



Taxation on E-commerce

(PART- I : Direct Tax Approach)

Team Tax Research Department

E-commerce, also known as electronic commerce or internet commerce, refers to the buying and selling goods or services over an electronic network, primarily the internet, as well as the transfer of money and data to complete these transactions. E-commerce is frequently used to refer to the online sale of physical products, but it can also refer to any type of commercial transaction that is facilitated by the internet. Whereas e-commerce covers all aspects of running an online business, e-commerce is solely concerned with the exchange of goods and services. Well-known Indian e-commerce examples include Amazon, Flipkart, Myntra, Paytm, Zomato, Swiggy, and others.

These business transactions occur mainly as business-to-business (B2B), business-to-consumer (B2C), consumer-to-consumer or consumer-to-business.

commerce has come a long way since the CompuServe launch in 1969. By May of 2020, e-commerce transactions reached \$82.5 billion — a 77% increase from 2019. E-commerce has allowed firms to establish a market presence, or to enhance an existing market position, by providing a cheaper and more efficient distribution chain for their products or services.

The working of e-commerce is similar to that of any offline or retail business. The main three functions in e-commerce are receiving orders, processing order information, and shipping. Let us look at the detailed understanding of the virtual process that takes place from computer surfing to dispatch. These steps are:

- A customer visits an online shop using a computer or mobile to search for products. The customer's web browser communicates simultaneously with a web server that handles the e-commerce website.
- The e-Commerce website connects to its database and requests this data to dynamically render any requested web pages.
- The customer browses the products and adds the

product on their cart.

- An order manager or order management software confirms the product is in stock.
- If the product is available and the customer is ready to check out, she enters her payment card details and shipping information on your payment form or page.
- The bank computer confirms sufficient funds in the customer's account in the bank or enough credit on her card to complete the transaction..
- Once the order is complete, and the payment has gone through, the website typically provides an estimated shipping time, a unique transaction number, postal tracking number, etc.
- The order management system requests the warehouse system to initiate the dispatch of goods to the customers.
- The warehouse computer system emails the customer about en-route delivery upon the dispatch of goods.
- The goods are finally delivered to the customer's address.

The E-commerce business models have introduced new tax issues. The typical direct tax issues relating to e-commerce are

1. difficulties of characterizing the nature of payment
2. establishing a nexus or link between a taxable transaction, activity and a taxing jurisdiction,
3. difficulty of locating the transaction, activity
4. identifying the taxpayer for income tax purposes.

Some terms related to taxation :

Person - Under Section 2(31), A 'Person' is An Association Of Persons (AOP) or a Body Of Individuals (BOI) or a Local Authority or an Artificial Juridical Person, whether or not, such Person or Body or Authority or Juridical Person, was formed or established or incorporated with the object of deriving income, profits or gains.

In other words, A Person includes...

- (i) An Individual
- (ii) A Hindu Undivided Family (HUF)
- (iii) A Company
- (iv) A Firm
- (v) An Association Of Person (AOP) or a Body of Individual (BOI), whether incorporated or not.
- (vi) A Local Authority
- (vii) Every Artificial Judicial Person not falling within any of the preceding sub-clauses.

A Hindu Undivided Family (HUF) :

has not been defined under the tax laws. However, as per the Hindu law, it means a family which consists of all persons lineally descended from a common ancestor including their wives and daughters.

Resident and Non-Resident :

The taxability of an individual in India depends upon his residential status in India for any particular financial year.

