

TAX IMPLICATIONS ON E-COMMERCE OPERATORS



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A PPLICABILITY

Section 194O – TDS on Payment made to E – Commerce Participant:

- ❖ Section 194O has been introduced in the Union Budget 2020. According to Section 194O, an e-Commerce operator is required to deduct TDS for facilitating any sale of goods or providing services through an e-Commerce participant. TDS on e-commerce operators under section 194-O is applicable from 1 October 2020.

Equalization levy:

- ❖ EL is levied on online sale of goods or online provision of services or a combination of both, by non-resident (NR) e-commerce operators (ECO), when online sale is made by a non-resident to specified persons. EL being charged at the rate of 2% on amount of consideration received or receivable by a non-resident ‘e-commerce operator’ from e-commerce supply or services as against 6% which was introduced earlier in 2016. Also, EL must be deposited by the NR ‘e-commerce operator’ and all related compliances viz. filing of EL return, etc. to be made by NR ‘e-commerce operator’.

TCS Mechanism under GST:

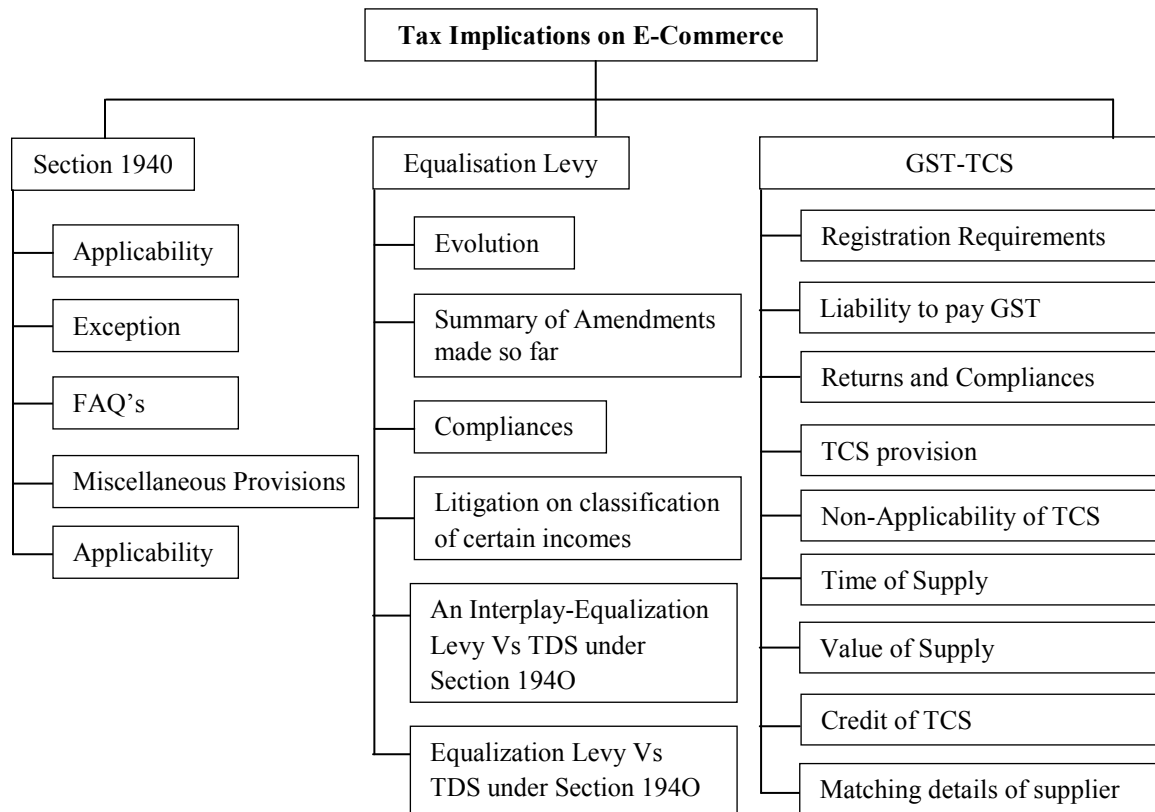
- ❖ Tax Collected at Source (TCS) under GST means the tax collected by an e-commerce operator from the consideration received by it on behalf of the supplier of goods, or services who makes supplies through the operator’s online platform. TCS will be charged as a percentage on the net taxable supplies. The provision of TCS under GST is dealt under Section 52 of the CGST Act.

