

Future of Digital Economy under BEPS Action 1

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Glossary

Abbreviation	Meaning
AAR	Authority for Advance Rulings
B2B	Business to Business
B2C	Business to Consumer
CBDT	Central Board of Direct Taxes
DE	Digital Economy
EQL	Equalization Levy
IT Act	Income tax Act, 1961
PE	Permanent Establishment



Background

Indian Budget 2016:

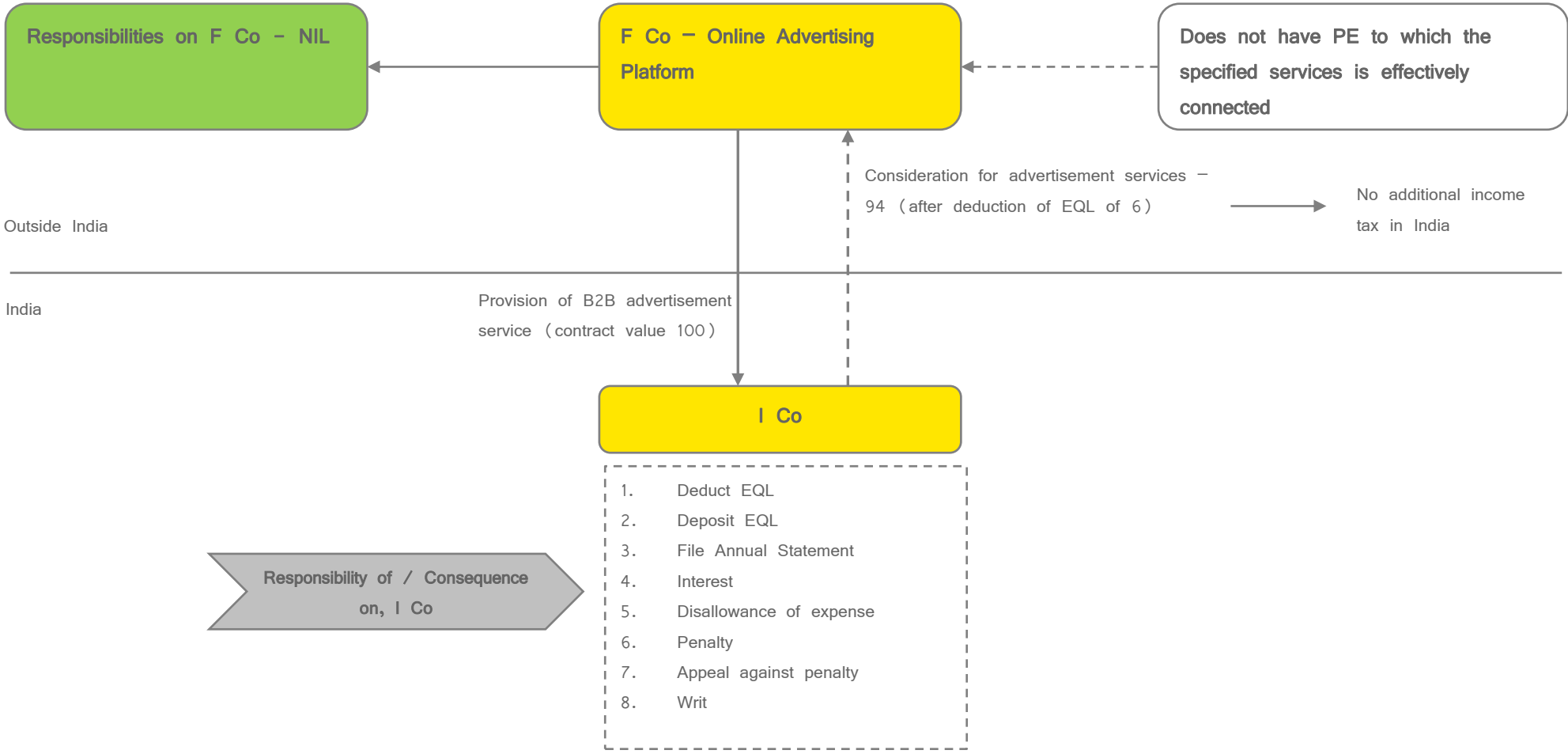
- ▶ Introduced an **EQL of 6%** on B2B transactions (from 1 June 2016)
- ▶ where the payment exceeds **INR 100,000**
 - ▶ by an **Indian resident** (& carrying on business or profession)
 - ▶ for **specified services**
 - ▶ **Online¹ advertisements**
 - ▶ **Provision for digital advertising space**
 - ▶ **Any other facility or service for the purpose of online advertisement**
 - ▶ Any other service as notified
 - ▶ to a **non-resident**
 - ▶ No EQL if
 - NR service provider has a PE in India; and
 - Specified services is effectively connected to such a PE
- ▶ CBDT subsequently released a report of the committee which recommended the levy of EQL:
 - ▶ Levy likely to be extended to other online services
 - ▶ Rate proposed in the budget has been kept at the lower end of the range of 6-8% as prescribed in the report

