

Chamber of Tax Consultants

GST IMPLICATIONS ON ONLINE INFORMATION & DATABASE ACCESS
RETRIEVAL SERVICES (“**OIDAR**”)

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Statutory
Provisions and
Concepts

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Quick Revision

Statutory Provisions and Concepts

PART I

Importance of Digital Economy

- “The world’s largest taxi firm, Uber, owns no cars. The world’s most popular media company, Facebook, creates no content. The world’s most valuable retailer, Alibaba, carries no stock. And the world’s largest accommodation provider, Airbnb, owns no property. Something big is going on.” - Tom Goodwin.
- An estimated 70% of new value created in the economy over the next decade will be based on digitally enabled platform business models.- World Economic forum.
- With more than half a billion internet subscribers, India is one of the largest and fastest growing markets for digital consumers.
- Digitation of economy – change in the business modal and acceleration caused by COVID.

Challenges of Taxing Digital Economy

- Physical absence of the supplier in the Taxing Jurisdiction.
- Traditional Tax Rules designed for brick and mortar economy does not fit in to new emerging technology and business models.
- Obligation to comply with international commitments tax treaties/Agreement.
- Double taxation and unintentional non taxation should be avoided.
- Balance to be maintained-No overtaxing at the cost of the digital companies.



Advent of taxation of OIDAR service: Taxable w.e.f. 16.07.2001 under Service Tax Regime

- Limited in scope
- Defined as-
65(75)“on-line information and database access or retrieval” means providing data or information, retrievable or otherwise, to any person, in electronic form through a computer network;
“taxable service” means any service provided or to be provided –
(zh) to any person, by any person, in relation to on-line information and database access or retrieval or both in electronic form through computer network, in any manner;”
- Circular no. F.No.B.11/1/2001-TRU, Dated 9th July, 2001 was issued inter-alia explaining the scope of the levy.

Negative List Regime: w.e.f. 1.7.2012

- Definition - 2 (l) of the POPS Rules, 2012 -Online Information and Database Access Retrieval Services means providing information, retrievable or otherwise, to any person, in electronic form through a computer network.
- **Service Providers Location Based Taxability**
RULE 9. Place of provision of specified services. - The place of provision of following services shall be the location of the service provider:-
....
(b) Online Information and Database Access Retrieval Services

Paradigm Shift: Remodeling of OIDAR Service w.e.f. 1.12.2016

- Definition of OIDAR Service expanded. Same Definition continued in GST regime as well.
- Service provided by Overseas Supplier to Govt / Local Authority / Govt Entity / Individual – Taxable in India. Such recipients referred as 'Non assessee online recipients'.
- Service providers providing OIDAR services to Non-Assessee Online Recipient responsible for payment of tax.
- Overseas Intermediary is also deemed to be service provider subject to exceptions.
- Omission of Clause (b) of Rule 9 of POPS 2012.
- Default Rule 3 of POPS applicable to OIDAR services . Proviso to Rule 3 amended to exclude OIDAR services to as to make service recipient location as Place of provision of service even when the place of location of the service is not available in the ordinary course of business.
- Circular No. 202/12/2016-S.T., dated 9-11-2016 was issued inter-alia explaining the aforesaid changes.

OIDAR under GST: Definitions

- Section 2 (17) of the IGST Act
- “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;

Salient Features

- Service provided and received through Internet or electronic network on real time.
- Supply essentially Automated.
- Service cannot be rendered without IT Infrastructure.
- Inclusive definition to cover other items as well.
- Use of phrase 'such as' will further expand scope.

Salient Features

- Minimal Human Intervention.
 - From whose point of view? Supplier or recipient? Third party?
 - Each individual supply made to the customer requires human intervention?
 - General overall set-up done by the supplier to enable him to render services?
 - Several packages – each packages to be examined individually
 - Supplier obliged to provide individual feedback even if customer not used in practice?
 - Exceptional case - Human interaction?
- C.B.E. & C. Flyer No. 43, dated 1-1-2018 was issued inter-alia explaining the nuisance of the levy of OIDAR under GST regime.

