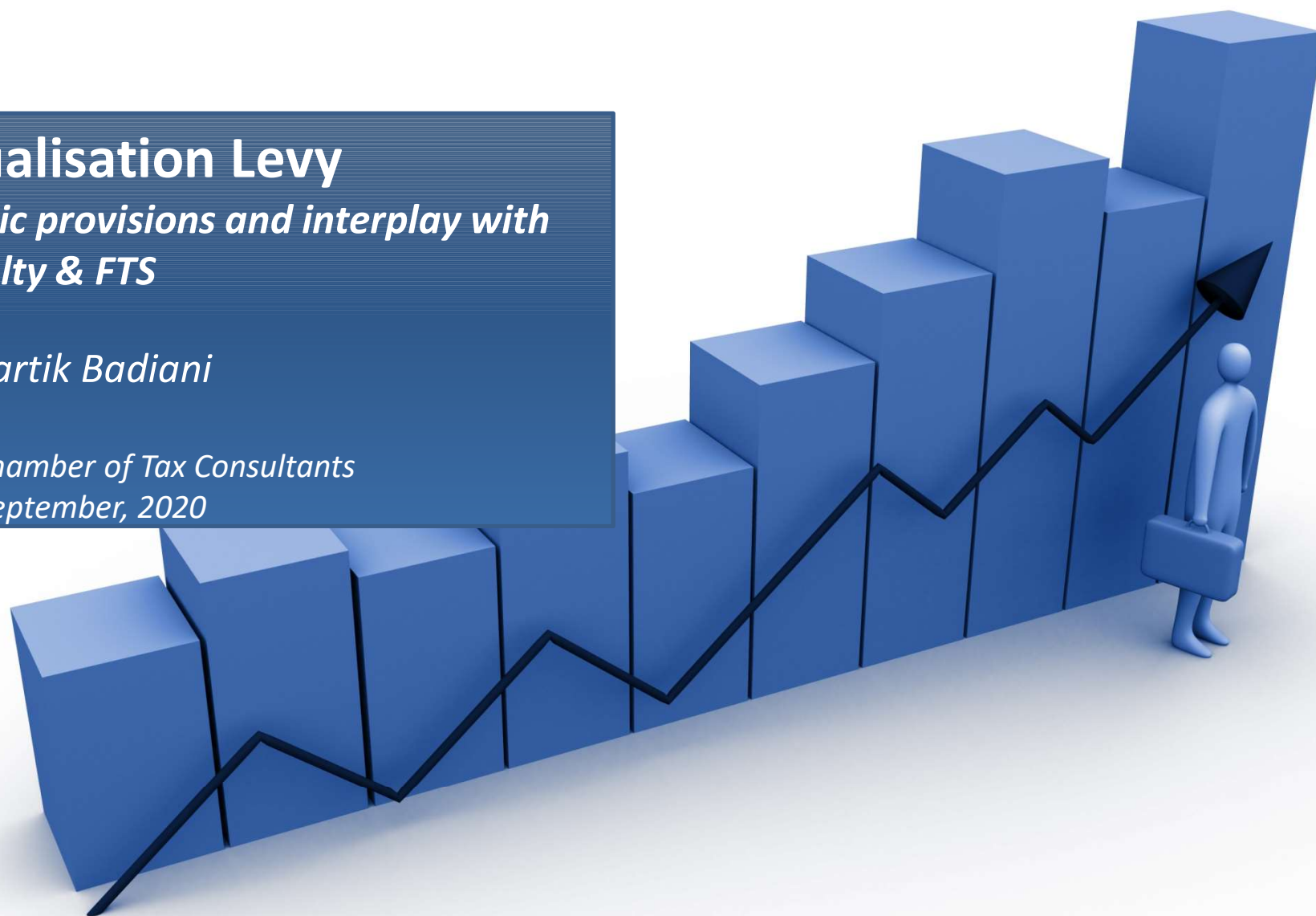


Equalisation Levy

*- Basic provisions and interplay with
Royalty & FTS*

CA Kartik Badiani

*The Chamber of Tax Consultants
23rd September, 2020*





Equalisation Levy

Background

BEPS work on Taxation of Digital Economy

- Action Plan 1 – Three interim options i.e. SEP, WHT and Equalisation Levy
- Rider that existing treaties should be respected

Equalisation Levy – Finance Act, 2016

- Rate – 6%, Applicable to Advertisement and similar services

Finance Act 2018

- Concept of SEP introduced in the Act
- Draft profit attribution rules released in March 2019

Finance Bill 2020

- SEP deferred and new Explanation 3A introduced
- TDS introduced on e-commerce operators u/s 194-O
- Bill silent on Equalisation Levy on e-commerce operators

