on introduction of the E-com EL, the intention of the government of India behind its introduction is not known.

The Supreme Court of India in the case of Girdhari Lal & Sons has held that the primary and foremost task of a court in interpreting a statute is to ascertain the intention of the legislature, actual or imputed. Thereafter, the court must interpret the statute so as to

promote/advance the object and purpose even by supplementing the written word if considered necessary. Given that the government's intention in the introduction of the E-com EL is not known, it may be difficult to interpret and decide whether the provisions of E-com EL are attracted to a particular situation.

IX. Are the Definitions Enough?

The provisions of the E-com EL have been drafted very loosely and do not define or explain the meaning of several words used in the statute. For example, while the provisions define the term "e-commerce operators," they do not provide the meaning of the terms "operate," "digital," "electronic facility," "platform," "online sale," "goods" and "online provision of services" used in the statute. While the provisions of the EL provide that the words and expressions used but not defined in Chapter VIII of FA, 2016, can derive their meaning from the ITA or Income-tax Rules, 1962 (ITR), interestingly, these words are not defined under the ITA or the ITR.

This creates interpretational issues, such that the provisions may be interpreted in a broad manner covering transactions/situations which were not intended to be covered in the first place. For example, in the absence of meaning of "online sale"/"online provision of service," it is unclear whether the E-com EL will be applicable to transactions which include only online sales or online provision of service, or it will be applicable to situations where the actual sale or provision of service is completed offline.

The interpretational issues are further exacerbated by the fact that the intent behind the introduction of the E-com EL remains unclear. While tax statutes have to be interpreted strictly as per the language used in the law, it is a well-settled rule of construction that where the plain literal interpretation of a statutory provision produces an absurd and unjust result which could never have been intended by the legislature, the court may modify the language used by the legislature, so as to achieve the obvious intention of the legislature and produce a rational construction. Having said that, considering the language of the provisions of the E-com EL, one may contend that the intention was to tax the service of facilitating online sale of goods or services which only a typical marketplace platform can do. However, given the literal meaning of the provisions, a broader interpretation cannot be ruled out.

At this juncture, it is interesting to remind ourselves of the principles enunciated by the courts while interpreting provisions wherein certain terms were not defined in a statute. The High Court of Kerala in the case of All Kerala Chartered Accountants' Association v. Union of India held that it is a basic canon of interpretation that each statute defines the expressions used in it, and that definition should not be used for interpreting any other statute unless in any other cognate statute there is no definition, and the extrapolation would be justified.

Further, the Supreme Court in the case of Jagatram Ahuja v. Commissioner of Gift-tax held that the words and expressions defined in one statute as judicially interpreted do not afford a guide to construction of the same words or expressions in another statute unless both the statutes are *pari materia* legislation or it is specifically so provided in one statute to give the same meaning to the words as defined in another statute. The Sale of Goods Act, 1930 (SOGA) defines the term "goods" to mean inter alia every kind of movable property other than actionable claims and money. There is a plethora of judicial guidance under the SOGA in relation to the meaning of "goods," which is similar to how the term was defined under sales tax laws as well. At the same time, "goods," defined under the current Goods and Services Tax (GST) laws, include actionable claims.

Therefore, the question whether one can apply the definition of "goods" under the SOGA or the GST laws in the context of the EL remains open. The answer may not be straightforward and one may have to look at the object and purpose of the SOGA/GST to conclude on its applicability in the context of the EL. Given that the meaning of undefined terms cannot be interpreted in the context of a term defined in another statute

which is not *pari materia* legislation, one may also have to resort to the dictionary to understand the meaning of such terms.

In this regard, the Supreme Court in the case of Commissioner of Income-tax v. Venkateswara Hatcheries (P.) Ltd has held that it may be permissible to refer to the dictionary to find out the meaning of that word as it is understood in the common parlance. However, where the dictionary gives divergent meanings, or more than one meaning of a word, the word has to be construed in the context of the provisions of the act and regard must also be had to the legislative history of the provisions of the act and the scheme of the act. The dictionary definition provides several meanings of the word "platform" in ordinary parlance. However, the word "platform" in the context of e-commerce transactions seems to be a technical word, and therefore, ascertaining its meaning in the correct sense will be extremely important.

It seems that not only has the Indian government introduced the provisions in relation to the E-com EL in a sudden manner, it has also not analyzed and considered the practicalities of these provisions before their introduction.