Illustrative Services covered under OIDAR

- Web-based services providing trade statistics, legal and financial data like TIOI, TMI etc.
- Matrimonial services- shaadi.com. Matrimony.com
- Social networking sites- Facebook. Twitter etc.
- Subscription of online newspapers and journals, online news, and weather reports
- PDF documents automatically emailed by the provider or downloaded from website
- Accessing or downloading software (including procurement/accountancy programmes and antivirus software) plus updates (e.g. Antivirus software supplied electronically)
- Supply of images, text, Movie, Music and information and making available of databases
- Online games

OIDAR under GST: Definitions

Section 2 (16) of the IGST Act

- “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
- In other words Non - Taxable Online Recipient is:
 - a. any Government, local authority, Governmental authority, an individual or any other person not registered, and
 - b. located in the taxable territory, and
 - c. must receive OIDAR services in relation to any purpose other than commerce, industry or any other business or profession.

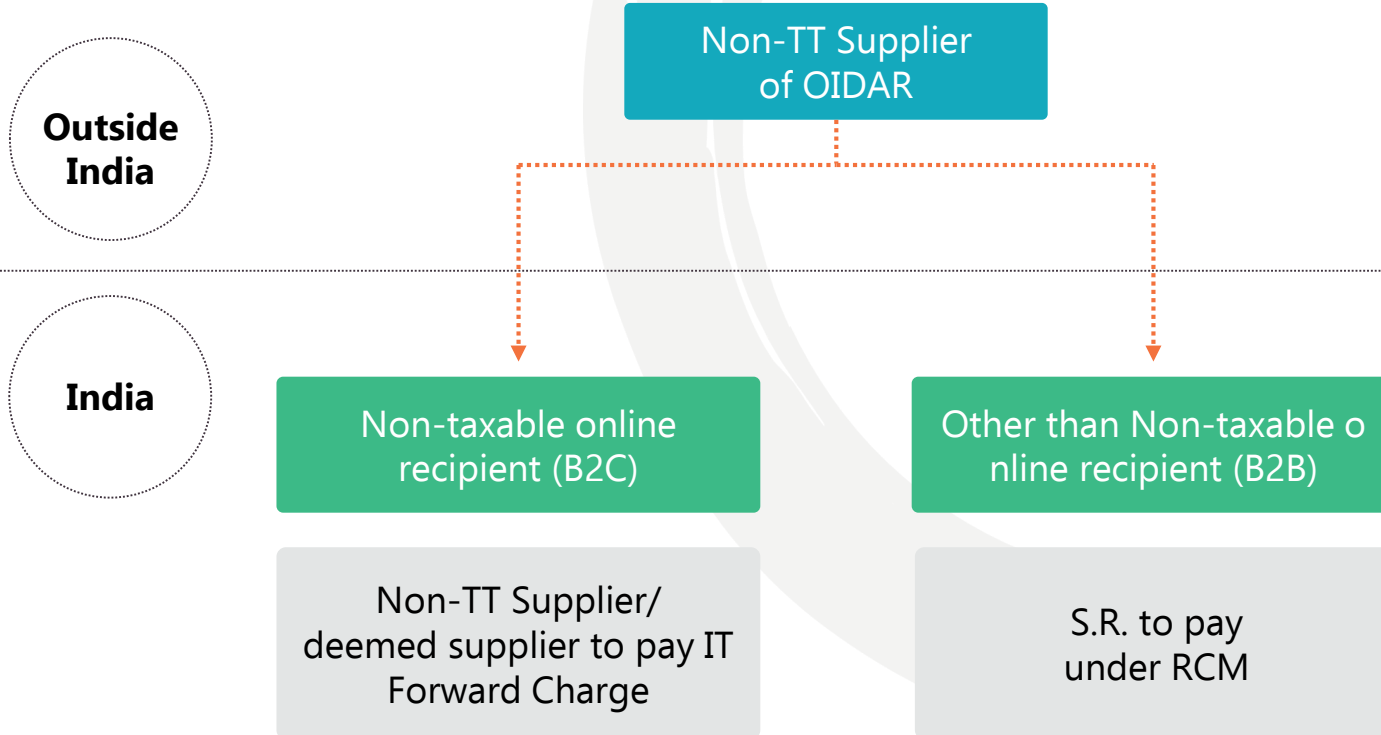
OIDAR under GST: Place of Supply - Section 13-IGST

