



# Equalisation levy

*Ch. VIII of the Finance Act, 2016*  
as amended by FA 2021

Refresher Course on International Tax

Western India Regional Council of  
The Institute of Chartered Accountants of India

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# Background

- BEPS Action 1 Report 2013 – Addressing Tax Challenges of Digital Economy

*Identify the main difficulties that the **digital economy** poses for the application of existing international tax rules and develop detailed options to address these difficulties, taking a holistic approach and considering both direct and indirect taxation.*

*Issues to be examined include, but are not limited to,*

*the ability of a company to have a significant digital presence in the economy of another country without being liable to taxation due to the lack of nexus under current international rules,*

*the attribution of value created from the generation of marketable location relevant data through the use of digital products and services,*

*the characterization of income derived from new business models,*

*application of related source rules, effective collection of VAT/GST wrt cross-border supply of digital goods/ services.*

- Action 1 Report (2015)

***None of the other options** analysed .... namely (i) a new nexus in the form of a significant economic presence, (ii) a withholding tax on certain types of digital transactions, (iii) an equalisation levy, recommended.*

- ‘Digital economy’ to ‘**Digitalised economy**’ in 2019

# Indian developments

- Rulings
  - Services for uploading and displaying advertisement on Portal outside India not taxable - Yahoo India (2011-TII-94-ITAT-Mum-INTL)
- E-commerce Committee Report Feb 2016
  - Report recommended a flat 6-8% levy on several types of digital transactions
- EL 1.0 vide Finance Act 2016
  - Chapter VIII of Finance Act 2016
  - Separate from the Income-tax Act
    - To deny treaty protection to the levy
  - 6% rate on specified services
- EL 2.0 vide Finance Act 2020
  - Separate from provisions of EL 2016
  - Expanded the scope of EL
  - 2% rate
- Introduction of SEP (Explan 2A) vide FA 2018 wef 1.4.19 (now wef 1.4.22)

# EL 1.0 – The charge

- Consideration for **specified service** received or receivable by a NR from
  - A person resident in India carrying on business or profession
    - Specified service need not be utilised in that business/profession; [but see s. 165(2)(c)]
  - A NR having a PE in India
- ‘Specified service’ means
  - **online** advertisement,
  - any provision for **digital advertising space** or
  - any other facility or service for the purpose of online advertisement
  - other service to be notified (none notified yet)
- online“ defined
  - a facility or service or right or benefit or access obtained through the internet or any other form of digital or telecommunication network

# *EL 1.0 – Specified services*

- Online Advertisement
  - Charges to list on review websites like Tripadvisor
- Provision for digital advertising space
  - Charges for listing offerings on marketplaces
    - For online advertisement or display for sale?
    - Charges paid for higher listing
- Production and creative fees for creating advertisement?

# EL 1.0 - Exclusions

- EL not charged -
  - NR service provider has a PE in India
    - Service to be effectively connected to that PE
  - Aggregate consideration for specified services in a previous year  $\leq$  INR 1 lac
  - Payment for specified service by Resident or PE in India not for the purpose of carrying out business/profession
- PE not defined
  - 'Includes a fixed place of business' As per s. 92F(iiiia) of ITA
    - Intention of the Parliament to include other kinds of PE -Morgan Stanley (2007) 292 ITR 416 (SC)



# *EL 1.0 – Collection and recovery*

- EL Collection and recovery
  - Deductible by payer if aggregate consideration > INR 1 lac
  - No grossing up necessary if payer bears the levy
  - Failure to deduct EL –
    - Payer liable to pay the levy
    - Disallowance of consideration u/s 40(ib) of ITA

# EL 1.0 & Act – disallowance for non-deduction

- Disallowance for non-deduction or non-payment of EL 1.0

**40(ib).** ... consideration paid or payable to a NR for a specified service on which EL is deductible under the provisions of Chapter VIII of FA, 2016, and **such levy has not been deducted or after deduction, has not been paid** on or before the due date specified in section 139(1):

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

- Non-discrimination clause in DTAA's

.... interest, royalties and other disbursements paid by an enterprise of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining the taxable profits of such enterprise, **be deductible under the same conditions as if they had been paid to a resident of the first-mentioned State.**[Deduction non-discrimination]



# EL 2.0 – The charge

- EL @ 2%
  - Of the *amount of consideration*
    - received or receivable
    - by an *ecommerce operator*
  - from *ecommerce supply or services*
    - made or provided or facilitated by it
  - to
    - A person resident in India; or
    - To a NR *in specified circumstances*
    - To a person who buys such goods or services by using an IP address located in India

- Consideration
  - not defined; Contract Act meaning; a *quid pro quo*
  - receivable vs due
  - ‘from’ and not ‘for’
- Exchange covered?
- Person resident in India
  - Defined in ITA
  - Need not carry on business (as in EL 1.0)
  - ‘Person in India’ in Expln 2A (SEP) & ‘who resides in India’ in Expln 3A (profit attribution)

# EL 2.0 – Ecommerce operator

- Sec. 164(ca)
  - Ecommerce operator (ECO) means
    - a non-resident
    - who owns, operates or manages
    - digital or electronic facility or platform
      - for online sale of goods or online provision of services or both.