Finance Act 2020

- Equalisation Levy introduced on e-commerce operators

Definitions

➤ e-commerce operator

- means a ***non-resident*** who owns, operates or manages digital or electronic facility or platform for online sale of goods or online provision of services or both

E-commerce supply or services ('ESS')

- means—
 - 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 activities

Charge of Equalisation Levy

Chargeability

- *Equalisation levy at 2%*
- *On consideration received or receivable by an e-commerce operator from e-commerce supply or services made or provided or facilitated*

ESS provided to

- *Resident in India; or*
- *Person who buys such goods or services or both using internet protocol address located in India; or*
- *Non-resident person, in the specified circumstances**

Exclusions

- ***Sale, turnover or gross receipts*** of the ecommerce operator < ***Rs. 2 crore*** during FY
- E-commerce operator making or providing or facilitating e-commerce supply or services has a Permanent Establishment ('PE') in India and ***such e-commerce supply or services is effectively connected with such PE*** or
- Equalisation levy is leviable under existing section 165

*** Specified Circumstances**

- *Sale of advertisement which targets a customer who is resident in India or a customer who accesses the advertisement through internet protocol address located in India; and*
- *Sale of data collected from a person who is resident in India or from a person who uses internet protocol address located in India*

Charge of Equalisation Levy

Section 165A.

(1) On and from the 1st day of April, 2020, there shall be charged an equalisation levy at the rate of two per cent. of the **amount of consideration received or receivable** by an e-commerce operator from e-commerce supply or services made or provided or facilitated by it—

- (i) to a person resident in India; or
- (ii) to a non-resident in the specified circumstances as referred to in sub-section (3); or
- (iii) to a person who buys such goods or services or both using internet protocol address located in India.

(2)

For the purposes of this section, "specified circumstances" mean—

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

Issues / Points for discussion

1

- In a case where e-commerce operator is a facilitator of goods / service and receives Rs. 100 as consideration and passes on Rs. 80 to the seller and retains Rs. 20 with him, EL will apply on Rs. 100 or Rs. 20?
- If EL is paid on Rs. 100, will the seller (resident or NR having PE in India) be liable to tax in India again in respect of Rs. 80?

2

- Whether EL applies to only highly digitalized products and services?
- Will it also apply to a case where only order is placed online and the goods are delivered physically?

3

- Booking of overseas hotel through a website whether covered? The hotel will provide services physically when the Indian resident travels abroad.
- Will EL apply if an Indian resident books overseas hotel online or order good / services online when he is outside India?

Issues / Points for discussion

4

- EL covers advertisement which targets a customer resident in India or who is using an Indian IP address
- What is meant by “targets a customer”? Even if the advt. is visible to an Indian resident, will it get covered? Or does it needs to be an advt., specifically targeting an Indian customer?

5

- “Goods” is not defined. Therefore can have a wide meaning as per the manner in which the law is drafted
- “Sale” is also not defined. Does the person collecting data become owner of data?

6

- The provisions cover sale of data by NR which is collected form Indian residents or from a person using Indian IP address
- In a case where data collected from Indian residents is analysed and based on that a report is prepared, can it be considered as sale of data?

Charge of Equalisation Levy

Section 165A

(2) The equalisation levy under sub-section (1) shall not be charged—

(i) where the e-commerce operator making or providing or facilitating e-commerce supply or services has a permanent establishment in India and such e-commerce supply or services is effectively connected with such permanent establishment;

(ii) where the equalisation levy is leviable under section 165; or

(iii) sales, turnover or gross receipts, as the case may be, of the e-commerce operator from the e-commerce supply or services made or provided or facilitated as referred to in sub-section (1) is less than two crore rupees during the previous year.

Issues / Points for discussion

Issue 1

- Crossing of Rs. 2 Cr. threshold in a financial year triggers EL from first rupee.
- In a case where the threshold is triggered post the first milestone of payment of EL (i.e. 7th July, 2020), can the e-commerce operator make the differential payment in the second quarter? Law seems to be silent on this aspect

Issue 2

- The exclusions cover a case where the EL is leviable under section 165 of the Act. Take a case where NR provides advertisement service online to customers in India and NR's total turnover is Rs. 2.50 Cr. It consists of Rs. 1.25 Cr worth of services on which 6% EL has been paid by the Indian customers. However, balance Rs. 1.25 Crs worth of service did not exceed the threshold of Rs. 1 Lakh and therefore enjoyed an exemption under section 165(2). Can such transactions of Rs. 1.25 Cr be said to be "not leviable to EL under section 165" and consequently be liable to the new EL @ 2%?