An individual is said to be a resident in the financial year if he/she is:

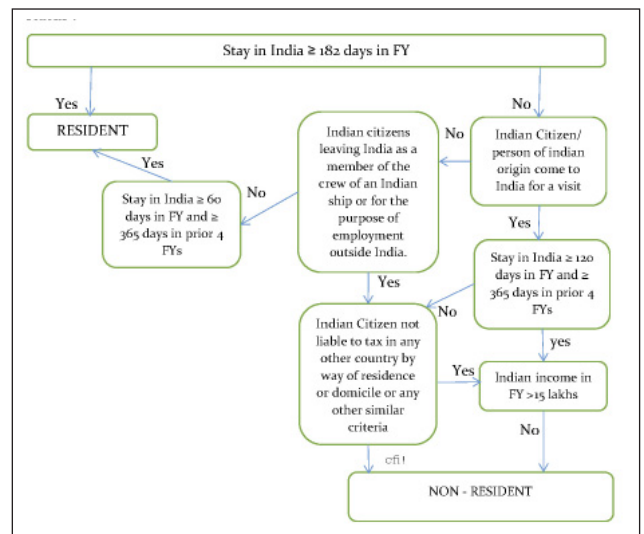
- physically present in India for a period of 182 days or more in the financial year, or
- physically present in India for a period of 60 days or more during the relevant financial year and 365 days or more in aggregate in four preceding financial years.

The Finance Act, 2020, w.e.f., Assessment Year 2021-22 has amended the above exception to provide that the

period of 60 days as mentioned in point 2 above shall be substituted with 120 days, if an Indian citizen or a person of Indian origin whose total income, other than income from foreign sources, exceeds INR 15 Lakhs during the previous year. Income from foreign sources means income that accrues or arises outside India (except income derived from a business controlled in or a profession set up in India).

If none of the above two conditions are met, the individual is said to be an Non Resident in that financial year.

Period of stay and other conditions in current Financial Year and residential status :



Considering the growing numbers of e-commerce transactions and entities, Government of India has recently brought in certain provisions in the Income Tax Act, 1961 to tax such E-commerce transactions. We will discuss such provisions which were introduced through Finance Act, 2016 and Finance Act, 2020 as explained in brief herein below:

Provisions introduced by Finance Act 2016

Section 165- Equalization Levy

This is a tax leviable on consideration received or receivable by a non-resident for any **specified service** such as online advertising, any provision for digital advertising space or any other facility or service for online advertising @6% from :

1. A resident person carrying on business/profession in India or

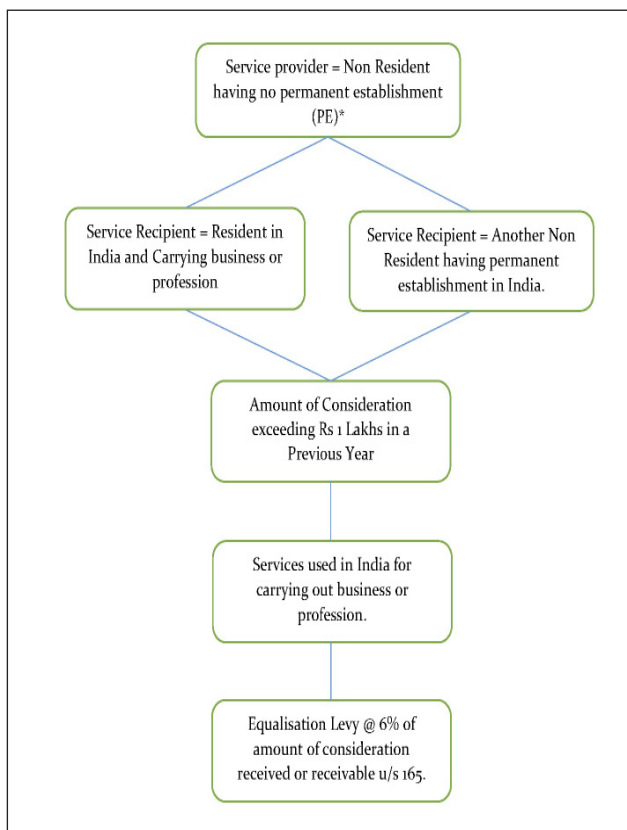


2. A Non-Resident having a permanent establishment in India

Specified services include the following:

1. Online advertisement
2. Any provision for digital advertising space or any other facility or service for the purpose of online advertisement.
3. Any other service as notified by the Central Government for this purpose.