X. What is Consideration?

Another interesting point to be noted in relation to the E-com EL provisions is that they apply on the consideration received or receivable by e-commerce operators from e-commerce supply or services to specified persons. The players in the e-commerce sector do not operate in a standardized manner, i.e. not necessarily following the same operating models or payment methods or policies. Given that the E-com EL applies on the consideration received or receivable by e-commerce operators, the impact of situations of cancellations/returns and exchanges has not been addressed in the provisions.

As returns or exchanges are very common in the e-commerce space, there should be a proper mechanism for credit or refund of the E-com EL in such situations to reduce the potential hardships for e-commerce operators. Further, it may be possible that the e-commerce operator is merely facilitating the flow of funds between the seller and the buyer on its platform in lieu of commission from the registered seller or buyer or both; in such situations it would be unfair for the E-com EL to be applied on the entire consideration received by the e-commerce operator.

The E-com EL provisions as they stand today are unclear on the above aspects.

XI. Is There Sufficient Taxable Nexus with India?

The provisions of the E-com EL are much wider than the provisions of the earlier Ad EL in so much as the provisions of the E-com EL attempt to cover transactions between two nonresidents targeting Indian customers. The E-com EL is applicable in cases where an e-commerce operator is providing services to a nonresident in the following specified circumstances:

- sale of advertisement, which targets a customer who is resident in India or a customer who accesses the advertisement through an internet protocol (IP) address located in India; and
- sale of data collected from a person who is resident in India or who uses an IP address located in India.

The EL is styled as a transaction or sales tax, in that it is a tax on advertising services rendered to a nonresident by another nonresident operator or with respect to the sale of data by a nonresident operator through their platform to another nonresident, where in neither case the taxable event (which is the sale) is in India. The definition of specified circumstances in the provisions creates further confusion as it uses the word "and" in between the two limbs, which could mean that the section only applies where the sale of advertisement by a nonresident operator to another nonresident also involves the sale of data, which does not make sense.

The question which arises here is whether parliament can enact laws which govern

transactions between two nonresidents. The parliament obtains powers to enact laws from Article 245 of the Constitution of India which states:

"Extent of laws made by Parliament and by the Legislatures of States

1. Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State
2. No law made by Parliament shall be deemed to be invalid on the ground that it would have extra territorial operation"

Courts have upheld the power of parliament to make extraterritorial laws, when the causation of such law is found in India or such an act has an impact, effect or consequence in the territory of India. It has also been stated that it is inconceivable in a situation of extraterritorial operation that law made by parliament in India has no relationship with anything in India. Having said that, in a case where a nonresident operator sells advertising services to another nonresident or sells data to a nonresident, the taxable event, i.e. the sale, happens outside India and the customer in India is not even privy to the contract or transaction between the two nonresidents.

Given the insufficient impact or consequence arising out of a transaction between two nonresidents in India, the question which arises is whether mere targeting of Indian customers from outside India constitutes sufficient nexus to enact law in India. Even if there was sufficient nexus for enacting law, from a tax perspective, given that the taxable event happens outside India, one may have to evaluate sufficiency of nexus with the taxable event before taxing such transactions.

Another point to be considered in relation to nonresident-to-nonresident transactions targeting Indian customers is the trigger of taxable event as provided under the provisions of the E-com EL. As stated earlier, a strict reading of the provisions concerned would mean that only a transaction by a nonresident operator with another nonresident is covered if such transaction involves both the sale of advertisement and sale of data together. At the outset, it is highly unlikely that there is a platform anywhere in the world that sells data on the platform, as that would be a privacy violation in many countries. The possibility of both happening together is even more unlikely. Even if the term "and" in the section as set out above is read as "or" it is still unlikely to make the second limb with relation to sale of data workable. It is trite law that clarity on a taxable event is essential for a valid tax, and given that the provisions of E-com EL in this regard are vague and unclear, one really comes to wonder about the sanctity of the provision itself.

The above challenges and issues may leave nonresident e-commerce operators in a fix. One of the arguments that may be adopted by nonresident e-commerce operators is that if there are two possible interpretations then the one favoring the taxpayer has to be adopted. Given that tax laws are in derogation of personal rights and considering that the provisions concerned in relation to the E-com EL are ambiguous and vague and are susceptible to two interpretations, the interpretation which favors the taxpayers, as against the revenue, should be preferred. Further, e-commerce operators can also explore the arguments in relation to the unconstitutionality of the E-com EL provisions, given the lack of sufficient nexus with India and lack of clarity on the taxable event.

