

NewsBites

Twenty-Fifth Edition

Greetings!

We are delighted to present our news bite for the month of April 2020. This News Bites intends to give an overview of what is happening in the sphere of direct and indirect taxation, audit and assurance, GST and Secretarial Compliances in the industry.

We hope you find this useful. For any feedback you can reach to us at info@sanca.in.

Best Regards,
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Chartered Accountants

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Income Tax

Equalization Levy - A Tax on Digital Services

Levy of tax on e-commerce (digital services) transactions is a global challenge for governments and business as well.

Section 165 of **Finance Act 2016** introduced Equalization Levy which got amended in Finance Act 2020.



A. Salient features of Finance Act, 2016.

- Equalization Levy aims at levy of tax on digital transactions accruing to non-resident e-commerce companies in India.
- The Finance Act, 2016 specified a rate of 'six' percent on consideration received or receivable for specified services provided on or after 1 June 2016. It applied only on business-to-business ("B2B") transactions.
- Specified services refer to online advertisement and providing digital advertising space or any other facility or service for the purpose of online advertisement.
- Such charge shall apply to specified services amounting to more than INR 100,000 supplied by non-residents not having permanent establishments ("PE") in India.
- The Equalization Levy has to be deducted by a recipient, who is resident in India or has a PE in India, "from the amount paid or payable to a non-resident in respect of the specified service" and paid to Indian Government by the seventh day of the month immediately following the calendar month in which the sum has been deducted.
- This Equalization Levy would be similar to withholding taxes, for instance, a person making the payment for advertisement will be required to deduct Equalization Levy at the rate of 6% on total amount of consideration.
- In case of failure to deduct Equalization Levy and deposit the same with Indian Government, such expenditure has to be disallowed for income tax purposes.



B. Salient features of Finance Act, 2020

The Indian Government expanded the scope of Equalization Levy to cover e-commerce supply or services by a non-resident e-commerce operator.

The amended provisions have been explained in the table below:

Effective date of applicability	1 April, 2020
Persons covered	Non-resident e-commerce operators who own, operate, or manage digital or electronic facility or platform for online sale of goods or online provision of services or both and derive revenues from e-commerce supply or services made or provided or facilitated by it.
Meaning of e-commerce supply or services	<ul style="list-style-type: none"> • Online sale of goods owned by the e-commerce operator; or • Online provision of services by e-commerce operators; or • Facilitation of online sale of goods or provision of services or both by e-commerce operator; or • Any combination of the above <p>Exceptions:</p> <ul style="list-style-type: none"> • If non-resident e-commerce operators have permanent establishment in India and e-commerce supply or services are effectively connected to those establishments; or • The levy at 6% on “specified services” i.e. if the service or supply is chargeable under section 165 of the Finance Act, 2016; or • Threshold of less than INR 2 crores of sales, turnover, or gross receipts during the financial year
Persons to whom e-commerce supply or services are rendered	<ul style="list-style-type: none"> • A person resident in India i.e. to say any sale of goods and services directly are covered; or • A non-resident in ‘specified circumstances’ alone i.e. which includes any sale of advertisements which is between two non-residents which specifically targets Indian customers; or • A person who buys goods or services using an internet protocol (“IP”) address located in India
Rate of levy	2% on consideration received or receivable by e-commerce operators from e-commerce supply or services
Tax Treaty Benefit	No tax treaty benefit may not be available in case of such levy.



Income Tax

C. Payment of Equalization Levy

The timelines for payment of equalization levy to Indian Revenue and consequences of non-payment are as follows:

Timelines	Quarter ending 30th June : 7th July Quarter ending 30th September : 7th October Quarter ending 31st December : 7th January Quarter ending 31st March : 31st March
Delay in payment	Interest to be charged at the rate of 1% on the amount of outstanding levy for every month or part thereof
Penalty for failure of payment	<ul style="list-style-type: none"> Equalization Levy not deducted: Penalty equal to the amount of levy failed to be deducted (along with interest and depositing of the principal levy outstanding). Equalization Levy deducted but not deposited: Penalty equal to INR 1,000 per day subject to the maximum of the levy failed to be deducted (along with interest and depositing of the principal levy outstanding). Disallowance of such expenditure in the hands of the payer (unless the defect is rectified).
Penalty for failure of filing statement of compliance	INR 100 per day for each day such non-compliance continues.
Prosecution	For filing a false statement, a person may be subjected to imprisonment of a term up to 3 years and a fine.