Situation	Place of Supply of services
Online Information Database Access or Retrieval services	Location of recipient of service

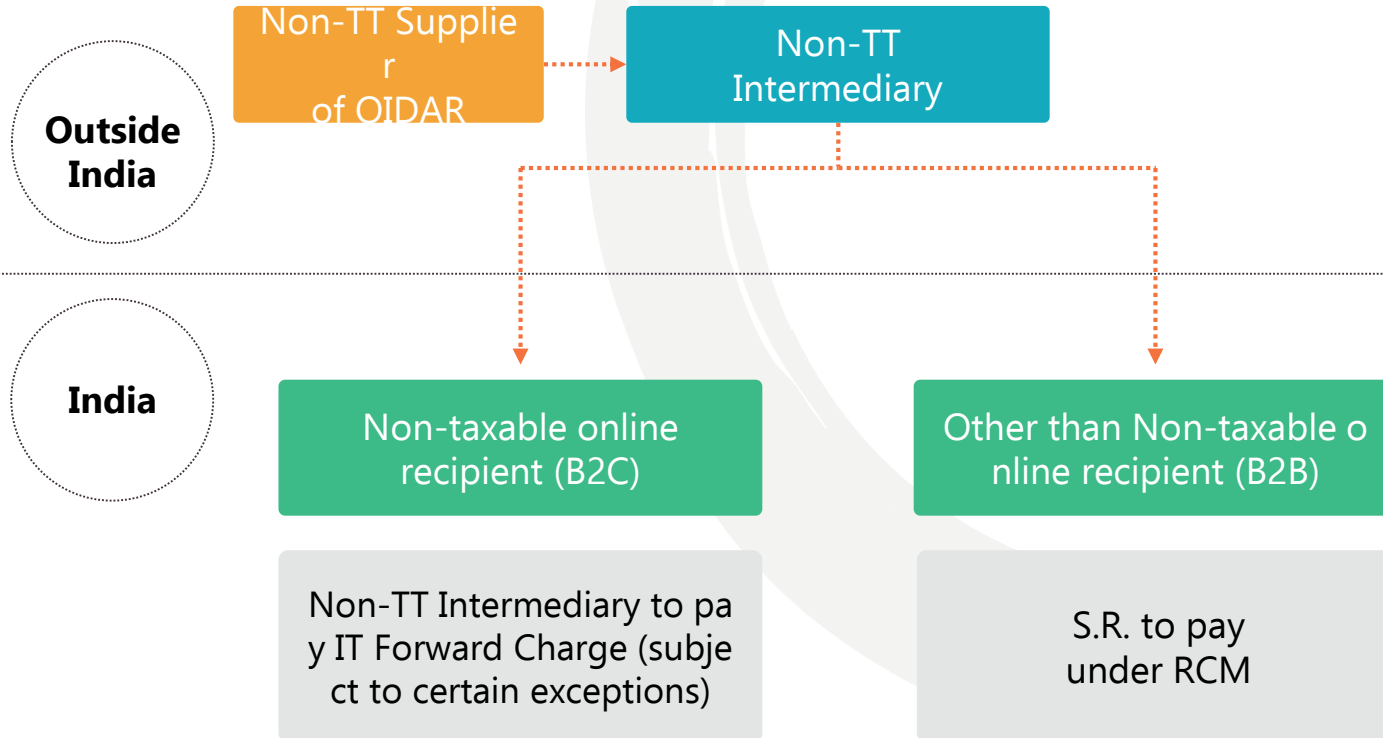
OIDAR under GST: Place of Supply - Section 13-IGST

- Location of Service recipient will be deemed to be in India if any of the following two non contradictory conditions fulfilled:
 - Location of address presented by the recipient through internet is in India
 - Credit card or debit card which the recipient uses to pay is issued in India
 - Billing address of the recipient of services is in India
 - IP address of the device used by the recipient is in India
 - Bank of the recipient's account used for payment is maintained is in India
 - Country code of the subscriber identity module card used by the recipient of services is of India
 - Location of the fixed land line through which the service is received by the recipient is in India

