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The Equalisation Levy: Dodging Existing Treaty Obligations Through a "Moral Tax"
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*584 Abstract

Taxation of the digital economy has occupied the minds of nations and tax experts for decades. The introduction of a digital services tax or equalisation levy as a consumption tax to side-step the tax treaty threshold of physical presence raises important issues of customary international law and constitutional law. This article seeks to examine the nature and scope of the equalisation levy introduced in India on foreign e-commerce operators and concludes that the levy has all the attributes of an "income tax" or at least a tax which is identical or substantially similar to income tax in addition to, or in place of, the existing income tax. As a result, the equalisation levy should be subject to the applicable Double Taxation Avoidance Agreement. In addition, this article explains how unilateral attempts to dodge existing tax treaty obligations are not only contrary to customary international law but also the Constitution of India.

A. Introduction

"The only constant in life is change."[1]

Innovation in digital technology and the rapid expansion of digital transactions are perhaps best summed up by this insight of the Ionian Greek philosopher, Heraclitus. The need for and growth of digital platforms can hardly be overemphasised, particularly in these uncertain times of physical distancing. The growth of the digital economy presents both exciting opportunities as well as immense challenges. One such challenge, which has occupied the minds of lawmakers, scholars, lawyers, accountants as well as national and international experts alike, is how best to tax the digital

economy. For the past two decades, the Organisation for Economic Co-operation and Development (OECD), the United Nations (UN) and the G20 have been at the forefront of addressing concerns about the taxation of enterprises engaged in some form of digital economy, with no permanent establishment (PE) within the territory of the source nation.

The introduction of the Equalisation Levy (EL) on e-commerce operators by the Parliament of India in April 2020 (EL-2020), in the midst of the coronavirus pandemic, is an example of a unilateral effort to address the challenge. ***585** [2]

This article traces the origins of the EL and reveals the scope and ambit of the levy in India. In the latter part of this article, an attempt has been made to examine the interplay between the EL and existing tax treaties, and the impact of this interplay on the touchstones of customary international law and the Constitution of India.[3]

B. Genesis of the EL

The Task Force on the Digital Economy (TFDE)[4] was established by the OECD in September 2013 to identify both the issues raised by the digital economy and possible options for addressing them. The TFDE identified four tax challenges posed by the digital economy: nexus; data collection; characterisation of business for direct tax purposes; and collection of value added tax (VAT). Based on work done by the TFDE, the OECD published a Final Report in October 2015, *Addressing the Tax Challenges of the Digital Economy, Action 1—2015 Final Report (OECD 2015 Final Report)*.[5]

The OECD 2015 Final Report dealt specifically with the issue of taxation of the digital economy and, inter alia, suggested three options for taxation of enterprises with no PE in the source nation: 1. insertion of a new definition of "nexus", based on significant economic presence; 2. enacting withholding tax on digital transactions; and 3. enforcing the EL. But, it said:

"None of the other options analysed by the TFDE, namely (i) a new nexus in the form of a significant economic presence, (ii) a withholding tax on certain types of digital transactions, and (iii) an equalisation levy, were recommended at this stage." [6]

This was

"…because, among other reasons, it is expected that the measures developed in the BEPS Project will have a substantial impact on BEPS issues previously identified in the digital economy, that certain BEPS measures will mitigate some aspects of the broader tax challenges, and that consumption taxes will be levied effectively in the market country".[7]

The OECD advised countries adopting such options in their domestic laws to respect existing international legal commitments.[8]

Pursuant to the OECD 2015 Final Report, a "Committee on Taxation of E-Commerce" was formed in India by the Central Board of Direct Taxes (CBDT) and its Report, *Proposal for Equalization Levy on Specified Transactions (Report of the Committee on Taxation of* ***586** *E-Commerce) (CBDT Report)*[9] recommended that the EL be introduced in India. The CBDT Report noted that the EL could be introduced as a tax, other than income tax, in accordance with Entries 92C[10] and 97[11] of List 1 of the Seventh Schedule to the Constitution of India.[12] The Finance Act, 2016 (IND) (FA 2016 (IND)),[13] introduced a new Chapter VIII, outside the Income-Tax Act, 1961 (IND) (ITA 1961 (IND))[14] proposing an Equalisation Levy (EL-2016) at the rate of 6 per cent of the amount of consideration received or receivable by a non-resident in the form of advertisement revenue from a person resident in India or a non-resident having a PE in India.[15] The levy was to be deducted by the Indian tax payer or the PE while remitting the consideration of the non-resident.

