

FAQ's on amendments in Equalisation Levy by the Finance Act, 2020

Due to immense increase in digitalisation and digital transformation of various businesses whereby digital processes and tools were adopted to achieve strategic business goals, the concept of Equalisation Levy was introduced in India in the year 2016 with the intention of taxing the digital transactions relating to advertisement services provided by the non-residents to the Indian businesses or the businesses having permanent establishment (“**PE**” for short) in India. On account of expansion of digitalisation and movement of more businesses towards digital space, the non-resident players are earning huge revenues from India without suffering any taxation in India due to the absence of any PE in India. In order to address the said non-taxability of income in India in case of non-residents engaged in digital transactions, the Government has now widened the scope of Equalisation levy so as to include within its ambit the e-commerce supplies or services made/provided/facilitated by the non-residents using digital platforms/ facilities where such non-residents do not have any PE in India.

In order to bring clarity regarding the amendments brought in Equalisation Levy regime by the Finance Act, 2020, we have attempted to address certain common queries by way of Frequently Asked Questions set out as under:

1. How Finance Act, 2020 has widened the scope of Equalisation Levy?

As per Section 165 of the Finance Act, 2016 (“**FA, 2016**” for short), Equalisation Levy was chargeable only on the consideration received or receivable by a non-resident from providing online advertisement services or related services to the Indian resident or person having PE in India.

Now, by virtue of Finance Act, 2020, a new section 165A has been inserted in FA, 2016 to widen the scope of Equalisation Levy by including within its ambit the consideration received or receivable for E-commerce Supply or Services by an e-commerce operator. Now, e-commerce operator will be liable to pay Equalisation Levy @2% (“**New Equalisation Levy**” in short) of the consideration received or receivable by such e-commerce operator.

2. From which date this New Equalisation Levy is applicable?

New Equalisation Levy is made effective from 1st April, 2020. Meaning thereby an e-commerce operator who provides e-commerce supply or services to certain category of persons would be liable to pay New Equalisation Levy from F.Y. 2020-21 onwards.

3. Which persons are covered within the scope of “e-commerce operator”?

The expression “e-commerce operator” has been defined by way of inserting a new clause (ca) in Section 164 of the FA, 2016. As per the said definition, “e-commerce operator” means a non-resident who owns, operates or manages digital facility or platform for supplying goods online or for providing online services to the customers or for both. For attracting New Equalisation Levy, it is important that the e-commerce

operator either itself owns a digital or electronic facility/platform or it is operating or managing such digital or electronic facility/platform.

4. Whether any non-resident selling its own goods through a third party's digital platform will be covered within the scope of New Equalisation Levy?

As per Section 165A r.w.s. 164 of the FA, 2016, New Equalisation Levy is attracted on an e-commerce operator who owns, operates or manages a digital platform/ facility for E-commerce supply or services. If any non-resident uses a third party's facility or platform to supply its goods which is also operated and managed by the said third party, such non-resident will not be covered within the ambit of an e-commerce operator and accordingly will not be chargeable to New Equalisation Levy.

5. What is the meaning of "e-commerce supply or services" for the purpose of New Equalisation Levy?

New Equalisation levy is attracted where an e-commerce operator is engaged in providing e-commerce supply or services. For this purpose, the expression "*e-commerce supply or services*" is defined in clause (cb) of Section 164 of the FA, 2016 as under:

- **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
- **combination of any of the aforesaid activities.**

The aforesaid definition can be better understood with the help of an example. Suppose XYZ Inc. a non-resident is operating an electronic or digital platform, whereby services of enabling online meeting for various participants is being provided. The platform of XYZ Inc. is being used for online webinars/meetings, etc. by Indian customers who are availing such services by paying annual/ monthly charges. In the said example, XYZ, Inc. is an e-commerce operator and online provision of services of enabling webinars/meetings by the said company will fall within the meaning of "**e-commerce supply or services**".

6. Whether all the e-commerce supplies or services made/provided/facilitated by the e-commerce operator will attract the chargeability of New Equalisation Levy in India?