DEFINITIONS:

TDS U/S 194O	EQUALISATION LEVY	GST - TCS
<p>a. Electronic Commerce means the supply of goods or services or both, including digital products over digital or electronic network.</p>	<p>a. "E-commerce operator" means a non-resident who owns, manages, or operates digital or electronic facility or platform for online sale of goods or online provision of services or both</p>	<p>a. Electronic Commerce Section 2(44): electronic commerce means supply of goods or services or both including digital products over digital or electronic network.</p>
<p>b. E-commerce operator: means a person who owns, operates, or manages digital or electronic facility or platform for electronic commerce and is responsible for paying to ecommerce participant. (It is mandatory to fulfill both precondition which are conjunctive and not dis conjunctive i.e., person must own, operates, or manage Digital/Electronic Facility or Platform.)</p>	<p>b. "E-commerce supply of services" (ESS) means:</p> <ul style="list-style-type: none"> ➤ Online sale of goods owned by the e-commerce operator; or ➤ Online provision of services provided by the e-commerce operator; or ➤ Online sale of goods or provision of services or both, facilitated by the e-commerce operator; or ➤ Any combination of activities listed above 	<p>b. E-commerce operator Section 2(45): electronic commerce operator means any person who owns, operates, or manages digital or electronic facility or platform for electronic commerce</p>
<p>c. E-commerce participant means a person resident in India selling goods or providing services or both, including digital products, through digital or electronic facility or platform for electronic commerce.</p>	<p>c. "Online" is defined as a facility or service or right or benefit or access that is obtained through the internet or any other form of digital or telecommunication network.</p>	<p>c. Section 9(5):</p> <ul style="list-style-type: none"> i. services by way of transportation of passengers by a radio-taxi, motorcab, maxicab and motor cycle; ii. services by way of providing accommodation in hotels, inns, guest houses, clubs, campsites or other commercial places meant for residential or lodging purposes* iii. services by way of house-keeping, such as plumbing, carpentering etc, *.

E-Commerce VS OIDAR:

	E-Commerce	OIDAR
Meaning	Ecommerce, also known as electronic commerce or internet commerce, refers to the buying and selling of goods or services using the internet, and the transfer of money and data to execute these transactions.	Online Information Database Access and Retrieval services (hereinafter referred to as OIDAR) is a category of services provided through the medium of internet and received by the recipient online without having any physical interface with the supplier of such services.
Nature	Electronic commerce provides platform for others to sell and buy goods whereas OIDAR itself provides services with least human intervention.	Electronic commerce involves buying and selling of goods and services whereas OIDAR deals only in services.

