

# **The Institute of Chartered Accountants of India – Western India Regional Council, Mumbai**

## **Equalisation Levy**

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# Synopsis of Equalisation Levy

- EL is chargeable on “specified services”. At present it is applicable on advertisement services and other related services.
- Any payer – Indian resident or a PE of a non-resident is required to deduct EL @ 6% and pay net amount of consideration.
- Alternatively the payer may pay EL without deducting EL from consideration. No grossing up.
- The whole matter of taxing digital business is “Work in process”.

# Why Equalisation Levy?

- Digital businesses can avoid tax in COS.
- Even companies engaged in physical goods (Non-digital) can avoid PE in COS.
- The nexus in DTA is PE. ONLY if there is a PE in COS, tax can be levied by COS.
- PE requires physical presence or Dependent Agent in COS. + It requires “conclusion of contracts” by Dependent Agent to become a PE.
- Digital business does not require physical presence in the Country of Source (COS). Contracts can be concluded by the Principal.

# Why Equalisation Levy?

- The US financial crisis of 2007 brought to light tax avoidance by several large companies as one of the reasons for the crisis.
- G20/OECD formed BEPS group. It came out with 14 final Action reports + an unfinished Action report 1 on E-commerce taxation.
- OECD has been working on E-commerce taxation (Digital business taxation) since 1997. The solution is proposed in 2020 ! – largely due to opposition of US companies and US Government.

# Why Equalisation Levy?

- Other countries (COS countries) are not willing to wait.
- BEPS Action 1 report suggested three alternatives:
  - Equalisation Levy.
  - Withholding tax.
  - Significant Economic Presence (SEP).

# Why Equalisation Levy?

- Committee appointed by CBDT recommended EL in 2016. India has adopted EL as it was a simple option. It is also a message that India can't wait anymore. Other countries also have proposed their own laws.
- Indian resident is liable to Direct and Indirect tax. To equalise the situation between resident and non-resident, EL is levied.

# Alternatives to EL

- India has also considered and introduced SEP nexus.
- SEP is not operative where there is a DTA.
- Even for non-DTA countries, threshold has yet to be specified above which SEP will apply.
- Once the Inclusive Framework group of OECD / G20 takes a decision, we will know the final picture.

# Legal basis

- EL was introduced by Finance Act 2016 in Chapter VIII.
- Separate chapter - independent of Income-tax Act.
- Why a separate chapter?
  - If it was a part of ITA, tax would not be possible as DTA will not permit tax without a PE. (DTA overrides ITA.)

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**Note:**

Section numbers in this slide are of Finance Act 2016  
– unless stated otherwise.



# Meaning and charge of EL

- - EL is a tax,
  - on consideration received or receivable,
  - for any “specified service”. [S. 164(d)]
- - EL is charged on consideration received or receivable by a non-resident,
  - from an Indian resident and **carrying on business or profession** or from a non-resident having a permanent establishment in India,
  - for any specified service,
  - **@ 6% of the consideration.** [S. 165(1)]

# Meaning and charge of EL

- EL is not chargeable where:
  - NR who provides the specified service (income earner) has a PE in India with which specified service is effectively connected with.
  - consideration during the year is upto Rs. 1 lakh.
  - Payment is not for carrying on business or profession. (Usually this situation will not be there for a non-resident having a PE in India).
- What if the payment is a composite payment for personal use and business use?

# EL and Income-tax Act

- Is there an overlap between Income-tax and EL?
- Income chargeable to EL is exempt u/s. 10(50) of the Income-tax Act.
- Thus there is no overlap. EL is given priority. The objective is that non-residents are encouraged to form a PE in India.

# Meaning of Specified service

- “Specified service” means:
  - online advertisement,
  - any provision for digital advertising space or any other facility or service for the purpose of online advertisement and,
  - includes any other service as may be notified.

[Committee had recommended more services]

[S. 164(i)]

# Meaning of Specified service

- “Online” means 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. [S. 164(f)]
- Does it include foreign TV channels, radio, digital magazines? Yes.
- If advertisement is given in Walls Street journal newspaper which then also appears on website, is it liable to EL?

# EL collection

- Payer has to deduct EL and pay to the Government if the amount exceeds Rs. 1 lakh in a year.
- It has to be deposited by the 7<sup>th</sup> of next month.
- If the payer does not deduct EL, he still has to pay the EL to the Government.

