

ANALYSIS OF SECTION 194O VS SEC 52 OF GST E-COMMERCE AND IT'S RELATED ISSUES



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Earlier, when there were no provisions on the E-Commerce transactions, small sellers who were selling their goods/ providing services through E-Commerce Operators, the transactions were out of the tax nets and taxes were being avoided. Also, the Non-Resident E-Commerce Operators made profits in India without paying any taxes. So, the Government introduced the following provisions in Income Tax. Although, similar provision already exists in the GST Act of collecting tax at source (TCS) by the E-Commerce Operator, such collection is limited only if the E-commerce operator is responsible for collecting the sale amount from the buyer.

TCS Mechanism under GST:

Tax Collected at Source (TCS) under GST means the tax collected by an E-Commerce Operator from the consideration received by it on behalf of the supplier of goods, or services who makes supplies through the operator's online platform. TCS will be charged as a percentage on the net taxable supplies. The provision of TCS under GST is dealt under Section 52 of the CGST Act, 2017

UNDER INCOME TAX ACT:

The Government of India introduced Section 194O (in Union Budget 2020) to address the issue, which mandated TDS on E-commerce transactions. According to Section 194-O, an e-Commerce operator is required to deduct TDS for facilitating any sale of goods or providing services through an e-Commerce participant. TDS on E-Commerce Operator under section 194-O is applicable from 1 October 2020.

Who are E-commerce operators and participants?

E-Commerce Operator

An E-Commerce Operator is a person who owns, operates, or manages a digital/electronic facility for the sale of goods and services. He is responsible for making payments to the e-Commerce participant on such sales. Notable examples of E-Commerce Operators include Amazon, Flipkart and Myntra.

E-Commerce Participant

An E-Commerce Participant is a person who sells goods, services, or both through an electronic facility provided by an E-Commerce Operator. He must be a resident of India. For instance, various local clothing brand such as SASSAFRAS and BIBA are available on platforms like Amazon, Flipkart and Myntra. **Scope of Section 194O.**

E-Commerce operators should deduct **TDS @1% on the gross amount of such sales or services or both** at the time of credit of the amount of sale of goods, services, or both to the account of an e-commerce participant or at the time of making payment to an e-Commerce participant by any other mode, whichever is earlier.

But the word “**gross amount of sales**” has not been defined in this case. Let us understand it through an example. Suppose there is sales of Rs 30 lacs and returns of Rs 5 lacs, TDS should be deducted @ 1% on Rs 30 lacs and not on Rs 25 lacs.

E-Commerce Participant being a resident individual or HUF: E-commerce operator is not required to deduct TDS if the gross amount of sale of goods, services, or both during the previous year does not exceed Rs 5 lakh and if the e-Commerce participant has furnished his PAN or Aadhaar.

If the E-Commerce Participant does not furnish his PAN or Aadhaar, TDS must be deducted at the rate of 5%, as per provisions of Section 206AA.

For example, a proprietary firm M/s DEF (E-Commerce Participant) is selling its products through Amazon (E-Commerce Operator). Mr. A buys this product online from M/s DEF for Rs 100,000 on 1 October 2020. Amazon credits the account of M/s DEF on 1 October 2020, but the customer makes the payment directly to M/s DEF on 15 October 2020. Here, Amazon is required to deduct TDS @1% on Rs 100,000 at the time of credit to the party or making payment, whichever is earlier. In this case, TDS should be deducted on 1 October 2020.

E-Commerce Participant being a non-resident: As stated earlier, an E-Commerce Participant must be a resident of India. Thus, no TDS will be deducted if the participant is a non-resident. In Case of Non-resident Equalization Levy gets triggered.

Purpose of Section 194O

The purpose of the introduction of Section 194O is to widen the TDS base by bringing e-Commerce participants under the tax. Of late, customers prefer digital platforms for buying or selling of goods and services because:

From the sellers' perspective: It requires less cost for creating the setup and less effort for the search of buyers.

