

SITG No.



SATURDAY INTERNATIONAL TAX

GYAN !!!

#taxmadeeasy

**Deputy Commissioner of Income-tax, Circle -1
V/s**

Prakash Chand Mishra

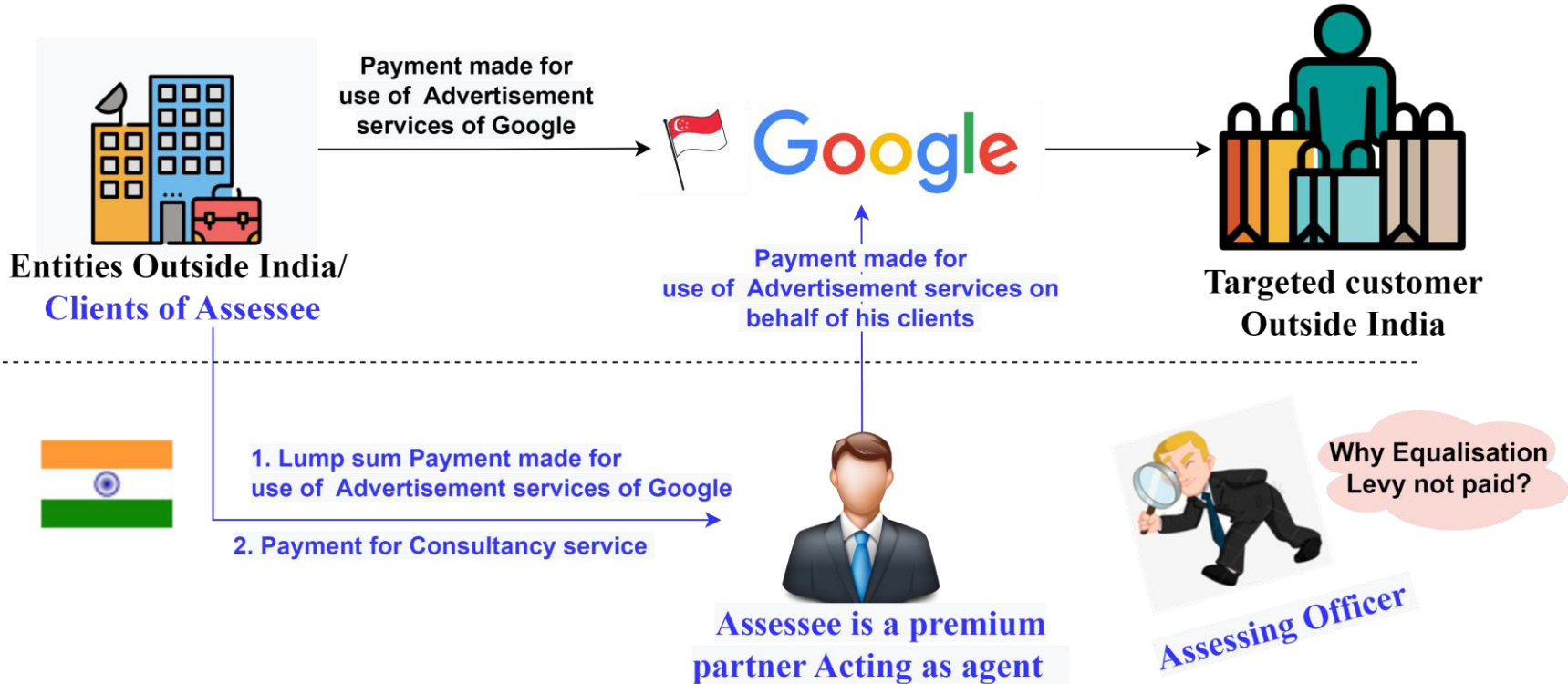
**Equalisation Levy 1.0 will not be applicable if recipient of service is
located outside India and advertisement income is not accruing in
India**

ITA No. 305/JPR/2022

Date: 15.10.2022

Taxinpic

Transaction in Normal Scenario
Transaction as per facts of the case



Fact of the Case

- ❖ The Assessee (Individual) tax resident of India engage in the business of providing support **services of online advertisement, digital marketing and web designing and receives consultancy charges** for such services rendered.
- ❖ Assessee made a payment outside India being Online Advertisement Expenditure to Google Asia Pacific Pte ltd (Google) located in Singapore.
- ❖ Google is a Non Resident having No Permanent establishment in India.
- ❖ No **Equalisation Levy** had been deducted by the assessee while making payment to Google through digital mode.



Still Unaware about Equalisation Levy :
Refer: Equalisation Levy 1.0
Equalisation Levy 2.0

Revenue's Contention

- ❖ A.O. contended that the payment made by the assessee to Non-resident for advertisement purpose will fall in the ambit of Equalisation Levy as per the provisions of Finance Act, 2016.
- ❖ As No Equalisation levy had been deducted by the assessee while making payment to the Google the expenses claimed by the assessee is to be disallowed as per the provisions of **Sec. 40(a)(ib) of the Act.**
- ❖ Further, A.O. contended that the transaction between the assessee and Google Singapore is not covered under the exceptions provided under the section 165(2) of the Finance Act, 2016

Assessee's Contention

- ❖ Assessee contended that **the assessee is mere a agent of Google Singapore**. Assessee have granted access to it's clients for the purpose of running advertisement on Google. Ultimate beneficiary of such online ads were the clients of the assessee.
- ❖ Clients of the assessee were all located outside India and they themselves decides the geographical location where the online ad will be run, who would be the target audience and for how much time the online ad will run. Assessee has **no control** over the relevant decision making.
- ❖ Assessee also contended that section 40(a)(ib) could not be invoked on the assessee as Equalisation levy could not be applicable **when services recipient is outside India and the target customer of the advertisement are also outside India**. Thus, the clients of assessee have no connection to India in respect of business carried out or services rendered.
- ❖ Google does not have a PE in India and hence no tax will be applicable on income earned by it.