OIDAR under GST: Liability to pay - Section 14-IGST



OIDAR under GST: Liability to pay - Section 14-IGST



OIDAR under GST: Liability to pay - Section 14-IGST

- An intermediary located outside India, arranges or facilitates the supply of OIDAR services, from the service provider to the non-taxable online recipient - then the intermediary will be deemed to be the recipient of such services and further supplying such services to non-taxable online recipient e.g. Google Play store
- But if the intermediary satisfies the following conditions then it will **not be considered as a recipient**–
 - a. The invoice issued by the intermediary clearly **identifies the service and its supplier** in non-taxable territory
 - b. 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 **does not authorize delivery**
 - d. The **general terms and conditions** of the supply are set by the service provider and not by the intermediary

OIDAR under GST: Liability to pay - Section 14-IGST

- Any person located in the taxable territory representing him for any purpose will be required to take registration and pay IGST
- 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
- Is there any Constitutional bar in making non-resident liable to pay tax?
 - **British Columbia Electric Railway Co. Ltd. v. King MANU/PR/0103/1946**
 - **Electronics Corporation of India Ltd. v. CIT(2015) 14 SCC 71**
 - **GVK Industries Limited v. Income Tax Officer MANU/SC/0163/2011**

Simplified Procedure

Simplified Registration- GST
- REG -10 Principal Commis
sioner of Central Tax, Benga
luru West

Simplified Return - Form
GSTR -5A.

Not required to furnish
an annual return in FORM
GSTR-9

Not required to furnish
reconciliation statement in
FORM GSTR-9C

EU VAT: Taxation

- EU definition of Digital Services are also similar to Indian definition but additionally includes telecommunication services as well
- Supply of Digital Services on B2B basis, the supply takes place where the business customer is located
- Supply of Digital Services on B2C basis, from a supplier who belongs in one EU member to consumer in another EU member state, the place of supply will be the location of the consumer
- However, for B2C supplies, from a supplier who belongs in UK to private consumers in another EU member the place of supply will be UK if the supplier is not established in any other EU member state and total value of cross-border supplies to consumers in EU in the current year and previous year is less than £8,818 i.e. EURO 10,000
- Supply of Digital Services on B2C basis, from a supplier who belongs to a country other than EU member state to consumer in EU member state, the place of supply will be the location of the consumer and non-resident is required to take registration and make payment
- **Mini One-Stop Shop (MOSS) Scheme** gives provider of B2C Supplies, a simplified option of registering in one EU Member State from where VAT returns & VAT payment due in all Member States can be done. Otherwise, they will have to register for VAT separately in each EU Member State where they have customers

Australia VAT: Digital Services Taxation

The ATO defines digital services refers to the supply of intangibles by non-established suppliers which include, but are not limited to:

- The streaming and downloading of entertainment (movies, music, apps, games and e-books)
- Telecommunication and broadcasting;
- Websites, web-hosting, maintenance of software and hardware;
- Software and updating them;
- Streaming or downloads of music, films, apps and games;
- E-books;
- Online professional services;
- Online web, cloud and storage services.



Australia VAT: Digital Services Taxation

- The definition is similar to Indian definition but telecommunication, broadcasting and online professional services are also covered.
- In B2C transactions only, GST will apply where the supplier's turnover from sales to Australian consumers exceeds the AUD75,000 registration threshold.
- Non-resident suppliers without a GST permanent establishment in Australia only have GST liability in B2C transactions.
- In B2B transactions, reverse charge applies.



Income Tax: Equalization Levy

- Budget 2016 introduced Income Tax on digital transactions i.e. the income accruing to foreign e-commerce companies from India
- Tax to be withheld @ 6% by Service Recipient when payment is made to Non-Resident Service Provider and annual payment > 1 lakhs
- As on date, only two services covered:
 - i. Online Advertisement
 - ii. Provision of Digital Advertisement Space for online advertisement
- Not applicable when services used for personal consumption
- Budget 2020 imposed levy @ 2% on the consideration received by an E-Commerce operator from e-commerce supply of goods or services- > 2 cr