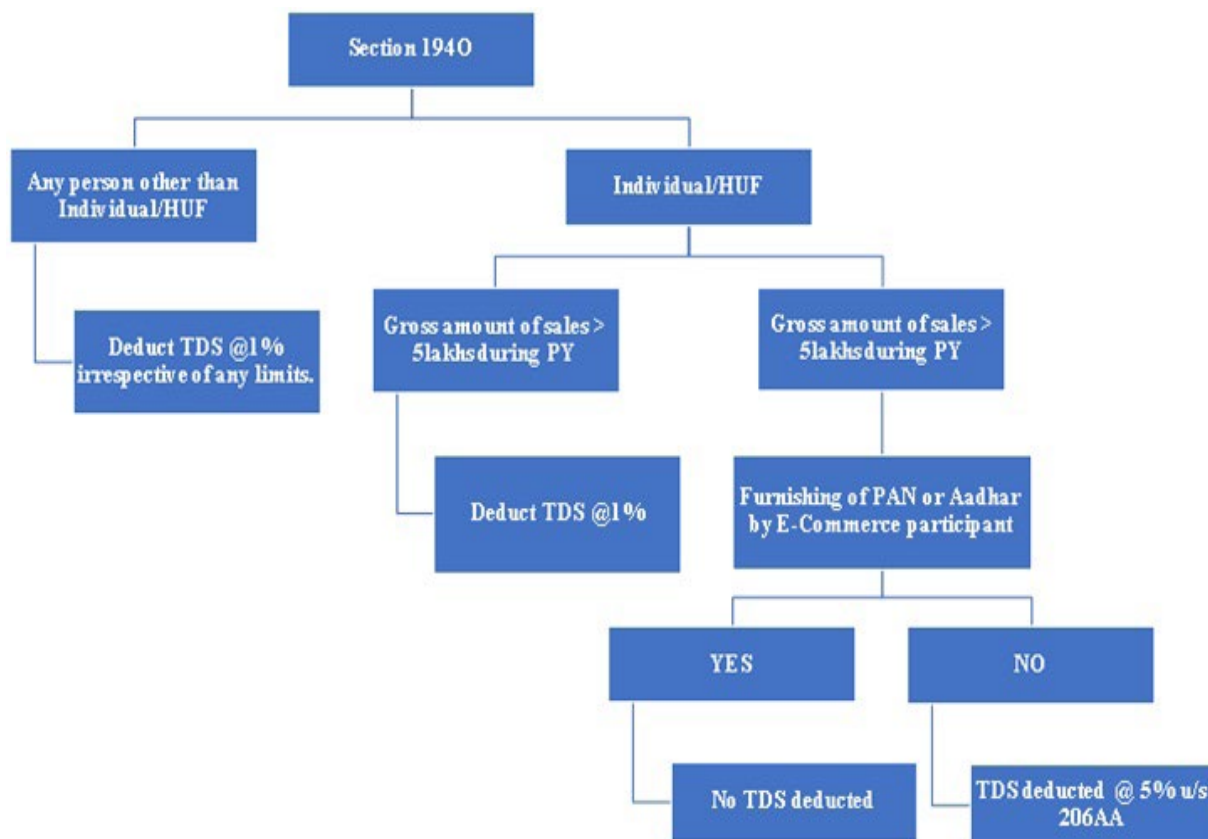


Section 1940 TDS on Payments Made to e-commerce Participants.

Law before 1940

Earlier, there was no TDS on payments made to e-Commerce participants. They were required to independently file their income tax returns. Therefore, many small e-Commerce participants did not file their ITR's and escaped the tax liability.

Section 1940 has been introduced in the Union Budget 2020. And is applicable from 1 October 2020.