Exemption from Income-tax

Amendment to section 10(50)

- extending exemption to any income arising from any e-commerce supply or services made or provided or facilitated on or after the 1st day of April, 2021 and chargeable to equalisation levy

Issues / Points for discussion

- Mismatch in effective date of charging provision (i.e. FY 2020-21) and exemption provision which applies to ESS made or provided on or after 01 April 2021
- Whether exemption can be extended to the seller who is selling goods or services on e-commerce platform if the e-commerce operator has paid EL?
- Scope of EL would overlap with section 9(1)(vi), section 9(1)(vii) and with Explanation 3A in certain situations. In such a case, what is the hierarchy – What applies EL or the Act?

Compliances

- Equalisation levy shall be paid to the credit of central government on quarterly basis as follows:

Period	Due Date
April – June (1 st Quarter)	7 th July
July – Sept (2 nd Quarter)	7 th Oct
Oct – Dec (3 rd Quarter)	7 th Jan
Jan – March (4 th Quarter)	31 st March

- Simple interest @1% for every month or part of a month in case of default in payment as per the above schedule
- Penalty equal to 100% of EL / Prosecution in case of furnishing false statement

Filing of Annual Statement:

- **On or before 30th June** of the financial year immediately following the financial year in which equalisation levy is chargeable.

Issues / Points for discussion

1

- Non resident ecommerce operator might face issues in opening a bank account in India for payment of EL
- Rules might come up with a simplified procedure or the ecommerce operator might have to tie up with an India bank

2

- EL for January to March quarter is payable by 31 March
- Would this be practically possible for an ecommerce operator?

3

- Appeal allowed only against order imposing penalty under EL chapter
- No appeal remedy for the applicability and charge of EL

TDS on e-commerce transactions (Section 194-O)

Obligation

- E-commerce operator: person who owns, operates or manages digital or electronic facility or platform for electronic commerce**

Scope

- TDS on payment or credit to the account of e-commerce participant* upon sale of goods or provision of service or both facilitated by an e-commerce operator through its digital or electronic facility or platform

Deeming coverage

- Payment made directly by customer to e-commerce participant deemed to be credited or paid by e-commerce operator - liable for TDS

Rate of TDS

- 1% on gross amount of sales or services or both credited or paid to e-commerce participant by e-commerce operator

Exclusions

- E-commerce Participant being individual/ HUF whose gross amount of sale or service is less than Rs. 5 lakhs and has furnished PAN/ Aadhaar to e-commerce operator

*e-commerce participant mean a person resident in India selling goods or providing services or both, including digital products, through digital or electronic facility or platform for electronic commerce

If TDS made by e-commerce operator under this section, no other TDS provision shall apply (except in case of receipts by e-commerce operator for hosting advertisement or providing other services not in connection with sales or services provided by e-commerce participant)

Macro Issues / Points for discussion

1

- Whether e-commerce operators should have been given more time to understand the provisions and adapt to it?
- Considering the present Covid 19 situation and lockdown, whether this was the right time to come up with this new levy?

2

- Whether EL is tax on income and therefore eligible for relief under the tax treaty?
- Can FTC be claimed for EL in the home country by the e-commerce operator?

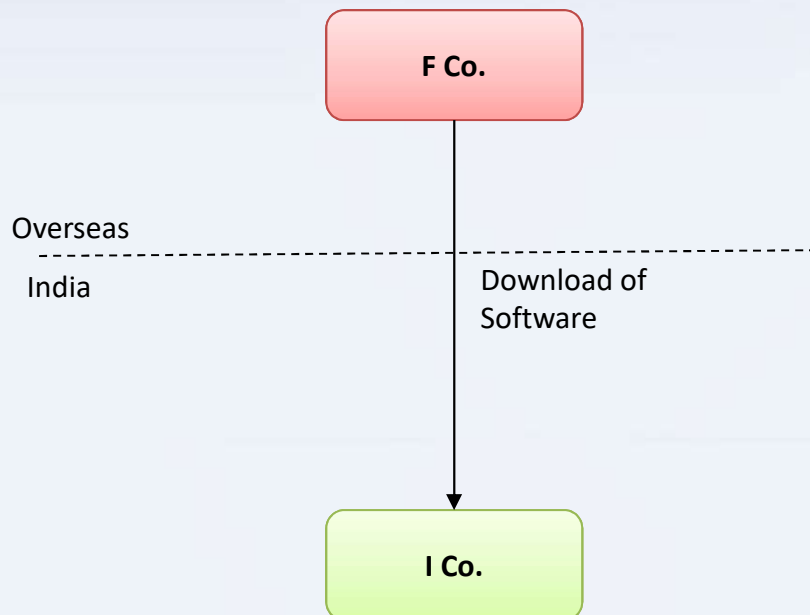
3

- In many e-commerce transactions there might be overlap of Section 194-O and EL. This will amount to dual compliance on the e-commerce operator



EL - Interplay with Royalty & FTS

Case study 1



Facts:

- I Co. purchases a software from F Co. and downloads the same from the website of F Co.
- The turnover of F Co. 1 is more than Rs. 2 cr for FY 2020-21 and FY 2021-22

Issue:

- Whether tax u/s 195 is to be deducted by I Co. for FY 2020-21?
- Whether tax u/s 195 is to be deducted by I Co. for FY 2021-22?
- Whether the equalisation levy is payable by F Co. for FY 2020-21 and FY 2021-22?