No, all the e-commerce supplies or services made/provided/facilitated by the e-commerce operator will not attract New Equalisation Levy. As per Section 165A(1) of the FA, 2016, only the supplies or services made/provided/facilitated to the following persons ("*Specified Persons*" for short) will attract New Equalisation Levy:

- (i) Where goods or services or both are supplied by the e-commerce operator **to a person resident in India;**

- (ii) Where goods or services or both are supplied by the e-commerce operator **to a person who buys** such goods or services or both using internet protocol address located in India;
- (iii) Where goods or services or both are supplied by the e-commerce operator **to a non-resident person under specified circumstances** (Refer Q7 below).

7. Under which specified circumstances, an e-commerce operator is liable to pay New Equalisation Levy in relation to goods or services or both supplied to a non-resident?

An e-commerce operator would be liable to pay New Equalisation Levy in relation to goods or services or both supplied to a non-resident in the following circumstances:

- (a) Where an e-commerce operator provides sale of advertisement to another non-resident wherein such advertisement targets an Indian customer or a customer who, accesses such advertisement through internet protocol address located in India

For instance, ABC, a UK based food company approaches PQR which is a US based company targeting Indian customers at large, for placing advertisement of its food products on digital platform of PQR. In this case, PQR will be liable to pay Equalisation levy @ 2% of the consideration received by it from ABC.

- (b) Where an e-commerce operator is involved in sale of data, collected from an Indian resident or from a person who uses internet protocol address located in India.

For instance, a UK based Company, an e-commerce operator, collects data from an Indian resident person and further sells such data collected to a UAE based company. In this case, UK based company selling the data collected from an Indian resident will be liable to pay Equalisation levy @2% on the amount of consideration received by it from the UAE based company.

8. Whether New Equalization Levy is to be charged separately from the customers in the Invoice raised by the e-commerce operator or the same is a cost which is to be borne by the e-commerce operator?

New Equalisation levy is a type of direct tax levied on an e-commerce operator on the consideration received or receivable from e-commerce supply or services made/provided/facilitated by it. Accordingly, the said levy has been directly imposed on the e-commerce operator and thus, has to be borne by it only. However, it may depend on case to case basis as to how an e-commerce operator structures its commercial dealings to deal with this additional levy.

For instance, ABC an e-commerce operator receives a consideration of Rs. 10 crores for the e-commerce services provided to Indian Residents and accordingly, it is required to deposit an equalisation levy @2% of the consideration received from such services which comes out to Rs. 20 Lacs. Now, if ABC decides to charge this equalisation levy of Rs.

20 Lacs from its customers and increases the consideration to Rs. 10.20 Crores then it will be liable to pay Equalisation levy on this revised consideration.

9. Whether New Equalisation Levy will be levied in the following cases where supply of goods is made by an e-commerce operator through its digital platform:

- **Case I: Supply of goods is made on 29.03.2020 but the consideration is received on 04.04.2020.**
- **Case II: Consideration is received on 28.03.2020 but the supply of goods is made on 05.04.2020.**
- **Case III: Order has been placed on 15.03.2020 and the goods have been delivered on 10.04.2020 as well as consideration is also received on 10.04.2020**

As per amended provisions of Section 163 r.w.s 165A of FA, 2016, New Equalisation Levy applies to consideration received or receivable by an e-commerce operator for e-commerce supply or services made/provided/facilitated by it on or after 01.04.2020. Therefore, in our view, New Equalisation Levy is attracted when both the following conditions are satisfied

- (i) consideration is received/ receivable on or after 01.04.2020; and
- (ii) the said consideration is received/receivable for e-commerce supply or services made, provided or facilitated on or after 01.04.2020.

Thus, if either of (i) or (ii) conditions is not satisfied, New Equalisation Levy will not be attracted. In view of this, the chargeability of New Equalisation Levy in the aforesaid cases will be as follows:

Case I: In this case, since the consideration received on 04.04.2020 is not for e-commerce supplies made on or after 01.04.2020, New Equalisation Levy will not be attracted.

Case II: In this case, though goods are supplied on 05.04.2020 but as the consideration has been received before 01.04.2020, New Equalisation Levy will not be attracted.

Case III: Unlike the aforesaid cases, in this case, both receipt of consideration and supply of goods is made on or after 01.04.2020 i.e. on 10.04.2020 only; thus, New Equalisation Levy will be attracted here.