¹“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

Background

- ▶ Income arising from specified services and subject to EQL would be exempt in the hands of the non-resident service provider [Section 10(50)]
- ▶ Expenditure to be allowed as deduction to payer only on payment of levy
 - ▶ Penalty and interest prescribed for non payment of levy
 - ▶ Reporting requirements applicable to payer to be prescribed

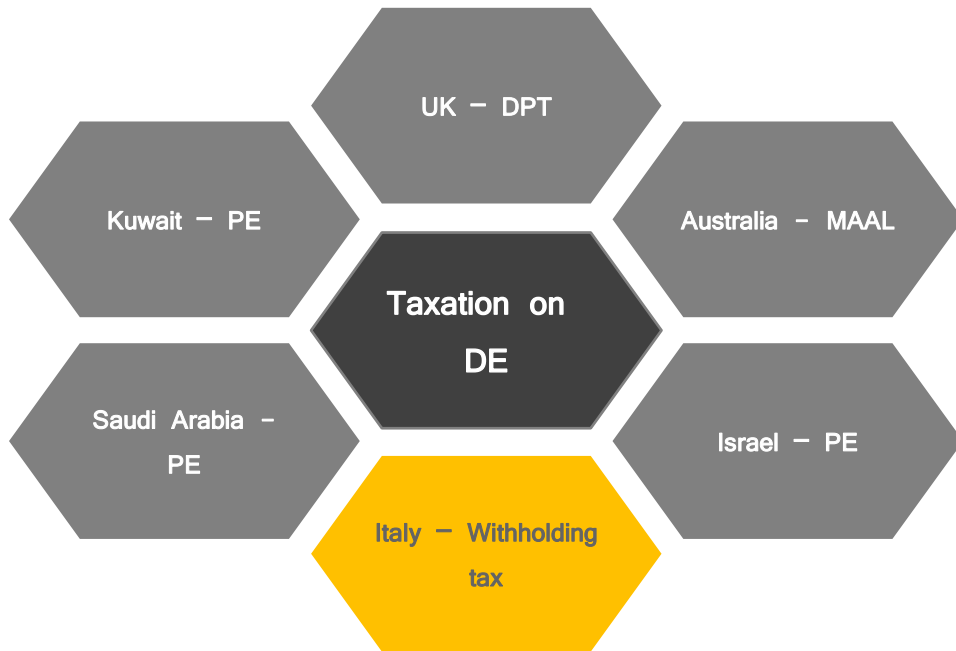
EQL – A snapshot



Applicability of EQL

SI No	Payer	Recipient	EQL Not Applicable	EQL Applicable
1	Resident	Resident	✓	
2	Non-Resident	Non-Resident	✓	
3	Non-Resident	Resident	✓	
4	Resident	Non-Resident (having PE with the specified service effectively connected to PE)	✓	
5	Resident (assumed: carrying on business or profession)	Non-Resident (other than at Sr. no 4 above)		✓