From the buyers' perspective: Many options are available at one platform and the comparison of products becomes very easy. This has resulted in an increase in the number of E-Commerce users over a period of time. It is difficult to identify small sellers (E-Commerce Participants) who don't file their income tax returns. Thus, the government has enlarged the tax base to bring such E-Commerce Participants under the tax base.

In this article, we will first examine the confusion and difficulties that are caused to the stakeholders in the space of electronic commerce, because of this provision.

Contradiction between Income Tax and GST

As it can be observed that TDS u/s 194O of Income Tax Act and Section 52 of CGST Act creates a liability on the electronic commerce operators to deduct TDS under the Income Tax Act and collect tax under GST Act respectively on the same transaction.

Example 1- Supplier Mr. A (Resident) makes the following inter-state sales through the E-Commerce Operator Amazon to its customers:

Particulars	A m o u n t (Rs)	Amount (Rs)
Taxable Value (Gross Sales)	25,00,000	
Add: GST @ 12%	<u>3,00,000</u>	28,00,000
Sales return	5,00,000	
Add: GST 12%	<u>60,000</u>	5,60,000
Net Sales		<u>22,40,000</u>

So, in the above case, Gross Sales is 25 lacs, Net Sales is 20 lacs which is net of Sales Returns and exclusive of GST. Hence, Amazon will deduct TDS under Income Tax Act @1% on 25 lacs which is Rs 25,000 and collect TCS under CGST Act @1% on 20 lacs which is Rs 20,000. Suppose Amazon Ltd charges 5% as commission which comes to Rs 1,00,000 (5% of 20 lacs) and charges 18% GST on it, total commission is Rs 1,18,000. There is no liability on Mr. A to deduct TDS under Section 194H on the commission it pays to Amazon. **since Section 194O overrules the entire chapter of TDS.**

Mr. A will be able to claim the TCS of Rs 20,000 in Electronic Cash Ledger and utilize/claim refund of the same. TDS of Rs 25,000 can be claimed in the Income Tax Return.

Lets understand one actual practical scenario/issue faced by most of the ecommerce participant selling goods on more than one platform.

The Practical difficulties faced by the E-commerce Participant is reconciliation of their TDS as per 26AS and actual sales as recorded in GST and Books of accounts.

For Example – Supplier B (Resident) makes supply of his goods on Amazon and Flipkart platform. Sales on Amazon platform are Gross Sales – Rs 450,000/-, Goods return – Rs 50,000/- Net Sales were Rs 400,000/-. Sales on flipkart are Gross Sales – Rs 300,000/-, Goods Return – Rs 100,000/- Net Sales were Rs 200,000/-.

In such scenario Amazon normally deducts TDS on Gross amount ignoring the Goods return i.e. 1% on 450,000 = 4500, whereas Flipkart deducts TDS on Net Sales amount i.e. 1% on 200,000 = 2000. All this TDS would be rightly be submitted by the E-Commerce Operator in their TDS returns which will be reflected in Form 26AS of E-Commerce Participant. It will create discrepancy while filing the income tax return by Mr. B since he will disclose his turnover on Net basis in his Income Tax Return whereas Turnover as per 26AS as disclosed by E-Commerce Participant would be higher being gross amount reported by Amazon.

In such a scenario, Mr. B has to reconcile his books of accounts vis a vis 26AS to clarify the difference arisen due to goods return mismatch since under automatic processing done by CPC, would mark such return defective due to turnover mismatch. However, in reality on submission of response against such defective notice, the CPC has ignored the response and adjusted the refund proportionately to cater the difference.

The difference is not just about 26AS and Income Tax Return but also notice could be issued for difference in turnover in GST vis a vis Income Tax return. Such mismatches may also create high chances of assessment by Income tax department.

During the assessment, assessee can place his points relating to goods return and provide the reconciliation of his books of accounts vis a vis 26AS. The same can be proven with reports generated by ecommerce operator from their portal and also TCS reports as declared by the same ecommerce operator on GST Portal wherein Sales net of returns are disclosed by same operator.

