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ENHANCED ENFORCEMENT BY INDIAN GST AUTHORITIES AGAINST NON-RESIDENT DIGITAL SERVICES PROVIDERS POST AMENDMENTS WITH EFFECT FROM 1 OCTOBER 2023

Digital services tax under Indian GST laws have been levied under a specific category called "*online information and database access or retrieval*" (OIDAR) services – which underwent some crucial amendments from 1 October 2023. Subsequently, in the last couple of months, e-commerce/other digital platforms who cater to Indian users but are located outside India have experienced increased summons and enquiries from Indian GST authorities, alleging non-compliance with GST provisions in India under OIDAR.

As per news reports¹, notices have been sent by Indian GST authorities to around 70 foreign companies – most of whom are subscription-based service providers, educational technology, online gaming, and advertising companies (including big names like Netflix, Google, Meta, and Spotify). In this context, it is pertinent to understand the recent changes in OIDAR and potential compliance requirements.

'OIDAR service' prior to 1 October 2023:

Prior to 1 October 2023, OIDAR services were defined to mean services delivered over the internet which are "**essentially automated and involve minimum human intervention**", impossible to deliver in the absence of information technology.

GST Department's circulars had clarified¹ that the mere usage of internet to render services does not make it an OIDAR service. An indicative list of OIDAR services, as per the Circular *inter alia* include advertising on internet, providing cloud services, provision of e-books, digital data storage, online gaming, supply of images, text, information, music, etc. There was also a 'GST Flyer' issued by the Department which envisaged an illustrative list as to what is not an OIDAR Service including *inter alia* PDF documents manually emailed by service provider; online course consisting of pre-recorded videos and downloadable PDFs plus support from a live tutor; and individually commissioned content

sent in digital form e.g., photographs, reports, medical results.

While the words "automated" and "minimal human intervention" were not defined, a review of various Indian and global precedents lead to the following tests for identifying OIDAR services:-

- The main supply should be of provision of OIDAR services and consideration must be provided for the same: In **M/S. PVR Limited**² the Delhi CESTAT held that convenience fee charged by PVR cannot be treated as a consideration for online access of information about show timings, centres, etc. Since convenience charges are applicable only when a person books tickets and information about show timings is available irrespective of any charges – the supply is for booking the tickets and not for retrieval of information.
- Where human intervention is for ancillary activities, it would qualify as minimum human intervention: Where a computerised test is provided with automated scoring, mere supervising and re-verification by a human is 'minimal human intervention'.³ Where the main supply is the electronic money system, any human intervention for ancillary function (such as Help Desk and accounting) is minimal human intervention.⁴ In such circumstances, supply will continue to be that of OIDAR services.
- There should be no customisation for individual customers: The Value Added Tax Committee of the European Commission (VAT Committee)⁵ has taken the view that where the supplier responds to requests of individual customers and curates the supply for the customer, it would not be 'minimal human intervention'.
- Activity of a third party who is not related to the supply is irrelevant for the determination of minimal human

¹ See 'Business Standard' news article at <https://www.business-standard.com/economy/news/expanding-oidar-taxman-intimation->

[to-nudge-foreign-cos-for-gst-compliance-123101500723_1.html](https://www.business-standard.com/economy/news/expanding-oidar-taxman-intimation-)
(last accessed on 28.12.23)

intervention: The European Commission while deliberating the notion of 'minimum human intervention' gave an example that betting on the results of sports events organised by an entity independent from the provider of betting services, is not relevant for the assessment of the 'minimal human intervention' element.

Expansion in scope of OIDAR services w.e.f. 1 October 2023:

Vide Finance Act 2023, w.e.f. 01 October 2023, the definition of OIDAR services was amended and the condition of 'essentially automated and involving minimal human intervention' was removed from the definition of OIDAR services.

Thus, at present, to qualify as an OIDAR service, only the following factors must be satisfied: (i) the delivery of these services is mediated through internet; and (ii) the supply of these services is impossible without information technology.

Owing to this amendment, all internet-based services now appear to qualify under 'OIDAR' services after 01 October 2023.

