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The Honorable Robert E. Lighthizer
United States Trade Representative
Office of the United States Trade Representative

Re: Docket No. USTR-2020-0022

Dear Ambassador Lighthizer:

On behalf of the Board of Directors and member companies of the US-India Strategic Partnership Forum (USISPF), we write to submit a public comment in connection with concerns regarding the Government of India's ("GOI") 2% digital services tax ("DST") – the "Equalization Levy" amendment enacted on March 27, 2020 ("EL") – which applies levy on non-resident companies, and covers online sales of goods and online provision of services to, or aimed at, persons in India. In particular, we are concerned that the EL is unreasonable due to: (1) the timing of the tax policy, especially in the midst of an unprecedented global pandemic; (2) the lack of notice and consultation prior to the tax policy being adopted; and (3) several provisions being unclear, overly broad, and inconsistent with international norms. We also submit that the EL discriminates on its face against foreign companies and, in practice, against U.S. companies. Finally, GOI's implementation of the EL runs in contravention of its consistently reaffirmed commitment to the outcome of the efforts to create a unified digital tax framework via the G-20/Organisation for Economic Co-operation and Development (OECD) Base Erosion and Profit Shifting (BEPS) project deliberations.

I. Unreasonableness of the Tax Policy

A. Timing and Lack of Notice and Consultation

On March 23, 2020, the Indian Parliament passed the 2020 Finance Bill Amendments, which contained a new provision taxing non-resident "e-commerce operators" for the online sale of goods and online provision of services effective April 1, 2020 with the commencement for compliance date beginning on July 7, 2020. This tax policy is unreasonable because it was: (1) incorporated into the Union Budget 2020 at a late stage; (2) without any public consultation or

Parliamentary debate; and (3) without formal discussion or a policy statement by the GOI regarding its intent to introduce the EL. As a result of the lack of notice or formal consultation, the short turnaround time for compliance makes it nearly impossible to comply with the policy – particularly in light of the significant time and resource constraints affecting most companies as a result of the ongoing global coronavirus pandemic, which notably began *prior* to the GOI adopting the EL.

The 2020 EL significantly expanded the scope of the GOI's existing 2016 EL, which only applied to online advertising services provided by non-residents. Specifically, the 2020 EL imposes a new 2% levy on non-resident companies, and covers online sales of goods and online provision of services (including facilitation by an aggregator or intermediary) to, or aimed at, persons in India. As with the new 2020 EL, the GOI did not provide prior notice of its intent to introduce the 2016 EL as part of its 2016 Union budget proposal, which was announced in February 2016. The next month, the GOI issued a March 2016 press release with a Report prepared by the Committee on Taxation of E-Commerce, which identified 13 services on which the EL should be imposed.[1] The press release stated that the GOI took the Report into consideration in preparation of the Finance Bill 2016. However, it is notable that as part of its 2016 Budget, the GOI chose to only impose the EL on online advertising services and related services (*i.e.,* provision of digital ad space and any other facility or service for the purpose of online advertisement). Under the 2016 EL provisions, the GOI had notified a residuary clause, which empowered the government to expand the scope of the EL. Since the GOI never discussed a formal expansion of the EL, there was no reason for U.S. companies to believe that the GOI was considering adopting an expanded EL on any other services, which would also include placing the compliance burden on non-residents.

Although industry participants were not given an opportunity for formal consultation prior to the Indian Parliament adopting the tax, USISPF has tried to meaningfully engage with the GOI regarding the EL since its adoption. On April 1, 2020, USISPF sent a letter to the Honorable Union Minister of Commerce and Industry, Mr. Shri Piyush Goyal, expressing specific concerns regarding the EL and requesting that the government forbear on imposing this tax until such time as a thorough analysis and consultation can be held. On April 20, 2020, USISPF sent a letter to the Honorable Union Minister of Finance and Corporate Affairs, Ms. Nirmala Sitharaman, presenting several recommendations to address industry concerns regarding the EL, and also requesting that the government forbear on imposing this tax until such time as a thorough analysis and consultation can be held and made consistent with the conclusion of the G20/OECD process. On July 7, 2020, USISPF also sent a letter to Chairperson Shri P.C. Mody of the Central Board of Direct Taxes at the Ministry of Finance, noting the operational difficulties in meeting the deadlines and requesting a deferral or postponement of the relevant dates. Additionally, on March 27, 2020,

[1] Press Release, Sub: Report of the Committee on Taxation to examine the business models for e-commerce –reg-., Gov. of India, Min. of Finance, Dept. of Revenue, Central Board of Direct Taxes (Mar. 21, 2016); Proposal for Equalization Levy on Specified Transactions (Report of the Committee on Taxation of E-Commerce), Committee on Taxation of E-Commerce formed by the Central Board of Direct Taxes, Department of Revenue, Ministry of Finance, Government of India (Feb. 2016).