Section 194O: TDS on Payments Made to E-Commerce Participants

- W.e.f. 1.10.2020, E-Commerce Operator is required to deduct TDS @ 1% (0.75% till 31.3.2021) for facilitating sale of goods or providing services through an E-Commerce participant
- **E-Commerce Operator:** Person who owns, operates, or manages a digital/electronic facility for sale of goods and services. Responsible for making payments to E-Commerce participant on such sales
- **E-Commerce Participant:** E-Commerce participant is a person who sells goods, services, or both through an electronic facility provided by an e-Commerce operator. Must be a resident of India
- **If E-commerce Participant is Resident Individual or HUF:** No TDS if gross amount of sale of goods, services during the previous year does not exceed Rs 5 lakh and if the E-Commerce participant furnishes PAN/AADHAR
- If E-Commerce Participant does not furnish PAN/Aadhaar - TDS @ 5% u/s. 206AA

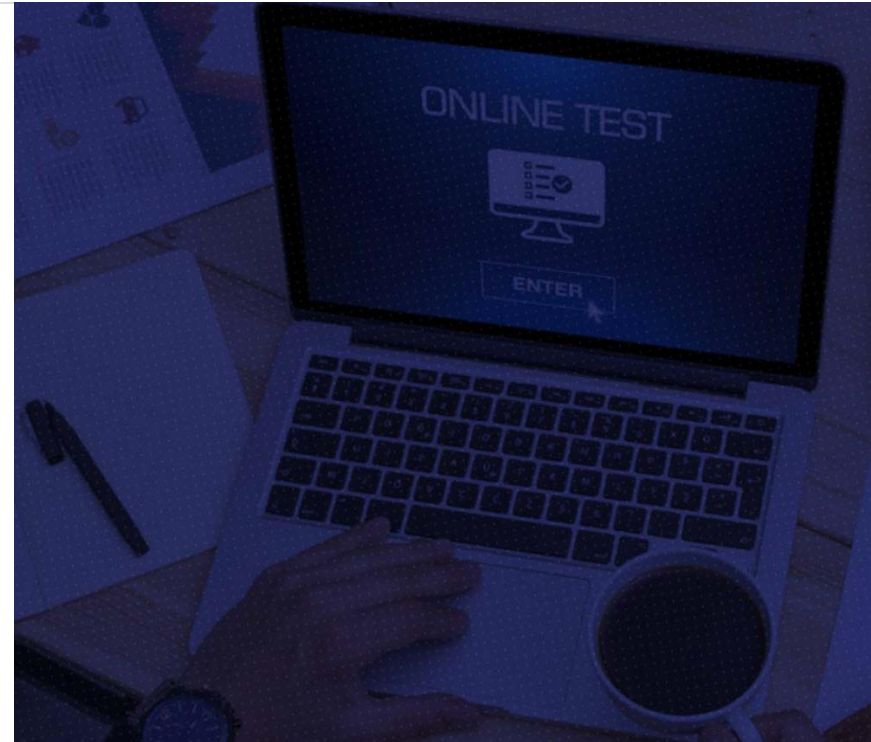
Case Study

PART II

Case Study 1: Different types of Online Tests

FACTS

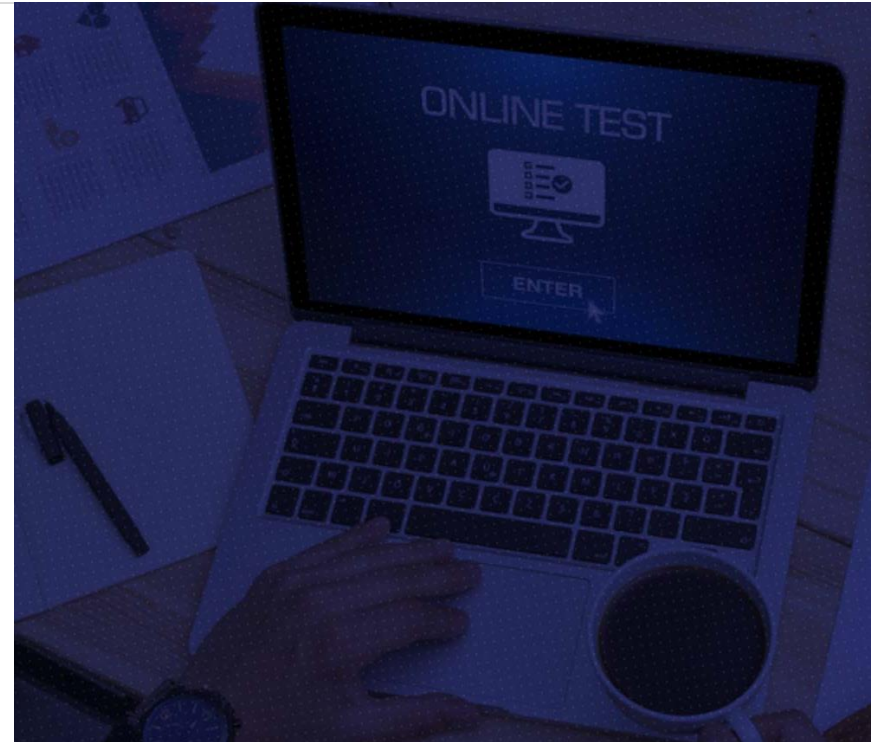
- ABC Inc USA is engaged in conducting online exams and providing administrative solutions to students. The company provides electronic software to enable students to take the online test on electronic platform.