XII. Impractical Responsibilities on E-Commerce Operators?

The E-com EL applies where an e-commerce operator is providing an e-commerce supply or services to specified persons. To determine the applicability of the E-com EL, the e-commerce operators may be required to be mindful of the residential status of/manner of access to the platform by their service recipients. It may be impractical or unfeasible for e-commerce operators to keep track of the IP address or the location of each customer or user whose data is collected, processed, aggregated or sold, or to

whom advertisements are targeted or presented. In addition to being impractical, tracking data flow of each customer and ensuring compliance with the provisions of the E-com EL may not be pocket-friendly for the e-commerce operators.

Further, given that the provisions of the E-com EL use the concept of residency under the ITA, the e-commerce operators may find themselves stuck in determining who is a resident of India and who is not a resident of India. Also, digital transactions take place in a non-linear fashion. A targeted advertisement may or may not lead to a sale to an Indian customer. Similarly, data collected from Indian customers may or may not be monetized. From a practical standpoint, it seems very unreasonable to expect an e-commerce operator to keep track of these transactions and comply with the provisions of the E-com EL.

XIII. International Relations Disregarded?

The Organization for Economic Co-operation and Development (OECD) Action Plan 1 Report (AP 1 Report), while stating the possible options to tackle challenges arising in taxing the digital economy, has given liberty to countries to introduce any of the options in their domestic laws or in bilateral tax treaties as additional safeguards from base erosion and profit shifting (BEPS), provided they respect their existing tax treaty obligations. As stated above, the EL does not form part of the ITA.

In the past, arguments have been made that nonresidents will not be able to obtain double taxation avoidance agreements (DTAAs) benefits against the EL, thereby violating existing tax treaty obligations and resulting in non-availability of tax credit with respect to the EL paid in India in their home jurisdiction. Given that the ITA specifically exempts income subject to the EL from income tax and the collection and recovery mechanism of the EL relies on the provisions of the ITA, theoretical arguments exist that the EL may be considered as "taxes covered" under Article 2 of the DTAAs and hence, treaty benefits may be obtained. However, this position remains untested in India.

Article 51(c) of the Constitution of India provides inter alia that the state shall endeavor to foster respect for international law and treaty obligations in the dealings of organized peoples with one another. While Article 51(c) is one of the Directive Principles of State Policy and cannot be enforced by any court, the principles contained therein are fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws. Courts have recognized that national courts, being organs of the national state and not organs of international law, must perforce apply national law if international law conflicts with it. But the courts are under an obligation within legitimate limits to so interpret the municipal statute as to avoid confrontation with the well-established principles of international law. In this context, it may be possible to argue that the provisions of the E-com EL, in so far as they relate to transactions between two nonresidents, may have to be interpreted to avoid any conflict with principles of international law.

Further, Article 26 of the Vienna Convention on the Law of Treaties (VCLT), which contains the pacta sunt servanda principle, provides that every treaty in force is binding upon the parties to it and must be performed by them in good faith. Article 27 of the VCLT provides that a party may not invoke the provisions of its internal law as a justification for its failure to perform a treaty. Article 31 of the VCLT provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. It is further provided that context for the interpretation of a treaty shall comprise, in addition to the text, its preamble and annexes. While India is not a signatory to the VCLT, since the VCLT contains principles of customary international law, several courts have drawn inspiration from the VCLT when it was necessitated.

As part of its BEPS project, the OECD under Action Plan 15 has developed the multilateral instrument (MLI) to modify existing bilateral tax treaties to swiftly implement tax treaty measures developed in the course of the BEPS

Project. Prevention of treaty abuse is a minimum standard covered under Action 6 of the final BEPS package. Pursuant to such minimum standard under Action 6, Article 6(1) of the MLI provides for the introduction of a clear statement of intent in DTAAs to avoid creation of opportunities for non-taxation or reduced taxation through tax evasion or avoidance.

In the past, arguments were made that introduction of the EL under domestic law amounts to unilateral treaty override. In light of the MLI's coming into force from October 1, 2019 and the clear statement of intent included in the preamble of the tax treaties, one may argue whether inclusion of the EL is to avoid the creation of opportunities for non-taxation in e-commerce transactions and hence, in accordance to the object and purpose of the tax treaty. However, the present E-com EL may fail that test as it would apply even in a situation where there is double or triple taxation of the income due to lack of carveout in the event such income is actually subject to taxation elsewhere.