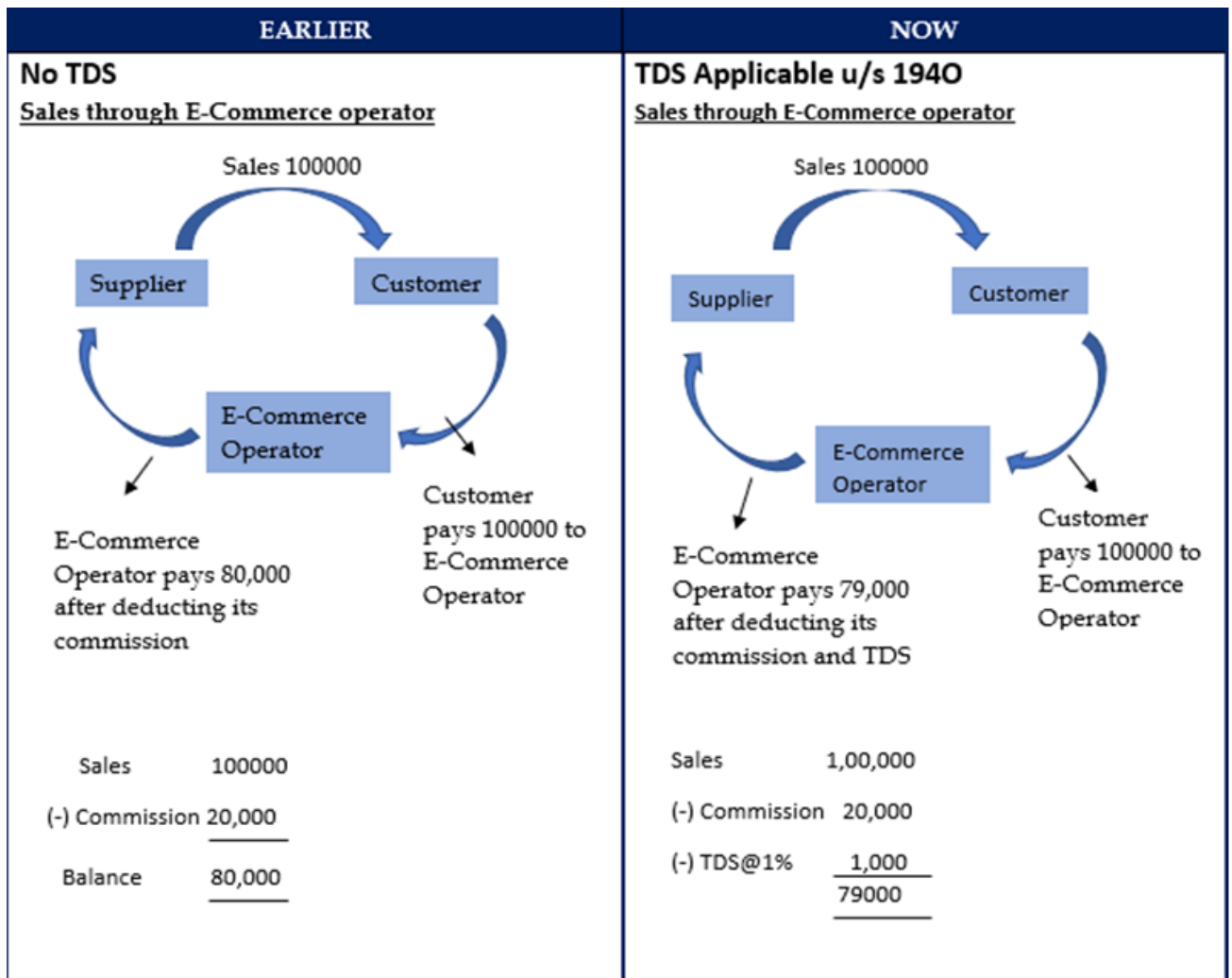


Applicability

1. both resident and non-resident e-commerce operator.
 2. resident e-commerce participant.
- ❖ even if purchaser of goods/recipient of services is a non-resident. E-Commerce operators should deduct TDS @1% at the time of credit or making payment to an e-Commerce participant, whichever is earlier.
 - ❖ If e-commerce participant is a corporate, then TDS u/s 194O is deductible irrespective of the threshold limits.
 - ❖ In case of Individuals/HUF, there is no requirement to deduct TDS if the gross amount of sale of goods, services, or both during the previous year does not exceed Rs 5 lakh and if the e-Commerce participant has furnished his PAN or Aadhaar.
 - ❖ The threshold limit of INR 500,000 under section 194-O is calculated from 1 April 2020.
 - ❖ The liability to deduct TDS or collect TCS applies to payments or credits on or after 1 October 2020.
 - ❖ TDS must be deducted at the rate of 5%, as per provisions of Section 206AA if the participant does not furnish his PAN or Aadhaar.

Exception:

- ❖ No TDS will be deducted if the participant is a non-resident. (In such cases the provisions of “Equalization levy” are applicable.)
- ❖ And if the amount, paid or credited to individuals/HUF during a financial year, does not exceed Rs 5 lakh.