International precedents : Direct tax

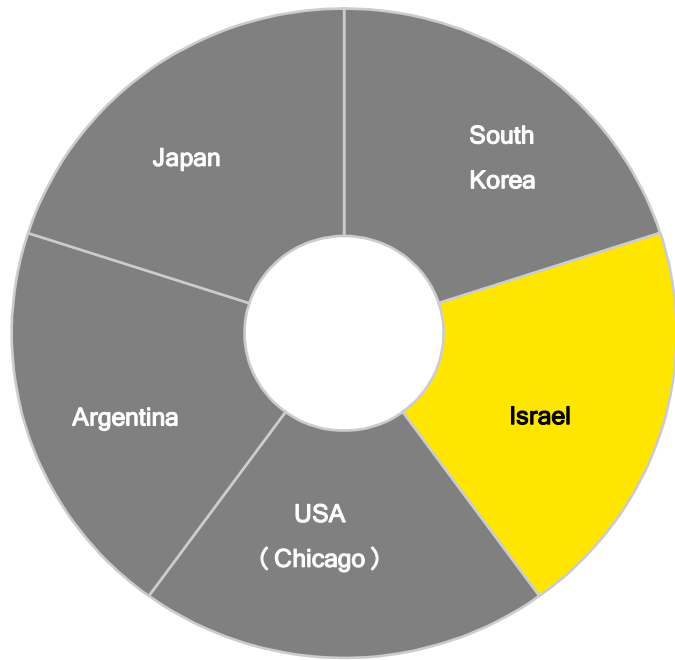


Country	Actions in brief
UK	Diverted Profits tax – An anti abuse regime
Australia	Multinational Anti Avoidance Law – An anti abuse regime
Israel	A company having significant digital presence in Israel and conducts activity on the ground in Israel may be considered to have a PE
Italy	Proposed withholding tax on the amount paid towards an e-commerce transaction with a foreign company
Saudi Arabia & Kuwait	Introduced concept of Virtual Service PE whereby a Service PE would arise based on the duration of contract (exceeding specified threshold) even where the services are rendered from outside

- Implemented
- Yet to be implemented

■ General provisions ■ Provisions specifically Impacting DE

International precedents : Indirect tax



Country	Actions in brief
Japan	New consumption tax rules will apply to cross-border digital services provided by overseas businesses to the Japanese market (No credit in B2C scenario)
South Korea	Requires a foreign service provider to register for and charge VAT on the supply of electronic services to customers in South Korea (clarity on input credit awaited)
Israel	Proposed levy of VAT for non-resident suppliers of B2C supplies of digital services
USA (Chicago)	Chicago City levies 9% tax on streaming services
Argentina	A turnover tax withholding system for the revenues derived from the use of the internet to obtain access to movies, TV series, games, music, videos, and other similar services when payments are made to non-resident suppliers with credit or debit cards. Obligation on credit/debit card issuers to act as withholding agents

- Implemented
- Yet to be implemented

The larger questions

- ▶ Is imposition of EQL constitutional?
- ▶ Is EQL in the nature of income tax or indirect tax?
- ▶ Will imposing EQL be a breach of India's treaty obligations?