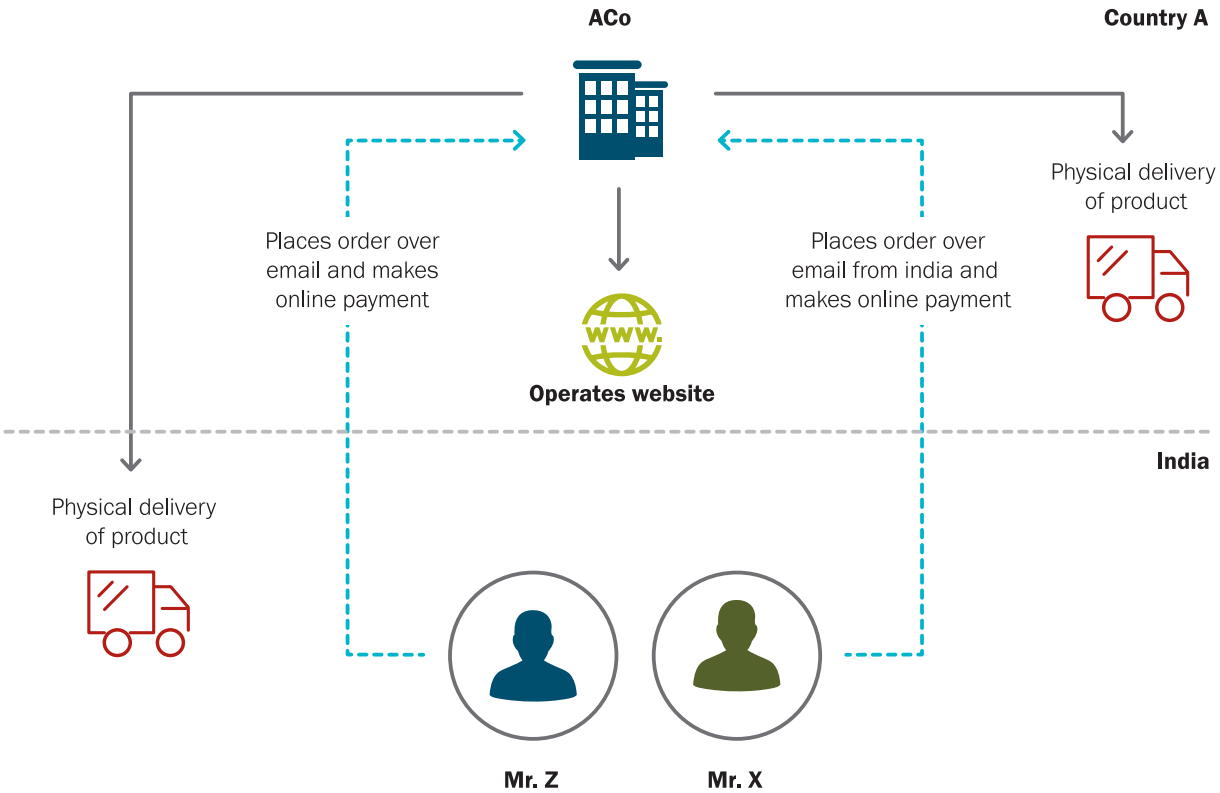
XIV. Other Loose Ends

Introduction of the E-com EL will surely increase compliance cost for e-commerce operators. Further, the ITA provides exemption from income tax to e-commerce operators in relation to any income arising from any e-commerce supply or services made or provided or facilitated on or after April 1, 2021. However, the provisions related to the E-com EL are applicable from April 1, 2020. This seems to be an inadvertent error, and a clarification in this respect will be much appreciated.

XV. Illustrative Case Studies

In this section the authors have tried to capture the problems expected to arise due to interpretational issues as highlighted above, by means of some practical illustrations.

- **Case Study 1:** ACo, a pharma company incorporated in Country A, operates a website to provide information about the company (details of the management, latest financial information, etc.) and display its products online.



Case Study 1

a. Mr. Z, a person resident in India, after browsing through the website, sends an email to the customer care ID placing an order for a product displayed on the website. ACo provides order confirmation to Mr. Z and sends an e-invoice over email to Mr. Z. Mr. Z makes payment for the product online using his bank's internet banking tool. ACo physically dispatches the product to Mr. Z's address in India.