USISPF, along with a collection of the nation's most innovative companies, sent a letter to the Honorable Robert E. Lighthizer, United States Trade Representative, presenting several key concerns and requesting that Ambassador Lighthizer swiftly engage with the GOI to raise such strong concerns. Despite these efforts to engage in consultation, at this time, GOI has not deferred the tax policy as initial payments were due on July 7, 2020.

Due to not receiving the opportunity to consult, this provision came as a surprise to the industry. As noted, the tax law's April 1st effective date was only one week after it was adopted and the compliance commencement date begins shortly thereafter on July 7, 2020. Even before the global coronavirus pandemic, this timeline would have been unreasonable and difficult to achieve. A minimum of 6-9 months is required for non-resident companies to appropriately assess the impact of the tax policy and to engage in meaningful consultation. In light of the global COVID-19 pandemic, the July timeline is particularly unreasonable since the international community, including businesses, has necessarily shifted its time and resources to respond to the ongoing global pandemic, which will continue to affect businesses for the foreseeable future. The unprecedented stress to the financial and continuity operations of businesses as a result of the pandemic adds to the significant challenges to implementation and meeting the payment schedule in the EL amendment. In particular, under these circumstances, it is challenging for the affected businesses to build new processes and systems, re-architect their IT infrastructure, and map IP addresses in order to capture sales data. The April 1st tax effective date is particularly difficult to implement under the limited timeline as it requires companies to design processes and systems that, in practice, will require technology to retroactively capture sales data. Additionally, due to various quarantine, lockdown, and "stay-at-home" orders, non-resident companies are limited in their ability to consult with the GOI and to comply with the requirement to obtain a tax registration in India. Notably, the application for tax registration needs to be accompanied by apostilled/notarized documents, which is difficult to accomplish during the COVID-19 pandemic.

For the reasons discussed, the tax policy imposes a significant burden on U.S. companies due to the lack of consultation, the inappropriate timing due to the coronavirus, and the resources needed to implement and comply with the tax policy itself. As the several letters to the GOI and Ambassador Lighthizer indicate, USISPF, along with several other U.S. companies, would have been and remain eager to engage in formal consultation with the GOI on the discussions and formation of a new digital tax policy.

B. **Unclear, Overly Broad, and Inconsistent with International Norms**

The EL amendment is also unreasonable since it contains several terms that are unclear and overly broad, which result in provisions that are inconsistent with international norms, including related to double-taxation, taxing revenue not income, and extraterritoriality. Also, as a result of unclear provisions, companies cannot reasonably know the expectations required for compliance and thus, it is impossible to comply.

Several provisions violate international norms, either intentionally or due to a lack of clarification, including those regarding:

1. The mismatch between the effective date of exemption under section 10(50) of the Income-tax Act, 1961 and effective date of EL provisions (relating to double-taxation);
2. The meaning of "consideration" on which the EL at the rate of 2% would apply (relating to taxing revenue – *i.e.,* whether consideration means "gross consideration");
3. Transactions between non-residents (relating to extraterritoriality concerns);
4. The inter-play between withholding tax on royalty/fees for technical services vis-à-vis EL (relating to double-taxation);
5. The wide scope of "e-commerce operators" subject to EL (relating to the definition's general inconsistency with industry wide parameters); and
6. The absence of any dispute resolution mechanism for interplay of income tax and EL, on advance or post facto basis, leading to lengthy parallel litigation (relating to the penalizing nature of the tax).

Along with the above examples, several other provisions may be inconsistent with international norms. For example, relating to double-taxation, some of the definitions under the EL may cover certain transactions and business models which are B2B supplies – such as intra-group transactions and reseller/distributor arrangements – and therefore, should be carved out of its scope. As another example relating to double-taxation, we submit that India is levying EL based on users who are resident outside India on which other countries are levying DST, which will thereby result in double-taxation within EL/DST provisions, in addition to corporate tax paid in country of residence. Additionally, given that the EL is a unilateral measure, it may not get covered by the existing Double Tax Avoidance Agreements, which may lead to double taxation.

