

Treading the GST Path – 51

All about “OIDAR”

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In today's world where technology and internet plays a major role, most of the transactions are happening online. Most of the information, lectures, discourses, music, films, E Books and other contents are available over internet and it becomes important to understand the GST implications for such transactions.

Section 2 (17) of the IGST Act, 2017 defines, “online information and database access or retrieval services (hereinafter referred to as OIDAR services)” as,

“online information and database access or retrieval services” means services whose 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 impossible to ensure in the absence of information technology and includes electronic services such as, -

(i) advertising on the internet;

(ii) providing cloud services;

(iii) provision of e-books, movie, music, software and other intangibles through 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 like);

(vi) digital data storage; and

(vii) online gaming;

It may be noted that such contents provided may either be commercially used by the user or used by the user for his individual purpose. For example, a company may subscribe and download various technical information for being used in their business; an individual may download songs from a music app, by paying the prescribed subscription and listen to music. So irrespective of the purpose of ultimate use of the content, the same is liable to GST levy, when such services are supplied by a supplier located in India. Under Section 12 of the IGST Act, no special provisions are available for determination of place of supply of services and only the residual provision under sub section (2) of Section 12 would apply, as per which the place of supply of OIDAR services provided to a registered recipient would be the location of the recipient and in case of unregistered

recipient, it will be location of the **recipient** if his address is available and in other cases, the location of the supplier.

Most of such service providers are located outside India and their services are used in India, both by commercial entities for business purpose, as well as by individuals for their own consumption. If reverse charge is made applicable to all such cases, even an individual who downloads a song for listening, from a service provider located outside India, would be liable to pay GST under reverse charge and comply with various provision of the GST law, which would be too cumbersome for an individual. Thus Notification 10/2017 Integrated Tax (Rate) Dated 28.06.2017, prescribes the reverse charge cautiously, as

Sl. No.	Category of Supply of Services	Supplier of service	Recipient of Service
(1)	(2)	(3)	(4)
1	Any service supplied by any person who is located in a non-taxable territory to any person other than non-taxable online recipient.	Any person Located in a non-taxable territory	Any person located in the taxable territory other than non-taxable online recipient.

The term "non-taxable online recipient" is defined in Section 2 (16) of the IGST Act, as

"non-taxable online recipient" means 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.

Explanation. - For the purposes of this clause, the expression "governmental authority" means an authority or a board or any other body,

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(i) set up by an Act of Parliament or a State Legislature; or

(ii) established by any Government,

with ninety per cent. or more participation by way of equity or control, to carry out any function entrusted to a municipality under article 243W of the Constitution;

If OIDAR services supplied by a person outside the taxable territory, to a non-taxable online recipient, the special procedure for payment of GST is contained in Section 14 of the IGST Act, according to which the liability to pay GST is on the intermediary / supplier of service, as the case may be. The provisions of the said section 14 is reproduced below.

14. Special provision for payment of tax by a supplier of online information and database access or retrieval services. — (1) *On supply of online information and database access or retrieval 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 :*

Provided that in the case of supply of online information and database access or retrieval services by any person located in a non-taxable territory and received by a non-taxable online recipient, an intermediary located in the non-taxable territory, who arranges or facilitates the supply of such services, shall be deemed to be the recipient of such services from the supplier of services in non-taxable territory and supplying such services to the non-taxable online recipient except when such intermediary satisfies the following conditions, namely :-

(a) the invoice or customer's bill or receipt issued or made available by such intermediary taking part in the supply clearly identifies the service in question and its supplier in non-taxable territory;

(b) the intermediary involved in the supply does not authorise the charge to the customer or take part in its charge which is that the intermediary neither collects or processes payment in any manner nor is responsible for the payment between the non-taxable online recipient and the supplier of such services;

(c) the intermediary involved in the supply does not authorise delivery; and

(d) the general terms and conditions of the supply are not set by the intermediary involved in the supply but by the supplier of services.

(2) The supplier of online information and database access or retrieval services referred to in sub-section (1) shall, for payment of integrated tax, take a single registration under the Simplified Registration Scheme to be notified by the Government :

Provided that any person located in the taxable territory representing such supplier for any purpose in the taxable territory shall get registered and pay integrated tax on behalf of the supplier :

Provided further that if such supplier does not have a physical presence or does not have a representative for any purpose in the taxable territory, he may appoint a person in the taxable territory for the purpose of paying integrated tax and such person shall be liable for payment of such tax.

As per the above, if OIDAR services are supplied by a person in non-taxable territory, but received by a non-taxable online recipient, then the supplier of OIDAR services is liable to pay GST. If an intermediary is facilitating such services, then such intermediary would be liable to pay GST, subject to certain exceptions. In other cases, the supplier of OIDAR services from abroad, or his representative in India or any person appointed by the supplier of OIDAR services from abroad, for this purpose, would be liable to pay GST.

The crux of this article is sub section (12) of Section 13 of the IGST Act, which deals with determination of place of supply of OIDAR services, if either the supplier or the recipient is situated outside India.

Sec. 13 (12) The place of supply of online information and database access or retrieval services shall be the location of the recipient of services.

Explanation. - For the purposes of this sub-section, 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.*

There are two possibilities, viz., (i) OIDAR services are provided by a supplier in India to a recipient outside India; (ii) OIDAR services are provided by a supplier outside India to a recipient in India. In both these situations, the place of supply of such service has to be determined as per section 13 (12) of the IGST Act, reproduced above.