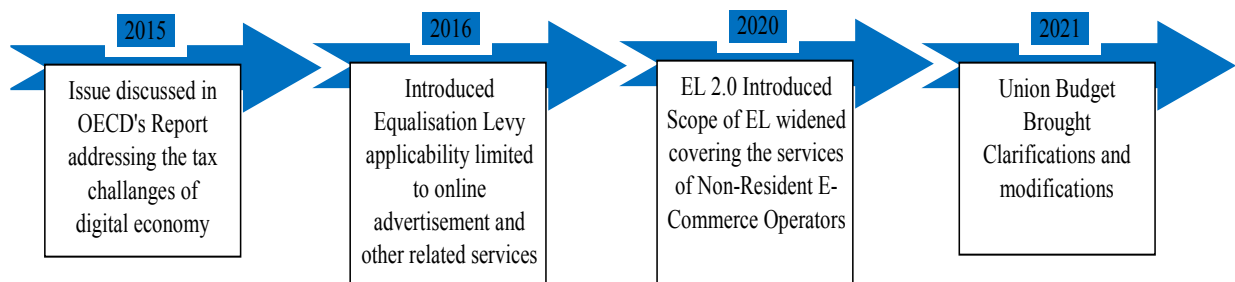


Points to be noted:

- In this section “Grosssales” is interpreted as gross sales from e-commerce operator after excluding GST components.
- Commission of e-commerce operator: It would be logical to deduct TDS on gross sales after excluding commission/ service fee of e-commerce operator. TDS u/s 194H would be deducted on such commission.
- As per act rest all penal, filing and other provisions of the TDS chapter will be applicable.

Equalization Levy

EVOLUTION



Transition of Equalization from 2016 to 2021

Particulars	Advertisement EL as introduced by FA 2016	E-com EL as introduced by FA 2020	Union Budget 2021
Applicability for EL in India	Non-resident service provider engaged in providing specified services as below.	<ul style="list-style-type: none"> ➤ Non-resident e-commerce operator who owns, operates, or manages digital or electronic facility or platform in connection with India operations. ➤ Non-resident who sells advertisement to another non-resident which targets an Indian resident customer or a customer who accesses the advertisement through internet protocol (IP) address located in India. ➤ Non-resident who sells data, collected from an India resident person or from a person who uses IP address located in India. 	
Specified services/ transactions on which EL is applicable	<ul style="list-style-type: none"> ➤ Online advertisement. ➤ Any provision for digital advertising space. ➤ Any provision of facility or service for online advertisement. ➤ Any other service which may be notified later by the central government. 	<ul style="list-style-type: none"> ➤ Online sale of goods owned by the nonresident e-commerce operator. ➤ Online provision of services provided by the non-resident e-commerce operator. ➤ Online sale of goods or provision of services or both, facilitated by the non-resident ecommerce operator. ➤ Any combination of activities listed above. 	
Rate	6%	2%	
Person responsible for compliance or person liable to pay EL in India	Payer	Non-resident e-commerce operator	
Non-Applicability of EL	<p>EL is not applicable if:</p> <ul style="list-style-type: none"> ➤ Non-resident has a PE in India and specified services (as above) are effectively connected to PE in India; or ➤ Aggregate value of consideration for specified transactions do not exceed INR0.1 million (approx. US\$1,300) in a FY; or ➤ Where payment is not for the purpose of carrying out business or profession. 	<p>E-com EL is not applicable if:</p> <ul style="list-style-type: none"> ➤ Non-resident e-commerce operator has a PE in India and e-commerce transaction is effectively connected to PE in India; or ➤ Aggregate value of consideration for specified transactions do not exceed INR 2 crores ; or ➤ Where Ad EL is levied on services. 	<p>E-Com EL is not applicable to:</p> <ul style="list-style-type: none"> ➤ Consideration in the nature of royalty and fees for technical services (FTS), which is taxable under the Income Tax Act read with Double Tax Avoidance Agreements, will not be subject to EL. ➤ Thus, royalty and FTS income will continue to be charged at 10% (plus applicable surcharge and cess) on a gross basis and will not be chargeable to EL.