Simultaneously with the introduction of Chapter VIII of FA 2016 (IND), section 10(50)[16] was inserted in ITA 1961 (IND) to exempt receipts of such non-residents, which had suffered an EL, from any further income tax. Similarly, section 40 ITA 1961 (IND) was amended to introduce a new clause (ib)[17] to provide that a person responsible for paying amounts which are subject to an EL shall be disallowed a deduction of such amounts, if the EL is not deducted from the consideration. This is analogous to the other provisions of ITA 1961 (IND) which prohibit deduction of expenses which are the subject matter of withholding tax when such withholding tax is not affected.

The EL-2020 has now been introduced to provide a 2 per cent levy on the consideration (in excess of INR 20,000,000) received or receivable by a non-resident e-commerce operator on ***587** account of the sale of goods or services by the e-commerce operator itself or facilitated by such an e-commerce operator, if such goods, services or facilities are extended to:

any Indian resident; or

any person who buys goods or services from the e-commerce operator using an IP address located in India; or

any non-resident

(a)

for sale of advertisement, which either targets a customer in India, or is made using an IP address located in India; or

(b)

for sale of data, which is either collected from an Indian resident, or from a person who uses an IP address located in India.

The EL-2020 will have a significant impact on non-resident providers of digital supply or services, considering the expansive definition of the terms "e-commerce operator" and "e-commerce supply or services". Apart from non-resident online platforms, even travel aggregators, subscription-based platforms, paid search engines, streaming and online gaming, e-music, e-movies and e-books appear to be within the scope of the EL-2020.

A purchase made by a non-resident on an e-commerce platform, owned or operated by another non-resident is brought into account for tax purposes solely because the purchaser used an IP address located in India. Imagine a situation where a US resident, stuck in India due to COVID-19, placing an order with a non-resident e-commerce operator for delivery of food or medicine to his/her spouse in the US being subject to a levy because he/she used an IP address in India. The extension of the EL to sale of advertisement or data between two non-residents and making it contingent on nebulous phraseology like "targets a customer in India" raises questions of arbitrariness. Perhaps that is why leading industry organisations like Japan Electronics and Information Technology Industries Association (JEITA), and the US-India Business Council (USIBC) have sought deferral of the levy in its present form.

It is not that India is alone in levying some form of digital tax:

"As of June 22 [2020], Austria, France, Hungary, Italy, Poland, Turkey, and the United Kingdom have implemented a [digital services tax] DST. Belgium, the Czech Republic, Slovakia, and Spain have published proposals to enact a DST, and Latvia, Norway, and Slovenia have either officially announced or shown intentions to implement such a tax." [18]

Even Indonesia has proposed to levy "a 10 per cent VAT on digital products sold by non-resident internet companies with a significant presence in the Indonesian market".[19]

The EL enacted in India is, however, significantly different from what was proposed by the OECD and what other countries have enacted. One of the major distinctions and concerns is that the EL discriminates directly against foreign corporations and exports while explicitly exempting Indian companies. This was never intended in the OECD 2015 Final Report. Even the scope of ***588** the levy is significantly wide. For example, while Austria and Hungary have introduced a DST only on tax revenues from online advertising, France's tax base is much broader, including revenues from the provision of a digital interface, targeted advertising, and the transmission of data collected about users for advertising purposes. The combined scope of the EL-2016 and the EL-2020 is, as indicated earlier in this article, much wider. Further, the levy is applicable to all companies with a turnover of INR 2 crore (INR 20 million), which is a very low exemption threshold when compared to the thresholds applied in Europe; the lowest being in Turkey,[20] that is, €3.1 million of domestic turnover and a global turnover of €750 million.

On 2 June 2020, the United States Trade Representative (USTR) announced that investigations into DST policies in nine countries and the EU were to be conducted under section 301 of the Trade Act 1974 (US).[21]

Similar investigations in 2019 into the French DST and the threat of tariffs being imposed by the US on French wine led to an offer of a concession from France to limit the scope of the levy to automated digital services companies only. Reports suggest that the UK, Italy and Spain have also offered to limit the scope of the DST.[22] Belgium, too, reintroduced an adjusted DST proposal: a 3 per cent tax on revenue from activities such as the selling of user data on companies with global revenues exceeding €750 million (US $840 million) and domestic revenues exceeding €5 million (US $5.6 million). The Czech Republic has also lowered its proposed DST rate from 7 per cent to 5 per cent and postponed the date on which this is to become effective to January 2021. No such concession or deferral had been announced by either Indonesia or India until June 2020.

Unlike the EL-2016, which was to be recovered by way of a deduction[23] from the Indian payer, the EL-2020 is to be discharged by the non-resident e-commerce operator itself.[24] Consequently, the compliance burden of reporting[25] the transactions, which was to be borne only by the payer in respect of specified services, is now, under the new regime, to be borne by the e-commerce operator. As a result, failure to provide details of the transaction and to pay the tax/levy will result in a penalty[26] being imposed on the e-commerce operator and not the payer.