- 'Platform' not defined
  - A facility which can be used for online supply or services
- Not covered
  - Passive websites disseminating information
- Mere use of third-party platform not ECO
- Platform for online activities specified
- Online sale of goods
  - The words 'sale of goods' nomen juris (Gannon Dunkerley (1959) SCR 379(SC))
  - Rental not covered
    - A service? Service-tax law?
  - 'supply of goods' [s. 194-O Expln (a)]
- Social media platforms covered
  - Sale of advt (EL 1.0) & Sale of data (EL 2.0)

# EL 2.0 – Ecommerce supply or services

## Sec. 164(cb)

e-commerce supply or services" means—

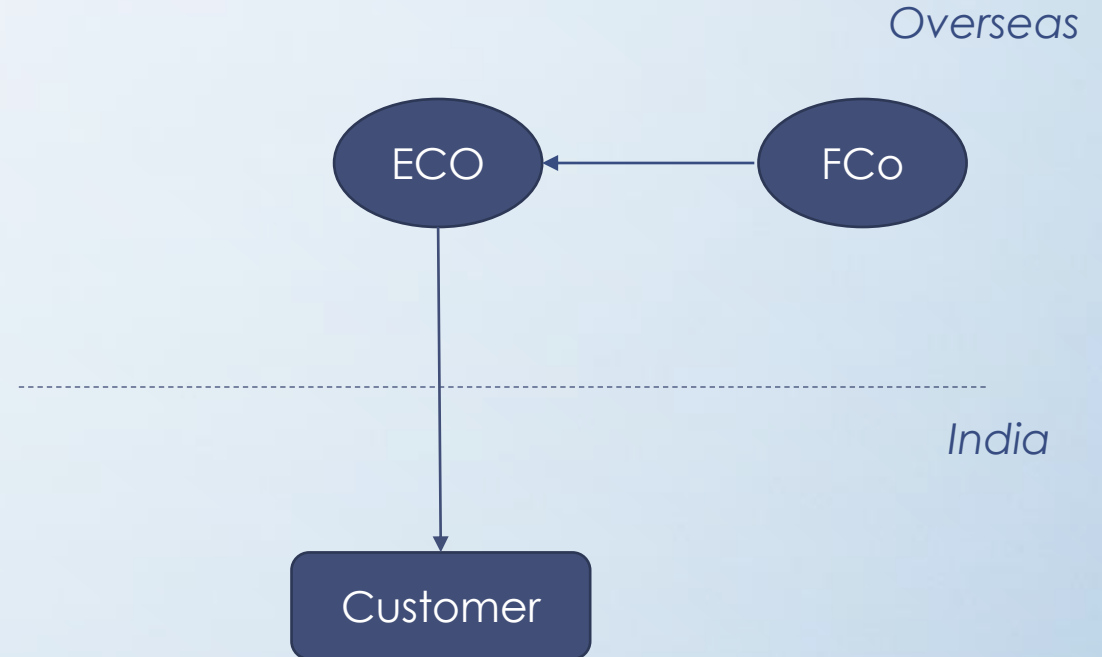
- (i) online sale of goods **owned by the ECO** ; or
- (ii) online provision of services **provided by the ECO**; or
- (iii) online sale of goods or provision of services or both, **facilitated by the ECO**; or
- (iv) any combination of activities listed in clause (i), (ii) or clause (iii);

Explanation.—For the purposes of this clause, “online sale of goods” and “online provision of services” **shall include one or more of the following online activities**, namely:—

- (a) acceptance of offer for sale; or
- (b) placing of purchase order; or
- (c) acceptance of the purchase order; or
- (d) payment of consideration; or
- (e) supply of goods or provision of services, **partly or wholly**;

# EL 2.0 – Consideration (1/2)

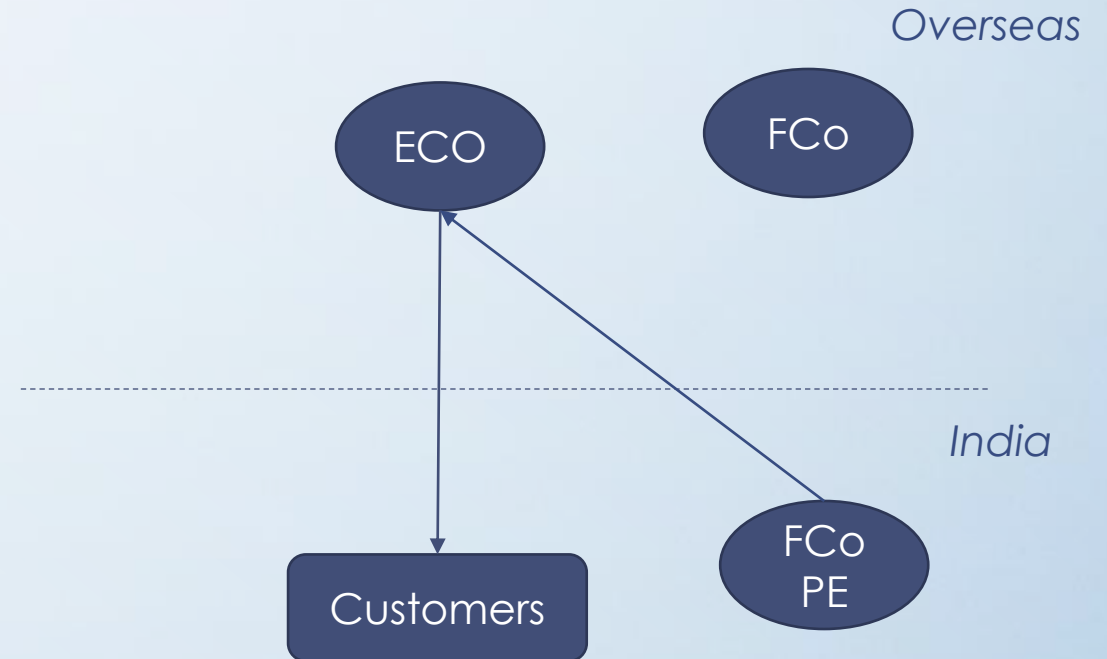
- Sec. 163(3)  
It shall apply to ..... to consideration recd or receivable **for** e-comm. supply or services...
- Sec. 165A(1)  
Consideration recd or receivable by an ECO **from** ecomm. supply or services made or provided or facilitated by it to a person resident in India
- Sec. 165A(3)(b)(i)  
Consideration recd or receivable from ecomm. Supply or services **shall include**
  - consideration for sale of goods irrespective of whether the ECO owns the goods*
  - consideration for provision of services irrespective of whether service is provided or facilitated by the ECO*
  - Does not deem something to be received; only ensures if recd, it shall be included!
- Contrast with Explan to sec. 194-O(1)