The government identified that Indian people majorly availed services relating to advertising over the internet from non-resident service providers and hence decided to levy a fixed percentage as tax on the consideration amount which has to be deducted by the Indian resident before making payment to the Non-resident service provider



* PE includes a fixed place of business through which the business of the enterprise is wholly or partly carried on. A PE will generally not be deemed to exist where the activity performed is preparatory or auxiliary in nature.

As the income earned by Non- residents having PE in

India are already deemed to accrue or arise in India under section 9 of the Income Tax Act and are taxable in India, Non-residents having NO PE in India are only included as service providers for this purpose.

Time of levy - The equalisation levy should be deducted at the time of payment (or) at the time of credit to the account of the payee whichever is earlier.

Due date of payment - Within 7th of the month immediately following the calendar month when the equalization levy collected under section 165.

Furnishing the statement :

1. The statement under section 165 should be submitted by the person receiving the specified services from the Non-resident.
2. The assessee shall furnish the statement in Form No.1 on or before 30th June immediately following the Financial Year of deduction.
3. Penalty @ Rs. 100/day will be charged till the default continues.
4. Revised statement shall be filed by an assessee before the expiry of 2 years from the end of the financial year in which the service was provided in the following cases:
 - a. If the assessee fails to furnish the equalization levy statement within the prescribed time or
 - b. If he notices any omission or wrong particulars in the statement filed.

Non payment within due date :

1. Interest: at the rate of 1% per month or part of the month after due date till the date of payment
2. Penalty: (over and above the above of equalisation levy)

For Non-deduction: Penalty equal to amount of equalisation levy

For Non-payment: Penalty equal to Rs. 1000/day (maximum upto equalisation levy not paid)

Under the following conditions the Equalization Levy @6% is not charged

1. The non-resident providing the specified service has a permanent establishment in India and the specified service is effectively connected with such permanent establishment;
2. 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
3. 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**.

Co-relation with other sections of Income Tax Act, 1961 :

Section 40(a)(ib)

If the equalisation levy under section 165

1. Is deductible but not deducted during PY (or)
2. Deducted but not paid to government upto the due date of filing return of Income

100% of the expenditure on which equalisation levy should have been deducted will be disallowed while computing taxable income of the person liable to deduct equalisation levy.

Section 10(50)

Under section 10(50) of the Income Tax Act, income arising to a non-resident from supplying specified services on which equalisation levy under section 165 is levied shall be exempt for the purpose of calculating taxable income for the purpose of paying income tax.

Example :

Y Ltd., an Indian company makes a payment of Dollar 3200 to ABC Inc., a company based in Panama for online advertisement of its products. ABC Inc. does not have a permanent establishment in India. Should Y Ltd deduct equalization levy in respect of the above transaction?

In the above case, equalization levy shall be applicable as ABC Inc is a non-resident company having NO PE in India and the payment is made in respect for availing online advertisement services.

Y Ltd shall deduct Rs. 15,850 [6% of (3200 x 82.55)] as equalization levy and remit the balance amount to ABC Inc.

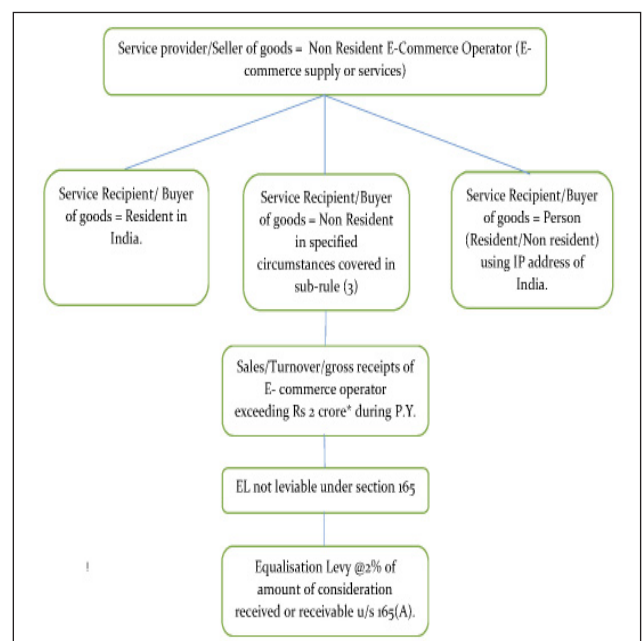
Provisions introduced by Finance Act 2020

Section 165A - Equalisation Levy

As per Section 165 of the Finance Act, 2016 ("FA, 2016" for short), Equalisation Levy was chargeable only on the consideration received or receivable by a non-resident from providing online advertisement services or related services to the Indian resident or person having PE in India.