Unlike other DSTs, India's new tax applies to *all* services and *all* goods supplied over the internet or sold through internet medium. While most countries have implemented or plan to implement a single DST levy to tax digital transactions, India has chosen to introduce equalization levy in addition to existing Goods and Services Tax on Online Information Database Access and Retrieval (OIDAR) services provided by non-residents. Furthermore, the EL amendment is overly broad as it relates to the threshold for taxation – Rs. 20 million (approximately U.S. $267,000 / EUR 237,000) – which is highly inconsistent with international norms. This threshold is substantially lower than the thresholds discussed at the OECD – revolving around a global turnover criteria of EUR 750 million (approximately U.S. $846 million) – and national European DSTs, some of which are hundreds of millions of U.S. dollars.

Finally, in addition to several provisions which present compliance obstacles due to the lack of clarity or being overly broad, there are several procedural aspects of the EL that make it onerous and difficult to comply, such as the e-commerce operator being required to deposit EL by March

31st for the quarter ending on March 31st. As online sales take place until midnight, it is impossible to comply with this provision.

II. **Discriminates Against Foreign Companies and U.S. Companies**

The expanded EL is discriminatory against non-Indian firms, given that it targets "e-commerce operators," defined as non-residents who own, operate, or manage a digital or electronic facility or platform for online sale of goods, online provision of services, or both. Also, EL applies to technology companies and traditional businesses alike given that the sale of goods or services is through internet medium. This broad definition would include large numbers of U.S. online marketplaces, services providers, retailers, and manufacturers – several of which create significant job opportunities within the U.S. and Indian economies.

As previously noted, the tax law applies to *all* services and *all* goods supplied over the internet or sold through internet medium by foreign companies and therefore, amounts to a tariff. Thus, the EL creates significant General Agreement on Tariffs and Trade (GATT)/World Trade Organization (WTO) issues under Article I and Article III, both relating to trade without discrimination. As drafted, the new tax will not be assessed against Indian companies and places the burden of reporting and compliance exclusively on non-Indian companies. On its face, the EL will violate Article III "national treatment" principles, which provide that foreign and domestic goods and services should be treated equally once they have entered the market. The EL may also violate Article I "most-favored-nation treatment" principles because, while the EL does not directly mention the United States or U.S. companies, in practice, the EL may have a disproportionate effect on U.S. companies given the proportion of U.S. multinational corporations in the global marketplace and their predominant use of internet-based sales channels for international sales. This disproportionate effect may result in de facto discrimination against U.S. companies.

In addition to the EL being discriminatory on its face and in practice, the GOI's 2016 Report of the Committee on Taxation of E-Commerce, points to the discriminatory intent of this tax when the Committee stated:

> The Committee notes that the ability of multinational enterprises to avoid taxes completely in the source jurisdiction under the existing rules, poses significant challenges and concerns for countries like India. The unfair advantage enjoyed by them over their Indian competitors can make Indian enterprises, both digital as well as brick & mortar ones, relatively less competitive in the long run, resulting in detrimental impact on growth of Indian enterprises. Further, their ability to avoid payment of taxes in India can also adversely impact revenue collections, and lead to a rising tax burden on Indian enterprises and Indian citizens that could be

> even more detrimental to Indian economy as a whole. Thus, the Committee considers that there is a need for addressing these issues without any further delay.[2]

The Report clearly points to intentional discrimination against foreign companies for the purpose of countering what the Committee views as "[t]he unfair advantage" that multinational enterprises enjoy due to different jurisdictions' tax laws.

III. **Inconsistent with commitment to work with the Organisation for Economic Co-operation and Development (OECD)**

Finally, the GOI's decision to adopt and implement the EL is inconsistent with its commitment to reaching a multilateral solution in ongoing international negotiations. As part of the Steering Committee of the G20 and an active participant in the OECD's Base Erosion and Profit Shifting (BEPS) project deliberations, India has consistently reaffirmed its commitment to the outcome of the efforts to create a unified digital tax framework. Imposition of this new tax while discussions are ongoing via the G20/OECD BEPS process to address the global international tax challenges arising from digitalization, runs contrary to India's commitment to that process, which we believe is the best way to ensure a multilateral, harmonized solution. Given that the OECD intends to wrap up its work in 2020/early 2021, the GOI's adoption of the expanded EL detracts from this process and sets a problematic precedent.