Case study 1 - Annexure

Whether royalty under the Income-tax Act?

- Copyright v/s copyrighted article
- CIT vs. Samsung Electronics Co Ltd (Karnataka High Court)
- Insertion of explanation 4 with retrospective effect from 01/04/1976

Whether royalty under the treaty?

- Covered under Royalty article under the treaty?
- Whether the extended definition under explanation 4 applies to the treaty?

Whether EL applies?

- Software – whether goods or services?
 - Tata Consultancy Services vs. State of AP 271 ITR 401 (Supreme Court)
 - Infosys Technology Limited vs. the Special commissioner & Commissioner of Commercial Taxes [2008] 17 VST 256 (Mad)
- Download of software - whether Sale or license?

Case study 1 – Annexure

Extract of Section 9(1)(vi)

(vi) income by way of royalty payable by—

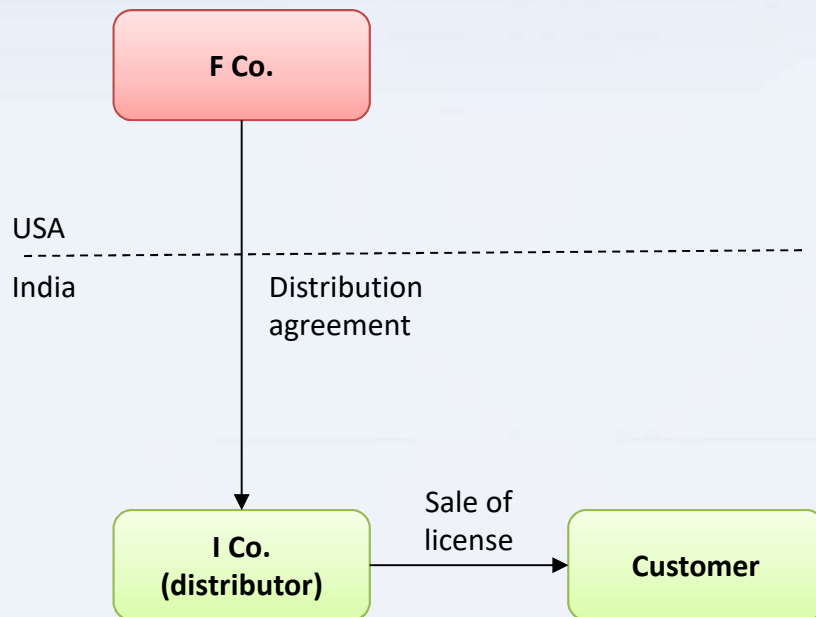
(a) the Government ; or

(b) a person who is a resident, except where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India ; or

(c) a person who is a non-resident, where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India :

Explanation 4.—For the removal of doubts, it is hereby clarified that the transfer of all or any rights in respect of any right, property or information includes and has always included transfer of all or any right for use or right to use a computer software (including granting of a licence) irrespective of the medium through which such right is transferred.

Case study 2



Facts:

- F Co. enters into a distribution agreement with I Co. for sale/distribution of a software which has been developed by F Co.
- I Co. sells the software to ultimate customers
- Customers pay to I Co. for purchase of software license and I Co. further makes the payment to F Co. for the same

Issue:

- Whether the Equalisation levy is payable by F Co.?
- Whether tax u/s 195 is to be deducted by I Co. on payment to F Co.?

Case study 2 - Annexure

Whether royalty under the Act?