Case 1		Case 2		Case 3	
Customer - ECO	102	Customer - FCo	100	Customer - FCo	102
ECO - FCo	100	Customer - ECO	2	FCo - ECO	2
EL on	102	EL on	2	No EL	0

# EL 2.0 – Consideration (2/2)

- Consideration received or receivable by ECO **from** ecomm. supply or service made or provided or facilitated by it to – (i) a person resident in India [s. 165A(1)]
- consideration received or receivable from ecomm. supply or services **shall include**—
  - (i) consideration for sale of goods **irrespective of whether the ECO owns the goods**, so, however, that it **shall not include** consideration for sale of such goods which are **owned by a person resident in India or by a PE** in India of a person non-resident in India, if sale of such goods is effectively connected with such PE
  - (ii) consideration for provision of services **irrespective of whether service is provided or facilitated by the ECO**, so, however, that it shall not include consideration for provision of services which are **provided by a person resident in India or by PE in India** of a person non-resident in India, if provision of such services is effectively connected with such PE.



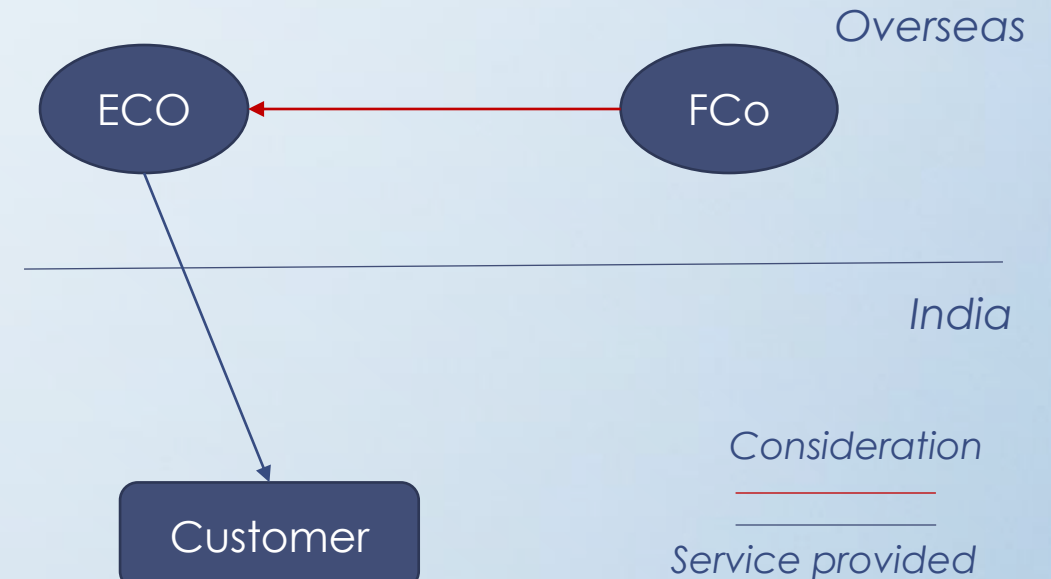
Case 4	
Customer- ECO	102
ECO – FCo PE	100
EL on	2

# EL 2.0 – ‘to a person resident in India’

- Sec. 165A(1)
  - **Consideration** recd or receivable by an ECO
  - **from** ecomm. supply or services
    - made or provided or facilitated by it
  - **to a person resident in India**
- ecomm. supply or services
  - (i) online sale of goods **owned by the ECO** ;
  - (ii) online provision of services **provided by the ECO**;
  - (iii) The above **facilitated by the ECO**; or
  - (iv) any combination thereof
- **Beneficiary on contracting party**
  - Vodafone Essar Cellular (2013) 33 taxmann.com 358 (Mum-CESTAT)
  - Paul Merchants Ltd (2013) 38 STT 702 (New Delhi CESTAT)