It may be noted that if any two of the above conditions (which are not contradictory to each other) mentioned in clauses (a) to (g) of sub section (12) of Section 13 are satisfied, it shall be construed that the recipient is in the taxable territory, i.e India. A perusal of the said conditions reveal that technologically it would be possible to identify the facts in this regard.

Now the moot question is the practical difficulties in determining as to whether any of the two conditions are satisfied, in the below given situations.

- (a) Balaji Venkatesh is from Chennai and is working in Infosys at USA. As he wanted to get married he subscribes to a famous matrimonial portal in India, while in USA. He gives his USA address, uses his credit card issued in USA and subscribes by using his laptop, by using the internet protocol address based at USA. So, while buying the subscription which has a validity of six months, none of the above conditions are satisfied and the Matrimonial website based in India thus determines the place of supply as outside India and not pays GST. But, after two months, Balaji Venkatesh comes to India to meet his parents and by using the internet connection at their home, visits the website and browses the details of various brides and in the next few days uses his smart phone to log into the matrimonial website for browsing, thus satisfying two of the conditions mentioned in section 13 (12). Will the Matrimonial website be required to redetermine the place of supply and pay GST?
- (b) Krithika works in Australia. She subscribes to an Indian traditional music website, while in Australia and none of the conditions mentioned in Section 13 (12) are satisfied and thus the place of supply is determined as being outside India. After few months, she passes on the username and password to her friend in India, who accesses the website in India. What would be the GST implications for the musical portal?
- (c) Christina is a US resident and wants to listen to lectures of a Yoga Guru from India and pays annual membership fee to a website offering such lectures and none of the conditions of Section 13 (12) are satisfied at that time. After six months, impressed by the Guru's lectures, she travels to India to meet the Guru in person and during her stay in India, accesses the web portal several times using several devices, using Indian internet protocol address / SIM card / Landline. Will the Guru ask her to pay GST after six months of receiving subscription?
- (d) Kripa, a NRI who works in London subscribes to an E Book, from Amazon UK and none of the conditions of Section 13 (12) are satisfied. During the validity period of the subscription, Kripa travels to India and satisfies

two of the conditions. Will Amazon UK be asked to pay GST in India, at that time?

Answer to all the above questions lies in Section 13 of the CGST Act, 2017, which prescribes the time of supply of services, relevant portion of which is reproduced below.

13. Time of supply of services. — (1) *The liability to pay tax on services shall arise at the time of supply, as determined in accordance with the provisions of this section.*

(2) *The time of supply of services shall be the earliest of the following dates, namely :—*

(a) *the date of issue of invoice by the supplier, if the invoice is issued within the period prescribed under sub-section (2) of section 31 or the date of receipt of payment, whichever is earlier; or*

(b) *the date of provision of service, if the invoice is not issued within the period prescribed under sub-section (2) of section 31 or the date of receipt of payment, whichever is earlier; or*

(c) *the date on which the recipient shows the receipt of services in his books of account, in a case where the provisions of clause (a) or clause (b) do not apply :*

Provided that where the supplier of taxable service receives an amount up to one thousand rupees in excess of the amount indicated in the tax invoice, the time of supply to the extent of such excess amount shall, at the option of the said supplier, be the date of issue of invoice relating to such excess amount.

Explanation. — *For the purposes of clauses (a) and (b) —*

(i) *the supply shall be deemed to have been made to the extent it is covered by the invoice or, as the case may be, the payment;*

(ii) *"the date of receipt of payment" shall be the date on which the payment is entered in the books of account of the supplier or the date on which the payment is credited to his bank account, whichever is earlier.*

(3) *In case of supplies in respect of which tax is paid or liable to be paid on reverse charge basis, the time of supply shall be the earlier of the following dates, namely :—*

(a) *the date of payment as entered in the books of account of the recipient or the date on which the payment is debited in his bank account, whichever is earlier; or*

(b) the date immediately following sixty days from the date of issue of invoice or any other document, by whatever name called, in lieu thereof by the supplier :

Provided that where it is not possible to determine the time of supply under clause (a) or clause (b), the time of supply shall be the date of entry in the books of account of the recipient of supply :

Provided further that in case of supply by associated enterprises, where the supplier of service is located outside India, the time of supply shall be the date of entry in the books of account of the recipient of supply or the date of payment, whichever is earlier.

(4) In case of supply of vouchers by a supplier, the time of supply shall be —

(a) the date of issue of voucher, if the supply is identifiable at that point; or

(b) the date of redemption of voucher, in all other cases.

(5) Where it is not possible to determine the time of supply under the provisions of sub-section (2) or sub-section (3) or sub-section (4), the time of supply shall —

(a) in a case where a periodical return has to be filed, be the date on which such return is to be filed; or

(b) in any other case, be the date on which the tax is paid.

(6) The time of supply to the extent it relates to an addition in the value of supply by way of interest, late fee or penalty for delayed payment of any consideration shall be the date on which the supplier receives such addition in value.

The liability to pay GST arises at the "time of supply" and in case of services, including OIDAR services, the place of supply shall be date of invoice or date of receipt of payment whichever is earlier. At the said "time of supply" if no two conditions prescribed under Section 13 (12) are not satisfied, the place of supply shall be outside India and there would be no GST liability. Any subsequent development, where two of such conditions came to be satisfied, will not alter the situation and make the supplier liable to pay GST for a transaction which is already assessed.

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