

Bimal Jain

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Dear Professional Colleague,

Withdrawal of Service tax exemption on cross border B2C online information and database access or retrieval services w.e.f. December 1, 2016

At present, the services received in taxable territory from outside the taxable territory by 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 are exempted [cross border B2C (business to consumer) services provided in taxable territory] vide Entry No. 34(a) of the Mega Exemption Notification No. 25/2012-ST dated June 20, 2012 (“**the Mega Exemption Notification**”). On the other hand, services received by other persons in taxable territory from non-taxable territory [cross border B2B (business to business) services] are taxable under reverse charge i.e. service recipient in taxable territory is liable to pay Service tax.

Further, in view of Rule 9(b) of the Place of Provision of Service Rules, 2012 (“**the POP Rules**”), with respect to online information and database access or retrieval (“**OIDAR**”) services, the place of supply is location of service provider and thus such cross border B2B/B2C services provided by a person in non-taxable territory and received by a person in taxable territory are outside the levy of Service tax.

Now, with a view to provide a level playing field to Indian service providers providing taxable OIDAR services including electronic services in India, the exemption to such services provided in India by service providers located in foreign territory is being withdrawn w.e.f. December 1, 2016. Thus cross border B2C OIDAR services provided by a foreign service provider to a person in India will become taxable from December 1, 2016 onwards. The Central Government has issued 4 new Notifications, namely Notification No. 46/2016-ST, 47/2016-ST, 48/2016-ST and 49/2016-ST all dated November 9, 2016, whereby Service tax would be chargeable on OIDAR services provided by any person located in non-taxable territory and received by Government, Local Authority, Governmental Authority, or an individual in relation to any purpose other than commerce, industry or any other business or profession [cross border B2C OIDAR services provided in taxable territory]. OIDAR services have been re-defined in Service Tax Rules, 1994 (“**the Service Tax Rules**”) to include electronic services. Corresponding changes have also been made in the POP Rules, the Mega Exemption Notification and Reverse Charge Notification No. 30/2012-ST dated June 20, 2012 (“**the Reverse Charge Notification**”). Further, the Central Board of Excise and Customs (“**the CBEC**”) has also issued a Circular in this regard to provide clarification on various aspects of taxability of OIDAR services pursuant to new changes.

These Notifications shall come into force with effect from December 1, 2016.

All these changes are discussed hereunder for easy digest:

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1. Amendment in the POP Rules: Cross border B2B/B2C OIDAR services received by a person located in taxable territory will be leviable to Service tax in the taxable territory

The Central Government vide **Notification No. 46/2016-ST dated November 9, 2016** has amended the POP Rules in the following manner:

- Amendment in Rule 2: Rule 2(l) of the POP Rules has been amended to assign OIDAR services the same meaning as assigned to it in clause (ccd) of Rule 2(1) of the Service Tax Rules, which is being inserted by another Notification No. 48/2016-ST dated November 9, 2016.

- Amendment in Rule 3: Presently, proviso to Rule 3 of the POP Rules (Default Rule) provides that in case the location of the service receiver is not available in the ordinary course of business, the place of provision shall be the location of the provider of service. Now, proviso to Rule 3 of POP Rules has been amended so as to make the proviso inapplicable to OIDAR services. Thus, the amended proviso will read as follows-

“Provided that in case of services other than online information and database access or retrieval services, where the location of the service receiver is not available in the ordinary course of business, the place of provision shall be the location of the provider of service.”

- Amendment in Rule 9: As per Rule 9 of the POP Rules, place of provision of following services shall be the location of the service provider:

(a) Services provided by a banking company, or a financial institution, or a non-banking financial company, to account holders;

(b) OIDAR services;

(c) Intermediary services;

(d) Service consisting of hiring of means of transport, upto a period of one month

Now, clause (b) of Rule 9 of the POP Rules has been omitted i.e. OIDAR services have been removed from the purview of Rule 9 of the POP Rules.

