OFFICE *of the* UNITED STATES TRADE REPRESENTATIVE
EXECUTIVE OFFICE OF THE PRESIDENT

Section 301 Investigation
Report on India's Digital Services Tax

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Contents

REPORT ON INDIA'S DIGITAL SERVICES TAX PREPARED IN THE INVESTIGATION UNDER SECTION 301 OF THE TRADE ACT OF 1974

I. EXECUTIVE SUMMARY

On June 2, 2020, the U.S. Trade Representative initiated an investigation of India's 2020 Equalisation Levy (the DST) under Section 301 of the Trade Act of 1974, as amended (the Trade Act). India's DST imposes a 2% tax on revenue generated from a broad range of digital services offered in India, including digital platform services, digital content sales, digital sales of a company's own goods, data-related services, software-as-a-service, and several other categories of digital services. India's DST explicitly exempts Indian companies—only "non-residents" must pay the tax.

In this report, the Office of the United States Trade Representative (USTR) presents its evidentiary findings on actionability. The applicable standard for actionability under Section 301 is whether India's DST is unreasonable or discriminatory and burdens or restricts U.S. commerce. As described in this report, our investigation suggests that the DST satisfies that standard. If the U.S. Trade Representative determines that the DST is actionable, Section 301 would authorize "all appropriate and feasible action … to obtain the elimination of" the DST.[1]

USTR carried out its investigation over the course of several months. As explained in the Federal Register notice launching the investigation (the Notice of Initiation),[2] USTR focused on various aspects of the DST, including whether the DST discriminates against U.S. companies, if the DST is unreasonable as tax policy, and whether the DST burdens or restricts U.S. commerce. The Notice of Initiation requested public comments on these points, and 383 comments from interested persons, companies, organizations, and governments are available in the public docket. USTR also participated in confidential government-to-government consultations with India regarding the DST on November 5, 2020. These investigatory steps indicated that India's DST discriminates against U.S. companies, unreasonably contravenes international tax principles, and burdens or restricts U.S. commerce.

<u>First, our investigation indicates that India's DST discriminates against U.S. digital services companies</u>. India's DST is discriminatory on its face. The law explicitly exempts Indian companies, while targeting non-Indian firms. The result is that U.S. "non-resident" providers of digital services are taxed, while Indian providers of the same digital services to the same customers are not. This is discrimination in its clearest form. Indeed, one Indian government official confirmed that the very "purpose" of the DST is to discriminate against non-resident foreign companies, explaining that: "[a]ll parts of the digital taxation incident should be

[1] 19 U.S.C. § 2411(b).

[2] USTR, "Initiation of Section 301 Investigations of Digital Services Taxes" 85 FED. REG. 34709, June 5, 2020 ("Notice of Initiation").

on the foreign player, because if the incidence is passed on to the Indian player, then it doesn't really serve the purpose."[3]

What is more, the DST targets digital services, but not similar services provided non-digitally. Because U.S. companies are global leaders in the digital services sector, U.S. companies face an inordinate share of tax burden. Indeed, of the 119 companies that USTR has identified as likely liable under the DST, 86 (72%) are U.S. companies.

For these and other reasons explained further in Section IV(A) below, our investigation would support a finding that India's DST discriminates against U.S. companies.

<u>Second, our investigation indicates that India's DST unreasonably contravenes international tax principles</u>. At least three aspects of the DST are inconsistent with principles of international taxation:

- Stakeholders have found the text of the DST to be unclear and ambiguous. This creates uncertainty for companies regarding key aspects of the DST, including the scope of taxable services and the universe of firms liable to pay the tax. India has published no official guidance to resolve these ambiguities. This amounts to a failure to provide tax certainty, which contravenes a core principle of international taxation.
- The DST taxes companies with no permanent establishment in India, contravening the international tax principle that companies should not be subject to a country's corporate tax regime absent a territorial connection to that country.
- The DST taxes companies' revenue rather than their income. This is inconsistent with the international tax principle that income—not revenue—is the appropriate basis for corporate taxation.

For these and other reasons explained further in Section IV(B) below, our investigation would support a finding that India's DST unreasonably contravenes international tax principles.

<u>Third, our investigation indicates that India's DST burdens or restricts U.S. commerce</u>. The DST is burdensome or restrictive in at least four ways:

- The DST creates an additional tax burden for U.S. companies. USTR estimates that the aggregate tax bill for U.S. companies could exceed US$30 million per year. Several aspects of the DST exacerbate this tax burden, including the DST's extraterritorial application, its taxation of revenue rather than income, and its low domestic revenue threshold (which allows India to tax U.S. firms that do relatively little business in India).
- The unusually expansive scope of taxable digital services under the DST makes the tax particularly burdensome for U.S. companies. India's DST is an outlier: it taxes numerous categories of digital services that are not leviable under other digital

[3] *International Tax Review*, "Discussion: Kamlesh Varshney talks about India's tax policy agenda," March 30, 2020, available at: https://www.internationaltaxreview.com/article/b1kxs1b3pvv2x1/discussion-kamlesh-varshney-talks-about-indias-tax-policy-agenda.

services taxes adopted around the world. This brings more U.S. companies within the scope of the DST, and makes the measure significantly more burdensome.

- The DST forces U.S. companies to undertake costly measures to comply with the tax's new payment and reporting requirements. This includes the reengineering of existing systems to collect and organize new and different types of information. USTR's analysis indicates that compliance costs could run into the millions of dollars for each affected company.
- The DST burdens U.S. companies by subjecting them to double taxation.

For these reasons, which we discuss further in Section IV(C) below, our investigation suggests that India's DST burdens or restricts U.S. commerce.

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In summary, as set out in detail in this report, USTR's investigation indicates that India's DST is discriminatory, unreasonable, and burdens or restricts U.S. commerce, and thus, is actionable under Section 301.

II. Background

This section provides background on the adoption of the Indian DST and on USTR's investigation. Subsection A summarizes the historical context of the DST, with a focus on the multilateral tax negotiations that were ongoing when India adopted its DST and the legislative and procedural history of the DST. Subsection B describes the relevant elements of Section 301 of the Trade Act, the focus of this investigation, and the investigatory process USTR followed.

A. India's Adoption of the DST in the Midst of Ongoing, Multilateral Negotiations Regarding Digital Services Taxes

In 2013, the Secretary-General of the Organisation for Economic Co-operation and Development (OECD) released an action plan on base erosion and profit sharing (BEPS).[4] The BEPS action plan discussed the "spread of the digital economy" and its impact on digital taxation.[5] That plan led to the establishment of the OECD/G20 Inclusive Framework, a group of countries and jurisdictions working to address issues raised in the BEPS action plan. The inaugural meeting of the OECD/G20 Inclusive Framework was held in Kyoto, Japan in June, 2016.[6]

The work of the OECD/G20 Inclusive Framework continues today. As of July 2020, the OECD/G20 Inclusive Framework negotiations involved over 135 countries and jurisdictions—including India and the United States—along with 14 observer organizations.[7] The United States remains actively engaged in the OECD Inclusive Framework process, and supports bringing those negotiations to a successful conclusion. As of now, the official position of the OECD is that, "[t]here is no consensus on either the merit or need for interim measures," such as country-specific digital services taxes like India's DST.[8]

Despite these long-running and ongoing negotiations, India has chosen to move forward with its own taxes on digital services. The first such effort began in 2016, with India's implementation of a 6% tax on digital advertising.[9] That 6% levy applies to gross revenue

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[4] Org. for Economic Co-operation and Development, *Action Plan on Base Erosion and Profit Sharing*, at 2, 11 (OECD Publishing 2013), available at: https://read.oecd-ilibrary.org/taxation/action-plan-on-base-erosion-and-profit-shifting_9789264202719-en.

[5] Org. for Economic Co-operation and Development, *Action Plan on Base Erosion and Profit Sharing*, at 12 (OECD Publishing 2013), available at: https://read.oecd-ilibrary.org/taxation/action-plan-on-base-erosion-and-profit-shifting_9789264202719-en.

[6] Org. for Economic Co-operation and Development, *OECD/G20 Inclusive Framework on BEPS: Progress report July 2019 – July 2020*, at 2 (OECD 2020), available at: https://www.oecd.org/tax/beps/oecd-g20-inclusive-framework-on-beps-progress-report-july-2019-july-2020.pdf.

[7] Org. for Economic Co-operation and Development, *OECD/G20 Inclusive Framework on BEPS: Progress report July 2019 – July 2020*, at 7, 35 (OECD 2020), available at: https://www.oecd.org/tax/beps/oecd-g20-inclusive-framework-on-beps-progress-report-july-2019-july-2020.pdf.

[8] Org. for Economic Co-operation and Development, *Tax Challenges Arising from Digitalisation – Interim Report 2018: Inclusive Framework on BEPS*, at 178 (OECD Publishing 2018), available at: https://read.oecd-ilibrary.org/taxation/tax-challenges-arising-from-digitalisation-interim-report_9789264293083-en.

[9] *See* The Finance Act of 2016, May 14, 2016, at Chapter VIII.

received by non-Indian residents for online advertisements and related services provided to Indian residents. The Indian purchaser of the covered digital advertising services is responsible for withholding and remitting the digital advertising tax to the Indian government.

The 2016 digital advertising tax is not the focus of this investigation.[10] Rather, this investigation relates to an expansion of that 2016 tax that the Indian government passed in 2020, which we refer to as the DST. The DST first appeared publicly on March 23, 2020 in amendments to India's 2020 Finance Act. Companies received no notice of this legislation before that date. Just four days later—absent any opportunity for public comment—the DST became law. The tax then went into effect just five days later. To date, the Indian Government has not issued implementing regulations clarifying fundamental aspects of the DST, such as the scope of services covered, companies impacted, etc. India did, however, amend previously existing rules related to the mechanics of how to pay the DST in October 2020.[11]

Unilateral laws like India's DST undermine progress in the OECD by making an agreement on a multilateral approach to digital taxation less likely. If unilateral measures proliferate while negotiations are ongoing, countries lose the incentive to engage seriously in the negotiations. For this reason, among others, the United States has discouraged governments from adopting country-specific DSTs. Nonetheless, India has chosen to create and implement its own unilateral tax on digital services.

B. USTR'S INVESTIGATION OF THE DST PURSUANT TO SECTION 301 OF THE TRADE ACT

On June 2, 2020, the U.S. Trade Representative initiated an investigation of the Indian DST under section 301 of the Trade Act.[12] Below, we describe: (i) the legal basis for this Section 301 investigation; (ii) the substantive focus of the investigation; and (iii) the process that USTR has followed in carrying out the investigation.