[No grossing up]

- If deductor pays less than Rs. 1 lakh in a year & does not deduct EL, but NR earns more than Rs. 1 lakh from various payers and does not pay EL, there is no consequence.

# Compliance

- A statement has to be filed every year by 30<sup>th</sup> June showing the details of consideration and EL.
- Statement has to be filed by the payer / deductor (i.e. Indian resident or PE of non-resident).
- No compliance by the recipient (i.e. non-resident earner of income)
- There are provisions for revising the return, assessment and rectification of mistake.

# Delay / Non-payment of EL

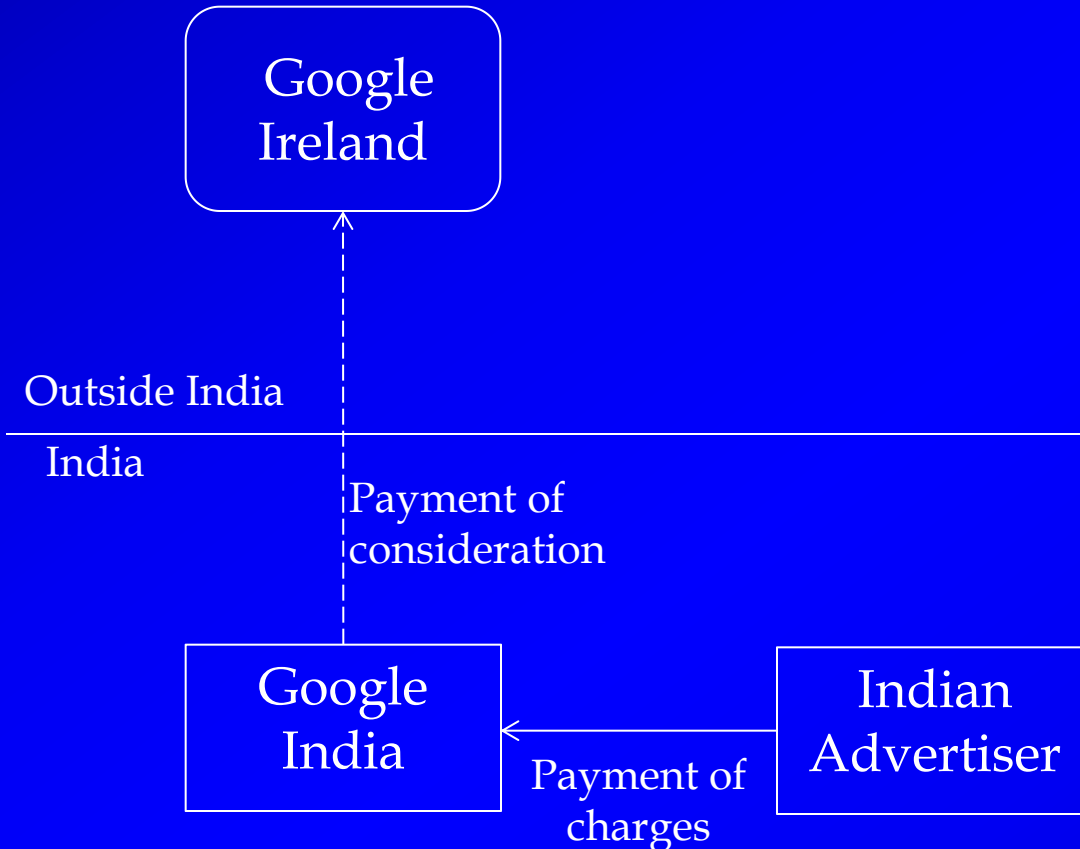
- Interest @ 1% p.m. u/s. 170.
- Penalty for non-deduction or not depositing the EL with Government after deducting EL u/s 171.
- Penalty for not filing annual statement u/s. 172.
- Show cause notice to be issued before levying penalty u/s. 173.
- Deduction of expenses not allowed if EL is not paid before due date of filing the tax return. Expense allowed in the year in which it is paid. [S. 40(ib) of Income-tax Act.]



# Improvements required in EL

- It should be a part of ITA & DTA.  
Foreign Tax credit will be allowed to non-residents.
- Non-residents should be responsible for payment & compliance. (CBDT report had recommended this.)
- Mechanism for deduction on website.