IV. **Additional Information on Unreasonable and Discriminatory Provisions**

The above discussion provides brief summaries of only some the several provisions that raise concerns. To this end, we have included an appendix with a detailed compilation of industry concerns, questions, and recommendations relating to the unreasonableness and discriminatory nature of the EL. Notably, this compilation was created after initial reviews of the tax policy – if provided with the necessary 6-9 months that would be required to assess the impact of the tax policy, we would be able to identify additional provisions requiring clarification or modification.

[2] Proposal, *supra* note 1, at 4-5.

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USISPF – Recommendations to address industry concerns on the expanded scope of Equalisation Levy ('EL') under Finance Act 2020

Our recommendations below have been divided into two parts:

Part A - Requests for legislative amendments
Part B - Requests seeking clarifications where a Circular/ FAQs may be issued by the CBDT

Part A - Requests for legislative amendments

1) Defer the applicability of the EL beyond 1 April 2020

Issue

- Presently businesses around the world are burdened by the global outbreak of COVID-19 which is causing immense pressure on day-to-day business operations. Most companies are working with very limited resources and are facing unprecedented stress in order to maintain business continuity. Under these circumstances, it is extremely challenging for the businesses to build new processes at this time and prepare to undertake requisite compliances. To take July 2020 as the basis for the commencement of compliance would not be appropriate as requisite changes in systems[1] have to be implemented immediately in view of the law having come into from April 1, 2020.

- The expanded EL provisions were not part of the Finance Bill, 2020 introduced in Parliament on February 1, 2020. They were included in the amended Finance Bill, 2020 that was passed by the Lok Sabha on March 23, 2020 without any deliberation and debate. Since these provisions were enacted quickly and were made applicable in a matter of days, businesses had very limited time to understand, analyse and prepare for its applicability. The corresponding rules and guidelines are yet to be released which has further led to difficulties in interpreting the provision, identifying relevant goods / services subject to EL, and understanding the transactions covered under EL to start scoping for new internal systems/ processes which have already begun accruing as taxes from April 1, 2020.

[1] *Significant efforts would be needed in identifying all the impacted systems such as marketplace, seller support, upstream and downstream payment, financial reporting and billing systems etc. across several countries. These systems will need to be configured to build in reporting and collation capabilities. Further, sophisticated technical abilities will be needed to track IP addresses from India which would require new technology resources and requisite hiring. Finally, these systems will need integration and testing which will be critical to ensure availability of relevant data needed for compliance with EL.*
Additionally, due to the global outbreak of COVID-19, it is challenging for companies to make the changes above immediately (considering the law is already in force) as companies are promoting working from home during this uncertain phase and are experiencing bandwidth and technical limitations.

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- The EL has been enacted without any consultation with the impacted stakeholders. There has been no discussion with respect to the basis of taxation, practical difficulties and impact on business. It is thus requested that the industry view be taken into consideration before formalizing guidelines or issuing any FAQs around the scope, clarity on interpretational issues and implementation aspects of EL. In fact, there is already a precedent to this effect.[2]

Our request

The EL represents a significant and far reaching change in India's approach to taxing the digital economy. It represents a fundamental shift in the manner that digital companies are taxed in India. Considering the business continuity challenges and the compliance difficulties which companies are experiencing in light of COVID 19 led economic crisis, we strongly urge the Government of India to defer the enforcement of the EL from April 1, 2020 and provide the industry with the requisite clarifications before the EL is implemented.

A minimum extension of 6-9 months would be appropriate to allow enough time to the non-resident companies to undertake an impact assessment given the present global circumstances and the need for meaningful consultations with affected taxpayers.

2) Clarify the timeline of exemption under section 10(50) of the Income-tax Act, 1961

Issue

At the time of introduction of the EL in 2016 vide the Finance Act, 2016 ('the FA') with effect from 1 June 2016, to avoid double taxation of same income, Section 10(50) was introduced under the Income-tax Act, 1961 ('IT Act') which exempted income arising from 'specified services' on which the EL was applicable from the levy of income-tax. These 'specified services' on which EL is applicable were specified in Section 165 of the FA.