10. Under which circumstances/cases, New Equalisation Levy shall not be chargeable?

Section 165A(2) of the FA, 2016 as inserted by the Finance Act, 2020 provides the following circumstances wherein New Equalisation Levy shall not be chargeable:

- (i) Where the e-commerce operator making or providing or facilitating e-commerce supply or services has a PE in India and such e-commerce supply or services is effectively connected with such PE.
- (ii) Where Equalisation levy @6% is levied section u/s 165 of the FA, 2016.

- (iii) Where sales, turnover or gross receipts of the e-commerce operator from the e-commerce supply or services is less than Rs. 2 crore during the previous year.

11. For determining the threshold limit of Rs. 2 Crore, whether the turnover, gross receipts etc., has to be considered for the preceding financial year or the current financial year?

As per sub-section (2) of Section 165A of the FA, 2016, New Equalisation Levy shall not be charged in case of an e-commerce operator if its turnover, gross receipts etc. from e-commerce supplies made or services provided to Specified Persons does not exceed Rs. 2 Crore during the previous year. For interpreting the meaning of “previous year”, clause (j) of Section 164 of the FA, 2016 is to be analysed which provides that any words and expressions not defined in the Chapter of equalisation levy shall have the same meaning as assigned to them in the Income-tax Act, 1961 (“*IT Act*” for short). Thus, the definition of “previous year” is to be interpreted from Section 3 of the IT Act, as per which previous year means the financial year immediately preceding the assessment year. Therefore, for computing the threshold limit of Rs. 2 crores, turnover or gross receipts etc. of the current financial year i.e. FY 2020-21 is to be considered.

12. For determining the threshold limit of Rs. 2 Crore, whether global turnover of the e-commerce operator is to be considered or only its turnover from e-commerce supply or services to Specified Persons (“EL Turnover” for short)?

As per Section 165A(2)(iii) r.w. sub-section (1) of Section 165A of the FA, 2016, for computing the threshold limit of Rs. 2 crore only the supplies or services made to the Specified Persons will be considered and not the global turnover or global receipts of the e-commerce operator.

For instance, XYZ Inc. is engaged in providing media services all over the world in respect of which it has generated gross receipts of Rs. 15 Crore during the F.Y. 2020-21. Out of the said gross receipts, Rs. 1.5 crore has been received from customers resident in India. In the said case, New Equalisation Levy will not be attracted as the turnover from the customers resident in India does not exceed Rs. 2 crore.

13. In a case where the EL Turnover of a F.Y. cannot be predicted by the e-commerce operator, at what point of time the charge of New Equalisation Levy shall arise?

As per the provisions of Section 165A of the FA, 2016, no equalisation levy is charged where the EL Turnover does not exceed Rs. 2 crore during the previous year. Further, Section 166A of the FA, 2016 states that the payment of New Equalisation Levy is to be made on quarterly basis. In this regard, there can be a practical challenge with respect to the chargeability of New Equalisation Levy since it might not be possible to predict in the 1st quarter itself as to whether the EL Turnover of the e-commerce operator would cross the threshold of Rs. 2 crore in the F.Y. or not. In such case, it is suggested that liability to pay New Equalization Levy is discharged on the basis of best estimates prepared or used for management reporting purposes. Though a plausible view can be taken that New Equalisation levy shall be payable as and when the yearly turnover

crosses the limit of Rs. 2 crore and the payment shall be made on the due date of such quarter in which said limit is crossed. Considering practical difficulty and absence of clarity in this respect, these aspects would require further clarification by the CBDT.

14. Whether the e-commerce operator shall be liable to pay Equalisation Levy in respect of the goods returned to it by the customers?

Section 165A of the FA, 2016 does not specifically deal with the cases of sales return. However, since the expression used in Section 165A of the FA, 2016 is “*consideration received/ receivable by an e-commerce operator from the supply or services made or provided or facilitated by it*”, a plausible view can be taken that as the goods have been returned by the customer to the e-commerce operator and accordingly, it is required to refund the consideration amount, thus, no consideration has been received by the said operator in respect of the goods supplied. Therefore, a view may be taken that New Equalisation Levy will not be attracted in such circumstances.

Further, in this context, some practical difficulties can also be envisaged wherein the sales is made in 1st quarter and the sale return has taken place in the 2nd quarter as in such a case, the equalisation levy would already have been paid by the e-commerce operator in the 1st quarter itself. Thus, it is expected that these aspects may be clarified by the CBDT.