## Case study

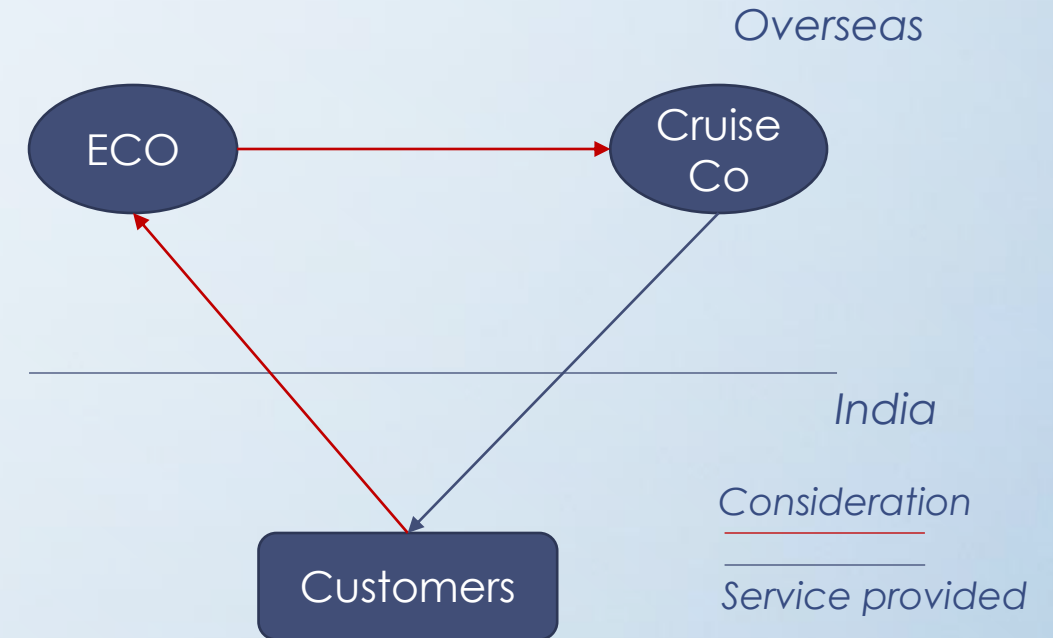
FCo engages ECO to provide online tech support for devices sold by it to customers in India. FCo pays charges to ECO.





# EL 2.0 – Ecommerce supply or services

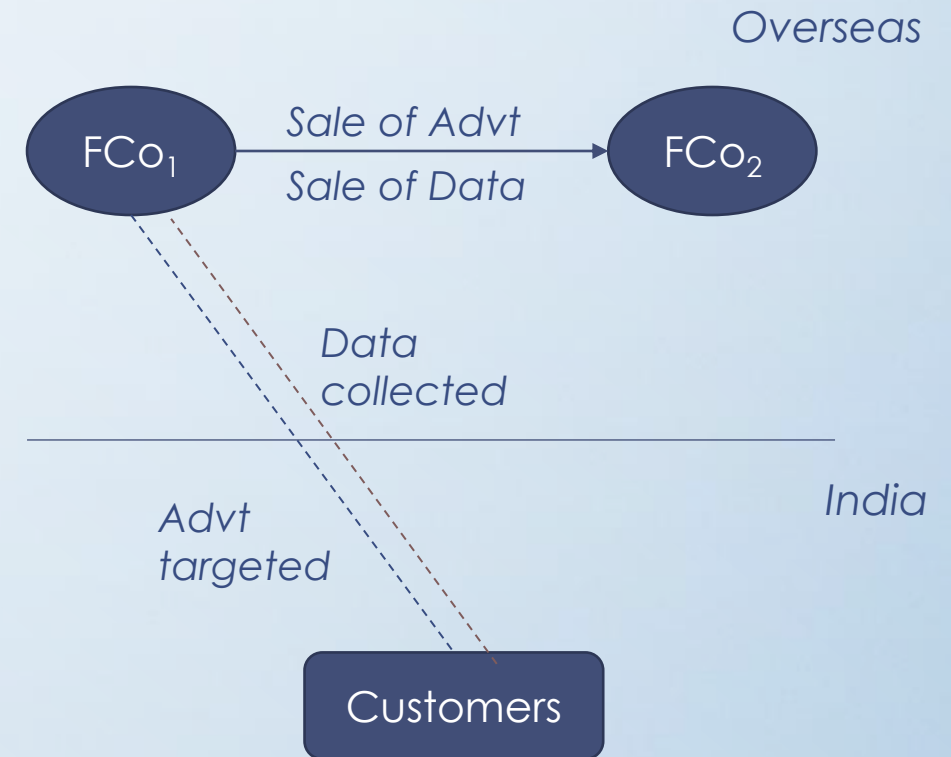
- *Ecomm Supply or services means-*
  - Online sale of goods owned by ECO
  - Online provision of services by ECO
  - Online sale of goods or provision of services facilitated by ECO
  - Any combination of the above
- *Online sale of goods or online provision of services shall include foll. online activities*
  - acceptance of offer for sale; or
  - placing of purchase order; or
  - acceptance of the purchase order; or
  - payment of consideration; or
  - supply of goods or provision of services, partly or wholly



	Case	EL on
a	Full cost of cruise to ECO	On Full Cost
b	Booking amount to ECO + bal. on Cruise	On booking amt only or on full cost?
c	Full cost to ECO + addl exp on Cruise	On Addl Exp on Cruise?

# EL 2.0 – NR to NR payments in specified circumstances

- S. 165A(3)(a)(i)
  - sale of advertisement **which targets a customer**,
    - who is resident in India or
    - a customer who accesses the advertisement though IP address located in India
  - No overlap with EL 1.0
- S. 165A(3)(a)(ii)
  - sale of data, **collected from**
    - a person who is resident in India or
    - from a person who uses IP address located in India
  - Origin of data to be from India, subsequent processing immaterial
  - ‘Data collected from’ not ‘data of’
  - Sale vs. licence of data
  - Onward sale of data?



