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May 07, 2021

Shri Tarun Bajaj  
Secretary – Revenue  
Ministry of Finance

**Subject: Clarifications required in relation to Equalisation Levy**

Respected Sir,

***Greetings from MAIT!***

Set up in 1982, MAIT is the apex body representing India's ICT sector. MAIT is recognised by both the Government, as well as the industry, for its role in the growth and development of the IT Hardware industry. At MAIT, we believe that technology is the primary contributor of economic growth and with our consistent policy advocacy efforts, we hope to help India being a leader in ICT and help India attain the ambitious goal of becoming a USD 5 Trillion economy.

**Objective of our representation**

Equalisation Levy (EL) on e-commerce supply and services has been implemented from April 1, 2020. The Government of India, vide Finance Act 2021 had issued clarifications regarding various grey areas in the EL provisions. However, there are several issues which still need to be addressed.

Separately, the latest scope of clarifications have the potential to include almost all digital activities/transactions in India. Even if the applicability were limited to non-resident e-commerce operators, it would lead to broad interpretations in terms of reach. To address any challenges that might arise in the future, we would like to urge the Government of India to consider holding a broader industry consultation on the issues the industry will be highlighting and align them with the larger multilateral consensus-based framework at the Organisation for Economic Cooperation and Development (OECD) inclusive Framework.

**Issues and our requests**

***Highlighted Issues***

The clarifications issued by the Government of India regarding EL in the Finance Act, 2021 will radically broaden the reach of the EL and create a host of new enforcement issues across various sectors. At the moment, digital trade is conducted through the use of online tools/portals, out of which many transactions are, in fact, carried out between companies that are part of the same group. The newly proposed changes are likely to include such transactions within its scope. Furthermore, the amendments take effect retroactively from April 1, 2020.

The details regarding the amendments are provided below:

- The clarification to clause (cb) of section 164 of the Finance Act, 2016, will broaden the scope of existing rules and will include transactions within the scope of EL if any of the following transaction aspects occur online - acceptance of an offer for sale; placement of a purchase order; acceptance of the purchase order; payment of consideration; or supply of products or provisions. Considering a lot of transactions require online purchases or are completed via email, this extension is likely to include brick-and-mortar businesses as well as other businesses, that typically operate offline, within the scope of EL, even if one aspect of the transaction is undertaken online.
- Section 165A now includes the entire amount of consideration earned for the sale of goods or services within its scope (except in cases where the consideration is for sale of goods or for provision of services which are provided by a person resident in India or by permanent establishment of a non-resident in India). The amount is considered even if the underlying product or service is delivered by a third party and the e-commerce operator's income is only a portion of the gross amount received.

In light of the foregoing and the concerns raised by the recent amendments, we request that necessary clarifications be issued, confirming the transactions covered and excluded from the scope of EL.

#### *Other issues*

We would also request you to issue clarifications on other administrative concerns and other gaps in the current provisions, as discussed below:

- Clarification may be issued that specific exemption be issued for reseller/distributor arrangements.
- Clarification may be issued regarding the availability of Foreign Tax Credit ('FTC') against EL paid in India.
- Clarification may be issued regarding the definition of 'digital facility', 'electronic facility', 'owns, operates or manages' and 'platform' for determining whether a non-resident qualifies as an 'e-commerce operator'
- An opportunity to carry the matter in appeal to appellate forums starting from CIT(A) even on the merits of the issue should be introduced.
- Clarification may be issued that EL is not chargeable to the suppliers engaged in supplying products /services to group entities in India that are subject to transfer pricing provisions in India. It may be clarified that when an Indian tax resident uses IP address located outside India, EL shall not be charged on such transaction.
- Clarification may be issued that in case where multiple e-commerce operators are involved, if the entire transaction value is to be taxed, then it should be subject to EL

only once and that too in the hands of e-commerce operator on whose platform the merchants actually list their products and the transaction really takes place ('primary e-commerce operator'). The other e-commerce operators should not be liable to EL.

- Clarification may be issued providing the due date for payment of EL for non-residents for previous quarters, who did not have a clarity regarding the applicability of EL for their transactions.
- Given that non-residents find it onerous to file various notarised and consularised documents to obtain a PAN, kindly consider providing a clarification/ amending the law relaxing certain documentation requirements for non-residents to obtain a PAN. Alternatively, foreign tax registration number etc may be accepted as an alternative to the documents required to be submitted by a non-resident to obtain a PAN.
- Kindly build in a mechanism to provide for refund of EL on contentious issues or for credit of EL against income-tax liability or credit of income tax against EL to prevent double taxation of the same income.
- Clarification may be issued for determining as to when is consideration said to be receivable for EL purposes.
- Clarification may be issued for scope of 'permanent establishment' for EL purposes.

*Prospective application of clarifications introduced by Finance Act 2021*

We would also like to emphasise the following critical points:

- **Impact of the EL on global supply chains during the Covid-19 crisis:** The COVID-19 crisis has proven the importance and effectiveness of the global supply chains by delivering critical goods and services to every corner of the country. Additional levies will jeopardize the committed supply chain's good work, incur additional loss, and disrupt the lives of millions – in addition to the current threat of lock-downs, and partial or complete closure.
- **The impact on future global partnerships:** Global bilateral and multilateral partnerships are the key to success during the pandemic and also play a critical role in post-pandemic recovery. We are concerned that the vast applicability of EL will disrupt and disintegrate the good efforts that are currently being made.
- **Impact on the investment environment and industry sentiment across sectors:** Most industries, including Indian manufacturers, were able to conduct commercial transactions through dedicated e-commerce portals. If a levy is imposed on the global supply chain, limiting its operation, it will have a cascading effect across industry segments, affecting companies that sell and procure goods and services through e-commerce, stifling investments, affecting trade and commercial activities, and eventually reducing employment opportunities.

In view of the above, we respectfully request that the Government of India to implement additional EL amendments under a prospective application thus allowing businesses to design and enforce the complex structures required to comply with the new rules in the future.

**Our request**

In light of all of the above, we request that the Government of India to reconsider the recent amendments and hold a formal stakeholder consultation. This is especially important given that the Indian government is yet to issue FAQs or implementation guidelines.

We will be glad to have a discussion with you at any time convenient.

With regards,

A handwritten signature in black ink, appearing to read "George Paul". The signature is stylized with a large, sweeping initial "G" and a horizontal line underlining the name.

George Paul  
Chief Executive Officer