The scope of the EL has now been expanded by introduction of Section 165A of the FA whereby EL has been made applicable to e-commerce supply or services made or provided or facilitated on or after April 1, 2020.However, the amended provision of Section 10(50) of the IT Act states that the above exemption will be applicable to *"income arising from any e-commerce supply or services made or provided or facilitated on or after the 1st day of April 2021",* and not April 1, 2020 as should be the case.

[2] *The introduction of the expanded EL may be contrasted with the introduction of the EL in 2016 on 'specified services' where the provisions were proposed on 29 February 2016 and enacted after due debate and consideration, and further brought into force only in June 2016 (rather than April 1, 2016).*

Therefore, as the provisions read currently, there is a time lag resulting in an income being charged to EL **at the rate of 2%** and to income-tax under the provisions of the IT Act for the Financial Year 2020-21.

Our request

We request that Section 10(50) of the IT Act be amended to include income from transactions liable for EL under Section 165A of the FA from April 1, 2020 onwards.

3) Enhance turnover threshold of Rs. 20 million

As per Section 165A(2) of the FA, EL shall not be charged where the sales, turnover or gross receipts of the e-commerce operator from the e-commerce supply or services is less than Rs. 20 million during the previous year. The threshold of Rs. 20 million is very low, considering that the discussions at the OECD revolve around a global turnover criteria of EUR 750 million. The Government should consider therefore enhancing the threshold to prevent small players from being subjected to EL.

4) Mechanism for set-off or refund of EL where transaction is eventually held to be taxable as royalty/FTS

Issue

In case EL has been paid by the non-resident on a transaction which is eventually held to be taxable as royalty/ FTS under the Income-Tax Act read with the relevant Tax Treaty, as adjudicated by the tax authority or a court of law, then there is no mechanism whereby the non-resident can claim a credit of the EL already paid by it.

Our request

A mechanism should be provided for set-off or refund of EL paid from income- tax along with related interest and penal consequences to this extent.

5) Make specific amendments with respect to transactions between non-residents

a) Exemption to non-residents in case of exports/ foreign vendors

Issue

- **Exclusion of the facilitation fee earned by non-resident e-commerce operator on exports from India –** Under the current provision, any consideration received by a non-resident e-commerce platform for facilitating Indian sellers to export to markets outside India would be exposed to EL. Such levy will not only negatively

impact the exports from India but also expands to scope of the levy to services consumed by final customers outside India.

- **Exclusion of supply of goods or services facilitated by an Indian ecommerce marketplace -** In case of goods and services sold by foreign sellers on an Indian e-commerce marketplace, where such foreign sellers rely on the e-commerce operator for the sale or facilitation of the sale, such sellers may be viewed as e-commerce operators. It may be noted that the fees earned for facilitating such sales are already subjected to income tax in India and accordingly, the foreign sellers should not be again subject to EL. Given that the consideration for the sale is received by an Indian ecommerce operator, such foreign sellers should not be liable to EL.

Our request

It is strongly urged that facilitation fee earned by non-resident e-commerce operator on exports from India should be exempt from EL. Also, EL should not be levied on foreign vendors selling through Indian e-commerce marketplace.

b) Sale of goods and services between non-residents:

Issue

Clause (iii) of Section 165A (1) of the FA also targets customers who buy goods / services merely using internet protocol ('IP') address located in India. This condition results in encompassing even such transactions which are carried out by persons which do not have a direct nexus in India. In order to determine such direct nexus, there ought to be provided certain additional conditions. Even under Goods and Services Tax ('GST') law where online services are provided to customers located in India, there are multiple criteria that need to be satisfied as a matter of fact for nexus with India to be established. Some of the conditions stated under Article 13 of the IGST Act, 2017 include billing address of the customer, location of bank account, credit/debit card used for transaction etc. Similar conditions are absent in the new EL provisions, except for the mention of IP addresses or that the customer is a resident in India.

Our request

In order to avoid undue and unintended transactions being covered under the ambit of the EL, the above condition should be deleted and may be aligned with similar provisions under the GST law.