- Whether purchase for reselling/distribution is royalty under the Act?
 - Samsung Electronics Co Ltd (2011) (16 taxmann.com 141 (Kar)
 - Various ITATs and AAR judgements – Payment by reseller to Owner – Not Royalty
- Right to sell / distribute a copy of the software vs. marketing function performed by the distributor

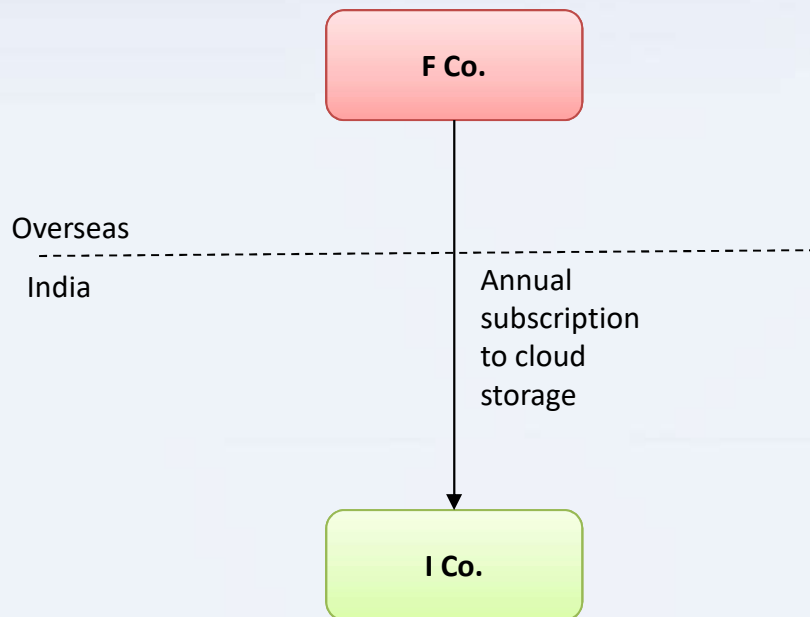
Whether royalty under the treaty?

- Whether reselling/distribution covered under royalty article under the treaty?

Whether EL applies?

- Software – whether goods or service?
- Whether EL would apply considering that I Co. has acquired the software license for reselling?

Case study 3



Facts:

- I Co. purchases annual subscription and gets cloud storage space for storage of data from F Co.
- The turnover of F Co. is more than Rs. 2 cr

Issue:

- Whether the equalisation levy is payable by F Co?
- Whether the payment would be covered under Royalty or Fees for Technical Services?
- Whether tax u/s 195 is to be deducted by I Co.?

Case study 3 - Annexure

Whether royalty or FTS under the Income-tax Act?

- Whether server is an equipment?
 - Poompuhar Shipping Corporation Ltd. vs. ITO
- Whether payment can be said to be for use of equipment?
 - Right / Control over the equipment – whether necessary?
 - ITO vs. People Interactive (I) P Ltd
 - ACIT vs. Vishwak Solutions Pvt. Ltd
- Insertion of Explanation 5 to section 9(1)(vi) of the Act

Whether royalty or FTS under the treaty?

- Whether explanation 5 extends to treaty?

Whether EL applies?

- F Co. an e-commerce operator?
- Annual subscription to cloud storage whether goods or services?
- Can making available cloud storage be regarded as a renting service?
- Whether definition of services under GST can be applied?

Case study 3 – Annexure

Extract of Section 9(1)(vi)

(vi) income by way of royalty payable by—

(a) the Government ; or

(b) a person who is a resident, except where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India ; or

(c) a person who is a non-resident, where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India :

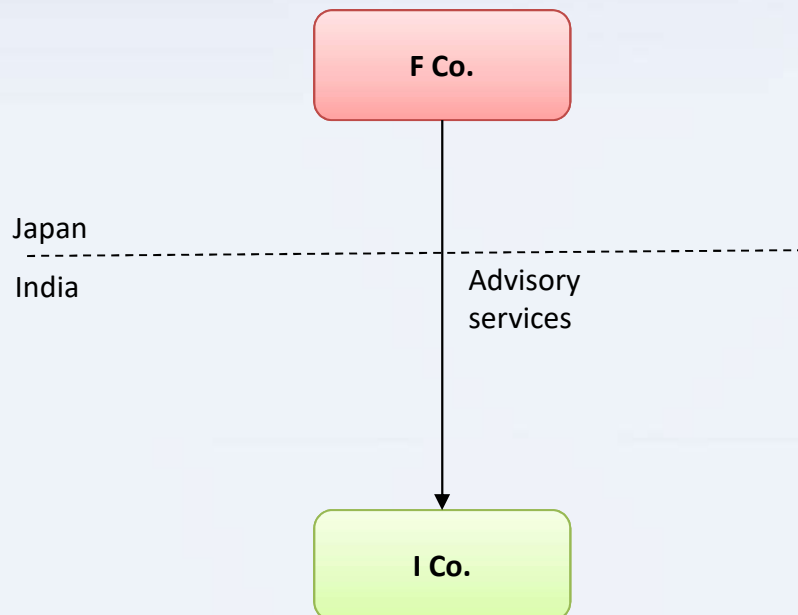
Explanation 5.—For the removal of doubts, it is hereby clarified that the royalty includes and has always included consideration in respect of any right, property or information, whether or not—

(a) the possession or control of such right, property or information is with the payer;

(b) such right, property or information is used directly by the payer;

(c) the location of such right, property or information is in India.