Key takeaways:

- Companies operating in India who are availing e-commerce supply or services (including IT & ITES services) from parent/subsidiary/group company or even from third party situated abroad need to evaluate the attraction of equalization levy on their transactions.
- E-commerce supply or services between non-residents having connection with India may also need to evaluate the attraction of equalization levy on their transactions.

Goods & Services Tax

GST on Directors Remuneration:

There has been a controversy regarding chargeability of GST on director's remuneration. There are two Authority of Advance Ruling ("AAR") which held that remuneration to director is liable for GST under Reverse Charge Mechanism ("RCM").

1st AAR Ruling:

AAR of Karnataka in case of M/s. Alcon Consulting Engineers (India) PVT AR No. KAR ADRG 83/2019 Ltd wherein it has been held that the remuneration to the Directors paid by the applicant are not covered under clause 1 of the Schedule III to the CGST Act, 2017, as the Director is not the employee of the Company. The consideration paid to the Director is in relation to the services provided by the Director to the Company and the recipient of such service is the Company as per clause (93) of section 2 of the CGST Act and the supplier of such service is the Director. Hence, the company is liable for the payment of GST under RCM.



2nd AAR Ruling:

AAR of Rajasthan in case M/s Clay Craft India Private Limited [RAJ/AAR/2019-20/33] which has hold a similar view as held by AAR in case of Alcon Consulting Engineers (India) Pvt hereinabove despite of appellant submission which is as under

1. Directors are also working apart from working as Board of Directors in the company at different level like procurement of raw material, production, quality checks, dispatch, accounting etc.
2. They are working as an Employee of the company.
3. Salary is regularly paid to the directors, TDS is also being deducted as applicable on salary u/s 192, Provident Fund and other benefit is also the same at par with other employees and as per company policy. Etc.

Despite above submission AAR has held that director is not the employee of the company and the Consideration paid to director is covered under RCM as mentioned in entry 6 Notification 13/2017 Central Tax (Rate).

In this context it would be important to analyse, whether the service of director of the company to the company would be service by an employee to the employer, in which case the same cannot be a supply and hence there is no question of GST levy either in the hands of the company or in the hands of the director.

- The terms employee and employer are not defined under the GST Act and hence the same must be understood in common parlance and with the aid of other laws.



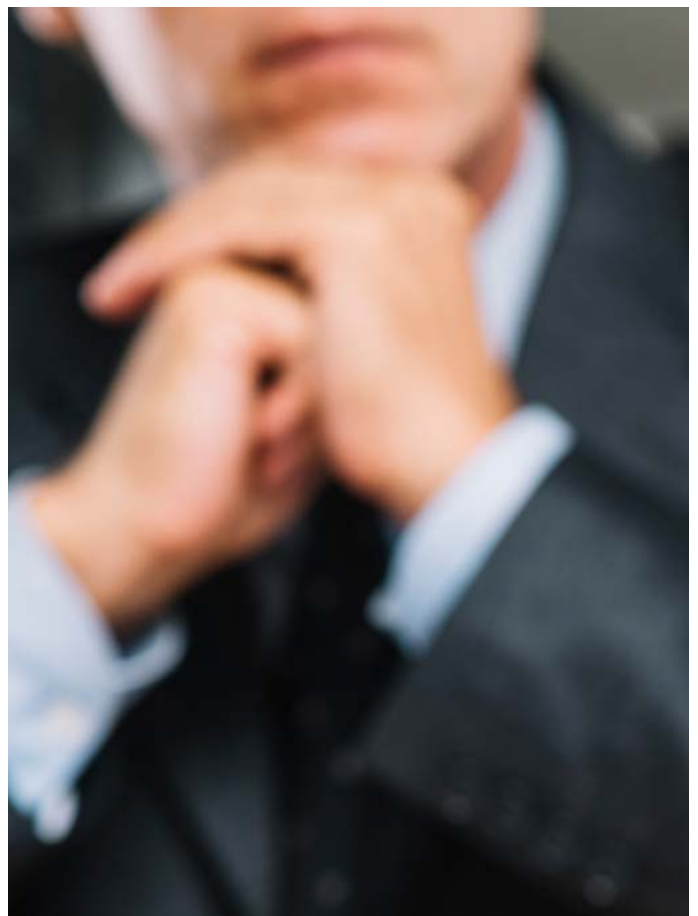
Goods & Services Tax

Who is Director?