1. Relevant elements of Section 301

Section 301 sets out three types of acts, policies, or practices of a foreign country that are actionable: (i) trade agreement violations; (ii) acts, policies or practices that are unjustifiable (defined as those that are inconsistent with U.S. international legal rights) and burden or restrict U.S. Commerce; and (iii) acts, policies or practices that are unreasonable or discriminatory and burden or restrict U.S. Commerce.[13] Section 301 defines "discriminatory" to "include . . . any act, policy, and practice which denies national or most-favored nation treatment to United States goods, service, or investment."[14] "[U]nreasonable" refers to an act, policy, or practice that

[10] This investigation does not include the 2016 digital advertising tax within its scope, and this report expresses no views on whether the 2016 digital advertising tax may or may not be actionable under Section 301.

[11] *See* Equalisation Levy (Amendment) Rules, 2020, October 28, 2020, available at: https://www.incometaxindia.gov.in/communications/notification/notification_87_2020.pdf.

[12] *See* Notice of Initiation.

[13] 19 U.S.C. § 2411(a)-(b).

[14] 19 U.S.C. § 2411(d)(5).

"while not necessarily in violation of, or inconsistent with, the international legal rights of the United States is otherwise unfair and inequitable."[15] The statute further provides that, in determining if a foreign country's practices are unreasonable, reciprocal opportunities to those denied U.S. firms "shall be taken into account, to the extent appropriate."[16]

If the Trade Representative determines that the Section 301 investigation "involves a trade agreement," and if that trade agreement includes formal dispute settlement procedures, USTR may pursue the investigation through consultations and dispute settlement under the trade agreement.[17] Otherwise, USTR will conduct the investigation without recourse to formal dispute settlement.

If the Trade Representative determines that the act, policy, or practice falls within any of the three categories of actionable conduct under Section 301, the Trade Representative must also determine what action, if any, to take. If the Trade Representative determines that an act, policy or practice is unreasonable or discriminatory and that it burdens or restricts U.S. commerce:

> "The Trade Representative shall take all appropriate and feasible action authorized under [section 301(c)], subject to the specific direction, if any, of the President regarding such action, and all other appropriate and feasible action within the power of the President that the President may direct the Trade Representative to take under the subsection, to obtain the elimination of that act, policy, or practice."[18]

Actions authorized under Section 301(c) include: (i) suspending, withdrawing, or preventing the application of benefits of trade agreement concessions; (ii) imposing duties, fees, or other import restrictions on the goods or services of the foreign country; (iii) entering into binding agreements that commit the foreign country to eliminate or phase out the offending conduct or to provide compensatory trade benefits; or (iv) restricting or denying the issuance of service sector authorizations, which are federal permits or other authorizations needed to supply services in some sectors in the United States.[19]

2. The focus of USTR's investigation

As set out in the Notice of Initiation, the investigation involves determinations of whether the act, policy, or practice at issue—*i.e.*, India's DST—is actionable under section 301 of the Trade Act, and if so, what action, if any, to take under Section 301. With respect to actionability, this investigation focused on discrimination against U.S. companies, and divergence from reasonable tax policy. Regarding unreasonable tax policy, USTR investigated whether the DST

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[15] 19 U.S.C. § 2411(d)(3)(A).

[16] 19 U.S.C. § 2411(d)(3)(D).

[17] 19 U.S.C. § 2413(a)(2).

[18] 19 U.S.C. § 2411(b).

[19] In cases in which USTR determines that import restrictions are the appropriate action, preference must be given to the imposition of duties over other forms of action. 19 U.S.C. § 2411(c).

diverges from principles reflected in the U.S. tax system and the international tax system, such as extraterritorial reach and taxing revenue rather than income.[20]

3. USTR's investigatory process

Throughout the investigation, USTR followed the process provided for under Section 301. That included, for instance, requesting consultations with the Indian Government on the date that the investigation was initiated.[21] India's Minister of Commerce and Industry accepted the request for consultations in a letter dated July 1, 2020.[22] The consultations took place on November 5, 2020.

USTR also provided the public and other interested persons with an opportunity to present their views and perspectives on the Indian DST. The Notice of Initiation invited written comments on this investigation (as well as the investigations of nine other jurisdictions' DSTs) by July 15, 2020.[23] Interested persons filed 383 written submissions, the majority of which related (either implicitly or explicitly) to India's DST.[24] Several of these public comments were lengthy and detailed, and analyzed India's DST specifically.[25]

Of the comments that addressed whether India's DST is actionable under Section 301, a substantial majority supported a positive finding on actionability.[26] Commenters provided evidence and argumentation supporting actionability based on several of the areas of concern outlined in the Notice of Initiation. As explained in more detail later in this report, commenters provided argumentation and evidence that, *inter alia*, India's DST discriminates against U.S. companies, that it is unreasonable, and that it burdens or restricts U.S. commerce.

III. DESCRIPTION OF INDIA'S DIGITAL SERVICES TAX

This section, which describes India's DST in detail, is based on USTR's review of public comments and a detailed analysis of the DST text itself. In general terms, India's DST is a 2% tax that applies to revenues received by a wide range of non-Indian digital service providers for a

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[20] *See* Notice of Initiation, at 34710 (setting out a list of the types of issues that the USTR might address through the ten investigations discussed in the notice). The Notice of Initiation also invited interested parties to submit comments on other aspects of the DST that may warrant a finding of actionability under Section 301. Notice of Initiation, at 34710.

[21] *See* Letter from Ambassador Robert Lighthizer to Minister Piyush Goyal, June 2, 2020 (Annex 3).

[22] *See* Letter from Minister Piyush Goyal to Ambassador Robert Lighthizer, July 1, 2020 (on file with USTR).

[23] Notice of Initiation, at 34709.

[24] The submissions can be viewed on the Federal eRulemaking Portal, https://www.regulations.gov.

[25] *See, e.g.*, Public comment submitted by the Information Technology Industry Council, July 15, 2020; Public comment submitted by the Silicon Valley Tax Directors' Group, July 15, 2020; Public comment submitted by the Computer & Communications Industry Association, July 14, 2020.

[26] *See, e.g.*, Public comment submitted by Americans for Tax Reform, July 11, 2020; Public comment submitted by the National Retail Federation, July 15, 2020; Public comment submitted by the Information Technology Industry Council, July 15, 2020; Public comment submitted by the Computer & Communications Industry Association, July 14, 2020; Public comment submitted by the Silicon Valley Tax Directors' Group, July 15, 2020.

broad array of digital services. In the subsections below, we address: the companies that are subject to the DST (Section A); the scope of the taxable services under the DST (Section B); and the payment protocol and for the DST as well as penalties for non-payment (Section C).

A. Companies Subject to the DST

The DST applies to a broad range of digital services providers, but specifically exempts all Indian companies. Only "non-resident" operators—including U.S. companies—are subject to the tax.[27] More specifically, the DST does not apply "where the e-commerce operator making or providing or facilitating e-commerce supply or services has a permanent establishment in India and such e-commerce supply or services is effectively connected with such permanent establishment."[28] This aspect of the DST—the explicit exclusion of domestic companies—distinguishes India's DST from other digital services taxes adopted by U.S. trading partners.[29]

India's DST also does not apply if a digital services company does not meet or exceed the revenue threshold of Rs. 2 crores (approximately US$267,000) in India-based digital services revenue in the previous year.[30] Put differently, if a company does not receive at least US$267,000 in revenue from Indian digital services activities in a given year, that company is exempt from the DST the following year. In comments submitted in this investigation, the Government of India acknowledged that its DST included "a low threshold" for domestic revenue.[31]

The DST's low domestic revenue threshold allows it to capture a large share of digital services providers, including companies with relatively low India-based revenues. A higher domestic revenue threshold would have excluded such firms. Of note, the low domestic revenue threshold does not capture small Indian companies, because the DST explicitly excludes them—and all other Indian "residents"—from the tax. One public comment received in this investigation highlighted this dynamic, noting that: "[u]nlike the other DSTs, a low threshold does not expose [Indian] suppliers to the tax, as the tax is imposed only on nonresidents."[32]

The Indian DST does not contain a global revenue threshold. Such thresholds can serve as a mechanism for shielding domestic companies—which tend to have lower global revenues than U.S. companies—from tax liability.[33] This approach would have been unnecessary for India, because India's DST explicitly excludes Indian companies.

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[27] DST at Sections 164(ca) and 165A(1).

[28] DST at Sections 165A(2)(i).

[29] We note, however, that Indonesia's digital services tax (which has not yet been fully implemented) includes a similar provision. *See* Government Regulation in Lieu of Law, Perppu No. 1/2020 (Indonesia) (passed into law May 16, 2020 as Law No. 2 Year 2020), Article 6(1)(b).

[30] DST at Sections 165A(2)(iii).

[31] Public comments submitted by the Government of India, July 15, 2020, at para. 8.

[32] Public comment submitted by the Silicon Valley Tax Directors' Group, July 15, 2020, at 49.

[33] *See, e.g.*, USTR Report on France's Digital Services Tax, December 2, 2019, Section IV(A)(3).

Although the DST potentially applies to all non-Indian digital services companies, in practice, the majority of companies subject to the tax will be U.S. firms. USTR's analysis identified 119 companies likely subject to the DST, of which 86 (72%) are U.S. companies, whereas the next most common nationalities are China and the United Kingdom with seven companies each, France with six companies, and Japan with five.[34] No Indian companies appear on this list due to their explicit exemption from the DST.

B. SERVICES SUBJECT TO THE DST

The companies subject to the DST must pay the tax on revenue they derive from "e-commerce supply or services."[35] The DST defines "e-commerce supply or services" as:

(i) online sale of goods owned by the e-commerce operator; or
(ii) online provision of services provided by the e-commerce operator; or
(iii) online sale of goods or provision of services or both, facilitated by the e-commerce operator; or
(iv) any combination of activities listed in clause (i), (ii) or clause (iii).[36]

This definition is extremely broad. As such, India's DST applies to revenue derived from nearly any type of digital activity that generates revenue. This includes categories of digital services that are <u>not</u> taxable under most other countries' digital services taxes, such as streaming video services, digital sale of a company's own goods, cloud services, and the provision of software-as-a-service.[37]

Importantly, the DST does not apply to certain digital advertising services, which are taxed separately under the 2016 digital advertising tax (discussed in Section II(A) above). Specifically, the following advertising-related services are not taxable under the DST: "online advertisement, any provision for digital advertising space or any other facility or service for the purpose of online advertisement,"[38] which a non-Indian resident receives from "(i) a person resident in India and carrying on business or profession; or (ii) a non-resident having a permanent establishment in India." Thus, for example, if an Indian company were to pay Google (a U.S. company) to advertise on Google's search engine, that revenue would be subject to the

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[34] USTR's analysis of companies likely covered under India's DST was based on a review of publicly available regulatory filings, corporate annual reports, corporate websites, press articles, and other sources. Using these sources, USTR identified which firms would likely meet the DST's revenue threshold, definition of covered services, etc. Where possible, USTR isolated revenue attributable to covered services in India, but this information was not available for many firms. Where that specific information was not accessible, USTR used the data available to assess the likely revenue derived from digital services provided in India.

[35] DST at Section 165A(1).