Case study 4



Facts:

- I Co. appoints F Co. and avails the following services in relation to market study/feasibility analysis of setting up a business entity in the Japan:
 - email opinion on a particular subject matter
 - online advisory through a zoom call
 - accesses a write up hosted on the website by paying subscription fee
- The turnover of F Co. for the financial year is more than Rs. 2 cr in India

Issue:

- Whether the equalisation levy is payable by F Co?
- Whether tax u/s 195 is to be deducted by I Co?

Case study 4 - Annexure

Opinion on an email:

- Whether FTS under the Act?
- Whether covered under Article 12 of India Japan DTAA and consequently taxable under the treaty?
- Whether EL applies?
 - F Co. an e-commerce operator?
 - Whether forming an opinion offline and communicating the same through email amounts to online provision of services?

Online advisory on a zoom call:

- Whether FTS under the Act?
- Whether covered under Article 12 of India Japan DTAA and consequently taxable under the treaty?
- Whether EL applies?
 - F Co. an e-commerce operator?
 - Whether answer changes if there is no forming of opinion offline and it is an interactive meeting on the zoom?
 - What if instead of zoom the advisor uses his own proprietary software?

Case study 4 - Annexure

Accessing a write up:

- Whether FTS under the Act?
 - CIT vs. Kotak Securities Ltd (Supreme Court) – service provided or facility offered?
 - CIT vs. Bharti Cellular Ltd (Supreme Court) - Human intervention is necessary for a service to be qualified as FTS.
- Whether covered under Article 12 of India Japan DTAA and consequently taxable under the treaty?
- Whether EL applies?
 - F Co. an e-commerce operator?
 - Whether access to write-up available on a website by paying a subscription would amount to online provision of services?

Case study 4 – Annexure

Extract of Section 9(1)(vii)

(vii) income by way of fees for technical services payable by—

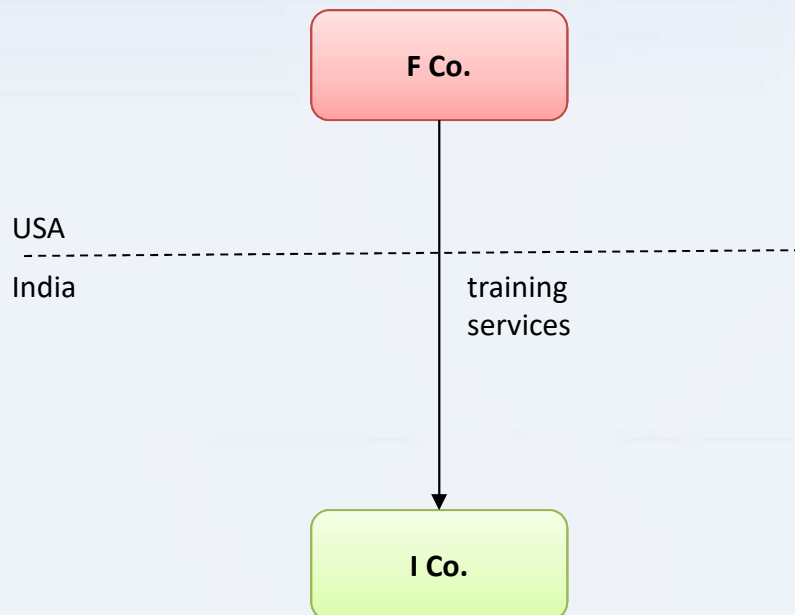
(a) the Government ; or

(b) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India ; or

(c) a person who is a non-resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India :

Explanation 2.—For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries";

Case study 5



Facts:

- F Co. provides training services to I Co. for FY 2020-21

Issue:

- Whether the equalisation levy is payable by F Co.?
- Whether tax u/s 195 is to be deducted by Mr. X considering the provisions of Double Tax Avoidance Agreement between India and USA?

Case study 5 – Annexure

Extract of Article 12 of India – US DTAA

4. For purposes of this Article, "fees for included services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services :

(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received ; or

(b) make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design.

Case study 6



Facts:

- USA Co. provides online services to an individual Mr. X who is residing in USA
- Service are utilized by Mr. X for his US business
- Mr. X is a resident but not ordinarily resident as per India Income-tax Act

Issue:

- Whether the equalisation levy is payable by F Co. considering that services are provided to a resident but not ordinarily resident?
- Whether tax u/s 195 is to be deducted by Mr. X considering that he is a resident but not ordinary resident?