1. Independent Director:
 2. Managing Director:
 3. Whole-time director.
 4. Nominee Director
- Broadly all directors are categorized into two categories which is Executive Directors and Non-Executive Directors. Executive Directors are the Directors, who are involved in the day-to-day affairs of the Company. Considering this, Managing Director and Whole-time director falls under the Executive Directors' category and Non-executive director is other than the executive director.
 - Further, a managing director or whole-time director cannot resign merely by giving a notice, as formal acceptance of the same is essential to make it complete and effective. This is because, they occupy two positions or possess two capacities, viz (i) one, that of director, and (ii) the other, that of a manager or officer of the company in the sense of whole time employee.
 - In short, to establish the employer-employee relationship, the clause of hiring and firing are an essential ingredient without which it cannot be construed whether the individual is the Promoter/Director or an employee Director. The remuneration cheque has to be paid on a month to month basis along with the admissible perquisites.

Conclusion:

Services in the capacity of a director shall only be chargeable to GST under the reverse charge mechanism. Services of a person being a director in capacity of an employee shall be outside the ambit of GST.



The Companies Act, 2013

Relaxation on holding Annual General Meeting by Companies whose financial year has ended on December 31, 2019:

Ministry of Corporate Affairs vide circular dated April 22, 2020, has relaxed due date for Companies, whose financial year has ended on 31st December, 2019, for holding Annual General Meeting from six months from end of FY to nine months from end of FY. Therefore, company whose financial year ended on December 31, 2019 can conduct its Annual General Meeting within nine months from the end of financial year i.e. till September 30, 2020.

Annual General Meeting and Extraordinary General Meeting allowed through video conferencing or through other audio-visual means:

Ministry of Corporate Affairs vide Circular dated April 8, 2020 and April 13, 2020 (MCA Circulars for EGM), allowed companies for conducting EGM through Video Conferencing or through other audio-visual means till June 2020 by following the procedure defined in the circular.

Further MCA vide circular 20/2020 dated May 05, 2020, has allowed to conduct Annual General Meeting through Video Conferencing or through other audio-visual means during the calendar year 2020.

Following are key points of MCA Circular for holding AGM:

- I. Companies which are required to provide e-voting facilities:
 - Provisions of MCA Circulars for EGM would be applicable mutatis mutandis for conducting AGMs through VC/OAVM.
 - In such meeting, other than ordinary business, only those items of special business, which are considered to be unavoidable by the Board, may be transacted.
 - Financial statements, auditor's report and/or any other documents shall be sent only by email. Physical dispatch of above documents is not mandatory.
 - One day before sending notice of AGM and other documents, Public notice by way of advertisement should be given in the newspaper, with the content as described in the MCA Circular.
 - In case company is unable to pay dividend by electronic mode, due to non-availability of details of bank accounts, the company shall dispatch the dividend warrant by post after normalisation of postal services.
 - If the Company has already obtained permission from relevant authorities as per Section 96 of the Companies Act, 2013, the companies are allowed to conduct AGM at Registered Office or any other place, as decided, in presence of some members and also with providing facility of VC/OAVM. Members physically present in the meeting and through electronic means, should be counted for quorum under Section 103 of the Act.

The Companies Act, 2013

II. Companies which are not required to provide e-voting facilities:

- AGM can be conducted through VC/OAVM only by Companies which has in its record email addresses of at least half of its shareholders who represent not less than seventy five percent of paid up share capital of the company in case company having share capital or seventy five percent of total voting power in case company not having share capital.
- Companies should take all possible steps to register email addresses, whose email address is not registered on the Company's records.
- MCA Circulars for EGM should be applicable mutatis mutandis for conducting meeting through VC and dispatch of notice.
- In such meeting, other than ordinary business, only those items of special business, which are considered to be unavoidable by the Board, may be transacted.
- Financial statements, auditor's report and/ or any other documents shall be sent only by email. Physical dispatch of above documents is not required.
- In case company is unable to pay dividend by electronic mode, due to non-availability of details of bank accounts, the company shall dispatch the dividend warrant by post after normalisation of postal services.

PERIOD/DAYS OF EXTENSION FOR NAMES RESERVED AND RESUBMISSION OF FORMS:

Ministry of Corporate Affairs vide circular dated April 22, 2020, has allowed additional period on following secretarial activities:

- Name reservation, for incorporation of new company or LLP or in case of change of name of existing LLP or company, expiring between 15th March, 2020 to 3rd May, 2020 will be given additional 20 days after May 03, 2020.
- Any SRN expiring between 15th March, 2020 to 3rd May, 2020 will be given additional 15 days after May 03, 2020.



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