

# TAX FLASH NEWS

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## CBDT notifies thresholds for the provisions of 'Significant Economic Presence'

### Background

The Finance Act, 2018 introduced the concept of 'Significant Economic Presence' (SEP) under the provisions of Section 9(1)(i) [Explanation 2A] of the Income-tax Act, 1961 (the Act) to provide that SEP of a non-resident in India shall constitute 'business connection' in India. The provisions of SEP were originally intended to become applicable from FY 2018-19; however, in view of on-going international discussions on tax digital economy, SEP provisions were amended, deferred and made applicable from FY 2021-22. SEP for this purpose, is defined to mean:

- transaction in respect of any goods, services or property carried out by a non-resident with any person in India including provision of download of data or software in India, if the aggregate of payments arising from such transaction or transactions during the previous year exceeds such amount as may be prescribed; or
- systematic and continuous soliciting of business activities or engaging in interaction with such number of users in India, as may be prescribed

### CBDT Notification

Recently, the Central Board of Direct Taxes (CBDT) has issued a Notification<sup>1</sup> introducing a new Rule 11UD in the Income-tax Rules, 1962 (the Rules) prescribing following thresholds for the purposes of SEP:

- The amount of aggregate of payments arising from transaction or transactions in respect of any goods, services or property carried out by a non-resident with any person in India, including provision of download of data or software in India during the previous year, shall be **INR 20 million**.

- The number of users with whom systematic and continuous business activities are solicited or who are engaged in interaction shall be **300,000**.

This Rule is effective from 1 April 2022 [i.e. Financial Year (FY) 2021-22].

### Our comments

The Finance Act, 2020 introduced new 2 per cent Equalisation Levy (EL) on the consideration received or receivable by an e-commerce operator from e-commerce supply or services. Such EL is not applicable if sales, turnover or gross receipts of the e-commerce operator is less than INR 20 million during the previous year. The revenue threshold notified for SEP is aligned to the EL revenue threshold.

Unlike the BEPS Pillar 1 proposals which envisage a global consolidated revenue threshold in addition to a jurisdiction level revenue threshold, the Indian SEP does not provide for a threshold based on global consolidated revenues and only looks to revenues generated from transactions with persons in India.

While the SEP is broadly defined, these provisions are part of India's domestic income-tax law. Consequently, it will not prevail over beneficial treaty provisions, where applicable. A non-resident can take shelter under the tax treaties since India's existing treaties contain the conventional concept of Permanent Establishment for taxing business profits of a non-resident and the inclusion of SEP in the Act will not be read into the tax treaties unless they are amended.

<sup>1</sup> CBDT Notification No. 41/2021, dated 3 May 2021

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