Case study 6 - Annexure

Taxability under the Act / Treaty

- Whether FTS under the Act? – utilization of services for US business
- Whether taxable under the India-US treaty?
 - Residence of Payer whether to be seen as per Article 4?

Whether EL applies?

- Whether resident definition as per section 6 of Income-tax Act to be considered?
- Whether services provided to Resident but not ordinarily resident are liable to EL?

Case study 6 – Annexure

Extract of Section 9(1)(vii)

(vii) income by way of fees for technical services payable by—

(a) the Government ; or

(b) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India ; or

(c) a person who is a non-resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India :

Extract of Section 165A

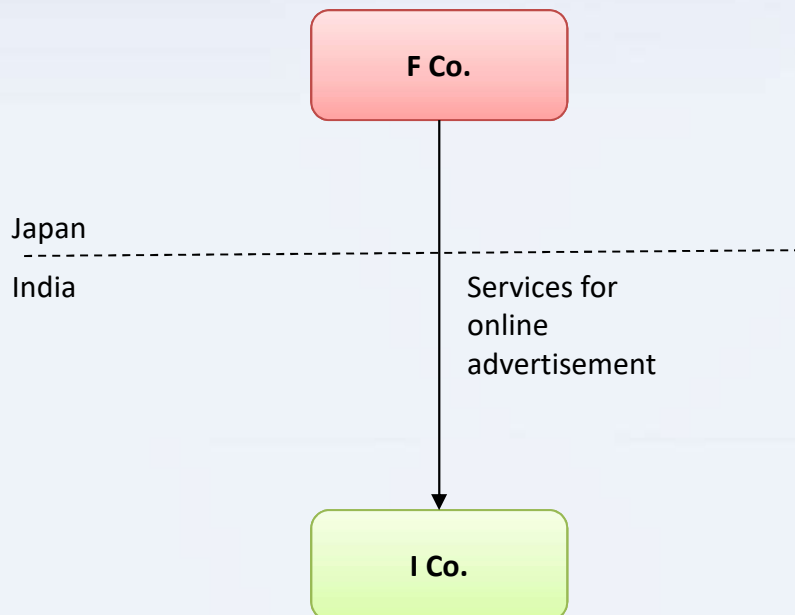
165A. (1) On and from the 1st day of April, 2020, there shall be charged an equalisation levy at the rate of two per cent. of the amount of consideration received or receivable by an e-commerce operator from e-commerce supply or services made or provided or facilitated by it—

(i) to a person resident in India; or

(ii) to a non-resident in the specified circumstances as referred to in sub-section (3); or

(iii) to a person who buys such goods or services or both using internet protocol address located in India

Case study 7



Facts:

- F Co. assists I Co. in making a online advertisement for the products that I Co. manufactures and sells

Issue:

- Whether the Equalisation levy 2016 is deductible by I Co. on payment to F Co.?
- Whether the Equalisation levy 2020 is payable by F Co.?
- Whether tax u/s 195 is to be deducted by I Co. in case EL 2016 or EL 2020 is applicable?

Case study 7 - Annexure

Applicability of EL 2016

- Whether services covered under specified services for EL 2016 to apply?

Applicability of EL 2020

- F Co. is an e-commerce operator?
- Whether there is online provision of services?
- Whether EL 2020 applies even if EL 2016 is applicable?

Whether taxable under the Act?

- Whether services are FTS under the Act?
- Whether exemption u/s 10(50) applies?

Case study 7 – Annexure

Extract of Section 164:

In this Chapter, unless the context otherwise requires,—

(cb) "e-commerce supply or services" means—

- (i) online sale of goods owned by the e-commerce operator; or*
- (ii) online provision of services provided by the e-commerce operator; or*
- (iii) online sale of goods or provision of services or both, facilitated by the e-commerce operator; or*
- (iv) any combination of activities listed in clause (i), (ii) or clause (iii);*

(f) "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;

(i) "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;