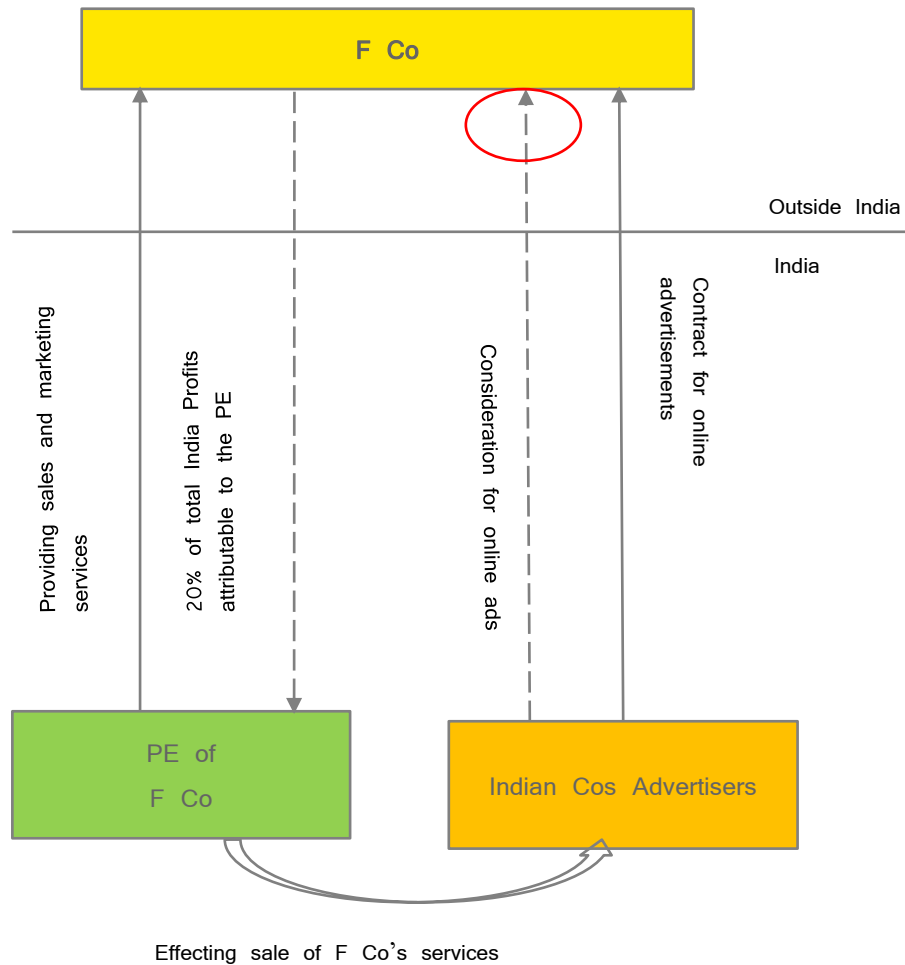
Discussion points

- ▶ Rationale of choosing the [rate of 6%](#)
- ▶ EQL impact in cases the specified services are effectively connected to the PE?
- ▶ Lack of advance measures to determine applicability of EQL
 - ▶ Sec. 195 of IT Act
 - ▶ Sec.197 of IT Act
 - ▶ AAR
- ▶ Lack of assessment mechanism
- ▶ Lack of grievance redressal mechanism – only remedy a writ?
- ▶ Provisions related to ‘refund’ of EQL already paid, if subsequently the recipient is litigated to have to have PE in India

Possible controversies

- ▶ Indirect tax impact
 - ▶ B2B – EQL + Service tax/ GST
 - ▶ B2C/B2G – Service tax/ GST (under OIDAR)
- ▶ Which payments would be covered within the ‘[specified services](#)’?
 - ▶ Online advertisements
 - ▶ Provision for digital advertising space
 - ▶ Any other facility or service for the purpose of online advertisement
 - ▶ Artists appearing in an advertisement
 - ▶ Listing fees paid to deals aggregator
 - ▶ Content recommendation platforms
- ▶ Expanding list/ scope of services to be subjected to EQL

Case Study 1 : Attribution to Indian PE of Foreign Co



- ▶ F Co is contracted by the Indian advertisers for online advertisements – total revenue from Indian Advertisers is 100
- ▶ F Co Net Profit (Margin) is 15%
- ▶ The Indian PE of the F Co. undertakes sales and marketing functions for F Co
- ▶ F Co has been filing returns & is being assessed to tax in India
- ▶ Profit attributable to the PE is 20% of the overall India profits of F Co

Discussion points

The entire amount of 100 is not subject to EQL?

