Indian amends service tax rules for overseas service providers regarding online information and database access or retrievable services

Executive summary
On 9 November 2016, India's Ministry of Finance amended service tax rules related to online information and database access or retrieval services (OIDAR). Key changes effective from 1 December 2016 include:

- The definition of OIDAR services is expanded to include electronic services such as advertising on the internet, providing cloud services, online supply of digital content, digital data storage, online gaming, etc.
- For business-to-business (B2B) transactions, the place of supply for OIDAR services will be the location of the service recipients. These services will become taxable under the reverse charge mechanism.
- For business-to-consumer (B2C) transactions, OIDAR services provided by an overseas service provider to Indian recipients will become taxable.
- The liability to pay service tax for B2C transactions will be shifted to the overseas service provider.

Detailed discussion
Background
Presently, services received by the Government, a local authority, a governmental authority or an individual in relation to any purpose other than commerce, industry or any other business or profession from an overseas service provider
are exempt from service tax\(^2\) (cross border B2C transactions also termed as non-assessee online recipients). This exemption is removed.

Currently, in accordance with rule 9(b) of Place of Provision of Services (PoPS) Rules, 2012, the place of provision for online information and database access or retrieval services (OIDAR) is the location of the service provider. Therefore, cross border OIDAR services provided by an overseas service provider and received by a person in India are not subject to service tax.

Amendments dated 9 November 2016 have been made to the PoPS Rules, and the rules dealing with exemptions and the reverse charges in relation to OIDAR services. The amendments will take effect on 1 December 2016.

**Changes to the definition of OIDAR**

The current service tax definition of an OIDAR service is redefined. The new definition is services for which the delivery is mediated by information technology over the internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and which are impossible to provide in the absence of information technology. An indicative list and illustrations of OIDAR services is provided in the Circular dated 9 November 2016 issued by the Ministry of Finance.

The definition includes electronic services such as:

- Advertising on the internet
- Cloud services
- The provision of e-books, movies, music, software and other intangibles via telecommunication networks or the internet
- Providing data or information, retrievable or otherwise, to any person, in electronic form through a computer network
- Online supplies of digital content (movies, television shows, music, etc.)
- Digital data storage
- Online gaming

OIDAR services will not include the following:

- Supplies of goods, where the order and processing is done electronically
- Supplies of physical books, newsletters, newspapers or journals
- Services of lawyers and financial consultants who advise clients through email
- Booking services or tickets to entertainment events, hotel accommodation or car hire
- 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)
- Offline physical repair services of computer equipment
- Advertising services in newspapers, on posters and on television

**Who is liable?**

B2C transactions involving OIDAR services are excluded from the reverse charge.

It has been specified that the service recipient shall be deemed to be a B2C online recipient, if the person does not have service tax registration. The person liable to pay service tax in relation to OIDAR services for B2C transactions will be the service provider.

An intermediary shall be deemed to be receiving OIDAR services from an overseas service provider and providing such services to the nonbusiness online recipient except when such intermediary satisfies all the criteria in the Circular.

The Circular clarifies that if an overseas intermediary\(^3\) successfully establishes that he is merely acting as an intermediary (by satisfying all the prescribed conditions\(^4\) set out in the Circular), the actual OIDAR service provider will be required to register and discharge the service tax provisions. However, if the intermediary does not satisfy the conditions set out in the guidance in the Circular, he will be deemed to be providing OIDAR services.

Any person located in the taxable territory who represents an overseas service provider will be the person liable to pay service tax. If the service provider does not have a physical presence or does not have a representative for any purpose in India, the service provider may appoint a person for the purpose of paying service tax.

The person receiving OIDAR services will be deemed to be located in the taxable territory of India if any two of the following non-contradictory conditions are satisfied:

- The location of address presented by the service recipient via the internet is in India
- The credit/debit/any other card by which the service recipient settles payment has been issued in India
- The service recipient’s billing address is in India
- The internet protocol address of the device used by the service recipient is in India
- The service recipient’s bank in which the account used for payment is maintained is in India
The country code of the subscriber identity module (SIM) card used by the service recipient is in India

The location of the service recipient's fixed land line, through which the service is received by the person, is in India

An overseas service provider liable for paying service tax may make an application for registration (using form ST-1A). This should be done within 30 days from 1 December 2016.

The service tax registration will be deemed to be granted from the date of receipt of the application.

In summary, the taxability of OIDAR services provided to service recipients in India from 1 December 2016 is as follows:

<table>
<thead>
<tr>
<th>Transaction</th>
<th>Indian service provider</th>
<th>Overseas service provider</th>
</tr>
</thead>
<tbody>
<tr>
<td>B2B</td>
<td>Service provider liable to pay service tax</td>
<td>Service recipient liable to pay service tax</td>
</tr>
<tr>
<td>B2C</td>
<td>Service provider liable to pay service tax</td>
<td>Service provider liable to pay service tax</td>
</tr>
</tbody>
</table>

Implications

The Indian Government has significantly widened the scope of service taxes for online activities by including an array of services provided with the use of technology into the definition of OIDAR and by bringing online services provided by overseas suppliers within the tax ambit.

These changes seem to be in line with the recommendations made by the Organisation for Economic Co-operation and Development (OECD) for Base Erosion and Profit Shifting (BEPS) Action 1 (*Addressing the Tax Challenges of the Digital Economy*). In the report released by OECD addressing tax challenges of digital economy in cross border transactions, it had emphasized the requirement for nonresident suppliers, to register, collect and remit tax in the jurisdiction of the consumer, particularly for B2C supplies.

Overseas service providers and intermediaries that provide electronic services to any customers in India will now need to identify if the service recipient for each transaction is a non-business customer so as to comply with the administrative requirements to register and account for service tax.

Furthermore, the Government seems to have aligned the service tax rules for online services with the draft place of supply provisions under the proposed goods and services tax (GST) regime, which is expected to be introduced on 1 April 2017.

Endnotes

1. Amendments have been made as under:
   - Place of Provision of Services Rules, 2012 (Notification 46/2016)
   - Mega Exemption Notification (Notification 47/2016)
   - Service tax Rules, 1994 (Notification 48/2016)
   - Reverse charge mechanism (Notification 49/2016)

2. As per Entry 34 of Mega Exemption Notification No 25/2012 dated 20 June 2012.

3. Including an electronic platform, a broker, an agent or any other person, by whatever name called, who arranges or facilitates provision of such service but does not provides the main service on his account.

4. Conditions prescribed include issuance of an invoice with specific details by the intermediary, that he neither collects nor processes payment, and the intermediary does not authorise delivery, general terms and conditions are not set by intermediary.
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