[36] DST at Section 164(cb).

[37] *See, e.g.* French Digital Services Tax Law; Spanish Law 4/2020 on Tax on Certain Digital Services, of October 15 2020.

[38] *See* DST at Section 165A(2)(ii) (exempting services "leviable under section 165"); DST at Sections 165(1) (imposing a levy on all "specified service[s]"); DST at Section 164(i) (defining "specified service" as "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 by the Central Government in this behalf.").

2016 digital advertising tax, and therefore not subject to the DST. However, if Airbnb (a U.S. company) were to pay Google to advertise to Indian users on Google's search engine, that revenue would be subject to the DST.

India's DST also only applies to digital services that have a nexus to India. More specifically, digital services are leviable under the DST only if they are provided:

(i) to a person resident in India; or
(ii) to a non-resident in certain "specified circumstances"; or
(iii) to a person who buys such goods or services or both using an internet protocol address located in India.[39]

Regarding point (ii) above, the DST defines "specified circumstances" as:

(i) sale of advertisement, which targets a customer, who is resident in India or a customer who accesses the advertisement though internet protocol address located in India; and
(ii) sale of data, collected from a person who is resident in India or from a person who uses internet protocol address located in India.[40]

As noted in Section IV(B)(1) below, stakeholders have identified a number of ambiguities regarding the scope of services to which the DST applies. We also understand that stakeholders have approached the Indian Government for clarification, but that to date, India has not released any clarifying regulations on these issues.

C. Payment of the DST and Penalties for Non-Payment

Digital service providers must pay the DST to the Indian Government according to the following schedule (column 2 lists the last day of the payment period; column 3 lists the due date for payment):[41]

TABLE

Serial number	Date of ending of the quarter of financial year	Due date of the financial year
(1)	(2)	(3)
1.	30th June	7th July
2.	30th September	7th October
3.	31st December	7th January
4.	31st March	31st March.";

[39] DST at Section 165A(1).

[40] DST at Section 165A(3).

[41] DST at Section 166A.

If a company fails to pay the DST on time, interest will run on the outstanding sum at a rate of 1 percent per month.[42] In addition, truant companies may be subject to a fine equal to the amount of unpaid tax.[43]

At the end of the financial year, digital service providers must submit a statement detailing the covered digital services it furnished during the previous year.[44] Based on that information, the digital service provider may receive a refund, or alternatively need to pay additional tax.[45]

IV. USTR'S FINDINGS REGARDING INDIA'S DST

This section set outs USTR's findings on the question of actionability, *i.e.*, whether India's DST is unreasonable or discriminatory and burdens or restricts U.S. commerce. As explained below, our investigation would support a finding that: the DST discriminates against U.S. companies (Section A); the DST is inconsistent with international tax principles and therefore unreasonable (Section B); and the DST burdens or restricts U.S. commerce (Section C). It follows that our investigation would justify a positive actionability finding under Section 301.

A. INDIA'S DST DISCRIMINATES AGAINST U.S. DIGITAL SERVICES COMPANIES

Our investigation indicates that the DST is intended to, and by its structure and operation does, discriminate against U.S. digital companies. This occurs in two principal ways: first, the DST's explicit exemption of companies resident in India overtly discriminates against non-Indian companies in general, and against U.S. companies in particular (Section 1); second, by targeting only digital services, but not the same or similar services provided non-digitally, the DST disproportionately impacts U.S. firms, which are market leaders in the digital services sector (Section 2).

1. The DST is discriminatory because it applies only to non-Indian digital services providers

India's DST is facially discriminatory. The tax applies to "non-resident" companies, but it does not apply to Indian firms.[46] This approach—overtly targeting only foreign companies—is unique among implemented digital services taxes. While other digital services taxes seek to exempt domestic companies indirectly using high revenue thresholds,[47] India's approach is more straightforward: India openly discriminates, explicitly exempting all Indian companies from the

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[42] DST at Section 170.

[43] DST at Section 171(b)(ia).

[44] DST at Section 167.

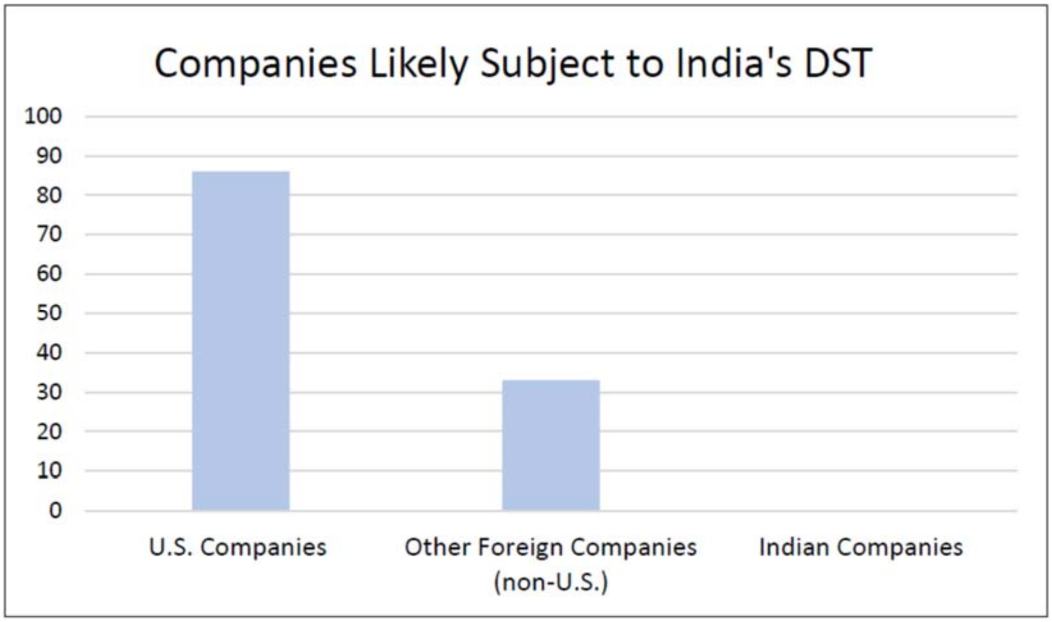
[45] DST at Section 168(c).

[46] DST at Sections 164(ca) and 165A(1).

[47] *See, e.g.*, USTR Report on France's Digital Services Tax, December 2, 2019 at Section IV(A)(3).

DST. As one Indian government official confirmed, the very "purpose" of the DST is to tax foreign companies only, explaining that "[a]ll parts of the digital taxation incident should be on the foreign player, because if the incidence is passed on to the Indian player, then it doesn't really serve the purpose."[48]

The DST's discriminatory approach will have an outsized impact on U.S. digital firms. USTR was able to identify 119 companies worldwide that likely are subject to the tax. The graph below shows the nationalities of those companies:



As this graph illustrates, of the 119 companies that USTR was able to identify, 86 (72%) are U.S. companies. The countries with the next most companies likely subject to the DST are China and the United Kingdom (7 companies), France (6 companies), and Japan (5 companies). Of course, zero Indian companies appear on the graph above, because Indian companies enjoy an explicit exclusion from the tax. In short, the overwhelming majority of the companies subject to the DST are U.S. companies, and thus, U.S. companies bear the greatest burden of India's discriminatory approach.

India's explicit targeting of foreign companies faced stringent criticism in the public comments collected in this investigation. Commenters referred to India's approach as

[48] *International Tax Review*, "Discussion: Kamlesh Varshney talks about India's tax policy agenda," March 30, 2020, available at: https://www.internationaltaxreview.com/article/b1kxs1b3pvv2x1/discussion-kamlesh-varshney-talks-about-indias-tax-policy-agenda.

"extreme,"[49] "pernicious,"[50] "blatantly discriminatory,"[51] and "by definition discriminatory."[52] Other commenters noted that:

- "There is not even a pretense of even-handedness -- the measure applies exclusively to non-resident suppliers, and is hence an arbitrary or unjustified discrimination."[53]
- "The intention and result of the [DST] is to disadvantage U.S. e-commerce suppliers vis a vis domestic Indian e-commerce suppliers."[54]
- "The discriminatory nature of [the DST] is indisputable."[55]

In sum, and as the above-quoted comments highlight, the DST's applicability only to non-Indian companies is a clear-cut example of discrimination. What is more, the impact of this discrimination falls disproportionately on U.S. companies.

2. The DST is discriminatory because it targets digital services, but not similar services provided non-digitally

The DST discriminatorily targets a select group of digital service providers (most of which are U.S. companies), but does not tax companies that provide the same or very similar services in non-digital format. The discriminatory nature of the DST's focus on digital services is perhaps clearest when considering companies that provide content digitally. Under the DST, if a company were to sell a movie to an Indian consumer, and deliver that content digitally, the proceeds of the sale would be taxable. If a second company were to sell that very same movie to the very same Indian consumer, but do so in a store on a DVD, that sale would not be taxable under the DST. This differential treatment of like transactions is a textbook example of discrimination.

The OECD has several times cautioned against this discriminatory 'ring-fencing' approach, whereby digital companies are taxed, but non-digital companies that provide the same or similar services are excluded. For instance, in March 2019, the OECD issued a document pursuant to the Inclusive Framework on BEPS where it agreed that "it would be difficult, if not impossible, to 'ring-fence' the digital economy from the rest of the economy for tax purposes because of the increasingly pervasive nature of digitalization."[56] Consequently, it recommended

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[49] Public comment submitted by the Silicon Valley Tax Directors' Group, July 15, 2020, at 11.

[50] *See* Public comment submitted by the Information Technology Industry Council, July 15, 2020, at 20.

[51] Public comment submitted by Asia Internet Coalition, July 15, 2020, at 3.

[52] Public comment submitted by the Silicon Valley Tax Directors' Group, July 15, 2020, at 22.

[53] Public comment submitted by the Silicon Valley Tax Directors' Group, July 15, 2020, at 23.

[54] Public comment submitted by the Silicon Valley Tax Directors' Group, July 15, 2020, at 50.

[55] Public comment submitted by the Information Technology Industry Council, July 15, 2020, at 9.