Legal provisions related to Income Tax Act,1961 and Finance Act, 2016

Section 40(a)(ib) of Income Tax Act, 1961 –

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 :

Provided that where in respect of any such consideration, the equalisation levy has been deducted in any subsequent year or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, such sum shall be allowed as a deduction in computing the income of the previous year in which such levy has been paid;

Legal provisions related to Income Tax Act, 1961 and Finance Act, 2016

As per **Section 165 of Finance Act, 2016**—

(1) On and from the date of commencement of this Chapter, there shall be charged an equalisation levy at the rate of six per cent of the amount of consideration for any specified service received or receivable by a person, being a non-resident from—

- (i) a person resident in India and carrying on business or profession; or
- (ii) a non-resident having a permanent establishment in India.

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

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

RULING

- ❖ It is pointed out that equalization levy is **not part of income-tax and therefore, any payment on which equalization levy is applicable will not fall within the provisions of Double Tax Avoidance Agreement (DTAA)** and the tax payer will have to pay equalization levy regardless of the provisions of the DTAA and the country the recipient belongs to.
- ❖ It was stated that as per the provisions of Equalisation levy, consideration should be received/receivable by the Non-Resident from Resident and such Resident should be carrying on business in India. However, in the present case ultimate recipient of the services of Google Singapore is not the assessee but his clients who were located outside India and **the advertisement services provided is not in relation to the business of the assessee.**
- ❖ Further, in the given case, it is clear that No specific exception had been provided for the services where the target customer of the advertisement are outside India under section 165 of Finance Act, 2016.

RULING

- ❖ However, Finance Minister in his speech, while introducing the Finance Bill, 2016, for the purpose of law on Equalization Levy stated as follows:-

*“...151. In order to tap tax on **income accruing** to foreign e-commerce companies **from India** it is proposed that a person making payment to a non-resident, who does not have a permanent establishment, exceeding in aggregate Rs. 1 lakh in a year, as consideration for online advertisement, with withhold tax at 6% of gross amount paid, as EL. The levy will only apply to B2B transactions...”*

- ❖ Further, reference is also drawn to Section 165A of the Finance Act, 2020 which clearly specified that the services shall be taxable in India, only if they are provided or facilitated to a person resident in India or to a person who buys such goods or services or both **using Internet Protocol Address located in India.**
- ❖ Thus, considering the speech of Finance minister and Section 165A it can be stated that the intention of the statute is to bring within **the purview of Equalization Levy, only those transactions which have some connection with India.**

RULING

- ❖ Also, under the tax laws only those transactions can be covered which have **territorial nexus with India**. Therefore, only such part of the income as is attributable to the operations carried out in India can be taxed in India. In the current case the service of online ads were received by clients of assessee location outside India.
- ❖ Considering the above, it can be stated that for applicability of Equalization Levy it is to be seen that whether the business for which, advertisement has been carried out, has earned any income from India or not.
- ❖ In present case as the targeted customer is outside India, client of assessee who was controlling the advertisement for his business carried out business outside India, **the advertiser (Google) ultimately running the advertisement was also located outside India and the Indian jurisdiction was only used for channelizing the funds.**

CONCLUSION

- ❖ It was held that the role of the assessee is that of an agent of Google Singapore whereby the assessee is granted access for the purpose of advertisement to be made on Google. On approaching the assessee, such person gets login credentials, generated by the assessee on the website of google through such credentials, the person on its own runs advertisement on google.
- ❖ Further, it was concluded that when the intention of levy is related to the targeted audience and party paying the online advertisement has no relation in India, Equalisation levy is not attracted based on facts and circumstances.

OUR COMMENTS/QUERIES

- ❖ On the bare reading of the law of equalization levy no exception or relief has been provided under equalization levy in a case where target customer is outside India. However, it will depend on the facts of the case whether the income is accruing in India or not as the intention of law in relation to equalization levy was to tax such Digital transaction where non residents were earning from India but not getting taxed in India.
- ❖ Further, since Equalization levy is not a part of Income Tax Act but is governed by Finance Act, 2016, hence assessee can never take benefit of DTAA while deciding on the deduction of equalization levy.
- ❖ In the above case if the assessee located in India was using the online advertisement to get export sales from outside India will he be still liable to deduct Equalization levy? In our opinion EL will be applicable if recipient of service is in India. Even if targeted customer/ audience is outside India.

Section/Article	Section 165 of Finance Act, 2016
DTAA/Country	Hong-kong, Singapore
Court	Jaipur - Trib.
Date of decision	07.10.2022

Note: Case law name in **Red**- in favour of the revenue, **Green**- In favour of the Assessee, **Orange** = Partial



Visit our website blog for previous case laws.-

<https://jainshrimal.com/blog/#taxgyaan>



Join Telegram group for discussion on International taxation-

<https://t.me/joinchat/rNjwnbhQo8g4Y2jI>

Disclaimer

- ❑ This presentation has been prepared on the basis of information available in the public domain and is intended for guidance purposes only.
- ❑ Jain Shrimal & Co. has taken reasonable care to ensure that the information in this presentation is accurate. It however accepts no legal responsibility for any consequential incidents that may arise from errors or omissions contained in this presentation.
- ❑ This presentation is based on the information available with us at the time of preparing the same, all of which are subject to changes which may, directly or indirectly impact the information and statements given in this presentation.
- ❑ Neither Jain shrimal & co., nor any person associated with us will be responsible for any loss however sustained by any person or entity who relies on this presentation. Interested parties are strongly advised to examine their precise requirements for themselves, form their own judgments and seek appropriate professional advice.