# EL 2.0 - Exclusions

- Sec. 165A(2)
  - ECO has a PE in India to which the ecomm. supply or services effectively connected
  - Where EL 1.0 is leviable on specified services
  - Sales, turnover or gross receipts of ECO from ecomm supply or services is < INR 2 crores during the previous year
- PE defined inclusively in ITA
- 'Effectively connected'
  - Attributable
- Sales, turnover or gross receipts
  - Annual limit
  - To exclude what is covered under
    - EL 1.0
    - Royalty/FTS taxable under ITA

# EL & Act – total income exemption

- Exemption from total income

**10(50).** Any income *arising* from any specified service provided on or after the date on which the provisions of Chapter VIII of the FA, 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, 2020 and *chargeable to equalisation levy* under that Chapter.

*Explanation 1.*—For the removal of doubts it is hereby clarified that the income referred to in this clause *shall not include* and shall be deemed never to have been included any income which is *chargeable to tax as royalty or fees for technical services in India* under this Act read with the agreement notified by the Central Government under section 90 or section 90A.

# Impact on supply chains – SEP & EL

- Provisions
  - EL payable by ECO for facilitating online sale of goods or online provision of services
  - SEP payable by NR for transaction in respect of goods, services or property with any person in India.

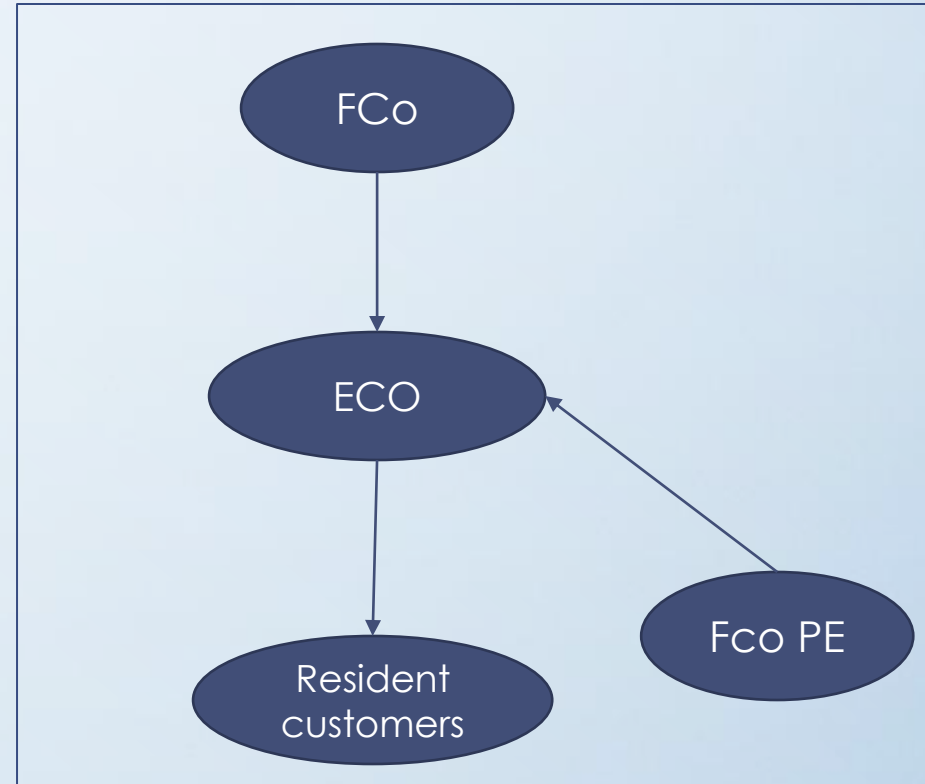
- Sec. 10(50)

*Any income arising from any specified service ... or arising from any e-commerce supply or services made or provided or facilitated ..... and chargeable to equalisation levy under that Chapter.*

- Sec. 165A(3)(i) and (ii)

*(ii) consideration for provision of services irrespective of whether service is provided or facilitated by the ECO, so, however, that it shall not include consideration for provision of services which are provided by a person resident in India or by PE in India of a person non-resident in India, if provision of such services is effectively connected with such PE.*

- Attribution if SEP applies to ECo? Only on its net profit but on both legs?