Now, Chapter VIII of Finance Act, 2016 is amended by Finance Act 2020 and provisions regarding Equalisation Levy are inserted (Section 165A and some more sections). The same is now extended to consideration received or receivable by an e-commerce operator for e-commerce supply or services w.e.f. 01.04.2020 and is levied @2% on such consideration and made or provided or facilitated by it—

1. To a person resident in India; or
2. To a non-resident in the specified circumstances as referred to in sub-section (3); or
3. To a person who buys such goods or services or both using internet protocol address located in India.





*As per Section 165A(2)(iii) r.w. sub-section (1) of Section 165A for computing the threshold limit of Rs. 2 crore only the supplies or services made to the Specified Persons will be considered and not the global turnover or global receipts of the e-commerce operator.

For instance, ABC Inc. is providing e-commerce services all over the world in respect of which it has generated gross receipts of Rs. 20 Crore during the P.Y. 2020-21. Out of the said gross receipts, Rs. 1 crore has been received from customers resident in India. In the said case, New Equalisation Levy will not be attracted as the turnover from the customers resident in India does not exceed Rs. 2 crore.

The equalisation levy is a direct tax on the e-commerce operator and to be paid by the e-commerce operator. Equalisation levy under section 165 is similar to the TDS mechanism where the service receiver is required to deduct the equalisation levy before making payment to the non-resident service provider, however, section 165A requires the service provider to directly pay the equalisation levy to the government. Now the e-commerce operator can decide to charge the consideration including the levy.

Example - An e-commerce operator receives a consideration of Rs. 6 crores for the e-commerce services provided to Indian Residents and accordingly, it is required to deposit an equalisation levy @2% of the consideration received from such services which comes out to Rs. 12 Lacs. Now, if the e-commerce operator decides to charge this equalisation levy of Rs. 12 Lacs from its customers and increases the consideration to Rs. 6.12 Crores.

But then it will be liable to pay Equalisation levy on this revised consideration.

As per amended provisions of Section 163 in relation with 165A of FA, 2016, New Equalisation Levy applies to consideration received or receivable by an e-commerce operator for e-commerce supply or services made/ provided/facilitated by it on or after 01.04.2020.

Therefore, it can be said that the Equalisation Levy will be applicable when both the following conditions are satisfied

- (i) consideration is received/ receivable on or after 01.04.2020; and

- (ii) the said consideration is received/receivable for e-commerce supply or services made/provided/ facilitated on or after 01.04.2020.

Therefore, if

- i. Supply of goods is made on 30.03.2020 and the consideration is received on 12.04.2020 - the equalisation levy will not be attracted as both the aforesaid conditions are satisfied.
- ii. Supply of goods is made on 05.04.2020 and the consideration is received on 20.04.2020 but the Order was placed on 22.03.2020 - the equalisation levy will be attracted both the aforesaid conditions are satisfied.
- iii. Supply of goods is made on 10.04.2020 but the consideration was received in advance on 20.03.2020 - equalisation levy will not be attracted as the consideration was received before 01.04.2020.

Some Concepts :

Specified Circumstances-

- i. Sale of Advertisement, which targets a customer who is Indian resident or a customer who accesses the advertisement through IP Address* located in India; and

Example - XYZ, a US based cosmetics company approaches MNP which is a UK based company targeting Indian customers at large, for placing advertisement of its cosmetics products on digital platform of MNP. In this case, MNP will be liable to pay Equalisation levy @ 2% of the consideration received by it from XYZ.

