

OIDAR SERVICES: TAXING THE UNTAXED IN INDIA'S GST REGIME

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ABSTRACT:

This study is an attempt to understand the universal concept of **Neutrality of Value added tax (VAT)** in cross border trade through one of the provision introduced in the latest Goods and Services Tax Act ("GST") by Government of India, known as '**OIDAR Services**'. The concept of Neutrality of VAT states that wherein the business in similar situations carrying out similar transactions should be subject to similar level of taxation. Further, with respect to level of taxation, the foreign business should not be in a disadvantaged or advantaged position as compared to domestic business in the jurisdiction where the tax may be due or paid.

With the introduction of OIDAR Services in GST with effect from 01st July 2017, it will provide a level playing field to the online domestic service provider vis-à-vis the supplier of services located in a non-taxable Territory, who were earlier out of the tax net, now need to pay the applicable taxes which are due to India.

KEYWORDS: OIDAR Services, Goods and Service Tax, GST, non-taxable online recipient, Neutrality of VAT

1.0 BACKGROUND

1.1 The Constitution of India vide Article 269A states that the supply of goods, or services, or both in the course of import into the territory of India shall be deemed to be in the course of inter-State trade or commerce and Integrated Goods and Service Tax (“IGST”) would be levied on such transactions. While IGST on import of services would be leviable under the IGST Act 2017, the levy of the IGST on import of goods would be levied under the Customs Act, 1962 read with the Custom Tariff Act, 1975. The importer of services will have to pay the tax based on Reverse Charge Basis (“RCB”) in case of Business to business (i.e. B2B) transactions. However, in respect of import of Online Information and Database Access or Retrieval Services (“OIDAR”) by unregistered, non-taxable recipients (i.e. B2C), the supplier located outside India shall be responsible for payment of taxes. Either the supplier will have to take Registration and charge GST on its invoices or will have to appoint a person in India for payment of taxes¹.

1.2 The OIDAR Services are those services which are essentially automated services and involve minimal human intervention. If the OIDAR Services which are received by an unregistered or non-taxable recipient (i.e. B2C) and are supplied by a supplier located outside India. Then the supplier of services who are located in a non-taxable territory (i.e. outside India) shall be the person liable for paying integrated tax on supply of services. This ensures that service providers (i.e. a non-resident service provider) would be chargeable to GST tax. Hence no additional benefit/ advantages would be available to foreign suppliers with respect of liability of GST taxes as compared to similar supply made by Indian Resident suppliers to same consumer in India.

1.3 The Government of India is introducing Goods and Services Tax regime in whole of India with effect from 01st July 2017 onwards.

2.0 OIDAR SERVICES IN INDIAN CONTEXT²

2.1 As per section 2(17) of the Integrated Goods and Services Act 2017 (“IGST Act”) “OIDAR services” means services whose delivery is mediated by information technology over internet or electronic network, the supply of which is essentially automated involving

¹ Source: www.cbec.gov.in

² Earlier with effect from 01st December 2016 under Service Tax regime, the Government of India vide Notification No. 46, 47, 48, & 49 /2016-17 dated 9th November 2016 withdrew the Service tax Exemption on OIDAR Services pertaining to services provided by a person located in a non-taxable territory and received by a non-taxable online recipient (i.e. B2C). Thus, making it a taxable service on which service tax was levyable from 1st December onwards only, prior to that no service tax was applicable on such services.

minimal human intervention and impossible to ensure in absence of information technology.

Further, it includes electronic services such as:

- i. Advertising on internet;
- ii. Providing cloud services;
- iii. Provision of e-books, movie, music, software and other intangibles via telecommunication networks or internet;
- iv. Providing data or information, retrievable or otherwise, to any person, in electronic form through a computer network;
- v. Online supplies of digital content (movies, television shows, music, and the likes etc.)
- vi. Digital data storage; and
- vii. Online gaming

2.2 Further, section 14(1) of the IGST Act 2017 states that on supply of OIDAR services by any person located in a **non-taxable territory** and received by a **non-taxable online recipient**, the supplier of services located in a non-taxable territory shall be the person liable for paying integrated tax on such supply of services.

2.3 Non-Taxable Territory has not been defined in the Act. However, taxable territory has been defined which means the territory to which the provision of IGST Act applies. Thus, the Non-Taxable territory would mean territories which are outside India.

2.4 Further, section 2(16) of the IGST Act 2017 defines “non-taxable online recipient” as any Government, local authority, governmental authority, an individual or any other person not registered and receiving online information and database access or retrieval services in relation to any purpose other than commerce, industry or any other business or profession, located in the taxable territory.

2.5 In addition to the above, an illustrative list of non-OIDAR services were provided in the Service tax Circular No. 202/12/2016-ST dated 9th November 2016, which are mentioned herein below:-

- i. Supplies of goods, where the order and processing is done electronically
- ii. Supplies of physical books, newsletters, newspapers or journals
- iii. Services of lawyers and financial consultants who advise clients through email
- iv. Booking services or tickets to entertainment events, hotel accommodation or car hire
- v. Educational or professional courses, where the content is delivered by a teacher over the internet or an electronic network (in other words, using a remote link)

- vi. Offline physical repair services of computer equipment
- vii. Advertising services in newspapers, on posters and on television

It has also been clarified therein that the use of the Internet or any electronic means of communication, to **communicate or facilitate the outcome of the service**, does not always mean that a company offers OIDAR services.