# Ad - Business Income or Royalty



## Facts:

- Indian advertiser pays to Google India.
- Google India retains a margin & pay to Google Ireland.

## Issues:

- Is payment to Google Ireland chargeable to tax? If yes, as what?
- Google India Pvt. Ltd. (Bangalore ITAT-93 taxmann.com 183) – **Payments to Google Ireland was held as Royalty.**

# Programmatic Advertisement



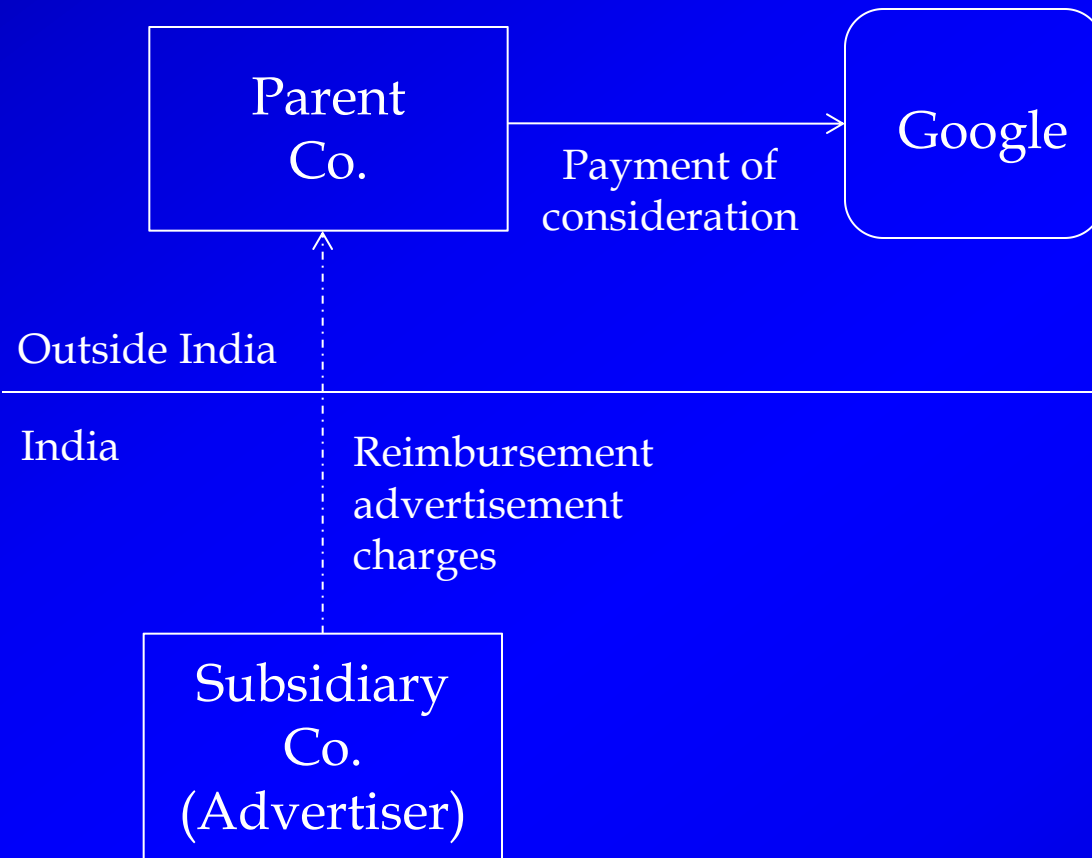
## Facts:

- News publisher makes its space available for advertisement.
- Aggregator connects publisher to Auction platform & uses software to get maximum revenue.
- Advertiser bids on Auction platform.
- All this is done with programs. Hence known as Programmatic advertisement.

## Issue:

- Is EL payable by Indian advertisers or by Aggregator?