- ii. Sale of data, collected from an Indian resident or from a person who uses IP Address located in India

* IP address: a unique string of characters that identifies each computer using the Internet Protocol to communicate over a network

For instance, ABC Inc. a US based Company, an e-commerce operator, collects data from an Indian resident person and further sells such data collected to a UK based company. In this case, US based company selling the data collected from an Indian resident will be liable to pay Equalisation

levy @2% on the amount of consideration received by it from the UK based company.

Non resident e-commerce operator -

The expression “e-commerce operator” has been defined by way of inserting a new clause (ca) in Section 164 of the FA, 2016. As per the said definition, “e-commerce operator” means

- i. a non-resident who owns, operates or manages a digital/electronic facility/platform for online sale of goods or online provision of services or both.
- ii. A person who owns, operates or manages a digital/electronic facility/platform for facilitating transactions between the buyer and seller will also be included under the scope of an e-commerce operator. (i.e. an intermediary e-commerce operator will also be covered)

#If any non-resident uses a third party’s facility or platform to supply its goods which is also operated and managed by the said third party, such non-resident will not be covered within the ambit of an e-commerce operator and accordingly will not be chargeable to New Equalisation Levy.

E-commerce supply or services -

The expression “e-commerce supply or services” is defined in clause (cb) of Section 164 of the FA, 2016 as under:

- i. online sale of goods owned by the e-commerce operator; or
- ii. online provision of services provided by the e-commerce operator; or
- iii. Online facilitation of transactions between a buyer and a seller where consideration is collected by the e-commerce operator. ; or
- iv. Any combination of activities listed in clause (i), (ii) or clause (iii).

“Online sale of goods” and “online provision of services” shall include one or more of the following activities :

- i. Acceptance of offer for sale: or

- ii. Placing of purchase order: or
- iii. Acceptance of the purchase order: or
- iv. Supply of products or making provisions of services.
- v. The aforesaid definition can be explained as below :

ABC Inc. a non-resident is operating an electronic or digital platform, whereby services of enabling online meeting for various participants is being provided. The platform of ABC Inc. is being used for online webinars/meetings, etc. by Indian customers who are availing such services by paying annual/ monthly charges. In the said example, ABC Inc. is an e-commerce operator and online provision of services of enabling webinars/meetings by the said company will fall within the meaning of “e-commerce supply or services”.

Under the following conditions the Equalization Levy @2% is not charged

- i. The e-commerce operator having permanent business establishment in India and their e-commerce supply of services has been extensively connected with such PE. or
- ii. Where the equalization levy is levied under section 165. or
- iii. Sales, turnover or gross receipts, as the case may be, of the e-commerce operator from the e-commerce supply or services made or provided or facilitated as referred to in sub-section (1) is less than 2 crore rupees during the previous year.

Due date of depositing Equalisation Levy under section 166A

According to section 166A Equalisation Levy is required to be deposited by the e-commerce operator on quarterly basis as follows:

Quarter ending	Due date of payment of Equalisation levy
30th June	7th July
30th September	7th October
31st December	7th January
31st March	31st March



Consequences of non-payment

Interest: at the rate of 1% per month or part of the month after due date till the date of payment by every e-commerce operator who fails to deposit whole or any part of the equalisation levy by the due date

Penalty: (over and above the above of equalization levy)

For Non-deduction: Penalty equal to amount of equalization levy

For Non-payment: Penalty equal to Rs 1000/day (maximum upto equalization levy not paid)

Statement of equalization levy

- i. Every e-commerce operator liable to pay equalisation levy shall furnish an annual statement containing all particulars, as prescribed in Form No. 1 on or before 30th June of the relevant assessment year.
- ii. The Form should be signed and verified electronically under digital signature or electronic verification code.

In case of failure to furnish within the time allowed :

- i. It would be required to furnish the annual statement in Form No. 1 or revised statement at anytime before the expiry of 2 years from the end of the financial year in which the e-commerce supply or services was made or provided or facilitated.
- ii. If the e-commerce operator fails to furnish annual statement, the A.O. may serve a notice upon the e-commerce operator requiring him to submit the statement, within 30 days from the date of service of the notice.