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6) Provide a mechanism for certainty for overlap of EL and withholding tax on royalty

Issue

As per Section 10(50) of the IT Act, in a scenario where a receipt is subject to EL, the income is exempt from income-tax. However, from a practical standpoint, payers may continue to withhold taxes considering the payments to be royalty or fees for included services to safeguard themselves from onerous consequences of not complying with withholding tax provisions (such as disallowance, interest, penalty etc.) This would be onerous on the non-resident taxpayer and burden its cash flows.

Our request

In order to bring in certainty and protect the interests of both the non-resident entity and the payers, a mechanism should be set in place whereby the non-resident entity can obtain certainty on whether the transaction will be subject to a withholding tax on royalty/ fees for technical services or EL on transactions undertaken or proposed to be undertaken by such non-resident. This mechanism could be either by extending Section 195 procedure (for Nil or reduced TDS) or advance ruling mechanism.

Part B - Requests seeking clarifications where a Circular/ FAQs may be issued by the CBDT

7) Inter-play between withholding tax on royalty/ fees for technical services vis-à-vis EL

Issue

- The scope of the EL provisions is wide enough to cover all digital transactions, including those digital transactions which were till now also being tested for royalty or fees for technical or included services (FTS/FIS) characterization.

- Further, where the taxability of such transactions pertaining to Royalty/FTS is already a subject matter of an ongoing revenue audit or tax dispute/ litigation in India, clarification needs to be issued to provide guidance to the taxpayers and ensure there is no double taxation of the same income or transaction. In case these transactions are considered by the tax authorities to be liable to EL, then it should be clarified that subsequently, tax on royalty/ FTS should not be imposed on such transactions.

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- The current provisions do not provide clarity on the aforesaid situations which could result in double taxation of the same income or transaction due to inconsistent positions taken by resident payer and non-resident recipient of income or seller.

Our request

A clarification should be issued *inter alia* clarifying mutual exclusivity between applicability of EL vis-à-vis taxability as royalty/FTS under the IT Act/relevant Tax Treaty.

8) Provide necessary clarifications on the wide scope of 'e-commerce operators' and 'online' sales/ services subject to EL

Issue

- As per section 165A of the FA, an EL at the rate of 2% is applicable on the "**consideration**" received/ receivable by non-resident '**e-commerce operators**' from '**e-commerce supply or services**' made, provided or facilitated by them. 'E-commerce operator' under Section 165A of the FA means *a non-resident who owns, operates or manages digital or electronic facility or platform for online sale of goods or online provision of services or both.*

- The way 'e-commerce operator' is currently defined has a significantly wide coverage. E-commerce in normal parlance is understood to mean marketplaces and this definition is not aligned with industry wide parameters.

- Further, the definition of 'e-commerce operator' is wide enough to cover many digital service providers such as banking or insurance companies, payment processing / payment facilitation companies, telecom, online education, healthcare and such other companies who are providing digital services through a website or portal or even a cloud service provider ("CSPs") which acts as an infrastructure service provider. All internet intermediaries and digital companies are not necessarily e-Commerce operators.

- There are various terms which have not been defined in the provisions, such as 'digital facility' or 'electronic facility' or 'platform', etc. The term 'online' is defined under Section 164(f) of FA to mean *a facility or service or right or benefit or access that is obtained through the internet or any other form of digital or telecommunication*

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network. Again, this term has a wide coverage and could cover unintended supplies, such as the following;[3]

- Correspondences over e-mail, placing of purchase orders through customized software, ERP, etc.
- Supplies with significant elements of the sales process such as enquiry, price negotiation, etc. are undertaken through offline modes and only placing of the purchase order is done online.
- Non-residents selling physical cards/gift cards to customers via the physical stores of their Indian distributors/ channel partners for purchase of games/ software online.

Such categories of transactions should not be construed as 'e-commerce supply or services' by 'e-commerce operators'.

- Similarly, it is also not clear if the word 'online' refers only to the contract of the sales/service being concluded through an online facility, or also the delivery / provision of the sale/service through online means. Given the context of the digital economy debate, the scope of the levy should ideally be restricted to marketplace models only.

Alternatively, this could be confined to marketplace only in cases where both the contract and delivery takes place online. In other words, only sales concluded online for supply of digital goods, and services contracts concluded online for provision of services through an online facility should be covered. For example, cases involving physical delivery of goods or non-online provision of services (e.g. hotels, air transportation) should be explicitly clarified.

