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June 17, 2016, New Delhi, INDIA

**OVERSEAS E-COMMERCE
COMPANIES TO BE SUBJECT TO
TAX DEDUCTIONS**

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A. The Equalisation Levy:

Overseas E-Commerce Companies (“OECs”) such as Facebook, Google and Amazon generate substantial revenues from Indian online advertisers through digital advertising. Since these OECs do not have a Permanent Establishment (“PE”)¹ in India, the revenue they generate is not taxable in India.

In his budget speech this year, the Finance Minister Mr. Arun Jaitley proposed a levy of 6% (“**Equalisation Levy**”) on OECs not having PEs in India. The Equalisation Levy, which has been implemented w.e.f. June 1, 2016, has been imposed on online advertising fees paid to OECs by (i) a person resident in India and carrying on business, and/or (ii) profession or a non-resident having a PE in India (collectively referred to as the “**Advertisers**”) and has been inserted by way of a new chapter² in the Finance Act, 2016 (the “**Act**”).

B. Applicability of the Equalisation Levy:

- (i) The Equalisation Levy will be levied on business to business transactions wherein a gross payment of above Rs.1,00,000 (Rupees One Lakh) per annum is received or receivable by an OEC from an Advertiser for rendering any specified service³. The Equalisation Levy is to be implemented by the Advertisers deducting an amount equivalent to 6% from the total payment being paid or payable by it to the OEC if such gross payment exceeds Rs. 100,000 (Rupees One Lakh).
- (ii) The Equalisation Levy is currently applicable on online advertising or digital advertising space or any other facility or service for the purposes of online advertisement provided by OECs to Advertisers. The Central Government has also reserved the power to notify any other service in the future.

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- (iii) The Equalisation Levy would not be applicable where the payment for the specified service by the Advertiser is not for carrying out business or profession or if the OEC has a PE in India and the specified service is effectively connected with such PE.

C. Purpose of the Equalisation Levy:

The purpose of the Equalisation Levy is to tax the revenue generated by the OECs in India. By way of the Equalisation Levy, the Central Government further seeks to address the issue of tax neutrality. In its recommendations/observations, the Committee of Central Board of Direct Taxes, Department of Revenue, Ministry of Finance, Government of India (the "**Committee**") noted that tax neutrality, which provides that tax should seek to be neutral and equitable between various forms of business activities, is a major concern for the Indian economy today. In the absence of tax neutrality, a market enterprise being an OEC may enjoy an unfair tax advantage over its peers which can adversely affect the market economy in the long run.

The Committee further observed that:

"The traditional brick and mortar business are likely to be taxable fully on their business income arising in source jurisdictions, such as India, either as a tax resident, or as the permanent establishment of a foreign company, and thus face a much higher tax burden on their profits than their multinational counterparts conducting their business by digital means. This lack of tax neutrality between digital enterprise and traditional enterprise can distort the market in favor of the former and there by disrupt the existing market equilibrium."

D. Penalty for Failure to Deduct the Equalisation Levy:

The penalty for an Advertiser who fails to deduct the Equalisation Levy prior to making gross payment of more than Rs. 1,00,000 (Rupees One Lakh) to an OEC or fails to deposit the deducted Equalisation Levy is envisaged as under:

- (i) An assessee who fails to deduct the Equalisation Levy in whole or part prior to making payment to the OEC shall be liable to pay the same to the Central Government within the first 7 (seven) days of the succeeding month. Any delay in payment beyond the stipulated 7 (seven) days would make the assessee further liable to pay simple interest of 1% of such levy for every month of the delay and an additional penalty equal to the amount of the Equalisation Levy that he has failed to deduct.
- (ii) An assessee who deducts the amount of Equalisation Levy but fails to pay the same to the Central Government within the stipulated 7 (seven) days of the succeeding month shall be liable to pay

the Equalisation Levy plus interest of 1% for every month of delay along with an additional penalty of Rs. 1,000 (Rupees One Thousand) for every day during which the failure to pay such Equalisation Levy continues provided that the penalty shall not exceed the amount of Equalisation Levy that was payable.

E. Conclusion:

It remains to be seen how the OECs react to the deductions being made pursuant to the implementation of the Equalisation Levy. Although this levy may result in the Government earning a considerable amount of revenue, Indian start-ups and other enterprises are already arguing against the levy as they would be compelled to pay and bear the Equalisation Levy as most OECs would not want the Equalisation Levy to affect the payments being received by them and consequently may require grossing up of payments due to them thereby increasing the cost of doing business in India.

Endnotes:

1. "Permanent Establishment" has been defined in Chapter VIII of the Finance Act, 2016 as a fixed place of business through which the business of the enterprise is wholly or partially carried on.
2. Section 163-180 in Chapter VIII of the Finance Act, 2016, inserted by way of the Notification No.28/2016.
3. "Specified Service" has been defined as an 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 notified by the Central Government in this behalf.

Feedback

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