

# Short Term Measures The EU Digital Services Tax (DST) Proposal v. The Indian Equalisation Levy



**Sriram Govind, LL.M.**

*Foundation for International Taxation*

*International Taxation Conference, 2018*

December 6, 2018



Institute for Austrian and International Tax Law • [www.wu.ac.at/taxlaw](http://www.wu.ac.at/taxlaw)



- Economy digitalized now – existing rules cannot deal with
  - BEPS AP1 – considered this issue – 3 options:
    - Digital PE
    - Withholding taxes
    - Equalisation levy (turnover taxes)
- Equalisation levy – national measures (India – first)
- EU Digital Services Tax Proposal – landmark proposal in EU – analyze specifics, compare with Indian law

# Object and Purpose, Legal Basis

	EU DST	Indian Equalisation Levy
<b>OBJECT AND PURPOSE</b>	<ul style="list-style-type: none"> <li>• Protect integrity of internal market – proper functioning</li> <li>• Tax bases not eroded – public finances in EU sustainable</li> <li>• Social fairness – level playing field for all businesses in EU</li> <li>• Fight ATP - digital companies – no tax where value created</li> </ul> <p>Interim tax – “intention”</p>	<p>PE not suitable for new business; based on BEPS AP1 – levy to have level playing field for digital, other businesses</p>
<b>LEGAL BASIS</b>	<p>Legal basis – Art. 113 TFEU addressing indirect taxes, requiring unanimity - Fragmentation – reason stated for competence - Valid basis? Questioned by States – may change</p>	<p>Separate Chapter in the Finance Act, 2016 – not in Income Tax Act, 1961 – S. 90 and dualism re: treaties</p>

# Taxable Revenues – EU DST

- Gross revenue (net VAT, other taxes) - situations:
  - Placing ads on websites, software or apps (incl. 3<sup>rd</sup> party ads);
  - Providing a digital platform – users can find/interact with other users – **may** also facilitate supply of goods/services b/w them;
  - Transmission of user data collected - websites, softwares, apps
- Google AdSense, Uber/AirBnB, Facebook – all covered!

# Taxable Revenues – EU DST

- Mere payment or communication services through digital interface – excluded – dependent on support software!
- E-commerce transactions; intra group transactions; investment/trade - crowdfunding – outside scope
- If main purpose of making available own interface – supply digital content to users – excluded (only user-user)

# Taxable Revenues - Comparison

## EU DST

Targeted tax – “specialized” services only where user value creation - user role more complex, monetizing user input

## Indian Equalisation Levy

- Gross revenue - specified services –
- online advertisements, any provision of digital advertising space or other facility/service for online advertisement;
  - Any other service as may be notified by the Central Government in this behalf

## ISSUES:

- More emphasis on user value creation in EU - EU proposal also covers other businesses (newspapers etc.), but no e-commerce!
- Indian tax – on advertisements or on all services – legal competence under Constitution?

# Taxable Person - Comparison

EU DST	Indian Equalisation Levy
<p><b>Any entity or group service provider</b> – EU or non EU where:</p> <ul style="list-style-type: none"><li>• Total worldwide revenues &gt; EUR 750 million per yr; and</li><li>• Total EU revenues &gt; EUR 50 million per yr</li></ul>	<p><b>Resident or Indian PE (of other NR) service recipient</b> of “specified services” from an NR</p> <p><i>De minimis</i> threshold of around USD 1400 (INR 1 lakh)</p> <p>Exempt if NR – taxable fixed base PE in India, attributable</p> <p>Non-business payments exempt</p>

## ISSUES:

- Service provider taxable in EU v. service recipient in India – impact on treaties?
- PE exemption per Art. 5(1) – dependent agent PE/service PE not included?
- Difference in thresholds – very low in India, very high in EU (*de facto* discrimination?)

- Taxable revenues – deemed obtained – member State where **users are located (based on IP/geolocation)**:
  - For ad services, State where member sees ad on device;
  - For digital platforms, a) State where users use a device **and** concludes underlying transaction or b) State where user opens account allowing access to interface;
  - For data transmission, if data generated from device in State used to access website, software etc. and then transmitted the same tax year



- Revenue allocation – divided again by **type of service**:
  - For ad services, proportion of total revenues attributed to the number of times an ad appears on device in State
  - For digital platforms, proportion of total revenues - number of users - underlying transactions in State; where not applicable, number of users opened account in State
  - For data transmission, proportion of total revenues to number of users – data generated & transmitted – having used a device in State to access

# Place of Taxation - Comparison

## EU DST

Taxable revenues – deemed obtained – member State where users are located (IP address/other geolocation)

## Indian Equalisation Levy

Domestic tax measure – revenues taxable in India based on service recipient and not users – unilateral measure

### ISSUES:

- IP based allocation of taxation rights – issues:
  - VPNs – easy to get around geolocation
  - Food delivery/transportation apps – order can be made by user in EU for services in India!
  - AirBnB – taxing rights to State other than residence/source? Travelling users?
  - Privacy concerns – cookie/fingerprinting tracking
- User v. service recipient source tax? – better model?

