

Proposed amendment to the OIDAR provisions

GST council meeting

The 48th GST Council meeting had announced amendments to be made to the provisions relating to ‘Online Information and Database Access or Retrieval services’ (**OIDAR**) to reduce interpretation issues and litigation on taxability of such services. The Finance Bill 2023 has now proposed amendments to the definition of OIDAR and Non-Taxable On-line Recipient (**NTOR**) thereby, significantly expanding the scope of taxability.

Amendment Proposed

The definition of OIDAR has been amended to exclude the condition of “*essentially automated and involving minimum human intervention*”. Further, the definition of NTOR has been substituted to mean “*any unregistered person receiving online information and database access or retrieval services located in taxable territory*”. Here, it has been clarified that unregistered person will include persons who are solely registered for the purpose of tax deduction at source (**TDS**) such as department or establishment of Central Government, State government, local authority, government agencies.

Issues sought to be addressed

- Interpretation of the term “*essentially automated and involving minimum human intervention*” was being a subject matter of litigation under the service tax regime which continued under the GST regime. An automated service, such as pre-recorded lecture, can be argued as automated involving minimum human intervention at the time when the services are availed (when the recording is being played), whereas, there is necessarily a significant human intervention at the time when the recording is being created. A further issue that arises is as to what is the extent of intervention to qualify as ‘minimal’¹.
- Another issue was with respect to the definition of NTOR which is presently defined to mean “*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 taxable territory*”.

¹ Circular No. 202 dated 09.11.2016 issued under the Service regime had clarified that where the provision of digital content is essentially

The above definition creates a confusion as to the extent of liability of a non-resident service provider where the NTOR is availing OIDAR services for the purposes of business or commerce but is unregistered under GST. Strictly speaking, the non-resident service provider is not liable in such cases, but it is practically impossible for it or the GST authorities to ascertain whether the recipient of services is using the services for personal or business purpose.

Impact of the amendment

▪ SCOPE OF TAXABILITY:

The proposed amendment significantly enhances the scope of taxability for OIDAR services by covering every service as listed in the definition liable to GST in the hands of non-resident service provider, irrespective of the level of human intervention. In addition, the non-resident supplier will be liable to GST for all unregistered recipients, whether or not the services are used for business or commerce.

▪ DISPUTE AS TO CLASSIFICATION AND PERSON LIABLE TO PAY TAX:

A confusion that gets aggravated is the coverage under the definition of OIDAR services. The scope of the definition is very wide to cover almost all online services. There could therefore be a dispute on the person liable to pay tax if a view is taken either by the non-resident service provider or by the GST authorities as to the coverage under the definition. e.g., online customization of software for a non-registered recipient – whether now covered under OIDAR or is it covered under RCM. Also, even in a situation where the non-resident service provider incorrectly fails to pay GST, the authorities may allege levy of tax in the hands of the recipient under RCM which will then have to be defended. Hence, it becomes imperative for a recipient to obtain a certainty on whether the GST has been discharged by the non-resident service provider on services availed by it.

automatic, and the small amount of manual process involved doesn't change the nature of supply from an OIDAR service.