Other ISSUES Faced by the assesses and E-Commerce Operators are as under:

One of the key challenges for any E-Commerce Operator is to deduct TDS on all supply transactions, irrespective of whether the amount is being collected by the them or not.

The TCS provision under the GST Act provides that only when consideration for supply is collected by the ECO, TCS is required to be charged and collected by the E-Commerce Operator from the suppliers. Therefore, the GST law appreciated the business wisdom that wherever the E-Commerce Operator has been acting as a collection agent for the suppliers, the E-Commerce Operator should also collect TCS and deposit it with the Government exchequer and not otherwise.

Service And Cancellation Charges:

Cancellation of orders or return to the suppliers is also a regular phenomenon in the electronic commerce world. For example, online food orders placed through the E-Commerce Operator may be cancelled, inviting cancellation charges payable by the customer to the supplier.

However, a question arises as to whether such cancellation charges would attract TDS. It is interesting to note that this was highly debated issue under the erstwhile service tax regime and it would continue to trouble taxpayers even in the current GST regime. The revenue authorities have been contending that the cancellation charges should be treated as the consideration for 'agreeing to the obligation to refrain from an act or to tolerate an act'; on the other hand, the assesses have been contending that such cancellation charges are merely a compensation for the loss which cannot be treated at par with consideration and, accordingly, not taxable. It is interesting to note that it is still a disputed question under foreign VAT legislations as well.

Where any E-Commerce Operator has decided to litigate Service Tax or GST demand on cancellation charges, such E-Commerce Operator will have to revisit its litigation strategy in view of the new TDS provision introduced in the Finance Bill, 2020. It will be necessary for these E-Commerce Operators to reconcile their positions harmoniously considering the new TDS provision.

Aspect Of Sales Returns

For good reasons, sales return is a very common trade practice in the E-Commerce industry. Thus, tax laws should recognize the value of sales return similar to what is being provided under the GST Act, under which there is a provision for issuance of credit note for sales return and reduction of tax liability.

Under the GST Act and regulations made thereunder, TCS is to be collected on the net taxable value of the supplies of goods or services after considering the value of sales returns. Section 194-O, on the other hand, does not provide any clarity as to whether TDS would apply on the net value after deducting the value of the sales return. This would also keep the E-Commerce Operator pondering whether to deduct TDS on the reduced value, particularly when the TDS has to be paid by the E-Commerce Operator from its own pocket.

Discounts

Every industry has its unique way of offering discounts for business promotion. The E-Commerce Operators are not exception and they have also introduced innovative schemes for offering business discounts.

Normally, the E-Commerce Operators offer discount on the total value of supplies. Refer to the above online food transaction and consider the following scenario: As per the list price, a restaurant charges Rs. 100 for food and the E-Commerce Operator charges a delivery fee of Rs. 20. Thereby making the total amount payable by the customer as Rs. 120. However, the e-commerce operator provides various offer promotion codes and offer net discounted price of Rs. 80. The discount of Rs. 40 is applied to the E-Commerce Operator charges as well as to the restaurant charges. The said additional discount is being compensated by the E-Commerce Operator to the restaurants.

The question is whether the payment made by the E-Commerce Operator to the restaurant should be liable for the TDS on Rs 120, even though only Rs. 80 is received from the buyer. One can say that the amount paid by the E-Commerce Operator to the restaurant is a third-party consideration and, therefore, it should attract tax withholding. However, this will keep haunting the E-Commerce industry given the ever-changing business models.

Conclusion:

These are the few practical and possible issues which might be faced by the E-Commerce Participant in their course of business. However, with the amount of fees in name of commission fee, platform fee, advertisement fee, sponsorship fees etc. which these E-Commerce Operators are charging to the participants (ranging from 30%-55%), from business perspective it is practically difficult for small traders to have a profitable business considering all the other fixed and variable expenses incurred by them. Secondly, reconciliation of receivables after all the charges and deduction by E-Commerce Operator is practically difficult because there is no proper data available or provided by any E-Commerce Operator which would tally with our books of account and receipts in our bank statements.