Collection and Recovery	The amount of equalisation levy so deducted by the payer has to be deposited by 7th day of the month following the month in which the equalisation levy is deducted.	The equalisation levy shall be paid by every e-commerce operator to the credit of government quarterly within the following due dates:		
		Date of ending of quarter	Due Date	
		30 June	7 July	
		30 September	7 October	
		31 December	7 January	
		31 March	31 March	
Due Date of Furnishing the Annual statement	on or before 30th June of FY ended.	on or before 30th June of each FY		
Interest on Failure to pay Equalisation Levy	1% of the outstanding levy for every month or part thereof is delayed.	1% of the outstanding levy for every month or part thereof is delayed.		
Penalty	Situation	Penalty (in addition to paying equalisation levy and interest)	Situation	Penalty (in addition to paying equalisation levy and interest)
	Failure to deduct equalisation levy (wholly or partly)	A penalty equal to amount of equalisation levy	Failure to deduct equalisation levy (wholly or partly)	A penalty equal to amount of equalisation levy
	Failure to deposit with government	Rs. 1000 for each day of default (not to exceed amount of equalisation levy)	Failure to furnish statement	Rs. 100 for each day of default
	Failure to furnish statement	Rs. 100 for each day of default		
Income Tax Exemption	When equalisation levy is deducted under the above provisions, income of the recipient non-resident is exempt under section 10(50).	Income from the above activities in the hands of e-commerce operator is exempt under section 10(50).	CLARIFICATION ON MISMATCH OF EFFECTIVE DATES OF EL Exemption from the income tax was with effect from 1 April 2021. Thus, for FY 2020-21, there was a mismatch in the effective dates of EL and the corresponding income tax exemption. It has been proposed to remove this anomaly in order to grant the income tax exemption with retrospective effect to 1 April 2020.	

Clarifications		<p>2. The scope of the terms “online sale of goods” and “online provision of services” will cover any of the following activities if undertaken online:</p> <ul style="list-style-type: none"> • Acceptance of an offer for sale • Placing a purchase order • Acceptance of a purchase order • Payment of the consideration • The supply of goods or provision of services, partly or wholly <p>As per the amendment EL, provisions are also made applicable if any one of the above activities has taken place online and such goods/services are supplied offline.</p> <p>3. E-commerce operators are currently subject to EL at 2% on the amount of consideration “received or receivable.” A clarification has now been provided through an amendment that such consideration will include:</p> <ul style="list-style-type: none"> • Consideration for sales of goods irrespective of whether the e-commerce operator owns the goods • Consideration for the provision of services irrespective of whether the service is provided or facilitated by the e-commerce operator.
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Litigation on classification of certain incomes

The taxability of a transaction as royalty or FTS has been a controversial issue in respect of which the courts and tribunals have pronounced conflicting judgments. An illustrative list of such pronouncements has been reproduced below:

Nature of transaction	In Favour of assessee	In Favour of revenue
Sale of Software	➤ Consideration received by assessee for the off the shelf sale of ‘shrink-wrapped software’, cannot be considered as a ‘royalty’ as the same is a consideration for the sale of a copyrighted product and not for use of any copyright ¹ .	➤ Where assessee, engaged in developing telecommunication equipment, purchased shrink-wrap software from a non-resident company, since payment was for the right to use said software, same is to be treated as royalty.

Onlinedata processing	➤ Data processing cost by no standards could be treated as royalty as a consideration for use of assets	➤ Where assessee had provided data processing services, since there was no imparting of information and entire equipment and technology which were used for processing data were solely for performing activity of assessee for itself and moreover, data were processed through programmed software without any human intervention, payment made to assessee fall within purview of royalty or fee for technical services.
Broadcasting Services	➤ Income earned by the assessee, a Thailand based company, for rendering digital broadcasting services through its satellite, to both residents of India as well as non-residents, was not taxable in India as royalty under section 9(1)(vi)8.	➤ In view of Explanations 5 and 6 to Section 9(1)(vi) which were inserted retrospectively by the Finance Act, 2012, receipt earned from providing data transmission services through satellites is to be considered as royalty9.
Telecom or transmission services	➤ Where assessee, a foreign shipping company, set up a telecommunication system in order to enable its agents across globe including India to perform their role more effectively, payment received for providing said facility was not taxable as fee for technical services10.	➤ Where assessee, engaged in providing audio, video and web conferencing services, made payments to foreign service providers towards international toll free services, said payments being in nature of fee for technical services, required deduction of tax at source11

Equalization Levy Vs TDS under Section 194O- An Interplay

Equalisation levy considers who the buyer on the NR E-Commerce platform is whereas 194-O consider whether the E-Commerce participant i.e. is a resident.