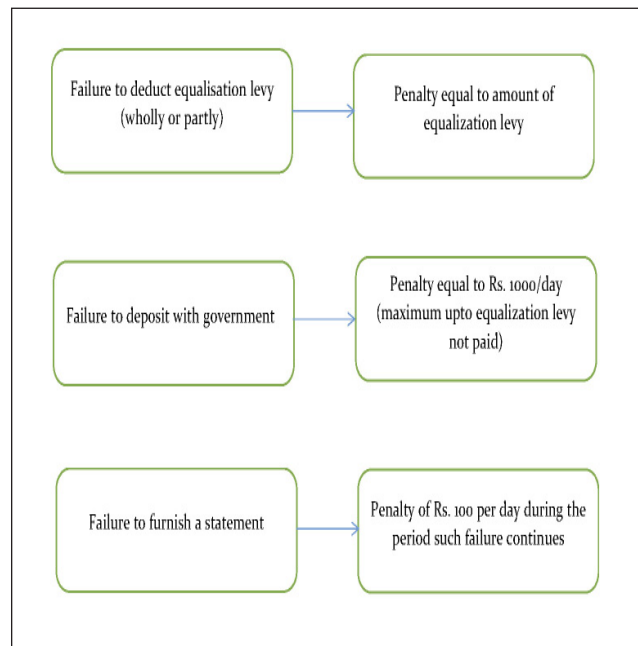
Main ingredients of Section 165 & 165A

	Section 165	Section 165A
Amount of consideration	In Excess of INR 1 lakh	In excess of INR 2 Crore
Services/ Goods received or receivable	<p>“Specified service” means</p> <ul style="list-style-type: none"> <input type="checkbox"/> online advertisement; or <input type="checkbox"/> any provision for digital advertising space or any other facility or service for online advertisement; or <input type="checkbox"/> any other service as may be notified by the central government on this behalf. 	e-commerce supply or services made or provided or facilitated by it

Penalty and Prosecution

- i. Penalty of Rs. 100 per day during the period such failure continues. However, no penalties shall be imposed unless the e-commerce operator is given an opportunity of being heard.
- ii. Prosecution: If a person files false statement, he shall be punishable with imprisonment for a term which may extend to 3 years and with fine.

Penalties under section 165A



Exemption under Income Tax

Vide the Finance Act, 2020, a consequential amendment has been brought in Section 10(50) of the IT Act to provide that income arising from e commerce supply or services made/provided/facilitated by the e-commerce operator shall not be chargeable to income-tax on which New Equalisation Levy is chargeable u/s 165A.

	Section 165	Section 165A
Amount of consideration	In Excess of INR 1 lakh	In excess of INR 2 Crore
Service receipt, Who is	Resident in India and carrying business in India; or Non-Resident having permanent establishment in India.	Resident in India ● Non Resident in specified circumstances; or ● Buy such goods or services or both using internet protocol address located in India.
Services Provider	Non-Resident	E-commerce operators
Rate of Equalisation Levy	6%	2%

E-commerce taxation under Section 194O of the Income Tax Act

Section 194O has been introduced in the Union Budget 2020. According to Section 194O, an e-Commerce operator is required to deduct TDS @1% on the gross amount of sales or services provided or facilitated by them through their digital or electronic facility or platform. The TDS is to be deducted at the time of crediting—for example, an amount to the supplier’s account or at the time of payment thereof in cash, by the issue of a cheque or draft, or by any other mode, whichever is earlier.

For example, a proprietary company XY (an e-commerce participant) sells its products on Flipkart (an e-commerce operator). On November 1, 2021, Mr A purchases this product online from MN for INR 60,000.

Flipkart credits XY’s account on November 1, 2021, but the customer pays XY directly on November 15, 2021. Flipkart is required to deduct TDS at 1% on INR 60,000 when crediting the party or making payment, whichever comes first. TDS should be deducted in this case on November 1, 2021.