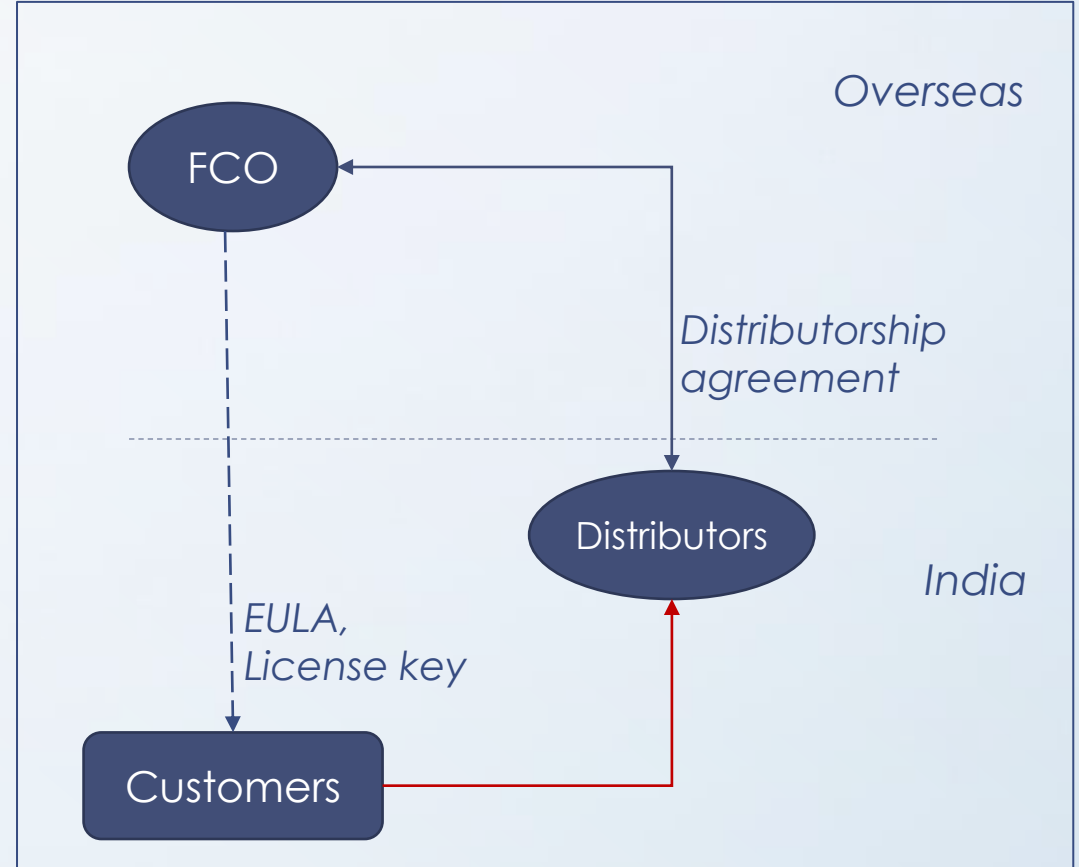
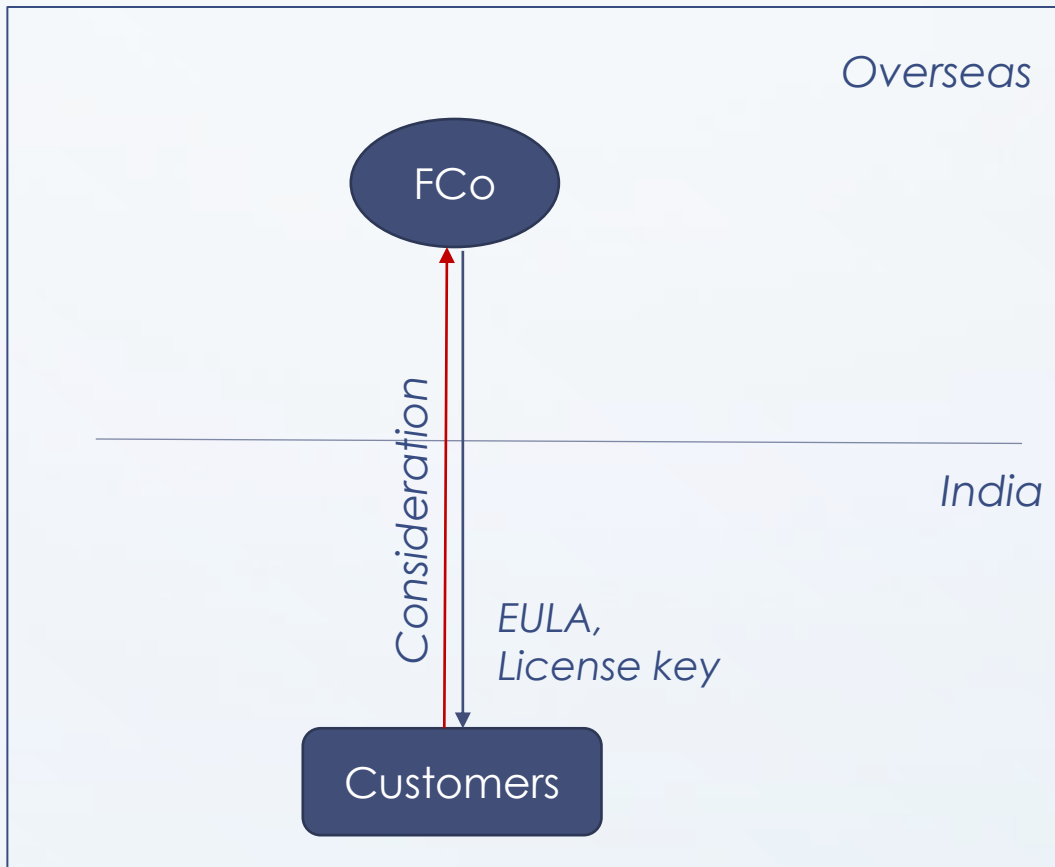
	ECo	FCo	Fco PE
FCo-ECo-Customer	EL	s. 10(50)? no SEP	-
PE-ECo-Customer	No EL; SEP?	-	Net basis taxation

# Other provisions

- Annual return EL
  - Payer (for EL 1.0) and Ecom Operator (for EL 2.0) responsible
  - Can be revised within 2 years from the end of the FY
  - Return to be processed, no assessment
- Penalty
  - for non deduction (for EL 1.0)/ non-payment
    - Equal to the amount of EL not deducted/not paid
  - For deduction and non-payment
    - Liable to pay the deducted EL plus INR 1000 /day till the default continues
  - No penalty if assessee proves reasonable cause
- Appeal lies against penalty to CIT (A) and thereafter to ITAT
- Application of provisions of ITA
  - Ch XV of the Act – liability of representative assessee
  - No order prescribed for determining EL- whether fatal?