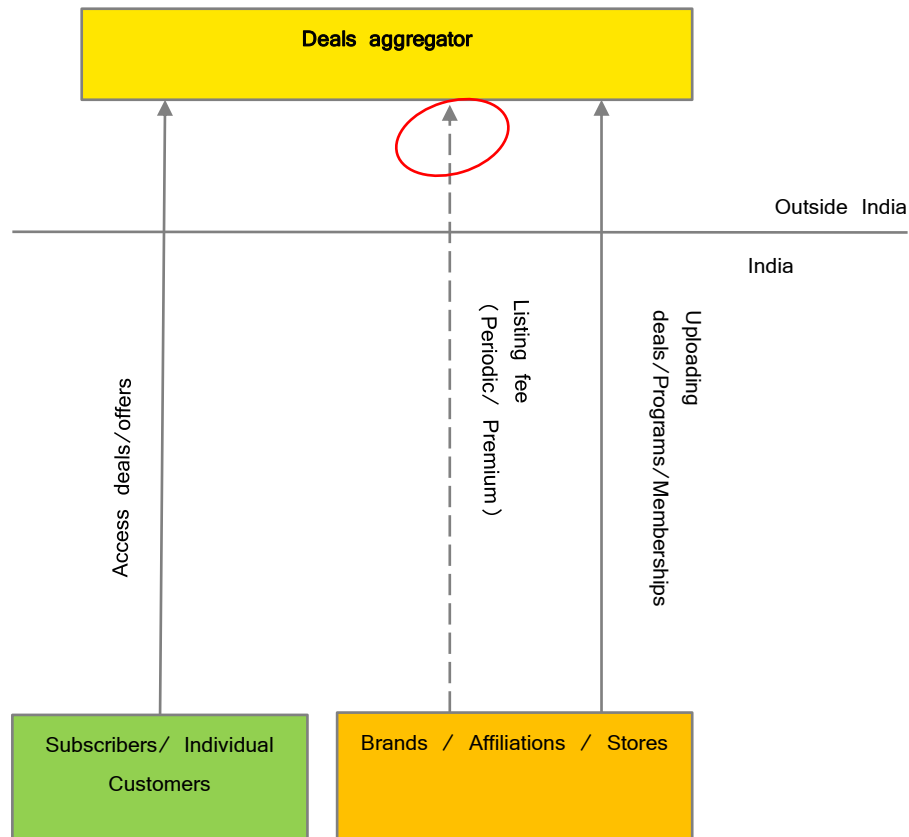
Impact of EQL on PE vs. No PE scenario

- ▶ An advertisement transaction of 100 entered into:
 - ▶ Scenario 1: The Service provider has a PE in India
 - ▶ Attribution to Indian PE determined @ say 20%
 - ▶ Profit margin of F Co say @ 15%
 - ▶ Tax rate 40% (plus surcharge and cess)
 - ▶ Scenario 2: The Service doesn't have a PE in India

Transaction	Scenario 1: With PE attribution (@ 20%)	Scenario 2: Without PE
Revenue from India	100	100
Revenue attributable to Indian PE	20	0
Subject to EQL	NA	100
Profit attributable to taxable income of Indian PE	3 (15% of 20)	NA
Tax outflow	1.2 (40% of 3)	6 (6% of 100)

[Discussion points](#)