[56] OECD, *Public Consultation Document: Addressing the Tax Challenges of the Digitalisation of the Economy*, February 13, 2019, at 5, available at: https://www.oecd.org/tax/beps/public-consultation-document-addressing-the-tax-challenges-of-the-digitalisation-of-the-economy.pdf.

changes to international tax rules that do not distinguish between digital and non-digital activities.[57] A subsequent OECD document also recognized "that it would be difficult, if not impossible, to ring-fence the digital economy from the rest of the economy for tax purposes" and therefore focused on a "systematic solution" applicable to all business models.[58]

Other entities have agreed that it is not possible or advisable to 'ring-fence' the digital economy. The International Chamber of Commerce endorsed the OECD's statement that it would be "impossible" to "ring-fence the digital economy."[59] The U.S. position—as expressed in international fora—is that any changes to the international tax system should apply across business models and not attempt to 'ring-fence' the digital economy.[60] An expert group of the European Commission agreed, acknowledging that "there should not be a special tax regime for digital companies. Rather the general rules should be applied or adapted so that 'digital' companies are treated the same way as others."[61]

Several of the public comments received during this investigation highlighted the discriminatory manner in which the DST singles out digital companies. For example, one commenter noted that "the tax only applies to sales made through digital companies, and thus excludes Indian … brick-and-mortar establishments that supply the same goods and services as the foreign digital businesses. There is an endless variety of Indian … physical marketplaces that compete with" non-Indian digital services companies.[62]

Given that U.S. companies are global leaders in the digital services sector, India's discriminatory treatment of digital companies will disproportionately impact U.S. firms. As one commenter explained: "by virtue of the fact that many U.S. companies are market leaders in the targeted business models, namely provision of goods and high value services over the internet, de-facto discrimination against U.S. companies results from the scope of the [DST]."[63]

In sum, the public comments echo the prevailing, long-standing international consensus: policies that target digital services, while exempting non-digital services, are not appropriate.

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[57] OECD, *Public Consultation Document: Addressing the Tax Challenges of the Digitalisation of the Economy*, February 13, 2019, at 24-25, available at: https://www.oecd.org/tax/beps/public-consultation-document-addressing-the-tax-challenges-of-the-digitalisation-of-the-economy.pdf.

[58] OECD, *Programme of Work to Develop and Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy*, May 2019, at 26, available at: https://www.oecd.org/tax/beps/programme-of-work-to-develop-a-consensus-solution-to-the-tax-challenges-arising-from-the-digitalisation-of-the-economy.pdf.

[59] International Chamber of Commerce (ICC), "Digital Tax Rules Should Be Global and Long-Term in Scope," *iccwbo.org*, March 22, 2018, available at: https://iccwbo.org/media-wall/news-speeches/icc-digital-tax-rules-global-long-term-scope/.

[60] *See* Isabel Gottlieb, "Don't 'Ring-Fence' Digital Economy: Treasury Official," *Bloomberg.Law*, March 27, 2018, https://news.bloomberglaw.com/tech-and-telecom-law/dont-ring-fence-digital-economy-treasury-official.

[61] EC Expert Group on Taxation of the Digital Economy, *Report*, May 28, 2014, at 5, available at: https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/gen_info/good_governance_matters/digital/report_digital_economy.pdf.

[62] Public comment submitted by the Information Technology Industry Council, July 15, 2020, at 14.

[63] Public comment submitted by the Silicon Valley Tax Directors' Group, July 15, 2020, at 49-50.

The DST disregards this consensus by discriminatorily taxing digital services companies, but not taxing non-digital companies that provide the same or similar services. Because U.S. companies are leaders in the digital services sector in India and around the world, U.S. companies bear the brunt of India's discriminatory approach.

3. Conclusion

As explained above, our investigation suggests that India's DST discriminates against U.S. companies. That discrimination takes two main forms: (1) explicitly targeting non-domestic firms, while exempting Indian companies; and (2) taxing digital services, but not taxing the same or similar services provided non-digitally. Both practices are discriminatory and both have outsized impact on U.S. digital services firms.

B. INDIA'S DST IS UNREASONABLE, BECAUSE IT IS INCONSISTENT WITH INTERNATIONAL TAX PRINCIPLES

In addition to discrimination, Section 301 also allows the USTR to act in relation to certain measures that are "unreasonable." The statute defines an "unreasonable" measure as one that "while not necessarily in violation of, or inconsistent with, the international legal rights of the United States is otherwise unfair and inequitable."[64] Tax measures that fail to comport with established principles of international taxation may be considered "unfair and inequitable," and thus, unreasonable under Section 301. USTR's analysis indicates that three aspects of India's DST are inconsistent with international tax principles, and thus, unreasonable under Section 301: the DST's failure to provide tax certainty to stakeholders (Section 1); the DST's extraterritorial application (Section 2); and the DST's application to revenue rather than income (Section 3).

1. The DST's failure to provide tax certainty to stakeholders contravenes international tax principles

As noted in Section II(A) above, the legislative process that led to adoption of the DST was rushed. The text of the DST first appeared publicly on March 23, 2020, and just four days later—without any public comment—the DST became law. This hurried process produced a law that stakeholders have found to be unclear and underdeveloped. These ambiguities contravene the core international taxation principle of tax certainty. The OECD recognized "certainty" as a "broad taxation principle[] that should apply to e-commerce" as early as 2003.[65] More recently, in 2014, the OECD proclaimed that "certainty" is one of the "fundamental principles of taxation."[66] India's DST provides no such certainty to stakeholders, and thus, contravenes this fundamental principle.

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[64] 19 U.S.C. § 2411(d)(3)(A).

[65] *See also* OECD, *Ottawa Taxation Framework* (2003), at 11-12, available at: https://www.oecd.org/tax/administration/20499630.pdf.

[66] OECD, *Addressing the Tax Challenges of the Digital Economy* (2014), at 30, available at: https://www.oecd-ilibrary.org/docserver/9789264218789-en.pdf?expires=1604330305&id=id&accname=guest&checksum=F2B6640E7909DBC57E97C18E168AF641.

In the public comments that the Government of India submitted in this investigation, it appeared to recognize the principle of tax certainty, noting that an "important objective of the [DST] is to provide greater clarity, certainty and predictability in respect of characterization of payments for digital services and consequent tax liabilities to all stakeholders, so as to minimize costs of compliance and administration and also minimize tax disputes in these matters."[67] By issuing a law that stakeholders believe lacks clarity, certainty, and predictability, India has failed to meet this objective.

Commenters noted that the DST is uncertain in many respects, and that India has failed to issue clarifying regulations.[68] One public comment included a detailed list of aspects of the DST requiring clarification that spanned nine pages.[69] Examples of these uncertainties include:

- The scope of services subject to the DST;
- The universe of companies liable to pay the DST;
- The applicability of the DST to intragroup transactions and re-seller/distributor arrangements;
- The proper method of calculating a company's tax base;
- The applicability of the DST to the sale of advertisements between non-residents;
- The applicability of the DST to the sale of data between non-residents; and
- When tax liability begins to accrue under the DST.[70]

Indeed, as one commenter explained, the DST is "unreasonable since it contains several terms that are unclear and overly broad … . Also, as a result of unclear provisions, companies cannot reasonably know the expectations required for compliance and thus, it is impossible to comply."[71]

USTR understands that multiple trade organizations have approached the Government of India with these concerns, seeking clarification on the various ambiguities described above. Despite these entreaties, India has failed to publish explanatory regulations,[72] leaving companies

[67] Public comment submitted by the Government of India, July 15, 2020, at para. 12.

[68] *See, e.g.*, Public comment from the U.S.-India Strategic Partnership Forum, July 15, 2020, at 3, 11 *et seq.*; Public comment submitted by the Silicon Valley Tax Directors' Group, July 15, 2020, at 51.

[69] Public comment submitted by the U.S.-India Strategic Partnership Forum, July 15, 2020, at 11 *et seq*.

[70] Public comment submitted by the U.S.-India Strategic Partnership Forum, July 15, 2020, at 11 *et seq*.

[71] Public comment submitted by the U.S.-India Strategic Partnership Forum, July 15, 2020, at 3.

[72] India did issue regulations describing the mechanics of how to pay the DST, but it has not issued regulations addressing the fundamental uncertainties described above. *See* Equalisation Levy (Amendment) Rules, 2020,

with uncertainty regarding key aspects of the DST. That being so, our investigation indicates that India has failed to provide tax certainty to stakeholders, and thus, has unreasonably contravened an important principle of international taxation.

2. The DST's extraterritorial reach contravenes international tax principles

Our investigation also indicates that the DST's extraterritorial application—*i.e.*, its targeting of revenues unconnected to a physical presence in India—contravenes prevailing international tax principles. As described in section III(B) above, the DST applies to digital services with a nexus to India, *i.e.*, services provided: (i) to a person resident in India; or (ii) to a non-resident in certain specified circumstances; or (iii) to a person who buys digital goods or services or both using an internet protocol address located in India.[73] However, no physical presence in India is required for the DST is to apply. Our investigation suggests that this taxation of revenue absent a physical presence in India is inconsistent with principles of international tax policy.

The international tax system reflects the principle that companies are not subject to a country's corporate tax regime in the absence of a territorial nexus to that country. This is reflected in international tax treaties, which typically establish that a company need not pay a country's corporate income tax unless it has a "permanent establishment" in that country. For instance:

- The OECD model tax treaty provides that the profits of an enterprise "shall be taxable" only in the country of which the enterprise is a national "unless the enterprise carries on business in [another country] through a permanent establishment situated therein."[74]

- The UN Model Treaty similarly provides that the profits of an enterprise are taxable in a country only if "the enterprise carries on business in [that country] through a permanent establishment situated therein."[75]

- The U.S. Model Tax Treaty and the U.S.-India Tax Treaty both contain similar provisions barring taxation absent a permanent establishment.[76]

October 28, 2020, available at: https://www.incometaxindia.gov.in/communications/notification/notification_87_2020.pdf. *See also* Public comment submitted by the Silicon Valley Tax Directors' Group, July 15, 2020, at 51 (noting that "the specific implementing guidelines of the [DST], except for the payment and return form, have still not been issued despite the fact that the first due date for payment under the tax was July 7, 2020.")

[73] DST at Section 165A(1).

[74] OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*, art. 7(1).

[75] UN, *Model Double Taxation Convention Between Developed and Developing Countries*, art. 7(1).

[76] *United States Model Income Tax Convention*, art. 7 ("Profits of an enterprise of a Contracting State shall be taxable only in that Contracting State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein."); U.S.-India Tax Treaty, art. 7(1) (same).

Each of these treaties defines "permanent establishment" as "a fixed place of business through which the business of an enterprise is wholly or partly carried on."[77] These treaties also provide that the term includes a place of management, branch, office, factory, workshop, and "place of extraction of natural resources."[78] A "permanent establishment" does not include, *inter alia*, the maintenance of a fixed place of business solely for the purpose of "purchasing goods or merchandise or of collecting information for the enterprise" or of "carrying on, for the enterprise, any other activity" "provided that … the overall activity of the fixed place of business, is of a preparatory or auxiliary character."[79] Other sources confirm that the requirement of a permanent establishment is the general rule in international tax policy.[80]

India's DST flips this rule on its head. Rather than limit the DST's applicability to companies with permanent establishments in India, the Indian tax applies only to companies without permanent establishments in India. This is not consistent with international tax principles.