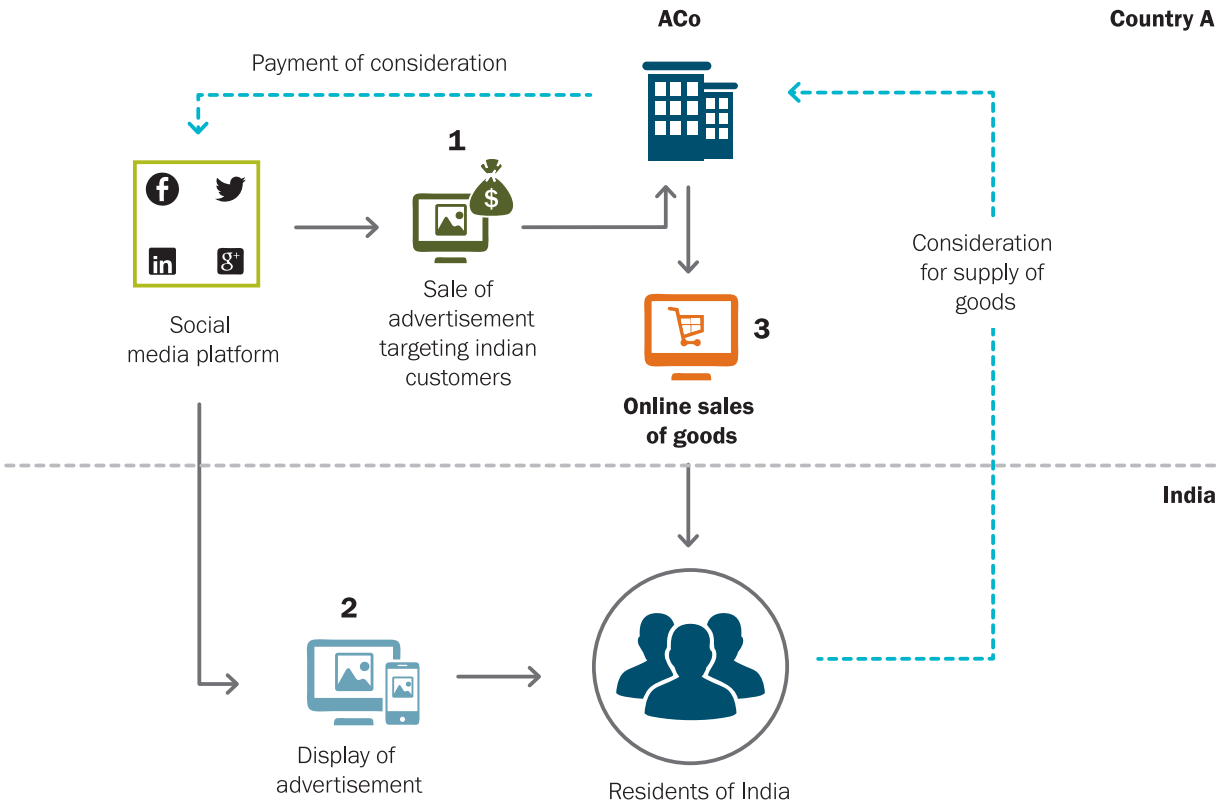
b. Mr. X, a nonresident of India, visits India for official purposes. While in India, Mr. X places an order on ACo's website and makes online payment. ACo physically delivers the product at Mr. X's address in Country A.

Applicability of E-com EL: in order to examine the applicability of E-com EL, we will need to analyze if ACo will qualify as an "e-commerce operator." In this regard, we need to analyze whether the website operated by ACo qualifies as a "platform." The Indian law is extremely silent on the word "platform," so much so that there are no judicial precedents which examine the meaning of the term. In such a case, one might have to rely on principles of statutory interpretation to understand the meaning of "platform." It seems that the term is used in the E-com EL provisions in a technical sense and one may rely on OECD reports to understand the meaning of the term. However, in the absence of any statutory backing and lack of judicial precedents, the term may be interpreted by the tax authorities very broadly, thereby leading to hardship for industry players.

In case a), even if one were to say ACo qualifies as an "e-commerce operator," considering that the sale of goods happens physically by delivery in India, it is again unclear whether the provisions intended to cover the online sale of goods, or sale of goods online.