Following is an instance where both the provisions are applicable-

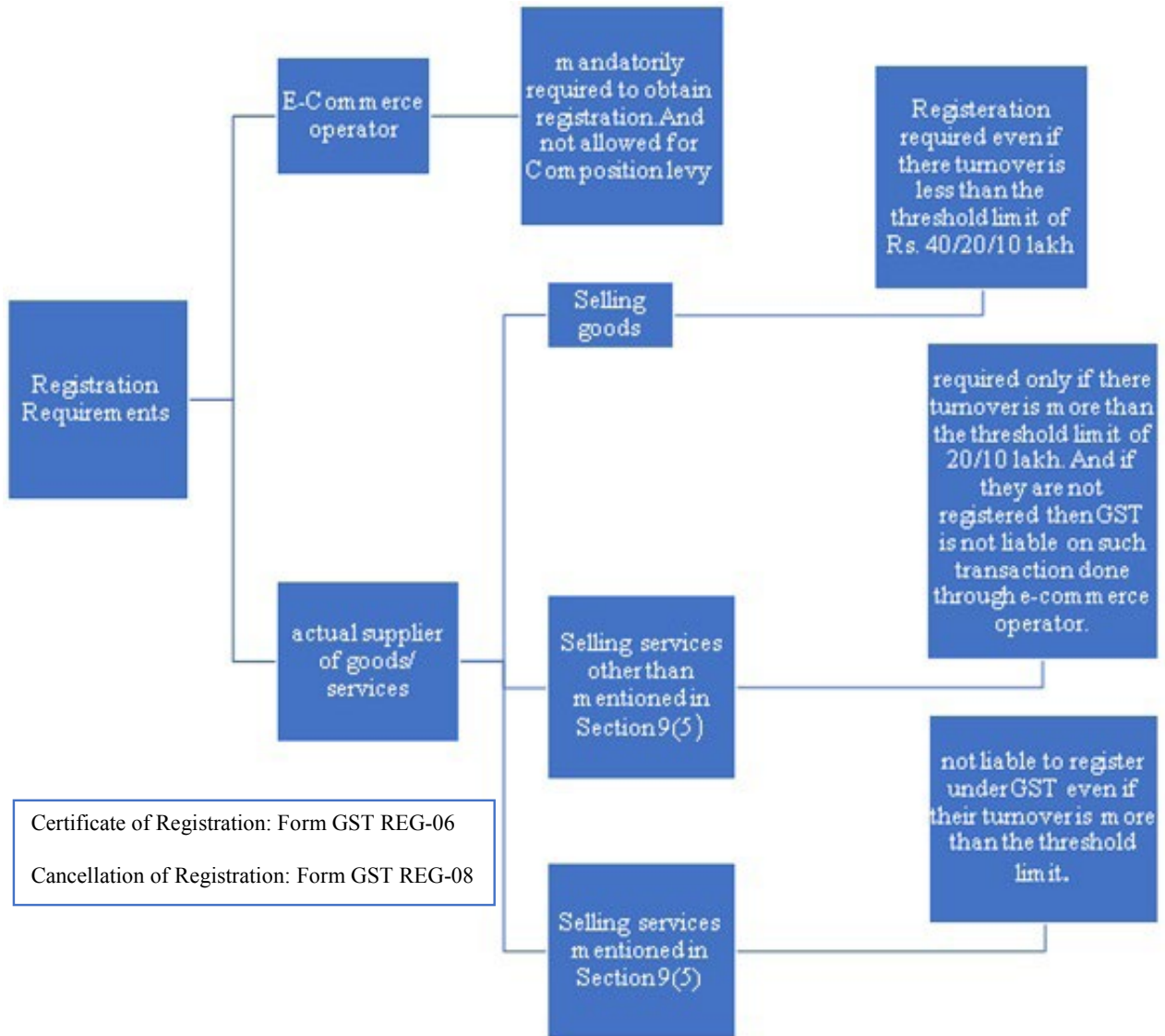
A Buyer, resident in India purchases goods on an E-Commerce platform run by a NR from a seller who is a resident in India. In such a scenario, NR E-Commerce Operator would be liable to pay an equalisation levy @ 2% in India (subject to other conditions of the section being satisfied) and deduct tax @1% u/s 194-O of the ITA from the payment to be made to the seller.