Public comments received in this investigation noted that the DST's extraterritorial reach contravenes international taxation principles.[81] One commenter explained that "[t]he [DST]'s extraterritoriality is inconsistent with international tax principles and unusually burdensome for U.S. affected companies. The DST is imposed only on nonresidents, so by design all Indian resident persons are exempt from the tax. Thus, … the burden of the [DST] is designed to fall entirely on nonresidents."[82] A second commenter similarly observed that the DST is "inconsistent with international tax principles because [it] focus[es] on tax revenue earned by firms that lack a permanent establishment."[83]

In summary, our investigation suggests that the DST's extraterritorial application to revenues not connected to a company's physical presence in India contravenes international taxation principles.

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[77] OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*, art. 5(1); UN, *Model Double Taxation Convention Between Developed and Developing Countries*, art. 5(1); *United States Model Income Tax Convention*, art. 5(1); U.S.-India Tax Treaty, art. 5(1). Note that the treaty in paragraph 4 of Article 5 may also deem a permanent establishment to exist notwithstanding the general rule in paragraphs 1 and 2 of Article 5 if there is a dependent agent conducting certain activities on behalf of the foreign enterprise.

[78] OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*, art. 5(2); UN, *Model Double Taxation Convention Between Developed and Developing Countries*, art. 5(2); *United States Model Income Tax Convention*, art. 5(2); U.S.-India Tax Treaty, art. 5(2).

[79] OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*, art. 5(4); UN, *Model Double Taxation Convention Between Developed and Developing Countries*, art. 5(4); *United States Model Income Tax Convention*, art. 5(4); U.S.-India Tax Treaty, art. 5(3).

[80] *See, e.g.*, OECD, Inclusive Framework on Base Erosion and Profit Sharing, Action 7: Permanent establishment status, https://www.oecd.org/tax/beps/beps-actions/action7/.

[81] Public comment submitted by the Silicon Valley Tax Directors' Group, July 15, 2020, at 50; Public comment submitted by the Information Technology Industry Council, July 15, 2020, at 16-17; Public comment from the U.S.-India Strategic Partnership Forum, July 15, 2020, at 3.

[82] Public comment submitted by the Silicon Valley Tax Directors' Group, July 15, 2020, at 50.

[83] Public comment submitted by the Information Technology Industry Council, July 15, 2020, at 16-17.

3. The DST's application to revenue rather than income contravenes international tax principles

As described in Section III above, the DST applies to gross revenues generated from covered digital services.[84] Thus, it differs from a taxes on income (also called net profit), which tax a company's gross revenues minus its business expenses.[85] Our investigation indicates that the DST's application to revenue rather than income is inconsistent with prevailing principles of international taxation, which recognize income—not gross revenue—as an appropriate basis for taxation.

A variety of international tax treaties reflect the principle that corporate income, and not corporate gross revenue, is a proper basis for taxation. For instance, the OECD Model Treaty provides for the taxation of "business profits" and other types of income streams (dividends, interest, royalties, capital gains, etc.), but makes no provision for taxes on gross revenues.[86] The UN Model Treaty likewise has disciplines on taxing business profits and numerous other types of income, but has no such disciplines for taxes on gross revenues.[87] Moreover, the U.S. Model Tax Treaty, and scores of bilateral tax treaties—including the U.S.-India Tax Treaty—make no reference to taxes on gross revenues.[88] Thus, the system of international tax treaties reflects the international principle that income, not revenue, is the appropriate basis for corporate taxation.

Other sources confirm that the taxation of corporate income comports with international tax principles, but that the taxation of gross revenue does not. For example, Chapter 2 of the OECD publication *Addressing the Tax Challenges of the Digital Economy*, which is entitled "Fundamental Principles of Taxation," lists two bases for corporate taxation: income and consumption.[89] Taxation of gross revenue is not recognized. In practice, taxes on revenue are rare. One tax policy organization noted that "there are few recent empirical studies on gross [revenue] taxes because of their near-universal abandonment in developed countries."[90]

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[84] DST at Section 165A.

[85] *See, e.g.* United Nations, *Model Double Taxation Convention Between Developed and Developing Countries*, art. 7, 2017.

[86] OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*, art. 7, Dec. 18, 2017 (on business profits); *see id*. arts. 6, 8-21.

[87] United Nations, *Model Double Taxation Convention Between Developed and Developing Countries*, art. 7, 2017 (setting out disciplines on taxes of business profits); *id.* arts. 6, 8-21 (covering other types of income).

[88] *See United States Model Income Tax Convention*, art. 2, 2016 (setting out disciplines on "total income, or on elements of income"); *id.* art. 7 (establishing disciplines on taxes of "business profits"); U.S.-India Tax Treaty, arts. 2, 7.

[89] OECD, *Addressing the Tax Challenges of the Digital Economy*, ch. 2: "Fundamental Principles of Taxation," at 32-47 (2014). There are, of course, other appropriate bases for taxation besides income. Consumption is one generally accepted basis for taxation. Value-added taxes and sales taxes are examples of consumption taxes. However, the Indian DST is not structured as a tax on consumption.

[90] *See* Justin Roxx, "Gross Receipts Taxes: Theory and Recent Evidence," *Tax Foundation*, available at: https://taxfoundation.org/gross-receipts-taxes-theory-and-recent-evidence/.

Public comments received in this investigation highlighted the inconsistency between the DST's taxation of revenue and international tax principles.[91] One commenter described the DST's focus on revenue rather than income as a "striking departure from the norm."[92]

In sum, our investigation suggests that the DST's application to revenue instead of income is inconsistent with principles of international taxation.

4. Conclusion

As explained above, our investigation indicates that the DST's failure to provide tax certainty, extraterritorial application, and application to revenue rather than income are inconsistent with international tax principles. It follows that these same aspects of India's DST are unreasonable under Section 301.

C. India's DST Burdens or Restricts U.S. Commerce

USTR's investigation also addressed the question of whether India's DST burdens or restricts U.S. commerce. Our investigation suggests that it does. More specifically, the DST burdens U.S. commerce by, *inter alia*: obligating U.S. companies to pay tens of millions of dollars in new taxes (Section 1); taxing an unusually broad group of digital services (Section 2); forcing U.S. companies to undertake costly compliance measures (Section 3); and subjecting U.S. companies to double taxation (Section 4).

1. U.S. companies face an additional tax burden under the DST

Our investigation indicates that the DST burdens or restricts U.S. commerce by subjecting U.S. companies to additional tax burdens. USTR's analysis indicates that U.S. companies, in the aggregate, may face tax payments in excess of US$30 million per year under the DST. Many of the aspects of the DST discussed in this report exacerbate this financial burden on U.S. companies.

First, at a basic level, and as described in Section IV(A), the DST creates this tax burden by discriminatorily targeting non-Indian digital services companies. And as noted above, the DST has an inordinate discriminatory impact on U.S. firms, because U.S. firms are market leaders in the digital services sector.

Second, India's decision to disregard international tax principles by taxing revenue rather than profit exacerbates the burden on U.S. companies further still. This is most apparent in the case of low margin businesses. For example, if Company A generates US$100 million in revenue in India, it must pay US$2 million under the DST (a 2% tax on Company A's revenue). But if we assume that Company A incurred US$95 million in costs, and thus received just US$5 million in profit, it would still pay US$2 million under the DST—a sum equal to 40% of

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[91] Public comment submitted by the U.S.-India Strategic Partnership Forum, July 15, 2020, at 3; Public comment submitted by the Coalition of Services Industries, July 15, 2020, at 1.

[92] Public comment submitted by the Coalition of Services Industries, July 15, 2020, at 1.

Company A's profits. This issue is particularly salient given that many digital companies—including many U.S. companies expected to be subject to DST—are low- or zero-margin businesses.[93]

Third, unlike other digital services taxes that use high revenue thresholds to exempt small companies,[94] India's low revenue threshold of approximately US$267,000 means that small- and medium-sized companies will be subject to the tax. As one commenter noted, "[t]he Indian levy targets companies with a much lower revenue threshold—around $267,000. Many small- and mid-sized startups could be exposed to liability under the levy because of this threshold."[95] Another public commenter echoed these sentiments, noting that: "the Indian government set the revenue threshold significantly lower than the other DSTs (presumably because domestic companies were already carved out on the face of the measure) – requiring revenue of [approximately $267,000] – meaning that an unusually large swath of foreign companies will fall within the scope. This will result in substantial tax … costs for many U.S. companies, including smaller businesses and low-margin businesses."[96]

In sum, and as explained above, additional tax liability under the DST represents a burden for U.S. companies.

2. U.S. companies face taxation for a broad range of digital services under the DST

India's DST extends to a broad scope of digital services, which increases the tax burden on U.S. companies.[97] Other countries' digital services taxes typically cover: (1) digital advertising, (2) platform services, and (3) data-related services, but India's digital taxes are even more expansive. Through the DST and India's 2016 digital advertising tax, India taxes the three categories of digital services listed above, plus numerous additional services that other digital services taxes do not cover. Those services include cloud services, software-as-a-service, financial services, education services, and digital sales of a company's own goods. The chart below illustrates the breadth of services covered under India's DST as compared to other digital services taxes:

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[93] *See, e.g.*, Sara Ashley O'Brien, "Uber Says It Lost $1.8 Billion in 2018," *CNN*, Feb. 15, 2019, available at: https://www.cnn.com/2019/02/15/tech/uber-2018-financial-report/index.html; "Amazon's Product Sales Climb Nearly 20% in 2018, but only 8% in Q4," *Digital Commerce 360*, Jan. 31, 2019, available at: https://www.digitalcommerce360.com/2019/01/31/amazons-q4-sales/ (showing that Amazon's profit margin in 2018 was 5.7% and that its international operations "continue to lose money").

[94] For example, the local revenue threshold in France's digital services tax is €25 million. French Law, at Art. 299.III. Turkey's digital services tax includes a revenue threshold of about €2 million. Turkey's Law Regarding Digital Service Tax, at Article 4(1).

[95] Public comment submitted by Engine Advocacy, July 15, 2020, at 4.

[96] Public comment submitted by the Information Technology Industry Council, July 15, 2020, at 18.

[97] DST at Section 164(cb) (noting that the DST covers "(i) online sale of goods owned by the e-commerce operator; or (ii) online provision of services provided by the e-commerce operator; or (iii) online sale of goods or provision of services or both, facilitated by the e-commerce operator; or (iv) any combination of activities listed in clause (i), (ii) or clause (iii))."

<u>Categories of Digital Services Covered by Digital Services Taxes</u>

	India	Turkey	France	Italy	Spain	U.K.[98]	Austria
Advertising	✓[99]	✓	✓	✓	✓	✓	✓
Platform services	✓	✓	✓	✓	✓	✓	
Data-related services	✓	✓	✓	✓	✓	✓	
Content provision	✓	✓					
Sale of own goods	✓						
Education services	✓						
Software-as-a-service	✓						
Cloud services	✓						
Financial services	✓						

As the table above demonstrates, India's DST taxes a broader scope of services than other digital services taxes adopted around the world. This expands the universe of U.S. companies subject to the DST, and increases the tax burden that U.S. firms face.