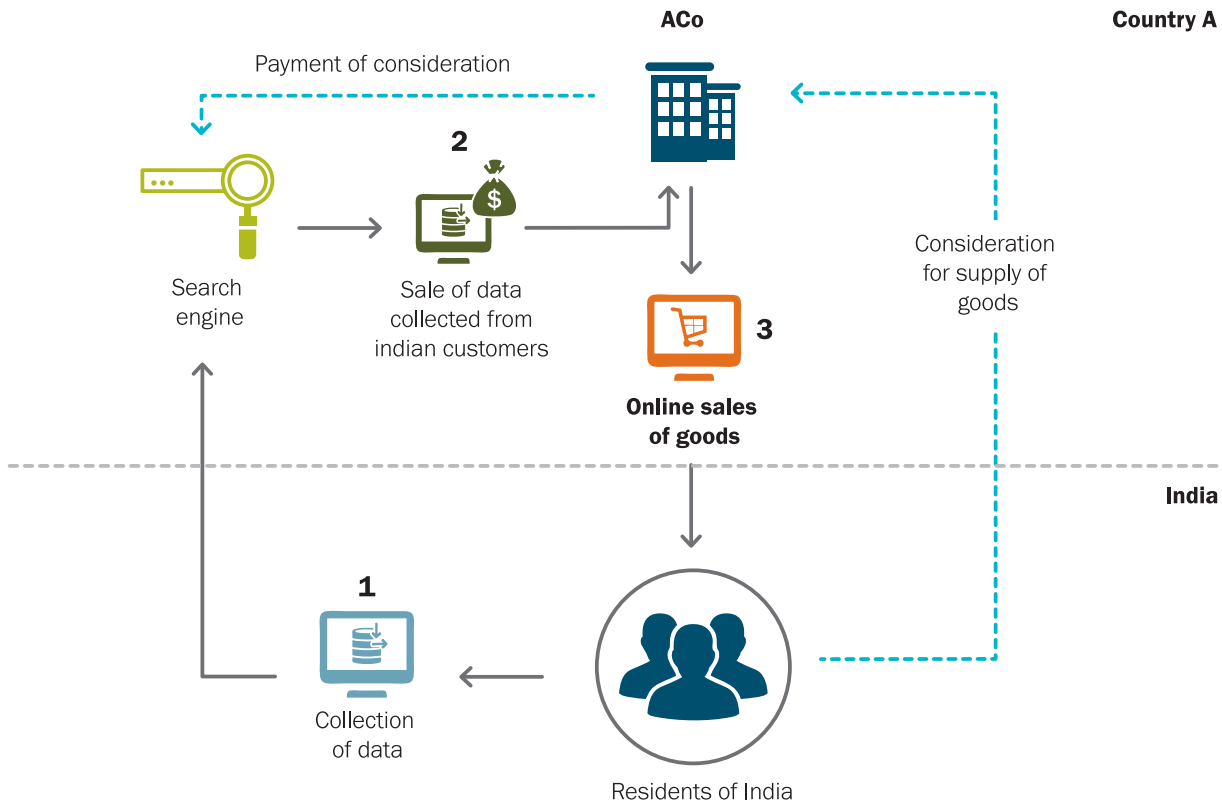
In case b), Mr. X is not a resident in India; however, he places the order for the product while in India. The provisions of the E-com EL are wide enough to cover situations where a person traveling to India obtains any service or goods by using an IP address located in India. However, the issue of online sale of goods versus sale of goods online remains in this example as well.

- **Case Study 2:** This case study deals with the structure of a typical social media platform. A social media platform sells advertisements targeting Indian customers to ACo, a company incorporated in country A. ACo is involved in retail of clothing for men and women. ACo pays consideration to the social media platform for sale of advertisements. On display of advertisements to Indian residents, some Indian residents purchase products from ACo and pay consideration to ACo online.



Case Study 2

- **Case Study 3:** This case study deals with the typical structure of a search engine. Residents of India browse data on the platform of a search engine. The search engine collects data on the basis of the browsing behavior/patterns of Indian residents. The search engine sells the data to ACo, a company incorporated in country A. ACo pays consideration to the search engine for the sale of data. ACo targets Indian customers on the basis of data received from the search engine. Some Indian residents purchase products from ACo and pay consideration to ACo online.