To access complete Notification, please click on the link below:

<http://www.cbec.gov.in/resources//htdocs-servicetax/st-notifications/st-notifications-2016/st46-2016.pdf>

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2. Amendment in the Mega Exemption Notification: Withdrawal of exemption from Service tax on cross border B2C OIDAR services provided online/electronically from a non-taxable territory to consumers in taxable territory

The Central Government vide **Notification No. 47/2016-ST dated November 9, 2016**, has amended the Mega Exemption Notification in the following manner:

- Proviso added to Entry No. 34: to provide that the existing exemption (vide Entry No. 34(a) of Mega Exemption Notification) to services provided by a person located in a non- taxable territory and received by 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, will not be available for OIDAR services received by such persons w.e.f December 1, 2016.
- New definition vide clause (xab) inserted in Paragraph 2: OIDAR services have been assigned the same meaning as assigned to in clause (ccd) of Rule 2(1) of the Service Tax Rules, which is being inserted by another Notification No. 48/2016-ST dated November 9, 2016.

To access complete Notification, please click on the link below:

<http://www.cbec.gov.in/resources//htdocs-servicetax/st-notifications/st-notifications-2016/st47-2016.pdf>

3. Amendment in the Service Tax Rules: Person located in non-taxable territory providing OIDAR services to 'non-assesse online recipient' is liable to pay Service tax and the procedure for payment of Service tax

The Central Government vide **Notification No. 48/2016-Service Tax dated November 9, 2016** had made Service Tax (Fourth Amendment) Rules, 2016 to amend the Service Tax Rules, effective from December 1, 2016, in the following manner:

- Insertion of clause (ccba) after clause (ccb) in Rule 2(1), providing definition of '**non-assesse online recipient**' as follows-

“(ccba) “non-assesse online recipient” means Government, a local authority, a governmental authority or an individual 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;”

Further, explanation regarding meaning of Governmental Authority for this clause has also been provided, which is same as existing in Clause 2(s) of the Mega Exemption Notification.

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- Insertion of clause (ccd) after clause (ccc) in Rule 2(1), providing definition of OIDAR services, as follows:

*“(ccd) **“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 via 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, etc.);

(vi) digital data storage; and

(vii) online gaming;”

- Amendment in Rule 2(1)(d)(i)(G): As per Rule 2(1)(d)(i)(G) of the Service Tax Rules, person liable for paying Service tax, in relation to any taxable service provided or agreed to be provided by any person which is located in a non-taxable territory and received by any person located in the taxable territory, shall be the recipient of such service.

Now, the stated Rule has been amended to exclude OIDAR services from its ambit. Accordingly, Rule 2(1)(d)(i)(G) of the Service Tax Rules will read as under from December 1, 2016:

*“ in relation to any taxable service **“other than online information and database access or retrieval services,”** provided or agreed to be provided by any person which is located in a non-taxable territory and received by any person located in the taxable territory, the recipient of such service.”*

- Insertion of new item (H) in Rule 2(1)(d)(i): After Rule 2(1)(d)(i)(G), new Rule 2(1)(d)(i)(H) has been inserted to provide that in relation to services provided or agreed to be provided by way of OIDAR, by any person located in a non-taxable territory and received by any person in the taxable territory **other than non-assesse online recipient**, recipient of such service, shall be the person liable to pay Service tax.