# EL 2.0 – Software payments



# Royalty – Software payments

- Software
  - Software controversy-
    - Use of computer software amounts to use of copyright in the software, royalty
      - Citrix Systems, Samsung
    - Copyright to be distinguished from copyrighted article - Infrasoft (Delhi HC)
  - Explanation 4 wref 1.6.76
    - includes right to use or right for use computer software
  - Supreme Court in Engineering Analysis Centre of Excellence
    - Use of computer software not use of copyright
    - No use of copyright by distributors of shrink-wrapped software
    - Expln 4 not retrospective

# Computer software – EL & SEP

Trxn with a resident	Treaty benefit	Royalty under Act	EL	SEP
<b>Licence to end user</b>	Not available	s. 9(1)(vi), Expln 4	NA	s. 9(1)(vi) lex specialis, SEP NA
<b>Licence to end user</b>	Available	Business income	EL	S. 10(50); SEP NA
<b>Sale of copy to end user</b>	Irrespective	Business income	EL	S. 10(50); SEP NA
<b>To intermediary - case 1</b>	Irrespective	Business income	EL	S. 10(50); SEP NA
<b>To intermediary - case 2<sup>1</sup></b>	Irrespective	s. 9(1)(vi), Expln 2	NA	s. 9(1)(vi) lex specialis, SEP NA
<b>Subscription-based</b>	Not available	s. 9(1)(vi), Expln 4	NA	s. 9(1)(vi) lex specialis, SEP NA
<b>Subscription-based</b>	Available	Business income	EL	S. 10(50); SEP NA

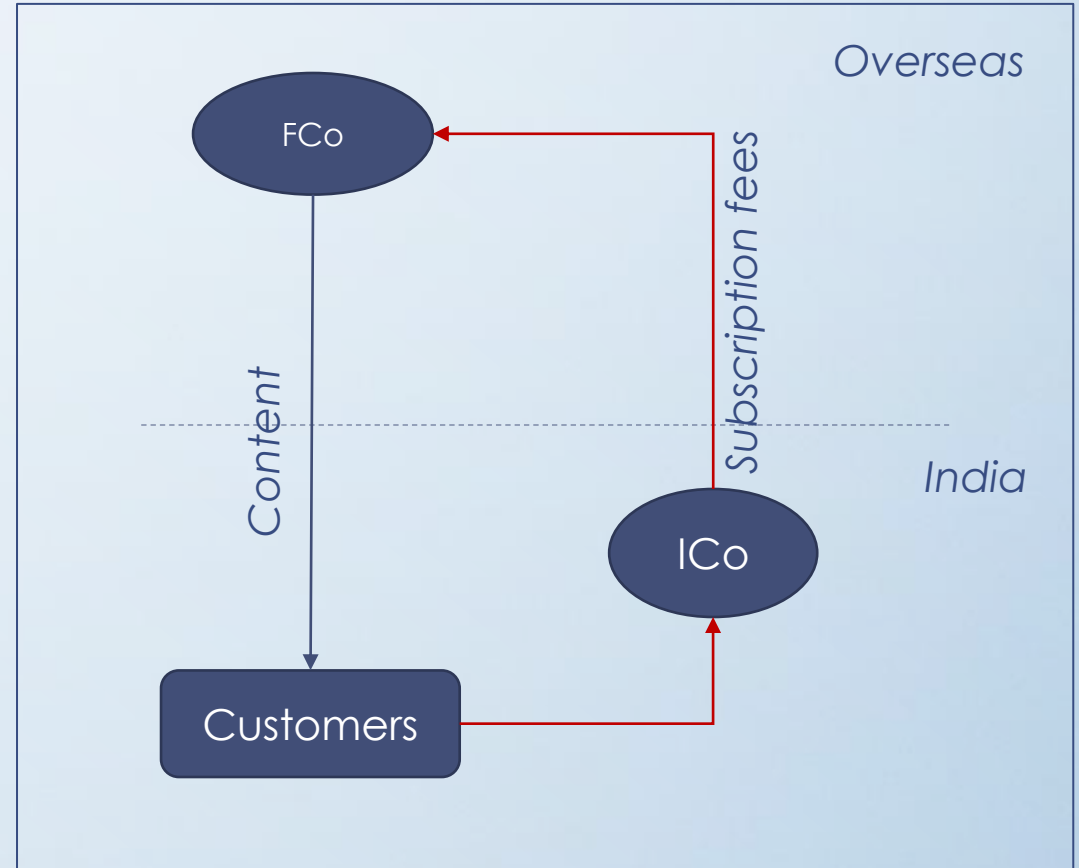
<sup>1</sup> If for the distribution right, *Engineering Analysis*

# EL 2.0 – Online streaming

ICo is the distributor in India for FCo, a content streaming platform.

ICo acquires subscribers for the site in India and collects the subscription revenue and remits to the FCo after retaining its commission.

Contract between FCo and ICo entered offline. Remittance by ICo to FCo through banking channel.