# Calculation and Tax Rate - Comparison

## EU DST

DST - proportion of taxable revenues obtained in one tax period by a taxable person as calculated per the Directive - 3% rate applicable

CIT deduction in EU States as cost – recital, not mandated

One stop shop system – one State – find taxpayer, collect tax, allocate tax

## Indian Equalisation Levy

6% tax rate on covered services – to be reduced from service fee by service recipient and paid

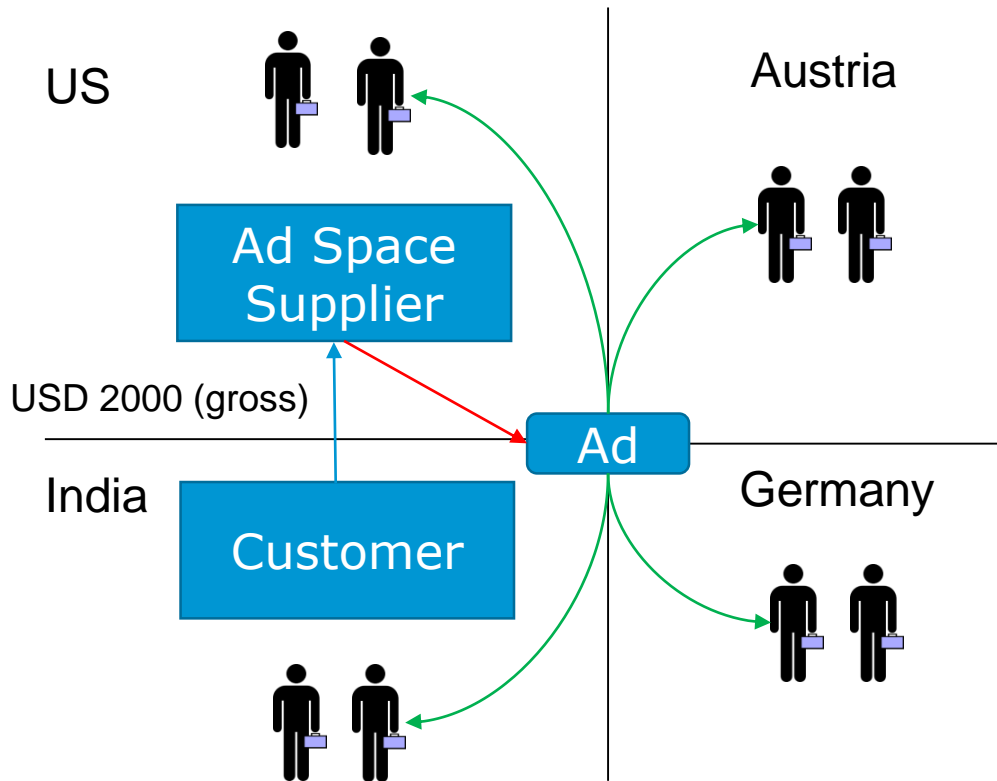
Exemption for service recipient from income tax

Interest and penalty – failure

### ISSUES:

- Deduction of income tax in both cases (not mandatory in EU) – does this make it an income tax, have impact on treaty coverage?

# Case Study



Total taxable revenues – USD 2000 (4 countries)

Austria/Germany share – 2/8 each – USD 500 (tax base) – 3% DST each

Indian levy – 6% on customer (withholding) as well since ad services!

Two new (gross level) taxes apart from US income tax, GST in India (assuming no credit in the US) – even if profits limited



VIENNA UNIVERSITY OF  
ECONOMICS AND BUSINESS

Sriram Govind, LL.M.

*Institute for Austrian and International Tax  
Law*

WU

Wirtschaftsuniversität Wien

*Vienna University of Economics and Business*

Welthandelsplatz 1, Building D3, 1020

Vienna, Austria

E-Mail:

[sriram.govind@wu.ac.at](mailto:sriram.govind@wu.ac.at)

# Thank You!