It is also noteworthy that there is no right to appeal against the levy of either the EL-2016 or EL-2020; however, an order levying a penalty for failure to pay the tax/levy is appealable. The absence of an explicit statutory right to appeal against a levy can at best be described as giving rise to ambiguity and without any clarification from the Income Tax Department this ambiguity could lead to a scurry of writ petitions being filed by taxpayers before the respective High Courts.

Having noted the general characteristics of the EL and its scope in general, the nature of the EL will now be examined, that is, whether it is an "income tax" or a separate "transaction tax". ***589**

C. Nature of the EL: is it an income tax in disguise?

The EL-2016 and the EL-2020 owe their existence to the OECD 2015 Final Report. This is admitted even in the CBDT Report.[27] It is, therefore, imperative to undertake a thorough appraisal of the OECD 2015 Final Report to appreciate the need for and purpose of the levy, both of which are factors to be considered when determining the nature of the EL.

C.1 Need and purpose of the EL

The EL, both as a concept and as perceived in the OECD 2015 Final Report is intended to address issues of tax neutrality. Taxpayers in similar situations carrying out similar transactions should be subject to similar levels of taxation, in order to avoid the introduction of distortions to the market.[28] In other words, the same principles of taxation should apply to all forms of business, while keeping in mind those specific features that might otherwise undermine an equal and neutral application of those principles. This objective is also specifically recognised in the CBDT Report in the following words:

"The word ‘equalization’ represents the objective of ensuring tax neutrality between different businesses conducted through differing business models or residing within or outside the taxing jurisdiction." [29]

It is further noted in the CBDT Report that

"asymmetry in tax burden faced by purely domestic and multi-national enterprises can have distortionary impact on the market competition and can adversely affect the development of purely domestic enterprises".[30]

Tax, in this context, refers to "income tax".

It is also interesting to note that, while discussing the concept of tax neutrality, both the OECD 2015 Final Report and the CBDT Report refer to "income tax" and not to any "transaction tax" like the VAT or goods and services tax (GST). In fact, Chapters 1 to 7 of the OECD 2015 Final Report deal with direct tax challenges faced by nations whereas a separate Chapter 8 deals with issues with respect to "collection" of VAT/GST and not the levy of such transaction taxes. Any doubt as to what is sought to be addressed through tax neutrality and the EL is put to rest in the OECD 2015 Final Report itself wherein the EL is proposed to "avoid some of the difficulties arising from creating new profit attribution rules for purposes of a nexus based on significant economic presence",[31] and "as an alternative way to address the broader direct tax challenges of the digital economy".[32] The OECD 2015 Final Report further provides that the "equalisation levy could be considered as an alternative to overcome the difficulties raised by the attribution of income to the new nexus"[33] and "would be intended to serve as a way to tax a non-resident ***590** enterprise’s significant economic presence in a country".[34] Even the Committee on taxation of E-commerce in its CBDT Report[35] acknowledges that the need and purpose of the EL, or the other alternatives suggested in the OECD 2015 Final Report, are to overcome the hurdles confronting the levy of

"income tax" on digital companies and that the EL should seek to neutralise or equalise the tax equations between domestic and foreign taxpayers.

On a bare perusal of the exposition in the OECD 2015 Final Report and the CBDT Report referred to above, it is not difficult to conclude that the purpose of the EL is to achieve neutrality between domestic and foreign taxpayers *qua* their income tax and that the EL needs to be introduced in order to overcome the hurdles posed by the existing Double Taxation Avoidance Agreements (DTAA) to achieve these objectives.

However, interestingly, after quoting extensively from the OECD 2015 Final Report, the CBDT Report comes to the conclusion that:

"As the Equalization Levy on a transaction is, in any case, inherently different from a tax on income, it need not be included within the laws governing tax on income." [36]

The above findings and the understanding of the Committee on taxation of E-commerce in the CBDT Report is not only contrary to the analysis in this article but also to the Revenue Secretary's own admission that "[a]lthough people are viewing it as indirect tax, this is a direct tax".[37] In fact, it would be interesting to know from the CBDT, which is the nodal authority for "income tax" or "direct tax", whether the collections from the EL would go towards meeting the targets of the Income Tax Department or those of the GST Department (which comes under the Central Board of Indirect Taxes and Customs), knowing that the achieving of targets is one of the bases for promotion in both of these Departments.

