



OIDAR SERVICES - PERPLEXITIES CONTINUE

Background

Internet is an invaluable tool that has made our life easier and more efficient in countless ways. It has become a vital tool in education, providing access to a vast array of resources that are otherwise unavailable. Additionally, it has enabled businesses to expand their reach, increase their customer base, and improve their services. Because of the comfort attached with the services offered online, the volume of services consumed via internet has grown exponentially.

Eying an opportunity to increase the tax revenue, in the Finance Bill, 2023, the government has introduced changes in the definition of Online Information and Database Access or Retrieval (OIDAR) Services.

The aim of this article is to discuss the changes brought in the definition of OIDAR services and its potential impact on taxability of such services.

OIDAR services

The concept of OIDAR services under GST was borrowed from the erstwhile Service Tax regime. As per definition, OIDAR services are those whose delivery is mediated through information technology over the internet, with the key characteristic being the rendering of such services is essentially automated, involving minimal human intervention and impossible to ensure in absence of information technology. The definition also includes specified services viz. online advertising, cloud services etc.

but that makes it an inclusive definition allowing room for other services not specified here to also be OIDAR services.

Having said that, to qualify under the definition of OIDAR services, following conditions need to be fulfilled:

- Delivery of service should be through internet
- It should be impossible to render the services without information technology
- The delivery of service should be essentially automated and involve minimal human intervention

The concept of taxation of OIDAR services puts the onus on overseas companies providing such services to Indian customers who are not registered under GST and using such services for non-business purposes. Point to note here is that the GST registered customer in India is anyway responsible to pay GST on reverse charge basis on import of services, including OIDAR services. So, the trigger for GST levy on the overseas supplier is when such services are supplied to non-registered customers only. In such cases, the overseas supplier needs to register itself under GST and comply with all relevant regulations including payment of GST.

Impact of amendments made

The amendments made now vide the Finance Act, 2023, in the definition of OIDAR services have a far reaching impact on all such services and on overseas suppliers of such services. These are:

- From the three essential conditions as explained above, the condition that the service should be essentially automated and involve minimal human intervention has been removed
- The definition of ‘non-taxable online recipient’ has been amended to include any unregistered person receiving OIDAR service, irrespective of the usage of such services for business or non-business purposes.

While the latter amendment does simplify the matters a bit, but the former amendment leads to not just continuing, but increasing the perplexity of coverage on such services. You will, naturally, ask why so? Let us try to answer that question.

Minimum human intervention

Taking the first amendment first. The phrase “minimum human intervention” has no guidance or judicial precedent anywhere in the GST regulations, nor has any clarifications been issued by the authorities. What threshold constitutes “minimum” or which all activities would fall under substantial automation has always been the subject matter of litigation. For example, in one of the Advance Rulings, the authority has taken a view that in an online test, the scoring by the human scorer for an essay-based responses render the element of human intervention more than the minimal, thereby disqualifying it as an OIDAR service. However, the said Ruling was overturned by the Appellate Authority for Advance Ruling, and it was held that the scoring done by the human scorer is to be regarded as minimum human intervention as all other parts of service like registration etc are done online without any human intervention. One may say that if this was the case, then doing away with the condition should resolve the ambiguity. Alas, if only this was the case! By doing away with this condition, now the canvas is full blank, and any and every activity of supply of service over the internet has the potential of falling under the mischief of OIDAR services. So, with a simple stroke of the eraser, instead of doing away with the controversy, it has been multiplied manifold.

Now, the overseas suppliers of services need to reassess the nature of services in cases where, directly or indirectly, information technology is being used for rendering services. If it is not possible to render such services without the use of information technology, then, the services can potentially qualify for OIDAR services and attract levy. But the issues here are how to judge that a service can or cannot be rendered without the use of information technology. To give an example, a student residing in India is pursuing a course from a foreign university located at Australia. All the services of the university like registration in the course, study material, live classes by the teachers, exams etc. are provided with the help of internet. Prior to the amendment, it could have been argued that since live classes are held over video and internet, human intervention is high. Without teachers teaching in front of camera, education was not being imparted. But now, that test does not hold true. Now, live classes will stand at par with recorded lectures. While the university can take a stand that all the aforesaid services can be rendered through physical mode also without the use of information technology, but the counter argument of the authorities will be that in-person classes are separate and distinct from classes over the internet and the two cannot be equated. Online classes are a supply which necessitate use of the internet and fall under OIDAR services.

The exporter of services are also affected. Where earlier, their services would have been treated as exports and zero-rated if not considered as OIDAR services, now if their services are determined as OIDAR services under the amended definition, then, based on satisfying any two of the non-contradictory conditions laid down in Explanation to Section 13(12), would render the services taxable. It is more important for the Indian businesses to assess their services and the mischief of the amendment, else, the tax would be a straight hit to their bottomline.

Conclusion

With the ever shrinking trade borders, evolution of technology and quantum leap in the volumes of cross-border businesses, such ambiguities and perplexities will do more harm than good. While the authorities may have their point of view and bring in legislations and amendments to increase tax revenue, businesses look for ease of doing business and simple laws to comply with as their first priority. The exceptions of tax evaders should not become the rule for bringing in complex and ambiguous legislations or amendments, penalizing the large segment of tax compliant businesses. It will do good if clarity is brought in this issue, the dark clouds are dispersed bringing sunshine to transactions done in cyberspace.

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