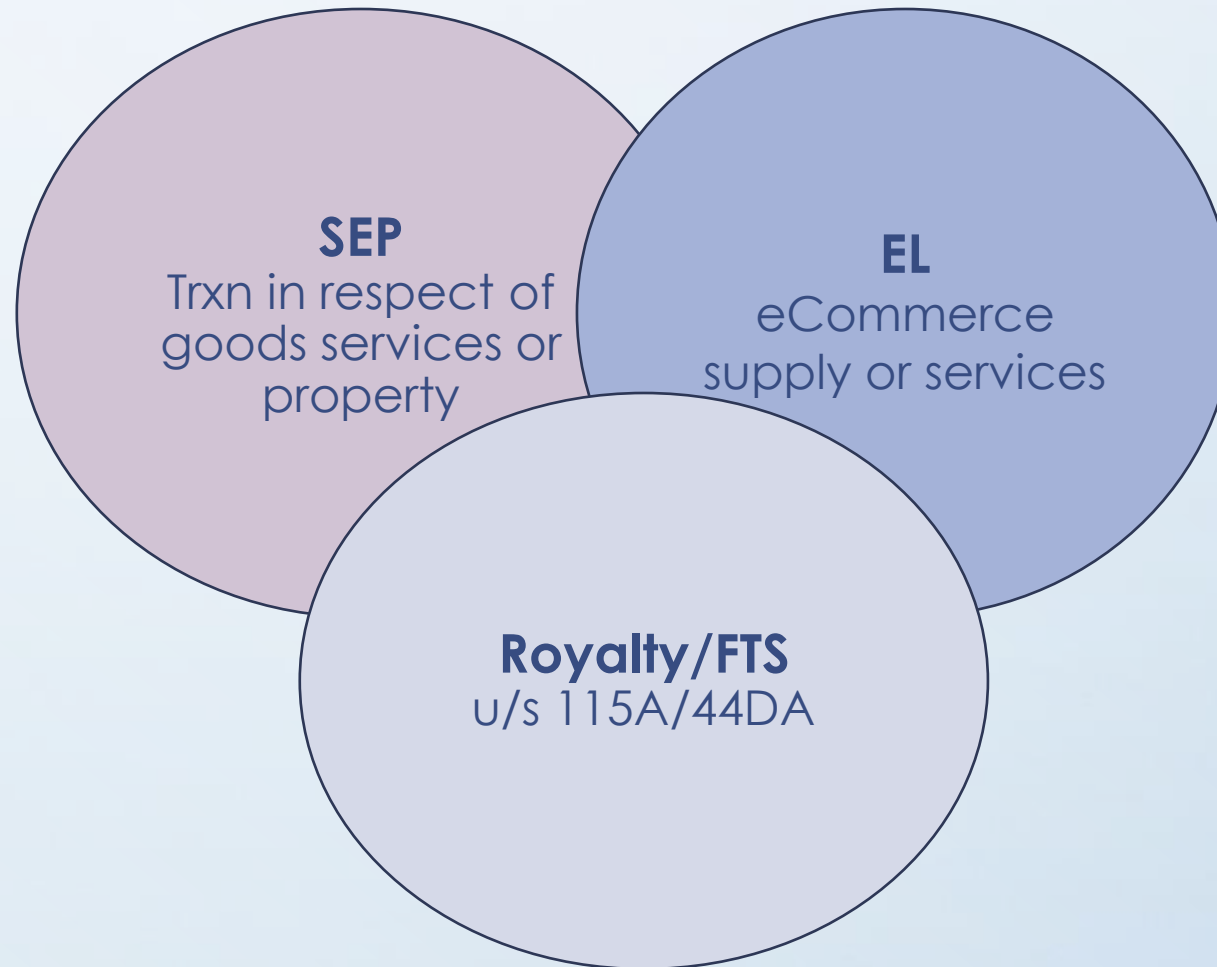


# Royalty & FTS - SEP & Equalisation levy

	Royalty/FTS u/s 115A/44DA	Not covered u/s 115A/ 44DA	SEP
<b>Treaty allocates taxing rights to India (u/Art. 12, 13 or 21, no PE)</b>			
R to NR: Royalty/FTS article applies	Under Act rw Treaty; EL NA	-	9(1)(vi) or (vii) lex specialis; SEP NA
NR to NR: Royalty/FTS NA; Possibly, Other Income article	-	EL applies	S. 10(50), SEP NA
<b>Treaty does not allocate taxing rights to India (u/Art. 12, 13 or 21, or 7 or 14)</b>			
R to NR: Royalty/FTS article NA	EL applies	-	
NR to NR: Royalty/FTS/Other income article NA	-	EL applies	S. 10(50); SEP NA
<b>Treaty allocates taxing rights to India (u/Art. 7 or 14, PE)</b>			
R to NR: Royalty/FTS article to Art. 7	Under Act rw Treaty; EL NA	-	9(1)(vi) or (vii) lex specialis; SEP NA
NR to NR: Art 7	-	EL NA	SEP?

- FA 2016, Sec. 163 Proviso  
*Provided that* the consideration received or receivable for specified services and for e-commerce supply or services shall not include the consideration, which are **taxable as royalty or fees for technical services** in India under the Income-tax Act, **read with the agreement notified ....u/s 90 or 90A ...**
- Sec. 10(50) Expn  
..... the income referred to in this clause shall not include ..... any income which is **chargeable to tax as royalty or fees for technical services** in India under this Act **read with the agreement notified ...u/s 90 or 90A.**
- Taxable vs. chargeable to tax  
Taxable as Royalty/FTS **u/s 115A or 44DA**
- 'Read with treaty'** meaning
  - Allocation of taxing rights to India; whether falls under royalty/FTS Articles not relevant
- Exclusion from EL for NR having a PE, not for having a BC.

# Royalty/FTS, EL and SEP scope





# *EL 1.0 and 2.0 – What the future holds*

- Unilateral levies to be withdrawn on culmination of Taxation of Digitalised businesses (Pillar 1 and 2 proposals)
- Meanwhile
  - Number of interpretational challenges in the law for the taxpayer and the Courts
  - USTR investigations of the levy as discriminatory; possible action by the US
  - Possible challenge to the levy under trade laws

*Thank you!*