One can understand the frustration[38] of the tax authorities in India (or for that matter in other jurisdictions) and their consequent endeavour to camouflage the EL as a "transaction tax" in a separate chapter of FA 2016 (IND) because any income tax levied under ITA 1961 (IND) is subject to applicable DTAAs and the non-resident operator would escape the EL by virtue of the applicable DTAA if such a levy was introduced under ITA 1961 (IND). However, merely because the levy is introduced by way of a separate chapter in FA 2016 (IND), does not alter the basic character of the EL. There is enough jurisprudence[39] to suggest that the nomenclature given to a levy cannot be the decisive criteria to be used to determine the nature of the levy. ***591** Moreover, the inability to amend existing DTAAs (which may not be correct in view of the fact that most countries have signed the MLI[40]), cannot be a ground for a unilateral override. Administrative inconvenience can never be a ground for imposing and collecting a tax which is otherwise not payable.[41] The construct and structure of the EL, discussed below, leaves no room for any intendment or speculation as to the nature of the levy.

C.2 Construct and structure of the EL

The EL-2020 charge attaches to the person providing the e-commerce facility. Secondly, the levy relates to receipts (consideration received) of the e-commerce operator and not to the value of the transaction, that is, it does not extend to the entire value of the transaction but only to the consideration received for rendering a particular service, or to the consideration received for the supply of a particular item, or to the consideration for facilitation of the sale or service. Thirdly, unlike GST, there is no mechanism to recover such tax under a "reverse charge" from the payer in India.

It is also surprising to note that, although the CBDT Report refers to the EL as a "transaction tax", amendments are still made to ITA 1961 (IND) to exempt[42] the e-commerce operator from any further "income tax" and to disallow deduction[43] of expenses for payers who do not withhold the EL-2016 from payments made to non-residents. Such disallowance is peculiar to non-deduction or non-payment of income tax. The disallowance of payment of a "transaction tax" like VAT/GST is housed in a different provision[44] of ITA 1961 (IND). The levy of the EL is inapplicable if the non-resident recipient of EL consideration has a PE in India and such consideration is effectively connected with such a PE. The definition of PE is borrowed from ITA 1961 (IND). It is unfathomable how a levy of a "transaction tax" can lead to exemption from charge of "income tax" or that the presence of a PE exempts the levy of a "transaction tax". This is completely contrary to any principle of tax jurisprudence. These contemporaneous expositions further strengthen the argument that the EL has all the attributes of "income tax". Moreover, the fact that the EL-2020 and the Online Information Database Access and Retrieval services (OIDAR)[45] under the GST regime operate simultaneously on similar or the same transactions and that the EL-2020 provides exemption from income tax and not OIDAR, also indicates that the EL is an "income tax" and not an "indirect tax"/"transaction tax". Not only that, there is a charge on the provision of e-commerce services under the GST[46] anyway. The field of "transaction tax" is, therefore, completely occupied by the OIDAR/GST and a reasonable presumption can be drawn that the Parliament of India does not intend to doubly tax the same transaction. Therefore, to ***592** provide a "transaction tax" outside the GST seems not only illogical but arbitrary. Moreover, the author cannot understand the logic of imposing two transaction taxes on the same transaction but providing "income tax" exemption on account of the second "transaction tax", that is, the EL. This demonstrates that the EL-2020 has all the attributes of an "income tax".

The aforesaid analysis reveals that not only is the purpose of the EL to overcome hurdles in enforcement of income tax but also that the nature and mechanics of the levy in the Indian context suggest that it is, in pith and substance, an "income tax" and not a "transaction tax".

Having examined the purpose, need and construct of the EL and concluding that the EL is an "income tax", the author now embarks upon an examination of its interplay with existing DTAAs.

D. Interplay with DTAAs and the constitutional scheme

The power to enter into a treaty is an inherent part of the sovereign power of India. In terms of Article 73[47] when read with Articles 246[48] and 253 of the Constitution of India, subject to the provisions of other Articles of the Constitution, the power of the Government of India extends to the matters with respect to which the Parliament of India has power to make laws, which include "income tax" and the power to enter into treaties concerning subject matter on which Parliament of India can legislate. But the obligations arising under the agreement or treaties are not automatically binding upon Indian nationals and must be enforced by way of domestic law. Theoretically, in order to enforce a DTAA, it has to be translated into an Act of Parliament, which is a time consuming and cumbersome procedure. Accordingly, section 90[49] ITA 1961 (IND) provides for a special procedure, which allows the Government of India to enforce a DTAA through a notification issued in the Official Gazette.