Points to keep in mind for e-commerce / other digital platforms who cater to Indian users but are located outside India and might qualify under OIDAR category from 1 October 2023:

- **An OIDAR service provider even if located outside India** must mandatorily obtain GST registration in Form GST REG-10, if they are supplying services to unregistered entities in India.⁶
- The supplier of OIDAR services must either establish a physical presence or hire a representative for the discharge of IGST and undertake GST compliances.⁷
- Foreign OIDAR service provider catering to unregistered persons must file returns in FORM GSTR-5A enlisting the details of the supplies on or before the twentieth day of the month succeeding month.⁸ It is emphasised that GSTR-5A is required to be filed only by the service provider

providing OIDAR services to an unregistered person. Other categories of OIDAR service providers (like those supplying OIDAR services from India) will have to file regular returns (GSTR 1, 2, 3/3B) prescribed for general categories of registered persons.

- In a situation where OIDAR services supplied by foreign companies to unregistered individuals in India, tax is to be collected at source by the payment gateway operator or an authorised representative of the foreign supplier.⁹
- An OIDAR service provider located outside India may also be required to discharge 'equalisation levy' in India¹⁰. As such proper reconciliation between returns for equalisation levy and OIDAR service returns must be maintained.
- Proper documentation relating to description of business operation, relevant agreements, details of revenue generated, balance sheets, bank statements, reconciliation of GSTR 5A with the equalisation levy etc., whilst conducting an investigation pertaining to OIDAR services:

Open questions and concluding comments

While intention of amending the definition of OIDAR services from 1 October 2023 was to curtail ambiguities, in absence of any test or qualifiers to indicate the constituents of OIDAR services, disputes and investigations pertaining to it have increased. **The definition as it stands today gives rise to various questions such as -**

- Will live streaming of events (concerts, sporting, etc.) involving significant human intervention continue to be outside OIDAR services?
- Where online training courses involve support and feedback by the tutor, will it remain outside OIDAR services?
- Will a foreign entity providing a mere paywall to an unregistered person in India be an OIDAR service?

- Whether online gaming transactions (including in the metaverse) other than 'real money gaming' be outside the ambit of OIDAR services?
- How will the GST department keep track of the consumption of unregistered persons in India?

In the absence of any clarity on the foregoing, it is likely that the foreign entities providing online services to unregistered Indian entities may be subjected to heavy scrutiny and may also be compelled to take registration and undertake the necessary GST compliances.

Hence it is imperative for the service providers who own and operate mobile / web-based application / online platform which is accessible to people in India to evaluate the nature of their services from an OIDAR perspective and take necessary steps in order to be compliant with the Indian GST laws.

- Onkar Sharma (Partner), Rishabh Prasad (Principal Associate) and Tanvi M (Associate)

For any queries please contact:
editors@khaitanco.com

1 [Refer Circular No. 202/12/2016-Service Tax dated 09 November 2016 in the service-tax era and GST Flyer No. 52 under the GST regime]

2 [M/S. PVR Limited v. Commissioner of Service Tax, New Delhi 2021 (55) G. S. T. L. 435 (Tri. - Del.)]

3 [IN RE: M/S. NCS Pearson Inc, 2021 (44) G. S. T. L. 215 (App. A. A. R. - GST - Kar.)]

4 [[Smart Voucher Limited v. The Commissioners for Her Majesty's Revenue and Customs (VAT), [2009] UKFTT 169 (TC)]

5 [Value Added Tax Committee, Article 398 of Directive 2006/112/EC, Working Papers No. 896 dated 09 February 2016 read with Working Papers No. 919 dated 28 February 2017.

6 [Section 24(xi), Central Goods and Services Tax Act, 2017 read with Section 13(12), IGST Act and Notification No. 10/2017- Integrated Tax (Rate) dated 28 June 2017]

7 [Section 14, IGST Act]

8 [Rule 64, Central Goods and Services Tax Rules, 2017]

9 [Section 52, Central Goods and Services Tax Act, 2017]

10 [Section 165 & 165A Finance Act, 2016]

11 [Section 167, Finance Act 2016]

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