TDS on e-commerce operators under section 194-O is applicable from 1 October 2020.

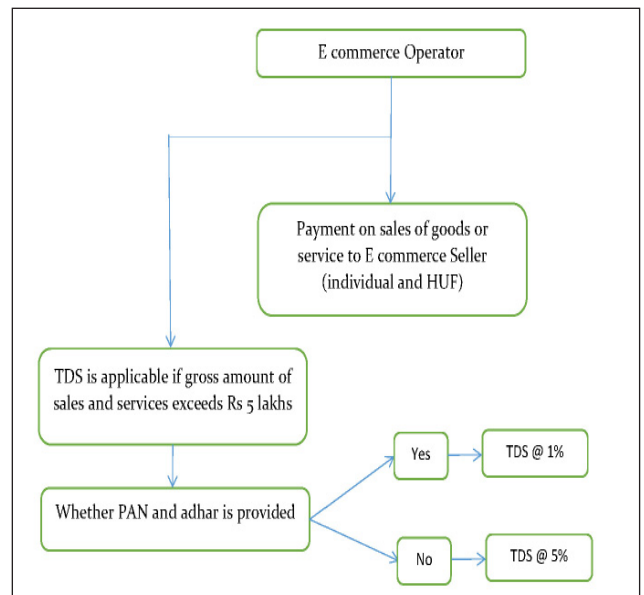
Before including this section, payments paid to participants in e-Commerce were not tax deductible. They had to submit their income tax return on their own. Many small-scale participants in e-Commerce as a result avoided filing their income tax returns and paying taxes.

No TDS is required to be deducted if the amount paid/credited to E-Commerce Participant being an individual/HUF whose gross amount of such sales or services does

not exceed Rs 5 lacs. The limit of Rs 5 lacs shall not be available when the services provided are in relation to hosting of advertisements.

But the word “gross amount of sales” has not been defined in this case.

Example - Suppose there is sales of Rs 50 lacs and returns of Rs 10 lacs, TDS should be deducted @ 1% on Rs 50 lacs and not on Rs 40 lacs.



Definitions :

- i. “Electronic Commerce” means the supply of goods or services or both, including digital products over digital or electronic network.
- ii. “E-commerce operator” means a person who owns,



operates or manages digital or electronic facility or platform for electronic commerce. An E-Commerce Operator can be a resident or a non-resident in India.

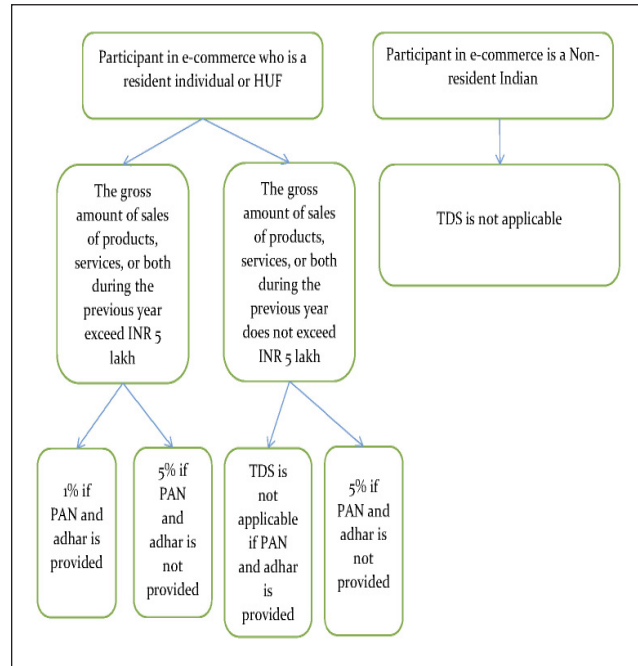
iii. “E-commerce participant” means a person resident in India selling goods or providing services or both, including digital products, through digital or electronic facility or platform for electronic commerce. Hence, if the E-Commerce participant is a non-resident, no TDS provisions would be applicable.