Once a DTAA is notified in this way, it is a settled principle of law that if a non-resident taxpayer is resident in a country with which India has a DTAA, the taxpayer has the option of ***593** being taxed either under the provisions of the tax treaty or under ITA 1961 (IND) whichever is more beneficial to the taxpayer.[50]

As the EL is in the nature of income tax, the next question is whether or not the levy is within the ambit of "Taxes Covered" under the applicable DTAA and, consequently, whether the non-resident taxpayer can take the benefit of the applicable DTAA by either seeking exemption from payment of the EL or taking credit for the EL paid in the source country.

India has DTAAs with over 90 countries. The DTAAs apply to and provide benefit in respect of "Taxes Covered" by the relevant DTAA. Broadly, for the purposes of this discussion, the DTAAs can be divided into two categories: 1. where "Taxes Covered" are defined to include both income tax levied under ITA 1961 (IND) and also any identical or substantially similar taxes which are imposed after the date of signature of the DTAA in addition to, or in place of, the existing taxes[51]; and 2. where "Taxes Covered" is defined to include both income tax without any reference to ITA 1961 (IND) and also any identical or substantially similar taxes which are imposed after the date of signature of the DTAA in addition to, or in place of, the existing taxes.[52]

In the second category there cannot be any quarrel that the EL is in the nature of an "income tax" and has been introduced as a substitute for "regular" income tax. Even if the EL is a *sui generis* income tax, protection under the relevant DTAA should be available to the non-resident taxpayer because

the DTAAs do not create any distinction between "ordinary taxes" and "extraordinary taxes". In the first category referred to above, an argument could be made that, since the main provision refers to income tax under ITA 1961 (IND) only, the reference to identical or substantially similar taxes in the latter part of ITA 1961 (IND) could only be a reference to taxes imposed under ITA 1961 (IND). One needs to remember that DTAAs are not to be read as statutes but as contractual agreements and words used in DTAAs have to be read in *good faith*, having regard to the objects of the DTAA and the Vienna Convention on the Law of Treaties (VCLT).[53] Secondly, the purpose of a DTAA is to relieve double-taxation. This objective cannot be defeated on the basis of technicalities. If these principles are kept in mind and the scope and ambit of the EL, in its current form, is analysed by reference to the touchstones referred to above, it follows that the EL is substantially similar to the income tax levied under ITA 1961 (IND) and that it has been introduced to overcome and be a substitute for the "regular" income tax in order to maintain tax neutrality.

Therefore, there is a strong argument to be made that the EL is akin to "income tax" and, hence, is subject to the provisions of the applicable DTAA. The natural corollary of this is that, in the absence of a PE of a non-resident e-commerce operator, the consideration received from ***594** India will not be subject to any tax, including the EL, unless it is held to be in the nature of a "royalty"[54] or "fees for technical/included services".[55]

The final section of this article will review the consequences of the introduction of the EL, as a unilateral measure, under public international law.

E. The EL: consequences under public international law

As discussed earlier in this article, the introduction of the EL by way of the EL-2016 and the expansion of its scope by way of the EL-2020 may have very laudable objectives, that is, the maintenance of tax neutrality and the provision of uniformity of taxation, etc. The morality of multinationals in structuring their transactions in such a way as to reduce taxation in the source nation has also been called out by many countries. However, can those objectives and concerns justify India overriding its existing tax treaty obligations? Does the structuring of transactions to reduce taxation in the source jurisdiction allow such jurisdictions to dodge existing DTAAs?

The *OECD BEPS Project Explanatory Statement: 2015 Final Reports* categorically notes that the measures discussed in that Report, including the EL, were not recommended at this stage. The caveats being that

"[c]ountries could, however, introduce any of these options in their domestic laws as additional safeguards against BEPS, provided they respect existing treaty obligations, or in their bilateral tax treaties" [56]

and that such measures are interim or temporary in nature, until other Action points are resolved. This is in line with the OECD's earlier approach[57] wherein the *Recommendation of the Council concerning Tax Treaty Override* was adopted by the OECD Council on 2 October 1989. The Instrument recommends that the Member countries undertake "bilateral or multilateral consultations to address problems connected with tax treaty provisions" and avoid enacting legislation that contradicts international treaty obligations.[58] Secondly, the EL portrays an unrealistic picture of temporariness. The classification of these measures as "interim measures" is illusory. Once interim measures are in place, there will be less political will to push for implementation of the permanent, consensus based measures; more importantly, it is unclear how long it will take to reach such consensus, if such were to be possible at all.[59] Therefore, the introduction of the EL cannot and should not be a measure which is used to reduce or deny the benefits of an existing DTAA or to completely dodge such DTAAs.