Numerous public comments received in this investigation highlighted the unusually broad scope of India's DST. For example, commenters noted that:

- "The Indian measure is perhaps the broadest of the DSTs, as it applies to the sale of all goods or services by digital businesses to persons using an Indian IP address."[100]

- The DST is "extremely expansive."[101]

- "[D]ue to its sweeping scope" the DST "may have tax implications for a broad range of U.S. goods and services suppliers."[102]

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[98] The U.K. digital services tax applies to certain business models. Specifically, the U.K. digital services tax applies to businesses that provide a social media service, an internet search engine, or an online marketplace. It is possible that services such as education services could be determined to be taxable under the U.K.'s DST.

[99] Note that certain categories of digital advertising are covered by India's 2016 digital advertising tax, which is not the focus of this investigation.

[100] Public comment submitted by the Information Technology Industry Council, July 15, 2020, at 18.

[101] Public comment submitted by the Silicon Valley Tax Directors' Group, July 15, 2020, at 49.

[102] Public comment submitted by the Coalition of Services Industries, July 15, 2020, at 2.

- "[T]he Indian tax represents the broadest framing of a unilateral tax on e-commerce firms."[103]

- The DST's "scope is significantly broader than that of national European digital services taxes," and this is a "key concern[]."[104]

As these commenters note, and as the analysis above demonstrates, the scope of services covered under India's DST is unusually broad. This aspect of the DST expands the list of U.S. companies subject to the tax, increases the amount of tax those companies must pay, and exacerbates the burden U.S. companies face.

3. U.S. companies face considerable compliance costs in connection with the DST

U.S. companies also face significant costs to comply with the DST's payment and reporting requirements. As a threshold issue, companies will first need to ascertain whether they are liable to pay the DST—a task complicated by the lack of clarity in the law (discussed in Section (IV)(B)(1) above). One commenter noted that companies "will have to undertake costly tax planning to determine if they in fact owe tax, what their tax burden is, how to remit the tax."[105]

If a company determines that its India-related revenues are taxable, it will then face what one commenter described as "substantial administrative burdens in terms of compliance costs and greater uncertainty. Companies will need to engage in significant re-engineering of their internal business and financial reporting systems to ensure that they can accurately capture required information and comply with the DSTs."[106] One reason this sort of "reengineering" is necessary, is because India's DST only applies to revenue from services with a nexus to India, as defined in the DST.[107] This requires companies to revamp their systems to capture and track the information needed to determine whether specific instances of service provision meet the requirements for taxability under the DST. Companies were not previously required to categorize their work in this way. In addition to these direct "re-engineering" costs, companies also incur substantial opportunity costs whenever they divert valuable (and often scarce) engineering resources away from their core products.

One public comment described the compliance challenges associated with the DST as follows:

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[103] Public comment submitted by the Computer & Communications Industry Association, July 14, 2020, at 9.

[104] Public comment submitted by Asia Internet Coalition, July 15, 2020, at 3.

[105] Public comment submitted by Engine Advocacy, July 15, 2020, at 4.

[106] Public comment submitted by the Information Technology Industry Council, July 15, 2020, at 17. *See also* Public comment submitted by the Computer & Communications Industry Association, July 14, 2020, at 4 (noting that to comply with taxes like India's DST, "[f]irms are required to make complex determinations on whether covered digital activities were 'supplied in country', a determination that varies across different DST legislation and implementing guidelines.").

[107] DST at Sections 165A(1) and 165A(3).

> "Given the unique structure of this tax, companies will not have the information necessary for compliance at hand, and will need to build systems to capture and track the necessary information. Indeed, due to the broad scope, many suppliers remain completely unaware of the new obligation. This will lead to uneven and unfair compliance experiences. This imposes an unreasonable burden on nonresident suppliers, who will need to design and implement new systems to track and store the user data required to comply with this novel tax."[108]

The hasty manner in which the Indian government adopted the DST exacerbated the compliance challenges for affected companies. As one commenter noted: "As a result of the lack of notice or formal consultation, the short turnaround time for compliance makes it nearly impossible to comply with the [DST] – particularly in light of the significant time and resource constraints affecting most companies as a result of the ongoing global coronavirus pandemic, which notably began prior to the [Indian Government] adopting the [DST]."[109]

One concrete example that multiple commenters raised was the difficulty—and perhaps impossibility—of properly registering for an Indian tax registration number (or PAN) in time to pay the DST.[110] As one commenter noted: "[o]btaining a PAN is a time-consuming process, and as many non-residents may not have a PAN already, it will be impossible to meet the first compliance deadline. Imposing obligations with which it is impossible to comply is unduly burdensome for nonresident suppliers."[111]

Another specific example of a compliance challenge that commenters raised relates to the timing of payment deadlines. As one public comment explained: "there are several procedural aspects of the DST that make it onerous and difficult to comply, such as the e-commerce operator being required to deposit [its tax payment] by March 31st for the quarter ending on March 31st. As online sales take place until midnight, it is impossible to comply with this provision."[112]

All told, commenters estimate that compliance costs for India's DST will be "in the millions" for each company,[113] and note that "[t]he administrative burden associated with compliance is significant, even if firms can pay the tax."[114] In sum, the compliance challenges posed by the DST represent a significant burden for U.S. companies.

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[108] Public comment submitted by the Silicon Valley Tax Directors' Group, July 15, 2020, at 51; *see also* Public comment submitted by the Information Technology Industry Council, July 15, 2020, at 16.

[109] Public comment submitted by the U.S.-India Strategic Partnership Forum, July 15, 2020, at 2.

[110] Public comment submitted by the Information Technology Industry Council, July 15, 2020, at 18; Public comment submitted by the Silicon Valley Tax Directors' Group, July 15, 2020, at 51.

[111] Public comment submitted by the Silicon Valley Tax Directors' Group, July 15, 2020, at 51.

[112] Public comment submitted by the U.S.-India Strategic Partnership Forum, July 15, 2020, at 4-5.

[113] Public comment submitted by the Information Technology Industry Council, July 15, 2020, at 17.

[114] Public comment submitted by the Computer & Communications Industry Association, July 14, 2020, at 14.

4. U.S. companies face double taxation under the DST

The DST also burdens U.S. companies by subjecting them to double taxation. U.S. companies that pay the DST in India will still be subject to U.S. corporate income tax, creating two layers of taxation. Take, for example, hypothetical Company A discussed above. To recall, Company A earned US$100 million from India-connected services, and incurred US$95 million in India-related costs. Company A must pay US$2 million (2% of Indian revenue) to India pursuant to the DST, leaving it with just US$3 million in remaining profit. Company A must then also pay U.S. corporate income tax on its residual US$3 million. Avoiding double taxation of this sort is the focus of prominent model tax treaties as well as the U.S.-India Tax Treaty.[115]

The risk of double taxation was a concern noted in several public comments. Commenters explained that:

- There exist "risks of multiple taxation intrinsic to an extraterritorial tax on revenue."[116]

- "DSTs cause companies to be taxed twice, hindering innovation and economic growth."[117]

- The DST raises "[c]oncerns related to the risks of multiple taxation."[118]

- The DST includes "provisions that are inconsistent with international norms, including related to double-taxation … ."[119]

Furthermore, in some circumstances, companies subject to the DST could face triple taxation. Consider, for example, a French digital advertising company that directs advertising to Indian users. That company may be liable to pay the French digital services tax, the Indian DST, and French income tax on the revenue from that single advertising placement. Although the United States has no digital services tax, U.S. companies could nonetheless face triple taxation risk if they own subsidiaries in countries with national digital services taxes. The public comments USTR received highlighted the potential for triple taxation pursuant to the DST.[120]

In sum, the DST exposes firms to multiple layers of taxation, which represents a clear burden on U.S. digital services companies.

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[115] *See, e.g.*, OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*, preamble, Dec. 18, 2017; United Nations, *Model Double Taxation Convention Between Developed and Developing Countries*, preamble, 2017; *United States Model Income Tax Convention*, preamble, 2016; U.S.-India Tax Treaty, preamble.

[116] Public comment submitted by the Information Technology Industry Council, July 15, 2020, at 17.

[117] Public comment submitted by CompTIA, July 15, 2020, at 2.

[118] Public comment submitted by the Information Technology Industry Council, July 15, 2020, at 16.

[119] Public comment submitted by the U.S.-India Strategic Partnership Forum, July 15, 2020, at 3.

[120] Public comment submitted by the U.S.-India Strategic Partnership Forum, July 15, 2020, at 4; Public comment submitted by the Information Technology Industry Council, July 15, 2020, at 18.

5. Conclusion

As explained above, our investigation would support a finding that the DST burdens or restricts U.S. commerce by negatively impacting U.S. companies' operations in India. More specifically, our investigation suggests that the DST creates a significant new tax burden for U.S. companies, taxes an unusually broad array of digital services, forces U.S. companies to undertake costly compliance measures, and subjects U.S. companies to multiple layers of taxation.

V. Conclusions

USTR's investigation indicates that:

1. India's DST is discriminatory against U.S. companies;

2. India's DST contravenes prevailing international tax principles, and is therefore unreasonable; and

3. India's DST burdens or restricts U.S. commerce.

It follows that USTR's investigation would support a finding that India's DST is actionable under Section 301. .

ANNEX 1: INDIA'S 2016 EQUALISATION LEVY

(*2*) The cess leviable under sub-section (*1*), chargeable on the goods specified in the Eleventh Schedule shall be in addition to any other duties of excise chargeable on such goods under the Central Excise Act, 1944 or any other law for the time being in force. 1 of 1944.

1 of 1944. (*3*) The provisions of the Central Excise Act, 1944 and the rules made thereunder, including those relating to assessment, non-levy, short-levy, refunds, interest, appeals, offences and penalties, shall, as far as may be, apply in relation to the levy and collection of the cess leviable under sub-section (*1*) in respect of the goods specified in the Eleventh Schedule as they apply in relation to the levy and collection of the duties of excise on such goods under the said Act or the rules, as the case may be.

(*4*) The cess leviable under sub-section (*1*) shall be for the purposes of the Union and the proceeds thereof shall not be distributed among the States.

CHAPTER VIII

EQUALISATION LEVY

Extent, commencement and application.

163. (*1*) This Chapter extends to the whole of India except the State of Jammu and Kashmir.

(*2*) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

(*3*) It shall apply to consideration received or receivable for specified services provided on or after the commencement of this Chapter.

Definitions.

164. In this Chapter, unless the context otherwise requires,—

(*a*) "Appellate Tribunal" means the Appellate Tribunal constituted under section 252 of the Income-tax Act;

(*b*) "Assessing Officer" means the Income-tax Officer or Assistant Commissioner of Income-tax or Deputy Commissioner of Income-tax or Joint Commissioner of Income-tax or Additional Commissioner of Income-tax who is authorised by the Board to exercise or perform all or any of the powers and functions conferred on, or assigned to, an Assessing Officer under this Chapter;

(*c*) "Board" means the Central Board of Direct Taxes constituted under the Central Boards of Revenue Act, 1963; 54 of 1963.

