

What's New Tax Insights



November 2021

India and US agree on transitional approach of 2% Indian Equalisation Levy and US trade actions

India, on 24 November 2021, through a press release¹ issued by the Ministry of Finance, announced that a transitional approach of 2% Indian Equalisation levy (Indian EL) on e-commerce supply or services has been agreed upon with the US. The US Treasury also announced this agreement through a press release.

This agreement will be in effect during the interim period until Pillar One, relating to new nexus and profit allocation rules, comes into effect through a multilateral convention (MLC) in 2023.

On 8 October 2021, 136 member nations of the Organisation for Economic Co-operation and Development and the G20 Inclusive Framework on Base Erosion and Profit Shifting, including India and the US, issued a statement on a Two-Pillar Solution to address the tax challenges arising from the digitalisation of the economy (statement). An MLC will be signed by countries during 2022 for the implementation of Pillar One, with effective implementation in 2023. Under the Pillar One MLC, all signing countries are required to withdraw their existing Digital Services Taxes (DSTs) and other relevant similar measures (unilateral measures) with respect to all companies. The statement also provided for a commitment not to introduce any new unilateral measures during the interim period.

This agreement also follows the trade tensions between India and the US on account of the findings of the United States Trade Representative under section 301 investigation of the US Trade Act, 1974. The findings indicated that the Indian EL was inconsistent with the principles of international taxation and discriminatory against US companies and that it should, therefore, be repealed.

India's press release¹ follows a joint statement that was issued on 21 October 2021 by Austria, France, Italy, Spain, the UK and the US regarding a similar compromise reached regarding unilateral measures while implementing Pillar One (joint statement). These five countries had preferred that the withdrawal of unilateral measures be contingent on the implementation of Pillar One, while the US preferred the withdrawal of unilateral measures immediately as of 8 October 2021, the date on which the political agreement with respect to Pillar One was reached.

India and the US have now agreed that the same terms that apply under the joint statement shall apply to the agreement with India. However, the applicable interim period will be from 1 April 2022 till the implementation of Pillar One or 31 March 2024, whichever is earlier. Both countries have also agreed that they will remain in close contact to ensure that there is a common understanding of the respective commitments and resolve any further differences on this matter through constructive dialogue by 1 February 2022.

The terms of the agreement of the US with Austria, France, Italy, Spain and the UK that will also apply to India are as follows:

- Countries will not be required to withdraw their existing DSTs until Pillar One comes into effect.
- A credit mechanism is agreed upon for US businesses subject to Amount A under the Pillar One framework [i.e. large multinational enterprises [MNEs] with turnover in excess of 20bn euros and

profitability in excess of 10%]. Under this mechanism, the excess between the total DST liability in the interim period and the liability under Pillar One Amount A calculated for the interim period (as if Pillar One was already implemented) can be used as a credit against the Amount A tax liability once Pillar One is implemented. Such excess credit can also be carried forward until fully utilised.

- Credit shall not be available in case an MNE becomes subject to Pillar One for the first time after four years of Pillar One coming into effect in the particular country.
- The US also committed not to impose or raise any trade actions (including the termination of the investigation under section 301 of the US Trade Act, 1974) with respect to the existing DSTs until the end of the interim period.

The takeaways

The announcement by the Ministry of Finance, India and the US Treasury provides for a transitional approach wherein credit of the Indian EL paid in the interim period will be available against the future corporate tax liabilities (arising from Amount A) for US businesses in scope for Pillar One.

The announcements however do not impact any other India digital tax measures i.e. 6% Indian EL on online advertisement or related services and 18% GST for online services.

¹ PIB Press Release dated 24 November 2021

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