India may not be a signatory to the VCLT but Article 26 of that Treaty, which incorporates the principle of "*Pacta sunt servanda*", and Article 27, which dissuades states from citing domestic ***595** law to override treaties, are both rules of customary international law, and as such are useful aids to interpretation and form the basic norms of civility. Similar provisions are reflected in other public international documents such as the International Law Commission articles on State Responsibility.[60] In addition, Article 51 of the Constitution of India requires that:

"The State shall endeavour to-…(c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another…." [61]

If the EL were to be examined using the principles referred to above as a touchstone, it is submitted that it would be found that the levy falls foul of all of these principles. Source jurisdictions cannot use domestic law (the EL) to disregard solemnly signed DTAAs. In other words, in the absence of a PE, the source jurisdiction cannot bring to tax business income of foreign taxpayers by imposing the EL. Additionally, the introduction of the EL strikes at the very root of the bilateral nature of tax treaties by creating friction between partner countries, which is exactly what the founders of the Constitution of India wanted to avoid.[62] Interestingly, the EL-2020 did not form part of the original Finance Bill, 2020 which was introduced in Parliament on 1 February 2020. It found its place only in the amendments to the Finance Bill, 2020 moved by the Finance Minister on 23 March 2020 and the amended Bill was passed by Parliament on the same day without any discussion. In effect, the EL-2020 was never discussed or debated in the Parliament of India and became effective on 1 April 2020.

Thus, the consequences of such unilateral measures not only impinge upon the existing DTAAs and violate the VCLT but are also in conflict with constitutional principles and the rule of law.

Unlike what took place in the Jadhav Case,[63] treaty partners may not be able to drag India or other source jurisdictions to the International Court of Justice (ICJ) or to the Permanent Court of Arbitration for such unilateral measures as the ICJ may not have jurisdiction in the absence of specific incorporation of the protocol in the relevant DTAA. But alleged treaty misuse provides no excuse for indulging in dodging existing treaty obligations.

F. Conclusion

Overwhelming evidence suggests that the EL has all the attributes of an "income tax". The Income tax authorities in India are, however, not likely to accept this proposition, particularly when the stand taken by the Committee in the CBDT Report is considered.[64] Given the foregoing discussion, taxpayers will now have the option of challenging the constitutional validity of the EL, particularly the EL-2020, on the grounds of extra-territoriality or remoteness of nexus and ***596** arbitrariness. Alternatively, taxpayers could dispute the liability itself on the grounds of the levy being within the scope of "Taxes Covered". In either case, it will be interesting to see how the courts in India react to the EL imposed by Parliament as a transaction tax by "dodging"[65] the existing tax treaty obligations.

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Footnotes

1 Partner, DMD Advocates.
2 Extracts from OECD materials are republished with permission of the OECD: permission conveyed through Copyright Clearance Center Inc.
1 Attributed to Heraclitus of Ephesus (c. 535 BC-475 BC).
2 The Equalisation Levy (EL) introduced by the Finance Act, 2016, No.28 of 2016 (IND) (FA 2016 (IND)) and further extended by the Finance Act, 2020, No.12 of 2020 (IND) (FA 2020 (IND)) inserting s.165A from 1 April 2020 in FA 2016 (IND) Pt IV. FA 2020 (IND) s.153(iv)–(xii) inserting FA 2016 (IND) s.165A, s.166A, s.167(A)–(C), s.168(A)–(D), s.169, ss.170–180.
3 Constitution of India [As on 1st April, 2019], available at: http://legislative.gov.in/sites/default/files/COI-updated.pdf [Accessed 24 August 2020].
4 *OECD/G20 Base Erosion and Profit Shifting Project, Addressing the Tax Challenges of the Digital Economy (Paris: OECD Publishing, 2014)*, as referred to in the Executive Summary and following.
5 *OECD/G20 Base Erosion and Profit Shifting Project, Addressing the Tax Challenges of the Digital Economy, Action 1—2015 Final Report (Paris: OECD Publishing, 2015)*, available at: https://dx.doi.org/10.1787/9789264241046-en [Accessed 24 August 2020].
6 OECD 2015 Final Report, above fn.5, 13.
7 OECD 2015 Final Report, above fn.5, paras 357 and 383.
8 OECD 2015 Final Report, above fn.5, 13 and paras 357 and 383.
9 *Committee on Taxation of E-Commerce, Proposal for Equalization Levy on Specified Transactions (Report of the Committee on Taxation of E-Commerce) (February*

2016), available at: https://incometaxindia.gov.in/News/Report-of-Committee-on-Taxation-of-e-Commerce-Feb-2016.pdf [Accessed 24 August 2020].