- Three types of test administrative solutions are provided:
 - TEST TYPE – 1
Tests are self-administered by the students and are wholly digital. Test contains only Multiple choice questions. Tests are not required to be taken from the test centers. Scores are provided by electronic software based on a computer-based algorithm and student gets result in electronic format immediately on completion of the test. The entire test experience is electronic.



Case Study 1: Different types of Online Tests

- TEST TYPE – 2

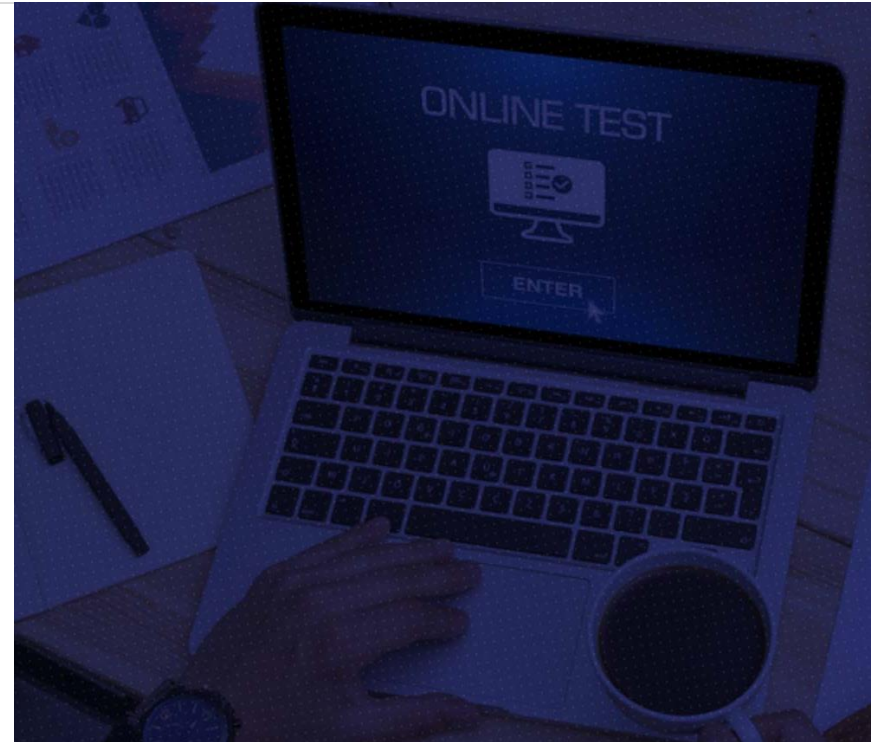
The student is required to go to test center, where an administrator will verify the identity of the candidate and validate test registration. Test administrator will assign a computer to student. During test, the candidate is monitored by the invigilator. Once test is completed, the scores are provided by computer-based algorithm on the electronic software and student gets result on completion of test. The test administrator shares the student's printed unofficial score report. In addition to this, the entire process is recorded by cameras as a video and such video recording of the test-taker's testing session is reviewed by a test security official to validate any testing issues (or to confirm any testing suspicions).