Some important points to keep in mind are:

- As per the Explanation to Section 194O, any payment made by a purchaser of goods or recipient of services directly to an e-commerce participant for the sale of goods or provision of services or both, facilitated by an e-commerce operator, shall be deemed to be the amount credited or paid by the e-commerce operator to the e-commerce participant and shall be included in the gross amount of such sale or services for the purpose of TDS.
- These provisions are applicable even if the purchaser of goods/ recipient of services is a non-resident but does not apply if the E-commerce participant conducts business through its own website.
- Any payment made directly to an e-commerce participant by a purchaser of goods or a recipient of services for the sale of products or the supply of services, or both, enabled by the e-commerce operator is presumed to be paid by the e-commerce operator, and TDS is needed to be deducted.
- Section 194-O applies only to e-commerce operators who are resident in India, and whose annual sales or turnover exceeds Rs. 10 crore.
- The TDS under Section 194-O is deducted on the gross amount paid or credited to the e-commerce participant, which includes the sale value, commission, delivery charges, and any other charges.
- No TDS is required to be deducted by an e-commerce operator if the gross amount paid or credited to the e-commerce participant does not exceed Rs. 5 lakhs in a financial year.

- The e-commerce participant must have a valid PAN to receive payment from the e-commerce operator.

Scope of Section 194O on E-commerce taxation



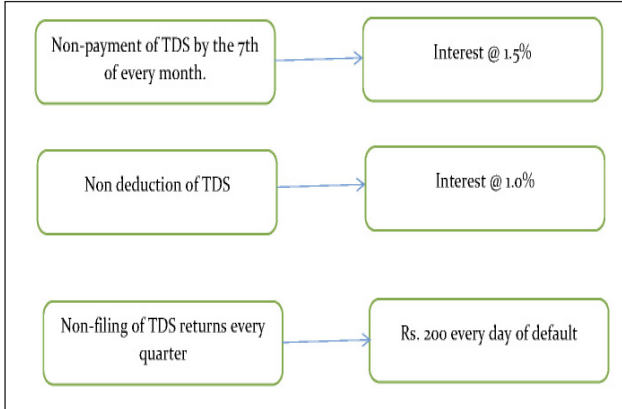
Section 194O is not applicable if the following requirements are met:

- The E-Commerce participant is a person or a HUF;
- The gross value of sale of products or supply of services or both during the year does not exceed Rs.5 lakhs; and
- Further, the E-Commerce participant has provided his PAN or Aadhar number to the e-commerce operator.

Moreover, if TDS has been deducted in respect of a transaction under Section 194-O of the Act, TDS must not be deducted on such transaction under any Section of Chapter XVII-B of the Act. TDS requirements, on the other hand, will continue to apply to amounts received by an E-Commerce operator for hosting ads or providing any other services not covered by this Section.

Penalties under Section 194O

The e-commerce operator will be subject to the penalties that are detailed here, if they fail to report and submit the TDS as required:



TDS Certificate

The e-commerce operator is required to issue Form 16A to the e-commerce seller. This form can be used by the seller to claim credit of the tax deducted while filing the Income Tax Return.

TDS Return

After depositing TDS with the income tax department, the deductor should file Form 26Q on TRACES (TDS Reconciliation Analysis and Correction Enabling System).

Example of TDS deduction for an E-commerce Business

Let's say A is a registered e-commerce seller on Nykaa

(e-commerce operator). Here are the details of her sales.

Gross sales = Rs. 6,20,000

GST @ 18% included in the above sales = Rs. 1,11,600

Nykaa's commission @ 2% = Rs. 12,400

TDS Calculation according to Section 194O

E-Commerce Operator – Nykaa

E-Commerce Seller – A

TDS = 1% of 6,20,000 = Rs. 6,200

Nykaa is required to,

- deduct TDS of Rs. 6,200 at the time of credit fulfillment or making payment, whichever is earlier.
- file TDS return via Form 26Q & issue form 16A to A.
- If A fails to furnish the PAN or Aadhar, then TDS should be deducted @ 5% irrespective of gross sales amount.



Part II will continue in next Edition