10 Constitution of India, above fn.3, Seventh Schedule, List 1, Entry 92C: "Taxes on Services." (Although this Entry was inserted by the Constitution 88th Amendment Act, 2003 (IND), it was never notified and brought into effect. This Entry 92C was omitted by the Constitution (101st Amendment) Act, 2016 (IND) as VAT and service tax were replaced by GST.)

11 Constitution of India, above fn.3, Seventh Schedule, List 1, Entry 97: "Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists."

12 Constitution of India, above fn.3.

13 FA 2016 (IND), above fn.2.

14 Income-Tax Act, 1961, No.43 of 1961 (IND).

15 FA 2016 (IND), above fn.2, s.165 inserted vide FA 2016 (IND), above fn.2.

16 ITA 1961 (IND), above fn.14, Ch.111, s.10:
"

Incomes not included in total income.

10.
In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included—…
(50)
any income arising from any specified service provided on or after the date on which the provisions of Chapter VIII of the Finance Act, 2016 comes into force *or arising from any e-commerce supply or services made or provided or facilitated on or after the 1st day of April, 2021* and chargeable to equalisation levy under that Chapter." (Italicised portion inserted vide FA 2020 (IND), above fn.2.)

17 ITA 1961 (IND), above fn.14, Ch.111, s.40:

"Amounts not deductible.

40.
Notwithstanding anything to the contrary in sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head 'Profits and gains of business or profession',—…
(ib)
any consideration paid or payable to a non-resident for a specified service on which equalisation levy is deductible under the provisions of Chapter VIII of the Finance Act, 2016, and such levy has not been deducted or after deduction, has not been paid on or before the due date specified in sub-section (1) of section 139…."

18 *E. Asen, "What European OECD Countries Are Doing about Digital Services Taxes", Tax Foundation, 22 June 2020*, available at: https://taxfoundation.org/digital-tax-europe-2020/ [Accessed 24 August 2020].

19 *T. Diela and F. Potkin, "Indonesia to impose VAT on internet giants from July", Technology News (Reuters), 15 May 2020*, available at: https://www.reuters.com/article/us-indonesia-tax-digital/indonesia-to-impose-vat-on-internet-giants-from-july-idUSKBN22R23V [Accessed 24 August 2020].

20 Asen, above fn.18.

21 Office of the United States Trade Representative, press release, *USTR Initiates Section 301 Investigations of Digital Services Taxes* (6 February 2020), available at: https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/june/

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24 FA 2016 (IND), above fn.2, s.166A inserted in FA 2016 (IND), above fn.2, vide FA 2020 (IND), above fn.2.

25 FA 2016 (IND), above fn.2, s.167 as amended by FA 2020 (IND), above fn.2.

26 FA 2016 (IND), above fn.2, s.172 as amended by FA 2020 (IND), above fn.2.

27 CBDT Report, above fn.9, paras 109–118.

28 OECD 2015 Final Report, above fn.5, para.351.

29 CBDT Report, above fn.9, para.109.

30 CBDT Report, above fn.9, para.169.

31 OECD 2015 Final Report, above fn.5, para.302.

32 OECD 2015 Final Report, above fn.5, para.302.

33 OECD 2015 Final Report, above fn.5, para.276.

34 OECD 2015 Final Report, above fn.5, para.302.

35 CBDT Report, above fn.9, paras 69–76.

36 CBDT Report, above fn.9, para.129.

37 D. Mondal, "There will not be in future any retrospective taxation: Business Today's Dipak Mondal caught up with Revenue Secretary Hasmukh Adhia", *Business Today, 5 June 2016*, available at: https://www.businesstoday.in/magazine/features/revenue-secy-hasmukh-adhia-on-countrys-tax-issues/story/232552.html [Accessed 24 August 2020].

38 *M. Schellekens, Report on Seminar H: Recent developments in international taxation in IFA's 70th Congress in Madrid (IBFD Online, 26 September 2016)*; A. Baez Moreno and Y. Brauner, "Taxing the Digital Economy Post BEPS… Seriously" (2019) 58(1) Columbia Journal of Transnational Law 121, 166: "Discussions with Indian officials reveal that the levy was enacted out of frustration with the inability of India to expand the PE rules within BEPS to include digital presence: India will allow MNEs to avoid the levy by declaring PE in India, applying the normal attribution rules, and India even seems to prefer a negotiated (hopefully treaty-based) solution that will allow it to impose sufficient source based taxation."

39 R. M. D. Chamarbaugwalla v Union of India AIR 1957 SC 628, 1957 SCR 930; Union of India & Others v M/S Martin Lottery Agencies Ltd (2009) 12 SCC 209.

40 *OECD, Multilateral Convention To Implement Tax Treaty Related Measures To Prevent Base Erosion And Profit Shifting (24 November 2016)*.