(*d*) "equalisation levy" means the tax leviable on consideration received or receivable for any specified service under the provisions of this Chapter;

43 of 1961. (*e*) "Income-tax Act" means the Income-tax Act, 1961;

(*f*) "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;

(*g*) "permanent establishment" includes a fixed place of business through which the business of the enterprise is wholly or partly carried on;

(*h*) "prescribed" means prescribed by rules made under this Chapter;

(*i*) "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 by the Central Government in this behalf;

(*j*) words and expressions used but not defined in this Chapter and defined in the Income-tax Act, or the rules made thereunder, shall have the meanings respectively assigned to them in that Act.

Charge of equalisation levy.

165. (*1*) On and from the date of commencement of this Chapter, there shall be charged an equalisation levy at the rate of six per cent. of the amount of consideration for any specified service received or receivable by a person, being a non-resident from—

(*i*) a person resident in India and carrying on business or profession; or (*ii*) a non-resident having a permanent establishment in India.

(*2*) The equalisation levy under sub-section (*1*) shall not be charged, where—

(*a*) the non-resident providing the specified service has a permanent establishment in India and the specified service is effectively connected with such permanent establishment;

(*b*) the aggregate amount of consideration for specified service received or receivable in a previous year by the non-resident from a person resident in India and carrying on business or profession, or from a non-resident having a permanent establishment in India, does not exceed one lakh rupees; or

(*c*) where the payment for the specified service by the person resident in India, or the permanent establishment in India is not for the purposes of carrying out business or profession.

Collection and recovery of equalisation levy.

166. (*1*) Every person, being a resident and carrying on business or profession or a non-resident having a permanent establishment in India (hereafter in this Chapter referred to as assessee) shall deduct the equalisation levy from the amount paid or payable to a non-resident in respect of the specified service at the rate specified in section 165, if the aggregate amount of consideration for specified service in a previous year exceeds one lakh rupees.

(*2*) The equalisation levy so deducted during any calendar month in accordance with the provisions of sub-section (*1*) shall be paid by every assessee to the credit of the Central Government by the seventh day of the month immediately following the said calendar month.

(*3*) Any assessee who fails to deduct the levy in accordance with the provisions of sub-section (*1*) shall, notwithstanding such failure, be liable to pay the levy to the credit of the Central Government in accordance with the provisions of sub-section (*2*).

Furnishing of statement.

167. (*1*) Every assessee shall, within the prescribed time after the end of each financial year, prepare and deliver or cause to be delivered to the Assessing Officer or to any other authority or agency authorised by the Board in this behalf, a statement in such form, verified in such manner and setting forth such particulars as may be prescribed, in respect of all specified services during such financial year.

(*2*) An assessee who has not furnished the statement within the time prescribed under sub-section (*1*) or having furnished a statement under sub-section (*1*), notices any omission or wrong particular therein, may furnish a statement or a revised statement, as the case may be, at any time before the expiry of two years from the end of the financial year in which the specified service was provided.

(*3*) Where any assessee fails to furnish the statement under sub-section (*1*) within the prescribed time, the Assessing Officer may serve a notice upon such assessee requiring him to furnish the statement in the prescribed form, verified in the prescribed manner and setting forth such particulars, within such time, as may be prescribed.

Processing of statement.

168. (*1*) Where a statement has been made under section 167 by the assessee, such statement shall be processed in the following manner, namely:—

(*a*) the equalisation levy shall be computed after making the adjustment for any arithmetical error in the statement;

(*b*) the interest, if any, shall be computed on the basis of sum deductible as computed in the statement;

(*c*) the sum payable by, or the amount of refund due to, the assessee shall be determined after adjustment of the amount computed under clause (*b*) against any amount paid under sub-section (*2*) of section 166 or section 170 and any amount paid otherwise by way of tax or interest;

(*d*) an intimation shall be prepared or generated and sent to the assessee specifying the sum determined to be payable by, or the amount of refund due to, him under clause (*c*); and

(*e*) the amount of refund due to the assessee in pursuance of the determination under clause (*c*) shall be granted to him:

Provided that no intimation under this sub-section shall be sent after the expiry of one year from the end of the financial year in which the statement is furnished.

(*2*) For the purposes of processing of statements under sub-section (*1*), the Board may make a scheme for centralised processing of such statements to expeditiously determine the tax payable by, or the refund due to, the assessee as required under that sub-section.

Rectification of mistake.

169. (*1*) With a view to rectifying any mistake apparent from the record, the Assessing Officer may amend any intimation issued under section 168, within one year from the end of the financial year in which the intimation sought to be amended was issued.

(*2*) The Assessing Officer may make an amendment to any intimation under sub-section (*1*), either *suo motu* or on any mistake brought to his notice by the assessee.

(*3*) An amendment to any intimation, which has the effect of increasing the liability of the assessee or reducing a refund, shall not be made under this section unless the Assessing Officer has given notice to the assessee of his intention so to do and has given the assessee a reasonable opportunity of being heard.

(*4*) Where any such amendment to any intimation has the effect of enhancing the sum payable or reducing the refund already made, the Assessing Officer shall make an order specifying the sum payable by the assessee and the provisions of this Chapter shall apply accordingly.

Interest on delayed payment of equalisation levy.

170. Every assessee, who fails to credit the equalisation levy or any part thereof as required under section 166 to the account of the Central Government within the period specified in that section, shall pay simple interest at the rate of one per cent. of such levy for every month or part of a month by which such crediting of the tax or any part thereof is delayed.

Penalty for failure to deduct or pay equalisation levy.

171. Any assessee who—

(*a*) fails to deduct the whole or any part of the equalisation levy as required under section 166; or

(*b*) having deducted the equalisation levy, fails to pay such levy to the credit of the Central Government in accordance with the provisions of sub-section (*2*) of that section,

shall be liable to pay,—

(*i*) in the case referred to in clause (*a*), in addition to paying the levy in accordance with the provisions of sub-section (*3*) of that section, or interest, if any, in accordance with the provisions of section 170, a penalty equal to the amount of equalisation levy that he failed to deduct; and

(*ii*) in the case referred to in clause (*b*), in addition to paying the levy in accordance with the provisions of sub-section (*2*) of that section and interest in accordance with the provisions of section 170, a penalty of one thousand rupees for every day during which the failure continues, so, however, that the penalty under this clause shall not exceed the amount of equalisation levy that he failed to pay.

Penalty for failure to furnish statement.

172. Where an assessee fails to furnish the statement within the time prescribed under sub-section (*1*) or sub-section (*3*) of section 167, he shall be liable to pay a penalty of one hundred rupees for each day during which the failure continues.

Penalty not to be imposed in certain cases.

173. (*1*) Notwithstanding anything contained in section 171 or section 172, no penalty shall be imposable for any failure referred to in the said sections, if the assessee proves to the satisfaction of the Assessing Officer that there was reasonable cause for the said failure.

(*2*) No order imposing a penalty under this Chapter shall be made unless the assessee has been given a reasonable opportunity of being heard.

Appeal to Commissioner of Income-tax (Appeals).

174. (*1*) An assessee aggrieved by an order imposing penalty under this Chapter, may appeal to the Commissioner of Income-tax (Appeals) within a period of thirty days from the date of receipt of the order of the Assessing Officer.

(*2*) An appeal under sub-section (*1*) shall be in such form and verified in such manner as may be prescribed and shall be accompanied by a fee of one thousand rupees.

(*3*) Where an appeal has been filed under sub-section (*1*), the provisions of sections 249 to 251 of the Income-tax Act shall, as far as may be, apply to such appeal.

Appeal to Appellate Tribunal.

175. (*1*) An assessee aggrieved by an order made by the Commissioner of Income-tax (Appeals) under section 174 may appeal to the Appellate Tribunal against such order.

(*2*) The Commissioner of Income-tax may, if he objects to any order passed by the Commissioner of Income-tax (Appeals) under section 174, direct the Assessing Officer to appeal to the Appellate Tribunal against such order.

(*3*) An appeal under sub-section (*1*) or sub-section (*2*) shall be filed within sixty days from the date on which the order sought to be appealed against is received by the assessee or by the Commissioner of Income-tax, as the case may be.

(*4*) An appeal under sub-section (*1*) or sub-section (*2*) shall be in such form and verified in such manner as may be prescribed and, in the case of an appeal filed under sub-section (*1*), it shall be accompanied by a fee of one thousand rupees.

(*5*) Where an appeal has been filed before the Appellate Tribunal under sub-section (*1*) or sub-section (*2*), the provisions of sections 253 to 255 of the Income-tax Act shall, as far as may be, apply to such appeal.

Punishment for false statement.

176. (*1*) If a person makes a false statement in any verification under this Chapter or any rule made thereunder, or delivers an account or statement, which is false, and which he either knows or believes to be false, or does not believe to be true, he shall be punishable with imprisonment for a term which may extend to three years and with fine.

(*2*) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, an offence punishable under sub-section (*1*) shall be deemed to be non-cognizable within the meaning of that Code. 2 of 1974.

Institution of prosecution.

177. No prosecution shall be instituted against any person for any offence under section 176 except with the previous sanction of the Chief Commissioner of Income-tax.

Application of certain provisions of Income-tax Act.

178. The provisions of sections 120, 131, 133A, 138, 156, Chapter XV and sections 220 to 227, 229, 232, 260A, 261, 262, 265 to 269, 278B, 280A, 280B, 280C, 280D, 282 and 288 to 293 of the Income-tax Act shall so far as may be, apply in relation to equalisation levy, as they apply in relation to income-tax.

Power to make rules.

179. (*1*) The Central Government may, by notification in the Official Gazette, make rules for carrying out the provisions of this Chapter.

(*2*) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(*a*) the time within which and the form and the manner in which the statement shall be delivered or caused to be delivered or furnished under section 167;

(*b*) the form in which an appeal may be filed and the manner in which it may be verified under sections 174 and 175;

(*c*) any other matter which is to be, or may be, prescribed.

(*3*) Every rule made under this Chapter shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

180. (*1*) If any difficulty arises in giving effect to the provisions of this Chapter, the Central Government may, by order published in the Official Gazette, not inconsistent with the provisions of this Chapter, remove the difficulty: Power to remove difficulties.

Provided that no such order shall be made after the expiry of a period of two years from the date on which the provisions of this Chapter come into force.

(*2*) Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament.

CHAPTER IX

THE INCOME DECLARATION SCHEME, 2016

181. (*1*) This Scheme may be called the Income Declaration Scheme, 2016. Short title and commencement.

(*2*) It shall come into force on the 1st day of June, 2016.

182. In this Scheme, unless the context otherwise requires,— Definitions.

(*a*) "declarant" means a person making the declaration under sub-section (*1*) of section 183**;**

43 of 1961. (*b*) "Income-tax Act" means the Income-tax Act, 1961;

(*c*) all other words and expressions used herein but not defined and defined in the Income-tax Act shall have the meanings respectively assigned to them in that Act.