Case Study 1: Different types of Online Tests

- TEST TYPE – 3

Type 3 is similar to Type 2, however difference is that these tests contain mixture of Multiple choice questions and analytical writing assessment section i.e. essay-based questions. The student is able to see final score for Multiple choice questions and indicative score for essay-based question marked by computer-based algorithm. However, the essay-based questions are then sent to a human-evaluator in USA for assessment and final scoring. If the difference in score for essay question between the electronic computed scoring vis-à-vis human scoring is more than 1 point, then the essay-based question is sent to an expert evaluator for assessment and scoring. In addition to physical presence and supervision of invigilator, human intervention is also required for evaluation and scoring of essay.



Case Study 1: Different types of Online Tests

ISSUES

Whether such services fall under the category of OIDAR?

- Contentions
 - In test type 2 many of the activities are performed by the administrator/invigilator which construe substantial (more than minimal) human intervention
 - In test type 3 in addition to the physical presence and supervision of the invigilator, human intervention is also required for evaluation and scoring of essay-based questions (by 1st stage evaluator) and also for the expert evaluation which construe substantial (more than minimal) human intervention

Case Study 2: General Question Relating to the Scope of Levy

FACTS

PQR GMBH a company located in Germany is in the business of supplying online scientific journals to customers all over the world including India . Such content is supplied by means of books, journals and databases. The company wishes to know:-.

ISSUES

- i. Whether the company is required to charge GST on supply of OIDAR services to “only” unregistered persons in India?
- ii. Whether the company is required to charge GST on the OIDAR supplies made to a person in the taxable territory who receives the same for the purpose of commerce, industry or any other business or profession?
- iii. The burden to prove that such services are received other than business or profession lies on whom?
- iv. Whether OIDAR Services rendered by the Non-Resident to another Non-Resident can still be taxed in India?
- v. Whether there is any threshold limit up to which registration or tax payment is not required in the aforesaid case?

Case Study 2: General Question Relating to the Scope of Levy

- *Section 2 (16) of IGST Act “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.”*
- **Contentions**
 - PQR Gmbh contends that if service is provided to an individual or any other person who is not registered person under GST, but is receiving services for commerce, industry or profession, the GST liability is not on PQR GMBH.
 - Further, a person providing OIDAR services from a place outside India is required to file returns only when services are supplied to a person other than a registered person (i.e. an unregistered person) as per Rule 64 of the CGST Rules, 2017

Case Study 2: General Question Relating to the Scope of Levy

- **RULE 64.** Form and manner of submission of return by persons providing online information and database access or retrieval services. — Every registered person providing online information and database access or retrieval services from a place outside India to a person in India other than a registered person shall file return in FORM GSTR-5A* on or before the twentieth day of the month succeeding the calendar month or part thereof.

- **Exemption Notification 9/2017-IGST -28-6-2017 Sr no.10**

Services received from a provider of service located in a non-taxable territory by-

....

(c) a person located in a non-taxable territory:

- **SECTION 24.** Compulsory registration in certain cases. — Notwithstanding anything contained in sub-section (1) of section 22, the following categories of persons shall be required to be registered under this Act, —

(xi) every person supplying online information and database access or retrieval services from a place outside India to a person in India, other than a registered person;

Case Study 3: Server-Establishment?

- X Plc., UK entity is engaged in providing OIDAR services. The company doesn't have any establishment in India. The data server of the company is located in India and are managed by Indian Internet Service Providers who host the website at such servers. The web sites of X Plc are operated through the such servers. The servers are owned and maintained by technical and human resources of Indian Internet service provider.
- It approached you to advice:
 - i. In cases where services are provided to registered person in India who will be liable to pay GST?
 - ii. Whether X Plc can be said to be having a fixed establishment in India?



Case Study 3: Server-Establishment?

Section 8 of IGST

Explanation 1: For the purposes of this Act, where a person has,-

- i. an establishment in India and any other establishment outside India;
- ii. an establishment in a State or Union territory and any other establishment outside that State or Union territory; or
- iii. an establishment in a State or Union territory and any other establishment registered within that State or Union territory

then such establishments shall be treated as **establishments of distinct persons**.