15. Is there any difference in the mechanism of collection of Equalisation levy on advertisement and New Equalisation Levy?

For equalisation levy on advertisement as referred to in Section 165 of the FA, 2016, service receiver receiving advertisement services from a non-resident is liable to deduct equalisation levy @ 6% from the amount payable to such non-resident service provider and then the equalisation levy so collected by the service recipient shall be payable by it to the credit of the Central Government. However, the concept of chargeability and payment of New Equalisation Levy is quite different wherein the e-commerce operator supplying good or rendering services, as the case may be, is itself liable to pay 2% equalisation levy on the amount of consideration received or receivable by it to the credit of Central Government.

16. What are the consequential amendments which have been brought in Section 10(50) of the IT Act by the Finance Act, 2020?

Section 10(50) of the IT Act as existed before the amendment made by Finance Act, 2020 provides that any income of a non-resident arising from online advertisement provided by it shall be exempt from income-tax where Equalisation Levy u/s 165 of the FA, 2016 has been already charged on it. *Vide* the Finance Act, 2020, a consequential amendment has been brought in Section 10(50) of the IT Act to provide that income arising from e-commerce supply or services made/provided/facilitated by the e-commerce operator shall not be chargeable to income-tax on which New Equalisation Levy is chargeable u/s 165A of the FA, 2016. However, there is an ambiguity in the effective date of the amendment made in Section 10(50) of the IT Act vis-a-vis Section 163 of FA, 2016 as

the provision of exemption in Section 10(50) has been brought into effect from 01.04.2021 whereas chargeability of New Equalisation Levy as envisaged in Section 163 has been brought into effect from 01.04.2020. In this regard, necessary Corrigendum in Finance Act, 2020 is expected.

17. Whether an e-commerce operator is required to apply for PAN in India? If yes, whether it is required to file income-tax return in India?

The requirement to obtain PAN in India is governed by the provisions of Section 139A of the IT Act. If the e-commerce operator falls within the scope of the said section, then it shall be required to obtain PAN in India. Consequently, if such e-commerce operator who has obtained PAN in India is a company or a firm, then it may be required to file income-tax return as per Section 139(1) of the IT Act. However, the requirement to obtain PAN and file income-tax return in India will have to be examined on case to case basis.

18. What are the due dates for depositing New Equalisation Levy to the credit of the Central Government?

As per Section 166A of the FA, 2016, an e-commerce operator has to deposit New Equalisation Levy to the credit of the Central Government on a quarterly basis as per the following due dates:

S.No.	Date of ending of the quarter of the F.Y.	Due Date of payment
1.	30 th June	7 th July
2.	30 th September	7 th October
3.	31 st December	7 th January
4.	31 st March	31 st March

There appears to be a practical challenge as to deposit of New Equalisation Levy for the 4th quarter wherein the payment has to be made within the quarter itself unlike the first 3 quarters where the said levy has to be deposited by the 7th day of the following month after the end of the respective quarter.

19. What are the consequences of failure to deposit or pay New Equalization Levy by the e-commerce operator?

Where an e-commerce operator fails to deposit or pay the New Equalisation Levy, it shall be liable to pay the following in addition to the deposit of equalisation levy amount:

- **Interest on delayed payment of equalisation levy**
Every e-commerce operator who fails to deposit whole or any part of the equalisation levy by the due date shall be liable to pay **simple interest @1% of such levy** for every month or part of the month during which such failure continues.
- **Penalty for failure to pay equalisation levy**

Every e-commerce operator who fails to pay whole or any part of the equalisation levy to the credit of the Central Government shall pay **a penalty equal to the amount of equalization levy** that he failed to pay.

20. What is the compliance requirement of furnishing of statement by the e-commerce operator?

Every e-commerce operator shall prepare and deliver Equalisation Levy Statement to the Assessing Officer or to any other authority or agency authorised by the Board in such form and manner yet to be prescribed. Further, due date of furnishing the said statement is on or before 30th June after the end of each F.Y. and the same is required to be filed annually.

21. What are the consequences for failure of filing the Equalisation Levy Statement?

Where an e-commerce operator fails to furnish the Equalisation Levy Statement within the time limit as stated above, it shall be liable to pay a penalty of Rs. 100/- for each day during which the failure continues.

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