# Payment by Foreign Parent Co. on behalf of Indian Subsidiary Co.



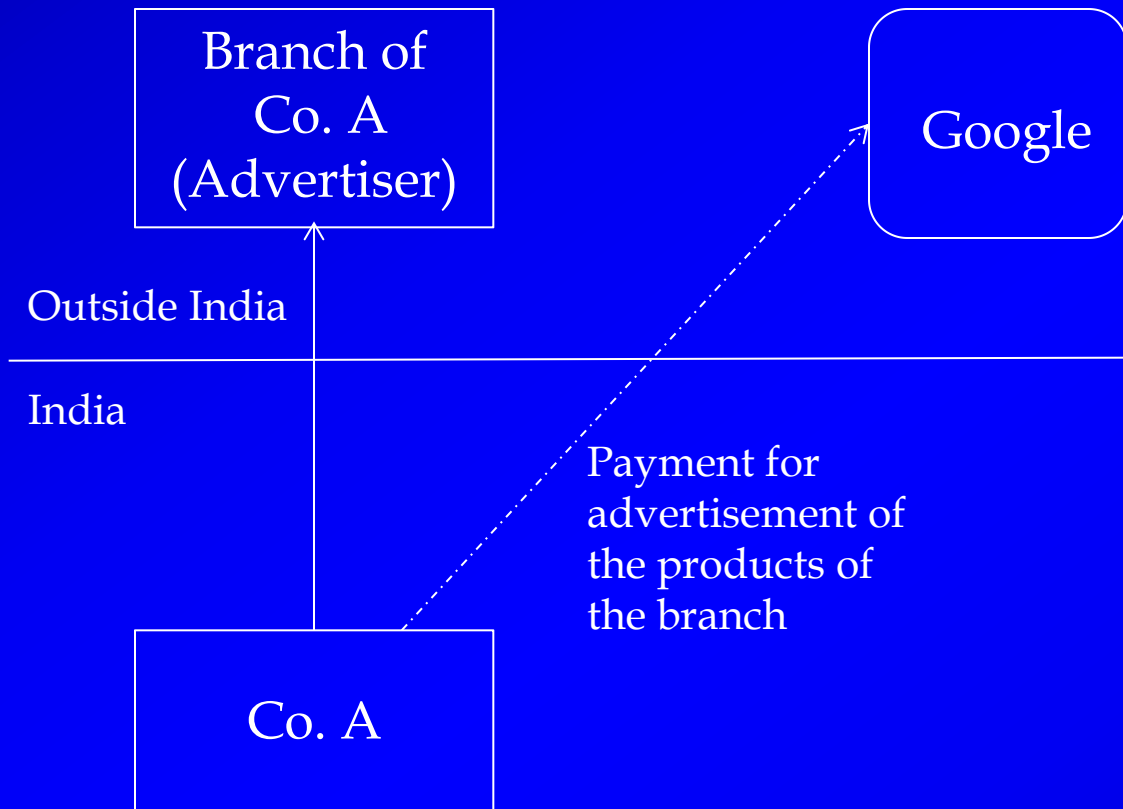
## Facts:

- Foreign Parent co. pays to Google for advertisement service on behalf of Indian Subsidiary Co.
- The ad charges are cross charged by Parent Co. to Indian Subsidiary Co.

## Issue:

- Can this be treated as ad charges paid by Indian co. indirectly to Google ?

# Indian Co. paying for advertisement expenses of its foreign branch



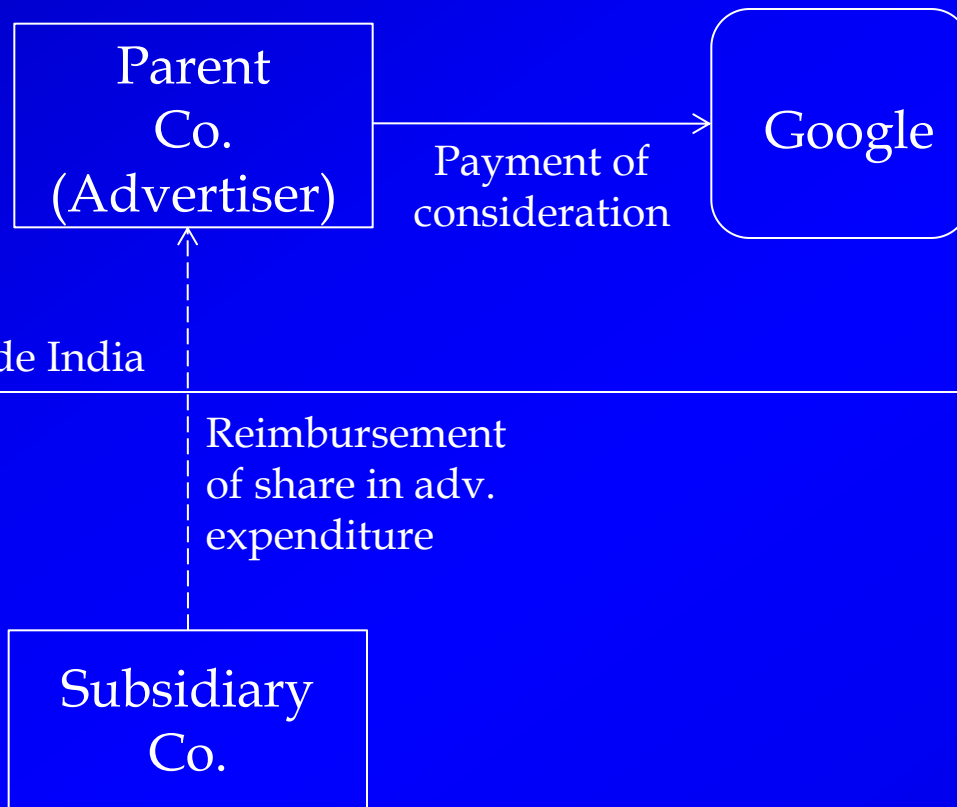
## Facts:

- Co. A has made payment for online advertisement to Google.
- It is for advertisement of the products of a branch of Co. A located outside India.
- Advertisement Service is utilised outside India

## Issues:

- Would this attract EL ?
- Nexus with India ?

# Cross charge of ad expenditure by Parent Co. to Indian entity towards its share



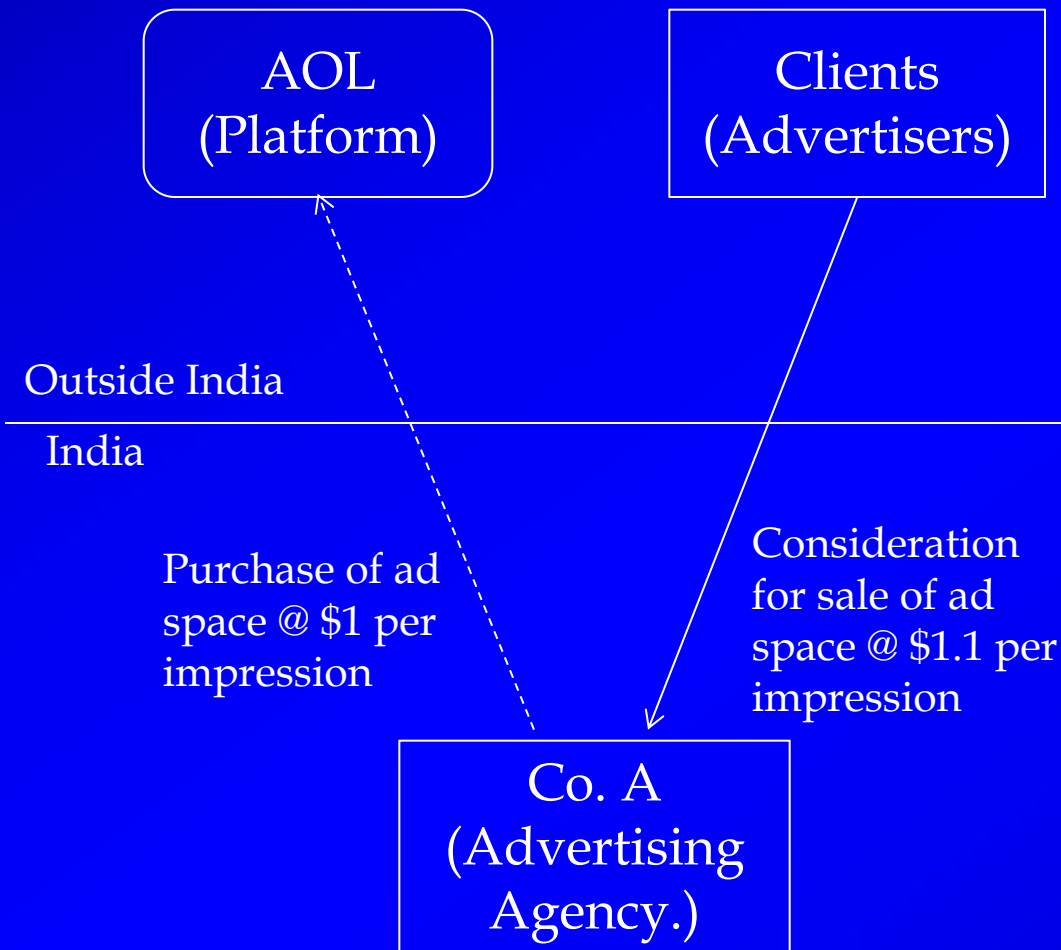
## Facts:

- Parent Company in France makes payment to Google for online advertisement for marketing the products/ services of its group entities across the globe.
- Indian Subsidiary Co. reimburses its share to the Parent Co.

## Issue:

- Will this reimbursement of advertisement expenditure attract EL ?

# Non-resident advertises on foreign platform through Indian company



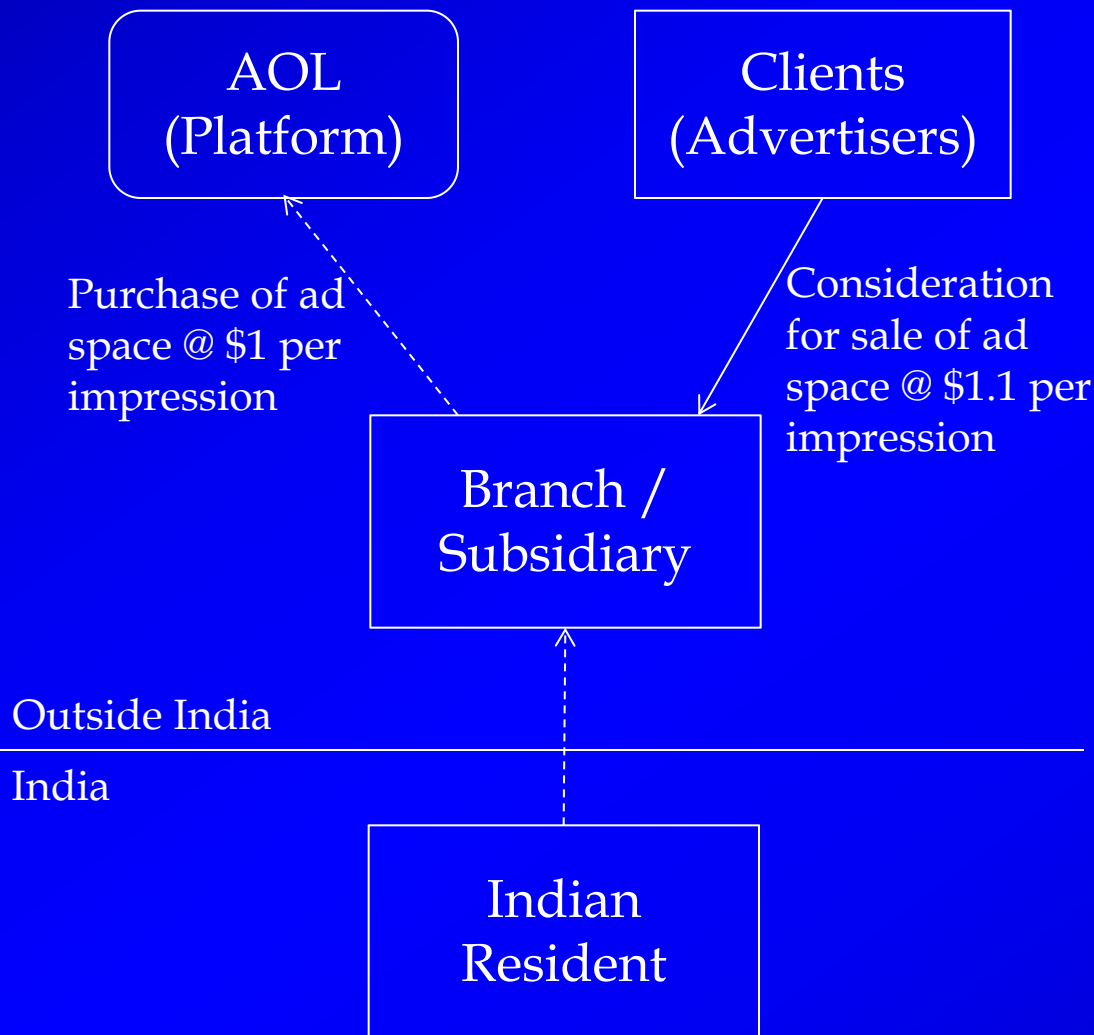
## Facts:

- Co.A purchases ad space on AOL for say \$ 1 per impression. It sells ad space to non-residents for US\$ 1.1 per impression.
- Co. A receives consideration from client and pays consideration to AOL.
- Co.A keeps commission.