Explanation 2: A person carrying on a business through a branch or an agency or a representational office in any territory shall be treated as having an establishment in that territory

Case Study 3: Server-Establishment?

- DFDS – Case C-260/95 ECJ.
- Guntur Berkhoz ECJ 168/84
- ARO Lease – C-190/95

Principles

- Business Establishment- Primary Point of reference
- Another establishment relevant only when reference to Business Establishment produces an inappropriate or irrational result
- Alternative establishments may only be considered if they are of a certain minimum size and both the human and technical resources necessary for the provision of the particular services are permanently present
- The actual economic situation, (economic substance and reality as opposed to the contractual provisions) can be taken into account in determining the point of reference for tax purposes

Case Study 4: Infrastructural Support

- MNO Ltd. entered into agreements with their overseas group entity in the Netherlands under which they avail certain IT infrastructure services. The overseas entity inter-alia provides network connectivity, ERP sharing, email services and information or communication among various entities.

ISSUE

Whether such services fall under the category of OIDAR?



Case Study 4: Infrastructural Support

- **Contentions**

- Company own data has been accessed
- Activity can be equated with telecom service which facilitates connectivity between two points such as Wide Area Network (WAN) service which enables exchange of Data or Information amongst each other
- Services are more appropriately classified as Telecommunication Services



Case Study 5: Online Coaching

FACTS

- Starsoft university located in Singapore is conducting a computer training course for students located all over the world including India. The course consist of providing online live teaching sessions, answering the queries of the students through e-mail and chat, practical demonstrations, undertaking online exams and awarding diploma certificate . They are charging a lump sum amount for the entire course. It approached you to advice:-
 - **Issues**
 - i. Whether any Indian GST is required to be paid by them?
 - ii. What if they are only providing study material in PDF format and giving access to pre recorded sessions and charging amount only for these two activities?

Case Study 6: CRS

FACTS

- M/s. PQR Airways is undertaking the activity of operating air transportation services in India. They enter into agreement with CRS/GDS companies for maintaining a database regarding their flight schedules, fares, seat availability on flights, etc., on real time basis and making this information available to IATA Agents. CRS/GDS Companies are located outside India. The airlines make payment to CRS companies based on number of bookings.

ISSUE

- Whether the service provided by the CRS/GDS Companies is taxable under “online database access and/or retrieval service”?



Case Study 6: CRS

- Contentions
 - i. Data is provided by airline itself and not by CRS Companies .
 - ii. CRS Companies in providing a technology platform and enabling the Travel Agents to make reservations and purchase tickets effectively facilities and culminates in an overall e-commerce transaction



Quick Revision

PART III

Services Whether OIDAR?



Online Consulting



**Online Support
Services /
Troubleshooting**

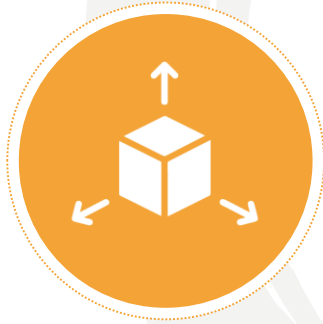


Cyber Cafe Services

Services Whether OIDAR?



Horoscope

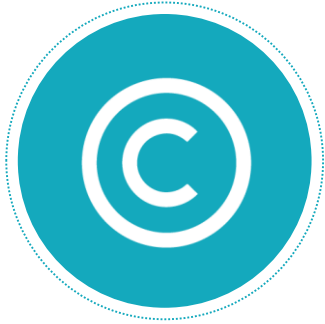


**Computer-aided-design
n**



E-Auction Services

Services Whether OIDAR?



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Services by one Internet Service Provider to another Internet Service Provider

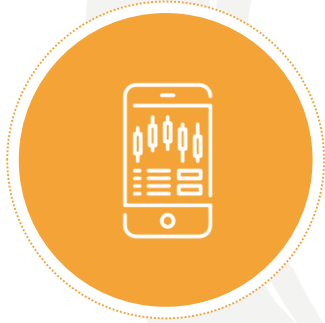


Online Multiplayer automated games

Services Whether OIDAR?



Legal services along with access to articles on legal matters for a combined fee



Online Trading Platform



Online Access to seminar live and recorded.



Thank You!!

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