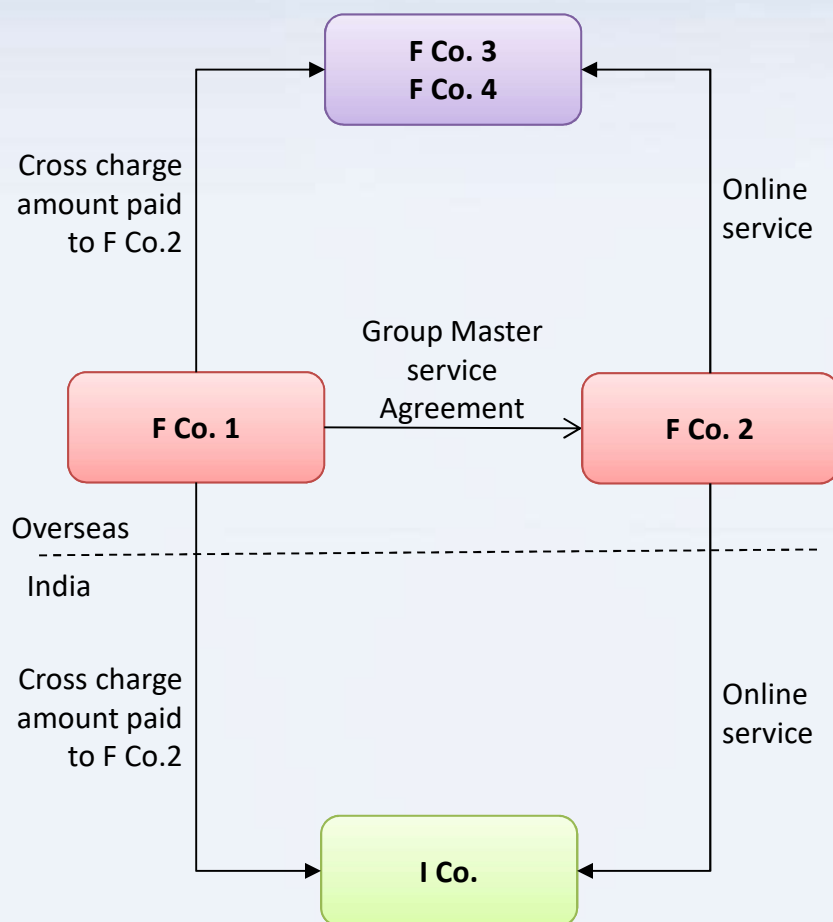
Case study 7 – Annexure

Extract of Section 10(50):

(50) any income arising from any specified service provided on or after the date on which the provisions of Chapter VIII of the Finance Act, 2016 comes into force or arising from any e-commerce supply or services made or provided or facilitated on or after the 1st day of April, 2021 and chargeable to equalisation levy under that Chapter.

Explanation.—For the purposes of this clause, "specified service" shall have the meaning assigned to it in clause (i) of section 164 of Chapter VIII of the Finance Act, 2016.

Case study 8



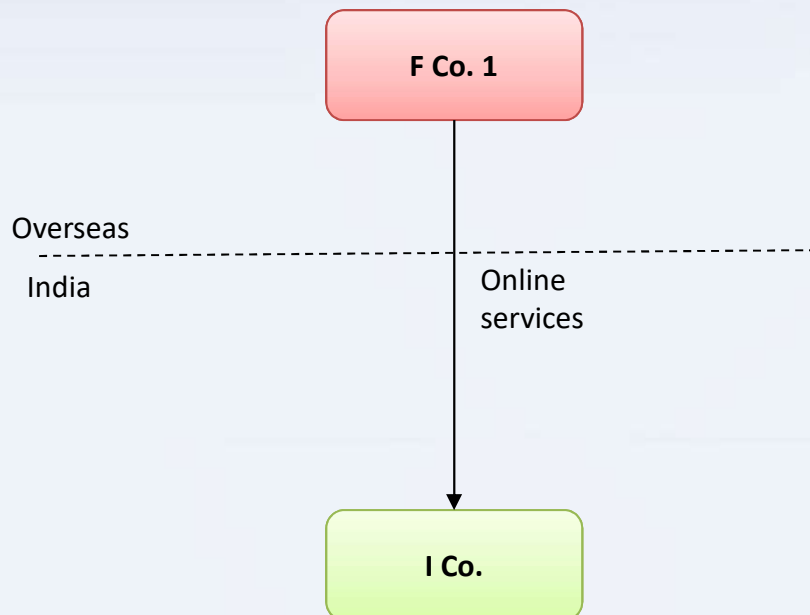
Facts:

- F Co. 1 enters into a master service agreement with F Co. 2 for services to be rendered to many group companies I Co., F Co. 3 & F Co. 4
- F Co. 2 renders services to all group companies including I Co. in India

Issue:

- Whether the equalisation levy applies?
- If yes, how to apportion the amount to services provided to I Co.?
- Whether tax u/s 195 is deductible on payment to F Co. 1 by I Co.?

Case study 9



Facts:

- F Co. 1 provides technical services online to I Co.
- Services qualify as online provision of services for EL
- The turnover of F Co. 1 for 2021-22 is Rs. 1.75cr

Issue:

- Whether the Equalisation levy is payable by FCo1 for FY 2021-22 considering the turnover of F Co.?
- Whether tax u/s 195 is to be deducted by I Co. in case EL does not apply FY 2021-22?

Thank You

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