## Issues:

- Is EL chargeable? On what amount?

# Non-resident advertises on foreign platform through Indian company



## Facts:

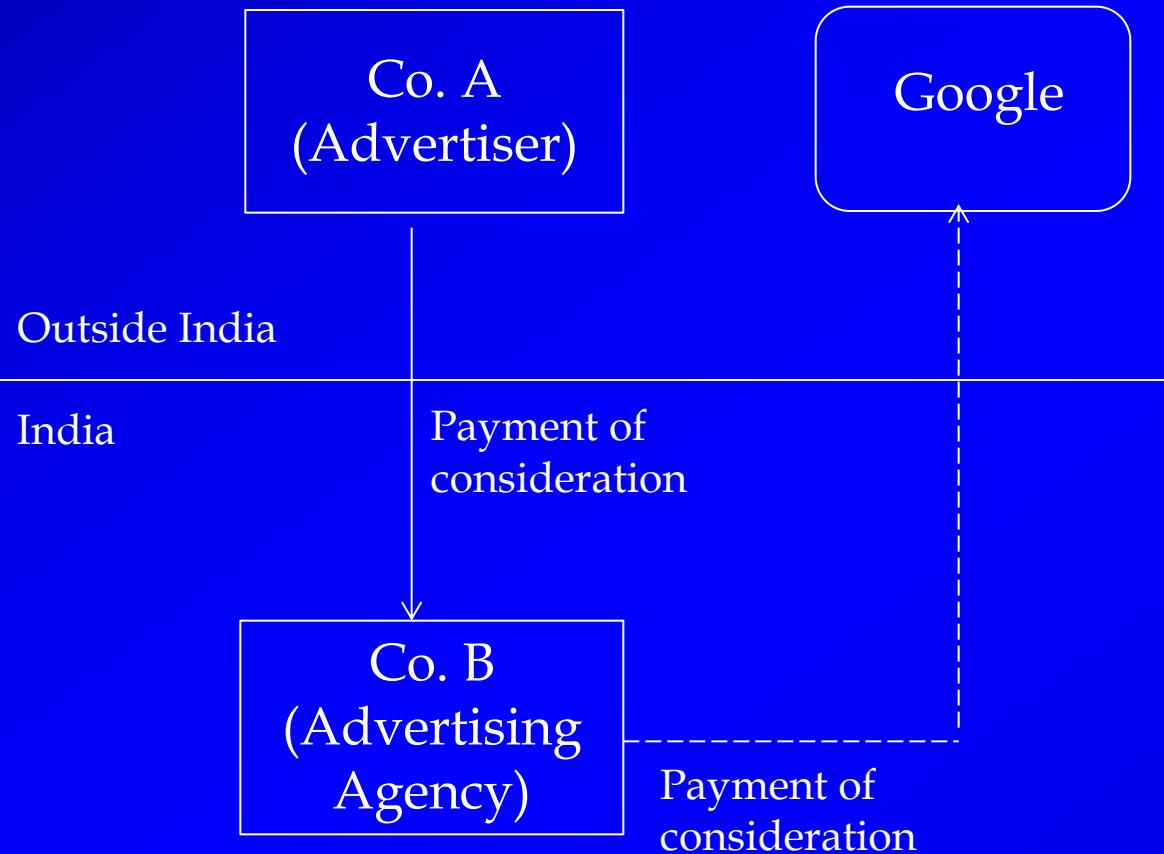
- Facts are similar to previous slide.
- Only change is that service is rendered through branch / subsidiary abroad.

## Issues:

- Will consideration be liable to EL?
- Can it be said that consideration is paid by a non-resident to non-resident?