2.6 Further, as per sub-section 12 of section 13 of the IGST Act 2017, the place of supply of OIDAR Services shall be the location of the Recipient of Services. (i.e., Destination Based Taxation). In addition to the above, explanation to the section 13(12) of the IGST Act, 2017 provides that a person receiving such services shall be **deemed** to be located in the taxable territory, if **any two** of the following **non-contradictory** conditions are satisfied, namely:-

- (a) The location of address presented by the recipient of services through internet is in the taxable territory;
- (b) the credit card or debit card or store value card or charge card or smart card or any other card by which the recipient of services settles payment has been issued in the taxable territory;
- (c) The billing address of the recipient of services is in the taxable territory;
- (d) The internet protocol address of the device used by the recipient of services is in the taxable territory;
- (e) The bank of the recipient of services in which the account used for payment is maintained is in the taxable territory;
- (f) The country code of the subscriber identity module card used by the recipient of services is of taxable territory;
- (g) The location of the fixed land line through which the service is received by the recipient is in the taxable territory.

3.0 SIMILAR PROVISION AVAILABLE IN UK LAW– NOTICE 741A³

3.1 These rules apply where a UK business meets all of the following criteria: -

- supplies digital services from the UK to another EU member state (goods and non-digital services sold over the internet are not within scope)
- supplies those services to a private consumer in another EU member state
- Charges for that supply (digital services provided free of charge are outside the scope of VAT)

³ As per UK VAT Law, this notice explains how to determine the place of supply

3.2 The Digital services include Radio and Television Services, Telecommunication Services, and **electronically supplied** services. Further, using the internet or some electronic means of communication, just to communicate or facilitate trading doesn't always mean that a business is supplying e-services.

3.3 Electronically supplied covers e-services which are automatically delivered over the internet, or an electronic network, where there's minimal or no human intervention. All 'e-services' that are 'electronically supplied' in the ways outlined above are 'digital services' and are covered by the rule changes

3.4 Examples of electronic supplies and whether they're 'digital services'

Service	E-service	Electronically supplied	Covered by 741A
PDF document manually emailed by seller	Yes	No	No
PDF document automatically emailed by seller's system	Yes	Yes	Yes
PDF document automatically downloaded from site	Yes	Yes	Yes
Stock photographs available for automatic download	Yes	Yes	Yes
Live webinar	No	No	No
Online course consisting of pre-recorded videos and downloadable PDFs	Yes	Yes	Yes
Online course consisting of pre-recorded videos and downloadable PDFs plus support from a live tutor	Yes	No	No
Individually commissioned content sent in digital form for example, photographs, reports, medical results	Yes	No	No
Link to online content or download sent by manual email	Yes	Yes	Yes

3.5 In addition to the above, if the Digital Services are supplied and the customer doesn't provide a VAT registration number (VRN), then it should be treated as a business to consumer supply and charge the VAT due in the customer's member state.

3.6 If a customer is unable to supply a VRN but claims they're 'in business' but not VAT registered (because, for example, they're below their member state's VAT registration

threshold) then other evidences of customer's business status can be accepted such as a link to the customer's business website or other commercial documents.

3.7 It would be the decision of the supplier whether to accept alternative evidence that the customer is 'in businesses and customer can't compel the supplier to treat a supply as business to business if they haven't provided a valid VRN.

3.8 If the supplier accepts that customer is in business, then the supply doesn't come within the scope of this business to consumer arrangements. In a cross-border business to business supply the customer will be responsible for accounting for any VAT due to the tax authorities in their member state through reverse charge mechanism. In other words, UK provisions are similar to the provisions in India.

4.0 AN ABERRATIONS IN OIDAR SERVICES

4.1 Keeping in view, the above OIDAR provisions, the taxes could be applicable wherein the location of the recipient of services would be deemed to be in India even though the recipient is outside the taxable territory.

4.2 A simple example would be, say XYZ Inc., of USA, provides OIDAR services to a Subsidiary of an Indian Company located in USA. The employee of the Subsidiary happens to be in India for an official trip at the time of receipt of services. He uses the internet infrastructure of its Indian Holding Company and downloads the software which is purchased online from the Vendor's website. Further the online payment were also made by the Indian Holding Company (through its Credit or Debit card), which was subsequently reimbursed by its subsidiary.

4.3 Sub-section 13 of section 12 of the IGST Act 2017, states that if any two of the non-contradictory conditions are satisfied, the location of the recipient of the services would be deemed to be in the taxable territory (i.e., in India). If we apply these provisions to the above facts, we may notice that two conditions as mentioned in para 2.6 are being satisfied namely:-

(b) the credit card or debit card or store value card or charge card or smart card or any other card by which the recipient of services settles payment has been issued in the taxable territory; and

(d) The internet protocol address of the device used by the recipient of services is in the taxable territory.

4.4 In view of the above discussion, XYZ Inc., USA shall be liable to pay integrated tax (i.e., IGST) in India towards supply of OIDAR Services, since place of supply is deemed to be located in

India. The supplier of OIDAR Services shall for the purpose of payment of Integrated Tax, shall take single registration under Simplified Registration Scheme in Form **GST REG-10**⁴ and shall be granted registration in **FORM GST REG-6**⁵.

5.0 CONCLUSION

5.1 The International VAT/GST guidelines issued by OECD states while explaining the principle of “Neutrality of VAT” vide its Guideline 2.2 that “*business in similar situations carrying out similar transactions should be subject to similar level of taxation*”. Further, it also stated in guideline 2.4 that “*with respect to the level of taxation, foreign business should not be disadvantaged or advantaged compared to domestic business in the jurisdiction where the tax may be due or paid.*”

5.2 In view of the above guidelines issued by OECD, the introduction of the taxability of the OIDAR Services by the Government of India earlier vide in Service tax regime and then through GST legislation is a step in a right direction. This will provide a level playing field to the online domestic service provider vis-à-vis the supplier of services located in a non-taxable Territory, who were earlier out of the tax net, now need to pay the applicable taxes which are due to India.

⁴ Application Form for Registration for Non-Resident Taxable Person

⁵ Form for grant of Registration Certificate