183. (*1*) Subject to the provisions of this Scheme, any person may make, on or after the date of commencement of this Scheme but before a date to be notified by the Central Government in the Official Gazette, a declaration in respect of any income chargeable to tax under the Income-tax Act for any assessment year prior to the assessment year beginning on the 1st day of April, 2017— Declaration of undisclosed income.

(*a*) for which he has failed to furnish a return under section 139 of the Income-tax Act;

(*b*) which he has failed to disclose in a return of income furnished by him under the Income-tax Act before the date of commencement of this Scheme;

(*c*) which has escaped assessment by reason of the omission or failure on the part of such person to furnish a return under the Income-tax Act or to disclose fully and truly all material facts necessary for the assessment or otherwise.

(*2*) Where the income chargeable to tax is declared in the form of investment in any asset, the fair market value of such asset as on the date of commencement of this Scheme shall be deemed to be the undisclosed income for the purposes of sub-section (*1*).

(*3*) The fair market value of any asset shall be determined in such manner, as may be prescribed.

(*4*) No deduction in respect of any expenditure or allowance shall be allowed against the income in respect of which declaration under this section is made.

ANNEX 2: INDIA'S 2020 EQUALISATION LEVY (THE DST)

(*D*) after sub-clause (*ii*), the following sub-clause shall be inserted, namely:—

"(*iii*) the difference between the settlement price and the strike price, in respect of transaction at serial number 7 of the Table in section 117.".

151. In sections 119, 120 and 132A of the principal Act, for the words "recognised association" wherever they occur, the words "recognised stock exchange" shall be substituted with effect from the 1st day of April, 2020. Amendment of sections 119, 120 and 132A.

PART VI

AMENDMENT TO THE FINANCE ACT, 2016

152. The provisions of this Part shall come into force on the 1st day of April, 2020. Commencement of this Part.

153. In the Finance Act, 2016,— Amendment of Act 28 of 2016.

(*i*) in section 163, in sub-section (*3*), for the word "Chapter", the words, letters and figures "Chapter, and to consideration received or receivable for e-commerce supply or services made or provided or facilitated on or after the1st day of April, 2020" shall be substituted;

(*ii*) in section 164,—

(*A*) after clause (*c*), the following clause shall be inserted, namely:—

'(*ca*) "e-commerce operator" 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;

(*cb*) "e-commerce supply or services" means—

(*i*) online sale of goods owned by the e-commerce operator; or

(*ii*) onlie provision of services provided by the e-commerce operator; or

(*iii*) online sale of goods or provision of services or both, facilitated by the e-commerce operator; or

(*iv*) any combination of activities listed in clause (*i*), (*ii*) or (*iii*)';

(*B*) in clause (*d*), after the words "specified service", the words "or e-commerce supply or services" shall be inserted;

(*iii*) in section 165, for the marginal heading, the following marginal heading shall be substituted, namely:—

"Charge of equilisation levy on specified services";

(*iv*) after section 165, the following section shall be inserted, namely:—

'165A. (*1*) On and from the 1st day of Apirl, 2020, there shall be charged an equalisation levy at the rate of two per cent. of the amount of consideration received or receivable by an e-commerce operator from e-commerce supply or services made or provided or facilitated by it— Charge of Equalisation levy on e-commerce supply of services.

(*i*) to a person resident in India; or

(*ii*) to a non-resident in the specified circumstances as referred to in sub-section (*3*); or

(*iii*) to a person who buys such goods or services or both using internet protocol address located in India.

(*2*) The equalisation levy under sub-section (*1*) shall not be charged—

(*i*) where the e-commerce operator making or providing or facilitating e-commerce supply or services has a permanent establishement in India and such e-commerce supply or services is effectively connected with such permanent establishment;

(*ii*) where the equalisation levy is leviable under section 165; or

(*iii*) sales, turnover or gross receipts, as the case may be, of the e-commerce operator from the e-commerce supply or services made or provided or facilitated as referred to in sub-section (*1*) is less than two crore rupees during the previous year.

(*3*) For the purposes of this section, "specified circumstances" mean—

(*i*) sale of advertisement, which targets a customer, who is resident in India or a customer who accesses the advertisement though internet protocol address located in India; and

(*ii*) sale of data, collected from a person who is resident in India or from a person who uses internet protocol address located in India.';

(*v*) in serction 166, in sub-section (*1*), for the words "equalisation levy", the words, brackets and figures "equalisation levy referred to in sub-section (*1*) of section 165" shall be substituted;

(*vi*) in section 166, for the marginal heading, the following marginal heading shall be substituted, namely:—

"Collection and recovery of equalisation levy on specified services.";

(*vii*) after section 166, the following section shall be inserted, namely:—

Collection and recovery of Equalisation levy on e-commerce supply or services.

"166A. The equalisation levy referred to in sub-section (*1*) of section 165A, shall be paid by even e-commerce operator to the credit of the Central Government for the quarter of the financial year ending with the date specified in column (*2*) of the Table below by the due date specified in the corresponding entry in column (*3*) of the said Table:

TABLE

Serial number	Date of ending of the quarter of financial year	Due date of the financial year
(1)	(2)	(3)
1.	30th June	7th July
2.	30th September	7th October
3.	31st December	7th January
4.	31st March	31st March.";

(*viii*) in section 167,—

(*A*) in sub-section (*1*),—

(*a*) for the word "assessee", the words "assessee or e-commerce operator" shall be substituted;

(*b*) for the words "specified services", the words "specified services or e-commerce supply or services, as the case may be," shall be substituted;

(*B*) in sub-section (*2*),—

(*a*) for the word "assessee", the words "assessee or e-commerce operator" shall be substituted;

(*b*) for the words "specified services was provided", the words "specified services was provided or e-commerce supply or services was made or provided or facilitated" shall be substituted;

(*C*) in sub-section (*3*), for the words "assessee" at both the places where it occurs, the words "assessee or e-commerce operator" shall be substituted;

(*ix*) in section 168,—

(*i*) in sub-section (*1*),—

(*A*) for the word "assessee" wherever it occurs, the words "assessee or e-commerce operator" shall be substituted;

(*B*) in clause (*b*), for the words "sum deductible", the words "sum deductible or payable, as the case may be," shall be substituted;

(*C*) in clause (*c*), for the word and figure "section 166", the words, figures and letter "section 166 or section 166A" shall be substituted;

(*D*) in the proviso, for the word "statement", the words "statement or revised statement" shall be substituted;

(*ii*) in sub-section (*2*), for the word "assessee", the words "assessee or e-commerce operator" shall be substituted;

(*x*) in section 169,—

(*i*) in sub-section (*2*), for the word "assessee", the words "assessee or e-commerce operator" shall be substituted;

(*ii*) in sub-section (*3*), for the word "assessee", wherever it occurs, the words "assessee or e-commerce operator" shall be substituted;

(*iii*) in sub-section (*4*), for the word "assessee", the words "assessee or e-commerce operator" shall be substituted;

(*xi*) in section 170,—

(*A*) for the word "assessee" the words "assessee or e-commerce operator" shall be substituted;

(*B*) for the word and figures "section 166", the words, figures and letter "section 166 or section 166A" shall be substituted;

(*xii*) in section 171,—

(*i*) for the word "assessee" the words "assessee or e-commerce operator" shall be substituted;

(*ii*) after clause (*a*), the following clause shall be inserted, namely:—

"(*aa*) fails to pay the whole or any part of the equalisation levy as required under section 166A; or";

(*iii*) in clause (*b*),—

(*a*) for the words "equalisation levy", the words, brackets and figures "equalisation levy referred to in sub-section (*1*) of section 165" shall be substituted;

(*b*) in the long line, in sub-clause (*i*), for the words "deduct; and", the following shall be substituted, namely:—

"deduct;

(*ia*) in the case referred to in clause (*aa*), in addition to the levy in accordance with the provisions of that section, or interest, in any, in accordance with the provisions of section 170, a penalty equal to the amount of equalisation levy that he failed to pay; and";

(*xiii*) in section 172, for the word "assessee", the words "assessee or e-commerce operator" shall be substituted;

(*xiv*) in section 173,—

(*i*) in sub-section (*1*), for the word "assessee", the words "assessee or e-commerce operator" shall be substituted;

(*ii*) in sub-section (*2*), for the word "assessee", the words "assessee or e-commerce operator" shall be substituted;

(*xv*) in section 174, in sub-section (*1*), for the word "assessee", the words "assessee or e-commerce operator" shall be substituted;

(*xvi*) in section 175,—

(*i*) in sub-section (*1*), for the word "assessee", the words "assessee or e-commerce operator" shall be substituted;

(*ii*) in sub-section (*3*), for the word "assessee", the words "assessee or e-commerce operator" shall be substituted;

(*xvii*) in section 178, for the word and figures "sections 120" the word and figures "sections 119, 120" shall be substituted;

(*xviii*) in section 180, in sub-section (*1*), for the words "expiry of a period of two years from the date on which the provisions of this Chapter come into force", the figures, letters and words "31st day of March, 2022" shall be substituted.

PART VII

AMENDMENT TO THE FINANCE ACT, 2018

Amendment of Sixth Schedule to Act 13 of 2018.

154. In the Finance Act, 2018, in the Sixth Schedule, against Item Nos. 1 and 2, for the entry in column (*3*), the entry "Rs. 18 per litre" shall be substituted.

ANNEX 3: LETTER FROM AMBASSADOR ROBERT LIGHTHIZER TO THE INDIAN GOVERNMENT DATED JUNE 2, 2020

THE UNITED STATES TRADE REPRESENTATIVE
EXECUTIVE OFFICE OF THE PRESIDENT
WASHINGTON

June 2, 2020

Minister Piyush Goyal
Ministry of Commerce and Industry
New Delhi, India

Dear Minister Goyal:

I am writing to inform you that, in accordance with Chapter 1 of Title III of the Trade Act of 1974 (known as Section 301), I have determined to initiate a Section 301 investigation of the digital services tax (DST) adopted by India in March 2020. In particular, the investigation addresses a 2% tax (i.e., equalisation levy) on online sales of goods and services to, or aimed at, persons in India, applicable only to non-resident companies.

The investigation will initially consider several problematic aspects of DSTs: (1) whether the tax would amount to discrimination against U.S. companies; (2) whether the tax would have retroactive elements; and (3) whether the tax diverges from norms reflected in the U.S. tax system and the international tax system due to, *e.g.*, possible extraterritorial application, or a purpose of penalizing certain technology companies for their commercial success. Depending on the course of the investigation, other aspects and features of the measure might also be included.

In accordance with Section 303 of the Trade Act of 1974, I hereby request consultations with the Government of India regarding this matter. These issues are of great concern to the Government of the United States. I look forward to working with you in a cooperative manner to resolve this matter.

Sincerely yours,

Robert E. Lighthizer