# Composite contract through Indian company



## Facts:

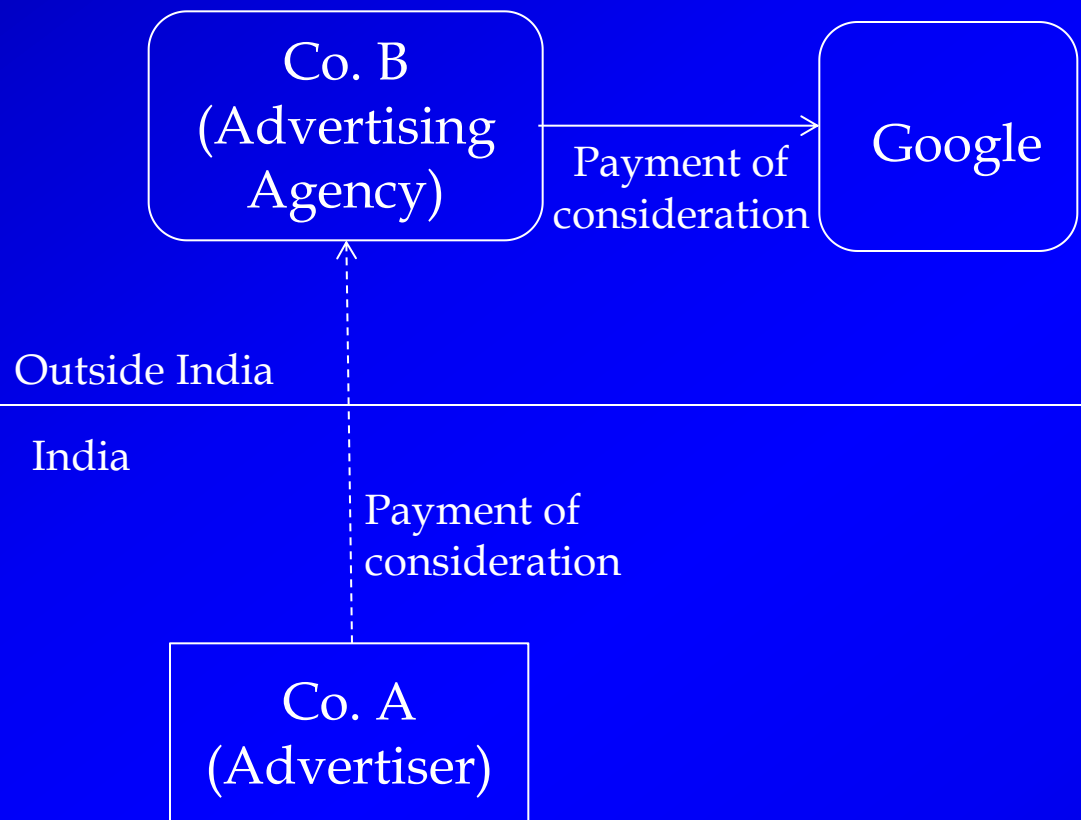
- Co. A gives a contract to Co. B for composite services of ad production and placement of the ad on the website of Google.
- Google is a US company.
- Co. A pays consideration to Co. B.
- Co. B pays consideration to Google.

# Composite contract through Indian company

## Issues:

- Can this be treated as a transaction between two Non-residents ?
  - If EL is applicable, whether it will be applied on entire amount including production charges or only on charges for hosting the ad on the website ?
- 
- Ideally there should be separate contracts for different kinds of services.

# Composite contract through Foreign Company



## Facts:

- Company A gives a contract to Company B for ad production and placement of the ad on the website of Google.
- Google is a US company.
- Company B raises an invoice on Company A giving bifurcation for ad production and hosting charges.

# Composite contract through Foreign Company

## Issues:

- Is Equalisation Levy attracted ?
- If yes, on the entire bill amount or only on ad hosting charges ?
- What is the position if the invoice does not give a break-up?

# Some other business models

Is EL payable on the following:

- Development of own website.
- Payment to actor for being on social media and actively using a product (without specifically advertising). Pseudo advertising...
- Actor pays to social media abroad for his Facebook page. Advertiser pays the actor for his endorsement of the product.

# Summary

- EL is a simple system.
- Low tax makes it uneconomical for litigation.
- It needs to be improved so that NR pays EL and gets credit in his country.
- It needs to be merged with the ITA and DTA.

Thank you.  
Questions and comments are welcome.

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