Points to ponder:

- EL is would be applicable to intercompany transactions and reseller arrangements. No exemption is provided in this regard.
- Advice rendered through email or telephone would also constitute digital or electronic facility or platform which is used for online provision of services and therefore can fall within the ambit of e-commerce supply or services, hence liable for equalization levy.

GST- TCS

Registration Requirement:



Liability to pay GST

Description of Supply	Person liable to pay GST
Supply of Goods	Supplier of Goods-Forward Charge Mechanism Applicable
Supply of Services	Supplier of Services-Forward Charge Mechanism Applicable
Supply of Passenger Transportation Services	E-Commerce Operator-Reverse Charge Mechanism Applicable
Supply of House Keeping Services	E-commerce Operator- Reverse Charge Mechanism Applicable. Once Supplier is liable to get registered, Supplier shall be liable to pay GST
Supply of Accommodation Services	E-commerce Operator- Reverse Charge Mechanism Applicable. Once Supplier is liable to get registered, Supplier shall be liable to pay GST

Returns and Compliances

Compliance/Return	Due Date
GSTR-8	up to 10th of next month.
Deposited of deducted TCS	up to 10th of next month
annual statement in Form GSTR-9B	before the 31st of December following the end of every FY
Rectification of any omission or incorrect particulars in monthly statement	up to September or actual filing of annual return whichever is earlier.

TCS Provision

- The dealers or traders supplying goods and/or services through e-commerce
- operators will receive payment after deduction of TCS @ 1%.
- This means for an intrastate supply 1% i.e., 0.5 % under CGST and 0.5% under SGST.
- between the states, the TCS rate will be 1%, i.e., under the IGST Act.

Non-Applicability of TCS Provisions

- TCS provisions are not applicable where GST is payable under RCM.
- exempt supply.
- import of goods or services
- No TCS if you are selling your own products through electronic portal
- a person supplying services, other than services under section 9 (5) were exempted from obtaining compulsory registration provided their aggregate turnover does not exceed threshold limits. Since such suppliers are not liable for registration, TCS provisions do not apply.

Time of supply

Between Seller & ECO

- TCS is to be collected once supply has been made through the e-commerce operator
- and where the business model is that the consideration is to be collected by the e-commerce operator irrespective of the actual collection of the consideration.

For example, if the supply has taken place through the e-commerce operator on 30th October 2018 but the consideration for the same has been collected in the month of November 2018, then TCS for such supply has to be collected and reported in the statement for the month of October, 2018.

Value of supply

The value of supply for goods and services provided through ECO which are not mentioned in sec 9(5) shall be the net value of taxable supplies.

NET VALUE OF TAXABLE SUPPLIES = AGG VALUE OF SUPPLIES THROUGH ECO – SUPPLIES RETURNED- SUPPLIES u/s 9(5).

Credit of tax collected:

The tax collected by the operator shall be credited to the cash ledger of the supplier. The supplier can claim credit of tax collected and reflected in the return by the Operator in his [supplier's] electronic cash ledger.

Matching of details of supplies:

- value of supplies, submitted by every operator in the statements will be matched with the details of supplies submitted by all such suppliers in their returns.
- If there is any discrepancy in the value of supplies, the same would be communicated to both.
- If such discrepancy in value is not rectified within the given time,
- then such amount would be added to the output tax liability of such supplier.
- The supplier will have to pay the differential amount of output tax along with interest.