41 GE India Technology Centre Private Ltd v Commissioner of Income-tax (2010) 327 ITR 456 (SC); Bharti Airtel Ltd v Union of India and Others (2017) 291 CTR (Del) 254.

42 ITA 1961 (IND), above fn.14, s.10(50).

43 ITA 1961 (IND), above fn.14, s.40(iib).

44 ITA 1961 (IND), above fn.14, s.43B.

45 Central Board of Indirect Taxes and Customs, Department of Revenue, Ministry of Finance, Government of India, Online Information Database Access and Retrieval Services, available at: http://cbic.gov.in/resources//htdocs-cbec/gst/OIDAR.pdf;jsessionid=298F141258A2D6D807AE6B8E688E5455 [Accessed 6 November 2020].

46 See Integrated Goods and Services Tax Act, 2017 (IND) s.14 read with s.2(17).

47 Constitution of India, above fn.3, Art.73 states:

"

(1)

Subject to the provisions of this Constitution, the executive power of the Union shall extend—

(a)

to the matters with respect to which Parliament has power to make laws; and

(b)
to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement:…." (Emphasis added.)

48 Constitution of India, above fn.3, Art.246(1) states:
"
(1)
Notwithstanding anything in clauses (2) and (3), *Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I* in the Seventh Schedule (in this Constitution referred to as the 'Union List')" (Emphasis added.)

(Entry 14 of List I reads as: "*Entering into treaties and agreements* with foreign countries and implementing of treaties, agreements and conventions with foreign Countries.") (Emphasis added.)

49 ITA 1961 (IND), above fn.14, s.90:
"
90.
(1)
The Central Government may enter into an agreement with the Government of any country outside India or specified territory outside India,—
(a)
…
(b)
for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country or specified territory, as the case may be, or
(c)
…
(d)
…,
and may, *by notification in the Official Gazette*, make such provisions as may be necessary for implementing the agreement." (Emphasis added.)

50 ITA 1961 (IND), above fn.14, s.90(2). See also the decision of the Supreme Court of India in Union of India v Azadi Bachao Andolan (2003) 263 ITR 706 (SC).

51 For example, DTAAs with Austria, Canada, the Czech Republic, and the US.

52 For example, DTAAs with the Netherlands, Singapore, and the UK.

53 Vienna Convention on the Law of Treaties (with annex), concluded at Vienna on 23 May 1969, No.18232, Authentic texts: English, French, Chinese, Russian and Spanish, Registered ex officio on 27 January 1980. Art.26 incorporates the principle of "Pacta sunt servanda", stating: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Although India is not a signatory to the Vienna Convention, the Supreme Court of India has, in the case of Ram Jethmalani v Union of India (2011) 8 SCC 1, recognised that the Vienna Convention codifies many principles of customary international law, which are useful aids in the interpretation of treaties.

54 ITA 1961 (IND), above fn.14, s.9(1)(vi).

55 ITA 1961 (IND), above fn.14, s.9(1)(vii).

56 *OECD/G20 Base Erosion and Profit Shifting Project, BEPS Project Explanatory Statement: 2015 Final Reports (Paris: OECD Publishing, 2016)*, available at: http://dx.doi.org/10.1787/9789264263437-en [Accessed 2 September 2020], para.19.

57 *OECD, OECD Legal Instruments, Recommendation of the Council concerning Tax Treaty Override, OECD/LEGAL/0253, OECD adopted on 2 October 1989 (OECD, 2020)*, available at: https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0253 [Accessed 25 August 2020].

58 *OECD, Recommendation of the Council concerning Tax Treaty Override*, above fn.57, I, 1 and 2.

59 Baez Moreno and Brauner, above fn.38.
60 *International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001*, text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10). The report, which also contains commentaries on the draft articles, appears in the *Yearbook of the International Law Commission, 2001, Vol.II, Part Two*, as corrected.
61 Constitution of India, above fn.3, Art.51(c).
62 Constitution of India, above fn.3, Art.51. See also Commissioner of Customs, Bangalore v G.M. Exports [2015] 324 ELT 209 (SC).
63 Jadhav Case (The Republic of India v Islamic Republic of Pakistan), 17 July 2019, General List No.168, available at: https://www.icj-cij.org/files/case-related/168/168-20190717-JUD-01-00-EN.pdf [Accessed 25 August 2020].
64 CBDT Report, above fn.9.
65 A. Mehta, "'Equalization Levy' Proposal in Indian Finance Bill 2016: Is it Legitimate Tax Policy or an Attempt of Treaty Dodging?" (2016) 22(2) Asia-Pacific Tax Bulletin Online.

B.T.R. 2020, 4, 584-596