Case study 2 : Payment for online advertisement

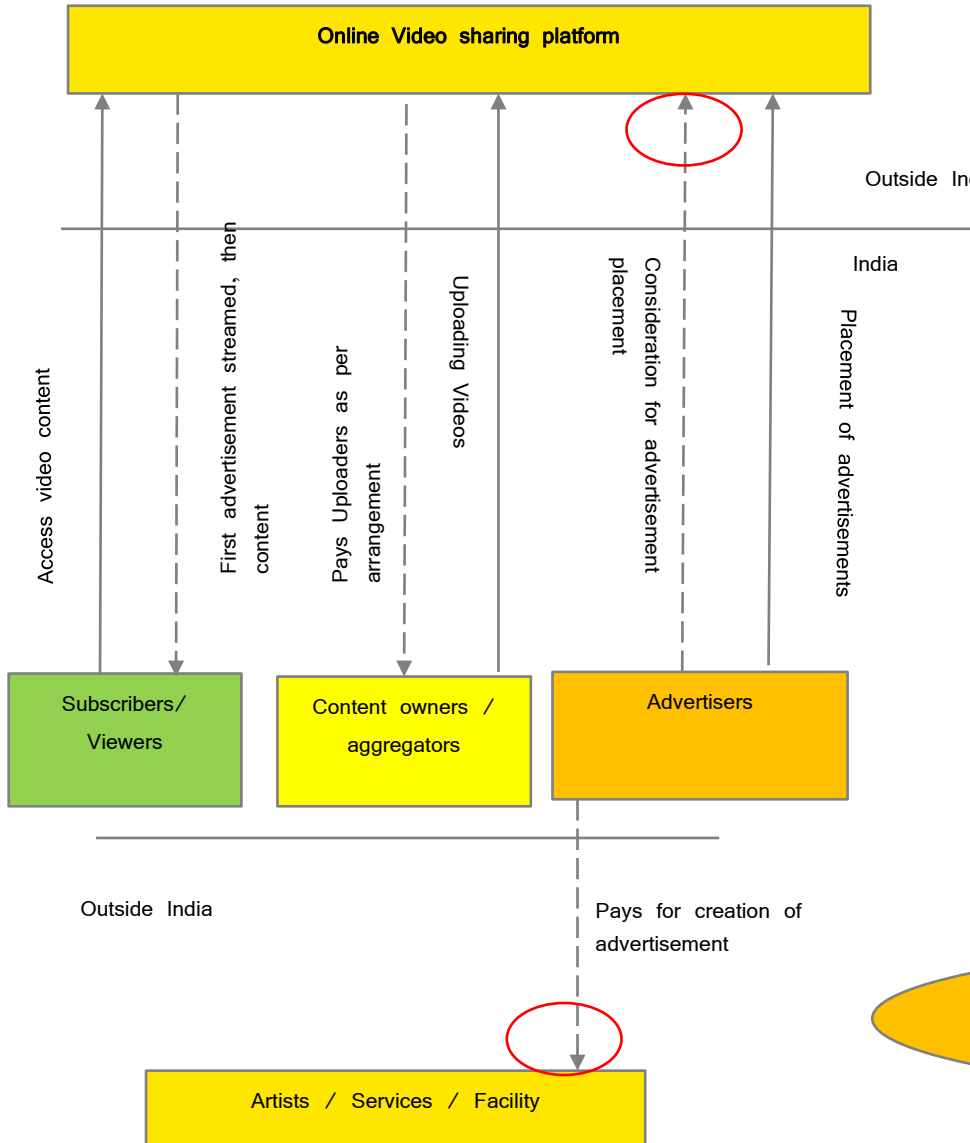


- ▶ Vendors in India list their offerings on the platform
- ▶ The Deals Aggregator undertakes the following services:
 - ▶ Provides a focussed customer base to Brands / Affiliations / Stores
 - ▶ Acts as an aggregator for deals/offerings
- ▶ The Brands / Affiliations / Stores inter-alia pay consideration to Deals Aggregator for:
 - ▶ Periodic listing fee
 - ▶ Premium listing fee
- ▶ Individual subscribers access deals and other offerings

Are listing fees subject to EQL?

[Possible controversies](#)

Case Study 3 : Online video sharing platform



- ▶ Content owners / aggregators upload videos on the platform
- ▶ Advertisers place advertisements on the platform (and make payment to the platform owner for the same)
- ▶ The video sharing platform is accessed by subscribers / viewers
 - ▶ First the advertisement is streamed
 - ▶ The video is subsequently streamed
- ▶ As regard the advertisement uploaded by the advertiser the following may be noted:
 - ▶ For creation of advertisement, consideration was paid to artists, facility and services providers (some of the payments are to service providers outside India)
 - ▶ The advertisement was created for broadcast on multiple platforms - online, theatres/screens, TV, radio

Is the payment by the advertiser to artists / service provider subject to EQL?

Thank You



Section 165(1) of the Finance Act 2016

165. (1) On and from the date of commencement of this Chapter, there shall be charged an

- ▶ equalisation levy at the rate of six per cent of the amount of consideration for any specified service
- ▶ received or receivable by a person, being a non-resident from—
 - (i) a person resident in India and carrying on business or profession; or
 - (ii) a non-resident having a permanent establishment in India.

Proposed section 165(2) of the Finance Act 2016

165(2) The equalisation levy under sub-section (1) shall not be charged, where—

- (a) the non-resident providing the specified service has a permanent establishment in India and the specified service is effectively connected with such permanent establishment;
 - (b) the aggregate amount of consideration for specified service received or receivable in a previous year by the non-resident from a person resident in India and carrying on business or profession, or from a non-resident having a permanent establishment in India, does not exceed one lakh rupees;
- or
- (c) where the payment for the specified service by the person resident in India, or the permanent establishment in India is not for the purposes of carrying out business or profession.

Definition of specified services : Section 164(i)

- (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;