Our request

- The definition of 'ecommerce operator' should be clearly defined and aligned with e-commerce as understood in normal parlance. Further, the following supplies should be carved out of its scope;
  - Internet service providers, such as banking, payment processing/ payment facilitation, insurance, telecom and CSPs.
  - Sales conducted through use of e-mail communication or specialized software, company portal, online ordering system, ERP etc. for placing orders.

[3] Owing to the wide scope of the definition in its current form, there could be unintended consequences where traditional brick and mortar businesses may also get covered in case a part of the sales process is conducted through an online mechanism. It may also be noted that there is no business/ industry which does not use any form of digital medium to operate its business. For e.g. almost every business has a website and electronic/ digital form of payment

- Sales where both the contracting and delivery of the goods/services do not take place online.

- It should be clarified that EL shall not be applicable where only a part of the sale process involving placing of orders is done through an online mechanism.

- In addition, it should be specifically clarified any services provided by the non-resident e-commerce operator, which are not related to its electronic facility or platform for online sale of goods or online provision of services or both should be excluded from the definition of 'online services'.

  All of the above shall lead to minimisation of disputes by clarifying vexatious aspects of the new law and enable timely compliance.

9) Extended coverage to intra-company transactions and reseller arrangements

Issue

Besides the aforesaid B2C supplies, the current definitions of expressions under the EL may unintendedly cover certain transactions and business models which are B2B supplies and therefore should be carved out of its scope, as these result in double taxation, such as:

- **Intra-group transactions-** Aforesaid definitions may cover inter-group services including IT/ ITES services, management support services, support services etc. provided by foreign group companies to its group entity in India. 'Online provision of services' may also unintendedly cover recovery of third-party costs incurred by a non-resident company from its group companies.

- **Reseller/ Distributor arrangements:** In many cases, digital services/ goods are sold by non-resident entities through Indian establishments acting as re-sellers/ distributors. Under the current provisions, such non-resident entities would get covered under the definition of 'e-commerce operator'. The Indian establishments pay due taxes in India on their income in accordance the Indian tax and transfer pricing provisions. However, EL would levy an additional tax on the same transaction by virtue of the wide scope of 'e-commerce operator' under the EL provisions.

Our request

- Intra- group company transactions and reseller/ distributor arrangements should be excluded from coverage of EL.

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- A clarification may be issued to the effect that there shall be no double taxation of the same intra-company transaction between related group entities, even in cases where taxability of intra-company/ B2B transactions between related group entities is already a subject matter of an ongoing revenue audit or tax dispute/ litigation in India.

10) Provide clarifications on the meaning of 'consideration' on which the EL at the rate of 2% would apply

Issue

As per section 165A of FA, equalization levy at the rate of 2% shall be levied on the amount of consideration received or receivable by an e-commerce operator from e-commerce supply or services made or provided or facilitated by it. This has inter alia the following concerns;

- It is not clear if the 'consideration' in case of sale of goods/ services facilitated by the e-commerce operator refers to the gross consideration / value (i.e. value of goods/ services) or to the net margin earned / commission or listing fee charged by the ecommerce operator for the online facilitation of sale of goods and / or service for a third-party seller.[4]

- Different industries and businesses follow different practices for accruing the gross margin.[5] An EL on the gross consideration for online marketplaces/ aggregators with very low margins would place immense burden on the cash flow position of these entities.[6]

Our request

It may be clarified that the levy will apply only on the fees earned by such marketplace for the online facilitation services or commission received by an e-commerce operator and not

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[4] *It may be noted that the consideration for an e-commerce entity for its facilitation services is only the listing or facilitation fee or commission or remuneration (by whatever name called) related to the facilitation activity and not the entire gross consideration/ receipt. The value of goods/services facilitated by the e-commerce operator do not belong to the e-commerce operator but belongs to the seller on the e-commerce platform.*

[5] *In certain business models, the e-commerce entity retains its margin on the gross consideration from the customer, before remitting the balance (gross receipts less e-commerce operator's fees/ commission) to the sellers. In others, the seller receives the full consideration / receipts from customers through e-commerce operators and remunerates the service fees to the e-commerce entity for the online facilitation services.*

[6] *As an illustration, in case the customer pays $100 on the e-commerce platform for purchase of a product, the platform retains $2 and pays $98 to the third party. Here, it is unclear whether EL shall be applicable on gross margin ($2) or gross consideration or receipts ($100). From a bare reading of the provisions, it seems like the EL shall be applicable on gross consideration or receipts of $100, which would lead to onerous consequences and adverse implications on businesses operating on low margins.*

the total gross receipts/ consideration in case of sale of third party goods or services facilitated by non-resident e-commerce marketplace on their platforms. It needs to be further clarified that EL at the rate of 2% should be calculated on the amount of 'consideration', excluding any GST payable by the e-commerce operator.