Case Study 3

XVI. Applicability of E-com EL

The case studies above are a typical example of a transaction between two nonresidents targeting Indian customers. As stated earlier, the social media platform/search engines may possibly contend the non-applicability of E-com EL due to lack of clarity to taxable event and lack of sufficient nexus with India. It may also be argued that on a strict reading of the provisions, the E-com EL is applicable only in cases where the transaction involves both sale of advertisement and sale of data, which is not the case above. Further, the chances of double taxation are also high in case the transaction is taxed in other country and foreign tax credit is not available against the E-com EL paid in India.

XVII. Conclusion

As discussed above, there are several issues and open points related to the provisions of the E-com EL. The introduction of the E-com EL has also caught the attention of technological giants worldwide, with the U.S. already cautioning India against such a move. The introduction of the E-com EL while the world is battling through an unprecedented crisis indicates the keenness of the Indian government to monetize tax from digital transactions even if it is at the cost of reducing ease of doing business and causing uncertainty to businesses in India.

Further, a levy like the E-com EL may be workable in a situation where businesses are doing well, but given the circumstances and the fact that most e-commerce players are not profit-making, the application of the E-com EL which does not take into account the losses of e-commerce operators may create cash flow issues for them.

Considering the first due date for payment of E-com EL is July 7, 2020, it would be rational for the government to defer the applicability of these provisions until further clarifications are provided. In the meantime, it will be useful for e-commerce operators to revisit their structures

and carefully examine the applicability of the provisions of the E-com EL while keeping an eye on the international developments in this space. The Indian government seems to be taking contradictory approaches to deal with taxation of digital transactions, given that on one hand, the applicability of the significant economic presence (SEP) regime was deferred in light of the ongoing global discussions, and on the other hand, it inserted the E-com EL in the FA, 2016.

The OECD/G-20 Inclusive Framework on BEPS released a Statement in January 2020 endorsing the Unified Approach as the basis for the negotiations of a consensus-based solution to be agreed in 2020 and welcoming the significant progress achieved with respect to the technical design of Pillar Two. The Statement provides that any consensus-based agreement must include a commitment by members to withdraw unilateral actions taken by member states. Considering India is a member of the Inclusive Framework and has extended its support to the BEPS project, the timing of introduction of the provisions of the E-com EL really comes into question.

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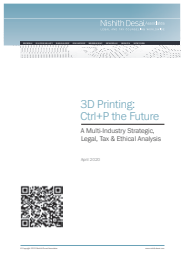

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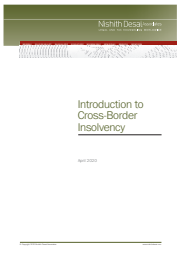

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TITLE	TYPE	DATE
Delhi Tribunal: Hitachi Singapore's Liaison Office in India is a Permanent Establishment, Scope of Exclusion Under Singapore Treaty Restrictive	Tax	November 2019
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Research is the DNA of NDA. In early 1980s, our firm emerged from an extensive, and then pioneering, research by Nishith M. Desai on the taxation of cross-border transactions. The research book written by him provided the foundation for our international tax practice. Since then, we have relied upon research to be the cornerstone of our practice development. Today, research is fully ingrained in the firm's culture.

Our dedication to research has been instrumental in creating thought leadership in various areas of law and public policy. Through research, we develop intellectual capital and leverage it actively for both our clients and the development of our associates. We use research to discover new thinking, approaches, skills and reflections on jurisprudence, and ultimately deliver superior value to our clients. Over time, we have embedded a culture and built processes of learning through research that give us a robust edge in providing best quality advices and services to our clients, to our fraternity and to the community at large.

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As the first step, they would conduct a capsule research, which involves a quick analysis of readily available secondary data. Often such basic research provides valuable insights and creates broader understanding of the issue for the involved associates, who in turn would disseminate it to other associates through tacit and explicit knowledge exchange processes. For us, knowledge sharing is as important an attribute as knowledge acquisition.

When the issue requires further investigation, we develop an extensive research paper. Often we collect our own primary data when we feel the issue demands going deep to the root or when we find gaps in secondary data. In some cases, we have even taken up multi-year research projects to investigate every aspect of the topic and build unparallel mastery. Our TMT practice, IP practice, Pharma & Healthcare/Med-Tech and Medical Device, practice and energy sector practice have emerged from such projects. Research in essence graduates to Knowledge, and finally to *Intellectual Property*.

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