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- Insertion of provisos in sub-clause (ii) dealing with various details of OIDAR services provided or agreed to be provided by any person located in a non-taxable territory and received by non-assesse online recipient:
 - ✓ When an intermediary located in the non-taxable territory including an electronic platform, arranges or facilitates provision of cross border B2C OIDAR service but does not provide the main service on his account, the intermediary shall be deemed to be receiving such services from the service provider in non-taxable territory and providing such services to the non-assesse online recipient except when such intermediary satisfies all the specified conditions.
 - ✓ When the service provider in non-taxable territory is represented for any purpose in taxable territory by a person, then such person is deemed to be the person liable for paying Service tax.
 - ✓ If the service provider in non-taxable territory does not have a physical presence or does not have a representative for any purpose in the taxable territory, the service provider may appoint a person in the taxable territory for the purpose of paying Service tax and such person shall be liable for paying Service tax.
 - ✓ A person receiving OIDAR services shall be deemed to be a non-assesse online recipient, if such person does not have Service tax registration under the Service Tax Rules.
- New proviso inserted in Rule 4(1) of the Service Tax Rules prescribing registration requirement/procedure of person located in non-taxable territory liable for paying Service tax in the case of OIDAR services.
- New proviso inserted in Rule 4A(1) of the Service Tax Rules prescribing invoicing details in case of OIDAR services provided or agreed to be provided in taxable territory by a person located in the non-taxable territory.
- Amendment in Rule 7(1): Return form ST-3C has been inserted.
- Following forms has been inserted:
 - ✓ **“FORM ST- 1A”**: Application form for registration under Section 69 of the Finance Act, 1994 (**“the Finance Act”**) for person in non-taxable territory providing OIDAR services in India.
 - ✓ **“FORM ST- 2A”**: Certificate of registration under Section 69 of the Finance Act.
 - ✓ **“FORM-ST-3C”**: Return under Section 70 of the Finance Act, read with Rule 7 of Service Tax Rules, with respect to OIDAR services provided or agreed to be

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provided by any person located in a non-taxable territory and received by any person located in the taxable territory.

To access complete Notification, please click on the link below:

www.cbec.gov.in/htdocs-servicetax/st-notifications/st-notifications-2016/st48-2016.pdf

4. Amendment in Reverse Charge Notification:

The Central Government vide **Notification No. 49/2016-ST dated November 9, 2016**, has made corresponding amendments in the Reverse Charge Notification so as to incorporate liability of Service tax payment and procedure thereunder on to the service provider located in the non-taxable territory with respect to OIDAR services provided in the taxable territory to 'non-assesse online recipient'. The amendments would be effective from December 1, 2016.

To access complete Notification, please click on the link below:

www.cbec.gov.in/htdocs-servicetax/st-notifications/st-notifications-2016/st49-2016.pdf

5. Clarification as to taxability and other aspects issued by the CBEC

In view of the above changes in OIDAR services, there may be many questions in the mind of service providers in the non-taxable territory, recipients in the taxable territory and other stakeholders, in respect of various aspects pertaining to the taxation of such services.

Thus, the CBEC vide **Circular No. 202/12/2016 - ST dated November 9, 2016** has issued extensive clarification regarding taxability of cross border B2C OIDAR services with a purpose to provide clarity to all the question in the mind of all the stakeholders. Some of important issues covered are as follows-

- Meaning of OIDAR Services
- Meaning of Cross Border B2C OIDAR services provided in taxable territory in India
- Changes made in statutory/legal provisions and date from when these are coming into effect
- Changes made in the POP Rules and its implications
- Services that would not be considered as OIDAR services
- Type of services that would be covered under OIDAR services
- Clarification on who shall be liable to collect and discharge the Service tax liability in cases of provision of cross border B2C OIDAR services.

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- Clarification regarding availability of any deeming provision for the provider of OIDAR services/electronic services.
- Procedure of registration
- Manner to deposit Service tax and file Service tax returns etc.

To access complete Circular, please click on the link below:

<http://www.cbec.gov.in/htdocs-servicetax/st-circulars/st-circulars-2016/st-circ-202-2016>

Conclusion:

Now, cross border B2C OIDAR services provided by a foreign service provider to a person in India will become taxable from December 1, 2016 onwards, which includes webpage hosting, online maintenance of programmes, remote systems administration, data warehousing, cloud storage and downloading of games, music, distance teaching, and supply of images, text and information and making available of databases, etc.

Further, an online mechanism of taking registration has been prescribed and registration will be deemed to be granted online on submission of registration application with a simplified mechanism of online payment of taxes and online filing of returns is being also prescribed.

Hope the information will assist you in your Professional endeavours. In case of any query/information, please do not hesitate to write back to us.

Thanks & Best Regards

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