11) Applicability of Equalization Levy and Digital Services Tax (DST) on specified services

- The entire genesis of India's Equalisation Levy and Digital Services Tax (DST) imposed by some countries like France, UK, Austria on digital advertising services is that users of the digital platform add value, which helps digital platforms earn advertising revenue and accordingly, tax needs to be paid based on the users in a particular jurisdiction.

- Without getting into the merits of the user-based taxation system, it is submitted that inadvertently India is levying Equalisation Levy based on users who are resident outside India on which other countries are levying DST which may thereby result in double taxation within EL/DST provisions (in addition to corporate tax paid in country of residence). The same is explained below.

- Following situation arises in relation to digital advertising revenue:

Situation	Advertiser	User/viewer of the advertisement	Is Equalisation Levy applicable	Is Digital Service Tax (DST) applicable
I	In India	In India	Yes	No
II	Outside India	In India	Yes	No
III	In India	In France	Yes	Yes, because user is in France

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IV	Outside India	In France	No	Yes

- It is submitted that where the user of the digital platform through which advertisement revenue is generated is outside of India (situation III above), the Equalisation Levy should not be levied, since such users are not resident in India and such levies lead to double taxation.

12) Provide specific clarifications on transactions between non-residents

a) Sale of advertisement space between non-residents

Issue

The current provision may cover the following as well, which appears to be unintended:

- Situations where an online advertisement is merely accessed by persons in India, who were not the target audience for such advertisement at first place.

- Consideration for the sale of advertisement space which is agreed on a global basis, which has potential issues regarding how much consideration for the sale of advertisement space shall be allocated to persons accessing the advertisements in India and outside India.

Our request

A specific carve out from the scope may be notified instead of extending the levy to unintended situations. In particular, clarity be provided with respect to the India allocation of sale consideration where the advertisements are more widely targeted.

b) Sale of data between non-residents:

Issue

Clause (ii) of Section 165A(3) of the FA aims to apply the EL on transactions relating to *"sale of data collected from a person who is resident in India or from a person who uses internet protocol address located in India"*. The language here does not specify the nature of 'data' sought to be covered by the provision. Further, the provisions purport to tax sale of data irrespective of whether it was collected in the past or not.

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Our request

Provide clarity with respect to the nature of 'data' intended to be covered; and also specify the period to which the 'data' relates.

13) Challenges with respect to procedural aspects

a) Payment of EL for the last quarter of the financial year on 31 March

Issue

As per Section 166A of the Finance Act, 2020, the e-commerce operator is required to deposit EL for the quarter ending March, by 31 March of the financial year. In this regard, it may be noted that typically online sales take place till the last hour of the day, i.e. till midnight. Accordingly, it is impossible for an e-commerce operator to compute and deposit correct EL by 31 March for the quarter ending on 31 March of the financial year.

Our request

It is strongly urged to consider the aforesaid practical challenges faced and reconsider the due dates for deposit of EL.

b) Clarity on timing of accruing EL

Issue

As per the amended Section 163 of the FA, EL is applicable to consideration "received" or "receivable" for e-commerce supply of goods or services. However, the trigger of EL is unclear in certain circumstances, especially during the transitional phase.

For instance, the invoicing for goods or services has been done prior to April 1, 2020, however, the services are rendered at a later stage. Similarly, the provision of services or delivery of goods has taken place prior to April 1, 2020, however, the invoicing happens post April 1, 2020. In these scenarios, it is unclear if such sale of goods/services will trigger EL applicability.

Even for the subsequent period, it is unclear as to the EL will pertain to the quarter in which invoicing/accruals are done or to the quarter in which payment is received.

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Our request

In order to avoid any complexity with respect to the mechanism for payment of EL, clarification with respect to trigger of EL is requested for the transitional period as well as the subsequent quarter.